COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 05-1360-BLS1

MARCIA RHODES, HAROLD RHODES, REBECCA RHODES Plaintiffs, v. AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN INSURANCE COMPANY Defendants.	)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

From the outset of this case, the stakes were very high. AIG warned the Court that Plaintiffs sought to recover $36 million from each defendant for a potential recovery of $72 Million.[1] (AIG Memo in Supp. Summary Judgment at p. 2). Throughout the proceedings, the Court indicated its awareness that its rulings would be closely scrutinized by both the insurance industry and plaintiffs' bar.

Massachusetts follows the "lodestar" method of calculating attorney's fees. *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 326 (1993). "The basic measure of reasonable attorney's fees is a fair market rate for the time reasonably spent preparing and litigating a case." *Stowe v. Bologna*, 471 Mass. 199, 203 (1994). In applying the lodestar analysis, the court "should not only consider the plaintiff's financial interests at stake but also the plaintiffs other interests sought to be protected by the statute in question and the public interest in having persons with valid claims represented by competent legal counsel." *Id.* at 203.

The following factors should be considered when awarding attorney's fees under c. 93A: how long the trial lasted; the difficulty of the legal and factual issues involved; and, the degree of competence demonstrated by the attorneys. *Heller v. Silverbranch Constr. Corp*., 376 Mass. 621, 629 (1978). Additional factors were identified in *Linthicum v. Archambault*, including: the nature of the case and issues; the time and labor required; the amount of damages involved; the

[1] The judgments entered in favor of the Plaintiffs in the underlying personal injury action totaled $9.412 million. With interest, and deducting the $550,000 Professional Tree settlement, the Judgments were worth $11,365,334 on September 28, 2004.

result obtained; the experience, reputation and ability of the attorneys; the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases. 379 Mass. 381, 388-89 (1979).

I. The Rhodes Family Interests: Taking Action to Make It Less Likely That Another Massachusetts Family Will Be Forced Through Trial and Appeal Where Liability is Undisputed and Damages are Catastrophic.

Having traversed the insurers' gauntlet in the Underlying Action, which included repeated attempts to discover Mrs. Rhodes' privileged therapy records, last-minute depositions and an independent medical exam, and a trial in which each of them was subjected to emotional extremes, the Rhodes family filed this action to hold the defendants accountable for their failure to comply with c. 176D's mandate to make prompt efforts to effectuate settlement where liability is reasonably clear. The Rhodes family did not ask to become the poster children for this cause - it was thrust upon them on January 9, 2002 the day that Carlo Zalewski drove a 78,000-lb tractor tanker into Marcia Rhodes's stopped car. Marcia, Harold and Rebecca testified about the stress and anxiety they suffered throughout the Underlying Action and the gloom that descended upon them when AIG appealed the jury verdict. As Harold Rhodes testified, "[T]his is when I realized that if they can delay this for two more years, we would be in dire financial straits. And I was just absolutely afraid that we wouldn't be able to withstand two more years and then we would just have to take whatever they offered." *Trial Trans*., Vol. 9 at 128. The Rhodes family has a very keen understanding that if they can be put in a position of "having to take" whatever the insurance company offers, then every other Massachusetts family is in the same, if not a worse, position.

II. Nature of the Case and Legal Issues.

AIG made a number of business decisions that resulted in a record-setting jury award in the Underlying Action, which was then appealed. Those business decisions also resulted in this lawsuit. In order to establish AIG's knowledge and evaluation of the case, the Plaintiffs had to understand what information was provided to AIG by the primary insurer and its Third Party Administrator ("TPA") and what conversations took place between the primary and excess carriers.

This case covers new territory. This is the first c. 176D case involving a multi-million dollar judgment. This is also the first c. 176D judgment case where the policies and conduct of both a primary and excess carrier were at issue. Moreover, when ruling on the motions to compel, the Court noted the lack of precedent in Massachusetts to serve as guidance on the joint

defense privilege raised by the Defendants and those complicated issues resulted in a 26 page decision from this Court and Defendants both petitioning for interlocutory review.[2]

III. Experience. Reputation and Ability of Attorneys.

Once the Rhodes family made the decision to pursue the c. 176D claim, they had every reason to expect that the Defendants would take full tactical advantage of the adversarial nature of the litigation process given their previous experience and the fact that the insurers' own conduct and financial interests were at stake. Accordingly, the Plaintiffs wanted a litigation team that had the depth and experience to match the resources available to two international insurance behemoths, including the capacity and commitment to litigate the case through trial and appeal. Having been represented by Brown Rudnick Berlack Israels, LLP ("Brown Rudnick") during the Underlying Action, the Plaintiffs had a great deal of trust and confidence in the firm and its attorneys.

While Brown Rudnick is not best known for personal injury work, the firm was up to this task. Brown Rudnick was the only large "corporate" firm in Boston to agree to represent the Commonwealth of Massachusetts in the Tobacco Litigation in the 1990's. Brown Rudnick acted as lead local counsel in the case, which at the time, was described as the largest lawsuit ever litigated in the Commonwealth. Attorney Pritzker, who was the Chairman of Brown Rudnick's Litigation Department throughout the Tobacco Litigation, gained extensive experience doing plaintiffs' work early in his career, with more than thirty-five personal injury/auto cases in his first few years of practice. Some notable personal injury cases in which Attorney Pritzker was involved include:

- represented plaintiff who was seriously injured in collision with a U.S. Post Service truck in 1970s where Judge Tauro awarded close to $1,000,000;
- represented plaintiff paralyzed when tractor trailer rear-ended her car in traffic on the Turnpike, resulting in $6 million settlement, which at the time, was the largest settlement in a personal injury case;
- represented defendants in a wrongful death case involving a commercial truck in case that settled during trial;
- represented defendants in early 1990s in a wrongful death/personal injury case and monitored insurance defense counsel in case in which fire killed three people and caused permanent injuries to three others.

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[2] It was not until August, 2007 that the SJC formally recognized joint defense agreements as an exception to the waiver of the attorney-client privilege under the common interest doctrine. *Hanover Insurance Co. v. Rapo & Jepsen Insurance Services, Inc.*, 449 Mass. 609 (2007).

Over the last twenty-five years, Attorney Pritzker has also litigated complex commercial disputes around the country, including securities fraud, class actions and construction cases. He has tried well in excess of fifty cases to verdict or awards during his career. There are but a handful of attorneys in Boston who have practiced for more than forty years, and at such a high level. Attorney Pinkham, though not as seasoned as Attorney Pritzker, is a very capable trial attorney who focuses on commercial litigation and has also had the benefit of significant courtroom experience in her fifteen years of practice. Attorney Pinkham tried 6 cases to verdicts or awards from 1995-2003.[3]

The 2004 jury award to Marcia Rhodes in the Underlying Action was reported to be the largest jury verdict in Massachusetts to date involving a plaintiff who had been paralyzed in a car accident. Similarly, the loss of consortium awards to Harold and Rebecca Rhodes were also described by counsel for the defendants in the Underlying Action as record-setting (and therefore "excessive"). The record-setting nature of the jury awards certainly reflects the devastating injuries that the Rhodes family suffered. The verdicts also reflect in some measure the skill and effort of the attorneys in preparing the case and presenting it to the jury.

IV. Time and Effort Required in Present Action.

Plaintiffs were required to fight every step of the way in this case, from discovery through trial, continuously facing hardened resistance from AIG. In a way, AIG employed a Stalingrad-type defense, and therefore, cannot be allowed to complain about the time expended. See *Lipsett v. Blanco*, 975 F. 2d 934, 939, 941 (1st Cir. 1992) (noting fee award in excess of damages was the result of a "hard-nosed approach to litigation" akin to "trench warfare," and a factor that weighed heavily in analysis of plaintiff s staffing needs); see also *City of Riverside v. Rivera*, Ml U.S. 561, 581 n.l 1 (1986) (party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.").

A. Discovery.

AIG went to great lengths to avoid producing documents or providing basic facts. The Plaintiffs served discovery requests with the Complaint in April 2005. In responding to Plaintiffs' First Set of Interrogatories, AIG refused to disclose the names of its employees who worked on the Rhodes file until the Court ordered it to do so. While it is certainly within the right of every party to assert legitimate objections to discovery requests, AIG's decision to refuse to identify employees who worked on the claim was clearly specious as the Court wasted little time in ordering AIG to supplement its response.

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[3] The experience and efforts of the Plaintiffs' core legal team are set forth in more detail in the Affidavits of M. Frederick Pritzker, Margaret M. Pinkham, Daniel J. Brown and Susan G. Oldham, submitted herewith.

Motion practice related to documents commenced in August, with Plaintiffs seeking to compel, and after the Court ordered Defendants to produce withheld documents, AIG still did not respond in a timely manner. Even when it started to do so, AIG did not produce all responsive documents that it had been ordered to produce until Plaintiffs identified the specific documents by name, date and type. See Exhibit A attached hereto (Brown email to Zelle dated 3/27/06). It was not until April 2006 that AIG finally produced the last of the requested documents.

Having withheld the bulk of the requested documents between April 2005 and January 2006, when the Court ruled on the various motions to compel, AIG continued to drag its feet by seeking interlocutory review of the discovery order that was clearly within the Court's discretion. Zurich followed the same approach. As the Single Justice (Dreben, J.) ruled on February 27, 2006: "It is only in the rarest cases that a Single Justice will interfere with a discovery order. This is not such a case."

Having exhausted all opportunities to keep documents from the Plaintiffs, the Defendants begrudgingly began producing them on a piecemeal basis, even though the Court's February 2, 2006 Order on Discovery Schedule mandated that the Defendants ready their documents for disclosure, and, in the event the Single Justice denied relief, that the documents "shall be disclosed to plaintiffs' counsel on the next business day." AIG supplemented its production five times in March. Notably, most of the March supplemental productions took place late in the afternoon on the day before, or even on the morning of, a deposition of an AIG witness: 3/15 production before 3/16 deposition of Warren Nitti; 3/27 production before 3/28 Tracey Kelly deposition; 3/29 production before 3/29 Satriano deposition. AIG also supplemented its production again in April, after its witnesses were deposed.

The Defendants handed over documents in dribs and drabs because the Plaintiffs continually pressed for more documents, after poring over the documents that had been produced and Defendants' privilege logs and carefully comparing different versions of the documents that were produced with varying redactions. In one glaring example of how a crucial document was not produced despite the Court's clear order, neither Defendant produced the letter that was ultimately marked as Exhibit 32 at trial, a March 18, 2004 letter from the insured's outside counsel at McCarter English notifying AIG of the requirements of c. 176D and its obligation to make a settlement offer to the Rhodes family. This letter was emailed to several recipients, including Fred Hohn, the insurance broker for GAF, which according to the January 23, 2006 Discovery Order meant that the "joint defense" protection was waived and it had to be produced. Zurich produced the email to Fred Hohn, but withheld the attachment until Attorney Brown noted the attachment icon on the e-mail and pointed it out to the Defendants. Similarly, Zurich did not

produce Kathleen Fuell's notes of a November 13, 2003 conference call with AIG and the insured, despite the fact that Fred Hohn was on the call, until Attorney Brown made a specific request for them pointing out that since Fred Hohn was on the conference call, the notes should have been produced. These documents were crucial to establishing AIG's knowledge and liability.

Having first received the March 18th Bartell letter because of the thoroughness of Attorney Brown's review of Zurich's documents, Plaintiffs had to wonder why AIG had also not produced the letter. AIG finally produced the letter only after Attorney Brown made a specific request for it on March 27, 2006 - a full month after the Single Justice's denial of interlocutory review on February 27th. Plaintiffs marked the letter produced by AIG, which had a "received" stamp and a copy of the envelope addressed to Nicholas Satriano, as an exhibit at trial to forestall any argument that the letter had not been received by AIG or was lost in a "paperwork limbo." Because that document, Trial Exhibit 32, notified AIG that it was in violation of G.L. c. 176D, it was a "smoking gun" that established that AIG's conduct was knowing and willful *(Findings of Fact, Conclusions of Law and Order, 44)*. But for Plaintiffs' counsel's diligent review of the documents, Plaintiffs would have been denied that important piece of evidence. AIG's recalcitrance in producing discovery and its motion practice were part of a larger litigation strategy - one that now comes at a large cost about which they cannot complain. *See Lipsett*, 975 F. 2d at 939, 941; *see also Rivera*, 477 U.S. at 581 n.l1.

AIG's own document requests set an unfortunate tone for discovery. AIG's First Request for the Production of Documents to Marcia Rhodes sought "medical, psychological, psychiatric, therapist or other treatment related in any manner to National Union's alleged action or failure to act as described in the Complaint in this action." Having been aware that two different judges denied two motions to compel the production of Marcia Rhodes' mental health records in the Underlying Action, AIG certainly could not have had any legitimate basis for seeking the same records in this case. Marcia Rhodes objected to the Request, and AIG did not file a motion to compel, from which one can infer that AIG decided to lead off its discovery efforts with an attempt to intimidate Marcia Rhodes.[4]

AIG also requested that Plaintiffs produce the entire case file from the Underlying Action. This request necessitated the painstaking review of 55 boxes of documents by a team of

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[4] AIG continued these tactics when it subpoenaed Rebecca Rhodes' mental healthcare providers, apparently hoping to obtain records before Plaintiffs could move to quash the subpoenas since AIG had never asked Plaintiffs to produce those records.

paralegals and attorneys in order to remove privileged documents and communications. Plaintiffs made the non-privileged documents available, on a timely basis, in October 2005.

All document discovery and depositions of Zurich fact witnesses were necessary to establish communications with AIG and AIG's knowledge, as well as what Zurich did because AIG alleged that Zurich's handling of the claim was deficient. As the Court found, AIG was involved almost from the beginning when it received a copy of the initial report in February 2002 and asked to be kept apprised of the matter in April. *Findings of Fact, Conclusions of Law and Order*, pp. 4-5. Additionally, the investigation conducted by Crawford & Co., which was passed along to and relied upon by AIG, was clearly important to proving the extent of AIG's knowledge of the case and the extent of its unnecessary delays. This last point is especially true given the Court's finding that "liability was reasonably clear when Zurich tendered its policy limits to AIGDC on January 23, 2004." *Findings of Fact, Conclusions of Law and Order*, 43.

In order to make that factual determination, it was necessary to establish what had been done by Zurich and its Third Party Administrator, Crawford & Co. Accordingly, all of the discovery that was obtained from Zurich was necessary to Plaintiffs case against AIG, and would have been necessary even if Zurich had not been a party to the suit. *Rini v. United Van Lines, Inc.,* 903 F. Supp. 234, 238 (D. Mass. 1995) (apportioning fees impractical because "Plaintiff would have had to expend precisely the same amount for her lawyers on the claims she has prevailed on, if the others had never been filed.").

Although Plaintiffs would have deposed the Zurich and Crawford & Company witnesses even if Zurich had not been named as a defendant, it is reasonable to conclude that the depositions may not have been conducted with as much intensity in terms of establishing Zurich's knowledge and its failure to act. Accordingly, Plaintiffs have agreed to reduce their request for attorneys' fees by: 1) value of attorneys fees and paralegal time for Day 2 of Fuell testimony ($18,290); 2) value of Attorney Pinkham's and one-half value of Paralegal Oldham's time for the Chaney deposition ($9,250) and for Mills deposition ($5,250); and 3) value of Attorney Pinkham's, Attorney Brown's and one-half of Paralegal Oldham's time for McIntosh deposition activities ($7,852). These reductions total $40,642. The only other discovery tool that could credibly be found to have not been necessary to establish the case against AIG was Plaintiffs' Request for Admissions to Zurich. Ms. Oldham has reviewed those time entries, which total $15,825 for the various timekeepers who drafted the requests and/or reviewed those responses, and the Plaintiffs will reduce their request for attorneys' fees by this amount.

B. Motion Practice.

Throughout this case, Plaintiffs had to file several motions and oppositions because of AIG's tactics, starting with the motion to compel AIG to provide the names of the employees who worked on the Rhodes claim and continuing on with the disputes regarding document production, even after the Court's January 26 Discovery Order. Additionally, after its initial production of documents in July 2005, AIG produced 100 pages of "confidential" documents on February 9, 2006. The Court subsequently ordered the parties to amend their confidentiality agreement after AIG refused to remove the "confidential" designation so that documents that were truly confidential were to be re-designated.

After the close of discovery, despite the multitude of facts in dispute, AIG moved for summary judgment. At the same time, AIG also filed a tactical motion to disqualify Attorney Pritzker, claiming he was going to be a key witness. The Plaintiffs' legal team devoted an enormous amount of time in November 2006 opposing these motions. The Plaintiffs' legal team delegated initial research and drafting to more junior attorneys, subject to the review of the more senior attorneys, and each attorney was tasked with primary responsibility for various arguments. "Effective preparation and presentation of a case often involve the kind of collaboration that only occurs when several attorneys are working on a single issue." *Gay Officers Action League v. Comm. of Puerto Rico*, 247 F.3d 288, 297 (1st Cir. 2001). The AIG motions were denied.

AIG's Motion to Disqualify Attorney Pritzker was shown to be just another tactical maneuver when the time came for AIG to call its witnesses. At the close of testimony on day 14 of the trial, AIG's counsel indicated that it had not yet "decided whether we're going to call Mr. Pritzker." *Trial Trans.,* Day 14 at 129. The next day, AIG's counsel stated, "I don't think we're going to call Mr. Pritzker." *Trial Trans*., Day 15 at 186. AIG's equivocation on this issue at trial —after steadfastly declaring that Attorney Pritzker was a key witness who had to testify in order to establish the negotiations that occurred in the Underlying Action, only to put him on the stand to ask about a single, non-probative email he sent to a former partner—supports a finding that AIG never intended to call him as a witness, and that it did so only to avoid being accused of unethical, tactical maneuvering to the detriment of the Rhodes family.

Zurich also moved for summary judgment, but focused primarily on legal arguments, one of which duplicated an argument made by AIG (Plaintiffs not entitled to recover damages in 93A action for harm compensated by the jury award in Underlying Action) and did not require as much time to address as AIG's multiple factual arguments. Brown Rudnick has reviewed the time entries for the summary judgment pleadings, and it is difficult to identify the precise amount of time devoted to opposing the Zurich motion. Plaintiffs estimate that the large majority of the $175,505 in time spent opposing the motions for summary judgment were devoted to AIG's

arguments. Accordingly, Plaintiffs will reduce their request for attorneys' fees by $45,000, which represents slightly more than 25% of the total fee for preparing Plaintiffs'' unified opposition to both motions for summary judgment.

AIG was undeterred by the summary judgment ruling, as it simply recycled its summary judgment arguments into nine motions in limine, compared to the two filed by the Plaintiffs. Again, Plaintiffs' legal team had to devote significant time to opposing the AIG motions, with less time devoted to Zurich's three motions in limine, two of which raised the same issues as AIG. The Plaintiffs will reduce their request for attorneys' fees by $11,000, which reflects approximately 25% of the $44,000 in attorneys fees incurred in opposing the motions in limine.

C. Length of Trial.

This case was tried over a number of half-days of testimony: ten days in February 2007, and another six days in March. Closing arguments were made on March 30, 2007. The Plaintiffs' trial team consisted of three attorneys, which was entirely appropriate given that Zurich had three trial counsel for most of the trial, and AIG had four trial counsel plus another attorney in attendance on various trial days. *Rini,* 903 F. Supp. at 238 ("The use of two attorneys to try the case was entirely appropriate and customary, mirroring the fact that defendant itself had two active attorneys at trial, as well as a third present in reserve representing [defendant] and available for consultation."). If the defendants had three and four attorneys at counsel table, as well as in house counsel who attended various days of trial, it must have been reasonable for the Plaintiffs to rely on three trial counsel and a paralegal, with addition support from junior associates.

The Plaintiffs called witnesses from both AIG and Zurich. Of the Zurich witnesses, Kathleen Fuell was the most important to establishing AIG's liability as she was the only Zurich representative who had direct dealings with AIG.[5] John Chaney, via deposition designations, and Ms. Johanna (Jody) Mills testified as to Crawford & Company's practices in connection with keeping both Zurich and AIG informed of developments in the case and their estimates of the claim's value. Had Zurich not been a party, Plaintiffs still would have presented testimony from these witnesses to establish AIG's liability. Given the half-days of testimony and the late starts on certain mornings because of the Court's schedule and the request of AIG's counsel, the trial took longer than all parties anticipated.

D. Time Expended and Personnel Involved.

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[5] Deposition testimony of David Macintosh of Zurich, who had responsibility for the Rhodes claim before Fuell, was also submitted at trial.

The Plaintiffs' core legal team in this case was comprised of: a senior partner, a junior partner, a mid-level associate, a junior associate and a paralegal. As specific events or deadlines approached, various personnel assisted in the representation, including, for example additional associates to complete the review of the case file in the Underlying Action or to research various legal issues. The core team was supplemented by another associate as the trial date approached. Attached hereto as Exhibit B are reports of the time entries for each of the timekeepers who billed to the Rhodes case which summarize the time entries totaling $2,833,029.

These timekeeper reports have been reviewed and reductions have been made to reflect an overlap of effort, or to reduce certain hours, including, for example, associate hours at witness preparation meetings that were more valuable for the associate's professional development than for the legal services provided by the associate. The reports of Attorneys Lipton and MacDowell's time entries, included in Ex. B. reflect a 3 hour reduction on each trial day. The Plaintiffs have included the value of one hour per day of Attorneys Lipton and MacDowell's trial attendance in the request for fees to reflect the value that their presence at trial added to the Plaintiffs' case in the form of their input on testimony, increased efficiency in preparing the post-trial briefs, statement of facts, and the accuracy of citations to the record. The chart below summarizes the total time entries and values of the efforts of Brown Rudnick professionals through the time of trial that are the subject of the Plaintiffs' request for an award of fees.[6] A chronological report of time entries on the Rhodes matter is attached hereto as Exhibit C.

Timekeeper	Rate Range	Hours	Value
Pritzker, Partner	$650-$765	951.1	703,011
Pinkham, Partner	$440-$530	1161	597,949
Brown, Associate	$280-$420	2370	892,659.50
Lipton, Associate	$200-$315	743.3	216,713
Oldham, Head Litigation Paralegal	$220-$250	1074.9	243,976
Pinarchick, Partner	$475	60.8	27,108
Ryan, Associate	$170	85.6	19,734
MacDowell, Associate	$215	373.8	97,857
Shaw, Partner	$550	15.3	8,828
Sroka, Associate	$200	8.6	1,720

[6] As previously explained, Plaintiffs are further reducing the amounts billed to reflect time spent on Zurich-specific issues.

Kearney, Summer Associate	$170	17.5	2,975
Rappaport, Litigation Paralegal	$235	26.7	6,234
Cole, IT Specialist	$110	29.5	3,245
			2,822,009.5

In the two and one-half years from the service of the 93A demand letters to the end of the trial, a number of attorneys, law students, and support staff provided assistance in the case on an interim or project by project basis, including a number of junior associates, summer associates, and a few partners who were consulted on topics within their area of expertise. A total of $26,000 was removed from the total bill reflecting the efforts of the "non-core" timekeepers. The efforts of other time-keepers who assisted in significant litigation efforts, including, for example identifying privileged documents, defending the depositions of Plaintiffs' counsel, assisting in motions to compel when one of the core team was unavailable, or assisting Ms. Oldham to prepare exhibits and the designated transcript testimony, remain a part of the Plaintiffs' request for attorneys' fees.

At times, Ms. Oldham was assisted by another litigation paralegal, Laura Rappaport. Ms. Rappaport has been a paralegal for almost fifteen years, and her hourly rate was $235. She has an associate's degree in paralegal studies from Newbury College, from which she graduated in 1992. Laney Cole worked in Brown Rudnick's Information Technology Department, and she assisted the trial team in preparing CDs with the portions of the videotaped Nitti deposition that were designated by the parties, as well as preparing the DVDs from the videotaped Satriano and Kelly depositions which were used at trial. Ms. Cole also developed the chronology/timeline that was prepared as a visual aid for opening statements and closing arguments, and the hard copy of the printout of the timeline was submitted with Plaintiffs' post-trial brief. Ms. Cole's hourly rate was $110.

E. Apportionment of Fees Would Not Be Appropriate in This Case.

AIG should be responsible for the overwhelming majority of the fees requested in this case, including those that AIG may argue are related to claims against Zurich, because the factual underpinnings, discovery disputes, petition for interlocutory review and the full length of trial would still have occurred even if Plaintiffs had not named Zurich as a defendant. *Batischev v. Cote*, 23 Mass. L. Rptr. 541(Mass. Super. Feb. 20, 2008) (Thayer Fremont-Smith, J.)[7] ("apportionment is not required where, as here, the c. 93A claims against all of the defendants

[7] Superior Court cases cited herein will be attached in alphabetical order as Exhibit D.

were intertwined factually."); *see also Rini*, 903 F. Supp. at 238 (the "unsuccessful claim and the unsuccessful pieces of other claims cannot be severed from the successful claims in any way to permit a rational or fair diminution of fees. They are all inextricably intertwined, legally and factually. Plaintiff would have had to expend precisely the same amount for lawyers on the claims she has prevailed on, if the others had never been filed."); *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. 672, 682 (1986) (litigation related to defending against rent claim and establishing tortuous interference with prospective contractual relationship were so "intertwined factually with the merits of the claim under Chapter 93A that the judge would not have been required to segregate out more than a nominal portion of total hours expended ... in arriving at an appropriate attorney's fee."); *Alfonso v. Aufiero*, 66 F. Supp. 2d 183 (D. Mass. 1999) (awarding $129,903.38 in attorneys fees and $36,757.67 in costs in case where jury awarded $15,676 in favor of plaintiffs on civil rights claims against two of several police officers named as defendants, and plaintiffs had voluntarily dismissed three defendants and did not prevail on unlawful arrest and race-based conspiracy claims).

This case involved one, indivisible chain of events beginning with the crash that left Mrs. Rhodes paralyzed, continuing with the immediate investigation by John Chaney of Crawford & Co., dealings between Zurich and AIG regarding the request to make a $5 million offer in November 2006 and the tender dispute in early 2007, through AIG's handling of the claim, and including its decision to appeal and cause further delay.

Additionally, as described above, the scope of discovery would have been virtually the same even if Zurich had not been a defendant, and Plaintiffs' counsel would have had to take the same steps during each stage of the litigation. First, Plaintiffs were required to file motions to compel documents from both Zurich and AIG because both of them claimed that their claim files were privileged. Regardless of Zurich's status as a defendant or a third-party, the privilege issue still would have been fought because Zurich likely would not have waived its claimed privilege, and even if it had, AIG still would have withheld its claim file for the same reason, thereby requiring the same briefing in the summer and fall of 2005. After the Court's January 23, 2006 Discovery Order, both Zurich and AIG filed petitions for interlocutory review, to which Plaintiffs prepared one omnibus response. Again, even if Zurich had not been a defendant, Plaintiffs still would have had to prepare a response to at least AIG's petition, but likely to petitions from both Zurich and AIG. *See Torres-Rivera v. O 'Neill-Cancel*, 524 F.3d 331 (1st Cir. 2008) (overturning fee award in which trial court apportioned fees on basis of "relative liability," finding "time expended" against defendant who mounted ferocious defense should have been used since default judgment entered against other defendant).

With respect to summary judgment, AIG should receive no more than a $45,000 discount in fees because Plaintiffs' filed one omnibus opposition to the motions of Zurich and AIG. While Plaintiffs' counsel did have to prepare responses to Statements of Undisputed Facts from both Zurich and AIG, Zurich's filings were significantly shorter than AIG's, were based on the same set of facts and, as stated above, Plaintiffs will apply such a reduction in preparing this request.

While motions in limine were filed by both Zurich and AIG, Zurich only filed three while AIG filed nine, and two of their arguments overlapped. Indeed, the two most junior attorneys on the Rhodes litigation team, Rebecca MacDowell and Rachel Lipton, were primarily responsible for drafting oppositions to Zurich's Motions in Limine and arguing them as well.[8] The only trial time focused on a Zurich witness for the sole purpose of establishing Zurich's liability was Attorney Pritzker's cross-examination of Zurich's expert witness. Plaintiffs will reduce their request for attorney's fees by $12,450, which represents the value often hours of Attorney Pritzker's time, and four hours of the time spent at trial by Attorneys Pinkham and Brown and Paralegal Oldham (as the time entries of Attorneys Lipton and MacDowell already reflect a three hour reduction for each trial day).

At the close of trial, Plaintiffs prepared a post-trial brief, more than half of which dealt with AIG's liability and when it was obligated to take action on the Rhodes claim. Regardless of Zurich's presence in the case, that drafting had to be done, and AIG should be required to pay for those services. The time entries on the omnibus post-trial brief submitted by Plaintiffs total $246,000, and the Plaintiffs will reduce their request for attorneys fees by $61,500 to reflect the components of the briefing that could be deemed attributable to Zurich in its capacity as a defendant, as opposed to its capacity as a witness and actor in the chain of events that culminated in AIG's willful violation of its obligations as an insurer under c. 176D.

In all, the various discovery efforts, pleadings, and trial activities that focused on Zurich as party to this action - as opposed to its crucial role as a witness to develop the case against AIG, total $186,417.[9] Accordingly, Plaintiffs seek an award of attorney's fees in the amount of

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[8] Zurich and AIG both moved to exclude evidence regarding Harold Rhodes' lost earning capacity, which Attorney Rebecca MacDowell, a first year associate, was responsible for drafting and arguing. Nevertheless, Plaintiffs have agreed to reduce the value of their entire core team's time on the Motions in Limine by 25%.

[9] $40,642/ deposition time reduced to reflect different intensity of examination based on status as a party; $15,825/time spent on Zurich requests for admissions; $45,000/allocation of time spent on Zurich summary judgment motion; $11,000/allocation of time spent on Zurich motions in limine; $12,450/Plaintiffs' core team time for Zurich expert prep and examination at trial; $61,500/Zurich as party allocation of post trial brief.

$2,635,592.50.

V. Results Obtained.

The Plaintiffs prevailed on their claims against AIG, including proving a willful violation on the part of AIG, thus triggering an award of multiple damages. The ruling in this case is the first time an excess carrier has been found to have violated chs. 93A/176D. Though Plaintiffs did not convince the Court that Zurich's lack of activity on the claim from January 2002 - September 2003, together with its failure to tender until January 2004, was an unfair insurance practice, the case stands as a warning to primary insurers who delegate claims handling to Third Party Administrators and who lack adequate systems for forwarding claims information, thus creating a "paperwork limbo" that lets claims fall through the cracks.

An additional factor that should be considered in determining the amount of fees to be awarded is the potential effect that the case might have on future claims. As the Supreme Judicial Court has acknowledged, "[t]he evolution of c. 93A has shown that there is a benefit to the public where deception in the marketplace is brought to light (and thereby corrected) by an individual who has been deceived even though his actual damages were not proved." *Bertassi v. Allstate Ins. Co.*, 402 Mass. 366, 373-74 (1988) (quoting *Trempe v. Aetna Casualty & Sur. Co*., 20 Mass. App. Ct. 448, 458 (1985))[10]..Substantial attorneys' fee awards may be maintained, even in the case of limited or nominal damages, because of "the importance of providing an incentive to attorneys to represent litigants ... who seek to vindicate [statutory] rights but whose claim may not result in substantial monetary compensation" and on "the deterrent impact" of litigation. *O'Connor v. Huard,* 117 F.3d 12, 18 (1st Cir.1997), *cert, denied*, 522 U.S. 1047 (1998).

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[10] It is worth noting that Bertassi is the case to which the legislature responded with the 1989 Amendment to c. 93A, changing the measure of punitive damages to the amount of judgment because the lost use of money calculation was not sufficiently punitive. R. W. Granger & Sons v. J&S Insulation, 435 Mass. 66, 83 n.21 (2001).

VI. Usual Price Charged For Similar Services By Other Boston Attorneys And Awards in Similar Cases

Brown Rudnick employs more than 200 lawyers, with offices in Boston, New York (45 attorneys), Hartford (26 attorneys), Providence (12 attorneys), Washington D.C. (18 attorneys) and London (13 attorneys). With more than 100 attorneys in Boston, Brown Rudnick is one of the 20 largest firms in Massachusetts. Brown Rudnick's rates are higher than average, but its rates are competitive among its peer firms, and in line with other fee awards in favor of parties who retained attorneys employed by the twenty largest Boston firms. See *Fronk v. Fowler*, 22 Mass. L. Rptr. No. 15, 366 (May 21, 2007) (finding hourly rates of WilmerHale partners of $450-$575; associate rates from $195 - $360 and paralegal rates of$110-$195 over four years of litigation, while high, were reasonable in context of the litigation); *Brooks Automation, Inc. v. Blueshift Technologies, Inc.*, 21 Mass. L. Rptr. 53 (April 6,2006) (awarding hourly rates of $500, $600 and $625/hour for partners with 12, 19 and 23 years of experience, respectively, and awarding hourly rates for associates at $410 for fifth year associate; $300 for second year associate, and $260 for first year associates).

In *Brooks*, the Court found that Goodwin Procter's rates were reasonable by comparison to large, national law firms as they reflected the "going-rate" in the large firm attorney market. As Judge Van Gestel noted in *Eastern Holding Corporation v. Congress Financial Corporation*, the difference between New York rates and Boston rates "has essentially faded away with the growth of Boston firms and their offices in New York City and the expansion of New York firms with branches in the Boston market." *Suffolk Superior Court No. 04-3148 BLS1* (Feb. 23, 2007), n.3; *see Giuliano v. Piantkowski,* 20 Mass. L. Rptr. 17 (August 16, 2005) (awarding attorneys fees to successful counterclaimants represented by Mintz Levin in the amount of $1.46 million and applying hourly rate of $325 for lead counsel in 2001 and up to $395 for 2003-2004); *Office One Inc. v. Lopez*, 1 Mass. L. Rptr. 589 (Nov. 4, 1997) (awarding attorneys fees in case where defendant was represented by Hill & Barlow, finding its hourly rates were commensurate with those charged at other firms of similar size and reputation).

Given what was at stake in this case, it was reasonable for Plaintiffs to retain a large firm with the institutional resources (with associated higher rates and overhead) to prosecute a multiyear case against AIG, which describes itself as a world leader in the insurance industry. It was also reasonable to have a team of three trial counsel to match AIG's four. The rates of trial counsel - from $650 - $765 for Attorney Pritzker, who has practiced law for more than 40 years; from $475 - $530 for Attorney Pinkham, who has practiced law for 15 years, and from $360 -

$420 for Attorney Brown, who was a fifth year associate at the time of trial, are comparable to those charged by large firms in the Boston market. The 2007 rates of the Brown Rudnick attorneys who billed time on the case are well within the ranges of other national firms in Boston.[11] Attached hereto as Exhibit E is a table with self-reported 2007 hourly rates of attorneys and paralegals at national firms with Boston offices as reported to *Mass. Lawyers Weekly* and *American Lawyer Surveys*. The Plaintiffs also rely on the Affidavit of Joseph Savage, a partner at Goodwin Procter, who has both collaborated with, and been on the other side of, Brown Rudnick attorneys and is familiar with the firm's reputation. Attorney Savage is of the opinion that the hourly rates for the core Brown Rudnick team are comparable to the rates of other large, well-respected Boston firms.

Plaintiffs seek attorneys' fees for the value of Paralegal Oldham's efforts on the case. Her $220-$250 hourly rate is higher than the average paralegal rate in Boston, but such a rate is reasonable given the wealth of her experience. Unlike a large percentage of paralegals who may work for one or two years at a law firm before applying to law school, Ms. Oldham is a professional paralegal with more than 20 years of experience. That experience makes her a valuable asset on a litigation team, and she brings a set of skills to each case that easily outshine those of inexperienced attorneys. In fact, for every assignment that would be appropriate for a first or second year associate, with the exception of drafting pleadings, Ms. Oldham will get the work done faster and with more accuracy. By awarding attorneys fees that included the efforts of a senior paralegal at Goodwin Procter who had 12 years of experience, and billed at $250/hr, this Court has recognized that experienced paralegals perform valuable legal work. *See Brook Automation,* 21 Mass. L. Rptr. 53 (April 6, 2006). Moreover, as the chart attached hereto as Ex.. D demonstrates, large Boston-based firms charged $100-$210 for paralegals in 2005, and $100 - $230 in 2006. It is reasonable for large Boston-based firms to bill out their most experienced paralegals at an hourly rate that is more than twice what is charged for a paralegal in his or her first year on the job. It is also reasonable for large Boston-based firms to bill a paralegal with 20

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[11] There is ample authority for using the most current billing rates of attorneys when making an award of attorneys' fees to reflect the time value of money in cases in which litigation progresses over the course of more than one year. *See Missouri v. Jenkins*, 491 U.S. 274, 2830-84 (1989) (court may use current rates rather than historical rates as payment of legal fees after case is over is not equivalent to same dollar value received reasonably promptly after legal services were performed); Dixon v. International Brotherhood of Police Officers, 434 F. Supp.2d 73, 85 (D. Mass. 2006) (applying current hourly rate for plaintiffs attorney in civil rights case based on length and complexity of case). As Brown Rudnick's billing system has recorded the value of the time entered at the various hourly rates in effect between 2004 - 2007, however, the Plaintiffs seek their attorneys' fees at the historic rates.

years of experience at a rate that more closely approximates a junior attorney's rate to reflect the value of that experience and efficiency.

VII. Costs.

The Plaintiffs incurred $190,000 in costs that are the subject of this request for an award of reasonable attorneys' fees and costs. As set forth in more detail in the Affidavit of Margaret Pinkham, the costs have been carefully reviewed and a number of reductions have been made. Attached hereto as Exhibit F are reports of the cost categories and their totals. The cost summaries list every cost and disbursement that was billed to the case. The Plaintiffs are seeking to recover the amount identified as "Grand Total Bill" which in many instances is less than the "Grand Total Work." The difference between these two totals reflects the various reductions that were made by a careful review of all entries. Any cost or disbursement that could not be linked directly to an event in the litigation has been written off. A chronological list of all disbursements is attached as Exhibit G.

VIII. Fees Incurred in Preparing Fee Application.

The Plaintiffs seek legal fees for the time spent preparing this fee application, and the records of the time-keeping entries relating to the fee application are included in Exhibit B. Attorney Pinkham billed 110 hours between May 2007-June 2008, while Attorney Brown billed 60 hours. Recognizing that the passage of time created inefficiencies in preparing the fee application since work on it occurred over an extended period of time, the Plaintiffs will reduce these hourly amounts by 25%. Paralegal Oldham spent 43 hours working on the fee application.

Attorney Pinkham - 82 hours @ 530 = 30,210

Attorney Brown - 42 hours @420 = $43,460

Paralegal Oldham - 43 hours @ 250 =$10,750

Accordingly, the Plaintiffs seek an award of $71,850 for their efforts in preparing this fee application.

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DATED: June 27, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this day, a true and accurate copy of the above document was served via hand delivery on the attorney of record for each party:

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DATED: June 27, 2008