

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

DEVRA BOMMARITO, an individual,
Plaintiff,
v.
THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY and MARK
MAJEWSKI,
Defendant.

No. 2:15-cv-1187 WBS DB
ORDER RE: BILL OF COSTS

----oo0oo----

After judgment in favor of defendant was entered (Docket No. 59) following a grant of partial summary judgment, defendant Northwestern Mutual Life Insurance Company ("Northwestern Mutual") submitted a Bill of Costs totaling \$13,541.14 for the costs of subpoenas, transcripts, witness fees, copies, and related expenses. (Docket No. 60). Plaintiffs have filed objections to the Bill of Costs on several grounds, arguing that the court should not award any costs, or should reduce or

1 disallow costs for many items listed.¹ (Docket No. 61).

2 Rule 54(d)(1) of the Federal Rules of Civil Procedure
3 and Local Civil Rule 54.1 govern the taxation of costs, which are
4 generally subject to limits set under 28 U.S.C. § 1920. See 28
5 U.S.C. § 1920 (enumerating taxable costs); Fed. R. Civ. P.
6 54(d)(1) ("Unless a federal statute, these rules, or a court
7 order provides otherwise, costs--other than attorney's fees--
8 should be allowed to the prevailing party."); Crawford Fitting
9 Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 440-45 (1987) (limiting
10 taxable costs to those enumerated in § 1920).

11 The court exercises its discretion in determining
12 whether to allow certain costs. See Amarel v. Connell, 102 F.3d
13 1494, 1523 (9th Cir. 1996) (district court has discretion to
14 determine what constitutes a taxable cost within the meaning of §
15 1920). The losing party has the burden of overcoming the
16 presumption in favor of awarding costs to the prevailing party.
17 See Russian River Watershed Prot. Comm. v. City of Santa Rosa,
18 142 F.3d 1136, 1144 (9th Cir. 1998) (noting that the presumption
19 "may only be overcome by pointing to some impropriety on the part
20 of the prevailing party"); Amarel, 102 F.3d at 1523.

21 I. Prevailing Party Status

22 Plaintiffs' first objection is that the court cannot
23 award costs to defendant because it is not a prevailing party.
24 Plaintiff argues that the court's order did not materially alter
25 the parties' legal relationship because it only decided that

26 ¹ Plaintiff states in her objections that she will appeal
27 this court's previous order. Regardless, the court elects to use
28 its discretion and rule on the request for costs. See 1993
Advisory Committee Notes to Fed. R. Civ. P. 54(d).

1 ERISA applied instead of state law. (Pl.'s Objs. to Def.'s Bill
2 of Costs at 1-2.)

3 This argument ignores the judgment itself. (Docket No.
4 59.) Pursuant to the stipulation signed by both parties, the
5 court entered judgment in favor of defendant on both of
6 plaintiff's claims.² Therefore, defendant is clearly a
7 prevailing party. See Labotest, Inc. v. Bonta, 297 F.3d 892, 895
8 (9th Cir. 2002) (finding that a court's incorporation of a
9 stipulation is enough to qualify a party as a prevailing party).

10 II. Court's Discretion to Deny All Costs

11 Plaintiff also argues that the court should exercise
12 its discretion to deny all costs because of (1) the financial
13 disparity between the parties, (2) plaintiff's limited financial
14 means, (3) defendant's misconduct, (4) the potential chilling
15 effect on future litigation if costs are granted, (5) the
16 plaintiff's good faith in litigating, and (6) the importance of
17 the case.

18 A district court may consider a variety of reasons,
19 including those mentioned by the plaintiff, in determining
20 whether to exercise its discretion to deny costs to the
21 prevailing party. See Champion Produce, Inc. v. Ruby Robinson
22 Co., 342 F.3d 1016, 1022 (9th Cir. 2003).

23 A. Financial Disparity Between the Parties

24 Plaintiff argues that this court should deny all costs
25 because she is an individual and defendant is a \$265 billion
26

27 ² The judgment explicitly said that the court would
28 "determine the amount, if any, of costs of suit to which
[defendant] is entitled." (Judgment at 2.)

1 company. Such a disparity by itself, however, is insufficient to
2 deny costs, given that even plaintiffs who proceed in forma
3 pauperis are not per se protected from taxation of costs. See
4 Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994). A
5 financial disparity will almost always exist between individual
6 plaintiffs litigating against large corporations. The
7 presumption of Rule 54(d)(1) may sometimes be overcome by a
8 financial disparity, but the bulk of these cases deal with civil
9 rights issues or the application of important federal statutes.
10 See Van Horn v. Dhillon, No. 08-CV-01622 LJO DLB, 2011 WL 66244,
11 at *4 (E.D. Cal. Jan. 10, 2011). Therefore, the mere fact of a
12 financial disparity is not sufficiently persuasive to support a
13 denial of costs.

14 B. Plaintiff's Limited Financial Resources

15 Next, in her declaration, plaintiff claims that (1) she
16 has earned no salary from her physical therapy business since
17 2009; (2) she was forced to close her office permanently in 2014
18 after losing key staff; (3) her only income is \$2,495 from Social
19 Security Disability Insurance; (4) she has incurred hundreds of
20 thousands of dollars in criminal defense fees; (5) she has a lien
21 against her home; (6) the San Joaquin County District Attorney's
22 Office has frozen her bank accounts containing less than \$20,000;
23 (7) she owes \$12,335.03 in tax attorney fees; (8) she owes
24 \$30,144.04 to The Grey Law Firm for costs related to this action;
25 (9) she owes a monthly mortgage of \$2,055.86; and (10) she has
26 had to liquidate much of her IRA which is currently worth
27 approximately \$236,800. (Decl. of Devra Bommarito ("Bommarito
28 Decl.") ¶¶ 3-13).

1 Even if plaintiff's declaration is completely and fully
2 accurate,³ she has not put forth enough evidence to establish
3 indigency. Plaintiff claims that her IRA is "currently worth
4 approximately \$236,800." (Bommarito Decl. ¶ 13). Defendant's
5 costs are only a fraction of that amount. Thus, plaintiff has
6 not demonstrated that payment of defendant's costs would make her
7 indigent. See Rivera v. NIBCO, 701 F. Supp. 2d 1135, 1143 (E.D.
8 Cal. 2010) (Wanger, J.) (finding that the proper inquiry is
9 whether an award of costs would render the party indigent).

10 C. Defendant's Misconduct

11 Plaintiff cursorily asserts that the primary drain on
12 her assets have been the costs related to her criminal defense,
13 which she claims resulted from defendant's supposed misconduct.
14 More specifically, she claims that defendant "pivot[ed] from an
15 unbiased evaluator of her insurance claim to a retaliatory
16 advocate in search of information to justify terminating her
17 benefits, paint her as a liar and cheat, and assist in a criminal

18 ³ Plaintiff has not provided any documentation that supports
19 her current claims about her assets and liabilities. The only
20 evidence she puts forth are her statements in her declaration.
21 She has not included any corporate tax returns for her business,
22 evidence regarding her personal residence, bills related to her
23 legal fees, or any financial documents about her IRA. Thus, her
24 alleged limited financial means are likely insufficient to
25 disallow costs in this case. See, e.g., Fletes v. City of San
26 Diego, No. 13-cv-2279-JAH(JMA), 2016 WL 6804434, at *2-3 (S.D.
27 Cal. July 1, 2016) (requiring plaintiff to prove indigence
28 through documentation because "mere assertions are inadequate to
demonstrate indigence that would warrant relief from Plaintiff's
obligation to pay costs"); Ritchie v. Haw. Dep't of Pub. Safety,
No. 14-46 LEK-KJM, 2017 WL 4172500, at *3-6 (D. Haw. Aug. 23,
2017) (plaintiff's representations regarding her employment
status, current salary, and state of finances were insufficient,
without detailed information regarding her assets, to establish
indigency for purposes of bill of costs).

1 prosecution of her for insurance fraud.” (Pl.’s Objs. to Def.’s
2 Bill of Costs at 4.)

3 This court already decided that defendant did not act
4 in bad faith. (Docket No. 57). In ruling on defendant’s motion
5 for partial summary judgment, the court concluded that defendant
6 had a reasonable basis to deny her insurance claim given
7 plaintiff’s misrepresentations and evidence that plaintiff was
8 working as a physical therapist. Even though the court did not
9 express an opinion on the merits of plaintiff’s breach of
10 contract claim, the court did conclude that defendant’s actions
11 were reasonable given the circumstances. Plaintiff has not
12 provided any basis for the court to conclude that defendant’s
13 involvement with plaintiff’s criminal prosecution was
14 inappropriate.

15 D. Chilling Effect on Future Litigation

16 Plaintiff claims that requiring her to pay defendant’s
17 costs would chill litigation by individuals against powerful
18 corporations because the costs associated with litigation would
19 be too great a risk.

20 Plaintiff provides no justification for why costs
21 upwards of \$13,000 would chill future insurance litigation. The
22 Ninth Circuit has only discussed the chilling effect of awarding
23 costs against plaintiffs in the context of civil rights
24 litigation, though some district courts have discussed this
25 factor in the context of other types of “public interest”
26 litigation. See, e.g., Stanley v. Univ. of S. Cal., 178 F.3d
27 1069, 1080 (9th Cir. 1999) (“[T]he imposition of such high costs
28 on losing civil rights plaintiffs of modest means may chill civil

1 rights litigation"); Ass'n of Mex. Am. Educators, 231
2 F.3d at 593 (discussing Stanley); Makaneole v. SolarWorld Indus.
3 Am., Inc., 3:14-CV-1528-PK, 2017 WL 2345706, *3 (D. Or. May 10,
4 2017) (recommending that \$2,375.40 in costs be denied because
5 awarding costs would have a significant chilling effect on future
6 class action wage-claim litigation where the potential individual
7 recovery is small). The court assumes, but does not decide, that
8 courts may consider whether an award of costs will chill
9 subsequent insurance contract actions. However, the facts of
10 this particular case counsel against finding any chilling effect.
11 Just as plaintiffs with potentially meritorious claims should not
12 be discouraged from bringing the, plaintiffs with non-meritorious
13 claims should not unnecessarily be encouraged to bring them.

14 E. Plaintiff's Good Faith and the Importance of the Issue

15 Finally, plaintiff argues that costs should be denied
16 because (1) she pursued the matter in good faith and (2) it is
17 important to apply state law rather than ERISA to this matter.

18 Good faith by itself is insufficient to justify denying
19 costs. Parties are legally and professionally obligated to act
20 in good faith. See Fed. R. Civ. P 11; Model Rules of Prof'l
21 Conduct R. 3.1. Denials based on good faith alone would render
22 Rule 54(d) meaningless because any unsuccessful party who acted
23 in accordance with their obligations would be free from paying
24 any costs. See Popeil Bros., Inc. v. Schick Elec., Inc., 516
25 F.2d 772, 776 (7th Cir. 1975) ("If the awarding of costs could be
26 thwarted every time the unsuccessful party is a normal, average
27 party and not a knave, Rule 54(d) would have little substance
28 remaining.")

1 Separately, plaintiff has not sufficiently argued that
2 this case "present[s] a landmark issue of national importance."
3 See Quan v. Comput. Sciences Corp., 623 F.3d 870, 888-89 (9th
4 Cir. 2010) (citation omitted). Even though the issue of ERISA's
5 applicability may be important to plaintiff's specific claim,
6 plaintiff has not explained its significance in the context of
7 other cases.

8 As such, plaintiff has not met her burden of showing
9 that costs should not be awarded in this case, and the court
10 finds that "the reasons for denying costs are not sufficiently
11 persuasive to overcome the presumption in favor of an award."
12 See Save Our Valley v. Sound Transit, 335 F.3d 932, 945 (9th Cir.
13 2003) (district court must provide reasons for denying costs but
14 need not do so if it grants costs, as "[t]he presumption itself
15 provides all the reason a court needs for awarding costs").
16 Accordingly, the court will proceed to examine plaintiffs'
17 specific challenges to certain items in defendant's Bill of
18 Costs.

19 II. Defendant's Request for Reduction of Costs

20 A. Fees for Service of Summons and Subpoenas

21 Plaintiff challenges defendant's taxation of \$528.04 in
22 fees for service of subpoenas. Plaintiff claims that the
23 thirteen charges for service (1) do not describe the need for
24 subpoenas, (2) do not provide the hourly rate charged by the
25 process server, or (3) include charges that are not related to
26 subpoenas.

27 28 U.S.C. § 1921(1) provides for the collection of fees
28 for serving a subpoena. Alflex Corp. v. Underwriters Labs.,

1 Inc., 914 F.2d 175, 178 (9th Cir. 1990). Based on the itemized
2 description of the documents and parties, the plaintiff's
3 subpoena for records appears to be "reasonable and necessary in
4 light of the facts known at the time of service." See U.S. Fid.
5 & Guar. Co. v. Lee Invs., LLC, Civ. No. 99-5583 OWW SMS, 2010 WL
6 3037500, at *3 (E.D. Cal. Aug. 2, 2010) (citation omitted).

7 While plaintiff claims that the subpoena for records to the San
8 Joaquin County District Attorney is unrelated to this case, the
9 itemized invoice specifically lists that the documents were
10 acquired for the civil case and both parties agree that the
11 criminal prosecution of the plaintiff relates to this case.

12 Parties seeking to tax costs for subpoenas may only
13 recover the fees that may be charged by the United States
14 Marshals Service, which is \$65 per hour for each item served per
15 process server, plus travel costs and any other out-of-pocket
16 expenses. 28 U.S.C. § 1920(1); 28 C.F.R. § 0.114(a)(3); Oleksy
17 v. Gen. Elec. Co., No. 06-cv-1245, 2016 WL 7217725, at *3 (N.D.
18 Ill. Dec. 12, 2016). All of defendant's subpoenas, except for
19 the subpoena to the San Joaquin County District Attorney, satisfy
20 this requirement. That invoice, however, does not itemize hourly
21 rates or particular expenses. Because of the lack of detail as
22 to this cost, the court will award \$65 for this subpoena. See
23 Oleksy, 2016 WL 7217725, at *3 (where party seeks to recover
24 private service fees without providing sufficient information to
25 determine if the rate exceeded the Marshals' normal rate, "the
26 appropriate practice is to award the lesser of the amount that
27 the party actually paid and the minimum charge of the U.S.
28 Marshals") (citations and internal punctuation omitted).

1 Finally, defendant cannot recover costs for the service
2 of documents. Communication charges, including courier and mail
3 charges, cannot be taxed under Section 1920.⁴ Nat'l Union Fire
4 Ins. Co. of Pittsburgh v. Allied Prop. & Cas. Ins. Co., No. 2:12-
5 CV-01380-MCE-KJ, 2014 WL 3529980, at *1 (E.D. Cal. July 16,
6 2014). Accordingly, defendant's requests for these costs are
7 denied. The cost award will be reduced by \$306.04. Defendant is
8 thus entitled to recover \$135.00 in fees for service of summons
9 and subpoenas.

10 B. Transcripts and Related Costs

11 Plaintiff objects to awarding costs for the deposition
12 transcripts of Sharon Hyde, Adam Kawa, Lisa Duller, Donald
13 Seebach, and Mark Majewski. "Whether a transcript or deposition
14 is 'necessary' must be determined in light of the facts known at
15 the time the expense was incurred." Sunstone Behavioral Health,
16 Inc. v. Alameda Cty. Med. Ctr., 646 F. Supp. 2d 1206, 1219 (E.D.
17 Cal. 2009) (Shubb, J.) (citation omitted).

18 Each challenged deposition appears necessary given the
19 circumstances of the case. Sharon Hyde was the director of
20 disability benefits at Northwestern Mutual at the time the
21 decision was made to deny plaintiff's claim for disability
22 benefits. Adam Kawa investigated the claim that plaintiff was
23 working at the time she was collecting disability benefits. Lisa
24 Duller approved the denial of the claim for benefits made by the

25 ⁴ Relatedly, defendant cannot recover for any printing
26 costs related to the service of documents. Defendant has not
27 shown that the printed service of these documents was necessary.
28 See Robinson v. Kia Motors Am., Inc., No. 2:10-CV-03187-SOM, 2016
WL 4474505, at *4 (E.D. Cal. Aug. 25, 2016) (finding that
printing costs must be necessarily incurred).

1 plaintiff. Donald Seebach was familiar with documentation
2 relevant to plaintiff's claim. Mark Majewski was an employee of
3 Northwestern Mutual and he was listed as a defendant in the
4 original complaint.

5 The court finds that defendant may recover costs for
6 the original and one certified copy of those deposition
7 transcripts, as well as exhibit fees, read and sign fees,
8 shipping and handling fees, production and processing fees, and
9 fees for the court reporter's attendance, mileage, and parking,
10 which all appear necessary to obtain the transcripts. See
11 Daniel v. Ford Motor Co., No. 2:11-cv-2890 WBS EFB, 2018 WL
12 1960653, at *4 (E.D. Cal. Apr. 26, 2018) (citation omitted).
13 However, the court will not allow costs for rough drafts,
14 expedited fees, electronic litigation packages, or "LEF files,"
15 which appear to have been provided for the convenience of at the
16 attorneys without an explanation of their necessity.
17 Accordingly, the court will award for transcripts and related
18 expenses as follows:

19	Devra Bommarito	\$ 1,289.60
20	Sharon Hyde (Vol. 1)	\$ 1,164.40
21	Sharon Hyde (Vol. 2)	\$ 224.25
22	Mark Majewski	\$ 945.00
23	Adam Kawa	\$ 661.45
24	Lisa Duller	\$ 1,130.95
25	Donald Seebach	\$ 818.25
26	Total:	\$ 6,233.90

27 C. Witness Fees

28 Witness fees are recoverable under 28 U.S.C. §§

1 1920(3). Relying on 28 U.S.C § 1821, Eastern District Local Rule
2 292 includes “[p]er diem, mileage, and subsistence for witnesses”
3 within the list of items taxable as costs. Nothing within these
4 statutes or the local rules indicates that witness fees include
5 fees for subpoenaing documents from parties. Therefore,
6 defendant’s request for witness fees is denied and its total
7 recovery is reduced by \$105.00.

8 D. Copying Costs

9 28 U.S.C. §§ 1920(4) allows a prevailing party to
10 recover fees for exemplification and costs of making copies of
11 any materials where the copies are necessarily obtained for use
12 in the case. For many of the same reasons discussed above, the
13 court files and records defendants obtained appear to be
14 necessarily obtained. The criminal prosecution of the plaintiff
15 closely intersects with her civil claim; and defendant relied on
16 the patient and medical records in their motion for partial
17 summary judgment. As explained before, however, defendant cannot
18 recover for the service of documents. Nat’l Union Fire Ins. Co.
19 of Pittsburgh, 2014 WL, at *1. Accordingly, the court will award
20 for exemplification and the costs of making copies as follows:

21	San Joaquin Court File	\$	7.33
22	San Joaquin Deposition File	\$	1,220.10
23	Records of Jeff Jones	\$	33.00
24	Records of Jenny Sanders	\$	0.75
25	Records of Valley Medical	\$	17.00
26	Records of Charter Pharmacy	\$	0.50
27	Records of El Dorado	\$	1.50
28	Records of Rite Aid	\$	0.25

1 San Joaquin Court File \$ 18.72
2 Total: \$ 1,299.15

3 E. Total Costs

4 In total, costs of \$7,668.05 will be allowed for
5 defendant and are taxed against plaintiff as follows:

6 Subpoenas \$ 135.00
7 Deposition and Related Costs \$ 6,233.90
8 Copying Costs \$ 1,299.15
9 TOTAL AWARD \$ 7,668.05

10 IT IS SO ORDERED.

11 Dated: September 25, 2018



12 WILLIAM B. SHUBB
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28