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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 TODD L. ASHKER,

No. 05-03759 CW

9 Plaintiff,

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
REVIEW OF CLERK'S  
TAXATION OF COSTS AND  
FOR OUT-OF-POCKET  
EXPENSES UNDER 42  
U.S.C. § 1988 AND  
GRANTING PLAINTIFF'S  
MOTION FOR EXTENSION  
OF TIME TO FILE REPLY  
(Docket Nos. 494, 499)

10 v.

11 MICHAEL SAYRE, et al.,

12 Defendants.  
13 \_\_\_\_\_/

14  
15 In this civil rights case, Plaintiff Todd L. Ashker moves for  
16 review of the clerk's taxation of costs entered on March 10, 2010  
17 (Docket # 452) and for the recovery of out-of-pocket expenses  
18 pursuant to 42 U.S.C. § 1988. Defendants Michael Sayre and Matthew  
19 Cate have filed an opposition and a supplemental opposition.<sup>1</sup> The  
20 matter was taken under submission on the papers. Having considered  
21 all the papers filed by the parties, the Court grants Plaintiff's  
22 motion, in part.  
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24 BACKGROUND

25 On February 4, 2010, judgment was entered against Defendant  
26 Sayre on Plaintiff's claims for violation of the Eighth Amendment  
27 \_\_\_\_\_

28 <sup>1</sup>Plaintiff's motion for an extension of time to file his reply  
is granted. (Docket No. 499).

1 guarantee against deliberate indifference to Plaintiff's serious  
2 medical needs and for medical malpractice and against Defendant  
3 Cate on Plaintiff's claim for breach of contract. Plaintiff  
4 subsequently submitted a bill of costs to the Clerk of the Court in  
5 the amount of \$14,570.78, to which Defendants objected. On March  
6 10, 2010, the Clerk entered a notice taxing costs in the amount of  
7 \$684.14. On May 29, 2010, Plaintiff filed a motion for an  
8 extension of time to move for review of the Clerk's taxation of  
9 costs and to move for recovery of out-of-pocket expenses pursuant  
10 to 42 U.S.C. § 1988. Defendant Sayre opposed on the ground that  
11 the motion was untimely. On July 29, 2010, the Court entered an  
12 order granting Plaintiff's motion, finding good cause to allow  
13 Plaintiff to seek review of the Clerk's cost award because he was  
14 proceeding pro se.<sup>2</sup>

15 LEGAL STANDARD

16 Two statutes govern the award of costs in this case: 28  
17 U.S.C. § 1920 concerns the taxation of costs in all cases and 42  
18 U.S.C. § 1988 concerns the taxation of costs in civil rights cases.  
19 Section 1920 permits the taxing of costs for:

- 20 (1) Fees of the clerk and marshal; (2) Fees for printed  
21 or electronically recorded transcripts necessarily  
22 obtained for use in the case; (3) Fees and disbursements  
23 for printing and witnesses; (4) Fees for exemplification  
24 and the costs of making copies of any materials where the  
25 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

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26 <sup>2</sup>Because the Court has already ruled that Plaintiff may file a  
27 late motion, it does not address Defendants' argument regarding  
timeliness.

1 this title.

2 Section 54-3 of the Local Civil Rules further specifies the  
3 costs that are taxable under § 1920.

4 Under 42 U.S.C. § 1988, the prevailing party in a civil rights  
5 case may recover those out-of-pocket expenses that would normally  
6 be charged by an attorney to a fee-paying client. Dang v. Cross,  
7 422 F.3d 800, 814 (9th Cir. 2005). The requested expenses must be  
8 reasonable. Id. Thus, even though requested expenses may not be  
9 taxable under § 1920, they may be allowable under § 1988. Harris  
10 v. Marhoefer, 24 F.3d 16, 20 (9th Cir. 1994).

11 DISCUSSION

12 I. Objection to Taxing of Costs Pursuant to 28 U.S.C. § 1920

13 A. Photocopies

14 Plaintiff originally requested reimbursement of \$1,670 for  
15 photocopying legal documents. The Clerk denied this request,  
16 referring to Civil Local Rule 54-3(d)(3), which provides that the  
17 cost of reproducing copies of motions, pleadings, notices and other  
18 routine case papers is not allowable. In his motion, Plaintiff  
19 requests reimbursement of only \$1,096 for copying because he  
20 deleted the costs associated with claims on which he did not  
21 prevail. In his declaration, Plaintiff states these are copies,  
22 for the most part, of motions, oppositions to Defendants' motions,  
23 and the declarations and exhibits accompanying the motions. The  
24 Clerk was correct in disallowing this cost request under Civil  
25 Local Rule 54-3(d)(3).

26 B. Witness Dr. Everett Allen's Travel Expenses

27 Plaintiff originally requested \$2,500 as a witness fee and  
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1 \$430.68 to cover Dr. Allen's gas, tolls, rental car, parking and  
2 other expenses incurred in his traveling from Crescent City to  
3 Oakland to testify on Plaintiff's behalf. Plaintiff stated that  
4 Dr. Allen attended the trial for three days, accommodating other  
5 witnesses' schedules, before he was able to testify. The Clerk,  
6 citing Civil Local Rule 54-3(e), partially disallowed the \$2,500,  
7 awarding \$120 for the three days Dr. Allen attended the trial. The  
8 Clerk partially disallowed the \$430.68, awarding \$189.14 for gas,  
9 tolls, rental car and parking. Plaintiff requests that, under  
10 § 1920, the Court award him the \$241.54 disallowed by the Clerk.

11 Civil Local Rule 54-3(e) governs witness expenses:

12 Per diem, subsistence and mileage payments for witnesses  
13 are allowable to the extent reasonably necessary and  
14 provided for by 28 U.S.C. § 1821. No other witness  
expenses, including fees for expert witnesses, are  
allowable.

15 Section 1821 provides that witnesses are to be paid an  
16 attendance fee of forty dollars for each day attending the trial,  
17 and for the time necessarily occupied in going to and returning  
18 from the place of attendance at the beginning and end of such  
19 attendance. 28 U.S.C. § 1821(b). Witnesses shall also receive a  
20 travel allowance for mileage and reimbursement for toll roads,  
21 bridges, tunnels, and parking. 28 U.S.C. § 1821(c)(2) and (3).

22 The Court has reviewed the receipts submitted by Dr. Allen.  
23 They all relate to his attendance at Plaintiff's trial and appear  
24 to be reasonable and allowable under § 1821(c)(2) and (3). The  
25 disallowed costs in the amount of \$241.54 are allowed for Dr.  
26 Allen's witness expenses. Because Dr. Allen traveled from Crescent  
27 City to Oakland to testify at the trial and then traveled back to  
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1 Crescent City, the Court awards an additional eighty dollars  
2 attendance fee for the two days of traveling. Therefore, an  
3 additional \$321.54 in costs is allowed for Dr. Allen, for a total  
4 of \$630.68 (\$120 for three days attendance at trial allowed by the  
5 Clerk; \$189.14 for costs allowed by the Clerk; \$241.54 for  
6 disallowed costs that the Court allows; and an eighty dollar  
7 attendance fee for two days of travel time).

8 C. Two Trial Transcripts

9 In Plaintiff's June 19, 2009 declaration submitted in support  
10 of his motion for taxation of costs, he explained that, because he  
11 understood that transcripts of Dr. Duncan's trial testimony and of  
12 Plaintiff's cross-examination testimony had been ordered, he felt  
13 it prudent to obtain copies of these transcripts also. He  
14 submitted the invoice for the two transcripts in the amount of  
15 \$50.10. The Clerk denied this request, citing Civil Local Rule 54-  
16 3(b)(3), which provides that, with two exceptions not relevant  
17 here, the cost of transcripts is not normally allowable unless,  
18 before it is incurred, it is approved by a judge or stipulated to  
19 be recoverable by counsel.

20 Section 1920(2) provides that fees for printed transcripts  
21 necessarily obtained for use in the case are taxable. The Court  
22 finds that these two transcripts were necessarily obtained for use  
23 in the case and allows the \$50.10 as a taxable cost.

24 II. Out-of-Pocket Expenses Under 42 U.S.C. § 1988

25 A. Photocopying of Motions, Oppositions, Exhibits, etc.

26 Pursuant to § 1988, Plaintiff again requests the reimbursement  
27 of \$1,096 he spent for photocopying motions, oppositions and  
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1 accompanying declarations and exhibits. Plaintiff states the cost  
2 is reasonable in that he only made two copies of each document, one  
3 for opposing counsel and one for himself, and sent the original to  
4 the Court for filing. Pelican Bay State Prison (PBSP) charges ten  
5 cents per page for photocopying and, with his reply, Plaintiff  
6 submits receipts from PBSP for the photocopying.

7 Defendants argue that \$1,096 for photocopying is unreasonable  
8 because, at ten cents per page, Plaintiff would have photocopied  
9 over 10,000 pages. Defendants also argue that Plaintiff's  
10 description of his request is not clear and that he does not  
11 provide evidence of these expenses. However, as mentioned  
12 previously, with his reply, Plaintiff provides receipts for  
13 photocopying, totaling approximately \$1,088. This is adequate  
14 documentation. Also, in his reply, Plaintiff requests an  
15 additional \$3.60 for photocopying his reply and declaration.

16 The costs of reproducing pleadings, motions and exhibits are  
17 typically billed by attorneys to their fee-paying clients.  
18 Although the number of pages claimed by Plaintiff is large, the  
19 Court notes that, because he is an inmate, Plaintiff must handwrite  
20 all his pleadings and motions, which requires more pages than  
21 typescript. Furthermore, this case was fiercely litigated by  
22 Defendants, requiring Plaintiff to file many motions and  
23 oppositions. Therefore, the Court finds that the \$1,099.60  
24 requested for photocopying is reasonable and is allowable under §  
25 1988.

26 B. Postage

27 Plaintiff requests reimbursement for postage in the amount of  
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1 \$150. In his reply, Plaintiff requests an additional \$3.12 for  
2 postage to mail his reply brief and declaration to defense counsel  
3 and the Court. Plaintiff states that he has no receipts for  
4 postage because PBSP does not provide such receipts. Defendants  
5 oppose this on the ground that Plaintiff fails to present evidence  
6 that postage costs are normally charged to a fee-paying client and  
7 that he fails to present evidence of the postage rate and explain  
8 how he arrived at an estimate of \$150. The Court notes that this  
9 case is more than five years old, and has been heavily litigated  
10 during that time. Plaintiff has filed and served many documents,  
11 some of which consist of many pages. Therefore, the Court finds  
12 that \$153.12 is a reasonable amount for postage and that it is the  
13 type of expense that would be billed by an attorney to a fee-paying  
14 client. Therefore, \$153.12 is allowed for postage.

15 C. Dr. Weinstein's Assistance

16 Plaintiff requests reimbursement in the amount of \$6,480 for  
17 the services of Dr. Corey Weinstein. On January 22, 2007, Dr.  
18 Weinstein performed a physical examination of Plaintiff, reviewed  
19 medical documents and reported his findings; in February, 2008, Dr.  
20 Weinstein reviewed documents, and wrote a declaration supporting  
21 Plaintiff's opposition to Defendants' motion for summary judgment;  
22 in March, 2009, Dr. Weinstein reviewed documents and prepared for  
23 his deposition by opposing counsel; and, in May, 2009, Dr.  
24 Weinstein testified at Plaintiff's trial. Plaintiff argues that  
25 Dr. Weinstein's services were reasonable, necessary and the type  
26 normally charged to fee-paying clients.

27 In Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437,  
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1 439 (1987), the Supreme Court held that expert witness fees are  
2 only recoverable pursuant to a contract or statutory authority. In  
3 1991, the Supreme Court held that § 1988 did not authorize the  
4 shifting of expert witness fees to the losing party. West Virginia  
5 Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 102 (1991). After Casey,  
6 Congress amended § 1988 to provide for the recovery of expert  
7 witness fees in cases brought under 42 U.S.C. §§ 1981 and 1981a.  
8 See 42 U.S.C. § 1988(c) ("In awarding an attorney's fee  
9 . . . in any action or proceeding to enforce a provision of section  
10 1981 or 1981a of this title, the court, in its discretion, may  
11 include expert fees as part of the attorney's fee."). Claims  
12 brought under § 1983 are not covered by this amendment. Ruff v.  
13 County of Kings, 700 F. Supp. 2d 1225, 1243 (E.D. Cal. 2010);  
14 Agster v. Maricopa County, 486 F. Supp. 2d 1005, 1019 (D. Ar. 2007)  
15 (because Congress did not amend § 1988 to include § 1983 cases, the  
16 Casey decision stands in regard to § 1983 cases).

17 The Court finds the reasoning in Ruff and Agster persuasive.  
18 Therefore, Plaintiff's request for expert witness fees for Dr.  
19 Weinstein is disallowed. The Court notes that the Clerk of the  
20 Court properly taxed costs applicable to Dr. Weinstein's testimony  
21 as a trial witness.

22 D. Dr. Allen's Assistance.

23 Plaintiff requests reimbursement of \$2,500 paid to Dr. Allen  
24 for his testimony as a percipient witness. Because Dr. Allen was a  
25 percipient witness, § 1920 applies to reimbursement of costs  
26 relating to his attendance at trial. As discussed above, costs for  
27 Dr. Allen's appearance as a witness were awarded under § 1920.



1 E. Attorney Herman Franck's Assistance

2 Plaintiff requests reimbursement of \$2,000 paid to Attorney  
3 Franck for his assistance with "confidential, timely contact with  
4 Drs. Weinstein and Allen, necessary in order for Plaintiff to  
5 obtain the doctors' document reviews, declarations, physical exam  
6 and reports; especially with Plaintiff's regular mail communication  
7 problems." Reply at 9. He argues that Mr. Franck acted as a  
8 paralegal, and paralegal fees are reimbursable under § 1988.  
9 Defendants argue that paralegal fees are not reimbursable under  
10 § 1988 and, in any event, Plaintiff fails to provide evidence of a  
11 contract between himself and Mr. Franck or that the fee of \$2,000  
12 was reasonable or an explanation of why Mr. Franck's services were  
13 necessary.

14 Plaintiff responds that he presented evidence of the \$2,000 he  
15 paid Mr. Franck with his declaration submitted with his June 19,  
16 2009 motion for taxation of costs. In that declaration, Plaintiff  
17 attests to the assistance Mr. Franck rendered, as quoted above from  
18 his reply. Attached to the declaration is a copy of a February 20,  
19 2008 letter from Mr. Franck to Plaintiff stating that Mr. Franck  
20 has been spending a great deal of time communicating with Drs.  
21 Weinstein and Allen and requesting payment. On the letter is a  
22 handwritten note from Plaintiff stating, "Agreed to \$2,000 for  
23 assistance." In his present declaration, Plaintiff states that he  
24 wrote to Mr. Franck requesting him to file a declaration indicating  
25 he was paid, but he has not done so.

26 It appears that Mr. Franck was functioning as a paralegal in  
27 this case, rather than as an attorney, and fees for his paralegal  
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1 services would be reimbursable. See Perez v. Cate, \_\_\_ F.3d \_\_\_,  
2 2011 WL 149869, \*1 (9th Cir.) (paralegal fees are reimbursable  
3 under § 1988 but are subject to a fee cap under the Prison  
4 Litigation Reform Act (PLRA), 42 U.S.C. § 1997e). The PLRA allows  
5 an award for paralegal fees of up to \$169.50 per hour, which is  
6 below the market rate for paralegal work in the San Francisco Bay  
7 Area. Id. at \*4.

8 In order for Mr. Franck to earn \$2,000 at the hourly rate of  
9 \$169.50, he would have had to work 11.8 hours. The Court finds  
10 that, over the course of the five years that this case has been  
11 litigated, it would be reasonable for Mr. Franck, acting as a  
12 paralegal, to have spent at least 11.8 hours communicating with and  
13 making logistical arrangements for Drs. Weinstein and Allen.

14 Therefore, the Court concludes that the \$2,000 is reasonable  
15 and allowable under § 1988.

16 F. State Tort Claim Filing Fee

17 Plaintiff requests reimbursement of twenty-five dollars for  
18 filing his state tort claim. Plaintiff cites no authority holding  
19 that this cost is reimbursable under § 1920 or § 1988, and the  
20 Court knows of none. Therefore, this expense is disallowed.

21 CONCLUSION

22 Based on the foregoing, Plaintiff's motion for an extension of  
23 time to file a reply is granted (docket no. 499) and Plaintiff's  
24 motion for costs and expenses is granted in part and denied in part  
25 (docket no. 494). Under § 1920, Plaintiff is awarded additional  
26 costs in the amount of \$291.64, for a total of \$975.78, and under  
27 § 1988, Plaintiff is awarded out-of-pocket expenses in the amount

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1 of \$3,252.72. Defendants shall pay these amounts to Plaintiff  
2 within fourteen days from the date of this order.

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4 IT IS SO ORDERED.

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6 Dated: 3/7/2011

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CLAUDIA WILKEN  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 ASHKER,

5 Plaintiff,

6 v.

7 ALAMEIDA ET AL et al,

8 Defendant.

Case Number: CV05-03759 CW

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,  
10 Northern District of California.

11 That on March 7, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)  
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in  
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's  
14 office.

15 Todd A. Ashker C58191  
16 Pelican Bay State Prison  
17 Box 7500  
18 D1-119  
19 Crescent City, CA 95532

20 Dated: March 7, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk

United States District Court  
For the Northern District of California