UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 15-cv-61736-BLOOM/VALLE

ALEXSAM, INC.,

Plaintiff/Counterclaim Defendant,

v.

WILDCARD SYSTEMS, INC.,
EFUNDS CORPORATION, and
FIDELITY NATIONAL INFORMATION
SERVICES, INC.,

Defendants/Counterclaim Plaintiffs.

DEFENDANTS' REPLY TO ALEXSAM, INC.'S
OPPOSITION TO DEFENDANTS' BILL OF COSTS

Defendants Wildcard Systems Inc., eFunds Corporation, and Fidelity National Information Services, Inc. (collectively "FIS" of "Defendants") respectfully submit this Reply to Alexsam's Opposition to FIS's Bill of Costs.[1] FIS's timely refiled its Bill of Costs in accordance with this Court's April 10, 2018 Order (D.E. 188, the "7.3 Order"). FIS's Bill of Costs requests only reasonable costs taxable under 28 U.S.C. § 1920, and FIS's Bill of Costs is supported by an attorney affidavit stating that the costs were actually and necessarily incurred during the course of this case. Accordingly, FIS should be awarded its reasonable taxable costs.

MEMORANDUM OF LAW

While Alexsam acknowledges that "[f]or a Bill of Costs to be denied at the Court's discretion, the Court must provide an explanation" (D.E. 200 at 2 (citations omitted)), Alexsam failed to provide the Court with such an explanation. Alexsam cannot dispute that FIS's costs are properly taxable and were reasonably and necessarily incurred as part of this litigation. In fact, when Alexsam threatened to seek reimbursement from FIS, it asked for a much more liberal assessment of costs without invoices or the exhaustive explanations Alexsam now demands from FIS. *See* D.E. 208 (the motion for attorneys' fees Alexsam served on FIS and Exhibit G thereto), rows 5-8 (costs associated with travel to Court hearings); rows 12-17 (costs associated with travel to mediation); rows 18-24 (document production costs); row 36 (legal research costs); and row 37 (costs for transcript of July 1, 2016 Court hearing).[2]

Alexsam now argues that FIS did not provide a "sufficient rationale" for the modest costs FIS requests, turning the straightforward accounting process envisioned by federal statutes and

[1] FIS filed a single Motion for Bill of Costs and Attorneys' Fees (D.E. 192), which Alexsam admits supports FIS's pro forma Bill of Costs (D.E. 194). *See* D.E. 200 at 1 n. 1. But Alexsam has filed two oppositions. *See* D.E. 200, D.E. 201.

[2] The blue highlighting in the exhibit has been provided by FIS for the Court's convenience. The yellow highlighting was included in version of the document Alexsam served on FIS.

the local rules into a granular, drawn-out exercise. Alexsam (1) cannot deny that the costs FIS seeks are enumerated as recoverable under 28 U.S.C. § 1920, and (2) does not dispute that FIS has submitted an attorney affidavit and supporting documentation enabling the Court (and Alexsam) to determine what costs were incurred and whether Defendants are entitled to them.

Moreover, the record shows that FIS timely filed and served its Bill of Costs under the Local Rules (D.E. 161), but Alexsam insists that the Bill of Costs is late now because FIS refiled its Bill of Costs in accordance with this Court's Orders (D.E. 171 and 188). Alexsam's argument that refiling a bill of costs at the Court's instruction expunges previously filed versions from the record and makes complying with the Local Rules impossible should be rejected.

A. Prevailing Parties Are Entitled To Recover Costs As A Matter Of Course.

"Normally, an award of costs is relatively straightforward." *Fla. Key Deer v. Bd. of Cty. Comm'rs for Monroe Cty.*, Fla., 772 F. Supp. 601, 603 (S.D. Fla. 1991). "Fed.R.Civ.P. 54(d)(1) entitles a prevailing party to recover costs as a matter of course unless directed otherwise by a court or statute . . . ." *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, No. 07-22988-CIV, 2011 WL 710699, *1 (S.D. Fla. Mar. 1, 2011) (*report and Recommendation adopted*, No. 07–22988–CIV, DE 503). "[T]here is a strong presumption that the prevailing party will be awarded costs." *Mathew v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007). "To defeat the presumption and deny full costs, a district court must have a sound basis for doing so." *Chapman v. AI Transp.,* 229 F.3d 1012, 1039 (11th Cir. 2000). And, while "a court may only tax as costs those expenses enumerated in 28 U.S.C. § 1920 . . . [u]pon the filing of a timely motion or bill of costs, which sets forth in detail the amounts requested, the opposing party has the burden of showing that the costs requested fall outside the scope of this statute or were otherwise unreasonable." *Buckley Towers*, 2011 WL 710699 at *2. Thus, "the burden is on the losing party to show that a cost is not taxable, [but] the prevailing party 'bears the burden of submitting a request for [costs] that

would enable the Court to determine what [costs] were incurred and whether [the prevailing party] is entitled to them.'" *McCalla v. AvMed, Inc.*, Case No. 11-60007-CIV-COHN/SELTZER, D.E. 114, at *7 (S.D. Fla. Nov. 1, 2011) (citation omitted).

Alexsam argues that "winning a case does not equate to being entitled to . . . costs," and that "[t]here is no reason why AlexSam should be required to pay Defendants' [] costs in this case." D.E. 200 at 6 n. 9. The law is not reason enough for Alexsam.[3]

B. FIS Provided Sufficient Explanation For The Court To Determine What Costs Were Incurred And That FIS Is Entitled To Them.

FIS's Bill of Costs includes an attorney affidavit declaring that FIS's "costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed," and attaches invoices for the requested costs.[4] *See* D.E. 194 at 1, Appendix A. The affidavit further states that FIS's costs include: (1) "Costs of processing electronic copies for document production used in the case;" and (2) "Fees for transcript of July 1, 2016 hearing." *Id.* at 3. FIS provided further explanation in its Motion for Attorneys' Fees and Bill of Costs. *See* D.E. 192 at 12 n. 12. Alexsam's otherwise line-by-line dissection of FIS's Bill of Costs ignores these explanations. *See, e.g.,* D.E. 200 at 3 ("Defendants' Bill Of Costs Provides No Explanation For Why Any Of The Requested Costs Were Necessary."). Further, Alexsam (1) does not dispute that FIS produced the documents

[3] Alexsam also asks to delay awarding FIS costs because, based on the chance that the Supreme Court takes up Alexsam's appeal, "whether Defendants ultimately are the prevailing parties is still at issue." D.E. 200 at 6 n. 9. Alexsam should not be permitted to further drag out its cost obligations while its unlikely appeal is pending. *C.f., Kinglite Holdings Inc. v. Micro-Star Int'l Co.*, No. 14-03009, D.E. 235 at *7-8 (C.D. Cal. Jun. 23, 2016) (holding that determinations of prevailing party status may be made during each "phase" of litigation because otherwise "a litigant . . . could continually delay the conclusion of a case, thus frustrating the ability of the Court to . . . impose meaningful sanctions.").

[4] FIS's original and first refiled Bill of Costs included the same information. *See* D.E. 161, 178.

processed for this case, (2) concedes that FIS used the transcript invoice as an exhibit during this litigation, and (3) dismisses the straightforward explanations for FIS's minimal fees because "more is needed." D.E. 200 at 6. Alexsam's Opposition establishes that Alexsam in fact knows why FIS incurred the costs it now seeks, and the information provided in FIS's Bill of Costs is sufficient for the Court to determine the same, so no more is needed. *See McCalla,* Case No. 11-60007-CIV-COHN/SELTZER, D.E. 114 at *7. Yet, Alexsam insists on wasting Court resources disputing the minutiae of less than $5,000 in taxable costs.

1. FIS's Expenses For "Fees of the Court" Should Be Allowed.

Under § 1920(1), a prevailing party may recover filing fees paid to the court. 28 U.S.C. § 1920(1); *see also EEOC v. W & O, Inc.,* 213 F.3d 600, 623 (11th Cir. 2000). Further, "the Notice of Removal filing fee [] has been 'explicitly recognized as a taxable 'fee of the clerk' under 28 U.S.C. § 1920(1)" by this Court. *Covington v. Arizona Beverage Co., LLC*, No. 08-21894-CIV, 2011 WL 810592, at *3 (S.D. Fla. Jan. 25, 2011)*, report and recommendation adopted*, No. 08-21894-CIV, 2011 WL 777883 (S.D. Fla. Mar. 1, 2011) (citations omitted).

FIS removed this action to federal court because Alexsam filed a complaint steeped in patent issues in state court. This Court, the Eleventh Circuit, and the Federal Circuit all upheld FIS's removal. Even after having lost on this issue several times, Alexsam seeks to relitigate the issue yet again in the context of a bill of costs.

Alexsam argues that the removal fee was "incurred a result of a [successful] tactical decision made by Defendants' counsel and, therefore, was not necessary to the litigation or collectible here." D.E. 200 at 7. This Court has rejected this exact argument. *See Covington,* 2011 WL 810592, at *3 (awarding Removal fees even though "plaintiff objects to an award . . . for the Notice of Removal filing fee on the grounds that the defendants chose to remove the case on its own behalf and that nothing the plaintiff did required the defendants to incur this cost.").

Indeed, even in the *Berbridge* case Alexsam cites, "[t]he parties [did] not dispute that Defendant is entitled to its $400 filing fee for [Removal]." *Berbridge v. Sam's East, Inc*., No. 16-cv-62681-BLOOM/Valle, 2017 WL 4938820, at *2 n. 3 (S.D. Fla. Nov. 1, 2017). And the *Berbridge* and *Gupta* courts denied costs of copies made for the "convenience of counsel," not removal fees, so neither case supports Alexsam's argument. *See id.* at *3-4; *Gupta v. Walt Disney World Co.,* 2007 WL 2002454, at *3 (M.D. Fla. July 5, 2007). FIS's Removal fees are recoverable.

2. FIS's Necessary Transcript Expense Should Be Fully Allowed.

Under § 1920(2), a prevailing party may recover "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920(2). FIS's Bill of Costs seeks reimbursement for an $87.00 transcript from a July 1, 2016 hearing on FIS's Motion to Compel documents that Alexsam originally promised to produce in its initial discovery responses. *See* D.E. 109, Ex. 6 at Responses to Request Nos. 12, 13, 16, 17. At the July 1, 2016 hearing, Alexsam promised again to produce the requested materials by July 15. *See* D.E. 142 at 7-8. As the July 15 date passed without Alexsam fulfilling its promise to produce all relevant materials (a promise Alexsam confirmed it would not honor on July 18, *see* D.E. 177, Ex. 11), FIS requested the July 1 transcript in expedited fashion on July 15. *See* D.E. 194, Appendix B. FIS cited the transcript in its July 22, 2016 motion to enforce Alexsam's promise before the Court, D.E. 147, which Alexsam concedes. D.E. 200 at 7 ("The transcript was only cited in Defendants' Motion to Compel Compliance . . . ."). Further, Alexsam admits that FIS "provide[s] as explanation for their request to be reimbursed for a hearing transcript that it was used in their motion to compel (DE 147)." D.E. 200 at 7. Yet, Alexsam's very next sentence states that "[w]ithout more, it is difficult to determine for what purpose the hearing transcript was needed, if at all." *Id.* What more could Alexsam want, especially when Alexsam also requested from FIS its costs for the ***very same transcript***? *See* D.E. 208 at Ex. G, row 37.

Alexsam's failure to keep its promises necessitated (1) FIS's motion to compel, (2) the July 1, 2016 hearing on the same, (3) FIS's emergency motion to enforce Alexsam's promises, and (4) the expedited need for the transcript to cite in the emergency motion. That FIS's emergency motion was denied as moot has no bearing on whether those costs were necessary at the time they were incurred by FIS. *Cf. Buckley Towers*, 2011 WL 710699 at *3 ("In determining the necessity of a deposition, the deposition must only appear to have been reasonably necessary at the time it was taken, regardless of whether it was ultimately used at trial.") (citing *EEOC,* 213 F.3d at 620–21). Thus, as FIS's Bill of Costs states, the fees for the expedited transcript "were necessarily incurred in this action," D.E. 194 at 1, and are recoverable.

3. FIS's Costs For Copying Documents For Production In Response To Alexsam's Discovery Requests Were Necessary And Should Be Allowed.

Under § 1920(4), a prevailing party may recover "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." This includes the costs of making copies of pleadings, discovery, documents provided to the opposing party, and documents prepared for the court's consideration. *Sensormatic Elec. Corp. v. Tag Co. US,* No. 06-81105, 2009 WL 3208649, at *9 (S.D. Fla. Oct. 2, 2009). FIS produced 55,712 pages of documents and seeks the $3,820.03 cost of providing these documents to Alexsam. *See* D.E. 194 at 3 (itemizing "[c]osts of processing electronic copies for document production used in the case."). The costs amount to a reasonable $0.069 per page. *See James v. Wash Depot Holdings, Inc.*, 242 F.R.D. 645, 652 (S.D. Fla. 2007) (noting that Southern district courts have found photocopying rates of $0.10-$0.15 per page reasonable).

Alexsam does not dispute that FIS produced documents by necessity in response to discovery requests or allege that FIS's production was done solely for the convenience of FIS's counsel. Instead, Alexsam complains only about individual line items in FIS's vendor's invoices,

including culling, processing of native documents, tiff processing, and branding. D.E. 200 at 8. While Alexsam questions how these "tasks resulted in useful work," *id.*, it knows full well that FIS's production includes Bates-branded documents in tiff format and native documents and that these were the requirements for electronic discovery.[5] Indeed, Alexsam thought its own demand for over $8500 in attorney costs for preparing, coordinating, and reviewing document production justified, so its granular objections to FIS's vendor costs are duplicitous. *See* D.E. 208 at Ex. G, rows 18-24. Further, Alexsam's complaints about the miscellany included in the vendor's invoices "are not material enough for the Court to make any reduction in the amount sought, especially where [Alexsam] has not identified in particular the types of copies that they believe are outside the parameters of the statute." *Buckley Towers*, 2011 WL 710699 at *4. Thus, as FIS's Bill of Costs states, the fees for copying documents for production to Alexsam "were necessarily incurred in this action," D.E. 192 at 1, and are recoverable.

C. FIS Followed The Court's Rules And Orders In Submitting Its Bill Of Costs.

Without citing any instance of FIS ignoring any Local Rule or Court order, Alexsam accuses FIS of "a pattern and practice of ignoring Local Rules." D.E. 200 at 4. At all times, FIS respected this Court's rules and orders, and the chronology of this case reflects that.

Local Rule 7.3(b) requires that a Bill of Costs be "filed and served within thirty (30) days of entry of final judgment . . .". On August 16, 2016, 14 days after the Court entered Final Judgment in FIS's favor on August 2, 2016 (D.E. 159), FIS first moved for attorneys' fees and submitted its Bill of Costs (D.E. 160, 161), in compliance with the timing requirements of L.R.

[5] The parties began negotiating, but never completed, a proposed order governing discovery of electronically stored information ("ESI Order"). The drafts exchanged, however, all covered Bates numbering of documents, production of documents as TIFF files, and production of certain documents in native format. The latest version of the draft ESI order, with track changes removed, is attached as Exhibit 1.

7.3(b). Before doing so, FIS conferred with Alexsam pursuant to L.R. 7.1(a)(3). *See* D.E. 160 at "Certificate of Compliance with Local Rule 7.1(a)(3)." L.R. 7.3(c) states that "[p]rior to filing the bill of costs, the moving party shall confer with affected parties under the procedure outlined in S.D.Fla.L.R.7.1(a)(3) in a good faith effort to resolve the items of costs being sought." L.R. 7.1(a)(3), however, does not require pre-filing service of a bill of costs. Instead, it requires "counsel for the movant [to] confer (orally or in writing) . . . with all parties or non-parties who may be affected by the relief sought . . . ." Alexsam does not dispute that this meet and confer happened, only its counsel contends it was not "meaningful."[6]

On August 30, Alexsam filed a notice of appeal (D.E. 163), and the Court stayed FIS's motions for fees and costs (D.E. 164). Thereafter, Alexsam served its own motion for attorneys' fees on FIS, seeking more expansive costs than FIS. *See* D.E. 208 at Ex. G. As a result, FIS moved to stay issues related to fees and costs on September 16, 2016. D.E. 169. Alexsam opposed FIS's request because FIS allegedly "[sought] to prevent the Court from considering Alexsam's not yet filed Motion for Attorneys' Fees," and FIS's requested stay "directly impact[ed] the sanctity of these proceedings and the honor of this Court." D.E. 170.[7] The Court granted FIS's motion to stay the same day, ordering the parties to "meet and confer regarding any motion for fees and costs within twenty-one (21) days after the [appeals court mandate], and

[6] Alexsam seems to confuse L.R. 7.1(a)(3), which governs the meet-and-confer process for bills of costs and does not require pre-filing service, with the service requirements for motions for attorneys' fees under L.R. 7.3. *See, e.g.,* D.E. 200 at 3 ("Defendants' first attempt [at a bill of costs] (DE 161) was not provided to AlexSam prior to its filing, a violation of L.R. 7.3(c) . . . ."); *see also, id.* at 4. Alexsam cites no case law for the proposition that bills of costs must be served separately before they are filed.

[7] Thus, Alexsam's claim that it was "prevented" from bringing FIS's alleged failure to follow the meet and confer requirements for a bill of costs is untrue, s*ee* D.E. 200 at 3, 3 n. 2—it could have. Nor did Alexsam raise FIS's supposed failure to provide pre-filing service of FIS's first-filed Bill of Costs in Alexsam's "planned fees motion" as it claims it was going to. *See* D.E. 208.

. . . file any motion for fees and costs no later than thirty (30) days after the [appeals court mandate]." D.E. 171.

The Federal Circuit issued its mandate affirming judgment in FIS's favor on February 15, 2018. D.E. 175. Following the Court's September 16 Order (D.E. 171), FIS requested a meet and confer with Alexsam the next day, *see* ex. 2, which Alexsam ignored. FIS followed up a week later, and the parties met and conferred on Tuesday, February 27, twelve days after the mandate. Ex. 3; *see also* D.E. 177 at 19 (Certificate of Compliance with Local Rule 7.1(a)(3)). In this meet and confer, as with in the previous one, Alexsam represented that it opposed FIS's requested relief. Had Alexsam intended to dispute FIS's Bill of Costs on a line-by-line basis, Alexsam had the opportunity to do so—Alexsam admits that FIS served its "essentially identical" original Bill of Costs on August 16, 2016. D.E. 181 at 5, *see also* D.E. 200 at 3 n. 4. On March 19, 2018, FIS renewed its Bill of Costs pursuant to this Court's September 16 Order. D.E. 178.[8]

On April 10, the Court ordered FIS to refile its motion for attorneys' fees after proceeding with the requirements of L.R. 7.3. D.E. 188. Thereafter, FIS followed this Court's 7.3 Order and L.R. 7.3's requirements, serving its Motion for Attorneys' Fees and required accompanying materials within 30 days, holding a meet and confer with Alexsam 21 days later, and filing its Motion for Attorneys' Fees within 60 days. On June 8, 2018, at the end of this process, FIS again refiled its Bill of Costs. Alexsam does not dispute this, yet Alexsam accuses FIS of disregarding this Court's Orders and rules. Indeed, it is Alexsam that (1) did not confer with FIS when Alexsam's first filed a "Motion in Opposition" to FIS's Bill of Costs, *see* D.E. 181 (omitting the required Certificate of Compliance with Local Rule 7.1(a)(3)); (2) did not

[8] March 19, 2018 was 32 days after the Federal Circuit's mandate, but as the 30th day fell on a Saturday, March 17, FIS's Bill of Costs (D.E. 178) was timely. Importantly, despite moving to oppose FIS's Bill of Costs, Alexsam made no timeliness objections then. *See* D.E. 181.

confer regarding its 11th-hour motion for extension, *see* D.E. 196 (same); and (3) has now filed two oppositions to FIS's single Motion for Bill of Costs and Attorneys' Fees.

Thus, the public record shows that FIS first filed and served its Bill of Costs under the Local Rules on August 16, 2016, and FIS subsequently refiled the same Bill of Costs in full compliance with this Court's Orders. Yet Alexsam inexplicably claims that the record "is nonsense" and FIS's Bill of Costs was not filed until 675 days after this Court entered final judgment. D.E. 200 at 3 n. 4. Alexsam's argument, to the extent it can be understood, is that by complying with this Court's Orders, FIS violated the Local Rules.[9] This cannot be.

CONCLUSION

Alexsam's Opposition to FIS's Bill of Costs is another in a string of baseless filings that harass FIS, multiply the proceedings in this case, and squander resources. FIS's Bill of Costs requests a modest, reasonable fraction of FIS's expenses—all of which are expressly enumerated as recoverable under 28 U.S.C. § 1920—and is supported by an attorney affidavit and explanation of their necessity. Alexsam is fully aware of the purpose of those costs, as its Opposition readily indicates, and Alexsam provides no explanation for why the Court should deviate from the normal course of awarding expenses to the prevailing party, FIS.

[9] Alexsam also attempts to incorporate by reference its Motion to Strike (D.E. 195) in support of its timeliness argument, which the Court struck from the record. *See* D.E. 199. Incorporating a stricken motion is improper. *See Santander Consumer USA Inc. v. Superior Pontiac Buick GMC, Inc.*, No. 10-13181, D.E. 103, *3 (E.D. Mich. Jun. 11, 2012) ("The Court will not allow Defendant to incorporate any arguments in the stricken motion by reference and all arguments must be contained in a single motion, within the page limits set by the Local Rules.").

Dated: July 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to:

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