

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT

for the

Southern District of New York

FREDERICK M. CARGIAN)

v. BREITLING USA, INC.)

Case No.: 15-CIV-1084 (GBD)

USDC SDNY
 DOCUMENT
 ELECTRONICALLY FILED
 DOC #:
 DATE FILED: 10/19/21

BILL OF COSTS

Judgment having been entered in the above entitled action on 09/15/2021 against PLAINTIFF,
Date

the Clerk is requested to tax the following as costs:

Fees of the Clerk	\$ _____
Fees for service of summons and subpoena	_____
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	_____
Fees and disbursements for printing	_____
Fees for witnesses (itemize on page two)	0.00
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case	_____
Docket fees under 28 U.S.C. 1923	_____
Costs as shown on Mandate of Court of Appeals	_____
Compensation of court-appointed experts	_____
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	_____
Other costs (please itemize) . DEPOSITIONS OF WITNESSES	2037.60 9,855.65
<i>DONE ON SUBMISSION, OBJECTIONS FILED, AND REPLY</i>	
<i>MEMO OF LAW IN SUPPORT OF DEFENDANT'S APPLICATION FOR COSTS</i>	
TOTAL \$	9,855.65
<i>SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.</i>	
	<i>2,037.60</i>

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

Electronic service First class mail, postage prepaid

Other: _____

s/ Attorney: /s/ Glenn S. Grindlinger

Name of Attorney: Glenn S. Grindlinger

For: Defendant Breitling USA, Inc. Date: October 1, 2021
Name of Claiming Party

Taxation of Costs

Costs are taxed in the amount of \$2,037.60 and included in the judgment.

Ruby J. Keatler
 Clerk of Court

By: [Signature]
 Deputy Clerk

10/19/2021
 Date

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)							
NAME, CITY AND STATE OF RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
							\$0.00
							\$0.00
							\$0.00
							\$0.00
							\$0.00
							\$0.00
						TOTAL	\$0.00

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

“Sec. 1924. Verification of bill of costs.”

“Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.”

See also Section 1920 of Title 28, which reads in part as follows:

“A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.”

The Federal Rules of Civil Procedure contain the following provisions:

RULE 54(d)(1)

Costs Other than Attorneys’ Fees.

Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney’s fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 day’s notice. On motion served within the next 7 days, the court may review the clerk’s action.

RULE 6

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 58(e)

Cost or Fee Awards:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney’s fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FREDERICK M. CARGIAN,

Plaintiff,

-against-

BREITLING USA, INC.,

Defendant.

ECF Case

15 Civ. 1084 (GBD)

**DECLARATION IN SUPPORT OF
DEFENDANT'S APPLICATION FOR
COSTS AGAINST PLAINTIFF**

GLENN S. GRINDLINGER declares, pursuant to 28 U.S.C. §1746 and under penalty of perjury, the following:

1. I am a member of the law firm Fox Rothschild LLP, attorneys of record for the Defendant in the above-captioned action. As such, I am familiar with the facts and circumstances set forth herein.

2. I submit this Declaration in support of Defendant's Bill of Costs and application for an award of costs against Frederick M. Cargian ("Plaintiff").

3. On or about February 17, 2015, Plaintiff initiated this action by filing a Complaint in the United States District Court, Southern District of New York (the "Court"), located at 500 Pearl Street, New York, New York 10007.

4. On February 29, 2016, Defendant's served and filed a Motion for Summary Judgment seeking dismissal of the Complaint. See ECF No. 38. Attached as "Exhibit 1" to Defendant's Notice of Motion for Summary Judgment were relevant excerpts from the transcript of Plaintiff's deposition. Defendant's cited multiple times to Plaintiff's deposition testimony in their supporting memorandum of law, and such testimony was used by Defendant's to prepare their Statement of Undisputed Material Facts.

5. On September 13, 2021, this Court issued a Memorandum Decision and Order granting Defendant's Renewed Motion for Summary Judgment and dismissing Plaintiff's Complaint. See ECF No. 90. Multiple causes of action were dismissed with prejudice; the others were dismissed without prejudice.

6. On September 15, 2021, to close this matter, the Clerk of the Court entered Judgement a copy of which is annexed hereto as **Exhibit A**.

7. As the prevailing party, Defendant is now entitled to costs pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure, and Rule 54.1(c)(2) of the Local Civil Rules of Southern District of New York, insofar as judgment was entered in favor of Defendant on all claims.

8. Defendant submits invoices for the depositions obtained from the court stenographer, Ellen Grauer Court Reporting Co. LLC, which are annexed hereto as **Exhibit B**, for depositions taken in this matter between September 17, 2015 and January 25, 2016. The depositions were taken during the period of fact discovery, the transcript of same was used in the preparation of Defendant's successful Motion for Summary Judgment, and said transcripts were submitted as exhibits to that Motion. The costs claimed are correctly stated, are allowable by law, and were necessarily incurred. As prevailing the prevailing party, Defendant is entitled to these costs.

9. The total costs incurred by the Defendants, pursuant to Local Rule 54.1, in connection with the taking of Plaintiff's deposition are \$9,855.65.

WHEREFORE, it is respectfully requested that the Clerk issue an order granting the Defendants costs in the amount of \$9,855.65.

Respectfully submitted,

DATED: New York, New York

FOX ROTHSCHILD LLP
Attorneys for Defendant

October 4, 2021

/s/ Glenn S. Grindlinger
Glenn S. Grindlinger

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
FREDERICK M. CARGIAN,

Plaintiff,

15 CIVIL 1084 (GBD)

-against-

JUDGMENT

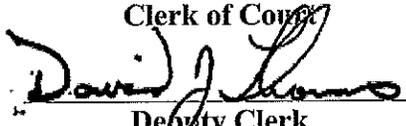
BREITLING USA, INC.,

Defendant.
-----X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Memorandum Decision and Order dated September 13, 2021, Defendant's Renewed Motion for Summary Judgment, (ECF No. 84) is granted; accordingly, this case is closed.

Dated: New York, New York
September 15, 2021

RUBY J. KRAJICK

BY: 
Clerk of Court
Deputy Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FREDERICK M. CARGIAN,

Plaintiff,

-against-

BREITLING USA, INC.,

Defendant.

ECF Case

15 Civ. 1084 (GBD)

**NOTICE OF APPLICATION FOR
COSTS SOUGHT AGAINST
PLAINTIFF**

PLEASE TAKE NOTICE that, upon Defendant's Bill of Costs, the Declaration of Glenn S. Grindlinger dated September 27, 2021, and the exhibits annexed thereto, and all other pleadings and proceedings herein, Defendants will move this Court before the Orders and Judgment Clerk at the United States Courthouse for the Southern District of New York, located at 500 Pearl Street, Room 250, New York, New York 10007 on October 18, 2021 at 9:30 a.m., or as soon thereafter as counsel may be heard at a time and date to be determined as convenient for the Court for an order pursuant to Rule 54 of the Federal Rules of Civil Procedure, Local Civil Rule 54.1, and 208 U.S.C. §§1920 and 1923 granting costs sought by Defendant and granting such other relief that this Court deems proper.

Respectfully submitted,

DATED: New York, New York

October 4, 2021

FOX ROTHSCHILD LLP
Attorneys for Defendant

/s/ Glenn S. Grindlinger
Glenn S. Grindlinger

Ellen Grauer COURT REPORTING



Co. LLC
126 East 56th Street, Fifth Floor New York, New York 10022
PHONE: (212) 750-6434 FAX: (212) 750-1097
www.ELLENGRAUER.com

Billed To: Zev Singer
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20160303EA	2/23/2016	21251HW	1/25/2016
Case Caption			
Frederick M. Cargian vs. Breitling USA, Inc.			
Case #			
Witness			
Ovidio John Cargian/Michael Cargian			
Payment Terms			
Due upon receipt			

Description	Quan	Total
Original + 1 Certified Deposition (Ovidio)	66	\$346.50
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Original + 1 Certified Deposition (Michael)	40	\$210.00
Reporter's Appearance (am)	1	\$75.00
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Due upon receipt and is not contingent on client payment.		
	Sub-Total	\$631.50
	Payments	\$0.00
	Total Due	\$631.50
For billing questions, please email earisty@ellengrauer.com or call 877.727.4230		
	After 4/23/2016 Pay	\$694.65

Notes:

#0
Wine NOT used in motion for summary Judgment

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Zev Singer
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Job No. 21251HW Case No. _____
Case Name Frederick M. Cargian vs. Breitling USA, Inc.
Invoice No. 20160303EA Invoice Date 2/23/2016
Total Due \$631.50 After 4/23/2016 Pay \$694.65

Remit To: **Ellen Grauer Court Reporting**
126 East 56th Street, Fifth Floor
New York, New York 10022

PAYMENT WITH CREDIT CARD	
Card Holder's Name	_____
VISA/MasterCard #:	_____
Exp. Date:	_____ Phone #: _____
Billing Address:	_____
Zip:	_____ Card Security Code: _____
Amount to Charge:	_____
Cardholder's Signature:	_____

Ellen Grauer

COURT REPORTING

Co. LLC



126 East 56th Street, Fifth Floor New York, New York 10022
 PHONE: (212) 750-6434 FAX: (212) 750-1097
 www.ELLENGRAUER.com

Billed To: Zev Singer
 Fox Rothschild
 100 Park Avenue
 Suite 1500
 New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20153235EA	12/9/2015	20965HW	11/19/2015
Case Caption			
Frederick M. Cargian vs. Breitling USA, Inc.			
Case #			
Witness			
Diana Figueroa			
Payment Terms			
Due upon receipt			

Description	Quan	Total
Exhibits	1	\$40.00
1 Certified Deposition	210	\$756.00
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Due upon receipt and is not contingent on client payment.		
	Sub-Total	\$796.00
	Payments	\$0.00
	Total Due	\$796.00
For billing questions, please email earisty@ellengrauer.com or call 877.727.4230		
	After 2/7/2016 Pay	\$875.60

Notes:

0
 NONE NOT USED IN
 MOTION FOR SUMMARY
 JUDGMENT

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Zev Singer
 Fox Rothschild
 100 Park Avenue
 Suite 1500
 New York, NY 10017

Job No. 20965HW Case No.
 Case Name Frederick M. Cargian vs. Breitling USA, Inc.
 Invoice No. 20153235EA Invoice Date 12/9/2015
 Total Due \$796.00 After 2/7/2016 Pay \$875.60

Remit To: Ellen Grauer Court Reporting
 126 East 56th Street, Fifth Floor
 New York, New York 10022

PAYMENT WITH CREDIT CARD	
 	
Card Holder's Name	_____
VISA/MasterCard #:	_____
Exp. Date:	_____ Phone #: _____
Billing Address:	_____
Zip:	_____ Card Security Code: _____
Amount to Charge:	_____
Cardholder's Signature:	_____

Ellen Grauer COURT REPORTING



Co. LLC
126 East 56th Street, Fifth Floor New York, New York 10022
PHONE: (212) 750-6434 FAX: (212) 750-1097
www.ELLENGRAUER.com

Billed To: Zev Singer
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20160283EA	2/22/2016	21267HW	1/19/2016
Case Caption			
Frederick M. Cargian vs. Breitling USA, Inc.			
Case #			
Witness			
Sophie Morice/Melissa Vessely			
Payment Terms			
Due upon receipt			

Description	Quan	Total
1 Certified Deposition (Morice)	125	\$450.00
Complimentary Condensed Transcript & ASCII File	1	\$0.00
1 Certified Deposition (Vessely)	163	\$586.80
Exhibits	1	\$11.00
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Due upon receipt and is not contingent on client payment.		Sub-Total \$1,047.80
For billing questions, please email earisty@ellengrauer.com or call 877.727.4230		Payments \$0.00
		Total Due \$1,047.80
		After 4/22/2016 Pay \$1,152.58

Notes:

80

*were not used in
motion for summary
judgment*

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Zev Singer
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Job No. 21267HW Case No.
Case Name Frederick M. Cargian vs. Breitling USA, Inc.
Invoice No. 20160283EA Invoice Date 2/22/2016
Total Due \$1,047.80 After 4/22/2016 Pay \$1,152.58

Remit To: Ellen Grauer Court Reporting
126 East 56th Street, Fifth Floor
New York, New York 10022

PAYMENT WITH CREDIT CARD		VISA	MasterCard
Card Holder's Name	_____		
VISA/MasterCard #:	_____		
Exp. Date:	_____	Phone #:	_____
Billing Address:	_____		
Zip:	_____	Card Security Code:	_____
Amount to Charge:	_____		
Cardholder's Signature:	_____		

Ellen Grauer

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 PHONE: (212) 750-6434 FAX: (212) 750-1097
 www.ELLENGRAUER.com

Billed To: Zev Singer
 Fox Rothschild
 100 Park Avenue
 Suite 1500
 New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20152280EA	8/31/2015	20048HW	7/23/2015
Case Caption			
Cargian vs. Breitling			
Case #			
Witness			
Isaac Schafraath			
Payment Terms			
Due upon receipt			

Description	Quan	Total
Complimentary Condensed Transcript & ASCII File	1	\$0.00
1 Certified Deposition	349	\$1,256.40
Due upon receipt and is not contingent on client payment.		
	Sub-Total	\$1,256.40
	Payments	\$0.00
	Total Due	\$1,256.40
For billing questions, please email earisty@ellengrauer.com or call 877.727.4230		
	After 10/30/2015 Pay	\$1,382.04

Notes:

80

*None not used in
 motion for summary
 judgment*

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Zev Singer
 Fox Rothschild
 100 Park Avenue
 Suite 1500
 New York, NY 10017

Job No. 20048HW Case No.
 Case Name Cargian vs. Breitling
 Invoice No. 20152280EA Invoice Date 8/31/2015
 Total Due \$1,256.40 After 10/30/2015 Pay \$1,382.04

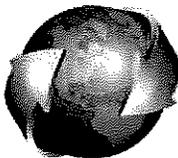
Remit To: **Ellen Grauer Court Reporting**
 126 East 56th Street, Fifth Floor
 New York, New York 10022

PAYMENT WITH CREDIT CARD	
Card Holder's Name	_____
VISA/MasterCard #:	_____
Exp. Date:	_____ Phone #: _____
Billing Address:	_____
Zip:	_____ Card Security Code: _____
Amount to Charge:	_____
Cardholder's Signature:	_____

Ellen Grauer

COURT REPORTING

Co. LLC



126 East 56th Street, Fifth Floor New York, New York 10022
 PHONE: (212) 750-6434 FAX: (212) 750-1007
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Billed To: Zev Singer
 Fox Rothschild
 100 Park Avenue
 Suite 1500
 New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20160142EA	1/21/2016	21132HW	1/6/2016
Case Caption			
Frederick M. Cargian vs. Breitling USA, Inc.			
Case #			
Witness			
Thierry Prissert ✓			
Payment Terms			
Due upon receipt			

Description	Quan	Total
1 Certified Deposition	462	\$1,663.20 ✓
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Due upon receipt and is not contingent on client payment.		
	Sub-Total	\$1,663.20
	Payments	\$0.00
	Total Due	\$1,663.20
For billing questions, please email earisty@ellengrauer.com or call 877.727.4230		
	After 3/21/2016 Pay	\$1,829.52

Notes:

\$ 1,663.20

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Zev Singer
 Fox Rothschild
 100 Park Avenue
 Suite 1500
 New York, NY 10017

Job No. 21132HW Case No.
 Case Name Frederick M. Cargian vs. Breitling USA, Inc.
 Invoice No. 20160142EA Invoice Date 1/21/2016
 Total Due \$1,663.20 After 3/21/2016 Pay \$1,829.52

Remit To: Ellen Grauer Court Reporting
 126 East 56th Street, Fifth Floor
 New York, New York 10022

PAYMENT WITH CREDIT CARD	
Card Holder's Name	_____
VISA/MasterCard #:	_____
Exp. Date:	_____ Phone #: _____
Billing Address:	_____
Zip:	_____ Card Security Code: _____
Amount to Charge:	_____
Cardholder's Signature:	_____



126 East 56th Street, Fifth Floor
New York, New York 10022
Tel: 212-750-6434
Fax: 212-750-1097

Billed To: Zev Singer
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20160297EA	2/23/2016	21268HW	1/21/2016
Case Caption			
Frederick M. Cargian vs. Breitling USA, Inc.			
Case #			
Witness			
Annie Sommer/Teleconference			
Payment Terms			
Due upon receipt			

Description	Quan	Total
1 Certified Deposition (Sommer)	104	\$374.40 ✓
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Complimentary Condensed Transcript & ASCII File	1	\$0.00
1 Certified Deposition (Teleconference)	49	\$176.40 ✗
Due upon receipt and is not contingent on client payment.		Sub-Total \$550.80
For billing questions, please email earisty@ellengrauer.com or call 877.727.4230		Payments \$0.00
		Total Due \$550.80
		After 4/23/2016 Pay \$605.88

Notes:

Handwritten note in a circle: 8374.40

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Zev Singer
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Job No. 21268HW Case No.
Case Name Frederick M. Cargian vs. Breitling USA, Inc.
Invoice No. 20160297EA Invoice Date 2/23/2016
Total Due \$550.80 After 4/23/2016 Pay \$605.88

Remit To: **Ellen Grauer Court Reporting**
126 East 56th Street, Fifth Floor
New York, New York 10022

PAYMENT WITH CREDIT CARD		VISA	MasterCard
Card Holder's Name	_____		
VISA/MasterCard #:	_____		
Exp. Date:	_____	Phone #:	_____
Billing Address:	_____		
Zip:	_____	Card Security Code:	_____
Amount to Charge:	_____		
Cardholder's Signature:	_____		

Ellen Grauer COURT REPORTING



Co. LLC
126 East 56th Street, Fifth Floor New York, New York 10022
PHONE: (212) 750-6434 FAX: (212) 750-1087
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Billed To: Glenn S. Grindlinger
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Invoice

Invoice #	Invoice Date	Job #	Job Date
20152571EA	10/12/2015	20405HW	9/17/2015
Case Caption			
Frederick M. Cargian vs. Breitling USA, Inc.			
Case #			
Witness			
Frederick Cargian ✓			
Payment Terms			
Due upon receipt			

Description	Quan	Total
Reporter's Appearance (am & pm & evening)	1	\$225.00 X
Original + 1 Certified 5 Day Expedited Deposition	399	\$3,291.75 X
PM pages	36	\$70.20 X
Reporter's Appearance (am & pm & evening)	1	\$225.00 X
Complimentary Condensed Transcript & ASCII File	1	\$0.00
Exhibits	1	\$75.00 X
Delivery	1	\$23.00 X
Sub-Total		\$3,909.95
Payments		\$0.00
Total Due		\$3,909.95
After 12/11/2015 Pay		\$4,300.95

Due upon receipt and is not contingent on client payment.

For billing questions, please email earisty@ellengrauer.com or call 877.727.4230

not below B Co

Notes:

Federal Tax Id #: 42-1650856

Please detach bottom portion and return with payment.

Glenn S. Grindlinger
Fox Rothschild
100 Park Avenue
Suite 1500
New York, NY 10017

Job No. 20405HW Case No.
Case Name Frederick M. Cargian vs. Breitling USA, Inc.
Invoice No. 20152571EA Invoice Date 10/12/2015
Total Due \$3,909.95 After 12/11/2015 Pay \$4,300.95

PAYMENT WITH CREDIT CARD



Card Holder's Name _____
VISA/MasterCard #: _____
Exp. Date: _____ Phone #: _____
Billing Address: _____
Zip: _____ Card Security Code: _____
Amount to Charge: _____
Cardholder's Signature: _____

Remit To: **Ellen Grauer Court Reporting**
126 East 56th Street, Fifth Floor
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDERICK M. CARGIAN,

Plaintiff,

15 Civ 1084 (GBD)

-against-

AFFIRMATION OF COUNSEL
IN OPPOSITION TO DEFENDANT'S
BILL OF COSTS

BREITLING USA, INC.,

Defendant.
_____X

JANICE GOODMAN, an attorney in good standing in the State of New York, affirms the following under penalty of perjury:

1. I am counsel to plaintiff, Frederick M. Cargian ("Cargian" or plaintiff), in the above referenced matter and submit this affirmation opposing defendant's bill of costs in its entirety. Alternatively, reimbursement should be limited at most to \$1,314.78.

2. Cargian was hired by the then President of Breitling USA, Marie Bodman, in 1990. He was the leading sales person until 2011 when Thierry Prissert ("Prissert") became the newly appointed President. ECF 48. Within one short year of Prissert's appointment Cargian went from being the best to the worst sales rep. He alleged that the reversal in his production was caused by Prissert treating him differently and more harshly than the other male sales reps by (a) imposing higher unobtainable sales goals than any other rep ; (b) not inviting him to critical marketing events which would enhance his sales; © demoting him in function and pay while

replacing him with a younger straight man with absolutely no sales experience; (d) subjecting him to reprimand even when no policy was violated. Prissert terminated Cargian's employment effective December 31, 2013. Plaintiff was 53 years old at the time. Id

3. On February 17, 2015, after the required EEOC filing, Cargian filed this complaint alleging discrimination because of his sexual orientation (gay) and his age in violation of 42 U.S. §§ 2000e *et seq.* ("Title VII) and the Age Discrimination in Act, 29 USC § 621 *et seq.*. Supplemental jurisdiction was invoked pursuant to the Administrative Code of the City of New York, Secs 8-107 and the New York Human Rights Law, N.Y. Exec Law Sec. 296 *et seq.* ECF 1

4. On February 29, 2016, defendant moved for summary judgment on the grounds that plaintiff's claim of gender discrimination was not cognizable under Title VII and the ADEA Claim failed for lack of proof. ECF 38

5. On September 29, 2016, District Court Judge George B. Daniels granted Defendant's Motion on both claims. He dismissed the supplemental claims without prejudice. ECF 63

6. On October 24, 2016, Plaintiff appealed from the judgment dismissing his Title VII claim, but not the dismissal of the ADEA claim and requested reinstatement of the supplemental claims. ECF 66

7. On September 10, 2018, the Court of Appeals for the Second Circuit reversed the lower Court's grant of summary judgment based on its prior decision in *Zarda v Altitude Express*, 883 F.3d 100 (2d Cir. 2018), which was filed a few weeks before plaintiff's case, upheld by the Supreme Court's in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) both holding that Title VII prohibits discrimination based on sexual orientation. The Circuit remanded this case to the District Court for further consideration in light of the new law. ECF 67

8. On November 9, 2020, defendant renewed its motion for summary judgment

motion primarily arguing that the court's prior decision, in fact, already made a finding that even under a law that covered sexual orientation there were no facts to support a claim and that plaintiff failed to even establish a prima facie case of discrimination. ECF 84, 87.

9. On September 13, 2021, the District Court issued a memorandum decision and order granting defendant's renewed motion for summary judgment. In essence the court found that plaintiff did establish a prima facie claim of discrimination based on sexual orientation, but failed to adduce sufficient evidence to present to the jury to support a claim of discriminatory motivation. ECF 90

10. On September 15, 2021, the Clerk of the Court entered a final judgment dismissing the complaint. ECF 91

11. Plaintiff strongly disagrees with the Court's conclusions, but litigation costs make further appeals prohibitive. Plaintiff finds himself in precisely the situation that Congress and the Supreme Court were concerned with when they protected plaintiffs who act as private attorneys general against the costs of litigation unless the claims are frivolous or vexatious. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

12. Plaintiff submits that defendant's bill of costs be denied in total as a matter of equity because (1) defendant has flaunted all of the local rules regarding costs, burdening the court and plaintiff with unnecessary review; (2) plaintiff prevailed on a very significant issue which established new law benefitting thousands of employees, if not more, making him in part the prevailing party, (3) plaintiff's claims are not frivolous or vexatious under *Christiansburg Garment Co. V. EEOC*, 434 U.S.412,422 (1978), (4) defendant's bill of costs is improper and vexatious.

13. Alternatively, as discussed below, defendant's reimbursement should be limited to

reimbursement for every deposition transcript taken in discovery, including testimony totally irrelevant on summary judgment (Cargian's two brothers); were even filed by defendant as part of the records it submitted in support of its summary judgment motion (Figueroa, Morice, Vessely, Schafrath) or were relied upon in their briefs or by the court in its ultimate decision (Prissert, Sommer, Cargian). Moreover, defendant improperly requests reimbursement for expedited transcripts where speed was not necessary; for appearance fees; and other costs this district regularly disallows.

14. First there is no evidence submitted by defendant that the amounts claimed were actually paid by defendant. All that was submitted are invoice. Six (6) of the nine (9) depositions were taken by plaintiff. We served copies for signing on defendant. It is not unheard of for a party to simply make photo copies of the deposition.

15. As was reported in the papers, and told to me, defendant had insurance coverage and the insurer was present during the case and involved at various points. On information and belief, counsel for defendant may also have represented the insurer. Plaintiff suggests that insurance may have covered these costs, in which case defendant would not be entitled to any reimbursement, since it may never have paid for the transcripts. Defendant should at least be required to answer this question.

16. Moreover, of the nine (9) persons for whom reimbursement is requested all but plaintiff and his brothers were employees of defendant, including its president, Prissert. These company witness were deposed by plaintiff, not defendant, solely for discovery purposes. Defendant did not need these depositions, since all of these witness were available to defendant by affidavit. Indeed, defendant did produce and relied almost exclusively on the 15 page

affirmation of Prissert, the 11 page affirmation of Charles Anderson, the sales manager, and a multitude of business records to support its summary judgment motion. ECF 39, 40. The court, in its final judgment, similarly adopted and relied exclusively on defendant's 56.1 statement and its supporting affirmations and exhibits. ECF 90.

17. The following addresses each deposition transcript and why the cost is not recoverable:

A. . John Cargian and Michael Cargian, \$631.50. These are relatives of plaintiff whose depositions were taken by defendant. They were listed by plaintiff as having knowledge relating to the emotional damages suffered by plaintiff. Their testimony was never relevant on a summary judgment motion and was never even introduced by defendant. ECF 39-41.

B. Diane Figuero, Breitling Personnel Director, \$796. Breitling's never made Figuero's testimony part of the record; nor did it once introduce her testimony to support its claims, nor does the court note it or rely on it in any form. ECF 39, ECF 90. Moreover defendant impermissibly requests payment for reproduction of exhibits. These were all Breitling's business records produced by defendant in discovery.

C. Sophie Morice, Breitling Director of Retail and Melissa Vessely, Breitling's Training Manager. \$1,047.80. These depositions were also taken by plaintiff. Both had complementary comments about plaintiff. Breitling never introduced any of their testimony into the record or make note of it in its brief ECF 39, 41,46 nor does the Court make note of any testimony, and certainly does not rely on anything these witnesses said. ECF 90. .Again defendant includes an \$11 charge for reproduction of documents it produced in discovery.

D. Isaac Schafrath, the man who replaced Cargian as sales rep. \$1,256.40.

Plaintiff took this deposition as part of his discovery. Again, defendant did not introduce the transcript into the record, ECF 39, or rely on this deposition on its briefs to demonstrate a legitimate reason for replacing Cargian, ECF 39, nor is the deposition relied upon by the court. ECF 90.

E. Thierry Prissert, President of Breitling USA. \$1,663.20. Defendant submitted a 15 page affirmation by Prissert together with many business records regarding Cargian and his alleged performance. ECF 39. The court's ultimate decision relies almost exclusively on this affirmation, not on deposition transcripts. ECF 90 Defendant in its opening brief cites this affirmation at least 18-20 times and about 25 times in its reply brief. ECF 84, 87. Throughout its decision the court relies almost exclusively on Defendant's 56.1 statement and the Prissert affirmation (along with the affirmation of Chuck Anderson) and the business records. The Court does not cite the Prissert deposition. ECF 90.

F. Annie Sommers was a fact witness in support of plaintiff but because she was still employed by defendant she would not voluntarily testify. \$550.80. Plaintiff conducted this deposition but, as was testified to at the deposition defendant debriefed her prior to the deposition. Again, her deposition testimony was not relied upon by defendant or the court, rather the defendant cited business records which were also relied upon by the court. ECF 84, 87, 90. Moreover, in addition to the \$374.40 requested for the transcript of the deposition, defendant improperly requests payment of \$176 for a transcript of a teleconference which, to the best of my recollection, related to a conference with the court where there was a legal dispute as to the propriety of some inquiries. That is not an includable cost.

G. Frederick M. Cargian the plaintiff. \$3,909.95. Plaintiff submits that this deposition,

taken by defendant, was simply discovery and not relied upon by the defendant or the court in its ultimate decision, and therefore is not reimbursable. Indeed defendant cites the testimony only once (a few lines) in its briefs . Cargian's deposition testimony was not relied upon either by defendant or the court in its ultimate decision. Defendant and the Court relied almost exclusively on the affidavits of Prissert and Anderson and the attached exhibits in arguing for summary judgment. At a minimum, the following charges, which are not allowable under the Local Rules, should be rejected: defendant requests \$3,291.75 for "expedited delivery" of the transcript. There was no reason to expedite. There was no court mandate and defendant's first summary judgment motion was not filed for another 4 plus months. The charge to plaintiff for a copy of the transcript on ordinary 2 week delivery was \$1,314.78. In addition to the expedited fee, there is \$450 requested for an appearance fees, a cost that has been consistently disallowed under the local rules. There is an unexplained charge of \$70 for PM pages; \$75 for reproducing their own exhibits and \$23 for delivery which is only charged because it was expedited. None of these costs are recoverable. If the court decides to allow any costs for this deposition then it should be limited to the cost for ordinary 2 week delivery.

18. Plaintiff submits, based on the above, and his brief in support, defendant should be denied the requested costs entirely or, at a minimum, those costs should be reduced to \$1,314.78.

Dated: New York, New York
October 13 2021.


JANICE GOODMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

FREDERICK M. CARGIAN,

Plaintiff,

15 Civ 1084 (GBD)

-against-

BREITLING USA, INC.,

Defendant.

X

MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S BILL OF COST

JANICE GOODMAN
Law Office of Janice Goodman
61 Jane Street, Suite 11D
New York, New York 10014
212-869-1940

Plaintiff Frederick M. Cargian (“Cargian” or “plaintiff”) submits this Memorandum of Law in opposition to the defendant’s Bill of Costs in the amount of \$9,855.65 seeking to recover the costs of depositions of nine witnesses taken during the discovery phase of this action. For the reasons set forth below, defendant’s Bill of Costs should be denied in its entirety or at most reduced to \$1,314.78.

PROCEDURAL BACKGROUND

Plaintiff commenced this action on February 17, 2015, alleging that he was discriminated against by Thierry Prissert (“Prissert”) Breitling’s president, because of his sexual orientation (gay) and his age, in violation of 42 U.S. §§ 2000e *et seq.* (“Title VII); and the Age Discrimination in Act, 29 USC §§621 *et seq.* (“ADEA”). Supplemental jurisdiction was asserted pursuant to the Administrative Code of the City of New York, Secs 8-107 and the New York Human Rights Law, N.Y. Exec Law Sec. 296 *et seq.* On September 29, 2016, the court granted defendant’s summary judgment motion dismissing the Title VII claim on the ground that the law does not protect against discrimination based on sexual orientation and the ADEA claim based on plaintiff’s failure of proof. The court dismissed the supplemental claims without prejudice. On October 24, 2016, plaintiff appealed the dismissal of the Title VII cause, but not the ADEA claim, and asked for reinstatement of the supplemental claims. On September 10, 2018, the Court of Appeals for the Second Circuit reversed the lower Court’s decision holding that Title VII protects victims of discrimination because of their sexual orientation based on its decision in *Zarda v Altitude Express*, 883 F.3d 100 (2d Cir. 2018) which was upheld by the

Supreme Court's in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). This case was then returned to the District Court for further consideration. On November 9, 2020, Defendant renewed its motion for summary judgment making the primary argument that the court's prior decision already ruled that even under a law that covered sexual orientation there were no facts to support a claim and that plaintiff failed to even establish a *prima facie* case of discrimination. On September 13, 2021, the court issued a memorandum decision and order granting defendant's motion for summary judgment on the single claim of sex discrimination under Title VII and the local laws. The court found that plaintiff did establish a *prima facie* claim of discrimination based on sexual orientation, but failed to adduce sufficient evidence to present to the jury on motivation. On September 15, 2021, the clerk of the court entered final judgment dismissing the complaint. On October 4, 2021, defendant filed this Application for Costs Against Plaintiff in the exorbitant amount of \$9,855.65 to cover depositions taken during discovery. For a full statement of the factual background and procedural history of this matter see Goodman Affirmation, ¶¶ 2-10.

ARGUMENT

I. LEGAL STANDARD

The Supreme Court has cautioned that "costs" under Fed. R. Civ. P. 54, which incorporates the standard from 28 U.S.C. § 1920, must be narrowly construed. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 132 S. Ct. 1997, 2006, 182 L. Ed. 2d 903 (2012) (internal quotation omitted). Following this admonition the Local Civil Rules of this court have narrowly

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defined what is recoverable. Committee Note, Local Civil Rule 54.1 ("Local Civil Rule 54.1")
Moreover, equity is to be considered in assessing costs. "The decision to award costs pursuant
to Rule 54(d)(1) and Local Rule 54.1 rests within the sound discretion of the district court,"
Dattner v Conagra Foods, Inc., 458 F.3d 99, 100 (S.D.N.Y. 2006) (citing *LoSacco v. City of
Middletown*, 71 F.3d 88, 92 (2d Cir. 1995)) (internal quotations omitted). Even where a party is
held prevailing, "A court need not award costs if it finds such an award would be inequitable."
Bekiaris v United States, 1998 WL 734362 (S.D.N.Y. October 20, 1998) (citation omitted).
Bucalo v. E. Hampton Union Free Sch. Dist., 238 FRP 126, 129 (E.D.N.Y. 2006). Courts may also
consider the public importance of the case; the difficulty of the issues; the financial hardships to
the plaintiff, and the plaintiff's good faith in bringing the action to deny or limit costs. See
Whitfield v Scully, 241 F.3d 264, 270 (2d Cir. 2001) (citations omitted)

The Rules as interpreted by this court have placed many specific limitations on what
expenses can be recovered. Although Local Rule 54.1 permits taxing of costs for depositions, it
is strictly limited. Costs for depositions solely for discovery are not recoverable. Only where
the deposition was used as evidence at trial or was used by the Court in ruling on a summary
judgment or other dispositive motion will costs be allowed. Local Civil Rule 54.1(c)(2)
"Williams v. Cablevision Sys. Corp., No. 98 Civ. 7988 (RPP), 2000 WL 620215 (S.D.N.Y. May
12, 2000)" Williams v. Cablevision Sys. Corp., No. 98 Civ. 7988 (RPP), 2000 WL 620215, at *2
(S.D.N.Y. May 12, 2000). The depositions, in addition, must be "necessarily obtained" for use in
the case. 28 U.S.C. § 1920(2). Whitfield v. Scully, 241 F.3d 264, 271 (2d Cir. 2001).

Fees associated with the deposition, such as "expedited service, delivery costs,
appearance fees, and rough diskettes and/or ASCII disks are not taxable. Farberware Licensing

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Co. LLC v. Meyer Mktg. Co., Ltd., No. 09 Civ. 2570 (HB), 2009 WL 5173787 (S.D.N.Y. Dec. 30, 2009) aff'd sub nom. Farberware Licensing Co., LLC v. Meyer Mktg. Co., Ltd., 428 F. App'x 97 (2d Cir. 2011)" Farberware Licensing Co. LLC v. Meyer Mktg. Co., Ltd., No. 09 Civ. 2570 (HB), 2009 WL 5173787, at *5 (S.D.N.Y. Dec. 30, 2009) aff'd sub nom. Farberware Licensing Co., LLC v. Meyer Mktg. Co., Ltd., 428 F. App'x 97 (2d Cir. 2011); J.S. Nicol, Inc. v. Peking Handicraft, Inc., No. 03 Civ. 1548 (GHD) (AJP), 2008 WL 4613752, at *17 (S.D.N.Y. Oct. 17, 2008) (rough transcript and delivery costs were not recoverable).

Other incidental costs such as the court reporter's attendance fee must also be excluded from costs. See Document Sec. Sys., Inc. v. Coupons.com, Inc., No. 11 Civ. 6528 (CJS), 2015 WL 1189551, at *4 (W.D.N.Y. Mar. 16, 2015) (excluding from deposition transcript costs "attendance fee" and "CD Depo Litigation Package"); Yin v. Japan Soc'y, Inc., No. 99 Civ. 4806 (HB), 2000 WL 827671, at *2 (S.D.N.Y. June 27, 2000) (excluding from deposition transcript costs "Appearance Fee," "Delivery Fee," "ASCII Conversion" fee, and "Condensed Transcript" fee).

II. EQUITY DICTATES THAT NO COSTS BE AWARDED

Defendant has flagrantly flaunted the Local Rules demonstrating disrespect for the court and placing an inordinate burden on plaintiff to respond. Breitling did no more than throw together a bunch of invoices with no evidence of payment and asked for reimbursement of all costs, including for depositions never entered in the record and for expenses routinely disallowed (ie appearance fees, expedited delivery). At no point does defendant even attempt to assert any justification for its demands, most of which are patently unjustified.

Indeed, defendant fails to submit evidence that it paid any of these invoices. Since

almost all of these depositions were taken of by plaintiff of defendant's employees whom defendant's attorney represented, they were served with copies for signature. It is not unheard of under these circumstances for the party to simply make photocopies of the transcript.

Of even greater significance, defendant was protected in this case by an insurance policy. The insurance company had a presence at some junctures during the litigation. There is reason to believe that defendant's counsel may also represent the insurance company. Defendant should reveal whether insurance covers the claimed costs, which is a factor to be weighed in equity. Goodman Aff. ¶¶ 14, 15.

Defendant requests payment for depositions totally unrelated to summary judgment (Cargian's brothers); for employees whose testimony defendant never entered into the record (Figueroa, Morise, Vessely, Schafrath); for the president, Prissert, who submitted a 15 page affirmation with documents upon which the defendant and the court relied totally; a fact witness (Sommers) about whom defendant relied on documents; and for plaintiff whose testimony was ordered unnecessarily on an expedited basis. Defendant's bad behavior should not be rewarded. Indeed the court may want to consider sanctions where as here defendant has shown such disrespect for the rules forcing plaintiff and the court do extraordinary extra work

Courts also have denied costs to defendants in Title VII actions in part because of the "important public interest served by the pursuit of colorable Title VII claims." Christoforou v. Ryder Truck Rental, Inc., 668 F. Supp. 294, 304 (S.D.N.Y. 1987). Plaintiff in this case was the prevailing party on the central issue: the extension of Title VII to the protection against sexual orientation discrimination. Acting as a private attorney general plaintiff was one of three cases before the Court of Appeals raising this issue, upon which he ultimately prevailed. It was the efforts of

litigants like Cargian who have benefitted thousands of others by seeking protection based on sexual orientation.

Further, plaintiff brought this suit in good faith, and imposition of costs against this civil rights litigant, particularly at such an exorbitant rate, may have a chilling effect on future civil rights litigants. Shervington v. Vill. of Piermont, No. 09 Civ. 4273 (RWS), 2012 WL 2574744, at *3 (S.D.N.Y. July 3, 2012) (denying costs to defendant, in part, because no evidence to suggest plaintiff acted in bad faith); Bucalo, 238 F.R.D. at 129-30 (plaintiff's good faith a basis for denying costs to defendant); see Ass'n of Mexican-Am. Educators v. State of California, 231 F.3d 572, 592-93 (9th Cir. 2000) (citing Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1079-80 (9th Cir. 1999)) (grant of costs against civil rights plaintiff "might have the regrettable effect of discouraging potential plaintiffs from bringing such cases at all.

Plaintiff further submits that costs should not be assessed against a Title VII plaintiff unless his claims are frivolous or vexatious as articulated in Chirstianburg Garment Co. v EEOC, 434 US 412 (1978). This equitable principle should be applied to costs as well as attorneys' fees, particularly in the instant matter in light of defendant's vexatious behavior in overreaching any legitimate claim it might have.

In light of the public importance of this case (protection of those discriminated against because of sexual orientation); the difficulty of the issues, the financial hardships to the plaintiff; the plaintiff's good faith in bringing the action; and finally defendant's bad faith in not limiting its request to only recoverable costs, defendant should be denied any costs..

III. ALTERNATIVELY, IF ANY COSTS ARE ASSESSED IT SHOULD BE LIMITED TO \$1, 314.78 FOR THE CARGIAN DEPOSITION

None of the deposition transcripts were relied upon by defendant in support of its summary judgment motion or relied upon by the court. Indeed, six (6) of the depositions were never even entered into evidence by defendant; and two of those are totally unrelated to the summary judgment motion. See generally Goodman Aff. ¶¶ 16-17.

Cargian's brothers, John and Michael Cargian, (cost \$631.50) whose information related solely to the issue of emotional pain and suffering (not an issue on summary judgment).

Goodman Aff. ¶ 17A.

Three administrative employees, Diana Figueroa, Sophie Morice and Melissa Vessely (cost \$1,843.8) none of whose testimony defendant even entered into the record nor cited once in its motion; nor did the court make any note of their testimony. Goodman Aff. ¶ 17 B & C.

Isaac Schafrath, (cost \$1,256.4) is the man who replaced Cargian when he was demoted and then fired. Here too defendant did not enter any part of Schafrath's testimony into the record, nor does it cite to any Schafrath deposition testimony in its brief; nor is it relied upon by the court. Goodman Aff. ¶ 17D.

The Court should disallow \$1,663.20 for the cost of the deposition of Prissert taken by Plaintiff in discovery. Defendant did not need deposition testimony from Prissert. Clearly Prissert's testimony was available to defendant without deposition, and, in fact, a 15 page affirmation of his testimony was submitted by defendant as part of the record together with multiple documents. Defendant in its moving and reply brief relies totally on this affirmation which it cites 45-50 times, not on deposition transcripts. The court ultimately relies on

defendant's 56.1 statement, and the affirmation and the documents submitted by defendant, not once citing the Prissert deposition. Goodman Aff. ¶ 17E. ECF 90

The Court should disallow \$550.8 for the cost of the deposition taken by plaintiff in discovery of Annie Sommers. Again her deposition testimony was not relied upon by defendant or the courts, but rather defendant cited business records in support of its position. Moreover \$176 of \$550.80 was not related to deposition testimony of Ms. Sommer at all, but rather was a transcript of a conference with the Court. Goodman Aff. ¶ 15F.

Finally, plaintiff submits that the Court should disallow the \$3,909.95 for the cost of the deposition it took of Plaintiff Frederick Cargian. Neither Breitling nor the court relied on deposition testimony in support of its summary judgment motion. Again, it was the Prissert and Anderson affirmations and the business records that were the basis for defendant's argument that its treatment of Cargian was not gender based, and it was almost exclusively that testimony upon which the court relied. Goodman Aff. ¶ 17G

If, however, the court finds costs for this deposition are recoverable, then the maximum to which defendant is entitled is \$1,314.78 which is the price plaintiff paid for the transcript on ordinary delivery. Defendant paid significantly more because it ordered expedited service although there was no compelling need for speed. It was not court ordered and Defendant did not file its summary judgment motion for another 4 plus months. Costs do not cover expedited service when is it merely a convenience rather than a necessity, See *Morales v Smith*, 1998 WL352595 (S.D. N.Y. June 26, 1998). In addition to the expedited fee, defendant improperly

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includes \$450 for an appearance fee, \$75 for unexplained PM pages; \$75 for reproduction of
their own exhibits and \$23 for delivery. Goodman Aff. ¶ 17G.

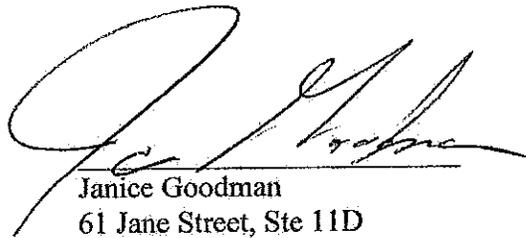
CONCLUSION

For the reasons stated above, defendant's request for costs denied in its entirety , or in the
alternative reduced to \$1,314.78.

Dated: New York, New York
October 14, 2021

Respectfully submitted,

LAW OFFICE OF JANICE GOODMAN

A handwritten signature in black ink, appearing to read 'Janice Goodman', is written over a horizontal line.

Janice Goodman
61 Jane Street, Ste 11D
New York, New York 10014
(212) 869-1940-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

FREDERICK M. CARGIAN,

Plaintiff,

15 Civ 1084 (GBD)

-against-

AFFIRMATION OF COUNSEL
IN OPPOSITION TO DEFENDANT'S
BILL OF COSTS

BREITLING USA, INC.,

Defendant.

X

JANICE GOODMAN, an attorney in good standing in the State of New York, affirms the following under penalty of perjury:

1. I am counsel to plaintiff, Frederick M. Cargian ("Cargian" or plaintiff), in the above referenced matter and submit this affirmation opposing defendant's bill of costs in its entirety. Alternatively, reimbursement should be limited at most to \$1,314.78.

2. Cargian was hired by the then President of Breitling USA, Marie Bodman, in 1990. He was the leading sales person until 2011 when Thierry Prissert ("Prissert") became the newly appointed President. ECF 48. Within one short year of Prissert's appointment Cargian went from being the best to the worst sales rep. He alleged that the reversal in his production was caused by Prissert treating him differently and more harshly than the other male sales reps by (a) imposing higher unobtainable sales goals than any other rep ; (b) not inviting him to critical marketing events which would enhance his sales; © demoting him in function and pay while

replacing him with a younger straight man with absolutely no sales experience; (d) subjecting him to reprimand even when no policy was violated. Prissert terminated Cargian's employment effective December 31, 2013. Plaintiff was 53 years old at the time. Id

3. On February 17, 2015, after the required EEOC filing, Cargian filed this complaint alleging discrimination because of his sexual orientation (gay) and his age in violation of 42 U.S. §§ 2000e *et seq.* ("Title VII) and the Age Discrimination in Act, 29 USC § 621 *et seq.*. Supplemental jurisdiction was invoked pursuant to the Administrative Code of the City of New York, Secs 8-107 and the New York Human Rights Law, N.Y. Exec Law Sec. 296 *et seq.* ECF 1

4. On February 29, 2016, defendant moved for summary judgment on the grounds that plaintiff's claim of gender discrimination was not cognizable under Title VII and the ADEA Claim failed for lack of proof. ECF 38

5. On September 29, 2016, District Court Judge George B. Daniels granted Defendant's Motion on both claims. He dismissed the supplemental claims without prejudice. ECF 63

6. On October 24, 2016, Plaintiff appealed from the judgment dismissing his Title VII claim, but not the dismissal of the ADEA claim and requested reinstatement of the supplemental claims. ECF 66

7. On September 10, 2018, the Court of Appeals for the Second Circuit reversed the lower Court's grant of summary judgment based on its prior decision in *Zarda v Altitude Express*, 883 F.3d 100 (2d Cir. 2018), which was filed a few weeks before plaintiff's case, upheld by the Supreme Court's in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) both holding that Title VII prohibits discrimination based on sexual orientation. The Circuit remanded this case to the District Court for further consideration in light of the new law. ECF 67

8. On November 9, 2020, defendant renewed its motion for summary judgment

motion primarily arguing that the court's prior decision, in fact, already made a finding that even under a law that covered sexual orientation there were no facts to support a claim and that plaintiff failed to even establish a prima facie case of discrimination. ECF 84, 87.

9. On September 13, 2021, the District Court issued a memorandum decision and order granting defendant's renewed motion for summary judgment. In essence the court found that plaintiff did establish a prima facie claim of discrimination based on sexual orientation, but failed to adduce sufficient evidence to present to the jury to support a claim of discriminatory motivation. ECF 90

10. On September 15, 2021, the Clerk of the Court entered a final judgment dismissing the complaint. ECF 91

11. Plaintiff strongly disagrees with the Court's conclusions, but litigation costs make further appeals prohibitive. Plaintiff finds himself in precisely the situation that Congress and the Supreme Court were concerned with when they protected plaintiffs who act as private attorneys general against the costs of litigation unless the claims are frivolous or vexatious. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

12. Plaintiff submits that defendant's bill of costs be denied in total as a matter of equity because (1) defendant has flaunted all of the local rules regarding costs, burdening the court and plaintiff with unnecessary review; (2) plaintiff prevailed on a very significant issue which established new law benefitting thousands of employees, if not more, making him in part the prevailing party, (3) plaintiff's claims are not frivolous or vexatious under *Christiansburg Garment Co. V. EEOC*, 434 U.S.412,422 (1978), (4) defendant's bill of costs is improper and vexatious.

13. Alternatively, as discussed below, defendant's reimbursement should be limited to

\$1,314.78, the basic cost of the Cargian deposition. Defendant improperly requests reimbursement for every deposition transcript taken in discovery, including testimony totally irrelevant on summary judgment (Cargian's two brothers); were even filed by defendant as part of the records it submitted in support of its summary judgment motion (Figueroa, Morice, Vessely, Schafrath) or were relied upon in their briefs or by the court in its ultimate decision (Prissert, Sommer, Cargian). Moreover, defendant improperly requests reimbursement for expedited transcripts where speed was not necessary; for appearance fees; and other costs this district regularly disallows.

14. First there is no evidence submitted by defendant that the amounts claimed were actually paid by defendant. All that was submitted are invoice. Six (6) of the nine (9) depositions were taken by plaintiff. We served copies for signing on defendant. It is not unheard of for a party to simply make photo copies of the deposition.

15. As was reported in the papers, and told to me, defendant had insurance coverage and the insurer was present during the case and involved at various points. On information and belief, counsel for defendant may also have represented the insurer. Plaintiff suggests that insurance may have covered these costs, in which case defendant would not be entitled to any reimbursement, since it may never have paid for the transcripts. Defendant should at least be required to answer this question.

16. Moreover, of the nine (9) persons for whom reimbursement is requested all but plaintiff and his brothers were employees of defendant, including its president, Prissert. These company witness were deposed by plaintiff, not defendant, solely for discovery purposes. Defendant did not need these depositions, since all of these witness were available to defendant by affidavit. Indeed, defendant did produce and relied almost exclusively on the 15 page

affirmation of Prissert, the 11 page affirmation of Charles Anderson, the sales manager, and a multitude of business records to support its summary judgment motion. ECF 39, 40. The court, in its final judgment, similarly adopted and relied exclusively on defendant's 56.1 statement and its supporting affirmations and exhibits. ECF 90.

17. The following addresses each deposition transcript and why the cost is not recoverable:

A. . John Cargian and Michael Cargian, \$631.50. These are relatives of plaintiff whose depositions were taken by defendant. They were listed by plaintiff as having knowledge relating to the emotional damages suffered by plaintiff. Their testimony was never relevant on a summary judgment motion and was never even introduced by defendant. ECF 39-41.

B. Diane Figuero, Breitling Personnel Director, \$796. Breitling's never made Figuero's testimony part of the record; nor did it once introduce her testimony to support its claims, nor does the court note it or rely on it in any form. ECF 39, ECF 90. Moreover defendant impermissibly requests payment for reproduction of exhibits. These were all Breitling's business records produced by defendant in discovery.

C. Sophie Morice, Breitling Director of Retail and Melissa Vessely, Breitling's Training Manager. \$1,047.80. These depositions were also taken by plaintiff. Both had complementary comments about plaintiff. Breitling never introduced any of their testimony into the record or make note of it in its brief ECF 39, 41,46 nor does the Court make note of any testimony, and certainly does not rely on anything these witnesses said. ECF 90. .Again defendant includes an \$11 charge for reproduction of documents it produced in discovery.

D. Isaac Schafrath, the man who replaced Cargian as sales rep. \$1,256.40.

Plaintiff took this deposition as part of his discovery. Again, defendant did not introduce the transcript into the record, ECF 39, or rely on this deposition on its briefs to demonstrate a legitimate reason for replacing Cargian, ECF 39, nor is the deposition relied upon by the court. ECF 90.

E. Thierry Prissert, President of Breitling USA. \$1,663.20. Defendant submitted a 15 page affirmation by Prissert together with many business records regarding Cargian and his alleged performance. ECF 39. The court's ultimate decision relies almost exclusively on this affirmation, not on deposition transcripts. ECF 90 Defendant in its opening brief cites this affirmation at least 18-20 times and about 25 times in its reply brief. ECF 84, 87. Throughout its decision the court relies almost exclusively on Defendant's 56.1 statement and the Prissert affirmation (along with the affirmation of of Chuck Anderson) and the business records. The Court does not cite the Prissert deposition. ECF 90.

F. Annie Sommers was a fact witness in support of plaintiff but because she was still employed by defendant she would not voluntarily testify. \$550.80. Plaintiff conducted this deposition but, as was testified to at the deposition defendant debriefed her prior to the deposition. Again, her deposition testimony was not relied upon by defendant or the court, rather the defendant cited business records which were also relied upon by the court. ECF 84, 87, 90. Moreover, in addition to the \$374.40 requested for the transcript of the deposition, defendant improperly requests payment of \$176 for a transcript of a teleconference which, to the best of my recollection, related to a conference with the court where there was a legal dispute as to the propriety of some inquiries. That is not an includable cost.

G. Frederick M. Cargian the plaintiff. \$3,909.95. Plaintiff submits that this deposition,

taken by defendant, was simply discovery and not relied upon by the defendant or the court in its ultimate decision, and therefore is not reimbursable. Indeed defendant cites the testimony only once (a few lines) in its briefs . Cargian's deposition testimony was not relied upon either by defendant or the court in its ultimate decision. Defendant and the Court relied almost exclusively on the affidavits of Prissert and Anderson and the attached exhibits in arguing for summary judgment. At a minimum, the following charges, which are not allowable under the Local Rules, should be rejected: defendant requests \$3,291.75 for "expedited delivery" of the transcript. There was no reason to expedite. There was no court mandate and defendant's first summary judgment motion was not filed for another 4 plus months. The charge to plaintiff for a copy of the transcript on ordinary 2 week delivery was \$1,314.78. In addition to the expedited fee, there is \$450 requested for an appearance fees, a cost that has been consistently disallowed under the local rules. There is an unexplained charge of \$70 for PM pages; \$75 for reproducing their own exhibits and \$23 for delivery which is only charged because it was expedited. None of these costs are recoverable. If the court decides to allow any costs for this deposition then it should be limited to the cost for ordinary 2 week delivery.

18. Plaintiff submits, based on the above, and his brief in support, defendant should be denied the requested costs entirely or, at a minimum, those costs should be reduced to \$1,314.78.

Dated: New York, New York
October 13 2021.


JANICE GOODMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

FREDERICK M. CARGIAN,

Plaintiff,

Civil Action No.:

15-CV-01084(GBD)(HBP)

-against-

BREITLING USA INC.,

Defendant.

-----X

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
APPLICATION FOR COSTS**

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INTRODUCTION

Pursuant to Rule 54 of the Federal Rules of Civil Procedure, Local Civil Rule 54.1, and 28 U.S.C. §§1920 and 1923, Defendant Breitling USA, Inc. (“Breitling”) submits this reply memorandum of law in support of its Applications for a Bill of Costs to address issues raised by Plaintiff Fred Cargian (“Plaintiff”) in his Opposition to Defendant’s Bill of Costs that was filed with the Court on October 13, 2021 (Docket Numbers “Dkt Nos.”: 95-97).

Breitling is seeking costs for deposition transcripts that were used in its successful Motion for Summary Judgment. These costs are statutorily authorized, and Plaintiff has not presented any admissible evidence that his is indigent or would suffer financial hardship if he paid the award of costs. Further, Plaintiff has not presented any other evidence to support his contention that the requested costs should not be awarded to Breitling. Accordingly, the Court should grant Breitling its Bill of Costs as originally submitted.

BACKGROUND

Plaintiff is a former sales representative of Breitling whose employment was terminated in December 2013 for legitimate and non-discriminatory reasons; namely, his failure to achieve his sales goals, a decrease in his actual total sales numbers, and his negative attitude towards his job and his boss. On February 17, 2015, Plaintiff filed the instant action alleging that he was discriminated against on the basis of his age, sex (male) and sexual orientation (homosexual) in violation of the Age Discrimination in Employment Act (“ADEA”), Title VII of the Civil Rights Act of 1964 (“Title VII”), the New York State Human Rights Law (“SHRL”), and the New York City Human Rights Law (“CHRL”).

One year later, on February 29, 2016, Breitling moved for summary judgment on all of Plaintiff’s claims. On September 29, 2016, this Court granted Breitling’s summary judgment

motion dismissing Plaintiff's ADEA and Title VII claims and declining to exercise supplemental jurisdiction over Plaintiff's SHRL and CHRL claims. Specifically, this Court noted in its September 29, 2016 decision that Breitling "has established that there is no admissible evidence sufficient to allow a trier of fact to find that [Breitling] discriminated against Plaintiff." Dkt No. 63 at 1.

Plaintiff appealed this Court's decision to grant summary judgment to Breitling on his Title VII claim; he did not appeal the dismissal of his ADEA claim. After the Court issued its September 29, 2016 decision, there was a change in the law. Specifically, in *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) *aff'd* 140 S. Ct. 1731 (2020), the Second Circuit reversed the Circuit's precedent finding, for the first time, that sexual orientation discrimination was cognizable under Title VII. In light of *Zarda*, the Second Circuit instructed this Court to reexamine Breitling's summary judgment motion. *See Cargian v. Breitling USA, Inc.*, 737 Fed.Appx. 41, 42 (2d Cir. 2018) (Summary Order). Thus, contrary to Plaintiff's assertion, he did not make law or succeed in changing the law – *Zarda* did.

On November 9, 2020, Breitling renewed its Motion for Summary Judgment. On September 13, 2021, this Court granted Breitling's Motion in full. The Court found that Breitling had articulated a legitimate, non-discriminatory reasons for all the actions about which Plaintiff complained, and that Plaintiff could not show that such reasons were pretextual. As such, summary judgment in favor of Breitling was warranted on Plaintiff's Title VII and SHRL claims. Further, this Court held that summary judgment was even warranted on Plaintiff's CHRL claim, which has a significantly lower standard for Plaintiff to satisfy than Title VII or the SHRL. Accordingly, this Court dismissed all of Plaintiff's claims and entered judgment for Breitling.

On September 15, 2021, the Clerk docketed Breitling's judgment. On October 4, 2021, Breitling filed its Bill of Costs seeking reimbursement of \$9,855.65 for the costs of deposition transcripts used in its successful Summary Judgment Motion. Plaintiff filed his opposition to the Bill of Costs on October 13, 2021 by submitting two identical affirmations of counsel, *see* Dkt. Nos. 95 and 97, and a memorandum of law. *See* Dkt No. 96.

ARGUMENT

Breitling is entitled to the costs it seeks because the deposition transcripts for which it seeks reimbursement were used in Breitling's successful Summary Judgment Motion. Plaintiff contends that he should not be required to pay the statutory costs that Breitling seeks because of (i) equity; (ii) Breitling's insurer likely paid for the deposition transcripts costs; and (iii) Breitling did not rely on any of the deposition transcripts in its successful motion for summary judgment. Each of Plaintiff's arguments is unavailing.

A. Legal Standard

"Unless a federal statute, these rules, or a court provides otherwise, costs – other than attorneys' fees – should be allowed to the prevailing party." Fed.R.Civ.P. 54(d). The Supreme Court has held that "costs" are limited to those items set forth in 28 U.S.C. § 1920, which provides that "[a] judge or clerk of any court of the United States may tax as costs . . . [f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *Crawford Gitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). The Second Circuit has consistently held that the prevailing party may obtain "deposition expenses when necessarily incurred for use of the deposition in the case." *Whitfield v. Scully*, 241 F.3d 264, 270 (2d Cir. 2001) *abrogated on other grounds by Bruce v. Samuels*, 136 S.Ct. 627 (2016).

The Second Circuit has also held that the default rule is to award costs to the prevailing party. *See Wilder v. Gl. Bus Lines*, 258 F.3d 126, 129 (2d Cir. 2001). While the decision to award costs rests within the discretion of the district court, *see Cosgrove v. Sears, Roebuck & Co.*, 191 F.3d 98, 102 (2d Cir. 1999), the losing party carries the burden of showing that costs should not be imposed. *See Whitfield*, 241 F.3d at 270. In determining whether to deny costs, courts may consider the equities of the case, such as plaintiff's financial hardship and plaintiff's good faith in bringing the lawsuit. *See Moore v. Cty. of Delaware*, 586 F.3d 219, 222 (2d Cir. 2009).

B. Breitling is the Prevailing Party and Therefore Entitled to Costs

There can be no doubt that Breitling is the prevailing party for purposes of Rule 54(d). A party is a "prevailing party" where there has been a "judicially sanctioned change in the legal relationship of the parties." *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 101 (2d Cir. 2006). Where a party prevails "on every claim resolved on the merits," that party is the prevailing party. *Vuona v. Merrill Lynch & Co.*, 2013 WL 1971572, at *3 (S.D.N.Y. May 14, 2013).

Here, after moving for summary judgment, Breitling succeeded in having all of Plaintiff's claims dismissed by the Court. *See generally*, Dkt Nos. 63 and 90. Accordingly, Breitling is the prevailing party under applicable law entitled to costs.

C. The Costs Sought Are Taxable Pursuant to Local Rule 54.1

Pursuant to Local Rule 54.1, Breitling is entitled to costs for deposition transcripts used by the Court in ruling on its motion for summary judgment. In fact, Local Rule 54.1(c)(2) states:

Unless otherwise ordered by the Court, the original transcript of a deposition, plus one copy, is taxable if the deposition was used or received in evidence at the trial, whether or not it was read in its entirety. Costs for depositions are also taxable if they were used by the Court in ruling on a motion for summary judgment or other dispositive substantive motion.

Id.

It is well-settled that, under Local Rule 54.1, the “filing of a deposition transcript,” by attaching it to a motion for summary judgment (or in opposition to such motion), “means a court will ‘use’ it, since summary judgment may be granted only ‘if the pleadings, depositions, answers to interrogatories, admissions on file, ... how that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Whitfield*, 241 F.3d at 271.

In its moving papers, Breitling filed with the Court the deposition transcripts of Plaintiff, Thierry Prissert, and Annie Sommer. *See* Dkt. Nos. 39-1, 39-2, and 39-3. In his opposition papers, Plaintiff cited attached the depositions of Isaac Schafrath, Diana Figueroa, Melissa Vessely, and Sophie Morice. *See* Dkt Nos. 44-6, 44-9, 44-10, and 44-13. Accordingly, these deposition transcript costs that Breitling seeks are taxable costs.

D. Plaintiff’s Assertions That He Should Not Be Taxed Costs Are Unavailing

Plaintiff Opposition to Breitling’s Bill of Costs can be condensed into three arguments as to why Plaintiff should not be taxed costs. First, he argues that equity dictates against taxing him costs. Second, he claims that Breitling’s insurer paid for the deposition transcripts. Third, Plaintiff claims that Breitling did not rely on the deposition transcripts. All three arguments are specious.

1. Plaintiff’s Equity Argument Is Fallacious

Plaintiff asserts that equity dictates that no costs should be awarded and he should therefore be relieved of having to pay costs. Plaintiff is wrong.

In determining whether equity prohibits the taxing of costs to a plaintiff, courts consider the financial hardship to the taxed party, the good faith plaintiff had in bringing the case, and the public importance of the case. *See Jackson v. Time Warner Cable Administration LLC*, No. 16-cv-8639(PKC), 2018 WL 572925, at *1 (S.D.N.Y. Nov. 1, 2018). Plaintiff contends that all three of these elements are present. None are; thus, costs should still be awarded to Breitling.

The first equity argument that Plaintiff raises is that it would cause him financial hardship. However, “indigency *per se* does not automatically preclude an award of costs.” *Whitfield*, 241 F.3d at 270. Indeed, “[a] non-prevailing party relying on indigency must make a ‘strong showing of financial hardship’ before a court will decline to award costs.” *Jackson*, 2018 WL 5729295, *1 (quoting *Sims v. City of New York*, No. 08-cv-5965 (JGK), 2011 WL 4801363, at *3 (S.D.N.Y. Oct. 11, 2011)). Furthermore, if a party is going to rely on financial hardship to avoid costs, the party must provide evidence “documenting his alleged lack of financial resources.” *Campbell v. Empire Merchants, LLC*, No. 16-cv-5643 (ENV)(SMG), 2020 WL 587484, at *1 (E.D.N.Y. Feb. 6, 2020) (citing *Hogan v. Novartis Pharm. Corp.*, 548 F.App’x 672, 674 (2d Cir. 2013)). When the party fails to document such financial hardship “and, instead, relies solely on bald assertions...a district court should not excuse the taxing of costs on that basis.” *Id.*

In his Opposition to Breitling’s Bill of Costs, Plaintiff did not present any evidence to support his contention that financial hardship prevents him from paying costs. *See* Dkt Nos. 95-97. Indeed, Plaintiff did not even present an affidavit attesting to his financial hardship. *See id.* Instead, he merely relies on “bald assertions” of indigency. Accordingly, he should not be excused from paying costs due to financial hardship.

Second, Plaintiff contends that he brought the case in good faith. However, “good faith alone does not compel the denial of costs.” *Campbell*, 2020 WL 587484, *2. If a plaintiff could avoid costs by simply arguing that he had good faith in bringing the lawsuit, then defendants would never be entitled to costs unless plaintiff’s complaint was filed in contravention to Rule 11 or the plaintiff otherwise engaged in sanctionable conduct. That has never been the standard. This is why courts routinely grant a prevailing defendant costs even if plaintiff brought his case in good faith. *See, e.g., Pierre v. City of New York*, No. 05-cv-5018 (JFB) (KAM), 2008 WL 1700441, at

*3 (E.D.N.Y. Apr. 9, 2008) (“[P]laintiff’s good faith in pursuing this lawsuit is insufficient . . . to warrant vacating the costs.”). Therefore, Plaintiff the second equitable grounds to avoid costs is misplaced and does not reveal Plaintiff of his obligation to pay costs.

Third, Plaintiff contends that his case was important because civil rights actions serve an important public interest and Plaintiff “was the prevailing party on the central issue: the extension of Title VII to the protection against [*sic*] sexual orientation.” Dkt No. 96 at 6. If simply filing a civil rights claim is enough to avoid costs, then courts would never award costs to defendant’s who prevail in such cases. Yet, courts routinely grant costs to prevailing defendants in civil rights cases. *See, e.g., Campbell*, 2020 WL 587484 (granting costs to defendant in Section 1981 employment discrimination case).

Further, Plaintiff’s argument that he “was the prevailing party on the central issue: the extension of Title VII to the protection [to] sexual orientation” is disingenuous at best, and a lie at worst. The Second Circuit changed the law and extended Title VII to sexual orientation discrimination claims in *Zarda*, which was upheld by the Supreme Court. Plaintiff had nothing to do with *Zarda*; the law had changed before the Second Circuit heard Plaintiff’s appeal. Therefore, Plaintiff played no role whatsoever in changing the law or extending Title VII protections to victim of sexual orientation discrimination.

Moreover, the Second Circuit did not find Plaintiff to be the prevailing party on his sexual orientation discrimination claim; it merely remanded the case back to this Court to review Breitling’s summary judgment motion in light of *Zarda*. This Court followed the Second Circuit’s instructions and found that even after *Zarda*, no rational fact finder could hold that Plaintiff suffered from unlawful discrimination. Accordingly, equity does not weigh in favor of allowing Plaintiff to avoid costs in this case.

2. Breitling Is Entitled To Costs Even If It Has An Insurance Policy

Plaintiff's second argument to excuse him from costs fares no better than his first. Plaintiff contends that Breitling has an insurance policy and therefore it is likely that the insurance carrier paid for the transcripts and not Breitling. This argument borders on the ridiculous.

Whether Breitling or its insurance carrier paid for the deposition transcripts is irrelevant. Local Rule 54.1 permits a prevailing defendant to recover the costs of deposition transcripts relied upon by the Court in granting the defendant summary judgment. It does not include a carve out for defendants with insurance policies nor does it even state that the defendant had to have paid for the transcripts. Indeed, the defendant might still owe the money to the stenographer or the stenographic company. Thus, it is irrelevant whether Breitling or its insurer paid for the transcript or even if transcript bills from the stenographer are still outstanding. By their express language, Rule 54 and Local Rule 54.1 permit Breitling to recover deposition transcript costs.

Nevertheless, courts around the country have held that a prevailing defendant is entitled to costs even if the costs incurred were paid by a third-party such as an insurance carrier. *See, e.g., Kevin M. Ehringer Enters., Inc. v. McData Servs. Corp.*, No. 3:06-CV-812-L (BH), 2012 WL 1835759, at *2 (N.D.Tex. Apr. 30, 2012) ("On its face, Rule 54(d) merely provides that costs should be allowed to a prevailing party and does not create an exception for a prevailing party whose costs are paid by another."); *Guarrasi v. Gibbons*, No. 07-5475, 2011 WL 382598, at *1 (E.D.Pa. Feb. 3, 2011) ("Indeed, other courts that have considered the issue have concluded that costs may be awarded 'to a prevailing party even if such costs were initially paid by a third party on the prevailing party's behalf.'" (citation omitted)). Furthermore, at least one circuit court of appeals has specifically found that costs covered by a non-party insurer are recoverable by the insured as the prevailing party. *See Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 638-

39 (11th Cir. 1991); *see also Bilezikjian v. Baxter Healthcare Corp.*, No. 92 CIV. 9498(HB), 1999 WL 945522, at *2 (S.D.N.Y. Oct. 18, 1999) (noting that the prevailing party “may have insurance coverage for all expenses associated with this litigation”).

Accordingly, Plaintiff’s argument that he should be excused from paying costs because Breitling has an insurance policy should be rejected.

3. The Deposition Costs That Breitling Seeks Is Proper

Finally, Plaintiff contends that Breitling did not rely on the deposition transcripts for which it seeks costs. This is demonstrably untrue.

As set forth above, when a court grants a defendant’s summary judgment motion, in reaching its decision, it is assumed that the court relied upon the deposition transcripts submitted by the parties. *Whitfield*, 241 F.3d at 271. Either Plaintiff or Breitling (or both) attached to their papers the deposition transcripts for which Breitling now seeks costs. Accordingly, under well-settled law, the Court relied on such transcripts in granting Breitling’s summary judgment motion.

Therefore, the deposition transcript costs that Breitling seeks are taxable costs and Plaintiff should not be excused from having to pay same.

CONCLUSION

For the reasons set forth herein above, Breitling’s Bill of Costs should be granted in its entirety.

Dated: New York, New York
October 15, 2021

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