ORAL ARGUMENT SCHEDULED FOR FEBRUARY 6, 2020

CASE NO. 19-7064

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, EX REL. HARRY BARKO,

Appellant,

v.

HALLIBURTON COMPANY, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia (No. 05-cv-1276-RCL)

APPELLANT'S REPLY BRIEF

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GLOSSARY

KBR	Kellogg Brown & Root Services, Inc. and all KBR-related Defendants
PDF	Portable Document Format
TIFF	Tagged Image File Format
e-discovery	Electronic Discovery

SUMMARY OF ARGUMENT

The main issue in this case is straightforward: What e-discovery costs sought by Defendants-Appellees (hereinafter "KBR")[1] actually qualify as "costs of making copies" under 28 U.S.C. § 1920(4)?

Despite KBR's efforts to force all its e-discovery costs into the "narrow scope" of § 1920(4), this Court should follow the decisions of all its sister circuits that have addressed this issue and find that only costs directly for copying documents produced in discovery into non-editable production formats and onto production drives can be taxed as a matter of law. *Country Vintner of N.C., LLC v. E & J Gallo Winery, Inc.*, 718 F.3d 249 (4th Cir. 2013); *Race Tires Am. Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012); *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320 (Fed. Cir. 2013); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914 (9th Cir. 2015); *Colosi v. Jones Lang LaSalle Ams., Inc.*, 781 F.3d 293 (6th Cir. 2015).

As a preliminary matter, all costs associated with 2,229,000 unproduced electronic documents, 92.875% of the total amount of documents at issue, should

[1] The Defendants below, and the Appellees here, are Halliburton Company, Kellogg Brown & Root Services, Inc., Kellogg Brown & Root, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown and Root International, Inc. (a Delaware Corporation), and Kellogg Brown & Root International, Inc. (a Panamanian Corporation) (collectively "KBR").

not be taxed against Plaintiff-Appellant Harry Barko ("Barko") as they are not covered by 28 U.S.C. § 1920(4). *CBT Flint*, 737 F.3d at 1330 (holding that when tasks are completed "on a large volume of documents **before** culling to produce only a subset, the awarded copying costs must be confined to the subset actually produced") (emphasis in original). KBR presented no argument or authority to justify any costs associated with the unproduced documents.

Despite KBR's claims, there is no evidence that the 2008 amendments to §1920(4) made any drastic change to the types of activities related to copying for which costs can be taxed. In fact, all the circuit courts that have analyzed the amendments have agreed that any changes were "limited" and simply made to allow for taxation of electronic copying, rather than just the previously allowed paper copying. *Race Tires*, 674 F.3d at 165; *CBT Flint*, 737 F.3d at 1326; *Country Vintner*, 718 F.3d at 254-57; *Colosi*, 781 F.3d at 298. KBR offers no evidence to support its legislative history theory but rests its argument entirely on two random floor statements taken out-of-context and simply referred to taxation of electronic copying costs.

Without the meritless textual and legislative history arguments, the foundation for all of KBR's remaining e-discovery arguments crumbles. KBR fails to offer any persuasive case law to support taxation of its e-discovery costs and does not rebut

the mountain of persuasive authority from multiple circuits that Mr. Barko laid before this court in his Opening Brief. The specific arguments KBR lays out for taxing costs for e-discovery hosting, extraneous discovery tasks performed by its employees or outside vendors, and conversion of original documents into an e-discovery platform format fall flat. All the non-binding authorities and arguments advanced by KBR for taxing these items are either easily distinguishable, involve special circumstances leading to a misapplication to the present case, or simply carry extremely limited persuasive weight as they are vaguely reasoned or have not been followed.

Regarding the disputed transcript costs, KBR presents no argument refuting the fact that its supporting affidavits on the record cannot justify taxing Mr. Barko costs for expedited fees, a video recording, and an ASCIII disk for the contested depositions.

Finally, costs for labor and office supplies charged by KBR's external copying vendors fall outside of 28 U.S.C. § 1920(4). KBR's central case for taxing labor, when read carefully, actually supports denying taxation for the labor charges at issue here. All the other authorities cited by Mr. Barko demonstrate that such items are outside the narrow scope of § 1920(4).

ARGUMENT

I. E-DISCOVERY COPYING COSTS

Throughout its brief, KBR continuously refers to e-discovery costs, but nothing in the statute or the case law supports including in a bill of costs all "e-discovery" costs incurred by a party. It is important to note that this case, and the costs statute at issue, is not about e-discovery costs, but about "the costs of making copies." As the other circuits have held, the only e-discovery copying costs which can be taxed under 28 U.S.C. § 1920(4) are the costs of copying electronically produced documents into a non-editable production format and onto a production drive. As discussed herein, the district court erred in adopting KBR's arguments to tax all e-discovery costs and ordering Mr. Barko to pay for millions of pages of documents that were not even produced by KBR.

A. KBR Did Not Contest the Holding in *CBT Flint* That Costs for Non-Produced Documents Cannot Be Taxed Under 28 U.S.C. § 1920(4).

KBR did not contest the fact that 2,229,000 pages of documents covered by its Bill of Costs were simply stored on its e-discovery platform but never produced in discovery. A 27-28. These documents account for $46,124.45 of KBR's

requested costs.[2] As cited in Mr. Barko's Opening Brief and in filings before the district court, the Federal Circuit has held when tasks are performed "on a large volume of documents **before** culling to produce only a subset, the awarded copying costs must be confined to the subset actually produced . . . by using a reasonable allocation method such as prorating." *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1330 (Fed. Cir. 2013) (emphasis in original) ("only costs of creating the **produced** duplicates are included") (emphasis added); *see* Opening Br. 17, 25; *see, e.g.*, Barko Mot. for Recons. 12, ECF 300.

Here, the majority of costs taxed against Mr. Barko were for tasks performed on the large volume of 2.4 million pages of documents and those costs were not prorated down to only the 171,000 pages eventually produced. KBR made no argument and presented no authority as to why costs for the unproduced 2,229,000 pages are covered by § 1920(4). As such, following *CBT Flint*, a case relied upon by KBR and described in its brief as "better-reasoned," the prorated amount of

[2] KBR's initial affidavit supporting its Bill of Costs makes clear that all costs for: 1) KBR E-Discovery Labor Costs ($6,477.79); 2) KBR E-Discovery Hosting Costs ($33,035.14); and 3) External Vendor (Pathway Forensics) Costs ($10,150.00) were for tasks performed on all 2.4 million documents hosted by its e-discovery platform, not just the 171,000 which were eventually produced. A 27-30. The costs apportioned to the unproduced documents, 92.875% of total, is $46,124.45.

$46,124.45 in costs directly related to the unproduced documents should not be taxed against Mr. Barko. A 27-30.

B. KBR Offers No Persuasive Argument That This Court Should Find the Remaining Contested E-Discovery Copying Costs Are Taxable Under § 1920(4).

Mr. Barko's Opening Brief provided the Court with persuasive authority from other circuits and clear Supreme Court directives that 28 U.S.C. § 1920 be narrowly construed. In response, KBR was able to offer only weak textual and legislative history arguments (which have already been soundly rejected by multiple circuit courts), a random smattering of vaguely reasoned or distinguishable district court cases, and misapplied or inapplicable circuit court case law to support its excessive demands for e-discovery related costs.

KBR's entire argument on e-discovery copying costs hinges on its belief that the 2008 amendments to 28 U.S.C. § 1920(4) caused a radical shift in the types of costs that are taxable. Appellee's Br. 21-22; 33-35. Specifically, KBR insists that by changing the text from "[f]ees for exemplification and copies of papers" to "[f]ees for exemplification and the costs of making copies of any materials," Congress

intended to allow the taxation of all sorts of previously untaxable costs not directly related to copying.[3] Appellee's Br. 21-22, 35.

However, lacking supporting authority from any circuit court, KBR could not locate any controlling or persuasive support in the legislative history. Rather, KBR attempts to prop up this meritless argument with two random congressional floor statements which simply state that the amendment was meant "to keep up with the changes and challenges of the 21st Century," 154 Cong. Rec. S9897 (daily ed. Sept. 27, 2008) (statement of Sen. Leahy), and "mak[e] electronically produced information coverable in court costs." 154 Cong. Rec. H10270, H10271 (daily ed. Sept. 27, 2008) (statement of Rep. Lofgren). These types of floor statements are generally dismissed by the courts, and, in this matter, clearly do not overturn the specific statutory language and the long line of cases mandating that the costs statute be construed narrowly. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 n.15 (2002) (dismissing the persuasive authority of floor statements in statutory interpretation); *Kouichi Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560, 573 (2012). KBR also fails to note that the amendment accomplished both of the goals contained

[3] KBR also offers a textual argument related to the amendments, claiming that the word "making" now allows for the taxation of costs in the entire "process" revolving around producing a copy. Appellant's Br. 24. The word "process" is not included in the definition of "make" that KBR cites, but shoehorned in by KBR afterwards and chiefly relied upon throughout its brief.

in the cited floor statements simply by allowing taxation of costs for electronic copying, rather than just paper copying which had previously been the exclusive form of copying covered by the text.

KBR fails to mention that the amendments were based on recommendations made by the Judicial Conference of the United States. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 165 (3d Cir. 2012). These recommendations completely contradict the argument raised by KBR and clarify the amendments are consistent with the plain language of the statute and the longstanding court rulings that costs must be narrowly construed. The Judicial Conference had met on March 18, 2003, where the Committee on Court Administration and Case Management recommended the amendments that were eventually accepted by Congress in 2008, word-for-word. Judicial Conference, *Report of the Proceedings of the Judicial Conference of the United States* 9-10 (March 18, 2003). The Committee "was asked to consider whether the list of taxable costs should be amended to include expenses associated with new courtroom technologies." *Id.* Having been asked to consider the possibility of large-scale changes to § 1920, the Committee concluded "that adding the full range of such costs might go well beyond the intended scope of the statute," and therefore recommended only two "**limited** amendments," including permitting "taxing the costs associated

with copying materials whether or not they are in paper form." *Id.* (emphasis added). The Committee's report clearly shows the original intent behind the amendment was small and limited, and simply to allow copying costs to be taxed for non-paper copying.

KBR's textual and legislative history arguments have already been soundly rejected by the circuit courts which have considered them, including the Federal Circuit in *CBT Flint*, a case on which KBR places heavy reliance. The court in *CBT Flint* analyzed the amendments to 28 U.S.C. § 1920, including the textual changes and legislative history, and agreed that the amendment "was modest rather than dramatic in its bottom-line effect on litigants," that there is "no significance in the change from 'copies' to 'making copies,'" and that the textual change was simply meant to accomplish the "linguistic aim of using activity-describing phrases." *CBT Flint*, 737 F.3d at 1326. Additionally, the other circuit court cases relied upon in Mr. Barko's opening brief all occurred after the amendments and discussed the legislative history of the § 1920(4), with none finding the sweeping changes KBR advocates.[4] *See Country Vintner of N.C., LLC v. E. & J. Gallo Winery Inc.*, 718 F.3d

[4] KBR attempts to lessen the impact of the Third Circuit's decision in *Race Tires*, by explaining the court supposedly "ignored" the 2008 amendments. Appellant's Br. 33-35. However, *Race Tires* was clearly decided after 2008, and the court conducted its full analysis using the updated text of § 1920(4) and examining the amendment's history. *Race Tires*, 674 F.3d at 164-65. The simple explanation

249, 254-57 (4th Cir. 2013) (analyzing the plain meaning of the updated text of § 1920(4) and holding that it should be read narrowly); *Race Tires*, 674 F.3d at 165 (3d Cir. 2012); *Colosi v. Jones Lang LaSalle Ams., Inc.*, 781 F.3d 293, 296, 298 (6th Cir. 2015).

Nothing in KBR's brief rebuts the overarching fact that all the circuit courts that have dealt with the issue of what e-discovery costs fall under copying costs in § 1920(4) have found that when, as is the case here, electronic copies of documents are made for production in a case with no agreement, meta-data requests, or special circumstances, the only costs covered by § 1920(4) are those for copying the original documents into a production format and copying those files onto a production drive. Opening Br. 15-22 (outlining circuit court case law). KBR did not rebut many of these cases but simply cited them to support the uncontested standard that costs for copying documents into a production format are taxable. Opening Br. 25. The few rebuttals of circuit court authorities were ineffectual and are discussed further below.

The extremely limited number of district courts cited by KBR that have allowed e-discovery costs like those taxed against Mr. Barko are easily distinguishable and "certainly in the distinct minority." *Split Pivot, Inc. v. Trek*

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is that the Third Circuit believed, like the Federal Circuit, that the amendments were not intended to cause sweeping change to the types of taxable costs for copying, a belief bolstered by the utter lack of any evidence or authority to the contrary.

Bicycle Corp., 154 F. Supp. 3d 769, 776 (W.D. Wisc. 2015) (citing *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 2 F. Supp. 3d 1306, 1317 (N.D. Ga. 2014)). As shown in Mr. Barko's Opening Brief, and as stated in *Split Pivot*, all of the circuits that have addressed the issue of electronic discovery costs in § 1920(4) have shown that, absent special circumstances not present here, only copying the original files into producible formats and copying those files onto production drives are covered as copying costs under § 1920(4). This Court should adopt the same interpretation.

C. HOSTING COSTS ARE NOT TAXABLE UNDER § 1920(4).

Costs for hosting documents on a server are not costs of making copies under 28 U.S.C. § 1920(4). Mr. Barko was taxed $33,035.14 in costs for hosting documents on KBR's e-discovery platform. Like many other courts, the *CBT Flint* court rejected hosting costs incurred by one of the parties "in acquiring, installing, and configuring a new data-hosting server at the offices of [the counsel]." *CBT Flint*, 737 F.3d. at 1331; *see Race Tires*, 674 F.3d at 167 (rejecting "preservation" costs for electronically stored information); *see also* Opening Br. 25-26 (citing district court cases rejected similar hosting costs). It is not difficult to understand why such costs should be rejected. As explained in *Balance Point Divorce Funding, LLC v. Scrantom*, 305 F.R.D. 67, 76 (S.D.N.Y. 2016), taxing hosting costs would be the

equivalent to taxing costs for the rental of office space and the purchasing of file cabinets to store hard copy documents which may later be copied and produced in discovery. Opening Br. 26. Further, KBR's explanation for why its hosting costs were necessary to copying, all relate to its ability to cull a large set of documents down into a production subset. Appellee's Br. 35-36. These costs for culling non-produced documents are not taxable.[5] *CBT Flint*, 737 F.3d at 1330.

KBR cannot rebut any of these arguments but simply retreads its unsupported textual and legislative history arguments, which were discussed in full above (*supra* pp. 6-10). KBR takes these erroneous arguments to their illogical conclusion and argues that even though the analog version of hosting costs, like those for file cabinets and office space, may not have been available pre-2008, the amendments opened the floodgates to costs which should be found clearly and unquestionably outside the statutory language, including the taxed hosting costs. Appellee's Br. 35. Once again, this is unfounded as the 2008 amendments made no such change and KBR did not, because it cannot, show any actual evidence that such a change occurred or that Congress intended to make such a change.

[5] The total of $33,035.14 includes the costs for hosting all 2.4 million documents, not just the 171,000 that were eventually produced. As discussed above (*supra* pp. 4-6), if the Court agrees with KBR and taxes hosting costs, only $2,353.74, the prorated amount for the 171,000 produced documents, should be taxed. *CBT Flint*, 737 F.3d at 1330.

Even though KBR often relies upon *CBT Flint* in its brief as a "better-reasoned" case, it tries to distinguish it here as *CBT Flint* clearly rejected hosting costs such as those taxed against Mr. Barko. Appellant Br. 34 n.10; *CBT Flint*, 737 F.3d at 1331. To try to get around this rejection, KBR offers a meager distinction between the two cases, saying "the court held only that installing a new server on site at a lawyer's office is for the convenience of counsel. The court did not say that the costs a party incurs in maintaining an e-discovery platform necessary to its production of ESI are categorically unallowable." Appellant's Br. 34 n.10. This is clearly a distinction without a difference. The rejected costs in *CBT Flint* involved a party buying and maintaining a server to store its e-discovery documents, whereas here KBR's costs were for the maintenance and use of a server it had access to. A 29. In the end the result is the same, the costs sought are simply for maintenance and server space on which to store e-discovery documents. Under *CBT Flint*, the hosting costs taxed against Mr. Barko should be rejected. *CBT Flint*, 737 F.3d at 1331.

The only circuit court case KBR relies upon for the taxation of hosting costs, *In re Ricoh Co. Patent Litig.*, 661 F.3d 1361, 1364-67 (Fed. Cir. 2011), is easily distinguishable as the database used there was agreed upon by both parties prior to production and was necessary in order for the documents to be produced in the

manner requested (i.e., in their "native formats"). Because the requested party in *Ricoh* required the documents in the native format, the parties agreed that the most feasible way to produce them was to use a specific database for viewing the documents, meaning the database was actually used as the means of production. *Id.* Here, the "means of production" was not a database, but rather PDF and TIFF files on production drives, and therefore no database or hosting costs are covered by § 1920(4). *See Race Tires*, 674 F.3d at 171 ("*In re Ricoh Patent Litigation* 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.").

KBR is left with only a random scattershot of district court cases which it claims support the taxation of its hosting costs. *See* Appellee's Br. 36-37; *but see* Opening Br. 25-26 (citing district court cases which have denied such costs). Whatever little persuasive authority these opinions may hold should be further disregarded as they were either decided with little to no analysis, are counter to the statute and all circuit court precedent, or have not been followed.

D. ALL BUT $362.41 OF KBR'S INTERNAL AND EXTERNAL E-DISCOVERY LABOR COSTS ARE NOT TAXABLE UNDER § 1920(4).

Mr. Barko was taxed for costs related to a number of discovery tasks performed by either internal personnel or external vendors that this Court should find do not fall under 28 U.S.C. § 1920(4). In his Opening Brief, Mr. Barko fully

explained why costs for these extraneous tasks, such as "Bates-stamping documents, organizing documents," and preparation, are not taxable and offered a multitude of persuasive circuit court and district court cases in which similar costs have been routinely denied. Opening Br. 27-31; Appellee's Br. 26-27. Following this precedent, Mr. Barko did however concede that all costs explicitly for copying original documents into a production format and onto production drives was taxable.[6]

Of these many tasks, KBR's brief only specifically cited cases to support that "Bates-stamping" and "shipping and delivery of electronic documents" should be taxable. Appellee's Br. 25-26. KBR only points to four district court cases that taxed costs for Bates stamping, one of which was in the Fourth Circuit, which itself held that such costs were not taxable two months later. *Compare Nobel Biocare*

[6] As such, Mr. Barko conceded he owed $362.41 in costs related to these tasks. Opening Br. 5 n.4. Based on the documentation provided by KBR and in the record, this is the total amount he could apportion to these tasks, as the only listing of specific amounts for the tasks were found in external vendor receipts for "convert to PDF" and "copy to USB Keys." A 80. While KBR claims some of its internal costs were for "converting documents into a production format" and "transferring the documents onto the production media," since KBR failed to specify the amount in costs associated with those tasks, Mr. Barko was unable to include them in his total. Appellee's Br. 26-27. KBR's brief erroneously states Mr. Barko "understates the e-discovery costs" he conceded. Appellee's Br. 32 n.9. However, Mr. Barko did take into consideration the external e-discovery costs for converting the documents into PDF format and those line item amounts added up to the conceded $362.41. Opening Br. 5 n.4

USA, LLC v. Technique D'usinage Sinlab, Inc., No. 1:12-cv-730, 2013 WL 819911, at *7 (E.D. Va. Mar. 4, 2013), *with Country Vintner*, 718 F.3d at 253, 261; Appellee's Br. 26. Regarding, shipping and delivery costs, KBR cites to only one unreported district court case. Appellee Br. 26. For the rest of the extraneous tasks, such as "organizing," "preparation," and "quality check," which were included in the costs taxed against Mr. Barko, KBR provides no support for their taxation other than its misguided reading of the statute, which was discussed fully above (*supra* pp. 6-10). Appellee's Br. 24-27.

In contrast, Mr. Barko has already presented the Court with numerous cases both from the circuit and district court levels, specifically rejecting costs for the extraneous tasks. Opening Br. 27-31. Specifically, three separate circuits have rejected taxing Bates-stamping costs, along with many district courts. *See Country Vintner*, 718 F.3d at 253, 261; *Race Tires*, 674 F.3d at 161, 170; *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 931-32 (9th Cir. 2015); *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, No. 4:14-CV-371, 2017 WL 4038886, at *3 (E.D. Tex. Sep. 13, 2017); *DSS Tech. Mgmt. v. Taiwan Semiconductor Mfg. Co.*, No. 2:14-CV-00199-RSP, 2016 WL 5942316, at *8 (E.D. Tex. Oct. 12, 2016); *Powell v. Home Depot, U.S.A., Inc.*, No. 07-80435-Civ, 2010 WL 4116488, at *16 (S.D. Fla. Sep. 14, 2010) (collecting cases); *D&B Countryside, L.L.C. v. Newell*, 217 B.R. 72,

80 (Bankr. E.D. Va. 1998); *Bond Safeguard Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. 6:13-cv-561-Orl-37DAB, 2015 WL 12835944, at *6 (M.D. Fla. Mar. 6, 2015).

As held in *CBT Flint*, "only the costs of creating the produced duplicates are" taxable, "not a number of **preparatory** or **ancillary** costs commonly incurred leading up to, in conjunction with, or after duplication." *CBT Flint*, 737 F.3d at 1328 (emphasis added). This holding conforms to the Supreme Court's directive to read 28 U.S.C. § 1920 narrowly and ensure it remains "modest in scope." *Taniguchi*, 566 U.S. at 573. As such, Mr. Barko urges the Court to likewise keep § 1920(4) modest in scope and reverse the district court's taxation of all costs related to extraneous tasks sought by KBR.

E. Costs for the Conversion of Documents into an E-Discovery Platform Format Are Not Taxable Under § 1920(4).

Finally, the Court should find that the $10,150 in costs taxed against Mr. Barko for an external vendor to convert all of KBR's original documents into a format compatible with its e-discovery platform are not taxable under 28 U.S.C. § 1920(4).[7] KBR points to nothing in the record, because it does not exist, showing that Mr. Barko requested metadata or load files. Appellee's Br. 4-5. Nor does KBR

[7] Again, the total here includes costs for converting all 2.4 million documents, which, if awarded at all, should be prorated down to the amount exclusively for the 171,000 produced documents. *CBT Flint*, 737 F.3d 1330.

point to any item in the record showing that Mr. Barko requested anything more than the simplest version of a document possible. *Id.* In fact, in the section describing Mr. Barko's discovery request, KBR does not cite to any items in the record to substantiate many of its claims. *Id.*

KBR's section arguing that the conversion into an e-discovery platform format is rife with misapplied and distinguishable case law in an attempt to analogize taxing costs for formatting original documents into e-production platform formatted copies. Appellee's Br. 27-32. First, KBR cites *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009), for taxing costs of "converting computer data into a readable format." However, KBR makes no argument that the original documents in this case were unreadable nor that the conversion to e-discovery platform format was necessary to make them readable, as in *Hecker*. Rather, KBR used the e-discovery platform formats simply to search, filter, and review the large set documents, most of which were never produced. Appellee's Br. 34.

Next, KBR cites *Colosi* as the Ninth Circuit allowed costs for imaging a hard drive in that case. *Colosi*, 781 F.3d at 297. KBR fails to explain the distinguishing facts in *Colosi,* however. In that case, the plaintiff refused to simply produce requested computer files. *Id.* at 298. Rather the plaintiff forced the defendant to hire a third-party vendor to image her personal computer's hard drive in the presence of

her attorney. *Id.* Therefore, imaging the hard drive was "the sole avenue permitting review of [plaintiff's] files" in that case. *Id.* As such, copying the hard drive was necessary to making copies. *Id.* (highlighting that "the vendor's invoice excluded costs of deduplication, indexing, and the other non-copying electronic discovery services"). That is not what occurred in this case.

Finally KBR cites *BDT Prods., Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005), for the simple proposition that scanning hard copy documents into electronic files may be taxable, a proposition Mr. Barko does not contest.[8] None of these cases involve converting original documents into an e-discovery platform format, nor do any relate to the types of costs taxed against Mr. Barko here.

Likewise, regarding the *CBT Flint* case, Mr. Barko again points to the differences in the facts of the cases. While the present case involves only requests for documents, *CBT Flint* was a patent infringement case that involved "highly technical" production of source code and meta-data that conformed to a rigid set of agreed-to production standards. *CBT Flint*, 737 F.3d at 1324. All the language

[8] KBR also cites to an unreported district court case, which has not been followed by any other court. *See AgJunction LLC v. Agrian Inc.*, No 14-cv-2069, 2016 WL 3031088, at *11 & n.2 (D. Kan. May 2, 2016); *see also Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, No 09-2518, 2017 WL 2734588, at *5 (D. Kan. June 26, 2017) (discussing *AgJunction* and stating the court there "refuse[d] to endorse an interpretation of the statute that all costs associated with the collection and production of ESI are recoverable."

relied upon by KBR from *CBT Flint* to justify its creation of an e-discovery platform format copy prior to its production copy, involved the court describing a process which explicitly dealt with situations where a party was "produc[ing] a single production copy of the document's visible content and of the metadata (where **both** are requested) . . . ." *Id.* at 1329 (emphasis added). In that case, when a party requests metadata and the producing party **must** make sure it is kept intact, it may be necessary to first "create an image of the original source first" in order to "apply special techniques to the extract documents while preserving all associated metadata." *Id.* Since it was necessary to meet the needs of producing the **requested** metadata, the court in *CBT Flint* found that costs of making the initial image were taxable. *Id.*

However, as made clear by the court, this first image (which KBR tries to equate to its e-discovery formatted documents) was only taxable because it was necessary to create a production of the requested metadata. *Id.* Here, the conversion of documents into an e-discovery platform format by KBR was not necessary to convert the eventual produced documents into PDF or TIFF. Rather, such conversion was only necessary in order to use KBR's e-discovery platform to sort, filter, and review its large set of documents and cull them down to the eventually produced subset. Appellee's Br. 34.

KBR does not, nor could it, argue that it was necessary to first convert the original documents into the e-discovery platform format in order to eventually copy them to the requested PDF and TIFF production formats. On the contrary, the initial image created in *CBT Flint* which KBR analogizes its e-discovery platform format copy to was necessary to eventually copy the requested metadata. *CBT Flint*, 737 F.3d at 1329-30. Therefore, all of KBR's arguments regarding *CBT Flint* and the steps it describes as "necessary" are irrelevant in this case.

In fact, to clarify this point, after describing the necessary steps to create the production with requested metadata intact, the *CBT Flint* court analogized that situation to allowing certain initial copying costs when metadata is not requested and a party must only produce PDFs or must start with hard copy originals. *Id.* Specifically, the *CBT Flint* court cited favorably to *Country Vintner* and *Race Tires* where the initial taxable steps were simply "converting electronic files to non-editable formats" or "scanning paper documents," both of which Mr. Barko has conceded are taxable. *Id.*

Following *CBT Flint* and all the remaining circuit court cases relied upon by Mr. Barko, the necessary steps involved in copying the original documents into a production format **do not** include copying into an e-discovery platform format as

argued by KBR, and therefore, such costs are not taxable.[9] *Id.*; *Race Tires*, 674 F.3d at 171; *Country Vintner*, 718 F.3d at 261; *In re Online DVD*, 779 F.3d at 931-32; *Colosi*, 781 F.3d at 297-98.

II. TRANSCRIPT COSTS

Nothing set forth by KBR in its brief addresses the fact that the affidavits found on the record do not justify taxing Mr. Barko costs for expedited fees, a video recording, and an ASCII disk for the depositions he contests in this appeal.[10] Opening Br. 31-36. KBR cannot argue around the deficient nature of the documentation it filed with the district court that now constitutes the record on appeal.

III. EXTERNAL COPYING COSTS

Regarding the challenged labor costs for external copying jobs, totaling $518.18, KBR restates its failed textual and legislative history argument regarding

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[9] KBR's argument regarding an abuse of discretion standard here is inapplicable. Appellee's Br. 30-31. Mr. Barko did not argue in the lower court, and does not argue here, that the copies at issue here were not "necessarily obtained for use in the case" as a matter of fact, but rather Mr. Barko argues that, as a matter of law, the requested costs are not covered by 28 U.S.C. § 1920(4). Appellee's Br. 30-32. Further, KBR's reference to the *Sedona Principles* revolve around the production of metadata even though the record contains no mention of metadata ever being requested. *Id.*

[10] Mr. Barko has conceded the taxation at the standard rate for all transcripts. Opening Br. 32 n.12.

the 2008 amendments to 28 U.S.C. § 1920(4). Appellee's Br. 45; *see* Opening Br. 37-38. As discussed above (*supra* pp. 6-10), these amendments made no sweeping changes but were intended for the limited purpose of allowing electronic copying costs to be taxed. As fully argued in Mr. Barko's opening brief, labor charges for copying, as a matter of law, should not fall under the authority to tax costs provided by 28 U.S.C. § 1920(4), as they are "overhead." Opening Br. 37-38 (citing *Icebreaker Ltd. v. Gilmar S.P.A.*, No. 3:11-cv-00309, 2013 WL 22713, at *8 (D. Or. Feb. 20, 2013). Just like with electronic discovery, only the actual costs of making copies can be taxed and not any "ancillary" costs such as labor that are associated. *CBT Flint*, 737 F.3d at 1328.

KBR relies on *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980), to support its claim for taxation of these labor costs.[11] Appellee's Br. 45. However, a close reading of *Penn Central* shows that the labor charges like those sought by KBR should not be taxed. *Penn Central* only taxed labor when "traditional means of printing" were employed to actually print versions of briefs and other documents. *Id.* As this case was decided in 1980, it is fair to assume the "traditional means" refers to hard copy printing using typeset and a printing press of some sort. *Id.*

[11] The remaining district court cases cited by KBR are unpersuasive as they provide no analysis, statutory or otherwise, or do not involve the same labor charges at issue here. Appellee's Br. 45-46.

However, if versions of documents were not being printed by "traditional means," but rather copies were made using "reproducing methods" like was done by the external vendors in this case, "labor is usually not taxable." *Id.*

Finally, the $4,637.03 in costs taxed against Mr. Barko for office supplies should likewise be found to fall outside of § 1920(4)'s narrow scope. Opening Br. 37-38. Costs for office supplies, such as binders and tabs, have been rejected multiple times by the district courts in this circuit. *Johnson v. Holway*, 522 F. Supp. 2d 12, 21 (D.D.C. 2007); *Osseiram v. Int'l Fin. Corp.*, 68 F. Supp. 3d 152, 160 (D.D.C. 2014). Other jurisdictions have held the same. *Crouch v. Teledyne Cont'l Motors, Inc.*, No. 10-00072-KD-N, 2013 WL 203408, at *25 (S.D. Ala. Jan. 17, 2013) ("Also, costs for binders and tabs are not taxed."); *Warner Chilcott Labs. Ir. Ltd. v. Impax Labs., Inc.*, No. 08-6304 (WJM), 2013 WL 1876441, at *12 (D.N.J. Apr. 18, 2013) ("Plaintiffs correctly observe that the outside vendors' invoices include fees for items such as slip sheets, tabs, binders, folders, redweld file pockets and labels. These charges constitute attorney's overhead and as such, are not taxable."); *Close-Up Int'l, Inc. v. Berov*, Civil Action No. 02-CV-2363 (DGT), 2007 WL 4053682, at *11 (E.D.N.Y. Nov. 13, 2007) ("Courts in this Circuit have found that binders are not properly reimbursable, because they are considered to be part of a law firm's overhead that is already paid for in the attorney's fees."); *Laura P. v.*

Haverford Sch. Dist., No. 07-5395, 2009 WL 1651286, at *9 (E.D. Pa. June 12, 2009) ("Costs for exhibit binders, parking, mileage, legal research, attorney travel expenses, court reporter expenses, and meals are not authorized by § 1920."); *Yong Fang Lin v. Tsuru of Bernards, LLC*, 2011 WL 2680577, at *4 (D.N.J. July 8, 2011) ("binders constitute general overhead costs.").

CONCLUSION

For the reasons set forth above and in the Opening Brief, Appellant Harry Barko respectfully requests that this Court find that $58,531.60 in contested in e-discovery costs do not fall under the scope of 28 U.S.C. § 1920(4) and therefore, reverse the district court's order taxing these costs against Mr. Barko.

Further, Mr. Barko asks that this Court reverse the district court's order taxing Mr. Barko $7,003.12 in costs for expedited transcripts, a video recording, and an ASCIII disk of depositions.

Finally, Mr. Barko respectfully requests that this Court find that $5,155.21 in external copying costs for labor and office supplies do not fall under the scope of 28 U.S.C. § 1920(4) and therefore, reverse the district court's order taxing these costs against Mr. Barko.

Respectfully Submitted,

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January 3, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,025 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

Dated: January 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on that on this 3rd day of January, 2020, I caused to be served by using the appellate CM/ECF system for the United States Court of Appeals for the District of Columbia Circuit a true copy of the Appellant's Reply Brief, and eight paper copies thereof to be filed by hand delivery. All participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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