

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 03/29/2017

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: E. Brown

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2008-00014593-CU-CL-GDS** CASE INIT.DATE: 06/30/2008

CASE TITLE: **People of the State of California ex real Edmund G Brown Jr Attorney General vs. Native Wholesale Supply Company**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Attorney Fees - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion for Attorney Fees) taken under submission on 3/23/2017

TENTATIVE RULING

Plaintiff, the People of the State of California's motion for attorney's fees is granted, as set forth below.

In this action which was filed in 2008, the People alleged numerous causes of action against Native Wholesale Supply Company ("NWS") based on its conduct in importing illegal cigarettes from Canada and selling them in California. The People asserted causes of action for violation of the Directory Statute (Rev. & Tax. Code § 30165.1), the Fire Safety Act (Health & Safety Code § 14955 et seq.) and for violations of Bus. & Prof. Code § 17200.)

This case has a long protracted history involving removal to and remand from Federal Court, extensive litigation related to the issue of whether personal jurisdiction existed over NWS including appeals to the Third District Court of Appeals, and NWS's bankruptcy and attempts to stay the action. The case was designated complex and a discovery referee was assigned. Numerous discovery motions were filed and NWS also attempted to re-litigate the personal jurisdiction issue on numerous occasions. Demurrers were filed and novel issues of Tribal Immunity were raised. Ultimately, the Court granted the People's motion for summary judgment finding that they were entitled to \$4,292,500 in civil penalties and permanent injunctive relief. The final judgment entered on December 28, 2016 found that NWS committed 476 violations of the Directory Statute, 229 violations of the Fire Safety Act and 96 violations of 15 U.S.C. § 376.

The People now seek attorney's fees and expert expenses in the amount of \$4,013,336.25 which represents 9,174.74 hours of attorney time.

At the outset, the Court addresses a few of NWS's preliminary points raised in opposition. NWS first argues that the motion should be denied because the December 28, 2016 Judgment does not state that the People were awarded attorneys' fees but only that they were entitled to costs and thus the People

have no basis to seek fees. The Court rejects this argument. "Statutory attorney's fees are an element of costs." (*Meister v. Regents of Univ. of California* (1998) 67 Cal.App.4th 437, 450.) The Directory Statute states that "[i]n any action brought by the state to enforce this section, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney's fees." (Rev. & Tax. Code § 30165.1(p).) In addition, the Fire Safety Act provides that "the Attorney General shall be entitled to recover costs of investigation, expert witness fees, costs of the action, and reasonable attorney's fees." (Health & Safety Code § 14955(f).) The People prevailed on these causes of action and are entitled to statutory fees as an element of costs. The fact that the Judgment does not expressly mention fees does not change the result. The People's act of bringing this motion is a proper way to seek such fees. (CCP § 1033.5(c)(5)(A); CRC Rule 3.1702.). The motion will not be denied because the Judgment failed to specifically mention fees.

In addition, the Court declines to stay the fees motion until NWS's appeal of the judgment is concluded. NWS will not be prejudiced if the court rules on this motion because NWS may separately appeal any order on attorneys' fees. (*Torres v San Diego* (2007) 154 Cal.App.4th 214, 222.) The fact that the People may not be able to collect on the fee award immediately under NWS's bankruptcy plan is not germane to whether the Court can award fees. Indeed, it is well established that post judgment proceedings are permitted when they do not render an appeal futile, or do not impinge on the "effectiveness" of the appeal. *Whittier Redevelopment Agency v. Oceanic Arts* (1995) 33 Cal. App. 4th 1052, 1059-1060. Thus, an award of attorney's fees as costs is a collateral matter which, although "embraced" by the action, is not "affected" by the judgment. *Bankes v. Lucas* (1992) 9 Cal. App. 4th 365, 369 ["[F]iling of a notice of appeal does not stay any proceedings to determine the matter of costs and does not prevent the trial court from determining a proper award of attorney fees claimed as costs."].

Nor will the Court stay the motion to allow NWS to conduct discovery to determine whether the People have an internal policy regarding the hourly rates for its attorneys which show that the People's rates are significantly less than the rates sought on this motion. NWS points to the fact that Ms. Hickerson seeks fees premised on a \$500 hourly rate in this motion despite having stating that her hourly rate was \$170 in discovery motions in this action and referred to a "state agency rate for Deputy Attorneys General." While NWS argues that the Court will not be able to determine whether the People are seeking hourly rates that are unreasonably higher than those which its own office has determined to be fair, the "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." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) Indeed, as discussed further below, the People are permitted to seek recovery based on private sector rates and thus the fact that the People may have internal rates that are lower than such rates does not preclude the Court from making a determination as to a reasonable hourly rate. (E.g. *City of Santa Rosa v. Patel* (191 Cal.App.4th 65, 67-68, 71.) In any event, as seen in reply, the \$170/hr rate is a rate used for internal accounting purposes within the State and is not an indication of the value of the attorney's services on the open market. (Eckhart Reply Decl. 9.) The court agrees.

NWS next contests the reasonableness of the fees, both in the amount of time spent and the hourly rates.

"The fee setting inquiry in California ordinarily begins with the 'lodestar' method, i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." (*Plcm Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "The reasonable hourly rate is that prevailing in the community, for similar work." (*Id.*) In making this determination, the Court may consider "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (*Id.*)

"[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; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1367(declarations of counsel are also "sufficient to meet the burden of establishing the reasonableness of the fees incurred, without the need to produce copies of counsel's detailed billing statements.") A party may redact billing statements to delete items protected by the attorney-client and attorney work product privileges. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing. Co.*(1995) 39 Cal.App.4th 1379, 1382; *Banning v. Newdow* (2004) 119 Cal .App.4th 438,454.) Nonetheless, the Court will reduce the hours it determines were excessive or not supported. (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 816 (party seeking attorney fees has the "burden of showing that the fees incurred were 'allowable, 'were 'reasonably necessary to the conduct of the litigation,' and were 'reasonable in amount'"); *Christian Research Institute v. Ahor* (2008) 165 Cal.App.4th 1315, 1326-29 (affirming award for 71 hours of attorney time in case where attorneys sought fees for over 600 hours).) Fee award amounts are matters within the trial court's discretion: the "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." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

Here, the People have submitted numerous declarations setting forth the time spent and attaching time records in order to establish the number of hours expended by the People's counsel in successfully prosecuting this action. In addition, the People consulted with Richard Pearl, a leading California expert on attorney's fees to assist with a review of the billing records and who opines that the People's hourly rates are well within the rates for comparably qualified Sacramento attorneys performing similarly complex work. The Court would note that Mr. Pearl's treatise has been favorably cited by appellate courts. (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698-699.)

The People seek recovery of fees from the inception of the matter in 2008 through February 10, 2017 when the instant motion was filed. The People seek \$4,017,708.75 which represents 9,174.74 hours of attorney time. The following attorneys/legal assistants worked on this matter and charged the following rates:

- Ed Dumont (31 years of practice) worked 22.75 hours at \$750/hr for a total of \$17,062.50
- Dennis Eckhart (40 years of practice) worked 456.50 hours at \$675/hr for a total of \$308,137.50
- Michael Edson (23 years of practice) worked 3455.25 hours at \$525/hr for a total of \$1,814,006.25
- Nora Flum (5 years of practice) worked 58 hours at \$325/hr for a total of \$18,850
- Monica Gable (26 years of practice [legal assistant]) worked 1057.25 hours at \$225/hr for a total of \$237,881.25
- Michelle Hickerson (18 years of practice) worked 3481.50 hours at \$500/hr for a total of \$1,740,750
- Laura Kaplan (41 years of practice) worked 42 hours at \$675/hr for a total of \$28,350
- Karen Leaf (33 years of practice) worked 195 hours at \$675/hr for a total of \$131,625
- Nicholas Wellington (13 years of practice) worked 406.50 hours at \$400/hr for a total of \$162,600.

The People have also voluntarily deducted 10% from their request to account for any possible inefficiencies or duplicative work. (Leaf Decl. ¶ 22.) In addition the People seek recovery for their expert Mr. Pearl's fees in connection with this motion in the amount of \$4,372.50 (5.3 hours at \$825/hr). The People also deducted 101 hours of Ms. Hickerson's time that was spent in connection with discovery motions which resulted in the People being awarded sanctions. In addition, the People deducted 479 hours for time spent by attorneys who had a minimal role in the action, time spent solely on the People UCL claim, etc. (Leaf Decl. ¶ 9.) As pointed out by, and not challenged by NWS, the People are entitled to fees in connection with the UCL claim even though the UCL does not itself provide for fees to the extent that the work was inextricably intertwined with the Directory Statute and Fire Safety Act causes of action which did provide for recovery of fees and upon which the UCL claim was based. (E.g., *Pellegrino v. Robert Half International, Inc.* (201) 182 Cal.App.4th 278, 288.) Again, fees incurred solely

in connection with the UCL claim that was not related to Directory Statute and Fire Safety Act was deducted.

NWS first argues that the People cannot recover for any time spent working on the various appeals in this case because neither the Revenue and Taxation Code or the Health & Safety Code section which authorize attorney's fees expressly permit recovery for such tasks. It is the general rule "that fees, if recoverable at all...are available for services at trial and on appeal." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) "A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise." (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499.) Neither statute relevant to this action explicitly excludes fees on appeal. Rather, each statute expressly allows for recovery of fees in actions brought to "enforce" the section or act. Clearly this litigation was brought to enforce both the Directory Statute and the Fire Safety Act and work taken in connection with appeals in this very action easily fall within the statute's purview. That is, the People's successful appeal of the trial court's ruling granting NWS' motion to quash for lack of personal jurisdiction was certainly work taken to enforce the Directory Statute and the Fire Safety Act. The case cited by NWS deals with a situation where a party was not permitted to recover expert witness fees because the statute failed to mention such fees. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147.) But here the relevant statutes expressly authorize recovery of attorney's fees in addition to expert witness fees. The People's work in connection the appellate activity in this action is recoverable. So too is the People's work in connection with the fee motion. "[I]t is well established that plaintiffs and their attorneys may recover attorney fees for fee-related matters." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 580.)

NWS next argues that the People cannot recover for time spent by attorney Ed DuMont and legal assistant Monica Gable because neither submitted a declaration confirming the hours worked. This is not fatal as attorney Karen Leaf Senior Assistant Attorney General who supervised all of the Tobacco Section attorneys and paralegals assigned to the matter since December 2010, attached each of these individual's time records to her declaration and summarized their experience. (Leaf Decl. ¶¶ 5, 18-19.)

NWS also argues that the time records are vague and appear to include work performed in other matters. "An attorney fee award should include compensation for all hours reasonably spent[, which] means padding in the form of inefficient . . . efforts is not subject to compensation." (*Rey v. Madera Unified Sch. Dist.*, (2012) 203 Cal. App. 4th 1223, (internal quotation marks and citations omitted).) Thus, in determining what number of hours are reasonably compensable, the "court should exclude hours that are excessive, redundant, or otherwise unnecessary." (*McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2008) (citation omitted).) "To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward or deny an unreasonable fee altogether." (*Ketchum*, supra, 24 Cal. 4th at 1138.) "California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent." (*Syers Properties, III, Inc.*, supra, 226 Cal.App.4th at 698 [quoting Pearl, Cal. Attorney Fee Awards (Cont. Ed. Bar 3d ed. 2014 supp.) § 9.83, p. 9-70].) "Because time records are not required under California law..., there is no required level of detail that counsel must achieve." (*Id.* at 699 [citations omitted].)

NWS cites to various examples in its opposition and reasons that the records were not sufficiently reviewed and appear inflated and that they should be sufficiently discounted. Essentially NWS complains that the billing records, which are not required in any event under California law, are not sufficiently detailed to support the requested hours. Here, however, while it cannot be denied that a significant number of hours are claimed (9,174.74) which represents approximately 382 days, this action began in 2008 and involved significant litigation including numerous appellate proceedings. Moreover as discussed above, the People made efforts to eliminate inefficiencies in billing by voluntarily deducting 10% from the time worked. (Leaf Decl. ¶ 22.) In addition, the People deducted the time spent by

attorneys who did not materially contribute to the action. (Leaf Decl. ¶ 9.) Further, each attorney submitted declarations describing the work performed on this matter. To the extent that NWS argues that Mr. Eckhart's work after he retired in 2010 was unnecessary because he retired, Mr. Eckhart's declaration demonstrates that he led the People's investigation of NWS in 2008 and drafted the complaint. His work as a consultant after he retired is recoverable given his instrumental role in this action. Further, the few entries that NWS cited which it argues may relate to other cases involve time spent discussing enforcement actions against NWS in other states and reviewing actions against other entities for the sale of the same brands of contraband cigarettes at issue in this action. This was reasonable.

The People do concede that Ms. Hickerson's .25 time entry on 3/21/06 was erroneously included.

The Court would note, that despite the reductions made by the People, the billing entries do contain a level of vagueness which suggest some inefficiency in the billings which may not have been captured by the voluntary reductions by the People. To that end, the Court finds that an additional downward reduction is necessary with respect to some of the attorney's hours. The Court reached this conclusion after carefully reviewing the time records. The lodestar calculated by the People appears to have already reduced 10% from the hours listed and thus in order to reflect the additional reductions based on its review of the records, the Court will reduce the hours further reflect what it perceives are inefficiencies that were not captured by the People's 10% reduction. This essentially amounts to an additional 5% reduction (the Court rounded to the nearest quarter hour).

Given its review the Court will award the following hours: Ed Dumont 19.25 hours (reduced from 22.75); Dennis Eckhart 388 hours (reduced from 456.50 hours); Michael Edson 2937 hours (reduced from 3455.25 hours); Nora Flum 49.25 hours (reduced from 58 hours); Monica Gable [legal assistant] 898.75 hours (reduced from 1057.25 hours); Michelle Hickerson 2,959.25 hours (reduced from 3481.50 hours); Laura Kaplan 35.75 hours (reduced from 42 hours); Karen Leaf 165.75 hours (reduced from 195); and Nicholas Wellington 345.5 hours (reduced from 406.50 hours). The total hours awarded are 7,800.5 reduced from 9,174.74 for the work incurred up to February 10, 2017.

In addition, the Court will allow the People the following hours for worked performed since February 13, 2017 as seen in the reply and the supporting declarations: Dennis Eckhart 3 hours (reduced from 3.5); Karen Leaf 15 hours (reduced from 17.5); Laura Kaplan 3.5 hours (reduced from 4.25); Michelle Hickerson 14 (reduced from 16.5); Michael Edson 2 (reduced from 2.25), Nicholas Wellington 2.75 (reduced from 3.25), Nora Flum 41.75 (reduced from 49), Monica Gable 73 (reduced from 86). The total hours awarded are 155 for the work incurred from February 13, 2017.

NWS next argues that the People's hourly rates should be reduced. NWS argues that the Court should take into account the fact that the case started in 2008 and some of the attorneys were less experienced at that time and the rates should reflect that. NWS also argues that the Third District recently found that \$260/hr was a reasonable hourly rate for an attorney in this community with 14 years' experience which is less than the \$400/hr rate sought by Mr. Wellington who has 13 years' experience. On this point the Court simply notes that the Third District simply stated that the appellant failed to show that the trial court abused its discretion that a \$260/hr rate was reasonable. (*Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 272-723.) The Court did not say that a higher rate would be unreasonable.

NWS also argues that the People have an internal policy regarding hourly rates which is reflected by Ms. Hickerson's declarations in this action regarding her \$170/hr rate. NWS argues that she should not be permitted to now seek \$500/hr and that the other attorney's rates should also be reduced to reflect this discrepancy. The Court disagrees. First, the People are entitled to use private sector rates in requesting fees. Indeed, "[t]here is no requirement that the reasonable market rate mirror the *actual* rate billed." (*Syers Properties III, Inc., supra*, 226 Cal.App.4th at 701 [emphasis in original].) Fee awards are

properly calculated based on prevailing market rates regardless of the actual costs to the prevailing party. (*Serrano, supra*, 32 Cal.3d at 643.) "The reasonable hourly rate is that prevailing in the community, for similar work." (*Plcm Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The fact that Ms. Hickerson may have utilized a \$170/hr rate in connection with discovery motions because it may reflect the People's internal policy setting rates does not preclude her or any other attorney in this action from seeking a higher rate on this motion to the extent that it reflects the reasonable market rate. Moreover, the doctrine of judicial estoppel does not, as NWS argues, bar her from doing so. This is not a situation where two totally inconsistent positions were taken and the People are now relying on a contradictory argument to prevail on the motion. (*People v. Castillo* (2010) 49 Cal.4th 145, 154.)

Here, while NWS argues that the rates requested are out of line with market rates, it offers no evidence to counter the People's expert's opinion (again a leading attorney's fees expert) that the rates are in line with prevailing market rates in the Sacramento legal marketplace for attorneys of reasonably comparable experience, skill, and expertise for reasonably comparable services. (Pearl Decl. ¶¶ 11, 13.) The expert based his opinion on review of other fee awards to the People in tobacco-related work based on similar rates, in addition to fee awards issued by Sacramento Superior Court in other matters. (Id. ¶¶ 12, 13.) Mr. Pearl also reviewed numerous other fee awards throughout Northern California and reviewed multiple surveys and rates charged by numerous law firms. (Id. ¶¶ 14-16.) While the requested rates are substantial, there is no denying that this was a complex matter and NWS fails to counter the People's showing that the requested rates do not reflect prevailing market rates. In fact Mr. Pearl opines that not only are the rates reasonable but that they are sometimes significantly below the rates charged by comparably qualified attorneys for comparable work. (Pearl Decl. ¶ 18.) The fact that NWS's attorney's rates were much lower than the People's requested rates does not show that the rates are not reasonable. It is true that case law indicates that a comparative analysis of each side's litigation costs may be a useful check on the reasonable fee request. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 272.) This does not mean that the fact that one side's fees are higher renders those fees unreasonable which is especially true in this case given the uncontroverted declaration of Mr. Pearl.

To the extent that NWS argued that the People improperly rely on counsel's current rates instead of rates at the time the work was performed, the People's expert declares that fee awards are commonly determined using the rate at the time the motion was made rather than the historical rate at the time the work was performed to compensate for the delay in getting paid. (Id. ¶ 19.)

NWS also points to the US Attorney Office Laffey Matriz and Brudge report to argue that the hourly rates are unreasonable. However, the People's expert declares that the report does not provide rates for attorneys of similar skill and experience in the Sacramento market and in any case, the requested rates are close to or even lower than rates in that report. (Pearl Supp. Decl. 3-14.)

As a result, the Court awards the People attorneys' fees in the following amount:

- Ed Dumont 19.25 hours at \$750/hr (\$14,437.50)
- Dennis Eckhart 391 hours at \$675/hr (\$263,925);
- Michael Edson 2939 hours at \$525/hr (\$1,542,975);
- Nora Flum 91 hours at \$325/hr (\$29,575);
- Monica Gable [legal assistant] 971.75 hours at \$225/hr (\$218,643.75);
- Michelle Hickerson 2973.25 hours at \$500/hr (\$1,486,625);
- Laura Kaplan 39.25 hours at \$675/hr (\$26,493.75);
- Karen Leaf 180.75 hours at \$675/hr (\$122,006.25); and
- Nicholas Wellington 348.25 hours at \$400/hr (\$139,300)

The above totals **\$3,843,981.25**.

NWS submitted no argument that the **\$4,372.50** for the fees incurred by the People's expert Mr. Pearl was unreasonable. The Court therefore awards this amount as well in addition to the **\$4,743.75** in fees he incurred in connection with the reply for a total of **\$9,119.25**.

The People's motion is granted. The People are awarded reasonable fees and expenses in the amount of **\$3,853,100.50**.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 3/23/2017, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling with the following modification:

NWS submitted no argument that the \$4,372.50 for the fees incurred by the People's expert Mr. Pearl was unreasonable. The Court therefore awards this amount as well in addition to the \$4,743.75 in fees he incurred in connection with the reply for a total of **\$9,116.25**.

The People's motion is granted. The People are awarded reasonable fees and expenses in the amount of **\$3,853,097.50**.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: March 29, 2017

E. Brown, Deputy Clerk _____s/ E. Brown_____

PATRICK J MACKEY
LIPSITZ GREEN SCIME CAMBRIA LLP
11845 WEST OLYMPIC BLVD., SUITE 1000
LOS ANGELES, CA 90064

NORA FLUM
DEPUTY ATTORNEY GENERAL
P.O. BOX 70550
OAKLAND, CA 94612-0550