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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES,

Case No. C-05-5124 JCS

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO STAY
TAXATION OF COSTS AND
PLAINTIFF'S OBJECTIONS TO
TAXATION OF COSTS** [Docket No. 443]

v.

OPTIN GLOBAL, INC., ET AL.,

Defendants.

I. INTRODUCTION

Plaintiff, ASIS Internet Services (“ASIS”), brought suit against Defendant, Azoogleads.com, Inc. (“Azoogle”), on December 12, 2005, asserting that Azoogle violated the CAN-SPAM Act of 2003, 15 U.S.C. § 7701, and California Business and Professions Code § 17529.5. The Court granted summary judgment in favor of Azoogle on April 28, 2008, and found that: 1) ASIS lacked standing to assert a CAN-SPAM Act claim; 2) Azoogle did not “procure” the emails that are the subject of the action under the CAN-SPAM Act; and 3) Azoogle did not “advertise” for the purposes of the state law claim. Order Granting Defendants’ Summary Judgment, Denying Plaintiff’s Motion for Summary Judgment and Dismissing Action, Docket No. 401. Accordingly, Plaintiff’s claims were dismissed with prejudice. *Id.* ASIS filed a notice of appeal on April 18, 2008.

On May 13, 2008, Azoogle filed its Bill of Costs with the Clerk of the Court. Azoogle requested a total of \$38,442.61 for the following items: 1) \$502.52 (transcripts); 2) \$1,009.32 (witness fees); 3) \$1,226.87 (photocopies); 4) \$35,703.00 (miscellaneous costs). ASIS filed objections to Azoogle’s Bill of Costs and Azoogle responded. On September 3, 2008, the Clerk awarded costs in the amount of \$34,825.24. *See* Bill of Costs, Docket No. 441.

1 ASIS filed a Motion to Stay Taxation of Costs and Plaintiff’s Objections to Taxation of
2 Costs (“Motion”) on September 9, 2008. In the Motion, ASIS asks the Court to stay taxation of
3 costs pending the appeal of the Court’s summary judgment order on the basis that Plaintiff is likely
4 to prevail on the merits and taxation of costs will impose a significant hardship. In the alternative,
5 ASIS objects to the taxation of costs on the grounds that: 1) the Bill of Costs filed by Azoogole was
6 untimely; and 2) an award of costs is contrary to the intent of the CAN-SPAM Act.

7 Finally, Plaintiff objects to certain specific cost items sought by Azoogole in its Bill of Costs.
8 In particular, Plaintiff objects to the following costs sought by Defendants in the Bill of Costs: 1)
9 hearing transcripts; 2) videography services for three depositions; 3) video conference fees for one
10 deposition; 4) cost of three DVD copies of a single deposition; 5) video conference cost for another
11 deposition; 6) interactive/rough disk costs for five depositions; 7) expedited services included in a
12 deposition bill; 8) travel expenses for deposed witness; 9) costs of copying documents for another
13 case; 10) costs of copying documents for production at discovery.

14 **II. ANALYSIS**

15 **A. Whether the Court Should Stay Taxation of Costs**

16 In determining whether to issue a stay pending appeal, courts consider the following factors
17 “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
18 (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay
19 will substantially injure the other parties interested in the proceeding; and (4) where the public
20 interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Having considered these factors in
21 the context of this case, the Court concludes that entry of a stay on taxation of costs is not warranted.

22 **B. Whether Costs Should be Denied on the Basis that Bill of Costs was Untimely**

23 Plaintiff asserts that the Bill of Costs was not timely, citing to Civil Local Rule 54-1(a),
24 which provides that a bill of costs should be filed “no later than 14 days after entry of judgment or
25 order under which costs may be claimed.” According to ASIS, this rule required Azoogole to file its
26 bill of costs within 14 days of the Court’s summary judgment order, which was filed on March 27,
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1 2008, rather than within 14 days of the Court’s entry of judgment, on April 29, 2008. The Court
2 disagrees. To the extent the Local Rule is, arguably, ambiguous as to whether the 14 days began to
3 run when the summary judgment order was filed or when final judgment was entered, Azoogole’s
4 interpretation of the rule was reasonable. Further, ASIS was not prejudiced in any way by the fact
5 that ASIS filed its bill of costs in May rather than April 2008. The Court, therefore, declines to deny
6 Azoogole its costs on this basis.

7 **C. Whether an Award of Costs is Consistent with the CAN-SPAM Act**

8 Plaintiff asserts that costs should not be awarded because it was acting as a “private attorney
9 general” under the CAN-SPAM Act and, under the standard articulated in *Christiansburg Garment*
10 *Co. v. EEOC*, 434 U.S. 412 (1978), an award of costs is inconsistent with the remedial nature of the
11 statute. The Court concludes that the *Christiansburg* standard does not apply here, and that under
12 the correct standard, articulated in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), Azoogole is entitled
13 to its costs.

14 Under Rule 54(d)(1) of the Federal Rules of Civil Procedure, a prevailing party is entitled to
15 an award of costs “[u]nless a federal statute . . . provides otherwise.” The federal statute at issue
16 here, the CAN-SPAM Act, gives courts the discretion to award reasonable costs against any party.
17 15 U.S.C. § 7706(g)(4). In exercising this discretion, the Court must determine whether to apply the
18 “dual standard” that is often used in civil rights cases (“the *Christiansburg* standard”) or the “even-
19 handed’ approach (“the *Fogerty* standard”). This question was directly addressed in *Gordon v.*
20 *Virtumundo, Inc.*, 2007 WL 2253296 (W.D. Wash. Aug. 1, 2007). In that case, the court concluded
21 – after conducting an in-depth analysis of the legislative intent behind the CAN-SPAM Act – that
22 the *Fogerty* standard applied. *Id.* at *2-4. This Court finds that reasoning in *Virtumundo* be
23 persuasive and therefore applies the *Fogerty* standard here.

24 Under the *Fogerty* standard, “[p]revailing plaintiffs and prevailing defendants are to be
25 treated alike.” 510 U.S. at 534. There is “no precise formula” for determining when the court
26 should exercise its discretion, but factors that may be considered include “frivolousness, motivation,
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1 objective unreasonableness (both in the factual and in the legal components of the case) and the need
2 in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at 534 n.
3 19 (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (1986)). The Court concludes that
4 under the circumstances here, Azoogole is entitled to an award of costs.

5 **D. Specific Objections to Azoogole’s Cost Bill**

6 **1. Standard of Review**

7 “Under the well-established Rule 54(d)(1) case law, the district court is charged with making
8 a de novo review of the clerk's determination of the costs issue.” *In re Paoli R.R. Yard PCB*
9 *Litigation*, 221 F.3d 449, 461 (3d Cir. 2000) (citing 10 Moore’s Federal Practice, § 54.100[3], at
10 54-145).

11 **2. Hearing Transcripts**

12 Plaintiff ASIS objects to Defendant’s request for \$502.52 for hearing transcripts, which the
13 Clerk taxed in full. Under Local Rule 54-3(b), the cost of transcripts is allowable if it: (1) was
14 necessarily obtained for appeal; (2) approved by the court or stipulated to by the parties; or (3) to
15 implement a court order. LR 54-3(b).

16 Plaintiff argues that none of these three requirements have been met. First, Plaintiff asserts
17 that although the case is being appealed, Defendant’s request for transcripts occurred prior to the
18 issuance of the Court’s summary judgment order and therefore, the transcripts were not “necessarily
19 obtained for appeal.” Further, it is undisputed that there was no stipulation or court order regarding
20 that would satisfy subsections (2) or (3). Azoogole counters that the cost of transcripts is allowable
21 under Rule 54-3(b) because the transcripts address issues relevant to the appeal. Defendant does
22 not respond to Plaintiff’s argument that the request occurred before summary judgment. The Court
23 concludes that Azoogole is correct.

24 Regardless of whether the request for the transcript occurred before or after summary
25 judgment, Azoogole is entitled to the costs of hearing transcripts because they are relevant to and
26 necessary for the appeal. Accordingly, the Court finds that the Clerk properly taxed this cost.

1 provided documenting cost but acknowledging that § 1821 authorizes award of airfare for witness
2 travel to depositions); *Ferguson v. Bombardier Services Corp.* 2007 WL 601921 * 5 (M.D.Fla. Feb.
3 21, 2007) (awarding airfare for witness travel to depositions under § 1821). Accordingly, the Court
4 concludes that Azoogle is entitled to the full \$1,009.32 that it requested for witness costs.

5 **4. Exemplification and Copy Costs**

6 In its Bill of Costs, Azoogle requested \$1,226.87 for “exemplification and copies of papers
7 necessarily obtained for use in the case.” This includes a request for \$307.00 for “reproduction of
8 discovery documents throughout 2007” and \$93.20 for “[c]osts for copying/shipping documents
9 produced to ASIS by *Satellite v. Blue Horseshoe Media Docs.*” Plaintiff objected to both of these
10 requests and the Clerk sustained Plaintiff’s objection to the former, reducing the amount for copies
11 by \$307.00, to \$919.87. In the Motion, ASIS renews its objections to the two items. The Court
12 agrees and therefore deducts both items from the award.

13 Local Rule 54-3(d)(2) allows the Court to award “the cost of reproducing disclosure or
14 formal discovery documents when used for any purpose in the case.” Nonetheless, these costs must
15 be adequately documented to support an award of such costs. *See Arboireau v. Adidas Salomon AG*,
16 2002 WL 31466564 *6-7 (D. Or. June 14, 2002) (denying request for photocopying costs because
17 party failed to provide the number of copies made, the cost per page or the reason for the copies).
18 Azoogle has not offered any details as to the two entries to which Plaintiff objects: it has not stated
19 the number of copies, the nature of the copies or the rate charged for the photocopies. Further, as to
20 the “*Satellite v. Blue Horseshoe Media Docs.*,” it is unclear that these documents were even used in
21 this case, and Azoogle failed to offer any explanation in response to Plaintiff’s object to this cost
22 item. According, the court awards \$826.67 for exemplification and copies.

23 **5. Deposition Costs**

24 Azoogle requested \$35,703.00 for deposition costs, consisting of charges related to obtaining
25 deposition transcripts. Fox Decl., Ex. A. The Clerk taxed deposition costs at \$33,371.85. The
26 Clerk indicated that the following deductions were made from Azoogle’s request: (1) \$1,007.40 for
27 unspecified video conference services; (2) \$80.00 for an extra DVD disk; and (3) \$1,244.65 for
28 rough ascii disk costs. *Id.* ASIS asserts that the amount should be further reduced. The Court

1 addresses Plaintiff’s specific objections below.

2 **a. Videotaping Costs for Three Separate Depositions**

3 ASIS objects to costs associated with the video recording of the depositions of Nella White,
4 Rex White, and Sally Then. Defendant seeks \$3,266.00 for these items. Fox Decl. at 2. ASIS
5 argues that these costs are not allowable under Local Rule 54-3(c)(1) and that they do not satisfy
6 28 U.S.C. § 1920(2), which allows for an award of costs for “printed or electronically recorded
7 transcripts necessarily obtained for use in the case.” The Court rejects both arguments.

8 In *MEMC Electronics*, this Court addressed whether 54-3(c) allowed for an award of costs
9 associated with videotaping a deposition. 2004 WL 5361246 *3 (N.D. Cal. October 22, 2004). The
10 Court concluded that it does. For the reasons stated in that decision, the Court reaches the same
11 conclusion here.

12 The Court also rejects Plaintiff’s assertion that the videotaping costs should be excluded
13 because they were not necessarily obtained for use in the case. Had the case gone to trial, the
14 deposition transcripts may well have had value for impeachment purposes, even if the witnesses
15 were available to testify. *See Independent Iron Works, Inc., v. United States Steel Corp.*, 322 F.2d
16 656, 678-79 (9th Cir.1963).

17 Accordingly, the Court declines to reduce the costs requested by Azoogole as to these costs.

18 **b. Video Conference Fees For The Deposition of Jen Evans**

19 Defendant seeks \$5,011.69 for video conference fees associated with the deposition of Jen
20 Evans. Plaintiff ASIS objects to these costs, arguing that they do not fall within the ambit of Local
21 Rule 54-3(c). ASIS further asserts that these costs should be excluded because they were incurred
22 only after Defendant refused to produce Ms. Evans at least twice and had to be ordered by the Court
23 to produce her for deposition.

24 The Court finds that Azoogole is entitled to these costs. First, the cost of a video conference,
25 while not specifically listed in Local Rule 54-3(c), is still a cost of producing an original deposition,
26 which is allowable under 54-3(c)(1). Second, this Court has already found that “both sides bear
27 some measure of responsibility in the difficulty of the scheduling of the deposition of Ms. Evans.”
28 Under these circumstances, exclusion of these costs is not warranted.

1 ASIS objects to the cost of expedited delivery reflected in deposition invoices for Jeffrey
2 Posluns (\$1,480.72), Julian Mossenan (\$1,556.60), and Marvin Hernandez (\$1,556.60), asserting
3 that such costs are not permitted under Local Rule 54-3 or 28 U.S.C. § 1920. The Court agrees.

4 Courts in this district have held that the cost of expedited delivery is not recoverable. *See*
5 *Affymetrix Inc., v. Multilyte Ltd.*, 2005 WL 2072113 *2 (N.D.Cal. Aug. 26, 2005)(holding that
6 expedited delivery or messenger fees are not recoverable); *Fresenius Medical Care Holdings v.*
7 *Baxter*, 2008 WL 2020533 (N.D.Cal. May 8, 2008)(holding that shipping or expedited delivery
8 charges are not allowed). Accordingly, the Court excludes these costs.

9 Based on the foregoing, the Court finds that costs for depositions should be taxed in the
10 amount of \$28,777.08.

11 **IV. CONCLUSION**

12 The Motion is GRANTED in part and DENIED in part, as follows. Plaintiff's request to stay
13 the taxation of costs is DENIED. Plaintiff's request to deny an award of costs altogether is
14 DENIED. The Court GRANTS the Motion as to certain specific objections to Azoogole's Bill of
15 Costs and DENIES the Motion as to others, as stated in the preceding section. Azoogole shall be
16 awarded \$31,115.59 in costs, which consists of the following costs: 1) \$502.52 (hearing transcripts);
17 2) \$1,009.32 (witness travel expenses); 3) \$826.67 (exemplification and copies); 4) \$28,777.08
18 (deposition costs).

19 IT IS SO ORDERED.

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21 Dated: December 17, 2008

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JOSEPH C. SPERO
United States Magistrate Judge