UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

M.B., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:17-cv-04102-NKL
	)	
Jennifer Tidball, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND EXPENSES AND SUGGESTIONS IN SUPPORT

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I. INTRODUCTION

On June 10, 2019, after two years of hard-fought litigation, the parties executed a groundbreaking Settlement Agreement in this case. Doc. 280-1. The Settlement Agreement, the first of its kind in the nation, comprises the State officials' promise to ensure robust oversight of the administration of powerful psychotropic medications to Missouri foster children, and provides a structure to guide the planning and implementation of necessary reforms. It supplies a framework for accountability, absent before, by which the State's efforts and progress toward achieving meaningful reform will be measured. Thousands of foster children in Missouri will benefit as a result of Plaintiffs' efforts.

Plaintiffs' successful outcome required a tremendous expenditure of time and resources. Beginning with a thorough pre-filing investigation and proceeding through preliminary motion practice, large-scale fact and expert discovery, and extensive mediation and settlement negotiations, Plaintiffs expended significant time and resources on this case. In total, Plaintiffs' co-counsel team expended well more than the 11,417.6 hours and $132,907.56 in expenses claimed in this motion. As discussed in more detail below, the number of hours spent by Plaintiffs substantially increased as a result of Defendants' aggressive litigation positions, including: their vigorous motion to dismiss; their appeal of this Court's class certification decision; their failed attempt to stay all district court proceedings pending that appeal; their myriad challenges to the appointment of Next Friends and the voluntary withdrawal of a Named Plaintiff; and their attempt to obtain a child's private therapy notes that were covered by the psychotherapist-patient privilege, the disclosure of which would have caused substantial harm to the child.

In the Settlement Agreement, Plaintiffs have succeeded in securing complete and concrete relief on each of the major structural deficiencies underlying their constitutional claims. As prevailing parties, they respectfully petition this Court to award reimbursement of their attorneys' fees and expenses. Plaintiffs present below a reasonable lodestar figure, summarized in Exhibit 1 to the Declaration of Erin Sussman ("Sussman Decl."), which derives from the

appropriate exercise of billing judgement in calculating attorney and paralegal hours and the application of a reasonable set of hourly rates based on the local Missouri legal market. Plaintiffs additionally attach hereto attorney declarations that provide full factual support for their claim for reimbursement.

II. STATEMENT OF FACTS

A. The Pre-Filing Investigation, Class Action Complaint, and Amended Complaint

Before filing this lawsuit in 2017, Plaintiffs' counsel conducted an intensive investigation for approximately two years into suspected systemic deficiencies in the Missouri foster care system with respect to the oversight of the administration of psychotropic medications. *See* Decl. of Samantha Bartosz ("Bartosz Decl.") ¶ 29. During the investigation, Plaintiffs' counsel collected and reviewed a large volume of publicly available information; made extensive outreach to knowledgeable stakeholders, including dozens of in-person and telephonic interviews; assessed applicable case law, statutes, and regulations; and identified representative Named Plaintiffs and suitable Next Friends. *Id.* ¶ 30.

On June 12, 2017, Plaintiffs, by their Next Friends and through counsel, commenced this first-of-its-kind action against the Director of the Children's Division ("CD") of the Department of Social Services ("DSS") and the Acting Director of the Department of Social Services, each in their official capacities. *See* Doc. 1. The Complaint, as amended on July 3, 2017, alleged substantive and procedural due process violations and sought declaratory and injunctive relief regarding at least three alleged deficiencies in Defendants' policies, procedures, practices and customs with respect to the administration of psychotropic drugs: (1) failure to maintain, and to furnish to caregivers and prescribing physicians, up-to-date medical records detailing each child's physical and mental health history; (2) failure to ensure informed consent to the administration of psychotropic medication, both at the outset and as treatment continues; and (3) failure to ensure secondary review of all outlier prescriptions by a qualified, independent child psychiatrist. *See* Doc. 22. Plaintiffs' procedural due process claim with respect to the

provision of informed consent and assent for the administration of psychotropic medications, in particular, advanced a novel legal theory not previously tested in the courts.

B. Preliminary Motion Practice

1. Motion to Dismiss

On August 21, 2017, Defendants filed a motion to dismiss asserting Plaintiffs' alleged failure to state a claim and seeking application of the federal abstention doctrine recognized in *Younger v. Harris*, 401 U.S. 37 (1971). Docs. 33 & 35. After the parties fully briefed Defendants' motion and presented oral argument to the Court, Doc. 77, the motion to dismiss was granted in part and denied in part, Doc. 91. Specifically, the Court concluded that: (1) the abstention doctrine did not apply; (2) Plaintiffs stated a plausible procedural due process claim; and (3) Plaintiffs stated a plausible substantive due process claim, except that claims relating to informed consent in that cause of action were dismissed without prejudice. *Id.* The Court also dismissed with prejudice Plaintiffs' third cause of action for violation of the Federal Adoption Assistance and Child Welfare Act, concluding that the statutes at issue did not confer a private right of action. *Id.* Separately, Defendants moved to dismiss certain unknown plaintiffs on the grounds that those plaintiffs were unidentifiable. Doc. 34. Plaintiffs opposed that motion, and Defendants ultimately withdrew the motion upon learning the identities of those Named Plaintiffs. Docs. 46 & 48. The same set of facts to be developed in discovery would serve to prove either the constitutional or statutory claims that Plaintiffs initially brought.

2. Motion Challenging Appropriateness of Next Friends

On August 23, 2017, Plaintiffs filed a motion to appoint Next Friends for the Named Plaintiffs. Doc. 36. Defendants filed a response in partial opposition, challenging the appointment of two of the Plaintiffs' proposed Next Friends. Doc. 45. Eventually, the parties filed joint stipulations agreeing to the appointment of Next Friends for all but one of the Named Plaintiffs, Docs. 50, 56 & 61, although Plaintiffs maintained that their proposed Next Friends were suitable. After fully briefing Defendants' motion, including a supplemental response in opposition filed by Defendants, Doc. 59, and a sur-reply filed by Plaintiffs, Doc. 66, the parties

filed a joint stipulation finally agreeing to the appointment of all Next Friends, which was ordered by the Court on October 20, 2017, Doc. 69. Additionally, Defendants challenged Plaintiffs' motion to dismiss a Named Plaintiff who inadvertently had been joined to the suit. That matter was fully briefed, and the Court granted dismissal. Docs. 111, 124, 133 & 168.

3. Motion for Class Certification

On March 16, 2018, Plaintiffs filed their motion for class certification. Doc. 113. Plaintiffs' motion presented the legal standard for class certification in the Eighth Circuit and addressed each of the Rule 23 requirements in turn. The opening brief provided detailed examples, supported by ample evidence, of the common questions of law and fact binding members of the proposed class together and supporting class certification. Doc. 113 at 5-13. The brief also addressed the typicality requirement, describing the ongoing risk of harm to each putative class member from "Defendants' systemic failure to properly oversee and administer psychotropic medications to the children in their custody." Doc. 113 at 14.

In addition to vigorously opposing Plaintiffs' arguments regarding commonality and the other Rule 23 requirements, Defendants' brief in opposition raised a number of arguments challenging the typicality and adequacy of each proposed class representative. Doc. 144. These arguments, filed under seal and based entirely on each child's individual trauma history, required a significant expenditure of time and resources from Plaintiffs' counsel to fully explore and address in reply. Doc. 154. On July 19, 2018, following full briefing and oral argument, this Court granted Plaintiffs' motion for class certification, defining a class consisting of "all children in Children's Division foster care custody who presently are, or in the future will be, prescribed or administered one or more psychotropic medications while in state care." Doc. 183 at 19.

4. Defendants' Appeal of the Court's Class Certification Order and Motion for Stay of Proceedings

On August 2, 2018, Defendants requested permission from the Eighth Circuit to appeal the class certification order. Pet. for Permission to Appeal Order Granting Class Action Cert., *M.B. v. Corsi*, No. 18-8009 (8th Cir. Aug. 2, 2018). Plaintiffs invested substantial, though

entirely reasonable, time resisting Defendants' efforts to challenge class certification, filing their opposition to Defendants' petition within the required ten days. Pls.' Opp'n to Defs.' Pet. for Permission to Appeal Order Granting Class Certification, *M.B. v. Corsi*, No. 18-8009 (8th Cir. Aug. 13, 2018). The Eighth Circuit granted Defendants' petition on August 22, 2018. Order, *M.B. v. Corsi*, No. 18-8009 (8th Cir. Aug. 22, 2018).

Shortly thereafter, Defendants moved for a stay of all proceedings and deadlines in the district court pending the Eighth Circuit's ruling on their forthcoming appeal, citing among other things, the risk of "irreparable harm" to *Defendants* if a stay was not granted. *See* Docs. 201 & 202. In their suggestions filed in support of the motion, Defendants further represented that "Plaintiffs have not shown a stay will inflict irreparable harm." Doc. 202 at 8. To defeat this argument, Plaintiffs' counsel spent a significant number of hours identifying specific examples of Plaintiff children in Defendants' custody experiencing direct and immediate harm as a result of the deficiencies alleged in Plaintiffs' Complaint to demonstrate the ongoing risk of such harm to all children in the putative class. Doc. 209 and 210. Defendants replied, claiming the injuries described in Plaintiffs' opposition were "nowhere near establishing the existence of constitutional violations." Doc. 221 at 9. The Court denied the motion, finding that Defendants failed to show a likelihood of success on the appeal, failed to establish irreparable harm to themselves, failed to overcome Plaintiffs' showing that a stay would subject them to a greater risk of harm, and failed to show that a stay was in the public interest. Doc. 226.

On November 1, 2018, Defendants' brief was filed with the Eighth Circuit. Appellants' Brief, *M.B. v. Corsi*, No. 18-2798 (8th Cir. Nov. 1, 2018). The appeal was fully briefed to the Eighth Circuit over the course of three months, an effort that involved substantial investment of time from Plaintiffs' Counsel. Pursuant to Defendants' request in their opening brief, the case was set for oral argument. Case Placed on Court Calendar, *M.B. v. Corsi*, No. 18-2798 (8th Cir. Mar. 14, 2019). Plaintiffs' counsel traveled to St. Louis to present oral argument on Defendants' appeal. The parties recently notified the Eighth Circuit that a settlement agreement had been reached, resulting in an order from the Eighth Circuit staying the appeal pending this Court's

decision on approval of the Settlement Agreement. Order, *M.B. v. Corsi*, No. 18-2798 (8th Cir. July 9, 2019).

C. Factual Discovery

To prepare the case for trial, the parties engaged in extensive factual discovery, both written and oral. Plaintiffs received approximately 1.5 million pages of documents from Defendants in the course of written discovery. Bartosz Decl. ¶ 31. In addition to Defendants' business documents and emails, Plaintiffs obtained and analyzed tens of thousands of pages produced from third parties, Dr. Laine Young-Walker and Great Circle Inc. *Id.* Plaintiffs produced approximately 50,000 pages of documents to Defendants. *Id.* ¶ 34.

Beyond their review of the documents, Plaintiffs spent a substantial amount of time responding to interrogatories. Defendants propounded three separate sets of interrogatories, totaling fifty-four interrogatories (not including subparts). *Id.* Plaintiffs drafted approximately one-hundred pages in response to Defendants' interrogatories. *Id.*

In addition to written discovery, Plaintiffs engaged in extensive oral discovery. Plaintiffs deposed witnesses on topics including, among others, medical records, informed consent, and secondary review of psychotropic medications. *Id.* ¶ 35. In total, Plaintiffs took fifteen depositions during the course of discovery, including nine fact depositions and six 30(b)(6) depositions. *Id.* Plaintiffs also defended the depositions of three Next Friends. *Id.*

During fact discovery, Plaintiffs participated in dozens of meet-and-confer conference calls with Defendants to address a wide array of discovery issues, including the selection of email search terms and custodians. *Id.* ¶ 34. Additional hours and resources were spent addressing the numerous delays and deficiencies in Defendants' responses to Plaintiffs' discovery requests, for example, Defendants' failure to timely produce clearly responsive emails for one of the Named Plaintiff children's case managers. *Id.*

Plaintiffs also engaged in motion practice addressing discovery disputes raised by Defendants. *Id.* ¶ 36. Defendants sought to compel the production of notes of confidential therapy sessions conducted between Named Plaintiff A.H. and her Next Friend, her

psychotherapist. Doc. 127. After the parties conferred, the Court heard oral argument and denied Defendants' request, holding that the psychotherapist-patient privilege applied and was not waived, and that any probative value of such material would be outweighed by the very serious harm to the child if the material were disclosed. *Id.* Following the ruling, Defendants availed themselves of the Court's offer to submit limited briefing if they so desired, further pressing the matter. Docs. 127 & 138. Concurrently, Defendants filed a motion for leave to create an appellate record regarding their request to compel production of A.H.'s therapy notes. Doc. 136. Both motions were fully briefed by the parties. Docs. 148, 151, 152 & 153. Defendants' motion to create an appellate record was granted in part and denied in part, Doc. 160, and Defendants' motion to compel production was denied, except that this Court ordered Plaintiffs to furnish for *in camera* inspection notes from three specific dates. Doc. 161. Following the *in camera* review, this Court denied Defendants' motion. Doc. 164.

D. Expert Reports

In addition to fact discovery, Plaintiffs expended substantial time working with expert witnesses. Bartosz Decl. ¶ 38. Plaintiffs retained four experts in the fields of child and adolescent psychiatry and pharmaceutical sciences. *Id.* ¶ 47. Plaintiffs' four experts produced lengthy and detailed expert reports covering the topics of informed consent, oversight of psychotropic medication, medical records, and an in-depth review of voluminous Named Plaintiff case files. *Id.* ¶ 38. Preparation of these exhaustive reports involved a substantial amount of attorney and paralegal time to, among other things, gather relevant materials for the experts to review, meet in-person or by telephone with the experts to discuss their opinions, review draft reports, and prepare the accompanying productions. *Id.* Plaintiffs' experts alone produced more than one-hundred pages of written reports summarizing their opinions. *Id.* In addition to their reports, Plaintiffs' experts, through counsel, disclosed and produced thousands of pages of reliance materials and communications. *Id.*

E. The Settlement Agreement

1. Mediation Efforts

The parties first undertook mediation efforts in October of 2017, pursuant to the Notice of Inclusion in the Mediation and Assessment Program issued on June 12, 2017. Doc. 3. Under the guidance of Professor James Levin at the University of Missouri School of Law, the parties met in Columbia, Missouri on October 2, 2017, to explore possible settlement avenues. Prior to this mediation session, Plaintiffs expended considerable time preparing settlement proposals and materials. This session ultimately was not productive, and the litigation forged ahead. Bartosz Decl. ¶ 40.

On June 14, 2018, this Court directed the parties to participate in mediation with the Director of the Mediation and Assessment Program ("MAP") for the Western District of Missouri. Doc. 174. The parties thereafter contacted the MAP Director and began settlement negotiations under her guidance. Bartosz Decl. ¶ 41. Over the course of nearly a year, the parties engaged in extensive mediation efforts covering every issue raised in the Complaint. These efforts involved four in-person meetings in Kansas City and dozens of telephone conferences, as well as countless internal meetings to review settlement proposals and discuss strategy. *Id.* Numerous draft proposals between the parties were exchanged. *Id.* ¶ 43. Both sides brought in subject matter experts at various points in the negotiations to help tackle some of the clinical or technical aspects of the Agreement. *Id.* ¶ 42. Plaintiffs' counsel spent approximately a year working with Defendants, DSS, and CD staff to arrive at a comprehensive Settlement Agreement. *Id.* ¶ 41, 43.

On May 28, 2019, the parties notified the Court that they had reached an agreement in principle to settle the case. Doc. 270. The Settlement Agreement was executed by all parties as of June 10, 2019, Doc 280-1, and preliminarily approved by the Court on July 15, 2019, Doc. 282. The Settlement Agreement resolves Plaintiffs' and the Plaintiff Class's remaining substantive and procedural due process claims brought under the Fourteenth Amendment of the U.S. Constitution.

2. Principle Terms of the Settlement Agreement

The Settlement Agreement addresses the issues and legal claims raised in the Complaint and provides relief to the Class that would never have been obtained had Plaintiffs not commenced and vigorously pursued this action. Specifically, the Agreement contains substantive commitments in the following areas:

- Initial and ongoing training of case management staff and resource providers;
- Medication monitoring, including regular mental health assessments, medical examinations, and concurrent non-pharmacological treatment for Class members;
- Medical records, including system and reporting capabilities and commitments to comply with CD policy on the collection and distribution of medical and mental health records;
- Secondary review of designated prescriptions of psychotropic medications to Class members by a qualified, independent child and adolescent psychiatrist to ensure safety and appropriateness;
- Informed consent and youth assent to the administration of psychotropic medications to Class members, including specific policies and processes governing the provision of consent and assent and periodic review of consent;
- Establishment of a Psychotropic Medication Advisory Committee to provide professional and technical consultation and policy advice to DSS, CD, and the MO HealthNet Division of DSS on issues related to psychotropic medication; and
- Establishment of excessive dosage guidelines based on advice from and consultation with medical and clinical experts.

Doc. 280-1. Every child in the Plaintiff class will benefit substantially from the extraordinary result achieved through the Settlement Agreement.

F. Time Spent and Expenses Incurred by Plaintiffs' Counsel

Plaintiffs invested substantial time and resources to achieve this successful outcome and push the case forward to protect class members from the risk of harm posed by Defendants'

challenged policies and practices as quickly as reasonably possible. For their considerable and important work protecting the rights and safety of class members in this case, Plaintiffs respectfully request an award of their reasonable attorneys' fees in the amount of $3,894,975.22 and expenses in the amount of $132,907.56, as summarized in Exhibit 1 to the Sussman Declaration.

III. DISCUSSION

A. Plaintiffs Are Entitled to an Award of Reasonable Attorneys' Fees and Expenses Under 42 U.S.C. § 1988

"The Court may allow 'the prevailing party' in certain civil rights actions to recover 'a reasonable attorney's fee . . . .'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 2:13-CV-4022-NKL, 2018 WL 5848994, at *1 (W.D. Mo. Nov. 7, 2018) (quoting 42 U.S.C. § 1988). A "reasonable" fee is one "that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010).

"When a plaintiff succeeds in remedying a civil rights violation he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 833 (2011) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1978)) (internal quotation marks omitted). Congress enacted § 1988's fee shifting remedy because it was concerned with ensuring that "those who violate the Nation[]'s fundamental laws are not to proceed with impunity," and so that "our civil rights laws" would not "become mere hollow pronouncements which the average citizen cannot enforce." S. Rep. No. 94-1011, at 2-3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910, 5913. "The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. . . . Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks and citations omitted).

Plaintiffs are considered "prevailing parties" for attorneys' fees purposes under § 1988 "if they succeed on *any* significant issue in litigation which achieves some of the benefit the parties

sought in bringing suit." *Id.* at 433 (internal quotation marks and citation omitted) (emphasis added). "[S]tatus as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how a party fares on each motion along the way." *Jenkins by Jenkins v. State of Mo.*, 127 F.3d 709, 714 (8th Cir. 1997); *see also Emery v. Hunt*, 272 F.3d 1042, 1046-48 (8th Cir. 2001) (recognizing that "[w]hen a plaintiff has prevailed on some claims but not others, the plaintiff may be compensated for time spent on unsuccessful claims that were related to his successful claims . . .").

Plaintiffs in this matter clearly satisfy that standard. They have achieved significant relief in the Settlement Agreement, Doc. 280-1, that addresses each component of systemic reform that they sought in their Amended Complaint, Doc. 22, including requiring Defendants to:

- Implement a system to maintain comprehensive and updated healthcare records for all children in foster care custody, *compare* Doc. 22 at 45, *with* Doc. 280-1 § III.C.1;
- Provide foster care providers with medical information related to the children entrusted to their care, *compare* Doc. 22 at 45, *with* Doc. 280-1 § III.C.2;
- Institute a clear and effective informed consent policy, track compliance with that policy, and train social workers and foster care providers, *compare* Doc. 22 at 45, *with* Doc. 280-1 § III.A, E;
- Establish and track "red flag" criteria designating outlier or elevated risk prescribing practices, *compare* Doc. 22 at 45-46, *with* Doc. 280-1 § III.G; and
- Require secondary review of all "red flag" prescription regimens for children in foster care custody, *compare* Doc. 22 at 46, *with* Doc. 280-1 § III.D.

Further, Defendants have agreed that "Plaintiffs are prevailing parties, at least in part, pursuant to 42 U.S.C. § 1988." Doc. 280-1 § II.P.

As prevailing parties who have successfully protected the civil rights of vulnerable foster children in Missouri, Plaintiffs are entitled to recover their reasonable attorneys' fees and expenses.

B. Plaintiffs Should Recover Their Attorneys' Lodestar

"The basis for any fee award under § 1988 is the lodestar calculation, the product of a reasonable hourly rate and the number of hours reasonably expended on the litigation." *Trinity Lutheran Church of Columbia, Inc.*, 2018 WL 5848994, at *1 (citing *Hensley*, 461 U.S. at 433; *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005)). "There is a strong presumption that the lodestar calculation represents a reasonable fee award." *Stallsworth v. Mars Petcare US Inc.*, No. 2:17-CV-04180-NKL, 2018 WL 2125950, at *1 (W.D. Mo. May 8, 2018) (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)); *see also Perdue*, 559 U.S. at 552 ("the lodestar method yields a fee that is presumptively sufficient to achieve [the] objective" of "induc[ing] a capable attorney to undertake the representation of a meritorious civil rights case").[1]

Plaintiffs who have "won excellent results," as Plaintiffs have done here, are "entitled to a fully compensatory fee award, which will normally include time spent on related matters on which [the plaintiffs] did not win." *Jenkins*, 127 F.3d at 716.

1. Plaintiffs' Requested Hourly Rates Are Reasonable.

For the purposes of the lodestar calculation, "[i]n the Eighth Circuit, 'a reasonable hourly rate generally means the ordinary fee for similar work in the community.'" *Trinity Lutheran Church of Columbia, Inc.*, 2018 WL 5848994, at *2 (quoting *Little Rock Sch. Dist. v. State Ark. Dep't of Educ.*, 674 F.3d 990, 997 (8th Cir. 2012)). "Nonetheless, where local community rates would not be sufficient to attract experienced counsel in a specialized legal field, the appropriate rate may be determined by reference to a national market or a market for a particular legal

[1] Courts may also consider the factors identified by the Supreme Court in *Hensley*: "(1) the time and labor required; (2) the novelty and difficulty of the legal questions; (3) the skill requisite to handle the case properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Stallsworth*, 2018 WL 2125950, at *2 (citing *United Health Care Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 575 n.9 (8th Cir. 1996)). "[M]any of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9.

specialization . . . ." *Id.* (citations and internal quotation marks omitted); *see also Little Rock Sch. Dist.*, 674 F.3d at 997 ("In such a case, '[a] national market or a market for a particular legal specialization may provide the appropriate market.'" (alteration in original)). Courts have found that the reasonable hourly rates are determined by reference to the "prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

Here, Plaintiffs have a sound basis to seek out-of-state or national rates, but they instead are seeking hourly rates that derive strictly from the local Missouri legal market.

a. The Requested Rates Are Reasonable in Relation to Local Missouri Rates

Plaintiffs' counsel's rates are well within the range of reasonableness when compared to rates in the local Missouri legal community. For their most senior litigators, Plaintiffs seek rates between $400 and $500 per hour. For their associates and staff attorneys, Plaintiffs seek rates between $225 and $375 per hour. For their paralegals, Plaintiffs seek a rate of $150 per hour. *See* Sussman Decl., Ex. 1; Bartosz Decl. ¶ 23; Decl. of Leecia Welch ("Welch Decl.") ¶ 24; Decl. of John Ammann ("Ammann Decl.") ¶ 14; Decl. of Scott Schutte ("Schutte Decl.") ¶¶ 17, 18.

Local attorneys have attested that these rates are within the range of fees normally charged by lawyers within Missouri for comparable civil rights class action litigation. Decl. of Thomas Kennedy ("Kennedy Decl.") ¶¶ 13-15; Ammann Decl. ¶ 15. This is further supported by the Missouri Lawyers Weekly study, the preeminent study of attorneys' fee rates within the state. Kennedy Decl. ¶ 13; Ammann Decl. ¶ 14 & Ex. B. The most recent study, released in August 2018, concluded that, in Kansas City, the median rate for partners was $440 per hour, with the highest rate for partners being $865 per hour. Ammann Decl. ¶ 14 & Ex. B. For associates, the median rate in Kansas City was $333 per hour, with the highest rate for associates being $475 per hour. *Id.* For paralegals, Kansas City firms charged $85-$275 per hour, with a median of $150 per hour. *Id.*; Welch Decl. ¶ 24. For civil rights and class action litigation, the

2018 Missouri Lawyers Weekly study further showed rates as high as $550-$865 per hour for partners, $375-475 per hour for associates, and $215-$275 per hour for paralegals—rates that are *higher* than what Plaintiffs seek here. Ammann Decl. ¶ 14 & Ex. B.

The Missouri Lawyers Weekly study results are consistent with the information provided by Plaintiffs' declarants. John M. Kilroy, Jr. is an attorney with more than forty years of experience, who has been involved in numerous class action lawsuits during that time period. Decl. of John Kilroy ("Kilroy Decl.") ¶¶ 2-6. At the beginning of this year, he retired as a shareholder from his firm, Polsinelli, P.C., and continues to engage with the firm and the local legal community. *Id.* ¶ 7. He has reviewed the rates sought here, and he attests that "[t]he standard hourly rate for lawyers and paralegals at Polsinelli P.C. of similar years of experience is higher than the rates sought by plaintiffs." *Id.* ¶ 10.

Thomas Kennedy is an attorney with more than forty years of experience who practices in Missouri and Illinois on civil rights, education rights, and public benefits cases, including on behalf of children. Kennedy Decl. ¶ 2. Mr. Kennedy's firm charges clients a rate between $400-450 per hour for his time, between $300-350 per hour for a partner with seven years of experience, $200 per hour for an associate with one year of experience, and $125-150 per hour for paralegals. Kennedy Decl. ¶ 14. His firm charges the higher hourly rate in contingent fees cases, *id.*, where, as is the case here, counsel has assumed substantial risk that they would receive no fee whatsoever unless the suit is successful. Mr. Kennedy also notes that his firm's rates are somewhat lower than the rates charged by Missouri lawyers, because about half of his firm's work is done in Illinois, where rates are lower than in Missouri. *Id.*

Further, courts have previously deemed comparable or higher rates reasonable for attorneys in Missouri possessing Plaintiffs' counsel's experience in civil rights and class action matters. For example, in 2017, in *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198 (W.D. Mo. Mar. 14, 2017), *aff'd*, 896 F.3d 900 (8th Cir. 2018), a class action lawsuit, the court approved "average hourly fees" for the class counsel firms ranging from $261 to $897 as reasonable. The court noted that the rates, "although some are on the high side, are not

dissimilar to those hourly rates charged in the Kansas City area" and were "indicative of counsel's extensive national experience in class action lawsuits." *Pollard*, 320 F.R.D. at 222. *See also Albright v. Bi-State Dev. Agency of Missouri-Illinois Metro. Dist.*, No. 4:11CV01691 AGF, 2013 WL 4855304, at *8 (E.D. Mo. Sept. 11, 2013) (setting as reasonable rates in a class action $500 per hour for each of the three lead counsel, $245-$395 per hour for other attorneys, and $150 per hour for paralegals); *D.L. v. St. Louis City Pub. Sch. Dist.*, No. 4:17 CV 1773 RWS, 2019 WL 1359282, at *2 (E.D. Mo. Mar. 26, 2019) (noting that the plaintiff had submitted evidence "demonstrating billing rates of $200-$350 for 'attorneys' or 'associates' practicing employment or civil rights law in the St. Louis metropolitan area and billing rates of $350-$500 for 'partners' practicing employment or civil rights law in the St. Louis metropolitan area." (internal citation omitted)).

b. Plaintiffs' Counsel Would Have Been Reasonably Justified Seeking Out-of-State, Specialist Rates

The requested rates are particularly reasonable when considered in relation to the considerable experience and expertise of Plaintiffs' counsel. *See Stallsworth v. Staff Mgmt. | SMX SMX, LLC*, No. 2:17-CV-04178-NKL, 2018 WL 2125952, at *3 (W.D. Mo. May 8, 2018) (in addition to the local market rates, "[t]he rate charged should also take into account the experience, skill, and expertise of the attorneys as well as the complexity, significance, and undesirability of the case"). Such expertise was crucial to the success of this case, which involved highly specialized areas of law and science, new legal theories, and very high stakes in terms of the health and safety of vulnerable children. *See* Ammann Decl. ¶¶ 9-10 (attesting that the St. Louis University School of Law did not have the available resources to undertake this litigation alone and did not have the necessary expertise to have undertaken this case without partnering with specialized co-counsel).

Plaintiffs' counsel include the National Center for Youth Law ("NCYL"), based in Oakland, California, and Children's Rights ("CR"), based in New York City, New York. These two nonprofit organizations have been recognized for their wealth of experience specifically

representing children in the custody of state child welfare systems. *See* Bartosz Decl. ¶¶ 2-4; Welch Decl. ¶¶ 3, 4, 6; Doc. 183 at 7 (recognizing that Plaintiffs' counsel "are well qualified and experienced, including with respect to issues surrounding children's rights and class actions"). Both Children's Rights and NCYL have successfully prosecuted numerous federal class action suits aimed at large-scale reform to ensure that child welfare systems are properly serving the needs of children in their care. Bartosz Decl. ¶¶ 2-4, 8; Welch Decl. ¶¶ 3, 4, 6. *See, e.g.*, *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517, 519 (8th Cir. 1995) (utilizing out of state rates for attorneys who were "leaders in the field of reproductive-rights law" with "extensive experience").

In addition to child welfare systems reform experience, this case required specialized knowledge regarding psychotropic medications, including utilization and effects on children, and the oversight of the administration of such drugs to children in government custody. NCYL and CR have been among the leading advocates in the country focused on ensuring that children in foster care are safely prescribed psychotropic medications and protected from the harmful effects of overmedication. Welch Decl. ¶¶ 4, 9-10, 30; Bartosz Decl. ¶ 3. NCYL has led efforts to enact numerous pieces of legislation increasing oversight in this area. Welch Decl. ¶ 9. CR has resolved multiple cases through settlements that directly address the oversight of psychotropic medications for foster youth among other issues. Bartosz Decl. ¶¶ 3-4. NCYL has also used class action litigation to enforce children's rights regarding oversight of psychotropic medications in other custodial settings, including in immigration detention. *See* Order re: Plaintiffs' Motion to Enforce Class Action Settlement, *Flores v. Sessions*, Case No. 85-CV-4544 (C.D. Cal. July 30, 2018), Doc. 470; First Amended Complaint, *Lucas R. v. Azar*, 2:18-cv-05741-DMG-PLA, (C.D. Cal. Sept. 7, 2018), Doc. 81.

Plaintiffs' counsel also reasonably believed that it was important to partner with a private law firm who could devote additional time and resources to successfully litigate the case, due to the resource-intensive nature of large-scale litigation and the limited resources of the nonprofit and law clinic counsel. Welch Decl. ¶ 31; Ammann Decl. ¶ 9. Plaintiffs' counsel contacted

numerous law firms, both within Missouri and nationally, but were unsuccessful at finding a private law firm who was willing to take on this case on a contingency or *pro bono* basis. Bartosz Decl. ¶ 53; Welch Decl. ¶ 31; *see also* Kennedy Decl. ¶¶ 10-11 (attesting that his firm was not available for this litigation and noting that this case's high demands for resource and time, including expert costs that could not be recovered, made it highly undesirable from the perspective of private, for-profit law firms). Ultimately, Morgan, Lewis & Bockius was retained. Bartosz Decl. ¶ 53.

Although Plaintiffs' counsel could reasonably seek to recover fees at their regular out-of-state rates, they have elected not to do so. Instead, they are requesting rates that are significantly lower than their reasonable home market rates based on their specialized expertise and experience and, for Morgan, Lewis & Bockius, lower than rates paid by their private clients. *See, e.g.*, Welch Decl. ¶¶ 25-29 (collecting information regarding reasonable market rates in the San Francisco Bay Area; noting that in 2014, a federal court approved rates of $695 per hour for a NCYL attorney with 29 years of experience and $450 for an attorney with 6 years of experience); Bartosz Decl. ¶¶ 27-28 (setting forth information about national and New York City rates); Schutte Decl. ¶¶ 17, 18. Plaintiffs' requested rates for their out-of-state counsel are more than reasonable.

2. Plaintiffs Only Seek Recovery for Services Reasonably, Necessarily, and Actually Performed

After applying thorough billing judgment, Plaintiffs submit that the number of hours reasonably expended on the litigation for which they should be compensated is 11,417.6. Sussman Decl., Ex. 1; Bartosz Decl. ¶ 10 & Ex. B; Welch Decl. ¶ 21 & Ex. C; Ammann Decl. Ex. A; Schutte Decl. ¶¶ 15, 16 & Ex. A. In support of this claim, Plaintiffs have "submit[ted] documentation supporting the requested amount," detailing the hours that their counsel expended in pursuing this litigation, and "making 'a good faith effort to exclude from [the] fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.'" *Trinity Lutheran Church*

of Columbia, Inc., 2018 WL 5848994, at *2 (quoting *Hensley*, 461 U.S. at 434) (second alteration in original).

This number of hours represents tremendous work by Plaintiffs' counsel in prosecuting this case. Counsel conducted a thorough pre-filing investigation and successfully completed substantial preliminary motion practice, large-scale discovery, and extensive mediation and settlement negotiations. Bartosz Decl. ¶¶ 29-43. That work included developing and successfully defending a novel procedural due process theory that had not previously been advanced on behalf of children in foster care deprived of adequate protections prior to being given psychotropic medications. *Id.* ¶ 36. As this suit was aimed at protecting vulnerable children from significant risks of harm from the improper administration of powerful medications, Plaintiffs' counsel had an obligation to devote the time necessary to advance the case as quickly as reasonably possible to protect class members from those harms. The time spent by Plaintiffs' counsel on this case increased substantially as a result of Defendants' mistakes in discovery productions and aggressive litigation postures. *Id.* ¶¶ 31, 36. The substantial time investment required of counsel significantly limited their ability to take on and litigate large systemic reform cases in other jurisdictions during the pendency of this case. Welch Decl. ¶ 31. Plaintiffs' counsel's immense efforts have resulted in a Settlement Agreement from which thousands of Missouri foster children will benefit.

Taking seriously the obligation to be "mindful that 'hours that are not properly billed to one's client also are not billed to one's adversary pursuant to statutory authority,'" *Stallsworth*, 2018 WL 2125950, at *2 (quoting *Hensley*, 461 U.S. at 434), Plaintiffs have carefully reviewed each attorney's time entries to eliminate excessive, redundant, or otherwise unnecessary hours. Each firm has waived the time of all lawyers, law students, and other staff who were not central to the litigation. Bartosz Decl. ¶ 15; Welch Decl. ¶ 21; Schutte Decl. ¶¶ 19, 20. Counsel has also waived all time for work performed on the case prior to June 13, 2016 and are not currently seeking compensation for work performed subsequent to when Defendants provided the parties' fully executed Settlement Agreement on June 13, 2019. Bartosz Decl. ¶ 15; Welch Decl. ¶ 21.

Counsel further are not currently seeking to recover for time spent in preparing the instant motion for fees. Bartosz Decl. ¶ 15; Welch Decl. ¶ 21.

In addition to these reductions, Plaintiffs have also contracted with an external consultant, Sterling Analytics, Inc. ("Sterling"), to further reduce their attorneys' hours to account for improper entries and duplication of effort among the co-counsel team, including between the four law firms. Bartosz Decl. ¶¶ 13-14; Welch Decl. ¶ 22; Sussman Decl. ¶ 1. Sterling helped to limit hours claimed as follows: for depositions, no more than two attorneys in attendance per witness; for court hearings, no more than one attorney in attendance per firm; for telephonic conferences with Defendants, including for mediation, no more than four attorneys in attendance total; for regularly scheduled co-counsel meetings, no more than two attorneys in attendance per firm; and for other internal conferences among co-counsel, no more than four attorneys in attendance total. Sussman Decl. ¶¶ 3, 5. In addition, all counsel reduced their requested rates for travel by fifty percent. Bartosz Decl. ¶ 14; Welch Decl. ¶ 22. In sum, these reductions amount to more than 2,459.4 hours and more than 17.7% of the time that they spent on this case. Sussman Decl. ¶ 7.

After this meticulous application of billing judgment, and utilizing the reasonable rates addressed above, Plaintiffs submit that the proper measure of the lodestar in this case for the 11,417.6 hours rendered by the attorneys and paralegals through June 13, 2019 is $3,894,975.22. The lodestar calculation is further detailed in Exhibit 1 to the Sussman Declaration.

C. Plaintiffs' Counsel Should Receive an Award of Reasonable Expenses

"Counsel to a prevailing party in a § 1983 action is entitled to an award reimbursing reasonable expenses of the kind normally charged to clients by attorneys." *Trinity Lutheran Church of Columbia, Inc.*, 2018 WL 5848994, at *14. Items such as "travel expenses for attorneys and other expenses that a law firm normally would bill to its client are properly characterized as part of an attorney's fees award." *Id.* (quoting *Williams v. ConAgra Poultry Co.*, 113 F. App'x 725, 728 (8th Cir. 2004)) (internal quotation marks omitted).

Plaintiffs' counsel seek recovery for reasonable expenses in the total amount of $132,907.56, including for expenses associated with travel, including flights, hotels, and rental cars.[2] Sussman Decl., Ex. 1; Bartosz Decl. ¶¶ 18-19 & Ex. C; Welch Decl. ¶ 20 & Ex. B; Schutte Decl. ¶¶ 23, 24 & Ex. B. In making this request, counsel exercised substantial billing judgment, and eliminated significant categories of expenses for which they are not seeking reimbursement, including: all meal expenses, including those incurred for necessary travel; any expenses associated with an attorney's travel for which counsel is not seeking to recover fees; and any expenses that counsel has deemed overhead, such as copying, mailing, research, and equipment costs. Welch Decl. ¶ 20; Bartosz Decl. ¶ 21; Schutte Decl. ¶¶ 23, 24. These eliminations reduced the expense request by more than 42.6%.

IV. CONCLUSION

As authorized under 42 U.S.C. § 1988, Plaintiffs respectfully request that the Court award them their reasonable attorneys' fees in the amount of $3,894,975.22 and expenses in the amount of $132,907.56.

DATED: August 1, 2019

Respectfully Submitted,

CHILDREN'S RIGHTS, INC.

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[2] Pursuant to Local Rule 54.1, Plaintiffs intend to file a bill of costs within twenty-one days after final judgment, limited to seeking recovery of only the taxable costs identified in 28 U.S.C. § 1920.767

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on August 1, 2019, to be served by the operation of the Court's CM/ECF electronic filing system upon all parties.

/s/ *Elizabeth Pitman Gretter*
Plaintiffs' Counsel