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6 **Attorneys for Defendant PEPPERDINE UNIVERSITY**

7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10
11 HALEY VIDECKIS and LAYANA
WHITE, individuals,

12 Plaintiffs,

13 vs.

14 PEPPERDINE UNIVERSITY, a
15 corporation doing business in
California,

16 Defendant.

Case No. 2:15-cv-00298-DDP (JCx)

**FIRST AMENDED¹ NOTICE OF
MOTION AND MOTION TO
AMEND JUDGMENT OR IN THE
ALTERNATIVE RECONSIDER
ORDER; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF ATTORNEY
AND EXHIBIT IN SUPPORT
THEREOF**

Date: October 30, 2017
Time: 10:00 a.m.
Dept.: 9C

Trial Date: July 18, 2017

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20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 NOTICE IS HEREBY GIVEN that on **October 30, 2017, at 10:00 a.m.** or as
22 soon thereafter as the matter may be heard in Courtroom 9C located at 350 West
23 First Street, Los Angeles, CA 90012, Defendant PEPPERDINE UNIVERSITY

24 _____
25 ¹ This document is being filed solely to address clerical errors in the initial
26 electronic filing of the document. This document was submitted with the incorrect
27 exhibit attached. The correct exhibit has been substituted and no further changes
28 have been made.

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1 (“Pepperdine”) will, and hereby does, move the Court for an order to amend its
2 judgment [Docket No. 253] in order to provide for an award of costs to Pepperdine,
3 or in the alternative, for reconsideration of its ruling to not award costs to prevailing
4 party Pepperdine [Docket No. 252].

5 This Motion is made upon the grounds that Pepperdine is entitled to costs
6 under Federal Rules of Civil Procedure section 54(d) and asserts there is no good
7 cause to deny costs in this matter. Pepperdine was not able to address the Court on
8 this issue since the Court entered its order denying Pepperdine its costs on the
9 Court’s own motion without notice [Docket No. 252] and Pepperdine seeks leave to
10 be heard on this issue.

11 This Motion is made pursuant to Federal Rules of Civil Procedure 54 and
12 59(e) and Local Rule 7-18 and is based upon this notice of motion, the attached
13 memorandum of points and authorities, the declaration of David R. Hunt and
14 exhibits attached thereto, defendant’s memorandum of costs, all of the pleadings,
15 files and records in this proceeding, all other matters of which the Court may take
16 judicial notice, and any argument or evidence that may be presented to be
17 considered by the Court prior to this ruling.

18
19 DATED: September 26, 2017 ANDERSON, McPHARLIN & CONNERS LLP

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21
22 By: /s/ David R. Hunt
23 Paula Tripp Victor
24 David R. Hunt
25 Peter B. Rustin
26 Attorneys for Defendant PEPPERDINE
27 UNIVERSITY
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Costs are recoverable under Federal Rule of Civil Procedure (“FRCP”) 54(d) as a matter of right absent a statute or court order to the contrary. The Court may in its discretion order that costs cannot be recovered by a prevailing party upon a showing justifying that order. The party opposing an award of costs has the burden of proof to establish that costs should not be awarded. Typically the argument is made in a motion to re-tax costs filed by the defeated party. Such a motion would have given the prevailing party, here Pepperdine, the opportunity to oppose that position and demonstrate why costs are justified. Moreover, following this statutory scheme would have created a record to address the issue on appeal if the parties wished to challenge any decision on the award of, or failure to award, costs.

With respect, Pepperdine wishes to be heard on the question of recovery of costs and effectively put the plaintiffs to their proof on the issue. As a result, Pepperdine moves for amendment of the judgment pursuant to Federal Rule of Civil Procedure 59(e) to allow it to recover its costs as prevailing party or in the alternative reconsideration of the Court’s order under Local Rule 7-18 regarding denial of costs.

II. STATEMENT OF THE CASE

This matter was filed on December 10, 2014 asserting effectively that the plaintiffs were discriminated against and harassed due to their sexual orientation. Pepperdine denied any such discrimination for harassment and ultimately brought the case to trial before this honorable Court commencing on July 18, 2017 and concluding on August 11, 2017. The jury returned a verdict within 4 hours. The jury found in Pepperdine’s favor on the first question of the special verdict forms on each of the four theories presented to them.

Virtually all of the evidence submitted during the jury trial was offered by Pepperdine. Plaintiffs were the only two percipient witnesses that offered testimony

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1 on their behalf. All of the other percipient witnesses were either Pepperdine
2 employees or Pepperdine basketball players. In effect, Plaintiffs had no evidence of
3 their own and attempted to prove their case through cross-examination.

4 **III. DISCUSSION**

5 Pepperdine submits to the Court that none of the five bases under 9th Circuit
6 law that would justify denying a prevailing defendant an award of the costs apply
7 here. (*See, Draper v. Rosario*, 836 F.3d 1072 (9th Cir 2016); *Association of*
8 *Mexican-American Educ. V. State of California*, 231 F.3d 572, 591 (9th Cir. 2000, en
9 banc); *Stanley v. University of S. California*, 178 F.3d 1069 (9th Cir 1999).)

10 Pepperdine asserts that all five bases should be examined in the light of the nature of
11 the evidence that was submitted by Plaintiffs and the jury’s prompt decision after
12 such a short deliberation.

13 With respect to the Court, Pepperdine asserts that this case did not present
14 substantial public importance. The evidence firmly showed that Plaintiffs were fully
15 mistaken on their claims that they were harassed or discriminated against based
16 upon sexual orientation. Uniformly all of the basketball players who were on their
17 team and all of the assistant coaches, and all of the athletic training staff and doctors
18 and the academic coordinator, many of whom themselves identified as gay or
19 bisexual, testified that no such thing occurred. What effectively happened was
20 Plaintiffs asserted something that just was not true.

21 These facts also demonstrate that this case was not close or difficult. The jury
22 spent four hours deciding the case. Clearly it was easy for the jury to judge the
23 relative position of the parties and find Plaintiffs to be wrong.

24 Further, there is no evidence that Plaintiffs lack financial resources. In fact,
25 the testimony was that they made over \$100,000 in the one year between leaving
26 Pepperdine and beginning school at USC. Moreover, plaintiff Haley Videckis has
27 financial resources in the form of a trust account following the death of her father.
28 This is information presented during the trial; more information from testimony of

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1 Ms. Videckis’ mother, not offered at trial but which could have been if Plaintiffs had
2 filed a motion to tax costs, is available. Yes, they were scholarship basketball
3 players, but that does not mean they did not have resources of their own. Since
4 athletic scholarships are scholarships awarded regardless of financial need, this fact
5 does not establish a lack of financial resources. Thus, there is evidence to establish
6 a lack of a significant economic disparity between the parties.

7 Finally, Pepperdine submits that the award of costs would not create a chilling
8 effect in similar actions. The goal of such actions is to identify and resolve any
9 harassment or discrimination based upon sex (or here, sexual orientation, as allowed
10 by the Court). To that end, the law encourages plaintiffs to notify appropriate
11 individuals within an institution of those claims so the institution can resolve the
12 problems. Plaintiffs in this case never informed Pepperdine of their claims of sexual
13 orientation discrimination until Plaintiffs’ filed their Title IX complaint and this
14 lawsuit was a foregone conclusion. They had already retained a lawyer. Plaintiffs
15 simply were not pursuing the investigation of their claims at the institution level in
16 good faith. An award of costs to the prevailing party in this case would incentivize
17 potential plaintiffs to actually make their claims prior to litigation so that the claims
18 can be resolved promptly and to their benefit.

19 **IV. CONCLUSION**

20 Based upon all of the above, Pepperdine moves this Court for an order
21 amending the judgment and providing for the recovery of costs by the prevailing

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1 party, Pepperdine University, or in the alternative reconsidering its order denying
2 Pepperdine its costs as prevailing party.

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DATED: September 26, 2017 Respectfully submitted,

ANDERSON, McPHARLIN & CONNERS LLP

By: /s/ David R. Hunt
Paula Tripp Victor
David R. Hunt
Peter B. Rustin
Attorneys for Defendant PEPPERDINE
UNIVERSITY

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DECLARATION OF DAVID R. HUNT

I, DAVID R. HUNT, declare:

1. I am an attorney licensed to practice law in the courts of the State of California and am admitted to the bar of the United States District Court, Central District of California. I was one of the attorneys trying this case and I know the facts set forth herein of my own personal knowledge and can testify competently thereto in a court of law.

2. Attached hereto as Exhibit "A" and hereby incorporated by reference is a true and correct copy of defendant's proposed cost bill. Pepperdine University seeks to recover \$73,824.74 in costs based upon the cost bill being presented to the Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Los Angeles, California on September 26, 2017.

/s/ David R. Hunt
DAVID R. HUNT

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Exhibit A to Application to the Clerk to Tax Costs**Itemization of Costs with Documentation****Filing Fees**

| | |
|--|-------------------|
| First Appearance Fees (Weisenberg and Pepperdine University) | 870.00 |
| Notice of Removal | 400.00 |
| Total | \$1,270.00 |

Fees for Service of Process

| Witness | Total |
|--|--------------------|
| Antonio White (includes surveillance) | 2,660.95 |
| Tamil White (includes surveillance) | 458.45 |
| Nancy Videckis (includes surveillance) | 1,914.10 |
| Babak Barcohana | 109.55 |
| Anne Stone (includes surveillance) | 4,450.74 |
| University of Arizona, PMK | 194.00 |
| Niya Butts | 309.25 |
| University of Southern California | 105.42 |
| Arizona State University, COR | 270.25 |
| University of Arizona, COR | 271.25 |
| Chris Allen | 295.75 |
| Total | \$11,039.71 |

Depositions

| Deponent | Total |
|------------------------|--------------|
| Layana White, 5/23/16 | 2,113.10 |
| Layana White, 5/24/16 | 1,954.70 |
| Layana White, 7/6/16 | 424.60 |
| Haley Videckis, 6/6/16 | 1,933.60 |
| Haley Videckis, 6/7/16 | 1,784.30 |
| Haley Videckis, 7/6/16 | 549.50 |

| Deponent | Total |
|---|--------------|
| Ryan Weisenberg, 6/1/16 | 1,651.55 |
| Ryan Weisenberg, 6/2/16 | 1,666.10 |
| Adi Conlogue | 699.80 |
| Krista Pettepier | 2,917.05 |
| Krista Pettepier witness fees for appearance at deposition | 63.00 |
| Bria Richardson | 2,769.90 |
| Kelsey Brockway | 2,290.30 |
| Christopher Allen | 541.50 |
| Christopher Allen witness fees for appearance at deposition | 46.00 |
| Trisha Raniewicz | 999.30 |
| Jordan Adams-Smith | 1,084.60 |
| Karissa Scherer | 1,322.10 |
| Diana Padilla | 649.70 |
| Tabatha Jones Jolivet | 1,611.40 |
| Mallorie Winn | 908.00 |
| Nancy Videckis | 1,746.15 |
| Nancy Videckis witness fees for appearance at deposition | 150.41 |
| Susy Mason, PMK for University of Arizona | 1,585.70 |
| Tamil White | 750.30 |
| Tamil White witness fees for appearance at deposition | 70.00 |
| Antonio White | 1,077.40 |
| Antonio White witness fees for appearance at deposition | 70.00 |
| Reyes Zaragoza | 772.30 |
| Steven Potts | 1,042.70 |
| Gary Green | 804.20 |
| Mark Davis, 2/13/17 | 935.90 |
| Mark Davis, 3/1/17 | 1,165.30 |
| Brian Barrio | 797.20 |
| Niya Butts | 839.00 |
| Sean Michael Phillips | 510.10 |

| Deponent | Total |
|-------------------------------------|--------------------|
| Keitra Wallace | 884.10 |
| Karina Herold | 857.80 |
| Margaret Murphy | 659.30 |
| Victoria Wilkerson | 653.30 |
| Whitney Williams | 628.50 |
| Jody Shipper | 659.50 |
| Christopher Schoemann | 366.80 |
| Richard Mouw | 441.70 |
| Sourav Poddar | 475.90 |
| Ronald Roberts | 567.10 |
| Anthony Reading, 6/6/17 late cancel | 195.00 |
| Anthony Reading, 6/15/17 | 1,561.90 |
| Anthony Reading, 7/19/17 | 566.54 |
| Barbara Luna | 598.80 |
| Donna Lopiano | 1,311.75 |
| Margaret Sanders | 1,497.40 |
| Eliot Felman | 597.40 |
| Total | \$52,819.55 |

Witness Fees

| Witness | Type | Travel Expenses |
|--|--|------------------------|
| Brian Barrio, Reno, NV | Airfare, hotel, meals, ground transportation | 960.39 |
| Krista Pettepier, Ankeny, IA | Airfare, hotel, meals, ground transportation | 2,578.53 |
| Mark Levy, San Francisco, CA | Airfare, hotel, meals, ground transportation | 1,032.44 |
| Ronald Roberts, San Francisco, CA | Airfare, hotel, meals, ground transportation | 718.40 |
| Tabatha Jones Jolivet, Thousand Oaks, CA | Hotel, meals, ground transportation. 130 miles/\$.535 = \$69.86; parking \$16 | 861.78 |
| Mallorie Winn, Oakland, CA | Airfare, hotel | 980.11 |

| Witness | Type | Travel Expenses |
|-------------------------------------|--|------------------------|
| Jordan Adams Smith, Leander, TX | Airfare, hotels, meals, ground transportation | 1,160.58 |
| Keitra Wallace, Corona, CA | Witness fee \$40; 100 miles/\$.535 = \$53.50; parking \$11 | 104.50 |
| Keitra Wallace, Corona, CA | Day 2. 100 miles/\$53.5 = \$.535; parking \$11 | 64.50 |
| Kelsey Brockway, Redondo Beach, CA | Witness fee \$40; 50 miles/\$.535 \$26.75; parking \$8 | 74.75 |
| Whitney Williams, Redondo Beach, CA | Witness fee \$40; 50 miles/\$.535 \$26.75; parking \$8 | 74.75 |
| Allie Green, Long Beach, CA | Witness fee \$40; 50 miles/\$.535 \$26.75; parking \$18 | 84.75 |
| Total | | \$8,695.48 |