Supreme Court of the United States
No. 19-416
NESTLÉ USA, INC.,
Petitioner
v.
JOHN DOE I, ET AL.;
Respondents
and
No. 19-453
CARGILL, INC.,
Petitioner
v.
JOHN DOE I, ET AL.
Respondents

MOTION TO TAX COST AWARD AND WAIVE COSTS FOR INDIGENT RESPONDENTS.

On July 19, 2021, the Clerk of the Supreme Court awarded $8,694.14 in costs taxed to the Respondents, $8,394.14 for the preparation of the Joint Appendix and $300 in Clerk's costs. In doing so, the Clerk was likely not aware that Respondents John Does I-VI are subsistence farmers in Mali and are indigent and unable to pay such a large cost award. Respondents respectfully request that the Court issue an Order that these costs be waived on account of Respondents' indigency. Their situation is described in the Declaration of Terrence Collingsworth attached hereto ("Collingsworth Declaration").

It is well established in the vast majority of Circuits that indigency – or, more broadly, an inability to pay due to financial circumstance – is an important factor that may be considered in determining an award of costs pursuant to Fed. R. Civ. Pro. 54

(d). *See Rivera v. City of Chicago*, 469 F.3d 631, 365 (7th Cir. 2006) (listing seven other Circuits which have expressly come to this conclusion); *Badillo v. Cent. Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983) ("Mindful of the presumption that costs are to be awarded to the prevailing party under this rule, *Popeil Brothers, Inc. v. Schick Electric, Inc.*, 516 F.2d 772 (7th Cir. 1975), we hold that this presumption may be overcome by a showing of indigency"); *Stanley v. Univ. of S. Cal.,* 178 F.3d 1069, 1079 (9th Cir. 1999) ("Indigency is a factor that the district court may properly consider in deciding whether to award costs"). Costs allocated under Fed. R. Civ. Pro. 54 must generally adhere to the confines of reasonability and necessity and are reviewed for abuse of discretion. *See Crosby v. City of Chicago*, 949 F.3d 358, 364 (7th Cir. 2020). While an appellate court may correct a district court's allocation of costs, a district court's discretion is usually ultimate. *Id.* at 363–64 ("Challenging a district court's award of costs is an uphill battle. 'We have made it clear that Rule 54(d) creates a presumption that the prevailing party will recover costs, and that the ultimate decision to award costs is within the district court's discretion.'") (quoting *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991)). Federal Rule of Appellate Procedure 39(d)(2) likewise allows for objections to costs to be filed.

This Court's analogue to Rule 54, Rule 43, places discretion over the taxation of costs squarely in the Court's purview by compelling that the side against whom the Court directs to "pay costs unless the court otherwise orders." U.S. Sup. Ct. Rule 43 (2); *see also Bradstreet v. Potter*, 41 U.S. 317, 318 (1842). Respondents are extremely poor

former child slaves who currently reside in Mali. They simply do not have the capability to pay $8,394.14 in costs. *See* Collingsworth Declaration at ¶¶ 2-11, filed concurrently herewith. Therefore, it is in the interest of justice and equity for the Court to exercise its discretion and vacate the cost award.

To show indigency for purposes of the taxation of costs, a party must show they are unable to pay without adherence to mere "unsupported, self-serving statements that [they are] unable to pay the costs sought. . ." *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994). They must provide "substantial documentation of a true inability to pay" and the court must first determine whether or not they have the financial capacity to pay taxed costs. *Chapman v. AI Transport*, 229 F.3d 1012, 1039 (11th Cir. 2000); *see also Rivera*, 469 F.3d at 635 (establishing a two-pronged test for a District Court to use to find indigency, starting first with a determination of financial capacity); *Cote v. Stuecker*, 547 Fed. Appx. 778, 779 (7th Cir. 2013) ("a litigant asserting indigence must furnish proof of his inability to pay"). Next, Courts should survey other relevant factors including "the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case when using its discretion to deny costs." *Rivera*, 469 F.3d at 635–36; *see also Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999) (listing similar relevant factors).

Although the Supreme Court is not bound by the caselaw of lower courts which allows lower federal courts to consider a party's financial vulnerability when awarding costs, Fed. R. Civ. Pro. 54, Fed. R. App. Pro. 39, and U.S. Sup. Ct. Rule 43 all provide

discretion over the taxation of costs. As such, this Court certainly would be able to consider Respondents' financial vulnerability before taxing costs. Consistent with the test established by the Seventh Circuit in *Rivera*, 469 F.3d at 635, Respondents have displayed they cannot pay the costs the Clerk has initially taxed. Each Respondent makes below $1,000 (U.S.) a year working in Mali, a country where the average per-capita income is $859 (U.S.) per year. Collingsworth Declaration at ¶ 9. A charge of $8,394.14 would deprive all six Respondents of over a year's worth of income and would likely starve Respondents and their families. *Id.* at ¶ 10. While Respondents lack U.S. income statements by virtue of the fact that they are ex-child slaves who live in poverty overseas, Respondents' inability to pay the sum taxed by the Clerk is documented by Terrence Collingsworth based on interviews and data provided on Malian average income by the World Bank. *Id.* at ¶ 2, 9. Therefore, Respondents have provided documentation of their inability to compensate Petitioners Nestle, USA and Cargill for the preparation of the Joint Appendix.

Moreover, the other factors outlined in *Rivera*, 469 F.3d at 635–636, "the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case when using its discretion to deny costs," also suggest the Court should waive charges to Respondents. First, the amount of money required to compensate for the preparation of the Joint Appendix and Clerk's fees would exceed each Respondents' yearly income multiple times over; for these impoverished children, $8,394.14 is an insurmountable sum. Collingsworth Declaration at ¶¶ 9–10. Second, Respondents did

not choose to be in the Supreme Court. They were defending a decision by the Ninth Circuit. They made substantial good faith arguments before the Court and did not prevail based on jurisdictional grounds unrelated to the merits of their claims. In these circumstances it would be appropriate for each side to bear its own costs.

For all these reasons Respondents request that the Court vacate the cost award and instead order that each side bear its own costs.

Dated: July 30, 2021

Paul L. Hoffman

Attorney for Respondents