

1 On March 28, 2012, the Court granted Federated's motion for summary judgment and the
2 Clerk entered judgment against Warkentin. Warkentin has appealed that judgment to the Ninth
3 Circuit Court of Appeals.

4 On April 10, 2012, Federated filed a bill of costs requesting a total of \$52,074.20.
5 Warkentin filed objections and supplemental objections, contending *inter alia*, that costs should
6 not be awarded because he is financially unable to pay and he has limited financial resources.
7 Docs. 76 and 93. Given Warkentin's contention, the Court ordered Warkentin to submit
8 additional information regarding his financial resources, including a declaration signed under
9 penalty of perjury.
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11 On August 13, 2012, Warkentin filed a declaration and exhibits regarding his financial
12 resources. Federated filed a reply to the declaration on August 21, 2012.
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14 **DISCUSSION**

15 A. Legal Standard

16 [Federal Rule of Civil Procedure 54\(d\)\(1\)](#) states:
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18 Unless a federal statute, these rules, or a court order provides otherwise, costs—
19 other than attorney's fees—should be allowed to the prevailing party.

20 The types of costs awarded under this rule are limited to those set forth in [28 U.S.C. § 1920](#),
21 including fees of the clerk and marshal, fees for printed or electronically recorded transcripts,
22 and fees and disbursements for printing, copying and witnesses. [Crawford Fitting Co. v. J.T.
23 Gibbons, Inc.](#), 482 U.S. 437, 441-42 (1987); [28 U.S.C. § 1920](#).

24 [Rule 54\(d\)\(1\)](#) creates a presumption in favor of awarding costs to a prevailing party, but
25 vests the district court with discretion to refuse to award costs. See [Ass'n of Mexican-American
26 Educators v. State of California](#), 231 F.3d 572, 591 (9th Cir. 2000). However, this "discretion is
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1 not unlimited. A district court must ‘specify reasons’ for its refusal to award costs.” *Id.* The
2 specified reasons must “explain why a case is not ‘ordinary’ and why, in the circumstances, it
3 would be inappropriate or inequitable to award costs.” *Id.* at 593.
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5 Although not exhaustive, the Ninth Circuit has approved the following reasons for
6 refusing to award costs to a prevailing party: (1) the losing party’s limited financial resources;
7 (2) misconduct on the part of the prevailing party; (3) whether the issues in the case were close
8 and difficult; (4) whether the prevailing party’s recovery was nominal or partial; (5) whether the
9 losing party litigated in good faith; and (6) whether the case presented issues of national
10 importance. [Quan v. Computer Sciences Corp., 623 F.3d 870, 888-89 \(9th Cir. 2010\)](#); [Ass’n of](#)
11 [Mexican-American Educators, 231 F.3d](#) at 593.
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13 In this case, Warkentin argues that the Court should deny all costs because (1) he is
14 financially unable to pay and (2) Federated delayed in bringing its action for rescission resulting
15 in excessive and unreasonable costs. Warkentin also argues that Federated should not be
16 awarded costs for its depositions, copying of materials and “other” costs.
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18 B. Analysis

19 1. Warkentin’s Limited Financial Resources

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21 In deciding whether to award costs, a district court should consider the plaintiff’s
22 financial resources. [Ass’n of Mexican-American Educators, 231 F.3d](#) at 592. It is not necessary
23 for the court to find that the plaintiff is indigent; rather, the proper inquiry is whether an award of
24 costs might make him so. [Stanley v. University of Southern California, 178 F.3d 1069, 1079-80](#)
25 [\(9th Cir. 1999\)](#).
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1 Here, Warkentin claims that he is financially unable to pay the costs because he is unable
2 to work as a result of his disability and his wife is the sole wage earner. In his supplemental
3 objections, Warkentin states that a cost award will represent “a heavy financial burden” on him,
4 and “a mere ‘drop in the bucket’ for Federated.” Supp. Obj. p. 2.

6 According to his declaration and supporting exhibits, Warkentin reports that (1) he has
7 not received any income from his business, Certified Automotive of Atwater, Inc. since October
8 2008; (2) he has not received state disability since early 2009; (3) his wife began working for the
9 California Department of Fish and Game on April 1, 2010, earning \$1,638.45 per month; (4) his
10 daughter and son-in-law live in his household and occasionally contribute to household food; (5)
11 his adjusted gross income in 2011 totaled \$18,871; (6) he is more than \$500 delinquent on his
12 taxes for water access with Merced Irrigation District; (7) he is more than \$8,000 dollars behind
13 in taxes on a parcel of land in Mariposa County; (8) his house is “upside down” and is valued at
14 approximately \$267,000 and has roughly \$340,000 owed against it; (9) his monthly mortgage
15 payment is \$1,023, 28 and was scheduled to increase to \$1,110.15 on September 1, 2012; (10) he
16 owns a few small trailers and non-operable vehicles, along with a 1996 Geo Metro, 2004 Honda
17 Goldwing, and 1997 Dodge Caravan; and (11) his business, Certified Automotive of Atwater,
18 Inc. is “currently upside down,” and he values its assets at approximately \$45,000, and its
19 liability at approximately \$105,000. Declaration of Keith Warkentin (“Warkentin Dec.”) ¶¶ 5-18
20 and Exhibits.

24 Federated disputes that Warkentin’s financial resources are so limited and provides some
25 support with its identification of unsupported assertions in Warkentin’s declaration and the
26 absence of certain financial information. Notably absent from Warkentin’s declaration and
27 exhibits are documents to support his claim regarding business income from Certified
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1 Automotive of Atwater, Inc. Warkentin declares that he has not received any income from the
2 business, the business is upside down and he values its assets at \$45,000 and its liabilities as
3 \$105,000. Warkentin has not included any corporate tax returns, balance sheets or payroll
4 records and has not included information regarding whether he owns or leases the land, building
5 or equipment used by the business. Additionally, Warkentin omits any documents detailing the
6 land he owns in Mariposa County or an appraisal of that land. He also does not provide evidence
7 regarding his personal residence, such as the balance owed on his mortgage, the purchase price
8 or even a valid appraisal. Further, Warkentin omits any detailed information regarding his
9 personal property, such as a list of assets and their respective values.
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12 Warkentin has not demonstrated that he is incapable of paying Federated's limited
13 amount of costs in the future. Warkentin's statements and documents regarding his limited
14 financial resources are not sufficient to overcome the presumption under [Rule 54\(d\)\(1\)](#).
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16 2. Federated's Delay

17 Warkentin complains that Federated did not promptly bring its action to rescind the
18 policy "upon the first discovery of the facts that led to the rescission of [the] policy." Obj. p. 2.
19 Warkentin believes that if Federated had done so, then Warkentin would not have incurred the
20 excessive and unreasonable costs of litigation. This argument suggests misconduct on the part of
21 Federated in not seeking rescission at the outset of this case. However, Federated has
22 represented that it discovered the basis for rescission during discovery in this case. There has
23 been no contrary finding by this Court to suggest unreasonable delay by Federated.
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1 3. Specific Objections

2 a. Depositions

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4 Federated seeks \$6,792.95 for deposition transcripts and videography, along with
5 \$2,093.29 in witness fees. Doc. 64.

6 Warkentin specifically objects to the recovery of costs for the following deposition
7 transcripts: (1) Keith Warkentin; (2) Jim Anderson, M.D.; (3) Joerg Schuller, M.D.; (4) Jesus
8 Medina; (5) Carl Smith; (6) Raymond Black; and (7) Jason Mosiman. Warkentin also objects to
9 the recovery of costs for the videographer for Keith Warkentin's deposition and the witness fees
10 for Dr. Tru Chang, Dr. Joerg Schuller, Cindy Bueno, Carl Smith, Ray Black, Jesus Medina and
11 Jason Mosiman.
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13 In his supplemental objections, Warkentin correctly notes that Federated has not filed any
14 receipts or other documentation evidencing the \$6,792.95 in costs for the videographer and the
15 deposition transcripts. Accordingly, the Court sustains Warkentin's objection and disallows the
16 \$6,792.95 in costs for transcripts and videography.
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18 However, the Court overrules Warkentin's objections regarding the \$2,093.29 in witness
19 fees incurred in the course of this litigation. Federated has submitted evidence of the relevant
20 fees and costs.
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22 b. Document Copying

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24 Federated seeks recovery of costs for document copying in the amount of \$716.30.
25 Warkentin objects that this copy service was unnecessary because Federated had the right to seek
26 this information in the course of its mandatory duty to investigate claims under the Insurance
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1 Code and state law. Warkentin also argues that this information was not used or necessary for
2 Federated's rescission action.

3 Photocopying is a taxable cost pursuant to [§ 1920\(4\)](#). *See EEOC v. W & O, Inc.*, 213 F.3d
4 [600, 622 \(11th Cir. 2000\)](#) ([§ 1920\(4\)](#) permits taxation of “[f]ees for exemplification and copies
5 of papers necessarily obtained for use in the case”); *Allison v. Bank One-Denver*, 289 F.3d 1223,
6 [1249 \(10th Cir.2002\)](#) (copying and exemplification costs are allowed only when necessary to a
7 party's case). “[I] n evaluating copying costs, the court should consider whether the prevailing
8 party could have reasonably believed that it was necessary to copy the papers at issue.” *EEOC*,
9 [213 F.3d](#) at 623.
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12 Based on the information presented, the Court concludes that Federated is entitled to
13 recover its copying costs. There is no indication that the copies were not necessary in this case.

14 c. Legal Consultants

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16 Federated requests costs for Swiggum Med-Legal Consultants in the amount of \$1,155.00
17 for record review and chronology. These costs fall outside of the categories enumerated in [28](#)
18 [U.S.C. § 1920](#) and are therefore not allowable.
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20 d. Surveillance

21 Federated seeks to recover costs for surveillance of Warkentin by Claims Bureau USA in
22 the amount of \$10,947.13. As with the legal consultants, this is not one of the costs permitted
23 under [28 U.S.C. § 1920](#). This amount is disallowed.
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1 e. Expert Fees

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3 Federated seeks recovery of expert fees for (1) attorney Robert DiLiso in the amount of
4 \$10,192.00; and (2) Dr. Jim Anderson in the amount of \$18,475.00. Expert fees are generally
5 not recoverable costs and are therefore not allowed. [28 U.S.C. § 1920](#).

6 f. Deposition Fees

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8 Federated seeks to recover for attorney travel expenses, including airfare, hotel and rental
9 care expenses, which total \$1,609.83. The travel expenses of attorneys are not recoverable under
10 [§ 1920](#) and are not allowed.

11 g. Transcript Costs – Hearing

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13 Federated requests \$92.70 for the transcript of the January 6, 2012 hearing before this
14 court. [Section 1920\(2\)](#) provides for the taxation of the “[f]ees for printed or electronically
15 recorded transcripts necessarily obtained for use in the case.” [28 U.S.C. § 1920\(2\)](#). As
16 Warkentin has not objected to the transcript costs, this amount will be allowed.

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18 **CONCLUSION AND ORDER**

19 For the reasons detailed above, Warkentin’s objections to Federated’s bill of costs are
20 SUSTAINED IN PART and OVERRULED IN PART. Federated’s bill of costs is GRANTED
21 in the amount of \$ 2,902.29.

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24 IT IS SO ORDERED.

25 Dated: September 6, 2012

26 /s/ Dennis L. Beck
27 UNITED STATES MAGISTRATE JUDGE