DISTRICT COURT, DENVER COUNTxY STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): COLORADO CROSS-DISABILITY COALITION *et al.* v. Defendant(s): COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING *et al.*	▲ COURT USE ONLY ▲
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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF AWARD OF ATTORNEYS' FEES

Plaintiffs' counsel hereby submits this Reply Brief In Support of Award of Attorneys' Fees.

INTRODUCTION

Plaintiffs' opening brief ("Op. Brf.") provides this Court with the basis for awarding the requested fees in the amount of $94,861.00 and for awarding $964.74 in costs, for a total of

$95,825.74 under the lodestar approach applicable Colorado Court of Appeals precedent. *Stuart v. North Shore Water & Sanitation Dist*., 211 P.3d 59, 63 (Colo. App. 2009) and cases cited in Op. Brf. p. 3, n. 1.[1] Plaintiffs' opening brief also provides a basis for awarding fees under Colorado statutes. *See* Colorado Dispute Resolution Act ("CDRA"), Colo. Rev. Stat. § 13-22-301 *et seq*., and Colo. Rev. Stat. § 13-17-102, *et seq*., regarding "Frivolous, Groundless, or Vexatious Actions." Defendant has made no showing to the contrary in its Response Brief ("Resp. Brf."), and this Court should award Plaintiffs' request for fees and costs in its entirety, plus $8,957.50 for the time and $27.00 for costs spent since the filing of the Brief in Support of Award of Attorneys' Fees. *See* Affidavit of Kevin W. Williams ("Second Williams Aff.") ¶ 11 and its Exhibit 1, attached hereto.

ARGUMENT

I. Plaintiffs' Counsel's Rates Are Reasonable

Defendant argues that all of the rates billed for each timekeeper are too high based on experience level and a comparison to the relevant market.[2] Defendant is incorrect. Entries for

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[1] Throughout its response, Defendant refers to a single Tenth Circuit Court of Appeals case decided in the year 1983, *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). *Ramos* is not binding authority on this Court, was brought pursuant to the federal Civil Rights Attorney's Fees Award Act, is not applicable in this case, and has been disagreed with and declined to be followed by virtually every court that has cited it since 1983, including the Colorado Court of Appeals. *See, e.g.*, *Hartman v. Community Responsibility Center, Inc*., 87 P.3d 254, 258 (Colo. App. 2004) (holding *Ramos*, in which 12 lawyers billed for over 2000 hours, to be inapposite in a case where fees were awarded to two lawyers – a partner and associate – working on the same case).

[2] The prevailing market rate applies "regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Balkind v. Telluride Mountain Title Co*., 8 P.3d 581, 588 (Colo. App. 2000).

specific timekeepers are addressed below.

At the October 2010 mediation regarding the amount of attorneys' fees, Plaintiffs' counsel submitted the affidavit of Timothy P. Fox, Esq., a Denver civil rights attorney with years of experience in disability rights litigation, who opined regarding the reasonableness of Plaintiffs' proposed rates as well as the reasonableness of the claim, for fees itself. *See* Op. Brf., Fox. Aff., Williams Aff., Exh. 6.

Defendant's discussion of the reasonableness of Plaintiffs' counsel's rates and the opinion of David G. Brougham, Esq., submitted with the Response Brief, do not take into account the risk of non-payment when representing clients who cannot afford to pay fees and costs, particularly in putative class actions such as this case. *See, e.g.*, *Brody v. Hellman*, 167 P.3d 192, 201 (Colo. App. 2007) ("[B]ecause payment is contingent upon receiving a favorable result for the class, attorneys should be compensated both for services rendered and for the risk of loss or nonpayment assumed by following through with the case") (*citing In re Combustion, Inc.*, 968 F.Supp. 1116, 1132 (W.D. La. 1997) (*citing* 1 Conte, *Attorney Fee Awards* 61, § 1.09 (2d ed. 1993))). *See also Berra v. Springer and Steinberg, P.C.*, No. 08CA2503, 2010 WL 3259883, at *4 (Colo. App., Aug. 19, 2010) ("We readily acknowledge that '[t]he whole point of contingent fees is to remove from the client's shoulders the risk of being out-of-pocket for attorney's fees upon a zero recovery. Instead, the lawyer assumes the risk, and is compensated for it by charging what is (in retrospect) a premium rate.'" 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 8.6, 8-15 (3d ed. 2010); *see also Brody*, 167 P.3d at 201 ("The size of the contingent fee is designed to be greater than the reasonable value of the

services, or the hours worked multiplied by the hourly rate, to reflect the fact that attorneys will realize no return for their investment of time and expenses in cases they lose."); Restatement of Lawyering § 35 cmt. c ("[a] contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation, because '[a] contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk')"); *In re Combustion, Inc., supra*, 968 F.Supp. at 1132 (*citin*g F. MacKinnon, *Contingency Fees for Legal Services* 28 (1964)).

Plaintiffs' counsel and staff do increase the billing rate annually. Second Williams Aff. ¶¶ 5-6.[3] Adjusting the hourly rate by application of the current market rate, keeping in mind the rate can be higher in contingency cases, is appropriate and reasonable when there is a delay between the time the case is filed and resolved. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1987). This practice is also consistent with the practices of attorneys in the Denver market. *See* CBA Survey p. 27. "An adjustment for delay in payment is . . . an appropriate factor in the determination of what constitutes a reasonable attorney's fee." *Johnson by Agyei*, 491 at 284; *see also Brady v. Wal-Mart Stores, Inc.,* No. 03-CV-3843 (JO), 2010 WL 4392566, *6 (E.D.N.Y., Oct. 29, 2010).

II. The Factors for Adjusting the Lodestar Rate Under Colorado Precedent Justify Plaintiffs' Counsel's Requested Fee Award

[3] In an effort to save additional attorney time and additional fees and costs, undersigned counsel has not requested a second affidavit from Mr. Fox opining on the reasonableness of the increased rate or fees sought requested after the mediation. If this Court believes further expert witness testimony is necessary, undersigned counsel will request Mr. Fox's participation in a hearing on this issue.

The starting point for analysis in determining the reasonableness of attorneys' fees is the lodestar amount, which "carries with it a strong presumption of reasonableness." *Balkind*, 8 P.3d at 587-88; *Stuart*, 211 P.3d at 63. Adjustments can be made "upward or downward," *see Balkind*, 8 P.3d at 587-588, and should only be made examining the factors set forth in *Brody*, 167 P.3d at 200-01 (*citing Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)); *see also* Colo. RPC 1.5.

As set forth below, Defendant's response inaccurately applies both fact and law regarding the timekeepers in this case and the factors to be considered in adjusting the presumptively reasonable lodestar amount.

A. Time Entries for Briana McCarten

Ms. McCarten's title is CCDC's Legal Assistant; however, Ms. McCarten holds a Paralegal/Legal Assistant Certificate, conferred by the Colorado State Board for the Community Colleges and Occupational Education and upon recommendation by Front Range Community College, conferred in 2008. *See* Affidavit of Briana McCarten ("McCarten Aff.") ¶ 4, attached hereto. Ms. McCarten also has a Bachelor of Arts degree in Sociology from the University of Wisconsin-LaCrosse. *Id.* ¶ 5. Ms. McCarten has been CCDC's Legal Assistant and has worked in that capacity since May of 2008. *Id.* ¶ 6. In that capacity, her duties include legal research, drafting pleadings and discovery documents, managing and coding documents, interviewing clients and witnesses and generally all duties traditionally associated with work as a paralegal and legal assistant. *Id.* ¶ 7.

Defendant assumes all of Ms. McCarten's time should be subsumed in CCDC's

"admin/overhead." This is inaccurate. Pages 2-23 of Defendant's Amended Exhibit to its response brief appear to suggest that all of Ms. McCarten's time should be discounted as administrative overhead; however, as the time entries to which Defendant objects show, Ms. McCarten spent time on activities normally attributed to a paralegal (e.g., research, drafting/revising/transcribing pleadings, proofreading/editing/cite checking documents) and to a legal assistant that are unrelated to administrative overhead (calls and e-mail contact with clients and CDASS members, investigation of claims, document management and coding of documents). As shown in the billing statements, a sizable portion of Ms. McCarten's time was devoted to collecting and reviewing CDASS clients' allocation miscalculations by the Department, communicating by phone and e-mail with clients, creating and updating a spreadsheet that performed the "complex task of recalculating clients' allocation amounts" (Resp. Brf. at 6) and demonstrated the disparities and miscalculations in CDASS benefit reductions, gathering and coding the input necessary to develop this case and prepare for class action certification. McCarten Aff. ¶ 8.

Recovery of Ms. McCarten's time as a legal assistant or paralegal is compensable. "Fees for non-attorneys, such as paralegals, whose labor contributes to the work product of an attorney may be awarded, provided that attorneys in the relevant market customarily bill clients separately for such work." *Jenkins ex rel. Agyei*, 491 U.S. at 284-89; *Morris v. Belfor USA Group, Inc.,* 201 P.3d 1253, 1262-63 (Colo. App. 2008); *Newport Pacific Capital Co., Inc. v. Waste*, 878 P.2d 136, 140 (Colo. App. 1994) ("Numerous courts have allowed for the recovery

of services of paralegals, law clerks, [and] staff.");[4] *see also* CBA Survey, showing separate billing rates for paralegals.

B. Time Entries for Andrew Montoya

As noted in Plaintiffs' opening brief, Mr. Montoya became a member of the Colorado Bar last fall. Mr. Montoya's time prior to then was billed at a legal assistant rate of $100.00/hour, and his time as an attorney has been billed at $200.00/hour. These rates are consistent with prevailing market rates and this Court's decision in the *Rossart* case in 2008. *See* Op. Brf., Williams Aff., Exh. 5, p. 5 (finding $200 (Krichiver), a beginning first year associate, and hourly paralegal and intern rates of $110 are "fair and reasonable").

C. Degree of Success Achieved and Class Certification Time

Plaintiffs set forth in detail the degree of success achieved in the settlement of this case in their opening brief. Op. Brf. at 22-24. Defendant's arguments that Plaintiffs' settlement did not obtain complete relief and that time spent preparing for class certification was unnecessary are incorrect and disingenuous.

First, Defendant settled this case on the brink of its deadline to respond to the motion for class certification. Op. Brf. at 10-11. Plaintiffs filed their motion for class certification at the time ordered by this Court; *see* Order entered June 17, 2010, denying Motion to Dismiss and setting an August 23, 2010 deadline for Plaintiffs' class certification motion and a September 3,

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[4] *See* this court's decision in *Rossart v. Developmental Pathways, Inc*., Case No. 06CV4479 (Denv. Dist. Ct., July 21, 2008) (paralegal and intern hours spent at rate of $110.00/hour reasonably necessary in Medicaid/Due Process case settlement), Op. Brf., Williams Aff., Exh. 5; *Lucas v. Kmart Corp*., Civil Action No. 99-cv-01923-JLK-CBS, 2006 WL 2729260 (D. Colo., July 27, 2006), Op. Brf., Williams Aff., Exh. 4.

2010 deadline for Defendant's response. *Id.* Defendant was granted an unopposed motion for extension to respond up to and including September 17, 2010. *See* Order, entered September 7, 2010. The mediation resulting in the settlement agreement and "ending" this case, except for the fees determination, occurred on September 15, 2010. *See* Motion to Enforce Agreement ("Motion to Enforce"), filed Oct. 18, 2010, Exh. 5 to Williams Aff. Defendant never moved for a stay of proceedings, even though Plaintiffs agreed to do so to finalize resolution. Motion to Enforce, Williams Aff. ¶ 12.

Defendant argues Plaintiffs were unsuccessful on two of the three claims they brought, but fails to articulate how this occurred or how discovery regarding these issues did not result in a settlement. As noted above, the documents received, provided and exchanged were what led Plaintiffs' counsel and the Department to "learn" of the significant miscalculations in this case. Defendant never objected to turning over documents requested or to reviewing the documents provided, and Plaintiffs voluntarily disclosed all of Plaintiffs' correspondence from case managers. If this discovery had not occurred, Defendant would have needed to wait until after class certification briefing was completed to begin discovery, engaging in class discovery, and, presumably, arrive at the same settlement position, after incurring much more fees and costs and delaying due process for CDASS clients.

There is no dispute the final resolution applies to all 1,400 CDASS clients, not just the original four or ultimate thirteen named plaintiffs identified in this case. *See* Op. Brf., Williams Aff., Exh. 1 ("Settlement Agreement").

Despite these obvious facts demonstrating the time spent in this case was necessary to the

outcome, according to Defendant:

> Plaintiffs' counsel has expended significant time on issues for which he was not successful. Plaintiffs unsuccessfully pursued the theory that each Plaintiff was entitled to a full hearing prior to an allocation decrease made as a result of an across the board budget cut ordered by the Governor of the State. Plaintiffs' theory is inconsistent with the Medicaid statutes and was ultimately abandoned by Plaintiff. However, the theory was not abandoned before Plaintiffs spent substantial time on discovery and conducting research on the issue.

Although the settlement agreement may be brief in verbiage, it is large in scope: These issues are squarely addressed in the settlement agreement. Settlement Agreement ¶¶ 2-5. Under the agreement, the Department was required to send each client a letter explaining the corrected recalculation of their CDASS allocation amount. *Id.* ¶ 1. Any change to allocation amounts going forward will require advance notice and an opportunity for a hearing consistent with the mandates of due process and the Medicaid regulations. *Id.* ¶ 4. Plaintiffs and all CDASS clients cannot be punished for the Department's past errors, *id.* ¶ 5, and, when the Department attempts to cut allocation amounts in the future, regardless of the reason, it must provide advanced notice and the legal reason. *Id.* ¶ 4.

Prior to this settlement, Defendant steadfastly opposed providing CDASS clients with individual advanced notice of allocation changes, claiming notice provided in the Colorado Register was sufficient. *See, e.g.*, Motion to Dismiss at 11-13 ("Plaintiffs were not entitled to notice under 42 C.F.R. § 431.210"). The settlement requires advance notice of any allocation change and permits an appeal for any reduction not due solely to changes in State or Federal law, which is consistent with the language in 42 C.F.R. § 431.220(b). If CDASS clients disagree with the reason, be it budget cuts or any other (as long as the sole issue is a not a change in Federal or

State law requiring an automatic change adversely affecting some or all recipients), they can appeal. *Id.* For example, clients will receive advance notice of any miscalculations and an opportunity to appeal. This was not possible under the Department's pre-settlement position.

Defendant asserts that work performed in this case was unnecessary because Defendant "had already given reassurances that 1) the problems with the notices were already being rectified by the Department; and 2) that no CDASS participant would be penalized or have their allocation reduced until such time as the calculations were corrected." Resp. Brf. at 3-4. The only time Plaintiffs had certainty that the Department had agreed to anything was when signatures were placed on the settlement agreement on September 15, 2010.[5] Second Williams Aff. ¶ 8.

IV. Reasonable Number of Hours For Research, "Learning" Background and Consulting With Other Lawyers

Undersigned counsel has thirteen years experience with federal disability discrimination law cases (the ADA, Fair Housing Act, Section 504, etc.), but, simply put, the ADA is not the Medicaid Act. As this Court noted in the *Rossart* case, Medicaid Act and Due Process cases "involv[e] the always numerous and often inscrutable federal Medicaid statute and regulations." *See Rossart supra* at 5. The case at bar involved not only the Medicaid Act and due process, but also how a new and unusual Medicaid waiver program like CDASS fits into these "numerous"

[5] To the extent the Defendant relies on the Affidavit of Joan E. Smith to support these representations, it should not be considered. The entire affidavit is based on representations made by counsel during mediation sessions at which the parties were negotiating terms of settlement. The guarantee of the parties' promises lies in the enforceability of the signed settlement agreement, not statements made by the attorneys in settlement discussions.

and "inscrutable" rules. Clearly, the parties' views were widely divergent. *See, e.g.*, Defendant's very novel argument in its motion to dismiss, suggesting Plaintiffs were not entitled to due process because they are "providers" of Medicaid services under the rules, not Medicaid recipients. Motion to Dismiss at 8. Research on this and other similar issues was needed. Research time is compensable. *See e.g.*, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (among the factors to consider are the novelty and difficulty of the questions, which require a "greater expenditure of time in research and preparation . . . ."); *Blanchard v. Bergeron*, 489 U.S. 87, 92 n.5 (1989) (approving the factors set forth in *Johnson*); Colo. RPC 1.5.

In addition to the research conducted by undersigned counsel necessary to understand this case, Ms. McCarten and Mr. Montoya were assigned specific research tasks necessary to complete the various briefs, responses and replies submitted in this case. The time for these tasks is reflected in each of their billing records. Second Williams Aff. ¶ 9. To the extent these records lack specificity as suggested by Defendant, counsel seems to be "damned if we do and damned if we don't." There is always a risk in providing billing records that counsel will disclose too much in trial preparation strategies that should not be viewed by opposing counsel based on privileged information. In this case, in the instances where Plaintiffs' counsel identified specific research tasks, Defendant criticizes the task as being non-compensable. All of Mr. Montoya's and Ms. McCarten's research was conducted specifically to assist undersigned counsel with the advancement of this case.

In addition, Plaintiffs' counsel contemplated a class action from the inception of this case. Although the exchange of information and records obtained, reviewed and analyzed from

the thirteen Plaintiffs demonstrated the same miscalculations and due process violations likely applied to all CDASS clients, the assistance of outside counsel was considered in the event that Plaintiffs' counsel may soon need to manage documents on behalf of fourteen hundred CDASS clients. Also, undersigned counsel benefitted from some admitted consulting with experts in the field of Medicaid law. Second Williams Aff. ¶ 10.

V. Alleged "Block Billing"

What Defendant refers to as "block billing" is not. A review of Defendant's exhibit shows there is very little, if any, actual "block billing." There appear to be four objectionable entries, which, when, examined, are very detailed:

- 12/22/2009: KWW 10 hours. Research class action cases, injunction case, due process, draft complaint; telephone calls client; research CDASS history and rules; complaint revisions; review client letters; e-mail membership; telephone calls assistant regarding revisions and filing.

- 5/12/2010: KWW 2.6 hours. Review and code disclosures; e-mail and respond to CDASS clients; review /respond to e-mail regarding extension for discovery responses; e-mail clients regarding increase in allocations; review responses; e-mail client regarding documents; e-mail clients regarding mediation; review responses.

- 5/19/2010: KWW 2.7 hours. Review department disclosure docs; draft notes and motion for certification; e-mail clients regarding allocations.

- 12/21/2010. KWW 2 hours. Review cases cited by Department; review Montoya memos regarding parol evidence; draft reply; draft Reiskin affidavit; draft order.

Even if undersigned counsel's entries did constitute block billing, this Court is not required to reduce the amount of fees for block billing. *See Cadena v. Pacesetter Corp*. 224 F.3d 1203, 1215 (10th Cir. 2000) (declining to extend holding in *Ramos*).

VI. Costs

Plaintiffs' justification for costs is set forth in the opening brief. Op. Brf. pp. 28-29. The mediation agreement has been made an order of this court. As such, Plaintiffs did prevail and are entitled to an award of costs. *See also Anderson v. Pursell*, 244 P.3d 1188, 1195-96 (Colo. 2010) (costs may be awarded if plaintiffs are prevailing party under settlement agreement).

VII. Fees for Additional Time Beyond Mediation

Defendant's methods for agreeing to pay fees during mediation and then substituting counsel who "suddenly" came up with a new legal theory for denying fees are detailed in Plaintiffs' Motion to Enforce. Motion to Enforce at 5-6. Plaintiffs are entitled to recovery of their reasonable attorneys' fees under Colo. Rev. Stat. § 13-17-102 and for prosecuting their claim for fees. The court should award fees to compensate Plaintiffs' attorneys for preparation and successful litigation of their fee application. *Mishkin v. Young,* 198 P.3d 1269, 1274 (Colo. App. 2008); *Mau v. E. P. H. Corp*. 638 P.2d 777, 781 (Colo. 1981) ("[a]ttorneys' fees allowable include those incurred in resolving the fee issue").

CONCLUSION

WHEREFORE, Plaintiffs respectfully request this Court award Plaintiffs $94,861.00 and costs in the amount of $964.74. In addition, Plaintiffs respectfully request this Court award an additional $8,957.50 for time and $27.00 for costs spent since the filing of the Brief in Support of Award of Attorneys' Fees. *See* Revised Proposed Order. If the Court feels a hearing is necessary, Plaintiffs will present additional evidence. However, based on Defendant's failure to show Plaintiffs' request is not reasonable and consistent with Colorado law, Plaintiffs' counsel

do not believe a hearing is necessary.

Dated: March 15, 2011

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s Kevin W. Williams
Kevin W. Williams
Legal Program Director

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2011, I electronically filed the foregoing using the Lexis Nexis Court Link and served by electronic mail on the following:

Patricia D. Herron, Esq.
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/s/ Briana McCarten
Briana McCarten
Legal Program Assistant

Duly Authorized Signature on file at the Colorado Cross-Disability Coalition.