UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Masimo Corporation, Plaintiff, v. **Tyco Health Care Group, L.P. and Mallinckrodt, Inc.** Defendants.	**CASE No. CV 02-4770 MRP (AJWx)** **ORDER GRANTING ATTORNEYS' FEES AND COSTS**

I.

INTRODUCTION AND BACKGROUND

The procedural background of this case is well documented in the Court's prior orders and will only be summarized briefly here. In March 2005, a jury found Defendants Tyco Healthcare Group LP and Mallinckrodt, Inc. ("Tyco") liable to Plaintiff Masimo Corporation ("Masimo") for violations of §§ 1-2 of the Sherman Act and § 3 of the Clayton Act. The conduct involved "Pulse Oximetry Systems," which measure a patient's heart and lung function via a non-invasive procedure for calculating blood oxygen saturation.

Following the jury verdict, Tyco filed a RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY, A NEW TRIAL. On March 22, 2006, the Court sustained the jury verdict based on the anticompetitive harm caused by Market Share Discounts and Sole Source

Contracts, but vacated the jury's liability finding in connection with other alleged anticompetitive conduct. The Court also vacated the jury's damage award, because it was not sustainable by the proof introduced at trial. The Court then ordered a new trial to determine damages because (1) the damages model provided by Masimo provided no principled way to allocate damages caused by each anticompetitive practice, and (2) Sole Source Contracts with the Novation Group Purchasing Organization had only minimal anticompetitive effects, and therefore could not serve as a major component of a damages award as Masimo had proposed.

After the parties stipulated to a bench retrial on damages, this Court found Tyco liable for $14.5 million. This damage amount is trebled under the Clayton Act.

Masimo now requests attorneys' fees in the sum of $10,150,757.30 and costs in the sum of $886,861.30 pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15. Tyco objects to several components of that request, specifically: (1) fees and costs relating to the damages retrial; (2) fees incurred in Masimo's activities before the United States Senate, the Department of Justice and the Federal Trade Commission; (3) any enhancement to account for the delay in payment; (4) fees associated with the attendance of attorney Steven C. Jensen at trial and costs attributed to Knobbe Martens Olson Bear L.L.P. ("the Knobbe firm"); (5) fees and costs incurred in two mock proceedings conducted by Masimo's attorneys; and (6) fees at the rate of $1100 per hour for the work of Stephen D. Susman, an attorney at Susman Godfrey L.L.P. ("the Susman firm").

II.

LEGAL STANDARDS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that a successful plaintiff may recover reasonable attorneys' fees and costs associated with the suit. The starting point, or "lodestar," for determining the amount of a reasonable fee is the number of hours expended on litigation multiplied by a reasonable hourly rate. *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990). There is a strong presumption that the lodestar figure computed by this method represents a reasonable attorneys' fee, but it may be adjusted upwards or downwards in rare circumstances to account for factors not subsumed within its calculation. *Id.*

at 1383-84.

The prevailing party bears the burden of documenting the appropriate hours expended in litigation and submitting evidence of those hours worked. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). The opposing party has the burden of rebuttal to challenge the accuracy or reasonableness of the hours charged. *Id.* at 1398. The court must exclude from the calculation hours that it determines were not "reasonably expended" on litigation because they were excessive, redundant, or otherwise unnecessary. *Van Gerwen v. Guaranteed Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983)).

The court must then determine a reasonable hourly rate based on the experience, skill, and reputation of the attorneys requesting fees. *D'Emanuele*, 904 F.2d at 1384 (citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986)). While the rates charged by attorneys for the prevailing party may be relevant, market rates in the community should ultimately guide the court. *Id. See also Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996). The burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984).

Finally, to account for the delay in payment from the time of billing to time of award, the court may augment an award based on historical billing rates with interest for the delay, or adjust the award by using current billing rates. *D'Emanuele*, 904 F.2d at 1384 (citing *Missouri v. Jenkins*, 471 U.S. 274 (1989)). However, such an adjustment is firmly in the court's discretion. *Jordan v. Multnomah*, 815 F.2d 1258, 1263 n.7 (9th Cir. 1987). *See also Barjon v. Dalton*, 132 F.3d 496, 502-03 (9th Cir. 1997); *Gates*, 987 F.2d at 1407 (explaining that "*Jenkins* does not require an enhancement for delay under all circumstances, but rather permits an adjustment 'where appropriate'"). These adjustments are appropriate if the fee amount would otherwise be unreasonable in light of the "totality of circumstances." *Jordan*, 815 F.2d at 1263 n.7. The court must be wary of granting the plaintiff a windfall when substituting current rates for historical rates because "changes in hourly rates reflect not only inflation but also an attorney's increased

experience and skill." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663 (7th Cir. 1986).

III.

DISCUSSION

Since Masimo prevailed in the suit, it is entitled to reasonable fees and costs under the Clayton Act. *See Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989). Tyco does not dispute this conclusion. Accordingly, the Court devotes the rest of this order to the calculation of the award.

Masimo seeks fees at current rates and costs for work completed by three law firms: the Susman firm, the Knobbe firm, and Blecher and Collins ("the Blecher firm"). Masimo's fee requests are summarized in the following chart:

		Historical[1]		Current[2]	
Firm Name	**Hours**	**Average Rate**	**Total Amount**	**Average Rate**	**Total Amount**
Susman firm	21353.54	$356.02	$7,602,377.55	$444.73	$9,496,491.30
Knobbe firm	992.20	$465.65	$462,023.80	$520.81	$516,749.50
Blecher firm	498.40	$275. 91	$137,516.50	$275.91	$137,516.50
Total	22844.14	$359.04	$8,201,917.85	$444.35	$10,150,757.50

Masimo also seeks compensation for costs incurred by the firms, amounting to $870,275.10 in costs incurred by the Susman firm, $11,531.43 by the Knobbe firm, and

[1]"Historical" rates refer to the attorneys' rates at the time the work was billed. For example, attorney Marc. M. Seltzer billed at a rate of $550 per hour for his work on May 19, 2002. In 2007, Mr. Seltzer billed at $850 per hour.

[2]In the alternative to a fee augmented by current rates, Masimo requests an enhancement by interest amounting to $1,125,399 over the amount calculated with historical rates.

$5,054.85 by the Blecher firm.

Tyco does not dispute the vast majority of Masimo's requests and presents six specific objections. Four relate to the hours expended and scope of work for which Masimo requests fees, addressed in Section A; one relates to the reasonableness of Mr. Susman's fee rates, addressed in Section B; and one disputes Masimo's entitlement to an enhancement due to the delay in payment, addressed in Section C.

A. Hours Expended

The first step in calculating the "lodestar" is determining the number of hours reasonably expended in the course of the litigation. Masimo seeks a fee award for approximately 23,000 hours of work. Tyco makes four specific objections to the scope of the work that this figure includes, and seeks to exclude certain blocks of work from the fee award. Each of these objections is addressed in turn.

1. Damages Retrial

The parties disagree as to whether fees and costs associated with the damages retrial should be included in Masimo's fee award.

Generally, a party may receive fees for a retrial so long as the mistake that made the retrial necessary is not attributable to unreasonable conduct by the party. *See Shott v. Rush-Presbyterian-St. Lukes Med. Ctr.*, 338 F.3d 736, 741 (7th Cir. 2003). In *Shott*, the Seventh Circuit reversed a district court's fee award for fees associated with the first of two trials because the fee applicant pursued an unreasonable strategy of confusing the jury with largely irrelevant information and opposed a jury instruction that would have alleviated the confusion. *Id.* at 741-42. As a consequence of this strategy, the trial court felt that a new trial was necessary in case the jury reached its decision when focused on irrelevant information. *Id.* at 741. The Seventh Circuit did not think it appropriate to award a litigant attorneys' fees "for a trial that was voided by her unreasonable strategy." *Id.* at 743.

Masimo contends that the retrial was caused by a combination of its arguments, the

Court's findings with respect to Sole Source contracts, and Tyco's failure to object to Dr. Leitzinger's testimony. Tyco argues that Masimo is not entitled to fees for work associated with the damages retrial because the effort and expense of that retrial is attributable solely to Masimo's improper tactics and strategy.

Under *Shott*, the court clearly has discretion to deny fees for the damages retrial if it was a result of an unreasonable strategy. In its March 22, 2006 order, this Court determined that a retrial was necessary in part due to Masimo's flawed damages model which provided "no way" to account for damages caused by each individual anticompetitive practice. *See Masimo Corp. v. Tyco Health Care Group*, L.P., 2006 WL 1236666, *14 (C.D. Cal. 2006). The Court explained that Masimo's allocation of damages amongst the anticompetitive practices "did nothing to separate the substantial overlap of conduct and this led to what appears to have been a substantial duplication of damages." *Id.*

The damages retrial was also predicated on the Court's finding that Novation Sole Source contracts could only have had a minimal impact on the market within the damages period at issue. *Id.* As the Court could not recalculate damages in accordance with that finding because Masimo's damages model included Novation contracts, a retrial on damages was necessary. *Id.* Masimo's arguments and damages model regarding Sole Source contracts and Novation, while ultimately determined to be without basis in the Court's March 22, 2006 decision, were not so unreasonable as to rise to the level of *Shott*. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713, 737 (1st Cir. 2002) (holding that attorney's introduction of irrelevant evidence was not "misconduct" sufficient to deny fees). For these reasons, the Court awards Masimo $1,006,167.05 in fees attributable to the damages retrial.

2. Matters before the United States Senate, Department of Justice, and Federal Trade Commission

Tyco seeks to exclude from any damages award hours spent on several matters that appear only tangentially related to the litigation here. Citing *Hasbrouck v. Texaco*, 879 F.2d 632 (9th Cir. 1989), Masimo argues that its attorneys' efforts in matters before various federal

government entities are compensable because they were reasonably conducted to obtain government help for its cause. In *Hasbrouck*, the Ninth Circuit affirmed a fee award for counsels' preparation of an amicus brief to the Supreme Court in a different case because a legal issue in that case directly bore on the litigation at hand. *Id.* at 638.

The court in *Hasbrouck* found a clear and direct connection between the litigation and the Supreme Court case (including the precedential value of a favorable decision the latter case). *Id.* Here, the connection between Masimo's activities in front of these various outside organizations to this litigation is far more tenuous. *See also Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 278-279 (9th Cir. 1992) (denying attorneys' fees for ancillary administrative and state proceedings because they lacked the "intimate connection" or direct relationship with the federal claim subject to a fee award). There is no suggestion that these tangential activities offered any reasonable prospect of substantially contributing to the litigation. The Court therefore concludes that attorney expenditures on these matters should be excluded from the fee award for the Masimo v. Tyco litigation.

3. Fees and Costs associated with Masimo's Mock Summary Judgment and Second Mock Trial.

Tyco objects to Masimo's fee request with respect to a mock summary judgment argument and the second of two mock jury trials on the grounds that those proceedings were unnecessary and excessive.

Masimo suggests that courts "routinely award fees and costs associated with mock trials, even when there is more than one." PLAINTIFF MASIMO CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS APPLICATION FOR ATTORNEYS' FEES AND COSTS, at 9 ("Masimo Br."). The cases on which Masimo relies, however, distinguish between reasonable expenditures and those that were excessive and unnecessary. *See, e.g., Charles v. Daley*, 846 F.2d 1057, 1076-77 (7th Cir. 1988) (expressing skepticism about holding in-person moot courts on both the east and west coasts and describing them as "excessive expenditures"); *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.3d 403, 407 (9th Cir. 1990) (finding that a single moot court trial run could be included in a fee award so long as the number of hours

spent was reasonable).

Here, the activities in question fall on the unnecessary, redundant, and unreasonable side of the line. The mock summary judgment argument cost $51,000 and was conducted well before Tyco had filed for summary judgment and the summary judgment oral argument was never even heard before this Court. Masimo's mock argument on the issue can only be described as over-lawyering and over-preparation, and is not entitled to compensation. *Cf. Finkelstein v. Bergna*, 804 F. Supp. 1235, 1239 (N.D. Cal. 1992) (denying a fee award because the lawyers' timing of second mock trial activities were imprudent, as the issue was largely moot).

The same can be said about the second mock trial because it followed so closely after the first one. Masimo's attorneys' held a mock trial in May 2004 costing about $81,000. Just three months later, they conducted a second mock trial. The attorneys billed thousands of dollars for tasks such as traveling to this second mock trial (which was conducted in Los Angeles). The total sought for the second mock trial amounts to over $205,000. The Court recognizes that there may be situations where multiple mock trials are reasonable expenditures, if, for example, a substantial period of time has lapsed between exercises or the nature of the case has changed so as to require a second trial. Neither of those situations is at issue here in the three month period between May and August of 2004. Masimo's attorneys quite reasonably could have avoided the duplicative and excessive second mock trial with more prudent timing and careful planning the first time around. In failing to do so they accumulated thousands of dollars in excessive and redundant fees and costs which Masimo now seeks to recover from Tyco.

The Court accordingly excludes fees and costs related to the mock summary judgment argument and the second mock trial from the award. This exclusion amounts to $265,519 at historical rates, with an additional $5,228 for costs.

4. Fees for Mr. Jensen's Attendance at the Antitrust Trial and Costs Submitted by the Knobbe firm.

Masimo seeks, and Tyco objects to, $78,275 in fees associated with Mr. Jensen's attendance at trial, as well as $11,531.43 in costs for the Knobbe firm.[3] The Court is not convinced by Masimo's arguments, or Mr. Jensen's extremely vague block billing statements, that his attendance was necessary to this litigation. *See In re Donovan*, 877 F.2d 982, 996 (D.C. Cir. 1989) (maintaining that while counsel is free to retain duplicative attorneys, it is not free to "exercise its judgment in a fashion that unnecessarily inflates the losing party's fee liability") (internal citations omitted). Mr. Jensen has a series of entries marked simply "Antitrust Trial" or "Trial and Trial Preparation" in his statement, and to the Courts' recollection his time was not spent at counsel's table or actively participating in the antitrust litigation. To the extent that Mr. Jensen conducted other activities included in those time entries that might be compensable, the Court finds that Masimo has not met its burden to produce satisfactory documentation of his hours and did not "maintain billing records in a manner that will enable a reviewing court to identify distinct claims." *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 905 (9th Cir. 1995) (citing *Hensley*, 461 U.S. at 437).

The documentation is similarly flawed with respect to costs sought on behalf of the Knobbe firm. Mr. Jensen has failed to submit an itemized list of the components that compose the $11,531 figure, or any further detail whatsoever. As Masimo seeks nearly $900,000 in total costs, the Court considers it reasonable to deny Masimo the $11,531 in costs for which it has not submitted proper accounting.

5. Conclusion

The number of hours in these calculations reflects the magnitude of attorneys' work on this matter over a several year period. The Susman firm, for example, has submitted a billing statement over 250 pages long with entries dating back to April 2002. Clearly the hours are

[3]The Court notes that this $78,275 figure is about 17% of the fees that Masimo seeks on behalf of Mr. Jensen's work.

illustrative of the high stakes involved in this litigation and the amount of preparation and effort necessary for such a complex antitrust case. But in the Court's view, the extraordinary number of hours also involves time which must be characterized as unnecessary, redundant, and excessive for which Tyco should not be required to pay.

After considering Tyco's objections, the Court finds that Masimo is entitled to fees for the work its lawyers have itemized, with the exception of (1) fees associated with efforts ancillary to the litigation, (2) fees and costs associated with unnecessary and excessive mock trial and summary judgment exercises; (3) and fees associated with Mr. Jensen's attendance at trial and costs submitted by the Knobbe firm.

B. Reasonable Hourly Rates

The next step in determining the lodestar amount is to identify a reasonable hourly rate, defined as the "prevailing market rate in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." *D'Emanuele*, 904 F.2d at 1384 (citing *Chalmers*, 796 F.2d at 1210-11). In this case, the fee rates used to determine the "historical" amounts stem from the firms' actual billing rates. Each of the three firms claims that their rates are competitive with other firms in the legal community.[4] JENSEN DECL. at 1; BLECHER DECL. at 4-5; SELTZER DECL. at 1.

Tyco limits its objection of billing rates to the rates sought for the work of Mr. Susman, which ranged from $900 to $1100 per hour, and averaged $1002.96 per hour over the course of the litigation. It contends that Masimo has not shown that Mr. Susman's billing rates are reasonable and proposes a lower rate of $700 per hour for Mr. Susman's work.

Masimo has not offered a comparison of Mr. Susman's rates to others in the community. Nonetheless, Mr. Susman is one of the foremost trial attorneys in the country, and while his

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[4]Notably, out of the three declarations submitted on behalf of law firms, only Mr. Blecher's offers some analysis of the legal rates in the community when concluding that the rates of his firm fall within the range for rates of law firms in Los Angeles providing similar services. The other declarations provide no support for the assertions that their rates are competitive in the community.

billing rate is presumably at the upper end for attorneys in the community (and indeed, in the country), he offers clients abilities and a skill set that are largely unique and particularly valuable in a case of this complexity. His average rate of about $1000 per hour is not so far above the range for other lawyers in the community (and other lawyers in this case) that it outweighs these considerations. Thus, the Court finds that Mr. Susman's regular hourly rates are reasonable for his work in this case.

As Tyco makes no other objections to the reasonableness of the rates proposed by Masimo, the Court finds that the "historical" rates are within the range of reasonable hourly rates for the services rendered at the time they were rendered.

C. Enhancement for Delay in Payment

Masimo seeks to augment its fee award to account for the delay in payment. Tyco vigorously objects to any augmentation on the grounds that the fee award is reasonable without any addition for the delay in payment. The question for this Court is "the reasonableness of the fee in light of the totality of the circumstances and the relevant factors, including delay in payment." *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.7 (9th Cir. 1987).[5]

As has been discussed, other than Mr. Blecher's declaration, Masimo has not provided any evidence that indicates where the requested billing rates fall in comparison to prevailing market rates, either historically or today. The affidavits merely offer conclusory statements that the actual rates are believed to be competitive. Especially pertinent here, Masimo has not explained why the historical rates are rendered "unreasonable" in light of the delay in payment.

The evidence that has been submitted shows just the opposite: Masimo's recovery will be

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[5]Citing *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989), Masimo contends that the "case law unambiguously establishes that, in fee-shifting cases, historical hourly rates should be adjusted to account for delay of payment absent exceptional circumstances." REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF MASIMO CORPORATION'S APPLICATION FOR ATTORNEYS' FEES AND COSTS, at 3 ("Masimo Reply Brief"). But that case concludes only that "an adjustment for delay in payment is within the *contemplation*" of the statute that provides for a fee award. *Id.* at 284. Indeed, Justice Brennan explicitly states an adjustment for delay is one "appropriate factor" in the determination of a reasonable attorney's fee. *Id.*

sufficient without augmentation. Masimo's submissions show that the four attorneys who accumulated the largest fees for Masimo are Mr. Susman, Mr. Seltzer, Vineet Bhatia, and Stephen E. Morrissey. These attorneys account for 71% of the fees requested on behalf of the Susman firm, and approximately 66% of the total fees requested by Masimo. Their average billing rates for the 5 year period are $1002.96, $677.36, $462.85, and $390.81 respectively. Mr. Jensen, whose work accounts for about 5% of the total fees sought, billed at an average rate of $508. Considering the rates submitted by Mr. Blecher – the only attorney to submit any evidence backing his rates – these average rates are well within the range of market rates *today*.[6] The Court can only conclude that the rates of the other lawyers represented the very top end for attorney billing rates within the Los Angeles area for similar services when the work was performed. As Masimo has not submitted any evidence or made any arguments that suggest otherwise, enhancement is not necessary to render the award reasonable. *See, e.g.*, *Barjon v. Dalton*, 132 F.3d 496, 502-03 (9th Cir. 1997) (denying enhancement because, amongst other reasons, the requested rates were at the upper end of the market). Thus, while the Court found in Section B that the historical rates are "in the range of market rates," it does not think that any augmentation is necessary, or appropriate, in light of the fact that they are at the top of that range.

This result is further supported by the fact that the delay in payment is not as significant as Masimo contends. While it is true that Masimo began incurring fees as early as 2002, nearly half of the total fees can be attributed to work done in 2005 or later, and 75% in 2004 or later.

Moreover, the use of current billing rates, as Masimo proposes, would quite clearly grant the party a windfall in this case. The award increases by roughly 25% when current rates substitute for historical ones, even though most of the hours stem from the past three years. The example provided in Note 1 illustrates the point: Mr. Seltzer's billing rate has increased

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[6]Indeed, Mr. Susman's average rate of $1000 for the work completed in 2002-2007 is at the high end when compared to top billing rates in the country today. *See* Nathan Koppel, *Lawyers Gear Up Grand New Fees*, The Wall Street Journal, Aug. 22, 2007. Obviously his fee does not need to be augmented to be "reasonable."

approximately 55% between 2002 to 2007, and 42% between 2004 and 2007. To permit Masimo to collect for all of Mr. Seltzer's work at his current rate would enhance the award 55% for his work in 2002, and 42% for his work in 2004. Mr. Seltzer is unquestionably an exceptional lawyer, but this enhancement would push the award for his work in this case well outside the range of reasonableness and would compensate Masimo for considerations other than the delay in payment.[7]

In summary, the Court finds that an award measured by "historical" rates is a reasonable fee award because the delay was not sufficient in length to support enhancement of fees that already represent the high end of those in the community, and Masimo's proposed use of current rates would result in overcompensation to it.

D. Lodestar

The Court treats the lodestar – the calculations presented in Sections A, B, and C - as a reasonable fee without adjustment.

[7]Masimo submits an alternative enhancement calculation using prime interest rates in its Reply Brief. But its submission of the alternative calculation does not alter the Court's determination that the award measured by historical rates is well within the range of reasonable without enhancement.

IV.

CONCLUSION

The fees and costs sought by Masimo and the Court's deductions and awards are summarized in the following table:

	Fees	**Costs**	**Total**
Masimo's Request (Historical Rates)	$8,201,917.85	$886,861.30	$9,088,779.15
Deductions	1. $43,573.75 (fees for ancillary proceedings) 2. $78,275 (Mr. Jensen's trial fees) 3. $51,085 (fees for mock summary judgment) 4. $205,434 (fees for second mock trial)	1. $5,228 (costs for mock proceedings) 2. $11,531.43 (Knobbe costs)	$395,127.18
Awarded	$7,823,550.10	$870,101.87	$8,693,651.97

In accordance with this Order, Masimo is awarded $7,823,550.10 in attorneys' fees and $870,101.87 in costs pursuant to Section 4 of the Clayton Act.

IT IS SO ORDERED

DATED: November 5, 2007

Mariana R. Pfaelzer

Honorable Mariana R. Pfaelzer
United States District Judge