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United States District Court,
S.D. New York.

Pauline DAVIS, Cynthia Williams, Cornelia Simmons, and Kim Rivera, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
THE NEW YORK CITY HOUSING AUTHORITY, Defendant.
UNITED STATES OF AMERICA, Plaintiff,
v.
THE NEW YORK CITY HOUSING AUTHORITY, Defendant.

Nos. 90 Civ. 628(RWS), 92 Civ. 4873(RWS). | Dec. 6, 2002.

Suit was brought seeking injunctions prohibiting New York City Housing Authority (NYCHA) from implementing proposed changes in its method of complying with a consent decree settling actions alleging race discrimination in accepting tenants for public housing. Class action plaintiffs moved for attorney fees, costs, and expenses. The District Court, Sweet, J., held that: (1) hourly rates for attorneys would be $375, rather than $425, and $275, rather than $350; (2) award would properly be discounted by 64.5 hours spent on first appeal; (3) administrative time would be eliminated from fee award; (4) time spent attempting to enjoin project choice for larger families would be compensable, although five hours would be discounted due to lack of success on claim; (5) time spent on racial disparate impact claims would be discounted for 10 hours; and (6) action was brought pursuant to Fair Housing Act (FHA), and thus expert fees could not be awarded.

Ordered accordingly.

Attorneys and Law Firms

The Legal Aid Society Civil Division, New York, NY, By: Scott A. Rosenberg, Director of Litigation, Judith Goldiner, for Plaintiff Class in Davis, of counsel.

The New York City Housing Authority, New York, NY, By: Henry Schoenfeld, for Defendant, of counsel.

Opinion

OPINION

SWEET, J.

***1** Class action plaintiffs Pauline Davis, Cynthia Williams, Cornelia Simmons and Kim Rivera have moved for an award of attorney's fees, costs and expenses pursuant to 42 U.S.C. §§ 1988 and 3613(c)(2) in the amount of $581,024.44. Defendant New York City Housing Authority ("NYCHA") opposes this application, stating that the plaintiffs are entitled to a maximum award of $96,778.83.

For the following reasons, the plaintiffs shall receive an award in the amount of $308,896.32 in attorney's fees, costs and expenses.

Facts

This application arises from litigation efforts over the course of six years seeking to prevent NYCHA from slowing or reversing desegregation efforts at housing projects. The litigation has generated no fewer than six opinions by this Court, three opinions by the Second Circuit Court of Appeals, eighteen expert affidavits, and an order of the United States Supreme Court denying NYCHA's petition for certiorari. The background and prior proceedings in this action have been set forth in previous opinions and will not be recounted here. *Davis v. New York City Hous. Auth.,* 1992 WL 420923 (S.D.N.Y.Dec.31, 1992) (*Davis I*); *Davis v. New York City Hous. Auth.,* 1997 WL 407250 (S.D.N.Y. July 18, 1997) (*Davis II*); *Davis v. New York City Hous. Auth.,* 1997 WL 711360 (S.D.N.Y. Nov.13, 1997) (*Davis III*); *Davis v. New York City Hous. Auth.,* 166 F.3d 432 (2d Cir.1999) (*Davis IV*); *Davis v. New York City Hous. Auth.,* 60 F.Supp.2d 220 (S.D.N.Y.1999) (*Davis V*); *Davis v. New York City Hous. Auth.,* No. 99-6238, 2000 WL 232191 (2d Cir. Feb.23, 2000) (summary order) (*Davis VI*); *Davis v. New York City Hous. Auth.,* 103 F.Supp.2d 228 (S.D.N.Y.2000) (*Davis VII*); *Davis v. New York City Hous. Auth.,* 278 F.3d 64 (2d Cir.2000) (*Davis VIII*).

Plaintiffs filed the instant motion on August 2, 2002. The motion was heard and considered fully submitted on October 23, 2002.

Discussion

I. ***Plaintiffs Are "Prevailing Parties"***

NYCHA does not dispute that the plaintiffs are "prevailing parties" and thus may be entitled to a fee award. As a result, plaintiffs seek $397,788 in attorney's fees, $180,807.87 in expert witness fees, $2,273.74 in Westlaw fees, $70.33 in long distance telephone charges, and $84.50 in travel and postage charges.[1] NYCHA does not dispute the telephone, travel and postage charges. It does dispute the other requests, which are discussed in greater detail below.

[1] Plaintiffs originally had sought an additional $1,730.62 in printing costs but have since withdrawn this request.

II. ***Attorney's and Other Fees***

The calculation of a reasonable fee to be awarded to a prevailing plaintiff is based principally on a "lodestar" figure, "which is arrived at by multiplying 'the number of hours reasonably expended on the litigation ... by a reasonable hourly rate." ' *Gierlinger v. Gleason,* 160 F.3d 858, 876 (2d Cir.1998) (*quoting Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

Plaintiffs seek compensation for 911.90 hours of time by counsel Scott Rosenberg ("Rosenberg")[2] at an hourly rate of $425.00, and 29.23 hours for counsel Judith Goldiner ("Goldiner") at an hourly rate of $350.00, totaling $383,758.75.[3] NYCHA disputes both the hourly rates and the total amount of time that should be credited at those rates.

[2] This figure includes 36.17 hours necessary to reply to NYCHA's 87-page opposition brief and subtracts 3.16 hours that were erroneously included (0.17 hours in connection with an inadvertently included time record from May 2, 2002, and 2.99 hours related to the filing of a corrected Second Circuit brief).

[3] This amount does not reflect work by another attorney and three paralegals on the case as the plaintiffs did not seek reimbursement for that time.

A. ***Hourly Rates***

***2** **[1]** In determining a reasonable hourly rate, courts should look to market rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Gierlinger,* 160 F.3d at 882 (*quoting Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). The relevant community is the district in which the case was brought, which here is the Southern District of New York. *In re Agent Orange Prod. Liability Litig.,* 818 F.2d 226, 232 (2d Cir.1987); *Marisol A. v. Giuliani,* 111 F.Supp.2d 381, 386 (S.D.N.Y.2000).

Where, as here, litigation spans a number of years, the reasonable hourly rate should be based on current, as opposed to historical, rates. *Gierlinger,* 160 F.3d at 882 ("In order to provide adequate compensation where the services were performed many years before the award is made, the rates used by the court to calculate the lodestar should be 'current rather than historic hourly rates." ') (*quoting Missouri v. Jenkins,* 491 U.S. 274, 284, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989)). The rates should take into consideration, however, the varying level of experience of the lawyers over the course of the litigation. "Each attorney should receive fees based on the average of his or her level of experience over the course of the litigation, as opposed to their current level of experience." *Marisol A.,* 111 F.Supp.2d at 387 n. 2 (*citing New York State Nat'l Org. for Women v. Terry,* 94 F.Supp.2d 465, 473 (S.D.N.Y.2000)).[4] Rosenberg's average level of experience over the course of the litigation is 15 years and Goldiner's average level of experience is 10 years.

[4] The plaintiffs dispute this conclusion, citing to *Gierlinger* for the proposition that a court should utilize "current rather than historic rates." *Gierlinger,* however, merely stands for the proposition that one who is billing as a mid-level partner should be billed out at the current rate for mid-level partners as opposed to a sliding scale of fees over the course of the litigation. The rationale is that plaintiffs' counsel should be compensated for the delay in receiving payment. *Gierlinger,* 160 F.3d at 882. By contrast, the above proposition is that an attorney who starts a litigation as a first-year associate and continues with that litigation over the course of a decade, should not then be entitled to be billed out as a tenth-year associate (or lower-level partner) for the entire span of the litigation. The attorney is entitled to the current, as opposed to contemporary, rate for a first-year associate for work done at the beginning of the litigation and the current, as opposed to contemporary, rate for a tenth-year associate (or lower-level partner) for work done at the close of the litigation. To find otherwise would be to award prevailing plaintiffs' counsel with a windfall and to charge usurious "interest" of the defendants.

Further, the fact that plaintiffs were represented by a nonprofit legal services organization does not alter the

reasonable hourly rate. *Blum,* 465 U.S. at 894 ("Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization."); *Jenkins,* 491 U.S. at 286 (not-for-profit counsel should receive a "fully compensatory fee" that is "comparable to what 'is traditional with attorneys compensated by a fee-paying client" ' (citations omitted)).

Thus, the reasonable hourly rates should be based on current figures for attorneys with comparable experience to Rosenberg and Goldiner from comparable firms based in New York, and these fees should not be discounted in any way based on the fact that Rosenberg and Goldiner work for a nonprofit legal services organization.

In requesting hourly rates of $425 for Rosenberg and $350 for Goldiner, the plaintiffs rely on recent case law, a National Law Journal survey and affidavits from counsel at Morrison & Foerster and Kaye Scholer. NYCHA disputes each form of proof. After examining recent fee awards in civil rights cases in this District, the Court finds that these rates are slightly above the average hourly rates. *E.g., Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc.,* 2002 U.S. Dist. LEXIS 9358, at *43-44 (S.D.N.Y. May 28, 2002) ($345 per hour in civil rights case for partner with 12 years' litigation experience, $270 per hour for attorney with eight years' experience and $175 per hour for attorney with two years' experience); *Marisol A.,* 111 F.Supp.2d 381 (S.D.N.Y.2000) ($375 per hour for lead attorney with extensive experience in child welfare litigation, $350 per hour for attorneys with more than 15 years of experience, $300 per hour for attorneys with 10-15 years of experience, $230 to $250 per hour for attorney with seven to nine years of experience); *Skold v. American Int'l Group, Inc.,* No. 96 Civ. 7137, 1999 WL 405539, at *7 (S.D.N.Y. June 18, 1999) ($400 per hour for experienced civil rights litigator who provided overall direction and strategy, $275 per hour for attorney who served as lead counsel; $225 per hour for attorney who served as co-lead counsel); *Rodriguez v. McLoughlin,* 84 F.Supp.2d 417, 421-23 (S.D.N.Y.1999) ($425 per hour for senior partner at large firm who was an experienced civil rights lawyer and $240 per hour for attorney at large firm with four years of experience).

***3** [2] Rosenberg, a graduate of Princeton University (1978) and the New York University School of Law (1982), now serves as Director of Litigation for the Civil Division of The Legal Aid Society and Adjunct Professor at Brooklyn Law School. A former law clerk for two judges on the United States Court of Appeals for the Third Circuit, he has 18 years of litigation experience in numerous class action cases, and has served as counsel of record in this case since its inception. Rosenberg's hourly rate has been the subject of a judicial determination in another case, *Williams v. New York City Housing Authority,* 975 F.Supp. 317 (S.D.N.Y.1997). There, Rosenberg requested $300 per hour and received $250 per hour for work performed during the course of a litigation spanning twelve years. The court looked to the fact that at the start of litigation, Rosenberg was just two years out of law school and "[h]is contribution to this case thus was not always that of a seasoned litigator." *Id.* at 320. More than five years have passed since that decision, and there is no question that Rosenberg's contributions to this case were consistently those of a much more seasoned civil rights litigator. In light of the finding in *Williams* and in order to keep Rosenberg's hourly rates in line with attorneys at comparable firms with comparable experience, he shall be entitled to $375 per hour.

[3] Goldiner, a graduate of Yale University (1985) and the New York University School of Law (1988), is employed as a staff attorney in the Legal Aid Society's Civil Appeals & Law Reform Unit. She has 13 years of litigation experience in numerous class action cases. Goldiner billed just 29.23 hours of the total 908.12 hours logged. In light of her level of experience and the smaller role she played in this litigation, *Anderson v. City of New York,* 132 F.Supp.2d 239, 243 (S.D.N.Y.2001) (fees reduced from $250 per hour to $200 per hour where co-counsel "essentially prepared and tried [the] action alone and certainly handled the more difficult issues that arose"); *Knoeffler v. Town of Mamakating,* 126 F.Supp.2d 305, 312 (S.D.N.Y.2000) (reducing fees from $325 to $300 where an experienced civil rights litigator with more than 22 years of experience did not play a significant role), Goldiner is entitled to $275 per hour.

While NYCHA has cited cases where courts have awarded lower rates to civil rights litigators, there is no suggestion that those attorneys had the same background and experience as Rosenberg and Goldiner. The rates of $375 and $275, respectively, are within the range of reason given the experience of plaintiffs' counsel and nature of the work involved.[5]

5 The rates appear even more reasonable as plaintiffs did not seek reimbursement for all of the work done on the case, including that completed by another attorney and three paralegals.

B. ***Hours To Be Discounted***

1. ***Paralegal Tasks***

NYCHA argues that 9.64 hours of the plaintiffs' time should be reimbursed at a paralegal rate of $75 per hour. Such deductions often occur where an attorney performs non-legal matters. *E.g., Luciano v. Olsten Corp.,* 925 F.Supp. 956, 966 (E.D.N.Y.1996) (assigning $50 per hour rate to work completed by fifth-year associate, including cite checking, proofreading, and file organization); *Cooper v. Sunshine Recoveries,* 00 Civ. 8898, 2001 U.S. Dist. LEXIS 8938, at *12-13 (S.D.N.Y. June 27, 2001) (reducing attorney's rate from $150 to $50 per hour where the attorney prepared exhibits, proofread affidavits of other counsel, and processed time entries of other counsel).

***4** [4] Of the 9.64 hours cited by NYCHA, all of the tasks may have been completed by an experienced paralegal except for (1) 0.58 hours to Shepardize reply brief on January 28, 1997; (2) some portion of 0.83 hours to check tenant statistics by race and Davis claimant reports for completeness less time to assemble and prepare them for copying on March 15, 1999; and (3) some portion of 2.0 hours on August 2, 2002 to discuss the preparation of declarations and proof read the brief, less time to prepare a table of contents, etc. Therefore, 2.0 of the 9.64 hours will be billed as attorney hours. The plaintiffs will receive $75 per hour for the remaining 7.64 hours, for a total of $573 in paralegal fees.

2. ***First Appeal to the Second Circuit***

[5] _____ NYCHA argues that the proposed lodestar should be reduced by the 64.5 hours that counsel spent in defending against the first appeal by NYCHA to the Second Circuit.[6]

6 In the alternative, NYCHA argues that 2.08 of the hours should be discounted as clerical or administrative work. A review of those entries reveals that they are not merely clerical or administrative and thus should not be so discounted.

By Opinion and Order dated July 17, 1997, this Court enjoined NYCHA from implementing the working family preference. *Davis IV,* 166 F.3d at 434. NYCHA appealed, seeking to overturn the preliminary injunction on several grounds, including that the Court's findings on the issue of perpetuation of segregation were vague, conclusory and unsupported. *Id.* at 435. As a result of the appeal, the case was remanded for further factual findings. *Id.* at 437. In so holding, the Second Circuit concluded that "the plaintiffs' expert's opinion was so vague and conclusory as to preclude defendant from effectively challenging the accuracy of the opinion and to preclude [the district court] from being able to specify the subsidiary facts underlying the ultimate finding of perpetuation of segregation." *Id.*

In light of the above finding, the 64.5 hours will be discounted. While plaintiffs are correct that they do not lose eligibility for a fee award simply because of lack of success at any particular stage of litigation, that does not mean that they are entitled for all of the hours they claim. It is appropriate to discount these hours given the lack of success upon the appeal and the excessive number of hours spent on the appeal.

3. ***Clerical/Administrative Tasks***

[6] NYCHA suggests that another 24.29 hours representing clerical tasks such as faxing, filing and mailing should be either discounted entirely or compensated at a rate of $50 per hour. Other courts have excised such tasks because "clerical and secretarial services are part of overhead and are not generally charged to clients." *Sulkowska v. City of New York,* 170 F.Supp.2d 359, 368 (S.D.N.Y.2001) (eliminating hours expended on tasks such as filing, photocopying, mailing, faxing, and serving papers) (*citing Marisol A.,* 111 F.Supp.2d at 390)). *See also Broome v.. Biondi,* 1 F.Supp.2d 230, 236 (S.D.N.Y.1997) (disallowing compensation for editing letters, preparing for depositions, serving and filing papers, completing a civil cover sheet, legal research regarding consolidation, revising letters, preparing papers for filing and service, revising answers, organizing files, and teleconferences).

***5** Of the 24.29 hours, the time spent in instructing and supervising staff on how to perform administrative tasks may be counted. That constitutes approximately 5 of the 24.29 hours. In addition, a number of the tasks that NYCHA underscored appear to be attorney tasks. These include: (1) proofing the brief (3/10/97, a portion of 1.25 hours); (2) corrections to papers (3/19/99, a portion of 2.42 hours); (3) preparing a certification of compliance with Fed. R.App. Proc. 32 and declaration of service (12/13/99; .33 hours); (4) preparation of bluebacks and declaration of service (4/14/00; .58 hours); (5) writing a letter to the Court (4/14/00; 1.25 hours); and (6) preparation of bluebacks (7/2/00; .08). For these activities, the plaintiffs shall be credited with an additional 4 (four) hours of attorney time.

The remainder of the tasks involve administrative tasks and shall be eliminated.

4. ***Technical tasks***

[7] _____ NYCHA objects to work performed

related to the HATS program, NYCHA's computerized database of all public housing applicants. Any work actually analyzing the information certainly counts toward billable hours; however, the citations highlighted by NYCHA all involve preparatory work to enable that analysis. As such, the hours cannot be considered, and 5.97 hours cannot be considered attorney time. The plaintiffs shall instead be reimbursed at a paralegal level of $75 per hour, totaling $447.75.

5. ***Vague Entries***

NYCHA also objects to 11.37 hours for "vague" entries. The plaintiffs explained that the entries appear to be vague as a result of a printing error, and they provided in their reply papers a fuller explanation for those activities. A review of the more complete explanation shows that the entries are not vague. One entry, however, involves administrative work such as discounted above. Thus, of the 11.37 hours, the 0.08 hours spent in preparing labels for serving and filing a memorandum of law will not count. The plaintiffs are thus entitled to 11.29 hours of attorney time, and the 0.08 hours shall be eliminated.

6. ***Motion to Compel***

[8] _____ NYCHA states that plaintiffs should not be compensated for 9.16 hours expended in unsuccessfully moving to compel NYCHA to produce computer tapes of various tenant statistics.

The tapes in question made record of various tenant statistics for the first half of 1999. NYCHA was required to provide a printed copy of such statistics to the plaintiffs' counsel within 30 days after its publication. NYCHA was not able to publish the statistics for the first half of 1999 because of computer problems-a problem that the plaintiffs acknowledged as legitimate. Thus, the plaintiffs moved to obtain the tapes recording the statistics. At the time they did so, they reasonably believed that the statistics might be necessary. As a result, it does not matter that, in the end, the matter turned on statistics ending in December 31, 1998. *E.g., Grant v. Martinez,* 973 F.2d 96, 99 (2d Cir.1992) ("The relevant issue ... is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures."). These hours therefore will be counted.

***6** NYCHA also argues that 0.84 hours should be discounted as clerical or administrative work. These entries do focus on clerical tasks and shall be discounted.

7. ***Hours Not Undertaken in Support of Litigation***

[9] NYCHA alleges that plaintiffs' counsel expended 11.88 hours[7] on activity that did not directly support plaintiffs' efforts.

[7] This figure does not include the 0.17 hours entered on May 2, 2002 that plaintiffs admit should be discounted as the entry was erroneous.

Plaintiffs are persuasive in arguing that the records are related to the litigation. One category that NYCHA objects to involves discussions with counsel in the *Williamsburg* litigation, *Williamsburg Fair Housing Comm. v. New York City Housing Authority,* 76 Civ. 2125. The three projects at issue in *Williamsburg* were also disproportionate projects, and any relief under the *Williamsburg* remedial consent decree had to be factored into the analysis for this case. Further, this Court entered an injunction that affected those three projects, and the counsel in the two cases had to communicate concerning the impact of the injunction. Another category involves communications with legal experts concerning issues related to the case. Such communications are clearly compensable as an essential part of an attorney's preparation for a complex case like this one. Finally, another category involves the monitoring of compliance with orders in this case, actions that are also compensable as related to the litigation. Therefore, NYCHA's objections are rejected.

8. ***Communications with Professor John Yinger***

[10] NYCHA seeks to reduce the lodestar figure by 8.34 hours spent seeking to obtain an expert affidavit from Professor John Yinger ("Yinger") in 1996.

In connection with the plaintiffs' motion to enjoin the application of NYCHA's working family preference in 1996, plaintiffs' counsel consulted with Yinger, a leading expert on housing discrimination and professor of economics and public administration at The Maxwell School, Syracuse University. Plaintiffs had contemplated submitting an expert affidavit by Yinger, but determined that the points he made could be made as legal arguments in the briefs rather than by expert affidavit. Plaintiffs' counsel therefore utilized these discussions in outlining arguments related to irreparable injury and less discriminatory alternatives on NYCHA's part.

Part of the 8.34 hours spent on Yinger was related to the

creation of an expert affidavit that never was used. This time cannot be compensable. Time spent with Yinger related to garnering his advice on the issues discussed above may be compensable. Therefore, four (4) of the 8.34 hours will be counted.

9. ***Correction of Plaintiffs' Errors***

[11] [12] NYCHA seeks to discount 13.58 hours plaintiffs' counsel spent performing work to correct his own errors.

The 1.83 hours spent correcting time records as a result of NYCHA's notification of errors shall be discounted. While the plaintiffs are correct that a reasonable fee may be awarded for time spent in preparing and defending a fee application, *Weyant v. Okst,* 198 F.3d 311, 316 (2d Cir.1999) (citing cases), taking 1.83 hours to correct errors pointed out by other counsel is excessive. The 2.99 hours for correcting the appellate brief on the second appeal shall be counted; however the 1.17 hours of that time spent in serving and filing those briefs will not be counted for the reasons discussed above. Finally, the 8.76 hours spent related to Dr. Leonard Cupingood, a Vice President at the Center for Forensic Economic Studies in Philadelphia ("Cupingood"), shall be counted as it represents time spent between counsel and an expert. While part of the time was spent in reviewing and correcting expert affidavits, a great portion was spent in editing the affidavit. Such time is compensable.

***7** Thus, three (3) of the 13.58 hours shall be discounted.

10. ***Statistical Significance***

[13] NYCHA argues that 7.25 hours should be discounted for the time plaintiffs' counsel devoted to the argument that the differences between the WFP and the original TSAP were statistically significant, as the Second Circuit did not adopt this argument.

The issue arose because, on the first appeal, the Second Circuit held that "[t]he proper standard to be applied on remand is whether the proposed use of the working family preference will *significantly* perpetuate desegregation at the relevant NYCHA developments." *Davis IV,* 166 F.3d at 438 (emphasis in original). Responding to that direction, plaintiffs presented evidence on remand demonstrating that the WFP would severely impair desegregation at the 21 disproportionate projects and that the impact would be significant whether measured in absolute numbers or by standard statistical tests. NYCHA maintained that the plaintiffs had failed to establish either statistical significance or legal significance. Agreeing with the plaintiffs, this Court found that the impact of the WFP was statistically and legally significant. *Davis V,* 60 F.Supp.2d at 239.

On the second appeal, NYCHA continued to insist that a showing of statistical significance was essential. Ultimately, however, the Second Circuit rejected NYCHA's position, holding that the "present inquiry falls outside the realm in which ordinary statistical analysis, and the need for inquiry into significance from a purely statistical standpoint, are needed." *Davis VIII,* 278 F.3d at 83.

In its petition for certiorari to the United States Supreme Court, NYCHA continued to argue that a showing of statistical significance was required.

In light of NYCHA's promotion of the argument of the necessity for a statistical showing, it cannot now begrudge the plaintiffs 7.25 hours spent in attempting to prove that there was statistical significance. There is no showing that 7.25 hours is excessive or redundant, and it seems a reasonable amount of time to spend to rebut an argument that originated with the NYCHA.

11. ***Excessive Hours***

NYCHA argues that an additional 16.62 hours should be deducted as excessive.

[14] NYCHA first focuses on time spent in drafting the instant motion, arguing that the plaintiffs should not have spent 16.24 of the 21.68 hours to draft and edit the background section of plaintiffs' memorandum, as well as 5.34 hours to draft a declaration restating the same facts. However, other courts have held that it was reasonable for counsel to spend much longer periods of time on fee applications. *E.g., Harb v. Gallagher,* 131 F.R.D. 381, 388 (S.D.N.Y.1990) (51.25 hours in connection with a Rule 11 motion); *American Petroleum Institute v. EPA,* 72 F.3d 907, 918 (D.C.Cir.1996) (60 hours of associate time and 30 hours of partner time). Therefore, considering the complexity of the instant case, these amounts are not excessive.

***8** [15] Second, NYCHA seeks to discount 3.43 hours during which Goldiner second-seated various oral arguments. "[P]revailing parties are not barred as a matter of law from receiving fees for sending a second attorney to depositions or an extra lawyer into court to observe and assist." *New York State Ass'n for Retarded Children v. Carey, Inc. .,* 711 F.2d 1136, 1146 (2d Cir.1983). Given the negligible amount of time claimed for Goldiner's second-seating, the plaintiffs have not sought an

unreasonable amount of time. NYCHA's request that Goldiner be billed out at a lower rate than requested has already been addressed above; the rate at which she will be billed already takes into consideration the less active role she took in this litigation.

Finally, NYCHA points out 2.35 hours that it deems excessive. All but .25 hours (time spent preparing an affidavit and meeting regarding document production) appear to be excessive and shall not be counted.

12. ***Travel Time***

[16] NYCHA requests that 1.71 hours of travel time be discounted because plaintiffs failed to request just 50% of the number of hours spent in travel on two occasions. However, plaintiffs counsel used the time in travel to accomplish substantive work and thus the time will not be discounted.

13. ***Limited Success***

NYCHA asserts that the lodestar should be reduced by 35.33 hours[8] to reflect work on unsuccessful claims related to project choice for larger families, 37.96 hours[9] to reflect work on an unsuccessful disparate impact theory and that the entire award should be discounted by 50% to reflect overall limited success.

8 The plaintiffs claim that they spent only 15.7 hours on the project choice. The record supports plaintiffs' calculation.

9 Similarly, plaintiffs assert that they spent just 27.55 hours on the disparate impact claim-an assertion also supported by the record.

While there is a strong presumption that the lodestar figure represents a reasonable fee, the court's determination does not end with this calculation. *Grant v. Martinez,* 973 F.2d 96, 101 (2d Cir.1992). Instead, upon a showing by a party contesting the lodestar figure that plaintiffs' success was limited, the lodestar figure can be adjusted downward. *Id.; see also Farrar v. Hobby,* 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (stating that "most critical factor" in determining reasonableness of fee award is degree of success obtained). To determine whether plaintiffs' partial success requires a reduction in the lodestar, the court first examines whether plaintiffs "failed to succeed on any claims wholly unrelated to the claims on which plaintiff[s] succeeded. The hours spent on such unsuccessful claims should be excluded from the calculation." *Grant,* 973 F.2d at 101 (*citing Hensley v. Eckerhart,* 461 U.S. 424, 434-35, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Next the court considers whether there are any unsuccessful claims interrelated with successful claims. If there are such unsuccessful claims, the court then "determines whether plaintiff[s]' level of success warrants a reduction in the fee award." *Id.* (*citing Hensley,* 461 U .S. at 436). Attorneys should recover fully compensatory fees, however, where plaintiffs have obtained excellent results. *Hensley,* 461 U.S. at 435. Ultimately, the decision of whether a plaintiff's success is limited lies within the discretion of the court. *Id.* at 437.

a. ***Project Choice for Larger Families***

***9** **[17]** There is no dispute that the claim regarding project choice for larger families was unsuccessful. The parties do dispute, however, whether it was so related to the successful claims that the hours should not be discounted completely.

NYCHA's original Tenant Selection and Assignment Plan ("TSAP") permitted families seeking smaller apartments to select from among projects where NYCHA anticipated vacancies. Without project choice, those families would automatically be placed in any one of a number of developments in the borough of their choice, without any regard for a particular family's need to be near a job, school, family member or health care provider, etc. NYCHA stated that the goal of project choice was "to restore to lower-income public housing families the same dignity of choice available to families residing in private homes." Def.'s Mem. at 2.

In light of these factors, NYCHA proposed to amend the TSAP to extend project choice to families needing larger apartments. The United States Department of Housing and Urban Development ("HUD"), the federal agency that oversees public housing, approved the proposal, concluding that it was "not likely to affect the racial identifiability of the developments in New York City for the remaining period of the *Davis* TSAP." Plaintiffs objected to the proposal, arguing that it would perpetuate segregation.

The issue of project choice for larger families is not "wholly unrelated" to the successful claims. *E.g., LeBlanc-Sternberg v. Fletcher,* 143 F.3d 748, 762 (2d Cir.1998) ("No fees should be awarded for time spent in pursuing a failed claim if it was 'unrelated' to the plaintiff's successful claims in the sense that it was 'based on different facts and legal theories." ') (*quoting Hensley,*

461 U.S. at 434-35); *Lunday v. City of Albany,* 42 F.3d 131, 134 (2d Cir.1994) ("[S]o long as the plaintiff's unsuccessful claims are not 'wholly unrelated' to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount.") (*quoting Grant v. Martinez,* 973 F.2d 96, 101 (2d Cir.1992)).

Plaintiffs' motion papers to enjoin the Working Family Preference were supported by a detailed computer simulation performed by Dr. Cupingood, of what the racial and economic impact of the WFP would have been if it had been in effect during 1995. Dr. Cupingood concluded that the WFP would have increased white admissions from 250 to 580 families-an increase of 132 percent.

Plaintiffs argued that the increase in the white admissions rate would violate the Fair Housing Act because it would have a discriminatory impact on African-American and Latino families and because it would perpetuate past segregation by NYCHA. The perpetuation of segregation, they argued, was directly related to NYCHA's "project choice" rules that enable white families to cluster in predominantly white projects. Dr. Cupingood concluded that because of the "project choice" rules, "36.8 percent of all white admissions would cluster in projects with white occupancy percentages a third higher than the system-wide average."

***10** Although the expansion of project choice to larger families was not enjoined, its impact on concentrating additional white families in predominantly white projects arguably did form part of the basis for the injunction. Thus, it is not "wholly unrelated" to the successful claim and the 15.7 hours shall not be discounted completely. However, due to the plaintiff's lack of success on this issue, the 15.7 hours shall be reduced by five (5) hours.

b. ***Disparate Impact***

[18] In an early phase of litigation, plaintiffs challenged NYCHA's policies on the basis of disparate impact. Relying on similar facts that supported their perpetuation-of-segregation claim, the plaintiffs pointed to Dr. Cupingood's finding that the working families preference would increase white admissions from 4.2 to 9.9 percent. This underlying factual similarity suggests that the claims were not wholly unrelated and thus the entire amount should not be discounted. Nonetheless, ten (10) of the 27.55 hours will be discounted to reflect the limited success of that claim.

The plaintiffs assert that they argued the disparate impact theory in the alternative to the perpetuation of segregation claim, as both claims were designed to show that the working families preference was discriminatory. Further, they argue that such argument would entitle them to all of the hours billed on this subject. *E.g., Hensley,* 461 U.S. at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee."). However, the claims for disparate impact and perpetuation-of-segregation involve entirely different legal theories and provide for entirely different remedies. It is true that the plaintiffs were able to obtain a measure of success in combating the working families preference through the perpetuation-of-segregation claim where they were unable to do so on the disparate impact claim. This fact alone is insufficient to consider the claims to have been made "in the alternative," particularly given the fact that the disparate impact theory was an arguably broader claim.

c. ***Limited Success***

[19] NYCHA finally requests that the entire number of hours be reduced by 50% in light of the plaintiffs' purported limited success. To bolster this argument, NYCHA points to the fact that the plaintiffs completely failed to stop project choice for larger families and ultimately only enjoined 14 of 322 developments. The lack of success on the project choice for larger families has already been reflected in the discounted hours related to that topic. Further, the plaintiffs did not seek to enjoin any particular number of housing projects. Presumably, NYCHA argues that if the plaintiffs had been successful on their disparate impact theory, injunctions would have issued with regard to all 322 developments. There is no guarantee that such an injunction would have been necessary and, in any case, the plaintiffs' lack of success on the disparate impact theory has been reflected in the discounting discussed above with regard to hours spent on that project. Finally, the success of this lawsuit should not be measured by how many projects were enjoined, but rather whether the plaintiffs were successful in addressing purported discriminatory effects of the working families preference. The answer to that question is in the affirmative.

***11** Finally, NYCHA questions the efficacy of the lawsuit because of a dissenting opinion suggesting that the lawsuit may have had the opposite of its intended effect. That opinion is insufficient to justify reducing plaintiffs' fees by any amount.

The foregoing findings result in the following amount of attorney's fees:

Scott Rosenberg
CLAIMED HOURS: 911.90

TOTAL DEDUCTIONS: 118.81 hours
• 7.64 hours of paralegal work

• 64.5 hours for first appeal to Second Circuit

• 15.29 for clerical/administrative tasks

• 5.97 for technical tasks

• 0.08 for administrative tasks among alleged vague entries

• 0.84 for administrative tasks among motion to compel entries

• 4.34 hours for time spent on unused Yinger affidavits

• 3 hours for correction of errors

• 2.15 hours as excessive

• 5 hours for project choice for larger families

• 10 hours for disparate impact

NET HOURS: 793.09 hours

TOTAL FEES (@ $375 per hour): $297,408.75

PARALEGAL FEES (@$75 per hour): $1,020.75

Judith Goldiner
CLAIMED HOURS: 29.23 hours

DEDUCTIONS: _____ none

TOTAL FEES (@ $275 per hour): $8,038.25

COMBINED TOTAL FEES: $306,467.75

____ III. *Plaintiffs Are Not Entitled to Expert Fees*

[20] NYCHA objects to the plaintiffs' application for an award of more than $180,000 in expert fees, arguing that the action was brought only under the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq*. ("Fair Housing Act"), under which expert fees are not recoverable.

As in initial matter, the parties do not contest that expert fees are not recoverable under the Fair Housing Act, *e.g., Cabrera v. Fischler,* 814 F.Supp. 269, 291 (S.D.N.Y.1993); *BD v. DeBuono,* 177 F.Supp.2d 201, 206 (S.D.N.Y.2001), nor that such fees would be recoverable if this act were brought pursuant to 42 U.S.C. § 1981. *E.g.,* 42 U.S.C. § 1988(c).[10] There is also no dispute that the plaintiffs prevailed upon a claim brought under the Fair Housing Act.

10 The FHA provides that "the Court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee and costs ." 42 U.S.C. § 3613(c)(2). The standards applicable to an award of fees under this provision were the same as those applicable to 42 U.S.C. § 1988. In 1991, however, the Supreme Court held that fees for expert witnesses were not recoverable as part of § 1988 attorney's fees absent express statutory language. *West Virginia Univ. Hosps. v. Casey,* 499 U.S. 83, 86, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Congress thereafter enacted the Civil Rights Act of 1991, amending § 1988 and certain other civil rights statutes to provide that expert fees were recoverable as part of an attorney's fee award. The attorney's fee provision of the FHA, however, has not been likewise amended. Thus, the FHA's attorney's fees provisions are still subject to the *West Virginia Hosps.* ruling.

Plaintiffs argue, however, that the FHA claim was brought along with a § 1981 claim. Where a plaintiff combines a fee-generating claim with a non-fee generating claim,[11] it has been held that attorney's fees may still be awarded so long as the fee-generating claim is "substantial" and the claims arose out of a "common nucleus of operative fact." *Maher v. Gagne,* 448 U.S. 122, 132 & n. 15, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). *See also Bonner v. Guccione,* 178 F.3d 581, 595-96 (2d Cir.1999); *Lightfoot v. Union Carbide Corp.,* 110 F.3d 898, 914 (2d Cir.1997). It is not necessary to conclude that plaintiffs would have prevailed on the merits of the fee-generating claim, but only that the claims were not "frivolous, unreasonable or groundless." *Nat'l Helicopter Corp. of America v. City of New York,* 1999 WL 562031, at *4 (S.D.N.Y. July 30, 1999) (*quoting Koster v. Perales,* 903 F.2d 131, 136 (2d Cir.1990)).

11 The cases plaintiffs cite involve the pairing of a claim-such as a pendant state claim-for which no attorney's fees at all are available with another claim-such as a § 1983 claim-for which attorney's fees are available. Here, the purported pairing is of (1) a

> federal claim for which attorney's fees are available, but those attorney's fees may not include expert fees, with (2) a federal claim for which attorney's fees are available, and those attorney's fees may include expert fees. It follows that the same logic and case law related to the first situation also applies in the instant case.

***12** In January 1990, the plaintiffs filed a class action complaint, *Davis v. New York City Housing Auth.,* 90 Civ. 628, alleging discrimination by NYCHA on the basis of race, color, and national origin in violation of 42 U.S.C. § 1981, 1982 and 1983; the Fair Housing Act, and Title VI of the Civil Rights Act of 1964, 42 U.S.c. § 2000d. The parties resolved these claims in a Consent Decree approved by this Court on December 30, 1992. *Davis I,* 1992 U.S. Dist. LEXIS 19965 (S.D.N.Y. Dec. 30, 1992). The Decree permanently enjoined various discriminatory housing practices, afforded remedial relief for up to 2,190 class members, and provided for the payment of monetary damages to the named plaintiffs. Additionally, the Decree incorporated by reference a Tenant Selection and Assignment Plan ("TSAP") that was to remain in effect for five years.

The 1992 Decree authorized plaintiffs to challenge modifications of TSAP during the first five years of its existence and "to seek full and complete relief authorized by the Fair Housing Act." On November 15, 1996, within that five-year period, plaintiffs moved to enjoin the WFP and project choice for larger families as violating the TSAP.

While the plaintiffs list § 1981 in their complaint as a means of seeking redress, this case in essence was a successful attempt to enforce the Decree under the Fair Housing Act. Plaintiffs admit as much in this fee application, when they state that they brought this action "to enjoin adoption of the WFP on the ground that it would violate the Fair Housing Act ...," Pls.' Mem. at 8, and that plaintiffs "argued that this increase in white admissions rate would violate the Fair Housing Act." *Id.* As a result, a § 1981 claim could not be a "substantial" part of it even if based upon the same nucleus of operative facts. Further, a challenge to the Decree under § 1981 would be groundless. Therefore, it cannot be said that the plaintiffs brought an expert-fee generating claim (§ 1981) along with an non-expert-fee generating claim (FHA), and plaintiffs' efforts to seek compensation for expert fees must be rejected.

_____ In reaching this holding, this Court is mindful of a valid, if distressing, point made by plaintiffs' counsel. He pointed out that this Court's holding will apply whenever an action is brought pursuant to § 1981 to enjoin a discriminatory housing practice, the action is resolved in a consent decree, and a later action is brought under the Fair Housing Act to enforce a portion of the consent decree. Further, the satisfactory resolution of such cases seeking to enforce consent decrees with regard to alleged widespread discriminatory practices of a necessity rely on expert testimony. Thus, to hold that expert fees are not recoverable when seeking to enforce a consent decree under the Fair Housing Act would be to handicap such actions in the future. Nonetheless, such complaints should be lodged against the United States Congress, which has not seen fit to pass legislation permitting the award of expert fees in any Fair Housing Act cases. In the absence of such legislation, this request unfortunately must be denied.

IV. *Westlaw Charges May Be Awarded*

***13** [21] The seminal case in this Circuit regarding the recovery of computer research costs is *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.,* 95 F.3d 153, 173 (2d Cir.1996). There, the Second Circuit held that "computer research is merely a substitute of an attorney's time that is compensable under an application for attorney's fees and is not a separately taxable cost." *Id.* at 173 (holding that district court did not abuse discretion in declining to shift cost of computer research).

Courts are divided, however, in their application of *Evergreen. Compare Tsombanidis v. City of West Haven,* 208 F.Supp.2d 263, 287 (D.Conn.2002) (noting disagreements among district courts and denying costs of computer research) *with Nat'l Distillers Prods. Co., LLC v. Refreshment Brands, Inc.,* 2002 WL 1766548, at *2 n. 6 (S.D.N.Y. July 20, 2002) (awarding Westlaw bills as "attorney fees" rather than as a "cost" in light of *Evergreen*). *See also Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.,* 2002 U.S. Dist. LEXIS 13706, at *46-47 (S.D.N.Y. July 26, 2002) (awarding compensation for computer research because plaintiffs' counsel typically charged clients for computer research separately of hourly rate).

A later Second Circuit case suggests that the cases allowing compensation for computer research as part of attorney's fees are correct. In *LeBlanc-Sternberg,* the Court listed *Evergreen* among other cases as an example of a case where a category of expenses is "not properly treated as overhead expenses for purposes of a fee award but are the sort of expenses that may ordinarily be recovered." 143 F.3d at 763. Thus, the Second Circuit has suggested that computer research costs "may ordinarily be

recovered."

As a result, plaintiffs are entitled to $2,273.74 for Westlaw charges.

Conclusion

In light of the foregoing, the plaintiffs shall receive $306,467.75 in attorney's fees, $2,273.74 in Westlaw fees, $70.33 in long distance telephone charges, and $84.50 in travel and postage charges, for a total of $308,896.32 in attorney's fees, costs and expenses.

It is so ordered.