IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	Case No. 02-CV-72-SPF-FHM
	)	
WILLIAMS SECURITIES LITIGATION	)	Lead Case
	)	
	)	Judge Stephen Friot
This document relates to the WCG Subclass	)	

ORDER

On July 6, 2007, this court entered a Memorandum Opinion and Order (doc. no. 1712) granting summary judgment in favor of defendants, Keith E. Bailey, Howard E. Janzen, Scott E. Schubert, Kenneth K. Kinnear, II, Matthew W. Bross, Bob F. McCoy, Howard S. Kalika, John C. Bumgarner, Jr., Frank M. Semple, Ernst & Young LLP, and The Williams Companies, Inc. The court entered judgment in favor of defendants on that same date (doc. no. 1713). Subsequently, defendants filed their bills of costs. After conducting a hearing, the clerk of the court taxed costs in favor of defendants and against the WCG Subclass plaintiffs as follows: the WCG defendants $231,549.08 (doc. no. 1790),[1] the WMB defendants $180,411.70 (doc. no. 1789)[2], and Ernst & Young, LLP (E&Y) $229,371.72 (doc. no. 1791).

On August 27, 2007, the WCG Subclass plaintiffs filed WCG Subclass Plaintiffs' Motion to Review Taxation of Costs (doc. no. 1794). In their motion, the WCG Subclass plaintiffs argued that: (1) costs were taxed for copies of documents without requiring defendants to establish the necessity for use and for which there was

[1] The WCG defendants are Howard E. Janzen, Scott E. Schubert, Kenneth K. Kinnear, II, Matthew W. Bross, Bob F. McCoy, Howard S. Kalika, John C. Bumgarner, Jr., and Frank M. Semple.

[2] The WMB defendants are Keith E. Bailey and The Williams Companies, Inc.

no description of use; (2) costs were taxed for depositions for which defendants made no demonstration of use by the court on summary judgment or likely use at trial, contrary to the court's published guidelines; (3) much of the amount taxed as costs was equally related to the WMB Subclass action and the WCG Subclass plaintiffs should not be responsible for the full amount for the costs; and (4) the court should decline to award costs or, at a minimum, reduce any award of costs because the case was a close and difficult one and defendants' requested costs are unreasonably high. Subsequently, on August 31, 2007, the WCG Subclass plaintiffs filed WCG Subclass Plaintiffs' Motion for Oral Argument on Plaintiffs' Motion to Review Taxation of Costs (doc. no. 1796).

On October 1, 2007, this court referred both motions filed by the WCG Subclass plaintiffs to United States Magistrate Judge Frank H. McCarthy in accordance with 28 U.S.C. § 636 (doc. no. 1805). Subsequently, Magistrate Judge McCarthy granted the WCG Subclass plaintiffs' motion for oral argument and the Motion to Review Taxation of Costs was set for hearing on November 20, 2007 (doc. nos. 1807, 1814). After conducting the hearing, Magistrate Judge McCarthy, on December 6, 2007, issued comprehensive a Report and Recommendation (doc. no. 1821), wherein, after thorough analysis of the facts and the parties' contentions, he recommended that the court approve an award of costs to the WCG defendants in the amount of $231,549.08, to the WMB defendants in the amount of $174,276.25, and to E&Y in the amount of $223,721.27.

On December 20, 2007, the WCG Subclass plaintiffs filed WCG Subclass Plaintiffs' Objections to Magistrate Judge's Report and Recommendation on Plaintiffs' Motion to Review Taxation of Costs (doc. no. 1823). The defendant groups have individually responded to the WCG Subclass plaintiffs' objections to Magistrate Judge McCarthy's Report and Recommendation (doc. nos. 1830, 1831, 1832), and the

WCG Subclass plaintiffs have replied (doc. no. 1834). The court, pursuant to 28 U.S.C. § 636(b)(1), has conducted a *de novo* review of the objections and makes its determination as hereinafter discussed. Although the WCG Subclass plaintiffs have requested oral argument in regard to their objections, the court, upon review of all of the parties' submissions and the record, concludes that oral argument is not necessary.

On December 21, 2007, the WCG Subclass plaintiffs also filed a Motion for Leave to Submit Additional Evidence (doc. no. 1824). The defendant groups have jointly responded to the motion (doc. no. 1826), and the WCG Subclass plaintiffs have replied (doc. no. 1833). The court has carefully considered the motion and makes its determination as hereinafter discussed.

Motion for Leave to Submit Additional Evidence

The WCG Subclass plaintiffs seek leave to submit additional evidence related to their objections to Magistrate Judge McCarthy's Report and Recommendation in regard to third-party documents (primarily documents produced by WilTel[3]) for which plaintiffs were taxed copying costs. Magistrate Judge McCarthy found the copies of third-party documents were necessarily obtained for use in the case and that the amount taxed for the copies was reasonable. Because the WCG Subclass plaintiffs firmly believed that defendants had not met their burden of demonstrating entitlement to taxation of the copying costs of the third-party documents, plaintiffs had not presented evidence either to the court clerk or Magistrate Judge McCarthy to show that the documents were not necessarily obtained for use in the case. The WCG Subclass plaintiffs now desire to submit evidence of "some examples" of how the copies made of the massive document productions, such as the WilTel documents, do not satisfy the legal requirements for taxation of costs. According to the WCG

[3] WilTel is the new company that emerged from the WCG Bankruptcy.

Subclass plaintiffs, the evidence will show that the copies taxed included large numbers of wholly irrelevant or duplicative documents and pages. These examples, they argue, will strongly suggest that the copies of third-party documents, specifically WilTel documents, cannot be found, *en masse*, to have been necessarily obtained for use in the case.

Defendants oppose the WCG Subclass plaintiffs' request, arguing that plaintiffs have not presented legal authority to support the request and the court's guidelines in regard to taxation of costs do not permit supplementation of evidence. In addition, defendants argue that plaintiffs have had ample opportunity to present the evidence and made the decision not to present it. Defendants contend that, if new evidence were submitted, they would be forced to respond in kind and the expense of briefing the bill of cost issues would be greatly increased.

The WCG Subclass plaintiffs reply that defendants, in responding to plaintiffs' objections, have themselves supplemented the record by filing dozens of deposition transcripts and exhibits for the court's review.[4] They also argue that the court's guidelines, upon which defendants rely in opposing plaintiffs' requested supplementation, plainly preclude the taxation of the WilTel copying costs that defendants sought and were awarded. Plaintiffs contend that it is improper to apply the guidelines to plaintiffs but not to defendants.

Section 636(b)(1) of Title 28 of the United States Code and Rule 72(b)(3) of the Federal Rule of Civil Procedure afford the district court discretion, in conducting its *de novo* review, to consider evidence not submitted to the magistrate judge. *See*, 28

[4] On January 8, 2008, defendants filed an Unopposed Joint Motion of WCG Subclass Defendants for Leave to File Joint Appendix in a Conventional Manner and Under Seal (doc. nos. 1825, 1827). The court granted the motions on January 9, 2008 (doc. no. 1828). Defendants promptly filed the Joint Appendix of WCG Subclass Defendants (doc. no. 1829). The joint appendix, according to defendants' motion, consists of deposition transcripts and exhibits for which costs were awarded.

U.S.C. § 636(b)(1) ("The judge may also receive further evidence . . . ."); Rule 72(b)(3), Fed. R. Civ. P. ("The district judge may . . . receive further evidence . . . ."). The court, however, declines to exercise its discretion to consider the WCG Subclass plaintiffs' proposed evidence. Considerations of efficiency and fairness militate in favor of a full evidentiary submission for the magistrate judge's consideration. Hynes v. Squillace, 143 F.3d 653, 656 (2nd Cir. 1998). In the court's view, the WCG Subclass plaintiffs have failed to provide adequate justification for not submitting the evidence for Magistrate Judge McCarthy's consideration. If the court were to allow the additional evidence for the reasons urged by plaintiffs, Magistrate Judge McCarthy's role would be "reduced to that of a mere dress rehearser," *see*, Paterson-Leitch Co., Inc. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 991 (1st Cir. 1988). That result, in the court's view, is not in the interests of justice. *See*, Wallace v. Tilley, 41 F.3d 296, 302 (7th Cir. 1994) ("It is not in the interests of justice to allow a party to wait until the Report and Recommendation or Order has been issued and then submit evidence that the party had in its possession but chose not to submit. Doing so would allow parties to undertake trial runs of their motion, adding to the record in bits and pieces depending upon the rulings or recommendation they received.") (quoting district court ruling).

The court recognizes, as pointed out by the WCG Subclass plaintiffs, that defendants supplemented the record with the filing of deposition transcripts and exhibits for which costs were taxed. *See*, Joint Appendix of WCG Subclass Defendants, filed January 9, 2008 (doc. no. 1829). Although that evidence has been made a part of the record, the court has not reviewed or considered the new evidence in conducting its *de novo* review. The court has only reviewed and considered the record which was before Magistrate Judge McCarthy.

The WCG Subclass Plaintiffs' Motion for Leave to Submit Additional Evidence is accordingly denied.

Report and Recommendation in regard to the WCG Subclass Plaintiffs' Motion to Review Taxation of Costs

As previously stated, the court clerk taxed costs as follows: the WCG defendants $231, 549.08, the WMB defendants $180,411.70, and E&Y $229,371.72.

The costs taxed for the WCG defendants included:

> Fees of the clerk of court: $150.00
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> Fees for service of summons and subpoena: $360.00
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> Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case: $96,017.11
>
> Witness fees: $333.45[5]
>
> Fees for exemplification and copies of papers necessarily obtained for use in the case: $134,688.52.[6]

See, doc. no. 1790.

The costs taxed for the WMB defendants included:

> Fees for court reporter for all or any part of the transcript necessarily obtained for used in the case: $106,237,00
>
> Fees for exemplification and copies of papers necessarily obtained for use in the case: $74, 174.70

See, doc. no. 1789.

The costs taxed for E&Y included:

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[5] The court clerk's Order on Bill of Costs (doc. no. 1790) refers to these costs as "Fees and disbursement for printing." It is clear from the record that the costs are actually for witness fees.

[6] The court clerk's Order on Bill of Costs (doc. no. 1790) refers to these costs as "Witness Fees." It is clear from the record that the costs taxed are actually for fees for exemplification and copies of papers necessarily obtained for use in the case.

> Fees of the court reporter for all and any part of the transcript necessarily obtained for use in the case: $104,161.65
>
> Fees for exemplification and copies of papers necessarily obtained for use in the case: $125,210.07

See, doc no. 1791.

In their Motion to Review Taxation of Costs, the WCG Subclass plaintiffs challenged the costs taxed in favor of the defendant groups for fees for the court reporter relating to depositions (including costs for deposition exhibits) and fees for exemplification and copies. In their respective bills of costs, each defendant group sought costs for over 80 depositions. With the exception of costs related to one deposition (witness Strauss) which was voluntarily withdrawn by each defendant group, the court clerk taxed all requested deposition costs. In their motion, the WCG Subclass plaintiffs argued that defendants had not met their burden of showing which deposition transcripts and video expenses were necessarily obtained for use in the case. Based upon the language of the court's guidelines with respect to taxation of costs,[7] the WCG Subclass plaintiffs claimed that the defendant groups would be entitled, at a maximum, to recover costs for 47 depositions (9 depositions specifically referenced or cited by the court in its Memorandum Opinion and Order, 9 depositions, not included in the previous category, of witnesses who were likely to testify at trial, and 29 depositions, not included in previous categories, of witnesses for which testimony was designated for trial.)[8] Although two of the defendant groups had

[7] The "Clerk's Guidelines for Taxation of Costs" are published on the court's public website: www.oknd.uscourts.gov.

[8] In support of their arguments, plaintiffs cite to VI (C)(2) of the Clerk's Guidelines for Taxation of Costs which provides in pertinent part:

> Costs of depositions are allowed if necessarily obtained for use in the case. A deposition of a witness who testifies at trial will be allowed.

identified a number of additional depositions which had been cited in their summary judgment and *Daubert*[9] papers, plaintiffs argued that they were unaware of any authority which would allow recovery of deposition costs for depositions merely cited in briefs. With respect to depositions not falling into any of the discussed categories, plaintiffs contended that defendants had clearly failed to show that the depositions were necessarily obtained for use in the case.

With regard to fees for exemplification and copies of papers, the WCG Subclass plaintiffs argued that the defendants had failed to show that the copies of various third-party and co-defendant documents were necessarily obtained for use in the case. According to plaintiffs, defendants submitted nothing more informative than statements from copying services for thousands of copies, without identifying the use made of the copied materials. Without any explanation as to the uses of the documents, other than conclusory statements that the copies were necessary for defense of the action, plaintiffs claimed that defendants were not entitled to the costs awarded. Plaintiffs pointed out that the court's guidelines as to taxation of costs limit the recovery to costs for papers "which help bring about the disposition of the case. In other words, those papers related to the actual trial (or summary judgment)." *See*, Clerk's Guidelines for Taxation of Costs, VI(E). Plaintiffs asserted that defendants failed to show that any of the third-party documents and co-defendant documents fell within the guidelines. Further, plaintiffs argued that even if defendants had met their

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> If a deposition is read into evidence, it will be allowed. All other depositions are generally disallowed.
>
> If the case was determined by summary judgment, depositions utilized by the court to determine the summary judgment are allowed.

[9] *See*, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

burden with respect to the necessity of the costs, they had failed to show that the costs were reasonable.

As to any deposition and copying costs the court might find recoverable, the WCG Subclass plaintiffs argued that the court should reduce or otherwise discount the taxation of costs on the basis that the costs were equally related to the settled WMB Subclass action. Plaintiffs argued that the vast majority of witnesses deposed and copying costs incurred were related to both the WCG Subclass action and the WMB Subclass action. Plaintiffs claimed that if the WMB Subclass action had not settled, defendants would not be able to seek recovery of the full amount of costs separately from both the WCG Subclass plaintiffs and WMB Subclass plaintiffs. According to plaintiffs, the costs attributable to both actions should be discounted by a factor of at least 50%.

Finally, as to any costs that the court would find necessary and fair, the WCG Subclass plaintiffs argued that the court should, in its discretion, reduce or even eliminate any award of costs because the issues in dispute were close and difficult and the costs requested are unreasonably high. Plaintiffs assert that the court's ruling on summary judgment turned heavily on questions of law that were far from transparent. Because the issues were close and difficult, plaintiffs argued that they should not be required to pay all of the costs awarded or, indeed, any costs at all. Plaintiffs further argued that they should not be taxed with the costs because the costs sought by defendants for the deposition transcripts and copying of third-party and co-defendant documents are unreasonably high and that, if any case calls for reduction of costs based on the sheer amount sought, it is this case. Plaintiffs argued that, if the cost award were upheld, it would be the largest cost award in the history of American jurisprudence.

In the Report and Recommendation, Magistrate Judge McCarthy initially rejected the WCG Subclass plaintiffs' arguments that the award of costs was unreasonable and that the case was close. As to the former, Magistrate Judge McCarthy pointed out that the gross figure of costs includes awards to three distinct defendant groups. It is not a single cost award. The fact that there were three defendant groups is the result of choices plaintiffs made in bringing the action. Magistrate Judge McCarthy also pointed out that the amount of costs taxed is related to the fact that plaintiffs sought nearly $3 billion in damages and aggressively pursued discovery from defendants and third parties. In regard to the latter, Magistrate Judge McCarthy concluded that the fact the case was decided on summary judgment carries an implication that the case was not close.

Magistrate Judge McCarthy next rejected the WCG Subclass plaintiffs' argument that the costs taxed by the court clerk cannot be "squared" with the court's guidelines. Magistrate Judge McCarthy stated that the guidelines "do not purport to be a definitive, or even authoritative, exposition of costs allowable under 28 U.S.C. § 1920." *See*, Report and Recommendation (doc. no. 1821), p. 5. Magistrate Judge McCarthy noted that plaintiffs had not presented any authority to suggest that the court's guidelines, rather than case authority, define the clerk's authority or the limits of the court's discretion under 28 U.S.C. § 1920. Therefore, for purposes of his analysis of the bills of costs, Magistrate Judge McCarthy declined to refer to the court's guidelines.

After setting forth the standards to be applied in examining the categories of costs challenged, Magistrate Judge McCarthy addressed the deposition expenses for each defendant group and the copying costs for each defendant group. As to the WCG defendants, Magistrate Judge McCarthy found that most of the fact witness depositions for which costs were taxed were initiated by plaintiffs and most of the

deposition witnesses appeared on the parties' witness lists. As shown by the WCG defendants, the fact witnesses also fell into the categories of former officer, director, or employee of WCG; former or current officer, director, or employee of co-defendant WMB; former or current employee of co-defendant E&Y; WCG investor; or former WCG banker or business consultant. In view of these facts, Magistrate Judge McCarthy concluded that the WCG defendants had met their burden of showing that, measured by the facts known to the parties at the time the expenses were incurred, the depositions were necessarily obtained for use in the case and not merely for investigative purposes or convenience of counsel. Magistrate Judge McCarthy also found the expert witness depositions to be necessarily obtained for use in the case. As to the expenses for videoing the depositions, Magistrate Judge McCarthy found that the expenses were appropriately taxed. In reaching his decision, Magistrate Judge McCarthy found that plaintiffs had insisted upon the videotaping of depositions and voiced no objection to recovery of these expenses aside from their argument that defendants had not shown that the depositions were necessarily obtained for use in the case. Magistrate Judge McCarthy therefore recommended that the deposition costs awarded to the WCG defendants be affirmed.

As to deposition costs for the WMB defendants and E&Y, Magistrate Judge McCarthy found that each defendant group had demonstrated that all but four depositions (witnesses Hicks, Holder, Osborne, and Rudley) for which costs were taxed were necessarily obtained for use in the case. Magistrate Judge McCarthy therefore recommended that the cost awards to WMB defendants and E&Y in regard to deposition costs be reduced by the amount of the costs attributable to the four depositions, but affirmed as to all other deposition costs.

In examining the costs awarded for depositions, Magistrate Judge McCarthy rejected the WCG Subclass plaintiffs' request for a percentage reduction due to the

fact that the costs were equally related to the WMB Subclass action. Magistrate Judge McCarthy was persuaded that the expenses incurred would have been incurred even in the absence of the WMB Subclass. Magistrate Judge McCarthy concluded that the reduction of costs for the depositions of witnesses Hicks, Holder, Osborne, and Rudley, who were designated as experts in the WMB Subclass action, was all that was required.

Finally, Magistrate Judge McCarthy addressed the WCG Subclass plaintiffs' challenge to copying costs. Magistrate Judge McCarthy specifically rejected plaintiffs' assertions that defendants had merely attached invoices to their bills of costs without any description of the documents copied or indication of the use made. Magistrate Judge McCarthy concluded that defendants had provided sufficient identification of the documents copied and sufficient description of their necessity for use in the case. Magistrate Judge McCarthy also rejected plaintiffs' argument that the differences between the amounts the defendant groups sought for copying was unexplained and should have bearing on the court's decision. He concluded that the differences showed that defendants appropriately exercised discretion in choosing which documents to copy. Magistrate Judge McCarthy rejected plaintiffs' suggestion that the court should reduce the cost award for copying because it was unreasonably high. Magistrate Judge McCarthy concluded that the level of costs was driven by the number of defendants plaintiffs sued, the high amount of damages sought, the broad allegations lodged against the defendants, and the aggressive course of discovery pursued by plaintiffs.[10] Magistrate Judge McCarthy examined the copying costs taxed

[10] The undersigned agrees with Judge McCarthy that the massiveness and complexity of the litigation pursued by plaintiffs (and the resultant massiveness of the discovery) provide no basis for criticism of plaintiffs or their counsel. Taxing costs is substantially driven by the hard, cold facts of the case and requires neither moral approval of the prevailing party nor condemnation of the losing party.

for each of the defendant groups and concluded that each defendant group had demonstrated that it was necessary to obtain the subject copies for use in the case, not merely for discovery or for convenience of counsel. Therefore, Magistrate Judge McCarthy recommended that the taxation of costs for copies be affirmed.

Based upon his findings, Magistrate Judge McCarthy recommended in his Report and Recommendation that the court approve an award of costs to the WCG defendants in the amount of $231,549.08, the WMB defendants in the amount of $174,276.25, and E&Y in the amount $223,721.27.

In their objections to Magistrate Judge McCarthy's Report and Recommendation, plaintiffs challenge the recommendation of awards of costs totaling $629,546.60. At the outset, plaintiffs maintain that the recommended award would be the largest in the history of American jurisprudence and would be sixteen times the amount of costs that the court's guidelines suggest may be involved in complex cases.[11] However, the court notes, as did Magistrate Judge McCarthy, that the $629,546.60 figure is not an award for one single defendant group. The total figure consists of three cost awards to three separate defendant groups. The fact that the total amount awarded is high is because the WCG Subclass plaintiffs chose to sue three separate defendant groups and all three are prevailing parties. The court also agrees with Magistrate Judge McCarthy that the amount of costs is related to the fact that plaintiffs sought nearly $3 billion in damages and aggressively pursued comprehensive discovery from defendants and third-parties. The court notes that the recommended award for each defendant group is not out of line with the award of costs of $135,830.34 in 1995 to the one single defendant group in Tilton v. Capital Cities, Inc., Case No. 92-CV-1032-MB (N.D.Okla.), a case also decided on summary

[11] Guidelines VI(E) provides ("Occasionally, in protracted, complex cases, the costs may involve thirty to forty thousand dollars . . . .")

judgment, which award of costs was subsequently affirmed by the Tenth Circuit in Tilton v. Capital Cities, Inc., 115 F.3d 1471, 1474-79 (10th Cir. 1997). This action was more protracted and more complex than Tilton. Though higher than most cost awards in this district, based upon the number of defendant groups involved, the claims alleged, the complexity of the issues, the damages sought, and the particular circumstances of the case, the court concludes that the recommended award for each defendant group is not unreasonably high. As discussed below, the court finds that the recommended award for each defendant group should be reduced as to certain deposition costs. The court also finds that the recommended award for the WCG defendants should be reduced as to certain copying costs. The court concludes that the new award for each defendant group is also not unreasonably high. Therefore, the court concludes that no reduction is warranted on the basis that the recommended awards of costs (or the new awards of costs) are unreasonably high.

The court likewise concurs with Magistrate Judge McCarthy that a reduction of costs is not warranted on the basis that the issues in dispute were close. Although the undersigned judge is of the opinion that the dispositive issues (predominantly the issues presented by the *Daubert* motions) that led to the result reached in the court's July, 2007 order were analytically complex but not exceptionally close, self-assured commentary of that sort is neither necessary nor, it seems, prudent. *See, e.g.*, Williams v. United Parcel Service, ___ F.3d ___, 2008 WL 2265160, at *4 (10th Cir. June 4, 2008) ("Unfortunately, and contrary to the district court's confident determination [citation omitted], we find the meaning of [the governing statute] anything but plain.") It is sufficient simply to observe here that Rule 54, Fed. R. Civ. P., creates a presumption that the district court will award the prevailing party costs. Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 1190 (10th Cir. 2004). Thus, the established rule is that costs are generally awarded to the prevailing party.

Id. The burden is on the non-prevailing party to overcome the presumption. *Id*. The denial of costs is in "'the nature of a severe penalty'" and "'there must be some apparent reason to penalize the prevailing party if costs are to be denied.'" *Id*. (quoting Klein v. Grynberg, 44 F.3d 1497, 1507 (10th Cir. 1995)). The court concludes that plaintiffs have not demonstrated a basis upon which the defendants ought to be penalized with denial or reduction of otherwise taxable costs.

The court further concurs with Magistrate Judge McCarthy that a reduction (by a factor of at least 50%) is not warranted for costs equally related to the WMB Subclass action, which was settled. In regard to the WMB defendants and E&Y, the court is persuaded, as was Magistrate Judge McCarthy, that because of the factual overlap between the WCG and WMB Subclass cases, the costs to be awarded would have been incurred even in the absence of the WMB Subclass action. While it is true that the costs would also have been incurred if the WCG Subclass action had not been filed, the fact remains that the costs to be awarded related directly to the WCG Subclass action, the defendants were the prevailing parties in the action, and the defendants, as discussed below, have shown that the costs to be awarded were necessarily incurred for the defense of the claims asserted by plaintiffs.[12] The court thus finds no justification for reducing the costs to be awarded to the WMB defendants and E&Y on the basis that they were equally related to the WMB Subclass action.

In addition, the court finds that a reduction of costs is not warranted in regard to the WCG defendants. The WCG defendants would not have incurred any costs in

[12] The court also notes that defendant E&Y agreed to an ADR procedure for resolution of the WMB Subclass claims in October 2005. *See*, Stipulation and Order Staying the WMB Subclass Action Against Ernst & Young LLP and Vacating the Modified Scheduling Order as to Ernst & Young LLP in the WMB Subclass Action (doc. no. 897). E&Y attended 50 of the 83 depositions for which it requested taxation of costs after October 2005. Those costs were obviously incurred because of the WCG Subclass action.

the absence of the WCG Subclass action. With the exception of defendant John Bumgarner the WCG defendants were not parties to the WMB Subclass action. Therefore, the costs incurred by the WCG defendants related solely to the WCG Subclass action. Moreover, as represented by counsel for the WCG defendants, the costs related to the WMB Subclass action were segregated because costs related to the defense of John Bumgarner in the WMB Subclass action were paid by WMB and not the WCG directors and officers' insurance carriers. Furthermore, John Bumgarner was dismissed as a defendant in the WMB Subclass action during discovery. These facts lead to the conclusion that the reduction sought is not appropriate.

Plaintiffs additionally challenge the recommended award for each defendant group on the basis that it cannot be squared with the court's guidelines. Plaintiffs argue that the guidelines restrict taxable costs to a much smaller subset of expenses of the prevailing party and that it was arbitrary and unfair for Magistrate Judge McCarthy (as well as the court clerk) to disregard the court's guidelines. The court, however, concurs with Magistrate Judge McCarthy that the guidelines "do not purport to be a definitive, or even authoritative, exposition of costs allowable under 28 U.S.C. § 1920." *See*, Report and Recommendation (doc. no. 1821), p. 5. The guidelines are simply that – guidelines. They are intended to assist counsel in determining the proper costs and to minimize the amount of time required for counsel to determine what is properly included in a bill of costs. They are not binding on the court as to whether a particular expense is recoverable. Other courts have so concluded. Southside River Rail Terminal, Inc. v. CSX Transp., Inc., 2005 WL 1630848, *2 (S.D. Ohio July 5, 2005); Cofield v. Crumpler, 179 F.R.D. 510, 516, n. 5 (E.D. Va. 1998). The court agrees with Magistrate Judge McCarthy that the defendants' bills of costs should be analyzed and evaluated in accordance with § 1920 and controlling Tenth Circuit cases.

The court therefore rejects plaintiffs' objection to the recommended awards on the basis that they cannot be squared with the court's guidelines.

The WCG Subclass plaintiffs object to the recommended awards for deposition costs by each of the defendant groups. Applying the court's guidelines, plaintiffs contend that defendants are entitled, at most, to costs for 47 depositions. Plaintiffs assert that even if the guidelines are not applied, defendants still have the burden to show necessity of use in the case. With respect to depositions that were not cited by the court in its summary judgment order and were of witnesses who were not likely to testify or whose depositions were not designated for trial, plaintiffs contend that defendants have not met their burden of showing necessity.

In his Report and Recommendation, Magistrate Judge McCarthy addressed the deposition expenses awarded for each defendant group. Magistrate Judge McCarthy specifically found that the WCG defendants had met the burden of showing that the 81[13] depositions for which costs were awarded were necessarily obtained for use in the case. He also concluded that the WMB defendants met their burden of showing that 81 of the 85 depositions for which costs were awarded were necessarily obtained for use in the case. Finally, he concluded that E&Y had met its burden of showing that 79 out of 83 depositions for which costs were awarded were necessarily obtained for use in the case.[14]

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[13] In the Report and Recommendation, Magistrate Judge McCarthy states that the clerk of the court awarded costs for 82 depositions for WCG defendants. It appears from the record that costs were awarded for 81 depositions. Although WCG defendants identified Jack McCarthy as a witness for which it was entitled to recover deposition costs, they did not seek any costs for Mr. McCarthy because they could not locate and identify sufficient information as to the recoverable costs in time to include it in their bill of costs.

[14] Although Magistrate Judge McCarthy recommended a reduction of costs awarded by the clerk to the WMB defendants and E&Y for four depositions, neither the WMB defendants nor E&Y have objected to the reduction.

The court, having conducted a *de novo* review of the WCG Subclass plaintiffs' objections, concurs with Magistrate Judge McCarthy's findings as to deposition costs except for witnesses Blake, Gerwitz, Mode, Mogil, Mark Dolan, Hakala, and Kushner. Magistrate Judge McCarthy addressed, at length, the appropriateness of taxing the deposition costs, and the court need not repeat his thorough analysis. The court finds plaintiffs' objections to be without merit as to all witnesses except Blake, Gerwitz, Mode, Mogil, Mark Dolan, Hakala, and Kushner. "As long as the taking of the deposition appeared to be reasonably necessary at the time it was taken, barring other appropriate reasons for denial, the taxing of such costs should be approved." Callicrate v. Farmland Indus., Inc., 139 F.3d 1336, 1340 (10th Cir. 1998). The court agrees with Magistrate Judge McCarthy that each of the defendant groups have shown that, measured by the facts known to the parties at the time the expenses were incurred, the depositions for which Magistrate Judge McCarthy recommends an award of costs (except witnesses Blake, Gerwitz, Mode, Mogil, Mark Dolan, Hakala, and Kushner) were necessarily obtained for use in the case. The court, being familiar with the nature and course of this litigation, specifically concludes that the subject depositions were not taken merely for investigative purposes or for the convenience of counsel. The court also concurs with Magistrate Judge McCarthy's conclusion that the award of the videotaping expenses related to the depositions was appropriate. The court therefore rejects plaintiffs' objections to the recommended awards for deposition expenses.

Although Magistrate Judge McCarthy specifically found that defendants adequately demonstrated that the depositions of WMB Subclass plaintiffs' retained experts, Hakala and Kushner, were necessarily obtained for use in this case, the court, reviewing the matter *de novo*, respectfully disagrees. While Kushner, a telecom expert, may have had unkind things to say about WCG, and Hakala, a damages expert,

may have provided some issues pertinent to WCG issues, the court cannot conclude that the depositions of these experts, who were retained solely by the WMB Subclass, were necessarily obtained for use in this case. The court acknowledges that the WMB defendants cited to a portion of Hakala's deposition in support of their Motion to Exclude Testimony of Plaintiffs' Expert Blaine F. Nye (doc. no. 1316). However, after re-reading the citation, the court is not persuaded that the citation provides an adequate basis for shifting the cost of the Hakala deposition to the plaintiffs. The court therefore concludes that the deposition costs incurred with respect to these witnesses should not be taxed against the plaintiffs.

The WMB defendants and WCG defendants were awarded costs for witnesses Blake, Gerwitz, and Mogil, and the WCG defendants were awarded costs for witness Mode. These witnesses were employees of underwriter defendants in the WMB Subclass action. These witnesses were not listed on the WCG Subclass plaintiffs' witness list, and the record reflects that these witnesses were not questioned by WCG Subclass counsel. Although the witnesses were listed on defendants' witness list, the court notes that the list was filed on behalf of all defendants in both the WMB and WCG Subclass actions. The court is not convinced that the defendants have shown that the depositions of these particular witnesses were necessarily obtained for use in this case. The court therefore concludes that the deposition costs of these witnesses should not be awarded to either the WMB defendants or the WCG defendants.

As to witness Mark Dolan, the court finds that E&Y has not demonstrated that his deposition was necessarily obtained for use in the case. Although an employee of E&Y, the record reflects that his testimony related only to issues relating to the WMB Subclass action. He was not listed as a witness by the WCG Subclass plaintiffs. The court is not persuaded that Dolan's deposition was necessarily obtained for use in this

case. The court therefore concludes that these deposition costs should not be awarded to E&Y.

The WCG Subclass plaintiffs object to the recommended awards of costs for copying third-party and co-defendant documents. Plaintiffs contend that defendants have failed to show that the copies were necessarily obtained for use in the case. On *de novo* review, the court concurs with Magistrate Judge McCarthy that each of the defendant groups have provided sufficient identification of the documents copied, and sufficient description of the necessity for use in the case, as to the WilTel and the co-defendant documents. The court concurs with Magistrate Judge McCarthy in rejecting plaintiffs' argument that the variations in the amounts sought by the defendants are unexplained and that that should have a bearing on the court's decision. The court agrees with Magistrate Judge McCarthy that the number of copies made by the defendant groups reflect the different approaches to defending the claims against them. The differences show that defendants exercised discretion in choosing which documents to copy.

As to the other third-party documents, the court concludes that the WMB defendants and E&Y have provided sufficient identification of the documents copied and sufficient description of necessity for use in the case. As to the WCG defendants, the court concludes that the defendants have sufficiently identified and established necessity of use as to the other third-party documents, except as to the following documents: "Copies of third-party subpoenaed documents" in the amount of $474.58; "Underwriter production" in the amount of $1,392.58, "Copies of underwriter document production" in the amount of $2,151.51; and "Copies of underwriters production" in the amount of $174.33. The court thus concludes that WCG defendants should not be awarded costs for these documents.

In sum, the court, having conducted a *de novo* review of plaintiffs' objections to the Report and Recommendation issued by Magistrate Judge McCarthy, accepts adopts, and affirms the Report and Recommendation to the extent stated in this order. Based upon the Report and Recommendation and this court's order, Plaintiff's Motion to Review Taxation of Costs is granted to the extent that Magistrate Judge McCarthy and this court have reviewed the court clerk's taxation of costs; is granted to the extent that this court has reduced the award of costs for the WCG defendants by $8,795.30 (representing expenses for six depositions, Hakala $1,196.85, Kushner $1,509.90, Blake $706.00, Mode $353.00, Mogil $354.15, and Gerwitz $482.40, totaling $4,602.30, and documents totaling $4,193.00), for the WMB defendants by $11,920.75 (representing expenses for nine depositions, Hicks $1,713.80, Holder $1,114.75, Osborne $1,829.45, Rudley $1,477.45, Hakala $1,898.85, Kushner $2,393.90, Blake $681, Gerwitz $457.40, and Mogil $354.15), and for E&Y by $8,652.25 (representing expenses for seven depositions, Hicks $1,538.80, Holder $1,154.75, Osborne $1,654.45, Rudley $1,302.45, Hakala $1,046.85, Kushner $1,309.90, and Dolan $645.05), and is denied in all other respects.

Conclusion

IT IS THEREFORE ORDERED that The WCG Subclass Plaintiffs' Motion for Leave to Submit Additional Evidence (doc. no. 1824) is **DENIED**.

IT IS FURTHER ORDERED that the Report and Recommendation issued by United States Magistrate Judge Frank H. McCarthy (doc. no. 1821) is **ACCEPTED**, **ADOPTED,** and **AFFIRMED** to the extent stated in this order.

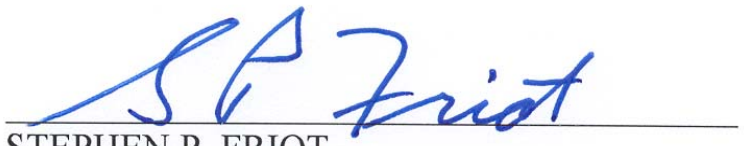
IT IS FURTHER ORDERED that Plaintiff's Motion to Review Taxation of Costs (doc. no. 1794) is **GRANTED** to the extent that Magistrate Judge McCarthy and this court have reviewed the court clerk's taxation of costs as to the WCG defendants, the WMB defendants, and E&Y; is **GRANTED** to the extent that this

court has reduced the costs awarded to the WCG defendants by $8,795.30, to the WMB defendants by $11,920.75, and to E&Y by $8652.25; and is **DENIED** in all other respects.

IT IS FURTHER ORDERED that each defendant group is awarded costs as follows:

WCG defendants	$222,753.78
WMB defendants	$168,490.95
E&Y	$220,719.47

Entered this 10th day of June, 2008.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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