No. 09-1700

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TANYA JACKSON; MICHAEL AGYEMAN; THOMAS GEORGE; ISAAC ASAVE, on behalf of themselves and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

ESTELLE'S PLACE, LLC; JIREH PLACE, LLC; OUR PLACE, LLC; DESTINY PLACE, LLC; DEBRA ROUNDTREE; MARY BELL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS SUBMITTED BY THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS AND THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN FAVOR OF REVERSAL

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Rule 26.1 Corporate Disclosure Statement

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12/14/09_____ ____/s/_____
Date Susan E. Huhta

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INTEREST OF *AMICUS CURIAE*

The Washington Lawyers' Committee for Civil Rights & Urban Affairs (the "Lawyers' Committee") has a strong interest in ensuring that the federal law relating to awards of attorneys' fees and costs is interpreted in a manner that best effectuates the goals of the Fair Labor Standards Act and other federal civil rights statutes that provide for fee awards to prevailing plaintiffs.

The Lawyers' Committee, a non-profit, public interest organization, seeks to eradicate discrimination and fully enforce the nation's civil rights laws through the provision of legal assistance to the residents of Washington, D.C., Maryland, and Virginia. In the Lawyers' Committee's 40-year history, its attorneys have represented thousands of individuals who alleged discrimination and other civil rights violations under both federal civil rights statutes and local civil rights laws. The largest and oldest of the Lawyers' Committee's projects is the Equal Employment Opportunity Project, which represents victims of employment discrimination and wage and hour violations in individual cases and class and collective actions against both public and private entities. From these cases, the Lawyers' Committee has amassed expertise in issues arising under the federal Fair Labor Standards Act, as well as awards of attorneys' fees and costs to prevailing plaintiffs in civil rights cases generally. The Lawyers' Committee has participated

in numerous cases as an *amicus curiae*, most often before this Court, the Court of Appeals for the D.C. Circuit, and the D.C. Court of Appeals.

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association. MWELA is comprised of over 250 members who represent plaintiffs in employment and civil rights litigation in the Washington, D.C. metropolitan area, including litigation within this Circuit. MWELA's purpose is to bring into close association plaintiffs' employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia, Maryland, and Virginia. MWELA's member attorneys frequently represent employees in Fair Labor Standards Act cases.

STATEMENT OF THE CASE

Four of the six Plaintiffs-Appellants in this action filed suit on September 22, 2008, alleging claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (2006), along with common law claims for breach of contract and quantum meruit, against the several Defendants-Appellees which operated group homes that employed Plaintiffs-Appellants. J.A. at 19. Two additional Plaintiffs-

Appellants opted in to the suit shortly thereafter. Plaintiffs-Appellants were low-wage, hourly employees of Defendants-Appellees, whose job responsibilities consisted largely of menial tasks such as transporting clients to program facilities, completing paperwork, janitorial duties and grocery shopping. J.A. at 19. Plaintiffs-Appellants in their complaint alleged that Defendants-Appellees were joint employers who, together, regularly employed them to work in excess of 40 hours per week, but failed to pay them the overtime rate they were due under the FLSA. J.A. at 19.

After the district court granted Plaintiffs-Appellants' motion for notice to issue to similarly situated employees of Defendants-Appellees, the parties were able to reach a settlement agreement which provided for the full recovery of unpaid overtime wages owed each of the Plaintiffs-Appellants, plus an equal amount of liquidated damages. The parties further agreed that Plaintiffs-Appellants were prevailing parties under the FLSA, entitling them to an award of attorneys' fees and costs, and that the question of the amount of such award would be submitted to the district court for determination. The district court approved the settlement as fair on February 23, 2009, J.A. at 157, whereupon the Plaintiffs-Appellants submitted a petition for an award of attorneys' fees and costs. After full briefing, the district court issued a Memorandum Opinion and Order on May 8, 2009, granting in part and denying in part Plaintiffs-Appellants' fee petition. J.A. at 359.

In its May 8 Opinion, the district court acknowledged that Plaintiffs-Appellants were entitled to an award of attorneys' fees and costs. J.A. at 370-71. The court then went about determining what it considered to be the appropriate lodestar. In so doing it made a downward adjustment to the requested hourly rates of Plaintiffs-Appellants' counsel and excluded specific categories of time spent on the matter which the court found were not "reasonably expended" on the litigation.[1] J.A. at 362-368. Then, purportedly considering "the amount involved and the results obtained," see Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978), cert. denied, 439 U.S. 934 (1978), the district court reduced the lodestar by an additional, roughly 25 percent, based on the following analysis:

> In the end, only six plaintiffs joined the lawsuit and their total recovery was less than $10,000 after being doubled under the liquidated damages provision of the FLSA. Moreover, of the six awards, four were for less than $1,000 before doubling as plaintiff Agyeman received the largest recovery because of the misclassification. ***An attorneys' fee should bear some reasonable relationship to the recovery of plaintiffs. Given the modest value of the plaintiffs' claims***, the Court will further reduce to [sic] the lodestar figure by approximately 25 percent to $36,000.

J.A. at 369 (emphasis added). The district court made this further deduction notwithstanding its acknowledgement that, pursuant to the settlement agreement, each Plaintiff-Appellant was to receive all unpaid overtime wages owed to him or

1 Amici express no views on these aspects of the district court's analysis, given that Plaintiffs-Appellants have not challenged these determinations on appeal.

her under the FLSA, plus an equal amount of liquidated damages, and that this was the maximum amount Plaintiffs-Appellants could have recovered under the FLSA for the overtime violations alleged. J.A. at 369-370, 418.

Plaintiffs-Appellants then filed a motion to alter or amend the Court's May 8 Order, pursuant to Fed. R. Civ. P. 59(e), challenging the additional percentage reduction as a clear error of law. J.A. at 373. After full briefing, the district court denied the motion on June 9, 2009. J.A. at 414. In its June 9 Order, the district court reiterated that it made the percentage reduction to Plaintiffs-Appellants' lodestar based on "the amount in controversy and the results obtained." J.A. at 416. Acknowledging that the Supreme Court in City of Riverside v. Rivera, 477 U.S. 561 (1986), had squarely rejected any rule of proportionality, the district court nonetheless found the reduction appropriate in this case, given that Plaintiffs-Appellants' ultimate recovery was "quite modest." J.A. at 418. Additional factors the court cited in defense of its reduction were the facts that Plaintiffs-Appellants did not achieve all the non-monetary relief sought in their complaint (various forms of equitable relief, declaratory relief, compensatory and punitive damages, prejudgment interest, and class certification), and a purported lack of any public benefit from the settlement. J.A. at 418. Plaintiffs-Appellants then timely appealed.

ARGUMENT

I. Relevant Legal Principles

A. The Purposes Behind the Fair Labor Standards Act and its Fee Shifting Provision

In enacting the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, Congress intended to rectify and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . ." 29 U.S.C. § 202(a). To fully effectuate this goal, Congress included within the FLSA a fee-shifting provision, providing that "[t]he court in such [FLSA] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Whereas under other fee-shifting statutes an award of attorneys' fees and costs to the prevailing party is provided at the discretion of the court, such an award to a prevailing plaintiff is mandatory under the FLSA. See 29 U.S.C. § 216(b); Burnley v. Short, 730 F.2d 136, 141 (4th Cir. 1984) ("The payment of attorney's fees to employees prevailing in FLSA cases is mandatory.").

FLSA's fee-shifting provision, similar to those contained in other federal civil rights statutes, was intended to make the aggrieved employee whole "without incurring any expense for legal fees or costs." Maddrix v. Dize, 153 F.2d 274, 275-276 (4th Cir. 1946). Indeed, Congress specifically included the fee-shifting

provision in the FLSA to ensure that all non-exempt workers, regardless of hourly income levels, have access to the courts through representation by private attorneys. See, e.g., United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co., Inc. ("Roofers"), 732 F.2d 495, 502 (6th Cir. 1984) (the purpose of the attorneys' fee shifting provision in the FLSA "is to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances"). See also Ayres v. 127 Restaurant Corp., No. 96-1255, 1999 U.S. Dist. LEXIS 7935, at *5 (S.D.N.Y. May 21, 1999) ("Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation") (citing Quaratino v. Tiffany & Co., 166 F.3d 422, 426 (2nd Cir. 1999)). In further explicating Congress's intent behind the FLSA's fee-shifting provision, this Court has explained that there is no limitation in the Act that would "free a defaulting employer from liability for any part of the services rendered by the attorney in order to secure his client's rights." Maddrix, 153 F.2d at 276.

B. Guiding Principles of Fee Determinations

Under the FLSA, once plaintiffs are determined to be prevailing parties,[2] the

2 Although the FLSA does not use the term "prevailing party," federal courts commonly apply "prevailing party" fee-shifting jurisprudence to fee award determinations in cases under the FLSA. See, e.g., Saizan v. Delta Concrete

district court must award them their "reasonable" attorneys' fees and costs. 29 U.S.C. § 216(b); Burnley, 730 F.2d at 141. Neither the FLSA nor its legislative history illuminates the meaning of "reasonable" as used in the FLSA's fee-shifting provision. Caselaw makes clear that, although the district court has discretion to determine what is "reasonable," it nonetheless should compensate the plaintiff for the time spent on the litigation as if the plaintiff were a fee-paying client. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 430 n.4 ("In computing the fee, counsel for prevailing parties should be paid…for all time reasonably expended on a matter") (internal quotation and citation omitted); Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 550 (7th Cir. 1999) (FLSA plaintiff shall be compensated for all hours reasonably spent on the litigation).

The Supreme Court has established a framework and methodology for calculating the amount of reasonable attorneys' fees to award a prevailing party. The first step in the analysis is determining the "lodestar fee," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886, 888 (1985) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours

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Prod. Co., 448 F.3d 795, 799 n.7 (5th Cir. 2006) ("Though the attorney's fee provision of the FLSA does not mention 'prevailing party,' we typically cite prevailing party fee-shifting jurisprudence in FLSA cases."); Lyle v. Food Lion Inc., 954 F.2d 984, 988 (4th Cir. 1992) (same).

reasonably expended on the litigation times a reasonable hourly rate"); Hensley, 461 U.S. at 433 (same). There is a strong presumption that prevailing lawyers are entitled to their lodestar fee in full. See Lyle, 954 F.3d at 988-989 (noting the "strong presumption" that the lodestar is a reasonable fee) (citing Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986)). However, in calculating the lodestar fee, the prevailing party must exercise billing judgment to exclude from the fee request hours that are duplicative or otherwise unnecessary, and the district court likewise may exclude from the lodestar computation hours that it deems unreasonably spent on the litigation. Hensley, 461 U.S. at 433-434.

After calculating the lodestar amount, there remain "'other considerations that may lead the district court to adjust the fee upward or downward.'" Lyle, 954 F.3d at 989 (quoting Hensley, 461 U.S. at 434). The court then must review the factual circumstances of the case using the twelve factors adopted in Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978), and any award "must be accompanied by detailed findings of fact with regard to the factors considered." Id. at 226. The twelve Barber factors are:

(1) the time and labor expended;
(2) the novelty and difficulty of the questions raised;
(3) the skill required to properly perform the legal services rendered;
(4) the attorney's opportunity costs in pressing the instant litigation;
(5) the customary fee for like work;
(6) the attorney's expectations at the outset of the litigation;
(7) the time limitations imposed by the client or circumstances;
(8) the amount in controversy and the results obtained;

(9) the experience, reputation and ability of the attorney;
(10) the undesirability of the case within the legal community in which the suit arose;
(11) the nature and length of the professional relationship between attorney and client; and
(12) attorneys' fees awards in similar cases.

Id. at 226 n.28. Several of these factors are often subsumed within the initial calculation of the lodestar fee. Hensley, 461 U.S. at 434 n.9; see also Blum, 465 U.S. at 898-900. After considering the Barber factors, the court then subtracts any hours plaintiff's counsel failed to exclude that were spent on unsuccessful, unrelated claims, and then "'awards some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.'" Robinson v. Equifax Info Servs., 560 F.3d 235, 244 (4th Cir. 2009) (quoting Grissom v. The Mills Corp., 549 F.3d 313, 321 (4th Cir. 2008)).

1. A Lack of Complete Success Occurs When Plaintiff Fails to Prevail on Some of Her Claims or Where She Only Recovers Part of the Damages Sought

The "degree of success" standard a judge in this Circuit applies in determining an appropriate fee award to a prevailing party derives from that term's use and description in Hensley, 461 U.S. at 436. In Hensley, the Supreme Court instructed judges to consider the "degree of success" attained by the plaintiffs, expressly stating that "[t]he result is what matters." Id. at 435. This success or result is to be assessed "in comparison to the scope of the litigation as a whole." Id. at 439. The examples the Hensley Court used to illustrate a circumstance

appropriate for reducing the lodestar figure based on lack of complete success all contemplate scenarios in which plaintiffs fail to obtain full relief on one or more of their claims against defendants. See id. at 439 n.15.

Thus, courts have reduced a fee award where the plaintiff recovered only a portion of the amount actually sought in the litigation. See, e.g., Saizan, 448 F.3d at 801 (attorneys' fee award reduced due to difference between amount initially sought in complaint and ultimate settlement amount); Spegon, 175 F.3d at 558 (upholding attorneys' fee award that reduced lodestar by 50% because plaintiff claimed $25,000 in damages but obtained only $1,100). Likewise, where a plaintiff prevails on only some of the claims brought for which fee-shifting is applicable, the court may reduce the award under the "degree of success" standard. See, e.g., Doden v. Plainfield Fire Protection Dist., No. 96-2175, 1997 U.S. App. LEXIS 5571, at *4-5 (7th Cir. Mar. 17, 1997) (FLSA case) (plaintiffs' achieving success on only one-third of their claims led to reduction of award of attorney's fees by 50 percent).

Where, however, a plaintiff has achieved full recovery of damages claimed and/or success on all claims, whether through settlement or trial, that plaintiff is generally entitle to a full lodestar award. See, e.g., Hyeon Soon Cho v. Koam Med. Servs. P.C., 524 F. Supp. 2d 202, 210-11 (E.D.N.Y. 2007) (FLSA case) ("If a plaintiff achieves only limited success, the lodestar amount may be excessive. In

this case, plaintiffs were successful on all their wage-and-hour claims and thus are entitled to compensation based upon the full lodestar amount.")

2. The Barber Factor "The Amount in Controversy and the Results Obtained" Reinforces the Court's Focus Upon the Plaintiff's Degree of Success

The Barber factor of "the amount in controversy and the results obtained," Barber, 577 F.2d at 226 n.28, is largely coextensive with the general concept of the plaintiff's "degree of success." See Nigh v. Koons Buick Pontiac GMC, Inc., 478 F.3d 183, 189-90 (4th Cir. 2007) (finding the terms "degree of success," "extent of relief," and "the amount in controversy and the results obtained" to be functionally interchangeable). In Nigh, a case arising under Title IX, this Court expounded on how this Barber factor is to be applied:

> We do consider the extent of the relief obtained by the plaintiff to be particularly important when calculating reasonable fees, and Barber requires district courts to weigh the amount in controversy and the results obtained before deciding upon a reasonable fee. Looking to the extent of relief permits courts quickly to assess the merits of a plaintiff's claims. The Barber requirement rests on the idea that a prevailing plaintiff is less worthy of a fee award when one or more of his claims lack merit -- that is, when he cannot demonstrate that he deserves the compensation he demanded in his complaint.

Id. at 190 (internal quotations and citations omitted) (emphasis added).

This analysis is consistent with other precedent. "When considering the extent of relief obtained, [the court] must compare the amount of the damages sought to the amount awarded." Mercer v. Duke Univ., 401 F.3d 199, 204 (4th

Cir. 2005) (citation omitted) (Title IX case). The district court is "obligated to give primary consideration" to the difference, if any, between these two figures where "recovery of private damages is the purpose of [the] civil rights litigation." Farrar v. Hobby, 506 U.S. 103, 114 (1992) (quoting Rivera, 477 U.S. at 585 (Powell, J., concurring in judgment)) (§ 1988 case). A "substantial difference" between the two amounts would suggest that "the victory is in fact purely technical," id. at 121 (O'Connor, J., concurring), and thus that the most reasonable attorney's fee to award is none at all. The focus of Rivera, Farrar, and Mercer when determining the degree of success of the plaintiff, then, is upon the damages sought relative to the damages recovered in the action. Mercer, 401 F.3d at 205. Where the damages sought are complete, and the recovery more than nominal, reducing the lodestar fee due to the "amount in controversy" facot in Barber cuts against settled law.

3. The Court May Not Apply a Rule of Proportionality Between the Damages Recovered and the Amount of the Attorneys' Fees Awarded to Reduce the Lodestar Fee

In Rivera, 477 U.S. 561, the Supreme Court flatly rejected any rule of proportionality between the amount recovered by a plaintiff and the ultimate fee award. The Court explained the basis for its holding as follows:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to

> ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.

Id. at 578.

This Court has repeatedly applied Rivera to reject a rule of proportionality between the damages a FLSA plaintiff obtains and the attorneys' fee award. For example, in Lyle, 954 F.2d at 986, the plaintiffs sued the defendants for unpaid overtime and recovered all the unpaid wages they sought in addition to liquidated damages. The district court awarded 20 percent of the judgment award as attorneys' fees. Id. at 987. On appeal, this Court vacated that award, holding that it was an abuse of discretion to pursue an approach other than that of the presumptively reasonable lodestar fee without adequate explanation. Id. at 988-989. In so doing, this Court rejected the notion that FLSA fee awards should be proportionate to the plaintiff's actual recovery. Id.

Likewise, in Llora v. H.K. Research Corp., No. 96-1552, 1997 U.S. App. LEXIS 29865, at *4-5 (4th Cir. Oct. 29, 1997) (unpublished), this Court again found that adherence to a strictly proportional approach in reducing an award of attorneys' fees under the FLSA contradicted established legal principles. In Llora, the plaintiff claimed that her employers retaliated against her by lowering or denying her compensation and then terminating her employment. Id. at *2. Ultimately, she prevailed only with respect to the compensation claims. Id. The

district court, rather than follow the lodestar approach to calculate attorneys' fees, simply awarded fees equal to one-third of the plaintiff's recovered damages without any factual findings or explanation beyond the purported need for a "reasonable relation" between attorneys' fee awards and the results of the case. Id. at *4. This Court reversed, finding that the district court had abused its discretion in reducing the lodestar fee without adequate justification. Id. at *4-5. In so doing, this Court explicitly rejected the notion that a fee award should be based on the amount awarded to the plaintiff. Id. at *4-5. See also Nigh, 478 F.3d at 190 (4th Cir. 2007) (in Truth in Lending Act case where plaintiff obtained "the maximum recovery available," court applied Rivera in ruling that "we do not reflexively reduce fee awards" proportionally to the size of the damages); Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967, 974 (4th Cir. 1987) (in Fair Credit Reporting Act case, court rejected rule of proportionality, acknowledging that such claims often result in low damages award and requiring proportionality would discourage enforcement).

Other courts similarly have ruled against a rule of proportionality for attorneys' fees in FLSA litigation and other civil rights cases. See Roofers, 732 F.2d at 502 (refusing to cap attorneys' fee award at a percentage of the unpaid overtime wages recovered pursuant to the FLSA); Kassim v. City of Schenectady, 415 F.3d 246, 252 (2nd Cir. 2005) ("[A] rule calling for proportionality between

the fee and the monetary amount involved in the litigation would effectively prevent plaintiffs from obtaining counsel in cases where deprivation of a constitutional right caused injury of low monetary value, [and] we have repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation"); Spegon, 175 F.3d at 550 (the only appropriate proportionality analysis is that comparing the amount in controversy to the results obtained); Lunday v. City of Albany, 42 F.3d 131, 134-35 (2d Cir. 1992) (§ 1988 case) ("We consistently have rejected a strict proportionality requirement in civil rights cases"); Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 581 (8th Cir. 2006) (Equal Pay Act case) ("a pro rata reduction [in attorney's fees] would not normally be appropriate…. We have, indeed, explicitly rejected a 'rule of proportionality' in civil rights cases because tying the attorney's fees to the amount awarded would discourage litigants with small amounts of damages from pursuing a civil rights claim in court."); Quaratino v. Tiffany & Co., 166 F.3d 422, 425-26 (2nd Cir. 1999) (Title VII case) ("Were we to adopt the 'billing judgment' approach that the district court advocates, we would contravene that clear legislative intent [of ensuring access to counsel] by relinking the effectiveness of a civil rights plaintiff's legal representation solely to the dollar value of her claim"); Cunningham v. Gibson Elec. Co., 63 F. Supp. 2d 891, 894 (N.D. Ill. 1999) (FLSA case) (refusing to force a "Hobson's choice" upon plaintiffs

of either finding counsel unconcerned about obtaining anything close to adequate compensation if the case is won or give up your case without a fight); Hodgson v. Miller Brewing Co., 457 F.2d 221, 228-29 (7th Cir. 1972) (rejecting a rule of proportionality on grounds that it would "prevent individuals with relatively small claims from effectively enforcing their rights and protecting…not only themselves but also the [interest of the] general public as well").

Indeed, any requirement of proportionality between the plaintiff's recovery and the fee award is particularly inappropriate where the plaintiff achieves a full recovery, or excellent results. A case on point is Estrella v. P.R. Painting Corp., 596 F. Supp. 2d 723 (E.D.N.Y. 2009). In Estrella, the plaintiffs recovered the full amount of overtime pay the defendants denied them, plus the full liquidated damages and interest due to them under the FLSA. Id. at 727-728. Defendants argued that the proposed fee award should be reduced because it exceeded the plaintiffs' total recovery. Id. at 727. The court rejected this argument, noting that requiring proportionality between the plaintiffs' recovery and fee awards would conflict with the purpose of the FLSA fee-shifting provision and that the instant case was "precisely the type of case that is contemplated by the attorney's fees provision in the FLSA." Id.

Likewise, in Baird, 219 F. Supp. 2d at 523-524, the court reduced the final award of attorneys' fees to the plaintiffs under § 1988 for achieving relief only on

some of their claims and in less that the amount plaintiffs initially sought. However, the court rejected any rule of proportionality as a basis to further limit a fee award. Id. at 519-520. The court explained its reasoning as follows:

> Even if the plaintiff recovers the maximum possible damages, she may recover only a modest amount…. In view of her excellent results, however, her attorney likely deserves a full award of fees. Yet if attorneys' fees were proportionately tied to a plaintiff's recovery, however, the award would necessarily be low. . . . [I]n rejecting a rule of proportionality, the Supreme Court sought to avoid precisely this result.

Id. at 520 n.7. See also Saunders v. City of New York, 07 Civ. 830, 2009 U.S. Dist. LEXIS 115366, at *18 (S.D.N.Y. Dec. 9, 2009) ("There is, however, no rule requiring proportionality between the amount of fees requested and the damages recovered" in FLSA action); Urnikis-Negro v. American Family Property Services, Inc., 06 C 6014, 2009 U.S. Dist. LEXIS 52355, at *9-11 (N.D. Ill. Jan. 26, 2009) (policy concerns animating the FLSA support awarding attorneys' fees on bases other than proportionality); Heder v. City of Two Rivers, 255 F. Supp. 2d 947, 956 (E.D. Wis. 2003) (FLSA case) ("the proportionality inquiry is merely another way of evaluating the results the plaintiff obtained in light of what he sought"); Ayres, 1999 U.S. Dist. LEXIS 7935, at *5 ("This reasoning [of rejecting proportionality] is particularly applicable to wage-and-hour cases...[because] [w]ithout the possibility of a fee award, employees who earn the income of a waiter would not be able to obtain quality legal representation").

II. The District Court Erred in Reducing Plaintiffs-Appellants' Fee Award Based on the "Modest" Amount of Plaintiffs-Appellants' Damages, Given that Plaintiffs-Appellants Recovered All They Were Entitled To Under FLSA

There can be no doubt that the district court reduced Plaintiffs-Appellants' fee award by roughly 25 percent based on a comparison between the fees sought and the dollar amount that Plaintiffs-Appellants recovered. Indeed, the district court explicitly based its decision to make the additional percentage reduction on its view that, "[a]n attorneys' fee should bear some reasonable relationship to the recovery of plaintiffs." J.A. at 369. Its reference to the "recovery of plaintiffs" in this context could not possibly be construed as a finding of a lack of complete success, or a consideration of the amount sought versus the recovery obtained, because Plaintiffs-Appellants in this case negotiated a settlement that provided them with complete monetary relief due to them under the FLSA (all the unpaid overtime wages plus an equal amount in liquidated damages), as the district court repeatedly recognized. See J.A. at 369-370; see also J.A. at 418.

As noted above, this type of proportionality approach has been squarely rejected by the Supreme Court, this Court and other jurisdictions on numerous occasions. See, e.g., Rivera, 477 U.S. at 574 (rejecting the proposition that attorneys' fees be proportionate to the amount a civil rights plaintiff recovers); Lyle, 954 F.2d at 988 (finding that it is not appropriate to award attorneys' fees in proportion to the damages recovered in a FLSA action); Llora, 1997 U.S. App.

LEXIS 29865 at *4-5 (FLSA case) (remanding issue of attorneys' fees because district court reduced an award of attorneys' fees using a proportional approach); Kassim, 415 F.3d at 252 (§ 1988 case) ("we have repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation."); Roofers, 732 F.2d at 502 (refusing to cap attorneys' fee award at a percentage of the unpaid overtime wages recovered pursuant to the FLSA); Heder, 255 F. Supp. 2d at 955 (FLSA case) (rejecting proposition that proportionality between fees and damages must exist); Ayres, 1999 U.S. Dist. LEXIS 7935, at *4 (size of damage award in FLSA cases is irrelevant when determining attorneys' fees). [3]

The analysis in the district court's June 9 order fares no better. In that decision denying Plaintiffs-Appellants' Rule 59(e) motion to correct the fee award, the district court affirmed the percentage reduction based on the "modest" amount

[3] In its May 8 decision, the district court also noted that "only six plaintiffs joined th[e] lawsuit . . . ." in its discussion regarding the 25 percent reduction. J.A. at 369. It is unclear whether the number of participating plaintiffs was a factor in the court's decision to reduce the fee award. If it was, this too would constitute legal error. Indeed, this concept was flatly rejected when a defendant-employer argued that a fee reward should be reduced solely because only four plaintiffs opted into a FLSA collective action. Estrella, 596 F. Supp. 2d at 728. The Estrella Court explained, "[t]he Court has awarded each of the four Plaintiffs who did opt-in the full amount of overtime they sought plus the liquidated damages and interest they were entitled to by statute. The Court finds that the Plaintiffs obtained a high degree of success and therefore will not reduce counsel's fee award." Id. at 728.

of the recovery, but then also noted that Plaintiffs-Appellants "did not receive any of the other forms of relief they sought in the complaint." J.A. at 418. Here, the district court is referring to the prayer for relief contained in Plaintiffs-Appellants' complaint, which sought, *inter alia*, punitive damages, a request for declaratory judgment, and various forms of injunctive relief. J.A. at 32-33.

But punitive damages are not available to a prevailing plaintiff in a claim under the FLSA for unpaid overtime. Lanza v. Sugarland Run Homeowners Assoc., 97 F. Supp. 2d 737, 741 (E.D. Va. 2000). Nor is a plaintiff entitled to reinstatement or other injunctive relief in such cases. Marshall v. Gilbarco, Inc., 615 F.2d 985, 988 (4th Cir. 1980). Indeed, it would appear that the prayer for relief contained in Plaintiffs-Appellants' complaint relied on boilerplate language designed to ensure that all potential bases were covered, and should not provide a basis for finding that Plaintiffs-Appellants did not obtain complete success. See, e.g., Smith v. District of Columbia, 466 F. Supp. 2d 151, 160 n.10 (D.D.C. 2006) ("*Ad damnum* requests, as all judges and litigants know, rarely bear any relationship to reality or expectations.")

Furthermore, the district court's passing remark in the June 9 Order that Plaintiffs-Appellants' settlement did not achieve a public benefit, J.A. at 418, is also clearly erroneous. As the district court aptly recited in that same Order, "damages in civil rights cases also serve[] the public interest, for example, by

deterring future civil rights violations." J.A. at 417 (citing Rivera, 477 U.S. at 575). See also Ayres, 1999 U.S. Dist. LEXIS 7935, at *4 (in FLSA cases the public interest is "most meaningfully served by the day-to-day private enforcement of these rights, which secures compliance and deters future violations" (quoting Quaratino, 166 F.3d at 426)). Thus, the settlement at issue in this case did, in fact, achieve a public benefit.

III. If Upheld, the District Court's Approach Will Deter Employees from Vindicating Their Rights Under the FLSA and Will Discourage Lawyers From Agreeing to Represent Low-Wage Workers in FLSA Cases

The Lawyers' Committee and the private lawyer members of MWELA regularly represent low-wage workers denied the minimum and overtime wages required under the FLSA and other local wage and hour laws. Low-wage workers denied their full wages is not an isolated or rare problem. In fact, numerous investigations have documented shocking rates of noncompliance with the minimum standards established in the FLSA, particularly in low-wage industries such as the janitorial, food service, garment, and hospitality industries.[4] See, e.g.,

[4] The situation involving low-wage immigrant workers is particularly grave. Not only are immigrant workers already fearful of the judicial process, but language barriers deter these individuals from seeking advice from competent legal counsel. In a recent report, the Southern Poverty Law Center in Alabama concluded that "immigrant workers have emerged as a shadow economy where employers are keenly aware that immigrants – including those who are working here legally – are often ill-equipped to stand up for their rights." Southern Poverty Law Center, Under Siege: Life for Low-Income Latinos in the South (2009),

National Employment Law Project, Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability (2006).[5] In 2008, the National Employment Law Project surveyed over 4,000 workers in "low wage industries," and found that 26 percent of workers interviewed in Chicago, Los Angeles and New York City, were paid less than the legally required minimum wage in the previous work week.[6] It also found that 76 percent of the respondents who had worked more than 40 hours in the previous week were not paid the legally required overtime rate by their employers.[7]

Ensuring that low-wage workers have access to the courts to enforce their rights was a central intention of Congress when it included a mandatory fee-shifting provision in the FLSA for prevailing plaintiffs. See Urnikis-Negro, 2009 U.S. Dist. LEXIS 52355, at *12 ("limiting recoverable fees when a plaintiff

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http://www.splcenter.org/legal/undersiege/UnderSiege.pdf.

[5] This policy update also found that "[m]ost service jobs, where 11.2% of the working poor are employed, are not in compliance with federal wage and hour laws." Id. at 2. (citing U.S. Department of Labor, Bureau of Labor Statistics, *A Profile of the Working Poor, 2004*, 3 (May 2006), and David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?*, 10-11, 30 (May 2004)).

[6] Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 2 (2009), http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1

[7] Id.

recovers relatively modest damages in a FLSA case would create a significant disincentive for lawyers to take on such litigation, which, in turn, would undermine Congress' intent in creating the statute and authorizing private enforcement actions."); Ayres, 1999 U.S. Dist. LEXIS 7935, at *4 ("Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation."). Indeed, it has been recognized repeatedly by various courts that the costs of obtaining competent counsel to vindicate the rights of low-wage workers will often exceed the value of the damages at issue in the litigation. See, e.g., Holyfield v. F.P. Quinn & Co., No. 90-C-507, 1991 U.S. Dist. LEXIS 5293, at *1 (N.D. Ill. Apr. 22, 1991) ("[G]iven the nature of claims under the FLSA, it is not uncommon that attorneys fee requests will exceed the amount of the judgment in the case."); Fegley v. Higgins, 19 F.3d 1126, 1134-35 (6th Cir. 1994) (affirming award of $7,680 in overtime compensation and $40,000 in attorneys' fees); Cox v. Brookshire Grocery Co., 919 F.2d 354, 358 (5th Cir. 1990) (affirming an award of $1,181 in overtime compensation and $9,250 in attorneys' fees); Bonnette v. Cal. Health & Welfare, 704 F.2d 1465, 1473 (9th Cir. 1983) (affirming award of $18,455 in damages and $100,000 in attorneys' fees).

Thus, if the district court's analysis in this case is upheld, it will eviscerate Congress's intent to ensure access to courts for low-wage workers because,

ultimately, competent lawyers will be disinclined to represent those workers out of fear that they will not be fully compensated, even if they achieve excellent results for their clients and fully vindicate their rights under the FLSA. This reality has been recognized by multiple courts in rejecting any rule of proportionality between the recovery of FLSA plaintiffs and the fee award owed to those plaintiffs. See, e.g., Roofers, 732 F.2d at 503 (rejecting such a rule of proportionality because it "would penalize those litigants whose cases carry slight pecuniary damages, but which present instances of significant statutory violations"); Heder, 255 F. Supp. 2d at 955 (rejecting rule of proportionality between wages received and attorneys fees in FLSA cases and explaining that, "'To hold otherwise would in reality prevent individuals with relatively small claims from effectively enforcing their rights.'") (quoting Hodgson, 457 F.2d 228-229; Urnikis-Negro, 2009 U.S. Dist. LEXIS 52355, at *11-12 ("[L]imiting recoverable fees when a plaintiff recovers relatively modest damages in a FLSA case would create a significant disincentive for lawyers to take on such litigation, which, in turn, would undermine Congress' intent in creating the statute and authorizing private enforcement actions."); Ayres, 1999 U.S. Dist. LEXIS 7935, at *5 ("Without the possibility of a fee award, employees who earn the income of a waiter would not be able to obtain quality legal representation.").

Likewise, if the district court's decision is upheld, it will create inappropriate disincentives for competent counsel to provide fully adequate representation, due to concern that at some point, counsel's time spent on the litigation may go uncompensated. Quaratino, 166 F.3d at 426 (if the court adopted a proportional analysis, "we would contravene that clear legislative intent by relinking the effectiveness of a civil rights plaintiff's legal representation solely to the dollar value of her claim."). In Quaratino, the Second Circuit vacated the lower court's order awarding fees that were exactly half of the damages the plaintiff-employee received at trial in a pregnancy discrimination action. Id. at 424-25. In its decision, the Second Circuit stated, "Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation." Id. at 426. Similarly, it will encourage defendants who have already flaunted federal law by not paying their workers in compliance with FLSA to defend cases more vigorously or vexatiously than they otherwise might. See Kassim, 415 F.3d at 252 ("[I]n litigating a matter, an attorney is in part reacting to forces beyond the attorney's control, particularly the conduct of opposing counsel and of the court. . .it is therefore difficult to generalize about the appropriate size of the fee in relation to the amount in controversy.").

Finally, adoption of a rule of proportionality in this Circuit will ultimately encourage employers to violate the FLSA and will reward them when they do. In Cunningham, 63 F. Supp. 2d at 892, the plaintiff-employee prevailed on his FLSA claims and was awarded $37,808.78 in unpaid wages and damages and sought $144,347.50 in attorneys' fees and costs. The defendant-employer argued that "devoting more dollars worth of time than the maximum amount of dollars the claim possibly could be worth is an unreasonable expenditure of attorney resources." Id. at 893. In rejecting this argument, the Court in Cunningham stated:

> Hence this Court rejects the Hobson's choice that [the defendant] would thrust on an employee such as [plaintiff], who has been the victim of far more than a "small offense" or "petty tyranny" in the form of his employer's protracted nonpayment of statutorily-mandated overtime: Either try to find a lawyer who will handle your case without the prospect of receiving anything even approaching adequate compensation if the case is won (and of course taking the risk of being paid nothing if the case is lost), or give up your case without a fight, thus rewarding your employer for having flouted the law.

Id. at 894. The district court's approach to Plaintiffs-Appellants' attorneys' fees in this case endorses the "Hobson's choice" referenced by the court in Cunningham, and risks substantially undermining the purposes of the FLSA. Id.

If the district court's decision were affirmed, and a rule of proportionality became the law of the land, competent counsel likely would not agree to represent low-wage clients, fearing – with good reason – that they would never be fully compensated even if they achieved a full victory for the clients. This is contrary to

Congress' intention in enacting the FLSA, to rectify and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . ." 29 U.S.C. § 202(a). Affirming the district court's decision would effectively prohibit low-wage workers who are cheated out of statutorily mandated wages from pursing legal recourse.

CONCLUSION

For the foregoing reasons, Amici urge this Court to reverse the district court's decision.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and 32(a)(7) because the brief contains 6,867 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on this date, December 14, 2009, the foregoing Joint Brief of *Amicus Curiae* in Support of Plaintiff-Appellants' Petition for Reversal has been served upon the following via the Court's CM/ECF system:

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