REPLY TO SUPPLEMENTAL BRIEF FOR APPELLEE/CROSS-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant

AND CONSOLIDATED NOS. 82-1274,
83-1722 and 83-1764

On Appeal from the United States District Court
for the District of Columbia

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On May 1, 1984, Appellant/Cross-Appellee Weisberg ("Weisberg") filed a supplemental memorandum pursuant to this Court's Rule 8(k) discussing the impact of the Supreme Court's decision in Blum v. Stenson, No. 81-1374 (March 21, 1984). Appellee/Cross-Appellee Department of Justice ("the Department") sought leave, now granted, to file a supplemental memorandum responding to Weisberg's. Because several contentions advanced in the Department's supplemental memorandum require response, Weisberg submits this reply.

The Department first notes that in Blum the Supreme Court declined to rule on whether a multiplier for risk is ever justified. It then states that "[t]he Court did indicate strongly, however, that it would be the rare case where an adjustment to the lodestar should be authorized." Department's Supplemental Memorandum at 2, citing slip opinion (hereafter "Op.") in Blum at 14 n.18.

Earlier in Blum the Court declared that a quality adjustment would be justified "only in the rare case" (Op. 11) without any implication that this also would apply to risk adjustments. The footnote cited by the Department accompanies a passage in the opinion which refers back to the ruling on quality adjustments. Thus, placed in context, the reference cited by the Department appears to have been directed only to quality adjustments.

The Court explained why quality adjustments are warranted only in the rare case:

> The "quality of representation" . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional." [Op. 11-12]

Thus, where the quality of representation is simply what one would expect of attorneys commanding the hourly rates used in the lodestar, it would be "a clear example of double counting" to award

a quality adjustment on top of such lodestar rates. (Op. 12) Because market rates are to be used in the lodestar, it will be "the rare case" in which a quality adjustment would be warranted (Op. 11).

This same reasoning cannot be applied to risk adjustments because the market rates utilized in calculating the lodestar are based on the rates charged by attorneys for services which are compensated regardless of the outcome or result of the litigation. Such rates are, in effect, nonrisk market rates. Obviously, however, attorneys in the marketplace do not charge the same rate for noncontingent work as they do where remuneration hinges entirely upon the success of the litigation. Thus, the considerations which limit quality adjustments to "the rare case" do not apply where risk adjustments are concerned.

The Department further relies on the Supreme Court's declaration that when "the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." (Op. 10) Here again, the Court's statement is made during a discussion of the need for an enhanced award "in some cases of exceptional success." (Id.) That is, the Court is discussing quality adjustments, not risk adjustments. Moreover, the Court is guided by the statutory requirement for a "reasonable fee." (Id.) A reasonable fee cannot be arrived at by prescribing that attorneys whose compensation is contingent upon their success

shall be paid at the same rate as attorneys who undertake no risk when supplying their services.

Having latched onto a presumption which the Supreme Court applied to quality rather than risk adjustments, the Department then argues that Weisberg failed to meet "the stringent Blum standard," stating--inaccurately--this "his 'evidence' consists largely of his failure to obtain compensation in other FOIA cases. . . ." Department's Supplemental Memorandum at 2-3. In fact, Weisberg's fee application pointed to several factors bearing on the risk involved in taking this particular case, including: (1) the general difficulties faced by the plaintiff in any FOIA case case, including the difficulties of "substantially prevailing"; (2) the highly uncertain determination of legal issues due to the inchoate state of the newly amended law; (3) the commitment made by Weisberg's counsel to invest a large amount of time in the case; and (4) the unpopularity of the plaintiff with both the Department of Justice, the defendant, and the courts. See Motion for Attorney's Fee and Litigation Costs [R. 255] at 24-28; August 19, 1982 Affidavit of James H. Lesar, ¶¶19, 24-25 [JA 642-645].

Despite this showing, not contravened by the Department, the Department nonetheless proclaims that "[p]laintiff adduces no valid extraordinary factors above and beyond the risk of failure present in every case to justify a contingency adjustment to the lodestar." Department's Supplemental Memorandum at 3. There is, of course, no "risk of failure present in every case" where at-

torneys receive market-rate compensation regardless of the outcome of the case. There is considerable risk in every FOIA case taken on a pure contingency, as this one was. The risk is particularly great in cases such as this where the enterprise represents a vast undertaking requiring an attorney to commit himself to spending a large amount of time to a possibly unremunerative endeavor, and this risk is further increased where the state of the applicable law is inchoate and uncertain, as the FOIA was at the time this suit was brought.

The magnitude of the risk assumed by Weisberg's counsel is driven home by the Department's "vigorous submission that plaintiff is not entitled to any fees for this case." Department's Supplemental Memorandum at 2 n.2. (Emphasis in original) The Department cannot have it both ways. It cannot in one breath say that Weisberg has failed to demonstrate the appropriateness of a contingency adjustment while proclaiming in the next breath that after eight years of litigation involving approximately 1,000 hours of attorney's time, he is entitled to no compensation whatsoever.

Moreover, the Department's argument ignores Blum's holding that the district court has discretion in determining both the lodestar and any adjustment, and that review of a district court's fee award is governed by the abuse of discretion standard (Op. 4, 8 n.11, 8-9, 14 n.19). The Department has failed to make any showing that would warrant reversal of the District Court's discretionary award of fees under an abuse of discretion standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of May, 1984, mailed a copy of the foregoing Reply to Supplemental Brief for Appellee/Cross-Appellee to Mr. John S. Koppel, Civil Division, Room 3617, U.S. Department of Justice, Washington, D.C. 20530.

JAMES H. LESAR