

Opinion
No. 1200(A)

MAR 12 1981

CALVIN-HUMPHREY CORPORATION,
et al.,

Petitioners,

v.

DISTRICT OF COLUMBIA, et al.,

Defendants.

FILED

Docket No. 2221

O P I N I O N

This matter is before the Court upon the petition of Herbert E. Adelman, Esquire, requesting that the Court award him attorney's fees. Mr. Adelman represents petitioner-intervenor River Park Mutual Homes, Inc., et al. (River Park), a class composed of all non-profit cooperative housing projects in the District of Columbia. No opposition has been filed by the District of Columbia Government or its officers to the petition for award of attorney's fees and expenses.

For the reasons which follow, the Court concludes that Mr. Adelman shall be awarded One Hundred Forty-five Thousand Dollars (\$145,000.00).

A. The Case

In its memorandum opinion dated June 6, 1980, this Court summarized the labyrinthine history of this case from October 12, 1973 through February 27, 1979. On February 27, 1979, the Court denied the motion of the District of Columbia to dismiss this action as to River Park because in the judgment of the Court there appeared to be a genuine issue of material fact respecting whether the River Park

sub-class had knowledge of the District's use of dual levels of tax assessment. Under District of Columbia v. Keyes, 362 A.2d 729 (D.C. App. 1976), such knowledge is necessary for a timely administrative claim for tax refunds; without such knowledge, River Park could not have been expected to have exhausted administrative remedies for tax refunds. Thereafter, on July 22, 1980, the Court issued an Order respecting River Park's one viable claim for the year 1974^{*/} stating that "[t]he record herein indisputably establishes that the River Park sub-class did not know and could not have known ... of the dual levels of assessment being utilized by the District. ..." This ruling apparently motivated the parties to reach a settlement agreement on December 2, 1980, which was approved by the Court on December 9, 1980. Notice of the settlement agreement was published in the two major newspapers of the District of Columbia and was mailed to all known members of the sub-class. Although administration of the refund procedures agreed to by the District of Columbia with the sub-class may continue until 1983, it is necessary to award attorney's fees at this time, in order to satisfy current claims for refunds.

B. The Award

This Court's opinion of June 6, 1980 determined the amount of the fee to be awarded to counsel for petitioner Calvin-Humphrey Corp., et al., and in it the Court set forth the best and proper method of calculating a reasonable attorney's fee. As stated there,

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In 1974 this action challenging the dual levels of assessment was pending before this Court; the Court therefore concluded as a matter of law that it had jurisdiction over the tax refund claims of the River Park sub-class for fiscal year 1974.

"a careful consideration and the balancing of many factors is required to fix an award which can be sustained both in legal reasoning and out of a sense of fairness." Adhering to this premise, the Court believes that the following facts and conclusions of law are relevant to a determination of the attorney fee and expenses to be awarded to counsel for petitioner-intervenor River Park Mutual Homes, Inc., et al.

(1) Hours-fee formula.

The starting point for any award of an attorney's fee must be the figure obtained by multiplying attorney's hours by their hourly fees. City of Detroit v. Grinnel Corp., 495 F.2d 448 (2nd Cir. 1974). See also, Copeland v. Marshall, ___ F.2d ___ (D.C. Cir. No. 77-1351; Sept. 2, 1980); Evans v. Sheraton Park Hotel, 164 U.S. App. D.C. 86, 503 F.2d 177 (1974); Kiser v. Miller, 364 F.Supp. 1311 (D.D.C. 1973), aff'd in part, rev'd in part, sub nom. Pete v. UAW Welfare and Retirement Fund, 171 U.S. App. D.C. 1, 517 F.2d 1275 (1975). Mr. Adelman has provided the Court with a table, supported by photocopies of his work log, displaying the number of hours expended on this case by each partner of his firm and by each associate. This table also displays the hourly billing rate for the partners and associates for each year (1973 through 1980) of this litigation. The aggregate of the number of hours times the hourly rate is \$115,553.75.

In his petition, counsel asserts a claim for an estimated \$7,500.00 for anticipated legal services to be performed after October, 1980. He based this estimate on an anticipated one hour of work for each of approximately 60 refunds, or 60 hours, at \$125.00 per hour, which is the partners' 1980 billing rate. The time estimate is admitted to be arbitrary, for it attempts to take into account the contact with sub-class members, review of affidavits filed by each

member claiming a tax refund and coordination of effort with the District of Columbia. The Court is of the view based upon the amount of work remaining to be accomplished, and noting the communications received evidencing continuing involvement of counsel in this case, that the \$7,500.00 claim is indeed reasonable and should therefore be awarded to counsel.

Mr. Adelman also claims itemized expenses and estimated expenses. The estimated expenses were and are to be incurred after the petition for award of an attorney fee was filed on December 10, 1980. The amount sought is Eleven Thousand, Fifty-eight Dollars and Eighty-four Cents (\$11,058.84). The Court finds that the itemized expenses are justified and the anticipated expenses reasonable, with the exception of the costs of publication of notice. The petition asked for \$1,400.00 for these notices, based upon estimates from the two newspapers. The actual cost came to only \$510.40, as acknowledged by counsel in his letter dated January 7, 1981. Because the actual expense was \$889.60 less than that estimated in the petition, the claimed expenses should be reduced by this amount. Therefore, the Court will award \$10,169.24 for expenses incurred by counsel.

(2) Risk assumed by counsel.

In his petition, counsel asserts that the risk he assumed greatly exceeded that assumed by counsel for Calvin-Humphrey Corp., et al. (the commercial class). This assertion is based on the contention that petitioning counsel "redoubled" his efforts to obtain a tax refund notwithstanding that counsel for the commercial class had made the judgment that the weight of probability was extremely great against obtaining a refund. Petitioning counsel was vindicated in his efforts when he succeeded in obtaining a refund for his sub-class for the tax year 1974.

There is no doubt that counsel assumed a substantial risk when he pressed for tax refunds in spite of the decision in District of Columbia v. Keyes, supra. Counsel spent many hours proving that the sub-class he represented had no knowledge of the dual levels of tax assessments. Indeed, approximately two-thirds of the time expended by counsel on this case came after the Keyes decision. This effort would have gone unrewarded had the evidence shown knowledge on the part of any member of the River Park sub-class. By electing not to share in the common fund resulting from the abolition of the illegal taxing system, but instead choosing to go forward and to press for refunds of the illegally-collected tax monies, counsel stood to lose approximately \$133,000.00 in out-of-pocket expenses and wasted hours of effort had his tentative venture been unsuccessful.

(3) Novelty and difficulty of the issues.

After the decision in Keyes, counsel for the commercial class quite properly proceeded no further. Petitioning counsel, however, concluded that his sub-class stood on different footing than the commercial class of property owners and for this reason adopted a different approach to overcome the legal obstacle to refunds established by Keyes. He put forth a series of arguments supported by exhaustive efforts at gathering evidence which, together with his imagination, established the successful ground work for claiming tax refunds for his sub-class.

(4) Skill of counsel

For more than seven years, this Court has closely observed counsel's work product, trial preparation, legal acumen, and general ability. There can be no gainsaying that counsel has consistently demonstrated an outstanding skill in all phases of this litigation.

Counsel displayed uncommon dedication and perseverance in investigating the case and in conducting extensive discovery to establish River Park's position. All briefs and memoranda submitted to the Court were exceedingly thorough, well written, and cogent; legal and factual issues were presented clearly and thoughtfully. At no time did counsel represent his sub-class clients with anything less than the highest legal ability. His clients were well served, and the benefits obtained in their behalf dissuade any challenge to his competency.

(5) The nature and amount of the result obtained.

The most obvious benefit accruing to the River Park sub-class is the tax refund from the District of Columbia in the amount of \$377,000.00. Without the efforts of petitioning counsel, there would have been no refund. Over and above that tangible result, however, it is clear that this lawsuit contributed to the elimination of an illegal taxing system carried out by the District of Columbia Government, thus saving the taxpayers of the District of Columbia a substantial amount of money in future years.

After balancing the considerations outlined above, the Court finds that the hourly rates presented by counsel in his petition are reasonable and just. The Court has no reason to question the amount of time counsel has submitted as logged in this case, nor the expenses as discussed above. Counsel for the petitioner-intervenor River Park sub-class is therefore entitled to an attorney fee award of at least \$133,222.99.

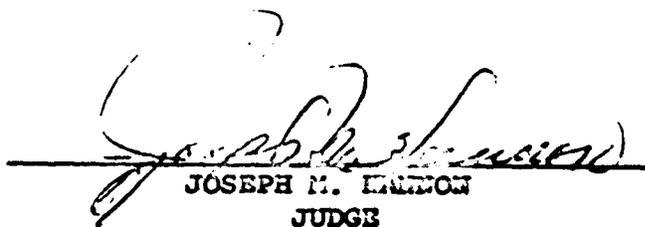
For the reasons set forth in its earlier fee opinion, the Court is persuaded that it is appropriate to award counsel a bonus to help provide an incentive for private attorneys to represent the public

and to enforce the law. The Court is satisfied that the public interest was served in this case.

Having carefully considered the difficulty and novelty of the issues, the nature and amount of the benefits obtained, and the risk assumed by counsel, the Court concludes that a substantial bonus is warranted. However, as the Court noted in its earlier fee opinion, an "acceptable economic equation ought to be that costs should bear some relationship to the benefits received." Because the amount to be paid in attorney's fees by agreement of counsel for the parties is to be included in, and not additional to, the amount of settlement, the amount of the bonus to be paid to counsel must be limited by the amount of the recovery. In his petition, counsel requested a fee of \$145,000.00 based on the factors enumerated above, modified by the amount of the total refund. The Court agrees that the suggested award is appropriate and fair under all the circumstances, and awards a bonus in the amount of \$11,777.01. The attorney's fee award shall be \$145,000.00, in accordance with this Court's order of February 17, 1981.

C. Collection of the Award

The attorney's fee award shall be paid out of the recovered common fund in the manner described in the settlement agreement dated December 2, 1980.


JOSEPH M. EGAN
JUDGE

Dated: March 12, 1981

Copies of the foregoing Opinion mailed to:

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Finance Officer, D. C.

A. Brief History of the Litigation

This action is a sibling of the case District of Columbia v. Green, 310 A.2d 848 (D.C. App. 1973) (Green I). On October 9, 1973 the District of Columbia Court of Appeals issued its decision in the Green case, affirming the trial Court decree enjoining the District of Columbia from assessing single family residential properties at other than 55% of the estimated market value for fiscal year 1974. In sustaining the injunction, the Court of Appeals held that the use of unequal levels of assessment within the class of single-family residential taxpayers was an unconstitutional denial of equal protection under the due process clause of the Fifth Amendment to the United States Constitution. The Court of Appeals, however, explicitly left open the question of "whether the District may constitutionally differentiate in the level of assessment applied to residential real property as opposed to commercial real property." Green I, supra, at 857.

On October 12, 1973 petitioner Calvin-Humphrey Corporation filed this action seeking an injunction preventing the District of Columbia from using a different level of real property tax assessment for commercial property than that used with respect to residential property. Petitioners also sought a declaratory judgment that the use of such dual levels of assessment violated D.C. Code, 1973 ed., § 47-713^{2/} and the Fifth Amendment. Further they claimed entitlement to tax refunds from the District

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D.C. Code, 1973 ed., § 47-713 provides as follows:

All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money.

compensating them for the alleged illegal taxation of past years. Petitioners, in short, sought to have this Court resolve the issue left open in Green I.

The filing of this action came at a point in time when the District Government was preparing to issue real property tax bills for fiscal year 1974. In view of the great need of the District for tax revenues, the parties to this proceeding entered into a stipulation, approved by the Court on October 18, 1973. Under the terms of the stipulation the petitioners agreed to withdraw their motion for preliminary injunction seeking to enjoin the District from mailing tax bills for fiscal year 1974 at dual levels of assessment, but preserved their right to seek recovery of any taxes illegally collected in that fiscal year. Thus, once again, the District mailed out tax bills based upon the dual level of assessment. The parties also agreed that the District would take all necessary steps in compliance with the District of Columbia Administrative Procedure Act to set a single level of assessment for fiscal years commencing with fiscal year 1975.

On the date of approval of the stipulation, the Court also certified this case to be a class action. Thus, the Calvin-Humphrey Corporation became the representative member of a class consisting of all owners of real property in the District of Columbia excepting those owning real estate improved by single-family residences. However, on October 30, 1973 River Park Mutual Homes, Inc., a non-profit cooperative housing project, filed a motion for leave to intervene as a petitioner or, in the alternative, to consolidate the case of River Park Mutual

Homes, Inc. v. District of Columbia, Docket No. 2219, with the instant action. Upon consideration of the motion, the Court ordered that the class of petitioners be divided into two subclasses; one to include all non-profit cooperative housing projects, the other to encompass the remainder of the original class of all commercial property owners. Further, the Court granted River Park leave to intervene on its own behalf and as representative of the subclass of petitioners consisting of all non-profit cooperative housing projects.

River Park was not the only entity who wished to become a party to this litigation. On November 29, 1973 Clarzell Green, and others,^{4/} by an amended motion, sought to intervene in this case as respondents on behalf of themselves and all other owners of property improved by single-family dwellings in the District of Columbia. This Court denied the motion to intervene. On appeal, the Court of Appeals reversed and Clarzell Green was granted leave to intervene. Calvin-Humphrey v. District of Columbia, 340 A.2d 795 (D.C. App. 1975). This Court views the appearance of Clarzell Green in this action as that of a private attorney general.^{5/}

By the time the issue of who were proper parties to this litigation and who each represented had been settled, several

^{3/} On September 21, 1973 River Park instituted action No. 2219 on behalf of itself, and all other non-profit cooperative housing projects, seeking a refund of taxes for fiscal years 1971, 1972, and 1973 illegally assessed.

^{4/} See, Green v. District of Columbia, 310 A.2d 848 (D.C. App. 1973).

^{5/} See footnote 1.

of the prayers for relief contained in the original complaint had been mooted by subsequent events. In the October 18th stipulation petitioners had agreed to withdraw their request for a preliminary injunction. Petitioners' prayer that respondents establish and promulgate a rule requiring the use of a single, 55% assessment level, was effected by order of then Mayor Walter Washington on January 18, 1974.^{6/} Finally, on July 1, 1975 Public Law 93-407 (D.C. Code, 1973 ed., 47-621 et seq. Supp. V 1978) took full effect. This law brought about a change in District of Columbia Code so as to establish a single rate of assessment for real property at 100% of fair market value beginning in fiscal year 1976, as compared with the 55% and 65% rates that had been used in previous years. This action by the Congress of the United States mooted petitioners' claims for permanent injunctive relief to enjoin the use of dual level of assessments.

Because of these events, by July of 1975 petitioners' only truly viable claim was the demand for a refund of those tax dollars which petitioners alleged had been illegally assessed against them and collected prior to fiscal year 1975. This issue of tax refunds was closely akin to issues already pending in the Court of Appeals in the case District of Columbia v. Keyes, 362 A.2d 729 (D.C. App. 1976). For this reason, this litigation was essentially stotted until the Keyes decision was issued on July 23, 1976.

The Keyes case was an outgrowth of District of Columbia v. Green, 310 A.2d 848 (D.C. App. 1973) (Green I). There the Court

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D.C. Register Volume 20, Number 15, page 571.

of Appeals had held that the District's "stairstep" approach to achieve an increased debasement factor for all single-family residential properties was unconstitutional because it resulted in different debasement factors being applied to the same class of property in the same year. In Keyes, petitioners sought to recover that portion of the fiscal year 1973 residential property taxes paid which was attributable to the illegal increase of 5% in the level of assessment. The Court of Appeals held that such a refund was barred because petitioners had failed to exhaust their administrative remedies and the limitation period to pursue such administrative remedies had run. The Court noted that since it was clear that petitioners had notice their tax bills had been increased, they were statutorily required, as a first step, to seek administrative relief with the Board of Equalization and Review. Inasmuch as petitioners had not done so the Superior Court lacked subject matter jurisdiction to afford tax refunds.

In light of all these events, including the Keyes decision, which had occurred since the filing of the original complaint, the District of Columbia filed a motion before this Court seeking dismissal of petitioner Calvin-Humphrey's complaint for injunctive and declaratory relief and petitioner-intervenor River Park's like complaint. On February 27, 1979 the Court granted the District's motion to dismiss as to Calvin-Humphrey class on grounds of mootness and the holding of the Court of Appeals in Keyes. As to River Park, the Court denied the District's motion to dismiss for the reason that there appeared to be a genuine issue of material fact respecting whether the River Park subclass had knowledge of respondent District of Columbia's use of dual

levels of assessment. Such knowledge, under Reyes, is necessary to claims for refund of taxes, and if this subclass had no knowledge of the wrongdoing they could not, a fortiori, exhaust administrative remedies.

With the complaint dismissed, the only matter unresolved with regard to petitioner Calvin-Humphrey class was the vexing issue of award of attorneys' fees. The award had been requested by Calvin-Humphrey's counsel in July of 1977 but because the claim for attorneys' fees was closely allied to the still pending litigation involving River Park, the District of Columbia and Clarzell Green the Court could not act upon it. As viewed by the Court, for counsel to assert successfully an entitlement to attorneys' fees, counsel for the Calvin-Humphrey class were still obligated to satisfy the Court that dual levels of assessment used in fiscal year 1974 and previous years were in fact contrary to District of Columbia law. This very issue, at that time still unresolved, was the on-going basis of the claim of the River Park subclass that they were entitled to tax refunds.

This question of law was decided by the Court on the motion for summary judgment filed by intervenor Clarzell Green. The intervenor private attorney general Clarzell Green asserted that dual level of assessments were authorized by the relevant law of the District of Columbia and, inferentially, for this reason the complaints filed by the two subclasses of commercial property owners should be dismissed. On December 11, 1979 the Court denied the Green motion for summary judgment and declared as a conclusion of law that all actions taken by the District of Columbia Government predicated upon a dual level of assessment were null and

void and contrary to section 47-713 of the District of Columbia Code as enacted by Congress. Finality had at last been achieved and resolution of the matter of award of attorneys' fees was then appropriately before the Court.

B. Propriety of Awarding Attorneys' Fees

The long-standing "American rule" on the payment of attorney's fees in the absence of a statute or enforceable contract is that each party pays his own. There are, however, two well-recognized judicially created exceptions to this rule. One exception permits an award of attorney's fees to the prevailing party where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. See, Vaughan v. Atkinson, 362 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962). The other exception, pertinent here, is the so-called common fund or common benefit exception. See, Alaska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.ed. 141 (1975).

In District of Columbia v. Green, 381 A.2d 578 (D.C. App. 1977) hereinafter Green III, the Court there made clear that the common benefit exception is potentially applicable in a taxpayer class action suit which results in a tax savings to the class. The circumstance presented was one in which no money was actually brought into the Court because it reposed in the hands of the taxpayer class. The Court observed that in such a case an award of attorney's fees would be appropriate if four criteria are met: (1) the class of beneficiaries is "small"; (2) the class members are easily identifiable; (3) the benefits can be traced with some accuracy; and (4) the costs can be shifted with some exactitude

to those benefitting. Applying these criteria to the present case we have little difficulty in concluding that the common benefit doctrine is applicable. In fact, the instant action is so similar to the issues raised in Green that much of what was said by the Court of Appeals in that case regarding passing muster with each of these criteria applies to this case.

First, the size of the class, the Calvin-Humphrey type of commercial property owners, in the instant case, is smaller than the class, the single-family residential owners, involved in Green III, and is therefore conclusively small enough. Second, the class members are identifiable through the same means suggested in Green III, i.e., through the property tax records of the District of Columbia. Third, the benefits can be traced with the same degree of accuracy as used in Green III — that is, the property tax records contain the fair market value of the property owned by each class member thus yielding the proportion of the overall benefit (tax savings) that each member received. And finally, the Court is confident that the costs can be shifted with some exactitude to those benefitting from this class action filed by counsel for the Calvin-Humphrey class of plaintiffs. While some taxpayers may have sold their properties and may, for this reason, be impossible to locate, "[t]his fact alone should not defeat an award where [petitioners] have still benefited a large class of taxpayers, who can be located." Green III, *supra*, at 584. The Court recognizes that more time has elapsed in this case between the years the benefits accrued and the award of attorneys' fees than occurred in Green III, yet we are confident that since the present class is smaller and has less turnover than the class involved in Green III, this fourth criteria is also met.

Counsel for petitioners have requested the Court to award them \$640,000 in attorneys' fees, an amount representing 1% of the estimated \$64 million saved by the Calvin-Humphrey class of taxpayers by virtue of this litigation.^{7/} On the surface an award of a mere 1% of the benefits derived by the Calvin-Humphrey class of commercial property owners from this lawsuit would not seem unreasonable. However, for the sake of its own integrity, and that of the legal profession, Courts have been admonished to avoid awarding "windfall fees" or, for that matter, giving the appearances of having done so. See, § 1.47, Manual for Complex Litigation, Wright and Miller (1977 ed.); City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2nd Cir. 1974). We are told that the guiding principles to be utilized in determining awards of attorneys' fees should be to provide compensation sufficient to motivate attorneys to undertake representation of classes in pro bono matters and to ensure that fees awarded are consistent with the degree of benefits bestowed upon the class as a product of the lawyer's efforts. § 1.47, Manual for Complex Litigation, supra. To reach a result consistent with these principles and

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At the time the petition for attorneys' fees was filed (July 1977), it was assumed by all parties that the tax savings to the Calvin-Humphrey class resulting from use of a 55% debase-ment factor was \$16 million annually. Counsel then asserted that, in aggregate, this lawsuit is responsible for saving the Calvin-Humphrey class \$16 million annually for four years (fiscal year 1974 through fiscal year 1977). On January 18, 1980 counsel for the Calvin-Humphrey class provided this Court with figures obtained from the District of Columbia Department of Finance and Revenue which show that the actual tax savings for those four years was \$57,763,828. In light of the method used by the Court here to calculate an appropriate award of attorneys' fees, the Court is not required to decide the number of years this lawsuit is primarily responsible for saving the Calvin-Humphrey class tax dollars.

one which avoids the appearance of windfall, requires that the Court do more than merely pronounce what it feels is a fair and just award based upon a percentage of the recovery. Rather, a careful consideration and the balancing of many factors is required to fix an award which can be sustained both in legal reasoning and out of a sense of fairness.

Precise standards for the determination of appropriate attorneys' fees have been enunciated in many recent cases. Indeed some of these cases have set down certain mathematical steps for the Court to follow in computing attorneys' fees in class action litigation. See, e.g., Lindy Bros. Builders v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. , 1973). Gruin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975). These helpful disquisitions, notwithstanding, the awarding of attorneys' fees remains a matter that demands inquisition by the Court on a case-by-case basis. And so it is that the following facts and conclusions of law become relevant to a determination by the Court of the amount of the attorneys' fees to be awarded here.

(1) Attorneys' hours and hourly fees. Multiplying attorneys' hours and their normal hourly fees appears to be the legitimate starting point for analysis. City of Detroit v. Grinnell Corp., supra. See also, Evans v. Sheraton Park Hotel, 164 U.S. App. D.C. 86, 503 F.2d 177 (1974); Kiser v. Miller, 364 F.Supp. 1311 (D.D.C. 1973) aff'd in part, rev'd in part, sub nom Pete v. UMSA Welfare and Retirement Fund, 171 U.S. App. D.C. 1, 517 F.2d 1275. Counsel for petitioners have provided the Court their normal hourly rate for each partner (\$100.00); each associate (\$50.00); each law

clerk (\$35.00), and each paralegal (\$20.00) who participated in some way in the preparation and pursuit of this litigation, plus the number of hours devoted by each. The aggregate of the number of hours times the hourly rate is \$92,157.50. Counsel also claim expenses amounting to \$7,976.79.

(2) Risk assumed by counsel. It should not be expected that a lawyer, whose compensation is contingent upon success, will charge, when successful, as little as he would charge a client who has agreed to pay for his services regardless of success. At the same time, the greater the probability of success, the less this consideration should serve to amplify the basic hourly fees to be charged. City of Detroit v. Grinnell Corp., *supra*, at 471. In this matter, petitioner's success in obtaining injunctive relief against the District of Columbia's tax program as applied to commercial property owners, had it been necessary, was virtually assured by the plain meaning of the statute involved, D.C. Code 1973 ed. 47-713, and the ruling of the Court of Appeals in District of Columbia v. Green, 310 A.2d 848 (D.C. App. 1973). However, another factor bearing upon amplification of the fee sought here is that petitioners, in their complaint made a demand for refund to all commercial property owners of those tax dollars illegally assessed against them. Had they been successful in obtaining the refunds the aggregate would have been a very substantial sum of money. The ruling by our Court of Appeals in District of Columbia v. Keyes, 362 A.2d 729 (1976) precluded the grant of the refunds. Though thwarted by the Keyes decision in their effort to reclaim taxes unlawfully collected, the soundness of counsel's judgment in seeking those refunds must be recognized as a factor bearing upon fee award.

(3) Novelty and Difficulty of the Issues. An attorney should be appropriately compensated for accepting the challenge in a class action suit involving either a novel or difficult question or both. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Counsel for petitioners here have accurately and frankly summarized the relevancy of this criterion to this case by stating: "[T]he fact [is] that the earlier Clarzell Green cases were the first to expose the inequity of the District of Columbia's real estate tax assessment regime. It is likewise clear, however, that the Green cases left unresolved the issue of the disparity in levels of assessment between commercial and residential property. The situation following the decision in Green, therefore, was an exposed inequity in the taxing system that called for relief on behalf of the commercial property owners."^{8/} It would seem clear from this candid observation that the attorney-petitioners simply put in motion forces which, as has been noted earlier, almost inevitably would lead to a cessation of the disparity of levels of assessment for different types of real property.

(4) Skill of counsel. In the general marketplace the greater the skill of counsel the higher the fee he may command. The rules should not be different in the controlled environment of a Court. The Court has closely observed counsel for petitioners' work product, trial preparation, legal acumen, and general ability before this Court for nearly six years. It may not be challenged that these attorneys have been extraordinarily skilled in all

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Petitioners' Second Supplemental Memorandum in Support of
Petition for Award of Attorneys' Fees and Expenses, p. 6.

phases of this litigation. Most particularly, their legal brief on the ultimate issue in the case, the legality of dual level of assessments, was a scholarly and exhaustive exegesis of the subject matter. There can be no question but that the commercial property owners represented by these attorneys were extremely well-served. Had counsel been less diligent and less able the benefits derived by the class represented would have been substantially less and obtained only at a greater expense.

(5) The nature and amount of the result obtained. An acceptable economic equation ought to be that costs should bear some relationship to the benefits received. While there is some dispute as to exactly how many tax dollars the Calvin-Humphrey class-petitioners were saved as a result of the filing of this lawsuit,^{9/} at the barest minimum that figure is \$14,460,792. This represents the difference in tax dollars between the use of the 55% assessment rate and a 65% rate, the previous rate, in fiscal year 1975. Over and above those dollars saved, counsel for petitioners performed a public service of great worth by bringing an end to the illegal tax practice being carried out by the local government and in acting as a catalyst to produce the change in the law.

These conclusions are admittedly somewhat subjective. They are also somewhat competing and, in reaching a decision on a fair award, they must be balanced against each other. After careful reflection the Court finds, on the facts presented in this case, that the hourly rates presented by counsel in their memorandum

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See footnote 7.

are reasonable and just. The Court has no reason to question the amount of time counsel has submitted as logged in this case, nor the expenses incurred. Counsel for the petitioner Calvin-Humphrey class are therefore entitled to an attorney fee award of at least \$100,162.29.

There remains the question of whether the award of attorneys' fees should also include a premium, or bonus, to provide incentive to members of the Bar to undertake class action representation in the public interest. The policy of the law in class actions litigation clearly is to provide a motive to private counsel to represent the public and enforce the law. Kiser v. Miller, 364 F.Supp. 1311 (D.D.C. 1973). See also, § 1.47, Manual for Complex Litigation, supra, at 62-64. In furtherance of this policy, courts have, after making an initial determination of an attorney fee based on the number of hours logged multiplied by a reasonable hourly fee, supplemented this fee with an incentive bonus, usually expressed in terms of a percentage of the initial award. See, Kiser v. Miller, supra, aff'd in part, rev'd in part, sub nom, Pete v. UMWA Welfare and Retirement Fund, 171 U.S. App. D.C. 1, 517 F.2d 1275; Pealo v. Farmers Home Administration, 412 F.Supp. 561 (D.D.C. 1976) rev'd on other grounds, 183 App. D.C. 225, 562 F.2d 744; National Association of Regional Medical Programs, Inc. v. Weinberger, 396 F.Supp. 842 (D.D.C. 1975) aff'd 546 F.2d 1043, 178 U.S. App. D.C. 277, rev'd on other grounds, 179 U.S. App. D.C. 154, 551 F.2d 340, cert. den. 97 S.Ct. 2633, 431 U.S. 930, 53 L.Ed. 2d 245, cert. den. 97 S.Ct. 2674, 431 U.S. 954, 53 L.Ed. 2d 270, Larionoff v. United States, 365 F.Supp. 140 (D.D.C. 1973) aff'd 175 U.S. App. D.C. 32, 533 F.2d 1167. This Court agrees

with the statement of the United States Court of Appeals for the District of Columbia Circuit in Pete v. UMWAWFE, supra, that "it is sound policy to grant class counsel some premium for their efforts as an incentive for other attorneys to undertake the risk of prosecuting class actions." Id. at 16.

The Court is therefore prepared to award a bonus in this case. However, in doing so the Court is looking over its shoulder at the case of District of Columbia v. Green, 381 A.2d 578 (D.C. App. 1977) (Green III). In that case, the trial Court had awarded a 35% incentive bonus in addition to the attorneys' total hourly fees and expenses. In a footnote, the Court of Appeals remarked that the bonus "should be eliminated altogether" because petitioners' purpose in filing the litigation "was admittedly only for selfish, monetary gains". Id. at 587, fn. 27. We find this to be a somewhat curious statement. In all of the cited cases it appears equally true that class plaintiffs could be said to be seeking "selfish, monetary gains". In Kiser v. Miller, supra, plaintiffs sought to compel defendant to pay pensions. In Pealo v. FMEA, supra, plaintiffs sought a Court order requiring defendants to implement the Farmers Home Administration interest credit loan program so that plaintiffs could receive low interest loans. In NARMP v. Weinberger, supra, plaintiffs sought release of impounded funds appropriated for the benefit of the plaintiff class. And in Larionoff, class plaintiffs claimed entitled by plaintiffs to a re-enlistment bonus.

On remand the issue of award of an attorney fee in Green III was settled. Although the language of the Court of Appeals contained in the footnote appears to be in the form of a directive, the fact is that the precedential value of footnote 27 is slight

for it was not necessary to the decision reached in the case. As such it must be viewed as dicta. While it would appear that the Court of Appeals in Green III was not convinced that a public benefit was derived from the results in that case, this Court is more than satisfied that an overwhelming public benefit has been reached in this case. Petitioners' action brought an end to an illegal taxing policy on the part of their government. One need not be a student of early American history touching the revolution to know that Americans hold dear their right to be taxed only in accordance with laws passed by their elected representatives. Here, though the Congress of the United States had explicitly mandated that all real properties in the District of Columbia be assessed at one level of assessment, the executive taxed properties at two levels of assessment. By bringing an end to this practice petitioners, through their counsel, rectified a dangerous usurpation of power on the part of the executive; for "[t]he power to tax involves the power to destroy." McCullough v. Maryland, 17 U.S. 316, 427, 4 Wheat. 316, 4 L.Ed. 579.

In making a determination of a dollar figure which would be a proper incentive bonus for counsel, the Court was required to consider carefully the factors of difficulty and novelty of the issues, risk involved, and nature and amount of the benefits. Having done so, the Court concludes that a bonus of \$100,000 is appropriate in this case. The total attorneys' fee award shall therefore be \$200,152.29.

D. Collection of the Award

In most class actions, collection of attorneys' fees creates no great problems; the Court simply directs that the fees and

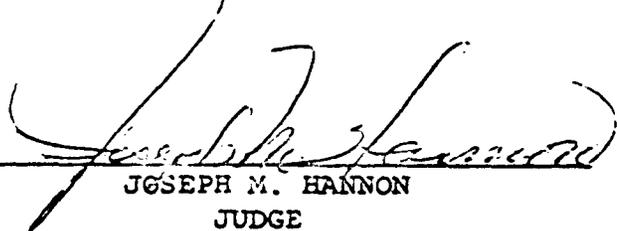
expenses be paid out of the recovered common fund. Here, however, there is no common fund for the tax dollars saved were never collected. The fund remains in the pockets of the class member taxpayers. A method, therefore, need be devised which will enable counsel to recover directly from each class member that portion of the fee owed.

In its reply to counsel's petition for attorneys' fees, respondent, District of Columbia, has offered to make available to petitioners' counsel a computer print-out of the names of affected property owners. The public interest in assuring the payment of the fee award in this case requires that it do more. For an untold number of years respondent District of Columbia has obtained a bounty from its illegal tax program involved in this case. For the most part, the District of Columbia need not refund all of those illegally acquired taxes because it would bring the government into further bankruptcy. See Keyes v. District of Columbia, supra. The District of Columbia in this Court's view is in a convenient position to assist petitioners' counsel in collecting their fee and expenses. The government communicates with each of the class members at least once a year by sending out property tax bills. It is for this reason that the Court is ordering the District of Columbia to act as a conduit for the collection of the fee and expenses awarded to counsel in this case.

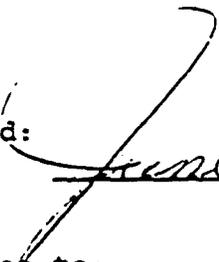
The District, in its reply, has formally objected to any utilization of its property tax bills for the purpose of collecting attorneys' fees. It has stated no grounds for this objection. Absent a good faith assertion that the use of tax records and

billing for the purpose of collecting attorneys' fees would be contrary to law or so administratively burdensome as to be impractical,^{10/} the Court does not find the formal objection of the District of Columbia sufficient to outweigh the considerations favoring petitioners' counsel. Moreover, in Kelly v. District of Columbia, 229 Wash. L. Repr., 2149, Judge John Garrett Penn, then of this Court, entered an order requiring the District, through its property tax bills, to administer the collection of attorneys' fees for class petitioners' counsel in that case. The District did not appeal that order. Indeed, it appears that it complied with that order fully. It therefore appears to the Court that a similar order entered in this proceeding will not give rise to any more administrative cost or inconvenience than it is fair to command.

An order consistent with this opinion will be prepared by petitioning counsel, submitted to all parties for their consideration and then filed with the Court for its approval.


JOSEPH M. HANNON
JUDGE

Dated:


June 6, 1980

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See District of Columbia v. Green, 381 A.2d 578, 587 (D.C. App. 1977).