APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50701

CITY OF SAN ANTONIO, TEXAS, On Behalf Of Itself And All Other Similarly Situated Texas Municipalities,
Plaintiff-Appellant,

v.

HOTELS.COM, L.P.; HOTWIRE, INCORPORATED; TRIP NETWORK, INCORPORATED, doing business as Cheaptickets.com; EXPEDIA, INCORPORATED; INTERNETWORK PUBLISHING CORPORATION, doing business as Lodging.Com; ORBITZ, L.L.C.; PRICELINE.COM, INCORPORATED; SITE59.COM, L.L.C.; TRAVELOCITY.COM, L.P.; TRAVELWEB, L.L.C.; TRAVELNOW.COM, INCORPORATED,
Defendants-Appellees.

Filed: May 11, 2020

Appeal from the United States District Court
for the Western District of Texas

Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

OPINION

STUART KYLE DUNCAN, Circuit Judge:

The Federal Rules of Appellate Procedure provide a framework for allocating appellate litigation costs between parties. For example, if the judgment below is reversed, the costs of printing appellate briefs are, by default, "taxed" against the appellees. FED. R. APP. P. 39(a)–(c). The rules also provide that certain other appeal costs, including premiums paid for bonds used to stay a money judgment and secure the right to appeal, are taxable in the district court. FED. R. APP. P. 39(e). In this case, the district court concluded that it was obligated under these rules to tax in excess of $2 million in appeal bond costs against the City of San Antonio. We affirm.

I.

This appeal represents the latest installment in a long-running legal dispute pitting a class of 173 Texas municipalities against various online travel companies (OTCs) such as Hotels.com, Hotwire, Orbitz, and Travelocity. The dispute began in 2006 when the City of San Antonio filed a putative class action lawsuit alleging the service fees charged by OTCs for facilitating hotel reservations are part of the "cost of occupancy," and, therefore, subject to the municipalities' hotel tax ordinances. The municipalities sought money damages for unpaid and underpaid hotel occupancy taxes, as well as a declaratory judgment that OTCs must collect and remit hotel occupancy taxes based on the amount collected for the room rate and service fee combined, i.e., the "retail rate."

In 2011, after a jury determined OTCs "control" hotels under the municipalities' ordinances, the district

court held that, as a matter of law, the retail rate was subject to the hotel occupancy tax, not merely the discounted room rate negotiated by the OTCs. Shortly thereafter, a Texas state court of appeals handling similar litigation involving the City of Houston (which had opted out of the class in the federal proceeding) reached the opposite conclusion. The state court held that the hotel occupancy tax only applies to the discounted room rate paid by the OTC to the hotels. *City of Houston v. Hotels.com, L.P.*, 357 S.W.3d 706, 708 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The OTCs subsequently moved the district court to amend its findings and conclusions in light of the Texas court's decision. The district court denied the motion and instead entered a final judgment awarding the municipalities $55,146,489 in unpaid taxes, interest, and penalties.

The OTCs immediately sought approval for $68,673,780 in appeal bonds, a figure calculated to cover the judgment along with up to 18 months' worth of interest and penalties. The district court approved the bond amounts, and, pursuant to Rule 62 of the Federal Rules of Civil Procedure, stayed the judgment until after all post-judgment motions and appeals had been resolved. The OTCs promptly filed their appeal bonds. Shortly thereafter, in early May 2013, the OTCs filed a renewed motion for judgment as a matter of law, or, alternatively, a new trial. In November 2014, after the district court failed to decide the OTCs' post-judgment motion within 18 months, the OTCs increased their appeal bond amounts. Another year passed with no decision from the district court, so the bonds were increased yet again.

Finally, in January 2016, the district court denied the OTCs' various post-judgment motions. That April, the

court entered an amended judgment of $84,123,089 reflecting increased penalties as well as taxes and interest that had accrued since the first judgment. The parties cross-appealed to this court.

In November 2017, we ruled in favor of the OTCs, reasoning that the state court's decision was "on point" and its "interpretation control[ling]," therefore "the hotel occupancy tax applies only to the discounted room rate paid by the OTC to the hotel." *City of San Antonio v. Hotels.com*, 876 F.3d 717, 724 (5th Cir. 2017) (cleaned up). We "vacated" the district court's judgment and "rendered" judgment for the OTCs. *Id.*

Pursuant to Federal Rule of Appellate Procedure 39(d), the OTCs timely filed a bill of costs in this court seeking copying costs in the amount of $905.60, nothing more. San Antonio did not object to these costs. We subsequently denied San Antonio's requests for panel and en banc rehearing, issuing our mandate on February 14, 2018. The mandate ordered that "plaintiff-appellee cross-appellant [i.e., San Antonio] pay to defendants-appellants cross-appellees [i.e., the OTCs] the costs on appeal to be taxed by the Clerk of this Court."

Back in the district court, the OTCs moved for "an order entering Final Judgment in favor of the OTCs, releasing all supersedeas bonds, and awarding costs to the OTCs as the prevailing parties." The OTCs' proposed order stated that "costs shall be taxed against the Cities in favor of the OTCs pursuant to 28 U.S.C. § 1920, Fed. R. Civ. P. 54, and Fed. R. App. P. 39." San Antonio responded that it had "no objection as to the form of the Proposed Judgment." Accordingly, the district court entered the OTCs' proposed order without alteration.

Following entry of final judgment, the OTCs filed a bill of costs in the district court seeking $2,353,294.58. In addition to the $905.60 sought in our court and various other court fees and copying costs, the bill of costs included $2,008,359.00 for "post-judgment interest" and "premiums paid for the supersedeas bonds required to secure a stay of execution and preserve rights pending appeal (FED. R. APP. P. 39(e)(3))."

San Antonio objected, urging the district court to refuse to tax, or at least substantially reduce, the appeal bond premiums sought by the OTCs. The district court noted that San Antonio made "some persuasive arguments" but, relying on *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578 (5th Cir. Mar. 4, 1991), the court concluded that it lacked discretion to reduce taxation of the bond premiums. Accordingly, the district court entered a bill of costs taxing $2,226,724.37 against San Antonio.[1] The City timely appealed.

II.

Although we have not previously articulated the standard of review applicable to a district court's interpretation of the Federal Rules of Appellate Procedure, we review other matters of statutory interpretation *de novo*, including a district court's interpretation of the Federal Rules of Civil Procedure. *See Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003). Therefore, *de novo* review is appropriate here. *Cf. L-3 Communications Corp. v. OSI Sys., Inc.*, 607 F.3d 24, 27 (2d Cir. 2010) (reviewing interpretation of

[1] This figure is slightly reduced from the amount originally billed by the OTCs for reasons not relevant to this appeal.

Federal Rules of Appellate Procedure *de novo*); *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 497 F.3d 805, 808 (8th Cir. 2007) (same); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1340 (11th Cir. 1997) (same).

III.

A.

Under Rule 39 of the Federal Rules of Appellate Procedure, some appellate costs are taxed in the court of appeals, while others are "made taxable in the district court for general convenience." *Sioux*, 1991 WL 182578, at *1 (quoting FED. R. APP. P. 39, Advisory Committee Notes). In general, Rule 39 "dictates that the disposition of the appeal is the deciding factor in the assessment of appellate costs." *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983). To that end, Rule 39(a) provides default taxation rules for four categories of cases as follows:

> **Against Whom Assessed**. The following rules apply unless the law provides or the court orders otherwise:
>
> > (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
> >
> > (2) if a judgment is affirmed, costs are taxed against the appellant;
> >
> > (3) if a judgment is reversed, costs are taxed against the appellee;

> (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

FED. R. APP. P. 39(a).

A threshold question that divides the parties is whether this case is properly viewed under Rule 39(a)(3) or 39(a)(4). San Antonio argues that Rule 39(a)(4) applies because this court, by the terms of its mandate in the first appeal, "vacated" the district court's judgment. The OTCs maintain that Rule 39(a)(3) applies because this court "set aside the entire judgment against the OTCs and rendered judgment for the OTCs ... a reversal under any standard."

We agree with the OTCs that this is a Rule 39(a)(3) case. Parts (1)–(3) of Rule 39(a) apply when there is a clear prevailing party on appeal, regardless of the exact decretal language used by the court of appeals, whereas part (4) applies when there is no clear winner or the results are mixed. *See Chem. Mfrs. Ass'n v. E.P.A.*, 885 F.2d 1276, 1278 (5th Cir. 1989) ("[A]lthough the structure of Rule 39(a) suggests that the allocation of costs ordinarily follows the ruling on the merits, when the results on appeal are mixed, then costs should be allowed only as ordered by the court." (internal quotation marks and citation omitted)); *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1081 (9th Cir. 2009) (applying 39(a)(4) where "neither side is the clear winner"); *L-3 Communications*, 607 F.3d at 28 (explaining 39(a)(4) applies where "the disposition on appeal will not lend itself to a ready determination of which party, if any, should bear costs on appeal"); 16AA Wright & Miller, Fed. Prac. & Proc. Juris. § 3985 (4th ed.) ("The prevailing party, except where no party completely prevails, thus becomes entitled to an award of

costs as a matter of course, whether or not the opinion or judgment of the court of appeals so states."). Here, the OTCs utterly prevailed in their first appeal. There was nothing left for the district court to do other than enter final judgment in the OTCs' favor and address costs. Because the OTCs were the clear prevailing party in the first appeal, not to mention the entire case, Rule 39(a)(3) applies.

The fact that the decretal language in the first appeal used the word "vacated" instead of "reversed" does not change this result. Indeed, "there is a difference of opinion among judges as to the circumstances in which 'vacated' or 'reversed' should be used in decretal language." Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOK. L. REV. 727, 728 (2005). While an argument can be made that "reversed" might have been the better choice for the decretal language in the first appeal, *see id.* at 728–29, what matters for purposes of Rule 39(a) is the *substance* of the disposition, not merely the form. *See, e.g.*, *Saunders v. Washington Metro. Area Transit Auth.*, 505 F.2d 331, 333 (D.C. Cir. 1974) ("Our disposition of appellants' appeals, though in form a remand for further proceedings, was a reversal in every sense of the word."). In substance, our mandate in the first appeal—which rendered judgment for the OTCs—was nothing less than a reversal.

B.

Where applicable, Rule 39(a)(3) provides that, by default, appeal "costs are taxed against the appellee." FED. R. APP. P. 39(a)(3). This includes the enumerated appeal costs—such as appeal bond premiums—taxable in the district court under Rule 39(e), which reads:

> **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:
>
> (1) the preparation and transmission of the record;
>
> (2) the reporter's transcript, if needed to determine the appeal;
>
> (3) premiums paid for a bond or other security to preserve rights pending appeal; and
>
> (4) the fee for filing the notice of appeal.

FED. R. APP. P. 39(e). An exception to the default rule exists where the appellate court "orders otherwise." FED. R. APP. P. 39(a). *See Moore v. Cty. of Delaware*, 586 F.3d 219, 221 (2d Cir. 2009) (holding Rule 39 gives appellate courts discretion to deny award of appeal costs even where properly taxable and collecting cases); *Saunders*, 505 F.2d at 334 ("Absent a contrary direction by this [appellate] court, appellants were entitled ... to their costs as a matter of course."). Seizing on this exception in Rule 39, San Antonio contends that even if 39(a)(3) controls, our mandate in the first appeal "displaced" the default rule by limiting appellate costs to those "taxed by the Clerk of this Court." Based largely on the fact that the OTCs "never asked" our court for Rule 39(e) costs, the City construes the mandate language as limiting appellate costs to the docketing and printing costs taxable in this court.

San Antonio's argument is unavailing. Nothing in our mandate in the first appeal purports to preclude or otherwise limit an award of taxable Rule 39(e) appeal costs in the district court. Furthermore, the OTCs' failure to

request Rule 39(e) appeal costs in *this* court is of no moment. The proper place to seek Rule 39(e) appeal costs is in the district court, where those costs are taxable "for general convenience." FED. R. APP. P. 39, Advisory Committee Notes. *See*, *e.g.*, *LULAC v. City of Boerne*, No. SA-96-CV-808-XR, 2013 WL 12231416, at *26 (W.D. Tex. Feb. 20, 2013) (instructing prevailing appellant to include supersedeas bond premiums and other Rule 39(e) appeal costs on district court bill of costs).

Because we did not "order otherwise," the default rule under 39(a)(3) controls. Accordingly, the district court was empowered to grant the OTCs' request for appeal bond costs.

C.

San Antonio asserts that even if the district court was authorized to grant the OTCs' request for Rule 39(e) appeal costs, the award should nevertheless be vacated because the district court applied the wrong legal standard, thinking it lacked discretion to deny or reduce the award when in reality it could have done so. As San Antonio points out, most other circuits to have considered this issue have held—or at least implied—that a district court retains discretion to deny or reduce a Rule 39(e) award, regardless of whether the district court's authority to grant the award arises from one of the default rules in 39(a)(1)–(3) or from an appellate court's mandate in a 39(a)(4) case. *See, e.g.*, *Republic Tobacco Co. v. N. Atl. Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007) (citing *Guse v. J. C. Penney Co.*, 570 F.2d 679, 681 (7th Cir. 1978)); *Campbell v. Rainbow City, Alabama*, 209 F. App'x 873, 875 (11th Cir. 2006) (unpublished); *In re Bonds Distrib.*

Co., 73 F. App'x 605, 607 (4th Cir. 2003) (unpublished).[2] The problem for San Antonio, however, is that our circuit adopted the contrary position almost three decades ago in *Sioux*, which remains binding precedent.[3]

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[2] To be sure, San Antonio overstates the out-of-circuit support for its position. Some of San Antonio's cases are distinguishable because the appeal costs at issue were above and beyond those enumerated in Rule 39(e). *See, e.g.*, *Dana Corp. v. IPC Ltd. P'ship*, No. 90-1443, 1991 WL 5890, at *3 (Fed. Cir. Jan. 25, 1991) (considering district court's discretion to award costs paid for letter of credit); *Johnson v. Pac. Lighting Land Co.*, 878 F.2d 297, 298 (9th Cir. 1989) (same); *Bose Corp. v. Consumers Union of U.S., Inc.*, 806 F.2d 304, 305 (1st Cir. 1986) (per curiam) (same); *Lerman v. Flynt Distrib. Co.*, 789 F.2d 164, 167 (2d Cir. 1986) (considering district court's discretion to award interest costs on funds borrowed to secure appeal bond). Others only address a district court's discretion to *grant* Rule 39(e) costs in the absence of, or in contravention of, a specific instruction from the appellate court. *See, e.g.*, *L-3 Communications*, 607 F.3d at 30 (holding district court had "authority to tax costs pursuant to Rule 39(e) absent a specific authorization from this Court" and dismissing as "dubious" the argument that amendments to Rule 39 "alter[ed] the scope of a district court's discretion in taxing Rule 39(e) costs"); *Standard Concrete Prod. Inc. v. Gen. Truck Drivers Union Local 952*, 175 F. App'x 932, 933 (9th Cir. 2006) (unpublished) (holding that a district court "does not have discretion to award fees in contravention of this court's order as to which party should bear appellate costs"). Finally, some of San Antonio's cases are not on point because they turn on the appellate court's manifest intention to leave the taxation decision to the discretion of the district court in Rule 39(a)(4) situations where the appeal resulted in a remand for further proceedings such that it remained unclear which party would ultimately prevail on the merits. *See, e.g.*, *Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616, 628–29 (8th Cir. 2003); *Berthelsen v. Kane*, 907 F.2d 617, 622–23 (6th Cir. 1990).

[3] "The fact that [*Sioux*] is unpublished does not alter its precedential status, because it was decided before January 1, 1996." *Weaver v.*

In *Sioux*, we considered a prior appeal that vacated the district court's judgment and remanded for retrial. 1991 WL 182578, at *1; *cf. Sioux, Ltd., Sec. Litig. v. Coopers & Lybrand*, 914 F.2d 61, 66 (5th Cir. 1990) (first appeal). Applying Rule 39(a)(4), we treated the mandate, which awarded appellants "the costs on appeal to be taxed by the Clerk of this Court," as a determination that appellants were "the 'party entitled to costs' in this case." *Id.* at *1 (quoting FED. R. APP. P. 39(e)). Further, we recognized that the appellate mandate did not "limit costs on appeal taxable in the district court." *Id.* Reasoning that "[a]bsent some limiting provision in the mandate from the court of appeals, the party entitled to costs in the court of appeals is entitled to costs in the district court under Rule 39(e)," we held that appellants were entitled to such costs. *Id.* Indeed, we went even further. Noting that "Rule 39(e) is mandatory," we held "[t]he district court ha[d] no discretion whether, when, to what extent, or to which party to award costs of the appeal" and therefore erred by denying appellant's application for appeal bond premiums under Rule 39(e). *Id.*

San Antonio argues *Sioux* is no longer good law because it specifically relied on language from an old version of Rule 39(e), which was amended in 1998. The old version stated appellate costs "*shall be taxed* in the district court" whereas the current version states appellate costs "*are taxable* in the district court."[4] FED. R. APP. P.

Ingalls Shipbuilding, Inc., 282 F.3d 357, 359 (5th Cir. 2002) (citing 5TH CIR. R. 47.5.3).

[4] The pre-amendment version of Rule 39(e) stated, in full:

> Costs incurred in the preparation and transmission of the record, the costs of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas

39(e) (emphases added). According to San Antonio, the "permissive language" of the 1998 amendment "clarifies that the phrase 'shall be taxed in the district court' was meant only to identify in which court the listed costs *could be taxed*, not to convey that those costs *must be taxed* to a party entitled to any appellate costs." Importantly, though, San Antonio concedes that the 1998 amendment was not substantive in nature.[5] The City's view is that the Advisory Committee "simply made clearer what it had always intended: that district courts have discretion whether and in what amount to award Rule 39(e) costs."

San Antonio's argument misses the mark. As San Antonio concedes, the 1998 amendment worked no substantive change to Rule 39(e). This means that, at most, *Sioux*'s treatment of Rule 39(e) was just as wrong *before* the amendment as it was *after*. But even assuming *arguendo* that *Sioux* was wrong from the start as a matter of interpretation, its treatment of Rule 39 nevertheless remains controlling law. "As a general rule, one panel may not overrule the decision of a prior panel, right or wrong, in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the

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bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

[5] The 1998 Advisory Committee Note to Rule 39 reads:

> The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

United States Supreme Court." *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir. 1998); *see also Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("[E]ven if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void.").

We express no view on the merits of *Sioux*'s interpretation of Rule 39(e). We hold only that, because no substantive change in the law has occurred, *Sioux* remains binding precedent. Therefore, the district court correctly recognized that it lacked discretion to deny or reduce the appeal bond costs to which the OTCs were entitled under Rule 39.

* * *

For the foregoing reasons, the order of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-06-CA-381-OG
A CLASS ACTION

CITY OF SAN ANTONIO, TEXAS, on behalf of itself and all other similarly situated Texas cities,
Plaintiffs

v.

HOTELS.COM, L.P., et al,
Defendants

Filed: June 26, 2019

ORDER ON OBJECTIONS TO BILL OF COSTS

Before ORLANDO L. GARCIA, Chief United States District Judge.

On April 9, 2018, Defendants filed their post-appeal bill of costs. Docket no. 1337. Plaintiffs filed their objections thereto. Docket no. 1340. Defendants filed a response to the objections. Docket no. 1342. Having reviewed the bill of costs, the objections, written arguments, and the applicable law, the Court finds that Plaintiffs' objections should be granted in part and the total costs to be taxed against the City of San Antonio should be reduced as follows:

A. Reduction of bond premiums[1]

Plaintiffs first object to any taxation of supersedeas bond costs; alternatively, the City of San Antonio objects to being solely responsible for this tremendous cost which will be borne by the taxpayers. The City of San Antonio makes some persuasive arguments, but the Court is constrained by the rules and existing precedent on this issue.

On February 14, 2018, the Fifth Circuit ordered that its judgment vacating and rendering for the OTCs be issued as the mandate. As part of that mandate, the circuit court ordered that "plaintiff-appellee cross-appellant pay to defendants-appellants cross-appellees the costs on appeal to be taxed by the Clerk of this Court." Docket no. 1332. When a judgment is vacated, "costs shall be allowed only as ordered by the court." *In re Sioux Ltd., Securities Litig.*, 1991 WL 182578, at *1 (5th Cir. 1991) (per curiam) (quoting Fed. R. App. P. 39(a)).[2] In this case, the Fifth Circuit so ordered, and "[a]bsent some limiting provision in the mandate from the court of appeals, the party entitled to costs in the court of appeals is entitled to costs in the district court under Rule 39(e)." *Id.* "Some costs on appeal are taxed in the circuit court. Other costs on appeal are 'made taxable in the district court for general convenience.'" *Id.* (quoting, in part, Fed. R. App. P. 39(e), Advisory Committee Notes). Rule 39(e)(3) states that premiums paid for a supersedeas bond or other bond to preserve rights pending appeal are taxable in the district court. Fed. R. App. P. 39(e)(3).

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[1] Docket no. 1340, pp. 3-9.

[2] Pursuant to Fifth Circuit Local Rule 47.5.3, "[u]npublished opinions issued before January 1, 1996, are precedent."

Plaintiffs argue that because the award to the City of San Antonio represented only a portion of the total judgment, it would be unjust to hold San Antonio solely responsible for the full bond amounts. *See, e.g.*, *In re Paoli Railroad Yard PCB Litigation*, 221 F.3d 449,454 (3d Cir. 2000) ("We conclude that it was inequitable to saddle [two of the nineteen plaintiffs] with one hundred percent of the defendants' costs . . . when they were responsible for only a discrete and recognizable fraction of that sum . . ."); *Rand v. Monsanto*, 926 F.2d 596, 601 (7th Cir. 1991) ("a district court may not establish a per se rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the [class] action"), *overruled on other grounds*, *Chapman v. First Index, Inc.*, 796 F.2d 783 (7th Cir. 2015). However, there is no precedent in the Fifth Circuit to support the City's argument under the circumstances herein. Instead, Fifth Circuit authority seems to make clear that the district court "has no discretion regarding whether, when, to what extent, or to which party to award costs of the appeal . . . its sole responsibility is to ensure that only proper costs are awarded." *In re Sioux Ltd.*, 1991 WL 182578, at *1. For that reason, the Court is constrained to enforce Rule 39(e) as written, pursuant to the Fifth Circuit's mandate. *See Certain Underwriters at Lloyds, London v. Oryx Energy Co.*, 25 F. Supp. 2d 769, 770 (S.D. Tex. 1998) (as the Fifth Circuit specifically ordered that costs on appeal be taxed against the plaintiff, the district court "has no discretion") (citing *In re Sioux Ltd.*, 1991 WL 182578, at *1); *see also LULAC v. City of Boerne*, 2013 WL 12231416, at *23 (W.D. Tex. 2013) ("Absent some limiting provision in the mandate . . . the district court has no discretion regarding whether, when, to what extent, or to which party to award costs of the appeal")

(citing *In re Sioux Ltd.*, 1991 WL 182578, at *1).[3] The Court is unable to further reduce the amount of bond premiums being sought.[4]

B. Reduction of costs for deposition transcripts and videos

1. Unidentified deposition costs[5]

Plaintiffs object to some of the deposition costs because there is no supporting documentation to substantiate such costs. Most of the deposition costs can be traced to actual invoices from court reporting services, but Plaintiffs object to the deposition costs that cannot be traced to any invoices and fail to identify the deponent and whether the costs relate to written transcripts or videotaped depositions. Defendants do not respond to this argument. Without supporting documentation to identify the depositions for which the alleged cost was incurred, the request for reimbursement must be denied. *Modesta Lopez-Santiago v. Coconut Thai Grill*, 2015 WL 7294896, at *3 (N.D. Tex. 2015) (defendants did not meet their burden to show deposition costs were necessarily incurred when they failed to identify the depositions for which they sought recovery of costs). This results in a reduction of $16,623,75.

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[3] *See also Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co.*, 600 F. App'x. 230, 237 (5th Cir. 2015) ("Rule 39(e)'s express authorization of these costs is binding on district courts") (citing *Republic Tobacco Co. v. N. Atl. Trading Co.*, 481 F.3d 442,448 (7th Cir. 2007)).

[4] The parties stipulated to a downward adjustment in the amount of $68,681.64, but the Court cannot order any further reduction.

[5] Docket no. 1340, p. 10 ¶ 1.

2. Duplicative deposition costs[6]

The OTCs engaged in a joint defense of this litigation. But with respect to 15 deponents, multiple defendants appear to be seeking reimbursement for the exact same transcripts or videos. As Plaintiffs point out, "it would have been reasonable for no more than one of the OTCs' law firms to order a copy of any given transcript or video, as the firms could readily share the transcripts and videos. Indeed, this appears to have occurred in most instances." In some instances where there was duplication, the OTCs "appear to have controlled for the duplication" by eliminating the duplicate amounts from the bill of costs. But there are still 15 deposition transcripts or videos that are entirely duplicative. The OTCs claim they weren't obligated to share transcripts and videos; by the same token, they have to show their costs are reasonable and necessary. Costs that are duplicative are typically unnecessary. Considering the joint manner in which the OTCs litigated this case, and the failure to explain why it was necessary to incur these duplicative costs, other than mere convenience, the Court will not require Plaintiffs to reimburse them. *See Baisden v. I'm Ready Productions, Inc.*, 793 F. Supp. 2d 970, 973 (S.D. Tex. 2011) ("once an objection has been raised, the party seeking costs bears the burden of verifying that the costs were *necessarily incurred* in the case rather than just spent in preparation and litigation of the case") (emphasis added); *Canion v. United States*, 2005 WL 2216881, at *3 (W.D. Tex. 2005) (costs incurred "primarily for the convenience of counsel" are not authorized). This results in a downward adjustment of $18,867.76.

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[6] Docket no. 1340, pp. 10-11 ¶ 2.

3. Video depositions of the OTCs' own witnesses[7]

The OTCs are also seeking reimbursement for video depositions of their own witnesses. When seeking costs for both videotaped and transcribed versions of the same deposition, the requesting party bears the burden of showing that both versions of the deposition were reasonably and necessarily obtained for use in the case. *Baisden*, 793 F. Supp. 2d at 977. Defendants have failed to make a showing that the cost of video depositions of their own witnesses who were reasonably expected to appear live at trial were necessarily obtained for use in the case. Subtracting the costs of the video depositions of the OTCs' own witnesses results in a downward adjustment of $16,258.94.

4. Video deposition costs for witnesses whose depositions were not used at trial[8]

Defendants seek costs for the video depositions of 77 deponents, and only 26 of the deponents actually testified by deposition at trial. This Court does not generally award costs for both transcripts and videos unless the videos were actually used at trial. *Structural Metals, Inc. v. S & C Elec. Co.*, 2013 WL 3790450, at *4 (W.D. Tex. 2013); *Two-Way Media, LLC v. AT&T Services, Inc.*, 2013 WL 12090356, at *3 (W.D. Tex. 2013). The amount of deposition costs sought by the OTCs for videos of deponents who did not testify by deposition at trial will not be reimbursed. This results in a reduction of $17,424.85.

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[7] Docket no. 1340, p. 11 ¶ 3.

[8] Docket no. 1340, p. 12 ¶ 4.

5. Total downward adjustment to deposition transcript and video costs[9]

As the City of San Antonio has noted, some of the foregoing objections and reductions to transcript and video costs overlap. Thus, the Court cannot simply aggregate the individual reductions to compute a total downward adjustment for transcript and video costs. After taking this into account, the downward adjustment to all of the deposition transcript and video costs is $58,753.09.

C. Copying and exemplification costs[10]

Plaintiffs further object to the OTCs' request for reimbursement of copying and exemplification costs in the amount of $202,068.25. Many of the documents offered in support of the request generically refer to "B&W Copies - Medium/Heavy Litigation" or "Heavy Litigation Copies" or "Color Copies - Legal" or "Blowbacks" and "Slip Sheets" without specifying the type of documents being copied or how they relate to the case. Without further description, the Court does not have sufficient information to make a reasonable determination of necessity. *See Honestech v. Sonic Solutions*, 725 F. Supp. 2d 573, 584 (W.D. Tex. 2010) ("Although prevailing parties do not have to justify every single photocopying cost, they do have to provide enough information for the Court [to be] able to make a reasonable determination of necessity"); *Eastman Chemical Co. v. PlastiPure, Inc.*, 2013 WL 5555373, at *7 (W.D. Tex. 2013) (same). This results in a downward adjustment of $67,817.12 in copying and exemplification costs.

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[9] Docket no. 1340, pp. 12-13 ¶ 5

[10] Docket no. 1340, pp. 13-15.

It is therefore ORDERED that the Clerk of the Court may tax costs in the amount of **$2,226,724.37**.[11]

SIGNED this 26 day of June, 2019.

s/ *Orlando L. Garcia*
ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE

[11] The total reduction ordered herein is $126,570.21. The total sum sought ($2,353,294.58) minus the reduction ($126,570.21) equals $2,226,724.37.

APPENDIX C

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No.: 5:06-cv-00381-OLG

CITY OF SAN ANTONIO, TEXAS, et al.,
Plaintiffs

v.

HOTELS.COM, L.P., et al.,
Defendants

Filed: June 26, 2019

BILL OF COSTS

Judgment having been entered in the above entitled action on 3/26/2018 against Plaintiffs, the Clerk is requested to tax the following as costs:

Fees of the Clerk……..	$ 505.00
Fees for service of summons and subpoena……..	632.50
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case……...	139,276.23

Fees and disbursements for printing...	
Fees for witnesses *(itemize on page two)*.....	1,548.00
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.....	202,068.25
Docket fees under 28 U.S.C. 1923.....	0.00
Costs as shown on Mandate of Court of Appeals..........	905.60
Compensation of court-appointed experts.....	0.00
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828.....	0.00
Other costs *(please itemize)*..... .....See Footnote 1.....	2,008,359.00
TOTAL	$2,353,924.58

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been

charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

[√] Electronic service [ ] First class mail, postage prepaid

[ ] Other _____

s/ Attorney: s/Les Strieber

Name of Attorney: Les Strieber

For: Defendants Date: 04/09/2018
Name of Claiming Party

Taxation of Costs

Costs are taxed in the amount of $2,226,724.37 and included in the judgment.

s/ JEANNETTE J. CLACK	s/[signature]	6/26/19
Clerk of Court	*Deputy Clerk*	*Date*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50479

CITY OF SAN ANTONIO, TEXAS, On Behalf Of Itself And All Other Similarly Situated Texas Municipalities,
Plaintiff-Appellee Cross-Appellant,

v.

HOTELS.COM, L.P.; HOTWIRE, INCORPORATED; TRIP NETWORK, INCORPORATED, doing business as Cheaptickets.com; EXPEDIA, INCORPORATED; INTERNETWORK PUBLISHING CORPORATION, doing business as Lodging.Com; ORBITZ, L.L.C.; PRICELINE.COM, INCORPORATED; SITE59.COM, L.L.C.; TRAVELOCITY.COM, L.P.; TRAVELWEB, L.L.C.; TRAVELNOW.COM, INCORPORATED,
Defendants-Appellants Cross-Appellees.

Filed: November 29, 2017

Appeal from the United States District Court
for the Western District of Texas
D.C. Docket No. 5:06-CV-381

Before BARKSDALE, DENNIS, and CLEMENT,
Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated and rendered for OTCs.

IT IS FURTHER ORDERED that plaintiff-appellee cross-appellant pay to defendants-appellants cross-appellees the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50479

CITY OF SAN ANTONIO, TEXAS, On Behalf Of Itself And All Other Similarly Situated Texas Municipalities,
Plaintiff-Appellee Cross-Appellant,

v.

HOTELS.COM, L.P.; HOTWIRE, INCORPORATED; TRIP NETWORK, INCORPORATED, doing business as Cheaptickets.com; EXPEDIA, INCORPORATED; INTERNETWORK PUBLISHING CORPORATION, doing business as Lodging.Com; ORBITZ, L.L.C.; PRICELINE.COM, INCORPORATED; SITE59.COM, L.L.C.; TRAVELOCITY.COM, L.P.; TRAVELWEB, L.L.C.; TRAVELNOW.COM, INCORPORATED,
Defendants-Appellants Cross-Appellees.

Filed: February 14, 2018

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See* FED. R. APP. P. & 5th CIR. R. 39. Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

City of San Antonio, Texas v. Hotels.com, L.P., et al. No. 16-50479

The Clerk is requested to tax the following costs against: Appellee City of San Antonio, Texas

COSTS TAXABLE UNDER Fed. R. App. P. & 5th Cir. R. 39	**REQUESTED**				**ALLOWED (If different from amount requested**			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee ($500.00)				500				500.00
Appendix or Record Excerpts	4	333	0.15	199.8	4	333	.15	199.80
Appellant's Brief	7	101	0.15	106.05	7	101	.15	106.05
Appellee's Brief								

Appellant's Reply Brief	7	95	0.15	99.75	7	95	.15	99.75
Other: [ ]								
Total $ [905.6]					Costs are taxed in the amount of $ [905.60]			

Costs are hereby taxed in the amount of $ 905.60 this 14th day of February , 2018 .

State of

County of _____

LYLE W. CAYCE, CLERK

By s/[signature]
Deputy Clerk

I David Keltner , do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This 13th day of December , 2017 .

/s/ David Keltner
(Signature)
Attorney for Appellants Hotels.com, L.P., et al.

***SEE REVERSE SIDE FOR RULES GOVERNING TAXATION OF COSTS**

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50701

CITY OF SAN ANTONIO, TEXAS, On Behalf Of Itself And All Other Similarly Situated Texas Municipalities,
Plaintiff-Appellant,

v.

HOTELS.COM, L.P.; HOTWIRE, INCORPORATED; TRIP NETWORK, INCORPORATED, doing business as Cheaptickets.com; EXPEDIA, INCORPORATED; INTERNETWORK PUBLISHING CORPORATION, doing business as Lodging.Com; ORBITZ, L.L.C.; PRICELINE.COM, INCORPORATED; SITE59.COM, L.L.C.; TRAVELOCITY.COM, L.P.; TRAVELWEB, L.L.C.; TRAVELNOW.COM, INCORPORATED,
Defendants-Appellees.

Filed: July 6, 2020

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion: 05/11/20, 5 Cir., ___, _____ F. 3d. _____)

Before SOUTHWICK, COSTA, and DUNCAN,
Circuit Judges.

ORDER

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), rehearing en banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judge Smith, Judge Dennis, Judge Elrod, Judge Duncan, Judge Engelhardt, and Judge Oldham), and ten judges voted against rehearing (Chief Judge Owen, Judge Jones, Judge Stewart, Judge Southwick, Judge Haynes, Judge Graves, Judge Higginson, Judge Costa, Judge Willett, and Judge Ho).

ENTERED FOR THE COURT:

s/ *Stuart Kyle Duncan*
STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE