

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA STREET ADDRESS: 1100 Anacapa St MAILING ADDRESS: CITY AND ZIP CODE: Santa Barbara, CA, 93101 BRANCH NAME:	FILED SUPERIOR COURT of CALIFORNIA COUNTY of SANTA BARBARA 09/07/2023 Darrel E. Parker, Executive Officer BY <u>Temple, Kristi</u> Deputy Clerk
PLAINTIFF: Nicole Nagel et al DEFENDANT: The Westen-Lawson Trust we al	CASE NUMBER: 15CV01178
ORDER AFTER HEARING	

On August 4, 2023, a Civil Law and Motion Hearing was set before Judge Donna Geck on the following matters:

Matters:

08/04/2023 Motion: Attorney Fees, Motion: Strike Tax, Motion: Tax Costs (x2) - taken under submission, Filed

Counsel presented oral argument and the matter was taken under submission. The Court rules as follows:

Findings:

Background:

This action arises out of a dispute over alleged defects in a home in Los Angeles that plaintiffs Nicole Nagel and ESY Investments, LLC, purchased from defendants Tracy Westen and Linda Lawson in June 2011. The parties arbitrated the dispute, and, on August 5, 2013, plaintiffs were awarded \$4.595 million in damages, contractual attorney fees and costs. On February 21, 2014, the Superior Court of Los Angeles County confirmed the award.

Plaintiffs brought this action against defendants Tracy Westen and Linda Lawson; Westen Family Group, LLC; Derek Westen, individually and as trustee of the Westen Family Trust; and Peter K. Westen, individually and as trustee of the Westen 2010 Trust, for recovery of fraudulent transfers, conspiracy to commit fraudulent transfers, and aiding and abetting fraudulent transfers.

Plaintiffs Nicole Nagel ("Nagel") and ESY Investments, LLC ("ESY"), filed the action in the Los Angeles Superior Court on October 22, 2014. On April 7, 2015, that court granted a motion to change venue and ordered the case transferred to this court.

As alleged in their First Amended Complaint ("FAC"): By the time of the arbitration award, Tracy Westen and Linda Lawson ("judgment debtors") had absconded to the "debtor-friendly" state of Texas and engaged in asset protection and exemption planning to thwart plaintiffs' collection efforts. (FAC ¶ 22.) The actions include restructuring defendant Westen Family Group, LLC ("WFG"), with the advice and coordination of defendants Derek Westen and Peter K. Westen; converting the California LLC into a Nevada LLC; and making changes to the operating agreement. Tracy, Derek, and Peter Westen are brothers, are all attorneys, and each is a manager of WFG. Defendants coordinated with "asset protection" lawyers in both Nevada and Texas. WFG holds for the benefit of the Westen brothers a variety of real estate in Santa Barbara, California; Las Vegas, Nevada; and Phoenix, Arizona. Tracy, Derek and Peter Westen effected the conversion of the LLC to a Nevada LLC with the principal purpose of hindering, delaying and defrauding plaintiffs in efforts to charge and

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foreclose under applicable California law the interest of judgment debtors. (FAC ¶¶ 28-33.) Defendants engaged in the fraudulent asset protection transfers by purchasing with the non-exempt proceeds of the Moss House an ostensibly exempt homestead residence in Texas and purchasing and transferring existing annuities intended to be held as entirely exempt under Texas law from execution, as opposed to California law which limits the exemption of annuities. (FAC ¶ 47.)

The causes of action in the FAC are: 1) to set aside fraudulent transfer of assets (per the caption of the cause of action, against WFG and Does only, but, in paragraph 47, plaintiffs allege judgment debtors' fraudulent asset protection transfers); 2) conspiracy to fraudulently transfer assets; 3) aiding and abetting the fraudulent transfer of assets; and 4) imposition of constructive trust over the proceeds from the sale of the Moss House. Judgment debtors are sued individually and as trustees of the Westen and Lawson Trust. Derek Westen is sued individually and as trustee of the 1999 Westen Family Trust. Peter Westen is sued individually and a trustee of the Westen 2010 Trust. WFG is also a defendant.

On January 13, 2017, judgment debtors filed a petition for chapter 7 bankruptcy in the Eastern District of Texas. On September 18, 2017, the Bankruptcy Court issued its order lifting the automatic stay to permit plaintiffs to proceed with this action and pursue all claims against the judgment debtors in this action.

On May 14, 2018, plaintiffs filed a supplemental complaint alleging additional transfers, transactions, and related bad faith conduct with the intent to hinder, delay, and defraud plaintiffs as judgment creditors.

Peter Westen served a Code of Civil Procedure, section 998 Offer to Compromise, in the amount of \$100,000.00 on July 23, 2018. The offer was not accepted.

Following a jury trial, plaintiffs were awarded \$2,000,000.00 from WFG, \$50,000.00 from Derek Westen, and \$50,000.00 from Peter Westen.

Plaintiffs and Peter Westen each claim to be the prevailing party and move for attorney fees pursuant to Code of Civil Procedure, section 685.040 as well as costs. Plaintiffs and Peter Westen each seek to strike the cost memorandums of the other or to tax claimed costs. WFG and Derek Westen join in the motion to strike or tax plaintiffs' costs. WFG, Derek Westen, and Peter Westen oppose plaintiffs' motion for attorney fees. Plaintiffs oppose Peter Westen's motion for attorney fees.

A hearing was held on August 4, 2023, at which time attorney Chris Kroes presented oral argument on behalf of Peter Westen and Westen Family Group. Nathan Rogers presented oral argument on behalf of Derek Westen and Westen, LLC. Jeffery Valle presented oral argument on behalf of plaintiffs.

Kroes essentially argued that: (1) Peter Westen should be considered the prevailing party due to the Code of Civil Procedure section 998 offer in the amount of \$100,000.00 that was not accepted and, by way of trial, a judgment of only \$50,000.00 was entered against him; (2) That, due to the size of the fee request, there should be a "haircut" of at least 20%; (3) The invoices were so heavily redacted that it is impossible to determine if the billed time was reasonable and necessary; and (4) That some items contained in the invoices were related to the Texas case, and other matters, and therefore should be excluded.

Rogers agrees with Kroes' argument and then adds that his evidentiary objections to the invoices should have been sustained and that Paul Laurin's fees should have been reduced due to his work pro hac vice related to the Texas case. Rogers also argues that a majority of fees were incurred pursuing issues which plaintiffs failed to prevail on at trial.

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Valle argued that the invoices were properly authenticated and that they were presented in the same manner that defendants had presented invoices in their prior requests for attorney fees. Valle also noted that defendants' previous fee request was for \$5 million, inferring that plaintiff's current request is reasonable. Finally, Valle argues that the court mistakenly used a pre-Code of Civil Procedure section 998 attorney fee amount, for attorney Andrew Kent, in the amount of \$316,145.89, rather than the final amount of \$686,789.87.

No party presented oral argument with respect to the court's tentative ruling regarding costs.

The court has considered counsels' arguments and has again reviewed the invoices and evidence presented.

Analysis:

Prevailing Party

As set forth above, plaintiffs and Peter Westen each claim to be the prevailing party in this action. Peter Westen argues that he served a Code of Civil Procedure section 998 offer to compromise, in the amount of \$100,000.00, on July 19, 2018. The offer was not accepted. As the result of trial, plaintiff was awarded \$50,000.00 from Peter Westen. The offer to compromise specifically stated that "[E]ach side will bear their own costs and attorneys' fees." As of July 19, 2018, the parties had been litigating this case for approximately three years and nine months and had engaged in a substantial amount of litigation.

"If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (Code Civ. Proc., §998, subd. (c)(1).)

" 'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (Code Civ. Proc., § 1032, subd. (a)(4).)

When determining prevailing party attorney fees awards: " 'A typical formulation is that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " [Citation.]" (*Quiles v. Parent* (2018) 28 Cal.App.5th 1000, 1015.)

"[I]t is well settled that " '[p]artially successful plaintiffs may recover attorney fees under Code of Civil Procedure section 1021.5.' " [Citation.]" (*City of Oakland v. Oakland Police & Fire Retirement System* (2018) 29 Cal.App.5th 688, 708.)

"In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs." (Code Civ. Proc., § 998, subd. (c)(2)(A).) "As the Fourth District Court of Appeal has

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explained: “ ‘By specifying postoffer costs are excluded for purposes of determining whether plaintiff obtained a more favorable judgment, the statute necessarily implies preoffer costs are included. (§ 998, subd. (c)(2)(A).)’ ” [Citation.] Costs include attorney fees for purposes of section 998. (§ 998, subd. (c)(2)(B).)” (*Hersey v. Vopava* (2019) 38 Cal.App.5th 792, 798-799.)

As such, plaintiffs’ success at trial as well as preoffer costs and attorney fees must be considered when determining whether or not she obtained a more favorable result at trial than that offered to her by way of the offer to compromise. Peter Westen’s arguments that plaintiffs level of success was low is simply untrue. Plaintiffs’ success and overall recovery was substantial.

Preoffer costs are set forth in the Wisnia and Kent declarations in support of plaintiffs’ motion to strike or tax Peter Westen’s memorandum of costs. Plaintiffs claim: (1) Filing and Motion Fees of \$2,865.00; (2) Jury Fees of \$300.00; (3) Deposition costs of \$51,765.33; (4) Service of Process Costs of \$7,436.78; (5) Court Reporter Fees of \$390.00; and Discovery Referee Fees of \$50,851.75. (Wisnia Dec., ¶ 10.) Preoffer attorney fees total \$3,017,960.07. (Laurin Dec., ¶ 3; Kent Dec., ¶ 4; Franke Dec., ¶ 3.) The claimed costs and fees are supported by invoices.

Plaintiffs argue that the total amount to be considered, for purposes of determining if she obtained a more favorable result at trial, is \$3,181,568.93. That amount consists of the \$50,000.00 in damages, attributable to Peter Westen, and preoffer costs and attorney fees.

Considering the results at trial and the preoffer fees and costs, even if reduced in amount by post-trial motions, the court finds that plaintiffs are the prevailing parties. For this reason, Peter Westen’s motion for an award of attorney fees will be denied and his memorandum of costs will be stricken.

Attorney Fees

Despite the written objections and oral argument on the matter, Derek Westen and WFG’s position that the fee invoices are inadmissible hearsay is without merit. “In California, an attorney need not submit contemporaneous time records in order to recover attorney fees, although an attorney’s failure to keep books of account and other records has been found to be a basis for disciplinary action. [Citation.] Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.) Plaintiffs provided the billing records along with attorney declarations stating that the fees were actually billed to plaintiffs. The bills are meant to corroborate the sworn declarations of the attorneys. Taking the declarations as a whole, they effectively verify and authenticate the attached invoices.

Derek Westen and WFG argue that attorney fees are not awardable to the law firm of Clark Hill PLC (formerly Strasburger & Price LLP) because they are located in Texas and not licensed to practice law in California. In support, they cite *Golba v. Dick’s Sporting Goods, Inc.* (2005) 238 Cal.App.4th 1251. Defendants misread the holding of that case.

“A fundamental principle of California law, enshrined in the State Bar Act (Bus. & Prof. Code, § 6000 et seq.), is that no person may “ ‘practice law in California’ ” unless that person is an active member of the State Bar. (Bus. & Prof. Code, § 6125 (section 6125).) As a corollary principle, no person may recover compensation for practicing law “ ‘in California’ ” unless that person was a member of the State Bar or admitted pro hac vice at the time the services were performed, or the legal services fall within an exception. (*Id.* at p. 1255.) The attorneys from Clark Hill PLC were not practicing law in California. They represented Nagel in the bankruptcy

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court in Texas in an effort to collect money owed and obtain leave from the bankruptcy court for plaintiffs to continue with this matter. They were successful in their efforts.

"Attorney fees incurred in one action may be considered necessary litigation costs in another." (*Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1275.) A judgment creditor "is entitled pursuant to [Code of Civil Procedure] section 685.040 to recover reasonable attorney fees and necessary costs incurred in [] bankruptcy proceedings to enforce the judgment. To conclude otherwise would encourage judgment debtors to file bogus bankruptcy petitions and potentially escape paying for the attorney fees and costs incurred by the creditors in combating those petitions." (*Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 938.)

The services that the Texas attorneys performed were directly related to this matter and the enforcement of the underlying judgment. As such, plaintiff is entitled to recover the attorney fees related to the bankruptcy proceedings.

Plaintiffs seek attorneys' fees in the amount of \$7,374,483.00. However, the supporting invoices and declarations do not total those amounts. The motion is supported by declarations from plaintiffs current counsel and prior counsel. Barnes & Thornburg, LLP claims \$3,515,775.50 in fees (Laurin Dec., ¶ 3 & Exh. 1.); Rincon Venture Law Group claims \$686,789.87 in fees (Kent Dec., ¶ 4 & Exh. 1.); Kathleen Bliss Law PLLC claims \$114,640.00 in fees (Bliss Dec., ¶ 3 & Exh. 1.); Valle Makoff LLP claims \$2,423,232.59 in fees (Valle Dec., ¶ 3 & Exh. 1.); and Clark Hill PLC (formerly Strasburger & Price) claim \$363,457.68 in fees. (Franke Dec., ¶ 3 & Exh. 1.). The total of those claimed fees is \$7,103,895.64.

None of the parties appear to dispute that Code of Civil Procedure, section 685.040 is applicable in this action. Nor do they dispute that they waived the "two-year rule" for filing a Memorandum of Costs. (Valle Dec., ¶ 13 & Exh. 11.) In fact, defendants previously brought a motion for attorney fees based on the same statute. Peter Westen and WFG bring such a motion currently. Code of Civil Procedure, section 685.040 provides: "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5." The court need not address Peter Westen's argument that the code section is reciprocal as the court does not find that Peter Westen is a prevailing party, and he will not be granted attorney fees.

"[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citation.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary. [Citation.]" (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

"[T]he verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.)

"[T]rial courts must carefully review attorney documentation of hours expended" in assessing reasonable and necessary attorney fees. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) "The ' "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' ' " (*Ibid.*)

" '[A] reasonable hourly rate is the product of a multiplicity of factors the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case.' " (*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1003–1004.)

"[T]he [party] ... seeking fees and costs ' "bear[s] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." [Citation.]" (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320.) "To that end, the court may require [a] defendant[] to produce records sufficient to provide "a proper basis for determining how much time was spent on particular claims." [Citation.]" (*Ibid.*) "The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended. [Citation.]" (*Ibid.*)

"A trial court may not rubber stamp a request for attorney fees, but must determine the number of hours reasonably expended." (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 271.)

Prior to the hearing on this matter, the court thoroughly reviewed the voluminous invoices and declarations provided by plaintiffs in support of their motion. Following oral argument, the court has again thoroughly reviewed all of the declarations and invoices in support of plaintiffs' motion and considered them in conjunction with the oral arguments.

Kroes' request that the court reduce the requested fees by 20%, as a "haircut," will be denied as improper. "An across-the-board reduction in hours claimed based on the percentage of total time entries that were flawed, without respect to the number of hours that were actually included in the flawed entries, is not a legitimate basis for determining a reasonable attorney fee award." (*Mountjoy v. Bank of America* (2016) 245 Cal.App.4th 266, 282 (*Mountjoy*)). As such, the court has reviewed each invoice entry and has made an objective determination of reasonable and necessary attorneys' fees.

a. Barnes & Thornburg

As noted above, Barnes & Thornburg seeks attorneys' fees in the amount of \$3,515,775.50. Nagel was originally charged \$470.00 per hour for Laurin's services. The invoices show that the hourly rate was increased to between \$510.00 per hour, for attorney Matthew B. O'Hanlon, to \$535.00 per hour for Laurin. The rates are comparable to other attorneys with similar experience and skill. Based on the qualifications and success of the attorneys, the court finds the hourly rates reasonable.

There are 684 pages of invoices attached to the declaration of counsel Laurin. While many of the redactions are clearly proper to protect attorney-client communications, or work product, many of the entries are so heavily redacted that it is impossible for the court to determine if the activities were reasonable and necessary or should have taken the time claimed. For example: On November 2, 2014, there is an entry for 5.60 hours that is completely redacted after "Conduct legal research to." The overly redacted entries will be either reduced or disallowed as appropriate.

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There are also several entries consisting of block billing, which is not in and of itself impermissible, but the entry must be such that the court is capable of determining the reasonableness of the claimed charges. "Block billing occurs when " 'a block of time [is assigned] to multiple tasks rather than itemizing the time spent on each task.' " [Citation.]" (*Mountjoy*, supra, 245 Cal.App.4th at p. 279.) For example: on December 22, 2014, there is an entry for 10.60 hours for: "Continue drafting numerous revisions to the appellate response brief in the garnishment matter; conference and exchange numerous emails with Lerman and Laurin; include extensive revisions provided by Lerman and Laurin; review response brief, documents composing the record, and transcript; conduct additional research on . . . ; including . . . ; conference with the court regarding the filing of the brief." There are many other examples of similar entries. The block billing tends to become much more common beginning in 2016 and continuing through the remainder of the invoices. "One court has said that " 'counsel may not submit a plethora of noncompensable, vague, block-billed attorney time entries and expect particularized, individual deletions as the only consequence.' " (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1329.) It is the obligation of the party (and attorney) seeking the fee award " 'to prune the fee request to comply with the law,' " and the party (and attorney) cannot " 'transfer that responsibility onto the trial court.' " (*Ibid.*)" (*Mountjoy*, supra, 245 Cal.App.4th at p. 280.) The block billed entries, where they hinder the ability of the court to assess whether the time claimed was reasonable and necessary, will be either reduced or disallowed as appropriate.

There are also several entries that appear to list clerical work rather than attorney work. For example: on April 18, 2016, there is an entry for: "Prepare discs and labels of motion to compel." Entries for clerical work will be disallowed.

Additionally, there are entries that claim time that is facially excessive. For example: On May 9, 2018, attorney Laurin claims to have worked a total of 22.5 hours on this case. While it is not uncommon for attorneys to work long hours, the court finds it difficult to believe that only 1.5 hours of that day was needed for non-billable tasks such as traveling to the office, eating, and sleeping. Charges that appear grossly excessive will be reduced appropriately.

The court has identified fees that plaintiff has failed to establish entitlement to. Those entries were correlated with each timekeeper's rate, for each billing period, and either reduced or eliminated as appropriate. As a result, after considering all of the relevant factors, including nature of the litigation, its difficulty, the amount involved, the skill required, the skill employed in handling the litigation, the attention given, and the success of the attorney's efforts, the court will find that reasonable fees for the services of Barnes & Thornburg is \$1,973,442.00.

b. Rincon Venture Law Group

Rincon Venture Law Group seeks attorneys' fees in the amount of \$686,789.87. Nagel was charged rates that ranged from \$500.00 per hour to \$590.00 per hour. The rates are comparable to other attorneys with similar experience and skill. Based on the qualifications and success of the attorneys, the court finds the hourly rates reasonable.

There are 360 pages of invoices attached to the declaration of counsel Kent. As is with the invoices submitted by Barnes & Thornburg, the Rincon Venture invoices are heavily redacted with some of the entries redacted to the point that the court is unable to determine if the charges were reasonable and necessary. For example: on June 18, 2014, the invoice reflects 4.10 hours for, "Review the . . . ; continue to assist Paul Laurin with . . . ; confer with Nicole Nagel regarding . . . analyze . . ." The overly redacted entries will be either reduced or disallowed as appropriate.

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Although appearing with much less frequency than those in the Barnes & Thornburg invoices, the Rincon Venture invoices contain some entries that are block billed to the point of making it impossible to determine the reasonableness and necessity of the work claimed. For example: on July 22, 2014, there is an entry for 6.10 hours for, "Review the notice sent by judgment debtors' counsel regarding the Minnesota garnishment and seeking another TRO hearing; discuss . . . with Paul Laurin; review Minnesota case law regarding . . . ; prepare for and attend the TRO hearing; work with Kim Price on the Return of the Writ of Execution from the constable; draft a report . . . and send to Mr. Laurin; discuss . . . with Mr. Laurin and Mr. Knapp." The block billed entries, where they hinder the ability of the court to assess whether the time claimed was reasonable and necessary, will be either reduced or disallowed as appropriate.

There do not appear to be time entries for clerical tasks, nor are there any glaring examples of overbilling for any particular tasks.

The court has identified fees that plaintiff has failed to establish entitlement to. Those entries were correlated with each timekeeper's rate, for each billing period, and either reduced or eliminated as appropriate. As a result, after considering all of the relevant factors, the court will find that reasonable fees for the services of Rincon Venture Law Group is \$523,829.87.

c. Bliss Law PLCC

Bliss Law PLCC seeks attorneys' fees in the amount of \$114,640.00. Nagel was charged \$400.00 per hour. The rates are comparable to other attorneys with similar experience and skill. Based on the qualifications and success of the attorneys, the court finds the hourly rate reasonable.

There are 13 pages of invoices attached to the declaration of counsel Bliss. The invoices are, overall, minimally redacted and appear to only protect attorney client communications and work product. The invoices contain no block billing entries or charges that appear excessive for the tasks performed. As such, Bliss has established entitlement to all claimed fees in the amount of \$114,640.00.

d. Valle Makoff LLP

Valle Makoff LLP seeks attorneys' fees in the amount of \$2,423,232.59. Nagel was charged between \$385.00 per hour and \$750.00 per hour. The rates are comparable to other attorneys with similar experience and skill. Based on the qualifications and success of the attorneys, the court finds the hourly rate reasonable.

There are 185 pages of invoices attached to the declaration of counsel Valle. The invoices are, for many entries, redacted to the point that the court is unable to determine if the charges were reasonable and necessary. For example: on September 26, 2019, for 2.8 hours, the entry reads, "Review/analyze . . . and . . ." This type of entry is insufficient to establish entitlement to fees. The overly redacted entries will be either reduced or disallowed as appropriate.

Likewise, the invoices are riddled with block billing to the point that it is impossible to determine the reasonableness and necessity of some of the work claimed. For example, on February 3, 2020, there is a block billed entry for 6.2 hours that reads: "Review/analyze Nicole's comments; discuss . . . with Jeff V.; work on the Appellate Brief; work on the Appendix of trial record; discussions with paralegal re Appendix and additions thereto; review/revise Notice of Interested parties; review/revise Motion for Judicial Notice; communications with Nuritsa K. re . . . ; review Paul L's . . . ; meeting with Jeff V. to discuss . . ." The block billed

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entries, where they hinder the ability of the court to assess whether the time claimed was reasonable and necessary, will be either reduced or disallowed as appropriate.

Additionally, some of the invoice entries do not seem reasonably related to the case. Or if they are, they are not reasonable and necessary. For example, on May 3, 2021, the invoice shows that Nagel was billed for, among other things, "Fill out the Santa Barbara Magazine's article submission form." Fees for tasks such as this will not be allowed.

Finally, in calculating the total amount of attorney's fees, Valle includes paralegal fees, which are charged at \$150.00 per hour, appearing throughout the invoices. "[P]aralegal fees may be awarded as attorney's fees if the trial court deems it appropriate [citation], and . . . attorney's fees for travel hours may be awarded if the court determines they were reasonably incurred." (*Roe v. Halbig* (2018) 29 Cal.App.5th 286, 312.) The court finds that paralegal fees are not appropriate under the circumstances of this case and are not properly awarded as attorney's fees. The court will exercise its discretion and disallow them. The court will however find that the hours for travel were reasonably incurred and will allow them.

The court has identified fees that plaintiff has failed to establish entitlement to. Those entries were correlated with each timekeeper's rate, for each billing period, and either reduced or eliminated as appropriate. As a result, after considering all of the relevant factors, the court will find that reasonable fees for the services of Valle Makoff LLP is \$1,642,872.59.

e. Clark Hill PLC

Clark Hill PLC seeks attorneys' fees in the amount of \$363,457.68. Nagel was charged between \$190.00 per hour and \$590.00 per hour. The rates are comparable to other attorneys with similar experience and skill. Based on the qualifications and success of the attorneys, the court finds the hourly rate reasonable.

There are 360 pages of invoices attached to the declaration of counsel Franke. As with other of the invoices, the invoices for Clark Hill are, for many entries, redacted to the point that the court is unable to determine if the charges were reasonable and necessary. For example: on April 3, 2018, there is an entry of 4.40 hours for: "Research case law . . . ; draft memorandum over the . . ." The overly redacted entries will be either reduced or disallowed as appropriate.

Likewise, the many of the entries in the invoices are block billed to the point that it is impossible to determine the reasonableness and necessity of some of the work claimed. For example: On August 27, 2018, there is an entry of 3.80 hours for: "Review the documents . . . ; work with Paul Laurin regarding . . . ; communicate with Trustee's counsel regarding . . . ; draft a response in Support of Notice; review Trustee's Application to employ an art appraiser; draft a Witness & Exhibit List for hearing; review Trustee's filed Reply Brief; finalize the Response and file same." The block billed entries, where they hinder the ability of the court to assess whether the time claimed was reasonable and necessary, will be either reduced or disallowed as appropriate.

As with Valle Makoff, Clark Hill includes administrative tasks performed by paralegals or legal assistants in their fee request. For example, on July 28, 2021, there is an entry for "Work on redacting invoices for privileged information." As with Valle Makoff, the court will exercise its discretion and disallow paralegal or legal assistant fees.

The court has identified fees that plaintiff has failed to establish entitlement to. Those entries were correlated with each timekeeper's rate, for each billing period, and either reduced or eliminated as appropriate. As a result, after considering all of the relevant factors, the court will find that reasonable fees for the services of \$273,298.18.

Costs

“Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Code Civ. Proc., § 1032, subd. (b).)

“If items on a memorandum of costs appear to be proper charges on their face, those items are prima facie evidence that the costs, expenses, and services are proper and necessarily incurred. [Citations.] The burden then shifts to the objecting party to show them to be unnecessary or unreasonable.” (*Doe v. Los Angeles County Dept. of Children & Family Servs.* (2019) 37 Cal.App.5th 675, 693.)

CCP § 1033.5(a) identifies cost items that are allowable under section 1032; CCP § 1033.5(b) identifies items that are not allowable; and CCP § 1033.5(c)(4) provides that “[i]tems not mentioned in this section ... may be allowed or denied in the court’s discretion.” “Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation” and “shall be reasonable in amount.” CCP § 1033.5(c)(2) & (3). “If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citation] Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court....” *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 (“*Ladas*”).

“Initial verification will suffice to establish the reasonable necessity of the costs claimed. There is no requirement that copies of bills, invoices, statements, or any other such documents be attached to the memorandum. Only if the costs have been put in issue via a motion to tax costs must supporting documentation be submitted.” (*Jones v. Dumrichob*, 63 Cal.App.4th 1258, 1267 (1998).) Plaintiffs have provided sufficient documentation of claimed costs.

Notwithstanding the above language in *Ladas*, “the mere filing of a motion to tax costs may be a ‘proper objection’ to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. [Citation] However, ‘[i]f the items appear to be proper charges the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citations], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party].’ [citations].” (*Nelson v. Anderson*, 72 Cal.App.4th 111, 131 (1999).) “[I]t is not enough for the losing party to attack submitted costs by arguing that he thinks the costs were not necessary or reasonable. Rather, the losing party has the burden to present evidence and prove that the claimed costs are not recoverable.” (*Seever v. Copley Press, Inc.*, 141 Cal.App.4th 1550, 1557 (2006).)

Defendants object to several of plaintiffs’ claimed costs.

Filing and motion fees of \$3,559.00 are allowable pursuant to Code of Civil Procedure, section 1033.5, subdivision (a)(1). Peter Westen argues that plaintiffs were not the prevailing parties. As discussed above, plaintiffs were the prevailing parties, and the filing and motion fees will be allowed.

Jury fees of \$6,440.05 are also allowable pursuant to Code of Civil Procedure, section 1033.5, subdivision (a)(1). The jury fees will be allowed.

Deposition costs of \$81,146.58 are allowable pursuant to Code of Civil Procedure, section 1033.5, subdivision (a)(3)(A). Peter Westen argues that several of the depositions were not necessary. They refer the court to the Peter Westen and Kroes declarations attached to their motion to strike. However, neither of those declarations

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address deposition costs at all. The deposition costs appear to be reasonable and necessary and will be allowed.

Service of process in the amount of \$8,511.58 are allowable pursuant to Code of Civil Procedure, section 1033.5, subdivision (a)(4). Peter Westen makes the same argument as he did with regard to the deposition costs and, again, the declarations do not address service of process. The costs will be allowed.

Court reporter fees of \$6,310.50 are allowable pursuant to Code of Civil Procedure, section 1033.5, subdivision (11). Peter Westen's claim that he is the prevailing party is without merit. The court reporter fees will be allowed.

Fees for electronic filing service in the amount of \$5,393.45 are allowable pursuant to Code of Civil Procedure, section 1033.5, subdivision (14). Peter Westen's claim that he is the prevailing party is without merit. The electronic filing fees will be allowed.

Discovery referee fees of \$42,589.75. Peter Westen's argument that the court has no discretion to award these costs is incorrect. The case cited by Peter Westen makes clear that it is discretionary. The order appointing the discovery referee specifically states: "Upon the Court's determination of prevailing part(ies) under the meaning of Code of Civil Procedure Section 1032 upon the conclusion of the case, such prevailing part(ies) shall be entitled to claim any fees actually paid by such subject prevailing part(ies) to the Referee as recoverable costs pursuant to Code Civil Procedure Sections 1032 and 1033.5." (Wisnia Dec., Exh. 5, ¶ 5.) The court notes that Peter Westen himself included discovery referee fees in his memorandum of costs. The Discovery referee fees will be allowed as a discretionary cost.

As plaintiffs and Peter Westen acknowledge, mediation fees of \$1,995.00 are discretionary. The mediation took place in October 2014 and was obviously unsuccessful. The court will exercise its discretion and the mediation fees will not be allowed.

Costs to obtain legislative history in the amount of \$1,595.00 are discretionary pursuant to Code of Civil Procedure, section 1033.5, subdivision (c)(4). (See *Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1291-1293.) Peter Westen argues that the legislative history was merely beneficial or helpful rather than necessary. Plaintiffs argue that it was necessary in order for them to oppose defendants' motions for attorney fees. The court finds that the legislative history was merely convenient and not necessary. The costs to obtain the legislative history will not be allowed.

Trial tech costs in the amount of \$47,787.50 are discretionary. "Models, the enlargements 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).) The acceptance and use of technology at trial has increased greatly since 1995. As one result of this fact, Code of Civil Procedure section 1033.5, subdivision (a)(13) was amended to include, as a recoverable cost, "the electronic presentation of exhibits." This addition reveals the legislature's recognition of the persuasive effect of technological presentations at trial and the acknowledgment that presenting such evidence results in costs. This acceptance of the use of technology can also be seen in the language of *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 991. The amount of evidence, and the amount of money at issue, in this case makes the hiring of a trial tech reasonable and necessary. The costs for the trial tech will be allowed.

Lodging and Meals totaling \$28,820.87 and \$4,654.57, respectively, are sought as discretionary costs. Peter Westen argues that only travel expenses to attend deposition are authorized and that routine travel expenses

that are not related to depositions are not necessary to the conduct of litigation. The court agrees with Peter Westen with respect to the lodging and meals. Lodging costs are not reasonably necessary to the conduct of the litigation. Local lodging is merely convenient for counsel. Los Angeles is not prohibitively far from Santa Barbara to justify the expenses. Reducing travel costs is not a proper basis for recovery. Further solidifying this opinion is that some of the dining bills appear to be very high and there is no indication of who was actually dining. For example, a receipt is provided for September 7, 2022, in an amount over \$500.00 (after tip), that appears to list six entrees and cocktails. The court will exercise its discretion and not allow any costs for lodging or meals.

Plaintiffs seek unpaid expert fees of \$1,000.00 for fees that defendants did not pay to Wesley Nutten in connection with his deposition of July 27, 2022. This is not a properly included item in seeking costs. Fees of experts not ordered by the court are specifically excluded by Code of Civil Procedure, section 1033.5, subdivision (b)(1). The fees will not be allowed.

Appellate costs in the amount \$2,518.50 is objected to by Peter Westen on the grounds that plaintiffs are "doubling up" on costs already made to the court of appeal. Plaintiffs deny that they are "doubling up" and point out that the appellate court ruled that "appellants shall recover their costs on appeal." (Wisnia Dec., Exh. 15, p. 15.) Additionally, on June 25, 2021, ruling on a separate motion for attorney fees, this court specifically deferred plaintiffs' request for attorneys' fees on appeal until and if plaintiffs prevailed at trial, which they did. The appellate costs will be allowed.

Ruling:

For the reasons above defendant Peter K. Westen's motion for attorney fees is denied. Plaintiff Nicole Nagel's motion to strike Peter Westen's memorandum of costs is granted. Plaintiffs' motion for attorneys' fees, and Peter Westen's motion to tax costs are granted in part and denied in part as follows:

- (1) Attorney fees are awarded in favor of plaintiffs Nicole Nagel and Esy Investments, LLC, and against all defendants, jointly and severally, in the total amount of \$4,528,082.64. \$1,973,442.00 payable to Barnes & Thornburg, LLP; \$523,829.87 to Rincon Venture Law Group; \$114,640.00 to Kathleen Bliss Law PLLC; \$1,642,872.59 to Valle Makoff LLP; and \$273,298.18 to Clark Hill PLC.
- (2) Costs in favor of Plaintiffs
 - a. Costs in the amount of \$3,559.00 are allowed for filing and motion fees;
 - b. Costs in the amount of \$6,460.05 are allowed for jury fees;
 - c. Costs in the amount of \$81,146.58 are allowed for deposition costs;
 - d. Costs in the amount of \$8,511.58 are allowed for service of process;
 - e. Costs in the amount of \$110.00 are allowed for witness fees;
 - f. Costs in the amount of \$6,310.50 are allowed for court reporter fees;
 - g. Costs in the amount of \$5,393.45 are allowed for electronic filing fees;
 - h. Costs in the amount of \$42,589.75 are allowed for discovery referee fees;
 - i. Costs in the amount of \$47,787.50 are allowed for trial tech costs; and
 - j. Appellate costs in the amount of \$2,518.50 are allowed. So as to avoid any confusion, this appellate cost award replaces any previously ordered costs on appeal.

No costs are allowed for mediation fees, costs to obtain legislative history, lodging during trial, meals during trial, or unpaid expert fees.

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Unless otherwise mutually agreed, or further order of the court, payment for fees and costs is to be made no later than December 29, 2023.

SO ORDERED. The clerk shall give notice.

Dated: September 7, 2023



Donna D. Geck
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA STREET ADDRESS: 1100 Anacapa Street CITY AND ZIP CODE: Santa Barbara CA 93101 BRANCH NAME: Anacapa	FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA BARBARA SEP 07 2023 Darrel E. Parker, Executive Officer BY <u>Kristi Temple</u> Kristi Temple, Deputy Clerk
CAPTION: Nicole Nagel et al vs The Westen-Lawson Trust et al	CASE NUMBER: 15CV01178
CLERK'S CERTIFICATE OF MAILING	

I certify that I am not a party to this cause and that a true copy of the **Order After Hearing** was mailed first class, postage prepaid, in a sealed envelope addressed as shown, and that the mailing of such and execution of this certificate occurred at (place) Santa Barbara, California, on (date): 09/07/2023

Darrel E. Parker, Executive Officer

Dated: 09/07/2023

By Kristi Temple, Deputy

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