

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DONNA M. AVILA, *et al.*,

No. C 99-03941 SI

Plaintiffs,

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS' AND  
DEFENDANTS' CROSS-MOTIONS FOR  
REVIEW OF TAXATION OF COSTS**

v.

WILLITS ENVIRONMENT, *et al.*,

Defendants.

Plaintiffs and defendants have filed cross-motions for judicial review of the Clerk's taxation of defendants' costs. The motions were scheduled for hearing on November 20, 2009. Pursuant to Civil Local Rule 7-1(b), the Court found this matter appropriate for resolution without oral argument and vacated the hearing. Having considered the papers submitted, and for good cause shown, the Court hereby GRANTS IN PART and DENIES IN PART the parties' cross-motions for review of the Clerk's taxation of costs.

**BACKGROUND**

In 1999, plaintiffs filed *Avila, et al. v. Willits Environmental Remediation Trust, et al.*, C 99-3941 SI. Another related case was filed in 2001, *Abbott, et al. v. Willits Environmental Remediation Trust, et al.*, C 01-266 SI, and a third action was removed to this Court in 2006, *Nickerman et al. v. Remco Hydraulics, Inc. et al.*, C 06-2555 SI. The three cases were consolidated and originally involved over 1100 plaintiffs. During the course of this litigation, hundreds of plaintiffs have settled their claims and others have been dismissed for various reasons. On June 18, 2009, the Court entered summary judgment against the ten remaining plaintiffs.

1 Defendants filed a bill of costs on July 2, 2009 seeking \$362,063.16 in costs. Plaintiffs filed  
2 objections to certain items in the bill of costs. Defendants subsequently reduced the amount of costs  
3 sought to \$331,691.48 to account for the costs of obtaining education and employment records  
4 associated exclusively with settled plaintiffs. On October 7, 2009, the Clerk taxed costs in the amount  
5 of \$159,297.77, awarding fees of the Clerk, fees for service of summons and subpoena, fees for  
6 witnesses, and fees for printed or electronically recorded transcripts necessarily obtained for use in the  
7 case. The Clerk disallowed all reproduction and exemplification costs pursuant to plaintiffs' objections.  
8 *Id.* Both parties now move for review of the Clerk's taxation of costs.

### 10 LEGAL STANDARD

11 28 U.S.C. § 1920 authorizes a judge or clerk of the district court to tax costs. Pursuant to Federal  
12 Rule of Civil Procedure 54(d), costs incurred by the prevailing party may be assessed against the losing  
13 party as of course and may be taxed by the clerk. "Unless a federal statute, these rules, or a court order  
14 provides otherwise, costs -- other than attorney's fees -- should be allowed to the prevailing party." Fed.  
15 R. Civ. P. 54(d)(1). "Rule 54(d) creates a presumption in favor of awarding costs to prevailing parties,  
16 and it is incumbent upon the losing party to demonstrate why the costs should not be awarded." *Stanley*  
17 *v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999). Taxable costs are listed in 28 U.S.C. § 1920  
18 as follows:

- 19 (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded  
20 transcripts necessarily obtained for use in the case; (3) Fees and disbursements for  
21 printing and witnesses; (4) Fees for exemplification and the costs of making copies of  
22 any materials where the copies are 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.

23 Civil Local Rule 54-3 provides additional "standards for interpreting the costs allowed under section  
24 1920." *Intermedics v. Ventritex, Co.*, No. C-90-20233, 1993 U.S. Dist. LEXIS 17803, at \*2 (N.D. Cal.  
25 Dec. 2, 1993). Upon motion for review of the Clerk's taxation of costs, the Clerk's actions may be  
26 reviewed by the Court. Fed. R. Civ. P. 54(d)(1). The taxation of costs lies within the trial court's  
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1 discretion. *In re Media Vision Tech. Secs. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996).

2 If the district court wishes to depart from the presumption in favor of awarding costs, it must  
3 gives reasons for doing so by explaining “why a case is not ‘ordinary’ and why, in the circumstances,  
4 it would be inappropriate or inequitable to award costs.” *Assoc. of Mexican-American Educators v.*  
5 *Cal.*, 231 F.3d 572, 593 (9th Cir. 2000). District courts may consider a variety of factors in determining  
6 whether to exercise their discretion to deny costs to the prevailing party. These factors include great  
7 economic disparity between the parties, and the losing party’s limited financial resources. *Id.*

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9 **DISCUSSION**

10 Both parties move for review of the Clerk’s taxation of costs. Defendants contend that they are  
11 entitled to additional costs for the reproduction and exemplification of government records and  
12 disclosure and discovery documents. Plaintiffs, in turn, object to the taxation of the following: (1) costs  
13 for delivery services pertaining to certain litigation-related documents, (2) costs that they assert are  
14 associated exclusively with settled plaintiffs, and (3) certain costs associated with depositions, such as  
15 fees for videotaping, CD conversion, and expedited delivery. Further, plaintiffs assert that the Court  
16 should exercise its discretion to apportion the total cost among the plaintiffs rather than holding them  
17 jointly and severally liable.

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19 **I. Reproduction and exemplification costs**

20 Defendants challenge the Clerk’s exclusion of costs for reproducing and exemplifying various  
21 documents. Defendants seek \$169,707.91 for reproducing the following: (1) government records  
22 regarding Remco Hydraulics, Inc., in the amount of \$16,285.91; (2) plaintiffs’ birth certificates, in the  
23 amount of \$8,674.20; (3) plaintiff Donna Avila’s discovery documents, in the amount of \$2,560.20; (4)  
24 defendants’ expert disclosures, in the amount of \$9,645.30; (5) plaintiffs’ medical, education, and  
25 employment records, in the amount of \$131,412.90; and (6) documents produced pursuant to subpoenas  
26 duces tecum, in the amount of \$1,129.40. The Court will address each of these costs separately.

1 First, defendants contend that they are entitled to costs for the reproduction of government  
2 records relating to Remco pursuant to Civil Local Rule 54-3(d)(1), which provides that “[t]he costs of  
3 reproducing or certifying or exemplifying government records used for any purpose in the case is  
4 allowable.” Defendants assert that they incurred costs in the amount of \$16,285.91 for the reproduction  
5 of documents in possession of the United States Environmental Protection Agency, the California  
6 Regional Water Quality Control Board, the Department of Toxic Substances Control, the Department  
7 of Public Health, and other government agencies. The parties do not dispute that these documents are  
8 government records that were “necessarily obtained for use in the case.” 28 U.S.C. § 1920(4).  
9 However, plaintiffs contend that defendants’ reproduction costs include various charges that are not  
10 permitted under § 1920 or the Local Rules, including fees for labor, travel time, and machine  
11 transportation and set-up.

12 Defendants contend that they are entitled to recover fees for labor and machine transportation  
13 and set-up where such costs were necessarily incurred in order to reproduce the documents.  
14 Specifically, defendants seek labor costs for those instances in which they did not have access to the  
15 documents themselves and were required to pay the government agency a fee to have its employees  
16 make the copies. Additionally, defendants seek machine transportation and set-up fees for those cases  
17 in which it was necessary for the vendor to reproduce the documents at on-site locations. However, the  
18 plain language of Rule 54-3(d)(1) provides only for the cost of reproducing or exemplifying the relevant  
19 records. Further, defendants do not cite any authority supporting an award of fees for labor and machine  
20 set-up, and the few cases they do cite are factually distinguishable. *See Affymetrix, Inc. v. Multilyte Ltd.*,  
21 No. C-03-03779, 2005 U.S. Dist. LEXIS 41177, \*8-9 (N.D.Cal. Aug. 26, 2005) (awarding costs incurred  
22 in conducting patent assignment searches and obtaining patent file histories); *Competitive Techs. v.*  
23 *Fujitsu Ltd.*, No. C-02-1673, 2006 U.S. Dist. LEXIS 98312, \*25-26 (N.D. Cal. Aug. 23, 2006)  
24 (awarding costs for bates stamping). Therefore, the Court reads this rule to allow recovery for the costs  
25 of the copies themselves, but not for all the subsidiary costs pertaining to labor and machine set-up.  
26 Accordingly, the Clerk is directed to tax an additional \$13,051.93, which is the cost for reproduction  
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1 of government records related to Remco.

2           Second, defendants contend that they are entitled to costs for the reproduction of plaintiffs' birth  
3 certificates because these records also constitute government records pursuant to Rule 54-3(d)(1). The  
4 Court finds that defendants have provided sufficient documentation to support an award of these costs.  
5 Since plaintiffs do not raise specific objections to the taxation of these costs, they have not met their  
6 burden of demonstrating why these costs should not be awarded. Therefore, the Clerk is directed to add  
7 \$8,674.20 for reproducing plaintiffs' birth certificates.

8           Third, defendants assert that they are entitled to costs for reproduction of disclosure documents  
9 from plaintiff Donna Avila pursuant to defendants' first request for production of documents. Civil  
10 Local Rule 54-3(d)(2) provides that "[t]he cost of reproducing disclosure or formal discovery documents  
11 when used for any purpose in the case is allowable." The invoice for copies of these disclosure  
12 documents includes fees for the copies as well as for machine transportation and set-up. In keeping with  
13 the discussion above, the Court will allow the cost for copies but deny the cost for machine  
14 transportation and set-up. Accordingly, the Clerk is directed to add \$2,335.20 for reproducing Avila's  
15 disclosure documents.

16           Fourth, defendants assert that they are entitled to costs for scanning expert disclosure documents,  
17 converting them to a TIFF or PDF, and uploading them to CDs for production to plaintiffs. Defendants  
18 contend that these fees should be awarded pursuant to Rule 54-3(d)(2). In their objection to defendants'  
19 bill of costs, plaintiffs argued that costs of scanning documents to a CD is for the convenience of  
20 counsel and should be disallowed. Pls' Objections, at 8 [Docket No. 1274]. However, the Court finds  
21 that where defendants have not sought additional costs for making regular copies, and the electronic  
22 conversion was "in lieu of making conventional copies," electronic conversion costs are permissible  
23 under the Local Rule. *MEMC Elec. Materials v. Mitsubishi Materials*, No. C-01-4925, 2004 U.S. Dist.  
24 LEXIS 29359, at \*46 (N.D. Cal. Oct. 22, 2004). As such, the Clerk is directed to add \$9,645.30 for  
25 reproducing expert disclosure documents.

26           Fifth, defendants contend that they are entitled to costs for reproduction of plaintiffs' medical,  
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1 education, and employment records because these are also recoverable disclosure documents pursuant  
2 to Rule 54-3(d)(2). The parties do not dispute that these disclosure documents were “necessarily  
3 obtained for use in the case.” 28 U.S.C. § 1920(4). However, plaintiffs contend that these costs include  
4 various impermissible charges, such as costs for food, lodging, rush delivery, and “certification of no  
5 records.”

6 The Court finds that while defendants have not sought charges for food and lodging, the relevant  
7 invoices reflect certain impermissible fees for rush delivery, shipping, and “certification of no records.”  
8 These charges do not fall within taxable reproduction costs under the Local Rule. However, defendants  
9 assert that they are entitled to recover these “retrieval” costs because it was plaintiffs’ obligation to bear  
10 these costs at the outset of the case. Defendants claim that plaintiffs failed to produce these documents  
11 pursuant to their discovery obligations and as a result, defendants were forced to incur these costs.  
12 However, defendants do not cite to the record in support of this contention. Since retrieval costs are not  
13 otherwise taxable under the Local Rule, the Court denies these fees and limits defendants’ recovery to  
14 the cost for reproducing these records.

15 Plaintiffs also object to the costs of reproducing medical records on the ground that defendants  
16 are claiming double recovery because plaintiffs served various medical records on defendants.  
17 Defendants submitted sufficient documentation to support an award of these costs. Therefore, the  
18 burden is on the plaintiff to demonstrate why these costs should not be awarded. *Stanley v. Univ. of S.*  
19 *Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999). Although plaintiffs’ declaration lists the medical records  
20 they served on defendants, plaintiffs fail to specify which of defendants’ invoices correspond with these  
21 produced records and thereby constitute a duplication. Consequently, the Court finds that plaintiffs have  
22 not met their burden.

23 Plaintiffs further argue that the cost of reproducing these records should be denied because the  
24 vendors’ invoices fail to indicate the number of copies made and the rate per page. Defendants assert,  
25 and the Court agrees, that neither § 1920 nor the Local Rules require that invoices specify these details.  
26 The Court concludes that the invoices submitted by defendants sufficiently document the costs of  
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1 reproducing these documents. Therefore, the Clerk is directed to add \$73,133.08 to the taxation of costs  
2 for reproducing plaintiffs’ medical, education, and employment records.

3 Lastly, defendants assert that they are entitled to costs for reproducing documents disclosed  
4 pursuant to subpoenas duces tecum. The Court agrees with defendants that these documents constitute  
5 “disclosure or formal discovery documents” under Civil Local Rule 54-3(d)(2). Since plaintiffs do not  
6 raise specific objections to the taxation of these costs, they have not met their burden of demonstrating  
7 why these costs should not be awarded. As such, the Clerk is directed to add \$1,129.40 for reproducing  
8 subpoenaed documents.

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10 **II. Service of summons and subpoena**

11 The Clerk awarded \$14,366.38 for “fees for service of summons and subpoena” in its taxation  
12 of costs. Plaintiffs contend that this figure impermissibly includes costs for delivery services pertaining  
13 to discovery materials, case management orders, and other litigation related documents.<sup>1</sup> Civil Local  
14 Rule 54-3(a)(2) provides for the taxation of “[f]ees for service of process by someone other than the  
15 marshal acting pursuant to Federal Rule of Civil Procedure 4(c).” The Court reads this Rule to only  
16 award fees for service of process, which may be in the form of a summons or a writ. The record  
17 indicates that defendants were awarded fees for service of deposition subpoenas as well as various court  
18 documents, such as motions, declarations, and case management conference statements. The Court finds  
19 that service of these documents does not constitute “service of process” under the Local Rule and  
20 therefore, these costs are not recoverable.

21 The fees at issue also include costs for serving the notice of removal and accompanying  
22 documents. Since service of the notice of removal is functionally equivalent to service of process, the  
23 Court finds that the \$309.00 awarded for service of documents relating to defendants’ removal of this

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25 <sup>1</sup>Plaintiffs raise this issue in their opposition to defendants’ motion for review of costs even  
26 though it is outside the scope of defendants’ motion for review of costs. Pls’ Opposition [Docket No.  
27 1310]. Further, plaintiffs fail to raise this issue in their own motion for review of costs. Pls’ Motion  
28 [Docket No. 1300]. Nonetheless, defendants had an opportunity to respond to this argument in their  
reply brief. [Docket No. 1315]. Therefore, the Court will address the issue on the merits.

1 action are permissible. The Court strikes the remaining \$14,057.38 from this category of fees.  
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3 **III. Deposition costs**

4 Plaintiffs seek a \$ 67,775.68 reduction in the taxation of costs for certain fees associated with  
5 depositions, including videotape copies of depositions, CD conversion, ASCII disks, expedited delivery,  
6 and transportation fees. Local Rule 54-3(c)(1) allows for “[t]he costs of an original and one copy of any  
7 deposition (including video taped depositions) taken for any purpose in connection with the case.” Civil  
8 L.R. 54-3(c)(1). According to plaintiffs, the “reasonable reading” of this rule is that “taxing of video  
9 tape deposition in addition to the written transcript” is not allowed. Pl.’s Reply at 2-3. However, the  
10 Court finds that the language of the rule does not support plaintiffs’ position. Section 1920 and Rule  
11 54-3(c)(1) provide that videotaped copies are permitted as long as the cost of the deposition transcript  
12 is recoverable, even if the party also obtains a hard copy of the transcript. Therefore, the Clerk properly  
13 allowed costs for videotape copies of depositions.

14 The other fees associated with deposition transcripts, however, are not recoverable. The Court  
15 finds that conversion of the deposition transcripts into CDs as well as ASCII disks was for the  
16 convenience of counsel. Therefore, these fees, in the amount of \$8,711.45, should be deducted from  
17 the awarded costs. *See Competitive Techs, et al., v. Fujitsu Ltd.*, No. C-02-1673, 2006 U.S. Dist. LEXIS  
18 98312, at \*25 (N.D. Cal. Aug. 23, 2006). Additionally, fees for shipping and expedited delivery are not  
19 taxable costs. *Affymetrics, Inc., v. Multilyte Ltd.*, 2005 U.S. Dist. LEXIS 1177, at \*7 (N.D. Cal. Aug.  
20 26, 2005). Although fees for expedited delivery were omitted from defendants’ bill of costs, the taxed  
21 costs improperly included fees for regular shipping and handling of deposition transcripts. Accordingly,  
22 the Clerk is directed to deduct an additional \$2,702.50 to account for these fees.

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24 **IV. Costs associated with settled plaintiffs**

25 Plaintiffs contend that costs associated exclusively with settled plaintiffs should be deducted  
26 from the costs awarded by the Clerk. Specifically, plaintiffs argue that the deposition costs for those  
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1 settled plaintiffs whose depositions relate solely to their own exposure and causation should be deducted  
2 from the total awarded costs. Defendants note that they already excised costs incurred to copy school  
3 and employment records for the settled plaintiffs because these documents had no evidentiary value to  
4 any other plaintiffs or issues in the case. By contrast, the depositions at issue are not exclusively  
5 associated with certain plaintiffs, but rather provide information relevant to the litigation as a whole,  
6 such as observations of the events that supposedly took place at the Remco site. Consequently, the  
7 Court agrees with defendants that these deposition costs cannot be isolated from the rest of the costs  
8 incurred to advance the general litigation. Moreover, plaintiffs do not cite any legal authority to support  
9 their argument. Indeed, one court rejected this argument, stating that “at the time defendants took [the  
10 settled plaintiff’s] deposition, defendants did not know that she would ultimately settle with them, so  
11 the taking of her deposition was a necessary cost.” The Court is persuaded by this reasoning and  
12 concludes that the depositions of the settled plaintiffs were “reasonably necessary” in this case. *See*  
13 *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998) (“Deposition costs are taxable if they are  
14 reasonably necessary for trial.”).

15 For the aforementioned reasons, the Clerk is directed to allow costs of (1) \$13,051.93 for  
16 reproducing government records relating to Remco, (2) \$8,674.20 for reproducing plaintiffs’ birth  
17 certificates, (3) \$2,335.20 for reproducing Avila’s disclosure documents (4) \$9,645.30 for reproducing  
18 expert disclosure documents, (5) \$73,133.08 for reproducing plaintiffs’ medical, education, and  
19 employment records, and (6) \$1,129.40 for reproducing subpoenaed documents in addition to the  
20 \$159,297.77 already assessed by the Clerk. However, the taxation of costs shall be reduced by  
21 \$25,471.33 to account for impermissible fees relating to depositions and service of documents. After  
22 making these revisions, the total allowable costs amount to \$241,795.55.

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24 **V. Joint and several liability**

25 Plaintiffs request that the Court exercise its discretion to separately apportion the taxed costs  
26 among the 755 plaintiffs whose claims were involuntarily dismissed so that each plaintiff is only  
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1 responsible for his or her prorated share of the litigation costs. The limited case law on this issue  
2 “places the burden on the losing parties to introduce evidence and persuade the court that costs should  
3 be apportioned.” *Tubbs v. Sacramento County Jail*, No. CIV. S-06-280, 2009 U.S. Dist. LEXIS 80659,  
4 at \*7 (E.D. Cal. Aug. 21, 2009) (citing *In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 469 (3d Cir.  
5 2000). “If they fail to do so, ‘the default rule is that costs may be imposed jointly and severally.’” *Id.*  
6 (quoting *Paoli*, 221 F.3d at 469). Plaintiffs contend that it is inequitable to make each plaintiff jointly  
7 and severally liable because each plaintiff’s claim for damages was separate, not joint, and the cases  
8 were consolidated only for purposes of judicial economy. Defendants argue that plaintiffs should be  
9 held jointly and severally liable because “this case, for all intents and purposes, involved a ‘class’ of  
10 toxic tort claims that required Defendants to hire experts and prepare motions to defend against the  
11 claims as a group, not on an individual basis.” Dfs’ Opposition at 7.

12 The Court agrees with defendants that although plaintiffs technically had separate claims for  
13 damages, the case operated like a quasi-class action. Plaintiffs’ counsel made the decision to join all  
14 the thousand-plus plaintiffs in just three actions (*Avila, Abbott, and Nickerman*). Defendants defended  
15 against all the toxic tort allegations collectively because common issues among the plaintiffs  
16 predominated the litigation. Therefore, the Court finds that it would not be equitable to limit  
17 defendants’ recovery to the remaining plaintiffs’ individual shares of the litigation costs.

18 Defendants state that they are amenable to an equitable apportionment of costs at the start of the  
19 collection process based on the length of each plaintiff’s involvement in the case. However, in the event  
20 that certain plaintiffs are insolvent or incapable of being found, defendants wish to reserve the right to  
21 recover those costs from the rest of the plaintiffs. The Court agrees that plaintiffs should be held jointly  
22 and severally liable for the taxed costs but directs defendants to use their best efforts to equitably  
23 apportion costs based on the above terms.

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25 **VI. Discretionary reduction of taxable costs**

26 Plaintiffs argue, and the Court agrees, that it would be inequitable to assess the total amount of  
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1 taxed costs against the plaintiffs whose claims were involuntarily dismissed. First, the prorated  
2 responsibility of each of the remaining plaintiffs is much greater now than it was at the outset of this  
3 case. This case dates back to August 1999 and originally involved over 1100 plaintiffs, many of whom  
4 have settled their claims. The 755 plaintiffs who did not settle must now cover the cost for over ten  
5 years of litigation.

6 Second, although no evidence has been presented regarding Plaintiffs' financial resources, the  
7 Court's knowledge of this case and the community that it involves persuades the Court that plaintiffs'  
8 capacity to pay is limited. The Ninth Circuit has recognized that the district court may properly consider  
9 the losing party's ability to pay the litigation fees in deciding whether to award costs. *See*  
10 *Mexican-American Educators*, 231 F.3d at 593; *Stanley*, 178 F.3d at 1079. The Court finds that the 755  
11 plaintiffs at issue cannot afford to cover the total cost of \$241,795.55.


12 For these reasons, the Court holds that the total taxed costs shall be reduced by half, from  
13 \$241,795.55 to \$120,897.77, and the 755 plaintiffs whose claims were involuntarily dismissed shall be  
14 jointly and severally liable for this amount.

15  
16 **CONCLUSION**

17 For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART and  
18 DENIES IN PART the parties' motions for review of the Clerk's taxation of costs. [Docket Nos. 1300,  
19 1305].

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21 **IT IS SO ORDERED.**

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23 Dated: November 23, 2009

  
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SUSAN ILLSTON  
United States District Judge