

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO**

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Civil Action N<sup>o</sup> 05-cv-01858-EWN–MJW

SEAN HARRINGTON

Plaintiff,

v.

MADLINE WILSON and the “LAW OFFICE OF MADLINE WILSON”;  
CHRISTY RYAN;  
BILL J. FYFE and COLUMBINE COUNSELING CENTER, P.C.;  
LAURA ARCILISE, in her personal capacity;  
LOUISE CULBERSON-SMITH, in her personal capacity;  
JOHN GLEASON in both his personal and official capacity;  
WENDELL PRYOR in his official capacity;  
ROBERT EVANS, in his official capacity; and  
the JEFFERSON COUNTY COMBINED COURT (a/k/a “THE FIRST JUDICIAL DISTRICT”),  
by and through the COLORADO ATTORNEY GENERAL, JOHN SUTHERS, in his official Capacity.

Defendants

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**PLAINTIFF’S OBJECTION TO DEFENDANT WILSON’S PROPOSED BILL OF COSTS**

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COMES NOW, Plaintiff, Sean Harrington, for the purpose of submitting the within Objection:

1. On September 21<sup>st</sup> 2006 this Court signed an Order of Dismissal, which was docketed the following day. Docket # 74. That Order was amended to correct the date signed. Dockets 78~79. On the 25<sup>th</sup> of September, the Court entered another Order of dismissal. Docket # 80. None of these three Orders included any award of costs.

**Dismissal under § 1919, rather than § 1920**

2. This case was dismissed pursuant to 28 U.S.C. § 1919, which allows for a discretionary award of costs (“Whenever any action or suit is dismissed in any district court”). Unlike the situations covered by § 1920, there is no presumption that costs will be awarded under § 1919. “While Rule 54(d)(1) provides that “costs . . . shall be allowed as of course to the prevailing party unless

the court otherwise directs . . . ,” § 1919 instead states that the court “may order the payment of just costs” when a jurisdictional dismissal occurs. *Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1339 (10<sup>th</sup> Cir. 1998). Unlike costs awarded under Rule 54, costs awarded under § 1919 are not subject to a presumption that they shall be awarded to a prevailing party. *Id.* at 1340 n.8 (citing *Edward W. Gillen Co. v. Hartford Underwriters Ins. Co.*, 166 F.R.D. 25, 27 (E.D. Wis. 1996)).

3. Defendant Wilson is not a “prevailing party” entitled to costs: In any action where, as here, dismissal is attributable to alleged lack of subject matter jurisdiction, a defendant is not a “prevailing” party. *See e.g., Keene Corp. v. Cass*, 908 F.2d 293, 298 (8<sup>th</sup> Cir. 1990) (“Where a complaint has been dismissed for lack of subject matter jurisdiction, the defendant has not prevailed over the plaintiff on any issue central to the merits of the litigation.”); *Hidahl v. Gilpin County Dep't of Social Servs.*, 699 F. Supp. 846, 849 (D. Colo. 1988) (“When a complaint is dismissed for lack of jurisdiction, the defendant cannot be a ‘prevailing party.’ Defendant has not ‘prevailed’ over the plaintiff on any issue central to the merits of the litigation”); *Sellers v. Local 1598, Dist. Council 88, Am. Fed'n of State, County, & Mun. Employees*, 614 F. Supp. 141, 144 (E.D. Pa. 1985), *aff'd*, 810 F.2d 1164 (3<sup>rd</sup> Cir. 1987) (same); *Hygienics Direct Co. v. Medline Industries, Inc.*, 33 Fed.Appx. 621 C.A.3 (Pa.), 2002 (same).

4. Attorneys requesting fees bear the burden of establishing the amount of compensable expenses to which they are entitled. *Case v. Unified School Dist.*, 157 F.3d 1243, 1258, 10<sup>th</sup> Cir. 1998). Opposing counsel has failed to meet this burden.

### **Computerized Research Fees**

5. Costs for computer legal research are not statutorily authorized. *Sorbo v. United Parcel Service*, 432 F.3d 1169, 1180 (10<sup>th</sup> Cir. 2005) (citing *Jones v. Unisys Corp.*, 54 F.3d 624, 633 (10<sup>th</sup> Cir., 1995)). Wilson’s attorney is seeking \$131.26 in unspecified “Computer research costs” and has not established that these “Westlaw charges are expenses normally itemized and billed in addition to the hourly rate..” *Case, supra*. *See also Ortega v. City of Kansas City*, 659 F. Supp. 1201 (D. Kan. 1987) (computer assisted research costs are not recoverable because they are included in a firm’s overhead); *Aloha Tower Associates Piers v. Millennium Aloha*, 938 F. Supp. 646 D. Hawaii 1996) (same). Computer-aided research, like any other form of legal research, is a component of

attorneys' fees and cannot be independently taxed as an item of cost. *See Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 695 (8<sup>th</sup> Cir. 1983); *see also Haroco v. American National Bank & Trust*, 38 F.3d 1429 (7<sup>th</sup> Cir. 1994) (computer assisted legal research is not an expense taxable as costs, but is recoverable as part of an attorney fee award because computerized legal research costs are not included under the definition of costs contained in 28 U.S.C. §1920).

6. The Tenth Circuit in *Case v. Unified School Dist.*, *supra*, considered Westlaw fees to the extent that “[the district court] was not able to separate research related to the appellants’ prevailing claims from research on claims which they lost” 157 F.3d at 1258. In this case, Defendant Wilson hasn’t prevailed on **any** claims, as noted above, because the Court concluded that it lacks jurisdiction under *Rooker-Feldman*. Only if the Court had jurisdiction could it declare that any party had prevailed.

7. The Tenth Circuit in *Case* also considered Westlaw fees to the extent that “[the district court] determined that Westlaw was not the most cost effective research method.” 157 F.3d at 1258. Opposing counsel’s incurrence of additional fees beyond his firm’s flat rate subscription was not a cost effective use of resources. A full use subscription to Fastcase™ (available through TrialSmith™), for example, can be purchased for only \$199 per year and, in any event, is incidental to operating a law practice, because “Hours spent familiarizing oneself with the general area of law should be absorbed in the firm’s overhead and not be billed to the client.” *Case, supra* at 1253. Moreover, opposing counsel is a member of the Colorado Bar Association. *See* display of Online CBA Attorney Member Directory, attached hereto and made part hereof as, “**Exhibit A.**” All CBA members have unlimited free access to Casemaker,® a product of Lawwriter Corp., which is a competitor to WestLaw,® LexisNexis®, LoisLaw,™ VersusLaw® and Fastcase™ legal research online content products. Plaintiff alleges the same upon personal knowledge, because Plaintiff also is an associate-member of the Colorado Bar Association. Every statute, rule and case cited by opposing counsel, including Tenth Circuit, Colorado state and U.S. Supreme Court, was available in full text from CaseMaker **at no cost**. A copy of the CBA Web page describing this member benefit is attached hereto and made part hereof by reference as, “**Exhibit B.**”

### **Travel Costs**

8. Opposing counsel for Defendant Wilson is also seeking reimbursement for travel to Jefferson County Court. However, with the exception of witnesses, “accommodation and travel expenses [are] not recoverable as costs under § 1920.” *Sorbo, supra*, 432 F.3d at 1180 (citing *Bee v. Greaves*, 910 F.2d 686, 690 (10<sup>th</sup> Cir. 1990))

### **Long Distance Phone Calls**

9. Opposing counsel for Defendant Wilson is also seeking reimbursement for long distance phone calls. Absent some other statutory authorization, costs available to a prevailing party under Rule 54(d)(1) are limited to those specified in 28 U.S.C. § 1920. *Sorbo*, 432 F.3d at 1179. Long-distance phone calls are not authorized under either 28 U.S.C. §§ 1919 or 1920.

### **Incidental, Non-essential Copying Costs**

10. Costs must be those necessary to sustain the action. Upon information and belief, the entirety of Wilson’s copying costs was generated by counsel’s volitional printing (and mailing) of electronically filed PDF documents. One of the primary purposes of CM/ECF is to reduce the use of paper and ameliorate overhead costs (*see, e.g.*, ECF flyer available at the Court’s Web site at: [http://www.co.uscourts.gov/forms/cm\\_flyer.pdf](http://www.co.uscourts.gov/forms/cm_flyer.pdf) (“ECF provides the following benefits: . . . reduction in overhead costs”). Counsel’s election to print copies of electronic documents, even at the request of his client[s] was incidental, rather than “essential,” to the litigation and runs counter to the purpose of ECF. Plaintiff has previously corresponded with both Defendant Wilson and opposing counsel by electronic mail. Costs for volitional printing of electronic files in this case is purely elective.

WHEREFORE, Plaintiff respectfully request an Order directing the Clerk to amend the Entry of Judgment *nunc pro tunc* to reflect the Court’s September 25<sup>th</sup> 2006 Order, thereby denying defendants an award of costs in any amount.

Submitted this 10<sup>th</sup> day of October, 2006:

/s Sean Harrington  
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### CERTIFICATE OF SERVICE

I hereby certify that on October 10<sup>th</sup> 2006, I served the foregoing Objection via electronic mail to the following ECF participants.

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/s Sean Harrington