

No. S263569

**IN THE
SUPREME COURT OF CALIFORNIA**

MICKEY SEGAL and SIZE IT, LLC,

Plaintiffs, Appellants, and Petitioners,

v.

ASICS AMERICA CORPORATION,

ASICS CORPORATION, KEVIN WULFF,

KENJI SAKAI, MOTOI OYAMA, and KATSUMI KATO,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FOUR, CIVIL NO. B299184
SUPERIOR COURT OF LOS ANGELES, CIVIL NO. BC597769

ANSWERING BRIEF ON THE MERITS

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ISSUE PRESENTED

May a party recover costs for preparing multiple sets of trial exhibits and closing slides that were not used at trial?

INTRODUCTION

Trials are complex. The parties must be ready to present witnesses and evidence at a moment's notice to ensure that the trial proceeds as efficiently as possible. Given how difficult it is to predict the order of witnesses and evidence—or even whether they will be needed at all—parties commonly prepare copies of all exhibits and demonstratives that might be needed. In many cases,

Local Court rules or case management orders *require* that the parties exchange copies of exhibits before the final pretrial conference or trial. While some copies of some exhibits do not ultimately get used, having them ready avoids wasting the court’s and the jury’s time with disruptive pauses whenever an unexpected exhibit or demonstrative needs to be retrieved and prepared.

This case was no exception. At the trial court’s direction, both sides prepared full sets of all exhibits and demonstratives that might be used. The parties then proceeded to put on a complex jury trial under extreme time pressures. After the jury returned a verdict for Defendants (collectively “ASICS”), the court found that the parties’ preparation of the exhibit binders and other materials had been “reasonably helpful”—the statutory prerequisite for reimbursing such costs under Code of Civil Procedure section 1033.5, subdivision (a)(13)—and allowed ASICS to recover those costs as a prevailing party. The Court of Appeal agreed and unanimously affirmed.

This Court should affirm the decisions of the courts below, and make clear that section 1033.5 gives trial courts authority to award costs for preparing photocopies of exhibits and demonstratives where reasonably helpful, without requiring that each exhibit or demonstrative be used at trial.

First, the decision below is consistent with the plain meaning and purpose of the statute. Subdivision (a)(13) allows costs for “[m]odels, the enlargement of exhibits and photocopies of exhibits, and the electronic presentation of exhibits . . . if they were reasonably helpful to aid the trier of fact.” (Code Civ. Proc., § 1033.5,

subd. (a)(13).) That language is broad and inclusive. It specifically enumerates the items at issue in this appeal—photocopies, demonstratives, and electronic presentations—and does not premise recovery for preparing such modes of presentation on whether an individual exhibit was used. Rather, if a trial court finds it “reasonably helpful” for the parties to prepare such items in advance—such as in the form of binders with copies of each potential exhibit for the court’s and witnesses’ use—it may award a prevailing party the reasonable costs incurred in preparing them, regardless of whether each underlying exhibit ultimately is admitted. While Petitioners contend that allowing such costs will encourage wasteful practices, the statute gives trial courts discretion to strike costs to that are not “reasonably necessary” or “reasonable in amount.” (Code Civ. Proc., § 1033.5, subd. (c)(2), (3).)

Petitioners argue that copies and demonstratives of unused exhibits can *never* be “helpful” to the trier of fact, relying on a single, unsupported sentence from one intermediate appellate decision, *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550. The majority of appellate courts to consider the issue, including the court of appeal below, have refused to follow *Seever*, and for good reason. *Seever*’s position disregards the statute, undermines the trial court’s discretion, and ignores the reality that preparing copies of ultimately unused exhibits and demonstratives often is quite helpful—as the trial court here expressly found—because it encourages litigants to be prepared and helps trials to run smoothly. *Seever*’s holding is also impractical because, among other things, it

would require prevailing parties to undergo the extremely burdensome task of counting the number of pages of exhibits that were and were not used at trial, so as to allocate portions of their photocopying invoices—a task that in many cases would exceed the costs of the photocopies themselves.

Second, such costs are independently recoverable as an exercise of the court’s discretion under section 1033.5’s catch-all provision, subdivision (c)(4). Courts have recognized that subdivision (c)(4) provides discretion to allow costs that are neither expressly allowed nor expressly disallowed, and courts have long used this provision to award costs in response to activities ordered by the trial court, or that are part of routine practice and are reasonably necessary to prepare or present the case for trial. Petitioners again rely on *Seever* to oppose this basis for recovery, but they overlook that when the legislature intended to prohibit or limit costs, it did so plainly. Nothing in section 1033.5, subdivision (a) or (b) implies a bar on trial court’s discretion to award costs where photocopying was reasonably necessary (including where it was required by Local Rules or ordered by the court), even if not all of the exhibits are actually used at trial.

Accordingly, the Court should affirm the decision below and disapprove of *Seever*.

FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioners’ Allegations

Petitioners alleged that the former CEO of ASICS America, at a cocktail party, fraudulently induced them to invest in a retail

venture doing business with ASICS America. In addition to suing ASICS America and its former CEO, Petitioners sued its Japanese parent company, ASICS Corporation, and individuals in Japan.

The ensuing litigation was contentious, and involved thousands of pages of briefing, more than half-a-million pages of produced documents, subpoenaing dozens of parties, and engaging the services of a discovery referee for more than seven months to resolve discovery disputes. (See, e.g., AA 6-14, 29.)¹

B. The Trial

On January 29, 2019, a 10-day jury trial began on Petitioners' fraud claim. The parties sharply disputed the relevant issues and documents, requiring ASICS to prepare a broad defense. The parties jointly marked more than 1,500 potential trial exhibits and identified at least 20 witnesses each. (RA 25-117; RA 6-8.) Pursuant to the trial court's procedures, the parties were required to prepare copies of all potential exhibits. (RA 245.)

Once trial began, Petitioners failed to follow their own time estimates for calling witnesses to the stand. That meant that Petitioners did not rest until the ninth day of the 10-day trial. (See RA 12-13, 18-19, 123-125, 130-134, 139.) After Petitioners rested, ASICS had less than two days left to put on its case-in-chief. Because the court was scheduled to be dark after the 10th trial day, moreover, ASICS was warned it would risk a mistrial if it had not

¹ In this brief, "AA" refers to Appellant's Appendix of Exhibits in Support of Opening Brief, "RA" to Respondents' Appendix, "OBM" to Opening Brief on the Merits, "RT" to Reporter's Transcript, and "Opn." to the Court of Appeal's June 15, 2020 opinion.

rested its case before then. (RA 138.) That timing made ASICS' coordination of witnesses and exhibits extremely difficult, and required having out-of-state and foreign witnesses and interpreters on standby for days, in addition to having ready the exhibits necessary for cross-examining and impeaching Petitioners' witnesses. By the end, twelve witnesses were called to testify (nine by Petitioners before they rested), and over 200 exhibits of the roughly 1,500 marked exhibits were introduced. (RA 173; see also RA 297.)

After closing arguments, the jury rendered a complete defense verdict for all Defendants. (RA 142.)

C. ASICS' Post-Trial Cost Motion Proceedings

As the prevailing party, ASICS submitted a verified Memorandum of Costs on March 14, 2019, seeking approximately \$380,000 in reasonable and necessary costs incurred, a fraction of what ASICS had expended to defend against this action. (AA 1-29.) On March 29, 2019, Petitioners moved to tax nearly 85% of ASICS' claimed costs. (AA 31-48.) ASICS opposed Petitioners' motion and submitted hundreds of pages of documentation supporting each category of costs claimed. (AA 90-110; RA 150-192.)

On June 26, 2019, after briefing and argument, the Superior Court rejected Petitioners' request to tax costs associated with photocopying exhibits marked for trial and creating closing demonstrative slides. (AA 134 [incorporating the court's tentative ruling by reference, except as to one category, interpreter fees]; RA 318-319 [tentative ruling at 4-5].) The court explained that it would

“permit recovery of the costs for exhibit binders as reasonably helpful to aid the trier of fact (CCP § 1033.5, subd. (a)(13)) as part of the parties’ presentation of the case to the jury,” and that it found that “costs of preparation of demonstrative boards and slides are recoverable, even if only portions were utilized, because Defendants’ counsel may not have foreseen that the entirety of such demonstratives would not be utilized.” (RA 319.)

At the hearing on the motion to tax, the trial court elaborated on why it was allowing recovery for the cost of preparing exhibit binders, even though most exhibits were not used:

You prepare for trial you may determine that some exhibits on the fly are important and others are not, but you have to be fully prepared, you have to have all the binders, you have to have everything copied.

(RT 10:21-25.) The trial court repeated the point later in the colloquy with respect to the demonstratives: “[w]hen you prepare, you don’t know what evidence is going to come up, you don’t know what you’re going to need for cross-examination. You’re working on the fly, and being overprepared is not a sin in this instance.” (RT 13.) The trial court emphasized that “[w]e had time constraints” to complete the trial before an alternate juror became unavailable, and the court was not going to “parse through” everything on the motion to tax when having the photocopies and demonstratives was reasonably helpful and necessary. (RT 12-14.)

D. Petitioners’ Appeal of ASICS’ Cost Award

Petitioners appealed the trial court’s decision as to copying and demonstrative costs along with a few other categories of costs

not at issue here.² On June 15, 2020, in a published decision, the Court of Appeal, Second District, Division Four, affirmed the trial court’s ruling in full. On the issue of copying costs, the Court of Appeal acknowledged “a split in authority” over whether costs related to exhibits ultimately not used at trial are recoverable. (Opn. 2, 5.). Echoing the trial court’s observation, it concluded that such costs may indeed be awarded because “having well-prepared counsel is ‘reasonably helpful to aid the trier of fact’—the test for cost recovery under the statute.” (*Id.* at p. 2.)

In particular, the Court of Appeal explained that the “interpretation of section 1033.5, subdivision (a)(13) must reflect the reality of how complicated cases are tried.” (Opn. 6.) Among other things, “[g]iven that trials are unpredictable, . . . it is difficult for even the most experienced trial lawyers to divine which exhibits and demonstratives will in fact be used. Consequently, it is in counsels’ (and their clients’) interests to come to trial with copies of all exhibits and demonstratives reasonably anticipated for use in hand.” (*Ibid.*) Such preparation is “especially important in lengthy jury trials, where common courtesy and respect for the jurors’ time and sacrifice requires that courts adopt policies and procedures to expedite the proceedings.” (*Id.* at p. 7.)

² The photocopying and demonstrative costs added up to \$34,000. Other issues on appeal below were travel expenses for ASICS’ counsel to attend the depositions of witnesses in Japan and deposition and trial interpreter fees for Japanese witnesses who lacked English proficiency. Although Petitioners petitioned for review of those categories, too, this Court limited the issues to solely the recovery of costs for unused exhibits and demonstratives.

As the Court explained, “[e]xhibit binders allow trials to proceed more quickly.” (Opn. 7.) Thus, the Court explained, “[e]ven if the binders contain exhibits never offered or admitted at trial, their preparation facilitates trial proceedings and helps avoid wasting the jurors’ time.” (*Ibid.*) It is similarly helpful to have “all possible closing argument demonstratives at the ready” so that “[c]ounsel can close immediately after the last witness has testified, rather than requiring dead time while counsel prepares.” (*Id.* at p. 8.) As the Court emphasized, “the jurors’ time is precious,” and it is important for courts and lawyers to follow practices that streamline the proceedings and keep the trial on schedule. (*Ibid.*)

Accordingly, the Court of Appeal concluded that it would not “read into the statute allowing costs a restriction which has not been placed there. [Citation.]” (Opn. 8.) It explained that “[t]he meaning of the phrase ‘reasonably helpful to the trier of fact’ is broader than the limited notion of helpfulness in the specific task of finding facts, and encompasses as well the more general concept of helpfulness in the form of efficiency in the trial in which the trier of fact is asked to perform that task.” (*Id.* at pp. 8-9.) Consequently, it held that “costs incurred in preparing models, blowups, and photocopies of exhibits may be awarded under section 1033.5, subdivision (a)(13), even if these materials were not used at trial,” and “[f]or the same reasons, . . . these costs may be awarded under section 1033.5, subdivision (c)(4).” (*Id.* at p. 9.)

E. Petitioners’ Petition for Review

Petitioners petitioned for review. This Court granted review limited to the single question of whether a party may recover costs

for preparing multiple sets of trial exhibits and closing slides that were not used at trial.

STANDARD OF REVIEW

Review of an award of costs after trial is generally for abuse of discretion. (*Berkeley Cement, Inc. v. Regents of Univ. of Cal.* (2019) 30 Cal.App.5th 1133, 1139; *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 485.) To the extent the issue requires statutory construction to determine whether a particular category of costs are authorized, de novo review applies. (*Berkeley Cement, Inc., supra*, 30 Cal.App.5th at p. 1139.) This Court can affirm the decision below on any ground supported by the record. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.)

ARGUMENT

“[A] prevailing party is entitled as a matter of right to recover costs in any action or proceeding” (Code Civ. Proc., § 1032, subd. (b)), so long as the costs are authorized by Code of Civil Procedure section 1033.5, and are “reasonably necessary to the conduct of the litigation” and “reasonable in amount.” (Code Civ. Proc., § 1033.5, subd. (c)(2)-(3).) As relevant here, subdivision (a)(13) provides that “[m]odels, the enlargement of exhibits and photocopies of exhibits, and the electronic presentation of exhibits may be allowed if they were reasonably helpful to aid the trier of fact.” (Code Civ. Proc., § 1033.5, subd. (a)(13).) In addition, subdivision (c)(4) is a catch-all provision that gives trial courts discretion to allow or deny costs for additional items that are not “mentioned” as allowed in subdivision (a) nor disallowed in subdivision (b). (Code Civ. Proc., § 1033.5, subd. (c)(4).)

A number of intermediate appellate courts have addressed these provisions as they apply to photocopies of exhibits that were not themselves used at trial. The majority of those courts—including the decision below—have found that such photocopying costs may be allowed either under subdivision (a)(13), or under the catch-all provision in subdivision (c)(4). (See *LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1124; *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 59; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856-857; *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 363-364.) Petitioner, in contrast, relies on *Seever* for a categorical rule that, if an exhibit was not used at trial, costs relating to it are never recoverable.

The Court should side with the decision below and disapprove of *Seever*. Under the plain language and purpose of section (a)(13), a trial court has authority to allow costs for photocopies of exhibits or other similar methods of facilitating the presentation of evidence at trial, regardless of whether each exhibit ultimately is admitted. Alternatively, such costs may be allowed in the trial court's discretion pursuant to subdivision (c)(4).³

³ The issue argued to the Court of Appeal and as presented in this Court is solely one of statutory interpretation—whether the trial court had authority to award costs—and not whether the trial court abused its authority or discretion. Thus, if the Court answers the statutory question in ASICS' favor, it must affirm the cost judgment. In any event, the trial court did not abuse its discretion for the reasons set forth above.

I. Subdivision (a)(13) Allows Costs Incurred in Preparing Photocopies of Exhibits or Demonstratives Where “Reasonably Helpful,” Without Requiring That Each Exhibit Be Used.

A. Allowing Such Costs Is Consistent with The Plain Language of Subdivision (a)(13) and the Practical Reality of How Trials Are Conducted.

1. “In construing a statute,” the Court’s “fundamental task is to ascertain the Legislature’s intent so as to effectuate the purpose of the statute.” (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) The Court “begin[s] with the language of the statute, giving the words their usual and ordinary meaning,” and construing the language “in the context of the statute as a whole and the overall statutory scheme.” (*Ibid.*, internal quotation mark and citations omitted). If the language is subject to more than one interpretation, the Court will “choose the construction that comports most closely with the Legislature’s apparent intent, endeavoring to promote rather than defeat the statute’s general purpose, and avoiding a construction that would lead to absurd consequences.” (*Ibid.*) In other words, the Court should choose a construction that makes the statute “workable and reasonable.” (*Regents of Univ. of Cal. v. Superior Court* (1970) 3 Cal.3d 529, 536-537.)

As noted above, the relevant subsection states that “[m]odels, the enlargement of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact.” (Code Civ. Proc., § 1033.5, subd. (a)(13).) That broad language makes no distinction about whether something is “used” or not, and requires only that

method of presentation (whether it be models, photocopies, or electronic display) be “reasonably helpful.” Given that the items at issue in this appeal—photocopies, demonstratives, and electronic presentations—are recoverable under the text of the statute, and that the trial court expressly found ASICS’ preparation of those items to have been “reasonably helpful,” that alone should end the issue.

Seever and Petitioners assume that the “reasonably helpful” qualifier refers to the particular *exhibits* themselves (rather than the mode of presentation), such that an exhibit “obviously could not have assisted the trier of fact” if it was not admitted at trial. (*Seever, supra*, 141 Cal.App.4th at pp. 1557-1559 [characterizing the provision as allowing costs for “exhibits used at trial that are reasonably helpful”].) That misreads the provision.

What must be “reasonably helpful,” following the syntax of the statute, are the *models, enlargements, photocopies, or electronic presentation* of exhibits. Each of those is a different method of preparing and displaying exhibits to the court and to the jury at trial. The statute does not require that each individual *exhibit* be reasonably helpful to the trier of fact, let alone that each be used or admitted as a prerequisite for displays of those exhibits to be compensable. As the Court of Appeal observed, “[t]he meaning of the phrase ‘reasonably helpful to the trier of fact’ . . . encompasses as well the more general concept of helpfulness in the form of efficiency in the trial.” (Opn. 8.)

The point is illustrated by the clause relating to “the electronic presentation of exhibits, including costs of rental equipment

and electronic formatting,” where the focus is clearly on the helpfulness of the overall “electronic presentation,” not discrete portions of the presentation.⁴ The costs associated with rental equipment and electronic formatting are allowed because they *enable* exhibits to be presented more efficiently at trial. It is not plausible to construe the statute as allowing costs for electronic formatting only as to the exhibits *used* at trial. Indeed, such costs are often incurred upfront and on a basis (e.g., per gigabyte of data or hour of labor) that is not dependent on whether a given exhibit is later used, nor could they be readily segregated based on which exhibits were and were not admitted.

The portion about “enlargements of exhibits and photocopies of exhibits” is no different, and should receive a parallel construction that focuses on the helpfulness of having the photocopies or demonstratives prepared, so as to facilitate the trial. (Opn. 6-8.) Of course, a trial court may *consider* the extent to which the exhibits were actually used, but that cannot be—and for the trial court here, plainly was not—the dispositive consideration.

2. The construction adopted by the Court of Appeal below—and other cases such as *Benach* and *LAOSD Asbestos Cases*—is consistent not only with the provision read as a whole but also the reality of how parties prepare for trial and how trials are actually

⁴ This clause referring to the electronic presentation of exhibits was added by amendment in 2018. (See Stats 2017 ch 583 (AB 828), s 1, eff. 1/1/2018.) The fact that the Legislature simply inserted the clause into an existing provision without other modification supports giving a parallel interpretation to the pre-existing language.

conducted. That includes incurring costs for photocopying exhibits in advance—something that is often required by Local Rules or the trial court and otherwise is reasonably helpful because “their preparation facilitates trial proceedings and helps avoid wasting the jurors’ time.” (Opn. 7.)

As both the trial court and Court of Appeal observed, a party preparing for trial cannot reasonably predict which exhibits or demonstratives will be used during trial. (Opn. 6; RT 10-13.) Indeed, counsel often marks exhibits in response to the opposing party’s designations or anticipated argument. Prudent counsel thus will routinely prepare additional copies of every exhibit in advance. That preparation avoids disruptions, saves time, and allows for the trial to proceed efficiently. (Opn. 7.) This is especially true for defendants, whose presentation of evidence depends on the scope, length, and strategy of plaintiffs’ case-in-chief.

Likewise, prudent counsel will begin preparing demonstratives before and throughout the trial, rather than waiting for a judge’s rulings about any potential motions to exclude. (Opn. 8.) While Petitioners argue that it is “perverse” to compensate a party for portions of a closing slide deck that were excluded (OBM 9), it is helpful to have “all possible closing argument demonstratives at the ready” so that “[c]ounsel can close immediately after the last witness has testified, rather than requiring dead time while counsel prepares.” (Opn. 8.)

The Court of Appeal’s decision in *Chaaban* is also instructive. There, *Chaaban* challenged the entirety of Wet Seal’s costs for photocopying exhibits because Wet Seal did not use any paper

copies of exhibits to present evidence, and instead, relied on audiovisual equipment. (*Chaaban, supra*, 203 Cal.App.4th at p. 59.) The court rejected this argument and allowed the entirety of the claimed costs as reasonably helpful to aid the trier of fact because “counsel (for both sides), the witnesses, and the judge all used paper exhibits, in trial binders Without these exhibits, it would have been even more difficult to conduct this trial than it already was.” (*Ibid.*) In affirming the cost award, the court in *Chaaban* made no distinction between admitted and unadmitted exhibits because, as a whole, the photocopied exhibits were helpful to the presentation of the case. (*Ibid.*; see also *Benach, supra*, 149 Cal.App.4th at p. 856 [allowing costs for unused exhibits because no indication that prevailing party “could have anticipated that they would not be used”]; *Applegate, supra*, 23 Cal. App.4th at p. 363-364 [allowing defendants to recover costs for exhibits never used at trial because “it would be inequitable to deny as allowable costs exhibits which a prudent attorney would prepare in advance of trial, and which were not used only because the action was dismissed” the day of trial].)

Having counsel prepare photocopies and demonstratives in advance is often so helpful, in fact, that many courts, as a matter of Local Rules or judges’ case management orders, actually *require* the parties to do so. As noted, the trial court in this case did so. (RA 245.)⁵ And so do numerous superior courts around the state.

⁵ That requirement ended up being prescient—after the court allotted 10 days for trial, Petitioners did not rest until the beginning of day nine. ASICS thus not only had to be ready to cross-examine Petitioners’ witnesses with a wide range of exhibits and potential

(See Super. Ct. Orange County, Local Rules, rule 317(C), Exhibit Notebooks [“On the date set for trial, the parties also must bring with them . . . [t]wo complete sets of Joint Exhibit Notebooks, not to exceed 3" each. The original set will be for the witness, pre-marked with Court Exhibit tags, and one set will be for the Court.”]; Super. Ct. Sacramento County, Local Rules, rule 2.98(B) [“Prior to the first day of trial, the parties shall prepare binders containing copies of the agreed exhibits for use by the trial judge, clerk, and counsel during trial.”]; Super. Ct. Riverside County, Local Rules, rule 3401(9)(b) [“In addition to the copies provided to opposing counsel and any copies to be conformed, counsel shall provide the original and one copy of each of the following trial documents to the Court: . . . iv) Exhibits.”]; Super. Ct. San Francisco County, Local Rules, rule 11.13(C)(8) [“all exhibits must be individually marked, identified, and offered into evidence at trial, and Parties must bring to trial copies for the Court, opposing counsel, and themselves in addition to the item to be marked and retained by the clerk”]; Super. Ct. Alameda County, Local Rules, rule 3.35(b) [“copies of the exhibits must be exchanged by counsel . . . at least three court days before the pretrial conference”].)

impeachment evidence on each of those prior nine days, but also had to decide how best to condense its case-in-chief into less than two days, which meant that several exhibits could not feasibly be used. While defendants always have to engage in some guesswork when preparing exhibits, it would be particularly inequitable to disallow such costs here, where a major reason for ASICS being unable to use its exhibits was Petitioners’ monopolization of trial time.

Given that so many courts have found pre-prepared copies of exhibits and demonstratives to be helpful, and given that so many courts in fact require them, it would make little sense to construe subdivision (a)(13) in a manner that conflicts with that reality and categorically finds such items to *not* be helpful.

3. Petitioners' argument that allowing costs for photocopying unused exhibits would spur wasteful litigation fails. To start, though Petitioners insinuate they are impecunious wisps battling a "deep-pocketed corporation[] with unlimited funds" (OBM 2), their litigation conduct alone belies such a mischaracterization.⁶ Indeed, Petitioners made the same sorts of pretrial copies to prepare for trial that ASICS did (and no doubt would have sought to recover the associated costs had they prevailed at trial), making it hard to credit their newfound view that such conduct constitutes wasteful "over-lawyering." (*Ibid.*) In any event, under the language of the statute, the trial court always retains the discretion to disallow costs to the extent a party's conduct was not reasonably helpful, not "reasonably necessary" to the conduct of the litigant, or not "reasonable in amount." (Code Civ. Proc., § 1033.5, subd. (a), (c)(2),

⁶ Petitioners' David-versus-Goliath trope is immaterial to the pure statutory interpretation issue before the Court. It is also baseless and undermined by the fact that Petitioners ran a multi-million-dollar retail company that collapsed from their own mismanagement and improper diversion of funds. (See, e.g., AA 68-69.) Petitioners then tried to shift the blame for their collapse by asserting groundless fraud claims against ASICS America, its parent, and numerous individual officers. ASICS had to spend far more in attorneys' fees to vindicate itself than what is now at issue on appeal. It is hardly unjust or oppressive for a defendant that successfully exonerates itself to recover reasonably necessary trial costs.

(3.) That factbound check on abusive or excessive costs leaves no reason to read a categorical exclusion into the statute.

If anything, Petitioners' argument creates perverse incentives. It would pressure poorer litigants to forgo preparation of photocopies and demonstratives to the detriment of their case, while wealthier litigants could indeed "weaponize" (OBM 1) extensive copies and multiple versions of alternative closing presentations with little fear of mutuality from their opponents. Even worse, where such materials were required by court order or where the party reasonably believed that the exhibits at issue were likely to be used, Petitioners' proposal would leave poorer litigants without the ability to recover costs for preparing exhibit binders or similar photocopies. The Legislature cannot have intended to penalize litigants in this manner, and this Court should not read the statute to impose such an inequitable result.

B. The Interpretation Advanced by *Seever* and Petitioners Is Unsupported and Would Lead to Absurd Results.

For the reasons explained above, *Seever*'s conclusory observation—that photocopies of exhibits "obviously could not have assisted the trier of fact" if an exhibit itself was not used at trial—does not properly construe the language and ignores the practicalities of how cases are tried. For several additional reasons, *Seever*'s interpretation should be rejected as inconsistent with the overall statutory scheme and purpose and because it leads to absurd results. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.*

(1987) 43 Cal.3d 1379, 1387 [“Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.”].)⁷

1. To start, *Seever*’s bar against recovering costs for unused exhibits inappropriately rewrites a statute that does not, on its face, distinguish between used and unused items. As the Court of Appeal below observed, courts should not “read into the statute allowing costs a restriction which has not been placed there. [Citation.]” (Opn. 8 [quoting *LAOSD Asbestos Cases, supra*, 25 Cal.App.5th at p. 1124, which similarly rejected *Seever*]; see also Code Civ. Proc., § 1858 [“In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . .”]; *Chaaban, supra*, 203 Cal.App.4th at p. 59.) That is all the more true given the Legislature’s choice to use a broad concept—whether models, enlargements, or photocopies are “reasonably helpful”—when it just as easily could have said “used,” “admitted,” or some other set of preconditions.

The Legislature’s more specific limitations for other cost items in the broader statute reinforce this reading. (See *Cummins*,

⁷ Petitioners also cite (but do not discuss) *Ladas v. California State Automobile Association* (1993) 19 Cal.App.4th 761, 775, as an example of a court disallowing recovery for unused exhibits. (OBM 5.) That case disallowed costs for exhibit photocopies where *none* were used because the entire case was dismissed before trial, leaving no occasion to make a distinction between unadmitted and admitted exhibits. It thus has no application here.

Inc. v. Superior Court (2005) 36 Cal.4th 478, 487 [“[T]he words of a statute [must be construed] in context, harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole.”]; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 [statute’s various components should be read together to achieve the overriding purpose of the legislation].) In contrast to the broad allowance for models and photocopies that are deemed reasonably helpful to the trier of fact, for instance, the Legislature specified that parties ordinarily may recover costs for only one copy of a deposition transcript (Code Civ. Proc., § 1033.5, subd. (a)(3)(A)), or for an interpreter only where the party “does not proficiently speak or understand the English language” (Code Civ. Proc., § 1033.5, subd. (a)(3)(B)). No similar limitation appears in subdivision (a)(13).

Likewise, the Legislature devoted an entire subdivision—subdivision (b)—to listing specific “items [that] are not allowable as costs.” (Code Civ. Proc., § 1033.5, subd. (b).) But subdivision (b) does not suggest, let alone specify, any prohibition against costs for unused exhibit and demonstrative copies; to the contrary, it specifically makes clear that its general prohibition of “photocopying charges” does *not* apply to photocopying charges “for exhibits.” (Code Civ. Proc., § 1033.5, subd. (b)(3).) If the Legislature had intended to bar photocopies of unused exhibits, it would have done so by specifying that subset of costs as not allowable under subdivision (b). It did not do so.

Instead of categorically prohibiting certain types of exhibit-related costs, the Legislature explicitly left the question of helpfulness to the trial court's discretion. Trial courts are free to conclude that unused copies were *not* helpful in a given case, or even that copies that *were* used ended up being unhelpful or unreasonable. But the trial court is in the best position to make that determination. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385 ["Deference is given to the factual findings of trial courts because those courts generally are in a better position to evaluate and weigh the evidence"]; *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 713 ["[T]rial courts are in a better position than appellate courts to . . . make findings of fact . . . [in] a case they inevitably will be more familiar with than the appellate courts".]) Any rule to the contrary would be untenably arbitrary, as a categorical rule that unused exhibits are *per se* not helpful is no more supportable than categorically denying costs for electronic presentations that use three screens, or enlargements exceeding 100 square inches, or models made with 3D printers, or copies rendered with color ink. The statute is silent in each of those instances; and for each, the trial court should make the determination of helpfulness based on the facts in a given case.

2. *Seever's* interpretation would make it prohibitively expensive and unduly burdensome even to seek costs for photocopying exhibits. Under *Seever's* approach, a party would have to do a document-by-document inquiry to count the number of pages in each exhibit that were admitted as compared to the number of pages that were not admitted, to allocate photocopying invoices between

used and unused exhibits. The process would be even more complicated if some exhibits are in color and thus cost more per page. The time required by a paralegal to undertake that inquiry would often exceed the value of the photocopies themselves.

The Legislature cannot have intended for prevailing parties—who are “entitled *as a matter of right* to recover costs” (Code Civ. Proc., § 1032, subd. (b), italics added)—to be left with such a pyrrhic path. That is particularly true in the context of a process for submitting costs, via a form Memorandum of Costs, that the Legislature plainly intended as a way of streamlining the recovery process. For cost recovery to work, a litigant should be able to look at its invoices, and, if the costs fall within an allowable category, claim them without hassle, subject to objection. *Seever*’s rule would impose an unreasonable burden on even the initial step of filling out the cost memorandum that the Legislature cannot have contemplated.

3. *Seever*’s interpretation is also untenable because, logically, it would not be limited to whether exhibits were used at trial. Rather, it would require trial courts to conduct substantive exhibit-by-exhibit inquiries into how relevant or important—each exhibit was to the jury reaching its conclusion. For example, in a breach of contract case, exhibits admitted to mount a defense on the issues of breach, causation, and damages would not be reasonably helpful to the trier of fact if, on a special verdict, the jury found no contract was formed. To paraphrase *Seever*, an exhibit “obviously could not have assisted the trier of fact” if the trier of fact did not even reach the issue for which the exhibit was relevant. Of

course, no one has interpreted the statute in that way because it would lead to absurd results.

An obligation to conduct a substantive inquiry into how “reasonably helpful” each exhibit was—which is what *Seeever*’s interpretation implies—would also impose unrealistic burdens on the parties and the court. It would require precisely the kind of “parsing” that the trial court here rejected as unnecessary, not intended by the statute, and not worth a court’s time. (RT 12, 14.)

II. Costs for Unadmitted Exhibits and Unused Closing Slides Are Independently Recoverable In The Court’s Discretion Under Subdivision (c)(4).

Alternatively, if subdivision (a)(13) is read restrictively to *not* encompass costs for preparing exhibit copies and demonstratives that are not used, then such costs are recoverable as an exercise of the court’s discretion under subdivision (c)(4), which provides an independent basis for affirming the award below. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12 [“[W]e review the ruling, not the court’s reasoning, and, if the ruling was correct on any ground, we affirm”].)

Section 1033.5, subdivision (c)(4), provides that “[i]tems not mentioned in this section [i.e., section 1033.5] . . . may be allowed or denied in the court’s discretion.” (Code Civ. Proc., § 1033.5, subd. (c)(4).) As discussed above, ASICS believes that subdivision (a)(13) encompasses *all* “reasonably helpful” photocopies of exhibits and demonstratives, whether used or not, making this catch-all provision unnecessary here. But if subdivision (a)(13) is read to implicitly apply only to photocopies of exhibits and demonstratives that

were used at trial, then such a reading necessarily does not speak to the preparation of photocopies and demonstratives that were not ultimately used. Likewise, subdivision (b) does not mention or expressly prohibit recovery for unused items, either, leaving these costs fully within the trial court's discretion to award. Or, as one Court of Appeal explained it, "[i]tems not specifically allowable under subdivision (a) and not prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.'" (*Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 363-364.).

In a wide variety of circumstances, courts have allowed costs under section 1033.5, subdivision (c)(4), where the costs were incurred to comply with a court-ordered procedure or involved common practices that were necessary to facilitate the proceedings. (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1204, 1207-1209 [affirming cost award for unsuccessful court-ordered mediation]; *Winston Square Homeowner's Ass' v. Centex West, Inc.* (1989) 213 Cal.App.3d 282, 292-293 [awarding fees for court-appointed special master]; see also *Benach, supra*, 149 Cal.App.4th at p. 858 [allowing messenger fees where reasonably necessary].)

Interpreting subdivision (c)(4) to encompass unused copies of exhibits (if subdivision (a)(13) does not) is consistent with the approach taken by most of the Courts of Appeal. (See *Benach, supra*, 149 Cal.App.4th at p. 856; *City of Anaheim v. Dep't of Trans.* (2005) 135 Cal.App.4th 526, 534 [allowing costs for exhibits never

used because “even if the exhibit costs are not authorized by” subdivision (a), “they may still be allowed in the trial court’s discretion pursuant to subdivision (c)(4)”]; *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1623 [affirming award of costs under section 1033.5, subdivision (c), even assuming subdivision (a) did not authorize them]; *Applegate, supra*, 23 Cal. App.4th at pp. 363-364.)

Benach’s approach is particularly helpful. There, the Court of Appeal affirmed an award of costs to the County for photocopies of exhibits, even though most were not used at trial, because there was no indication that the County “could have anticipated that they would not be used.” (*Benach, supra*, 149 Cal.App.4th at p. 856.) The parties had agreed to exchange exhibits in advance of trial and prepared exhibit binders for use by the court, witnesses and the plaintiff. While noting that the County “did not use the majority of its exhibits at trial,” the court recognized that any prudent counsel would have prepared them in advance of trial and that denying them would be inequitable. (*Ibid.*)

Benach and the other authorities listed above would counsel the same result here. ASICS created exhibit binders as a reasonably necessary component of trial preparation. Indeed, the trial court’s procedures *required* them (RA 245)—making their preparation analogous to other activities ordered by the court, for which costs are routinely allowed either as of right in subdivision (a) or as a matter of discretion under subdivision (c)(4). (See *Gibson*, 49 Cal.App.4th at pp. 1207-1209.) No reasonable counsel would have appeared for trial without physical copies of all marked exhibits, let alone disregard court rules requiring them. (See RT 10:28-

11:11.) As the trial court reasoned, ASICS could not have anticipated which of the marked exhibits would and would not be used. (See RT 10:21-25 [“You prepare for trial you may determine that some exhibits on the fly are important and others are not, but you have to be fully prepared, you have to have all the binders, you have to have everything copied.”].)

Similarly, ASICS’ closing demonstratives were also prepared as a reasonably necessary component of ASICS’ presentation of its case because they identified for the jury the key exhibits and testimony supporting ASICS’ case-in-chief at the conclusion of a ten-day trial. (See *supra* at pp. 14, 20-21.) And, as the trial court found, ASICS did not foresee and could not have foreseen that certain slides would not be used. (RA 319 [tentative ruling at 5].) ASICS exchanged copies of closing demonstrative slides the day before closing arguments and brought them to court the next day in anticipation that the full deck would be used. (RA 147.) When the court excluded some slides, ASICS was prepared to proceed without delay.

Petitioners again rely solely on *Seever*, reasoning that because exhibits are “mentioned” in subdivision (a), the Legislature, by implication, must have intended to preclude discretion to award costs relating to them under subdivision (c). (*Seever, supra*, 141 Cal.App.4th at pp. 1559-1660.) Again, *Seever*’s analysis is unpersuasive.

When the Legislature intended to bar or limit costs related to items already mentioned in subdivision (a), it did so expressly. For example, “[f]ees of expert witnesses ordered by the court” are

expressly permitted under section 1033.5, subdivision (a)(8), whereas the Legislature specified “[f]ees of experts not ordered by the court” as an item “not allowable as costs.” (Code Civ. Proc., § 1033.5, subd. (b)(1).) In the same way, “[t]ranscripts of court proceedings ordered by the court” are expressly permitted under section 1033.5, subdivision (a)(9), while “[t]ranscripts of court proceedings not ordered by the court” are expressly prohibited by section 1033.5, subdivision (b)(5). In both instances, if subdivision (a)’s mere “mention” of a subject matter (expert fees and transcripts ordered by the court) had been sufficient to implicitly bar all other types of expert fees and transcripts *not* ordered by the court, then subdivision (b)’s express prohibition of those items would be surplusage, an untenable result. (See *Woosley v. California* (1992) 3 Cal.4th 758, 775-776 [courts must avoid interpreting statute in a way that renders language meaningless or extraneous].)

If the Legislature had intended to bar photocopies of unused exhibits or unused demonstratives, it would have done so either by limiting recovery in subsection (a) to only “used” versions, or by specifying that subset of costs to be plainly not allowable under subdivision (b). It did not do either of those things. Instead, the statute specifically carves out “photocopying charges . . . for exhibits” from the scope of excluded costs, without any distinction based on whether they were used at trial. (Code Civ. Proc., § 1033.5, subd. (b)(3).)

Thus, even if subdivision (a)(13) does not itself apply (and it does), subdivision (c)(4) preserves a trial court’s discretion to

award costs for preparing exhibit binders, demonstratives, and other material where, as here, they are ordered by the court or otherwise found reasonably necessary for the conduct of litigation.

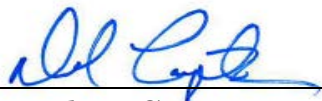
CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: December 30, 2020

Respectfully submitted,

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I hereby certify, pursuant to Cal. Rules of Court, rule 8.520(c)(1), that the text of this brief consists of 7,321 words as counted by the word processing program used to generate the brief.

Dated: December 30, 2020

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