IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ACCIDENT CARE SPECIALISTS OF PORTAND, INC., an Oregon Corporation,

Plaintiff,

v.

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, an Illinois Corporation,

Defendants.

ALLSTATE INSURANCE COMPANY, ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, an Illinois Corporation,

Counterclaim Plaintiff,

v.

ALEXIS LEE, D.C., and GEORGE CLUEN, D.C.,

Counterclaim Defendants.

No. 3:11-cv-01033-MO
No. 3:13-cv-00408-MO

OPINION AND ORDER

MOSMAN, J.,

Counterclaim Defendants Accident Care Specialists, Dr. Alexis Lee, and Dr. George Cluen have sought attorney's fees as prevailing parties under both the Oregon Unfair Trade Practices Act ("UTPA") and Oregon Racketeer Influenced and Corrupt Organizations Act ("ORICO"). All counterclaim Defendants are prevailing parties on these claims, because I GRANTED [197][1] counterclaim Defendants' motions for summary judgment on Allstate's counterclaims for violations of the UTPA and ORICO. On April 29, 2014, I DENIED Accident Care's motion for attorney fees [212] in full and GRANTED Drs. Lee and Cluen's motions for attorney fees [202, 213] under ORICO only. (Order [235].) I write to briefly explain my rulings.

LEGAL STANDARDS

Attorney fees are only available under the UTPA if "if the court finds that an objectively reasonable basis for bringing the action . . . did not exist." Or. Rev. Stat. § 646.638(3). Thus, I have discretion to award attorney fees under the UTPA *only if* I find that Allstate lacked an "objectively reasonable basis" for bringing the claims.

A prevailing party to a private ORICO action, whether plaintiff or defendant, may recover its attorney fees. Or. Rev. Stat. § 166.725(14). Thus, I have discretion to award the prevailing counterclaim Defendants their reasonable attorney fees.

Or. Rev. Stat. § 20.075 governs the award of attorney fees where they are authorized at the discretion of the court. There are eight factors the court is to consider in determining whether fees are warranted:

> (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

[1] All docket numbers refer to the lead case, 3:11-cv-01033-MO.

> (b) The objective reasonableness of the claims and defenses asserted by the parties.
>
> (c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
>
> (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
>
> (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
>
> (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
>
> (g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
>
> (h) Such other factors as the court may consider appropriate under the circumstances of the case.

Or. Rev. Stat. § 20.075(1)(a)–(h). If the court determines that an award of fees is warranted under these factors, additional factors are to be considered in determining the amount of the award. Or. Rev. Stat. § 20.075(2). The additional factors to be considered are as follows:

> (a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.
>
> (b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.
>
> (c) The fee customarily charged in the locality for similar legal services.
>
> (d) The amount involved in the controversy and the results obtained.
>
> (e) The time limitations imposed by the client or the circumstances of the case.
>
> (f) The nature and length of the attorney's professional relationship with the client.
>
> (g) The experience, reputation and ability of the attorney performing the services.
>
> (h) Whether the fee of the attorney is fixed or contingent.

Or. Rev. Stat. § 20.075(2)(a)–(h).

DISCUSSION

As noted above, I DENIED Accident Care's motion for attorney fees [212] and GRANTED attorney fees to Drs. Lee [202] and Cluen [213] under ORICO only. As will be discussed below, I do not find that Allstate's UTPA claim lacked an objectively reasonable basis, and thus no award of attorney fees is warranted on the UTPA claim.

I. Accident Care's Motion for Attorney Fees

Accident Care moved for attorney fees, stating that counsel has spent "approximately 808 hours litigating this matter on issues that intertwined and have necessarily involved the defense of [Accident Care] on Allstate's allegations . . . against [Accident Care]." (Mem. in Support [212-1] at 2.) Accident Care seeks a total of $310,137.25 in attorney fees in compensation for all hours worked by counsel and staff between April of 2011—when Accident Care first began to pursue its claims in chief in state court—and the summary judgment rulings in January of 2014. *Id.* at 2–3.

Allstate's counterclaims against Accident Care were not filed until March of 2013. Accident Care provides no justification for any entitlement to attorney fees incurred while pursuing its own case, beginning nearly two years before Allstate filed any counterclaims.

Even if some work done before the counterclaims were filed could be explained as reasonably necessary to their defense—for instance, defending the deposition of one of the witnesses on whose testimony Allstate based its allegations—it is impossible to identify any such hours here. Accident Care has failed to explain the nature of the work done during a single one of the hours claimed. Counsel's declaration simply states that counsel James Shadduck has worked a total of 808 hours at a billing rate of $350.00 per hour, paralegal Angie Milligan has worked 140.75 hours at a billing rate of $175.00 an hour, and legal assistant Heather Weatherell

has worked 46.75 hours at a billing rate of $75.00 an hour. (Decl. Shadduck [212-2] at 2–3.) It is impossible for this court to determine which hours were actually spent defending against the counterclaims and which were spent on Accident Care's own claims. It is also impossible for this court to determine when any particular hour of work took place, so hours cannot be identified as either preceding or following the filing of the counterclaims. Finally, it is impossible for this court to determine whether any particular hour represents work reasonably and necessarily undertaken in defending against the ORICO or UTPA counterclaim, as opposed to the common law counterclaims for which attorney fees are unavailable.

Or. Rev. Stat. § 20.075(1)(h) directs me to consider, in determining whether to award discretionary attorney fees, "[s]uch . . . factors as the court may consider appropriate under the circumstances of the case." The failure to adequately document hours is such a factor. Accident Care has provided no information on which I may base my decision whether to award attorney fees and what the reasonable amount of such fees would be. The recitation of the bare number of hours worked is insufficient to allow me to determine what amount of fees was reasonably incurred in defending against either the ORICO or UTPA counterclaim. Consequently, I DENIED Accident Care's motion [212]. I make no finding as to the reasonableness of the hourly rate sought for counsel and staff.

II. Individual Defendants' Motions for Attorney Fees

I GRANTED Counterclaim Defendant Dr. Lee's motion for attorney fees [202] and Dr. Cluen's motion for attorney fees [213] under ORICO. I conclude that Allstate's UTPA claim was not without an objectively reasonable basis, however, and thus attorney fees may not be awarded under Or. Rev. Stat. § 646.638(3). I thus DENY the motion as to the UTPA claim.

A. UTPA Standard for Attorney Fees

Allstate urges the Court to deny the request for attorney fees under the UTPA, arguing that the denial of Accident Care's Federal Rule of Civil Procedure 11 ("Rule 11") motion for sanctions establishes as a matter of law that its claims had an objectively reasonable basis. (Allstate Resp. [217] at 9.)

This argument reads too much into my ruling on the Rule 11 motion. After the close of discovery, Accident Care had filed a request for sanctions under Rule 11 as to Allstate's counterclaims. (Mot. for Sanctions [139].) I took this motion up at the summary judgment hearing. I explained that "although I'm inclined to grant summary judgment on some of these counterclaims, it's not in my view at all appropriate to impose any Rule 11 sanctions for bringing them." (Hearing Tr. [201] at 15:14–20.) I concluded that the claims were not "so without merit as to violate Rule 11." *Id.*

Rule 11's standard for the imposition of sanctions is separate from the Oregon statutory standard of "objectively reasonable basis." To conclude that a court's declination to impose sanctions under Rule 11 is a finding, as a matter of law, that the claims have an "objectively reasonable basis" under Or. Rev. Stat. § 646.638(3) would conflate the two inquiries. It is in the court's discretion to impose sanctions under Rule 11(c). That I declined to do so here does not establish that the claims met the standards under the UTPA. Nevertheless, I find that Allstate's UTPA counterclaim did not lack an objectively reasonable basis.

Dr. Lee argues that Allstate could have had no objectively reasonable basis for filing the UTPA counterclaim because the claim was already barred by the UTPA's one-year statute of

limitations by the time it was filed. (Lee Mem. [203] at 6–7.)[2] The complaint alleged conduct occurring from October 2008 to 2011, but Allstate did not file the counterclaims until March of 2013. Thus, Dr. Lee argues, it was or should have been clear to Allstate that the UTPA claim was time-barred. *Id.* at 6–7.[3]

Allstate's argument against application of the statute of limitations was that it could not have discovered the fraud prior to conducting discovery in this case because Accident Care's fraudulent conduct concealed the fact that its bills contained misrepresentations about the services provided. I rejected this argument, concluding that Allstate was on inquiry notice of the misrepresentations giving rise to the UTPA claim by April of 2010. (Hearing Tr. [201] at 10:6–17.) I thus ruled that the UTPA claim was entirely barred by the one-year statute of limitations, and granted summary judgment for the counterclaim Defendants.

It is well established under Oregon law that a limitations period does not begin to run until the plaintiff discovers or reasonably should have discovered the injury giving rise to the claim. *See Gaston v. Parsons*, 318 Or. 247, 255–56, 864 P.2d 1319, 1323–24 (1994). The discovery rule does not operate based on actual knowledge, but based on whether "the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the . . . elements [of the claim] exists." *Id.* at 256, 864 P.2d at 1324. In a case of fraud or misrepresentation, the test has been described as follows: "First, it must appear that plaintiff had sufficient knowledge to excite

[2] Dr. Cluen joins Dr. Lee's motion and memorandum in support. (Cluen Mem. [214] at 2.) Consequently, I have considered the applicability of all arguments raised by Dr. Lee in deciding Dr. Cluen's motion.

[3] Dr. Lee also points out that Allstate was put on direct notice of the statute of limitations' bar by a filing in on April 1, 2013: although the filing was later withdrawn, it raised the statute of limitations as a defense, and thus Allstate was made aware of the bar. (*See* Cluen Memorandum [48] at 5.) Although I have taken this filing into account, for the reasons discussed above, I conclude that Allstate did not lack an objectively reasonable basis for continuing to pursue the claim.

attention and put a party upon his guard or call for an inquiry. If a plaintiff had such knowledge, it must also appear that 'a reasonably diligent inquiry would disclose the fraud.'" *Mathies v. Hoeck*, 284 Or. 539, 543, 588 P.2d 1, 3 (1978) (internal quotations omitted); *see also McCulloch v. Price Waterhouse LLP*, 157 Or. App. 237, 248, 971 P.2d 414, 420 (1998). I concluded that Allstate knew or should have known of the misrepresentations giving rise to its claim by April of 2010, by which time it had put a hold on all payments to Accident Care. (Hearing Tr. [201] at 10:6–11:5, 40:23–25.) Thus its UTPA counterclaim, filed in 2013, was well without the one year limitations period.

However, my ruling does not mean that Allstate lacked an objectively reasonable basis for bringing the claim. First, running of the statute of limitations is an affirmative defense that can be waived. *Cf. U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 893 F.2d 1117, 1122 (9th Cir. 1990); *Hovden and Hovden*, 104 Or. App. 514, 517, 802 P.2d 89, 90 (1990); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (3d ed. 2008). Second, and more importantly, Allstate had a non-frivolous (albeit unsuccessful) argument for the tolling of the limitations period under the discovery rule.

Dr. Lee also argues that the claim lacked an objectively reasonable basis because it has not been established that an insurer who made payments to a medical provider pursuant to an insurance contract has standing to bring suit under Oregon's UTPA. (Lee Mem. [203] at 7–8.) The facts underlying the claim "did not involve consumer transactions, nor did the alleged conduct constitute any of 'enumerated violations'" of the UTPA. *Id.* at 7.

Allstate alleged that Accident Care violated the UTPA when it "issued bills for treatment not performed as billed." (Consolidated An. [55] ¶ 157.) Oregon's UTPA covers only consumer transactions. Oregon courts have established a two-part test for identifying a consumer

transaction: (1) the transaction at issue is a transaction for goods or services "customarily purchased by a substantial number of people for personal, family, or household use" and (2) the transaction was actually entered into by the plaintiff "for personal, family, or household use, rather than for commercial use or resale." *Fowler v. Cooley*, 239 Or. App. 338, 344, 245 P.3d 155, 159 (2010). Allstate argued that because individual patients sought Accident Care's chiropractic services for their "personal" needs, the transactions at issue were both objectively and subjectively "consumer transactions"—that the bills were paid by the insurer rather than out of pocket by the insured consumer should not change the nature of the transaction. (Allstate's MSJ Resp. [134] at 13–14.)

Allstate pointed to a Washington case in which the court allowed an insurer to bring suit under the Washington Consumer Protection Act based on allegations of fraudulent billing by a chiropractor similar to the allegations in this case. *See State Farm Fire & Cas. Ins.v. Huynh*, 962 P.2d 854 (Wash. Ct. App. 1998). Although Washington's Consumer Protection Act differs from the Oregon UTPA in important ways, the statutes are similar in that each provides a cause of action for the protection of consumers. Unlike Oregon's UTPA, however, Washington's Consumer Protection Act is not limited to "personal, family, or household" transactions. *See Huynh*, 962 P.2d at 857.

Allstate claimed standing to assert a UTPA claim based on its payments, on behalf of its insureds, for bills for services not performed properly. I conclude that it was not objectively unreasonable for Allstate to seek this extension of Oregon law. I indicated on the record that I consider the Washington Consumer Protection Act sufficiently different from the UTPA that the *Huynh* case is distinguishable, and that the UTPA likely does not create standing under the circumstances alleged here. (Hearing Tr. [201] at 11:6–14.) However, that issue remains one of

first impression in Oregon—I declined to reach it at summary judgment, and I decline to reach it today. It was not objectively unreasonable for Allstate to seek to extend the protections of the UTPA to the transactions at issue here.

Because I find that Allstate did not lack an objectively reasonable basis for bringing the UTPA claim, notwithstanding that the claim did not survive summary judgment, I need not reach the factors set out in Or. Rev. Stat. § 20.075. Attorney fees are not recoverable under the UTPA in this case.

B. ORICO Standard for Attorney Fees

ORICO makes attorney fees are available to any prevailing party. Or. Rev. Stat. § 166.725(14). A court granted discretionary authority to award fees by Oregon law (such as Or. Rev. Stat. § 166.725(14)) is to consider the factors set out in § 20.075 in determining whether an award of attorney fees is warranted and the amount of the award.

1. Entitlement to Attorney Fees

Dr. Lee points to the first two factors, arguing that it was not reasonable to bring an ORICO claim "in light of the conduct alleged." The first two factors are:

> (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
>
> (b) The objective reasonableness of the claims and defenses asserted by the parties.

Or. Rev. Stat. § 20.075(1)(a)–(b). Dr. Lee argues that the first factor weighs in counterclaim Defendants' favor, as "the alleged conduct that gave rise to this litigation involved nothing more than a corporation (ACS) acting through its principals, employees, and agents. This was a garden-variety billing dispute between a medical provider and an insurer and should have been

litigated as such, without resorting to claims that threatened personal liability for treble damages." (Lee Mem. [203] at 5.)

As to the third and fourth factors, both of which have to do with deterrence, Dr. Lee argues that an award would be unlikely to deter private parties from bringing ORICO actions "in cases that involve actual criminal enterprises committing actual crimes." *Id.* at 5; § 20.075(1)(c) & (d). Similarly, she argues that an award of fees could deter others from bringing frivolous ORICO claims "to gain tactical advantage in billing disputes." *Id.* at 5–6.

Allstate points to the evidence of fraud highlighted in the summary judgment record, arguing that this same evidence shows that the claim was objectively reasonable under Or. Rev. Stat. § 20.075(1)(b). (Allstate Resp. [217] at 4–6, 10–12.) Allstate argues that its counterclaims "are not the claims that the Oregon legislature wishes to deter, as they were brought in good faith and with reasonable basis." *Id.* at 9. I interpret Allstate's position to be that because there was evidence to support the underlying fraud and misrepresentations alleged as predicate acts in the ORICO claim, the claim was reasonable and claims of its nature should not be deterred by the award of attorney fees to prevailing defendants.

I declined to grant summary judgment for either party on the portions of Allstate's fraud counterclaim not barred by the statute of limitations, concluding that there remains a genuine dispute of material fact as to whether the bills were fraudulently submitted. Allstate thus suggests that the conduct at issue was "willful [or] malicious," a factor cutting against allowing attorney fees under Or. Rev. Stat. 20.075(1)(c)–(d).

While claims of willful fraud remain in this case, my grant of summary judgment on Allstate's ORICO claim was not on the merits of the factual allegations. Whether the allegations of fraud are ultimately accepted by the jury is irrelevant to the objective reasonableness of the

ORICO claim on this metric. I granted summary judgment for all counterclaim Defendants on the ORICO claim, concluding that Allstate had shown no distinct "person" engaged in predicate racketeering acts through an "enterprise" giving rise to ORICO liability. (Hearing Tr. [201] at 11:17–12:7, 41:8–9.) As argued in this case Allstate's ORICO counterclaim necessarily rested on Or. Rev. Stat. § 166.720(3), because Allstate sought redress for the harm caused by the alleged predicate acts. *See Kilminster v. Day Mgmt. Corp.*, 133 Or. App. 159, 169–71, 890 P.2d 1004, 1009–1011 (1995), *rev'd on other grounds* 323 Or. 618, 919 P.2d 474 (1996). That is, Allstate sought to recover for the harm caused when it paid for the treatments that were allegedly not performed properly.

Under Oregon law, the "person" conducting racketeering activity through an "enterprise" must be distinct from that "enterprise." *Kilminster*, 133 Or. App. at 169–71, 890 P.2d at 1010. Corporations can act only through their agents, and alleged racketeering activity conducted by corporation through an agent "do[es] not maintain the distinction between [agent] and enterprise that 'ensures that RICO sanctions are directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted." *Id.* at 171, 890 P.2d at 1011 (quoting *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991)). The record at summary judgment showed that there was no distinction between either Dr. Lee or Dr. Cluen and Accident Care such that any of the counterclaim defendants could have conducted racketeering activity through a separate enterprise. As such, I find that Or. Rev. Stat. §§ 20.075(1)(a) and (b) tilt in favor of awarding fees to the prevailing party.

As to the deterrence factors found in Or. Rev. Stat. §§ 20.075(1)(c) and (d), I find that the danger of undue deterrence of meritorious ORICO claims premised on criminal activity is slight. *See* Or. Rev. Stat. § 166.715(6)(a) (listing criminal predicate acts that constitute "racketeering

activity" under ORICO). Moreover, an award of attorney fees in this case could potentially deter ORICO claims lacking a legal foundation under that statute.

The other factors set out in Or. Rev. Stat. § 20.075(1) are not of particular relevance in this case, and so I decline to discuss them specifically. I find that the factors considered counsel in favor of awarding attorney fees to Drs. Lee and Cluen under ORICO.

2. Reasonable Amount of Attorney Fees

In determining a reasonable award of attorney fees to Drs. Lee and Cluen, I have considered the factors set out in Or. Rev. Stat. § 20.075(2). As discussed below, I find the hourly rate sought by counsel for both doctors to be reasonable.

Attorney fees can be awarded only for those claims having a statutory provision allowing fees, and only fees for work that was "reasonably necessary to prevail" on the fee-bearing claims are recoverable. *See Freedland v. Trebes*, 162 Or. App. 374, 378, 986 P.2d 630, 632 (Or. 1999). However, where fee-bearing and non-fee-bearing claims involve common issues, hours pertinent to both the fee-bearing claim and other claims may be recoverable. *Id.* at 378–79, 980 P.2d at 632. If the fees were "reasonably incurred to achieve the success that the [party] eventually enjoyed" on a fee-bearing claim, they may be recovered. *Fadel v. El-Tobgy*, 245 Or. App. 696, 709, 264 P.3d 150, 158 (2011) (internal quotation omitted). Such fees may be included "if there are common issues among the claims such that it would have taken roughly the same amount of time to litigate a case in which the successful claim was the sole claim as it took to litigate the case in which it was one among several claims." *Id.* at 709–10, 264 P.3d at 158 (internal quotations omitted).

Dr. Lee urges this court to include all time spent on the ORICO claim, even if it also contributed to the defense of other counterclaims, because "the four counterclaims involved the

exact same factual allegations." (Lee Mem. [203] at 8.) I agree that the inclusion of such time is proper, as the ORICO claim—as argued by Allstate—involved allegations and some legal issues intertwined with the other claims. Dr. Lee and Dr. Cluen have submitted billing records documenting time spent on the ORICO claim and excluding all time spent exclusively on any other claim. (Ryan Supp. Decl. [237] ¶ 5–7, Ex. A; Valentine Decl. [215] ¶ 5, Ex. A.)

Dr. Lee seeks a total of $112,339 in attorney fees arising from the ORICO claim. Her request reflects a one third reduction of time spent on both the ORICO claim and other claims. (Ryan Supp. Decl. [237] ¶ 8.) She also seeks litigation expenses and costs in the amount of $6,870.48. Dr. Cluen seeks a total of $90,512.5 in attorney fees and $7,938.63 in litigation costs for the ORICO claim. (Valentine Decl. [215] ¶ 4.) Allstate does not object to the hourly rates charged by counsel or staff for either individual Defendant, nor does Allstate object to any of the recorded time.

a) Dr. Lee

Dr. Lee seeks compensation for 383.4 hours of work by David Ryan, her lead trial counsel, at the rate of $245 an hour. Mr. Ryan is a member of his firm and has eighteen years of experience practicing law in Portland. (Ryan Supp. Decl. [237] ¶¶ 2, 8.) Mr. Ryan's billing rate was $245 per hour in this case. *Id.* ¶ 8. The most recent Oregon State Bar Survey ("2012 OSB Survey"), which is frequently used by courts in this district to determine the reasonableness of attorneys' billing rates, reflects that Portland attorneys with 16–20 years' experience bill at a median hourly rate of $250 an hour, with a range between $200 per hour at the 25th percentile and $300 per hour at the 75th percentile. 2012 OSB Survey at 30. Mr. Ryan's rate of $245 an hour is well within the range, being slightly below the median. Taking into account the complexity of the allegations, the number of legal issues involved in defending an ORICO

action, and that the amount at stake for Dr. Lee, I conclude it is a reasonable rate for Mr. Ryan's time.

Dr. Lee also seeks compensation for 37.6 hours worked by Mike Belisl, an associate attorney with eight years' experience, at the hourly rate of $215 an hour. (Ryan Supp. Decl. [237] ¶ 8.) The 2012 OSB Survey reflects that attorneys in Portland with 7–9 years' experience bill at the median hourly rate of $250, with a 25th percentile rate of $225 an hour and a 75th percentile rate of $295 an hour. 2012 OSB Survey at 30. Mr. Belisl's hourly rate is below the 25th percentile for attorneys of his experience, and I conclude for the reasons stated above that $215 an hour is a reasonable rate for Mr. Belisl's time.

Dr. Lee seeks compensation for 13.6 hours worked by two litigation assistants, Evan Alford and Joanna Stalheim, at the hourly rate of $105. She also seeks compensation for 65.9 hours worked by paralegal Pat Brundidge, who has twenty-three years' experience. Ms. Brundidge bills at an hourly rate of $135 an hour. Having reviewed the tasks completed by staff and the amount of time taken to complete them, I conclude that the hourly billing rates and the number of hours worked by each were reasonable.

I conclude that the entire $112,339 in attorney fees incurred by Dr. Lee in defense of the ORICO claim is reasonable and recoverable under ORICO.

Dr. Lee also seeks litigation expenses and costs in the amount of $6,870.48. These costs were billed separately by counsel, a standard practice in the Portland legal community. *See* Ryan Supp. Decl. [237] ¶ 9.) They include fees for online research, photocopies, electronic reproduction of documents, and court reporters' fees and transcript fees. (Ryan Decl. [205] Ex. B.)

In general, litigation expenses and costs are recoverable. However, the records submitted by Dr. Lee do not provide any detail as to which claim or legal issue any particular charge is associated with. Entries are labeled generically as "online research" or "electronic reproduction" without any reference to what issue was being researched or what document was being reproduced. (*See* Decl. of Ryan Ex. B [205].) While fees for court reporting are identified by deponent, I cannot determine whether each of these deponents actually testified to issues relevant to the ORICO claim. Without more, I cannot tell whether the full amount of costs sought is related to the ORICO claim, as opposed to any other counterclaim. Because there is insufficient detail to allow me to eliminate entries with specificity, I conclude that a percentage reduction is appropriate. Therefore, I award Dr. Lee fifty percent of the expenses and fees sought, for a total of $3,435.24. Many of the factual issues underlying the ORICO counterclaim are the same as those underlying the other claims, but many legal issues pertinent to ORICO are separate from any other claim. I have reduced the award by less than seventy-five percent—the percent that could be applied because ORICO is one of four counterclaims—because it is reasonable to assume that the factual issues giving rise to the significant deposition expenses were largely common between all claims, and were thus necessary to explore in defense of the ORICO claims.

b) Dr. Cluen

Dr. Cluen seeks compensation for hours worked by three attorneys and two paralegals. He seeks compensation for 620 hours worked by Jamie Valentine, lead trial counsel, defending against the ORICO counterclaim. Mr. Valentine has five years' experience in private practice. (Valentine Decl. [215] ¶ 2.) Mr. Valentine's billing rate is $125 an hour. This is well below the

average billing rate for attorneys of his experience in Portland, who bill at a median rate of $218 an hour. 2012 OSB Survey at 29. I find it reasonable.

Dr. Cluen seeks compensation for 35.8 hours worked by attorney Scott O'Donnell. Mr. O'Donnell has over twenty years' experience in private practice defending healthcare providers and institutions. (Valentine Decl. [215] ¶ 2.) Mr. O'Donnell's billing rate is $165 an hour. The OSB Survey reflects that attorneys in Portland with over twenty years' experience bill at a median rate of $333 an hour, with a range of $251 an hour to $399 an hour at the twenty-fifth and seventy-fifth percentiles. 2012 OSB Survey at 30. Mr. O'Donnell's rate is well below the average for attorneys of his experience, and I find it a reasonable rate for the defense of this matter.

Dr. Cluen seeks compensation for three (3) hours worked by attorney Lindsay Byrne. (Valentine Decl. [215] ¶ 4.) Ms. Byrne has three years' experience in private practice. *Id.* ¶ 2. Her billing rate is $125 an hour. As discussed above, this billing rate is well below the average for attorneys of her experience in Portland, and I consider it reasonable. (OSB Survey at 29.)

Dr. Cluen also seeks compensation for 60.6 hours worked by paralegal Kristin Francis and 5.3 hours worked by paralegal Susan Hanson. (Valentine Decl. [215] ¶ 4.) Both paralegals' billing rates are $90 an hour. I find this rate to be reasonable, in light of the tasks undertaken by Ms. Francis and Ms. Hanson in this case.

There is no objection to the inclusion of the hours worked by counsel and staff for Dr. Cluen. Having reviewed counsel's billing records, I conclude that the hours were reasonably expended in defending against the ORICO counterclaim. As noted, many hours worked were pertinent to other counterclaims as well, but I find that the hours included in Dr. Cluen's request

were reasonably incurred in defending against issues common to the ORICO counterclaim. As such, Dr. Cluen is awarded $90,512.50 in attorney fees.

Dr. Cluen seeks $7,938.63 in costs billed separately by counsel. (Cluen Mem. [214] at 3–4; Decl. Valentine [215-1, 215-2] ¶ 10; Ex. A at 5, 12, 29–32 , 48–57.) These costs include photocopying, fees for court reporters and transcripts, expert fees, and fees for witnesses and process service. *Id.* Dr. Lee's documentation of costs suffers the same deficiency in detail discussed above—the Court cannot determine whether particular costs were associated with the ORICO claim, other counterclaims, or both. Consequently, Dr. Cluen's costs and expenses are also reduced by fifty percent. Dr. Cluen is awarded $3,969.32 in costs and expenses.

CONCLUSION

Pursuant to my Order [235] and as explained above, counterclaim Defendant Dr. Lee's Motion for Attorney Fees [202] and counterclaim Defendant Dr. Cluen's Motion for Attorney Fees [213] are GRANTED under ORICO. Dr. Lee is awarded $112,339 in attorney fees and $3,435.24 in expenses and costs. Dr. Cluen is awarded $90,512.50 in attorney fees and $3,969.32 in expenses and costs. Accident Care's Motion for Attorney Fees [212] is DENIED.

IT IS SO ORDERED.

DATED this 16th day of June, 2014.

/S/ MICHAEL W. MOSMAN
MICHAEL W. MOSMAN
United States District Judge