IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

v.

GILBERT P. HYATT,

Respondent.

Supreme Court Case No. 53264

District Court Case No.: A382999

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF REGARDING COSTS

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Respondent/Cross-Appellant Gilbert P. Hyatt ("Respondent" or "Hyatt") files this Supplemental Answering Brief Regarding Costs, in response to Franchise Tax Board of the State of California's ("Appellant" or "FTB") Supplemental Opening Brief Regarding Costs ("FTB Supplemental Brief"). The FTB has challenged the cost award on four grounds (in three sections): (i) the District Court violated NRCP 53(e) with respect to the Special Master's report (the "Special Master Challenge"); (ii) the District Court improperly allowed and considered back-up documentation, in accord with procedures it established (i.e., challenging the District Court's discretion in setting up procedures to evaluate cost issues, referenced as the "Procedural Challenge"); and (iii) the District Court improperly awarded fees and expenses for experts (the "Expert Challenge") and technical services at trial (the "Technical Challenge").[1]

Hyatt addresses each of these challenges and submits that the FTB's failure to challenge other aspects of the District Court's allowance of costs constitutes acquiescence that, except for the Special Master Challenge, the Procedural Challenge, the Expert Challenge and the Technical Challenge, the District Court's order is correct and should be affirmed.

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION UNDER NRCP 53 ON THE SPECIAL MASTER CHALLENGE AND DID NOT VIOLATE ANY PROCEDURAL OR SUBSTANTIVE RIGHTS OF THE FTB.

A. The District Court did not improperly abdicate its responsibilities and duties by appointing the special master and authorizing procedures to determine the propriety and allowance of Hyatt's litigation costs.

NRCP 53 allows judges to appoint special masters for determining complex matters. With respect to the scope of the special master's role, NRCP 53(e)(1) states that "The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact *and conclusions of law*, the master shall set them forth in the report." (Emphasis added). Further, NRCP 53(c) specifically gives the master authority to rule on the admissibility of evidence unless proscribed by the court's order of reference. As such,

[1] FTB Supplemental Brief, Sections A (pp. 8-12), B (pp. 12-17) and C (pp. 17-27).

special masters clearly have the ability to make legal conclusions. At the same time, a district court cannot abdicate the entire trial or "substantially all issues in the case" to a special master.[2]

The District Court did not abdicate the entire trial or any issues other than the analysis of Respondent's costs. The Special Master properly made recommendations to the District Court concerning the facts and whether those facts met applicable legal standards for the award of costs. The District Court properly adopted those recommendations, after giving the parties more than adequate opportunity to be heard and in full compliance with NRCP 53(c).

Following trial, Hyatt submitted a timely, properly-verified Memorandum of Costs, reflecting over $3,000,000 in requested costs incurred during this 10-year litigation.[3] When the FTB challenged virtually every cost item, Hyatt presented the District Court with thousands of pages of litigation expenses to support his Memorandum of Costs.[4] The FTB briefed its objections to Hyatt's requested costs, and the parties appeared before the District Court on January 29, 2009, for hearing the FTB's Motion to Retax Costs.[5] At the hearing, the District Court *sua sponte* appointed a special master to assist with evaluating Hyatt's supporting documentation for costs and the FTB's objections thereto, in order to determine what costs, if any, were recoverable under the applicable facts, documentation and legal standards.[6] The complexity and magnitude of the special master's undertaking in determining costs, and the resulting savings of judicial resources, is evidenced by the fact that the parties paid approximately $150,000 to the special master and the professionals he engaged for his task.[7] The special master and his professionals spent 1,016 hours on this assignment, hours that the District Court was not required to expend in making the detailed analysis of the cost issues.[8]

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[2] *Russell v. Thompson*, 96 Nev. 830, 834, 619 P.2d 537 (1980).

[3] 1 ACA 0001 – 2 ACA 500; 3 ACA 510-523.

[4] 3 ACA 568 -15 ACA 3718.

[5] 3 ACA 509-523, 529-567; 15 ACA 3719-3744.

[6] 1 RCA 61-63.

[7] 1 RCA 127-129,1RCA 217-219, 2 RCA 264-269, 2 RCA 289 – 291, RCA 331-336.

[8] *Id.*

The special master set up procedures and gave the parties the opportunity at each stage of the process to review, comment, and object to the procedures and evaluations being performed by the special master.[9] Neither party submitted any objections to (i) the District Court's appointment of the special master, (ii) the ultimate form of order specifying the tasks of the special master, (iii) the procedures proposed by the special master, or (iv) the reports submitted by the special master (until the final report that the FTB challenges in this appeal). Both parties followed the procedures throughout the evaluation process.

In light of the foregoing, the District Court appropriately enlisted the services of the special master in this case, and delegated the evaluation of the voluminous documentation and the positions of the parties to the special master. The special master's work and exhaustive report regarding the factual and legal basis of Hyatt's litigation costs did not overstep the bounds of NRCP 53, which expressly authorizes the master to make "findings of fact and conclusions of law."[10] Furthermore, the narrow issue entrusted to the special master (litigation costs) is merely a post-trial matter and had no impact on the District Court's pretrial rulings or the verdict of the jury, which were "substantially all issues in the case."[11] Delegating the narrow issue of taxable costs to the special master, post-trial, obviously has no impact on the presentation and merits of the parties' claims or defenses at trial. Therefore, the District Court did not improperly abdicate its responsibilities.

Notably, the order of reference to the special master in this case states, in pertinent part:

> 7. The Special Master and the parties to this case may *at any time* apply to this Court for further instructions or orders and for further powers necessary to enable the Special Master to perform his duties properly as herein described.[12]

Therefore, the District Court expressly allowed the FTB to "at any time" object or apply for "further instructions or orders" concerning the special master. The FTB did not object to the

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[9] 21 ACA 5109-5111, 5119-5121, 5136-5138; 21 ACA 5223 – 22 ACA 5307; 20 ACA 4851-4972.

[10] *See* NRCP 53(e)(1).

[11] *Russell v. Thompson, supra.*

[12] 1 RCA 61-63.

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special master's preliminary report.[13] Until the special master issued his final report recommending that certain costs be taxed to the FTB, it never objected to *any* aspect of the appointment of the special master or the performance of his duties. The FTB was therefore very willing to accept the special master and his process and procedure, so long as his findings were in favor of the FTB. Only after receiving what it perceived was an adverse ruling (a ruling in which Hyatt received substantially less than what he requested) did the FTB begin objecting to the special mater's process and procedure.

As the FTB knew early in the process, the special master engaged counsel and an accountant without any FTB objection, to provide their expertise and assistance, to make sure that the special master had appropriate, independent legal and accounting advice while evaluating Hyatt's submissions, FTB's objections, and Hyatt's responses to those objections.

B. The requirements of NRCP 53(e) were met in this case, because the FTB worked closely with the special master in reviewing and determining Hyatt's allowable litigation costs and had multiple opportunities to object to those costs.

The provisions of NRCP 53(e)(2) and (3) concerning the special master's reports differ between non-jury actions and jury actions:

> **(2) In Nonjury Actions.** In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties…The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.
>
> **(3) In Jury Actions.** In 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.

Because this case is a jury action, the District Court's determination that NRCP 53 (e)(3) applies to the special master's report is proper and comports with the plain language of the Rule.

[13] 21 ACA 5223-22 ACA 5307.

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The FTB cites *In re Ray's Estate*[14] and *Wagoner v. Tillinghast*[15] for the proposition that a master's report is void if the provisions of NRCP 53 are not followed. Notably, however, NRCP 53(e)(3) does not set forth a specific procedure the District Court should follow before adopting the special master's findings and conclusions.

The District Court and the special master gave the FTB (and Hyatt) multiple opportunities to object to the procedures and substance of the litigation cost issues in this case. The FTB extensively briefed its arguments and objections in its motion to retax costs and attended the hearing on its motion on January 29, 2009. Subsequently, the FTB submitted additional and significant briefing to the special master. For nearly one year, the parties worked closely with the special master in working through Hyatt's voluminous cost documentation and determining the appropriate amount of costs to be awarded. The FTB, like Hyatt, was provided with a preliminary report and given every opportunity to object to the special master's reasoning, findings and conclusions.[16]

By the time the District Court received the special master's final report, FTB had already set forth every plausible factual and legal argument against Hyatt's litigation costs on multiple occasions. The FTB does not include, in its 26-volume Appendix of Exhibits, all of the interaction which occurred under the procedures followed by the parties. This chronology shows how diligent and conscientious the District Court and the special master were, in making sure that each side had a full and complete opportunity to present all factual and legal issues:

1. January 29, 2009: District Court appoints special master;[17]
2. February 2, 2009: FTB submits documents and information to special master;[18]
3. February 2, 2009: Hyatt submits documents and information to special master;[19]

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[14] 79 Nev. 304, 383 P.2d 372 (1963).

[15] 102 Nev. 385, 724 P.2d 197 (1986).

[16] 17 ACA 4029 – 20 ACA 4850.

[17] 1 RCA 61-63.

[18] 21ACA 5029-5030.

[19] 21 ACA 5027-5028.

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4. February 5, 2009: Special master submits report for month of January, 2009;[20]

5. March 1, 2009: Special master submits report for month of February, 2009;[21]

6. May 7, 2009: Special master submits Analytical Matrix and other items;[22]

7. May 8, 2009: Hyatt counsel requests clarification to Preliminary Audit Report;[23]

8. May 11, 2009: Special master's agenda for working conference with parties;[24]

9. May 11, 2009: Working conference held with parties;[25]

10. June 4, 2009: Special master submits report for month of May, 2009;[26]

11. July 7, 2009: Special master submits report for month of June, 2009;[27]

12. July 15, 2009: Hyatt responds to Phase 1 Draft of Special Master – Re: Costs[28]

13. August 6, 2009: Special master submits report for month of July, 2009;[29]

14. August 14, 2009: FTB responds to Hyatt's response to Phase I Draft;[30]

15. September 3, 2009: Special master submits report for month of August, 2009;[31]

16. October 9, 2009: Special master submits report for month of September, 2009;[32]

17. November 12, 2009: Special master submits report for October, 2009;[33]

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[20] 1 RCA 74-83.

[21] 1 RCA 90-105.

[22] 21 ACA 5223 – 22 ACA 5307.

[23] 1 RCA 154-156.

[24] 22 ACA 5309-5310.

[25] 22 ACA 5308.

[26] 1 RCA 157-177.

[27] 1 RCA 178-197.

[28] 17 ACA 4029 – 20 ACA 4779.

[29] 1 RCA 198- 216.

[30] 20 ACA 4780-4850.

[31] 1 RCA 220-242.

[32] 2 RCA 243-263.

[33] 2 RCA 270-288.

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18. November 30, 2009: Special master submits Final Report and Recommendation pursuant to the Order Appointing Special Master – Awarding $2,539,068.65;[34]

19. December 15, 2009: Notice of Objections to the Court's Order Dated December 4, 2009, filed by FTB;[35]

20. December 15, 2009: Notice of Filing with Exhibits re: Special Master Proceedings and Documents filed by FTB;[36]

21. December 21, 2009: Special master submits report for November, 2009;[37]

22. January 5, 2010: Special master submits report for month of December, 2009;[38]

23. January 6, 2010: Notice of Entry of Order re: the Court's January 4, 2010 Order adopting Special master's Final Report and Recommendation in its entirety;[39]

More importantly, the final report and the FTB's motion to retax costs, completely apprised the District Court of all of the FTB's objections. As such, the District Court reviewed these materials and exercised her discretion, as permitted, in adopting the special master's findings and conclusions through an in-chambers determination. Given this history, there was no denial of the FTB's right to procedural due process or a lack of compliance with the substance and intent of NRCP Rule 53. If a district court is required to re-hear all of the arguments and positions of the parties, then the benefits and functions of a special master would be negated. The District Court properly delegated cost determinations to a special master, the special master properly gave each side complete and thorough opportunities to present all factual and legal arguments, the special master presented his report to the District Court, and the

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[34] 20 ACA 4851-4972.

[35] 20 ACA 4977 – 21 ACA 5007.

[36] 21 ACA 5008 – 26 ACA 6261.

[37] 2 RCA 292-312.

[38] 2 RCA 313-330.

[39] 2 RCA 337-342.

District Court properly benefited from all of the special master's work in reviewing and determining that the special master's report should be adopted.

Lastly, the opportunity afforded to the FTB to object to the special master's report was sufficient, given the issue at hand – litigation costs. The special master's report meticulously explained the legal standard that he was going to follow (NRS 18.005 and cases interpreting that statute), and how the requested costs were evaluated under that legal standard. The FTB did not challenge the legal standard, and does not challenge that standard in this appeal. In other words, the FTB complains that the extensive procedures developed by the special master and approved by the District Court without objection, then followed by the parties, somehow did not lead to the result the FTB wanted. Those procedures, however, gave the FTB and Hyatt more than enough due process to assert their positions and have independent legal, accounting and special master expertise evaluate those positions. The District Court had the discretion to decide the matter based on the voluminous written record provided to and evaluated by the special master. It does not have to provide either or both sides with further opportunity, *ad nauseum*, to submit additional briefings and argument. The procedures were appropriate, fair, and well within the District Court's reasonable discretion. Again, the award of litigation costs is merely a post-trial matter and has no impact on the merits of the parties' claims or defenses. The FTB's Special Master Challenge should be rejected.

II. BACK-UP DOCUMENTATION IS PROPERLY SUBMITTED ONCE AN OPPONENT HAS CHALLENGED PARTICULAR COST ITEMS

The FTB asserts that the absence of invoices and billing statements in Hyatt's initial Memorandum of Costs absolutely precluded any award of costs to Hyatt, and that the District Court improperly allowed a full and complete presentation of materials justifying Hyatt's Memorandum of Costs, the FTB's extensive objections thereto, and a final decision which evaluates costs on their merits. Hyatt submits that the procedures implemented by the District Court are established and permissible under NRS 18.005. Hyatt submitted a verified memorandum in compliance with NRS 18.110. When the FTB objected to cost items on the ground of insufficient documentation, Hyatt provided that documentation so the District Court

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could evaluate it. The verification of a party and/or his counsel meets the *prima facie* showing that asserted costs were necessarily incurred in the litigation, which is what NRS 18.110 requires. If an opponent does not request back-up documentation, of course, the parties and the District Court need not be burdened with excessive paperwork on undisputed items.

In the District Court, the FTB followed its usual practice of objecting to each and every cost item, challenging the integrity of the verifications provided by each of Hyatt's trial counsel, thereby forcing Hyatt to provide the voluminous back-up materials to support Hyatt's requested costs, within the time parameters approved by the District Court in its discretion. The FTB was then given ample opportunity to challenge every cost item, and it did so in its extensive submissions to the special master. This process allowed cost determinations to be made on the merits, in accord with the facts and NRS 18.005.

Courts in Nevada and other states have accepted a verified memorandum of costs as *prima facie* evidence that the costs specified therein have been necessarily incurred.[40] The FTB's cases include situations where costs have been disallowed for lack of documentation, but these cases do not go as far as FTB wishes. They do not hold that a cost award can *never* be

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[40] *Sugarman Iron & Metal Co. v. Morse Bros. Machinery & Supply Co.*, 50 Nev. 191, 257 P. 1 (1927) (holding "[t]he practice, therefore, is that, upon filing and serving a verified cost bill as required by [the applicable rule], a prima facie case is made, which must be overcome by proof of the party excepting thereto," and affirming the award of costs since the respondent failed to overcome the prima facie case made by appellants' verified cost bill); *McLeod v. Dist. Ct.*, 39 Nev. 337, 157 P. 649 (1916) (recognizing that a memorandum of costs duly verified and timely filed is prima facie evidence that the items were necessarily expended and are properly taxable, unless, as a matter of law, they appear otherwise, but observing that a party may challenge the taxing of such costs). *See also City of Downey v. Gonzales*, 262 Cal. App. 2d 563, 69 Cal. Rptr. 34 (Cal. Ct. App. 1968) ("the verified cost bills are prima facie evidence that the items thereof had been necessarily incurred and, in the absence of objection to the contrary, the prima facie evidence must be taken as conclusive for the purpose of this appeal.") (citing *San Francisco v. Collins*, 98 Cal. 259, 263, 33 P. 56 (1893)); *Evers v. Cornelson*, 163 Cal.App.3d 310, 209 Cal. Rptr. 497, 499-500 (Cal. Ct. App. 1984) ("As to defendant's attack on plaintiff's proof of her costs, generally, '[i]f items on their face appear to be proper charges, the verified memorandum of costs is *prima facie* evidence of their propriety, placing the burden of proof on the party attacking them.'") (emphasis in original) (citing 4 Witkin, *Cal. Procedure* (2d ed. 1971) Judgment, § 113, p. 3265); In *Decoto School Dist. of Alameda County v. M. & S. Tile Co.*, 225 Cal. App. 2d 310, 316-17, 37 Cal. Rptr. 225 (Cal. Ct. App. 1964) ("Although the burden of proof is upon the defendant to establish the costs which are objected to on a motion to retax, if the items appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses, and services therein listed were necessarily incurred by the defendant, and the burden of showing that an item is unreasonable is upon the plaintiff") (citations omitted). *Cf. Jeffers v. Screen Extras Guild, Inc.*, 134 Cal.App.2d 622, 623, 286 P.2d 30 (Cal. Ct. App. 1955) (holding that verified memorandum of costs is prima facie evidence that the costs specified therein have been necessarily incurred); *Von Goerlitz v. Turner*, 65 Cal. App. 2d 425, 432, 150 P.2d 278 (Cal. Ct. App. 1944) (same); *Meyer v. City of San Diego*, 132 Cal. 35, 36, 64 P. 124 (Cal. 1901) (same).

made, especially where a party provides documentation which the district court finds and concludes is adequate for her to evaluate the costs on their merits, whether that documentation is submitted as part of an opposition to a motion to retax costs or part of a court-initiated special master process, in which all parties participated without objection. Especially in a case with costs of this volume and magnitude, continuing over 10 years, the District Court had the power and discretion to adopt a procedure that would be fair to both sides, allowing a correct ruling on the merits rather than a "gotcha" result based on a procedural determination that is contrary to law and practice accepted by this Court. In fact, had the District Court simply denied all costs, based on Hyatt's timely-submitted verified memorandum of costs, it is much more likely that such an act would have been an abuse of discretion, when compared to the diligent and comprehensive review undertaken by the District Court and its independent special master, designed to reach the correct outcome.

Such a "gotcha" rule is also contrary to any court's role to reach a correct decision on the merits of issues brought before it. In Nevada, this Court accepted as valid and appropriate the submission of back-up documents that were not submitted with the claimant's Memorandum of Costs, but rather were submitted in response to a motion to retax costs.[41] The FTB relies on *Gibellini* for its decisions on the merits disallowing costs, but then the FTB objects to the same procedure used in that case, i.e., submission of back-up documents as part of the process in deciding a motion to retax costs. This Court reviewed the process, without questioning it: "Respondents [the prevailing party] requested and were awarded $7,826.25 in expert fees for W. Brown, as listed in their memorandum of costs and disbursements. ***In their memorandum in reply to appellants' motion to retax costs***, the fees for W. Brown's engineering report were broken down into two bills, one dated 12-3-91 for $5,923.75, and one dated 5-3-89 for $1,902.50." *Id.* at 1206 (emphasis added). Neither the district court nor this Court in *Gibellini* questioned the propriety of identifying cost items in the Memorandum of Costs, then providing back-up in a response to a Motion to Retax, after an opponent has challenged a particular item.

[41] See, *e.g., Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540 (1994), where both the district court and this Court accepted this practice in ruling on the merits of the documents and issues presented during the motion process to retax costs.

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Here, Hyatt identified his costs in his Verified Memorandum (i.e., just as the prevailing party did with the Brown expert fee for $7,826.25 in *Gibellini*). Once the FTB challenged each and every cost item, Hyatt submitted his back-up to support his identified costs, in response to the FTB's Motion to Retax and in compliance with the directives of the special master appointed by the District Court. Hyatt did *not* add any cost items not included in his original Memorandum of Costs; he simply provided the back-up, which supported the categories and amounts of recoverable costs, for evaluation by the District Court and the special master.

The FTB's assertion that Hyatt was given three attempts to submit his supporting documentation is therefore patently false. Hyatt followed the typical and well accepted procedure of submitting documentation when costs sought were opposed by the FTB. What the FTB refers to as the "third attempt" was in fact Hyatt's submission of additional documentation in direct response to the special master's preliminary submissions, providing additional documentation where he could. In some instances, Hyatt could not provide the type of documentation sought by the special master and was not awarded those requested costs.

Trial courts routinely exercise their discretion in allowing supporting invoices and documentation to be submitted in response to a motion to retax costs.[42] The rule has been stated succinctly: "Initial verification will suffice to establish the reasonable necessity of the costs claimed. There is no *requirement* that copies of bills, invoices, statements, or any other such documents be attached to the memorandum. *Only* if the costs have been put in issue via a motion to tax costs must supporting documentation be submitted" (emphasis added).[43]

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[42] *See, e.g., Women's Federal Sav. and Loan Ass'n of Cleveland v. Nevada Nat'l Bank*, 108 F.R.D. 396, 398 (D. Nev. 1985) (permitting costs where "[t]he receipts, which the Clerk did not have before her when she taxed costs, do document and confirm the representations contained in the affidavit of the plaintiff's counsel. Under these circumstances, the Court chooses to consider the receipts in deciding the motion to retax costs"); *Finchum v. Ford Motor Co.*, 57 F.3d 526, 533-34 (7th Cir. 1995) (affirming the district's court's action in permitting the defendants to revise their claim for costs and "add supporting materials" in their response to a motion objecting to the costs) (citing *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991)).

[43] *Jones v. Dumrichob*, 63 Cal.App.4th 1258, 1267, 74 Cal. Rptr. 2d 607 (Cal. Ct. App. 1998). *Cf. United Teacher Associates Ins. Co. v. Union Labor Life Ins. Co.*, 414 F.3d 558 (5th Cir. 2005) (stating that the fact that the defendant did not precisely itemize its photocopying costs does not undermine the district court's award since defense counsel made the appropriate declaration under penalty of perjury that the costs were "correct" and "necessarily incurred in this action").

Further, in *Albios v. Horizon Communities, Inc.*,[44] after the parties filed their memoranda of costs with the district court, and the parties opposed each other's costs, the district court considered supplements to their motions which supplied additional documentation regarding the costs incurred, permitting the parties to file amended memoranda of costs and fees. On appeal, this Court affirmed the trial court's award of costs. Significantly, this Court made no finding that it was error on the part of the district court to consider documents supporting the costs memoranda after the original memoranda of costs were filed.

Additional California case law recognizes this practice and supports the applicable reasoning. In *Bach v. County of Butte*,[45] the prevailing party filed a memorandum of costs that was verified by the party's attorney of record and recited the requisite statutory oath (essentially the same as Nevada's verification under NRS 18.110).[46] In Bach, the adverse party "claim[ed] the trial court's award of costs was improper since no 'invoices, billings, or statements showing proof of any of the itmes [sic] claim' were attached to the memorandum of costs . . . ."[47] The *Bach* court held that the adverse party had "misrepresented the procedure parties must follow to claim their costs . . . ."[48] The California statutes require

> ...only that the memorandum of costs . . . be filed under verification by the party or its attorney [like NRS 18.110]. There was no requirement that copies of bills, invoices, statements or any other such documents be attached to the memorandum as the . . . [adverse party] erroneously suggested. To the contrary, a properly verified memorandum of costs is considered prima facie evidence that the costs listed in the memorandum were necessarily incurred. Documentation must be submitted only when a party dissatisfied with the costs claimed in the memorandum challenges them by filing a motion to tax costs.[49]

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[44] 22 Nev. 409, 132 P.3d 1022 (2006).

[45] 215 Cal.App.3d 294, 263 Cal. Rptr. 565 (Cal. Ct. App. 1989).

[46] *Id.* at 307.

[47] *Id.*

[48] *Id.*

[49] *Id.* (internal citations omitted). *See,* also, *Nelson v. Anderson,* 72 Cal.App.4th 111, 131, 84 Cal. Rptr. 2d 753 (Cal. Ct. App. 1999) ("[i]f the items appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the [moving party], [citations] and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party]."); *Ladas v. California St. Auto. Assoc.,* 19 Cal.App.4th 761, 774, 23 Cal. Rptr. 2d 810 (Cal. Ct. App. 1993) ("If the

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Therefore, Hyatt's initial Memorandum of Costs was timely filed and verified. The back-up documentation properly met the requirements of NRS 18.005 and 18.110, submitted pursuant to procedures ordered by the District Court in her discretion and followed by the parties. The FTB's Procedural Challenge should also be rejected.

III. THE EXPERT CHALLENGE AND THE TECHNOLOGY CHALLENGE SHOULD BE REJECTED, AS ALLOWANCE OF SUCH COSTS ARE PERMITTED AND WITHIN THE DISTRICT COURT'S DISCRETION

A. Charges for expert witness testimony (the Expert Challenge)

NRS 18.005(5) (emphasis added) allows for:

> 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 the larger fee.*

The District Court properly exercised its discretion to grant a larger fee under the statute, and its decision is reviewed for abuse of discretion.[50] Having been involved in countless pretrial hearings and the trial itself, the District Court was in the best position to evaluate the necessity and reasonableness of the experts used by Hyatt (and experts on the same issues from the FTB).

Here, Respondent retained seven experts whose testimony he reasonably expected would be necessary at trial. The back-up documentation submitted to the District Court shows the costs incurred by each of these experts. The unprecedented nature of this case, where Hyatt was seeking to recover damages for the tortious, bad faith, and fraudulent manner in which the FTB conducted the audits, required extensive expert testimony to assist the jury in understanding: (1) the relationship between the FTB and a taxpayer, along with the responsibilities the FTB has toward the taxpayer; (2) the specific acts taken by the FTB that illustrate that the FTB was

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items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they are not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs."); *Oak Grove School Dist. v. City Title Ins. Co.*, 217 Cal.App.2d 678, 699-700, 32 Cal. Rptr. 288 (Cal. Ct. App. 1963) ("[i]f the correctness of the memorandum is challenged either in whole or in part by the affidavit or other evidence of the contesting party, the burden is then on the party claiming the costs and disbursements to show that the items were for matters *necessarily relevant and material to the issues involved in the action.*" (emphasis in original)).

[50] *See Gilman v. Nevada State Bd. of Veterinary Medical Examiners*, 120 Nev. 263, 272-73, 89 P.3d 1000, 1006-07 (2004); *Arnold v. Mt. Wheeler Power Co.*, 101 Nev. 612, 615, 707 P.2d 1137, 1139 (1985).

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conducting the audit of Hyatt in bad faith; (3) the effect of privacy intrusions on a person's life and well-being; (4) the stereotypical misconceptions that the FTB attempted to exploit during the audit that wealthy individuals live in opulence and extravagance; (5) the calculations of the tax liability, fraud penalties, and interest that the FTB was seeking from Hyatt; and (6) the values and assets of the FTB for the purpose of assessing punitive damages. The following expert input was necessary in this case, and allowance of a larger fee than the $1,500 provided by statute was reasonable and well within the District Court's discretion.

1. **Malcolm Jumelet ($ 886,789.53) and Diane Truly ($ 41,502.19)**

Mr. Jumelet's and Ms. Truly's expert testimony was necessary to assist the jury in understanding the methods utilized by the FTB in conducting the audit, how those methods can be abused, and how they were abused in this case. Mr. Jumelet's testimony further assisted the jury in understanding and debunking the purported analysis claimed by the FTB to support its audit conclusions — ultimately opining that this was the most biased audit he had ever seen in his 27 years working for the FTB and 10 years in private practice representing clients in proceedings against the FTB.[51] This testimony went directly to the issue of whether the FTB conducted the audit in bad faith. Hyatt argued, and the jury clearly agreed, that the FTB conducted the audit in bad faith and used its bad faith conclusions to try to extort a settlement.

The FTB argues that Jumelet's invoices include other expert consultant work performed for Hyatt not directly related to Mr. Jumelet's testimony. However, the invoices and bills included for Mr. Jumelet were only those bills and invoices for Mr. Jumelet's services as an expert and other individuals working at Jumelet's direction to assist him in preparing for his testimony in this case. These invoices do not include any other expert work by PricewaterhouseCoopers, and allowing these invoices was within the District Court's discretion.

Courts have found that the fees for an expert witness' assistant may be recoverable as costs to a prevailing party.[52] An expert's assistant's fees may also be recoverable under NRS

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[51] RT: June 12, 2008, 82:24-83:8.

[52] *E.g., Moore v. Western Forge Corp.*, 192 P.3d 427 (Colo. Ct. App. 2007), *cert. denied*, 2008 WL 4801524 (Colo. 2008). In *Moore*, the trial court had reviewed the expert witness's bill in detail and found the costs associated with the expert's assistant to be reasonable. *Id.* On appeal the Court held as follows, "[w]e first reject Moore's argument

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18.005(17) (formerly NRS 18.005(16). In *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*,[53] the district court awarded PETA $3,561.25 in fees for investigative services. On appeal, this Court stated that "[a]lthough investigative fees are not specifically recoverable pursuant to NRS 18.005, a district court may nonetheless award costs for additional items pursuant to NRS 18.005(16) [now subsection 17] on the condition that such fees are reasonable, necessary and incurred in the action."[54] NRS 18.005(16) [now subsection 17] provides that costs can be allowed for "[a]ny other reasonable and necessary expense incurred in connection with the action . . . ."[55]

2. **Edwin Antolin ($ 152,309.67)**

Mr. Antolin's expert testimony was necessary to assist the jury in understanding the relationship between tax professionals (*i.e.*, accountants and tax attorneys) and the FTB taxing authority and what generally is expected with respect to a taxpayer's cooperation with the FTB during an audit. This testimony went directly to showing that Hyatt's tax professionals cooperated with the FTB, consistent with their duties and responsibilities, refuting the FTB's assertions to the contrary.[56]

3. **Paul G. Schervish ($73,301.33)**

Mr. Schervish's expert testimony was necessary to demonstrate that certain of the FTB's presumptions were false in concluding Hyatt did not move to Nevada as he asserted, and this testimony supported Hyatt's assertion that the FTB was acting in bad faith and attempting to extort a settlement.[57] This testimony assisted the jury in explaining that wealthy people do not

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that the cost award should not have included fees for an expert witness's assistant." *Id.* (citing *In re Estate of Breeden v. Gelfond*, 87 P.3d 167, 174-75 (Cal. Ct. App. 2003), *cert. denied*, 2004 WL 551233 (Colo. 2004) (permitting an award of costs for an expert witness's assistant)); *see also Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395 (2d Cir. 1981) (while reversing on other grounds, noting that the district court had awarded to the plaintiff "the fee for the services of a personnel expert, a statistical expert and his assistants, and costs").

[53] 114 Nev. 1348, 971 P.2d 383 (1998).

[54] *Id.* at 1352, 386.

[55] NRS 18.005(16), now codified as part of NRS 18.005(17).

[56] RT: May 6, 2008, 23:20-107:7, 108-16-123:1, 125:5-133:4, 136:16-142:23.

[57] RT: June 10, 2008, 56:4-57:9, 61:1-62:17, 68:4-20.

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always live an opulent lifestyle and that FTB's conclusions about Hyatt's behavior being unusual was blatantly false and could have only been made by the FTB in bad faith.

4. **Daniel Solove ($79,650.53) and Mari J. Frank ($74,543.69)**

Mr. Solove's and Ms. Frank's expert testimony was necessary to assist the jury in understanding how the FTB's use and publication of Hyatt's social security number and private address, as well as false publication that Hyatt had already been found to be a tax cheat, invaded Hyatt's privacy.[58] Professor Solove's testimony also provided background information regarding the origin and development of information privacy and how the FTB had violated Hyatt's informational privacy rights.[59] Professor Solove also testified as to what could be experienced by someone when their social security number is publicly disseminated,[60] and this provided additional support of Hyatt's emotional distress damages.

5. **George C. Swarts ($17,067.00)**

Mr. Swarts' expert testimony was necessary to assist the jury in understanding the amount of taxes, penalties, and interest being sought by the FTB against Hyatt and how that amount has grown over the 15 plus years the FTB has been pursuing him, from less than $2 million in taxes for the 1991 tax-year in the first proposed assessment issued in 1995, to over $50 million in taxes, penalties, and interest for the 1991 and 1992 tax-years due to the passage of time and additional penalties imposed by the FTB.[61] This evidence assisted the jury in understanding another aspect of the emotional distress that the FTB inflicted upon Hyatt: the exponential growth of the FTB's purported tax bill during the time the FTB was delaying and refusing to bring to conclusion its investigation of Hyatt.[62]

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[58] RT: May 21, 2008, 42:24-50:1, 53:18-59:11; 1 RCA 1 -57.

[59] RT: May 21, 2008, 50:16-53:17.

[60] RT: May 21, 2008, 42:24-50:1.

[61] RT: June 18, 2008, 67:20-75:6.

[62] This testimony simply quantified the benefit to the FTB (and the distress to Hyatt) from the FTB's delay and was not presented as a challenge to the FTB's tax assessment or interest calculations in any manner.

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6. **Kurt Sjoberg ($ 60,056.68)**

Mr. Sjoberg's expert testimony was necessary during the liability phase to explain how the FTB benefits by making large tax assessments, even if those assessments are fraudulent and never collected. He testified that the FTB's budget allocations are based on assessed amounts, not collected amounts.[63] This testimony supported Hyatt's evidence about the use of cost-benefit ratios (CBR) as a motive for the FTB to aggressively pursue a large, non-meritorious case to try to coerce a settlement. Mr. Sjoberg also testified in the punitive damages stage regarding the assets and value of the FTB and its admitted alter ego (the State of California) for the purpose of determining the appropriate amount of punitive damages.[64] This type of financial wealth evidence is typical during a punitive damages phase of a case. In fact, it is the primary evidence taken during this stage of litigation.

In sum, the District Court was fully aware of the complexity of the issues in this case and the unprecedented nature of the claims for damages, necessitating extensive and careful expert testimony to assist the jury in understanding the facts giving rise to Hyatt's claims and damages from the FTB's conduct. Further, the FTB incorrectly asserts that only expert fees for experts who "had been sworn and testified" can be recovered as costs. This Court has held that "calling the witnesses at trial was not a prerequisite to an award of witness fees as costs."[65]

The standard for determining whether expert witness fees for experts can be recovered as costs is not whether the experts were called and testified at trial, but whether "it was reasonably expected that [the witnesses'] attendance would be necessary and [the witnesses] had held [themselves] in readiness to attend."[66]

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[63] RT: April 22, 2008, 69: 8-71:3, 73:3-74:23, 84:2-86:2, 88:22-90:19, 94:4-96:9; April 23, 2008, 88:1-89:22.

[64] RT: August 11, 2008, 85:10-99:16.

[65] *Bergmann v. Boyce*, 109 Nev. 670, 680, 865 P.2d 560, 567 (1993).

[66] *Id.* at 679-80 (quoting *Spanish Action Comm. of Chicago v. City of Chicago*, 811 F.2d 1129, 1138 (7th Cir. 1987). The *Bergmann* court also cited the Eleventh Circuit's ruling that the trial court "abused its discretion by applying a 'blanket rule' that 'no costs shall be awarded for expenses incurred in procuring the presence at trial of witnesses who were not called . . . '" *Id.* at 679 (quoting *Murphy v. City of Flagler Beach*, 761 F.2d 622, 631 (11th Cir. 1985).

Here, the expert witness fees approved by the District Court only include the fees charged by those witnesses whom Hyatt had retained to testify at trial. Respondent reasonably expected that the attendance of these expert witnesses would be necessary at trial and had arranged to have them readily available to testify. Indeed, six out of the eight expert witnesses did testify at trial (Daniel Solove, Paul G. Schervish, Malcolm Jumelet, Edwin P. Antolin, Kurt Sjoberg, and George C. Swarts). The other two witnesses (Mari J. Frank and Diane Truly) were retained to offer testimony at trial and were readily available to testify, but Respondent made a tactical decision to not call either of these witnesses at trial.[67] Respondent should not be penalized for making tactical decisions to economize the time of the trial court.[68]

B. Charges for ZMF (John Eamigh) ($302,779.09) and Tsongas ($147,115.45) (the Technical Challenge)

FTB cites *Bergmann v. Boyce*[69] for the proposition that, as of 1993, the practice of law had not then developed to a point where charges for such trial consultants were necessary. Fifteen years later, the District Court saw the efficiency provided by these professionals, through edited video transcripts and prompt retrieval of exhibits. Changes were made within seconds or minutes, based on the District Court's ruling on objections to video-taped testimony. The District Court concluded that, in the trial of a case of this magnitude, length, complexity, and volume of exhibits and depositions, the efficient use of information technology and graphics professionals is both reasonable and necessary. Indeed, such professional assistance was instrumental in the presentation of this trial.[70] Even if such trial professionals are not necessary in every case in today's litigation practice, they were necessary in this trial, and the District Court exercised its discretion properly to allow them as costs incurred for their services.

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[67] Ms. Truly was paid $51,502.19 for expert witness fees and costs. Ms. Frank was paid $74,543.69 for expert witness fees and costs.

[68] *See Bergmann*, 109 Nev. at 679..

[69] 109 Nev. 670, 856 P.2d 560 (1993).

[70] Here, the FTB also used professionals of similar background and training in the presentation of its case. See *DiBella v. Hopkins*, 407 F. Supp. 2d 537, 540 (S.D.N.Y. 2005) (computers, computer graphics, digitized documents, and other technological advancements have become important tools of the modern-day trial lawyer and a prevailing party should be able to recover their reasonable cost.).

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The modern trend is that courts generally award costs for graphics and technology reasonably incurred to assist the court and the jury to understand the issues in the case. In *Asyst Technologies v. Emtrak Inc.*,[71] the Court awarded a party's costs for exhibits and computer graphics in a case whose procedural history was nearly as extensive as the instant case:

> Jenoptik's exhibits and computer graphics were reasonably necessary to aid the Court and the jury to understand the highly technical and complex issues in this patent case. While $50,000 does seem like a large amount of money to spend on demonstratives, the figure must be viewed in the context of the case, which was so complicated and confusing that *three* appeals to the Federal Circuit were required over ten years before the case finally was resolved. *Id.* (emphasis in original)

Similarly, in *Science Applications Int'l Corp. v. Superior Court*,[72] the trial court awarded the prevailing party costs, including the costs of "graphic exhibit boards," a "document control and database for internal case management," "laser disks 'containing' trial exhibits," and a "graphics communication system . . . ."[73] The California Court of Appeal upheld the trial court's findings that: (1) the graphic exhibit boards and laser disks were "'the modern equivalent to models and blow-ups,' the cost was reasonable and necessary, and using the materials saved trial time"; (2) the document control and database cost "was reasonable and necessary"; and (3) the graphics communication system "reduced the trial time and was reasonable and necessary."[74]

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[71] 2009 WL 668727 (N.D. Cal. 2009).

[72] 39 Cal. App. 4th 1095, 47 Cal. Rptr. 2d 332 (Cal. Ct. App. 1995).

[73] *Id.* at 1099-1104.

[74] *Id.* at 1099; *see also Shum v. Intel Corp.*, 682 F. Supp. 2d 992, 1000 (N.D. Cal. 2009) (holding "[t]he Court concurs with defendants that the case presented complex technical issues and that the jury benefitted at trial from the use of demonstrative evidence," and permitting costs "related to the creation or presentation of demonstrative exhibits," including "in-court technician time and the equipment costs associated therewith"); *Smith and Nephew, Inc. v. Arthrex, Inc.*, 2010 WL 2432358, *2 (E.D. Tex. 2010) (permitting recovery of graphics technicians fees as costs: "This Court requires the parties to present their evidence at trial in a streamlined, orderly, and efficient manner. The use of technology support during trial, particularly in complicated cases such as this case, is an anticipated, useful, and necessary tool to assist in the efficient presentation of cases.

In *Farberware Licensing Co. LLC v. Meyer Marketing*,[75] the Court permitted costs of trial graphics equipment and trial consultants, stating:

> With respect to the trial graphics equipment and trial consultants, who, based on Meyer's invoices, prepared at least the lion's share of the trial graphics presented at trial, I am inclined to agree with Judge Chin's recent pronouncement that "the use of technology to improve the presentation of information to the jury and/or to the bench should be supported" and that "[c]omputers, computer graphics, digitized documents and other technological advancements have become important tools to the modern-day trial lawyer." *Id.* (citing *DiBella v. Hopkins*, 407 F. Supp.2d 537, 540 (S.D.N.Y. 2005)).

In today's modern trial practice, the use of technical and trial consultants has become necessary in both civil and criminal cases, and the District Court's discretion to allow recovery of costs here should be affirmed.

IV. THE CASES CITED BY THE FTB CONFIRM THAT COST AWARDS ARE BASED ON CASE-SPECIFIC FACTS, WITHIN THE DISCRETION OF THE TRIAL COURT AND CONSISTENT WITH APPLICABLE STATUTES.

To support its arguments why specific costs in this case should not have been allowed, the FTB cites to nearly forty cases from federal district and state courts around the country. The FTB repeatedly frames the myriad of cases under the general argument that cost statutes should be strictly construed.[76] If strict construction were the *de jure* and *de facto* policy among courts, then there would be some consistent application of comparable cost statutes. However, the FTB's cases lend no such consistent support to its overall argument, in that a review of the cases does not indicate any strict formula or consistent application of cost statutes. When courts around the country do not agree on bright-line policies for specific cost categories and issues, even under statutes similar to Nevada's, their cases do not represent binding or guiding authority to this Court on what "strict" application should look like, and these decisions are properly left to the discretion of the trial court.

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[75] 2009 WL 5173787, *8 (S.D.N.Y. 2009).

[76] *See* FTB Brief at 18; *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560, 566 (1993) (stating that because costs statutes are in derogation of the common law, they should be strictly construed).

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Many of the FTB's supporting cases lack precedential authority. Further, they highlight the many different ways that courts around the country have ruled when applying cost statutes. Looking at the cases as a whole, there is one point they convey: determining what costs to allow is a fact-specific, case-specific inquiry, and the outcome, although guided by statute, is ultimately a matter within the trial court's sound discretion. The FTB's supporting cases and other cases from the same jurisdictions make a strong argument that, within the parameters of applicable statutes, and regardless of what costs each court allowed and the reasoning to allow or disallow particular costs, the overarching principle is that the trial court has the discretion to determine the reasonableness of specific costs.[77]

The FTB's supporting cases further demonstrate that the ultimate question for a court to exercise its discretion on costs is whether the trial court is sufficiently informed to find the expenses were reasonable, necessary and adequately supported in the particular case, under the applicable statutes.[78] In the nearly forty cases from state and federal courts around the country to which the FTB cites, there is no consistent formula to explain what costs were and were not allowed. This Court can see the wide range of approaches other courts have taken by looking at their treatment of specific issues like the timeliness of memoranda of costs, experts' assistants'

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[77] *See, Albios v. Horizon Communities*, 122 Nev. 409, 132 P.3d 1022, 1037 (2006) (deferring to the lower court's discretion to award costs); *Eberle v. State ex rel. Redfield Trust*, 108 Nev. 587, 589-590, 836 P.2d 67, 69 (1992) (recognizing the court's *sua sponte* discretion to award costs and consider a late memorandum of costs to be timely); *Trustees of Carpenters for S. Nevada Health & Welfare Trust v. Better Bldg. Co.*, 101 Nev. 742, 710 P.2d 1379, 1382-1383 (1985) (deferring to the discretion of the trial court to deny expert witness fees); *Wheeler v. Carlton*, 3:06-CV-68, 2007 WL 1020481, *11 (E.D. Ark. 2007) (citing to *Schering Corp. v. Amgen Inc.*, 198 F.R.D. 422, 428 (D. Del. 2001), which gave trial court discretion to award trial technology costs if the technology materially aided the court's understanding of issues in the case); *Moore v. Western Forge Corp.*, 192 P.3d 427, 439-440 (Colo. Ct. App. 2007), *cert. denied*, 2008 WL 4801524 (Colo. 2008) (allowing expert's assistant's fees under the court's discretion and in disagreement with *Perkins v. Flatiron Structures*, 849 P.2d 832, 836 (Colo. Ct. App. 1992)); *In re Estate of Breeden v. Gelfond*, 87 P.3d 167, 174-75 (Colo. Ct. App. 2003), *cert. denied*, 2004 WL 551233 (Colo. 2004) (allowing expert's assistant's fees under the court's discretion and in disagreement with *Western Fire Truck Inc. v. Emergency One, Inc.*, 134 P.3d 570, 578 (Colo. Ct. App. 2006), and *Perkins v. Flatiron Structures*, 849 P.2d at 836); *Scallet v. Rosenblum*, 176 F.R.D. 522, 526 (W.D. Va. 1997) (allowing costs for copying depositions and reasoning that trial courts have considerable discretion in deciding costs because there are so few rigid rules to dictate their decisions).

[78] *See Bobby Berosini, Ltd. v. People for Ethical Treatment of Animals*, 114 Nev. 1348, 971 P.2d 383, 386 (1998) (denying costs where the court was unable to determine the reasonableness of costs due to lack of documentation); *Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540, 543 (1994) (denying party's office costs because the law firm's practice of charging four percent of attorneys' fees as miscellaneous office costs did not enable to court to determine the reasonableness of those office costs).

fees, technology and consulting fees, online research, non-testifying witness fees, and deposition costs. With so many different applications from various courts, the FTB citations simply reinforce that the District Court's discretion should govern the fact-specific cost items here. The District Court had extensive oversight and involvement in all pre-trial proceedings and the 4-month trial, with first-hand observations of the experts, consultants, and technology contributions to a more-efficient trial.

A. Timeliness of Memoranda of Costs

The FTB's cases show that this Court and other courts across the country may allow or deny late-filed supplementation of costs for various reasons beyond the explicit statutory language.[79] [80] The FTB's cases do not demonstrate a consistent judicial policy disallowing late-filed memoranda of costs. They merely show that courts use discretion to allow or deny late memoranda of costs in varying circumstances. Here, Hyatt's submissions were with the express permission and direction of the District Court and the special master, whose directives were within their discretion, to rule on Hyatt's costs correctly, after a complete review of available materials and the FTB's challenges thereto.

Although explicit statutory compliance is not the *de facto* trend among courts, the FTB cites to *Carson-Tahoe Hospital v. Building Construction Trades Council of N. Nevada*,[81] and

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[79] Nevada cases include *Flamingo Realty, Inc. v. Midwest Development, Inc*, 110 Nev. 984, 992-993, 879 P.2d 69, 74 (1994) (allowing costs where the prevailing party did not file any memoranda of costs, even after stating as dicta that noncompliance with NRS 18.110 is grounds to deny costs); *Valladares v. DMJ, Inc.*, 110 Nev. 1291, 1293-1294, 885 P.2d 580, 582 (1994) (denying supplemental costs for a specific invoice when the party received the invoice after the filing deadline and waited too long to file the invoice with the court); *Eberle v. State ex rel. Redfield Trust*, 108 Nev. 587, 589-590, 836 P.2d at 69 (finding that the five-day requirement under NRS 18.110 was not an absolute requirement and giving the trial court discretion to rule on the merits of a memorandum of costs filed after the statutory deadline); *Henry Products Inc. v. Tarmu*, 114 Nev. 1017, 1020-1021, 967 P.2d 444, 446 (1998) (denying costs in a supplemental bill of costs because the opposing party was not served with the bill of costs, not because supplemental submissions were prohibited); *State ex rel. Wolf v. Justice of Peace*, 47 Nev. 359, 223 P. 821, 821-22 (1924) (denying costs ultimately because the party did not file any memorandum of costs, not because it was filed late).

[80] Cases from other courts include *American Color Graphics, Inc. v. Travelers Prop. Cas. Ins. Co.*, C 04-3518 SBA, 2007 WL 832935, *2 (N.D. Cal. 2007)) (allowing the clerk to require and consider further documentation as necessary to determine allowable costs); *Garcia v. Berkshire Life Ins.*, 04-CV-1619-LTB-BNB, 2008 WL 821805, *3-*4 (D. Colo. 2008) (denying supplemental costs where internal accounting issues prevented the party from filing invoices with the court on time); *Orient Mineral v. Bank of China*, 2:98-CV-238BSJ, 2010 WL 624868, *5 (D. Utah 2010) (allowing a late memorandum of costs due to difficulty arranging foreign documents).

[81] 122 Nev. 218, 128 P.3d 1065, 1067 (2006).

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argues that strict compliance is necessary to avoid stripping statutes of all meaning. This Court in *Carson-Tahoe* supported strict statutory interpretation, but in the context of federal wage statutes.[82] *Carson-Tahoe* did not address any issues related to filing deadlines for taxing costs.

B. Experts' Assistants' Fees

The FTB cites to cases where the court denied costs for experts' assistants. One court denied experts' assistants' fees, but it did so for case-specific reasons, not because of the lack of statutory authority for such fees.[83] The FTB also cites to two Colorado cases which denied experts' assistants' fees, because the particular statute did not allow them.[84] However, this is not a consistent rule in Colorado.[85] Although the FTB argues that explicit interpretation of statutes requires that experts' assistants' fees not be allowed, courts may allow or deny experts' assistants' fees for case-specific reasons beyond statutory application.[86]

Apart from the lack of consistent guidance from the FTB's supporting cases, the FTB relies on other cases where the court denied experts' assistants' fees according to a statutory scheme different from Nevada's.[87] Given the inconsistent treatment of experts' assistants' by different courts, and the FTB's reliance on distinguishable tax court cases, the FTB's supporting cases do not provide significant guidance to this Court on this issue.

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[82] *Id.* at 1067-1068.

[83] *Lawson v. Lapeka, Inc.*, 87-4018-S, 1991 WL 49775, *3 (D. Kan. 1991) (denying fees for expert's assistant primarily because the court had allowed a high expert witness fee and believed the expert fee was sufficient to compensate for the assistant's costs).

[84] *Western Fire Truck Inc. v. Emergency One, Inc.*, 134 P.3d 570, 578 (2006); *Perkins v. Flatiron Structures*, 849 P.2d 832, 836 (1992).

[85] See, *Moore v. Western Forge Corp.*, 192 P.3d at 439-440 (Colo. Ct. App. 2007) and *In re Estate of Breeden v. Gelfond*, 87 P.3d 167, 174-75 (Colo. Ct. App. 2003) (both allowing experts' assistants' fees where the court applied a different statute with a list of allowable costs that was illustrative and not exclusive, similar to NRS 18.005(17), the general provision allowing other necessary and reasonable costs not specifically identified elsewhere).

[86] *Lawson v. Lapeka, Inc.*, 87-4018-S, 1991 WL 49775 at *3.

[87] *Ferche Acquisitions v. County of Benton*, 550 N.W.2d 631 (Minn. 1996) (applying a cost statute that dealt exclusively with tax court appeals); *Huisken Meat Center Inc.*, C8-95-271, 1998 WL 205772 (Minn. Tax 1998) (applying a cost statute that dealt exclusively with property tax appeals).

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C. Technology Costs and Technology Consulting Fees

The key question in considering an award of technology and consulting fees is whether the District Court determines that the technology was reasonably necessary in trying the case. FTB's supporting cases on these issues also do not show a consistent or categorical policy against allowing these expenses as costs. The FTB's supporting cases show that among the highest courts in the country, there is a bias against bright-line rules on technology costs, and a preference for trial courts to grant technology costs on a discretionary basis, according to the reasonableness and necessity of the technology in question.[88]

Rather than show consistent treatment of technology costs and consulting fees across courts, FTB's cases show how courts employ their discretion to decide whether the technology was a reasonably necessary expense in the context of the particular case.[89] The FTB also quotes *Nelson v. Anderson* for the proposition that just because a winning party used cutting edge technology "does not mean that it can automatically pass the high cost of that technology to the other side."[90] However, the FTB did not quote the remainder of the sentence, showing that the court denied technology costs for the case-specific reason that the winning party did not rely on the technology in presenting its case: a party cannot " . . . automatically pass the high cost of [cutting edge] technology to the other side, *especially when it is used only sporadically during the trial, and when many times when counsel attempted to use it, they were unable to and reverted to traditional 'low tech' methods for presenting evidence*" (emphasis added).[91] In its

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[88] *Compare Computer Cache Coherency Corp. v. Intel Corp.*, C-05-01766 RMW, 2009 WL 5114002, *2 (N.D. Cal. 2009) (limiting compensable technology costs by drawing a line between the physical preparation of trial exhibits and the intellectual effort in designing the exhibits), and *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 428 (7th Cir. 2000) (rejecting such a bright-line rule where the Seventh Circuit remanded the case back to the trial court to determine whether the technology equipment was reasonably necessary in conducting the trial).

[89] *In re Turn-Key-Tech Matters*, CV 01-4158 LGB, 2002 WL 32521814 (C.D. Cal. Oct. 15, 2002) (denying technology costs for an unnecessary second computer animation when there was already one computer animation, and the second animation only made minor changes from the first); *Eli Lilly v. Zenith Goldline Pharmaceuticals*, 264 F.Supp. 2d 753, 781 (S.D. Ind. 2003) (denying technology costs for case-specific reasons including that elaborate computer simulations were not necessary in the bench trial, and that the party rented technology equipment which the courtroom already had).

[90] 72 Cal. App. 4th 111,133, 84 Cal. Rptr. 2d 753 (Cal. Ct. App. 1999).

[91] *Id.*

discretion, then, the California Court of Appeals found the technology costs not compensable, because the technology was not reasonably necessary to presenting the case. It did not rule that technology costs were not compensable in every instance. Due to the divergent treatment of technology expenses among courts, the FTB's supporting cases do not categorically deny that technology costs are never taxable as costs. At best, the FTB's cases confirm that it is in the trial court's discretion to allow the recovery of technology expenses found to be reasonably necessary in the context of this case. Judge Walsh performed that evaluation, with the assistance of the special master, and concluded that the use of technology was reasonable, necessary and appropriate in this case.

The fields of trial consulting and jury consulting are well-established professions frequently utilized in high-profile, high-penalty and high-stakes civil and criminal trials across the United States. While once considered not to be necessary tools of litigators,[92] their use has expanded in modern trial practice. Litigators routinely hire trial or jury consultants to assist, even in smaller cases without million-dollar damage claims.[93] Given the widespread utilization of trial consulting in the legal community and the acceptance of the science (psychology, communications, sociology, statistical methods, etc.) at its base, the use of trial consultants or jury consultants has become both reasonable and necessary, especially in a case like this, where both parties expended millions in attorneys' fees and costs in litigating this case.

D. Online Research

Courts around the country disagree whether costs for internet research should be compensated separately or whether they should be included as part of the attorney's fee. NRS 18.005(17) clearly reflects Nevada's policy that such fees can and should be compensable and taxable as costs, and not included as part of an attorney's overhead. The FTB's supporting

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[92] *E.g., Bergmann, supra.,* 109 Nev. at 682.

[93] A 1999 article by Franklin Strier in the journal *Law and Human Behavior* is illustrative: *"No self-respecting trial lawyer will go through the process of jury selection in an important case without the assistance of highly paid trial consultants...It's almost malpractice not to use them."* F. Strier, *Whither Trial Consulting: Issues and Projections,* 23 LAW AND HUMAN BEHAVIOR 93 (1999).

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cases only demonstrate the lack of a consistent treatment of online research among the courts.[94] Although the FTB makes the argument, there is no consensus among courts around the country that internet research costs should be denied categorically. The FTB's supporting cases do not assist this Court on that issue.

E. Fees for Non-Testifying Witness and Expert Witnesses

FTB's cases do not demonstrate a categorical prohibition against awarding costs for non-testifying witnesses by courts around the country.[95] The FTB further argues that it is "well established case law" that an expert witness must testify in trial in order to justify expert witness fees.[96] However, the *Mays* court's statement that experts must testify is *dicta*, supported only by *analogizing* that concept to a single case where costs were not allowed for a medical report acquired in the initial stages of discovery.[97] Although the *Maxwell* court used its discretion to deny costs for the medical report in the context of that case, it does not set out a bright line rule or "well-established case law" to guide the court in the context of this case. The FTB similarly relies on distinguishable case law to support its argument against costs for non-testifying expert witnesses.[98] In *Trustees,* there had been a settlement offer, and the primary disagreement was over what statute should decide the compensable costs. The court's decision to deny costs for a non-testifying expert witness was primarily determined by the decision of what statute to apply, not by the fact that the witness did not testify. Given the disagreement between courts over

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[94] *Gibellini v. Klindt*, 885 P.2d at 542-43 (denying online research costs because they are akin to an attorney fee, prompting the amendment to NRS 18.005); *Bergmann v. Boyce*, 856 P.2d at 566; *Ladas v. California State Auto. Assn.*, 19 Cal. App. 4th 761, 777, 23 Cal. Rptr. 2d 810 (Cal. Ct. App. 1993) (denying computer research costs due to an absence of statutory authority); *Eli Lilly and Co. v. Zenith Goldline Pharmaceuticals*, 264 F. Supp. 2d at 780 (allowing electronic research fees where the trial court found the requested fees to be reasonable).

[95] *See Bergmann v. Boyce*, 856 P.2d at 566 (allowing costs for subpoenaed witnesses who did not attend trial); *Quality-Care USA, Inc. v. Gorenstein Enterprises, Inc.*, 80 C 3927, 1988 WL 33824 (N.D. Ill. 1988), *aff'd*, 874 F2d 431 (7th Cir. 1989) (allowing fees for witness who did not testify in trial); *Green Construction Co. v. Kansas Power & Light*, 153 F.R.D. 670, 679 (D. Kan. 1994) (denying costs for witnesses who did not testify in trial).

[96] FTB Brief at 21, citing *Mays v. Todaro*, 97 Nev. 195, 626 P.2d 260, 263 (1981).

[97] *Id.*; *Maxwell v. Amaral*, 79 Nev. 323, 328, 383 P.2d 365, 368 (1963).

[98] *Trustees of Carpenters for S. Nevada Health & Welfare Trust v. Better Bldg. Co.*, 710 P.2d at 1382-1383. (electing to apply a cost statute that did not allow costs for non-testifying expert witnesses, when the court could have chosen another statute which included those costs).

costs for non-testifying witnesses, there is a lack of authority and guidance for this Court to use in its own determination of costs for witnesses and expert witnesses who did not testify in trial.

F. Video Deposition Costs

The FTB's supporting cases show only inconsistent treatment of video and other deposition costs by courts around the country. [99] But there are a number of cases from federal courts which interpret 28 U.S.C. § 1920(4) and F.R.C.P. 30(b)(2) to allow video deposition costs.[100] The FTB's supporting cases and cases from the same jurisdictions yield no consistent policy denying the various forms of deposition costs. Therefore, the FTB's cases do not provide significant guidance to this Court, when the trial court had the discretion to determine whether those costs should be reasonably allowed under the circumstances of this case after seeing the video depositions used efficiently at trial.

V. CONCLUSION

The decision of what costs to allow is a case-specific, fact-intensive inquiry which requires the trial judge to follow applicable statutes, including whether cost items were reasonable and necessary in the context of the litigation, with the permitted assistance of a special master. The trial court has discretion to perform this inquiry, because it observed the litigation first-hand. This Court and other courts have reached different conclusions on particular costs based upon different fact situations. The voluminous materials presented as part of the Court-approved process show that the District Court properly exercised its discretion and allowed some of Hyatt's requested costs and disallowed other of his-requested costs, consistent with the statutory requirements of NRS Chapter 18.

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[99] *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993), *cert. denied,* 510 U.S. 1195 (1994) (denying costs for video depositions); *Fresenius Med. Care Holdings v. Baxter Int'l, Inc.*, C 03-1431 SBA, 2008 WL 2020533, *6 (N.D. Cal. 2008) (allowing costs for video depositions even where depositions were also transcribed); *Green Construction Co. v. Kansas Power & Light,* 153 F.R.D. 670, 678 (D. Kan. 1994) (denying costs for converting depositions into digital computer files).

[100] *See MEMC Electronic Materials v. Mitsubishi Materials,* C-01-4925 SBA, 2004 WL 5361246, at *3 (N.D. Cal. 2004); *Pioneer Natural Resources USA, Inc. v. Diamond Offshore Drilling, Inc.*, 05-0224, 2009 WL 4020563, *3-*5 (E.D. La. 2009) (allowing "exemplification" costs for the video support in trial because of the complexity of the case); *Garonzik v. Whitman Diner*, 910 F. Supp. 167, 170-72 (D.N.J. 1995).

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **RESPONDENT'S SUPPLEMENTAL ANSWERING 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, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: September 13, 2010.

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Pursuant to NRAP 25, I certify that I am an employee of **KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO** and that on this 13th day of September, 2010, I caused the above and foregoing document entitled **RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF REGARDING COSTS** to be served as follows:

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