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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MORELOCK ENTERPRISES, INC.,

No. CV04-0583-PA

Plaintiff,

v.

WEYERHAEUSER CO.,

**DEFENDANT'S OPPOSITION TO
PLAINTIFF CLASS'S BILL OF COSTS
AND MOTIONS FOR ATTORNEYS'
FEES AND COSTS**

Defendant

DEFENDANT'S OPPOSITION TO PLAINTIFF CLASS'S BILL OF COSTS AND MOTIONS
FOR ATTORNEYS' FEES AND COSTS

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Defendant Weyerhaeuser Company (“Weyerhaeuser”) hereby submits its Opposition to Plaintiff Class’s Bill of Costs and Motions for Award of Attorneys’ Fees and Costs, together with the Affidavit of George J. Cooper in Support of Defendant’s Opposition to Plaintiff Class’ Bill of Costs and Motions for Award of Attorneys’ Fees and Costs (“Copper Affidavit”), and exhibits thereto.¹

I. INTRODUCTION

Weyerhaeuser objects to Class counsel’s extraordinary request that they be awarded over \$24.2 million in fees and costs on the grounds that (1) Class counsel’s time records violate the Court’s rule against block billing and cannot be adequately assessed for reasonableness in the form presented; (2) both the statutory attorneys’ fees request and the request for 25% of the common fund are patently excessive and unwarranted considering Class counsel relied heavily on evidence developed by others during *Ross-Simmons*, *Washington Alder*, and other related lawsuits, including the very same evidence of overbidding and overbuying of alder sawlogs; (3) the requested hourly rates are well beyond the prevailing rates in this district; (4) many of the costs are excessive and non-reimbursable, including excessive charges for airfare, food, wine and entertainment; and (5) Class counsel failed to notify the Class members of their request thereby denying Class members an opportunity to object. For these reasons, Class Counsel’s request should be denied in its entirety, or substantially reduced.

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¹ “Ex. ___” references are to exhibits to the Cooper Affidavit filed concurrently herewith.

II. ARGUMENT

A. Class Counsel's Block Billed Time Entries Are Improper And Cannot Be Assessed For Reasonableness

Class counsel failed “to record time spent on particular, individual tasks and support their fee petitions with a level of documentation that allows the Court, and opposing counsel, to adequately review the reasonableness of the time spent on a single task.” U.S. Dist. Ct. (D. Or.), *Message From The Court Regarding Attorney Fee Petitions* at 1, available at http://www.ord.uscourts.gov/attorney_fee_statement.pdf.² This is fatal to their request for attorneys’ fees in the “lodestar” amount of \$5,086,652. Class counsel’s use of block billing clearly violates this rule and, in so doing, has denied Weyerhaeuser and the Court the ability to evaluate the reasonableness of the request.

Class counsel’s assertion that it “only recently” became aware of the district’s rule is unavailing. Messrs. Berry, Leftwich, and Baruch are admitted in this district *pro hac vice*, and are thus expected to be familiar with the local rules, practices, and procedures. *See, e.g., Johnson v. Mortham*, 950 F. Supp. 1117 (N.D. Fla. 1996). Moreover, Class counsel associated two local firms -- O’Donnell Clark & Crew LLP and Karnopp Petersen LLP. Even local counsel submitted block-billed time entries. Indeed, Class counsel’s plea of ignorance rings even more hollow given they did nothing to alter their block-billed time entries after learning of the prohibition against block billing. In short, the evidence suggests strongly that Class counsel made a deliberate, tactical decision to submit time entries they knew to be insufficiently detailed.

The use of vague, ambiguous, and scant (many times one-word) descriptions of the work performed has rendered it virtually impossible for Weyerhaeuser or the Court to assess the

² The District’s *Message From The Court Regarding Attorney Fee Petitions* (“*Message*”), which was in effect well before the present lawsuit was filed in 2004, provides: “The Court recommends that members of the bar record time spent on particular, individual tasks and support their fee petitions with a level of documentation that allows the Court, and opposing counsel, to adequately review the reasonableness of the time spent on a single task.” It also states: “Because the burden to document the reasonableness of the requested fees is on the attorney requesting fees, fee petitions that fail to support the reasonableness of the request due to one of these problems may be denied, at least in part.” *Id.* at 2.

reasonableness of the hours requested, which cannot be evaluated without first knowing how those hours were spent.³ Mr. Berry, for example, is seeking over \$350,000 for nearly 500 hours for document coding,⁴ but provided no further explanation that would allow anyone to assess why senior trial counsel, as opposed to a paralegal, for example, was coding documents, or whether the time spent was reasonable. Likewise, it is impossible to determine the reasonableness of the hours requested for travel time, how counsel reduced or discounted travel time and why it did so for some trips but not others,⁵ how deductions for inefficiency were determined for Mr. Baruch, for example, but not for anyone else,⁶ and why Mr. Berry, for example, repeatedly billed in whole hour increments.⁷

³ See, e.g., time entries for Mr. Berry described as “arrangements” (2/11/05, 10/22/07); “time” (2/22/05); “administration” (3/21/05, 10/23/07); “review” (4/10/05); “checking” (1/25/06); “notes” (7/23/07); “files” (9/21/07, 10/28/07, 11/19/07, 12/6/07, 2/1/08); “correspondence” (10/11/07); “research” (2/1/08); “ship” (3/8/05); “e-mails” (10/28/04, 1/25/06, 9/26/07, 12/14/07); “shipping” (3/10/08); time entries for Mr. Baruch, “review documents” (multiple dates); “draft e-mails” (multiple dates); time entries for Mr. Crew, “continue to investigate” (3/25/04); “review documents” (multiple dates).

⁴ See time entries for Mr. Berry billed to “Weyerhaeuser – Doc. Coding” (4/25/03 – 9/7/05).

⁵ While Mr. Baruch, in paragraph 11 of his Declaration, attested to cutting travel time in half for attorneys at his firm, that is clearly not the case. There are numerous time entries that were not reduced at all. See time entries for Mr. Berry (3/31/04, 10/27/07, 1/24/08, 4/9/08, 4/29/08); time entries for Mr. Baruch (9/19/05, 9/21/05, 10/24/07, 4/9/08). Further, there was no attempt whatsoever to reduce travel time for paralegals and local counsel. See time entries for Berry & Leftwich paralegal “ALW” (3/27/08, 3/29/08, 4/11/08, 4/29/08); time entries for Mr. Crew (8/13/04, 11/1/04, 3/10/08, 3/31/08); time entries for Mr. Buchanan (4/12/04, 9/27/04, 9/30/04, 10/4/04, 12/8/04, 4/28/05, 4/29/05, 12/2/07, 12/4/07/14/08, 4/17/08). Moreover, Class counsel’s travel time is block billed, making it unclear how much travel time is requested.

⁶ Mr. Baruch’s time entries are the only time entries accounting for inefficient work. Baruch Decl. at ¶ 11 (“[I]n some cases I have modified the timesheets for my time to reflect deductions in cases in which I concluded that the work should have been performed more efficiently.”); see Baruch time entries 5/1/2007 to 5/31/2007 (deducting 37.5 hours from 66.75 hours for inefficiency).

⁷ Of the 657 time entries submitted by Mr. Berry, 604 entries, or 92%, were in whole hour amounts, casting doubt on the accuracy of his time entries and the reasonableness of the hours requested. There are also examples of double, and even triple billing. See time entries for Mr. Leftwich (10/17/07)(double billed); time entries for Mr. Baruch (9/24/07)(double billed); time entries for Berry & Leftwich paralegal “ALW” (4/11/2008)(triple billed).

Not only do Class counsel's billing practices preclude Weyerhaeuser and the Court from ascertaining the reasonableness of any individual time entries, the total hours requested are patently unreasonable. As the Court is aware, the Class' case was essentially a carbon copy of the *Ross Simmons* and *Washington Alder* cases. The Class "piggy-backed" off of the discovery in those cases, and presented virtually the same witnesses and evidence at trial. Yet, the Class requests fees for 8,950 hours, or 3,600 additional attorney hours compared to *Ross-Simmons* and nearly 4,700 additional attorney hours compared to *Washington Alder*. In dollar amounts, the Class requests over three and one half times the amount awarded in *Ross-Simmons* (\$1,416,236) and nearly seven times the amount awarded in *Washington Alder* (\$729,330).

While Class counsel would have the Court believe that they blazed a new trail in a heretofore uncharted legal forest, such was clearly not the case here. *See Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975). In fact, aside from shifting its damages theory to account for the fact that it represented direct purchasers instead of direct competitors, Class counsel covered little new ground. Class counsel's claim that it had to "take substantial additional discovery and to address many new issues" is absurd on its face. Class Mem. at 5. Class counsel relied almost entirely on the work done by plaintiffs' counsel in the *Ross Simmons* and *Washington Alder* matters—not merely with respect to the allegations of anticompetitive conduct, but also with respect to the discovery taken in those matters, and the evidence presented in those trials.⁸

Not only are the number of hours billed unreasonable, the hourly rate applied to those hours vastly exceeds prevailing rates in this district. Class counsel proposes rates of \$500 and \$725 per hour for Messrs. Leftwich, Baruch, and Berry. The 2007 Oregon State Bar Economic

⁸ To name but one of many examples of Class counsel's liberal reliance upon prior cases, the depositions of only 16 witnesses were initiated by the Class in this case (Arend, Bamber, Beck, Howell, Jendro, Lockwood, Martin, Mater, Princehouse, Rausser, Redman, Regan, Roach, Sabalaski, Spencer, and Webber). Of these, five were Weyerhaeuser experts, one was the Class' own expert, and seven were taken to perpetuate trial testimony of witnesses previously deposed in prior cases. Only three Weyerhaeuser employees were deposed, and two of these three had themselves been deposed one or more times in prior cases.

Survey, by contrast, indicates that \$375 per hour marked the 95th percentile in Portland. There is no reason here for the Court to depart from the prevailing hourly rates *within the forum*. As is evident from the prior litigation, many local Oregon attorneys could have handled this case, including the Class' local counsel, and there was nothing about the case that required the personal services of Messrs. Berry, Leftwich, and Baruch. Indeed, as described above, Class counsel's job was made markedly easier by Oregon counsel's work in prior related litigation.

The rates previously approved by this Court in the *Ross-Simmons* and *Washington Alder* cases set a clear benchmark for the prevailing rates in this forum. In *Ross-Simmons*, the Court approved maximum hourly rates of \$225 and \$250 for the lead attorneys, and in *Washington Alder* it approved hourly rates of \$275 and \$300, noting that these rates *took into account the fact that antitrust litigation is usually complex and document intensive*. Applying the 2007 Oregon State Bar Economic Survey's annual hourly rate increase of 4.5% for the four year period 2004 to 2008 (a total of 18%)—as Class counsel does in estimating top reported and 95th percentile fees for 2008 (Class Mem. at 6-7)—to the more generous hourly rate awarded in *Washington Alder*, appropriate fees for this matter would be \$355 per hour for Mr. Berry and \$325 per hour for Messrs. Leftwich and Baruch.⁹ These rates remain at the high end of the survey's range.¹⁰

⁹ The proposed billing rates must also be evaluated with respect to the nature and complexity of the work performed. Messrs. Berry, Leftwich, and Baruch spent substantial time “coding” documents and transcripts. See time Entries for Mr. Berry billed to “Weyerhaeuser – Doc. Coding” (4/25/03 – 9/7/05)(billing nearly 500 hours for coding). If, as suspected, “coding” is a task generally reserved for paralegals, then compensation for attorneys' fees should be no more than that for a paralegal. Court's Opinion and Order Regarding Fee Petition and Bill of Costs in *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 2003 WL 23715982, at *2 (D. Or. Oct. 27, 2003)(citing *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989)).

¹⁰ These rates exceed those of the Class' local counsel. The maximum rate submitted by Mr. Crew of O'Donnell, Clark & Crew LLP (and formerly of Ramis Crew Corrigan LLP) was \$300 per hour. Affidavit of Stephen F. Crew in Support of Plaintiff's Motion for Attorney Fees, ¶¶ 2-3. The maximum rate submitted by Mr. Buchanan of Karnoff Petersen LLP was \$265 per hour. Declaration of William F. Buchanan in Support of Plaintiff's Motion for Attorneys Fees and Costs, pp. 2-3.

As illustrated above, Class counsel's request fails to comport with the local rules mandating detailed task billing. As a result, Class counsel cannot meet their burden of demonstrating the accuracy or reasonableness of their fees. Given that this situation is the direct result of Class counsel's flaunting of the district's rules on task billing, the proper remedy here is to deny the fee petition in its entirety. However, even if the petition is not denied, it should be substantially reduced because the hours are excessive when compared to hours spent litigating related cases, and because the rates requested by Class counsel are in excess of the rates prevailing in the forum for the type of work performed here.

B. Class Counsel's Request for Statutory and Other Costs Is Excessive, Cannot Be Adequately Evaluated, and Should be Denied

In support of its request for \$458,793 in costs from Weyerhaeuser, Class counsel has done nothing more than submit a declaration with sums for broad categories such as "Travel" and dump a box full of receipts and "Expense Vouchers" on the Court and Weyerhaeuser. Presumably Class counsel expects the Court to simply rubber stamp its costs request without wading into the pile of receipts to determine whether they are reasonable. The party seeking out-of-pocket expenses as part of a fee award, however, bears the burden of demonstrating that all the expenses it seeks are reasonable. *Pappas v. Watson Wyatt & Co.*, No. 3:04CV304 (EBB), 2008 WL 45385, at *9 (D. Conn. Jan. 2, 2008); *see also Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992) ("The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked."). The Class' submission falls woefully short.

As a threshold matter, it is impossible to determine what particular expenses are being sought for reimbursement. Some receipts indicate that a particular item should not be charged to Weyerhaeuser (*see, e.g.*, Ex. B), but there is no way to confirm that those items have not been included in the Class' submission to the Court. Other receipts indicate that Weyerhaeuser should not be charged at a luxury rate for accommodations or airfare (*see, e.g.*, Ex. C), but again there is no way to verify that such charges have been deleted. Additionally, several charges for flights,

hotel rooms, and other items lack receipts, or the receipts are illegible. *See, e.g.*, Exs. D-F. In short, the Class has failed to meet its burden of showing that the costs it seeks are reasonable.

What is apparent is that Class counsel and the Class representative have spent extravagantly on travel, and now expect Weyerhaeuser to foot the bill. The Clayton Act, however, does not require that Weyerhaeuser reimburse the Class for first-class airfare, lavish meals, wine, entertainment, and routine daily expenses such as hairspray and newspapers.¹¹ Rather, the Class may recover *reasonable* out-of-pocket litigation expenses as part of a statutory attorneys' fee. *See United Steel Workers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *In re Abbott Labs. Omniflox Prods. Liab. Litig.*, No. 94 C 2469, 1997 WL 162891, at *2 (N.D. Ill. Mar. 26, 1997) (In evaluating costs to be charged to a common expense fund during multi-district litigation, the court held it "will not award exorbitant expenses. No first-class airfare, expensive hotels, or lavish meals were reasonably necessary to discovery. Attorneys should not view representation of the consolidated plaintiffs as an opportunity to travel in style.").

Reimbursement of expenses for out-of-state counsel to travel to Oregon also should be disallowed. Such costs are inappropriate when local attorneys could have competently litigated the case. *See Simmons v. N.Y. City Transit Auth.*, No. CV-02-1575 (CPS)(RLM), 2008 WL 630060, at *7 (E.D.N.Y. Mar. 5, 2008). Courts regularly reject requests for travel expenses absent a showing that out-of-state counsel was necessary. *See, e.g., id.; Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc.*, 798 F. Supp. 522, 529 (N.D. Ind. 1992) ("simply because [plaintiff] chose to use an attorney from [out-of-state] does not mean that the defendant must pay for the extra cost of transporting that attorney back and forth from the relevant forum"); *Entm't Concepts, III, Inc. v. Maciejewski*, 514 F. Supp. 1378, 1382 (N.D. Ill. 1981).

¹¹ A list of those travel expenses that Weyerhaeuser can decipher and which are plainly unreasonable are listed in Ex. A. This list does not include expenses for which there is some indication that Weyerhaeuser should not be charged, although, as noted above, the Class should be required to demonstrate that these costs actually are not included in the costs sought by the Class.

Accordingly, travel fees, including airfare, hotel, meals,¹² and other expenses for Class counsel's trips to and from Portland should be disallowed. Charges for office space¹³ and in-house copying and office supplies should also be disallowed. *See Wash. Alder*, 2004 WL 4076675 at *3 (“Ordinarily, an attorney billing \$300 per hour should absorb routine copying costs as part of the overhead covered by the fee.”).

C. **Class Counsel's Request for Fees and Costs from the Common Judgment Fund Lacks Adequate Notice to the Class and Is Otherwise Unwarranted**

Class counsel's request for over \$22,000,000 in attorneys' fees¹⁴ from the common fund – more than four times the amount of fees requested under Section 4 of the Clayton Act – is both staggering and wholly improper. Class counsel asks that they be awarded fees without any notice to the Class despite the clear requirements of Rule 23. Moreover, this fee request is excessive based on the amount of work required to prosecute what Class counsel regarded as a follow-on action. The Class' original Complaint makes clear that Class counsel intended to rely on issue preclusion based on the *Ross-Simmons* verdict, which Class Counsel had seen the Court apply to all follow-on cases at the time Class Counsel filed its case. Even after the Court denied issue preclusion, counsel relied largely on the discovery and other work done by previous plaintiffs and their attorneys, and the testimony and exhibits on which they relied at trial were

¹² Weyerhaeuser should not be required to pay for Class counsel's meals at all, let alone the exorbitant meal costs Class counsel incurred. *See Ex. A*. As the Court has noted, “[a]n attorney billing \$300 per hour for travel time can pay for his own meals.” *Wash. Alder LLC v. Weyerhaeuser Co.*, No. CV 03-753-PA, 2004 WL 4076675, at *3 (D. Or. Nov. 24, 2004). Class counsel here seeks to effectively bill their travel time at \$362.50 or \$250 per hour. Class counsel billing at this rate can also afford to pay for their own meals – even room service at the Four Seasons.

¹³ Despite having local counsel with offices in Portland, Class counsel spent \$4,668.99 renting a “working suite” at the Embassy Suites during trial. Absent any explanation as to why local counsel's offices were inadequate, Weyerhaeuser should not be billed for this space.

¹⁴ Class counsel requests either \$22,372,876 (one-fourth of the common fund, consisting of the \$83,946,060 judgment plus \$5,086,652 in requested statutory fees and \$458,793 in requested statutory costs) or \$20,346,608 (four times the lodestar equal to requested statutory fees). Class counsel also requests \$1,833,130 in costs regardless of the method used to calculate fees.

virtually the same as what had already been done in the prior cases. For these reasons, Class counsel's motion should be denied, and Class counsel should be awarded only statutory fees under the Clayton Act.

1. Class Counsel Failed to Provide Required Notice to the Class

Class counsel attempts to take 25% of the Class' recovery without giving the Class any notice or opportunity to object. The Federal Rules of Civil Procedure – not to mention simple principles of fairness and equity – require that members of the Class have the opportunity to protect their own interests, which obviously are now divergent from Class counsel's interests. *See Staton v. Boeing Co.*, 327 F.3d 938, 970 (9th Cir. 2003). Federal Rule of Civil Procedure 23(h) is unambiguous in its notice requirements: "A claim for an award [of attorney's fees] must be made by motion Notice of the motion must be served on all parties and, for motions by class counsel, *directed to class members* in a reasonable manner." Fed. R. Civ. P. 23(h)(1) (emphasis added). The rule also provides that "[a] class member . . . may object to the motion." Fed. R. Civ. P. 23(h)(2). Rule 23(h) was promulgated to "ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid." Rule 23 Advisory Committee's Note (2003 Amend.). Class counsel's failure to provide notice to the Class of their fee request frustrates this purpose and is in clear disregard of Rule 23.¹⁵ Class counsel's fee request should be denied for this reason alone.

2. Class Counsel Should Not Be Awarded More Than Statutory Fees Because Most of the Work in Prosecuting the Class' Claim Was Done By Prior Attorneys and Plaintiffs

a. Weyerhaeuser Is Entitled To Object to Class Counsel's Request for Fees from the Common Fund

Motions for attorneys' fees must be brought under Rule 54(d)(2), *see* Fed. R. Civ. P. 23(h)(1), which requires courts to "give an opportunity for adversary submissions on the

¹⁵ Neither of the previous notices sent to class members, in January 2005 and May 2007, notified the Class that Class counsel could or would seek fees from any Class recovery greater than provided for by the Clayton Act.

motion.” Fed. R. Civ. P. 53(d)(2)(C); *see, e.g., In re Con'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). Courts have a fiduciary duty toward the members of a class in evaluating fee awards. *See Staton*, 327 F.3d at 970. In discharging its fiduciary duty to absent Class members, the Court can benefit from advice from all corners. The need for another voice at the table is particularly compelling because counsel failed to notify Class members whose rights are being adjudicated and thus there is no one but Weyerhaeuser to challenge Class counsel’s request for excessive fees and improper costs.

b. Class Counsel Should Not Be Awarded a Percentage of the Common Fund But Should Be Limited to Whatever the Court Determines is a Proper Lodestar Amount

Class counsel’s request that the Court award a percentage of the common fund is without merit. The Ninth Circuit has noted that the percentage fee approach is less accurate than the lodestar approach, and at best provides a rough approximation of a reasonable fee. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994). Where, as here, the fund is large, the percentage-based method’s margin of error is compounded, rendering it even less accurate. *Id.* The only benefit of the percentage approach is that it is easier to calculate. *Id.* (citing *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 125 (N.D. Ill. 1990). Here, however, that benefit is lacking entirely since the Court must determine a lodestar amount for an award of statutory fees.¹⁶

The lodestar method is also appropriate given the limited amount of *new* work performed by Class counsel in this case. The lodestar method focuses primarily on the number of hours worked by counsel. That approach is more appropriate because it is a better measure of the efforts and skill of counsel, rather than simply basing the award on the amount of damages, which are more a function of the number of Class members and the trebling of damages than of

¹⁶ Citing no cases, Class counsel suggests that the Court may calculate a different lodestar for statutory fees than fees from the common fund, using a “less rigorous approach” for fees from the Class. Pl. Mem. in Supp. of Mot. for Costs and Fees at 18. It is puzzling, at best, to suggest that the Court in acting as a fiduciary for the Class will less rigorously scrutinize Class counsel’s request for fees from the Class it represents.

the efforts of counsel. *See In re Infospace, Inc. Sec. Litig.*, 330 F. Supp. 2d 1203, 1210 (W.D. Wash. 2004) (“[V]ictories’ are sometimes obtained with minimal effort, and the large award obtained ‘is often due more to the number of class members or the defendant’s past acts than to the attorney’s actual skill.’”). Accordingly, the lodestar method will more accurately capture the amount of benefit *counsel* provided the Class, and should be used instead of a percentage.¹⁷

c. *A Multiplier to the Lodestar Is Inappropriate Here Where Class Counsel Largely Relied Upon the Work of Prior Plaintiffs.*

The Court should not apply a risk multiplier to the lodestar.¹⁸ While Class counsel focuses its risk enhancement analysis on a post-hoc evaluation of risk, it fails to mention that in this Circuit, “risk should be assessed when an attorney determines that there is merit to the client’s claim and elects to pursue the claim on the client’s behalf.” *Fischel v. Equitable Life Assurance Soc’y of the U.S.*, 307 F.3d 997, 1009 (9th Cir. 2002). Specifically, “[t]his will likely occur before a lawsuit is filed.” *Id.* At the time Class counsel filed this case, they intended to rely on issue preclusion regarding the issues determined in *Ross-Simmons*. The Class’ first complaint repeatedly and explicitly relied upon the verdict in that case. Compl. (Apr. 28, 2004) ¶¶ 1-7, 19, 24-26, 30-31, 42, 48-50. Of the twelve paragraphs comprising the Class’ two counts for relief, four began with, “Weyerhaeuser is precluded” *Id.* ¶¶ 42, 48-50. Their express theory at the outset was that for all of the same reasons Weyerhaeuser was liable to Ross-Simmons and other competitors, Weyerhaeuser was also liable to downstream purchasers. *See id.* ¶ 39. Evaluating the risk of the case as it appeared to Class counsel *before* the case was filed,

¹⁷ Class counsel relies on a single case for their argument that the percentage method is more appropriate here because of their continuing obligations to the Class on appeal. Yet, contrary to Class counsel’s assertions, *see* Pl. Mem. in Supp. of Mot. for Costs and Fees at 15-16, the district court in that case utilized the lodestar approach to determine fees and used the percentage method only as a cross-check on the reasonableness of the lodestar amount. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 990 (9th Cir. 1997).

¹⁸ As set forth in detail above, Weyerhaeuser also considers the size of the requested lodestar excessive. All of the arguments with respect to the size of the lodestar for statutory fee purposes apply with equal force to the size of the lodestar for common fund purposes.

as the Ninth Circuit requires, makes clear that Class counsel expected that Weyerhaeuser would be precluded from raising any meaningful defense because of the *Ross-Simmons* verdict.¹⁹

In fact, Class counsel intended to do as little work as possible. Even after the Court denied issue preclusion, Class counsel relied almost exclusively on the work done by prior plaintiffs. Class counsel did very little to further develop the case, conducting little discovery beyond what was handed to them by prior plaintiffs. As explained above, the Class initiated the deposition of only one witness who had not testified in one or more of the prior litigations or trials. Furthermore, Class counsel's trial presentation was a virtual reproduction of the plaintiffs' presentation in *Ross-Simmons*.²⁰ Thus, the Class presented no evidence supporting liability or damages post-2001, which was where the *Ross-Simmons* case had stopped. Though the amount of hours Class counsel recorded is not a factor in determining whether a multiplier is appropriate, *see infra*, courts have recognized the reduced risk for counsel who "piggy-back" on the work of another plaintiff or investigatory body. *See, e.g., In re Quantum Health*, 962 F. Supp. at 1259.

Class counsel also errs in conflating factors that determine the size of the lodestar with factors that determine whether a multiplier is appropriate. The amount of work performed by Class counsel is a factor in determining the size of the lodestar, not whether a multiplier is

¹⁹ Although Class counsel focuses on their post-hoc argument about the risk of the case (which, as shown above, is beside the point), they offer only a boilerplate statement about the risk they considered when originally deciding whether to accept the representation. *See* Decl. of Gregory Baruch in Supp. of Bill of Costs and Mots. for Award of Costs and Fees at ¶ 14. Class counsel's conclusory statements of the risk they considered when initially taking the case are entitled to little weight. *See In re Quantum Health Res., Inc.*, 962 F.Supp. 1254, 1259 (C.D. Cal. 1997).

²⁰ *Berry & Leftwich* routinely prosecutes follow-on cases, where they begin an action only after someone else has either won a verdict or brought an action against the defendant they sue. *See, e.g., Bradburn Parent Teacher Store v. 3M (Minnesota Mining and Manufacturing Company)*, 513 F. Supp. 2d 322, 324-25 (E.D. Pa. 2007) (*Berry & Leftwich* represented a class of indirect purchasers, and sued after 3M was already found liable to 3M's competitors.); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 296-97 (5th Cir. 2003) (Shortly after competitor brought suit against AT&T, *Berry & Leftwich* intervened and sought to certify classes of consumers.); *American Seed Co., Inc. v. Monsanto Co.*, 238 F.R.D. 394, 395 (D. Del. 2006) (Shortly after competitor brought suit against Monsanto, *Berry & Leftwich* intervened and sought to certify classes of consumers.).

appropriate. Indeed, the key input in the lodestar analysis is the number of hours worked by counsel. Thus, the fact that counsel had to spend more hours prosecuting the case through trial should not affect the multiplier analysis. Class counsel will be compensated for this work by being paid for those hours at a reasonable rate, through the unenhanced lodestar. The “significant new discovery and substantial new expert witness expenses” – to the extent there were any – as a result of the Supreme Court’s decision in *Ross-Simmons* will likewise already be compensated because counsel is billing for that time. Indeed, Class counsel cites no cases for the proposition that a multiplier is appropriate because of the amount of work the case required. The clear requirement for a multiplier is risk. *See Fischel*, 307 F.3d at 1008 (“A district court generally has discretion to apply a multiplier for the risk of nonpayment.”); *In re Wash. Pub. Power*, 19 F.3d at 1300 (“courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases”).

III. CONCLUSION

Weyerhaeuser respectfully requests that the Class counsel’s motion for statutory attorneys’ fees and costs be denied in its entirety for failure to comply with this Court’s rules and practices. At a minimum, Weyerhaeuser requests that Class counsel’s proposed hourly rate be reduced to a level appropriate for the district, and that the excessive number of hours requested be cut significantly. Weyerhaeuser further respectfully requests that Class counsel’s motion for an award of statutory costs be denied in its entirety, or reduced significantly for failure to adequately document those costs. Finally, Weyerhaeuser respectfully requests that Class counsel’s motion for an award of attorneys’ fees from the Class’ common judgment fund be denied for failure to serve notice upon the Class members, who are the real parties in interest on

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such a motion, or at least be limited to the amount of statutory attorneys' fees to which the Court determines Class counsel are entitled.

Dated this 13th day of June, 2008.

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