

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ALBERT JOHNSON,)	
)	
Plaintiff)	
)	
v.)	Docket No. 02-73-P-H
)	
SPENCER PRESS OF MAINE, INC.,)	
)	
Defendant)	

RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR ATTORNEY FEES

In the wake of the First Circuit’s affirmance of this court’s judgment of \$300,000¹ in favor of plaintiff Albert Johnson and against his former employer, defendant Spencer Press of Maine, Inc. (“SPM”), on his claim of religious-based workplace harassment in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Maine Human Rights Act (“MHRA”), *see* Judgment (Docket No. 113); *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 372 (1st Cir. 2004), Johnson seeks an award of attorney fees and costs totaling \$184,968.47, *see* Plaintiff’s Motion for Award of Attorney’s Fees and Costs (“Motion”) (Docket No. 144) at 13. For the reasons that follow, I recommend that the court grant in part and deny in part the Motion.

I. Applicable Legal Standards

¹ Following a four-day trial a jury awarded Johnson \$400,000 and \$750,000 in compensatory and punitive damages, respectively, on his religious-harassment claim. *See* Docket (entries of Apr. 28-May 1, 2003, including Docket No. 106 (Jury Verdict Form)). The court reduced the total award to \$300,000 in conformance with statutory Title VII and MHRA caps. *See* Findings of Fact and Conclusions of Law on Wage Loss (Docket No. 112) at 2; *Johnson*, 364 F.3d at 372.

Johnson seeks fees and costs pursuant to Title VII, 42 U.S.C. § 2000e-5(k), and its similarly worded MHRA counterpart, 5 M.R.S.A. § 4614. *See* Motion at 3; *compare* 42 U.S.C. § 2000e-5(k) (“In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee (including expert fees) as part of the costs[.]”) *with* 5 M.R.S.A. § 4614 (“In any civil action under this Act, the court, in its discretion, may allow the prevailing party . . . reasonable attorneys’ fees and costs[.]”). Under both statutes, the prevailing party “should ordinarily recover an attorney’s fee unless special circumstances would render an award unjust.” *Maine Human Rights Comm’n v. Allen*, 474 A.2d 853, 858 (Me. 1984) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)).

As this court has explained:

The Court’s determination that Plaintiffs are prevailing parties does not automatically entitle Plaintiffs to all fees that they have requested. The Court must also determine whether Plaintiffs’ requested fees award is reasonable. This analysis generally begins with a lodestar calculation of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. In making the lodestar calculation, a court considers the prevailing rates in the community for attorneys with similar experience and qualifications to those for whom fees have been requested, as well as whether fees have been requested for duplicative, unproductive, or excessive hours. In determining the reasonableness of Plaintiffs’ submitted time, a court may reduce a fee award to exclude hours inadequately explained or detailed. A court also may bring to bear its knowledge and experience concerning both the cost of attorneys in its market area and the time demands of the particular case. Ultimately, the party requesting fees bears the burden of establishing the reasonableness of the rates and hours submitted in a fees petition.

Several other factors also inform a court’s determination regarding the reasonableness of requested fees, including the degree of success obtained in the litigation. The determination of degree of success is a significant factor in a court’s evaluation of a fees petition, and it is measured in light of a plaintiff’s success claim by claim, the relief actually achieved, and the societal importance of the right which has been vindicated.

Okot ex rel. Carlo v. Conicelli, 180 F. Supp.2d 238, 242-43 (D. Me. 2002) (footnote, citations and internal punctuation omitted).

II. Analysis

Johnson seeks to recover \$160,420.00 in attorney fees, \$6,447.00 in paralegal fees, \$4,258.93 in expert-witness fees and costs, and \$13,842.54 in other costs and expenses (including electronic-research, telephone and copying charges), for a total of \$184,968.47. *See* Motion at 13; Albert Johnson/Spencer Press billing statement dated June 3, 2004 (“Billing Statement”), attached as Exh. A to Affidavit of Eric J. Uhl in Support of Plaintiff’s Motion for Award of Attorney’s Fees and Costs (“Uhl Aff.”) (Docket No. 145), at 103; Johnson v. Spencer Press Statement of Costs (“Statement of Costs”), attached as Exh. B to Uhl Aff. SPM does not contest that Johnson, as the “prevailing party” in this case, is entitled to a fee award; rather, it argues that the amount sought is excessive on several grounds. *See generally* Defendant’s Objection to Plaintiff’s Motion for Award of Attorney’s Fees and Costs (“Objection”) (Docket No. 153). I address each of its points in turn:

A. Excessive Time Spent by Plaintiff’s Counsel. Johnson was represented in the instant matter by attorney Eric J. Uhl, a director in the law firm of Moon, Moss, McGill & Shapiro, P.A. (“Moon, Moss”) who has concentrated his practice in civil-rights, discrimination and employment law. *See* Uhl Aff. ¶¶ 2-3. Uhl commenced work on this matter on August 8, 2001, when Johnson’s claim was pending before the Maine Human Rights Commission (“MHRC”). *See* Billing Statement at 1. As is reflected in the Billing Statement, he has litigated this case virtually single-handedly. *See id.* at 103 (reflecting charges through May 31, 2004 of \$158,878.00 for 836.2 hours logged by Uhl at an hourly rate of \$190.00, \$1,110.00 for six hours logged by attorney Melinda J. Caterine at an hourly rate of \$185.00, \$432.00 for 2.7 hours logged by attorney Matthew N. Tarasevich at an hourly rate of \$160.00, and \$6,447.00 for 92.1 hours logged by paralegal Julie L. Howland at an hourly rate of \$70.00).

Johnson represents, and SPM does not contest, that the total 844.9 hours of combined attorney time for which fees are sought breaks down as follows: (i) 639.4 hours spent in litigating this matter in court, including time spent on pre-filing activities, preparation of the complaint, pre-trial discovery, document review, witness depositions, defense of several separate summary-judgment motions, response to several pre-trial motions *in limine*, trial preparation, and trial and post-trial motions and procedures, (ii) 23.6 hours spent in prosecuting the matter before the MHRC, (iii) 113.7 hours spent defending SPM's appeal to the First Circuit, (iv) 17.9 hours spent preparing the instant fee application, and (v) 50.3 hours incurred through May 31, 2004 in attempting to collect on the court's judgment. *See* Motion at 6-10; Objection at 2.² Johnson further represents, and SPM does not dispute, that these totals exclude attorney time for which Moon, Moss has chosen not to charge – for example, time spent crafting an ultimately unsuccessful opposition to the summary-judgment motion of co-defendant Spencer Press, Inc. and an ultimately unsuccessful cross-appeal to the First Circuit. *See* Motion at 6 n.6; Objection at 2. Nor does SPM take issue with the hourly rate charged by Uhl, Caterine or Tarasevich. *See* Objection at 2.

Nonetheless, SPM urges the court to slash Uhl's reimbursable hours by one-third (from the requested 836.2 to 557.5) on the basis that "[t]he fees sought are excessive and unreasonable in what in the end was a disputed factual testimonial case established largely on the Plaintiff's own testimony[.]" *Id.* For this proposition SPM cites two cases, *FDIC v. Singh*, 148 F.R.D. 6, 10 (D. Me. 1993), and *Okot*, 180 F. Supp.2d at 247-50. *See id.*

Neither *Singh* nor *Okot* supports SPM's bid for a drastic reduction in compensable fees billed by Uhl. The defendant in *Okot* disputed the plaintiff's fee request point-by-point, asserting for example, that a

² SPM's reference to 639.1 hours (rather than 639.4 hours) spent litigating in this court evidently is a typographical error. (*continued on next page*)

charge of 26.8 hours for complaint preparation was excessive and unreasonable when a single attorney should have been able to do the job in two to three hours. *See Okot*, 180 F. Supp.2d at 247. And the court in *Singh* determined that plaintiff’s trial counsel (i) failed to exercise any “billing judgment” and (ii) submitted many billing entries too vague or meaningless to allow the court to judge their reasonableness; for example, “attention to file.” *See Singh*, 148 F.R.D. at 10.³

Here, SPM identifies no example of an unreasonable or excessive expenditure of Uhl’s time. Indeed, Moon, Moss clearly exercised billing judgment, declining to charge for certain segregable work that did not lead to successful results. In addition, Moon, Moss’s 103-page billing statement contains entries significantly more meaningful and detailed than those criticized in *Singh*. *See, e.g.*, Billing Statement at 3 (entry of Oct. 17, 2001: “Draft correspondence to Maine Human Rights Commission regarding refusal to conciliate, request for right to sue letter.”), 94 (entry of Dec. 12, 2003: “Analyze issues regarding transferability of property interest, sale of assets, remedies for judgment.”).

Finally, the basis on which SPM seeks to slash Uhl’s time – that the facts were disputed, with Johnson relying largely on his own testimony to build his case – simply does not support a fee reduction. If anything, this factor tends to cut the other way. A case in which the material facts are sharply disputed likely will not settle or be resolved (at least fully) on summary judgment. Indeed, that is precisely what happened in this case. The Docket reflects that SPM and Spencer Press, Inc. declined to respond to Johnson’s settlement demands until after Uhl had written the court to complain of their lack of response, *see* Docket

See Objection at 2.

³ As this court observed in *Singh*, “‘Billing judgment’ has been described as follows: ‘This concept may be most clearly understood by viewing fee computation as a process similar to preparing a bill for a client. It is sometimes true that not all time which an attorney or a firm has spent on a given suit is charged to the client, whether because the firm itself views the total fee as excessive for the results produced, or the firm views certain of its time as having been nonproductive or duplicative.’” *Singh*, 148 F.R.D. at 10 n.5 (citation omitted).

No. 83, and that they aggressively defended this case, filing, *inter alia*, a motion to amend their answer, *see* Docket No. 8, five separate motions for summary judgment (raising some thorny points of law), *see* Docket Nos. 14, 16, 18, 20 & 22, five motions *in limine* (again raising some difficult legal issues), *see* Docket Nos. 26-28, 65, 76, a motion for a new trial, *see* Docket No. 115, an appeal to the First Circuit, *see* Docket No. 118, and a related motion to stay judgment proceedings and/or execution, *see* Docket No. 121.

From all that appears, Moon, Moss efficiently responded to its counterpart's vigorous defense. Uhl, an experienced attorney who was intimately familiar with the case, handled it virtually single-handedly with assistance from a paralegal, sparingly consulting with his Moon, Moss colleagues. He won a stunning victory for his client on an issue central to the case. I can discern no unreasonableness, or excessiveness, under these circumstances. *See, e.g., Lipsett v. Blanco*, 975 F.2d 934, 939 (1st Cir. 1992) (refusing to disturb district court's finding that plaintiff's staffing, though abundant, was reasonable and necessary given nature of case; noting, "This case was bitterly contested. Appellants mounted a Stalingrad defense, resisting Lipsett at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree. Since a litigant's staffing needs often vary in direct proportion to the ferocity of her adversaries' handling of the case, this factor weighs heavily in the balance.").

Accordingly, with the exception of attorney fees for Uhl's travel time – which is addressed below – I recommend that the court allow in full the requested compensation for the time of Uhl, Caterine and Tarasevich.

B. Time Spent Endeavoring To Collect Judgment. SPM next challenges Johnson's requests to recoup fees incurred through May 31, 2004 in ongoing judgment-collection efforts and for leave to petition again for additional collection-related attorney fees and costs he expects to incur. *See* Motion at 9-10; Objection at 3-4. Johnson relies on five cases – four from other jurisdictions that he asserts squarely

provide for an award of attorney fees to a civil-rights plaintiff for judgment-collection efforts and one from the First Circuit that he contends embraces that reasoning. *See* Motion at 9-10; Plaintiff's Reply Memorandum in Support of Motion for Award of Attorney's Fees and Costs ("Reply") (Docket No. 154) at 2-3 & n.2. SPM posits that all five cases are distinguishable inasmuch as each involves efforts to modify, reinterpret or limit the judgment itself rather than attempts to collect on a judgment. *See* Objection at 3-4.

Johnson has the better of this argument. Three of the four cases from other jurisdictions upon which he relies make no hint that the relatedness of a collection dispute to the underlying merits is relevant; rather, the court in each rested its holding solely on a strong policy concern that, in the absence of compensation for such collection efforts, a civil-rights plaintiff's victory could be rendered hollow. *See Balark v. Curtin*, 655 F.2d 798, 802-03 (7th Cir. 1981) (reversing district court's denial of attorney fees for wage-garnishment efforts; noting, "Plaintiff seeks fees for her efforts to collect the judgment awarded her in her successful action under the civil rights laws. Congress has determined that attorneys' fees are necessary to fulfill the purposes of the civil rights laws by transferring the costs of litigation to those who infringe upon basic civil rights. The compensatory goals of the civil rights laws would thus be undermined if fees were not also available when defendants oppose the *collection* of civil rights judgments.") (citation omitted) (emphasis in original); *Brinn v. Tidewater Transp. Dist. Comm'n*, 113 F. Supp.2d 935, 936-38, 940 (E.D. Va. 2000), *aff'd*, 242 F.3d 227 (4th Cir. 2001) (awarding attorney fees incurred in defending against attempt to delay payment of previously awarded attorney fees via motion to amend judgment; relying on rationale that "the victory would be hollow if plaintiffs were left with a paper judgment not negotiable into cash except by undertaking burdensome and uncompensated litigation.") (citations and internal quotation marks omitted); *Seibel v. Paolino*, 249 B.R. 384, 386 (E.D. Pa. 2000) (awarding attorney fees incurred in efforts to collect Title VII judgment through bankruptcy dischargeability proceedings; observing, "[J]ust as the

Balark plaintiff's award for violations of her civil rights would have been diluted if fees resulting from the garnishment proceedings were denied, so too would that of the Plaintiffs. . . . This is the case notwithstanding the fact that the Plaintiffs expended their efforts in bankruptcy court, as opposed to some other forum.”⁴

I agree with Johnson that the First Circuit has signaled that it subscribes to this view. *See Burke v. Guiney*, 700 F.3d 767, 771 (1st Cir. 1983) (observing, in rebuffing argument that plaintiff's attorneys' efforts with respect to motion for sanctions should be non-compensable because unrelated to merits of underlying civil-rights litigation, “It is well-established . . . that fee awards are appropriate for time spent on efforts to secure compliance with court decrees, no less than for time spent securing those decrees.”) (citations and internal punctuation omitted) (citing, *inter alia*, *Balark*).

Johnson's request for reimbursement of 50.3 hours of attorney time expended through May 31, 2004 on collection efforts, with leave to supplement his fee petition to account for subsequent such efforts, accordingly should be granted.

C. Travel Time. Johnson initially sought reimbursement at Uhl's full hourly rate for time Uhl spent traveling to and from Boston for oral argument before the First Circuit. *See* Billing Statement at 99 (entry of Mar. 2, 2004). SPM objected that this court historically has awarded only \$10 per hour for travel time and, therefore, the attorney-fee award for the four-hour round trip should total \$40 rather than the \$760 requested. *See* Objection at 4-5; *see also, e.g., Singh*, 148 F.R.D. at 9 (court typically allows \$10 per hour for attorney travel time during which no legal work accomplished). Johnson then offered to cut his requested fee for Uhl's travel time in half (to \$380), observing that (i) he had incurred an “opportunity cost”

⁴ The court in *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991), on which Johnson also relies, *see* Motion at 9-10, did note (*continued on next page*)

in being obliged to travel to Boston to defend against SPM's appeal, and (ii) the First Circuit has authorized compensation for travel time at one-half the regular rate of the prevailing attorney. See Reply at 3-4 (citing *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983)). The problem for Johnson is that while the First Circuit did approve such a rate in *Maceira*, it did not set such a rate as the standard or otherwise suggest that lower courts must approve such a rate for attorney travel time. See *Maceira*, 698 F.2d at 40. Nonetheless, in a case not cited by either party, Magistrate Judge Kravchuk recently adjusted this court's historic \$10-per-hour allowance for attorney travel time for inflation, deriving a fee of \$20 hourly for such time. See *Adams v. Bowater Inc.*, No. Civ. 00-12-B-C, 2004 WL 1572697, at *8 n.7 (D. Me. May 19, 2004) (*rec. dec.*, stip. of dismiss. filed June 10, 2004). This strikes me as a reasonable revision of the court's historic rate; hence, I recommend that the court award a total sum of \$80 for Uhl's four hours of travel time in this case.

D. Paralegal Time. SPM next challenges Johnson's requested award of \$6,447.00 for 92.1 hours of paralegal time, noting that this court historically has disallowed reimbursement of paralegal time on the bases that (i) it properly is included in firm overhead, and (ii) "to the extent that paralegals are allowed to perform work that constitutes 'the practice of law' under Maine law, such practice is inconsistent with Maine law." Objection at 5 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 801 F. Supp. 804, 823 (D. Me. 1992), *aff'd*, 47 F.3d 463 (1st Cir. 1995) (footnote and internal punctuation omitted)). As Johnson points out, see Reply at 4-5, in *Lipsett* the First Circuit upheld a fee award for paralegal time, reasoning:

(and arguably found significant) that the collection matter in issue was inherently intertwined with the merits of the underlying civil-rights litigation, see *Dotson*, 933 F.2d at 932-33.

The efficient use of paralegals is, by now, an accepted cost-saving device. Recognizing this reality, courts generally allow hours reasonably and productively expended by paralegals in civil rights litigation to be compensated at market rates when constructing fee awards. The Supreme Court has given its blessing to such a practice, stating: “By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.”

Lipsett, 975 F.2d at 939 (quoting *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989)) (footnote and additional citations omitted).

As Johnson further notes, *see* Reply at 4, in *Okot* this court considered the impact of *Lipsett* and *Jenkins*, declining to award paralegal fees in that particular case because the plaintiffs’ documentation failed to distill tasks performed by the paralegal that did not involve the type of legal judgment properly performed by lawyers or that were not properly accounted for in firm overhead, *see Okot*, 180 F. Supp.2d at 246-47.

Johnson contends that, mindful of *Okot*, he has submitted a fee application detailing time entries for paralegal Howland that demonstrate that (i) he is not seeking recovery of fees for work properly performed by lawyers or otherwise included in firm overhead, and (ii) the standard practice in this community is to bill for reasonable time spent by a paralegal. *See* Reply at 4-5. I agree.

SPM identifies no lawyer-like tasks performed by Howland, *see* Objection at 5-6, and my own perusal of the Billing Statement indicates that she spent the bulk of the recorded time engaged in such tasks as helping to obtain and keep track of the plaintiff’s medical and personnel records, *see, e.g.*, Billing Statement at 29, organizing and managing trial exhibits and exhibit lists, *see, e.g., id.* at 56-60, and attending trial with Uhl, *see id.* at 70-71. In addition, affidavits submitted by Johnson (and uncontradicted by SPM) establish that the \$70.00 hourly billing rate for Howland represents the prevailing community rate for paralegal work in this type of matter and that Moon, Moss customarily bills paralegal expenses to its clients

as part of its attorney-fee invoice. *See* Uhl Aff. ¶¶ 4, 6; Affidavit of Melissa A. Hewey in Support of Plaintiff's Motion for Award of Attorney's Fees and Costs (Docket No. 146) ¶ 5.

For these reasons, I recommend that the court allow in full the paralegal fees sought in this case, totaling \$6,447.00.

E. Expert-Witness Fees. Johnson seeks recovery of \$4,258.93 in fees incurred through January 2003 for expert economic witness Allan McCausland, Ph.D.; however, he notes that he seeks no recovery for \$2,238.00 in fees subsequently charged by Dr. McCausland for trial-preparation work in view of the court's ruling barring Dr. McCausland from testifying at trial (a ruling that Johnson unsuccessfully cross-appealed to the First Circuit). *See* Motion at 11-12. SPM disputes the requested partial recovery of Dr. McCausland's fees on the bases that (i) review of his invoices reveals nothing about the work he performed (or the work of an unknown "associate") and (ii) given the court's ruling, his testimony had no impact on the case. *See* Objection at 6-7. SPM also asks the court to disallow \$798.00 for 4.2 hours of attorney Uhl's time spent consulting with Dr. McCausland. *See id.* at 7 n.4. Johnson rejoins that recovery of Dr. McCausland's fees through January 2003 is reasonable inasmuch as the standard for a fee award is not the impact of the expert on the case, but rather whether the expense was reasonably incurred. *See* Reply at 5.

Johnson submits three invoices for work performed in the time period for which he seeks recoupment of expert-witness fees and expenses: (i) an invoice dated June 28, 2002 for work performed by Dr. McCausland and associates from June 21, 2002 through June 28, 2002, totaling \$1,797.50, (ii) an invoice dated October 16, 2002 for work performed by Dr. McCausland and associates from August 13, 2002 through October 16, 2002, totaling \$926.25, and (iii) an invoice dated February 15, 2003 referencing

“Original Invoice 10-16-03,” a previous balance of \$1,535.18 and a finance/administrative fee of \$23.03. *See* Exh. C to Uhl Aff.⁵ I recommend that the court allow the first two invoices but not the third.

The McCausland invoices dated June 28, 2002 and October 16, 2002 are sufficiently detailed to enable SPM and the court to know how many hours Dr. McCausland and his associates worked on this matter, at what hourly rate and to what general purpose (namely, a determination of economic loss to the plaintiff, including case preparation, study and report). *See id.* What is more, the fruit of those efforts (a report dated October 16, 2002) was submitted to the court on summary judgment, together with a detailed affidavit explaining the manner in which Dr. McCausland undertook his front pay/back pay review. *See* Declaration of Allan McCausland, Ph.D., in Support of Plaintiff’s Opposition to Defendants’ Motions for Partial Summary Judgment (“McCausland Decl.”), attached to Plaintiff’s Opposition to Defendants’ Statement of Facts re[:] Partial Summary Judgment Motion on Back Pay/Front Pay (Docket No. 30); Summary of Economic Loss to Albert Johnson (dated Oct. 16, 2002), attached as Exh. B to McCausland Decl. The nature of the work performed is sufficiently clear from the invoices and materials submitted on summary judgment, and the commissioning of the work sufficiently reasonable at least through the summary-judgment phase of this litigation (when the outcome of the front pay/back pay issue was as yet uncertain), that the total of \$2,723.75 in fees and expenses detailed in the first two invoices should be allowed. *See, e.g., Hutton v. Essex Group, Inc.*, 885 F. Supp. 331, 335 (D.N.H. 1994) (“The court will entertain the plaintiff’s claim for front pay only if she produces sufficient evidence to allow the jury rationally to reduce her lost future earnings to their January, 1995, value. Although the testimony of an economic expert is not absolutely required, this is the preferred approach.”).

⁵ Johnson evidently refrained from seeking reimbursement of the finance/administrative fee of \$23.03 in requesting a total
(continued on next page)

Nonetheless, the third McCausland invoice on which Johnson relies (dated February 15, 2003) is not itself a detailed invoice for fees and expenses for work performed but rather a purported effort to collect on a prior balance (of “October 16, 2003” – perhaps an erroneous reference to the prior invoice of October 16, 2002). *See* Exh. C to Uhl Aff. While it is possible that this invoice mistakenly referenced a prior balance rather than itemizing freshly performed services, neither the court nor SPM should be obliged either to speculate as to what transpired or to pore through the record to attempt to reconstruct these services. It behooved Johnson to obtain a proper invoice for submission to the court. Accordingly, this portion of requested fees and expenses for Dr. McCausland, totaling \$1,535.18, should be disallowed. *See, e.g., Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 849-50 (D. Me. 1996) (cutting expert-witness fee from requested \$20,204.92 to \$6,000 when invoices “lack[ed] anything approaching the specificity and detail that would allow the Court to engage in serious review” and court was persuaded that expert had not had kind of impact on case necessary to support such a high fee).

That said, I recommend that the court decline SPM’s further invitation to disallow Uhl’s fees for a total of 4.2 hours logged in consultation with Dr. McCausland on various dates from August 19, 2002 through May 2, 2003. *See* Objection at 7 n.4. As previously noted, Uhl reasonably relied in part on Dr. McCausland in the context of his summary-judgment opposition. The court ruled on April 9, 2003 that for purposes of trial Dr. McCausland’s statistical model was irrelevant. *See* Order on Defendant’s Motion *in Limine* (Docket No. 98). SPM identifies only two disputed entries posted subsequent to that date: on April 11 and May 2, 2003. *See* Objection at 7 n.4. Uhl logged four-tenths of an hour on April 11, 2003 in a telephone conference with Dr. McCausland regarding the court’s ruling, and four-tenths of an hour on

of \$4,258.93 for expert-witness fees and expenses incurred through January 2003.

May 2, 2003 discussing front pay/back pay with Dr. McCausland in the context of preparing a report for the court on that very issue. *See* Billing Statement at 63, 72. I see nothing at all unreasonable or excessive about the time spent by Uhl conferring with his expert witness at any point during this case. *Compare, e.g., Wilcox*, 921 F. Supp. at 847 (“From the records the Court also concludes that the Webbers spent an inordinate amount of time in needless consultation with or preparation of their expert, Dr. Waxman. Either Curtis or Rebecca Webber spoke or wrote to Dr. Waxman on virtually a daily basis[.]”).

F. Electronic Research. Johnson seeks recovery, *inter alia*, of the cost of electronic research undertaken in connection with this case. *See* Motion at 12. SPM opposes this request (totaling \$8,085.85 for online legal research and \$74.69 for PACER-related charges) in its entirety on the basis that this court has held that charges of this nature are properly included in firm overhead and, thus, non-compensable. *See* Objection at 7 (citing *McDermott v. Town of Windham*, 221 F. Supp.2d 32, 35 (D. Me. 2002); *Weinberger*, 801 F. Supp. at 827).⁶ Johnson rejoins that the First Circuit recently sounded the death knell for that school of thought, *see* Reply at 6, and I agree. Although the First Circuit ruling in question was made in the context of a motion for fees pursuant to the Copyright Act, 17 U.S.C. § 505, it clearly has broader repercussions and flatly rejects the proposition that electronic-research charges incurred in connection with a specific case, and customarily passed on to clients, constitute “firm overhead”:

Although section 505’s “full costs” language could be distinguished from more familiar and slightly narrower wording in other fee shifting statutes, *e.g.*, 42 U.S.C. § 1988 (2000) (“the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs”), the tendency of the courts has been to treat most statutes similarly whether in allowing or disallowing particular items. The starting point in many cases— and

⁶ SPM additionally argues that reimbursement of the PACER-related charges is inappropriate inasmuch as this case commenced prior to the court’s institution of the PACER system and therefore the parties were neither required to, nor did, file pleadings online. *See* Objection at 7-8. Johnson explains that the PACER charges had nothing to do with the later-instituted electronic-filing (*i.e.*, ECF) requirement but rather were incurred in accessing online dockets and files of this court and of the First Circuit. *See* Reply at 6 n.3. I see no reason to disallow them.

the ending point in some – is that another federal statute specifies various taxable “costs” (e.g., “[f]ees of the clerk and marshal” and “[f]ees and disbursements for printing and witnesses”), but the list does not include computer-assisted research.

Nevertheless, the Supreme Court has endorsed the view that *disbursements* made by an attorney and ordinarily billed directly to the client (that is, separately from the hourly or fixed fee) can properly be encompassed within the phrase “attorney’s fee,” and it is not uncommon for courts to allow such costs as travel, long distance calls, and parking on top of the hourly fee.

In our view, computer-assisted research should be treated similarly and reimbursed under attorney’s fee statutes like section 505, so long as the research cost is in fact paid by the firm to a third-party provider and is customarily charged by the firm to its clients as a separate disbursement. If it saves attorney time to do research this way, probably the hours billed are fewer, and in any event Westlaw and Lexis are now as much part of legal service as a lawyer’s taxi to the courthouse.

Courts that have resisted reimbursement of computer-assisted research as part of attorney’s fees have asked why that cost should be distinguished from the law firm’s cost of maintaining its law book library – a cost that is customarily treated as overhead to be covered by the hourly or other fee rather than billed as a disbursement. Some courts may also think that, as the hourly fee generically covers “legal research,” there is a taint of double billing in charging separately for Westlaw or Lexis.

The answer to these concerns has something to do with economics but also with history and record-keeping practice. As configured by the provider, computer-aided research is often a variable cost in an individual case – that is, the cost varies (from zero upward) depending on the amount of Westlaw or Lexis service used in the case. By contrast, the firm pays no more or less for its library books, regardless of whether they are pulled off the shelf for a given law suit, so it is described as a fixed rather than a variable cost.

Invessys, Inc. v. McGraw-Hill Cos., Ltd., 369 F.3d 16, 22-23 (1st Cir. 2004) (citations and footnote omitted) (emphasis in original). Inasmuch as Johnson submits evidence – which SPM does not controvert – that the charges in question were incurred in connection with this case and that charges of this nature are not included in firm overhead but rather customarily are billed to clients, *see* Statement of Costs; Uhl Aff. ¶ 6, I recommend that in accordance with the reasoning of *Invessys* they be allowed in full.

G. Facsimiles. SPM challenges Johnson’s request for reimbursement of \$284.00 in facsimile charges as unreasonable inasmuch as overly vague. *See* Objection at 8. SPM complains that only one

entry (that for March 27, 2003) specified the number of pages faxed and the amount charged per page and that none of the entries indicated what documents were faxed, to whom or at what facsimile number. *See id.* While SPM seeks more detail than is reasonable, I agree that Johnson should at a minimum have indicated how many pages were faxed and at what per-page rate. Johnson seeks to cure this omission by explaining that the charge was \$1.00 per page, which he posits is “a reasonable and typical amount,” a proposition for which he cites two cases from other jurisdictions. *See* Reply at 7 (citing *Golden v. Hotyellow98.com, Inc.*, No. 01 C 1094, 2003 WL 1394507, at *2 (N.D. Ill. Mar. 19, 2003); *Ortega v. IBP, Inc.*, 883 F. Supp. 558, 562 (D. Kan. 1995), *recon. denied*, 1995 WL 350972 (D. Kan. Apr. 10, 1995)). He further contends that, in any event, the total charge is facially reasonable after three years of litigation. *See id.*

Nonetheless, Johnson submits no evidence that \$1.00 per page is a reasonable and customary charge for outgoing facsimiles here and now. Caselaw from other jurisdictions cannot substitute for such evidence; while the courts in *Golden* and *Ortega* did indeed approve such an award, other courts have declined to do so. *See, e.g., Berry v. Secretary of Health & Human Servs.*, No. 97-0180V, 1998 WL 481882, at *2 (Fed. Cl. July 27, 1998) (“In the special master’s view, facsimile expenses present a hybrid of traditional overhead costs – such as telephone lines, facsimile machine maintenance, equipment depreciation and electricity – and compensable costs – such as long-distance telephone charges for specific, outgoing facsimiles or paper expenses for incoming facsimiles analogous to photocopying expenses. . . . However, in this case, the special master is not satisfied that the Berrys have presented adequate evidence showing that their request for \$1.00 per page for outgoing facsimiles bears any relationship to the actual cost of the facsimiles. Rather, it appears to the special master that the Berrys’ rate is merely arbitrary. Thus, the special master is constrained to deny the Berrys’ facsimile expenses.”) (footnote

omitted). Hence, I recommend that the requested reimbursement of \$284.00 for facsimile charges be disallowed.

H. Telephone Conferences. SPM next complains that Johnson seeks compensation for a significant number of telephone toll charges (totaling \$310.12) for which (i) there is no corresponding billing entry for the date on which the toll call was charged, (ii) a billing entry exists for that date but with no indication that a teleconference took place, or (iii) the billing entry indicates that a local (not a long-distance) teleconference was held. *See* Objection at 8-9. Johnson proffers a reasonable explanation: that many of the calls in question were made by staff rather than attorneys and that Uhl did not separately bill for short calls that he placed, as a result of which, in either case, there would be no billing entry corresponding to the toll call. *See* Reply at 7. Accordingly, I recommend that the charges be allowed in full.

I. Photocopies.

1. In-House Photocopying. SPM contests reimbursement of a total of \$179.00 in in-house photocopy costs for which there is no indication which document was copied, how many pages were copied or at what per-page charge. *See* Objection at 9. Johnson offers no explanation for these charges even in his reply memorandum, *see* Reply at 7; hence, I recommend that they be disallowed. With respect to the remaining \$3,266.40 in inside photocopying charges, SPM requests that the per-page charge be reduced from twenty to ten cents, *see* Objection at 9-10, and Johnson does not object to that proposal, *see* Reply at 7 n.4. Accordingly, I recommend that reimbursement for this charge be halved, to \$1,633.20.

2. Outside Photocopying. SPM objects on the ground of lack of specificity to reimbursement of a Curry Printing charge of \$169.50, complaining that Johnson fails to explain the number of pages copied, the amount charge per page and whether that amount customarily is charged in the region. *See* Objection at 10. Johnson represents that these were actual charges incurred in connection with

photocopying and assembly of his appellate briefs, at Curry Printing's established commercial rate of fifteen cents per page. *See* Reply at 7 n.4. I recommend that the charge be allowed in its entirety.

J. Professional Services. Johnson agrees to drop a disputed charge of \$105.00 for "professional services," *see* Objection at 10; Reply at 7 n.4; hence, I recommend it be disallowed.

K. Interest on Award of Attorney Fees. Johnson requests that "the Court order interest to accrue at the statutory rate[.]" Motion at 13. SPM lodges no objection to an award of post-judgment interest on attorney fees but argues that to the extent Johnson thereby seeks pre-judgment interest, such an award is inappropriate pursuant to relevant precedent and should be disallowed. *See* Objection at 10-11 (citing *Foley v. City of Lowell*, 948 F.2d 10, 22 (1st Cir. 1991); *Chaloult v. Interstate Brands Corp.*, 296 F. Supp.2d 2, 4 (D. Me. 2004)). SPM observes that the parties "may be in agreement" on this point, *see id.* at 10, and that appears to be the case. Johnson offers no rejoinder, *see* Reply at 7, which I construe as acquiescence that he does not seek pre-judgment interest on his attorney-fee award and/or that such interest is not allowable.

III. Conclusion

For the foregoing reasons, I recommend that the Motion be **GRANTED** in part and **DENIED** in part and that Johnson be awarded a total of \$180,552.09 – \$4,416.38 less than originally requested – comprising reimbursement of \$159,740.00 in attorney fees, \$6,447.00 in paralegal fees, \$2,723.75 in expert-witness fees and costs and \$11,641.34 in other costs. I further recommend that the court (i) permit Johnson to supplement his fee petition to seek reimbursement of collection-related fees and costs incurred after May 31, 2004 and (ii) award post-judgment interest on Johnson's attorney-fee award pursuant to 28 U.S.C. § 1961.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of August, 2004.

David M. Cohen
United States Magistrate Judge

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