

The Honorable John C. Coughenour

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JAMES S. GORDON, Jr., a married individual,
d/b/a 'GORDONWORKS.COM'; OMNI
INNOVATIONS, LLC., a Washington limited
liability company,

Plaintiffs,

v.

VIRTUMUNDO, INC, a Delaware corporation
d/b/a ADKNOWLEDGEMAIL.COM;
ADKNOWLEDGE, INC., a Delaware
corporation, d/b/a
ADKNOWLEDGEMAIL.COM; SCOTT
LYNN, an individual; and JOHN DOES, 1-X,

Defendants.

NO. CV06-0204JCC

**DEFENDANTS' MOTION FOR
ATTORNEYS' FEES AND COSTS**

NOTE ON MOTION CALENDAR:
July 6, 2007

I. INTRODUCTION

Pursuant to 15 U.S.C. § 7706(g)(4) and Wash. Rev. Code 19.190.090(3), Defendants hereby move the Court for an award and judgment in the amount of reasonable attorneys' fees and costs as the prevailing party in this litigation. For the reasons stated below, this Court should grant Defendants an award of reasonable attorneys' fees in the amount of \$509,821.50 and costs in the amount of \$32,213.01.

II. FACTS

A. Defendants Were the Prevailing Party in this Litigation.

This Court granted summary judgment in favor of Defendants on all causes of action. (Dkt. #121, hereinafter, the “Order”.) The Court found that Defendants were the prevailing party in this litigation. (Order at 24:23-24 (“As the prevailing parties, Defendants may file a motion for attorneys fees pursuant to 15 U.S.C. § 7706(g)(4).”); *see also* Order at 24:13 (“Defendants may move for attorneys’ fees in light of this Order.”)). On June 6, 2007, the Court entered final judgment in favor of Defendants and dismissed all claims asserted by Plaintiffs. (Dkt. #122.)

B. The Rate and Hours of Attorneys’ Fees Were Reasonable in Light of the Complexity of the Lawsuit

Plaintiffs filed this lawsuit on February 9, 2006. For a period of approximately sixteen (16) months, the parties actively engaged in pre-trial and trial preparation litigation. The case was litigated through the discovery period, through dispositive motion practice, and past the initial trial date.

The parties exchanged extensive written discovery requests and produced substantial documents. The parties conducted six depositions. Plaintiffs James Gordon and Omni Innovations, LLC were deposed over a two day period. Plaintiffs deposed Fed. R. Civ. P 30(b)(6) representatives of both corporate defendants and the individual defendant, all of which are located in Missouri or Kansas. Defendants’ counsel traveled to Kansas to defend those depositions. Newman Decl. at ¶ 7. Defendants traveled to Chicago, Illinois to depose Plaintiffs’ expert witness, Pete Resnick. *Id.*

Plaintiffs moved for partial summary judgment on December 18, 2006 and, for the first time, articulated that one basis for their claims was their novel “from” line theory. (Dkt. #53.) Defendants successfully opposed that dispositive motion. On January 22, 2007, Defendants moved for summary judgment on all of Plaintiffs’ claims. (Dkt. #98.) Defendants prevailed on their motion for summary judgment and Judgment was entered in their favor. Briefing on

1 these motions were extensive and supported by numerous declarations with voluminous
2 exhibits. (*See* Dkt. ##53-66; Dkt. ##82-89; Dkt. ## 98-109.) From the date Plaintiffs filed
3 their motion for summary judgment on December 18 until all dispositive motions were fully
4 briefed and ripe for the Court's consideration on February 16, 2007, Defendants' counsel was
5 actively involved in dispositive motion briefing in this case. Newman Decl. at ¶ 5.

6 Plaintiffs asserted that more than 10,000¹ of Defendants' emails violated CAN-SPAM,
7 the Washington CEMA and the Washington CPA. The defense in this litigation was
8 complicated by Plaintiffs' tactical decision to withhold a theory of liability as applied to
9 individual emails or categories of emails. Until their Motion for Summary Judgment (Dkt.
10 #53), Plaintiffs refused to commit to any particular statutory provision which was allegedly
11 violated. Accordingly, Defendants were required to employ a team of newly admitted lawyers
12 to review the emails and analyze whether the emails violated any of the statutes' many
13 provisions. This analysis (referred to in briefing as the "Linke Log") included columns for
14 each of the many potential violations of the email statutes and an excerpt of the relevant fields
15 as they applied to those potential violations (e.g., "to", "from", "subject line", transmission
16 path" and "header information"). *See* Dkt. # 73, 102.) A reasonable hourly rate for the
17 document analysis attorneys is \$125.00 per hour. The document analysis attorneys devoted a
18 reasonable 533.1 hours to the creation of the Linke Log. Newman Decl. at ¶ 4.

19 Subsequent to and concurrent with the dispositive motions in this case, the parties
20 engaged in Fed. R. Civ. P. 39.1 mediation and trial preparation for the April 16, 2007 trial
21 date. (*See* Dkt. 27.) Defendants filed various discovery motions, including a motion to
22 compel Plaintiffs to produce and segregate the morass of produced emails (*See* Dkt. # 71 *et*
23 *seq.*) and a motion to permit Defendants to depose Plaintiffs witnesses disclosed after the
24 discovery cutoff. (*See* Dkt. # 116 *et seq.*) Each of these efforts were either required by Court
25 order or were the reasonable expenditure of legal effort in the defense of Plaintiffs claims.

26
27 ¹ 10,000 is a conservative estimate of the number of emails at issue in this case. Although Plaintiffs
28 claimed 7,890 emails as the basis for their Motion for Summary Judgment (Dkt. #53), they produced over 30,000
emails total. *See* Defendants' Motion to Compel Segregation of Email Production (Dkt. #71).

1 Newman Decl. at ¶ 6.

2 Defendants were principally represented by Derek Newman and Roger Townsend. A
3 reasonable rate for attorneys of similar experience, skill, background and knowledge in
4 technology disputes is \$350 per hour. Messrs. Newman and Townsend devoted a total of 552
5 hours to the defense in this litigation. Messrs. Newman and Townsend were supported by
6 other lawyers throughout this litigation and efforts were made to have less expensive attorneys
7 work on matters where appropriate. A reasonable rate for junior attorneys on this matter is
8 \$200 per hour. Junior attorneys devoted a total of 890.7 hours to the defense in this litigation.

9 Newman Decl. at ¶ 3.

10 **C. Hourly Rates Were Reasonable Considering the Experience, Skill, and**
11 **Reputation of the Attorneys**

12 Plaintiffs raised novel questions of law which had no precedent in this judicial district
13 or the Ninth Circuit Court of Appeals. Plaintiffs' alleged violations were hyper-technical in
14 nature and required counsel with familiarity with high-technology disputes and the contractual
15 and technical relationships incidental to the Internet. Defendants were required to hire legal
16 counsel familiar with the subject matter (*i.e.*, the Internet and email) and high-technology and
17 intellectual property law disputes. Newman Decl. at ¶ 2.

18 The retail hourly rate for Defendants' attorneys ranged from \$325.00 per hour for
19 senior attorneys to \$115.00 for junior attorneys. Defendants' retail rate was consistent with
20 Newman & Newman, Attorneys at Law, LLP ("N&N") standard rates during the course of
21 this litigation. Moreover, the retail rate is less than or consistent with prevailing hourly rates
22 in the Seattle legal market for attorneys with comparable expertise, experience and skill. (*See*
23 *Declarations of Seth Wilkinson, Jessica Eaves Mathews, Spencer Freeman, Steven Hayes,*
24 *and Eric Blank filed herewith (collectively, the "Prevailing Rate Declarations").*) The
25 reasonable rate for an experienced technology and intellectual property lawyer in the Seattle
26 legal market is \$350.00 an hour and the rate for a junior lawyer is \$200 per hour. *Id.*

27 N&N has substantial experience defending actions under CAN-SPAM, the
28 Washington CEMA and spam related lawsuits across the United States. In this district, N&N

1 has represented defendants in numerous cases brought by Plaintiff Omni Innovations LLC.
 2 (*See e.g.*, Omni Innovations LLC v. Ascentive LLC et al., W.Dist.Wa. Case No.
 3 2:06-cv-01284-TSZ; Omni Innovations LLC et al v. Smartbargains.com LP, W.Dist.Wa.;
 4 Case No. 2:06-cv-01129-JCC; Omni Innovations LLC et al v. Inviva Inc et al, W.Dist.Wa.;
 5 Case No. 2:06-cv-01537-JCC; Omni Innovations LLC et al v. BMG Music Publishing NA
 6 Inc et al, W.Dist.Wa., Case No. 2:06-cv-01350-JCC; Omni Innovations LLC v. Stamps.com
 7 Inc et al, W.Dist.Wa., Case No. 2:07-cv-00386-MJP). Additionally, N&N has represented
 8 defendants in cases brought by Joel Hodgell, another frequent anti-spam plaintiff represented
 9 by the same counsel as Omni Innovations in the present matter. For example, N&N
 10 represented Samson Distributing, Daniel Amato, EyeFive, Inc., DirectClick, Acetech, Topica,
 11 Revenue Alley, Ride Marketing, and Savicom in several unrelated cases brought by Mr.
 12 Hodgell². In one of those cases, Hodgell v. Amato, King County Dist. Court, Case No. Y2
 13 1066, N&N's client was awarded attorneys' fees as the prevailing party. Similarly, N&N won
 14 a dismissal for Tandax in CAN-SPAM litigation brought in the United States District Court
 15 Western District of Oklahoma. Braver v. Ameriquest Mortgage Company, W.Dist. Ok, Case
 16 No. CIV-04-1013-W. N&N defended Samson Distributing in a lawsuit brought by
 17 AOL/TimeWarner in the Eastern District of Virginia. America Online, Inc. v. Samson
 18 Distributing, Inc., et al., E.Dist.Va., Case No. 03-473-A. Finally, N&N successfully won
 19 before the Supreme Court of Utah dismissal of an action under the Utah state spam law
 20 (which was similar to Washington's CEMA). Fenn v. Mleads Enters., 137 P.3d 706 (Utah
 21 2006).

22 While N&N's standard rates are reasonable and consistent with the prevailing market
 23

24
 25 ²See Hodgell, et al. v. Samson Distributing, et al., W.Dist.Wa, Case No. C02-2184Z; Hodgell v. Amato et
 26 al., King County Dist. Court, Case No. Y2 1066; Hodgell v. EyeFive, Inc., King County Super. Court, Case No.
 27 04-2-01754-8 SEA; Hodgell v. Direct Click.com, Inc., King County Super. Court, Case No. 04-2-01755-6 SEA;
 28 Hodgell v. Bulk Marketing, Inc., et al., King County Super. Court, Case No. 05-2-13730-4 SEA; Hodgell v.
Memolink, Inc., et al., W.Dist.Wa., Case No. C02-2183Z; Hodgell v. Revenue Alley LLC, et al., King County
 Super. Court, Case No. 05-2-38340-2 SEA; Hodgell v. Ride Marketing Group, LLC, et al., King County Super.
 Court, Case No. 05-2-01930-1SEA; Hodgell v. Topica, et al., San Francisco County Super. Court, Case No. CGC-
 03-425317.

1 rate, they were discounted in the actual billing to Defendants. N&N regularly discounted
 2 Defendants' fees by striking entries of attorney time from monthly invoices. (Attached as
 3 Exhibit A to Newman Decl.) Accordingly, the effective rates for fees were considerably
 4 lower than the retail rate. To date, Defendants were billed \$276,861.44 in attorneys' fees for
 5 1,975.3 attorneys' hours expended.³ *Id.* However, the amounts billed actually underestimate
 6 the reasonable attorneys fees in this case.

7
 8 **D. The Fees Expended Were Reasonable in Light of the Exposure to Defendants**

9 Plaintiffs sought at least \$10,257,000.00 in statutory damages in their summary
 10 judgment motion in this litigation. (Dkt. #53.) The Court found as follows:

11 Plaintiffs' partial summary judgment motion requests a total of \$10,257,000 in
 12 statutory damages: \$2,367,000 pursuant to CAN-SPAM and \$7,890,000 pursuant
 to CEMA, which allows \$1,000 per illegal e-mail. WASH. REV. CODE §§
 19.190.040(2).

13 Order at p.9, n.8. However, Plaintiffs only moved for *partial* summary judgment; the motion
 14 only sought relief based on allegations of fraudulent email header content. (Plaintiffs' Motion
 15 for Partial Summary Judgment, Dkt #53.)

16 In their First Amended Complaint (Dkt. #15 "FAC"), Plaintiffs alleged violations of
 17 more than a dozen different provisions carrying statutory damages. 15 U.S.C. § 7704(a)(1)
 18 (\$100 for each email containing materially misleading header information); 15 U.S.C. §
 19 7704(a)(2) (\$25 for each email containing materially misleading subject lines); 15 U.S.C. §
 20 7704(a)(3)(A) (\$25 for each email lacking a functioning unsubscribe mechanism); 15 U.S.C.
 21 § 7704(a)(4)(A)(i) (\$25 for each email sent in violation of previous unsubscribe request); 15
 22 U.S.C. § 7704(a)(5)(A)(i) (\$25 for each email lacking identification of email as
 23 advertisement); 15 U.S.C. § 7704(a)(5)(A)(ii) (\$25 for each email lacking notice of
 24 opportunity to unsubscribe); 15 U.S.C. § 7704(a)(5)(A)(iii) (\$25 for each email lacking the
 25 sender's postal address); Wash. Rev. Code 19.190.020(1)(a) (\$1,000 for each email

26
 27 ³The aggregated effective hourly rate actually billed to Defendant in this litigation was \$140.17 per hour.
 28 Defendants' lawyers billed approximately \$276,861.44 for 1,975.3 hours of attorney time, equating to a blended
 rate of \$140.17 per hour.

1 containing misrepresented or obscured header information or using a third party's domain
2 name without permission); Wash. Rev. Code 19.190.020(1)(b) (\$1,000 for each email
3 containing a misleading subject line); Wash. Rev. Code 19.190.080 (\$5,000 for each email
4 fraudulently soliciting personally identifying information); Wash. Rev. Code 19.170 *et seq.*
5 (Uncertain amount of damages for deceptive advertising violations). Plaintiffs also alleged
6 that Defendants committed acts in violation of 15 U.S.C. § 7704(b), which, if true, would
7 permit a court to award treble damages of any award under CAN-SPAM. Finally, Plaintiffs
8 claimed that all of the Washington State CEMA claims constituted violations of the
9 Washington Consumer Protection Act, Wash. Rev. Code 19.86, *et seq.*, which also provides
10 for treble damages.

11 Plaintiffs never articulated the precise nature or extent of their claimed damages, but
12 the maximum recovery under the above statutory provisions and accounting for the
13 availability of treble damages is *more than two hundred million dollars*. While it is
14 implausible that a court would award \$200,000,000 for commercial email violations, this
15 figure is technically possible based on Plaintiffs' allegations and the sheer volume of the
16 emails Plaintiffs produced. Considering that many of the statutory provisions at stake in this
17 case had never been interpreted by any court, it is unquestionable that Defendants faced
18 substantial legal exposure.

19
20 **E. Defendants' Costs Were Reasonable.**

21 Defendants expended costs in an amount of at least \$26,338.01. These costs included:
22 deposition costs (\$10,383.70), Plaintiffs' expert witness's fee for his deposition in Chicago
23 (\$1,350.00), *pro hac vice* fee (\$75.00), mediator fees (\$2,759.37), telecommunications fees
24 (\$207.29), travel expenses for depositions out of the district (\$2,343.32), photocopying
25 expenses (\$10,224.94), electronic legal research expenses (\$1,010.20), mailing and
26 messenger expenses (\$485.54), and other costs. Each of the foregoing fees was necessary and
27 reasonable in defending this lawsuit. Newman Decl. at ¶ 9.

28 Additionally, Defendants paid their expert witness, Neal Krawetz, Ph.D., a fee in the

1 amount of \$5,875.00. (Attached as Exhibit B to Newman Decl.) An expert witness was
2 necessary to rebut Plaintiffs' claims related to email headers and email protocol. Defendants
3 relied on the expert witness in bringing their successful motion for summary judgment. *See*
4 *e.g.*, Krawetz Decl. (Dkt. #99); Defendants' Motion for Summary Judgment (Dkt. # 98,
5 *passim*). Moreover, had this case proceeded to trial before a jury, Dr. Krawetz would have
6 been necessary to explain the technical intricacies of email transmission to the jury.

7 8 III. ARGUMENT AND AUTHORITY

9 A. The Determination of a Reasonable Attorneys' Fees Award

10 CAN-SPAM and CEMA each provide for an award of attorneys' fees to the prevailing
11 party. 15 U.S.C. § 7706(g)(4); Wash. Rev. Code 19.19.190(3). In its order granting summary
12 judgment, this Court invited Defendants to apply for attorneys' fees. (Order at 24:23-24.)
13 Fed. R. Civ. P. 54(d)(2) provides for the application for attorneys' fees. Defendants have
14 timely applied for an award of attorneys' fees within 14 days of the Court's entry of judgment
15 on June 6, 2007. (*See* Dkt. #121.)

16 17 B. The Lodestar Analysis for Determining Reasonable Attorneys' Fees

18 Attorneys' fees are awarded by the court under the lodestar approach from Hensley v.
19 Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). The lodestar is
20 determined by multiplying the number of hours reasonably expended by a reasonable hourly
21 rate. Jordan v. Multnomah County, 799 F.2d 1262, 1265 (9th Cir. 1986). Once the number of
22 reasonable hours is determined, the court must set a reasonable hourly rate considering the
23 experience, skill, and reputation of the attorney requesting fees. Chalmers v. City of Los
24 Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986). "*The most critical factor in determining the*
25 *reasonableness of a fee award is the degree of success obtained.*" Farrar v. Hobby, 506 U.S.
26 103, 114, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992) (emphasis added) (quoting Hensley v.
27 Eckerhart, *supra*).

28 The Ninth Circuit has held that the determination of a reasonable hourly rate "is not

1 made by reference to the rates actually charged the prevailing party.” *See, e.g., Mendenhall v.*
2 *Nat’l Transp. Safety Bd.*, 213 F.3d 464, 471 (9th Cir. 2000) (quoting *Chalmers*, 796 F.2d at
3 1210). Rather, billing rates “should be established by reference to the fees that private
4 attorneys of an ability and reputation comparable to that of prevailing counsel charge their
5 paying clients for legal work of similar complexity.” *Davis v. City of San Francisco*, 976 F.2d
6 1536, 1545 (9th Cir. 1992); *see also Carson v. Billings Police Dep’t*, 470 F.3d 889, 892 (9th
7 Cir. 2006) (holding that the prevailing market rate -- not the individual contract between the
8 applicant attorney and the client -- “provides the standard for lodestar calculations”).

9 Defendants submit that reasonable hourly rates in the present matter are \$350 per hour
10 for managing attorneys, \$200 for associate attorneys, and \$125 for document analysis
11 attorneys. *See* Prevailing Rate Declarations. *Davis v. City of San Francisco*, 976 F.2d 1536
12 (9th Cir. 1992) (“[D]eclarations of the prevailing market rate in the relevant community . . .
13 [are] sufficient to establish the appropriate [billing] rate for lodestar purposes.”).

14 Courts in this district have found that significantly higher legal hourly rates are
15 recoverable in cases of similar complexity and sophistication. In comparable technology
16 cases, this district has awarded fees up to \$650 per hour. *See Eon-Net, L.P. v. Flagstar*
17 *Bancorp, Inc.*, 2006 U.S. Dist. LEXIS 91735 (W.D. Wash. 2006) (approving fees as high as
18 \$650 per hour in patent dispute despite non-moving party’s assertion that “reasonably
19 competent” patent litigation counsel could have been obtained for \$ 138.20 per hour); *see also*
20 *Derek Andrew, Inc. v. Poof Apparel Corp.*, 2006 U.S. Dist. LEXIS 92710 (W.D. Wash.
21 2006) (approving fees in the amount of \$450 per hour in trademark dispute); *Twentieth*
22 *Century Fox Film Corp. v. Dastar Corp.*, 2000 U.S. Dist. LEXIS 22064 (C.D. Cal. 2000),
23 *aff’d, rev’d, vacated, remanded sub nom by Twentieth Century Fox Film Corp. v. Entm’t*
24 *Distrib.*, 34 Fed. Appx. 312, 315 (9th Cir. 2002), *rev’d on other grounds, Dastar Corp. v.*
25 *Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (approving of fees ranging between
26 \$295 - \$475 in 2000 copyright dispute); *Velez v. Wynne*, 2007 U.S. App. LEXIS 2194 (9th
27 Cir. 2007) (finding abuse of discretion by district court in not awarding \$475 hourly rate for
28 complex employment litigation where opposition did not establish that rate was

1 unreasonable); Freitag v. California Dep't of Corr., 2003 U.S. Dist. LEXIS 26579 (N.D. Cal.
 2 2003) (finding that \$400 per hour was a reasonable rate in 2003). Based upon existing
 3 findings in this Circuit, Defendants' asserted reasonable rate for attorneys' fees of \$350 per
 4 hour for managing attorneys and \$200 for associates is *actually below* the prevailing market
 5 rate for legal counsel in high-technology and intellectual property matters.

6 7 **C. The Lodestar Amount should be Increased by this Court**

8 The district court may adjust the presumptive lodestar award upward or downward
 9 using a multiplier based on twelve factors not included in the initial lodestar calculation. Van
 10 Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000); McGrath v. County
 11 of Nevada, 67 F.3d 248, 252 & n.4 (9th Cir. 1995); Cunningham v. County of Los Angeles,
 12 879 F.2d 481, 487 (9th Cir. 1988). The twelve factors the Court considers when adjusting the
 13 lodestar amount are:

14 (1) the time and labor required, (2) the novelty and difficulty of the questions
 15 involved, (3) the skill requisite to perform the legal service properly, (4) the
 16 preclusion of other employment by the attorney due to acceptance of the case, (5)
 17 the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations
 18 imposed by the client or the circumstances, (8) the amount involved and the results
 19 obtained, (9) the experience, reputation, and ability of the attorneys, (10) the
 20 "undesirability" of the case, (11) the nature and length of the professional
 21 relationship with the client, and (12) awards in similar cases.

19 Id. at 252 n.4 (citing Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975)).

20 The twelve factors for determining reasonable fees support an increase in the
 21 attorneys' fees award to Defendants. It has already been determined that Defendants were the
 22 prevailing party on all claims in this litigation. According, the "most critical factor" weighs
 23 heavily in favor of defendants. Farrar v. Hobby, 506 U.S. 103, 114, 121 L. Ed. 2d 494, 113 S.
 24 Ct. 566 (1992) (quoting Hensley v. Eckerhart, supra).

25 Furthermore, the remaining eleven factors also support increasing fees above the
 26 amounts actually billed to Defendants. The novelty and difficulty of the questions involved as
 27 well as the technical knowledge required to perform the legal service properly, all support a
 28 higher hourly rate. Finally, the circumstances of the litigation warrant an increase in

1 determining reasonable attorneys' fees. Plaintiffs sought damages far in excess of
2 \$10,000,000 and the litigation effectively challenged the legitimacy of Defendants' business
3 operations. Had Plaintiffs prevailed in this litigation, then other plaintiffs would have rushed
4 to file against Defendants, and Defendant's business would have been in jeopardy. The
5 attorneys' fees as-billed represent a small fraction of the asserted exposure to Defendants. In
6 light of the importance of this litigation to Defendants, reasonable attorneys' fees should be
7 increased 20% from the presumptive lodestar rate.

8
9 **D. Standards for Costs**

10 Fed. R. Civ. P 54(d)(1) provides as follows:

11 Costs Other than Attorneys' Fees. Except when express provision therefor is made
12 either in a statute of the United States or in these rules, costs other than attorneys'
13 fees shall be allowed as of course to the prevailing party unless the court otherwise
14 directs.

14 (Emphasis added.) Deposition costs, service of process fees, witness fees, travel expenses,
15 photocopying expenses, electronic legal research expenses, messenger/courier expenses, clerk
16 fees and other costs are routinely awarded as recoverable costs under 28 U.S.C. § 1920 and
17 Fed. R. Civ. P 54(d)(1). See GT Dev. Corp. v. Temco Metal Prods. Co., 2005 U.S. Dist.
18 LEXIS 37501 (W.D. Wash. 2005). Defendants' costs in the amount of \$26,338.01 are
19 reasonable and recoverable.

20 Additionally, Defendants seek an award that includes their expert witness fees in the
21 amount of \$5,875. Washington law provides for recovery of expert witness fees under RCW
22 19.86. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 26P.3d 910,
23 917 (Wash. 2001) (holding that it was an error to not award expert witness fees and other
24 expenses necessary to fully compensate the prevailing party.)

25 Defendants' retention of an expert witness was essential in this case. Defendants
26 retained the services of an expert witness with knowledge, skill, training and experience in the
27 behind-the-scenes operation of email transmission and standards and practices in the industry.
28 Defendants' expert witness report was relied upon in Defendants' successful motion for

1 summary judgment. (See Dkt. # 99.) Had this case gone to trial, it would have been before a
2 jury (see Dkt. #114) who would have relied upon the opinions of competing experts to
3 determine the appropriate standards and practices for transmission of email. This area of
4 knowledge is outside of the common understanding of a jury and, for this reason, expert
5 witness testimony was necessary in this case.

6
7 **IV. CONCLUSION**

8 Applying the lodestar calculation to the present matter, defendants should be awarded
9 a fee at the prevailing market rate of \$350 per hour for senior attorneys and \$200 for junior
10 attorneys. At a rate of \$350 per hour for senior attorneys (Newman & Townsend) and \$200
11 for junior attorneys (all other attorneys), and \$125 per hour for document analysis attorneys,
12 aggregated reasonable attorneys' fees amount to \$424,851.25.

13 Furthermore, due to the technical nature of the case, Defendants' success and the
14 significant exposure to Defendants in this litigation, the reasonable attorneys' fees awarded to
15 defendants should be increased by 20% to \$509,821.50.

16 Finally, Defendants should be awarded costs in the amount of \$32,213.01 pursuant to
17 Fed. R. Civ. P. 54(d)(1). Therefore, Defendants should be awarded a total of \$542,034.51 for
18 attorneys fees and costs.

19 DATED this 19th day of June, 2007.

20
21 **NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP**

22 

23 By:

24 _____
Derek A. Newman, WSBA No. 26967
Roger M. Townsend, WSBA No. 25525

25 Attorneys for Defendants
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