

(Previously published in *The Legal Intelligencer*, November 8, 2011)

**New Cost Guidelines for E-Discovery**

by Peter Vaira

In a recent case in the Eastern District, Judge Legrome Davis upheld court costs of \$510,137 for pre-trial discovery, most of which involved e-discovery. In doing so, Judge Davis staked out new areas of accepted costs for e-discovery which should be a guide for future litigation. In the *Aspartame Antitrust Litigation*, plaintiffs filed separate complaints against three corporate defendants in class action suits alleging a horizontal conspiracy regarding setting the price for an artificial sweetener. The Court dismissed the complaints as being barred by the four-year statute of limitations. After appeals were denied, the defendants, who were the prevailing parties, filed for court costs pursuant to Fed. R. Civ. P. 54(d), and Local Civil Rule 54.1. The Clerk assessed costs of \$576,058 against the plaintiffs. The plaintiffs appealed the Clerk's Order to the District Court. After briefing by the parties, the Court reduced the total costs to be paid to the three prevailing defendants to \$510,137. *In re Aspartame Antitrust Litigation*, 2011 U.S. Dist. LEXIS 118226 (E.D. Pa. Oct. 5, 2011).

**E-Discovery**

A great portion of the award dealt with e-discovery. The largest portion of the costs were associated with creating a litigation database, processing and hosting electronic data, conducting keyword and privilege screens on the documents in the database, making documents OCR searchable, and extracting metadata. Judge Davis concluded that e-discovery was appropriate and saved substantial costs. He said, "The court is persuaded that in cases of this complexity, e-discovery saves costs overall by allowing discovery to be conducted in an efficient and cost-effective manner."

The Court recognized that taxing costs for e-discovery is a new area of law where courts diverged in their approaches. Compare *Fells v. Virginia Dept. of Transp.*, 605 F. Supp. 2d 740, 743 (E.D. Va. 2009) (refusing to tax “electronic records initial processing, Metadata extraction, [and] file conversion”) (internal quotation marks omitted) and *Klayman v. Freedom’s Watch, Inc.*, No. 07-22433, 2008 WL 5111293, at \*2 (S.D. Fla. Dec. 4, 2008) (refusing to tax the cost of hiring “experts at a huge hourly cost to search for and retrieve discoverable electronic documents”) with *Race Tires America, Inc., v. Hoosier Racing Tire Corp.*, No. 07-1294, 2011 U.S. Dist. LEXIS 48847, at \*26-30 (W.D. Pa. May 6, 2011) (awarding costs for creating a litigation database, imaging hard drives, scanning documents, processing and indexing data, extracting metadata, and enabling documents to be OCR searchable) and *United States Bankr. v. Dorel Indus.*, Case No. A-08-CA-354-SS, 2010 U.S. Dist. LEXIS 78096, at \*11-14 (W.D. Tex. Aug. 2, 2010) (granting costs under § 1920(3) for the creation of an electronic database) and *Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Envtl. Sys.*, No. CV-98-316-E-BLW, 2006 U.S. Dist. LEXIS 52242, at \*8 (D. Idaho July 27, 2006) (awarding costs under § 1920(4) for a litigation database that “was necessary due to the extreme complexity of this case and the millions of documents that had to be organized”). The Court cited example decisions from the Eastern District of Virginia, the Southern District of Florida, the Western District of Pennsylvania and the Western District of Texas which differed on their approach to awarding costs for e-discovery.

The Court described the volume of discovery in the case as “staggering”. One defendant was required to collect documents from 28 different document custodians totaling 87.73 gigabytes of data – equivalent to copying between four to six million pages

of documents. Another defendant collected 1.05 terabytes of potentially responsive electronic documents, over 75 million pages, in addition to 262,000 hard copy documents.

The Court awarded costs for the creation of a litigation database, storage of data, imaging hard drives, keyword searches, duplication, data extraction and processing and costs associated with a privilege screen. The Court also awarded costs associated with hosting data that accrued after defendants produced documents to plaintiffs, because discovery was ongoing up to the date summary judgment was issued. The Court also awarded costs associated with technical support necessary to complete these tasks, citing other courts which have done so.

Judge Davis followed the decisions of those courts that taxed the costs for optical character recognition (OCR), the process of making fixed images such as PDFs and TIFFs searchable. *See, e.g. Race Tires AM, Inc. v. Hoosier Racing Tire Corp.*, No. 07-1294, 2011 U.S. Dist. LEXIS 48847 (W.D. Pa. May 6, 2011). The Court said searchable documents are essential in a case of this complexity and benefit all parties.

The Court granted one defendant's cost of \$26,244 for "Production Processing Fee – Load File". This cost covered creation of load files that allow documents saved as TIFFs to be loaded onto review platforms. The Court also awarded costs of creating concordance load files, noting that the plaintiffs requested load files accompany documents produced in discovery.

The Court would not permit, however, costs for the sophisticated e-discovery program, Attenex Document Mapper, "a document review tool with visual clustering of a document collection based on concepts extracted from those documents." The Court

found that this service exceeded necessary keyword search and filtering functions, and was used for the convenience of counsel. The Court denied Tech Usage Fees related to the cost of Document Mapper. As a related matter, the Court permitted Tech Usage Fees for Attenex Workbench which is used for extracting and decrypting data, which functions are necessary for litigation.

The plaintiffs objected to the costs of electronic data recovery and tape restoration on the grounds that such work is generally done by attorneys or paralegals, and is not taxable. The Court overruled this objection, holding that electronic data recovery is the process of opening and restoring password protected and corrupted files and tape restoration which are technical processes not done by attorneys. *See, e.g. Tibble v. Edison International*, No. 07-5359, 2011 U.S. Dist. LEXIS 94995 (C.D. Cal. Aug. 22, 2011); *Promote Innovation LLC v. Roche Diagnostics Corp.*, No. 10-cv-964, 2011 U.S. Dist. LEXIS 87995 (S.D. Ind. Aug 9, 2011).

### Depositions

The Court permitted taxation of a videotape deposition or transcripts of deposition, but not for both. *See, Steven v. D.M. Bowman*, No. 07-2603, 2009 U.S. Dist. LEXIS 3065 (E.D. Pa. Jan. 15, 2009). The test is not whether the videotape was actually used at trial, but merely whether the videotape appeared “reasonably necessary” to defendants at the time of the deposition. *Id.* In one instance, the Court denied the costs because the defendant had not shown that the videotaping of the deposition was reasonably necessary.

The Court denied the cost of shipping and handling depositions, but permitted costs of copying exhibits for depositions that were necessarily obtained for use in the case

as well as the costs of a rough draft of the deposition. *See, 168<sup>th</sup> and Dodge, LP v. Rave Reviews LLC*, 501 F.3d 945, 957 (8th Cir. 2007); *Service Employees International Union v. Rosselli*, No. C09-00404, 2010 U.S. Dist. LEXIS 12202 (N.D. Cal. Nov. 1, 2010); *Gallagher v. Gallagher*, No. 07-4196, 2010 U.S. Dist. LEXIS 64185 (N.D. Del. June 24, 2010).

#### Bates Labeling and Confidentiality Labeling

The Court agreed with a majority of courts who have been presented with the issue, and denied costs for bates labeling and confidentiality labeling. *See, e.g. Powell v. Home Depot, USA*, No. 07-80435, 2010 U.S. Dist. LEXIS 110301 (S.D. Fla. Sept. 14, 2010). The Court permitted limited costs for metadata extraction. *See, Race Tires AM, Inc. v. Hoosier Racing Tire Corp.*, No. 07-1294, U.S. Dist. LEXIS (W.D. Pa. May 6, 2011).

#### Scanning and Copying Costs

The Court rejected plaintiffs suggested costs of \$.08 per page for copying costs and awarded \$.25 per page. The Court permitted the costs of scanning charts and graphs in color to preserve the information contained therein, but as defendants failed to demonstrate what percentage of the charts were necessary in color, the Court reduced the requested costs by 50%.

#### CDs and DVDs

The Court permitted the defendants to recover the full cost of creating CDs and DVDs of electronic documents in response to plaintiffs' requests. The Court held that the costs of \$15-\$35 per CD and \$25-\$50 for DVD was not excessive, because it included the cost of transferring the information.

### Miscellaneous Costs

The Court declined to award costs of converting a TIFF document to a PDF document as the parties had agreed the parties could produce documents in either format. This conversion was solely for convenience of counsel.

The Court denied the request for purchasing hard drives as not being itemized.

This was a detailed Order on numerous costs, and the Court's rulings of electronic data accommodation and preservation is a bellwether for future litigation in this area. *See Vaira, E.D. Pa. Federal Practice Rules, Comment on Local Civ. Rule 54.1.*

While this decision is important in pointing out the savings of e-discovery it is also evidence of why companies who become involved in litigation are choosing commercial arbitration over the courts. Pre-trial discovery, e-discovery or otherwise, as evidenced by this case, is becoming so extensive that it is destroying the true purpose of the dispute resolution process as we know it today.