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18

19 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
20 **SAN FRANCISCO DIVISION**

21 BERNARD PAUL PARRISH, HERBERT  
ANTHONY ADDERLEY, WALTER  
22 ROBERTS III,

23 Plaintiffs,

24 v.

25 NATIONAL FOOTBALL LEAGUE  
PLAYERS ASSOCIATION and NATIONAL  
26 FOOTBALL LEAGUE PLAYERS  
INCORPORATED d/b/a/ PLAYERS INC,

27 Defendants.  
28

Case No. C 07 0943 WHA

**DEFENDANTS' OBJECTIONS TO  
PLAINTIFFS' BILL OF COSTS**

1 Pursuant to Federal Rule of Civil Procedure 54 and Local Rule 54-2, Defendants  
2 respectfully submit the following objections to Plaintiffs' Bill of Costs dated November 26,  
3 2008.<sup>1</sup>

4 Under Fed. R. Civ. Proc. 54, a prevailing party may recover only those costs "necessarily  
5 obtained" for use in the case.<sup>2</sup> Terry v. Allstate Ins. Co., No. Civ. S-05-2261 RRB DAD, 2007  
6 WL 3231716, at \*1 (E.D. Cal. Nov. 1, 2007). The prevailing party bears the burden of stating its  
7 costs with the requisite specificity and justifying why its costs were necessarily incurred.  
8 Moreover, "the prevailing party necessarily assumes the risks inherent in a failure to meet that  
9 burden." Id. See also Ferreira v. M/V CCNI Antofagasta, No. 2:04-cv-1916-MCE-DAD, 2007  
10 WL 3034941, at \*1-\*2 (E.D. Cal. Oct. 16, 2007) ("The mere recitation of the phrase 'necessarily  
11 incurred,' as Plaintiff has done in his bill of Costs, is not sufficient to meet the requirements of  
12 Section 1920 . . . Plaintiff has failed to provide the Court with any specific basis justifying" his  
13 costs.).

14 Here, Plaintiffs did not justify at all why their \$92,000 in costs were necessarily incurred.  
15 Rather, Plaintiffs simply submitted, without any explanation, various charges they incurred in  
16 connection with this case, many of which cannot be taxed to Defendants as a matter of law.  
17 Thus, Plaintiffs' Bill of Costs should be rejected in its entirety or, in the alternative, should be  
18 substantially reduced.

19  
20 **A. Plaintiffs Failed, in Violation of the Local Rules,  
to Provide Any Affidavit Justifying Their Costs**

21 In violation of Local Rule 54-1, Plaintiffs failed to justify their Bill of Costs with an  
22 affidavit, pursuant to 28 U.S.C. § 1924, stating that their costs are correctly stated, were  
23 necessarily incurred, and are allowable by law. See L.R. 54-1(a) ("[The bill of costs] must be  
24 supported by an affidavit, pursuant to 28 U.S.C. § 1924 . . .") (emphasis added). In fact,

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26 <sup>1</sup> Pursuant to Local Rule 54-2, Defendants met and conferred with Plaintiffs regarding these  
Objections on December 10, 2008.

27 <sup>2</sup> 28 U.S.C. § 1920 allows the Court to tax, among other things, (i) fees of the clerk and marshal;  
28 (ii) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained  
for use in the case and (iii) fees and disbursements for printing and witnesses.

1 Plaintiffs provide no explanation whatsoever why their \$92,000 in costs were necessarily  
2 incurred, or even whether their costs were incurred in connection with one of the claims on  
3 which Plaintiffs ultimately prevailed. For this reason, Plaintiffs' Bill of Costs should be rejected  
4 outright.

5 Additionally, all of the claims asserted in this case by Bernard Parrish were voluntarily  
6 dismissed by him with prejudice. See Order Granting Bernard Paul Parrish's Unopposed Motion  
7 for Dismissal with Prejudice (Rec. Doc. 396) (Sept. 9, 2008). As to those claims, Defendants are  
8 the prevailing party within the meaning of the applicable rules and Plaintiffs, therefore, are  
9 entitled to none of their costs incurred in connection with those claims. See L.R. 54-1 (a)  
10 (permitting only "a prevailing party" to file a bill of costs); Marbled Murrelet v. Babbitt, No. C  
11 95-3261 LCB, 1999 WL 193387, at \*3 (N.D. Cal. April 5, 1999) (the defendant is the prevailing  
12 party on claims plaintiff voluntarily dismissed with prejudice). Because Plaintiffs made no effort  
13 to segregate the costs they incurred for Plaintiff Parrish's claims from the costs they incurred for  
14 the claims of the GLA Class, Plaintiffs' bill should be rejected.

15 But, even if Plaintiffs' bill is not rejected in its entirety, certain costs purportedly incurred  
16 by Plaintiffs are not taxable to Defendants as a matter of law and should be deducted from  
17 Plaintiffs' bill. Each is discussed below.<sup>3</sup>

18 **B. Fees of the Clerk**

19 Plaintiffs seek \$655.00 in costs related to pro hac vice applications and a certificate of  
20 good standing for admission to the Court. See Plaintiffs' Bill of Costs, at Exh. A. Defendants  
21 have found no authority in this district allowing Plaintiffs to recover such costs. See Gidding v.  
22 Anderson, No. C-07-04755-JSW, 2008 WL 5068524, at \*2 (N.D. Cal. Nov. 24, 2008)  
23 (disallowing assessment of court fees in connection with pro hac vice applications); MEMC  
24 Elec. Materials v. Mitsubishi Materials, No. C-01-4925 SBA (JCS), 2004 WL 5361246, at \*1  
25 (N.D. Cal. Oct. 22, 2004) ("Defendants concede that they are not entitled to the cost of . . . pro  
26 hac vice fees"). Moreover, these costs cannot be disassociated from the claims asserted by

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28 <sup>3</sup> For the Court's convenience, Defendants are filing concurrently herewith as Exhibit A a list of  
all the costs to which Defendants specifically object.

1 Plaintiff Parrish, as to which Plaintiffs decidedly did not prevail. Thus, in its discretion, the  
2 Court should not tax these expenses to Defendants.

### 3 **C. Fees for Hearing and Trial Transcripts**

4 Local Rule 54-3(b) provides that the costs of obtaining hearing and trial transcripts are  
5 taxable only for transcripts (i) necessarily obtained for an appeal, or (ii) which contain a  
6 statement by a Judge from the bench which is to be reduced to a formal order prepared by  
7 counsel. The cost of “other transcripts is not normally allowable unless, before it is incurred, it is  
8 approved by a Judge or stipulated to be recoverable by counsel.” L.R. 54-3(b) (emphasis added).  
9 Here, Plaintiffs request over \$31,000 in costs for hearing and trial transcripts, none of which  
10 were approved by a Judge or stipulated to be recoverable by Defendants’ counsel. Further,  
11 Plaintiffs made no attempt to meet their burden to show that these transcripts – including daily  
12 trial transcripts costing over \$19,000 – were necessarily obtained for any appeal or contain  
13 statements from a Judge that were reduced to a formal order prepared by Plaintiffs.<sup>4</sup> Thus,  
14 pursuant to the normal rule, these transcript costs should be disallowed. See MEMC Elec.  
15 Materials, 2004 WL 5361246, at \*2 (“With respect to the hearing transcripts for the discovery  
16 motions, Defendants also fail to provide any persuasive argument for awarding these costs where  
17 they did not obtain the prior approval of a judge or the stipulation of Plaintiff, as required under  
18 Local Rule 54-3(b)(3).”); Dunn & Fenley, LLC v. Allen, No. 02-1750-JE, 2007 WL 2973549, at  
19 \*6 (D.Or. Oct. 9, 2007) (“Though the trial transcript may have been of some use to counsel, it  
20 was not necessary within the meaning of § 1920, and this court does not routinely allow for the  
21 recovery of the costs of such transcripts.”).

22 Plaintiffs’ bill of costs for trial transcripts should be disallowed for the additional reason  
23 that the parties split the cost of daily transcripts, and the approximately \$19,000 requested by  
24

25 <sup>4</sup> This includes Plaintiffs’ costs for the following: Sanctions Hearing Transcript, Case  
26 Management Conference Transcript, Hearing on Plaintiffs’ Discovery Dispute, Hearing on  
27 Motion to Dismiss Second Amended Complaint, Hearing on Discovery Dispute, Class  
28 Certification Hearing, Hearing on Discovery Dispute, Summary Judgment Hearing, Summary  
Judgment Hearing (deposit), Pretrial Hearing, Trial Transcripts (\$2,255.86), Trial Transcripts  
(deposit), Trial Transcript (\$17,000), Trial Transcript (\$607.24). See Plaintiffs’ Bill of Costs, at  
Exh. C.

1 Plaintiffs represents their share of the costs, as Defendants have already paid the same amount to  
2 the reporter.<sup>5</sup> See El Dorado Irrigation Dist. v. Traylor Bros., Inc., No. CIV. S-03-949  
3 LKK/GGH, 2007 WL 512428, at \*8 (E.D. Cal. Feb. 12, 2007) (deducting the cost of trial  
4 transcripts from the bill of costs because “[b]oth parties had requested a daily transcript and  
5 agreed to split the cost. The amount [billed] represents TBI’s share of the costs.”).

6 Plaintiffs also seek at least \$8,482.00 for “realtime” Live Note feed during trial. See  
7 Plaintiffs’ Bill of Costs, at Exhibit C pp. 58 (\$671.00) and 63 (\$7811.05). It is well-settled that  
8 such costs are not “necessarily incurred” and, therefore, are not taxable. Ishida Co., Ltd. v.  
9 Taylor, No. C-02-1617-JF(PVT), 2004 WL 2713067, at \*1 (N.D. Cal. Nov. 29, 2004)  
10 (disallowing fees for realtime hookups, which are “extras”); El Dorado, 2007 WL 512428, at \*11  
11 (costs incurred for the convenience of counsel are not taxable).

12 Plaintiffs also seek the costs of multiple copies of hearing and trial transcripts. See, e.g.,  
13 Plaintiffs’ Bill of Costs, at Exhibit C pp. 45 (original plus one copy), 63 (original plus two  
14 copies), 51 (same), 54 (same), 58 (original plus two copies), 63 (hard copy, “txt copy”, pdf  
15 copies and condensed copy). And, in some instances, Plaintiffs also seek to charge Defendants  
16 for additional rough ASCII copies of transcripts. See Plaintiffs’ Bill of Costs, at Exh. C pp. 48  
17 (some portion of \$132 charged for ASCII version), 61 (\$214 charge for ASCII version).

18 Defendants have found no authority in this district that would allow Plaintiffs to recover the  
19 costs of multiple copies of hearing transcripts obtained from court reporters. Moreover, costs for  
20 additional ASCII rough versions are never allowed. Ishida Co., Ltd., 2004 WL 2713067, at \*1  
21 (disallowing costs for ASCII version). Thus, all these costs should be disallowed.

22 Moreover, Plaintiffs seek to tax Defendants for the cost of expediting certain hearing  
23 transcripts. See, e.g., Plaintiffs’ Bill of Costs, at Exh. C pp. 54 and 45. Costs for expedited  
24 delivery, however, are disallowed and must be deducted here. Fresenius Med. Care Holdings,

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27 <sup>5</sup> See Plaintiffs’ Bill of Costs, at Exh. C, pp. 56 (“Included in that estimate: Split cost of original  
28 transcript between Plaintiffs and Defendants”); 63 (charging for original and 2 pdf copies of trial  
transcript “split with defense counsel.”).

1 Inc. v. Baxter Int'l, Inc., No. C 03-1431 SBA, 2008 WL 2020533, at \*5 (N.D. Cal. May 8, 2008)  
2 (“Baxter is clearly not entitled to expediting fees and therefore such costs will not be allowed.”).

3 Finally, Defendants may not be taxed for the cost of the motion hearings on which  
4 Defendants were the prevailing party. For example, Plaintiffs seek \$101.40 for the transcript of a  
5 discovery dispute hearing held on June 11, 2008, and \$217.80 for the transcript of a hearing held  
6 on Defendants’ Motions to Dismiss the Second Amended Complaint. Defendants, however,  
7 were the prevailing parties with respect to both these hearings. See 6/11/2008 Discovery Dispute  
8 Hearing Tr. 10:24-11:4 (“The Motion to Compel is denied. The reason it’s denied is that the  
9 salary paid to Upshaw is so far removed from the issues in this case, that I don’t see any reason  
10 to invade his privacy and try [sic] make him the issue in this case.”) and Order Granting Motions  
11 to Dismiss (Rec. Doc. 133) (Sept. 6, 2007). Cf. Solis v. Cty. of Los Angeles, 514 F.3d 946, 958-  
12 59 (9th Cir. 2008) (vacating bill of costs entered against prevailing party); Mills v. State of Cal.,  
13 320 F.3d 986, 989 (9th Cir. 2003) (“Here, the underlying case was dismissed without prejudice .  
14 . . . Under these circumstances, the [defendant] is a ‘prevailing party’ and Rule 54(d) properly  
15 applies.”). Similarly, Plaintiffs seek \$132.00, which is presumably the full cost incurred by them  
16 to obtain the class certification hearing transcript.<sup>6</sup> Defendants, however, prevailed in part on  
17 Plaintiffs’ Motion for Class Certification and, therefore, should not be taxed the full amount of  
18 Plaintiffs’ costs. See Order Granting in Part and Denying in Part Plaintiffs’ Motion for Class  
19 Certification (Rec. Doc. 275) (April 29, 2008).

#### 20 **D. Deposition Transcripts**

21 Plaintiffs are not entitled to any costs incurred in connection with the claims voluntarily  
22 dismissed by Bernard Parrish. Order Granting Bernard Paul Parrish’s Unopposed Motion for  
23 Dismissal with Prejudice (Rec. Doc. 396) (Sept. 9, 2008). For purposes of those claims,  
24 Plaintiffs are not the prevailing party and, thus, may not recover any costs. See L.R. 54-1  
25 (permitting only “a prevailing party” to file a bill of costs); Solis, 514 F.3d at 958-59; Marbled

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27 <sup>6</sup> Additionally, the “Notice of Transcript Availability” provided by Plaintiffs regarding the class  
28 certification hearing transcript indicates that a copy of the transcript, ASCII and a condensed  
version of the transcript would cost Plaintiffs a total of \$132.00. As set forth above, ASCII and  
condensed copies are not taxable. See Ishida, 2004 WL 2713067, at \*1.

1 Murrelet, 1999 WL 193387, at \*3 (N.D. Cal. April 5, 1999) (the defendant is the prevailing party  
2 on claims plaintiff voluntarily dismissed with prejudice). Accordingly, Plaintiffs' charges for  
3 \$4,043.91 for the cost of Bernard Parrish's deposition, \$1493.71 for the cost of Margaret  
4 Parrish's deposition, and some portion of \$796.00 for videotape copies of these same  
5 depositions, see Plaintiffs' Bill of Costs, at Exhibit C at pp. 6, 28, 29, 30 and 31, should be  
6 deducted. These depositions were taken by Defendants in connection with Mr. Parrish's claims  
7 on which Defendants were the prevailing party. Thus, these costs are not allowable.

8 Plaintiffs also seek fees for video and stenographic copies of various depositions. See,  
9 e.g., Plaintiffs' Bill of Costs, at Exh. C, pp. 13 (\$2,487.92 charge for original transcript, rough  
10 transcript and video services); 8 (\$4, 918.95 charge for, among other things, original transcript,  
11 stenographic copy of transcript, videotape copies, and word index). This is not allowable where,  
12 as here, Plaintiffs provide no rationale "justifying why both [video and stenographic] copies were  
13 necessary for the litigation." Terry, 2007 WL 3231716, at \*3, citing Nederhiser v. Foxworth,  
14 No. 05-787-KI, 2007 WL 1378602, at \*2 (D.Or. May 7, 2007) (noting that "an award of costs for  
15 both transcribing and videotaping a deposition turns on whether both are reasonably necessary,  
16 which requires a showing beyond convenience or duplication to ensure alternative methods of  
17 presenting materials at trial."). This is especially the case since the testimony of all the trial  
18 witnesses who testified by deposition was read into the record at trial, and not presented by  
19 videotape means. Thus, Plaintiffs should (at most) be allowed to recover the costs they incurred  
20 in obtaining only the stenographic transcripts of such depositions.

21 Plaintiffs also apparently seek over \$4,493.00 in costs for the expedited delivery of  
22 numerous deposition transcripts, including rough transcripts. See, e.g., Plaintiffs' Bill of Costs,  
23 at Exhibit C pp. 11 ("daily delivery" fee); 16 ("immediate" rough transcript), 17 (expedited  
24 delivery fee for rough transcript), 26 (same), 28 (two-day delivery fee), 31 (expedited delivery  
25 fee), 32 (daily delivery fee), 33 (same), 39 ("immediate" rough transcript), 61 (expedited  
26 delivery fee), 25 (some portion of \$4,313.21 for 4-day expedited rate), 36 (some portion of  
27 \$3,475.55 fee for 1-day expedited rate). The costs of expediting transcripts are not allowable as  
28 a matter of law and should be deducted. Fresenius Med. Care Holdings, Inc., 2008 WL 2020533,

1 at \*5 (“Baxter is clearly not entitled to expediting fees and therefore such costs will not be  
2 allowed.”).

3 Further, the local rules allow Plaintiffs to recover the cost of an original and one copy of  
4 a deposition transcript, but not the cost of additional rough ASCII copy. See L.R. 54-3(c)(1)  
5 (“The cost of an original and one copy of any deposition (including video taped depositions) . . .  
6 is allowable.”). However, Plaintiffs seek to charge Defendants for multiple rough ASCII  
7 versions. See e.g., Plaintiffs’ Bill of Costs, at Exhibit C pp. 16 (invoicing costs of an original,  
8 certified copy, and \$136.00 for additional rough copy), 17 (\$706.00 for additional rough copy),  
9 19 (\$265.00 for rough ASCII disk); 11 (\$222 charge for rough ASCII disk), 5 (\$583 charge for  
10 rough ASCII disk), 28 (\$747 charge for rough ASCII disk), 31 (\$273 charge for rough ASCII  
11 disk), 32 (\$364 charge for rough ASCII disk), 33 (\$353.40 charge for rough ASCII disk), 39  
12 (\$136.50 charge for rough ASCII).<sup>7</sup> These are not taxable costs. Ishida Co., Ltd., 2004 WL  
13 2713067, at \*1 (disallowing costs for ASCII transcripts); Universal Trading & Investment Co. v.  
14 Kiritchenko, No. C-99-3073 MMC (EDL), 2008 WL 2156993, at \*3 (N.D. Cal. May 21, 2008)  
15 (“At the hearing, the Court asked Defendants whether certain costs claimed were recoverable,  
16 namely postage and handling for transcript delivery, rough ASCII transcripts, and  
17 expedition/rush costs. Defendants agreed that they would subtract such costs out from their cost  
18 bill . . .”).

19 Plaintiffs also seek at least \$245.00 for the cost of condensed versions of transcripts, see  
20 e.g., Plaintiffs’ Bill of Costs, at Exh. C, pp. 5, 11, 19, 28, 31, 32, 33, 61, and at least \$202.40 for  
21 “word indexes” of at least one transcript. Id. at 8. Plaintiffs further seek at least \$1000 for “real  
22 time” Live Note feed or “synch” for various depositions. See Plaintiffs’ Bill of Costs, at Exh. C  
23 pp. 6 (video capture & “synch”), 18, 27. These costs, which are not “necessarily incurred,” are  
24 not allowable. Ishida Co., Ltd., 2004 WL 2713067, at \*1 (disallowing fees for realtime hookups,  
25 ASCII, mini-scripts, and e-transmissions of transcripts; “[w]hile these services may provide

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27 <sup>7</sup> Plaintiffs also seek the cost of two video copies for at least one deposition, while the local rules  
28 allow Plaintiffs to recover the cost of only one copy. See Plaintiffs’ Bill of Costs, at Exh. C p. 39  
(charge for 2 copies of video deposition); L.R. 54-3(c)(1) (allowing costs for the original  
transcript and one copy).



1 added convenience to counsel, they are ‘extras’ in addition to the one original and one copy of  
2 the transcript allowed under the rule. Accordingly, these costs properly were disallowed by the  
3 Clerk.”); El Dorado, 2007 WL 512428, at \*11 (costs incurred for the convenience of counsel are  
4 not taxable). These costs, therefore, should be subtracted from Plaintiffs’ bill.

5 Finally, Plaintiffs seek the cost of various “invoice processing fees”, which are to be  
6 “deducted if paid within 30 days.” See, e.g., Plaintiffs’ Bill of Costs, at Exh. C pp. 39 (\$216.57),  
7 16 (\$91.42). Plaintiffs, however, provide no documentation that would allow Defendants to  
8 determine if such fees were ever deducted. These fees are not allowable costs.

#### 9 **E. Fees for Witnesses**

10 Taxable costs for “witness fees” include (i) witness attendance fees of \$40 per day, 28  
11 U.S.C. § 1821, (ii) subsistence payments and (iii) mileage payments. See L.R. 54-3(e) (“Per  
12 diem, subsistence and mileage payments for witnesses are allowable . . . No other witness  
13 expenses, including fees for expert witnesses, are allowable.”). Plaintiffs, however, seek  
14 \$2,058.60 in costs for service of subpoenas, which are not properly taxed as “witness fees.” See,  
15 e.g., Plaintiffs’ Bill of Costs, at Exh. B. These costs, therefore, should be deducted from  
16 Plaintiffs’ bill.

#### 17 **F. Fees for Exemplification and Costs of Making Copies**

18 Plaintiffs wholly fail to state with any specificity their costs for exemplification and  
19 copying. Plaintiffs, for instance, tax Defendants \$3,203.79 for copying costs of “images” and the  
20 production and duplication of “DVD’s.” See Plaintiffs’ Bill of Costs at Exh. D. This does not  
21 even come close to meeting Plaintiffs’ burden to state with specificity some justification for their  
22 expenses. Ferreira, 2007 WL 3034941, at \*2-3 (rejecting bill for exemplification fees where  
23 Plaintiff provided no specific basis justifying the expense); El Dorado, 2007 WL 512428, at \*10  
24 (rejecting bill for costs of copies where “not enough has been done to explain and justify these  
25 costs”). These costs, therefore, should not be allowed.  
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**CONCLUSION**

For all of the foregoing reasons, Plaintiffs' Bill of Costs should be rejected in its entirety or, in the alternative, the Court should exercise its discretion to reduce the amount of Plaintiffs' costs that are taxable to Defendants as reviewed above.

Date: December 11, 2008

DEWEY & LEBŒUF LLP

BY: /s/ David G. Feher  
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