IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v. Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, *et al.*,

Plaintiffs,

v. Case No. 12-CV-0185

THOMAS BARLAND, *et al.*,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO BILL OF COSTS

INTRODUCTION

Plaintiffs raise various objections to Defendants' bill of costs, but the objections are largely meritless. Defendants are undoubtedly prevailing parties in these cases. The Court should determine the amount of taxable costs and grant Defendants' bill of costs.

I. Defendants are prevailing parties; therefore, the bill of costs is not premature and should not be stayed or denied.

Defendants are prevailing parties in these cases. Fed. R. Civ. P. 54(d)(1). Defendants' bill of costs is not premature, and there is no reason to stay or deny it. Plaintiffs cannot portray themselves as the losing parties at one juncture, and then as potential winners when it is more convenient for their current purposes. Nothing they can argue changes the fact that Defendants are prevailing parties.

With regard to the *LULAC* plaintiffs, in particular, there is no basis for them to contend that Defendants are not *the only* prevailing parties. The *LULAC* plaintiffs obtained judgment on their sole claim—a Section 2 Voting Rights Act claim—and judgment was reversed by the Seventh Circuit. *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). The *LULAC* plaintiffs have raised no other claims in this Court on remand, nor could they. Their case is over. Defendants' bill of costs in *LULAC* is ripe for disposition, and there is no legitimate reason to stay the determination of the *amount* of taxable costs in *LULAC*. Determining the amount of taxable costs is different than ordering which Plaintiffs (between *Frank* and *LULAC*) will pay what portion of the costs, or when taxable costs must be paid. The Court can determine the amount of taxable costs now.

With regard to the *Frank* plaintiffs, they stated as follows to the Seventh Circuit: "Plaintiffs have not succeeded on the merits of this appeal." (Emergency Mot. to Extend the Stay of, or Recall and Stay, the Mandate Through the Conclusion of the April 7, 2015 Elections, 7th Cir. Dkt. 85:4, Case No. 14-2058.) Inconsistent with that statement to the Seventh Circuit, the *Frank* plaintiffs are now asserting that "Defendants are not yet prevailing parties in the *Frank* action." (*Frank* Dkt. 234:2.)

It is hard to imagine what Defendants would need to do to "prevail" in this case based upon the *Frank* plaintiffs' theory. Defendants successfully obtained a complete reversal of this Court's final judgment in the Seventh Circuit, which the U.S. Supreme Court then declined to review. The *Frank* plaintiffs conceded that they did not succeed on the merits in the Seventh Circuit, but now they are staking out an inconsistent position based upon the fact that "as-applied claims (Doc. #222) remain pending." (*Frank* Dkt. 234:2.) Even if the *Frank* plaintiffs were to prevail on as-applied claims, they have already conceded that Defendants prevailed in the Seventh Circuit "on the merits." (7th Cir. Dkt. 85:4, Case No. 14-2058.) Defendants cannot now "un-prevail"; Plaintiffs have exhausted all of their appellate options.

The *Frank* plaintiffs should be judicially estopped from taking such stances because (1) their litigation positions are inconsistent, (2) they

successfully persuaded the Seventh Circuit of their earlier position by obtaining a stay of the mandate, and (3) they are now attempting to derive an unfair advantage regarding the bill of costs. *See United States v. Thomas*, 763 F.3d 689, 695 (7th Cir. 2014).

Plaintiffs sensibly do not argue that Defendants are not prevailing parties for the claims upon which they obtained final judgment in the Seventh Circuit. Defendants' bill of costs reflects expenses reasonably incurred in defending those claims. Because the *Frank* plaintiffs are relying solely upon the trial record in support of their as-applied claims, Defendants' costs as to as-applied claims cannot be neatly separated from expenses already incurred defending against Plaintiffs' other claims. They are inextricably intertwined. Accordingly, this Court should proceed to determine the amount of taxable costs that Plaintiffs owe to Defendants based upon the fact that Defendants are prevailing parties under Rule 54(d)(1).

II. Defendants' bill of costs is reasonable and should be granted.

Defendants' bill of costs is reasonable and should be granted. Plaintiffs raise several objections to the amount and type of costs requested, but the objections are largely meritless.

First, Plaintiffs suggest that this Court should use its discretion to reduce the amount of costs that Defendants have requested because "most

Plaintiffs are persons of very limited incomes" and because there will be a potential deterrent effect upon future voting rights plaintiffs. (*Frank* Dkt. 234:3, 4.) While some of the individual *Frank* plaintiffs likely have limited incomes, staking out such a position here is inconsistent with the way Plaintiffs' counsel has handled this case.

Recall that for the approximately two-week trial in this case, Plaintiffs' counsel, perhaps excessive in number, flew to Milwaukee from such places as Los Angeles, New York City, Denver, and Washington D.C., and they required lodging in Milwaukee. Is Plaintiffs' counsel passing along the costs of all of those flights and downtown Milwaukee hotel rooms to the individual, supposedly indigent Plaintiffs? Likewise, is Plaintiffs' counsel passing along *any* of the extensive costs accrued in this case to their clients? Plaintiffs' filing here does not state that individual Plaintiffs—and not, instead, Plaintiffs' numerous legal counsel—will be paying the State for any recoverable costs that this Court would tax. There would be no impact on individual Plaintiffs, nor a deterrent effect on future litigation, if no individual Plaintiffs will be paying the costs that are taxed.

Second, Plaintiffs argue that Defendants' bill of costs was not itemized as to some charges. (*Frank* Dkt. 234:4.) Specifically, Plaintiffs argue that there are no page counts for transcripts of the Lorraine Minnite and Matthew Barreto depositions. (*See id.*) Because of the lack of page counts, Plaintiffs

argue that it is not possible to determine whether the costs incurred were reasonable. (*See id.*)

Defendants filed with the Court the invoices that the State paid for the Minnite and Barreto depositions. (*Frank* Dkt. 227-1:23, 34, and 37.) While the invoices do not include page counts, the page counts for these three depositions were known to Plaintiffs' counsel because they also received copies of the same transcripts from Veritext and Van Pelt Corbett Bellows, the court reporting services. It is disingenuous for Plaintiffs to challenge these costs as "unreasonable" due to insufficient itemization when Plaintiffs' counsel received copies of the same transcripts for use in the litigation.

If the Court nonetheless finds that it needs the page counts, Defendants have obtained them and are submitting the paid invoices again as Exhibit 1 to this brief. The Court will note that Veritext invoice number PA1887830 includes an expedited transcript fee of $467.20 for a deposition that occurred on November 1, 2013. This expedited deposition transcript was requested because Professor Minnite had served a supplemental expert report only weeks before the November 2013 trial. The transcript was needed to prepare for Professor Minnite's trial testimony.

Third, Plaintiffs assert that certain rough draft deposition transcripts were not reasonable. (*Frank* Dkt. 234:4.) Civil Local Rule 54(b)(2) does not limit the taxation of costs to only the original and a copy of the deposition

transcript. In other words, it does not prohibit recovering the costs for a draft or ascii transcript of a deposition. The only limitation is that "the taxing party's copy [is] taxable if the deposition was reasonably necessary for use in the case." Civil. L. R. 54(b)(2). Here, the two rough draft copies and one rough ascii copy that Plaintiffs take issue with were for depositions that were reasonably necessary for use in the case.

The expedited and rough draft transcript of Leland Beatty's deposition, which was taken on October 30, 2013, *see Frank* Dkt. 227-1:18, was necessary to the litigation. The *LULAC* plaintiffs intended to offer at trial the testimony of a late-disclosed witness, John Mas, upon whose testimony Mr. Beatty was going to rely to support of his expert opinion. (*See LULAC* Dkt. 95 (expedited motion to exclude John Mas's testimony).) In responding to Defendants' motion to exclude, the *LULAC* plaintiffs *themselves* filed excerpts with the Court from Mr. Beatty's expedited deposition transcript. (*LULAC* Dkt. 99-2 (Nathan D. Foster Decl., Ex. 2).) It was necessary to the litigation to obtain the deposition transcript in rough form very quickly to permit Defendants to prepare their October 31, 2013, expedited motion to exclude.

An ascii rough transcript of Professor Barry Burden's October 29, 2013, deposition was also reasonably necessary to the litigation. (*See Frank* Dkt. 227-1:20.) Professor Burden had served a supplemental expert report (dated October 23, 2013) only weeks before trial was to begin.

His supplemental deposition was taken to prepare for trial testimony. A rough draft of Professor Minnite's November 1, 2013, deposition was necessary for the same reason—trial was rapidly approaching, and Minnite had served a supplemental expert report on October 23, 2013. (*See Frank* Dkt. 227-1:23.)

Fourth, Plaintiffs challenge the expediting costs related to the Beatty and Hood depositions. (*Frank* Dkt. 234:5.) They argue that the costs are "excessive and not reasonable," and not consistent with "the normal fee schedule for transcripts set forth by the Judicial Conference of the United States." (*Id.*) In a footnote, Plaintiffs also take issue with an expedited transcript fee relating to a deposition of Professor Barreto that occurred 18 months before trial. (*Id.* at 6 n.2.)

The Eastern District's Civil Local Rules do not limit the rate for deposition costs to the per-page rates set forth by the Judicial Conference. Accordingly, Plaintiffs' citation to *Montanez v. Simon*, 755 F.3d 547, 558 (7th Cir. 2014), is misplaced. (*Frank* Dkt. 234:5.) The Judicial Conference fee schedule does not establish a ceiling for the per-page rate for deposition transcripts in this District. The only limitation regarding deposition costs that is imposed by the Eastern District's Civil Local Rules is that, "The court reporter's charge for the original of a deposition, if paid by the taxing party, and the taxing party's copy are taxable if the deposition was

reasonably necessary for use in the case, whether or not it was used at trial." Civil L. R. 54(b)(2). Here, Defendants' bill of costs meets this standard.

Plaintiffs are not arguing that the Beatty and Hood depositions taken close to the start date of trial were not "reasonably necessary." Both depositions were unquestionably reasonable and necessary. The costs associated with obtaining expedited transcripts for both depositions were necessary due to the schedule by which the parties exchanged supplemental expert reports in the weeks leading up to trial, and then conducted supplemental expert witness depositions. Were the shoe on the other foot, Plaintiffs would doubtless be seeking to have the Court tax costs for these expedited deposition transcripts, which were made necessary by the abbreviated schedule in place to finalize expert discovery before trial.

With regard to the expedited transcript of Professor Barreto's April 26, 2012, deposition, *see Frank* Dkt. 227-1:37, this transcript was reasonably expedited because of the *Frank* plaintiffs' April 23, 2012, motion for a preliminary injunction. (*See Frank* Dkt. 49 through Dkt. 62-40.) The preliminary injunction motion relied in substantial part upon the expert report prepared by Professor Barreto. (*Frank* Dkt. 62-10 (Barreto expert report); *Frank* Dkt. 50:7, 14, 17, 43, 44 n.23, 47 (preliminary injunction brief).) To prepare a substantive response to the *Frank* plaintiffs' injunction

motion, it was essential to depose Professor Barreto and to quickly obtain a transcript of his testimony.

Fifth, Plaintiffs take issue with taxing court reporter appearance costs, totaling $300. (*Frank* Dkt. 234:6.) Eastern District Civil Local Rule 54(b)(2) states that, "Reasonable expenses of the reporter . . . are taxable." That should be the end of the issue. It is reasonable for the court reporter in a deposition to charge a small fee for appearing at the deposition. Without paying such a fee, it would not likely be possible for the parties to contract with a court reporter to do the necessary work of transcribing the deposition testimony for use in the case.

Sixth, Plaintiffs challenge various shipping costs. (*Frank* Dkt. 234:6-7.) While the Eastern District's Civil Local Rules do not specifically endorse the payment of shipping costs for deposition transcripts, they also do not forbid the taxation of such costs. *See* Civil L. R. 54, Committee Comment ("The rules governing bills of costs are liberally construed to allow permitted costs. Civil L. R. 54 does not list every allowable cost and should be interpreted to accommodate ever-changing technology."). Plaintiffs' construction of Eastern District Civil Local Rule 54 would disallow all costs "not specifically authorized." (*Frank* Dkt. 234:6.) This is not how the rule works.

It was reasonable for Defendants to have court reporting services ship to defense counsel transcripts, exhibits, and related materials. Having these materials shipped assisted defense counsel in preparing their case.

Finally, Plaintiffs challenge what they call "miscellaneous costs items." (*Frank* Dkt. 234:7.) With regard to sales tax, *see id.*, the $2.53 cost is not taxable and should be removed. The remaining miscellaneous costs that Plaintiffs challenge are not prohibited by the Eastern District Civil Local Rules and constitute reasonable litigation expenses incurred by the State in defending this action. They should be taxed accordingly.

CONCLUSION

The Court should determine the amount of taxable costs and grant Defendants' bill of costs.

Dated this 19th day of May, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

/s/ Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General
State Bar # 1066228

MARIA S. LAZAR
Assistant Attorney General
State Bar # 1017150

BRIAN P. KEENAN
Assistant Attorney General
State Bar # 1056525

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7477 (Kawski)
(608) 267-3519 (Lazar)
(608) 266-0020 (Keenan)
(608) 267-2223 (fax)
kawskicp@doj.state.wi.us
lazarms@doj.state.wi.us
keenanbp@doj.state.wi.us

Exhibit 1

Frank v. Walker / LULAC v. Barland

Defendants' Brief in Opposition to Plaintiffs' Objections to Bill of Costs

Veritext Mid-Atlantic

1801 Market St., Suite 1800
Philadelphia PA 19103
Tel. 888-777-6690 Fax. 215-241-1539
Fed. Tax ID: 20-3132569

VERITEXT LEGAL SOLUTIONS

Bill To: Clayton Kawski, Esq
Wisconsin Department of Justice
17 W Main St.

Madison, WI, 53703-3960

Invoice #:	PA1887830
Invoice Date:	11/5/2013
Balance Due:	$0.00

Case: Lulac v. Deininger, Et Al
Job #: 1753719 | Job Date: 11/1/2013 | Delivery: Expedited
Billing Atty: Clayton Kawski, Esq
Location: Dechert LLP
Cira Centre | 2929 Arch Street | Philadelphia, PA 19104
Sched Atty: Clayton Kawski, Esq | Wisconsin Department of Justice

Witness	Description	Units	Quantity	Price	Amount
Lorraine Minnite	Original with 1 Certified Transcript	Page	128.00	$3.65	$467.20
	Transcript - Expedited Fee	Page	128.00	$3.65	$467.20
	Attendance Fee	1	1.00	$95.00	$95.00
	Exhibits	Per Page	52.00	$0.65	$33.80
	Exhibits - Color	Per Page	2.00	$1.75	$3.50
	Rough Draft	Page	128.00	$2.25	$288.00
	CD Depo Litigation Package	Per CD	1.00	$45.00	$45.00
	Shipping & Handling	Package	1.00	$18.00	$18.00

Notes:

Invoice Total:	$1,417.70
Payment:	($1,417.70)
Credit:	$0.00
Interest:	$0.00
Balance Due:	$0.00

TERMS: Payable upon receipt. Accounts 30 days past due will bear a finance charge of 1.5% per month. Accounts unpaid after 90 days agree to pay all collection costs, including reasonable attorney's fees. Contact us to correct payment errors. No adjustments will be made after 90 days. For more information on charges related to our services please consult http://www.veritext.com/services/all-services/service-information

To pay online, go to www.Veritext.com

Veritext accepts all major credit cards
(American Express, Mastercard, Visa, Discover)

Please remit payment to:
Veritext
P.O. Box 71303
Chicago IL 60694-1303

Invoice #:	**PA1887830**
Job #:	**1753719**
Invoice Date:	**11/5/2013**
Balance:	**$0.00**

Veritext Mid-Atlantic

1801 Market St., Suite 1800
Philadelphia PA 19103
Tel. 888-777-6690 Fax. 215-241-1539
Fed. Tax ID: 20-3132569

Bill To: Clayton Kawski, Esq
Wisconsin Department of Justice
17 W Main St.

Madison, WI, 53703-3960

Invoice #:	PA1504486
Invoice Date:	6/4/2012
Balance Due:	$0.00

Case: Jones v. Deininger
Job #: 1500928 | Job Date: 5/16/2012 | Delivery: Normal
Billing Atty: Clayton Kawski, Esq
Location: Dechert LLP
Cira Centre | 2929 Arch Street | Philadelphia, PA
Sched Atty: Clayton Kawski, Esq | Wisconsin Department of Justice

Witness	Description	Units	Quantity	Price	Amount
Lorraine Minnite	Original with 1 Certified Transcript	Page	130.00	$3.65	$474.50
	Exhibits	Per Page	123.00	$0.65	$79.95
	Surcharge - Video Deposition	Page	130.00	$0.50	$65.00
	CD Depo Litigation Package	Per CD	1.00	$45.00	$45.00
	Shipping & Handling	Package	1.00	$18.00	$18.00

Notes:

Invoice Total:	$682.45
Payment:	($682.45)
Credit:	$0.00
Interest:	$0.00
Balance Due:	$0.00

TERMS: Payable upon receipt. Accounts 30 days past due will bear a finance charge of 1.5% per month. Accounts unpaid after 90 days agree to pay all collection costs, including reasonable attorney's fees. Contact us to correct payment errors. No adjustments will be made after 90 days. For more information on charges related to our services please consult http://www.veritext.com/services/all-services/service-information

To pay online, go to www.Veritext.com

Veritext accepts all major credit cards
(American Express, Mastercard, Visa, Discover)

Please remit payment to:
Veritext
P.O. Box 71303
Chicago IL 60694-1303

Invoice #:	**PA1504486**
Job #:	**1500928**
Invoice Date:	**6/4/2012**
Balance:	**$0.00**

Van Pelt Corbett Bellows

Accounting Department
20328 - 30th Ave NE
Lake Forest Park, WA 98155

Invoice

View your invoice online at www.vanpeltdep.com

Terms: Net 30

12% per annum Finance Charges will be assessed after 30 days

Clayton P. Kawski
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, WI 53707-7857

Invoice Date	Invoice #
5/4/2012	4116DE

Date: 4/26/2012 9:00:00 AM
Case: Frank, et al., v. Governor Scott Walker, et a
Witness: Matt Barreto
Case #: 11-CV-1128
Reporter: Jacqueline Bellows, Michele Mason

Description	Each	Quan	Total
Appearance	$75.00	3.25	$243.75
Transcript (O+1)	$4.25	108	$459.00
Black & White Exhibits	$0.35	161	$56.35
Documents printed	$0.15	323	$48.45
Delivery and Handling	$30.00	1	$30.00
		Sub Total	**$837.55**
		Payments	**$837.55**
		Balance Due	**$0.00**

Taxpayer Identification 75-3053993

THANK YOU

206-682-9339 • Fax 206-682-9978 • www.vanpeltdep.com • reporters@vanpeltdep.com