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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY PRUITT,  
  
                                Plaintiff,  
  
                                v.  
  
GENENTECH, INC.,  
  
                                Defendant.

No. 2:17-cv-00822-JAM-AC

**ORDER GRANTING IN PART AND  
DENYING PLAINTIFF'S BILL OF  
COSTS, AND GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S BILL  
OF COSTS**

Timothy Pruitt filed a lawsuit in Solano County Superior Court after Genentech, Inc. fired him in July 2016. His ten-count complaint alleged violations of the California Fair Employment and Housing Act ("FEHA"), California Labor Code Section 1102.5, the California Family Rights Act ("CFRA"), and the Family and Medical Leave Act ("FMLA"). Compl., ECF No. 1-1. He also raised defamation and wrongful termination claims. Id. Genentech removed this case to federal court. Notice of Removal,

1 ECF No. 1.

2 The Court dismissed Pruitt's defamation claim. ECF No. 18.  
3 Furthermore, the Court granted Genentech summary judgment on  
4 Pruitt's FEHA discrimination claim, CFRA claim, and FMLA claim.  
5 Minutes for 1/8/2019 Hearing; see also, Transcript of 1/8/2019  
6 Proceedings at 28:20-29:6. The Court also granted Genentech  
7 summary judgment on Pruitt's FEHA and Section 1102.5 retaliation  
8 claims to the extent that those claims rested on the theory that  
9 Genentech retaliated against Pruitt for taking medical leave.  
10 Id. at 29:9-13. Pruitt's wrongful termination claim went to  
11 trial, as did his FEHA and Section 1102.5 retaliation claims  
12 based on the theory that Genentech retaliated against him for  
13 filing a race-based discrimination complaint. The jury returned  
14 a verdict in favor of Pruitt on his wrongful termination and  
15 Section 1102.5 retaliation claims, and in favor of Genentech on  
16 the FEHA retaliation claim. Jury Verdict, ECF No. 163.

17 As the prevailing party in this action, Plaintiff seeks to  
18 recover costs totaling \$17,072.16. Plf.'s Bill of Costs, ECF No.  
19 167. Genentech opposes Pruitt's motion and seeks to recover the  
20 costs incurred after Pruitt rejected its Rule 68 offer. Def.'s  
21 Bill of Costs, ECF No. 169; Def.'s Objections, ECF No. 170.  
22 Pruitt opposes Genentech's claimed costs. Plf.'s Objections, ECF  
23 No. 171. For the reasons discussed below, the Court GRANTS IN  
24 PART AND DENIES IN PART Pruitt's bill of costs, and GRANTS IN  
25 PART AND DENIES IN PART Genentech's bill of costs.<sup>1</sup>

26  
27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was  
scheduled for July 16, 2019.

1 I. OPINION

2 A. Legal Standard

3 In general, "costs—other than attorney's fees—should be  
4 allowed to the prevailing party." Fed. R. Civ. Proc. 54(d)(1).  
5 A party's bill of costs must conform to 28 U.S.C. § 1924. E.D.  
6 Cal. L.R. 292(b). It must "itemize the costs claimed and [] be  
7 supported by a memorandum of costs and an affidavit of counsel  
8 that costs claimed are allowable by law, are correctly stated,  
9 and were necessarily incurred." Id. "The party against whom  
10 costs are claimed may . . . file specific objections to claimed  
11 items with a statement of grounds for objections." E.D. Cal.  
12 L.R. 292(c). The objecting party bears the burden of presenting  
13 reasons that are "sufficiently persuasive to overcome the  
14 presumption in favor of an award." In re Online DVD-Rental  
15 Antitrust Litig., 779 F.3d 914, 932 (9th Cir. 2015).  
16 Ultimately, a district court must "exercise its discretion in  
17 determining whether to allow certain costs." Yeager v. Bowlin,  
18 No. 2:08-cv-102-WBS-JFM, 2010 WL 716389, at \*1 (E.D. Cal. Feb.  
19 26, 2010) (citing Amarel v. Connell, 102 F.3d 1494, 1523 (9th  
20 Cir. 1997)).

21 B. Analysis

22 1. Pruitt's Bill of Costs

23 Pruitt claims \$17,062.16 in costs. Plf.'s Bill of Costs at  
24 1. Genentech does not challenge Pruitt's \$435 filing fee, but  
25 objects to the remaining costs on three grounds: (1) Pruitt  
26 failed to establish his claimed transcript, demonstrative, and  
27 copying costs were necessarily incurred; (2) Rule 68(d) bars  
28 Pruitt from collecting costs incurred after March 18, 2019; and

1 (3) the costs Pruitt claims for video depositions are  
2 duplicative.

3 a. Costs Incurred following Rule 68 Offer

4 Pruitt incurred \$942.30 in costs following Genentech's  
5 March 18, 2019 offer of judgment. Although Pruitt contends  
6 Genentech cannot recover costs following its Rule 68 offer—an  
7 argument discussed below, infra at 6—Pruitt does not oppose  
8 Genentech's argument that Rule 68 bars Pruitt from recovering  
9 costs incurred after Genentech made the rejected March 18 offer.  
10 Correctly so. Rule 68 states, "[i]f the judgment [ ]the offeree  
11 finally obtains is not more favorable than the unaccepted offer,  
12 the offeree must pay the costs incurred after the offer was  
13 made." Fed. R. Civ. Proc. 68(d). On March 18, 2019, Genentech  
14 served Pruitt with an offer of judgment amounting to \$600,000,  
15 inclusive of costs, expenses, and attorneys' fees. See Decl. of  
16 Julie A. Totten ISO Genentech's Bill of Costs ¶ 2, Exh. A.  
17 Pruitt did not accept this offer. Rather, he proceeded to trial  
18 where the jury returned a verdict for him in the amount of  
19 \$233,126. Verdict Form, ECF No. 163. Because Pruitt obtained a  
20 judgment less favorable than the one Genentech offered, the  
21 Court DENIES the \$942.30 in costs he incurred from April 1-4,  
22 2019.

23 b. Section 1920(1) Costs

24 Pruitt is entitled to tax "fees of the clerk" under 28  
25 U.S.C. § 1920(1). Pruitt incurred \$435 when he filed his  
26 lawsuit against Genentech. The Court awards Pruitt this cost.

27 c. Section 1920(2), (4) Costs

28 Section 1920(2) allows a party to tax costs for "printed or

1 electronically recorded transcripts necessarily obtained for use  
2 in the case.” 28 U.S.C. § 1920(2). Section 1920(4) allows a  
3 party to tax costs for “exemplification and the costs of making  
4 copies of any materials where the copies are necessarily  
5 obtained for use in the case.” 28 U.S.C. § 1920(4). Pruitt  
6 claims \$16,637.16 in costs under these two sections.

7 The Court does not award Pruitt the \$1441.25 incurred for  
8 videotaping his two-day deposition. The Court agrees with  
9 Genentech’s objection that these costs are duplicative of the  
10 \$2571.40 he incurred for stenographic transcripts of that same  
11 deposition. See Def.’s Objection at 4 (citing Sullivan v.  
12 Costco Wholesale Corp., No. 1:17-cv-00959-EPG, 2019 WL 1168531,  
13 at \*2 (E.D. Cal. Mar. 13, 2019). Pruitt did not explain why  
14 duplication of these deposition costs was necessary and absent  
15 such an explanation he is not entitled to recover this cost.

16 Furthermore, Pruitt failed to provide a specific basis for  
17 the remaining \$14,253.61 claimed in transcript and copying costs  
18 were “necessarily obtained.”<sup>2</sup> See 28 U.S.C. § 1920(2), (4).  
19 Indeed, Pruitt’s counsel filed an affidavit and receipts in  
20 support of the bill of costs, ECF No. 168, but did not file a  
21 “memorandum of costs” at all. The Ninth Circuit adopts “[a]  
22 narrow construction of § 1920(4) [which] requires recognition  
23 that the circumstances in which a copy will be deemed  
24 necessarily obtained . . . will be extremely limited.” Pac.

25 \_\_\_\_\_  
26 <sup>2</sup> Based on the receipts attached to McHenry’s declaration, Pruitt  
27 incurred \$14,203.69 rather than \$14,253.61 in transcript costs  
28 prior to Genentech’s Rule 68 offer. See McHenry Decl., Exh. 2.  
Pruitt’s bill of costs incorrectly lists the cost of Hall’s  
deposition transcript as \$881.47 instead of \$831.55.

1 Marine Center, Inc. v. Philadelphia Indem. Insur. Co., No. 1:13-  
 2 cv-00992-DAD-SKO, 2017 WL 6538990, at \*4 (E.D. Cal. Dec. 21,  
 3 2017) (quoting In re Online DVD-Rental Antitrust Litig., 779  
 4 F.3d at 930). As Genentech argues, the Eastern District has  
 5 previously denied a prevailing party costs where the bill of  
 6 costs included “[t]he mere recitation of the phrase ‘necessarily  
 7 incurred.’” Def.’s Objections at 2 (citing Ferreira v. M/V CCNI  
 8 Antofagasta, No. 2:04-cv-1916-MCE-DAD, 2007 WL 3034941, at \*2  
 9 (E.D. Cal. Oct. 16, 2007)). But before the Court denied costs  
 10 in Ferreira, it issued a minute order permitting the plaintiff  
 11 twenty (20) days “to provide further support” for the costs in  
 12 question. Id. The Court affords Pruitt the same opportunity  
 13 here. Within twenty (20) days, Pruitt must file a memorandum of  
 14 costs explaining why his remaining Section 1920(2)&(4) costs  
 15 were “necessarily obtained.”

16 In sum:

17 Original amount of costs requested	\$17,072.16
18 Deduction for costs related to costs incurred following Rule 68 offer	-\$942.30
19 Deduction for cost of videotaped depositions	-\$1,441.25
20 Deduction for remaining transcript and copying costs pending supplemental briefing	-\$14,253.61
<b>TOTAL costs awarded</b>	<b>\$435</b>

21  
 22 2. Genentech’s Bill of Costs

23 Genentech claims \$18,571.82 in costs. Genentech contends  
 24 Rule 68(d) requires Pruitt to pay these costs. Def.’s Memo. of  
 25 Costs, ECF No. 169-1. Pruitt objects, arguing (1) FEHA prohibits  
 26 a prevailing defendant from recovering costs absent the suit was  
 27 “frivolous, unreasonable, or groundless”; and (2) Genentech’s  
 28 claimed costs are unnecessary and unreasonable. Plf.’s Objection

1 1-4.

2 The Court finds FEHA does not bar Genentech from recovering  
3 costs under Rule 68(d). As Genentech argues, three of Pruitt's  
4 claims went to trial: the FEHA claim, the Section 1102.5 claim,  
5 and the wrongful termination claim. See Reply ISO Genentech's  
6 Bill of Costs ("Reply") at 1-2. See also Verdict Form. These  
7 claims had largely overlapping elements. Id. Accordingly, even  
8 if the Court prevented Genentech from seeking costs related to  
9 its FEHA defense, Genentech could still claim identical costs  
10 under the remaining two claims.

11 a. Section 1920(2) Costs

12 Genentech claims \$2,897.91 in costs under 28 U.S.C.  
13 § 1920(2). Genentech argues it incurred these costs printing the  
14 depositions it was required to lodge with the Court under Local  
15 Rule 133(j); printing deposition excerpts it might need for  
16 impeachment refreshing witnesses' recollection; and obtaining  
17 draft transcripts of portions of the trial proceedings. Memo. of  
18 Costs at 2-3. Pruitt objects, arguing it was not necessary for  
19 Genentech to obtain depositions for "every potential witness on  
20 the parties' witness lists." Plf.'s Objections at 2. The Court  
21 disagrees. Up to and throughout trial, Pruitt sought to expand  
22 the scope of litigation, attempting to admit evidence that was  
23 relevant only to his previously-dismissed discrimination claims.  
24 It was not clear, even at the pretrial conference, who and how  
25 many of Pruitt's witnesses he intended to call. The Court finds  
26 the depositions Genentech printed were necessarily obtained given  
27 Pruitt's litigation strategy. The Court awards Genentech  
28 \$2,897.91 for these costs.

1                   b.    Section 1920(3) Costs

2           Genentech claims \$2,378.28 in costs under 28 U.S.C.  
3 § 1920(3).  Pruitt's only objection to these costs is that  
4 Genentech's witnesses lived too far away.  Plf.'s Objection at 4.  
5 Genentech's vocational expert flew into Sacramento from Michigan.  
6 Its economist and forensic psychiatrist flew in from Southern  
7 California.  Pruitt does not provide any authority for the  
8 proposition that the costs Genentech incurred fell outside  
9 Section 1920(3).  Genentech incurred \$3,724.61 in lodging,  
10 sustenance, parking, and air and ground transportation for three  
11 of its witnesses.  See Totten Decl., Exh. E.  The \$2,378.28  
12 Genentech claims reflects a reasonable reduction of those costs.  
13 The Court awards Genentech \$2,378.28 for these costs.

14                   c.    Section 1920(4) Costs

15           The Court does not find all the costs Genentech claimed for  
16 "exemplification and [] making copies" were necessary for its  
17 defense.  See 28 U.S.C. § 1920(4); see also Def.'s Bill of Costs.  
18 Genentech contends it incurred \$13,295.63 in Section 1920(4)  
19 copying costs.  Def.'s Bill of Costs; Memo. of Costs at 3.  
20 Pruitt argues these costs are unreasonable because Genentech's  
21 "kitchen sink approach to trial exhibits" and use of color  
22 printing render many of these costs unnecessary.  Plf.'s  
23 Objection at 2-3.  The Court agrees in part.  The Court disagrees  
24 that the sheer number of exhibits Genentech included in its  
25 exhibit list compared to the number of exhibits admitted at trial  
26 renders the non-admitted exhibits "unnecessary."  See Plf.'s  
27 Objections at 3.  Although the Ninth Circuit adopts a narrow  
28 construction of "necessarily obtained," it does not interpret the



1 phrase so narrowly as to "specifically require that the copied  
2 document[s] be introduced into the record." In re Online DVD-  
3 Rental Antitrust Litig., 779 F.3d at 927. Genentech argues it  
4 used the exhibit copies to prepare its witnesses and aid in  
5 witness examination. Memo. of Costs at 3. It also, at opposing  
6 counsel's request, provided copies of its exhibits to Pruitt.  
7 Reply at 4. The Court's review of Genentech's exhibit list  
8 confirms the exhibits were reasonably needed either for  
9 Genentech's case-in-chief or for impeachment purposes. See  
10 Def.'s Amended Exhibit List, ECF No. 88.

11 Review of Genentech's exhibits does, however, belie  
12 Genentech's contention that it needed thousands of color copies  
13 for its defense. See id.; Plf.'s Objections at 3. Genentech  
14 argues "[u]sing color copies . . . [was] entirely appropriate and  
15 [] necessary to ensure that binders contained true and correct  
16 copies of the parties' exhibits." Reply at 5. Genentech's  
17 exhibits are primarily copies of email correspondence,  
18 performance evaluations, employee files, and investigation notes.  
19 See Def.'s Amended Exhibit List. The Court does not find  
20 persuasive Genentech's argument that black and white copies would  
21 undermine the veracity of those exhibits. At fifty cents per  
22 page, Genentech's color copies were five times more expensive  
23 than its black-and-white copies. The Court therefore reduces  
24 Genentech's \$8,069 in costs for color printing to \$1,613.80.

25 Finally, the Court reduces the costs Genentech claims for  
26 copying video exhibits. As Plaintiff argues, and as Genentech  
27 eventually concedes, the only video exhibits needed were the two  
28 videos relating to the "cafeteria incident." Id.; Reply at 4.

1 Genentech represents the cost for copying these two videos in  
2 each party's preferred format was \$440. Reply at 5. The Court,  
3 therefore, reduces Genentech's video-copying costs from \$2,060 to  
4 \$440.

5 In sum:

6 Original amount of costs requested	\$18,571.82
7 Deduction for costs of color copying	-\$6,455.20
8 Deduction for costs of copying unnecessary video exhibits	-\$1,620.00
<b>TOTAL costs awarded</b>	<b>\$10,496.20</b>

9

10 II. ORDER

11 For the reasons set forth above, the Court GRANTS IN PART  
12 AND DENIES IN PART Pruitt's bill of costs. The Court awards  
13 Pruitt \$435 and denies \$2,383 of Pruitt's claimed costs. As to  
14 the remaining \$14,253.61 in Section 1920(4) costs, the Court  
15 orders Pruitt to file a memorandum of costs within twenty days of  
16 this order explaining why these fees were necessarily incurred.  
17 Genentech may file a response to this memorandum within five days  
18 thereafter.

19 The Court also GRANTS IN PART AND DENIES IN PART Genentech's  
20 bill of costs. The Court awards Genentech \$10,496.62 in costs  
21 and denies \$8,075.20 of Genentech's claimed costs.

22 IT IS SO ORDERED.

23 Dated: August 26, 2019

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE