Un-taxing E-Discovery Costs: Section 1920(4) After *Race Tire Amer. Inc.* and *Taniguchi*

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INTRODUCTION

The general rule is that a party producing documents, including electronically stored information (ESI), pays the cost of production. There is an exception. Under Fed. R. Civ. P. 26(b)(2)(B), ESI that is not reasonably accessible because of undue burden or cost need only be identified, not produced. The requesting party may then try to show good cause for production. The district court may then require production but has the discretion to impose conditions. One typical condition is shifting a portion or all of the costs of production to the requesting party. While I do not pretend to have conducted an exhaustive survey, I am confident in saying that heretofore, at least, cost shifting is the exception, not the rule.

Fast forward to the end of litigation. A judgment now has been rendered. Under Fed. R. Civ. P. 54(d), costs, other than attorneys' fees, "should be allowed" in favor of the prevailing party "unless a federal statute, these rules, or a court order provides otherwise." The clerk of the district court "may tax" costs after 14 days' notice to the losing party. On motion served within seven days, the district court then may review the clerk's decisions on taxing costs.

There is federal statute that "provides otherwise." Under 28 U.S.C. §1920(4), judges and court clerks are instructed that they "may tax" as costs, "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Prior to 2008, subparagraph (4) allowed fees for "exemplification and copies of papers." Congress amended the statute then to change "copies of papers" to "copies of any materials."

Case law teaches that there is a presumption in favor of taxing allowable costs to the prevailing party and that the losing party bears the burden of showing why costs should not be taxed against it.

It should not surprise anyone, therefore, that prevailing parties who have spent large sums of money collecting ESI or scanning documents and organizing electronic information for hosting and production began to argue that they "exemplified" or copied "materials" and because of the broad and aggressive demands of requesting parties had no choice but to do so, and thus should receive their costs for doing so.

Courts began to listen. One decision, *Race Tires Amer. Inc. v. Hoosier Racing Tire Corp.,* 2011 WL 1748620 (W.D. Pa. May 6, 2011), started a tsunami of decisions in the last eight months of 2011, that expanded the reach of "exemplification" under Section 1920. In *Hoosier Racing*, the district court approved of the clerk's decision to tax $367,000 for (1) costs associated with imaging nineteen hard drives and processing data from five custodians, and (2) costs associated with imaging four servers which contained 490 gigabytes of data and over 270,000 files. The files contained "a mix of native files – Word, Excel, Zip, JPG pictures, music files

(sound), HTML (web), etc." Invoices presented in support of the motion to tax costs reflected that the vendor in question "extracted data, processed data, loaded data, and performed all tasks associated with putting electronic documents in the position to be produced" to the requesting party. In part to establish "necessity," the prevailing parties pointed out that the case management order in the matter required that the requesting party receive metadata and "key-word searchable" files and described the "aggressive" pursuit of e-discovery by the requesting party (119 requests for ESI and 442 search terms).[1]

Race Tires was appealed. The Third Circuit slowed the e-discovery cost taxation parade. *Race Tires Amer., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012). And the Supreme Court has now likely stopped it. *Taniguchi v. Kan Pacific Saipan, Ltd.*, __ US __, 132 S.Ct. 1997 (May 21, 2012). Both cases are discussed below.

WHAT DOES EXEMPLICATION MEAN UNDER 28 U.S.C. § 1920(4)?

One remarkable feature of the Third Circuit's decision reversing most of the costs' judgment was the ease with which it dispatched a broad reading of the word "exemplification." The court of appeals looked at two extremes in the case law. Citing *Kohus v. Cosco, Inc.*, 282 F.3d 1355, 1361 (Fed. Cir. 2002), where Sixth Circuit law was applied, the court of appeals described the narrow reading of Section 1920(4): "exemplification" means an official transcript of a public record authenticated for use as evidence.[2] 674 F.3d at 166.

The court of appeals regarded a Seventh Circuit interpretation of "exemplification" as at the other end of the spectrum. Citing *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427-28 (7th Cir. 2000) (which itself cited Merriam-Webster's Collegiate Dictionary 406 (10th ed. 1993)), the court of appeals explained that an expansive definition of "exemplification" would broaden the reach of taxable costs to include a "wide variety of exhibits and demonstrative aids" as long as the means of presentation furthered "the illustrative purposes of an exhibit." 674 F.3d at 166.

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[1] See also *In re Aspartame Antitrust Litigation*, 2011 WL 4793239 (E.D. Pa. Oct. 5, 2011), where three defendants received approximately $510,000 in costs to process the equivalent of over 80 million pages of ESI. The district court awarded costs for the creation of a litigation database, storage of data, imaging hard drives, keyword searches, deduplication, data extraction and processing; a "privilege screen" (a keyword search for potentially privileged documents); hosting data; and "technical support necessary to complete these tasks." It further taxed costs associated with optical character recognition, the creation of load files that allowed documents to be saved in Tagged Image File Format to be loaded onto a software platform for review, creating Concordance load files, electronic data recovery and tape restoration, creating CDs and DVDs, and "intaking, cataloging and loading" hard drives into a processing system. The district court did, however, reject costs associated with a software tool that involved clustering of a document collection based on concepts extracted from those documents, and associated technical usage fees. "This service, while undoubtedly helpful, exceeds necessary keyword search and filtering functions. Rather, it is advanced technology that falls squarely within the realm of costs that are not necessary for litigation but rather are acquired for the convenience of counsel." In an ERISA matter, *Tibble v. Edison International at al.*, 2011 U.S. Dist. LEXIS 94995 (C.D. Cal. Aug. 22, 2011), the district court allowed e-discovery costs to a prevailing defendant. The bulk of defendants' costs, about $530,000, "were necessarily incurred in responding to" twenty-eight requests for production of documents, including electronically stored information, "reaching documents over a decade old." "Plaintiffs aggressively sought electronic files, whether active, deleted, fragmented, or stored on electronic media or network drives. Ultimately, Defendants produced 537,955 pages of electronic documents in response to Plaintiffs' requests." The district court also approved of the rates charged defendants by their vendors based on the expertise involved and the use of competitive bidding. *Id.* at *24. *Jardin v. Datallegro, Inc.,* 2011 WL 4835742 (S.D. Calif. Oct. 12, 2011) allowed about $64,000 in costs for converting native files into TIFF images, and $5,950 for management of the conversion, and $20,576 for time billed for technicians to work on e-discovery for one defendant. Cf. *In Re Ricoh Company Ltd. Patent Litigation,* 661 F.3d 1361 (Fed. Cir. 2011) (Costs to maintain a third-party electronic database represented exemplification. However, the parties had agreed to split the costs of the database. The court of appeals held that the agreement was controlling; hence, no costs were allowed.)

[2] In *Kohus,* the Federal Circuit reversed an award of costs for producing a video exhibit because the district court lacked statutory authority to make the award for this type of expenditure. 282 F.3d at 1359.

The court of appeals decided that it did not have to decide which appellate decision was the correct one (and did not consider even whether these decisions defined the extremes of the meaning of "exemplification") because "[t]he electronic discovery vendors' work in this case did not produce illustrative evidence or the authentication of public records." 674 F.3d at 166.

THE LIMITED SCOPE OF "MAKING COPIES OF MATERIALS"

The court of appeals spent the bulk of its opinion on the relatively easy task of concluding that "making copies" means just that: scanning or copying digital files, but not the host of other e-discovery tasks that were allowed by the district court.

In workmanlike manner, the court of appeals used a dictionary definition of a "copy": "an imitation, transcript, or reproduction of an original work." To "copy" something, the court of appeals said, is to "duplicate" it as in making photocopies of a document on copy machine, the traditional basis for awarding costs for "making copies" under Section 1920(4).[3] *Id.*

With the statutory change to copies of "materials," the court of appeals acknowledged that Section 1920(4) now addresses more than paper. But this change was not enough to embrace e-discovery vendor charges.

The court of appeals first had to discern what the vendor was charging for:

> *The invoices that Hoosier and DMS submitted in support of their Bills of Costs are notable for their lack of specificity and clarity as to the services actually performed. For instance, Preferred Imaging invoices appended to the Bill of Costs have thousands of dollars in charges for "EDD Processing," without explaining what that activity encompasses. And while Preferred Image's use of the phrase "Performing Searching/Filtering/Exporting" may be less obtuse, the invoices provide no indication of the rationale for these activities, nor their results in terms of the actual production of discovery material. These activities also amount to thousands of dollars in charges. The CCC invoices are similarly replete with technical jargon that makes it difficult to decipher what exactly was done. RTA's brief was helpful in categorizing the invoices' numerous entries, and with its guidance, we identify the following general categories of services comprising the vendors' electronic discovery services: collecting and preserving ESI; processing and indexing ESI; keyword searching of ESI for responsive and privileged documents; converting native files to TIFF; and scanning paper documents to create electronic images.*

Id. at 166-67 (record citations omitted).

Of these activities, only two, converting native files to Tagged Image File Format, or TIFF,[4] and scanning of documents to create digital duplicates, are taxable under Section 1920(4), the court of appeals held.[5] *Id.* at

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[3] To make the point, the court of appeals referenced *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 643 (7th Cir. 1991), *Tokyo Electron Ariz., Inc. v. Discreet Indus. Corp.*, 215 F.R.D. 60, 65 (E.D.N.Y. 2003), and *Gen. Cas. Co. of Am. v. Stanchfield,* 23 F.R.D. 58, 60 (D. Mont. 1959) as decisions "since the advent of photocopying technology" allowing fees for "copies" under Section 1920(4). 674 F.3d at 166.

[4] This was "the agreed-upon default format for production of ESI," the court of appeals explained. 674 F.3d at 167.

[5] The court of appeals referenced "*Hecker v. Deere & Co.,* 556 F.3d 575, 591 (7th Cir. 2009) (costs of converting computer data into a readable format in response to plaintiffs' discovery requests . . . are recoverable under 28 U.S.C. § 1920); *BDT Prods. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005) ([E]lectronic scanning and imaging could be interpreted as exemplification and copies of papers); *Brown v. McGraw-Hill Cos.,* 526 F. Supp. 2d 950, 959 (N.D. Iowa 2007) ([T]he electronic scanning of

167. Only roughly $20,000 of the more than $365,000 awarded by the district court represented charges for scanning and TIFF conversion. RTA acknowledged the recoverability of these charges but argued that defendant did not show that these digital copies were "necessarily obtained for use in the case." However, the court of appeals held that the district court did not abuse its discretion: "In light of the volume of ESI produced in this case, we cannot find that the inclusion of all scanning and TIFF conversion costs was an abuse of the District Court's discretion. Accordingly, we will affirm the taxation of $20,083.51, representing the scanning and TIFF conversion undertaken on behalf of Hoosier." 674 F.3d at 167.

The court of appeals also held the $10,286.91 cost of transferring VHS recordings to DVD format also qualified as "making copies."[6] *Id.* at 167-68.

The court of appeals then reviewed and rejected the district court's reasoning. It held that it did not matter that the services provided by the e-discovery vendor were not ones that lawyers and paralegals could provide; that they were highly technical; or that they were indispensable to the discovery process.

> *The decisions that allow taxation of all, or essentially all, electronic discovery consultant charges, such as the District Court's ruling in this case, are untethered from the statutory mooring. Section 1920(4) does not state that all steps that lead up to the production of copies of materials are taxable. It does not authorize taxation merely because today's technology requires technical expertise not ordinarily possessed by the typical legal professional. It does not say that activities that encourage cost savings may be taxed. Section 1920(4) authorizes awarding only the cost of making copies.*
>
> *It may be that extensive "processing" of ESI is essential to make a comprehensive and intelligible production. Hard drives may need to be imaged, the imaged drives may need to be searched to identify relevant files, relevant files may need to be screened for privileged or otherwise protected information, file formats may need to be converted, and ultimately files may need to be transferred to different media for production. But that does not mean that the services leading up to the actual production constitute "making copies."*[7]

Id. at 169 (footnote omitted).

In categorical terms, the court of appeals said that the use of third party consultants does not affect the outcome under Section 1920(4): "Neither the degree of expertise necessary to perform the work nor the identity of the party performing the work of 'making copies' is a factor that can be gleaned from §1920(4)."[8] *Id.* at 169. The

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documents is the modern-day equivalent of . . . copies of paper,' and, therefore, can be taxed pursuant to § 1920(4))." 674 F.3d at 167.

[6] The court of appeals explained: "RTA, while acknowledging that this activity is taxable, disputes the amount taxed, observing that only 10 of 31 converted videos were produced to it. Once again, however, the question of the amount of costs to be taxed for copies necessarily obtained for use in the case falls within the District Court's ample discretion, and we cannot find an abuse of discretion in the District Court's decision to tax the cost for transferring all of the videos, totaling $10,286.91." 674 F.3d at 167-68.

[7] The court of appeals looked to the paper world by analogy explaining that a number of steps had to occur before "copies" were made and these steps did not result in taxable costs: "First, the paper files had to be located. The files then had to be collected, or a document reviewer had to travel to where the files were located. The documents, or duplicates of the documents, were then reviewed to determine those that may have been relevant. The files designated as potentially relevant had to be screened for privileged or otherwise protected material. Ultimately, a large volume of documents would have been processed to produce a smaller set of relevant documents. None of the steps that preceded the actual act of making copies in the pre-digital era would have been considered taxable. And that is because Congress did not authorize taxation of charges necessarily incurred to discharge discovery obligations. It allowed only for the taxation of the costs of making copies." 674 F.3d at 169.

[8] The court of appeals took comfort in the ample case law supporting the refusal to award the costs of electronic discovery vendors for gathering, preserving, processing, searching, culling, and extracting ESI because these tasks "do not amount to 'making copies.'" "For instance, in *Mann v. Heckler & Koch Defense, Inc.*, No. 1:08-cv-611, 2011 WL 1599580, at * 9 (E.D. Va. Apr. 28, 2011), the court observed that "such tasks as 'Searching and Deduping,' and 'Creation of Native File Database with Full Text and

court of appeals also endorsed the precept that district courts cannot award costs unless they are enumerated under § 1920.[9] 674 F.3d at 170. Not surprisingly, the court of appeals also rejected equitable concerns as a basis to award costs for "services that Congress has not made taxable." *Id.*

Hoosier argued that one cannot extract from the scanning and TIFF conversion process all of the other "technical processes" necessary for the production of "intelligible electronic copies." But this assertion was not supported by the vendor invoices, the court of appeals held. *Id.* Adding that other courts have had no difficulty sorting only the costs for "the physical preparation of ESI produced in litigation,"[10] the court of appeals concluded:

> *The highly technical nature of the services simply does not exempt parties who seek to recover their electronic discovery costs under §1920(4) from showing that "the costs fall within the subsection's limited allowance for the costs of making copies of any materials where the copies are necessarily obtained for use in the case."*

Id.

The court of appeals also invoked the presumption that "that the responding party must bear the expense of complying with discovery requests," citing this oft-cited statement from *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). *Id.* at 170-71. While it noted that Fed. R. Civ. P. 26(c) allows a district court to issue orders protecting a producing party "from undue burden or expense" in complying with a discovery requests, including as *Oppenheimer* states, "orders conditioning discovery on the requesting party's payment of the costs of discovery,"[11] it explained that, "Here, neither Hoosier nor DMS obtained a cost-shifting protective order. We are consequently limited to shifting only those costs explicitly enumerated in § 1920."[12] *Id.* at 171.

Metadata Extraction,'" do not qualify as 'copying.' Acknowledging the 2008 amendment to § 1920(4) that substituted 'materials' for 'papers,' the court aptly stated that the statute 'still requires copying.' *Id.* (emphasis omitted). In *In re Scientific-Atlanta, Inc. Securities Litigation,* No. 1:01-cv-1950-RWS, 2011 WL 2671296, at *1 (N.D. Ga. July 6, 2011), the court analogized keyword searching to a room full of reviewers physically reviewing paper documents. Just as the cost of reviewers examining documents is not taxable, so too the task of keyword searching is not taxable. *Id.* In I*n re Fast Memory Erase v. Spansion, Inc.,* the court awarded nearly $200,000 'for creating TIFF/OCR images of documents responsive to plaintiff's discovery requests,' but disallowed more than $860,000 'for collecting and processing more than 2,100 gigabytes of . . . ESI.' No. 3-10-CV-0481-M-BD, 2010 WL 5093945, *4 (N.D. Tex. Feb. 2, 2010). The court found that data collection and extraction of relevant discoverable ESI was more like non-taxable attorney and paralegal review than copying. *Id.* at *6 (citing *Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co.*, W.W.L., No. H-07-2684, 2009 WL 1457632 at *6 (S.D. Tex. May 26, 2009))." 674 F.3d at 170.

[9] The court of appeals cited *Fells v. Va. Dep't of Transp.*, 605 F. Supp. 2d 740, 743-44 (E.D. Va. 2009) (refusing to tax costs of processing records, extracting data, and converting files). 674 F.3d at 170.

[10] The court of appeals referenced *In re Fast Memory Erase,* 2010 WL 5093945, at *4 "(awarding nearly $200,000 for TIFF/OCR conversion but disallowing more than $860,000 for collecting and processing in excess of 2,100 gigabytes of ESI)." 674 F.3d at 170.

[11] Rule 26(c) allows a district court to issue a protective order in appropriate circumstances. Rule 26(c)(1) states in pertinent part: "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: … (B) specifying terms, including time and place, for the disclosure or discovery…." Rule 26(c) contains no express provision conditioning discovery on the payment of costs, but "specifying terms" in Rule 26(c)(1)(B) is presumably broad enough to allow for such relief and presumably is what the Supreme Court had in mind in *Oppenheimer* since the Court did not reference what part of Rule 26(c) allowed for cost shifting.

[12] Hoosier relied on *Synopsys, Inc. v. Ricoh Co. (In re Ricoh Co. Patent Litigation)*, 661 F.3d 1361 (Fed. Cir. 2011) to support the award of electronic discovery costs. As noted earlier, in that case, the Federal Circuit determined that the cost of an agreed-upon database that served as the platform for the parties to obtain electronic documents was taxable, but reversed the district court's award of those costs because the parties had agreed to share that expense. *Id.* at 1367. The Third Circuit said that this decision "is plainly distinguishable because the parties had agreed to the creation of a specific document review database by a specific vendor for document production purposes, unlike this case, where Hoosier and DMS retained their own electronic discovery

The court of appeals' conclusion emphasizes the limited application of Section 1920(4): "Although there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so, either generally or in particular cases, under the cost statute." 674 F.3d at 171.

WHY IT IS LIKELY THAT OTHER CIRCUITS WILL FOLLOW *RACE TIRES*?

Is the Third Circuit decision the final word on breadth of "exemplification" and "making copies"? It is not—at least, not yet, but after the Supreme Court's decision in *Taniguchi v. Kan Pacific Saipan, Ltd.*, __ US __, 132 S.Ct. 1997 (May 21, 2012), it likely will be.

But first, some context.

The Decision of the Northern District of California in In Re: Online DVD Rental Antitrust Litigation

The district court in *In Re: Online DVD Rental Antitrust Litigation*, 2012 U.S. Dist. LEXIS 55951 (N.D. Cal. April 20, 2012) chose not to follow *Race Tires*, electing instead to let the Ninth Circuit decide the question. The district court acknowledged that the Third Circuit's opinion was "well reasoned" but because of a prior order on the topic and a broad statement in *Taniguchi v. Kan Pacific Saipan, Ltd.*, 633 F.3d 1218, 1221 (9th Cir. 2011) on the freedom of district courts to interpret the reach of Section 1920(4), the district court awarded $710,194.23 in costs, all apparently for "TiFF conversion costs," "copying/'blowback' costs that were not described, "document productions" that allegedly were never delivered, and "professional fees re visual aids." It is not clear from the opinion whether any of these costs represent anything other than "making copies" or how the opinion conflicts with *Race Tires.* Nonetheless, the district court wrote:

> *Furthermore, although the court takes note of the Third Circuit's well-reasoned opinion in* Race Tires Am., Inc. v. Hoosier Racing Tire Corp. *(3d Cir. Mar. 16, 2012), the court concludes that in the absence of directly analogous Ninth Circuit authority, and in view of the court's prior order in connection with the Blockbuster subscriber plaintiffs' motion for review of the clerk's taxation of costs, broad construction of section 1920 with respect to electronic discovery production costs – under the facts of this case – is appropriate.* See also Taniguchi v. Kan Pacific Saipan, Ltd.*, 633 F.3d 1218, 1221 (9th Cir. 2011) (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").*[13]

The Supreme Court's Decision in Taniguchi v. Kan Pacific Saipan, Ltd

The Ninth Circuit in *Taniguchi* read Section 1920 broadly in the context of affirming an award of costs for translating a document. Section 1920(6) permits taxation of costs for the "compensation of interpreters." The court of appeals held that this phrase encompassed translation of a document: "In § 1920(6), the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common

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consultants. Furthermore, we have acknowledged that the costs of conversion to an agreed-upon production format are taxable as the functional equivalent of "making copies." It is all the other activity, such as searching, culling, and deduplication, that are not taxable. *In re Ricoh Patent Litigation* affords no assistance to Hoosier and DMS in this regard, as it did not address the question of whether the activities undertaken by the electronic discovery vendors in this case are the equivalent of 'making copies.'" 674 F.3d at 171.

[13] However, the district court stayed enforcement of its award of costs pending a ruling from the Ninth Circuit. By year-end 2012 or thereabouts, there should be a Ninth Circuit opinion resulting from the appeal.

usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." 633 F.3d at 1221.

However, by a 6-3 vote, the Supreme Court rejected the Ninth Circuit's statutory interpretation and vacated the cost judgment made in that case:

> *Because the ordinary meaning of "interpreter" is someone who translates orally from one language to another, we hold that the category "compensation of interpreters" in § 1920(6) does not include costs for document translation.*

Taniguchi v. Kan Pacific Saipan, Ltd., supra, 132 S.Ct. at 2007.

En route to this decision, the Court's discussion was unfriendly to an expansive reading of Section 1920, consistent with the constraint shown by the Third Circuit in *Race Tire.* The Court explained that its holding is "in keeping with the narrow scope of taxable costs." *Id.* at 2006. In language that will surely be cited by any litigant seeking to avoid taxation of e-discovery costs that go beyond "making copies," the Court then explained how "minor" and "modest" the costs are that can be recovered under Section 1920:

> *Taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920, which lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts. Indeed, "the assessment of costs most often is merely a clerical matter that can be done by the court clerk."* Hairline Creations, Inc. v. Kefalas, *F.2d 652, 656 (C.A.7 1981). Taxable costs are a fraction of the nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators. It comes as little surprise, therefore, that "costs almost always amount to less than the successful litigant's total expenses in connection with a lawsuit." 10 Wright & Miller § 2666, at 203. Because taxable costs are limited by statute and are modest in scope, we see no compelling reason to stretch the ordinary meaning of the cost items Congress authorized in § 1920.*

Wittingly or unwittingly, *Taniguchi* effectively endorsed the approach and holding in *Race Tires.* Assuming that the costs awarded in *In Re: Online DVD Rental Antitrust Litigation* do not represent "making copies," the Ninth Circuit should agree when it issues its opinion in the appeal of that cost judgment.

CONCLUSION

If the Ninth Circuit agrees with the Third Circuit's view of Section 1920(4), as seems likely after the Supreme Court's decision in *Taniguchi* addressing Section 1920(6) specifically and the dicta in *Taniguchi* addressing Section 1920 generally, the district courts and other circuits will almost certainly follow suit.

If that prediction is correct, it will take a further amendment to Section 1920(4) before e-discovery costs beyond "making copies" are awardable. In the meantime, parties seeking cost shifting will have to do so under the authority of Fed. R. Civ. P. 26(b)(2)(B) or 26(c).

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Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental, commercial, or reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the LCIA, and serves on the AAA and ICDR roster of neutrals, the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals," and the National Roster of Environmental Dispute Resolution and Consensus Building Professionals maintained by the U.S. Institute for Environmental Conflict Resolution. He has served or is serving as a neutral in scores of matters involving in the aggregate more than $4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk and conducts independent investigations where such services are needed.

In March 2012, Chief Justice Roberts appointed Mr. Barkett to serve on the Advisory Committee for Civil Rules. Mr. Barkett had been serving as the ABA Section of Litigation's liaison to the Advisory Committee on Civil Rules since 2009. Mr. Barkett is also a former member of the Council of the ABA Section of Litigation.

Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers*, (First Chair Press, Chicago, October 2008) and *The Ethics of E-Discovery* (First Chair Press, Chicago, January 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past five years, in addition to a number of other articles on a variety of topics:

- *The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America* (ABA Section of Litigation News, December 11, 2011) (http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf)
- *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011)
- *The Challenge of Electronic Communication, Privilege, Privacy, and Other Myths*, 38 Litigation Journal 17 (ABA Section of Litigation, Fall 2011)
- *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York. 2011)
- *The Roberts Court 2010-11: Three Women Justices!* (ABA Annual Meeting, Toronto, August 2011)
- *The Ethics of Web 2.0*, (ACEDS Conference, Hollywood, FL March 2011)

- *The Roberts Court: Year Four, Welcome Justice Sotomayor* (ABA Annual Meeting, San Francisco, August 2010)
- *The Myth of Culture Clash in International Commercial Arbitration* (co-authored with Jan Paulsson), 5 Florida International University Law Review 1 (June 2010)
- *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (Duke 2010 Conference, Civil Rules Advisory Committee, May 11, 2010)
- *Zubulake Revisited: Pension Committee and the Duty to Preserve, (Feb. 26, 2010) (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)*
- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *From Canons to Cannon* in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics (American Bar Association, Chicago, 2009)
- *The Robert's Court: Three's a Charm* (ABA Annual Meeting, Chicago, August 2009)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Annual Meeting, Chicago, 2009)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules* in Electronic Disclosure in International Arbitration (JurisNet LLC, New York, September 2008)
- *The Robert's Court: The Terrible Two's or Childhood Bliss?* (ABA Annual Meeting, New York, August 2008)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13,* (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008)
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007)
- *The Roberts Court: Where It's Been and Where It's Going* (ABA Annual Meeting, San Francisco, August, 2007)
- *Help Has Arrived…Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007)
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *Help Is On The Way…Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void,* ABA Section of Litigation Annual Meeting, Los Angeles (2006)
- *The Battle For Bytes: New Rule 26*, e-Discovery, Section of Litigation (February 2006)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago, (2005)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)

- *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003)

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