

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM W. ADAMS, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 00-12-B-C
)	
BOWATER INCORPORATED,)	
et al.,)	
)	
Defendants)	

RECOMMENDED DECISION ON ATTORNEY FEES MOTIONS¹

Now pending are four motions submitted by the plaintiffs in their quest for attorney fees. The first motion (Docket No. 152) seeks an award of statutory attorney fees pursuant to ERISA, 29 U.S.C. § 1132(g). Specifically plaintiffs seek an Order directing that defendants pay them statutory attorneys' fees of \$1,668,215.00 plus a 25% enhancement for extraordinary result of \$417,053.75, for a total of \$2,085,268.75; for paralegal fees of \$218,652.50; and for necessary out-of-pocket disbursements in the case of \$140,390.88 (See also, Docket No. 157, Bill of Costs). The defendant does not oppose an award of statutory attorney fees,² but challenges numerous aspects of the plaintiffs' request, (Docket No. 162), some of which are conceded by the plaintiffs in their reply

¹ The imposition of an award of attorney fees as a Rule 11 or discovery sanction has historically been viewed differently than are post-judgment motions for an award of such fees. In the post-judgment context, the majority of courts considering the issue have determined that a decision on such a motion is in the nature of a dispositive motion and therefore not a proper subject for a magistrate judge's order, as opposed to recommendation. See Blair v. Sealift, Inc., 848 F. Supp. 670 (E.D. La. 1994) (collecting cases); Insurance Co. of N. Am. v. Bath, No. 90-8083, 1992 WL 113746, 1992 U.S. App. LEXIS 13504 (10th Cir. May 27, 1992) (unpublished order).

² The conclusory statement of Bowater's introduction reads as follows: "In sum, Plaintiffs' motion seeks an unreasonable amount of attorneys' fees and costs and should be substantially reduced." (Docket No. 162 at 2.)

memorandum (Docket No. 173). The second motion asks the Court for leave to conduct discovery concerning what fees the defendants paid their lawyers, in the event that the defendants (collectively referred to as "Bowater") challenge as excessive either the number of hours plaintiffs' counsel worked or the hourly rates that they request. (Docket No. 153.) The third motion seeks an additional award of "common fund" attorney fees because there are some individuals who benefited from this litigation without sharing the litigation burdens assumed by the plaintiffs. (Docket No. 155.) The fourth motion asks for leave to conduct discovery to determine the number of non-plaintiffs who benefited and the degree to which they have already benefited or may yet benefit, so that the Court might be able to calculate an appropriate common fund award. (Docket No. 154.) I recommend that the Court deny the motion for an award of common fund attorney fees and the related discovery motion because there is no common fund available from which to make an award. I further recommend that the Court grant the plaintiffs' motion for statutory attorney fees, but in a reduced amount. I see no need for discovery and therefore would deny the motion for leave to conduct discovery regarding the fees Bowater paid to its counsel.

Background

A brief history of this case has already been provided by the First Circuit Court of Appeals:

In August 1999, Great Northern, until then a subsidiary of Bowater, was sold in a share sale to a third party. Bowater, however, retained the assets and responsibilities of the pension plan that covered both Bowater and Great Northern employees. In the same month, Bowater announced that it would amend the plan to cut back certain early retirement benefits that the plan offered to Great Northern employees. The plan was so amended in October retroactive to August 13.

In brief, the plan prior to August 1999 had allowed employees with extensive service at Great Northern to opt for early retirement and yet receive pensions as if they had retired at ordinary retirement age or, in other cases, with something less than the usual discount in benefits for early retirement. For example, an employee who had worked 30 years could retire at age 60 and receive the same benefits as if he had worked to 65. In effect, Bowater's amendment meant that future work by employees at Great Northern, now no longer a Bowater subsidiary, would not count for purposes of early retirement.

Whether and to what extent an employer can cut back on such benefits for employees who have not yet retired is governed by provisions of ERISA--in particular, by section 204(g), 29 U.S.C. § 1054(g) (2000). For present purposes, the details of the statute and its application here are unimportant; it is enough to say that Bowater maintained that its cut-back was lawful and that the employees took the opposite position. In January 2000, the Bowater employees brought the present action in federal district court under ERISA against Bowater and the plan.

The main count of the complaint (count I) sought a declaration that the plan amendment violated section 204(g) and an order requiring the defendants to delete the amendment. Other counts (counts II and III)³ sought further relief for ten of the plaintiffs who said that they had relied on Bowater's statements about the amendment and advice to individual employees; the ten plaintiffs said that as a result they had accepted lump sum payments, surrendering their rights to the greater benefits that would have been available to them under the original plan.

At this point, Bowater began to retreat but reluctantly. In March 2000, Bowater, as plan administrator, sent a letter saying that work done by Great Northern employees would continue to be credited toward early retirement; the letter did not explain how this could be reconciled with the plan amendment. In the same month Bowater filed its answer to the complaint which continued to deny that the plan amendment was unlawful. In April, Bowater amended the plan to conform to the letter, but it declined to enter into a consent decree conceding that the original amendment was unlawful or promising not to adopt the same amendment in the future.

Count I was referred to a magistrate judge and, based on her recommendation, the district court ruled in September 2000 that count I

³ There were, in all, four counts. In the fourth count the plaintiffs alleged that the defendants had violated their fiduciary duty to provide accurate information to Plan participants. (Second Amended Complaint, Docket No. 39.) Count IV was dismissed for failure to state a claim. (Docket No. 84 (recommendation); Docket No. 89 (order affirming recommendation).)

was moot. Litigation on counts II and III continued⁴ until, in October 2000, Bowater posed a notice agreeing to allow full benefits under the original plan to those who had taken a lump sum payment in exchange for surrendering their right to full benefits. In June 2001, Bowater amended the plan to conform to this promise of full benefits. Thereafter, the district court ruled that counts II and III were moot.

Adams v. Bowater, 313 F.3d 611, 612-13 (1st Cir. 2002) (footnotes added). On appeal, the First Circuit Court of Appeals vacated the judgments and remanded for further proceedings.

In February, 2003, I held a conference of counsel to discuss further proceedings. (Docket No. 126). Plaintiffs were ordered to file a renewed dispositive motion addressing the issues under ERISA § 204(g) by February 25, 2003. At the same conference, defendants requested leave to renew their motion to dismiss because of mootness. I indicated that they could file such a motion, but that since the matter had again been referred to me, I intended to issue a recommended decision regarding the merits of the ERISA § 204(g) claim in light of the remand order. Accordingly, on March 18, 2003, defendants filed in conjunction with their response to the plaintiffs' renewed motion for summary judgment, a motion for summary judgment based upon mootness.

(Docket No. 137.) In favor of a finding of mootness, Bowater supplemented the summary judgment record with an affidavit from Harry F. Gear, Bowater's Vice President, General Counsel and Secretary, who averred under penalty of perjury, "Under no circumstances will Bowater adopt any Plan amendment or take any other action which would rescind the April 25, 2000 or June 25, 2001 Plan amendments." (See id.) I concluded, in essence, that this was too little, too late and recommended that the Court deny Bowater's motion for summary judgment. (Id.) Turning to the merits of the plaintiffs' claims, I recommended that summary judgment enter on their behalf with respect to all three counts because Bowater's initial amendment of the plan amounted to a

⁴ There was an intervening summary judgment motion against counts II and III that was filed by Bowater, also on the ground of mootness. That motion was denied, primarily because Bowater had not yet re-amended the plan to cure the prior, unlawful amendment. (Docket No. 83 (recommendation); Docket No. 90 (order affirming recommendation).)

prohibited cut-back of accrued benefits under ERISA. In reaching this recommendation, I rejected Bowater's contention that the plaintiffs could not continue as plan participants simply because GNP was sold to a third party. (Id.) The Court subsequently adopted my recommendation over Bowater's objection and issued the requested declaratory and injunctive relief. (Docket No. 147.) Bowater did not pursue an appeal and the instant fee-related motions were duly filed.

Papers submitted in conjunction with the plaintiffs' fee motions reflect that they have agreed to pay a 25 percent contingency fee to their counsel, which is calculated based on the amount by which the instant litigation enhanced the plaintiffs' benefits under the Plan. The plaintiffs estimate that their net enhanced benefits will exceed \$10 million.

I. Statutory Fee Award

The parties are in agreement that, pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), the Court "in its discretion may allow a reasonable attorney's fee and costs" to the plaintiffs in this suit. Although such an award of attorney fees is "not obligatory," Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 223 (1st Cir. 1996) (affirming the denial of ERISA attorney fee award), Bowater has not argued that the Court should deny the plaintiffs' motion, only that the plaintiffs' motion "seeks an unreasonable amount of attorneys' fees and costs and should be substantially reduced." (Docket No. 162 at 2.) Accordingly, I do not address the five factors that the Court of Appeals has prescribed to guide a court's deliberations on whether to make such an award. See Cottrill, 110 F.3d at 225 (listing the five "exemplary rather than exclusive" factors). Rather, I turn to the issue of what constitutes a reasonable ERISA attorney fee award under the "lodestar." See

Stark v. PPM Am., Inc., 354 F.3d 666, 674 (7th Cir. 2004) (approving district court's use of the lodestar methodology to determine an ERISA § 502 attorney fee award).

Ordinarily, the trial court's starting point in fee-shifting cases is to calculate a lodestar; that is, to determine the base amount of the fee to which the prevailing party is entitled by multiplying the number of hours productively expended by counsel times a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Typically, a court proceeds to compute the lodestar amount by ascertaining the time counsel actually spent on the case "and then subtracting from that figure hours which were duplicative, unproductive, excessive, or otherwise unnecessary." Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984). The court then applies hourly rates to the constituent tasks, taking into account the "prevailing rates in the community for comparably qualified attorneys." United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 19 (1st Cir. 1988); see also Grendel's Den, 749 F.2d at 955. Once established, the lodestar represents a presumptively reasonable fee, although it is subject to upward or downward adjustment in certain circumstances. See Blum v. Stenson, 465 U.S. 886, 897, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984).

Lipsett v. Blanco, 975 F.2d 934, 937 (1st Cir. 1992); see also Okot v. Conicelli, 180 F. Supp. 2d 238, 242 (D. Me. 2002) (internal citations and punctuation omitted). The plaintiffs bear the burden of establishing the reasonableness of the rates and hours submitted in their motion for fees. Chaloult v. Interstate Brands Corp., 296 F. Supp. 2d 2, 4 (D. Me. 2004). "The figure derived from the lodestar calculation may be adjusted up or down to reflect [their] degree of success in the litigation." Chaloult, 296 F. Supp. 2d at 4 (citing Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)).

A. Reasonable Rate

In determining a reasonable hourly rate, the Court "considers the prevailing rates in the community for attorneys with similar experience and qualifications to those for whom fees have been requested." Okot, 180 F. Supp. 2d at 242. On this issue the

plaintiffs have submitted no evidence. Instead, they argue in their memorandum that their counsel should be considered part of a national community of ERISA litigators and their rates set accordingly: \$350 per hour for Attorney James W. Case and \$400 per hour for Attorneys Patrick N. McTeague and William T. Payne. (Docket No. 156, Ex. 2, p. 317.) The plaintiffs argue that this rate is justified because their suit involved millions of dollars in employee benefits, complex legal issues, a large, international corporate defendant, and "a Plan with approximately 1,000 active service plan participants, and approximately 650 plan beneficiaries and 551 named Plaintiffs." (Docket No. 152 at 11.) Additionally, the plaintiffs contend that their counsel's hourly rate should be set at a national rate because Bowater hired attorneys at the Seyfarth Shaw firm, which has approximately 500 attorneys and because the Western District of Michigan in 2003 imposed an award against Bowater to pay fees based on hourly rates between \$340 and \$450. (Id. at 12-13 (citing Crosby v. Bowater Inc. Retirement Plan, 262 F. Supp. 2d 804 (W.D. Mich. 2003).) Other than citing the Michigan case, the plaintiffs offer no real evidence of what a national rate is. Nor do they offer any testimony by someone participating in the so-called national ERISA litigation market suggesting that counsel's level of experience and expertise is comparable to attorneys practicing within this market. What the plaintiffs indicate they would prefer to do is conduct discovery concerning the hourly rate Bowater paid its Seyfarth Shaw attorneys, as though this would sufficiently fill in the gaps in their motion. The plaintiffs indicate, in short, that their counsel's lodestar rate should be comparable to the hourly rates charged by Seyfarth Shaw attorneys because plaintiffs won. (Docket No. 152 at 13.)

In opposition to this presentation, Bowater argues that the lodestar rate should be established based on the hourly rate charged by Maine-based counsel who specialize in labor litigation. They offer the Affidavit of Richard G. Moon, Esquire, a Maine-based attorney whose practice has concentrated on labor and employment issues and related litigation for over 25 years. Attorney Moon presently charges \$275 per hour for representation in ERISA proceedings. (Docket No. 162, Ex. C, ¶ 5.) Attorney Moon represents that his rates are at the higher end of the spectrum for Maine attorneys in labor law/ERISA practice and that he is not aware of any Maine ERISA attorney charging rates of \$400 per hour. (Id., ¶¶ 6-7.)

In connection with their reply, the plaintiffs reveal that Attorney McTeague charges \$250 per hour and Attorney Case charges \$220 per hour in the context of other matters (First Supp. Aff. of Patrick N. McTeague, Docket Nos. 174; Affidavit of James W. Case, Docket No. 176), but they make no reference to these concessions in their reply memorandum (Docket No. 173). There does not appear to be an affidavit from Attorney Payne.

Although I fully appreciate plaintiff counsel's considerable skill and experience, the showing the plaintiffs make does not justify the rates that they seek. The appropriate community rate is the rate that another Maine attorney of comparable experience and expertise would be able to charge a paying client (as opposed to a contingent fee client) for similar representation. Although the First Supplemental Affidavit of McTeague and the Affidavit of Case do not speak to the issue of the "community" rate, which is distinct from what rates they may have privately obtained, see Stark, 354 F.3d at 675,⁵

⁵ What the Seventh Circuit Court of Appeals stated in Stark might be repeated here:

nevertheless, viewing the McTeague and Case affidavits in conjunction with Attorney Moon's affidavit, and considering the nature of this dispute, I would conclude that \$220 per hour constitutes a reasonable hourly rate for the plaintiffs' attorneys with the exception of Attorney McTeague whose reasonable rate is \$250 per hour. The core legal issue in this case has always been whether Bowater violated ERISA § 504(g), 29 U.S.C. § 1054(g) (the "anti-cut back" provision), by amending the Plan to preclude GNP participants from aging into accrued early retirement benefits. This presented a straight-forward legal issue that was locked and loaded from the commencement of this case. Both parties moved for summary judgment on the primary claim (count I) three months after the complaint was filed. (Docket Nos. 7, 13.) Bowater contended that its amendment of the Plan was not a prohibited cut back because the stock sale of GNP to a third party had terminated the GNP employees from any legal affiliation with Bowater (as Plan sponsor). Moreover, as of the filing of the initial summary judgment motions, Bowater had undone the unlawful amendment with a corrective amendment, effectively undoing the injury it had caused the vast majority of the plaintiffs. (See Docket No. 23.)

Following the Court's acceptance of my initial recommendation on count I, the ten count II and III plaintiffs turned their efforts toward evaluating what harm befell them by virtue of opting for less favorable early retirement options in reliance upon the initial, unlawful Plan amendment. Unlike the count I plaintiffs, the count II and III plaintiffs

The burden of proving the market rate is on the applicant[,] however, once the attorney provides evidence of the market rate, the burden shifts to the opposing party to show why a lower rate should be awarded. In this case, the defendants presented affidavits from attorneys in the law firms involved in this case regarding their rates. The district judge found the submissions self-serving and "precipitously close to being insufficient." The defendants were saved on this issue by statements by the defendant-companies that they paid their attorneys in full for the services rendered and by Stark's failure to adequately contest the issue.

allegedly suffered a readily discernable injury that could not be undone simply by undoing the unlawful amendment. As for the count I plaintiffs, however, the focus of the case became discovery initiatives in support of their eventual motion for attorney fees⁶ (See Oct. 25, 2000, Report of Conference of Counsel, Docket No. 33), which was understood not to be foreclosed by the fact that count I had been dismissed as moot. Counts II and III required two rounds of summary judgment motions before Bowater amended the plan in a manner that ensured no harm would befall the plaintiffs. (Docket Nos. 40, 91.) Briefing on the mootness issue was "déjà vu all over again," although Bowater's "controlled group" theory first presented itself at this juncture. Similarly, the plaintiffs' motion for summary judgment on counts I and II presented the same core argument of illegality that had been maintained in the very first go round, including the recurring issue of whether the stock sale served to terminate the plaintiffs' benefits because the plaintiffs had become disassociated from Plan sponsor Bowater. (Docket No. 94.) On appeal the First Circuit Court of Appeals found the mootness issue "quite close," but reversed. Adams, 313 F.3d at 613. The summary judgment cross-motions resurfaced without significant revision (Docket Nos. 127, 130), and Counts I, II and III were ultimately resolved largely on the basis of arguments presented at the first summary judgment stage, albeit primarily by making reference to the Plan language, something that the plaintiffs' counsel largely overlooked in their arguments.

In sum, although protracted, these legal issues presented by this litigation were no more complex than most of the litigation taking place in this Court. My assessment is

⁶ In my May 11, 2001, Order denying what amounted to a motion by the plaintiffs for further discovery, I indicated that the merits of counts II and III remained "the primary focus of this litigation." (Docket No. 85.) Nevertheless, time spent by counsel pursuing the attorney fee discovery appears to have been quite considerable.

that the most complicated aspect of this case arose simply because of the numbers of plaintiffs, but this fact actually suggests that many hours were likely spent administering to the clients rather than formal "legal" work. As for the protracted nature of the case, the Court's close, but ultimately mistaken conclusion on mootness is partly to blame. Blame also falls on Bowater, which engaged in a protracted, multi-staged retreat when a full surrender was probably more appropriate. There is no question but that the plaintiffs should be awarded fees for the time expended as a consequence of these factors. But I am not persuaded that they should receive an enhancement bonus in their counsel's hourly wage rate.

B. Reasonable Hours

Bowater addresses numerous problems in the plaintiffs' fee application, which I address topic by topic, as set forth in Bowater's opposition. (Docket No. 162.)

1. Unrelated work

Bowater objects to the plaintiffs' request for attorney fees related to 243.9 hours of time spent by plaintiffs' counsel on matters that appear, from counsel's timesheet, to be unrelated to this litigation. (Docket No. 162 at 7 & Ex. A, pp. 19-35.) The plaintiffs are willing to concede 185.55 of these hours. (Docket No. 173 at 5-6 & Ex. A1, ¶ 12 & Ex. A2, pp. 19-35.) My impression is that more hours ought to be trimmed than 185.55. Of the 243.9 hours identified by Bowater, only one-half hour (0.5) of time spent on "legal research re ERISA anti alienation and note to co-counsel" appears likely to be sufficiently related to the subject matter of this litigation. Based on the paper record, which lacks testimonial evidence explaining how the hours in dispute relate to this litigation, I would reduce the plaintiffs' request by 243.4 hours on account of unrelated billing activity.

Specifically, I would disallow:

0.2 hour billed by Attorney Jeffrey N. Young;

0.7 hour billed by Attorney Wayne W. Whitney;

1.4 hour billed by Attorney Payne;

35.4 hours billed by Attorney Case; and

205.7 hours billed by Attorney McTeague.

2. Work on unsuccessful claims

Bowater complains that the plaintiffs have not segregated work performed in connection with the short-lived count IV, which involved at the very least research, drafting and moving to add the count in a second amended complaint (Docket No. 34, 37, 54), briefing in response to Bowater's motion to dismiss (Docket No. 45) and seeking to further amend the second amended complaint (Docket No. 45). The plaintiffs respond that count IV involved minimum time and effort and that this objection amounts to "small potatoes." (Docket No. 173 at 6.) In my own review of the timesheet, I count roughly 33 hours specifically designated as count IV or related activity between October 27, 2000, and January 4, 2001, including a portion of attorney time spent consulting with the plaintiffs' actuary regarding this count or preparing for related depositions.

Specifically, I would disallow:

8 hours billed by Attorney Payne; and

38 hours billed by Attorney McTeague.

3. Work performed after first plan amendment

Bowater contends that the plaintiffs should not recover attorney fees for litigation occurring after April 25, 2000, the date the Plan was re-amended, because the plaintiffs

"achieved success in the litigation" as of that date and the "remainder of the litigation dealt with mootness . . . and was more an exercise in increasing fees for Plaintiffs' counsel than an attempt to provide substantive relief or reimbursement to Plaintiffs for any damages they may have incurred." (Docket No. 162 at 8.) The plaintiffs respond that mootness was not the only issue because Bowater kept pressing defenses to the plaintiffs' contention that the initial plan amendment was illegal. (Docket No. 173 at 7.) I also observe that this case was ultimately not resolved based on mootness, but on the merits. Although I agree with the plaintiffs that their award of attorney fees should include time billed after April 25, 2000, Bowater's point is not entirely lost on me. The fact that the vast majority of the plaintiffs obtained substantive relief within the first few months of litigation is part of the reason why I have recommended that the Court not increase its award by using a national hourly rate or otherwise applying an enhancement multiplier to its award. In fairness to the plaintiffs' counsel, I also note that the entire matter could have been put to bed in April 2000 had Bowater been willing to agree to an appropriately worded consent judgment at that time, as I suggested during an early case management conference.

4. *Vague entries*

Bowater challenges numerous attorney billing entries as too vague to support an award of fees. (Docket No. 162 at 9-10.) The plaintiffs concede 19 of the 76.45 hours challenged by Bowater. (Docket No. 173 at 8.) The parties' respective charts tell the story, albeit vaguely. (Docket No. 162, Ex. A, pp. 13-18; Docket No. 173, Ex. A2, pp. 13-18.) My assessment is that the vast majority of Bowater's vagueness challenges have merit. The onus is on the plaintiffs to produce quality billing records in the first instance.

I am not impressed by their efforts to elaborate on some entries and I am not inclined to accept their invitation to reconstruct one attorney's vague entries by reference to another attorney's entries on the same date, given the volume of entries at issue. I would reduce any award by 76.45 hours. The few entries that are close calls are "small potatoes," using plaintiffs' counsel's terminology.

Accordingly, I would disallow:

17.75 hours billed by Attorney Case;

0.5 hour billed by Attorney Jeffrey N. Young; and

58.2 hours billed by Attorney McTeague.

5. *Duplicative entries and overstaffing*

Bowater complains that the plaintiffs' counsel routinely overstaffed "every court appearance, deposition and meeting that occurred." (Docket No. 162 at 10.) They also complain of duplicative document review and multiple attorneys billing for inter-office conferences. (*Id.* at 10-11.) They ask the court to nix 62.95 hours for "duplication of effort," 3.8 hours for duplicate time entries, 208.2 hours for duplicate attendance, and 88.35 hours for "intra-office conferences." (*Id.*, Ex. A, pp. 4-13.) The plaintiffs argue that multiple attorney billings are appropriate because of the size of the case, the value of collaboration and the need to keep everyone informed. (Docket No. 173 at 8-11.) They also observe that Bowater was represented by multiple attorneys at some hearings, depositions and conference. Overstaffing and duplication of work raises a legitimate issue where a reasonable fee award is at issue. On the other hand, added value often comes from collaborative work and it is reasonable that clients should pay for it under

some circumstances. The problem here is that a line-by-line consideration of the multitude of time entries presented is not practicable. Of the 363.3 total hours challenged in these categories I would discount 218 (roughly 60 percent), understanding that the challenged hours are duplicative hours, and that for every hour challenged, there is already an hour that has not been challenged. Disallowed hours will be earmarked to Attorney Case's and Attorney Payne's duplicative billings first, because the plaintiffs request a lower hourly rate for Attorneys Case and Payne than Attorney McTeague.

Accordingly, I would disallow:

165.05 hours billed by Attorney Case; and

52.95 hours bills by Attorney Payne.

6. *Paralegal fees*

According to Bowater paralegal fees should not be incorporated in a fee shifting award. (Docket No. 162 at 11-12.) The plaintiffs argue that the best policy is to permit such fees to be recovered in order to set an ERISA plaintiff counsel on an equal footing as ERISA defense counsel. (Docket No. 173 at 11-12.) This Court has previously indicated its unwillingness to award paralegal fees as part of a fee shifting award. Weinberger v. Great N. Nekoosa Corp., 801 F. Supp. 804, 822 (D. Me. 1992). I also observe that the plaintiffs have not offered any evidence tending to support a finding that charging \$60 per hour for paralegals or \$75 per hour for research librarians represents a normal community practice or reasonable community rate. See Lipsett, 975 F.2d at 939 n.5.

Accordingly, I would disallow all paralegal fees requested by the plaintiffs as unreasonable or, in the alternative, insufficiently supported. This amounts to a total disallowance of \$218,652.50.

7. *Nonlegal work performed by an attorney*

Bowater challenges hours billed by attorneys for what Bowater categorizes as clerical (5.3 hours) or administrative (34.4 hours) functions and travel time (152.4 hours) totaling 192.1 hours. (Docket No. 163 at 12-13 & Ex. A, pp. 1-4, 18-20.) The plaintiffs will concede the 5.3 hours of clerical work. (Docket No. 173 at 11-12.) Of the 34.4 hours in the administrative category, my only concern is that 22.95 hours in the category reflect time counsel spent putting together their retention and fee agreements. I find this amount of time to be unreasonable and would reduce it by roughly half. Thus, for these two categories, I would disallow 16.8 hours (5.3 clerical and 11.5 administrative). Finally, although I would not strike travel time from any forthcoming award, I would reduce the hourly rate for the 152.4 hours of travel time to \$20 per hour. See Weinberger, 801 F. Supp. at 824 (award \$10 per hour for travel time in 1992 in the absence of evidence that counsel was performing legal work while traveling).⁷

Accordingly, I would disallow the following:

Clerical: 3.8 hours by Attorney McTeague and 1.5 hours by Attorney Case.

Administrative: 1.4 hours by Attorney Case, 1.7 hours by Attorney Payne, and 8.4 hours by Attorney McTeague.

Travel: 26 hours by Attorney Case, 17 hours by Attorney Payne, and 109.4 hours by Attorney McTeague, all to be billed at \$20 per hour.

8. *Work performed on pending fee motions*

⁷ The rate of \$20 per hour as compared with \$10 per hour in 1992 reflects an inflation adjustment of between five and six percent annual increase over 12 years.

Bowater argues that hours spent preparing the pending fee motions should be compensated at a substantially reduced rate and that hours spent preparing the common fund attorney fee motion should not be compensated at all because filed in bad faith. (Docket No. 163 at 13-14.) The plaintiffs limit their response to the following sentence: "Plaintiffs' fee request is an inherent part of the case and time expended should be recognized by the Court subject, however, to reasonable limits and considering the efforts of Defendants." (Docket No. 173 at 13.) Neither party itemizes these hours. Between December 30, 2003, the first post-judgment billing entry regarding attorney fees, and January 31, 2004, the last entry in the plaintiffs' bill, I calculate a total of 38.9 attorney hours expended on the pending motions, 19.5 by Attorney Payne and roughly 19.4 by Attorney McTeague. I would discount the award for this time by 50% to account for two things: (1) activity related to fee applications "does not require the same level of expertise or skill as legal work related to substantive claims," Weinberger, 801 F. Supp. at 822-23, and (2) time spent on the common fund fee application, which in this case appears to have been considerable, would not be recoverable even if that motion were successful, id. (discussing general disallowance of fees on fees in common fund cases).

Accordingly, I would disallow:

19.5 hours billed by Attorney Payne; and

19.4 hours billed by Attorney McTeague.

Instead, I would allow \$4279 for time spent on the fee motions, reflecting 38.9 hours at \$220 per hour, reduced by 50% (as opposed to the \$15,560 requested).

9. *Other*

Despite the foregoing disallowances, the total number of hours billed by the plaintiffs' counsel would still exceed 3600. Of these, Attorney McTeague posted in

excess of 2300 hours. These numbers are shocking, regardless of the duration of this litigation. Although I appreciate that the number of plaintiffs made this case burdensome, I find it unreasonable to suggest that a competent lead attorney such as Attorney McTeague would have needed to devote an entire year's worth of professional activity to this case, on top of nearly a year's worth of work by associated counsel and more than a year's worth of work by paralegals. In my assessment, a reasonable award requires the Court to reduce Attorney McTeague's hours by a further 350, roughly 15 percent.

Accordingly, I would disallow a further:

350 hours billed by Attorney McTeague.

C. Recommended Lodestar Award

My application of the lodestar standards suggests that a reasonable statutory fee award would be \$753,474. I arrive at this amount as follows:

<u>Attorney</u>	<u>Requested</u>	<u>- Disallowed</u>	<u>= Allowed</u>	<u>x Rate</u>	<u>= Award</u>
Fongemie	0.6	0	0.6	\$220	\$132
Young	1.8	0.7	1.1	\$220	\$242
Case	646.3	247.1 ⁸	399.2	\$220	
					\$87,824
McTeague	2856.7	792.9	2063.8	\$250	
					\$515,950

⁸ Attorney Case's hours are heavily discounted because of duplicative work, intra-office conferences, etc. (See, supra, § B.5.) Mr. Case's hours were targeted disproportionately to Attorney McTeague's because his rate was the lower of the two. My rationale is that, where duplicative work occurs that ought not to be duplicatively billed, it is reasonable for the attorneys to bill at the rate of that attorney whose rate is the highest among them.

Payne	746	100.55	645.45	\$220	
	\$141,999				
Paralegal	3633.8	3633.8	0	n/a	\$0
Travel	152.4	0	152.4	\$20	\$3048
Fee App.	38.9	19.45	19.45	\$220	\$4279 ⁹

Lodestar Total:

\$753,474

I consider this amount to be a reasonable award given the relative complexity of this case. Although litigation was protracted, it was due in significant part to the closeness of the mootness question, not any especially great legal "complexity."

D. Appropriateness of an Enhancement Multiplier

The plaintiffs contend that any fee award should be enhanced by 25 percent for "extraordinary result." (Docket No. 152, Motion at 1.) In their memorandum, they argue that an extraordinary result was reached because there were several unintended beneficiaries of the suit, individuals other than those who fell within the categories described by counts I, II and III. (*Id.*, Memo. at 11.) In opposition, Bowater argues that an enhancement is not appropriate because the "vast bulk of efforts in this litigation addressed only the issue of whether or not the complaint was moot" and the "results were not extraordinary." (Docket No. 162 at 15.)

In my view, the recommended award represents a reasonable attorney fee for this case. I am not of the opinion that a greater award would be necessary to ensure the availability of plaintiff counsel in cases such as this. In sum, this is not one of the "few

⁹ See supra, ¶ B.8.

cases where a combination of sterling performance and exceptional results could conceivably justify a premium fee." Lipsett, 975 F.2d at 942.

E. Expenses

In addition to the lodestar computation, Bowater challenges several aspects of the plaintiffs' request for litigation costs (as opposed to Court costs). (Docket No. 162 at 16 & Ex. B.) It is difficult to tell how much of the \$140,390.88 total request Bowater actually challenges. The plaintiffs, in reply, concede over \$23,000 in challenged costs. (Docket No. 173, Ex. A4.) Tracking the categories identified by Bowater in its opposition (Docket No. 162, Ex. B), I make the following recommendation respecting the challenged costs:

	<u>Challenged Cost</u>	<u>Recommendation</u>
1.	Postage charges of \$3,891.56:	Disallow.
2.	Phone charges of \$328:	Disallow.
3.	Fax transmittals of \$9761:	Disallow.
4.	Westlaw research of \$8366.71:	Disallow. ¹⁰
5.	Duplicate attendance costs of \$6026.82:	Disallow.
6.	Photocopy costs of \$10,245.90:	Disallow. ¹¹
7.	Arnold & Porter \$1740 tax advice:	Disallow. ¹²
8.	"Vague expenses" of \$11,359.14	Disallow. ¹³
9.	"Overhead" of \$ 187.81	Disallow.

¹⁰ See Weinberger, 801 F. Supp. at 827 (disallowing expense because time expended doing research already billed at attorney rate).

¹¹ The figures provided by Bowater in its Exhibit B to its opposition memorandum reflect a 10 cent per page allowance. The plaintiffs reply that they would settle for 15 cents per page instead of 25 cents and 35 cents as originally requested. My impression is that 10 cents is more likely to approximate costs.

¹² The plaintiffs have conceded this cost.

¹³ The plaintiffs have conceded all but \$192.58. (Docket No. 173, Ex. A4, p.4.)

10. "Unrelated matter expense" of \$991.03 Disallow.¹⁴

Total Recommended Costs Disallowance: \$ 52,897.97

Recommended Costs Award: TBD

This recommendation is premised, in part, on a belief that the taxation of costs under ERISA § 502(g) should conform with 28 U.S.C. § 1920, which does not provide for any award of costs in several of the identified areas. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 444-45 (1987); People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 370-71 (4th Cir. 2001); Agredano v. Mut. of Omaha Cos., 75 F.3d 541, 543-44 (9th Cir. 1995); Hall v. Ohio Educ. Ass'n, 984 F. Supp. 1144, 1145-46 (S.D. Ohio 1997). I have made no recommendation as to the amount of costs to be awarded as requested in Docket No. 157, a total amount of \$140,390.88, as Magistrate Judge Brownell will ultimately review the Bill of Costs submitted by plaintiffs as is the practice in this District in all such matters. However, since some limited aspects of the submitted Bill of Costs appear to have been addressed in the memoranda filed in conjunction with these motions, I have addressed the matters as they were presented in the papers.

Common Fund Attorney Fees

In their motion for common fund attorney fees, the plaintiffs seek, in essence, to obtain a contingency award from those plan participants who benefited from the litigation but did not participate in the litigation. The plaintiffs premise their motion "on the grounds that a common fund or common funds have been created by the Plaintiffs' litigation and that all beneficiaries should bear equitably and proportionately the attorneys fees expended to create such common fund(s)." (Docket No. 155, motion at 1-

¹⁴ The plaintiffs have conceded all but \$156.40. (Id., p.5.)

2.) According to their memorandum in support of such an award, “Any such awards . . . will result in a reduction of Plaintiffs’ contingent fees and thus redound entirely to the benefit of named-Plaintiffs,” as opposed to their counsel. (Id., memo. at 1.) Bowater argues that the plaintiffs are not entitled to both statutory attorney fees and common fund attorney fees and that, in any event, there is no legal basis for a common fund award under the circumstances of this case. (Docket No. 161 at 1-2.)

[One] well-recognized exception to the general principle that an attorney must look to his or her own client for payment of attorney's fees is the common fund doctrine. Since the decisions in Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527, 26 L. Ed. 1157 (1882), and Central Railroad & Banking Co. of Ga. v. Pettus, 113 U.S. 116, 28 L. Ed. 915, 5 S. Ct. 387 (1885), the Supreme Court has consistently recognized "that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). The doctrine reflects the traditional practice in equity, and "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." Id. Parties as well as counsel can seek fees under the common fund doctrine, for the doctrine rests on a theory of unjust enrichment on the part of beneficiaries of a successful lawsuit at the expense of the litigants. See id.

Brytus v. Spang & Co., 203 F.3d 238, 242 (3d Cir. 2000). Unlike a statutory fee-shifting provision, the common fund doctrine draws an attorney fee award from the beneficiaries of the litigation rather than from the defendant. Id. Another distinction is that common fund awards are most often in the nature of a contingent fee award, where a percentage of the common fund is awarded to the plaintiffs or their counsel. Id. at 242-43. Finally, because the doctrine is equitable in nature, it is within a court’s discretion whether to make a common fund award. Id. at 244. In making its determination, the Court should consider whether an inequity would exist if the non-plaintiff beneficiaries retained the

benefit of the litigation without paying a share of the plaintiff's attorney fees; whether the enrichment of the non-plaintiff beneficiaries is unjust in light of the expense ultimately borne by the plaintiffs. Id. at 245-46 (discussing Boeing, 444 U.S. at 480).

As already discussed, there is no precise way to calculate the amount of any enhancement in the benefits of the plaintiffs or the non-plaintiff beneficiaries. The plaintiffs estimate that they alone will receive approximately \$10.8 million in enhanced benefits as a result of this litigation, but this estimate is supported only by their counsels' educated guesswork. (Docket No. 152 at 6; see also Aff. of Patrick N. McTeague, Docket No. 154, ¶ 4 & Ex. 6.) The plaintiffs indicate that due to the relatively recent closing of the GNP mills, only 286 of their 551 member group have received or will receive enhanced benefits as a consequence of this litigation. (Docket No. 152 at 5.) This is a roughly 48 percent reduction in the number of plaintiffs who benefited from this litigation. The plaintiffs estimate that approximately 100 non-plaintiff beneficiaries also stood to gain from the litigation. (Docket No. 155 at 1-2.) If the mill closings impacted them similarly to the plaintiffs, it would leave some 52 individuals who benefited from this litigation. Applying the plaintiffs' estimates about their own enhanced benefits to the non-plaintiff beneficiaries, 52 non-plaintiff beneficiaries are to 286 plaintiff beneficiaries as \$1.96 million is to the plaintiffs' \$10.8 million estimate.¹⁵ Assuming a 25 percent fee award, we would arrive at a common fund award of approximately \$500,000. Of course, these kinds of rough estimates are entirely speculative, which is where the plaintiffs' motion for "limited" discovery comes in. In order for the Court to obtain some level of certainty that a common fund award equitably apportioned the burden of paying the

¹⁵ The plaintiffs estimate that approximately 60 non-plaintiffs have or will benefit to the tune of approximately two or three million dollars. (Docket No. 152 at 10.)

award among all who benefited, a considerable amount of discovery would have to transpire and at least one more round of motions would be in order. There is no reason to think that the end result would necessarily enable the Court to fashion an equitable award, either. As the plaintiffs point out, “some non-Plaintiffs . . . have already been paid litigation-enhanced lump sum pensions by Defendant Plan and its successors.” (Docket No. 155 at 2.) The plaintiffs do not suggest, and I do not see, any practical means by which these non-parties can realistically be made to turn over a pro rata portion of a common fund fee award at this juncture. Even though there may be a “common fund” remaining in the possession of the Plan consisting of the benefits that have not already been distributed, there does not appear to be a realistic means of equitably apportioning a common fund fee award among all of the individuals who benefited from this litigation.

Another issue is how administrable a common fund fee award would be. Because any common fund in this case would be comprised, in part, of money the subject beneficiaries are not necessarily entitled to at this point in time, the Court's award would have to impose ongoing administrative duties on the Plan, which would create the possibility of ongoing litigation and oversight. In other words, this case not only does not present a readily ascertainable common fund, it does not present a readily administrable fund. Were the Court to wade into this thicket, these concerns suggest that it would be inviting further litigation rather than resolving this litigation. Cf. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (indicating in the context of statutory fee award, "A request for attorney's fees should not result in a second major litigation"). Accordingly, I recommend that the Court deny the motion for common fund attorney fees and the related discovery motion.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** the plaintiffs' motion for statutory attorney fees and costs (Docket No. 152) and award fees to the plaintiffs in the amount of \$753,474 and costs as determined by the court. I **RECOMMEND** that the Court **DENY** all other pending fee motions. (Docket Nos. 153, 154, 155.)

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, within ten (10) days of being served with a copy thereof. A responsive memorandum 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated May 19, 2004

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