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.)

RESPONSE OF DEFENDANTS, AIG DOMESTIC CLAIMS, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., TO PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

I. Introduction

In awarding attorneys' fees under Chapter 93A, this Court should apply the criteria set forth in *Linthicum v. Archambault*, 379 Mass. 381, 388-89, 398 N.E.2d 482, 488 (1979) (rev'd on other grounds). Plaintiffs should be awarded only the reasonable value of the fees and costs they incurred in connection with the one claim on which they prevailed - that AIGDC unfairly delayed settling their claim after the judgment was entered in the underlying case. Even as to that claim, the result Plaintiffs obtained ($896,500) fell far short of the result they sought (nearly $36,000,000). Plaintiffs should not be entitled to recover any fees and costs incurred in connection with those claims on which they did not prevail, including: (1) their claims against Zurich, on which they spent substantially more time in discovery and at trial than they spent on the claims against AIGDC;[1] (2) their allegations based on AIGDC's claim handling prior to the trial of the underlying case, which consumed the overwhelming majority of time spent by Plaintiffs on their claims against AIGDC; and (3) the various damage theories which Plaintiffs withdrew (such as the claims that Marcia and Rebecca Rhodes suffered physical injuries and Harold Rhodes suffered economic loss as a result of AIGDC's claim handling), or on which they

[1] As used herein, AIGDC refers to AIG Domestic Claims, Inc. and National Unison Fire Insurance Company of Pittsburgh PA.

did not prevail (such as their claim for emotional distress related to the "frustrations of litigation.").

While AIGDC reserves the right to appeal the award of any attorneys' fees, to the extent that the Court's June 3, 2008 Order awarded Plaintiffs' their reasonable attorney's fees in litigating their Chapter 176D/93A claims against National Union and AIGDC (but not Zurich), as set forth in the attached affidavit of J. Owen Todd[2], a reasonable large Boston firm could have litigated the "bad faith appeal" claim on which Plaintiffs prevailed for between $212,155 and $242,105. As detailed on pp. 19-22, even including the allegations that AIGDC acted in bad faith before the trial of the underlying case, Plaintiffs' claim against AIGDC should have been litigated for no more than $511,578.62. If the Court awards the attorneys' fees Plaintiffs would be entitled to recover under their contingent fee agreement with Brown Rudnick, Plaintiffs would be entitled to $298,833.33 - one-third of their recovery from AIGL)C. Plaintiffs' request for more than $190,000 in out of pocket costs is also grossly excessive and should be substantially reduced to no more than $72,000.

II. Argument

A. **Plaintiffs' Fee Application is Not Sufficiently Detailed to Permit this Court to Establish the Reasonable Fees and Costs Relating to the Claim on which Plaintiffs Prevailed.**

In a fee shifting case, the plaintiff bears the burden of proving the reasonableness of the fees and costs for which recovery is sought. *See Watts Water Techs., Inc. v. Fireman's Fund Ins. Co*., No. 05-2604-BLS2, 22 Mass. L. Rptr. 659, 2007 WL 2083769, at *9 (Mass. Super. Ct. July 11, 2007) (Gants, J.) (citing *Snow v. Mikenas*, 373 Mass. 809, 812 (1977) (The "burden of proving the reasonableness of the attorney's fees incurred rests with the party seeking payment of those fees.")). In determining an appropriate award of attorneys' fees and costs, the Court is "not required to review each individual item in the legal bill, but can consider the bill as a whole." *Brooks Automation, Inc. v. Blueshift Techs., Inc*., No. 053973BLS2, 21 Mass. L. Rptr. 53, 2006 WL 1537520, at *1 (Mass. Super. Ct. Apr. 6, 2006) (Gants, J.) (*quoting Berman v. Linnane*, 434 Mass. 301, 303 (2001)).

Moreover, "prevailing counsel understandably are held to a much more exacting standard for record keeping and accounting for expenditures of time and money than might be required in

[2] In addition to the affidavit of Mr. Todd (Tab A), AIGDC also submits (at Tab B) highlighted copies of Plaintiffs' attorneys' time entries, which depict those specific time entries the Court should reject, even if the Court bases its attorneys' fees award on all claims Plaintiffs litigated against AIGDC, and explains why each such entry should be rejected.

general practice. Plaintiffs' counsel has the burden of submitting 'detailed contemporaneous time records.'" *Roberts v. Dep't of State Police for the Commonwealth*, No. 0101877, 15 Mass. L. Rptr. 462, 2002 WL 31862711, at *4 (Mass. Super. Ct. Sept. 26, 2002), (citing *Lipsett v. Blanco*, 975 F.2d 934, 938 (1st Cir. 1992)). To recover fees, attorneys "must submit a full and precise accounting of their time, including specific information about the number of hours, dates, and … the nature of the work performed." *Id.* at *1 (citing *Calhoun v. Acme Cleveland Corp*., 801 F.2d 558, 560 (1st Cir. 1986)). If "proper documentation in proper specific detail is not submitted, the requested fees should be reduced or even denied altogether." *Id*. at *4. (citing *Grendel's Den v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984)). In *Roberts*, the court found that the attorney's timesheet notations were insufficient to support his request for attorney's fees because they often lacked information providing the "nature of the work performed at every line item." *Id* For example, the Court noted that Roberts' counsel used the term "communications" without any indication about the subject matter that the exchanges addressed. *Id*

The time entries provided by Plaintiffs' attorneys in the present case are hopelessly vague. Their block billing descriptions do not describe the work being performed with any particularity and they repeatedly use vague terms, such as "meetings" and "strategize," without providing any indication about what subject matter was being discussed, making it impossible for AIGDC or the Court to determine whether such work related to matters on which Plaintiffs prevailed.[3] *See Crane v. Native Am. Air Ambulance, Inc.,* No. CV 06-092 TUC FRZ, 2008 WL 2001281, at *4 (D. Ariz. May 7, 2008) (Rejecting fee request for "redundant and excessive hours in intra-office conferences regarding `strategizing' positions to be taken in written and oral forms and memorializing these strategized positions.").

In *Ellis v. Varney,* No. 9801397, 19 Mass. L. Rptr., 2005 WL 1009634, at *3 (Mass. Super. Ct. Mar. 22, 2005) (Fecteau, J.), in assessing a similarly vague fee application, the court found that "the invoices are largely block-billed, with many individual entries having been made in blocks of time of 4 hours or more, relating to vaguely described services without further itemization of time within the block for each item of service within each block of time in some, and with only a single item referenced as consuming such amounts of time in others." The court determined that "block-billing, certainly as regards segments of time in excess of four hours or more, and likely less, [is] commercially unreasonable, as it is bound to lead to uncertainty at least, and a likelihood of inaccuracies, such as by exaggeration of absolute time spent, by failing to deduct for the occurrence of non-billable events within the time, by failing to itemize time spent

[3] *Six hundred twenty-one* separate Brown Rudnick time entries use the term "strategize" and *five hundred ninety-one* entries refer to team meetings or other intra-office conferences.

on individual functions, and to have failed to itemize the amount of particular time spent towards particular claims." *Id* at *4.

In the present case, the problems created by the vague billing descriptions submitted by Plaintiffs' attorneys is compounded by the fact these descriptions rarely differentiate between whether the given activity is related to the claim on which Plaintiffs prevailed or the many claims and issues on which they did not prevail. "A successful plaintiff under chapter 93A should not be able to benefit from poor record-keeping on the part of counsel." Incase*, Inc. v. Timex Corp.,* 421 F. Supp. 2d 226, 243 (D. Mass. 2006). Because Plaintiffs' attorneys' fees application makes it impossible for this Court and AIGDC to determine the reasonable amount of fees incurred in connection with the one claim on which Plaintiffs' prevailed, the requested fees should be denied altogether or at least significantly reduced. *See Ellis*, 2005 WL 1009634, at *6 (Due to block-billing, vagueness, and excessiveness in the preparation of various aspects of the case, and in seeking to apply the appropriate standards as governed by "strict conservative principles," it was reasonable and proper to reduce the Plaintiff's fee application by one-third.).

Finally, much of the work for which Plaintiffs seek recovery is duplicative. In *T&D Video, Inc. v. City of Revere*, 66 Mass. App. Ct. 461, 476, 848 N.E.2c[1221, 1235 (2006) (*rev 'd on other grounds*), the court held that in determining the amount of an attorneys' fee award, "the court should consider the time counsel spent on the case exclusive o f hours that are excessive, redundant, duplicative or unproductive." Because of the vague and unclear nature of almost all of their billing entries, Plaintiffs' attorneys' fees submission in the present case is insufficient to carry their burden of establishing the reasonableness of the fees sought.

B. Applying the Established Criteria for Determining What are the Reasonable Attorneys' Fees in a Chapter 93A Case Requires a Substantial Reduction of the Amount Claimed.

As this Court has explained, in a Chapter 93A case, "while the amount of a reasonable attorney's fee is largely discretionary, the judge should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Brooks Automation,* 2006 WL 1537520, at *1 (*citing Linthicum*, 379 Mass. at 388-89). In evaluating an application for attorneys' fees, a court may also consider "[w]hether the fee is fixed or contingent." *Brown, Rudnick, Freed & Gesmer v. Commonwealth,* No. 015883BLS, 16 Mass. L. Rptr. 815, 2003 WL 22707409, at *2 (Mass. Super. Ct. Oct. 20, 2003) (van Gestel, J.).

The determination of what is a reasonable attorney's fee "is a question that is committed to the sound discretion of the judge." *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.,* 445 Mass. 411, 432 (2005) (quoting *Berman v. Linnane,* 434 Mass. 301, 302-03 (2001)). The trial judge "has ample opportunity to acquire firsthand knowledge of all these factors" and "is to rely on his firsthand knowledge of the services performed before him …." *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 629, 630-31 (1978).

1. The Nature of the Case and the Issues Presented

In *Brooks Automation,* 2006 WL 1537520, at *3, this Court described the nature of the subject litigation as "a life or death case" for Blueshift Technologies, the party seeking an award of attorneys' fees. The Court added that "the future of Blueshift likely depended on the outcome of this litigation." *Id*. Unlike the prevailing party in *Brooks Automation*, by June 2005 the Plaintiffs in the present case had already recovered nearly $12 million, which provided them with financial security. Before the Chapter 93A Complaint was even filed, Plaintiffs had already recovered more than $2.8 million from Zurich and the tree service. The Chapter 93A litigation was pursued by Plaintiffs after the underlying case settled to punish Zurich and AIGDC and to try to recover a bonanza.[4]

The issues presented by Plaintiffs' claims against AIGDC and Zurich commonly arise in Gen. Laws ch. 176D and ch. 93A claims. Plaintiffs were merely required to prove through the presentation of expert testimony that the liability of the insurers was reasonably clear and the insurers failed to make prompt or reasonable settlement offers. With respect to the specific allegation on which Plaintiffs prevailed, this Court's finding of liability on the part of AIGDC was

---

[4] Plaintiffs' argue they pursued this case to protect others. Memorandum in Support of Plaintiffs' Request for Attorneys' Fees and Costs at 3 ("The Rhodes family did not ask to become the poster child for this cause, it was thrust upon them."). This assertion, however, is neither supportable nor relevant. There is no evidence that Plaintiffs retained Brown Rudnick to pursue this claim for the benefit of other Massachusetts citizens. Plaintiffs also claim they filed the Chapter 93A lawsuit to ensure that no other Massachusetts family will be forced to accept "whatever" an insurance company offers in settlement and that they "traversed the insurer's gauntlet" in the underlying action, which included attempts to gain access to medical records, depositions, an independent medical examination, and a trial. Id at 2-3. This rhetoric ignores that this Court has determined that it was reasonable and appropriate for AIGDC to seek the discovery that Plaintiffs claim was unnecessary. Plaintiffs also ignore that this Court found that the underlying case was tried to a verdict because Plaintiffs would not accept what the Court has decided were reasonable offers made before and during the trial of the underlying case. Neither the Plaintiffs here, nor any plaintiff ever, is "forced" to accept a settlement offer. Plaintiffs did not accept the reasonable offers made before and during the accident case trial and they obtained a judgment that was far in excess of what this Court has held would have been a reasonable offer.

based on the judgment in the underlying case, the undisputed fact that the amount of the post judgment offer was $7 million, and AIGDC's state of mind as reflected in its claim handling notes.[5] The result obtained by Plaintiffs could have been achieved with little discovery and no testimony at trial.

2. The Amount of Damages Involved and the Result Obtained

a.) Virtually All of Plaintiffs' Damages Claims Were Rejected.

"[T]he inclusion of the amount of damages involved among the *Linthicum* factors indicates that what is reasonable may depend, at least in part, on the amount of damages involved and the result obtained." *Brooks Automation*, 2006 WL 1537520, at *3 (citing *Linthicum*, 379 Mass. at 388-89). In the present case, the Court determined that Plaintiffs' were entitled to recover $896,500. Plaintiffs, however, sought nearly $36 million in damages from both AIGDC and Zurich. Evidence concerning AIGDC's conduct between the time the judgment entered in the underlying lawsuit and the time the case was settled was the only proof of damages Plaintiffs were required to submit to obtain the damages awarded. The Court rejected all of Plaintiffs' other damages theories, including their claim that they were entitled to emotional distress damages for the "frustrations of litigation." Therefore, all of the damages discovery, trial testimony and motion practice was unnecessary given the result that Plaintiffs' obtained.

b.) **Plaintiffs' Fee Application Should be Reduced by at Least 50% Due to their Unsuccessful Claim Against Zurich.**

Like the discovery, motion practice, and trial testimony concerning damages issues, because Zurich tendered its policy limits to AIGDC months before the trial of the underlying case, all discovery, motion practice and trial testimony relating to Zurich was not relevant to the only claim on which Plaintiffs prevailed - their claim that AIGDC failed to make prompt and reasonable settlement offers after the trial of the underlying case. In fact, the bulk of the Zurich related discovery was not relevant to any allegations against AIGDC.

Plaintiffs spent considerable time and resources litigating their unsuccessful claim against Zurich. The claims Plaintiffs pursued against Zurich and the facts developed to support them were distinct from the legal arguments asserted and the facts relevant to the claims against AIGDC. The only factual evidence obtained through Zurich witnesses that had any bearing on any claim against AIGDC was the testimony of Kathleen Fuell concerning her November 2003

[5] . The Plaintiffs' expert admitted at trial that he was not qualified to render an opinion as to the propriety of the appeal. See Trial Transcript, Vol. 11 at 86 (attached hereto at Tab C) ("Q: you're not claiming that you're qualified to render an opinion on the merits of the appeal in the Rhodes case, right? A: No, I am not.").

telephone conference and ensuing communications with Nicholas Satriano at AIGDC. But even this evidence had no bearing on the claim against AIGDC based on its claim handling conduct after the judgment entered in the underlying case. Yet, Plaintiffs contend that virtually all pretrial and trial time and expense incurred in connection with developing and presenting evidence against Zurich would **reasonably** have been incurred even if Zurich was not a party in the case.

A similar situation was presented in *Professional Services Group, Inc. v. Town of Rockland,* C.A. No. 04-11131-PBS, 2008 WL 1924996 (D. Mass. Apr. 30, 2008). In rejecting one-third of the fees sought, Judge Saris explained:

> The challenge in awarding attorneys' fees in this case is that Rockland's counsel charged full-bore ahead on multiple claims, and lost all but one of them. The quality of representation by Rockland's counsel was excellent, albeit aggressive. Indeed the quality of representation by PSG's lawyers was also of the highest caliber. This was a well-litigated, hard-fought trial, and the legal and factual issues were fully duked out to a draw before the jury. In the end, Rockland prevailed on one theory of its Chapter 93A claim as a result of judicial findings. So, the difficulty for the court is how to allocate attorneys' fees to ensure that Rockland is only compensated for the fees necessary to prevail on the Chapter 93A claim.

Id at *2.

As Plaintiffs argue here, Rockland asserted that "the facts supporting the winning Chapter 93A claim were inextricably intertwined with the facts underlying the lost claims." *Id*. Although Judge Saris agreed that some of the "factual issues underpinning the common law and statutory claims overlapped with the factual predicate for the winning Chapter 93A claim," she noted that "there were clear exceptions." *Id*. Judge Saris made "a reasonable judgment as to the proportion of time spent on these unsuccessful aspects of the case, particularly where the Court cannot realistically review voluminous attorney time records, line-item by line-item," and she reduced the requested attorneys' fees based on what she estimated was the time spent on the non-prevailing claims, the amount of damages actually awarded, and the fact that the prevailing party had already modestly reduced the fee request. *Id.* at *3.

Plaintiffs' reduction of their fee request by $186,417 (6.6%) due to the fact that they did not prevail on their claims against Zurich is arbitrary and far too low. While it would be a Herculean task for the Court to attempt to discern a definitive amount from Plaintiffs' vague billing entries, it appears that far more than 50% of the charges arise in whole or in part from Zurich-related tasks.

c.) Plaintiffs' Fee Request Should Be Substantially Reduced Because They Did Not Prevail on Most of the Legal and Evidentiary Issues They Raised.

Plaintiffs did not prevail on numerous legal theories that consumed much of the time spent by their counsel on legal research and motion practice, such as their claims that: (1) they were entitled to recover under Gen. Laws ch. 93A without proving they suffered any injury caused by the alleged ch. 93A violation; (2) they did not have to show they would have accepted a reasonable settlement offer; (3) they should be entitled to recover emotional distress damages even if they could not prove all elements necessary for an intentional infliction of emotional distress claim; and (4) they could obtain double or treble the amount of the judgment in the underlying case for a 93A violation that occurred after that judgment was entered.

In their fee petition, Plaintiffs complain about the time they had to spend responding to Motions in Limine filed by AIGDC. Plaintiffs ignore, however, that these Motions were either granted (such as the motions relating to Plaintiffs' attempt to subpoena Judge Murphy and to submit evidence about statements made by the mediator and settlement judge at the mediation and settlement conference in the underlying case); or they related to evidence that did not provide any basis for the Court's judgment against AIGDC (such as the evidence relating to the *Oliveira* case).

Moreover, although Plaintiffs spent considerable time opposing AIGDC's Motion for Summary Judgment, many of the arguments made by AIGDC in that Motion were ultimately adopted by the Court, such as: (1) Plaintiffs could not recover emotional distress damages; (2) Plaintiffs could not recover for the pre-trial claims handling because Plaintiffs would not have accepted a reasonable settlement offer; and (3) AIGDC had no duty to investigate or settle until Zurich tendered its policy limits.

d.) Plaintiffs' Fee Request Should Be Reduced For the Fees Related to the Pritzker and Pinkham Depositions and the Motion to Disqualify.

Because attorneys Pritzker and Pinkham held themselves out as percipient witnesses, based on their knowledge of settlement communications with AIGDC, it was necessary for AIGDC to take their depositions.[6] However, because Plaintiffs determined, after AIGDC filed motion seeking their disqualification, that Mr. Pritzker and Ms. Pinkham would not testify at trial about any matters pertaining to AIGDC's conduct (though Mr. Pritzker did testify at trial about costs his firm incurred in the underlying case), the time spent by Plaintiffs' counsel on these depositions and in opposing AIGDC's Motion to Disqualify was not required. While there is no blanket prohibition against the same attorney handling a Chapter 93A claim in which he is a potential witness, any attorney facing that issue must be mindful of the fact that "without the

[6] Plaintiffs also improperly seek to recover as attorneys' fees for time spent by Mr. Pritzker and Ms. Pinkham testifying as witnesses.

testimony of plaintiff's lawyers, there would be no one who could testify about the factual `backbone' of the case - *i.e.,* the circumstances underlying the defendants' purportedly unfair settlement practices." *Carta v. Lumbermens Mut. Cas. Co.,* 419 F. Supp. 2d 23, 30 (D. Mass. 2006). In the present case, the time associated with Plaintiffs' attorneys' depositions and the Motion to Disqualify was due solely to the Plaintiffs' decision not to retain separate counsel to handle the Chapter 93A claim.

e.) Plaintiffs' Fee Request Should Be Reduced for the Time Related to Communications with Witnesses Who Never Testified or Whose Testimony Did Not Benefit Plaintiffs' Case.

Plaintiffs should not be entitled to recover attorneys' fees related to communications with witnesses that they never called to testify at trial or even deposed and those witnesses whose testimony added nothing to the allegation on which Plaintiffs prevailed. For example, Plaintiffs spent considerable time communicating with Martin Maturine, a former AIGDC claim handler who briefly worked on the underlying case. Mr. Pritzker made a trip to New York City to talk to Maturine and Plaintiffs' counsel had numerous other communications with him. Witnesses that Plaintiffs called at trial but who added nothing to their case, included Carlotta Patten, Judge Stephen Rhodes (who was called to testify about his brother's tone of voice during phone conversations), Peter Hermes (who ostensibly was called to testify about confidential mediation related communications), and their expert, Arthur Kiriakos, who did not testify about the "bad faith appeal" theory on which Plaintiffs prevailed.

The result obtained by Plaintiffs in the present case stands in stark contrast to the result achieved by the prevailing party in *Brooks Automation*, 2006 WL 1537520, at *4, where "[t]he ultimate result obtained ... was a complete victory on every count in the complaint and counterclaim." *See also PolyCarbon Indus., Inc. v. Advantage Eng 'g, Inc.,* 260 F. Supp. 2d 296, 298 (D. Mass. 2003) (reducing award of attorneys' fees and costs by 50% because the ch. 93A claim was based on several theories of liability on which Plaintiff did not prevail); *Reddish v. Bowen,* 66 Mass. App. Ct. 621, 631, 849 N.E.2d 901, 909 (2006) (The court "took into account the [plaintiff]'s failure to prevail on its claims for negligence and breach of contract as well as its delay in amending the complaint" and awarded "only a fraction of the total amount incurred in litigating the third-party complaint."); *Miller v. Risk Mgmt. Found. of Harvard Medical Insts.,* Inc., 36 Mass. App. Ct. 411, 422, 632 N.E.2d 841, 848 (1994) (In considering attorney's fees, the trial judge noted plaintiffs did not prevail on their Gen. Laws ch. 176D claim, which would have supported a vastly higher award, and their claim against two defendants "was unrealistic and its pursuit rather quixotic."); *Clifton v. Mass Bay Transp. Auth.,* No. 95-2686-H, 11 Mass. L. Rptr.

316, 2000 WL 218397, at *16 (Mass. Super. Ct. Feb. 3, 2000) (Gants, J.) (reducing claimed attorneys' fees by 10% because co-plaintiff settled before trial).

3. The Experience, Reputation, and Ability of the Attorneys

Although AIGDC does not dispute Brown Rudnick's reputation as a successful and aggressive commercial litigation firm, as evidenced by the affidavits submitted by Plaintiffs' counsel in support of the fee petition, before the present case none of Plaintiffs' attorneys had any prior experience with "bad faith" claims arising under Gen. Laws ch. 93A and ch.176D.[7] The billing entries submitted with Plaintiffs' fee petition demonstrate that much time was expended by the Plaintiffs' attorneys in "getting up to speed" on the legal issues involved in this case. This time should not be charged to AIGDC.

Plaintiffs' attorneys' aggressiveness in litigating the present case also significantly increased the cost of the litigation. For example, Plaintiffs routinely filed motions for sanctions whenever there was any discovery dispute, but all such motions were denied. In connection with their allegations against Zurich, Plaintiffs deposed three Crawford & Co. witnesses, two Zurich witnesses, and two GAF employees, and met or communicated with five of the attorneys involved in the handling of the claim prior to Zurich's tender of the defense to National Union (Peter Hermes, Gregory Deschenes, John Johnson, Lawrence Boyle, and Anthony Bartell). An attorney with prior experience with ch. 93A/176D claims would have recognized that an equally effective prosecution of the case could have been accomplished without these efforts.

4. The Usual Price Charged for Similar Services By Other Attorneys in the Same Area

In determining the proper award of attorneys' fees, the Court must consider the average rates charged by similar firms in the Boston area, not the actual rates that were charged by Brown Rudnick. "Where the award is provided for by statute and is assessed against the party having no contractual relationship with the attorney involved, ***the standard of reasonableness depends not on what the attorney usually charges but, rather, on what his services were objectively worth."*** *Heller,* 376 Mass. at 629 (emphasis added) (citing *Dillon's Case,* 324 Mass. 102, 113 (1949)). See also *Fontaine v. Ebtec Corp.,* 415 Mass. 309, 325, 613 N.E.2d 891 (1993) (Fair market rates for time reasonably spent should be the basic measure of reasonable fees, and should govern unless there are special reasons to depart from them); *Heath v. Silvia & Silvia Assocs., Inc.,* No.

---

[7] Attorney Joseph Savage, who submitted an affidavit attesting to the skill of Plaintiffs' attorneys, also does not have any Chapter 93A/176D experience, at least based on his affidavit (Mr. Savage is a former federal prosecutor and he directed his former firm's white collar crimes and governmental investigations work). Affidavit of Savage, at ¶ 3.

041570C, 2007 WL 3259150, at *1 (Mass. Super. Ct. Oct. 5, 2007) (Henry, J.) ("The rate applied to the reasonable hours expended should be the prevailing rate in the community … The fee applicant bears the burden … of establishing the market rate.").

Plaintiffs seek attorneys' fees based on hourly rates that are substantially higher than the average rates (as represented by Plaintiffs) for large Boston firms during the time period when the present case was being litigated. *See Exhibit E to Plaintiffs' Request for Attorney's Fees and Costs.* The average midpoint of the rates charged in 2006 by the large firms presented by Plaintiffs is: $494.38 for partners; $340.00 for junior partners/associates; and $163.13 for paralegals. Plaintiffs, however, left Burns & Levinson off the chart they provided to the court. According to Massachusetts Lawyers Weekly's 2007 survey of the 100 Largest Massachusetts firms, in 2007 Burns & Levinson was ranked 16th in size, one spot ahead of Brown Rudnick. The published 2007 Burns & Levinson rates are: $375-$475 for partners; $350 for junior partners; $210-325 for associates; and $125-$200 for paralegals. *See Tab D.* The Burns & Levinson rates are more in line with what a reasonable large Boston firm would have charged for prosecuting a case such as the present case. By contrast, Plaintiffs seek to recover attorneys' fees based upon rates ranging from $650 to $765 per hour for Mr. Pritzker, a senior partner; $440-$570 per hour for Ms. Pinkham, a junior partner; and $280-$520 per hour for Mr. Brown, who was only a fifth year associate when this case was tried in 2007. The reason for the 86% increase in Mr. Brown's hourly rate over the three years this case was litigated (compared to an increase of 18% for Mr. Pritzker and an increase of 30% for Ms. Pinkham) is not explained. Mr. Brown billed more than 2,400 hours to this case.

This is not a case that necessitated retaining an experienced "specialist" from a large firm, which may have required payment of a higher rate than normal. *See Mulhern v. Roach*, 398 Mass. 18, 25 (1986) (nature of the dispute required retention of "highly regarded … eminent domain attorney"). Rather, this was a straightforward insurance bad faith case. This case simply did not require the resources of a "top twenty" firm, much less a large firm inexperienced in insurance bad faith litigation. In *Brooks Automation*, 2006 WL 1537520, at *5, this Court observed: "[I]n some cases … ten attorneys, a senior litigation technology specialist, a paralegal, and a case assistant-would be excessive or inefficient." Having presided over the present case from its inception, this Court is well-situated to determine that the time and labor expended by ten Brown Rudnick attorneys, two paralegals and an IT Specialist was excessive and inefficient.

The paralegal hourly rate ($220-250 per hour) is particularly unreasonable. As with attorneys' fees, law clerk and paralegal work "is to be compensated at the prevailing market rate for such services, not the rate normally billed by that particular clerk." Roberts, 2002 WL

31862711, at *5 (citing *Guckenberger v. Boston Univ.,* 8 F. Supp. 2d 91, 107 (D. Mass. 1998)). In *Roberts,* the court determined, based on knowledge of the field and research into the matter, a reasonable fee for law clerks' services with extensive documented experience (about eight years) was $75 per hour. *Id*. *See also Chestnut v. Coyle*, No. Civ. A. 99-10236-RWZ, 2004 WL 438788, at *2 (D. Mass. Mar. 9, 2004) ("[T]his jurisdiction for several years has valued the work of paralegals and law students at $60/hour," but the court awarded $75 per hour due to the paralegal's "extensive legal training and experience.").

Furthermore, the time entries indicate that most of the work that was performed on this case by the Brown Rudnick paralegals was clerical in nature. Such work should be part of the firm's overhead and should not be compensable in a fee shifting case. *See Roberts*, 2002 WL 31862711, at *6 (The court held that much of the costs "are overhead that the Court presumes are included in an attorney's hourly rate, such as administrative support staff and in-house photocopying."). At a minimum, the rates for this work should be dramatically reduced. *See R. W. Hatfield Co., Inc. v. Ceric Fabricating Sys., Inc.,* No. 962409, 2000 WL 33170690, at *6 (Mass. Super. Ct. Oct. 17, 2000) (Gershengorn, J.) (In a case involving Brown Rudnick, the court found it "unreasonable to bill paralegals more than the lowest [Brown Rudnick] paralegal rate" of $70 per hour because the paralegals were frequently assigned clerical tasks).[8] In the present case, Brown Rudnick is seeking reimbursement for considerable time spent by the paralegals for clerical work such as filing, obtaining and "managing" documents, communicating with vendors, setting up and cleaning the "war room," and maintaining a case calendar, exhibit binders and a production log.

5. The Amount of Awards in Similar Cases

In considering the amount of awards in similar cases, the Court should take into account cases in which plaintiffs did not prevail on claims which required the vast majority of time spent during discovery and at trial. *See, e.g., PolyCarbon Indus.,* 260 F. Supp. 2d at 309 (reducing fee request by 50% because plaintiff did not prevail on several different liability theories and against other defendants); *Twin Fires*, 445 Mass. at 431, 837 N.E.2d at 1139 (reducing fees by nearly 45% because, *inter alia*, plaintiffs did not prevail on various damage theories).

[8] Massachusetts courts have also routinely reduced attorneys' fee requests on the grounds that work performed by attorneys were clerical in nature or could have been performed by a less experienced person, such as a secretary or paralegal. *E.g., McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 1.40 F.3d 288, 308 (1st Cir. 1998) (reducing fee request for tasks that could be performed by less experienced persons to an appropriate level); *Malone v. Hecker,* No. 06-10210-GAO, 2007 WL 4200951, at *2 (D. Mass. Nov. 27, 2007) (reducing fees requested by attorneys to $115 paralegal rate to the extent the work could have been performed by a paralegal); *Sys. Mgmt, Inc. v. Loiselle*, 154 F. Supp. 2d 195, 202 (D. Mass. 2001) (The dollar value of clerical work, investigation and compilation of facts and statistics "is not enhanced just because a lawyer does it.").

Additionally, hourly rates approved in other ch. 93A/176D bad faith cases have been far less than the rates Plaintiffs seek in the present case. *E.g., Brewster v. Arbella Mut. Ins. Co.,* No. 0502111, 24 Mass. L. Rptr. 37, 2008 WL 2097405, at *2 (Mass. Super. Ct. Apr. 4, 2008) (Grabau, J.) (rates of $300 per hour deemed reasonable); *Mongeon v. Arbella Mut. Ins. Co.,* No. 200201054, 18 Mass. L. Rptr. 249, 2004 WL 2075466, at *3 (Mass. Super. Ct. Aug. 24, 2004) (Agnes, J.) (hourly rates of $250 per hour for partner and $175 per hour for associate within the range of rates charged in the Greater Boston area.); *Hopkins v. Liberty Mut. Ins. Co.,* No. 950053, 11 Mass. L. Rptr. 106, 1999 WL 33117342, at *3 (Mass. Super. Ct. Dec. 10, 1999) (Sweeney, J.) (Hourly fee of $150 for trial attorney with sixteen years of experience consistent with rates charged by attorneys in Berkshire County).

6. Whether the fee is fixed or contingent

In evaluating an application for attorneys' fees, a court may also consider "[w]hether the fee is fixed or contingent." *Brown, Rudnick,* 2003 WL 22707409, at *2. In the present case, Plaintiffs will pay as attorneys' fees a percentage of their ultimate recovery, not the $2.8 million Plaintiffs seek to recover from AIGDC. *See* Trial Transcript, Vol. IX at 108-09 (attached as Tab E). In *Brown, Rudnick*, Judge van Gestel noted that the "reasonableness [of attorneys' fees] must, of logical necessity, be measured on at least two occasions: first, when the contingent fee agreement is reached or executed; and second, when the product of the agreement – settlement or judgment -- is achieved." *Id.* In that case, Brown Rudnick sought to enforce a contingent fee agreement that would have entitled it to nearly $500 million in a case in which the actual hourly fees totaled less than 10% of that amount. At the outset of that case, it was reasonable for Brown Rudnick and the Commonwealth to believe that there would either be no fee at all, or the fee would be hundreds of millions of dollars. In the present case, when the fee agreement was entered, Plaintiffs and their counsel understood that if they recovered $36 million, Plaintiffs would receive $24 million and Brown Rudnick would receive $12 million. Plaintiffs and their attorneys also presumably understood that if there was no recovery, Brown Rudnick would receive nothing. As Brown Rudnick argued in their case against the Commonwealth, they are entitled to no less than the benefit of the bargain they struck, the full amount of the contingent fee provided for in the contract - but also no more. Accordingly, it would be reasonable and consistent with the expectations of Brown Rudnick when they entered into the contingent fee agreement with Plaintiffs, for the Court to award $298,833.33 in attorneys' fees, i.e., one-third of the amount Plaintiffs recovered.

7. The Time and Labor Required

As discussed above, Plaintiffs are entitled to an attorneys' fees award that corresponds to the amount that their attorneys' services were "objectively worth" arising from their modest success against AIGDC, not the actual fees related to all claims against both Zurich and AIGDC. [W]here the [attorneys' fees] award is provided for by statute and is assessed against the party having no contractual relationship with the attorney involved, the standard of reasonableness depends … on what his services were objectively worth." *Heller,* 376 Mass. at 629. Based on Mr. Todd's affidavit, the "objective worth" of the reasonable legal services related to the theory on which Plaintiffs prevailed, would have been approximately $212,155 to $242,105. A reasonable fee for all claims against AIGDC (including the allegations that AIGDC failed to make reasonable and prompt offers before and during the trial of the underlying case) would be $511,578.62.

C. A Detailed Review of the Brown Rudnick Time Records Demonstrates That the Overwhelming Majority of the Fees Claimed Are Unreasonable.

As discussed above, this Court's time should not be spent attempting to discern from Plaintiffs' attorneys' block billing what fees pertain to the claim against AIGDC on which Plaintiffs prevailed and the reasonableness of the time that was spent on these efforts. Plaintiffs' opposed AIGDC's motion to compel Plaintiffs' attorneys to provide more detailed and comprehensible bills. In light of this opposition, to the extent this Court undertakes a detailed review of Plaintiffs' attorneys' bills, it should not hesitate to strike all block-billed time entries or any other entry that does not precisely describe the nature of the work performed and time spent on each task. To aid the Court, should it undertake a detailed review of the bills, AIGDC has submitted herewith (at Tab B) a color-coded copy of Plaintiffs' attorneys' bills which identifies the following categories of time spent by Plaintiffs' attorneys that should be excluded from the attorneys' fees award, even if the Court awards Plaintiffs fees based on AIGDC's claim handling both before and after the trial of the underlying lawsuit:

- Work that involved Zurich only (e.g. Zurich-related discovery or motion practice)[9] - highlighted in orange;
- Work described as "Strategizing" - (e.g. "Strategize re defendants")[10] is highlighted in red. Plaintiffs only are entitled to recover attorneys' fees for legal work actually performed, not planning or contemplating what work to perform;

---

[9] Plaintiffs even included with their fee submission time spent discussing the potential settlement of their claim against Zurich and time they spent determining what Zurich-related time to deduct from their fee petition.

[10] For example, Mr. Brown's entries such as "strategize re defendants," "strategize re complaint," strategize re interrogatories" utterly fail to indicate what work Mr. Brown was doing.

- Time entries for "Team Meetings" and "internal communications" are highlighted in green. In addition to "strategizing," there are numerous charges by the Brown Rudnick attorneys and paralegals for meetings and conferences that fail to describe the substance of the meeting or conference or, more importantly, how the meeting or conference added value to the legal effort. These charges lack the specificity necessary to determine what the services were objectively worth;
- Work that may have involved only Zurich, and for which the explanation is too vague to identify whether the work related to AIGDC (e.g. "drafted interrogatory answers") is highlighted in pink;
- Work related to claims against both AIGDC and Zurich (e.g. the summary judgment opposition, general research, trial preparation and attendance) is highlighted in yellow;
- In addition to the time already highlighted, time spent on the settlement of the underlying case, damages claims that Plaintiffs withdrew or did not prevail upon, communications with attorneys for the underling defendants, administrative or clerical tasks, and entries with vague descriptions are highlighted in dark blue.[11]

Following is a chart that summarizes the hours and fees submitted by Plaintiffs in support of their fee petition. Since the rates charged by most Brown Rudnick timekeepers increased over the life of the case, the "average hourly rate" was computed by dividing the total charges for each timekeeper with the total hours billed that timekeeper.

[11] In addition, if it is not already highlighted, work that related to AIGDC's conduct prior to the trial of the underlying case is highlighted in light blue;

Timekeeper	Amount of Hours	Average Rate	Total
M. Frederick Pritzker	951.10	$739.15	$703,011.50
Margaret Pinkham	1271.00	$519.09	$659,765.00
Daniel Brown	2431	$380.02	$923,825.50
Rachel A. Lipton	743.30	$291.67	$216,713.50
Susan G. Oldham	1,159	$229.24	$265,691.00
Rebecca A. McDowell	373.80	$261.79	$97,857.00
Paul W. Shaw	15.30	$577	$8,828.00
Andrew M. Sroka	8.6	$200	$1,720.00
Paul A. Kearney	17.50	$170	$2,975.00
Laura M. Rappaport	26.7	$233.48	$6,234.00
Laney C. Cole	29.5	$110	$3,245.00
Cheryl B. Pinarchick	60.80	$445.86	$27,108.00
Jennifer M. Ryan	85.6	$230.54	$19,734.00
Total			$2,936,707.50

Although Plaintiffs reduced their fee request by $180,000 to reflect work they admit was unrelated to any claims against AIGDC, as discussed above, the Court should reduce the amount of hours billed for each timekeeper by at least 50% as a reasonable allocation of litigation time and effort spent on Plaintiffs' claims against Zurich. In addition, the Court should further reduce the amount by at least an additional 25% to reflect time spent on: (1) liability, damages and evidentiary theories advanced by Plaintiffs that they later dropped or for which they did not recover (in addition to the theories based upon the alleged failure to make prompt and reasonable offers before the trial of the underlying case), (2) duplicative and unnecessary work, (3) time spent in meetings, and (4) other vague and redundant time entries. In addition, the hourly rates for each timekeeper should be reduced to - at a maximum - a reasonable "big firm" rate, which AIGDC submits is the median of the published 2007 Bums & Levinson rates, a firm of comparable size to Brown Rudnick: $425 for senior partners; $350 for junior partners; $267.50 for associates; and $162.50 for paralegals. Applying these deductions, results in the following calculations:

Timekeeper	Reasonable Amount of Hours (25%)	Reasonable Rate	Total
M. Frederick Pritzker	237.76	$425	$101,048.00
Margaret Pinkham	317.75	$350	$111,212.50
Daniel Brown	607.75	$267.50	$162,573.12
Rachel A. Lipton	185.83	$267.50	$49,709.53
Susan G. Oldham	289.75	$162.50	$47,084.38
Rebecca A. McDowell	93.45	$267.50	$24,997.88
Paul W. Shaw	3.83	$425	$1,627.75
Andrew M. Sroka	2.15	$200	$430.00
Paul A. Kearney	4.38	$170	$744.60
Laura M. Rappaport	6.68	$162.50	$1,085.50
Laney C. Cole	7.38	$110	$811.80
Cheryl B. Pinarchick	15.2	$350	$5,320.00
Jennifer M. Ryan	21.4	$230.54	$4,933.56
Total			$511,578.62

D. The Costs Requested by Plaintiffs are Unreasonable

With respect to the vast majority of the out of pocket costs for which Plaintiffs seek recovery, they have not met their burden of proving that the costs were reasonable, necessary or recoverable from AIGDC.

First, Plaintiffs have not produced any back-up documentation from which the Court could assess the reasonableness or necessity of the expenses. Rather, Plaintiffs produced only cost summaries. The court should disregard all of Plaintiffs' requests for reimbursement of costs because of their failure to support the summaries with the documents from which the summaries were supposedly created. See *Roberts,* 2002 WL 31862711, at **4., 7 (Noting that request for fees should be reduced or denied if the prevailing party has not submitted "proper documentation in proper specific detail"; and disallowing request for outside expenses not accompanied by "vendor documentation.").

Second, much of the costs for which recovery is sought are patently inappropriate and unreasonable. Courts generally disallow requests for reimbursement for a law firm's overhead, "which, in turn, is subsumed within the fee structure of a firm's professionals … and will not be reimbursed." *In re Malden Mills Indus., Inc.,* 281 B.R. 493, 497, 501 (Bankr. D. Mass. 2002) ("Overhead" includes routine office expenses, and clerical or ministerial functions, such as secretarial overtime and document production charges);[12] *Rolland v. Cellucci,* 106 F. Supp. 2d 128, 145 (D. Mass. 2000) (Court disallowed request for expenses that "are part of an organization's overhead," including document assembly; telephone calls; travel, transportation and parking; supplies; postage and mail delivery; facsimile use; computerized research; meals and conferences; and in-house copying); *Roberts,* 2002 WL 31862711, at *6 (Disallowing requests for costs such as administrative support staff, and in-house photocopying and facsimiles, because such costs are part of the attorney's overhead "that the Court presumes are included in an attorney's hourly rate."); *Fredkin v. Camelot IS-2 Int'l, Inc.,* No. 001831, 2002 WL 1020665, at *4 (Mass. Super. Ct. Apr. 17, 2002) (Kern, J.) (Subtracting "costs for photocopying and facsimile expenses, postage and courier expenses and telephone expenses which this court considers part of the overhead and therefore included in [the attorneys' hourly] rates"); *Stanford v. President & Fellows of Harvard Coll.,* No. 994042, 2001 WL 716834, at *2 (Mass. Super. Ct. Mar. 21, 2001) (Cratsley, J.) ("Consistent with the practice of some trial judges, costs for items that should be absorbed as overhead in an attorney's hourly rate are not compensable. Thus, all costs for photocopying, postage, telephone charges, faxes, legal research, travel and expedited delivery are excluded."); *Cholfin v. Gordon,* No. 943623C, 1998 VEIL 1182066, at *1 (Mass. 12 Super. Ct. Mar. 17, 1998) (Gershengorn, J.) (excluding from award "costs for photocopying, postage, telephone charges, faxes, legal research, travel, parking, filing fees, transcripts, summons or expedited delivery"); *Eight Sys., Inc. v. Daley,* No. 91-7833, 1994 WL 902946, at *2 (Mass. Super. Ct. Dec. 13, 1994) (McHugh, J.) (telephone, mail, computer usage and secretarial overtime are clearly overhead, not recoverable costs).

Most of the costs for which Plaintiffs seek recovery in this case constitute unreimbursable Overhead.[13] Therefore, this Court should reject Plaintiffs' claim to be reimbursed for telephone

---

[12] In addition to seeking to recover costs that are part of the Brown Rudnick firm's overhead, as discussed above, much of the fees for which the Plaintiffs seek recovery, and virtually all of the paralegal charges, constitute time spent on clerical tasks (such as filing, maintaining the "war room," keeping a case calendar and production log, communicating with vendors and the like) for which recovery should be denied.

[13] In addition to being part of the Brown Rudnick firm's overhead, the laser printing and copying costs (25 cents per page) and facsimile charges ($1.25 per page) that were billed to the Rhodes matter are also excessive. In

expenses ($700.90); travel costs ($6,926.76); copying, laser printing and binding ($84,361.86); messenger services and overnight mail ($5,515.45); LEXIS/Westlaw charges and other electronic research ($15,707.86); facsimile ($403.50); and secretarial overtime ($1,625.00). The charges for "miscellaneous" ($1,613.70); and "petty cash" ($519.40) also should be rejected because insufficient detail has been provided by Plaintiffs concerning the reason for and nature of these costs. At a minimum then, the total amount of the claimed out of pocket costs that should be rejected is $117,374.43.

Additionally, costs related to the allegations against Zurich and the many other issues on which Plaintiffs did not prevail should be deducted. Given the vague descriptions provided by Plaintiffs in their fee petition, however, it is not possible to determine how much of the claimed costs relate to matters on which Plaintiffs did not prevail.

E. Plaintiffs' Request for Fees to Prepare the Fee Petition Should be Substantially Reduced.

Plaintiffs seek to recover over $70,000 for preparing the fee petition itself. This request is grossly excessive and should be substantially reduced. *See United States v. Metropolitan Dist. Comm 'n,* 847 F.2d 12, 18 n.6 (1 S` Cir. 1988) ($5,000 would be a reasonable fee for preparing fee petition and citing with approval cases allowing $60 and $70 per hour for such work); *Arthur D. Little Intern., Inc. v. Dooyang Corp.,* 995 F. Supp. 217, 225 (D. Mass. 1998) (finding fee request for $6,709 for preparing fee petition excessive and noting that lower rates should be used "for such drudge work"); *R. W. Hatfield,* 2000 WL 33170690, at *6 (reducing Brown Rudnick request for work on fee petition by one-third).

IV. Conclusion

For the foregoing reasons, AIGDC requests that the Court reduce the amount of attorneys' fees requested by Plaintiffs from $2,897,442.50 to no more than $511,578.62. Plaintiffs' request for $190,000 in out of pocket costs is also excessive and should be reduced to no more than $72,625.57.

Respectfully Submitted,

AIG DOMESTIC CLAIMS, INC. and
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

By their attorneys,

---

determining what to charge for copying and laser printing, Brown Rudnick took into account not only the actual costs, but also the cost of leasing and servicing equipment and the value of the leased space the equipment occupied. See Affidavit of Margaret Pinkham, para. 62.

Anthony R. Zelle, BBO# 548141
Mark E. Cohen, BBO #089800
Brian P. McDonough, BBO# 637999
Robert J. Maselek, BBO #564690
ZELLE MCDONOUGH & COHEN
Four Longfellow Place, 35th Fl.
Boston, MA 02114
Tel: (617) 742-6520
Fax: (617) 973-1562
Dated: July 25, 2008