IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KIRK ALBERTSON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 01-116 KAJ
WINNER AUTOMOTIVE, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

Richard R. Wier, Jr., Esq. and Daniel W. Scialpi, Esq., Richard R. Wier, Jr., P.A., 1220 Market Street, Suite 600, Wilmington, Delaware, 19801, counsel for Plaintiff.

R. Stokes Nolte, Esq., Nolte & Brodoway, P.A., Three Mill Road, Suite 304, Wilmington, Delaware 19806, counsel for Defendant.

October 27, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

This is the conclusion of an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*. Presently before me are two motions. The first is a Motion to Vacate Judgment pursuant to Federal Rule of Civil Procedure 60(b), filed by defendant Winner Automotive, *et al.* ("Winner"). (Docket Item ["D.I."] 58; the "Motion to Vacate.") The second is a Motion for Costs Including Attorneys' Fees pursuant to Federal Rule of Civil Procedure 68 and 42 U.S.C. § 2000e *et seq*, filed by plaintiff Kirk Albertson ("Plaintiff"). (D.I. 60; the "Motion for Costs.") Jurisdiction is proper under 28 U.S.C. § 1331. For the reasons set forth, defendant Winner's Motion will be denied, and Plaintiff's Motion will be granted.

II. BACKGROUND

Plaintiff was an employee of Winner until his termination on January 29, 1999. (D.I. 63 at 1.) On March 9, 1999, Plaintiff filed a Charge of Discrimination with the Delaware Department of Labor and the Equal Employment Opportunity Commission ("EEOC"). (*Id.*) The EEOC issued a right to sue letter, after which Plaintiff filed a Title VII suit in this court on February 20, 2001. (*Id.*) On April 15, 2001, Plaintiff's Complaint was amended to include a claim alleging that Winner had breached its contractual covenant of good faith and fair dealing. (*Id.*) A jury trial was scheduled to begin on September 29, 2003. (*Id.*)

On August 13, 2003, Winner sent Plaintiff's counsel a letter by electronic mail which made an offer of judgment in the amount of $40,000. (*Id.* at 1; D.I. 59 at 2.) The offer did not specifically address attorney's fees. (D.I. 59 at 2.) The offer stated:

> Please accept this letter as the defendants [sic] Offer of Judgment, pursuant to rule 68.1 of the Local Rules of United States District Court for the District of Delaware. The offer of judgment is in the amount of $40,000.00. Please respond to this offer within 10 days as indicated within the rule.

(D.I. 63, Ex. A.)

On August 27, 2003, Plaintiff accepted the offer, within the 10 day limit,[1] sending notice of his acceptance by both hand delivery and electronic means. (D.I. 59 at 2; *see* D.I. 63 at 1.) Plaintiff filed the Notice of Acceptance and the Offer of Judgment with the Clerk of the Court on August 28, 2003. (D.I. 63 at 1; *see* D.I. 59 at 2.) After indicating a difference of opinion with regard to whether the Offer of Judgment included attorneys' fees, Winner filed its Motion to Vacate on September 11, 2003. Plaintiff then filed his Motion for Costs on September 22, 2003. (D.I. 63 at 1.)

III. STANDARD OF REVIEW

A. Motion to Vacate - Rule 60(b)

"The general purpose of Rule 60, which provides relief from judgments for various reasons, is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *U.S. v. Enigwe*, 320 F. Supp. 2d 301, 306 (E.D. Pa. 2004) (quoting *Boughner v. Sec'y of Health, Educ. and*

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[1] Plaintiff's response was within the 10 day time limit because, under Rule 6 of the Federal Rules of Civil Procedure, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the calculation." Therefore, Plaintiff's response was timely under Rule 68's 10 day limit.

Welfare, 572 F.2d 976, 977 (3d Cir. 1978)). The decision to grant or deny relief pursuant to Rule 60(b) lies in the "sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances." *Ross v. Meagan*, 638 F.2d 646, 648 (3d Cir. 1981) (internal quotations and citations omitted). A district court's discretion has been described as "especially broad." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). "A 60(b) motion to set aside judgment is to be construed liberally to do substantial justice." *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977) (internal citations and quotations omitted).

Rule 60(b) provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) ... excusable neglect ... (4) the judgment is void ...." Fed. R. Civ. P. 60(b). Winner relies on both Rule 60(b)(1) and (4) in its Motion to Vacate Judgment. (D.I. 59 at 4-10.)

B. Attorneys' Fees - Title VII

Title VII provides, in relevant part: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee ... as part of the costs ...." 42 U.S.C. § 2000e-5(k). The United States Court of Appeals for the Third Circuit ("Third Circuit") has established a test to determine whether a party qualifies for an award of attorney's fees:

> First, the plaintiff must be a "prevailing party"; i.e., the plaintiff must essentially succeed in obtaining the relief sought on the merits. Second, the circumstances under which the plaintiff obtained the relief sought must be causally linked to the prosecution of the Title VII complaint, in the sense that the Title VII proceedings constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief.

Blackshear v. City of Wilmington, 15 F. Supp. 2d 417, 432 (D. Del. 1998) (quoting *Sullivan v. Commonwealth of Pennsylvania Dept. of Labor and Indus.*, 663 F.2d 443, 452 (3d Cir. 1981)). Under this test, attorney's fees are generally available "whenever a civil rights cause of action ultimately results in the plaintiff's having obtained relief." *Id.* (quoting *Sullivan*, 663 F.2d at 447).

IV. DISCUSSION

A. Winner's Motion to Vacate

Winner makes two arguments in support of its Motion to Vacate (D.I. 59 at 4-10), both based on Federal Rule of Civil Procedure 60(b): Winner argues that it committed excusable neglect under Rule 60(b)(1) and that the judgment itself is void under Rule 60(b)(4). (*Id.*)

1. Excusable Neglect - Rule 60(b)(1)

Winner argues that the judgment should be vacated because it committed excusable neglect by failing to specifically state that its Offer of Judgment did not include costs. (*Id.* at 5.) Winner's argument is based entirely on *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), and a plea that this area of law is "complex." (*Id.* at 5-7.)

Excusable neglect "is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 403 (8th Cir. 2000) (quoting *Pioneer Inv. Servs.*, 507 U.S. at 394 ["*Pioneer*"]). "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' ... is a somewhat 'elastic concept' and is not limited strictly to omissions caused by

circumstances beyond the control of the movant." *Pioneer* at 392. The four factors to be weighed include: "the danger of prejudice to the ... [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395.

Winner argues that Plaintiff "would not be prejudice[d] because the judgment would be vacated and no consequence from it would further apply[,] ... trial in this matter has not occurred and would not be substantially delayed[,] ... the omission was one of inadvertence, and ... the movant has acted in good faith." (D.I. 59 at 6.) Essentially, Winner argues that its mistake was excusable because this "area of law is complex" and "[t]he phrase 'with costs then accrued' [in Rule 68] would seem to indicate that the offer includes costs, or in this case attorneys [sic] fees." (*Id.* at 7.)

Winner's exclusive focus on *Pioneer* is misplaced. "*Pioneer* did not alter the traditional rule that mistakes of law do not constitute excusable neglect ...." *Ceridian*, 212 F.3d at 404. "[N]o circuit that has considered the issue after *Pioneer* has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect.'" *Id.* (quoting *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (citation omitted) (citing cases from the 2d, 5th, 7th, and 9th Circuits); *see also Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998) (attorney's failure to conduct research not excusable neglect); *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), *aff'd on other grounds*, 501 U.S. 115 (1991) (counsel's ignorance of the law did not mandate relief from judgment)). Winner essentially admits that it made a mistake of law when it argues that "the area of law is complex." (D.I. 59 at 7.)

Winner's neglect is not "excusable" in the sense contemplated by Rule 68 and the case law under that rule. Federal Rule of Civil Procedure 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, *with costs then accrued*.

Fed. R. Civ. P. 68 (emphasis added). In 1985, the United States Supreme Court made it clear that "with costs then accrued" means accrued costs are in addition to the sum offered, unless otherwise specified. *Marek v. Chesny*, 473 U.S. 1, 6 (1985) ("*Marek*"). The Court stated that "if the offer does not state that costs are included and an amount for costs is not specified, the court will be obligated by the terms of the Rule to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover costs." *Id.* (internal citations omitted.) Thus, even if the language of Rule 68 were not clear, the Supreme Court's holding in *Marek* is unmistakable. *Marek,* 473 U.S. at 6.

To set aside the judgment in this case would undermine the purpose of the Rule, "to encourage settlement and avoid protracted litigation." *Webb v. James*, 147 F.3d 617, 619 (7th Cir. 1998) (holding that the defendants should bear the burden of the ambiguity created by their silence on fees). Therefore, Winner's neglect is not "excusable" under Rule 60(b)(1).

2. Void Judgment - Rule 60(b)(4)

Winner's second argument in its Motion to Vacate is that "the underlying offer itself was improper which renders the judgment null or void" under Rule 60(b)(4). (D.I.

59 at 7-8.) Winner argues that Rule 68 requires that the defendant "serve" an offer of judgment on the plaintiff and that the offer in this case was "clearly not served." (*Id.* at 8.) Rule 68 states: "At any time more than 10 days before the trial begins, a party defending against a claim may *serve* upon the adverse party an offer to allow judgment ...." Fed. R. Civ. P. 68 (emphasis added). Rule 5(b)(2)(D) provides that: "Service ... [may be] made by: ... Delivering a copy by any other means, including electronic means, *consented to in writing* by the person served." Fed. R. Civ. P. 5(b)(2)(D) (emphasis added).

Winner's argument is that Plaintiff did not consent in writing to service by electronic means and therefore, since its Offer of Judgment was sent electronically, it was not properly served under Rules 5 and 68. (D.I. 59 at 8.)

Plaintiff makes two arguments in response: (1) that service of the offer by facsimile was proper and (2) that Winner is "estopped from claiming the impropriety of their chosen method of service ...." (D.I. 63 at 10.) I agree with Plaintiff. Service was proper because Plaintiff consented to service by facsimile when he sent his Notice of Acceptance in response on August 27, 2003. (*Id.* at 11.) Even if service were not proper, Winner is bound by quasi-estoppel from repudiating its attempt to serve Plaintiff.

Winner proposes that I interpret Rule 5(b)(2)(D) in a highly technical manner and admits the "technical nature of [its] ... argument." (D.I. 59 at 9.)[2] Winner sent the Offer of Judgment by facsimile. (D.I. 59 at 2.) Plaintiff received it, acknowledged receipt, and

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[2] In support of its argument, Winner cites two cases regarding "filing by facisimile." (D.I. 59 at 8-9 (citing *McIntosh v. Antonio*, 71 F.3d 29, 35 (1st Cir. 1995) and *Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110, 111 (5th Cir. 1994)). These cases, however, discuss service in terms of court filings and are therefore inapposite to the issue at hand.

accepted the Offer of Judgment. (*Id.*) He sent his written response by two different means: facsimile and hand delivery. (D.I. 63 at 3.) Under the circumstances, the written consent to the offer can only be viewed as consent to the service as well. Moreover, during the litigation, various documents besides the Offer of Judgment were transmitted between counsel by facsimile and electronic mail. (D.I. 63 at 3.) It is clear that Winner believed, correctly, that Plaintiff would accept service by facsimile or it would not have sent its Offer of Judgment in that manner.

Even if service were not technically proper under Rule 5, however, Winner is estopped from making the “ineffective service” argument. “The doctrine of quasi-estoppel precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position it has previously taken.” *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th Cir. 2002). Quasi-estoppel applies when it would be unconscionable to allow a person “to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.” *Id.* It is “[a]n equitable doctrine preventing one from repudiating an act or assertion if it would harm another who reasonably relied on the act or assertion.” Black’s Law Dictionary 591 (8th ed. 2004). Winner clearly believed that its service of the Offer of Judgment upon Plaintiff was proper. Plaintiff reasonably relied on the offer and Winner’s chosen method of service, and accepted it. It would be unconscionable to allow Winner to repudiate its chosen method of service after it received its intended benefit of the offer, namely, settlement of the case.

Rule 5(b)(2)(D) exists to protect the party receiving service, not the party providing service.[3] Under these circumstances, Winner is estopped from arguing that service was not proper. Based on the language of the Rule, the course of conduct of the parties, and Plaintiff's written acknowledgment of receipt and acceptance of Winner's Offer of Judgment, I hold that the Offer of Judgment was properly served on Plaintiff.

Therefore, Winner's Motion to Vacate will be denied.

B. Plaintiff's Motion for Costs

As noted earlier, Winner's Offer of Judgment was silent as to costs. *See supra*, section II. Plaintiff's basic argument is that he should be awarded costs, including attorneys' fees, because he is a prevailing party under Title VII and because, given the terms of Winner's Offer of Judgment, Rule 68 permits such recovery. (D.I. 61 at 4.) Winner's counter-argument is that it did not intend to offer more than $40,000 and that although its offer was silent as to costs, it should not be obligated to pay any more than its offer. (*See* D.I. 65 at 1.)

Attorney's fees are considered "costs" under Rule 68 when the underlying statute provides for attorney's fees to be awarded as part of the costs. *Marek*, 473 U.S. at 2. The underlying statute in this case is Title VII. In a Title VII action, attorney's fees are expressly categorized as costs by 42 U.S.C. § 1988(b), which states: "The court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the

[3] The requirement for consent, as discussed by the Advisory Committee, was to protect the party receiving service "because it is not yet possible to assume universal entry into the world of electronic communication." Fed. R. Civ. P. 5 (2001 Amendments, Advisory Committee Notes).

costs." Therefore, if Plaintiff qualifies for an award of attorney's fees under the Third Circuit's two-part test,[4] then a reasonable fee will be awarded as part of the costs. Plaintiff does qualify under that test.

First, Plaintiff is clearly the "prevailing party" by virtue of his acceptance of Winner's Offer of Judgment. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring) (noting that: "A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows, therefore, that the 'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer.") (internal citations omitted); *Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510, 522 n.9 (S.D.N.Y. 2002) (finding that "plaintiffs here are 'prevailing parties' by virtue of their acceptance of the Rule 68 offer of judgment"). Second, it is undisputed that the relief Plaintiff obtained was causally linked to the prosecution of his Title VII complaint. Therefore, I must determine what reasonable attorneys' fees to award in this case.[5]

1. The Lodestar Amount

A reasonable fee is one that is adequate to attract competent counsel, but which does not produce a windfall to attorneys. *Pub. Interest Research Group of New Jersey,*

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[4] As noted earlier, *see supra*, section III.B., the test is whether the plaintiff is a "prevailing party" and if so, are the circumstances under which the plaintiff obtained the relief sought causally linked to the prosecution of the Title VII complaint.

[5] Winner does not contest that Plaintiff qualifies for an award of attorney's fees, and focuses its argument on the reasonableness of the fees requested. (D.I. 65.)

Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995) (internal quotations omitted) ["*PIRG*"]; *see Blum v. Stenson*, 465 U.S. 886, 897 (1984). The starting point for determining the reasonableness of a fee is to calculate the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The result of this calculation is called the "lodestar." *See Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

a. Reasonableness of Rates

The general rule is that a reasonable hourly rate is calculated according to the prevailing market rate in the community. *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031,1035 (3d Cir. 1996). "The 'starting point' in determining the appropriate hourly rate is the attorneys' usual billing rate." *See Pennsylvania Envt'l Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 231 (3d Cir. 1998) ["*PEDF*"] (citing *PIRG*, 51 F.3d at 1185). This rate, however, is not automatically deemed reasonable. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989); *PIRG*, 51 F.3d at 1185 (internal citations omitted). The party requesting the payment of attorneys' fees bears the burden of establishing by way of satisfactory evidence, "in addition to the attorney's own affidavits, that the requested hourly rates meet this standard." *Washington*, 89 F.3d at 1035 (internal citations omitted).

In the instant case, Mr. Wier, counsel for Plaintiff, contracted with Plaintiff for an hourly rate of $300 in December 2000, subject to change. (D.I. 60, Wier Aff. at ¶ 8; D.I. 65, Ex. A, Fee Agreement between Mr. Wier and Plaintiff.) In September 2001, Mr. Wier's hourly rate increased to $325 and then to $350 in April 2002. (*Id.*) Plaintiff's counsel's associate, Mr. Scialpi, charged an hourly rate of $95 in December 2000. (*Id.*

at ¶ 9.) Mr. Scialpi's rate increased several times thereafter (to $110 in May 2001, $125 in October 2001, $150 in April 2002, $175 in July 2002, $185 in May 2003, and $195 in June 2003). (*Id.*) Mr. Wier's paralegal, Ms. Edwards, charged an hourly rate of $85. (*Id.* at ¶ 10.) Mr. Wier asserts that these rates are "commensurate with the prevailing market rate in the community for similar cases for attorneys, with reasonably comparable skills, reputation and experience." (*Id.* at ¶ 11.) In support of Plaintiff's argument that his counsel's fees are reasonable, affidavits of David H. Williams, Esquire and Richard G. Elliot, Jr., Esquire are attached to Mr. Wier's affidavit. (*Id.*, Ex. E.) Both supporting affidavits confirm that Mr. Wier and Mr. Scialpi's rates are "in accordance with the prevailing market rate in Delaware for similar services by attorneys with reasonably comparable skill, experience and reputation." (*Id.*, Ex. E, Williams Aff. at ¶¶ 4-5; *Id.*, Ex. E, Elliot, Jr. Aff. at ¶¶ 4-5.) In fact, Winner does not contest the reasonableness of Plaintiff's counsels' hourly rates and I accept those rates as reasonable. Therefore, this Court "may not exercise its discretion to adjust the requested rate downward." *Washington*, 89 F.3d at 1036 (holding that, "[w]here, as here, the plaintiff has met his prima facie burden under the 'community market rate' lodestar test, and the opposing party has not produced contradictory evidence, the district court may not exercise its discretion to adjust the requested rate downward.").

Winner does argue, however, that the overall fee award sought is unreasonable. (D.I. 65 at 5.) Winner argues that the reasonableness of Plaintiff's attorneys' fees must be determined by applying three factors discussed by Justice O'Connor in her concurrence in *Farrar v. Hobby*, 506 U.S. 103, 116-22 (1992). (D.I. 65 at 2.) *Farrar*, however, does not apply to this case. The test set forth in *Farrar* applies only to cases

where nominal damages are obtained or "plaintiff's recovery is merely technical or de minimis." *See Fisher v. Kelly*, 105 F.3d 350, 352 (7th Cir. 1997) (citing *Farrar*, 506 U.S. at 114-16). In *Farrar*, the plaintiff sued for 17 million dollars, but obtained only nominal damages of one dollar in judgment. *Farrar*, 506 U.S. at 108. In this case, Plaintiff received a judgment that cannot be characterized as nominal. Therefore, the correct standard is that, "[a] prevailing party is entitled to recover its reasonable attorney's fees unless special circumstances would render such an award unjust." *Torres v. Metro. Life Ins. Co.*, 189 F.3d 331, 332 (3d Cir. 1999) (citing 42 U.S.C.A. § 2000e-5(k)).

Winner's next argument is that Plaintiff's counsel averaged his billable rate over the life of the case and then used that average as the rate for the multiplier for the number of hours expended. (D.I. 65 at 4.) That assertion, however, is incorrect. As pointed out in his Reply, Plaintiff's counsel did not use the average hourly rate to calculate the fees. (D.I. 67 at 3.) For example, the first entry states that 1.5 hours were spent in a conference with Plaintiff. (D.I. 60, Ex. A, at 1.) The total fee billed for that time was $450. (*Id.*) The fee was calculated based on Plaintiff's counsel's hourly rate at that time of $300, not the average of $333.56 as stated on page 19 of Exhibit A. (*Id.*) The attorneys' fees will be calculated based on the hourly rate at the time the work was performed.

b. Reasonable Hours

The next step in the lodestar calculation is to make a determination of "the time reasonably expended in conducting the litigation." *Local Union No. 1992 of the Intern'l Bhd. of Elec. Workers v. Okonite Co.*, 34 F. Supp. 2d 230, 236 (D.N.J. 1998) (citing *Hensley*, 461 U.S. at 433; *PIRG*, 51 F.3d at 1188)). Plaintiff has the burden of proving

the reasonableness of the hours to be compensated. *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 477 (3d Cir. 1989). Hours which are "excessive, redundant, or otherwise unnecessary" must be excluded by the court. *Hensley*, 461 U.S. at 434.

A party requesting attorneys' fees must provide a "fee petition ... specific enough to allow the district court to determine if the hours claimed are unreasonable for the work performed." *Washington*, 89 F.3d at 1037 (internal quotations and citations omitted). A district court must review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary. *See id.*; *Hensley*, 461 U.S. at 433.

In the instant matter, Plaintiff requests payment for the following time expenditures:

R. R. Wier	130.35	hours
Anne Edwards	12.20	hours
Dan Scialpi	127.24	hours
Total	269.79	hours

(D.I. 60, Wier Aff., Ex. A at 9.) Descriptive time entries were submitted in support of the Plaintiff's Motion for Costs. (*Id.*)

c. Objections to Time Billed

Winner's first objection to the time billed is actually in regards to the fee agreement. (D.I. 65 at 3.) Winner characterizes the agreement as a "misnomer"

because Plaintiff's counsel gets paid for service regardless of the outcome of the case. (*Id.*) The fee agreement calls for "40% of any recovery by way of settlement or litigation, or the number of hours I [Plaintiff's counsel] have expended at my hourly rate of $300 an hour, whichever is greater." (D.I. 65, Ex. A, Fee Agreement between Mr. Wier and Plaintiff.) Whether or not a provision such as that is usual for this type of case, and I have no basis for commenting on that question, it was evidently agreed to by Plaintiff. Therefore, Winner's characterization of the fee agreement as a "misnomer" is inaccurate. Laudable or not, it was an agreement, and Winner has not provided authority or argument for voiding it in its entirety as being unconscionable. Even if Winner had done so, however, the relevant inquiry here is entitlement to fees under pertinent statutory and case law. I need not and do not make any decision on the enforceability of the fee agreement as such.[6]

Winner's second objection to the time billed is a series of questions regarding the amount of time listed for particular events. (*Id.* at 3-5.) Each of those questions is addressed as follows.[7]

i. Demand Letter

Winner alleges that the time spent by Plaintiff's counsel preparing a ten page demand letter (the "Demand Letter") is excessive for counsel as accomplished as

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[6] Winner also argues that the agreement specifies that costs are to be advanced by Plaintiff by way of a retainer, but that the costs were actually advanced by counsel. (D.I. 65, Ex. A, Fee Agreement between Mr. Wier and Plaintiff.) How costs were paid is not relevant to the issue of the reasonableness of the time billed in this case.

[7] The question regarding the amount billed for preparing the fee request is addressed in section III, *infra*.

Plaintiff's. (D.I. 65 at 4.) Plaintiff argues in rebuttal that the time spent was reasonable because the Demand Letter was on behalf of three plaintiffs, the other two of whom were witnesses in Plaintiff's case. (D.I. 67 at 4.) The Demand Letter "specifically detailed the facts of the cas*es*, expected testimony, damages, and the exposure of the Defendants." (*Id.* (emphasis added)) The time spent was "verified as accurate and necessary by the affidavit of counsel." (*Id.*)

Plaintiff's counsel's response is not entirely persuasive. He admits that the time spent on the Demand Letter was on behalf of "three plaintiffs." (See D.I. 67 at 4.) Counsel would not be permitted to bill each client the full time spent drafting the Demand Letter. Again, the burden is on Plaintiff to show the reasonableness of the fees. Having admitted that the work was done to address the claims of three clients, it is not enough simply to assert that the work would have been the same for Plaintiff alone. Under these circumstances, counsel's time should be divided in proportion to the number of clients on whose behalf the Demand Letter was drafted. Accordingly, Plaintiff's counsel's time will be reduced by two-thirds from 14.50 hours to 4.83 hours.

ii. Conference - February 12, 2001

Winner next questions the reasonableness of Plaintiff's counsel's billing 1.50 hours for a conference with defendants' counsel on February 12, 2001. (D.I. 65 at 4.) Winner's basis for its argument of unreasonableness is that Winner's counsel billed only 0.80 hours for the same conference. (*Id.*) Plaintiff's counsel does not rebut Winner's assertion except to say "a discrepancy of less than an hour for a conference is not a basis for reducing the award." (D.I. 67 at 4.)

I disagree. Plaintiff has again not carried his burden with regard to the time billed. Therefore, Plaintiff's counsel's time will be reduced to match that of Winner's counsel, from 1.50 hours to 0.80 hours.

iii. Teleconference - May 16, 2001

Winner also questions Plaintiff's counsel's bill for 1.00 hour for a teleconference with defense counsel and the court for which Winner's counsel billed only 0.60 of an hour. (D.I. 65 at 4.) Plaintiff's counsel argues that this twenty minute difference was spent preparing for the scheduling conference. (D.I. 67 at 4.) Plaintiff's counsel also points out that although Winner's counsel described his time as 0.60 hours, he also spent time (0.20 hours) preparing for the conference. (*Id.*; *see* D.I. 65, Ex. C.) Therefore, there is only a 12 minute difference between the time billed by each party's counsel. Winner's counsel spent 12 minutes preparing for the conference and Plaintiff's counsel spent 24 minutes.

Plaintiff's counsel's unrebutted assertion, supported by affidavit, that he spent the time in preparation is sufficient to satisfy his burden of proving the reasonableness of the preparation time.

iv. Mediation - October 30, 2001

Winner questions why Plaintiff's counsel is "permitted to bill the entire eight hours ... for attendance at a mediation in this matter when he was representing three clients at the mediation." (D.I. 65 at 4.) Plaintiff's counsel's response is that "[t]he time ... would have been the same regardless of whether one or three clients were present." (D.I. 67 at 4.)

As with the Demand Letter, Plaintiff's counsel's response in this regard is unpersuasive. Without demonstrating a basis for the assertion that the time would have been the same, and without providing any other rationale for dividing the time among the clients, Plaintiff's counsel leaves as the most sensible alternative dividing the time in proportion to the number of clients represented at the mediation. Plaintiff's counsel's time for that mediation will therefore be reduced by two-thirds, from 8.00 hours to 2.67 hours.

v. Deposition Transcript Summary

Winner questions why "it took plaintiff's counsel's associate 4.75 hours ... to summarize a deposition transcript of Al Stevens for a deposition that lasted only three and one half hours." (D.I. 65 at 4.) Plaintiff's counsel's response is that Mr. Stevens was "the general manager of the Defendants, who retaliated against Plaintiff and terminated him ... [and was therefore,] an important deponent." (D.I. 67 at 5.)

Winner's argument is unpersuasive. There is no basis for me to reduce the time spent by Plaintiff's counsel's associate when Winner offers no specific contradictory evidence that the task should have been completed in less time. It is clear that Mr. Stevens was an important deponent and information gained from his deposition required due care. Four and three-quarters hours does not appear excessive in light of the importance of Mr. Stevens' deposition to Plaintiff's case.

d. Total Reasonable Hours Expended

Winner does not attack the adequacy of the documentation submitted in support of Plaintiff's Motion for Costs. Plaintiff's counsel submitted 20 pages of itemized records indicating the date the legal work was performed, the attorney who performed it, the

nature of the work, the number of hours spent, and the total fee charged for the work. Accordingly, I find that Plaintiff has submitted adequate documentation in support of his Motion for Costs.

The hours billed by Mr. Wier are reduced as described above. A reduction of 0.70 hours for the conference on February 12, 2001, a reduction of 9.67 hours for the Demand Letter, and a reduction of 5.33 hours for the mediation on October 30, 2001. The remaining requested hours are granted without change.

e. Final Award

The following represents the reasonable attorneys' fees awarded in this matter.

ATTORNEY	FEE IN DOLLARS
MR. WIER	
24.38 hours at $300 per hour	$7,314.00
10.87 hours at $325 per hour	$3,532.75
79.40 hours at $350 per hour	$27,790.00
MR. SCIALPI	
2.45 hours at $95 per hour	$232.75
3.35 hours at $110 per hour	$368.50
16.79 hours at $125 per hour	$2,098.75
13.45 hours at $150 per hour	$2,017.50
35.35 hours at $175 per hour[8]	$6,186.25

[8] In Plaintiff's Counsel's Affidavit (D.I. 60 at ¶ 9), Mr. Scialpi's rates are said to have been increased from $175 to $185 in May 2003. In the computer printout summary (D.I. 60, Ex. A)

22.95 hours at $185 per hour	$4,245.75
32.90 hours at $195 per hour	$6,415.50

MS. EDWARDS

12.20 hours at $85 per hour[9]	$1,037.00

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LODESTAR	$61,238.75

2. Enhancement of the Lodestar

Plaintiff argues that an upward adjustment of the lodestar is warranted in this case. (D.I. 61 at 7.) Winner objects because in its view, "Plaintiff and his counsel have chosen to await the resolution of this matter before the consideration of any fees." (D.I. 65 at 4.)

The Supreme Court has held that "compensation received several years after the services were rendered-- as it frequently is in complex civil rights litigation--is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings." *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283 (1989) (finding that an appropriate adjustment for delay in payment is appropriate in some civil rights cases). Therefore, a delay enhancer

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the first time Mr. Scialpi's rates are listed at $185 per hour is actually 11/08/02. (D.I. 60, Ex. A at 11.) Since this is inconsistent with the sworn affidavit, the lodestar calculations include 13.20 hours at $175 per hour encompassing the time from 11/08/02 through 4/29/03. Thereafter, beginning on 5/03/03, Mr. Scialpi's rates are calculated at $185 per hour as stated in Plaintiff's counsel's Affidavit (D.I. 60 at ¶ 9). Any other discrepancy between the lodestar calculations and the fees listed in the summary (D.I. 60, Ex. A) are due to computer error on behalf of Plaintiff's counsel, most likely similar to the error described below in footnote 9.

[9] In Plaintiff's counsel's Affidavit (D.I. 60 at ¶ 10), Ms. Edwards, Mr. Wier's paralegal, is said to have had an hourly rate of $85. Yet, on page 19 of the computer printout summary (D.I. 60, Ex. A) Ms. Edwards' hourly rate is listed at $87.46 and her total is calculated based on that amount. (D.I. 60, Ex. A at 19.) The lodestar was calculated based on $85 per hour of Ms. Edwards' work as stated in Plaintiff's counsel's Affidavit (D.I. 60 at ¶ 10).

is designed to compensate an attorney for the gap between the time services were rendered and the fee award. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987). The Plaintiff has the burden of "documenting evidence of the time value of money and market interest rates of the period in question." *Spruill v. Winner Ford of Dover, LTD.*, No. CIV. A. 94-685 MMS, 1998 WL 186895, at *7 (D. Del. Apr. 6, 1998) (citing *Blum v. Witco Chem. Co.*, 888 F.2d 975, 984 (3d Cir. 1989)). Computing a delay enhancer is "within the district court's discretion." *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 414, 424 (3d Cir. 1993) (citing *Student Pub. Interest Research Group v. AT & T Bell Labs.*, 842 F.2d 1436, 1453 (3d Cir. 1998); *Rode v. Dellarciprete*, 892 F.2d 1177, 1188 (3d Cir. 1990); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 588 (3d Cir. 1984)).

In this case, Plaintiff has satisfied his burden of documenting evidence of the time value of money and the market interest rates during the period in question. (D.I. 60, Ex. C.) Plaintiff requests a delay enhancement in the amount of $2,885.38. (D.I. 60 at 1.) In my discretion, however, and in accordance with my reduction of Plaintiff's counsel's reasonable billable time, I will reduce the amount of the delay enhancer. Plaintiff was seeking $66,142.00 in attorneys' fees,[10] but I determined the lodestar to be $61,238.75. That is a reduction of 7.41%. Therefore, Plaintiff will be awarded a delay enhancement of $2,671.57, which represents 7.41% less than the requested amount.

3. Fee Application

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[10] This is different than the $66,244 stated in Plaintiff's Motion for Costs (D.I. 60 at 1) because of the reasons discussed in footnotes 8 and 9, *supra*.

Plaintiff also requests compensation for the time spent preparing the fee application. (D.I. 61 at 7-8.) Plaintiff claims that 34.30 hours were spent on activities related to the application. (D.I. 60, Ex. F at 3.) Winner argues that it is not "appropriate to award $7,000.00 for the preparation of a straight-forward fee request." (D.I. 65 at 4-5.) Plaintiff's counsel's response is that "Defendants offer no contradictory evidence that the task should have, or could have, been completed in less time, with the same due care." (D.I. 67 at 5.)

The analysis of the fee application costs is independent of, but identical to the analysis imposed upon the litigation costs. *See Institutionalized Juveniles v. Sec'y. of Pub. Welfare*, 758 F.2d 897, 924 (3d Cir. 1985). The number of hours allotted to the petition are multiplied by the hourly rate. *See id.* I agree with Winner that the time billed for the fee request is excessive. It is evident that Plaintiff's counsel did in fact invest due care in his application, but the $7330.75 represents nearly 12% of the underlying fee awarded for the prosecution of the entire case. The request thus appears to me to be excessive, in light of all of the circumstances of the case. I will award $5,000 for preparation of the fee application, which is an amount that fully recognizes the commitment of resources required to meet Plaintiff's burden on this application.

4. Costs

Plaintiff has submitted for reimbursement costs of $5,734.71. (D.I. 60.) Winner does not object to the amount or veracity of the costs submitted for reimbursement. Therefore, I will award costs of $5,734.71.

5. Post-Judgment Interest

The Third Circuit has held that "pursuant to 28 U.S.C. § 1961(a), post-judgment interest on an attorney's fee award runs from the date that the District Court enters a judgment quantifying the amount of fees owed to the prevailing party ...." *Eaves v. County of Cape May*, 239 F.3d 527, 542 (3d Cir. 2001); *see also Institutionalized Juveniles*, 758 F.2d at 927 (noting that "interest on a judgment ... should be computed from the date of [the district court's] initial entry.") Therefore, post-judgment interest in this case would not begin to run until the date of this opinion and the accompanying order, in which the amount of fees owed is quantified. Post-judgment interest is granted from the date of this opinion and order and is to be calculated by the parties in accordance with 28 U.S.C. § 1961.

V. CONCLUSION

Based on the above discussion, I will award $68,910.32 in attorneys' fees and $5,734.71 in costs to Plaintiff as a prevailing party in his suit against Winner. Plaintiff's Motion for Costs (D.I. 60) will be GRANTED, as described, and Winner's Motion to Vacate (D.I. 58) will be DENIED. An appropriate order will follow.

IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KIRK ALBERTSON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 01-116 KAJ
WINNER AUTOMOTIVE, et al.,	)	
Defendants.	)	

ORDER

In accordance with the Memorandum Opinion issued today, IT IS HEREBY ORDERED that the Plaintiff Albertson's Motion for Costs Including Including Attorneys' Fees (D.I. 60) is GRANTED and Plaintiff is awarded $68,910.32 in attorneys' fees and $5,734.71 in costs as a prevailing party, post-judgment interest to be awarded thereon in accordance with 28 U.S.C. § 1961. Defendant Winner Automotive, *et al.*'s Motion to Vacate Judgment (D.I. 58) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
October 27, 2004