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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
12

13 **HALEY VIDECKIS and LAYANA**
WHITE, individuals,
14 **Plaintiffs,**
15 **v.**
16 **PEPPERDINE UNIVERSITY, a**
corporation doing business in
17 **California,**
18 **Defendant.**
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CASE NO. 2:15-CV-00298-DDP (JCx)
[Assigned to Hon. Dean D. Pregerson,
Courtroom 9C]

**PLAINTIFFS HALEY VIDICKIS
AND LAYANA WHITE'S
OBJECTION TO DEFENDANT
PEPPERDINE UNIVERSITY'S
FIRST AMENDED APPLICATION
TO THE CLERK TO TAX COSTS**

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1 Plaintiffs Haley Videckis and Layana White hereby object to Defendant
2 Pepperdine University’s First Amended Application to The Clerk to Tax Costs, Dkt.
3 257. This objection is made pursuant to Local Rule 54-2.2 and 7-9.

4 **I. INTRODUCTION**

5 Plaintiffs object to this application to tax costs as inappropriate, in light of this
6 Court’s order denying costs. Dkt. 252. The Court correctly based its decision the
7 following facts: the *Videckis* case raised issues of substantial public importance; the
8 issues in the case were extremely difficult and close; an award of costs would have
9 an undesired chilling effect on future similar civil rights actions; the plaintiffs have
10 very limited financial resources; and there is a significant economic disparity
11 between the parties. Pepperdine’s application does nothing to refute any of these
12 elements necessary to overturn the Court’s order.

13 Pepperdine also comes to the Court with unclean hands. Among the events
14 that made this case “extremely difficult and close” were serial Pepperdine witnesses,
15 or witnesses affiliated with Pepperdine, who recanted their deposition testimony or
16 made false statements that were directly contradicted by their deposition testimony.
17 In at least one instance, the recanting witness testified that Pepperdine and its
18 counsel knew of the purported change in testimony for six months before trial
19 without disclosing that fact to Plaintiffs’ counsel.

20 Plaintiffs respectfully request that this Court reaffirm its exercise of discretion
21 under Fed. R. Civ. P. 54(d) to deny Defendant Pepperdine’s Application to Tax
22 Costs.

23 **II. DISCUSSION**

24 **A. This Court Has Already Denied Costs**

25 The Court has already determined that defendant should not be awarded costs.
26 Dkt. 252. The Court applied all the requisite elements to exercising its discretion,
27 and concluded that this case raised issues of substantial public importance,
28 contained issues that were extremely difficult and close, and would result in an

1 undesired chilling effect on future similar civil rights actions if costs were awarded.
2 The Court further noted that evidence at trial revealed that the plaintiffs have very
3 limited financial resources and recognized the significant economic disparity
4 between the parties.

5 The Court’s decision is consistent with legal standards which allow the Court
6 to exercise discretion on whether or not costs are awarded. FRCP 54(d) provides for
7 taxable costs “[u]nless...a court order provides otherwise.” Fed. R. Civ. P. 54(d).

8 Supreme Court cases interpreting Rule 54(d) make clear, this Court has the
9 discretion to decline to tax costs in favor of the prevailing party. *Farmer v. Arabian*
10 *American Oil Co.*, 379 U.S. 227 (1964). Acceptable bases for denying costs
11 include, but are not limited to all the factors cited in the Court’s existing order: “(1)
12 the substantial public importance of the case, 2) the closeness and difficulty of the
13 issues in the case, 3) the chilling effect on future similar actions, 4) the plaintiff’s
14 limited financial resources, and 5) the economic disparity between the parties.”
15 *Draper v. Rosario*, 836 F.3d 1072, 1087 (9th Cir. 2016). Plaintiffs request the Court
16 reaffirm its decision to deny costs, as it has already ruled on the issue.

17 **This “Application” Is Tantamount To A Motion For**
18 **Reconsideration, And Fails The Heightened Standard To**
19 **Overcome The Court’s September 11 Order**

20 Since this Court already denied an award of costs to Pepperdine (Dkt. 252),
21 the proper vehicle for opposing such an order is a Motion for Reconsideration
22 (which Pepperdine also filed), not an Application for Costs. Federal Rule of Civil
23 Procedure 59 and Local Rule 7-18 provide the standards for reconsideration of a
24 prior ruling. “Under Rule 59(e), a motion for reconsideration should not be granted,
25 absent highly unusual circumstances, unless the district court is presented with
26 newly discovered evidence, committed clear error, or if there is an intervening
27 change in the controlling law.” *389 Orange St. Partners v. Arnold*, 179 F.3d 656,
28 665 (9th Cir. 1999) (citing *School Dist. No. 13 v. ACANDS, Inc.*, 5 F.3d 1255, 1263

1 (9th Cir. 1993)). Local Rule 7-18 sets the standard of review for a motion for
2 reconsideration and states that such a motion will be granted only upon a showing
3 by the moving party that (a) a material difference in fact or law from that presented
4 to the Court before such decision that in the exercise of reasonable diligence could
5 not have been known to the party moving for reconsideration at the time of such
6 decisions or (b) the emergence of new material facts or a change of law occurring
7 after the time of such decision, or (c) a manifest showing of a failure to consider
8 material facts presented to the Court before such decision.

9 None of the factors that would merit a reconsideration of the Court’s
10 September 11, 2017 Order re Costs (Dkt. 252) are present here. There is no material
11 difference in fact or law from what the Court was presented with prior to its
12 decision. There are no new material facts or changes of law that have occurred
13 since the Court’s decision 21 days ago or a manifest showing of a failure by the
14 Court to consider material facts presented to it. Pepperdine therefore has no basis
15 for its frivolous Application.

16 **C. Factors Weigh Against Awarding Costs**

17 **1. This Case Raised Issues of Substantial Public Import that**
18 **Were Close and Difficult**

19 Where a case involves issues of substantial public importance, *see Ass’n of*
20 *Mexican-American Educators*, 231 F.3d at 593, or where the legal issues are close
21 and complex, *see Save Our Valley v. Sound Transit*, 335 F.3d 932, 946 (9th Cir.
22 2003), the District Court has the discretion to deny any award of costs under Rule
23 54.

24 This case presented complex and difficult questions of substantial public
25 import. Plaintiffs’ failure at trial does not demonstrate that the claims had no merit.
26 Plaintiffs survived two motions to dismiss and Pepperdine brought no dispositive
27 motions prior to trial. This Court denied Pepperdine’s second motion to dismiss on
28 the basis that “claims of discrimination based on sexual orientation are covered by

1 [Title] IX, but not as a category of independent claims separate from sex and gender
2 stereotype. Rather, claims of sexual orientation discrimination are gender stereotype
3 or sex discrimination claims.” *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151,
4 1159 (C.D. Cal. 2015), is a decision that has now been cited several times by other
5 courts as setting forth a heretofore unstated application and interpretation of Title
6 IX.

7 As the Court stated in its September 11, 2017 Order, Dkt. 252, the legal
8 claims that Plaintiffs’ brought under Title IX were relatively novel and unsettled in
9 this circuit, and the factual issues presented to the jury were difficult ones,
10 regardless of the amount of time it took the jury to reach a verdict.

11 **2. Granting Costs Would Have a Chilling Effect**

12 As the Court already decided, awarding costs to Pepperdine in this case would
13 have a “chilling effect on future similar civil rights” litigants. Dkt. 252, citing
14 *Stanley v. Univ. of S. Cal*, 178 F.3d 1069, 1079 (9th Cir. 1999). At its core, this case
15 was an attempt by two basketball players to get justice for the harassment and
16 discrimination that they felt they suffered at Pepperdine. Plaintiffs’ ultimate failure
17 at trial does not diminish the fact that this was a civil rights case. The threat of
18 deterring future litigants from prosecuting civil rights and discrimination issues in
19 the future is especially present in a case like this, where plaintiffs have limited
20 financial resources and Defendant is a large, powerful private university.

21 **3. Plaintiffs Have Limited Financial Resources**

22 As the Court noted in its Order re Costs, the economic disparity between
23 Plaintiffs, college students, and Defendant, a private university with millions in
24 endowments, cannot be more stark. Plaintiffs are students at the University of
25 Southern California, where annual tuition is in excess of \$50,000. They are not
26 currently employed and do not have the financial resources to pay Defendant’s
27 exorbitant costs of \$73,824.74.

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1 **4. Plaintiffs Brought Their Case in Good Faith**

2 “[T]he mere fact that [a party] lost cannot establish [its] objective
3 unreasonability.” *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1181 (9th Cir. 2013).
4 Here, Pepperdine acknowledged that Plaintiffs’ beliefs were genuine, stating during
5 opening statements at trial that Pepperdine was not there to tell the jury that
6 Plaintiffs were not sincere in the perception of what happened to them, but that
7 perception did not reflect intent. (Trial Transcript, 7-19-17 at 34:5-15). Moreover,
8 this is not a case where Plaintiffs’ had no credible evidence, as demonstrated by
9 Pepperdine’s attempts at trial to repeatedly and cumulatively dispute the evidence.

10 **5. Pepperdine Has Unclean Hands**

11 The Supreme Court has stated that “he who comes in equity must come with
12 clean hands.” *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*,
13 324 U.S. 806, 814 (1945). The “clean hands” doctrine denies recovery to a party
14 who is “tainted with inequity.” *Id.* Under this doctrine, courts may deny
15 relief to a litigant like Pepperdine with unclean hands. Similarly, a wide range of
16 cases have been invoked to justify withholding costs from the prevailing party who
17 conducted themselves with unclean hands. One such illustrative case denying costs
18 is *McFarland v. Gregory*, 425 F.2d 443, 449 (2d Cir. 1970). In *McFarland v.*
19 *Gregory*, the Second Circuit upheld the denial of costs to the successful parties
20 because they had been obstructive and conducted the litigation in the tradition of the
21 old-fashioned total warfare. *Id.*

22 Like the prevailing parties’ conduct in *McFarland*, Pepperdine’s witnesses,
23 including Coach Ryan Weisenberg and Tabatha Jones , made false and contradictory
24 statements during their testimony on key elements of the case. Moreover,
25 Defendant proceeded to trial with admissions from witnesses like Kelsey Brockway
26 and Whitney Williams, who later attempted to recant their deposition testimony at
27 trial, professing to have testified dishonestly during their respective depositions.
28 Long before trial started, Pepperdine’s in-house and outside counsel learned that

1 Ms. Brockway was changing her deposition testimony, without making any
2 corrections to her deposition transcript as provided by statute, but failed to make
3 any such disclosure to Plaintiffs' counsel. In presenting before the court during
4 trial, a lawyer shall not seek to mislead the judge or jury, or make false statements of
5 law or fact. California Rule of Professional Conduct 5-200(B). Nor shall a lawyer
6 knowingly offer evidence that the lawyer knows to be false. ABA Model Rule of
7 Professional Conduct 3.3(a)(2). If a lawyer, the lawyer's client, or a witness called
8 by the lawyer, has offered material evidence and the lawyer comes to know of its
9 falsity, the lawyer shall take reasonable remedial measures, including, if necessary,
10 disclosure to the tribunal. *Id.* A lawyer may refuse to offer evidence, other than the
11 testimony of a defendant in a criminal matter, that the lawyer reasonably believes is
12 false. *Id.* Pepperdine and its counsel did none of the foregoing.

13 Pepperdine also did its best to harass and embarrass Plaintiffs, publicly filing
14 a declaration in support of an opposition to a motion *in limine* attaching documents
15 with Plaintiffs' confidential medical records and information, including the results
16 of Plaintiffs' psychological exams taken by Pepperdine's hired experts. *See* Dkt.
17 166-5 to 166-8, later sealed. This was done by Pepperdine in violation of a
18 Stipulated Protective Order (Dkt. 54) and despite the fact that Pepperdine was aware
19 of the media interest in the case.

20 **D. Pepperdine's request for costs is overbroad**

21 Even if the Court were to entertain Pepperdine's request for costs, Pepperdine
22 has failed to meet its burden and sought costs beyond permissible bounds. First,
23 Pepperdine's First Amended Application to the Clerk to Tax Costs (Dkt. 257)
24 includes costs for videos of depositions, which is precluded by Local Rule 54-
25 3.5(a)-(b). Second, the request includes luxury items, such as an upgrade on a flight
26 and reimbursement for minibar charges.

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1 **III. CONCLUSION**

2 Based on the foregoing, the Court should exercise its sound discretion and
3 *again* decline to tax costs against Plaintiffs in any amount.

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Dated: October 2, 2017

Respectfully submitted,

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