

Wright v. Unocal Oil Co.  
Hearing Date:  
Motion: Tax Costs

Case No. 21CV00925  
November 14, 2023

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**PARTIES/ATTORNEYS**

|           |                                 |  |
|-----------|---------------------------------|--|
| Plaintiff | Kevin Wright                    | Trial Lawyers For Justice<br>Nicholas C. Rowley, Esq.<br>Brian J. Ward, Esq.<br>Erin L. Powers, Esq.<br><br>Ernst Law Group<br>Taylor Ernst<br>Terry Kilpatrick<br><br>Singleton Schreiber, LLP<br>Benjamin I. Siminou<br>Jonna D. Lothyan |
| Defendant | Union Oil Company of California | Alston & Bird LLP<br>Jason Levin<br>Jennifer Bonneville<br><br>Rogers Joseph O'Donnell<br>Robert C. Goodman<br>Jon-Erik W. Magnus<br><br>Horvitz & Levy LLP<br>David M. Axelrad  |

\*\*All other named defendants were dismissed or never served.

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**PROPOSED TENTATIVE**

The facts of this case are known to the court and parties and will not be recounted here.

On September 28, 2023, plaintiff filed and served a Memorandum of Costs in the total amount of \$6,158,879.30. A motion to tax costs was filed October 13, 2023. Opposition was filed on October 31, 2023.

## Costs Under Code of Civil Procedure, Section 998

### 1. Prejudgment Interest

The memorandum of costs includes a request for prejudgment interest on the entire \$63,000,000 verdict pursuant to Code of Civil Procedure<sup>1</sup> section 998 amounting to \$5,782,191.72.<sup>2</sup> This represents interest at 10% for 335 days beginning September 22, 2022 and ending August 23, 2023.

Civil Code section 3291 provides that if plaintiff makes an offer to compromise pursuant to section 998 which defendant does not timely accept and “plaintiff obtains a more favorable judgment,” the judgment shall bear interest at 10 percent per annum from the date of the offer. There is no argument here whether plaintiff obtained a more favorable judgment.

Prejudgment interest under Civil Code section 3291 is an item of costs under section 1033.5, subdivision (a)(13) which allows “[a]ny other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing at trial...” (*Wagy v. Brown* (1994) 24 Cal.App.4th 1, 8.) The proper way to claim these costs is by memorandum of costs. (*Id.*; *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1012—prejudgment interest under § 3291 “is not an element of damages and must be claimed by memorandum of costs.”)

#### a. Plaintiff's Offer

On September 22, 2022, plaintiff made an offer to compromise pursuant to section 998. It stated:

“Plaintiff KEVIN WRIGHT hereby offers to have a judgment entered in favor of Plaintiff and against Defendants UNION OIL COMPANY OF CALIFORNIA and CONOCOPHILIPPS COMPANY collectively for the global total amount of Eleven Million and Two Hundred Twenty Five Thousand Dollars (\$11,225,000.00), including punitive damages, each party to bear its own costs. Payment of this amount will resolve all of Plaintiff's claims against Defendants UNION OIL COMPANY OF CALIFORNIA and CONOCOPHILIPPS COMPANY.”

(Bonneville Decl., Exh. A.)

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless indicated otherwise.

<sup>2</sup> Union Oil points out that punitive damages cannot be regarded as “damages for personal injury” within the meaning of Civil Code section 3291. Therefore, prejudgment interest is not recoverable on an award of punitive damages in personal injury actions. (*Lakin v. Watkins Associated Indus.* (1993) 6 Cal.4th 644, 662.) Plaintiff concedes this point in opposition and reduces its request by \$3,763,013.64 in interest that was calculated on the punitive damages portion of the verdict.

### b. Offer Was Not Sufficient to Trigger Penalties

Union Oil asserts plaintiff's section 998 offer was insufficient to trigger the prejudgment interest penalties. An unapportioned settlement offer to several defendants jointly is not sufficient to trigger section 998 penalties: "The offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 586; *Burchell v. Faculty Physicians & Surgeons of Loma Linda Univ. School of Medicine* (2020) 54 Cal.App.5th 515, 532-534; *Textron Fin'l Corp. v. National Union Fire Ins. Co. of Pittsburgh, Penn.* (2004) 118 Cal.App.4th 1061, 1076 (disapproved on other grounds by *Zhang v. Sup.Ct. (Calif. Capital Ins. Co.)* (2013) 57 Cal.4th 364, 382.)

As a general rule, "a section 998 offer made to multiple [defendants] is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them." (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 544 (*Burch*); see *Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498 [we will leave intact the bright-line rule that a separate offer (or an apportioned and unconditional joint offer) should be extended to each party].) There are exceptions to this rule. For example, 'where ... there is ... a single injury, and where as joint tortfeasors they would be jointly and severally liable, an unapportioned section 998 settlement offer made to both is valid. (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1550.) However, "[e]ven if a section 998 ... offer is allocated among individual defendants,' or an unallocated joint offer is made to defendants jointly and severally liable, the offer is still not valid if it is 'conditioned on acceptance by all defendants.'" (*Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 576.)

In interpreting section 998, plaintiff, the offering party, has the burden of demonstrating that the offer is a valid one under section 998. (*Timed Out LLC v. 13359 Corp.* (2018) 21 Cal. App.5th 933, 942; *Weinberg v. Safeco Ins.* (2004) 114 Cal. App 4th 1075, 1086.) A section 998 offer is strictly construed in favor of the party sought to be subjected to its operation. (*Timed Out LLC v. 13359 Corp.* (2018) 21 Cal. App.5th 933, 942.) The validity of a section 998 offer is considered in light of the circumstances existing on the date the offer was served, not in hindsight. (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal. App. 4th 537, 547.)

Here, the offer is conditioned on acceptance by all defendants. The offer was made for entry of judgment "collectively" against Union Oil and ConcocoPhilipps. The proposed acceptance on behalf of defendants indicates they have "collectively"

accepted the offer of judgment. (See *Bonneville Decl.*, Exh. A.) This alone undermines the validity of the offer. The court nevertheless will examine whether the failure to apportion the offer invalidates it.

Plaintiff argues the general rule against offers made to multiple defendants does not apply when the defendants are joint tortfeasors and/or there is a “unity of interest” between the defendants, relying on *Steinfeld v. Foote–Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1549. This is true, as far as it goes. The *Steinfeld* court held that the defendants “were sued as joint tortfeasors for a single act of negligence causing a single injury. In this case, which preceded the adoption of Proposition 51, they faced joint and several liability for respondent's economic and noneconomic damages.” (*Steinfeld v. Foote–Goldman Proctologic Medical Group, Inc.*, *supra*, 50 Cal.App.4th at 1549.) Neither plaintiff nor the *Steinfeld* court addresses the implication of Proposition 51’s elimination of joint and several liability for noneconomic damages on this principle.

This omission is addressed in later cases: “In multidefendant cases, the rule barring comparative indemnity claims against a ‘good faith’ settling defendant and the Proposition 51 elimination of joint and several liability for noneconomic damages play a significant role in the determination of each defendant's ultimate liability.” (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 547 citing Flahavan et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2002) ¶ 4:163.2g.)

“Consequently, a plaintiff who makes a § 998 offer to joint defendants having *potentially varying liability* must specify the amount plaintiff seeks from *each defendant*. Otherwise, there is no way to determine whether a subsequent judgment against a particular nonsettling defendant is ‘more favorable’ than the offer.” (Flahavan et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2002) ¶ 4:163.2g, pp. 4–48 to 4–49, first italics added.) “Thus, a lump-sum settlement offer made to several defendants whose liability may be apportioned (i.e., *not* jointly liable) must state [plaintiff's] position as to each defendant's share or percentage of the settlement demand.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 12:610.2, pp. 12(II)–20 to 12(II)–21.)”

(*Id.*)

An examination of the operative pleading confirms that plaintiff requested “[p]ast and future non-economic damages, including: physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress” in connection with his first cause of action for negligence (FAC, ¶ 56(e)) and his second cause of action for premises liability (FAC, ¶ 65(e)). Answers from Union Oil and

ConocoPhillips allege apportionment as a defense. (See Union Oil's Answer, 4th Affirmative Defense specifically invoking Prop. 51; ConocoPhillips's Answer, 2nd Affirmative Defense for comparative negligence.) Proposition 51 abolished joint liability for noneconomic damages in negligence actions. (Civ. Code §1431.2.) Consequently, the offer, which did not apportion the settlement demand, is invalid and cannot serve as the basis for penalties or prejudgment interest.

For the foregoing reasons, the prejudgment interest (even reduced as conceded in the opposition) must be stricken from the memorandum of costs.

## 2. Expert Witness Fees

For the same reasons discussed above, the section 998 offer is invalid. The \$223,705.42 related to plaintiff's claims for expert witness fees is stricken accordingly.

### Costs Pursuant to Section 1033.5

Union Oil challenges the following costs claimed pursuant to section 1033.5 as follows:

| Category                               | Amount to be Taxed    |
|--|-----------------------|
| Section 1-Filing and Motion Fees       | \$1,334.24            |
| Section 4-Deposition Costs             | \$41,857.68           |
| Section 5 -Service of Process          | \$5,906.58            |
| Section 8a -Ordinary Witness Fees      | \$80                  |
| Section 8b -Expert Fees                | \$223,705.42          |
| Section 12 -Trial Exhibits             | 24,894.58             |
| Section 14 -Fees for Electronic Filing | \$51.50               |
| Section 16 -Other                      | \$5,828,524.84        |
| <b>TOTAL</b>                           | <b>\$6,126,354.84</b> |

If the items on their face appear to be proper charges, the verified memorandum of costs is prima facie evidence of their propriety, and the burden is on the party seeking to tax costs to show they were not reasonable or necessary. (*Ladas v. California State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 774-776; *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 989.) Items that are properly objected to are put in issue, and the burden of proof is on the party claiming them as costs. (*Ladas v. California State Auto. Ass'n*, *supra*, 19 CA4th at 774-776.)

Whether an item listed on the cost bill was reasonably necessary is a question of fact for the trial court, whose decision is reviewed on appeal for abuse of discretion. (*Bender v. County of Los Angeles, supra*, 217 Cal.App.4th at 989.)

### 1. Filing and Motion Fees

Union Oil seeks to reduce the requested fees by \$1,334.24 on the basis that they are not filing fees imposed by the court. Plaintiff used an attorney service to file documents. The service imposed fees in addition to the statewide filing fee, including photocopying charges and convenience fees for payment by credit cards, for its service.

Attorney service costs are not expressly listed in section 1033.5 and thus are within the court's discretion to award. (§ 1033.5, subd. (c)(4); *Ladas v. California State Auto. Assn., supra*, 19 Cal.App.4th at 776 [fees for courier and messenger services and filing documents were reasonable and properly awarded].) The court finds the request for attorney service costs reasonable because it was minimal and was incurred to file documents with the court. The request to strike these costs is accordingly denied.

### 2. Deposition Costs

Union Oil seeks to reduce the requested fees of \$56,498.18 by \$41,857.68 on the basis that the fees include costs that are not enumerated under the cost recovery statute, such as late fees for failing to timely pay invoices; duplicate invoices; photocopy costs associated with pre-lawsuit investigation; and fees to expedite transcripts. In addition, Union Oil asserts that for 12 depositions, costs were incurred for attachment of exhibits as well as for counsel to obtain rough drafts and condensed transcripts, which Union Oil argues was for convenience of counsel and not necessary to the litigation. Finally, Union Oil argues that plaintiff seeks recovery of costs not related to depositions, such as transcripts of hearings and photocopy charges. All are represented on the chart below.

| Category   | Wright Bates Numbers                        | Amount (Total)     |
|--|---|--------------------|
| Fees for late payment of invoices  | Wright 077, 080, 081, 082, 096, 099, 100    | \$1,792.30         |
| Duplicate and illegible charges  | Wright 082, 093, 097, 098                   | \$7,742.13         |
| Photocopy charges <sup>8</sup>   | Wright 104-115                              | \$1,565.53         |
| Fees for rough and expedited transcripts <sup>9</sup>  | Wright 72, 85, 86, 88, 91, 92, 116          | \$1,798.55         |
| Depositions not reasonably necessary   | Wright 075, 076, 077, 080, 081, 083 and 084 | \$7,812.31         |
| Non-transcript deposition costs not allowable and neither reasonable nor reasonably necessary (e.g., excessive exhibits) | Wright 079, 081, 091, 092 095 and 099       | \$12, 574.66       |
| Hearing transcripts not ordered by the Court <sup>10</sup>   | Wright 078 and 102                          | \$142.88           |
| Transcripts from prior litigation-not reasonably necessary   | Wright 103                                  | \$2,160            |
| Rush photocopy charges <sup>11</sup>   | Wright 116                                  | \$423.05           |
| Information provided insufficient to determine whether reasonably necessary nor reasonable in amount                     | Wright 087, 090, 094 and 101                | \$5,846.30         |
| <b>TOTAL</b>   |   | <b>\$41,857.68</b> |

Plaintiff agrees to withdraw the \$1,792.30 in fees for late payments and \$142.88 for a hearing transcript.

Duplicate and illegible charges: The document with the stamp 082 is legible, so it must fall under the category of duplicative. However, Union Oil had not identified what it duplicates. The documents stamped 093, 097, and 098 are indeed illegible. Plaintiff is ordered to produce them at the hearing for Union Oil's examination.

Photocopy charges: These charges are expressly not permitted under section 1033.5 subdivision (b)(3). This argument was rejected in *Naser v. Lakeridge Athletic Club* (2014) 227 Cal.App.4th 571, 577-578 (affirming trial court's denial of motion to strike costs associated with photocopying records produced pursuant to business subpoena because they were unallowable photocopying costs under section 1033.5). The court thus rejects it here.

However, the rush photocopy charges in the amount of \$432.05 are stricken. There is no explanation for these charges and the court thus finds these were incurred for the convenience of counsel.

Fees for rough and expedited transcripts: While “[s]tandard transcription fees for ‘necessary’ depositions are recoverable... the extra cost for expediting transcripts may be allowed only in the exercise of the trial court’s discretion.” (*Hsu v Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330, 1342.) Here, plaintiff states: “With respect to the fees for rough and expedited transcripts in the amount of \$1,798.55, Plaintiff’s counsel requested expedited transcripts on rare occasions and incurred the costs with no guarantee of recovery. The timing of the depositions and related motions and trial work made it necessary to expedite transcripts.” (Kilpatrick Decl., ¶¶ 9-10.) The court is not willing to exercise its discretion to allow these fees based on this nonspecific representation. The fees in the amount of \$1,798.55 will thus be stricken.

Unnecessary depositions: Union Oil challenges the deposition costs of third-party witnesses (e.g., Aimee Long, William Sarraff, Lauren Bennett, Paul Lavelle, Eric Kett, Kaitlin McNally and Ed Dykes) who did not testify at trial, arguing it was not reasonably necessary since the testimony was not offered at trial and was not relied upon by any expert. But determination whether the expenses for deposition were reasonable and necessary should be determined from pretrial vantage point rather than from his or her usefulness at trial. (See *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132.) Union Oil offered no argument why it was unreasonable to pursue the testimony.

Nontranscript deposition costs (e.g., excessive exhibits): These costs (\$12,574.66) represent costs associated with having the exhibits attached to the deposition. As noted above, standard transcription fees are recoverable, while extra costs are allowed only in the trial court’s exercise of discretion. (See *Hsu v Semiconductor Systems, Inc.*, *supra*, 126 Cal.App.4th at 1342.) Plaintiff asserts this is standard procedure when taking depositions, where many of the documents are being produced for the first time, and/or are being authenticated by a witness. (Kilpatrick Decl. at 12.) It’s unclear whether those circumstances presented themselves here. The court thus declines to exercise its discretion to allow these fees. The fees in the amount of \$12,574.66 will thus be stricken.

Transcript from prior litigation: These charges (\$2,160) were for the deposition transcripts of Ross Haeberle from a prior lawsuit. (Kilpatrick Decl., ¶ 12.) Plaintiff argues these transcripts were reasonable and necessary to rebut Defendant’s attempt to disqualify Mr. Haeberle based in part on his testimony during those depositions. While this is a deposition cost, it is not related to this lawsuit and therefore may be allowed only in the trial court’s exercise of discretion, which the court will do. The cost is allowed.



Insufficient information: This category is nonspecific. The court cannot discern from Union Oil's briefing what the objection is to this category of information. The objection will thus be overruled unless the court is satisfied at the hearing that the costs must be stricken.

### 3. Service of Process

In this category, Union Oil challenges the costs for service of process in the form of deposition subpoenas on the following witnesses: Aimee Long, William Sarraff, Lauren Bennett, Paul Lavelle, Eric Kett, Kaitlin McNally and Ed Dykes. Consistent with the ruling above, the request is denied as there is no argument why, from a pretrial vantage, the depositions were unnecessary. The remainder of the arguments in this category are likewise denied.

### 4. Ordinary Witness Fees

It appears that \$80 in ordinary witness fees was incurred in connection with the depositions of Lauren Bennett and Paul Lavelle (see list above). Consistent with the above rulings, the court denies the request to strike these fees.

### 5. Costs for Trial Exhibits

Union Oil seeks an order striking the entire \$24,894.58 in costs requested in this category. It points out that plaintiff was ordered two by the court during trial to correct is misnumbered and nonconforming exhibits and exhibit binders. Costs incurred after the start of trial are presumably related to plaintiff's execution of that order. Plaintiff agrees to waive recovery of any duplicate exhibit copies and narrows its request to the following:

- Wright 180 – Animation video - \$11,150.00
- Wright 181 – Contamination drawing and Timeline - \$3,375.00
- Wright 191 – One copy of trial exhibits - \$2,495.39
- Wright 192 – Trial binders - \$269.55

The court accepts the concession and reduces the costs in this category by \$7,604.64. Any further reduction will be considered at the hearing after argument.

### 6. Other Costs

Union Oil challenges \$40,176.62 in personal travel, lodging and food expenses incurred by counsel and \$6,156.50 in investigation expenses.

As for travel, lodging and food, plaintiff's attorney states: "With respect to the costs totaling \$46,333.12 for travel, these costs were incurred for travel to depositions." (Kilpatrick Decl., ¶ 16.) He also asserts: "The cost of food and lodging for the [ ] travel is well within the normal range for food in the Santa Barbara area.

(Kilpatrick Decl., ¶ 17.) Section 1033.5, subdivision (a)(3)(C) specifically authorizes reimbursement of travel expenses to attend depositions. (See *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548.)

Despite Kilpatrick's representation, the record suggests otherwise. The cost details include the following:

|           |  |             |         |
|-----------|--|-------------|---------|
| 2023      | Coastal Rental - Five out of town attorneys for 35 days.   | \$13,799.00 | y       |
| 05/03/23  | Airtravel for witness Karen Alexander  | \$1,613.29  | y       |
| 05/09/23  | Car rental for witness Karen Alexander   | \$52.00     | y       |
| 05/12/23  | Hotel Room - Kevin Wright  | \$122.98    | y       |
| 05/12/23  | Airfare - Kevin Wright   | \$228.98    | y       |
| 05/12/23  | Airfare - Kevin Wright   | \$138.00    | y       |
| 05/12/23  | Hotel Room - Kevin Wright  | \$588.93    | y       |
| 05/10/23  | Transport and care for Kevin Wright during trial   | \$3,003.00  | y       |
| 05/12/23  | Rental Car for Kevin Wright during trial   | \$364.05    | y       |
| 07/16/23  | Airtravel to courthouse. Attorney Kilpatrick   | \$594.40    | y       |
| 07/16/23  | Baggage Fee x2 for attorney Kilpatrick   | \$60.00     | n       |
| June 2023 | Travel by car from office to Courthouse by attorneys and staff.<br>Taylor, Danielle, Don, Espi, Terry, Noelle, 62 total car trips at<br>66.2 miles roundtrip each per day at \$0.625 per mile. | \$2,565.25  | n       |
| 05/09/23  | Food reimbursement for out-of-town attorneys   | \$168.25    | n       |
| 05/09/23  | Food reimbursement for out-of-town attorneys   | \$51.50     | n       |
| 05/09/23  | Travel expense reimbursement to pick up exhibits   | \$83.50     | n       |
| 05/12/23  | Food reimbursement for out-of-town attorneys   | \$109.10    | n       |
| 05/30/23  | Airline travel reimbursement for attorney to trial   | \$618.43    | n       |
| 06/13/23  | Food reimbursement for out-of-town attorneys   | \$233.67    | n       |
| 07/17/23  | Food and travel reimbursement for attorney O'Brien   | \$200.00    | n       |
| 09/05/23  | Airline travel for attorney O'Brien  | \$541.69    | y       |
| 09/05/23  | Bag fee for air travel   | \$70.00     | y       |
| 09/10/23  | Airline travel for attorney O'Brien  | \$408.90    | y       |
| 09/10/23  | Bag fee for air travel   | \$70.00     | y       |
| 07/15/05  | Food and travel reimbursement for attorney Brian Ward  | \$3,049.91  | y and n |
| 2023      | Food and travel reimbursement for attorney Erin Powers   | \$4,913.85  | y and n |
| 2023      | Food and travel reimbursement for attorney Jakob Norman  | \$5,847.60  | n       |
| 04/28/23  | Attorney Meals during trial - Red Robin  | \$120.71    | n       |
| 04/29/23  | Attorney Meals during trial - Uber Eats  | \$67.75     | n       |
| 05/07/23  | Attorney Meals during trial - Uber Eats  | \$88.95     | n       |
| 05/09/23  | Attorney Meals during trial - Red Robin  | \$214.96    | n       |
| 05/10/23  | Attorney Meals during trial - Chipotle   | \$20.88     | n       |
| 05/16/23  | Attorney Meals during trial - Uber Eats  | \$11.80     | n       |
| 05/17/23  | Attorney Meals during trial - Red Robin  | \$52.47     | n       |
| 05/18/23  | Attorney Meals during trial - Jaffa Café   | \$102.82    | n       |

According to this detail, the travel costs were all incurred between May and September 2023, which suggests this travel was for purposes of trial, not depositions. The supporting receipts confirm this time frame, as do the handwritten notations accompanying the breakdown of expense by attorney identifies these expenses as trial related (e.g., Brian Ward Trial Expenses, .pdf page 263; Erin Powers Trial Expenses, .pdf page 267; Trial Expenses Jakob Norman, .pdf page 288).

The court is therefore not persuaded that these travel costs are related to depositions. Nor is there authority to award travel expenses related to trial. If the Legislature had wanted to specifically permit travel-related costs, it would have done so in the statute, and would not have limited allowable travel costs to deposition-related travel. In any event, even if the court were to consider an award of these costs under the “catch-all” provision of §1033.5(c)(4), the trial travel costs were merely convenient or beneficial, and not reasonably necessary to the conduct of the litigation. Finally, even if the court was persuaded to reconsider, the costs must be reasonable. Here, there are several entries for the finer dining establishments in our locale (such as Ember restaurant, which resulted in a cost of \$451.05). A careful review would be required. Finally, the court notes the entry for June of 2023 in the amount of \$2,565.25 for “Travel by car from office to Courthouse by attorneys and staff. Taylor, Danielle, Don, Espi, Terry, Noelle, 62 total car trips at 66.2 miles roundtrip each per day at \$0.625 per mile.” This, presumably, is a mileage reimbursement request for the local attorneys to travel from San Luis Obispo to Santa Maria for trial. Routine expenses for local travel, including parking fees, cab fares, and mileage fees, incurred by attorneys, paralegals, or other law firm employees are not reasonably necessary to conduct of litigation and, thus, cannot be allowed as reimbursable costs. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761.) For these reasons, the court grants the request to strike costs in the amount of \$40,176.62 in personal travel, lodging and food expenses.

Plaintiff also seeks costs of \$6,156.50 for “other” expenses “per 998 and 1033.5(c)(4).” (See Memo of Costs, Category 16.) Section 1033.5, subdivision (c)(4) provides that “[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.” Items not specifically allowable under subdivision (a) and not prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if “reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.” (§ 1033.5, subd. (c)(2).)

The expenses include the following:

**16. OTHER-PER CCP 998 and 1033.5(c)(4) (WRIGHT: 205-284)**

|          |  |                |
|----------|--|----------------|
| 09/22/22 | Prejudgment Interest (Per CCP 998) 9/22/22 - 8/23/23 = 335 days @10% on \$63,000,000 | \$5,782,191.72 |
| 01/13/23 | Legal Services, Inc. - Greg Berends  | \$85.00        |
| 02/01/23 | Legal Services, Inc. - Paul McCaw  | \$85.00        |
| 02/23/23 | Legal Services, Inc. - Richard Seely   | \$85.00        |
| 02/23/23 | Legal Services, Inc. - Cynthia Seely   | \$85.00        |
| 02/24/23 | Legal Services, Inc. - Danny Gonsalves   | \$85.00        |
| 02/25/23 | Legal Services, Inc. - Cynthia Gonsalves   | \$85.00        |
| 05/09/23 | Capital Logistics - Locate witnesses   | \$797.50       |
| 02/28/23 | Defense expert Geosyntec depo fee  | \$500.00       |
| 03/01/23 | Defense expert Summit Toxicology depo fee  | \$1,225.00     |
| 03/08/23 | Defense expert M. Thirman depo fee   | \$3,000.00     |
| 03/09/23 | Defense expert Dominic Alexander depo fee  | \$450.00       |
| 03/24/23 | Defense expert GeoSynec depo fee   | \$2,250.00     |
| 03/30/23 | Defense expert Buck Rice ProSource depo fee  | \$750.00       |
| 03/31/23 | Defense expert Blayne Hartman depo fee   | \$1,200.00     |
| 04/04/23 | Defense expert Barry Castleman depo fee  | \$2,299.00     |
| 05/03/23 | Leg. Intent Service - Legislative History Search                                     | \$450.00       |
| 05/11/23 | Leg. Intent Service - Legislative History Search                                     | \$1,050.00     |
| 05/24/23 | Leg. Intent Service - Legislative History Search                                     | \$750.00       |
| 05/31/23 | TrialSmith - Deposition transcript copies  | \$300.00       |
| 03/14/23 | Joplin Library room rental - Haeberle Deposition                                     | \$50.00        |

Union Oil characterizes these as investigation expenses related to trial preparation and argues they are expressly excluded under CCP 1033.5(b)(2) (“The following items are not allowable as costs, except when expressly authorized by law: Investigation expenses in preparing the case for trial.”).

Plaintiff argues that the expenses were all incurred to locate the addresses of witnesses so that they could be served with subpoenas. “Plaintiff does not consider this type of work “investigation” in the sense normally meant to mean a private investigator interviewing witnesses or conducting surveillance. Plaintiff believes these costs were reasonable and necessary and not “investigative” expenses, but defers to the Court’s discretion.” (Opposition, p. 13, ll. 4-8.)

Items that are properly objected to are put in issue, and the burden of proof is on the party claiming them as costs. (*Ladas v. California State Auto. Ass'n*, *supra*,

19 Cal.App.4th at 774-776.) Plaintiff has not met that burden when it deferred to the court's discretion without providing any law or guidance on the expenses incurred (which include expenses other than those that may reasonably be interpreted to be related to locating addresses of witnesses). (*Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934—"Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide. On the record in this case, the trial court was justified in declining to look beyond that failure.")

For this reason, the court grants the request to strike \$6,156.50 for "other" expenses "per 998 and 1033.5(c)(4)."

### **Summary of Rulings**

1. The court grants the motion to strike prejudgment interest in the total amount of \$5,782,191.72 from the memorandum of costs. Even assuming Union Oil and ConocoPhillips might be jointly liable for the economic damages occasioned by the injury itself, they are not jointly liable for noneconomic damages. Consequently, the offer was not properly apportioned. Moreover the offer was improperly conditioned on the acceptance of all defendants.
2. For the same reasons as above, the court grants the request to strike \$233,705.42 in expert witness fees.
3. The request to strike \$1,334.24 in filing and motion fees that included photocopying charges and convenience fees because the costs because were minimal and incurred to file documents with the court.
4. Costs of \$1,792.30 in fees for late payments and \$142.88 for a hearing transcript are withdrawn.
5. Rush photocopy charges in the amount of \$432.05 are stricken as are fees in the amount of \$1,798.55 for rough and expedited transcripts.
6. The costs in the amount of \$12,574.66 to have exhibits produced at deposition attached to the deposition transcript are stricken. Counsel argues that is standard procedure when taking depositions where many of the documents are being produced for the first time or are being authenticated by a witness. However, it is unclear whether those circumstances were present here.
7. Costs of \$7,604.64 related to trial exhibits are withdrawn. Any further reduction in this category will be considered at the hearing after argument.
8. The request to strike costs of \$40,176.62 in personal travel, food, and lodging is granted. The court is not persuaded, based on the record as detailed above, that these travel costs are related to depositions. Nor is there authority to award travel expenses related to trial.
9. Costs of \$6,156.50 for "other" expenses "per 998 and 1033.5(c)(4)" are likewise stricken. Plaintiff has offered no cogent argument in support of an award of these costs.

Duplicate and illegible charges: The documents stamped 093, 097, and 098 are indeed illegible. Plaintiff is ordered to produce them at the hearing for Union Oil's examination.

All other requests to strike costs are denied. Union Oil is directed to prepare a proposed order pursuant to this tentative.