

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

PAUL LEHR and COLLEEN LEHR,  
  
                    Plaintiffs,  
  
          v.  
  
FRANK M. PERRI; PERRI ELECTRIC,  
INC., a California Corporation;  
PERRI ELECTRIC INC. PROFIT  
SHARING PLAN; PERRI ELECTRIC  
INC. PROFIT SHARING TRUST FUND;  
and DOES 1-50,  
  
                    Defendants.

No. 2:17-cv-1188 WBS AC

ORDER RE: DEFNDANTS FRANK M.  
PERRI'S AND PERRI ELECTRIC  
INC.'S REQUEST FOR ATTORNEYS'  
FEES AND COSTS

----oo0oo----

Plaintiffs Paul and Colleen Lehr brought this action  
against defendants Frank M. Perri ("Frank Jr."), Perri Electric,  
Inc. ("Perri Electric"), Perri Electric Inc. Profit Sharing Plan,  
Perri Electric Inc. Profit Sharing Trust Fund, and Does 1-50,  
alleging violations of the Employee Retirement Security Act of  
1974 ("ERISA"), 29 U.S.C. §§ § 1001 et seq. Before the court is

1 defendants Frank Jr.'s and Perri Electric's Motion for Attorneys'  
2 Fees and Bill of Costs. (Docket Nos. 57 & 58.)

3 I. Background

4 This court described much of the factual and procedural  
5 background to the lawsuit in its order on summary judgment.

6 (Mem. & Order: Re Mot. for Summ. J. ("Summ. J. Order") (Docket  
7 No. 56).) The court granted moving defendants' motion for  
8 summary judgment on the grounds that plaintiffs lacked statutory  
9 standing under ERISA. (See id. at 13.) In light of the judgment  
10 in their favor, moving defendants now move for attorneys' fees  
11 and costs.

12 II. Discussion

13 A. Attorneys' Fees

14 ERISA provides that "[i]n any action under this  
15 subchapter (other than an action described in paragraph (2))<sup>1</sup> by  
16 a participant, beneficiary, or fiduciary, the court in its  
17 discretion may allow a reasonable attorney's fee and costs of  
18 action to either party." 29 U.S.C. § 1132(g)(1). By its express  
19 terms, the statute authorizes an award of attorneys' fees "only  
20 when the action is brought by one of the parties enumerated in §  
21 1132(g)(1)." See Corder v. Howard Johnson & Co., 53 F.3d 225,  
22 229 (9th Cir. 1994).

23 The court previously found that plaintiffs are not any  
24 of the parties enumerated in Section 1132(g)(1). On summary

---

25 <sup>1</sup> Paragraph 2 of 29 U.S.C. § 1132(g) provides for  
26 mandatory attorneys' fees and costs in actions for the payment of  
27 delinquent contributions under 29 U.S.C. § 1145. See 29 U.S.C. §  
28 1132(g)(2). The parties agree that this subdivision is not  
applicable in this case. (See Defs.' Mem. at 4 (Docket No. 59);  
Pls.' Opp'n at 2 (Docket No. 95).)

1 judgment, the court held that Colleen Lehr did not have standing  
2 under ERISA as a plan participant because she lacked a colorable  
3 claim to vested benefits. (See Summ. J. Order at 11-13.)  
4 Consequently, the court concluded that Paul Lehr did not have  
5 standing either because his standing, as Colleen's spouse and  
6 beneficiary, was dependent on her status as a plan participant.  
7 (See id. at 13 n.9.)

8 Ninth Circuit case law recognizes two exceptions to  
9 this general rule. The first exception allows a court to "assess  
10 attorney's fees against a multi-employer benefit plan that  
11 unsuccessfully sues an employer for non-payment of ERISA  
12 contributions." Corder, 53 F.3d at 230 (citing Carpenters S.  
13 Cal. Admin. Corp. v. Russell, 726 F.2d 1410, 1415-16 (9th Cir.  
14 1984)). The second exception authorizes courts to award  
15 attorneys' fees against a party who "survives summary judgment  
16 and actually tries its case on the colorable theory that it is  
17 one of the enumerated parties specified in § 1132(g)(1)" and then  
18 "fails to prevail on that ground because its claim lacks any  
19 evidentiary basis." Id. at 230-31 (citing Credit Managers Ass'n  
20 of S. California v. Kennesaw Life & Accident Ins. Co., 25 F.3d  
21 743, 747 (9th Cir. 1994)).

22 The first exception does not apply because moving  
23 defendants do not seek an award of fees against a multi-employer  
24 benefit plan. Moreover, moving defendants cannot rely on the  
25 second exception created in Credit Managers. For this exception  
26 to apply, plaintiffs must have survived summary judgment on the  
27 theory that they are one of the parties enumerated in Section  
28 1132(g)(1). See Corder, 53 F.3d at 230-31 (holding that this is

1 a requirement for the Credit Managers exception to apply)<sup>2</sup>; see  
2 also Lifecare Mgmt. Servs., LLC v. Zenith Am. Sols., Inc., No.  
3 3:15-cv-00307 RCJ VPC, 2017 WL 2587602, at \*2 (D. Nev. June 14,  
4 2017) ("Corder establishes that before attorneys' fees may be  
5 awarded against a plaintiff in an ERISA action, the plaintiff  
6 must at least survive summary judgment on the possibility that it  
7 is an enumerated party under § 1132(g)." (emphasis in original)).  
8 Because the court's found on summary judgment that plaintiffs  
9 lacked standing under Section 1132, this court lacks authority to  
10 award moving defendants fees. See Corder, 53 F.3d at 231.

11 Accordingly, this court must deny moving defendants'  
12 motion for attorneys' fees.

13 B. Costs

14 Rule 54(d)(1) of the Federal Rules of Civil Procedure  
15 governs the taxation of costs, which are generally subject to  
16 limits set under 28 U.S.C. § 1920. See 28 U.S.C. § 1920  
17 (enumerating taxable costs); Fed. R. Civ. P. 54(d)(1) ("Unless a  
18 federal statute, these rules, or a court order provides  
19 otherwise, costs--other than attorney's fees--should be allowed to  
20 the prevailing party."); Crawford Fitting Co. v. J.T. Gibbons,  
21 Inc., 482 U.S. 437, 440-45 (1987) (limiting taxable costs to  
22 those enumerated in § 1920). While 29 U.S.C. § 1132(g)(1) is  
23 another federal statute that provides for costs in applicable  
24 ERISA actions, the Ninth Circuit has held that "it does not

---

25 <sup>2</sup> While moving defendants acknowledge that Corder  
26 contains such a requirement, they argue that "the ruling in  
27 Credit Managers is not so strict." (See Defs.' Reply at 2  
28 (Docket No. 96).) However, Corder binds this court as the later  
and controlling authority. See Miller v. Gammie, 335 F.3d 889,  
893 (9th Cir. 2003) (en banc).

1 necessarily preclude an award of costs pursuant to Rule 54(d)(1)  
2 or make an award of costs pursuant to Rule 54(d)(1) superfluous.”  
3 See Quan v. Comput. Scis. Corp., 623 F.3d 870, 888 (9th Cir.  
4 2010), abrogated on other grounds, Fifth Third Bancorp v.  
5 Dudenhoeffer, 573 U.S. 409 (2014).

6 This court has discretion in determining whether to  
7 allow certain costs. See Amarel v. Connell, 102 F.3d 1494, 1523  
8 (9th Cir. 1996) (district court has discretion to determine what  
9 constitutes a taxable cost within the meaning of § 1920).  
10 However, Rule 54(d)(1) creates a presumption in favor of awarding  
11 costs to prevailing parties and the losing party must show why  
12 costs should not be awarded. See Save Our Valley v. Sound  
13 Transit, 335 F.3d 932, 944 (9th Cir. 2003); see also Russian  
14 River Watershed Prot. Comm. v. City of Santa Rosa, 142 F.3d 1136,  
15 1144 (9th Cir. 1998) (noting that the presumption “may only be  
16 overcome by pointing to some impropriety on the part of the  
17 prevailing party”).

18 Moving defendants are clearly prevailing parties under  
19 Rule 54, having received a complete grant of summary judgment.  
20 See Quan, 623 F.3d at 889; Bommarito v. Nw. Mut. Life Ins. Co.,  
21 No. 2:15-cv-1187 WBS DB, 2018 WL 4657243, at \*1 (E.D. Cal. Sept.  
22 26, 2018). Moving defendants’ bill of costs totals \$180.84.  
23 They itemize \$164.64 in transcript fees and \$16.20 for the costs  
24 of making copies. Plaintiffs have not filed any objections and  
25 the court finds these costs to be proper. Transcript fees and  
26 copying costs are encompassed by 28 U.S.C. §§ 1920(2) and 1920(4)  
27 respectively. And the specific items were necessarily obtained  
28 for use in this case. See Alflex Corp. v. Underwriters Labs.,

1 Inc., 914 F.2d 175, 177 (9th Cir. 1990).

2 Accordingly, the court will allow \$180.84 in costs for  
3 moving defendants.

4 IT IS THEREFORE ORDERED that Frank M. Perri's and Perri  
5 Electric, Inc.'s Motion for Attorneys' Fees (Docket No. 58) be,  
6 and the same hereby is, DENIED.

7 IT IS FURTHER ORDERED that Frank M. Perri's and Perri  
8 Electric, Inc.'s request for costs (Docket No. 57) be, and the  
9 same hereby is, GRANTED. Costs shall be taxed against plaintiffs  
10 in the sum of \$180.84.

11 Dated: August 21, 2019



12 **WILLIAM B. SHUBB**  
13 **UNITED STATES DISTRICT JUDGE**  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28