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92-7255

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROYSWORTH D. GRANT, WILLIE E. ELLIS, on behalf of themselves, and all others similarly situated,

Plaintiffs-Appellees,

v.

LOUIS MARTINEZ,

Plaintiff-Intervenor,

v.

BETHLEHEM STEEL CORPORATION, JAMES DEAVER, THOMAS R. CONNELLY, E. RICHARD DRIGGERS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Defendants-Appellants.	:	

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

Defendants-Appellants Bethlehem Steel Corporation, James Deaver, Thomas R. Connelly and E. Richard Driggers (collectively "Bethlehem") submit this reply brief in response to the Brief of Plaintiffs-Appellees ("Plaintiffs' Brief") and in further support of their appeal from the award of attorneys fee to class counsel.

Preliminary Statement

Plaintiffs' Brief constitutes an effort to obscure the fundamental issue presented on this appeal by resort to unsupported assertion and diversionary arguments. Thus, it engages in a protracted refutation of the applicability of Rule 68 to this fee award, but fails to note that Bethlehem has never suggested that Rule 68 did apply. Similarly, it suggests that Bethlehem is trying to reduce the fee award by the same amount in three different, cumulative ways. Nowhere is there a suggestion that such triple reduction is appropriate. Finally, when all else fails, it resorts to pure, unsupported rhetoric.

What class counsel are attempting to avoid is a critical analysis of the reasonableness of the fee awarded by the District Court. As demonstrated in the Brief of Defendants-Appellants ("Bethlehem's Brief") that award is unreasonable because the vast preponderance of the hours expended by class counsel were spent pursuing unreasonable hopes or wishes after full monetary relief had been offered to their clients in October 1977. That indisputable fact mandates reduction of the fee award. Whether it is accounted for, by a reduction of hours included in the calculation of the lodestar itself, or by a reduction of the lodestar to account for counsel's limited success, is simply a matter of characterization. The fact is that following October 1977 class counsel conferred no benefit whatso-

ever on the class they represented and should not be compensated for the time they spent after that date.

Class counsel do not appear to argue seriously that it is reasonable to be compensated for time spent futilely. Instead they have focused virtually their entire argument on the proposition that their efforts were not futile. Thus, they argue extensively that (i) they could not have evaluated Bethlehem's settlement offer in 1977 because of lack of information; (ii) injunctive relief really was feasible; and (iii) this Court's decision in Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980) ("Grant I"), by itself justified their continued efforts. As described below, each of these propositions is demonstrably false. Moreover, without them, class counsel are left with having expended hundreds of hours in futile pursuit of fantastic, unattainable remedies, for which they effectively concede they are not entitled to be compensated.

I.

THE 1977 SETTLEMENT OFFER WAS REASONABLE AND CLASS COUNSEL SHOULD HAVE EVALUATED AND ACCEPTED IT

Class counsel recognize that their failure to evaluate the October 1977 offer of settlement is potentially determinative of the reasonableness of the fee awarded by the District Court. Thus, they engage in an extended discussion attempting to justify their failure to even evaluate the settlement offer or make a

counter proposal at that time. They take the outrageous position that nearly two years into the case, and only two months before trial, they were incapable of evaluating their case or a settlement because certain discovery was outstanding. (Plaintiffs' Brief at 6-7.) Indeed, they go so far as to argue that "[i]t would have been irresponsible and even unethical to consider the settlement without full awareness of all the relevant facts." Id. at 7 (emphasis added). This is the crux of class counsel's position. It appears that they seriously contend that even on the eve of trial they not only had no obligation to evaluate a settlement offer, but that to have even "considered" one would be "unethical."

Bethlehem submits that it is that wrong-headed attitude which led to the clear abuse in this case and for which Bethlehem is now being asked to pay. Such an attitude is clearly inconsistent with the interests of the courts and administration of justice in general (not to mention client interest) in expeditious resolution of lawsuits. Class counsel's position, boldly stated in Plaintiffs' Brief, is that so long as any discovery was outstanding a settlement could not even be considered. Their flat rejection of Bethlehem's effort to commence a settlement dialogue with an opening offer of $40,000 is entirely explicable in light of that attitude. It, however, contravenes every principle of our system.

This attitude -- that they were not even required to consider a settlement in light of pending discovery -- is even

more disingenuous because nowhere in Plaintiffs' Brief does class counsel reveal what information was necessary from that discovery in order to permit an evaluation of the settlement offer. They repeatedly state that discovery was necessary and more information was required (Plaintiffs' Brief at 6-7), and come to the rhetorical conclusion that the "statistical analysis" necessary to evaluate the 1977 offer "could not have been made in 1977, at the time of the initial offer of settlement" (id. at 11). If, however, the Court parses class counsel's rhetoric, the only specific fact they indicate was necessary to permit that "statistical analysis" to be performed was that "all of the potential members of the class were not identified at the time of the initial offer of settlement" (id. at 7) and "until counsel obtained a better idea of the total number of workers affected by the discriminatory practices of Bethlehem and the amount of damages each could reasonably have been expected to obtain . . . they could not properly evaluate the offer" (id.).[1] Despite repeated statements that more data was necessary, nowhere in Plaintiffs' Brief is any other "specific fact" necessary to permit an evaluation of the settlement offer identified.

There are three fundamental problems with class counsel's retrospective "excuse" for refusing to even consider a settlement. First, they had an enormous amount of information

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[1] That same claim is restated at page 7-8, footnote 5, of Plaintiffs' Brief, where class counsel assert that "without specific knowledge relating to membership in the class, counsel could not have agreed to a settlement, under Rule 23."

about the identity of the potential class. They had reviewed extensive interrogatory answers indicating employment of black and Puerto Rican ironworkers by Bethlehem. Moreover, they had available to them employment records from Local 40. Indeed, when Mr. Levy did perform an evaluation of the ultimate settlement, it was these Local 40 records that he used for determining minority ironworker earnings. (A 261)

Secondly, they proffer no explanation as to why it remained "unethical" or "irresponsible" for them to evaluate settlement only six weeks later, in December, 1977, when, concededly, all discovery was complete and the parties were getting ready for trial.

Finally, and most importantly, the one fact that was purportedly missing -- identity of members of the potential class -- was not even considered by Mr. Levy in evaluating the ultimate $60,000 settlement. In his 1985 affidavit in support of the proposed settlement, Mr. Levy engaged in a detailed analysis of the fairness of the final $60,000 settlement. The only references to the identity of minority ironworkers (members of the potential class) appear in his paragraphs NINTH and ELEVENTH, and Exhibit E thereto. (A 261-62, A 286-93, A 300). The source of the identity and earnings of those ironworkers is "Local 40 pension and welfare records." (A 261). Thus, when class counsel finally decided that it was "ethical" and "responsible" for them to consider a settlement offer, they did not find it necessary to even look at any data provided by Bethlehem relating to the

identity of potential class members, but rather resorted to materials already available to them through Local 40.

The conclusion is inescapable that far from declining to consider the 1977 settlement offer because of the lack of information, class counsel simply declined to consider the offer because they had their sights set on unrealistic goals. All the information they needed to evaluate the final settlement in 1985 (and all that they needed to swear to this Court that that settlement was the maximum recovery possible) they had available to them in 1977. The fact is that, despite the rhetoric of Plaintiffs' Brief, they simply declined to engage in the analysis. It was no more "ethical" or "responsible" to "consider" settlement in 1985 than it was in 1977 when only six weeks remained to discovery and twelve weeks to trial. Class counsel's suggestion to the contrary is sheer sophistry.

Plaintiffs' Brief makes one point very clear -- class counsel did not consider it to be their duty to even consider Bethlehem's settlement overture in October 1977. (Plaintiffs' Brief at 7.) The record is clear, however, that it was not lack of information which prevented such consideration, it was lack of judgment. The most compelling evidence of the real reason behind the adamant rejection of settlement in 1977 is class counsel's -- Richard Levy -- own words. Thus, in 1985 when he argued to the District Court and later to this Court that a $60,000 settlement (contrasted to the $40,000 offered six years earlier) was, not only fair, but the maximum which could ever be obtained, he

refuted each of his own clients' (the objectors to the settlement) arguments seriatim. He then summarized the gravamen of the class members' objections:

> "12 "In short, the challenge to the settlement is based upon misreadings of the scope of the litigation and unrealistic assertions about the potential post-trial recovery. The objectors offer no sound assessment of how a higher amount than the proposed settlement figure could be recovered after trial. Nor do the objectors address the issue of the time and cost of additional litigation which would be spent seeking their improbable goals. Apparently, no attorney has yet been found who will identify him or herself with the objectors' position. The objectors have a "gut" dissatisfaction with the amount of the settlement. This is understandable. They feel that a big company like Bethlehem should pay more if it discriminated against black and Hispanic ironworkers. I agree with the feeling. But upon any reasonable legal analysis the settlement sum fairly reflects what is likely to be recovered after trial."

(A 415-16) (emphasis added).

This passage by Mr. Levy is compelling and conclusive. It is clear that his clients had derived "unrealistic" expectations about "the potential post-trial recovery."[2] The key insight, however, is Mr. Levy's admission that he "agree(s) with the feeling" that a "big company like Bethlehem should pay more . . .". Bethlehem submits that it is that "gut" sense which impelled class counsel to refuse to even consider Bethlehem's $40,000 offer of settlement. They reacted to that "gut" feeling and told Bethlehem that they would not consider a settlement and

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[2] One must wonder from whom ironworkers gleaned the potential value of their case if not from their lawyers.

would instead "Bust Bethlehem's _____." (A 746). What they failed to do in their enthusiasm was conduct what Mr. Levy characterized as "any reasonable legal analysis" regarding the fairness of the offered amount. The record is uncontradicted that if Mr. Levy had conducted the "reasonable legal analysis" which he performed six years later he would necessarily have concluded in 1977 that the amount offered was completely fair and reasonable. What he did instead was follow his "gut", run up over $400,000 more in legal fees, and, when he finally realized this error, now expects Bethlehem to pay for it. Bethlehem submits that the error is class counsel's and to compensate them for it is unreasonable and extremely dangerous precedent.

II.

INJUNCTIVE RELIEF WAS NEVER POSSIBLE IN THIS CASE

Class counsel also attempt to find a justification for their continued prosecution of this action in the District Court's memorandum approving class certification. In January 1977, in rejecting Bethlehem's contention that because injunctive relief was not available the action should not proceed as a class action, Judge Knapp rejected "make-work" injunctive solutions but noted that it might be "feasible to require Bethlehem to participate in -- or finance -- a training program." (A 111). Accordingly, he certified a class. Class counsel now seize on this comment by Judge Knapp as a basis for rejecting Bethlehem's

settlement offer in October 1977, nearly a year later, and for refusing to discuss any form of settlement. This comment by Judge Knapp, and class counsel's own continued insistence that injunctive relief might someday be possible are the only bases presented in Plaintiff's Brief to support the proposition that injunctive relief might someday be available. Thus, they state "[t]he District Court's order of January 12, 1977, and counsel's continued insistence before trial that injunctive relief was feasible . . . undermines all of [Bethlehem's] assertions." (Plaintiff's Brief at 6 n.4.) Class counsel's "continued insistence" is specifically predicated upon counsel's belief that

> "although Bethlehem had announced it was going out of the structural steel business, it was conceivable that a change in market conditions might lead it to change its mind. Levy explains: 'the plaintiffs believed, reasonably in our opinion, that given more favorable market conditions, Bethlehem would promptly resume its structural steel business making jobs and other relief available.'" (Id. at 8.)

These statements are the only bases upon which they attempt to justify spending over $400,000 in incremental legal fees without even attempting to negotiate a settlement. Unfortunately, even if these statements of subjective belief are credited, wishing is not enough to create a remedy. As with the claim for money damages, class counsel apparently hoped that injunctive relief might some day miraculously become available, if they just litigated long enough. Thus, their entire argument is predicated not on authority, precedent, or reasoned analysis,

but on the "belief" that it was "conceivable" that Bethlehem, a public company, would at some unstated time in the future reverse a publicly disclosed business decision to close an entire business division and terminate all of its employees and operations. That "belief" is sheer fantasy. It is not supported by one shred of evidence.

Indeed, during the course of discovery class counsel utterly failed to pursue the question of Bethlehem's future plans. Moreover, class counsel's retrospective claim that they believed Bethlehem might go back into business someday, when they rejected the October 1977 settlement offer, fails to explain how they reconciled that "belief" with the fact that the trial was scheduled in less than three months -- January 1978. Assuming that "belief" and assuming their good faith prosecution of the case, they must then have believed that the date on which they would have been required to seek such injunctive relief would promptly follow the trial at the end of January 1978 -- a mere three months later. They make no attempt to explain how they had any basis to believe that Bethlehem was going back in business before Christmas in order to permit them to fashion injunctive relief in the New Year.

The indisputable fact is that class counsel had no basis for any belief that injunctive relief was available at any time. Despite their repeated retrospective protestations of belief in such relief, class counsel never made any effort to pursue injunctive relief at the time. No discovery was taken

directed at any form of equitable relief. Nor did they ever cite a single case to Judge Knapp supporting such unusual relief. The reason they never made any such effort is plain -- they knew there was no support for injunctive relief, and were relying entirely on Mr. Levy's belief that Bethlehem was a "big company" which should pay "more" in damages. (A 416) Injunctive relief never entered the picture except as a make weight.

Indeed, in the same affidavit in which Mr. Levy concluded that there was no "reasonable legal analysis" supporting a larger damage award, he conceded that even after the passage of seven years he still could find no authority or argument for injunctive relief. While class counsel now argue that Judge Knapp's comment in his January 12, 1977 order "that it might be feasible to require Bethlehem to participate in -- or finance -- a training program" provided a basis for continued litigation, in 1985 Mr. Levy conceded that such relief was not feasible. Thus, when Mr. Ellis, one of the plaintiffs, objected to the settlement in 1985 on the ground that class counsel had not obtained injunctive relief of precisely the type ruminated on by Judge Knapp, Mr. Levy powerfully refuted the possibility of such relief:

> "Ellis argues that the time period used to calculate back pay (from February 1973 to the end of 1976, when Bethlehem quit the structural steel business) was too short, since Bethlehem could have been directed to employ minority supervisors in its other businesses. And, he says, Bethlehem might also have been ordered to finance affirmative relief beyond back pay, e.g., training programs. Here, we are confronted with a question of probabilities. It is <u>possible</u> that the District

> Court, after a completed trial, would have determined that Bethlehem's discrimination was of such a nature that affirmative action would be required notwithstanding that the company no longer had a structural steel business in this country. Perhaps it would have required the company to employ plaintiffs as supervisors in ship repair work or in the steel fabricating plants, or ordered a supervisory training program to be set up. It was counsel's judgment that an award of such relief was extremely unlikely. We are aware of no case in which a company, no longer engaged in the business in which the discrimination occurred, has been directed to employ people elsewhere or to provide training." (A 413) (emphasis added).

Lest there be any doubt about the strength of class counsel's conviction that seeking injunctive relief was futile, Mr. Levy argued later in the same affidavit that "[d]ue to the fact that Bethlehem went out of the structural steel business years ago, the possibility of obtaining injunctive relief is nil. Realistically, then, monetary relief is the only remedy which plaintiffs and the class could expect after trial." (A 417)

Class counsel's analysis of the likelihood of injunctive relief of the type contemplated by Judge Knapp is precisely the type of analysis they should have performed in October 1977 before they summarily rejected Bethlehem's attempt to settle the case. Had they performed that analysis in 1977 instead of 1985, a fortiori, they would have reached the same conclusion. If there was no law to support the relief in 1985, there surely was none in 1977. Rather than perform that analysis, however, they relied upon their "beliefs" and hopes, and accordingly, launched seven more years of litigation.

Class counsel also argue, somewhat elliptically, that somehow the passage of time from 1977 to 1982 made it clear that no injunctive relief was possible. (Plaintiffs' Brief at 6). It appears that the Court is expected to reach the conclusion that it was reasonable for them to believe injunctive relief might be possible in 1977, and at the same time, reasonable for them to believe that the likelihood of such relief was "nil" in 1985. Nowhere in Plaintiffs' Brief, however, do they explain that bizarre contention. They do not argue that any additional facts came to light to obviate the possibility of injunctive relief, nor do they refer to any change in the law. As noted above, the passage of time clearly did not render the type of relief suggested by Judge Knapp less likely. If any thing, it gave class counsel more time in which the law might have changed in their favor, but clearly does not justify their 1977 refusal to negotiate.

The only possible basis for the passage of time being determinative is their inchoate belief that Bethlehem might some day go back into business. Claiming that the passage of time made the likelihood of that event more remote is akin to claiming that the likelihood of the dead rising decreases over time. The fact is that when class counsel made their decision to fight rather than settle, Bethlehem's public decision to shut down its structural steel operations was more than two years old and Bethlehem had actually been completely out of business for nearly a year. Thus, on October 1, 1975, Bethlehem publicly announced

its decision to terminate the business, and that it anticipated the shutdown process would last until March 1977. (A 768) In fact, the last ironworker was laid off in the New York Metropolitan area on December 24, 1976 and the last ironworker anywhere in the United States was laid off on March 8, 1977. (A 769-70) By the time of the October 1977 offer of settlement Bethlehem had absolutely no operations in structural steel. It had laid off or transferred all of its administrative and operational personnel and closed all facilities. At that point any "belief" by counsel -- without any support at all -- that Bethlehem might "change its mind" was fantasy at best or, worse, simply disingenuous. To suggest that it took seven more years to convince them of this fait accompli is insulting and should not be credited.

Moreover, in order to credit class counsel's argument that they had such a belief in October of 1977, they must be able to point to some evidence that Bethlehem was going to reverse its business decision before the case was tried in January 1978. A belief that the case would be tried and judgment entered without injunctive relief, and that Bethlehem would, after judgment, "change its mind" could not justify a belief that injunctive relief was feasible. Thus, to be credited, class counsel's contention must demonstrate that their belief was that Bethlehem was about to immediately "change its mind". They do not make any such contention. Quite the contrary they affirmatively link their "belief" to an eventual change in "market conditions". (Plaintiff's Brief at 8). There is not any suggestion, even one

made in fantasy, that the market for high steel commercial construction was going to change between October 1977 and early 1978.

Bethlehem submits that the conclusion is inescapable that in 1977 class counsel did not conduct any "reasonable legal analysis" to determine whether injunctive relief was feasible. When they summarily rejected Bethlehem's settlement offer they did not perform such an analysis because they knew that there was no factual or legal basis for entry of injunctive relief against Bethlehem. They knew in 1977 that there was "no case in which a company, no longer engaged in the business in which the discrimination occurred, has been directed to employ people else where or to provide training. They knew in 1977 that "the possibility of obtaining injunctive relief is nil". They finally admitted both of these facts in 1985 when they were attempting to convince the Court to approve their belated decision to settle. (A 414, 417) They knew it just as surely in 1977 and no amount of rhetoric or self-serving denial can change that fact.

Accordingly, Bethlehem submits that the "possibility of injunctive relief" provides no justification for prolonging this litigation after essentially full monetary relief was offered at the beginning of a settlement negotiation. Class counsel made a decision to pursue their "gut" feeling that Bethlehem should pay more than could be won at trial. Bethlehem should not have to pay for that decision.

III.

THIS COURT'S DECISION IN GRANT I CANNOT BE A BASIS FOR A SECTION 1988 FEE AWARD

Since class counsel had all of the information they needed to evaluate the monetary aspect of the 1977 offer, and since injunctive relief was never possible in this case, class counsel's only possible justification then for the nine years of litigation that they engaged in between the $40,000 1977 offer of judgment, and this Court's approval in 1986 of the $60,000 settlement in this action -- which resulted in no real relief for the class members in terms of money, jobs or retraining -- is their claim that this Court's 1980 decision in this case "swept away certain subjective hiring and promotion criteria in the structural steel industry" and "established an important precedent in the employment discrimination field." (See Plaintiffs' Brief at 4.)

That claim, which is repeated throughout class' counsel's brief (see Plaintiffs' Brief at 22-23, 35, 37-39), is inflated and completely unsubstantiated. Grant I did not make new law; it was based on well-settled legal precedent. Applying existing law, this Court determined that plaintiffs had established a prima facie case of discriminatory treatment and discriminatory impact. It then reversed the District Court's dismissal of the complaint and remanded the case, giving Bethlehem an opportunity to articulate a business necessity for its con-

duct. 635 F.2d at 1020. Contrary to class counsel's assertion that Grant I "dealt a strong blow to the use of subjective hiring and promotion criteria in the construction industry", the decision actually acknowledged that there were circumstances under which such practices might be permissible because a genuine business need for such practices could be shown. Id. at 1015.

Grant I has not been heralded by any court as breaking new ground or adding to the jurisprudence.[3] Nowhere in their 46 page brief do class counsel support their assertions with any citations or any other evidence showing that Grant I in fact had any impact on the named plaintiffs in this action or any member of the plaintiff class or society-at-large. In fact, it appears that the only "support" for the proposition that class counsel was able to muster comes from Bethlehem's own petition for writ of certiorari where, in its efforts to obtain review by the United States Supreme Court of the Grant I decision, Bethlehem argued that the decision was of "fundamental importance." Class counsel, however, conveniently fail to point out to this Court that the argument in Bethlehem's certiorari petition was flatly rejected by the Supreme Court -- certiorari was denied, without a single justice voting in favor of granting it.

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[3] In fact, it was Judge Gurfein's earlier decision in United States v. Local 638 . . . and Local 40, 347 F.Supp. 169, 182 (S.D.N.Y. 1972), in which unions were immediately ordered to increase their non-white membership that had a dramatic impact on hiring practices in the structural steel industry. See Grant I, 635 F.2d at 1018.

Class counsel's suggestion that a review of the Shephards' citator, which shows that Grant I has been cited more that 20 times, is "an indication of its continued legal importance" cannot be taken seriously. A review of the actual decisions which have cited to Grant I reveals quite a different story. Grant I has never been cited as having "swept away subjective hiring practices." It has most often been cited (16 times) in conjunction with the rudimentary application of the analytical framework for indirect proof of a Title VII claim initially set forth in McDonnell Douglas v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-26 (1973).

Grant I has also been cited for other previously established propositions of law. It has been cited 4 times for the proposition, established in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365, 97 S. Ct. 1843, 1869 (1977), that non-applicants may be awarded backpay if it is shown that the filing of an application would have been futile. It has been cited 8 times for the proposition, established in Teamsters, 431 U.S. at 335 n.15, 97 S. Ct. at 1854 n.15, Hazelwood School Dist. v. United States, 433 U.S. 299, 97 S Ct. 2736 (1977) and Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S Ct. 849, 852-53 (1970), that a prima facie case of discriminatory impact may be established by showing that a facially neutral practice has resulted in a disproportionately higher rate of employing whites than others, and that such disproportionality may be shown through statistical evidence, and 3 times for the proposition,

established in Teamsters and Griggs, that a discriminatory motive is not necessary to establish disparate impact.

In sum, despite class counsel's rhetoric, Grant I was a case that simply followed, rather than set, important precedent. Indeed, even in this case, its impact was merely to remand the case for further evidence.

Class counsel's related argument, that the Grant I decision "itself justifies the award of a significant fee" (see Plaintiffs' Brief at 23 and 4), must be squarely rejected. Even if class counsel were correct in its belief that Grant I had an impact on hiring and promotion practices in the "construction industry", it is undisputed that the decision had no impact on Bethlehem's fabricated steel operations, which had been shutdown three years earlier, and it provided no relief to the named plaintiffs or any of the class members in this action.

Fees may be awarded under Section 1988 for obtaining a judicial precedent only where the opinion of the court confers an actual benefit on the plaintiff. (See Bethlehem's Brief at 47-48 and cases cited therein.) Section 1988 does not permit counsel to recover fees incurred in connection with procuring advisory opinions. As the Supreme Court held in Hewitt v. Helms, 482 U.S. 753, 761-764, 107 S.Ct. 2672, 267-77 (1987), a favorable judicial statement of law in the course of a litigation cannot justify a fee award under Section 1988 unless the judicial pronouncement affects the relationship between the plaintiff and defendant. The "moral satisfaction of knowing that a federal court concluded

that [plaintiff's] rights had been violated" simply cannot form the basis for a fee award. 482 U.S. at 760, 107 S.Ct. at 2676.

Indeed, in Hewitt, the plaintiff, who was a prisoner at the time he commenced his lawsuit, argued that a fee award in that case was justified by the fact that his lawsuit served as a catalyst for changes in the bureau of corrections' regulations governing the use of informant testimony at disciplinary hearings. The Court found that since the plaintiff had been released from prison long before the bureau changed its standards, he was not directly benefited by the court's decision. 482 U.S. at 763, 107 S.Ct. at 2677. The Court rejected plaintiff's "catalyst theory", finding that even if plaintiff could establish that his case was the catalyst for the state's amendment to its regulations, such a finding could not support a fee award since it did not provide any redress to the plaintiff himself. Id. The Court made this finding even though the plaintiff himself had subsequently returned to prison and was "presumably benefiting from the new procedures." The Court stated, "that fortuity can hardly render [plaintiff], retroactively, a prevailing party . . . ." 482 U.S. at 764, 107 S.Ct. at 2677.

In sum, the law is clear that, no matter how favorable the statements of law contained in Grant I might be, Grant I cannot be the basis for a Section 1988 fee award because it did not alter toward the plaintiffs the conduct of defendants which was the basis for this lawsuit.

Conclusion

For the reasons set forth herein and in Bethlehem's Brief, the order of the District Court awarding class counsel attorneys' fees and costs in excess of $500,000 for the recovery of a $60,000 settlement should be reversed and the action remanded to the District Court with instructions to reduce the fee award to exclude hours unreasonably expended in light of the results obtained and, as described in Bethlehem's Brief to bring the fee award in line with the results obtained.

Dated: New York, New York
May 27, 1992

Respectfully submitted,

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89488.2

1 – Class Action – need Ct approval

FAIRNESS hearing – Plunkey
⟷ class counsel MUST be careful + explore [illegible]

2 – case in public interest. Thus precedent is impt. Beth can't disavow its cert petition NOW. Denial of cert means NOTHING.
Ct below saw case as public interest case

3. Beth NOW Abandons Rule 68 arguments in favor of emotional attack on π counsel which was rejected by both MAG + D. Ct

4. Claims case going forward cost them $400,000. But they had use of $. Now that it "interest" argument has been turned on them, Beth Abandons it.

5. They now characterize their $40,000 offer of judgment as an "opening offer."
So called "opening offer" NOT raised until after Trial + all appeals Exhausted.
then CLASS counsel Accepted & rest of hours distribution

Pure Fabrication