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 8 ARENA MANAGEMENT COMPANY, LLC dba HP
 PAVILION MANAGEMENT

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

12 DENIZ BOLBOL, AN INDIVIDUAL,
 JOSEPH CUVIELLO, AN INDIVIDUAL,
 13 AARON LODGE, AN INDIVIDUAL,
 TRACEY DEMARTINI, AN INDIVIDUAL,
 14 AND ALFREDO KUBA, AN INDIVIDUAL,

15 Plaintiffs,

16 v.

17 THE RINGLING BROS. AND BARNUM
 AND BAILEY CIRCUS; THE CITY OF SAN
 18 JOSE, AND HP PAVILION
 MANAGEMENT,

19 Defendants.
 20

CASE NO. C04 00082 JW

HP PAVILION MANAGEMENT'S NOTICE
 OF MOTION AND MOTION TO REVIEW
 AND VACATE CLERK'S TAXATION OF
 COSTS

[FRCP RULE 54(D)(1), LOCAL RULE 54-5]

Date: October 20, 2008
 Time: 9:00 a.m.
 Judge: Hon. James Ware
 Courtroom: 8

1 NOTICE OF MOTION

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on October 20, 2008, at 9:00 a.m., or as soon thereafter as
4 the matter may be heard in the above-entitled court, located at 280 South First Street, Courtroom
5 8, San Jose, California, Defendant San Jose Arena Management Company, LLC dba HP Pavilion
6 Management will and hereby does move for an order pursuant to FRCP Rule 54(d)(1) and Local
7 Rule 54-5 reviewing and vacating the Clerk's taxation of costs, on the ground that Plaintiff Deniz
8 Bolbol ("Bolbol") included in her bill of costs items which are not recoverable under Local Rule
9 54-3(b), namely, the costs of certain trial transcripts, and on the further ground that Bolbol may
10 not recover costs against HP Pavilion Management incurred after April 18, 2005, because the
11 judgment obtained by Plaintiffs is not more favorable than HP Pavilion Management's April 15,
12 2005 offer of judgment under Rule 68, which was served on April 18, 2005.

13 This motion will be based on this Notice of Motion, the Memorandum of Points and
14 Authorities served and filed herewith, the declaration of Thomas P. Murphy in support of the
15 motion, the papers and records on file herein, on such oral and documentary evidence as may be
16 presented at the hearing on the motion, on the reply brief, if any, and on the argument at the
17 hearing on the motion.

18 MEMORANDUM OF POINTS AND AUTHORITIES

19 I. INTRODUCTION

20 By this motion, HP Pavilion Management asks Court to review and vacate the Clerk's
21 June 27, 2008 taxation of costs, on two grounds. First, Bolbol has been allowed \$4,534.50 as
22 court reporter fees for the trial transcripts in this case which are not recoverable under this
23 Court's local rules. Second, Bolbol is not entitled to costs after April 18, 2005 in any event. HP
24 Pavilion Management served a FRCP Rule 68 offer of judgment on April 18, 2005. It is HP
25 Pavilion Management's position that Bolbol failed to obtain a judgment against HP Pavilion
26 Management that is more favorable than the offer of judgment, and that therefore all of her
27 claimed costs incurred after that date should be disallowed. HP Pavilion Management is mindful
28 that, in deciding the attorneys' fees motion of Bolbol and CuvIELLO, the Court has previously

1 determined that the Rule 68 offer is not more favorable than the judgment. Docket No. 446. HP
2 Pavilion Management reasserts its position solely in order to preserve its rights on review of that
3 determination, in particular as it may be applied to the Clerk's June 27, 2008 taxation of costs.

4 II. FACTUAL BACKGROUND

5 The Court entered its Judgment and Permanent Injunction on August 30, 2006. *See*
6 Docket No. 332. On September 13, 2006, Plaintiffs electronically filed a bill of costs in which
7 they claimed \$8,156.26 in costs. Docket No. 344. The Clerk taxed costs in the amount of
8 \$8,009.76 two days later. Docket No. 353. On October 2, 2006, HP Pavilion Management filed
9 a motion to vacate or review the clerk's taxation of costs, in part on the basis that the clerk taxed
10 costs prematurely. Docket No. 359 (a courtesy copy of this motion is attached as Exhibit A to
11 the Declaration of Thomas P. Murphy in Support of Motion to Review Clerk's Taxation of Costs
12 ("Murphy Declaration"), filed concurrently herewith. In the alternative, HP Pavilion
13 Management argued that the transcript and any costs incurred after April 18, 2005 were
14 improperly allowed. *Id.* at pp. 5-6.¹

15 On April 16, 2007, Bolbol and Plaintiff Joseph CuvIELLO ("CuvIELLO") opposed HP
16 Pavilion Management's October 2, 2006 motion. Docket No. 415; Murphy Declaration, Exhibit
17 B. In their opposition, Bolbol and CuvIELLO agreed that the clerk had prematurely taxed the costs
18 (*Id.* at p. 2:3), but devoted nearly all of the opposition to addressing the merits of HP Pavilion
19 Management's arguments concerning whether the Rule 68 offer was more favorable than the
20 judgment and whether the costs of trial transcripts were properly allowed. *Id.* at pp. 2:6-7:17.

21
22 ¹ As the Court is aware, prior to trial in this matter, on April 15, 2005, HP Pavilion
23 Management served a Rule 68 Offer of Judgment on Bolbol and CuvIELLO in which HP Pavilion
24 Management offered to allow judgment to be taken against it in the amount of \$5,000 as to each
25 plaintiff, together with reasonable attorneys' fees and costs incurred to the date of the offer, and
26 to permit access to HP Pavilion facilities for speech activities. *See* October 2, 2006 Declaration
27 of Thomas P. Murphy in Support of Motion to Vacate or Review Clerk's Taxation of Costs, ¶ 4
28 and Exhibit B thereto. Docket No. 360. The August 30, 2006 Judgment and Permanent
Injunction awarded Bolbol and CuvIELLO each damages of \$2,400.00. The Court also awarded
certain injunctive relief. *See* Docket Entry No. 332. HP Pavilion Management contended that
the final judgment was less favorable than the Rule 68 offer so that Bolbol and CuvIELLO could
not recover attorneys' fees or costs after April 18, 2005. *See infra.*

1 HP Pavilion Management filed a reply to the opposition on May 7, 2007; that reply addressed
2 only the merits of its arguments regarding the Rule 68 offer and the trial transcripts. *Id.*

3 On August 22, 2007, the Court issued an order indicating that it would allow attorneys'
4 fees after HP Pavilion Management served its April 18, 2005 Rule 68 offer and referring the
5 question of the amount of fees to Magistrate Judge Seeborg. Docket No. 446. This order also
6 granted HP Pavilion Management's motion to vacate the taxation of costs and ordered Bolbol
7 and CuvIELLO to resubmit their costs bill by September 10, 2007, with HP Pavilion Management
8 to file its objections by September 17, 2008 and the Clerk to tax costs immediately following that
9 date. *Id.* at p. 8:1-5. The order also provided that the parties' right to file post-taxations motions
10 were not affected by the order. *Id.*

11 Bolbol and CuvIELLO did not file a cost bill by September 10, 2007 but later sought leave
12 to file a late cost bill. Docket Nos. 454, 455. On April 25, 2008, the Court allowed Bolbol and
13 CuvIELLO leave to file a late cost bill. Docket No. 466, p. 2. Bolbol filed a cost bill that same
14 day, seeking \$8,009.76 in costs. Docket No. 467, p. 2. CuvIELLO has not filed a resubmitted bill
15 of costs. On June 27, 2008, the Clerk taxed costs in favor of Bolbol in the amount of \$5,426.31.
16 Docket No. 492. Of this amount, \$4,534.50 represented the costs of trial transcripts. *Id.*

17 A. *Under this Court's Local Rules, Bolbol May Not Be Allowed the Cost of Trial*
18 *Transcripts.*

19 The Clerk has allowed Bolbol costs that are not allowable under this Court's local rules.
20 Costs were taxed in the amount of \$4,534.50 for fees of the court reporter for trial transcripts.
21 Docket No. 492. Under Local Rule 54-3(b), the costs of transcripts other than those necessarily
22 obtained for an appeal or the cost of a transcript of a statement by a judge from the bench which
23 is to be reduced to a formal order prepared by counsel are not normally allowable unless, before
24 they are incurred, they are approved by a judge or stipulated to be recoverable by counsel.
25 Bolbol has not made and cannot make any showing that the Court approved such costs or that
26 counsel stipulated that they would be recoverable.

27 Moreover, although Bolbol has appealed from the Court's judgment in this case, it cannot
28 be said that the transcripts were necessarily obtained for an appeal. First, \$957 of her claim is for

1 transcripts of proceedings held on January 10 and 13, 2006. Docket No. 467, p. 15. These were
2 apparently ordered on an expedited basis on January 20, 2006, months before the Court
3 conducted its trial on injunctive relief in May 2006 and long before the final judgment was
4 entered on August 30, 2006. Docket No. 338. Also, on May 12, 2006, before the injunction
5 trial, Bolbol and CuvIELLO ordered additional transcripts of proceedings held on January 10, 2006
6 to January 20, 2006, for which Bolbol was allowed \$3,195.12. Bolbol and CuvIELLO ordered
7 these transcripts before the result of the injunction trial was even known. Hence, the transcripts
8 were not necessarily obtained for an appeal. Indeed, Bolbol has previously argued that the
9 transcripts were used for “preparing for the second phase of trial where the permanent injunction
10 was at issue.” Docket No. 415, p. 7:2-3. Although she likened her use of the transcripts in this
11 manner to the use of transcripts for an appeal (*Id.* at p. 7:1-17), in doing so she effectively
12 acknowledged that she had not obtained the transcripts for an appeal. And although in June
13 2007, Bolbol filed an appeal from the judgment (Docket No. 439), there is no indication that she
14 ordered the transcripts in January and May 2006 for that purpose. To the contrary, as noted it
15 appears that she obtained them for use in the district court proceedings. Local Rule 54-3(b)(3) is
16 clear: “the cost of other transcripts [apart from transcripts necessarily obtained for an appeal or a
17 statement by a judge from the bench which is to be reduced to a formal order’ is not normally
18 allowable unless, *before it is incurred*, it is approved by a judge or stipulated to be recoverable
19 by counsel” (italics added). There was no such judicial approval or stipulation.

20 In any event, under Federal Rules of Appellate Procedure Rule 39(a), appellate costs,
21 including necessary reporter’s transcripts (FRAP Rule 39(d)), are assessed in favor of the party
22 prevailing in the appeal. The cost of the reporter’s transcript, if needed to determine the appeal,
23 is taxed in the district court for the benefit of the party entitled to costs under FRAP Rule 39.
24 See FRAP Rule 39(e). If the basis for allowing the cost of the reporter’s transcript is that it is
25 necessary for appeal, then it would be premature to tax that cost before the pending appeals are
26 determined.

27 Accordingly, under Local Rule 54-3(b), the Court should disallow the \$4,534.50. 45
28 allowed to Bolbol as transcript costs.

