IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2010

No. 825

JOY FRIOLO
Appellant,

v.

DOUGLAS FRANKEL, *et al.*,
Appellees.

On Appeal from the Circuit Court for Montgomery County

**BRIEF OF PUBLIC JUSTICE CENTER,
D.C. EMPLOYMENT JUSTICE CENTER,
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION,
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS,
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, AND
NATIONAL FEDERATION OF THE BLIND OF MARYLAND
AS *AMICI CURIAE***

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SUMMARY OF ARGUMENT

Workers in Maryland and throughout the country are denied wages to which they are legally entitled at alarming rates. Although Maryland's Wage and Hour and Wage Payment and Collection Laws provide remedies for victims of wage theft, the effectiveness of these laws depends on how well they are enforced. Unfortunately, governmental enforcement of wage and hour laws on both the state and federal level has ranged from weak to non-existent in recent years. Thus employees must turn to private attorneys to vindicate their rights to receive fair wages for their work. Yet private attorneys only are able to take on these cases if they can rely on being compensated reasonably for meritorious claims, exactly as contemplated by the General Assembly in passing these remedial statutes. Thus to ensure workers' ability to enforce Maryland's wage laws, courts must reasonably remunerate attorneys for successful claims through proper application of the lodestar method.

Assertions that the lodestar method is too complex and burdensome are simply wrong and do not constitute a valid excuse for a court's refusal to follow the law on fee shifting. Despite the lower court's contentions to the contrary, the lodestar method of calculating attorneys' fees is straightforward and does not overly burden trial court judges. Judges may start by multiplying a lawyer's reasonable hourly rate by the number of hours reasonably devoted to successful claims. There are adjustments that judges may choose to make thereafter, but none are particularly complicated and most are not required. Furthermore, once the prevailing party presents an adequately supported fee petition to the court, the burden shifts to the opposing party to object to any requests it

deems unreasonable. The judge need not, and indeed must not, look beyond the opposition's specific objections, in exercising his or her discretion to award fees. Thus when properly applied, the lodestar method—used by courts for decades to support private enforcement of civil rights laws,[1] as well as wage laws—is straightforward and does not unduly burden trial court judges.

INTEREST OF *AMICI*

The Public Justice Center (PJC), a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to promoting the rights of low-wage workers. Towards that end, the PJC has represented thousands of employees seeking to recover unpaid wages from their employers through collective and/or class actions under state wage and hour laws and the Fair Labor Standards Act (FLSA). *See In re Tyson Foods, Inc., Fair Labor Standards Act Litigation,* MDL Docket No. 1854 (M.D. Ga.) (pending); *Fox v. Tyson Foods, Inc.*, No. 4:99-CV-1612-VEH, 2006 WL 6012784 (N.D. Ala., Nov. 15, 2006); *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448, 144 Lab. Cas. ¶ 34,364 (D. Del., Aug. 16, 2001); *Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000). The PJC has also filed *amici curiae* briefs in this case and others

[1] In recognition of the strong need for private enforcement of civil rights laws, all federal civil rights statutes provide for the award of attorneys' fees to the prevailing party. *See* Henry Cohen, Congressional Research Service, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 25-39 (2008) (listing all statutes), *available at* http://www.fas.org/sgp/crs/misc/94-970.pdf. Although this case raises lodestar application in the wage context, the same concepts apply both in wage and civil rights cases. Thus the import of a decision in this case extends to civil rights cases, and could affect plaintiffs' ability to enforce the full array of civil rights laws, just as it does wage laws.

involving the rights of low-wage workers to collect unpaid wages and attorneys' fees under Maryland's wage and hour laws and the FLSA. *See Jackson v. Estelle's Place, LLC*, No. 10-763 (U.S.) (pending); *Perez v. Mountaire Farms, Inc.*, No. 09-1917 (4th Cir.) (pending); *Friolo v. Frankel*, 403 Md. 443 (2008); *Friolo v. Frankel*, 373 Md. 501 (2003).

The D.C. Employment Justice Center (EJC) is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. Established on Labor Day of 2000, EJC advises and counsels well over 1000 workers from D.C., Maryland, and Virginia each year on their rights in the workplace. Approximately 25% of our clinic cases are from Maryland. The most common category of complaints among EJC's clients are wage and hour complaints, especially unpaid wages for work performed; indeed, in 2010, 32.6% of the claims handled in EJC's Workers' Rights Clinic were wage and hour claims. A significant portion of those who have such complaints are undocumented workers, who are hired by unscrupulous employers for the specific purpose of evading their wage payment responsibilities. EJC submitted *amici curiae* briefs previously in this case in *Friolo v. Frankel*, 403 Md. 443 (2008), and *Friolo v. Frankel*, 373 Md. 501 (2003).

The Metropolitan Washington Employment Lawyers Association (MWELA) is a legal membership organization with approximately 300 members who represent plaintiffs in employment and civil rights litigation in the Washington area. MWELA has

participated as *amicus curiae* in this case and in the following recent cases: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, *rehearing en banc den.*, 467 F.3d 378 (4th Cir. 2006); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007); *Manor Country Club v. Flaa.*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003). As a longtime advocate in employment and labor law, MWELA appreciates this opportunity to offer the Court its wide-ranging expertise and unique perspective on the issues presented in this appeal. The circuit court's disposition of this case threatens to undermine important statutory rights which protect employees in the state of Maryland by deterring competent counsel from accepting such cases. Because the outcome of this case will directly impact the ability of MWELA members to take cases on behalf of Maryland workers, MWELA has an interest in the fair resolution of the issues presented in this appeal.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (the Lawyers' Committee) is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation. In furtherance of this mission, the Lawyers' Committee represents victims of wage and hour violations in individual, class, and collective actions in state and federal courts. *See, e.g., Montoya v. S.C.C.P. Painting Contrs., Inc.*, 530 F. Supp. 2d 746 (D. Md. 2008); *Granados v. Hann & Hann, Inc.*, No. 8:08-cv-01206 (D. Md.) (pending); *Pachina v. Chanticleer of Frederick, Inc.*, No 1:07-cv-03235 (D. Md.). From these cases, the Lawyers' Committee has amassed expertise in issues arising under state wage and hour laws and the FLSA, as well as in awards of attorney's fees to prevailing plaintiffs in civil rights cases generally. The Lawyers' Committee has also filed *amici curiae* briefs in

cases involving awards of attorney's fees under the FLSA. *See, e.g., Jackson v. Estelle's Place, LLC*, No. 10-763 (U.S.) (pending); No. 09-1700, 2010 U.S. App. LEXIS 16856 (4th Cir. August 12, 2010).

The aforementioned *Amici* have a continued interest in an appropriate resolution of this case because the question of attorneys' fees in wage and hour cases significantly impacts low-wage workers' ability to secure legal representation and enforce their rights.

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in this nation's Constitution and civil rights laws. Since its founding in 1931, the ACLU of Maryland, which is comprised of approximately 14,000 members throughout the state, has appeared before various courts and administrative bodies in numerous civil rights, employment, and civil liberties cases against private and public actors, both as direct counsel and as *amicus curiae*. The ACLU, nationally and locally, is extensively involved in the representation of individuals who have been the victims of constitutional and civil rights violations. The ACLU's ability to serve as "private attorneys general" in doing this important work, is made possible by statutory fee-shifting provisions. Without these laws, and courts' willingness to fairly compensate attorneys who prevail in private enforcement of civil rights laws to vindicate individual rights and promote the public good, the ACLU's ability to take on this role would be severely limited. As such, the ACLU often participates in cases like the instant matter, where access to justice is threatened by a cramped reading of the fee-shifting laws.

The National Federation of the Blind of Maryland (NFB-Md) is the Maryland state affiliate of the National Federation of the Blind (NFB), the oldest and largest national advocacy organization of blind persons in the United States. The vast majority of NFB-Md's members are blind persons. NFB-Md is recognized by the public, the General Assembly of Maryland, executive agencies of state government and the courts as a collective and representative voice on behalf of blind Marylanders and their families. Its purpose, like that of the NFB, is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on equal terms and (2) removing barriers and changing social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness and that result in the denial of opportunity to blind persons in virtually every sphere of life. To effectuate these goals, NFB-Md has not hesitated to bring civil rights actions in its own name or to support litigation by individual blind Marylanders under a variety of statutes that contain fee shifting provisions for prevailing parties. NFB-Md and NFB often bring such litigation by paying its attorneys their customary hourly fees as they accrue, and then petitioning for a court award of attorneys' fees as part of its total relief when the litigation is successful.

The ACLU of Maryland and NFB-Md previously submitted an *amici curiae* brief in *Friolo v. Frankel*, 403 Md. 443 (2008), and have a continued interest in ensuring the proper application of the lodestar method in fee-shifting cases because of its critical role in encouraging private enforcement of civil rights.

ARGUMENT

I. To Advance Low-Wage Workers' Ability to Access Justice, Courts Must Ensure that Attorneys are Reasonably Remunerated for Bringing Meritorious Wage Claims.

Given the widespread phenomenon of employers unlawfully withholding wages from their employees, vigilant enforcement of Maryland's Wage and Hour Law, Md. Code Ann., Lab. & Empl. § 3-401 *et seq.*, and Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 *et seq.*, is of critical importance. Unfortunately, governmental enforcement of these statutes has ranged from inadequate to virtually non-existent, particularly in recent years. In the absence of sufficient public enforcement, the right of workers to receive their lawful wages must be vindicated through private enforcement actions. Most private attorneys, however, will only be able to bring these claims on behalf of low-wage workers if they can be reasonably certain that they will be adequately compensated for bringing successful claim. As such, the award of reasonable attorney's fees for meritorious wage claims is vital to low-wage workers' ability to vindicate their rights.

A. Wage Theft, Particularly Among Low-Wage Workers, is Rampant.

Wage theft, the unlawful deprivation of legally-mandated wages, has grown increasingly widespread and pervasive throughout the United States in recent years. *See* Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—And What We Can Do About It* 7 (New Press 2009). Although wage theft occurs among workers of all income levels, the prevalence of wage theft among low-wage

workers has been well-documented. *See* Annette Bernhardt, *et al.*, Ctr. for Urban & Econ. Dev., Nat'l Employment Law Project, & UCLA Inst. For Research on Labor and Employment, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities* (2009).[2]

According to a recent study, more than one-quarter of the 4,387 low-wage workers surveyed in Chicago, Los Angeles, and New York in 2008 had been paid less than the minimum wage the previous week and more than three-quarters of those surveyed had not received overtime pay to which they were entitled. *Id.* at 2. The average worker surveyed in the study earned just $339 a week and had been cheated out of $51, roughly 15% of his wages, the previous week. *Id.* at 5. Overall, the study found that employers for over one million workers unlawfully cheat their employees out of more than $56.4 million in wages each week in Chicago, Los Angeles, and New York alone. *Id.* at 6. A similar 2008 survey of workers in New York City also uncovered high levels of wage theft, with 54% of workers sampled experiencing at least one pay-related violation in the previous workweek. *See* Annette Bernhardt, *et al.*, Nat'l Employment Law Project, *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City* 6 (2010).[3] On average, workers surveyed in the New York City study lost $3,016 annually, nearly 15% of their total earnings of $20,644, due to wage theft. *See id.*

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[2] *Available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1.

[3] *Available at* http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf.

Consistent with these national findings, a 2006 survey of 286 domestic workers in Maryland found that 75% of the workers did not receive required overtime pay and approximately half earned below Maryland's minimum wage. CASA of Maryland, *Wage Theft: How Maryland Fails to Protect Low-Wage Workers* 4 (2007).[4] Similarly, a 2006 survey of 75 South-Asian workers in Baltimore City revealed that 76% were not paid overtime wages to which they were entitled. *Id.* at 5. Employers have also failed to pay wages to which they were contractually obligated in large numbers. A 2004 survey of day laborers in the metropolitan Washington area, focusing on Maryland suburbs, reported that 58% of the workers had been denied wages at least once and that 55% were paid less than had been agreed. *Id.* at 4. CASA of Maryland, which negotiates and litigates wage and hour violations on behalf of immigrant workers, has described the phenomenon of unpaid wages in Maryland as an "epidemic." *Id.* The $764,000 in unpaid wages the Maryland Department of Labor, Licensing, and Regulation (DLLR) collected on behalf of Maryland workers in 2008 further confirms the high prevalence of wage theft in this state. DLLR, *Annual Report 2008* at 13.[5]

B. Private Enforcement of Wage Laws is Critical Given Substantial Gaps in Governmental Enforcement.

In Maryland, DLLR is responsible for enforcing the Wage and Hour and Wage Payment and Collection Laws. *See* Md. Code Ann., Lab. & Empl. §§ 3-101(b), 3-102, 3-

[4] *Available at* http://www.casademaryland.org/storage/documents/wagetheft.pdf.

[5] *Available at* http://www.dllr.state.md.us/whatsnews/dllrannrep2008.pdf.

507. Yet the DLLR's ability to enforce wage laws depends largely on whether the agency is adequately funded. Unfortunately, DLLR is vulnerable to major funding fluctuations depending on the political environment and budgetary constraints. For example, from 2003 to 2007, general fund appropriations to DLLR from the state budget were cut by 44%. Eleanor M. Carey, *et al.*, *Report on the Department of Labor, Licensing and Regulation: Maryland Transition* 3 (2007) [hereinafter *Transition Report*].[6] Although federal funding to DLLR increased during this period, this funding cannot be used to enforce wage and hour laws. *Id.* According to Governor Martin O'Malley's 2007 Transition Report, "DLLR continues to suffer a chronic shortage in human capital to ensure the rights of workers are enforced and workplaces stay safe." *Id.*

DLLR's Employment Standards Service (ESS), which is charged with investigating wage complaints, has been particularly vulnerable to funding cuts. DLLR has twice eliminated funding to ESS, resulting in a complete cessation of enforcement activity. *See id.* at 2. ESS had a staff of thirty-five when it was disbanded in 1991. *Id.* at 2-3; *see also Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. 366, 382 (2001) (observing that "budgetary constraints in 1991 rendered state enforcement of the [Wage] Act a virtual nullity"). When ESS was reestablished in 1994, it had only three wage investigators. *See* Transition Report at 3. In 2006, ESS was again stripped of funding and lost all of its wage and hour investigators. *Id.* Although the unit was refunded in 2007, it currently operates with insufficient enforcement resources. *See id.* In 2007, DLLR

[6] *Available at* http://www.governor.maryland.gov/documents/transition/Labor.pdf.

estimated that it needed a minimum of eleven investigators simply to begin addressing enforcement of wage and hour laws. *See id.* at 17. Nevertheless, DLLR currently has only five wage inspectors for the entire state. *See* Policy Matters Ohio, *Investigating Wage Theft: A Survey of the States* 3 (2010).[7] In addition, two of these positions are set to be eliminated in July 2011 as a result of pending budget cuts. *Id.* at 4. Thus Maryland's public enforcement of wage and hour laws is woefully inadequate, at best.

On the federal side, government enforcement of federal wage and hour laws is also weak. Generally, the probability of the average workplace in the U.S. being investigated for violation of any federal employment law by the federal government is well below one in a thousand. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Underenforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 62 (2005). More specifically, the effectiveness of the U.S. Department of Labor's Wage and Hour Division has been greatly limited due to cuts in resources. *See* Annette Bernhardt & Siobhan McGrath, Brennan Center for Justice, *Trends in Wage and Hour Enforcement in the U.S. Department of Labor* (2005). Between 1975 and 2004, the number of investigators in the Wage and Hour Division dropped by 14%, the number of investigations dropped by 36%, and, consequently, the number of workers paid back wages dropped by 24%. *Id.* at 1. Yet during the same period, the labor force grew by 55% and the number of workplaces grew by 112%. *Id.* This trend in declining enforcement has continued, with the Wage and Hour Division conducting fewer than half the number of

[7] *Available at* http://www.policymattersohio.org/pdf/InvestigatingWageTheft2010.pdf.

investigations in 2008 as it did in 1998. *See* David Weil, *Improving Workplace Conditions Through Strategic Enforcement* 7 (2010).

In addition to struggling with limited resources, the Wage and Hour Division suffers from more systemic problems in the way complaints and investigations are handled. A 2009 Government Accountability Office (GAO) investigation of the Wage and Hour Division found the agency's response to complaints "sluggish" and the intake process "ineffective." United States GAO, *Wage and Hour Division's Complaint Intake Processes Leave Low Wage Workers Vulnerable to Wage Theft* 1, GAO-09-458T (Mar. 25, 2009).[8] The investigation also revealed numerous instances of improperly conducted investigations. *Id.* The GAO concluded that its "investigation clearly shows that the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn." *Id*. at 24.

Given this major gap in public enforcement of wage laws, private enforcement constitutes the primary means of vindicating workers' right to fair wage payment. Indeed, the Maryland Legislature intended for workers to obtain the services of private attorneys in order to enforce their rights under Maryland's wage laws, in essence acting as private attorneys general. To this end, Md. Code Ann., Lab. & Empl. §§ 3-427 and 3-507.1 aim to encourage private attorney representation of low-wage workers.[9] The provision

[8] *Available at* http://www.gao.gov/new.items/d09458t.pdf.

[9] Legislative history regarding § 3-427 is not as ample as it is for § 3-507.1, the difference being the dates of the statutes' enactment. While § 3-507.1 was enacted for the first time in 1993 with plenty of recorded legislative history, the private right of action available in § 3-427 under the Wage and Hour Law first became available in 1965. *See*

allowing employees to bring private actions for unpaid wages, section 3-507.1, was added to the Wage Payment and Collection Law in 1993. *See* 1993 Md. Laws, Ch. 578, at 2869 (H.B. 1006). This private enforcement statute was enacted in response to the 1991 budget cuts that dealt a crippling blow to the DLLR's ability to enforce the Wage Payment and Collection Law. *See Friolo* I, 373 Md. at 516. Legislators were cognizant of the likelihood that many aggrieved workers would have claims for relatively small amounts and would find it difficult to obtain representation without a fee-shifting provision. The House Economic Matters Committee observed that "many employees whose employers fail to pay them as required by law are low and minimum wage employees who may be unable to afford legal representation." *Wage Payment and Collection Law, 1993: Hearings on H.B. 1006 Before the House Economic Matters Committee* (*microfilmed at* H.B. 1006 file) (on file with State library) [hereinafter

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former Md. Ann. Code art. 100, § 90 (1957, 1965 Supp.) (1965 Laws of Maryland, ch. 697 (S.B. 468)), repealed and recodified in the new Labor and Employment Article in 1991. 1991 Laws of Maryland, ch. 8 (H.B. 1). Although more explicit legislative pronouncements of the purpose of the private enforcement action for Wage and Hour violations are lacking, the reasoning of the Legislature in enacting § 3-507.1 is still persuasive. Indeed in *Friolo v. Frankel*, 373 Md. 501, 517 (2003) ("*Friolo I*"), the Court of Appeals noted that although the 1993 enactment of § 3-507.1 dealt only with the Wage Payment and Collection Law:

> [I]t was clear that the problem sought to be remedied—the inability of the Commissioner to continue to pursue claims for unpaid wages—existed under the Wage and Hour Law, which, as noted, also provided for employee suits and the award of counsel fees. Unquestionably, the provisions for counsel fees in § 3-427(d) and § 3-507.1(b) are remedial in nature and should therefore be given a liberal interpretation.

Hearings].[10] Testimony on the House Bill informed legislators that low-paid employees with unpaid wage claims were owed an average of $150-200. *See Friolo I*, 373 Md. at 517.

Prior to the statutory private right of action provided by § 3-507.1, an aggrieved employee could only bring a breach of contract action. This was likely to be a "complicated and expensive proposition particularly for hourly employees." *Hearings*, Letter from Paula M. Carmody, Chair of Maryland State Bar Association, Section of Delivery of Legal Services, to House Economic Matters Committee (Mar. 15, 1993). Thus, the fee-shifting provisions of the Maryland Wage and Hour and Wage Payment and Collections Laws were clearly intended to facilitate workers' ability to engage private lawyers to pursue their wage violation claims.

To honor this legislative intent, the Maryland Court of Appeals has adopted the lodestar method of calculating attorneys' fees under fee-shifting provisions in wage and civil rights cases. *See Friolo v. Frankel*, 403 Md. 443, 457-58 (2008) ("*Friolo III*"[11]). The lodestar approach enables private enforcement of wage laws by increasing the likelihood that victims of wage theft will be able to obtain competent legal representation.

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[10] Many low-income persons with legal needs do not seek or obtain a lawyer's help because it would be too expensive. *See* American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans* (1994); *see also* Maryland Access to Justice Commission, *Interim Report and Recommendations-Fall 2009* 19, *available at* http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf (comparing the total number of persons per lawyer in Maryland, 162.8, with the number of low-income persons in Maryland per legal services lawyer or pro bono equivalent, 455.7).

[11] *Amici* will refer to *Friolo v. Frankel*, 403 Md. 443 (2008) as "*Friolo III*" to avoid confusion with this Court's decision in *Frankel v. Friolo*, 170 Md. App. 441 (2006) ("*Friolo II*").

The economic reality is that private attorneys are generally unable under any reasonable business model to take a case from which they will earn only a percentage of the recovery of a claim for a few hundred dollars. Representation is much more feasible and, in fact, a case is more attractive to an attorney, if there is a fair possibility that he or she will be compensated for the reasonable time spent on the case. After all, despite the vast difference in dollar amounts at issue, it could take as long to draft a complaint, engage in discovery, or conduct a trial for a low-wage worker as for a highly-paid CEO.

For this reason, the Court of Appeals has noted that proportionality between the client's recovery and the attorney's fee due plays no role in the determination of attorneys' fee awards under the lodestar method. *See Friolo I*, 373 Md. at 528; *see also Stevenson v. Branch Banking & Trust Corp.*, 159 Md. App. 620, 665 (2004) (holding that "a court may not determine attorney's fees by simply awarding a selected proportion of the compensatory judgment, or otherwise engaging in a cost-benefit analysis"). In *Friolo I*, the Court of Appeals explained that basing attorneys' fees on proportionality would "frustrate the very purpose of the statute" by precluding low-wage workers and all workers with small monetary claims from enforcing their statutory rights. *Id.* at 528. Rather, to promote private enforcement of the Maryland Wage and Hour and Wage Payment and Collection Laws, courts must apply the lodestar method to ensure that attorneys who bring meritorious claims under these laws receive fair compensation. *Id.* at 528-29. If courts do not honor this legislative intent, unscrupulous employers will continue to freely engage in rampant wage theft with impunity, and the legal system will fail in its duty to provide access to justice to low-wage workers.

II. The Lodestar Method of Calculating Attorneys' Fees is Straightforward and Need Not Unduly Burden Trial Court Judges.

In *Friolo I*, the Court of Appeals held that "the lodestar approach, with its adjustments, is the presumptively appropriate methodology to be used under the Wage and Hour Law and the [Wage] Payment [and Collection] Law." 373 Md. at 529. In both *Friolo I* and *Friolo III*, the Court of Appeals remanded the case to the circuit court with instructions to apply the lodestar approach and explain how the lodestar factors affected the award amount. *Friolo III*, 403 Md. at 455. Nevertheless, in its third attempt to determine reasonable attorneys' fees in the present case, the trial court again failed to clearly explain how it applied the lodestar factors in determining its attorneys' fee award. Instead, the judge repeatedly and incorrectly complained that the lodestar approach was somehow too burdensome and complicated for trial court judges to apply, even though state and federal judges routinely apply the lodestar analysis in adjudicating statutory fee petitions and sanctions awards. For example:

> [T]he appellate courts have put a tremendous burden on the trial judge in these lodestar cases. We are now being asked to function as a billing analyst to sort through an attorney's trial bill and, a bill for drafting, three hours of pleading, and make a determination whether or not to throw all the billing out because the pleadings are so intertwined, or to adjust that and to separate out what it took to prepare only the successful counts. And I'm not going to go into great detail, but I'll just say that math and auditing never have been my strong suit, and this is just torturous. It's extremely time consuming for me. I suspect that I'm not alone.

(J.R.E. at 2254.)[12] The judge further described the lodestar method as a "painstaking process" and noted that "it's very difficult for the trial judge to apply without spending this inordinate amount of time. It's hard to believe this is a workable solution when it has consumed so many hours in what is a very, very simple case. It's just unwieldy …" (J.R.E. at 2256, 2299.)

The judge below also seemed to contend that, notwithstanding the rulings of the Court of Appeals, the lodestar method is particularly inappropriate in wage and hour cases:

> [T]he appellate courts have required us as trial courts to devote an unbelievable amount of time going through the plaintiff's bills in this case, for every phase of this proceeding. I, for one, don't like or enjoy having to act as a CPA to go through and audit an attorney's bill, especially in this case, where I believe it to be, as did Judge Sharer, outrageous.…It is a huge waste of the Court's resources to engage in this when we have, according to Judge Sharer, 'a garden-variety wage and hour claim for unpaid overtime dressed up to appear to be something that it is not.' I have had -- and I mean this -- to literally beg the Assignment Office to give me time off from my trial assignment in order to apply lodestar to this case, review Judge Rowan's findings, and write out in very rough form my opinion or my thoughts with respect to this matter.

(J.R.E. at 2309-10.)

These complaints, however, cannot excuse the lower court's continued refusal to follow the law and properly apply the lodestar method. Despite Judge Dugan's protestations, the lodestar approach is straightforward when properly applied and need not constitute an undue burden on trial court judges. The "'most useful starting point' for determining the amount of a reasonable fee [is] the number of hours reasonably expended

[12] Citations herein to "J.R.E. __" refer to the Joint Record Extract submitted with Appellant's brief.

on the litigation multiplied by a reasonable hourly rate." *Friolo I*, 373 Md. at 523 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). As the United States Court of Appeals for the District of Columbia Circuit has explained, determining the amount of time reasonably expended "need not be unduly burdensome: 'It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (quoting *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)).

When prevailing parties submit their fee petitions, they customarily provide a summary table showing the general category of work performed next to the corresponding attorney and the number of hours expended. Judges may rely on these tables in determining the number of hours reasonably devoted to the litigation. To arrive at a reasonable hourly rate, judges may consider documentation and other submissions provided by the parties, with the option of holding a hearing if useful. *See id.* at 892. One helpful resource for judges in determining a reasonable hourly rate may be the hourly fee guidelines published in the Local Rules of the United States District Court for the District of Maryland. *See* D. Md. Loc. R. App. B. By multiplying each attorney's hourly rate by the number of hours expended, as indicated by the table, trial courts can easily arrive at the lodestar fee.

From there, the court may consider a wide range of factors to adjust the lodestar fee, although it is not required to do so. *See id.* (noting that "[t]he burden of justifying any deviation from the 'lodestar' rests on the party proposing the deviation") (citing *Lindy*

Bros. Builders, Inc., 540 F.2d at 118). The Supreme Court has noted that although courts may consider the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."[13] *Hensley*, 461 U.S. at 434 n.9. More recently, the Court opined that trial courts ordinarily should not alter the basic lodestar fee calculation, obtained by multiplying reasonable hours with a reasonable hourly rate, because calculation of the lodestar "includes most, if not all, of the relevant factors constituting a reasonable attorney's fee." *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1673 (2010) (internal quotation marks omitted). The Court reasoned that the lodestar method "yields a fee that is presumptively sufficient to achieve [the] objective"

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[13] As described in *Friolo I*, the twelve *Johnson* factors are:

> (1) the time and labor required (the judge should weigh the hours claimed against his or her own knowledge, experience, and expertise and, if more than one attorney is involved, scrutinize the possibility of duplication); (2) the novelty and difficulty of the questions (cases of first impression generally require more time and effort); (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent (fee agreed to by client is helpful in demonstrating attorney's fee expectations, litigant should not be awarded fee greater than that he is contractually bound to pay); (7) time limitations imposed by the client or circumstances (whether this was priority work); (8) the amount involved and the results obtained (court should consider amount of damages awarded but also whether decision corrects across-the-board discrimination affecting large class of employees); (9) experience, reputation, and ability of attorneys; (10) undesirability of the case (effect on the lawyer in the community for having agreed to take an unpopular case); (11) nature and length of professional relationship with [t]he client; and (12) awards in similar cases.

Friolo I, 373 Md. at 522 n.2.

of drawing capable attorneys to meritorious claims. *Id.* at 1671; *see also* (noting that when "the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by" the fee-shifting statute).

Nearly identical to the *Johnson* factors, Rule 1.5 of the Maryland Rules of Professional Conduct sets out factors[14] for determining the reasonableness of a fee and requires that attorneys' fees comport with this reasonableness requirement. Although the Maryland Court of Appeals has advised courts to "be mindful of Rule 1.5" when calculating the lodestar fee, *see Friolo III*, 403 Md. at 456, the Court has clarified that Rule 1.5 must not be applied so as to defeat the goals of fee-shifting statutes such as the Wage and Hour and Wage Payment and Collection Laws:

> The kind of limit imposed by … Rule [1.5], whether expressed as a percentage of recovery or through a lodestar approach, may well clash with the public policy behind statutory fee-shifting provisions, however, because it would likely preclude individuals seeking to recover relatively small amounts from procuring the assistance of private counsel, other than on a *pro bono publico* basis, and thus would frustrate the very purpose of the statute. The courts that have either allowed or mandated a lodestar approach

[14] The factors to be weighed under Rule 1.5(a) are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

> have at least tacitly recognized that limits implicit from rules of this kind cannot be rigorously applied when determining what is reasonable under a statutory fee-shifting provision, the predominant purpose of which is to permit the favored suitor to obtain counsel that, because of legal or practical fee limitations, might otherwise be unavailable.

Friolo I, 373 Md. at 528; *see also Monmouth Meadows Homeowners Ass'n v. Hamilton*, 416 Md. 325, 337-38 (2010) (noting that "unlike the lodestar method, Rule 1.5 does not carry with it the notion that the importance of the right vindicated will justify an expenditure of attorney time that is hugely disproportionate to the dollar amount at issue in the case").

Thus, courts need not attempt to reconcile every Rule 1.5 factor with the lodestar fee amount. In particular, although Rule 1.5 references the amount involved in the litigation, courts should not adjust awards that are "grossly disproportionate" to the judgment obtained because doing so would be "contrary to the intent underlying § 3-427, the fee shifting statute." *Friolo III*, 403 Md. at 459.

In addition, although the terms of a retainer agreement may be considered in adjusting the initial lodestar calculation, a court should not opine upon the reasonableness of the fee agreement itself as part of this analysis. As the Court of Appeals stated in *Monmouth Meadows Homeowners Ass'n*,

> Although the Rules of Professional Conduct certainly place limitations on how much attorneys may charge their clients, we do not address that issue here, even though we use Rule 1.5 as a rubric for our reasonable fee analysis. When courts are asked to award 'reasonable attorneys' fees' against a person or entity not privy to the fee agreement, they act in a different role than a court reviewing a charge by the Attorney Grievance Commission that a specific fee agreed to by an attorney's client was not reasonable.

416 Md. at 338.

Thus, in awarding attorneys' fees under the lodestar method, courts may consider the prevailing party's fee agreement for limited purposes, such as fine-tuning the attorney's hourly rate or calculating the hours devoted to the case, but not for decreasing the lodestar amount to comport with the fee agreement or declaring the agreement a violation of Rule 1.5. *See Stevenson*, 159 Md. App. at 666 (holding that courts "should not treat a contingency fee agreement as an automatic cap on the recovery of attorney's fees") (citing *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989)).[15] This limited consideration of the fee agreement, as well as the other factors listed in Rule 1.5, should not overly burden trial court judges.

Consideration of how much to deduct when plaintiffs are only partially successful in their claims also need not involve complex calculations or analysis. The Court of Appeals in *Friolo I* approvingly described the Supreme Court's approach to the issue of partially successful litigation in *Hensley*. See 373 Md. at 524-525 (citing *Hensley*, 461 U.S. at 434-436). If the plaintiff has been only partly successful, two questions should be addressed: (1) whether "the plaintiff fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded"; and (2) whether "the plaintiff achieve[d] a level of

[15] Nor should courts interpret fee agreements in which plaintiffs agree that counsel will be compensated, if at all, under a fee-shifting law as a reason for restricting the award of attorneys' fees under the lodestar method. To the contrary, such fee agreements are entirely consistent with the legislative intent underlying fee-shifting provisions in remedial legislation because they enable individuals to obtain legal assistance that they otherwise could not afford.

success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434.

Where the unsuccessful claim is completely separate from the successful claim, no fees should be awarded for time spent on the unsuccessful claim. *Id.* at 435. Yet the Court in *Hensley* specified that in cases where the unsuccessful and successful claims are based upon intertwined facts or legal theories, and counsel's time is devoted to the litigation as a whole, courts should not attempt to divide up the hours spent on each claim. *Id.* Instead, the claims should be regarded as related and the court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.; see also Reisterstown Plaza Assocs. v. Gen. Nutrition Ctr., Inc.*, 89 Md. App. 232, 245 (1991) (explaining that "a party may recover attorney fees rendered in connection with all claims if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts") (internal quotation marks omitted).

The Court explicitly rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Hensley*, 461 U.S. at 435 n.11 (internal quotation marks omitted). The Court reasoned that to attempt to parse out the hours spent on unsuccessful claims in these situations would punish attorneys for litigating good faith alternative legal grounds for the desired outcome. *Id.* at 435. Rather, the Court explained that attorneys who achieve excellent results should be fully compensated for the total hours reasonably devoted to the litigation. *Id.* at 435. Conversely, if the plaintiff only achieves limited success overall, the court may reduce

the fee award accordingly. *Id.* at 436. Once the court adjusts for unsuccessful claims, there is not a great deal more it must do before awarding the prevailing attorney the adjusted lodestar fee.

Perhaps the most important point for a trial judge concerned with the burden of adjudicating a fee claim is this: After the prevailing party files a sufficient fee petition or motion, and thus presents a prima facie case, it is the duty of the defendant to make specific arguments and to object to particular entries or items. *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (explaining that "[t]he party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the … facts asserted by the prevailing party in its submitted affidavits") (internal quotation marks omitted); *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1991) (noting that in a statutory fee case, once the prevailing party has met its burden of proving that its request for attorneys' fees is reasonable, "the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee"); *Blackman v. District of Columbia*, 677 F. Supp. 2d 169, 172 (D.D.C. 2010) (same).

Given this authority, if the trial judge had questions about the reasonableness of the plaintiff's attorneys' hourly rates, he could—and should—have relied upon the defendant to demonstrate why a lower hourly rate was more reasonable. *See Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 554-54 (7th Cir. 1999) (stating that once the prevailing party establishes his market rate, "the burden shifts to the defendant to

demonstrate why a lower rate should be awarded"). Similarly, if a challenge is made to compensation sought based on the contention that time was spent on unsuccessful claims, the burden is upon the defendant, not the court, to prove that challenge. Here, it was not the court's burden to parse through the fee petition any further than the defendants were prepared to do themselves. The opposing party bears the burden of uncovering and highlighting for the court any improper fee entries for work performed on unsuccessful claims. *See Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991) (observing that when the "defendant asserts that a particular charge is related solely to work done on unsuccessful claims, the burden shifts to the defendant to demonstrate that the particular entry represents work done on unsuccessful claims").

If the party opposing the fee petition simply raises generalized objections to the reasonableness of the fees, the court may demand greater specificity before taking it upon itself to scrutinize the fee petition. As the Honorable Paul W. Grimm, Chief Magistrate Judge for the United States District Court for the District of Maryland, explained in *Thompson v. U.S. Dep't of Hous. & Urban Dev.*:

> It is not the Court's burden to sift through literally hundreds of pages of billing records to look for similar instances of allegedly improper billing entries when the challenging parties have not thought the effort sufficiently important to undertake themselves … Defendants are forewarned that with respect to any future interim bills that are submitted by the Plaintiffs, the Court will not review any challenged entry in the bill unless the challenging party has identified it specifically and given an adequate explanation for the basis of the challenge.

No. MGJ95309, 2001 WL 1636517, at *10 (D. Md. Dec. 12, 2001); *see also Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1176 n.14 (6th Cir. 1990) (noting that "[t]he

defendants' failure to raise more than a generalized objection to the fees in this case would ordinarily require us to review only those items which should have been eliminated through a cursory examination of the bill"), *overruled on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

Assuming the prevailing party presents an adequately supported petition, therefore, the court need address only those challenges raised and supported by the opposing party. *See Bell v. United Princeton Props., Inc.*, 884 F.2d 713, 720 (3d Cir. 1989) (observing that courts may "not decrease a fee award based on factors not raised at all by the adverse party"). Contrary to the approach taken below, a court should not engage in significantly more detailed scrutiny of the fee claim than the defendant is prepared to do. This should alleviate any concern over being required to function as a "CPA" or "billing analyst."

Furthermore, in arriving at a proper attorneys' fee award, judges need not provide a lengthy explanation of the basis for the award. Instead, all that is required under the lodestar method is "a concise but clear explanation" of the court's reasons for the fee award. *Hensley*, 461 U.S. at 437. A recent federal case involving a fee-shifting statute provides a good example of a clear and concise, straightforward application of the lodestar method. *See Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC*, -- F. Supp. 2d --, No. 3:08-291, 2010 WL 3895698 (W.D.N.C. Oct. 1, 2010). In *Irwin*, the court began its analysis by determining whether the number of hours claimed was reasonable. *See id.* at *18. Although only part of the plaintiff's case arose under the fee-

shifting statutes, the court concluded that all of the claims were "necessarily intertwined" and thus found the plaintiff's calculation reasonable. *Id.*

Next, the court determined the reasonableness of the attorneys' and paralegals' hourly rates. *Id.* at * 19. Considering both sides' conflicting affidavits as to the prevailing market rate for attorneys fees, the court staked out a compromise hourly rate based on its own knowledge and experience. *Id.* at *22. Because the Fourth Circuit applies the *Johnson* factors to adjust the lodestar amount, the court briefly addressed each factor, quickly noting when a factor was inapplicable. *Id.* at *22-25. Nevertheless, after analyzing the *Johnson* factors, the court concluded that the lodestar figure resulted in a reasonable fee and that there was no need for adjustment. *Id.* at *25. Application of the lodestar method in the present case need not be more complex than the thorough, yet simple analysis in *Irwin*.

CONCLUSION

Despite the lower court's protestations in this case, proper application of the lodestar method is not unduly burdensome for trial court judges. This Court should reverse the judgment of the Circuit Court for Montgomery County because proper application of the lodestar method is critical to ensuring access to justice for low-wage workers.

Respectfully submitted,

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Dated: February 14, 2011
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