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15 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF TEHAMA**

17 CALIFORNIA OAK FOUNDATION,
a non-profit organization,

18
19 Petitioner and Plaintiff,
vs.

20 COUNTY OF TEHAMA; TEHAMA
COUNTY BOARD OF SUPERVISORS; and
21 DOES 1 - 20,

22 Respondents and Defendants.

23 DEL WEBB CALIFORNIA CORP.; PULTE
HOME CORPORATION; NINE MILE HILL
24 INVESTMENT COMPANY, INC.; NOBY
VENTURE, LLC; DOES 21-40.

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26 Real Parties in Interest.
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28

FILED
SUPERIOR COURT OF CALIFORNIA

DEC 03 2007

COUNTY OF TEHAMA, CORNING BRANCH
IRENE RODRIGUEZ, CLERK OF THE COURT
BY **Angela S. Kiefer**, DEPUTY

CASE NO. 58258
[Hon. Richard Scheuler, Judge]

**REAL PARTIES' OPPOSITION TO
PETITIONER'S MOTION TO TAX
COSTS**

**[CODE OF CIVIL PROCEDURE
SECTIONS 1032 AND 1033.5]**

Hearing Date: December 18, 2007

Hearing Time: 11:00 AM

Department: 4

Action Filed: November 16, 2006

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

3 Real Parties-in-Interest Del Webb California Corp. and Pulte Home Corporation
4 (collectively, "Real Party") timely filed a Memorandum of Costs, requesting that this Court enter
5 a cost award in their favor in the amount of \$31,303.96.¹ Petitioner has challenged many of Real
6 Party's costs, and alleges that Real Party is only entitled to recover \$1,089.97 of its costs; or only
7 3.5% of the costs Real Party actually incurred. *See* Memorandum of Points and Authorities in
8 Support of Petitioner's Motion to Tax Real Parties' Costs ("Petitioner's P's & A's").

9 In support of its Memorandum of Costs, Real Party files contemporaneously herewith the
10 declarations of Richard S. Zeilenga, Samuel E. Gasowski, Darth K. Vaughn and Marc Shapiro.
11 All of the exhibits to which this Opposition cites are attached to the declaration of Richard S.
12 Zeilenga; and all of the back-up documents (receipts, invoices, etc.) supporting Real Party's
13 Memorandum of Costs are provided in Exhibit A to Mr. Zeilenga's declaration.

14 Most of the \$31,303.96 in costs incurred by Real Party in this matter are recoverable as a
15 matter of right, and the remainder are recoverable pursuant to this Court's discretion. All of the
16 \$31,303.96 in costs were reasonable in amount and were "reasonably necessary" to the conduct of
17 the instant litigation, involving a voluminous 41-volume record, and complex evidence regarding
18 financial feasibility of highway and oak woodland mitigation. Code of Civil Procedure section
19 1033.5(c)(2) and (3). No portion of the Real Party's costs were "merely convenient or beneficial"
20 to the preparation of this matter. *Id.*

21 **II. ARGUMENT.**

22 A. Real Party is the Prevailing Party and is Entitled to Recover Its Costs Under Code
23 of Civil Procedure section 1032(b) in the Amount of \$31,303.96.

24 Code of Civil Procedure section 1032(b) provides that a prevailing party is entitled to
25 recover its costs as a matter of right. In its Memorandum of Points and Authorities, Petitioner

26 _____
27 ¹ This overall amount, when compared to the amount Real Party initially sought in its Memorandum of Costs, has
28 been reduced by \$27.75. Since the filing of its Memorandum of Costs, Real Party discovered it received a 5%
discount for its September 28, 2007 car rental, which resulted in a \$27.75 credit on its American Express bill. *See*
Exhibit A to the Declaration of Mr. Richard S. Zeilenga, line item no. 33 and Tab No. 21.

1 does not contest the fact that Real Party is the prevailing party, nor does Petitioner generally
2 challenge the fact that Real Party is entitled to recover its costs – other than a strained argument
3 that Real Party's Cost Memorandum was untimely filed. Rather, Petitioner only challenges the
4 amounts of certain cost items and alleges that certain, specific costs are not recoverable.

5 B. Real Party's Memorandum of Costs Was Timely Filed.

6 California Rule of Court 3.1700(a) provides that the prevailing party must serve and file
7 its memorandum of costs within "15 days after the date of mailing of the notice of entry of
8 judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of
9 service of written notice of entry of judgment or dismissal, or within 180 days after entry of
10 judgment, whichever is first. (Emphasis added). Here, no Notice of Entry of Judgment was ever
11 served, and therefore, the triggering event for the filing deadline for Real Party's Memorandum of
12 Costs is the Court's entry of a final Judgment; and, under 3.1700(a), that event provides for a
13 filing deadline of 180 days.² 180 days from the Court's October 12, 2007 entry of Judgment is
14 April 10, 2007. Therefore, Real Party's November 2, 2007 service, and its November 5, 2007
15 filing of its Memorandum of Costs is – if anything – exceedingly early.

16 Petitioner makes the strained argument that the clerk's mailing of the Court's Judgment is
17 the same as a Notice of Entry of Judgment triggering the time period in California Rule of Court
18 3.1700(a). *See* Petitioner's P's & A's, p. 2, lns. 24-25. Petitioner is wrong. This very issue -- i.e.
19 whether a clerk's mailing of a file-stamped copy of the court's judgment constitutes a Notice of
20 Entry of Judgment – has been decided by the California Supreme Court. *See Van Beurden Ins.*
21 *Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 64. In
22 *Van Beurden*, the Supreme Court stated that "to qualify as a notice of entry of judgment under
23 Code of Civil Procedure section 664.5, the clerk's mailed notice must affirmatively state that it
24 was given 'upon order by the court' or 'under section 664.5.'" (Emphasis added). *Accord*, Wegner

25 _____
26 ² It is important to note that here, it is a legal and factual impossibility for either party to serve a Notice of Entry of
27 Judgment. The Judgment has not yet been finalized, and is subject to a currently pending motion to correct the
28 proposed judgment. Upon the Court's entry of the Judgment, Real Party quickly requested that the Court make some
revisions to the Judgment, which request is to be heard on December 4, 2007. Given Real Party's request, it would
have been premature for the Real Party or the Clerk to file a Notice of Entry of Judgment under Code of Civil
Procedure section 664.5, until *after* the Court has issued its ruling for that December 4, 2007 hearing.

1 et al., Cal Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) ¶17:86.3, *citing to*
2 *Van Beurden*, and explaining that the court may order the clerk to file a notice of entry of
3 judgment, but to so qualify, the clerk must affirmatively state the nature of the notice by stating
4 thereon that it was given "upon order by the court" or "under section 664.5." (A copy of § 17.86.3
5 of the Rutter Group Practice Guide is attached hereto for the Court's ease of reference.) *See also*
6 *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 259 (2006).
7 ("The 14-page minute order with the notice of entry language on page 13 does not comply with
8 the literal requirement that the document providing notice of entry be so entitled.") (Emphasis
9 added).

10 Here, the mailed copy of the Court's Judgment does not state that that it was filed "upon
11 order by the court" or "under section 664.5." As such, according to the California Supreme
12 Court, the Courts of Appeal and the practice guides, it does not technically constitute Notice of
13 Entry of Judgment.

14 Moreover, had the Judicial Council *intended* that the clerk's mailing of the Court's
15 Judgment be the same as a Notice of Entry of Judgment, it would have so stated in Rule 3.1700.
16 *Compare*, for example, Rules of Court, Rule 8.104, which governs the time for filing an appeal.
17 Rule 8.104 provides that a notice of appeal must be filed by the earlier of:

18
19 (1) 60 days after the superior court clerk mails . . . a document entitled 'Notice of
Entry' of judgment or a file-stamped copy of the judgment, . . .

20 (2) 60 days after the party filing the notice of appeal serves or is served by a party
21 with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of
the judgment, . . . ; or

22 (3) 180 days after entry of judgment. (Emphasis added).

23 In other words, when the Judicial Council intends to have either a Notice of Entry of
24 Judgment or a file-stamped copy of a Judgment trigger a deadline, it has so stated. It has long
25 been the law that statutes are interpreted by their plain, literal meaning. *See People v. Howard*
26 (2002) 100 Cal.App.4th 94, 97. ("In determining legislative intent, a court begins with the actual
27 words of the statute because they are generally the most reliable indicator of intent. Our inquiry
28 ends if the words of a statute are clear and unambiguous. The plain meaning of the statute

1 governs and there is no need for judicial construction." [Citations Omitted]).

2 The Judicial Council did not provide for the either/or arrangement that it used in Rule
3 8.104 (which governs the appeal period) in Rule 3.1700 (which governs the prevailing party's
4 memorandum of costs), which means, as a matter of statutory construction, the difference was
5 intentional. Here, the rule is clear – the deadline for filing a Memorandum of Costs, when no
6 Notice of Entry of Judgment has been served – is 180 days from the entry of Judgment, or April
7 10, 2007.

8 Even if Petitioner's argument had merit – which it does not – the Court has broad
9 discretion to extend the filing deadline associated with a Memorandum of Costs by up to 30 days.
10 See Rule of Court 3.1700(b)(3) ("court may extend the times for serving and filing the cost
11 memorandum . . . for a period not to exceed 30 days"); and *Jones v. John Crane, Inc.* (2005) 132
12 Cal.App.4th 990, 1012 (court has discretion to excuse untimely filing). To the extent that Real
13 Party did make a calendaring error – which, according to the Supreme Court and the clear
14 language in Rule 3.1700, it did not – the Court clearly has the discretion to extend the deadline by
15 up to 30 days. Here, Petitioner is objecting, in the context of the service date, to the difference of
16 one day; November 1 vs. November 2; and, in the context of the Court's filing date, four days;
17 November 1, 2007 vs. November 5, 2007. Clearly such a short time period raises no issue of
18 prejudice for petitioner. See *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380
19 (holding that, in the absence of prejudice, court was within its discretion to allow defendants to
20 file cost bill five days after statutory deadline).³

21 Real Party respectfully requests that the Court make its finding in the alternative; i.e.,
22 finding that Real Party's Memorandum of Costs was timely filed because no formal Notice of
23 Entry of Judgment has been served by the Clerk and/or, alternatively, that the Court exercises its
24 broad discretion under Rule 3.1700(b)(3) to extend the filing and service deadline by 4 days
25 making Petitioner's objection moot. Given the work involved in preparing the Memorandum of
26 Costs, such a short extension of time is more than justified here, where there is no prejudice to
27

28 ³ The Court can, of course, also grant an extension of up to 6 months under Code of Civil Procedure section 473(b).

1 Petitioner. See Declaration of Samuel E. Gasowski ("Gasowski Decl."), ¶ 5.

2 C. Costs Incurred by Real Party were Both Reasonable In Amount and Reasonably
3 Necessary to the Conduct of the Litigation; They Were Not "Merely Convenient or
4 Beneficial" to its Preparation.

5 Code of Civil Procedure section 1033.5 explains what types of costs are recoverable under
6 section 1032. 1033.5(a) lists various items that are allowable, and subsection (b) lists various
7 items that are not. Subsection (c) provides, *inter alia*, that all allowable costs shall be
8 "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial
9 to its preparation" and that all "[a]llowable costs shall be reasonable in amount." 1033.5(c)(2)
10 and (c)(3), respectively. Subsection 1033.5(c)(4) provides a "catch-all" cost provision, which
11 explains that any cost "[i]tems not mentioned in [section 1033.5 which are] . . . assessed upon
12 application may be allowed or denied in the court's discretion." In sum, if an item is provided for
13 in 1033.5(a), it is recoverable as a matter of right. If it is not, and it is not specifically proscribed
14 under 1033.5(b), it still may be recoverable, subject to the court's discretion. See *El Dorado Meat*
15 *Co. v. Yosemite Meat and Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 616.

16 1. The \$25,824.24 in Costs Associated with Real Parties' Models, Blowups and
17 Photocopies are Both Reasonable In Amount and are Reasonably Necessary to the
18 Conduct of the Litigation, and Are Therefore Recoverable.

19 1033.5(a)(12) lists – as a cost item recoverable as a matter of right – costs associated with
20 "[m]odels and blowups of exhibits and photocopies of exhibits," so long as "they were
21 reasonably helpful to aid the trier of fact." Obviously, whether or not Real Party's PowerPoint
22 presentation, bench books and trial presentation boards were reasonably helpful to the Court is a
23 decision for the Court. Assuming that they were, the \$25,824.24 in costs associated with the
24 same are both reasonable in amount and necessary to the conduct of the litigation. Of these
25 \$25,824.24 in costs, Petitioner argues Real Party is only entitled to \$682.03 – less than 3% of the
26 amounts Real Party actually incurred.

27 ///

28 ///

1 a. The \$17,122 in Costs Associated with Real Party's PowerPoint
2 Presentation are Both Reasonable In Amount and are Reasonably
3 Necessary to the Conduct of the Litigation, and Are Therefore
4 Recoverable.

5 Petitioner argues that costs associated with time spent preparing Real Party's PowerPoint
6 presentation are not recoverable under 1033.5(a)(12). Petitioner is incorrect. The costs
7 associated with Real Party's PowerPoint presentation fit squarely within section 1033.5(a)(12).
8 *See El Dorado Meat Co. v. Yosemite Meat and Locker Service, Inc.* (2007) 150 Cal. App. 4th
9 612, 614-619, *citing* section 1033.5(a)(12) (upholding cost award of \$191,566, \$143,809 of
10 which represented amounts associated with "models and blowups of exhibits;" and which were
11 primarily for one, single exhibit.)

12 Petitioner argues that the costs associated with Real Party's bench books are duplicative of
13 the costs incurred for its PowerPoint presentation. Petitioner's P's & A's, p. 4, lns. 26 – 28. They
14 are not. The bench books are merely a print-out of the PowerPoint presentation for use the by
15 Court after the trial concluded. As such, the bench books were intended as a post-trial aid for the
16 Court, not a substitute for the PowerPoint presentation at trial. The requested costs associated
17 with the bench books are strictly limited to the cost of the materials used to make them (i.e., color
18 copies and binder costs). Declaration of Darth K. Vaughn ("Vaughn Decl."), ¶ 4. Real Party is
19 not seeking one cent of the costs associated with the physical act of printing the PowerPoint
20 presentation and inserting it into the bench books, which was a time-consuming process. *Id.*, ¶ 4.
21 Since "Petitioner does not contest that Real Parties' bench books were reasonably necessary," and
22 since it does not contest "that such costs are, in principle, recoverable," its argument that the
23 PowerPoint preparation costs are not recoverable is unpersuasive. Petitioner's P's & A's, p. 6, ln.
24 24-25. Those preparation costs are one in the same. Petitioner would simply prefer to pay for the
25 relatively inexpensive print out of the PowerPoint presentation that was inserted into the bench
26 books, rather than pay for the costs associated with the PowerPoint preparation.

27 It is important to note the genesis of these costs. The Administrative Record in this matter
28 is 41 volumes and over 28,000 pages. Vaughn Decl., ¶ 2. It is beyond argument that it takes

1 many, many hours to fully review the record, as the Court well knows. Culling through the
2 28,000+ page record, pulling out certain pages, imaging those pages, and editing them by
3 highlighting them, underlining them and creating "call-outs," i.e., animation on some slides, take
4 a significant amount of time. The same is true for the preparation of an extensive number of
5 PowerPoint slides which compared key text from numerous California Supreme Court cases,
6 Court of Appeal cases, and statutory history that were relied upon by both the Petitioner and
7 Respondents. *See*, for example, Real Party's bench book at pp. 20-25, 33-38, 97-100 and 128-
8 139, which gives some indication of the work, but not all, since the bench books cannot show the
9 real time animation that occurred at trial during the PowerPoint presentation. Those tasks made
10 up the bulk of Mr. Vaughn's time preparing the presentation. *Id.*, ¶ 2. Real Party used common
11 technology – that comes standard with many versions of Microsoft's Office software suite –
12 which did not increase the amount of time Real Party spent in creating its bench books and
13 presentation. In fact, this process saved a substantial amount of time in presenting this
14 voluminous information at trial. *Id.*, ¶¶ 2, 4.

15 Petitioner complains that Real Party did not elaborate on Mr. Vaughn's qualifications and
16 experience, and that his hourly rate is "astronomical." Petitioner's P's & A's, p. 5, ln. 12. Given
17 his educational background and professional experience, Real Party contends that Mr. Vaughn's
18 hourly rate of \$185 is not unreasonable. Mr. Vaughn holds a Master's degree in Real Estate
19 Development from the University of Southern California's School of Policy, Planning, and
20 Development, and a Juris Doctorate from the University of Southern California's Gould School
21 of Law.⁴ Vaughn Decl., ¶ 6. Mr. Vaughn also holds a Master's Degree in Regional Planning and
22 a Bachelor of Science in Urban & Regional Planning, both from Cornell University's School of
23 Architecture, Art, & Planning. *Id.*, ¶ 6. The quality of Mr. Vaughn's efforts at trial speaks for
24 itself.

25 Mr. Vaughn has extensive work experience in the information technology field, which
26 qualifies him as an excellent candidate to prepare the PowerPoint presentation and bench books

27 _____
28 ⁴ As of this writing, Mr. Vaughn is not yet a member of the California State Bar. He sat for the July, 2007 bar exam, which he passed and will shortly be sworn in on December 4th. Vaughn Decl., ¶ 6.

1 for this matter; and which allows him to do so with great efficiency, particularly as he takes
2 direction from lead counsel on how to present and animate key evidence and case language in the
3 PowerPoint presentation. Vaughn Decl., ¶ 7. Mr. Vaughn spent four years with a leading
4 information technology firm, Accenture, at their New York City office, as an information
5 technology consultant. *Id.* Moreover, for three years, he was a partner for a multimedia
6 production studio, specializing in information technology, graphic design and website
7 development. *Id.* He is qualified to perform the tasks that he did in preparing the PowerPoint
8 presentation and, given his educational background and work experience, his hourly rate is
9 justified.

10 Additionally, the regular graphics firm used by Real Party's counsel – despite not having
11 nearly the qualifications of Mr. Vaughn – would have charged a roughly similar fee, or at least
12 one within the same "ballpark" amount. *See* Declaration of Mr. Marc Shapiro, ¶ 5 (estimating his
13 firm would have charged \$15,000 for the PowerPoint presentation). *See Wagner Farms, Inc. v.*
14 *Modesto Irr. Dist.* (2006) 145 Cal.App.4th 765, 775 (a CEQA case that used "ballpark" test in
15 determining whether cost award for preparation of the administrative record was reasonable).

16 Petitioner argues that these costs are "investigation expenses," and are therefore not
17 allowable. In support of its position, Petitioner cites to *Ladas v. California State Auto. Assn.*
18 (1993) 19 Cal.App.4th 761, 776. *Ladas* does not support Petitioner's position. Rather, *Ladas*
19 held that costs associated with computer legal research fees are not recoverable, as they are
20 considered "investigation expenses" under section 1033.5(b)(2). *Ladas* and this part of its
21 holding are inapposite to this case. Real Party is not seeking costs associated with "computer
22 legal research;" rather, it is seeking costs of "models and blowups of exhibits" for trial, which are
23 recoverable under 1033.5(a)(12).

24 Petitioner also argues Real Party's costs associated with Mr. Vaughn's time are non-
25 recoverable "paralegal fees." Mr. Vaughn is not a paralegal; and, even if he was, his fees would
26 be recoverable. *See El Dorado Meat Co., supra*, 150 Cal.App.4th at 620.

27 Petitioner also argues that Mr. Vaughn is an "expert," and as such, that the costs incurred
28 for his time are not allowable pursuant to 1033.5(b)(1). Mr. Vaughn is not an "expert" in terms

1 of providing "expert opinion evidence." At least one California case has rejected Petitioner's
2 argument, i.e. that fees of a consultant preparing models and blow-ups of exhibits are disallowed
3 as "expert fees" under 1033.5(b)(1). See *El Dorado, supra*, 150 Cal.App.4th at 618. See also
4 *Hubbard v. Twin Oaks Health and Rehabilitation Center* (2005) 406 F.Supp.2d 1096, 1101
5 (indicating 1033.5(b)(1)'s ban on "expert fees" refers to fees of expert witnesses.)

6 Petitioner argues that this category of costs is not recoverable because it is elaborate and
7 expensive, and that "'alternative but mundane method[s]' are available." Petitioner's P's & A's, p.
8 3, lns. 16 – 21. Petitioner argues that the case which Real Party relies upon in its Memorandum of
9 Costs – *El Dorado Meat Co. v. Yosemite Meat and Locker Service, Inc.* – is inapposite to the
10 instant matter, claiming that *El Dorado* involved a "complex jury trial." Petitioner's P's & A's, p.
11 5, ln. 22 – p. 6, ln. 7. In doing so, Petitioner has glossed over the fact that this case is also
12 complex. Here, the Administrative Record is over 28,000 pages, contains documents which span
13 several decades and includes highly detailed financial analysis. Vaughn Decl. ¶, 2. Interestingly,
14 the quote Petitioner cites from *El Dorado* in its Memorandum of Points and Authorities fully
15 supports Real Party's cost prayer for this category, stating: "there is little doubt that using
16 computers and suitably trained personnel to compile the data . . . was more efficient than any
17 low-tech method of doing the same thing." See Petitioner's P's & A's, p. 6, lns. 2-3 and *El*
18 *Dorado*, 150 Cal.App.4th at 620. Thus, Petitioner's "lowest common denominator" theory for
19 "mundane trial presentations" is not consistent with relevant case authority. *Id.*

20 In support of its position that this category of costs is not recoverable because it is
21 elaborate and expensive, Petitioner also relies on *Science Applications International Corp. v.*
22 *Superior Court* (1995) 39 Cal.App.4th 1095. So too did the losing party in *El Dorado*. In
23 *Science Applications* – which is 12 years old – the appellate court considered several items of
24 costs awarded by the trial court. *Science Applications*, 39 Cal.App.4th at 1103-1104. There, the
25 appellate court upheld the trial court's allowance of a \$57,969 cost award for graphic exhibit
26 boards, and a \$101,908 cost award for a video presentation. *Id.* The appellate court explained
27 that each of these "appear to be a computerized form of [a] blowup or model which was
28 apparently, in the opinion of the trial court, reasonably helpful to the trier of fact...." *Id.* These

1 are exactly the types of costs that Real Party is seeking. If anything, the *Science Applications*
2 case supports Real Party's argument for the award of its costs here.

3 In *Science Applications*, the trial court rejected – and the appellate court upheld the
4 rejection of – a \$200,000 expense for a document control database; \$47,481 for laser disks;
5 \$9,916 for a "graphics communication system"; \$11,983 for an on-site technician at trial; and
6 \$35,652 for videotaped depositions. *Science Applications*, 39 Cal.App.4th at 1103-1104. It was
7 these items *only* that the appellate court rejected. More importantly, it was only to the video-
8 taped depositions that the appellate court held that "the existence of the alternative but mundane
9 method . . . strongly suggests [that those costs were] 'not reasonably necessary to the conduct of
10 the litigation,' however 'convenient or beneficial' it may have been. *Id.*, at 1105 *citing* section
11 1033.5(c)(2). Petitioner's reliance on *Science Applications* for the argument that all cost items
12 related to technology or computers for trial presentations are *per se* unallowable, is erroneous.
13 More importantly, the costs which Real Party seeks are nothing like those costs the court rejected
14 in the *Science Applications* case.

15 As stated above, the losing party in *El Dorado* attempted to rely on *Science Applications*
16 for a similar position. 150 Cal.App.4th at 619. The appellate court in *El Dorado* held that it did
17 not "understand *Science Applications* to mean . . . that the cost of creating an exhibit that
18 summarizes data is nonrecoverable . . ." *El Dorado Meat Co.* 150 Cal.App.4th at 620. The court
19 continued by explaining that:

20 . . . the reference in *Science Applications* to high-tech paralegals cannot mean what
21 [losing party] *El Dorado* suggests. If the cost of labor for creating an exhibit is a
22 recoverable item, the fact that it was the labor of a paralegal, high-tech or not,
makes no difference, assuming the cost was not unreasonably high. . . .

23 Here, there is little doubt that using computers and suitably trained
24 personnel to compile the data upon which [an exhibit] was based was more
25 efficient than any low-tech method of doing the same thing. The idea that the cost
is not allowable because the exhibit could have been created using adding
machines, ledger paper, and pencils instead of electronic databases is antiquated.

26 *Id.* The same situation exists here. Real Party's costs are not more expensive simply because
27 basic technology was employed. Vaughn Decl., ¶ 2. The idea that Real Party's costs are not
28 allowable because Mr. Vaughn could have used a photocopier, a highlighter and an overhead

1 projector is antiquated. *Id.* and *El Dorado Meat Co.* 150 Cal.App.4th at 620. Here, Mr. Vaughn
2 distilled a 41 volume, 28,000 page record, into a PowerPoint presentation of 125 slides. Vaughn
3 Decl., ¶¶ 2, 4. The distillation process is not – by any means – elaborate. It simply takes a
4 significant amount of time to cull through a 41 volume, 28,000 page record to pick out certain,
5 key facts to be presented to the Court under the relevant Substantial Evidence Standard of review,
6 which requires the County's decision to be upheld by the Court if there is any substantial evidence
7 in the "whole" 41 volume record to support it. *See* Public Resources Code sections 21168 and
8 21168.5.

9 Moreover, Petitioner's methods are hardly elaborate or particularly cutting-edge. A quick
10 Internet search reveals that it has been approximately 20 years since the PowerPoint program was
11 released. Gasowski Decl., ¶ 2 and Exhibit F to the Declaration of Mr. Richard S. Zeilenga
12 ("Zeilenga Decl."). Petitioner fails to recognize – in the world of technology – that what was
13 once "elaborate," quickly becomes "mundane." Indeed, this designation can change in a manner
14 of months, let alone in the 12 years since the *Science Applications* case so heavily relied upon by
15 Petitioner.

16 b. The \$8,702.24 in Costs Associated with Real Parties' Bench Books, Trial
17 Presentation Boards and Trial Presentation Supplies are Both Reasonable
18 In Amount and are Reasonably Necessary to the Conduct of the Litigation,
19 and Are Therefore Recoverable.

20 As stated, "Petitioner does not contest that Real Parties' bench books were reasonably
21 necessary." In fact, it agrees "that such costs are, in principle, recoverable." Petitioner's P's &
22 A's, p. 6, ln. 24-25. Petitioner only laments that the amount sought is excessive, that Real Party
23 did not state the number of bench books it created, and that Petitioner incurred less costs in

24 preparing its own bench books. Real Party's costs are not excessive. Real Party created seven
25 bench books – one for the Court, one for the Court reporter, one for opposing counsel, one for the
26 County's counsel and three for Real Party (one for its counsel, Mr. Zeilenga, one for Mr. Vaughn,
27 who facilitated the presentation, and one for Noby Venture's counsel, Mr. Cohen). Vaughn Decl.,
28 ¶ 4. Real Party's seven bench books consisted of approximately 141 pages each, including the

1 125 PowerPoint slides and the argument outlines. *Id.* The fact that Petitioner produced a less
2 involved bench book, consisting of certain pages from the record, is not an "apples-to-apples"
3 comparison. The costs Real Party incurred in producing its seven bench books are both
4 reasonable in amount and are reasonably necessary to the conduct of the litigation, and are
5 therefore recoverable.

6 Petitioner also complains Real Party's costs incurred for its trial presentation boards were
7 excessive, that Real Party did not state how many boards were created or how much each board
8 cost. Real Party incurred \$6,632.35 in costs associated with the production of 31 "blow-up"
9 boards, at a cost of approximately \$214 per board. Zeilenga Decl., ¶ 2. True and correct copies
10 of the invoices for the preparation of those boards are attached to Mr. Zeilenga's Declaration as
11 Exhibit A, Tabs 1-4, filed contemporaneously herewith. Real Party's counsel used its standard
12 graphics firm vendor, and incurred the usual and customary costs, and is unaware of a vendor
13 who could have done the job for less. *Id.*

14 c. Travel Costs.

15 Petitioner argues travel costs are not recoverable. It is incorrect. *See Page v. Something*
16 *Weird Video* (1996) 960 F. Supp. 1438, 1447 (interpreting Code of Civil Procedure section
17 1033.5, court allowed defendant to recover travel costs for its New York-based counsel to travel
18 to Los Angeles to argue at two hearings).

19 Petitioner argues that travel costs incurred are unnecessary, that expenses associated with
20 both airline tickets and rental cars were not required and that local travel costs are not
21 recoverable. Petitioner's P's & A's, p. 7, ln. 2 – p. 9, ln. 21. Real Party's travel costs were
22 absolutely necessary. Real Party's counsel had to incur costs for both air line tickets and a rental
23 car for each trip. Zeilenga Decl., ¶ 4. The City of Corning does not have an airport serving
24 commercial airlines flying from Southern California. Zeilenga Decl., ¶ 4. In order to get to
25 Corning, Real Party's counsel flew into Sacramento, and rented a car for the two hour drive to
26 Corning. *Id.*, ¶ 4. The rental car is absolutely necessary to get to Corning, and as such, it cannot
27 be considered "local travel." *Id.*, ¶¶ 4-5. Real Party's counsel has traveled to nearby Red Bluff
28 many times, and they have found this to be the most economical way to do so. *Id.*, ¶ 5.

1 Petitioner's counsel seems to indicate that flying into Redding would be cheaper. See Declaration
2 of David B. Edelson, ¶ 3, filed in support of Petitioner's Motion to Tax. It is not. In fact, flights
3 into Redding from Southern California are twice as much as the Sacramento flight, and route
4 through Seattle, Portland or San Francisco – which is clearly less economical and would force
5 Real Party to incur additional attorneys' fees. Gasowski Decl., ¶ 3 and Exhibits G and H to
6 Zeilenga Decl.

7 Petitioner complains Real Party's rental of a truck was unnecessary. The truck was
8 necessary – indeed, required – to haul the 41 volume administrative record, the 31 trial
9 presentation boards and other bulky presentation equipment (projectors, screens, brief cases, trial
10 documents, etc.) Zeilenga Decl., ¶ 8. Real Party's counsel rented two cars at the time of trial
11 because one of its attorneys arrived at a later time, in an effort to conserve Real Party's attorneys'
12 fees. *Id.*, ¶ 7.

13 Finally, Petitioner complains of the cost associated with the Real Party's transportation of
14 the Administrative Record. As one might imagine, there is no easy way to transport a 41 volume
15 administrative record from Westlake Village to Corning. The costs incurred by Mr. McKim were
16 his actual costs for mileage, calculated at the IRS statutory mileage rate. Don McKim
17 Declaration (filed with Real Party's Memorandum of Costs), ¶ 2. Real Party obtained a quote for
18 this transportation job from its regular messenger firm, which was approximately \$800 more than
19 the costs Real Party has requested. Gasowski Decl., ¶ 4 and Exhibit I to Zeilenga Decl.

20 D. Petitioner Cites to No Authority whatsoever that the Court Should Consider the
21 Losing Party's Legal and Financial Status in Determining a Cost Award.

22 Petitioner goes to great lengths to explain its non-profit, tax exempt organizational status,
23 its good works, etc., and requests that the Court consider this in its analysis of the Real Party's cost
24 award. However, Petitioner offers no case authority whatsoever in support of its position.
25 Indeed, there is no authority in either 1032 or 1033.5 – or in the cases interpreting those statutes –
26 that discuss a court's need to consider the losing party's legal or financial status when deciding a
27 request for a cost award. In fact, California law states otherwise, i.e., even indigent litigants are
28 held responsible for cost awards when they lose. *Fuller v. State of California* (1969) 1

1 Cal.App.3d 664, 670 ("California is among those states that do not exempt the unsuccessful
2 indigent party from a judgment for costs . . .")

3 Ultimately, the decision of costs is – of course – well within the Court's discretion.
4 However, Petitioner's argument that its legal and financial status should be taken into account is
5 immaterial. In fact, the Petitioner California Oaks Foundation is hardly the impoverished
6 "Mother Teresa" of "environmental watch dogs," that it holds itself out to be. To the contrary, the
7 California Oaks Foundation has recently obtained multi-million dollar settlements/awards based
8 on its more successful litigation tactics against other development projects. *See* Gasowski Decl.,
9 ¶ 7, and Exhibits B and C attached to Zeilenga Decl. Interestingly, the Executive Director of the
10 California Oaks Foundation (Janet Cobb) also claims, in relevant filings with the State, that she
11 works two full time jobs for Petitioner COF and the California Wildlife Foundation ("CWF").
12 She claims to work 35 hours per week at COF and 40 hours per week at CWF, for a total of
13 \$187,269.00. *See* Gasowski Decl., ¶ 6., and Exhibits D and E. Setting aside the double
14 jobs/double salary, those amounts demonstrate that Petitioner is not a pauper organization, unable
15 to pay trial costs in this case.

16 **III. CONCLUSION**

17 The \$31,303.96 in costs incurred by the Real Party in this matter are reasonable in amount
18 and were "reasonably necessary" to the conduct of the instant litigation. Code of Civil Procedure
19 section 1033.5(c)(2) and (3). No portion of the Real Party's costs were "merely convenient or
20 beneficial" to the preparation of this matter. As such, Real Party is entitled to a cost award in its
21 favor in the amount of \$31,303.96. Petitioner's assertion that its "special status" exempts it from
22 paying those costs, is less than persuasive.

23 Dated: November 30, 2007

24 STOWELL, ZEILENGA, RUTH,
25 VAUGHN AND TREIGER, LLP

DLA PIPER US LLP

26 By: Richard S. Zeilenga
27 Richard S. Zeilenga
28 Attorneys for Del Webb California Corp.
and Pulte Home Corporation

By: _____
Steven G. Cohen
Attorneys for Real Parties in Interest
Nine Mile Hill Investment Company, Inc.
and Noby Venture, LLC

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2 indigent party from a judgment for costs")

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15 **III. CONCLUSION**

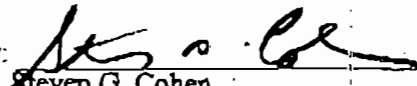
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24 VAUGHN AND TREIGER, LLP

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25 By: _____
26 Richard S. Zeilenga
27 Attorneys for Del Webb California Corp.
28 and Pulte Home Corporation

By:  _____
Steven G. Cohen
Attorneys for Real Parties in Interest
Nine Mile Hill Investment Company, Inc.
and Noby Venture, LLC

004c. [17:86] **Notice of entry of judgment:** Except as noted below, the *party submitting the judgment* for entry is required to:004—serve notice of entry of judgment on all parties who have appeared in the action;

004—file the original notice with the court; *and*

004—file proof of service. [CCP § 664.5(a); see *Palmer v. GTE Calif., Inc.* (2003) 30 C4th 1265, 1269, 135 CR2d 656 (*discussed at* ¶ 18:21.1 *ff.*); *Van Beurden Ins. Svs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 C4th 51, 65, 61 CR2d 166, 174, fn. 5 (citing text)]

004(1) [17:86.1] **Exception for parties in pro per:** Where the prevailing party is *in pro per*, the court clerk is required to mail notice of entry of judgment to all parties who have appeared in the action “promptly upon the entry of judgment.” [CCP § 664.5(b)]

004(2) [17:86.2] **Exception in certain Family Code proceedings:** In dissolution, legal separation and nullity proceedings, child custody and support cases, and proceedings to establish a parental relationship, it is the *clerk's* responsibility to mail notice of entry of judgment. [See CCP § 664.5; CRC 5.134; and more detailed discussion in Hogoboom & King, *Cal. Prac. Guide: Family Law* (TRG), Ch. 15]

FORM: NOTICE OF ENTRY OF JUDGMENT, see Cal. Prac. Guide Civ. Trials & Ev. Form 17:B.

004(3) [17:86.3] **Compare—court may order clerk to provide notice:** Notwithstanding the prevailing party's duty to serve notice of entry of judgment, the court may order such notice to be given by the clerk. [See CCP § 664.5(d); *and discussion at* ¶ 18:22.4 *ff.*]004(a) [17:86.3a] **Clerk must affirmatively state nature of notice:** To qualify as a notice of entry of judgment, the clerk's mailed notice must affirmatively state that it was given “upon order by the court” or “under section 664.5.” [*Van Beurden Ins. Svs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, *supra*, 15 C4th at 64, 61 CR2d at 173–174]

004(b) [17:86.3b] **Certificate of mailing required:** In addition, a certificate of mailing the notice must be executed and placed in the file. [*Van Beurden Ins. Svs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, *supra*, 15 C4th at 64, 61 CR2d at 174]

004(4) [17:86.3c] **Notice to Attorney General where state statute or regulation declared unconstitutional:** Within 10 days after entry of judgment in a contested action or special proceeding in which a state statute or regulation has been declared unconstitutional, the *prevailing party*, “or as otherwise ordered by the court,” must mail a copy of the judgment and notice of entry of judgment to the Attorney General; and must file proof of such service with the court. [CCP § 664.5(e); see CRC 2.1100]

004(5) [17:86.4] **Effect of notice of entry of judgment:** Service of notice of entry of judgment usually starts the time running within which a party must file postjudgment motions and/or a notice of appeal. [*Palmer v. GTE Calif., Inc.* (2003) 30 C4th 1265, 1267, 135 CR2d 654, 655—prevailing party's service of copy of file-stamped judgment triggered deadline for JNOV and new trial motions; *Filipescu v. California Housing Finance Agency* (1995) 41 CA4th 738, 740, 48 CR2d 736, 738 (notice of appeal); *Cuenllas v. VRL Int'l, Ltd.* (2001) 92 CA4th 1050, 1053–1054, 112 CR2d 383, 385–386—service of minute order that noted date of judgment entry but was not *entitled* “notice of entry” did *not* trigger deadline for filing notice of appeal; see ¶ 18:21 (motion for JNOV), 18:206 *ff.* (motion for new trial)]*Cross-refer:* See further discussion of the effect of service of notice of entry of judgment and of service of a file-stamped copy of the judgment in Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (TRG), Ch. 3.

004d. [17:87] **Compare—entry of judgment where statement of decision waived:** Similar procedures ~~apply where a statement of decision is waived (either expressly or by failure to make timely request, see ¶~~

~~16:144).~~004(1) [17:88] **Preparation of judgment:** It is the court's duty to prepare and mail a proposed judgment to all parties who appeared at the trial within 10 days after expiration of the time for requesting a statement of decision. [CRC 3.1590(g)]Alternatively, the court may direct one of the parties to prepare, serve and submit a proposed judgment to the court within 10 days. [CRC 3.1590(g)] (As to form of judgment, see ¶ 17:83 *ff.*)

PROOF OF SERVICE

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STATE OF CALIFORNIA

COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action; my business address is 2815 Townsgate Road, Suite 330, Westlake Village, California 91361. On November 30, 2007, I served the document described as **REAL PARTIES' OPPOSITION TO PETITIONER'S MOTION TO TAX COSTS** on the parties herein in this action by placing true copies thereof enclosed in a sealed envelope, addressed as follows:

Thomas N. Lippe, Esq.
Law Offices of Thomas N. Lippe
329 Bryant Street, Suite 3D
San Francisco, CA 94107

William James Murphy, Esq.
Arthur J. Wylene, Esq.
Office of the County Counsel
County of Tehama
332 Pine Street - P. O. Box 8189
Red Bluff, CA 96080

X BY FEDERAL EXPRESS

X As follows: I caused said envelope to be delivered to a Federal Express pickup station located at 2801 Townsgate Road, Westlake Village, California 91361, in a Federal Express envelope marked: FedEx PriorityOvernight

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 30, 2007, at Westlake Village, California

Becky Salan-Motta

