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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

COMPASS BANK, an Alabama
banking corporation, d/b/a “BBVA
COMPASS,”

Plaintiff,

v.

MORRIS CERULLO WORLD
EVANGELISM, a California
corporation,

Defendant.

Case No. 13-cv-654-BAS-WVG

ORDER:

**(1) DENYING DEFENDANT’S
MOTION TO RETAX COSTS
[ECF NO. 313]; AND**

**(2) GRANTING IN PART
PLAINTIFF’S MOTION TO
RETAX COSTS [ECF NO. 314]**

AND RELATED CROSS-ACTIONS

I. INTRODUCTION

After trial, Plaintiff and Counter-Defendant Compass Bank filed a Bill of Costs seeking recovery of costs as the prevailing party in the amount of \$32,161.41. (ECF No. 300). Morris Cerullo World Evangelical (“MCWE”) filed an objection to the Bill of Costs (ECF No. 309), and the Clerk taxed costs in the amount of \$12,847.99. (ECF No. 311). Both parties now move to retax costs. MCWE argues that no costs should have been taxed as Compass Bank was not the prevailing party and had unclean hands

1 because of discovery abuses (ECF No. 313). Compass Bank seeks an additional
2 amount of \$3324.30 for witness fees and deposition transcripts. (ECF No. 314). As
3 discussed below, the Court finds Compass Bank is entitled to costs as the prevailing
4 party, and is entitled to an additional amount of \$3166.01. Therefore, the Court
5 **GRANTS IN PART** Compass Bank’s Motion to retax costs (ECF No. 314) and
6 **DENIES** MCWE’s Motion to retax costs (ECF No. 313).

7 **II. STATEMENT OF FACTS**

8 Compass Bank brought this declaratory relief action under 28 U.S.C. § 2201(a)
9 against MCWE to declare that a \$5.2 million standby letter of credit purportedly
10 issued by Compass Bank and held by MCWE was fraudulent and unenforceable.
11 (ECF No. 1). MCWE answered and countersued Compass Bank along with third-
12 party defendants Larry Sorenson, Christopher Hammatt, and Jack Wilkinson. (ECF
13 No. 6). MCWE proceeded to trial against Compass Bank on causes of action for
14 breach of contract and promissory estoppel. (ECF No. 31).

15 Following a Bench Trial, this Court found in favor of Compass Bank on its
16 declaratory relief action, and in favor of Compass Bank and against MCWE on its
17 counter-claims for breach of contract and promissory estoppel.

18 During the course of the litigation, the Court sanctioned Compass Bank for
19 discovery violations. (ECF 166, 292).

20 **III. ANALYSIS**

21 Out of the original \$32,161.41 requested by Compass Bank, the Clerk of the
22 Court taxed costs in the amount of \$12,847.99. (ECF No. 300, 311). MCWE filed
23 objections indicating it did not object to the amount of the costs taxed by the Clerk,
24 but to the fact that costs were awarded at all. (ECF No. 313). Compass Bank’s Motion
25 to retax only objected to \$3,324.30 not awarded. (ECF No. 314). Following this
26 Court’s local rules, the Court will only consider the rulings of the Clerk to which the
27 parties have objected. *See* Civ. L.R. 54.1(h)(2) (“A motion to retax must particularly
28 specify the ruling of the clerk excepted to and no others will be considered at the

1 hearing.”).

2 **A. MCWE’s Objections**

3 First, MCWE objects to the characterization of Compass Bank as the
4 prevailing party. Under Rule 54(d)(1) of the Federal Rules of Civil Procedure, “costs
5 other than attorneys’ fees shall be allowed as of course to the prevailing party...” To
6 be considered the prevailing party, a party must receive some affirmative relief. *See*
7 *Tunison v. Continental Airlines Corp., Inc.*, 162 F.3d 1187, 1190 (D.C. Cir. 1998).
8 As articulated by the U.S. Supreme Court, a plaintiff “prevails” “when actual relief
9 on the merits of his claim materially alters the legal relationship between the parties
10 by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”
11 *Farrar v. Hobby*, 506, U.S. 103, 111–12 (1992). “[A] material alteration of the legal
12 relationship occurs [when] the plaintiff becomes entitled to enforce a judgment,
13 consent decree or settlement against the defendant. In these situations, the legal
14 relationship is altered because the plaintiff can force the defendant to do something
15 he otherwise would not have to do.” *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118
16 (9th Cir. 2000) (internal citation omitted). A party can be the “prevailing party” based
17 solely on injunctive relief; monetary relief is not required. *Id.*

18 In this case, Compass Bank filed a complaint for declaratory relief seeking a
19 court judgment that a \$5.2 million standby letter of credit purportedly issued by
20 Compass Bank and held by MCWE was fraudulent and unenforceable. (ECF No. 1).
21 Compass Bank was successful in this declaratory relief action. MCWE countersued
22 Compass Bank and proceeded to trial against Compass Bank on causes of action for
23 breach of contract and promissory estoppel. (ECF No. 6, 31). Compass Bank was
24 successful in these counter-claims as well. The Court granted Compass Bank’s
25 request for declaratory relief and entered judgment for Compass Bank and against
26 MCWE on its counter-claims for breach of contract and promissory estoppel. (ECF
27 No. 295). The resulting judgment altered the legal relationship between Compass
28 Bank and MCWE because Compass Bank became entitled to enforce its requested

1 declaratory judgment against MCWE and because MCWE’s attempts to force
2 Compass Bank to pay \$5.2 million on the letter of credit were unsuccessful. Under
3 Rule 54(d)(1), Compass Bank is entitled to recover costs as the “prevailing party.”
4 The fact that MCWE may have prevailed against other defendants, even a defendant
5 who was an ex-Compass Bank employee, is irrelevant to the issue of who prevailed
6 in the action between Compass Bank and MCWE. Between these two parties,
7 Compass Bank was the prevailing party.

8 Next MCWE asks the Court, in its discretion, to decline to award costs in light
9 of Compass Bank’s dilatory tactics during discovery. During the course of this
10 litigation, Magistrate Judge Gallo, in an order affirmed by this Court, granted
11 MCWE’s motion for evidentiary and monetary sanctions finding Compass Bank had
12 “wilfully engaged in the spoliation of relevant evidence” and “demonstrated a pattern
13 of recalcitrant behavior during discovery in this litigation.” (ECF No. 166). The court
14 granted an evidentiary adverse inference against Compass Bank and awarded
15 monetary damages to MCWE. (ECF No. 166). MCWE now argues that this conduct
16 warrants additional sanctions in the nature of denying costs to Compass Bank. The
17 Court disagrees.

18 First, the Court finds the sanction originally ordered was sufficient. Second, to
19 the extent MCWE is arguing that there were additional discovery violations in that:
20 (1) Compass Bank suppressed evidence of an internal investigation into the Century
21 letter of credit and (2) analyzed recordings in preparation for trial that it failed to turn
22 over to MCWE, as discussed in the Order denying Sanctions filed simultaneously
23 with this Order, this Court finds there is no evidence to support these additional
24 allegations of discovery abuse.

25 Finally, to the extent MCWE argues that attempting to subpoena and/or depose
26 Morris Cerullo and Louis Galuppo was done in bad faith, the Court again disagrees.
27 Both were key witnesses in the case. MCWE reserved the right to rely on an advice
28 of counsel defense and Morris Cerullo was a witness to the key meetings in the case.

1 Therefore, deposing and/or subpoenaing each as a witness was not done in bad faith.

2 **B. Compass Bank’s Objections**

3 Compass Bank requests that the following additional amounts be taxed: (1)
4 \$2548.16 for the costs of deposition transcripts for Frank Hicks, Burton McCullough,
5 Paul Honeycutt, Brenton Gee, Bonnie Karow and Andy Castro; (2) \$413.70 for
6 standard service of process fees for deposition subpoenas served on Andy Castro,
7 Christopher Hammatt, Jack Wilkinson, Union Bank, Lisa Mora and Louis Galuppo;
8 (3) \$160.05 for mileage reflected in witness fees offered and taken pursuant to
9 deposition subpoenas by Andy Castro, Christopher Hammatt, Jack Wilkinson, and
10 Lisa Mora; and (4) \$202.39 for mileage fees offered and taken by witnesses served
11 with trial subpoenas including Louis Galuppo, Jack Wilkinson, Morris Cerullo and
12 Roger Artz, for a total of \$3,324.30. The Court will address each of these requests in
13 turn.

14 **1. Deposition Transcripts**

15 The cost of an original and one copy of any deposition is recoverable as costs
16 even if the deposition is not introduced in evidence or used at trial “so long as at the
17 time it was taken it could reasonably be expected that the deposition would be used
18 for trial preparation, rather than mere discovery.” Civ. L.R. 54.1(b)(3). Compass
19 Bank seeks recovery for the deposition transcripts of Frank Hicks, Burton
20 McCullough, Paul Honeycutt, Brenton Gee, Bonnie Karow and Andy Castro. The
21 Clerk denied these costs pursuant to Local Rule 54.1(b)(3)(b) which provides “[i]f
22 both video and stenographic depositions are taken, they both will be allowed as costs
23 only if the video deposition is used at trial. The cost of electronic versions is
24 recoverable.” However, Compass Bank’s Motion to Retax costs clarifies that these
25 depositions were not videotaped and the amount sought is strictly for an electronic
26 version of the transcripts. Therefore, to the extent the clerk denied the costs of the
27 deposition transcripts for these witnesses believing they were the costs of video
28 recordings, in light of Compass Bank’s clarification, the Court finds these costs

1 should now be included.

2 In addition, at the time the original cost bill was submitted, Compass Bank
3 failed to provide a breakdown of what was included in the costs submitted for the
4 deposition of Andy Castro. Compass Bank now submits an invoice decreasing the
5 original amount requested, and asking for reimbursement of only \$859.71 for the
6 deposition transcript of Castro. The invoice submitted supports this request. (ECF
7 No. 314-3, Exh. B).

8 MCWE argues that, with the exception of Brenton Gee, none of these
9 witnesses testified at trial and thus these witnesses were purely investigatory.
10 However, all of these witnesses were on the final pretrial order as potential witnesses.
11 Frank Hicks and Burton McCullough were both potential expert witnesses retained
12 specifically to testify at trial. (ECF No. 261). Paul Honeycutt was “expected to
13 provide testimony consistent with his deposition concerning (1) Wilkinson’s
14 employment history with Compass; (2) the termination of Wilkinson’s employment
15 with Compass; (3) policies and procedures.” *Id.* Bonnie Karow was:

16 expected to provide testimony consistent with her deposition concerning:
17 (1) Compass’ investigation of Wilkinson; (2) Compass’ investigation of
18 Christopher Hammatt and the Purported LOC; (3) conversations between
19 Ms. Karow and other witnesses to this litigation; and (4) the Secret
Services’ investigation of Christopher Hammatt.

20 *Id.* And Andy Castro was:

21 expected to provide testimony consistent with his deposition concerning:
22 (1) his business dealing and transactions with Hammatt and MCWE; (2)
23 his business relationship with Hammatt; (3) his retention of Hammatt to
24 provide legal representation and the subsequent termination of said
25 representation; (4) the knowledge of the Jade statute (“Jade”) and
26 discussion with Hammatt concerning the Jade; (5) conversations with
27 MCWE and its representatives concerning the Subject Loan transaction
28 and the Jade; and (6) conversations with MCWE’s undersigned counsel
concerning the Subject Loan Transaction and the Jade.

Id. At the time these witnesses’ depositions were taken, it could reasonably be
expected that their depositions would be used for trial preparation, rather than mere

1 discovery. Therefore, the costs of the deposition transcripts are recoverable. *See* Civ.
2 L.R. 54.1(b)(3).

3 **2. Standard Service of Process Fees**

4 In its original Motion to Tax Costs, Compass sought reimbursement for
5 priority and same day service of process fees. The Clerk denied this request.
6 Compass now submits a request for reimbursement of \$68.95 for regular service of
7 deposition subpoenas on Castro, Hammatt, Wilkinson, Union Bank, Mora and
8 Galuppo, despite the fact that it expended higher amounts for priority and same day
9 service. (ECF No. 314). Compass Bank provides invoices supporting this request.
10 (ECF No. 314-3, Exh. D; 314-3 Exh. C, pgs. 9, 11, 13, 15; ECF No. 300-2, pgs. 49,
11 54.)

12 Fees for service of process, including the costs for service of subpoenas are
13 taxable. *See* Civ. L.R. 54.1(b)(1). Fees for expedited service are allowable only if the
14 Court ordered service to be effected on an expedited basis. *Id.* Since the Court did
15 not order that service be effected on an expedited basis in this case, the Clerk was
16 correct to deny the original request. However, the Court finds the Motion to Retax
17 Costs, reducing the amount requested to the standard service of process fees, is
18 appropriate, and the Court will grant Compass Bank's motion on these grounds.

19 MCWE argues that these service of process fees are not recoverable because
20 these witnesses never testified at trial. However, the subpoenas were not for trial
21 attendance but for attendance at depositions. With the exception of Galuppo and
22 Union Bank, all of these witnesses attended a deposition. Therefore, the costs for
23 service of subpoenas to compel their attendance at the deposition are recoverable.
24 With respect to Galuppo, as discussed above, he was a necessary witness because
25 MCWE had indicated it may be relying on the advice of counsel as a defense.
26 Therefore, Compass Bank was entitled to depose MCWE's counsel to determine
27 what advice he gave to MCWE. The fact that MCWE then decided to withdraw the
28 defense of counsel defense, rather than waive the attorney-client privilege, does not

1 undermine the fact that Compass Bank was within its rights to subpoena a necessary
2 witness for a deposition, and is entitled to recover the costs of serving this witness
3 with a subpoena. Likewise, Compass Bank served Union Bank with a subpoena for
4 production of records. The costs of serving this subpoena are recoverable under Rule
5 54.1.

6 **3. Mileage Fees for Witnesses Attending Depositions or Trial**

7 Compass Bank submitted witness fees tendered and accepted by witnesses
8 attending either depositions (Castro, Hammatt, Wilkinson and Mora) or trial
9 (Galuppo, Wilkinson, Cerullo and Artz). The Clerk disallowed any amounts over the
10 standard \$40.00 witness fees. Compass Bank now submits additional documentation
11 reflecting the fact that each of these witnesses was tendered and accepted a witness
12 fee that included mileage reimbursement from the place in which the subpoena was
13 served to the place of either the deposition or the courthouse.

14 Fees paid to a witness, including mileage, subsistence and attendance fees are
15 recoverable as costs so long as the fees are provided to witnesses subpoenaed who
16 actually attend the proceedings. *See* Civ. L.R. 54.1(b)(4)(a). Such fees are taxable
17 even though the witness does not take the stand at the trial provided the witness
18 necessarily attends court. *See* Civ. L.R. 54.1(b)(4)(b). In this case, witness fees,
19 including mileage tendered to Castro, Hammatt, Wilkinson and Mora for their
20 attendance at depositions, was reimburseable. Thus, Compass Bank's motion to retax
21 the additional mileage amounts of \$160.05 is granted.

22 Compass is also entitled to the mileage tendered and accepted to Wilkinson
23 and Artz for their attendance at trial. Although Wilkinson was not actually called, he
24 did attend court and was ordered back. However, the parties eventually concluded
25 that his testimony would not be needed. Nonetheless, Compass Bank may obtain
26 costs for these two witnesses, who both attended court. On the other hand, neither
27 Galuppo nor Cerullo was compelled to attend court as a witness. Although Galuppo
28 was present at counsel table, it was resolved before the trial began that MCWE would


1 not be relying on a defense of counsel defense, and thus Galuppo was not required to
2 attend as a witness. Cerullo never attended court as a witness, and thus his fee is not
3 recoverable. Therefore, the Clerk's award of \$40.00 for each of these two witnesses
4 was in error. The Court denies Compass Bank's request to add mileage fees for these
5 two witnesses, and deducts \$80.00 awarded by the clerk in error.

6 **IV. CONCLUSION & ORDER**

7 For the foregoing reasons, the Court **DENIES** MCWE's Motion to Retax
8 Costs (ECF No. 313). The Court grants in part and denies in part Compass Bank's
9 Motion to Retax Costs (ECF No. 314). Additional costs are granted in the amounts
10 of: (1) \$2,548.16 for deposition transcripts; (2) \$413.70 for standard service of
11 process fees for service of deposition subpoenas; (3) \$160.05 mileage fees tendered
12 to witnesses for attendance at depositions; and (4) \$124.10 for mileage fees tendered
13 to Wilkinson and Artz for their attendance at trial. The Court declines to award
14 mileage fees in the amount of \$78.29 for Galuppo and Cerullo who were not required
15 to testify at trial, and the Court further finds that the \$80.00 in witness fees for these
16 two witnesses was awarded by the Clerk in error. Therefore, the Court **GRANTS**
17 Compass Bank's Motion to Retax costs in the additional amount of \$3166.01 above
18 the amount ordered by the Clerk of \$12,847.99, for a total costs bill of \$16,014.00.

19
20 **IT IS SO ORDERED.**

21
22 **DATED: December 9, 2015**

23 
24 **Hon. Cynthia Bashant**
25 **United States District Judge**