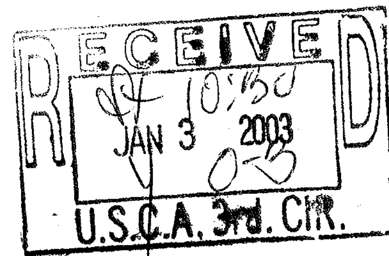


Case No. 01-3301

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDIK GOTLIEB, and STEPHEN BRENNER

Plaintiff-Appellants,

v.

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacity as Council Members of the Borough of Tenafly

Defendants-Appellees.

PLAINTIFFS-APPELLANTS TENAFLY ERUV ASSOCIATION, INC. AND STEFANIE DARDIK GOTLIEB'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEY'S FEES AND COSTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Case No. 00 CV 6051

Richard D. Shapiro
HELLRING LINDEMAN GOLDSTEIN & SIEGAL LLP
One Gateway Center
Newark, New Jersey 07102
Telephone: (973) 621-9020

Robert G. Sugarman
Harris J. Yale
Craig L. Lowenthal
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Attorneys for Plaintiffs-Appellants Tenafly Eruv Association, Inc. and Stefanie Dardik Gotlieb

Received and Filed
1-3-03
Marcia M. Waldron, Clerk

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS 3

THE INSTANT FEE REQUEST 5

ARGUMENT 6

POINT I 6

THE COURT SHOULD AWARD PLAINTIFFS-APPELLANTS THEIR REASONABLE ATTORNEYS' FEES AND COSTS BECAUSE PLAINTIFFS-APPELLANTS ARE THE PREVAILING PARTIES IN THIS ACTION. 6

POINT II 10

THE ATTORNEYS' FEES REQUESTED BY PLAINTIFFS-APPELLANTS ARE REASONABLE AND SHOULD BE FULLY COMPENSATED 10

A. The Time Expended By Plaintiffs-Appellants' Counsel On This Case Was Reasonably Expended 11

B. The Hourly Rates Requested By Plaintiffs-Appellants' Counsel Are Reasonable 15

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

American Civil Liberties Union of New Jersey v. City of Long Branch, 670 F. Supp. 1293 (D.N.J. 1987) 12

Blakey v. Continental Airlines, 2 F. Supp. 2d 598 (D.N.J. 1998) 15

Blum v. Stenson, 465 U.S. 886 (1984) 15

Buckhannon Board & Care Home, Inc., v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) 7, 10

City of Riverside v. Rivera, 477 U.S. 561 (1986) 14

Doe v. Terhune, 121 F. Supp. 2d 773 (D.N.J. 2000) 19

Graham v. Sauk Prairie Police Com'n, 915 F.2d 1085 (7th Cir. 1990) 14

Haley v. Pataki, 106 F.3d 478 (2d Cir. 1997) 7

Hanrahan v. Hampton, 446 U.S. 754 (1980) 10

Hensley v. Eckerhart, 461 U.S. 424 (1983) 6, 7, 9, 11

Hewitt v. Helms, 482 U.S. 755 (1987) 7

Holmes v. Millcreek Township School District, 205 F.3d 583 (3d Cir. 2000) 8

Horner v. Kentucky High Sch. Athletic Association, 296 F.3d 685 (6th Cir. 2000) 7

J.O. on behalf of C.O. and J.O. v. Orange Township Board of Education, 287 F.3d 267 (3d Cir. 2002) 7, 9

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 11

Lanni v. New Jersey, 259 F.3d 146 (3d Cir. 2001) 15

Loughner v. University of Pittsburgh, 260 F.3d 173 (3d Cir. 2001) 16

Maldonaldo v. Houstoun, 256 F.3d 181 (3d Cir. 2001) 11, 15, 16

Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244 (3d Cir. 1992) 8

Microsoft Corp. v. United Computer Resources of New Jersey, Inc., 216 F. Supp. 2d 383 (D.N.J. 2002) 19

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) 11

Planned Parenthood of Central New Jersey v. The Attorney General of the State of New Jersey, 297 F.3d 253 (3d Cir. 2002) 10, 14, 15

Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179 (3d Cir. 1995) 11, 15, 16

Tenafly Eruv Association, Inc., 155 F.Supp.2d 142 (D.N.J.), rev'd, 309 F.3d 144 (3d Cir. 2002) 4, 8

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 7, 10

Truesdall v. Philadelphia Housing Authority, 290 F.3d 159 (3d Cir. 2002) 6, 7

West Virginia University Hospitals, Inc., v. Casey, 898 F.2d 357 (3d Cir. 1990) 9

STATE CASES

In re Cendant Corp., 2002 WL. 31443781 (D.N.J. 2002) 19

Smith v. County Board No. 14, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (N.Y. Sup. 1985) 12

FEDERAL STATUTES

42 U.S.C. § § 1983, et seq .... *passim*

MISCELLANEOUS

5 U.S. Cong. & Admin. News, p. 5908, 5913 (1976) 15

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

PRELIMINARY STATEMENT

Pursuant to Third Circuit Local Rule 108.1, Plaintiffs-Appellants Tenafly Eruv Association, Inc. ("TEAI") and Stefanie Dardik Gotlieb (collectively "Plaintiffs-Appellants"), by their attorneys, Weil, Gotshal & Manges LLP and Hellring Lindeman Goldstein & Siegal LLP, respectfully submit this Memorandum of Law in support of their Motion for Attorney's Fees and Costs pursuant to 42 U.S.C. § 1988. Plaintiffs-Appellants are the prevailing party in this litigation, having successfully challenged the constitutional legitimacy of the Tenafly Borough Council's decision to remove lechis from telephone poles that constitute an eruv located in Tenafly. The District Court denied Plaintiffs-Appellants' request for a Preliminary Injunction preventing the removal of the eruv by order dated August 9, 2001. However, after extensive briefing and oral argument, the Third Circuit reversed the District Court's denial of injunctive relief and entered an order on October 24, 2002, directing the District Court to issue the preliminary injunction barring the Borough from removing the eruv. This Court's order has now become final, and the Defendants-Appellees are now restrained from removing the eruv.

Having received from the Third Circuit the injunctive relief they sought, Plaintiffs-Appellants are the prevailing parties in this matter and are entitled to their reasonable attorneys' fees and costs under 42 U.S.C. § 1988. As set forth in the accompanying affirmations of Robert G. Sugarman ("Sugarman Aff.") and Richard D. Shapiro ("Shapiro Aff.") these amounts are:

- Weil, Gotshal & Manges LLP: $317,345.40 ($284,875 fees; $32,470.40 costs)
- Hellring Lindeman Goldstein & Siegal LLP: $29,979.48 ($29,076.25 fees; $903.23 costs)

STATEMENT OF FACTS

On December 12, 2000, the Tenafly Borough Council unanimously voted to require plaintiff TEAI to dismantle an eruv located in the Borough. Under Jewish law, an eruv is an unbroken delineation of an area. The designation of an eruv enables observant Jews to carry or push objects from place to place within the area on the Sabbath and Yom Kippur. The eruv located in Tenafly was constructed by attaching lechis – thin black strips of hard plastic material that is identical to the material used by Verizon to cover ground wires – to utility poles in the Borough; these lechis, combined with the preexisting horizontal overhead utility lines, designated the eruv's boundary. TEAI had received permission from the Bergen County Executive to construct the eruv in Tenafly, and had received from Verizon both permission to attach, and assistance in attaching, the lechis to the poles. On December 12, 2000, the Tenafly Borough Council ordered the eruv removed.

On December 15, 2000, Plaintiffs-Appellants filed this action in district court, contending inter alia, that the actions of the Defendants-Appellees: (a) violated the First Amendment to the United States Constitution; and (b) violated 42 U.S.C. § § 1983 and 1985. On December 15, 2000, the District Court issued a Temporary Restraining Order ("TRO") enjoining removal of the eruv pending the preliminary injunction hearing. A factual hearing was held over the course of four days – April 30, 2001, May 5, 2001, May 8, 2001, and May 14, 2001. On August 10, 2001, the District Court denied Plaintiffs-Appellants' motion for a preliminary injunction. 155 F. Supp.2d 142 (D.N.J. 2001).

After the District Court denied a stay pending appeal, but issued a temporary stay to enable plaintiffs to seek a stay in this Court, Plaintiffs-Appellants filed a Notice of Appeal and a Motion for Stay or Injunction Pending Appeal. This Court granted Plaintiffs-Appellants' request for a stay or injunction pending appeal on September 19, 2001, and set a briefing

schedule.

Extensive briefing on the complex constitutional issues involved in this case ensued. In addition to the normal briefing, Defendants-Appellees moved to strike Appellants' briefs, necessitating a response by appellants. Also, immediately prior to oral argument, Plaintiffs-Appellants, at the request of the Court, filed a supplemental brief on additional legal issues which were not fully addressed in the initial briefs. Oral argument was heard by the Third Circuit on March 22, 2001. Defendants-Appellees then filed a post-argument letter brief addressing several issues which arose during the course of the oral argument, requiring a response from Plaintiffs-Appellants.

This Court reversed the District Court on October 24, 2002, entering an order "directing the [district] court to issue a preliminary injunction barring the Borough from removing the lechis." 309 F.3d 144, 178-9 (3d Cir. 2002). In making its decision, the Third Circuit exercised plenary review over the District Court's conclusions of law and its applications of the law to the facts. Id. at 150. It independently examined the facts in the record and drew its own references from them. Id. Concluding that the facts in the record clearly showed that the Borough "tacitly or expressly granted exemption from the ordinance's unyielding language for various secular and religious – though never Orthodox Jewish – purposes," the Third Circuit determined that the Borough Council selectively enforced the relevant Ordinance 691 when it ordered the removal of the eruv. Id. at 158. The Third Circuit held that such selective enforcement violated the Free Exercise Clause of the First Amendment to the United States Constitution and thus violated the civil rights of the Plaintiffs-Appellants. Id. at 158-59.

The Defendants-Appellees filed a Petition for Rehearing or Rehearing En Banc on November 6, 2002; the Third Circuit denied this petition on November 20, 2002.

THE INSTANT FEE REQUEST

On this motion, Plaintiffs-Appellants are now seeking a total of $347,324.88 for their reasonable costs and attorneys fees in this action at the appellate level. As set forth in the Sugarman Aff. and Shapiro Aff., the requested fees and costs are calculated as follows:

Attorneys' Fees:

Attorney	Total Hours	Hourly Rate	Total Fee Requested[1]
Robert G. Sugarman	256.50	$500.00	$128,250.00
Harris J. Yale	247.50	350.00	86,625.00
Craig L. Lowenthal	400.00	175.00	70,000.00
Richard D. Shapiro	103.25	281.61	29,076.25
Total fees:			$313,951.25

Weil, Gotshal & Manges Costs:

Expense	Total Cost Requested
Copying	$ 6,662.22
LEXIS/NEXIS/WESTLAW	11,940.53
Travel and Incidentals	624.04
Federal Express/U.S. Mail	973.88
Messengers and Couriers	147.45
Telephone/Fax	909.98
Transcripts/Printing	11,212.30
Total Costs:	$32,470.40

[1] Discounted as per discussion below.

Hellring Lindeman Goldstein & Siegal Costs:

Expense	Total Cost Requested
LEXIS/NEXIS/WESTLAW	37.13
Travel and Incidentals	231.00
Federal Express/U.S. Mail	81.18
Messengers and Couriers	184.75
Telephone/Fax	336.44
Lawyers' Service	32.73
Total Costs:	$903.23

Total Attorneys' Fees and Costs: $347,324.88

ARGUMENT

POINT I

THE COURT SHOULD AWARD PLAINTIFFS-APPELLANTS THEIR REASONABLE ATTORNEYS' FEES AND COSTS BECAUSE PLAINTIFFS-APPELLANTS ARE THE PREVAILING PARTIES IN THIS ACTION.

The Third Circuit having held that defendants violated plaintiffs' First Amendment rights, and awarded the very relief sought – an injunction preventing the Borough from enforcing their decision to remove the eruv – Plaintiffs-Appellants are undeniably the prevailing parties in this action and therefore entitled to recover all of their reasonable attorneys and costs under the provisions of 42 U.S.C. § 1988. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), provides that in an action or proceeding to enforce 42 U.S.C. § 1983, the prevailing party is entitled to recover attorney's fees as a cost of litigation. 42 U.S.C. § 1988(b); Truesdall v. Philadelphia Housing Auth., 290 F.3d 159, 163 (3d Cir. 2002). It is universally accepted that the prevailing party should be awarded such fees and costs pursuant to § 1988 absent special circumstances. Truesdall, 290 F.3d at 163; Hensley v. Eckerhart, 461 U.S.

424, 429 (1983).

Parties are considered prevailing parties for attorney's fees purposes if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley, 461 U.S. at 433. "To be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Truesdall, 290 F.3d at 163 (quoting Texas State Teachers Association v. Garland Independent School Dist., 489 U.S. 782, 792 (1989)). This resolution can be an enforceable judgment against the defendant from whom fees are sought or some other comparable relief that is enforceable by a court of law, such as an injunction, a settlement or a consent decree. Truesdall, 290 F.3d at 163-64; Horner v. Kentucky High Sch. Athletic Ass'n, 296 F.3d 685, 698 (6th Cir. 2000) (citing Hewitt v. Helms, 482 U.S. 755, 760-61 (1987)). The fact that there might be future proceedings does not make attorney's fees unavailable prior to the conclusion of the litigation; a party receiving interim relief is considered a prevailing party and entitled to an award for attorney's fees as long as the party prevailed on the merits of at least some of its claims. J.O. on behalf of C.O. and J.O. v. Orange Township Board of Education, 287 F.3d 267, 273 (3d Cir. 2002); Haley v. Pataki, 106 F.3d 478, 483 (2d Cir. 1997) (concluding that "[w]hen a party receives a stay or preliminary injunction but never obtains a final judgment, attorney's fees are proper if the court's action in granting the preliminary injunction is governed by its assessment of the merits."); Garland Independent School Dist., 489 U.S. at 791; Buckhannon Bd. & Care Home, Inc., v. West Virginia Dep't. of Health and Human Res., 532 U.S. 598, 604-05 (2001) (stating that a plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail").

The Third Circuit applies the following two part test to determine whether a

petitioner for fees is a 'prevailing party': 1) a determination of whether the plaintiff obtained relief on a significant claim in the litigation; and 2) whether there is a casual connection between the litigation and the relief obtained from the defendant. See, e.g. Holmes v. Millcreek Township School District, 205 F.3d 583, 593 (3d Cir. 2000); Metro. Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244, 250 (3d Cir. 1992). To meet the first prong of this test the plaintiff must show that the relief obtained caused a material alteration in his relationship with the defendant and that this alteration is not merely technical or de minimus. Holmes, 205 F.3d at 593. The Third Circuit's reversal of the District Court's decision and its instruction that a preliminary injunction restraining the Borough from removing the eruv be issued materially altered the parties' legal relationship and was a direct result of Plaintiffs-Appellants' lawsuit. Due to the Third Circuit's decision, the Borough is no longer able to remove the eruv from Tenafly.

Furthermore, the Third Circuit's decision was based entirely upon the merits of the case. Not only did the Third Circuit exercise plenary review over the District Court's conclusions of law and its application of the law to the facts, but it also conducted an independent examination of the factual record and drew its own inferences from that review. Tenafly Eruv Association, Inc., 309 F.3d at 157. On the basis of its own findings of undisputed facts, the Third Circuit concluded that the Borough's action constituted a violation of Plaintiffs-Appellants' free exercise rights under the First Amendment to the United States Constitution, and that an injunction was necessary to protect Plaintiffs-Appellants' constitutional rights. The preliminary injunction ordered was precisely the relief sought by Plaintiffs-Appellants. Thus, as a direct result of the Third Circuit's order, Plaintiffs-Appellants have prevailed on the merits of their free exercise claim, thus entitling them to attorneys' fees pursuant to § 1988.

A prevailing party may be compensated for fees expended on unsuccessful claims if all of the causes of action arose from a common core of facts or were based on related legal theories. Hensley, 103 U.S. at 435. "Where a lawsuit consists of related claims, a plaintiff should not have his attorneys' fees reduced simply because some related claims are unsuccessful." West Virginia University Hospitals, Inc., 898 F.2d at 361. Thus, the fact that Plaintiffs-Appellants did not prevail on their Free Speech and Fair Housing Act claims does not prevent them from being considered a prevailing party, and it also does not warrant reducing the amount of attorneys' fees that they are entitled to recover. See J.O. on behalf of C.O. and J.O., 287 F.3d at 271 ("parties are considered prevailing parties if 'they succeed on any significant issue in litigation which achieves *some* of the benefit the parties sought in bringing suit."); West Virginia University Hospitals, Inc., v. Casey, 898 F.2d 357 (3d Cir. 1990); Hensley, 103 U.S. at 435, 440. The court should focus on the significance of the overall relief obtained by the prevailing party when awarding attorney's fees. Hensley, 103 U.S. at 435. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." Id; West Virginia University Hospitals, Inc., 898 F.2d at 361 ("when the relief obtained is excellent, the prevailing party may recover fees for all hours reasonably expended on the litigation.").

Here, all three of Plaintiffs-Appellants claims arise out of the same set of facts. Although Plaintiffs-Appellants were successful on only one of the claims, they nevertheless achieved precisely the result they sought by filing suit – an order enjoining Defendants-Appellees from removing the eruv and violating Plaintiffs-Appellants' constitutional rights. According to the Supreme Court, "litigants in good faith may raise alternative grounds for a desired outcome, and the court's rejection of or failure to reach certain founds is not a sufficient reason for reducing a fee. The result is what matters." Hensley, 461 U.S. at 435. Having

accomplished such excellent results, Plaintiffs-Appellants are entitled to be fully compensated for their time and effort.

Furthermore, it is of no significance that Plaintiffs-Appellants prevailed on the merits of their claim only upon appeal. "Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees: a prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of litigation." Texas State Teachers Association, 489 U.S. at 791. A prevailing party may recover an interlocutory award of attorney's fees as long as he has prevailed on the merits of his claim in either the trial court or on appeal. Buckhannon Bd. & Care Home, Inc., v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 604 (2001); Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). In Texas State Teachers Association, the Supreme Court held that plaintiffs were the prevailing party, and thus entitled to attorney's fees, because on appeal the Fifth Circuit overturned the district court's decision and found that plaintiffs' free speech rights had been violated. 489 U.S. at 791-3. Similarly, Plaintiffs-Appellants are the prevailing party and entitled to attorney's fees because the Third Circuit reversed the District Court and determined that Defendants-Appellees' actions violated the free exercise rights of Plaintiffs-Appellants.

POINT II

THE ATTORNEYS' FEES REQUESTED BY PLAINTIFFS-APPELLANTS ARE REASONABLE AND SHOULD BE FULLY COMPENSATED

In determining the reasonableness of claimed attorney's fees, the Court must initially ascertain the lodestar amount. The lodestar is calculated by determining the number of hours reasonably expended by counsel during the course of the litigation and multiplying that number by the applicable reasonable hourly rate for the legal services. Planned Parenthood of

Central New Jersey v. The Attorney General of the State of New Jersey, 297 F.3d 253, 265 n.5 (3d Cir. 2002); Maldonaldo v. Houstoun, 256 F.3d 181, 184 (3d Cir. 2001). Once it has been established that the claimed hourly rates and the number of hours are reasonable, the resulting lodestar number is presumed to be the reasonable fee to which counsel is entitled. Planned Parenthood of Central New Jersey, 297 F.3d at 265, n.5; Maldonaldo, 256 F.3d at 184; Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986). However, the Court has the discretion to increase or decrease the fee for a variety of reasons; the most important reason to increase or decrease a fee is the "result(s) obtained" by the fee petitioner. Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995); Hensley, 461 U.S. at 433-4.[2]

A. The Time Expended By Plaintiffs-Appellants' Counsel On This Case Was Reasonably Expended

The total time for which compensation is requested for the appellate phase of this litigation is 1007.25 hours. The breakdown of this total per attorney is as follows: 256.5 hours for Mr. Sugarman, 247.5 hours for Mr. Yale, 400 for Mr. Lowenthal, and 103.25 hours for Mr. Shapiro.[3]

These hours are reasonable for Plaintiffs-Appellants attorneys' efforts in this matter. This was a very complex case, both factually and legally. Only two courts – both trial

[2] Some of the other reasons to adjust the fee are: (1) the experience, reputation, and ability of the attorneys; (2) the novelty and difficulty of the legal questions; (3) the customary fee for similar work; (4) time limitations imposed by the client or the circumstances; and (5) whether the fee is fixed or contingent. Public Interest Research Group of New Jersey, Inc., 51 F.3d at 1185, n.8; Hensley, 461 U.S. at 430, n. 3; Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). This Court has recognized that many of these factors are subsumed in the lodestar calculation. Public Interest Research Group of New Jersey, Inc., 51 F.3d at 1185, n.8; Hensley, 461 U.S. at 434, n.9.

[3] Notably, Plaintiffs-Appellants are not requesting compensation for the time expended in preparation this attorneys' fees application, even though such "fees on fees" are permitted by this Court. Planned Parenthood of Central New Jersey, 297. F.3d at 268.

courts – had ever decided cases concerning eruvs. See American Civil Liberties Union of New Jersey v. City of Long Branch, 670 F. Supp. 1293 (D.N.J. 1987); Smith v. County Bd. No. 14, 128 Misc. 2d 944, 491 NYS 2d 584 (N.Y. Sup. 1985). In both cases, the issue was whether the municipality which granted permission to establish an eruv violated the Establishment Clause. Neither of these cases nor any other court at any level in this country had ever addressed whether a municipality's decision and attempt to remove an eruv violated the Free Exercise or Free Speech Clauses of the First Amendment to the United States Constitution, or the Fair Housing Act. Id.

The appellate portion of this case was quite complex. After the District Court denied the application for a preliminary injunction, it was imperative that Plaintiffs-Appellants obtain a stay or injunction of the Court's decision pending appeal. Defendants-Appellees had made it clear that they intended to remove the eruv immediately, and the Jewish Holiday of Yom Kippur was little more than a month away. Plaintiffs-Appellants' immediate request for a stay or injunction pending appeal was denied by the District Court, although a limited stay was granted to permit Plaintiffs' an opportunity to file an application to this Court seeking a stay pending appeal.

In order to prepare such an important motion in an extremely short period of time, counsel commenced an expedited process of examining the district court's decision. Counsel reviewed the transcripts of both the preliminary injunction factual hearing and of the preliminary injunction oral argument, and analyzed the complex legal issues involved in the case and how they were addressed by the district court. The significance of this application was reflected in the fact that it engendered a response not only from Defendants-Appellees, but also from two amicus curiae. The Beckett Fund for Religious Freedom ("The Beckett Fund") filed a brief in

support of Plaintiffs-Appellants' motion, while the American Civil Liberties Union ("ACLU") filed a brief opposing the request for a stay. In addition, Plaintiffs-Appellants Chaim Book, Yosifa Book and Stephen Brenner chose to be represented by separate counsel, and they too filed a separate motion for stay. Plaintiffs-Appellants' counsel necessarily had to read, analyze and/or reply to the arguments contained in each of these briefs.

After this Court granted the request for a stay pending appeal, Plaintiffs-Appellants' counsel prepared both the principal Brief and the multi-volume Joint Appendix. Preparation of the Brief required a substantial effort; it required extensive research on several complex constitutional issues which had never before been considered by a court of appeals, and an exhaustive review of the factual record.

Plaintiffs-Appellants then had to respond to Defendants-Appellees' motion to strike the brief of Plaintiffs-Appellants Book, Book and Brenner, which Defendants-Appellees argued impermissibly raised new issues for the first time on appeal. Responding to this motion necessitated both research on concepts previously unrelated to this case, and coordinating TEAI's position and response with that of Plaintiffs-Appellants Book, Book, and Brenner. Plaintiffs-Appellants' efforts were successful, as this Court denied Defendants-Appellees' motion to strike.

Drafting the Reply Brief was similarly challenging, as Plaintiffs-Appellants had to respond not only to Defendants-Appellees' lengthy brief but also to the four amicus curiae briefs that had been filed in the interim. Each of the amicus curiae briefs raised new legal issues or expanded upon the legal arguments that had been central to the case up until this point.

Then, two weeks before oral argument, the panel requested supplemental briefing on two constitutional issues relating to free speech rights which had not been researched or

briefed during the course of the litigation. With only a week to respond, this task required both further research and an expedited drafting process.

Due to the complex constitutional issues involved, numerous hours were spent preparing for the oral argument. After the oral argument, Defendants-Appellants filed a post-argument letter brief addressing several different issues that arose during the course of the oral argument. Responding to this letter-brief required both a review of the case law and the factual record.

A large percentage of the time expended by Plaintiffs-Appellants' counsel during the appellate portion of this litigation is attributable to the consideration of, and the drafting of papers responsive to Defendants-Appellees' various motions and supplemental briefing. As a general proposition, a party must be compensated for meeting the vigorous defense of the opposing party. The Seventh Circuit has explained "a defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." Graham v. Sauk Prairie Police Com'n, 915 F.2d 1085, 1109 (7th Cir. 1990) (citing City of Riverside v. Rivera, 477 U.S. 561, 580, n. 11 (1986)).

In addition, Plaintiffs-Appellants' counsel has exercised significant "billing judgment" in requesting fees. As noted in the Sugarman Aff., Weil, Gotshal & Manges is not requesting compensation for the approximately 120 hours expended on this case by junior associates, over one-third of the time billed by Mr. Lowenthal (213.9 hours) and all 22 hours of paralegal and other staff members time. Sugarman Aff. ¶ 9.

Finally, even though compensation for hours reasonably expended in preparing the fee application is clearly recoverable under § 1988, see e.g. Planned Parenthood of Central New Jersey, 297 F.3d at 268, counsel does not seek reimbursement for such fees.

B. The Hourly Rates Requested By Plaintiffs-Appellants' Counsel Are Reasonable

For attorneys fees awarded under § 1988, the reasonable hourly rate is calculated according to the prevailing market rates in the relevant community. Planned Parenthood of Central New Jersey, 297 F.3d at 265, n.5; Maldonaldo, 256 F.3d at 184; Public Interest Research Group of New Jersey, Inc., 51 F.3d at 1185; Blum v. Stenson, 465 U.S. 886, 895 (1984). The prevailing market rate is determined by comparing the rates of the prevailing party's attorneys with the rates in the community for comparable services provided by lawyers of similar experience, skill, and reputation as the prevailing party's attorneys. Maldonado, 256 F.3d at 184. Furthermore, the current market rate is the rate at the time of the fee petition, and not the prevailing market rate at the time the services were performed. Lanni v. New Jersey, 259 F.3d 146, 149 (3d Cir. 2001). Thus, the current reasonable hourly rate should be uniformly applied to all legal services performed throughout the course of the litigation, instead of using the hourly rates in effect at the time when the services were performed. Lanni, 259 F.3d at 149; Blakey v. Continental Airlines, 2 F. Supp. 2d 598, 602 (D.N.J. 1998) ("to take into account delay in payment, the hourly rate should be based on current rates rather than the rates in effect when the services were performed.").

Moreover, the amount of fees awarded under § 1988 is governed by the same standards which prevail in other types of complex Federal litigation and should not be reduced simply because the rights involved are non-pecuniary in nature. Blum, 465 U.S. at 893 (quoting Senate Report No. 1011, 94th Cong., 2d Sess., 5 U.S. Cong. & Admin. News, p. 5908, 5913 (1976)). Thus, in assessing a reasonable hourly rate, the Court must determine what lawyers of comparable skill and experience handling other complex litigation charge their private clients, regardless of whether the prevailing party is represented by private or nonprofit counsel. Public

Interest Research Group of New Jersey, 51 F.3d at 1185 (citing Blum, 465 U.S. at 895). The usual billing rate charged by the attorney is relevant to ascertaining the reasonable hourly rate to be used in the lodestar calculation. Maldonaldo, 256 F.3d at 184; Public Interest Research Group of New Jersey, Inc., 51 F.3d at 185; Loughner v. University of Pittsburgh, 260 F.3d 173, 180 (3d Cir. 2001).

The entire state of New Jersey is the relevant community for this case; all of the individual plaintiffs-appellants and defendants-appellees live in Tenafly, the eruv in question is located in Tenafly, and the case was filed in the District of New Jersey. While this Court has not yet adopted a single, authoritative definition of what is the "relevant community," it has, in Public Interest Research Group of New Jersey, Inc., adopted and applied the recommendation of a Third Circuit Task Force that "the best rule [to use] is the 'forum rate' rule. Hence, an out-of-town lawyer would receive not the hourly rate prescribed by his district but rather the hourly rate prevailing in the forum in which the litigation is lodged." 51 F.3d at 1186. In Public Interest Research Group of New Jersey, Inc., the Court determined that, where the a case was originally filed in the District of New Jersey, the relevant community for the purposes of determining the prevailing market rate was the entire state of New Jersey. Id. The Court stated that because the case was filed in the District of New Jersey, and that District services, and is used by lawyers located throughout all of New Jersey, the entire state of New Jersey was the relevant community. Id. Applying this 'forum rate' rule to the facts of this case, the state of New Jersey is the relevant community.

Plaintiffs-Appellants' counsel are seeking hourly rates of $500.00 for Mr. Sugarman; $350.00 for Mr. Yale; $175.00 for Mr. Lowenthal; and $281.61 for Mr. Shapiro. These rates are entirely reasonable and represent the current market rate for New Jersey attorneys

of similar skill, reputation and experience. See Sugarman Aff. at 11. The hourly rate sought for Mr. Shapiro is presumptively reasonable since that is the usual hourly rate he charges his clients; Mr. Shapiro is an attorney who practices in the New Jersey. However, the reasonableness of the hourly rates currently sought for Messrs. Sugarman, Yale, and Lowenthal is evidenced by the fact that these hourly rates actually represent a reduced hourly rate from what these attorneys usually charge their clients to the prevailing market rate for New Jersey attorneys of similar skill, reputation and experience. Mr. Sugarman is a partner in, Mr. Yale is of counsel to, and Mr. Lowenthal is an associate with the law firm Weil Gotshal & Manges, LLP ("Weil Gotshal & Manges").

Robert Sugarman, lead counsel in this action, is a nationally recognized specialist in the litigation of intellectual property and First Amendment matters. He has been a partner at Weil Gotshal & Manges LLP since 1975. He has litigated significant cases in the libel, privacy, copyright, trademark, trade dress, unfair competition and false advertising areas. He graduated from Yale University in 1960, and graduated from Yale Law School in 1963. He is a Fellow of the American College of Trial Lawyers, founded and chaired the annual Practicing Law Institute Seminar on Litigating Copyright, Trademark and Unfair Competition Cases from 1982 to 1994 and chaired the Communications and Media Law Committee of the Association of the Bar of the City of New York between 1990 and 1992. The $500.00 rate requested is, therefore, appropriate.

Harris Yale has a diverse commercial litigation practice, concentrating primarily on representing corporations and individuals in investigatory, criminal and international matters. He graduated from Cornell University in 1977, and graduated from Hofstra University School of Law in 1984. He has been counsel to Weil Gotshal & Manges LLP since 1992. Mr. Yale is a member of the American Bar Association, Criminal Justice and Litigation Sections, and serves

on the Board of Directors of the Justice Resource Center. The $350.00 hourly rate requested is, therefore, appropriate.

Craig Lowenthal is a 2000 graduate from New York University School of Law, where he was a Special Assistant District Attorney in Manhattan, New York throughout his third year of law school. Since graduation, he has worked at Weil Gotshal & Manges LLP, where he is now a third year associate. The $175.00 hourly rate requested is, therefore, appropriate.

Richard Shapiro, a partner at the New Jersey law firm of Hellring Lindeman Goldstein & Siegal LLP since December, 1977, Mr. Shapiro has litigated significant cases in the criminal, commercial and unfair competition areas. He graduated from Clark University in 1966 and from the University of Tennessee College of Law in 1969. He is the immediate past president of the Association of the Federal Bar of the State of New Jersey and was a member of the Lawyer's Advisory Committee for the United States District Court for the District of New Jersey in 2001. He is Chairman fo the Israel Commission, United Jewish Committee of Metrowest, and a member of the New Jersey and American Bar Associations and the Association of the Federal Bar of the State of New Jersey. The $281.61 hourly rate requested is, therefore, appropriate.

Furthermore, the requested hourly rates are in accordance with recent articles and decisions discussing what the prevailing hourly rates are in New Jersey. In *The New Jersey Law Journal*'s December 23, 2002 article entitled "Firms Hike Rates, Weak Economy Notwithstanding," which provided the hourly billing rate for partners and associates for many of the state's largest law firms, the following prestigious New Jersey law firms reported their hourly billing rates for partners and associates: Lowenstein Sadler bills its partners at $285-525, and its associates at $140-295; Pitney, Hardin, Kipp & Szuch bills its partners at $280-450, and its

associates at $155-290; Gibbons, Del Deo, Dolan, Griffinger & Vecchione's bills its partners at $235-600 for partners, and its associates at $145-265; and, McCarter & English bills its partners at $250-495, and its associates at $140-285.

In Microsoft Corp. v. United Computer Resources of New Jersey, Inc., 216 F. Supp.2d 383 (D.N.J. 2002), the reasonableness of the rates of $350 per hour for the services of an attorney who was "of counsel" to the Cherry Hill, N.J. firm of Montgomery, McCracken, Walker & Rhoads, LLP, and of $150 per hour for junior associates at the firm was not even challenged, and the district court noted that these rates seem to be consistent with the prevailing market rate. Id. at 389 n.8. In In re Cendant Corp., 2002 WL 31443781 (D.N.J. 2002), the district court found that hourly rates ranging from $225-500 per hour were reasonable for the lead counsel in a shareholder derivative suit, where lead counsel was highly skilled and experienced in litigating such cases. Id. at *8, 12. Moreover, in Doe v. Terhune, 121 F. Supp.2d 773 (D.N.J. 2000), a § 1983 action brought by a parolee seeking to prevent the state parole board from informing his employer of his status as a parolee and the nature of his crime, the court approved as reasonable hourly rates of $285 per hour and $385 per hour for two established civil rights litigators, and also approved an hourly rate of $200 for a fifth year associate as reasonable. Id. at 782-3.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that, pursuant to 42 U.S.C. § 1988, the Court grant Plaintiffs-Appellants' motion for attorneys' fees and costs incurred during the appellate portion of this action in the amount of $347,324.88.

Dated: January 3, 2003

Respectfully submitted,

Robert G. Sugarman
Harris J. Yale
Craig L. Lowenthal
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel.: (212 310-8000
Fax: (212) 310-8007

and

Richard D. Shapiro
HELLRING LINDEMAN
GOLDSTEIN & SIEGAL LLP
One Gateway Center
Newark, NJ 07102
Tel.: (973 621-9020
Fax: (973) 621-7406

Attorneys for Plaintiffs-Appellants
Tenafly Eruv Association, Inc. and
Stefanie Dardik Gotlieb

CERTIFICATE OF SERVICE

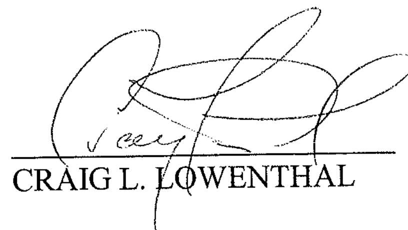
I hereby certify that I caused a true and correct copy of the foregoing Motion of Plaintiffs-Appellants, Tenafly Eruv Association, Inc. and Stefanie Dardik Gotlieb's Memorandum of Law In Support of Motion for Attorney's Fees and Costs to be served by Federal Express on January 2, 2003, on the following individuals:

Bruce S. Rosen, Esq.
McCusker, Anselmi, Rosen, Carvelli & Walsh
127 Main Street
Chatham, New Jersey 07928

Noah R. Feldman, Esq.
New York University Law School
40 Washington Square South
New York, New York 10012

Nathan Lewin, Esq.
Lewin & Lewin LLP
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036

Richard D. Shapiro, Esq.
Hellring Lindeman Goldstein & Siegal LLP
One Gateway Center
Newark, New Jersey 07102



CRAIG L. LOWENTHAL

NY1:\1155951\02_RXR02!.DOC\99995.1523