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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 PIXION, INC.,

No. C 09-03496 SI

9 Plaintiff,

10 v.

**ORDER OVERRULING PLAINTIFF'S
OBJECTION TO TAXATION OF COSTS;
VACATING HEARING**

11 CITRIX SYSTEMS, INC., and CITRIX
12 ONLINE, LLC.

13 Defendants.
14 _____/

15 Now before the Court is plaintiff's objection to the taxation of certain costs under Federal Rule
16 of Civil Procedure 54(b)(1). Defendants have opposed the objection, and plaintiff has filed a reply.
17 Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for disposition without oral
18 argument and therefore VACATES the hearing. Having considered the parties' arguments, the Court
19 hereby OVERRULES plaintiff's objection, for the reasons set forth below.

20 **BACKGROUND**

21 Plaintiff Pixion sued defendants (collectively "Citrix") for patent infringement. Citrix filed
22 counterclaims for declaratory relief alleging non-infringement, invalidity, and unenforceability of the
23 patents due to Pixion's purported inequitable conduct. On March 8, 2012, the Court granted Pixion's
24 motion for judgment on the pleadings as to one of Citrix's counterclaims, finding that Pixion did not
25 engage in inequitable conduct. *See* Dkt. 113. On August 13, 2012, the Court granted summary
26 judgment for Citrix on the remaining patent invalidity and non-infringement claims. *See* Dkt. 178. On
27 August 28, 2012, Pixion filed a notice of appeal to the Federal Circuit. Citrix filed a Bill of Costs on
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1 August 30, 2012, seeking taxable costs in the amount of \$91,137.74, which it later reduced to
2 \$87,596.52. Dkts. 182, 189, 194. Pixion filed an objection to the Bill of Costs. Dkt. 192.

3 On January 14, 2013, the Clerk of the Court reduced taxable costs to \$45,330.36, disallowing
4 \$41,980.27 as “unrecoverable under Civil Local Rule 54-1(a),” with no further explanation.

6 LEGAL STANDARD

7 Pursuant to Federal Rule of Civil Procedure 54(d), costs incurred by the prevailing party may
8 be assessed against the losing party as of course and may be taxed by the clerk. “Unless a federal
9 statute, these rules, or a court order provides otherwise, costs – other than attorney’s fees – should be
10 allowed to the prevailing party.” Fed. R. Civ. P. 54(d)(1). The rule creates a presumption in favor of
11 awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs.
12 *Association of Mexican-American Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000) (citing
13 *National Info. Servs. Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471 (9th Cir. 1995)).

14 28 U.S.C. § 1920 “enumerates the expenses that a federal court may tax as a cost under the
15 discretionary authority found in Rule 54(d).” *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437,
16 441-42 (1987). Civil Local Rule 54-3 provides additional “standards for interpreting the costs allowed
17 under section 1920.” *Intermedics v. Ventritex, Co.*, No. C-90-20233, 1993 WL 515879 (N.D. Cal. Dec.
18 2, 1993). Additionally, “it is incumbent upon the losing party to demonstrate why the costs should not
19 be awarded.” *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999).

21 DISCUSSION

22 Citrix has not objected to the Clerk’s disallowance of \$41,980.27.¹ Instead, the instant motion
23 concerns only Pixion’s objection to \$3,013.53 in costs associated with the service of a deposition
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25
26 ¹ A district court reviews the Clerk’s taxation of costs de novo. *Lopez v. San Francisco Unified*
27 *Sch. Dist.*, 385 F.Supp.2d 981, 1000–1001 (N.D. Cal. 2005). Upon review, these costs were properly
28 disallowed by the Clerk as they improperly included paralegal and staff labor costs, travel costs, and
vague, unsupported document production processing costs. *See James Decl.*, Ex. 1 (Dkt. 194-2).

1 subpoena on Joseph Salesky, the first named inventor of the patents-in-suit and founder and first CEO
2 of PictureTalk, the predecessor of Pixion.² Pixion contends that Salesky was “lawfully served” at 4:51
3 p.m. on January 27, 2012, when Salesky fled while a process server attempted service on him. Thus,
4 the 27.5 hours of “surveillance,” and associated fees amounting to \$3,013.53, which all occurred after
5 the date and time in question, should not be recoverable. In other words, in Pixion’s view this “extra”
6 time and money was not necessary because service had already effectively been accomplished.

7 According to Citrix, it engaged First Legal Solutions to conduct surveillance on Salesky outside
8 his place of business in order to serve the subpoena on him. On the day and time in question, the
9 investigator identified and approached Salesky, addressed him by name and showed Salesky a photo
10 of himself:

11 Observed subject, who matched the picture given by client, exiting the elevator in
12 the main lobby. I then approached subject and called out his name, he replied I am not
13 Joseph Salesky. I the[n] showed him the photo that I had in my hand, I announced
14 service and placed documents at his feet. Subject then bolted out the door towards the
15 parking lot. As I followed after subject. All I heard was screeching tires but did not see
16 an actual vehicle.

17 Dkt. No. 194-20, Ahearn Decl. Ex. 6, at 1. Subsequently, on January 28-29, investigators waited for
18 Salesky outside his home, and on January 29, 2012 at 3:32 p.m., an investigator personally served
19 Salesky as he exited his home towards a car parked in his driveway. *Id.* at 3-4. Pixion contends that
20 by placing the documents at Salesky’s feet days earlier, service had been lawfully accomplished and that
21 no further efforts were necessary.

22 The Court disagrees. Pixion misstates the issue. The issue is not whether the January 27, 2012
23 attempt was effective service, and the Court declines to take a position on that issue. Instead, Civil
24 Local Rule 54-3(a)(2) provides that service costs are “allowable to the extent *reasonably* required and
25 actually incurred.” (emphasis added). The issue here is whether it was reasonable for Citrix to make
26 additional efforts subsequent to the January 27, 2012 attempt.

26 ² In its motion, Pixion objected to the entirety of the costs of serving Salesky – \$3,802.53 – and
27 to \$251.70 and \$295.80 for the service of other subpoenas. *See* Doc. 196. However, Pixion withdrew
28 these objections in its reply and now objects only to a portion of the Salesky service costs.


1 The Court concludes that it was reasonable under the circumstances. First, as detailed in Citrix's
2 papers, Salesky had attempted to frustrate service of process several times before. *See* Dkt. 198 at 4.
3 Second, the cases primarily relied upon by Pixion, which generally relate to the service of a summons
4 and complaint, do not rebut Citrix's position that its actions in attempting to serve a *subpoena* in this
5 case were reasonable. In each of those cases, plaintiff sought to prove that it had technically served a
6 summons and complaint on an unwilling defendant. *See, e.g., Doe v. Qi*, 349 F.Supp.2d 1258, 1275
7 (N.D. Cal. 2004); *Travelers Casualty and Surety Co. v. Brenneke*, 551 F.3d 1132, 1136 (9th Cir. 2009).
8 The subpoena at issue here sought to compel a third party witness to appear at deposition, and the
9 question is not whether service occurred, but whether the costs incurred in the various attempts at
10 service were reasonable. Unlike a plaintiff serving a summons and complaint, Citrix had little incentive
11 to later argue it technically completed service by dropping the papers at Salesky's feet. Instead, Citrix's
12 goal was to actually compel Salesky to appear and provide testimony. Having found him previously
13 uncooperative, and having had him flee days prior, the Court finds that the service costs were reasonably
14 required. This is not to say that third party subpoenas are subject to a heightened notice requirement
15 beyond what is required by the Federal Rules of Civil Procedure. Rather, the Court holds only that
16 under Civil Local Rule 54-3(a)(2), it was reasonable for Citrix to incur these costs through its aggressive
17 surveillance efforts, given the nature of Salesky's prior conduct and the purpose Citrix sought to achieve
18 through service, that of compelling Salesky's appearance.

19
20 **CONCLUSION**

21 For the foregoing reasons, the Court hereby DENIES Pixion's motion for reversal. Defendant
22 shall be awarded \$45,330.36 in costs.

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24 **IT IS SO ORDERED.**

25 Dated: March 20, 2013

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28 SUSAN ILLSTON
United States District Judge