IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, SMOKEY POINT HARDWOODS, INC., ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC., and STEDCO/ROSS-SIMMONS JOINT VENTURE,	)	CV 00-1693-PA
Plaintiffs,	)	**OPINION AND ORDER REGARDING ATTORNEY FEE PETITION AND COST BILL**
v.	)	
WEYERHAEUSER COMPANY,	)	
Defendant.	)	

PANNER, J.

Following a two week trial, a jury awarded Plaintiff Ross-Simmons Hardwood Lumber Co. $78,769,218 (after trebling) on its antitrust claims against defendant Weyerhaeuser Company. Plaintiff now requests $3,942,370 in attorney fees and $78,100.65 in costs. Defendant does not dispute Plaintiff's right to recover fees and costs, but contends the sum requested is excessive, and that some items are not authorized by statute or inadequately documented. Defendant suggests an appropriate award is

$285,238.80 in fees, and $23,956.37 in costs, *i.e.,* about one-twelfth of the sum sought by Plaintiff.

Discussion

A successful antitrust claimant is entitled to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). An award of fees to the prevailing plaintiff is mandatory, the court having discretion only in fixing the amount of such award. Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1312 (9th Cir. 1982). The attorney's fees provision is intended to insulate the successful claimant's treble damage recovery from expenditures for legal fees. Id.

Under a fee-shifting statute, the "lodestar" method is used to calculate the attorney fee award. Staton v. Boeing Co., 327 F.3d 938, 965 (9th Cir. 2003). The court first multiplies the number of hours the prevailing party reasonably expended on the litigation times a reasonable hourly rate. If circumstances warrant, the court then adjusts the lodestar to account for factors not subsumed within it. Id.[1]

While it is not necessary to detail every numerical calculation, and across-the-board percentage adjustments are permissible, the court must provide "enough of an explanation to allow for meaningful review of the fee award." Sorenson v. Mink,

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[1] Factors subsumed within the lodestar include the novelty and complexity of the issues, special skill and experience of counsel, quality of the representation, results obtained, and the superior performance of counsel. D'Emanuele v. Montgomery Ward & Co., 904 F.2d 1379, 1383 (9th Cir. 1990). (citations omitted).

239 F.3d 1140, 1146 (9th Cir. 2001).

1. Hourly Rates for Attorneys

Plaintiff requests the following hourly rates:

Michael Haglund	$240 - $250[2]
Michael Kelley	$215 - $225
Leroy Wilder	$250
Shay Scott	$175 - $185
Timothy Jones	$215
Christopher Lundberg	$155 - $170
Julie Weis	$155 - $170

Defendant does not contend that these rates exceed those prevailing in the community for similar services performed by lawyers of reasonably comparable skill, experience and reputation.

2. Hourly Rates for Paralegals and Law Clerks

Fees for services performed by paralegals and law clerks may be billed separately, at market rates, if that is the prevailing practice in the community. Missouri v. Jenkins, 491 U.S. 274, 285-89 (1989). Plaintiff requests compensation at the following hourly rates:

Danica Hibpshman	$90 - $100
Lisa Kaech	$120
Scott Rathbone	$120

[2] Two rates are shown if the rate increased during this litigation.

Kent Kelly $120

Sharon Payant $100

Pamela Rentz $75

Defendant does not contest these rates, or that billing separately for paralegals and law clerks is the prevailing practice in this community.

Plaintiff also seeks compensation for the services of several "secretaries who performed paralegal work during times of peak effort." Defendant argues that, as a matter of law, "secretarial time is not compensable." That is an overstatement,[3] but it also misses the mark. Plaintiff seeks compensation only for services it contends were paralegal in nature. It is the nature of the

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[3] In Jenkins, the Court quoted, with approval, the following passage:

> It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

Jenkins, 491 U.S. at 288, n. 10. In other words, "the Court assumed that secretarial and paralegal services were both billable and only discussed the proper billing *rate* for such services." Burt v. Hennessey, 929 F.2d 457, 459 (9th Cir. 1991) (emphasis in original). An attorney may, in a proper case, "recover the reasonable costs of paralegal and secretarial assistance." Id. The reason secretarial costs ordinarily are not compensable is because the prevailing practice in the community is to include such costs within the overhead subsumed by the attorney's hourly rate.

work, and not just the title of the person performing the task, that determines whether the service is compensable and at what rate. See Jenkins, 491 U.S. at 288, n. 10.

Plaintiff requests 90.0 hours, at the rate of $50 per hour, for Cheryl Hohnstein's work summarizing deposition transcripts.[4] That is a task often performed by paralegals to minimize attorney time, and the rate is reasonable.

Some other "secretarial" time entries do not adequately explain what task was performed. For instance, the entry "production time" could mean almost anything. Those hours are therefore disallowed. This includes 42.6 hours by Colleen Jackson, 7.0 hours by Jeanette Bostwick, 19.75 hours by Linda Hall, and 1.25 hours by Cheryl Hohnstein. I allow the 17.5 hours billed by Linda Hall, at the rate of $60 per hour, for preparation of trial exhibits, and assembling documents for production to opposing counsel, a task often performed by paralegals.

3. Kent Kelly

Qualified experts are essential in a complex antitrust action. Nevertheless, a prevailing antitrust claimant may not recover the costs of compensating those experts, either as attorney fees or "cost of suit" under 15 U.S.C. § 15(a), or as costs awarded under 28 U.S.C. § 1920. See Twentieth Century Fox

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[4] Judging by the uniformity of the hours and days, Plaintiff may have reconstructed these time entries at a later date.

Film Corp. v. Goldwyn, 328 F.2d 190, 223-24 (9th Cir. 1964). See also West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) (denying expenses for non-testimonial expert under 42 U.S.C. § 1988 because the statute does not explicitly authorize recovery of such costs).[5]

Acknowledging this limitation, Plaintiff has not sought compensation for an estimated $200,000 paid to six outside experts. Plaintiff does seek $254,328 (2,119.4 hours @ $120/hr) for what Plaintiff characterizes as "paralegal" services furnished by Kent Kelly. The affidavit in support of the fee petition describes Kelly as "a full-time staff forester for our law firm since January, 1995." Defendant cites this as proof that, the "paralegal" label notwithstanding, it is actually a disguised expert fee.

Once again, it is the nature of the work, and not just the title of the person performing the task, that determines whether it is compensable. See Jenkins, 491 U.S. at 288, n. 10. No bright line separates "paralegal" work from that of a hired expert. Some tasks clearly fall on one side of the line or the other, but in the middle the line is blurry.

A significant portion of Kelly's time involved discovery matters: reviewing and organizing documents received from

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[5] Congress subsequently abrogated the holding in West Virginia with respect to § 1988 actions, but the antitrust fee statute has not been amended.

Weyerhaeuser and others, or preparing documents and interrogatory responses for submission to Weyerhaeuser. That is classic paralegal work. Kelly also helped locate and interview witnesses, research and summarize the relevant facts, sift through a mountain of documents, and prepare demonstrative exhibits. Again, this is within the realm of paralegal tasks, particularly in a complex case. The same is true of Kelly's efforts to identify, retain, instruct, prepare, and coordinate experts from diverse fields. Had Kelly not performed these tasks, they would have been performed by an attorney. Kelly's technical expertise simply enabled him to perform these tasks more efficiently than someone with less knowledge of forestry.

Kelly and paralegal Scott Rathbone also spent some time analyzing log cost data received from Weyerhaeuser during discovery. Under the circumstances of this case, that was a permissible use of paralegal time, notwithstanding that this task might also have been delegated to an outside firm or expert. Finally, Kelly performed a variety of trial support duties, again within the range of paralegal duties.

A small percentage of Kelly's time (perhaps two percent) is more properly classified as expert services. To account for that, I deduct 50 hours from his total.

4. Reduction for Partial Success

Only one of the three plaintiffs prevailed in this action.

Plaintiff Smokey Point Hardwoods Company ("Smokey Point") voluntarily dismissed its claims on the eve of trial. The jury found against Plaintiff Confederated Tribes of Siletz Indians of Oregon ("Siletz") and the STEDCO/Ross-Simmons Joint Venture ("STEDCO").[6] The lone successful plaintiff, Ross-Simmons, was not formally added as a party until August 31, 2001, eight months after this action was commenced, although counsel was actively exploring that step even before this action was filed. See time entries for Sept. 25, Oct. 3, and Nov. 3, 2000.

Defendant contends that Plaintiff should receive no compensation for expenditures prior to August 31, 2001, and that all subsequent hours must be reduced by two-thirds because only one of three plaintiffs prevailed.[7]

A. Unrelated Claims

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[6] STEDCO was named as an additional plaintiff for technical reasons at the close of trial, but for purposes of this fee petition is not considered a fourth plaintiff.

[7] Defendant does not contend that the jury's rejection of Plaintiff's "finished lumber market" theory justifies a reduction in attorney fees. Such reductions are disfavored in this Circuit. Cf. Twin City Sportservice, 676 F.2d at 1313, 1316 (no reduction warranted even though one proposed relevant market was rejected, along with two antitrust theories); Hasbrouck v. Texaco, Inc., 879 F.2d 632, 638 (9th Cir. 1989) (awarding compensation for amicus brief filed by Plaintiffs' counsel in another case raising similar legal questions, even though the legal theory advocated in that amicus brief was rebuffed). Comparatively little time was devoted exclusively to the finished lumber market issue. Information about the lumber market likely would have been offered at trial anyway to give the jury an overview of the industry, or because of defendant's contentions regarding the "Asian economic flu," or the alleged dissonance between log and lumber prices.

In analyzing a deduction for "limited success," the first step is to consider whether "the plaintiff fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Claims are "unrelated" if they are "entirely distinct and separate" from the claims on which the plaintiff prevailed. Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1499 (9th Cir. 1995). Hours expended on unrelated, unsuccessful claims should not be included in an award of fees. Conversely, related claims involve a "common core of facts" and are "based on related legal theories." Hensley, 461 U.S. at 435. In such cases, "[m]uch of counsel's time will be devoted generally to the litigation as a whole . . . . Such a lawsuit cannot be viewed as a series of discrete claims." Id.

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While the "limited success" issue most often arises in cases where a single plaintiff asserts multiple claims, many of the same principles are applicable here. For instance, time devoted exclusively to prosecuting unsuccessful claims is not compensable, but efforts applicable to both successful and unsuccessful claims should be compensable. See Twin City Sportservice, 676 F.2d at 1313.

There was extensive overlap between the claims asserted by the three plaintiffs. Each revolved around a common nucleus of facts, a common legal theory, and the same course of conduct by

Defendant Weyerhaeuser. Cf. Community Association for Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943, 956 (9th Cir. 2002) ("CARE") (claims are unrelated if the relief sought on the unsuccessful claim "is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.")

The discovery obtained from Weyerhaeuser, and the analysis and presentation of that information at trial, would not have differed dramatically whether there was one plaintiff or three. Weyerhaeuser's alleged course of conduct, and predatory acts, were substantially similar as to each plaintiff. The discovery, and legal research, undertaken by counsel prior to Ross-Simmons formally being added as a party contributed significantly to the favorable outcome. Ross-Simmons (and Weyerhaeuser) are not entitled to a free ride on the backs of the other plaintiffs. Cf. CARE, 305 F.3d at 356 ("[E]ven if a specific claim fails, the time spent on that claim may be compensable, in full or in part, if it contributes to the success of other claims"). Researching Weyerhaeuser's course of conduct, evaluating potential anti-trust claims, and identifying experts, is compensable time.

Plaintiff may not recover for time expended exclusively on behalf of the non-prevailing plaintiffs. Examples of non-compensable hours include traveling to Los Angeles for a

presentation to the Smokey Point clients, and reviewing that client's financial records; presentations to the Siletz Tribal Council; researching legal issues relating exclusively to the Siletz claims, such as sovereign immunity and the "real party in interest" issue; most of the hours spent preparing for and defending depositions of individuals associated with Smokey Point and Siletz; and most hours spent on document production and attorney-client privilege issues involving Smokey Point and Siletz.

In addition, most, but not all, of the time spent on matters specific to the Siletz joint venture with Ross-Simmons is non-compensable. A limited recovery is appropriate because, to a lesser extent, the Siletz joint venture would have been an issue in the case anyway. Defendant cited the losses from that venture as a significant factor contributing to the demise of Ross-Simmons. The joint venture also would have been cited as evidence that hardwood mills in the Northwest were closing for reasons unrelated to the alleged antitrust violations. Likewise, whether there was one plaintiff or three, it would have been prudent for plaintiffs to conduct at least some investigation of the other participants in the same relevant market, both to show the circumstances of that market and to uncover evidence of pattern and practice, motive, intent, and other factors. And, in fact, the jury heard some testimony regarding several non-party mills.

The non-compensable hours also include some, but not all, of the time counsel spent responding to interrogatories and requests for admission directed at Smokey Point and Siletz. Partial compensation is appropriate because portions of those responses were incorporated in Ross-Simmons' responses.

Unfortunately, Plaintiff's fee petition makes no effort to weed out the non-compensable hours. Rather, Plaintiff has employed the venerable "toss a plate of spaghetti at the wall and hope some of it sticks" approach. This defect is aggravated by rampant "block billing." Instead of separate entries for each task performed, the billing records contain a single daily entry for each timekeeper showing the total number of hours billed to that client, and a list of all tasks performed by the timekeeper, but with no explanation of how much time was attributable to each task.

I considered denying the fee petition outright because of these defects, but the Ninth Circuit would likely deem that an abuse of discretion. Cf. Traditional Cat Ass'n, Inc. v. Gilbreath, 340 F.3d 829 (9th Cir. 2003) (reversing trial court's conclusion that documentation offered in support of fee petition precluded distinguishing compensable and non-compensable hours). "The fact that it is not a simple task to discern from this data precisely what fees are attributable to the [compensable] claims," and "the impossibility of making an *exact* apportionment, does not

relieve the district court of its duty" to make such an apportionment." Id. at 834 (emphasis in original).

i. Specifically Identifiable Non-Compensable Time

Some non-compensable time is readily identifiable from the description of the task performed, and either most or all tasks in that billing entry are non-compensable, or the court can make an informed estimate of the non-compensable time. Included in Appendix B to this opinion is a partial list of hours I disallowed on this basis.

Attorney Wilder's pre-trial efforts related almost exclusively to the claims of the Siletz Tribe. Wilder also billed 84 hours for attending the jury trial. Presumably, he acted in a litigation support capacity of some sort, but the fee petition is devoid of any explanation. Plaintiff has not shown that any of the 251.8 hours by Wilder were reasonably expended on behalf of the prevailing plaintiff, Ross-Simmons.

The time entries for Wilder's legal assistant, Pamela Rentz, also appear to relate entirely to the claims of the Siletz Tribe, though I cannot say for sure because the cryptic descriptions offer little insight. Plaintiff has not shown that any of these 112.6 hours were reasonably expended on behalf of the claims by Ross-Simmons.

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I reduce, by 60 percent, the 90 hours billed by Cheryl

Hohnstein for summarizing depositions. Some transcripts pertained mostly to the claims asserted by the other plaintiffs.

ii. Percentage Reduction for Non-Compensable Hours

The reductions above do not fully account for all hours attributable solely to efforts on behalf of the non-prevailing plaintiffs. Additional non-compensable time is masked by opaque descriptions, or is jumbled with other, compensable tasks. Accordingly, additional cuts are warranted, the only question being how much to cut and from where.

With regard to the "evaluation" phase, from February 2000 until this action was commenced on December 8, 2000, the hours remaining (after the cuts discussed above) were not exclusively for the benefit of the non-prevailing plaintiffs. Rather, this research formed the foundation for the subsequent Complaint. A further reduction is not warranted, at least on this ground.

Turning to the period from December 8, 2000, through October 11, 2002, although Plaintiff describes it as the "Discovery" phase a significant amount of legal research was also completed, especially during the latter stages. I already disallowed 297.6 (or about 39.2 %) of the 760 hours billed by attorney Michael Kelley, which leaves 462.4 hours. After reviewing his time entries, an additional 7.5% reduction, or 34.7 hours, appears sufficient.

I previously disallowed 68.8 (or 6.86 %) of the 1,003.1 hours

billed by attorney Michael Haglund during this period, which leaves 934.3 hours. A further ten percent reduction, or 93.4 hours, is warranted. As for attorneys Weis, Scott, and Lundberg, I previously disallowed 8 (or 19 %) of the 42 hours they collectively billed. No further reduction is needed, given the nature of the tasks they performed.

I previously deducted 196.3 hours (or 15.5 %) from the 1,264.3 hours billed by paralegal Kelly. An additional ten percent reduction, or 106.8 hours, is warranted. Paralegal Rathbone billed 420.2 hours during this period, of which 8.4 were disallowed. An additional 7.5 % reduction, or 30.9 hours, is appropriate.

During the period from October 12, 2002, through April 7, 2003, Plaintiff successfully resisted Defendant's motions for summary judgment and motions to strike the Plaintiff's expert reports. No reductions are warranted in connection with those activities (on the basis of "limited success"). Those motions did not focus on the claims of any single defendant, but on issues common to all.

During this time period, Plaintiff also prepared for trial. Exhibits and pretrial materials were generated, witnesses prepared, additional expert reports obtained, mock trials held, and the presentation refined. Many issues were common to all plaintiffs, but at least some time was necessarily spent preparing

exhibits, witnesses, and stipulated facts relating solely to the claims of Smokey Point and Siletz, and preparing to present their claims at trial. These hours are not mentioned in the timesheets submitted by the Siletz attorneys, Wilder and Rentz, so they must be subsumed within the hours billed by the Haglund firm.

To account for that time, I deduct an additional 40 hours from those billed by attorney Haglund, and 30 hours each from those billed by attorney Kelley and paralegals Kelly and Rathbone, respectively. No reduction is warranted for attorneys Scott, Lundberg, and Weis, as their efforts during this period were addressed solely to matters common to all plaintiffs, such as defining the relevant market, drafting jury instructions, and opposing the motions to strike.[8]

No trial time is attributable solely to the claims of Smokey Point, which had been dismissed from the case by then. The fast pace of the trial ensured that only a small amount of trial time is attributable solely to the Siletz claim. In addition, the joint venture would have been an issue at trial anyway. A deduction of ten hours each from attorneys Haglund and Kelley, and

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[8] The time spent deciding whether to dismiss Smokey Point's claims on the eve of trial was not solely for the benefit of Smokey Point. Counsel had to evaluate whether a perceived weakness in one plaintiff's case, or the added factual complexity, might detract from the claims of the other plaintiffs (including Ross-Simmons) in the eyes of the jury. As such, it is compensable as "an item of service which would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." Hasbrouck, 879 F.2d at 638.

from paralegals Rathbone and Kelly, is sufficient to account for trial time devoted solely to the Siletz claim.

No reduction is warranted for work on the post-trial motions. Those efforts were aimed solely at protecting the judgment obtained by Ross-Simmons. All time expended on this fee petition also was for the sole benefit of Ross-Simmons.

B. Adjustment for Level of Success

The second step in analyzing a "limited success" deduction is to consider whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." Hensley, 461 U.S. at 434. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." Id. at 435. A plaintiff may obtain excellent results without receiving all the relief requested. Id. at 435, n. 11.

There is no disputing the level of success achieved: a $78 million verdict, near the upper end of what this Plaintiff had sought. Accordingly, no further reduction is warranted (nor is an upward adjustment permitted).

5. Other Adjustments

I have disallowed additional hours that do not appear to have been reasonably expended in furtherance of the prevailing plaintiff's antitrust claims. Examples include 8.3 hours spent investigating alleged environmental violations by Weyerhaeuser,

2.0 hours investigating allegations of timber theft, 16.0 hours for attending hardwood symposiums, and a 7.0 hour drive (@ 120 per hour) to obtain signatures on declarations when a faxed signature page would temporarily have sufficed. I struck 9.0 hours claimed for attending a press conference and reading newspaper articles regarding that event. There are rare cases in which such public relations activities might properly be compensable, but this was not one. See Gates v. Gomez, 60 F.3d 525, 535 (9th Cir. 1995) (abuse of discretion to award attorney fees for media contact).

I disallow 21.7 hours of the hours that Kent Kelly spent surfing the internet for news regarding Weyerhaeuser. Some research was appropriate, as evidenced by the speeches regarding industry consolidation that Plaintiff uncovered. Almost daily monitoring for weeks on end was excessive, especially at the rate of $120 per hour.

I cut an additional 25 hours for tasks Kelly performed that were more suitable for a capable secretary than a $120 per hour paralegal, or are subsumed within the law firm's overhead.[9] I eliminated the 11 hours Kelly spent loading and driving a truck, and the time billed by Scott Rathbone (at $120 per hour) to rent a

[9] Examples include locating a copy shop near Newport or storage facilities in Camas and Vancouver, researching truck sizes for transporting discovery materials, calling moving van rental agencies regarding one way reservations and fees, calls to get directions, "work[ing] with staff to locate areas to store boxes (war room overflow)," and registering himself for conferences.

truck and purchase locks for the storage units.

I also disallow all time incurred in connection with the post-trial motion to unseal the record. While this activity may have furthered the interests of the Plaintiff in some respects, it did not contribute to the Plaintiff prevailing on its claims at trial or to preserving that victory afterwards. The amount disallowed is $6,478.50.

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6. Block Billing

Defendant contends that any fee award in this case should be reduced by 30 percent due to Plaintiff's "block billing." This practice obstructs the efforts of the court, and opposing party, to ascertain how much time was billed for each task and whether it was reasonable. Block billing also impairs the court's ability to strike only the non-compensable portion of a time entry. Despite repeated admonitions against this practice, including a notice posted on the district court's web site,[10] Plaintiff's counsel has persisted in block billing.

Plaintiff, as the party requesting the fee award, bears the burden of demonstrating that the amount requested is reasonable. Since block billing has interfered somewhat with the court's ability to fully discharge its review function, I find that a

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[10] See Message From The Court Regarding Attorney Fee Petitions, available online at http://ord.uscourts.gov/attorney_fee_statement.pdf.

$25,000 reduction in the attorney fee award is warranted.

The reduction is not greater only because, for the most part, the descriptions of services performed were reasonably well detailed. Timesheets filled with cryptic entries reading "12 hours - legal research" would have resulted in a far greater reduction.

7. Contingency Multiplier

Plaintiff's request for a 2.0 contingency multiplier is denied. With limited exceptions, contingency multipliers are no longer permitted under most federal fee-shifting statutes. See City of Burlington v. Dague, 505 U.S. 557, 562 ("our case law construing what is a 'reasonable' fee applies uniformly to all of [those statutes]"). Plaintiff has not shown that 15 U.S.C. § 15(a) is exempt from that rule, or that this case falls within the few exceptions.[11]

Plaintiff also argues that a multiplier is appropriate to compensate for the delay in receiving payment for services performed years earlier. The court, in its discretion, may compensate for this delay by applying either the attorney's current rates to all hours billed or the attorney's historic rates

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[11] Cf. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 697-99 (9th Cir. 1996) (multiplier justified by undesirability of case and difficulty of obtaining counsel); In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994) (City of Burlington does not bar risk multiplier in common fund case).

plus interest. Bell v. Clackamas County, 341 F.3d 858, 868-69 (9th Cir. 2003); Barjon v. Dalton, 132 F.3d 496, 502 (9th Cir. 1997). However, Plaintiff did not request such an adjustment, nor is the delay in this case especially long.

8. Trial Consulting Services

Plaintiff seeks compensation for the services of a firm employed to conduct a mock trial. The usual fee for this service, $60,000, was more than Plaintiff could afford, so Plaintiff negotiated a contingent fee. If Plaintiff prevailed in this litigation, it would pay $360,000, or six times the usual rate. Otherwise, it owed only the consultant's out-of-pocket expenses.

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Defendant asserts that, as a matter of law, such services are never compensable as either attorney fees or costs. A number of decisions, both published and unpublished, have concluded otherwise.[12] Defendants rely upon Carter v. Chicago Police

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[12] See, e.g., United Steelworkers of America v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990) (allowing reasonable costs incurred for "a moot court trial run, and on consultations regarding a jury project related to the case"), and on appeal following remand, 1991 WL 178115 (9th Cir. 1991) (unpublished) (affirming trial court's discretionary determination that mock trial was unwarranted under the circumstances of that particular case). See also Charles v. Daley, 846 F.2d 1057, 1076-77 (7th Cir. 1988) (allowing fees for "mock oral arguments" though eliminating some excessive charges); Sigley v. Kuhn, 2000 WL 145187 (6th Cir. 2000) (unpublished) (affirming trial court's award of expenses associated with mock trial); Dubin v. E.F. Hutton Group, Inc., 878 F. Supp. 616, 623 (S.D.N.Y. 1995) (allowing recovery for costs of "mock jury trial"); Guzman v. Bevona, 1996 WL 374144 (S.D.N.Y. 1996) (expenses for "focus group"

Officers, 1996 WL 446756 (N.D. Ill.), aff'd on unrelated issues, 165 F.3d 1071 (7th Cir. 1998). Carter does not say such expenses are not compensable as a matter of law. In fact, the Plaintiff in Carter was allowed to recover for the services of a jury and trial consultant, but the amount requested was reduced because the court found that the portion of the services rendered after the jury was selected was not reasonably necessary. Id. at *4.

I do not suggest that mock trials and jury consultants are necessary expenditures in routine litigation. Far from it. However, this was a complex case with many millions of dollars at stake. Plaintiff's experienced counsel reasonably concluded that Defendant would likely employ these services itself, and that Plaintiff would be at a decided disadvantage at trial if it did not match that expenditure. I find that, under all the circumstances, this expenditure was reasonably necessary to the

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recoverable); Majestic Box Co., Inc., 1998 WL 720463 (E.D. Pa. 1998) (complicated nature of defense justified defendant's expenditures on "mock trial"); Finkelstein v. Bergna, 804 F. Supp. 1235, 1239, 1258-59 (N.D. Calif. 1992) (allowing fees and costs associated with one mock trial and focus group, including employment of high-caliber attorney to act as mock opposing counsel, but disallowing second mock trial because contested issues were close to resolution by then); Aguinaga v. United Food and Commercial Workers Int'l Union, 142 F.R.D. 328, 337 (D. Kan. 1992) (allowing recovery of expenses for mock trial), reversed on other grounds, 993 F.2d 1480 (10th Cir. 1993); City of Shreveport v. Chanse Gas Corp., 794 So.2d 962, 979 (La. App. 2001) (court has discretion to award expenses for mock trial and jury consultant). Cf. Denesha v. Farmers Ins. Exchange, 976 F. Supp. 1276, 1291 (W.D. Mo. 1997) (disallowing mock trial expenses on ground that the particular case did not warrant such preparation), reversed in part on other grounds, 161 F.3d 491 (8th Cir. 1998).

successful prosecution of this action, and is compensable as part of Plaintiff's attorney fees. However, Plaintiff may recover only the standard fee of $60,000, and not the higher contingency rate of $360,000. See City of Burlington, 505 U.S. 557.

Defendant has not argued, or presented evidence, that the $60,000 rate for this particular case was excessive. I did not deduct for "limited success," since there is no evidence Plaintiff would have paid a lower rate had there been fewer plaintiffs. In addition, it was this mock trial exercise that persuaded Plaintiffs that the chances of Ross-Simmons prevailing at trial would be higher without Smokey Point.

9. Out-of-Pocket Expenses

Plaintiff seeks compensation, as part of its attorney fees, for certain out-of-pocket expenses not recoverable as statutory "costs" under 28 U.S.C. §§ 1920 and 1921. Counsel has stated that their law firm customarily bills these expenses to its clients in addition to the hourly rate.

I have denied compensation for any items that pertain solely to the Siletz or Smokey Point claims. Examples include travel expenses for meeting with Steve Hammer and Karen Borrell, and the deposition of Terri Lane-Shepard. Plaintiff has withdrawn certain items it acknowledges were not related to the Ross-Simmons claims, *e.g.,* $2,178.20 for copying costs associated with discovery produced to Weyerhaeuser by the Siletz and Smokey Point

plaintiffs.

With regard to the remaining expenses, Defendant does not dispute any particular item, or the reasonableness of the amount sought. Rather, Defendant requests an across-the-board 66 percent reduction on the ground that only one of the original plaintiffs prevailed. This greatly overstates the added costs attributable to the other plaintiffs. Most of these expenses would have been incurred whether there was one plaintiff or three.

I will not waste scarce judicial resources calculating the precise number of additional photocopies or exhibit tabs consumed due to the presence of the other plaintiffs. Instead, I will apply an appropriate percentage reduction, where warranted.

Plaintiff also has advised the court of certain accounting errors that further reduce the amount sought. Finally, Plaintiff included some items in its cost bill that I elect to treat as out-of-pocket expenses, and will address here.

Description	Amount Requested	Amount Allowed
Airfare	$10,365.17	$ 5,374.67
Facsimile Charges	821.75	616.31
Long Distance	431.47	323.60
Lodging	1,728.35	1,652.59
Meals	881.98	661.48
Westlaw	111.65	111.65
Messenger & FedEx	1,916.24	1,437.18

Mileage[13]	3,433.46	2,575.09
Parking	144.25	108.19
Other Travel Costs	1,435.26	717.63
Outside Exhibit Production	1,076.21	968.59
Exhibit Supplies	133.43	120.09
Printing (aerial photo)	32.52	32.52
Maps	375.00	337.50
Color Copies	2,696.12	2,156.90
Outside Copying Costs	8,782.17	6,900.67
In-house Photocopying[14]	30,839.55	28,492.85
Total	$65,204.58	$52,587.51

10. Statutory Costs

Plaintiff requested an award of $78,100.65 in costs pursuant to 28 U.S.C. §§ 1920 and 1921. Plaintiff subsequently withdrew certain items. I treated some other items as out-of-pocket expenses compensable in the attorney fee award, rather than as statutory costs. Defendant does not dispute that the remaining

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[13] Numerous depositions were taken, and witnesses interviewed, around the Pacific Northwest. The billing records also reflect many trips to Ross-Simmons' facilities and corporate records in Longview.

[14] Approximately $20,000 of that request is for copying Weyerhaeuser log purchase and log inventory records. This line item also includes exhibits and other trial materials, and summary judgment briefing. Plaintiff seeks reimbursement at the rate of 15 cents per copy. Defendant does not contest that rate.

items are the kinds of costs recoverable under the applicable statutes, nor does Defendant dispute the reasonableness of any specific expenditure.

Description	**Amount Requested**	**Amount Allowed**
Witness Fees (including mileage & subsistence, when applicable)	$ 3,947.50	3,947.50
Deposition Transcripts	792.05 (remainder withdrawn)	792.05
Deposition Appearance Fee	withdrawn	0.00
Trial Transcripts	2,147.48	2,147.48
Total	$6,887.03	$6,887.03

Conclusion

Plaintiff Ross-Simmons' Motion (# 247) for Attorney Fees and Costs, and Cost Bill (# 246) are granted in part. Plaintiff is awarded $1,416,236.01 in attorney fees and out-of-pocket expenses, and $6,887.03 in statutory costs.

IT IS SO ORDERED.

DATED this 27th day of October, 2003.

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OWEN M. PANNER
United States District Judge