

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF KANSAS  
KANSAS CITY DIVISION**

**M.B.** and **S.E.** through their next friend )  
Katharyn McIntyre, **R.M.** through his next )  
friend Allan Hazlett, **C.A.** through his next )  
friend Allan Hazlett, **E.B.** through his next )  
friend Allan Hazlett, **J.P.** through her next )  
friend Allan Hazlett, **Z.Z.** through her next )  
friend Ashley Thorne, and **M.A.** through his )  
next friend Ashley Thorne, for themselves and )  
those similarly situated, )

Case No. 2:18-cv-02617-DDC-GEB

**Plaintiffs,**

**v.**

**Laura Howard** in her official capacity as )  
Kansas Department for Children and Families )  
Secretary, **Dr. Lee A. Norman** in his official )  
capacity as Kansas Department of Health and )  
Environment Secretary, and **Laura** )  
**Howard** in her official capacity as Kansas )  
Department for Aging and Disability Services )  
Secretary, )

**Defendants.**

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
ATTORNEYS' FEES AND EXPENSES**

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## **I. INTRODUCTION**

After a year of investigation, almost two years of litigation, and intensive settlement negotiations, the parties have reached a groundbreaking settlement that promises to transform Kansas's foster care system for the benefit of the state's children in foster care. If granted final approval by the Court, the settlement will vastly improve the health and welfare of approximately 7,000 children now in foster care, and thousands more children who will move through the system going forward.<sup>1</sup> The settlement requires Defendants to remedy alleged systemic constitutional and statutory deficiencies in the Kansas foster care system, including through specific actions such as ending the use of dangerous "night-to-night" and short-term housing and agency office stays; dramatically reducing the extremely high number of housing moves imposed on children in foster care; and providing medically necessary mental health services, including trauma screening. The settlement includes a clear, phased-in, measurable path to final exit and dismissal; a respected third-party Neutral to assess, validate, and report on Defendants' performance; and an alternate dispute resolution process and respected Mediator, to minimize litigation while the Court retains jurisdiction to enforce Defendants' obligations.

This successful outcome would not have been possible without Plaintiffs' steadfast and efficient efforts to investigate, litigate, and negotiate the settlement in this case. Plaintiffs have collectively invested thousands of hours of legal work and thousands of dollars of expenses to achieve an outstanding result for the Class, all reasonably expended to achieve an outstanding result.

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<sup>1</sup> In its order granting preliminary approval of the settlement, the Court certified for settlement purposes a class of "[a]ll children who are now, or in the future will be, in the protective custody of the Department for Children and Families pursuant to Kan. Stat. Ann. § 38-2242(c)(1)" (the "Class"). ECF No. 140 at 3.

The parties have agreed that, as prevailing parties, Plaintiffs are entitled to an award of reasonable attorneys’ fees and expenses, and that the Court should determine the appropriate amounts. *See* Settlement Agreement, ECF No. 134-1 (“Settlement”), § 1.4. Plaintiffs present this fully supported initial application for fees and expenses through the date of the unopposed preliminary approval motion.<sup>2</sup> This application includes: (1) a reasonable lodestar figure, based on reasonable local rates, reasonable hours expended, and a rigorous application of billing judgment; and (2) reasonable reimbursable expenses. Plaintiffs respectfully request a total award of attorneys’ fees in the amount of \$3,753,896.50, and expenses in the amount of \$128,476.01, for the period of November 16, 2017 through July 27, 2020.<sup>3</sup>

## **II. STATEMENT OF FACTS**

### **A. The Systemic Problems and Complexities of Kansas’s Child Welfare and Mental Health Delivery Structures**

Plaintiffs filed this lawsuit to remedy two complex, interrelated, and systemic problems impacting children in Kansas foster care, as detailed in the Amended Complaint. *See* ECF No. 59-1 (“Am. Compl.”). First, Defendants subject children in Kansas foster care to extreme housing disruption—also known as churning—by needlessly moving them from placement to placement. *Id.* ¶ 2. Children routinely move from placement to placement more than fifteen or twenty times, and some even more than fifty or one hundred times—rendering them essentially homeless. *Id.* On top of this placement instability, children in Kansas foster care routinely experience “night-to-night” or short-term placements, and are regularly forced to sleep in dangerous, inappropriate

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<sup>2</sup> ECF No. 139 (July 27, 2020). Plaintiffs respectfully reserve the right to file additional motions for reasonable attorneys’ fees and expenses for work performed following an order of final approval of the settlement, if granted.

<sup>3</sup> Each firm submits its own declaration with attached exhibits as separate docket entries. *See* Declaration of Ira Lustbader on behalf of Children’s Rights (“CR”) (“Lustbader Decl.”); Declaration of Leecia Welch on behalf of the National Center for Youth Law (“NCYL”) (“Welch Decl.”); Declaration of Teresa Woody on behalf of Kansas Appleseed Center for Law and Justice (“Kansas Appleseed”) (“Woody Decl.”); Declaration of Loretta Burns-Bucklew (“Burns-Bucklew Decl.”); and Declaration of Caryn Schechtman on behalf of DLA Piper LLP (“Schechtman Decl.”).

placements, including child welfare agency offices, as they wait to find out where they will sleep next. Second, Defendants fail to provide children in foster care custody with mental and behavioral health screening, diagnostic services, and treatment, including trauma-related screening and diagnostic services. *Id.* ¶ 6. Each of these failures causes direct physical, emotional, and psychological harm to the vulnerable children in Kansas’s foster care system, who have already experienced the trauma of removal from their homes. *Id.* ¶¶ 5-6.

The complexities of the heavily privatized child welfare and mental health delivery systems in Kansas, which formed the backdrop for the claims and the relief obtained in the Settlement, presented significant challenges throughout the investigation, litigation, and resolution of this case. When children enter foster care, they are placed in the protective custody of the Kansas Department for Children and Families (“DCF”), the agency charged with administering Kansas’s child welfare system. Am. Compl. ¶ 106. When Plaintiffs filed the complaint, two private lead agencies, KVC Behavioral HealthCare Kansas and St. Francis Community Services, held contracts to provide family preservation, foster care, adoptive, and reintegration services in Kansas. *Id.* ¶ 131; Lustbader Decl. ¶ 75. During the litigation, Kansas contracted with two additional private agencies for these services: Cornerstones of Care and TFI Family Services, Inc. *Id.* ¶ 75. Each of the four lead agencies subcontracts with a variety of other service providers and agencies, including for the day-to-day delivery of housing services, mental health services, placement matching, and case work. *Id.* ¶ 75.

Plaintiffs’ investigation, litigation, and settlement negotiations also involved navigating the complex intersection between the foster care and mental health care systems. Children in the Kansas foster care system are eligible for mental health care through Medicaid. Am. Compl. ¶ 137. Kansas administers Medicaid through KanCare, a program jointly run by the Kansas

Department of Health and Environment (“KDHE”) and the Kansas Department for Aging and Disability Services (“KDADS”). *Id.* ¶ 139. Although government agencies oversee KanCare, private managed care organizations (“MCOs”) handle the day-to-day delivery of services. Lustbader Decl. ¶ 75; Am. Compl. ¶ 139. Each of the four MCOs involved in recent years has delivered mental health and behavioral health services through its own complex provider network. Lustbader Decl. ¶ 75.

Adding to these systemic complexities, the overarching failures underlying the Plaintiffs’ claims are deeply intertwined: Kansas’s failure to provide children in foster care with adequate housing causes and compounds mental health issues, while making the provision of adequate mental health care impossible. Am. Compl. ¶¶ 169-72, 200-01. The lack of mental health services causes children’s mental health to deteriorate and further undermines placement stability. *See, e.g., id.* ¶¶ 203-04. All of this takes place alongside additional failures, as alleged in the Amended Complaint, including high caseloads and turnover among caseworkers, inadequate oversight of private provider agencies, and poor information management systems and coordination among DCF, KDADS, and KDHE. *Id.* ¶¶ 209-42.

In order to investigate, plead, litigate, and resolve the claims in this case, Plaintiffs’ counsel had to develop a deep understanding of these complex structures and intersecting problems within Kansas’s systems of care. *See* Lustbader Decl. ¶¶ 21-23, 42, 73-75.

#### B. Pre-Filing Investigation, Class Action Complaint, and Amended Complaint

Plaintiffs’ counsel collectively spent over a year conducting a detailed pre-filing investigation into reported systemic housing and mental health care deficiencies in the Kansas foster care system. Lustbader Decl. ¶¶ 21-24; Welch Decl. ¶ 16; Woody Decl. ¶ 18; Burns-Bucklew Decl. ¶ 10. During the investigation, Plaintiffs’ counsel made extensive outreach to

knowledgeable stakeholders, including through dozens of in-person and telephone interviews with Kansas child welfare and mental health advocates, lawyers for children and parents, foster parents, and former foster youth. Lustbader Decl. ¶¶ 21-24; Welch Decl. ¶ 16; Woody Decl. ¶ 19; Burns-Bucklew Decl. ¶¶ 10-11. Plaintiffs' counsel also collected and reviewed a large volume of publicly available information and performance data, including by pursuing a public records request. Lustbader Decl. ¶ 23; Welch Decl. ¶ 16. At the same time, Plaintiffs' counsel researched and analyzed applicable law and identified ten representative Named Plaintiffs and suitable Next Friends. Lustbader Decl. ¶¶ 23, 28; Welch Decl. ¶¶ 15, 21, 23; Woody Decl. ¶¶ 19, 25. The complex nature of Kansas's systems of care, and the intersecting structural failures identified, as discussed in detail above, made this investigation all the more challenging. Lustbader Decl. ¶¶ 21-23, 75. Additionally, the frequent movement of children within Kansas's foster care system made it particularly challenging to identify Named Plaintiff children and adult Next Friends. *Id.* ¶ 74.

On November 16, 2018, Plaintiffs filed a 68-page Class Action Complaint against the Secretaries of DCF, KDHE, and KDADS, and the Governor, each in their official capacities. ECF No. 1. The Complaint alleged substantive due process violations under the Fourteenth Amendment and violations of the Medicaid Act, and sought only declaratory and injunctive relief to remedy two interrelated systemic failures, and the structural problems contributing to these failures: (1) Defendants' practice of subjecting children in foster care to extreme housing disruption, including through the use of "night-to-night" or short-term placements; and (2) Defendants' failure to provide children in foster care with mental health and behavioral health screening, diagnostic services, and treatment, including trauma screening. *See id.* ¶¶ 1-10. Plaintiffs filed an Amended Complaint on August 30, 2019, adding Named Plaintiffs to the case. *See* ECF Nos. 57-1, 59-1.

### C. Plaintiffs' Litigation and Mediation Efforts

Before successfully resolving the case, the parties engaged in extensive fact discovery and targeted litigation and expended significant time and effort to focus on productive settlement discussions.<sup>4</sup> Reviewing discovery materials and addressing Defendants' repeated delays and production deficiencies required time-intensive work. *See* Lustbader Decl. ¶¶ 30-42; Welch Decl. ¶ 17; Woody Decl. ¶ 20. For example, at the start of the litigation, Defendants refused to produce the case files of the Named Plaintiffs for confidentiality reasons, despite the existence of the Stipulated Protective Order (ECF No. 26) designed to protect confidentiality. Lustbader Decl. ¶ 31. Plaintiffs spent months negotiating with Defendants just to receive their own clients' files. *Id.* The files Plaintiffs did receive violated the parties' production protocols (*see* ECF No. 51) and basic discovery conventions. *See* Lustbader Decl. ¶ 32 (discussing specific deficiencies in the Named Plaintiffs' case files). As a result, these several-thousand-page case files containing key evidence required additional time-intensive, manual review by Plaintiffs' counsel. *Id.*

As to general discovery, Plaintiffs received only minimal document productions from Defendants for months. *See id.* ¶¶ 33-34. For example, in response to 41 discovery requests directed to KDHE between September 2019 and April 2020, KDHE produced a single document.<sup>5</sup> *Id.* ¶ 34. DCF and KDADS did eventually produce several thousand documents each, but only after over a dozen "meet and confer" efforts, at one point on a weekly basis, at which Plaintiffs painstakingly explained the deficiencies in Defendants' productions to date and requested production of additional responsive materials. *Id.* ¶ 33. As just one example of these deficiencies,

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<sup>4</sup> While focusing efforts on discovery and productive settlement negotiations, Plaintiffs also necessarily expended resources engaging in targeted motion practice. This included two motions to proceed using pseudonyms (ECF No. 24, 58), and a motion to file the Amended Complaint. ECF No. 57. Plaintiffs also vigorously opposed Governor Laura Kelly's motion to dismiss. ECF No. 96; *see also* Lustbader Decl. ¶ 40 n.4.

<sup>5</sup> KDHE ultimately produced additional documents, but did so in June 2020, months after the initial requests were served. KDHE's eventual production still amounted to only forty total documents.

many of the documents produced lacked basic custodial information, making it impossible to determine how Defendants searched for and collected responsive documents. *Id.* ¶¶ 32-33. These meet and confer efforts also included conferences focused on electronic discovery for the sole purpose of helping Defendants meet their ESI obligations. *Id.* ¶ 33 (noting that as of settlement, the parties had negotiated electronic search terms but Defendants had not yet run them).

Aside from Defendants' production deficiencies, Plaintiffs' counsel dedicated time and resources to other problems that arose during discovery. *See* Lustbader Decl. ¶¶ 35-42. For example, in September 2019, several months into Plaintiffs' discussions with defense counsel, Defendants replaced their private law firm and the Kansas Attorney General's Office with their current firm. *See* ECF No. 64; Lustbader Decl. ¶ 38. This transition in counsel led to inefficiencies and further delay in discovery. For instance, this led to the parties revisiting discovery issues about which they already had significant dialogue, such as the redactions in Defendants' produced documents, and created further delays in Defendants' productions. *Id.* In addition, although Plaintiffs' counsel reminded Defendants at the start of the case of their duty to issue litigation holds to preserve critical evidence, it later became apparent that Defendants failed to do so properly, causing Plaintiffs' counsel to spend time investigating potential spoliation. *Id.* ¶ 35; *see also id.* ¶¶ 36-37 (describing additional discovery issues, such as Plaintiffs' repeated requests for a privilege log and Defendants' delays in designating Rule 30(b)(6) deponents).

In order to focus intensively on and maximize the productivity of settlement discussions initiated in November 2019, the parties jointly moved to stay discovery in December 2019. Lustbader Decl. ¶¶ 40, 44-45; Welch Decl. ¶ 18. Experienced mediator and child welfare systems expert Kevin Ryan aided the parties during the initial mediation efforts. Lustbader Decl. ¶ 45; Welch Decl. ¶ 18; Woody Decl. ¶ 21. After drafting and exchanging settlement documents and

analyses, the parties discussed possible settlement avenues at six in-person mediation sessions, all but one of which lasted a full day. Lustbader Decl. ¶¶ 45, 48; Welch Decl. ¶ 18; Woody Decl. ¶ 21. In between each of these settlement meetings, Plaintiffs' counsel necessarily expended significant resources strategizing and preparing numerous proposals and alternatives, discussing proposals among counsel and with clients, and communicating with defense counsel about the many provisions under negotiation. Lustbader Decl. ¶ 45. This process involved the parties exchanging approximately a dozen settlement drafts over the course of seven months. *Id.* Despite intensive efforts to reach agreement, however, this round of negotiations resulted in an impasse at the end of February 2020. Lustbader Decl. ¶¶ 40, 45; Welch Decl. ¶ 18; Woody Decl. ¶ 21.

The parties reinstated discovery in March 2020, this time proceeding on a dual track with settlement negotiations. Plaintiffs served additional discovery requests on Defendants and re-engaged with Defendants to resolve the discovery issues raised prior to the stay. Lustbader Decl. ¶ 40; Woody Decl. ¶ 20. The new discovery included expedited requests concerning the urgent issue of Defendants' response to the COVID-19 pandemic, given Defendants' ongoing obligation to keep the Class members and Named Plaintiffs in DCF custody safe from harm. Lustbader Decl. ¶ 40. Plaintiffs also drafted and served extensive third-party discovery requests upon Kansas's MCOs and foster care contractors, each a necessary component of fact discovery in the context of Kansas's heavily privatized systems. *Id.* ¶ 42; Welch Decl. ¶ 17; Woody Decl. ¶ 20. This process required Plaintiffs to begin negotiating with the MCOs and contractors, as well as begin reviewing the third-party productions prior to the parties resolving the case. Lustbader Decl. ¶ 42; Schechtman Decl. ¶¶ 10, 13, 17. At the same time, Plaintiffs continued to prepare the case for trial by seeking out consulting expert witnesses, taking one Rule 30(b)(6) deposition, and preparing for additional depositions. Lustbader Decl. ¶¶ 37, 43; Welch Decl. ¶ 17; Woody Decl. ¶ 19;

Schechtman Decl. ¶ 13. Defendants also served a total of 103 interrogatories and 120 requests for production on the minor Named Plaintiffs, requiring Plaintiffs' counsel to prepare responses, although the parties ultimately reached a settlement before those responses were served. Lustbader Decl. ¶ 41.

Throughout discovery, Plaintiffs devoted significant time to reviewing and analyzing Defendants' produced materials (a total of 78,000 pages across more than 12,000 documents) and discovery responses, including an effort to resolve as many issues as possible among the parties. *Id.* ¶ 39. Plaintiffs twice moved for extensions of time to file any motions to compel, to minimize and bundle any unresolved disputes as efficiently as possible. *Id.* Plaintiffs' efforts to meet and confer while simultaneously mediating ultimately obviated the filing of discovery motions. *Id.*

The parties re-engaged in intensive mediation efforts in May 2020, this time without a mediator, and participated in four additional settlement discussion sessions in June 2020—by videoconference because of the ongoing pandemic. *Id.* ¶ 46; Welch Decl. ¶ 18; Woody Decl. ¶ 21. Plaintiffs' counsel again expended significant resources strategizing about potential settlement avenues before and after each of these sessions. Lustbader Decl. ¶ 46. The parties ultimately notified the Court of an agreement to settle the case on July 9, 2020, and filed a copy of the Settlement signed by the parties. ECF No. 134-1. The parties further negotiated key aspects of the preliminary approval process, including the form and publication of notice; class certification for settlement purposes; and the process and timing for filings in connection with the settlement, this motion for fees and expenses, and a final fairness hearing, all of which was included in the Plaintiffs' unopposed Motion for Preliminary Approval of Class Action Settlement. ECF No. 139. The Court granted preliminary approval of the Settlement on September 9, 2020. ECF No. 140.

#### D. The Settlement

The Settlement thoroughly addresses the fundamental systemic issues and legal claims raised in the Amended Complaint and provides significant court-enforceable relief to the Class. Such relief would not have been achieved without Plaintiffs’ zealous advocacy in pursuing this action.<sup>6</sup> *See, e.g.*, Burns-Bucklew Decl. ¶ 13.

First, the Settlement includes several substantive commitments to significantly improve Kansas’s foster care system. *See* Settlement § 2.5 (“Practice Improvements”). These include ending the practice of housing children overnight in inappropriate and dangerous placements, including child welfare agency offices and unlicensed homes, and ensuring that placements generally do not exceed their licensed capacity. *Id.* §§ 2.5.1 – 2.5.2. The Settlement also requires Defendants to provide children in the Class with medically necessary mental health treatment services without delay, including by making sure that crisis intervention services are available statewide. *Id.* §§ 2.5.3 – 2.5.4. The Settlement requires Defendants to end the practice of night-to-night and short-term placements that, as alleged in the Amended Complaint, deprived children of basic shelter and rendered children in Kansas’s foster care system essentially homeless. *Id.* § 2.5.5; *see also* Am. Compl. ¶¶ 145-53.

Importantly, the Settlement requires Defendants to achieve several concrete and measurable outcomes. *See* Settlement § 2.9 (“Outcomes”). For example, Defendants must reduce the rate of placement moves significantly for all Class members entering DCF custody.<sup>7</sup> *Id.* §

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<sup>6</sup> This memorandum summarizes the key terms of the Settlement, which were also fully described in the Unopposed Motion for Preliminary Approval of Class Action Settlement, ECF No. 139, and its accompanying papers.

<sup>7</sup> The Settlement ultimately requires DCF to achieve a final outcome of an average of 4.44 moves per 1,000 days in care. *See* Settlement, Outcome 1, § 2.9.1. This final outcome will be a significant reduction from DCF’s self-reported average rate in September 2020 of 5.7 placement moves per 1,000 days in care, and an even greater decrease from the 2019 average rate of 9.7 moves. *See* DCF, Placement Stability, SFY 2021, [http://www.dcf.ks.gov/services/PPS/Documents/FY2021DataReports/FCAD\\_ContractOutcomes/PlacementStabilityRateFY21.pdf](http://www.dcf.ks.gov/services/PPS/Documents/FY2021DataReports/FCAD_ContractOutcomes/PlacementStabilityRateFY21.pdf) (September 2020 statewide rate); DCF, Placement Stability, SFY 2019,

2.9.1. The Settlement will also ensure that Defendants address Class members’ mental and behavioral health needs, provide Class members with stable housing, and ensure that the vast majority of Class members have only one or fewer placement moves per year at most. *Id.* §§ 2.9.2 – 2.9.4.<sup>8</sup> Finally, the Settlement will ensure that Defendants provide Class members entering DCF custody with an initial mental health and trauma screening performed by a qualified professional. *See id.* § 2.9.5.

The Settlement contains several additional provisions to ensure accurate, transparent, and meaningful measurement of Defendants’ compliance. An agreed upon third-party independent Neutral—Judith Meltzer at the Center for the Study of Social Policy<sup>9</sup>—will assess and report on Defendants’ performance. *See id.* §§ 2.3, 2.7. In addition, to ensure that needed improvements and outcomes are implemented and sustained, in several areas, the Settlement requires Defendants to: (1) meet interim targets over a period of multiple years; (2) substantially comply with a final outcome target for a 12-month period; and then (3) show they have sustained that compliance with the final target for a *successive* 12-month period. *See id.* § 2.8.

The Settlement contains additional provisions to ensure Defendants’ accountability for their performance. First, reflecting Defendants’ ultimate custodial responsibility for the settlement Class, Defendants must amend their foster care provider grants to incorporate the Settlement’s Practice Improvements and Outcomes, ensuring that the private grantees that do much of the daily work on housing and mental health service delivery in Kansas’s child welfare system under

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[http://www.dcfks.gov/services/PPS/Documents/FY2019DataReports/FCAD\\_ContactOutcomes/PlacementStabilityRateFY19.pdf](http://www.dcfks.gov/services/PPS/Documents/FY2019DataReports/FCAD_ContactOutcomes/PlacementStabilityRateFY19.pdf) (2019 statewide rate).

<sup>8</sup> Specifically, the Settlement includes, based on statistically significant reviews of Class member case files, final targets of 1) 90% of children having had their mental and behavioral health needs addressed (*id.* § 2.9.2) and 2) 90% of children with placements deemed “stable” (*id.* § 2.9.3). The Settlement also includes a final target of 90% of all children in the class having one or fewer placement moves (i.e., two or fewer total placements) in a twelve-month period. *Id.* § 2.9.4.

<sup>9</sup> *See* Judith Meltzer, Center for the Study of Social Policy (CSSP), <https://cssp.org/team/judith-meltzer/>.

contracts with Defendants are subject to crucial contract oversight and are held to the Settlement's mandates. *See id.* § 2.1.1. Defendants will also be required to develop an independent advisory group, made up of a statewide cross-section of stakeholders, to inform action planning and program improvement, offer recommendations, and assist in implementation of the Settlement. *See id.* § 2.1.2. In addition, Defendants will be required to track and report on 1) all Class members placed in the juvenile justice system, and 2) caseloads of all placement caseworkers and their supervisors, providing public accountability on these structural issues as well. *See id.* § 2.1.3.

Importantly, the Settlement establishes a process for alternate dispute resolution and mediation designed to resolve any disputes efficiently and minimize the need to seek Court intervention, including by securing a highly respected former juvenile court judge and child welfare monitor as mediator.<sup>10</sup> *See id.* § 4. Additionally, the Settlement lays out the parties' intentions regarding the resources needed to achieve substantial compliance (*id.* § 6.14), and provides a clear roadmap for ultimately achieving successful exit—possible after four years if Defendants meet all obligations in the time frames established. *See id.* §§ 2.6, 3.8 – 3.13. The parties may also seek to modify the Settlement in an effort to accelerate the successful achievement of Defendants' obligations. *Id.* § 6.13.

With these substantive commitments and concrete accountability measures, and a clear process for achieving final exit and dismissal upon achievement of the agreed upon improvements and outcomes, the Settlement provides extraordinary relief to the Class.

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<sup>10</sup> *See* Karen Baynes-Dunning, Former Interim President, Southern Poverty Law Center, <https://www.splcenter.org/about/staff/karen-baynes-dunning>.

E. Time Spent and Expenses Incurred by Plaintiffs' Counsel

For their vital work advancing the rights of children in the Class, each of Plaintiffs' co-counsel submits with this motion a declaration detailing their reasonable attorneys' fees and expenses suitable for reimbursement.<sup>11</sup> Plaintiffs respectfully request an award of reasonable attorneys' fees in the total amount of \$3,753,896.50 and expenses in the total amount of \$128,476.01. *See* Lustbader Decl. ¶¶ 50-54; Welch Decl. ¶¶ 27, 33; Woody Decl. ¶ 17; Burns-Bucklew Decl. ¶ 20; Schechtman Decl. ¶¶ 21-22. The requested fees and expenses for each firm representing Plaintiffs are summarized as follows:

| <u>Co-Counsel</u>        | <u>Hours</u> | <u>Legal Fees</u> | <u>Expenses</u> | <u>TOTAL</u>                 |
|--------------------------|--------------|-------------------|-----------------|------------------------------|
| Kansas Appleseed         | 1,103.1      | \$487,797.00      | N/A             | \$487,797.00                 |
| Loretta E. Burns-Bucklew | 231.1        | \$115,550.00      | N/A             | \$115,550.00                 |
| NCYL                     | 3,135.7      | \$1,211,512.50    | \$34,292.69     | \$1,245,805.19               |
| CR                       | 4,955.0      | \$1,736,167.00    | \$50,118.62     | \$1,786,285.62               |
| DLA                      | 639.2        | \$202,870.00      | \$44,064.70     | \$246,934.70                 |
| <b><u>TOTAL</u></b>      | 10,064.1     | \$3,753,896.50    | \$128,476.01    | <b><u>\$3,882,372.51</u></b> |

**III. DISCUSSION AND LEGAL ARGUMENT**

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

Defendants agree that Plaintiffs are entitled to reasonable attorneys' fees. The Settlement states that "Class Counsel is entitled to Class Counsel Fees and Expenses." *See* Settlement § 1.4. As prevailing parties under 42 U.S.C. § 1988, Plaintiffs are entitled to an award of reasonable attorneys' fees in this § 1983 action, as they have obtained a favorable, court-enforceable settlement requiring substantial changes on the part of Defendants that will significantly benefit

<sup>11</sup> Each firm has also filed, pursuant to Local Rule 54.2(e), attached as exhibits to each firm's declaration, spreadsheets containing itemized lists of the hours expended by each team member and any expenses sought that are suitable for reimbursement, in addition to other evidence supporting Plaintiffs' motion.

the Class. A plaintiff “prevails” for purposes of a fee award under § 1988 “when actual relief on the merits of [her] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This “material alteration” may result either from the entry of a judgment on the merits favorable to the plaintiff, or a settlement on terms favorable to the plaintiff that is then enforced by the court, as is the case here. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 604 (2001); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1194 (10th Cir. 1998). Plaintiffs are considered “prevailing parties” for attorneys’ fees purposes “if they succeed on *any* significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotation marks and citation omitted) (emphasis added).

The Tenth Circuit has further explained that, where a settlement resolves the case, plaintiffs prevail where: (1) the legal action was causally linked to securing the relief obtained; and (2) the defendant’s conduct in response to the action was required by law rather than a gratuitous response to a frivolous or groundless action. *Ellis*, 163 F.3d at 1194.

“When a plaintiff succeeds in remedying a civil rights violation he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority.” *Fox v. Vice*, 563 U.S. 826, 833 (2011) (quoting *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968)) (internal quotation marks omitted). Accordingly, where plaintiffs “achieve[] most or all of what [they] aimed for[,]” their attorneys “should receive a fully compensatory fee.” *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10th Cir. 1998) (citation omitted); *see also Fox v. Pittsburg State Univ.*, 258 F. Supp. 3d 1243, 1253 (D. Kan. 2017) (explaining that courts “concentrate[] on the significance of the overall relief” in awarding compensation). For the

purpose of awarding reasonable attorneys' fees, the Supreme Court has made clear: "The result is what matters." *Robinson*, 160 F.3d at 1283 (quoting *Hensley*, 461 U.S. at 435) (internal quotation marks omitted).

Applying these standards, Plaintiffs have clearly prevailed in this matter by successfully negotiating an extraordinary settlement that addresses the systemic failings alleged in the Amended Complaint, as detailed above. *See supra*, pp. 10-12. This relief was the direct result of Plaintiffs' lawsuit and court-enforceable Settlement, which sets forth a significant multi-year reform effort with measurable improvements and outcomes. *See Ellis*, 163 F.3d at 1194. Far from a gratuitous response by Defendants, and to their credit, the Settlement promises ambitious improvements to Kansas's foster care system and is the product of several years of hard-fought litigation and negotiation, in direct response to the allegations in the pleadings, facts that emerged during discovery, and the governing law. *See id.* at 1199; *see also* Burns-Bucklew Decl. ¶ 13.

As prevailing parties who have successfully obtained relief to protect the civil rights of vulnerable youth in foster care in Kansas, Plaintiffs are entitled to recover their reasonable attorneys' fees.

#### B. Plaintiffs Should Recover Their Attorneys' Lodestar.

The traditional method of calculating reasonable attorneys' fees, by multiplying "the number of hours reasonably expended on the litigation times a reasonable hourly rate," resulting in the lodestar, is "presumed to be the reasonable fee" to which counsel is entitled. *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *see also Fox v. Pittsburg State Univ.*, 258 F. Supp. 3d at 1253-54. "The lodestar method yields a fee that is presumptively sufficient to achieve [the] objective" of "induc[ing] a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Thus, courts in the Tenth Circuit have

repeatedly recognized that the lodestar calculation is meant to be the “primary consideration” in determining reasonableness of a request for attorneys’ fees. *Fox v. Pittsburg State Univ.*, 258 F. Supp. 3d at 1254 (citing *Anchondo v. Anderson, Crenshaw & Assocs., LLC*, 616 F.3d 1098, 1103 (10th Cir. 2010) (internal citation omitted)).

*1. Plaintiffs’ Requested Hourly Rates Are Reasonable.*

For the purpose of the lodestar calculation, a reasonable hourly rate is one that is “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 895–96, 896 n.11. This principle applies “regardless of whether plaintiff is represented by private or nonprofit counsel.” *Id.* at 895. In civil rights cases such as this one, a district court “should base its hourly rate on what the evidence shows the market commands for civil rights or analogous litigation.” *Case v. Unified Sch. Dist. No. 233, Johnson Cty., Kan.*, 157 F.3d 1243, 1255 (10th Cir. 1998). In awarding reasonable hourly rates, courts look to “the prevailing market rate of the relevant community.” *Pipeline Prods., Inc. v. Madison Co., LLC*, No. 15-4890-KHV, 2019 WL 3252743, at \*4 (D. Kan. Jul. 19, 2019) (quoting *Lippoldt v. Cole*, 468 F.3d 1204, 1224 (10th Cir. 2006)).

Although Plaintiffs in this case seek local rates derived squarely from the Kansas City legal market for complex federal class action litigation, Plaintiffs would have a sound basis to seek out-of-state or national rates in this case based on counsel’s specialized expertise and experience. The Tenth Circuit has held that rates may be determined based on a national market or out-of-state rates where a case is “unusual or requires such special skills” that “only an out-of-state attorney possesses.” *Lippoldt*, 468 F.3d at 1225 (citation omitted).<sup>12</sup>

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<sup>12</sup> This is in line with several other courts of appeal that have held that a “national market or a market for a particular legal specialization may provide the appropriate market.” *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir.

- a. The Requested Rates Are Reasonable in Relation to Local Kansas City Rates.

Plaintiffs' counsel's rates for this litigation are well within the range of reasonableness when compared to rates in the local legal community.

For their most experienced litigators, Plaintiffs seek rates of \$500 per hour. *See* Lustbader Decl. ¶ 51; Welch Decl. ¶ 33; Woody Decl. ¶ 17; Burns-Bucklew Decl. ¶ 19; Schechtman Decl. ¶ 21.<sup>13</sup> For their senior litigators, Plaintiffs seek rates between \$365 and \$410 per hour. *See* Lustbader Decl. ¶ 51; Welch Decl. ¶ 33; Woody Decl. ¶ 17; Schechtman Decl. ¶ 21. For their mid-level and junior litigators, Plaintiffs seek rates between \$240 and \$360 per hour. *See* Lustbader Decl. ¶ 51; Welch Decl. ¶ 33; Schechtman Decl. ¶ 21. For their experienced policy attorneys and other experienced attorneys, Plaintiffs seek rates between \$230 and \$345 per hour. *See* Lustbader Decl. ¶¶ 51; Woody Decl. ¶ 17. For their paralegals, Plaintiffs seek a rate of \$200 per hour. *See* Lustbader Decl. ¶ 51; Welch Decl. ¶ 33; Woody Decl. ¶ 17; Schechtman Decl. ¶ 21. For their law student intern, Plaintiffs seek a rate of \$200 per hour. Welch Decl. ¶ 33.

These rates are well within the range of fees normally charged by lawyers within the Kansas City legal market for comparable federal civil rights class action litigation. In particular, Plaintiffs submit a supplemental declaration by another attorney, who does not represent Plaintiffs, and who has practiced as a litigator in the Kansas City legal market for over forty years. *See* Declaration of J. Nick Badgerow ("Badgerow Decl.") ¶¶ 1-10, Ex. A (C.V.). Mr. Badgerow has

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1993); *see also* *Jeffboat, LLC v. Dir., Office of Workers' Comp. Prog.*, 553 F.3d 487, 490 (7th Cir. 2009) (finding that a "community" may refer to "a community of practitioners; particularly when . . . the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that area is a national market"); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections*, 522 F.3d 182, 192 (2d Cir. 2008) (observing that defining "markets simply by geography is too simplistic").

<sup>13</sup> Each firm, in its respective declaration, detailed the rates applied for each member of the Plaintiffs' counsel team for which the firm seeks attorneys' fees. *See* Lustbader Decl. ¶ 51; Welch Decl. ¶ 33; Woody Decl. ¶ 17; Burns-Bucklew Decl. ¶ 19; Schechtman Decl. ¶ 21.

particularly extensive expertise on the issue of the reasonableness of attorneys' fees.<sup>14</sup> Mr. Badgerow reviewed Plaintiffs' counsel's billing entries and has attested that, based on his extensive experience, the rates that Plaintiffs seek are reasonable in light of current standard market rates in the Kansas City legal market and counsel's significant experience and expertise. *Id.* ¶¶ 12, 14, 34-37. In addition, Mr. Badgerow has attested that the maximum rates sought here, by even the most senior lawyers, are significantly lower than those his law firm regularly charges for his services, and well below the rates charged by experienced senior lawyers in the Kansas legal market. *Id.* ¶ 13 (noting that Mr. Badgerow's own standard hourly rate is \$650); *id.* ¶ 35.

These rates Plaintiffs seek also conform to studies on billing rates applicable to the Kansas City region. The 2019 Missouri Lawyers Media Billing Rates study is the most recently published study of attorney rates in the Kansas City, Missouri area. *See* Missouri Lawyers Media, Billing Rates (August 2019), Lustbader Decl., Ex. E. This study concluded that in Kansas City, the median rate for partners was \$475 per hour, and the highest rate for partners was \$865 per hour. *See id.* at 3. For associates, the median rate in Kansas City was \$345 per hour, and the highest rate was \$495 per hour. *Id.* For paralegals, Kansas City firms charged up to \$305 per hour, with a median rate of \$225 per hour. *Id.* All of this aligns with the rates Plaintiffs seek, noted above. Moreover, for local attorneys at one firm, Shook, Hardy & Bacon, whose practice area was identified as "public interest class action," the 2019 Missouri Lawyers Media study showed rates of \$770 per hour for an attorney with about 40 years of experience, \$680 per hour for an attorney with 25 years of experience, \$465 per hour for an attorney with nine years of experience, \$375 per hour for an

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<sup>14</sup> *See* Badgerow Decl. ¶¶ 8-10 (noting that Mr. Badgerow has served as an expert in more than twenty-five cases, including cases involving the amount and reasonableness of attorneys' fees; served as a member of his firm's Fee Committee, which establishes the hourly rates charged by the lawyers and employees of the firm; and has served as lead trial counsel in numerous cases, including class actions involving claims under 42 U.S.C. § 1983 and § 1988).

attorney with four years of experience, and \$320 per hour for an attorney with three years of experience—rates *significantly higher* than what Plaintiffs seek here. *Id.* at 6.<sup>15</sup>

Plaintiffs’ proposed rates are also in line with the findings of a 2017 Kansas Bar Association survey of billing rates in Kansas, which, although older, sheds light on reasonable rates in diverse regions within the Kansas market. *See* A Flash Report on the 2017 Economics of Law Practice Survey in Kansas (Sept. 2017), Lustbader Decl., Ex. F. That survey showed that the 95th percentile of all hourly billing rates across the Kansas market was \$445, with higher rates of \$500 representing the 95th percentile in Kansas City, Missouri, and in Topeka/Shawnee County, and even higher rates of \$550 as the 95th percentile in West Kansas. *Id.* at 16. The median rate for attorneys identified as having a practice of “Other Trial Practice (Gen./Civ.)” was \$285, with a 95th percentile rate of \$450. *Id.* at 18.

Further, courts in the District of Kansas have recently approved rates comparable to those Plaintiffs seek here, for attorneys with similar experience in civil rights and class action matters. For example, in July 2020 in *Animal Legal Defense Fund v. Kelly*, the court found reasonable a rate of \$500 per hour for an experienced senior attorney litigating a constitutional civil rights case. No. 18-2657-KHV, 2020 WL 4000905, at \*9 (D. Kan. Jul. 15, 2020). In *Fish v. Kobach*, the Court found reasonable a senior attorney rate of \$450 per hour for work performed in 2017 and 2018 in a complex voting rights case. No. 16-2105-JAR, 2018 WL 3647132, at \*7 (D. Kan. Aug. 1, 2018). The Court noted the case was “more complex than most pro bono cases” and required “sophisticated work.” *Id.* at 1181. Plaintiffs’ requested rates are reasonable in the context of the

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<sup>15</sup> *See* Shook, Hardy, & Bacon, <https://www.shb.com/professionals/> (last visited Nov. 19, 2020) (listing Andrew D. Carpenter’s graduation year as 1994, Russell J. Shankland’s as 2010, Britta Stamps’ as 2015, and Emily A. Sellers’ as 2016); Jessica Shumaker, *Legal Champion: J. Stan Sexton*, MISSOURI LAWYERS MEDIA, Jan. 27, 2020, <https://molawyersmedia.com/2020/01/27/legal-champion-j-stan-sexton-shook-hardy-bacon-retired/> (noting Stan Sexton’s 42-year legal career).

Kansas market and past fee awards in comparable cases in this district involving complex constitutional and statutory claims.<sup>16</sup>

b. The Requested Rates Are Particularly Reasonable in Light of Plaintiffs’ Counsel’s Specialized Expertise.

The requested rates are particularly reasonable in light of the considerable experience and expertise of Plaintiffs’ counsel, who include highly specialized counsel who litigate structural reform cases in child welfare systems across the country. *See, e.g., Animal Legal Defense Fund*, 2020 WL 4000905, at \*7-\*9 (plaintiffs’ attorneys were part of a “small group” that had significant experience litigating “across the country” in a specific legal field, and therefore had “unique background and expertise” justifying higher rates); *see also* Badgerow Decl. ¶ 39(9) (discussing the experience, reputation, and ability of the Plaintiff co-counsel team). Plaintiffs’ counsel’s experience and skill were crucial to the success of this case, which involved highly specialized areas of law and particularly high stakes—the safety and welfare of Kansas’s most vulnerable children. *See, e.g.,* Lustbader Decl. ¶ 73; Welch Decl. ¶ 39. Although Plaintiffs’ out-of-state counsel could reasonably seek to recover fees at their regular rates, they have elected to request rates that are significantly lower than their reasonable home market rates based on their specialized expertise. *See* Badgerow Decl. ¶ 35; Woody Decl. ¶ 28; *see also* Welch Decl. ¶¶ 34-39. In addition, Plaintiffs’ local firms have also chosen to request rates that are well within or lower than what they would reasonably charge based on their level of experience and the local Kansas market. *See* Woody Decl. ¶ 28; Burns-Bucklew Dec. ¶ 19; Badgerow Decl. ¶¶ 35-36.

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<sup>16</sup> Another court in a neighboring market recently awarded members of the Plaintiffs’ counsel group fees based on comparable hourly rates in a complex child welfare class action. *See M.B. v. Tidball*, No. 2:17-cv-4102-NKL, 2020 WL 1666159, at \*13 (W.D. Mo. Apr. 3, 2020) (awarding senior attorney rates of \$500 in a class action co-counseled by attorneys at NCYL and CR). In that case, Plaintiffs submitted in support of their proposed rates the declaration of John M. Kilroy, Jr., an attorney with more than forty years of experience in the Kansas City area, including as a shareholder of Polsinelli, P.C., and who has litigated numerous class action lawsuits. *See* Declaration of John M. Kilroy, Jr., *M.B. v. Tidball*, No. 2:17-cv-4102-NKL, ECF No. 285-7, ¶¶ 2-6, 11 (W.D. Mo. Aug. 1, 2019).

Plaintiffs' counsel include the national nonprofits NCYL, based in Oakland, California, and CR, based in New York City, New York. *See* Welch Decl. ¶¶ 34, 39; Lustbader Decl. ¶ 62; Woody Decl. ¶ 28. Both NCYL and CR have successfully prosecuted numerous complex class action lawsuits to ensure child welfare systems adequately serve the needs of children and adolescents in their care and that children's legal rights are protected. Welch Decl. ¶¶ 3, 5, 34-38; Lustbader Decl. ¶¶ 4, 7; *see also* Burns-Bucklew Decl. ¶ 8; Woody Decl. ¶ 26. NCYL and CR attorneys have extensive expertise in the various areas of law that affect vulnerable and at-risk children and have among the most experience in the country in prosecuting child welfare institutional reform cases such as this one. Welch Decl. ¶¶ 3-13, 34-38; Lustbader Decl. ¶¶ 4, 7; *see also* Burns-Bucklew Decl. ¶ 8; Woody Decl. ¶ 26; Badgerow Decl. ¶ 39(9). In addition, NCYL and CR have significant experience negotiating, implementing, and enforcing class-wide settlements, such as the Settlement achieved here. Welch Decl. ¶ 3; Lustbader Decl. ¶¶ 7-8.

Plaintiffs' counsel also include Kansas Appleseed and the Law Office of Loretta Burns-Bucklew. Kansas Appleseed has extensive involvement in reform efforts across the state, including with regard to foster care. Woody Decl. ¶¶ 3-5, 18. Ms. Burns-Bucklew, as an attorney who has directly represented youth and families in the child welfare system for over 30 years, is deeply engaged in systemic advocacy on behalf of young people in Kansas. Burns-Bucklew Decl. ¶¶ 2-7. Both Kansas Appleseed and Ms. Burns-Bucklew were critical to achieving the substantive remedies in the Settlement and making other major strategic decisions throughout the litigation, given their deep familiarity with Kansas state government and its child welfare and Medicaid delivery systems. Lustbader Decl. ¶¶ 21, 24, 28; Welch Decl. ¶ 21; Woody Decl. ¶ 25; Burns-Bucklew Decl. ¶¶ 8, 10-11.

NCYL, CR, Kansas Appleseed, and Ms. Burns-Bucklew also reasonably partnered with private law firm DLA Piper (“DLA”) in light of the additional resources and experience that a case of this scale necessarily required. Lustbader Decl. ¶ 25; Welch Decl. ¶ 40; Woody Decl. ¶¶ 18, 25; Burns-Bucklew Decl. ¶ 8. DLA’s attorneys, in particular Class Counsel Caryn Schechtman and Jeffrey Rotenberg, have significant federal class action and electronic discovery experience, making them critical partners in this case. Schechtman Decl. ¶¶ 5, 7, 10-17; *see also* Lustbader Decl. ¶ 25; Woody Decl. ¶ 18. The rates requested are significantly lower than rates paid by DLA’s private clients and average rates charged by firms of DLA’s size and experience. *See* Schechtman Decl. ¶ 20 (typical DLA rates for attorneys on this matter range from \$555 to \$1,025 per hour); *see also* National Law Journal Billing Rate Survey (2017), Lustbader Decl., Ex. G (demonstrating that three years ago, the average partner billing rates for the nation’s largest law firms ranged from \$295 to \$1,350, and the average associate rates ranged from \$200 to \$1,025).

The rates Plaintiffs request are especially reasonable in light of the complexities of this case. The claims brought in this action required analysis of Kansas’s child welfare system—in particular its placement and mental health service delivery systems—a web of multiple agencies, private contractors, and managed care organizations. *See, e.g.*, Lustbader Decl. ¶ 75. As a class action in federal court on behalf of thousands of minor children represented by adult Next Friends, seeking systemic reform through solely injunctive relief, this case was challenging to litigate and even less likely to be brought by other lawyers. *Id.* ¶¶ 72-74; *see also* Badgerow Decl. ¶ 39(2). The placement instability Plaintiffs challenged also presented logistical hurdles, as children, including the Named Plaintiffs, were moved numerous times during the litigation, making contact difficult. Lustbader Decl. ¶ 74. Finally, negotiation of the Settlement required a sophisticated understanding of the far-reaching changes necessary to remedy the systemic deficiencies alleged

in the complaint. *Id.* ¶¶ 47, 75. Because of all of these factors, there were few, if any, local attorneys who would have taken on such a case alone. *See* Woody Decl. ¶ 26; Burns-Bucklew Decl. ¶¶ 8-9; *see also* Lustbader Decl. ¶ 76; Welch Decl. ¶ 40; Badgerow Decl. ¶ 39(2).

In sum, all of Plaintiffs’ requested rates are reasonable for this case.

2. *Plaintiffs Only Seek Recovery For Hours Reasonably, Efficiently, Necessarily, and Actually Expended.*

Plaintiffs’ counsel seek to recover attorneys’ fees only for services reasonably and necessarily performed to investigate, plead, and prove violations of the Class’s constitutional and statutory rights, and to achieve the outstanding results in the Settlement. In support of this fee application, Plaintiffs have submitted “meticulous, contemporaneous time records that reveal, for each lawyer[, paralegal, or law student intern] for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.” *Case*, 157 F.3d at 1250; *see* Lustbader Decl. ¶¶ 63, 66, Exs. B-C; Welch Decl. ¶ 32, Ex. C; Woody Decl. ¶ 24, Ex. B; Burns-Bucklew Decl. ¶ 16, Ex. A; Schechtman Decl. ¶ 18, Ex. A.<sup>17</sup> In addition, Plaintiffs have exercised significant billing judgment by “winnowing the hours actually expended down to the hours reasonably expended.” *Case*, 157 F.3d at 1250; *see* Lustbader Decl. ¶¶ 64-70; Welch Decl. ¶¶ 28-31; Woody Decl. ¶ 24; Burns-Bucklew Decl. ¶¶ 17-18; Schechtman Decl. ¶ 19. All of the work for which Plaintiffs’ counsel seek recovery was reasonable, as it was “useful” and “necessary to secure the final result obtained.” *Animal Legal Defense Fund*, 2020 WL 4000905, at \*2 (quoting

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<sup>17</sup> As with attorneys’ fees, fees for paralegals and law student interns or law clerks are recoverable. *See, e.g., Case*, 157 F.3d at 1249 (explaining that “if law clerk and paralegal services are . . . not reflected in the [attorneys’ fee], the court may award them separately as part of the fee for legal services”); *Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1285 (D. Wyo. 2004) (“Tenth Circuit case law is clear that the time of law students can be compensated.”). Counsel’s use of paralegals and law student interns furthered billing efficiency here, as these team members were assigned valuable work that otherwise would have been performed by attorneys, such as the time-intensive review of some of Defendants’ discovery productions, further reducing the total fees Plaintiffs request. *See* Lustbader Decl. ¶¶ 19-20; Welch Decl. ¶ 26; Woody Decl. ¶ 16; Schechtman Decl. ¶ 10.

*Johnson v. City of Tulsa, Okla.*, 489 F.3d 1089, 1107 (10th Cir. 2007)); Badgerow Decl. ¶¶ 15, 38-39 (opining on the reasonableness of the hours expended by Plaintiffs' counsel).

The number of hours expended represents tremendous work by Plaintiffs' counsel and is reasonable in light of the complexity and scope of this case. As discussed above, Plaintiffs engaged in months of pre-filing investigation into the interrelated systemic deficiencies in Kansas's foster care system, including by gathering evidence, fact-checking allegations, and meeting with stakeholders, potential Next Friends, and potential witnesses. Lustbader Decl. ¶¶ 21-23; Welch Decl. ¶ 16; Woody Decl. ¶ 19; *see also* Badgerow Decl. ¶ 39(1). This culminated in the filing of a detailed 68-page Complaint setting forth complex constitutional and statutory claims, and an Amended Complaint with additional Named Plaintiffs and factual allegations. ECF Nos. 1, 59-1. Plaintiffs engaged in significant fact discovery, including by propounding targeted written discovery on Defendants and third parties, taking and preparing for depositions, and reviewing and analyzing over 78,000 pages across over 12,000 documents. *See* Lustbader Decl. ¶¶ 34, 37-43; Welch Decl. ¶ 17; Woody Decl. ¶¶ 19, 25; *see also* Badgerow Decl. ¶ 39(1). This effort included a significant number of hours dedicated to addressing discovery delays and inadequate responses and productions, and participating in more than a dozen meet and confer conferences with Defendants to resolve discovery issues. Lustbader Decl. ¶¶ 30-38; *see* Woody Decl. ¶ 20. Plaintiffs' counsel also reasonably expended considerable time vigorously opposing Defendant Governor Laura Kelly's jurisdictional motion to dismiss.<sup>18</sup> Lustbader Decl. ¶ 40 n.4. Finally, Plaintiffs' counsel prepared for and participated in numerous mediation sessions and settlement

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<sup>18</sup> That the Court ultimately granted Governor Kelly's motion is not a basis for reducing Plaintiffs' requested fees, which overall represent a reasonable number of expended hours. The Supreme Court is clear that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440; *see also Hayes Trustee for Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GKF-PJC, 2018 WL 10780611, at \*7 (N.D. Okla. Mar. 21, 2018) (declining to reduce fee request because of unsuccessful motions). Notably, the dismissal of the Governor from this case did not reduce the scope of any of the claims, or the substance of any of the relief in the Settlement.

discussions, while analyzing, drafting, and revising settlement proposals, counterproposals, and possible alternatives, all of which were necessary to achieve the significant relief in the Settlement. *Id.* ¶¶ 44-47; Welch Decl. ¶ 18; Woody Decl. ¶ 21. The hours Plaintiffs' counsel have expended are reasonable in light of the substantial litigation efforts this case required in order to reach the resulting Settlement.

Plaintiffs' counsel had an obligation to advance the case as quickly and efficiently as reasonably possible to protect children in the Class from the ongoing harms of dangerous housing practices and the lack of mental health services. To that end, Plaintiffs' counsel was careful not to duplicate work, with each firm taking the lead on different aspects of the case, while partnering on major strategic decisions. Lustbader Decl. ¶¶ 27-29, Welch Decl. ¶¶ 20-21; Woody Decl. ¶ 25; Burns-Bucklew Decl. ¶ 11; Schechtman Decl. ¶ 8; *see also* Badgerow Decl. ¶ 39(3). For instance, CR and NCYL conducted the vast majority of the pre-filing fact investigation, while DLA took the lead on handling discovery productions and negotiating ESI search terms. Lustbader Decl. ¶ 28; Welch Decl. ¶ 21; Woody Decl. ¶ 25; Schechtman Decl. ¶ 8. Kansas Appleseed and Ms. Burns-Bucklew were critical to defining the substantive remedies in the Settlement and in making major strategic decisions given their deep familiarity with these state systems. Lustbader Decl. ¶ 28; Welch Decl. ¶ 21; Woody Decl. ¶ 25; Burns-Bucklew Decl. ¶ 11. In addition, Plaintiffs' counsel made every effort to keep the number of staff assigned to the case to a minimum in the interest of efficiency. Lustbader Decl. ¶¶ 64-65; Welch Decl. ¶ 20; Woody Decl. ¶ 24.

Taking seriously their obligation to exercise billing judgment, Plaintiffs' counsel have carefully reviewed all of the time records submitted and eliminated any entries that were potentially excessive, redundant, vague, or otherwise unnecessary to the litigation. Lustbader Decl. ¶¶ 66-70; Welch Decl. ¶¶ 28-31; Woody Decl. ¶ 24; Burns-Bucklew Decl. ¶¶ 17-18;

Schechtman Decl. ¶ 19; *see also* Badgerow Decl. ¶ 39(1). For example, Plaintiffs only request attorneys' fees for personnel who had significant involvement in this matter, writing off entirely time billed by those attorneys, paralegals, or law student interns whose involvement in the case was less substantial or not essential. *See* Lustbader Decl. ¶ 67; Welch Decl. ¶ 28; Woody Decl. ¶ 24; Schechtman Decl. ¶ 19; *see also* Badgerow Decl. ¶ 39(1)(b). Counsel has waived all time for work performed on the investigation prior to November 16, 2017—one year before the filing of the Complaint—and Plaintiffs are not currently seeking compensation for work performed after the parties sought preliminary approval of the Settlement on July 27, 2020. Lustbader Decl. ¶ 67; Welch Decl. ¶¶ 28-29; Woody Decl. ¶ 24; Burns-Bucklew Decl. ¶ 17; *see also* Badgerow Decl. ¶ 39(1)(d). Plaintiffs also do not seek any fees in connection with this fee application, despite those fees being ordinarily recoverable. *See Animal Legal Defense Fund*, 2020 WL 4000905, at \*3 (awarding compensation for work on the fee motion); Lustbader Decl. ¶ 67; Welch Decl. ¶ 29; Woody Decl. ¶ 24; *see also* Badgerow Decl. ¶ 39(1)(d).

In addition to these significant reductions, Plaintiffs have also elected to further reduce their attorneys' hours to minimize the number of billing participants and the total amount of time submitted. For example, Plaintiffs limited the number of billing attorneys for regular co-counsel strategy meetings, depositions, stakeholder meetings, court hearings, and conferences with Defendants, eliminating from this application time spent by many attorneys and any paralegals who also attended. Lustbader Decl. ¶ 68; Welch Decl. ¶ 30; *see also* Woody Decl. ¶ 24. In addition, counsel reduced all of their travel time by fifty percent.<sup>19</sup> Lustbader Decl. ¶ 69; Welch Decl. ¶ 30; *see also* Badgerow Decl. ¶ 39(1)(c). In sum, these reductions amount to approximately

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<sup>19</sup> Courts in the Tenth Circuit have found a 50% reduction of travel time to be reasonable. *See, e.g., Fox v. Pittsburg*, 258 F. Supp. 3d at 1259 (rejecting defendant's objections to time billed for travel, noting plaintiffs had already reduced the time by half); *see also Fresquez v. BNSF Railway Co.*, No. 17-cv-0844-WJM-SKC, 2020 WL 1322920, at \*4 (D. Colo. Mar. 20, 2020) (finding plaintiff's decision to seek recovery for only half of travel time to be appropriate).

25% of the time Plaintiffs' counsel devoted to the case prior to filing the preliminary motion for settlement approval (ECF No. 139). *See* Lustbader Decl. ¶ 70; *see also* Badgerow Decl. ¶ 39(1)(a).<sup>20</sup> This equates to a reduction of over \$1.1 million. Lustbader Decl. ¶ 70. Combined with the additional hours that Plaintiffs' counsel later devoted to the final approval motion and this fee application, which Plaintiffs excluded in its entirety, Plaintiffs' counsel has effectively reduced over 31% of their total time for this case, equating to over \$1.5 million. *Id.*

After this careful application of billing judgment, the reasonable lodestar in this case, for the 10,064.1 hours submitted by Plaintiffs' counsel through July 27, 2020, is \$3,753,896.50. *See supra* p.13; Badgerow Decl. ¶ 42.

C. Additional Factors Support Plaintiffs' Counsel Request For Reasonable Attorneys' Fees.

The particularities of this case further support Plaintiffs' counsel's requested fees under the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which courts often consider.<sup>21</sup> As discussed in detail above, this case presented complex and difficult factual and legal questions and required extensive time, labor, skill, and experience to investigate, litigate, and mediate to a successful resolution. *See id.* (considering, among other factors, the time and labor required; the novelty and difficulty of the questions presented in the case; the skill requisite to perform the legal service properly; and the experience, reputation, and

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<sup>20</sup> Plaintiffs' counsel excluded a number of other categories of hours from this application. These include hours spent doing general background research; hours spent working on media-related matters; vague time slips; time slips that were block billed; and hours spent on clerical work. *See* Lustbader Decl. ¶ 67.

<sup>21</sup> While courts in the Tenth Circuit often consider the *Johnson* factors, courts need not consider those factors "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate," given the primacy of the lodestar. *Fox v. Pittsburg State Univ.*, 258 F. Supp. 3d at 1254 (citation omitted). The *Johnson* factors include: (1) time and labor required; (2) novelty and difficulty of the questions presented in the case; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by the attorneys due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or circumstances; (8) amount involved and results obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

ability of the attorneys); Badgerow Decl. ¶ 39. As a result of the resources dedicated, Plaintiffs' counsel were precluded from working on other vital matters. *See Johnson*, 488 F.2d at 718 (considering the preclusion of other employment due to the acceptance of the case); Lustbader Decl. ¶ 72; Welch Decl. ¶ 40; Woody Decl. ¶ 23; Burns-Bucklew Decl. ¶ 14; *see also* Badgerow Decl. ¶ 39(4).

Given the urgency of the matters at issue—a critical shortage of housing and mental health services for Kansas's vulnerable foster children—Plaintiffs' counsel was under significant time pressure to achieve favorable results for the Class as quickly as reasonably possible. *See Johnson*, 488 F.2d at 718 (considering time limitations imposed by the circumstances); Lustbader Decl. ¶ 77; Badgerow Decl. ¶ 39(7). As also discussed in detail above, the extraordinary result represented by the Settlement, which will translate into a significant financial investment by the state of Kansas, further supports the reasonableness of the requested fees. *See Johnson*, 488 F.2d at 718 (considering the amount involved and results obtained); Badgerow Decl. ¶ 39(6).

The fees submitted represent significant financial risks borne by Plaintiffs' counsel, as Plaintiffs' counsel agreed to represent Plaintiffs on a fully contingent basis. *See Johnson*, 488 F.2d at 719 (considering the undesirability of the case and whether the fee is fixed or contingent); Lustbader Decl. ¶¶ 71-77; Welch Decl. ¶¶ 40-41; Woody Decl. ¶ 30.<sup>22</sup> Non-profit organizations that bring impact litigation cases such as this one depend on awards of legal fees in cases where they are successful to continue their important work. Likewise, fee and expense reimbursement allows private firms like DLA to continue taking on and funding costly litigation on a *pro bono* basis. Without the reimbursement of reasonable attorneys' fees, it will become increasingly

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<sup>22</sup> While *Johnson* discusses other factors, those are less relevant to this injunctive relief case brought on behalf of a class of children. *See Johnson*, 488 F.2d at 717-19 (considering additional factors, including the nature and length of the professional relationship with the client).

difficult to find a counsel team willing and able to undertake this critical representation. Awarding reasonable attorneys' fees, as Plaintiffs request, furthers the purposes set out by Congress in Section 1988 to "make sure that competent counsel [i]s available to civil rights plaintiffs," *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), and "encourag[e] the enforcement of federal law." *Penn. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 737 (1987).

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

Plaintiffs also seek recovery of reasonable expenses through the date of the preliminary approval motion. "[O]ut-of-pocket expenses incurred during litigation may be awarded as attorneys['] fees under Section 1988 if (1) the expenses are not absorbed as part of law firm overhead but are normally billed to a private client, and (2) the expenses are reasonable." *Animal Legal Defense Fund*, 2020 WL 4000905, at \*10 (citation and alterations omitted). Reasonable expenses include travel and mediation expenses. *See Brown v. Gray*, 227 F.3d 1278, 1297 (10th Cir. 2000) (travel expenses); *Animal Legal Defense Fund*, 2020 WL 4000905, at \*10 (rejecting defendants' challenge to travel expenses incurred); *Chavez Rodriguez v. Hermes Landscaping, Inc.*, No. 17-2142-JWB-KGG, 2020 WL 3288059, at \*5 (D. Kan. June 18, 2020) (awarding recovery of mediation expenses); *see also* Badgerow Decl. ¶ 41. All expenses for which Plaintiffs seek reimbursement are itemized as attachments to the supporting declarations. Lustbader Decl., Ex. D; Welch Decl., Ex. B; Schechtman Decl., Ex. B.

Defendants have agreed in the Settlement that Plaintiffs are entitled to recover reasonable expenses. *See* Settlement § 1.4. Plaintiffs' counsel seek recovery for reasonable expenses in the amount of \$128,476.01, including expenses associated with travel, such as flights, hotels, and rental cars, and mediation. Lustbader Decl., Ex. D; Welch Decl., Ex. B; Schechtman Decl., Ex. B; *see also* Badgerow Decl. ¶ 41. In making this request, counsel exercised substantial billing

judgment and eliminated significant categories of expenses for which they are not seeking reimbursement. These include copying, mailing, conference call, online legal research, and meal expenses. Lustbader Decl. ¶ 65; Welch Decl. ¶ 27; Schechtman Decl. ¶ 22; *see also* Badgerow Decl. ¶ 41. These eliminations reduced the expense request by more than 15%. Lustbader Decl. ¶ 65. Plaintiffs' counsel made diligent efforts to keep these expenses to a minimum, given that they were paid when incurred. Lustbader Decl. ¶ 65; Welch Decl. ¶¶ 27, 41; *see also* Schechtman Decl. ¶ 22. Plaintiffs' counsel should therefore receive an award of their reasonable expenses.

#### **IV. CONCLUSION**

Under 42 U.S.C. § 1988 and for all of the foregoing reasons, Plaintiffs respectfully request that the Court award reasonable attorneys' fees in the amount of \$3,753,896.50 and expenses in the amount of \$128,476.01, payable within thirty days of entry of the Court order granting such fees and expenses.

Dated: November 30, 2020

Respectfully submitted,

**KANSAS APPLESEED CENTER FOR LAW  
AND JUSTICE, INC.**

*/s/ Teresa A. Woody*

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of the Court on November 30, 2020, to be served by the operation of the Court's CM/ECF electronic filing system upon all parties.

DATED: November 30, 2020

*/s/ Teresa A. Woody*

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Teresa A. Woody

**Attorney for Plaintiffs**