SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 Case No. CFP-12-512466 ORDER GRANTING IN PART AND DENYING IN PART METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S MOTION TO TAX COSTS

On January 20, 2016 I heard argument on Metropolitan Water District of Southern California's motion to tax costs.

Depositions

San Diego seeks $48,860 in deposition costs, including costs associated with transcription, travel and videotaping. These costs, including transcription, video recording and travel are recoverable under CCP § 1033.5(a)(3).

Met objects to "expedite fees, Realtime reporting, and rough transcripts, totaling $13,202.59," Reply, 2, as not reasonably necessary. Compare, *Hsu v. Semiconductor Sys., Inc.*, 126 Cal.App.4th 1330, 1342 (2005). Certain transcripts were expedited because of imminent motions for summary adjudication or trial. Opp., 3 n. 3; Goldberg Decl. dated January 6, 2016 ¶ 4. The extra fees are reasonable. *Heller v. Pillsbury Madison & Sutro*, 50 Cal. App.4th

1367, 1396 (1996); *Chaaban v. Wet Seal, Inc.*, 203 Cal.App.4th 49, 55 (2012). Deponents Woodcock and Erie did not actually testify at trial, but the issue is whether at the time it was reasonable to take the depositions and expedite the transcripts. *Wet Seal*, 203 Cal.App.4th at 57. The only deposition that may not have been reasonable to expedite is that of Slater: the deposition took placed nearly two months before trial. Thus, the expediting costs should be awarded with the exception of the $166.60 for expediting Slater's transcript.

Turning to the real-time and rough transcripts, Met invokes *Seever v. Copley Press, Inc.*, 141 Cal.App.4th 1550, 1559 (2006) ("trial court has no discretion under section 1033.5, subdivision (c)(4) to permit recovery for additional copies even if the prevailing party is able to demonstrate those copies were reasonably necessary to the conduct of the litigation").

At argument, San Diego suggested that the governing statutory language uses the word "including" to suggest that I could award costs for more than "an original and one copy". CCP § 1033.5 (a)(3). But I read this language differently. It comes in subsection (a), which addresses costs as of right, suggesting no discretion; and subsection (c), which governs discretionary costs, tells us that *it* only applies where "this section" [§ 1033.5] does not otherwise apply. Hence I read § 1033.5 (a)(3)'s use of the word "including" to mean that I include (and must include) the original and one copy when I award deposition costs, not that deposition costs cover a range of things to be included in my discretion, only some of which are an original and a copy. This I think is the approach of *Seever*.

A decade before *Seever, Heller v. Pillsbury Madison & Sutro*, 50 Cal. App. 4th 1367, 1396 (1996) found that, in effect, additional copies were permissible. It did so with this slightly odd language:

> Heller contests $1,040 in costs for "min-u-scripts" and $992.50 in costs for ASCII disks. Although defendants' "min-u-scripts" and ASCII disks of depositions already videotaped and transcribed appear to be somewhat repetitive, we cannot say the awarding of costs results in a miscarriage of justice. Therefore, we do not disturb the award of these costs.

Heller v. Pillsbury Madison & Sutro, 50 Cal. App. 4th 1367, 1396 (1996).

The language is odd because (1) the opinion seems to assume the award is discretionary (i.e. under § 1033.5 (c)(4)), and (2) it uses the review standard of 'miscarriage of justice' which typically is only used in a review of the case as a whole, i.e. the judgment. Jon B. Eisenberg, et al., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ ¶ 8:287, 8:289, 8:292 (Rutter: database updated September 2015). Nor does the opinion appear to examine the issue from the perspective of the statute, § 1033.5, which seems to me essential. I was unable to locate a reported California case following *Heller* on this matter, and I defer to *Seever* instead. My calculation of the rough and real-time transcripts totals $6,323.75, based on the Goldberg Declaration dated January 6, 2016. This should be taxed.

Trial Transcripts

During the Phase I trial, I said: "[I]t will probably be helpful to forward to me, after you have consulted with the court reporters, a transcript of the trial." Goldberg Decl., Ex. B (Trial Tr.) at 843:16-18; *see also* Emanuel Decl. ¶ 3. The question is whether this was a court order for the transcripts, for if so the costs are not taxable. While I am acutely aware that a judge's expression of interest in e.g. a transcript is almost always treated by counsel as the equivalent of an order, in the sense that counsel will make every effort to comply, it is not in fact an order; a judge cannot hold counsel in contempt or otherwise sanction counsel for failing to conform to such an expression of interest or indication that something would be "helpful". These costs must be taxed.

Models, Blowups, and Photocopies of Exhibits

San Diego seeks $207,522.48 for exhibits, witness binders, trial technology, and electronic versions of hyperlinked briefs. Under § 1033.5(a)(13), the test is whether these things "were reasonably helpful to aid the trier of fact."

Met argues there were too many copies of exhibits–seven, by its count—made to really be helpful to me as the trier of fact.

But it is entirety reasonable, to enable the smooth running of the trial, to make a set of exhibits for the judge, the witness, and each side (four copies), and San Diego has explained that that the additional three copies were made after trial in order to meet my request that I (and so, too, the parties) have a set of just the admitted exhibits in order to assist me in drafting the statement of decision. See generally, *Wagner Farms, Inc. v. Modesto Irr. Dist.*, 145 Cal.App.4th 765, 776-77 (2006).

Too, costs for "converting exhibits to electronic format, renting audio-visual equipment, and a trial technician responsible for managing and displaying exhibits and depositions during trial" are reasonable. Mem. of Costs Attachment ¶ 11.h-l; *see also* Goldberg Decl., Ex. E (invoices supporting these costs). See e.g., *Ripley v. Pappadopoulos*, 23 Cal.App.4th 1616, 1623 (1994); *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal.App.4th 1017, 1057 (2002); *see also Bender v. Cnty. of L.A.*, 217 Cal.App.4th 968, 991 (2013).

Hyperlinks

Met objects to $14,843.33 in costs San Diego incurred to prepare and submit electronic hyperlinked versions of its Phase I and Phase II trial briefs. Met argues that these briefs were not "reasonably helpful to the trier of fact" and that they are duplicative because San Diego "has already sought to recover costs for delivery of hard copy versions of these documents." MPA, 7;

Reply, 5. It is not relevant that San Diego seeks costs for more than one copy, and the electronic briefs were in fact reasonably helpful. I noted this during trial. Goldberg Decl., Ex. B (Trial Tr.) at 299:2-10.[1]

Court Call Fees

Met objects to $288 in requested court call fees for the January 23, 2014, June 5, 2015, and October 30, 2015 hearings, because multiple counsel were present in the courtroom for these hearings. These costs may have been convenient to San Diego's lawyers, but were not reasonably necessary to the conduct of the litigation under § 1033.5(c)(2). These costs should be taxed.

Discovery Referee

Met objects to $18,662.52 requested by San Diego for a discovery referee – retired Judge James Warren. I agree. Judge Warren was not ordered by the court; he was suggested, and then the parties entered into a stipulation. Goldberg Decl., Ex. J (Feb. 21, 2012 Joint Stipulation Re: Appointment of Discovery Referee) ("the Court suggested that a Discovery Referee would be a helpful resource to the parties during the course of discovery" and "the Stipulating Parties have reached agreement to ask the Court to appoint [Judge Warren] as a Discovery Referee ....").

There is a material difference between a court ordered reference under C.C.P. § 639 and a party

[1] See also, Deborah Ausburn, "Make Your Case with A Digital Brief," TRIAL at 40, 41 (April 2006) (noting "Most courts that have received hyperlinked briefs have been enthusiastic about using them. For example, the federal Tax Court noted, 'The record, which includes a trial transcript of approximately 3,500 pages memorializing the testimony of 21 fact witnesses and 7 expert witnesses, consists of 43 "red" files and more than 10,000 pages of exhibits .... The written briefs, inclusive of their proposed findings of fact and objections to the other party's proposed findings of fact, totaled more than 3,300 pages. The copies of the briefs on CD-ROM were very helpful to the court'"); cf., *Phansalkar v. Andersen, Weinroth & Co., L.P.*, 356 F.3d 188, 190 (2d Cir. 2004) (hyperlinked briefs "more versatile" and "more useful" than standard briefs, but disallowing the costs under Federal Rules of Appellate Procedure Rule 39). Many federal courts allow or encourage hyperlinked memoranda and briefs, because they are so useful. See, Michael Dunbar, "Hyperlinking Electronic Submissions in the Federal Courts," (June 10, 2013) <http://federalcourthyperlinking.org/wp-content/uploads/2013/05/6-10-13-Hyperlinking-Electronic-Submissions-in-the-Federal-Courts.pdf>

stipulation to a referee under C.C.P. § 638. *See, Carr Bus. Enters, Inc. v. City of Chowchilla,* 166 Cal.App.4th 25 (2008).

San Diego offers *Winston Square Homeowner's Ass'n v. Centex West, Inc.*, 213 Cal.App.3d 282, 292-93 (1989) and *Gibson v. Bobroff*, 49 Cal.App.4th 1202, 1207 (1996) in support of its argument. But as *Carr* explained, *Winston* allowed recovery of referee costs without looking at §§ 638 and 639, and *Gibson* involved mediation, not discovery referees, under a different statutory scheme.

Conclusion

The motion is granted in part and denied in part. These costs are taxed: $166.60 (expedited transcript of Slater's deposition); $6,323.75 (rough and real-time transcripts); $24,734.75 (trial transcripts); $288 (Court Call); $18,662.52 (discovery referee).

Dated: January 21, 2016

Curtis E.A. Karnow
Judge Of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On JAN 21 2016, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: JAN 21 2016

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk