



1 **LEGAL STANDARD**

2 Federal Rule of Civil Procedure 54(d)(1) provides that “costs other than attorneys’  
3 fees shall be allowed as of course to the prevailing party unless the court otherwise directs.”  
4 “By its terms, the rule creates a presumption in favor of awarding costs to a prevailing party,  
5 but vests in the district court discretion to refuse to award costs.” *Association of*  
6 *Mexican–American Educators v. State of California*, 231 F.3d 572, 591 (9th Cir. 2000).

7 The presumption is not rigid. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S.  
8 275, 284 (1946). In order to overcome the presumption, a losing party must show that to  
9 award costs to the prevailing party would be unjust. *Key v. Chrysler Motors Co.*, 128 N.M.  
10 739, 741 (2000). Though broad, the Court’s “discretion is not unlimited. A district court must  
11 ‘specify reasons’ for its refusal to award costs.” *Mexican-American Educators*, 231 F.3d at  
12 591.

13 In the Ninth Circuit, there are several factors which may justify denial of costs: “(1)  
14 the losing party's limited financial resources; (2) misconduct on the part of the prevailing  
15 party; (3) the chilling effect of imposing such high costs on future civil rights litigants; (4)  
16 whether the issues in the case were close and difficult; (5) whether the prevailing party's  
17 recovery was nominal or partial; (6) whether the losing party litigated in good faith; and (7)  
18 whether the case presented a landmark issue of national importance.” *Van Horn v. Dhillon*,  
19 2011 WL 66244 at \*3 (E.D.Cal., 2011); *see also Quan v. Computer Sciences Corp.*, 623 F.3d  
20 870, 888-89 (9th Cir.2010) (citing *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342  
21 F.3d 1016, 1022 (9th Cir.2003)); *Mexican-American Educators*, 231 F.3d at 592. A finding  
22 of misconduct on the part of the prevailing party is not required to deny an award of costs.  
23 *Mexican-American Educators*, 231 F.3d at 592. These factors do not limit the reasons why a  
24 court may find justice requires denial of costs—the Ninth Circuit, in listing these reasons for  
25 denial, did not intend the list to be exhaustive. *Mexican-American Educators*, 231 F.3d at  
26 593.

1 **DISCUSSION**

2 Of the factors enumerated above, some may immediately be eliminated as  
3 inapplicable: a nominal or partial recovery, for example, is not at issue here, nor has  
4 misconduct by the prevailing party been an issue in this case. The remaining factors may be  
5 divided into three rough categories of inquiry: financial status of the parties, character and  
6 qualities of the litigation, and the potential chilling effect.

7 *1. Financial Factors*

8 The Plaintiffs argue that the limited financial resources of the Plaintiffs and the  
9 disparity between the parties' wealth justifies a denial of costs in this case. The Defendants  
10 respond by noting the relatively high income of the Plaintiffs in arguing that Plaintiffs'  
11 resources are not so mean as to justify denial of costs, and, furthermore, that the apparent  
12 disparity between the parties' wealth is lessened by the not-for-profit and dues-based nature  
13 of the Defendant unions.

14 There is a significant disparity between the financial resources of the individual  
15 Plaintiffs and the Defendant unions: the unions have far greater resources than the  
16 individuals in this case. However, disparity alone is insufficient to overcome the  
17 presumption in favor of awarding costs:

18 disparity of wealth between the parties, without additional evidence of the  
19 losing party's inability to pay or bad faith of the prevailing party, is not enough  
20 to justify a reduction in the cost award. *Cafeteria Operators, L.P. v.*  
21 *Coronado-Santa Fe Assocs.*, 1998-NMCA-005, ¶ 37, 124 N.M. 440, 952 P.2d  
22 435 (upholding the trial court's decision that both parties bear their own costs  
because the trial court articulated several reasons unrelated to the wealth of the  
parties). The Court of Appeals, in *Cafeteria Operators*, stated, and this Court  
agrees, "that a party should not be denied an award of costs simply because it  
can 'afford to swallow' the expense." *Id.*

23 *Key v. Chrysler Motors Co.*, 128 N.M. 739, 743 (2000).

24 In determining whether the financial resources of a plaintiff are so limited as to justify  
25 denying costs, "[t]here are no hard and fast rules for assessing a losing party's indigency or  
26 inability to pay; district courts should use their common sense in making this determination."  
27 *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 463-64 (3rd Cir.2000). "It is not necessary to  
28 find that the plaintiffs in question are currently indigent; rather, the proper inquiry is whether

1 an award of costs might make them so.” *Rivera v. NIBCO*, 701 F.Supp.2d 1135, 1143  
2 (E.D.Cal., 2010). Whether the financial resources in question are “of a level sufficient to  
3 deny an award of costs can be inferred from the economic circumstances of the plaintiff.”  
4 *Mansourian v. Bd. of Regents of the Univ. Of Cal. at Davis*, 566 F.Supp.2d 1168, 1171  
5 (E.D.Cal.2008).

6 Costs have been denied on the basis of financial inability in cases where plaintiffs are  
7 unemployed (*see, e.g. Stanley v. University of Southern California*, 178 F.3d 1069 (9th Cir.  
8 1999), overturning an award of costs and remanding to the district court to consider  
9 plaintiff’s unemployment and present indigent status), sporadically employed and low-  
10 income (*Van Horn v. Dhillon*, 2011 WL 66244 at \*4 (E.D.Cal. Jan. 10, 2011), finding that  
11 plaintiff would be considered indigent on the basis of her earning and employment, but was  
12 nevertheless able to pay due to having received a large settlement), earning under \$25,000  
13 per year (*Rivera*, 701 F.Supp.2d at 1143) or students and recent graduates with significant  
14 student debt and little income (*Mansourian*, 566 F.Supp.2d at 1171).

15 In the present case, the Plaintiffs have submitted declarations detailing their income,  
16 expenses, assets and debt, which disclose annual income of between \$84,000 and \$156,000  
17 per year. Though their own attorneys’ fees may be substantial, on the basis of their present  
18 financial resources, they are not unable to pay, nor would they be made indigent by an award  
19 of costs. There is, therefore, no financial reason why costs should not be awarded in this  
20 case.

## 21 2. Character And Qualities Of The Litigation

22 There are three factors which relate to the character and qualities of the litigation  
23 recognized by the Ninth Circuit as justifying a denial of costs: whether the claims were  
24 meritorious and the suit brought in good faith, whether the issues involved in the case were  
25 close or difficult, and whether the litigation itself was of particular importance.

26 With regards to the first, there has been no indication that the suit was not brought in  
27 good faith. The claims in this case may have been ultimately unsuccessful, but they were not  
28 without merit: the facts alleged by the Plaintiffs were sufficient to state the claims brought,

1 and, after a six-day-long bench trial, the claims failed due to Plaintiffs' failure to present  
2 evidence sufficient to meet their burden, not due to their claims having been unfounded.<sup>1</sup> The  
3 suit was clearly brought in good faith, as indicated by how the matter was pursued by both  
4 parties, and the Plaintiffs made meritorious, if unsuccessful claims. Their belief that they may  
5 have had a successful suit was reasonable.

6 With regards to the second, determinations of a case's complexity are generally made  
7 by looking to the record for indications that the question involved in the case presented some  
8 difficulty and involved significant effort to resolve. *See, e.g. Rivera*, 701 F.Supp.2d at 1144,  
9 *Dhillon*, 2011 WL 66244 at \*5. The instant case spanned over three years and culminated in  
10 six days of trial, at which nearly two hundred exhibits were entered, ten witnesses examined,  
11 and several months passed before the judgment issued, the Findings Of Fact And  
12 Conclusions Of Law spanning 41 pages in all. The copiousness of the record emphatically  
13 demonstrates the closeness and difficulty of the issues involved, which required a great deal  
14 of effort and time to resolve.

15 With regards to the third, a case is considered to be of great importance when the  
16 claims involved are subject to closer scrutiny or special interest by the court, or the issues  
17 raised in the litigation have ramifications beyond the parties and concerns immediately  
18 involved in the litigation. *See Mexican-American Educators*, 231 F.3d at 593 (requiring  
19 CBEST testing to teach in California was an issue of "the gravest public importance");  
20 *Stanley*, 178 F.3d at 1080 (an employment discrimination case brought by an individual  
21 under the Equal Pay Act raised "important issues and that the answers were far from  
22 obvious"); *Rivera*, 701 F.Supp.2d at 1141-42 (employees terminated after failing tests  
23 administered only in English raised claims involving "language-based discrimination" which  
24 "is often closely aligned with national origin discrimination, and has been recognized as  
25 being worthy of close scrutiny by the courts" and therefore, "although ultimately

---

26  
27 <sup>1</sup>Indeed, many of the claims may have been successful had they been more rigorously  
28 supported at trial—nothing indicates that the evidence was nonexistent or even unavailable to  
the Plaintiffs, and those fatal shortcomings noted by the Court in its judgment were not due  
to the claims having been unfounded, merely overlooked.

1 unsuccessful, were of substantial public importance.”; *Washburn v. Fagan*, 2008 WL 361048  
2 at \*2 (N.D.Cal. Feb.11, 2008) (civil rights claims against the San Francisco police  
3 department raised “important issues” and produced “great public concern for the issues  
4 underlying Defendants' behavior”).

5 Here, the claims raised by the Plaintiffs involve the duty of a labor union to fairly  
6 represent its members and adhere to the terms of a collective bargaining agreement.  
7 Specifically, the Plaintiffs claimed that favoritism and failure to respond to member requests  
8 constituted a breach of the agreement, and, more importantly for the purposes of the present  
9 inquiry, that arbitrary, discriminatory, bad-faith decision-making and conduct on the part of  
10 the union breached the duty of fair representation owed by labor organizations to their  
11 members. This duty is not specific to the individual unions involved in this case, but is

12 a judicially established rule imposed on labor organizations because of their  
13 status as the exclusive bargaining representative for all the employees in a  
14 given bargaining unit. The duty of fair representation exists because a single  
15 labor organization represents the interests of all employees within a unit, and if  
16 individual employees are not to be deprived of all effective means of protecting  
17 their own interests, it must be the duty of the representative organization to  
18 serve the interests of all members without hostility or discrimination toward  
19 any, to exercise its discretion with complete good faith and honesty, and to  
20 avoid arbitrary conduct. The burden of proving a breach of the duty of fair  
21 representation is on the plaintiff.

22 *Beck v. UFCW, Local 99*, 506 F.3d 874, 878-79 (quotations and citations omitted).

23 The universality of the duty of fair representation gives the issues raised in the instant  
24 case the potential to have an impact well beyond the seven individual plaintiffs, and even  
25 beyond the members of the unions involved—this is an issue of national importance, capable  
26 of impacting labor unions and their members nationwide. Not only is the potential impact of  
27 the case significant, the relationship involved is of special import—labor organizations are  
28 uniquely empowered to impact the lives of their members, and the exclusivity and high-  
stakes nature of the concerns involved underscores the import of the issues arising in this  
context. This is, in short, a case of great importance raising issues of significant public  
concern.

1 3. *Potential Chilling*

2 Where an award of costs could “lead to a harsh result that could chill...litigants from  
3 vindicating important rights” a denial of costs is appropriate. *Mansourian*, 566 F.Supp.2d at  
4 1171–72.<sup>2</sup>

5 Relatively small awards have been found not to bear sufficient potential for chilling to  
6 justify denying costs. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 (9th  
7 Cir.2003) (\$5,310.55); *Estate of Le Blanc v. City of Lindsay*, 2007 WL 2900515, at \*3  
8 (E.D.Cal. Sept. 28, 2007) (\$8,460.21); *Sorgen v. City of San Francisco*, 2007 WL 521235, at  
9 \*3–4 (N.D.Cal. Feb. 15, 2007) (\$4,987); *Ardalan v. Monterey Institute of Int'l Studies*, 2004  
10 WL 2047593, at \*3–4 (N.D.Cal. Sept. 14, 2004) (\$2,838.35).

11 Where the costs are larger, however, the potential chilling effect has been considered  
12 substantial enough to justify denying an award of costs. *See Mexican–American Educators*,  
13 231 F.3d at 591 (\$216,443.67); *Bowoto v. Chevron Corp.*, 2009 WL 1081096, at \*2  
14 (N.D.Cal. Apr. 22, 2009) (\$485,159.49); *Washburn*, 2008 WL 361048, at \*2 (\$16,268.71).

15 Plaintiffs argue that an award of costs in this case could serve to discourage workers  
16 from bringing suit against their unions, even where they may have important, meritorious  
17 claims, due to the fear of having to pay costs, should their suit prove unsuccessful. Given the  
18 amount of the award in question, which is well above the award denied in *Washburn* (and

19

20

21

---

22 <sup>2</sup>Though this factor has traditionally been invoked in civil rights cases, it is very much  
23 intertwined with the import of the case, and the two factors are often intertwined. *See, e.g.*  
24 *Stanley*, 178 F.3d at 1080. The civil rights context is special in that the claims and issues  
25 involved are almost without exception of great import, as they involve violation of  
26 fundamental rights and often raise concerns relating to the mistreatment of one or several  
27 groups, and therefore necessarily have the potential for greater impact and are of elevated  
28 public concern. The consideration of a potential chilling effect is intended to ensure that  
important litigation is not at risk of being discouraged or impaired by potential plaintiffs’ fear  
of costs should their suit prove unsuccessful. For those cases outside the civil rights arena  
but nonetheless having great importance, the capacity for broader impact and of public  
concern, there is no reason why chilling ought not be considered as a factor in the Court’s  
decision regarding costs. This is a case in which the chilling factor is applicable, as it raises  
the same concerns traditionally involved in a civil rights case. Those concerns being present  
here, this factor is appropriate for the Court’s consideration.

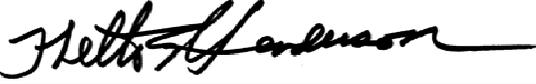
1 close to the costs denied in *Rivera*<sup>3</sup> in terms of the portion of costs each plaintiff could  
2 potentially bear), the potential to discourage future litigants from seeking to protect important  
3 rights should not be overlooked.

4  
5 **CONCLUSION**

6 This is a case brought in good faith, with meritorious claims that involved close,  
7 difficult issues. The importance of these issues is substantial. Awarding the costs sought by  
8 Defendants in this case would discourage union members from seeking to protect important  
9 rights by bringing suit against their labor union. This combination of factors is a sufficient  
10 basis for denying costs. *Mexican-American Educators*, 231 F.3d at 592. The award of costs  
11 sought by Defendants is therefore DENIED.

12  
13 **IT IS SO ORDERED.**

14  
15 Dated: 12/14/2011

  
\_\_\_\_\_  
THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27 \_\_\_\_\_  
28 <sup>3</sup>In *Rivera*, the costs totaled \$84,434.40, but, divided among 23 plaintiffs, came to \$3,671.06 for each. Here, the total cost of \$39,772.61 would come to \$3,571.43 for each of the seven Plaintiffs.