

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

DATEL HOLDINGS LTD,

No. C-09-05535 EDL

Plaintiff,

ORDER RE: SHIFTING FEES AND COSTS

v.

MICROSOFT CORPORATION,

Defendant.

At a hearing on May 6, 2011, the Court granted Defendant’s Motion for Leave to File Second Amended Answer, Affirmative Defenses and Counterclaims, and inquired about its authority to shift fees and costs as a condition. The Court gave the parties leave to file briefs regarding whether there was authority for shifting fees and costs that Plaintiff will incur for discovery into the new issues raised in Defendant’s amended answer.¹ Plaintiff filed its brief on May 13, 2011, and Defendant filed its brief on May 20, 2011. The Court has reviewed the parties’ arguments and legal authority, and concludes that it is proper and appropriate to shift certain limited fees and costs in this case.

Courts have the authority to shift fees or costs. See General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1514 (9th Cir. 1995) (“A district court, in its discretion, may impose costs pursuant to Rule 15 as a condition of granting leave to amend in order to compensate the opposing party for additional costs incurred because the original complaint was

¹ At the hearing, Defendant stated that it wished to move ahead with discovery on the new issues raised in the amended answer regardless of the Court’s ruling on the cost-shifting issue.

1 faulty.”); see also Firchau v. Diamond Nat’l Corp., 345 F.2d 269, 275 (9th Cir. 1965) (“In the
2 exercise of its discretion in acting upon such a motion the district court may, if it grants the motion,
3 prescribe as a condition reasonable terms compensating appellee for any loss or expense occasioned
4 by Firchau’s failure to file adequate pleadings in the first instance.”). Defendant argues that these
5 cases do not allow the shifting of fees and costs absent a showing that the original pleading was
6 defective. The Court, however, interprets them as applying a more general analysis which balances
7 the equities based on the specific facts of each case, rather than creating a rule that a defective
8 original pleading is a necessary predicate for imposition of payment of costs or fees. In fact, “the
9 most common condition imposed on an amending party is costs. An amendment frequently will
10 force other parties to undertake additional preparation in order to meet the new issues or theories
11 that are asserted. . . . If this preparation results in further expense, the court may order that the
12 amending party bear part or all of it.” 6 Wright & Miller, Federal Practice and Procedure, § 1486 at
13 p. 694 (2010).

14 Here, Plaintiff argues that the Court should shift to Defendant all of Plaintiff’s fees and costs
15 that will be incurred as a result of the filing of the amended answer because Defendant unduly
16 delayed in seeking amendment. Defendant, however, argues that any shifting of fees or costs is not
17 appropriate because it did not delay in seeking amendment. The issue of delay was extensively
18 briefed and argued at the May 6, 2011 hearing in connection with Defendant’s Motion for Leave to
19 File a Second Amended Answer. As the Court stated at that hearing, it was a “close question as to
20 whether there was any undue delay or not. . . and enough good cause” to grant Defendant’s motion
21 for leave to amend. Given that very close question, and after weighing the specific circumstances of
22 this case, the Court concludes that it would be fair and equitable to shift some of Plaintiff’s costs and
23 fees to Defendant. The late amendment, made after discovery closed, caused inefficiencies and
24 increased the burden on Plaintiff.

25 Plaintiff argues that the Court should shift all of its attorney’s fees for time traveling to and
26 from depositions of witnesses who were already deposed, and for the time actually spent in those
27 depositions. Plaintiff also seeks 50% of the attorney’s fees incurred in document collection,
28 document review and deposition preparation going forward. Defendant argues that any fee-shifting

1 would be improper because it would result in collateral litigation as to what fees were reasonable.
2 Plaintiff also seeks reimbursement of costs for court reporter and videographer expenses, for travel
3 to and from any re-depositions and for document collection and review.

4 Defendant argues generally that none of the fees and costs sought by Plaintiff are attributable
5 to any delay by Defendant in bringing its new counterclaims and so they should not be shifted. See
6 Miller v. Union Pac. R.R., 2008 WL 4271906, at *6 (D. Kan. Sept. 12, 2008) (declining to award
7 fees and costs where the scope of the case would not be radically changed by the new claims and
8 there was no prejudice that could not be cured by further discovery and there was no undue delay).
9 First, Defendant argues that there is no basis for awarding attorney's fees for document collection or
10 review because Plaintiff would have had to incur those fees anyway. Plaintiff counters persuasively
11 that had the counterclaims been part of the original lawsuit, document collection and review would
12 have taken longer, but not as long as it will take now that attorneys must re-familiarize themselves
13 with the issues and documents. It would have been much more efficient for Plaintiff to review its
14 documents once, and Plaintiff will incur fees that would not have been necessary had the
15 amendments been made earlier in the case. However, the Court is not convinced that document
16 collection and review will take half as much time as it initially did. Therefore, the Court concludes
17 that Plaintiff is entitled to recover 20% of its reasonable attorneys' fees for document collection and
18 review related to the amendments from Defendant.

19 Second, Defendant argues that Plaintiff would have incurred the same fees and costs for
20 travel to and from depositions even if Defendant had brought the counterclaims sooner. But if the
21 counterclaims had been brought earlier, Plaintiff's counsel would not have incurred fees for travel
22 time to make a second trip for depositions. Thus, the Court concludes that Plaintiff is entitled to
23 recover from Defendant its fees and costs for traveling to and from depositions of witness who have
24 already been deposed, except for those fees and costs related to the re-deposition of Paul Armitt,
25 who would have been re-deposed even if the motion to amend had been denied. Defendant need
26 only pay the costs for economy class travel, not business class accommodations. The Court declines
27 to shift any fees for the time spent in the depositions. That time would likely have been spent in
28 depositions regardless of when Defendant brought the counterclaims.

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Third, Defendant argues that it should not have to pay for the court reporter or videographer costs of any re-depositions. Defendant persuasively argues that the most significant charge for these services is the length of time spent at the deposition and the length of the transcript, so any court reporter or videographer fees would have been incurred anyway even if the claims had been filed before the depositions. Thus, Plaintiff is not entitled to cost-shifting for court reporters or videographers used for the re-depositions.

IT IS SO ORDERED.

Dated: June 17, 2011



ELIZABETH D. LAPORTE
United States Magistrate Judge