ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Appellant/Cross-Respondent, vs. GILBERT P. HYATT, Respondent/Cross-Appellant.	Supreme Court Case No. 53264

APPELLANT'S SUPPLEMENTAL OPENING BRIEF REGARDING COSTS

* * * * *

APPEAL FROM ORDER OF THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

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I. OVERVIEW OF SUPPLEMENTAL BRIEF

This brief is filed pursuant to the court's order of March 12, 2010, in which the court required the parties to file separate supplemental briefs addressing the award of costs. For the reasons discussed below, FTB contends that the district court's adoption of the special master's Final Report awarding $2,539,068.65 in costs to Hyatt failed to comply with Nevada law, was an abuse of discretion and must be vacated.

II. STATEMENT OF THE ISSUES

1. After the district court appointed a special master to review Hyatt's claim for costs, did the district court err by adopting the special master's report without failing to allow or consider objections to that report?

2. Did the district court and the special master abuse their discretion by permitting additional supplementation and documentation of costs to be received from Hyatt almost a full year after the original memorandum of costs was filed and after the motion to retax had been fully briefed and submitted for decision?

3. Did the district court and the special master abuse their discretion when they broadly construed the cost statute to award Hyatt over $1.2 million in expert witness fees, including luxury items like cigars and first-class air travel and fees for the work of 15 individuals who were not testifying experts?

4. Did the district court and the special master abuse their discretion when they awarded Hyatt almost $500,000 in costs for technology services when Hyatt failed to provide any evidence, and the court made no finding, that the costs were "necessary" to the case, as required under Nev. Rev. Stat. Ann. § 18.005(17)?

III. STATEMENT OF THE CASE

After a jury trial in 2008 before District Judge Jessie Walsh, the jury returned a verdict in favor of Hyatt. This appeal is limited to the district court's post-verdict award of costs to Hyatt in the amount of $2,539,068.65.

A. Statement of Facts

The jury in this case issued a verdict in favor of Hyatt in August 2008. On September 15, 2008, Hyatt submitted a memorandum of costs to the district court seeking

reimbursement of over $2,597,838.20 in costs as the prevailing party pursuant to Nev. Rev. Stat. Ann. § 18.110 (West). 1 ACA [Appellant's Costs Appendix] 1-7.[1] In spite of the astonishing amount sought, Hyatt did not provide the district court with any documentation supporting these costs. 1 ACA 13- 2 ACA 500. Instead, the memorandum only identified the various costs claimed, simply identifying various categories of costs with amounts listed next to each category. Id. There was no explanation, or documentation of any kind--no billing statements, receipts, invoices or other verifiable proof substantiating the significant amounts requested. Id.

FTB timely moved to retax Hyatt's memorandum of costs on September 18, 2008. 3 ACA 509-23. FTB's motion argued that Hyatt's request for costs must be denied because Hyatt failed to provide any supporting documentation or explanatory materials verifying that the costs claimed were actually incurred, reasonable, and necessary, as required under Nevada law. 3 ACA 511-13. FTB argued that because the cost statutes must be strictly construed, Hyatt should be foreclosed from offering late-filed documentation in opposition to the motion to retax, because any supplementation would be improper and untimely. 3 ACA 521. FTB also argued that Hyatt's claimed costs included numerous items that were neither recoverable pursuant to the statute nor contemplated by Nevada case precedent. 3 ACA 513-20. Specifically, FTB's motion argued that pursuant to Nev. Rev. Stat. Ann. § 18.005(5), Hyatt improperly sought reimbursement far in excess of the statutory presumptive maximum of $1,500 per expert witness, and also sought fees for more than five expert witnesses, including those who had never testified at trial. 3 ACA 517-518. FTB argued that Hyatt did not provide any explanation or support pursuant to which the court could determine that the "circumstances surrounding the expert's

[1]Hyatt's original memorandum of costs was filed on September 15, 2008 and sought $2,597,838.20 in costs. 1 ACA 1-7. Hyatt filed an addendum and errata to the memorandum of costs on September 16, 2008, 3 ACA 501-06, and a correction to Exhibit 8 on September 19, 2008, ultimately bringing his costs claim to over $3,226,270.78. 3 ACA 524-28.

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testimony were of such necessity as to require a larger fee" as required by NRS 18.005(5). 3 ACA 518. FTB further argued that fees for the trial graphics and technology consultant services provided by ZMF and Tsongas should not be awarded because Hyatt failed to provide any supporting documentation or explanatory materials establishing the necessity of such costs, as required pursuant to Nev. Rev. Stat. Ann. § 18.005(17).[2] 3 ACA 520.

Hyatt filed his opposition to FTB's motion to retax costs on October 2, 2008. 3 ACA 529-67. Hyatt argued, without any supporting authority or evidence, that the general practice in Nevada is to provide only a verified memorandum as evidence of costs. 3 ACA 530-32. Hyatt also argued that it was proper to provide back up documentation only *after* particular costs had been challenged. Id. Based on that reasoning, Hyatt attached some supplemental documentation including invoices and billing statements, consisting of approximately 3,151 pages. 3 ACA 574 - 15 ACA 3718.

FTB filed a reply brief in support of its motion to retax costs on October 14, 2008. 15 ACA 3719-44. In its reply, FTB argued that because Hyatt failed to meet the statutory deadline for filing a complete and documented memorandum of costs, he was precluded from recovering any costs. 15 ACA 3721-25. Further, FTB demonstrated that the untimely back up documentation supplied by Hyatt was insufficient to substantiate his claimed costs. 15 ACA 3725-36. Specifically, FTB pointed out that the backup documentation provided by Hyatt largely failed to provide the required support for an award of costs because the documentation consisted of simple itemization, credit card statements, or requests for reimbursement without any attached verifying receipt. 15 ACA 3725-27. Without specific documentation, FTB argued, it was impossible for FTB or the court to determine whether Hyatt's expenses were actually incurred, because credit card invoices and billing statements can easily mask inappropriate charges such as airplane upgrades and excessive tips. Id. In addition, they failed to explain their necessity or reasonableness. Id.

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[2]FTB advanced many more arguments against Hyatt's claimed costs, but limits its review on appeal to the most egregious.

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At a January 29, 2009 hearing on the motion to retax, the district court sua sponte appointed a special master, Ashley Hall -- a non-attorney -- to decide the motion to retax costs. 16 ACA 3934; 16 ACA 3979. The district court's order referring the motion to retax to the special master provided that he was "authorized to gather any and all information, facts, and data as deemed necessary by the Special Master...as to the various costs incurred by Plaintiff...and the propriety and allowance of such costs under Chapter 18 of the Nevada Revised Statutes." 21 ACA 5037-38. FTB objected to allowing Hyatt any further opportunity to supplement his opposition to the motion to retax. 16 ACA 3980. In response, counsel for Hyatt expressly stated that they had provided "everything that we've got" justifying the request for costs. 16 ACA 3975.

After the motion to retax costs and all filed documentation were referred to the special master for review, he spent over three months reviewing the briefing and documentation. 21 ACA 5226-35. The special master then filed a document entitled "Phase I Assessment of the Memorandum of Costs." 21 ACA 5223. This Phase I assessment included an "Analytical Matrix" prepared by the special master, a "Legal Brief" prepared by James R. Adams, legal counsel to the special master, and a "Preliminary Audit Report and Spreadsheets" assembled by David Lentes, the Forensic Financial Analyst to the special master. 21 ACA 5226-35. The legal brief explained the procedure which was followed by the special master in reviewing and making determinations on Hyatt's claimed costs. For every category of cost, the special master asked the following questions:

> (1) Is there supporting source documentation for the cost? (2) From a review of the supporting documentation, can the special master determine whether the cost was "actually incurred" in this case? (3) From a review of the supporting documentation can the special master make a determination whether or not the cost was reasonable?

21 ACA 5227. After completing the above described analysis, the special master's finding in the Phase I assessment was that the documentation provided by Hyatt supported only $306,168.97 of Hyatt's claimed $3.2 million in costs (i.e., the documentation supported less than 10 percent of Hyatt's claimed costs). 21 ACA 5226-35.

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The special master's Phase I assessment explicitly pointed out Hyatt's numerous failures in adequately and appropriately fulfilling his burden on costs. For example, the special master denied $483,973.61 in costs claimed by Hyatt pursuant to NRS 18.005(17), including the costs for "technology services" because Hyatt failed to provide an "adequate showing of necessity for costs requested in this category." 21 ACA 5234. Similarly, the special master declined to award expert witness fees pursuant to NRS 18.005(5) because Hyatt's documentation did not provide necessary information establishing why expert fees should be allowed in excess of the $1,500 statutory presumption, did not include invoices for the work of multiple persons who were not the testifying expert, and failed to provide any allocation calculating the total amount of fees incurred by the expert, as opposed to the expert's assistants. 21 ACA 5230. The Phase I assessment also pointed out numerous other gross deficiencies in Hyatt's documentation, including disallowing $27,733.12 in telecopy fees due to Hyatt's failure to provide sufficient justifying documentation--- noting that Hyatt failed to provide any supporting documentation "beyond a mere spreadsheet...to link the cost to this case (for example, no fax confirmation sheets or contemporaneous log)." 21 ACA 5232. Similarly, the special master also disallowed $65,573.12 in in-house photocopies and $38,032.86 in outsourced photocopies because Hyatt failed to provide "sufficient justifying documentation beyond a spreadsheet showing the date of each photocopy and the total photocopying charge." Id.

Nevertheless, despite spending over three months conducting a thorough review of the fully briefed motion to retax costs, and all documentary support, charging the parties in fees, and after finding that Hyatt had failed to meet his burden with regards to $2,920,101.81 in claimed costs, the special master allowed Hyatt special permission to offer supplementary documentation. 22 ACA 5331-33; 22 ACA 5335. Id. FTB vigorously opposed allowing additional supplementation, arguing that documentation to be received at such a late point in the proceedings was improper, where the motion to retax had been fully briefed many months earlier, Hyatt's counsel had expressly represented that they had already provided "everything that we've got," and Hyatt had previously been given full

opportunity to provide all necessary and required documentation. 22 ACA 5323. FTB also objected to the significant additional costs associated with supplemental documentation and briefing.[3] Id. In spite of these objections, the special master requested, received, and reviewed extensive supplemental suspect documents from Hyatt before submitting his final report. 17 ACA 4029-20 ACA 4779; 22 ACA 5335-36.

Hyatt then presented an extensive motion entitled "Hyatt's Response to Phase 1 Draft of Special Master (re: costs)," 17 ACA 4029-4088, and over 700 additional pages of supplementary materials. 17 ACA 4089-4779. The additional supplementation provided by Hyatt included new documentation in support of claimed costs that had not been submitted in his briefing on the motion to retax costs, as well as additional legal arguments and explanation in support of the reasonable and necessary nature of his cost requests. Id. The supplemental documentation was highly suspect. The additional documentation "track[ed] the spreadsheets prepared by the Special Master, with the addition of one column on the right labeled "Explanations" [whereby Hyatt] address[ed] each cost item in the Special Master's 'not recommended' items." 17 ACA 4356; 17 ACA 4034-54; 17 ACA 4089-355; 18 ACA 4356 - 20 ACA 4779.

After reviewing the supplementary documentation provided by Hyatt, the special master filed his Final Report and Recommendation on the Memorandum of Costs and Motion to Retax Costs on November 30, 2009 ("Final Report"). 20 ACA 4851-972. The Final Report awarded Hyatt $2,539,068.65 in costs--an increase of well over $2.2 million from the special master's original assessment. Id.

The district court subsequently entered an order setting FTB's motion to retax costs for a determination **in chambers** (incorrectly called a "hearing" in the order). 20 ACA 4973-76. The district court's order **prohibited** all parties from providing any "further supplementation or briefing" on the motion to retax, and the special master's Final Report.

[3]The parties were forced to pay over $150,000.00 for payment of the special master's fees. 21 ACA 5001.

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20 ACA 4975-76. In other words, Judge Walsh sought to preclude the parties from having an opportunity to criticize the special master's final report or provide any input on the final report's accuracy or legality.

In response to the district court's prohibition, FTB filed a document entitled "Notice of Objections to the Court's Order Prohibiting Objections to the Special Master's Report." 20 ACA 4977 - 21 ACA 5007. Attached to that notice was a draft of FTB's proposed objections to the numerous legal and accounting errors of the special master's Final Report. 20 ACA 4988-95. FTB's proposed objections included arguments that supplemental documentation should not have been considered by the special master, that the special master erroneously awarded Hyatt all of his expert witness costs (including the cost of an expensive cigar enjoyed by one expert after he testified at trial), and that the award of costs for technology services was improper because the special master provided no explanation as to why these fees were either necessary or reasonable to the litigation. Id.

No actual "hearing" occurred on December 16, 2009. In a January 4, 2010 Order, the district court simply adopted the special master's Final Report in its entirety as the "ruling and findings" of the district court on the motion to retax costs--thereby awarding Hyatt almost $2.6 million in costs. 26 ACA 6262-67. The district court also specifically found that FTB had no right to file an objection to the special master's Final Report, and moreover, that any potential objection to the special master's Final Report was overruled. 26 ACA 6266.

FTB now appeals the award of costs on various grounds. First, the district court's order awarding costs is void because she refused to allow or consider objections to the special master's Final Report, as specifically required by N.R.C.P. 53(e). Second, while the district court may have discretion to allow additional and untimely filing of supplemental backup documentation, the district court abused its discretion in this case by allowing Hyatt to provide significant supplemental documentation almost a full year after Hyatt originally filed his memorandum of costs and after the motion to retax had long been fully briefed and submitted for decision. Further, the district court erred in awarding

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Hyatt all of his costs for expert witness fees. The district court's broad interpretation of NRS 18.005(5), allowing the recovery of fees for 15 non-testifying persons as a component of an expert witness's fee and the entirety of their costs even when they included outrageous luxury items was in derogation of the requirement that Nevada's costs statute be strictly construed and all such fees be reasonable and necessary. Finally, the district court erred in awarding Hyatt all of his costs for technology services because Hyatt never established the specific "necessity" of those costs to the litigation, as required under NRS 18.005(17).

III. LEGAL ARGUMENT

A. The District Court Did Not Comply With N.R.C.P. 53(e), Therefore the Order Adopting Special Master's Report Awarding Hyatt Costs Is Void And Must Be Vacated

The district court's refusal to consider objections by FTB to the numerous and serious legal and accounting errors contained within the special master's Final Report was clear error, rendering the order on costs void. The special master was empowered by the district court to undertake an expansive review of the costs issue.[4] The special master is

[4]It is questionable whether Judge Walsh's broad reference of power to the special master to "gather any and all information, facts, and data as deemed necessary...[as well as determine] the propriety and allowance of such cost under Chapter 18 of the Nevada Revised Statutes" was permissible. 21 ACA 5037-38. Specifically, with this reference, Judge Walsh handed over control not just of the factual components of FTB's motion to retax costs, but also all of the legal issues related to the determination of costs under Chapter18. Id. The court has rejected a broad reference of significant issues, both legal and factual, to special masters, explaining that "[w]here. . .the trial court made a general reference of nearly all of the contested issues, giving the master authority to decide substantially all issues in the case, as well as be the fact finder, the trial court's function has been reduced to that of a reviewing court." Russell v. Thompson, 96 Nev. 830, 834, 619 P.2d 537, 539 (1980). Too broad of a delegation to the special master of substantially all issues--both legal and factual, is an "unallowable abdication by a jurist of [her] constitutional responsibilities and duties." Id. The district court's abdication of the entirety of her judicial responsibilities on the costs issue to the special master also resulted in a serious financial burden on the parties to pay over $150,000 in fees incurred by the special master and his staff. 21 ACA 5001.

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nevertheless a lay-person of limited authority, "appointed to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to place the trial judge into a position of a reviewing court." Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 118 Nev. 124, 129, 41 P.3d 327, 330 (2002). (quoting Russell, 96 Nev. at 834). By refusing to consider FTB's objections regarding clear legal errors within the special master's Final Report, the district court improperly abdicated her constitutional responsibilities and duties, and also failed to comply with the clear provisions of N.R.C.P. 53. Russell, 96 Nev. 830, 619 P.2d 537 (1980); see also Venetian Casino Resort, LLC, 118 Nev. at 132 (the district court must review the special master's conclusions of law pursuant to a de novo review). Further, because the district court denied FTB the opportunity to object to the special master's Final Report, and refused to consider any objections, as explicitly required under N.R.C.P. 53(e), the district court's order awarding Hyatt $2,539,068.65 in costs is void and must be vacated. In re Ray's Estate, 79 Nev. 304, 311, 383 P.2d 372 (1963) (failing to comply with the provisions of N.R.C.P. 53 renders a district court's order void).

1. N.R.C.P. 53(e) Specifically Required the District Court to Consider Objections to the Special Master's Report

The powers and duties of special masters are explicitly detailed in N.R.C.P. 53. For example, N.R.C.P. 53 requires that a special master is required to prepare a report on the matters submitted for review at the conclusion of the appointment. N.R.C.P. 53(e)(1). This report must contain specific findings and be filed with the Clerk of the Court and served upon the parties. Id. The provisions of N.R.C.P. 53 are to be "strictly construed," Estate of Ray, 79 Nev. at 309-10, 383 P.2d at 375, as special masters "may only exercise limited authority." Venetian Casino, 118 Nev. at 129, 41 P.3d at 330. With regard to objections, N.R.C.P. 53(e) contains parallel provisions categorically mandating the procedure that must be followed by parties and the district court in reviewing and objecting to a special master's report. N.R.C.P. 53(e)(2) provides that:

> [i]n an action to be tried without a jury...[w]ithin 10 days after being served with notice of the filing of the report any party may serve written objections thereto

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> upon the other parties. Application to the court for action upon the report and upon objections thereto shall be made by motion and upon notice...

Further, N.R.C.P. 53(e)(3) provides that:

> [i]n an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

Concluding that N.R.C.P. 53(e)(3), not N.R.C.P. 53(e)(2), controlled in this case, the district court denied the parties the opportunity to file objections after the submission of the special master's Final Report. 26 ACA 6266. Instead, the district court ordered that no briefing would be allowed on the special master's Final Report. Id.; see also 20 ACA 4975-76. The district court's order set a hearing regarding the report **in-chambers** on December 16, 2009--one day **before** objections pursuant to N.R.C.P. 53(e)(2) would have been due, and prior to allowing FTB any opportunity to brief and submit final objections related to clear legal errors. 20 ACA 4975-76. The district judge then adopted the special master's Final Report in its entirety, holding that "there is no right to file an objection to the special master's Final Report and Recommendation in this instance pursuant to N.R.C.P. 53(e)(2) and any properly and timely filed objection to the special master's Final Report and Recommendation is overruled." 26 ACA 6266.

2. The Order on Costs is Void and Must be Vacated

It was error for the district court to apply N.R.C.P. 53(e)(3) (jury trial provision) in this case denying FTB the procedural rights and protections of filing formal objections to the special master's Final Report, because N.R.C.P. 53(e)(3) has no applicability to post-trial motions. N.R.C.P. 53(e)(3) contemplates a concurrently impaneled jury to which the special master's findings "may be read." See N.R.C.P. 53(e)(3). The jury trial in this case concluded long before the special master was appointed. At the time of the district court's adoption of the special master's Final Report, no jury had been impaneled in this case for almost a year and a half. Although the underlying action in this case was a jury trial,

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the issue referred to the special master was a post-trial motion, the determination of which was the responsibility of the court, not a jury. 20 ACA 4975-76. As such, N.R.C.P. 53(e)(3), is simply not, by its terms, applicable in this situation.

The only reasonable interpretation of N.R.C.P. 53(e) is that objections to a special master's report on post-trial motions must follow the procedure in N.R.C.P. 53(e)(2).[5] The district court failed to follow that procedure—specifically setting an in-chambers determination on the special master's Final Report before objections would have been due, and making her final ruling on costs without allowing FTB any opportunity to brief or submit objections to the special master's nearly $2.6 million award. 20 ACA 4975-76.

Because the district court refused consideration of objections, and adopted the special master's Final Report without complying with N.R.C.P. 53(e), that order is void and must be vacated. For example, in In re Ray's Estate, this court expressly held that the district court's order approving a special master's report without complying with the dictates of N.R.C.P. 53(e) rendered the order void as a matter of law. 79 Nev. at 311, 383 P.2d at 376; see also Wagoner v. Tillinghast, 102 Nev. 385, 724 P.2d 197 (1986) (holding judgment entered by the district court without notice or hearing after ex parte approval of master's final report was void.) Based on the district court's actions, FTB was denied its absolute right to submit objections pursuant to N.R.C.P. 53(e).[6] Such actions were in clear

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[5]To the extent that this court finds that the district court was correct in applying N.R.C.P. 53(e)(3) to this case, that provision also clearly provides parties the opportunity to object--a point which was markedly ignored by the district court. See N.R.C.P. 53(e)(3) ("subject to the ruling of the court upon any objections in point of law which may be made to the report...").

[6]The district court disingenuously attempted to support her decision to prohibit all objections to the report, noting that the "Order did not preclude or prohibit the filing of objections but stated in pertinent part that 'Parties will note that no further supplementation or briefing is requested or permitted.'" 26 ACA 6266. It is difficult to comprehend what procedure the district court intended the parties to utilize in order to lodge objections to the special master's Final Report, given that the district court disallowed all "further supplementation or briefing" on the motion to retax. Further, the district court was clearly

Continued . . .

violation of N.R.C.P. 53(e) and also were patently unfair, in that they rendered FTB unable to object to the special master's Final Report, which contained numerous legal errors. 20 ACA 4999-21; 20 ACA 5006. As such, the district court's order on costs is void and must be vacated.

B. Supplementary Documentation of Hyatt's Costs, Accepted Almost a Year After Briefing on FTB's Motion to Retax Costs was Submitted for Decision, was Suspect, Improper, and Should Not Have Been Allowed

The district court allowed Hyatt multiple opportunities to "try again" to perfect the necessary documentation to support his claimed costs. See Memorandum of Costs (1 ACA 1- 2 ACA 500); Opposition to FTB's Motion to Retax Costs and Exhibits (3 ACA 524 - 15 ACA 3718); Hyatt's Response to Phase I Draft of Special Master (17 ACA 4029 - 20 ACA 4779). It was not until the third try, and almost a year after filing his initial memorandum of costs, that Hyatt provided the documentation and supporting explanatory materials upon which the district court's award of approximately $2.6 million in costs was based. 17 ACA 4029- 20 ACA 4779. By granting Hyatt the opportunity to submit supporting documentation almost a year after originally filing his memorandum of costs, and after the motion to retax had long been fully briefed and submitted for decision, and long after Hyatt's counsel represented that they had already filed everything they had, the district court ignored the correct process for reimbursement of costs, condoned the lack of diligence exhibited by Hyatt, and clearly abused her discretion.

1. After Failing Repeatedly, Hyatt was Improperly Allowed Multiple Opportunities to Comply with the Statutory Requirements for the Recovery of Costs

Hyatt submitted a memorandum of costs on September 16, 2008. 1 ACA 1-12. Hyatt's memorandum was incomplete and insufficient as it was filed without any supporting documentation, such as receipts, documents, invoices, or any other proof that Hyatt's costs were actually incurred or explanation that those costs were reasonable or

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not amenable to considering such objections, as the district court summarily and prospectively overruled "any properly and timely filed objection" Id.

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necessary. 1 ACA 13 - 2 ACA 500; see also Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352-53, 971 P.2d 383 (1998) (Stating under Nevada law, itemization of costs alone is unacceptable); Vill. Vill. Builders 96, L.P. v. U.S. Laboratories, Inc., 121 Nev. 261, 277-78, 112 P.3d 1082 (2005) (stating party seeking costs must provide justifying documentation "for each copy made or each call placed. . .because such documentation is precisely what is required under Nevada law to ensure that the costs awarded are only those costs actually incurred"). Instead, Hyatt's memorandum of costs was nothing more than an itemization of costs--hundreds of pages created by Hyatt merely listing alleged charges, but failing to provide any supporting documentation. 1 ACA 13 - 2 ACA 500.

After FTB filed a motion to retax costs explicitly pointing out Hyatt's failure to discharge his burden of proving entitlement to costs, 3 ACA 509-523, Hyatt subsequently responded with attempt number two to comply with his statutory responsibilities--filing an opposition that included some of the documentary support that should have been included by Hyatt at the outset. 3 ACA 529-67 (Opposition); 3 ACA 568-15 ACA 3718 (Exhibits). Nevertheless, Hyatt still failed to provide the required support for an award of costs, as a significant portion of Hyatt's documentation consisted of credit card invoices, billing statements, or requests for reimbursement without any attached verifying receipts. Id. Despite these deficiencies, Hyatt indicated to the district court that he had provided all of the documentation that existed, explaining: "the documents we've provided you [the court] is the best we can do, it's everything that we've got." 16 ACA 3975.

After the fully briefed motion was submitted to the court and subsequently referred to the special master, the special master engaged in a comprehensive review of those items. 21 ACA 5226 - 5235. The result of that review was the special master's Phase I assessment, and determination that Hyatt was entitled to only $306,168.97 in claimed costs. Id. At that point, Hyatt already had two opportunities to fully comply with the statutory and case law requirements for the recovery of costs. Yet Hyatt still failed to provide the necessary proof in support of his claimed costs. 21 ACA 5226-5235. Faced

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with the denial of the vast majority of claimed costs, Hyatt came forward with suspect supplemental documentation. 17 ACA 4029 - 20 ACA 4779; 16 ACA 3975. Clearly, the third time was the charm for Hyatt. The special master increased his preliminary cost award from approximately $300,000, to approximately $2.6 million.[7] 20 ACA 4851 - 4972.

2. Neither Chapter 18 Nor the Local Rules Contemplate Such Late Filed Supplementation, and it was Improper for the District Court to Reward Hyatt's Lack of Diligence

The district court's adoption of the special master's Final Report and award of costs to Hyatt based on the late-filed and suspect documentation is unprecedented, and was an egregious abuse of the district court's discretion. The appointment of the special master was for the sole purpose of resolving the issues related to FTB's motion to retax costs. 21 ACA 5037-5038. That motion was fully briefed and submitted to the district judge in late 2008. 16 ACA 3928- 3933. When it was assigned to the special master, it was fully briefed. Id.

Pursuant to NRS 18.110(4), FTB was required to file its motion to retax within 3 days of receiving Hyatt's Memorandum of Costs. Under the corresponding local rules of practice, Hyatt was permitted the opportunity to file an opposition to FTB's motion, wherein he was required to provide all legal arguments necessary to support his costs requests. See EDCR 2.22 (allowing for motions, oppositions, and replies only). There is no

[7]This court has repeatedly noted that it is an abuse of discretion for the district court to award costs unless there is sufficient justifying documentation to enable the district court to make a determination of reasonableness with respect to each of the individual costs. Berosini, 114 Nev. at 1352-53; Vill. Builders, 121 Nev. at 277-78. Much of the documentation provided by Hyatt was insufficient to meet this burden, in that it masked improper charges that could only be determined through review of actual receipts--for example, excessive gratuity at restaurants, charges for first class airfare, expenses incurred by a party that were not recoverable under the statutes. 3 ACA 568-15 ACA 3718. It is impossible to tell from credit card invoices, billing statements, and reimbursement requests what the charges are for, or whether the charges claimed are both reasonable and necessarily incurred. The special master originally recognized this failure by Hyatt in his "Phase I assessment," noting that in many instances, Hyatt failed to provide underlying source documentation to evidence the actual cost incurred, 21 ACA 5226, but then abandoned that principle in the Final Report.

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legal authority in Chapter 18 or the local rules of practice that would allow a party opposing a motion to retax costs the opportunity to file any additional opposition papers, documentation, or arguments in support of his requested costs beyond the original briefing. Id. Further, there is no procedure in the statute for allowance of doing a "better job later" of proving costs that were not appropriately documented---as were approximately $2.9 million of Hyatt's claimed costs (as found by the special master in his Phase I assessment). 21 ACA 5226 - 5235. While the time for filing the memorandum of costs is not jurisdictional, Eberle v. State ex rel. Nell J. Redfield Trust, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992), the late filing of a memorandum is sufficient grounds for granting a motion to retax costs. See, e.g., Sec. Inv. Co. of St. Louis v. Donnelley, 89 Nev. 341, 349, 513 P.2d 1238, 1243 (1973); State v. Justice of Peace of Lake Twp., Pershing County, 47 Nev. 359, 223 P. 821, 822 (1924) (interpreting former section 836 of Nevada's Practice Act, which is similar to the time requirements of NRS 18.110 for filing memorandum of costs); Henry Products Inc. v. Tarmu, 114 Nev. 1017, 1020-21, 967 P.2d 444, 446 (1998) (reversing an award of costs where the prevailing party failed to timely file and serve its memorandum of costs); Flamingo Realty, Inc. v. Midwest Dev., Inc., 110 Nev. 984, 993, 879 P.2d 69, 74 (1994) (noting that "noncompliance with NRS 18.110 would ordinarily require forfeiture of costs. . .").

Hyatt provided no explanation for his failure to provide these materials during the briefing of the motion to retax. See, e.g., 17 ACA 4029-4088. Such unexplained lack of diligence should not be rewarded, and in fact, has been disapproved of by this court. See Valladares v. DMJ, Inc., 110 Nev. 1291, 1293-94, 885 P.2d 580, 582 (1994) (holding that lack of diligence in providing documentation of costs justifies denial of those costs).

Other courts have similarly refused to reward a party for unexplained lack of diligence in filing a complete and supported memorandum of costs. See, e.g., Parts & Elec. Motors, Inc. v. Sterling Elec. Inc., 83 C 2349, 1986 WL 10995 (N.D. Ill. Sept. 29, 1986) (denying supplemental bill of costs where party had "ample opportunity to include this expense in his original bill of costs" and noting that any delay in filing

supplementation to a bill of costs should be supported by a "convincing showing as to why the supplemental costs were not included in the timely filed bill"); Garcia v. Berkshire Life Ins. Co. of Am., CIV. 04-CV-01619LTBB, 2008 WL 821805 (D. Colo. Mar. 26, 2008) (denying supplemental bill of costs where one-month delay in submission resulted from party's internal accounting system); Miller v. Holzmann, 575 F. Supp. 2d 2, 4 n.3 (D.D.C. 2008) (granting supplemental bill of costs where delay in submission of information resulted solely from unanticipated closure of the courthouse); Orient Mineral Co. v. Bank of China, 2:98-CV-238BSJ, 2010 WL 624868 (D. Utah Feb. 19, 2010) (allowing untimely supplemental bill of costs only based on showing of the serious difficulties in filing faced by foreign party, as well as lack of bad faith or actual prejudice to the opposing party). Hyatt made no such showing, nor ever attempted to explain his failure to provide sufficient justifying documentation until after such deficiencies were explicitly pointed out by the special master.

There must be some limit upon a party's ability to simply "try again" to comply with Nevada law governing the recovery of costs. Notably, the Berosini court determined that certain costs were not properly justified by the party's provided documentation. 114 Nev. at 1357, 971 P.2d at 388-89. Having found that the party seeking costs had failed to meet his burden, this court simply reversed the district court's award of costs and disallowed the costs to the prevailing party. Id. ; see also Vill. Builders, 121 Nev. at 278, 112 P.3d at 1093 (reversing district court's award of costs to prevailing party based on failure of documentation, but not remanding for supplementation). In neither of these cases did this court remand to allow the litigant to "try again" in the hopes of putting on better proof of the need for incurring the cost or to supplement its documentation. Yet, this is exactly what the district court allowed Hyatt the opportunity to do.

Although the district court may have discretion to allow a party who misses the deadline for filing a memorandum and supporting documentation, the district court improperly extended the deadline in this case by approximately 300 days, especially given the complete absence of any explanation by Hyatt for his lack of diligence. See

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Valladares, 110 Nev. at 1293-94, 885 P.2d at 582. To base a cost award upon supplemental documentation and explanatory materials so untimely filed, improperly renders the time limits within Chapter 18 meaningless. See Carson-Tahoe Hosp. v. Bldg. & Const. Trades Council of N. Nevada, 122 Nev. 218, 128 P.3d 1065, 1067 (2006) (no statutory provision should be rendered meaningless nor should a statute be interpreted in a manner that produces absurd or unreasonable results). If the time limit in Chapter 18 is to have any meaning, it must prevent parties from acting as Hyatt did here.

The district court abused her discretion by allowing Hyatt to evade the statutory procedure for claiming costs, and awarding Hyatt approximately $2.6 million in costs despite his failure to provide required documentation or explanation of necessity until the third opportunity--almost a year after filing the original memorandum of costs and the motion to retax had been fully briefed and submitted.

C. The District Court Abused Her Discretion in Awarding Hyatt All of His Claimed Costs for Expert Witnesses and "Technology Services"

Cost statutes are an abrogation of the common law and undermine the long accepted principle of the "American Rule," adopted by Nevada, which requires all parties to bear their own costs and attorneys fees in bringing and defending lawsuits. See Thomas v. City of N. Las Vegas, 122 Nev. 82, 127 P.3d 1057, 1063 (2006); In re Yochum, 156 B.R. 816, 818 (D. Nev. 1993) (Stating American rule fiercely protected common rule that requires litigants to bear their own costs). When determining and awarding costs, a court should be "guided by frugality and not generosity." English v. Cunningham, 80 S. Ct. 18, 21, 4 L. Ed. 2d 42 (1959). It is unreasonable to expect the losing party to bear the burden of all costs incurred by the prevailing party, simply by virtue of that party's status as the victor. See, e.g., Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964) disapproved of on other grounds by Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987) (holding items proposed by the prevailing party as costs should always be given careful scrutiny, as the court does not have "unfettered discretion to tax costs for every expense a winning litigant has seen fit to

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incur."). Because 'costs' are limited to necessary expenses, "they may not include everything that a party expends to achieve victory." 20 Am. Jur. 2d Costs § 1 (1995).

Because these statutes are in derogation of the common law, costs statutes must be narrowly and strictly construed. See, e.g., Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022, 1036 (2006); Bergmann v. Boyce, 109 Nev. 670, 679, 856 P.2d 560, 565 (1993); Berosoni, 114 Nev. at 1352, 971 P.2d 383; Gibellini v. Klindt, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). Strict construction of a statute requires that when there is any doubt about the meaning or application of the statute, it should be given the effect that makes the least, rather than the most, change in the common law. Norman J. Singer, Statutes and Statutory Construction, § 61:1 (6th Ed. 2001). Chapter 18 must be construed in a manner that limits, rather than expands, those circumstances in which a prevailing party's costs are to be paid by the opposing party. Id.

In awarding Hyatt all of his claimed expert fees--amounting to over $1.2 million, and almost $500,000 in "technology services" costs, the district court ignored the admonition that cost statutes must be narrowly and strictly construed. 20 ACA 4851-4972; 26 ACA 6265-67. Instead, in awarding Hyatt all of these claimed costs, the district court impermissibly granted Hyatt an extraordinarily broad construction of both NRS 18.005(5) and NRS 18.005(17)--allowing costs under those provisions that are not contemplated by the clear language of the statute, and were not established by Hyatt to be either reasonable or necessary.

1. Awarding Hyatt $1,250,781.96 in Expert Witness Fees was an Abuse of Discretion

The recovery of expert witness fees is expressly limited by NRS 18.005(5), which allows "reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require a larger fee." NRS 18.005(5). Despite the clear limitation of NRS 18.005(5), the district court erroneously awarded all of the costs requested by Hyatt related to the following

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five experts and their "assistants": (1) Malcolm Jumelet; (2) Edwin Antolin; (3) Paul Schervish; (4) Daniel Solove; and (5) Kurt Sjoberg, in the astonishing sum of approximately $1.25 million, including an award of $886,780.52 in fees associated with one expert alone. 20 ACA 4866-4867; 26 ACA 6262-67. This award was improper for numerous reasons.

Requests for expert fees in excess of the statutory maximum are to be strictly construed and should only be awarded if the fees are reasonable and of "such necessity" to the expert's testimony as to "require" the larger fee. Hyatt made no such showing. See, e.g., 3 ACA 529-567. Neither the special master's Final Report, nor the district court's order adopting it, explain or provide any analysis as to why expert fees of over $1.2 million in excess of the statutory maximum were either reasonable or necessary. 20 ACA 4866 - 4867; 26 ACA 6262 - 6267. The district court awarded fees significantly in excess of the statutory amount, including fees to PriceWaterhouseCoopers' Malcolm Jumelet, that were 590 times more than the presumptive maximum award contemplated by the statute. 13 ACA 3236 - 3240; 17 ACA 4170. Such excessive departure from NRS 18.005(5) is improper, especially in the absence of any explanation or analysis as to why such a departure from the statutory presumption was reasonable or necessary.

In awarding all of the expert fees sought by Hyatt, the district court did not conduct any meaningful review or analysis of the specific costs requested. 26 ACA 6262 - 6267. As a result, the district court erroneously awarded Hyatt various costs for these experts that were not necessary for the expert's testimony and were also entirely unreasonable under any standard. For example, the district court awarded the entirety of the expert witness fees requested by Hyatt for his "wealth" expert, Paul Schervish, in the amount of $73,295.33. 26 ACA 6253-6261. However, this award included numerous expenses which can only be described as extravagances. **Schervish's expert fees included the costs associated with two first class flights from Boston, MA to Las Vegas, NV, town cars and limousines to and from the airport, a tip of 51 percent on a restaurant bill, and**

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most egregiously, Schervish's purchase of an expensive cigar from "Gustov Mauler Gourmet Cigars." Id.

These costs are certainly not necessary to the litigation, and are simply unreasonable. NRS 18.005(5) does not provide for the inclusion of luxuries in an expert witness's fee. Further, numerous courts have denied requests for the specific luxuries granted to Hyatt's expert, as unreasonable. See, e.g., Eli Lilly & Co. v. Zenith Goldline Pharmaceuticals, Inc., 264 F. Supp. 2d 753, 762 (S.D. Ind. 2003) (denying costs of luxury rental cars and first class airfare and noting that "it is not reasonable to shift to the opposing party the costs of first class air travel, luxury cars, or even unreasonably high charges for less luxurious models"); Quality Care-USA, Inc. v. Gorenstein Enterprises, Inc., 80 C 3927, 1988 WL 33824 (N.D. Ill. Apr. 7, 1988) aff'd, 874 F.2d 431 (7th Cir. 1989) (reducing a witness's reimbursement for first class airfare); Page v. Something Weird Video, 960 F. Supp. 1438, 1447 (C.D. Cal. 1996) (reducing costs for first class airfare and noting that the cost of a first class airline ticket is "excessive"); Green Const. Co. v. Kansas Power & Light Co., 153 F.R.D. 670 (D. Kan. 1994) (denying first class airfare costs claimed by expert witness as excessive); Shevin v. Lederman, 92 F.R.D. 752, 753 (D. Colo. 1981) (although witness may have chosen to travel at some rate other than coach class, party opposing costs should not be forced to pay additional costs simply to accommodate personal preference). It cannot be seriously debated that these costs, such as the gourmet cigar, were either of necessity to the expert testimony in this case, or even reasonable, yet the district court rubber stamped all of these claimed expenses allowed by the special master.

a. The Expert Witness Fees Improperly Awarded Fees to 15 Non-Testifying Persons

The amount of fees awarded to Malcolm Jumelet---over $880,000---is in clear contravention of the statute, and must be reduced. 17 ACA 4170. This award far exceeded the amount necessitated and incurred by the testimony of Malcolm Jumelet alone. Instead, the district court awarded fees that reflected the work of 15 other persons at

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PriceWaterhouseCoopers, none of whom testified at trial. Id.

The law permits the prevailing party "[r]easonable fees of not more than five expert witnesses." NRS § 18.005(5). By its terms, NRS 18.005(5) clearly and specifically limits recovery to no more than five experts. The well established case law shows that an expert must be called and sworn for the court to award expert witness fees. See Mays v. Todaro, 97 Nev. 195, 199, 626 P.2d 260 (1981) ("[a] trial judge is authorized by statute to award [fees to expert witnesses under 18.005(5)]...to a party in whose favor judgment is rendered, if the witness had been sworn and testified"); see also Trustees of Carpenters for S. Nevada Health & Welfare Trust v. Better Bldg. Co., 101 Nev. 742, 747, 710 P.2d 1379, 1383 (1985) (approving district court's refusal to award expert witness fees where expert witness "was never sworn and did not testify at trial.").

Despite the fact that there is no allowance under NRS 18.005(5) for expansion in the number of experts for which the prevailing party may claim costs, nor for the award of costs to parties who did not testify at trial, the expert witness fee awarded to Hyatt for the testimony of Malcolm Jumelet contained only $248,426.00 in documented fees attributable to the work or testimony of Mr. Jumelet. 17 ACA 4157 - 4170. The remaining $638,354.52 of fees were awarded for the work of a whole host of other individuals who were not testifying experts, but who were nevertheless awarded fees between 8 and over 100 times greater than the presumptive maximum of $1,500-- despite the fact that these individuals were not shown to have any particular expertise, and none testified at trial.[8] Id.

b. NRS 18.005(5) Does Not Allow Recovery for Expert Assistant Helpers

Relying on a broad interpretation of NRS 18.005(5) and a New Mexico case with no precedential authority in Nevada, the district court erroneously included significant costs

[8] For example, the district court included in its award to Malcolm Jumelet, the fees of $158,579.80 for the work of Kathy Freeman; $118,217.50 for the work of Ligia Machado and $91,885.00 for Kathleen Dill. None of these persons testified as experts in this case. 17 ACA 4157-70. Yet, the district court allowed these fees to be shifted to FTB, in clear contravention of the statute.

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for the "support staff" of expert witness Malcolm Jumelet. 20 ACA 4866; 26 ACA 6262 - 6267. Such interpretation is an unwarranted expansion of the cost statute. There is nothing in NRS 18.005(5) or case authority allowing recovery of the costs for expert assistants or support staff as a component of an expert witness fee. Broadly expanding upon the language of Nevada's statute and case precedent to allow such costs is a clear violation of this court's directive that costs statutes be construed strictly. See Bergmann, 109 Nev. at 679, 857 P.2d at 565; Berosini, 114 Nev. at 1352, 971 P.2d at 385; Gibellini, 110 Nev. at 1205, 885 P.2d at 543.

Additionally, the district court overlooked numerous other jurisdictions that have denied costs for an expert's assistant or "support staff" where not explicitly enumerated by the state's cost statute. These courts strictly construed their costs statutes, as the district court was required to do in this case. See, e.g., W. Fire Truck, Inc. v. Emergency One, Inc., 134 P.3d 570, 578 (Colo. Ct. App. 2006) (finding that trial court erred by including assistant's fees in award of costs for expert witness, noting that statute does not address or authorize such fees); Perkins v. Flatiron Structures Co., 849 P.2d 832, 836 (Colo. Ct. App. 1992) (fees for expert's assistant denied because fees not explicitly authorized by cost statute); Huisken Meat Ctr., Inc., 1998 WL 205772 (Utah A.G. Apr. 24, 1998) (reimbursement for fees incurred by expert's employee not allowable); Lawson v. Lapeka, Inc., CIV. A. 87-4018-S, 1991 WL 49775 (D. Kan. Mar. 19, 1991) (not reported) (disallowing costs claimed for expert's assistant due to the ample nature of the expert witness fee already allowed by the court, because the fees of an assistant are overhead not properly chargeable as costs, and because plaintiffs did not establish fee was allowable under costs statute); Ferche Acquisitions, Inc. v. County of Benton, 550 N.W.2d 631, 635 (Minn. 1996) (affirming district court's denial of costs and fees for expert witness's staff); Seigler v. Gen. Leisure Corp., 289 So. 2d 429 (Fla. Dist. Ct. App. 1974) (disallowing costs incurred by expert witness for overhead and assistant support due to lack of authority for recovery of such items in statute).

By allowing over $600,000 in costs claimed for the work of 15 individuals who

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were not testifying experts under the guise of "support staff," the district court engrafted a broad exception onto the statute that is not present in the express provisions of 18.005(5), thereby improperly expanding the Legislature's clear limitation on the recoverable costs for expert witnesses.

2. The District Court Abused Its Discretion in Awarding Hyatt Almost a Half A Million Dollars in Costs for "Technology Services" Pursuant to NRS 18.005(17)

The district court awarded Hyatt all of his requested costs for the technology and technology consultant services of two outside vendors, ZMF and Tsongas, for a total award of $499,459.54. 20 ACA 4851-4972; 26 ACA 626-6267. Because these types of costs are not expressly allowable under the costs statute, they may only be awarded pursuant to the "catch-all" provision--NRS 18.005(17). Under NRS 18.005(17), a party may recover as costs, "[a]ny other reasonable and necessary expense incurred in connection with the action" (emphasis added). It is an abuse of discretion for a court to allow recovery of costs under NRS 18.005(17) unless the party seeking to recover such costs "demonstrate[s] how such fees were necessary to and incurred in the present action." Berosini, 114 Nev. at 1352-53. At best, Hyatt's use of the technology vendors was merely a convenience to the litigation of his case, while at worst, it was an extravagance. In either case, such trial graphics and technology were not essential or even reasonable costs "necessarily" incurred in the course of litigation. Because Hyatt did not establish either the reasonableness or the necessity of a half a million dollars worth of technology costs, as explicitly required by NRS 18.005(17), the district court abused its discretion in awarding those costs.

a. The Technology Costs Awarded by the Court Were Not Reasonable or "Necessary"

NRS 18.005(17) requires that all costs claimed pursuant to this provision be established as reasonable. Neither the special master nor the district court offered any explanation as to why the technology fees awarded to Hyatt were reasonable. 20 ACA 4851-4972. The special master was offered no comparative rates to determine if the fees charged to Hyatt were in fact reasonable. 17 ACA 4029 - 20 ACA 4779. In fact, the

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award for technology services included numerous costs that cannot be considered reasonable under any construction of the statute. The costs awarded by the district court included $34,434.88 in travel expenses for one vendor (ZMF) and $2,077.07 for another (Tsongas), as well as $47,262.00 in equipment rentals--fees which were clearly excessive and unreasonable. Like all other aspects of the cost provisions, NRS 18.005(17), must be strictly construed. See Bergmann, 109 Nev. at 679, 856 P.2d 560; NRS 18.005(17). NRS 18.005(17) does not contemplate allowance of a technology consultant's costs for lodging and food, particularly where those costs were excessively large given a party's choice to utilize an out-of-state consultant. It was neither reasonable nor necessary for Hyatt's technology vendor to accumulate over $40,000 in travel expenses alone--including meals, hotel expenses, and other travel expenses during trial. See, e.g., Transamerica Life Ins. Co. v. Lincoln Nat. Life Ins. Co., C06-110-MWB, 2009 WL 2584838 (N.D. Iowa Aug. 17, 2009) (a consultant's travel, food and lodging were not authorized, and even if the court allowed the costs for the technology consultant's services, there was no basis for awarding costs for all expenses incident to those tasks); Coats v. Penrod Drilling Corp., 5 F.3d 877, 891 (5th Cir. 1993) opinion reinstated in part on reh'g, 61 F.3d 1113 (5th Cir. 1995) (reviewing a request for recovery of travel expenses related to trial exhibits and trial technology consultants and finding that such costs were not recoverable); Computer Cache Coherency Corp. v. Intel Corp., C-05-01766 RMW, 2009 WL 5114002 (N.D. Cal. Dec. 18, 2009) (denying costs for lodging, airfare, meals, parking and taxi rides for those working on the preparation of trial technology). Many of these costs were incurred solely because Hyatt utilized out-of-state vendors. Hyatt made no showing such services were not available from in-state vendors. While Hyatt was entitled to make a choice of which vendors to utilize, the additional burden of these substantial costs was neither necessary nor reasonable.

b. It Was Improper to Award Costs Without Any Showing of the Necessity

It is difficult to comprehend how the district court could have concluded that a half a

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million dollars worth of technology services costs were **necessarily** incurred in this case. The necessity requirement of NRS 18.005(17) is to be strictly construed. See, e.g., Berosini, 114 Nev. at 1353 (denying costs sought under the catch-all provision where party failed to adequately justify necessity of such costs). While "[i]t is certainly not inappropriate for a party to choose cutting edge technology to present is case to the jury...that does not mean that it can automatically pass the high cost of that technology to the other side." Nelson v. Anderson, 72 Cal. App. 4th 111, 84 Cal. Rptr. 2d 753, 767 (Cal. Ct. App. 1999).

Although this court has not explicitly determined what renders a cost necessary under NRS 18.005(17), other jurisdictions addressing this issue provide helpful guidance. For example, the California cost statute has a somewhat similar requirement that costs incurred under its statute be necessary. See Ladas v. California State Auto. Assn., 19 Cal. App. 4th 761, 774, 23 Cal. Rptr. 2d 810 (Cal. Ct. App. 1993). Reasonably necessary has been explained as "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." Id. ; see also Scallet v. Rosenblum, 176 F.R.D. 522, 526 (W.D. Va. 1997) ("Although 'reasonably necessary' has no specific definition, its meaning has been carefully circumscribed to exclude materials that were obtained "for convenience only."). Additionally, this court has specifically disallowed costs for similar extraordinary trial items, such as juror analysis, which may be helpful to a party's victory, but which are nonetheless not a necessity. Bergmann, 109 Nev. at 682.

With regards to the necessity of the fees, the special master merely noted that "[t]he efficiency and cost effective nature of including technical trial support in the costs allowable under NRS 18.005(17) makes sense" because the technology consultants have "specialized knowledge in the efficient presentation and conduct of today's lengthy trials...[that] enhanced efficient use of the judge and the jury." 20 ACA 4837. While the use of third-party technology vendors may have been convenient or useful to Hyatt and his attorneys, the costs awarded to Hyatt for ZMF and Tsongas cannot legitimately be characterized as "necessary" expenses incurred as a matter of course in litigation.

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Instead, these costs represent an option elected by Hyatt. However, as a taxable cost, these costs are excessive and unwarranted. See, e.g, Farmer, 379 U.S. at 235(the court does not have "unfettered discretion to tax costs for every expense a winning litigant has seen fit to incur"); Berosini, 114 Nev. at 1352-53.

Numerous courts addressing the costs of cutting edge courtroom technology have declined to award such costs, given that a party can almost never establish that such technology is **necessary** to the case. For example, in Am. Color Graphics, Inc. v. Travelers Prop. Cas. Ins. Co., C04-3518SBA, 2007 WL 832935 (N.D. Cal. Mar. 19, 2007), ACG sought reimbursement for its use of software at trial, claiming that the technology was "vital to the presentation of countless documents given the number of documentary exhibits presented, and was critical because it enabled the jury to view the exhibits with precision, detail, and speed." Id. Nevertheless, the court disallowed the technology costs, explaining that "the use of the [technology] may in fact have been a useful means of conveying information, but it does not appear reasonably necessary." Id.; see also Wheeler v. Carlton, 3:06CV00068 GTE, 2007 WL 1020481 (E.D. Ark. Apr. 2, 2007) (denying costs for third party vendor utilized to run the technology at trial, explaining that "[a]lthough the use of the [third party vendor] may have been more efficient and convenient to the parties, and at times even aided the [prevailing party's] presentation, the...use of the [vendor] was not necessary"); Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc., C 03-1431 SBA, 2008 WL 2020533 (N.D. Cal. May 8, 2008) (disallowing costs for over a half a million dollars worth of graphics, animation and other visual aids because while the costs "may have been helpful, have simplified the issues or been efficient" they were not shown to be "necessary").

Similarly, many courts addressing the high costs of cutting edge technology have warned against the danger of routinely passing along those costs to the losing party, particularly given that such displays are often intended to "dazzle" the jury, as opposed to merely conveying necessary information. See, e.g., Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 428 (7th Cir. 2000); Eli Lilly, 264 F. Supp. 2d at 781 (awarding just $5,000 of the

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$136,653 in costs sought for technology, after finding that "the use of multi-media presentation may have less to do with conveying information to a judge and jury than it does with an effort to wow them" and noting that the costs statute "does not obligate the losing party to pay for the victor's 'glitz'"); In re Turn-Key-Tech Matters, CV 01-4158 LGB, 2002 WL 32521814 (C.D. Cal. Oct. 15, 2002) (declining to award costs for computer animation for exhibits and finding that "glitz is not taxable as a cost").

There is a distinction between costs which are incurred by a party due to convenience or benefit, and those that are necessary. Hyatt's use of technology vendors and cutting edge trial technology may have been more engaging, more convenient, or even more helpful, but it was not necessary to the presentation of his case. Because Hyatt failed to meet his burden of proving the necessity of a half a million dollars worth of technology services, it was error for the district court to award these costs. Berosini, 114 Nev. at 1352-53.

IV. CONCLUSION

For the reasons stated within, FTB respectfully requests that the court void the district court's order awarding costs in the amount of $2,539,068.65, or in the alternative, for the court to disallow $1,250,781.96 in expert witness fees, and $499,459.54 for technology services.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellant's supplemental opening brief regarding costs, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated this 7 of June, 2010

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CERTIFICATE OF SERVICE

Pursuant to N.R.A.P. 25, I hereby certify that I am an employee of McDonald Carano Wilson LLP and that on this date I served true copies of the foregoing APPELLANT'S SUPPLEMENTAL OPENING BRIEF REGARDING COSTS of by depositing said copies with Federal Express for overnight delivery upon the following:

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