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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DALE M. SPURLIN,
Plaintiff
v.
FOSTER WHEELER ENERGY
CORPORATION, et al.,
Defendants.

Case No.: 19-cv-02049-AJB-AHG

**ORDER DENYING PLAINTIFF’S
MOTION TO RE-TAX COSTS**

(Doc. No. 389)

Before the Court is Dale M. Spurlin’s (“Plaintiff”) motion to re-tax Foster Wheeler Energy Corporation and Foster Wheeler LLC’s (collectively, “Defendants”) Bill of Costs Re: Appeal. (Doc. No. 389.) Defendants filed an opposition. Plaintiff did not file a reply. For the reasons set forth below, the Court **DENIES** Plaintiff’s motion.

I. BACKGROUND

On December 1, 2023, the Ninth Circuit Court of Appeals filed a Memorandum affirming the judgment in favor of Defendants and against Plaintiff-Appellant in this asbestos-related products liability case. (Doc. No. 384-1 at 7.) Defendants thereafter filed with the Clerk of Court a Bill of Costs Re: Appeal, seeking to recover costs “incurred in the amount of \$9,000 for the reporter’s transcript of the trial proceedings.” (*Id.* at 2.) Plaintiff objected to Defendants’ request, arguing that because the transcripts were ordered

1 during the trial, “they were not ordered to assist in the appeal and are not costs of the
2 appeal.” (Doc. No. 387 at 2.) Plaintiff also asserted that if any amount should be taxed for
3 the transcripts, it should be the rate for the ordinary turnaround time for a transcript, not
4 for the expedited rate Defendants ordered. (*Id.*)

5 The Clerk held a hearing on Defendants’ request, found they were entitled to costs
6 incurred on appeal as the prevailing party, overruled Plaintiff’s objections, and found
7 Defendants’ request for \$9,000 in transcript costs recoverable under Federal Rules of
8 Appellate Procedure 39(e). (Doc. No. 388 at 1–2.) The Clerk therefore granted Defendants’
9 request for costs in its entirety. (*Id.* at 2.) The instant motion to re-tax costs follows.

10 **II. LEGAL STANDARD**

11 Federal Rule of Appellate Procedure (“Rule”) 39 provides that “if a judgment is
12 affirmed, costs are taxed against the appellant.” Fed. R. App. P. 39(a). The rule enumerates
13 four categories of “costs on appeal [that] are taxable in the district court for the benefit of
14 the party entitled to costs.” Fed. R. App. P. 39(e). One such category is “the reporter’s
15 transcript, if needed to determine the appeal.” Fed. R. App. P. 39(e)(2).

16 According to the Supreme Court, when the costs in question are taxable under Rule
17 39(e), “[t]he district court will ensure that the amount requested for the appellate costs in
18 question is ‘correct’” and “will consider whether the costs were ‘necessarily’ incurred.”
19 *City of San Antonio, Texas v. Hotels.com, L. P.*, 593 U.S. 330, 343 (2021) (quoting 28
20 U.S.C. § 1924).

21 **III. DISCUSSION**

22 Here, there is no dispute that Defendants are entitled to costs under Rule 39(a)
23 because the judgment in their favor was affirmed on appeal. Instead, Plaintiff argues that
24 Defendants should not be awarded \$9,000 in costs under Rule 39(e) because the transcript
25 fees were not necessarily incurred. Specifically, he contends that the transcripts were: (1)
26 ordered for the trial, not the appeal, (2) unreasonable because they were ordered on an
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1 expedited basis, and (3) unreasonable because more than one copy was ordered. (Doc. No.
2 389 at 2.) The Court disagrees.

3 As the Clerk noted, nothing in the text of Rule 39(e) limits recovery of costs to only
4 ordinary transcript rates and to only one transcript copy. (Doc. No. 388 at 2.) Rather, the
5 question is whether the transcript was “needed to determine the appeal.” Fed. R. App. P.
6 39(e)(2). In compliance with the applicable local rules and statute, counsel for Defendants
7 submitted a declaration verifying the bill of costs requested. *See City of San Antonio*, 593
8 U.S. at 339 (stating that “taxable” under Rule 39(e) “may mean no more than that the party
9 seeking those costs will not get them unless it submits a bill of costs with the verification
10 specified by statute and complies with any other procedural requirements that the local
11 rules of the court in question impose.”); *see also* 28 U.S.C. § 1924; Fed. R. Civ. P. 54(d)(1);
12 L. Civ. R. 54.1.

13 In his declaration, counsel attests that the “reporter’s transcript was needed to
14 determine the appeal and excerpts of said transcript were included as part of Foster
15 Wheeler’s Supplemental Excerpts of the Record on Appeal.” (Doc. No. 384-1 at 3.)
16 Counsel further declared that the “the services for which fees have been charged were
17 actually and necessarily performed.” (*Id.*) Plaintiff’s general objection to the
18 reasonableness of the expenditure does not rebut Defendants’ counsel’s declaration that the
19 trial transcripts ordered were needed for the appeal. While the transcripts were ordered
20 during trial, they were also used for the appeal, as evidenced by counsel’s declaration that
21 they were filed with the Ninth Circuit to defend against Plaintiff’s appeal. (*Id.*) And indeed,
22 Defendants prevailed. (*Id.* at 7.)

23 Moreover, the transcripts were reasonably necessary in this case as it appeared,
24 based on the litigiousness of both parties throughout the early stages of the case and at trial,
25 that this matter was destined to be appealed by the losing party.¹ *See, e.g., Nat’l Org. for*
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27 ¹ For this reason, the transcripts costs also qualify as taxable costs pursuant to Local Rule 54.1(b)(2).
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1 *Women, Inc. v. Scheidler*, 750 F.3d 696, 699 (7th Cir. 2014) (explaining that the defendants
2 “verified the reasonableness of these outlays by paying themselves, knowing that they
3 would have to bear every penny unless they won in the end.”).


4 Based on the foregoing, the Court overrules Plaintiff’s objections and affirms the
5 Clerk’s finding that Defendants’ request for \$9,000 in transcript fees are recoverable under
6 Rule 39(e) as reporter’s transcripts that were “needed to determine the appeal.”

7 **IV. CONCLUSION**

8 For the reasons stated herein, the Court **DENIES** Plaintiff’s motion to re-tax costs
9 and **SUSTAINS** the Clerk’s order taxing costs in favor of Defendants and against Plaintiff
10 in the amount of \$9,000. (Doc Nos. 388, 389.)

11 **IT IS SO ORDERED.**

12 Dated: July 1, 2024

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14 Hon. Anthony J. Battaglia
15 United States District Judge
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