

# **EXHIBIT A**



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(Cite as: 2008 WL 4829850 (D.Colo.))

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United States District Court,  
D. Colorado.

Douglas PERRY, Plaintiff,  
v.

TASER INTERNATIONAL CORP., City of Aurora,  
Colorado, a municipal entity, and Rick Bennet, in his  
individual and official capacity, Defendants.

**Civil No. 07-cv-00901-REB-MJW.**

Nov. 4, 2008.

David Arthur Lane, Qusair Mohamedbhai, Killmer,  
Lane & Newman, LLP, Denver, C.O., for Plaintiff.

Jonathan Marshall Abramson, Richard P. Kissinger,  
Kissinger & Fellman, P.C., Nathan Kent Davis,  
Timothy G. O'Neill, Snell & Wilmer, LLP, Denver,  
C.O., for Defendants.

**ORDER RE: DEFENDANT'S MOTION TO RE-  
VIEW TAXATION OF COSTS**

ROBERT E. BLACKBURN, District Judge.

\*1 The matter before me is **Defendant Taser International, Inc.'s Motion for Review of Clerk's Entry of Costs** [# 74], filed May 1, 2008. I grant the motion in part and deny it in part.

Allowable costs are delineated by 28 U.S.C. § 1920. The burden is on the prevailing party to establish that the expenses it seeks to have taxed as costs are authorized by section 1920. English v. Colorado Department of Corrections, 248 F.3d 1002, 1013 (10th Cir.2001); Griffith v. Mt. Carmel Medical Center, 157 F.R.D. 499, 502 (D.Kan.1994). Expenses not specifically authorized by the statute are not recoverable as costs. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42, 107 S.Ct. 2494, 2497, 96 L.Ed. 2d 385 (1987); Bee v. Greaves, 910 F.2d 686, 690 (10th Cir.1990). Moreover, even where costs are allowed by statute, the prevailing party still must demonstrate that the amount requested is reasonable. See U.S. Industries, Inc. v. Touche Ross & Co., 854

F.2d 1223, 1245 (10th Cir.1988), overruled on other grounds as recognized by Anixter v. Home-Stake Products Co., 77 F.3d 1215, 1231 (10th Cir.1996).

Defendant is entitled to costs as the prevailing party, having successfully moved to dismiss plaintiff's federal claims. Defendant sought \$2,259.13 in costs associated with taking plaintiff's deposition and \$1,149.93 in photocopying costs.<sup>FN1</sup> The Clerk of the Court taxed costs in the amount of \$329.90, representing the costs of filing two applications for admission to the District of Colorado and \$9.90 for copying of exhibits. The Clerk denied all other costs on a finding that they were not necessarily obtained for use in the case because the subject transcript and documents had not been utilized in connection with defendant's successful motion to dismiss.

<sup>FN1</sup> Although defendant also sought \$974.75 for "costs incident to Plaintiff's deposition" in its original motion (Def. Motion ¶ 2 at 2), it stated in its reply brief that it was "not requesting the Court review the Clerk's denial of these costs" (Def. Rep. at 2 n. 1).

Although the Clerk's standard may be "narrower than section 1920" requires, it is not necessarily an abuse of discretion to employ such a measure of costs. Merrick v. Northern Natural Gas Co., Division of Enron Corp., 911 F.2d 426, 434 (10th Cir.1990); Hernandez v. George, 793 F.2d 264, 268-69 (10th Cir.1986). Moreover, "[t]he most direct evidence of 'necessity' is the actual use of materials obtained by counsel or by the court." U.S. Industries, Inc., 854 F.2d at 1246. On the other hand, actual use in a motion presented to the court does not define the absolute outer limit of necessary costs, either. As this case was dismissed on the pleadings for failure to state claims on which relief could be granted, it would have been highly unusual, if not improper, for defendant to rely on plaintiff's deposition testimony, or any evidence for that matter, in connection with the motion. Moreover, it would strain credulity to conclude that a deposition of the plaintiff is not necessary in this case, or, indeed, most cases. That a defendant may believe the plaintiff's claims are subject to dismissal under Rule 12(b) does not absolve it from

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continuing to move forward with discovery in the event the court ultimately concludes otherwise. It does not take much to imagine that a deposition of the named plaintiff could well appear necessary at the time it was taken, even if a motion to dismiss on the pleadings were then pending. See Mitchell v. City of Moore, Oklahoma, 218 F.3d 1190, 1205 (10th Cir.2000) (“[I]t would be inequitable to essentially penalize a party who happens to prevail on a dispositive motion by not awarding costs associated with that portion of discovery which had no bearing on the dispositive motion, but which appeared otherwise necessary at the time it was taken for proper preparation of the case.”) (quoting Callicrate v. Farmland Industries, Inc., 139 F.3d 1336, 1341 (10th Cir.1998)).

\*2 However, not all the items defendant seeks as “costs” associated with plaintiff’s deposition are recoverable. Specifically, although costs of a videotaped deposition may be recovered in certain circumstances, defendant presents no argument or evidence showing that both a transcript and a videotape were necessary in this case. See Tilton v. Capital Cities/ABC, Inc., 115 F.3d 1471, 1477-78 (10th Cir.1997) (noting that recovery of cost of both stenographic transcript and videotape “would be appropriate if it had a legitimate use independent from or in addition to the videotape which would justify its inclusion in an award of costs”) (citation and internal quotation marks omitted).<sup>FN2</sup> Nor are the costs of a rough draft or “e-transcript” of the deposition recoverable, as defendant has made no showing that these items were anything more than a convenience for counsel. See Burton v. R.J. Reynolds Tobacco Co., 395 F.Supp.2d 1065, 1080 (D.Kan.), *rev’d in part on other grounds*, 397 F.3d 906 (10th Cir.2005). See also Irwin Seating Co. v. International Business Machines Corp., 2008 WL 1869055 at \*4 (W.D.Mich. Apr. 24, 2008); Centennial Broadcasting, LLC v. Burns, 2007 WL 1839736 at \* 2 (W.D.Va. June 22, 2007). Accordingly, these costs were properly disallowed.

<sup>FN2</sup>. Defendant apparently construes Tilton as creating an automatic rule of recovery, but I do not. The touchstone of entitlement to costs remains necessity, and the party seeking costs must present some evidence to support a finding on that critical issue.

Thus, defendant is entitled to recover the cost of one

copy of the original certified transcript of plaintiff’s deposition (\$1,070.70) and its attendant exhibits (\$29.68) for a total of \$1,100.38. In addition, defendant is entitled to recover statutory attendance fees of \$120.00 paid to plaintiff pursuant to 28 U.S.C. § 1821(b). See 28 U.S.C. § 1920(3) (providing for recovery of “[f]ees and disbursements for ... witnesses”); see Karsian v. Inter-Regional Financial Group, Inc., 13 F.Supp.2d 1085, 1091-92 (D.Colo.1998).

Defendant also seeks photocopying costs associated with producing documents for its expert witnesses, arguing that such costs appeared necessary at the time they were incurred because the deadline for submission of expert reports predated my resolution of the motion to dismiss. Although such costs might be recoverable on such a theory, defendant has failed to adequately support its request for recovery of those costs here. The records appended to its motion show nothing more than undifferentiated references to unspecified “copying charges,” with no indication of what documents were copied. Although defendant attempts to rectify this lack of substantiation in its reply by providing an index of documents sent to its expert witnesses (Def. Reply App., Exh. A), this evidence does not resolve the problem. Of the 36 categories of documents set forth in the index, some deal with manufacture and warranty issues related to the TASER device itself, while others relate to plaintiff’s medical condition and treatment. Defendant does not explain why its medical causation expert required copies of the TASER Operating Manual or the materials used by the Aurora Police force for its 2004 in-service training on use of the TASER device. Likewise, it is not clear why defendant’s experts on TASER devices required access to the full panoply of plaintiff’s extensive medical records. In the absence of any explanation by defendant as to why any individual expert required all the materials described by the index, I cannot conclude that defendant has shown that *any* of the photocopying charges sought were necessarily obtained for use in the case.

**\*3 THEREFORE, IT IS ORDERED** as follows:

1. That **Defendant Taser International, Inc.’s Motion for Review of Clerk’s Entry of Costs** [# 74], filed May 1, 2008, is **GRANTED IN PART** and **DENIED IN PART** as follows:

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a. That the motion is **GRANTED**:

- (1). With respect to defendant's request for costs associated with obtaining the original certified transcript of plaintiff's deposition and its attendant exhibits pursuant to [28 U.S.C. § 1920\(2\)](#);
- (2). With respect to defendant's request for costs incurred as witness fees to secure plaintiff's appearance at his deposition as required by [28 U.S.C. § 1821\(b\)](#), pursuant to [28 U.S.C. § 1920\(3\)](#);

b. That the motion is **DENIED** otherwise; and

2. That, thus, defendant is **AWARDED** additional costs of \$1,220.38 for the items found to be recoverable in paragraph 1.a., *supra*.

D.Colo.,2008.  
Perry v. Taser Intern. Corp.  
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# **EXHIBIT B**



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(Cite as: 2007 WL 1752465 (M.D.Fla.))

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**H**Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,  
Orlando Division.  
Danita DAVIS, Plaintiff,  
v.  
SAILORMEN, INC., Defendant.  
**No. 6:05-cv-1497-Orl-22JGG.**

June 15, 2007.

[Mark E. Tietig](#), Tietig & Tietig, P.A., Merritt Island, FL,  
for Plaintiff.

[Jolee Land](#), Phelps Dunbar L.L.P., Tampa, FL.

**ORDER**

[ANNE C. CONWAY](#), United States District Judge.

\*1 This cause is before the Court on Plaintiff's Motion to Review Taxation of Defendant's Bill of Costs (Doc. No. 39) filed on April 18, 2007.

The United States Magistrate Judge has submitted a report recommending that the Motion be granted in part and denied in part.

After an independent *de novo* review of the record in this matter, and noting that no objections were timely filed,

**MOTION:**

**FILED:**

Plaintiff Danita Davis sought to hold Defendant Sailormen, Inc. liable for allegedly refusing to hire her because of her disability under the Americans with Disabilities Act. Doc. No. 1. The district court granted summary judgment in favor of Defendant, and ordered the Clerk to enter final judgment providing that Defendant recover its costs arising from this action. Doc. No. 35 at 13. The Clerk entered judgment as directed and closed the case on

the Court agrees entirely with the findings of fact and conclusions of law in the Report and Recommendations.

Therefore, it is **ORDERED** as follows:

1. The Report and Recommendation filed May 24, 2007 (Doc. No. 43) is ADOPTED and CONFIRMED and made a part of this Order.
2. Plaintiff's Motion to Review Taxation of Defendant's Bill of Costs (Doc. No. 39) is granted in part and denied in part.
3. The Bill of Costs taxed by the Clerk is hereby VACATED.
4. The Defendant is hereby awarded costs in the sum of **\$2,722.32**.

**DONE and ORDERED.**

**REPORT AND RECOMMENDATION**

[KARLA R. SPAULDING](#), United States Magistrate Judge.

**TO THE UNITED STATES DISTRICT COURT**

This cause came on for consideration without oral argument on the following motion filed herein:

**PLAINTIFF'S MOTION TO REVIEW TAXATION OF DEFENDANT'S BILL OF COSTS (Doc. No. 39)**

**April 18, 2007**

March 30, 2007. Doc. No. 36.

On April 16, 2007, Defendant filed its proposed bill of costs, seeking a total of \$3,512.44 for costs for fees for service of summons and subpoena, expedited deposition transcripts, copy costs, and witness fees. Doc. No. 37-2. The Clerk taxed costs in the amount of \$3,512.44 the following day. Doc. No. 38.

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Plaintiff filed a timely Motion to Review Taxation of Defendant's Bill of Costs (now before the Court) asking the Court to strike \$2,033.12 from the bill of costs. Doc. No. 39. Plaintiff objects to a number of the costs taxed against her, including the costs for service of summons and subpoenas, costs for expedited deposition transcripts which Plaintiff claims were "not used in this case to obtain summary judgment," and a \$75.00 mediation room fee. *Id.* at 1-2. Defendant has withdrawn its request for the \$75.00 mediation room fee, but otherwise opposes Plaintiff's motion.

## I. THE LAW.

[Federal Rule of Civil Procedure 54](#) provides that a prevailing party may recover costs as a matter of course unless otherwise directed by the Court or applicable statute. See [Fed.R.Civ.P. 54\(d\)\(1\)](#). The applicable statutes referred to in the rule include [28 U.S.C. §§ 1920<sup>FN1</sup>](#) and [1921<sup>FN2</sup>](#), which delineate which costs are recoverable under [Rule 54\(d\)](#). The Court has the discretion to award those costs specifically enumerated in [section 1920](#), and may not tax as costs any items not included in that statute. See [Crawford Fitting Co. v. J.T. Gibbons, Inc.](#), 482 U.S. 437, 441-42, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987); see also [Morrison v. Reichhold Chems., Inc.](#), 97 F.3d 460 (11th Cir.1996). The Court can only award costs that are "adequately described and documented." [Scelta v. Delicatessen Support Servs., Inc.](#), 203 F.Supp.2d 1328, 1340 (M.D.Fla.2002).

[FN1.Section 1920](#) provides:

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.

[FN2.Section 1921\(a\)\(1\)](#) provides:

The United States marshals or deputy marshals shall routinely collect, and a court may tax as costs, fees for the following:

- (A) Serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, complaints, or any other writ, order or process in any case or proceeding.
- (B) Serving a subpoena or summons for a witness or appraiser.
- (C) Forwarding any writ, order, or process to another judicial district for service.
- (D) The preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale.
- (E) The keeping of attached property ....
- (F) Copies of writs or other papers furnished at the request of any party.
- (G) Necessary travel in serving or endeavoring to serve any process, writ, or order, except in the District of Columbia, with mileage to be computed from the place where service is returnable to the place of service or endeavor.
- (H) Overtime expenses incurred by deputy marshals in the course of serving or executing civil process.

### A. Service of Process or Subpoenas.

\*2 "Fees of the clerk and marshal" may be taxed as costs. [28 U.S.C. § 1920\(1\)](#). The Court may, therefore, tax as costs fees of the United States Marshals as listed in [28 U.S.C. § 1921\(a\)](#), including, among other things: 1.) fees for service of process ([28 U.S.C. § 1921\(a\)\(1\)\(A\)](#)); 2.)

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fees for serving a subpoena or summons for a witness (28 U.S.C. § 1921(a)(1)(B)); 3.) fees for “necessary travel” for service of process (28 U.S.C. § 1921(a)(1)(G)); and, 4.) fees for overtime expenses incurred while serving process (28 U.S.C. § 1921(a)(1)(H)).

Section 1921 also states that the “Attorney General shall from time to time prescribe by regulation the fees to be taxed and collected under [§ 1921(a) ].” 28 U.S.C. § 1921(b). The Attorney General prescribes a minimum fee of \$45.00 per hour for “process served or executed personally ... for each item served by one U.S. Marshals Service employee, agent, or contractor, plus travel costs and any other out of pocket expenses.” 28 C.F.R. § 0.114(a)(3). An additional fee of \$45.00 per hour plus costs and expenses is charged for each additional U.S. Marshals Service employee, agent, or contractor “who is needed to serve process ...” *Id.* While section 1920(1) only mentions fees of the United States Marshal, fees of a private process server may be taxed, so long as they do not exceed the statutory fees authorized in § 1921. *EEOC v. W & O, Inc.*, 213 F.3d 600, 624 (11th Cir.2000).

#### B. Costs for Transcripts.

Section 1920(2) authorizes the taxation of costs for the “[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case,” which includes the costs of deposition transcripts. 28 U.S.C. § 1920(2); *EEOC*, 213 F.3d at 620; *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1225 (11th Cir.2002). Costs for depositions transcripts are taxable only if the deposition was “necessarily obtained” for use in the case. *EEOC*, 213 F.3d at 621. “[W]here the deposition costs were merely incurred for convenience, to aid in thorough preparation, or for purposes of investigation only, the costs are not recoverable.” *Id.* (quoting *Goodwall Const. Co. v. Beers Const. Co.*, 824 F.Supp. 1044, 1066 (N.D.Ga.1992)). District courts have great latitude in determining whether a deposition was “necessarily obtained” for use in the case. *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 337 (5th Cir. Unit B June 1981).

Deposition costs of witnesses on a losing party's witness list are generally considered taxable. *Maris Distrib. Co.*, 302 F.3d at 1225. In addition, deposition costs are taxable even if a prevailing party's use of a deposition is minimal or not critical to that party's ultimate success, unless the losing party demonstrates that the deposition was not related to an issue present in the case at the time of the

deposition. *EEOC*, 213 F.3d at 621. The parties need not have used the deposition at trial. *Id.* Depositions costs of witnesses are taxable even if the prevailing party successfully moved to exclude from trial the testimony of those witnesses. *Id.* at 622.

## II. APPLICATION.

### A. Service of Subpoenas.

\*3 Plaintiff objects to costs related to the service of thirteen subpoenas—three subpoenas for trial and nine subpoenas duces tecum. Plaintiff contends that fees for the service of the nine subpoenas duces tecum are not taxable because “discovery gleaned from [these subpoenas] was not used in this case to obtain summary judgment.” Doc. No. 39 at 1. Plaintiff also asserts (without citation to any legal authority) that taxation for amounts over \$25.00 for service of process fees is unreasonable, and therefore asks the Court to award only \$75.00 total (\$25.00 for each trial subpoena) for fees related to service of subpoenas.

Subpoenas to trial witnesses who Plaintiff could have reasonably believed were “at least partially necessary to the litigation” may be taxed as costs. *George v. GTE Directories Corp.*, 114 F. Supp .2d 1281, 1299 (M.D.Fla.2000) (citing *EEOC*, 213 F.3d at 621-24); see also *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 2001 WL 862642, \*1 (M.D.Fla. May 4, 2001) (awarding costs for service of subpoenas on two trial witnesses who never testified at trial). The invoices in support of the Bill of Costs reflect that counsel for Plaintiff served “Kim Zachery Robar,” Terrence Oliver Lakeman, and Abel Elkharchafi with trial subpoenas. Doc. No. 37-2 at 48-52. “Zachery Robar,” <sup>FN3</sup> Lakeman, and Elkharchafi were listed as a possible trial witness by Plaintiff and Defendant in the Final Pretrial Statement. Doc. Nos. 28-4, 28-5 at 1. According to Plaintiff, Robar was the manager at the restaurant who first offered Plaintiff a job, and Lakeman was the general manager who allegedly refused to hire Plaintiff because of her disability. See Doc. No. 28 at 1-2 (Plaintiff's statement of her case). I find that the subpoenas to the three trial witnesses listed on Plaintiff's witness list are appropriately taxed as costs.

<sup>FN3</sup>. The invoice refers to the trial witness as “Kim Zachery Robar Witness for 4/2/06 trial” (doc. no. 37-2 at 47); both parties listed the witness as “Zachary Robar” in their witness lists (doc. nos. 28-4, 28-5 at 1); Plaintiff refers to the witness as “Zachery Robar” in her motion (doc.

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no. 39 at 1); and Defendant refers to the witness as “Kim Zachery Robar” in its memorandum in opposition (doc. no. 42 at 3). The deposition of Robar reveals the witness's full name to be “Ken Zachary Robar,” although the transcript is captioned “Deposition of Zack Robar.” Doc. No. 21-4 at 1. I assume that all references to Robar refer to the same person.

Defendant indicates that the “service of *eight* subpoenas for deposition [were] directed to witnesses for the production of Plaintiff's employment records, records relevant to the rebuttal of Plaintiff's claims.” Doc. No. 42 at 3 (emphasis added). Invoices submitted in support of the Bill of Costs reflect service of *nine* pretrial subpoenas on the following individuals and entities: Yoli & Associates Chapel Sales, Inc.; Taco Bell; Cocoa Christian Academy; Florida Today; IHOP; FMS Management Systems, Inc.; Wendy's (Georgia County); Wendy's International; and, Wendy's Restaurant (Brevard County). Defendant does not state which of the subpoenas was not for purposes of obtaining Plaintiff's employment records.

Defendant's exhibit list for trial includes documents from Taco Bell (ex. 14), and Florida Today (ex. 20). Doc. No. 28-3. Plaintiff averred during pretrial discovery that she previously worked for Florida Today, Wendy's, Cocoa Christian Center, IHOP, and Yoli & Associates, and that she also worked for Taco Bell. Doc. No. 21-6 at 3; Doc. No. 22-2 at 2-4. Defendant did not cite to any evidence that Plaintiff worked for FMS Management Systems, Inc., and I have not located such a reference in the file. Accordingly, I conclude that the service of process costs for subpoenas to obtain employment records, except records from FMS Management Systems, Inc., are compensable.

\*4 As discussed earlier, the Attorney General prescribes a minimum fee of \$45.00 per hour for each subpoena served by or behalf of the U.S. Marshals Service, in addition to expenses. [28 C.F.R. § 0.114\(a\)\(3\)](#). Thus, Plaintiff's argument that service of process fees in excess of \$25.00 are *per se* unreasonable is unavailing. The invoices submitted with the Bill of Costs show the fees actually incurred for service of these subpoenas. Accordingly, I recommend that the Court deduct \$99.00 from the costs for service of process on FMS Managements Systems, Inc., *see* doc. no. 37-2, but otherwise approve the service of process costs.

#### **B. Expedited Deposition Transcripts.**

Plaintiff objects to the costs for expedited transcripts of the depositions of Robar, Elkharchafi and Plaintiff Davis. *See* Doc. No. 39 at 1-2. Defendant responds that it needed the deposition transcripts to prepare its summary judgment motion and for trial, but does not explain why it needed *expedited* transcripts.

The record discloses that the parties had nearly ten months to conduct discovery. *See* Doc. No. 13. There is no indication in the file that discovery was delayed by circumstances beyond the control of Defendant. Accordingly, any need for expediting the production of deposition transcripts is, on this record, a cost incurred only for the convenience of counsel. As such, it is not taxable. *See, e.g., Nat'l Bancard Corp. v. VISA, U.S.A., Inc.*, 112 F.R.D. 62, 64 (S.D.Fla.1986) (holding that “the expedited nature of the transcript was for the convenience of counsel and therefore the additional expense is not taxable.”). Accordingly, \$616.12 <sup>FN4</sup> in costs for expediting the production of the cited deposition transcripts is not taxable.

<sup>FN4</sup>. Defendant obtained expedited transcripts for Plaintiff Davis, Robar, and Elkharchafi, but not for Terence Lakeman. *See* Doc. No. 37-2 at 23, 24, 41 (court reporter invoices filed in support of Defendant's proposed bill of costs). The court reporting service charged \$6.23 per page for Davis's transcript, \$7.00 per page for Robar's and Elkharchafi's expedited transcripts, and \$2.75 per page for the Lakeman's non-expedited transcript. *See id.* The deposition transcripts for Davis, Robar, and Elkharchafi were ninety-four, forty-seven, and twenty-one pages, respectively. *See id.* at 23, 41. Therefore, the correct charge for the depositions of Davis, Robar, and Elkharchafi at a non-expedited rate of \$2.75 per page are \$258.50, \$129.25, and \$57.75, respectively, for a total fee of \$445.50 for the three transcripts without the expedited charge. Defendant actually paid \$1061.62 for the three expedited transcripts, so \$616.12 is not taxable.

### **III. CONCLUSION**

For the reasons stated above, I recommend that Plaintiff's Motion to Review Taxation of Defendant's Bill of Costs (Doc. No. 39) be **GRANTED** in part and **DENIED** in part. I further recommend that the Bill of Costs taxed by the Clerk of Court be **VACATED**. Finally, I recommend that the Court award \$2,722.32 in costs, which amount is calculated by deducting from the costs originally taxed,

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\$3,512.44, the \$75.00 mediation room fee, \$99.00 for service of process on FMS Management Systems, Inc., and \$616.12 for fees for expedited deposition transcripts.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida on May 24th, 2007.

M.D.Fla.,2007.  
Davis v. Sailormen, Inc.  
Not Reported in F.Supp.2d, 2007 WL 1752465  
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# **EXHIBIT C**



Not Reported in F.Supp.  
 Not Reported in F.Supp., 1989 WL 89935 (D.Kan.)  
 (Cite as: **1989 WL 89935 (D.Kan.)**)

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**H**Only the Westlaw citation is currently available.

United States District Court, D. Kansas.  
 Marvin E. BOYER, Plaintiff,

v.

Lilly Leora CLINE, et al., Defendants,

v.

Stanley E. TOLAND, et al., Additional Parties.

**No. 85-1562-C.**

July 19, 1989.

Gorden Penny, Chapin & Penny, Medicine Lodge, Kansas, Tim J. Larson, Iola, Kansas, for plaintiff.

Mikel L. Stout, Charles P. Efflandt, Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas for pltf and Haney and Marvin E. Boyer Oil Co., Inc.

Kenneth G. Gale/Don C. Matlack, Matlack & Foote, Wichita, Kansas, for Paul Cline, Henrietta M. Hodges.

Gordon Penny, Chapin & Penny, Medicine Lodge, Kansas, for Robert Haney & Marvin E. Boyer Oil Co. Inc.

Clifford L. Malone, Adams, Jones, Robinson & Malone, Wichita, Kansas, for Stanley R. Toland.

Clark R. Nelson, Richard L. Honeyman, Kahrs, Nelson, Fanning, Hite & Kellogg, Wichita, Kansas, for Stanley R. Toland.

#### MEMORANDUM AND ORDER

CROW, District Judge.

\*1 This case comes before the court on defendants' motion to retax costs and eliminate certain costs from the bill of costs filed by additional party, Stanley E. Toland.

[Fed.R.Civ.P. 54\(d\)](#) states that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The rule also provides for the court's review of the clerk's action if a motion to retax costs is filed within 5 days of the taxation of costs. *See also* D.Kan.

Rule 219.

Review of the clerk's assessment of costs is a de novo review addressed to the sound discretion of the court. [Burk v. Unified School District No. 329](#), 116 F.R.D. 16, 17 (D.Kan.1987). The statutory basis for the award of costs is [28 U.S.C. § 1920](#). [28 U.S.C. § 1821](#) is also applicable, since it relates to the specific items of cost which can be recovered for witness fees. [EEOC v. Sears, Roebuck and Co.](#), 114 F.R.D. 615, 621 (N.D.Ill.1987). The court must scrutinize the proposed items of cost and should exercise its discretion sparingly with reference to costs not permitted under [§ 1920](#). *Id.*, at 620. While there is a presumption that the prevailing party will be awarded costs, inclusion of particular items of cost is within the court's discretion. [Brumley Estate v. Iowa Beef Processors, Inc.](#), 704 F.2d 1362, 1363 (5th Cir.1983). [28 U.S.C. § 1920](#) provides for the following items of cost to be taxed:

- (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 § 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

#### Transcripts

Additional party Stanley E. Toland included in his bill of costs the cost of the trial transcript for three days of trial. The court reporter's statement was for \$1,361.25, the amount charged for the original transcript being \$1,089,

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and the amount charged for one copy of the transcript being \$272.25. The clerk did not allow the cost of the copy. Defendants object to the allowance of the cost of the original transcript. Taxation of the costs of a trial transcript is permitted when that transcript was reasonably necessary for use in the case. Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 663 F.Supp. 1360, 1458 (D.Kan.1987). Toland states that the transcript was necessary for use in the case, since the transcript includes the testimony of F.A. Hodges concerning the alleged tampering with the audio tape of a telephone conversation between Toland and Hodges in December of 1984. Toland states that he needed this transcript to determine the precise charges of tampering made by F.A. Hodges. Defendants argue the transcript was unnecessary since the defendant's counsel offered to stipulate on the record and before the jury that the tape was not altered. The court finds that the transcript was necessary for use in the case considering the allegations of tampering F.A. Hodges repeatedly made in front of the jury. A copy of the transcript however, was merely for the convenience of counsel and is disallowed. Therefore, the court finds the cost of the original transcript, \$1,089, is a taxable cost under § 1920(2).

#### *Witness Fees*

\*2 Witness fees are a taxable cost under § 1920(3). Additional party Toland has included in his bill of costs \$1,851.34 in witness fees. This item of cost represents the travel and hotel expenses of John and Clyde Toland, who are Stanley E. Toland's sons and law partners. Before commencement of trial, the court ordered that all witnesses would be sequestered. Counsel for Stanley Toland requested that an exception to this order be made in the case of John Toland and Clyde Toland, because their father was too ill to appear during the trial. The defendants did not object to these two gentlemen sitting at counsel

table on alternate days in their father's stead. Stanley Toland argues that it was necessary that at least one of the Tolands be present in order for them to hear the development of defendants' case and to report back to each other at the end of each day of trial. If the court had not made an exception for these two gentlemen, they would have been sequestered along with the rest of the witnesses, and their presence in the courtroom would not have been allowed or required on the days reflected in their travel and hotel expenses. The court disallows the \$1,851.34 claimed by Stanley Toland as witness fees for travel and hotel expenses, as John and Clyde Toland were allowed to attend trial on those days as observers and not as witnesses. Counsel for Stanley Toland was competent, capable and owed the duty to report progress of the case to his client.

#### *Fees for Exemplification and Copies*

The standard for taxing exemplification and copying costs under § 1920(4) is that the exemplification and copying be necessarily obtained for use in the case. Robertson v. McCloskey, 121 F.R.D. 131, 134 (D.D.C.1988). In his bill of costs, additional party Toland claims \$5,012.31 as the cost of exemplification and copying. Defendants object to the inclusion of items of this cost on several grounds. One ground of objection is that the documentation furnished does not include sufficient detail to determine whether the copies were necessarily obtained for use in the case. Another ground of objection is that the cost of exhibit expense such as color folders, foamcore, index dividers and notebooks should not be allowed under § 1920(4) since these items are only for the convenience of counsel in organizing and assembling data. The court has scrutinized the fees for photocopies contained in attachment # 3 to additional party Toland's bill of cost. The following items of cost will be allowed by the court as being necessarily obtained for use at trial:

#### Photocopies

2/13/87	City Blue Print	\$12.48
10/22/86	Foulston, Siefkin	20.00
10/11/86	Don K. Smith	220.50
5/28/87	Jiffy Print	125.00
2/15/88	Kansas Blue Print	12.60
3/1/88	Kansas Corporation Commission	6.95
1/20/88	Allen County Clerk	2.25
10/21/88	Neosho County Abstract	25.00
10/28/88	Iola Abstract	20.00

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9/20/87	Kansas Corporation Commission	1.50
Subtotal for Photocopies		

\*3 The remainder of the cost of photocopying claimed by additional party Toland will not be allowed, as these photocopying expenses were not documented as required. See the front page of the bill of costs. The court does not anticipate any further documentation will be filed. Counsel for additional party Toland knew of the necessity for documentation because he provided such documentation for the photocopying expenses listed above. He should

have provided complete documentation at the time he filed the bill of costs.

The court will allow these additional items as costs of exemplification as being necessarily obtained for use at trial:

10/13/88	Photographs	\$11.18
	Photographs and duplicates	168.28
10/17/88	Maps copied (City Blue Print)	271.46

Subtotal for exemplification:

The remainder of the items listed under "exhibit expenses" in attachment # 3 of additional party Toland's bill of costs is disallowed. Costs of colored folders and labels, foamcore, index dividers, and notebooks are not taxable costs under [§ 1920](#). The total amount the court will allow as fees for exemplification and copying is \$897.20.

The defendants object to the taxation of expert witness fees and costs as not being within the recoverable costs of [§ 1920](#). The law in the Tenth Circuit is clear that expert witness fees are not allowed under [§ 1920](#). [Ramos, 713 F.2d at 559](#). The amount of expert witness fees listed in attachment # 4 to additional party Toland's bill of costs is disallowed.

#### *Depositions*

The defendants argue that copies of depositions are not ordinarily taxable under [§ 1920](#). The Tenth Circuit has held that when copies of depositions are reasonably necessary to the litigation of the case, the costs of those copies are allowed pursuant to [28 U.S.C. § 1920\(4\)](#) as fees for exemplification and copies of papers necessarily obtained for use in the case. [See Ramos v. Lamm, 713 F.2d 546, 560 \(10th Cir.1983\)](#). A deposition taken within the proper bounds of discovery will normally be deemed to be necessarily obtained for use in the case and its costs will be taxed unless the opposing party interposes a specific objection that the deposition was improperly taken or unduly prolonged. [George R. Hall, Inc. v. Superior Trucking Co., 532 F.Supp. 985, 994 \(N.D.Ga.1982\)](#) (citing [Jeffries v. Georgia Residential Finance Authority, 90 F.R.D. 62 \(N.D.Ga.1981\)](#)). The court finds that the cost of the transcripts of depositions listed in attachment # 4 is \$2,189.55 and should be allowed in its entirety.

#### *Travel Expenses*

\*4 The defendants object to the taxation of travel expenses of the attorneys to attend depositions. Most travel and subsistence expenses are not recoverable items of cost under [§ 1920](#). [State of Ill. v. Sangamo Const. Co., 657 F.2d 855, 864 \(7th Cir.1981\)](#). Absent extraordinary or compelling circumstances, travel of attorneys is not a taxable cost of taking depositions. [Hall, 532 F.Supp. at 995](#). In [Augustine v. United States, 810 F.2d 991, 996 \(10th Cir.1987\)](#), the Tenth Circuit held that the district court did not abuse its discretion in refusing to tax as costs counsel's travel expenses to attend a deposition. The amount of travel expense to attend depositions listed on attachment # 4 of additional party Toland's bill of cost is disallowed. The court also disallows the cost of the conference room used to take depositions, as this item of cost is not specifically allowed under [§ 1920](#).

#### *Expert Witness Fees*

IT IS THEREFORE ORDERED that defendants' motion to retax costs and eliminate certain costs from the bill of costs filed by additional party Stanley E. Toland is sus-

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tained. The court finds that under [28 U.S.C. § 1920](#) additional party Stanley E. Toland shall recover \$1,089 for the cost of three days of trial transcript, \$897.20 for the cost of exemplification and copying, and \$2,189.55 for the cost of depositions. The remainder of the bill of cost is disallowed. The clerk is directed to assess costs against the defendants in the amount of \$4,175.75.

D.Kan.,1989.  
Boyer v. Cline  
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END OF DOCUMENT

# **EXHIBIT D**



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**H** Only the Westlaw citation is currently available.

United States Court of Appeals,  
Tenth Circuit.  
In re WILLIAMS SECURITIES LITIGATION-  
WCG SUBCLASS.  
No. 08-5100.

March 3, 2009.

**Background:** Investors who had bought stock or notes issued by telecommunications corporation between date on which corporation's spin-off from its parent company was announced and date on which corporation filed for bankruptcy protection brought securities fraud class action. The United States District Court for the Northern District of Oklahoma, [Stephen P. Friot, J., 496 F.Supp.2d 1195](#), granted summary judgment for defendants, and awarded costs to defendants totaling approximately \$612,000. The Court of Appeals affirmed summary judgment, --- F.3d ---, [2009 WL 388048](#).

**Holdings:** On appeal of award of costs, the Court of Appeals, [Baldock](#), Circuit Judge, held that:

- (1) depositions for which costs were claimed did not have to be used in deciding summary judgment motion;
- (2) fact that certain relevant documents were available in central depository did not preclude award of costs of copies of those documents;
- (3) District Court did not abuse its discretion by awarding costs that investors argued were equally attributable to different subclass; and
- (4) District Court did not abuse its discretion as to size of award.

Affirmed.

West Headnotes

**[1] Federal Civil Procedure 170A 2742.1**

[170A](#) Federal Civil Procedure  
[170AXIX](#) Fees and Costs

[170Ak2742](#) Taxation

[170Ak2742.1](#) k. In General. [Most Cited Cases](#)

District court must provide valid reason for denying award of costs to prevailing party. [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\), 28 U.S.C.A.](#)

**[2] Federal Civil Procedure 170A 2740**

[170A](#) Federal Civil Procedure

[170AXIX](#) Fees and Costs

[170Ak2740](#) k. Stenographic Costs. [Most Cited Cases](#)

“Necessarily obtained for use in the case” statutory standard for taxing costs for transcripts and photocopies does not allow prevailing party to recover costs for materials that merely added to convenience of counsel or district court, or for materials produced solely for discovery; standard requires that prevailing party's transcription and copy costs must be reasonably necessary to litigation of case. [28 U.S.C.A. § 1920\(2, 4\)](#).

**[3] Federal Civil Procedure 170A 2742.1**

[170A](#) Federal Civil Procedure

[170AXIX](#) Fees and Costs

[170Ak2742](#) Taxation

[170Ak2742.1](#) k. In General. [Most Cited Cases](#)

Prevailing party bears burden of establishing amount of costs to which it is entitled; once prevailing party establishes its right to recover allowable costs, burden shifts to non-prevailing party to overcome presumption that those costs will be taxed. [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\), 28 U.S.C.A.](#)

**[4] Federal Courts 170B 830**

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(K\)](#) Scope, Standards, and Extent

[170BVIII\(K\)4](#) Discretion of Lower Court

[170Bk830](#) k. Costs, Attorney Fees and Other Allowances. [Most Cited Cases](#)

Court of Appeals reviews costs awards only for abuse of discretion. [28 U.S.C.A. § 1920](#); [Fed.Rules](#)

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[Civ.Proc.Rule 54\(d\)\(1\), 28 U.S.C.A.](#)**[5] Federal Courts 170B**  **878**[170B](#) Federal Courts[170BVIII](#) Courts of Appeals[170BVIII\(K\)](#) Scope, Standards, and Extent[170BVIII\(K\)5](#) Questions of Fact, Verdicts and Findings[170Bk870](#) Particular Issues and Questions[170Bk878](#) k. Costs and Attorney Fees. [Most Cited Cases](#)Whether materials are necessarily obtained for use in case, within meaning of statute governing taxation of costs, is question of fact that Court of Appeals reviews only for clear error. [28 U.S.C.A. § 1920](#)(2, 4).**[6] Federal Civil Procedure 170A**  **2738**[170A](#) Federal Civil Procedure[170AXIX](#) Fees and Costs[170Ak2738](#) k. Depositions. [Most Cited Cases](#)In order for costs of depositions to be awardable to party who prevailed on summary judgment, depositions did not have to be used in deciding summary judgment motion, and did not have to be designated for trial; governing statute required only that costs be reasonably necessary for use in case at time expenses were incurred. [28 U.S.C.A. § 1920](#)(2, 4).**[7] Federal Civil Procedure 170A**  **2740**[170A](#) Federal Civil Procedure[170AXIX](#) Fees and Costs[170Ak2740](#) k. Stenographic Costs. [Most Cited Cases](#)In order to satisfy burden of justifying award of copying costs, prevailing party need not justify each copy made, but rather need demonstrate that, under the particular circumstances, copies were reasonably necessary for use in case. [28 U.S.C.A. § 1920](#)(4).**[8] Federal Civil Procedure 170A**  **2740**[170A](#) Federal Civil Procedure[170AXIX](#) Fees and Costs[170Ak2740](#) k. Stenographic Costs. [Most Cited Cases](#)

Fact that documents relevant to litigation were avail-

able in central depository did not inexorably lead to conclusion that copies of those documents made for prevailing party's attorney's use were not reasonably necessary to litigation of case, and thus did not preclude award of costs of those copies. [28 U.S.C.A. § 1920](#)(4).**[9] Federal Civil Procedure 170A**  **2727**[170A](#) Federal Civil Procedure[170AXIX](#) Fees and Costs[170Ak2726](#) Result of Litigation[170Ak2727](#) k. Prevailing Party. [Most Cited Cases](#)In securities fraud class action that concerned one of two subclasses, district court did not abuse its discretion by awarding costs to prevailing defendants that plaintiffs argued were equally attributable to other subclass; given factual overlap between subclasses, court reasonably concluded that defendants would have incurred awarded costs even absent litigation involving other subclass. [28 U.S.C.A. § 1920](#); [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\), 28 U.S.C.A.](#)**[10] Securities Regulation 349B**  **157.1**[349B](#) Securities Regulation[349BI](#) Federal Regulation[349BI\(E\)](#) Remedies[349BI\(E\)1](#) In General[349Bk157](#) Costs and Expenses; Attorney Fees[349Bk157.1](#) k. In General. [Most Cited Cases](#)District court did not abuse its discretion in securities fraud class action by awarding costs to prevailing defendants that aggregated approximately \$612,000; case was massive and complex, investors had sought total of \$2.9 billion in damages from three defendant groups, all of whom had prevailed, and costs also had been driven upward by investors' broad allegations and aggressive course of discovery. [28 U.S.C.A. § 1920](#); [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\), 28 U.S.C.A.](#) Submitted on the briefs: <sup>FN\*</sup>[William Christopher Carmody](#), [Jonathan E. Bridges](#), and [Jeremy J. Brandon](#), Susman Godfrey LLP, Dallas, TX, [Joshua H. Vinik](#), [Matthew A. Kupillas](#), and [Kent A. Bronson](#), Milberg LLP, New York, NY, and [Behram V. Parekh](#), Yourman Alexander & Parekh, Los Angeles, CA, for Plaintiffs-Appellants.

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(Cite as: **2009 WL 514097 (C.A.10 (Okla.))**)

[Michael J. Gibbens](#), [Victor E. Morgan](#), and [Gerald L. Jackson](#), Crowe & Dunlevy, Tulsa, OK, for Defendants-Appellees Howard E. Janzen, Scott E. Schubert, Kenneth Kinnear II, Matthew W. Bross, Bob F. McCoy, Howard S. Kalika, John C. Bumgarner Jr., and Frank M. Semple.

[Graydon Dean Luthey, Jr.](#), and [Sarah Jane Gillett](#), Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, OK, [Timothy K. Roake](#), Gibson, Dunn & Crutcher, L.L.P., Palo Alto, CA, and [Ethan D. Dettmer](#), Gibson, Dunn & Crutcher, L.L.P., San Francisco, CA, for Defendants-Appellees The Williams Companies, Inc. and Keith E. Bailey.

[Patrick M. Ryan](#), and [Philip G. Whaley](#), Ryan, Whaley & Coldiron, Oklahoma City, OK, [Peter A. Wald](#), Latham & Watkins LLP, San Francisco, CA, and [Christopher Harris](#), Latham & Watkins LLP, New York, NY, for Defendant-Appellee Ernst & Young LLP.

Before [McCONNELL](#), [ANDERSON](#), and [BALDOCK](#), Circuit Judges.

[BALDOCK](#), Circuit Judge.

\*1 Following the breakup of AT & T in the 1980s, the Williams Companies (WMB), an energy group, devised a plan to run fiber-optic cables through some of its decommissioned pipelines. Subsequently, WMB used a subsidiary known as the Williams Communications Group (WCG) to develop a large fiber-optic network. WMB sold most of this network to a competitor in 1995. Rapid growth in the Telecommunications Index in the late 1990s, however, spurred WMB to reenter the network communications market through its WCG subsidiary. Indeed, WMB stated its intention to invest vast sums in creating a national fiber-optic network. But the Telecommunications Index experienced a major downturn in the spring of 2000. WMB subsequently spun off its WCG subsidiary. Less than two years later, WCG's stock was practically worthless and the company filed for Chapter 11 bankruptcy.

As a result, some thirty securities fraud class action suits were filed seeking \$2.9 billion against three defendant groups: (1) the WMB Defendants; (2) the

WCG Defendants; and (3) Ernst & Young, the outside auditor to both WMB and WCG. The district court consolidated these actions under the caption *In re Williams Securities*, bifurcated the litigation into two subclasses of plaintiffs—the WMB Subclass and the WCG Subclass—and ordered coordinated discovery. While the WMB Subclass Action settled, Defendants in the WCG Subclass Action filed a motion for summary judgment, which the district court granted. Plaintiffs appealed the district court's ruling, which we affirmed in *In re Williams Securities Litigation—WCG Subclass*, No. 07-5119, ---F.3d ---, 2009 WL 388048 (10th Cir.2009).

Pursuant to [28 U.S.C. § 1920](#) and [Fed.R.Civ.P. 54\(d\)\(1\)](#), the district court awarded the WCG Subclass Defendants costs. Plaintiffs now challenge the district court's costs awards on three separate grounds. First, Plaintiffs allege Defendants failed to prove that the transcripts and copies for which the district court awarded costs were “necessarily obtained for use in the case.” [28 U.S.C. § 1920\(2\) & \(4\)](#). Second, Plaintiffs maintain that many of the costs for which Defendants seek reimbursement are equally attributable to the WMB Subclass Action. Hence, Plaintiffs argue the district court abused its discretion in taxing them for the full amount of these costs. Third, Plaintiffs suggest that the district court's awards of costs are substantively unreasonable, even assuming these costs are taxable under [28 U.S.C. § 1920](#). We have jurisdiction under [28 U.S.C. § 1291](#). Satisfied that the district court acted within the broad confines of its discretion, we affirm.

## I.

After the district court granted summary judgment in favor of Defendants, each defendant group filed a timely bill of costs with the district court. The district court clerk held a joint hearing on Defendants' bills of costs. See *Furr v. AT & T Techs., Inc.*, 824 F.2d 1537, 1550 n. 11 (10th Cir.1987) (recognizing that “a bill of costs is initially filed with the clerk rather than with the court”). Shortly thereafter, the clerk issued three orders taxing Plaintiffs \$231,549.08 in favor of the WCG Defendants, \$180,411.70 in favor of the WMB Defendants, and \$229,371.72 in favor of Ernst & Young. Ultimately, the clerk reduced Defendants' requested costs awards by \$31,220.00 (WCG Defendants), \$3,287.45 (WMB Defendants), and \$97,339.05 (Ernst & Young) respectively. Defen-

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dants voluntarily withdrew their request for transcript costs related to one deposition witness and the WMB Defendants agreed to drop their request for approximately \$2,900.00 in copying costs.

\*2 Plaintiffs moved the district court to review the clerk's awards under [Fed.R.Civ.P. 54\(d\)\(1\)](#), raising substantially the same arguments they now press on appeal. *See id.* (“Should the party seeking costs be dissatisfied with the clerk's actions, or should the party against whom they are to be taxed object, on motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. Such review by the court is a de novo determination.”). The district court referred this motion to a United States Magistrate Judge, who held another hearing on the matter. Subsequently, the magistrate judge issued a twenty-two page report and recommendation, substantially affirming the clerk's awards of costs. The magistrate judge did exclude, however, costs related to four depositions for which the clerk awarded costs to the WMB Defendants and Ernst & Young. This reduced Defendants' costs awards by \$6,135.45 (the WMB Defendants) and \$5,650.45 (Ernst & Young) respectively. In total, the magistrate judge recommended the district court tax Plaintiffs \$231,549.08 in favor of the WCG Defendants, \$174,276.25 in favor of the WMB Defendants, and \$223,721.27 in favor of Ernst & Young.

Plaintiffs also objected to the magistrate judge's report and recommendation on essentially the same grounds they now raise on appeal. In a twenty-two page order, the district court adopted the magistrate judge's recommended awards of costs, with several notable exceptions. The district court independently reviewed the record and excluded transcription costs related to seven deposition witnesses because it was not satisfied that these depositions were “necessarily obtained” for use in the case. Further, the district court reduced the WCG Defendants' award for copy costs by over \$4,000.00. All together, the district court reduced the costs awards recommended by the magistrate judge by \$8,795.30 (the WCG Defendants), \$5,785.30 (the WMB Defendants), and \$3,001.80 (Ernst & Young) respectively. Accordingly, the district court taxed Plaintiffs \$222,753.78 in favor of the WCG Defendants, \$168,490.95 in favor of the WMB Defendants, and \$220,719.47 in favor of Ernst & Young.

## II.

[1] [Rule 54\(d\)\(1\)](#) provides that costs, other than attorney's fees, should generally “be allowed to the prevailing party.” We have recognized that the district court's discretion in taxing costs is limited in two ways. *See Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 458-59 (10th Cir.1995) (en banc). First, “[Rule 54](#) creates a presumption that the district court will award costs to the prevailing party.” *Id.* at 459. Second, the district court “must provide a valid reason” for denying such costs. *Id.*; *see also Klein v. Grynberg*, 44 F.3d 1497, 1507 (10th Cir.1995) (stating that denying costs to a prevailing party is a “severe penalty” and explaining that “there must be some apparent reason to penalize the prevailing party if costs are to be denied”).

\*3 Items proposed by prevailing parties “as costs should always be given careful scrutiny.” *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir.1988), *overruled on other grounds as recognized by Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1231 (10th Cir.1996). The costs statute allows a judge or clerk of any court of the United States to tax costs for transcripts and copies “necessarily obtained for use in the case.” [28 U.S.C. § 1920\(2\) & \(4\)](#). Both parties agree that this standard governs the costs at issue in this appeal.

[2] The “necessarily obtained for use in the case” standard does not allow a prevailing party to recover costs for materials that merely “added to the convenience of counsel” or the district court. *Touche Ross*, 854 F.2d at 1245. To be recoverable, a prevailing party's transcription and copy costs must be “reasonably necessary to the litigation of the case.” *Mitchell v. City of Moore*, 218 F.3d 1190, 1204 (10th Cir.2000). Materials produced “solely for discovery” do not meet this threshold. *Furr*, 824 F.2d at 1550. At the same time, we have acknowledged that materials may be taxable even if they are not “strictly essential” to the district court's “resolution of the case.” *Id.* The “realities of litigation occasionally dispense with the need of much of the discovery already taken by the parties when, for instance, a dispositive motion is granted by the trial court.” *Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1340 (10th Cir.1998). Our cases establish that if deposition transcripts or copies were “offered into evidence,” were “not frivolous,” and were “within the bounds of vigorous advo-

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cacy,” costs may be taxed. *Id.* (citing *Furr*, 824 F.2d at 1550). This standard recognizes that “caution and proper advocacy may make it incumbent on counsel to prepare for all contingencies which may arise during the course of litigation,” including the “possibility of trial.” *Id.*

Thus, we do not “employ the benefit of hindsight” in determining whether materials for which a prevailing party requests costs are reasonably necessary to the litigation of the case. *Id.* We base this determination, instead, solely “on the particular facts and circumstances at the time the expense was incurred.” *Id.*; see also *Allison v. Bank One-Denver*, 289 F.3d 1223, 1249 (10th Cir.2002) (recognizing that as long as the expense “appeared to be reasonably necessary at the time it was” incurred, “the taxing of such costs should be approved”). The standard is one of reasonableness. See *Mitchell*, 218 F.3d at 1204. If “materials or services are reasonably necessary for use in the case,” even if they are ultimately not used to dispose of the matter, the district court “can find necessity and award the recovery of costs.” *Callicrate*, 139 F.3d at 1339. Thus, we will not “penalize a party who happens to prevail on a dispositive motion by not awarding costs associated with that portion of discovery which had no bearing on the dispositive motion, but which appeared otherwise necessary at the time it was taken for proper preparation of the case.” *Id.* at 1340.

\*4 [3] A prevailing party bears the burden of establishing the amount of costs to which it is entitled. See *Allison*, 289 F.3d at 1248. Our precedents establish that the amount a prevailing party requests “must be reasonable.” *Callicrate*, 139 F.3d at 1339. Once a prevailing party establishes its right to recover allowable costs, however, the burden shifts to the “non-prevailing party to overcome” the presumption that these costs will be taxed. *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir.2004).

### III.

[4] The district court possesses “broad discretion” in awarding costs. *Touche Ross*, 854 F.2d at 1247; see also *Callicrate*, 139 F.3d at 1339 (“The taxing of costs rests in the sound judicial discretion of the district court.”). Accordingly, we review costs awards only for an abuse of that discretion. See *Touche Ross*, 854 F.2d at 1245. A district court abuses its discretion

where it (1) commits legal error, (2) relies on clearly erroneous factual findings, or (3) where no rational basis exists in the evidence to support its ruling. See *Elephant Butte Irrigation Dist. v. U.S. Dep’t of the Interior*, 538 F.3d 1299, 1301 (10th Cir.2008).

#### A.

[5] We first address Plaintiffs’ assertion that Defendants failed to provide sufficient evidence to show that the taxed materials were “necessarily obtained for use in the case.” 28 U.S.C. § 1920(2) & (4). Whether materials are necessarily obtained for use in the case is “a question of fact” that we review “only for clear error.” *Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1181 (10th Cir.2005). Clear error is established if, “after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made.” *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1263 (10th Cir.2008). Plaintiffs have not met this threshold here.

[6] Plaintiffs espouse an exceedingly narrow view of the deposition expenses authorized under 28 U.S.C. § 1920. Indeed, they argue that a district court may only award costs for depositions the district court actually used in deciding summary judgment, or for depositions that were, at the very least, designated for trial. But all § 1920 requires is that the generation of taxable materials be “reasonably necessary for use in” the case “at the time the expenses were incurred.” *Callicrate*, 139 F.3d at 1340. As we explained in *Merrick v. Northern Natural Gas Company*, 911 F.2d 426, 434 (10th Cir.1990), any “rule that permits costs only for depositions received in evidence or used by the court in ruling upon a motion for summary judgment is narrower than [S]ection 1920.” Plaintiffs’ understanding of the costs statute is thus surely flawed.<sup>FNI</sup>

[7][8] The same is true of Plaintiffs’ view of the burden placed on prevailing parties to justify the taxation of copy costs. We have specifically noted that the burden of justifying copy costs is not “a high one.” *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1259 (10th Cir.1998). A prevailing party need not “justify each copy” it makes. *Id.* All a prevailing party must do to recoup copy costs is to demonstrate to the district court that, under the particular circumstances, the copies were “reasonably necessary for use in the case.” *Touche Ross*, 854 F.2d at

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1246. Contrary to Plaintiffs' assertions, a description of each copy, replete with an explication of its use, is not necessarily required to satisfy this burden. Nor do we think the fact that documents are available in a central depository, as Plaintiffs allege here, inexorably leads to the conclusion that copies made for an attorney's use were not "reasonably necessary to the litigation of the case." *Ramos v. Lamm*, 713 F.2d 546, 560 (10th Cir.1983), *abrogated on other grounds by Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987).

\*5 On appeal, we remain aware that we cannot hope to match the district court's "first-hand sensitivity to the proceedings" in this case. *Sorbo*, 432 F.3d at 1181. The district court ultimately approved the awards of costs related to some seventy-four depositions. Based on its familiarity with the "nature and course" of the litigation, it concluded that these depositions were "not taken merely for investigative purposes or for the convenience of counsel." The district court found, instead, that these depositions—based on the information available to the parties at the time—were necessarily obtained for use in this case. Considering that the parties presented a combined total of sixty-nine fact witnesses, the district court's conclusion hardly seems suspect.

Similarly, the district court examined Defendants' requested copy costs and opined, in light of the fact that over fifteen million pages were produced, that Defendants selectively copied the documents at issue. The number of copies made by each defendant group necessarily varied, in the district court's view, because Defendants adopted differing approaches to fashioning a defense. After excluding some of the WCG Defendants' requested copy costs, the district court ruled that Defendants had shown the remaining copies were necessarily obtained for use in the case. Our examination of the record, gives us no reason to doubt that conclusion. We, therefore, reject Plaintiffs' first claim of error.

B.

9 We now turn to Plaintiffs' contention that the district court failed to properly apportion and tax the costs attributable to them. In short, Plaintiffs allege the district court abused its discretion in taxing them for costs that are equally attributable to the WMB

Subclass of Plaintiffs. Due to the factual overlap between the WCG and WMB Subclasses, the district court determined that Defendants would have incurred the costs at issue even in the absence of the WMB Subclass action. The district court consequently regarded the awarded costs as directly related to the WCG Subclass action, in which Defendants undisputably prevailed. A "rational basis in the evidence" clearly supports this conclusion. *Elephant Butte Irrigation Dist.*, 538 F.3d at 1301. As such, we cannot say that the district court abused its discretion in refusing to reduce Defendants' costs awards on this ground.

C.

10 Finally, we address Plaintiffs' argument that the district court's costs awards are unreasonably high. Aggregating the costs awarded to the three defendant groups, Plaintiffs contend that the district court rendered the highest costs award in the history of American jurisprudence. We disagree with Plaintiffs' characterization of the facts of this case.

The costs awarded in this case are undoubtedly higher than the norm. But given the massiveness and complexity of the litigation at issue, we do not regard the magnitude of Defendants' costs awards as particularly surprising. Plaintiffs sought \$2.9 billion in damages from three defendant groups, all of whom are prevailing parties. Thus, we are now faced with three separate costs awards.

\*6 Defendants' costs were, quite plainly, driven upward by the cold, hard facts of this case. Plaintiffs' litigation choices; including the number of defendants, the high amount of damages sought, the broad allegations asserted, the complexity of the claims at issue, and Plaintiffs' aggressive course of discovery; necessarily resulted in heightened defense costs. See *Klein*, 44 F.3d at 1507 ("[Plaintiffs'] own actions brought about the litigation."). We agree with the district court that consideration of such factors does not constitute disapproval or condemnation of Plaintiffs' conduct; rather, these considerations go directly towards the reasonable necessity of Defendants' costs. See *Mitchell*, 218 F.3d at 1204 (noting that our role is to measure "whether an incurred cost was reasonably necessary under § 1920"). In this case, the stakes were indisputably high and "it was incumbent on [D]efendants to fully prepare their case on the

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merits.” [Callicrate](#), 139 F.3d at 1341.

Of course, we have recognized that certain circumstances justify a district court in exercising its discretion to deny otherwise recoverable costs, “including when the prevailing party was only partially successful, when damages were only nominal, when costs were unreasonably high or unnecessary, when recovery was insignificant, or when the issues were close or difficult.” [Zeran v. Diamond Broad.](#), 203 F.3d 714, 722 (10th Cir.2000). But the district court concluded that none of these grounds apply here. We cannot say that, in so ruling, the district court abused its discretion.

[Rule 54](#)'s presumption that a prevailing party will recoup certain costs fully applies to class actions. See [White v. Sundstrand Corp.](#), 256 F.3d 580, 585-86 (7th Cir.2001). Even if litigation is complex or lengthy, instituted in good faith, and resolved early, we have rejected attempts to deny prevailing parties their otherwise taxable costs. See [AeroTech, Inc. v. Estes](#), 110 F.3d 1523, 1527 (10th Cir.1997). Plaintiffs “caused this litigation to be brought” and Defendants’ “costs to be incurred.” [White](#), 256 F.3d at 586. Thus, absent Plaintiffs carrying their burden of showing that Defendants’ otherwise recoverable costs should not be taxed, they must “make the prevailing [parties] whole.” *Id.* Plaintiffs have simply failed to meet this burden in that they have failed to establish a valid basis for penalizing Defendants with the denial or reduction of their otherwise recompensable costs.

We, therefore, AFFIRM Defendants’ costs awards for substantially the reasons stated by the district court.

[FN\\*](#) After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See [Fed. R.App. P. 34\(a\)\(2\)](#); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[FN1.](#) We reject Plaintiffs’ assertion that the district court’s costs awards were impermissible because they contravened the local Clerk’s Guidelines for Taxation of Costs. As the district court correctly noted, the clerk’s guidelines do not purport to be an authoritative exposition of the costs allowable under

applicable law and they are not binding on the district court. The district court, therefore, correctly analyzed Defendants’ requested costs under [§ 1920](#), Rule 54, and our controlling precedents.

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