IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., **Plaintiff,** **v.** **NATIONAL REVIEW, INC., *et al.*,** **Defendants.**	**2012 CA 008263 B** **Judge Alfred S. Irving, Jr.**

ORDER GRANTING IN PART MICHAEL E. MANN'S REQUEST FOR RULE 54 COSTS AND GRANTING IN PART COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S MOTION FOR COSTS UNDER RULE 54

Before the Court are requests from Plaintiff Michael Mann and Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg for costs under Super Ct. Civ. R. 54 and 54-I. For the reasons that follow, the Court will tax a portion of Plaintiff's costs against individual Defendants Rand Simberg and Mark Steyn, tax a portion of Defendant CEI's costs against Plaintiff, and deny taxation of costs solely incurred by Defendant Simberg.

I. BACKGROUND

The aforementioned motions are before the Court following a judgment entered in favor of Plaintiff Michael E. Mann, Ph.D., and against Defendants Rand Simberg and Mark Steyn as to two counts of defamation each and an award of compensatory damages to Dr. Mann and against Mr. Simberg of $1 and against Mr. Steyn of $1, and, following a grant of remittitur, awards of punitive damages to Plaintiff and against Mr. Simberg of $1,000, and against Mr. Steyn of $5,000. *See* Omnibus Order on Defs.' Post-Trial Mots. for J. as Matter of L., Remittitur, New Trial, & Stay of Execution of J. (Mar. 4, 2025); Final J. Order (Mar. 4, 2025).

On March 11, 2024, Dr. Mann filed his *Rule 54 Bill of Costs*, which was forwarded to the Court for review on March 27, 2024. *See* Pl.'s R. 54 Bill of Costs [hereinafter "Mann Mot."].

Messrs. Steyn and Simberg filed objections on April 12 and 17, 2024, respectively. *See* Def. Mark Steyn's Objections to Pl.'s Bill of Costs [hereinafter "Steyn Opp'n"]; Def. Rand Simberg's Objections to Pl.'s Bill of Costs [hereinafter "Simberg Opp'n"]. Dr. Mann filed a reply on April 25, 2024. *See* Pl.'s Consolidated Reply in Support of His Bill of Costs [hereinafter "Mann Reply"].

On March 12, 2024, CEI and Mr. Simberg filed the *Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Costs Under Rule 54*. *See* Defs. CEI & Rand Simberg's Mot. for Costs Under R. 54 [hereinafter "CEI & Simberg Mot."]. Dr. Mann filed an opposition on April 10, 2024, *see* Pl.'s Mem. of P. and A. in Opp'n to Defs. CEI & Rand Simberg's Mot. for Costs Under Rule 54 [hereinafter "Mann Opp'n"], and CEI and Mr. Simberg filed a reply on April 25, 2024, *see* Defs. CEI and Rand Simberg's Reply in Supp. of Mot. for Costs Under Rule 54 [hereinafter "CEI & Simberg Reply"].

II. LEGAL STANDARD

Super. Ct. Civ. R. 54(d) provides: "Unless an applicable statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

"'Costs,' as used to refer to those items a prevailing party is entitled to recover as a matter of course, has been construed to mean something less than a litigant's total expenses in connection with the suit." *Robinson v. Howard Univ.*, 455 A.2d 1363, 1368 (D.C. 1983). "The Superior Court's discretion to award costs to the prevailing party under Civil Rule 54(d) is limited to items 'specifically authorized by 28 U.S.C. § 1920 . . . or by other statutes (or court rule),'" *Cormier v. D.C. Water & Sewer Auth.*, 84 A.3d 492, 502 (D.C. 2013) (quoting *Talley v. Varma*, 689 A.2d 547, 555 (D.C. 1997)), such as 28 U.S.C. § 1821, *see id.* n.30.

"[F]ederal cases interpreting Fed. R. Civ. P. 54 are persuasive when we interpret Super. Ct. Civ. R. 54." *Talley*, 689 A.2d at 557. One federal circuit court has described the interplay between the rule and statutes as follows: "[S]ection 1920 has an esemplastic effect. It fills the void resulting from Rule 54(d)'s failure to define the term 'costs[.]'" *In re San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 962 (1st Cir. 1993). As a result, "the discretion that Rule 54(d) portends is solely a negative discretion, 'a power to decline to tax, as costs, the items enumerated in § 1920.'" *Id.* (quoting *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987)).

"While both attorneys' fee awards and taxation of costs have eventually come to be governed by statute in America, both types of statute embody the notions that assessment of attorneys' fees against the losers may be a form of *penalty*, while taxation of costs merely represents the *fair price* of unsuccessful litigation." *Baez v. U.S. Dep't of Justice*, 684 F.2d 999, 1003 (D.C. Cir. 1982) (en banc) (per curiam). As a result, trial courts should "neither deny nor reduce a prevailing party's request for costs without first articulating some good reason for doing so." *Id.* at 1004. More specifically, a judge "may" tax as costs

> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; [and]
>
> (5) Docket fees[.]

28 U.S.C § 1920. "Costs which have been paid to the Clerk and entered on the docket are ordinarily allowed as a matter of course, but other costs, such as witness fees and costs of

depositions must be taxed specially by the court." *Talley*, 689 A.2d at 555. "Circumstances justifying denial of costs to the prevailing party or the assessment of partial costs against him may exist where the amount of taxable costs actually expended were unnecessary or unreasonably large." *Mody v. Center for Women's Health, P.C.*, 998 A.2d 327, 336 (D.C. 2010).

III. ANALYSIS

"Generally speaking, the term 'prevailing party' is understood to mean a party 'who has been awarded some relief by the court' (or other tribunal)." *Settlemire v. D.C. Off. of Emp. Appeals*, 898 A.2d 902, 907 (D.C. 2006) (quoting *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 (2001)). Here, the Court considers both Dr. Mann and CEI as "prevailing parties" because both parties obtained judgments in their favor. Mr. Simberg, on the other hand, cannot be said to have been a prevailing party. The Court therefore will award costs to Dr. Mann and to CEI, but not to Mr. Simberg.

Both Mr. Simberg and Mr. Steyn argue that the Court should exercise its discretion and limit the taxation of Dr. Mann's allowable costs because the imposition of such costs would be financially prohibitive to them. When considering financial hardship, a court "should require substantial documentation of a true inability to pay." *Guevara v. Chukewuemeka Onyewu*, 943 F. Supp. 2d 192, 196 (D.D.C. 2013) (quoting *Chapman v. AI Transp.*, 229 F.3d 1012, 1039 (11th Cir. 2000)). Neither Mr. Simberg nor Mr. Steyn has demonstrated a financial hardship sufficient to deny the taxation of costs against them.

Messrs. Simberg and Steyn further argue that the Court should limit Plaintiff's costs because (1) he obtained a nominal victory, (2) the litigation costs were disproportionate to the result achieved, (3) he engaged in misconduct, and (4) because the issues in this case were close and difficult. *See* Steyn Opp'n 2-6; Simberg Opp'n 3-11. All such factors, however, implicate

the overall apportionment of costs and fees as between Plaintiff and the Defendants in this case as a whole. The equitable considerations going to that determination find their expression in the net effect of this order alongside current orders and an impending order granting fees and costs to Defendants National Review, Rand Simberg, and Competitive Enterprise Institute under D.C. Code § 16-5504(a) and the March 12, 2025 order granting Defendants' motions for sanctions.

In assessing costs taxable under Super Ct. R. 54 and 54-I, the Court determines what costs are allowable under the applicable rule and statutes and exercises its discretion to determine the extent to which such costs were necessarily incurred.

A. Dr. Mann

Dr. Mann requests a total of $679,489.74 in costs. Mann Mot. 1. He is entitled to taxation of some, but not all, of the costs he requests.

1. Filing Costs

Dr. Mann requests $3,183.25 in filing fees. Mann Mot. Ex. A at 1-2; *id.* Ex. B at 1-2. Mr. Steyn argues that Dr. Mann may not recover costs "charged by a third-party service provider, CaseFileExpress, for each filing." Steyn Opp'n 12. Parties represented by counsel in a civil action in this court, however, are required to e-file. As such, those charges were incidental to filing in this case and thus are allowable as taxable costs. *Pro hac vice* fees and appearance fees, on the other hand, are expenses of counsel for the privilege of practicing in this court; they are not taxable. *See Nicola v. Washington Times Corp.*, 947 A.2d 1164, 1177 (D.C. 2008); *Mody*, 998 A.2d at 337. The Court deducts a $100 *pro hac vice* fee included in Dr. Mann's filing fees.

2. Printing Costs

Dr. Mann requests $10,086.88 in printing costs. Mann Mot. Ex. A at 1-2; *id.* Ex. B at 1-2. Mr. Steyn argues that Dr. Mann should not be allowed costs and fees related to his filings in

the Supreme Court of the United States. *See* Steyn Opp'n 14. The Court agrees that Dr. Mann should not be allowed to tax as a cost in this court a fee or expense incurred as an incident to litigating the matter in another court. It should be noted that parties who prevail in the U.S. Supreme Court may not request the costs of printing. *See* Sup. Ct. R. 43.3 ("The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable."). The Court must deduct $1,605.35 in fees for printing U.S. Supreme Court briefs.

3. Deposition Costs

Dr. Mann requests $77,904.18 in deposition costs. Mann Mot. Ex. A at 1-2; *id.* Ex. B at 1-2. This Court excluded the testimony of proposed Rule 26 experts Dr. Gerald North, Dr. John Holdren, Dr. John Mashey, and Dr. Peter Frumhoff when it granted Defendants' motions *in limine*. *See* July 26, 2021 Order; Jan. 24, 2022 Order. Dr. Mann responds that taxable deposition costs must only be "necessary 'for case preparation,' more broadly—not just trial," and points to instances in which he cited those deposition transcripts as part of his summary judgment briefing. *See* Mann Reply 16. That much is true: "The deposition need not be used at trial; the court must, however, find that the deposition was necessary for case preparation." *Kleiman v. Aetna Cas. & Sur. Co.*, 581 A.2d 1263, 1267 (D.C. 1990) (citing *Ingber v. Ross*, 479 A.2d 1256, 1266 (D.C. 1984)). In view of the Court's extensive assessments of those proposed experts in orders excluding those experts' testimony, those depositions cannot be reasonably said to have been necessary for Dr. Mann's case preparation. *Cf. Mody*, 998 A.2d at 335 ("the relevant question is not whether, in retrospect, copies used to prepare each of these three witnesses were necessary, but whether trial counsel acted reasonably in preparing three witnesses for trial even though it ultimately turned out that not all three were called."). Dr. Mann did not act reasonably in designating, and thus incurring deposition costs for, those excluded expert

witnesses. Dr. Mann was no less able to consider and evaluate the admissibility of their testimony before he designated them than he was after briefing the Defendants' motions *in limine*. His costs in connection with those depositions, therefore, will not be taxed against the individual defendants, namely, $2,601.30 for Dr. Gerald North, $1,553.85 for Dr. John Holdren, $2,974.50 for Dr. John Mashey, and $1,496.80 for Dr. Peter Frumhoff.

Costs that CEI incurred in connection with those depositions were necessary for CEI's case preparation, as CEI was required to move for their exclusion, and must be taxed against Dr. Mann.

Mr. Steyn further argues that Plaintiff should only recover costs for obtaining one copy of each deposition, citing to instances in his bill of costs in which he claims costs for two copies. *See* Steyn Opp'n 12-13. Dr. Mann was indeed represented by attorneys from multiple law firms over the course of this case, but he offers no justification for why each firm needed to incur separate costs. For those duplicative deposition costs, the Court will therefore disallow whichever cost was higher. As such, the Court will deny Dr. Mann's request of $1,903.10 in costs connected to his deposition and $712.50 for the deposition of Dr. Judith Curry.

Messrs. Simberg and Steyn further argue that certain of the deposition costs Plaintiff seeks to tax were not relevant to Dr. Mann's case against them, specifically. Mr. Steyn argues, for example, that costs incurred by Dr. Mann solely relevant to his case against the organizational defendants should not be taxable against him. *See* Steyn Opp'n 10. Mr. Simberg, for his part, argues Dr. Mann should not have taxed against him "costs for depositions related to National Review, CEI, and Steyn." Simberg Opp'n 15. The Court agrees and will not tax against either of the individual Defendants deposition costs related solely to other defendants. Therefore, the $11,770.37 in deposition costs related to Dr. Mann's claims against National

Review and $7,657.76 in deposition costs related to Dr. Mann's claims against CEI will be disallowed as costs taxable against the individual defendants. Further, the deposition costs related to Dr. Mann's claim against Mark Steyn and those related to Dr. Mann's claim against Mr. Simberg are taxable against only those individual defendants, and not jointly.

Mr. Steyn further argues that Dr. Mann has not sufficiently justified the necessity of certain expedited and rough transcript fees. *See* Steyn Opp'n 13. He specifically objects to a "2 Day Expedite" fee of $1,573.83 and a "Rough ASCII" fee of $339.90 in connection with his deposition, and "Rough ASCII transcript" fees of $349.50 and $122.50 for the depositions of Dr. Richard Lindzen and Elroy Balgaard, respectively. *Id*. Dr. Mann offers no reply to Mr. Steyn's challenge of the necessity of such fees. The Court therefore will not allow the $1,913.73 in such fees attributable to Mr. Steyn's deposition, nor the $472.00 in such fees attributable to the Lindzen and Balgaard depositions.

4. Witness Costs

Dr. Mann requests $5,572.79 in witness fees. Mann Mot. Ex. B at 2-3. Messrs. Simberg and Steyn argue various of those fees should be disallowed because the testimony was not relevant. *See* Simberg Opp'n 18; Steyn Opp'n 13. The testimony provided at trial by Dr. Naomi Oreskes was not relevant to Plaintiff's case. The "importance of peer review" and its effect on "the types of materials relied upon in assessing scientific claims," *see* Mann Reply 19, were wholly irrelevant to the jury's charge to determine the truth or falsity of Defendants' statements. The Court therefore denies the $439.66 in witness fees attributable to Dr. Oreskes.

5. E-Discovery Costs

Dr. Mann requests $582,742.64 in e-discovery costs. Mann Mot. Ex. B at 2. Both Defendants argue that only those portions of the e-discovery process sufficiently analogous to

the activities described in 28 U.S.C. § 1920(4) may be recoverable as costs. *See* Simberg Opp'n 11-14; Steyn Opp'n 6-10. The Court agrees.

In *United States ex rel. Barko v. Halliburton Co.*, the U.S. Court of Appeals for the District of Columbia Circuit held that "section 1920(4) authorizes taxation of costs for the digital equivalent of a law-firm associate photocopying documents to be produced to opposing counsel," and only allowed as costs recoverable to the prevailing party those portions of the e-discovery process that most resembled "the final stage of 'doc review' in the pre-digital age: photocopying the stack of responsive and privilege-screened documents to hand over to opposing counsel." 954 F.3d 307, 311, 312 (D.C. Cir. 2020).

From the documents proffered in support of Dr. Mann's request, the Court can only discern one line item fitting that standard: a $10,407.64 charge on a December 30, 2019 invoice described as "TIFF/PDF Creation for Productions (B022)." Mann Mot. Ex. B at 278. Dr. Mann therefore is entitled to $10,407.64 in e-discovery costs.

B. Competitive Enterprise Institute

Although CEI and Mr. Simberg are represented by the same counsel, CEI and Mr. Simberg in their materials supporting their motions apportion those costs attributable solely to representation of Mr. Simberg. *See* Decl. & Bill of Costs of Mark W. DeLaquil in Supp. of Defs. Competitive Enterprise Institute's & Rand Simberg's Mot. for Costs Under Rule 54 [hereinafter "DeLaquil Decl."]. Unlike attorneys' fees, CEI's requested costs here would have been incurred with or without joint representation with Mr. Simberg. *See, e.g., 3000 E. Imperial, LLC v. Robertshaw Controls Co*., No. CV 08-3985 PA (EX), 2011 U.S. Dist. LEXIS 161747, at *6 (C.D. Cal. May 2, 2011) ("[I]f a party would have incurred the same costs despite the existence of multiple parties, or if the costs were incurred to pursue claims and defenses common

to all parties, apportionment is not appropriate."). As CEI prevailed on all claims asserted against it, the Court will award the following allowable costs to CEI.

1. Filing Costs

CEI requests $3,081.58 in filing costs. CEI & Simberg Mot. 4. Of that sum, CEI requests $300 in connection with filing a petition for writ of certiorari before the U.S. Supreme Court and $377.75 for *pro hac vice* admission to the Centre County, Pennsylvania Court of Common Pleas. As explained above as to Dr. Mann's similar requests, such costs are not recoverable and will be disallowed.

2. Printing Costs

CEI requests $5,547.68 in printing costs. CEI & Simberg Mot. 4. Of that sum, CEI requests $3,709.02 and $826.48 in printing its U.S. Supreme Court briefs. *Id.*, Ex. D. Such costs for printing U.S. Supreme Court briefs are not recoverable.

3. Deposition Costs

CEI requests $52,033.29 in deposition costs. CEI & Simberg Mot. 4. Dr. Mann makes no specific objection to the allowability or necessity of any of these costs. The Court will treat the request as conceded and will award the costs.

4. Witness Costs

In its reply brief, CEI revises its requested witness fees to $164.15. CEI & Simberg Reply 6 n.2. The Court will award the costs.

5. Service-Related Costs

CEI requests $585.25 in service-related costs. CEI & Simberg Mot. 4. The Court will allow the costs.

6. E-Discovery Costs

CEI requests $38,202.08 in e-discovery vendor fees. CEI & Simberg Mot. 4. The entirety of these fees are described as in the nature of data hosting. Data hosting is most akin to those parts of the e-discovery process "that preceded [or followed] the actual act of making copies in the pre-digital era," *Halliburton*, 954 F.3d at 312 (brackets in original) (quoting *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012)), and they are not a taxable cost within the meaning of 28 U.S.C. § 1920. None of CEI's requested e-discovery costs, therefore, are recoverable.

IV. CONCLUSION

The Court awards costs under Super. Ct. Civ. R. 54 and 54-I as follows:

- $67,685.94 to Plaintiff, taxed against Rand Simberg and Mark Steyn, jointly and severally.
- $3,023.71 to Plaintiff, taxed against Rand Simberg.
- $3,157.90 to Plaintiff, taxed against Mark Steyn.
- $56,093.80 to Competitive Enterprise Institute, taxed against Plaintiff.

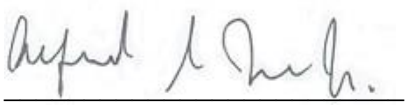
* * *

ACCORDINGLY, it is by the Court this 3rd day of May, 2025, hereby

ORDERED that Plaintiff Michael Mann's *Rule 54 Bill of Costs*, filed on March 11, 2024, and forwarded to the Court for review on March 27, 2024, is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED that *Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Costs Under Rule 54*, filed March 12, 2024, is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED that within thirty days of the date of this order Defendants Rand Simberg and Mark Steyn will jointly pay Plaintiff the sum of $67,685.94; Rand Simberg shall further pay Plaintiff the sum of $3,023.71; Mark Steyn shall further pay Plaintiff the sum of $3,157.90; and Plaintiff shall pay Competitive Enterprise Institute the sum of $56,093.80.



Judge Alfred S. Irving, Jr.

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