DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 COLORADO CROSS-DISABILITY COALITION, *et al*, Plaintiffs, v. COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, *et al.* Defendants.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General PATRICIA D. HERRON, Senior Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-6163 E-mail: pat.herron@state.co.us Registration Number: 32984 *Counsel of Record	Case No. 2009 CV 11761 Div.: 3 Judge Hoffman
STATE DEFENDANTS' *RESPONSE TO* PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND REQUEST FOR IMMEDIATE DISMISSAL	

I. Introduction

In cases brought pursuant to 42 U.S.C. § 1983, attorney fees are awarded in one of two ways: 1) fees can be awarded pursuant to 42 U.S.C.§ 1988 to the *prevailing party*; or 2) fees can be agreed upon by the parties and set forth in a written agreement. In this case, Plaintiffs ask this Court to convert the Settlement Agreement dated September 15, 2010 to an order and then award Plaintiffs' attorney's fees. Even if this Court grants the relief requested and converts the Settlement Agreement to an order, Plaintiffs are not entitled to an award of fees under the terms of the Settlement Agreement. For this Court to award fees to Plaintiffs, the Court would have to supply

additional substantive terms into the Settlement Agreement that the Settlement Agreement does not contain, or to interpret the Agreement in a strained and distorted manner contrary to the plain language contained in the Agreement. Moreover, Plaintiffs are also not entitled to an award of fees pursuant to 42 U.S.C. § 1988 because they are not prevailing parties.

II. Summary Background

The underlying issues in this case arose in September 2009, when the State of Colorado faced a deficit budget. In order to balance the budget, "across the board" cuts were ordered by the Governor. As a result, individuals receiving Medicaid benefits under the Community Based Long Term Care Services through the Consumer Directed Attendant Support Services (CDASS) program were advised that they would receive a reduction to their allocations. [1]

Before suit was filed, and immediately upon learning that the notifications to the CDASS recipients were inconsistent and contained deficiencies,[2] the Colorado Department of Health Care Policy and Financing (the "Department") took steps to rectify the deficiencies. The Department voluntarily returned these operations "in house." At great expense to the State of Colorado, the state officials had already begun the process of recalculating allocation amounts.

---

[1] The CDASS program is administered by the Colorado Department of Health Care Policy and Financing.

[2] The individual counties were tasked with the notification of their CDASS clients. The notifications lacked uniformity, contained calculation errors and other problems were identified by the Department.

In late December 2009 Plaintiffs brought suit pursuant to 42 U.S.C. § 1983 alleging a violation of their Constitutional right to due process. Plaintiffs filed an amended complaint thereafter adding a number of additional plaintiffs. The focus of Plaintiffs' complaint was their contention that they were entitled to notice and opportunity for a full hearing *on the Governor's budget cuts (including the rates)* prior to the CDASS allocation adjustments. This continued to be the focus of Plaintiffs' amended complaint and the focus of negotiations undertaken by counsel for the parties. Without resort to the court, during the pendency of the litigation, the Department notified plaintiffs that it was issuing notices to all CDASS recipients with corrected calculations and a notice that CDASS participants were entitled to a review of the calculation, but not the budget cuts or rate reductions. At the September, 2010 mediation, Plaintiffs abandoned their position that they were entitled to a hearing on the budget cuts.

At some point during the pendency of the case, the demands made by CCDC and CDASS representatives became unreasonable. It became apparent to state officials that the demands being made by Plaintiffs were intended to protract the proceedings, likely for the purpose of attempting to extract a large attorney's fee award from the State. As an example, prior to sending the letter containing the recalculated allocation amounts to CDASS recipients, Plaintiffs demanded that the notification letter include Plaintiffs' private corporation logo on State of Colorado letterhead. Because the Defendants believed Plaintiffs were unnecessarily protracting the litigation, counsel for Plaintiffs were notified August 18, 2010 that attorney fees would not be paid.

All issues in the case were resolved *by agreement of the parties.* Many issues were resolved prior to suit being filed. Once Plaintiffs abandoned their position that the CDASS recipients were entitled to a full hearing prior to implementation of the Governor's budget cuts,[3] the remainder of the issues were readily resolved between the parties without court assistance. No issues were resolved by the Court and no matters were subject to court intervention. At no time were Plaintiffs' allocations reduced and no CDASS recipients were penalized for spending above their allocation amount. Plaintiffs suffered no damages.

Upon resolution of the issues, the parties entered into a Settlement Agreement that memorialized the parties' agreements and concluded the litigation. On the issue of attorney fees, the Settlement Agreement contains provisions calling for the parties to attempt to resolve the issue by agreement. If not able to do so, the Agreement calls for the parties to return to mediation (not arbitration) to make further efforts to agree to an award of fees. If the parties fail to reach agreement at mediation, by its terms, the Agreement requires the parties to bear their own costs and attorneys' fees. (See ¶ ¶ 6, 12 Settlement Agreement).

[3] Plaintiffs abandoned this position at the September, 2010 mediation.

III. Argument

A. Entitlement To Attorney's Fees

The "American Rule" generally used in our legal system, requires that each party must pay its own attorney's fees and expenses. *Hensley v. Eckerhart*, 461 US 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).

B. Fees by Contract/Settlement Agreement

In this case Plaintiffs ask this court to convert the purported contract or Settlement Agreement to an order of the court. In making the request to convert the Settlement Agreement to an order of the court, Plaintiffs are acknowledging that they are not prevailing parties in accordance with *Buckhannon v. Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 605, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) and that the Settlement Agreement does not provide the necessary terms for an award of fees. Further, by seeking this remedy, Plaintiffs attempt, after the suit is concluded and there is no longer a justiciable controversy, to manipulate an award of attorney fees. Plaintiffs are asking the court to circumvent the ruling in *Buckhannon* and the Supreme Court's criteria for awarding attorney's fees in cases brought pursuant to Section 1983. The Court's criteria are set forth fully below.

The Settlement Agreement, drafted in part by counsel for Plaintiffs, does not contain a provision establishing Plaintiffs as the prevailing party or entitling them to an award of attorney fees. In fact, the Agreement specifies that it "shall not be construed in any manner or for any purpose as an admission of wrongdoing or liability on the part of either party."(¶ 11, Settlement Agreement) The Agreement also contains a specific provision mandating that unless the parties reach agreement as to an award of attorney

fees, each party shall pay their own fees and costs. (¶ 12, Settlement Agreement). Further, the language contained in Paragraph 16 of the Settlement Agreement, commonly known as an integration clause, states that all agreements and understandings among the parties are embodied and expressed in the Agreement. (¶ 16, Settlement Agreement) By including an integration clause in the Agreement the parties have established that the terms of this Agreement represent a final and complete integration of their agreements. As such, the parties' agreements are enforceable, and parol evidence that is offered to establish the existence of prior or contemporaneous agreements is inadmissible to vary the terms of such contract. *Sentinel Acceptance Corp. v. Colgate*, 162 Colo. 64, 66, 424 P.2d 380, 382 (1967); *Gardner v. Boettcher & Company, Inc.,* 872 F.2d 427, No. 87-4419, 1989 WL 37239 at *2 (9th Cir. April 14, 1989)); *Nelson v. Elway,* 908 P.2d 102, 107 (Colo. 1995) *reh'g denied* Jan. 16, 1996; Where an agreement is unambiguous, an integration clause is a further bar to the extrinsic evidence a party wants to introduce to attempt to vary the contract's terms; *Maryland Cas. Co. v. Formwork Services, Inc.*, 812 F.Supp. 1127, 1130. (D.Colo. 1993).

Despite the plain and unequivocal language of the Agreement and the specific inclusion of an integration clause, Plaintiffs now attempt to improperly use two previous, unexecuted draft agreements to show that the parties *intended* to pay fees. The use of these unsigned and incomplete drafts is wholly improper. By its terms, the executed Settlement Agreement (containing the integration clause) does not contain a provision calling for the Department to pay fees. It does not contain a provision establishing Plaintiffs' entitlement to fees and it does not contain language requiring attorney's fees be paid to or by either party. Further, the unsigned drafts now offered by Plaintiffs as

parol evidence of an "intent to pay" fees, were contemplated long before the final settlement agreement was reached and executed, and prior to the time the Department specifically notified Plaintiffs' counsel that fees would not be paid. Moreover, the two prior drafts do not reflect the final and unequivocal agreement of the parties as evidenced by the terms of the settlement agreement itself.

Although the State Defendants object to the use of any parol evidence and specifically object to the use of these unexecuted and draft agreements as highly improper in light of well established law, if the Court is inclined to consider them, the unexecuted draft of July 16, 2010 includes *specific language calling for the Department to pay fees*. In contrast, no such language is included in the Agreement executed by the parties in September, 2010. Further, the draft agreement referenced as Exhibit 4 by Plaintiffs in their Motion to Enforce, contains language different than either the executed agreement or the draft of July 16, 2010. The terms of this additional unexecuted draft call for the intervention of the Court if an agreement as to fees cannot be reached. That language was also omitted from the Settlement Agreement executed September 15, 2010 by the parties. It is clear from these older draft documents that counsel for the parties understood the need for specificity when dealing with the issue of attorney fees. From the earlier unexecuted draft agreements, the court can be certain that the parties knew and understood what language must be included in a contract in order to award fees and costs. None of those terms are included in the final executed agreement.

Further, the Settlement Agreement executed by the parties does not contain critical substantive terms relating to an award of fees such as: 1) an agreement as to the

prevailing party[4]; 2) an agreed hourly rate to be paid; or even, 3) an amount to be paid. Rather, the Agreement specifically calls for Plaintiffs' counsel to submit an itemized billing and seek an agreement as to an award of attorney fees. The Agreement further states that if the parties cannot agree on an award of attorney fees, the parties will return to mediation with Judge Barr.(¶ 6, Settlement Agreement) As agreed, the parties did return to mediation with Judge Barr. The defendants and the state Risk Manager attended mediation. The defendants mediated in good faith and made a substantial, good faith offer to compromise the attorney's fee issue in order to conclude the matter. However, the parties were not able to reach agreement. Finally, the Agreement states in paragraph 12 "Except as provided above, each party *shall* bear its own costs and attorneys' fees."

By its unequivocal terms, the Settlement Agreement establishes that the Agreement is "intended to resolve all claims by and between the parties that are related to the case" (¶ 10 Settlement Agreement) that "All agreements and understandings among the parties hereto are embodied and expressed in this Agreement:" and that "This Agreement will not be modified or amended unless the modification or amendment is in writing and is signed by authorized representatives of the parties." (Integration Clause, ¶ 16, Settlement Agreement).

Although there are few cases from which to adequately interpret the Dispute Mediation Act, C.R.S.§ 13-22-301, *et seq*, relied on by Plaintiffs, the Act contemplates having an agreement reached during mediation that has been reduced to writing and

[4] If litigated, Defendants would be deemed the prevailing party consistent with *Buckhannon.*

signed by the parties presented to the Court for approval. However, the Act does not contemplate submitting an agreement to the court for interpretation or modification of the terms particularly in light of the parties' specific inclusion of an integration clause in this particular agreement. In this case, the parties reached agreement, memorialized the terms in a Settlement Agreement dated September 15, 2010, and counsel for the parties signed the Agreement. The terms of the Agreement were negotiated and they are *unambiguous*. The terms set forth in the Settlement Agreement do not establish Plaintiffs as prevailing parties and do not establish a right to fees for either party. In the Settlement Agreement signed by the parties, the parties agreed to "attempt to agree" to an award of attorney fees. Failing that, the Agreement requires the parties to mediate the issue of fees. Finally, failing to reach agreement at mediation, the Agreement mandates that each party shall pay their own fees and costs. A fair reading of the terms of the Settlement Agreement, read as a whole and not reading one clause to the exclusion of others, is that the parties "agreed to attempt to agree," and failing that, to mediate(not arbitrate), and finally, failing at that stage, that each party pay their own fees and costs. Plaintiffs are not entitled to an award of attorney fees pursuant to the terms contained in the Settlement Agreement dated September 15, 2010 and executed by the parties and they are not entitled to go beyond the terms of the Agreement and have this court interpret the Agreement by resorting to the use of parol evidence.

C. Entitlement to Fees In Cases Brought Under 42 U.S.C.§1983

As a matter of law, in a case brought pursuant to 42 U.S.C.§ 1983, there are well defined rules establishing when attorney fees can be awarded. When fees are not agreed to by the parties, they can be awarded to a *prevailing party*. Congress enacted 42

U.S.C. §1988 in order to ensure that federal rights are adequately enforced. Section 1988 provides that a *prevailing party* in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs."

The case law also mandates that only a *prevailing party* is entitled to fees. The Supreme Court has stated that in order to be a "prevailing party" a party must receive some form of "judicial imprimatur" and there must be a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon v. Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 605, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

The standard for awarding fees generally applied before the *Buckhannon* decision, was known as the "catalyst theory." *Id.,* see also *Friends of the Earth, Inc. v. Laidlaw Environmental,* 528 U.S. 167, 120 S.Ct. 693 (2000). Under the catalyst theory, a plaintiff could be found to have achieved prevailing party status where the voluntary action taken by the defendant afforded the plaintiff some or all of the relief sought as long as there was a causal connection between the lawsuit and the relief obtained. However, the catalyst theory is no longer the law. In *Buckhannon*, the United States Supreme Court squarely rejected the catalyst theory, holding that the catalyst theory is not a permissible basis for an award of attorney's fees. The Court also specified that its holding was applicable to all federal fee-shifting statutes that use the same "prevailing party" language as the statutes at issue in that case, and subsequent decisions have therefore applied *Buckhannon* to cases arising under other fee-shifting statutes, including fee requests made pursuant to 42 U.S.C.§ 1988. *Id.* at 605.

Since 2001, the Court has required a party to secure either a judgment on the

merits or be subject to some court ordered intervention that resulted in the change of position of the parties in order to qualify as a "prevailing party." Since the decision in *Buckhannon*, fees may not be awarded simply because plaintiff achieved a desired result or because the filing of a lawsuit brought about a voluntary change in defendant's conduct.

Even if this Court grants Plaintiffs the relief requested and converts the Settlement Agreement to an order, Plaintiffs do not become "prevailing parties" as contemplated in *Buckhannon*. An order entered at this time, after the Defendants have already voluntarily performed every aspect of the Agreement, would not bring about a change in the position of the parties as required by the Court in *Buckhannon*. As such, the Plaintiffs in this case are not *prevailing parties* and their counsel is not entitled to a fees award.

D. The Terms of the Settlement Agreement Require Dismissal

Paragraphs 8 and 15 of the Settlement Agreement mandate dismissal of this action. Paragraph 8 requires that upon the Department's execution of a Joint Motion to Dismiss and the execution of the Settlement Agreement, the Plaintiffs will release the Department from any further obligation for claims at issue in this case. Paragraph 15 of the Agreement mandates the dismissal of this case *upon the signing of the Settlement Agreement* by all parties. Paragraph 15 further requires Plaintiffs to promptly file a Joint Motion to Dismiss with prejudice when the Agreement is signed by all parties. The language contained in the Agreement does not contain any additional impediment to a dismissal of this action and the Court should dismiss this case instanter.

IV. Conclusion

Plaintiffs ask this Court to determine fees in a Federal Civil Rights case in accordance with Colorado law. They do so by seeking to have the Court "interpret" and "supplement" substantive terms to the Settlement Agreement executed by the parties. Plaintiffs ask this Court to resort to the use of parol evidence even though the negotiated terms of the Settlement Agreement are unequivocal. They seek this relief after the parties reached a voluntary agreement as to all justiciable issues and after the State Defendants completed and fully performed each and every aspect of the negotiated Settlement Agreement. The State Defendants negotiated in good faith, resolved all issues voluntarily, and as a result, this is not the type case where attorney fees were contemplated by Section 1988 or by the U.S. Supreme Court in *Buckhannon.*

It is undisputed that this case was brought pursuant to 42 U.S.C. § 1983, a federal statute. The right that Plaintiffs contended was violated was a federal right, the violation of their due process rights under the U.S. Constitution. Fees can only be awarded pursuant to federal law under 42 U.S.C. § 1988. Accordingly, Plaintiffs are not entitled to an award of fees because they are not a prevailing party.

As Plaintiffs have pointed out, the agreements reached between the parties were negotiated by attorneys for both sides. The parties reached agreement of all issues and memorialized their agreements to writing. This is not a case of overreaching by an attorney for one side against an unrepresented party. Indeed, this is precisely the type case the Supreme Court intended to exclude from an award of fees; a case where the State Defendants began working to remedy the problems long before suit was filed and once suit was filed, the Defendants immediately compromised. In addition, Plaintiffs'

constitutional issue relating to the right to a hearing on the Governor's budget cuts was abandoned by Plaintiffs. The parties resolved all substantive issues without resort to the court. This is not a case in which the Plaintiffs prevailed pursuant to 42 U.S.C. §1988, and attorney fees should not be awarded to either side.

V. Specific request to address the reasonableness of Plaintiffs' fee application

In the event this Court decides to grant Plaintiffs the relief requested, the State Defendants respectfully request the opportunity to address each aspect of the reasonableness of Plaintiffs' fee application[5] prior to the entry of an award.

Respectfully submitted this 16th day of December, 2010.

JOHN W. SUTHERS
Attorney General

s/ Patricia D. Herron

_____
PATRICIA D. HERRON, *32984
Senior Assistant Attorney General
Litigation
Civil Litigation and Employment Law Section
Attorneys for the Defendants
*Counsel of Record

[5] This counsel was furnished a prior version of Plaintiffs' fee application by attorneys for the Department. To date, counsel for Plaintiffs has not provided a copy of his current fee application to the undersigned.

In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of the foregoing document with original signatures is maintained at the offices of the Colorado Attorney General and will be provided for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within State Defendants' Response to Plaintiffs' Motion to Enforce Settlement Agreement upon all parties herein by e-filing or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this16th day of December, 2010 addressed as follows:

Kevin W. Williams, Esq.
Carrie Ann Lucas, Esq.
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203
kwilliams@ccdconline.org
clucas@ccdconline.org

s/ Mary Brown

Mary Brown