

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

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RUTHELLE FRANK, et al., on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as  
Governor of the State of Wisconsin, et al.,

Defendants.

Civil Action No. 2:11-cv-1128 (LA)

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

Plaintiffs,

v.

THOMAS BARLAND, et al.,

Defendants.

Civil Action No. 2:12-cv-185 (LA)

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**PLAINTIFFS' OBJECTIONS TO DEFENDANTS' BILL OF COSTS**

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Plaintiffs request that this Court deny or stay action on Defendants' bill of costs pending the outcome of the ongoing *Frank* litigation. Alternatively, Plaintiffs request that Defendants' costs be reduced by removing items that are improper or reasonable.

## ARGUMENT

### I. The Bill of Costs is Premature and Therefore Should Be Denied or Stayed

Under Federal Rule of Civil Procedure 54(d)(1), costs are awarded to a “prevailing party.” Proceedings in this Court on the *Frank* Plaintiffs’ motion for class certification and relief on their remaining as-applied claims (Doc. #222) remain pending, and under Rule 54(b), “any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Therefore, Defendants are not yet prevailing parties in the *Frank* action, and their effort to recover costs is premature. And because the *Frank* and *LULAC* Plaintiffs will share the responsibility for paying any costs that may be awarded to Defendants for the previous proceedings, the Court should hold the cost issues in abeyance in both cases. *See Massey, Inc. v. Moe’s Sw. Grill, LLC*, No. 1:07-CV-741-RWS, 2013 WL 6190482, at \*5 (N.D. Ga. Nov. 26, 2013) (“Defendants are only entitled to compensation for the costs associated with claims for which they were the prevailing party. Several parties and claims remain pending in this action and Defendants have not demonstrated that these costs were unique or specific to the dismissed Plaintiffs. In the absence of such a representation, the Court finds this bill of costs premature.”); *In re Derailment Cases*, 417 F.3d 840, 845 (8th Cir. 2005) (directing district court “to hold in abeyance the order awarding costs to BNSF until the Stachon plaintiffs’ remaining claims have been resolved,” where Stachon plaintiffs had remaining unresolved claims against BNSF who had prevailed on other claims and against other plaintiffs).

Plaintiffs therefore request that Defendants’ claim for costs be denied, or in the alternative stayed pending the outcome of the ongoing *Frank* litigation.

## II. Certain Items in the Bill of Costs are Improper or Unreasonable

Should this Court nevertheless determine that it is appropriate to determine costs at this time, Plaintiffs submit the following objections to Defendants' bill of costs. Some of the costs sought by Defendants should be denied because they are not authorized, or are excessive and not justified.

Federal Rule of Civil Procedure 54(d)(1) gives courts "discretionary authority" to tax costs and thus "grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987). Further, a court must give "careful scrutiny" to all items proposed as costs. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964); *accord Koppinger v. Cullen-Schiltz & Assocs.*, 513 F.2d 901, 911 (8th Cir. 1975) ("The bill of costs proposed by a winning party should always be given careful scrutiny."). In evaluating whether to tax costs at all, and the reasonableness of those costs, this Court should also consider that most Plaintiffs are persons of very limited incomes. *See* Tr. 51:2-5, 207:2-9 (Holloway and Brown on disability); Frank Ex. 607 at 7:14-16 (Wilde received a limited retirement income); Tr. 563:4-8 (Ellis was homeless); Tr. 854:23-855:6 (Smith was unemployed); *see also, e.g., Badillo v. Cent. Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983) ("[I]t is within the discretion of the district court to consider a plaintiff's indigency in deny costs under Rule 54(d)."); *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994) (affirming denial of costs where plaintiffs were persons "of modest means"). That taxing costs to Plaintiffs may have a chilling effect on future plaintiffs seeking to vindicate their right to vote is another consideration this Court should take into account in assessing the appropriateness of Defendants' bill of costs. *See Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999) (courts should consider "chilling effect of imposing . . . high costs on future civil rights

litigation”); *Hiegel v. Hill*, 771 F.2d 358, 361 (8th Cir. 1985) (Sachs, J., concurring) (recognizing that while “even-handedness has much intrinsic appeal and simplifies the exercise of discretion,” this chilling effect should be considered in resolving costs).

**A. *Inadequately itemized costs***

Plaintiffs object to \$1074.40 and \$584.50 in costs sought by the Defendants for the Minnite depositions because Defendants do not provide any evidence to establish the number of pages of the transcript and thus whether that cost is reasonable, a significant concern in light of the unreasonable and excessive charges Defendants are seeking for the Beatty deposition. Doc. #227-1 at 23, 34; *infra* Sec. II.C. Plaintiffs also object to \$837.55 in costs sought by Defendants for the Barreto deposition, Doc. #227-1 at 37, because the document submitted by Defendants does not show the itemization of those costs and, again, it is not possible to ascertain the reasonableness of those costs. Given the excessive transcript and expedited costs discussed below, Plaintiffs assert that it is likely that these transcript costs are also unreasonable.

**B. *Unreasonable draft transcript costs***

While Local Rule 54(b) allows for payment of deposition transcripts “reasonably necessary” for use in the case, Defendants are improperly seeking payment for draft or ascii transcripts as well as the actual deposition transcripts *and*, in two of these cases, expedited fees. *See* Doc. #227-1 at 18 (\$160.06 for rough draft); at 20 (\$57 for rough ascii); at 23 (\$288 for rough draft). These costs totaling \$505.06 are not reasonable or necessary and should be disallowed. *See Montanez v. Simon*, 755 F.3d 547, 558 (7th Cir. 2014) (copies made for convenience of attorneys are not necessary and were disallowed).

**C. Unreasonable expedited costs**

Plaintiffs object to additional costs for expedited depositions. These costs—which far exceed the normal fee schedule for transcripts set forth by the Judicial Conference of the United States—are excessive and not reasonable.

First, the Court should disallow \$450.18 for the two-day expedite in the Beatty deposition. Doc. #227-1 at 18. Should the Court decline to do so, it should substantially reduce the cost, as the unreasonableness of these costs is highlighted by the fact that they vastly exceed the rates the Judicial Conference establishes for original expedited transcripts. *See* Doc. #227-1 at 18 (\$450.18 for two-day expedite plus \$528.90 transcript cost for 123 pages totals \$979.08, or \$7.96 per page; at \$4.85 per page for original plus \$.90 per-page copy,<sup>1</sup> total cost would be \$707.25, a reduction of \$271.83); *cf. Montanez*, 755 F.3d at 558 (denying portion of deposition transcript costs where local rule required use of Judicial Conference rates, and those costs exceeded transcript rates set by Judicial Conference); *Collins v. Gorman*, 96 F.3d 1057, 1060 (7th Cir. 1996) (limiting costs of service to what Marshal Service would have charged).

Second, the Court should either disallow \$607.50 for expedited costs for the Hood deposition or limit Defendants' recovery of costs for that deposition to the standard per-page deposition copy rates. The costs Defendants seek are entirely unreasonable: combined with transcript costs of \$1039.50, they total \$1647, or \$6.10 per page. *See* Doc. #227-1 at 21. Yet Defendants were defending, not taking, that deposition and thus only required a *copy*—which, on the Judicial Conference fee schedule, has the same \$.90 per page rate as any other transcript copy. Had that rate been used, the total cost would have been \$243—or \$1404 less than what is

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<sup>1</sup> Judicial Conference transcript rates are available on the United States District Court for the Eastern District of Wisconsin website under “Transcript Rates” at [http://www.wied.uscourts.gov/index.php?option=com\\_content&task=view&id=62&Itemid=110](http://www.wied.uscourts.gov/index.php?option=com_content&task=view&id=62&Itemid=110).

being assessed. Therefore, this Court should reduce the Hood deposition cost by at least \$607.50, if not by \$1404.<sup>2</sup>

***D. Appearance costs***

Allowing recovery of court reporter attendance costs is discretionary, not mandatory. *Held v. Held*, 137 F.3d 998, 1002 (7th Cir. 1998); *see also Harney v. City of Chicago*, 702 F.3d 916, 928 (7th Cir. 2012) (noting but not resolving disagreement among district courts as to whether imposing attendance costs in addition to transcript costs was permissible, where attendance costs caused transcript costs to exceed per-page rates). Plaintiffs here request that this Court exercise its discretion and disallow those costs. Charging for attendance fees is particularly unreasonable in light of the fact that the costs for transcript copies are already very high,<sup>3</sup> and in light of the indigency of most Plaintiffs. Those appearance costs total \$300, which include one \$100 appearance charge, Doc. #227-1 at 4, and four \$50 appearance charges, *id.* at 19, 20, 33, and 35.

***E. Shipping costs***

Local Rule 54(b)(2) specifically states that “postage costs for sending the original deposition to the Clerk of Court for filing are taxable.” Here, however, Defendants are seeking postage and handling costs totaling \$258.91 for costs related to shipping to themselves, costs not specifically authorized and which therefore should be disallowed. *See* Doc. #227-1 at 4 (\$22 for

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<sup>2</sup> To the extent that the Barreto deposition, Doc. #227-1 at 37 (where itemization was not provided at all), is not disallowed in its entirety, this Court should also preclude recovery of any expedited costs, as that deposition was taken 18 months before trial.

<sup>3</sup> The costs for deposition transcript copies substantially exceed the \$.90 per page costs set by the Judicial Conference for copies of transcripts and therefore should be presumed unreasonable, and the excess costs should be disallowed. This includes a total of \$10,696 for 4468 pages (excluding depositions taken by Defendants), or an average of \$2.39 per page—more than two and one-half times the Judicial Conference rate.

priority mail, handling and archiving—more than a year before trial); at 10 (\$11 video shipping and handling); at 18 (\$25 shipping); at 19 (\$22.78 FedEx); at 20 (\$14.63 FedEx); at 21 (\$39.50 shipping and handling); at 23 (\$18 shipping and handling); at 25 (\$15 priority mail and handling); at 33 (\$21 priority mail, handling and archiving); at 34 (\$18 shipping and handling); at 35 (\$22 priority mail, handling and archiving); and at 37 (\$30 delivery and handling).

***F. Miscellaneous costs***

Plaintiffs also request that this Court disallow \$63.57 in miscellaneous costs items. These include sales tax of \$2.53, Doc. #227-1 at 10, to which Defendants were not legally subject, Wis. Adm. Code Tax § 11.05(4)(a), and which therefore should not be paid, and a “CD Depo Litigation Package” with scanned-searchable exhibits (Doc. #227-1 at 21, \$39 plus \$22.04), for which Defendants are seeking costs in addition to the deposition transcript.

**CONCLUSION**

For the reasons set forth herein, Plaintiffs request that this Court deny or stay action on Defendants’ bill of costs pending the outcome of the ongoing *Frank* litigation. Alternatively, Plaintiffs request that those costs be at a minimum reduced by \$2496.45 for inadequately documented costs, *supra* Sec. II.A., by \$505.06 for draft transcripts, *supra* Sec. II.B., by \$450.18, or at least \$271.83, for unreasonable expedited and transcript costs in the Beatty deposition, *supra* Sec. II.C., and by \$1404, or at least \$607.50, for unreasonable expedited and transcript costs in the Hood deposition, *supra* Sec. II.C., by \$300 for appearance costs, *supra* Sec. II.D., by \$258.91 for costs related to the shipping of documents to Defendants rather than to the Court, *supra* Sec. II.E., and by \$63.57 for unreasonable and unnecessary miscellaneous costs, *supra* Sec. II.F.

Dated this 12th day of May, 2015. Respectfully submitted,

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