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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

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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

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 judgement 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

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

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 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 (Figuroa, 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 benefited 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..

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

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

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,

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