

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN and SHAUNTAE
ANDERSON, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

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

INTRODUCTION

Defendants’ opposition to Plaintiffs’ motion for attorneys’ fees and costs is notable for what it does *not* contest. Defendants do not contest that Plaintiffs are the prevailing party—on all three of their claims against these Defendants—and that Plaintiffs are entitled to attorneys’ fees and costs. (ECF No. 286, Defs’. Opp. at 3-4.) Defendants “do not dispute that the hourly rates requested by Plaintiffs’ counsel are generally in line with other awards in the District Court for the Southern District of West Virginia for civil rights cases.” (*Id.* at 4.) Additionally, Defendants are silent as to the costs Plaintiffs have sought, thus conceding that Plaintiffs’ request is reasonable. Ultimately, Plaintiffs’ fee request must be reviewed in light of their degree of success, which was complete and total on all claims relevant to this fee petition.

Despite Defendants’ concessions, confoundingly, Defendants make the following requests of this Court: (1) “reduce the lodestar by 50%” simply because Plaintiffs participated in multi-party litigation and even though Plaintiffs have, in fact, omitted time attributable solely to dismissed parties (*id.* at 11); (2) reduce Plaintiffs’ requested fee award by \$38,567 for purported

redundant hours attending depositions (*id.*); and (3) reduce the hourly rate for Walt Auvil's attendance at depositions and hearings as local counsel (*id.* at 12). Defendants make these requests despite the fact that Plaintiffs' counsel testified that they eliminated all time entries solely attributable to other Plaintiffs and Defendants, and then eliminated an *additional* 516.2 hours of billable time attributable to these Defendants. (ECF No. 285 at 8-9.) This amounts to a total reduction of \$167,917.50 when multiplied by the local prevailing rates for each timekeeper, or 17% of Plaintiffs' total lodestar. Because Plaintiffs already omitted 17% of their total hours, Defendants' request of an additional 50% reduction would result in a *67% reduction* of Plaintiffs' total lodestar attributable to these Defendants and recovery of only 33% of their lodestar. For the reasons below, Defendants' requests should be rejected.

First, Plaintiffs appropriately eliminated time entries unrelated to their Medicaid claims, and Defendants fail to show otherwise. No further lodestar reduction is required beyond the 17% reduction counsel has already adopted, and Defendants certainly cannot justify a recovery of only *one-third* of the time that was necessary to successfully prosecute the Medicaid claims in this case. *Second*, while Plaintiffs appropriately staffed depositions and have already eliminated duplicative hours, Plaintiffs have resolved this issue by *further* reducing their request to align with Defendants' argument about deposition staffing. *Third*, local counsel is entitled to the prevailing market rate for his work. *Finally*, Plaintiffs have made several additional reductions to help streamline the issues for the Court, further underscoring the reasonableness of their request. Incorporating these reductions, Plaintiffs' counsel reduce their original request of \$817,661.25 in attorneys' fees by \$32,627.50, and now seek a reduced total of \$785,033.75 in attorneys' fees.

ARGUMENT

I. PLAINTIFFS' LODESTAR REFLECTS THE HOURS NECESSARY TO SUCCESSFULLY PROSECUTE THEIR CLAIMS AND ALREADY EXCLUDES UNRELATED TIME ENTRIES.

In their opposition to Plaintiffs' Motion for Fees, Defendants request that this Court "reduce the lodestar by 50% to account for fees related to settled and unsuccessful claims." (ECF No. 286 at 8.) Nothing in Defendants' opposition supports such a severe reduction in counsels' reasonable and already-discounted hours expended on this matter. Defendants boldly assert that Plaintiffs' counsel "have not" reduced their fees to account for work related to other Plaintiffs—without support and contrary to the testimony of Plaintiffs' counsel.

A. Plaintiffs Obtained Complete Success.

On the Medicaid claims litigated at summary judgment and relevant to Plaintiffs' fees motion, Plaintiffs' success was complete and total. Defendants obfuscate, claiming that "Plaintiffs have succeeded on one of two proposed classes, on three of five claims, and recovered one of two types of damages sought, and Plaintiffs settled two additional claims," and spill ink reiterating the procedural history of claims by *separate plaintiffs* against *different defendants*. (ECF No. 286 at 1-3.) But the claims adjudicated on the merits—the only claims for which Plaintiffs seek fees—involved solely Medicaid-related claims by Mr. Fain and Ms. Anderson against Defendants West Virginia Department of Health and Human Resources, Bureau for Medical Services, Secretary William Crouch, and Commissioner Cynthia Beane (collectively, "Defendants"). (ECF No. 285 at 2 n.2.) Plaintiffs prevailed completely on all three of these claims.

The most critical factor in calculating the reasonableness of fees "is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436, (1983). This factor weighs heavily in Plaintiffs' favor. Defendants do not contest that Plaintiffs are the prevailing party on all three of their Medicaid claims. (ECF No. 286 at 3-4.) When this Court certified a Rule 23 class of "all

transgender people who are or will be enrolled in [W]est Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusion” (ECF No. 270) and granted summary judgment for Plaintiffs and the class on *each and every* claim Mr. Fain and Ms. Anderson successfully obtained complete relief (ECF No. 271). An “attorney’s fee award should reflect the relief granted” when “the decision corrects across-the-board discrimination affecting a large class.” *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). “[B]ut for the efforts, diligence, and discipline of these counsel, the pervasive relief granted by the Court might not have resulted in the meaningful and significant injunctive relief for Plaintiff[s] and the Class that is far-reaching and creates safeguards against the discrimination that precipitated the filing of this matter in the first place.” (ECF No. 284-15 at 7 ¶ 21.) Put simply, Mr. Fain and Ms. Anderson “could not have been any more successful” so “there is no need for this Court to reduce Plaintiffs’ attorney’s fees” *Meadows v. AM & GH LLC*, No. 2:15-cv-13370, 2018 WL 3876587, at *3 (S.D.W. Va. Aug. 15, 2018).

B. Plaintiffs’ Counsel Removed Unrelated Time, and the Time Remaining Benefited the Medicaid Plaintiffs and is Properly Billable to Their Claims.

“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation”—with “evidence supporting the hours worked”—“multiplied by a reasonable hourly rate.” *Hensley*, 461 U.S. at 433. There are no unrelated, unsuccessful claims to subtract from the lodestar amount, as Plaintiffs prevailed on all of their claims. Defendants assert without any basis that “Plaintiffs cannot cleanly separate all bills and assign them to particular Plaintiffs and particular Defendants.” (ECF No. 286 at 7.) But that is simply not true.

Defendants fail to support this allegation with relevant case law or sufficient facts. First, courts do not apply such a rigid approach to assessing the reasonableness of a party’s requested

lodestar. *See, e.g., Taylor v. Republic Servs., Inc.*, No. 1:12-cv-00523, 2014 WL 325169, at *7 (E.D. Va. Jan. 29, 2014) (finding plaintiff’s claims against different defendants “substantially interrelated” because they involved “the same facts or related legal theories” and declining to reduce award for unsuccessful claims). Second, Defendants’ cited authority is inapposite. Defendants point to *Prison Legal News v. Stolle*, 681 Fed. Appx. 182 (4th Cir. 2017) (per curiam), but this is about Plaintiffs who litigated and lost a claim for damages on the merits. *Id.* at 184. In contrast, here Plaintiffs have won *all claims*. Although *Prison Legal News* observed that a lodestar reduction may be appropriate “when a plaintiff has achieved only partial or limited success” on the merits, that has no application here. *Id.* at 185. Defendants also try to support their request to cut counsels’ recovery in half by pointing out how long other plaintiffs maintained parallel claims in the suit. (ECF No. 286 at 7-8 (noting the percentage of time other claims were pending, but admitting that “Plaintiffs have reduced their bills for time spent specifically on work for the individual claims of Plaintiffs Martell, McNemar, and James”).) Whether other plaintiffs also had claims pending for a fraction or 100% of the litigation is of no relevance because Plaintiffs’ counsel have already cut time relating solely to their claims and do not seek to recover for that time. Defendants’ “examples,” allegedly to the contrary, all fall flat:

(i) *Calls relating to multiple plaintiffs.*

Defendants object that some of Plaintiffs’ team calls and internal communications involved multiple Plaintiffs, although they admit that these “time entries may have assisted Plaintiffs Fain and Anderson in the successful prosecution of their claims.” (ECF No. 286 at 4, 7.) Defendants complain primarily that these time entries “also assisted” other Plaintiffs. *Id.* But Defendants produce no case law suggesting that work necessary to support the claims of the prevailing plaintiffs that also benefits other plaintiffs simultaneously is not compensable. This request should

be rejected.

(ii) Entries on Ms. Borelli's time sheet.

Defendants make several arguments about certain entries on one page of Ms. Borelli's time sheet (ECF No. 286 at 4, 7), but these arguments are misplaced.¹ For example, Defendants argue that Ms. Borelli billed time related to medical records collection. A single entry for a 24-minute teleconference appears on that page of the time sheet, and the call was related to development of a "medical records collection *protocol* for the plaintiffs." (ECF No. 284-4 at 2 (emphasis added); *see also* Declaration of Tara L. Borelli ("Borelli Decl.") ¶ 3.) This time expenditure is reasonable regardless of whether one or several plaintiffs was involved in the litigation—a protocol is needed in any event. (Borelli Decl. ¶ 3.) Collecting medical records is an involved and complex process requiring coordination with the plaintiff, communication with the relevant providers, completion of required authorizations, and ongoing tracking and follow-up on unanswered requests. (*Id.* ¶ 4.) As the entry itself indicates, the call was related to a general protocol, and organizing the work this way enhances efficiency rather than reducing it. (*Id.*) The development of a standard protocol for collecting medical records was equally necessary for the two plaintiffs who won summary judgment, both of whom produced extensive medical records to Defendants and the expert who examined them in this case. (*Id.*)

Defendants also quibble over time expended related to "research." (ECF No. 286 at 4, 7.) They fail to note that Ms. Borelli has one entry for 12 minutes related to "health plan structure, and case preparation updates." (ECF No. 284-4 at 2; Borelli Decl. ¶ 5.) The only other entry relating to research on that page is a 30-minute legal team call covering multiple topics. (ECF No.

¹ Defendants' own admissions show that these arguments are inapt. (ECF No. 286 at 4 (admitting that Ms. Borelli omitted all entries involving other plaintiffs or potential plaintiffs, and sought time only for entries related to prevailing Plaintiffs Shauntae Anderson and Christopher Fain).)

284-4 at 2; Borelli Decl. ¶ 5.) In fact, the complaint Plaintiffs’ counsel were preparing contained a detailed section spanning multiple pages describing Medicaid’s structure, which is complex. (ECF No. 1 ¶¶ 48-62; Borelli Decl. ¶ 5.) Defendants fail to explain how 12 minutes of work and discussion of that, as one of several topics during a 30-minute team call, constitutes an unreasonable expenditure of time. It is not.

Similarly, Defendants complain that Ms. Borelli’s time sheet includes entries for “complaint drafting” and “revis[ing] a complaint.” (ECF No. 286 at 4, 7.) But Ms. Borelli has already eliminated time expended that was specific to the other Plaintiffs in this case. (Borelli Decl. ¶¶ 6-9.) Other major sections of the complaint were equally applicable to, and necessary for, the claims of Mr. Fain and Ms. Anderson—*e.g.*, allegations explaining the diagnosis of gender dysphoria and the standards of care for its treatment (ECF No. 1 at ¶¶ 22-47); the claims themselves, which applied to all Plaintiffs and were differentiated only by headings indicating which Plaintiffs raised that claim against which Defendants (ECF No. 1 at ¶¶ 118-156).

(iii) Second Amended Complaint.

Defendants point out that Plaintiffs sought leave to file a Second Amended Complaint on January 21, 2022 to raise additional claims on behalf of former Plaintiff Leanne James. (ECF No. 286 at 3.) But as their time sheets show, Plaintiffs have already excised all entries related to that complaint since the amendment involved Ms. James only. (Borelli Decl. ¶ 9.)

Separate and apart from the reductions made for unrelated claims or parties, Plaintiffs have already eliminated 516.2 hours of their billable time spent on Plaintiffs’ Medicaid claims, amounting to a reduction of \$167,917.50 when multiplied by the local prevailing rates for each timekeeper. (ECF No. 285 at 8-9.) Additionally, Plaintiffs are not claiming any time relating to the preparation and briefing of their fees motion, and Plaintiffs have offered additional cuts described

below. And still, Defendants request that this Court reduce the lodestar by 50%, a request that is not only unreasonable but would serve as a substantial deterrent to doing this work and risk reducing judicial access for litigants who have endured civil rights violations. “Awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if [f]ederal civil and constitutional rights are to be adequately protected.” *Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014) (cleaned up). As complete successors in their constitutional and federal statutory claims, Plaintiffs should not have their lodestar arbitrarily reduced by half, particularly after the extensive cuts Plaintiffs already have made. The attorneys’ fees they seek here are reasonable.

C. To Demonstrate Plaintiffs’ Continued Reasonableness and Interest in Streamlining Their Application, Plaintiffs Agree to Reduce the Time Billed by an Additional \$32,627.50.

The attorneys’ fees sought by Plaintiffs are reasonable. Plaintiffs’ counsel exercised proper billing judgment, removing unrelated time and imposing significant additional cuts on their claimed time. Plaintiffs already have eliminated 516.2 hours of billable time from their request, amounting to a reduction of \$167,917.50. Nonetheless, in the interest of streamlining the issues for decision, Plaintiffs agree to the following reductions in time claimed:

(i) ESI Meet and Confer

Defendants identify a July 6, 2021 call held by the parties relating to discovery of electronically stored information (“ESI”). (ECF No. 286 at 10.) Setting aside the fact that resolving ESI-related issues was necessary for the case regardless of how many defendants participate, Plaintiffs agree to reduce the time billed by \$2,175.00.²

² Defendants claim inconsistent billing, but mistakenly read Ms. Lockhart-Clanton’s record which explicitly indicates that it includes multiple tasks, with the relevant time increment for each

(ii) Damages

Defendants also object to time expended on damages issues when Plaintiffs ultimately did not seek that remedy. (ECF No. 286 at 4.) Plaintiffs agree to eliminate entries relating to that issue, amounting to a reduction of five (5) hours in attorney time, for a total of \$1,960.00.³

II. ALTHOUGH PLAINTIFFS REASONABLY STAFFED DEPOSITIONS IN THIS CASE, THEY ADOPT DEFENDANTS' APPROACH TO RESOLVE THE ISSUE.

In addition to requesting that this Court reduce Plaintiffs' lodestar by a draconian 50%, Defendants also ask for Plaintiffs' requested fee award to be reduced by \$38,567.00 for purported redundant attendance at depositions. Attendance at depositions by local counsel, Nichols Kaster, and Lambda Legal was reasonable on multiple grounds. Because Defendants designated eight different Rule 30(b)(6) witnesses to testify on often overlapping topics, and the depositions of those witnesses were divided between Nichols Kaster and Lambda Legal, efficiency required attendance by a representative from both. (Borelli Decl. ¶ 11.) This included because the deposition schedule was conducted over a very compressed period of time, and attendance at the depositions assisted other attorneys in taking subsequent related depositions on a tight timeline. (*Id.*)

Plaintiffs' billing for deposition attendance is not excessive given the foregoing. Nonetheless, in the interest of quickly and collegially resolving this dispute and streamlining their

separately indicated, and includes the same one-hour increment billed for the call as other Plaintiffs' counsel. And while Mr. Auvil's records do not indicate that he billed 1.5 hours for that specific call, to eliminate all doubt Plaintiffs further reduce Mr. Auvil's request by 0.5 so that only one hour of telephonic time is claimed for that day, thereby subtracting \$250.00 from his total request.

In their review of their time sheets, counsel also have discovered one additional phone call in Ms. Prakash's time sheet that involved counsel for a different defendant, and counsel thus further reduce their request by one hour of Ms. Prakash's time at her requested rate of \$450.00.

³ Plaintiffs searched all time sheets for the word "damages" and cross-referenced all entries mentioning damages across all time sheets. (Borelli Decl. ¶ 10.) That produced a total of 10 entries devoted to the issue, amounting to \$1,960.00 in attorney time. (*Id.*)

fee request, Plaintiffs are willing to make further reductions—underscoring the reasonableness of their request. Accordingly, Plaintiffs have reviewed the depositions identified in Defendants’ brief and agree to the reductions discussed below.

First, however—despite their critiques of the care exercised by Plaintiffs’ counsel in reviewing the voluminous records in this case—Defendants made multiple errors just in their recounting of deposition responsibilities and the following corrections are required:

- Mr. Auvil did not attend the deposition of Dr. James Becker, and accordingly no redundancy can be attributed to him. Mx. Smith-Carrington was the lead attorney who took this deposition. Because Mx. Smith-Carrington is a junior attorney and this was their first deposition, Plaintiffs appropriately staffed this deposition with Ms. Borelli, who supported Mx. Smith-Carrington as a senior attorney. Plaintiffs agree to forego Ms. Schladt’s time, for a reduction of \$2,100.00.
- Contrary to Defendants’ representations (ECF No. 286 at 9), Ms. Prakash took the deposition of Frederick Lewis so her time is not redundant. Plaintiffs agree instead to omit time from Mx. Smith-Carrington and Ms. Schladt, for a reduction of \$2,702.50.
- Defendants are also mistaken about the division of work for Mr. Fain’s deposition. (ECF No. 286 at 10.) Ms. Prakash defended that deposition, not Ms. Buchert, so Ms. Prakash’s time is not redundant. Plaintiffs agree instead to omit time from Ms. Buchert, for a reduction of \$1,350.00.

Incorporating the corrections above, Plaintiffs reduce their request by the following amounts, subject to the adjustments listed in the bullet points above:

Deposition	Reduction agreed to by Plaintiffs	Full reduction requested by Defendants	Adjusted reduction

Deposition of Secretary Crouch	Reduced by \$950.00 for Ms. Borelli	X	
Deposition of Dr. Schechter	Reduced by \$4,602.50 for Ms. Borelli and Ms. Schladt	X	
Deposition of Commissioner Beane	Reduced by \$3,680.00 for Mx. Smith-Carrington and Ms. Schladt	X	
Deposition of Dr. Becker	Reduced by \$2,100.00 for Ms. Schladt		X
Deposition of F. Lewis	Reduced by \$2,702.50 for Mx. Smith-Carrington and Ms. Schladt		X
Deposition of B. Lewis	Reduced by \$1,350.00 for Ms. Prakash	X	
Deposition of Myers	Reduced by \$1,355.00 for Mx. Smith-Carrington and Ms. Schladt	X	
Deposition of Manning	Reduced by \$1,812.50 for Mx. Smith-Carrington and Ms. Prakash	X	
Deposition of Thompson	Reduced by \$1,850.00 for Ms. Borelli and Ms. Prakash	X	
Deposition of Dr. Karasic	Reduced by \$3,040.00 for Ms. Borelli	X	
Deposition of Anderson	Reduced by \$3,000.00 for Mx. Smith-Carrington and Ms. Borelli	X	
Deposition of Fain	Reduced by \$1,350.00 for Ms. Buchert		X
Total reduction:	\$27,792.50		

In sum, because Plaintiffs have adopted Defendants' position about attendance at deposition, subject to the reasonable adjustments above, the Court should award Plaintiffs' adjusted request.

III. MR. AUVIL SHOULD BE AWARDED THE PREVAILING MARKET RATE.

Defendants "do not dispute that the hourly rates requested by Plaintiffs' counsel are generally in line with other awards in the District Court for the Southern District of West Virginia for civil rights cases." (ECF No. 286 at 4.) Moreover, "Defendants do not dispute that this Court has found \$500.00 to be a reasonable hourly rate for an attorney with the experience and expertise of attorney [Walt] Auvil." (*Id.* at 12.) Defendants also "submit that it was reasonable for attorney Auvil to attend depositions with a visiting attorney who was taking or defending the deposition."

(*Id.* at 8.) Nevertheless, Defendants request that this Court reduce Mr. Auvil’s hourly rate simply because of his role as local counsel. (*Id.*) Unsurprisingly, Defendants provide no legal authority for this proposition, and it should be rejected.

To determine whether the proposed hourly rate is reasonable, “[t]he relevant market for determining the prevailing rate is ordinarily the community in which the court where the action is prosecuted sits.” *Rum Creek Coal Sales, Inc v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994). The fee applicant “must produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which [they] seek[] an award.” *Grissom v. The Mills Corp.*, 549 F.3d 313, 323 (4th Cir. 2008) (cleaned up). Affidavits from local attorneys who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community are sufficient to verify the prevailing market rates. *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009).

Plaintiffs have provided specific evidence of the prevailing market rates through affidavits of not one but two local attorneys. (ECF No. 284-15 ¶ 31 (“the highest billable rate Plaintiffs’ counsel is basing its lodestar on in this matter [for Mr. Auvil]—Five Hundred Dollars (\$500.00) for the senior most attorney on the case—is fair and reasonable.”); ECF No. 284-14 ¶ 21 (same).) For all that Defendants concede, it is perplexing that they ask this Court to reduce Mr. Auvil’s hourly without any factual or legal support. Instead, the only evidence in the record supports Plaintiffs (ECF Nos. 284-14, 284-15), as does the case law. *See, e.g., McGee v. Cole*, 115 F. Supp. 3d 765, 775 (S.D.W. Va. 2015) (awarding an attorney with 36 years of experience, an hourly rate of \$500.00 in a successful challenge to state’s ban on same-se marriage); *see also* ECF No. 285 at 17 (collecting authorities). Defendants instead minimize Mr. Auvil’s contributions by asserting that Mr. Auvil merely attended depositions and hearings. (ECF No. 286 at 12.) But as Plaintiffs’

counsel testified, as a local attorney with *four decades* of experience in West Virginia courts, Mr. Auvil “provided valuable input on strategy and guidance on local procedure.” (ECF No. 284-1 at 6 ¶ 8.) Additionally, over the course of more than two years of litigation, Mr. Auvil has billed fewer than 70 hours relating to Plaintiffs’ Medicaid claims (less than two weeks of full-time work), and seeks only \$34,875.00 in total compensation. This is eminently reasonable. (ECF Nos. 284-14 ¶¶ 16-17; 284-15 ¶¶ 23-24.) Plaintiffs have more than satisfied their burden and established that Mr. Auvil’s hourly rate of \$500.00 is well within local prevailing rates and Defendants’ request to reduce Mr. Auvil’s hourly rate is both unreasonable and unfounded. *See, e.g., Dameron v. Sinai Hosp. of Baltimore, Inc.*, 644 F. Supp. 551, 559 (D. Md. 1986) (declining to reduce requested rate simply because attorney’s “role in this litigation ... was primarily as local counsel”) (cleaned up).

CONCLUSION

Accordingly, for all of the reasons stated above, Plaintiff requests an order awarding \$785,033.75 in attorney’s fees. Plaintiffs also request \$34,509.32 in non-taxable expenses, which Defendants do not oppose.

* * *

Dated: October 21, 2022

/s/ Walt Auvil

Walt Auvil, WVSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058 | Fax: 304-485-6344
auvil@theemploymentlawcenter.com

Anna P. Prakash, MN Bar No. 0351362*
Nicole J. Schladt, MN Bar No. 0400234*
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700
Minneapolis, MN 55402
Phone: 612-256-3200 | Fax: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Nora Huppert, CA Bar No. 330552*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
65 E. Wacker Pl., Suite 2000
Chicago, IL 60601
Phone: 312-663-4413 | Fax: 312-663-4307
nhuppert@lambdalegal.org

Attorneys for Plaintiffs
* Admitted Pro Hac Vice

Respectfully submitted,

Avatara Smith-Carrington, MD Bar*
Sasha Buchert, OR Bar No. 070686*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245 | Fax: 202-429-9574
asmithcarrington@lambdalegal.org
sbuchert@lambdalegal.org

Tara L. Borelli, GA Bar No. 265084*
Carl Charles, NY Bar No. 5427026*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1 West Court Square, Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN and SHAUNTAE
ANDERSON, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically on October 21, 2022 on the following counsel for Defendants in this case:

Lou Ann S. Cyrus (WVSB # 6558)
Roberta F. Green (WVSB #6598)
Caleb B. David (WVSB #12732)
Kimberly M. Bandy (WVSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953, Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com, rgreen@shumanlaw.com
cdavid@shumanlaw.com, kbandy@shumanlaw.com

*Attorneys for Defendants William Crouch; Cynthia Beane; and West Virginia Department of
Health and Human Resources, Bureau for Medical Services*

Dated: October 21, 2022

Respectfully submitted,

s/ Walt Auvil

Walt Auvil, WV Bar No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-3058
auvil@theemploymentlawcenter.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN and SHAUNTAE
ANDERSON, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**DECLARATION OF TARA L. BORELLI IN SUPPORT OF PLAINTIFFS’
MOTION FOR ATTORNEYS’ FEES AND EXPENSES**

I, Tara L. Borelli, declare as follows:

1. I am Senior Counsel with Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), and counsel for Plaintiffs in this litigation. I am licensed to practice law in the states of Georgia, Washington, and California, and am practicing before this Court as a Visiting Attorney in accordance with the requirements of Local Rule of Civil Procedure 83.6. I submit this declaration in support of Plaintiffs’ Reply Memorandum of Law in Support of Plaintiffs’ Motion for Attorneys’ Fees and Expenses. I make this declaration of my own personal knowledge, and, if called as a witness, I could and would testify competently to the matters stated herein.

2. Defendants make several arguments about certain entries on one page of my time sheet (ECF No. 286 at 4, 7), but these arguments are misplaced.

3. For example, Defendants argue that I have billed unnecessary time related to medical records collection. (ECF No. 284-4 at 2.) I have reviewed that page of my time sheet and

identified one entry for a 24-minute teleconference related to development of a “medical records collection *protocol* for the plaintiffs.” (ECF No. 284-4 at 2 (emphasis added).) This time expenditure is reasonable regardless of whether one or several plaintiffs was involved in the litigation—a protocol is needed in any event.

4. Collecting medical records is an involved and complex process requiring coordination with the plaintiff, communication with the relevant providers, completion of required authorizations, and ongoing tracking and follow-up on unanswered requests. As the entry itself indicates, the call was related to a general protocol, and organizing the work this way enhances efficiency rather than reducing it. The development of a standard protocol for collecting medical records was equally necessary for the two plaintiffs who won summary judgment, both of whom produced extensive medical records to Defendants and the expert who examined them in this case.

5. Defendants also argue over time expended related to “research” on that page of my time sheet. (ECF No. 286 at 4, 7 (citing ECF No. 284-4 at 2).) After reviewing that page, I have identified one entry for 12 minutes related to “health plan structure, and case preparation updates.” (ECF No. 284-4 at 2.) The only other entry relating to research that I have identified on that page is a 30-minute legal team call covering multiple topics. (ECF No. 284-4 at 2.) In fact, the complaint that my co-counsel and I were preparing contained a detailed section spanning multiple pages describing Medicaid’s structure, which is complex. (ECF No. 1 ¶¶ 48-62.) I believe that the research-related entries on that page of the time sheet are a reasonable expenditure of time for the work required to prepare the relevant sections of the complaint.

6. Similarly, Defendants complain that my time sheet includes entries for “complaint drafting” and “revis[ing] a complaint.” (ECF No. 286 at 4, 7.) But I have already eliminated time

expended that was specific to the other Plaintiffs in this case. For example, before producing the version of the time sheet submitted with Plaintiffs' motion for fees and expenses, I eliminated all time I identified as:

- involving telephone calls and emails with former plaintiffs over the course of representing them, and
- involving review of documents that former plaintiffs provided to counsel.

7. I also eliminated the time I identified as involving reviewing and/or performing research related to former Plaintiffs' claims (0.2 on August 31, 2022; an additional entry for 2.1 on August 31, 2022; and 1.9 on September 5, 2022); and time spent drafting and revising certain portions of the complaint (1.2 hours on September 2, 2020; and 0.5 on September 5, 2022).

8. Other major sections of the complaint were equally applicable to, and necessary for, the claims of Mr. Fain and Ms. Anderson—*e.g.*, allegations explaining the diagnosis of gender dysphoria and the standards of care for its treatment (ECF No. 1 at ¶¶ 22-47); and the claims themselves, which applied to all Plaintiffs and were differentiated only by headings indicating which Plaintiffs raised that claim against which Defendants (ECF No. 1 at ¶¶ 118-156).

9. Defendants point out that Plaintiffs sought leave to file a Second Amended Complaint on January 21, 2022 to raise additional claims on behalf of former Plaintiff Leanne James. (ECF No. 286 at 3.) But as the time sheets for Plaintiffs' counsel show, counsel have eliminated all entries they identified as relating to that complaint since it involved former Plaintiff Leanne James only.

10. Defendants also object to time expended on damages issues when Plaintiffs ultimately did not seek that remedy. (ECF No. 286 at 4.) Plaintiffs agree to eliminate entries

relating to that issue, amounting to a reduction of five (5) hours in attorney time, for a total of \$1,960.00. I calculated this number by searching all time sheets for the word “damages.” I then cross-referenced all entries mentioning damages across all time sheets. That produced a total of 10 entries devoted to the issue, amounting to \$1,960.00 in attorney time.

11. In addition to requesting that this Court reduce Plaintiffs’ lodestar by a draconian 50%, Defendants also ask for Plaintiffs’ fee award to be reduced by \$38,567.00 for purported redundant attendance at depositions. Attendance at depositions by representatives from local counsel, Nichols Kaster PLLP (“Nichols Kaster”), and Lambda Legal was reasonable on multiple grounds. Because Defendants designated eight different Rule 30(b)(6) witnesses to testify on often overlapping topics, and the depositions of those witnesses were divided between Nichols Kaster and Lambda Legal, efficiency required attendance by a representative from both. This included because the deposition schedule was conducted over a very compressed period of time, and attendance at the depositions assisted other attorneys in taking subsequent related depositions on a tight timeline.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 21, 2022

/s/ Tara L. Borelli
Tara L. Borelli

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN and SHAUNTAE
ANDERSON, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically on October 21, 2022 on the following counsel for Defendants in this case:

Lou Ann S. Cyrus (WVSB # 6558)
Roberta F. Green (WVSB #6598)
Caleb B. David (WVSB #12732)
Kimberly M. Bandy (WVSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953, Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com, rgreen@shumanlaw.com
cdavid@shumanlaw.com, kbandy@shumanlaw.com

*Attorneys for Defendants William Crouch; Cynthia Beane; and West Virginia Department of
Health and Human Resources, Bureau for Medical Services*

Dated: October 21, 2022

Respectfully submitted,

s/ Walt Auvil

Walt Auvil, WV Bar No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-3058
auvil@theemploymentlawcenter.com