

1 Under Rule 54(d) of the Federal Rules of Civil Procedure, the prevailing party is entitled to
2 costs unless a court rules otherwise. This rule creates a presumption that costs will be taxed against
3 the losing party, but “vests in the district court discretion to refuse to award costs” if the losing party
4 shows why costs should not be awarded. *Ass’n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 591
5 (9th Cir. 2000) (en banc). Should it deny costs, the trial court must state its reasons. *Subscription*
6 *Television, Inc. v. S. Cal. Theatre Owners Ass’n*, 576 F.2d 230, 234 (9th Cir. 1978). The objecting
7 party bears the burden of presenting reasons “sufficiently persuasive to overcome the presumption in
8 favor of an award.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 932 (9th Cir. 2015)
9 (quoting *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 (9th Cir. 2003)).

10 “Appropriate reasons for denying costs include: (1) the substantial public importance of the
11 case, (2) the closeness and difficulty of the issues in the case, (3) the chilling effect on future similar
12 actions, (4) the [losing party’s] limited financial resources, and (5) the economic disparity between the
13 parties.” *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247-48 (9th Cir. 2014). “This is not
14 an exhaustive list of good reasons for declining to award costs, but rather a starting point for analysis.”
15 *Id.* (internal quotation marks and citation omitted). Misconduct by the prevailing party may also be
16 considered. *Murphy v. Precision Castparts Corp.*, 2021 WL 4524153, at *2 (D. Or. Oct. 4, 2021).

18 II. DISCUSSION

19 Plaintiff Dr. Joseph objects to four particular categories of costs: (1) witness fees for Highsmith
20 and Carandang; (2) research fees for various small claims cases involving Dr. Joseph and Wise Owl
21 Animal Hospital; (3) a trial transcript excerpt of co-defendant Benjamin Abrams’ testimony; and (4)
22 copies in response to Dr. Joseph’s discovery requests. As discussed below, the Court overrules all four
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1 of Dr. Joseph's objections because these costs were all reasonably necessary for use by the DPHSS
2 Defendants.

3 **A. Witness Fees**

4 Dr. Joseph seeks to preclude \$90 in costs associated with witnesses Highsmith and Carandang
5 because neither testified. The DPHSS Defendants argue the two witnesses were subpoenaed, ready to
6 testify but did not because "the testimony of Dr. Joseph unfolded differently than anticipated[.]" (Decl.
7 Civille, 2 ¶ 2, ECF No. 303.)

8 A judge of any court of the United States may tax as costs fees for witnesses. 28 U.S.C. §
9 1920(3). "To be taxable as costs, the testimony of the witness must be material to an issue tried and
10 reasonably necessary to its disposition." *Harrington v. City of Portland*, 1990 WL 177406, at *3 (D.
11 Or. Nov. 8, 1990) (citing *United Cal Bank v. THC Fin. Corp.*, 557 F.2d 1351, 1359 (9th Cir. 1977).
12 "Although courts do not ordinarily award a witness fee for a witness who does not testify at trial, a
13 court may award such fees if the witness is ready to testify, but extrinsic circumstances rendered the
14 testimony unnecessary." *Id.* (citation omitted); see 10 Charles Alan Wright & Arthur R. Miller, Federal
15 Practice and Procedure Civil § 2678 (4th ed. 2021) ("[F]ees have been allowed when an arrangement
16 with the opposing counsel and concessions made in open court ended the need for the witness's
17 testimony." (citing *Wehr v. Burroughs Corp.*, 477 F. Supp. 1012 (E.D. Pa. 1979), *aff'd on other*
18 *grounds*, 619 F.2d 276 (3d Cir. 1980))).

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20 Here, both Highsmith and Carandang were ready and their testimony were reasonably
21 necessary given the circumstances. First, Highsmith was, at one point, a co-defendant before being
22 dismissed from the case. He was an attorney that worked in the same office as defendant Abrams.
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1 Thus, his participation and relevance to this case was high and it was reasonably expected that he
2 would have been a necessary witness. As for Carandang, he was involved with the planned 2013 audit
3 and the subsequent execution of the administrative warrant at issue; had certain individuals not
4 testified adequately, Carandang would certainly have been a necessary witness. Furthermore, it is the
5 nature of trials that it may veer in unanticipated directions. These witnesses were not so removed from
6 the facts of this case that their participation and presence would not have been reasonably necessary
7 for the trial. The Court therefore grants the DPHSS Defendants' \$90 request for the two subpoenas
8 issued as a taxable cost.

9 **B. Superior Court Small Claims Case Copies**

10 Dr. Joseph objects to the costs of copies for various small claims cases filed by Wise Owl
11 Animal Hospital in the Guam Superior Court, totaling \$672.00.¹ According to him, these copies were
12 not part of an exhibit list and the research was done after the deadline for exhibit lists. "As such, there
13 was no good faith basis to believe that such documents would be used at trial[.]" (Objections 2.) The
14 DPHSS Defendants argue they were to use these copies "to counter his expected testimony that he
15 suffered emotional trauma because of this lawsuit" as "Joseph was accustomed to litigation and
16 routinely made use of the courts[.]" (Decl. Civile 2 ¶ 4.) Essentially, it was for impeachment purposes.
17 However, at trial, because Dr. Joseph did not dispute the large number of small claims complaints he
18 initiated, there was no need to use these documents to impeach him.
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22 ¹ Civile indicates that the total cost of research is \$672.00 (Decl. Civile 3 ¶ 7(j)); Dr. Joseph identified research charges
23 of \$512.00 and copy fees of \$183.00, which totals \$695.00 (ECF No. 301 at 2). Examining the billing submitted by the
24 DPHSS Defendants, the Court agrees with Defendants that \$672.00 is the appropriate amount. (See ECF No. 300 at 3.)

1 29 U.S.C. §1920(4) includes as taxable costs “[f]ees for exemplification and the costs of
2 making copies of any materials where the copies are necessarily obtained for use in the case.” The
3 Ninth Circuit adopts “[a] narrow construction of § 1920(4) [which] requires recognition that the
4 circumstances in which a copy will be deemed necessarily obtained . . . will be extremely limited.”
5 *Pruitt v. Genentech, Inc.*, 2019 WL 4034480, at *2 (E.D. Cal. Aug. 27, 2019) (citation and internal
6 quotation marks omitted). But it is not so narrow as to “specifically require that the copied document[s]
7 be introduced into the record.” *Id.* at *4 (citation and internal quotation marks omitted). Thus, in
8 *Genentech*, the court concluded that the “exhibit list confirms the exhibits were reasonably needed
9 either for [the plaintiff’s] case-in-chief or for impeachment purposes.” *Id.*

10 The Court finds that the research performed by the DPHSS Defendants was necessary to refute
11 Dr. Joseph’s claim of emotional damages due to this litigation. That Dr. Joseph filed nearly a hundred
12 small claims court cases is not the DPHSS Defendants’ doing, but rather Dr. Joseph’s doing. The
13 quantity of cases reveals that Dr. Joseph was no stranger to litigation. Furthermore, working with the
14 Guam Superior Court to acquire this information was the only means for the DPHSS Defendants to
15 obtain this discovery to refute Dr. Joseph’s claim.

17 The cases relied on by Plaintiff are not applicable here. First, in *Washington State Dep’t of*
18 *Transportation v. Washington Natural Gas Co.*, the Ninth Circuit simply stated that the district court
19 did not abuse its discretion in denying costs for depositions not used at trial. 59 F.3d 793 (9th Cir.
20 1995). No other information is given to explain the district court’s reasoning. In *Green Const. Co. v.*
21 *Kansas Power & Light Co.*, the district court simply held that the plaintiff had “not made the requisite
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1 showing that any of the copies were necessarily obtained for use at trial.” 153 F.R.D. 670, 682 (D.
2 Kansas 1994).

3 Here, the DPHSS Defendants make clear their intended use of these documents—to impeach
4 Dr. Joseph if necessary and as originally anticipated. Furthermore, although the circumstances for
5 allowing costs for copies are limited, it is not so narrow as to “specifically require that the copied
6 document[s] be introduced into the record to be an allowable cost.” *In re Online DVD-Rental Antitrust*
7 *Litig.*, 779 F.3d at 927 (citation and internal quotation marks omitted). Accordingly, the Court grants
8 the DPHSS Defendants’ total research and copy costs of \$672.00.

9 **C. Trial Transcript**

10 Dr. Joseph argues that because the \$54.45 trial transcript of Abrams was not used at trial, it
11 should not be permitted as taxable costs. (See Billing 1, ECF No. 299-1 and 299-6 (identifying
12 Abrams’ trial transcript costs).) The DPHSS Defendants maintain that the transcript “was used by
13 Defendant to prepare for cross-examination of Abrams on the critical question of whether Abrams had
14 advised the DPHSS Defendants not to release [Dr. Joseph’s] CSR. This was integral to the DPHSS
15 Defendants’ defense that they had reasonably relied on the advice of counsel.” (Decl. Civile 3 ¶¶ 7-
16 8.) The excerpt transcribed would reveal Abrams’ admission that he did in fact give the DPHSS
17 Defendants the advice not to release Dr. Joseph’s controlled substances registration certificate. Thus,
18 “the DPHSS Defendants wanted a transcript for use in cross examination and to be able to read
19 Abram’s admissions verbatim during closing argument if he vacillated during his testimony.” (*Id.* at ¶
20 9.)
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23 “Fees for printed or electronically recorded transcripts necessarily obtained for use in the case”
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1 may be taxed. 28 U.S.C. §1920(2). “Whether a transcript or deposition is necessary must be
2 determined in light of the facts known at the time the expense was incurred.” *Flowrider Surf, Ltd. v.*
3 *Pac. Surf Designs, Inc.*, 2020 WL 5819752, at *8 (S.D. Cal. Sept. 30, 2020) (citation and internal
4 quotation marks omitted).

5 The DPHSS Defendants submitted sufficient reasoning to establish that the excerpted trial
6 transcript was reasonably necessary at the time it was requested. Here, Benjamin Abrams is a co-
7 defendant who had an adverse position to the DPHSS Defendants, namely, whether he advised them
8 to withhold Dr. Joseph’s controlled substances registration certificate. Thus, critical to the DPHSS
9 Defendants’ defense at trial was their reliance on the advice of counsel, former Assistant Attorney
10 General Benjamin Abrams. It was therefore reasonably necessary for the DPHSS Defendants to
11 possess Defendant Abrams’ admission that he gave particular legal advice to the DPHSS Defendants.
12 Based on these facts, the Court finds that the relatively nominal costs of a \$54.45 transcript was
13 reasonably necessary for use in this case and grants the costs.
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15 Dr. Joseph’s reliance on the Seventh Circuit’s decision in *McIlveen* misses the mark. There,
16 the Circuit court affirmed the district court’s denial of the transcript costs where the district court found
17 the “only use of the three-day trial transcription was to verify witness credibility.” *McIlveen v. Stone*
18 *Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990) (internal citation omitted). At first blush, the
19 cases seem similar inasmuch as the transcripts are requested for the purposes of holding the witness
20 accountable. However, in *McIlveen*, there is no indication that the testimony requested was central to
21 the defendants’ case—as it is here. Defendants wanted to use Abrams’s limited trial testimony during
22 Plaintiff’s direct examination of him to prepare for cross-examination of Abrams on the critical
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1 questions of whether Abrams had advised the DPHSS Defendants not to release Plaintiff's controlled
2 substances registration. This was integral to the DPHSS Defendants' defense that they had reasonably
3 relied on the advice of counsel. Abrams's trial testimony was not elicited during his deposition. For
4 these reasons, the Court overrules Plaintiff's objection to DPHSS Defendants' claim for transcript
5 costs.²

6 **D. Discovery**

7 Finally at issue are the costs of discovery copies produced by the DPHSS Defendants to Dr.
8 Joseph, totaling \$941.25.³ (ECF No. 299-1 at 1.) Dr. Joseph disputes these costs, arguing that the
9 DPHSS Defendants did not produce hard copies of discovery to him. The DPHSS Defendants assert
10 that the discovery produced, albeit ultimately in electronic format, "were taken from a variety of
11 sources, including original files, hard copies belonging to DPHSS and electronically stored documents.
12 As part of the discovery process, and to organize all the documents, hard copies of the discovery
13 documents were made, then scanned and bates stamped." (Decl. Civile 4 ¶ 10.)
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15 "Copying costs for documents produced to opposing parties in discovery . . . are recoverable."
16 *Rojas v. Zaninovich*, 2015 WL 3657172, at *32 (E.D. Cal. June 11, 2015) (citation and internal
17 quotation marks omitted). "The faithful production of electronically stored information may require
18 processes such as optical character recognition (which renders material text-searchable), preservation
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22 ² Dr. Joseph also relies on *La Loma Grande LLC v. United States*, 2017 WL 6061610 (D. Ariz. Mar. 7, 2017). However,
that case is completely inapposite because there, costs were denied based on a local rule. *Id.* at *5.

23 ³ Dr. Joseph asserts that the total cost is \$991.00 (ECF No. 301 at 3), but that figure is nowhere to be found.
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1 of metadata, and conversion to a non-editable file format.” *In re Online DVD-Rental Antitrust*
2 *Litigation*, 779 F.3d at 927. In the *Antitrust Litigation* case, the Ninth Circuit followed the Federal
3 Circuit which held that

4 [t]o the extent that a party is obligated to produce (or obligated to accept) electronic
5 documents in a particular format or with particular characteristics intact (such as
6 metadata, color, motion, or manipulability), the costs to make duplicates in such a
format or with such characteristics preserved are recoverable as “the costs of making
copies ... necessarily obtained for use in the case.” 28 U.S.C. 1920(4).

7 779 F.3d at 928 (citing *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1328 (Fed. Cir.
8 2013)). The Ninth Circuit concluded that “[w]hen copies are made in a fashion necessary to comply
9 with obligations such as these, costs are taxable so long as the copies also ‘necessarily obtained for
10 use in the case.’” *Id.* Here, the DPHSS Defendants took measures to carefully compile and organize
11 the documents in response to Dr. Joseph’s discovery requests. Furthermore, the Court required all
12 document exhibits to be introduced at trial to have optical character recognition (OCR) in order to use
13 the Court’s jury electronic evidence presentation (JEEP) system during deliberation.

15 Dr. Joseph’s reliance on *Rodriguez* and *Goluba* is misplaced. In *Rodriguez*, the district court
16 declined to award copying costs totaling over \$20,000.00 because it was “struck by the extraordinary
17 difference between exhibits listed by [defendant] and exhibits actually referred to at trial.” *Rodriguez*
18 *v. Gen. Dynamics Armament and Tech. Prods., Inc.*, 775 F. Supp. 2d 1217, 1221 (D. Haw. 2011). The
19 court’s rejection was based on the fact that the defendant made copies for themselves that they
20 themselves did not use. Similarly, in *Goluba*, the district court did not award costs because the copies
21 were prepared by counsel for their own use. *Goluba v. Brunswick Corp.*, 139 F.R.D. 652, 655 (E.D.
22 Wis. 1991). By contrast, here, the DPHSS Defendants did not make copies of documents for discovery
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1 they necessarily needed, but for discovery Dr. Joseph requested. With this explanation, the DPHSS
2 Defendants have sufficiently established why the \$941.25 in discovery copies was reasonable and
3 necessary, and so the costs are granted and Plaintiff's objection is overruled.

4 **III. CONCLUSION**

5 For the foregoing reasons, the Court hereby GRANTS the DPHSS Defendants' Bill of Costs
6 (ECF No. 299) in its entirety in the amount of \$4,858.40, and Plaintiff Dr. Joseph's objections (ECF
7 No. 301) are overruled. The Clerk is directed to enter the Taxation of the Bill of Costs accordingly.

8 IT IS SO ORDERED this 13th day of December, 2021.

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12 RAMONA V. MANGLONA
13 Designated Judge
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