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

IN RE: WILLIAMS SECURITIES LITIGATION WCG SUBCLASS	Case No. 02-CV-72-SPF-FHM

REPORT AND RECOMMENDATION

The WCG Subclass Plaintiffs' Motion to Review Taxation of Costs [Dkt. 1794] has been referred to the undersigned United States Magistrate Judge for Report and Recommendation. The matter has been fully briefed and a hearing on the matter was held on November 20, 2007.[1]

BACKGROUND

This action is the lead case in a consolidated action of some thirty separate class actions filed against the defendant groups[2] on January 29, 2002. The Plaintiffs collectively sought damages of $2.9 billion for alleged violations of federal securities laws. The consolidated action was bifurcated into two subclasses of Plaintiffs: 1) purchasers of Williams Companies securities (the WMB Subclass); and 2) purchasers of Williams Communications Group securities (the WCG Subclass). [Dkt. 123]. To avoid needless duplication of discovery, the Court ordered "coordination of discovery in the bifurcated

[1] After the hearing, Plaintiffs filed a Motion for Leave to Supplement their Motion to Review Taxation of Costs. [Dkt. 1820]. The Motion to Supplement is DENIED. No part of that motion or its attachments have been considered by the undersigned.

[2] The Williams Companies and Defendant Keith E. Bailey are referred to as the WMB Defendants, the Williams Communications Group, Inc., and its former officers are referred to as WCG, and Defendant Ernst & Young LLP is referred to as E&Y.

actions." *Id*. at 6-7.[3] After discovery was completed, the WMB Subclass settled its claims. By Memorandum Opinion and Order dated July 6, 2007, the Court granted summary judgment against the WCG Plaintiff Subclass.

The Defendant groups timely filed their Bill of Costs. After conducting a hearing, the Clerk of Court awarded costs to the three different defendant groups in the following amounts: the Williams Communications Group (WCG), $231,549.08 [Dkt. 1790]; Ernst & Young (E&Y), $229,371.72 [Dkt. 1791]; and The Williams Companies, Inc. and Keith E. Bailey (the WMB Defendants), 180,411.70 [Dkt. 1789].

Plaintiffs seek review of the Clerk's Cost Orders arguing that: 1) the amount taxed is far out of proportion to the amounts taxed in other cases; 2) costs were assessed for copying and exemplification without requiring Defendants to establish the necessity for use and for which there was no description of use; 3) 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; and 4) some of the costs taxed against the Plaintiffs in this case were equally related to a different case, the WMB Subclass action.

ANALYSIS

Two of Plaintiffs' main contentions have not been adopted as reasons for denying costs. Those contentions will be addressed first.

[3] All citations to the record reflect the page number assigned by the CM-ECF docketing system, since the CM-ECF system counts unnumbered cover pages and preliminary pages (i, ii, etc.) the docket reference may not necessarily be the same as the page number printed at the bottom of the document.

Amount Taxed

Plaintiffs argue that if upheld, the total amount taxed against them, in excess of $600,000, "would be (to Plaintiffs' knowledge) the largest cost award in the history of American jurisprudence." [Dkt. 1794, p. 5]. It is important to first note that the gross figure includes cost awards to three distinct defendant groups, not a single cost award. The fact that there were three defendant groups is a result of choices Plaintiffs made in bringing their action. The amount of costs is related to the fact that Plaintiffs sought nearly $3 billion in damages and the fact that they aggressively pursued comprehensive discovery from Defendants and third parties in this case. That Plaintiffs aggressively pursued discovery is not intended as a criticism of their tactics, it is merely a statement of fact. However, the natural consequence that flowed from Plaintiffs' litigation choices is that the cost award is high.

Plaintiffs also argue that the Court should consider that this was a close case and that the large award may have a chilling effect on future cases. Those considerations run contra to the presumption that the prevailing party is entitled to an award of costs. *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006)(Fed.R.Civ.P. 54 creates a presumption that the district court will award the prevailing party its costs); *Rodriguez v. Whiting Farms, Inc*., 360 F.3d 1180, 1190 (10th Cir. 2004)(same). The fact that the case was disposed of by summary judgment carries the implication that the case was not close. In addition, the fact that numerous Plaintiffs and their law firms vied to become lead Plaintiffs and lead counsel in this case suggests that there is no shortage of those willing to pursue such cases.

The undersigned is not persuaded that the gross amount of the cost award in this case is unreasonable.

Clerk's Guidelines for Taxation of Costs

Plaintiffs argue that some of the costs were taxed contrary to statements contained in the "Clerk's Guidelines for Taxation of Costs" which are published on the Court's public web site: www.oknd.uscourts.gov. [Dkt. 1794-12, pp. 2-7]. In particular, Plaintiffs argue that the Clerk's award is contrary to the following language in the Clerk's guidelines:

> VI. Allowable Items
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> * * *
>
> C. Fees of the Court Reporter for all or any part of the transcript necessarily obtained for use in the case.
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> * * *
>
> 2. Depositions. 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. If a deposition is read into evidence, it will be allowed. All other depositions are generally disallowed.
>
> Costs of a copy of a deposition will be allowed (e.g., an original and one copy) if the prevailing party conducted the deposition. If the prevailing party defended the deposition, costs of a copy is allowed if such deposition is found to be necessarily obtained for use in the case.
>
> * * *
>
> If the case was determined by summary judgment, depositions utilized by the court to determine the summary judgment are allowed. Review case law for possible recovery of costs incurred in preparation for trial in cases determined by summary judgment. See, e.g., *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190 (10th Cir. 2000); *Tilton v. Capital Cities/ABC, Inc.,* 115 F.3d 1471 (10th Cir. 1997); *Merrick v. Northern Natural Gas Co*., 911 F.2d 426 (10th Cir. 1990).
>
> * * *
>
> E. Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case.

> Copies of papers necessarily obtained in the case are those papers which help bring about the disposition of the case. In other words, those papers related to the actual trial (or summary judgment). For example, trial notebooks, trial exhibits, motions in limine and jury instructions are papers and pleadings related to the trial.

Guidelines, [Dkt. 1794-12, pp. 5-6]. According to Plaintiffs, the cost award should be reversed, in part, because "large amounts of the costs awarded by the Court Clerk's ruling cannot reasonably be squared with these Guidelines." [Dkt. 1794, p. 11].

The undersigned rejects the proposition that any part of the Clerk's award should be reversed because it cannot be "squared" with the Guidelines. The Guidelines do not purport to be a definitive, or even authoritative, exposition of costs allowable under 28 U.S.C. § 1920. As indicated in the introduction to the 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. *See Guidelines*, Introduction, [Dkt. 1794-12, p. 1]. The conclusion to the Guidelines echos this unmistakable intent:

> These basic guidelines should enable lawyers to prepare a proper Bill of costs with a minimum amount of time and effort. as always, in the practice of law, there may be issues which do not fall within the parameters of basic guidelines. In those instances, lawyers must review case law and make their best arguments.

Guidelines, [Dkt. 1794-12, p. 6].

The section cited by Plaintiffs regarding depositions instructs counsel to "[r]eview case law for possible recovery of costs incurred in preparation for trial in cases determined by summary judgment." *Id*. at p.6. The section of the Guidelines which addresses copy costs provides a list of the types of papers which are considered to be related to the trial,

but nothing therein suggests the ones listed are the only papers which may be considered to be related to the trial. Furthermore, Plaintiffs presented no authority within their papers or in the arguments presented at the hearing to suggest that the Guidelines, rather than case authority, define the Clerk's authority or the limits of the Court's discretion under 28 U.S.C. § 1920. In fact, use of the Guidelines in the manner suggested by Plaintiffs would be contrary to the Tenth Circuit's implied disapproval in *Merrick v. Northern Nat. Gas Co., Div of Enron Corp.*, 911 F.3d 426, 434 (10th Cir. 1990). The Court noted that a district court rule that permits costs only for depositions received in evidence or used by a court in ruling on summary judgment is more narrow than §1920.

The undersigned has analyzed the Bill of Costs under 28 U.S.C. § 1920 and controlling case law of the Tenth Circuit, without reference to the content of the Guidelines.

Standards Applied

Costs are awarded as a matter of course to the prevailing party in an action under 28 U.S.C. § 1920, which provides in relevant part:

> A judge or clerk of any court of the United States may tax as costs the following:
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> * * *
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> * * *
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; . . .

The propriety of an allowance of costs in the two categories of costs being examined, deposition transcription and copies of papers, depends on whether the costs are for materials "necessarily obtained for use in the case." *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1245 (10th Cir. 1988). The burden is on the prevailing party to

establish the amount of compensable costs to which they are entitled. *Case v. Unified School Dist. No 233, Johnson Co. Kansas*, 157 F.3d 1243, 1258 (10th Cir. 1998)(quoting *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1208 (10th Cir. 1986)). Whether materials were necessarily obtained for use in the case is a question of fact to be determined by the district court and is reviewed for clear error. *Sorbo v. United Parcel Service*, 432 F.3d 1169, 1181 (10th Cir. 2005)(citing *Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1339 (10th Cir. 1998)). Further, the reasonable necessity of an expense is judged at the time when the expense was incurred. *Callicrate*, 139 F.3d at 1340.

Throughout their papers and at the hearing Plaintiffs argue that some of the costs should be denied because there was no proof of actual use of the depositions or copies in motions or at trial. That argument misstates the standard for an award for deposition or copying expenses under 28 U.S.C. § 1920. There is no requirement that a deposition or copied paper actually be used, rather it must be necessarily obtained for use in the case.

The Tenth Circuit has ruled that depositions taken merely for discovery are not taxable as costs. *Callicrate*, 139 F.3d at 1339. Although use by counsel at trial or by the court on summary judgment readily demonstrates the necessity of a deposition, such use is not the only means of showing necessity. A deposition might be necessarily obtained for use in the case even if it was not used to support or defend against a dispositive motion. *Id*. at 1340. "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." *Allison v. Bank One-Denver*, 289 F.3d 1223, 1249 (10th Cir. 2002).

Deposition Expense

WCG Deposition Expense

The Court Clerk awarded the WCG Defendants costs for deposition transcription fees involving 82 depositions. The depositions for which costs were requested are broken down as follows: one deposition each for the 8 individual WCG Defendants; 13 depositions of Plaintiffs' experts who offered testimony related to Plaintiffs' claims against the WCG Defendants; two class representatives; and three investors who were identified by Plaintiffs as potential witnesses; 32 witnesses who were deposed by Plaintiffs and whose testimony was designated for use at trial; and 24 other witnesses deposed by Plaintiffs who testified about matters relating to Plaintiffs' claims against the WCG Defendants.

It is significant to note that the deposition discovery in this case was driven by Plaintiffs as 117 fact witness depositions were taken, only five of which were initiated by Defendants. Defendant WCG has demonstrated that of the 82 witness depositions for which costs were sought, 69 were fact witnesses. Further, of those 69 fact witnesses, 67 were listed on either the WCG Plaintiffs' witness list or on Defendants' witness list. [Dkt. 923, 925, 1799, p. 16]. In addition, Defendant WCG has demonstrated all 69 fact witnesses fit into one of the following categories: 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. [Dkt. 923, 925].

In addition to the expert witnesses named by the WCG Plaintiffs, the WCG Defendants were awarded deposition expenses for two expert witnesses who were retained by the WMB Subclass Plaintiffs (Hakala and Kushner). At the hearing before the

undersigned Mr. Morgan, counsel for the WCG Defendants, made the unchallenged representation that although these witnesses were identified as experts by the WMB Subclass Plaintiffs, Mr. Kushner was a telecom expert who had unkind things to say about WCG and Mr. Hakala was a damages expert whose testimony was pertinent to WCG issues. Regardless of whether any of these depositions were actually used in support of Defendant WCG's motion for summary judgment, the undersigned finds that WCG has adequately demonstrated that these depositions were necessarily obtained for use in the case.

This result is entirely consistent with Tenth Circuit authority. In *Callicrate*, the Court considered the parameters for an order of costs under 28 U.S.C. § 1919, which provides for an award of "just costs" in the event a suit is dismissed for want of jurisdiction. The Court recognized a fundamental difference between awarding costs under §1919 and under §1920 and Fed.R.Civ.P. 54(d) in that Rule 54(d)(1) provides that costs *shall* be awarded to the prevailing party unless the court directs otherwise, whereas under §1919 an award of costs upon dismissal is merely permissive. *Id*. at 1340 n.8. However, in analyzing what costs could be awarded, the Court relied on the "necessarily obtained" standard contained in §1920 and related case law.

The *Callicrate* Court rejected the argument that use of depositions in the dispositive motion was the benchmark for an award of deposition expenses. The Court affirmed an award of costs for depositions which were not used in the dispositive motions but were initiated by the losing party. The Court found it was "reasonable for the defendants to request copies of the depositions initiated by [Plaintiff], especially in light of the fact that all of the individuals deposed by [Plaintiff] were employees or representatives of one or more

of the defendants." *Id.* at 1341. *See also*, *Mitchell*, 218 F.3d at 1204 (awarding prevailing defendants costs for depositions requested by Plaintiff); *Reddy v. Good Samaritan Hospital and Health Center*, 2001 U.S. Dist. LEXIS 19694 *5 (S. Dist. Ohio, Sept. 24, 2001) (given that the plaintiff noticed the depositions, plaintiff was not permitted to later take the position that they were not necessary).

In the instant case most of the fact witness depositions were initiated by Plaintiffs and most of them appeared on the parties' witness lists. In view of these facts, the undersigned finds that Defendant WCG has met its 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 taken for investigative purposes or for the convenience of counsel.

The undersigned notes that a portion of the deposition expenses taxed were incurred for obtaining video copies of depositions. Plaintiffs have based their objection to the taxation of deposition costs on their claim that Defendants made an insufficient showing that the depositions were necessarily obtained. In their request for review of the Clerk's taxation of costs, Plaintiffs have not voiced an objection to taxing the expense of videotaping the depositions. Indeed, the Tenth Circuit has affirmed the taxation of costs associated with the videotaping of depositions in addition to the printed transcription of a deposition under 28 U.S.C. § 1920(2). *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1477-78 (10th Cir. 1997). Further, Defendant WCG represented, and Plaintiffs have not disputed, that depositions were videotaped at Plaintiffs' insistence. [Dkt. 1716, p. 11]. The undersigned therefore finds that it was appropriate to include videotaping expenses in the award of costs.

The undersigned RECOMMENDS that the deposition costs awarded to the WCG Defendants be AFFIRMED.

WMB Deposition Expense

The Court Clerk awarded the WMB Defendants costs for deposition transcription fees involving 85 depositions. Seventy-four of the depositions were taken by one of the plaintiff groups, the remaining eleven depositions were either named party plaintiffs or expert witnesses. The WMB Defendants have demonstrated that they used 28 of the depositions in their dispositive motion, Daubert motion, motion in limine, or in response to a Daubert motion or motion in limine. An additional 21 depositions were designated by the WMB Defendants or counter-designated. Further, most of the fact witnesses for whom deposition costs were awarded were listed on a witness list in this case. Only eight of the 85 deposition fail to fall into one of the foregoing use categories,[4] of those four were noticed by the WCG Plaintiffs.[5] [Dkt. 1800-2, pp. 2-4]. The remaining four depositions, John W. Hicks, William Holder, Alfred Osborne, and Douglas Rudley were noticed by the WMB Plaintiffs. Although the WMB Defendants argue that an attorney for the WCG Plaintiffs attended those depositions, Plaintiffs assert that these witnesses were designated as experts by the Outside Director Defendants in the WMB Subclass and they did not give testimony relevant to the WCG Subclass. [Dkt. 1794-3, pp. 33, 37]. The undersigned has not been pointed to any information in the record contrary to Plaintiffs' assertion. Therefore, the undersigned finds that it has not been demonstrated that the depositions of

[4] John W. Hicks, William Holder, Thomas Mangold, Robert Morgan, Alfred Osborne, Douglas Rudley, William Taylor, and Keith Ugone.

[5] Thomas Mangold, Robert Morgan, William Taylor, Keith Ugone

witnesses Hicks, Holder, Osborne and Rudley were necessarily obtained for use in this case. Otherwise, the undersigned finds that the WMB Defendants have demonstrated the necessity for use in the case of the depositions for which costs were awarded.

Except for the depositions noted, the undersigned finds that the WMB Defendants have 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 taken for investigative purposes or for the convenience of counsel. The undersigned RECOMMENDS that the cost award to the WMB Defendants be reduced by $6,135.45 which is the amount of expense related to witnesses Hicks ($1,713.80), Holder ($1,114.75), Osborne ($1,829.45) and Rudley ($1,477.45). and RECOMMENDS that the remaining award for deposition costs be AFFIRMED.

E&Y Deposition Expense

The Court Clerk awarded Defendant E&Y costs for deposition transcription fees involving 83 depositions. In addition to the 74 fact witnesses listed on the WCG Plaintiffs' witness list, E&Y was awarded deposition expense for three deposed members of the WCG Subclass and five former WCG officers and employees whose job responsibilities related to the issues in the WCG Subclass case. Defendant E&Y was also awarded deposition expenses for two expert witnesses (Hakala and Kushner) who were retained by the WMB Subclass Plaintiffs. In addition to the information already discussed concerning those witnesses, E&Y represented, and Plaintiffs do not dispute, that the WCG Subclass Plaintiffs initiated questioning in these two depositions. [Dkt. 1801, p. 11].

The E&Y Defendants were also awarded costs for WMB experts Hicks ($1,538.50), Holder ($1,154.75), Osborne ($1,654.45) and Rudley ($1,302.45). The undersigned

recommends that the E&Y cost award for deposition expenses be reduced by $5,650.45, which is the amount related to those four depositions for the same reasons expressed in the analysis of the WMB deposition expenses. Otherwise, the undersigned finds that E&Y has adequately demonstrated that the deposition expenses taxed as costs were necessarily obtained for use in the case.

The undersigned finds that E&Y has met its 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 taken for investigative purposes or for the convenience of counsel. The undersigned therefore RECOMMENDS that, except for the depositions noted above, the cost award for deposition expense be AFFIRMED.

Overlap with WMB Subclass Action

Plaintiffs request a percentage reduction in the cost award because some of the discovery in this case was equally applicable to the WMB Subclass action. Plaintiffs maintain that it would be unfair to assess costs against them that are attributable to the other action which settled. As hereafter discussed, the undersigned finds no unfairness in the cost award.

Early on in the case, the Court recognized the significant overlap of factual issues between the two cases and found that "much of the same discovery will be required to support the claims of both the Securities Act and Exchange Act plaintiffs. . . ." [Dkt. 123, p. 4]. The WMB Defendants submitted a chart which demonstrates that WCG Subclass counsel (often more than one attorney) attended nearly all of the depositions, including ones noticed by the WMB Subclass. [Dkt. 1800-2]. Plaintiffs submitted an exhibit wherein they calculated the number of deposition pages generated by questioning performed by

their counsel and by the WMB Subclass counsel. [Dkt. 1794-2, 1794-3, 1794-4]. Plaintiffs argue that comparing the number of pages demonstrates the relative relevance of the deposition to each case. The undersigned takes a different view of that information. In view of the recognized overlap of the factual issues, the undersigned is not persuaded that questioning by a particular attorney demonstrates the testimony is any more or less relevant to one case, or the other. Instead, that demonstrates the accuracy of the Court's finding that the cases had significant factual overlap and that the same discovery would be relevant to both. The undersigned is persuaded that the factual overlap between the cases is such that the WCG Subclass would have incurred the deposition expenses even absent the existence of the WMB Subclass. The undersigned therefore rejects Plaintiffs' request to apply a percentage reduction in the cost award.

The undersigned finds that disallowance of WMB Subclass expert witness deposition costs for Hicks, Holder, Osborne and Rudley accounts for the deposition testimony that was not related to the WCG action. No other reduction is needed to reach a fair result.

Taxation of Copying Costs

Plaintiffs correctly point out that courts routinely deny an award of costs for copies where no attempt is made to explain why the copies were necessary. For instance, in *Allison v. Bank One-Denver*, 289 F.3d 1223, 1249 (10th Cir. 2002), the Court affirmed the district court decision to disallow copying costs where the prevailing party submitted documentation to establish that it had incurred copying costs but failed to establish that those copies were reasonably necessary. Likewise in *Battenfeld of Am. Holding Co. v. BK&D*, 196 F.R.D. 613, 617 (D.Kan. 2000) the court rejected a request for taxation of copying costs where the prevailing party submitted statements from copying services

without identifying the use made of the copied materials. There the Court said it did not expect every single photocopy to be identified, but there should be some effort made to identify the nature of the documents so a determination can be made whether they were necessarily obtained for use in the case. Plaintiffs argue that the instant case is similar to the cited cases because Defendants have done nothing more in this case than "provide a handful of brief, generic statements to the effect that all third-party documents for which they are requesting copying costs were necessary for their defense." [Dkt. 1794, p. 15].

Contrary to Plaintiffs' assertions, the undersigned finds that Defendants have not merely attached invoices without any description of the documents copied or indication of the use made. There is no requirement that every copy made be justified, and the burden to justify copies is not a high one. *Case v. Unified School Dist. No. 233, Johnson Co, Kansas*, 157 F.3d 1243, 1259 (10th Cir. 1998). As hereafter discussed, the undersigned finds that Defendants provided sufficient identification of the documents and sufficient description of their necessity for use in the case.

The undersigned rejects Plaintiffs' argument that the differences between the amounts the different defendant groups sought for copying costs is unexplained and should have any bearing on the Court's decision. The number of copies made reflect the differing positions of the various defendant groups and their approaches to defending the claims against them. The undersigned views the difference as showing that the Defendants appropriately exercised discretion in choosing which documents to copy.

As previously discussed, the undersigned rejects Plaintiffs' suggestion that the Court should exercise its discretion to reduce the cost award because the costs were unreasonably high. The level of costs was driven by the number of defendants the

Plaintiffs sued, the high level of damages sought by Plaintiffs, the broad allegations Plaintiffs lodged against the several defendant groups, and the aggressive course of discovery pursued by Plaintiffs. Again, this is not a criticism of Plaintiffs' tactics, but a recognition that Plaintiffs' practices increased the costs.

As hereafter discussed, the undersigned RECOMMENDS that the Court Clerk's taxation of costs for copies be AFFIRMED.

WCG Copy Expense

Plaintiffs do not object to all copying costs awarded to the WCG Defendants. They do not pose an objection to the award for copies related to predesignated deposition exhibits, expert reports, summary judgment and Daubert motions, motion in limine, and trial exhibits. They do object to the award for selected documents copied from document production by E&Y, the WMB Defendants and non-party document production, including WilTel.

The undersigned begins by noting that over 15 million pages of documents and data were produced either in hard copy or electronically pursuant to Plaintiffs' broad requests and pursuant to comprehensive subpoenas issued by Plaintiffs to third parties. In accordance with an agreement among the parties, most of the documents produced were placed in a centralized document repository. That the WCG Defendants selectively copied documents is demonstrated by the fact that the number of copies for which costs are sought is actually only a portion of the documents produced in the case.

Plaintiffs argue that costs should not be awarded because the documents copied were not sufficiently identified. Plaintiffs liken this case to the *Battenfeld* case where the court denied copying costs because the prevailing party simply submitted invoices from

copying services for thousands of copies with no elaboration or explanation about the nature or use of the documents. 196 F.R.D. at 617. The WCG Defendants' request for copying costs is distinguishable from *Battenfeld*.

The exhibits submitted in support of the WCG Defendants' Bill of Costs segregated the copying invoices by category of document: WilTel documents subpoenaed by Plaintiffs; documents selected from Co-Defendants' production pursuant to Plaintiffs' requests; copies of Plaintiffs' production; selected documents produced pursuant to Plaintiffs' subpoenas issued to third-parties. [Dkt. 1758-6 through 1758-9]. Many, but not all, of the attached invoices contain the bates numbers of the copied documents, some identify the box from which the documents were copied, and the invoices related to third party documents reflect the identity of the third party who produced the copied documents. Further, the WCG Defendants provided a chart which identified the category of document, invoice number, and source of the documents copied. [Dkt. 1715-3]. Based on review of the invoices, the undersigned finds that the copied documents were sufficiently identified.

Plaintiffs argue that Defendants have not explained the uses to which the copies were put. However, Defendants are not required to identify the use actually made of each document or even each category of document. According to the language of §1920, costs may be awarded for copies "necessarily obtained for use in the case." As with depositions, the necessity of obtaining copies is judged "in light of the facts known to the parties at the time the expenses were incurred." *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1204 (10th Cir. 2000)(quoting *Callicrate*, 139 F.3d at 1340).

The WCG Defendants explained that because WCG was bankrupt the successor corporation, WilTel, had possession of "virtually all of the relevant WCG documents related

to issues such as accounting, financial records, financial and business planning, strategic analysis, internal and external communications, network construction and performance analyses, and technology as well as meeting minutes and other similar documents that were key to the WCG Defendants' defense." [Dkt. 1799, p. 10]. The WCG Defendants demonstrated that these documents were relevant to their defense by referring to the breadth of Plaintiffs' subpoena of WCG documents from WilTel. *Id*., Dkt. 1799-7.

According to the WCG Defendants, other third party production involved WCG's banks, underwriters of various WCG securities, vendors and consultants. The WCG Defendants assert that many of the Plaintiffs' claims and allegations were directed at the relationships between WCG and these third parties. Therefore, selected copies of documents produced by third parties were necessarily obtained for use in the case.

Co-defendant WMB was WCG's former parent company. Co-defendant E&Y was its independent auditor. The WCG Defendants have explained that in view of the nature of the relationship WCG had to these entities, it was necessary to the defense of the WCG Defendants to obtain copies of some, but not all, of the documents these co-defendants produced at Plaintiffs' request.

The undersigned finds that the WCG Defendants have demonstrated that it was necessary to obtain the subject copies for use in the case, not merely for discovery or for the convenience of counsel. Further, viewed in context of the amount of damages sought, the nature of the allegations lodged by Plaintiffs, and the vast number of documents produced at Plaintiffs' behest, the amount taxed for copies is reasonable.

WMB Copy Expense

Plaintiffs argue that the Court Clerk awarded the WMB Defendants costs for copying third party production without any description of the actual documents copied and without any explanation of the use to which they were put.

The WMB Defendants submitted the affidavit of Heather E. Evans which contains a listing of invoice numbers, the producing party for all documents copied, and bates numbers for all documents copied. [Dkt. 1718-2, pp. 19-25]. The undersigned finds that identification of the copied documents by bates number describes the documents copied.

As previously discussed, Defendants are not required to identify the use actually made of each document or category of document. 28 U.S.C. § 1920 requires not that the copied documents be actually used in the case, but that the copies be "necessarily obtained for use in the case." The WMB Defendants explained the copying costs relate to non-party production of documents which resulted solely from subpoenas served by the WCG Plaintiffs. Although the documents were available in the central repository, the WMB Defendants assert that after review of the documents, counsel determined that they needed to obtain copies to defend themselves against the detailed and extensive allegations of securities law violations.

Plaintiffs essentially argue that copying costs should be denied because WMB Defendants have done nothing more than assert that their counsel determined that the copies were necessary. That argument ignores the significance of the fact that the documents copied were ones that Plaintiffs themselves caused to be produced by third parties, presumably after making some determination that the documents would be useful to the case. *See Mitchell*, 218 F.3d at 1205 (relying in part on fact that losing party

requested depositions for which costs were sought as supporting finding they were necessarily obtained) and *Reddy v. Good Samaritan Hospital and Health Center*, 2001 U.S. Dist. LEXIS 19694 at *5 (S.D. Ohio, September 24, 2001)(finding that party noticing depositions for which costs were sought should not be permitted to take position those depositions were not necessary). Since the WMB Defendants' copying of the documents tracked Plaintiffs' extensive discovery, and since somewhat less than all of the documents produced by Plaintiffs' third-party discovery were copied, the undersigned finds that the WMB Defendants have demonstrated that the third-party documents were necessarily obtained for use in the case, not merely for discovery or for the convenience of counsel. Further, viewed in context of the amount of damages sought, the nature of the allegations lodged by Plaintiffs, and the vast number of documents produced at Plaintiffs' behest, the amount taxed for copies is reasonable.

E&Y Copy Expense

The documents for which copying costs were taxed are identified by bates number. [Dkt. 1740]. The undersigned finds that the documents were appropriately identified.

E&Y asserts that it was not practical or economical to send its counsel to Tulsa for weeks to review the third-party documents contained in the document repository, it was therefore necessary to copy those documents. Further, effective review of the documents required the marking and categorization of the documents, which could not be accomplished at the repository. E&Y also states that necessity of the document copies is demonstrated by the fact that many of the documents copied were produced by entities who were specifically identified in the WCG Subclass Amended Complaint. The undersigned finds that E&Y has demonstrated that it was necessary to obtain the subject

copies for use in the case, not merely for discovery or for the convenience of counsel. Further, viewed in context of the amount of damages sought, the nature of the allegations lodged by Plaintiffs, and the vast number of documents produced at Plaintiffs' behest, the amount taxed for copies is reasonable.

CONCLUSION

Based on the foregoing discussion, the undersigned RECOMMENDS that the Court approve an award of costs to the defendants in the following amounts:

WCG Individual Defendants:	$231,549.08
WMB Defendants:	$174,276.25
Defendant E&Y	$223,721.27

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), a party may file specific written objections to this report and recommendation. Such specific written objections must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report.

If specific written objections are timely filed, Fed.R.Civ.P. 72(b) directs the district judge to:

> make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed.R.Civ.P. 72(b); see also 28 U.S.C. § 636(b)(1).

The Tenth Circuit has adopted a "firm waiver rule" which "provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate

review of factual and legal questions." *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)). Only a timely specific objection will preserve an issue for de novo review by the district court or for appellate review.

DATED this 6th day of December, 2007.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE