UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC. Plaintiff, v. AOL INC., *et al.*, Defendants.	Civil Action No. 2:11-cv-512

DEFENDANTS' OPPOSITION TO PLAINTIFF'S PROPOSED BILL OF COSTS

Pursuant to Federal Rule of Civil Procedure 54(d)(1) and Local Rule 54(D)(2), Defendants AOL Inc. ("AOL"), Google Inc. ("Google"), IAC Search & Media, Inc. ("IAC Search"), Gannett Co., Inc. ("Gannett") and Target Corporation ("Target") (collectively "Defendants") hereby submit this Opposition to Plaintiff I/P Engine, Inc.'s Proposed Bill of Costs.

Initially, late in this litigation, Plaintiff dismissed with prejudice claims against a majority of the systems initially accused. For example, after Defendants were forced to move for sanctions because Plaintiff failed to comply with a Court Order requiring to provide supplemental contentions as against Google Search and IAC's Ask Sponsored Listings, Plaintiff dismissed with prejudice its claims against those products entirely. And the Court explicitly ordered the parties to bear their own costs as to claims against AOL's Advertising.com Sponsored Listings. Yet, Plaintiff made no effort to apportion its costs to reflect the dismissal of a large portion of its case. Plaintiff should be awarded only those costs necessarily incurred in litigating its claims against Google's advertising system, the only system accused at trial.

Further, Plaintiff's submitted bill of costs claims at least some costs that are not enumerated in 28 U.S.C. § 1920 or the Court's guidelines, exceeds the amount allowable for

other costs, and fails to provide adequate detail to support its claimed totals.[1] The Court should therefore, at minimum, reduce the amount of costs to be taxed against Defendants from $183,440.01 to $41,089.30 as detailed below. Plaintiff's excessive and unnecessary cost requests go directly against the Local Rule 54(E) which provides "Any party applying for costs which are not recoverable or which are excessive shall be subject to sanction under Fed. R. Civ. P. 11."

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO FULL COSTS BECAUSE IT IS NOT A PREVAILING PARTY WITH RESPECT TO A MAJORITY OF THE CLAIMS INITIALLY BROUGHT AGAINST DEFENDANTS.

Federal Rule of Civil Procedure 54 provides that a prevailing party may seek taxation of certain designated costs. Here, Plaintiff is not a prevailing party entitled to costs as to claims against a majority of the systems initially accused in this litigation. Plaintiff voluntarily dismissed its claims against Google Search and IAC's Ask Sponsored Listings, and it dismissed it claims against AOL's Advertising.com Sponsored Listings as part of a settlement that required each party to bear its own costs. On August 6, 2012, almost a year after the action was filed and only after Defendants moved for sanctions based on Plaintiff's failure to supplement its infringement contentions as to Google Search and IAC's Ask Sponsored Listings, as the Court ordered it to do, (D.N. 189), the parties stipulated to the dismissal with prejudice of the patent infringement claims related to these products. (D.N. 203.) Then, on October 9, 2012, pursuant to a settlement agreement, the Court dismissed with prejudice all claims against AOL related to

[1] As required under the Local Rules, the parties have met and conferred on the Bill of Costs. (*See* Declaration of Sarah Agudo in Support of Defendants' Opposition ("Agudo Dec."), Exs. 1-3.) As a result and as set forth below, several of the requested costs are acceptable; unfortunately, several of the costs claimed are unsupported and, despite request, no good faith reasonable basis for such claims has been provided.

AOL's Advertising.com Sponsored Listings and ordered the parties to bear their own costs. (D.N. 690.) At trial, Plaintiff pursued allegations against only Google's advertising system.[2]

Plaintiff dismissed the majority of its case with prejudice after the completion of extensive discovery, yet made no attempt to apportion the costs sought between systems dismissed from the case and the single system accused at trial. This is inappropriate as Plaintiff is not the prevailing party for the dismissed claims against Google Search and IAC's advertising system and, thus, not entitled to costs relating to those claims. *Pacheco v. Mineta,* 448 F.3d 783, 795 n.19 (5th Cir. 2006) ("A dismissal with prejudice is tantamount to a judgment on the merits and thus the prevailing party is entitled to costs."); *see also, e.g.*, *Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997), *abrogated on other grounds*, (holding that voluntary dismissal of claims before trial conferred prevailing party status on the defendants for those claims). In addition, with regard to the claims against AOL's Advertising.com Sponsored Listings, the Court ordered Plaintiff to bear its own costs. Yet, Plaintiff made no effort to apportion its requests for costs to account for the costs it incurred in litigating the claims against AOL's Advertising.com Sponsored Listings, just as it failed to apportion costs from the other dismissed systems.

Because Plaintiff is not the prevailing party entitled to costs as to systems dismissed before trial, the Court should reduce Plaintiff's recovery to reflect the pre-trial dismissal of claims against a majority of the systems Plaintiff initially accused. *See Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("A reduced fee award [under 42 U.S.C. § 1988] is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.").

[2] The accused portions of Google's advertising system were AdWords, AdSense for Search, AdSense for Mobile Search, and AOL Search Marketplace, a white-labeled version of AdWords.

Thus, Defendants ask that the Court reduce any cost award by 60 percent to reflect the percentage of the case dismissed with prejudice.

II. PLAINTIFF SEEKS COSTS FAR BEYOND THE PERMISSIBLE SCOPE.

Plaintiff seeks $183,440.01 to compensate it for a broad array of costs incurred before and during trial. The district court retains broad discretion to decide how much to award in costs, if anything. *Farrar v. Hobby*, 506 U.S. 103, 115-16 (1992); *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1183 (Fed. Cir. 1996) (explaining that "the district court judge retains broad discretion as to how much to award, if anything" to the prevailing party). However, "Rule 54 does not provide the district court with unrestrained discretion to reimburse the winning litigant for every expense he has seen fit to incur." *Cofield v. Crumpler*, 179 F.R.D. 510, 514 (E.D. Va. 1998) (quotation omitted).

Moreover, Rule 54(d) provides courts with "a power to decline to tax, as costs, the items enumerated in § 1920," rather than with discretion to award costs not enumerated in § 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); Fed. R. Civ. P. 54(d). Costs that may be awarded are enumerated in the general taxation-of-costs statute, 28 U.S.C. § 1920, and this Court has also issued Taxation of Costs Guidelines setting forth examples of taxable and non-taxable costs under § 1920. *See* Eastern District of Virginia Taxation of Costs Guidelines (rev. Jan. 28, 2011) ("Guidelines"), *available at* http://www.vaed.uscourts.gov/formsandfees/documents/TaxationofCostsGuidelines1-28-11.pdf.

The party seeking costs bears the burden of showing that the requested costs are allowable under § 1920. *Cofield* 179 F.R.D. at 514. The party seeking costs should "distinctly set forth each item thereof so that the nature of the charge can be readily understood," and "[c]osts will be disallowed if proper documentation is not provided. E.D. Va. Local Rule 54(D)(1). Further, requested costs should be limited to those "reasonably necessary at the time"

they were incurred. *LaVay Corp. v. Dominion Fed. Savings & Loan*, 830 F.2d 522, 528 (4th Cir. 1987).

A. Allowable Costs

Defendants do not object to the following costs sought by Plaintiff.[3]

Undisputed Costs	
Description	**Cost**
Copy Costs	$12,567.94
Filing Fees	$350.00
Pro Hac Vice Applications	$825.00
Per-Page Deposition Court Reporter Costs	$13,481.85
Court Hearing Transcripts	$252.00
Trial Transcripts	$4,106.85
Witness Fees	$570.00
Witness Lodging & Subsistence	$7,206
Expert Witness Travel Costs	$1,729.66
TOTAL	**$41,089.30**[4]

Otherwise, by this Opposition, Defendants object to the taxation of costs as detailed below.

B. Fees for Copies

Plaintiff seeks $86,707.89 for fees for exemplification and the costs for making copies. Fees for *necessary* copies obtained for use in the case are taxable under 28 U.S.C. § 1920. Pursuant to that rule, this Court permits taxation of the "reasonable cost of copies of papers necessarily obtained from third-party records custodians" and the "reasonable cost of

[3] As explained in Section I, Plaintiff is entitled, at most, to taxation of a limited percentage of costs reflecting the fact that Plaintiff dismissed a majority of its claims prior to trial, but after extensive discovery. However, for purposes of assessing the propriety of each of Plaintiff's cost claims, Defendants will assume for the remainder of this brief that full costs will be awarded. This should not be construed as agreement that costs should not be reduced by a certain percentage to reflect Plaintiff's dismissal of claims.

[4] Plaintiff's Bill of Costs includes a request for taxation of $568.75 for service of deposition subpoenas by private process servers. (D.N. 810, 2; D.N. 810-2.) Plaintiff has agreed to withdraw this request. (Agudo Dec., Ex. 1, 2.)

documentary exhibits admitted into evidence at hearing or trial . . . including the provision of additional copies for the Court and opposing parties." (Guidelines, 4.) The Guidelines expressly prohibit, among other costs, taxation of "[t]he salaries and time of persons who prepare copies and exhibits." (*Id.*)

First, Plaintiff seeks $68,496.61 for the vendor's services in preparing and presenting trial exhibits. (D.N. 810-4, D-9; D.N. 810-5, E-10.) This fee is in addition to the actual copy costs of exhibits. No statutory provision provides authority for taxing these costs, and this Court's Guidelines expressly prohibit taxation of vendor service fees (taxation is not permitted for "[t]he salaries and time of persons who prepare copies and exhibits"). (Guidelines, 4.) *See also Francisco v. Verizon S., Inc.*, 272 F.R.D. 436, 445 (E.D. Va. 2011) (denying costs associated with printing vendor's processing of electronically stored information); *Tunnell v. Ford Motor Co.*, No. 4:03-cv-074, 2005 U.S. Dist. Lexis at *13-15 (W.D. Va. Nov. 10, 2005) (denying costs for digital exhibit preparer because "[t]here is no provision for taxing the hourly charges of a digital exhibit preparer or consultant," and denying costs for digital technology specialist for enlarging exhibits). Defendants therefore ask that the **$68,496.61** in service fees be stricken from the Bill of Costs.

Second, this Court's Guidelines provide for taxation of "[t]he cost of patent file wrappers and prior art patent . . . at the rate charged by the patent office." (Guidelines, 4 ¶ 7(A)(5).) Here, Plaintiff seeks to recover $3,471.75 in costs for copies of patents and patent assignments as obtained from an outside vendor. (D.N. 810-5, E-12, E-13, E-17, E-22, E-27.) The invoices it submits in support also include costs not specifically enumerated in 28 U.S.C. § 1920 or the Court's Guidelines—a certification fee paid to the vendor and Federal Express postage. Plaintiff also includes costs attributable to patents it did not assert at trial. Properly reduced to reflect the

fees charged by the United States Patent and Trademark Office for a copy of the file histories, which include a copy of the patents, for the two patents Plaintiff asserted at trial, this cost amounts to $930.00. Defendants therefore ask that the **$2,541.75** in costs for patents, patent assignments and related service fees be stricken from the Bill of Costs.

Third, Plaintiff seeks taxation of $1704.2 for the acquisition of numerous internet articles and books used for research. (D.N. 810-5, E-11, E-14-16, E-18-21, E-23-26.) For example, Plaintiff seeks $295 for a "Judge Report" on Judge Jackson, (*id.*, E-21), fees for rush research services by an outside vendor, (*id.*, E-19), the purchase price of books from Amazon.com and Research Solutions, (*id.*, E-14, E-15, E-25, E-26), and the purchase price of seven different dictionaries. (*Id.*, E-24.) Fees for research services and purchase of research materials fall outside the scope of 28 U.S.C. § 1920(4), as they cannot be considered "exemplifications" or "copies of any materials," nor can they be considered "necessarily obtained" for use in this case. Plaintiff's request to have Defendants pay for the expansion of its library are unfounded. Thus, Defendants ask that the **$3,101.59** in costs for research materials be stricken from the Bill of Costs.

C. Fees for Printed or Electronically Recorded Transcripts[5]

1. Transcripts for Depositions

Plaintiff seeks $60,684.49 in costs for the recording of depositions. (D.N. 809; D.N. 810, 2; D.N. 810-3.) 28 U.S.C. § 1920 allows for taxation of "fees for printed or electronically recorded transcripts necessarily obtained for use in the case." This Court's guidelines clarify that this includes "reasonable (1) stenographer's fees, (2) costs of original transcription or copy of

[5] Pursuant to the Guidelines, only "the cost of the original of a transcript of a court proceeding, either the original or one copy" is taxable. (Guidelines, 2.) Plaintiff has agreed to reduce its request for costs for trial transcripts by $814.80, the cost for additional copies of the trial transcript. (Agudo Dec., Ex. 1.)

transcription, and (3) reasonable delivery fees when accompanied by supporting itemized documentation." (Guidelines, 5.) Accordingly, Defendants do not object to taxation of Plaintiff's per-page court reporter costs for the depositions identified in its Bill of Costs.

Defendants, however, object to the following additional costs that Plaintiff seeks as falling outside the costs allowable under this Court's Guidelines: (1) fees incurred from Plaintiff's election to obtain videos of depositions in addition to written transcripts; (2) fees for depositions taken of Plaintiff's own witnesses; (3) fees incurred from Plaintiff's election to order more than one copy of deposition transcripts; and (4) fees incurred from Plaintiff's election to expedite certain transcripts. Defendants ask that the Court remove those improper costs and reduce the deposition costs to $16,435.88.[6]

(a) Taxation for video-taped depositions is impermissible

Plaintiff seeks $21,736.55 in costs resulting from Plaintiff's decision to videotape numerous depositions in addition to having them stenographically recorded. (D.N. 809; D.N. 810, 2; D.N. 810-3, C-6, C-7, C-9, C-11-13, C-17, C-19, C-22-26, C-28-34, C-47-50.) The guidelines specify that "the costs of a videotaped deposition" are "not taxable" without an "authorizing order or stipulation provid[ing] for taxing of these costs." (Guidelines, 5.) No such order or stipulation exists in this case.[7] Thus, Defendants respectfully request that Plaintiff's Bill of Costs be reduced by the **$21,736.55** sought for deposition videos to $38,947.94.

[6] Defendants have adjusted this amount to reflect the overlap in costs for videotaped depositions of Plaintiff's own witnesses. There was no overlap between costs for Plaintiff's own witnesses' depositions and costs for fees for additional transcript copies or fees for expediting transcripts, so no adjustment was necessary as to those categories.

[7] Even if this Court's Guidelines allowed for the taxation of video costs without an order or stipulation, parties are not entitled to recover costs for both video and stenographic recording of the same deposition without demonstrating necessity for both recordings as to each deposition, and the "concept of necessity for use in the case connotes something more than convenience or

(b) Taxation for depositions of Plaintiff's own witnesses is impermissible

Plaintiff seeks $3,505.26 for deposition transcripts and videos of its own witnesses, specifically Mr. Perlman, Mr. Berger, Mr. Kosak, and Mr. Lang. (D.N. 810-3, C-46, C-47, C-48, C-50, C-51.) Seeking taxation of costs for transcripts for one's own witnesses is improper. *See In re D&B Countryside, LLC*, 217 B.R. 72, 79-80 (Bankr. ED. Va. 1998) ("The court also cannot find that it was necessary to purchase transcripts of the deposition testimony of the debtor's own witnesses . . . .There is no suggestion that either witness was expected to be unavailable for trial, which is the only circumstance in which a transcript of one's own witness would ordinarily be necessary. Undoubtedly, it was useful to debtor's counsel to have a copy, given the possibility that the testimony of his witnesses might be impeached if they testified at trial contrary to their depositions, but at bottom the purchase of those two transcripts was for the convenience of counsel, not to assist in proving the debtor's case at trial."); *Smith v. Xerox Corp*., No. 3:06-cv-1213, 2009 U.S. Dist. Lexis 131121, at *7-8 (N.D. Tex. Apr. 14, 2009) ("Ordinarily, a party is not entitled to recover its costs for the deposition of a witness whom that party may call as its own witness at trial. *See Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 257-58 (5th Cir. 1997) (holding that the prevailing party should have known its own witnesses would have to be called on to testify in open court, and depositions of those witnesses were 'surplusage,' not reasonably necessary, and not taxable to the other party)."). Thus, Defendants ask that Plaintiff's Bill of Costs be reduced by **$3,505.26.**

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duplication to ensure alternative methods for presenting materials at trial." *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 449 (4th Cir. 1999).

(c) Taxation for expedited delivery of transcripts is impermissible

Plaintiff seeks to recover $22,730.35 in costs associated with expediting the deposition transcripts of eight witnesses. (D.N. 810-3, C-36, C-40-45.) However, "incidental costs associated with depositions, such as the cost of expedited delivery charges … are generally not recoverable." *Maurice Mitchell Innovations, L.P. v. Intel Corp*., 491 F. Supp. 2d 684, 687 (E.D. Tex. 2007); s*ee also Quantum Sys. Integrators, Inc. v. Sprint Nextel Corp.*, No. 1:07-cv-491, 2009 U.S. Dist. Lexis 98742, at *26 (E.D. Va. Oct. 16, 2009) ("The Court cannot assume, without explanation, that this expedited deposition transcript fee was necessary to the litigation."); *Fogleman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991) ("We have previously held that the extra cost of obtaining a trial transcript on an expedited basis is not taxable unless prior court approval of expedition has been obtained or the special character of the litigation necessitates expedited receipt of the transcript. … Additional charges incurred merely for the convenience of one party's counsel should not be taxed to the other.").

The witnesses for which Plaintiff seeks expedited transcript costs were either offered an earlier deposition date or, like Messrs. Cullis and Ortega, were not subpoenaed by Plaintiff until later in the case despite having been identified in Defendants' initial disclosures well before that time. Because any need for the expediting of transcripts was Plaintiff's own making, Plaintiff is not entitled to recover the costs of expedited transcripts. Defendants therefore ask the Court to strike the **$22,730.35** for expedited transcripts from the Bill of Costs.

D. Fees for Witness Attendance at Depositions and Trial

Plaintiff seeks to recover costs incurred for witnesses' attendance at trial, including travel and subsistence. (D.N. 809; D.N. 810-6-7; D.N. 810-4.) Defendants do not object to the taxation of per diem amounts and travel compensation pursuant to § 1920 and the Guidelines. This Court permits the following taxation of fees relating to witnesses:

(1) Attendance: An attendance fee of $40 per day for "necessary" trial witnesses. (Guidelines, 3.)

(2) Travel: At least for depositions, "'[c]ost of travel' for witnesses beyond subpoena jurisdiction is limited to 100 miles from place of trial or hearing." (*Id.* (citing Local Rule 30(E)).) Further, a witness must "utilize a common carrier at the most economical rate reasonable available" when traveling to or from proceedings. 28 U.S.C. § 1821(c)(1).

(3) Subsistence: "Reasonable subsistence is allowed for witnesses who live too far to be expected to travel to and from their residence daily while in attendance." (Guidelines, 3.) Per diem rates set by the General Services Administration must be used. (*Id.*)

However, Plaintiff seeks *vastly* more than the allowable taxation for its witnesses as follows:

1. Taxation for Andrew Perlman

(a) Attendance

Defendants do not contest the taxation of witness fees for Mr. Perlman for one day of trial and one day of deposition totaling $80.

(b) Travel

Mr. Perlman bought seven one-way tickets between New York, Norfolk, and Philadelphia during the course of trial, incurring a cost of $3,596.60. This is improper for two reasons. First, Mr. Perlman was dismissed as a witness on October 17, the second day of trial. His presence was no longer required at trial, so Plaintiff should bear any costs related to his decision to voluntarily remain at trial. The fact that Mr. Perlman was Plaintiff's corporate representative does not allow Plaintiff to tax his costs during that time. "Where a person serves as both a fact witness and as a corporate representative, the Court may tax costs for the portion of the witness' time when he was serving as a witness and disallow costs for the portion where he

served as a corporate representative." *Goldstein v. Costco Wholesale Corp.*, No. 02-1520-A, 2004 U.S. Dist. Lexis 22041, at *13-14 (E.D. Va. June 14, 2004) (holding that corporate representative's time at trial could only be taxed for the one day he testified); *Schmitz-Werke GMBH & Co. v. Rockland Indus.*, 271 F. Supp. 2d 734, 736 (D. Md. 2003) ("[W]here a person serves as both a fact witness and as a corporate representative, the Court may tax costs for that portion of his time where he was serving as a witness and disallow costs for the portion where he served as a corporate representative advising counsel."); *EEOC v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 624 (N.D. Ill. 1987) (costs for corporate representatives for days they do not testify may not be taxed).

Second, buying seven one-way tickets is not reasonable under the rules. *See, e.g.*, *Green Const. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 681 (D. Kan. 1994) (reducing taxable costs to one round trip ticket where party sought reimbursement for three round trip tickets for one consultant). Thus, Defendants ask that the **$3,596.60** be stricken from the Bill of Costs for Mr. Perlman's excessive travel costs.

(c) Subsistence

Plaintiff seeks costs for 21 days of lodging for Mr. Perlman totaling $1,869. For the reasons stated above, Defendants should not be responsible for Mr. Perlman's lodging because he voluntarily chose to stay and attend trial after he was dismissed as a witness. Thus, Plaintiff is only entitled to recover per diem lodging costs for Mr. Perlman for one day at deposition and two days at trial for a total of $801.[8] Thus, Defendants ask that the **$1,068.00** be stricken from the Bill of Costs for Mr. Perlman's excessive lodging costs.

[8] This rate applies the $89 per diem lodging rate set forth by the U.S. General Services Administration. (D.N. 810-4, D-14.)

2. Taxation for Donald Kosak

(a) Attendance

Defendants do not contest the two day witness fees taxed for one day of trial and one day of deposition totaling $80.

(b) Travel

Plaintiff seeks $5,545.92 for Mr. Kosak's air travel for trial and deposition. Mr. Kosak purchased business class flights for his travel between Hawaii and Norfolk and Washington, DC. (D.N. 810-4, D-17, D-29.)[9] Business class plane tickets are not reasonable expenses under 28 U.S.C. §§ 1920 and 1821. *See* 28 U.S.C. § 1821 ("Such a witness shall utilize a common carrier at the *most economical rate reasonably available*." (emphasis added)); *Green Const.*, 153 F.R.D. at 681 (reducing award of costs when party sought to tax costs for first class airfare); *In re Kulicke & Soffa Indus., Inc. Sec. Litig.*, 747 F. Supp. 1136, 1147 (E.D. Pa. 1990) (denying $1000 round-trip airfare from Philadelphia to Chicago to be taxed as costs absent an explanation from the party seeking reimbursement of how that price constituted "the most economical rate reasonably available"). Defendants ask that the **$5,545.92** be stricken from the Bill of Costs.

(c) Subsistence

Plaintiff seeks $1,120 in fees for 5 nights of lodging for Mr. Kosak's one-day deposition. Plaintiff also seeks fees for 20 nights of lodging during trial for Mr. Kosak totaling $1,780. Mr. Kosak was called to testify, then permanently excused on October 17, the second day of trial. Like Mr. Perlman, his presence was not required again at trial, and his decision to stay was completely his own. Thus, Plaintiff is only entitled recover per diem lodging costs for Mr.

[9] For the flight to trial, Mr. Kosak bought a $25 upgrade from business class to first class. (D.N. 810-4, D-17.) Plaintiff improperly seeks reimbursement for that cost as well.

Kosak for one day at deposition and two days at trial for a total of $801. Defendants ask that the **$2,039.00** be stricken from the Bill of Costs for Mr. Kosak's excessive lodging costs.

3. Taxation for Andrew Lang

(a) Attendance

Defendants do not contest the two day witness fees taxed for one day of trial and one day of deposition totaling $80.

(b) Travel

Plaintiff seeks $2,742.72 for Mr. Lang's travel between New York and Norfolk. This is far beyond a reasonable fare between those two cities. Mr. Perlman flew between those two cities seven times using one-way tickets at a cost of approximately $400 leg of travel. (*See, e.g.*, D.N. 810-4, D-18, D-19.) Furthermore, Mr. Lang's records indicate that he bought two tickets between New York and Norfolk for $461.80 and $224.60 on October 16, but Plaintiff does not provide any copy of the tickets or indication for why two tickets were bought for the same day. (*Id.*, D-25.) Defendants therefore ask that the **$2,742.72** be stricken from the Bill of Costs.

(c) Subsistence

Plaintiff seeks $2,136 for Mr. Lang to stay 24 nights at a hotel in Norfolk. Mr. Lang was called and permanently excused on October 17, the second day of trial. Like Mr. Perlman and Mr. Kosak, his presence was not required again at trial, and his decision to stay was completely his own. Thus, Plaintiff is only entitled recover per diem lodging costs for Mr. Lang for one day at deposition and two days at trial for a total of $801. Defendants ask that the **$1,335.00** be stricken from the Bill of Costs for Mr. Lang's excessive lodging costs.

4. Taxation for Drs. Becker, Frieder, and Carbonell

(a) Attendance

Defendants do not contest the trial and deposition attendance fees for Drs. Becker, Frieder, and Carbonell totaling $330.

(b) Travel

Plaintiff seeks $1,143.20 for its expert witness Dr. Carbonell, $586.46 for Dr. Frieder, and $2,906.18 for Dr. Becker. (D.N. 810-4, D-15, D-26, D-27.) Defendants have agreed to pay the travel expenses for Drs. Frieder and Carbonell. (Agudo Dec., Ex. 1.) However, Dr. Becker billed for travel expenses far higher than the other experts, and Plaintiff did not provide an itemized invoice for Dr. Becker's costs as required under 29 U.S.C. § 1920. (*See* D.N. 801-4, D-27.) Instead, Plaintiff submitted a single page stating "Travel – S Becker 2,906.18." (*Id.*) There are no receipts included with this invoice, so there is no way to evaluate whether Dr. Becker's travel costs were taxable. Thus, Defendants request that the **$2,906.18** for Dr. Becker's travel be stricken from the Bill of Costs.

(c) Subsistence

Plaintiff seeks taxation of 13, 15, and 14 days of lodging for Drs. Frieder, Becker, and Carbonell, respectively, for a total of $3,738. However, Plaintiff's experts only testified at trial for 4, 1, and 1 days, respectively. Defendants should not be responsible for the costs incurred in lodging Plaintiff's witnesses for additional days beyond a single day for deposition and the days during which the witnesses testified at trial plus an additional day after testimony ended for a total of 12 days. Thus, Defendants request that **$2,670.00** in lodging costs for Plaintiff's experts be stricken from the Bill of Costs.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court reduce the accounting of total costs from $183,440.01 to $41,089.30. Defendants also ask that the Court reduce by 60 percent the $41,089.30 to reflect the fact that Plaintiff was not a prevailing party entitled to costs for a majority of its claims against Defendants.

DATED: January 11, 2013

/s/ Stephen E. Noona

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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