

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES FIDELITY &
GUARANTY COMPANY,

Plaintiff,

vs.

LEE INVESTMENTS LLC dba THE
ISLAND, et al.,

Defendants.

No. CV-F-99-5583 OWW/SMS

MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART USF&G'S BILL
OF COSTS (Doc. 896)

United States Fidelity & Guaranty Company, American
Specialty Insurance Services, Inc., and American Specialty Risk
Management, LLC (collectively "USF&G") have filed a Bill of
Costs, seeking to recover the following costs from Lee
Investments, LLC ("Lee"):¹

Fees of the Clerk	\$150.00
Fees for service of summons	

¹USF&G submitted a bill of costs on March 12, 2007 (Docs. 712-716). The bill of costs submitted on August 14, 2009 (Doc. 896), supercedes the earlier bill of costs.

1	and subpoena	\$7,977.22
2	Fees of the court reporter	
3	for all or any part of the	
4	transcript necessarily	
5	obtained for use in the case	\$35,514.80
6	Fees for witnesses	\$11,546.79
7	Fees for exemplification	
8	and copies of papers	
9	necessarily obtained for	
10	use in the case	\$31,842.09
11	Docket fees under 28 U.S.C.	
12	1923	\$20.00
13	Other costs	<u>\$14,335.50</u>
14		\$101,386.40

15 Lee has filed objections to the Bill of Costs, asserting
16 that it should be reduced by \$64,986.64, resulting in a total
17 cost bill of \$36,399.76.

18 A. Fees for Service of Summons and Subpoena.

19 Lee objects to these costs on a number of grounds.

20 1. Deposition Subpoenas.

21 Lee objects to taxing the full costs of deposition subpoenas
22 in this action. Lee contends that the full amount, \$1806.50,
23 should be reduced by half, to \$903.25. In support of this
24 objection, Lee relies on the Declaration of Daniel O. Jamison:

25 2. I have been the lead attorney for Lee in
26 the above captioned matter since
approximately February 2006 and was the lead
attorney for Lee in the January/February 2007
jury trial and the April 2007 court trial in
this case. Since spring 2006, I have also
represented Lee as lead counsel in the
defense of the claim of ... USF&G ... in
California Workers' Compensation Appeals

1 Board ('WCAB') Case No. SB 0288749, entitled
2 *Conley v. The Island, et al.*, that USF&G is
3 entitled to rescind the workers' compensation
4 insurance policy that has been the subject of
5 the above captioned action.

6 3. Since becoming involved in these two
7 matters, I have read most, if not all, of the
8 depositions that were taken in the two cases
9 before I became involved. On the record in
10 several of the depositions, there were
11 stipulations between Lee and USF&G that the
12 deposition would be taken jointly in the two
13 proceedings and could be used in both
14 proceedings. Although USF&G may dispute the
15 application of the stipulation to expert
16 witness depositions, it is and was my
17 understanding that by stipulation and/or
18 notice all of the depositions taken in this
19 action were being taken in both proceedings.

20 4. USF&G's claim for rescission in WCAB Case
21 No. SB 0288749 has not yet been adjudicated
22 before the WCAB. There has been no
23 determination in the WCAB proceeding whether
24 or not USF&G is entitled to rescind the
25 subject insurance policy and no prevailing
26 party has been determined in that proceeding.
At the present time, the above captioned
court has issued an injunction preventing Lee
from seeking to have the WCAB make a
determination whether or not USF&G is
entitled to rescind the subject policy.

18 Exhibit A to Mr. Jamison's Declaration are partial copies of the
19 depositions of Richard Miler, Elaine Bartsch, and Stan Sheehan.

20 The Miler and Bartsch depositions were taken in the Federal
21 action. The Miler deposition states:

22 MR. SMYTH: [¶] Let's put a stipulation on the
23 record. This is going to be used in both -
24 potentially used in the Workers' Compensation
25 and the Federal action, but we'll stipulate
26 that the court reporter is relieved of her
obligations under the California Code of
Civil Procedure with respect to the Workers'
Compensation portion; that the witness can
sign the deposition under penalty of perjury

1 and that if he doesn't sign it within 30 days
2 of having received it for his signature, that
3 a certified copy may be used with the same
4 force and effect as a signed original.

5 The same stipulation was entered into in the Bartsch deposition.

6 In the Sheehan deposition, the following stipulation was entered
7 into:

8 MR SMYTH: Okay, while we were off the record,
9 we discussed the fact that this deposition
10 had been noticed only in the workers'
11 compensation action. We, among the
12 stipulations that I'll propose here ... is
13 that the deposition may be used and should
14 have a duplicate cover page for not only the
15 workers' compensation action, but the federal
16 court action. And that the deposition may be
17 used in ... both the federal court and the
18 workers' compensation action. We
19 additionally propose ... for stipulation that
20 the witness may have 30 days after receipt of
21 the transcript to make any changes as are
22 appropriate and to sign the transcript. And
23 that if a signed copy is not received and
24 copies to the changes provided to counsel and
25 the signature page within 30 days, that a
26 certified copy may be used in all proceedings
in these two matters with the same force and
effect as a ... signed original. This
deposition is being taken in connection with
a case pending in the federal court in
California and in a California workers'
compensation action. To the extent that
there's a stipulation required that the - in
the event that the deponent does not sign the
document in the presence of the court
reporter, the parties stipulate that that
requirement has been relieved and the
deponent may sign the document under penalty
of perjury.

27 The parties so stipulated.

28 Citing *Parkerson v. Borst*, 256 F. 827 (5th Cir.1919), for
29 the proposition that "[u]ntil final judgment, the incidence of
30 costs is not determinable," Lee argues that, because there has

1 been no final determination in the WCAB case, the costs of the
2 depositions should be split between this action and the WCAB
3 case.

4 USF&G responds that Lee's contention that these costs should
5 be halved because the parties agreed that the depositions would
6 be admissible in the WCAB proceeding is without merit:

7 Such costs were incurred in the District
8 Court action. More importantly, the judgment
9 of the District Court under which costs were
awarded constitutes a final judgment
10 resolving USF&G's complaint in all forums and
is res judicata.

11 By Memorandum Decision filed on December 2, 2008, (Doc.
12 864), and by Order filed on December 19, 2008, (Doc.872), the
13 Court ruled that Lee was precluded by res judicata from
14 proceeding with the WCAB action. While this ruling is on appeal
15 to the Ninth Circuit, it nonetheless remains that there is a
16 final Judgment pursuant to Rule 54(b), Federal Rules of Civil
17 Procedure, in this action. Lee's contention that the costs of
18 the deposition subpoenas should be halved because of the
19 possibility that the Ninth Circuit will reverse this Court's
20 rulings has no basis in law. The requested deposition costs are
21 allowed as all three depositions were used in the federal case.

22 2. Witness Subpoenas.

23 Lee argues that the cost of witness subpoenas for those
24 witnesses who did not testify at trial should be disallowed,
25 seeking a reduction of \$934.56. Specifically, Lee objects to the
26 following costs:

Date	Invoice	Vendor	Description	Amount
1/27/07	1621	SoCal Trial Subpoena	Attempt to serve Richard Miler	110.00
1/26/07	1620	SoCal Trial Subpoena	Subpoena of Dawn Wilson	65.63
2/2/07		SoCal Trial Subpoena	Subpoena of Richard Miler & Witness Fee	448.93
2/07/07	1662	SoCal Trial Subpoena	Subpoena of Nathan Hoagland	100.00
2/11/07	1717	SoCal Trial Subpoena	Attempt to serve Mark Stewart	100.00
3/2/07	1718	SoCal Trial Subpoena	Attempt to serve Steve Chadwick	110.00

"In order to award costs for service of subpoenas, the court need only determine whether the subpoenas were reasonable and necessary in light of the facts known at the time of service." *Movitz v. First National Bank of Chicago*, 982 F.Supp. 571, 574 (N.D.Ill.1997), citing *Shea v. Galaxie Lumber & Constr. Co.*, 1997 WL 51655 at *8 (N.D.Ill., Feb. 5, 1997) (costs of service of subpoenas are "recoverable even if the witnesses do not testify at trial; the relevant question is whether the plaintiff 'reasonably believed ... that the testimony would be helpful.'")

USF&G argues that these costs are recoverable, relying on his Declaration of Bruce T. Smyth, counsel for USF&G:

1 3. Three of the witnesses who are the
2 subject of Lee's request for reduction for
3 costs for subpoenas for witnesses who did not
4 testify, Nathan Hoagland, Mark Stewart and
5 Steve Chadwick, were current or former Lee
6 employees who did not testify because they
7 could not be located by the process server.
8 Since they were performing construction work
9 for Lee at the time of the injury to Diana
10 Conley, if we had located them, they would
11 have testified at trial. The other witness,
12 Richard Miler, a former Lee employee, would
13 have been called to testify except that the
14 testimony of another Lee witness, Lisa
15 Ehrlich, covered the same topics. Miler also
16 could have been called as a witness dependent
17 on the testimony introduced in Lee's case for
18 its defense or counterclaims.

19 Fees for service of potential trial witness subpoenas are
20 not made inadmissible if the witness is not called to testify if
21 it was necessary that the witness be available to give relevant
22 testimony. USF&G makes no showing that Miler's testimony was not
23 cumulative. Miler's witness and subpoena fees are disallowed.
24 USF&G has demonstrated that the fees of the other challenged
25 witnesses were necessary.

26 USF&G is allowed costs of \$7,418.29.

27 B. Fees of Court Reporter.

28 1. Motion and Trial Transcripts.

29 Lee seeks disallowance of \$11,269.35 of the \$35,514.80 of
30 costs of the court reporters, which pertain to daily trial
31 transcripts and motion hearing transcripts. Lee notes that USF&G
32 did not obtain prior court approval for these transcripts and did
33 not obtain Lee's agreement that some or all of the costs of daily

1 transcripts would be a recoverable cost by the prevailing party.²

2 Lee seeks disallowance of the following costs:

3

Date	Invoice	Vendor	Description	Amount
4 4/29/02	17738	VARs	COD for transcript of hearing on motion to compel discovery	286.00
5				
6				
7				
8 5/1/02	51	Shavavian Crump	Transcript of hearing	57.00
9 5/20/02	990462	Robert R. Molezzo	Transcript of motion to dismiss amended complaint	68.00
10				
11				
12 1/2/07	2814	Petrilla Reporting	Hearing transcript	441.60
13 1/04/07	31290	Karen Lopez	Hearing transcript 11/20/06	489.50
14				
15 1/17/07	20070013	Karen Lopez	Hearing transcript	17.97
16 1/19/07	31290	Peggy Crawford	Hearing transcript	764.50
17				
18 1/19/07	31290	Karen Lopez	Motions in limine hearing transcript	1,034.36
19				
20 2/7/07		Peggy Crawford	Trial transcript	501.62
21				

22

23 ²Although Lee notes that the Eastern District of California's Local Rules of Practice do not require prior Court approval for a daily transcript, Lee refers to the local rules for the Northern and Central Districts of California and the District of Arizona, which provide that the cost of daily transcripts are not regularly taxable without prior court approval or stipulation by the parties. The local rules of other jurisdictions have no application or relevance in the Eastern District of California.

24

25

26

1	2/13/07		Peggy Crawford	Trial transcript	637.40
2					
3	2/16/07		Peggy Crawford	Trial transcript	46.20
4	2/16/07		Karen Lopez	Trial transcript	222.44
5	2/21/07		Peggy Crawford	Trial transcript	110.00
6					
7	2/21/07		Karen Lopez	Trial transcript	96.80
8	3/26/07	20070047	Karen Lopez	Hearing transcript	27.39
9	3/26/07	03232007C	Peggy Crawford	Hearing transcript	47.31
10	4/1/07	04012007A	Peggy Crawford	Trial transcript	62.50
11	4/4/07	041122007A	Peggy Crawford	Trial transcript	1,949.20
12	5/31/07	53107	Peggy Crawford	Trial transcript	2,522.64
13	6/1/07	20070085	Karen Lopez	Trial transcript	1,840.92
14	11/5/08	3333	Petrilla Reporting	Hearing transcript	45.80

18 28 U.S.C. § 1920(2) allows taxation of "[f]ees for printed
19 or electronically recorded transcripts necessarily obtained for
20 use in the case." As explained in Wright, Miller & Kane, Federal
21 Practice and Procedure: Civil 3d § 3677, pp. 438-440:

22 The basic standard applied by the courts in
23 determining whether to allow the expense of a
24 transcript as a taxable cost is whether the
25 transcript was 'necessarily obtained for use
26 in the case.' This does not mean that the
transcript must have been 'indispensable' to
the litigation to satisfy this test; it
simply must have been 'necessary' to
counsel's effective performance or the

1 court's handling of the case. The transcript
2 may have been procured either for use at the
3 trial or after the trial. But the words 'use
4 in the case' in Section 1920 mean that the
5 transcript must have a direct relationship to
6 the determination and result of the trial.
7 Taxation will not be allowed if the
8 transcript was procured primarily for
9 counsel's convenience.

10 "As a general rule, daily trial transcript costs should not
11 be awarded absent court approval prior to the trial ... However,
12 a District Court may overlook the lack of prior approval if the
13 case is complex and the transcripts proved invaluable to both the
14 counsel and the court." *Manildra Mill. Corp. v. Ogilvie Mills,
15 Inc.*, 76 F.3d 1178, 1184 (Fed.Cir.1996); *see also Maris
16 Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1226
17 (11th Cir.2002), *cert. denied*, 537 U.S. 1190 (2003):

18 Although we do not believe that the costs
19 associated with expedited trial transcripts
20 should be allowed as a matter of course, lest
21 litigation costs be unnecessarily increased,
22 the district court found that expedited
23 transcripts were necessary in this case given
24 its length and complexity. Under the
25 circumstances, we cannot say that the
26 district court clearly abused its discretion
by reaching this conclusion.

27 *But see Battenfield of America Holding Co., Inc. v. Baird*, 196
28 F.R.D. 613, 618 (D.Kan.2000):

29 While the court expresses no opinion as to
30 whether daily copy was necessary for counsel
31 at trial, the court is in the best position
32 to assess the value of the daily copy to it
33 ... Suffice it to say, daily copy was not
34 necessary for the court's handling of the
35 case ... The court cannot recall any
36 occasions in which it even looked to daily
copy for guidance in analyzing an evidentiary
issue. While daily copy may have aided the

1 parties in resolving various disputes amongst
2 themselves, the court is fairly confident
3 that it could have resolved those issues for
4 the parties in the absence of daily copy. In
5 short, this case was neither so complex nor
6 so lengthy as to justify imposing such
7 'special costs' on BKD.

8 In arguing that the challenged costs should be allowed,
9 USF&G relies on Mr. Smyth's Declaration:

10 4. The trial and hearing transcripts
11 referenced in Exhibit 3 to the cost bill were
12 utilized for motions to the Court prior to
13 and during trial and for preparation for
14 motions for judgment and closing argument
15

16 5. Most of the trial transcript costs to
17 which Lee objects included only selected
18 portions of testimony utilized for trial or
19 specific hearings necessary for preparation
20 of motions before the Court. The first
21 challenged hearing transcript, for April 29,
22 2002, was the transcript of the hearing
23 before Magistrate Judge Snyder on motions by
24 USF&G to compel further responses by Lee to
25 interrogatories. The transcript of the
26 hearing was necessary to understand the scope
of the Court's rulings. The next challenged
transcript, for May 1, 2002, was for the
hearing on the motions for summary judgment.
The transcript obtained for May 20, 2002,
concerned the 2000 motion by USF&G to dismiss
the amended counterclaim.

6. The next series of transcripts which Lee
challenges, dated January 2, 4, 17 and 19,
2007, are for transcripts of the hearings
before the Court on November 13 and 20, 2006
and on the hearings on the motions in limine
on January 17 and 18, 2007. Those
transcripts were necessary to understand the
Court's rulings on key issues concerning the
pretrial proceedings, and in particular, on
the motions in limine. Indeed, the parties
agreed to split the costs of the transcript
of the hearing on motions in limine three
separate ways, in order to prepare orders on
the motions and to understand the scope of

1 the Court's rulings in order to instruct
2 witnesses as to the scope of their testimony
3 and to conduct examination and cross-
4 examination.

5 7. The next series of transcripts which Lee
6 challenges all involve portions of relevant
7 testimony and statements in the case,
8 invoices dated February 1, 13, 16, 21, and
9 March 26 and April 1, 2007. All of those
10 invoices were provided for extremely limited
11 portions of the trial or testimony, such as
12 opening statements, the hearings on the Rule
13 50 motions and copies of specific testimony.
14 In most cases, the invoices were for copies
15 of testimony ordered by *other* parties, Lee or
16 Aon. All of these costs were necessarily
17 incurred in the trial. In the case of copies
18 of transcripts ordered by other parties, the
19 copies were necessary to prepare responses to
20 the issues likely raised by other parties in
21 the testimony. For example, if other parties
22 intended to raise issues before the Court
23 based on the trial testimony, USF&G required
24 its own copy to verify the correctness and
25 immediate context of the testimony cited.
26 Portions of the opening statements and
transcripts of the testimony of Lee's key
witness, Lisa Ehrlich, were needed for
preparation of closing argument and cross-
examination.

8. The April 7, 2007 invoice, for a copy of
the transcript of the April 4-6 trial, was
necessary for the preparation of proposed
Findings of Fact and Conclusions of Law for
submission to the Court.

9. The charges in invoices for May 31, 2007
and June 1, 2007, were for USF&G's copies of
the transcripts of the entire trial obtained
by Lee in connection with its appeal.
Although such copies would be needed in the
appeal, USF&G obtained the copies in response
to any portions of those transcripts which
might be referenced by Lee in any future
trial of other trial phases, although the
other phase issues were subsequently resolved
by summary judgment.

10. The invoice dated November 5, 2008 was

1 for USF&G's copy of the hearing on its motion
2 for summary judgment on the remaining of
3 Lee's claims in its counterclaim and that of
4 the Rexford Parties (as well as of the motion
5 for injunction) and were needed in case of a
6 challenge to the Court's rulings.

7 Based on the standards set forth above, the transcripts for
8 April 29, 2002, May 1, 2002, May 20, 2002, and November 5, 2008,
9 were not necessarily obtained for use in the case. All of these
10 transcripts were hearings on motions that were subsequently
11 resolved by Court orders and USF&G provides no valid reasons why
12 the transcripts were necessary after the motions were taken under
13 submission. These costs, totaling \$458.80, are disallowed.

14 The transcripts of the hearings on the motions in limine and
15 the partial transcripts of the jury trial and the court trial
16 were necessarily obtained for use in the case. The motions in
17 limine were voluminous and complex and counsel was required to
18 submit proposed orders based on the Court's oral rulings. Both
19 the jury trial and the Court trial involved complicated issues
20 and, as to the Court trial, the transcript was necessary to
21 prepare Findings of Fact and Conclusions of Law.

22 However, the cost of the entire trial transcript described
23 in paragraph 9 of Mr. Smyth's declaration has not been shown to
24 have been necessarily obtained for use in the case because the
25 remaining issues in the case were resolved by summary judgment
26 motions. Mr. Smyth's declaration makes clear that these costs
were incurred on the possibility that reference to them might
become necessary. These costs, totaling \$4,363.56, are

1 disallowed.

2 2. Deposition Transcripts.

3 Lee objects to the \$24,245.80 in costs for deposition
4 transcripts.

5 Lee argues that only half of these costs should be taxed
6 because of the stipulation that the depositions could be used in
7 both the Federal action and the WCAB action.

8 For the reasons stated above, Lee's objection is without
9 merit.

10 Lee contends that \$1,681.85 of these costs should be
11 disallowed because certain of the depositions were taken purely
12 for investigative purposes and not for trial preparation:

DATE	INVOICE	DESCRIPTION	AMOUNT
9/29/00	85747	Mark Stewart	388.50
8/09/01	97523ELA	Richard Miler	796.45
4/3/02	85312	Deborah Long	269.80
4/26/02	85615	D. Wilson	74.80
4/30/02	17738	Pamela Lilly	152.30

13
14
15
16
17
18
19 In response, USF&G relies on Mr. Smyth's Declaration:

20 11. Although Lee has asserted that costs of
21 the transcripts of the depositions it
22 challenges were not necessarily taken in
23 preparation for trial, portions of the
24 deposition testimony of Debra Long, Dawn
25 Wilson and Richard Miler were designated for
26 trial in the designation of transcripts filed
with the Court by USF&G. Lee counter-
designated substantial portions of that
testimony

This averment is substantiated by Exhibit A to Mr. Smyth's

1 declaration. In addition, Mr. Smyth avers:

2 12. Although Lee complains that the costs of
3 the transcripts ... were not prepared for
4 trial, as to the depositions of Debra Long,
5 Dawn Wilson and Pamela Lilly, those
6 depositions were all noticed by Lee in this
7 matter.

8 That Lee noticed the depositions of Debra Long and Pamela Lilly
9 is substantiated by Exhibit B to Mr. Smyth's Declaration. Mr.

10 Smyth further avers:

11 13. Although Lee objects to the costs of
12 transcripts of Mark Stewart and Richard
13 Miler, both were employed by Lee or
14 affiliated entities. Mr. Stewart had
15 responsibility for construction in the water
16 park. We did not call him as a witness
17 because we were unable to serve him with a
18 subpoena and because we subsequently
19 determined that his testimony would be
20 duplicative of that of Bruce Calomires, who
21 did testify. Mr. Miler was knowledgeable
22 about the payment of water park construction
23 expenses and of water park construction
24 employees. USF&G was prepared to call him at
25 trial and in fact had subpoenaed him for
26 testimony, but determined that his testimony
would be duplicative of that of Lisa Ehrlich
after she testified.

18 Deposition transcripts are taxable as costs under 28 U.S.C.
19 § 1920(2). Here, from the record, all of the challenged
20 depositions were taken for trial preparation. Lee's challenge is
21 disallowed.

22 USF&G is awarded costs for fees of the court reporter in the
23 amount of \$30,692.44.

24 C. Fees for Witnesses.

25 1. Directors or Officers of American Specialty.

26 Lee objects to the taxation of fees for the following

1 witnesses on the ground that each is an officer or director of
2 American Specialty:

3 Witness	Amount
4 Stan Sheehan (senior vice-president & 5 chief underwriting officer)	1,800.49
6 Dan Weir (chief financial officer)	1,362.38
7 Lowell Gratigny (senior vice- president of litigation)	1,800.87

8 Parties are generally not able to recover witness fees for
9 their own trial attendance. *Barber v. Ruth*, 7 F.3d 636, 646 (th
10 Cir.1993). Lee contends that, where a party is a corporation,
11 generally its officers or directors are required to be present at
12 trial as the corporation's representative or to manage the
13 litigation. Citing *Kemart Corporation v. Printing Arts Research*
14 *Lab.*, 232 F.2d 897, 901-902 (9th Cir.1956), Lee asserts that, if
15 such representatives are personally involved in the litigation,
16 the cost to attend the trial should not be recoverable.

17 In *Kemart*, the Ninth Circuit adopted the reasoning of
18 *Perlman v. Feldmann*, 116 F.Supp. 102, 115 (D.Conn.1953), which
19 allowed witness fees as costs for corporate officers:

20 'No recovery [in the action to which they
21 were called as witnesses] was sought from
22 them individually; their interest was not
23 shown to be other than the natural concern of
24 an officer for the welfare of his
25 corporation. The Clerk's ruling [allowing
the fees] was amply supported by the cases
which he cited ... Though these were
admiralty cases the principle involved is
equally applicable to the situation here.

26 See also *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, 2007

1 WL 512428 at *9 (E.D.Cal., Feb. 12, 2007) ("[I]t is proper for the
2 court to assess witness fees for directors and officers of a
3 corporate party who are not personally involved in the
4 litigation.")

5 In response to Lee's objections, Mr. Smyth avers:

6 14. Although Lee seeks to exclude some of
7 the costs of witnesses who were also officers
8 of American Specialty, USF&G seeks recovery
9 only for the costs where those witnesses
10 testified or were made available for
11 testimony. Both Dan Weir and Stan Sheehan
12 testified during the trial. Although Lowell
13 Gratigny attended large portions of the
14 trial, the only expenses submitted are those
15 for which he was available for testimony,
16 after having been subpoenaed for his trial
17 testimony by Lee. Although it was ultimately
18 determined that he need not testify, Mr.
19 Gratigny was available for testimony.

20 Here, none of these witnesses was personally involved in
21 this action; none were named as parties. Lee's objection is
22 without merit.

23 Although not raised by Lee in its objections to USF&G's bill
24 of costs, several of the witness fee costs sought by USF&G exceed
25 the amounts allowed by Section 1920(3) and 28 U.S.C. § 1821.

26 Stan Sheehan is listed on Exhibit 4 as attending the trial
for two days, incurring a total witness fee of \$80.00. However,
Exhibit 4 seeks subsistence (hotel/meals) for seven days in the
amount of \$1,133.49. The Minutes of the jury trial show that
Stan Sheehan testified in the jury trial on February 7, 2007
(Doc. 627). Exhibit 4 shows that Mr. Sheehan arrived in Fresno
on February 1, 2007 and departed on February 9, 2007. USF&G is

1 entitled to the witness fee for the two days sought in the bill
2 of costs pursuant to 28 U.S.C. § 1821(b):

3 A witness shall be paid an attendance fee of
4 \$40 per day for each day's attendance. A
5 witness shall also be paid the attendance fee
6 for the time necessarily occupied in going to
 and returning from the place of attendance at
 the beginning and end of such attendance or
 at any time during such attendance.

7 Section 1821(d) provides for a subsistence allowance to a witness
8 "when an overnight stay is required at the place of attendance
9 because such place is so far removed from the residence of such
10 witness as to prohibit return thereto from day to day" "in an
11 amount not to exceed the maximum per diem allowance prescribed by
12 the Administrator of General Services." In 2007, the GSA per
13 diem for Fresno, California was \$79 for lodging and \$54 for meals
14 and entertainment. USF&G is entitled to costs for lodging and
15 meals for Mr. Sheehan in the total amount of \$266.00. USF&G is
16 allowed costs of \$1,013.00 for Mr. Sheehan's attendance at trial
17 as a witness, disallowing \$876.00 of the \$1,880.00 in costs
18 sought by the bill of costs.

19 Dan Weir is listed on Exhibit 4 as attending the trial for
20 one day, incurring a total witness fee of \$40.00; Exhibit 4 seeks
21 subsistence for three days in the amount of \$489.79. Mr. Weir
22 testified in the jury trial on February 9, 2007. (Doc. 629)
23 Exhibit 4 includes a hotel bill for the Radisson Hotel,
24 Indianapolis Airport for the night of February 7, 2007 (\$142.60).
25 Mr. Weir arrived in Fresno on February 8, 2007 and departed on
26 February 9, 2007. USF&G is entitled to the cost of Mr. Weir's

1 witness fee, lodging in the amount of \$158 and meals in the
2 amount of \$32.66 (the actual costs sought). USF&G is allowed
3 costs of \$1,066.25, disallowing \$566.13 of the \$1,362.38 in costs
4 sought by the bill of costs.

5 Lowell Gratigny is listed on Exhibit 4 as attending the
6 trial for one day, incurring a witness fee of \$40.00; Exhibit 4
7 seeks subsistence for four days in the amount of \$727.46.
8 Exhibit 4 establishes that Mr. Gratigny submitted hotel bills for
9 only three nights. USF&G is entitled to lodging costs in the
10 amount of \$237 ($\79×3) and meals costs in the amount of \$179.62
11 (the actual costs sought). USF&G is allowed costs of \$1,540.03,
12 disallowing \$350.84 in costs sought by the bill of costs.

13 The costs for lodging for Jack Zygnier are reduced from
14 \$352.28 to \$158.00 ($\$79 \times 2$) and for meals from \$230.45 to,
15 \$162.00 ($\54×3). USF&G is allowed costs of \$642.90,
16 disallowing \$262.73 in costs sought by the bill of costs.

17 As to the costs for Kathy Hacker, Ms. Hacker testified on
18 Friday, February 2, 2007 (Doc. 618) and on Tuesday, February 6,
19 2007 (Doc. 625). Exhibit 4 describes costs for hotel and meals
20 for six days (January 29, 2007, January 30, 2007, January 31,
21 2007, February 1, 2007, February 5, 2007 and February 6, 2007).
22 Costs for hotel and meals on January 29-31, 2007 are disallowed.
23 \$237.00 for hotels on February 1, 5, and 6, 2007 are allowed.
24 Costs for food in the amount of \$56.43 (actual amount) are
25 allowed. USF&G is allowed costs \$3,293.81, disallowing \$643.97
26 in costs sought by the bill of costs.

1 2. Expert Witnesses.

2 Lee objects to the witness fees for Bennett Bibel (\$192.00)
3 and Stan Sheehan (\$1,800.49) on the ground that these were expert
4 witnesses who were not appearing as such pursuant to contract,
5 statute, or appointment by the Court. Therefore, Lee contends,
6 these witness fees must be limited to the \$40.00 per day fee paid
7 to other fact witnesses, citing 28 U.S.C. § 1920(6); *Crawford*
8 *Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).

9 Exhibit 4 to USF&G cost bill establishes that Bibel was paid
10 a total of \$80 for two days attendance at trial and \$112.00 for
11 one day's stay at a hotel. The cost for the hotel is reduced to
12 \$79.00. Costs of \$159.00 are allowed.

13 As to Mr. Sheehan, Mr. Smyth avers:

14 15. Although Lee objects to the recovery of
15 the expenses of Mr. Sheehan incurred in
16 connection with his testimony on the
17 additional ground that in testifying as a
18 percipient witnesses he also testified as an
19 expert on the areas of his percipient
20 testimony, as a key witness to the
21 circumstances under which the worker's [sic]
22 compensation policy was issued, he would have
23 testified to the facts even if his testimony
24 as an expert had been excluded.

25 Lee's objection is meritless. USF&G is entitled to recover
26 the costs set forth above for Mr. Sheehan's attendance at trial.

 USF&G is awarded fees for witnesses in the amount of
\$8,814.12.

 D. Copying Costs.

 Lee objects to the \$31,842.09 in copying costs on several
grounds.

1 28 U.S.C. § 1920(4) enables the Court to allow copying costs
2 for any document "necessarily obtained for use in the case" and
3 does not specifically require that the copied document be
4 introduced into the record to be an allowable cost. *Haagen-Dazs*
5 *Co., Inc. v. Double Rainbow Gourmet Ice Cream, Inc.*, 920 F.2d
6 587, 588 (9th Cir.1990). "Fees for exemplification and copying
7 'are permitted only for the physical preparation and duplication
8 of documents, not the intellectual effort involved in their
9 preparation.'" *Zuill v. Shanahan*, 80 F.3d 1366, 1371 (9th
10 Cir.1996), *cert. denied*, 519 U.S. 1090 (1997), quoting *Romero v.*
11 *City of Pomona*, 883 F.2d 1418, 1428 (9th Cir.1989). Expert
12 research expenses incurred in assembling and preparing the
13 content of exhibits are not recoverable costs. *Romero, id.*³

14 Lee asserts that "the majority of USF&G's requests for
15 copies are without any reference or description as to what the
16 copy charges were incurred for or whether they are related to
17 this case" and that "Lee cannot discern whether the copy charges

18
19 ³Lee cites *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 892 (5th
20 Cir.1993) as stating, "The mere recitation with talismanic
21 regularity of the phrase 'necessarily obtained for use in the case'
22 is not sufficient ... Some further showing is necessary." However,
23 there is no such statement in *Coats*. Lee also cites *Haroco, Inc.*
24 *v. American Nat'l Bank & Trust Co. of Chicago*, 38 F.3d 1429, 1441
25 (7th Cir.1994), as holding that expenses for copies made solely for
26 the convenience of counsel or the litigant's own use are not
recoverable. *Haroco* does not so hold.
Lee also cites *M.T. Bonk Co. v. Milton Bradley Co.*, 849 F.2d 1404,
1410 (7th Cir.1991) for the proposition that copying costs may be
disallowed when there is no indication whether the charges were in
connection with pleadings, correspondence or other documentation in
the case or were for USF&G's counsel's own convenience. Again, the
case does not support Lee's contention.

1 were for USF&G's counsel [sic] own convenience."

2 Lee further objects to \$10,649.12 of the \$31,842.09 copying
3 costs on the ground that USF&G has not substantiated that these
4 costs were for copies of papers necessarily obtained for use in
5 the case. Lee specifically objects to the following costs:

Date	Invoice	Description	Amount
9/27/99	10480	Outside Document Reproductions Complex	601.05
10/8/99	10480	Outside Document Reproductions Complex	654.21
10/25/99	10480	Outside Document Reproductions Complex	101.40
11/8/05	CC-14004	Copying and binding of various documents	132.21
11/28/06	CC-144108	Heavy Litigation Copies	276.77
11/30/06	282303-1	Document copy	138.03
1/18/07	CC-26311	Heavy Litigation Copies	212.25
1/11/07	CC-26132	Medium Litigation Copies	416.75
12/20/06	CC-25698	Heavy Litigation Copies	71.45
12/29/06	CC-25852	Medium Litigation Copies	261.88
12/30/06	CC-25864	Medium Litigation Copies	792.45
12/31/06	CC-25891	Medium Litigation Copies	517.91
1/9/07	CC-26105	Heavy Litigation Copies	149.22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

2/2/07	23849	Heavy Litigation Copies	354.80
2/2/07	9514	Printing Costs	1,028.30
2/5/07	9517	Imaging, Printing & CD creation	381.97
2/5/07	9521	Imaging, Printing & CD creation	109.10
2/6/07	9526	Imaging, Printing & CD creation	110.22
2/8/07	9536	Imaging, Printing & CD creation	138.26
2/15/07	29460	Messenger Service to Secretary of State	153.00
2/16/07	24039	Heavy Litigation Copies	170.68
2/25/07	CC-26476	PDF, CD creating, Blowbacks	51.00
1/30/07	29314	Messenger Service Dept. of Assessment and Taxation for USF&G corporate records	294.70
1/31/07		Certificate of Status via Internet of USF&G	40.00
1/19/07		Expedited copies of Articles of Incorporation of USF&G	79.00
2/27/07	466131	Meeting with Bruce Smyth to get case overview and discuss options for graphics (2 hrs @ \$195/hr)	390.00
2/2/07	466131	Prepared first draft of graphics	780.00

		and scanned key documents for use in slides (4 hrs @ \$195/hr)	
2/2/07	466131	Met with B. Smyth to review graphics (1 hr @ \$195/hr)	195.00
2/2/07	466131	Continued work on slides (1 hr @ \$195/hr)	195.00
2/2/07	466131	Met at client's office to revise graphics; continued work back at office (4.5 hrs @ \$195/hr)	877.50
2/2/07	466131	GoPal revised slides per client's notes	395.00
2/2/07	466131	Revised slides/timeline (3 hrs @ \$195/hr)	585.00

In response, USF&G relies on Mr. Smyth's Declaration:

17. All of the copying and exemplification costs set forth in Exhibit 5 were incurred by the counsel for USF&G and American Specialty in connection with the litigation of the case. The 'litigants,' American Specialty and USF&G, are located in Indiana and the East Coast and have their own copying facilities for their own use. The costs of copying in-house at Charlston, Revich & Wollitz LLP and through outside vendors, where necessary, were incurred to obtain copies of documents from Lee Investments, Rexford Properties, Aon Risk Services, GAB and Diana Conley and providing service and filing copies regarding the various and numerous motions filed by USF&G and American Specialty and in opposition to Lee's various

1 motions

2 18. Although Lee challenges the copy charges
3 as improperly including fees paid to experts
4 for intellectual efforts in assembling and
5 preparing the copies, the costs sought are at
6 the in-house rate of \$.10 per page or the
7 actual charges of the copy service vendors
8 for the physical preparation and duplication
9 of documents.

10 19. Exhibit 5 also includes the cost of
11 obtaining certified copies of the articles of
12 incorporation of USF&G from the Maryland
13 Department of Assessment and Taxation to
14 establish that USF&G was in fact incorporated
15 in the State of Maryland. Although the
16 status of incorporation of USF&G in the State
17 of Maryland was determined from reliable
18 computerized research records, Lee refused to
19 accept that computerized information and
20 required USF&G to incur the expenses of
21 obtaining articles of incorporation on an
22 expedited basis and obtain copies.

23 20. Exhibit 5 also included sums included
24 for the preparation of a timeline of events
25 utilized in USF&G's opening and closing
26 statements and referred to during the trial
and provided to the jury as well as for the
preparation of graphics setting forth the
relations of the parties from Paulson
Reporting. USF&G has sought recovery only
for the costs of the expenses utilized to
prepare and revise the presentation slides
and subsequently [sic] documentary timeline
in the sum of \$3,412.50, and not the full
expenses of that vendor.

21 21. Although Lee objects to the in-house
22 charges for copies, the charges that reflect
23 the copying costs which were in fact charged
24 to USF&G and American Specialty in this
25 matter, for copies of documents produced,
26 pleadings, motions, service copies and
exhibits. The largest portion of the in-
house copy charges were incurred in the
filing and service of motions, pleadings and
deposition designations with this Court and
filings and exhibits utilized during the jury
trial. Thus, large charges were incurred

1 with the pre-trial motions including USF&G's
2 motion in limine to resolve the case, motions
3 to strike USF&G's affirmative defenses and
4 its motion to dismiss the counterclaim of
Rexford Parties. See charges dated 9/28/2006
for \$343.00 and 10/30/2006 for \$960.00 (for a
total of \$1,303.00).

5 22. The next large group of charges centers
6 on the designation of deposition transcripts,
7 the preparation of drafts and responses
8 regarding the pretrial order and the briefing
9 in support of and oppositions to almost 40
10 motions in limine. See in-house charges
11 dated 12/27/2006 for \$202.40, \$217.70,
12 \$448.70, and \$12.80 (for a total of \$886.60).
13 The next grouping of charges for in-house
14 copies all took place for work shortly before
the trial and includes copies of trial
exhibits, trial briefs and copies of
deposition transcripts. See charges dated
1/29/2007 for \$10.00, \$155.30, \$231.70,
\$6.80, \$553.10, \$2.00 and \$1652.40 and charge
dated 2/28/2007 for \$906.50 (for a total of
\$3,517.80). As a result, the in-house
copying charges in connection with the jury
trial total \$5,707.40 alone.

15 23. The final large grouping of costs were
16 incurred in connection with the April 4-6,
17 2007 bench trial, the preparation of proposed
18 findings of fact and conclusions of law and
19 the responses to Lee's various motions to
amend the judgment and for new trial. See
in-house copy charges dated 3/28/2007 for
\$294.60 and 4/26/2007 for \$289.40 (for a
total of \$584.00).

20 24. Although Lee contends that various of
21 the changes of the outside vendors could have
22 been used for other purposes, the records of
23 those invoices demonstrates that such costs
24 were in fact incurred in obtaining documents
25 from third parties in the case or for trial.
26 While in some circumstances, the charges or
billing invoices do not set forth the
specific documents copied, other available
information establishes that the copies were
necessarily made in and for the litigation in
the case. For example, the entries for
October 8, 1999 and October 25, 1999 for

1 outside document reproductions, were incurred
2 at the time I worked on the production of
3 documents for USF&G to Lee and reviewed
4 documents produced by Lee.

5 25. Other document copying costs for outside
6 services, such as those for November 8, 2005
7 and November 28, 2006, December 20, 29, 30
8 and 31, 2006, were ordered by my legal
9 assistants at the time, Carsi Beechler and
10 Anna Tom. Other charges, dated January 18,
11 2007 and January 9, 2007, reference documents
12 bearing a 'U' prefix, the prefix utilized for
13 USF&G trial exhibits in exchanges of
14 documents among the parties. The entries for
15 January 11, 2007 were ordered by the
16 paralegal assigned only to the trial of the
17 case, Tom Hayden. One charge, dated February
18 2, 2007, was a copy charge for GAB Robbins
19 documents by another attorney in this office,
20 Chad Wooten, in connection with documents
21 obtained for use at trial. The invoices for
22 February 2, 5, 6, and 8, 2007 were costs of
23 copying in connection with the trial of this
24 matter ordered by the temporary trial
25 assistant, Jan Williams, located out of the
26 temporary Fresno office utilized by USF&G's
counsel during the pendency of the trial.

1 The litigation involved an extended time period, a
2 construction project, and an injured employee who incurred over
3 \$1,000,000 in medical expenses. There were three sides to the
4 case and a large volume of documents. Because the copying costs
5 were limited to 10¢ per page and all parties needed voluminous
6 documents to prepare for and to try the case, the copying costs
7 have not been shown to unnecessary or excessive. These costs are
8 allowed.

9 USF&G is awarded copying costs in the amount of \$31,842.09.

10 E. OTHER COSTS.

11 Lee objects to \$9,070.50 of the \$14,335.50 of "other costs"

1 listed on the bill of costs. These costs are expert witness fees
2 of Arthur Levine on April 25, 2006 (\$2,655.00), June 2, 2006
3 (\$2,065.00), June 20, 2006 (\$3,613.00, and September 9, 2006
4 (\$737.50). Lee asserts that Dr. Levine was not a court-appointed
5 expert nor was he authorized pursuant to any statute and that
6 these costs should be entirely disallowed. See 28 U.S.C. §
7 1920(6); *Crawford Fitting Co.*, *supra*, 482 U.S. at 442.

8 In response, USF&G relies on Mr. Smyth's Declaration:

9 24. USF&G and American Specialty also seek
10 the recovery in the interest of justice of
11 all, or at least part, of the expert witness
12 fees paid to Arthur Levine for his deposition
13 testimony, a sum which totaled \$9,071.25. In
14 the case, USF&G and American Specialty were
15 unfairly forced to incur these fees to take
16 extremely lengthy depositions of Dr. Levine
17 necessitated by his repeated changes to his
18 testimony and his lengthy, exhaustive and
19 exhausting testimony about topics which were
20 not properly the subject of expert testimony.
21 In the limited circumstances when such
22 testimony might be admissible, Dr. Levine's
23 testimony was so obviously biased and lacking
24 in reasonable foundation that it had no
25 probative value. Most of the topics of Dr.
26 Levine's testimony were excluded by this
Court on the motion in limine of USF&G and
American Specialty. In the limited areas
where Dr. Levine did testify, his testimony
was inherently unbelievable and involved
simply the biased taking of a side in
litigation rather than appropriate testimony
of an expert. USF&G respectfully request the
award of all or at least a portion of the
expert witness fees they were compelled to
pay in order to elicit largely inadmissible,
biased and inherently unbelievable testimony
of Dr. Levine.

USF&G cites no authority permitting the Court to award these
costs in the interests of justice and none has been found.

1 *Crawford Fitting* and Section 1920(6) preclude allowance of these
2 other costs. These costs are disallowed.

3 CONCLUSION

4 For the reasons stated, USF&G's Bill of Costs is taxed at
5 the amount of \$78,936.94.

6 IT IS SO ORDERED.

7 Dated: August 2, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26