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AMERICAN MULTI-CINEMA, INC.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL BATEMAN, individually and on behalf of all others similarly situated, Plaintiffs, vs. AMERICAN MULTI-CINEMA, INC.; and DOES 1 through 10, inclusive, Defendants.	Case No. CV07-00171 JHN (AJWx) Hon. Jacqueline H. Nguyen FILED AS CLASS ACTION **DECLARATION OF KENNETH MOSCARET IN SUPPORT OF AMERICAN MULTI-CINEMA, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS** Filed concurrently with: 1. Opposition to Plaintiff's Motion for Award of Attorneys' Fees and Costs; 2. Declaration of Joseph E. Laska; and 3. Request for Judicial Notice. Hearing Date: August 1, 2011 Hearing Time: 10:00 a.m. Courtroom: 750 (Roybal) Action filed: January 9, 2007

DECLARATION OF KENNETH MOSCARET

I, Kenneth Moscaret, declare as follows:

I. INTRODUCTION

1. I am the principal of Moscaret Consulting, Inc., with offices in Sammamish, Washington (near Seattle) and Pasadena, California. I have been retained by Defendant American Multi-Cinema, Inc. ("AMC") to offer opinions regarding the reasonableness of Plaintiff's attorney's fee motion in this case. I am also an attorney at law licensed to practice before all courts of the State of California and before several federal district courts in California, including this Court. I have personal knowledge of each and every fact stated herein and would be competent to testify thereto if called upon to do so.

II. BRIEF SUMMARY OF MY OPINIONS

2. If this Court determines that reasonable attorney's fees should be awarded to Plaintiff based on a lodestar methodology, then Mr. Karasik's proposed rate of $700 per hour, if accepted in full by this Court, would reflect more than adequate compensation, indeed very high compensation, for an attorney with Mr. Karasik's 26 years of law practice experience at a small law firm in the current Los Angeles legal marketplace.

3. Mr. Karasik's proposed $700 per hour rate is comparable to rates for midlevel partners at the largest national law firms in Los Angeles that appear in the most recent large law firm national rate survey published by the *National Law Journal* ("*NLJ*") in December, 2010. Yet it is undisputed that a small, local, seven (7)-attorney law firm like Spiro Moss has none of the high overhead and cost structure of a major national law firm.

4. Plaintiff's reliance on the latest Laffey Matrix rate of $709 per hour for 20-year-plus attorneys does not take into account that the same $709 rate is also meant to apply to attorneys who might have *twice* as many years of law practice experience as Mr. Karasik's 26 years. Laffey Matrix rates for very experienced

senior attorneys end up being a "one-size-fits-all" rate scale, which is not helpful here. Mr. Karasik is actually toward the low end of the Laffey Matrix rate scale for 20-year-plus attorneys, given his 26 years of experience.

5. With the exception of 29.6 hours of overly-vague timekeeping entries in Mr. Karasik's time records where are clearly objectionable based on relevant federal court decisions and certain State Bar of California advisories, the remaining 396.0 claimed hours for Mr. Karasik's work in this case, if accepted in full by this Court, would reflect more than adequate compensation for a lawsuit such as this one, where there was hardly any expensive, time-consuming discovery conducted, nor dispositive motions filed, nor intensive trial preparation that occurred.

6. All of the *Kerr-Johnson* factors that Plaintiff could have cited in his fee motion opening brief (but did not), or that he might cite in any reply brief, to argue for a lodestar enhancement would already be subsumed within the $700 per hour rate and 396.0 net hours that Plaintiff is requesting for Mr. Karasik's work in this case. Hence, there is no evidentiary basis under the *Kerr-Johnson* factors for any upward lodestar adjustment.

7. Notwithstanding the above, the District Court's $95,480.94 fee award in 2008 in another FACTA lawsuit prosecuted by the same Spiro Moss firm in the Central District of California, *Soualian v. International Coffee & Tea*, Case No. CV07-00502-RGK (JCx), is a better benchmark for this Court to consider in awarding fees to this Plaintiff. Unlike this case, the *Soualian* case was heavily litigated to the verge of trial, yet also featured Ninth Circuit appellate briefing like in this case, and still the *Soualian* Court only awarded $95,480.94 as reasonable fees.

III. EXPERT QUALIFICATIONS

8. I am nationally known in my field for: (i) my across-the-board success as a lodestar fee expert in the huge *Enron* case in federal court in Houston in 2008; (ii) my multiple attorney fee seminars for JAMS judges nationwide; and (iii) being

regularly retained by the largest law firms in California and the U.S. to testify on ***both*** sides of large, complex cases involving multimillion-dollar legal fees. My full expert credentials can be found at my firm's website (www.FeeDispute.com).

9. For the past 20 years since 1991, I have been regularly retained as a full-time attorney fee consultant and expert witness by companies, insurers, public entities, law firms, and individuals nationwide to offer expert opinions as to the reasonableness of legal fees, propriety of attorney billing practices, and efficient litigation management practices in fee disputes, fee litigation, and fee arbitration.

10. I have been specializing in this field since 1991, and have been involved in well over 150 large fee disputes involving over $1.3 billion in legal fees to date. I would describe myself as a "customs-and-practices" expert specializing in the reasonableness and efficiency of multimillion-dollar legal fees in large, complex cases throughout California and nationwide.

11. During my 20-year career in this field, I have been retained as a fee consultant and/or testifying expert witness by both sides in fee disputes. Nearly all of my expert engagements over the past several years have involved seven-figure, eight-figure, and nine-figure legal fees billed by many of the largest law firms in the U.S. in large, complex litigation.

12. I have been found qualified to testify, and have testified as a fee expert in some of the largest attorney fee proceedings in recent years in the U.S. For example, I offered lodestar attorney fee expert testimony in February, 2008 in the huge *Enron* securities class action litigation before the U.S. District Court for the Southern District of Texas in Houston, U.S. District Judge Melinda Harmon presiding. Lead plaintiff's counsel in *Enron* who retained me was a major California law firm. Lead counsel submitted a nearly $700 million attorney fee request after securing approximately $7.2 billion in pre-trial settlements for the class from various bank defendants.

13. I ended up being the sole lodestar fee expert testifying in the *Enron* case about reasonable hourly rates, reasonable hours billed, efficient case staffing, litigation management efficiency, and other related lodestar fee and billing issues. I testified alongside several nationally-prominent law professors and a retired federal circuit judge (who were co-experts with me on certain non-lodestar fee issues), including law professors from Columbia University Law School and Harvard Law School,[1] and retired Third U.S. Circuit Judge H. Lee Sarokin. *Enron* is the largest securities class action lawsuit in U.S. history, and one of the largest business lawsuits generally ever litigated in this country. *Enron* was a massive, exceedingly difficult, hugely-complex, and unprecedented case.

14. The U.S. District Court in *Enron* relied heavily and favorably on my lodestar expert opinions in its 209-page published fee ruling awarding $688 million, plus interest, in attorney's fees to lead counsel in that case in September, 2008, a record-setting fee award for a securities class action in the U.S.[2] The District Court described me as one of the "nationally prominent experts on fee awards" who was testifying in the case, and "a recognized fee expert," and found me to be "highly qualified to testify about attorneys' fees and market rates." *In re Enron Corporation Securities, Derivative & ERISA Litigation*, 586 F.Supp. 2d 732 (S.D.Tex. 2008).[3]

15. In October, 2008, I gave attorney fee expert testimony in the *Coca-Cola* securities class action litigation in federal court in Atlanta (*Carpenters Health & Welfare Fund, et al. v. The Coca-Cola Company*, Case No. 1:00-CV-2838-WBH Consolidated). That case produced a $137.5 million class settlement. As in *Enron*,

[1] Professor John Coffee, Jr. of Columbia University Law School and Professor Lucian Bebchuk of Harvard Law School.

[2] I am informed that the final fee award, with accrued interest, exceeded $700 million.

[3] Judge Harmon cited me by name about 20 times in her published attorney fee ruling, agreeing with my opinions across the board.

I again testified in *Coca-Cola* on behalf of lead plaintiff's counsel. The U.S. District Court made a $31.5 million fee award. *Coca-Cola* was another truly large, complex case.

16. I have given expert testimony both in support of and in opposition to plaintiffs' fee applications in a handful of other class actions in recent years, all venued in Los Angeles County Superior Court.

17. Regarding my background, I graduated with a J.D. from Georgetown University Law Center in 1980, and was admitted to practice in California the same year. From 1980-1990, I was primarily a business litigator practicing in Los Angeles in California state and federal courts. I have "first-chair" and "second-chair" trial experience.[4] As a litigator, I represented many large institutional clients in complex litigation, such as the Hearst Corporation and major savings and loan associations.

18. Since 1991, I have testified as an expert witness over forty (40) times in court, at arbitrations and depositions, and by written declaration on: (i) the reasonableness of legal fees; (ii) the propriety of attorney billing practices; (iii) the lodestar issues of reasonable hourly rates and reasonable hours billed; and (iv) litigation management and case staffing efficiency.[5] I have submitted expert declarations in various state and federal courts.

19. In addition to serving as an expert witness, I have conducted training seminars on attorney's fees for a variety of business, legal, and judicial

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[4] Before I became a full-time attorney fee expert, I primarily litigated cases for corporate clients, on both the plaintiff and defense side. Nearly all of my corporate lawsuits settled before trial actually started. I did take about five to six cases to trial through judgment, mainly in California state courts. I was the sole trial counsel in half of those cases, second-chair in the rest. My prior litigation experience is listed and readily available on my firm's website at www.FeeDispute.com (under the "Experience" link on the website).

[5] Although the majority of my expert witness cases have settled prior to trial, I have testified "live" about a half-dozen times as a qualified fee expert in court and binding private arbitration proceedings. I have submitted at least 20 written expert declarations in various courts which were admitted into evidence. I have also given oral expert depositions about 15 times.

organizations. For example, in October, 2005, I was invited by the JAMS organization to conduct a live training/instructional MCLE program on attorney fee litigation and attorney fee awards for approximately 30 - 40 retired federal court and state court judges at JAMS offices throughout California.[6] Richard Chernick, national managing director of arbitration at JAMS, sponsored me. My audience included former California Supreme Court justices. A number of JAMS judges consulted me afterwards about particular attorney's fee cases that they were handling, and I continue to make myself available to them for that purpose. A true and correct copy of the acknowledgment letter which JAMS sent me afterwards is attached hereto as **Exhibit A** to this declaration.

20. JAMS invited me back to conduct a second live MCLE session in May, 2008, this time for all their judges and attorney-neutrals nationwide, not just in California, which I did. Afterward, JAMS prepared DVD video and audio podcast recordings from my second training session for all JAMS judges to use nationwide.

21. I try to offer expert opinions which are consistent, wherever possible, with judicial decisions and ethical rules and opinions that have addressed similar attorney's fee and billing issues. In this declaration, I cite to federal and state case law and ethical authorities (whether published or unpublished, binding or advisory) which I have consulted, considered, reviewed, or relied upon in forming my own opinions. I do that only so that this Court can understand how those case authorities and ethical opinions fit into my overall reasoning and form a supporting foundation for my opinions. I am not attempting to offer "legal" opinions.

22. When asked to express opinions about the reasonableness of legal fees and efficient litigation management practices in large, complex cases such as this one, I often find it helpful to construct charts and spreadsheets to help illustrate my

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[6] JAMS is a leading private arbitration/mediation provider in the U.S. with over 250 neutrals across the country, including many former state and federal court trial judges and appellate judges/justices.

opinions for the court and/or jury. Where appropriate, I consult, refer to, and rely upon those charts and spreadsheets in formulating some or all of my expert opinions. I have done so in this lawsuit.[7]

23. I have also been retained as a non-testifying attorney fee/litigation management consultant by large institutional clients seeking to exert greater control over their outside counsel billings. Some of my public sector clients in that regard have included the County of Los Angeles and the Los Angeles Unified School District.

24. For example, from 1996 - 2008, I helped supervise outside counsel relationships for the Office of General Counsel ("OGC") of the Los Angeles Unified School District ("L.A. Unified"), one of the largest public entities in Southern California. I played that role for L.A. Unified continuously for those 12 years, as the chief outside legal consultant to their OGC. L.A. Unified is the nation's second largest public school district (behind New York City), has an annual budget (operations and capital projects) of approximately $10 billion, and would be in the Fortune 500 if it were a private corporation based on the size of its annual budget. L.A. Unified has many of the same types of "big-league" high-stakes legal matters as a large corporation, and pays many millions of dollars each year in outside counsel fees, which I helped manage and oversee.

25. One of my ongoing responsibilities during those 12 years at L.A. Unified was to act as their outside counsel billing "gatekeeper." In that capacity, I reviewed and approved each month hundreds of outside counsel invoices on L.A. Unified legal matters, both litigation and non-litigation, including large, complex lawsuits in federal and state courts. I did that each month from 1996 - 2008. Those invoices were submitted by about 50 different law firms which worked for L.A. Unified's OGC, many of which were major national law firms. I reviewed outside

[7] Here, I collaborated with Manatt to prepare the charts and spreadsheets that I used. They were prepared under my direction and guidance by Manatt attorneys and staff persons.

counsel billings for L.A. Unified on such complex litigation matters as:

(a) Belmont Learning Center litigation (once dubbed "the nation's most-expensive high school" by the news media and costing hundreds of millions of dollars to date);

(b) School district takeover litigation pitting L.A. Unified against the Mayor of Los Angeles (AB 1381 litigation);

(c) Ambassador Hotel dispute (against developer Donald Trump);

(d) ACLU's massive statewide class action lawsuit against allegedly deteriorating public school facilities (known as the "Williams" case);

(e) ACLU's multibillion-dollar class action to compel L.A. Unified to reform its special education policies and practices (known as the "Chanda Smith" case);

(f) Environmental/toxic school site lawsuits; and

(g) School construction litigation between L.A. Unified and general contractors/sub-contractors over performance issues.

Quite a few of these cases were high-profile, hard-fought, and the subject of frequent reporting in the local news media in Los Angeles.

26. I estimate that, from 1996 - 2008, I reviewed well more than 30,000 law firm invoices in total in all manner of L.A. Unified cases from large, midsize, and small law firms that worked for L.A. Unified.[8] I oversaw the outside counsel billings on many large, complex lawsuits against L.A. Unified. The prevalence of so many large, complex cases is one of the reasons that L.A. Unified hires many major national law firms to defend it. My invoice-review work for L.A. Unified was in addition to the many thousands of other law firm invoices that I have reviewed in the more than 150 attorney's fee expert engagements that I have had over the years.

[8] L.A. Unified received 300 - 600 outside counsel invoices each month, on average, from 1996 - 2008. My monthly invoice-review function for L.A. Unified was a substantial part of my expert consulting practice during those years.

27. During summer, 2005, L.A. Unified asked me to negotiate hourly rate agreements covering the next 5 years with approximately 40 different law firms who were bidders under L.A. Unified's 2005 law firm RFP. I spent several months handling those rate negotiations. About one-third of the law firms with which I negotiated were major national law firms. From 1996 - 2008, L.A. Unified's OGC periodically involved me in law firm RFP's and outside counsel selection, too.

28. Toward the end of 2006, the County of Los Angeles retained me to conduct a litigation management review of the 270-attorney Los Angeles County Counsel's Office (i.e., Los Angeles County's in-house legal department) ("County Counsel"). Los Angeles County has one of the largest, if not the largest, in-house county legal departments in the U.S. Among other things, I examined how the County Counsel's Office handled, managed, and disposed of some of its most difficult, complex, and high-stakes lawsuits. My expert's report was prepared for and submitted to the Los Angeles County Board of Supervisors.[9] This litigation management review was the subject of news articles in the legal press in California.

29. Many major national law firms have retained me as a fee expert, frequently to testify in support of multimillion-dollar legal fees in large, complex litigation, and other times to testify in opposition to claimed multimillion-dollar legal fees. Other major law firms dealt with me for years on attorney fee and billing issues in connection with L.A. Unified cases they were handling.

30. I have published nearly 30 articles to date in the legal and business media on attorney's fees, the majority of them in the Los Angeles and San Francisco editions of the *Daily Journal* legal newspaper. I have also conducted over 35 continuing legal education seminars and other presentations on these subjects for client organizations, law firms, JAMS, the American Arbitration

[9] I worked in parallel with the Los Angeles County Auditor-Controller's Office on this project. Both of us submitted our own separate written reports to the Los Angeles County Board of Supervisors, each covering different aspects of the County Counsel's operations. I focused on litigation strategy, litigation management efficiency, and fees/billings.

Association, and various local bar associations.

31. Although my residence is in the Seattle area (for personal and family reasons since 1996), most of my consulting clients are in California, and have been in California since I first began specializing in this field in 1991. I travel back and forth between my Seattle and Los Angeles offices as client demands dictate. Most of the attorney fee disputes in which I have been involved since 1991, as well as most of the law firms whose billings I have examined for reasonableness, have been in California, particularly in the Los Angeles, Orange County, San Diego, and San Francisco Bay areas.

32. I am familiar with the fee and billing practices in the California legal marketplace, particularly in the Southern California and San Francisco Bay areas. I have frequently discussed fee and billing practices with partners at Southern California and San Francisco Bay area law firms, and I read a number of California (and national) online legal publications each day to stay current on new developments in the California legal marketplace, especially with respect to fee and billing issues.

33. I do not just limit myself to helping big clients and big law firms with legal fee and billing issues. I created a first-of-its-kind consumer legal cost management blog (www.myLawCoach.com) designed to help ordinary consumer clients manage all of the "dollars-and-cents" business aspects of their attorney-client relationships. My blog delivers practical tips and advice at no charge over the Internet to the types of individuals who might not otherwise have access to that kind of information.

34. In 2011, my firm also launched a first-of-its-kind litigation management consulting program aimed at midsize, middle market companies located in the U.S., Canada, Europe, and soon Asia that have to litigate expensive lawsuits in U.S. federal and state courts. My firm's consulting program is designed for companies that lack an in-house U.S. legal department or the internal know-how

and capability to manage complex litigation fees and case budgets by themselves. Among other things, my firm constantly educates midsize company management about the legal fees, litigation management efficiency, case budgeting, and other "dollars-and-cents" litigation cost issues on their lawsuits, to help company management make smarter, more informed litigation spending decisions.

35. As an attorney and an expert witness, I am aware that courts need to be satisfied that an expert's proffered opinions are both credible and reliable. I have therefore set forth below a number of factors as my offer of proof in that regard which show that I possess specific knowledge relating to the specific fact issues in dispute in this action. Specific knowledge is a strong indicia of my credibility and reliability to offer my opinions in this declaration. I offer the following additional evidence of my specialized knowledge regarding the fee issues in dispute in this lawsuit.

36. First, I work in a highly-specialized niche in the legal profession. There are probably fewer than two dozen full-time attorney's fee experts with knowledge, experience, specialization, and training comparable to mine in the entire U.S.

37. Second, having reviewed 30,000-plus law firm invoices for L.A. Unified from large, midsize, and small law firms in both ordinary, routine litigation and major, complex litigation from 1996 - 2008, plus the thousands of other law firm invoices that I have reviewed in my expert engagements, I have seen just about every variation on the specific attorney's fee and billing issues which I address in this declaration.

38. Third, from 1996 - 2008, I consulted to, advised, and on two occasions formally trained L.A. Unified's 30-40 in-house attorneys regarding:

(a) day-to-day working relationships between in-house counsel and outside counsel (especially major law firms);

(b) how in-house counsel should manage, supervise, oversee, and collaborate with outside counsel on major litigated cases; and

(c) when and how in-house counsel should negotiate and implement cost-efficient billing practices, case staffing, litigation management practices, case budgeting and other procedures with outside counsel.

39. Fourth, I spent considerable time during those 12 years with L.A. Unified negotiating hourly rates and/or retainer agreements for L.A. Unified's OGC with most of the 20 major national law firms and about 30 smaller law firms that work for L.A. Unified on litigated and non-litigated matters, including many big law firms in California.

40. Fifth, my clients have consulted me, have qualified me to testify, and have actually had me testify (both live and in written expert's reports and declarations) on the specific fact issues which I address in this declaration. I have also conducted continuing legal education training seminars and other presentations, and have published articles on the specific fact issues which I address in this declaration.

41. Sixth, I am familiar with various court decisions, both federal and state, reported and unreported, and with various ethical authorities, which relate to the specific fact issues which I address in this declaration. I have also spoken to many law firm partners about those specific fact issues over my many years in this field, and have read many legal media articles which addressed those same issues.

42. Seventh, the specific fact issues which I address in this declaration are not confined only to a single legal market. Those issues are not "local" in nature. Rather, they are universal attorney's fee/billing issues and litigation management issues within the legal profession that arise in all 50 states, and in every jurisdiction. Hence, my expert opinions about those particular attorney's fee/billing issues and litigation management issues, such as I have offered in this declaration, are not dependent upon subjective, locally-acquired knowledge drawn from having practiced law in a particular legal market. They apply across the country.

Notwithstanding that, I did litigate and try cases in California for a number of years before becoming a full-time expert witness.

43. I recognize that this Court has broad discretion in arriving at a reasonable fee award in this proceeding and in deciding whether to consider expert testimony on that issue. I am respectful of this Court's discretion, and offer this declaration in the hopes that my opinions and reasoning might be of some assistance to the Court in exercising its discretion.

IV. MATERIALS REVIEWED IN CONNECTION WITH THIS DECLARATION

44. Before preparing this declaration,[10] I undertook a number of investigative steps to learn more about this class action lawsuit. I took the following steps to acquire sufficient facts and data to have a foundation for my opinions in this declaration.

45. I received from Defendant's counsel, Manatt, Phelps & Phillips, LLP ("Manatt") and reviewed all of the documents comprising Plaintiff's attorney's fee motion in this lawsuit ("Plaintiff's fee motion"), including:

(a) Notice of Motion and Motion for Award of Attorney's Fees, Costs, and Enhancement Payment, with Memorandum of Points and Authorities in Support of Motion;

(b) Declaration of Gregory N. Karasik, with attached exhibits ("Karasik declaration");

(c) [Proposed] Order Granting Motion for Award of Attorney's Fees, Costs, and Enhancement Payment; and

(d) all of the billing records attached to the Karasik declaration.

46. I devoted a number of days to reviewing the court-filed case documents from the U.S. District Court and Ninth Circuit proceedings in this

[10] I was retained by Defendant on an hourly basis, which is my usual and customary fee arrangement in my expert engagements.

lawsuit which were available and accessible to me through the PACER federal court online dockets (which contained many hyperlinked viewable case documents);[11]

47. I reviewed certain State Bar of California Committee on Mandatory Fee Arbitration published arbitration advisories, which are cited in this declaration;

48. I discussed this case with Joseph E. Laska, Esq. of Manatt.

49. I reviewed documents relating to the fee motion filed by the Spiro Moss firm in *Soualian v. International Coffee & Tea*, Case No. CV07-00502-RGK (JCx) ("*Soualian*"), including:

(a) the Memorandum in Support of (Unopposed) Motion for Award of Attorneys' Fees, Costs and Expenses, and Incentive Award;

(b) the supporting Declaration of J. Mark Moore ("Moore declaration"); and

(c) the district court's July 16, 2008 order granting fees in the amount of $95,480.94.

50. Before rendering my opinions, I always try to obtain the fee-applicant law firm's "side of the story" about how they managed and billed the case. There are different ways I can do that.[12] First, I can review any law firm deposition testimony in which the law firm's responsible attorneys explain their litigation management and billing practices. Second, I can review any law firm written declaration testimony in which the responsible attorneys explain how they managed

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[11] There have been occasions in my past expert engagements where I did ***not*** receive the actual case file to review, or did not otherwise obtain sufficient access to case documents and information before opining. For example, where a client's former attorney withheld the case file under a retaining lien (outside California). Where I have had to render expert opinions under those circumstances, it has been akin to testifying with "one hand tied behind my back." So long as I am given access to all or most of the ***actual case file*** (as I was here), I can become sufficiently familiar with the facts, issues, and complexities in the case before opining. As a general rule, time and cost permitting, I review as much of the actual case file as possible before I testify.

[12] I discussed that in a *Daily Journal* article dated March 19, 2008 entitled "Auditing the Auditors."

and billed the case. The Karasik declaration submitted in support of Plaintiff's fee motion supplied me with the needed information. Thus, I did not feel it was necessary for me to attempt to interview any of Plaintiff's counsel personally and directly to obtain that information (assuming it would have even been feasible or appropriate for me to do that in these contested fee proceedings).

V. EXPERT OPINIONS AND SUPPORTING REASONING

1. Mr. Karasik's proposed rate of $700 per hour would reflect very high compensation for a comparable Los Angeles attorney

51. Based on my knowledge of prevailing market rates in the Los Angeles legal marketplace for law firms of all sizes and specialties, Mr. Karasik's proposed $700 per hour rate is currently at the *very* high end of the hourly rate scale for experienced litigation partners at small Los Angeles law firms such as Spiro Moss. The Los Angeles legal marketplace has suffered the same recessionary effects as other major U.S. legal markets over the past three years since 2008. Partner-level rates at large national law firms in Los Angeles have not changed very much in the past few years, as reflected in the above-mentioned large law firm hourly rate survey for the Los Angeles area published in December, 2011 by the *NLJ* (as can be seen in the attached **Exhibit B**). I prepared the illustrative chart in Exhibit B showing partner rates and associate rates at all of the large Los Angeles law firms that were actually included in the *NLJ's* December, 2010 survey.[13]

52. The annual *NLJ* rate survey is one of the most authoritative, if not *the* most authoritative, published hourly rate surveys in the U.S. each year for big law firms, because it identifies specific big law firms by name in specific cities, and discloses their specific rates for partners and associates.[14] I am not aware

[13] The *NLJ* rate survey for 2011 will not be published until December, 2011.

[14] Other courts have found the *NLJ* rate survey to be reliable and persuasive evidence. *See, e.g., In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F. Supp. 2d 732 (S.D. Tex. 2008); *Yurman Designs, Inc. v. PAJ, Inc.*, 125 F. Supp. 2d 54, 58 (S.D.N.Y. 2000), *aff'd*, 29 Fed. Appx. 46 (2d Cir. 2002).

of any other large law firm rate survey that does that.

53. As this Court can see, there was relatively little movement between 2008 and 2010 partner rates at the large Los Angeles law firms that were included in the *NLJ's* December, 2010 survey, due to the severe economic recession from which large national law firms are only slowly emerging in 2011. Prior to 2008, I had observed large law firms in Los Angeles (as well as in other major U.S. legal markets) typically raising their rates across-the-board by 7% - 10% annually starting in 2003 when the "dot-com" recession ended.

54. In the Central District of California, I am aware of at least one published decision which has recognized the direct correlation between hourly rates charged by comparable attorneys and the size of their law firms. *Gomez v. Gates*, 804 F.Supp. 69, 76 (C.D. Cal. 1992) ("for a given type of work, lawyers in large firms charge institutional clients far more per hour than is charged by lawyers of the same skill and experience in small firms to individual clients"). This observation by the District Court in *Gomez* has been my own observation, too, during my 20-year career in the field.

55. Unless they are primarily engaged in very high-value, high-end litigation, such as patent, IP, antitrust, and securities litigation, it has been my observation and experience that litigation partners at small law firms in Los Angeles with Mr. Karasik's level of experience are more typically charging their clients from $350 - $550 per hour in the current economic climate.

2. Mr. Karasik's proposed rate of $700 per hour is what comparable attorneys charge at the largest law firms in Los Angeles

56. Having been admitted to practice in California in 1984, and with between 26 - 27 years of law practice experience, Mr. Karasik has equivalent experience, in my view, to a midlevel partner at a large national law firm, like Manatt for instance. According to my Exhibit B rate chart, a $700 per hour rate would place Mr. Karasik somewhere in the middle or upper half of 2010 partner

rates among the large Los Angeles law firms who rates were disclosed in the latest *NLJ* rate survey.

57. This Court is aware, as I am from having worked with so many large national law firms in my 20-year career in this field, that large national law firm rates are high precisely because of the heavy overhead and cost structures that they face. Conversely, I have never seen a small law firm in any U.S. legal marketplace that has a similar overhead and cost structure to a large national law firm. Almost all small law firms that I have seen try to operate in a "lean-and-mean" fashion.

3. The Laffey Matrix senior attorney rate of $709 per hour is not a helpful benchmark for setting a reasonable hourly rate for a Los Angeles attorney such as Mr. Karasik

58. I am familiar with the Laffey Matrix hourly rate scale, because I opined on it to the District Court in the *Enron* case. The presiding federal judge in *Enron* referenced my findings and opinions about the Laffey Matrix in her published fee ruling in the course of rejecting the use of the Laffey Matrix in *Enron*, as follows:

> [Mr.] Moscaret makes important points in arguing that the Laffey Matrix is too simplistic, with its 'one-rate-fits-all approach, for major, complex litigation for several reasons.' It 'lumps all attorneys with 20-plus years of experience into the same rate bracket, and assigns the same uniform rate to each attorney in that bracket,' despite significant disparities in experience and status. He also contends that the Laffey Matrix is also contrary to federal case law in lodestar cases, which requires the district court to award to the petitioning attorney fees in accordance with the prevailing rate that other attorneys of comparable skill, experience and reputation would charge for similar work in the relevant market place.

586 F. Supp. 2d at 819 (citation omitted).

59. Furthermore, some federal district courts in California have rejected the application of the Laffey Matrix in making reasonable hourly rate determinations. *See e.g., Perez v. Cozen & O'Connor Group Long Term Disability Coverage*, 2007 WL 2142292, *6-7 (S.D. Cal. March, 27 2007) (unpublished)

(defendant failed to cite any legal authority stating the Laffey Matrix should be used in an ERISA case, or that it is applicable to any market outside of the Washington, D.C. area; further, despite its close proximity to Washington, D.C, the Eastern District of Virginia has declined to use the Laffey Matrix); *Housing Rights Center v. Sterling*, 2005 WL 3320738, *11 (C.D. Cal. Nov. 2, 2005) (unpublished) (in a federal Fair Housing Act lawsuit, District Court rejected Laffey Matrix because it did not comport with the reality of Los Angeles firm billing practices; also, Laffey Matrix sets a single rate for all attorneys with twenty years or greater experience).[15]

60. For all the very same reasons that the above California federal courts found the Laffey Matrix to be inappropriate and inapplicable in setting reasonable hourly rates in the fee-shifting cases that were before them, I do not believe that the Laffey Matrix can be used to justify Mr. Karasik's $700 proposed hourly rate in this case, either.

4. Objectionable Vague Times Entries by Mr. Karasik

61. I have attached another chart as **Exhibit C** which captures, in at-a-glance fashion, a series of time entries by Mr. Karasik totaling 29.6 hours for fees of $20,720 (computed at his proposed $700 per hour rate) which say nothing except for the discrete term "legal research." There was no other verbiage in these time entries to supply any further context to them, either.

62. At least one Central District of California published decision is on point that time entries that say "legal research" and nothing more are objectionable and too vague to be compensated in a fee-shifting setting. In that case, *Keith v. Volpe*, 644 F.Supp. 1317 (C.D. Cal. 1986), *aff'd* 858 F.2d 467 (9th Cir. 1988), which was a federal Fair Housing Act lawsuit, the District Court said that: "The [fee] application includes several vague entries such as . . . "legal research.' The

[15] I am aware of only one federal district judge in California (now-retired Judge Vaughn Walker in the Northern District of California) who was a frequent proponent of the Laffey Matrix in fee-shifting actions that he presided over.

court will only award fees for work which the court can identify with sufficient certainty." 644 F.Supp. at 1323.

63. In 2007, the Ninth Circuit held that it was not an abuse of discretion for a Los Angeles federal district judge to significantly reduce a fee applicant's time entries for objectionable or questionable timekeeping entries. *Welch vs. Metropolitan Life Insurance Company*, 480 F.3d 942 (9th Cir. 2007) (in ERISA lawsuit, District Court made reductions for quarter-hour minimum billing increments and block billed time entries).

64. The *Welch* court cited one of the various State Bar of California Committee on Mandatory Fee Arbitration's arbitration advisories ("State Bar advisory"), namely, State Bar advisory 03-01 (2003), which is attached hereto as **Exhibit D**. State Bar advisory 03-01 outlined both proper and potentially improper and objectionable timekeeping practices.

65. State Bar advisory 03-01 contains a section C.(6) entitled "Lack of detail," which says the following about certain types of time entries: " '*Research issues*', 'attention to file', 'discovery', 'prepare for trial', and similar statements are not specific enough to let the reader know what was done." (emphasis added.)

66. For the above reasons, I am recommending that this Court reduce Plaintiff's 425.6 total claimed hours for Mr. Karasik by the 29.6 "legal research" hours that appear on the time records supporting the fee motion, leaving 396.0 net hours.

67. Therefore, if this Court were to accept in full both Mr. Karasik's $700 per hour rate and his 396.0 net hours, the *potential* lodestar would be $277,200.

5. Applying the *Kerr-Johnson* Factors in This Case Should Not Lead to a Potential Fee Award to Plaintiff Higher Than $277,200, Either

68. Once any district court makes a lodestar calculation, the district court then has the discretion to adjust that lodestar amount either upward or downward in order to arrive at a reasonable fee. The Ninth Circuit set forth 12 factors for making

such a lodestar adjustment in *Kerr v. Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), known as the *Kerr-Johnson* factors, since the Ninth Circuit cited the same 12 factors from the earlier Fifth Circuit decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[16]

69. Plaintiff has not discussed the *Kerr-Johnson* factors per se in his fee motion. He may try to rehabilitate that omission in a reply brief. Regardless, the *Kerr-Johnson* factors are intended to ensure that a fee applicant is properly compensated in the event that the lodestar calculation by itself does not sufficiently accomplish that objective. Since a *potential* $277,200 lodestar by itself in this case would already be more than adequate and actually very generous compensation for the Court to award Plaintiff for Mr. Karasik's work in this case, it is my opinion that the *Kerr-Johnson* factors, even when considered by this Court, would add no further evidentiary weight to the determination of a reasonable fee here.

70. In the course of formulating my opinion on this particular point, and as part of the foundation and line of reasoning for this opinion, I consulted, considered, and gave weight to the following relevant federal case authorities and a leading treatise on attorney's fees:

(a) There is a strong presumption under federal law that the lodestar figure represents a reasonable fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious case. *See Perdue v. Kenny A. ex rel. Winn*, __ U.S. __, 130 S.Ct. 1662, 1672 (2010).

(b) In arriving at an appropriate hourly rate, the district court may make reference to the *Kerr-Johnson* factors. *See Davis v. City and County of San*

[16] Those 12 factors are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr*, 526 F.2d at 70.

Francisco, 976 F.2d 1536, 1546 (9th Cir. 1992).

(c) Under federal law, a fee applicant should consider requesting an hourly rate that incorporates as many of the *Kerr-Johnson* factors as possible. *See* Richard Pearl, *California Attorney Fee Awards* 3rd ed., §9.104, pg. 528 (Continuing Education of the Bar 2011).[17]

(d) Many of the factors that California state courts must address after the lodestar has been calculated to make a possible lodestar adjustment are presumed under federal law to have been already incorporated into the lodestar figure. These factors include the novelty and complexity of the issues, the skill and experience of counsel, the contingent risk nature of case, and, except in rare instances, the quality of representation and the results obtained. *See id.* at §10.22, pg. 570.

6. The $95,480.94 Fee Award to This Same Plaintiff's Law Firm in Another Recent FACTA Lawsuit in the Central District of California, the *Soualian* Case, Provides More Practical Guidance About What a Reasonable Fee Should Be in This Case

71. I have thus far discussed in this declaration a *potential* fee award to Plaintiff in this case of $277,200, if this Court were inclined to accept in full Mr. Karasik's proposed $700 per hour rate and all of his time charges submitted (less the objectionable vague time entries). I have also discussed why this potential amount would constitute more than adequate compensation to Plaintiff, even after application of the *Kerr-Johnson* factors.

72. However, what gives me considerable pause in simply recommending this sum to this Court as a reasonable fee award in this case is the very divergent fee award that the District Court made in another FACTA case, namely *Soualian*, to this same plaintiff's law firm three years ago in 2008, before the severe recession

[17] This is considered the leading treatise for attorney fee awards in California state and federal courts. I have consulted this treatise in many of my other fee expert engagements.

began affecting hourly rates and market conditions in the legal profession in California and Los Angeles.

73. Although Plaintiff in his fee motion compares the benefits obtained by the class in this case to other FACTA cases, he does not give this Court any evidence of "[*fee*] *awards* in similar cases," which is the 12th *Kerr-Johnson* factor. In the *Soualian* case, the Spiro Moss firm was awarded $95,480.94 as a reasonable fee award.

74. A striking factual distinction between *Soualian* and this case, which I found to be very significant, is revealed in the supporting declaration of Spiro Moss partner J. Mark Moore filed in the *Soualian* case in support of their fee motion in that case, which said in pertinent part:

> This was a *heavily-litigated* case. We [Spiro Moss] propounded and responded to substantial written discovery, reviewed tens of thousands of pages of documents, defended Plaintiff's deposition, deposed numerous Coffee Bean witnesses and a representative of Defendant's merchant bank, met with opposing counsel concerning case management issues, briefed a winning Rule 23(f) petition seeking review of the order denying class certification, *filed an appellate brief*, *prepared for trial* and filed numerous pretrial documents, and negotiated and secured a class settlement despite the denial of class certification, all while facing the prospect that any possibility for class recovery could be eliminated by H.R. 4008.

Declaration of J. Mark Moore in Support of (Unopposed) Motion for Award of Attorneys' Fees, Costs and Expenses, and Incentive Award, at p. 10, lines 7 - 16. (emphasis added.)

75. Not only did Spiro Moss litigate in the Ninth Circuit in *Soualian* (as they did in this case), they also litigated in the District Court virtually to the point of trial, with all the work that preparing for trial in federal court requires. Yet the Court in *Soualian* determined that a $95,480.94 fee award was reasonable, sufficient compensation for Spiro Moss' work. I am informed that Spiro Moss never appealed that fee award.

76. According to the docket that I reviewed in this case, the only "labor-intensive" attorney work by the Spiro Moss firm in this case were the following:

(a) Plaintiff filed two motions to strike Defendant's affirmative defenses in the original answer and first amended answer, respectively, which Judge Cooper granted with respect to only one of Defendant's affirmative defenses in the first amended answer, while denying the motion as to all nine other affirmative defenses. Plaintiff filed three briefs in connection with those two motions to strike. I have rarely if ever seen this kind of motion filed by any plaintiff's counsel in all my 20 years in this field;[18]

(b) Plaintiff's original motion and subsequent "renewed" motion for class certification, both of which were denied by Judge Cooper;

(c) Plaintiff/appellant's opening and reply briefs, and oral argument, on appeal to the Ninth Circuit, which produced an appellate decision that made new law in this Circuit regarding a district court's discretion to deny class certification on "superiority" grounds in a FACTA lawsuit (for which I gave Mr. Karasik and the Spiro Moss firm credit);

(d) Plaintiff's motion for preliminary approval of class action settlement; and

(e) Plaintiff's pending motion for attorney's fees.

77. Also very significant for me, Mr. Moore's declaration in *Soualian* claimed a lodestar amount for Spiro Moss in that case of only $235,000,[19] despite all of the additional work that Spiro Moss was required to do in *Soualian*. Moore declaration, at p. 10, line 7. By comparison, Plaintiff in this case claims a $297,920 lodestar for Mr. Karasik's work in a more abbreviated lawsuit (not counting the net

[18] After Plaintiff's first motion to strike with opening brief was filed, Defendant received leave of court to file a first amended answer.

[19] Mr. Moore (a 1995 California admittee) sought a $500 per hour rate. A midlevel-associate sought $350 per hour for assisting Mr. Moore. Mr. Moore billed twice as many hours on the case as his associate.

reduction that I have recommended above for overly-vague time entries).

78. In the final analysis, and based on all of the facts and evidence that I consulted, considered and discussed in this declaration, in my opinion a reasonable fee award that would adequately compensate Plaintiff in this case after a lodestar calculation *and* after taking into account all of the *Kerr-Johnson* factors would be between $150,000 and $200,000.

I declare under penalty of perjury under the laws of the United States of America that the contents of this declaration are true and correct, and that this declaration was executed by me on July 5, 2011, in Sammamish, Washington.

Kenneth Moscaret

EXHIBIT A

JAMS

THE RESOLUTION EXPERTS

October 24, 2005

Kenneth Moscaret, Esq.
Moscaret Consulting
2240 275th Ct., S.E.
Sammamish, WA 98075

Dear Ken:

On behalf of the JAMS Institute, please accept my sincerest thanks for your October 20 CADRE presentation on Resolving Complex Attorney Fee Disputes.

The multi-site format of the program allowed us to reach JAMS Panelists throughout California, many of whom, as you know, handle cases involving fee disputes on a regular basis. We have already received a good deal of positive feedback on the presentation from participants around the state, and expect that a number of them will be contacting you with additional questions and inquiries.

The JAMS Institute was originally established to demonstrate JAMS' commitment to continuing education for its neutrals. By bringing in new ideas and fresh perspectives on the work we do, you have made an invaluable contribution to our role as the "Resolution Experts".

Thank you again.

Sincerely,

Jay Folberg
Executive Director, JAMS Institute

TWO EMBARCADERO CENTER SUITE 1100 SAN FRANCISCO, CA 94111 TEL 415-982-5267 FAX 415-982-5287

EXHIBIT B

Name Of Listed Large L.A. Law Firms	***Partner Rates 2008***	***Associate Rates 2008***	***Partner Rates 2009***[1]	***Associate Rates 2009***	***Partner Rates 2010***	***Associate Rates 2010***
Loeb & Loeb	L.A. Office - NOT REPORTED	L.A. Office - NOT REPORTED	L.A. Office - NOT REPORTED	L.A. Office - NOT REPORTED	L.A. Office - NOT REPORTED	L.A. Office - NOT REPORTED
Manatt, Phelps & Phillips	\$495 - \$850 (partners)	\$290 - \$505 (associates)	\$495 - \$850 (partners) NO CHANGE REPORTED FROM 2008	\$290 - \$505 (associates) NO CHANGE REPORTED FROM 2008	\$525 - \$850 (partners)	\$200 - \$525 (associates)
Sheppard, Mullin, Richter & Hampton	\$475 - \$795 (partners)	\$275 - \$455 (associates)	\$495 - \$715 (partners)	\$285 - \$525 (associates)	\$495 - \$820 (partners)	\$270 - \$620 (associates)
Buchalter Nemer	\$260 - \$600 (partners)	\$225 - \$450 (associates)	\$270 - \$625 (partners)	\$195 - \$430 (associates)	\$270 - \$625 (partners) NO CHANGE REPORTED FROM 2009	\$195 - \$450 (associates)

[1] Some large law firms essentially "froze' their hourly rates in 2009 in the face of the severe U.S. economic recession.

EXHIBIT C

1/24/2007	1.5	legal research
1/25/2007	1.0	legal research
1/29/2007	1.4	legal research
2/1/2007	2.6	legal research
2/2/2007	1.2	legal research
2/6/2007	1.0	legal research
3/7/2007	0.5	legal research
3/12/2007	2.0	legal research
3/26/2007	2.3	legal research
4/20/2007	0.5	legal research
5/3/2007	1.7	legal research
5/9/2007	1.0	legal research
5/9/2007	1.0	legal research
8/10/2007	0.5	legal research
8/28/2007	0.5	legal research
9/28/2007	0.4	legal research
10/1/2007	0.5	legal research
10/2/2007	0.5	legal research
11/9/2007	1.0	legal research
11/12/2007	1.0	legal research
11/13/2007	1.5	legal research
11/16/2007	1.0	legal research
8/27/2008	1.2	legal research
3/4/2010	0.5	legal research
3/5/2010	0.4	legal research
4/1/2010	1.7	legal research
9/23/2010	0.6	legal research
11/19/2010	0.6	legal research
	29.6	

EXHIBIT D

ARBITRATION ADVISORY

03-01

DETECTING ATTORNEY BILL PADDING

January 29, 2003

QUESTION PRESENTED:

When an attorney's invoice overstates the amount of time required for work performed, it is called bill "padding." If a lawyer charges for services on an hourly basis how can an arbitrator evaluate the invoices for possible bill padding? This advisory explores the question of how an arbitrator may identify bill padding and determine a reasonable fee in such circumstances.

INTRODUCTION

Most bills are a collection of a great many estimates of time spent for work performed in the privacy of a lawyer's office. Accordingly, it is usually true that one cannot challenge most of these estimates with mathematical precision. Overall, arbitrators should look at three things:

A. Evaluate the team/staffing used on the matter,
B. Evaluate the work performed against the time billed, and
C. Look for certain patterns in the form of the work descriptions.

DISCUSSION

Rules and observations about determining reasonable attorney's fees in general are addressed in Arbitration Advisories 95-02 (June 9, 1995) and 98-03 (June 23, 1998). This advisory focuses on a subset of that topic: when too much time is recorded for the individual units of work performed, generally known as bill "padding". In order to understand the likely areas to look for such problems, it is useful to consider the historical background of attorney's professional fees [See American Bar Association Commission on Billable Hours Report (August, 2002) referred to hereinafter as "ABA Report" (See http://www.abanet.org/].

Historically, lawyers routinely billed clients in flat sums or fixed amounts - often at the conclusion of the matter. This required some estimating and discretion on the part of counsel. A bill often read something like this: "Fee for services rendered, $ 750.00."

Clients sometimes paid their bills six months or a year after receipt of the invoice, which reflected services performed long before it was sent.

In Gisbrecht v. Barnhart [Gisbrecht v. Barnhart, 535 U.S. 789 (2002)] the Supreme Court wrote:

> ". . . . An American Bar Association (ABA) report, published in 1958, observed that attorneys' earnings had failed to keep pace with the rate of inflation; the report urged attorneys to record the hours spent on each case in order to ensure that fees ultimately charged afforded reasonable compensation for counsels' efforts. See Special Committee on Economics of Law Practice, The 1958 Lawyer and His 1938 Dollar 9-10 (reprint 1959).
>
> Hourly records initially provided only an internal accounting check. See Honest Hour 19. The fees actually charged might be determined under any number of methods: the annual retainer, the fee-for-service method, the "eyeball" method under which the attorney estimated an annual fee for regular clients, or the contingent-fee method, recognized by this Court in Stanton v. Embrey, 93 U. S. 548, 556 (1877), and formally approved by the ABA in 1908. See Honest Hour [W. Ross, The Honest Hour: The Ethics of Time-Based Billing by Attorneys (1996),13-19]. As it became standard accounting practice to record hours spent on a client's matter, attorneys increasingly realized that billing by hours devoted to a case was administratively convenient; moreover, as an objective measure of a lawyer's labor, hourly billing was readily impartable to the client. Id., at 18. By the early 1970's, the practice of hourly billing had become widespread. See id., at 19, 21."

Over the decades, federal and state courts have developed vast experience in evaluating requests for fees calculated on the basis of units of time at hourly rates. This process is called the "lodestar" method. The number of hours reasonably devoted to each case is multiplied by an amount determined to be a reasonable hourly rate. The time involved in many lodestar matters is often hundreds, perhaps thousands of hours of time, and evaluating such a request can be a vexing, complicated process even for courts experienced in such matters. Once the lodestar amount is determined it is presumed thereafter to be the reasonable fee, although the amount can sometimes be adjusted upwards or downwards for 12 reasons or factors [See Kerr v. Screen Extras Guild, Inc. 526 F.2d 67, 70 (9th Cir. 1975)]. This advisory is not concerned with these adjustments but with evaluating the lodestar for fees for services which have been rendered by a law firm to its client on an hourly basis and with a specific focus on whether or not there has been "padding" or "heavy pencil" time estimates in the bill.

In the now-standard chronological legal bill, almost all time is (or can be, if requested) shown by day and by timekeeper. If a lawyer or other timekeeper does several things in one day on a particular matter then he or she must decide how to describe this work and how much time to enter for the work. This can be done for the batch of things done as a total or for each element within the batch. The use of only one total time is called "block billing" or "lumping" and it is not a favored practice. Many sophisticated users of legal services and many courts specifically prohibit block billing, and in evaluating the appropriateness of charges for legal services it may be appropriate - even essential in some cases - to write off time and fees to account for this practice.

An arbitrator's review of legal bills should include an inquiry into the method and timing used to prepare the bills in order to form an opinion as to the accuracy of the data shown by the bills. Some attorneys, particularly solo practitioners and very small firms, still use word processing programs to generate bills but most mid-size and larger firms use billing programs for this function. Many time and billing software programs in use today have a timer feature that allows one to input "start" and "stop" commands for one or more matters. The program then automatically calculates the elapsed time for each procedure in the same manner as a stopwatch. This feature is cumbersome and very rarely used by timekeepers, due in part to the nature of the way timekeepers devote their time to various matters during a typical day. Telephone calls, voice-mails, e-mails, faxes, couriers, mail, colleagues, sudden inspiration, etc., interrupt and require instant attention to another matter. Sometimes two or more things are happening at the same time, and there is no way to have a timekeeper keep track of these events and the time involved for each event will have to be estimated and written or entered manually for each task.

Many lawyers no longer write out what they do by hand on paper time sheets but input their work descriptions directly into computers. These can usually be identified because they are often longer and more detailed. For example, if an entry in an invoice reads: "meeting with client to discuss the elements of the separate statement of facts and the source of evidence for each element (1.8); research new opinion on the presumptions and burden of proof under Festo and progeny (2.5)" [Example 1], this is likely (but not necessarily) something actually entered into the program by the lawyer. On the other hand, the briefer description for the same work of: "meeting with client re MSJ; research burden of proof (4.3)" [Example 2] is probably something written in longhand and then transcribed into the billing program. Some lawyers still do not use billing programs but generate their bills by word processing programs or even on hand-written slips of carbon paper designed for this use. It is not the format of the bill but the information provided which is important. Full and complete hand-written descriptions are fine, but these are now very rare.

While it is almost universally acknowledged that contemporaneous records are the best practice, many times the press of business is such that a day or two (or more) goes by without the timekeeper entering any times. Sometimes a month may pass without any entries. Rarely *years* go by without any entries! At some point a bill needs to be generated and the timekeeper is faced with the need to reconstruct what happened a day or two or a month ago (or a year ago) with great precision. The time will be turned in or reconstructed and the invoices may appear to be very precise, with exact times noted for each activity, but this surface appearance of accuracy is deceptive and the time recorded is subject to re-evaluation by the arbitrator. When reading the bill it is very important to remember that in the vast majority of cases each time entry in a lawyer's bill is merely an estimate of how much time was required for the work performed that is being described in a summary fashion.

Since the entry for time spent is done by the individual timekeeper with no one watching, and because the ascribing of time is sometimes a very subjective thing which must be done with some care, it is up to the timekeeper to exercise judgment in making these estimates. Once the time is entered it is not final, however. It is customary for larger law firms to have a draft of the bill circulated to the partner in charge of billing on the matter. These are often called "pre-bills" which are edited for errors and the time is written up or down in an exercise of what is called "billing judgment" by the billing partner (who may or may not be the lawyer actually working on the file) who originated the case for the firm. Pre-bills have the raw data and often have cumulative totals as well. After the pre-bill is revised it becomes the invoice. The client may or may not ever know about this process. The final bill may or may not have some entries that read "no charge". Following this process, the final bill is sent out to the client, with or without an explanatory letter. Many times the pre-bills are not carefully reviewed by the billing partner for a number of reasons, including the fact that most billing partners are very busy and do not have or want to allocate the time to check each bill carefully, the entries may be for timekeepers who are not readily available, and the billing partner may have a huge stack of pre-bills to go through and only a short time to do so since the firm wants to "get the bills out".

It is just about impossible to be certain that any one single time entry is wrong or faked or padded. "The 'perfect crime' [is the] padding of bills…" [W. Ross, <u>the Honest Hour: The Ethics of Time Based Billing by Attorneys</u> 2 (1996)]. If, in Example 1 above, the client is certain that the meeting required only 30 minutes (with no travel time), then perhaps one could question the entry of 1.8 hours. But how can one prove that the time for, say, a specific letter was really 12 minutes rather than 30? If the time is block-billed and one does not even know how much time is being claimed for the letter, then what? Look at the totality of the data and consider the following three methods.

THE THREE APPROACHES TO IDENTIFYING PADDING

Assuming that one is presented with a group of invoices that seem to be (or are claimed to be) too high, and assuming that one suspects that some irregularity might be present, how can one evaluate these invoices for padding? There are three ways: (1) examine the staffing; (2) quantify and evaluate the reasonableness of the time spent on specific tasks or for major specific items; and (3) look at the format of the bills.

A. Examine Staffing. Invoices should indicate the names of the timekeepers.

It is customary to show the hours and fees billed by timekeepers by invoice and sometimes also cumulatively for the life of the matter. Examine these invoices and make a list of timekeepers and their hours per invoice. Do many come and go from invoice to invoice? If there are many timekeepers on a matter then one should focus on the ones who are more likely to have been using what is called a "heavy pencil" in recording their time. Who in the firm is the most likely to pad the bill?

The least experienced lawyers are called "associates". They are employees of the firm and are paid a salary and sometimes a bonus for billing high hours in a year. Many firms pay bonuses if associates bill about 2,000 to 2,420 hours in a year. Try to ascertain the plan in effect for the particular case and be aware that some firms will allow an associate to elect a particular plan. Base salary is tied to a certain minimum, and an associate may get a bonus for meeting specified "billables". New associates are often not efficient but they need to record as many hours as they can to meet their targets. The matters they work on are usually ones where they have no direct relationship with the client. New associates are most likely to be under great pressure to bill very high hours. If they have not developed the discipline to record their times daily, some time may go by before the associate enters the work description and time. Some will give in to the temptation to guess and to exaggerate in order to meet the demands on them, anticipating that it will be at least a month and maybe longer before anyone questions the time. Be observant for elastic phrases to describe what they did in a way which is easy to justify or at least hard to disprove. Phrases such as "review documents produced by counsel, 8.0 hours", "discovery, 6.0 hours", "prepare for trial 9.0 hours", etc., should trigger suspicion. Scrutinize newer associates' times first. The fewer the years of practice, the higher the probability of padding. The <u>ABA Commission on Billable Hours Report</u> recognizes that hourly billing penalizes efficient and productive lawyers and "may allow, indeed may encourage, profligate work habits" [ABA Commission on Billable Hours Report (August, 2002), at pages 6 - 8].

It is also generally accepted that the more timekeepers on a case, the higher the bill will be. Pay particular attention to time recorded by newer associates who record time on the matter only briefly, such as one or two months.

B. Measure some or all of the work produced by the law firm against the hours claimed. Evaluate this for a range of reasonableness.

What were the major items of work performed? How many hours were recorded for this work? How many timekeepers were involved? What did they do? Did they duplicate each other's work? Was some of this "training" time for new lawyers? Was the client given an estimate or a budget? An "estimate" is not binding. A budget is supposed to be accurate and binding but subject to revision if circumstances change and the client is promptly informed.

Major tasks. One may need to quantify the time first. It may be possible to calculate how much time was billed for certain major tasks and then to look at the work product to see if the time falls into a range that appears reasonable. This can be hard to do without some experience in the particular legal area involved.

While the times-by-task can be hard to assemble, sometimes the bills themselves will have guides to that information within them if the firm employs what are called the "Uniform Task-Based Management System" (or Codes) published by the American Bar Association. Task-based billing codes are in fairly wide use but are not standard and there is some debate over their usefulness. For example, one may know that certain hours were recorded for "L240 - Motions For Judgment" but not how many hours were shown for a specific Motion for Summary Adjudication.

The ABA Task Codes assign litigation time within 5 groups: case assessment, pre-trial, discovery, trial and appeal. There are also 11 optional Activities Codes (such as "A106 - Communication (with client)" which may be used within each of these 5 groups in the Litigation Code Set.

In Example 1 above, for example, the time billed for meeting with the client to prepare the statement of facts would show the codes "L240" / "A106" in or right after the descriptions of the activities and the totals for these things would (or could) appear on the bill. Once the ABA key is in hand, this will help to break down the time and fees into broad tasks, which may be useful information. Once it is known that a motion for summary judgment required many hours of several timekeepers' time, one can then come to a conclusion or ask for an explanation of whether or not the time spent on this particular task is reasonable.

Documents. There often is a good deal of time shown for "reviewing documents" ("L320 - Document Production") in many litigation matters. First, ascertain how many document pages were produced or reviewed. This is sometimes stated in terms of "boxes" which is a standard file storage box normally holding anywhere from 2,000 to 3,500 pages of documents, depending on how tightly they are packed. Some courts and commentators mention 2,500 as the average number of pages per box. Ask how many timekeepers reviewed the documents and how long did it took. A general rule of thumb commonly used by experts in billing analysis is that it will take a lawyer about 8 hours to review a box of relevant documents. It might also require a paralegal's help at about 4 hours per box. This can vary widely depending on the type of documents and their importance and repetitiveness.

C. Examine the format of the invoices for patterns that suggest padding.

1. Formula billing

Every single piece of paper gets a time entry as it wends its way past the timekeeper to its destination. It does not take more than a few seconds to read most routine correspondence. If the timekeeper reads a group of documents in a minute or two and then records a minimum time for each document, this may ultimately increase the time by several hours. Look for multiple timekeepers reading the same documents.

2. High minimum increments

The standard minimum is 1/10th of an hour or 6 minutes. If a higher minimum is used, such as .25 or .5, this probably increases the time by 15% to 25%. Some courts have criticized the use of a .25 or 1/4 hour minimum as being too high.

3. Time estimates

If the bills show hours in even numbers such as 8.0, 9.0, or 10.0, these are probably estimates rather than actual time spent and should be investigated.

4. Block billing

If one amount of time is shown for working on more than one discrete task, this is called “block billing” or “lumping” time. This is almost never allowed by federal courts. The practice hides accountability and may increase time by 10% to 30%. The larger the “block”, the more care should be exercised.

5. Standardized work descriptions

If one sees the exact same phrases used again and again in the bills, it is likely that some routine has set in and this allows some “down time” to find it way into the bills. An entry such as “review documents produced by opposition, 7.5 hours” is typical.

6. Lack of detail

“Research issues”, “attention to file”, “discovery”, “prepare for trial”, and similar statements are not specific enough to let the reader know what was done.

7. Wrong times

Sometimes a client knows that certain things took less time than was billed such as the meeting in Example 1, above. Perhaps other meetings were for known times or can be checked. Deposition transcripts usually have start and end times and can be checked against billing invoices.

8. Timeliness of invoices

Was the invoice prepared at or near the time when the services were provided? As noted above, if too much time has elapsed between the event and generating the invoice, the times shown might be estimates or best guesses of the time involved. On the other hand, it is possible that the timekeeper recorded his or her time contemporaneously but did not generate the invoice for some reason. The responsible attorney should be questioned about this.

9. Experts and outside investigators

Outside vendors such as experts or investigators should submit invoices that set out what they did with adequate detail. Representations or proof that these charges have actually been paid should also be produced.

10. Computer Assisted Legal Research ("CALR")

Firms such as Lexis-Nexis and Westlaw may offer "pro-forma" invoices which are not the actual charges to the firm. The actual net amounts paid by the firm should be determined.

11. Overhead items

Some charges such as telephone, facsimile, internet fees, extranet costs, office supplies, library charges, seminars, continuing legal education charges, and perhaps even basic CALR are really part of the cost of doing business and should be reflected in the professionals' hourly rates. These should not be passed on to the client unless the client has clearly agreed otherwise.

CONCLUSION

The vast majority of lawyers are honest and their bills are reliable statements of what was done. However, the economic pressure on lawyers and firms is enormous, continuous, and irrefutable. Some few timekeepers will pad the bill by inserting extra hours from time to time, and the cumulative effect of this practice can be very significant. Arbitrators should examine each case appropriately by: (1) examining the staffing, (2) quantifying and evaluating the time spent on major items of work, and (3) evaluating the form or pattern of the invoices for padding.