

1 ALSCHULER GROSSMAN STEIN & KAHAN LLP  
John M. Gatti (No. 138492)  
2 Rex D. Glensy (No. 198909)  
Jonathan E. Stern (No. 222192)  
3 The Water Garden  
1620 26th Street  
4 Fourth Floor, North Tower  
Santa Monica, CA 90404-4060  
5 Telephone: 310-907-1000  
Facsimile: 310-907-2000

6 Attorneys for Plaintiff  
7 BARBRA STREISAND

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES

10  
11 BARBRA STREISAND, an individual,  
12 Plaintiff,

13 vs.

14 KENNETH ADELMAN, an individual;  
15 PICTOPIA.COM, a California corporation;  
LAYER42.NET, a California corporation;  
and DOE 1 through DOE 20, inclusive.

16 Defendants.  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CASE NO. SC 077257

[Honorable Allan J. Goodman]

**REPLY TO DEFENDANT KENNETH  
ADELMAN'S AND PICTOPIA.COM'S  
OPPOSITION TO PLAINTIFF BARBRA  
STREISAND'S MOTION TO TAX COSTS**

Date: April 30, 2004

Time: 8:30 a.m.

Dept.: H

Complaint filed: May 20, 2003

1 **I. INTRODUCTION**

2 Section 1033.5 of the California Code of Civil Procedure limits Defendants  
3 Kenneth Adelman (“Adelman”) and Pictopia.com (collectively, “Defendants”) to only recovering  
4 those costs that are statutorily permitted and reasonably necessary to conduct the anti-SLAPP  
5 litigation. Defendants attempt to overextend the scope of the statute and force Plaintiff Barbra  
6 Streisand (“Streisand”) to absorb costs that not only were not reasonably necessary to conduct the  
7 litigation but altogether failed to advance this action.

8 Accordingly, this Court should deny Defendants’ improper requests for costs.

9 **II. DISCUSSION**

10 **A. Defendants Improperly Seek Costs for Exhibits and Exhibit Boards that**  
11 **Were Not Reasonably Helpful to the Court**

12 Defendants’ claim for \$1,238.44 for the creation of three exhibits and copying and  
13 collating those exhibits is unreasonable. California Civil Procedure Code § 1033.5(a)(12)  
14 provides that a party may recover the cost of photocopies of “[m]odels and blowups of exhibits  
15 and photocopies of exhibits” when they are “reasonably helpful to aid the trier of fact.”  
16 Defendants are expressly prohibited from recovering for the costs incurred as a result of  
17 photocopying exhibits that did not aid this Court. Cal. Civ. Proc. Code § 1033.5(b)(2).

18 First, Defendants acknowledge that not all of the exhibits offered by Adelman  
19 were admitted into evidence. Defendants’ Opposition to Streisand’s Motion to Tax (“Opposition  
20 Motion”), at 1:28-2:2. Nevertheless, Defendants make no attempt whatsoever to discount that  
21 cost. Instead, and without justification, Defendants seek to make Streisand accountable for the  
22 cost of producing evidence that the Court could not, and did not, rely upon. Similarly, section  
23 1033.5 only permits recovery of costs incurred for actual copying of exhibits. However,  
24 Defendants seek to charge Streisand for the cost of fasteners, tabs, custom tabs, and collating  
25 documents. None of these costs are provided for by the statute.

26 Furthermore, contrary to Defendants’ assertion, the mere fact that one exhibit  
27 board may have been “helpful” to this Court, is not sufficient to justify an award of costs for  
28 either the so-called “helpful” board or for any other exhibit board for which Defendants seek

1 compensation. Opposition Motion, at 1:25-26. Indeed, it is insufficient that an exhibit be merely  
2 helpful. Instead, the exhibits and photocopies must be “reasonably necessary to the conduct of  
3 the litigation rather than merely convenient or beneficial to its preparation.” Cal. Civ. Proc. Code  
4 § 1033.5(c)(2); see also Heppler v. J.M. Peters Co., 73 Cal. App. 4th 1265, 1298 (1999).

5 Defendants have not provided any evidence whatsoever to indicate that any of the exhibit boards  
6 were reasonably necessary for the conduct of this litigation, let alone that more than one of the  
7 boards might have been helpful to the trier of fact.

8 Defendants also mislead this Court in claiming that there is not any language in  
9 section 1033.5 prohibiting Defendants from recouping the costs incurred “in making a copy of  
10 exhibits for itself and the other parties for use at a court hearing.” Opposition Motion, at 2:4-7.  
11 Indeed, California Civil Procedure Code § 1033.5(b)(2) expressly prohibits photocopying charges  
12 that are not for exhibits that aid the trier of fact. Clearly, the Court only needs one copy of any  
13 exhibit as additional copies certainly are not reasonably helpful to aid the trier of fact. As a  
14 result, the cost of photocopying exhibits for the parties, as opposed to exhibits for the Court, is  
15 not recoverable.

16 Likewise, Defendants do not make any attempt to apportion between  
17 photocopying, collating, and exhibit board preparation costs related to the preliminary injunction  
18 and the motion to strike. Having failed to allocate the cost of creating the materials for each  
19 motion—while also failing to establish that the photocopies and exhibit boards were reasonably  
20 necessary to this Court—Defendants have not provided any evidence to justify their request for  
21 costs for creating exhibit boards or for copying exhibits. Moreover, most of the color  
22 photocopying, especially those exhibits that were downloaded off of the Internet, could have been  
23 done on an in-house color photocopying machine. There, the only expense would be the cost of  
24 the paper.

25 Accordingly, Defendants should not be able to recover the costs of photocopying  
26 exhibits or creating exhibit boards.

1           **B. Defendants' Request for Costs for Delivery of Court Filings and Documents**  
2           **to Court is Unreasonable**

3           Defendants incorrectly claim that use of messengers to deliver materials and file  
4 documents with the Court was both reasonably necessary to the litigation and reasonable in  
5 amount.

6           As an initial matter, messenger fees are not expressly authorized as costs by statute  
7 as this Court has discretion to determine whether it is appropriate to award those costs. Nelson v.  
8 Anderson, 72 Cal. App. 4th 111, 132 (1999). Second, contrary to Defendants' assertions,  
9 Defendants *could* have reasonably used U.S. mail, Federal Express, or personal filing when  
10 delivering documents to this Court. See Id. (holding that the trial court correctly determined that  
11 "messenger filings [were] of doubtful necessity and [were] unreasonable on their face, when  
12 compared to the probable cost of alternatives such as mail, Federal Express, or personal filing, in  
13 view of the size of the very large firm [Gibson, Dunn, & Crutcher] representing" the defendants).  
14 For example, Defendants bizarrely assert that "Federal Expressing the document would have cost  
15 the Defendants' counsel an entire day of time to prepare the filings." Opposition Motion, at 3:9-  
16 10. However, preparing a Federal Express air bill takes a matter of minutes and requires the same  
17 amount of time, if not less, than the time required to: (a) engage a courier, (b) provide the courier  
18 with filing and delivering instructions, and (c) monitor the courier to ensure that the task is  
19 completed. As a result, Defendants claim that it would have taken longer, let alone an "entire  
20 day," to Federal Express the documents is incomprehensible.

21           Lastly, since Defendants do not even itemize these expenses or attempt to describe  
22 how they arrived at this outrageous sum of \$1,395.80 for delivery of court filings and documents  
23 to the court, this Court has no basis to even determine whether the messenger services fees were  
24 reasonable. All evidence suggests, therefore, that the requested amount is grossly unreasonable  
25 and excessive.

26       ///

27       ///

28       ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

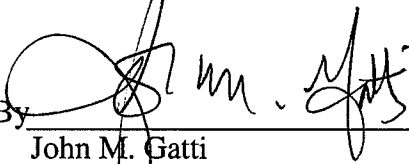
**III. CONCLUSION**

Defendants overreach and seek more than they are entitled to and which they should not recover. Therefore, Streisand respectfully requests that the Court tax Defendants' costs as set forth herein.

DATED: April 23, 2004

ALSCHULER GROSSMAN STEIN & KAHAN LLP

JOHN M. GATTI  
REX D. GLENSY  
JONATHAN E. STERN

By 

---

John M. Gatti  
Attorneys for Plaintiff  
BARBRA STREISAND