UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

L.T.T. by and through L.J.T. as Next Friend, Parent and Natural Guardian and L.J.T., individually,

Plaintiffs,

Case No. 6:14-cv-1921-ACC-GJK

v.

WALT DISNEY PARKS AND RESORTS US, INC.

Defendant.
_____/

PLAINTIFF'S MOTION TO REVIEW CLERK'S ACTION ON BILL OF COSTS, OBJECTIONS TO BILL OF COSTS, AND INCORPORATED MEMORANDUM

/s/Andy Dogali
Andy Dogali
Fla. Bar No.: 0615862
DOGALI LAW GROUP, P.A.
101 East Kennedy Blvd., Suite 1100
Tampa, FL 33602
Telephone: (813) 289-0700
Facsimile: (813) 289-9435
Email: adogali@dogalilaw.com

Eugene Feldman
Admitted pro hac vice
ARIAS, SANGUINETTI, STAHLE & TORRIJOS, LLP
6701 Center Drive West, Suite 1400
Los Angeles, CA 90045
Telephone: (310) 844-9696
Email: gfeldmanlaw@att.net

Domenick Lazzara, Esq.
Fla. Bar No.: 0103071
The Law Offices of H.S. Stephen Lee PA
3411 West Fletcher Avenue, Suite A
Tampa, FL 33616
Telephone: (813) 606-5036
Facsimile: (813) 606-4500
Email: DLazzara@HSLeeLaw.com

Attorneys for Plaintiff

November 1, 2016

Plaintiff, L.T.T. by and through L.J.T., as Next Friend, Parent and Natural Guardian, and pursuant to F.R.C.P. 54(d)(1), moves this Court to review the Clerk's Bill of Costs entered by the Clerk of Court on October 25, 2016 [Doc. 83]. Through this motion Plaintiff submits:

- Defendant did not file a motion to tax costs under Local Rule 4.18. The Clerk's action is inappropriate, and the bill of costs should be vacated.
- Plaintiff has filed a postjudgment motion under Rule 59, so that the Court's order is non-final. The Clerk's action is inappropriate and/or premature, and the Clerk's bill of costs should be vacated.
- It is inequitable to tax costs against Plaintiff. The Clerk's bill of costs should be vacated.
- In the alternative, the bill of costs should be amended to properly identify Plaintiff.
- In the further alternative, Defendant's proposed bill of costs seeks items of cost which are non-recoverable at law or in fact. To such extent, the Clerk's bill of costs must be reduced.

In further support of the motion, Plaintiff offers the following arguments and authorities.

A. <u>This Rule 54 Motion is Appropriate</u>

> The Court looks to Fed.R.Civ.P. 54(d) and Local Rule 4.18 for the controlling procedural rules. The Court notes that 28 U.S.C. Sec.1920 provides that a bill of costs shall be filed. The Court expects that a bill of costs will be filed as to eligible compensable costs within fourteen days of a final judgment. The Clerk can tax the costs on fourteen days' notice. Within seven days, a party challenging the costs taxed by the Clerk can seek review by filing a motion to review the Clerk's action. Fed.R.Civ.P. 54(d) (1).

<u>Regions Bank v. Hyman</u>, 2015 WL 1108302, *4 (M.D. Fla. 2015), <u>app. dism.</u> (May 27, 2015).

Objections to a party's proposed bill of costs, rather than to the Clerk's bill of costs, are premature, because until the Clerk takes action on a proposed bill of costs, nothing exists for the Court to consider.

> [Rule] 54(d)(1) makes plain the Clerk taxes initially. "The function of the court [pursuant to Rule 54(d)(1)] in the process of taxing costs is merely to review the determination of the clerk. Therefore, nothing normally can come before the court until the clerk has acted and an objection has been made."

Kemberling v. MetLife Life & Annuity Co. of Connecticut, 2008 WL 795297, *1 (M.D. Fla. 2008)), quoting 10 Wright, Miller & Kane, Fed. Prac. and Proc. § 2679 (3d ed.1998).

B. Defendant has Not Moved to Tax Costs

Local Rule 4.18 provides:

> APPLICATIONS FOR COSTS OR ATTORNEY'S FEES
> (a) In accordance with Fed. R. Civ. P. 54, all claims for costs or attorney's fees preserved by appropriate pleading or pretrial stipulation shall be asserted by separate motion or petition filed not later than fourteen (14) days following the entry of judgment. The pendency of an appeal from the judgment shall not postpone the filing of a timely application pursuant to this rule.

Defendant has filed no motion to tax costs. Consequently, the bill of costs should be vacated and the claimed costs disallowed, because "[t]he Courts in Middle District of Florida enforce Local Rule 4.18(a)" *Sanders v. Drainfield Doctor, Inc.*, 2009 WL 667158, *4 (M.D. Fla. 2009).

Cases in which this Court has considered whether to consider a motion to tax costs which was filed late are inapposite, because in this instance, Defendant has filed not motion to tax costs at all, and did not timely file a request for extension. And, should Defendant seek leave to file the motion late, the request should be denied. The Court has denied as untimely motions to tax costs which are filed after the 14-day deadline. *Giminez v. Am. Sec. Ins. Co.*, 2009 WL 3048563, *2 (M.D. Fla. 2009) (motion to tax costs filed 2 days late denied as untimely); *Estate of Miller ex*

rel Miller v. Ford Motor Co., 2004 WL 6235323, *1 (M.D. Fla. 2004)) (motion to tax costs filed 3 days late denied as untimely).

In the context of a motion for attorneys' fees, the Court discussed the need for compliance with Local Rule 4.18 as follows:

> A motion for attorney's fees must be filed no later than 14 days after the entry of judgment, unless a statute or court order provides otherwise. Fed.R.Civ.P. 54(d)(2)(B)(I). Additionally, Local Rule 4.18 reinforces the Federal rule by providing that "all claims for costs or attorney's fees... shall be asserted by separate motion or petition filed not later than fourteen (14) days following the entry of judgment." Local Rule 4.18, M.D. Fla. Here… Defendants filed the motion 23 days after entry of judgment, not 14 days as required by the rules. Other courts have denied similar untimely motions for attorneys' fees. *See Sanders v. Drainfield Doctor, Inc.*, 6:06CV1216–ORL28GJK, 2009 WL 667158 (M.D. Fla. 2009) (denying motion submitted 17 days after judgment on belief that FRCP 6(d) allowed for extra 3 days filing time); *Blanton v. Univ. of Florida,* 2008 WL 928114 (M.D. Fla. 2008) (denying motion filed 7 days late); *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., Inc.*, 688 F.Supp.2d 1356, 1362 (M.D. Ga. 2010) (denying motion filed 1 day late).

Allison v. Parise, 2014 WL 1763205, *4 (M.D. Fla. 2014).

If Defendant should request leave to make a late filing, and should the cause of Defendant's delay be rooted in unfamiliarity with Rule 4.18, the request will be unsound. *Porcelli v. Onebeacon Ins. Co.*, 2006 WL 3333599, *2-3 (M.D. Fla. 2006) (assumption that 30-day deadline under other rules would apply to motion rather than 14-day deadline under Rule 4.18 not excusable neglect); *Saadi v. Maroun*, 2009 WL 4730533, *3 (M.D. Fla. 2009) (assumption that 3-day mailing delay could be added to Rule 4.18 deadline not excusable neglect); *Estate of Miller ex rel Miller v. Ford Motor Co.*, 2004 WL 6235323, *1 (M.D. Fla. 2004) (same).

In the sections which follow in this memorandum, Plaintiff raises objections to categories of costs which are non-recoverable at law, or which are under-supported in fact. By not filing a

motion, Defendant seeks relief from its initial burden of submitting a request which is sufficient to permit the Court to determine entitlement:

> The party seeking an award of costs or expenses bears the burden of submitting a request that enables a court to determine what costs or expenses were incurred by the party and the party's entitlement to an award of those costs or expenses.

Powercore, Inc. v. W. Sur. Co., 2015 WL 3621376, *2 (M.D. Fla. 2015), citing *Loranger v. Stierheim*, 10 F.3d 776, 784 (11th Cir.1994). A motion was the opportunity to provide a more sophisticated and supported discussion of entitlement than a simple bill of costs and declaration. Here, Plaintiff is left in the position of trying to speculate or determine the basis by which Defendant claims entitlement to certain costs. Also, a motion to tax costs would have been preceded by a Local Rule 3.01(g) conference, which might have reduced the scope of the objections, the research, analysis and drafting necessary to submit them, and the scope of the Court's review. See *Mercado v. HRC Collection Ctr.*, 2013 WL 6085221, *2 (M.D. Fla. 2013) (motion to tax costs denied for failure to comply with Local Rule 3.01(g)).

C. The Clerk's Action in Entering the Bill of Costs is Inappropriate Pending Finality of the Judgment

The instant case resulted in entry of summary judgment in favor of the Defendant. Plaintiff has filed a motion to amend or alter the judgment under Rule 59 [Doc. 82]. As a result, the judgment and order are non-final, pending the Court's ruling on Plaintiff's post-judgment motion.

> …certain post-trial motions, such as a Rule 59 motion, "'suspend the finality of the district court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.'" *Galdames v. N & D Inv. Corp.*, 432 Fed.Appx. 801, 805 (11th Cir. 2011) (quoting *Members First Fed. Credit Union v. Members First Credit Union of Fla.*, 244 F.3d 806, 807 (11th Cir. 2001)).
>
> As such, judgments do not become "final" for purposes of a motion for attorneys' fees and costs until certain post-trial motions are adjudicated. *Id.*; *see also Pate v.*

> *Seaboard R.R.*, 819 F.2d 1074, 1085 (11th Cir. 1987) (providing that the finality of judgment is suspended by the filing of a timely motion for new trial).

Disa v. Ashley Furniture Indus., Inc., 2016 WL 3021867, *2 (M.D. Fla. 2016), app. dismissed (Aug. 1, 2016).

Rule 54 creates a presumption that costs shall be awarded to the prevailing party. *Butler v. Wright*, 2010 WL 599387, *5 (M.D. Fla. 2010), citing *Arcadian Fertilizer, L.P. v. MPW Indus. Servs., Inc.*, 249 F.3d 1293, 1296 (11th Cir.2001), citing *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633, 639 (11th Cir.1991). Accord, *Escobar Villatoro v. Figueredo*, 2015 WL 6150769, *2 (M.D. Fla. 2015); *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc.*, 89 F. Supp. 3d 1294, 1308 (M.D. Fla. 2015). A central theme of Plaintiff's Rule 59 postjudgment motion is that Defendant is not entirely or exclusively the "prevailing party." Pending final adjudication of the issue, an award of costs is premature.

D. The Court Should Equitably Consider Plaintiff's Inability to Pay, and Should Deny or Reduce Costs

Even if the Court disagrees with the above and deems Defendant the "prevailing party," the Court should vacate the bill of costs as inequitable.

> [T]here is a strong presumption that the prevailing party will be awarded costs, but the court is permitted to decide otherwise in its discretion. *Chapman v. AI Transp.*, 229 F.3d 1012, 1038 (11th Cir.2000) (en banc). A district court may deny full costs if there is a sound basis for such a decision and the reason is stated by the court. *Id.* at 1039. "[A] non-prevailing party's financial status is a factor that a district court may, but need not, consider in its award of costs pursuant to Rule 54(d)." *ANG v. Coastal International Sec. Inc.*, 417 F.App'x 836, 838 (11th Cir.1011) (citations omitted). However, if considering financial status, the court "must require substantial documentation of a true inability to pay." *Id.*

Palmer v. Johnson, 2012 WL 4512918, *2 (M.D. Fla. 2012). This Court has denied awards of costs against a litigant with a demonstrated inability to pay. See *Barrington v. Lockheed Martin*

Corp., 2007 WL 1303032, *2 (M.D. Fla. 2007); *Brown v. U.S. Dep't of Agric.*, 2008 WL 203382, *1 (M.D. Fla. 2008).

The only Plaintiff in this action is L.T.T., who is an incompetent minor. Any assessment of costs can only be against him. His mother L.J.T. brings this action as his next friend, solely in that capacity, pursuant to Rule 17(c)(2). A district court can tax costs against a next friend plaintiff, but only in the next friend plaintiff's purely representative capacity, not individually. *Somerville v. U.S.*, 2010 WL 3522046 (M.D. Fla. 2010). Costs may be awarded only against parties to the action. *Johnson v. Schneegold*, 419 So.2d 684 (Fla. 2d DCA 1982). L.J.T., in her individual capacity, is not a party to the action. *Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("A 'next friend' does not himself become a party" to the cause of action "in which he participates, but simply pursues the cause on behalf of...the real party in interest"); *Muhammad v. Timmerman*, 2014 WL 1918601, *1 (M.D. Fla. 2014); *Movimiento Democracia, Inc. v. Johnson*, 2016 WL 3522179, *6 (S.D. Fla. June 28, 2016). See also *Kadlecik v. Haim*, 79 So. 3d 892, 894 (Fla. 5th DCA 2012); *Puig v. Saga Corp.*, 543 So.2d 238 (1989) (survivor not proper party to wrongful death action and cannot be assessed costs); *Walker v. Bozeman*, 243 F.Supp.2d 1298, 1304–07 (N.D. Fla. 2003) (costs flowing from rejection of offer of judgment in wrongful death action payable only by estate); *Dade County v. Grossman*, 354 So.2d 131 (Fla. 3d DCA 1978) (court cannot order non-party to suit to pay fees or costs); *Meyer v. Scutieri*, 539 So.2d 602 (Fla. 3d DCA 1989) (court cannot assess costs against putative members of unsuccessful class action, but only against condominium association, which as their representative is the only party).

L.T.T. exhibits a variety of nonsocial and aberrant behaviors which will keep him from assimilating into society [Doc. 67-20]. The Court and parties must anticipate that Plaintiff will

never have assets, and will never have income except for government benefits. Exh. A, L.J.T. Declaration. Taxing costs against Plaintiff is a futile gesture. Disney's effort to seek costs against incompetent minors who are permanently disabled will never be fruitful.

The Court should vacate the Clerk's bill of costs for the reason that assessing costs against Plaintiff, an incompetent minor who will never be able to pay them and who has done nothing wrong, is inequitable.

E. Alternative Specific Objections

1. The Bill of Costs Should be Amended to Accurately Identify the Singular Plaintiff

The Court's Order granting summary judgment directed the Clerk "to enter judgment providing that Plaintiff shall recover nothing on his claims and that Defendant shall recover costs from Plaintiff." Doc. 79, p.15. Consistent with the Court's Order, the Clerk entered a judgment which states that "the Plaintiff shall recover nothing on his claims and the Defendant shall recover costs from Plaintiff." Doc. 80.

However, inconsistent with the case, the Court's Order, and the Judgment, when the Clerk entered the bill of costs, the singular reference to "Plaintiff" was changed to "L.T.T., et al." "Et al", being a Latin term meaning "and others," is inaccurately used here, as no "others" exist. Only one Plaintiff exists in the case. Even if the Court grants none of the relief sought and sustains none of the objections raised, the bill of costs should be modified to accurately reflect the Court's Order and the posture of the parties. Amending the bill of costs will prevent the kind of ambiguity and confusion which has arisen in cases such as *Brown v. City of Palatka*, 132 Fla. 260, 265, 181 So. 529, 531 (1938) ("et al" used in notice of appeal is ineffective to create appellate jurisdiction over party not expressly named), and cases cited therein. As stated by the Supreme Court of the United States:

> The purpose of the specificity requirement of [F.R.A.P.] 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions.

Torres v. Oakland Scavenger Co., 487 U.S. 312, 318, 108 S. Ct. 2405, 2409, 101 L. Ed. 2d 285 (1988). Accord, *Worlds v. Dep't of Health & Rehab. Servs., State of Fla.*, 929 F.2d 591, 592–93 (11th Cir. 1991). The Court should avoid the use of "et al" to infer the existence of non-existent parties.

2. Standard for Consideration of Costs

> The party seeking an award of costs or expenses bears the burden of submitting a request that enables a court to determine what costs or expenses were incurred by the party and the party's entitlement to an award of those costs or expenses. *Loranger v. Stierheim*, 10 F.3d 776, 784 (11th Cir.1994). "When challenging whether costs are properly taxable, the burden lies with the losing party, unless the knowledge regarding the proposed cost is a matter within the exclusive knowledge of the prevailing party." *Assoc. for Disabled Americans, Inc. v. Integra Resort Mgmt., Inc.*, 385 F.Supp.2d 1272, 1288 (M.D.Fla.2005).

Powercore, Inc. v. W. Sur. Co., 2015 WL 3621376, *2 (M.D. Fla. 2015).

Only those costs expressly authorized by statute may be taxed. *Daker v. Steube*, 2012 WL 2384050, *1 (M.D. Fla. 2012), citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987); *Butler v. Wright*, 2010 WL 599387, *5 (M.D. Fla. 2010); *Diamond Heads, LLC v. Everingham*, 2011 WL 3269685, at *2 (M.D. Fla. July 29, 2011).

3. *Pro hac vice* Fees (Defendant's Exh. A: $450.00)

Defendant seeks "Clerk's Fees" relating to *pro hac vice* admission. This Court has previously denied requests to tax *pro hac vice* costs. *Fulwood v. Capital One Auto Finance, Inc.*, 2011 WL 2148415, *1 (M.D. Fla. 2011) ("courts within the Eleventh Circuit have concluded that *pro hac vice* costs are not taxable"), citing *Covington v. Ariz. Beverage Co.*, 2011 WL 810592,

*3 (S.D. Fla. 2011); *Lane v. Accredited Collection Agency Inc.*, 2014 WL 1685677, *10 (M.D. Fla. 2014) ("As other courts have recognized, the *pro hac vice* fee is an expense of counsel, not the client, and is thus not properly recoverable."), quoting *Hernandez v. Motorola Mobility, Inc.*, 2013 WL 4773263, *5 (S.D. Fla. 2013). Accord, *Bumpers v. Austal U.S.A., L.L.C*, 2015 WL 6870122, *2 (S.D. Ala. 2015) ("*pro hac vice* fees are an expense of counsel, not recoverable under section 1920"); *Pickett v. Tyson Fresh Meats, Inc.*, 2004 WL 3712721, *7 (M.D. Ala. 2004); *Misener Marine Const., Inc. v. Norfolk Dredging Co.*, 2008 WL 5046174, *10 (S.D. Ga. 2008), aff'd, 594 F.3d 832 (11th Cir. 2010).

Should the Court consider an award of counsel's *pro hac vice* costs to be otherwise proper, the costs should be denied in this case, as Defendant has shown no basis from which the Court might conclude that it was necessary to seek *pro hac vice* admission for a fourth, fifth, and sixth attorney to appear in this case, all from another state.[1] At least absent such a showing, the Court must conclude that *pro hac vice* admissions serve the interest of counsel. For this reason, this Court has routinely denied requests for attorneys' fees for services relating to *pro hac vice* admissions. *Country Inn & Suites By Carlson, Inc. v. Interstate Properties, LLC*, 2009 WL 189946, *3 (M.D. Fla. 2009) ("preparing and filing motions for *pro hac vice* admission [is] a task which is personal to counsel but which does not advance the case against the adversary one iota"); *Sanfilippo v. Astrue*, 2007 WL 5159601, *6 (M.D. Fla. 2007); *Sanfilippo v. Comm. of Social Security*, 2008 WL 1957836, *2 (M.D. Fla. 2008). See also *American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 437 (11th Cir.1999); *Wales v. Jack M. Berry, Inc.*,

[1] None of the five out-of-state defense attorneys who appeared *pro hac vice* in at least 43 separate cases before this Court sought an exception to the prohibition against "more than 3 appearances in a 365-day period" under Rule 1-310(a)(2), Florida Rules of Professional Conduct. See *Yonce v. Comm'r of Soc. Sec. Admin.*, 2008 WL 2414307, *2 (M.D. Fla. 2008); *Bedford v. Family Dollar Stores of Florida, Inc.*, 89 F. Supp. 3d 1356 (S.D. Fla. 2015) (counsel seeking fourth *pro hac vice* appearance cautioned to seek admission to Florida Bar prior to seeking another). Two of the out-of-state attorneys also presently appear *pro hac vice* in a pending case in the Southern District of Florida, pursuant to an order granting motions for admission which did not disclose the pendency of the 44 appearances in this Court. See *Flaum v. Buth Na-Bodhaige, Inc.*, No. 0:15-cv-62695-WJZ Doc. 15, 16 (03/16/16), 20 (04/12/16).

192 F. Supp. 2d 1313, 1318 (M.D. Fla. 2001) (party seeking increased attorneys' fee rates relating to retention of non-local counsel required to show necessity of retaining non-local attorneys).

From the outset of this litigation in this Court, in November of 2014, Defendant was represented by counsel who is a member of this Court, located in the Florida office of Kaye Scholer, P.A. During that time, two attorneys from the Washington, D.C. office of Kaye Scholer, P.A. also appeared for Defendant.

Just before 5:00 p.m. on December 23, 2015, thirteen months after this case was filed, when only two months remained in the discovery period, Disney first declared an intention to take Plaintiff's deposition. As Disney abruptly did so, it simultaneously declared an intention to depose the plaintiffs in 42 other related cases which were pending in this Court, each of which had the same schedule and discovery cutoff date. The communication, in its entirety, stated: "We will be taking the deposition of the plaintiffs in the 43 cases during the month of February in Orlando, Florida. Please provide available dates." Doc. 33-1.

On January 11, 2016, Defendant gave notice that it intended to seek the appearance *pro hac vice* of a third Washington, D.C. attorney, Paul Margulies. At 11:58 p.m. that evening, Mr. Margulies served Plaintiff's counsel by email with the notice of taking the Next Friend Plaintiff's deposition, along with notices of taking the depositions of 48 other Plaintiffs in the related cases pending in this Court, scheduling all 49 depositions to occur during a three-week period of February 8 through February 29, 2016. Obviously, Defendant needed another attorney to frantically appear only because it waited so long to initiate any effort to depose any Plaintiff in any of the cases. But Defendant outlines no necessity for bringing in an out of state attorney for this purpose.

On February 1, 2016, Defendant filed another motion to permit another out-of-state lawyer, Oscar Ramallo of Los Angeles, to appear *pro hac vice* before this Court. Doc. 31, 32. On the last day of discovery, Defendant filed another motion to permit another out-of-state lawyer, Rhonda Trotter of Los Angeles, to appear *pro hac vice* before this Court. Doc. 38. No attorney from the Florida office of Kaye Scholer ever physically appeared in the case, for anything.

Defendant has offered nothing from which the Court can find entitlement to the claimed costs.

4. Service of Summons and Subpoena (Defendant's Exh. B: $1,884/42 = $44.86)

Defendant seeks costs related to numerous service-related expenses which Defendant proposes to allocate pro rata to various cases, and one invoice related to Dr. Ali Moshen which Defendant entirely to this case. The bill of costs includes the following allocated costs which are associated with service upon non-party witnesses KM, JM, MG, HM:

Expense type	K.M.	J.M.	M.G.	H.M.	Total
Rush Service	$175.00	$175.00	$175.00	$175.00	$700.00
Service	$50.00	$50.00	$50.00	$50.00	$200.00
Subpoena Fees	$75.00	$50.00	$79.00	$104.00	$308.00
"Expenditures"	$13.00	$13.00	$13.00	$13.00	$52.00
"Disbursements"	$123.00	$123.00	$208.10	$170.00	$624.10
	$436.00	$411.00	$525.10	$512.00	**$1,884.10**

As outlined below, the maximum amount taxable for any of the above subpoenas is $65.00, per subpoena, for all 42 cases. The total amount which Defendant suggests is proper, $1,884.10, must be reduced to $260.00. This amount divided by 42 cases reduces the maximum amount allowable from $44.86 to $6.19.

As shown below, the service charge of $175.00 is improperly taxed, as no more than $65.00 may be taxed for this service, and the $100.00 "disbursements" charge is non-taxable.

a. Service costs

28 U.S.C. §§1920 and 1921 control awards of costs. "While section 1920(1) only mentions fees of the United States Marshal, fees of a private process server may be taxed, so long as they do not exceed the statutory fees authorized in §1921." *Davis v. Sailormen, Inc.*, 2007 WL 1752465, *2 (M.D. Fla. 2007), citing *EEOC v. W & O, Inc.*, 213 F.3d 600, 624 (11th Cir.2000).

"As of October 30, 2013, the pertinent regulation, 28 C.F.R. § 0.114(a)(3), provides for service of process executed by the Marshals Service to be charged at $65.00 per hour (or portion thereof) and any other out-of-pocket expenses." *Berlinger v. Wells Fargo*, 2016 WL 4920079, *2 (M.D. Fla. 2016). In the absence of any time-related breakdown of the process server's fees, this Court cannot determine anything about the process server's time spent or services provided. For this reason, the recoverable "service" fees must be limited to no more than $65.00. *Hooks v. Geico Gen. Ins. Co., Inc.*, 2015 WL 9595402, *3 (M.D. Fla. 2015), rep. and rec. adopted, *Hooks v. GEICO Gen. Ins. Co., Inc.*, 2016 WL 25936 (M.D. Fla. 2016) (limiting recoverable service fees to $65.00 per subpoena).

b. "Rush service" costs

"The courts in this circuit routinely have declined to tax fees related to rush service." *Ballestero v. Fairfield Resorts, Inc.*, 2008 WL 5111100, *4 (M.D. Fla. 2008), citing *Modern, Inc. v. Florida*, 2008 WL 1771804, *2 (M.D. Fla. 2008) and *Johnson v. Comm. Supply Corp.*, 2006 WL 3709620, *2-3 (S.D. Fla. 2006); *Berlinger v. Wells Fargo*, 2016 WL 4920079, *3 (M.D. Fla. Sept. 15, 2016); *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC*, 2010 WL 1223904, *2 (M.D. Fla. 2010), rep. and rec. adopted, 2010 WL 1223906 (M.D. Fla. Mar. 22, 2010); *Langfitt v. Fed. Marine Terminals, Inc.*, 2010 WL 1416912, *1 (M.D. Fla. 2010), aff'd, 647 F.3d 1116

(11th Cir. 2011). See also *Hooks v. Geico Gen. Ins. Co., Inc.*, 2015 WL 9595402, *3 (M.D. Fla. 2015), rep. and rec. adopted, *Hooks v. GEICO Gen. Ins. Co., Inc.*, 2016 WL 25936 (M.D. Fla. 2016) ("even assuming rush service was necessary, Defendant cites no authority for the proposition that it may recover more than $65.00 per subpoena as provided by statute in the absence of any information regarding time, travel, or out-of-pocket expenses").

c. "Expenditures" and "Disbursements"

Defendant's failure to provide any information about the process server's alleged "expenditures" and "disbursements" prevents their taxation to Plaintiff. See *Powercore, Inc. v. W. Sur. Co.*, 2015 WL 3621376, *2 (M.D. Fla. 2015):

> [T]he Court notes that Plaintiff has failed to provide documented travel expenses or other out-of-pocket costs incurred by the private process server to justify the $87.00 request. In the absence of such justification, the Court determines that $65.00 is an appropriate recovery for the service of Defendant.

5. Depositions of Allocated Witnesses (Defendant's Exh. C)

Defendant seeks costs related to numerous depositions which Defendant proposes to allocate pro rata to various cases, and costs related to a Jenny Sweetman deposition (02/02/16) which Defendant allocates solely to this case. Among the depositions which Defendant allocates across 42 cases, non-taxable claimed costs include:

Deponent	Charge	Amount
Chris Lutz	E-Transcript Fee	$35.00
Scot Reynolds	E-Transcript Fee	$35.00
Sarah Riles	E-Transcript Fee	$35.00
Bethany Glader	E-Transcript	$248.10
Teri Rosenfeld	E-Transcript Fee	$35.00
Mark Jones	Rough draft	$302.10
Jenny Sweetman (02/05/16)	E-Transcript	$327.35
Non-recoverable, allocated depositions		$1017.55
Per case, Defendant's allocation: /42		$24.23

Decisions within the Eleventh Circuit establish that the above-listed expenses are inappropriate because they are ancillary charges incurred for the convenience of counsel, not transcript costs necessarily incurred for the case.

> Generally, [ancillary court reporter] services are only for the convenience of counsel and are not recoverable. *See Goodwall Const. Co. v. Beers Const. Co.*, 824 F.Supp. 1044, 1066 (N.D. Ga. 1992) (deposition costs incurred merely for convenience to counsel are not necessary or recoverable), *aff'd*, 991 F.2d 751 (Fed. Cir. 1993); *Johnson v. Commc'ns Supply Corp.*, 2006 WL 3709620, *2 (S.D. Fla. 2006) (declining to award costs for mini-transcripts and disk copies of transcripts because they were incurred for the convenience of counsel); *Am. Guarantee & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.*, 2010 WL 1935998, *4, *6 (E.D. Mo. 2010) (denying request for costs for mini, Etranscript, and rough ASCII because such costs were for the convenience of the attorneys and were not "necessarily obtained for use in the case" under section 1920; further denying request for costs of "litigation support CD–Rom" because such costs were incurred merely for convenience of counsel); *George v. Fla. Dept. of Corr.*, 2008 WL 2571348, *6 (S.D. Fla. 2008) (denying request for costs of transcript delivery fee where defendant failed to demonstrate that the cost was incurred out of necessity, as opposed to mere convenience of counsel); *Suarez v. Tremont Towing, Inc.*, 2008 WL 2955123, *3 (S.D. Fla. 2008) (denying request for costs of delivery of exhibits because such costs were not taxable).

Hartford Accident & Indem. Co. v. Crum & Forster Specialty Ins. Co., 2012 WL 12541570, *2 (S.D. Fla. 2012); *Lehman Bros. Holdings v. Hirota*, 2010 WL 3043653, *4 (M.D. Fla. 2010) (Court reduced claimed deposition transcript expenses by charges for "realtime, shipping and handling, copies of transcripts, rough drafts, ASCII Disks, condensed transcripts, 'reading & signing administrative fees', 'e-tran/email fees,' 'e-transcript services,' CD rom/mini transcripts, courier services, appearance fees, and 'rough ASCII via email'"); *Davis v. United States*, 2010 WL 3835613, *5 (S.D. Fla. 2010), rep. and rec. adopted, 2010 WL 3835610 (S.D. Fla. 2010) (court reporter charges for ASCII files, delivery, condensed copies, shipping, miniscripts, e-transcripts, index, and postage are for convenience of counsel and are not taxable, absent precise showing to the contrary); *Woods v. Deangelo Marine Exhaust Inc.*, 2010 WL 4116571, *3 (S.D. Fla. 2010), rep. and rec. adopted, 2010 WL 4102939 (S.D. Fla. 2010) (CDs and delivery charges

are not necessary and are not taxable); *Kidd v. Mando Am. Corp.*, 870 F.Supp. 2d 1297, 1299 (M.D. Ala. 2012) ("costs associated with the rough ASCII transcripts, condensed deposition transcripts, and the depo drive" are not taxable).

6. Deposition of Next Friend Plaintiff (Defendant's Exh. D)

Costs allegedly associated with L.J.T.'s deposition include the following items which are non-taxable pursuant to the authorities cited in this memorandum:

Expense type	Rate	Cost
Exhibit Scanning – OCR-PDF-Pg-STD	.40/page	$29.60
Rough ASCII – Pg – STD	$1.25/page	$300.00
Processing and delivery	$35.00	$35.00
Total reduction		$364.60

7. Printing Costs (Defendant's Exh. E: $17,776.01/42 = $423.06)

Defendant describes these costs thus: "Attached as Exhibit E are invoices for document production print jobs and a spreadsheet itemizing the printing costs for which Disney seeks taxation." The printing of documents and electronically stored information is performed for convenience of counsel, and is not taxable. *Ballestero v. Fairfield Resorts, Inc., supra*, 2008 WL 5111100, *2-3 (M.D. Fla. 2008); *Maronda Homes, Inc. of Florida v. Progressive Express Ins. Co.*, 2015 WL 6468191, *4 (M.D. Fla. 2015), app. dismissed (11th Cir. Mar. 29, 2016) (general description of types of issues or activities for which printing, copying or scanning charges were incurred is inadequate to support taxation of costs); *Gray v. Novell, Inc.*, 2012 WL 3886026, *2 (M.D. Fla. 2012) (costs denied where "defendant [did] not explain why the conversion and printing of all of the plaintiff's electronically produced discovery was necessary").

8. E-Discovery Costs (Defendant's Exh. F: $10,974.75/42 = $258.81)

Defendant describes these costs as "copying" in the proposed bill of costs but as "e-discovery" in the allegedly supportive declaration. In either event, the costs are not taxable.

Defendant seeks to recover costs for electronic document and database consulting services. However, Defendant does not provide details to show that such costs were necessarily incurred for use in this case, or whether the database consulting services were necessary or merely for the convenience of Disney in its production. See *Dillon v. Axxsys International, Inc.*, 2006 WL 3841809, *7 (M.D. Fla. 2006) ("because the plaintiffs have not described the photocopying costs sufficiently to permit a determination of whether the photocopies were necessarily obtained for use in the case, reimbursement… should be rejected"); *American Home Assurance Co. v. The Phineas Corp.*, 2004 WL 3142554, *3 (M.D. Fla. 2004); *Jablonski v. St. Paul Fire and Marine Ins. Co.*, 2010 WL 1417063, *12 (M.D. Fla. 2010).

Defendant proposes to pass along as a "cost" its invoices for paying for the time and expertise of its own outside consultant. The consultant's activity descriptions beg the question why the claimed costs are not those of a non-testifying consultant. Fees for services rendered by a consultant are not taxable. *Tempay Inc. v. Biltres Staffing of Tampa Bay, LLC*, 2013 WL 6145533, *6 (M.D. Fla. 2013); *Colbert v. United States*, 2014 WL 11353187, *3 (M.D. Fla. 2014). More specifically, costs associated with database compilation and management generally are not taxable, even where party seeks to characterize them as "copying" expenses. *Bumpers v. Austal U.S.A., L.L.C*, 2015 WL 6870122, *13 (S.D. Ala. 2015), and cases cited therein.

Also, many of the entries contained in Defendant's "e-discovery" submission show, on their face, that they are non-taxable. A plain reading of the vendor invoice shows that Defendant is attempting to pass along its own vendor's consulting fees, not administrative "costs." Defendant has not explained or outlined why these consulting fees are anything more than a convenience for Disney and its counsel; as a result, the costs cannot be taxed. *Gray v. Novell, Inc.*, 2012 WL 3886026, *2 (M.D. Fla. 2012).

Should the Court be of the view that Disney has come forward with anything resembling a showing of entitlement to the alleged costs, objections to individual entries are shown below.

Activity Date	Amount Claimed	Objection
12/08/15	$595.00	• "Several plaintiffs": shows inadequate attachment to the present case • Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Coding for upcoming production": Plaintiff did not request that the documents be coded, and the documents were produced to Plaintiff in the least user-friendly fashion possible.
12/08/15	656.25	• "Attention to management" and "attention to detail" cannot conceivably be taxable • Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit
12/09/15	743.75	• "Attention to detail" cannot conceivably be taxable • Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Coding for upcoming production": Plaintiff did not request that the documents be coded, and the documents were produced to Plaintiff in the least user-friendly fashion possible.
12/10/15	$1,050.00	• "Attention to management" cannot conceivably be taxable • Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Ensuring functionality and quality control of production searches and production sets": whatever this means, it is consulting fees related to searching, not costs related to producing
12/14/15	$630.00	• Whatever the description for this date means, it is consulting fees related to searching, not costs related to producing
12/17/15	$1,172.50	• Whatever the description for this date means, an indeterminable portion of it relates to conferring with counsel, which cannot be taxable
01/08/16	$735.02	• Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Deposition witness preparation" is completely unrelated to any taxable cost • "Finalize production": whatever this means, it is consulting

		fees which should not become taxable merely by out-sourcing them
01/19/16	$520.64	• Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Dep prep" is completely unrelated to any taxable cost
02/22/16	$505.33	• Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Import all wait time reports… and prepare for production to opposing counsel within next week": broad production was actually pre-planned to be made, and was made, by regular mail on the last day of discovery; see entry for March 1, 2016.
02/23/16	$183.76	• "SAB" is a different case • Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit
02/25/16	$735.00	• "Receive documents subpoenaed from third party (Facebook posts); convert to PDF and organize on network folder for attorney review per P. Margulies": purely defense counsel convenience, unrelated to producing anything to Plaintiff
02/26/16	$717.50	• Whatever the description for this date means, it is consulting fees related to searching, not costs related to producing • "JHAG" documents do not relate to this Plaintiff
03/01/16	$1,697.50	• "Deliver copy of documents to US Post Office for distribution to opposing counsel": confirms that consultant waited 8 days to mail the documents; an ***electronic*** production consultant taking something to the ***post office*** is the ultimate inconsistency, demonstrative of Defendant's penchant for producing everything as late as possible, by the slowest practicable means. See Exh. B.
04/05/16	$350.00	• "Attention to management" cannot conceivably be taxable • Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit
04/20/16	$245.00	• Paralegal fees disguised as costs
04/20/16	$437.50	• Whatever "Relativity" is, it was never shared with Plaintiff, so Relativity formatting and coding was purely for Defendant's benefit • "Attention to Plaintiffs' incoming production documents AB,MB0068-0627"; "attention" is ridiculously non-specific; • AB,MB is a different case, not LTT
	$10,974.75	

9. "Other Costs" (Defendant's Exh. G: $7,636.64/42 = $181.21)

The "other costs" component of Defendant's proposed bill of costs is supported by nothing more than a characterization that the category includes "postage and other shipping costs in connection with the service of document [sic] and the depositions taken by the parties." Decisions of this Court establish that Defendant cannot create a catch-all "other costs" category and expect the Court to award whatever costs Defendant characterizes as "other." See *United States v. Degayner*, 2009 WL 111673, *5 (M.D. Fla. 2009) (various "other costs" not taxable); *Reliable Salvage & Towing, Inc. v. 35' SEA RAY*, 2011 WL 2418891, *4 (M.D. Fla. 2011), aff'd, 476 F.App'x 852 (11th Cir. 2012) ("under §1920 "other costs" are not recoverable"); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 2007 WL 842771, *10 (M.D. Fla. 2007).

A cursory review of Defendant's Exhibit G indicates that the "other charges" consist mostly of shipping and postage costs. "It is well settled that costs for "shipping and handling" or postage costs are not recoverable expenses under § 1920." *Kobie v. Fithian*, 2014 WL 2215752, *2 (M.D. Fla. 2014); *Desisto Coll., Inc. v. Town of Howey-In-The-Hills*, 718 F. Supp. 906, 914 (M.D. Fla. 1989), aff'd, 914 F.2d 267 (11th Cir. 1990) ("fax transmittal, federal express, postage, telephone" charges not taxable); *Scelta v. Delicatessen Support Servs., Inc.*, 203 F. Supp. 2d 1328, 1339 (M.D. Fla. 2002).

F. Certificate of Compliance with Rule 3.01(g)

On the third day of the seven-day period during which this motion must be prepared and filed pursuant to Rule 54, undersigned counsel for Plaintiff advised defense counsel of Plaintiff's intention to file this motion. Plaintiff confirmed that Defendant opposes the motion.

WHEREFORE, Plaintiff respectfully requests that this Court:

- Vacate the Clerk's bill of costs, because:

- No motion to tax costs was filed; and
- A Rule 59 postjudgment motion has been filed, the Court's order is non-final, and the Clerk's bill of costs is inappropriate or premature; and
- It is inequitable to tax costs against the incompetent and indigent Plaintiff; or

- In the alternative:
  - Amend the bill of costs to properly identify Plaintiff; and
  - Sustain the above objections to individual line items in the Clerk's bill of costs, ordering the following reductions to the bill of costs:

Cost Category	**Reduction**
"Clerk's fees"	$450.00
Service costs	$248.67
Allocated depositions	$24.23
Parent deposition	$364.60
Printing costs	$423.06
E-discovery	$258.81
Other costs	$181.21
Total reduction	$1,950.58

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Electronic Mail this 1st day of November, 2016 to:

Robert M. Kline, Esq.
McDermott Will & Emery LLP
333 Avenue of the Americas, Suite 4500
Miami, FL 33131
rkline@mwe.com

Kerry A. Scanlon, Esq.
Jeremy White, Esq.
McDermott Will & Emery LLP
The McDermott Building
500 North Capital Street, N.W.
Washington, DC 20001
kscanlon@mwe.com; jmwhite@mwe.com

DOGALI LAW GROUP, P.A.

/s/ *Andy Dogali*
Andy Dogali
Fla. Bar No.: 0615862
Geoffrey E. Parmer
Fla. Bar No.: 989258
101 East Kennedy Blvd., Suite 1100
Tampa, FL 33602
Telephone: (813) 289-0700
Facsimile: (813) 289-9435
Email: adogali@dogalilaw.com
Attorneys for Plaintiff