LAW OFFICES OF KENNETH G. FRIZZELL, III
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

KIRK and AMY HENRY, Plaintiffs, vs. FREDRICK RIZZOLO aka RICK RIZZOLO, an individual; LISA RIZZOLO, individually and as trustee of The Lisa M. Rizzolo Property Trust and as successor trustee of The Rick J. Rizzolo Separate Property Trust; THE RICK AND LISA RIZZOLO FAMILY TRUST; THE RICK J. RIZZOLO SEPARATE PROPERTY TRUST; THE LISA M. RIZZOLO SEPARATE PROPERTY TRUST; THE RLR TRUST; and THE LMR TRUST, Defendants.	Case No.: 2:08-CV-635-PMP-GWF **DEFENDANT FREDRICK RIZZOLO aka RICK RIZZOLO'S OPPOSITION TO PLAINTIFFS' MOTION AND MEMORANDUM FOR COSTS AND ATTORNEY FEES TO BE ASSESSED AGAINST DEFENDANT FREDRICK RIZZOLO**

COMES NOW, Defendant FREDRICK RIZZOLO, aka RICK RIZZOLO, by and through his attorney of record, KENNETH G. FRIZZELL, III, ESQ., and hereby files the following Opposition to Plaintiffs' Memorandum for Costs and Attorney Fees to be Assessed Against Defendant Fredrick Rizzolo, with request, assuming statutory authority is present to assess attorney's fees and costs as sanctions, that any attorney's fees and costs awarded as sanctions be deferred under the "Final Judgment Rule" until the conclusion of the litigation and the imposition of final and appealable judgment.

This opposition is made and based upon the pleadings and papers on file herein,

and any and all oral argument heard by this Honorable Court.

DATED: November 30, 2009

LAW OFFICES OF KENNETH G. FRIZZELL, III

By /s/

KENNETH G. FRIZZELL, III, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 3, 2009, Plaintiffs' filed their Motion to Reveal Pro Se Litigant Rick Rizzolo's Ghost Writer, (#184). Defendant Rick Rizzolo filed his Response to Plaintiffs' Motion (#190) on September 9, 2009. Thereafter, the Plaintiffs' Reply to Defendant's Response (#193) was filed on September 14, 2009.

A non-evidentiary hearing was held on October 7, 2009. No direct evidence was presented. No direct or sworn testimony was placed on the record. It was unclear under which Rule, standard or authority sanctions would be decided. The matter was taken under advisement on the arguments of counsel.

The magistrate judge issued the Order (#227) on October 23, 2009, in which Plaintiffs' motion was granted in part and denied in part. The Order did not find bad faith on the part of Defendant Rizzolo. Specifically, the Plaintiffs were awarded their "*reasonable attorney's fees and costs incurred in preparing their reply to Defendant's opposition*" to the Plaintiffs' motion to reveal ghost writer.

The Plaintiffs filed their Motion and Memorandum for Costs and Attorney Fees (#235 / #239) on November 9, 2009.

This opposition follows.

1. TIMELINESS OF RESPONSE

The Plaintiffs' Motion was filed on November 9, 2009, and the response was due in fifteen (15) days, plus three (3) days under FRCP Rule 6(d) when service is made under Rule 5(b)(2)© (mail), or (E) (electronic), making the due date tentatively November 27, 2009 as stated in the Docket.

However, the Docket did not automatically calculate for FRCP Rule 6(a)(1) (Veteran's Day and Thanksgiving), and Rule 6(a)(4)(B) excluding November 27, 2009 as "State Family Day."

Accordingly, the due date is Monday, November 30, 2009.

2. STANDARD OF REVIEW

The standard of review is not only the reasonableness of the fees requested, but whether the underlying order constitutes an abuse of discretion. *Cooter & Gel v. Hartmax Corp.*, 496 U.S. 384, 405 (1990), cited *Chambers v. NASCO*, Inc., 501 U.S. 32, 55, 111 S.Ct. 2123, 2138 (1991).

3. UNITED STATES CODE DOES NOT CONFER JURISDICTION ON THE MAGISTRATE JUDGE TO ENTER INDEPENDENT ORDER FOR THE PAYMENT OF ATTORNEY'S FEES AND COSTS AS SANCTION

In both *Estate of Conners v. O'Connor*, 6 F.3d 656 (9th Cir.1993), and *Alpern v. Lieb*, 38 F.3d 933 (7th Cir. 1994), the Court of Appeals took the lead to define when a magistrate judge may or may not issue an order awarding attorney's fees and costs as sanctions.

Alpern is directly applicable to this matter because Alpern was abusing the federal judiciary in an effort to thwart a state court divorce he claimed was fraudulent and collusive. Alpern's first attempt to seek a stay of the divorce action pending in state court was promptly dismissed as frivolous--which it was for several reasons. *Ankenbrandt v. Richards*, 504 U.S. 689, 703, 112 S.Ct. 2206 (1992) (federal courts lack jurisdiction over divorce proceedings); 28 U.S.C. §2283 (federal courts may not enjoin state litigation). Refusing to take "no" for an answer, Alpern filed a second suit seeking damages from his former wife, her attorney, and the state judge who pronounced the divorce, claiming fraud.

The suit was dismissed under the domestic relations exception to federal jurisdiction, the Rooker- Feldman doctrine, Sec. 2283 (a case about the allocation of

property was still on the state court's docket), principles of claim and issue preclusion, and principles of judicial immunity exclude any possibility of relief in federal court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923) (i.e., a litigant dissatisfied with the decision of a state tribunal must intervene or appeal rather than file an independent suit in federal court).

After tossing out the suit, the district judge instructed a magistrate judge "to hear and enter an order on defendant's motion for Rule 11 sanctions." The magistrate judge took this language literally, reviewing the parties' submissions, holding an evidentiary hearing, and entering an order requiring Alpern to pay sanctions. The magistrate judge did not make a recommendation to the district judge; instead, the magistrate judge entered an order purporting to carry independent force and directing Alpern to pay. Alpern appealed.

Congress has authorized magistrate judges to make independent decisions on the merits in only three (3) kinds of matters: misdemeanor prosecutions, 28 U.S.C. §636(a); "any pretrial matter," with eight listed exceptions, 28 U.S.C. §636(b)(1)(A); and any civil proceeding in which the parties consent to final decision by a magistrate judge, 28 U.S.C.§636(c)(1).

None of these grants of power applied in Alpern, nor do they apply here.

In this matter, the hearing was not held at the direction of the district court judge, nor was it evidentiary in nature as no testimony or direct evidence was presented by which to support any finding.

Mr. Rizzolo did not consent to a final decision by a magistrate judge.

This was not a misdemeanor prosecution.

The magistrate judge, in the Order, failed to state under which standard, authority or rule, the matter was being decided.

The power to award sanctions, like the power to award damages, belongs in the hands of the district judge; certainly so if the district judge plans to treat an order to pay sanctions as one punishable as contempt of court--for Sec. 636(b)(1)(A) expressly denies

to the magistrate judge the power to issue any such order. A district judge may refer a dispute about sanctions to a magistrate judge for a recommendation under Sec. 636(b)(1)(B) or Sec. 636(b)(3), but the magistrate judge may not make a decision or enter an order with independent effect.

Plaintiffs are expected to rebut by relying on the definition of "pretrial matter[s]" as found in *Maisonville v. F2 America, Inc.*, 902 F.2d 746 (9th Cir.1990), where it was held that a magistrate judge, as a "pre-trial" matter, may award sanctions under Rule 11 for filing a frivolous complaint recommended for dismissal.

The Ninth Circuit, subsequent to *Maisonville*, and relying on *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717 (1988) (i.e., awards of sanctions and indeed, of attorney's fees in general, are treated as separate claims for purposes of appellate jurisdiction), clarified that holding. See again *Estate of Conners v. O'Connor*, 6 F.3d 656 (9th Cir.1993) (a magistrate judge may not independently award attorney's fees). Without citing *Maisonville*, the court observed in *Conners* that the grant or denial of a request for attorney's fees is a dispositive order involving a claim for money which restricts the magistrate judge to the role of recommender.

Accordingly, the Order issued by the magistrate judge is void for lack of statutory authority.

4. REVIEW OF THE MAGISTRATE JUDGE'S ORDER SHOWS THAT ORDER IS FATALLY DEFECTIVE AND UNENFORCEABLE

In *Primus Automotive Financial Services, Inc. V. Batarse*, 115 F.3d 644 (9th Cir. 1997), the Court of Appeals reversed for fatal defect similar in nature to the defect here.

In the *Primus* decision, as in this matter, the district court did not enumerate the rule or authority relied upon to award sanctions. Primus had requested sanctions under 28 U.S.C. §1927 and Rule 11, but neither provision supported the district court's order.

Section 1927, on its face, applied only to the conduct of lawyers. Rule 11 imposes a duty on attorneys to certify that all pleadings are legally tenable and well-grounded in fact; it governs only papers filed with the court. FRCP 11; *Chambers*, 501 U.S. at 41, 111 S.Ct. at 2130-31. Rule 11 could not be inferred in *Primus*, and cannot be inferred here,

because the magistrate judge levied sanctions against Mr. Rizzolo, a party, and his "non-lawyer," a non-party, without any evidentiary hearing upon which to base a finding of wrongdoing or any allocation of the level of responsibility between them.

The *Primus* court, as in this matter, failed to specifically state the rule or standard being applied, and only invoked the party's general behavior along with the general conduct of the litigation. Therefore, the sum of the purportedly sanctionable conduct fell outside of the specific prohibitions of Sec. 1927 and Rule 11.

In *Primus*, it was argued, that without a finding or citation to Sec. 1927 or Rule 11, the district court could have ordered sanctions by reliance on inherent powers considered appropriate where "the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address." *Primus*, supra.

The inherent powers of federal courts are those that "are necessary to the exercise of all others." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463 (1980). The most common utilization of inherent powers is the contempt sanction levied to "protect[ ] the due and orderly administration of justice" and "maintain[ ] the authority and dignity of the court." *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 395-96 (1925).

When a losing party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622 (1975) (quotation omitted), sanctions may be awarded under the court's inherent powers and may take the form of attorney's fees. See *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74-75 (3d Cir.1994).

Unfortunately, here as in *Primus*, reliance on inherent powers is not sufficient to support a finding of sanctions for two (2) reasons. First, a magistrate judge cannot rely on some form of inherent powers reserved to the district judge but not conferred on the magistrate judge by statute.

Second, before awarding sanctions under the inherent powers doctrine, the magistrate judge was required to make an explicit finding that a party's conduct

"constituted or was tantamount to bad faith." *Roadway Express*, 447 U.S. at 767, 100 S.Ct. at 2465; see also *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir.1986). See *Chambers*, 501 U.S. at 47, 111 S.Ct. at 2134 ("[T]he narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders.").

A finding of bad faith is warranted where an attorney or party "knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *In re Keegan*, 78 F.3d at 436 (citation omitted). A party also demonstrates bad faith by "delaying or disrupting the litigation or hampering enforcement of a court order." *Hutto v. Finney*, 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 2573 n. 14, 57 L.Ed.2d 522 (1978).

The bad faith requirement sets an extremely high threshold. The magistrate judge's conclusions, essentially adopting the unsworn arguments of counsel, without hearing from Mr. Rizzolo, or any third party alleged to have committed wrongdoing, falls far short of the requisite fact finding necessary for bad faith sanctions.

Mr. Rizzolo understands that not all instances involving sanctions require an evidentiary hearing, *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164-65 (9th Cir. 2003) (hearing not required with repeated instances, bad acts and warnings). However, in this matter, Mr. Rizzolo had never before been accused of misconduct in this case. An evidentiary hearing would have served to educate the magistrate judge and the court itself on the true facts and underlying circumstances - but without such a hearing to support the Order, doubt now exists on the accuracy of the proceeding.

The magistrate judge called the arguments in opposition to the Plaintiffs' motion "evasive" and "frivolous," and made a general finding, without the benefit of direct testimony or evidence, as to the unauthorized practice of law, ***but never found bad faith on the part of the Mr. Rizzolo***. Although one can perhaps appreciate the frustration the magistrate judge may have felt, one cannot "glean from the record whether this outrage

stemmed from a belief that [Defendant Rizzolo] acted in bad faith." *In re Mroz*, 65 F.3d 1567, 1576 (11th Cir.1995).

Accordingly, even though one may argue that statutory authority was conferred on the magistrate judge to issue an independent Order for the sanctions, that Order is fatally defective for failure to hold an evidentiary hearing on which to find facts in support of sanction, for failure to cite specific rule, statutory authority, or the standard on which the sanctions were grounded, and for failure to find bad faith under the inherent powers doctrine. *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir.1982) (remanding to the district court to either withdraw the personal sanctions or enter specific findings of fact on whether defense counsel acted in bad faith).

5. REVIEW OF THE MAGISTRATE JUDGE'S ORDER ALLOWING REASONABLE ATTORNEY'S FEES AND COSTS IN *REPLYING* TO DEFENDANT RICK RIZZOLO'S RESPONSE TO PLAINTIFF'S MOTION TO REVEAL GHOST WRITER (#184)

The magistrate judge's Order of October 23, 2009, reviewed the background of the motions filed by Pro Se Litigant, Rick Rizzolo. The pleadings that were purportedly prepared by Mr. Kimsey, as outlined in the Order, and denied by the District Judge, were stricken by this Court - but not for being frivolous or in bad faith - instead they were stricken merely as a formality.

During the hearing on this matter, Plaintiffs' Counsel requested the magistrate judge to sanction Mr. Rizzolo and order him to pay attorney's fees and costs for all "frivolous motions and pleadings purported prepared on his behalf by Mr. Kimsey." (Order at 3, lines 5-6). No authority or specific rule was cited for the request.

However, the magistrate judge noted that the Plaintiffs failed to request monetary sanctions in any of their written oppositions or responses, and again failed to do so at that time of the hearings on those matters. (Order at 3, lines 8-11).

The Order stated that it was "not appropriate for this Court to award sanctions on the motions that were previously decided by Judge Pro and as to which no request for sanctions were made." (Order at 3, lines 15-17). Having found that sanctions were appropriate in the instant motion, but without citing the authority or standard by which this

finding was made, the magistrate judge awarded "*Plaintiffs their reasonable attorneys fees and costs in **replying** to Mr. Rizzolo's Response to Plaintiffs' Motion to Reveal (Dkt. #190).*" (Order at 3, lines 26-27).

As can be seen from the review of the Order, and assuming for the presentation of this argument that the Order will not be determined as defective, the Plaintiffs will only be granted **reasonable** fees and costs for the time spent preparing their Reply, (#193), to Defendant's Response (#190). Defendant's Response was filed on September 9, 2009, with Plaintiffs' Reply to same being filed September 14, 2009. Accordingly, the time frame of allowable fees and costs is limited by those dates. Any time and costs spent outside that time frame is outside the scope of the Order, and must be disallowed.

6. REVIEW OF ALLEGED COSTS (PLAINTIFFS' EXHIBIT "1") THAT PLAINTIFFS' COUNSELS ARE SEEKING

Plaintiffs' are seeking costs in the amount of $3,250.90. Plaintiffs' counsel's ledger is an accounting program printout from Campbell and Williams of checks written for the alleged costs expended. However, Plaintiffs' Counsel failed to provide the invoices concerning these costs which would document when these costs were actually incurred.

The first cost is the service of process fee to secure Mr. Kimsey's appearance at the hearing on October 7, 2009, in the amount of $41.00. The service of a subpoena to secure Mr. Kimsey's appearance in court, in no way relates to the preparation of Plaintiffs' reply. Additionally, the invoice for the service of the subpoena is absent, and would document the date the work was performed. As this cost is outside the scope of the magistrate judge's order, it must be disallowed.

The second cost of $323.00 is for the transcript of the hearing on the Plaintiffs' Motion to Reveal Ghost Writer. This hearing took place **after** the Plaintiffs' prepared their reply. Plaintiffs requested this transcript after the hearing, and prior to the magistrate judge issuing its Order. As such, the transcript was not a necessary cost in the **preparation of the Plaintiffs' Reply**. Accordingly, this cost must be disallowed.

Similarly, the third cost listed for their investigator, David Groover & Associates, in the amount of $2,850.00 must also be disallowed. Mr. Groover was retained by Plaintiffs'

Counsel **prior to filing their moving papers** in this matter. Examination of Mr. Groover's Declaration which was attached to Plaintiffs' original Motion as Exhibit "4", states that he was first contacted on July 22, 2009 by Mr. DeGree, Counsel for Plaintiffs. At that time, Mr. DeGree requested that he identify the subscriber of a telephone number which he had been given. He provided the information requested **that same day**, July 22, 2009. At that time, he was asked to obtain additional information regarding Mr. Kimsey. Mr. Groover outlined the steps he took to obtain that information, including obtaining certified copies of pleadings. Mr. Groover's work in this matter allowed Plaintiffs' Counsel to file their motion, and had nothing to do with the preparation or filing their reply. All work performed by Mr. Groover was completed long before Plaintiffs' Reply was filed. Accordingly, as the work performed by Mr. Groover was completed in anticipation of Plaintiffs' motion, not their reply, the entire amount of $2,850.00 must be disallowed.

The long distance calls listed on Plaintiffs' ledger from September 9, 2009 through October 14, 2007, in the amount of $7.77 are similarly undocumented as being related to this case. Further, any calls placed after September 14, 2009, are outside the scope of the order and must be denied. While Defendant's Counsel believes this is a nominal amount, without documentation and actual call dates, these calls must be disallowed.

The postage listed from September 9, 2009 through September 14, 2009 in the amount of $0.88, and photocopies from September 9, 2009 through September 14, 2009, in the amount of $28.25, fall within the time frame allowed, and within the scope of the magistrate judge's order. Again, however, there is no itemization or breakdown as to what the copies were, or what the postage was used for.

Accordingly, without further documentation, these costs must also be disallowed.

7. REVIEW OF ALLEGED ATTORNEYS FEES THAT PLAINTIFFS' COUNSELS ARE SEEKING

Plaintiffs' are seeking attorney fees in the amount of $11,240.00. In order to substantiate this absurd amount, Plaintiffs rely on Exhibit "2" attached to their Memorandum. This exhibit is a **highly redacted** and **hand edited** billing sheet of services performed in the instant case. Plaintiffs' Counsel contends that their attorneys fees, for

the preparation of their reply in this matter, total the amount of $11,240.00. These fees include preparation for the hearing on this matter, as well as attendance at the hearing on this matter which under no circumstances relate to the preparation of Plaintiffs' reply. After a thorough review of same, Defendant's Counsel believes that the only allowable entries falling within the scope of this Court's order, begin on September 9, 2009 and end on September 14, 2009.

"Plaintiffs are awarded their reasonable attorneys fees and costs incurred in **preparing their reply to Defendant's opposition to this Motion (Dkt. #184).**" (Order at 5, Paragraph 4, lines 10-11). Any work performed in the preparation of the Plaintiffs' motion, or after filing Plaintiffs' reply, is **clearly outside** the Order by the magistrate judge.

When Plaintiffs' time sheet is reviewed in light of the Order, all entries after the filing date of Plaintiffs' Reply, September 14, 2009, must be disallowed. In so doing, this reduces the amount of attorneys fees to a total of $4,865.00, which will be analyzed for their **reasonableness**. The first allowable entry is the review of Defendant's opposition by attorney Jack DeGree. The time spent was listed as 0.8 hours, by attorney Jack Degree, at his hourly rate of $250.00, making the attorneys' fees for this review $200.00. Counsel accepts this amount as reasonable.

The next listing is that of the research for reply at 0.7 hours, by attorney Phillip Erwin, at this hourly rate of $200.00. The attorneys' fees for this research is $140.00. Counsel accepts this amount as reasonable.

However, the time spent by attorney Erwin on September 10, 2009 of 8.5 hours and September 11, 2009 of 6.0 hours to research, write, edit and prepare affidavits for their reply is unbelievable, and unreasonable. The Points and Authorities in their reply is four (4) pages. Much of which involves the discussion of Mr. Kimsey's past and the assertions made in Defendant's response, all of which is public record. There is little in the way of new arguments or case law which would have required legal research. Similarly, the affidavits themselves, absent the case caption, are one (1) page documents. For an attorney, even a newly licensed attorney, to spend 14.5 total hours on this reply must be

questioned. Defendant's Counsel contends that the time spent on preparation and editing this reply must be reduced by half, thereby allowing 7.25 hours of Mr. Erwin's time, which is **reasonable**. Accordingly, the September 10, 2009 billing in the amount of $1,700.00 and the September 11, 2009 billing of $1,200.00 should be reduced by half, for a total on these two entries of $1,450.00.

The next listing at issue is the September 11, 2009, entry by attorney Jack Degree, which states e-mails with Jan Allen regarding Mr. Kimsey, for a total time of 2.5 hours, at a cost of $625.00. There is nothing which documents who Jan Allen is, her knowledge of Mr. Kimsey, or why it took Mr. Degree 2.5 hours of emails to discuss this matter with her. Absent substantiation of relativeness to the reply, this fee of $625.00 should be disallowed.

8. DEFERMENT OF ANY SANCTIONS UNTIL ENTRY OF FINAL JUDGMENT

The "Final Judgment Rule" states that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at all stages of the litigation may be ventilated. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (alteration in original) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)); accord *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders only after entry of final judgment because those orders merge into that final judgment. See *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000) (noting that prior interlocutory orders are "merged into final judgment"); *Munoz v. Small Business Administration*, 644 F.2d 1361, 5330 1364 (9th Cir. 1981) (noting that "an appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment"). Accordingly, any award of attorney's fees and costs against the Defendant must be deferred until the entry of final judgment.

CONCLUSION

As discussed above, Defendant believes that the process which culminated in the Order is defective. The magistrate judge maintains authority to recommend, but not Order, sanctions. Additionally, the magistrate judge failed to state under which Rule, authority or

standard sanctions were appropriate and necessary.

The magistrate judge, assuming statutory authority was present, ordered **reasonable** costs and attorneys fees to Plaintiffs' Counsel which were incurred in **replying** to Defendant's Response to their Motion to Reveal Ghost Writer (#184). Defendant's Response was filed on September 9, 2009. Plaintiffs' reply was filed September 14, 2009.

Plaintiffs' request for costs in the amount of **$3,250.90** is outside the scope of the order, and must be disallowed. Plaintiffs' attorney fees for preparation of their reply in the amount of **$11,240.00** are absurd and patently unreasonable in light of the existing contingency fee agreement which exists between the Plaintiffs and Counsel. As addressed above, attorneys fees of **no more than $2,790.00** should be considered, assuming the Order by the magistrate judge is not fatally defective.

Further, as it was shown above, that the costs listed by Plaintiffs' either fall outside the scope of the order, or are unsubstantiated and undocumented as being relevant to the instant case, and Plaintiffs' reply. Therefore, Defendant's Counsel contends that there are no allowable costs listed in Plaintiffs' Memorandum.

Accordingly, this Court should disallow any and all fees and costs which fall outside the dates of the filing of Defendant's response, September 9, 2009 through the filing of Plaintiffs' reply, September 14, 2009. Further, this Court should look to the reasonableness of the attorneys' fees which remain, and reduce that amount, assuming there is jurisdiction, to no more than $2,790.00, to be deferred until the imposition of final judgment when all pre-trial and non-appealeable orders .

DATED: November 30, 2009

LAW OFFICES OF KENNETH G. FRIZZELL, III
By /s/

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

KIRK and AMY HENRY, Plaintiffs, vs. FREDRICK RIZZOLO aka RICK RIZZOLO, an individual; LISA RIZZOLO, individually and as trustee of The Lisa M. Rizzolo Separate Property Trust and as successor trustee of The Rick J. Rizzolo Separate Property Trust; THE RICK AND LISA RIZZOLO FAMILY TRUST; THE RICK J. RIZZOLO SEPARATE PROPERTY TRUST; THE LISA M. RIZZOLO SEPARATE PROPERTY TRUST; THE RLR TRUST; and THE LMR TRUST. Defendants.	Case No.: 2:08-CV-635-PMP-GWF AFFIDAVIT OF KENNETH G. FRIZZELL, III, ESQ. CONCERNING ATTEMPTED FILING OF OPPOSITION TO PLAINTIFFS' MOTION AND MEMORANDUM FOR COSTS AND ATTORNEY FEES TO BE ASSESSED AGAINST DEFENDANT FREDRICK ROZZOLO

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

KENNETH G. FRIZZELL, III, ESQ., being first duly sworn, deposes and says:

1. That I am a duly licensed and practicing attorney in the State of Nevada at the law offices located at 509 South 6th Street, Las Vegas, Nevada 89101.

2. That Affiant represents the Defendant Rick Rizzolo in the above-captioned action.

3. That Affiant attempted to electronically file Defendant's Opposition to Plaintiffs' Motion and Memorandum for Costs and Attorney Fees to be Assessed Against

Defendant Fredrick Rizzolo, on November 30, 2009, pursuant to the Order of the Court in this matter.

4. That Affiant did not receive a confirmation of filing and is unsure whether the CM/ECF accepted the document, and believes the filing website may have been updating thereby not allowing the filing of any documents. I have attached a printout which states that the date of last filing was 11/30/2009, however, the opposition does not show in the history as being filed.

5. That Affiant was unable to again access the internet to verify acceptance and if necessary resubmit the document for filing, due to an outage from his internet provider.

6. That Affiant will again attempt filing of Defendant's Opposition with the CM/ECF website, as well as faxing a copy of the opposition and this affidavit to all parties today.

7. That Affiant respectfully requests that Defendant's Opposition be considered timely filed.

FURTHER, your affiant sayeth not.

KENNETH G. FRIZZELL, III, ESQ.

SUBSCRIBED AND SWORN to before me

this 1st day of December, 2009.

NOTARY PUBLIC, in and for said County and State

Notary Public - State of Nevada
County of Clark
MELANI KIM RUDKIN
My Appointment Expires
August 23, 2010
No: 94-4758-1

2:08-cv-00635-PMP-GWF Henry et al v. Rizzolo et al
Philip M. Pro, presiding
George Foley, Jr, referral
Date filed: 05/16/2008
Date of last filing: 11/30/2009

Query

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