

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

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| CINDY RODRIGUEZ, STEPHEN GIBBS,) PAULA PULLUM, YOLANDA CARNEY,) JACQUELINE BRINKLEY, CURTIS) JOHNSON, FRED ROBINSON, et al.) | | |
| Plaintiffs,) | | Case No. 3:15-CV-01048 |
| v.) | | |
| PROVIDENCE COMMUNITY) | | (Class Action) |
| CORRECTIONS, INC., et al.) | | |
| Defendants.) | | |
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**MEMORANDUM IN SUPPORT OF RULE 54(d) MOTION FOR
ATTORNEYS' FEES AND LITIGATION EXPENSES**

Former counsel for Plaintiffs, Baker Donelson Bearman Caldwell & Berkowitz PC (“Baker Donelson”) respectfully submits this memorandum of law in support of their Rule 54(d) motion for attorney’s fees and litigation expenses. As stated in the accompanying motion, pursuant to the Settlement Agreement Baker Donelson ultimately seeks the following total compensation in fees, plus compensation of any reasonable out-of-pocket litigation expenses: \$185,920 in attorney’s fees, and \$5,546.56 in litigation expenses.

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 total amount of Settlement Agreement fees and expenses, subject to availability of funds after completion of the claims process. (ECF

197, Order, at 3). Thus, Baker Donelson seeks the following immediate compensation: \$92,960 in attorney's fees, and \$2,773.28 in litigation expenses.

In support of its claim, Baker Donelson respectfully submits the following:

I. FRCP 23(h) Authorizes the Court to Award Attorneys' Fees and Costs to Baker Donelson

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 \$190,000 to Baker Donelson, 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).¹

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 (6th Cir. 1996); *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 516 (6th 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

¹ 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).

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 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. 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, Baker Donelson tallied their hours worked up to the point of its withdrawal from the case. Baker Donelson then calculated lodestars based on agreed hourly rates, resulting in the agreed-upon fees of approximately \$190,000 to Baker Donelson.

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 Baker Donelson's claims. As to the first factor, the value of the benefit rendered to the plaintiff class, Baker

Donelson has 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, Baker Donelson obtained injunctive relief that will prevent plaintiffs from being subjected to illegal private probation practices in the future. Therefore, this factor strongly supports Baker Donelson'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 (6th Cir. 2011) (quoting *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 618 (6th Cir. 2007)). Here, Baker Donelson requests hourly rates that are likely *below* market value. Baker Donelson claims the following hourly rates for its attorneys between \$140 and \$400 per hour. (Ex. A, White Declaration).

As reflected by the declarations of well-regarded Nashville Attorneys David Garrison,² Tricia Herzfeld,³ and David Briley,⁴ filed in support of Civil Rights Corp. (“CRC”)’s Motion to Authorize Compensation of Class Counsel’s Attorneys’ Fees and Litigation Expenses, these rates, which are consistent with and less than those charged by CRC, are likely below market value. Indeed, Attorney Herzfeld opines, “I would expect that rates for Mr. Karakatsanis, Ms. Dharia, and Mr. Mothershead to be \$550 an hour.” Baker Donelson’s rates, the highest of which is \$400 per hour, are considerable less than this amount. Thus, Baker Donelson’s requested hourly rates are more than reasonable.

² Of the Nashville firm Barrett, Johnston, Martin, and Garrison, LLC.

³ Of the Nashville firm Branstetter, Stranch, & Jennings, LLC.

⁴ Of the Nashville firm Bone McAllester Norton, PLLC.

As to the third factor, whether the representation is on a contingency basis, Baker Donelson assisted Class Counsel in this matter, who represented the Plaintiffs on a contingency basis and along with Baker Donelson have invested substantial time into conceiving, litigating, and settling this litigation. Baker Donelson has not received hourly or other compensation to date for its efforts in this matter.

As to the fourth factor, society's interest in rewarding Baker Donelson, 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.

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 Baker Donelson have repeatedly litigated these complex issues in federal courts in Alabama and Tennessee, developing significant experience in the complex procedural and substantive issues necessary to successful litigation. The hours claimed by Baker Donelson 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. Therefore, this factor supports Baker Donelson's claim.

As to the sixth factor, the professional skill and standing of counsel, Baker Donelson is amongst the largest and most prestigious law firms in the country, and has litigated numerous cases in area of constitutional civil rights litigation. Baker Donelson has a proven track record of

success in litigating federal civil rights claims. 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 Baker Donelson attorneys 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 \$92,960 in attorney's fees, and \$2,773.28 in litigation expenses. (ECF 197, Order, at 3).

III. Litigation Expenses

The parties' agreement authorizes the compensation of Baker Donelson'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, several of the Baker Donelson attorneys working to dismantle the illegal private probation scheme at issue in this case worked out of the firm's Memphis office. Additionally, even the attorneys working out of Baker Donelson's Nashville office were required to travel repeatedly to Murfreesboro for this matter. As such, Baker Donelson's out-of-pocket travel expenses should be compensated. Here, Baker Donelson's litigation expenses, the majority of which relate to travel, total \$5,546.56. (Ex. A, White Declaration). 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 of these expenses, or \$2,773.28 in litigation expenses.

CONCLUSION

Based on the foregoing, Baker Donelson respectfully asks the Court to authorize immediate compensation from the settlement fund to Baker Donelson in the amount of **\$92,960 in attorney's fees, and \$2,773.28 in litigation expenses**, 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/ Jonathan Cole

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CERTIFICATE OF SERVICE

I hereby certify that on **February 20, 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/ Matthew G. White

Matthew G. White

3. I have reviewed the billing records of Baker Donelson in this matter for entries attributable to the resolution of the claims at issue in this litigation up to the point of its withdrawal from the case.

4. In the exercise of reasonable billing judgment, I have identified a total of 689 hours devoted by our attorneys to this work, including without limitation, document review, communications with clients, with co-counsel and with opposing counsel, document drafting, and hearing preparation and attendance.

5. Pursuant to the Settlement Agreement reached by the parties, Baker Donelson ultimately seeks the following total compensation in fees, plus compensation of any reasonable out-of-pocket litigation expenses: \$185,920 in attorney's fees, and \$5,546.56 in litigation expenses, plus preliminary approval of the total Settlement Agreement fees, subject to availability of funds after completion of the claims process.

6. In accordance with the Court's January 2, 2018 order, and to ensure that funds are available for all class claimants, the accompanying motion seeks immediate compensation of only half of the agreed amounts, plus reasonable out-of-pocket litigation expenses. (ECF 197, Order, at 3). Thus, Baker Donelson seeks the following immediate compensation: \$92,960 in attorney's fees, and \$2,773.28 in litigation expenses.

This the 20th day of February, 2018, I declare under penalty of perjury that the foregoing is true and correct.

s/ Matthew G. White
MATTHEW G. WHITE