

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 James McCalmont, *et al.*,

10 Plaintiffs,

11 v.

12 Federal National Mortgage Association, *et*
13 *al.*,

14 Defendants.

No. CV-13-02107-PHX-JJT

ORDER

15 At issue is Plaintiffs' Motion to Vacate Costs Taxed (Doc. 168, Mot.), to which
16 Defendant filed a Response (Doc. 170, Resp.) and Plaintiff filed a Reply (Doc. 171, Reply).

17 **I. BACKGROUND**

18 Plaintiffs filed a Complaint (Doc. 1) in October 2013 alleging that a prior short sale
19 of their home was later reported as a foreclosure in Defendant's automated Desktop
20 Underwriter system ("DU"), resulting in the denial of Plaintiffs' later applications for home
21 mortgage loans. After years of litigation in this and related matters, the Ninth Circuit held
22 in a separate case that Defendant is not a Consumer Reporting Agency ("CRA") and thus
23 is not subject to the relevant provision of the Fair Credit Reporting Act ("FCRA"). *See*
24 *Zabriskie v. Fed. Nat'l Mortgage Ass'n*, 912 F.3d 1192 (9th Cir. 2019). Based on the Ninth
25 Circuit's ruling in *Zabriskie*, the Court granted Defendant's Motion for Summary
26 Judgment in this case. (Doc. 153.)

27 On March 15, 2019, after considering Plaintiffs' objections, the Clerk entered
28 judgment on taxable costs against Plaintiffs in the amount of \$4,898.90—about \$2,000 less

1 than Defendant originally requested. (Doc. 166). Plaintiffs now move to vacate the taxable
2 costs in their entirety.

3 **II. LEGAL STANDARD**

4 Federal Rule of Civil Procedure 54(d)(1) provides that “[u]nless a federal statute,
5 these rules, or a court order provides otherwise, costs—other than attorney’s fees—should
6 be allowed to the prevailing party.” The Rule “creates a presumption in favor of awarding
7 costs to a prevailing party, but vests in the district court discretion to refuse to award costs.”
8 *Ass’n of Mexican-American Educ. v. California*, 231 F.3d 572, 591 (9th Cir. 2000). The
9 Court’s discretion “is not without limits.” *Id.* Rather, the Court “must specify reasons for
10 its refusal to award costs.” *Id.* (internal citation omitted).

11 Appropriate reasons for the Court to deny costs include: “(1) the substantial public
12 importance of the case, (2) the closeness and difficulty of the issues in the case, (3) the
13 chilling effect on future similar actions, (4) the plaintiff’s limited financial resources, and
14 (5) the economic disparity between the parties.” *Escriba v. Foster Poultry Farms, Inc.*, 743
15 F.3d 1236, 1247–48 (9th Cir. 2014). These five indicators are not “‘an exhaustive list of
16 good reasons for declining to award costs,’ but rather a starting point for analysis.” *Id.*
17 (quoting *Ass’n of Mexican-American Educ.*, 231 F.3d at 591).

18 **III. ANALYSIS**

19 While the Court’s review is not necessarily limited to the five considerations in
20 *Escriba*, both parties seem to agree that those are dispositive in this matter, and indeed the
21 Court reaches its conclusion based on those indicators alone.

22 **1. Substantial Public Importance**

23 The Court finds that the first factor—the public importance of the case—weighs in
24 Plaintiffs’ favor. While Defendant argues that the case does not reflect an issue of public
25 importance, in part because “Plaintiffs’ constitutional or civil rights were [not] at issue,”
26 that is not a requirement for substantial public importance. (Resp. at 2.) Cases do not have
27 to pertain to constitutional or civil rights in order to be a matter of public importance. *See*
28

1 *Ass'n of Mexican-American Educ.*, 231 F.3d at 593 (“Nor are we attempting to create an
2 exhaustive list of ‘good reasons’ for declining to award costs.”).

3 Defendant also argues that the issue is not of public importance because “DU was
4 adjusted in 2013 (before Plaintiffs’ lawsuit was filed) to enable lenders to instruct DU to
5 disregard foreclosure information after validating the applicant had only a short sale.”
6 (Resp. at 3.) But while Defendant’s decision to change its DU policy is important in
7 evaluating the third indicator—the potential chilling effect on future actions—it is not
8 relevant to the Court’s analysis of what constitutes an issue of substantial public
9 importance. Plaintiffs should not be prejudiced because a policy that allegedly caused them
10 harm has since been remedied, at least in part. At the time of his suit, the DU policy had
11 been a matter of public importance because it affected other people seeking home financing
12 in the same way it affected Plaintiffs. While the Court is not persuaded by Plaintiffs’
13 argument that the sheer volume of amicus briefs in the pending Ninth Circuit *en banc*
14 review renders this matter important, it is persuaded by the fact that this issue affected
15 many consumers and, by implication, the nationwide housing market. Thus, the first
16 indicator weighs in Plaintiffs’ favor.

17 **2. Closeness and Difficulty of the Issues**

18 The second indicator also weighs in Plaintiffs’ favor. As Plaintiffs point out, the
19 question in *Zabriskie*, which is largely identical to the question here, was difficult enough
20 to merit Ninth Circuit *en banc* review. Further, in the Court’s own experience, the issues
21 in this case were close and difficult to decide.

22 Defendant urges that the difficulty of the issues cannot weigh in any party’s favor
23 because “[w]hether [Defendant] was a [CRA] was not the only issue to be decided before
24 Plaintiff[s] could prevail,” and “a jury would still have needed to find that the foreclosure
25 notation in the DU findings was inaccurate and this inaccuracy caused the lenders to deny
26 Plaintiffs’ financing.” (Resp. at 3.) While this is a correct assessment of the case’s posture,
27 it does not render this case any less difficult to resolve. In fact, the baseline question of
28 Defendant’s status as a CRA was difficult to resolve. Further, Defendant cannot show that,

1 had the Court declared Defendant a CRA, the subsequent questions would have been any
2 easier to resolve. In fact, the Court is sure that those questions would have proven equally
3 difficult.

4 **3. Chilling Effect on Future Similar Actions**

5 Neither party presents the Court with sufficient argument on the question of whether
6 awarding Defendant costs in this case would chill future similar actions. Plaintiffs generally
7 declare that any award of costs would “have a chilling effect on consumers who would dare
8 to ever seek to clear their name in the future when [Defendant] falsely informs any potential
9 mortgage lenders about the contents of a consumer’s credit history.” (Mot. at 10.)

10 Defendant, on the other hand, argues that “with the law settled that [Defendant] is
11 not a [CRA], and the adjustments made to DU in 2013 . . . along with further revisions to
12 the software since that time, future lawsuits about the issues raised by Plaintiffs in this case
13 are extremely unlikely.” (Resp. at 4.) But Defendant cites no authority to support its
14 proposition that the only actions the Court should worry about chilling are identical actions
15 against the same Defendant regarding the same issue. Indeed, the Court is concerned about
16 chilling consumer protection actions against large financial clearinghouses similar to
17 Defendant. Further, the Court notes that if costs, which “might be considered modest when
18 compared to amounts sought in other, larger cases, even modest costs can discourage
19 potential plaintiffs who . . . earn low wages.” *Escriba*, 743 F.3d at 1249. For these reasons,
20 on balance, the third indicator weighs slightly in favor of Plaintiffs.

21 **4. Plaintiffs’ Limited Financial Resources**

22 While Defendant asserts that Plaintiffs are not of limited means, the Court cannot
23 be sure because Plaintiffs failed to proffer any evidence of their financial resources.
24 Characterizing Plaintiffs as “individual consumers with extraordinarily modest comparable
25 income” is not sufficient to show the Court that the \$4, 898.90 of costs would render them
26 indigent. *See id.* at 1248 (“Costs are properly denied when a plaintiff ‘would be rendered
27 indigent should she be forced to pay’ the amount assessed”) (quoting *Stanley v. Univ. of S.*
28 *Cal.*, 178 F.3d 1069, 1080 (9th Cir. 1999)). Due to Plaintiffs’ failure to provide any

1 evidence to the contrary, this factor weighs in favor of Defendant. *See Greene v. Buckeye*
2 *Valley Fire Dep't.*, No. CV-11-02351-PHX-NVW, 2013 WL 12160997, at *1 (D. Ariz.
3 July 16, 2013) (“[Plaintiff] is not obligated to provide any evidence of her financial
4 situation, but . . . she has the burden to support her claim of an inability to pay Defendants’
5 costs . . . [and] without any evidence beyond her declaration, [the Court] cannot find that
6 [Plaintiff] carried her burden.”).

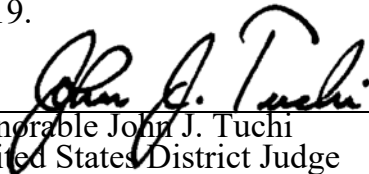
7 **5. Economic Disparity Between the Parties**

8 While the Court cannot be sure of Plaintiffs’ exact financial position, it can be sure
9 that there is great economic disparity between the parties. Plaintiffs assert that Defendant
10 has “assets presently valued over [three] trillion dollars and net income of over \$15 billion
11 last year alone.” (Mot. at 9.) Defendant does not dispute this characterization. Instead,
12 Defendant argues that “economic disparity alone is insufficient to deny costs, as economic
13 disparity is commonplace in litigation.” (Resp. at 4 (citing *Redwind v. W. Union, LLC*, No.
14 3:14-CV-01699-AC, 2017 WL 1025184, at *5 (D. Or. Mar. 16, 2017)).) The Court does
15 not dispute this point but has already found that three other indicators weigh in favor of
16 Plaintiffs. The vast economic disparity between the parties is not the sole consideration,
17 but it does weigh in Plaintiffs’ favor.

18 In sum, these factors weigh in favor of declining to award Defendant costs.

19 **IT IS THEREFORE ORDERED** granting Plaintiffs’ Rule 54(d)(1) Motion to
20 Vacate Costs Taxed (Doc. 168) and vacating the Clerk’s taxation judgment (Doc. 166).

21 Dated this 14th day of August, 2019.

22 
23 _____
24 Honorable John J. Tuchi
25 United States District Judge
26
27
28