

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

MINNESOTA SUPPLY COMPANY,

Civil No. 99-832 (JRT/FLN)

Plaintiff,

v.

**MEMORANDUM OPINION
AND ORDER ON PLAINTIFF'S
MOTION FOR ATTORNEY FEES
AND COSTS**

THE RAYMOND CORPORATION,

Defendant.

Gary W. Leydig, WORKER, SITKO & HOFFMAN, LLC, 150 North Wacker Drive, Suite 3100, Chicago, IL 60606; and David M. Jaffee, LEONARD STREET AND DEINARD, 150 South Fifth, Suite 2300, Minneapolis, MN 55402, for plaintiff.

John Edward Connelly, FAEGRE & BENSON, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402; and James B. Niehaus and Jay R. Carson, FRANTZ WARD, 55 Public Square, 19th Floor, Cleveland, OH 44113, for defendant.

Plaintiff Minnesota Supply Company (“Minnesota Supply”) prevailed in a jury trial in this case based on violations of the Minnesota Heavy and Utility Equipment Manufacturers and Dealers Act (“the Act”). Plaintiff requests attorney fees and costs, as provided by the Act. Minn. Stat. § 324E.0684. Defendant agrees that the Act allows reasonable attorney fees and costs to the prevailing party, but argues that the requested fees and costs are not reasonable. The Court has reviewed each line of Minnesota

Supply's submissions, and for the reasons discussed below, awards plaintiff the sum of \$748,593.27 for actual costs and reasonable attorney fees.

ANALYSIS

A prevailing plaintiff in a lawsuit brought pursuant to the Minnesota Heavy Utility Equipment Manufacturer's and Dealers Act is entitled to "actual costs of the action, including reasonable attorneys' fees." Minn. Stat. § 325E.0684. There is no question that plaintiff is the prevailing party in this dispute; in fact, plaintiff prevailed on each theory that was presented to the jury.

I. ATTORNEY FEES

A. The Lodestar Calculation

An award of attorney's fees to a prevailing party must be "reasonable." Minn. Stat. § 325E.0684; *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Hughes v. Sinclair Marketing, Inc.*, 375 N.W.2d 875, 879-80 (Minn. Ct. App. 1985). The starting point in determining a "reasonable fee" is arrived at by calculating "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. This figure, commonly referred to as the "lodestar" measure, is presumed to be reasonable. *City of Riverside v. Santos, Rivera*, 477 U.S. 561, 568 (1986). However, "[t]he product of reasonable hours times a reasonable rate does not end the inquiry." *Hensley*, 461 U.S. at 434. A court must take other factors into consideration, including the important factor of the results obtained in light of the plaintiff's litigation objectives. *Id.* Minnesota courts also consider the complexity of the

litigation, the time commitment required, delay in recovery, public policy, and the quality of the representation. *Hughes*, 375 N.W.2d at 879. Consideration of such factors may lead a court to adjust the fee upward or downward from the lodestar figure. *Hensley*, 461 U.S. at 434.

B. Reasonable Hourly Rates

Plaintiff's attorneys have submitted affidavits and exhibits to the Court documenting the hours expended in litigating this matter and the billing rates for these services. Attorney Leydig suggests that fees charged by Leydig and attorneys at his law firm were significantly below market rates. Plaintiff was charged a fee of \$195 to \$265 per hour for time expended by Gary W. Leydig, the senior attorney in the case. Mr. Leydig has practiced law for over twenty years; he has been a partner in two Chicago law firms, and is now of counsel to the Chicago firm, Worker, Sitko & Hoffman. Rates for work performed by associates at Worker, Sitko & Hoffman was as follows: Lawrence B. Hirsh, \$145 per hour; Kaci L. Barnes (Holguin), \$150 per hour; Louis P. Svendsen, \$195 per hour; Ronda L. Lee, from \$95 to \$165 per hour; Mary K. Cryar, \$95 per hour; and Stanley F. Orszula, \$140 per hour. The rate charged for work done by paralegal Kimberly T. Seminara was \$65 per hour.

Plaintiff was assisted by local counsel, first by attorneys and staff at the firm of Mahoney, Dougherty and Mahoney and then by attorneys and staff at the firm of Leonard, Street and Deinard. Mark J. Manderfeld, a partner at Mahoney, Dougherty and Mahoney, charged a rate of \$150 per hour. Paul Darsow and Sonya Walters charged a

rate of \$60 per hour, which was also the rate for a legal assistant. Victor E. Lund charged \$120 per hour, and a rate of \$70 per hour applied to work performed by Jodi L. Rogers.

The participating attorneys and staff at Leonard, Street and Deinard included Robert P. Thavis, at \$305 to \$320 an hour; David M. Jaffee at \$185 to \$195 per hour; Robert L. DeMay at \$310 per hour; Tracey Holmes-Donesky at \$155 to \$165 per hour; Julie A. Lust at \$125 to \$140 per hour; Bradley J. Gillan at \$330 per hour; Thomas P. Sanders at \$320 per hour; Abigail J. Mayer at \$85 per hour; Stephen M. Quinlivan at \$325 per hour; Jennifer Wilson at \$190 per hour; Diane Hilleman at \$140 per hour; Catherine Bass at \$125 per hour; Arthur Boylan at \$110 per hour and Ethan Mark at \$110 per hour.

Upon review of the evidence submitted by plaintiff and based on the affidavits submitted, the Court finds that the hourly rates charged by plaintiff's counsel and litigation assistants are reasonable. Moreover, defendant does not focus on the reasonableness of the hourly rate of any particular attorney or staff member. Instead, defendant argues that the fee request contains vague entries, unreasonable charges, redactions,¹ unnecessary expenses, and charges for matters not properly billable.

¹ Minnesota Supply has provided copies of the redacted documents for the Court's *in camera* review.

C. Hours Billed

Plaintiff seeks to recover fees for 3,267.95 total hours expended by attorneys, law clerks and legal assistants in this litigation. As noted above, defendant claims that a reduction is necessary because plaintiff's billing records are vague; contain unreasonable and unnecessary charges, and contain charges for matters that are not properly billable.

In *Hensley*, the Supreme Court recognized that inadequate documentation of hours is an appropriate basis for reducing a plaintiff's fee award. *Hensley*, 451 U.S. at 433-34 ("The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); see also *Transclearn Corp. v. Bridgewood Servs., Inc.*, 134 F. Supp. 2d 1049, 1052 (D. Minn. 2001). The Court acknowledged, however, that minute details are not required, stating, "plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Id.* at 437 n.12.

Upon reviewing the time records submitted by plaintiff's attorneys, the Court finds that, for the most part, they are sufficiently specific. The majority of the time entries contained in the billing records state the nature of the tasks performed, who performed

them and their general subject matter. The Court does not find that a more exacting degree of detail was necessary in order to consider whether hours claimed are excessive.²

Nonetheless, the Court agrees with defendant that a reduction for some of the hours and fees is necessary. First, the Court reduces the award for time spent requesting an extension. The Eighth Circuit has expressly noted that “it is not reasonable for the [defendant] to pay for . . . delays” related to requests for extensions of time, and requests for continuances. *Steele v. Van Buren Public School Dist.*, 845 F.2d 1492, 1496 (8th Cir. 1988). *See also Summerville v. Trans World Airlines, Inc.*, 1999 WL 33134345, at *4 (E.D. Mo. Sept. 28, 1999) (noting “Plaintiff requested fees for the time attorneys spent in obtaining extensions of time. The Eighth Circuit has ruled that it is unreasonable for the opposing side to bear the costs of such activity.”). Here, entries from 6/18/01 to 6/22/01 relate to a motion for an extension. Mr. Leydig spent 3.45 hours, at \$215.00 per hour on the motion for an extension. According, the Court reduces the award by \$741.75. In addition, local counsel dedicated a total of 2 hours at \$185.00 an hour and .25 hours at \$305 an hour preparing a motion to extend (entries dated 3/18/02; 4/1/02; 4/3/02; 4/15/02;), and the Court excises \$446.25 from the fee award.

² Although the Court finds the records adequately detailed, the Court is disturbed by the compound nature of many of the entries. As other courts have discussed, the problem with entries containing numerous tasks is that the Court has a difficult time determining how much time was spent on any one of the tasks listed. Indeed, some courts have reduced total fee requests by as much as 30% on this basis. *See Hensley*, 461 U.S. at 433; *Brown v. Smythe*, 1993 WL 481543 (E.D. Pa. Nov. 18, 1993) (citing *Hensley*). While the Court does not find such an overall reduction necessary in this case, the Court has reduced some compound entries, as discussed below.

The Court also finds unreasonable a portion of Mr. Leydig's entry dated 12/10/01, during which he "observe[d] Judge Tunheim's court room proceedings." This entry is not specific in explaining what Mr. Leydig was observing, and observing for general background on trial procedure is not properly chargeable. Because this entry contains numerous other items, the Court will reduce the award by one hour, which amounts to a reduction of \$235.00. Next, the Court finds either a redundant, or excessive time entry on 03/04/02 and 03/05/02 when Ms. Holguin spent 7.5 hours (at \$150 per hour) researching "argument of law in opening statement." The Court finds that 4 hours is a reasonable amount of time for what appears to be a basic research project. The award is therefore reduced by \$525.00. Similarly, Ms. Holguin spent 13.25 hours (at \$150 per hour) researching "instructions to jury at Commencement of case."³ Again, the Court finds this task should have been accomplished in less time, and the Court reduces the award by \$1,387.50.⁴ The Court also finds excessive the amount of time spent dedicated to whether Bette Star's memorandum was admissible. Although the Court understands that the issue was important to plaintiff's trial strategy, 12 hours is unreasonable, and the Court reduces it by half for a total reduction of \$570.

³ The Court notes that both research tasks might have involved more complicated issues of law, and therefore the time spent might have been justified. However, based on what is reported in the billing records, the number of hours billed appears unreasonable.

⁴ Specifically, the Court finds that 4 hours would have been reasonable for this project, and therefore reduces the award by 9.25 hours x \$150 = \$1,387.50.

The Court reduces the award for time billed by Mr. Leydig “survey[ing] hotels for trial support” entered on 9/24/02. This particular billing record contains numerous tasks, so the Court reduces the award by \$470.00, which is a reasonable estimate of the time spent on this task.

The Court finds that Mr. Leydig billed at his trial rate for tasks that, based on the description in the billing record, are more properly assigned to an associate or litigation assistant. In particular, a time entry for 5/19/03 includes time spent “set[ting] up office at Leonard, Street & Deinard”; and entries on 6/6/03, 6/19/03 and 6/20/03 contain time spent packing up to return to Minnesota and similarly, organizing materials for return to Chicago. As to the 5/19/03 entry, the Court assumes that two hours of the ten reflected in the billing entry related to setting up the office. This task could have been performed at a lower rate, and reduces the award by \$290.00.⁵ The eight-hour 6/06/03 entry containing “pack up for return to Minnesota” also contains “Further work on Timothy Koval direct; review of pertinent exhibits; pack up for return to Minnesota.” The Court assumes one hour was spent packing up, and reduces the award by \$145.⁶ The eight-hour entry on 6/19/03 contains time for appearing in Court regarding jury questions and the reading of the verdict. These properly billed activities did not take up more than two hours. Of the remaining six hours, only approximately four are fairly attributable to organizing

⁵ The Court reached this reduction as follows: Original charge was 2 hours x \$265 per hour = \$530. Reasonable rate would have been \$120 (the rate charged by litigation assistant Julie Lust) x 2 hours = \$240. \$530 - \$240 = \$290.

⁶ Original charge one hour at \$265 reduced to one hour at \$120 for reduction by \$145.

materials (which will be reduced from \$265 per hour to \$120 per hour). The remaining two hours will be excluded. The entry from 6/19/03 is therefore reduced by a total of \$1,110.00. Similarly, the eight-hour entry on 6/20/03 includes time spent organizing materials, traveling to Chicago, and time for a conference with Mark Olson. The Court assumes travel to Chicago encompassed four hours, and the conference with Olson two hours. The remaining two hours spent organizing material is properly billed at \$120 (rather than \$265), and the 6/20/03 entry therefore will be reduced by \$290.00.

The Court will next address defendant's contention that local counsel was unnecessary, and any charges by local counsel were necessarily redundant or unreasonable. Affiliation with local counsel is required under the Court's Local Rules. Nonetheless, it is not necessary for local counsel to be present at every stage of the litigation. In this case, local counsel for plaintiff was present only a handful of times over the course of the litigation. To be entitled to fees charged by local counsel, plaintiff must establish that no duplication of effort has occurred.⁷ *Ford Motor Co. v. B&H Supply, Inc.*, 1987 WL 59519, *4 (D. Minn. April 13, 1987) (citing *Fuddrucker's, Inc. v. Doc's B.R. Others, Inc.*, 623 F. Supp. 21, 24-25 (D. Ariz. 1985)). After reviewing the documentation submitted, the Court finds little duplication of effort, and finds that on the whole, plaintiff made efficient and appropriate use of local counsel.

Although most of the local counsel fees are appropriate, the Court makes the following adjustments. Plaintiff engaged different local counsel part way through the

⁷ Of course, local counsel fees are also subject to the reasonableness requirement.

litigation. While there is certainly nothing inappropriate about such substitution, the Court will not award fees for the time it took the new local counsel to familiarize itself with the background of the litigation or to prepare the substitution of counsel material. The Court reduces the award by \$948.50.⁸ The Court will reduce the fee award further for time spent by local counsel in “office conferences” in those instances where the subject of the office conference was insufficiently detailed and where the Court finds the office conference was redundant or took an unreasonable amount of time for the stated purpose of the conference. The Court finds such entries on 9/24/02⁹ totaling \$1,471.25 which will be reduced by half, or \$735.62. Similarly, on 2/05/03, both Mr. Jaffe and Mr. Thavis conferenced with Mr. Leydig regarding trial subpoenas; while it is not unreasonable to confer with local counsel, it is not necessary to have two local attorneys to address the same issue. The Court reduces the award by \$97.50, the amount of time Mr. Jaffe spent on the conference.

The Court next addresses defendant’s argument that plaintiff is not entitled to recover fees for issues on which plaintiff did not prevail at trial. In *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), the United States Supreme Court held that “[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful

⁸ The Court reaches this amount by reducing by half the entries of Mr. Thavis and Mr. Jaffe from 1/15/02; 1/21/02; 1/22/02; 1/23/02 (2 entries). Each entry contained more than one task, and the Court assumes that half of the time is reasonably attributable to the improperly charged items.

⁹ Entries by Mr. Jaffe; Mr. Thavis and Ms. Donesky.

claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee.” Defendant’s argument takes this well-established holding one step further—suggesting, for example, that because not all of plaintiff’s motions *in limine* were granted, the time spent preparing and arguing the motions *in limine* should be written off.¹⁰ *Hensley* dealt with the situation in which “a plaintiff . . . present[s] in one lawsuit distinctly different claims for relief that are based on different facts and legal theories.” *Id.* at 434. *Hensley* is applied, for example, where a plaintiff brings a claim of discrimination under Title VII, as well as tort claims for emotional distress. If the plaintiff prevails on the Title VII claim, he is not necessarily entitled to fees expended preparing and litigating the common law claim. However, the fees expended on common law claims are not automatically disallowed. The *Hensley* Court continued:

In other cases the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id. at 435.

This is not a case in which unrelated claims were pursued, and plaintiff prevailed on only one theory. Instead, plaintiff prevailed on each claim presented to the jury. To be sure, plaintiff did not prevail on every objection and argument, but this case is not akin

¹⁰ The ultimate result of defendant’s suggested approach would require the Court to recall all the objections made at trial, and write off the two or three minutes spent by plaintiff arguing, for example, an unsuccessful hearsay objection.

to the “typical” *Hensley* situation, in which the Court can readily discount fees spent pursuing an unsuccessful claim. The Court will not discount plaintiff’s fees on this basis.

Finally, the Court addresses plaintiff’s argument for a 30% enhancement for excellent results. “Success multipliers” are allowed in exceptional circumstances where the hourly rate does not accurately reflect the quality of service rendered, or where other unusual circumstances justify an increase in counsel’s fees. *See Blum v. Stenson*, 465 U.S. 886, 889 (1984); *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991) (reversing enhancement of 25% and noting that “enhancement is reserved for ‘rare’ and ‘exceptional’ cases, and must be supported by specific evidence in the record and detailed findings by the lower court.”). In this case, counsel for plaintiff argues for a significant fee enhancement for several reasons. For example, plaintiff argues that these cases are complex and require years of intense activity to bring to fruition, therefore to allow dealer-plaintiffs to pursue claims at all, it is necessary to discount rates that would be charged to a regular, commercial client. The Court is not persuaded by this argument. First, plaintiff in this instance did not make any showing of dire financial straits. There is no indication that the case was handled on a contingent basis; indeed, billing records reflect timely, and significant, payments by plaintiff Minnesota Supply. Further, many, if not most, lawsuits brought in federal court are complex and involve years of effort. *See, e.g., Defenders of Wildlife v. Administrator, E.P.A.*, 700 F. Supp. 1028, 1031 (D. Minn. 1988) (“The willingness of able counsel to undertake complex litigation does not alone warrant enhancement.”). The Court will not award an enhancement based on plaintiff’s argument that his rates were significantly discounted. The rate charged by first-chair

Mr. Leydig was well within the bounds of reasonable hourly rates for attorneys in this area. Although Mr. Leydig points out that his rate in this matter was lower than the rates charged by Leonard, Street and Deinard attorneys, the Court observes that it was higher than the rates charged by the first local counsel, Mahoney, Dougherty and Mahoney.

The Court also rejects as a justification for enhancement plaintiff's argument that defendant's unreasonable litigation position necessitated additional costs and fees. Such fees and costs are already included in the lodestar, as hours billed for work on the particular issues that plaintiff maintains were unreasonable.

II. COSTS

The Act provides that a plaintiff is entitled to reasonable costs. Minn. Stat. § 325E.0684. Plaintiff has submitted a request for actual costs in support of its petition totaling \$179,613.56. Of this amount \$121,034.89 is for the expert witness fees and actual costs of Frederic Lieber. As with other statutes awarding costs to the prevailing party, the standard for the award of costs is one of reasonableness. *Id.*; *Wadena Implement Co. v. Deere & Co., Inc.*, 480 N.W.2d 383, (Minn. Ct. App. 1992); *see also Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 338 (Minn. Ct. App. 1991) (in products liability action explaining that the trial court should only award those costs and disbursements which are "reasonable and necessary"). The Court notes that plaintiff's request is made pursuant to the Minnesota Heavy Utility and Equipment Manufacturers and Dealers Act, and is not a bill of costs, as allowed by 28 U.S.C. § 1920.

Because this award of costs is made pursuant to Minnesota Statute, and not § 1920, the Court must determine what is properly included in the “actual costs” authorized by the statute. Minn. Stat. §325E.0684. Citing Wisconsin cases, plaintiff argues that the term “actual costs” encompasses more than just taxable costs. *Esch v. Yazoo Mfg. Co.*, 510 F. Supp. 53, 59 (E.D. Wis. 1981).

The Court agrees with plaintiff that the term “actual costs” in the Act allows the award of costs that would not be authorized by § 1920. The term, however, must be limited to those actual costs that are reasonable in prosecuting this action. In determining what costs are “reasonable” the Court looks for guidance to other state’s “dealership” cases, cases awarding § 1920 costs from this district, and other relevant caselaw.

Generally speaking, the Court finds the costs claimed by plaintiff to be reasonable. However, as explained below, some reductions are necessary. For instance, “[i]t is well-settled that computer-aided research, ‘like any other form of legal research, is a component of attorneys’ fees and cannot be independently taxed as an item of cost.’” *Ryther v. KARE 11*, 864 F. Supp. 1525, 1534 (D. Minn. 1994)) (quoting *Leftwich v. Harris Stowe State College*, 702 F.2d 686, 695 (8th Cir. 1983)). The Court accordingly deducts \$3,965.06, the total of all “Westlaw charges” from plaintiff’s requested costs.¹¹

The Court also deducts \$325.18 from the costs submitted by Leonard, Street and Deinard for “miscellaneous” expenses. As the Court cannot discern what those expenses involved, the Court cannot deem them “reasonable.” Similarly, the Court reduces by

¹¹ This amount reflects \$3,921.39 attributed to Worker, Sitko and Hoffman; and \$43.67 to Mahoney, Dougherty and Mahoney.

\$393.65 fees for witnesses listed in the Leonard, Street and Deinard cost request. The witnesses are not identified, and it is not clear that this is not a duplicative cost for witness charges listed by Worker, Sitko and Hoffman.

Also disallowed will be \$1,865.53 for jury consultant fees. Plaintiff has not indicated special need for a jury consultant in this case, and the Court was unable to find any Minnesota case authorizing the award of jury consultant expenses. Such fees tend to be disfavored. *See, e.g., In re Fidelity/Micron Securities Litigation*, 167 F.3d 735, Appendix A (1st Cir. 1999) (standing order that “As a matter of practice, the court does not award, unless special circumstances are shown, the following categories of costs: . . . (11) jury consultant fees.”); *Summerville v. Trans World Airlines, Inc.*, 1999 WL 33134345 *4 (E.D. Mo. Sept. 28, 1999) (disallowing cost for jury consultant whether billed as part of costs or fees).

Worker, Sitko and Hoffman shows an expense of \$248.54 for meals on 5/18/03. The dollar amount requested is unreasonable, and there is no special showing (such as meals for a large group that was somehow necessary to the litigation) that would justify the expense. This amount is reduced by \$148.50.

Plaintiff requests \$121,034.89 for the fees and actual costs advanced by expert witness Lieber, and Lieber’s associates, Dick Kiep and Ann Johnson. Plaintiff suggests that the full costs of expert witness fees should be shifted to defendant. Although the Court agrees that “actual costs” encompasses expert fees, the Court is not satisfied that over one-hundred thousand dollars is a reasonable actual cost that is appropriately shifted in this dispute. The Court was unable to find any Minnesota case in which such a

significant expert-fee was awarded. Plaintiff cites analogous cases from other states; however, the cases cited by plaintiff are distinguishable because no case awarded such an amount. *See, e.g., Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1345 (1st Cir. 1988) (in age discrimination case brought under state and federal law, awarding \$7,756.25); *Kealy Pharmacy & Homecare Serv., Inc. v. Walgreen Co.*, 607 F. Supp. 155, 162, 170 (W.D. Wis. 1984), *aff'd in part, vacated in part on other grounds*, 761 F.2d 345 (7th Cir. 1985) (awarding expert witnesses, deposition costs, and other disbursements which **together** totaled only \$15,428). *But see Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338 (8th Cir. 1982) (awarding over \$300,000 for the expert expenses of two experts in a “complex anti-trust” case; also affirming most of the attorney’s fees of \$2.5 million).

Mr. Vondra billed for 355.25 hours of preparation at \$225.00 per hour, and billed for 63 hours of trial time at \$275.00 an hour. The Court finds, based on reviewing expert fees assessed in analogous cases, and based on a detailed review of Mr. Vondra’s billing submission, that two and one-half full work weeks are reasonable for preparation of this matter. Therefore, the Court reduces the award for expert witnesses by \$57,431.25.¹² The Court will not reduce any time spent by Kiep or Johnson, and will not reduce any time spent by Vondra at trial.

¹² The Court arrived at this amount as follows: 255.25 hours x \$225 per hour = \$57,431.25.

III. ADDITIONAL COSTS AND FEES

Counsel for plaintiff suggests that additional fees have been incurred, since this matter was fully briefed. The Court is also aware that an appeal of this dispute is pending before the Eighth Circuit. It is appropriate for plaintiff to request appellate fees from the appellate court. However, to the extent plaintiff claims additional fees for work related to matters addressed by this Court, the Court will entertain such a motion, if necessary, only after the conclusion of the appeal.

ORDER

Based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that plaintiff's motion for attorney fees and costs [Docket No. 178] is **GRANTED** as follows:

1. Plaintiff's request for attorney's fees is **GRANTED** in the amount of \$633,108.88.
2. Plaintiff's request costs and expenses is **GRANTED** in the amount of \$115,484.39.
3. Defendant is hereby **ORDERED** to remit to plaintiff a total amount of \$748,593.27 for actual costs and attorney's fees.

DATED: March 29, 2004
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge