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**UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**EASTERN DIVISION**

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| LOG CABIN REPUBLICANS,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense,<br><br>Defendants. | No. CV04-8425 VAP (Ex)<br><br>DEFENDANTS' OBJECTIONS TO PLAINTIFF'S BILL OF COSTS |

## INTRODUCTION

Defendants object to Plaintiff's Application for Costs ("application"). As a threshold matter, any assessment of costs in this case is inappropriate. This case presents a constitutional challenge to a federal statute, 10 U.S.C. § 654, and regulations that implement the military policy commonly referred to as "Don't Ask, Don't Tell." Given the importance and complexity of the constitutional issues presented, any award of costs is inappropriate. In addition, Defendants have appealed the District Court's decision, and any consideration of Plaintiff's Application should await final appellate resolution. Because the appeal may very well result in the reversal of the Court's rulings and judgment, interests of judicial economy weigh strongly in favor of awaiting final appellate resolution before Plaintiff's application for costs is considered by the Clerk or Court.

At a minimum, the costs claimed by Plaintiff in the application should be reduced. *First*, the airfare of two of Plaintiff's witnesses, Phillip Bradley ($1,159.58) and Christopher M. Meekins ($1,819.40), well exceed the amount charged for the fares of other witnesses. Because Plaintiff has failed to show that these rates were the most economical rates reasonably available to Plaintiff, as required by 28 U.S.C. § 1821, neither charge is appropriately taxed to Defendants.

*Second*, while Counsel has certified that Plaintiff incurred copying costs at fourteen cents per page for pretrial filings, totaling $2,147.20, see Exhibit 5A to Doc. 279-1, the only support Plaintiff offers for such costs is a print out of the docket from Pacer. And Counsel's certification that the best copying rate that was available to Plaintiff was fourteen cents per page is belied by the very next exhibit to Plaintiff's Bill of Costs, which shows that when it came time to copy Plaintiff's trial exhibits, Counsel was able to obtain an eight cents per page copying rate. Doc. 279-1, Exhibit 5B. The total amount charged for copying pretrial filings accordingly should be reduced to correspond to the eight cent per page rate that



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was readily available to Plaintiff. Applying that rate reduces the cost of copying the 3,501 pages from $490.14 to $280.08.

Finally, Plaintiff charges for the color reproduction of 468 pages of Plaintiff's trial exhibits. See Doc. 279-1, Exhibit 5B. Because Plaintiff has failed to carry its burden of demonstrating that the color reproduction of exhibits was necessary to the adjudication of this case, the $353.25 cost of such reproduction should be disallowed, further reducing the amount of the application.

## ARGUMENT

### I. Objection: No Costs Should Be Charged Here Given the Important And Complex Legal Issues Presented In This Constitutional Challenge

Fed. R. Civ. P. 54(d)(1) provides that costs other than attorneys' fees shall be allowed as a matter of course to the prevailing party unless "a court provides otherwise." By its terms, therefore, the District Court has discretion to refuse to award costs. Save Our Valley v. Sound Transit, 335 F.3d 932, 945-946 (9th Cir. 2003); Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 591-593 (9th Cir. 2000). Thus, where a case involves issues of substantial public importance, see Ass'n of Mexican-American Educators, 231 F.3d at 593, or where the legal issues are close and complex, see Save Our Valley, 335 F.3d at 946, the District Court has the discretion to deny any award of costs under Rule 54.

This case presents a constitutional challenge to a federal statute, 10 U.S.C. § 654, and implementing regulations that are commonly referred to as the "Don't Ask, Don't Tell" policy, which are of substantial public importance. Furthermore, while the District Court has found the statute and implementing regulations to be unconstitutional, the law at issue has been found constitutional in numerous other courts throughout the country. See Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); Able v. United States, 155 F.3d 628, 631-36 (2d Cir. 1998); Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc). No award of costs is accordingly appropriate here.



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## II. Objection: Consideration of Plaintiff's Application Should Be Deferred Until There Is A Final Appellate Resolution of Plaintiff's Challenge

At the very least, no award of costs should be made now, as the question of who is a "prevailing party" is not known. This matter is now on appeal, and implementation of the Court's judgment has been stayed pending the Ninth Circuit's decision in recognition of the substantial questions posed by the appeal. See Doc. 284. "[A] determination of who is the prevailing party for purposes of awarding costs should not depend on the position of the parties at each stage in the litigation but should be made when the controversy is finally decided." 10 Wright, Miller & Kane, Federal Practice and Procedure § 2667 (3d ed. 1998).

And it is well-established that a Court may deny without prejudice or defer its ruling on attorney's fees when an appeal on the merits is pending. See 1993 Advisory Committee notes to Fed. R. Civ. P. 54(d) ("if an appeal on the merits of the case is taken, the [district] court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice[.]"). The same principles apply to a ruling on a bill of costs. See Lasic v. Moreno, No. 05-161, 2007 WL 4180655 (E.D. Cal. Nov. 21, 2007) (finding that interests of judicial economy warrant deferring consideration of bill of costs while an appeal on the merits is pending); see also In re Farmers Ins. Exchange Claims Representatives Overtime Pay Litig., No. 33-1439, 2009 WL 3834034 (D. Or. Nov. 13, 2009) (deferring payment of costs pending Ninth Circuit disposition of pending appeals).

Accordingly, to the extent the Court concludes that costs are otherwise recoverable in this constitutional challenge, Defendants request that Plaintiff's application for costs be held in abeyance until this action has been finally resolved through the appellate process. If costs were to be assessed now pending appeal, and Defendants were to subsequently prevail on appeal before the Ninth Circuit, Defendants, as the prevailing parties, would be entitled to recover such costs from Plaintiff and, indeed, would themselves be eligible for an award of costs. Denying


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Plaintiff's application without prejudice to later re-file after the appeal is concluded or holding the application in abeyance until the appeal is concluded avoids this situation and is the only appropriate approach under the circumstances.

## III. Objection: Certain Charges Should be Disallowed or Reduced

### A. The Airfare Charged for Messrs. Bradley and Meekins Do Not Appear to be the Most Reasonably Available Economical Rates

Pursuant to L.R. 54-4.7, a prevailing party may charge for certain statutory witness fees, including airfare. But the airfare charged must be "at the most economical rate reasonably available." 28 U.S.C. § 1821. The airfare of two of Plaintiff's witnesses, Phillip Bradley ($1,159.58) and Christopher M. Meekins ($1,819.40), are almost four times the amount charged for Plaintiff's other trial witnesses. Compare Exhibits 4B & F to Doc. 279-1 with Exhibits 4A, 4C-E, 4G-I. Because Plaintiff has failed to show that the rates charged for Messrs. Bradley and Meekins were "the most economical rate reasonably available," as required by 28 U.S.C. § 1821, the amounts charged should be reduced to amounts that are commensurate with the airfares of Plaintiff's other witnesses. This is particularly so here, where the rate charged for Mr. Bradley appears to have been caused by his failure to properly board his scheduled flight. See Exhibit 4B (indicating that Mr. Bradley missed scheduled flight). If true, and if Mr. Bradley's failure to board his scheduled flight resulted in a price increase in airfare, Defendants certainly should not be taxed for the increased fare under such circumstances. Unless and until Plaintiff carries its burden of establishing the most economical rates reasonably available for the air travel of Messrs. Bradley and Meekins, the $2,978.98 claimed in the application must be disallowed.



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**B. The Cost of Copying Plaintiff's Pretrial Exhibits Should be the Reasonable Rate of Eight Cents Per Page Available to Plaintiff**

Costs awarded for photocopying must reflect a reasonable number of pages at a reasonable rate. Shephard v. Dorsa, No. 95-8748, 1998 WL 1799018, at *4 (C.D. Cal. July 2, 1998). While Plaintiff's counsel, Earle Miller, has certified that Plaintiff incurred copying costs at fourteen cents per page for pretrial filings, totaling $2,147.20, see Exhibit 5A to Doc. 279-1, the only support Plaintiff offers for such costs is a print out of the docket from Pacer. That is inadequate; it is particularly so here, where Plaintiff's Bill of Costs shows that Plaintiff was able to copy its trial exhibits for eight cents per page. See Exhibit 5B to Doc. 279-1. The total amount charged for photocopying Plaintiff's pretrial exhibits accordingly should be multiplied by 8 cents per page, not fourteen cents. See Shephard, 1998 WL 1799018 at *4 (reducing $.25 per page charge for copying to $.07 per page). Applying that rate reduces the cost of copying the 3,501 pages to $280.08 (from $490.14).

**C. Plaintiff Has Failed to Show that the Color Reproduction of Trial Exhibits Was Necessary for the Adjudication**

Lastly, Plaintiff seeks to charge for the color reproduction of 468 pages of Plaintiff's trial exhibits. See Exhibit 5B to Doc. 279-1. Beyond counsel's conclusory certification that such costs were necessary, see Doc. 279-1, at 1, however, Plaintiff fails to explain why the color reproduction of exhibits was necessary. Because a "conclusory statement made by [an applicant] that . . . costs were necessary is not sufficient to establish that the [services] were necessarily obtained," Berryman v. Hofbauer, 161 F.R.D. 341, 344 (E.D. Mich. 1995), the $353.25 cost of such color reproduction should also be disallowed. The proper amount for copying these pages is $37.44 ($.08 cents multiplied by 468).



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## CONCLUSION

Therefore, no costs should be awarded in this constitutional challenge. In any event, in light of Defendants' appeal, Plaintiff's application for costs should be denied without prejudice to re-file upon the conclusion of the appellate process or held in abeyance until this action has been finally resolved through the appellate process and the prevailing party is known. Should any costs be awarded now, the maximum allowable costs is $20,838.36.[1]

Dated: November 4, 2010

Respectfully submitted,

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[1] This amount reflects the reductions and includes a $37.44 substituted charge for the black and white reproduction of the 468 pages of trial exhibits that were reproduced by Plaintiff in color (multiplied by the 8 cents per page rate).