

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,

vs.

BEAU R. ORTH,
Respondent/Cross-Appellant.

Case No. 69935

District Court Case No. A648041

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ALBERT H. CAPANNA, M.D.,
Appellant,

vs.

BEAU R. ORTH,
Respondent.

Case No. 70227

**APPENDIX TO RESPONDENT/CROSS-APPELLANT'S
COMBINED OPENING AND ANSWERING BRIEF**

VOL. 8 PART 3

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1 their recollection about past testimony. Any one of the lawyers sitting with trial counsel could
2 have taken notes for that purpose.") Even the use of trial transcripts during cross-examination
3 and summation does not mean they were necessarily obtained. (*John & Kathryn G. v. Board of*
4 *Education* 891 F.Supp. 122, 123 (S.D. New York (1995) (citing *Galella v. Onassis*, 487 F.2d 986,
5 999 (2d Cir.1973).)

6 Moreover, Plaintiff's reference to Defendant's ordering of trial transcripts does not
7 support his argument that the trial transcripts were a necessary expense. Defendant had a
8 number of expenses in this matter, many of which would not have been reimbursable costs had
9 he been the prevailing party. In other words, simply because Plaintiff and Defendant both
10 purchased trial transcripts, does not make this item a taxable cost.

11 Telecopies/Scans/Long Distance Calls

12 Plaintiff still is unable to provide any evidence as to the claimed \$981.40 that the Keating
13 Law Group allegedly spent in photocopying charges. Again, it is Plaintiff's burden to
14 demonstrate that all claimed costs were reasonable, necessary and related to the litigation.
15 Plaintiff cannot just make any claim for an expense without any documentary support and
16 demand that Defendant pay for it. As a result, this item should be excluded from Plaintiff's cost
17 award.

18 Courier Charge

19 In Defendant's Motion, he disputed Plaintiff's claim for the \$279.00 "courier charge"
20 because Plaintiff did not provide a bill or even an indication as to the reason for this alleged
21 expense. Instead there are only non-specific log entries. In his Opposition, Plaintiff provides
22 absolutely no additional documentation for support, but rather refers back to the same vague
23 log entries. Defendant cannot analyze whether these expenses were reasonable, necessary,
24 related to this litigation or statutorily permissible based on the insufficient documentation
25 Plaintiff provided. Therefore, these expenses should be excluded from the cost award.

26 Travel Expenses

27 Plaintiff has voluntarily withdrawn his claim for \$1,218.96 for meals during trial;
28 therefore that expense should be excluded.

1 Defendant withdraws his objection to the \$488.00 for Dr. Yoo's travel.

2 Technical Support

3 Lastly, it is difficult to comprehend how Plaintiff's "tech support" and assistance with the
4 PowerPoint presentation at trial was anything more than a mere convenience. Plaintiff's
5 reliance on *Bergman v. Boyce* (1993) 109 Nev. 670 is misguided as the case has absolutely no
6 application here. In *Bergman*, the court *prohibited* the defendant, as the prevailing party, from
7 claiming in-house word processing and document preparation as a taxable cost (in reference to
8 1993 technology). (*Id.* at 681.)

9 However, in a case involving a cost claim that is strikingly similar to the one made by
10 Plaintiff here, the court held that the plaintiff's use of "Sanctions software" to electronically
11 present evidence and documents to the jury at a cost of \$22,289.04 was not taxable. (*American*
12 *Color Graphics, Inc. v. Travelers Property Ca. Ins., Inc.* 2007 WL 832935 at *3 (2007) (N.D. Cal.)).
13 (Full Case attached as Exhibit C.) In making its claim for costs, the plaintiff maintained that "the
14 Sanctions software was vital to the presentation of countless documents given the number of
15 documentary exhibits presented, and was critical because it enabled the jury to view the
16 exhibits with precision, detail, and speed." (*Ibid.*) In denying this claimed cost, the Court
17 asserted: "the Sanctions software may in fact have been a useful means of conveying
18 information, but it does not appear reasonably necessary to the sixty-one documents shown to
19 the jury." (*Ibid.*)

20 Similarly, in *Affymetrix, Inc. v. Multilyte Ltd.* 2005 WL 2072113 (2007) (N.D. Cal.), the
21 court denied the plaintiff's cost claim in the amount of \$126,556.15 for "visual aids" including
22 the cost of PowerPoint presentations and equipment rental, finding only the expense of the
23 poster boards at a cost of \$3,059.70 to be taxable. (*Id.* at *4.) (Full Case attached as Exhibit D.)
24 The court again determined the electronic visual aids to be a convenient resource rather than a
25 necessity and therefore non-taxable: "While using animated PowerPoint presentations was
26 admittedly a more engaging method of conveying information, it was not *necessary*. Poster
27 boards would have sufficed. Nor is Affymetrix entitled to recover the cost of equipment rental,
28 which the Court had explicitly indicated would be a shared cost." (*Ibid.*) (Emphasis in original.)

1 The cost claims Plaintiff makes here are essentially identical to the ones that the court
2 denied in *American Color Graphics, Inc.* and *Affymetrix*. Plaintiff's use of software and
3 electronic presentation of evidence at trial was a convenient resource but was certainly not a
4 necessity. Defendant should not be obligated to repay Plaintiff for these costs.

5 C. DEFENDANT'S SUMMARY OF PERMISSIBLE COSTS (changes in bold)

6	1. Clerk's Fees	\$861.11
7	2. Reporter's Fees for Depositions	\$4,679.75
8	3. Expert Fees	
9	a) Andrew Cash, M.D.	\$1,500.00
10	b) Kevin Yoo, M.D.	\$1,500.00
11	c) Anthony Ruggeroli, M.D.	\$0
12	d) Defense experts' depositions fees paid	\$4,100.00
13	4. Process Server Fees	\$528.48
14	5. Official Court Reporter Fees	\$0
15	5. Photocopies	\$3,713.78
16	7. Telecopies/Scans/Long Distance Calls/Postage	\$52.35
17	8. Federal Express/UPS	\$172.31
18	9. Travel and Lodging for Depositions/Discovery	\$488.00
19	10. Other Items Claimed Under 18.005(17)	
20	(a) Medical Records	\$2,055.90
21	(b) Tech Support	\$0
22		
23	TOTAL	\$19,651.68
24		
25		
26		
27		
28		

1 III.

2 CONCLUSION

3 As set forth above, Plaintiff's Memorandum of Costs includes costs not allowed by
4 statute.

5 WHEREFORE, Defendant ALBERT H. CAPANNA, M.D. request relief as follows:

6 For an Order retaxing and settling the costs at \$19,651.68 as set forth in his Motion and
7 the instant Reply.

8 Dated: October 30, 2015

LAURIA TOKUNAGA GATES & LINN, LLP

9
10 By: /s/Paul A. Cardinale

11 Paul A. Cardinale

12 Nevada Bar No. 8394

13 Attorneys for Defendant

14 Albert H. Capanna, M.D.
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1 CERTIFICATE OF SERVICE

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates &
3 Linn, and that on this 30th Day of October, 2015, I served a true and correct copy of the
4 foregoing **MOTION TO RETAX AND SETTLE THE COSTS**

5 ☐ By placing same to be deposited for mailing in the United States Mail, in a sealed
6 envelope upon which first class postage was prepared in Sacramento, California; and/or

7 X By mandatory electronic service (e-service), proof of e-service attached to any
8 copy filed with the Court; and/or

9 ☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

10 ☐ By personal service
11 as follows:

12 Dennis M. Prince, Esq.
13 EGLET PRINCE
14 400 South 7th Street, Box 1, Suite 400
Las Vegas, NV 89101
Tel. 702.450.5400

15 John T. Keating, Esq.
16 KEATING LAW GROUP
17 9130 West Russell Road, Suite 200
Las Vegas, NV 89148
Tel. 702.228.6800

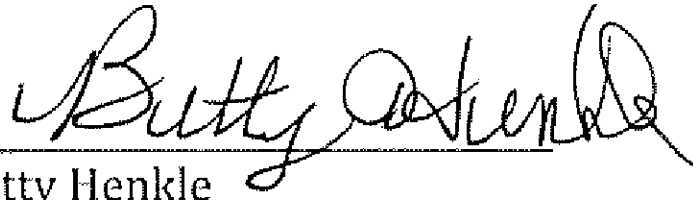
18
19 
20 Betty Henkle
21 An employee of Lauria Tokunaga
22 Gates & Linn, LLP
23
24
25
26
27
28

EXHIBIT A

EXHIBIT A

Paul A. Cardinale

From: Danielle Tarmu <DTarmu@egletlaw.com>
Sent: Thursday, October 22, 2015 3:28 PM
To: Anthony D. Lauria; Paul A. Cardinale
Cc: Brittney Glover; Lisa Titolo; Dennis Prince
Subject: Orth: Defendant's Motion to Retax/Settle Costs

Importance: High

Hi Tony and Paul,

Our Opposition to Defendant's Motion to Retax and Settle Costs is due tomorrow, Oct. 23. I was hoping you'd give me an extension until Monday, Oct. 26 to file it? My computer at work crashed and died today so I'm working off my laptop, which seriously slows me down because of its small size and the only way to get to the documents I need is through remote access, which is an ordeal in and of itself, not to mention super slow. I can't even go home to do the Opp to use my bigger desktop because my car is in the shop :(

The hearing (in chambers) is on Nov. 9, so by my calculation, your Reply is due Nov. 2 and extending our Opposition to Monday will still give you a full week to do the Reply. Please let me know ASAP so I can ask the court if they want a formal stipulation and order or if a letter is fine.

Thank you! Any cooperation in this respect is greatly appreciated.



Danielle Tarmu, Esq.
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This transmission (including any attachments) may contain confidential information, privileged material (including material protected by the solicitor-client or other applicable privileges), or constitute non-public information. Any use of this information by anyone other than the intended recipient is prohibited. If you have received this transmission in error, please immediately reply to the sender and delete this information from your system. Use, dissemination, distribution, or reproduction of this transmission by unintended recipients is not authorized and may be unlawful.

EXHIBIT B

EXHIBIT B

Paul A. Cardinale

From: Paul A. Cardinale
Sent: Thursday, October 22, 2015 4:47 PM
To: Danielle Tarmu
Cc: Anthony D. Lauria; Brittney Glover; Lisa Titolo; Dennis Prince
Subject: Re: Orth: Defendant's Motion to Retax/Settle Costs

Hi Danielle:

I just talked to Tony and we are agreeable to the extension. We would just expect the same courtesy should we need an extension in the future. Thank you.

Paul Cardinale

Sent from my Verizon Wireless 4G LTE DROID

Danielle Tarmu <DTarmu@egletlaw.com> wrote:

Hi Tony and Paul,

Our Opposition to Defendant's Motion to Retax and Settle Costs is due tomorrow, Oct. 23. I was hoping you'd give me an extension until Monday, Oct. 26 to file it? My computer at work crashed and died today so I'm working off my laptop, which seriously slows me down because of its small size and the only way to get to the documents I need is through remote access, which is an ordeal in and of itself, not to mention super slow. I can't even go home to do the Opp to use my bigger desktop because my car is in the shop :(

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Thank you! Any cooperation in this respect is greatly appreciated.



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EXHIBIT C

EXHIBIT C

2007 WL 832935

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
Oakland Division.

AMERICAN COLOR GRAPHICS, INC., Plaintiff,
v.
TRAVELERS PROPERTY CAS. INS. CO., Defendant.

No. C 04-3518 SBA. | Docket
Nos. 414, 427. | March 19, 2007.

Attorneys and Law Firms

Paul Hamilton Duvall, King & Ballow, La Jolla, CA, Richard
Steven Busch, King & Ballow, Nashville, TN, for Plaintiff.

David C. Capell, Angela Marie Bickel, Tad A. Devlin,
Gordon & Rees, LLP, San Francisco, CA, Richard Steven
Busch, King & Ballow, Nashville, TN, for Defendant.

ORDER

SAUNDRA BROWN ARMSTRONG, United States District
Judge.

*1 Defendant Travelers Property Casualty Insurance Co.
(Travelers) has filed a Motion for Review of the Clerk's
Taxation of Costs [Docket Nos. 414, 427] requesting
the Court reduce the taxable costs assessed against
Travelers from \$82,989.94 to \$22,124.70. After reading and
considering the arguments presented by the parties, the Court
finds this matter appropriate for resolution without a hearing.
See FED. R. CIV. P. 78. For the reasons that follow, the Court
GRANTS in PART Travelers's motion.

BACKGROUND

In August of 2004, plaintiff American Color Graphics, Inc.
(ACG) filed a complaint against Travelers alleging breach of
contract and breach of good faith and fair dealing. A jury trial
was held in September 2006. The jury found that Travelers
breached the contract and awarded nominal damages of seven
cents. *See* Docket No. 335 (Jury Verdict). The jury also
found that Travelers breached its implied obligation of good
faith and fair dealing and awarded AGC \$140,000.00. *Id.*
AGC filed its original Bill of Costs on November 3, 2006,

seeking \$99,667.01 in taxable costs. *See* Docket No. 357.
Travelers objected to the bill of costs on November 13, 2006.
See Docket No. 373. On November 21, 2006, ACG filed an
Amended Bill of Costs for \$94,980.41. *See* Docket No. 376.
On November 30th, Travelers filed further objections. *See*
Docket No. 383.

On December 14, 2006, the Clerk of Court assessed costs
against Travelers in the amount of \$82,989.94.

LEGAL STANDARDS

Rule 54(d) (1) provides: "Except when express provision
therefor is made either in a statute of the United States
or in these rules, costs other than attorneys' fees shall be
allowed as of course to the prevailing party unless the court
otherwise directs" FED. R. CIV. P. 54(d)(1). Rule 54(d)
(1) thus creates a presumption that the prevailing party will
be awarded its taxable costs. *See Delta Airlines, Inc. v.*
August, 450 U.S. 346, 352, 101 S.Ct. 1146, 67 L.Ed.2d 287
(1981); *Dawson v. City of Seattle*, 435 F.3d 1054, 1070 (9th
Cir.2006). To overcome this presumption, a losing party must
establish a reason to deny costs. *Dawson*, 435 F.3d at 1070.

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437,
441-42, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), the Supreme
Court held that federal courts are limited to assessing those
costs enumerated under 28 U.S.C. § 1920. Section 1920
provides that:

A judge or clerk of any court of the United States may tax as
costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the
stenographic transcript necessarily obtained for use in
the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers
necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts,
compensation of interpreters, and salaries, fees,
expenses, and costs of special interpretation services
under section 1828 of this title.

*2 The Local Rules outline the procedures for requesting and objecting to costs. Rule 54-1(a) provides that “No later than 14 days after entry of judgment or order under which costs may be claimed, a prevailing party claiming taxable costs must serve and file a bill of costs.” N.D. Cal. Civ. R. 54-1(a). Local Rule 54-2(a) declares that “Within 10 days after service by any party of its bill of costs, the party against whom costs are claimed must serve and file any specific objections to any item of cost claimed in the bill, succinctly setting forth the grounds of each objection.” N.D. Cal. Civ. R. 54-2(a). Rule 54-4(a) adds that “The Clerk may require and consider further affidavits and documentation as necessary to determine allowable costs.” N.D. Cal. Civ. R. 54-4(a). Rule 54-4(b) continues that “No sooner than 10 days after a bill of costs has been filed, the Clerk shall tax costs after considering any objections filed pursuant to Civil L.R. 54-2.” N.D. Cal. Civ. R. 54-4(b).

Federal Rule of Civil Procedure 54(d)(1) provides that “On motion served within 5 days thereafter [after costs are taxed by the clerk], the action of the clerk may be reviewed by the court.” Local Rule 54-5 similarly provides for review of the Clerk's taxation of costs. This rule stipulates that

Pursuant to FRCivP 54(d)(1), any motion for review of the Clerk's taxation of costs must be filed within 5 days of the entry of the notice of taxation of costs. The motion must conform to the requirements of Civil L.R. 7-2 through 7-5. If no motion is filed within 15 days of the Clerk's taxation of costs, the Clerk's determination of costs shall be final.

N.D. Cal. Civ. R. 54-5.

ANALYSIS

Travelers's specific objections to costs are addressed in turn.

1. Timeliness

Travelers objects that ACG's Amended Bill of Costs was untimely and therefore should not be considered. Rule 54-1(a) provides that a bill of costs must be served and filed within fourteen days of the judgment or order under which costs are claimed. In this case, judgment was entered on October

24, 2006. *See* Docket No. 352. The original bill of costs was timely filed on November 3, 2006. *See* Docket No. 357. Travelers objected on November 13, 2006. *See* Docket No. 373. ACG filed its amended bill of costs on November 21, 2006. *See* Docket No. 376. On November 30th, Travelers filed further objections. *See* Docket No. 383.

Travelers appears to be arguing that any amendment to a bill of costs must come within fourteen days of judgment to be timely. While the Local Rules do not explicitly provide for amended bill of costs, such amendments are common in federal court. In addition, Travelers has cited no authority that the filing of an amended bill of costs must come within the time period for the filing of the original bill of costs. Indeed, in the case cited by Travelers, *Intermedics, Inc. v. Ventritex, Inc.*, 1993 WL 515879, at *1 (N.D.Cal.1993), the court considered a revised bill of costs that was submitted outside the time-frame for the filing of the original bill of costs. Moreover, Travelers's position would seem to conflict with Local Rule 54-4(a), which declares that “The Clerk may require and consider further affidavits and documentation as necessary to determine allowable costs.” N.D. Cal. Civ. R. 54-4(a). The Court therefore finds that the amended bill of costs, filed one week after Travelers's objection, is not untimely and will therefore proceed to consider the substance of the parties' contentions as to costs.

2. Sanctions Software

*3 Travelers contends that it should not be taxed \$22,289.04 for ACG's use of Sanctions software at trial. It argues that not only did ACG mistakenly rely on *Afymetrix, Inc. v. Multilyte Ltd.*, 2005 WL 2072113 (N.D.Cal.2005), to support its position that the use of Sanctions software is the “type of cost for visual aids [that] is routinely awarded by the Court,” but in fact this case disallowed costs for use of animated PowerPoint presentations. The *Afymetrix* court found that “While using animated PowerPoint presentations was admittedly a more engaging method of conveying information, it was not necessary. Poster boards would have sufficed.” *Afymetrix*, 2005 WL 2072113, at *4 (emphasis in original).

The governing rule here is Local Rule 54-3. This states that “The cost of preparing charts, diagrams, videotapes and other visual aids to be used as exhibits is allowable if such exhibits are reasonably necessary to assist the jury or the Court in understanding the issues at the trial.” N.D. Cal. Civ. R. 54-3(d) (5). ACG maintains that the Sanctions software was vital to the presentation of countless documents given the number of documentary exhibits presented, and was critical

because it enabled the jury to view the exhibits with precision, detail, and speed. Travelers counters that this was a short trial and that the “countless documents” introduced by ACG amounted to a total of just sixty-one.

Of the \$22,289.04 of expenses incurred by the use of the Sanctions software, \$12,375.00 was for a video technician. In *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir.1993), *cert. denied*, 510 U.S. 1195, 114 S.Ct. 1303, 127 L.Ed.2d 654 (1994), the Fifth Circuit disallowed fees for a video technician incurred for video depositions because this was not an expense included in section 1920 and was therefore not recoverable. Section 1920 lists six categories of recoverable costs. Fees for a video technician does not easily fit within any of the enumerated categories and therefore the fees for the video technician will not be allowed.

As for the remainder of the Sanctions software costs, ACG has failed to demonstrate they were reasonably necessary. Just as in *Affymetrix*, the use of the Sanctions software may in fact have been a useful means of conveying information, but it does not appear reasonably necessary to the sixty-one documents shown to the jury. The \$22,289.04 in costs for the Sanctions software will not be taxed.

Travelers also requests that ACG’s overall costs be reduced by twenty percent because it argues that ACG has misled the Court, specifically for the citation to *Affymetrix*. Counsel for ACG has acknowledged misreading the case. There does not appear to be any pervasive misleading of the Court or any evidence of bad faith on the part of ACG. Accordingly, a general reduction of overall costs does not appear warranted.

3. Fees for Service of Summons and Subpoena

Travelers objects to the \$977.78 taxed for service of summons and subpoenas, and requests that it be taxed no more than \$752.78. Travelers contends that \$175.00 was for improper service of process of trial witnesses on counsel for Travelers. It also objects to \$50 .00 for the expedited service of process on Aiza Custodio. ACG does not address Travelers’s objections to these points, and therefore provides no justification for awarding these costs. Accordingly, the Court will reduce these costs by \$225.00.

4. Fees for Exemplification and Copies of Papers

*4 Travelers objects to costs for exemplifications and copies of papers that ACG is seeking to recover because Travelers asserts these costs are duplicative of fees and costs ACG

is seeking in another motion. ACG does not specifically respond to Travelers’s objection with regard to the charge of duplication of costs. On the other hand, Travelers does not identify what costs it alleges overlap with the other motion. Neither side identifies the specific costs in dispute here. Because Local Rule 54-2(a) declares that “the party against whom costs are claimed must serve and file any *specific objections* to any item of cost claimed in the bill, succinctly setting forth the *grounds* of each objection,” and Travelers has not identified specific objection to the costs awarded by the Clerk for exemplification and copies of papers, Travelers’s objection is overruled. N.D. Cal. Civ. R. 54-2(a) (emphasis supplied). In addition, if ACG is seeking duplicative costs in another motion, Travelers may object to any such duplication when that motion is filed and heard.

5. Fees for Witnesses

Travelers objects to costs associated with ACG’s out-of-state witness (Floyd Childress, Michael Spragge, and Pat Kellick) for five days of travel, meals, and lodging. The Clerk of Court assessed a total of \$6,221.92 for witness fees, which Travelers requests be reduced to no more than \$3,087.20. Travelers does not challenge the per diem rate charged for the witnesses, as the relevant statute authorizes this to be set by the United States General Services Administration. It objects to the number of days for which the costs are claimed. Travelers contends that five days of witness fees for Childress and Spragge is excessive and unnecessary, and it maintains that three days for Kellick is likewise excessive and unnecessary. Travelers argues that it was unnecessary for the witnesses to be available for these numbers of days before trial and before their actual trial testimony occurred.

ACG counters that courts have routinely awarded costs for witnesses for the time they were available for trial, not merely for the time the witnesses spend testifying at trial, citing to *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 38 F.3d 1429, 1442 (7th Cir.1994), and *Smith v. Board of School Commissioners of Mobile County*, 119 F.R.D. 440, 446 (S.D.Ala.1988). Resolution of this dispute hinges on a matter of statutory interpretation, which in this case clearly cuts in favor of ACG’s position. Title 28 U.S.C. § 1821(b) provides that “A witness shall be paid an attendance fee of \$40 per day for each day’s attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.” This would appear to cover any time necessarily spent during attendance.

ACG relates that Childress, Spragge, and Kellick are witnesses whose residences were in Tennessee. ACG seeks to recover \$2,132.76 for fees paid to Childress; \$1,469.96 for fees paid to Kellick; and \$2,151.90 for Spragge, which include a per diem rate for each day the witnesses were available for testifying at trial. Given that flights back and forth between California and Tennessee would likely cost more than meals and lodging for five or three days during trial, the costs for the time the witnesses were available to testify seems reasonable and necessary. Therefore, ACG will be allowed to recover these costs and Travelers's motion is denied on this point.

6. Additional Objections

*5 Travelers objects to \$377.86 in costs taxed for black-binder trial notebooks. Travelers requests that these costs either be vacated or reduced to \$161.94 for the costs of three binders rather than seven.

ACG's response is that the notebooks were necessary because there were over 2,200 pages of trial exhibits and it therefore needed to organize these materials. ACG also relies upon *Intermedics, Inc. v. Ventritex, Inc.*, 1993 WL 515879, at *7 (N.D.Cal.1993), where the court stated that "Ventritex is entitled to recover for reproduction costs of the five copies [of exhibits], plus the binders that were used to organize the exhibits." That case is not entirely persuasive. In *Ventritex*, the court required the party to deliver three sets of exhibits to be provided to the court, and of necessity, the party also had to provide a copy to opposing counsel and it made one copy for itself. Local Rule 54-3(d)(4) declares that "The cost of reproducing trial exhibits is allowable to the extent that a Judge requires copies to be provided." This Court does expect that counsel will provide the Court with a copy of such materials and a copy to be furnished to opposing counsel. Thus, the Court finds that the costs of three binders, one for the Court, one for opposing counsel, and one for the

producing party, to be reasonably necessary and will allow for the costs of \$161.94

7. ACG's Withdrawal of Costs for Depositions

ACG has agreed to withdraw its request for the costs of various depositions. Namely, it is withdrawing its request for \$815.08 for the deposition of James Sevey; \$1,646.96 for the deposition of George Williams; \$1,575.92 for the deposition of Alan Ghitterman; \$279.89 for the deposition of Russell Ghitterman; and \$998.94 for the deposition of Thomas Sampson. This totals a voluntary withdrawal of \$5316.79 in costs.

8. ACG's Requests

ACG requests that it be allowed to recover for the costs of obtaining daily transcripts and transcripts of various hearings. ACG's requests are in the form of a response to Travelers's motion. ACG, however, does not have a properly submitted motion before the Court to review the Clerk's assessment of costs. ACG's requests are therefore denied.

CONCLUSION

The Court reduce the costs taxed to Travelers by \$28,046.75 to reflect those costs associated with the Sanctions software, unopposed objections, four black-binder notebooks, and the voluntary withdrawal of costs by ACG. This reduces the \$82,989.94 imposed by the Clerk to a total award of \$54,943.19 in ACG's favor.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 832935

EXHIBIT D

EXHIBIT D

 KeyCite Yellow Flag - Negative Treatment

Declined to Follow by eBay Inc. v. Kelora Systems, LLC, N.D.Cal.,
April 5, 2013

2005 WL 2072113

Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

AFFYMETRIX, INC., a Delaware
corporation, Plaintiff and Counterdefendant,

v.

MULTILYTE LTD., a British corporation,
Defendant and Counterclaimant.

No. C 03-03779 WHA. | Aug. 26, 2005.

Attorneys and Law Firms

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ORDER GRANTING-IN-PART REVIEW OF COSTS AND VACATING HEARING

ALSUP, J.

INTRODUCTION

*1 In this patent case, plaintiff Affymetrix, Inc. now moves for review of the Clerk's taxation of costs. This motion is GRANTED IN PART. Specifically, the Clerk is directed to tax an additional (1) \$1,318.44 for transcripts of hearings, (2) \$374.22 for notary fees incurred in connection with a deposition, (3) \$4,997.75 for reproducing government documents, (4) \$84,034.62 for reproducing discovery documents, and (5) \$3,059.70 for the preparation of visual aids.

STATEMENT

As discussed more thoroughly in prior orders, plaintiff filed this declaratory-judgment action, alleging non-infringement, invalidity and unenforceability of defendant's patents. Summary judgment of no literal infringement was granted on April 28, 2005. Summary judgment of non-infringement under the doctrine of equivalents was granted on June 23, 2005. Final judgment for plaintiff was entered on June 23, 2005. As the prevailing party, Affymetrix filed its bill of costs on July 7, 2005, requesting \$293,758.29. On July 21, 2005, defendant filed its objections. On July 22, 2005, the Clerk assessed costs in the amount of \$30,608.94.

Plaintiff now seeks review of the Clerk's taxation of costs. Specifically, Affymetrix argues that it is entitled to recover costs incurred in (1) obtaining copies of hearing and deposition transcripts; (2) exemplification and copies; and (3) other costs.

ANALYSIS

1. LEGAL STANDARD.

In relevant part, FRCP 54(d)(1) states:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs.

This rule creates a presumption in favor of awarding costs to the prevailing party. *Ass'n of Mexican-American Educators v. State of Calif.*, 231 F.3d 572, 591 (9th Cir.2000)(en banc). Under 28 U.S.C.1920, taxable costs are:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for

use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Civil Local Rule 54—3 also provides “standards for interpreting the costs allowed under section 1920.” *Intermedics, Inc. v. Ventritex*, 1993 WL 515879, at *1 (N.D.Cal.1993)(Brazil, J.).

2. TRANSCRIPT-RELATED EXPENSES.

Affymetrix requested \$44,466.48 in costs for transcripts from hearings and depositions. The Clerk taxed \$20,147.58 in this category.

a. Hearing Transcripts.

By statute, fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case is recoverable. 28 U.S.C.1920(2). The local rules expressly permit recovery of costs of transcripts “necessarily obtained for an appeal” or if a statement by a judge from the bench is to be reduced to a formal order; otherwise, without prior court approval or stipulation by the parties, “[t]he cost of other transcripts is not normally allowable.” Civ. L.R. 54—3(b).

*2 Here, Affymetrix requests \$2,166.94 in costs for hearing transcripts. While not *normally* allowable, this order holds that plaintiff is entitled to the cost of all hearing transcripts because they were “necessarily obtained.” 28 U.S.C.1920(2). In *Intermedics*, Judge Jeremy Fogel of the Northern District of California found that:

The fact that this case was so contentiously litigated, and the parties so often made arguments based on the words very recently spoken by participants or by the court, sometimes using strained interpretations of the words or pulling them out of context, places this case in that category of unusual suits where, in order to protect itself, a party reasonably could incur the expense of obtaining transcripts of

all of the court proceedings. 1993 WL 515879, at *4.

So too here. It was reasonable for Affymetrix to incur the expense of transcripts for all court proceedings, given that this case was so contentiously litigated. The parties's briefing, as well as the Court's previous orders, relied heavily on representations made by counsel during hearings. It is only expected that both parties found it necessary to obtain the transcripts for appeal. Expedited delivery or messenger fees, however, are not recoverable. Where Affymetrix failed to document what amount was paid to the court reporter, the Clerk properly disallowed these costs. Based on Exhibit C to the bill of costs, it appears that \$1,318.44 was directly attributable to court reporter fees. Consequently, the Clerk is instructed to add \$1,318.44 in costs for hearing transcripts.

b. Deposition Transcripts.

With respect to deposition transcripts, Civil Local Rule 54—3(c)(1) allows only “[t]he cost of an original and one copy of any deposition (including video taped depositions) taken for any purpose in connection with the case.” This rule has been interpreted to mean that “the cost of *one* copy of a deposition transcript” is allowable. *Intermedics*, 1993 WL 515879, at *3 (emphasis in original)(further holding that parties must bear the additional expenses associated with transcripts made available in an additional, separate medium). Shipping or expedited delivery charges and “extra” charges such as ASCII/Mini/E-transcripts, however, are not allowed. *Ishida Co., Ltd. v. Taylor*, 2004 WL 2713067, at *1 (N.D.Cal.)(Fogel, J.).

Here, the Clerk properly disallowed the additional costs incurred in videotaping depositions for which stenographic written transcripts were also obtained. If the deposition had *only* been videotaped, Affymetrix would have been entitled to recover the cost of both an original tape and a copy, *i.e.*, two tapes total. But, having ordered written transcripts of its depositions, Affymetrix may not recover costs incurred for videotaping those *same depositions*. The Clerk likewise properly disallowed the costs of “extra” deposition services.

c. Notary Fees.

Finally, notary fees incurred in connection with depositions are also allowable. Civ. L.R. 54—3(c)(4). Accordingly, the Clerk is instructed to add \$374.22 to account for the notary fee incurred in the deposition of Multilyte's 30(b)(6) witness, Dr. Roger Ekins (Bill of Costs Exh. F).

3. EXEMPLIFICATION AND COPIES.

*3 Fees for exemplification and copies of papers necessarily obtained for use in the case are recoverable. 28 U.S.C.1920(4). Civil Local Rule 54—3(d) further outlines the standards for taxing such costs. The Clerk taxed \$10,015.53 in this category. Affymetrix sought \$246,634.27 in such costs, but agreed to reduce this amount by \$1,250.00 after meeting and conferring with Multilyte's counsel.

a. Deposition Exhibits.

While Civil Local Rule 54—3(c)(3) provides that the cost of reproducing exhibits to depositions is allowable if the cost of the deposition is allowable, Exhibit E to the bill of costs was properly disregarded by the Clerk as duplicative of costs already accounted for as part of the depositions themselves.

b. Government Records.

Affymetrix also seeks costs of \$5,357.58 for reproducing, certifying, or exemplifying government records. The documentation in Exhibit G to the bill of costs indicates that these costs were incurred in conducting patent assignment searches and obtaining patent file histories. This order finds that the costs associated with reproducing the patents-in-suit, as well as other related patents and associated file histories is recoverable. For purposes of claim construction and assessing invalidity defenses, it was reasonably necessary for Affymetrix to obtain these government documents.

Multilyte argues that Affymetrix has failed to demonstrate that the documents in the government patent office “were not otherwise available.” *Intermedics*, 1993 WL 515879, at *6. *Intermedics* is distinguishable. There, the prevailing party was the *patentee* seeking to recover costs for copying documents that should have been available from its own files. *Ibid.* Not so here. Affymetrix was the accused infringer, not the patentee. Even if these files had been made available during discovery, Affymetrix would have been entitled to recover at least the costs of copying them. (Although Multilyte was ordered to produce *chambers* copies of the entire prosecution files for the three patents-in-suit on May 10, 2005, the Court did *not* order Multilyte to provide courtesy copies to Affymetrix.)

Fees for expedited delivery via overnight courier, however, are not recoverable. Taking this adjustment into account, the Clerk is directed to add \$4,997.75 for reproduction of

government documents. This order stresses that Affymetrix would not be entitled to double-count this cost elsewhere, such as in its costs of reproducing discovery documents.

c. Discovery Documents.

With regard to documents produced electronically, Affymetrix initially sought \$109,645.44 in such costs (Bill of Costs Exh. H). Taking into account the agreed-upon reduction of \$1,250.00, Affymetrix now seeks \$108,395.44 for reproducing disclosure or formal discovery documents. Multilyte objects to the taxation of “impermissible ‘extra’ costs as well as the costs of document scanning above \$0.15 per page” (Opp.7). The Clerk allowed only \$10,015.53.

*4 This order agrees that “extra” costs are not allowable. The parties appear to agree, however, that Affymetrix is entitled to recover at least the amount of a reasonable per-page copying charge (*i.e.*, \$0.15 per page) multiplied by the number of pages. *See Intermedics*, 1993 WL 515879, at *6. Affymetrix has demonstrated that it has produced 627,001 pages of documents during discovery (Solari Exh. 1). This would translate into \$94,050.15 in costs. The Clerk shall add costs of \$84,034.62 to the \$10,015.53 already taxed for reproduction of discovery documents.

d. Preparation of Visual Aids.

Affymetrix seeks to recover \$129,615.85 in costs of preparing demonstratives (Bill of Costs Exh. 1). The Clerk allowed no costs in this category. “The cost of preparing charts, diagrams, videotapes and other visual aids to be used as exhibits is allowable if such exhibits are reasonably necessary to assist the jury or the Court in understanding the issues at the trial.” Civ. L.R. 54—3(d)(5). Notwithstanding the fact that there was no trial, the costs of preparing visual aids for the technology tutorial and the *Markman* hearing are recoverable if they were reasonably necessary to assist the Court in understanding the issues.

Here, the complicated subject-matter of the patents-in-suit made it reasonably necessary for the parties to prepare visual aids to help educate the Court. If the action had proceeded to trial, the jury would have needed similar assistance. Indeed, at the conclusion of the technology tutorial, the Court even commented on the record how helpful all the demonstratives were (Hearing Tr. 2/2/05 at 73:24—74:1). Likewise, at the *Markman* hearing, both sides were congratulated for doing a “great job” on their respective presentations (Hearing Tr. 2/16/05 at 107:11—13).

That said, the method of exemplification must itself be reasonably necessary to the presentation. *See e.g., Cefalu v. Village of Elk Grove*, 211 F.3d 416, 428—29 (7th Cir.2000) (“Among the factors that the judge might consider in evaluating the necessity of a particular type of exemplification is whether the nature and context of the information being presented genuinely called for the means of illustration that the party employed. In other words, was the exemplification vital to the presentation of information, or was it merely convenience or, worse, an extravagance?”). While using animated PowerPoint presentations was admittedly a more engaging method of conveying information, it was not *necessary*. Poster boards would have sufficed. Nor is Affymetrix entitled to recover the cost of equipment rental, which the Court had explicitly indicated would be a shared cost.

This order finds that only the costs of poster boards are recoverable. The other costs claimed in this category are not. Accordingly, the Clerk is directed to add \$3,059.70 for the preparation of visual aids.

4. OTHER COSTS.

Finally, Affymetrix seeks other costs in the amount of \$2,196.71 (Bill of Costs Exh. J). The Clerk did not allow any

of these costs. This order agrees that none of the requested costs in this category are allowable. The Clerk properly disregarded these costs.

CONCLUSION

*5 For the aforementioned reasons, plaintiff's costs of (1) \$1,318.44 for court reporter fees for hearing transcripts, (2) \$374.22 for notary fees incurred in connection with the deposition of Dr. Ekins, (3) \$4,997.75 for reproducing government documents, (4) \$84,034.62 for reproducing discovery documents, and (5) \$3,059.70 for the preparation of visual aids shall be added to the \$30,608.94 already assessed by the Clerk. It is hereby ORDERED that costs shall be taxed in the total amount of \$124,393.67. The hearing on this motion, currently scheduled for SEPTEMBER 8, 2005, is VACATED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2072113

End of Document

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CLERK OF THE COURT

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12 **DISTRICT COURT**
13
14 **CLARK COUNTY, NEVADA**

15 **BEAU R. ORTH,**
16 **Plaintiff,**

17 **vs.**

18 **ALBERT H. CAPANNA, M.D.;**
19 **DOES I through X; ROE BUSINESS**
20 **ENTITIES I through X, inclusive,**
21 **Defendants.**

CASE NO. : A-11-648041-C
DEPT. NO. : III

ORDER REGARDING PLAINTIFF'S
MOTIONS IN LIMINE

22
23 This matter having come on for hearing on the 14th day of August, 2015; Dennis M.
24 Prince, Esq., and Danielle Tarmu, Esq. of Eglet Prince appearing on behalf of Plaintiff, Beau
25 Orth; and Anthony D. Lauria, Esq. and Paul A. Cardinale, Esq. of Laura Tokunaga Gates &
26 Linn, LLP, appearing on behalf of Defendant Albert H. Capanna, M.D. The Court, having read
27 the moving papers and heard oral argument by counsel, and hereby rules as follows:
28

IT IS HEREBY ORDERED that Plaintiff's Omnibus Motion in Limine No. 1 is ruled upon as follows:

1) Hypothetical Medical Condition. This Motion is **GRANTED**. Questions must be related to evidence in the record or evidence they reasonably anticipate will be presented at trial.

2) Reference to Plaintiff Being a Malingerer, Magnifying Symptoms or Manifesting Secondary Gain Motives Should be Excluded. This Motion is **GRANTED** as unopposed. Defendant will not make this argument at all unless new evidence regarding these issues is disclosed at trial, in which case counsel must approach the bench before making any reference to the jury.

3) References to Defense Medical Examiners as "Independent." This Motion is **GRANTED** as unopposed.

4) Closing Argument. This Motion is **GRANTED** as unopposed. Defendant will not argue that Plaintiff's counsel is asking for a higher verdict because he thinks the jury will award less. This order does not prevent Defendant from arguing that the amount requested by Plaintiff is not supported by the evidence.

5) Taxation. This Motion is **GRANTED** as unopposed. The parties will not reference taxation of any amount of damages.

6) Precluding Reference as to Plaintiff's Counsel Working with Plaintiff's Treating Physicians on Unrelated Cases. This Motion is **GRANTED IN PART** and **DENIED IN PART**. Defendant can ask questions about the nature of physicians' practice, such as the amount of work for defense versus plaintiffs, and attorneys. However, Defendant

1 cannot ask specific questions about working with Plaintiff's counsel in the past, such as the
2
3 number of times the doctor treated Plaintiff's counsel's clients.

4
5 7) **Exclude Collateral Sources of Payment.** This Motion is **DENIED** without
6 prejudice.

7 **IT IS HEREBY ORDERED** that Plaintiff's Motion in Limine No. 2 to Exclude
8 Irrelevant and/or Unduly Prejudicial Information is **GRANTED**. Any reference to Plaintiff's
9 parents' alleged spinal treatment or Plaintiff having a congenital spinal condition is excluded
10 from trial.

11
12 **IT IS HEREBY ORDERED** that Plaintiff's Motion in Limine No. 3 to Exclude Prior
13 Unrelated Medical Conditions is **GRANTED**. Any reference to Plaintiff's previous injuries
14 sustained while playing football and sports, including but not limited to, his ankle injury in his
15 sophomore year of college, his torn ligament in his hand/thumb area approximately in 2009 or
16 early 2010, and his March 2010 concussion, are excluded from trial. If Defendant believes that
17 something at trial opens the door to allow questioning in this area, then the parties must
18 approach the bench before asking questions or referencing it before the jury.

19
20 **IT IS HEREBY ORDERED** that Plaintiff's Motion in Limine No. 4 to Permit
21 Treating Physicians to Testify as to Causation, Diagnosis, Prognosis, Future Treatment, and
22 Extent of Disability Without a Formal Expert Report is **GRANTED**. Dr. Cash can testify
23 about billing, causation, prognosis, future treatment, and extent of disability without a formal
24 expert report. He is a treating physician, not a retained expert. Asking a treating physician to
25 do a future cost letter or certain other tasks does not automatically convert him/her to a retained
26 expert.
27
28

1 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 5 to Allow Parties
2 to Present a Jury Questionnaire Prior to Voir Dire is **MOOT** as it is too late.

3 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 6 to Limit
4 Defendant's Experts' Testimony to the Opinions and Bases Set Forth in Their Expert Reports
5 is **GRANTED**. Retained expert opinions must comply with NRCP 16.1(a)(2)(B) and be in a
6 16.1 disclosure, report, or deposition.
7


8 Dated this 1 day of ~~August~~^{Sept}, 2015.

10 
11 DISTRICT COURT JUDGE

12 DATED this 1 day of ~~August~~^{Dec.}, 2015.

13 Respectfully Submitted By:

14 EGLET PRINCE

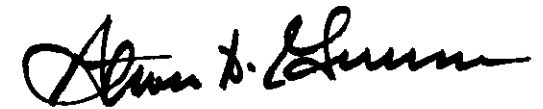
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DATED this ____ day of August, 2015.

Approved as to Form and Content:

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CLERK OF THE COURT

EGLET & PRINCE

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11 **DISTRICT COURT**
12
13 **CLARK COUNTY, NEVADA**

14 **BEAU R. ORTH,**

15 Plaintiff,

16 vs.

17 **ALBERT H. CAPANNA, M.D.;**
18 **DOES I through X; ROE BUSINESS**
19 **ENTITIES I through X, inclusive,**

20 Defendants.

CASE NO. : A-11-648041-C
DEPT. NO. : III

ORDER GRANTING PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES

21
22 Plaintiff BEAU ORTH, after prevailing at trial, filed a Motion for Attorney's Fees,
23 which was opposed by Defendant ALBERT H. CAPANNA, M.D. and heard in Chambers on
24 December 21, 2015. The Court, having read the papers and pleadings on file herein, hereby
25 **GRANTS** Plaintiff's Motion for Attorney's Fees pursuant to NRS 18.010(2)(b) in the amount
26 of \$169,989.58, as follows:
27
28

1 Pursuant to NRS 18.010(2)(b), attorney's fees are awardable to the prevailing party
2 when the Court finds the opposing party's claims were brought without reasonable grounds or
3 to harass the prevailing party. Moreover, the court is to liberally construe the provisions of
4 NRS 18.010(2)(b).
5

6 Plaintiff has alleged that all, and/or at least the liability part, of Defendant's defenses
7 were maintained without reasonable grounds and therefore Plaintiff should be awarded his
8 appropriate attorney's fees. As with most, if not all, medical malpractice actions, issues
9 regarding liability and damages are separate. Even when one issue or the other is agreed upon
10 between the parties, evidence regarding each issue requires a different presentation to the jury.
11 Generally speaking, where both issues are contested, the liability portion requires much more
12 time and effort as the parties never even reach the issue of damages without first establishing
13 liability. This case was no different. Although certain witnesses addressed both issues, the
14 manner of the presentation on each issue was different and the time spent on presenting each
15 issue was different. Understanding this is important in the instant case because the Court
16 cannot find that Defendant's liability defense was maintained with reasonable grounds,
17 although defending the issue of damages was made in good faith and with reasonable grounds.
18 The presentation of evidence on Defendant's liability, which it should be noted included
19 evidence and opinions from some of Defendant's own experts, was overwhelming. It could
20 not only be characterized as clearly exceeding the civil burden of proof standard but, arguably,
21 the totality of evidence showing that the original surgery was performed at the wrong level of
22 the spine would meet a "beyond a reasonable doubt" standard.
23
24
25

26 Turning to the issue of time, it is difficult to ascertain with precision exactly how much
27 time and effort is spent on liability issues versus damages issues over the course of a jury trial,
28 particularly one such as this that spans the course of three weeks. However, a review of

1 available information allows the Court to conclude that it is reasonable to characterize the
 2 presentation of liability issues (through jury selection, opening statements, evidence
 3 presentation, and argument) as encompassing at least 80% of plaintiff's trial presentation. The
 4 Court has further evaluated the requested amounts, the documentation provided and, pursuant
 5 to *Schouweiler v. Yancey Co.*, 101 Nev. 827 (1985), has taken into account the complexity of
 6 the case, the quality of the advocacy, the character of the work, the work actually performed,
 7 and the results. The Court also finds that the application of NRS 7.095 is an appropriate
 8 mechanism to address attorney's fees. Based upon that, the Court finds that the total attorney's
 9 fees award of \$212,486.98 as requested in plaintiff's reply brief (which is less than the original
 10 amount requested in the motion) is an appropriate figure to which to apply the 80% designation
 11 described above.
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26 ///

1 Therefore, having found pursuant to NRS 18.010(2)(b) that Defendant maintained a
 2 liability defense without reasonable grounds and that Plaintiff's liability presentation at trial
 3 encompassed at least 80% of their time and effort, the Court **HEREBY GRANTS** Plaintiff's
 4 Motion for Attorney's Fees and **ORDERS** that attorney's fees will be awarded in the amount
 5 of \$169,989.58.
 6

7 **IT IS SO ORDERED.**

8 Dated this 11 day of ^{April} ~~March~~, 2016.

9
 10
 11 **DISTRICT COURT JUDGE**

12 DATED this 8 day of ^{April} ~~March~~, 2016.

13 Respectfully Submitted By:

14 **EGLET PRINCE**

15
 16
 17
 18 DENNIS M. PRINCE, ESQ.
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19 DATED this 3 day of March, 2016.

20 Approved as to Form and Content:

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