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L. CHINEN, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI'I

COUNTY OF HAWAI'I, a municipal
corporation,

Plaintiff,

vs.

ROBERT NIGEL RICHARDS,
TRUSTEE UNDER THE MARILYN
SUE WILSON TRUST; ROBERT
NIGEL RICHARDS, TRUSTEE UNDER
THE JOAN ELIZABETH COUPE
TRUST; CHARLES WILLIAM COUPE;
JOAN ELIZABETH COUPE; MILES
HUGH WILSON; JOAN COUPE,
TRUSTEE UNDER REVOCABLE
TRUST OF JOAN COUPE DATED
MARCH 30, 1989; JOHN DOES 1-100;
JANE DOES 1-100; DOE
PARTNERSHIPS 1-100; DOE
CORPORATIONS 1-100; DOE
ENTITIES 1-100; and DOE
GOVERNMENTAL UNITS 1-100,

Defendants.

CIVIL NO. 00-1-0181K (Kona)(Condemnation)
(Consolidated)

PLAINTIFF/COUNTERCLAIM DEFENDANT
COUNTY OF HAWAI'I'S PROPOSED
SUPPLEMENTAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
STATUTORY DAMAGES (CIVIL NO. 00-1-
0181K); CERTIFICATE OF SERVICE

Trial Dates:

July 9-13, 2007

July 16-20, 2007

July 23-27, 2007

July 30 – August 2, 2007

ROBERT NIGEL RICHARDS, TRUSTEE
UNDER THE JOAN ELIZABETH
COUPE TRUST; CHARLES WILLIAM
COUPE; JOAN ELIZABETH COUPE;
JOAN COUPE, TRUSTEE UNDER
REVOCABLE TRUST OF JOAN COUPE
DATED MARCH 30, 1989,

Defendants/Counter-
claimants,

vs.

COUNTY OF HAWAI'I, a municipal
corporation,

Plaintiff/Counterclaim
Defendant.

ROBERT NIGEL RICHARDS, TRUSTEE
UNDER THE JOAN ELIZABETH
COUPE TRUST; CHARLES WILLIAM
COUPE; JOAN ELIZABETH COUPE;
JOAN COUPE, TRUSTEE UNDER
REVOCABLE TRUST OF JOAN COUPE
DATED MARCH 30, 1989,

Third-Party Plaintiffs,

vs.

1250 OCEANSIDE PARTNERS aka
HOKULI'A,

Third-Party Defendant.

COUNTY OF HAWAI'I, a municipal
corporation,

Plaintiff,

vs.

ROBERT NIGEL RICHARDS,
TRUSTEE UNDER THE MARILYN
SUE WILSON TRUST; ROBERT
NIGEL RICHARDS, TRUSTEE UNDER
THE JOAN ELIZABETH COUPE

CIVIL NO. 05-1-015K
(Kona)(Condemnation)

TRUST; CHARLES WILLIAM COUPE;
JOAN ELIZABETH COUPE; MILES
HUGH WILSON; JOAN COUPE,
TRUSTEE UNDER REVOCABLE
TRUST OF JOAN COUPE DATED
MARCH 30, 1989; 1250 OCEANSIDE
PARTNERS aka HOKULI'A; JOHN
DOES 1-100; JANE DOES 1-100; DOE
PARTNERSHIPS 1-100; DOE
CORPORATIONS 1-100; DOE
ENTITIES 1-100; and DOE
GOVERNMENTAL UNITS 1-100,

Defendants.

ROBERT NIGEL RICHARDS, TRUSTEE
UNDER THE JOAN ELIZABETH
COUPE TRUST; CHARLES WILLIAM
COUPE; JOAN ELIZABETH COUPE;
JOAN COUPE, TRUSTEE UNDER
REVOCABLE TRUST OF JOAN COUPE
DATED MARCH 30, 1989,

Defendants/
Counterclaimants,

vs.

COUNTY OF HAWAI'I, a municipal
Corporation,

Plaintiff/Counterclaim
Defendant.

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PLAINTIFF/COUNTERCLAIM DEFENDANT COUNTY OF HAWAII'S PROPOSED
SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING STATUTORY DAMAGES (CIVIL NO. 00-1-0181K)

Pursuant to this Court's status conference on January 22, 2009, and the Hawaii Supreme Court's December 24, 2008 decision in *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai'i 352, 198 P.3d 615 (2008), Plaintiff and Counterclaim Defendant County of Hawai'i ("County") submits the following proposed Findings of Fact, Conclusions of Law and Order regarding the amount of statutory damages under Hawai'i Revised Statutes ("HRS") § 101-27 that Defendant, Counterclaimant, Third-Party Plaintiff and Cross-claimant C & J Coupe Family Limited Partnership (hereinafter, C & J Coupe Family Limited Partnership for itself and as a substituted party will be referred to as "the Coupes") is entitled in defending against the condemnation in Civil No. 00-1-0181K.

INTRODUCTION

A non-jury trial on this consolidated action was held before the Honorable Ronald Ibarra on July 9-12, 16-20, 23, 25-27, and July 30-August 2, 2007. The County was represented by Joseph K. Kamelamela, Esq., and Michael J. Udovic, Esq., the Coupes were represented by Kenneth R. Kupchak, Esq., Robert H. Thomas, Esq., and Mark M. Murakami, Esq., and Third-Party Defendant, Defendant and Cross-claim Defendant 1250 Oceanside Partners ("1250 Oceanside") was represented by William Meheula, Esq., and Derek T. Mayeshiro, Esq., the Court, having received testimonial and documentary evidence, having heard the arguments of counsel, being otherwise fully advised in the premises, having reviewed the Proposed Findings of Fact and Conclusions of Law submitted by all parties on March 20, 2009, and judging the credibility of the witnesses, hereby makes and enters the following Findings of Fact and

Conclusions of Law regarding the issue of the amount of statutory damages under HRS § 101-27 that the Coupes are entitled in defending against the condemnation in Civil No. 00-1-0181K:

FINDINGS OF FACT

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. Pursuant to HRS § 101-27, the Coupes seek an award of attorney's fees and costs in the following amounts: \$1,645,408.90¹ for attorneys' fees (less \$63,173.45 for fees already paid per motion to Compel); \$200,226.58 for total costs and expenses; \$64,386.35 for general excise tax; and \$282,341.51 for prejudgment interest.
2. There are two sets of billing records: the first set totals \$1,057,653.40 fees and \$68,984.49 costs (billed 1/01-9/07) (First Set); and, the second set totals \$587,755.50 fees and \$14,326.53 costs (billed 3/05-9/07) (Second Set). Based on review of both the fee petition and the individual time entries, the billing scheme in this case is that the First Set of billing records concerns only condemnation case one, and the Second Set of billing records concerns only condemnation case two. Since none of the fees and costs related to the second condemnation action are recoverable, none of the billing in Set Two is recoverable under HRS § 101-27. More particularly, \$587,755.50 fees and \$14,326.53 costs comprising the billing in Set Two is not available for recovery by the Coupes.

¹ This amount is the total billing as calculated from the billing records themselves that includes \$1,057,653.40 in the First Set of billing records, and \$587,755.50 in the Second Set of billing records. In the Coupes' Motion for Statutory Damages, at page 13, under "Conclusion," the total fee request is \$1,547,748.80 (\$1,516,445.80 for attorneys' fees and \$31,303.00 for attorneys' fees – mediation). The fee total computed from billing records (rather than the claim stated in the Motion) is used because the billing records give this Court something to evaluate for description of work, accuracy and reasonableness. Since the law firm is the source of both the Motion for Statutory Damages and the billing records, this Court has compared the statements made in the Motion and the billing records to better evaluate the Coupes' request for fees and costs.

3. After the second condemnation action was filed, there was a flurry of new activity – for example, an Answer, Counterclaim, Motion to Consolidate, Motion to Join Indispensable Party, Motion to Realign Parties, and so forth. The extra billing during this period would be expected to appear in and add to the Second Set of billing records. Yet, the opposite proved true: there was more billing in the First Set of billing records during this period than in the Second Set. Specifically, billing for the period March 2005 through September 2007 in the First Set of billing records totals \$619,503.90, while billing for the same time period in the Second Set totals \$587,755.50. The difference is \$31,748.40, or about 2.6 percent of the total billing during this period. The recoverable First Set of billing records should not bear the burden of inflated fees, no matter how inadvertent. In fairness, therefore, one-half of the excess in Set One, or $\frac{1}{2}$ of 2.6 percent of the total billing during the period (or $\frac{1}{2} \times \$31,748.40$), is removed from the recoverable fees in Set One, and placed with the non-recoverable fees in Set Two.

4. The fee petition and billing records set out several additional adjustments to the billing at issue. For the first adjustment, the Coupes provide a “discount,” as described in Footnote 16 on page 12: “[defendant’s counsel] has provided courtesy discounts to the [County], amounting to \$56,929.64 to account for *inter alia* duplication of effort”; however, the billing records in Set One show a total discount of \$43,566.99 (in the interest of consistency, the latter amount is subtracted from the fees at issue in Set One). A second adjustment is for fees of \$63,173.45 already paid the Coupes following a contentious discovery battle and Motion to Compel. A third adjustment is a disallowance of redacted time entries representing by far the single largest “billing category” amounting to 2,204.3 hours of the 5,331.9 total hours that make up the First Set of billing records; and, as such, redacted entries represent 41.3 percent of the total billing in Set One that is subject to disallowance on the ground of an insufficient billing record. And a

fourth adjustment is a disallowance of billing that is simply not appropriate because clerical work, or entries that are incomprehensible and should be disallowed as overhead; here, 156 hours expended on clerical and other non-billable tasks that represents 2.9 percent of the total 5,331.9 hour that comprise Set One of the billing records.

5. The Coupes' recovery of attorneys' fees in this matter is limited to the time and fees expended in defending their interests in the first condemnation case filed by County on October 9, 2000. Within a few months, however, the Coupes expanded the litigation by filing a Counterclaim against the County on January 24, 2001. The Coupes further grew the litigation by filing a Third-Party Complaint against 1250 Oceanside on December 31, 2002. In January 2005, County filed a second condemnation action against the Coupes. As in the first condemnation case, the Coupes counterclaimed against County, and succeeded in having 1250 Oceanside joined as an indispensable party. The scope of this litigation was thus expanded to six fronts, and proceeded to bench trial in late 2007 in that posture. In regard to the instant fee petition, therefore, the relevant issue is the amount of fees allocable to the Coupes' original defense of the first condemnation action that are subject to the fee-shifting provision of HRS § 101-27. So, of the First Set of billing records totaling \$1,057,653.40, how much of that amount – after all the deductions set out above are accounted for – is recoverable under the fee-shifting statute. Given that the time entry descriptions are much too vague to distinguish the work done for which fees would be recoverable, the most reasonable alternative is to allocate the billing among the three fronts in the litigation of the first condemnation action. On that basis, the recoverable fees under the fee-shifting statute will thus consist of one-third of the billing in the First Set of billing records, after all specific and percent disallowances are accounted for.

6. Although the lodestar method is a preferred method for determining the 'reasonableness' of attorneys' fees, the billing records in this case fail to provide any billing rate information for timekeepers, so that is impossible to calculate a lodestar. While the billing records state total fees billed with each invoice, there is no detail as to fees billed with any particular entry. These omissions are serious, in that the billing record is not susceptible to review for reasonableness of billing rates, and individual time entries cannot be reviewed for reasonableness of the fees. Moreover, there are additional entries that are suspect because the billing records show block billing, vague entries and heavy redactions of time entries. This represents an additional layer of obfuscation of the billing records in the case that adds to their suspect reliability and integrity. A 15 percent disallowance on the attorneys' fees is in line because of block billing, vague entries, and redacted time entries.

7. While costs accumulated in the course of this litigation are subject to the same analysis as set out above for recovery of attorneys' fees, the costs presented here are not recoverable in any event, either because so sparsely described as to be incapable of evaluation as necessary or reasonable, or simply inappropriate altogether.

8. The amount of allowable fees is \$125,203.54 which was calculated by taking the total billing of \$1,645,408.90 less the adjustments (fees billed in the Second Set of billing records in the amount of \$587,755.50, Courtesy discount of \$43,566.99, and fees of \$63,173.45 already paid per Motion to Compel) with an allocation of one-third (1/3) of the adjusted fees (in the amount of \$316,970.99) and reducing that allocated fee amount by the billing drift from Set Two to Set One (by 1.3%), the redacted entries (by 41.3%), clerical work and inappropriate entries (2.9%) and inadequate records, blocked billing and vague entries (by 15.0%).

9. No costs are allowed.
10. No prejudgment interest.

CONCLUSIONS OF LAW

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. HRS § 101-27 allows a defendant who prevails in a condemnation action to recover damages sustained in that action regardless of whether the defendant's property is later taken for public use in a subsequent condemnation action. *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai'i 352, 366, 198 P.3d 615, 629 (2008). As for the scope of statutory damages permitted under HRS § 101-27, a defendant may be awarded costs of court, a reasonable amount of attorneys' fees, and other reasonable expenses. *Id.*, 119 Hawai'i at 367-8, 198 P.3d at 630-31. Any statutory damages awarded pursuant to HRS § 101-27 must be strictly related to a defendant's expenses in defending the initial condemnation. *Id.*, 119 Hawai'i at 368, 198 P.3d 615, 631(2008); *State v. Davis*, 53 Haw. 582, 499 P.2d 663 (1972).
2. Because HRS § 101-27 allows recovery of amounts of fees and costs expended in the first condemnation action in the Coupes defense against the County, the Coupes are not able to recover as fees and costs in their counterclaim against the County, third-party claim against 1250 Oceanside and in the second condemnation action. *See, Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 444-45, 32 P.3d 52, 88-89 (2001) (Hawai'i Supreme Court remanded and directed the trial court to engage in a *Hensley* analysis to determine whether it was reasonable to award attorney's fees for the entire time spent on the case, noting that time spent on unsuccessful claims unrelated to the plaintiff's successful claims could not be part of any award of "reasonable attorney's fees' under Hawai'i fee-shifting statutes." *Schefke*, 96 Hawai'i at 445, 32

P.3d at 89. The court directed that the trial court “consider whether Plaintiff’s successful and unsuccessful claims ‘involved a common core of facts or were based on related legal theories,’ *Hensley*, 461 U.S. [424,] 435, 103 S.Ct. 1933[(1983).]” *Schefke*, 96 Hawai‘i at 445, 32 P.3d at 89 (brackets omitted).

3. The Coupes have the burden of establishing that they are entitled to a specific award amount of reasonable attorney’s fees. *Hamada v. Wescott*, 102 Hawai‘i 210, 217, 74 P.3d 33, 40 (2003) (given the American Rule, party seeking attorneys’ fees has the burden of establishing that applicable statute expressly applies to allow an award of reasonable attorneys’ fees). It is the obligation of the moving party to “submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the [] court may reduce the award accordingly.” *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. Therefore, billing records must at least identify the general subject matter of time expenditures, so as to enable the reviewing court to determine whether the time spent is related to the prevailing claim. *Id.* 461 U.S. at 437, 103 S.Ct. at 1941, fn 12. If the moving party fails to do this, the Court may be justified in “throwing up its hands and refusing to award any fees whatsoever.” *Norris v. Sysco Corp.*, 191 F.3d 1043, 1052 (9th Cir. 1999).

4. Fees recoverable under HRS § 101-27 are subject to a reasonableness test. A law firm’s billing statement is a representation by the law firm that a particular task was performed on a particular day, by a particular timekeeper; and, that the task required the amount of time stated on the invoice. Billing format irregularities that bring into question the credibility, integrity, or reliability of billing records also offer grounds to reject the billing outright.

5. The time entries in this litigation are suspect on two additional grounds, being block billing, and vague entries. “Block billing” is the lumping together of time entries consisting of

two or more task descriptions, or the grouping of different tasks within a single block of time on a time record; and block billing hinders understanding the amount of time actually spent on individual tasks, and opens the door to both understatement and overstatement of time and fees (for example, the Tenth Circuit has ruled: “[t]he use of billing practices that camouflage the work a lawyer does naturally and quite correctly raises suspicions about whether all the work claimed was actually accomplished or whether it was necessary...” *Robinson, et al. v. City of Edmond, et al.*, 160 F.3d 1284 (10th Cir. 1998); and the Ninth Circuit held (in an unpublished opinion) that block billing and “overly generalized descriptions of tasks performed” requires a reduction in a fee award. *Gracie, et al. v. Semaphore Entertainment Group, et al.*, 52 Fed Apex. 43; 2002 U.S. App. LEXIS 24556 (9th Cir. 2002)). Vague entries, also, provide little or no information about the nature or significance of the work performed, thereby severely hampering a realistic assessment of its utility and reasonableness of the associated fees.² Specifically, billing records should provide, “...sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended.” *United Slate, Tile & Composition v. G&M Roofing*, 732 F.2d 495, 502 fn.2 (Sixth Cir. 1984).

6. While HRS § 101-27 allows costs and expenses to be recovered in order to make a defendant whole, the reasonableness of the charges is also a consideration. For example,

² U.S. District Court Local Rule 54.3 is helpful in this area as well in offering specific examples of information that ought to be included in time entry descriptions to win a Court’s approval of a fee petition, at 54.3(d)2:

The party seeking an award of fees must describe adequately the services rendered, so that the reasonableness of the requested fees can be evaluated... If the time descriptions are incomplete, or if such descriptions fail to describe adequately the services rendered, the court may reduce the award accordingly. For example, *time entries for telephone conferences must include an identification of all participants and the reason for the call*; entries for legal research must include an identification of the specific issue researched and, if possible, should *identify the pleading or document for which the research was necessary*; entries describing the preparation of pleadings and other papers must include an *identification of the pleading or other document prepared and the activities associated with such preparation. [Emphasis added.]*

computerized legal research costs are not taxable. *Bjornen v. State Farm Fire and Cas. Co.*, 81 Hawai'i 105, 107, 912 P.2d 602, 604 (App. 1996) (the Intermediate Court of Appeals concluded that disbursements for computerized legal research such as Westlaw are a component of attorney fees and are not taxable. Such legal research costs "are properly reflected as part of the law firm's overhead and, as such, are a factor to be included in the setting of attorneys fees as opposed to ordinary costs."); *DFS v. Paiea Properties*, 110 Hawai'i 217, 224, 131 P.3d 500, 507 (2006) (the Hawai'i Supreme Court has also adopted the position that "disbursements for computerized legal research . . . are a component of attorney fees and are not taxable costs"). And, absent extraordinary circumstances, the cost of "messenger fees for the routine task of delivering a party's documents to court is categorically outside the concept of costs." *Hawai'i Ventures, LLC v. Otaka, Inc.*, 116 Hawai'i 465, 479, 173 P.3d 1122, 1136 (2007).

7. HRS § 101-27 does not specifically allow for an award of prejudgment interest. HRS § 636-16 allows prejudgment interest in civil cases "provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred." See *Tri-S Corp. v. Western World Ins. Co.*, 110 Haw. 473, 498, 135 P.3d 82, 107 (2006) (award of prejudgment interest in a breach of contract case). The award of prejudgment interest cannot be based on either HRS § 101-27 or HRS § 636-16.

ORDER

Accordingly, IT IS HEREBY ORDERED that the Coupes are awarded attorneys' fees in the amount of \$124,203.54 pursuant to HRS § 101-27. In making awards of attorneys' fees in defense of a condemnation action, the Court must determine the reasonableness of an expenditure of attorneys' fees, and allocate fees between the claims, causes of action and

appropriate parties if at all practicable. After adjustments and allocation of one-third percent of \$950,912.96 of the remainder of the total billing, the Court reduced the remainder of \$316,970.99 by \$191,767.45 because of the billing drift from Set Two (Billing for Second Condemnation Billing) to Set One (Billing for First Condemnation), redacted entries, clerical work and inappropriate entries, and inadequate records, blocked billing and vague entries, to reach the amount of \$125,203.54.

Dated: Kealahou, Hawai'i, _____.

JUDGE OF THE ABOVE-ENTITLED COURT