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APPEARING BY TELEPHONE

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1 NOVEMBER 5, 2019

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3 THE COURT: Good afternoon, everyone. This is Judge
4 Laughrey speaking. I would just like to hear who is on the
5 line that is going to argue the motion. I know there's lots of
6 people listening in on the phone call, but I would like to have
7 the entry of appearance by those people who are actually going
8 to be arguing these motions -- the motion. First for the
9 plaintiff?

10 MS. WELCH: Good afternoon, Your Honor. This is
11 Leecia Welch at the National Center for Youth Law. I'm going
12 to be leading the plaintiffs' team's argument for this motion.
13 I will note that if the Court has specific time-reference
14 questions for other attorneys on our team, they're happy to
15 respond to those questions, but we will leave that to the
16 Court.

17 THE COURT: And for the defendant?

18 MS. PENNYCUFF: This is Melanie Pennycuff from the
19 Missouri Attorney General's Office for defendants.

20 THE COURT: All right. And I am assuming that
21 that's all that's going to be making argument. It is a motion
22 by the plaintiff, so I will let you begin.

23 MS. WELCH: Thank you, Your Honor, this is Leecia
24 Welch.

25 And I guess I would like to begin by saying that as

1 a co-counsel team, the plaintiffs in this case are extremely
2 proud of the work that we've accomplished on behalf of the
3 children in Missouri's foster-care system. As we lay out in
4 detail in our papers, this is a very complicated case that
5 posed a lot of unique challenges and was extraordinarily
6 complex and time consuming.

7 Frankly, there were times during the yearlong
8 mediation process when all of us questioned whether we could
9 ever reach a comprehensive settlement; but to the credit of
10 both sides and the MAP Director, Jill Morris, we kept
11 soldiering on and ultimately have achieved what we believe is
12 an incredible outcome for Missouri's children.

13 Obviously, we're awaiting this Court's final
14 approval of the settlement, so I don't want to get ahead of
15 ourselves, but we're hopeful that the settlement will be
16 approved; and if approved, we're confident that it will
17 profoundly improve oversight of the administration of very
18 powerful medications to Missouri's most vulnerable children.

19 It's our view that, given the risk of harm that all
20 children in foster care in Missouri have been exposed to in the
21 absence of this oversight, that our settlement will make more
22 than -- the more than 13,000 Missouri children in foster care
23 safer overall, we believe it will result in improved health
24 outcomes for thousands of Missouri children, and could save
25 countless children from devastating lifelong health

1 consequences because troubling prescribing practices will
2 either be stopped before they happen or swiftly identified and
3 stopped, or appropriate mental health services or medical
4 services will be provided that might not have been provided
5 before in the absence of this settlement. We believe there
6 simply isn't a price tag that can be placed on the health and
7 safety benefits that were derived to thousands and thousands of
8 our most vulnerable children in foster care over time.

9 I would also note that beyond these tangible
10 benefits, we believe the settlement greatly serves the
11 interests of Missouri citizens and also the public at large.
12 It's our hope that this settlement will be a national model.
13 We hope that it will catalyze other states to take similar
14 approaches and make similar improvements which will result in
15 improved outcomes for thousands more children in foster care
16 across the nation.

17 We hope that it will advance the field of child
18 psychiatry and pharmacology through the data collection and
19 analysis that occurs. And with regard to the advancement of
20 civil rights law, we believe the case demonstrates in very
21 important ways that youth have constitutional rights that can
22 and must be vindicated and that protecting these constitutional
23 rights is important, not just for its own sake, which is
24 enough, but also for the real-world changes that can result.

25 Finally, we believe the case will have the positive

1 effect of encouraging stakeholders. And by that term, I mean
2 the people who have an actual stake in the foster-care system;
3 that is, children themselves, their parents and other family
4 members, foster parents, mental health professionals, doctors,
5 CASAs, children's attorneys, caseworkers, and anyone else who
6 cares about the well-being of children in the system, that it
7 will have the effect of encouraging those people who are
8 troubled by what they're seeing in their own foster-care
9 systems to be vocal, to speak up, knowing that they, too, have
10 the ability to shine a light on harmful practices and advocate
11 for real change, and that this brave work can and will actually
12 improve health and safety outcomes for children.

13 We would also note that defendants simply don't
14 dispute that the parties' settlement is an excellent result for
15 the plaintiff class, and that notably they have not submitted
16 evidence that actually rebuts plaintiffs' well-supported
17 showing in our fees motion. These showings include that they
18 have not -- that they have not rebutted the prevailing market
19 rates in the local community and that plaintiffs' claims are
20 reasonable; they have not rebutted that the case was complex
21 and involved specialized areas of law and medicine, established
22 new legal theories, and was highly consequential to the health
23 and safety of children; they have not rebutted that plaintiffs'
24 counsel have considerable expertise in these special areas; and
25 they have not rebutted the accuracy of plaintiffs' hours, but,

1 rather, seek an unsupported 50 percent volume discount.

2 As this Court is well aware, the lodestar method has
3 become the guiding light for fee-shifting jurisprudence, and we
4 respectfully request this Court award plaintiffs' counsel our
5 full lodestar fee award. We would note that this award already
6 includes more than a 31 percent reduction from our actual fees
7 and costs based on our exercise of rigorous billing judgment.

8 I'm happy to respond to other questions the Court
9 may have, but that's what I would say to start.

10 THE COURT: Well, when you say to start, are you
11 suggesting that the Court turn to the defendants and hear
12 whether they agree with what you've just said? Is that your
13 argument?

14 MS. WELCH: Your Honor --

15 THE COURT: I've read the briefing, and I know they
16 don't agree with it.

17 MS. WELCH: I'm quite confident they will not agree.
18 I just know that in past oral arguments, the Court has had
19 quite a few questions, so I wanted to leave room for that; but
20 I'm happy to keep going if the Court doesn't have any questions
21 you would like for us to address at this point.

22 THE COURT: Well, I'm going to have questions, but,
23 you know, you may answer them if you have something you want to
24 provide. But, basically, I'm interested in this issue of --
25 you know, you talk about stakeholders. You know, I don't want

1 you to divulge any privileges or information that, you know,
2 might result in retaliation against any interested party or
3 anything of that nature, but there's obviously a dispute here
4 about the work of Attorney Dixon and the work that he did with,
5 quote, stakeholders.

6 I want more clarification as to who these
7 stakeholders are, why it was necessary, and it's a lot of hours
8 and a lot of money being asked, and I don't have a good sense
9 of who they are or what they did, what Mr. Dixon did. So if
10 that's what you're looking for...

11 MS. WELCH: Okay. I'll be sure to respond to that
12 in the course of my remarks.

13 THE COURT: Okay. I think it's better for you to go
14 ahead with your remarks, and then, if you have not clarified an
15 issue, let me ask the question. Go ahead.

16 MS. WELCH: Okay. So one of the primary arguments
17 that the AG's papers make is the question of, you know, why
18 there were 20 attorneys working on this case, and I want to
19 respond to that question in a few different ways.

20 First of all, we had -- we had four firms working on
21 this case, as everyone is aware. And with regard to the work
22 of the National Center for Youth Law and Children's Rights,
23 we -- and all the firms, for that matter, we worked hard to
24 avoid duplication of effort by having great communication
25 skills and dividing our work into sub-teams.

1 We assigned particular attorneys -- for example, we
2 assigned particular attorneys to work on issues involving
3 particular plaintiffs and next friends, we assigned particular
4 attorneys to our various experts, we divided up document review
5 by next friends and plaintiff or by particular deponent, and we
6 took great effort to ensure that there was not duplication of
7 effort in our work. Frankly, we're all extremely busy, and
8 there would have been no benefit to us to duplicate -- to
9 duplicating efforts.

10 In terms of the number of attorneys working on the
11 case, I think it's important to note that the case law
12 acknowledges that multiple attorneys can and should be working
13 on a case. The issue is really making sure that there isn't
14 duplication of effort.

15 The AG's papers would like you to think that we had
16 20 attorneys waking up every day and, you know, billing the
17 State of Missouri wildly, and that's just simply not the case.
18 Not all of our attorneys were even working on the case
19 simultaneously, and as is true in litigation that lasts for
20 years, there were individuals who joined and left the team over
21 the course of the case or who participated just for a limited
22 period of time or for a specific task.

23 Two examples of that would be fellows Amanda Grill
24 and Jackie Stolzenberg, who did not overlap at all on the NCYL
25 team; and another example would be Stephanie Schuster, who is

1 an appellate specialist at Morgan Lewis, who worked only on the
2 appeal.

3 I would note that this is an important case. It was
4 very complex. It included discovery, client management,
5 motions, settlement negotiation, and a lot of -- and appellate
6 work, and a lot of this was often happening at the same time.
7 We needed to have a number of attorneys working on the case so
8 that we could zealously advocate for our clients in all of
9 these varying tasks. We made sure that we, as I said, divvied
10 up the different responsibilities to individual attorneys or
11 sub-groups.

12 I would also note that the mediation in this case
13 was exceedingly complex. It wasn't just a simple two-page
14 settlement agreement to work out. It's a 30-page detailed
15 agreement that includes very specific relief, and that was very
16 carefully crafted. We needed -- we needed the resources to put
17 together a well-staffed team to protect the incredibly
18 important rights at stake in this case. Moreover, we made sure
19 to exercise very substantial billing judgment to address any
20 possibility of charges for overstaffing, although we
21 efficiently staffed as necessary, as I've noted.

22 Our claim at this point reflects a reduction of at
23 least 31 percent from the fees and costs that we billed and
24 accrued. Every day that percent is getting higher because we
25 are not billing for any of the time subsequent to when the

1 agreement was signed; and, obviously, with this fee motion and
2 the work that's gone into it, it's been an incredible amount of
3 work, none of which has been billed, nor is it accounted for or
4 could be accounted for in the percentages in front of the
5 Court.

6 I would note just as some examples that Children's
7 Rights removed more than 25 hours from their time slips. John
8 Ammann removed all of the time from his time slips for regular
9 team phone calls. NCYL removed multiple timekeepers who
10 weren't central to the case and eliminated more than 250 hours.

11 After making all of those reductions, we then
12 applied even more vigorous billing judgment by setting out a
13 variety of reductions that were going to be made across the
14 top. So, for example, for a deposition, we made sure that no
15 more than two attorneys in attendance were billed; for court
16 hearings, no more than one attorney per organization; for
17 telephonic conferences with defendants, no more than four
18 attorneys; and for other internal conferences among co-counsel,
19 no more than four attorneys in attendance.

20 So in addition to the cuts that we made off the top
21 before we even --

22 THE COURT: Could you go -- I'm sorry, let me
23 interrupt for a minute. Go back to this internal phone
24 conferences. You said no more than four attorneys.

25 Give me some concrete examples. You know, you're

1 having -- I assume you're talking about something not involving
2 the Court or not involving the opposing party. You're talking
3 about your case, right?

4 MS. WELCH: Right. So by internal phone conference,
5 I mean phone calls that the four firms had to make strategic
6 decisions.

7 For example, around our appeal -- the appeal of the
8 class certification or strategy calls that we were going to
9 make in terms of motions, responses to defendants' motions,
10 those sorts of strategy decisions.

11 THE COURT: Okay. Give me some sense of why there
12 are four groups here.

13 MS. WELCH: Sure.

14 THE COURT: Give me some background as to why this
15 is not just one organization pursuing this litigation.

16 MS. WELCH: Sure. So the National Center for Youth
17 Law and Children's Rights obviously have similar backgrounds
18 and areas of expertise; but for this case, we also ensured that
19 we had different complementary areas of expertise, shall we
20 say.

21 So, for example, Children's Rights has particular
22 expertise in investigating cases, and I would say in this case
23 they led probably 99 percent of the effort to investigate this
24 case. Notably, they're only seeking fees for one year of that
25 investigation, but, actually, it was a two-year investigation.

1 And this also dovetails with your questions about Mr. Dixon,
2 who played a very central role in that investigation.

3 But, for example, Children's Rights focused that
4 energy on the investigation, and NCYL did not. NCYL has deep
5 expertise in the research and literature and science of
6 psychotropic medications; and in that area, my late colleague,
7 Bill Grimm, played a lead role.

8 We also made sure to divide up the work between
9 Children's Rights and NCYL based on our background and
10 expertise. So, for example, the expert that we worked with who
11 was focused specifically on the literature and science of
12 psychotropic medications was assigned to NCYL, and the other
13 experts were assigned to Children's Rights.

14 Morgan Lewis brought specialized knowledge and deep
15 expertise in class action litigation and strategy, and a lot of
16 the time that they devoted to the case was spent on that,
17 including taking the lead on the appeal, arguing the appeal,
18 and doing the vast majority of the work on the briefs for the
19 appeal.

20 John Ammann, our esteemed local counsel, he
21 obviously brings deep knowledge of civil rights law, the local
22 rules, the community, local politics, the Missouri social
23 justice community, and was an invaluable member of our team,
24 along with his law students, who did a lot of very important
25 work on the case but did not bill for any of it.

1 THE COURT: All right. Thank you. That was very
2 helpful. Go ahead.

3 MS. WELCH: I would also note -- so I noted that,
4 you know, there were -- there was a large number and category
5 of hours that we excluded from our fees before we sent them
6 along to Sterling Analytics to apply the algorithm that I just
7 went through in terms of the number of attorneys for
8 depositions and court hearings, and so on and so forth. So
9 when you do the calculation --

10 THE COURT: Let me -- let me interrupt again. In
11 other words, you have all of these billing records, and then
12 one thing that you did was send it to this organization that
13 went through and made sure there were only billings for four
14 attorneys for an internal phone conference. Is that what
15 you're saying?

16 MS. WELCH: Yes. So Sterling Analytics -- we relied
17 on Sterling Analytics, and their methodology is laid out in the
18 declaration of Sterling Analytics that we submitted with our
19 motion for fees and expenses. They laid out their methodology.

20 They basically -- so our attorneys did an initial
21 scrub to ensure billing judgment and taking out what we thought
22 arguably shouldn't even go to Sterling to apply the rules that
23 they felt like were important to demonstrate that there was not
24 unneeded duplication of effort.

25 They then scrubbed our bills, and their scrub

1 resulted in about a 22 percent discount of our bills. If you
2 add that to the hours that we had already scrubbed, you get up
3 to almost 32 percent discount on our initial hours and costs;
4 and as I noted, that does not include things like all the work
5 we've done since the settlement was executed. So that's a very
6 conservative estimate of what our cut has been so far.

7 THE COURT: Tell me a little bit about -- obviously,
8 if I understand correctly, you work for a large law firm?

9 MS. WELCH: This is Leecia Welch at the National
10 Center for Youth Law. My nonprofit, I don't know that I would
11 characterize it as large.

12 THE COURT: Okay.

13 MS. WELCH: We have about 15 attorneys.

14 THE COURT: I'm trying to get a sense from someone
15 about the practice by -- billing practices by what I would say
16 are competitive law firms. I don't know how else to describe
17 it. The for-profit law firms, let's put it that way.

18 MS. WELCH: Sure.

19 THE COURT: How does Sterling Analytics fit into
20 this? This is the first example I've heard of something like
21 this, so I'm trying to put it in context.

22 MS. WELCH: Well, I think Sterling Analytics we
23 decided to retain because we wanted to ensure the highest level
24 of -- the highest exercise of vigorous billing judgment, and we
25 wanted to do it in a way that was systematic and fair and

1 applied to all firms equally.

2 I -- this is the first time that I have used such a
3 firm, as well. I have worked at law firms, though, in the
4 past, and I can speak for NCYL when I say that the way we bill
5 for time in our cases is exactly the same as how a firm would
6 expect its attorneys to bill for time, that the time notes are
7 made contemporaneously, they describe work that was actually
8 done on the case and needed to be done on the case.

9 The main reason we wanted to use Sterling is we
10 predicted that the AGs would take issue with the number of
11 timekeepers on the case; and while we thought it was a
12 reasonable use of our resources, we wanted to ensure that there
13 was an independent review and analysis, and so we relied on
14 Sterling's expertise for that. And they looked at things in
15 our bill -- billing time notes such as block billing, billing
16 for administrative tasks, those sorts of things, and they
17 made -- they made reductions where they thought it was
18 appropriate, and those are all noted in our -- the time notes
19 that were provided to the Court.

20 THE COURT: I guess maybe my question is just a
21 little bit more general. Sterling Analytics is in the business
22 of reviewing lawyers' billings, or it's just a big data company
23 and you gave them certain parameters to look for, and they just
24 developed a program that looked for those parameters?

25 MS. WELCH: No, they are -- they're solely dedicated

1 to the field of legal billing and review and auditing. They
2 have 40 attorneys and paralegals that do this. They claim that
3 they review billions of dollars annually in every area of law,
4 so it's -- my assumption is that it's primarily law firms that
5 hire them to do this work.

6 THE COURT: Okay. That's what I'm looking for.
7 Thanks very much for that.

8 MS. WELCH: You're welcome.

9 COURT REPORTER: Judge, this is Katie. I hate to
10 interrupt. I'm getting a lot of background noise, and I'm
11 wondering if the attorneys who aren't speaking could mute their
12 phones.

13 THE COURT: I do hear shuffling of papers myself in
14 the background, and I know that's very common with these big
15 telephone conferences. Go ahead and mute your phones unless
16 you're going to be speaking. Go ahead.

17 MS. WELCH: Your Honor, I would also note --

18 THE COURT: Thank you, Katie.

19 COURT REPORTER: Thank you, Judge.

20 MS. WELCH: I would also note that, while the AG's
21 opposition repeatedly notes the number of attorneys working on
22 the case on the plaintiffs' side, that our team actually wasn't
23 comparatively large. The defendants also employed a very big
24 team on their side. And we added the numbers up, and, by our
25 calculations, they had at least 20 attorneys working on their

1 side over time. That includes five contract attorneys. We're
2 not sure if there were more than that, but I think it just
3 demonstrates that this was a very complicated, time-consuming
4 case, and it required a number of people to do it well.

5 THE COURT: Okay. Go ahead.

6 MS. WELCH: I would also note that we -- in terms of
7 the need to bring in counsel from organizations outside of
8 Missouri, there really is a very valid justification for that,
9 based on the specialized knowledge that was needed to
10 effectively bring this case.

11 We think that this case requires specialized
12 knowledge in psychotropic medications, including things like
13 polypharmacy and side effects and the oversight of the
14 administration of these sorts of medications for children in
15 government custody. We think the case requires expertise in
16 the foster-care setting and understanding how the agencies are
17 structured and what systemic safeguards should be put in place
18 to address the issues that we identified in the case in a
19 practical way.

20 So we think that there was specialized knowledge
21 that simply wasn't available in the local community, and this
22 is supported by the declarations that we submitted, and also by
23 our knowledge of this field across the country. There's just
24 very few attorneys in the nation with this kind of expertise,
25 and almost all of them are at Children's Rights and the

1 National Center for Youth Law.

2 One other area that I would want to note is the AGs,
3 rather than actually rebutting plaintiffs' showing in terms of
4 the reasonableness of our fees, our particular hours, they just
5 across the board simply asked for a volume discount, and we
6 think that is unsupported by the law and certainly
7 inappropriate in this case.

8 First of all, as I noted, we've already taken a
9 volume -- essentially a volume discount of over 31 percent of
10 our original lodestar. The cases that the AGs point to to
11 support this notion of a volume discount, the largest one that
12 we saw that was taken by a court was 20 percent. We've already
13 far exceeded that kind of discount on our own. We -- and we
14 don't think that they -- more importantly, that they've
15 presented a valid justification or rebutted the lodestar that
16 we've presented to the Court.

17 THE COURT: Tell me about that. I know that, you
18 know, you have a difference of opinion about whether it's 2017
19 or 2019, but it appears that you are conceding that you're
20 looking at the Missouri market.

21 MS. WELCH: Yes, we are not seeking national rates
22 in this case. We are looking at the Missouri market for our
23 rates.

24 THE COURT: Okay.

25 MS. WELCH: In terms of the basis for our rates, we

1 think that our requested rates are well within the normal range
2 for the Missouri market, as shown by the *Missouri Lawyers*
3 *Weekly* summaries and also the declarations that we've submitted
4 from Mr. Kilroy, Mr. Kennedy, and Mr. Ammann.

5 They -- the AGs point to 2017 as the operable year.
6 We think that is incorrect under the law. First of all, the
7 case law in the Eighth Circuit says that we're entitled to the
8 current rate. Also, the AG's brief inaccurately suggests that
9 the majority of the work happened pre-2017, and that's just
10 inaccurate.

11 So there is a dispute there, but we think that, as
12 we laid out in our papers, that the vast majority of the work
13 happened in 2018 and 2019, and so there's not a valid
14 justification for looking at 2017 as the average.

15 THE COURT: Now, you've suggested that the Eighth
16 Circuit says you have a right to the current rate. What case
17 are you saying that you have a -- that says you have a right to
18 them? I thought it was that it's not an abuse of discretion or
19 it takes into account the potential for not recovering your
20 fees until the end of the case, rather than at the time the
21 work was done. But we're talking about a relatively narrow
22 time period here for the work, compared to other cases that I
23 have had where there might be a ten-year delay between the work
24 and the time period when the bills are being assessed.

25 MS. WELCH: I think that's accurate, Your Honor.

1 The use of the term "right" was probably a bit strong.

2 THE COURT: Okay. I think I understand the issue,
3 then, thank you. You may go on.

4 MS. WELCH: Yeah. And I would note that, as this
5 Court is well aware, that the prevailing market rate is really
6 only the starting point; and in addition to that, the Court
7 should take into consideration the experience, skill, and
8 expertise of the attorneys, as well as the complexity,
9 significance, and undesirability of the case.

10 So I would say that, you know, we basically -- in
11 terms of the rates that we've selected, we really tick all the
12 boxes to show, you know, that the rates that we have supported
13 through the surveys and our declarations are reasonable.

14 THE COURT: Okay. You may go ahead.

15 MS. WELCH: So I want to make sure that I address
16 the Court's questions regarding the work that Mr. Dixon did on
17 behalf of the children in Missouri's foster-care system.
18 There's a few things that I want to note about that.

19 First of all, I don't think there's any
20 justification, and, in fact, I think it's pretty outrageous
21 that the AG is requesting that none of his time entries are
22 compensable. I don't think there's a valid basis for that at
23 all, and we have laid out our arguments in that regard very
24 clearly in our reply.

25 I would say that the -- I've had the privilege of

1 working with Mr. Dixon now for many years and on multiple
2 cases, and the work that he does and has done on behalf of our
3 clients is some of the most important work on the case. I
4 would say as a personal matter that I've probably learned more
5 from Mr. Dixon in terms of the ethics and the advocacy needed
6 to effectively represent children in the foster-care system as
7 much as any attorney I've ever worked with. He has 27 years of
8 child-welfare-law experience, and for the last ten years he's
9 worked on teams focusing on systemic reform of child-welfare
10 systems.

11 Through all of this work, he has incredible skill in
12 analyzing and evaluating child-welfare systems in light of
13 federal, state, and best practice standards, and all of this
14 specialized knowledge he uses when he is working in the
15 community to develop an understanding of the specific
16 challenges that can and should be addressed through litigation.

17 Our cases often go on for many years, and sometimes
18 they go to trial, and it's crucial to develop relationships
19 with not only potential plaintiffs, but also witnesses who can
20 bear witness to the problems in the system and the real-world
21 effect they've had on children's lives.

22 So developing plaintiff relationships and
23 relationships with others in the system, the stakeholders that
24 I mentioned earlier, is really central to the success of any
25 case, and building rapport and trust with people, especially

1 about the topics that are as sensitive as those are in this
2 case where we're talking about administration of psychotropic
3 meds to children with mental health issues and some of the
4 horrific things that have happened, especially that foster
5 parents and others have witnessed because of improper
6 administration, talking about these issues with people is very
7 sensitive, and it takes the development of rapport and trust to
8 really get to the point where you can learn what is happening
9 in the system and what the needs are in terms of improving it.

10 I would also note that it's not uncommon and it was
11 certainly the case in this state, in Missouri, that many people
12 are very fearful of retaliation. They're afraid of having
13 their name out there. It takes a lot of time to gain the trust
14 of people, to explain and educate and answer their questions
15 and to listen to them.

16 And a lot of times people will speak to us only if
17 we promise that their name will remain confidential, and
18 there's a number of reasons for that. Sometimes it's a foster
19 parent who is literally afraid that if they speak out, that a
20 child in their home that they seek to adopt will get yanked.
21 Other people are fearful of losing their job, of losing
22 contracts with the defendants if they speak out or are
23 critical. There's a lot of reasons that people do not want
24 their name out in the public sphere. And so it's -- when
25 talking to a lot of these people, it's generally our practice

1 in our time notes to not note that information, to keep it
2 confidential.

3 So that's why if you look at Mr. Dixon's time notes,
4 and time notes of a lot of us, actually, you will see entries
5 relating to communication with stakeholders without further
6 description. There is a percentage of Mr. Dixon's time notes
7 that do use the terminology stakeholder, but there are many
8 others that reasonably -- and the fact -- in fact, the vast
9 majority of the time entries relate to reasonably identifiable
10 people, such as a client or others.

11 So the work that he did in developing relationships
12 was used at all stages of the case. It was very important to
13 developing the claims in our complaint, but that was just the
14 beginning. We weren't sure if we were going to be going to
15 trial, so ensuring that we had witnesses who could speak to the
16 harms, experiences with the system over time was crucial, and
17 that was work that, you know, needed to start from the
18 beginning.

19 Also the work supporting the next friends who were
20 representing our named plaintiffs was incredibly time consuming
21 at points. There were reasons for that, based on the decisions
22 that defendants made in litigation. We laid all of those out
23 in our papers. There were a number of litigation strategies
24 made by defendants that resulted in needing to provide
25 additional support to our next friends. They also needed to

1 be, you know, adequately prepared for their depositions, and
2 that was work that Mr. Dixon did, as well.

3 So there was a lot of work that was done that was
4 really crucial to the success of this case. And if there are
5 other specific questions the Court has on this, I'm happy to
6 answer, but I just really want to underscore the importance of
7 Mr. Dixon's work to the overall success of the case.

8 THE COURT: I don't mean -- excuse me. I don't mean
9 to undermine any of the work of Mr. Dixon. The question is
10 what is compensable.

11 So I am interested in hearing more -- and I know
12 this may be in your papers, but when we talk about making
13 people feel comfortable, that could be very open ended. It
14 could be he sat and he talked with them for five days in a row
15 for three hours each day.

16 I'm sorry, I'm hearing background noise again.
17 Please mute your phones if you are not the person who is
18 currently speaking. So if you're not currently speaking,
19 please mute your phone.

20 So I want to -- you know, how do I as a judge know
21 that this is what I would call preparation for the case and
22 necessary for the case, versus something that is so open ended
23 that a client is not going to effectively pay for it if they
24 were being billed themselves?

25 MS. WELCH: I would --

1 THE COURT: So how do I understand that?

2 MS. WELCH: I would say by reviewing the time
3 entries, one can see the amount of time that was spent on
4 various communications. You'll see that they're -- you know,
5 they're not communications that are going on, you know,
6 indefinitely, as you suggest, for days. They're communications
7 that are designed to elicit information, either about very
8 specific problems that a young person has experienced or that a
9 foster parent has observed or, in other cases, to prepare for
10 very specific tasks in the case, like defending the next
11 friend's deposition.

12 So I think by reference to the time notes, you can
13 see that there is a connection to other work that's going on in
14 the case that is important and it's not just, you know, having
15 prolonged conversations for their own sake.

16 THE COURT: Okay. So by looking at the briefing and
17 the documentation in your briefing, you would rely on that.

18 MS. WELCH: I think that it is -- I think that it's
19 clear. I mean, certainly if this Court has additional
20 questions or would seek further clarification, we would be
21 happy to, you know, try to respond to those questions or
22 requests for clarification.

23 THE COURT: And it may be that in the future after
24 we dig deeper into this that there will be more specific
25 questions that I don't have at this time until after I hear

1 from the opposing counsel to the issue.

2 MS. WELCH: Okay. And, Samantha, was there
3 something that you wanted to add?

4 MS. BARTOSZ: Yes, thank you, Miss Welch. And good
5 afternoon, Your Honor. This is Samantha Bartosz from
6 Children's Rights.

7 I just wanted to add one point with respect to time
8 billings for Mr. Dixon. We culled Mr. Dixon out individually
9 in our moving papers in an effort to show that we were actually
10 trying to be reasonable in how we billed out for his time. As
11 Miss Welch has represented, Mr. Dixon has in excess of 25 years
12 of practice in the child-welfare arena.

13 He very easily qualifies for the top \$500 rate that
14 we were assigning to the lead counsel on the matter. We took
15 seriously our responsibility to seek reasonable rates and
16 became very conservative with respect to Mr. Dixon. We billed
17 him at 375, rather than 500, because he was not serving in a
18 lead-counsel capacity, though he certainly brought the
19 expertise and skill set that a very expert lawyer would bring.

20 So I just wanted to add that, that we culled him out
21 originally to show how we were being extraordinarily
22 conservative, and the defense has now taken this and turned it
23 around and somehow tried to eliminate all of his time. We were
24 severely reducing the value of his time in an effort to be very
25 reasonable in our proffer.

1 MS. WELCH: I would also note --

2 THE COURT: All right.

3 MS. WELCH: Your Honor, this is Leecia again.

4 I would also note that because Children's Rights has
5 waived the first year of its investigation time, and we know
6 that Mr. Dixon played a very important lead role in a lot of
7 that investigation, that a lot of his time has already been
8 eliminated entirely even from our motion.

9 THE COURT: All right. Another issue that I am
10 concerned about is the amount of time for travel. I know this
11 is an issue that has been raised by the defendants, as well.
12 Tell me why so much travel was done, as opposed to either
13 having local counsel working on issues or by using technology,
14 rather than actual travel.

15 MS. WELCH: So, Your Honor, I'm happy to address
16 that.

17 First of all, we kind of did our own calculations,
18 and we would note that the travel time, in and of itself,
19 accounts for less than 4 percent of our overall request, so
20 there -- it isn't as, I think, as extensive as the AG's
21 briefing would have you conclude.

22 A couple of things. As this Court is well aware,
23 the Eighth Circuit recognizes a presumption that a reasonable
24 attorney's fee should include compensation for reasonable
25 travel time. And we -- you know, we've cited to that *Ludlow*

1 case.

2 We've also cited to the *Safelite* case where the
3 court -- the Eighth Circuit approved an award that included
4 travel time for out-of-state attorneys who were awarded local
5 rates, as we're seeking. As John Ammann's supplemental
6 declaration notes, there is a local practice to charge for
7 travel time, so we thought we were -- our request for it was
8 certainly well supported under the law. We think the 4 percent
9 is a relatively modest amount.

10 I would note also that a lot of the travel time has
11 been waived. What travel time we're seeking, we're asking to
12 be billed at half the attorney's regular rate, so we feel like
13 we've already taken quite a discount for the travel time that
14 we have undertaken.

15 In terms of the reason for it, we looked at a lot of
16 the trips that we took, and a lot of the travel time was
17 absolutely necessary to attend in-person mediations. There
18 were four of those. Certainly that doesn't account for all of
19 the mediations. There were dozens of mediations that were
20 carried out over the phone, but the MAP Director at times felt
21 like having an in-person meeting was really crucial to getting
22 to the next step or the next level in the resolution of the
23 case, and so there were some mediation sessions that needed to
24 be face to face.

25 A lot of the other travel time was for depositions,

1 either to prepare for them, to defend them, or to take them.
2 In our Sterling analysis, we accounted for two attorneys. Even
3 if more attorneys were at depositions, we only accounted -- we
4 only billed for two attorneys at depositions. And so those
5 attorneys' travel time would be included at 50 percent to get
6 to the deposition. If there were other attorneys at the
7 deposition, not only would they not have been -- not only are
8 we not seeking their billing time, we're also not seeking their
9 travel time.

10 So we have taken quite a huge reduction from our
11 travel time. Some of the travel time was necessary to do
12 face-to-face work with our next friends and the plaintiffs in
13 this case. There was certainly a lot of work that was done
14 with them over the phone to prepare for their depositions or to
15 keep them apprised of the status of the case. But there were
16 times, you know, especially in advance of their depositions,
17 that it was important to meet with them in person so they could
18 be adequately prepared.

19 So I think that accounts for most of the reasons
20 that we traveled. There was some travel time that was
21 necessary as part of the investigation of the case. And,
22 again, given the sensitivity of the topics that were at issue
23 in this case, it's not the sort of thing that you could usually
24 get people to open up about over the phone and, you know,
25 really understand the types of intense trauma that children

1 were experiencing due to overmedication or other problems. A
2 lot of these conversations really were not going to happen any
3 other way than face to face, so there was certainly some travel
4 time that was necessary in order to have those sorts of
5 conversations that allowed us to understand more deeply the
6 problems in the system that we ultimately addressed in our
7 complaint and in our papers.

8 THE COURT: All right. My final question is that
9 you have asked for, I believe, over \$3 million in attorneys'
10 fees and expenses. Tell me if there's any comparable kinds of
11 orders that you would point to to suggest that that was
12 reasonable, given the amount of work, whether it be in the
13 setting of not-for-profit organization litigation or for-profit
14 litigation.

15 MS. WELCH: Happy to do that, Your Honor. In our
16 supplemental declarations and our reply, we have listed a
17 number of different fee awards that Children's Rights and NCYL
18 have obtained that are at that level.

19 In 2008, in the state of Mississippi, Children's
20 Rights obtained a fee award of \$3,974,493. This was for a case
21 called *Olivia Y. v. Barbour* that was about reforming the State
22 of Mississippi's child-welfare system.

23 In 2009 in federal court in Georgia, Children's
24 Rights obtained a fee award of \$5,999,839. This was also for
25 reform of -- their work to reform the child-welfare system in

1 Georgia.

2 Also in 2009 in Michigan in federal court,
3 Children's Rights obtained a fee award of \$5,547,851 in a case
4 called *Dwayne B. v. Granholm*.

5 And then in 2013, Children's Rights obtained in
6 federal court in Oklahoma a fee award of \$5,565,794 in a case
7 called *D.G. v. Yarbrough*, which was also about reforming
8 Oklahoma's child-welfare system.

9 In my supplemental declaration, I noted that a
10 NCYL -- a NCYL team on a child-welfare case called *Katie A.*
11 received \$3.75 million in settlement of that case that was
12 focused specifically on ensuring that children in foster care
13 get a particular type of mental health service, so kind of a
14 more narrowly focused case.

15 And then NCYL also received a settled fee award of
16 \$3.1 million, which was approved by the court in the Western
17 District of Washington in a case called *T.R.*, which was also
18 about access to children's mental health services there. And
19 like I said, that was a settled award.

20 Some of the awards that I noted above for Children's
21 Rights were settled. *Olivia Y.* and *Dewayne B.* were settled,
22 *Kenny A.* and *D.G.* were litigated.

23 So just to note that both organizations have
24 received fees of over \$3 million, sometimes in cases that have
25 been settled, other times in cases that have been litigated, on

1 their fees.

2 THE COURT: All right. Thank you very much. I
3 would like to turn now and ask you to mute your phone while we
4 turn to the defendants' argument.

5 MS. WELCH: Okay. Thank you, Your Honor.

6 THE COURT: Thank you. And would you introduce
7 yourself again, for the defendant?

8 MS. PENNYCUFF: Yes, Your Honor. This is Melanie
9 Pennycuff from the Missouri Attorney General's Office for the
10 defendants.

11 THE COURT: Thank you. And Miss Pennycuff?

12 MS. PENNYCUFF: Pennycuff; P-E-N-N-Y-C-U-F-F, like
13 Frank.

14 THE COURT: Thank you, Miss Pennycuff. You may
15 begin.

16 MS. PENNYCUFF: Well, Your Honor, largely we would
17 just rely on what we said in our response. I would like to hit
18 just a couple of things that came up here today, and I guess I
19 would just work backwards with -- initially starting with
20 Stephen Dixon's hours, Stephen Dixon from Children's Rights.

21 I want to be clear that we're not at all in any way
22 attempting to disparage Mr. Dixon or alleging that he, you
23 know, isn't the experienced, you know, well-known,
24 long-practiced attorney that he is. Our issue with his rates
25 is that they did, in fact, set him out, and stated in the

1 affidavit by Miss Bartosz that he principally directed his
2 efforts to the recruitment, retention, and maintenance of the
3 named plaintiff and next-friend relationships. And we
4 understand that, but our issue is why did it take a lawyer with
5 27 years of experience who they've indicated could bill at \$500
6 an hour to do something that sounds a lot like it could have
7 been done by a -- by someone who is not necessarily an attorney
8 or by someone who doesn't bill at \$500 an hour or even at \$375
9 an hour.

10 You know, he wants 378.1 hours is what we calculated
11 that Mr. Dixon was billing for, and his billing records are
12 replete with this reference to these stakeholders. And they've
13 kind of indicated here today what they meant by stakeholders,
14 but it certainly wasn't indicated in their initial motion, it's
15 not indicated in their billing records anywhere.

16 And it's my understanding and my belief that in
17 class action cases when there's a fee petition, there has to be
18 some consideration to if this were a private client, what kind
19 of billing records would the private client expect to see
20 before they would pay a significant bill for attorney fees.
21 Here, 3.8 million I think is what they've requested, something
22 along those lines.

23 So our issue isn't with Mr. Dixon himself, it's with
24 the fact that they've used an attorney with almost 30 years of
25 experience, and the 378 hours include 80 hours of travel time.

1 Because he is from Children's Rights, which is an out-of-state
2 agency, and his -- also our understanding is that his
3 investigation -- he played a big part in the investigation,
4 which, as they indicated, was apparently a two-year
5 investigation pre-filing. They're only asking for the year
6 prior to filing. In fact, I think the billing covers an exact
7 three-year period of time, from one year prior to filing until
8 sometime this June, and I think the dates were exactly June 3rd
9 of 2016 to June 3, 2019, or something like that.

10 And in that -- along those lines, in this three-year
11 period, 36 months, almost exactly, they're asking for 10,206.4
12 attorney hours alone, which is where we get into the fact that
13 there were 20 attorneys -- that after they cut out apparently
14 31 percent of what they had billed, we still have 20 different
15 attorneys that are billing for work in this case.

16 And it's just -- I mean, I don't have a case for you
17 that says X number of attorneys are allowed or X aren't or this
18 is when it becomes excessive. It just seems to me that anytime
19 you've got that number of attorneys from different states
20 involved in an action that goes on for, you know, three years
21 is what they're billing for, there has to be some amount of
22 redundancy to the work. And it's almost like too many cooks in
23 the kitchen. It just --

24 THE COURT: Let me interrupt.

25 MS. PENNYCUFF: It seems --

1 THE COURT: Let me interrupt for just a moment
2 because she has indicated that the defendants also had a large
3 number of attorneys working on this case. So what is your
4 response to that?

5 MS. PENNYCUFF: My response to that is, one, I just
6 became involved in this case a few months ago, but I was
7 actually shocked by that when I heard it. And I would very
8 much like to know how they're coming up with that number
9 because we discussed it amongst us before we filed our
10 response, and I think we -- we figured out, you know, there
11 were like three main attorneys that handled the case, and then
12 people come and go, so there were some others, and we figured
13 about five attorneys' worth.

14 And we didn't -- I mean, we didn't discuss it in any
15 depth because I have no idea where they're coming up with the
16 20 attorneys. And if they're correct and I'm wrong or I --
17 there's something I don't know, I apologize. But I was stunned
18 when plaintiffs' counsel indicated that we had 20 attorneys
19 working on this case. I just don't know where they're coming
20 up with the number.

21 And like I said, not knowing we would be having this
22 discussion about an allegation of 20 attorneys here, we amongst
23 ourselves had a discussion here well before we filed the brief
24 in opposition to the motion, and I think we -- it was like
25 five. So that's the best answer I can give you, Your Honor. I

1 have no idea where 20 attorneys would come from.

2 THE COURT: Okay. You may go ahead.

3 MS. PENNYCUFF: Okay. So yes, in any event --

4 THE COURT: Let me put it this way, though.

5 MS. PENNYCUFF: Yes, ma'am.

6 THE COURT: Let me put it this way. At this point,
7 who were the five that you say have worked on this case?

8 MS. PENNYCUFF: I can get you that, if you can let
9 me check my e-mail. Obviously, I can get you -- I'm sorry,
10 Your Honor. I didn't know. Hang on.

11 MS. WELCH: Your Honor, this is Leecia Welch. I'm
12 happy to provide the names of the 15 attorneys that I have
13 right in front of me. We also have an e-mail from one of them
14 that says that there was a contract with five contract
15 attorneys to do document review, so that's where that five
16 comes from. I don't know their names or if there were more
17 contract attorneys --

18 THE COURT: Let's do --

19 MS. WELCH: -- but I'm happy to provide the names I
20 have.

21 THE COURT: Okay, let's do this. Let's let the
22 parties exchange that information; and if we need a hearing on
23 what the evidence is, we'll have to do that. But my hope is
24 that the parties can work together and come up with a
25 resolution of this question or at least --

1 MS. PENNYCUFF: Absolutely, we would be happy to.

2 THE COURT: Or present the evidence that each party
3 has to support how many attorneys interacted on this case.

4 MS. WELCH: And this is Leecia. I would note that
5 there are nine attorneys who entered an actual appearance. So
6 those you can find right at the top of the docket sheet for the
7 case; and then the other ones we have because they engaged in
8 the mediation sessions, along with Mark Gutchen. They're not
9 AGs, they're attorneys with the agencies. And then we have an
10 e-mail that notes the five contract attorneys doing the
11 document review. So happy to share that information with
12 Miss --

13 THE COURT: Let's go ahead and share that outside
14 this hearing; and then if you want to each present your
15 evidence, if there's still a disagreement, or let the Court
16 know what you've agreed on, we'll go from there.

17 All right. You may continue, though, with the
18 defendant -- and I would appreciate it if we let the defendant
19 talk now uninterrupted.

20 MS. PENNYCUFF: Thank you, Your Honor.

21 THE COURT: Except, of course, for interruptions by
22 the Court.

23 MS. PENNYCUFF: Of course. That's not a problem at
24 all, Your Honor.

25 Just to touch on that, just exchanging of

1 information, we would be happy to actually compare the number
2 of attorneys versus number of attorneys, so that will not be an
3 issue and we'll be happy to do that.

4 Okay. So I'll leave Mr. Dixon's time alone for now,
5 but I'd like to move to travel time. The travel time alone, by
6 our calculations, which we didn't run this through any computer
7 system or anything, it was just pen, paper, and calculator, but
8 we're coming up with right around a hundred and fifty eight
9 thousand, eight hundred and twenty-two, eighty-eight dollars in
10 travel time alone. Now, that's not travel time from the hotel
11 to the hearing location or from, you know -- or for Mr. Ammann
12 to go from his location to Jeff City or St. Louis or whatever.
13 I'm talking about air travel time, trains, driving.

14 And a couple things there. Our argument is that it
15 was not, in fact, necessary for two separate out-of-state
16 organizations, attorneys on opposite sides of the country to
17 handle this case. We believe that there were ample qualified,
18 aggressive attorneys, intelligent, able to handle the issues in
19 this case, which were basic constitutional issues, although
20 individual portions of it got a little complicated. But we
21 believe there were attorneys here that could have handled this,
22 and we didn't need attorneys from New York and California
23 converging on Missouri. And so the travel time --

24 THE COURT: And have you -- and have you identified
25 those attorneys --

1 MS. PENNYCUFF: I have not.

2 THE COURT: -- with this kind of expertise?

3 MS. PENNYCUFF: I have not, but I -- maybe I
4 overstated it, then. I'm assuming that there were. I know
5 that there are a lot of class action attorneys in Missouri.
6 And, again, this is a constitutional issue here. It's unique
7 in that it's -- a little bit unique in that it's a foster-care
8 system and psychotropic drugs, but this comes down to, you
9 know, basic common law, mostly.

10 And certainly, you know, opposite sides of the
11 country, two different organizations. And so we take issue
12 with the fact that it was necessary for that kind of travel
13 time to be required at all because we don't think that outside
14 counsel, foreign counsel was necessary, and certainly not as
15 many.

16 The other issue that we have with the travel time is
17 there's no indication in the billing records what anyone was
18 doing while they were traveling. Were they working on the
19 case, or were they sleeping for a four-hour plane ride, or were
20 they -- I mean, in one sense, yes, you're traveling, say, six
21 hours on a flight to and from. Are you working on the case at
22 all then? Are you doing something else unrelated to the case?
23 And since these are organizations, I'm not sure you're in the
24 same situation where attorneys who normally would travel --
25 would charge for that kind of travel time are where it's if I'm

1 on a plane, I can't, then, bill for another case or work on
2 another case.

3 But in any event, so we take issue with the
4 reasonableness of the travel time because we don't believe that
5 it should have been necessary, and also because there's no
6 indication in the billing records of what anyone was doing,
7 other than being, you know, en route.

8 And then our other -- oh, Sterling Analytics, if I
9 could just talk about them for one moment. I also had never --
10 I was not familiar with them, and it's my understanding that
11 this is what they do, that they -- I believe that they normally
12 review bills on behalf of someone who is going to be paying the
13 bill so that it's their thing. But I take a little bit of
14 issue with how -- after they removed some of the hours, how
15 they determined what they would, I guess, allow billing for.

16 And by that I mean, for example, they've limited the
17 number of attorneys in a telephone conference to four, whether
18 that be with outside attorneys, the Court, or interoffice
19 telecommunications, limited the number of attorneys at a
20 deposition to two, and had some other caps that seemed, one,
21 quite arbitrary, and, two, there's no indication of how they
22 chose which two attorneys they were going to allow to bill for
23 that time. For example, if there's four attorneys on a phone
24 call, that's the limit, did they pick the highest paid
25 attorneys or the lowest paid attorneys? There's just no

1 indication of how that was done.

2 And also, I appreciate the fact that they were used
3 in an effort that seems very legitimate to me, to try and
4 exercise billing judgment and cut the bill down and weed out
5 some things that -- you know, with the program or with people
6 or a spreadsheet that analytically can be removed from the
7 billing, but I also think that to some extent that that's
8 outsourcing your billing judgment that you're supposed to
9 exercise when billing a client.

10 And I guess that's really all that I have to say
11 about that. I don't have a problem if they were used, but I
12 think the fact that they were used really shouldn't be
13 something that's like a bonus point because they were used. I
14 still think that there had to be billing judgment exercised on
15 behalf of the attorneys that submitted the billing, separate
16 and apart from Sterling Analytics.

17 With regard to the hourly rates, leaving the hours
18 alone for a moment, it's, of course, their burden to
19 substantiate the hourly rates that they're requesting, and they
20 say that they're limiting it. I know we have a disagreement
21 over which year applies. I don't think in the grand scheme of
22 things that whatever cap from 2017 versus 2019 would be
23 applicable is going to be that different in this relatively
24 short period of time. But I do think that they are looking at,
25 according to them, Missouri attorneys and their rates, but

1 they're also looking at Missouri attorneys, one, that
2 participated in this Missouri attorneys weekly survey, which is
3 certainly not the -- not a large -- not the largest group of
4 attorneys. It's not a survey of anyone -- for everyone all
5 over the state, just the ones who want to participate, and
6 they're also looking at partnership rates. You know, this is
7 the highest paid attorney, this is the average highest.

8 But I believe that the case law indicates in class
9 action cases, plaintiffs' counsel doesn't get necessarily the
10 highest rates in the area because plaintiffs aren't entitled to
11 the best attorneys for their case. They would be entitled
12 under the Civil Rights Act to attorneys that -- qualified
13 attorneys, competent attorneys, obviously, but not necessarily,
14 you know, the hourly rate of a partner at a big firm or someone
15 with 40 years of experience or that kind of thing.

16 So that's the issue that I have with the rates. I
17 think, you know, you're coming to Missouri, you need to use
18 Missouri rates, and you also don't get to use, then,
19 partnership rates because if this were -- if these plaintiffs
20 were a regular case, if this were a regular basis, the
21 plaintiff would not necessarily be entitled to that or wouldn't
22 be able to afford that and wouldn't pay that.

23 And then we come to the volume discount.

24 THE COURT: Let me --

25 MS. PENNYCUFF: I'm sorry.

1 THE COURT: Let me stop here for a moment and go
2 back to the rates issue.

3 MS. PENNYCUFF: Yes.

4 THE COURT: So if not *Missouri Lawyers Weekly*, if
5 that's not a good tool -- I thought you also had cited to that,
6 but --

7 MS. PENNYCUFF: We had.

8 THE COURT: -- if that's not a good tool, what is?
9 What have you cited to that's a better tool?

10 MS. PENNYCUFF: We haven't cited to anything that's
11 a better tool, and the reason for that is that seems to be -- I
12 don't think it's a good tool, but it may be the only one that
13 we have, quite frankly.

14 There are consumer lawyer publications that survey
15 consumer lawyers that I know about. Nothing would really apply
16 in this case. So if it's all that we have to look at, if we
17 have to look at something, and I think we do, is the *Missouri*
18 *Lawyers Weekly*, that's what we look at. But I do think the
19 Court needs to keep in mind, though, that the number of lawyers
20 that respond to that survey, it's not a large -- compared to
21 the number of lawyers in Missouri, it's not a large number.
22 And there may be reasons that I do not know and can't cite to
23 you, but there may be reasons some attorneys respond to those
24 surveys and some don't.

25 And I do know, I do remember, and I have to look

1 again, but I know as far as the paralegals go or the paralegal
2 professionals that responded, I think it was a freakishly low
3 number of paralegals that -- at least in the 2017 that I looked
4 at, it was something like maybe 20 or 30 or 40. It was a very
5 low number.

6 So that's why I -- I don't have a better comparison
7 or I don't have a better, you know, weight or scale to give to
8 the Court, but I do think there needs to be some consideration
9 that that's -- it's useful in that we need -- probably maybe
10 have to use it, but the weaknesses there should also be
11 considered.

12 THE COURT: What about cases, judges who have set
13 fees? That's another place to look.

14 MS. PENNYCUFF: Right. And if we're speaking about,
15 for example, hourly rates for attorneys, because I know that
16 some of the attorneys on plaintiffs' side have been awarded,
17 and some quite recently in other cases, certainly hourly rates,
18 I guess what I have to say about that is it's -- first of all,
19 it would be a few, very few cases, because, obviously, the
20 attorneys aren't into every case. And then also --

21 THE COURT: No, I'm not talking about these
22 attorneys.

23 MS. PENNYCUFF: Okay.

24 THE COURT: That certainly is --

25 MS. PENNYCUFF: Oh, their hourly rates?

1 THE COURT: Although that is certainly a relevant
2 issue --

3 MS. PENNYCUFF: Right.

4 THE COURT: -- but the question of hourly rates.
5 There's lots of cases that routinely come down out of district
6 court --

7 MS. PENNYCUFF: Right.

8 (Unintelligible cross-talking.)

9 THE COURT: -- for attorneys' fees.

10 MS. PENNYCUFF: Right, allowing certain --

11 (Unintelligible cross-talking.)

12 THE COURT: Can you point to any of those that
13 challenge this?

14 MS. PENNYCUFF: I'm looking because I don't recall
15 off the top of my head.

16 We didn't talk about in our -- we didn't cite to
17 anything in our brief that said, you know, like, for an
18 example, and this is just taken out of the air, \$400 is
19 reasonable or \$300 -- or this court found that the attorneys in
20 that case were entitled to 375.

21 But what we did talk about is in a couple of cases,
22 what the judges in other cases like *St. Louis Effort for AIDS*,
23 *Albright*, *Comas* I think is in here, and what the judges seemed
24 to consider. And that's where we kind of developed the whole,
25 you know, we're looking at average Missouri rates for the

1 attorneys in Missouri, not necessarily the highest rates per
2 hour. So it was more not the number that the courts picked in
3 those cases, but kind of the thought processes and the
4 considerations that went into those numbers.

5 THE COURT: Okay. And so if I review these three,
6 I'm going to see those cases, and that's what you're relying
7 on. I realize you don't have the burden of proof here.

8 MS. PENNYCUFF: No, I understand, Your Honor.
9 (Unintelligible cross-talking.)

10 THE COURT: -- everything in front of me that I need
11 to consider.

12 MS. PENNYCUFF: I believe I'm -- I'm looking at Page
13 5 of our response, 5 and 6 is where we've talked about that in
14 there. And it talks about reasons to reduce the hourly rate
15 and those things, yes.

16 THE COURT: Okay. All right. Go ahead.

17 MS. PENNYCUFF: Okay. So talked about that. Hourly
18 rate. Number of hour --

19 Oh, the volume discount. Quite honestly, they're
20 correct in that the 50 percent comes from nowhere. It just
21 comes from nowhere. There's no case that I can point to that
22 says, oh, a 50 percent reduction was allowed here so it should
23 be allowed here.

24 It's just -- again, that's where we get into the
25 total amount of the fee request, and we set that out in our

1 response. If you take out all of Mr. Dixon's time and if you
2 reduce their hourly rates pursuant to the table that we
3 provided, if we capped one and then take a reduction -- a 25
4 percent reduction I think is what we argued about for everyone
5 else, they're still coming up for a three-year period of
6 time -- and not that this was not a lot of work. It was. It's
7 an institutional reform case. It's unique in the issues that
8 come up, again, with regard to foster care and psychotropic
9 meds, and it's certainly an important case. There's -- you
10 know, we're talking about children who are in the custody of
11 the state. Of course, that's very important, and a lot of work
12 went into it on both sides. But for three years, they're
13 asking for \$4 million, which seems like -- just to look at that
14 just seems kind of shocking to me.

15 So we just said, you know, if you did this, if we
16 took out Mr. Dixon's hours, and then if you reduce the hourly
17 rates that they're requesting, if you take out all of the
18 travel time that we say, you know, is excessive because really
19 we didn't need attorneys from New York and California, then
20 we're still left with this number. And if we reduce it, I
21 think the reduction comes down to, if you did the 50 percent
22 reduction we argued for, \$1.3 million, roughly.

23 And it's not that the percentage matters so much
24 there, we're trying to come up with, you know, what's three
25 years' worth, and this case, and the number of time -- and the

1 fact that, again, what would a private client do with this kind
2 of a bill? Even if you had a lot of private clients, that's an
3 astounding amount of money, it's an astounding amount of hours,
4 it's an astounding amount of attorneys. And no one -- at some
5 point, it's even ridiculous to even ask that question because
6 no one would. It would not happen.

7 THE COURT: Okay.

8 MS. PENNYCUFF: So what would be the fair amount
9 to --

10 THE COURT: Let me stop you there, because I asked
11 them about other awards that they've gotten in court that are
12 obviously higher than this.

13 MS. PENNYCUFF: Right. Exactly.

14 THE COURT: Tell me an award -- tell me an award in
15 a similar case that you've identified around the country -- I
16 know this is a unique case, so it may not be right here in
17 Missouri. Tell me a similar case or -- and, again, a
18 for-profit case, a for-profit or not-for-profit, tell me a
19 similar case with these kind of evidentiary issues and --

20 MS. PENNYCUFF: I don't know that I could do that
21 off the top of my head, and I don't know that I could do that
22 if you gave me time to research it, because, again, it's con
23 law, it's constitutional law, and so you're not going to
24 have -- one, we're not really going to have any similar class
25 actions that are private; and if we did, those would involve

1 money. I'm sure, instead of talking about fees coming out of
2 the -- you know, out of someone's checkbook, essentially, we
3 would be talking about a percentage of the pot going to the
4 attorneys.

5 So I don't know that it -- I don't have one for you,
6 and if you gave me time, I don't know that I could.

7 THE COURT: Okay. And those involve courts that are
8 approving it, right?

9 MS. PENNYCUFF: Exactly.

10 THE COURT: If there's a class action involving con
11 law, there's a court out there that has said this is
12 reasonable. Do you have anything that says absolutely 1.3
13 million is kind of the top that we could ever --

14 MS. PENNYCUFF: No, I don't. And I don't think that
15 they could come up with anything where a court said X is a
16 bottom or X is reasonable. It's just so unique. I mean,
17 it's -- not the case itself, but I mean, each case is so
18 unique.

19 And at the end of the day, you also, I do think,
20 have to look at who is paying the bill, what can that person,
21 the state, whoever, what can they afford, what can they
22 reasonably afford to pay? And I'm not bemoaning the fact that
23 the state is broke or it's not broke or whatever, but there has
24 to be some consideration, I think, given to the fact that the
25 taxpayers of Missouri are the ones that ultimately pay whatever

1 the bill ends up being.

2 I hope I answered that question for you, Your Honor.
3 That's the best I got.

4 THE COURT: I understand it. Anything else you've
5 got on your response?

6 MS. PENNYCUFF: No, Your Honor. I would refer you
7 to our response, and that's really all I have, unless you have
8 any other questions.

9 Oh, but I do want to -- definitely if the Court
10 wants to have a comparison of the hours -- well, we don't bill
11 hourly here, but number of attorneys that worked on this case,
12 we can definitely do that, and I absolutely would like to get
13 that done quickly, as opposed to later.

14 THE COURT: Okay. Well, for sure communicate with
15 opposing party to see if it can be done consensually. That
16 would be easiest.

17 MS. PENNYCUFF: Okay.

18 THE COURT: If not, then we'll have to find out a
19 way to resolve the dispute.

20 MS. PENNYCUFF: I'll send them an e-mail today.

21 THE COURT: I know it's been a long conference and
22 I've got a whole day of conferences scheduled. Let's see, the
23 plaintiffs may make a brief response, if you wish to.

24 MS. WELCH: Thank you, Your Honor. I want to start
25 off by responding to the issue of our use of local counsel,

1 which I think Your Honor had questions about and also were just
2 discussed. And I think part of the answer to that I have
3 already addressed. And if the question is, you know, why
4 didn't we rely on local counsel more, the answer -- the answer
5 is addressed in our papers, but I'll just highlight a few
6 aspects of that answer.

7 The first is that a huge majority of the work on the
8 case did require specialized knowledge in psychotropic
9 medications and oversight of those meds, issues around the
10 foster-care setting and how the child-welfare agency is
11 structured. And our local counsel himself in his declaration
12 has said that that's just not the type of knowledge he has, and
13 our -- the declarants that we've submitted have noted that this
14 sort of specialized knowledge is not available in the local
15 marketplace.

16 We partnered, obviously, with John Ammann, and he
17 was important to our team, but in his declaration, he also
18 notes that he had limited capacity in terms of time, given his
19 role at the law school, and that he didn't -- you know, he
20 wasn't going to be able to take on more of the work than he
21 did. That includes, you know, aspects of the investigation and
22 taking more of the depositions and those sorts of activities.

23 So we feel like we gained a lot from our partnership
24 with Mr. Ammann, but, given the need for specialized knowledge,
25 especially in the mediation context and with a lot of the

1 discovery in the case and reviewing the documents in -- you
2 know, in light of the work that needed to get done, there just
3 wasn't that knowledge on our team that was comparable.

4 And we also have declarations from Mr. Kennedy, who
5 affirmed that he didn't know anyone else among his colleagues
6 in the local community who could have done this case without
7 partnering with attorneys such as those at Children's Rights
8 and the National Center for Youth Law with substantial
9 expertise in addressing the systemic issues in the
10 child-welfare system, as well as the psychotropic meds issues.
11 That's also something that John Ammann noted.

12 He also -- Mr. Kennedy also noted that his office
13 wouldn't have been in a position to take a leading role in the
14 litigation, due to time and financial resources that were
15 required to work on this case.

16 I would also note that in our papers, we submit
17 evidence that we did work to identify other local counsel who
18 might have been able to participate more. In Paragraph 53 of
19 Miss Bartosz's declaration, she describes the work that
20 Children's Rights did in terms of outreach to try to locate
21 local counsel within St. Louis and Kansas City, but the fact
22 that she wasn't able to find anyone else besides Professor
23 Ammann and SLU.

24 Mr. Kennedy in his declaration at Paragraph 11 also
25 notes, you know, that one aspect of this case that was

1 undesirable, perhaps, for other local attorneys to work was the
2 fact that it was very expensive to litigate and risky in terms
3 of the investment of time and expert expenses that was needed.
4 Mr. Kennedy also discusses this in Paragraph 10 of his
5 declaration.

6 So I feel like we have substantial evidence in the
7 record of the efforts that we made to both identify local
8 counsel and the use of local counsel on our team, and we feel
9 like it was appropriate. I would just note that in opposition
10 to all of this, there really is no evidence submitted by the
11 defendants.

12 And another issue I want to raise has to do with the
13 rates. First of all, I think it's clear from our papers, but I
14 just want to stress the fact that we are not seeking the
15 highest rates on the scale in the *Missouri Lawyers Weekly*
16 surveys. We're not even in the top 20 statewide of the rates
17 for any of the survey years that are in evidence. So there's
18 certainly no evidence that we're seeking the top rates on the
19 scale. And I think, you know, if you look at the cases that
20 we've submitted in the brief, along with the declarations we've
21 submitted in the brief, it's very clear that we are not at the
22 top of the scale. We're nowhere near it.

23 Another issue I want to address is the suggestion
24 that we somehow outsourced our billing judgment. A couple of
25 points about that. First of all, as I noted, we engaged in

1 very rigorous billing judgment before we even submitted our
2 time notes to Sterling. We then worked with them to develop
3 reasonable rules to use to ensure that there wasn't duplication
4 of effort. We were part of the process all along.

5 And I think one of the major advantages that we were
6 able to obtain from working with Sterling is that they do this
7 for a living, and they spend their days looking at attorneys'
8 time notes, and so they are very experienced at identifying
9 practices that courts don't like: block billing, overqualified
10 task, overhead charges, inaccuracies, those sorts of things.
11 So they scrub for all of that in a way -- you know, using a
12 computer algorithm that I can't even imagine how much time as
13 attorneys it would have taken us to do the kind of equivalent
14 function that they can do because of the technology that they
15 use.

16 So I think that, you know, we're -- the AG is trying
17 to kind of penalize us for the hard work that we put into
18 exercising billing judgment, which resulted in, you know, over
19 32 percent cut in our initial amount. So, you know, I think
20 it's not well taken at all, this notion that we outsourced our
21 billing judgment.

22 THE COURT: Thank you very much. I do -- I missed
23 an issue that I wanted the defendants to address, so I would
24 like to return to this, Miss Pennycuff.

25 MS. PENNYCUFF: Yes, ma'am.

1 THE COURT: You've complained about block billing,
2 vague entries. Have you identified those, or how will the
3 Court find out what it is you're referring to?

4 MS. PENNYCUFF: Well, as far as vagueness goes, the
5 main thing I was talking about there was that whole stakeholder
6 thing. There's all of these references to the stakeholders,
7 and they've indicated here why they didn't name people, which I
8 understand, specifically, but they also -- stakeholder is just
9 this generic word that's thousands and thousands and thousands
10 of dollars worth of time spent working with them. And so those
11 are the main vague entries that I'm talking about, and those
12 are just replete throughout the billing.

13 And then also there's, you know, conferences.
14 Conference with X about -- you know, or conference with this
15 person or preparing for a deposition, or -- it's just that kind
16 of thing kind of just generically all the way through, but the
17 main issue there was with the whole stakeholders. Nobody on
18 our side, defendants, counsel at the agencies, anybody knew
19 what stakeholders were, and we still kind of really don't.

20 And then as far as block billing, it wasn't a
21 significant enough issue. Because their billing records, I
22 think, were 500 pages in very small font, and, again, we didn't
23 put them through any kind of computer system or anything. We
24 looked at them, just eyes on paper. And just some instances
25 where you've got people billing for, you know, preparing for

1 deposition, writing memo. So that wasn't really the main
2 thrust of our complaint was the block billing, it was more the
3 vagueness of the entries with regard to conferences and
4 communications, preparing, and then the stakeholder issue.

5 THE COURT: Okay. All right. I think that that is
6 all I have for the parties. I will take the matter under
7 advisement.

8 Again, I thank you and I thank Jill Morris, the head
9 of our mediation program, that this case was able to be
10 settled. You have both presented good arguments for your
11 clients throughout the case and here at this hearing, and I
12 look forward to a final resolution of the case. Thank you very
13 much.

14 (Teleconference adjourned.)

15 - - -

16 - - -

17 CERTIFICATE

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.

20

21

22 November 7, 2019

23

24

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/s/ _____
Kathleen M. Wirt, RDR, CRR
U.S. Court Reporter