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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ROBERT A. NITSCH, et al.,

Plaintiffs,

v.

DREAMWORKS ANIMATION SKG INC.,  
et al.,

Defendants.

Case No. [5:14-cv-04062-LHK](#) (SVK)

**ORDER GRANTING NON-PARTY  
MOTION FOR REIMBURSEMENT;  
GRANTING MOTION TO SEAL  
DOCUMENTS**

Re: Dkt. No. 285, 307

Non-party Croner Company (Croner) moves for reimbursement of costs it says it incurred in responding to the second of two subpoenas served by plaintiffs.<sup>1</sup> Croner is a consulting company that conducts annual compensation benchmarking studies in a variety of creative industries. Briefly stated, the subpoena contained two document requests asking for survey data Croner obtained from companies in the animation and visual effects industry. (Dkt. 285-2, Brownstein Decl. ¶ 3, Ex. 2). Croner says that the responsive documents pertained to 17 non-defendant companies and spanned a 7-year period, from 2008 and forward.

Before Croner formally responded to the subpoena, its counsel met-and-conferred with

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<sup>1</sup> Croner does not seek its costs incurred in responding to plaintiffs' first subpoena, which sought documents and a deposition and which (by stipulation) was limited to information pertaining to defendants.

1 plaintiffs' counsel. Croner advised that it would seek reimbursement of its costs, and it later said  
2 the same in its formal written objections. (Id. ¶ 5, Ex. 3; Dkt. 304-1 Schiltz Decl. ¶ 2). Although  
3 Croner initially estimated that its expenses would probably not amount to much more than "a  
4 couple thousand dollars," (Dkt. 304-1, Schiltz Decl. ¶ 2), as will be discussed, its endeavors ended  
5 up being more costly.

6 Because its surveys are subject to confidentiality provisions, Croner says it felt obliged to  
7 notify affected clients about the subpoena and to devise a form of production that would provide  
8 plaintiffs with discovery, while preserving the anonymity of the survey participants. Croner now  
9 seeks reimbursement of \$67,787.55 in costs, including its outside counsel's fees, for those efforts.  
10 Pointing out that Croner's production comprised 16 documents, plaintiffs contend that the  
11 requested sum is grossly overinflated and unreasonable. They further contend that Croner actually  
12 incurred document processing and production costs of only \$143.55, which plaintiffs argue is not  
13 a significant expense that warrants cost-shifting.

14 Upon consideration of the moving and responding papers, as well as the oral arguments  
15 presented, this court<sup>2</sup> rules as follows:

16 Fed. R. Civ. P. 45(d)(2)(B)(ii) provides that when a court orders compliance with a  
17 subpoena over an objection, "the order must protect a person who is neither a party nor a party's  
18 officer from significant expense resulting from compliance."<sup>3</sup> That rule "requires the district court  
19 to shift a non-party's costs of compliance with a subpoena, if those costs are significant." Legal  
20 Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013). The rule is mandatory; and "when  
21 discovery is ordered against a non-party, the only question before the court in considering whether  
22 to shift costs is whether the subpoena imposes significant expense on the non-party." Id. "If so,

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24 <sup>2</sup> Following Judge Grewal's resignation, the present motion was transferred to the undersigned  
25 magistrate. And, this court kept this particular discovery motion, notwithstanding the subsequent  
reassignment of this case, for discovery purposes, to Judge van Keulen.

26 <sup>3</sup> Under the particular circumstances presented here, the fact that Croner's production was made  
27 without the necessity of a court order compelling compliance does not foreclose its ability to seek  
28 reimbursement of its costs. Costs may be shifted if the requesting party is on notice that the non-  
party will seek reimbursement. Spears v. First Am. Eappraiseit, No. 5:08-cv-00868-RMW, 2014  
WL 6901808, at \*3 (N.D. Cal., Dec. 8, 2014). As discussed above, Croner clearly gave plaintiffs  
prior notice of its intent to seek reimbursement.

1 the district court must order the party seeking discovery to bear at least enough of the cost of  
2 compliance to render the remainder ‘non-significant.’” *Id.* (citation omitted).

3 “The shifting of significant expenses is mandatory, but the analysis is not mechanical;  
4 neither the Federal Rules nor the Ninth Circuit has defined ‘significant expenses,’ which is a term  
5 that readily lends itself to myriad interpretations depending on the circumstances of a particular  
6 case.” *United States v. McGraw-Hill Companies, Inc.*, 302 F.R.D. 532, 536 (C.D. Cal. 2014)  
7 (citing *Legal Voice*, 738 F.3d at 1184). “In making this determination, a court may ‘take into  
8 account the financial ability of the non-party to bear some costs’ for purposes of establishing  
9 whether expenses are ‘significant.’” *Cornell v. Columbus McKinnon Corp.*, No. 13-cv-02188-SI,  
10 2015 WL 4747260 at \*2 (N.D. Cal., Aug. 11, 2015) (quoting *Linder v. Calero-Portocarrero*, 251  
11 F.3d 178, 182 (D.C. Cir. 2001)).

12 Croner’s requested expenses are as follows: (1) \$14,700 in legal fees paid to its outside  
13 counsel; (2) approximately \$53,000 for time spent by Croner employees; and (3) \$143.55 for  
14 document and data processing costs. (Dkt. 285-1 Croner Decl., ¶¶ 21-22; Dkt. 285-2 Brownstein  
15 Decl. ¶¶ 10-11). The key issue in dispute is whether costs tied to Croner’s confidentiality  
16 concerns are compensable expenses “resulting from compliance” with a subpoena.

17 “Although party witnesses must generally bear the burden of discovery costs, the rationale  
18 for the general rule is inapplicable where the discovery demands are made on nonparties.” *United*  
19 *States v. Columbia Broadcasting Sys., Inc.*, 666 F.2d 364, 371 (9th Cir. 1982). “Nonparty  
20 witnesses are powerless to control the scope of litigation and discovery, and should not be forced  
21 to subsidize an unreasonable share of the costs of a litigation to which they are not a party.” *Id.*  
22 Reimbursable expenses under Rule 45 may include some attorney’s fees. However, “[t]he rule  
23 does not establish a blanket requirement that all of a nonparty’s legal fees are reimbursable so long  
24 as they are somehow related to its efforts in responding to a subpoena.” *In re American Housing*  
25 *Found.*, No. 09-20232-RLJ-11, 2013 WL 2422706, at \*2 (N.D. Tex., June 4, 2013). Rather,  
26 “[r]eimbursable fees are those that are necessary to the third party’s compliance and thus benefit  
27 the requesting party or are of assistance to the court.” *Id.*

28 For example, courts have found that reimbursable fees include those “incurred in

1 connection with legal hurdles or impediments to the production,” such as ensuring that production  
2 does not violate federal law or foreign legal impediments. *Id.* (citing cases). Conversely, fees  
3 incurred for services “for the non-party’s sole benefit and peace of mind” have been denied. *Id.* at  
4 \*3; see also *McGraw-Hill Companies, Inc.*, 302 F.R.D. at 536 (same). Other courts have  
5 concluded that fees incurred in “production-related tasks like document review, creating a  
6 privilege log, and drafting protective orders” are compensable expenses resulting from subpoena  
7 compliance, whereas “fees incurred litigating a subpoena” are not. *Storman’s Inc. v. Selecky*, No.  
8 C07-5374 RBL, 2015 WL 224914, at \*5 (W.D. Wa., Jan. 15, 2015).

9 Plaintiffs argue that Croner’s efforts to protect client confidentiality were purely business  
10 interests that inured solely to Croner’s benefit and peace of mind and therefore are not  
11 compensable. They point out that there is a protective order in place (Dkt. 48) that is sufficient to  
12 address confidentiality issues, making Croner’s effort re those issues entirely unnecessary.  
13 Croner, on the other hand, says it did precisely what one should do when asked to produce  
14 information subject to a confidentiality agreement. At oral argument, Croner’s counsel stated that  
15 at least several of the affected clients indicated that they would, in fact, move to quash plaintiffs’  
16 subpoena, unless the subject documents were produced in redacted form. So, Croner says it did  
17 what it did, not to prolong the litigation or increase costs, but rather, to attempt to craft an  
18 agreeable format for production while timely giving plaintiffs requested discovery---without  
19 resorting to time-consuming, and possibly even more expensive, motions practice over the  
20 subpoena.

21 This court finds *G&E Real Estate, Inc. v. Avison Young-Washington D.C., LLC*, 317  
22 F.R.D. 313 (D.D.C. 2016) instructive. There, the subpoenaed entity and its counsel “decided to  
23 litigate issues related to the subpoena zealously. And they appear to have done so with no eye  
24 towards minimizing their expenses or towards working cooperatively with Plaintiff’s counsel to  
25 resolve the disputed issues.” *Id.* at 318. Motions practice over discovery ensued. However,  
26 during a subsequent meeting, the parties agreed on a document review process in which plaintiff’s  
27 counsel was permitted to review the disputed documents. *Id.* at 319. That agreed-upon review led  
28 to the resolution of their discovery disputes. *Id.* On a subsequent motion for reimbursement of

1 costs, the court declined to order reimbursement of fees generated by what it found to be an  
2 “overall strategic approach to the subpoena issue---fierce litigation and expensive document  
3 review---rather than a creative and collaborative approach to resolving the issues at hand.” Id.  
4 Nevertheless, it concluded that certain activities were compensable, “such as the hours expended  
5 by [the subpoenaed entity’s counsel] to enable Plaintiff’s counsel to sit down and review the  
6 contested documents.” Id.

7 Under the particular circumstances presented here, this court concludes that Croner’s  
8 efforts to address confidentiality issues are reasonable and compensable. Plaintiffs are correct that  
9 such concerns generally do not preclude discovery when there is a protective order in place. See,  
10 e.g., *Realtek Semiconductor Corp. v. LSI Corp.*, No. 5:14-mc-80197-BLF-PSG, 2014 WL  
11 4365114 at \*3 (N.D. Cal., Sept. 3, 2014) (concluding, on a motion to compel compliance with a  
12 subpoena, that confidentiality concerns did not warrant modification of the subpoena).<sup>4</sup> Plaintiffs  
13 and Croner each claim that they would have prevailed on a motion to quash. This court can only  
14 speculate as to what the result would have been had any such motion been filed. What has been  
15 demonstrated to this court’s satisfaction on the record presented is that Croner’s efforts to protect  
16 client confidentiality were not made to be obstreperous, but were the result of compliance with the  
17 subpoena. Indeed, if any of the parties in this case were asked to produce a non-party’s  
18 confidential information, the stipulated protective order requires them to do what Croner did---  
19 give notice to the affected non-party of the discovery request and the information at issue. (Dkt.  
20 48 ¶ 9.2). And, before entertaining any motion to quash or for protective order, this court certainly  
21 would require the parties and affected entities to first make an effort to resolve their concerns  
22 between themselves.

23 Here, Croner and its counsel appear to have worked collaboratively as “go-betweens” with  
24 clients and with plaintiffs’ counsel to resolve confidentiality concerns and get plaintiffs the  
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26 <sup>4</sup> Plaintiffs’ reliance on the undersigned’s ruling in *Spears v. First American Eappraiseit* is  
27 misplaced. No. 5:08-cv-00868-RMW (HRL), 2014 WL 11369809 (N.D. Cal., July 3, 2014).  
28 There, this court was not persuaded that a substantial privilege review would need to be  
undertaken simply to extract a HUD-1 statement from a file. Also, the subpoenaed party had  
already produced a sampling of those statements to the requesting party. Id. at \*3.

1 discovery they wanted, without resorting to motions practice. In the end, Croner’s clients were  
2 appeased; plaintiffs timely got the discovery; and no one required the court’s intervention. Thus,  
3 Croner’s efforts did not inure solely to Croner’s benefit.

4 Plaintiffs insist that Croner is not entitled to reimbursement, asserting that Croner is only  
5 nominally a “non-party.” Pointing to a single line in the presiding judge’s class certification order,  
6 plaintiffs contend that Croner was entangled in the underlying alleged conspiracy. (See Dkt. 289  
7 at 55:9-10) (“Further, the evidence suggests that Defendants engaged in collusive communications  
8 directly and through the Croner Survey to benchmark their compensation structures against each  
9 other.”). This court does not find that argument persuasive.

10 Plaintiffs nevertheless balk at compensating Hali and Mel Croner at their hourly consulting  
11 rates (\$475/hour and \$450/hour, respectively), because plaintiffs say they were not paying for the  
12 Croners’ consulting services. The Croners’ hourly rates, however, are a reasonable measure of the  
13 loss to Croner of time that otherwise would have been spent on the company’s actual business.  
14 While the \$100/hour estimate for Croner’s non-billing employees necessarily is an estimate, this  
15 court also finds it to be reasonable inasmuch as Croner lost the normal services of those  
16 employees as a result of compliance with the subpoena. (Dkt. 285-1, Croner Decl. ¶ 18; Dkt. 308-  
17 1, Brownstein Decl. ¶ 5). Cf. *In re Propulsid Products Liability Litig.*, MDL No. 1355, 2003 WL  
18 22341310 at \*3 (E.D. La., Sept. 3, 2003) (rejecting, without explanation, a request for  
19 reimbursement at \$400/hour as excessive and unwarranted).

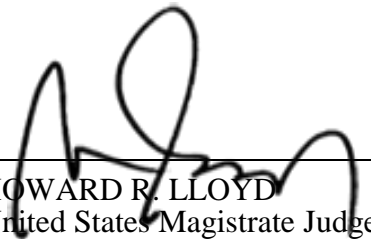
20 As for the claimed number of hours spent by Croner employees, plaintiffs argue that it  
21 could not possibly have taken as long as Croner claims to produce the information, which  
22 apparently is kept in a database. Croner says that producing the data was not simply a matter of  
23 finding documents and printing them. Rather, Hali Croner avers that production required  
24 employees to extract the pertinent data for each year of the survey; assemble the data into separate  
25 spreadsheets for each of the affected companies; proof the data; and then send the information to  
26 each affected client so they would know what data was subject to production. (Dkt. 308-3, Suppl.  
27 Croner Decl. ¶ 3; Dkt. 285-1 Croner Decl., ¶ 21). Then, once counsel agreed upon redactions, the  
28 redactions had to be made, proofed, and produced in a format acceptable to plaintiffs. (Dkt. 308-

1 3, Suppl. Croner Decl. ¶ 3; Dkt. 285-1 Croner Decl., ¶ 22). Croner states that while the hours  
2 claimed are estimates, the estimates are conservative, as the effort required several weeks of work.  
3 (Dkt. 285-1 Croner Decl. ¶ 21). Inasmuch this court concludes that costs incurred for these types  
4 of activities are compensable under the circumstances presented, this court finds them sufficiently  
5 specific. Cf. Western Convenience Stores, Inc. v. Suncor Energy (U.S.A.), Inc., No. 11-cv-01611-  
6 MSK-CBS, 2014 WL 1257762 at \*24 (D. Colo., Mar. 27, 2014) (declining to shift costs where the  
7 non-party provided total hours attributed to each of its employees without identifying specific  
8 tasks performed, and then later gave only vague task descriptions such as “time coordinating,”  
9 “prep meetings,” “phone conversations,” and “‘taking data’ to outside counsel,” which did not aid  
10 the court’s decision as to the reasonableness of the costs incurred).

11 Based on supporting documentation, it appears that Croner spent 182.75 hours at a cost of  
12 \$52,943.75, plus 24.5 hours at a cost of \$14,700 in outside counsel fees, and \$143.55 for  
13 processing documents and data that was produced. (Dkt. 285-1 Croner Decl. ¶¶ 21-22; Dkt. 285-  
14 2, Brownstein Decl. ¶¶ 10-11). The grand total: \$67,787.30.<sup>5</sup> Having reviewed Croner’s  
15 financial information (Dkt. 307-4),<sup>6</sup> this court finds that this sum is significant. This court also  
16 takes into account that this is the second subpoena served by plaintiffs on Croner and that Croner  
17 apparently bore all of its costs incurred in responding to the first one. Accordingly, \$66,787.30 in  
18 Croner’s costs is shifted to the plaintiffs.

19 SO ORDERED.

20 Dated: March 9, 2017

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HOWARD R. LLOYD  
United States Magistrate Judge

<sup>5</sup> This is 25 cents lower than the amount sought by Croner.

<sup>6</sup> Croner’s motion to seal that information is granted.