99-40547
99-40557

131 UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
New Orleans, Louisiana

Case No. 99 - 40547

EULUGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES,

Plaintiffs - Appellants;

SUFFICIENT

Vs.

ARTHUR BROTHERS, INC.,

Defendant - Appellee.

Case No. 99 - 40557

OSCAR GUERRA,

Plaintiff - Appellant;

U.S. COURT OF APPEALS
FILED
DEC 7 1999
CHARLES R. FULBRUGE III
CLERK

Vs.

CELANESE CORP., CELANESE CHEMICAL CO.,
and, ARTHUR BROTHERS, INC.,

Defendants - Appellees.

Appeal from the United States District Court
Southern District of Texas - Corpus Christi Division
The Hon. Ricardo Hinojosa, United States District Judge

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I. INTERESTED PARTIES

Case No. 99-40547 and Case No. 99-40557

The undersigned counsel of record certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) Texas Rural Legal Aid, Inc.
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II. ATTORNEYS FOR APPELLEES STATEMENT REGARDING ORAL ARGUMENT Pursuant to Local Rule 28.2.4

Appellant requests oral argument in this case pursuant to Local Rule 28.2.4. Oral argument is necessary in this appeal from summary judgment due the complexity of the legal and factual issues involved in this case. Oral argument would allow counsel to simplify matters and provide the Court the opportunity to probe into additional factual and legal issues raised by, or implicit in the written briefs.

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1. Cases

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UNITED STATES COURT OF APPEALS
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EULUGIO MIRELES,BARTOLO MENDIOLA,
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B R I E F O F A P P E L L A N T S

TO THE HONORABLE JUDGES
OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Come now Appellants, in appeal from Final Judgment of the United States District Court for the Southern District of Texas, Corpus Christi Division, and submit to this Honorable Court such Brief as follows.

V. STATEMENT OF JURISDICTION

A. District Court

The United States District Court had subject matter jurisdiction of this employment discrimination case pursuant to 42 U.S.C.§ 2000e-5(f)(3) for the claims arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000-e, *et seq.*, and under 28 U.S.C. § 1331 (federal question).

B. Court of Appeals

The Court of Appeals has the jurisdiction to review the final judgements signed and entered by the District Court on March 30, 1999. That final judgement disposed of all claims before the District Court. Plaintiffs filed timely appeals on April 30, 1999 (R.E.- Tab B).

The Court has directed Appellants to address the issue of timeliness. The Notices of Appeal were timely received by the District Clerk April 30, 1999 (R.E.- Tabs B&E). However, Plaintiffs' counsel over paid the filing fees, sending a check for $250.00 for filing the two notices (check No. 5588, $250.00, dated April 27, 1999) rather than the correct amount of $210.00.

Upon timely receipt of the package containing the Notices of Appeal on April 30, 1999, *the District Clerk date stamped the transmittal letter,* typed a note to counsel regarding the correct filing fee (R.E.- Tabs B & E). The Clerk returned the *original* letter and notices to Plaintiff's counsel, *but failed to date stamp the notices.*

Counsel received the package on May 5, 1999, prepared a check for the proper filing fees (check No. 5609, $210.00, dated May 5, 1999), mailed the original documents and the second check to the District Clerk, who received and them the next day (R.E. - Tabs B and E).

The referenced excerpt is a certified copy of a copy of the transmittal letter dated April 27, 1999 sent with the Notices of Appeal, from the District Clerk's official file, bearing the Clerk's stamp stating "Received U.S. District Clerk April 30, 1999.", and a note from the District Clerk to Plaintiff's counsel at the bottom of the letter, "APPEALS FEE IS $105.00. Please remit $210.00 for both notices at $105 each." The document also shows both filing fee checks. (R.E.- Tabs B & E)

Counsel's declaration verifying the facts stated herein is contained in Appellants' motion to supplement the record (R.E.- Tab E), for purposes of including the certified copy of the correspondence from the District Clerk's file, and matters stated above, which also appear in the motion (R.E.- Tab E). The motion is filed with this brief.

VI. STATEMENT OF THE ISSUES

1. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY FAILING TO FOLLOW THE INSTRUCTIONS FROM THE COURT OF APPEALS IN THE PROCEEDINGS AFTER REMAND, IN WAYS INCLUDING *FAILING TO MAKE ANY FINDINGS OF FACT* REGARDING a) REASONABLE ATTORNEYS' FEES, b) THE TYPE OR AMOUNT OF RELIEF SOUGHT BY THE PLAINTIFFS IN THEIR SUITS, c) THE NUMBER OF HOURS OF ATTORNEY AND PARA-LEGAL TIME, and d) THE REASONABLE HOURLY RATE OF EACH.

2. THE DISTRICT COURT ERRED BY *FAILING TO APPLY THE JOHNSON V. RAILWAY EXPRESS FACTORS* IN DECIDING WHAT A REASONABLE FEE SHOULD BE IN THIS TITLE VII CASE, IN WAYS INCLUDING a) FAILING TO CALCULATE THE LODESTAR OF THE ATTORNEY'S FEES BASED UPON FINDINGS OF FACT AS TO THE NUMBER OF HOURS AND THE REASONABLE HOURLY RATES, AND b) FAILING TO APPLY THE *JOHNSON V. RAILWAY EXPRESS* FACTORS TO A CALCULATED LODESTAR BASED UPON FINDINGS OF FACT.

3. THE DISTRICT COURT ERRED IN AWARDING PREVAILING PARTIES BY SETTLEMENT IN THIS TITLE VII CASE REASONABLE ATTORNEY'S FEES OF ONLY, a) $9600.00 IN *MIRELES,* and, b) $5,000.00 IN *GUERRA*, FOR WORK DONE OVER A PERIOD OF 23 YEARS BECAUSE SUCH AWARDS ARE NOT SUPPORTED BY THE EVIDENCE OR ARE AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE.

4. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY APPLYING RULES FOR MONETARY PROPORTIONALITY TO THE RESULTS ACHIEVED RATHER THAN THE RELIEF SOUGHT OR AVAILABLE.

5. THE DISTRICT COURT ERRED IN DETERMINING THE RESULTS ACHIEVED BY THE PLAINTIFFS AS *DE MINIMUS* WITHOUT FIRST FINDING THE FACTS REGARDING a) THE RELIEF SOUGHT OR AVAILABLE, AND b) THE RESULTS ACHIEVED.

6. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY FAILING TO INTERPRET AND APPLY CORRECTLY THE SUPREME COURT'S RULING IN *FARRAR V. HOBBY*.

VII. STATEMENT OF THE CASE

A. Course of Proceedings and
B. Disposition in Court Below

1. Introduction

This appeal, and the previous appeal in 1995 - 1998, are proceedings in the attorney's fee phase of Title VII litigation which began in 1976. There have been three (3) appeals. There are two (2) *records* in this consolidated case (*"Mireles-Guerra"*). Upon Appellants' motion herein, the Court included the *Trevino* record as a supplement to the consolidated record. *Trevino* was the lead case after the first remand, and through the second appeal.

References to the Records in this appeal and the second appeal (*Guerra-Trevino-Mireles*: 1995 - 1998), identify each case separately, in *Mireles*, "M/R. ___"; in *Trevino*, "T/R. ___"; and in *Guerra*, "G/R. ___". References to transcripts are, in *Mireles* and *Guerra*, "M&G/Tr.(Hearing date)___", and in Trevino, "T/Tr. ___",. References to the Record Excerpts are "R.E.- Tab ___."

In order to provide a complete detailed history and

reference, the brief filed in the second appeal is included in Tab E of the Record Excerpts (G/R: A/54-110; R.E. Tab- E). References to the previous brief identified as "Appellants' Brief: Second Appeal/ 1995-1998".

Appellants are referred to as "Appellants" or "Plaintiffs," Appellants' counsel by name, and Texas Rural Legal Aid, Inc., "TRLA." The Celanese companies are referred to as "Appellee Celanese," "Defendant Celanese," "CCC," or by name; Arthur Brothers, Inc. as "Appellee A.B.I.," "Defendant A.B.I.," or by name.

2. Proceedings Prior to First Appeal: 1976-1982

In order to provide a complete detailed history and reference, the substantive text of the brief filed in the second appeal is included in Tab E of the Record Excerpts (G/R: A/54-110). Excerpts from the brief appear below.

The five *Mireles* plaintiffs filed their class action case October 28, 1976, naming only defendant ABI (M/R. 1904; Appendix, Tab A *Mireles* Docket Sheet, Entry #1, p. 3). About four years later, *Trevino* was filed on April 30, 1980 (Supplemental Record- Appellants' Previous

Brief, R.E.- Tab 8; *Trevino* Docket Sheet, Entry #1, p. 1). Based on an EEOC charge filed in 1978, Plaintiff Guerra filed suit on August 23, 1980, against ABI and CCC (*Guerra v. Celanese Corporation and Arthur Brothers, Inc.*, C.A.No. C-80-115; USDC SDTX - Corpus Christi) (G/R. 1120).

In contested discovery through 1980, plaintiffs obtained evidence indicating substantial involvement by CCC managers and supervisors in decisions directly affecting their employment with ABI, and with their opportunities to compete equally for CCC employment (T/R. Vol. 6, 827-1309). Based on the discovered evidence regarding the CCC-ABI interrelationship, Plaintiff Trevino filed a second EEOC charge in October 1979, naming CCC and ABI as employers (T/R. 1446 - 1447), and on April 30, 1980 filed suit against CCC and ABI (T/R. 1494) (*Trevino v. Celanese and Arthur Brothers, Inc.*, C.A.No. C-80-049; USDC SDTX - Corpus Christi Division).

Although the Court of Appeals, consolidated the cases in both appeals involving multiple cases, the District

Court refused to do so. Plaintiffs repeatedly sought pre-trial consolidation of all three cases. Such consolidation was resisted by defendants and always denied by the court (M/R. 1080-1086; G/R. 945-953: T/R. 1310-1325). In *Mireles*, plaintiff filed two motions on May 13, 1980 (M/R. 1157-1158), both denied by oral order on July 3, 1980. In *Trevino*, a motion was submitted on July 31, 1980 (T/R. 1081), and denied on August 1, 1980 (T/R. 1080). In *Guerra* and *Mireles* plaintiffs filed motions to consolidate on February 17, 1982 (G/R. 848; M/R. 621). Nine years later, the court denied the motions on October 23, 1991 (G/R. 644; M/R.543). The court also denied similar motions in the last remand proceedings [M-G/Tr. 2: 18-20 (08/20/98)].

Mireles was certified as a class action by Judge Owen Cox in 1979 (M/R. 1596-1597), and decertified by him in 1981 (M/R. 833-835). The District Court also denied class certification in *Trevino* and *Guerra* in 1981 (T/R. 1065-1067; G/R. 958-959), granted summary judgement against plaintiff in *Trevino*, and awarded $24,541.00 in fees to defendants against plaintiff and TRLA, on grounds

that the case was frivolous and an abuse of legal process (T/R. 770-773). Plaintiff Trevino, and TRLA, as movant-appellant, appealed.

3. The First Appeal: *Trevino* (1982 - 1983)

Plaintiff Trevino's and TRLA's appeal in 1982 of the summary judgements and the adverse fee awards in *Trevino* was the first of the three (3) appeals herein ("*Trevino I*"). The *Trevino* record is part of the supplemental record to the current appeal.

In *Trevino I*, TRLA was a party, as Movant-Appellant, appealing the adverse award of costs and attorney's fees to both ABI and Celanese. TRLA was not counsel for Plaintiff-Appellant Trevino on appeal. TRLA and the LSC were both represented by the *Whittenburg* law firm (Amarillo). Both TRLA and the LSC prevailed on appeal.

Plaintiff Trevino both during the appeal, and later on remand, continuously had his own private counsel (Mr. George Powell and Ms. Lydia Serrata), until Celanese agreed to settle with Plaintiff Trevino in 1993. In *Trevino II* (1995 - 1998), TRLA sought to recover fees and costs for the appeal in *Trevino I* (1982 - 1983), a

small amount in context of the total amount at issue herein. The Court of Appeals denied the appeal.

In *Trevino,* this Court reversed the summary judgements, holding that the District Court erred in failing to consider the case under the "joint employer" theory plead by plaintiff, explaining that the District Court had erroneously considered the case as a simple "failure-to-hire" case against Celanese alone, a theory that had not been asserted by plaintiff. *Trevino v. Celanese Corporation,* 701 F.2d 397 (5th Cir. 1983) (T/R. 767).

This Court also vacated the adverse fee awards, the order denying class certification, an order limiting discovery against CCC, and ordered the District Court to reconsider plaintiff's consolidation motion under the correct theory (T/R. 766-767).

4. Proceedings on First Remand: 1983 - 1995

a. Bifurcation of Joint Employer Issue and Limited Consolidation

After remand in *Trevino,* the three cases were assigned to Judge Hayden Head, who recused himself

because his former law firm represented Celanese. In turn the cases were assigned to Judge James De Anda, and others to Judge Filemon Vela. Ultimately assigned to Judge Ricardo Hinojosa (McAllen) in 1983 (R.E.- Tab A).

The parties requested an expedited evidentiary hearing on the issue of joint liability. At the defendants's request, the court canceled a pre-trial hearing in 1984, and took no further action in the case for seven years (T/R. 675-676; M/R. Civil Docket Sheet, p. 23 - Aug. 9, 1984; 532).

Finally, on December 16, 1991, the court held a status conference, and granted the motion for bifurcated hearing on the joint employer issue (T/R. 673; G/R. 644; M/R. 543). In March 1992 the court granted a joint motion for limited consolidation of all three cases for pre-hearing procedures and filing, so the joint employer issues common to all three cases could be considered together (T/R. 391; G/R. 368; M/R. 493).

b. Settlement: Plaintiffs and ABI

In April 1992, ABI and plaintiffs settled all claims in all cases. The settlements included disposition of

attorney's fees and costs.

In settlement ABI agreed to pay each plaintiff in each case $2500.00, a total of $12,500.00, and ABI agreed to an additional contingent liability of $2500.00. The agreement is part of the supplemental record in the second appeal . Further, ABI agreed to give plaintiffs information regarding which ABI employees had relatives working for Celanese (T/R. 257-259). This information was probative of the joint employer issue.

c. Hearing on Joint Employer Issue: February 23, 1993

Almost 10 years after the remand in *Trevino*, pursuant to this Court's instructions, on February 25, 1993 an evidentiary hearing was held on the joint employer issue. Judge Hinojosa did not hear the matter. The hearing was held before a visiting judge (The Hon. Wendell Miles, USDC WD MI) (T/R. 217; transcript is in T/R.: Vol. 9). However, the District Court never ruled on the issue.

d. Settlement: Plaintiff Trevino and CCC - 1993

In October 1993, CCC and plaintiff Trevino settled (M/R. 475/12-16; M/R. 8-11). Trevino was the only

plaintiff not represented by TRLA at time of settlement. The District Court *sua sponte* dismissed the Trevino case on December 3, 1993 (T/R. 110), even though the settlement between CCC and Trevino did not dispose of Trevino's claims against ABI. Because of the erroneous dismissal with claims still pending, and ambiguity related to TRLA's status as a party (movant-appellant) in the first appeal, *Trevino* was included with *Mireles* and *Guerra* in the second appeal.

e. Plaintiffs and CCC - 1994

During 1993, CCC and plaintiffs discussed settlement while awaiting the ruling on the joint employer issue. Finally, beginning in January 1994, CCC and plaintiffs settled plaintiffs' claims, and reserved the issues of attorney's fees and costs.

f. Plaintiffs' Claims for Costs and Attorney's Fees - Phase 1: 1994 - 1995

Even during phase one of the costs and fees proceedings, the court refused to consolidate *Mireles* and *Guerra* (G/R. 325-326). After mediation efforts failed in 1994, hearing was held on September 28, 1995

(T/R. 5; M/R. 3; G/R. 408). The court ruled that plaintiffs were not "prevailing parties," and denied all claims by orders dated September 29, 1995 (M/R. 3; G/R.4). Plaintiffs appealed.

5. The Second Appeal:
Mireles-Trevino-Guerra (1995 - 1998)

The second appeal (1995 - 1998) involved all three cases. The appeal was limited to the "prevailing party" issue. Once again (February 1998) this Court reversed and remanded with instructions (M/G: A/250-239).

6. Proceedings on Second Remand:
Costs and Attorney's Fees - Phase 2 (1998-1999)

Four hearings were held during the second remand, the first on April 30, 1998; others on August 20, 1998; January 13, 1999; and the final hearing on March 29, 1999 (R.E.- Tabs A & E). The District Court announced its decision at last hearing.

The District Court did not conduct an evidentiary hearing on remand, nor did it make findings of fact or conclusions of law. The District Court determined that

> the court does not have to get into the *Lode Star* or the *Johnson* factors here if the awards are of such a minimal amount

> that they don't even come close to what the parties -- the plaintiffs were actually seeking to begin with, and that basically the damages that are awarded are nominal compared to what had been requested here.

[M/G Tr. (03/29/99) 5:12-17]. Quoting from *Ferrar,* the stated that

> A district court in fixing fees is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought [M/G Tr. (03/29/99) 6:20-22]. ... the Court may lawfully award low fees or not fees with reciting the 12 [*Johnson]* factors bearing on reasonableness [M/G Tr. (03/29/99) 7:2-3] . . . In some circumstances, even a plaintiff, who normally prevails under Section 1988, should receive no attorney's fees at all. A plaintiff who seeks compensatory damages would receive no more than nominal damages is often such a prevailing party [M/G Tr. (03/29/99) 7:5-9]

In apparent justification for the District Court's decisions, again the court quotes from *Ferrar,* stating

> In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual compensable injury.

[M/G Tr. (03/29/99) 5:14-16]. The court awarded $9600.00 in *Mireles,* and $5000.00 in *Guerra.* The court also awarded plaintiffs costs of court (R.E.- Tab C).

VIII. STATEMENT OF FACTS

This is an appeal of the above referenced awards of attorney's fees. Defendants did not appeal the decisions. This litigation has spanned more than twenty-three years (23), resulting in settlements of Plaintiffs' claims in 1992, 1993, and 1994. In settlements Plaintiffs obtained $76,500.00 from CCC; and from ABI, $12,500.00 cash, and an additional contingent asset of up to $12,500.00, for a total monetary value of $101,500.00. Plaintiffs seek approximately $1,095,913.06 in attorney's fees and costs (G/R: A/27-30), plus interest. Plaintiffs also seek additional fees for work done in the District Court after filing the initial fee claim in 1994 until final judgements were perfected in March 1996, and in remand proceedings during 1998-1999 (M/R: A-27).

Plaintiffs worked at the CCC plant in Bishop, Texas (M/R. 1904; T/R. 1494; G/R. 1120), employed by ABI, a company which provided maintenance and operating employees, usually temporary or part-time, to CCC (M/R.

1904; T/R/ 1494; G/R. 1120). Plaintiffs alleged CCC-ABI jointly denied Hispanic employees equal opportunity to compete for the preferred regular jobs at CCC, leaving them behind at ABI in disproportionate numbers while ABI's Anglo employees were "promoted" to regular employment at CCC.

Plaintiffs also complained that ABI treated its employees who had friends or family at CCC better than ABI employees who did not have the CCC "nexus." Most ABI employees who had such Celanese nexus "were Anglo" (R.E.-Tab E; G/R: A/80-87).

After *Trevino* was filed, ABI recalled Plaintiff Trevino. He began earning more money. His eligibility for free legal services from TRLA became an issue.

As the result of complaints filed with the Legal Services Corporation ("LSC") by defendants, contending Plaintiff Trevino was financially ineligible under LSC Regulations for free legal services, TRLA withdrew as counsel for Plaintiff Trevino after the filing of the Notice of Appeal on November 16, 1981 (Appendix, Tab 9, *Trevino* Docket Sheet, Entry #56, p. 7). While TRLA has

been plaintiffs' counsel in *Mireles* for almost *23 years*, in fact, TRLA was counsel in *Trevino* for fewer than *two years*.

The unnecessarily prolonged and tortuous history of these cases in large part resulted from the vigorous defense at each and very procedural state and at each and every discovery request made by the plaintiffs. Defendant succeeded in causing the District Court to commit several errors early in the litigation, *e.g.*, limiting the scope of discovery, decertifying the *Mireles* class action and denying certification the related cases, refusing consolidation, granting summary judgement, awarding fees and costs against plaintiff Trevino and TRLA. Such errors required the first appeal, wherein plaintiff prevailed on all issues.

Using the "Stalingrad" tactics, defendants delayed hearing on the central joint employer issue for 18 years. Eight months after the hearing was finally held on February 25, 1993, Celanese began settling plaintiffs' claims. By then plaintiffs counsel had expended more than 4600 hours of attorney time, and incurred more than

$265,000.00 in expenses. Almost all of the time and expenses were directed at the joint liability issue.

IX. SUMMARY OF ARGUMENT

The District Court ignored the instructions of the Court of Appeals during the remand proceedings. The court erred in failing to make findings of fact under both *Ferrar* and *Johnson.*

The District Court misinterpreted *Ferrar.* The court erred in applying the quantitative proportionality principle in *Ferrar* to cases in which either damages were not sought or were unavailable as a matter of law.

The court erred in failing to make findings of fact to support its conclusion that Plaintiffs' settlements were *de minimis.* The court erred in failing to make findings of fact regarding the relief sought or available, compared to the results obtained.

Even for the nominal attorney's fees awarded, the court erred in failing to make findings of fact as required by *Johnson v. Railway Express.*

A. STATEMENT OF THE ISSUES

1. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY FAILING TO FOLLOW THE INSTRUCTIONS FROM THE COURT OF APPEALS IN THE PROCEEDINGS AFTER REMAND, IN WAYS INCLUDING *FAILING TO MAKE ANY FINDINGS OF FACT* REGARDING a) REASONABLE ATTORNEYS' FEES, b) THE TYPE OR AMOUNT OF RELIEF SOUGHT BY THE PLAINTIFFS IN THEIR SUITS, and, c) THE NUMBER OF HOURS OF ATTORNEY AND PARA-LEGAL TIME, d) THE REASONABLE HOURLY RATE OF EACH.

2. THE DISTRICT COURT ERRED BY *FAILING TO APPLY THE JOHNSON V. RAILWAY EXPRESS FACTORS* IN DECIDING WHAT A REASONABLE FEE SHOULD BE IN THIS TITLE VII CASE, IN WAYS INCLUDING a) FAILING TO CALCULATE THE LODESTAR OF THE ATTORNEY'S FEES BASED UPON FINDINGS OF FACT OF THE NUMBER OF HOURS AND THE REASONABLE HOURLY RATES, AND b) FAILING TO APPLY THE *JOHNSON V. RAILWAY EXPRESS* FACTORS TO A CALCULATED LODESTAR BASED UPON FINDINGS OF FACT.

3. THE DISTRICT COURT ERRED IN AWARDING PREVAILING PARTIES BY SETTLEMENT IN A TITLE VII CASE REASONABLE ATTORNEY'S FEES OF ONLY, a) $9600.00 IN *MIRELES,* and, b) $5,000.00 IN *GUERRA,* FOR WORK DONE OVER A PERIOD OF 23 YEARS BECAUSE SUCH AWARDS ARE NOT SUPPORTED BY THE EVIDENCE OR ARE AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE.

4. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY APPLYING RULES FOR MONETARY PROPORTIONALITY TO THE RESULTS ACHIEVED RATHER THAN THE RELIEF SOUGHT OR AVAILABLE.

5. THE DISTRICT COURT ERRED IN DETERMINING THE RESULTS ACHIEVED BY THE PLAINTIFFS AS *DE MINIMUS* WITHOUT FIRST FINDING THE FACTS REGARDING a) THE RELIEF SOUGHT OR AVAILABLE, AND b) THE RESULTS ACHIEVED.

6. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY FAILING TO INTERPRET AND APPLY CORRECTLY THE SUPREME COURT'S RULING IN *FARRAR V. HOBBY*.

B. STANDARD OF REVIEW

The Court of Appeals reviews a District Court's award of attorney's fees for abuse of discretion, and its supporting factual findings for clear error. *Foreman, et al. V. Dallas County, Texas, et al.*, 193 F 3d. 314, 317 (5th Cir. 1999), citing *Wilson v. Mayor of St. Francisville*, 135 F. 3d 996, 998 (5th Cir. 1998). The conclusions of law underlying the award of attorney's fees is subject to *de novo* review. *Foreman, Id.*, citing *Marre v. United States*, 117 F. 3d 297, 301 (5th Cir. 1997).

C. ARGUMENT

1. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY FAILING TO FOLLOW THE INSTRUCTIONS FROM THE COURT OF APPEALS IN THE PROCEEDINGS AFTER REMAND, IN WAYS INCLUDING *FAILING TO MAKE ANY FINDINGS OF FACT* REGARDING a) REASONABLE ATTORNEY'S FEES, b) THE TYPE OR AMOUNT OF RELIEF SOUGHT BY THE PLAINTIFFS IN THEIR SUITS, and, c) THE NUMBER OF HOURS OF ATTORNEY AND PARA-LEGAL TIME, d) THE REASONABLE HOURLY RATE OF EACH.

The instant cases were remanded after appeal by this Court on January 9, 1998 (G/R: A/239 & 248) "to the District Court for further proceedings in accordance with the opinion of this Court." The Opinion of this Court

made it clear in *Guerra* and in *Mireles* that on remand the District Court was "to determine a reasonable amount of attorney's fees." (G/R: A-248).

In *Guerra*, the Opinion directed:

> On remand, the district court should determine a reasonable attorney [fee] for this case, by *e.g.*, calculating the lodestar (reasonable number of hours times reasonable hourly rate) then applying the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and adjusting the lodestar upward or downward if appropriate.
> See *Riley v. Jackson, Mississippi*, 99 F.3d 757, 760 (5th Cir. 1996). FN1 [A "reasonable" fee for a prevailing party under the circumstances of a particular case may be a low fee or no fee, *Farrar*, 506 U.S. at 115, 113 S.Ct. at 575, in which case the district court need not recite each of the *Johnson* factors or even do the lodestar calculations. Id. We express no opinion at to what a reasonable fee might be in these cases.']" (R A-246).

In *Mireles*, the Opinion directed: "We therefore reverse the denial of attorneys fees in this case as well and remand for a determination of the appropriate amount of fees." (R A-248).

After remand the District Court did not any evidentiary hearings (R.E.- Tab A). The District Court

failed to make *any* findings of fact based upon any of the evidence previously admitted into the record during the prior years of the litigation of this case. (R.E.- Tabs A, C). Without any findings of fact, the District Court could not have applied any law to facts in order "to determine a reasonable amount of attorney's fees." (G/R: A-248).

In an effort to determine reasonable attorneys' fees in a Title VII case, this Court and the Supreme Court have consistently instructed the district courts to measure results with the type or amount of relief sought by plaintiffs in their suits. *Farrar v. Hobby*, 113 S.Ct. 566, 575, a 42 U.S.C. §1983 civil rights case; *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998) a Title VII case. Usually the plaintiffs' complaints are the primary source for this determination. *Foreman v. Dallas County, Texas*, 193 F.3d 314, 321 (5th Cir. 1999) a voting rights act case.

In their complaints plaintiffs asserted claims under Title VII (42 U.S.C. Section 2000-e, *et seq.*) and 42 U.S.C. Section 1981, in order to remedy racial

discrimination in the defendants' employment practices (M/R: 1904-1909; R.E.- Tab E; G/R: 1120-1123). However, in *Mireles* Plaintiffs requested only equitable relief, focusing on affirmative action relief, backpay, and reinstatement. Specifically, in contrast to Plainitiff in *Ferrar*, Plaintiffs did not seek punitive or compensatory damages (M/R: 1909-1910). Plaintiff Guerra did pray for "compensatory and punitive damages", but the focus of the requested relief was also equitable, including an "affirmative action program", backpay, promotions, reinstatement (G/R: 1122; R.E. Tab E).

The lawsuits were settled by written agreements among the parties. Prior to the settlements and during the course of the litigation, significant changes were observed in Defendant Celanese employment practices. The catalyst effect of the litigation in terms of changes in Celanese's employment practices is reviewed in Appellants' brief in the second appeal. This evidence, and affidavit by Plaintiff Trevino, and the analyses by Plaintiffs' statistician, confirms Plaintiffs "achieved their goal of opening up employment opportunities for

Hispanics at Celanese". (Tab E- Appellants' Brief: Second Appeal/ 1995-1998, pages 39 and-40.) It is clear that the plaintiffs achieved a significant portion, if not all, of the relief they originally sought by their lawsuits.

While the law regarding calculations of attorney's fees is clear, the District Court declined to make any fact findings at all.

> The calculation of attorney's fees involves a well-established process, First, the court calculates a
> 'lodestar' fee by multiplying the reasonable number of hours expended on the case by the reasonable
> hourly rates for the participating lawyers." *Migis*, 135 F.3d at 1047.

In the instant case, before or after remand, the District Court made no findings of fact about either the number of hours expended on the case or the reasonable hourly rates for the participating lawyers. Therefore, calculation of the lodestar is not possible.

2. THE DISTRICT COURT ERRED BY *FAILING TO APPLY THE JOHNSON V. RAILWAY EXPRESS FACTORS* IN DECIDING WHAT A REASONABLE FEE SHOULD BE IN THIS TITLE VII CASE, IN WAYS INCLUDING a) FAILING TO CALCULATE THE LODESTAR OF THE ATTORNEYS FEES BASED UPON FINDINGS OF FACT OF THE NUMBER OF HOURS AND THE REASONABLE HOURLY RATES, AND b) FAILING TO APPLY THE *JOHNSON V. RAILWAY EXPRESS* FACTORS TO A CALCULATED LODESTAR BASED UPON FINDINGS OF FACT.

After calculating the lodestar,

> [T]he court then considers whether the lodestar figure should be adjusted upward or downward depending on the circumstances of the case. Id. [*Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995)]. In making the lodestar adjustment the court should look to the twelve factors, known as the *Johnson* factors, after *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)." Migis, 135 F.3d at 1048.

In the instant case, without finding the lodestar as a fact, the District Court could not proceed with its determination of reasonable attorneys' fees by applying the *Johnson* factors to it.

3. THE DISTRICT COURT ERRED IN AWARDING PREVAILING PARTIES BY SETTLEMENT IN A TITLE VII CASE REASONABLE ATTORNEY'S FEES OF ONLY, a) $9600.00 IN *MIRELES*, and, b) $5,000.00 IN *GUERRA*, FOR WORK DONE OVER A PERIOD OF 23 YEARS BECAUSE SUCH AWARDS ARE NOT SUPPORTED BY THE EVIDENCE OR ARE AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE.

In the instant cases, the uncontroverted evidence before the District Court was that employment opportunities with Celanese, the primary defendant, changed favorably for Hispanics during the course of the litigation (Tab E- Appellants' Brief: Second Appeal/ 1995-1998, pages 39 and-40.). The changes were a direct

result of the plaintiffs' lawsuits. Thus, as stated above, Plaintiffs achieved a significant portion, if not all, of the relief they originally sought by their lawsuits. Additionally, the plaintiffs each received their requested back pay in cash as a part of the settlements with the defendants.

There is no evidence in the record regarding how much back pay Plaintiffs sought or would have been entitled to if liability had been established. Plaintiffs were laborers. At the time suit was filed, the *Mireles* Plaintiffs were earning in the range of $2.36 - $4.00 per hour (M/R.: 1906-1909).

It is worth noting that at the time the *Mireles* case was filed Plaintiff Mireles was 57 and Plaintiff Mendiola was 54 (M/R: 1904-1905). They reached age 65 eight (8) and eleven (11) years, respectively, after the case was filed. There is no evidence in the record regarding any Plaintiff's ability to work, but the record does reflect that the Estates of Plaintiffs Guerra and Gonzales settled with Defendants.

Therefore, the District Court's failure to award the

plaintiffs a reasonable attorney's fee at or near the lodestar calculation (had one been made), is an abuse of discretion. Accordingly, the case should be remanded for calculation of the lodestar and an award of reasonable attorneys based thereon.

4. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY APPLYING RULES FOR MONETARY PROPORTIONALITY TO THE RESULTS ACHIEVED RATHER THAN THE RELIEF SOUGHT OR AVAILABLE.

5. THE DISTRICT COURT ERRED IN DETERMINING THE RESULTS ACHIEVED BY THE PLAINTIFFS AS *DE MINIMUS* WITHOUT FIRST FINDING THE FACTS REGARDING a) THE RELIEF SOUGHT OR AVAILABLE, AND b) THE RESULTS ACHIEVED.

6. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY FAILING TO INTERPRET AND APPLY CORRECTLY THE SUPREME COURT'S RULING IN *FARRAR V. HOBBY*.

The District Court erred in applying the *Farrar* principals to this Title VII case in such a way that the results achieved under Title VII for racial discrimination were not considered or were determined to be *de minimus*. The Supreme Court in *Farrar* made it clear that the principals announced therein applied

> [W]here recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount

sought. *Farrar*, 113 S.Ct. at 575.

In the instant cases, the relief sought by the plaintiffs was elimination of racial discrimination in the Defendants' employment practices. As explained above, " damages" for violations of their civil rights (under 42 U.S.C. 1981) were not sought by the *Mireles* plaintiffs.

Regarding Plaintiff Guerra's claim for "damages" under 42 U.S.C. Section 1981, as a matter of law, Guerra could not assert any claim for damages under that statute for post-employment violations. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Thus, at the time of settlement in 1994, damages, as a matter of law, were not available to Plaintiffs for post-employment violations.

Therefore, the District Court erred in applying *Farrar* to the instant case because it is a Title VII case. At the time of the beginning of the litigation, Title VII did not provide for recovery of any monetary damages. The *Mireles* Plaintiffs did not pray for damages, and after June 15, 1989, damages were not available as a matter of law. Even had Plaintiffs litigated to

successful final judgements they could not have obtained damages.

This Court addressed the problem of a plaintiff achieving success without the element of monetary damages in *Foreman v. Dallas County, Texas*, 135 F.3d 314 (5th Cir. 1999). *Foreman* was brought under the Voting Rights Act of 1965, 42 U.S.C. §1973 et seq. and sought attorney's fees under §19731(e).

The Court approached the results achieved by the plaintiffs (a legislative change in the law) from the perspective of the "catalyst theory" and, without deciding, suggested that the catalyst theory might still be good law in this circuit. *Foreman*, 135 F.3d at 320.

> We have held that under the catalyst theory a plaintiff may obtain attorney's fees as a prevailing party only if it establishes (1) that the relief sought by plaintiff was in fact obtained, and (2) that the suit itself caused the defendant to alter its conduct. *Pembroke*, 981 F.2d at 230.

In order to prove the requisite causation, the lawsuit must have been a "substantial factor or a significant catalyst" in motivating the defendants to alter their behavior. *Robinson v. Kimbrough*, 652 F.2d

458, 466 (5th Cir. 1981)." *Foreman*, 135 F.3d at 320-321. The analysis of the catalyst theory and the facts of the *Foreman* case resulted in the Court deciding that the causation link between the litigation and the changes made to the Texas Election Code was either not proven or was too weak to support a "prevailing party" status and an entitlement to attorneys' fees. "...the plaintiff must prove the lawsuit itself, as a discrete event, had a significant and identifiable influence on the attainment of relief." *Foreman*, 135 F.3d at 321-322.

As stated above, prior to the settlements and during the course of the litigation, significant changes were observed in Defendant Celanese's employment practices. The catalyst effect of the litigation in terms of changes in Celanese's employment practices is reviewed in Appellants' brief in the second appeal. This evidence, and affidavit by Plaintiff Trevino, and the analyses by Plaintiffs' statistician, confirms Plaintiffs "achieved their goal of opening up employment opportunities for Hispanics at Celanese". (Tab E- Appellants' Brief: Second Appeal/ 1995-1998, pages 39 and-40.)

It is clear that the plaintiffs achieved a significant portion, if not all, of the relief they originally sought by their lawsuits. Although the District Court failed to make any findings about non-monetary results achieved by plaintiffs, the record fully supports a finding that the plaintiffs achieved a significant portion, if not all, of their objectives.

The focus of this appeal is that the District Court did not apply the *Johnson* analysis. Appellants reviewed in detail the *Johnson* analysis in context of the facts of this litigation in their initial fee applications (M/R.: 397-477), in the previous brief (R.E.- Tab E, Appellants' Brief: Second Appeal/ 1995-1998), and in the most recent remand proceedings (G/R: A/33-52). In summary form the "core" *Johnson* analysis and factors are reviewed below.

The *Johnson* Factors

In considering an award for attorney's fees District Courts have been directed by the Fifth Circuit to consider twelve factors set out in *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974) Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th and that the discussion of these factors must be clear in the fee order. *Fain v. Caddo Parish Police Jury*, 564 F. 2d 707, 709 (5th Cir. 1977); *Nisby v. Commissioners Court*, 788 F. 2d 134 (5th Cir. 1986)Fain v. Caddo Parish

Police Jury, 564 F. 2d 707, 709 (5th Cir. The *Johnson* factors are:

1. the time and labor required,
2. the novelty and difficulty of the questions,
3. the skill required,
4. the preclusion of other employment,
5. the customary fee,
6. whether the fee is contingent or fixed,
7. time limitations imposed by the client or other circumstances,
8. the amount involved and the results obtained,
9. the experience, reputation, and ability of the attorneys,
10. the "undesirability" of the case,
11. the nature and length of the professional relationship with the client, and
12. awards in similar cases.

Johnson, 488 F.2d at 717-719. The applicability of the *Johnson* factors to attorneys' fee awards is well settled. *E.g., Nash v. Chandler*, 848 F. 2d 567 (5th Cir. 1988).

In *Copper Liquor, Inc. v. Adolph Coors Company*, 684 F.2d 1087 (5th Cir. 1982), the 5th Circuit upheld an attorneys' fee award which paid "special heed" to four of the twelve *Johnson* factors, the "Core" *Johnson* Factors: "(1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation, and ability of counsel." *Id.* at 1092.

Consideration of the four core factors emphasized in *Copper Liquor, Inc.*, establishes the reasonableness of Plaintiff's request. The remaining eight factors underscore Plaintiff's entitlement to the requested amount of attorneys' fees and costs and present a strong rationale either for enhancement of the lodestar amount or valuing the services rendered at current market rates.

a. The "Core" *Johnson* Factors

(1). Time and Labor Required

It is important to note that Defendants conducted a staunch defense, which did not concede even minor points. Particularly relevant is the conduct of Celanese in resisting discovery of documents indicating a joint

.p with Arthur Brothers. See *Trevino* have existed
'01 F.2d 397, 399-402 (5th Cir. 1983). itigation. As
in this case was akin to the confluence" of
in *Lipsett v. Blanco,* 975 F. 2d 934 on in fees and
rein the court noted that the number 'seem to have
expended was reasonable given the lts achieved".
' nature of the litigation. The court st Cir. 1980).
defense as a "Stalingrad defense, *Helgemoe,* 581
ntiff] at every turn and forcing her existence of
ied victory from rock to rock and from s should not
t 939. diminishing a

e reasonableness of the hours expended
the contemporaneous pendency of the al expense and
litigation does *not* militate toward a er Defendants
expenses. First, it should be noted f Plaintiffs'
ing data base creation and discovery counsel. In
ts which would have to have been 408 (5th Cir.
s of whether the two other cases were ied a complete
words, Plaintiffs in this litigation f 5th Circuit
quired to establish joint employer for both trial
e Plaintiffs' claims. Therefore, the *cialty Stores,*

Inc., 913 F.2d 253, 257 (5th Cir. 1990); *Marks v. Prattco*, 633F.2d 1122, 1125-26 (5th Cir. 1981); *Morrow v. Dillard*, 580 F.2d 1284, 1300-01 (5th Cir. 1978); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358-59 (5th Cir. 1977) (awarding fees for pretrial, trial and appellate work in a Title VII case), *cert. denied*, 434 U.S. 1034 (1978).

Substantial effort and expense have gone into preparation of Plaintiffs' attorneys' fee application. This endeavor entailed collecting, reconstructing and summarizing work performed over eighteen years. Plaintiffs prudently opted to defer work on the application until it was clearly absolutely necessary. For that reason, most of the cost and attorney time attributable to preparing the fee application was incurred after mediation failed to resolve the fee dispute. The 5th Circuit has consistently held that a prevailing plaintiff is entitled to attorney's fees for the effort entailed in litigating a fee claim and securing compensation. *Alberti v. Klevenhagen*, 896 F.2d 927, 937 (5th Cir. 1990); *Cruz v. Hauck*, 762 F.2d 1230

(5th Cir. 1985); *Knighton v. Watkins*, 616 F.2d 795, 800 (5th Cir. 1980); *Johnson v. State of Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979).

(2). The Customary Fee for Similar Work

The fact that a substantial portion of the work herein was performed by a nonprofit, public interest organization (*i.e.*, Texas Rural Legal Aid, Inc.) does *not* militate toward a reduction of the applicable hourly rates and other expenses. *Blum v. Stenson*, 465 U.S. 886 (1984). As the Supreme Court has held, the hourly rates applicable to attorneys are to be set at "market rates," even though the attorney performing the services is employed by a nonprofit, public interest group. *Id.* Similarly, the rates applicable to paralegal and other staff are also to be set at "market rates" rather than actual cost. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *See generally, U.S. Football League v. N.F.L.*, 887 F.2d 408 (2nd Cir. 1989) (awarding over 1 million dollars at market rates for paralegal time at market rates), *cert. denied*, 493 U.S. 1071 (1990).

Case law supports the proposition that paralegal

assistance can be taxed as a cost. *International Woodworkers of America v. Champion Internationl Corporation*, 790 F.2d 1174, 1185 (5th Cir. 1986); *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 379 (5th Cir. 1990). In *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 534-35 (5th Cir. 1990), the court refused to allow the taxation of paralegal expenses because the court concluded that the cost of such support services was encompassed in the high hourly billing rate of the attorneys. The expenses associated with Plaintiffs' expert, Dr. Bernard Yancey arguably fit into an exception to the rule that expert can only obtain the standard witness attendance fee. The magnitude of those expenses flowed directly from Defendants vexatious defense strategy which succeeded in denying Plaintiff access to all Celanese records relevant to the joint employer issue. See *Woodworkers* 790 F.2d at 1175.

In the assessment of this factor, another crucial element to consider is the long course of litigation Plaintiff was forced to endure. Plaintiffs filed their

original charges with the EEOC in 1976. Suit was commenced on October 28, 1976. Thus, it has been nearly eighteen years since this litigation commenced, and only in 1994, did Plaintiff prevail through the settlement which was obtained. Any award of fees for work done several years ago creates a special problem. If the rate of compensation in effect at the time the work was done is used, then a "delay [in payment] obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonable low one." *Johnson v. Univ. Col. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1210 (11th Cir. 1983). "As a result" Judge Roney continued:

> . . . district courts should take into account inflation and interest, perhaps by adjusting the contingency factor to reflect delay, not just contingency, or perhaps by compensating at current and not historic rates. *See Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (*en banc*); *Northcross v. Board of Education*, 611 F.2d 624, 640 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980). We do not prescribe any set method for correcting for delay in payment, but some sort of correction must be undertaken. *Id.* 706 F.2d at 1210-1211.

When litigation has extended over many years, the award of attorneys fees should take into the account the

delay in payment of attorneys fees. In *Missouri v. Jenkins*, 491 U.S. 274, 275 (1989), the plaintiffs were a class suing for desegregation in Missouri schools. At the close of the litigation the district court granted a fee award which compensated for the work of paralegals and law clerks as well as attorneys and which compensated for the delay in payment, the preclusion of other employment, and the undesirability of the case. *Id.* at 277. The Supreme Court upheld the use of current market rates for all the attorneys, law clerks and paralegals in order to compensate for the delay in payment. *Id.* The Court stated: "In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its current value." *Id.* at 282 (cites omitted). In addressing the compensation for the work of law clerks and paralegals the Court expressly held that

'a reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar. . . . Thus, the fee must take into account the

work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. *Id.* at 285. The court also upheld the use of a higher than market rate for the attorney because of his expertise in the field of civil rights. *Id.* at 277.

Although the 5th Circuit has taken the approach of awarding interest on the lodestar amount, see *Islamic Center of Mississippi, Inc. v. Starkville, Mississippi*, 876 F.2d 465, 473 (5th Cir. 1989) (case remanded because district court failed to consider whether it should enhance the lodestar based on delayed payment), the more accepted approach is to compensate for the factor of long delay by valuing the services at current market rates. This is the approach adopted by the Supreme Court in *City of Riverside v. Rivera*, 477 U.S. 561 (1981).

Therefore, it is submitted that the rates to be applied in determining the lodestar amount should be current market rates. As reflected by Exhibit A, the

affidavit of Ruben D. Campos, these current market rates should be as follows:

Attorneys

A. $135.00 per hour for the time of David Horton

B. $125.00 per hour for the time of John Williamson

C. $165.00 per hour for the time of Enrique Valdivia

D. $70.00 per hour for other assisting attorneys

Paralegals

A. $30.00 per hour

c. The Amount Involved and Results Obtained

Plaintiffs goals in these related cases were to obtain equitable relief, including backpay, for employment discrimination they suffered at the hands of Defendants. Plaintiffs' monetary claims settled for a total of nearly $100,000.

Historically, the 5th Circuit has not required

proportionality between the amount recovered for the client and the attorney's fee award. In *Reneau v. Mossy Motors*, 622 F.2d 192 (5th Cir. 1980), the court remanded the attorneys' fees award for further development of the *Johnson* factors but cautioned that "[w]hile an award greatly in excess of a client's recovery requires strong support from the particular circumstances of the case, the ceiling on the client's recovery should not operate as an impenetrable barrier to reasonable compensation." *Id.* at 196 (cites omitted). In *Brantley v. Surles*, 804 F.2d 321, 323 (5th Cir. 1986), the plaintiff received a judgment of $15,880.85 in back pay and his attorney a fee award of $37,500.00. Neither the fact that the defendant's attorneys were paid only $7,923.50, nor the fact that the attorney's fees were twice that of the plaintiff's judgment, was grounds for reducing the fee award. *Id.* at 326. The 5th Circuit upheld that award,

stating that "there is no rule of proportionality between fee awards under § 1988 and the amount of damages a civil rights plaintiff actually recovers."[1] *Id.* at 326-327.

In *Farrar v. Hobby* 113 S.Ct. 566, 575 (1992) the Supreme Court held that where recovery of private damages is the purpose of civil rights litigation, a district court must give primary consideration to the amount of damages awarded as compared to the amount sought. The *Farrar* case is distinguishable in that it does not deal with a controversy that was resolved through settlement. To adopt a *Farrar* fee analysis in settlement cases would discourage settlement before trial. Plaintiffs would have no incentive to settle a hotly disputed matter for less than the amount demanded because that would

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[1] See also Branch-Hines v. Hebert, 939 F.2d 1311 (5th Cir. 1991), in which the 5th Circuit upheld an attorneys' fee award of $10,098 for a plaintiff's jury award of only $4,000.

automatically discount their fee award.

This case is further distinguishable from *Farrar* in that Plaintiffs not only did not, but under Title VII here applicable, could not seek or obtain money damages. Plaintiffs sought to open up job opportunities at Celanese's facility in Bishop, Texas for Hispanics working for Arthur Brothers.

The data relied upon by Dr. Bernard Yancey in his testimony on the joint employer issue also shows increased hiring of Hispanics from Arthur Brothers by Celanese since the filing of this lawsuit. Plaintiff Trevino was one of the beneficiaries of this change in attitude as he was eventually hired by Celanese. Thus, Plaintiffs achieved their broad goal of obtaining greater employment opportunity for Hispanics at Arthur Brothers.

Unlike *Farrar*, this change in the legal relationship between the plaintiffs and defendants in this case was

wrought by the bringing of the litigation itself and not by any monetary award. See *Pembroke v. Woods County*, Texas 981 F.2d 225, 231 n. 27 (5th Cir. 1993).

(4). Experience, Reputation and Ability of the Attorneys

Plaintiffs' lead counsel has been an attorney since 1971. He has twenty years experience practicing employment law in Texas, Montana, Louisiana and Colorado. He was a trial attorney for the EEOC's Office of General Counsel in Denver Colorado from 1974 to 1977 where he was Attorney-in-Charge of the Commission's largest case *(EEOC v. General Dynamics-USDC NDTX-FW)* and the Commission's litigation challenging the airline's flight attendant height-weight standards. At times relevant herein during 1981-193, he was Board Certified in employment law.

Mr. John Williamson has been an attorney since 1974.

He was staff attorney with Texas Rural Legal Aid, Inc. from 1975 to 1981. He was attorney in charge of the *Mireles-Trevino-Guerra* litigation from August of 1977 until May of 1991. He has been a member of the State Bar of Texas Committee on Administration of Justice. Since 1991 he has been the chair of the Southern Region of the Supreme Court of Texas Unauthorized Practice of Law Committee.

Mr. Enrique Valdivia has been an attorney since 1984. Since February of 1985 he has worked as a staff attorney with Texas Rural Legal Aid, Inc. in Edinburg, Kerrville and San Antonio, Texas. He has extensive experience in federal litigation including Title VII and civil rights cases. He was attorney in charge in *Martinez v. City of Mercedes*, Civil Action No. B-86-072 Southern District of Texas, Brownsville Division, a false arrest case brought under sec. 1983. Most recently he was lead attorney in

an employment discrimination case brought under the American's with Disabilities Act, *Lespreance v. Schriener College*, Civil Action No. SA-93-CA-1084 Western District of Texas, San Antonio Division.

XI. CONCLUSION

WHEREFORE, Appellants pray the Court of Appeals reverse in all respects the Orders of the District Court, and render judgement in favor of Appellants; or, in the alternative, reverse and remand with appropriate instructions for proceedings on remand; and, other such further relief as is just and proper.

XII. SIGNATURE OF COUNSEL

Respectuflly submitted,

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Enrique Valdivia

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XIII. CERTIFICATE OF SERVICE

Pursuant to Rule 25- Federal Rules of Appellate procedure, I served a copy of this document on counsel as follow:

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ARTHUR BROTHERS, INC.

by means of FCM To ABI, UPS To CCC, w/RECORDS

on this 06 day of DECEMBER, 1999.

David Horton

REVISED CERTIFICATE OF COMPLIANCE

(PLACE THIS AS LAST DOCUMENT IN YOUR BRIEF BEFORE THE BACK COVER)

Pursuant to 5TH CIR. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS (select one):

   A. 9749 words, OR

   B. _____ lines of text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (select one):

   A. in proportionally spaced typeface using:

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   _____

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORD OR LINE PRINTOUT.

THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH CIR. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

David Horton

Signature of filing party

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE BACK COVER)

99-40547
99-40557

147 XIII. AMENDED CERTIFICATE OF SERVICE-FIRST

I served copies of Appellants' brief and record excerpts; and computer diskettes (3 ½ inch) containing only the brief, with a label on each diskette stating the case name, docket number, the document contained on the diskette, and the word processing program used to produce same (WP 6.1), on counsel of record, to-wit:

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by means of private express courier (briefs and record excerpts), and First Class mail on the 9th and 11th days of December, 1999, respectively.

David Horton

Date: 12/16/99