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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
7

8 LOUIS BRANCH,

9 Plaintiff,

10 v.

11 D. UMPHENOUR, et al.,

12 Defendants.

Case No. 1:08-cv-01655-SAB (PC)

ORDER RE BILL OF COSTS

(ECF Nos. 319, 321, 322, 329)

13
14 **I.**

15 **BACKGROUND**

16 On January 30, 2017, this action proceeded to a jury trial on Plaintiff's claim that
17 Defendants Umphenour, Szalai, and Alvarez failed to protect him in violation of the Eighth
18 Amendment and that Defendant Umphenour retaliated against him in violation of the First
19 Amendment. On January 31, 2017, the jury returned a verdict in favor of Defendants
20 Umphenour, Szalai, and Alvarez on all claims. Judgment was entered against Plaintiff and for
21 Defendants Umphenour, Szalai, and Alvarez on February 1, 2017. On February 6, 2017,
22 Defendants Umphenour, Szalai, and Alvarez filed a bill of costs. After receiving an extension of
23 time to file an opposition to the bill of costs, Plaintiff filed his opposition entitled "Motion for the
24 Parties to Bear Their Own Costs" on March 22, 2017.

25 **II.**

26 **LEGAL STANDARD**

27 Rule 54 of the Federal Rules of Civil Procedure provides that "costs--other than
28 attorney's fees--should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). Rule 54

1 creates “a presumption for awarding costs to prevailing parties; the losing party must show why
2 costs should not be awarded.” Draper v. Rosario, 836 F.3d 1072, 1087 (9th Cir. 2016) (quoting
3 Save Our Valley v. Sound Transit, 335 F.3d 932, 944-45 (9th Cir. 2003)). In deciding whether
4 to exercise discretion to refuse to award costs, the district court should consider appropriate
5 reasons to deny costs such as “(1) the substantial public importance of the case, (2) the closeness
6 and difficulty of the issues in the case, (3) the chilling effect on future similar actions, (4) the
7 plaintiff’s limited financial resources, and (5) the economic disparity between the parties.”
8 Draper, 836 F.3d at 1087 (quoting Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1247–48
9 (9th Cir. 2014)). This list is not exhaustive, but is a starting point for the analysis. Draper, 836
10 F.3d at 1087.

11 **III.**

12 **DISCUSSION**

13 The jury found for Defendants Umphenour, Szalai, and Alvarez in this action. Therefore,
14 Defendants Umphenour, Szalai, and Alvarez are the prevailing parties in this action and the
15 presumption to award costs has arisen. Defendants Umphenour, Szalai, and Alvarez seek costs
16 for Plaintiff’s deposition and copying fees which are taxable costs under 28 U.S.C. § 1920. At
17 the time that Plaintiff’s deposition was taken it could reasonably have been expected to be used
18 in the trial of this action. Defendants have demonstrated that the costs for copying documents
19 were necessarily obtained for use in this action and are seeking a reimbursement at a reasonable
20 rate. The Court finds that the costs for which Defendants seek reimbursement were necessarily
21 obtained for use in the action.

22 Accordingly, the burden shifts to Plaintiff to rebut the presumption to award costs to the
23 prevailing party by showing reasons to deny costs.

24 **III.**

25 **DISCUSSION**

26 Defendants are seeking costs of \$2,182.00 for fees for transcripts and copies necessarily
27 obtained for use in the case. Plaintiff does not address the factors to be considered in deciding
28 whether to deviate from the presumption to award costs, but contends that he acted in good faith

1 by paying the filing fee and diligently attempted to obey the orders issued in this action. Further,
2 Plaintiff argues that Defendants engaged in misconduct that would subject them to sanctions.
3 Plaintiff seeks to have the parties each bear their own costs.

4 **A. Misconduct of Defendants**

5 Plaintiff contends that costs should be denied because Defendants' motion for summary
6 judgment contained a willful misrepresentation of Staff complaint, perjury, subordination of
7 perjury, and spoliation that were proved to be frivolous and a calculated and deliberate
8 misrepresentation that could subject defendants to fines. (ECF No. 329 at 2.) The court may
9 properly deny costs to the prevailing party based upon the party's misconduct in the litigation.
10 Ass'n of Mexican-Am. Educators v. State of California, 231 F.3d 572, 592 (9th Cir. 2000).

11 While Plaintiff has continually made unsubstantiated accusations against Defendants and
12 defense counsel based upon his disagreement with documents submitted in support of motions in
13 this action, the order on the motion for summary judgment did not find that Defendants'
14 evidence was frivolous, nor has there been any finding of spoliation in this action. Although
15 there was an issue of the timing of some of the discovery produced, the Court specifically found
16 that Plaintiff was served with the discovery as soon as counsel became aware of its existence and
17 that it was responsive to Plaintiff's request for discovery. (ECF No. 151 at 7.) Having reviewed
18 the orders entered in this action, the Court finds no order supporting Plaintiff's allegations that
19 Defendants have engaged in discovery misconduct.

20 Plaintiff also argues that defense counsel used a racial epithet which was inexcusable.
21 The Court finds no merit to Plaintiff's allegations of misconduct at trial. Accordingly, Plaintiff
22 has not demonstrated that an award of costs should be denied due to misconduct of the
23 defendants in this action.

24 **B. Other Factors Considered in Exercising Discretion to Deny Costs**

25 Similar to his litigation strategy throughout this Court's involvement in the action,
26 Plaintiff does not focus on the issues to be decided in the bill of costs. Rather, despite this
27 Court's admonitions during the pendency of the litigation, Plaintiff continues to focus on his
28 disagreement with discovery documents that have been produced in this action and his

1 unsubstantiated claims of misconduct by the defendants. Although Plaintiff did not address any
2 of the factors which the Ninth Circuit has directed courts to consider in deciding whether to
3 exercise the discretion to deny an award of costs, the Court shall consider the factors below.

4 In this action Plaintiff was alleging an Eighth Amendment claim of failure to protect and
5 retaliation in violation of the First Amendment. The Ninth Circuit has held that cases bringing
6 claims for violations of the Eighth Amendment have “substantial public importance” because
7 they are important to safeguard the rights and safety of prisoners. Draper, 836 F.3d at 1088.
8 Plaintiff’s claims implicate important prisoner rights and are of substantial public importance.

9 The issues to be decided in this action were not difficult or close. While Plaintiff
10 survived summary judgment based upon his statements that the Defendants in this action stood
11 and watched as he was assaulted, the defendants presented evidence that they were not in the
12 area at the time of the assault. Although this action ultimately turned on the version of events
13 which were believed by the jury, unlike Draper in which the jury deliberated for a half day and
14 for several hours the next morning before returning a verdict, 836 F.3d at 1088, after hearing a
15 day and a half of testimony, the jury here returned their verdict in approximately one hour.
16 Therefore, the Court finds that this action was not close.

17 The award of the full amount of costs sought in this action would have the potential to
18 chill inmates in similar lawsuits challenging constitutional violations from filing actions. Draper,
19 836 F.3d at 1088.

20 The fact that a plaintiff has been granted in forma pauperis status in the action does not,
21 by itself, preclude the prisoner from paying costs. Draper, 836 F.3d at 1087. The Prison
22 Litigation Reform Act requires that a prisoner pay costs that are awarded on a monthly payment
23 plan. Id. at 1087. Therefore, the resources of the plaintiff and the economic disparity of the
24 parties “are to be considered in the context of the record as a whole.” Id.

25 While Plaintiff has not submitted any argument regarding his income or ability to pay
26 costs in this action, the Court notes that he is incarcerated and his initial application to proceed
27 without prepayment of fees indicates that he has limited income. There is nothing to indicate
28 that this situation has changed. Therefore, the Court finds that there is great economic disparity

1 between the parties, and Plaintiff has limited financial resources since he is incarcerated. The
2 Court finds it appropriate to exercise its discretion and award costs in a reduced amount.

3 Defendants are seeking costs for duplicating in the amount of \$1,469.00 which were
4 calculated at \$.10 per page for black and white copies and \$1.00 per page for color copies.
5 (Decl. of Kristina Doan Ginsburg, ECF No. 321.) Defendants also seek \$713.00 for the costs
6 incurred in taking Plaintiff's deposition. (ECF No. 319-1 at 3.) Considering the record as a
7 whole, the Court finds that it would be equitable to require Plaintiff to pay Defendants' out of
8 pocket deposition expenses in this action. In determining the amount of costs to be awarded in
9 this instance, the Court shall deny the request for the copying costs and grant the out of pocket
10 costs Defendants' incurred in deposing Plaintiff.

11 **IV.**

12 **CONCLUSION AND ORDER**

13 Based on the foregoing, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff's objection to the bill of costs is sustained in part and overruled in part;
15 2. The Clerk of the Court is directed to issue taxation of costs in the amount of
16 \$713.00.

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18 IT IS SO ORDERED.

19 Dated: March 29, 2017

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UNITED STATES MAGISTRATE JUDGE