UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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-01128 (LA)
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)

PLAINTIFFS' REPLY IN SUPPORT OF OBJECTIONS TO DEFENDANTS' BILL OF COSTS

Plaintiffs file this reply brief in support of their objections to Defendants' bill of costs. As explained below, Defendants' opposition brief is filled with rhetoric and short on case law. Their claim for costs should be held in abeyance, if not outright denied.

Defendants first insist, repeatedly, that they are prevailing parties. (Defs.' Br. at 2-4.) Yet they do not deny that several claims remain outstanding, and they cite no rule or caselaw disputing the elementary principle that a case is not over when claims remain outstanding. *See* Fed. R. Civ. P. 54(b). They attempt to isolate *LULAC* by asserting that "Defendants' bill of costs in *LULAC* is ripe for disposition" (Defs. Br. at 2), yet they fail to identify what costs are supposedly specific to *LULAC*. *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 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."). They argue that judicial estoppel should apply because Plaintiffs previously stated that "Plaintiffs have not succeeded on the merits of this appeal" when asking the Seventh Circuit for a stay of the mandate, but "this appeal" only concerned some, but not all of Plaintiffs' claims. Lastly, Defendants concede that "Defendants' costs as to as-applied claims cannot be neatly separated from expenses already incurred defending against Plaintiffs' other claims. They are inextricably intertwined." (Defs.' Br. at 4.) That is all the more reason to hold Defendants' claim in abeyance, since Plaintiffs may succeed on their as-applied claims.

Defendants – who do not dispute Plaintiffs' indigence – also argue that costs should be assessed against the indigent Plaintiffs because Plaintiffs' *counsel* will pay the costs. But counsel are not parties to this litigation, and Defendants cite no legal authority to support their position. To the contrary, it is clear that costs may not be taxed against a non-party. *See In re Cardizem CD Antitrust Litigation,* 481 F.3d 355, 361 (6th Cir. 2007) ("[T]he purpose of Rule 54(d) and [28 U.S.C.] § 1920 is to define what costs may be imposed, when and how—not to offer those explications, then leave it to judicial discretion to shift costs in an entirely different

way under their historic equitable powers. . . . [T]he discretion permitted under the rule and the statute concerns whether to award costs, not whether to tax them against a non-party," such as counsel); *Wilder v. GL Bus Lines*, 258 F.3d 126, 129 (2d Cir.2001) (per curiam) ("Rule 54(d)(1) is phrased permissively not because it permits a court to impose costs on counsel instead of the losing party, but rather because it permits a court to refuse to impose costs on the losing party at all."); *cf, Leimkuehler v. American United Life Ins. Co*., 713 F.3d 905, 915 (7th Cir. 2013) (citing *Cardizem* in holding that "district court had no authority to order an award of costs against a non-party.") Faced with the same argument, the court in *Levy v. Lexington County, S.C.*, 2012 WL 6675051, *3 (D.S.C. Dec. 20, 2012), "decline[d] to take into account the ACLU's advancing costs and expenses during the course of litigation. Taken to a logical conclusion, Defendants' argument could apply any time an attorney accepted a case on a contingency basis and agreed to advance costs and fees. The court finds no support in the law for such an expansive reading of Rule 54(d)."

Defendants' remaining arguments confirm that several items in their bill of costs are improper or unreasonable. This Court may disallow the $2496.45 in inadequately documented costs for the Minnite and Barreto depositions. (Dkt. #234 at 4.) Defendants now belatedly respond by submitting itemized invoices for those depositions, but this Court need not allow them a second bite of the apple. Should this Court be inclined to allow such costs, however, it should disallow total costs in the amount of $758.15, as follows. For Minnite (Dkt. #236-1 at 2-3), this Court should disallow: $288 for the unnecessary rough draft transcript of Minnite's 2013 deposition; the $65 surcharge for the unnecessary videotaping of her 2012 deposition – a videotape never used at trial; a reduction of $198.40 for the 2013 deposition for exceeding the

Judicial Conference rate;[1] $95 for the unnecessary attendance fee in the 2013 deposition; $36 ($18 for the 2013 deposition and $18 for the 2012 deposition) in shipping costs to Defendants; and $90 ($45 for the 2013 deposition and $45 for the 2012 deposition) for unnecessary "CD Depo Litigation Packages." For Barreto (Dkt. #236-1 at 4), this Court should disallow the $243.75 in unnecessary attendance fees and the $30 in shipping costs to Defendants.

Defendants have also failed to justify the remaining costs which Plaintiffs have argued should be disallowed. They attempt to justify all of their rough draft costs by asserting the need for expedited delivery, but this conflates the two costs. They ignore the fact that they are also seeking *separate expedited fees* in two instances where rough draft costs were incurred (Dkt. #227-1 at 18 (Beatty), 236-1 at 2 (Minnite 2013 deposition)), and the Judicial Conference rate for expedited fees already include fees for an extra copy.[2] They do not explain how a second extra copy, in rough draft form and made solely for the attorneys' convenience, is acceptable. *See Montanez v. Simon*, 755 F.3d 547, 558 (7th Cir. 2014) (disallowing costs for copies made just for attorneys' convenience). Nor do they cite any cases to suggest otherwise.

As for the expedited fees themselves, Defendants cling to the fact that the Eastern District's Civil Local Rules do not explicitly limit the rate for deposition costs to the per-page rates set forth by the Judicial Conference. (Defs.' Br. at 8-9.) However, local rules still limit taxable costs to "*[r]easonable* expenses of the reporter," Civil L. R. 54(b)(2) (emphasis added), and Plaintiffs respectfully submit that the reporters' expedited fees are excessive in light of the

[1] $467.20 was charged for the expedited fee, plus $467.20 for the 128-page transcript cost, totaling $934.40, or $7.30 per page. At the Judicial Conference rate of $4.85 per page for original plus $.90 per-page copy, the total cost would be ($4.85 x 128) + ($.90 x 128) = $736, a reduction of $198.40.

[2] For the Court's convenience, Plaintiffs provide the following shortened weblink: http://tinyurl.com/lotpng4, which contains the link to the Eastern District of Wisconsin's website with the transcript rate schedule.

Judicial Conference rates, which are the same rates charged by the court reporters of the Eastern District of Wisconsin.

Defendants insist on taxing court reporter appearance costs because "[w]ithout 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 . . . deposition testimony." (Defs.' Br. at 10.) But Plaintiffs do not ask this Court to prevent court reporters from being paid. Plaintiffs ask this Court to exercise its discretion in not ordering indigent Plaintiffs to pay the State of Wisconsin. As for shipping costs, Defendants note that Civil L. R. 54 "should be interpreted to accommodate ever-changing technology." It is difficult to imagine how, in a world of "ever-changing technology" where electronic transcripts are instantly e-mailed to counsel and can be easily printed from counsel's own computers, expedited shipping and handling of hard-copy transcripts can be deemed "reasonably necessary" and taxable as costs. Indeed, almost *all* of the invoices indicate that electronic versions of transcripts were *in fact e-mailed* to Defendants' counsel. (Dkt. #227-1 at 3-9, 11-20, 24-33, 35-36 ("TEXT and PDF files e-mailed on [date]", or similar language).) Moreover, 28 U.S.C.A. § 1920 does not permit taxation of costs not specifically listed in the statute, *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441-2 (1987), and shipping costs are not among the items listed.

Lastly, Defendants concede that sales taxes should be disallowed, but they conclusorily state that the remaining miscellaneous costs are "reasonable" without any explanation. (Defs. Br. at 11.) They do not even attempt to justify the costs for the "CD Depo Litigation Package," or even explain what it is. Those costs should thus be disallowed.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny or stay action on Defendants' bill of costs pending the outcome of the ongoing *Frank* litigation. Alternatively, Plaintiffs reiterate their request to disallow costs in the amount set forth in prior briefing. (*See* Dkt. #234 at 7.) Should the Court be disinclined to disallow $2496.45 for Minnite and Barreto for inadequate documentation, Plaintiffs respectfully request that such costs by reduced by $758.15, as set forth above.

Dated this 26th day of May, 2015.

Respectfully submitted,

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General Information

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