CITY OF SANTA MONICA
LANE DILG, SBN 277220
City Attorney
Lane.Dilg@smgov.net
GEORGE CARDONA, SBN 135439
Special Counsel
George.Cardona@smgov.net
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: 310.458-8336

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR., SBN 132099
tboutrous@gibsondunn.com
MARCELLUS MCRAE, SBN 140308
mmcrae@gibsondunn.com
WILLIAM E. THOMSON, SBN 187912
wthomson@gibsondunn.com
KAHN SCOLNICK, SBN 228686
kscolnick@gibsondunn.com
TIAUNIA HENRY, SBN 254323
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Defendant
CITY OF SANTA MONICA

Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA,

Plaintiffs,

v.

CITY OF SANTA MONICA,

Defendants.

CASE NO. BC 616804

DEFENDANT CITY OF SANTA MONICA'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO TAX COSTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Complaint Filed:	Apr. 12, 2016
Trial Date:	Aug. 1, 2018
Hearing Date:	June 25, 2019
Hearing Time:	9:30 a.m.
Dep't:	44
Reservation ID:	064970161404

Assigned for all purposes through judgment to Hon. Yvette M. Palazuelos

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on June 25, 2019, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Department 44 of the above-titled Court, located at 111 North Hill Street, Los Angeles 90012, Defendant City of Santa Monica will and hereby does move, pursuant to rule 3.1700(b) of the California Rules of Court, for an order striking plaintiffs' Memorandum of Costs dated March 28, 2019, or in the alternative, for an order taxing costs.

Plaintiffs' costs memorandum is untimely because it was not filed and served within the mandatory time period established by rule 3.1700(a) of the Rules of Court. Plaintiffs have therefore waived any right to recover costs, and the Court should strike the Memorandum in its entirety.

If the Court declines to strike the Memorandum in its entirety, the Court should nevertheless tax several categories of costs that are specifically excluded by Code of Civil Procedure ("CCP") section 1033.5(b). The Court should also tax several other categories of costs that plaintiffs seek on the ground that such costs were not reasonably necessary to the conduct of the litigation—at most they merely served plaintiffs' convenience—and therefore are not recoverable, and/or that the costs are claimed in an unreasonable amount. Specifically the following costs should be taxed:

a. **Item 8b(5) - Expert Fees - $613,875.26**. The boilerplate line item entries for expert costs are insufficient to establish that any and every portion of such costs was reasonably necessary to the conduct of the litigation and/or reasonable in amount under CCP section 1033.5(c)(2) and (c)(3).

b. **Item 11(a) - Models/Enlargements/Photocopies of Exhibits - $5,036.31**. Costs relating to exhibits that were not used at trial are not reasonably necessary to the conduct of the litigation. (CCP, § 1033.5, subd. (a)(13), (c)(2).)

c. **Item 12c - Court Reporter / Transcripts Fees - $30,333.77**. Costs relating to transcripts not ordered by the court are excluded by CCP section 1033.5(b)(5).

d. **Item 16(a) – Other**.

   i. **Copying / Postage - $6,461.56**. Costs of copying and postage are excluded by CCP section 1033.5(b)(3).

   ii. **Federal Express / Golden State Overnight - $690.18**. Postage costs are

excluded by CCP section 1033.5(b)(3).

iii. **Lodging/Hotel - $10,384.56**. Not reasonably necessary to the conduct of the litigation and/or not reasonable in amount under CCP section 1033.5(c)(2), (c)(3).

iv. **Meals - $7,455.38**. Not reasonably necessary to the conduct of the litigation and/or not reasonable in amount under CCP section 1033.5(c)(2), (c)(3).

v. **Mileage - $16,063.97**. Not reasonably necessary to the conduct of the litigation and/or not reasonable in amount under CCP section 1033.5(c)(2), (c)(3).

vi. **Parking - $5,293.10**. Not reasonably necessary to the conduct of the litigation and/or not reasonable in amount under CCP section 1033.5(c)(2), (c)(3).

vii. **USPS - $63.70**. Postage costs are excluded by CCP section 1033.5(b)(3).

viii. **Research (Thomson West) - $8,825.00**. Legal research costs are excluded by CCP section 1033.5(b)(2).

ix. **Conference Calls - $40.57**. Telephone call costs are excluded by CCP section 1033.5(b)(3).

x. **Deposition Summaries - $5,256.00**. Not reasonably necessary to the conduct of the litigation and/or not reasonable in amount under CCP section 1033.5(c)(2), (c)(3).

xi. **Photographer / Dropbox Fee - $432.89**. Investigation costs are excluded by CCP section 1033.5(b)(2).

xii. **War Room/Lunch/ Photocopying - $4,562.61**. Photocopying costs unrelated to exhibits are excluded by CCP section 1033.5(b)(3); and meals and War Room costs are not reasonably necessary to the conduct of the litigation and/or not reasonable in amount under CCP section 1033.5 (c)(2), (c)(3).

This Motion is based upon: (1) this Notice of Motion and Motion, (2) the accompanying Memorandum of Points and Authorities; (3) the accompanying Declaration of Kahn Scolnick; and (4) any other evidence and argument as may be presented at or before the hearing on this Motion.

DATED: April 12, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____

Kahn A. Scolnick

Attorneys for Defendant
City of Santa Monica

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' memorandum of costs was untimely filed and should therefore be stricken or denied in its entirety. Rule 3.1700 of the Rules of Court provides that memoranda of costs must be filed and served "within 15 days after the date of service of the notice of entry of judgment . . . by the clerk." Here, the Court ordered the clerk to serve notice of entry of the judgment on February 13, 2019, and the clerk did so. But plaintiffs did not file their costs memorandum until *six weeks* later. Unless plaintiffs were to bring and prevail upon a motion for relief from the 15-day deadline based upon some "mistake, inadvertence, surprise, or excusable neglect" to excuse their untimely filing (Code Civ. Proc., § 473, subd. (b)), the Court should decline to award them *any* of their requested costs on account of their failure to comply with the mandatory time limit prescribed by rule 3.1700.

Even if plaintiffs were to belatedly bring such a motion for relief, and even if the Court were to grant it—and the City is not aware of any valid basis on which the Court could do so—the Court should nevertheless substantially tax plaintiffs' request for $903,013.80 in costs, for two main reasons.

First, plaintiffs are seeking to recover costs that are specifically prohibited under California law, including Westlaw research charges, postage charges, photocopying charges unrelated to exhibits, and charges for transcripts not ordered by the Court. (See Code Civ. Proc., § 1033.5, subd. (b).)

Second, plaintiffs demand payment for costs that were not "reasonably necessary to the conduct of the litigation" and were instead "merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2).) Plaintiffs seek to recover, among many other things, more than $5,000 for deposition summaries; over $16,000 in "mileage" charges, including $2,000 for an attorney who never made a single appearance in Court or at any deposition, as well as approximately $700 for an unnamed "Intern"; and reimbursement for luxury hotel rooms during trial averaging more than $550 per night, despite the fact that another attorney on plaintiffs' trial team paid half as much to stay at an equally luxurious property only half a mile from the Court.

In addition, expert fees account for the majority of plaintiffs' claimed costs, but because plaintiffs have provided no documentation to support those requests (or any other requests), the City

cannot assess whether such expenses were necessary to the conduct of the litigation, or reasonable. Plaintiffs must supply itemized supporting documents so that the City and the Court may assess the propriety of their substantial request.

In sum, the Court should strike plaintiffs' Memorandum in its entirety as untimely. But even if plaintiffs had timely filed their Memorandum, the Court should nevertheless substantially tax their requested costs as follows:

Cost	Item #	Amount Claimed	Amount to Tax	Basis for Objection
Expert Fees	8b5	$613,875.26	TBD	Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3))
Models/Enlargements/Photocopies of Exhibits	11	$8,256.25	$5,036.31	Not reasonably necessary to the conduct of the litigation and not helpful to trier of fact (see §§ 1033.5(a)(13), (c)(2))
Court Reporter / Transcripts Fees	12c	$54,008.77	$30,333.77	Excluded by statute (see § 1033.5(b)(5))
Copying / Postage	16(a)	$6,461.56	$6,461.56	Excluded by statute (see § 1033.5(b)(3))
Federal Express / Golden State Overnight	16(a)	$690.18	$690.18	Excluded by statute (see § 1033.5(b)(3))
Lodging / Hotel	16(a)	$29,921.02	$10,384.56	Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3))
Meals	16(a)	$7,455.38	$7,455.38	Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3))
Mileage	16(a)	$16,063.97	$16,063.97	Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3))
Parking	16(a)	$5,293.10	$5,293.10	Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3))

Cost	Item #	Amount Claimed	Amount to Tax	Basis for Objection
USPS	16(a)	$63.70	$63.70	Excluded by statute (see § 1033.5(b)(3))
Research – Thomson West	16(a)	$8,825.00	$8,825.00	Excluded by statute (see § 1033.5(b)(2))
Conference Calls	16(a)	$40.57	$40.57	Excluded by statute (see § 1033.5(b)(3))
Deposition Summaries	16(a)	$5,256.00	$5,256.00	Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3))
Photographer / Dropbox	16(a)	$432.89	$432.89	Excluded by statute (see § 1033.5(b)(2))
War Room / Lunch / Photo-copying	16(a)	$4,562.61	$4,562.61	Excluded by statute (see § 1033.5(b)(3) [as to photocopying]) Not reasonably necessary to the conduct of the litigation and not reasonable in amount (see §§ 1033.5(c)(2), (c)(3) [as to meals and War Room])
TOTAL AMOUNT TO TAX:			**At least $100,899.60** + TBD Expert Fees	

II. BACKGROUND

On February 13, 2019, the Court issued its Final Judgment declaring plaintiffs to be the prevailing parties entitled to seek an award of costs in an amount to be determined in a memorandum of costs. (Scolnick Decl., Ex. A.) On the same day, the Court issued a separate Minute Order entitled: "NOTICE OF ENTRY OF JUDGMENT; STATEMENT OF DECISION IS ENTERED." (*Id.*, Ex. B.) In that document, the Court provided notice that, among other things, "[t]he Judgment is signed and filed this date." (*Ibid.*) The Court also ordered that the "Clerk shall give notice" of, among other things, signing and filing of the Judgment, the filing of the Statement of Decision, and the Notice of Entry of Judgment. (*Ibid.*) The Minute Order further noted that a "Certificate of Mailing is attached." (*Ibid.*) The Clerk served the Final Judgment, the Notice of Entry of Judgment, the Statement of Decision, and a Certificate of Mailing on the parties on February 13, 2019. (*Id.*, Ex. C.)

Six weeks later—on March 28, 2019—plaintiffs filed a duplicate (and unnecessary) Notice of Entry of Judgment. (Scolnick Decl., ¶ 4.) The next day, plaintiffs served a Memorandum of Costs seeking to recover $902,013.80 in costs, the vast majority of which (more than $600,000) were for expert fees. Only a portion of the other costs claimed (about $100,000) are for items specifically authorized under Code of Civil Procedure section 1033.5(a), such as filing and motion fees, deposition costs, and costs for service of process. Plaintiffs' other claimed costs fall into either (a) one of the categories specifically listed as *not* recoverable under section 1033.5(b) or (b) a category not specifically addressed by section 1033.5(a) or (b).

III. ARGUMENT

A. Plaintiffs have waived their right to recover any costs.

The Court should strike plaintiffs' Memorandum of Costs in its entirety because plaintiffs failed to file and serve it within the mandatory 15-day deadline established by rule 3.1700(a) of the Rules of Court.

Rule 3.1700(a) requires a prevailing party claiming costs to serve and file a memorandum of costs within 15 days after the service of the notice of entry of judgment by the clerk under Code of Civil Procedure section 664.5. Subdivision (d) of section 664.5, in turn, provides that, "[u]pon order of the court in any action or special proceeding, the clerk shall serve notice of entry of any judgment."

Here, pursuant to the Court's instructions, the clerk served the Final Judgment, the Statement of Decision, and the Minute Order expressly providing "NOTICE OF ENTRY OF JUDGMENT" by mail on February 13, 2019. (Scolnick Decl., Ex. C.) Because the clerk's service was made under Code of Civil Procedure section 664.5 (i.e., it was done by express order of the Court), that service triggered the 15-day deadline for plaintiffs to file a memorandum of costs under rule 3.1700. With an additional five days added for service by mail (see Rules of Court, rule 3.1700; Code Civ. Proc., § 1013), their deadline was March 5, 2019.

Plaintiffs missed the March 5 deadline by several weeks. Indeed, they did not file their Memorandum until March 29, 2019.

Rule 3.1700's 15-day deadline is "mandatory." (*Hydratec, Inc. v. Sun Valley 260 Orchard &*

Vineyard Co. (1990) 223 Cal.App.3d 924, 929.) And the consequence of missing the deadline is waiver of the right to recover any costs. "'[I]f the one party fails, within the time prescribed to file *and* serve his memorandum of costs, then he is to be conclusively deemed to have waived the costs, if any, accruing in his favor.'" (*Davis Lumber Co. v. Hubbell* (1955) 137 Cal.App.2d 148, 150.) Following this rule, courts enforce rule 3.1700's mandatory time limit and strike memoranda that are untimely served. (E.g., *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 425–426 [error to award costs where memorandum was not filed within 15 days after service of notice of entry of dismissal].) The Court should do so here.[1]

Plaintiffs seemingly recognized their own untimely filing, so they then attempted to cure it by re-starting the clock unilaterally—they filed and served their own duplicate notice of entry of judgment on March 28, 2019, and then filed their Memorandum the next day. But this artifice does not render their Memorandum timely. The 15-day period begins to run upon the Clerk's service of notice of entry of judgment under section 664.5 *or* a party's service of notice of entry of judgment, "*whichever is first*." (Rules of Court, rule 3.1700, subd. (a), italics added; see also *Fries v. Rite Aid Corp.* (2009) 173 Cal.App.4th 182, 187 [noting deadline is triggered by the earliest of "three alternative deadlines"].) Because the clerk's service of notice of entry of judgment under section 664.5 occurred first, the clock began running on February 13, 2019, not upon plaintiffs' own notice of entry of judgment subsequently issued on March 28, 2019. Plaintiffs' later-served notice does not extend (or restart) the deadline, and the Court should strike their Memorandum of Costs as untimely.

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[1] At the urging of plaintiffs' counsel, the Court previously applied a filing time limit strictly when it refused to consider the merits of the City's summary judgment motion—even though plaintiffs had waived their timeliness objection under controlling case law. At the time, plaintiffs' counsel argued that "there are rules about when you file," that "the Rules should be complied with," and that such filing deadlines must be strictly enforced because "there is absolutely no reason in the world why any one of us should be somehow immune from following well-established rules that have been in place for decades." (Scolnick Decl., Ex. I [2018.06.14 Tr. 7:14-15, 13:2-3, 12:19-23].) Similarly, again at the urging of plaintiffs' counsel, the Court excluded the majority of the opinions from the City's expert witness, Dr. Allan Lichtman, at trial, because the Court found (erroneously, in the City's view) that the City had designated him seven days too late. As plaintiffs' counsel proclaimed: "I think the rules are there for a reason and as soon as we lose the formality of those rules, justice will evaporate." (Scolnick Decl., Ex. J [Trial Tr. 649:25-28].) As a matter of symmetry and basic fairness, the Court should apply the rules here strictly and find that plaintiffs' untimely costs memorandum has waived their right to recover costs.

B. Plaintiffs may not recover certain categories of costs that are expressly precluded by section 1033.5(b).

If the Court does not strike plaintiffs' Memorandum and deny costs entirely due to the untimeliness, the Court should nevertheless tax the entire amount of several categories of costs that California law expressly bars plaintiffs from recovering.

"It is axiomatic that the right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered." (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 732.) The authorizing statutes in this case are Code of Civil Procedure section 1033.5, which applies to civil actions generally, and section 14030 of the Elections Code, which applies to CVRA cases.

Section 1033.5 lists certain allowable costs (in subdivision (a)) and certain excluded costs (in subdivision (b)); it also gives the trial court discretion (in subdivision (c)(4)) to allow or deny any other costs that are not specifically enumerated in either subdivision (a) or subdivision (b). (*El Dorado Meat Co. v. Yosemite Meat & Locker Serv., Inc.* (2007) 150 Cal.App.4th 612, 616; *Sci. Applications Int'l Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1103.) Although section 1033.5(b)(1) provides that "[f]ees of experts not ordered by the court" "are not allowable as costs," section 14030 of the Elections Code expressly provides otherwise, making recoverable "litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs." Elections Code section 14030 does not otherwise "expressly authorize[]" the recovery of any costs that are "not allowable" under subdivision (b) of section 1033.5.

Here, plaintiffs seek to recover costs that fall into several prohibited categories: (i) "Investigation expenses in preparing the case for trial"; (ii) "Postage, telephone, and photocopying charges, except for exhibits"; and (iii) "Transcripts of court proceedings not ordered by the court." (Code Civ. Proc., § 1033.5, subd. (b)(2)-(3), (5).)

1. Plaintiffs' legal research and other investigation expenses are not recoverable.

Plaintiffs seek to recover $8,825.00 in "Research" costs associated with the use of Westlaw. (Mem. at pp. 32–34.) But the law is clear that "[f]ees for legal research, computer or otherwise, may

not be recovered under section 1033.5" because "subdivision (b)(2) of section 1033.5 plainly bars recovery of '[i]nvestigation expenses in preparing the case for trial.'" (*Ladas v. California State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 776.).

Likewise, the $432.89 in claimed costs for hiring a "photographer" and a "Dropbox fee" for storing photos (Mem. at p. 34) are "investigation expenses" and therefore not recoverable. Section 1033.5 authorizes the recovery of costs relating to the copying or display of photographic exhibits (in subdivision (a)(13)), but it does not authorize the recovery of costs relating to the *creation* of such photographs, as such costs are a species of "[i]nvestigation expenses."

"[B]ecause the right to costs is governed strictly by statute, a court has no discretion to award costs not statutorily authorized." (*Ladas*, *supra*, 19 Cal.App.4th at p. 774, citation and italics omitted [collecting cases].) The Court should therefore tax all $9,257.89 of plaintiffs' claimed research and investigation costs (i.e., $8,825.00 for research and $432.89 for photographer and Dropbox fees).

2. Postage, telephone, and photocopying costs unrelated to exhibits are barred.

Costs for postage and telephone calls are not recoverable under section 1033.5(b)(3). Costs for photocopying "are allowable only" for exhibits—otherwise, they "are expressly disallowed by statute." (*El Dorado*, *supra*, 150 Cal.App.4th at p. 618; see also *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1627; *Gorman v. Tassajara Dev. Corp.* (2009) 178 Cal.App.4th 44, 77–78.)

Plaintiffs' Memorandum is rife with requests for these disallowed charges. For instance, plaintiffs claim $690.18 in Federal Express and similar Golden State Overnight postage charges (Mem. at pp. 13–14); $63.70 in USPS postage charges (*id.* at p. 32); and $40.57 in conference calls (*id.* at p. 34). All these charges should be taxed.

Plaintiffs also claim $6,461.56 in photocopying charges (Mem. at p. 13); and at least some amount for copying charges embedded in the $4,562.61 they seek for "War Room & Copies" and "War Room/Lunch & Copies" charges. (*Id.* at p. 35.) These copying charges are specifically disallowed by subdivision (b)(3) of section 1033.5 because they are not charges for photocopies of *exhibits.* Plaintiffs effectively admit as much by separately claiming entitlement to copying and delivery costs that *are* purportedly related to exhibits. (Mem. at p. 11.)

Because there is no statutory basis for recovering postage, telephone, and photocopying expenses that are not attributable to exhibits, the Court should tax all such charges identified in Attachment 16(a). (See Mem. at pp. 13–35.) If plaintiffs contend that any of these charges do not, in fact, fall within the categories expressly barred under section 1033.5, they must substantiate the amount, nature, and purpose of the charges with itemized supporting documentation. (See *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1265.)

The Court should therefore tax a total of $7,256.01 for all of the following claimed costs: $6,461.56 in photocopying charges, $690.18 in Federal Express and other overnight charges, $63.70 in USPS postage charges, and $40.57 in conference calls.[2]

3. Costs of non-Court-ordered transcripts are unrecoverable.

Costs associated with obtaining transcripts of court proceedings that are not ordered by the court are not recoverable. (Code. Civ. Proc., § 1033.5, subd. (b)(5).) Yet plaintiffs seek to recover $54,008.77 for "Trial Transcript[s]," none of which were ordered by the Court. (Mem. at p. 10.)

Plaintiffs are entitled to recover a lesser amount for "[c]ourt reporter fees as established by statute" (Code Civ. Proc., § 1033.5, subd. (a)(11)), which are "an entirely different expense" from transcripts. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 58.) Because the parties split reporting costs evenly during the trial, plaintiffs and the City each paid the same reporter fee, which is described in the invoices sent to both parties as an "Attendance Fee - Split Among Parties." (Scolnick Decl., Ex. D.) The fee was $945 per party per day (and $497.50 per party per half-day). (*Ibid.*) The total attendance fees paid by the City were $23,675. (*Ibid.*) Plaintiffs should recover no more than that amount, meaning that the Court should tax plaintiffs' claimed "Trial Transcripts" costs by $30,333.77.

[2] As discussed in Section C(5) below, the Court should also strike the entirety of the $4,562.61 in claimed "War Room" costs, which includes (without differentiating detail) some amount of copying costs that are, for the reasons discussed above, statutorily disallowed.

C. The Court should tax costs that are not reasonable in amount and/or not reasonably necessary to the litigation.

Even if a cost is potentially allowable under section 1033.5, it does not become automatically recoverable in whatever amount a prevailing party demands. To the contrary, there are two additional limitations on any request for costs, which serve to protect against a prevailing party's abusive demands for unnecessary costs.

First, "[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2); see *Charton v. Harkey* (2016) 247 Cal.App.4th 730, 743.) Second, "[a]llowable costs shall be reasonable in amount." (Code Civ. Proc., § 1033.5, subd. (c)(3); see *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1431, fn. 24.) The Court thus must disallow *any* costs (even those "allowable as a matter of right") that are not "reasonably necessary" and must also reduce the amount of any allowed costs to that which is "reasonable." (*Perko's Enters., Inc. v. RRNS Enters.* (1992) 4 Cal.App.4th 238, 244–245.)

Several categories of plaintiffs' claimed costs fail to satisfy one or both of these criteria, and therefore should be taxed in whole or in part.

1. Costs relating to exhibits not used at trial.

Under subdivision (a)(13) of section 1033.5, expenses for trial exhibits are allowed only "if they were reasonably helpful to aid the trier of fact," so it follows that "fees are not authorized for exhibits not used at trial." (*Ladas, supra*, 19 Cal.App.4th at p. 775 [reversing trial court's award of costs for unused exhibits]; see also *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557–58 ["On its face this statutory language excludes as a permissible item of costs exhibits not used at trial, which obviously could not have assisted the trier of fact"].)

Here, plaintiffs claim $8,256.25 in costs related to photocopying trial exhibits. (Mem. at p. 11.) But at trial, plaintiffs used only approximately thirty-nine percent of their exhibits. (Scolnick Decl., Ex. E & ¶ 6 [of the 307 exhibits on plaintiffs' list, only 120 were admitted at trial].) The Court should therefore tax plaintiffs' exhibit-related costs by sixty-one percent, in the amount of $5,036.31.

2. Costs for lodging, travel, mileage, and parking unrelated to depositions.

Plaintiffs claim $51,278.09 in lodging and travel costs, including $29,921.02 for hotel charges, $16,063.97 in mileage, and $5,293.10 in parking. (Mem. at pp. 15–16, 19–31.) The City objects to these charges for several reasons.

a. Only deposition-related travel and lodging costs are recoverable by right, and plaintiffs have not specified which of the costs they seek relate to depositions. Section 1033.5 "does not provide for recovery of local travel expenses by attorneys and other firm employees unrelated to attending depositions." (*Gorman*, *supra*, 178 Cal.App.4th at pp. 72–73; see also *Ladas*, *supra*, 19 Cal.App.4th at pp. 775–776 ["The only travel expenses authorized by section 1033.5 are those to attend depositions."].) The Court should therefore tax all costs other than those related to depositions. (*Ladas*, *supra*, 19 Cal.App.4th at p. 776 [reversing trial court's allowance of "'Local Travel Expenses' unrelated to depositions . . . includ[ing] parking fees, cab fares and 'mileage/parking' fees for attorneys and paralegals"].)

b. Plaintiffs have not established that any claimed travel and lodging costs were reasonably necessary for the litigation, rather than being "merely convenient or beneficial." (Code Civ. Proc., § 1033.5, subd. (c)(2).) For example, plaintiffs demand $1,028.10 for the mileage of attorney Wesley Ouchi (Mem. at pp. 20–21), who never once appeared at trial (or any other Court proceeding) or at the offices of the discovery referee, and who appeared at only one deposition in the case. (Scolnick Decl., ¶ 12.) Wherever he was going—and it must have been several different places, as he charges six different amounts for his travel, including one entry implying a journey of 174 miles in a single day—he cannot have been making these trips to do something that was "necessary to the conduct of the litigation." (Code Civ. Proc., § 1033.5, subd. (c)(2); see also *Ladas*, 19 Cal.App.4th at p. 761 ["Routine expenses for local travel by attorneys or other firm employees are not reasonably necessary to the conduct of litigation."].)

Similarly, attorney Mary Hughes—Kevin Shenkman's wife, and a self-described "corporate transactional attorney" (see *www.shenkmanhughes.com/mary-ruth-hughes.html*)—never appeared at trial or any other Court proceeding, and never appeared before the discovery referee, or even at any

deposition. (Scolnick Decl., ¶ 13.) Yet plaintiffs demand $2,339.95 for her travel, most of which predated the filing of their complaint. (Mem. at pp. 24–29.)

There are also nearly a dozen travel charges ($699.79) for an unnamed "Intern" to attend trial. (Mem. at pp. 22–24.) Though attendance at trial may have been a good learning experience for an eager law student, the unnamed intern's attendance could not have been essential to plaintiffs' litigation efforts.

In sum, the vast majority of plaintiffs' mileage expenses have no connection to appearances at depositions, before the discovery referee, or in court, and therefore were not "necessary" to the litigation.[3]

For that matter, even mileage expenses that *are* connected to depositions should be heavily taxed. Throughout this case, the City's counsel urged plaintiffs' counsel to be reasonable and courteous by taking the depositions of City Council members and other Santa Monica residents in Santa Monica, where they reside, or in downtown Los Angeles, where the Court is located—or any other location more convenient than Lancaster, where the Parris Law Firm is located. (E.g., Scolnick Decl., Ex. F & ¶ 7.) But plaintiffs' counsel consistently refused, presumably to make the depositions more burdensome on the witnesses and the City's counsel. Having taken that discourteous tack throughout the case, plaintiffs should not now be able to recover their *own* expenses for driving to Lancaster to attend these depositions. Simply put, it was not reasonably necessary to take depositions in Lancaster, so to the extent it was inconvenient for plaintiffs' counsel themselves to get there—in particular, Mr. Shenkman repeatedly drove from his home in Malibu to Lancaster, rather than to Santa Monica or downtown, where the City would have preferred to hold the depositions—plaintiffs themselves should bear the cost of their strategic decision.

c. The cost of plaintiffs' lodging during trial was not reasonable, as the Memorandum itself shows. Attorney Robert Rubin stated at the Miyako Hotel, a luxury property located half a mile from the Stanley Mosk Courthouse, for an average of $258 per night. (Mem. at p. 15; Scolnick Decl.,

[3] The parking and mileage costs in large part do not appear to have been necessary to the litigation or reasonable in amount. At the very least the Court should require more detail regarding these charges to provide a basis for determining whether they meet the requirements of subdivision (c) of section 1033.5, and should disallow the costs until such detail is provided.

¶¶ 14–15.) By contrast, the rest of the trial team, including Rex Parris and paralegal Marci Cussimonio, stayed at the Omni Hotel, which is 0.3 miles from the courthouse, and substantially more expensive than the Miyako Hotel. The average price of Mr. Parris's room, for example, was $554 per night, and each Omni guest also racked up $49 in parking charges nightly. (Mem. at pp. 15–16; Scolnick Decl., ¶¶ 14–15.) It was not reasonable to stay at one luxury hotel over another, at twice the cost, to save two minutes of walking each morning and afternoon. Plaintiffs cannot meet their burden of showing any of these additional charges for their preferred luxury hotel were "necessary" rather than merely convenient.

Therefore, the Court should tax all costs that were not necessary to the litigation and reasonable in amount—at the very least, the $10,384.56 difference between plaintiffs' lodging and the charges that they would have incurred at an equally desirable but substantially cheaper hotel.

3. Deposition summaries.

Plaintiffs seek to recover $5,256.00 for deposition summaries. (Mem. at p. 34.) But paying a third party to summarize a deposition is, by its very nature, "merely convenient or beneficial," not "necessary to the conduct of the litigation." (Code Civ. Proc., § 1033.5, subd. (c)(2).) Accordingly, the Court should tax these claimed costs in their entirety.

4. Costs of meals.

Plaintiffs claim $7,455.38 in meals. (Mem. at pp. 16–18) The Court should tax all or most of these charges.

As an initial matter, meal-related costs are not expressly allowed under section 1033.5, and courts have rejected invitations to award such costs because "meal expenses [cannot] be justified as 'necessary to conduct the litigation' since attorneys have to eat, whether they are conducting litigation or not." (*Ladas*, *supra*, 19 Cal.App.4th at pp. 774–775 [noting the only meals expressly allowed "are those for jurors while they are kept together during trial and deliberations"].) At most, then, plaintiffs' claimed meal "expenses are 'merely convenient or beneficial' to preparation for litigation, the recovery of which is proscribed under section 1033.5, subdivision (c)." (*Ibid.* [holding that claimed meal costs "should have been stricken"].) Accordingly, the Court should tax the costs of plaintiffs' meals in their entirety.

Even if plaintiffs could recover some of their meal-related expenses—for example, on those days on which they were compelled to be away from their own offices—the highest amount they could recover would be much smaller than the $7,455.38 they demand in their Memorandum. Many of the meals were purchased on dates when plaintiffs' counsel were not in trial, defending a deposition, or otherwise obligated to be away from their offices over the lunch hour. To the extent plaintiffs' counsel preferred to travel to each other's offices to do their work, that decision served only their convenience and could hardly be characterized as necessary. For example—and remarkably—plaintiffs are attempting to recover the cost of meals purchased well before this litigation even began, as early as in September 2015, which was three months before plaintiffs sent the City a demand letter and seven months before they filed this suit. (Mem. at p. 16; Scolnick Decl, Ex. G.) Many meal-related charges incurred thereafter were no more "necessary" to the litigation than those pre-litigation expenses.

5. Use of a war room, meals, and copying.

Plaintiffs claim $4,562.61 in expenses for a "War Room" and lunch/photocopying services provided by "Personal Court Reporters." (Mem. at p. 35.) That expense was unnecessary and unreasonable in amount. Although a separate "War Room" may have been beneficial to plaintiffs during trial, they have not shown it was necessary, rather than merely convenient. Plaintiffs had, for example, several attorneys with hotel rooms equally as close to the courthouse as the "War Room." Also, as noted above, plaintiffs cannot recover for photocopying services except in connection with exhibits, and they have already identified all exhibit-related copying expenses elsewhere in the Memorandum, so photocopying costs attributable to Personal Court Reporters are not recoverable. (Mem. at p. 11.) The Court should thus tax the entirety of the claimed $4,562.61 in "War Room"-related costs.

D. Plaintiffs must substantiate more than $600,000 in expert fees.

Plaintiffs must provide documentation to support their request for $613,875.26 in expert fees. With only a single line entry listing an amount for each expert (Mem. at p. 12), the City and the Court cannot say with any certainty whether plaintiffs are requesting reasonable or unreasonable amounts, or whether the charges at issue were necessary to the conduct of the litigation. Once objected to, the party claiming expert fees must "produce[] sufficient documentation" enabling the "determin[ation

of] the necessity" of expert fees including a declaration from counsel "as well as [] the paid invoices themselves." (*Jones*, *supra*, 63 Cal.App.4th at pp. 1266-1268; see also *Levy v. Toyota Motor Sales* (1992) 4 Cal.App.4th 807, 816 [affirming trial court's taxation of costs where claiming party "offered no substantiation of the challenged charges in response to [the] objections" raised in motion to tax].)

To take just one example, plaintiffs' expert Dr. Morgan Kousser traveled to Lancaster to attend the deposition of the City's expert, Dr. Allan Lichtman. But Dr. Kousser's attendance cannot have been reasonably necessary, as plaintiffs' counsel was later able to successfully persuade the Court that they were entirely unprepared to take Dr. Lichtman's deposition, and the Court excluded much of his testimony on this basis.

In reality, Dr. Kousser's attendance at Dr. Lichtman's deposition was merely as a prop:

> Q. The question is would you consider Dr. Kousser a friend?
>
> A. I already testified absolutely.
>
> Q. And how long has he been a friend? ...
>
> A: -- over 40 years.
>
> Q. Okay. *Have you ever been betrayed by a friend before*?
>
> A. I'm not going to answer that question. . . .
>
> Q. Earlier you told Mr. Shenkman that you don't have any feelings and it's not going to get to you, but wouldn't you say the *real emotional impact and hurt here is to Dr. Kousser*, not you -- . . . for a friend to come in and refute his 50 years of work? . . .
>
> A. There's nothing personal. . . . I already said he's a good friend and I respect him. It has nothing to do with this case. . . .
>
> Q. And so a friend of 45 years gets no more respect from you than you to come in here and refute his work? . . .
>
> A: This has nothing to do with personalities or respect for one another.

(Scolnick Decl, Ex. H at pp. 194:4-196:18, italics added; see also *id.* at pp. 200:2-201:14 [similar].) Obviously, then, Dr. Kousser's attendance at Dr. Lichtman's deposition cannot have been reasonably necessary to the litigation efforts. So if plaintiffs are now trying to have the City foot the bill for Dr. Kousser's attendance, the Court should tax those costs.

There are many other similar examples, which the City will be able to identify for the Court once plaintiffs substantiate their blanket request for more than $600,000 in expert fees.

IV. CONCLUSION

For these reasons, the Court should grant the City's Motion to Strike Plaintiffs' Memorandum of Costs, or, in the alternative, should tax Plaintiffs' costs by at least $100,899.60, as set forth in the table in the Introduction above.

DATED: April 12, 2019

Respectfully submitted,

GIBSON DUNN & CRUTCHER LLP

By: _____
Kahn A. Scolnick

Attorneys for Defendant,
City of Santa Monica

PROOF OF SERVICE

I, Ramona Gonzalez, declare:

I am employed in the County of Los Angeles, State of California. My business address is 333 South Grand Avenue, Los Angeles, California 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On April 12, 2019, I served the

CITY'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO TAX COSTS

on the interested parties in this action by causing the service delivery of the above document as follows:

Kevin I. Shenkman, Esq.
Mary R. Hughes, Esq.
John L. Jones, Esq.
SHENKMAN & HUGHES PC
28905 Wight Road
Malibu, California 90265
shenkman@sbcglobal.net
mrhughes@shenkmanhughes.com
jjones@shenkmanhughes.com

R. Rex Parris
Robert Parris
Jonathan Douglass
PARRIS LAW FIRM
43364 10th Street West
Lancaster, California 93534
rrparris@parrislawyers.com
jdouglass@parrislawyers.com

Milton Grimes
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, California 90043
miltgrim@aol.com

Robert Rubin
LAW OFFICE OF ROBERT RUBIN
237 Princeton Avenue
Mill Valley, CA 94941-4133
robertrubinsf@gmail.com

☑ **BY PERSONAL SERVICE:** I placed a true copy of the above-titled document in a sealed envelope addressed to Mr. Parris and gave the same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

☑ **BY MAIL SERVICE:** I placed a true and correct copy of the above-titled document in sealed envelopes addressed to the other persons listed above, on the above-mentioned date, and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 12, 2019, in Los Angeles, California.

Ramona Gonzalez

Ramona Gonzalez