DISTRICT COURT, COUNTY OF DENVER, COLORADO
Court Address:
1437 Bannock Street
Denver, Colorado 80202

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CASE NUMBER: 2020CV34319

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Plaintiff:

ERIC COOMER

Defendants:

DONALD J. TRUMP FOR PRESIDENT, INC., Et al.

Case # 20-CV-34319

Div. 409

Attorney for Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media, Inc. d/b/a Conservative Daily
Andrea M. Hall
THE HALL LAW OFFICE, LLC
P.O. Box 2251
Loveland, CO 80539
(970) 419-8234
andrea@thehalllawoffice.com
Atty. Reg. #: 036410

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S FEE AND COST BILLS AND REQUEST FOR FEES AND COSTS

Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media, Inc. d/b/a/ Conservative Daily by and through their undersigned counsel, hereby submit their Response in Opposition to the Plaintiff's Fee and Cost Bills and the Plaintiff's Request for Fees and Costs, stating as follows:

The Plaintiff asserted that the 30(b)(6) depositions of FED United and Shuffling Media Madness, Inc. d/b/a Conservative Daily were worthless, because the witnesses were not sufficiently knowledgeable to provide proper depositions, which was untrue, but nevertheless, the Court, based solely on Plaintiff's untruthful representations, granted him a second deposition of each, and an additional deposition of CD Solutions. The Plaintiff repeatedly refused to take depositions via remote

means, as he has with virtually all other defendants, and Plaintiff's counsel advised Defendants' counsel that they wanted Mr. Oltmann at the Denver District Courthouse so that if he refused to answer their questions, they could have him held in contempt and jailed. Due to grave concerns about his personal safety, which has been repeatedly threatened in the past nine months, via armed intruders into his home, being repeatedly followed when he attempts to travel, being threatened in both public and private, being the recipient of a terroristic mailing, and the threat of incarceration, which he could not anticipate surviving, and which has been repeatedly expressed to this Court, Mr. Oltmann did not appear at the publicly-announced deposition on August 11, and thereby violated this Court's Order, incurring sanctions. In the interest of judicial economy, and to avoid needless repetition, these Defendants incorporate here, by reference, their previous Response to the Plaintiff's Motion for Sanctions and Exhibits thereto, filed on August 25, 2021.

The Plaintiff proceeded to take the depositions of Mr. Oltmann personally, and as the improperly-compelled 30(b) "designee" of FEC United, Shuffling Madness Media, and CD Solutions on September 8 and 9, 2021. The Plaintiff has not demonstrated that most of the fees and costs he seeks reimbursement for would not have been necessarily incurred in the ordinary course of litigation, nor has he demonstrated that those fees and costs were, with minimal exceptions, prejudicially incurred as a result of any discovery misconduct. Where no prejudice resulted, reimbursement is improper. Further, the Plaintiff's Fees and Costs are excessive, unsupported, and largely devoid of the mandatory showing of reasonableness or necessity, and so must be denied or sharply reduced to comply with Colorado law.

I. THE REQUEST FOR ATTORNEYS' FEES IS GROSSLY EXCESSIVE, FRAUDULENT, AND LARGELY UNWARRANTED

Despite being supported by the sworn affidavit of counsel, the attorney billing statement is a fraud upon the court, and violates Rule of Professional Conduct 8.3. Where it is not patently

fraudulent, it is, in large part, grossly excessive and unwarranted.

> In determining whether an attorney fee is reasonable, the trial court shall consider the eight factors for determining the reasonableness of fees set forth in Rule 1.5 of the Colorado Rules of Professional Conduct and "other factors may be appropriate to consider in a particular case."
>
> *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1115–1116 (Colo. 1996).

The eight factors set forth in Rule 1.5 to be considered in determining the reasonableness of fees are:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the result obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) Whether the fee is fixed or contingent.

"It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero." *Payan v. Nash Finch Co.*, 310 P.3d 212, 219 (Colo. App. 2012)(quoting *Mares v. Credit Bureau,* 801 F.2d 1197, 1210 (10th Cir.1986)).

A "reasonable" fee should be determined in light of all the circumstances for the time and effort reasonably expended by the prevailing party's attorney. *Spensieri v. Farmers Alliance Mutual Insurance Co.,* 804 P.2d 268 (Colo.App. 1990); *Tallitsch v. Child Support Services,* 926 P.2d 143 (Colo.App. 1996). In arriving at a reasonable fee amount, the court should initially calculate the "lodestar" amount which represents the number of hours reasonably expended multiplied by a reasonable hourly rate. This lodestar amount carries a strong presumption of reasonableness. *Payan*, *supra,* 310 P.3d at 217.

"A trial court should award attorney fees based on the prevailing market rate by private lawyers in the community." *Id.* (citing *Balkind v. Telluride Mountain Title Co.,* 8 P.3d 581, 588–89 (Colo.App.2000); *Spensieri,* 804 P.2d at 270; *see also* Colo. RPC 1.5)(internal quotes omitted).

The Plaintiff has billed at $500 per hour for **three** attorneys, and has made no showing that $500 is a reasonable lodestar rate. "Plaintiffs must provide evidence of the prevailing market rate for similar service by lawyers of reasonably comparable skill, experience, and reputation in the relevant community." *Lippoldt v. Cole,* 468 F.3d 1204, 1224 (10th Cir. 2006)(internal quotation marks omitted) The Plaintiff has submitted no evidence of the prevailing market rate in Denver's front range. The U.S. District Court calculates the presumptive lodestar rate using the Colorado Bar Association's 2017 Economics of Law Survey, *Exhibit 1, Fresquez v. BNSF Ry. Co.,* 2020 U.S. Dist. LEXIS 48416, *6-7 (D. CO. March 20, 2020)(Martinez, U.S.D.J.) The median hourly rate for "civil litigation" practitioners is $248. While the survey makes hourly-rate adjustments based on years in practice, the Plaintiff has provided no such information beyond his opinion, nor any information from which the Court could determine particularized expertise permitting an upward adjustment. The presumptive lodestar hourly rate is $248. The Plaintiff's attorneys have also produced no fee agreement from which the Court could determine what hourly rate is actually being charged to the client, or for which staff members and/or attorneys.

Under no conceivable circumstance is it reasonable or necessary for three, $500 per hour attorneys to be required to conduct three-hour depositions. "Another factor the court should examine in determining the reasonableness of hours expended is the potential duplication of services. "For example, [if] three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." *Ramos v. Lamm,* 713 F.2d 546, 554 (10th Cir. 1983) (*citing Copeland v. Marshall,* 641 F.2d 880, 891 (D.C. Cir. 1980)). The typical deposition lasts seven hours; these were not scheduled to be even half as long. While the Plaintiff argues that Mr. Oltmann had two attorneys

present, he has not asked, nor made any attempt to determine whether the Defendants were being billed by both. In fact, they were not. *Exhibit 2, billing statement.*

Not only does the Plaintiff provide no evidence of the appropriate lodestar rate, his attorneys' billing hours are grossly excessive, and generally appear to be attempts to secure $500 per hour for work that does not require the time or effort of a skilled attorney. There is no means, in the absence of any meaningful timekeeping or detail, for the Court to exercise its discretion appropriately in determining what portion of the work billed was reasonable and necessary, nor is it the Court's responsibility or, indeed, within its discretion, to attempt to divine that when the Plaintiffs have failed to provide the essential information.

Exhibit A (Oltmann deposition)

Line item 1: Mr. Cain billed 3.9 hours at $500 per hour for "work on Oltmann deposition exhibits". This is paralegal work, which any vaguely competent paralegal or technician can easily handle, and was not "reasonably necessary" in preparation for a deposition. The hourly rate should be reduced to the actual hourly rate of the firm's paralegal or technician. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 2: Ms. Prentice billed 1.1 hours at $500 per hour to "download and revised clips of Conservative Daily podcasts". Again, this is paralegal/technician work, not $500 per hour attorney work, and the involvement of a $500 per hour attorney was not "reasonably necessary". In fact, this individual is **not** an attorney, and the line item is fraudulently billed. *Exhibit 3* The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 3: Mr. Kloewer, the four-year veteran, billed 2.5 hours at $500 per hour for

"collecting evidence". Paralegals collect evidence based on direction from an attorney. This is not skilled attorney work, and it was not "reasonably necessary" to have an attorney perform it. The hourly rate should be reduced to the actual hourly rate of the firm's paralegal or technician. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 4: Ms. Prentice **block** billed 5.5 hours at $500 per hour for downloading and uploading videos, and editing them, technician work, and not reasonably necessary to be performed by a skilled attorney. The hourly rate should be reduced to the actual hourly rate of the firm's paralegal or technician. In fact, this individual is **not** an attorney, and the line item is fraudulently billed. *Exhibit 3.* The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 5: Ms. Beam **block** billed 1 hour at $500 per hour for an **ex parte** telephone call with the Court's assistant, some (unknown amount) email communication, unknown amount of time "assisting" with exhibits and speaking to the court reporter. Block billing is impermissible. *Ramos,* 713 F.2d 553-56. In fact, this individual is **not** an attorney, and the line item is fraudulently billed. *Exhibit 3.* The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 6: Mr. Cain **block** billed 7.5 hours at $500 per hour for deposition preparation and travel. The Court has no means of determining what amount of time was reasonably necessary for either, as no detail has been presented, and the impermissibly-billed line item should be denied. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not

prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 7: Mr. Kloewer billed 4 hours at $500 per hour for "collection and organization of exhibits", a paralegal task, and travel (some unknown amount) to prepare for deposition. This attorney has been admitted to the practice of law since only 2017, does not appear to have clerked for a Supreme Court Justice, is employed in Salida, Colorado, rather than New York City, and $500 per hour is wholly unwarranted. Mr. Kloewer's presence was redundant and not reasonably necessary. This line item should be denied.

Line item 8: Ms. Prentice billed 1.1 hours at $500 per hour to watch videos and grab screen shots, and watched some segment of the Mike Lindell cyber symposium, reviewed Oltmann Facebook and posts, and allegedly saved a screen shot of an Oltmann post. This is a paralegal/technician task, and there is no showing of how this activity was reasonably necessary or compensable, or why watching the Mike Lindell symposium was relevant to a deposition. In fact, this individual is **not** an attorney, and the line item is fraudulently billed. *Exhibit B.* The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 9: Mr. Skarnulis billed 2 hours at $500 per hour for travel to and from the courthouse, which is grotesquely excessive, as the hotel, at 1314 Elati Street, is three-tenths of a mile from the Denver District Courthouse. *Exhibit 4.* Further, the hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 10: Mr. Cain **block** billed 3.8 hours on August 11 at $500 per hour for preparation, travel, and attendance, with no indication of amounts of time allocated to each. Mr. Cain was advised when he arrived at the courthouse that Mr. Oltmann would not appear that day, yet remained, with

no participation in the depositions. Because Mr. Cain improperly block billed this time, the Court has no reasonable means of determining what amount of time was reasonably necessary, and what amount was spent on a private frolic. The line item should be denied. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 11: Mr. Kloewer **block** billed 3 hours at $500 per hour for attendance and discussions with counsel and client. Mr. Kloewer' s presence was wholly redundant, unnecessary, and non-compensable.

Exhibit B (FEC United and SMM Depositions)

Line item 1: Ms. Beam **block** billed .5 hour at $500 per hour for exhibit "coordination". In fact, this individual is **not** an attorney, and the line item is fraudulently billed. *Exhibit 3*. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 2: Mr. Skarnulis **block** billed 4.3 hours at $500 per hour for "printing documents" and preparation. Block billing is impermissible, and given the number of paralegals the firm employs paying $500 per hour for a skilled attorney to print documents is wholly inappropriate and not reasonably necessary. Further, because Mr. Skarnulis elected to block bill this time, the Court has no reasonable means of determining what actual amount of time was spent, or reasonably necessary, for "preparation". The line item should be denied. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 3: Mr. Skarnulis **block** billed 4 hours at $500 per hour for travel and preparation on August 9, 2021. The travel time is not enumerated, there is no means of ascertaining whether it

was reasonable and necessary. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 4: Mr. Skarnulis billed 2.4 hours at $500 per hour for preparation and taking depositions on August 10, 2021. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 5: Mr. Skarnulis billed 5.5 hours at $500 per hour for preparation and taking depositions on August 10, 2021. The hours would necessarily have been incurred absent discovery misconduct; the Plaintiff was not prejudiced by incurring them, as they are ordinary costs of litigation, and they are not properly awarded as a discovery sanction.

Line item 6: Mr. Cain billed 2 hours at $500 per hour for attendance at the FEC and SMM depositions, in addition to his also-billed travel time, and despite being advised, upon arrival, that Mr. Oltmann would not appear. His attendance was as a spectator, who spent nearly all his time sitting in the jury box, concentrated on his computer. His presence was wholly-unnecessary, and non-compensable. This line item should be denied.

Lime item 7: Mr. Kloewer billed 2 hours at $500 per hour for attendance at the depositions and discussions, in addition to three hours billed for travel and preparation. As previously noted, a $500 hourly rate is wholly unwarranted, and his presence was unnecessary and unwarranted. This line item should be denied.

The allowable hours, insofar as the Court is able to determine what hours are reasonable and necessary, were necessarily expended whether Mr. Oltmann appeared for his deposition or not, because the Plaintiff was permitted to re-take his deposition, and the preparation would have had to be done at some point. The Plaintiff was not prejudiced by having to wait thirty days to take the

deposition, and the costs should not be awarded as sanctions, because they were necessary expenses of this litigation, not the result of misconduct by Mr. Oltmann. The travel time, which is impossible to determine, because it was not broken out, would also have inevitably been expended, because the Plaintiff refused to take a remote deposition of Mr. Oltmann or the entities, and insisted on travelling to Colorado to conduct it. These costs are not properly awarded as sanctions, because a court is required to impose "the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party." *Kallas v. Spinozzi,* 2014 COA 164 ¶ 20 (quoting *Pinkstaff v. Black & Decker (U.S.) Inc.,* 211 P.3d 698, 702 (Colo. 2009). Where a plaintiff has not been prejudiced, an award of fees and costs for discovery misconduct is improper.

II. PLAINTIFFS BEAR THE BURDEN OF PROVING THE AMOUNT, NECESSITY, AND REASONABLENESS OF ANY COSTS AND FEES THEY SEEK, AND HAVE NOT MET THEIR BURDEN

"The burden is on the requesting party to provide sufficient information and supporting documentation to allow the court to make a reasoned decision for each cost item presented." See *Valentine v. Mountain States Mut. Ins. Cas, Co.*, 252 P.3d 1182, 1187 (Colo. App. 2011); *Moore Western Forge Corp.*, 192 P.2d 427, 439 (Colo. App. 2007). A trial court must hold an evidentiary hearing if the reasonableness of the bill of costs is challenged and must make findings to support its award of costs. *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34, 41 (Colo. App. 1998) aff 'd and remanded sub nom. *Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000); *see also Evenson v. Colorado Farm Bureau Mutual Insurance Co.* 879 P.2d 402, 410 (Colo. App. 1993) (finding of reasonableness always required). The court's findings must be sufficient to disclose the basis for its decision to award costs and to support the amount awarded. *Madison Capital Co., LLC v. Star Acquisition VIII*, 214 P.3d 557, 561 (Colo. App. 2009); see also *Novell v. Am. Guar. & Liab. Ins. Co.*, 15 P.3d 775, 780 (Colo. App. 1999) ("A

trial court's findings must be sufficient for this court to understand and review the order awarding costs.").

Costs are limited and may not be awarded simply upon the submission of a bill of costs. C.R.S. § 13-16-122 (1) (2021), *Items includable as costs,* provides for the following items that the Colorado General Assembly has expressly recognized as reasonable costs:

- Docket and court fees;
- Jury fees and expenses;
- Sheriff's fees;
- Court reporter's fees for all or any part of a transcript necessarily obtained for use in this case;
- Witness fees, including mileage, and any expert witness charges approved pursuant to section 13-33-102(4);
- Fees for copies of papers necessarily obtained for use in the case
- Any costs of taking depositions for the perpetuation of testimony;
- Attorney fees if authorized by statute or court rule;
- Fees for service of process or fees for any required publications; and
- Any item specifically authorized by statute to be included as part of the costs.

Although this is not an exclusive list, these items provide guidance from the General Assembly as to what costs are allowable.

III. PLAINTIFFS HAVE NOT CARRIED THEIR BURDEN TO DOCUMENT ALLEGED COSTS OR TO SHOW THAT THE COSTS CLAIMED WERE REASONABLE AND NECESSARY.

The Plaintiffs request that this Court award $1,633.10 and 3,763.64 in costs. The lack of supporting documentation, including the lack of any invoices for the gas and mileage, is a fatal omission by the Plaintiffs which requires the Court to reject the request and decline to award any costs for which there is no supporting documentation. *See Fed. Ins. Co. v. Ferrellgas, Inc.,* 961 P.2d 511, 515 (Colo.App.1997) & *Fenton v. Fibreboard Corp.,* 827 P.2d 564, 569-70 (Colo. App. 1991) *ajf'd in part and rev'd in part on other grounds* by *Fibreboard Corp. v. Fenton,* 845 P.2d 1168 (Colo. 1993) (award of costs set aside where the party seeking costs did not provide the court with any

documentation indicating that the costs requested had been incurred or that they were necessary and reasonable).

In *Brody v. Hellman,* 167 P.3d 192 (Colo.App. 2007), the Colorado Court of Appeals reversed a trial court's full award of costs. *Brody* was a common fund case in which lead counsel were awarded all of their attorneys' fees and costs after the case had settled. *Id.* at 197. The appellants argued that the trial court abused its discretion in charging undocumented costs and expenses against the settlement fund. *Id.* at 205-06. In defending the award of costs, lead counsel countered that it was sufficient to support their request for costs with counsels' sworn declaration that the expenses were properly incurred. *Id.* at 206. The court of appeals agreed with the appellants, giving significant direction to trial courts considering such requests:

> [A]s in any case, attorneys in a common fund case have the burden to persuade the court that the costs requested are reasonable and equitable.
>
> In this case, the trial court awarded $1,335,714.56 in costs. Objectors dispute the following portions of that award: $105,114.04 for computer research; $168,754.76 for meals, hotels, and travel; and $105,032.52 for photocopying. They assert lead counsel failed to provide documentation for these costs, other than the amount requested in each category by each law firm.
>
> In this case, lead counsel did not provide documentation to support their requests for computerized research costs, hotels, meals, and travel expenses, or photocopying costs, other than to list the total amount requested in each category by each law firm.

Id. at 206-07. A party seeking costs must provide the court with sufficient information and supporting documentation to allow a judge to make a reasoned decision for each cost item presented. *City of Aurora ex rel. Util. Enter. v. Colo State Eng'r,*105 P.3d 595, 627 (Colo.2005). *Compare Am. Water Dev., Inc. v. City of Alamosa,* 874 P.2d352, 389-90 (Colo.1994) (upholding award of costs where party provided billing statements and testimony to demonstrate witness fees were necessary and reasonable),*with Fenton v. Fibreboard Corp.,* 827 P.2d 564, 569-70 (Colo. App.1991) (setting aside award of costs where party did not provide documentation indicating how costs had been incurred or that they were necessary

and reasonable), *aff'd in part and rev'd in part on other grounds,* 845 P.2d 1168 (Colo.1993).

A party seeking to recover hotel, meals, and travel expenses or photocopying costs must demonstrate the costs were necessary and reasonable and must show: (1) the client was billed for expenses separate from attorney fees; (2) the photocopying was necessary for trial preparation; and (3) the requested costs were reasonable.

Here, counsel has not provided documentation to support the Plaintiffs' request for hotels and travel expenses, mileage, or photocopying costs, other than to list the total amount requested in each category by each lawyer. *Mackall v. Jalisco Int'l, Inc.,* 28 P.3d 975, 977-78 (Colo. App.2001); *Roget v. Grand Pontiac, Inc.,* 5 P.3d 341, 347-48 (Colo.App.1999). Similarly, a party seeking to recover hotel, meals, and travel expenses or photocopying costs must demonstrate the costs were necessary and reasonable. *Fed. Ins. Co. v. Ferrellgas, Inc.,* 961 P.2d 511, 515 (Colo.App.1997). Plaintiff's counsel has not provided any documentation to show the client was billed for these expenses, and has not established that a hotel room for Mr. Kloewer was reasonably necessary.

Similarly, in *Fed. Ins. Co. v. Ferrellgas, Inc.,* 961 P.2d 511 (Colo. App. 1997), the court of appeals reversed an award of costs because it was based on plaintiff's statement of categories of alleged costs without supporting documentation:

> The bill of costs consisted of broad categories of alleged costs and a total dollar amount for each. It included, among other things, expert witness fees, travel expenses, copying costs, service of process fees, and telephone charges. The insurance company did not tender to the court, and the court did not request,any documentation indicating that any of these costs had in fact been incurred, or that they were necessary and reasonable. In its order of judgment, the trial court concluded without discussion that the costs were reasonably and necessarily incurred.
>
> In the absence of evidence and findings, we cannot determine whether the award of costs was proper. Therefore, while the award is affirmed as to those costs not disputed by defendant, including the fees for filing and service, the remainder of the award must be set aside.

Id. at 515 (internal citations omitted). Colorado law is clear that the party requesting costs

must provide the fact-finder with sufficient documentation to show that the costs were actually incurred and that they were necessary and reasonable. *See also City of Aurora ex rel. Util. Enter. v. Colorado State Eng 'r,* 105 P.3d 595, 627-28 (Colo. 2005) (a party seeking costs must provide the court with sufficient information and supporting documentation to allow a judge to make a reasoned decision for each cost item presented); *Regents of University of Colorado v. Harbert Construction Co.,* 51 P.3d 1037, 1042 (Colo. App. 2001) (the record must contain evidence that costs are necessary before those costs may be awarded); *Fenton v. Fibreboard Corp.,* 827 P.2d 564, 569-70 (Colo. App. 1991) (setting aside award of costs where party did not provide documentation indicating how costs had been incurred or that they were necessary and reasonable), *aff'd in part and rev'd in part on other grounds,* 845 P.2d 1168 (Colo. 1993).

As *Brody* and *Ferrellgas* demonstrate, it is reversible error to award costs without sufficient documentation and based solely on counsel's verification of the costs. Here, not only has the Plaintiff failed to submit invoices showing items such as hotel and deposition fees have been paid in full or cancelled checks/receipts evidencing the costs claimed, Plaintiff's counsel does not even attempt to address, verify, or establish the necessity or reasonableness of the costs they seek. The Cost Bill is devoid of any discussion of the reasonableness or necessity of the costs requested, and is accompanied only by the conclusory averment of counsel that, "in my opinion" the fees and costs are "reasonable and necessary".

Specifically, the Plaintiff fails to document mileage costs, photocopying costs, and alleged travel fees, or to demonstrate that they were reasonable and necessary. He offers no rationale for a $339.15 hotel bill for Mr. Kloewer on August 11, which was clearly unnecessary, as Mr. Kloewer is a Colorado resident, who also charged for travel to the courthouse (unenumerated portion of $2000.) and whose presence on August 11 was not reasonably necessary to the short depositions to be taken by two $500 per hour experienced attorneys.

The deposition transcript costs, while documented, contain a number of entries which were neither reasonable nor necessary, in an amount of more than $2300.00 including:

- *Digitizing & transcript synchronization* - $625. These are trial costs, and the Plaintiff claims that the depositions were unsatisfactory, demanded that he be allowed to redo them. There was no reason for him to order the transcripts digitized and synchronized, particularly given his claim that the depositions were worthless, and intention to repeat the depositions, and in the case of Mr. Oltmann, there was nothing to digitize or synchronize.

- *Media & cloud services* – $75. The Defendants received no such services, and this appears to be an improperly-billed overhead cost. *Fresquez, supra,* at *4 (citing *United States ex. rel. Trustees of Colo. Laborers Health & Welfare Tr. Fund v. Expert Envel. Control, Inc.* 790 F. Supp. 250, 252 (D. Colo. 1992)); *accord, Mackall v. Jalisco Int'l, Inc.,* 28 P.3d 975, (Colo. 2001)(citing *Roget v. Grand Pontiac, Inc.,* 5 P.3d 341 (Colo. App. 1999)

- *Litigation package* - $92. Improperly billed overhead

- *Administration Fee* - $124. Improperly billed overhead

- *Primary participation fee*- $295. Improperly billed overhead

- *Exhibit share fee*- $250. Improperly billed overhead

- *Video – Initial Services* - $285. Improperly billed overhead, and unwarranted given the Plaintiff's claim that the depositions were worthless and intention to repeat them.

- *Video – Electronic Access - $50.* Improperly billed overhead, and unwarranted given the Plaintiff's claim that the depositions were worthless and intention to repeat them.

- *Certificate of Non Appearance* - $225. There was no dispute over whether Mr. Oltmann appeared for the deposition, and this fee was neither reasonable nor necessary.

- *Expedited transcripts* - $ 610.40 This was not reasonably necessary as the Plaintiff had thirty-seven days to receive the deposition transcript before his response was due and, given Plaintiff's claim that the depositions were worthless, and his intention to repeat them with Mr. Oltmann, an expedited transcript was wholly unreasonable.

Simply stated, Plaintiffs have not met their burden with respect to the costs requested and this Court must decline to award the Plaintiffs any costs for which they provided no supporting documentation and which they failed to show were reasonable and necessary.

CONCLUSION

Wherefore, for the reasons set forth herein, the Defendants respectfully request that the Court take cognizance of the fraudulent billing statements, and deny all fraudulent line items, award the lodestar rate of $217, deny fees and costs not necessarily expended and not enumerated in such a manner that the Court can determine whether they were reasonably incurred, and make no award for ordinary costs of litigation, which would necessarily have been incurred, absent discovery misconduct.

Respectfully submitted this 24th day of September, 2021

By: /s/ Andrea M. Hall
Attorney for Defendants Oltmann/FEC United/Shuffling Madness Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2021, I electronically filed **DEFENDANTS JOE OLTMANN/FEC UNITED/SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S FEE AND COST BILL AND REQUEST FOR FEES AND COSTS** with the Clerk of the Court using the ICCES electronic filing system, which will send an electronic copy of this filing to all counsel of record.

/s/ Andrea M. Hall