



preponderance of the evidence that Eastern Propane had failed to deliver the amount of propane gas that it said it had delivered. (See Docket No. 97). Judgment, therefore, entered in favor of Eastern Propane.

This matter is presently before the court on Eastern Propane’s “Requests for Costs and for Attorney’s Fees.” (Docket No. 100). Therein, Eastern Propane seeks costs pursuant to Fed. R. Civ. P. 54(d)(1) in the amount of \$1,075.70 for photocopying charges and two deposition transcripts. In addition, Eastern Propane seeks to recover its attorneys’ fees, which exceed \$100,000.00, on the grounds that Great Northern had not put on any evidence that Eastern Propane was negligent, and that this court has the inherent power to award fees when the circumstances so warrant. Great Northern challenges the request for costs for copying and for one of the depositions, and opposes the request for attorneys’ fees in its entirety.

After consideration of the parties’ arguments, and for the reasons detailed herein, this court awards Eastern Propane its costs in their entirety, and denies the request for attorneys’ fees.

## **II. DISCUSSION**

### **A. Request for Costs**

Pursuant to Fed. R. Civ. P. 54(d), “[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney’s fees – should be allowed to the prevailing party.” Thus, “[t]here is a background presumption favoring cost recovery for prevailing parties.” B. Fernandez & HNOS, Inc. v. Kellogg USA, Inc., 516 F.3d 18, 28 (1st Cir. 2008) (additional citations omitted). Nevertheless, the court has “wide latitude in shaping the contours of such awards.” Conway v. Licata, 144 F. Supp. 3d 212, 217 (D. Mass. 2015) (internal

quotation omitted). Among the costs that are generally recognized as recoverable are some deposition transcripts and copying costs. See Templeman v. Chris Craft Corp., 770 F.2d 245, 248 (1st Cir. 1985) (citing 28 U.S.C. § 1920).

### **Deposition Costs**

In the instant case, Eastern Propane is seeking to recover the costs of the deposition transcripts for Richard Noone (\$510.95) and Robert Flachbart (\$215.35). It is well-established that “if depositions are either introduced in evidence or used at trial, their costs should be taxable to the losing party.” Id. at 249. Great Northern does not challenge the amount for Mr. Noone’s deposition, since it was used in cross-examination at trial. It does challenge the cost for the deposition of Mr. Flachbart since it was not used at trial. However, Mr. Flachbart was the key witness in the case, as he was the driver who delivered the propane gas. Presumably, his deposition was noticed by the plaintiff. The “necessity” for the deposition “is determined as of the time of taking, and the fact that a deposition is not actually used at trial is not controlling.” Martinez v. Cui, No. 06-40029-FDS, 2009 WL 3298080, at \*2 (D. Mass. April 13, 2009) (quoting Sales v. Marshall, 873 F.2d 115, 120 (6th Cir. 1989)) (punctuation omitted). Where, as here, “there can hardly be any suggestion” that the deposition was taken solely “for defendant’s investigative or discovery purposes or purely for defense counsel’s convenience[,]” this court finds the award of costs for the deposition to be appropriate. Id. (punctuation omitted). See also Templeman, 770 F.2d at 249 (it “is within the discretion of the district court to tax deposition costs if special circumstances warrant it, even though the depositions were not put in evidence or used at the trial”). Therefore, this court will award Eastern Propane the full amount of the deposition transcripts it is seeking.

### Copying Costs

Eastern Propane is also seeking \$394.40 in copying charges. Eastern Propane has submitted invoices which indicate the number of pages copied and the charges incurred. It appears that the copying was done soon after new counsel for the defendant entered their appearance.<sup>1</sup> While Eastern Propane has recognized that copying costs are recoverable “where the copies are necessarily obtained for use in the case” it has not provided any additional description of the need for the charges. See Requests for Costs and Fees (Docket No. 100) at 4 (quoting 28 U.S.C. § 1920(4)). Great Northern objects to this request on the grounds that insufficient detail is provided. Given the minimal amount requested, and the fact that the copying was clearly done in connection with new counsel preparing the case, this court will allow the request in its entirety

To be recoverable, copying costs must be “reasonably necessary to the maintenance of the action.” Martinez, 2009 WL 3298080, at \*3 (citing 28 U.S.C. § 1920(4); additional citations omitted). “While a page-by-page justification is not required, the prevailing party must offer some evidence of necessity.” Id. (quotations and citations omitted). Thus, “counsel should inform the Court of the number of copies, the cost of each copy, and provide, if possible, a breakdown of the reasons why photocopying of certain documents was necessary.” Id. (quotations omitted). While there is certainly room for a more detailed description of the defendant’s need for the copies, this court is aware that the case involved a claim of property damage (presumably justified by invoices) for more than \$700,000, as well as a significant

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<sup>1</sup> According to the invoices the costs were incurred in the May – July 2016 time-frame, and new counsel entered their appearances in May and June 2016. (See Docket Nos. 19, 21-22)

number of other exhibits. As an exercise of discretion, this court will award Eastern Propane the full amount of photocopying costs requested.

### Attorneys' Fees

Under the “American Rule,” each party bears its own attorneys’ fees. However, an exception exists which “allows a district court to award attorney’s fees to a prevailing party when the losing party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” Dubois v. U.S. Dep’t of Agriculture, 270 F.3d 77, 80 (1st Cir. 2001) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 33, 111 S. Ct. 2123, 2126, 115 L. Ed.2d 27 (1991)). “To invoke this exception under a claim of ‘vexatious’ conduct, the moving party must demonstrate that the losing party’s actions were ‘frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.’” Id. (quoting Local 285 v. Nonotuck Resource Assocs., 64 F.3d 735, 737 (1st Cir. 1995)). “Because of its potency, however, a ‘court’s inherent power to shift attorney’s fees should be used sparingly and reserved for egregious circumstances.’” Id. (quoting Whitney Bros. Co. v. Sprafkin, 60 F.3d 8, 13 (1st Cir. 1995) (additional quotations and citation omitted)).

In this case, this court declines to award Eastern Propane its attorneys’ fees.

In its motion, Eastern Propane argues that

during the course of trial, Great Northern put forth no evidence to show that Eastern Propane was negligent and breached the standard of care it owed to the Davises. Great Northern presented no evidence that questioned that delivery documentation produced by Eastern Propane or challenged the accuracy and reliability of the equipment used by Eastern Propane in its delivery. Great Northern only presented evidence to try to prove that the pipes in the crawl space could not have frozen rather than proving that Eastern Propane was negligent in delivering propane to the Davis Home.

Requests for Costs and Fees (Docket No. 100) at 4. For its part, Great Northern argues that it introduced evidence of some irregularities in documents, as well as evidence that Mr. Flachbart

