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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

**JESSICA GESSELE, ASHLEY ORTIZ,  
NICOLE GESSELE, TRICIA TETRAULT,**  
and **CHRISTINA MAULDIN**, both on  
behalf of themselves individually and, in  
addition, on behalf of the other similarly  
situated employees,

Plaintiffs,

vs.

**JACK IN THE BOX INC.,**

Defendant.

Case No. 3:14-cv-01092-HZ

**Plaintiffs' Reply re their motions  
for attorney fees, costs, and  
nontaxable expenses**

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## I. What the class is and is not seeking fees for

First, Jack in the Box argues that “No claim under ORS 652.120 was presented to the jury and therefore the class received no judgment under ORS 652.120.” Dkt. 451 at 2. That is wrong. As a general matter, claims need not be presented to the jury for a party to prevail and obtain judgment on those claims (whether via motion for summary judgment, directed verdict, or otherwise). More specifically, O.R.S. 652.120(1) requires that “every employer shall establish and maintain a regular payday, at which date the employer shall pay all employees the wages due and owing to them.” Jack in the Box stipulated at trial that they had underpaid employees by overdeducting WBF assessments from their wages. As a matter of law, unauthorized wage deductions are “unpaid wages” under O.R.S. 652.200. *Allen v. Cnty. of Jackson*, 191 Or. App. 185, 193 (2003), *aff’d sub nom. Allen v. Cnty. of Jackson Cnty.*, 340 Or. 146 (2006) (“Thus, an employer who makes a deduction that ORS 652.610(3) prohibits has, as a matter of law, failed to pay wages in the amount of the deduction. The employee may recover those unpaid amounts by a claim for unpaid wages, and may recover attorney fees under ORS 652.200(2) if the employee prevails. The separate claim under ORS 652.615 is irrelevant to that right.”) (emphasis in original). Like the plaintiffs in *Allen*, plaintiffs here pled the right to recovery under both O.R.S. 652.120 and 652.615. Dkt. 1-2 at ¶¶ 57–62. Thus, as a matter of law, plaintiffs are entitled to attorney fees for their successful action to recover those unpaid wages under O.R.S. 652.200; the fact that they also prevailed under O.R.S. 652.615 “is irrelevant to that right.” *Allen, supra*.

Further, plaintiffs recovered penalty wages under both O.R.S. 652.150 and O.R.S. 653.055. Under Oregon law, penalty wages *are also wages*. See, *Wyatt v. Body Imaging*, 163 Or. App. 526, 536 (1999) (“In sum, we conclude that an ‘action for collection of

wages’ encompasses an action seeking only wages owed as a penalty under ORS 652.150 and that an employee is entitled to attorney fees under ORS 652.200 (2)”.

Second, Jack in the Box argues that “the class did not prevail on the majority of claims asserted.” Dkt. 451 at 2. That is wrong. Under Oregon law, a “claim” for purposes of attorney fees is defined as the bundle of facts giving rise to liability, not a specific statutory right of recovery. *See, e.g., Mindful Insights, LLC v. VerifyValid, LLC*, 301 Or. App. 256, 258 (2019), *adh’d to on recons*, 302 Or. App. 528 (2020), *rev. granted*, 367 Or. 257 (2020), *rev. dismissed*, 369 Or. 69 (2021). The class had three certified claims at trial: the WBF claim, the late final paychecks when stores were franchised claim, and the shoe claim. They prevailed on all of those claims. They did not prevail on every statutory right of recovery, and thus they have not submitted attorney-fee requests for, *e.g.*, work related only to their shoe claim. Similarly, the named plaintiffs have not submitted attorney-fee requests for work related only to their meal period claims. Jack in the Box’s argument to the contrary is simply false.

## **II. *Belknap* does not foreclose attorney fees here**

O.R.S. 652.200 reads, in pertinent part, “(2) In any action for the collection of wages, if it is shown that the wages were not paid for a period of 48 hours, excluding Saturdays, Sundays and holidays, after the wages became due and payable, the court shall, upon entering judgment for the plaintiff, include in the judgment, in addition to the costs and disbursements otherwise prescribed by statute, a reasonable sum for attorney fees at trial and on appeal for prosecuting the action, ... unless the court finds that the plaintiff’s attorney unreasonably failed to give written notice of the wage claim to the employer before filing the action.” Thus, attorney fees are mandatory unless the defendant meets its burden to show that (a) the plaintiff’s attorney gave no written notice of the wage

claim, and (b) that lack of notice was unreasonable.

The only deficiency that Oregon courts have found to be a basis for denying attorney fees is the refusal to provide the plaintiff's name. *Belknap v. U.S. Bank National Association*, 235 Or. App. 658, 672, (2010), *rev. den.*, 349 Or. 654 (2011); *Migis v. AutoZone, Inc.*, 282 Or. App. 774, 810 (2016). Defendant argues that *Belknap* bars plaintiffs from recovering attorney fees in this case under O.R.S. 652.200. That is wrong.

#### **A. *Gessele I***

In our case, plaintiffs gave their names, and much more besides, in their prelitigation demand letters. Exhibit C to the Declaration of Jon M. Egan filed herewith ("Egan Dec."). Thus, on its plain terms, *Belknap's* holding does not apply. Plaintiffs are not aware of any case in which a plaintiff who gave their name in a prelitigation demand letter was prevented from recovering attorney fees under *Belknap* due to some other alleged lack of detail in the letter. Jack in the Box has certainly not provided any.

Further, it is worth noting that *Belknap* involved a plaintiff who prevailed on an individual basis only, after all classes were decertified. Thus, the court was looking at only whether the demand letter was reasonable in light of the named plaintiff's eventual individual wage claim. In our case, all of the claims for which attorney fees are sought under O.R.S. 652.200 were certified class claims. It is impossible to provide the names, specific violations, and amounts due to class members in a prelitigation demand letter, so that prelitigation notice cannot be an unreasonable failure to provide such information.

And an employee can only give detailed information regarding claims if they have the time and pay records from which to make those calculations. That is why O.R.S. 652.750 requires employers to produce employees' time and pay records upon request. Plaintiffs did request their time and pay records before litigation was commenced in this case.

Exhibit C to Egan Dec. However, defendant refused to provide plaintiffs' time and pay records prelitigation, producing only their personnel files. *See*, Exs. A–B to Egan Dec. Jack in the Box cannot argue that it was unreasonable not to provide more detail, when it refused to provide the documents from which such details could have been gleaned.

### **B. *Gessele II***

It is undisputed that plaintiffs sent detailed prelitigation notices before commencing *Gessele II* in state court. Dkt. 451 at 5. Jack in the Box argues that the cases were really the same, so the second round of prelitigation notices was irrelevant. But Jack in the Box cannot eat its cake and have it too. Before both *Gessele I* and *Gessele II*, plaintiffs' counsel sent demand letters identifying the named plaintiffs and giving the level of detail that was in his possession regarding the wage claims at that time. Jack in the Box knew during the pendency of *Gessele I* exactly what the nature of the underlying claims was. It did not pay employees for those claims. If it had, we would be having a different conversation regarding attorney fees. But Jack in the Box's failure to pay the class anything, even after getting the supplemental prelitigation notice in *Gessele II*, shows that its protestations about lack of detailed prelitigation notice are hollow.

Next, Jack in the Box somewhat confusingly argues that plaintiffs did not prevail on an unpaid wage claim for WBF overdeductions because they chose the higher \$200 statutory damages under O.R.S. 652.615. That is wrong. Plaintiffs prevailed on both. They cannot recover both unpaid wages under 652.120 and the \$200 minimum statutory damages under 652.615, because "actual damages" are subsumed into those minimum statutory damages. For example, if an employer unlawfully deducts \$1 from a worker, the worker is owed \$1 in unpaid wages under O.R.S. 652.120. Under O.R.S. 652.615, the worker is owed \$1 or \$200, whichever is greater. Because the actual damages are the

same under each statute, and \$200 is greater than \$1, the worker recovers \$200—not \$201 or \$202. Because plaintiffs had already won summary judgment on both statutes, there was no reason to submit actual damages to the jury—indeed, Jack in the Box stipulated to the ultimate amount of statutory damages before it could be submitted to the jury either. Plaintiffs prevailed on their unpaid wage claim for WBF overdeductions, and even Jack in the Box admits that such overdeductions totaled nearly \$22,000 in unpaid wages. Dkt. 451 at 7. The fact that plaintiffs also prevailed on the statutory unlawful deduction claim is irrelevant to that determination. *See, e.g., Allen v. Cnty. of Jackson*, 191 Or. App. 185, 193 (2003), *aff'd sub nom. Allen v. Cnty. of Jackson Cnty.*, 340 Or. 146 (2006) (“*Thus, an employer who makes a deduction that ORS 652.610(3) prohibits has, as a matter of law, failed to pay wages in the amount of the deduction. The employee may recover those unpaid amounts by a claim for unpaid wages, and may recover attorney fees under ORS 652.200(2) if the employee prevails. The separate claim under ORS 652.615 is irrelevant to that right.*”) (emphasis in original).

### **III. O.R.S. 20.075 factors under O.R.S. 652.615 and 653.055**

We address the following factors to rebut defendant’s arguments:

(a)—Defendant argues that its behavior was not malicious. But the factor does not say that the conduct must have been “reckless, willful, malicious, in bad faith AND illegal”—it says “or.” So any one of the listed adjectives is sufficient. And there is no question that Jack in the Box’s conduct was “willful,” because it lost that issue on summary judgment.

(c)—Jack in the Box argues that, “for reasons lost to time,” it overdeducted. Dkt. 451 at 7. An award of attorney fees will motivate employers to double-check their deductions before such reasons become lost to time. It does not “punish Jack in the Box” to force it to compensate plaintiffs and their counsel for its violations. Attorney fees are

compensatory, not punitive. Obviously, the prospect of having to pay only the underlying damages provided by statute was not enough to convince Jack in the Box to double-check its math at any time in the nine years it overdeducted Workers' Benefit Fund assessments from workers' wages.

(d)—Jack in the Box's argument that its behavior was not willful was clearly meritless, given Oregon law on what willfulness means. Jack in the Box has not offered any good-faith argument for a different rule on appeal, nor did it ask that any such proposed new rule be referred to the Oregon Supreme Court.

#### **IV. Apportionment**

It is the Court, not the parties, that apportions attorney fees if required. O.R.S. 20.077 provides in pertinent part: "If more than one claim is made in an action or suit for which an award of attorney fees is either authorized or required, **the court or arbitrator shall:** (a) Identify each party that prevails on a claim for which attorney fees could be awarded; (b) Decide whether to award attorney fees on claims for which the court or arbitrator is authorized to award attorney fees, and the amount of the award; [and] (c) Decide the amount of the award of attorney fees on claims for which the court or arbitrator is required to award attorney fees . . ." (bolding added). *See Jones v. Four Corners Rod and Gun Club*, 366 Or. 100, 126 (2020) ("in a wage action with both claims and counterclaims, **the trial court** must separately calculate all of the wages, penalties, interest, and attorney fees due on the plaintiff's claims, and all amounts due to the defendant on the counterclaims. ORS 20.077(2)") (bolding added).

The Court awards a reasonable attorney fee. The parties' suggested allocations are not binding on the Court. And when a to-the-penny allocation is difficult or not possible, courts have not awarded zero attorney fees; they instead have simply awarded attorney fees based on the parties' attorney-fee agreement. *See, e.g., Rogers v. RGIS, LLP*, 229 Or.

App. 580, 587–88, *opinion adhered to as modified on reconsideration*, 232 Or. App. 433 (2009) (trial court did not abuse its discretion by awarding attorney fees in the amount of plaintiff’s contingent fee percentage with plaintiff’s counsel), citing *Cook v. Coos–Curry Electric Cooperative, Inc.*, 86 Or. App. 600, 603 (1987) (trial court properly awarded plaintiff fees consistent with contingent fee agreement where the trial court did not limit the fees on the basis of the agreement, but independently determined that the amount was reasonable under the circumstances). Plaintiffs here would not oppose the trial court making a fee-shifting award in the amount of their contracted contingent-fee percentage with plaintiffs’ counsel (40% of the recovery) or, if less, the common fund percentage awarded by the Court.

Further, Jack in the Box misinterprets the standard for attorney fees on issues that overlap multiple claims. “Statutes that authorize an award of attorney fees to a party who succeeds or prevails in a proceeding authorize an award for the fees reasonably incurred to achieve the success that the party actually achieved. If the party asserts several claims that are subject to an award of fees but prevails on only one of them, fees can be awarded only for the time reasonably necessary to prevail on the sole claim on which the party prevailed. ... Time devoted to claims on which plaintiff did not succeed may also be recoverable where the trial court determines 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.” *Rogers v. RGIS, LLP*, 229 Or. App. 580, 587 and n.7, *opinion adhered to as modified on reconsideration*, 232 Or. App. 433 (2009) (internal quotations omitted).

For those tasks that pertained only to specific claims, we broke them out (for

example, the motions for summary judgment were apportioned by claim/issue). For those that were generally applicable to all claims, plaintiffs get all of those fees. Not an arbitrary percentage—all, from both *Gessele I* and *Gessele II*. See, e.g., *Fadel v. El-Tobgy*, 245 Or. App. 696, 709–10 (2011) (“Moreover, a plaintiff does not lose the right to recover fees for those pre-filing endeavors simply because they were associated with filing an initial complaint that turns out, for whatever reason, to have been ineffective. What matters is whether the work the attorneys did in conjunction with preparing, filing, and litigating that first complaint was reasonably incurred to achieve the success that the plaintiff eventually enjoyed in the litigation that followed the filing of a subsequent complaint. In that respect, the circumstances here—where plaintiff’s first complaint was dismissed but she prevailed on the second—are somewhat analogous to a situation in which a plaintiff prevails only on some of several claims that go to trial. In that latter situation, the plaintiff may recover the fees reasonably incurred in association with the claims on which she prevailed, including time spent on the *other* claims 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. In such a case, the issue is not whether the plaintiff may be entitled to recover fees associated with the unsuccessful claims—she may—but whether the amount of those fees is reasonable. Here, too, plaintiff is entitled to recover fees for all of the work her attorneys reasonably performed in helping her prevail, even though they did some of that work in association with a complaint that was dismissed, but that involved issues in common with those raised by the second, successful complaint.”) (internal citations and quotations omitted, emphasis in original).

## V. Reasonableness of fee award

We again note that Oregon state law focuses on a reasonable fee under the totality of the circumstances. It is not constrained by the lodestar. However, below we discuss the lodestar-like factors that Jack in the Box argues.

### A. Hourly rates

Defendant objects to using Portland rates for plaintiffs' counsel Jon M. Egan, because his office is located in Lake Oswego. Lake Oswego abuts Portland, and it straddles the Clackamas/Multnomah County line. Courts in this District have always awarded Mr. Egan fees based on the Portland locality, because "His office is in Clackamas County, although he handles cases primarily in Portland." *Kerpan v. Biscuits Cafe, Inc.*, No. 08-CV-811-ST, 2009 WL 1813147, at \*3 (D. Or. June 23, 2009). That is confirmed by the list of Mr. Egan's class and collective actions in paragraph 9 of Dkt. 446, of which nearly all were filed in the Portland Division of this District or Multnomah County Circuit Court. *Accord, I.Q. Credit Union v. Khaleesi*, No. 3:22-CV-01226-YY, 2023 WL 5917715, at \*4 (D. Or. Aug. 14, 2023), *report and recommendation adopted*, No. 3:22-CV-01226-YY, 2023 WL 5887272 (D. Or. Sept. 11, 2023) ("The relevant community is one in which the district court sits.").

Jack in the Box tries to compare this 5,000-class-member, 13-plus-year complex class action, which resulted in the largest wage-and-hour verdict in Oregon history, with a one-person overtime case, *Huyck v. Shilling*, Case No. 3:18-cv-00400-JR, 2022 WL 16924130 (D. Or. Nov. 14, 2022). The two cases did not involve the same issues, length, complexity, or risk. O.R.S. 20.075 is not a straight lodestar analysis, but even the lodestar takes account of the specific skills and work necessary in the particular case in which it is decided. Further, there is not a "class action" or "complex litigation" category of the Oregon

State Bar Economic Survey; “employment law” does not adequately capture the scope of the kinds of cases that Mr. Egan handles. Plaintiffs’ counsel submits that an individual run-of-the-mill wrongful termination suit is qualitatively different in both scope and difficulty than an eight-figure wage-and-hour class action.

## **B. Hours**

Defendant does not identify any particular hours that they claim were unnecessary, only that the total is excessive. That is insufficient, as well as wrong on the merits.

First, it should be noted that plaintiffs and defendants face different obstacles in litigation. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9<sup>th</sup> Cir. 2008) (“It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical... where plaintiff’s lawyer engages in churning. By and large, the court should defer to the winning lawyer’s professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.”); *Chabner v. United of Omaha Life Ins. Co.*, C-95-0447 MHP, 1999 WL 33227443, \*3 (N.D. Cal. Oct. 12, 1999) (“Defendant ignores the crucial differences between prosecuting and defending a case. These include the burden of proof, the relative difficulty of obtaining access to essential information, and the chance that a given case may have greater precedential value for one side than the other. Finally, defendant lost this case, so defendant’s approach does not recommend a model for conducting litigation.”)(internal citations omitted).

If Jack in the Box had offered the eventual verdict amount at the outset of this case, the Court and the parties would have avoided all of this time, effort, and cost. But

plaintiffs in such a situation do not have a choice—if they want the money that the statute guarantees them, they have to keep matching defendants, procedural blow for procedural blow, for as long as it takes to win.

### **C. Multiplier**

Jack in the Box cites federal cases to argue that multipliers are only proper in “rare and exceptional cases.” Dkt. 451 at 19. But attorney fees in this case are governed by Oregon law, not federal law, and multipliers are common in large Oregon state-court contingent-fee class actions resulting in historic verdicts.

Jack in the Box argues that the size of this verdict should be scoffed at because “half of the judgment is for statutory interest on a case that was delayed for at least four years by class counsel’s failure that led to dismissal of *Gessele I*, his failed litigation expansion efforts in *Gessele II*, and the class’s multiple failed interlocutory appeals.” *Id.* Not so. While it is true that a large part of the judgment is for prejudgment interest, (a) the pre-interest verdict itself is the largest wage-and-hour verdict in Oregon history, (b) the delay referred to was due to defendant’s sandbagging (Dkt. 454 at 16–17), (c) that sandbagging did not extend the case four years longer, it required only refiling in state court and removal, and (d) complex litigation is complex. Sauce for the goose is sauce for the gander—Jack in the Box could have made an offer of judgment on the first day of this case. They chose not to do so, instead dragging the case out for well over a decade. Further, Jack in the Box chose to wait four years to assert its statute of limitations defense. Any interest that has accrued is attributable entirely to Jack in the Box’s intransigence, strategic choices, and refusal to properly value the case.

For the award of attorney fees to be an effective deterrent, the threat must be real. Attorney fees cease to be a deterrent if the court dilutes the amount awarded. Large employers use the fear of protracted litigation to discourage both workers and attorneys

from pursuing cases against them. The purpose of Oregon's wage-and-hour attorney-fee provisions is to promote access to justice by encouraging attorneys to represent employees in wage claims. Without attorneys willing to represent employees in wage claims, the purpose of the statutes is undermined and the purpose of encouraging employees to seek the recovery of their wages is defeated. Employers litigate wage claims if it makes economic sense to do so. It makes economic sense for an employer to run up the employee's attorney fees to a point that no attorney will ever be motivated to bring another claim against the employer. Awarding full attorney fees and a multiplier sends a message to employers that it is more profitable to settle claims than to pursue a scorched-earth litigation policy.

Finally, we note that all of Jack in the Box's objections from *Strawn v. Farmers Ins. Co. of Oregon*, 233 Or. App. 401 (2010) are inapposite. Defendants always do this—fight tooth and nail for years over every single petty thing in the case, then say that it should have been easy. If the final result were that easy, why did Jack in the Box put us through all of this to reach the final result? Why didn't they make a settlement offer or offer of judgment at the outset of the case?

## **VI. Time entries**

We begin by generally noting that, under Oregon law, the job of the court is to award reasonable attorney fees under the totality of the circumstances. There are many factors that go into that determination, as laid out by statute, and none of them have to do with the actual amount of time spent. The time reasonably required to reach the achieved result is the factor at issue.

### **A. Block-billed and vague entries**

Block billing is when more than one task is included in one time entry, so that the

Court is unable to determine how much time was devoted to each. Plaintiffs' counsel bills time singly by task—preparation of one motion is one time entry. The Court read each of the motions filed by the parties and can determine whether the amount spent was a reasonable amount to prepare each submitted filing.

Further, plaintiffs' counsel does not bill substantial minimums for relatively routine tasks such as emails or telephone calls. Such minimal expenditures are billed only at 0.05 hours (for emails) and 0.075 hours (for short telephone calls with clients). That equates to 3 minutes per email and 4.5 minutes per telephone call. Anything in excess of those, plaintiffs' counsel makes a more detailed time entry. But it would take longer to make a detailed time entry, for opposing counsel to read it, and for the court to read it, than such tasks took in the first place. When there is another task being done on the same day, such as preparation for a motion, we do not bill for the time at all. But when such short, routine tasks are the only thing being done on a case in a day, from both a matter of efficiency and judicial economy, a simple notation of the result and 3 minutes should suffice.

## **B. Clerical/administrative work**

The work that Ms. Lauzier does in reviewing and cite checking documents is not “clerical.” Mr. Egan does his own nonbillable clerical work, such as typing, filing, copying, printing, scanning, scheduling, downloading and saving documents, filing documents, and communicating with court staff on non-substantive issues. *Compare, e.g., Strugari v. Sagamore Ins. Co.*, No. 3:20-CV-00956-SB, 2023 WL 3002442, at \*11 (D. Or. Apr. 19, 2023); *Bergen v. Tualatin Hills Swim Club, Inc.*, No. 3:16-CV-00052-HZ, 2016 WL 2736105, at \*3 (D. Or. May 11, 2016) (“In Strand, the court noted that examples of clerical tasks include handling filing confirmation, receiving emailed court

notices, and keeping track of docketing deadlines. The Court finds that, unlike tasks such as these, preparing a certificate of compliance is not clerical in nature. Preparing such a certificate involves reading and potentially interpreting the Local Rules of Civil Procedure. It is legal work, albeit exceedingly simple legal work. While the local rules governing word-count are simple to understand and apply, reading them and certifying compliance does not qualify as a clerical task.”) (underlining in original, internal citations omitted).

Ms. Lauzier’s billed work is that of a paralegal—evaluating the consistency and persuasiveness of arguments, making sure that the cited cases and statutes say what is indicated in the briefing, checking for spelling and grammar errors, proofreading case captions and footers, curating appropriate exhibits to suggest to counsel, etc. Some firms might even employ an associate to do such work.

## **VII. Common fund**

We note that defendant does not have standing to object to an award of common-fund fees—it has no interest in any part of the judgment, and how that judgment is divided between the class and class counsel. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 (1980). We nevertheless address the merits of the arguments below.

### **A. FRCP 23(h)**

Defendant objects that the class has not yet received notice of this motion. That is because the Court has not yet determined that the briefing is completed and in a state that is presentable to the class, nor a reasonable manner by which to direct such notice. Fed.R.Civ.P. 23(h) determines the manner of such notice; parties are not authorized (either generally or in our case) to unilaterally mail copies of motions to the class. The Court may (as it has) determine that additional briefing is needed, or that the services of

a special master are necessary. Fed.R.Civ.P. 23(h)(4). We are certain that once the Court is satisfied that the briefing is ready to be presented to the class, it will inform the parties and direct their future actions regarding appropriate notice to the class. *See*, commentary to paragraph (1) (“In adjudicated class actions, the court may calibrate the notice to avoid undue expense.”) and (2) (“In setting the date objections are due, the court should provide sufficient time *after the full fee motion is on file* to enable potential objectors to examine the motion.”) (emphasis added).

We note, of course, that because liability has already attached, the cost of notice is to be borne by Jack in the Box. *See, e.g., Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9<sup>th</sup> Cir. 2009) (“[I]nterim litigation costs, including class notice costs, may be shifted to defendant after plaintiff’s showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure.”), citing 3 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, *NEWBERG ON CLASS ACTIONS* § 8:6 (4<sup>th</sup> ed.2007). “Also, we have recognized a district court’s power to shift interim costs to a defendant in the attorney fee context, even when the defendant might later prevail on the underlying merits question and be entitled to reimbursement. *See Rosenfeld v. United States*, 859 F.2d 717, 720 (9<sup>th</sup> Cir.1988) (holding that interim attorney fee award was unreviewable even though ‘upon completion of the district court proceedings, the government could recover the interim fees it paid out if it successfully appealed the [merits issue], which formed the limited basis of the interim fee award’).” *Id.* at 1143–44 (alterations in original).

**B. 40% is a reasonable common fund in this case**

First, defendant has no standing to object to the requested common-fund allocation.

Second, The Ninth Circuit’s benchmark fee is not technically applicable, since it is

Oregon law that applies here.

Nevertheless, plaintiffs have presented the case law identifying routine upward departures from the benchmark in complex wage-and-hour class and collective actions such as this one.

### **C. Service payments**

Defendant has no standing to object to the requested service payments. Moreover, plaintiffs in this case took on a publicly traded company for over a decade, despite having relatively low-value claims, declined a settlement offer that would have compensated them for their individual meal period and shoe claims in order to make sure that the class obtained full value for the class claims, and won the largest wage-and-hour verdict in Oregon history. Their names are now a prominent fixture in Westlaw searches for Oregon wage-and-hour law. The requested \$25,000 service awards are less than ten times the average class member's recovery (judgment in excess of \$13 million divided by approximately 5,000 class members equals approximately \$2,600 per class member), and the aggregate judgment amount is substantial. *Compare, e.g., Lemus v. H & R Block Enters. LLC*, 2012 WL 3638550, at \*5–6 (N.D. Cal. Aug. 22, 2012) (approving \$15,000 service awards where the average class recovery was about \$1,200).

### **VIII. Costs**

Jack in the Box objects to transcript costs and copying and printing costs being included in plaintiffs' cost bill. Both are appropriate.

First, Jack in the Box's argument that not all of the deponents' transcripts were played at trial is inapposite. Plaintiffs obtained summary judgment in multiple respects by presenting those deposition excerpts, thus obviating the need to play them again at trial. Further, Jack in the Box chose to produce multiple people as corporate

representatives; if they had produced only one, we would have played that one person's deposition excerpt.

Second, the sought copying and printing costs were all incurred for judge's copies and trial exhibits. Those are recoverable.

### **IX. Nontaxable expenses (part of attorney fees)**

Defendant makes multiple arguments as to why plaintiffs' nontaxable expenses are not awardable as section 1920 costs. We are not seeking them as section 1920 costs on the cost bill. Nontaxable expenses are, by definition, not taxable on a cost bill. They are only awardable when attorney fees are awarded.

Oregon state substantive standards for attorney fees and nontaxable expenses apply. Federal law applies only to relevant procedures—*e.g.* requests for nontaxable expenses must be made by motion. Fed.R.Civ.P. 54(d)(2)(A) (“A claim for attorney’s fees and related nontaxable expenses must be made by motion...”). The substantive law awarding nontaxable expenses is state law, and Oregon provides that successful class action plaintiffs may recover “litigation expenses” under O.R.C.P. 32 M. The Court can also award attorney fees in a class action against a defendant where the fees are “permitted by law in similar cases not involving a class.” O.R.C.P. 32 M(1)(d). Both state and federal law recognize that certain out-of-pocket expenses by a law firm are recoverable as part of attorney fees, even though they would not be taxable as costs in a non-attorney-fee case. *See, e.g., Logan v. Tiegs*, No. 03-CV-435-BR, 2010 WL 2245060, at \*2 (D. Or. June 2, 2010) (“Reasonable attorneys’ fees include such costs as photocopies, computer-aided research, and deposition costs that are directly billed to and paid for by the client.”), citing *Robinowitz v. Pozzi*, 127 Or. App. 464, 470–71 (1994); *Oire Oregon C, LLC v. Yaldo*, No. CV 08-724-ST, 2009 WL 1270254, at \*4 (D. Or. May 6, 2009) (“[C]omputer

assisted legal research and an asset search for defendant ... were directly related to the services provided by plaintiff's attorneys and staff, were not included as overhead within the attorneys' hourly rates, and are the direct responsibility of plaintiff. Therefore, they should be awarded as part of the attorney fees.") (internal citations omitted); *Willamette Prod. Credit Ass'n v. Borg-Warner Acceptance Corp.*, 75 Or. App. 154, 159 (1985) ("In setting a reasonable attorney fee for the prevailing party, it is appropriate for the court to take into consideration the actual billing practices of the party's attorney. Traditionally, courts simply have determined fees based on the hourly charge for the attorney working on the case with the assumption that the hourly rate was set to recoup overhead and realize a profit. Modern electronic accounting methods allow a more specialized billing for attorney fees. Courts should recognize the reality of modern legal business practices and include expenses specially billed to the client in the attorney fees award when they are properly documented and are reasonable. We conclude that the charges to which defendant objected are proper in addition to the amounts attributable to individual attorneys' hourly charges."). These charges were all billable to the named plaintiffs per their attorney fee agreements. Exhibit 3 to Dkt. 446 ("If we advance money for filing fees, witness fees, doctors' reports, court reporters' services, or other expenses on your behalf, you must repay us whether the case is won or lost.").

Because defendant directs its objections to whether the expenses are recoverable under section 1920, the objections are not well-taken. The expenses that were not presented as part of the cost bill are all recoverable as part of attorney fees.

We generally direct the Court's judicial notice to the Oregon State Bar's FEE AGREEMENT COMPENDIUM, 2018 edition, Chapter 2, Form 2-1, "Billing for Costs Checklist," which provides that "This checklist provides a summary of the types of costs

that can be billed to clients separately from attorney fees,” and specifically lists each of the below expenses as recoverable and billable to clients separate and apart from normal hourly rates. Courtesy copy attached.

We also note that defendant has asked the Court to award each of these same categories of expenses against the plaintiffs.

**A. Class notice had to be sent out regardless of how many claims.**

Defendant objects to the full assessment of class notice expenses, as plaintiffs did not prevail on every claim. The cost to mail a notice is the same regardless of how many claims are alleged. That cost would have had to be undertaken in its entirety even if the WBF and final paycheck upon franchization claims were the only ones in the case. This expense should be awarded in its entirety.

**B. Westlaw and PACER charges**

When a lawyer attributes and bills expenses to individual clients that are separate from the lawyer’s hourly charges, those separately billed expenses may be recoverable as attorney fees. “The Ninth Circuit has expressly held that computerized legal research charges may be awarded as attorney fees when the prevailing practice in the particular legal community is to bill the charge separately from the hourly rate.” *Knowledge Learning Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. CV-10-188-ST, 2011 WL 2133824, at \*9 (D. Or. Apr. 19, 2011), *report and recommendation adopted sub nom. Knowledge Learning Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. CIV. 10-188-ST, 2011 WL 2115631 (D. Or. May 27, 2011). *See also* FEE AGREEMENT COMPENDIUM, Form 2-1, at paragraph 8 (“Computerized legal research, whether such costs are fixed or variable, is considered an ‘in-house provision of services’ properly charged to the client.”).

### **C. Witness fees for Jennifer Murphy**

Defendant has not presented any state statute or decision holding that witness fees are not awardable as part of attorney fees. Plaintiffs had to undertake substantial fees in order to present their damage calculations to the jury (especially since Jack in the Box did not present its own damage witness). Those fees were reasonable and necessary to obtain their judgment. Ms. Murphy's fees are therefore awardable. The FEE AGREEMENT COMPENDIUM specifically provides that "**6. Expert and Witness Fees.** Costs may include actual fees charged by experts, witness or expert fees prescribed by court rules." (bolding in original).

### **D. AV fees and jury mapping**

Defendant again presents no Oregon authority here. These out-of-pocket fees were actually and necessarily incurred to ensure plaintiffs' eventual victory in this historic case. *Compare*, FEE AGREEMENT COMPENDIUM at paragraph 9, "**9. Litigation Support.** Many vendors provide litigation support for complex matters. Often the firm circulates requests for proposals (RFPs) and selects the lowest bidder. Many firms have invested in litigation-support technology or have developed sophisticated software that provides this service in-house. These firms may compete with other vendors for firm work or provide this service for other firms as long as a conflict does not exist." (bolding in original). Defense counsel did their presentations to the jury using in-house labor, which they billed their client for. Plaintiffs do not have an in-house AV department. They are no less entitled to recover the cost of the presentation to the jury.

### **E. Postage, delivery, telephone calls, photocopies and scanning**

The FEE AGREEMENT COMPENDIUM specifically provides that all of these charges may be assessed as part of attorney fees separate from the regular hourly rate:

**12. Photocopies and Document Scanning.** Electronic systems that can be attached to most standard photocopiers are available to assist in tracking and recovering copy costs. Smaller firms may keep manual logs next to their copiers. Larger firms purchase or lease equipment, or contract for services that provide cost-recovery information. Some copiers have built-in cost-recovery systems. As discussed above, many firms do not bill separately for routine photocopying. Various methods for charging for photocopies are as follows:

(a) Charge a flat rate per copy. It may be actual direct cost or include a reasonable sum for overhead pertaining to office, employee, and equipment costs.

...

**13. Pick-up and Delivery Services.** A firm that uses outside services usually passes along the charge to the client.

...

**14. Postage.** Charge-back rates vary, depending on the type of practice and volume of mail. Firms may charge the actual cost of postage or may set a base and charge only for postage above the base. Express or overnight delivery charges may be passed along at cost to the client.

...

**18. Telephone.** If a phone system is charging for long-distance calls, there are a variety of ways to recover the cost of long-distance charges.

(all bolding in original).

## **X. Conclusion**

The Court’s award of Plaintiffs’ attorney fees in this case serves the legislative purpose of the wage statutes mandating such an award. The Oregon Supreme Court “has repeatedly concluded that, in requiring an award of attorney fees in a judgment for unpaid wages, the legislature intended to give effect to two related policies. The first is to aid employees ‘in the prompt collection of compensation due,’ and the second is to ‘discourage an employer from using a position of economic superiority as a lever to dissuade an employe[e] from promptly collecting’ compensation that is due.” *Mathis v. St. Helens Auto Ctr.*, 367 Or. 437, 445 (2020) (string citations omitted). “The distinction between plaintiffs and defendants is clearly based upon a legislative finding that employees as a class are at an economic disadvantage in seeking legal redress for their claims. Furthermore, few attorneys would be motivated to pursue employee’s wage

claims on a contingent-fee basis in view of the relatively small amount of most such claims.” *Kling v. Exxon Corp.*, 74 Or. App. 399, 404 (1985). The penalty and attorney fees provided in ORS Chapters 652 and 653 are designed to accomplish these policy objectives.

Privately initiated lawsuits, such as this one, are essential to the effectuation of the Oregon statutory scheme. Without the award of reasonable attorney fees, employees would continue to be at the mercy of their employers for their wages and without access to justice for recovery of the wages they have earned. The aim of the fee-shifting statute is to enable private parties to obtain legal help and seek redress for injuries resulting from violations of specific laws. Plaintiffs’ attorneys, and other attorneys who undertake cases that vindicate public policies, require statutory assurance that if they obtain a favorable result for their client, the court will award their attorney fees. By making the attorney fees mandatory, the legislature provided that assurance, and it is the Court’s duty to ensure that the intent of the legislature is carried out.

Plaintiffs therefore ask the Court to grant their motion for an award of attorney fees against Jack in the Box, award them service payments of \$25,000 each, and award class counsel a common-fund percentage of the class’s total recovery as well as costs and litigation expenses.

DATED this 11<sup>th</sup> day of October, 2023

JON M. EGAN, P.C.

*/s/ Jon M. Egan*

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Attorney for Plaintiffs and Class Counsel

# **FEE AGREEMENT COMPENDIUM**

**2018 Edition**



## **Disclaimer**

The Oregon State Bar provides the Fee Agreement Compendium as a starting point to aid lawyers in drafting their own written fee agreements.

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### *Printing History*

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## FORM

### Form 2-1 Billing for Costs Checklist

[Download MS Word](#)

This checklist provides a summary of the types of costs that can be billed to clients separately from attorney fees. The general benchmark should be to bill only for costs that are covered by the fee agreement between the lawyer and the client and for costs not to be marked up by the lawyer unless, at a minimum, the client has consented to a markup. This is especially true in light of Oregon RPC 1.5(a), which prohibits a lawyer from entering into an agreement for, charging, or collecting an illegal or a clearly excessive fee *or* a clearly excessive amount for expenses. Although there may be times when a lawyer can claim a right to recover costs not expressly identified in a fee agreement, a lawyer who does not obtain an express right of recovery runs at least the risk that the fee agreement will be construed against the lawyer. The lawyer can use this checklist to make a conscious decision about how to bill for each type of cost or to communicate the firm's policy to the client. Please note that the following list is not meant as exhaustive or all-inclusive.

**1. Administrative Fees.** These fees can include charges for various tasks, from opening a file to returning documents to the client. Although most firms today tend to treat such matters as part of overhead to be absorbed by the firm and not separately charged to the client, some firms do employ such charges with client consent. Examples of this type include the following:

(a) *File opening*—A fee of \$25 to \$50, for example, for opening a file. The charge recovers the labor for processing and entering client intake information as well as the expenses for file materials.

(b) *Check writing*—A flat fee per check to recoup the costs of checks, bank charges, and personnel time.

(c) *File storage*—Charges vary, depending on off-site storage fees versus digital or cloud storage. The charge often appears as a one-time charge when the file is being closed. In addition, when complex files are being closed, a firm may seek agreement to charge for shredding sensitive (but no longer needed) file information and the cost of moving the files off-premises.

(d) *Scanning*—When files are stored or managed electronically, a firm may seek agreement to pass the cost on to the client.

(e) *File retrieval*—Firms may charge for retrieving a file from an off-site storage center when a client requests it; or for the time required to search, sort, and produce to the client information that has been electronically stored.

**2. Document and File Return.** The general rules are as follows:

(a) *Original documents*—A lawyer cannot charge a client (or former client) for copies of original documents given by the client to the lawyer, and cannot charge for copies of original documents prepared by the lawyer for the client and held by the lawyer at the client’s request (e.g., the original of a client will).

(b) *Copy charges permitted by agreement*—A lawyer may charge for copies of other file materials only as long as the lawyer made clear in the engagement agreement that there would be a separate charge for copies.

(c) *Personnel costs*—A lawyer may not charge clients for the personnel costs of segregating the materials that the lawyer chooses not to produce except when segregating materials that the lawyer is legally prohibited from producing or when the client has requested only certain portions of the file.

(d) *Multiple requests by client*—If the client has not consented to a separate charge for copies, it may still be permissible to impose a charge if the client makes multiple requests for copies of the same documents or materials.

See OSB Formal Ethics Op No [2017-192](#).

**3. CLE or Seminar Expenses.** Some legal matters necessitate additional legal education or the lawyer’s attendance at matter-related seminars. Registration fees, travel, meals, and lodging expenses may be passed on to the client only when they have been discussed and negotiated with the client beforehand. Most lawyers will likely consider this education as overhead because it is required to be competent to take the legal matter.

**4. Courier Services.** The costs of courier services are often passed on to the client in the full amount. Some firms, however, may treat routine hand-delivery costs as overhead.

5. **Faxes.** To the extent a lawyer uses fax rather than email for document transmission, associated costs can in theory be passed through. This practice used to be common. Now that fax function is largely integrated into email and telecommunication systems, costs should only be passed along if there is an actual cost associated with the function.

6. **Expert and Witness Fees.** Costs may include actual fees charged by experts, witness or expert fees prescribed by court rules, travel, lodging, and meals. These fees are generally billed separately to the client. The cost of meals, if passed on to the client, should be itemized on the bill.

7. **Filing Fees.** Most firms charge actual filing fees and may pass along service or travel costs when applicable.

8. **Legal and Investigative Research.** Billing for the use of informational databases, such as Lexis, Westlaw, Courtlink, and Commercial Information Systems, Inc., presents concerns about discount disclosure and surcharge. Charges for legal research vary from only the direct online cost to including a charge to cover the cost of the equipment and administrative costs. Fixed or flat-rate plans by Westlaw and Lexis have also increased in popularity, creating concerns that such costs are more properly characterized as overhead. *See* George Relles & Richard Solomon, *Get It in Writing: Electronic Research Poses Billing Dilemma*, 11 No. 8 Acct L Firms 5 (1998). **Computerized legal research, whether such costs are fixed or variable, is considered an “in-house provision of services” properly charged to the client.** Relles & Solomon, *Get It in Writing*, 11 No. 8 Acct L Firms 5. Sometimes the cost of computerized legal research is even recoverable as a litigation expense. As noted by one commentator,

the majority of the circuit courts have adopted a rule that holds computerized legal research expenses recoverable as an expense separate from the attorney’s hourly rate . . . . A slim minority has followed a rule that subsumes the expenses into the attorney’s hourly rate, and virtually no federal courts have held computerized legal research expenses to be taxable costs.

Sarah Wise, *Show Me the Money! The Recoverability of Computerized Legal Research Expenses by the Prevailing Party in the Federal Circuits*, 36 Cap U L Rev 455, 480–81 (2007) (footnote omitted).

This means that “a reasonable allocation of overhead expenses directly associated with the provision of the service” may be billed to the client. Relles &

Solomon, *Get It in Writing*, 11 No. 8 Acct L Firms 5 (quoting ABA Formal Ethics Op No 93-379). However, firms must be careful not to create an undisclosed profit center, and to ensure that nonbillable uses (or writeoffs or writedowns) are not inadvertently passed on to clients.

**9. Litigation Support.** Many vendors provide litigation support for complex matters. Often the firm circulates requests for proposals (RFPs) and selects the lowest bidder. Many firms have invested in litigation-support technology or have developed sophisticated software that provides this service in-house. These firms may compete with other vendors for firm work or provide this service for other firms as long as a conflict does not exist.

**10. Overtime.** By agreement with their clients, many firms charge for employee overtime when overtime is required due to a client's timeline or lateness in responding to the firm's request for a response, discovery, etc. Overtime is generally not passed on to the client when the overtime results from the firm's workflow problems or a lawyer's procrastination. "If the overtime was incurred, for example,

because work for other clients was done during the normal workday and work for Client was, thus, performed on an overtime basis, charging Client for that secretarial overtime would not comply with ABA Formal Opinion 93-379. It would not be an expense reasonably incurred in connection with Client's matter; rather, it reflects how Lawyer prioritized her office workflow.

San Diego Cnty Bar Ass'n Op No 2013-3.

If overtime causes the firm to incur additional expenses for meals or transportation, those charges may be treated the same as the overtime itself if the client so agrees.

**11. Paralegal Fees.** Paralegal fees are usually listed with attorney fees in the fee agreement. As a result, paralegals are regularly a source of profit for law firms, rather than a passed-through expense. *Cf. Richlin Sec. Serv. Co. v. Chertoff*, [553 US 571](#), [128 S Ct 2007](#), [170 L Ed 2d 960](#) (2008) (recognizing different methods of charging clients for paralegal services, and allowing recovery of paralegal fees at rates charged to client, rather than at cost to firm, under fee-shifting statute). Clients should be made aware of the advantages of providing paralegal services at an hourly rate lower than attorney rates. Some firms list in the fee agreement the types of services routinely handled by paralegals.

**12. Photocopies and Document Scanning.** Electronic systems that can be attached to most standard photocopiers are available to assist in tracking and recovering copy costs. Smaller firms may keep manual logs next to their copiers. Larger firms purchase or lease equipment, or contract for services that provide cost-recovery information. Some copiers have built-in cost-recovery systems. As discussed above, many firms do not bill separately for routine photocopying. Various methods for charging for photocopies are as follows:

(a) Charge a flat rate per copy. It may be actual direct cost or include a reasonable sum for overhead pertaining to office, employee, and equipment costs.

(b) Projects requiring multiple copies may be charged at a less than standard rate.

(c) Large projects may be sent to an outside vendor, with the actual cost passed along to the client. Brief copying and binding and trial notebooks often fall into this category.

**13. Pick-up and Delivery Services.** A firm that uses outside services usually passes along the charge to the client. In-house charges vary, depending on whether the firm is charging for the employee's time. Some firms use paralegals or law clerks to pick up and deliver documents and charge on the basis of their hourly rates; others use office clerks or messengers and charge fees at the lower hourly cost. The rate also varies by the distance and time needed to complete the service.

**14. Postage.** Charge-back rates vary, depending on the type of practice and volume of mail. Firms may charge the actual cost of postage or may set a base and charge only for postage above the base. Express or overnight delivery charges may be passed along at cost to the client.

**15. Secretarial/Word Processing.** Most firms treat secretarial and word-processing expenses as part of overhead and do not seek client agreements to pass this cost along.

**16. Supplies.** By agreement with their clients, some firms pass along to the client some of the cost of supplies, particularly when the costs for a particular client or matter are large. Firms usually do not bill separately if the client requires only routine or minimal use of office supplies. These costs may include the following:

(a) *Three-ring binders*—The three- to five-inch binders used for document discovery and deposition transcripts are sometimes billed to the client. Some firms recycle binders and credit the client for binders that can be used again. However, some binders cannot be retrieved or become part of the permanent file.

(b) *Expanded pocket files or wallets*—Some firms pass along the cost of expanded pocket files to the client. Other firms charge a file-opening fee to recover the cost of all opening materials and labor.

(c) *Electronic storage or file cabinets*—Complex and document-intensive matters often require the firm to invest in additional storage. Firms sometimes pass along the cost for additional data storage. If the matter involves actual paper and the need to purchase file cabinets, firms may pass along that cost to the client and will return documents and related discovery to clients in the file cabinets. Some firms buy back the file cabinets at the end of the matter if they happen to need them.

**17. Travel, Meals, and Lodging.** Travel expenses can be passed along to the client at the actual cost of airfare, hotel, mileage, etc. Meals must be delineated on the cost bill. Only 50 percent of the cost of meals for business and for meals associated with business travel is deductible. IRC § 274(n).

**18. Telephone.** If a phone system is charging for long-distance calls, there are a variety of ways to recover the cost of long-distance charges. Software and hardware are available to sort data by user, extension, profit center or department, office, and client number.

With the proliferation of flat-rate long-distance service and the daily use of long distance, some firms no longer charge for routine long-distance calls. They may, however, bill for operator-assisted conference calls or long-distance calls that exceed a certain cost; those excess costs can be passed on.

**19. Contract Lawyer Service.** The cost attributable to a contract lawyer may be billed to a client either as fees or as costs incurred by the retaining lawyer. If billed as a cost, the amount billed “should not be greater than the actual cost incurred, plus those costs that are associated directly with the provision of services, unless there has been a specific agreement with the client otherwise.” ABA Formal Ethics Op No 00-420. If, on the other hand, a firm bills the client for services of a contract lawyer at an hourly rate higher than the cost of the contract lawyer, then such charges are more accurately characterized as fees. This type of arrangement is

substantially similar to the use of associates at most firms and therefore does not necessarily require any more disclosure or informed consent than would be necessary for an employed associate. *See* ABA Formal Ethics Op No 00-420 (“There is no duty to disclose the surcharge when the work of the contract lawyer is supervised or, absent supervision, when the work of the contract lawyer is adopted as the work of the retaining lawyer.”). Thus, a good practice will be to at least specify in the fee agreement that contract attorneys may be utilized and their rates, which may also be stated in the client’s bills, just as a firm would generally do with an associate.

**20. Accounting Fees.** Clients may be charged for special requests for information from the firm’s accounting department, such as spreadsheets that provide information that is not available with the firm’s time and billing software, analyses of billing history, original record production (timesheets), copies of invoices related to disbursements, etc. *But see Attorney Grievance Comm’n of Maryland v. Kremer*, [404 Md 282](#), 338, [946 A2d 500](#), 533 (2008) (“[W]e do not find it reasonable, under the circumstances presented, for Respondent to separately charge her clients for ‘accounting services.’ We view ‘accounting services’ as an overhead expense incidental to the practice of law.”).