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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 16cv2644-WQH-MSB

**ORDER**

CHEAP EASY ONLINE  
TRAFFIC SCHOOL; BORNA  
MOZAFARI AND MARLA  
KELLER AS TRUSTEES FOR  
CHEAP EASY ON-LINE  
TRAFFIC SCHOOL PENSION  
PLAN; BORNA MOZAFARI AS  
TRUSTEE FOR THE CHEAP  
EASY ON-LINE PROFIT  
SHARING PLAN; EASY ON  
LINE TRAFFIC SCHOOL.COM,  
INC.; MARLA KELLER AS  
TRUSTEE FOR THE MARLA  
KELLER PENSION PLAN AND  
MARIA KELLER 401(K) PLAN,  
Plaintiffs,

v.

PETER L. HUNTTING & CO.,  
INC.; SMI PENSIONS;  
SHEFFLER CONSULTING  
ACTUARIES INC.; ESTATE OF  
PETER L. HUNTTING; MIKE  
EDWARDS; WILLIAM  
SHEFFLER; ECONOMIC  
GROUP PENSION SERVICES

1 GROUP, INC.; and DOES 1 to  
2 100, inclusive ,  
3 Defendants.

4 HAYES, Judge:

5 The matters before the Court are the motions for reconsideration of attorney fees  
6 filed by Defendants. (ECF Nos. 112, 113).

7 **I. BACKGROUND**

8 On September 13, 2017, Plaintiffs Cheap Easy Online Traffic School; Borna  
9 Mozafari and Marla Keller, as Trustees for Cheap Easy On-Line Traffic School Pension  
10 Plan; Borna Mozafari, as Trustee for the Cheap Easy On-Line Profit Sharing Plan; Easy  
11 On Line Traffic School.Com, Inc.; and Marla Keller, as Trustee for the Marla Keller  
12 Pension Plan and Marla Keller 401(K) Plan filed the First Amended Complaint, the  
13 operative complaint in this action. (ECF No. 34). Plaintiffs alleged that Defendants, who  
14 provided actuarial and administrative services in connection with the Plans, breached their  
15 fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA).  
16 Plaintiffs alleged that the Defendants' recommendations resulted in overfunding of the  
17 Plans and termination of the Plans. Plaintiffs alleged that the Defendants' conduct caused  
18 Plaintiffs significant excise and income tax damages. Plaintiffs additionally brought state  
19 law claims arising from Defendants' conduct in relation to the Plans. (ECF No. 34).

20 On December 13, 2018, the Court granted summary judgment in favor of  
21 Defendants. (ECF No. 88).

22 On January 11, 2019, Plaintiffs filed a notice of appeal to the Court of Appeals for  
23 the Ninth Circuit with respect to the Order granting summary judgment. (ECF No. 91).

24 On December 20, 2019, Defendants filed a joint motion to extend time to file  
25 motions for attorneys' fees and costs. (ECF No. 89).

26 On December 21, 2019, the Court granted the parties' joint motion to extend time to  
27 file motions for attorneys' fees and costs. (ECF No. 90). The Court ordered any motions  
28 for attorney's fees be filed on or before January 27, 2019. *Id.*

1 On January 24, 2019, Defendants submitted bills of costs. (ECF Nos. 96, 101).

2 On February 7, 2019, Plaintiffs filed an objection to the bills of costs. (ECF No.  
3 102).

4 On February 8, 2019, the Clerk of Court denied the bills of costs for failure to file  
5 within fourteen days after entry of judgment pursuant to Local Rule 54.1.a. (ECF No. 103).

6 On May 9, 2019, the Court denied Defendants' motions for attorney fees. (ECF No.  
7 111).

8 On June 5, 2019, Defendants filed motions for partial reconsideration of the Order  
9 denying attorney fees. (ECF Nos. 112, 113).

10 On June 6, 2019, Defendants filed notices of appeal with respect to the Order  
11 denying attorney fees. (ECF Nos. 114, 115).

12 On June 17, 2019, the Court of Appeals for the Ninth Circuit ordered appellate  
13 proceedings with respect to the denial of attorney fees to be held in abeyance pending the  
14 resolution of the motions for partial reconsideration of the denial of attorney fees. (ECF  
15 Nos. 120, 121).

16 On July 1, 2019, Plaintiffs filed a response in opposition to the motions for partial  
17 reconsideration. (ECF No. 122).

18 On July 8, 2019, Defendants filed replies in support of the motions for partial  
19 reconsideration. (ECF Nos. 123, 124).

## 20 **II. DISCUSSION**

21 Defendants contend that the Court committed clear error in failing to address and  
22 rule on Defendants' request for costs. Defendants assert that the reply briefings from the  
23 initial motions for attorney fees requested that the Court award costs pursuant to ERISA.  
24 Defendants assert that Defendants requested the same costs pursuant to Fed. R. Civ. Proc.  
25 54(d)(1), which the Clerk of Court denied as untimely. Defendants request "that for  
26 purposes of a complete record the Court grant their Motion for Partial Reconsideration of  
27 the Order which was seemingly limited only to a ruling on their request for attorney fees,  
28

1 in order to allow the Court to alter or amend the Order to also address and rule on their  
2 request for an award of costs of action.” (ECF Nos. 123, 124 at 3).

3 Plaintiffs contend that Defendants are not entitled to reconsideration because the  
4 Court did not commit clear error by not addressing the issue of costs in the Order denying  
5 attorney fees. Plaintiffs contend that res judicata and collateral estoppel prohibit  
6 Defendants relitigating the issues related to costs. Plaintiffs contend that the Court was not  
7 required to address costs when ruling on Defendants’ motion for attorney fees because the  
8 issue of costs was addressed separately and with finality when the Clerk of Court denied  
9 the requests for costs as untimely. Plaintiffs contend that the local rules required  
10 Defendants to seek review of the Clerk’s denial of costs within seven days, which  
11 Defendants failed to do.

12 “Reconsideration is an extraordinary remedy, to be used sparingly in the interests of  
13 finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229  
14 F.3d 877, 890 (9th Cir. 2000); *see also United Nat’l Ins. Co. v. Spectrum Worldwide, Inc.*,  
15 555 F.3d 772, 780 (9th Cir. 2009). “[A] motion for reconsideration should not be granted,  
16 absent highly unusual circumstances, unless the district court is presented with newly  
17 discovered evidence, committed clear error, or if there is an intervening change in the  
18 controlling law.” *Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d  
19 873, 880 (9th Cir. 2009) (citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th  
20 Cir. 1999)). The party seeking reconsideration has the burden of demonstrating that  
21 reconsideration is warranted. *See Mitchell v. San Diego Cty. Sheriff*, 17 Fed.Appx. 697,  
22 697–98 (9th Cir. 2001); *Kohl v. Las Vegas Metro. Police Dep’t*, 17 Fed.Appx. 706, 706–  
23 07 (9th Cir. 2001). “Clear error occurs when the ‘reviewing court on the entire record is  
24 left with the definite and firm conviction that a mistake has been committed.’” *Smith v.*  
25 *Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *United States v. U.S.*  
26 *Gypsum Co.*, 333 U.S. 364, 395 (1948)). “Whether or not to grant reconsideration is  
27 committed to the sound discretion of the court.” *Navajo Nation v. Confederated Tribes &*  
28 *Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

1            “In an ERISA action, ‘the court in its discretion may allow a reasonable attorney’s  
2 fee and costs of action to either party.’” *Simonia v. Glendale Nissan/Infiniti Disability*  
3 *Plan*, 608 F.3d 1118, 1120 (9th Cir. 2010) (quoting 29 U.S.C. § 1132(g)(1)). The factors  
4 set forth by *Hummell v. S.E. Rykoff & Co.* govern awards of both costs and fees pursuant  
5 to ERISA. *See Franklin v. Thornton*, 983 F.2d 939, 943 (9th Cir. 1993) (reversing costs  
6 awarded pursuant to ERISA where district court did not weigh *Hummell* factors) (citing  
7 634 F.2d 446 (9th Cir. 1980)); *Tingey v. Pixley–Richards West, Inc.*, 958 F.2d 908, 910  
8 (9th Cir. 1992) (denying costs pursuant to ERISA based on *Hummell* factors); *see also*  
9 *Mogck v. UNUM Life Ins. Co. of America*, No. Civ. 99-CV-201-CGA, 2001 WL 34084379,  
10 at \*1–2 (S.D. Cal. Jan. 8, 2001) (same).

11            In this case, Defendants requested awards “of attorney’s fees *and statutory costs of*  
12 *action under ERISA § 502(g)(1).*” (ECF Nos. 99, 100 at 11) (emphasis added). The Court  
13 stated, “ERISA provides that ‘the court in its discretion may allow a reasonable attorney’s  
14 fee *and costs of action to either party.*” (ECF No. 111 at 3 (quoting 29 U.S.C. §  
15 1132(g)(1)) (emphasis added)). The Court denied the motions in their entirety. *Id.* at 6.  
16 Defendants have provided no authority supporting the conclusion that the Court was  
17 required to separately address and rule on the requests for costs and fees pursuant to  
18 ERISA. Defendants have identified no substantive difference between costs and fees with  
19 respect to the Court’s analysis of the *Hummel* factors in this case. *See Franklin*, 983 F.2d  
20 at 943; *Tingley*, 958 F.2d at 910. The Court finds that Defendants have not carried the  
21 burden to demonstrate that the Court committed clear error by not separately addressing  
22 and ruling on Defendants’ request for costs pursuant to ERISA. *See Marlyn*  
23 *Natraceuticals*, 571 F.3d at 880. The Court declines to grant reconsideration for purposes  
24 of addressing requests for costs that were made pursuant to ERISA.<sup>1</sup>

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27 <sup>1</sup> Defendants do not request reconsideration on the grounds that the Clerk improperly denied costs pursuant  
28 to Local Rule 54.1.a on February 8, 2019. Defendants did not timely move to retax costs and are not  
entitled to costs pursuant to Rule 54 at this stage in the proceedings. *See Fed. R. Civ. Proc. 54(d)(1)* (“On  
motion served within the next 7 days, the court may review the clerk’s action.”); S.D. Cal. Civ. R. 54.1.h.

1       **III. CONCLUSION**

2           The motions for reconsideration (ECF Nos. 112, 113) are DENIED.

3       Dated: August 2, 2019

*William Q. Hayes*

Hon. William Q. Hayes

United States District Court

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(“A review of the decision of the clerk in the taxation of costs may be taken to the court on motion to re-tax . . . . A motion to retax must be served and filed within seven (7) days . . . .”).