

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

CINDY RODRIGUEZ, STEPHEN GIBBS, ) PAULA PULLUM, YOLANDA CARNEY, ) JACQUELINE BRINKLEY, CURTIS ) JOHNSON, FRED ROBINSON, et al. )		
Plaintiffs,	)	Case No. 3:15-CV-01048
	)	
v.	)	
	)	(Class Action)
PROVIDENCE COMMUNITY ) CORRECTIONS, INC., et al. )	)	
	)	
Defendants.	)	
	)	

**MEMORANDUM IN SUPPORT OF RULE 54(d) MOTION FOR  
ATTORNEYS' FEES AND LITIGATION EXPENSES**

Plaintiffs respectfully submit this memorandum of law in support of their Rule 54(d) motion for attorney’s fees and litigation expenses on behalf of Civil Rights Corps and Attorney Kyle Mothershead (collectively “Class Counsel”). As stated in the accompanying motion, pursuant to the Settlement Agreement Class Counsel ultimately seeks the following total compensation in fees, plus compensation of any reasonable out-of-pocket litigation expenses:

- A. Civil Rights Corps: \$336,200
- B. Kyle Mothershead: \$24,115

However, in accordance with the Court’s January 2, 2018 order, this motion seeks immediate compensation of only half of the agreed amounts, plus reasonable out-of-pocket litigation expenses, as well as preliminary approval of the Settlement Agreement fees subject to

availability of funds after completion of the claims process. (ECF 197, Order, at 3). Thus, Plaintiffs seek the following immediate compensation for Class Counsel:

- C. Civil Rights Corps: \$169,713.53.
  - a. Attorney's Fees: \$168,100.00.
  - b. Litigation Expenses: \$1,619.53.
- D. Attorney Kyle Mothershead: \$12,057.50.
  - a. Attorney's Fees: \$12,057.50.
  - b. Litigation Expenses: None.

In support of Class Counsel's claim, Plaintiffs respectfully submit the following:

**I. FRCP 23(h) Authorizes the Court to Award Attorneys' Fees and Costs to Class Counsel**

In a successful class action resulting in a financial recovery, FRCP 23(h) permits the Court to grant a Rule 54(d) motion for reasonable attorney's fee and compensation of out-of-pocket litigation costs "that are authorized by law or by the parties' agreement." FRCP 23(h). Here, the Settlement Agreement specifically authorizes a claim for attorney's fees in the amounts of \$336,200 (Civil Rights Corps) and \$24,115 (Kyle Mothershead), plus reasonable out-of-pocket expenses. (ECF 192-1, Revised Settlement Agreement, at 22 – 25; ECF 192-8, Attorney's Fee Schedule). Thus, so long as the fees authorized by the Settlement Agreement are reasonable, they should be awarded. *Robinson v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 12071, \*2 – 3 (S.D. Ohio 2005).<sup>1</sup>

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<sup>1</sup> In addition, 42 U.S.C. § 1988 authorizes an award of attorney's fees and costs for prevailing parties in actions brought under 42 U.S.C. § 1983, and 18 U.S.C. § 1964(c) authorizes the same for prevailing parties in actions brought under the Racketeering Influenced Corrupt Organizations Act ("RICO"). *See* 42 U.S.C. § 1988; 18 U.S.C. 1964(c). Under § 1988, "[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) (citation omitted).

## II. The Attorneys' Fees Requested Are Reasonable

A FRCP 23(h) attorney's fee claim can be based on either the "percentage-of-the-fund" or the "lodestar" method. *In re Southeastern Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70167, \* 14 – 15 (citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6<sup>th</sup> Cir. 1996); *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 516 (6<sup>th</sup> Cir. 1993)). The percentage-of-the-fund method is preferred in the Sixth Circuit, and courts typically allow an award of at least 25% of the fund. *In re Southeastern Milk*, at \*14 – 16 (citing *Stanley v. United States Steel Company*, 2009 U.S. Dist. LEXIS 114065 (E.D. Mich. 2009); *Bessey v. Packerland Plainwell, Inc.*, 2007 U.S. Dist. LEXIS 79606, \*4 (W.D. Mich. 2007)). Meanwhile, the lodestar method is based on multiplying counsels' reasonable hours by counsels' reasonable hourly rate. *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 910 (S.D. Ohio 2001) (citing *Hensley*, 461 U.S. at 433).

In this case, the parties determined that the more reasonable method of determining fees was the lodestar method, given that the bulk of the work in the case was performed by attorneys working at non-profit entities and given the parties' desire to maximize the amount of the fund that would be distributed to the class of impoverished probationers. The parties agreed that the attorneys should be fairly compensated for the work performed, but that larger distributions based on a typical percentage of the amount recovered would be unnecessary and would be inconsistent with the social change mission of the non-profit organizations involved. The parties also determined that, given the early settlement of this case — prior to even conducting discovery, let alone proceeding with costly discovery or trial — would not warrant a typical percentage of the fund award. To determine the fees contemplated by the Settlement Agreement, Class Counsel tallied their hours worked up to the point of filing the agreement, and then estimated the prospective hours that would be necessary to complete this litigation. Class

Counsels then calculated lodestars based on agreed hourly rates, resulting in the agreed-upon fees of \$336,200 (Civil Rights Corps) and \$24,115 (Kyle Mothershead).

Under the factors utilized by the Sixth Circuit to assess the reasonableness of Rule 23(h) claims, the fees contemplated in the Settlement Agreement are more than reasonable. The Sixth Circuit uses the following factors to assess Rule 23(h) awards:

(1) the value of the benefit rendered to the plaintiff class . . . ; (2) the value of services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides."

*In re Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at \*17 (citing *Bowling*, 102 F.3d at 780).

Here, all of the Sixth Circuit reasonableness factors strongly support Class Counsel's claims.<sup>2</sup> As to the first factor, the value of the benefit rendered to the plaintiff class, Class Counsel have obtained significant success for the plaintiffs, including repayment of all debts paid by the class, and a significant premium payment above and beyond the return of all probation fees paid to compensate them for violations of their civil rights. In addition, Class Counsel obtained injunctive relief that will prevent plaintiffs from being subjected to illegal private probation practices in the future. Therefore, this factor strongly supports Class Counsel's claim.

As to the second factor, the value of the services on an hourly basis, "[C]ourts use as a guideline the prevailing market rate . . . that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Van Horn v.*

*Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 498 – 499 (6<sup>th</sup> Cir. 2011) (quoting

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<sup>2</sup> The vast bulk of the work in this case was performed by Class Counsel Elizabeth Rossi and Alec Karakatsanis. Attorneys Rossi and Karakatsanis were employed at the non-profit Equal Justice Under Law (which Karakatsanis co-founded) for much of the duration of this case, before leaving to found Civil Rights Corps in September 2016. Civil Rights Corps has agreed that Equal Justice Under Law may be compensated for the work that Rossi and Karakatsanis performed while employed there.

*Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 618 (6<sup>th</sup> Cir. 2007)). Here, Class Counsel requests hourly rates that are likely *below* market value. Class Counsel claims the following hourly rates:

- 1) Alec Karakatsanis: \$450 per hour. (Ex. A, Karakatsanis Declaration).
- 2) Elizabeth Rossi: \$350 per hour. (Ex. B, Rossi Declaration).
- 3) Kyle Mothershead: \$350 per hour. (Ex. C, Mothershead Declaration).

As reflected by the declarations of well-regarded Nashville Attorneys David Garrison,<sup>3</sup> Tricia Herzfeld,<sup>4</sup> and David Briley,<sup>5</sup> these rates are likely below market value. (Ex. D, Garrison Decl.; Ex. E, Herzfeld Decl.; Ex. F, Briley Decl.). Indeed, Attorney Herzfeld opines, “I would expect that rates for Mr. Karakatsanis, Ms. Dharia,<sup>6</sup> and Mr. Mothershead to be \$550 an hour.” (Ex. E, Herzfeld Decl.). Thus, Class Counsel’s requested hourly rates are more than reasonable.

As to the third factor, whether the representation is on a contingency basis, Class Counsel has represented the Plaintiffs on a contingency basis and has invested substantial time into conceiving, litigating, and settling this litigation. Class Counsel is also committed, going forward, to pursuing the interests of the Class throughout the Class Administration process, which will likely involve significant additional time.

As to the fourth factor, society’s interest in rewarding Class Counsel, 42 U.S.C. § 1988 reflects society’s significant stake in ensuring that civil rights lawyers working on behalf of the poor and marginalized are compensated for this type of civil rights victory in order to provide systemic incentives for attorneys to take these kinds of claims on behalf of people who otherwise would likely not have the means to hire their own counsel.

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<sup>3</sup> Of the Nashville firm Barrett, Johnston, Martin, and Garrison, LLC.

<sup>4</sup> Of the Nashville firm Branstetter, Stranch, & Jennings, LLC.

<sup>5</sup> Of the Nashville firm Bone McAllester Norton, PLLC.

<sup>6</sup> Ms. Dharia is another Civil Rights Corps attorney who has performed some work on this case since the filing of the Settlement Agreement. Pursuant to the Agreement, Civil Rights Corps will not seek any compensation for those fees unless money remains in the Settlement Fund after distribution.

As to the fifth factor, the complexity of the litigation, civil rights litigation in the emerging field of collection of court debts, privatized probation reform, and money bail systems is extremely complex and novel, and litigation of any federal class action calls for a high degree of skill and competence. Counsel from Civil Rights Corps has been at the forefront of litigating these complex issues all over the country, developing significant experience in the complex procedural and substantive issues necessary to successful litigation.<sup>7</sup> The hours claimed by Class Counsel are more than reasonable, and were necessary in order to prevail on plaintiffs' claims, reach the settlement agreement entered into by the parties, and effectuate that settlement. (Ex. A – C, Class Counsel Declarations). Moreover, over half of the hours that were originally contemplated as “prospective” have at this point already been worked.<sup>8</sup> Therefore, this factor supports Class Counsel's claim.

As to the sixth factor, the professional skill and standing of counsel, Civil Rights Corps is the leading nationwide civil rights organization in the area of constitutional civil rights litigation reforming privatized probation and money bail systems,<sup>9</sup> and Mr. Mothershead is a well-regarded Middle District attorney with his own track record of success in litigating federal civil

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<sup>7</sup> See, e.g., Michael Zuckerman, Criminal Injustice, Harvard Magazine (October 2017), available at <http://harvardmagazine.com/2017/09/karakatsanis-criminal-justice-reform> (summarizing the work of Attorney Karakatsanis and Civil Rights Corps around the country in similar cases).

<sup>8</sup> ECF 192-1, Settlement Agreement, at 20; ECF 192-8, Fee Schedule, at 1. Since filing the agreement, Civil Rights Corps has expended significant additional time on this case: 46.4 additional hours by Attorney Karakatsanis (\$20,880), 25.9 hours for Attorney Rossi (\$9,065), 32.3 hours by Attorney Charles Gerstein (\$11,305), 9 hours by Attorney Premal Dharja (\$4,950), and 19.6 hours by investigator Clarissa Kimmy (\$1,960). Thus, Civil Rights Corps has already legitimately earned \$48,160 of the contemplated \$80,000 in prospective fees. Likewise, Mr. Mothershead has already worked an additional 17 of the contemplated 30 prospective hours, earning \$5,950 out of a contemplated \$10,500 in prospective fees. (Ex. C, Mothershead Declaration; Ex. C-1, Mothershead Time Log).

<sup>9</sup> E.g., Richard A. Opel Jr., Defendants Can't be Jailed Solely Due to Inability to Post Bail, Judge Says, N.Y. Times, July 17, 2017, available at <https://www.nytimes.com/2017/07/17/us/chicago-bail-reform.html>; Meagan Flynn, In Historic Decision, Federal Judge Says Harris County Bail System is Unfair to the Poor, Houston Press, April 28, 2017. <http://www.houstonpress.com/news/federal-judge-says-harris-county-bail-system-is-unfair-to-poor-defendants-9397124>; Michael Hardy, In Fight Over Bail's Fairness, a Sheriff Joins the Critics, N.Y. Times, March 8, 2017, available at <https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html>.

rights claims. (Ex. C, Mothershead Declaration). Moreover, the defense counsel adversaries involved in this case are all highly qualified and well-regarded in this District.

Thus, although this case settled at a relatively early stage without significant financial expenditures on discovery or trial, all six factors support the reasonableness of the claimed attorney's fees. Indeed, the total fees for all present and former Class Counsels contemplated in the Settlement Agreement, \$1.381 million, is significantly smaller than what could be claimed by requesting 25% of the common fund under the default "percentage-of-the-fund" method. *See In re Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at \*16. Thus, the total fees contemplated in the Settlement Agreement are reasonable, and should be approved. That said, in light of the Court's preliminary approval order, and to ensure the availability of funds for all class claimants, this motion seeks the immediate disbursement of only half the fees, or \$168,100.00 (Civil Rights Corps) and \$12,057.50 (Mr. Mothershead). (ECF 197, Order, at 3).

### **III. Litigation Expenses**

The parties' agreement authorizes the compensation of Class Counsel's expenses from the settlement fund, and compensation for Counsel's travel expenses is permitted under 42 U.S.C. § 1988 within the discretion of the Court. *Anderson v. Wilson*, 357 F. Supp.2d 991, 1000 (E.D. Ky. 2005). Here, it is apparent that no local attorney or firm was prepared to undertake to dismantle the illegal private probation scheme at issue in this case, and it was thus necessary for Civil Rights Corps and former counsel Equal Justice Under the Law to step in. As such, Class Counsel's out-of-pocket travel expenses should be compensated. Here, Civil Rights Corps's travel expenses total \$1,619.53. (Ex. A, Karakatsanis Declaration; Ex. A-2, CRC Expenses). Meanwhile, Mr. Mothershead claims no litigation expenses.

## CONCLUSION

Based on the foregoing, Plaintiffs respectfully ask the Court to authorize the immediate compensation of Class Counsel from the settlement fund in the amount of **\$169,713.53 (Civil Rights Corps)** and **\$12,057.50 (Kyle Mothershead)**, and to grant preliminary approval to the full compensation contemplated by the Settlement Agreement subject to the availability of funds once the claims process is complete.

Respectfully submitted,

*s/ Kyle Mothershead*

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<sup>10</sup> Admitted solely to practice law in Maryland; not admitted in the District of Columbia. Practice is limited pursuant to D.C. App. R. 49(c)(3).

## CERTIFICATE OF SERVICE

I hereby certify that on **February 3, 2018** a copy of the foregoing **Memorandum in Support of Motion for Attorney's Fees and Litigation Expenses** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, including:

- Attorneys for Pathways Community Corrections, Inc. and the Individual Defendants: Lisa Rivera, Kathryn Walker, and David Esquivel of Bass, Berry, & Sims, PLC.
- Attorneys for Pathways Community Corrections, Inc.: Manny Abascal and Julie Gerchik of Latham & Watkins, LLP.
- Attorneys for Rutherford County: Josh McCreary, Evan Cope, and Blake Garner of Hudson, Reed, & McCreary, PLLC.

s/ Kyle Mothershead  
Kyle Mothershead