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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENAFLY ERUZ ASSOCIATION, INC. CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDIK GOTLIEB, and STEPHEN BRENNER

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Case No. 01-3301

District Court No.: 00-6051 (WGB)

Sat Below: Hon. William G. Bassler, U.S.D.J.

DEFENDANTS-APPELLEES' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-APPELLANTS' APPLICATION FOR ATTORNEYS' FEES AND COSTS

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Preliminary Statement

Although plaintiffs-appellants ("appellants") in this matter "prevailed" on only one of the three points for which they sought a preliminary injunction before this Court, they have filed a fee application that is staggering in its dimensions, duplicative in almost every respect, and excessive by any measure: almost $425,000 in fees and expenses for six attorneys in three firms working on one appeal.

Appellants' counsel have not only failed to justify their exorbitant rates, they have submitted hour upon hour of ambiguous and estimated time entries, added delegable and administrative tasks that should have been performed by non-lawyers, and seek reimbursement for significant unwarranted billings, such as reading newspaper accounts of the case, talking with reporters or attending Borough Council meetings. The issues before the Court were largely litigated before the District Court and again before a panel of this Court in a stay application at the outset, so by the time this Court heard this matter, counsel should have been well versed in most every issue. One would not know that by reading the fee applications under consideration. The excesses are self-evident, but we should point out a few egregious examples:

- Robert Sugarman, an experienced litigator and partner with Weil Gotshal & Manges, who is seeking $500 per hour and who has been involved with this matter from before it became a complaint, billed 19 hours, or $8,500 to simply **review** the district court opinion after its issuance and 63 hours or $31,500.00 to **prepare** for oral argument. Other counsel in the firm billed an additional 23 hours preparing for the oral argument.

- Local counsel Robert Shapiro of Hellring Lindeman Goldstein and Siegal, an experienced federal practitioner, seeks a rate of almost $300.00 per hour and spent numerous hours on ministerial tasks that could have been handled by a secretary or paralegal, such as ¾ of an hour to "fax" material or an hour to review "forms of appellate briefs," in total nine hours, or more than $2,500, for administrative tasks.
- Appellants seek to profit from their own error, billing more than 26 hours to respond to defendants' motion to strike their brief in November 2001, which was occasioned by their filing two briefs under only one notice of appeal in clear violation of Circuit Rules.
- Weil Gotshal spent more than 24 hours drafting and preparing a joint motion to request an extension of time to file briefs.
- Although it is not clear from the bills exactly how much time was spent on a bill of costs because other tasks were involved, it is more than likely Weil Gotshal billed well in excess of the $2,400 they sought in taxed costs in order to apply for those costs.

While none of this consolidated opposition is meant to reflect on the abilities or professionalism of appellants' counsel, this Court will see that the task of billing for this matter – perhaps because it was ostensibly *pro bono* – was never taken seriously by many of the attorneys involved and certainly not carefully reviewed before it was submitted. While the statutory scheme permits fee shifting in certain cases, precedent and public policy demands that counsel not receive a windfall. For the reasons stated within,

Appellee Borough of Tenafly[1] believes that these fee applications are so infirm as to require that this Court substantially reduce the fee applications accordingly or at very least refer them to the District Court for factfinding hearings pursuant to LAR 108.2. While counsel may be entitled to fees under the statute, that does not negate the fact that any fees would be paid from public coffers, requiring, at a minimum, that the applications be scrutinized with special care.

ARGUMENT

I.
THE FEE APPLICATIONS BY APPELLANTS' COUNSEL INCLUDE EXCESSIVE AND DUPLICATIVE TIME AT EXCESSIVE RATES AND SHOULD BE SHARPLY REDUCED

There is no dispute that a prevailing party in an action to enforce 42 U.S.C. §1983 may recover reasonable attorneys fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988(b). Section 1988(b) provides, in pertinent part:

> In any action or proceeding to enforce a provision of section [] ... 1983 ... of this title ..., the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fees as part of the costs.

To recover reasonable attorney's fees, a party must have been "prevailing" in the underlying litigation and then, "unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)(citations omitted). Although the Borough intends to file a Petition for Certiorari with the United States Supreme Court

[1] Since the preliminary injunction is to be entered against Appellants Borough of Tenafly, any judgment for fees should be directed to the Borough, rather than individual defendants. There has been no finding of liability on the part of any individual defendant in this matter.

and believes consideration of this motion is premature, it does not dispute for the purposes of this application that a plaintiff who has not obtained final relief on the merits may nonetheless "prevail" for the purposes of Section 1988 by establishing a "clear casual relationship between the litigation brought and the practical outcome realized." Robinson v. Ariyosji, 933 F. 2d 781, 783-784 (9th Cir. 1991). Further, the Borough does not dispute, for the purposes of this application, that in reversing the District Court, this Court "altered the legal relationship of the parties," by preventing the Borough from removing the lechis that constitute the eruv. Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792-93 (1989).

However, while Congress' intent behind enacting Section 1988 was "to attract competent counsel," Congress also required that the award be "reasonable" so as to not produce "windfalls to attorneys." Blum v. Stenson, 465 U.S. 886, 897 (1984). The reasonableness of the fee must be determined and appropriately adjusted according to the facts of each case. Hensley, 461 U.S. at 429. In other words, what is reasonable in one case may be considered excessive in another or minimal in others.

Once a party has "prevailed" in the underlying litigation, and thereby satisfied the statutory threshold, the Court considering the fee application must determine the "lodestar." This figure is ascertained by taking "the number of hours reasonably expended on the litigation and multiplying them by a reasonable hourly rate." Id. at 433. The Court may then consider a number of other factors to adjust the fee upward or downward such as the quality of the work performed as evidenced by the work observed, the complexity of the issues involved and the results obtained. Id. at 437.

The instant fee applications are made by two separate groups of counsel: 1) Three attorneys from Weil Gotshal and Manges, LLP and one attorney from Hellring, Lindemann, Goldstein and Siegal, LLP (collectively, for purposes of this brief, "Weil Gotshal") counsel for appellants Tenafly Eruv Association, Inc. and Stefanie Dardik Gotlieb; and 2) Lewin & Lewin, LLP (hereinafter "Lewin & Lewin") attorneys for appellants Chaim Book, Yosifa Book and Stephen Brenner. Weil Gotshal alleges to have spent a total of 1007.25 hours on the appellate work amounting to fees of $313,951.23, plus costs in the amount of $33.373.62, for a grand total of $347,324.88. Lewin & Lewin seeks $74,924.50 in attorneys' fees for 149.6 hours expended. The fees requested by both counsels are exorbitant and unreasonable. As such, this Court should reduce the fee applications accordingly.

A. "Prevailing" Party

A party is considered 'prevailing' 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. As noted above, Appellees concede that at this juncture, appellants meet this statutory threshold and are the "prevailing" party for §1988 purposes.

B. The "Lodestar"

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable

hourly rate." Id at 433; see also Hughes v. Lipscher, 852 F. Supp. 293, 308 (D.N.J. 1994). This method is commonly referred to as the "lodestar" approach.

The party seeking attorney's fees has the burden of proffering evidence in support of the number of hours worked and the hourly rates claimed. Hughes, 852 F. Supp. at 307 (citing Hensley, 461 U.S. at 433). Importantly, the Court considering the fee application has a "duty to independently review the billing entries and exclude hours not reasonably expended." Blakely v. Continental Airlines, 2 F.Supp. 598, 604 (D.N.J. 1998). Courts must not "passively accept" the submissions of counsel, ARC v. Voorhees, 986 F. Supp. 261, 268 (D.N.J. 1997), and, following, where the documentation of the hours expended is insufficient or inadequate to support the proposed figures, a court must reduce the award accordingly. Hensley, 461 U.S. at 433; Rode v. Dellarciprete, 892 F.2d 1177(3d Cir. 1990). The lodestar is intended to be more than a "rough guess" of the attorney's fees to be awarded; the lodestar should be the fee to which counsel is *entitled.* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564 (1986).

Weil Gotshal alleges a lodestar amount of $313,951.25 based on the following figures:

Attorney	Total Hours	Hourly Rates	Total Fee Requested
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
Totals:	1007.25		$313,951.25

Weil Gotshal claims to have discounted the hours expended by Mr. Lowenthal (as well as hours expended by junior associates and staff), but does not identify in its application which hours were discounted. The result is a moving target. While the Borough is able to pinpoint significant parts of Mr. Lowenthal's time that should be discounted or eliminated, it cannot know, nor can the Court, which entries have already been eliminated. In addition, Weil Gotshal seeks costs in the amount of $33,373.63. The attorneys fees plus costs sought by Weil Gotshal totals $347,324.88.

Lewin & Lewin seek a lodestar amount of $74,924.50 based on the following figures:

Attorney	Total Hours	Hourly Rates	Total Fee Requested
Nathan Lewin	118.3	$550	$65,065.00
Alyza D. Lewin	31.30	$315	$9,859.50
Totals:	149.60		$74,924.50

Lewin & Lewin does not claim to have discounted any hours and does not seek costs in addition to attorneys fees.

1. Reasonable Hours

The first consideration for a Court in determining the proper fee is to determine the hours reasonably expended by counsel in its participation in the litigation for which it now seeks attorneys' fees. The Court should exclude from its consideration hours not "reasonably expended." Hensley, 461 U.S. at 434. Hours not reasonably expended are those "that are excessive, redundant or otherwise unnecessary" and"[c]ounsel for the

prevailing party should make a good faith effort to exclude [these], just as a lawyer in private practice is obligated to exclude such hours from his fee submission." Id.

Both Weil Gotshal and Lewin & Lewin seek fees for hours expended in obtaining a stay of the District Court's denial of appellants' request for an injunction. Some of this time was spent on obtaining a stay from the District Court, for which the Borough did not take a position. The District Court then issued a stay pending a further application to this Court. Weil, Gotshal expended 168 hours and Lewin & Lewin expended 33.8 hours in obtaining these stays. It is difficult to determine what time was spent litigating before the District Court and what time except that on August 20, 2001, Messrs Sugarman, Yale and Rosenthal all attended the hearing for a stay in the district court. Clearly all time through August 20, 2001 was focused on the district court and should be discounted. Even if it were not discounted, surely only one attorney should be compensated for making that argument. The hours spent in pursuit of the stay in this Court were excessive; even if they were not, the work expended on the stay application to this Court was in effect a duplication of many of the arguments made in appellants' principal briefs. Therefore much of the time spent on the principal briefs should be discounted accordingly.

The hours submitted by Weil Gotshal are rampant with time entries that reflect time not "reasonably expended," but, to the contrary, are excessive, redundant and/or otherwise unnecessary. Examples of excessiveness, redundancy and/or unnecessary entries are numerous:

- 9.3 hours expended by Mr. Lowenthal drafting "correspondence" with the District Court and Third Circuit on August 30 and 31, 2001;
- 29.6 hours expended by Mr. Lowenthal preparing appearance forms, corporate disclosure statement, a civil information statement, a summary of the case and an application for admission to Third Circuit for himself,

most of which is administrative work that could have been drafted by paralegals and support staff. See Halderman v. Penhurst State School and Hospital; 49 F. 3d 939, 942 (3d Cir 1995) (cautioning against granting attorneys fees at a legal services rate "when a lawyer spends time on tasks that are easily delegable to non-professional assistance);

- At least 9 hours expended by Mr. Shapiro reflect time entries for such administrative work as correspondences regarding "appearance form," reviewing said correspondences, reviewing adjournment letters, reviewing, faxing and forwarding a Third Circuit Order regarding "dates of merit disposition," and reviewing the transcript for the argument that he attended and one1 hour expended reviewing "form of appellate briefs" on October 2, 2001.

- 327.7 hours expended by Messrs Sugarman, Yale, Rosenthal and Shapiro in drafting, revising, re-revising, and finalizing the appellate brief and accompanying appendix; See Maldonado v. Houston 256 F 3d 181 (3d Cir 2001) (reducing claim for 276.5 hours by 120 hours for drafting appeal brief where the same attorney had represented appellant at the District Court, was familiar with facts and legal reasoning and when District Court had discussed legal issues on appeal in well-written, thorough opinion.)

- In one day, on October 21, 2001, Mr. Lowenthal claims to have expended 22.3 hours "drafting FHA [Fair Housing Act] portion of appellate brief;"

- Mr. Sugarman alone spent approximately 19 hours reviewing the District Court's decision;

- 173.4 hours expended by Messrs. Sugarman, Yale and Rosenthal in drafting the reply appellate brief. This number excludes the amount of time billed by associates for researching the issues in the reply brief;

- 86 hours billed by Messrs. Sugarman, Yale, Rosenthal and Shapiro (63 hours for Mr. Sugarman alone) in preparation for the March 21, 2002 oral argument. See Maldonado v. Houston supra., (reducing 167.35 hours straight for oral argument preparation to 24 hours because cause had already been tried, briefed, and argued in District Court.)

- 29.5 hours expended by Messrs. Sugarman, Yale, Rosenthal and Shapiro for attendance at the oral argument. See Planned Parenthood of Central New Jersey v. Attorney General of State of NJ, 297 F.3d 253, 272 (3d Cir. 2002)(quoting Halderman v. Pennhurst State Sch. & Hosp., 49 F.3d 939, 943 (3d Cir. 1995)("'[T]he attendance of additional counsel representing the same interests as the lawyers actually conducting' the litigation is 'wasteful and should not be included in a request for counsel fees....'").

- Approximately 140.6 hours were expended on telephone conference calls and meetings. See Maldonado, supra (of 120 hours requested, Court granted 40.) In fact, almost one half of Mr. Shapiro's time was spent on telephone conferences. Further, although some of Mr. Shapiro's time entries reflect telephone conferences with the other Weil Gotshal attorneys, none of the Weil Gotshal time entries reflect such a conference.

- At least three entries for an undetermined number of hours in November 2001 and January 2002 regarding "flags," presumably flags placed on Borough utility poles following the September 11, 2001 attack on the World Trade Center, an issue never brought before this Court.

- Messrs. Sugarman and Lowenthal billed for time spent in Tenafly observing the Borough Council and personally lobbying the Council to end the litigation, and they billed as well for settlement discussions with the Borough, which as of this point have been unsuccessful.

- There are excessive consultations with purportedly objective amici, which indicates a coordination and review of the amicus briefs before they were submitted to the Court, and for which Weil Gotshal should not be paid.

Compared to the Weil Gotshal application, the time billed by Lewin & Lewin is a model of restraint. Yet even the Lewin application contains questionable entries, such as more than three hours of teleconferences with appellant Chaim Book, an hour expended reviewing the motion to strike, which was brought because Mr. Lewin failed to file a notice of appeal, and three hours for drafting a reply to the Borough's post-argument brief, which was never accepted by this Court.

Although a fee application need not contain "the exact number of minutes spent nor the precise activity to which each hour is devoted, nor the specific attainments of each attorney," it must contain "some fairly definitive information as to the hours devoted to various general activities." Rode, 892 F.2d at 1190 (3d Cir. 1990); see also Hensley, 461 U.S. at 437. Without detailed descriptions, the Court cannot ascertain the quality of the work performed and should exclude the time as unreasonable.

The fee applications by both Weil Gotshal and Lewin & Lewin contain very ambiguous and unspecific time entries. For example, much of the time billed by Yale reflected his "attention" to a matter, without more explicit explanation. Yale expended 172.1 hours with time descriptions as cryptic as "Attn to brief," "Attn to reply," and "Attn to papers." This Court cannot accurately assess whether the time spent on "Attn to Papers" was reasonable without knowing precisely what "Attn to papers" is intended to mean. See generally Washington v. Philadelphia Cty. Ct. of Common Pleas, 89 F. 3d 1031,1037 (3d Cir 1996) (stating that a fee petition must be specific enough for a court "to determine if the hours claimed are unreasonable for the work performed"); see also Carter v. Sanders, 1992 WL 33844 (D.N.J. 1992) (when determining the fee request, the Court discounted time entries with vague descriptions because it was unable to determine if the hours claimed were reasonable for work performed). The Court must exclude these hours that have been inadequately documented. Hensley, 401 US at 433.

2. Reasonable Hourly Rate

For the next step in determining whether fees are "reasonable," the Court must multiply the reasonable hours by a reasonable hourly rate. The reasonable hourly rate is calculated "according to the prevailing market rate in the community." Smith v. Philadelphia Housing Auth., 107 F.3d 223, 225 (3d. Cir. 1997). There is no dispute the relevant community is New Jersey as a whole (Tenafly Eruv Association Br. at 16). PIRG v. Windall, 51 F.3d 1179, 1187-88 (3d Cir. 1995)

Fee applicants must satisfy their burden of proof as to the prevailing market rate like any other litigant, producing "satisfactory evidence – in addition to [their] own affidavits – that the requested rates are in line with those prevailing in the community for

lawyers of reasonably comparable skill, experience and reputation. Blum, 465 U.S. at 895 n.11. In other words, prevailing attorneys must justify the rates they seek. Id. (emphasis added.) Then, once the applicant has produced such evidence, the opponent may dispute it with its own evidence. Smith, 107 F.3d at 225. If the rates are thus disputed, "the Court must conduct a hearing to determine the reasonable market rates." Id.

The hourly rates requested by counsel are excessive and must be significantly reduced. For the Weil Gothsal attorneys, fees were requested as follows:

- Robert G. Sugarman: seeks an hourly rate of **$500**; partner at Weil Gothsal since 1975; lead counsel on this matter; graduated from Yale Law School in 1963; specializes in libel, privacy, copyright, trademark, trade dress, unfair competition and false advertising. Although Mr. Sugarman claims that his fee is in accord with fees charged by senior partners at large New Jersey firms, there cannot be more than a handful of partners charging such exorbitant rates in New Jersey.

- Harris Yale: seeks an hourly rate of **$350**; counsel to Weil Gotshal since 1992; graduated from Hofstra University School of Law in 1984; specializes in diverse commercial litigation practice. Yale bills out more than senior partners at most New Jersey firms and was "second chair" throughout the entire litigation and never argued before this Court. Virtually his entire time entry duplicates the work of either Mr. Sugarman or Mr. Lowenthal, and the $350 per hour rate, on top of Mr. Sugarman's rate is excessive by any standard in New Jersey. One of the reason large corporate clients hire New Jersey counsel is to obtain lean representation, far from the combined $1,025 per hour rate charged by the New York City-based Weil Gotshal attorneys.

- Craig Lowenthal: seeks an hourly rate of **$175**; associate at Weil Gotshal since 2000; graduated from New York University Law School.

- Richard D. Shapiro: seeks an hourly rate of **$281.61**; partner at Hellring, Lindeman, Goldstein & Siegal, LLP.

Lewin & Lewin requests the following hourly rates in their attorneys' fee application:

- Nathan Lewin: seeks an hourly rate of **$550**; graduated from Harvard Law School in 1980; clerked for Supreme Court Justices; Constitutional Law Professor at prestigious law schools. While this rate may be common in Washington, D.C. it is almost unheard of in New Jersey. With all due respect to Mr. Lewin, it should be reduced.

- Alyza D. Lewin: seeks and hourly rate of **$315**; graduated from New York University Law School in 1992.

Fee applicants bear the burden of producing "satisfactory evidence" that the rate requested is akin to the prevailing rate in that community. Blum, 465 U.S. at 896 n.11. Satisfactory evidence includes "evidence other than the attorney's own affidavits." Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583, 594 (3d Cir. 2000). The fees sought by both counsels are unsupported by any documentation or evidence, other than affidavits and a reference to an anecdotal article from a legal periodical. The handful of cases cited by Weil Gotshal belies the point that $550, $500 or $350 per hour is unusual for New Jersey attorneys. Counsel should have submitted surveys or studies or even prior counsel fee awards to support their requests, and the Borough should have an opportunity to dispute those figures. There is significant case law in the district reflecting sharp cuts in New York and even New Jersey rates. E.g., Apple Corps Ltd. v. Int'l Collectors Soc'y, 25 F. Supp. 2d 480, 494-97 (D.N.J. 1998); Blakey, 2 F. Supp. 2d at 602-03. As such, without evidence produced demonstrating the reasonableness of their requested rates, this Court should adjust the hourly rates downward or send the matter back to the District Court for factfinding.

C. Other Factors a.k.a. Adjustment of Lodestar

After the 'lodestar' has been ascertained, the Court may, in its discretion, adjust the fee upward or downward based on certain case-specific factors. Hensley U.S. at 434. However, it must be noted that there is a strong presumption that the lodestar represents

the reasonable fee for purposes of the fee award, Blum, 465 U.S. at 897, and, as such, "to date, the Supreme Court has restricted the court's discretion to adjust the lodestar upward," except in the most unique circumstances. Rode, 892 F.2d at 1184.

Some factors a court may consider in determining whether to adjust the lodestar are the quality of the work performed as evidenced by the work observed, the complexity of the issues involved and the results obtained. Hensley, 461 U.S. at 434. The consideration of the "results obtained" is particularly crucial where a party is deemed 'prevailing' even though he succeeded on only some questions of his claims for relief. Id. As such, the lodestar should be reduced for "time spent [on] litigati[ng] wholly or partially unsuccessful claims that are related to the litigation of the successful claims." Rode at 1183. "Work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved'" and the lodestar should be adjusted downward to reflect that. Hensley at 434-35 (citation omitted).

On appeal, both counsels each submitted a brief. Each brief contained distinct arguments as the suggested bases for the preliminary injunction. However, this Court did not adopt more than one of the theories for relief. Therefore, these rejected theories and the work performed on them, must be considered, and the lodestar must be adjusted downward to reflect the time spent on these unsuccessful claims.

For example, the Court of Appeals based its decision to reverse the District Court on the Free Exercise Clause of the First Amendment. The Court took pains to deny relief based on either the Free Speech Clause of the First Amendment or the Fair Housing Act, and refused to consider state claims that were never properly raised below.

Appellants Chaim Book, Yosifa Book and Stephen Brenner, represented by Lewin & Lewin raised the following five issues on appeal:

I. Whether the Borough violated the Free Exercise Clause by prohibiting plastic strips that have religious significance when identical plastic strips that serve non-religious purposes are permitted and even encouraged;

II. Whether removing the plastic strips that are symbols of the eruv from utility poles that have frequently been used for non-religious expression is unconstitutional discrimination against religious speech under the Free Speech clause;

III. Whether the Tenafly Council's acknowledgement of religion as a factor in denying application to affix plastic strips to utility poles invalidates the council's decision under the religious clauses;

IV. Whether the Establishment Clause permits a municipality to authorize private maintenance of an eruv that will enable its orthodox Jewish residents to engage in religious observance; and

V. Whether Tenafly may stifle symbolic religious speech in order to "avoid the appearance of entanglement" or to "take a church-state issue off the table."

Of Lewin & Lewin's 39 page principal brief, 8 pages were directed to the issue that made the appellants the "prevailing" party for the purposes of the instant fee application: whether their First Amendment rights, via the Free Exercise Clause, were violated by the Borough actions. Another 12 pages of their principal brief involved the jurisdictional statement, the questions presented, the statement of the case, the statement of the facts, the statement of related cases and the standard of review, required as per the court rules. Therefore, if the space accorded these theories is in any way related to the time spent on them in preparation of the brief, one can conservatively estimate that about half of the brief dealt with the issue upon which appellants ultimately "prevailed." The remaining theories of recovery as set forth in the Lewin brief were either not adopted or dismissed

by this Court. Accordingly, Lewin & Lewin should not be allowed to recover compensation for hours expended on the unsuccessful issues raised on appeal.

Similarly, two of the three substantive arguments put forth by Weil Gotshal were rejected or not even considered by this court. The issues presented by Weil Gothsal on appeal were as follows:

I. THE DISTRICT COURT ERRED IN RULING THAT DEFENDANTS' ACTION DID NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHTS.

A. Defendants' Action Violates Plaintiffs' First Amendment Rights Because it Intentionally Discriminated Against Plaintiffs' Religious Exercise

B. Defendants' Action Violates The First Amendment Because it Burdens Religious Exercise in a Non-Neutral and Specific Manner and it Does not Serve a Compelling Interest

1. Defendants' Enforcement of Ordinance 691 Targeted Plaintiffs' Religious Activity and the Ordinance was Not, Therefore, Generally Applicable

2. Defendants' Action had an Impermissible Object and was not, Therefore, Neutral

3. Defendants' action is not Justified by a Compelling Interest

4. Defendants' Refusal to Accommodate the Free Exercise of Religion Here is Contrary to the Defendants' Accommodations of other Religions and Therefore Violates New Jersey Law Requiring a Municipality to Exercise its Power Reasonably and not Arbitrarily

C. Defendants' Action Violates the First Amendment Because it is Impermissible Viewpoint Discrimination

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT PLAINTIFFS DID NOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FAIR HOUSING CLAIM

A. The District Court Erred as a Matter of Law in Holding that Plaintiffs Did not Have Standing to Bring a Claim under Section 3604(a) of the Fair Housing Act

B. The District Court Erred as a Matter if Law in Determining that Defendants' Refusal to Allow the Eruv be Maintained in Tenafly did not Constitute a Discriminatory Housing Practice under 3604(a)'s "Otherwise Make Unavailable or Deny" Language

The entirety of Point II was rejected by this Court, as was Point I C. It should be noted that approximately one-half of the hours expended by Mr. Lowenthal in drafting the appellate brief were spent on drafting the FHA portion, including the 22.3 hours in one day, October 21, 2001. Although the Free Speech issue in both briefs comes from the same Constitutional Amendment, both the cases and analysis are distinctly independent and should not be considered as integral to one another. The Fair Housing Act is even more removed. The Court should not hesitate in striking any time spent on Point 1. B. 4 (New Jersey state law) because as experienced counsel, they should have known that argument was improper, having not been raised below. Where plaintiff has only limited success, a downward adjustment to the lodestar must be made. Hensley, 461 U.S. at 435. Even where plaintiffs' claims were "interrelated, non-frivolous and made in good faith," that does not create a statutory basis for a fee award. Id. This principle is particularly important in civil rights litigation, which often consumes many hours of attorneys time and in which the number and range of challenges – and consequently the range of success – are often vast. Id. This Court should therefore exercise its discretion in accordance with that principle and make an "equitable judgment" of the extent to which the lodestar should be reduced. Id. at 437, resulting in application of a negative multiplier against the ascertained lodestar. See Bell v. United Princeton Properties, 884 F.2d 713 (3d Cir. 1989).

Further, the lodestar must be adjusted downward for the repetitive nature of the appeal process. Weil Gothsal, counsel for all plaintiffs-appellants at the District Court level, was fully familiar with the facts of the case and the legal issues presented when the appeal was being addressed. The lodestar awarded to Weil Gothsal, if any, should, therefore, be reduced because their brief on appeal simply rehashed many issues they already briefed and addressed at the District Court level. In addition, many of the issues on appeal were not novel. The Free Speech and FHA arguments were straightforward. There is substantial case law that addresses these issues. At bottom, there is no justification for the enormous fee application in this case.

II.

THE COSTS AND EXPENSES SUBMITTED BY OF WEIL GOTSHAL ARE EXCESSIVE AND SHOULD BE REDUCED

As part of its "reasonable attorneys fees" pursuant to §1988, the fee applicant may recover costs and expenses for reproduction, telephone, travel and postage as long as the request is reasonable, Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995), and the fee applicant documents that such fees are line with community practice. Blum, 465 U.S. at 897 n. 11. "With respect to expenses the '[c]ourt looks to whether the expenses are reasonable, necessary to the prosecution of the litigation, and adequately documented.'" Coalition to Save Our Children v. State Bd. of Educ., 901 F.Supp. 824, 833 (D.Del. 1995)(quoting Steiner v. Hercules, Inc., 835 F.Supp. 771, 792 (D.Del. 1993)). Weil Gotshal seeks $33.373.62 in costs along with their request for attorney's fees. Weil Gotshal has not produced any evidence whatsoever documenting that the fees

are in line with community practice; the costs requested are outrageous and should not be granted.

Expenses for copying, telephone, travel, postage and word processing are only compensable "when it is the custom of attorneys in the local community to bill their clients separately for them." Abrams, 50 F.3d at 1225. The fee applicant must provide documentation demonstrating that said fees are customarily billed in the local community or otherwise they are not entitled to recover such costs. West Virginia University Hospitals, Inc. v. Casey, 898 F.2d 357, 367 (3d. Cir. 1990). Weil Gotshal has submitted no documentation in support of their request for costs nor have they even addressed the matter in their supporting affidavits. Based on this fact alone, the costs must be excluded. Id.

Furthermore, the expenses sought are outrageously extreme. Weil Gotshal seeks the following expenses:

- Approximately $5,700 in copying costs;
- Approximately $730.74 for travel expenditures;
- $75.50 for meals;
- Approximately $450 for telephone charges;
- An exorbitant $12,420 for computerized research fees, including Westlaw and Lexis/ Nexis, for which counsel likely has a flat fee, (and, according to the time records, was used almost as much to locate news articles as it was to do legal research).
- More than $1,200 in Federal Express and postage charges;
- $178 for a courier service between Weil Gotshal's office and Chaim Book; and
- $905 for "document processing" which includes proofreading, revisions, word processing, etc.

- $10,145.79 for printing and binding thirty copies of the appellate brief on December 20, 2001. First, any cost of printing would be part of the taxed costs already awarded. Second, as with all of the duplicating costs, there is no way to ascertain whether these materials were distributed to Weil Gotshal associates, the Eruv Association or passersby. The Borough should not bear the cost of supplying an unknown quantity of copying of unknown materials.

"A court is free to deny a petition for costs either when the court finds no documentation, or said documentation is insufficient." Coalition to Save Our Children, 901 F.Supp. at 833. Weil Gotshal has produced no documentation or descriptions explaining exactly why these charges were made. Without such descriptions, the court cannot accurately determine the proper costs to be awarded.

CONCLUSION

For the foregoing reasons, appellants' fee application should be reduced drastically, or referred to the District Court for further proceedings pursuant to LAR 108.2.

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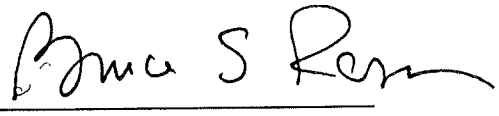
By: 
BRUCE S. ROSEN

February 20, 2003

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the Defendant-Appellees' Consolidated Opposition to Plaintiff-Appellants' Motion for Attorneys Fees and Expenses was served on each counsel of record as listed below via facsimile and Federal Express and that an original and four copies of this motion have been dispatched via hand delivery to the Clerk of the United States Court of Appeals for the Third Circuit.

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