7-19-1991

Brief for Appellants

Town of Huntington

91-6124

To Be Argued By:
RICHARD C. CAHN

United States Court of Appeals

For the Second Circuit

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; HOUSING HELP., INC., MABEL HARRIS; PERREPPER CRUTCHFIELD; KENNETH L. COFIELD,

Plaintiffs-Appellees,

–v–

THE TOWN OF HUNTINGTON, NEW YORK; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SAMUEL PIERCE; KENNETH C. BUTTERFIELD; CLAIRE KROFT; KENNETH DEEGAN; EDWARD THOMPSON; JOSEPH CLEMENTE,

Defendants,

THE TOWN OF HUNTINGTON, NEW YORK; KENNETH C. BUTTERFIELD; CLAIRE KROFT; KENNETH DEEGAN; EDWARD THOMPSON; JOSEPH CLEMENTE,

Defendants-Appellants.

BRIEF FOR APPELLANTS

On Appeal From a Judgment of the United States District Court for the Eastern District of New York

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Are the district courts authorized to apply multipliers to lodestar fees in cases brought under the Fair Housing Act, 42 U.S.C. § 3601 et seq.?

2. If so, did the district court in this case make sufficient findings to justify the award of a multiplier?

3. If so, does this record in any event justify the award of a multiplier in any amount, and particularly in the amount of 1.75?

Preliminary Statement

Plaintiffs became prevailing parties at the time of this Court's reversal of a judgment dismissing the complaint after trial, 844 F.2d 926 (2d Cir. 1988), and promptly thereafter made an attorneys' fee application to this Court, which it referred to the District Court for determination. Following the Supreme Court's affirmance of this Court's determination, 109 S. Ct. 276 (1988), the District Court issued a partial final judgment granting plaintiffs declaratory and injunctive relief (A12, 19)[1]. Plaintiffs then moved pursuant to 42 U.S.C. § 3613 for attorneys' fees, costs and expenses from the filing of the action on February 23, 1981 (A15).

Defendants sought discovery in connection with the attorneys' fee application (A173), which the District Court denied (A231). Plaintiff's counsel did disclose, however, that for the first four years of their representation, when they invested 1005.5 hours of lawyers' time in the case (44% of the ultimate total of 2300 hours), they received $52,000 in legal fees from a local housing advocacy group, which was being subsidized by the Veatch program of the Unitarian Church (A38).

On October 23, 1990 (A362), the District Court issued an order which fixed the lodestar fee in the amount of

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[1]Reference are to pages of the Appellants' Appendix

$503,035.65, applied a multiplier of 1.75 thereto, and reached a total award of case fees in the amount of $883,312.38.[2]

The defendants appeal from only so much of the final judgment as applied a multiplier to the lodestar fee.

Summary of Argument

Neither Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air ("Delaware Valley II"), 483 U.S. 711, 107 S. Ct. 3078 (1987), nor any other pertinent case authority, authorizes contingency enhancement of an attorneys' fee under 42 U.S.C. § 3613(c)(2). To the contrary, cases both predating and following Delaware Valley II establish a presumption that the lodestar, computed by multiplying reasonable hours by reasonable hourly rates, is a reasonable fee to be paid by a defendant under

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[2]In addition to case fees of $880,312.38, the District Court's October 24 order (A362), as amended by its December 26, 1990 order (A383), awarded $30,243 in costs and expert fees, which by final judgment entered May 1, 1991 (A386) has now been reduced by $18,898 expended for expert witness fees, to $11,345.00 on the authority of West Virginia University Hospitals, Inc. v. Casey, 111 S. Ct. 1138 (1991).

$26,550 was also awarded for the making of the attorneys' fee application (A383).

The total award thus stands at $918,207.38, of which $377,276.73 represents enhancement of the lodestar fee.

The District Court applied the 1.75 multiplier to two portions of the lodestar fee that were not at risk: (1) the $52,000 paid to the plaintiff's attorneys for the first 1,005 hours of work (which added $39,000), and (2) the $43,415 in fees accrued after plaintiffs became prevailing parties by virtue of this Court's 1988 decision (which added another $32,415 in enhancement). Thus, included in the total enhancement of $377,276.73 was $71,415 applied to fees which were not at risk.

the usual fee-shifting statutes. Close examination of Delaware Valley II and subsequent Supreme Court authorities leads to the conclusion that fee multipliers cannot be justified and should not be awarded. This conclusion is buttressed by the lack of any definitive evidence that, in enacting fee-shifting statutes, Congress intended to authorize contingency enhancements.

Additionally, there are sound policy reasons for not awarding multipliers in civil rights cases: a multiplier is unnecessary to attract competent counsel to prosecute such cases, and in practice, award of a multiplier has capricious and unfair results.

Finally, if multipliers are permissible under some circumstances, neither the record nor the decision of the lower court support the award of a multiplier in this case.

ARGUMENT

I. NO RISK ENHANCEMENT IS PROPER IN THIS CASE

A. Prevailing Plaintiffs Should Be Limited to a Lodestar Award and Should Not Receive An Additional Award to Compensate Counsel for Risk

1. The lodestar fee is presumptively the reasonable fee to be awarded under fee shifting statutes.

The Supreme Court has long made it clear that the lodestar is presumptively the reasonable attorney's fee under the usual fee-shifting statutes. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986)

("Delaware Valley I"); Blum v. Stenson, 465 U.S. 886, 898-901 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

Delaware Valley II reinforced this rule. In that case, four Justices held that contingency multipliers should never be available, and a fifth Justice, Justice O'Connor, held that such a multiplier should be denied in that case, and would only be available under severely limited circumstances upon specifically enumerated factual findings.

The Supreme Court's subsequent references to Delaware Valley II only seem to have strengthened the presumption. In Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463 (1989), Justice Brennan referred to Delaware Valley II as a case in which the Court "rejected an argument that a prevailing party was entitled to a fee augmentation to compensate for the risk of nonpayment." In Jenkins, the Court held that "a reasonable attorney's fee under Section 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, i.e., 'in line with those (rates) prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[3]

In Venegas v. Mitchell, 110 S. Ct. 1679 (1990), the Court assumed, based upon the plurality and concurring opinions in Delaware Valley II, that a fee multiplier could not be

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[3]The language allowing a court, in its discretion, to award attorneys' fees to a prevailing party under 42 U.S.C. § 3613 is identical to that in 42 U.S.C. § 1988 and therefore should follow the same analysis.

awarded. And, in Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939 (1989), the Court emphasized that "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." 489 U.S. at 91. The Court held that Congress intended in providing for a "reasonable attorney's fee" that prevailing parties should be paid "reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less" (489 U.S. at 93). The Court concluded that "fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim." 489 U.S. at 96.

This Court has recognized that the lodestar amount --

> ...presumptively equals the reasonable fee to which an attorney may be statutorily entitled..., and that enhancement of an award may no longer be justified on the basis of factors such as the novelty of the issues, the complexity of the litigation, the high quality of representation or the number of people benefitted...These factors are assumed to be already reflected in the hourly rate and the number of hours charged by the attorney and thus cannot be counted again to support an enhancement.

Krieger v. Gold Bond Building Products, 863 F.2d 1091, 1099 (2d Cir. 1988); see also Dague v. City of Burlington, ___ F.2d ___, United States Court of Appeals, Second Circuit, No. 90-7544, decided June 12, 1991, slip op. at 5121. This Court has also noted that in fee-shifting cases, in contrast to contingency

cases, "courts have looked to the lodestar method, which necessarily emphasizes the calculation of a reasonable rate of compensation for the number of hours reasonably worked." Wells v. Sullivan, 907 F. 2d 367, 371 (2d Cir. 1990).

Justice O'Connor's concurrence in Delaware Valley II, although sometimes cited to support the theoretical possibility of a multiplier, actually provided minimal support for fee enhancement:

> The lodestar-the product of reasonable hours times a reasonable rate...- is flexible enough to account for great variation in the nature of the work performed in, and the challenges presented by, different cases.

107 S. Ct. at 3091 (O'Connor, J., concurring). Thus, "A reasonable attorney's fee under Section 1988 is --

> one calculated on the basis of rates and practices prevailing in the relevant market, i.e., 'in line with those (rates) prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463, (1989), as cited in N.Y. State National Organization For Women v. Terry, 737 F.Supp. 1350, 1359 (S.D.N.Y. 1990).

The presumption that the lodestar constitutes a reasonable fee is so strong that a lodestar will be awarded even if it exceeds that contingency fee which would be payable under the contractual arrangements between a prevailing party and its counsel:

> [T]he very nature of recovery under Section 1988 is designed to prevent any ... windfall. Fee awards are to be reasonable as to billing

> rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of plaintiff's civil rights claim.

Blanchard v. Bergeron, 109 S. Ct. 939, 943 (1989).

As Justice O'Connor wrote, "to be 'reasonable', the method for calculating a fee award must be not merely justifiable in theory, but also objective and nonarbitrary in practice...In my view certain constraints on a court's discretion in setting attorney's fees are appropriate." 107 S. Ct. at 3090 (1987) (O'Connor, J., concurring).

2. Examination of the Authorities Leads to the Conclusion that Fee Multipliers Cannot be Justified and Should Not be Awarded.

As this Court has noted, the Supreme Court in Delaware Valley II, "was sharply divided, four justices concluding that the contingency factor did not permit enhancement of the lodestar figure, four concluding that an upward adjustment of the lodestar for contingency was appropriate, and Justice O'Connor concluding that consideration of contingency was not foreclosed under the Act, but was not applicable in that case." Friends of the Earth v. Eastman Kodak Company, 834 F.2d 295, 298 (2nd Cir. 1987); Dague v. City of Burlington, supra at 5122 ("We do not view any one of the three separate opinions dispositive on the issue....").

In Rode v. Dellaciprete, 892 F.2d 1177, 1184 (3rd Cir. 1990), the Third Circuit noted:

> [t]o date, the Supreme Court has restricted the court's discretion to adjust the lodestar upward....The District Court can adjust the fee to account for the necessity of attracting competent counsel. This adjustment has been called a contingency multiplier and is only to be granted in rare circumstances.

Nothing in these cases describes the circumstances under which a fee multiplier request would be favorably entertained.

When the Supreme Court decides a case and no one rationale for the decision satisfies five of the Justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) quoting Greg v. Georgia, 428 U.S. 153, 169 n.15 (1976).[4]

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[4]Although the other Circuits have generally agreed that Justice O'Connor's concurrence in Delaware Valley II controls as to the permissibility of applying a contingency multiplier: Blum v. Witco Chemical Corp., 888 F.2d 975, 981 (3rd Cir. 1989) (Blum II); ("Although there is some awkwardness in attributing precedental value to an opinion of one Supreme Court justice to which there no other justice adhered, it is the usual practice when that is the determinative opinion."); Spell v McDaniel, 824 F.2d 1380, 1404 (4th Cir. 1987) ("Justice O'Connor's position in the concurrence controls on the circumstances in which a contingency multiplier may ever be allowable.); Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987); Skelton v. General Motors Corp., 860 F.2d 250, 254 n. 3 (7th Cir. 1988) ("Her position on risk multipliers thus represents the position of a majority of the Court."); Jenkins by Agyei v. State of Missouri, 838 F.2d 260, 267-268 (8th Cir. 1988) ("Justice O'Connor's concurrence in judgment formed a majority for the holding that a contingency enhancement would be permissible in some circumstances, and another majority for the holding that such circumstances did not exist in the Delaware Valley II case.); Jackson v. Rheem Manufacturing Company, 904 F.2d 15 (8th Cir. 1990); Fadhl v. City and County of San Francisco, 859 F.2d 649, 650, n. 1. (9th Cir. (continued...)

Close examination of Justice O'Connor's position in Delaware Valley II does not provide much comfort for advocates of fee enhancements. Justice O'Connor joined wholeheartedly in, and underscored, 107 S. Ct. at 3090, Part III A of the plurality opinion, in which four Justices detailed the many substantial and practical difficulties and anomalies associated with a rule which would compel defendants to pay a multiple of the presumptively reasonable lodestar to compensate prevailing plaintiffs for contingency risk. (These will be detailed in section 4, infra.)

Justice O'Connor's concurrence dramatizes the rarity of the circumstances in which a contingency multiplier could be considered. While insisting upon proof as to "how a particular market compensates for contingency" and reaffirming the Court's holding in Blum v. Stenson, 465 U.S. 886,898, 104 S. Ct. 1541, 1548 (1984), that "at all times the fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency," 107 S. Ct. at 3090-91, she noted that "in most fee-shifting cases,...the private market model of contingency compensation will provide very little guidance." 107 S. Ct. at 3090. In so stating, Justice O'Connor echoed the

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[4](...continued)
1986) ("Justice O'Connor's concurring opinion constitutes the Court's holding in the case"); Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292 (11th Cir. 1988); Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987); Crumbaker v. Merit Systems Protection Board, 827 F.2d 761 (Fed. Cir. 1987), this Court does not. Dague v. City of Burlington, supra at 5122.

holding of the full Court in Delaware Valley I, that fee-shifting statutes were not "intended to replicate exactly the fee an attorney could earn through a private fee agreement with his client." 478 U.S. at 565. The necessary inference to be drawn from Justice O'Connor's concurrence is that where the private market provides "very little guidance," no contingency multiplier is permissible.

Justice O'Connor further endorsed the Court's earlier holding in Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941 (1983), that a court "should not award any enhancement based on 'legal' risks or risks peculiar to the case. The lodestar-- 'the product of reasonable hours times a reasonable rate,' [citing Hensley] -- is flexible enough to account for great variation in the nature of the work performed in, and the challenges presented by, different cases." 107 S. Ct. at 3091.

Finally, Justice O'Connor emphasized, "I agree with the plurality that without guidance as to the trial court's exercise of discretion, adjustment for risk could result in 'severe difficulties and possible inequities.'" 107 S. Ct. at 3090.

3. Congress Did Not Intend To Authorize Fee Multipliers

There is clearly evidence that it was not Congress' intention to authorize contingency fee multipliers in § 1988 and § 3613 cases; there is conspicuously absent from both statutes any express authorization for a greater fee than that necessary to compensate an attorney for a prevailing party "for all time

reasonably expended on a matter." S. Rep. No. 94-1011 at 6, reprinted at 1976 U.S. Code Congressional and Administrative News, 94th Congress, 2d Session, 5908, 5913.

The Seventh Circuit has recently stated that:

> [i]n Delaware Valley II, the Court, reviewing an award under the Clean Air Act's attorney's fee provision, 42 U.S.C. § 7604(d), by a plurality reversed the rule in eight circuits and held that a contingency multiplier was inconsistent with congressional intent. "[W]e are unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee for the time and effort expended in prevailing." 483 U.S. at 725, 107 S. Ct. at 3086.

Dutchak v. Central States Southeast and Southwest Areas Pension Fund, ___ F.2d ___, 1991 WL 63472 (7th Cir. (Ill.) 1991). "Thus in fee shifting cases where Delaware Valley II governs ... no risk multiplier could be awarded by the district court." Id.

The Supreme Court has carefully scrutinized fee-shifting statutes so that expenses will not be shifted to defendants without specific statutory authorization. In West Virginia University Hospitals, Inc. v. Casey, 111 S. Ct. 1138 (1991), the Court declined to expand the scope of 42 U.S.C. § 1988 to shift the costs of expert witness fees to defendants. In reviewing the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(2)(A), in which Congress expressly provided for a cap of $75 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved,

justifies a higher fee," the Supreme Court construed the "special factor" language narrowly. Pierce v. Underwood, 108 S. Ct. 2541, 2553-54 (1988); see, Dubose v. Pierce, 857 F. 2d 889, 893 (2d Cir. 1988). Despite the fact that the Court in Underwood described the issue as "quite different from the question of contingent fee enhancement," 108 S. Ct. at 2554, it is likely that the Court would restrictively read 42 U.S.C. § 3613, and find that it provides no authority to enhance a fee.

This Court in Dague, supra at 5122-5123, concluded "that the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide." We submit that for the reasons set forth herein, a contingency multiplier is not authorized and Dague was wrongly decided.

4. There are Sound Policy Reasons for not Awarding Multipliers in Civil Rights Cases

The plurality of Justices in Delaware Valley II, joined by Justice O'Connor, catalogued a variety of reasons for not awarding multipliers: in theory, there should be no limit on the size of the fee if risk enhancement is permitted; the contingency factor penalizes the losing parties with the strongest and most reasonable defenses; the chances of winning could not be set with anything approaching mathematical precision; using the risk of loss to increase the lodestar figure compensates attorneys for their unsuccessful claims asserted in related cases, thereby encouraging "marginal litigation" and raising the question as to why a subsidy for unsuccessful litigation should come from the

defendant in another case; evaluating the risk of loss creates a potential conflict of interest between the plaintiff and his attorney; and, a retroactive estimate of the prevailing party's initial chances of success is, after the fact, nearly impossible. 107 S. Ct. at 3082-85.

The function of fee-shifting statutes is to ensure that persons with valid claims have a reasonable probability of finding counsel to represent them. Advocates of fee multipliers mainly argue that fee enhancements are necessary because no rational attorney would take a case where there was a significant possibility of losing, unless compensated in some way beyond his or her normal hourly rates for the risk of the endeavor.

This analysis is flawed because there is no empirical evidence that attorneys who choose to litigate on behalf of civil rights plaintiffs are encouraged to do so by the prospect of receiving more than their hourly rates if successful. In some instances, the prosecution of plaintiffs' civil rights claims may principally derive from the attorney's philosophical convictions, rather than purely pecuniary considerations. Attorneys falling into this classification would not seem to require the prospect of a fee enhancement to induce them to take a case. On the other hand, attorneys who may be principally motivated by the prospect of earning a considerable fee at the expense of a "deep-pocket defendant," can still be expected to exercise care in selecting cases, knowing that they will earn no fee if they lose. In light of the heavy caseload of the federal courts, and widely expressed

concerns about frivolous litigation, the courts should not discourage lawyers from carefully scrutinizing claims -- including civil rights claims -- before agreeing to prosecute them. Adding the enticement of an open-ended enhancement to an attorney's usual billing rates would encourage frivolous claims.

It seems difficult to imagine a group of attorneys who would be sufficiently attracted by the justice of a civil rights client's cause to consider accepting a case, but who would not be sufficiently attracted to accept the representation without the prospect of a fee multiplier.

In its submissions to the en banc District of Columbia Circuit in King v. Palmer, ____ F.2d ____ (D.C. Cir. 1990), the District of Columbia took the position -- with which the appellants here fully agree -- that "fee-shifting itself has rendered profitable litigation that previously was not economically feasible," Supplemental Brief for Appellees/Cross-Appellants, King v. Palmer, No. 89-7027, United States Court of Appeals for the District of Columbia Circuit,[5] and thus has been

[5]The District of Columbia points to City of Riverside v. Rivera, 477 U.S. 561 (1986), and Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939 (1989), as examples: in Rivera, the Supreme Court affirmed a fee award of $245,000 in a case that produced a damages award of $33,000; in Blanchard, lodestar fees of $40,000 were sought in a case that produced a $10,000 damages award. As the District notes, "In the absence of fee-shifting, a profit-seeking attorney would not have taken these cases on a contingency fee basis. Nor would a cost-conscious fee-paying client bring such litigation." Supplemental Brief, supra, p. 11, n. 13. This Court's rejection of proportionality between the plaintiff's recovery and the attorneys' fee award, Cowan v. The Prudential Insurance Company of America, U.S. Court of Appeals, Second Circuit, No. 90-7865, decided June 12, 1991, further

(continued...)

demonstrated to be sufficient to attract sufficient numbers of attorneys to civil rights prosecutions. Fee multipliers are not needed.[6]

Additionally, the large number of lawyers in New York indicates without contradiction in the literature or in this record, that there is no dearth of lawyers willing and able to accept Title VIII cases on a private retention basis, contenting themselves with the prospects of lodestar fees being paid in the event of success.[7]

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[5](...continued)
weakens the rationale for fee multipliers and guarantees that the attorneys for a prevailing plaintiff will be fairly compensated for their time even if their client's award is minimal or non-monetary. The latter is the case here: no damage award was rendered to the appellees out of which a contingency fee could be paid, but nonetheless a lodestar fee of $503,035.65 was awarded to their attorney.

[6]An additional reason appears for not authorizing a fee multiplier in this case: the former statute, 42 U.S.C. § 3612(b), in effect when this case was filed, and effective until 1988, provided for court appointment of counsel to represent persons to commence Title VIII actions. Plaintiffs did not require a fee multiplier to attract counsel when counsel was readily available to them free of charge, upon appointment by the Court.

[7]The pro bono bar, working in many instances with not-for-profit organizations which provide free legal services for the poor, as did Steel & Bellman in this case, are available in the New York metropolitan area to take civil rights cases. In Delaware Valley II, Justice Blackmun pointed out that the pro bono bar ...is concentrated in the eastern urban centers..." 489 U.S. at 743. Not-for-profit organizations, such as Suffolk Housing Services and the Unitarian Church, which provided four years' of funding for this case, do not need fee enhancements to continue to provide legal services to the poor. Nor does the NAACP, whose attorney's fee [Charles Sanders] of $14,175 was increased by the District Court by application of the 1.75 multiplier (A376).

Plaintiffs submitted anecdotal statements by three attorneys in an attempt to show that civil rights plaintiffs are experiencing or would experience substantial difficulties in securing representation in the absence of the prospect of a fee multiplier. Appellees' affidavits are virtually identical to those submitted to the court for virtually the same purpose in U.S. Department of Labor v. Triplett, 110 S. Ct. 1428, 1433 (1990). In Triplett, the Supreme Court rejected those affidavits as "blatantly insufficient." Id. They should be accorded no more weight here.[8]

[8]The affidavits submitted in Triplett, were from three non-interested attorneys. In the instant case, two of the three affidavits were submitted by attorneys claiming fees in the action and should be accorded less weight than in Triplett. Similarly, in Rode v. Dellaciprete, the Third Circuit found the anecdotal affidavits of three attorneys "failed to satisfy the standards enunciated in Delaware Valley II," 892 F.2d at 1184.

B. Assuming that Risk Enhancement May Sometimes Be Proper, Plaintiffs Did Not Demonstrate that They Were Entitled to an Enhancement in this Case.

Even if the law permits the award of multipliers in some cases, the district court erred in awarding a contingency multiplier in this case. If there is any room in Delaware Valley II to authorize multipliers, the record in this case does not support an award. Further, the district court did not make the necessary findings to justify an award of a contingency multiplier.

1. The District Court's Findings

In its memorandum and order, the district court considered three issues as relevant to the fee application: (1) What 'lodestar' fee are plaintiffs' attorneys entitled to? This encompasses both the question of what rate is 'reasonable' and whether there exist grounds to 'enhance' that reasonable fee, as asserted by plaintiffs. (2) How many hours will the court approve as 'reasonable'? and (3) What multiplier is appropriate? (Memorandum and Order, October 24, 1990, at p. 3 (A364). However, the Supreme Court plurality and concurring opinions in Delaware Valley II held that a contingency multiplier was not available absent special circumstances and specific findings as to how the relevant market compensates for contingency and that plaintiff would have faced "substantial difficulties" in obtaining counsel, absent the availability of a fee multiplier. 107 S. Ct. at 3091.

In contrast, the district court in this case assumed, without benefit of any proof or market analysis, that such a multiplier was appropriate.

In its analysis of the lodestar claim, the district court found that the relevant market for legal services was "civil rights cases in the Eastern District of New York." (A365). In fixing the lodestar figure, the court awarded plaintiff "current, not historical rates" as compensation for the delay in payment. (A367). The court then expressly rejected all other factors plaintiffs asserted as justifying an enhancement of the lodestar as already subsumed in the rate and number of hours utilized, except for the issue of contingency:

> Finally, Plaintiffs seek enhancement for the contingency nature of the case. While contingency may be considered as a basis for increasing a fee award, Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 729-31 (1987); Lewis v. Coughlin, 801 F.2d 570, 576 (2d Cir. 1986), this factor may be adequately addressed by means of a multiplier.

(A368). The court said nothing further about a contingency multiplier until section III of the Memorandum and Order, where it began by stating that:

> Plaintiffs seek a multiplier of 1.75. They predicate this claim upon two factors; the contingent nature of the case...and the quality of their representation. Defendants claim that no multiplier is warranted. (Memorandum and Order, October 24, 1990, A369).

The plaintiffs' assertion that a multiplier should be granted on the basis of the quality of representation was correctly rejected

by the court below, citing the Supreme Court decision in Blum v. Stenson, 465 U.S. 886 (1984), and pointing out that quality of representation was already taken into account in fixing the hourly rate allowed (A369).

The court apparently relied exclusively upon a single comment of Justice O'Connor:

> Justice O'Connor, in her concurring opinion in Delaware Valley, stated that risk multipliers are permissible, as long as the court does not "enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." 483 U.S. at 733.

(A369). The court overlooked the balance of Justice O'Connor's opinion and substantial case authority making clear that the lodestar presumptively is a reasonable fee and that a contingency multiplier, if ever appropriate, is only appropriate in "rare" circumstances.

A district court must make sufficient findings regarding the market, to set a standard for future cases within the same market. In the instant case, as in Blum v. Witco, "the district court established a contingency multiplier for this individual case rather than setting a standard which would be applicable to future litigation within the same market... Nothing in the district court's opinion suggests that it made any effort to do more than establish a contingency multiplier applicable to this single case." Blum v. Witco Chemical Corp., 888 F.2d 975 (3rd Cir. 1989) ("Blum II").

In contrast, in Fadhl v. City and County of San Francisco, 859 F.2d 649 (9th Cir. 1986), the trial court made all the requisite findings under Delaware Valley II, relying upon plaintiff's rejection by thirty-five lawyers, and evidence as to how and the amount to which the San Francisco market compensated contingency as a class, to support the award of a multiplier for the San Francisco market.

In this case, the court below made no findings as to the treatment of the relevant class of cases in the Eastern District of New York. Moreover, it did not have before it sufficient evidence to do so (See discussion of this point, pp. 23-29, infra). More importantly, plaintiff submitted no market evidence to support such findings, even had they been made. Without a finding as to the treatment of the relevant class of cases in the relevant market, the award of a contingency multiplier is unsupported.

The district court in the instant case made no findings that absent a contingency multiplier, the plaintiffs would have "faced substantial difficulties" in securing representation. As Justice O'Connor pointed out, such a multiplier should only be large enough to attract competent counsel: without a finding that a multiplier is necessary so that a plaintiff will not face substantial difficulty in securing counsel, it would be impossible to begin to determine the amount of multiplier necessary to ensure the availability of counsel. On this ground

also, the district court's award of a fee multiplier must be vacated.

The Fifth Circuit has stated, in a case where, like this one, there were insufficient findings of fact to warrant a contingency multiplier, that: "[t]here is none of the required evidence that without risk-enhancement the plaintiffs in this case would have been unable to find counsel in the local market." Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987): Thus the Court held:

> While it is a rare case indeed in which we find an abuse of discretion regarding an award of attorney's fees, we cannot shirk our responsibility under the law when we encounter one... The excess amount awarded by the District Court was founded on erroneous legal analysis and in part upon an abuse of its discretion. We therefore vacate the judgment of the District Court and remand for entry of a judgment in the amount of $683,805.00.

831 F.2d at 586.

In Dague v. City of Burlington, supra at 5123, this Court noted that the district judge, applying the test earlier enunciated in Friends of the Earth, found that "plaintiffs' attorneys would not have been compensated at all unless plaintiffs had prevailed," and that "absent an opportunity for enhancement to balance the risk of losing entirely, plaintiff

would have faced substantial difficulty in obtaining counsel of reasonable skill and competence."[9]

In this case, the District Court failed to make the required findings in either category, and the judgment must be vacated.

For a district court to presume that a contingency multiplier is available in the absence of a specific foundation, is an abuse of discretion:

> Defendants challenge this [contingency multiplier] primarily on the basis that the District Court acted on a "presumption" of entitlement to a contingency multiplier rather than by a careful exercise of its discretion."... Applying this standard to the careful analysis of the District Court, we conclude that the defendant's contentions are without merit except as to the court's inclusion of a "contingency multiplier."

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987).

In the case presently before the court, the absence of the necessary findings renders the district court's award of a contingency multiplier clearly erroneous.

2. Plaintiff's Failure to Carry the Burden of Proof

Had the Court below applied the appropriate standards, either under Delaware Valley II or Friends of the Earth and Dague, a contingency multiplier would still have been impermissible, since the plaintiffs failed to meet their burden of proof.

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[9]The Friends of the Earth test is similar to the plurality/ Justice O'Connor test in Delaware Valley II. See, Friends of the Earth v. Eastman Kodak Company, 834 F.2d 295, 298 (2d Cir. 1987).

"[A]t all times, the fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency." Delaware Valley II, 107 S. Ct. at 3090-3091 (O'Connor, J. concurring); citing Blum v. Stenson, 465 U.S. 886 (1984) and Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). See also Fadhl v. City and County of San Francisco, 859 F.2d 649, 650 (9th Cir. 1986) "The fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency."

In a series of post-Delaware II cases, it has been made clear that anecdotal evidence contained in attorneys' affidavits is insufficient:

> The impression of three lawyers that the current system has produced 'few' lawyers, or 'fewer qualified attorneys' (whatever that means), and that 'many' have let the field, are blatantly insufficient to meet respondent's burden of proof, even if entirely unrebutted.

U.S. Department of Labor v. Triplett, 110 S. Ct. 1428, 1433.

In a case where the evidence was comparable to that submitted below, the United States District Court for the Middle District of Pennsylvania denied appellant's request for a 25% multiplier because appellants did not present evidence which would justify any contingency multiplier. The Third Circuit affirmed, concluding that the affidavits submitted by appellants failed to meet Delaware Valley II's "stringent" requirements. Rode v. Dellaciprete, 892 F.2d 177 (3rd Cir. 1990).

Cases in the Southern District of New York concur:

> The Supreme Court has explained that an enhancement of a fee award is proper only in certain rare and exceptional cases... The purpose of a fee shifting statute is not to replicate exactly a private fee arrangement, but to ensure that private parties will be able to retain counsel to further the objectives of the civil rights statutes...The applicant bears the burden of overcoming the presumption that the lodestar reflects a reasonable fee award and establishing that an enhancement is appropriate." (emphasis added)

N.Y. State National Organization for Women v. Terry, 737 F.Supp. 1350, 1361 (S.D.N.Y. 1990); also, see, Soler v. G & U, Inc. 658 F.Supp. 1093, 1102-03 (S.D.N.Y. 1987).

In this case, to support their request for a 1.75 multiplier, the plaintiffs only submitted affidavits of three attorneys with practices in New York County[10]: Richard F. Bellman, the attorney to whom the fees were to be awarded; Julius LaVonne Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., New York, New York (The NAACP Legal Defense Fund aided in the representation of plaintiffs and was also seeking legal fees for Charles F. Sanders) and Myron

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[10]In support of their application for attorney's fees, plaintiffs asserted that the relevant market consisted of the Greater New York area: The court properly found that the relevant market consisted of the Eastern District. New York County is within the Southern District. Moreover, the anecdotal affidavits of three Southern District of New York attorneys that the local practice requires the application of a contingency multiplier is inconsistent with the relevant case law in the Southern District. See, e.g., Wilder v. Bernstein, 725 F.Supp. 1234 (S.D.N.Y. 1989); Meriwether v. Coughlin, 727 F.Supp. 823 (S.D.N.Y. 1989); N.Y.S. National Organization for Women v. Terry, 737 F.Supp. 1350 (S.D.N.Y. 1990) and discussion thereof, infra.

Beldock. Without regard to the fact that Mr. Bellman and Mr. Chambers are interested parties, neither their affidavits nor that of Mr. Beldock rise to the required level of proof.

Mr. Bellman, in his affidavit, states that:

> Certainly, from the outset this was the type of case where the victims of governmental housing discrimination would be hard pressed to find counsel to take on the burdens of this type of litigation. The difficulties of securing counsel in this type of case are enormous, as class action cases brought under the Fair Housing Act involve difficult legal issues,...The accompanying affidavits of Julius LaVonne Chambers and Myron Beldock confirm the difficulty involved in securing counsel in this type of case and the fact that in the prevailing market a contingent risk multiplier would be expected by counsel agreeing to take on the matter. The difficulty involved in securing counsel in this type of case increased even more after this Court entered its ruling after trial dismissing the litigation. Indeed I remember meeting with the Board of Housing Help on October 19, 1987 following this Court's decision. I recall the great sense of relief and appreciation on behalf of the Board members when I told them I was willing to pursue the appeal to the Second Circuit even though at the time I had not received any compensation from before the trial and I knew there were no funds to cover appellate work. It is submitted that plaintiffs have satisfied the legal burdens warranting enhancement of the lodestar and the granting of a multiplier.

(A38-39).

Mr. Bellman's conclusory and self-serving affidavit does not provide factual support for the conclusion that plaintiffs would have faced difficulties obtaining counsel absent the expectation of a fee multiplier. He does not speak to the

availability of counsel in the relevant market, and discusses the possibility plaintiffs would have faced difficulty in securing counsel in the broadest abstract terms. Moreover, nothing in his or the other affidavits makes any showing of how such cases are treated as a class within the Eastern District of New York. Mr. Chambers is equally conclusory and general, stating that:

> Cases such as this are extraordinarily complex, extremely time-consuming and, because they raise issues on the cutting edge of civil rights law, of high risk in terms of outcome. These factors make it extraordinarily difficult for local community groups, as well as individuals, to obtain competent counsel to represent them. Local community groups and individuals simply do not have the funds to finance litigation such as this. Because the lawyers who do become actively engaged in such cases receive either no compensation or compensation at greatly reduced rates, they must look to the possibility of compensation under prevailing plaintiffs' attorneys' fees provisions. Given the projected length of time in which attorneys can be excepted to participate in such cases and the complexity of the cases, it is simply unrealistic to expect attorneys to undertake this work without having the expectation that they will receive more than their usual rates in the event they prevail. Attorneys engaging in litigation of this nature, therefore, should be awarded an appropriate multiplier in order to attract them to such work.

(A42).

Mr. Chambers then claims that Steel and Bellman took on this case without expectation of receiving much payment during the course of long and complex litigation, and gives his opinion that it would be "most appropriate for the Court to award a multiplier in this matter." (A44).

An identical claim regarding an attorney's fee expectations was rejected by the First Circuit:

> The fact counsel chose to take the case upon the understanding that they would look solely to their right to recover fees under the statute speaks well of counsel, but it is not a strong argument for a multiplier. They chose to make this arrangement. Had they wished to insist on another arrangement, they could have done so. The 50% upward multiplier is vacated.

Hall v. Ochs, 817 F.2d 920, 929 (1st Cir. 1987).

Nor does Mr. Chambers present competent evidence tending to show that plaintiffs generally were likely to, or that these plaintiffs in fact did, encounter difficulty, or that in the relevant market a fee multiplier is necessary to secure competent counsel. Rather, he abstractly terms it "unrealistic" to expect attorneys to take on such cases without a multiplier. However, abstract affidavits of attorneys are insufficient to warrant the award of a multiplier.

Similarly, the affidavit of Myron Beldock does not go beyond abstractions. Mr. Beldock, who speaks of his own admirable "commitment to serving as wide a group of clients as possible, despite the economic pressures of a New York City practice," states:

> The purpose of this affidavit is to inform the court of what I know of Mr. Steel and Bellman's [sic] qualifications and expertise; to inform the court of what lawyers of comparable skill and reputation charge for their services in the New York area; and to support the Steel/Bellman application for a multiplier.

... I am aware of the fact that it is extremely difficult to obtain legal representation to vindicate rights in the area of housing. Clients who seek to assert rights under the housing act generally do not have the funds to finance litigation, particularly complex class action litigation. Lawyers who take on such cases generally receive little compensation or compensation at greatly reduced rates. In this type of case-- a class action housing act case against the government-- the market would require some sort of contingency enhancement. This is true regardless of whether some partial funding is obtained (as in this case) because in such cases it is understood that initial funding will be very inadequate for the long, difficult and expensive commitment that will be involved. This is particularly true because in such cases the government is always resourceful, with open ended financial and legal staff support; and invariably digs in to strenuously defend a contested law or regulation, causing the work load to expand tremendously and making it difficult to compromise or settle. In taking such cases for plaintiffs, there is no thought of a windfall or a generally high return (exceeding time charges), as there might be in personal injury cases. A lawyer would not take on such a case under these circumstances without the possibility of obtaining fees under the civil rights or housing act provisions allowing for the collection of attorney's fees to the successful party. Moreover, given the difficulty this type of case presents and the long period such cases could be excepted [sic] to take, lawyers would not take them on without the hope of obtaining a multiplier of their fees if they are successful. I am therefore of the opinion that Mr. Steel and Bellman [sic] should be entitled to a multiplier, given the difficulty of obtaining counsel in this type of case without the possibility or promise of

> extra compensation at the end of a successful litigation.[11]

(A46) (emphasis added).

The Beldock affidavit merely refers to the economic pressures of a New York City practice. However, considering that a total of 1889 hours were devoted to the matter by Mr. Bellman (and his associates' time was minimal) over a period in excess of eight years (A376), the impact upon Mr. Bellman's practice of an average of approximately 236 hours per year cannot have significantly contributed to "the economic pressures of a New York City practice."

Astoundingly, Mr. Beldock specifically avers "there is no thought of a windfall or a generally high return (exceeding time charges), as there might be in personal injury cases" (A51)[12].

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[11]Many of the factors Mr. Beldock relies upon, such as difficulty and complexity, are already subsumed in the hourly rates and the number of hours. The delay in payment has been compensated by application of current, rather than historic rates, in accord with the Supreme Court holding in Missouri v. Jenkins supra.

[12]This sentence was omitted from Appellees' citation in the lower court to Mr. Beldock's testimony, Memorandum of Law in Support of Plaintiff's Application for Attorneys' Fees and Expenses at 32 and undercuts the argument for a contingency multiplier, as he states that an attorney's expectation does not exceed time charges. The conclusion to be drawn from the Beldock affidavit is that contingency multiplier awards do constitute windfalls to attorneys, contrary to the purpose of fee shifting statutes as enunciated by the Supreme Court in Delaware Valley II.

Appellees had every opportunity to include information in their affidavits that could have met the standards of either Friends of the Earth or Delaware Valley II, but did not. The proofs below were clearly insufficient to support the award of a multiplier. As the Third Circuit aptly held:

> We note that it is not the number of affidavits submitted that is important, rather it is the content of the affidavits and the expertise of the affiant, with a proper foundation, to make the representations contained therein. Counsel should seek to establish the necessity of a contingency multiplier in the same manner as he or she would seek to establish any fact which requires scientific, technical or specialized knowledge to understand - through the use of expert testimony.... Here at a minimum, the affidavits fail to establish the first two requirements; how the relevant market treats contingency cases differently as a class from hourly rate cases and the degree to which that market compensates for contingency.

Rode v. Dellaciprete, 892 F.2d 1177, 1185 (3rd Cir. 1990).

It should be noted, moreover, that appellants sought discovery into the issues of difficulty in securing counsel and market contingency enhancement and were vigorously opposed by appellees' counsel.[13] In denying discovery, the court below cautioned that a plaintiff has "the burden of demonstrating the reasonableness of the fee request. Should the plaintiff fail to

[13]The discovery requests sought information as to unsuccessful attempts by appellees, if any, to secure counsel; fee arrangements of Steel and Bellman in other civil rights cases; retainer agreements or equivalent with the Veatch program or Suffolk Housing Services; and contingency fee cases handled by Steel and Bellman. (A202-206).

sustain that burden, his application for fees and costs will be either denied or reduced." (A234)

The case law under Delaware Valley II has consistently required evidentiary showings regarding whether and to what extent contingency is compensated for in the relevant market; whether without such a multiplier plaintiff would have had difficulty in securing counsel; and, if a multiplier was then necessary, how much of a multiplier was necessary in the relevant market. These showings are lacking here, in part because appellees resisted discovery of information that might have shed some light on these subjects.

This Court's review of the record in Dague, supra at 17, led it to conclude that it was not clearly erroneous for Judge Billings to have found that "plaintiffs' attorneys would not have been compensated at all unless plaintiffs had prevailed," and "absent an opportunity for enhancement to balance the risk of losing entirely, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence." No support for such findings is present in this record.

a. The Degree to Which the Relevant Market Compensates for Contingency

Under Delaware Valley II, courts have consistently held that a plaintiff must at least show some evidence of the degree to which contingency cases are treated as a class; if no such showing is made, as here, a contingency multiplier is not

appropriate. "In view of the rates which this Court has previously sustained as reasonable, and in light of the fact that plaintiffs have offered no evidence as to the degree to which contingency is compensated in relevant market, we find this case is not of those 'rare' and 'exceptional' cases where enhancement of the lodestar figure would be warranted." Meriwether v. Coughlin, 727 F.Supp. 823 (S.D.N.Y. 1989)

In vacating an award of a contingency multiplier by the District of New Jersey, the Third Circuit has stated that abstract evidence is not acceptable, but that the applying party must provide a specific basis for contingency adjustment:

> [L]ooking to the relevant market of "all civil cases," the [district court in Blum] concluded that plaintiff's affidavits demonstrated "that lawyers generally expect and receive a premium for contingency cases." Second, the court concluded from the affidavits submitted on behalf of plaintiffs "that contingency multipliers are necessary to ensure sufficient legal representation in [civil rights and employment litigation]." The court stated, however, that the affidavits submitted on behalf of plaintiffs were not specific enough to "provide the court with a basis to make a market-based, quantitative finding. Unlike the record [in Black Grievance Committee v. Philadelphia Electric Co., 690 F.Supp. 1393 (E.D.Pa. 1988)], the record herein simply does not include any substantiated amount by which fees need be enhanced. Thus, the court has insufficient "market" evidence to quantify the amount of enhancement necessary to ensure an adequate supply of competent counsel in employment discrimination cases.

Blum v. Witco Chemical Corp., 888 F.2d 975, 979 (3rd Cir. 1989) (Blum II). See also Rode v. Dellaciprete, 892 F.2d 177 (3rd Cir. 1990).

Moreover, Appellees in no way attempted to show the level at which a fee would have to be enhanced to secure competent counsel in the Eastern District.

b. No Showing that Without a Contingency Multiplier, Plaintiffs Would Have Faced Substantial Difficulties in Securing Counsel

In the instant case, "[t]here is none of the required evidence that without risk-enhancement the plaintiffs in this case would have been unable to find counsel in the local market." Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987)

This Court has stated that, "[i]n considering whether bonus should be included for the contingency factor, the rationale that should guide the court's discretion is whether '[w]ithout the possibility of a fee enhancement ... competent counsel might refuse to represent ... clients thereby denying them effective access to the court.' Lewis v. Coughlin, 801 F.2d 570, 576 (2d Cir. 1986). This position is similar to that taken by the plurality and Justice O'Connor in Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air ..." Friends of the Earth v. Eastman Kodak Company, 834 F.2d 295, 298 (2nd Cir. 1987); See also N.Y. State National Organization For Women v. Terry, 737 F.Supp. 1350, 1362 (S.D.N.Y. 1990). In the Southern District, this evidentiary showing has been requisite for consideration of a multiplier:

> Plaintiffs have averred that both Prisoners' Legal Services and an attorney appointed by the court declined to take the case due to the high degree of risk involved.... However, while a case's "undesirability" is a factor to be considered in calculating the lodestar, "a court should not award any enhancement based on 'legal' risks ... [since the lodestar] is flexible enough to account for great variation in the nature of the work performed."

Meriwether v. Coughlin, 727 F.Supp. 823, 829-30 (S.D.N.Y. 1989).

In a case where evidence of difficulty in securing representation was introduced by a petitioner, the court nonetheless denied a fee enhancement:

> Plaintiffs initially encountered difficulty in securing representation from attorneys in private practice.... No evidence has been presented, however, regarding the reasons these other attorneys refused to represent plaintiffs, or that without a fee enhancement for risk of loss private attorneys would be unwilling to undertake similar cases which ultimately further the objectives of the civil rights statutes.... Furthermore, the Court has not been presented with evidence on how the relevant market compensates for contingency.... Thus, an enhancement for risk of loss is not called for on the record in this case.

N.Y. State National Organization For Women v. Terry, 737 F.Supp. 1350, 1362-63 (S.D.N.Y. 1990).

Other courts in the Circuit also require a more stringent evidentiary showing than that present in this record:

> The plaintiffs claim an upward adjustment or 'multiplier,' ... in order to compensate for the contingency of non-payment and excellent results achieved ... the court does not find here the extraordinary combination of circumstances under which a multiplier is appropriate.

Hilburn v. Commissioner, Connecticut Department of Income Maintenance, 683 F.Supp. 23, 26 (D. Conn. 1987).

Similarly, in another case in which Mr. Chambers participated, the Eighth Circuit held that where it was shown that the market did compensate for contingency, proof was still required as to whether without a multiplier, plaintiffs would have had difficulty securing counsel, or that adjustment for contingency was a crucial factor in the ability to secure counsel:

> While plaintiffs presented evidence that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency fee cases, they did not introduce evidence about availability of counsel to plaintiffs in the absence of contingency adjustments. Several attorneys testified that they would not have taken the case at all, and one civil rights litigator testified he would not have taken the case at all, without regular payments. Testimony of these individuals comes short of proof that adjustment for contingency was a crucial factor in plaintiff's ability to obtain counsel.... On the record, we do not discover the proof required by Justice O'Connor as prerequisite for an award of contingency enhancement.

Jenkins by Agyei v. State of Missouri, 838 F.2d 260, 268 (8th Cir. 1988).

c. The post-Delaware Valley II cases, upon which plaintiff relied to demonstrate awards of contingency multipliers, did so upon the basis of evidence which is not present in this record.

In the cases relied upon by Appellees below, in contrast to this case, evidence of the type called for by Justice

O'Connor was adduced to support the contingency multiplier, and one such case was reversed on appeal. For example, while in Norwood v. Charlotte Memorial Hospital & Medical Center, 720 F.Supp. 543, 554 (W.D.N.C. 1989) (a case involving Mr. Chambers), the district court stated that it had before it "substantial evidence as to: (1) the relevant attorney market; (2) the problems that market conditions create for prospective plaintiffs who have arguably meritorious cases; and (3) the contingency enhancement which is necessary to ensure that attorneys will undertake contingent civil rights litigation," the Fourth Circuit reversed and found that it was improper to make specific findings of the type described by Justice O'Connor based on the evidence before it; and further held that the district court had not properly considered the factors set forth in Delaware Valley II. Norwood, supra, reversed sub nom. Oliphant v. Charlotte Memorial Hospital and Medical Center, 925 F.2d 1457 (table), unpublished decision, see Appendix annexed hereto)[14]: In Oliphant, the Fourth circuit found that

> there was no evidence to show that any of the plaintiffs' cases had been rejected by any other attorneys or that they had experienced any difficulty in obtaining legal representation: and ... its findings as to the need for an enhancement of fees were supported only by self-serving affidavits

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[14]Oliphant is an unpublished decision that would not ordinarily be cited as precedent. Appellants are, nevertheless, making reference to the holding in that matter and annexing a copy of the Fourth Circuit's opinion, since the determination of the district court therein reversed was relied upon by the appellees in the court below.

that did not relate to the market conditions at the time the litigation commenced ...

[Based on the constraints imposed in Delaware Valley II], the one hundred percent (100%) enhancement awarded by the district court must be reversed. The district court failed to consider that, according to Delaware Valley II, the fee applicant bears the burden of establishing that he "would have faced substantial difficulties in finding counsel in the local or other relevant market." ... Neither the findings of the district court nor the evidence indicates that the one-hundred percent (100%) enhancement in this case was necessary to attract competent counsel. There is no evidence in the record that the plaintiffs in this case encountered any, let alone substantial difficulty in obtaining counsel. In fact, in the 1987 fee order, the district court found that "[t]here was no evidence that other attorneys refused to take this case." The district court, in its 1989 fee order, found that the conditions were the same as when it had entered the 1987 order. There was still no evidence that anyone had refused to take either the Oliphant or Norwood cases. In short, there is no evidence of any difficulty in finding competent counsel to litigate either case when they were initiated in 1978.

Delaware Valley II also instructs that, in determining whether a fee enhancement is necessary, courts should consider "how a particular market compensates for contingency ...." 438 U.S. at 733. In calculating the one-hundred percent (100%) enhancement in this case, the district court relied on affidavits from three attorneys practicing law in the state of Florida. While each of these attorneys offered valuable insight into employment discrimination litigation in the state of Florida, these affidavits regarding the Florida market's need for an enhancement to attract competent counsel simply are not relevant. In determining whether a fee enhancement was necessary to attract competent counsel in this case, the district court should have limited its focus to the Charlotte, North Carolina market. We find that, in determining whether a fee

> enhancement was necessary in this case, the district court erred by considering the Florida contingent-fee market.
>
> In addition to considering an irrelevant geographic market, the district court also erred in its focus on the contingent-fee market at the time the fee orders were issued.

Also in Hidle v. Geneva County Board of Education, 681 F.Supp. 752, 758 (M.D. Ala. 1988), after detailing the facts, the Court specifically found that the evidence submitted "convincingly" demonstrated, for that market, "that only if attorneys who undertake such work are compensated...at a level that reflects the inherent risk of the contingency arrangement, will a sufficient number of competent counsel be attracted to represent alleged victims of employment discrimination, who cannot afford to pay attorneys' fees."

In Fadhl v. City and County of San Francisco, 859 F.2d 649 (9th Cir. 1986), the Ninth Circuit noted that the district court made all the requisite findings under Delaware Valley II, including plaintiff's rejection by thirty-five lawyers, and evidence as to how and the amount to which the San Francisco market compensated contingency as a class, to support the award of a multiplier for the San Francisco market.

Findings such as those made in Hidle and Fadhl were not made here, and the record would not support them if the district court had made them.

II. ASSUMING THAT A RISK ENHANCEMENT IS PROPER, THE AWARD HERE IS EXCESSIVE

A. The application of a contingency multiplier of 1.75 was so excessive as to constitute a windfall to plaintiff's attorneys.

Were one to assume arguendo that Appellees had met their evidentiary burden and that the district court had applied the appropriate standards in awarding a contingency multiplier, an award of a 1.75 contingency multiplier would still be so excessive as to constitute a windfall to the Appellees' attorneys and the imposition of punitive damages upon the Huntington taxpayers.

In Delaware Valley II, four justices agreed that even were contingency enhancements ever to be permissible, they should not exceed one-third of the lodestar fee: "an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar." 107 S. Ct. 3078, 3089 (1987) (Justice White, joined by the Chief Justice, Justice Powell and Justice Scalia). While non-binding, the Justices' opinions are worthy of consideration in gauging the parameters of an acceptable level of enhancement.[15]

The cases relied upon by the district court as precedent for the parameters of a multiplier are shaky:

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[15]In Dague v. City of Burlington, supra, it is worth noting that Judge Billings awarded a 25% enhancement. The enchancement awarded by Judge Glasser in this case is three times greater than that approved by this Court in Dague.

> As to risk, the general rule recognized by the most recent cases is that a multiplier of .5 to 1 is appropriate to compensate for contingency. See, McKenzie v. Kennickell, 875 F.2d 330, 334 (D.C. Cir. 1989); Wesley v. Spear, Leads & Kellogg, 711 F.Supp. 713, 717 (E.D.N.Y. 1989).

(A369-370). McKenzie v. Kennickell is questionable precedent in the District of Columbia as it is presently being reviewed upon a rehearing en banc of King v. Palmer, 906 F.2d 762, 772 (D.C. Cir. 1990).[16]

Wesley v. Spear, Lead & Kellogg, supra, is conspicuously distinguished from the case at bar. Wesley was a securities fraud case with attorney's fees awarded pursuant to the Securities Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b). Wesley v. Spear, Leads & Kellogg, 711 F.Supp. 713 (E.D.N.Y. 1989). Attorneys' fees were not awarded under a fee shifting statute in Wesley, but instead paid from the fund established by the settlement. The multiplier of 2.3 awarded in Wesley raised the fee to 19% of the total recovery. In part, this was to ensure that counsel was not penalized for his "unusually efficient" handling of the matter based on his special expertise in the particular area of the securities market. Wesley v. Spear, Leads & Kellogg, 711 F.Supp. 713, 715 (E.D.N.Y. 1989). Counsel was paid by the plaintiff class and fees were not taxed to a losing defendant. Wesley is hence more analogous to

[16]The Court of Appeals for the District of Columbia heard oral argument on the King en banc reargument on February 21, 1991. The matter is sub judice at this writing.

personal injury litigation contingency where attorneys are paid a percentage of the damages recovered than to a fee awarded under a fee-shifting statute. While a 2.3 multiplier was employed, the attorney fee represented only 19% of the recovery, a low contingency percentage. In cases such as Wesley, there is no possibility of taxing a losing defendant in inverse proportion to the merit of his initial stance. In contrast, the enhancement awarded here was applied to a lodestar fee which reflects more than eight years' work in a non-frivolous and vigorously contested litigation, and the enhancement has served to penalize a defendant with a strong defense. Reliance on a securities act case, so conspicuously distinguishable, for the purpose of fixing the range of acceptable multipliers in a fee-shifting case, is clearly inappropriate.

It should be noted that in the Southern District of New York, a contingency multiplier of 1.75 has been found to be unnecessary to secure counsel in a civil rights case; accordingly, no multiplier was awarded. Wilder v. Bernstein, 725 F.Supp. 1324 (S.D.N.Y. 1989).

B. The Court Below Erroneously Enhanced $52,000.00 In Fees That Were Paid To Plaintiffs' Counsel During a 4-year Period, and Fees Accrued After This Court's 1988 Remand, Neither Of Which Were At Risk.

The Court below noted that:

> [h]ere, plaintiffs' attorneys were paid $52,000 for the early stages of the suit. Partial payment is relevant to the risk multiplier ... but there the amount paid is

> quite small compared to the entire fee to which plaintiffs' attorneys are entitled.

(A369-370).

However, the Court erred when it failed to subtract $52,000 from the lodestar for the purpose of applying a multiplier. That sum was not insignificant, and plaintiffs' counsel were content, while receiving these assured payments, to perform over a four-year period what ultimately constituted 44% of their total services in the case. The attorney "was able to mitigate the risk of nonpayment" in that way, Delaware Valley II, 483 U.S. at 747 (Blackmun, J., dissenting).

Further, the Court did not factor out $43,219 in fees accrued after this Court's reversal which rendered the plaintiffs prevailing parties. The Fourth Circuit, in Spell v. McDaniel, 852 F.2d 762, 772 (4th Cir. 1988), refused to approve a risk enhancement for appellate counsel, where plaintiff was "armed with a jury award of $900,000 which enjoyed a presumption of regularity on appeal."

Since neither the $52,000 nor the post-appeal fees of $43,219 were at risk or contingent in any sense, the District Court erred in applying a fee multiplier to these portions of the lodestar.[17]

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[17]In contrast, the Court below correctly declined to apply the multiplier to fees for preparing the attorney's fee application, which was made after plaintiffs had become prevailing parties. It was neither justified nor justifiable to apply a contingency fee multiplier to some of the non-contingent fees, while correctly declining to do so with others.

Accordingly, if the Court sustains a multiplier here, the sum of $95,219 ($52,000 plus $43,219) should be subtracted from the lodestar before the multiplier is applied. Such a calculation would result in a reduction of the total fee by the sum of $71,415.

C. A 75% Risk Enhancement is Excessive

In light of the District Court's award of a lodestar based upon a substantial current rate of $225 per hour, it was unnecessary to add a premium of 75% to the lodestar in order to attract counsel in future civil rights cases. The Supreme Court plurality in Delaware Valley II pointed out that any adjustment exceeding more than one-third of the lodestar "would require the most exacting justification." 107 S. Ct. at 3089.

Whether or not Steel and Bellman's needs or expectations are dispositive of the issue in this case, they are at least probative on the question as to whether there is, generally, a need for a 75% fee multiplier in this market,[18] and whether the circumstances here provide "the most exacting justification."

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[18]We assume that the relevant market consists of civil rights cases in the Eastern District of New York. However, if the market is broadened to encompass the entire metropolitan New York City area and Long Island, there was no showing that a 75% multiplier represents the "degree to which the relevant market compensates for contingency" (Blum v. Stenson, 104 S. Ct. 1541, 1548; Delaware Valley II, 107 S. Ct. at 3091); and, certainly, plaintiffs did not carry their burden of showing that "without an adjustment for risk [of this proportion] the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" Id.

Steel and Bellman are lawyers of sophistication in civil rights matters and can be presumed to have analyzed plaintiffs' chances of success carefully and concluded that they possessed a substantial chance of prevailing, before committing their resources to the case. Since this case was brought against a local government, its general taxing power insured that any fee award would ultimately be collected. Thus, it is difficult to imagine that Steel and Bellman required or, in 1981 expected, to receive a fee enhancement of the magnitude awarded by the District Court.[19]

Just as the three attorney's affidavits were insufficient to establish a general need for a fee multiplier, (Department of Labor v. Triplett, supra), the anecdotal evidence provided to the court was likewise insufficient to establish the need for a 75% enhancement. Indeed, there is no evidence in the record at all to support the proposition that a 75% enhancement produced a "reasonable" attorney's fee as contemplated by 42

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[19]This is particularly true since Steel and Bellman were "informed...that Suffolk Housing Services, a civil rights housing group in Long Island, which had been receiving limited grants for housing litigation from the Veatch Program of the Unitarian Church of North Plandome, would be able to provide some fees at reduced rates and the litigation disbursements." (A37-38)(emphasis added). Suffolk Housing Services provided $52,000 in fees over a four-year period until the end of 1984, (and apparently disbursements as well) while Steel and Bellman were performing 1005.5 hours of work, approximately 44% of the total time ultimately devoted by them to the case. Steel and Bellman's involvement in "numerous precedent setting civil rights cases" (A29), attests dramatically to the fact that they did not require or expect fee multipliers in order to continue to take such matters.

U.S.C. § 3613(c)(2), "no more and no less." Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939 (1989); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

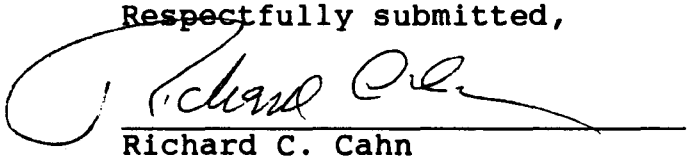
CONCLUSION

(1) As a matter of law, multipliers are not authorized to be awarded in fee-shifting cases; alternatively, (2) the trial court did not employ appropriate legal standards in determining the applicability of a contingency multiplier, or make the required findings; (3) plaintiffs failed in any event to meet their burden under any appropriate legal standard; and (4) the application of a 1.75 multiplier was excessive and should not have applied to fees that were not at risk.

The judgment should be reversed and the cause remanded with instructions to enter a judgment for $540,930.65, representing $503,035.65 for the lodestar fee; $26,550 for the attorneys' fee application; and $11,345 for the allowable costs and disbursements.

Dated: Melville, New York
July 19, 1991

Respectfully submitted,



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