1995

Brief for Plaintiff-Appellants Joseph Rodonich, Alex Chotowicky, Wasyl Lawro, Harry Diduk, Edward T. Markunas, Executor of the Estate of Harry Diduk

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92-7394, 93-9262

In The

United States Court of Appeals

For The Second Circuit

JOSEPH RODONICH, ALEX CHOTOWICKY, WASYL LAWRO, HARRY DIDUCK, EDWARD T. MARKUNAS, Executor of the Estate of Harry Diduck,

Plaintiffs-Appellants,

vs.

HOUSEWRECKERS UNION LOCAL 95 OF LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, JOHN SENYSHYN, individually, and as president, JOHN ROSHETSKI, individually, and as treasurer, STEPHEN MCNAIR, JOSEPH SHERMAN, ANDREW KLEBETZ, ALBERT BENDER, WILLIAM NAHAY, PHIL CHILLAK, JOSEPH PASTROSKI, SAMUEL ADAMS, HAROLD SPELLMAN, PETER JONES, JOHN SLAN, EARL DUPREE, JOHN CHILLAK, ALBERT NAHAY,

Defendants-Appellees.

BRIEF FOR PLAINTIFFS-APPELLANTS JOSEPH RODONICH, ALEX CHOTOWICKY, WASYL LAWRO, HARRY DIDUCK, EDWARD T. MARKUNAS, EXECUTOR OF THE ESTATE OF HARRY DIDUCK

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Docket Nos. 92-7344, 93-9262

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JOSEPH RODONICH, ALEX CHOTOWICKY, WASYL LAWRO, HARRY DIDUCK, EDWARD T. MARKUNAS, Executor of the Estate of Harry Diduck,

Plaintiffs-Appellants,

-v-

HOUSE WRECKERS UNION LOCAL 95 OF LABORERS' INTERNATIONAL UNION, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, et al.,

Defendants- Appellees,

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On Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLANTS

Plaintiff-appellants appeal from a final judgment of the United States District Court for the Southern District of New York (Honorable John M. Cannella), denying plaintiffs' application for attorneys' fees and costs (1323a).

OPINION BELOW

The opinion below pertinent to this appeal is the memorandum of November 1, 1993 (1286a). It is unreported.

JURISDICTION

This appeal is taken from a final judgment of the District Court. This Court has jurisdiction under 29 U.S.C. Section 1291.

QUESTIONS PRESENTED FOR REVIEW

1. Under the doctrine of Hall v. Cole, 412 U.S. 1 (1973), can a union member who vindicates his free speech rights

protected by the "Bill of Rights" of Title I of the LMRDA be denied an award of attorneys' fees without a showing, on the part of the offending union, of exceptional circumstances warranting the denial ?

2. Can a district court deny attorneys' fees to a union member who obtains a holding that his internal union discipline for exercise of free speech rights was imposed in bad faith in knowing violation of the LMRDA, solely because he did not obtain equitable relief ?

3. Where a union member recovers modest damages ($40,000) for the union's violation of his free speech rights which are plainly insufficient, after years of protracted litigation, to cover his attorneys' fees, is he entitled to an fee award ?

4. Did the court have jurisdiction to hear plaintiffs' allegations that their disqualifications from eligibility to run for union office and other violations of Title I membership rights were part of an overall scheme to suppress and intimidate the union membership, entitling counsel to fees for the "catalyst" benefit of their preliminary injunction motion ?

OVERVIEW

This case presents the fundamental question of whether a union member who vindicates his free speech rights protected by the "Bill of Rights" of Title I of the LMRDA as a result of a decision by this Court finding the union's discipline of him in bad faith and unlawful, can yet be denied an award of attorneys'

fees without any showing of exceptional circumstances warranting the denial.

After some ten years of litigation to achieve this result, and the receipt $40,000 in compensation for the unions' suppression of his rights, the court below denied plaintiff Diduck any attorneys' fees whatsoever. If the ruling below is upheld on appeal, it will inevitably deter other union members who speak out from even attempting to vindicate their rights in federal court. The ruling below therefore negates the ratio decidendi of Hall v. Cole, 412 U.S. 1 (1973), and must be reversed.

The appeal also challenges the court below's misapplication of the doctrine announced in Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973), which instructs that federal courts have jurisdiction under Title I of the LMRDA over complaints alleging violations of union members' democratic rights that occur as part of a scheme to suppress dissent during the course of an election campaign.

STATEMENT OF THE CASE

Appellants brought this suit in August of 1982, challenging their internal union discipline pursuant to, inter alia, Section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 411(a)(2).

In June of 1983 plaintiffs moved for preliminary injunctive relief and filed a supplemental complaint alleging, inter alia, that their disqualifications from running for office in the upcoming elections of local union officers was based on

pretextual grounds deriving directly from the 1981 disciplines and were part of an overall scheme to intimidate plaintiffs and the local's membership in the exercise of the rights of free speech and assembly guaranteed by Section 101(a)(1) and 102(a)(2) of the LMRDA, 29 U.S.C.Sections 411(a)(1) and 411(a)(2) and in reprisal for plaintiffs' efforts to reform the union in further violation of Section 101(a)(2) (113-114a). The supplemental complaint was revised in October of 1983 (182a). Ultimately, but not until after defendants had, in response to the motion, provided much of the relief requested, the motion and the district court granted defendants' motion to dismiss the supplemental complaint.

Jury trial of the case was conducted in 1985.

Judgment of March 1986 was entered in accordance with the jury verdict, inter alia, awarding plaintiffs Rodonich, Chotowicky and Lawro damages against Local 95 and certain of the individual defendants, dismissing all of Diduck's claims and all of plaintiffs' claims against LIUNA (751a).

Plaintiffs appealed the 1986 Judgment; defendants cross-appealed. The Court of Appeals affirmed the district court's jury instructions, and the jury verdicts, as to plaintiffs Rodonich, Chotowicky and Lawro. Rodonich v. Housewreckers, 817 F.2d 967 (2d Cir. 1987).

The Court of Appeals rejected defendant LIUNA and Local 95's cross-appeals and affirmed the district court's application of a three-year statute of limitations to LMRDA suits and further

affirmed the legal standard announced by the district court for imposing liability upon an international union for its affirmance of wrongful union discipline by a local affiliate.

In particular, the Court rejected LIUNA's argument that, absent a showing of "bad faith", an international could not be held liable in damages, but only for equitable relief, for affirming wrongful discipline by an affiliated local union. Id., at 973 n. 1. Rather, the Court held, Id. "[r]atification with full knowledge of unlawful discipline necessarily amounts to bad faith".

The Court of Appeals reversed the district court's dismissal of plaintiff Diduck's claims against defendants Local 95 and LIUNA, and the jury instructions as to Diduck. The Court held that Diduck had been disciplined by Local 95 and, on appeal from the decision of the local union Trial Board, by LIUNA for his exercise of free speech rights protected by the LMRDA. The Court held that LIUNA had affirmed Diduck's discipline on grounds of "slander" in bad faith and with full knowledge of the unlawful character of the discipline "because the charges of slander were violative of the LMRDA on their face; ibid., at 976. The Court of Appeals remanded Diduck's claims for further proceedings in the district court with instructions that, on remand, a directed verdict be entered in Diduck's favor as to Local 95's and LIUNA's liability and Diduck's damages determined.

On remand Diduck settled his damages claims before trial. The parties agreed that Diduck would receive $20,000 from LIUNA

and $20,000 from Local 95 (814a). Plaintiffs preserved the right to apply for equitable relief and an award of reasonable attorneys' fees and costs (814a).

By Memorandum of July 8, 1991, the district court denied plaintiffs' application for equitable relief, inter alia, directing defendants to correct their disciplinary records to reflect the Second Circuit's finding that the discipline of Diduck was void (861a). The district court further denied Diduck's motion for an award of post settlement interest based on LIUNA's protracted delay in payment of its share of the settlement proceeds to Diduck. By Memorandum of March 3, 1992, the district court denied plaintiffs' motion for reargument of their application for equitable relief (1259a). Plaintiffs appealed (1325a); the parties stipulated to stay of the appeal pending the district court's resolution of their then-pending application for attorneys' fees. By Memorandum of November 1, 1993, the district court denied plaintiffs' fee application in its entirety (1286a).[1] A Judgment was entered (1323a). This appeal followed (1327-1329a).

THE FACTS

A. LIUNA's Discipline of Member Diduck

The charges on which appellant Diduck was disciplined, brought by member Samuel Adams (520a) alleged as follows:

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[1]In the same Memorandum, the district court granted plaintiffs' application (unopposed by defendants) to substitute Edward T. Markunas, executor of Diduck's estate, as party plaintiff. Diduck died in 1993, while plaintiffs' fee application was sub judice in the district court.

> "On May 25th, 1981, Didick [sic] wrote a letter to the President of the International stating that he was threatened by me.
>
> His allegations are not only a lie, but he wilfully slandered me."

The charges then assert that Diduck's letter thereby violated various sections of LIUNA's Uniform Local Union Constitution ("ULUC") which required members, inter alia, to refrain from slandering officers or members (520a).

Diduck's letter (522a) reported that Adams had threatened to break Diduck's legs.[2]

On Adam's charges, the Local 95 trial board tried Diduck, found him guilty, fined him $500 and issued a further "warning" that if he "continues to ignore proper procedures set forth in our Constitution, the membership will be asked to deny Mr. Diduck membership in this organization." (523a). Pursuant to Art. XII, Sec. 7 of ULUC, the fine was stayed pending Diduck's appeal to the international (235a).

On appeal, LIUNA's Eastern Hearings Panel, consisting of LIUNA Vice-Presidents Arthur Coia and Michael Lorello, reported

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[2]Diduck's letter also accused Local 95's then-President John Senyshyn ("Senyshyn") of having cheated the union's Pension and Welfare Funds out of hundreds of thousands of dollars by failing to report the work performed by non-union, undocumented Polish workers during the 1980 demolition of the Bonwit Teller Building in Manhattan to make way for Trump Tower. In 1983, Diduck brought suit, on behalf of the class of fund participants and beneficiaries, to recover the resulting delinquencies; cf. Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992) and 874 F.2d 912 (2d Cir. 1989).

"That the charges are amply supported by the evidence" and recommended that Diduck's appeal be denied (564a). LIUNA's General Executive Board ("GEB") thereupon approved the Panel's report and adopted it (563a) By such approval and adoption, the stay was lifted and the fine went into effect (235a,422a).[3]

LIUNA's Hearings Panel -- and especially its Chairman Lorello -- were aware that the LMRDA protected union members from discipline for the exercise of free speech and were specifically reminded of it at Diduck's appeal hearing (593-595a). At the September 1981 Convention of LIUNA, only four months earlier, Lorello had chaired LIUNA's Constitutional Committee. Lorello's Committee had recommended deletion from ULUC of those provisions that purported to permit discipline of members for "slander" and like offenses because the law had "been clear for many years that it is unlawful for a union to prohibit 'slander'" and, consequently, restrictions on speech are "legally unenforceable and expose the Union to litigation at any time due to their 'chilling effect' ... " (570a). The Convention adopted the Committee's proposed amendments and deleted from ULUC the provisions on which Diduck's discipline was purportedly based (570a).

Testifying at trial, another LIUNA General Vice President and GEB member, Robert Vinall, admitted that he could give no

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[3] In June 1982, Local 95 wrote Diduck demanding payment of the fine (567a) Shortly thereafter, however, this suit was instituted and the union took no further action to collect.

rational basis for the GEB's affirmance of Diduck's discipline in view of the Committee's report and the Convention's deletion from LIUNA's ULUC of the provisions on which Diduck's discipline was assertedly based (406-422a).

At the 1985 trial, defendants based their defense to Diduck's claims on the fact that the fine had never been paid. The Court below accepted defendants' argument and instructed the jury accordingly; cf. 817 F.2d at 975-976. Because Diduck had admitted that he had not paid the fine, the Court's instruction -- as this Court subsequently held on appeal -- was tantamount to directing the jury that it could not find for Diduck. cf. Rodonich v. Housewreckers, 817 F.2d at 976.

On appeal, this Court reversed the dismissal of Diduck's LMRDA claims. 817 F.2d at 975-976. Concluding that lack of enforcement of the fine was "irrelevant", this Court held that "Clearly, Diduck was penalized for the assertion of protected rights." Ibid. ,

> "Once Local 95 rendered its decision, Diduck became a debtor of the Local. Failure to pay the fine presumably would result in further sanctions, including the possibility of expulsion from the union.

The Court continued, Ibid.,

> "Moreover, the language in Judge Cannella's instruction permitting the jury to find discipline if the proceedings were brought in bad faith and if Diduck suffered injury to his free speech did not remedy this error. Diduck should have been permitted to prove that he was disciplined merely by showing that the fine was imposed. The alternative elements of bad faith and injury to free speech are more difficult to prove and,

therefore, do nothing to alleviate the prejudicial impact of the charge."

The Court directed, Id., that "Because imposition of a fine constituted discipline in violation of Diduck's rights under the LMRDA, a directed verdict should be entered on remand in favor of Diduck on the issue of liability both as to Local 95 and LIUNA."

As to LIUNA, this Court held that the international "is liable for having ratified Local 95's action with full knowledge of the its unlawful character because the charges of slander were violative of the LMRDA on their face." Ibid.

On the day of Diduck's damages trial on remand, the parties settled his damages claims. LIUNA and Local 95 were each to pay Diduck $20,000. Plaintiffs reserved the right to move for equitable relief and attorneys' fees and costs (821a).

B. The 1983 Elections and Motion for Preliminary Injunction

The 1985 jury found that the 1981 disciplinary removals from elective union office of plaintiffs Rodonich, Chotowicky and Lawro were part of an overall scheme to suppress dissent within Local 95 on the part of the local union and certain of the individual defendants and hence violative of Title I of the LMRDA.[4]

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[4]The jury found that the officers' removals were taken not only in reprisal against them for their exercise of protected LMRDA rights, but as part of a deliberate and purposeful scheme to intimidate the entire membership from exercising their rights. In accordance with Judge Cannella's jury instructions, the jury found that the local's leadership had become "so entrenched and despotic that the democratic character of the union was threatened", and that prior to the removals, that leadership had engaged in "a series of oppressive acts" which "directly threatened the freedom of all the members to speak out" (Record #

The next regularly scheduled elections of local union officers following the 1981 disciplinary removals, and following the August 1982 initiation of plaintiffs' lawsuit, were to be held on June 25, 1983.

At nominations meetings conducted during the spring of 1983, all of the members of plaintiffs' political faction within the union, led by Rodonich, were declared ineligible to run for office by the local's Judges of Election, while the members of the rival faction (allied with President Senyshyn) were declared eligible (75-77a, 79-80a, 145a). The grounds on which plaintiffs were disqualified derived directly from their 1981 discipline and amounted to an extension of the discipline (62-72a, 75-78a). The disqualifications were, moreover, part and parcel of the same ongoing scheme to intimidate the local's membership and restrain their exercise of protected rights. (62a-70a).

When their appeals to LIUNA failed to result in immediate action (74a, 76a,93-99a,104a,1303a), plaintiffs, on June 9, 1983, brought on their Order to Show Cause for preliminary injunctive relief. Rodonich's supporting Affidavit detailed the facts to the court (59a-104a). Rodonich informed the Court that the "rejection of our nominations for office -- like the discipline meted out to us in August of 1981 -- has, in fact, the same dual purpose: to eliminate all political opposition to defendants' power within the union and to suppress dissent among the

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246, trial transcript pp. 1311-16; jury instruction).

membership" (82a). He reiterated the history of union factionalism and of the events constituting the scheme (82a-89a) and, additionally, advised that Court that the union's election eligibility rules laid down in ULUC were being applied to qualify the members of Senyshyn's faction and disqualify plaintiffs and their allies, to the same end of suppressing dissent (79a-80a).

At a June 14, 1983 court conference on the motion, and in its opposition Affidavit of counsel of the same date (123a), LIUNA advised that it had stayed the Local 95 elections pending its investigation into plaintiffs' appeals. LIUNA asked the Court to withhold action on plaintiffs' motion pending completion of LIUNA's investigation (126a, 1303a); the Court agreed. Thereafter, LIUNA conducted hearings on July 28 and August 11 (1303a), voided the previous rulings as to the candidates' qualifications and ordered a nominations meetings to be held under the supervision of LIUNA's New York Regional Office (163a, 1303a).

At the nominations meeting, held in September of 1983, t Rodonich, Chotowicky, Diduck and Hardy were again nominated and, thereafter, challenged and, on October 12, disqualified on the same grounds as previously with one exception. An additional ground for was added to the challenge as to Rodonich's eligibility, namely, that he had not been working "at the calling" during the period preceding the election as required by ULUC (154a-155a, 1303a). Plaintiffs challenged the eligibility of three members of the Senyshyn faction (John Roshetski, Joseph

Pastrowski and Stephean McNair) on grounds of lack of good standing for failure to pay union dues. The union's dues records, proving the non-payment's of each, were submitted (152a, 165a-180a); each was, nonetheless, declared eligible (155a)

With the new election date pending, and upon LIUNA's failure to act on their appeals, plaintiffs (on October 21) renewed their motion (1304a). In addition, they filed a revised supplemental complaint, inter alia, revising the prayer for relief to request an order enjoining LIUNA, as well as Local 95, from holding the election until plaintiffs names had been placed on the ballot and ordering LIUNA, as well as Local 95, to so place plaintiffs' names on the ballot (199a-200a).

Four days later (on October 25) LIUNA informed the plaintiffs that they would be notified, at some unspecified future date, as to when their appeals would be heard (267a, 287a). Then, in a turn-around the next day (on October 26), also the day before the parties were again due to appear in Court on plaintiffs' motion (on October 27), LIUNA telegrammed an order directing Local 95 to place the names of Chotowicky, Diduck and Hardy (but not Rodonich) on the ballot (205a, 267a, 966a). Still, LIUNA delayed ruling on plaintiffs' challenges to Senyshyn allies Roshetski, McNair and Pastrowski. After the October 27 conference with Magistrate Raby, and in response to the Magistrate's specific directive, LIUNA issued a letter (dated November 2) holding them qualified to run (213a, 1303-04a,

268a).[5] By letter of the same date (November 2), Local 95's counsel confirmed with the Magistrate that the election would be supervised by an independent agency, the New York State Mediation Board (968a). Also on November 2, Local 95 filed a motion to dismiss the supplemental complaint.

The election was scheduled for November 19. On November 14, Magistrate Raby recommended dismissal of the motion as "moot" because, inter alia, "in the face of plaintiffs' charges" the defendants had arranged for supervision of the election by the New York State Mediation Board and LIUNA had ordered three out of the four of their names placed on the ballot (305a,306a, 1304-05).

POINT I

BY VINDICATING HIS OWN FREE SPEECH RIGHTS, DIDUCK NECESSARILY CONFERRED A BENEFIT UPON HIS FELLOW MEMBERS OF LIUNA, WARRANTING FEE-SHIFTING

A. The Applicable Legal Standard

1. An Individual Union Member Who Vindicates His Own Title I Rights "Necessarily" Confers A Substantial Benefit Upon the Union and its Membership

This case raises the issue of whether this Court will maintain the rule of Hall v. Cole., 412 US 1, 36 L Ed 2d 702, 93 S Ct 1943 (1973), aff'ing Cole v. Hall, 462 F.2d 777 (2d Cir. 1972) and of Rosario v. International Ladies' Garment Workers

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[5]Senyshyn's allies were qualified by LIUNA because, although they were delinquent and subject to suspension for non-payment of union dues, Local 95 secretary-Treasurer Roshetski (appointed by the Senyshyn-controlled Executive Board following Rodonich's removal) had failure to suspend himself and his cronies from union membership, in violation of ULUC (269-271a).

Union, 749 F.2d 1000 (2d Cir. 1984), that a union member who vindicates his own free speech or other rights protected by Title I of the LMRDA, except under very limited circumstances not relevant to this appeal, should recover an award of reasonable attorneys' fees.

In Hall v Cole, the Supreme Court considered the propriety of this Court's award of counsel fees in Cole v. Hall, in a suit brought under Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 412 ("LMRDA")

The plaintiff-respondent in that case, John Cole[6], a member of the Seafarers International Union, had been expelled from the union for "deliberate and malicious vilification' of union officers; the district court had denied his damage claims but granted him equitable relief ordering his reinstatement to union membership and, in addition, counsel fees against the union. The Second Circuit affirmed; Cole v. Hall, supra.

The Supreme Court concluded that, "there can be no doubt that, by vindicating his own right to free speech guaranteed by Section 101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members." Hall v. Cole, 412 U.S. at 8.

"When a union member is disciplined for the exercise of any of the rights protected by Title I," the Court continued, "the

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[6] The "Hall" named in the caption was not plaintiffs' counsel, Burton Hall, but Paul Hall, then President of the Seafarers' International Union. Burton Hall represented the plaintiff, John Cole, a rank and file member of the Union.

rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial 'not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.' Yablonski v United Mine Workers of America, 150 US App DC 253, 260, 466 F.2d 424, 431 (1972)."

"Thus", the Supreme Court held, 412 US at 8-9, "as in Mills, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit' Mills v Electric Auto-Lite Co. supra, at 397, 24 L Ed 2d 593." Accordingly, the Supreme Court awarded fees on the basis of the common benefit rationale. on the ground that the plaintiffs' lawsuit represented a substantial, although not a monetary, benefit to the "ascertainable class" of the union and its membership.

In Rosario v Amalgamated Ladies' Garment Cutters, 749 F.2d 1000, 1005-1006 (2d Cir 1984), this Court upheld an award of counsel fees including compensation for time devoted by counsel to the trial of plaintiff's damages claims. Writing for the Court, Judge Mansfield explained that although "the substantial verdict awarded by the jury for violation of the plaintiffs' LMRDA rights was largely set aside because it included recovery

for one claim that was held on appeal not to be actionable ... it had the potential effect of deterring the union from denying members their due process procedural rights guaranteed by Section 101 of the LMRDA and of encouraging union members to enforce those rights through Section 102" Rosario, 749 F.2d at 1006.

The Second Circuit rejected the union's contention that the time devoted by plaintiff's counsel to trial of the damages issues should be excluded on grounds plaintiff had already prevailed, on summary judgement, on the procedural due process issues as to which he had received equitable relief, e.g. establishing a members' right to tape record disciplinary hearing procedures and to re-trial before a different tribunal. On the contrary, the Court concluded, the jury's findings as to defendants' misconduct were not reversed on appeal and "were clearly of benefit to the union and its membership regardless of the amount of provable damage to plaintiffs" Ibid, at 1007. The damages trial was thus "important", and counsel's time devoted to the trial "benefitted the union and its members". Id.

Judge Miriam Cedarbaum recently considered the application of Hall v. Cole and Rosario to plaintiff's application for attorneys' fees in Petramale v. Local 17, 1992 WL 212605 (S.D.N.Y). Her unreported decision is appended to this brief as Attachment "A".[7] In awarding counsel fees against LIUNA for its

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[7] The Petramale case is no stranger to this Court; cf. Petramale v Local 17, 736 F.2d 13 (2d Cir., cert. denied 469 U.S. 1087 (1984) and 847 F.2d 1009 (2d Cir. 1988). It concerned the same international union-defendant, LIUNA (and a different affiliated local union), and LIUNA's imposition of discipline

violation of plaintiff Petramale's free speech rights in that case, Judge Cedarbaum reasoned, Id. at *4, that,

> [T]he rationale for fee shifting in such a case -- a rationale which was expressly adopted by the Second Circuit in Rosario -- is that an individual who successfully challenges unlawful restrictions on his or her speech helps to create an atmosphere in which other union members can speak out without fear of retaliation. 749 F.2d at 1004 (" '[T]he successful litigant dispels the 'chill' cast upon the rights of other.'") (quoting Hall, 412 U.S. at 8)

Judge Cedarbaum concluded, accordingly, that an individual litigant's recovery of compensatory or punitive damages "does not negate the benefit of the lawsuit to the union as a whole". Ibid. Rather, "such damages enhance the benefit by supplying a deterrent to future unlawful conduct beyond the specific relief won". Id.

The court below veered away from the standard established in these cases, on the theory that when a union member receives damages, but not injunctive relief, as a result of a violation of Title I's "Bill of Rights", that member has not conferred a common benefit on his fellow-members and on his union as an institution. The court below reasoned that a damage award does nothing to change the union's conduct. Relying on cases outside this Circuit, the district court announced a new legal standard. Under that standard, a union member must not only successfully challenge the union's imposition of unlawful discipline violative of protected Title I rights. His claim for attorneys' fees, in

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upon member Petramale for his exercise of free speech rights during the summer of 1981 -- shortly before LIUNA similarly affirmed Diduck's discipline on grounds of "slander".

addition, depends upon a district court judge's issuance of an injunction. Because the district court had denied plaintiff Diduck's application for injunctive relief here, the district court denied Diduck his attorneys' fees.

The court below in effect said that it is of no matter that a jury or, on appeal from a jury verdict (as here), the Second Circuit itself finds a violation of the union member's rights. If the district court determines to exercise its discretion not to grant, in addition to money damages, equitable relief, that act alone will cut off the union member's entitlement to attorneys' fees.

Nothing in Hall v. Cole or Rosario renders that approach to the law viable. To the contrary, those cases speak of the great value in decisions publicly finding union misconduct as vindicating a member's protected LMRDA rights and conferring a benefit upon his fellow members and his union as an institution. As Judge Cedarbaum stated in the Petramale case, such findings "help to create an atmosphere in which other union members can speak out without fear of retaliation". 1992 WL 212605 at *4.

In short, once it is established that plaintiff has vindicated his own free speech rights secured to him by the LMRDA, by his "successful challenge" to unlawful restrictions on his or her free speech, under Hall v. Cole, he has "necessarily" conferred a substantial benefit upon his union and its membership, warranting fee shifting to the union treasury. The determination that Title I rights have been vindicated simply

ends the court's inquiry as to whether or not an LMRDA plaintiff has conferred a substantial benefit under the common benefit theory. Under Hall v. Cole, no further inquiry as to either benefit "commonality" or "proportionality" is warranted or permissible. When LIUNA disciplined Diduck for his exercise of protected free speech rights -- knowingly and in bad faith, cf. Rodonich, n. 1 at 973 -- the rights of all of LIUNA's members were threatened. In vindicating his own rights, Diduck "necessarily" dispelled the "chill" cast by LIUNA upon the rights of his fellow union members.

2. Under Hall v. Cole, a Plaintiff Who Vindicates Rights Protected By Title I's "Bill of Rights" Is Ordinarily Entitled To Attorneys Fees

In Hall v. Cole, the Supreme Court reviewed, in detail, the legislative history of the LMRDA. The Court concluded that the award of attorneys' fees under Section 102 of the LMRDA is consistent with Congress's intention in enacting the statute to fully protect the rights and interests of employees and the public. Hall v Cole, supra, 412 US at 13. Quoting from the Second Circuit's holding below, cf. Cole v. Hall, 462 F.2d 777 (2d Cir. 1972), the Supreme Court agreed with this Court that not to award counsel fees in LMRDA cases would be "tantamount to repealing the Act itself by frustrating its basic purpose." The Court found, Id:

> It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and paid counsel at their beck and call while the member is on his own. ... An individual union member

> could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it. 462 F.2d at 780-781."

"Thus", the Supreme Court continued, Id., "it is simply 'untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation...' Gartner v Soloner, supra, [384 F.2d] at 355."

The Supreme Court carefully considered the purpose and legislative history of the LMRDA, observing, at 412 U.S. at 7-8, that Congress enacted the "Bill of Rights of Members of Labor Organizations", after conducting investigations in the labor and management fields. Congress found in its investigations that there had been "a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of reponsibility and ethical conduct...' 29 USC Section 1401(b) 29 USC Section 401(b)]"; Ibid.. Congress concluded that the way to overcome corruption and racketeering in this area was to strengthen democracy within labor organizations. Thus, the Court emphasized, " In an effort to eliminate these abuses, Congress recognized that it was imperative that all union members be guaranteed at least 'minimum standards of democratic process...'; Ibid. The Court continued, Ibid.,

> Thus, Title I of the LMRDA --the "Bill of Rights of Members of Labor Organizations" -- was specifically designed to promote the full and active participation

> by the rank and file in the affairs of the union,' and, as the Court of Appeals noted, the rights enumerated in Title I were deemed 'vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership.'462 F.2d at 780" [footnotes and additional citations omitted]

"Viewed in this context", then, the Supreme Court concluded that there could be "no doubt" that "by vindicating his won right to free speech" guaranteed by the LMRDA, respondent Cole had "necessarily rendered a substantial service to his union as an institution and to all of its members." Ibid.

Congress, in enacting the statute, and the Supreme Court in Hall v. Cole, recognized that LMRDA plaintiffs are wage-earners; most are entirely unable to finance the litigation required to vindicate their Title I rights. And such litigation is, typically, extremely protracted, as in this case, in Petramale, in Rosario, and in Hall v Cole. In view of the protracted nature the litigation and plaintiff's relative impecuniousness, this Court recognized, in Cole v. Hall, 462 F.2d 777 at 780, that unless counsel could anticipate an award of fees in the event plaintiff prevailed in the litigation "most cases vindicating such rights would never be filed". [8]

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[8]Diduck's complaint, filed in 1982, was first tried in 1985 and settled on the day of re-trial in 1989; this is the second appeal. In Petramale, plaintiff's apparently straight-forward free speech case, filed in 1981, involved three separate trials and two appeals; cf. Petramale v. Local 17, 736 F.2d 13 (2d Cir.), cert. denied, 469 U.S. 1087 (1984) and 847 F.2d 1009 (2d Cir. 1988). The Rosario case similarly involved two appeals; Rosario v. Amalgamated Ladies' Garment Cutters, 605 F.2d 657 (2d Cir. 1979), cert. denied, 446 U.S. 919 (1980) and 749 F.2d 1000 (2d Cir. 1984).

The Supreme Court agreed; cf. Hall v. Cole, 412 U.S. at 13 Plainly, such cases as Diduck's would "never be filed" if plaintiff's counsel could not expect to receive his counsel fees if and when plaintiff ultimately prevailed in the litigation. The district court's decision hence subverts, and threaten to defeat, the statutory purposes of the LMRDA and to effectively "repeal" the Act.[9]

The Supreme Court in Hall v. Cole left open the possibility that a district court, in the exercise of its discretion, might yet determine that an award of fees is inappropriate in unusual and extraordinary mitigating circumstances. One example of such unusual circumstance warranting denial of fees was suggested in Hall v.Cole, namely, when a union's financial condition is so precarious that an award of fees would seriously jeopardize its institutional interests.[10] Where the award of fees would destroy the union as an institution, the benefit of increased democracy within the union would be obviated by the negative result. If the Supreme Court's example is any guide, the circumstances justifying the denial of a fee must be extreme.

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[9]Repealing the Act would appear to be one of LIUNA's aims in opposing plaintiff's fee application. LIUNA "monitors" the activities of federal agencies that regulate labor unions and enforce provisions of the LMRDA, lobbies against appropriations for them, and also "monitor[s] the progress of LMRDA litigation and the activities of counsel who specialize in LMRDA litigation (1201a, 1211a).

[10] In view of Local 95's financial distress, plaintiffs did not apply for attorneys' fees (but only out-of-pocket litigation costs) for the work performed by counsel solely in connection with the litigation of plaintiffs' claims against the local.

In short, the court's discretion to deny fees to a successful Title I litigant is narrowly circumscribed by the overriding purposes of the LMRDA. For Hall v. Cole teaches that in order to promote, rather than frustrate, the Act's purposes, attorneys' fees should ordinarily be awarded by the court whenever the vital interests of democracy have been so furthered by a plaintiff's successful litigation. Otherwise, if counsel could not expect to recover attorneys' fees if and when plaintiff succeeded in vindicating his rights under Title I, such cases "would never be filed".

In analogous circumstances, the courts have consistently interpreted the attorneys' fees provision of Title VII (42 U.S.C. Section 2000e-5(k)) (which states "...the court in its discretion, may allow the prevailing party ... a reasonable attorney's fee ...") to "mandate attorney's fees to a prevailing plaintiff unless 'special circumstances' would render such an award unjust'". Clarke v. Frank, 960 F.2d 1146, 1152 (2d Cir. 1992), quoting Albemarle Paper Co. v. Moody, 422 U.S.405, 415 (1975). The Supreme Court has emphasized that a "court's discretion to deny a fee award to a prevailing plaintiff is narrow" New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 68 (1980). "Absent 'special circumstances' ... fees should be awarded"; ibid. (citations omitted). And see: Newman v. Piggie

Park Enterprises, 390 U.S. 4[11]; Christiansburg Garment Co. v. EEOC, 434 U.S.412, 416-417 (1978).

The Second Circuit, in Rodonich, 817 F.2d at 977 and the Supreme Court in Reed v. United Transport Union, 488 U.S.319, 326 (1989) (holding state personal injury statutes of limitations applicable to LMRDA actions as to other federal civil rights statutes), albeit in another context, have recognized the close analogy between Title I of the LMRDA and other federal civil rights statutes. This Court emphasized, Id., that "Civil rights actions bear a strong resemblance to claims asserted under the LMRDA, such as free speech, freedom of assembly and right to vote claims".

The district court accordingly erred in construing the common benefit doctrine of Hall v. Cole as a "narrow" exception to the American Rule that the courts must construe and apply "narrowly" in assessing the availability of fee-shifting in LMRDA cases (1301a). As the Supreme Court stated in Hall v. Cole, 412 U.S. at 4-5, the common benefit doctrine is an exception to the traditional American Rule. It is fully applicable, however, to LMRDA actions and cannot be applied to those actions "narrowly"

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[11] In this case, the Court of Appeals has held that LIUNA's ratification of Diduck's discipline with full knowledge of its unlawful character was in "bad faith"; Rodonich, 817 F.2d at 973, n. 1 and at 976. Ironically, LIUNA's "bad faith" discipline of Diduck constitutes "exceptional circumstances" warranting an award of attorney's fees under the traditional American Rule, even without application of the common benefit rationale. see: Newman v. Piggie Park Enterprises, 390 U.S. 400 at 402.

without defeating the Congressional purpose and running afoul of the standard laid down by the Supreme Court in Hall v. Cole.

B. The Court Below Applied An Erroneous Legal Standard

1. Shinman and Its Progeny Confuse the "Common Benefit" Theory With the "Common Fund" Doctrine

Under Hall v. Cole, then, fee-shifting is warranted when an LMRDA plaintiff "vindicates" protected Title I rights. So long as those rights are "vindicated", it is of no moment whether they are so "vindicated" through the attainment of "legal" relief or "equitable" relief or otherwise.

In holding to the contrary, the court below relied upon the Sixth Circuit's decision in Shinman v. International Union of Operating Eng., Local 18, 744 F.2d 1226 (6th Cir. 1984), cert. denied, 469 U.S. 1215 (1985), and the decisions of those courts that have followed the Shinman analysis. See:, e.g., Guidry v. International Union of Operating Eng., Local 406, 882 F.2d 929 (5th Cir. 1989), cert. granted and judgment vacated on other grounds, 494 U.S. 1022 (1990); Black v. Ryder/P.I.E. Nationwide, Inc., 970 F.2d 1461 (6th Cir. 1992). And see: Aguinaga v. United Food and Commercial Workers International Union, 993 F.2d 1480 (10th Cir. 1993) (applying the rationale of Shinman in a non-LMRDA case brought under the duty of fair representation doctrine). These decisions, as Judge Cedarbaum held in Petramale, misconstrue Hall v. Cole and are inconsistent with it.

In Shinman, the plaintiff had recovered substantial compensatory ($107,067.00) and punitive ($145,000) damages under the LMRDA and Ohio common law following his assault at a union

meeting; he had also been awarded counsel fees through trial of the action. At issue was the district court's supplemental fee award ($56,178) for appellate work.

The Sixth Circuit struck down the supplemental fee award, holding that, "Overriding considerations of justice do not compel an appellate fee award to a plaintiff awarded punitive damages well in excess of the fees sought." Shinman, at 1235-1236.

The Sixth Circuit reasoned in Shinman that "[o]ther union members could not have brought suit to redress Shinman's personal injuries," Id. at 1235. Thus it concluded that Shinman was not entitled to fees under the common benefit doctrine because he obtained damages benefitting only himself. As to the common benefit actually at issue on Shinman's fee application -- protection of the members' exercise of democratic rights through Shinman's vindication of his own LMRDA rights. -- the Shinman Court brushed that aside as "incidental" to Shinman's attainment of money damages.

The Shinman Court further reasoned, again incorrectly, that the "incidental" benefit of restoring democracy would not "justify" a fee award, because such an award must "operate so as to impose the burden in proportion to the benefit received". Misconstruing Hall v. Cole, the Court held that fee-shifting would not "operate to spread the costs proportionately" among the group benefitted because although Shinman alone was receiving money damages, "if the fee award were upheld he would pay no

greater portion of the fees than any other union member..." Shinman, 744 F.2d at 1235.

Similarly, in Guidry, supra, the Fifth Circuit agreed that, under a "common benefit" theory, the costs of litigating are to be shifted "to those who would have had to pay if they had brought the suit." Ibid. Reasoning that "other members of the union could not have brought suit to redress the injuries of an individual union member", the Court accordingly held the common benefit theory inapplicable.

The rationale of Shinman and Guidry stands Hall v. Cole on its head. As Judge Cedarbaum observed in the Petramale case, Section 102 of the LMRDA provides that suit may be brought only by "a person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter." 29 U.S.C. Section 412. "In order to have standing under the LMRDA", Judge Cedarbaum observed, Id.," a union member must be able to demonstrate that his or her individual rights were violated." In short, the entire union membership does not, in any case, have standing to vindicate plaintiff's individual rights protected by the LMRDA. That fact is irrelevant to plaintiff's fee entitlement. In Hall v. Cole, then, as in Petramale and in this case, "the claim was that an individual member's right of free speech was violated." Petramale, Ibid.

Moreover, depriving a plaintiff of his compensatory or punitive damages award by placing the entire expense of litigation upon him flies in the face of Hall v Cole.. As to any

compensatory award, such a result would deprive a plaintiff of fair compensation designed to make him whole for his injury -- in short, to restore him to a position equal to that of his fellow members. As to a punitive damages award, such a result effectively annuls the award, by returning to the union the monies it was ordered to part with as punishment.

Application of the Shinman rationale, moreover, creates a built-in conflict of interest between client and counsel in LMRDA actions. Counsel must fear that a fairly successful outcome in terms of his client's damages might prevent the collection of a reasonable award of attorneys' fees adequate to compensate counsel for years of protracted federal litigation.

The contrary holdings of Shinman and its progeny confuse the "common benefit" rationale of Hall v. Cole with the quite different "common fund" theory. In the "common fund" cases, plaintiff (usually a class representative) confers an economic benefit upon the class, through the literal creation of a "common fund" from which his counsel fees are paid with strict "proportionality". Under the related, but by no means identical, common benefit doctrine, as the Supreme Court carefully explained in Hall v. Cole, Id. at n. 7, the common benefit conferred upon the "ascertainable class" by an individual plaintiff's litigation is the correction or prevention of a non-economic abuse prejudicial to their rights and interests, to wit: the protection of democratic rights.

Thus, the "common benefit" exception to the American Rule, the Hall Court explained, developed from, but is not identical to, the "common fund" cases. In the "common fund" cases, the Court explained, the federal courts have "traditionally" awarded fees to the successful plaintiff "when his representative action traces a 'common fund', the economic benefit of which is shared by all members of the class", Id., note 7 (citations omitted).

In Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), the "rationale" of the 'common fund' cases "was extended" to award attorneys' fees to a successful plaintiff who, although suing only on her own behalf and not as representative of a class, "nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of stare decisis." Hall v. Cole, Ibid. "In reaching this result", the Supreme Court emphasized, Ibid., "the Court explained that the beneficiaries of the plaintiffs' litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of defendant's assets from which the beneficiaries would recover."

"Finally" in Mills v Electric Auto-Lite, 396 US 375 (1970), the Court had held that "the rationale" of the "common fund" cases "must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation 'which corrects or prevents an abuse which would be prejudicial to the rights and interests' of those others'" Hall v. Cole, Id., quoting Mills.

The Hall Court went on to hold, "The instant case is clearly governed by this aspect of Mills." Id.

The distinction between the "common fund" cases and the common benefit rule is crucial, because while "commonality" of plaintiff's monetary recovery exists in the "common fund" cases, it does not and by definition cannot exist under the common benefit doctrine unless the LMRDA plaintiff recovers no damages at all. Yet, the non-monetary benefits of increased democracy obtained through the successful litigation of an LMRDA suit are strictly "all for one and one for all". When an individual union member is disciplined for his exercise of any of the rights protected by Title I of the LMRDA, 'the rights of all members of the union are threatened". Hall v. Cole, 412 U.S. at. 8. In vindicating his own rights, the individual LMRDA plaintiff "dispels the 'chill' cast upon the rights of others" and so "necessarily render[s] a substantial service to his union as an institution and to all of its members". Ibid.

Nor is the common benefit of the preservation of the democratic rights of the unions' membership a mere "incidental" benefit, as the Shinman Court and the district court below would have it (1295a). On the contrary, those rights are, rather, "deemed 'vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership'" Hall v. Cole, Ibid, at 8, quoting the Second Circuit decision in Cole v. Hall, 462 F.2d at 780. It is precisely because they are "vital", and not "incidental", that

the LMRDA plaintiff confers a substantial benefit upon the union and its members through the vindication of his "personal" free speech rights.

As Judge Cedarbaum concluded, the individual litigant's recovery of compensatory or punitive damages serves to "enhance" rather than to "negate" the lawsuit's benefit to the union as a whole "by supplying a deterrent to future unlawful conduct"; 1992 WL 212605 at 4, following Rosario.

Thus, neither "benefit commonality" nor "proportionality" are destroyed by an LMRDA plaintiffs' recovery of damages.

The district court plainly misconstrued Hall in holding that the "proportionality and benefit commonality ... requirements of the common benefit doctrine" were not met in this case (1297a), To the extent that "benefit commonality" and "proportionality" are "requirements" of the common benefit doctrine, under Hall v. Cole they are "necessarily" present in actions under the LMRDA in which an individual litigant vindicates his free speech rights.

Of course, the individual litigant necessarily obtains some personal benefit from the lawsuit that is not "shared" by the union membership -- be it personal damages or personal equitable relief. This fact does not destroy the "commonality" of the benefit conferred upon the membership in the form of increased protection of the members' democratic rights. Moreover, as the Supreme Court held in Hall, in view of that common benefit of enhanced democracy, fee-shifting to the union treasury insures equitable apportionment of the fees.

Thus, under Hall v. Cole, the non-economic benefit conferred by the LMRDA plaintiff upon the class of beneficiaries (the union membership and the union as an institution) is necessarily "commensurate to the benefit bestowed upon the individual plaintiff", as Judge Cannella insisted it must be (1297a, 1301a); moreover, that benefit is necessarily, "held in common by the [LMRDA] plaintiff and the beneficiaries among whom the fee is being equitably apportioned" -- just as Judge Cannella said it must be (1297a, 1301a).

It is not true, then, that this Court has not yet considered whether benefit "commonality" and "proportionality" are "requirements" of the common benefit theory (1297a). On the contrary, this Court carefully considered the matter in Cole v. Hall; and its decision setting the standard applicable for awarding counsel fees under the LMRDA was adopted by the Supreme Court in Hall v. Cole.

2. The District Court's Distinction Between Legal and Equitable Relief is Inherently Illogical

The new rule announced by the district court in this case -- that fees are available only where the court, in its exercise of discretion, awards equitable relief -- is unsupported by authority. In point of fact, in Guidry, plaintiff obtained an equitable order directing his reinstatement to union membership in addition to damages; 882 F.2d at 934. Compare: the court below's mis-reading of Guidry, 1295a. In Black, plaintiff who received damages was denied fees although he had also obtained the substantial equivalent of equitable relief: after suit was

filed, the union rescinded all formal discipline. 970 F.2d at 1465. The courts that deny fees on the basis of the Shinman rationale do so whether or not equitable relief has been granted. Nor is the distinction drawn by the district court between equitable relief and damages supported by logic or common sense. [12]

LMRDA actions are not, by their nature, class actions;

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[12] In view of Diduck's death, his estate is not pursuing his claims for equitable relief on this appeal. The court's denial of fees here is all the more egregious in view of Diduck's clear entitlement to an equitable order.

On Diduck's 1986 appeal, this Court reversed the 1986 Judgement in so far as it dismissed Diduck's LMRDA cause of action against LIUNA and Local 95. In so holding, the Court rejected LIUNA's contention that an international affirming discipline in "good faith" is not liable in damages, but only for equitable relief, to an aggrieved member. 817 F.2d at 973 n. 1. Compare: Petramale, 625 F.Supp. 775 (S.D.N.Y.1986), rev'd in part 847 F.2d 1009, 1011 (2d Cir. 1988). To emphasize its holding that the unions were liable to Diduck in damages, this Court directed that, "On remand, Diduck may seek damages for Local 95's imposition of unlawful discipline." 817 F.2d at 976.

On remand, Judge Cannella relied upon this language in denying Diduck's motion, misconstruing the Court's instructions as a limitation on his power to award appropriate equitable relief (864a). Cf. Contra: Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939). This conclusion was clearly erroneous.

The equitable relief sought by Diduck was undoubtedly appropriate. Under Sections 102 and 609 of the LMRDA, 19 U.S.C. Sections 412 and 529, union members disciplined in violation thereof are entitled to such relief, including injunctions, as may be appropriate. Such relief necessarily includes remedial equitable relief. Cf. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir.), cert. denied, 375 U.S. 946 (1963); Cole v. Hall, supra,; Kuebler v. Cleveland Lithographers, 473 F.2d 359, 364 (6th Cir. 1973); and see: Johnson v. Kay, 860 F.2d 529 (2d Cir. 1988); Petramale v. Local 17, 736 F.2d 13, 19 (2d Cir. 1984); And see: description of the equitable relief granted below in Petramale, at 847 F.2d 1009, 1011.

Plainly, this Court did not intend, in addressing Diduck's appeal, to overrule this well-established body of precedent sub silentio. Diduck's entitlement to the equitable relief requested, including purging of his disciplinary record and enjoining enforcement, was so well established as to be routine. In short, it went without saying.

entire classes of union members are not subjected to union discipline. Whether the relief obtained be equitable or legal in nature, it is individual, not class-based and not class-wide.

As the district court acknowledged (A 14-15), the equitable relief usually awarded in LMRDA cases is individual, personal or "private" in nature. The plaintiff Cole in Hall v. Cole obtained only his personal reinstatement to union membership. In Goldberg v. Hall, 1988 WL 215393 at 5 (S.D.N.Y.July 28, 1988), aff'd, 873 F.2d 1435 (2d Cir. 1989) cited by the district court (A 14) plaintiff obtained no equitable order, but was voluntarily reinstated to union office following the filing of his lawsuit, and fees were awarded under a "catalyst" theory. In Ostrowski v. Utility Workers Union of America, Local 1-2, 1980 WL 2183, at 1-2 (S.D.N.Y. Dec. 29, 1980) (cited by the court below 1299a) plaintiffs obtained reinstatement to union membership and an injunction against their (personal) future discipline.

There is no logical reason for concluding that a common benefit has been conferred upon all union members when plaintiff has vindicated his rights by obtaining such "private" equitable relief, but not when he has recovered damages instead. This is especially so in a case like this one, where plaintiff was not suspended from union membership.

The district court sought to justify its holding with the assertion that equitable relief causes a defendant to alter its behavior, while an award of damages, rather, has a "general" deterrent effect upon society as a whole (1300a-1301a). In so

holding, the court below again relied upon the erroneous reasoning of the Sixth Circuit in Shinman, 744 F.2d n. 13 at 1235, and, in so doing, rejected this Court's controlling decision in Rosario.

Following this aspect of Shinman, the district court erroneously concluded that "concrete benefits" flow from equitable relief, however personal and individual in nature, but not from an award of damages (1300a-1301a). Assertedly, "[a] defendant made to pay damages, unlike the defendant who must reform its behavior due to an equitable decree, is not under any legal compulsion to modify its behavior in accord with a judgment." (1301a).

This argument is untenable. In LMRDA cases, the ascertainable class -- the union and its membership -- plainly benefit more and more directly from the individual plaintiff's successful vindication of rights than does the public. The public is not compelled pay out the plaintiff's damages. Damages have a direct, concrete impact on a defendant's behavior: it is compelled to reach into its pocket and pay out to the plaintiff. No more "concrete benefit" can flow from any judgment. Additionally, officers who are at the helm at the time when damages are awarded against the union may well pay for their illegal conduct at the next election.

In Rosario, this Court held that a concrete benefit was conferred by the jury's findings. Here, this Court's published findings as to defendant LIUNA's violations of the law perform

the same function. All of LIUNA's members benefit from these findings, as repetitive violations by LIUNA are more likely to subject it to increasingly severe sanctions and punitive damages.

3. The Supreme Court's Decision in Aleyeska Is Inapplicable

The Shinman Court, like the district court below, sought support for its theories in Aleyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Yet Aleyeska provides no support for the courts' illogic. The determinative fact in Aleyeska barring application of the common benefit theory, was that the litigation solely benefitted the public at large.[13] Certainly, no benefit was conferred upon the defendant pipeline company. In LMRDA cases, on the other hand, an ascertainable class -- the union and its membership -- exits, and shifting fees to the class -- that is, to the union treasury -- distributes the costs "proportionately" among that union-member class. And see: Petramale, at 6-7. The Aleyeska Court, moreover, explicitly reconfirmed the continued validity of Hall v. Cole, 421 U.S. at 257-259.[14] Nor does anything in Aleyeska

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[13]In Aleyeska, the Court of Appeals had declined to award counsel fees against the oil development company that intended to build the Alaska pipe line in favor of environmentalists who had sued, in the interest of the public at large, to block the building of the pipeline. Unlike the Union defendant in an LMRDA suit, the pipeline company was simply not an "ascertainable class" of beneficiaries of the benefits resulting from plaintiffs lawsuit. The class of beneficiaries, was, rather, the public at large.

[14]Thus, the Court noted "the historic power of equity" to permit "a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been

support the distinction drawn by the Shinman Court, and the court below in this case, between injunctive and legal relief (1300a)

C. Plaintiff Diduck Vindicated His Free Speech Rights and Thus Conferred a Substantial Common Benefit Upon LIUNA as an Institution and its Membership Warranting Fee-Shifting to the Union Treasury

Because it applied Shinman, instead of Hall v. Cole, the court below failed utterly to address the inquiry at hand: whether Diduck had in fact vindicated his own free speech rights secured to him by Title I of the LMRDA. If he did, Hall v. Cole teaches that Diduck "necessarily" conferred a substantial, albeit non-monetary, benefit upon his fellow LIUNA members and upon LIUNA as an institution. Undoubtedly, he did.

On his appeal from the district court's dismissal of his claims, Diduck obtained this Court's finding that he had been disciplined by LIUNA, as a matter of law, in violation of his free speech rights secured to him by the LMRDA and in bad faith. He obtained, in addition, this Court's directive that a directed verdict as to liability be entered in his favor against defendants LIUNA and Local 95 on remand. In the process, Diduck established several important legal precedents.

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consistently followed." Among the authorities relied upon by the Court in support of this observation is Hall v Cole, cited together with Sprague v Ticonic National Bank, Mills and so on. Again, at 421 U.S. at 260 the Court emphasized that: "These exceptions [to the "American Rule"] are unquestionably assertions of the inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress ... "

First, he established the legal standard for liability of an international labor organization for affirming discipline imposed by its local affiliate: affirmance with full knowledge of the wrongful nature of the discipline.

Second, Diduck established the international's liability to him in money damages as well as for equitable relief. LIUNA had argued here, as in Petramale, that the international could only be held liable for equitable relief (but not for damages) to an aggrieved member. This Court firmly rejected LIUNA's argument, and so included in its opinion the specific, direction to the district court to determine Diduck's damages on remand.

Third, in prevailing on his appeal, Diduck established that the mere imposition of discipline, without more, is violative of the LMRDA. LIUNA had argued that its affirmance of the Local 95 Trial Board decision did not constitute discipline, because the fine imposed upon Diduck had been stayed pending his inter-union appeal and thereafter (following Diduck's filing of this lawsuit) the unions had refrained from enforcing the discipline. This Court rejected LIUNA's argument and agreed with Diduck that the district court's jury instructions, in this regard, were erroneous.

Fourth, Diduck established that the analogous state statue of limitations for personal injury (three years) applicable to other federal civil rights statutes applies to LMRDA actions, instead of the six-month limitations period applicable to unfair labor practice charges filed with the NLRB. At the time of

Diduck's appeal, most of the other Circuit Courts (with the then-sole exception of the First Circuit) had held the six-month limitations period applicable to Title I actions under the LMRDA. Two years later, in Reed v. United Transport Union, 488 U.S.319 (1989), the Supreme Court agreed with this Court's holding.

The Court of Appeals' findings as to LIUNA's misconduct surely are of as great a benefit to the union and its membership as were the jury findings of union misconduct in Rosario, 749 F.2d 1000, at 1007. The published appellate court decision against LIUNA was henceforth available to every union member and put the union on notice that further repetition of such misconduct would be met with progressively more severe remedies and sanctions. The Court of Appeals' findings apprise the union's officers and agents that each time LIUNA is caught violating the protected free speech rights of one of its members, the union's treasury will be endangered. Thus, the Court of Appeal's decision clearly "help[ed] to create an atmosphere in which other union members can speak out without fear of retaliation". Petramale, 1992 WL 212605 at 4.

Under the circumstances, Diduck's damages on remand, $20,000 each from LIUNA and Local 95, served to "enhance" the benefit of the lawsuit to the union as a whole by "supplying a deterrent to future unlawful conduct beyond the specific relief won". Ibid.

If the unions had come forward and settled Diduck's case for $20,000 apiece as soon as the case was filed, with a confidentiality order, it could conceivably be argued that a "personal"

benefit alone had been achieved by the litigation. But when a case goes to the Second Circuit and this Court makes strong findings which spell out the law and the nature of defendants' misconduct, a substantial benefit has been conferred on every other union member who in the future may want to speak out without fear of retaliation.

In the analogous context of civil rights litigation under Title VII of the 1964 Civil Rights Act, this Court has recognized the importance of judicial holdings. In Grant v. Martinez, 973 F.2d 96, 102 (2d Cir. 1992), cert denied 113 S.Ct. 978 (1993), this Court held that the precedent established in prior Second Circuit decisions in the case benefitted plaintiff class of minority union members and had "contributed to changes in the hiring practices of the building trades" and "opened the courts to other meritorious civil rights claims". Indeed, this holding echoes the Court's similar holding, in Rosario, that the jury's award of damages, subsequently set aside on appeal, had nonetheless benefitted Rosario's fellow union members because it "had the potential effect of deterring the union from denying members their due process procedural rights guaranteed by Section 101 of the LMRDA and of encouraging union members to enforce those rights through section 102".

Similarly, in Cowan v. Prudential Ins. Co. of America, 935 F.2d 522, 526-527 (2d Cir. 1991), this Court rejected defense arguments that plaintiff's civil rights action was "'nothing more than a private tort suit' benefitting only him'". This Court

found, to the contrary, that the individual plaintiff's successful litigation of his civil rights suit had benefitted his co-workers at defendant company, "Cowan has helped other employees at Prudential by exposing a discriminatory supervisor, and by making Prudential aware that it has to exert still greater efforts to protect its employees and society itself from future discriminatory behavior in its employment actions". Ibid.

The district court below completely ignored the Second Circuit's findings and their prophylactic value. Undoubtedly, Diduck "vindicated" his own free speech rights and, in so doing, conferred a substantial benefit upon LIUNA as an institution and its members. Absent extraordinary mitigating circumstances, then, Diduck is entitled to an award of attorneys' fees.

In this case, no such mitigating circumstances exist. On the contrary, all of the surrounding circumstances strongly militate in favor of fee-shifting.

Unlike Local 95, LIUNA's financial resources are extensive; the international can readily absorb plaintiff's fee award. LIUNA's financial disclosure statements (Forms LM2) filed annually with the Department of Labor disclose that the international routinely pays out of the union treasury nearly a million dollars a year in professional fees (Record # 294).

Moreover, LIUNA acted in manifest bad faith in knowingly imposing discipline on Diduck for his exercise of protected free speech rights. As this Court has held, "[r]atification with full

knowledge of unlawful discipline necessarily amounts to bad faith". Rodonich, 817 F.2d at 973 n. 1.

And Diduck's free speech rights (like democratic rights in most instances) were "cheap." Diduck recovered only $20,000 from LIUNA (and an another $20,000 from Local 95) for defendants' free speech violations. As Judge Cannella noted, Diduck's recovery was plainly inadequate to provide his counsel with reasonable compensation for their protracted services (1300a).

As the Supreme Court observed in Hall v. Cole, Congress enacted "Bill of Rights" of Title I of the LMRDA as an antidote to union corruption and abuse of trust. Indeed, as regards defendant LIUNA, the President's Commission on Organized Crime has made specific findings of instances of corruption and abuse of trust (1263a-1285a). And see: 1133a-1147a;1155a-1208a. LIUNA's discipline of Diduck (and Petramale) appears to have occurred while LIUNA was engaged in efforts to suppress a rising democratic tide within the international (1117a-1122a).

Moreover, LIUNA has itself introduced evidence indicating that, since Diduck initiated this litigation, it has by-in-large refrained from affirming discipline imposed by its local affiliates on grounds of "slander", thus indicating that Diduck's pursuit of this litigation has, in fact, benefitted the union's membership (1018a)

POINT II

PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES IN CONNECTION WITH THEIR 1983 MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

There are only two questions going to plaintiffs' entitlement to attorneys' fees for work performed in connection with their 1983 motion for preliminary injunctive relief, namely: (1) did the district court have jurisdiction over plaintiffs' claims pursuant to Title I of the LMRDA, and (2) did plaintiffs' motion serve as a "catalyst" prompting LIUNA to voluntarily provide, in response, most of the relief requested, rendering the motion "moot". The district court answered the latter question in the affirmative, but, because it concluded that the court lacked jurisdiction, denied plaintiffs fee request.

A. Under This Circuit's Decision in Schonfeld, The District Court Had Jurisdiction of Plaintiffs' Causes of Action Under Title I of the LMRDA

As the district court recognized, however, this Court has held that "federal court intervention is proper 'where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union.' " Memorandum (1313a), quoting Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973). As the court below acknowledged, the Second Circuit in Schonfeld "viewed the restrictions of the eligibility of the plaintiff in Schonfeld as 'a form of intimidation of the membership' which 'amount[ed] to reprisal of efforts by Schonfeld and others to advocate and

implement changes in the union structure and procedures'" Memorandum (1313a), quoting Schonfeld at 903. Examining plaintiffs' complaints in Schonfeld, this Court concluded that "the allegations in the complaints here were sufficient to meet this test." 477 F.2d at 904.

The allegations of plaintiffs' supplemental complaint here more than satisfies the Schonfeld test.

The proposed supplemental complaint incorporated by reference (para. 1; 105a) the allegations of plaintiffs initial complaint setting forth in (evidentiary) detail the history of union factionalism and the ongoing scheme to suppress dissent of which plaintiffs' 1981 discipline was a part (33a-48a)[15]. It went on to allege, inter alia, that defendant LIUNA, although fully apprised of the events transpiring within the local, had maliciously failed to rule upon plaintiffs' appeals (para. 116, 138, 139, 151, 152; 112a, 115a); that the disqualifications were intended to intimidate the membership in violation of their protected Title I rights; that the asserted grounds for disqualification were pretextual (paras. 144-146; 113a-114a) and were an extension of the 1981 disciplines (paras. 147, 155-163;

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[15]The first cause of action of the initial complaint, beginning at paragraph 14 (33a), alleged an ongoing pattern of infringement of the rights of the membership and went on to detail the history of union factionalism and the specific acts of violence and repressive abuse of union power alleged to constitute the pattern; it further alleged LIUNA's ratification of the scheme (para. 56; 44a); cf. para. 57 (44a). It alleged, in conclusion, that the continued enforcement of plaintiffs' discipline, and their repercussions, would render or be used by defendants to render plaintiffs ineligible to run for office in the upcoming 1983 elections (paras. 63-68, 46a-47a).

114a, 117a-118a); that defendants' actions were part of the scheme to suppress dissent within the local (paras. 148-149; 114a-116a); that the scheme also included specific acts of threats and harassment of plaintiffs by defendants calculated to force them to leave the nominations meeting (para. 120, 121; 108a); that the disqualifications were taken in retaliation for plaintiffs' (and Hardy's) exercise of the rights protected by the LMRDA, including the right to sue protected by the Section 101(a)(4) of the LMRDA (paras. 155-158; 116a-117a); that all of the members' of Senyshyn's faction (individual defendants in the litigation) had been qualified while plaintiffs had all been declared unqualified (para. 127; 110a) -- all in violation of Title I of the LMRDA's "Bill of Rights".[16] And see: the revised supplemental complaint filed October 21, 1983 (199-200a).

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[16] Plaintiffs affidavits submitted in support of their motion further detailed the history of union factionalism, plaintiffs' attempts to reform the union and defendants' retaliation, and the ongoing development of the scheme to suppress dissent (82a-88a; 65a-71a; 255a-260a), as well as the 1983 events and the continuation of defendants' violent suppression of members' rights during the 1983 election period (71a-82a; 151a-158a; 261a-264a). They also substantiated that plaintiffs' disqualifications amounted to an extension of their 1981 discipline. Rodonich and Chotowicky were disqualified on asserted grounds the discipline "barred" them from holding office (71-72a, 76-77a); Diduck on grounds he had failed to fulfill his obligations to the union, that is, because he hadn't paid the $500 disciplinary fine (72a, 77-78a). Plaintiffs' political ally, Joseph Hardy, was challenged for asserted failure to follow constitutional procedures, an allusion to Hardy's having sued the union for personal injuries following his 1981 stabbing by a Senyshyn-faction member, Albert Bender (63a, 71a-72a). The stabbing had been specifically pled in plaintiffs' initial complaint as one of the oppressive acts constituting the scheme to suppress dissent (36-37a, 256-259a).

Undoubtedly, the court had Title I jurisdiction of the complaint under Schonfeld.

The court below attempted to circumvent the application of Schonfeld by relying on 1981 facts and events whereas the supplemental complaint sought relief from violations that occurred two years later in 1983. The jury's 1985 findings also referred exclusively to the 1981 events, and are therefore not determinative as to whether or not LIUNA was involved in a scheme to suppress dissent in 1983. That question was never tried on the merits in view of the district court's grant of defendants' motion to dismiss the supplemental complaint for lack of jurisdiction. In analyzing the complaint, the facts as alleged by plaintiffs were to be taken as true. That dismissal of the complaint was thus plainly without legal basis in light of Schonfeld. Plaintiffs have not yet had an opportunity to discover and develop the facts and present evidence in support of their supplemental complaint.

In recommending dismissal of plaintiffs' motion on November 14, 1983 Magistrate Raby concluded that the relief of judicial supervision of the election sought by plaintiffs had been rendered moot, because "in the face of plaintiffs' charges, the defendants have made arrangements for the supervision of the proposed election by the New York State Board of Mediation" (305a). As to the issue of improper disqualification of "the entire 'slate' of plaintiffs" to run for office in the election, the Magistrate concluded that issue, too, had been "rendered

moot" as to all candidates except for Rodonich by order of LIUNA (305-306a).

As to Rodonich, the Magistrate held that he had been disqualified on "factually uncontestable ground" that he had not been working in the trade (306a) since his removal from office, (306a). Relying upon and misconstruing Calhoon v. Harvey, 379 U.S. 134 (1964), and ignoring this Court's controlling decision in Schonfeld, the Magistrate went on hold that in any event plaintiffs' claims should be adjudicated before the Secretary of Labor under Title IV of the LMRDA (306a-310a).

Plaintiffs objected (313a), inter alia on grounds "no hearing has been held and no findings made". By decision dated November 18, the day before the election was to be held (on November 19), Judge Milton Pollack affirmed (318a). The Judge held that the district court lacked jurisdiction of plaintiffs's "challenges to candidates' eligibility" under Calhoon (320a). In addition, in a single sentence, without making any factual findings, without record support, and in particular without analyzing the specific allegations of plaintiffs' supplemental complaint, Judge Pollack stated summarily that the "peculiar context" of an ongoing "factional dispute" involved in Schonfeld "not present here", particularly because "some of the plaintiffs are former union officers" (323a).[17]

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[17]The asserted distinction of Schonfeld on grounds "some of the plaintiffs are former union officers" is completely untenable. Schonfeld upheld both the complaint of union members and that of Schonfeld, then Secretary-Treasurer and chief executive officer of Painters' District Council 9, IBPAT.

Long after the election, on February 18, 1984, Judge Cannella adopted Judge Pollack's decision and granted defendants' motion to dismiss the supplemental complaint on grounds of lack of jurisdiction (328a-334a). Although Judge Cannella made some general "findings of fact" as to the sequence of pre-election events (329a-331a), he too failed to consider the detailed allegations of the supplemental complaint setting forth, in detail, plaintiffs' Schonfeld cause of action (332a). Instead, the court summarily announced that "In the November 18 Order [Judge Pollack's], the Court held that the election issues did not invoke Title I jurisdiction; plaintiffs' exclusive remedy is with the Secretary of Labor pursuant to Title IV of the LMRDA" (citations of Calhoon, Schonfeld, and other authority omitted).

B. Plaintiffs' Motion Was The "Catalyst" To Achieving The Results Sought By Their Motion For Preliminary Injunctive Relief

The "catalyst" issue is disposed of easily. Magistrate Raby found that plaintiffs were the "catalyst" to defendants' remedial actions. In denying plaintiffs' motion for preliminary injunctive relief, the Magistrate found that most of the relief sought had been "rendered moot" when, "in the face of plaintiffs' charges" LIUNA's qualified three of the four plaintiffs as candidates and defendants arranged for the Mediation Board's supervision of the upcoming election. Raby's finding was never disturbed by the district court but, rather, were adopted by it. Moreover, it is well supported by the facts, particularly the timing and chronology of events. See: Statement of Facts, Part B above. The district court itself, although it made no ultimate

finding on the issue, accepted all of the factual predicates which undergirded Raby's opinion (1302-1305a).

CONCLUSION

Plaintiffs respectfully request that this Court reverse the decision below and remand the case to the district court to determine an award of attorneys' fees and costs in connection with Diduck's litigation of his LMRDA challenge to the 1981 discipline as against defendant LIUNA, to determine an award of attorneys' fees and costs for that portion of the litigation in which plaintiffs obtained the relief sought by their 1983 preliminary injunction motion, and for such other and further relief as is just and equitable.

Respectfully submitted,

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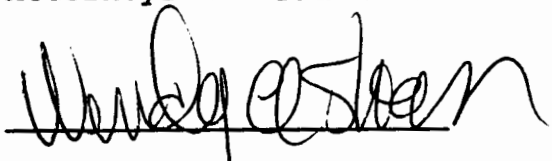
By: 

Wendy E. Sloan
(WES 7998)

On the brief:

Wendy E. Sloan
Lewis M. Steel

APPENDIX A

Pasquale PETRAMALE, Plaintiff,
v.
LOCAL NO. 17 OF LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, Laborers' International Union of North America, Anthony Galietta, individually and as President of Local No. 17, Lawrence T. Diorio, individually and as Secretary-Treasurer of Local No. 17, and Lorenzo Diorio, individually and as Business Manager of Local No. 17, Defendants.
No. 81 CIV. 4817 (MGC).
United States District Court, S.D. New York.
Aug. 25, 1992.

Hall & Sloan, by Burton H. Hall, Wendy E. Sloan, New York City, for plaintiff Pasquale Petramale.

Spengler, Carlson, Gubar, Brodsky, & Frischling, by Sarah S. Gold, Stephen W. Feingold, New York City, for defendant Local No. 17 of Laborers' Intern. Union of North America.

Connerton, Ray & Simon, by Michael Barrett, Washington, D.C., for defendant Laborers' Intern. Union of North America.

OPINION AND ORDER

CEDARBAUM, District Judge.

*1 Plaintiff Pasquale Petramale seeks attorneys' fees and expenses from the union defendants in this action, which was commenced in 1981 and was pursued through three trials and two appeals to the Second Circuit. The case arises from disciplinary action taken by the leadership of Local No. 17 of the Laborers' International Union of North America ("Local 17") against Petramale, a long-time member, after Petramale made allegedly slanderous accusations against union officials and disrupted a meeting on August 29, 1980. Following a hearing, Local 17 imposed a fine of $1500 and suspended Petramale from union meetings for a period of ten years. The membership of Local 17 approved these measures by a unanimous vote.

Petramale appealed the discipline to the parent international union, Laborers' International Union of North America ("LIUNA"). LIUNA upheld the decision to discipline Petramale, but rescinded the fine and reduced the suspension. On August 4, 1981, Petramale initiated this suit against Local 17, its chief officers and LIUNA, alleging that the discipline and the union constitutional provisions on which it was based violated his statutory right of free speech as protected by section 101 of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. s 411.

The first trial resulted in a jury verdict in favor of the unions and union officials. On appeal, the Second Circuit held the jury instructions were improper, directed a verdict for Petramale on the ground that the discipline illegally interfered with protected speech, and remanded for a determination of damages. Petramale v. Local No. 17, Laborers' Int'l Union, 736 F.2d 13 (2d Cir.), cert. denied, 469 U.S. 1087 (1984).

On remand, the district court granted partial summary judgment in favor of LIUNA on the issue of damages, finding that LIUNA had merely exercised its appellate authority in good faith. Petramale v. Local Union 17, Laborers' Int'l Union, 625 F.Supp. 775 (S.D.N.Y.1986), rev'd, 847 F.2d 1009 (2d

Cir.1988). After a trial on damages against Local 17 and the three union officials, the jury awarded Petramale $200,000 in compensatory damages and $65,000 in punitive damages. Local 17 and the union officials moved for judgment n.o.v. The district court granted their motion, and reduced Petramale's damages to the nominal amount of $1 on the finding that Petramale had failed to establish actual injury or that the union or its officers had acted with malicious intent or reckless or wanton indifference to his rights. Petramale v. Local No. 17, Laborers' Int'l Union, 671 F.Supp. 261 (S.D.N.Y.1987), rev'd in part, 847 F.2d 1009 (2d Cir.1988).

On appeal, the Second Circuit reversed the judgment n.o.v. and reinstated the jury verdict of punitive damages of $5,000 against each of the three union officials, but found the $50,000 punitive damages award and the $200,000 compensatory damages award against Local 17 to be excessive. Petramale v. Local No. 17, Laborers' Int'l Union, 847 F.2d 1009, 1013 (2d Cir.1988). To avoid a new trial, Petramale accepted the Court of Appeals' remittitur of $10,000 in punitive damages and $100,000 in compensatory damages against Local 17. The damage award to Petramale against Local 17 and the union officials thus totalled $125,000. In this second opinion, the Court of Appeals also reversed the partial summary judgment in favor of LIUNA and remanded for a trial on the issue of damages against LIUNA. Id. at 1014.

*2 On remand, the case was reassigned to me. [FN1] At the third trial, which took place in September 1989, the jury returned a verdict for LIUNA. No further activity occurred in the case until Petramale filed this motion for fees.

A. Plaintiff's Entitlement to Fees

Petramale relies primarily on Hall v. Cole, 412 U.S. 1 (1973), as the basis for a fee award in this case. In Hall, the Supreme Court considered a district court's award of attorneys' fees against a union in a case in which the plaintiff had successfully sued the union for violating his right of free speech under the LMRDA. After reviewing the rationale of Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), a shareholders derivative action in which the attorneys' fees incurred by the successful plaintiffs were shifted to the corporation on the ground that the plaintiffs' lawsuit represented a substantial, although not necessarily monetary, benefit to the shareholders as a group, the Court held that the plaintiff in Hall had rendered an analogous service to "his union as an institution and to all of its members." Hall, 412 U.S. at 8. As Justice Brennan explained:

> [T]here can be no doubt that, by vindicating his own right of free speech guaranteed by s 101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs."

Id. (quoting Yablonski v. United Mine Workers, 466 F.2d 424, 431 (D.C.Cir.1972), cert. denied, 412 U.S. 918 (1973)). The Court concluded that an award of counsel fees to a successful plaintiff in an action under the

LMRDA "falls squarely within the traditional equitable power of federal courts to award such fees whenever 'overriding considerations indicate the need for such a recovery.' " Id. at 9 (quoting Mills, 396 U.S. at 391-92 (1970)). The Court went on to find that such equitable relief was not at odds with the congressional purpose in passing the LMRDA.

In 1984, the Second Circuit adhered to Hall when it awarded fees to three dissident union members who brought successful claims against their union for violation of their rights under the LMRDA. Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, 749 F.2d 1000 (2d Cir.1984). In Rosario, the Court of Appeals explained the Hall holding as follows: "[U]nion members who succeed in vindicating rights guaranteed them by s 101 of LMRDA through an action under s 102 may recover attorney's fees when the effect of the attorney's services has been to benefit the union and all of its members." Id. at 1004.

*3 Defendants contend that Hall was in effect overruled by Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Alyeska was a suit brought by environmental groups who were challenging the issuance of permits by the Secretary of the Interior to build the Alaska pipeline. Even though Congress passed legislation which effectively nullified the litigation by expressly authorizing the granting of the permits, the plaintiffs applied for an award of attorneys' fees. The court below had held that since respondents had acted to vindicate the " 'important statutory rights of all citizens,' " they were entitled to attorneys' fees from Alyeska (though not the governmental defendants) for having performed the functions of a "private attorney general." Alyeska, 421 U.S. at 245-46.

Defendants focus on a statement in the Alyeska opinion that Congress has never " 'extended any roving authority' to the Judiciary to allow counsel fees." Id. at 260. But Alyeska does recognize certain judicially fashioned exceptions to the American Rule. Following a list of representative cases, which includes Hall, the Court notes that "[t]hese exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." Id. at 259. Thus I do not read Alyeska, which involved a different claimed exception to the American Rule, as repudiating Hall. Rather, the best reading of Alyeska appears to be that the Court refused to extend the logic of Hall to the very different set of facts involved in Alyeska. Furthermore, in Rosario, which was decided after Alyeska, the Second Circuit followed Hall.

Defendants also cite a footnote in another Supreme Court case, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986), as demonstrating that the Court intends to abandon the "substantial benefit" exception to the American Rule that was upheld in Hall. The footnote states:

> In addition to ... statutory exception[s], courts traditionally have recognized three other ... exceptions to the "American Rule." First, courts can enforce their own orders by assessing attorney's fees for the wilfull [sic] violation of a court order. Second, courts are empowered to award fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. And finally, a court's equitable powers allow it to award fees in commercial litigation to plaintiffs who recovered a "common fund" for themselves and others through securities or antitrust litigation. None of

these situations are involved in the present case.

Delaware Valley Citizens' Council, 478 U.S. at 562 n. 6 (citations omitted). Although defendants assert that this footnote demonstrates that the substantial benefit exception has been undermined because the Hall scenario is not explicitly included in the list of exceptions, the language of the footnote suggests otherwise. This footnote does not purport to be an exhaustive list but rather represents a summary rendition of the principal judicial exceptions to the American Rule.

*4 Finally, defendants point to two cases from other circuits in which fees were denied to plaintiffs who prevailed in their claims against unions under the LMRDA. In Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226 (6th Cir.1984), cert. denied, 469 U.S. 1215 (1985), a union member successfully sued under the LMRDA and Ohio common law after he was assaulted by two other members pursuant to a plan to intimidate and suppress dissidents within the union. Shimman sought to recover the fees he incurred during an earlier appeal of his case to the Court of Appeals. The Sixth Circuit, noting that "[o]ther union members could not have brought suit to redress Shimman's personal injuries," id. at 1235, found that he was not entitled to fees under the common fund doctrine because he obtained only compensatory and punitive damages rather than equitable relief. The court decided that, unlike the plaintiff in Hall, Shimman did not bestow a benefit on all of the union's members.

In Guidry v. International Union of Operating Eng'rs, Local 406, 882 F.2d 929 (5th Cir.1989), Guidry and others brought suit under the LMRDA, alleging that the union's hiring hall practices were discriminatory. After a bench trial, the district court found the union liable under the LMRDA and awarded Guidry compensatory and punitive damages and attorneys' fees. The Fifth Circuit upheld the finding of liability but vacated the fee award. Adopting the Shimman logic, the court held that Guidry was not entitled to fees since the redress he obtained was for personal injuries not shared by other union members.

Shimman and Guidry are neither controlling nor persuasive. Section 102 of the LMRDA provides that a suit for violation of the LMRDA may only be brought by a "person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter." 29 U.S.C. s 412. In order to have standing under the LMRDA, a union member must be able to demonstrate that his or her individual rights were violated. Thus in Hall, as in this case, the claim was that an individual member's right of free speech was violated. The rationale for the shifting of fees in such a case--a rationale which was expressly adopted by the Second Circuit in Rosario--is that an individual who successfully challenges unlawful restrictions on his or her speech helps to create an atmosphere in which other union members can speak out without fear of retaliation. 749 F.2d at 1004 (" '[T]he successful litigant dispels the "chill" cast upon the rights of others.' ") (quoting Hall, 412 U.S. at 8).

The recovery of compensatory or punitive damages by the individual litigant does not negate the benefit of the lawsuit to the union as a whole. Rather, in a case such as this one, such damages enhance the benefit by supplying a deterrent to future unlawful conduct beyond the specific relief won. The Second Circuit recognized this principle in Rosario when it noted that

"[a]lthough the substantial verdict awarded by the jury for violation of the plaintiffs' LMRDA rights was largely set aside [on appeal] because it included recovery for one claim that was held on appeal not to be actionable ..., it had the potential effect of deterring the union from denying members their due process procedural rights guaranteed by s 101 of LMRDA and encouraging union members to enforce those rights through s 102." 749 F.2d at 1006. The Court of Appeals went on to hold that the fees incurred in connection with a trial of damages issues can be recovered under the common fund theory, especially where defendants persisted in opposing plaintiff's claims throughout the trial and later on appeal. Id.

B. Benefits Conferred on Local 17 and LIUNA

*5 Hall and Rosario are directly applicable to this case. Accordingly, it is within the equitable power of the court to grant a fee award to Petramale if through this litigation he has conferred a substantial benefit on his fellow union members. I find that he has.

Petramale's lawsuit challenging the disciplinary action taken against him affected the policies of both Local 17 and LIUNA. In its first opinion, the Second Circuit held that the discipline imposed on Petramale by Local 17 and upheld by LIUNA was "illegal as a matter of law." 736 F.2d at 19. On the second appeal, the Second Circuit reversed the district court's grant of summary judgment in favor of LIUNA on the damages issue, holding that Petramale "should have the opportunity to prove the damages he sustained by reason of the fact that LIUNA 'ratified Local [17's] action with full knowledge of its unlawful character.' " 847 F.2d at 1014 (quoting Rodonich v. Housewreckers Union Local 95, Laborers' Int'l Union, 817 F.2d 967, 971 (2d Cir.1987)).

As a result of the litigation, Petramale's discipline was nullified, and LIUNA was required to notify all members of Local 17 that the discipline was null and void. The $125,000 in damages recovered by Petramale represents a substantial deterrent to future violations of members' free speech rights by Local 17 and LIUNA. With respect to both Local 17 and LIUNA, Petramale's efforts to vindicate his right of free speech benefited his fellow union members, in the words of Hall v. Cole, " 'not only in the immediate impact of the results achieved but in [the] implications for the future conduct of the union's affairs.' " 412 U.S. at 8 (quoting Yablonski v. United Mine Workers, 466 F.2d 424, 431 (D.C.Cir.1972), cert. denied, 412 U.S. 918 (1973)).

Defendants attempt to characterize Petramale's pursuit of the litigation, except for its earliest stages, as a quest to recover monetary damages which could benefit him alone. They further assert that his appellate victories were legally meaningless. Aside from ignoring the deterrent effects of a monetary recovery, they misconstrue the relevant facts.

Defendants' contention is not accurate that once the union had reduced Petramale's suspension to meetings already missed, no equitable relief remained to be sought through the action. Although Petramale's fine was rescinded and his right to attend union meetings was restored by LIUNA in late 1981, the disciplinary action was not declared null and void by LIUNA until 1986.

It should be noted that plaintiff asserts, though without much supporting evidence, that the lifting of the suspension represented a concession in exchange for Petramale's withdrawing his appeal from the denial of a preliminary injunction. In any event, it can be inferred that Petramale's

legal exertions were a factor in the union's decision to end the suspension.
Defendants next assert that Petramale's efforts to change union policy through the litigation were unnecessary because, at the convention of local unions and district councils that took place during September 14-18, 1981, the delegates voted to repeal the provisions of the union constitution upon which the discipline was based. It is unclear whether Petramale's lawsuit prompted this modification. However, counsel for Petramale established in a separate lawsuit, Rodonich v. Housewreckers Union Local 95, Laborers' Int'l Union, 817 F.2d 967 (2d Cir.1987), that subsequent to the constitutional change but prior to the conclusion of the Petramale litigation, LIUNA upheld discipline against another union member in violation of that member's free speech rights. Furthermore, Petramale's discipline was not officially nullified by LIUNA until some five years after the constitutional modification, and then only by virtue of Petramale's litigation efforts. The constitutional change did not obviate Petramale's complaint against Local 17 or LIUNA.

*6 In its brief, LIUNA attempts to portray Petramale's victory as a limited one against Local 17 alone. This is not accurate. LIUNA's ratification of the discipline of Petramale was held by the Second Circuit to be illegal as a matter of law. Although LIUNA was not found liable in money damages, Petramale obtained substantial equitable relief against the international--LIUNA was permanently enjoined from effectuating the discipline and was required to notify Local 17's members that the discipline was null and void. As discussed above, the Second Circuit made it clear in its second opinion that LIUNA could be held liable in money damages for ratifying the illegal discipline. This was not an incidental byproduct of the litigation. Rather, the issue of whether LIUNA could be subjected to monetary liability was vigorously contested by LIUNA, which resulted in explicit holdings at both the trial and appellate levels.

In a similar vein, Local 17 contends that the benefit conferred in this case, if any, was limited to resolving the issue of LIUNA's liability as a matter of law. As is clear from the preceding discussion, the litigation sought and achieved results against Local 17 as well as LIUNA.

Finally, defendants do not explain why, if Petramale was pursuing a legally meaningless victory, they did not immediately acknowledge their liability for the unlawful discipline rather than litigate the issue for years.

C. Calculation of Appropriate Fee Award

Plaintiff seeks a very substantial fee award in this case. Petramale claims he is entitled to a total of $712,285.70 in attorneys' fees. He has requested $544,914.20 from Local 17 and LIUNA "jointly and severally," which includes some of the expense of bringing this fee application: $144,382.50 from Local 17 only for the 1986 trial in which LIUNA did not participate; [FN2] $22,989.00, apparently also from both Local 17 and LIUNA, in connection with reply papers in support of this fee application; and $4,157.41 against both entities for expenses incurred throughout the litigation. Petramale does not seek fees in connection with the trial against LIUNA in 1989 at which he was unsuccessful in obtaining a damage award. However, all but the work on the reply papers for the fee application and the out-of-pocket expenses have been adjusted upward for delay in compensation. In addition, the first two items listed, which amount to $689,296.70, represent double the adjusted lodestar amount; plaintiff claims that a multiplier of two is necessary to compensate

counsel adequately for the risk of undertaking this litigation.

The Second Circuit continues to adhere to the lodestar approach in calculating fee awards. Dague v. City of Burlington, 935 F.2d 1343, 1358 (2d Cir.1991), rev'd in part on other grounds, 120 L.Ed.2d 449 (1992); Cosgrove v. Sullivan, 759 F.Supp. 166, 168 (S.D.N.Y.1991); see also Rosario, 749 F.2d at 1005. Indeed, in a case such as this one where the benefit conferred is an intangible one, perhaps the best measure of the benefit is the cost of the effort required to obtain it as represented by reasonable attorneys' fees. It should be noted that since this fee application was filed, the Supreme Court has held that the only permissible enhancement to the lodestar figure in a contingent fee case is an adjustment to compensate for delay in payment of the fees, City of Burlington v. Dague, 120 L.Ed.2d 449 (1992), so the risk multiplier sought by plaintiff cannot be awarded.

*7 I find that the fees sought in this application all pertain to hours expended litigating claims involving the core factual and legal issues as to which plaintiff prevailed. See Hensley v. Eckerhart, 461 U.S. 424, 435-40 (1983); Rosario, 749 F.2d at 1005. Unfortunately, the lead attorney for plaintiff, Burton H. Hall, died before the final submission of this motion. Most of the fees incurred in the litigation were for his work. The moving papers in support of this fee application include Mr. Hall's daily calendar entries. The two other attorneys who were responsible for the case, Mr. Hall's law partner Wendy E. Sloan, and a sole practitioner who worked on the case in conjunction with Mr. Hall during its initial stages, Joseph M. Ingarra, have also submitted daily calendar entries. The fee award plaintiff requests is based on a rate of compensation of $340 per hour for Mr. Hall, $291 per hour for Ms. Sloan, and $150 per hour for Mr. Ingarra.

Mr. Hall was an experienced attorney with a recognized expertise in this area of litigation. A 1954 graduate of Yale Law School, he not only represented the plaintiffs in Rosario but also argued Hall v. Cole before the Supreme Court. After examining fee awards in other cases, including Rosario and more recent matters, I believe that a reasonable rate for Mr. Hall is $250 per hour. Because this rate is based on the market rate for similarly experienced attorneys in 1989, plaintiff is adequately compensated for the delay in payment through 1989. See Missouri v. Jenkins, 491 U.S. 274, 284 (1989) ("[A]n appropriate adjustment for delay in payment--by the application of current rather than historic hourly rates or otherwise--is within the contemplation of the statute); Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1060 (2d Cir.1989), cert. denied, 496 U.S. 905 (1990). An enhancement for delay beyond 1989 is not warranted since plaintiff could have made this application for fees at the conclusion of the litigation in 1989.

Mr. Hall logged a total of 1,106.91 hours on this case, 194.75 of which were attributable to the trial in which LIUNA did not participate, and 100.5 of which were spent on this fee application. [FN3] Seven hours must be deducted from the total because, as is pointed out by defendants, the amounts claimed for March 28, 1982 and April 26, 1982 are not supported by the calendar entries. An additional 3.5 hours must be deducted because the amounts claimed for April 5, 1982 and September 24, 1983 exceed the amounts that appear in the calendar entries. Finally, I am reducing the hours attributable to the fee application to 35 (and thus subtracting an additional 65.5 hours from Hall's total) because of the inefficiencies resulting from the delay of nearly two

years before bringing the motion and Hall & Sloan's disorderly timekeeping practices. With the appropriate reductions, Mr. Hall's work can fairly be valued at $209,040.00 chargeable against both Local 17 and LIUNA, and $48,687.50 chargeable against Local 17 alone.

*8 Ms. Sloan, a 1974 graduate of Hastings School of Law with a commendable background in labor law, who joined Mr. Hall in his practice in 1984, worked on the case more sporadically. She logged 18.25 hours in connection with the 1986 trial against Local 17, and an additional 93.5 hours after that, 89.5 of which were expended on the fee application. [FN4] At 1989 rates of pay, Ms. Sloan's work can fairly be valued at $210 per hour. After reducing the hours properly chargeable to the fee application to 25, the fees attributable to Ms. Sloan's work amount to $6,090.00 chargeable against both Local 17 and LIUNA, and $3,832.50 chargeable against Local 17 alone.

Mr. Ingarra worked on the case in 1980 through 1982. He is a 1973 graduate of Albany Law School and a sole general practitioner in Kingston, New York. According to his affidavit, he possesses no expertise in federal civil litigation and therefore could not assume primary responsibility for Petramale's case. Applying a 1989 rate of $150 per hour to the 26.5 hours Mr. Ingarra spent on this case amounts to a total fee for his work of $3,975.00 chargeable against both Local 17 and LIUNA.

D. Plaintiff's Request for Reimbursement of Expenses

Plaintiff's request to be reimbursed for expenses incurred during the litigation is denied. All of the expenses for which plaintiff seeks reimbursement, which include transcript and printing costs, represent taxable costs pursuant to 28 U.S.C. s 1920. Under rule 11(a) of the Civil Rules of the Southern and Eastern Districts of New York,

> [w]ithin thirty (30) days after final judgment, or in the case of an appeal by either party, within thirty (30) days after the disposition of the appeal, the party recovering costs shall file with the clerk a request to tax costs indicating the date and time of taxation.... Any party failing to file a bill of costs within this thirty (30) day period will be deemed to have waived costs.

This rule went into effect on October 26, 1983, that is, before the disposition of the first appeal in this case. Similarly, rule 39(d) of the Federal Rules of Appellate Procedure, in effect since 1979, provides that "[a] party who desires ... costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after entry of judgment."

Since plaintiff did not seek costs timely in this case, he has waived any entitlement to reimbursement for taxable expenses.

CONCLUSION

Local 17 and LIUNA are directed to pay to plaintiff $219,105.00 as attorneys' fees chargeable to both unions jointly and severally. In addition, Local 17 is directed to pay to plaintiff the attorneys' fees chargeable only to it of $52,520.00. All fees are to be paid within thirty days of this order.

SO ORDERED.

FN1. The earlier trials were conducted by Judge Irving Ben Cooper of this Court.

FN2. These amounts are taken from the notice of motion in support of the fee award. For unexplained reasons, the figures listed in plaintiff's brief in support of the motion are slightly different.

FN3. These figures were arrived at by adding the hours entries listed in Exhibit A to Hall's affirmation. Arithmetic errors appear to account for different sums in Hall's affirmation itself.

FN4. The first two figures are taken from Ms. Sloan's daily calendar entries, which differ slightly from the typewritten version of her hours. In addition, Ms. Sloan concedes that the 1991 total listed in her first affirmation includes an extra hour due to an error in arithmetic.

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