

Keyword Searching and Other Related ESI Charges Disallowed as Taxable Costs Under 28 U.S.C. §1920

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The court in *In Re Scientific-Atlanta, Inc. Securities Litigation*, 2011 WL 2771296 (N.D. Ga. July 6, 2011) recently joined the overwhelming majority of courts that have disallowed, under 28 U.S.C. Section 1920, substantial ESI processing and searching costs to a prevailing party. Finding that keyword searching costs, and training sessions associated with keyword searching, are not taxable under Section 1920, the court agreed with the plaintiff that “such searches are simply the ESI equivalent of having a room full of reviewers physically review paper documents for responsive documents.”

searches, support and blow-back of documents, leaving the remaining categories at issue for the court. “Taxation” of costs to a prevailing party should distinguished from “cost-shifting” during the litigation which typically involve issues of inaccessibility of ESI.

The *In Re Scientific-Atlanta, Inc. Securities Litigation* court began its analysis by noting that the “services required for producing information stored electronically differ from those required to produce information from hard copies of documents.” Referring to another Northern District of Georgia opinion, the court stated that:

“According to the court, the vendor’s key word searching was ‘simply the ESI equivalent of having a room full of reviewers physically review paper documents for responsive documents.’”

Section 1920(4) authorizes an award of certain costs to a prevailing party at the end of the litigation, and provides in pertinent part that:

A judge or clerk of any court of the United States may tax as costs the following....(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.

Under this section, the defendants in *In Re Scientific-Atlanta, Inc. Securities Litigation* sought to recover as taxable costs all of charges billed by their electronic document discovery vendor contained in more than 160 pages of invoices. These charges included costs associated with “privilege searches, support segregation, [and] blow-backs of documents...” as well as training-related costs, keyword searching costs, and home support costs....” Prior to the court’s ruling, the defendants withdrew their requests for taxation of expenses for the privilege

It is appropriate to take into account the costs associated with these additional services in assessing costs for *exemplification and copying of materials*. However, that being said, the party seeking to recover costs for copying bears the burden of establishing entitlement to the costs.

[Emphasis added.] See, *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp.2d 1376 (N.D. Ga. 2009). Turning to keyword searching electronic documents, training and home support expenses, the court found that they are not taxable costs under subsection 1920(4). In particular, according to the court, the vendor’s key word search-

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ing was “simply the ESI equivalent of having a room full of reviewers physically review paper documents for responsive documents.” Further, such related services as “home support” and more than 81 hours of training charges were not taxable costs under Section 1920(4).

The court’s ruling in *In Re Scientific-Atlanta, Inc. Securities Litigation* is consistent with the overwhelming majority of courts that have considered what ESI expenses may be recovered as taxable costs under Section 1920 (4). Electronic document expenses which have been permitted to be taxed as “exemplification” and “making copies” under Section 1920(4) include expenses associated with scanning (of paper documents) and TIFFing of electronically stored documents. See, e.g., *BDT Products v. Lexmark Int’l, Inc.*, 405 F.3d 415 (6th Cir. 2005) (scanning) and *Fast Memory Erase, LLC v. Spansion, Inc.*, 2010 WL 5093945 (N.D. Tex. Nov. 10, 2010) (TIFFing).

Of the more than half a dozen courts that have considered the “taxation” of electronic evidence expenses, the overwhelming majority have disallowed expenses associated with the collection, processing, searching and electronic review of ESI. For example, in *Fells v. Virginia Dept. of Transportation*, 605 F.Supp. 740, 743 (E.D. Va. 2009), the court held that the “defendant’s techniques of processing [electronic] records, extracting data and converting files which served to create searchable documents...” were not taxable costs under Section 1920(4). In *Mann v. Heckler & Koch Defense, Inc.*, 2011 WL 1599580 (E.D. Va. April 28, 2011), the court held that expenses for searching, de-duplicating, and converting electronic files from native format, and extracting text and metadata, were not taxable costs. In *Fast Memory Erase, LLC v. Spansion, Inc.*, 2010 WL 5093945 (N.D. Tex. Nov. 10, 2010), while allowing TIFFing and OCRing expenses, the court disallowed all charges allocated with making forensic images of hard drives in laptops and servers, de-duping, extracting text and metadata for native review, key-word searching and hosted on-line ESI review tools. See also, *Barrett v. Ambient Pressure Diving, Ltd.*, 2009 WL 3435842 (D.N.H. 2009) [Imaging and exporting of .PST files are not “exemplification” costs and thus are not allowed under Section 1920(4)]; and *Kellogg Brown & Root Int’l v. Altanmia Commercial Marketing Co.*, 2009 WL 1457632 (S.D. Tex. 2009) [Company and ESI

vendor’s charges to retrieve information from back-up tapes are not taxable costs.].

But see, *CBT Flint Partners, LLC v. Return Path, Inc.*, 767 Supp. 2d 1376 (N.D. Ga. 2009) [Allowing all ESI related expenses because such expenses are “necessary in this digital age...”] and *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, W.D. Pa. (May 6, 2011) [Following CBT, and allowing all expenses for all amounts of electronic discovery.]

Undoubtedly more courts will be weighing in on this issue under Section 1920(4) going forward because of the substantial expenses often associated with conducting electronic discovery. Whether these future decisions will adopt the reasoning of the majority of courts is uncertain. However, given the clear language of the statute that costs may be taxed only for “exemplification” and “making copies” as well as the American rule that each party, win or lose, bears the legal costs associated with bringing or defending a claim, future courts may continue to follow the lead of courts such as *In Re Scientific-Atlanta, Inc. Securities Litigation*, which distinguished among the various e-discovery activities in order to ascertain which ones constitute “making copies.”

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