UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STRAITSHOT COMMUNICATIONS, INC., et al., Plaintiffs, v. TELEKENEX, INC., et al., Defendants.	C10-268 TSZ ORDER

THIS MATTER comes before the Court on plaintiffs' motions for spoliation sanctions, docket no. 511, and for attorney's fees and costs pursuant to Washington's Consumer Protection Act ("CPA"), docket no. 512. Having reviewed all papers filed in support of, and in opposition to, each motion, the Court enters the following Order.

Background

Plaintiff Straitshot Communications, Inc. ("Straitshot") commenced this action in King County Superior Court on February 5, 2009. *See* Ex. 5 to Martin Decl. pursuant to Local Rule CR 101(b) (docket no. 4-6); *see also* Complaint, Ex. 1 to Praecipe (docket no. 28-2). The complaint was amended twice before the matter was removed to this Court on February 12, 2010, based on federal question jurisdiction, Straitshot having

added in its Second Amended Complaint a claim under the Racketeer Influenced and Corrupt Organizations ("RICO") statute, specifically 18 U.S.C. § 1962. *See* Notice of Removal (docket no. 1); *see also* Second Amended Complaint, Ex. A to Notice of Removal (docket no. 1-2). The Court subsequently dismissed the RICO claim, as well as a claim under a similar state statute, without prejudice and with leave to amend. Order (docket no. 139). By Fourth Amended Complaint, Straitshot RC, LLC ("SRC LLC") was added as a plaintiff, and the federal and state RICO claims were realleged. *See* Fourth Amended Complaint (docket no. 173). By Fifth Amended Complaint, defendant Telekenex, Inc.'s successor-in-interest, IXC Holdings, Inc. (collectively "Telekenex"), was named as a defendant. Fifth Amended Complaint (docket no. 175). A few months later, the Court granted summary judgment against plaintiffs, and dismissed the federal and state RICO claims, as well as a claim for "corporate disregard," with prejudice. Order (docket no. 229). The Fifth Amended Complaint was the operative pleading for the remainder of the case.

The case proceeded to trial on eight claims asserted by plaintiffs against various defendants and one counterclaim asserted by defendant Mammoth Networks, LLC ("Mammoth") against plaintiffs. *See* Court's Instructions (docket no. 388). After hearing evidence and counsel's arguments over a 14-day period and deliberating for 2½ days, the jury rendered a verdict as follows:

Claim No.	Theory of Relief	Defendant(s)	Verdict in Favor of	Damages
1	Breach of Contract	Prudell Radford	Plaintiffs	$0
2	Tortious Interference	Telekenex	Telekenex	N/A

Claim No.	Theory of Relief	Defendant(s)	Verdict in Favor of	Damages
3	Breach of Loyalty	Prudell Radford Summers	Plaintiffs, except as to Radford	$6,490,000*
4	Tortious Interference	All Defendants	Plaintiffs, except as to Mammoth/Worthen	$6,490,000*
5	Trade Secret Misappropriation	All Defendants	Defendants	N/A
6	Lanham Act Violation	Telekenex Zabit Chaney Prudell Radford	Defendants	N/A
7	Consumer Protection Act	Telekenex Zabit Chaney Summers Prudell Radford	Plaintiffs, except as to Summers	$6,490,000*
8	Breach of Contract	Mammoth	Mammoth	N/A
CC	Breach of Contract	Plaintiffs	Mammoth	$674,431

See Verdict (docket no. 403); *see also* Judgment (docket no. 411). Plaintiffs' award of damages (indicated with an asterisk in the foregoing chart) is the same regardless of the theory of relief on which it is based. *See* Judgment (docket no. 411); *see also* Court's Instruction No. 27 (docket no. 388).

After the jury reached its verdict, the Court entered two separate sets of findings of fact and conclusions of law, one concerning the affirmative defenses of estoppel, waiver, and the doctrine of unclean hands, and the other regarding spoliation and the failure to produce documents during discovery. *See* Findings of Fact and Conclusions of Law (docket no. 410); Spoliation Findings of Fact and Conclusions of Law (docket no. 416) [hereinafter "Spoliation FFCL"]. In the former, the Court concluded that the affirmative defenses had not been proven, and in the latter, the Court awarded sanctions in favor of plaintiffs and against defendants Joshua and Julia Summers, Telekenex, Inc., and IXC

Holdings, Inc. for (i) costs in attempting to identify and recover destroyed documents, including the fees and costs of expert Erik Laykin; (ii) reasonable attorney's fees in pursuing the destroyed documents and documents that Summers and/or Telekenex failed to produce; and (iii) other costs caused by defendants' conduct related to the Straitshot laptop. Spoliation FFCL No. 32 (docket no. 416 at 13). In their pending motion seeking to quantify these sanctions, docket no. 511, plaintiffs request a total award of $519,074.99, which includes (i) $185,769.72 in costs, including the charges of expert Erik Laykin of Duff & Phelps, LLC; (ii) attorney's fees in the amount of $222,203.51, adjusted in light of defendants' response identifying certain computational errors and other discrepancies, *see* Reply (docket no. 551); and (iii) a multiplier of 1.5, which plaintiffs argue is warranted by contingency enhancements plaintiffs are contractually obligated to pay to their attorneys.

In their other pending motion for attorney's fees and costs pursuant to the CPA, docket no. 512, plaintiffs originally asked for $3,385,983.92, but revised the figure to $3,145,861.56, conceding as to some but not all of defendants' challenges regarding the calculation of the lodestar amount and the inclusion of non-compensable costs. *See* Reply (docket no. 549). The total requested by plaintiffs includes: (i) $1,955,460.39 in attorney's fees accrued by three different law firms; (ii) $212,670.97 in expenses, including attorney's fees charged by two other law firms; and (iii) a multiplier of 1.5 to reflect the contingent nature of the litigation, its alleged difficulty, and the perceived quality of the services provided. In preparing their motion, plaintiffs represent that they

have excluded time spent on matters unrelated to the CPA claim, for example, the federal and state RICO claims and the claims between plaintiffs and Mammoth.[1]

Discussion

A. Spoliation

The Court's authority to impose sanctions for spoliation of evidence is derived from two sources: (i) the inherent power of federal courts to take appropriate measures in response to abusive litigation practices, and (ii) the available remedies outlined in Federal Rule of Civil Procedure 37 when a party fails to comply with a duty or obey an order to provide or permit discovery. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Sanctions may take the form of attorney's fees against a party who acts in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 961. The Court has already found that defendant Joshua Summers engaged in bad faith spoliation of evidence and that he did so while an employee of Telekenex and acting within the scope of his employment. *See* Spoliation FFCL Nos. 25 & 31 (docket no. 416). During the course of trial, the parties stipulated that various e-mails, which were recovered from the despoiled laptop that had been issued to and untimely returned by Summers, were not produced in discovery by Telekenex. *See id.* at No. 21; Stipulations (docket no. 377). Telekenex's failure to disclose these e-mails, which were either received or sent by individuals, other

[1] Although the Fifth Amended Complaint contained fifteen causes of action, *see* docket no. 175, in light of plaintiffs' efforts to segregate the attorney's fees related to claims dismissed prior to trial, the Court has treated the CPA claim as one of only eight, rather than fifteen, causes of action.

than Summers, who were associated with Telekenex, undermines any claim that it was not complicit in or otherwise liable for Summers's spoliation efforts.

In determining the amount of monetary sanctions, the Court must be guided by a standard of reasonableness. *Leon*, 464 F.3d at 961. Recovery should not exceed "those expenses and fees that were reasonably necessary to resist the offending action." *In re Yagman*, 796 F.2d 1165, 1185, amended by 803 F.2d 1085 (9th Cir. 1986). The starting point for computing reasonable attorney's fees is the lodestar figure, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate. *See Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987). A reasonable hourly rate is one "in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Id.* at 1263. Upward adjustments from the lodestar amount, based on certain "other considerations," are proper only in "rare" and "exceptional" cases, and they must be supported by specific evidence in the record and detailed findings by the Court. *Id.* at 1262.

1. Lodestar

Turning now to the calculation of the lodestar value, the Court acknowledges and appreciates plaintiffs' attorneys' attempts to apportion the attorney's fees and costs associated with the spoliation issue,[2] but the Court must agree with many of the criticisms lodged by defendants.

[2] Defendants contend that plaintiffs should not be compensated for the time required to segregate the spoliation fees and costs. To the contrary, the Court concludes that the number of hours spent on such effort was both necessary and reasonable. Lawyers do not ordinarily keep separate records for particular

a. Rates

Although plaintiffs have appropriately not requested the full hourly rates charged by Massey & Gail LLP ("Massey & Gail"), namely $660 for named partners and $375 for a first-year associate, the reduced amounts still far exceed the prevailing rates in the local legal community for comparable work. Plaintiffs were, of course, within their rights to retain out-of-state counsel, but they may not pass along the monetary consequences of such decision to defendants when many equally competent attorneys in the greater Seattle area could have provided similar services. With regard to the Massey & Gail attorneys, the Court will apply the following hourly rates:

Attorney	**Rate**
Leonard A. Gail (named partner)	$425
Jonathan Massey (named partner)	$425
Bruce Doughty (affiliated lawyer)	$375
Matthew Reedy (first-year associate)	$195

These rates are consistent with those charged by other attorneys retained by plaintiffs in this case, and they are within the range of rates used by the Court in connection with attorney's fee applications involving similar claims and equivalent representation during the timeframe at issue here. Defendants have not challenged the hourly rates ascribed to lawyers and paralegals at the other two firms representing plaintiffs, namely the Summit

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tasks or services performed in a particular case, and counsel here could not have arranged in advance to track fees associated with spoliation, which is not expected in most cases. Thus, to determine the amount of attorney's fees and costs relating solely to spoliation, plaintiffs' counsel were required to engage in an after-the-fact parsing of voluminous billing records to cull out the subset of entries on which sanctions could be based. The Court will fully credit plaintiffs' attorneys for the time spent on this endeavor.

Law Group PLLC ("Summit") and Savitt Bruce & Willey LLP (the "SBW Firm"), and the Court has therefore employed all of those rates.

b. Hours

Having fixed the rates to be used in calculating the lodestar amount, the Court must evaluate whether the hours claimed were reasonably expended in connection with the spoliation matter. The Court concludes that the following reductions are warranted.

i. Block Billing

The Court agrees with defendants that, with respect to block billing, plaintiffs' counsel cannot simply assign an amount of time to a particular activity in the entry absent some contemporaneous record to support such allocation. Ordinarily, in deciding attorney's fee motions, when a billing entry contains more than one activity, the Court apportions the reported time equally among the described activities. The Court generally does so when the moving party has made no or minimal effort to segregate compensable time within one or more block-billed entries. Recognizing that plaintiffs' counsel has at least attempted to parse through the various block-billed entries, the Court declines to follow its usual course, which is unlikely to result in any more accurate estimate of the time spent on spoliation issues, particularly given the incompleteness of Massey & Gail's submissions.[3] Instead, the Court will apply a reduction of ten percent (10%), which will sufficiently account for the generous nature of plaintiffs' counsel's approximations.

[3] Plaintiffs have not provided a full set of billing statements from Massey & Gail, instead proffering pared down "invoices" that were created specifically for the pending motions, and the Court is therefore unable

ii. Quarter-Hour Increments

Pursuant to plaintiffs' concession that a deduction is justified because of Massey & Gail's practice of billing in quarter-hour (rather than tenth-of-an-hour) increments, the Court will decrease the attorney's fees associated with Massey & Gail's work by another five percent (5%).

iii. Duplication

The Court shares defendants' view that plaintiffs' counsel are seeking fees for duplicative work. The most glaring examples involve the trial testimony of plaintiffs' expert Erik Laykin, concerning which five different attorneys and three paralegals billed time, and closing argument, as to which, in addition to the lawyer who delivered the remarks, three others charged time. To adjust for such duplication of effort, which was most apparent in connection with trial work, the Court will decrease by 50% the fees relating to trial testimony and to opening and closing arguments. This reduction will not, however, apply to attorney's fees associated with discovery and pretrial efforts, including motions in limine, proposed findings of fact and conclusions of law, proposed spoliation jury instructions, and supplemental briefing on spoliation.[4]

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to determine what proportion of plaintiffs' overall attorney's fees and costs are reflected in their current estimates of spoliation and CPA fees and costs.

[4] With regard to defendants' other complaints about duplication, the Court declines to penalize plaintiffs for substituting and adding attorneys, and will not otherwise second guess counsel's decisions concerning the efficient distribution of responsibilities or management of specific work.

c. Calculation

Based on the adjustments described above, the Court has computed the following attorney's fees and costs:

Firm or Party	Atty's Fees	Costs[5]	TOTAL
Massey & Gail LLP	$91,265.36	$185,479.59	$276,744.95
Summit Law Group PLLC	$35,104.95	$182.00	$35,286.95
Savitt Bruce & Willey LLP	$18,274.28	$0.00	$18,274.28
Straitshot RC, LLC	N/A	$108.13	$108.13
TOTALS	$144,644.59	$185,769.72	$330,414.31

2. Multiplier

Having calculated the lodestar amount, the Court must now consider plaintiffs' request for an upward adjustment. In seeking an enhancement, plaintiffs rely on their agreements to pay some of their attorneys a multiple of their customary rates, depending on the outcome of the case.[6] In response, defendants contend that, under the "Discovery Fee Award" provision of the Attorney-Client Fee Agreement between plaintiffs, Summit, and Massey & Gail, plaintiffs owe no premium to counsel, and they should not receive an

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[5] Defendants have not challenged the costs that plaintiffs have requested in connection with spoliation, which include $184,555.19 for the services of expert Erik Laykin, $182.00 in service fees, $924.40 in travel expenses relating to Joshua Summers's second deposition, and $108.13 in e-mail server fees.

[6] Plaintiffs have not provided copies of these agreements, but they have offered their attorneys' summaries of the relevant provisions. According to Jessica Goldman, plaintiffs are obligated to pay Summit, in the event of a recovery, 145% of the standard hourly rate for work performed after May 2010. Goldman Decl. at ¶ 22 (docket no. 515). Before that date, Summit was apparently compensated on an hourly basis. The SBW Firm entered into a slightly different agreement whereby plaintiffs would pay (i) nothing if the recovery was less than $600,000; (ii) fees at between 2.5 and 5 times the actual rate, depending on the number of hours expended and the types of services performed, up to a maximum of $25,000, if the recovery was between $600,000 and $1,902,000; and (iii) fees at similar multiples, up to a maximum of 50% of the recovery, if the recovery was in excess of $1,902,000. Savitt Decl. at ¶¶ 12 & 13 (docket no. 514). In contrast, Massey & Gail has a more traditional contingency fee agreement with plaintiffs, expecting no payment unless the recovery exceeds a certain amount, and being entitled to specific percentages of any recovery over such sum, with the percentages increasing as various conditions and thresholds are met. Gail Decl. at ¶ 7 (docket no. 513).

upward adjustment from the lodestar amount.[7] The Court need not and does not decide whether the spoliation sanctions constitute a "Discovery Fee Award" within the meaning of the fee agreement. Defendants are not parties to the fee agreement, and the Court need not interpret or enforce the agreement to determine the amount of attorney's fees and expenses "reasonably necessary to resist the offending action." *Yagman*, 796 F.2d at 1185. Whether the spoliation sanctions are governed by the quoted provision of the fee agreement is a matter strictly between plaintiffs and their counsel, and regardless of how such question might ultimately be resolved, the Court is satisfied that an upward adjustment of the lodestar figure for the spoliation sanctions is not warranted. The spoliation dispute was only one among many battles fought in this case. None of the factors on which a lodestar may appropriately be enhanced are present with regard to this particular skirmish. *See Jordan*, 815 F.2d at 1262 nn.4 & 6 (reciting a previous twelve-element approach to calculating a reasonable attorney's fee, which was articulated in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and identifying four *Johnson* considerations on which an upward adjustment of the lodestar may not be

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[7] The section of the fee agreement on which defendants rely reads in relevant part:

> Counsel may recover from defendants certain sums as sanctions, for fees and costs incurred in a discovery dispute ("Discovery Fee Award"). It is agreed that, because a Discovery Fee Award is a result of the additional work and expense required by the discovery dispute, each Counsel shall be paid that portion of the Discovery Fee Award that resulted from such Counsel's work as reflected in the fee application filed with the Court. Such a Discovery Fee Award would not qualify for the premium (145%) billing rate and in addition would be reduced from the fees owed Counsel under, respectively Subparagraphs 4(a)(i) and (ii) above (for Summit) and Subparagraphs 4(c)(i) and (ii) (for Massey).

See Ex. H at ¶ 4(e) to Silverstein Decl. (docket no. 547).

based). In particular, the contingent nature of plaintiffs' counsel's fees has no bearing with respect to the spoliation sanctions because the "risk of non-payment due to lack of success" was exceedingly low. *See Jordan*, 815 F.2d at 1264. Even if plaintiffs had not prevailed at trial, the Court would still have imposed monetary sanctions relating to the spoliation. The Court DECLINES to impose a multiplier and HOLDS that the lodestar amount is adequate and reasonable compensation for the efforts expended by plaintiffs' attorneys in detecting the spoliation, exposing the culprits, and securing the various remedies.

B. Consumer Protection Act

Under the CPA, a prevailing plaintiff need not prove bad faith, or even actual damages, to be entitled to an award of reasonable attorney's fees. *See* RCW 19.86.090; *see Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 855-56, 792 P.2d 142 (1990). In computing, for purposes of the CPA, a reasonable amount of attorney's fees, the Court is not bound by the lodestar figure; rather, the Court is charged with making "an independent decision" as to what represents a reasonable amount of attorney's fees. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). With regard to reasonableness, an attorney's billing records, although relevant, are "in no way dispositive." *Id.*

1. Lodestar

For the reasons discussed in connection with the spoliation sanctions, the Court will use hourly rates for the Massey & Gail attorneys that are commensurate with those prevailing in the Seattle legal community, and will apply the rates requested for the

lawyers at Summit and the SBW Firm. The various concessions plaintiffs have made, including the five percent (5%) reduction in fees for work performed by Massey & Gail to compensate for the firm's quarter-hour billing practice, will also be incorporated into the Court's calculations. The remaining issue for the Court's consideration is whether plaintiffs, in their attorney's fee application, have exceeded the scope of efforts necessary to achieve a favorable result on their CPA claim. The Court concludes they have and has made the following adjustments.

a. Vague Descriptions

The Court has not credited vague descriptions, for example "correspondence re strategy issues," "correspondence re discovery cut off," or "conference re discovery issues," *see* Ex. 3 to Tab 2 to Gail Decl. (docket nos. 513-6 through 513-9), which provide no indication that the services related to plaintiffs' CPA claim. All of the time associated with such vague entries has been disregarded.

b. Unrelated and Unsuccessful Matters

The Court has excluded all entries referencing Brian Worthen and/or Mammoth,[8] against which the CPA claim was not alleged, and all entries mentioning Telekenex's creditor "Wellington," which provided no evidence relevant to liability under the CPA and only minimally pertinent information indirectly related to damages. The Court has also omitted the time spent deposing, conducting discovery concerning, or examining Joshua and Julia Summers, as to whom plaintiffs did not prove their cause of action under

[8] Plaintiffs have, however, received a portion of the attorney's fees requested for deposing and examining Jeremy Malli and Wayne Worthen.

the CPA.[9] To the extent that Brian Worthen, Mammoth, Wellington, and/or Summers appears in a block-billed entry, all of the time for such entry has been omitted.

c. Duplicate Recovery

With respect to the CPA claim, the Court has not awarded any fees for motions in limine or proposed findings of fact and conclusions of law, which primarily concerned spoliation and which have already been taken into account in the spoliation sanctions. With regard to jury instructions, in addition to the amount included in the spoliation sanctions, the Court has credited only one (1) hour of attorney time at the rate of $195, which more than sufficiently compensates for the almost verbatim use of Washington's pattern instructions concerning the elements of a CPA claim.

d. Block Billing

With respect to legal research and dispositive motions, to the extent that billing entries reflected the quantity of time devoted solely to the CPA claim, the Court has attributed the full amount; however, to the extent that billing entries refer to such efforts or motions generally, only a pro rata portion of the fees was allowed.

e. Pro Rata Recovery

The Court is unpersuaded by plaintiffs' assertion that the CPA claim was so closely related to other claims that "no reasonable segregation" can be made. *See* Motion at 10 (docket no. 512). Plaintiffs suggest that, "[b]y misappropriating Plaintiffs'

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[9] Although labeling as "fallacious" defendants' position that plaintiffs should not receive attorney's fees relating to Summers's testimony because they did not prevail in their claim against him, *see* Reply at 4 n.3 (docket no. 549), plaintiffs offer no citation to the record to support their apparent contention that Summers's testimony helped establish the CPA violation at issue.

confidential business information, the Telekenex Defendants were able to make their disinformation campaign more effective," *id.* at 13, but plaintiffs notably did not prevail on their trade secret misappropriation or false advertising (Lanham Act) claims. With respect to the other causes of action on which plaintiffs were successful, namely breach of employment contract, breach of loyalty, and interference with contractual relations, plaintiffs fail to explain how the evidence underlying such legal theories overlapped with the proof necessary to support their CPA claim, the sole premise of which was that defendants made false statements about Straitshot to its customers. *See* Instruction No. 20 (docket no. 388). Indeed, the other three causes of action could have been established without reference to false statements, *see* Instructions Nos. 14, 16, & 17, and the making of false statements could have been demonstrated without showing any breach of contract or duty of loyalty and in the absence of any tortious interference. Thus, unless a billing entry specifically referred to the CPA claim, the Court has reduced the number of hours in the billing entry by the ratio that the CPA claim bears to the total number of claims presented at trial, specifically one-to-eight (1/8). Moreover, time spent on the current motion for attorney's fees has been discounted by 40% to reflect plaintiffs' limited success.

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f. Calculation

The Court has computed a lodestar sum of $212,088.91, which is derived from the following data:

Attorney/Paralegal	Hours	Rate	Discount		Award
Summit Law Group PLLC					
AAR	383.1	$ 170	0.125		$ 8,140.88
ALV	230.75	$ 90	0.125		$ 2,595.94
JEK	31.9	$ 170	0.125		$ 677.88
JLG	863.25	$ 320	0.125		$ 34,530.00
KMO	175.8	$ 170	0.125		$ 3,735.75
LMH	44.2	$ 270	0.125		$ 1,491.75
	2.5	$ 270	1.000		$ 675.00
Savitt Bruce & Willey LLP					
DBP	67.7	$ 155	0.125		$ 1,311.69
DEM	55.9	$ 345	0.125		$ 2,410.69
DMC	0.7	$ 155	0.125		$ 13.56
	0.4	$ 155	1.000		$ 62.00
JPS	323.9	$ 395	0.125		$ 15,992.56
Massey & Gail LLP	625.0	$ 375	0.95	0.125	$ 27,832.03
BMD	2.75	$ 375	0.95	1.000	$ 979.69
JSM	565.55	$ 425	0.95	0.125	$ 28,542.60
	79.25	$ 425	0.95	1.000	$ 31,997.19
LAG	659.85	$ 425	0.95	0.125	$ 33,301.80
MJR	427.0	$ 195	0.95	0.125	$ 9,887.72
	69.5	$ 195	0.95	0.600	$ 7,724.93
	1.0	$ 195	0.95	1.000	$ 185.25
				TOTAL[10]	$212,088.91

[10] The Court has not awarded fees for the time billed by the following individuals: DEJK (David Kruse), DLA (Denise Ashbaugh), DNB (David Bruce), LCL (Larry Locker), MAT (Molly Terwilliger), MAY (Miles Yanick), MLM (Maureen Mitchell), RCB (Rex Browning), SAS (Sivan Steffens), SCW (Stephen Willey), and SDM (Sofia Mabee). Almost all of the time claimed for Mr. Browning was associated with fully redacted billing entries, and what services Mr. Browning actually provided in connection with this case remains a mystery. The descriptions of work performed by Mr. Kruse, Mr. Locker, Ms. Mabee, and Ms. Steffens are not much more informative, with the exception of the eight hours Mr. Locker spent assisting then lead counsel Jessica Goldman prepare to defend Philip Howe's deposition, which the Court has not credited because it was unnecessarily duplicative. Messrs. Bruce, Yanick, and Willey billed

2. Multiplier

Plaintiffs have requested 150% of the attorney's fees they allege were incurred in connection with their CPA claim. Plaintiffs bear the burden of justifying such deviation from the lodestar result. *Bowers v. Transam. Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). Under Washington law, adjustments to the lodestar figure may be based on one or both of the following considerations: the contingent nature of a fee arrangement and the quality of work performed. *Id.* The latter basis is extremely limited, and may be applied "only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the 'lodestar.'" *Id.* at 599 (emphasis in original). Plaintiffs make reference to this factor, but they offer no support for a determination that counsel in this case provided services of an exceptional quality. Thus, the only ground on which plaintiffs might demonstrate the appropriateness of an enhancement is the contingent character of the fee arrangements with counsel.

The purpose of the contingency adjustment is to account for the risk that the suit will not succeed. *See id.* at 598 (quoting Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 324-25 (1977) (In contingent cases, "counsel bear the risk that they will not be compensated at all for their time and

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solely for reading (and preparing to read) at trial designated portions of deposition transcripts; the Court has awarded $40 per day of testimony in witness fees for such non-legal services. Moreover, with respect to similar activities performed by Messrs. Doughty and Manville, the Court has also credited only witness fees and not attorney's fees. Finally, Ms. Ashbaugh, Ms. Mitchell, and Ms. Terwilliger appear to have devoted most of their minimal time on this case to issues unrelated to the CPA claim.

effort. The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk.")). Thus, before using a contingent fee arrangement as a basis to enhance the lodestar amount, the Court must assess the likelihood of success at the outset of the litigation, bearing in mind that the contingency enhancement is designed solely to compensate for the possibility that the action would be unsuccessful and that counsel would receive no fee. *Id.* at 598-99. The adjustment may not be employed if the fee agreement assures the attorney of fees regardless of the outcome of the case, or if the hourly rate underlying the lodestar amount includes a premium, taking into account the contingent nature of the representation. *Id.* at 599. Finally, the multiplier should not be applied to time expended after recovery is assured, for example, for efforts made toward securing attorney's fees as the prevailing party under a fee-shifting statute. *Id.*

Thus, plaintiffs' assertion that they are entitled to an across-the-board multiplier lacks merit. In applying the contingency enhancement to time devoted to obtaining attorney's fees, as well as to post-verdict motions practice, plaintiffs completely disregard the Washington Supreme Court opinion referenced in their motion. *See* Motion at 14 (docket no. 512) (citing *Bowers*). Moreover, because Summit was compensated on an hourly basis until May 2010, plaintiffs have no basis for requesting a contingency-based adjustment as to over 70% of the attorney's fees accrued by Summit. On the other hand, with regard to attorney's fees incurred prior to verdict, for work performed by Massey & Gail and the SBW Firm, as well as for services provided by Summit after May 2010, the Court is persuaded that a slight upward departure from the lodestar figure is justified.

Plaintiffs' counsel prepared for and proceeded to trial in this matter with no assurance of payment absent recovery. Indeed, in the event that the jury's award failed to exceed certain thresholds, two of the three firms were positioned to receive no fees even if plaintiffs prevailed. Thus, the Court concludes that a multiplier is necessary to account for the risk that the suit would not be sufficiently successful.

In determining the appropriate quantum of such enhancement, the Court is mindful that plaintiffs are entitled to attorney's fees only on their CPA claim, which was only one of eight causes of action they pursued at trial, and only one of four causes of action on which they prevailed. Of the various hurdles plaintiffs surmounted in proving their CPA and three other claims, the one to which the Court would assign the highest risk of failure was establishing damages. Indeed, the crux of defendants' post-verdict motions was that the evidence did not support the jury's award of $6.49 million in damages. *See* Tr. (Apr. 10, 2012) at 56:20-61:10 (docket no. 528). With respect to the CPA claim, however, plaintiffs did not have to prove actual damages to prevail; the injury element of a CPA claim is met "if the consumer's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." *Mason*, 114 Wn.2d at 854. Moreover, plaintiffs did not have to prove actual damages to obtain attorney's fees pursuant to the CPA; only an award of treble damages requires an underlying determination of actual damages. *Id.* at 855. Thus, with respect to the CPA claim, plaintiffs did not face the same challenges as existed in connection with their other theories of recovery. The Court is therefore of the opinion that the 1.5 (150%) multiplier plaintiffs seek is not reasonable, and the Court will instead use a factor of 1.2 (120%).

Applying this enhancement to Summit's fees after May 2010 and before February 6, 2012, as well as to the pre-verdict fees of Massey & Gail and the SBW Firm, the Court derives the following sum to be awarded to plaintiffs in addition to the lodestar figure:

Firm	**Fees Eligible for Enhancement**	**Additional Amount to be Awarded**
Summit Law Group PLLC	$ 14,225.00	$ 2,845
Savitt Bruce & Willey LLP	$ 17,979.63	$ 3,595.93
Massey & Gail LLP	$ 110,866.63	$ 22,173.33
	TOTAL	$ 28,614.26

The Court concludes that the computed lodestar amount, together with the stated contingency enhancement, constitutes a reasonable attorney's fee in light of the nature of the CPA claim, the course of the proceedings, the results achieved, and the underlying purpose of the CPA. *See Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667, 989 P.2d 1111 (2000) (observing that a "central" consideration in the Court's analysis should be "the underlying purpose of the statute authorizing the attorney fees"). Defendants Telekenex, Inc., IXC Holdings, Inc., Brandon Chaney, Mark Radford, and Anthony Zabit, and the marital community of each individual defendant,[11] shall be jointly and severally liable for the attorney's fees awarded by the Court to plaintiffs Straitshot Communications, Inc. and Straitshot RC, LLC. *See Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) (fee-shifting statute controls "what the losing defendant must pay" to the

[11] Defendants Mark and Maria Josefina (a/k/a Joy) Prudell having filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code, the Court STAYS all further proceedings concerning the Prudells, *see* 11 U.S.C. § 362(a), and the Court will enter supplemental judgment only as to defendants other than the Prudells.

prevailing party, not what the successful plaintiff must pay his, her, or its attorney); *see also* *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (the prevailing party, rather than the lawyer, is entitled to receive the attorney's fees awarded under a fee-shifting provision); *compare* *Okla. ex rel. Okla. Bar Ass'n v. Weeks*, 969 P.2d 347, 357 (Okla. 1998) (a prevailing plaintiff's attorney may not recover both a contingency fee and the statutory award (citing *Venegas v. Skaggs*, 867 F.2d 527, 534 n.7 (9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990))).

3. Costs

Plaintiffs seek costs to which they are not entitled under the CPA. Costs are limited to those defined in RCW 4.84.010. *See* *Nordstrom*, 107 Wn.2d at 743 ("We believe it gives the plaintiff in a Consumer Protection Act action an unwarranted recovery to extend costs beyond those statutorily defined in RCW 4.84.010."). Under RCW 4.84.010, plaintiffs are entitled to filing fees, fees for service of process, notary fees, reasonable expenses for obtaining certain reports and records that are admitted into evidence at trial, statutory attorney and witness fees, and reasonable expenses for the transcription of depositions used at trial.

Plaintiffs will not be awarded as costs the fees paid to other law firms, attorney travel and subsistence expenses,[12] legal research service charges, copying, mailing, and

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[12] Plaintiffs' reliance on *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001), for the proposition that attorney travel and subsistence expenses may be recovered as costs is entirely misplaced. In *Panorama*, the plaintiff did not tax costs pursuant to RCW 4.84.010. *See id.* at 143. Instead, the plaintiff was awarded attorney's fees as an insured that was "forced to file suit to obtain the benefit of [its] insurance contract," pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). *See* 144 Wn.2d at 143. In *Panorama*, the issue

messenger fees, pro hac vice application fees, electronic filing (PACER) fees, or undefined printing costs. *See Estep v. Hamilton*, 148 Wn. App. 246, 261-63, 201 P.3d 331 (2008) (declining to award costs of deposition transcripts that were not made part of the record, airfare for a party, expert witness fees, or photocopying costs); *compare* 28 U.S.C. § 1920.

Costs will be awarded only as follows:

CATEGORY	AMOUNT
Filing Fee & Ex Parte Fees	$306.00
Service of Process Fees[13]	$790.00
Deposition Transcripts[14]	$9,312.90

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was whether Westlaw charges and expert witness fees should have been included within the *Olympic Steamship* attorney's fees; the opinion does not provide any ruling concerning reimbursement of airfare or charges for food and lodging. Plaintiffs refer to the portion of the *Panorama* decision that cites hazardous waste cleanup and civil rights cases in which expenses beyond the costs enumerated in RCW 4.84.010 were allowed, *id.* at 142-43 (quoting *La.-Pac. Corp. v. Asarco Inc.*, 131 Wn.2d 587, 934 P.2d 685 (1997), and *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987)), but as the Washington Court of Appeals has recently reiterated, the CPA is not analogous to such statutes, and unlike such statutes, the CPA is not "liberally construed to serve its beneficial purposes," *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 739, 281 P.3d 693 (2012).

[13] The cost summary submitted by plaintiffs, Ex. 4 to Tab 2 to Gail Decl. (docket nos. 513-9 through 513-10), includes numerous charges by ABC Legal Services, Inc. for "service" on individuals and entities that are not parties to this case. By definition, such "service" does not constitute service of process, *see* BLACK'S LAW DICTIONARY 1325, 1491 (9th ed. 2009); *see also* Wash. CR 4(d) (outlining the methods for service of "summons and other process"), and plaintiffs are not entitled to reimbursement for such expenses. The Court has credited plaintiffs with the charges associated with service on defendants Brandon Chaney ($140), Mark Radford ($160), Anthony Zabit ($75), IXC Holdings, Inc. ($245), and IXC, Inc. ($170), but not for service on Joshua Summers, as to whom plaintiffs did not prevail on their CPA claim. Plaintiffs have not requested process service fees relating to defendants Mark Prudell or Telekenex, Inc.

[14] The Court has included the costs of transcripts for the depositions of individual defendants other than Joshua Summers, namely Brandon Chaney ($1,860.25), Mark Prudell ($2,033.25), Mark Radford ($1,902.50), and Anthony Zabit ($3,516.90). The Court has not awarded the costs of transcripts for the depositions of Carl Thomas Hunsinger, Jeremy Malli, Larry Marcus, Oscar Molnar, and Wayne Worthen, portions of which were read into the record during trial, *see* Minutes (docket nos. 370, 375, 376), because plaintiffs have provided no documentation concerning these depositions. The description "Court Reporter fee," which appears several times in the cost summary prepared by Massey & Gail, does not suffice. The expenses relating to Andrew Gold's and Phil Howe's depositions have been excluded because both individuals provided live testimony on behalf of plaintiffs, and such transcripts were not used by plaintiffs

CATEGORY	AMOUNT
Statutory Attorney Fee (RCW 4.84.080)	$200.00
Witness Fees[15]	$760.00
TOTAL	$11,368.90

Conclusion

For the foregoing reasons, plaintiffs' motions for spoliation sanctions, docket no. 511, and for attorney's fees and costs pursuant to Washington's Consumer Protection Act ("CPA"), docket no. 512, are each GRANTED in part and DENIED in part. The Clerk is DIRECTED to enter two separate supplemental judgments as follows. The first supplemental judgment shall be in favor of plaintiffs Straitshot Communications, Inc. and Straitshot RC, LLC and against defendants Joshua and Julia Summers, Telekenex, Inc., and IXC Holdings, Inc., jointly and severally, in the amount of $144,644.59 in attorney's fees and $184,555.19 in costs, for a total of $330,414.31 as spoliation sanctions, together

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at trial. Finally, with regard to the deposition of Brian Worthen, the Court declines plaintiffs' request for such expenses in light of the fact that the CPA claim was not even alleged against Worthen or Mammoth.

[15] Plaintiffs have not sought mileage or other travel expenses of witnesses. As to witness compensation, although Washington contemplates a lower amount, *see* RCW 2.40.010; RCW 2.36.150, the Court has applied the federal rate of $40 per day, *see* 28 U.S.C. § 1821(b). The Court has taxed the witness fees as follows:

Witness	No. of Days	Costs Awarded	Witness	No. of Days	Costs Awarded
Lorraine Barrick	3	$120	Scott MacPherson	1	$40
David Bruce (Hunsinger deposition)	1	$40	Duncan Manvill (W. Worthen deposition)	1	$40
Bruce Doughty (Marcus deposition)	1	$40	Stephen C. Perry	2	$80
Andrew Gold	4	$160	Zachary Sargent	1	$40
Philip Howe	2	$80	Stephen Willey (Malli deposition)	1	$40
Erik Laykin	1	$40	Miles Yanick (Molnar deposition)	1	$40
				TOTAL	$760

with interest at the rate of eighteen-hundredths of one percent (0.18%) per annum from the date of entry of the Court's Spoliation Findings of Fact and Conclusions of Law, namely March 6, 2012, until paid in full. *See* 28 U.S.C. § 1961; *see also Friend v. Kolodzieczak*, 72 F.3d 1386, 1391-92 (9th Cir. 1995) ("Interest runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of fees is set.").

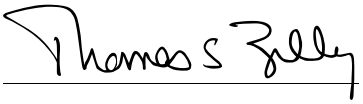
The second supplemental judgment shall be in favor of plaintiffs Straitshot Communications, Inc. and Straitshot RC, LLC and against defendants Telekenex, Inc., IXC Holdings, Inc., Brandon Chaney, Mark Radford, and Anthony Zabit, and the marital community of each individual defendant, jointly and severally, in the amount of $240,703.17 in attorney's fees and $11,368.90 in costs, for a total of $252,072.07, which is awarded pursuant to RCW 19.86.090, RCW 4.84.010, and 28 U.S.C. § 1920, together with interest at the rate of seventeen-hundredths of one percent (0.17%) per annum from the date of the original judgment, namely February 23, 2012, until paid in full. *See Friend*, 72 F.3d at 1391-92.

This matter is STAYED with respect to defendants Mark and Maria Josefina (a/k/a Joy) Prudell (the "Prudell Defendants") pursuant to 11 U.S.C. § 362(a), and is CLOSED with respect to all other parties. Plaintiffs and the Prudell Defendants are DIRECTED to file a joint status report within fourteen (14) days after the conclusion of bankruptcy proceedings or by June 10, 2013, whichever occurs earlier.

The Clerk is further DIRECTED to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Dated this 20th day of November, 2012.



THOMAS S. ZILLY
United States District Judge