BARBARA J. PARKER, City Attorney - SBN 069722
MARIA BEE, Chief Assistant City Attorney - SBN 167716
JAMILAH A. JEFFERSON, Supervising Deputy City Attorney - SBN 219027
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: (510) 238-7686
Facsimile: (510) 238-6500
jjefferson@oaklandcityattorney.org

STACEY M. LEYTON - SBN 203827
DANIELLE LEONARD - SBN 218201
JONATHAN ROSENTHAL - SBN 329638
EMANUEL WADDELL – SBN 350156
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
sleyton@altber.com
dleonard@altber.com
jrosenthal@altber.com
ewaddell@altber.com

Attorneys for CITY OF OAKLAND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, a California limited liability company, and OAKLAND GLOBAL RAIL ENTERPRISE, LLC, a California limited liability company Plaintiffs, v. CITY OF OAKLAND, a California municipal corporation, Defendant.	Consolidated Case Nos. RG18930929 / RG20062473 Unlimited Civil Case/Assigned to Dept. 21 (Hon. Noël Wise) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF OAKLAND'S MOTION TO TAX COSTS** **[CAL. RULE OF COURT 3.1700(B)]** **Reservation No.: 472413722818** Hearing Date: April 3, 2024 Time: 10:00 AM Dept.: 21
CITY OF OAKLAND Counter-Plaintiff, v. OAKLAND BULK AND OVERSIZED TERMINAL, LLC, and CALIFORNIA CAPITAL INVESTMENT GROUP, Counter-Defendants.	

INTRODUCTION

Oakland Bulk and Oversized Terminal, LLC ("OBOT"), Oakland Global Rail Enterprise, LLC ("OGRE"), and California Capital Investment Group ("CCIG")[1] seek to recover $772,363.52 in post-judgment costs from the City of Oakland. OBOT's ability to claim post-judgment costs as a prevailing party in this action is entirely determined by statute, and OBOT has overreached. Among the categories of "allowable" costs, OBOT has included items that are entirely prohibited by statute and therefore unavailable, and has claimed as both allowable and discretionary costs some items that are not reasonable in amount or reasonably necessary to the litigation. OBOT has supported its costs memorandum with charts of claimed expenses (rather than actual records) containing descriptions that are also often insufficient for the Court to determine whether the item is permitted under the statutory standards. Finally, although OBOT has indicated that it believes the contract's attorneys' fees and costs provision can somehow act as a back-up or catch-all for the costs not permitted by the costs statute, as explained below, that is simply not permitted under the applicable California law, which makes post-judgment costs *exclusively* a matter of statute. The City therefore moves to tax a total of **$667,862.05**, as explained for each category of claimed costs below.

ARGUMENT

I. Legal Standards Applicable to OBOT's Request for Costs

Under well-established California law, the right to recover any costs or expenses of litigation "is determined *entirely* by statute." *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439, *disapproved of on other grounds by Williams v. Chino Valley Indep. Fire Dist.* (2015) 61 Cal.4th 97 (emphasis added); *see Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131; *Hsu v. Semiconductor Sys., Inc.* (2005) 126 Cal.App.4th 1330, 1341–42; C.C.P. §§1032, 1033.5.

First and foremost, Code of Civil Procedure 1032(a)(4) specifically defines "prevailing party" for purposes of costs to include a plaintiff with a net *monetary* recovery (which is *not* OBOT, OGRE, or CCIG in this action). The Code also includes, as is applicable here, a

[1] This memorandum collectively refers to Plaintiffs and Counter-Defendants as "OBOT," unless otherwise indicated.

defendant against whom a plaintiff does not prevail (here, OBOT and CCIG, on the City's counter-claim, but not OGRE, which is not a defendant). C.C.P. §1032(a)(4). Notably, California law is clear that when a plaintiff receives only injunctive rather than monetary relief, as is the case on *Plaintiffs'* affirmative claims, prevailing party status is only discretionary. C.C.P. §1032(a)(4); *see United States Golf Assn. v. Arroyo Software Corp*. (1999) 69 Cal.App.4th 607, 625 (costs award solely in trial court's discretion when relief obtained was a permanent injunction, because such relief is "purely equitable"); *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248–49 (affirming trial court's exercise of discretion to require each party to bear its own costs in action for declaratory judgment). The City does not contest OBOT's and CCIG's recovery of costs in defending the City's claims as a prevailing party as of right, but cautions that any determination of prevailing party status and award of costs to OBOT or OGRE as Plaintiffs is entirely within this Court's discretion. The City addresses below these distinctions to the extent they matter for assessing costs reasonably incurred and this Court's discretion in awarding costs.

The standards applicable under the costs statute to a prevailing party are familiar: the statute provides for categories of costs that are allowable (§1033.5(a)), prohibited (§1033.5(b)), or discretionary if neither allowable or prohibited (§1033.5(c)(4)). All costs claimed, whether allowable or discretionary, must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation," §1033.5(c)(2), and reasonable in amount. §1033.5(c)(3).

If the items appearing in a cost bill appear on their face to be proper charges, the party seeking to tax costs bears the burden of showing they were not reasonable or necessary. *Ladas v. California State Auto. Assn*. (1993) 19 Cal. App. 4th 761, 774 (collecting cases). If the items are properly objected to, they are put at issue and the party claiming them as costs bears the burden of proof. *Id*. "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court." *Id*.; *see also Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548; *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 29. And, "because the right to costs is governed strictly by statute, a court has no discretion to award costs

not statutorily authorized." *Ladas,* 19 Cal.App.4th at 774.

Importantly for this case, these statutory rules exclusively govern even when, as here, the claims involve a contract that contains a prevailing party provision awarding fees and costs. *E.g., Hsu*, 126 Cal.App.4th at 1341–42; *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1627–28. The contract provision thus *does not* expand the post-judgment costs available by statute. In California, if a party seeks to recover costs provided by contract, those costs "must be specially pleaded and proven *at trial, and not awarded posttrial*." *Hsu*,126 Cal.App.4th at 1341–42 (emphasis added).

The reason for this rule of California law is straightforward. Questions about the meaning of contractual provisions, including cost or fee shifting provisions, turn on the intent of the parties at the time of contract. *See Davis*, 17 Cal.4th at 446 n.5. Thus, a party seeking to recover costs under a cost-shifting provision in a contract as opposed to under Code of Civil Procedure section 1033.5 must specially plead those costs and prove them at trial. *Hsu*, 126 Cal.App.4th at 1341–42. Efforts after judgment to recover contractual costs that exceed the costs permitted by statute are therefore *improper* because the issue of the contracting parties' meaning requires a merits determination. *Id.*; *see also Ripley,* 23 Cal.App.4th at 1627; *First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 Cal.App.4th 871, 878–879; *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 551. The First District has only held otherwise in one case, *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, and the First District later rejected *Bussey's* holding in *Robert L. Cloud & Assocs., Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1154. *See also Carwash of Am.-PO LLC v. Windswept Ventures No. I* (2002) 97 Cal.App.4th 540, 544 ("Every subsequent reported decision considering the issue has followed *Ripley* and rejected *Bussey.*"); *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1280–81. Even a contract like the Ground Lease that states a prevailing party "may recover *all* expenses incurred as a result of litigation over the contract" cannot expand the availability of *statutory* costs in California. *Carwash of Am.-PO,* 97 Cal.App.4th at 544. There is therefore no doubt that OBOT's costs memorandum must be analyzed *exclusively* under Code of Civil Procedure sections 1032 and 1033.5, and the language of any costs provision in the Ground Lease cannot expand that statute.

II. This Court Should Exercise Its Discretion to Greatly Reduce the Claimed Costs for the Remedy Phase of Trial

Because this issue cuts across multiple categories of the claimed costs discussed below, the City briefly addresses the Court's discretion to reduce costs that pertain to the remedies phase of trial as not reasonably necessary. First and foremost, per the Civil Code, CCIG and OBOT are prevailing parties as of right only as defendants against the City's claim, which *ended* with the Court's decision on the liability phase. The remedies phase pertained only to OBOT and OGRE's affirmative claims, for which they received a *mixed* result at best. They received only part of their requested specific performance; received none of their additional requested declaratory relief; lost entirely on their attempt to recover $20 million in monetary damages along with the force majeure specific performance award; and, most significantly, had their claims of $160 million in lost profit damages rejected entirely. OBOT prevailed only on an issue that the City did not contest (the length of the proposed force majeure extension of time). This phase could have therefore been *far* shorter or avoided entirely had OBOT not insisted on taking the time and resources to present its entirely speculative and inadmissible lost profits damages evidence. And OBOT now admits in its Motion for Attorneys' Fees that specific performance was its "preferred remedy" all along. February 2, 2024 Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Costs at 1:20–21.

Any costs claimed by OBOT for Phase Two, like all claimed costs, must both be reasonable in amount, and reasonably necessary for the conduct of the litigation. C.C.P. §1033.5(c)(2), (3). This Court can, and should, exercise its considerable discretion under the Code and rule that costs incurred in pursuit of an uncontested remedy and wildly inflated and unprovable damages figures were not reasonably necessary or reasonable in amount, and should not be allowed. *See Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 605 (affirming the trial court's decision to entirely disallow certain discovery costs because "[t]he determination of reasonableness is peculiarly within the trial court's discretion."). By the City's calculation, OBOT seeks over $50,000 in costs related to the remedies phase of trial. The proportional reductions for reasonableness proposed by the City for this issue are discussed with

respect to each category below, along with any other applicable bases to tax costs.

III. OBOT's Requested Costs Should be Taxed

Per Rule of Court 3.1700(b)(2), the City discusses the various categories claimed by OBOT in the order presented in the Memorandum, and has attempted to straightforwardly present the disqualifying issues that apply to any of the items within each of those categories. As set forth below, among its various claimed categories, OBOT includes several items that are categorically prohibited as costs, including: (1) investigation expenses in preparing the case for trial; (2) postage, telephone, and photocopying charges, except for exhibits; and (3) transcripts of court proceedings *not ordered* by the court. C.C.P. §1033.5(b). Further, among the categories that are presumptively allowable as costs under California law—such as filing and motion fees, service of process, the taking of necessary depositions, and the reproduction of exhibits—OBOT includes specific cost items that are not cognizable under the statute, and are otherwise not "reasonably necessary" to the litigation *or* "reasonable in amount." C.C.P. §1033.5(c)(1), (2). For example, OBOT seeks over $200,000 in electronic document storage, notwithstanding that such costs are no longer allowable costs, and that in any case the former statutory provision for this cost permitted only storage *ordered by the court* (which this undeniably was not). OBOT's cost memorandum is replete with items that may have made OBOT's counsel's litigation more convenient (such as thousands of dollars in courier expenses, delivery of documents to counsels' houses, meals and snacks, and others) but are not reasonably necessary per the costs statute.

As discussed above, the Ground Lease contract fee-shifting clause does not and cannot provide a catch-all back up permitting any of these conveniences to be claimed as statutory costs. And, to further the Court's evaluation of reasonableness, the City flags throughout these categories where the amounts were incurred during the remedies phase of trial and should be subject to further reduction for unreasonableness.

A. Memorandum Category 4: Deposition Costs

Deposition costs, including transcripts and recordings of depositions, are allowable only to the extent that the depositions are "necessary." CCP 1033.5(a)(3)(a). Necessity is determined by the nature of the case and the claims being pursued by the parties. *Garcia v. Tempur-Pedic N.*

Am., LLC (2024) 98 Cal.App.5th 819, 901–02; *see Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 57.

While there were several depositions taken in this matter of individuals either noticed by OBOT or listed by OBOT as witnesses, whom OBOT then never called at trial, and which were arguably not necessary to this litigation, the City does not challenge these costs incurred in the pursuit of discovery. The City does, however, challenge the costs claimed related to expert damages discovery in this case, in light of the blatant inadmissibility of the opinions set forth in OBOT's damages expert's report, which OBOT never should have attempted to use under governing California law. December 22, 2023 Statement of Decision at 23–26. This is not a circumstance where a fact witness might have been useful but hindsight showed otherwise. Plaintiff's expert developed a report with the assistance of OBOT's counsel, and whether to use that report and the resulting testimony was entirely within OBOT's control. The City's expert was offered only as a responsive expert in light of those (inadmissible) opinions offered by OBOT. OBOT seeks to recover $4,024.95 for transcribing and videotaping depositions of their own expert (Peter Brown), as well as $9,819.95 in costs for transcribing and videotaping depositions of the City's responsive expert (Jonathan Borck). These damages-related costs also only pertain to Phase Two of the trial and Plaintiffs' affirmative claims, and should be taxed as unnecessary and unreasonable in light of the outcome of that phase with respect to OBOT's damages claims.

The City therefore moves to tax the $**13,844.90** in costs of these damages expert depositions as not reasonably necessary to the conduct of this litigation.

B. Memorandum Category 5: Service of Process

OBOT seeks to recover $919.50 in personal service costs for subpoenas to three third parties that Plaintiffs later withdrew: the Sierra Club, the International Longshore & Warehouse Union, Local 34 Oakland ("ILWU"), and Eric Thronson (an individual who provided consulting services to the City in 2021, well after the time period relevant to the claims in this case). Setting aside that these entities and this individual are represented and service could have been achieved through counsel, avoiding these costs entirely, OBOT never took any of these depositions and did

not call these persons or entities as witnesses at trial. Waddell Decl. ¶ 4. For example, counsel for OBOT admitted in an April 28, 2023 email cancelling the deposition that the "the deposition of the ILWU is no longer necessary." Waddell Decl. ¶ 5. OBOT also seeks duplicative amounts for serving the Sierra Club (both $100 and $180.50 for noticing the same deposition on the same day, to the same entity). The City moves to tax these **$919.50** in personal service costs as entirely unnecessary to this litigation.

C. Memorandum Category 11: Court Reporter Fees

Section 1033.5 lists as allowable costs the *fees* paid to court reporters for their services, and, separately, the cost of any *court-ordered* transcripts. *See* §1033.5 (a)(9), (11). Section 1033.5(b)(5) then expressly prohibits the award of the cost of transcripts *not* ordered by the court. Court reporter fees and transcript costs are not the same thing, and are treated differently by the costs statute. *Chaaban*, 203 Cal.App.4th at 58. Per the plain language of the Code, a party cannot claim transcript costs along with reporter fees unless those costs were ordered by the court. None of the pre-trial transcripts in this case were court-ordered. With respect to trial, the City will agree that although not ordered, the Court requested a copy of transcripts during trial and the parties agreed to help provide them, and will therefore not dispute the application for OBOT's half of the cost of the trial transcript expenses requested by the Court (including the expense for real time). But OBOT cannot claim as statutory expenses the cost of any pre-trial transcripts, or the cost of any of its own copies of trial transcripts, or the use of real time reporting (which is a mere convenience, and the City's counsel did not use).

OBOT seeks a total of $83,012.50 listed as "Court Reporter Fees." However, OBOT's spreadsheet supporting this category indicates only that OBOT is claiming the cost of *transcripts,* without differentiating between the costs for fees, or transcript copies for itself or the Court, or the real time charges, or any charges for rush or expedited transcripts. Because OBOT's supporting records do not include the underlying documentation and provide insufficient information to determine which costs are and are not permitted here, the City, in an abundance of caution, moves to tax the entire amount of **$83,012.50** listed as transcript costs, not ordered by the Court, that are expressly prohibited by statute. If OBOT can demonstrate that part of these costs are fees for

services and part were transcript costs, and which were for the Court's versus OBOT's own copies, the City moves only to exclude here the prohibited transcript costs (i.e. pre-trial transcript costs, and the cost of OBOT's trial copies and OBOT's use of real time reporting).

In addition, for all the reasons explained above, the Phase Two remedies trial was far longer than was reasonably necessary. In the alternative, the City also moves to tax all fees and transcript costs beyond one day of that portion of the trial as not reasonably necessary for this litigation (a proposed tax of 80% of the five-day cost of $11,867.50, or $9,494.00).

D. Memorandum Category 12: Exhibits

OBOT seeks to recover $59,125.55 in costs for models, enlargements, and photocopies of exhibits, for dates ranging from 2020 through the trial in 2023. OBOT has not provided sufficient information in its supporting documentation to establish what services were provided by these entities, including failing to differentiate between photocopies of exhibits and the other types of demonstrative aids, or whether these are fees for "the electronic presentation of exhibits, including costs of rental equipment and electronic formatting." C.C.P. §1033.5(a)(13).[2]

These costs are only recoverable if they were "reasonably helpful to aid the trier of fact." §1033.5(a)(13). "It follows that fees are not authorized for exhibits not used at trial," *Ladas*, 19 Cal.App.4th at 775 (1993), because they could not have been helpful if they were not used. That admonition is particularly appropriate here. OBOT refused to properly meet and confer to resolve objections and finalize the parties' trial exhibit lists prior to trial to narrow the submitted material to a reasonable exhibit list. As a result, OBOT's prepared exhibit lists were vastly overinclusive and OBOT delivered to the Court hundreds of documents it never sought to introduce as a result of obvious deficiencies regarding their admissibility, including irrelevant timeframe. Further, if these costs represent photocopying, there is no basis to evaluate the rate, volume, or scope. There were also no "models, enlargements and photocopies of exhibits" prior to 2023, and the charges from earlier years are mysterious. In an abundance of caution, the City therefore moves to tax this entire category as insufficiently supported on the fact of OBOT's supporting documentation,

[2] OBOT has also already claimed over $150,000 in "other" category for trial technology and rental equipment.

totaling **$59,125.55**.

E. Memorandum Category 14: Filing, Messenger, and Service Costs

OBOT seeks $17,538.63 for "Fees for the electronic filing or service of documents through an electronic filing service provider if a court requires or orders electronic filing or service of documents." §1033.5(a)(14). This Court never required or ordered electronic filing or service of documents, and these do not appear to be charges for the use of an electronic filing or service provider. The City moves to tax this entire amount, **$17,538.63**, on this ground.

Moreover, the descriptions provided by OBOT of the claimed costs, although cryptic, appear to indicate that these are not charges for an electronic filing service, but rather messenger services, used in lieu of defense counsels' own staff for the convenience of counsel. *See* Mem. Ex. 14. The cost of such services, if that is what these represent, and if OBOT elected to use them, can be considered as a discretionary cost, but does not fit the claimed category for allowable costs claimed by OBOT in its memorandum.

Again, the documentation provided by OBOT contains insufficient information to evaluate the bases for the charges listed. Even from OBOT's scant information, several amounts also jump out as unreasonable on their face. OBOT seeks $1,172.25 for one delivery of courtesy copy documents (ten times as much as the average listed here); $1,429.40 in costs for retrieval of boxes from the courtroom, a task the City's counsel easily accomplished using staff (Waddell Decl. ¶ 8); and $220.72 for "courtesy copies-courtesy copies." Finally, the City moves in the alternative to tax the Phase Two-related costs as not reasonably necessary to this litigation, totaling $1,400.37.

F. Memorandum Category 15: Fees for Hosting Electronic Documents

OBOT seeks to recover $215,790.90 in costs for fees for hosting electronic documents, ignoring the plain language of the cost statute, which states that such costs *are no longer recoverable as of January 1, 2022*. C.C.P. §1033.5(a)(15). Moreover, the statute, even when it was in effect, applied *only* to: "Fees for the hosting of electronic documents *if a court requires or orders a party to have documents hosted by an electronic filing service provider.*" *Id.* (emphasis added).

This provision was never intended to imply that courts should award as post-judgment

costs the private hosting of discovery documents in litigation. As the Committee Report for the enacting legislation explained, the purpose of this provision was to allow prevailing low-income litigants to offset the costs of court-ordered document housing where the court lacked the capacity to maintain documents in house:

> Recovering Hosting Costs. In some matters, courts will order parties to have their documents "hosted" by an electronic filing service provider. This often occurs in complex cases *when certain documents are never lodged with the court, and courts lack the infrastructure to hold these out-of-court documents*. Although this bill still allows parties to recover these hosting costs, the bill includes a five-year sunset which allows the Legislature to determine whether it is appropriate for these responsibilities to be shifted to third-party vendors.

Assem. Bill No. 2244 (2015–2016 Reg. Sess.) There is no such court order in this case. The City moves to tax this entire amount, **$215,790.90**, as directly contrary to statute.

In light of the sunset provision removing this category from the statute, these costs are presumptively not allowed as a matter of law, and OBOT bears the burden of demonstrating their reasonableness and necessity. *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132. This Court should not open the door to litigants claiming as a necessary litigation expense rather than a convenience of the parties and their counsel the cost of vendor-based electronic hosting of documents (if indeed that is what this is, which is impossible to discern from OBOT's filing). These costs can be extremely substantial and vary widely, and can be affected by factors beyond the opposing party's control, such as the reasonableness and breadth of a party's collection of large volumes of irrelevant documents, and the rates and contracts negotiated between firms and vendors, or use of in-house services. There are many ways to increase and decrease costs associated with these services, and the courts are not well-positioned to monitor the reasonableness of these fees. OBOT has failed to provide *any* documentation, even a summary spreadsheet, identifying the source and dates for these costs, and the Court should exercise its discretion to tax these costs in their entirety for that reason as well. OBOT's failure to provide even the most basic information as to the basis for this claimed cost, which on its face is contrary to the statute, makes it impossible for the City or Court to assess the reasonableness or necessity of these costs, and OBOT's request should be denied.

G. Memorandum Category 16: Other

OBOT seeks $285,638.59 in other, discretionary costs, that it categorizes in the supporting materials into these categories: "Expenses," "Research," "Transcribing and Proofreading," "Trial Tech & Tech Support," and "Document Production." These claimed expenses are largely unreasonable, and the City moves to tax **$277,630.07** of this amount, for the specific reasons described below.

1. "Expenses."

This category includes $92,032.73 for food and lodging during trial, parking, travel, additional messenger services, and other items that are either barred or not expressly allowed under Code of Civil Procedure section 1033.5.

a. Food. OBOT seeks to recover $11,392.54 in costs for food expenses. But "attorneys have to eat, whether they are conducting litigation or not." *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774. Meal expenses for local counsel are thus "merely convenient or beneficial" and thus cannot be recovered. *Id.* And, any *choice* by a large law firm to staff a case using out of town counsel (as more than half of OBOT's attorneys were), rather than attorneys from the San Francisco office, is a staffing decision for convenience, and is not reasonably necessary for litigation. The Court should tax these **$11,392.54** in food costs as unnecessary to the litigation and unreasonable. Of this amount, $743.46 was for Phase Two, and the City also moves in the alternative to tax that amount as additionally unnecessary to this litigation and unreasonable.

b. Delivery. Section 1033.5 expressly prohibits the recovery of postage charges, except for exhibits. C.C.P. §1033.5(b)(3). Nevertheless, OBOT seeks to recover $1,240.09 in delivery charges, largely apparently for delivering items to counsel's house: $756.11 in FedEx delivery charges; $310.20 in Western Messenger delivery charges (to local counsel on the case); and $173.78 in First Legal delivery charges. Recovery of these items is therefore prohibited by law, and the Other category should be taxed by this amount. Even if these costs were recoverable, they are clearly for the convenience of counsel rather than reasonably necessary for the litigation, when such deliveries could be organized and achieved by counsel's many administrative staff rather than paid delivery. The City therefore moves to tax these **$1,240.09** in costs.

c. Non-Local Counsel and Staff. OBOT seeks recovery for approximately $74,119.68 in travel-related expenses for out-of-town counsel and staff that were unnecessary and unreasonable.[3] Any choice by a large law firm to use counsel from out of town was one made for convenience, not necessity of this litigation. These costs should therefore be taxed in their entirety as merely convenient and not reasonably necessary.

In addition, particular expenses appear highly unreasonable:

- Exorbitant Flights: On July 17, 2023, OBOT counsel, associate Doug Smith, took a flight from San Francisco to DC for $1,597.10. This flight, taken in the middle of trial, is more than double the price of the typical flight Mr. Smith took during trial. Mr. Smith also took a flight on September 17, 2023 for $904.75, likewise far more expensive than a typical flight from DC to San Francisco.

- Flights and Lodging for non-local support staff: OBOT, despite obtaining local counsel with offices and staff in San Francisco, apparently enlisted non-local administrative staff support over the course of trial. Waddell Decl. ¶ 11. This cost was clearly just for convenience, as demonstrated by the size of counsel's firm and fact that OBOT did *not* make use of non-local staff for the damages phase of trial. Further, this staff member took four round-trip flights during the liability phase of trial, totaling $1,983.84.[4]

- Mileage: OBOT seeks to recover mileage costs for two of its counsel, Mr. Rodriguez and Ms. Eiritz, who traveled from Los Angeles to Hayward for trial. However, Mr. Rodriguez's mileage costs amount to approximately $0.65 per mile, while Ms. Eiritz's mileage costs amount to approximately $1.32 per mile. Waddell Decl. ¶ 12. At the very least Ms. Eiritz's mileage costs should be taxed by 50% to account for this unexplained discrepancy, which would reduce her mileage costs from $942.55 to $471.28.

- Closing Arguments: OBOT seeks to recover $2,449.88 in travel, lodging, and food costs for out-of-town counsel and staff to *observe* closing arguments. Only one attorney, Mr. Lee, made closing arguments for OBOT.

The City therefore moves to tax this entire amount, **$74,119.68**, as not reasonably necessary for this litigation. In addition, of this amount, approximately $3,010.00 was for Phase Two, and the City also moves in the alternative to tax that amount as additionally unnecessary to this litigation and unreasonable. OBOT's two local counsel could have and should have handled the one day that was reasonably necessary for Phase Two.

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[3] The City includes costs for travel, food, lodging, laundry, parking, and supplies in this calculation. The number is approximate because some of OBOT's listed costs do not identify who incurred them.

[4] OBOT also seeks mileage costs of $552.89 and lodging costs of $7,200.72 for non-local support staff.

2. "Research"

OBOT seeks to recover $31,155.96 in "research" costs, without further explanation. These **$31,155.96** in costs should be taxed in their entirety. The law has been well-established for over 30 years in California that these items are not allowable as costs as a matter of law under section 1033.5(b)(2), which prohibits the recovery of "investigation expenses in preparing the case for trial." *See Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 776 ("Fees for legal research, computer or otherwise, may not be recovered under section 1033.5."). No published decision has arrived at a different conclusion since it was decided. Allowing OBOT to recover these costs would be error, as they are plainly prohibited by the statute.[5]

3. "Transcribing and Proofreading"

OBOT seeks to recover $84.00 in costs for "proofreading" from a proofreading service, ProofreadNOW.com. Proofreading, which is typically done by attorneys and staff, is another plain example of costs that are "merely convenient," as opposed to necessary, to conducting litigation. C.C.P. §1033.5(c)(2). This **$84.00** item should therefore be taxed in its entirety.

4. "Trial Equipment and Tech Support"

OBOT seeks to recover $159,637.80 in costs for trial tech support and equipment during both phases of trial. The City moves to tax some but not all of these costs, as follows:

i. $20,130.59 of those costs are attributed to copier rental and costs, and thus should have been attributed to photocopying expenses, not tech. Such costs are not allowable as a matter of law, and this **$20,130.59** must be taxed in its entirety. C.C.P. §1033.5(b)(3) ("photocopying charges" are not allowable as costs.).

ii. OBOT's supporting documentation indicates that it also seeks $139,507.21 in costs for trial tech equipment and support. OBOT has not differentiated here between staff costs and equipment costs. The City does not object to claiming the cost of equipment used to present electronic evidence to the Court (which is now allowable pursuant to §1033.5(a)(13)), but cannot

[5] Further, $4,639.80 of OBOT's costs in this category appear to be related exclusively to the remedies phase and should be taxed for that reason as well. *See supra* Part II.

discern the amount attributable to that cost (which OBOT also did not include in that category of allowable costs, but may have included under "Other"). In contrast, a contracted, on-site technician to help counsel present electronic documents is a luxury, not a necessity, particularly when the parties prepared voluminous binders of exhibits for the Court, witnesses, and counsel (for which OBOT also seeks to recover fees). *See Sci. Applications Internat. Corp. v. Superior Ct.* (1995) 39 Cal.App.4th 1095, 1104–05 (holding "the cost of hiring assistants to help counsel organize documents and access them in discovery and at trial" and the cost of a graphics communication system is not recoverable). The City therefore, in an abundance of caution, moves to tax the entire $**139,507.21** amount. However, should OBOT be able to document the equipment versus staffing costs, the City does not object to the equipment costs as allowable, subject to review of the amounts.

Finally, $16,189.02 of OBOT's costs in this category appear to be related exclusively to the remedies phase and the City moves in the alternative to tax for that reason as well. *See supra* Part II.

CONCLUSION

For the foregoing reasons, OBOT's costs should be taxed by **$667,862.05** for the unreasonable, unnecessary, and excessive costs discussed above.

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Respectfully submitted,

ALTSHULER BERZON LLP
Stacey M. Leyton
Danielle Leonard
Jonathan Rosenthal
Emanuel Waddell

By: /s/ Danielle Leonard
Attorneys for CITY OF OAKLAND