UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-5359 SVW (AGRx)	Date	August 22, 2011
Title	Glenn Tibble et al v. Edison International et al.		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER re Application to the Clerk to Tax Costs against Defendants [421]; Application to the Clerk to Tax Costs against Plaintiffs [424]; Motion for Attorney Fees by Plaintiff [425]

I. BACKGROUND

The Court and the parties are familiar with the dispute and the substance of the Court's Findings of Fact and Conclusions of Law dated July 8, 2010. On December 29, 2010, the Court found that a limited award of attorneys' fees was proper in this case after proceeding through the appropriate factors under Ninth Circuit and Supreme Court precedent on ERISA attorney's fee awards. (Doc. No. 449, "Prior Order"). The Prior Order noted that fees must be *limited* in view of the fact that Plaintiffs succeeded minimally on only part of one of ten of their claims. The Court ordered a new attorneys' fee request from Plaintiffs with updated fee calculations, illustrating compliance with the Court's directive. Plaintiffs originally sought nearly $2.5 million in attorneys' fees and nontaxable costs, and in their new request, seek $407,277.30 in attorneys' fees and $3,731.92 in nontaxable costs. Defendants seek a further reduction in these fees.[1]

Defendants also seek a determination on the parties' Applications to the Clerk to Tax Costs ("Cost Applications"). The Court recently held Defendants are the prevailing parties under Fed. R. Civ. P. 54(d) in a Minute Order dated April 28, 2011 ("Prevailing Party Order"). The Court further clarifies its reasoning in holding that Defendants are the prevailing party. In light of the Court's consideration of the additional issues raised in the prevailing party analysis under Rule 54(d)(1), the Court declines to award attorney's fees to Plaintiffs.[2] Alternatively, the Court holds Defendants may offset their

[1] Defendants did not move for attorney's fees, though such fees would clearly be available under ERISA.

[2] The Court had not considered which party ultimately prevailed in the litigation at the time of its

Initials of Preparer PMC

prevailing party costs with the attorneys' fee award requested.[3]

II. DISCUSSION

A. Application to Tax Costs

The Parties have submitted separate Cost Applications to the Clerk. Local Rule 54-1 states, "[u]nless otherwise ordered by the Court, a prevailing party shall be entitled to costs." When there is a partial recovery by any party or a recovery by more than one party, "[t]he Court shall determine the prevailing party." L.R. 54-2.3. Pursuant to L.R. 54-2.3, the Clerk referred the Applications to the Court. The Clerk also submitted a report to the Court with an analysis of the reasonableness of each party's cost Application for the Court's review.[4]

(1) Prevailing Party

Plaintiffs and Defendants both claim they are the prevailing parties in this case. The Court finds that Defendants are the prevailing parties for the reasons discussed below.

Fed. R. Civ. P. Rule 54(d)(1) states that "[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." Fed. R. Civ. P. Rule 54(d)(1); L.R. 54-1. ERISA § 502(g)(1) also provides for an award of costs: "In any action under this subchapter ... by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

Plaintiffs first argue that they are entitled to costs whether or not they are "prevailing parties"

December 29, 2010 Order because the Bill of Costs had been submitted to the Clerk per the local rules. The Court's Prior Order addressed only whether Plaintiffs had "some success" under the ERISA attorney's fee provision and the Court had not considered the prevailing party analysis.

[3] Defendants do not seek to recover out-of-pocket expenses from Plaintiffs, but only seek to offset their costs up to the amount of Plaintiffs' attorney's fee award. Plaintiffs argue that such an offset is not available as a matter of law, and further, Plaintiffs argue that attorney fees under ERISA are awarded only to *attorneys* and not *parties*. In the event the Court finds an offset is available, Plaintiffs argue that Defendants should not be allowed to offset costs of e-discovery. The Court addresses these issues below.

[4] In the report, the Clerk suggested costs should not be awarded for expenses relating to hiring technicians to unearth electronic data to respond to Plaintiffs' discovery requests. The Clerk did not cite to any relevant authority explaining her decision. However, under these circumstances, this type of legal analysis is beyond the purview of the Clerk and the Court addresses whether these costs should be awarded below.

under Rule 54(d)(1) because § 502(g)(1) overrides Rule 54(d)(1). However, this argument has been foreclosed in Quan v. Computer Sciences Corp., 623 F.3d 870, 888 (9th Cir. 2010). In Quan, the Ninth Circuit held that § 1132(g)(1) does not override Fed. R. Civ. P. 54(d)(1). Id. Thus, the Ninth Circuit required that the district court proceed under a "prevailing party" analysis under Rule 54(d)(1) even in an ERISA context. Id.

Plaintiffs alternatively argue that they are in fact the prevailing party even under Rule 54(d)(1). The general rule is that "the litigant in whose favor judgment is rendered is the prevailing party for the purposes of Rule 54(d)." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2667 (1998) (hereinafter "Wright & Miller"). Courts may award costs to whichever party prevails in "the substantial part of the litigation." O.K. Sand & Gravel v. Martin Marietta Technologies, 36 F.3d 565, 572 (7th Cir. 1994) (quoting Northbrook Excess and Surplus Ins. Co. V. Procter & Gamble, 924 F.2d 633, 641 (7th Cir. 1991)) (quotations omitted); see also K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 477 (9th Cir. 1974).

In this case, Defendants clearly prevailed in the substantial part of the litigation. In a similar case, O.K. Sand, the Seventh Circuit upheld a district court's award of costs against the plaintiff under Rule 54(d). O.K. Sand, 36 F.3d at 571-72. In O.K. Sand, the plaintiff asserted numerous claims worth about $2.2 million and the defendant asserted a counterclaim for $50,000. The defendant lost on its counterclaim, but succeeded in defeating the plaintiff's $2.2 million claim. The district court found that the defendant substantially prevailed in the litigation and awarded costs to the defendant. The Seventh Circuit affirmed the award of costs, reasoning that "[a]lthough it is true that [the defendant] lost on its $50,000 breach of contract counterclaim, it successfully avoided a potentially multimillion dollar judgment on several claims." Id. at 571-72. As in O.K. Sand, here, the Court entered judgment in favor of Defendants and against Plaintiffs on nine separate claims involving all but three funds. By contrast, the Court only entered judgment in favor of Plaintiffs and against Defendants only on part of one claim involving three of several implicated Funds. (Doc. No. 413, "Judgment"). Further, Plaintiffs sought hundreds of millions in damages but succeeded only in receiving a judgment of about $370,000 on behalf of the class.[5] For these reasons, Defendants are the prevailing parties.

Plaintiffs alternatively argue that equitable factors overcome the presumption of cost awards to the prevailing party in this case. "[T]he losing party [bears] the burden to show why costs should not be awarded." Quan, 623 F.3d at 888 (quoting Save Our Valley v. Sound Transit, 335 F.3d 932, 944–45 (9th Cir.2003)) (internal quotations omitted). Here, Plaintiffs have not met their burden.

"Proper grounds for denying costs include (1) a losing party's limited financial resources; (2) misconduct by the prevailing party; and (3) the chilling effect of imposing ... high costs on future civil rights litigants, as well as (4) whether the issues in the case were close and difficult; (5) whether the

[5] The judgment was awarded to the Plan. This recovery amounts to about $20 for each of the 17,395 Plan participants. (Doc. No. 432 at 6).

prevailing party's recovery was nominal or partial; (6) whether the losing party litigated in good faith; and (7) whether the case presented a landmark issue of national importance." Quan, 623 F.3d at 888-89 (quoting Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016, 1022 (9th Cir. 2003)) (quotations omitted) (alterations in original).

Though Plaintiffs contend that all of the equitable factors weigh in their favor, the Court has already found that factors (2), (4), (5), and (7) do not weigh in favor of Plaintiffs in its Prior Order. Plaintiffs focus primarily on their "limited financial resources" and the "chilling effect of imposing high costs" in future ERISA cases. Plaintiffs' contend that as Defendants seek nearly $600,000 in costs, charging individual class representatives Defendants' costs would impose a significant financial burden on the individual representatives. See Taylor v. United Techs. Corp., No. 06-1494, Doc. 231 (D. Conn. July 26, 2010); See also George v. Kraft Foods Global, Inc., No. 07-1713, Doc. 2812, 2010 WL 1976826 (N.D. Ill. May 14, 2010). However, Plaintiffs' argument is misplaced. Defendants do not seek to impose *out-of-pocket* costs against Plaintiffs – Defendants only seek to offset their costs with Plaintiffs' fee award.

Additionally, the chilling effect on future litigants is low under the circumstances of this case. As part of their contingency fee arrangement, Plaintiffs' counsel represented that Plaintiffs would not be liable for Plaintiffs' counsel's costs during the litigation. As the Plan received a judgment of $370,000, each of the Plaintiffs would receive a net (albeit small) benefit from the suit.[6]

(2) Reconsideration of December 29, 2010 Order

At the time of the December 29, 2010 Order, the issue before the Court was solely Plaintiffs' attorney's fees request, not which party prevailed under Rule 54(d)(1).[7] Further, in exercising its

---

[6] As the Court discusses *infra*, Defendants only seek to offset their costs with any attorney's fees award to Plaintiffs.

[7] The Bill of Costs had been submitted to the Tax Clerk. The Court did not address Rule 54(d)(1) in the Prior Order because ERISA attorney's fees awards under 29 U.S.C. § 1132(g)(1) are based on a discretionary standard, which requires ***some success*** on the merits. By contrast, under Rule 54(d)(1), the Court ***must determine*** which party ***ultimately prevailed*** on the substantial portion of the litigation. Here, the analysis above clearly shows that Defendants ultimately prevailed, even though Plaintiffs had *some success*. Under Rule 54(d)(1), the Court may decline to award costs to Defendants only if Plaintiffs meet the burden of showing that a statute or equity requires a contrary result. For example, in Quan, the fiduciaries in an ERISA case succeeded in dismissing all of the plaintiffs' claims on summary judgment. However, the district court did not award costs to the fiduciaries, without any explanation. Quan, 623 F.3d at 887. The Ninth Circuit held that a district court need not specify reasons for awarding costs to a prevailing party, however, in *refusing to award costs* to the prevailing party, the district court

discretion to award fees, the Court had not considered the fact that Plaintiffs' tactic of submitting aggressive discovery requests and asserting numerous non-meritorious claims caused substantial costs for Defendants. Awarding fees rewards such a shotgun approach.

Having now fully considered the additional issue of which party ultimately prevailed and the additional arguments in the Bill of Costs Applications discussed above, the Court has reconsidered its exercise of discretion in awarding fees in its December 29, 2010 Order.[8] The Court DECLINES to award any attorney's fees to Plaintiffs. Alternatively, as discussed below, the Court GRANTS Defendants' request to offset their prevailing party costs up to the amount of Plaintiffs' attorney's fee request.

(3) Availability of Offset

"[T]he general rule is that a judgment for costs for one party may be set off against a judgment for another in the same action." Wright & Miller § 2667 (citing Massachusetts Cas. Ins. Co. v. Forman, 600 F.2d 481, 485 (5th Cir. 1979)). Plaintiffs argue that this principle is not applicable for two independent reasons. First, Plaintiffs contend that an award of attorneys fees under § 1132(g)(1) is awarded to *counsel* and not to *a party*; therefore, the award is not subject to an offset. Second, Plaintiffs argue that even if § 1132(g)(1) requires that attorneys fees be awarded to a party rather than directly to counsel, the Court does not have discretion to offset attorney fee awards with prevailing party costs. After reviewing the relevant case law, the Court rejects both arguments.[9]

The ERISA attorney fee statute expressly states that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either *party*." 29 U.S.C. § 1132(g)(1) (emphasis added). In Astrue v. Ratliff, 130 S. Ct. 2521 (2010), the Supreme Court decided the issue of whether a fee award

---

must specify a proper ground. Id. at 888 (citing Save Our Valley v. Sound Transit, 335 F.3d 932, 944-45 (9th Cir. 2003)). This reasoning underscores the fact that refusing to award costs under Rule 54(d)(1) is not entirely a matter of discretion as is the case when awarding fees under § 1132(g)(1).

[8] The Court retains the power to *sua sponte* reconsider its earlier Order. See Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 420 Fed.Appx. 97, 100, 2011 WL 1549506, at*2 (2d Cir. 2011) ("We emphasize that the district court retains the power to reconsider its order granting the preliminary injunction, upon request or *sua sponte*."); Cain v. Airborne Exp., 188 F.3d 506, 1999 WL 717948, at *1 n.1 (6th Cir. 1999) (district court has power to *sua sponte* reconsider denial of summary judgment) (unpublished). Moreover, the Court never entered a judgment for Plaintiffs' attorney's fees, but instead ordered an additional fee request.

[9] In its Prevailing Party Order, the Court also invited additional briefing on the availability of an offset of attorneys fees awarded under § 1132(g)(1) with costs awarded to Defendants under Rule 54(d)(1).

under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), was payable to the litigant and therefore subject to an offset to satisfy the litigant's pre-existing debt to the government. Id. at 2522. The Court held that as subsection (d)(1)(A) expressly directed courts to award fees to a prevailing *party* rather than directly to counsel, the award was payable to the litigant and subject to an offset. Id. at 2529 (noting that cases concerning awards in the civil rights contexts buttress the conclusion that the party, rather than the lawyer, is entitled to receive the fee award). Subsequently, in United States v. $186,416.00, 642 F.3d 753, 754-55
(9th Cir. 2011), the Ninth Circuit followed Ratliff in holding that attorney's fees under CAFRA are awarded to the claimant rather than directly to the claimant's attorney. The Ninth Circuit stated that "Ratliff counsels that in the absence of explicit instructions from Congress awarding fees to the attorney, direct payment to the attorney should *not* be presumed." Id. at 756. Importantly, $186,416.00 and Ratliff also rejected the policy argument that awarding fees directly to the litigant would make the fees subject to an offset by the government, which may leave the attorneys with no fees. Id. at 757; Ratliff, 130 S. Ct. at 2528. In $186,416.00, the Ninth Circuit concluded that these "policy arguments must be made to Congress, which could draft the fee award statute to specify payment to counsel." $186,416.00, 642 F.3d at 757.

Here, § 1132(g)(1) clearly states that attorney's fees and costs are to be awarded to *parties*. An indication that these awards are payable directly to the attorney is wholly absent. As such, under Ratliff and $186,416.00, the Court holds that fee awards under § 1132(g)(1) are payable to Plaintiffs as part of their judgment, not to their counsel.

Plaintiffs contend that even if fee awards under § 1132(g)(1) are payable to Plaintiffs, they are not subject to an offset with Defendants' prevailing party costs. The essence of the issue raised by Plaintiffs is whether the Court's equitable power to offset is limited by lien priority principles. Plaintiffs distinguish Ratliff and $186,416.00 because in those cases, offsets were available for *preexisting government debt*, whereas in this case, Defendants seek an offset for prevailing party costs. Indeed, Plaintiffs go so for as to argue that Ratliff's reasoning limited the availability of offsets to preexisting government debts. However, the Supreme Court in Ratliff did not specifically address the issue of why the offset was available – the Supreme Court made no finding as to whether the offset was available only because the government would have priority over any attorney's lien based on a contractual assignment. In $186,416.00, the majority opinion also did not address this issue.[10]

On the other hand, as noted above, the general rule is that a judgment for costs for one party may

---

[10] However, in her dissenting opinion, Judge Berzon noted that "debts owed by a claimant to the government . . . might constitute a lien superior to the attorney's contractual or other assignment-based right." $186,416.00, 642 F.3d at 763 (Berzon, J. dissenting). Judge Berzon concluded that a blanket rule awarding fees to the litigant who may have prior debts would create additional uncertainty for attorneys and hinder litigants' access to the courts. Id.

be set off against a judgment for another in the same action. "The right of setoff (also called 'offset') allows parties that owe each other money to apply their mutual debts against each other thereby avoiding 'the absurdity of making A pay B when B owes A.' " Citizens Bank v. Strumpf, 516 U.S. 16, 18, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995) (quoting Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528, 33 S.Ct. 806, 57 L.Ed. 1313 (1913)). "The historical antecedents of setoff rights are long and venerable and are based on the common sense notion that 'a man should not be compelled to pay one moment what he will be entitled to recover back the next.'" United States v. Norton, 717 F.2d 767, 773 (3d Cir.1983). "Because of its origins as an equitable remedy. . . the 'allowance of a setoff lies within the sound discretion of the trial court.'" In re Braniff Airways, Inc., 42 B.R. 443, 448 (Bkrtcy. Tex. 1984) (quoting Riggs v. Government Emp. Financial Corp., 623 F.2d 68, 73 (9th Cir. 1980)). Indeed, even in bankruptcy law, where priority of distribution among creditors is a fundamental policy, courts apply the common law discretionary principles of setoff (now codified) even though setoff would allow a creditor to receive priority in the satisfaction of its debts regardless of whether its lien was first in time.[11] Matter of Bevill, Bresler & Schulman Asset Management Corp., 896 F.2d 54, 57 (3d Cir. 1990) (recognizing that setoff is at odds with the tenets of the bankruptcy statute and noting setoff is nonetheless discretionary); Norton, 717 F.2d at 772 ("The broad equitable discretion of courts in recognizing setoff rights defined by the common law has been carried over to the Bankruptcy Reform Act of 1978 and in particular to section 553, whose language is permissive, not mandatory."). As such, Plaintiffs' argument that lien priority principles preclude an equitable offset is unavailing.

Plaintiffs alternatively argue that offsets are inequitable here because Defendants request that costs be offset against attorney's fees, rather than a judgment for Plaintiff, and as such, Plaintiffs' access to the courts is hindered. However, as discussed above, this distinction is illusory in this case because the attorney's fee award under ERISA is simply awarded as part of the judgment. Moreover, Ratliff and $186,416.00 rejected policy arguments that are similar to those made by Plaintiffs here – that ERISA plaintiffs would not have access to the courts. Even if that policy rationale was a relevant consideration, Plaintiffs asserted damages of hundreds of millions of dollars on behalf of a class of over 17,000 individuals. Under such circumstances, there is little chance that Plaintiffs' access to the courts would be impaired by an offset. See White v. Sundstrad Corp., 256 F.3d 580, 586 (7th Cir. 2001) (noting that ERISA class actions are "designed to generate financial return, [which] induces lawyers to compete for the opportunity to represent the class"); Cf. Plant v. Blazer Financial Services, Inc., 598 F.2d 1357, 1365-66 (holding setoff of attorney's fees not available in truth-in-lending action where maximum

---

[11] For example, if Party A (a bankruptcy debtor) owes Party B (a bankruptcy creditor) but Party B also owes Party A some greater sum on a separate claim, equitable setoff would allow Party B to subtract Party A's debts before making payment on the separate claim. As a result, Party B would have first access to Party A's bankruptcy estate through setoff even though Party A's other bankruptcy creditors may have had liens with higher priority than Party B.

amount of damages was capped at $1,000 and if fee award were subject to setoff, then plaintiffs would have no access to courts as they are generally insolvent debtors suing for small recoveries). Other courts have also offset fees with costs. See, e.g., Forman, 600 F.2d at 484-86; Navarro v. General Nutrition Corp., 2005 WL 2333803, at *24 (N.D.Cal. 2005) (offsetting fees and costs without discussion); Gomez v. Reinke, 2008 WL 3200794, at *19 (D.Idaho 2008) (same).

In any case, the Court need not decide whether an offset is generally available under the authorities above. Under the circumstances of this case, the equities sharply favor Defendants, particularly because the costs faced by Defendants are a result of Plaintiffs' needless and protracted litigation on non-meritorious claims. Additionally, Defendants only seek to offset the amount of Plaintiffs' attorney's fee award and will still internalize substantial costs.

(4) Reasonableness of Defendants' Costs

Plaintiffs argue that Defendants' costs are excessive. In particular, Defendants seek costs for utilizing the expertise of computer technicians in unearthing the vast amount of computerized data sought by Plaintiffs in discovery. Plaintiffs argue that these costs fall outside the scope of Rule 54 and 28 U.S.C. § 1920(4).[12] The Court focuses on these costs because they comprise about $530,000 -- by far the greatest portion of Defendants' costs.[13]

Plaintiffs first argue that Defendants' request to tax costs for unearthing electronically stored information should have been raised in a Motion for Attorney's Fees, which Defendants never filed. However, Defendants' Application to Tax Costs appropriately raises the issue because although costs associated with the function of attorneys are part of fees, costs associated with the technical expertise required to unearth electronically stored information are not. See Teicher v. Regence Health & Life Ins. Co., No. 06-CV-1821-BR., 2008 WL 5071679, at *11 (D. Or. Nov. 24, 2008) ("[C]osts of the type enumerated in [28 U.S.C.] § 1920 are treated as a category of expenses distinct from attorney's fees.").

Plaintiffs next argue that the Court may not award costs for utilizing the expertise of computer technicians to provide electronic data under § 1920(4). Although the Court is restricted in awarding costs to the categories enumerated in § 1920, "[d]istrict courts are free to interpret the meaning of the cast of categories listed within § 1920." Taniguchi v. Kan Pacific Saipan, Ltd., 633 F.3d 1218, 1221 (9th Cir. 2011). "Once it is established that an item falls within 28 U.S.C. § 1920, the prevailing party is presumed to be entitled to recover costs, and the burden is on the losing party to show impropriety of an

---

12 Title 28, United States Code § 1920(4) states that a judge or clerk of court may tax as costs the "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."

13 The Court does not address the remainder of Defendants' Application to Tax Costs as the Court need only determine whether these costs are reasonable to offset Plaintiffs' latest fee request.

Initials of Preparer PMC

allowance." Cofield v. Crumpler, 179 F.R.D. 510, 514 (E.D.Va. 1998).

Courts have found that costs such as those sought by Defendants are recoverable under § 1920(4). BDT Products, Inc. v. Lexmark Intern., Inc., 405 F.3d 415, 420 (6th Cir. 2005) (affirming district court's award of costs for electronic scanning and imaging); Race Tires Am., Inc. v. Hoosier Racing Tire Corp., No. 2:07-cv-1294, 2011 WL 1748620 at *7-9 (W.D. Pa. May 6, 2011) (compiling case law and holding e-discovery costs were available under § 1920(4) in case where plaintiff aggressively pursued electronically stored information); CBT Flint Partners, LLC v. Return Path, Inc., 676 F.Supp.2d 1376 (N.D.Ga.2009) (holding expenses incurred in retaining computer consultant to collect, search, and identify documents in response to plaintiff's discovery requests were taxable costs).

Plaintiffs cite to cases where courts have held that costs relating to providing computerized data are unavailable under § 1920 when such steps are taken merely for the convenience of a party. Fells v. Virginia Dept. of Transp., 605 F.Supp.2d 740, 743-44 (E.D.Va. 2009) (rejecting defendant's request for costs of creating electronically searchable documents); Roehrs v. Conesys, Inc., 2008 WL 755187 at *3 (N.D. Tex. Mar. 21, 2008) (scanning of documents into electronic format for "convenien[ce] for counsel" was not "necessary" and not a recoverable cost).

It is clear, however, that in this case, Defendants' costs were not accrued merely for the convenience of counsel, but were necessarily incurred in responding to Plaintiffs' discovery requests. Plaintiffs propounded twenty-eight requests for production of documents, including electronically stored information,[14] reaching documents over a decade old. (Doc. No. 442 Longo Decl. ¶ 5). Plaintiffs aggressively sought electronic files, whether active, deleted, fragmented, or stored on electronic media or network drives. (Doc. No. 442 Longo Decl. ¶ 5). Ultimately, Defendants produced 537,955 pages of electronic documents in response to Plaintiffs' requests. (Doc. No. 442 ¶ 7). Defendants were *required* to produce this electronically stored information under the Federal Rules of Civil Procedure unless they could demonstrate that they faced an "undue burden or cost."[15] See Fed. R. Civ. P. 26(b)(2)(B); Adv. Comm. Note to 2006 Amendment to Fed. R. Civ. P. 26(b)(2); see generally Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2004) (discussing the duty to preserve electronically stored information).

Courts have also approved of the appointment of electronic data recovery experts to ensure data

---

[14] "Electronically stored information" includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data stored in any medium from which information can be obtained. Fed. R. Civ. P. 34(a)(1)(A); Adv. Comm. Note on 2006 Amendment to Fed. R. Civ. P. 26(a).

[15] Even had Defendants met this high bar, Plaintiffs could have shown good cause to require production of the information sought. Further, the Defendants would be at fault for the inaccessibility of the information. See Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 620-21 (D.N.J. 2010).

Initials of Preparer PMC

is preserved, properly retrieved, and that the responding party's privacy interests are sufficiently protected. See Playboy Enterprises, Inc. v. Welles, 60 F. Supp. 2d 1050, 1054-55 (S.D. Cal. 1999); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 650-51 (D. Minn. 2002). Particularly in the context of retrieving deleted e-mails or backup tapes, courts have acknowledged that expert assistance is often necessary and occasionally shifted costs of retaining such experts to the requesting party. See Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D 421, 429-32 (S.D.N.Y. 2002) (shifting discovery costs of retaining electronic data experts to produce electronically stored information to plaintiffs); Zubulake, 217 F.R.D. at 317-18.

Plaintiffs argue that even if Defendants' costs were necessary, the costs were excessive because of the rates charged by Defendants' third-party technicians. However, Defendants have shown that they selected the third-party technicians on the basis of their expertise and after a competitive bidding process. (Doc. No. 442 Schubert Decl. ¶ 4; Longo Decl. ¶ 6). Defendants present evidence that the third-party technicians charged market rates. (Doc. No. 442 Longo Decl. ¶ 9; Schubert Decl. ¶ 6). Plaintiffs do not refute this evidence. The Court concludes Defendants' costs are reasonable.[16]

B. Amount of Attorney's Fees

As the Court has declined to award attorney's fees, or alternatively, has offset the requested fee award with Defendants, the Court need not reach the issue of whether the present fee request is reasonable. However, the Court does so to illustrate Plaintiffs' needless and protracted litigation tactics to support the Court's reasoning above.

The Parties agree that $16,145.63 in attorney fees relate directly to Plaintiffs' successful claim and that the Court has already deemed that these fees will be awarded.[17] Supp. Mot. Decl. of Jason Kelly, ¶ 15, Ex. 11; Defendants' Resp. at 1.

Plaintiffs further seek $258,525.00 in "Post Judgment" hours, which were not addressed by the Court in the Prior Order. Decl. of Kelly, ¶ 18, Ex. 12. The vast majority of the 674.8 hours billed under this category were billed for drafting the attorney's fee motion and Cost Application. Decl. of Kelly, Ex. 12.

---

16 In any case, Defendants only seek costs up to the amount of Plaintiffs' attorney's fee award. The Court need only determine whether Defendants could have reasonably charged $407,277.30 (the amount of Plaintiffs' fee request) for e-discovery costs.

17 These hours relate primarily to drafting the declaration of Steve Pomerantz, the deposition of Defendant's expert, and research of the mutual funds at issue. Decl. of Kelly Ex. 11.

Plaintiffs also seek $132,606.67 in fees for 340.48 "Post-Summary Judgment Hours" billed.[18] Decl. of Kelly, ¶¶ 25-30. Plaintiffs arrive at this figure after noting that Plaintiffs had three viable claims after summary judgment and a total of approximately 2000 hours were billed. Decl. of Kelly, ¶¶ 25-27. Plaintiffs then reduce these hours by one-third and again by one-half for the successful claim. Decl. of Kelly, ¶ 28. Applying a similar methodology, Plaintiffs reduce their nontaxable cost request to $3,731.92. Decl. of Kelly ¶¶ 34-36.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "The district court should also exclude from this initial fee calculation hours that were not 'reasonably expended'" such as "fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." Id. at 434; see also Mogck v. Unum Life Ins. Co. Of Am., 289 F. Supp. 2d 1181, 1194-95 (S.D. Cal. 2003). As recently emphasized by the Supreme Court:

> [T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.

Fox v. Vice, 131 S. Ct. 2205, 2216, 563 U.S. ___ (2011).

The Court's Prior Order has thoroughly discussed the legal standard and the Court's discretionary authority in granting attorney's fees in ERISA cases. Although the Court granted *limited* attorney's fees, the Court's Prior Order emphasized the unreasonableness of Plaintiffs' request for $2.5 million in overall attorney's fees and non-taxable costs, despite the fact that Plaintiffs succeeded only on a portion of one claim out of ten.[19] As discussed earlier in the Prior Order, the bulk of Plaintiffs' efforts related to a duty of loyalty theory of liability, not their successful claim under a duty of prudence

---

18 These hours relate generally to trial preparation between the Court's Summary Judgment Order and the Court's Findings of Fact and Conclusions of Law. Decl. of Kelly ¶ 23.

19 As discussed above and in the Prior Order, Plaintiffs originally sought hundreds of millions of dollars, asserting at least ten claims relating to several mutual funds and money market funds. Plaintiffs succeeded on only a part of one claim relating to three particular mutual funds, leading to a judgment of approximately $370,000. Judgment was entered for Defendants on the remaining claims.

theory.[20] The Court found the duty of loyalty theory clearly meritless and that it constituted the bulk of Plaintiffs' hours. Plaintiffs initially attempted to request the hours expended pursing the duty of loyalty theory along with hours spent on the far less time intensive duty of prudence theory. The Court denied this request. See Prior Order; See also Ingram v. Oroudjian, __ F.3d __, 2011 WL 3134530 (9th Cir. July 27, 2011) (upholding district court' deduction of hours spent on issue because district court felt work was unnecessary). However, the Court gave Plaintiffs an opportunity to resubmit their request in light of the Court's Prior Order of December 29, 2010.

In this renewed request, Plaintiffs' attorneys, continuing a trend of billing unnecessary and wholly unreasonable hours, request fees for 674.8 "Post-Judgment" hours. These hours resulted in $258,525.00 of additional fees alone. The *vast majority* of these hours relate to only two motions: Plaintiffs' Cost Application and Plaintiff's Attorney's fees motion. See Decl. of Kelly Ex. 12. The entries are either vague or duplicative. See, e.g., Decl. of Kelly Ex. 12, Entries 46-50 ("Research - Bill of Costs application"), Entries 52-57 ("Research and drafting - bill of costs motion"), Entries 77, 88 ("Conference re: case status"), Entry 129 ("Meeting with attorneys and staff re: attorneys fees, costs and appeal"). In view of the pervasive duplicative, vague, and unnecessary hours requested, the Court does not award fees for post-judgment hours. See Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir.1986) ("In determining reasonable hours, counsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended. Those hours may be reduced by the court where documentation of the hours is inadequate; if the case was overstaffed and hours are duplicated; if the hours expended are deemed excessive or otherwise unnecessary.") (emphasis added) (citing Hensley, 461 U.S. at 433-34), *amended on other grounds*, 808 F.2d 1373, (9th Cir. 1987).

Many of Plaintiffs' entries for "Post-Summary Judgment Hours" are also duplicative, excessive, or otherwise unnecessary. Specifically, the Court finds the following entries in Exhibit 13 vague, duplicative, or excessive: Entries 222-29 ("Depo index, trial prep" or simply "trial prep" – approximately 50 hours at "A" rates); Entries 338-40 ("prepare for and attend trial" – approximately 50 hours at "B" rates); 457-58, 475 ("Conference," "E-mail exchange," and "trial prep" – approximately 28 hours at "C" rates); and Entry 500 ("Trial prep meeting" totaling .5 hours at "E" rates). As such, the Court reduces the applicable "A" hours by 50 ($16,250.00), "B" hours by 50 ($22,500.00), "C" hours by 28 ($17,500), and "E" hours by .5 ($62.50). Based on the Court's calculation, it reduces the fees award for post-summary judgment work to $123,221.28.[21] Excluding the Plaintiffs' expenses and costs, the

---

[20] The successful duty of prudence theory asserted that Defendants should have inquired as to institutional investor pricing discounts for its mutual funds rather than retail investor pricing.

[21] Exhibit 13 apparently includes all Post-Summary Judgment Hours, which Plaintiffs subsequently reduced by one-third and then one-half. Thus, though the reductions amount to $56,312.50, five-sixths

total fees award would be $139,366.91.[22]

III. CONCLUSION

In conclusion, the Court declines to award attorney's fees under 29 U.S.C. § 1132(g)(1). Thus, Defendants' request for costs is moot as Defendants seek costs only to the extent Plaintiffs receive attorney's fees.

Alternatively, Defendants' request for an offset of costs up to the amount of Plaintiffs' award of attorney's fees is GRANTED. Regardless of whether Plaintiffs' fee award is $407,277.30 or $139,366.91, after the offset, neither party is to receive any fees or costs.

---

of these fees have already been removed from Plaintiffs' calculation. As such, the Court only reduces Plaintiffs' fee request by one-sixth of $56,312.50, or $9,385.42.

[22] It is important to note that Plaintiffs submitted an incredible number of excessive, redundant, and unnecessary hours despite the Court's prior admonition that Plaintiffs' success was extremely limited and that only limited attorney's fees are appropriate in this case. "At least four circuits have held that when a party submits a [civil rights] fee request that is outrageously excessive, the court may respond by awarding no fees at all." Case v. Unified School Dist. No. 233, 157 F.3d 1243, 1254-55 (10th Cir. 1998) (citing District of Columbia, First, Fourth, and Seventh Circuits); See also Scham v. District Courts Trying Criminal Cases, 148 F.3d 554, 557 (5th Cir. 1998) (upholding denial of all fees under a "shocks the conscience" standard). Here, despite the Court's Prior Order reducing the grossly excessive $2.5 million fee award sought and emphasizing the fee award must be limited given the circumstances of this case, Plaintiffs request over $400,000 in fees. Under the law of the Circuits cited above, the Court would find Plaintiffs' pursuit of fees outrageously unreasonable and reject Plaintiffs' fee request. However, the Court notes that the Ninth Circuit has not followed the law of these other Circuits. Instead, the Ninth Circuit has held that a request for excessive hours is grounds not for eliminating the fees entirely, but for reducing or eliminating only those hours found to be excessive. Mendez v. County of San Bernardino, 540 F.3d 1109, 1128-29 (9th Cir. 2008). Thus, the Court's analysis eliminates only those portions of the request found to be excessive.

Initials of Preparer PMC