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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHOENIX TECHNOLOGIES LTD.,
Plaintiff,
v.
VMWARE, INC.,
Defendant.

Case No. [15-cv-01414-HSG](#)

**ORDER GRANTING IN PART AND
DENYING IN PART VMWARE'S
MOTION FOR REVIEW OF CLERK'S
TAXATION OF COSTS**

Re: Dkt. No. 497

Pending before the Court is a motion for review of the Clerk's taxation of costs by Defendant VMWare, Inc. Dkt. No. 497. For the reasons set forth below, the Court grants in part and denies in part Defendant's motion.

I. BACKGROUND

A. Procedural History

Plaintiff Phoenix Technologies, Ltd. initially filed this lawsuit on March 27, 2015. Dkt. No. 1 ("Complaint" or "Compl."). The case arose out of Defendant's alleged unauthorized use of certain computer programs that Plaintiff licensed to Defendant "for limited purposes." *See id.* ¶ 1. Plaintiff alleged copyright infringement, *id.* ¶¶ 84–97, contributory infringement of copyright, *id.* ¶¶ 98–109, and breach of contract, *id.* ¶¶ 110–17. The parties filed cross-motions for summary judgment in July 2016. *See* Dkt. Nos. 121, 129. On January 6, 2017, the Court denied Plaintiff's motion for summary judgment and largely denied Defendant's motion for summary judgment, granting it only as to Plaintiff's contract claims. Dkt. No. 222 at 16–17.

A two-week jury trial was held beginning on May 30, 2017. On June 12, 2017, the jury reached a verdict after four hours of deliberations, Dkt. No. 450-1, finding that Defendant was not liable for copyright infringement or contributory copyright infringement, and that even if it were, Plaintiff had waived any such claims against Defendant, *see* Dkt. No. 438. The Court entered

1 judgment on August 3, 2017. Dkt. No. 458.

2 On August 17, 2017, Defendant timely filed its motion for attorney’s fees and costs
3 pursuant to Civil Local Rule 54-5. Dkt. No. 462. On August 31, 2017, Plaintiff timely filed its
4 motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), and its
5 motion for a new trial under Federal Rule of Civil Procedure 59. Dkt. No. 467. The Court denied
6 both motions on February 12, 2018. *See* Dkt. No. 494.

7 **B. Defendant’s Second Amended Bill of Costs**

8 Defendant filed a second amended Bill of Costs on September 20, 2017, seeking
9 \$900,951.22. Dkt. No. 483 at 2. Plaintiff objected to \$708,076.10 of those costs. Dkt. No. 486 at
10 5. On February 14, 2018, the Clerk taxed costs in the amount of \$187,626.44, disallowing
11 \$713,324.78. Dkt. No. 496 at 2.

12 On February 21, 2018, Defendant filed a motion for review of the Clerk’s taxation of costs.
13 Dkt. No. 497 (“Mot.”). Plaintiff filed an opposition on March 7, 2018, Dkt. No. 499 (“Opp.”), and
14 Defendant replied on March 14, 2018. Dkt. No. 500 (“Reply”). In response to the Court’s order,
15 Dkt. No. 501, the parties filed a joint exhibit summarizing the costs Defendant seeks to which
16 Plaintiff objects. *See* Dkt. No. 502.

17 **II. LEGAL STANDARD**

18 Under 28 U.S.C. § 1920, the Clerk of Court may tax costs for the following:

- 19
- 20 (1) Fees of the clerk and marshal;
 - 21 (2) Fees for printed or electronically recorded transcripts necessarily
22 obtained for use in the case;
 - 23 (3) Fees and disbursements for printing and witnesses;
 - 24 (4) Fees for exemplification and the costs of making copies of any
25 materials where the copies are necessarily obtained for use in the
26 case;
 - 27 (5) Docket fees under section 1923 of this title;
 - 28 (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.

26 “Although ‘costs’ has an everyday meaning synonymous with ‘expenses,’ the concept of
27 taxable costs under Rule 54(d) is more limited and represents those expenses, including, for
28 example, court fees, that a court will assess against a litigant.” *Taniguchi v. Kan Pac. Saipan,*

1 *Ltd.*, 566 U.S. 560, 573 (2012) (quoting 10 C. Wright, A. Miller, & M. Kane, Federal Practice and
2 Procedure § 2666, pp. 202–203 (3d ed.1998)). Federal Rule of Civil Procedure 54(d)(1) “creates a
3 presumption” that costs, other than attorneys’ fees, shall generally be allowed to the prevailing
4 party as a matter of course. *Ass’n of Mexican-Am. Educators v. State of Cal.*, 231 F.3d 572, 591
5 (9th Cir. 2000) (en banc). It also “vests in the district court discretion to refuse to award costs,”
6 although such discretion “is not unlimited.” *Id.* (citation omitted). Civil Local Rule 54-3 further
7 provides standards for interpreting the categories of costs set forth in Section 1920.

8 With respect to costs, Rule 54 “places the burden on the losing party to demonstrate why
9 costs should not be awarded.” *Velasquez v. Donahue*, No. C 11-03444 JSW, 2014 WL 1018068,
10 at *1 (N.D. Cal. Mar. 12, 2014) (citing *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir.
11 1999)). The party seeking costs, however, “bears the burden of establishing the amount of
12 compensable costs and expenses to which it is entitled.” *Id.* (citation, internal quotation marks,
13 and brackets omitted).

14 The Clerk’s taxation of costs is reviewed de novo. *See Lopez v. S.F. Unified Sch. Dist.*,
15 385 F. Supp. 2d 981, 1001 (N.D. Cal. 2005).

16 **III. DISCUSSION**

17 Defendant initially sought \$900,951.22 in costs, of which the Clerk allowed \$187,626.44
18 and disallowed \$713,324.78. Dkt. No. 496 at 2. In its motion, Defendant decreased that amount
19 by \$97.50 to avoid a potential double recovery for a witness travel expense, bringing its total
20 request to \$900,853.72. *See* Mot. at 2 n.2. In reply, Defendant withdrew a request for \$4,883.56
21 in airfare costs, bringing its total request to \$895,970.16. Reply at 12. Plaintiff, for its part,
22 requests that the Court lower the amount of fees taxed from \$187,626.44 to \$115,714.56. *See*
23 Opp. at 1.

24 The Court accordingly considers each category in which the Clerk disallowed costs.

25 **A. Fees of the Clerk and for Service of Process**

26 Defendant sought \$5,901.55 in costs related to service of process, which the Clerk
27 disallowed in its entirety as “outside the ambit of Civil L.R. 54-3.” *See* Dkt. No. 496 at 1.
28 Defendant now seeks its full costs in this category, *see* Mot. at 12, which Plaintiff contends were

1 “properly disallowed,” *see* Opp. at 2.

2 Civil Local Rule 54-3(a)(2) permits recovery of fees for service of process “to the extent
3 reasonably required and actually incurred.” *See also Alflex Corp. v. Underwriters Labs., Inc.*, 914
4 F.2d 175, 178 (9th Cir. 1990) (holding that “private process servers’ fees are properly taxed as
5 costs,” including “fees for serving a subpoena or summons”). Civil Local Rule 54-3(e) allows per
6 diem, subsistence, and mileage payments for witnesses who appear at a deposition “to the extent
7 reasonably necessary.” *See also* 28 U.S.C. § 1821. At the outset, regardless of how broadly
8 Defendant argues the “reasonably required” standard ought to be construed, it has failed to carry
9 its burden “of establishing the amount of compensable costs and expenses to which it is entitled.”
10 *See Velasquez*, 2014 WL 1018068, at *1. Schedule A only sets forth invoices enumerating costs
11 related to subpoenas for trial, subpoenas for depositions, and the related witness fees. *See* Dkt.
12 No. 483-2 (“Schedule A”). There is nothing in Schedule A that shows (or even purports to show)
13 that the costs therein were “reasonably required.”

14 While it may be true that Rule 54 creates a presumption that the prevailing party is entitled
15 to costs, it is also true that such party has an obligation to establish that entitlement. Defendant
16 has done nothing to do so here. Accordingly, the Court **DENIES** Defendant’s challenge to the
17 Clerk’s decision regarding service of process fees and finds that the Clerk properly disallowed
18 these costs.

19 **B. Reporters’ Transcripts**

20 Defendant sought \$11,970.36 in costs related to transcripts for appeal, which the Clerk
21 disallowed in its entirety as outside the ambit of the local rule. *See* Dkt. No. 496 at 1.¹ Defendant
22 seeks its full costs in this category, *see* Mot. at 8–9, which Plaintiff again contends were “properly
23 disallowed,” *see* Opp. at 4.

24 Civil Local Rule 54-3(b)(1) permits taxation of “[t]he costs of transcripts necessarily
25 obtained for an appeal.” The same rule also provides that “[t]he cost of other transcripts is not
26 normally allowable unless, before it is incurred, it is approved by a Judge or stipulated to be

27 _____
28 ¹ The Clerk allowed all \$136.80 requested by Defendant for rulings from the bench under Civil
L.R. 54-3(b)(3), which Plaintiff does not appear to dispute. *See* Dkt. No. 502 Ex. A at 1.

1 recoverable by counsel.” Civil L.R. 54-3(b)(3). “Courts in the Northern District generally allow
2 for recovery of costs for one copy of the trial transcript.” *Apple Inc. v. Samsung Elecs. Co., Ltd.*,
3 No. 11-CV-01846, 2014 WL 4745933, at *7 (N.D. Cal. Sept. 19, 2014) (citing *TransPerfect*
4 *Global, Inc. v. MotionPoint Corp.*, No. 10-02590, 2014 WL 1364792, at *3 (N.D. Cal. Apr. 4,
5 2014)). Moreover, “various courts in the Northern District tax the costs for pretrial hearing
6 transcripts for claim construction and summary judgment hearings.” *Id.* (citations omitted). And,
7 while the costs of other transcripts are not usually recoverable, parties “reasonably could incur the
8 expense of obtaining transcripts of all of the court proceedings” where a case is “contentiously
9 litigated, and the parties . . . often made arguments based on the words very recently spoken by
10 participants or by the court, sometimes using strained interpretations of the words or pulling them
11 out of context.” *Affymetrix, Inc. v. Multilyte Ltd.*, No. C-03-03779 WHA, 2005 WL 2072113, at
12 *2 (citing *Intermedics, Inc. v. Ventritex*, No. C-90-20233 JW (WDB), 1993 WL 515879, at *4
13 (N.D. Cal. Dec. 2, 1993)).

14 Defendant argues that “the complexity of the litigation, which involved complicated
15 technology, a factual record dating back nearly two decades, and the need for frequent briefing to
16 the Court during the course of the trial” made it necessary for it to obtain the transcripts for which
17 it now seeks to have the costs taxed. *See* Mot. at 8–9. Specifically, Defendant seeks costs related
18 to transcripts for two discovery dispute hearings, a motion to compel hearing, the hearing on the
19 motion for summary judgment, a case management conference, a charging conference, the pretrial
20 conference, and trial. *See* Dkt. No. 483-3 (“Schedule B”). Plaintiff counters that Defendant has
21 “failed to demonstrate the necessity of any of the hearing transcripts for which it seeks costs,” and
22 with respect to trial transcripts, further “fails to offer any justification beyond the ‘complexity of
23 the litigation.’” *Opp.* at 4–5.

24 The Court is satisfied that the cost of Defendant’s daily trial transcript ought to be taxed,
25 given the general practice in this district and the utility of such a transcript on appeal. *See Apple*,
26 2014 WL 4745933, at *7. The Court also finds, however, that such cost should be reduced by the
27 amount Defendant seeks for expedited, hourly, and real-time transcripts, as such services are not
28 necessary to bring an appeal. *See* Schedule B at 15; *see also TransPerfect*, 2014 WL 1364792, at

1 *4 (denying requests for costs for hourly and real-time transcripts, as well as additional copies,
2 because “any appeal would be weeks or months after the jury’s verdict, rendering hourly delivery
3 and real time services unnecessary and inappropriate for an award of costs”).

4 With respect to the remaining costs, the Court finds it appropriate to award \$262.65 for the
5 cost of the summary judgment transcript, in keeping with the practice of certain courts in this
6 district, *see Apple*, 2014 WL 4745933, at *7, and because the motion resolved Plaintiff’s contract
7 claims, *see* Dkt. No. 222 at 16–17. The Court is not persuaded, however, that Defendant is
8 entitled to costs for transcripts for the other hearings. In its reply brief, Defendant for the first time
9 characterizes this case as “fall[ing] squarely within the category of unusual suits where, in order to
10 protect itself, a party reasonably could incur the expense of obtaining transcripts of all of the court
11 proceedings” because the parties’ briefs “relied heavily on representations made by counsel during
12 hearings.” *See* Reply at 2 (citing *Affymetrix*, 2005 WL 207113, at *2). In support of that
13 assertion, Defendant cites a single motion in limine where the Court struck a theory posited by
14 Plaintiff and, in so doing, “heavily quoted representations made by counsel on the record at
15 hearings and the pretrial conference.” *Id.* (internal citations omitted). Defendant argues that
16 “[o]ther disputes and hearings were similarly contentious,” but provides no citations. *See id.*

17 Accordingly, the Court **ORDERS** Defendant to provide a final accounting, supported by
18 clear documentation, of the taxable cost of the trial transcripts. In accordance with the Court's
19 ruling, the accounting and documentation shall identify the costs of only the taxable transcripts as
20 described above, excluding the non-taxable costs incurred for expedited, hourly, and real-time
21 transcripts. The Court expects to see a figure representing what it would have cost to obtain the
22 daily trial transcript at the regular rate. Defendant must submit *only* this number and the backup
23 support for it; no further argument from either side is permitted on this (or any other) point.

24 **C. Depositions**

25 Defendant sought \$40,315.94 in costs related to deposition transcripts and video, of which
26 the Clerk allowed \$39,383.79 and disallowed \$932.15 as outside the ambit of the local rule. *See*
27 Dkt. No. 496 at 1. Defendant also sought \$2,601.25 in reporter attendance fees, which the Clerk
28

1 disallowed in its entirety as outside the ambit of the local rule. *See id.*² Defendant seeks its full
 2 costs in this category. *See Mot.* at 9–10. Plaintiff argues that Defendant’s taxable costs for
 3 deposition transcripts and video should be further reduced by \$5,367.50, and that its reporter
 4 attendance costs were properly disallowed. *See Opp.* at 8.

5 Civil Local Rule 54-3(c)(1) provides that “[t]he cost of an original and one copy of any
 6 deposition (including videotaped depositions) taken for any purpose in connection with the case is
 7 allowable.” The prevailing party may seek reimbursement for “a combination of any two copies,”
 8 in any format, so long as it “does not seek to claim costs for more than two copies of the
 9 transcript.” *Ancora Techs., Inc. v. Apple, Inc.*, No. 11-CV-06357 YGR, 2013 WL 4532927, at *6
 10 (N.D. Cal. Aug. 26, 2013). Here, Defendant seeks a copy of “either (a) one original and one
 11 certified paper transcript, or (b) one certified paper transcript and one copy of the videotape of the
 12 deposition.” *Mot.* at 9. Defendant has provided extensive receipts to detail how it arrived at a
 13 total cost of \$40,315.94 for two copies of each deposition. *See Dkt. No.* 483-5. Given the plain
 14 text of the rule, Plaintiff has not met its burden to demonstrate why these demonstrated costs
 15 should not be awarded. Accordingly, the Court **GRANTS** the Defendant’s challenge and
 16 **ORDERS** the Clerk to charge an additional \$932.15 for the costs of the deposition transcripts and
 17 recordings.

18 Civil Local Rule 54-3(c)(5) permits taxation of “[t]he attendance fee of a reporter when a
 19 witness fails to appear . . . if the claimant made use of available process to compel the attendance
 20 of the witness.” With respect to the reporter attendance costs, Defendant argues that the language
 21 of the rule indicates that if the reporter’s attendance fee is recoverable when a witness fails to
 22 appear, it stands to reason that the attendance fee should be recoverable when a witness does
 23 appear. *See Mot.* at 9–10. In support of its argument, Defendant cites *Ishida Co., Ltd. v. Taylor*,
 24 where the district court found that, given Civil Local Rule 54-3(c)(5)’s providing for recovery of a
 25 reporter’s attendance fee when a witness fails to appear, “[i]t would be illogical if the same
 26 attendance fee were not permitted when the witness does appear.” Nos. C-02-1617-JF (PVT), C-
 27

28 ² The Clerk allowed all \$3,790.05 requested by Defendant for deposition exhibits under Civil L.R.
 54-3(c)(3), which Plaintiff does not appear to dispute. *See Dkt. No.* 502 Ex. A at 2.

1 02-05416-JF (PVT), 2004 WL 2713067, at *1 (N.D. Cal. Nov. 29, 2004). In response, Plaintiff
2 cites *Frlekin v. Apple Inc.*, where the court referred to such fees as “non-appearance fees.” *See*
3 Nos. C 13-03451 WHA, C 13-03775 WHA, C 13-04727 WHA, 2016 WL 354862, at *2 (N.D.
4 Cal. Jan. 25, 2016). The Court is persuaded that Plaintiff’s position (and *Frlekin*) are correct. It
5 would make little sense for the rule to require claimants to “[make] use of available process to
6 *compel the attendance* of the witness” in order to recover the reporter attendance fee if the fee
7 were available regardless of whether the witness appeared. Therefore, the Court **DENIES**
8 Defendant’s challenge to the \$2,601.25 disallowed by the Clerk for reporter attendance fees.

9 **D. Reproduction and Exemplification**

10 Defendant sought \$703,229.56 in costs related to disclosure and formal discovery
11 documents. *See* Dkt. No. 496 at 1. The Clerk allowed \$96,162.66, but disallowed \$607,066.90
12 because the claim was (1) outside the ambit of the local rule, and (2) unsupported by the
13 documentation provided by Defendant because the invoices were not itemized. *See id.* Also in
14 this category, Defendant sought \$124,616.54 in costs related to visual aids, of which the Clerk
15 allowed \$45,273.54 and disallowed \$79,343 as outside the ambit of the local rule. *See id.* at 2.
16 Defendant seeks its full costs in this category. *See* Mot. at 10. Plaintiff contends that \$684,129.26
17 of the costs sought by Defendant for disclosure and discovery documents are not taxable.³ *See*
18 Opp. at 9. Plaintiff also “objects to at least \$65,609” of the costs related to Defendant’s visual
19 aids. *See id.* at 16.

20 “Fees for exemplification and the costs of making copies of any materials where the copies
21 are necessarily obtained for use in the case” are taxable. 28 U.S.C § 1920(4). Under the Local
22 Rules, the “cost of reproducing disclosure or formal discovery documents when used for any
23 purpose in the case is allowable.” Civil L.R. 54-3(d)(2). “A narrow construction of § 1920(4)
24 requires recognition that the circumstances in which a copy will be deemed ‘necessarily obtained’
25 for use in a case will be extremely limited.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d
26

27 _____
28 ³ The Clerk allowed all \$822.36 in costs sought from services provided by The Sorbi Group and
Warp9. *See* Dkt. No. 496; Mot. at 15. Plaintiff does not appear to object to these awards. *See*
Opp. at 8–15.

1 914, 930 (9th Cir. 2015). “[W]hether certain tasks are taxable pursuant to § 1920(4) calls for some
2 common-sense judgments guided by a comparison with the paper-document analogue.” *Id.*
3 (internal quotation omitted). “[C]osts compensable under section 1920 are only permitted for
4 preparation and duplication of documents, not the efforts incurred in assembling, collecting, or
5 processing those documents.” *Kwan Software Eng’g, Inc. v. Foray Techs., LLC*, No. C 12-03762
6 SI, 2014 WL 1860298, at *4 (N.D. Cal. May 8, 2014) (quoting *Ancora Techs., Inc.*, 2013 WL
7 4532927, at *10). In general, “e-discovery storage costs” are not compensable. *Id.*

8 **i. Discovia Costs**

9 Defendant seeks a total of \$479,406.20 in costs billed by Discovia, its e-discovery vendor.
10 Mot. at 11. This includes \$95,339.30 in production costs, \$103,635 in overage costs, and
11 \$280,431.90 in electronic database hosting fees. *Id.* at 11–12. Plaintiff objects to \$77,063.06 of
12 the production costs (to which it did not previously object) and the entirety of the overage and
13 electronic database hosting fees. Opp. at 9–10.

14 In regards to the claimed production costs, Plaintiff is correct that many of these costs “are
15 not production related.” Opp. at 10. A narrow construction of the statute requires concluding that
16 costs should be awarded based on what Defendant produced, not on what Defendant uploaded to
17 its e-discovery platform. Defendant produced approximately 115,000 pages of the 1.1 million
18 pages (10.45%) and 17.35 of the 303GB (5.73%) it seeks to charge. Opp. at 10. The Court finds
19 it appropriate to charge Plaintiff a pro rata share, based on the amounts actually produced and the
20 invoices provided by Defendant. *See Apple Inc.*, 2014 WL 4745933, at *12 (calculating the
21 approximate percentage of e-discovery costs that were spent on document production to opposing
22 party and awarding costs accordingly); Dkt. No. 460-6. Accordingly, the Court **ORDERS** the
23 Clerk to reduce the amount taxed for Discovia production costs by \$77,063.06.

24 The Clerk was correct to deny the overage costs and electronic database hosting fees. Such
25 e-discovery storage costs or hosting fees are not taxable. *See Kwan Software Eng’g, Inc.*, 2014
26 WL 1860298, at *4; *Golden Bridge Tech., Inc. v. Apple Inc.*, No. 5:12-CV-04882-PSG, 2015 WL
27 13427805, at *3 (N.D. Cal. Dec. 21, 2015), *aff’d*, 673 F. App’x 1010 (Fed. Cir. 2017). Therefore,
28 the Court **DENIES** Defendant’s challenge to the \$103,635 in overage costs and \$280,431.90 in

1 electronic database hosting fees disallowed by the Clerk.

2 **ii. OpenAxes Costs**

3 The Clerk denied the \$223,000 in fees Defendant sought in relation to the “electronic
4 document processing activities” performed by OpenAxes. *See* Dkt. No. 496; Mot. at 14.
5 Defendant describes the services as being used to “cull through the data and return any data that
6 hit on the parties’ agreed upon search terms” as well as to “process the requested discovery.” Mot.
7 at 14. Such tasks fit squarely within the categories of “assembling, collecting, or processing” and
8 thus are non-recoverable. *See Kwan Software Eng’g, Inc.*, 2014 WL 1860298, at *4. The Court
9 **DENIES** Defendant’s challenge to the Clerk’s disallowance of \$223,000 in fees from OpenAxes.

10 **iii. Visual Aids**

11 Defendant seeks \$124,616.54 in costs for visual aids, of which the Clerk allowed
12 \$45,273.54 and disallowed \$79,343.⁴ *See* Mot. at 15; Dkt. No. 496 at 2. Plaintiff objects to “at
13 least” \$65,609 of these costs. Opp. at 16. Under the Local Rules, the “cost of preparing charts,
14 diagrams, videotapes and other visual aids to be used as exhibits is allowable if such exhibits are
15 reasonably necessary to assist the jury or the Court in understanding the issues at the trial.” Civil
16 L.R. 54-3(d)(5). “The ‘costs of preparing’ demonstrative exhibits are limited to the cost of
17 physical preparation of demonstratives, not costs associated with the intellectual effort involved in
18 creating the content of demonstratives.” *Fitbug Ltd. v. Fitbit, Inc.*, No. 13-1418 SC, 2015 WL
19 2251257, at *4 (N.D. Cal. May 13, 2015) (internal quotation and citations omitted).

20 Defendant has established the total cost of \$124,616.54 for visual aids with detailed
21 itemized receipts, *see* Dkt. No. 482-3, though it has made minimal effort to demonstrate why such
22 costs were “reasonably necessary” other than to say that the case presented “complex technical
23 issues,” Mot. at 16. That said, Plaintiff’s handful of specific objections based on the “reasonably
24 necessary” standard, Opp. at 16, were explained and contextualized by Defendant, *see* Reply at
25 10–11, and thus Plaintiff has not met its burden to disallow these costs.

26 In contrast, Plaintiff has shown that the \$13,260 of in-court technical assistance, \$40,458

27 _____
28 ⁴ Neither party has explained in any detail how the Clerk arrived at its calculations for this portion
of the costs.

1 of on-site technical support, and \$11,891 of meeting and consultation expenses should not be
 2 awarded. Opp. at 16–18. These costs, totaling \$65,609, required intellectual effort, rather than
 3 simply physical preparation, and are therefore outside the scope of Local Rule 54-3(d)(5). See
 4 *Fowler v. California Highway Patrol*, No. 13-CV-01026-TEH, 2014 WL 3965027, at *4 (N.D.
 5 Cal. Aug. 13, 2014) (“in-court technical support and equipment rental fees are not properly taxed
 6 as costs because they are not, by their own terms, acts of copying or exemplification”); *Vectren*
 7 *Commc’ns Servs. v. City of Alameda*, No. C 08-3137 SI, 2014 WL 3612754, at *6 (N.D. Cal. July
 8 22, 2014) (awarding “only those charges related to the physical preparation of the demonstratives”
 9 and not those related to “assisting counsel in the courtroom with presenting the exhibits”).

10 The Court **DENIES** Defendant’s challenge and accordingly **ORDERS** the Clerk to
 11 increase the amount taxed by \$13,734, for a total visual aid tax of \$59,007.54.

12 **E. Witness Fees and Expenses**

13 Defendant sought \$7,264.17 in witness fees, of which the Clerk allowed \$1,754.15 and
 14 disallowed \$5,510.02 as an “excessive expense.” See Dkt. No. 496 at 2. After withdrawing a
 15 request for \$97.50 in cumulative witness fees, Mot. at 16 n. 12, and \$4,883.56 for business-class
 16 airfare for deponent Rupert Schultes, Reply at 12, Defendant now seeks a total of \$2,283.11 in
 17 witness fees and expenses. See Dkt. No. 502 at 5. After Defendant’s withdrawals, Plaintiff
 18 objects to the \$626.46 in witness costs the Clerk previously disallowed, which represents two of
 19 the three days of hotel expenses for Mr. Schultes. Opp. at 18.

20 “Fees and disbursements for . . . witnesses” are taxable as costs. 28 U.S.C. § 1920(3).
 21 “Per diem, subsistence and mileage payments for witnesses are allowable to the extent reasonably
 22 necessary and provided for by 28 U.S.C. § 1821.” Civil L.R. 54-3(e). “A subsistence allowance
 23 shall be paid to a witness when an overnight stay is required at the place of attendance because
 24 such place is so far removed from the residence of such witness as to prohibit return thereto from
 25 day to day.” § 1821(d)(1).

26 Mr. Schultes flew from Germany to San Francisco for a one-day deposition. See Mot. at
 27 17; Opp. at 18. While a one-night stay in a hotel is reasonably necessary to conduct a one-day
 28 deposition, the necessity of a three-night stay is unexplained and perhaps unexplainable. The


1 Clerk was correct to disallow the extra two nights of hotel expenses, amounting to \$626.46. The
2 Court **DENIES** Defendant's challenge to the clerk's taxation of witness fees and expenses.⁵

3 **IV. CONCLUSION**

4 Defendant shall file an accounting and documentation of the costs of the trial transcripts, as
5 directed *supra*, within seven days of the date of this Order. The Clerk shall not adjust its taxation
6 of costs until the Court receives and reviews Defendant's filing and issues a Final Order directing
7 the Clerk to tax costs. *Again, no further argument will be entertained on this motion.*

8 **IT IS SO ORDERED.**

9 Dated: 9/30/2018

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11 HAYWOOD S. GILLIAM, JR.
12 United States District Judge

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27 _____
28 ⁵ Defendant sought \$1,125 in costs for an interpreter under § 1920(6), to which Plaintiff did not
object and the Clerk allowed. The Court agrees with the Clerk and the parties that these costs
were appropriate.