DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 800202 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

STATE DEFENDANTS' CLOSING ARGUMENT

Defendants Colorado Department of Health Care Policy and Financing, ("HCPF") et al, ("State Defendants") by and through the Attorney General, respectfully submit their closing argument on the issue of attorneys fees. This court has determined that under the Settlement Agreement executed September 15, 2010, Colorado Cross-Disabilities Coalition, ("CCDC") is entitled to an award of fees, subject to this court's determination of reasonableness. State Defendants' closing argument addresses the reasonableness of the fees and costs requested by Plaintiffs' counsel.

INTRODUCTION

Courts determine reasonableness according to the "lodestar" calculation: a reasonable hourly rate, determined by the relevant market for attorney fees charged by attorneys of similar experience working on matters of similar complexity, multiplied by the number of hours reasonably spent to perform ordinary and necessary services. *Jane L. v. Bangerter*, 61 F. 3d 1505, 1509 (10th Cir. 1995).

In a case such as this one where not a single deposition was taken, no hearings were conducted before the court other than the recent *reasonableness hearing* on CCDC's attorney fees, no trial preparation was needed or conducted, and the substantive issues were all resolved without court intervention, fees and costs totaling nearly $114,000 are excessive and unconscionable. CCDC's fee request reflects an amount nearly $50,000 greater than they initially requested after all substantive issues were resolved by agreement of the parties. Essentially, CCDC seeks an additional $50,000 for fees on fees.

The State Defendants have shown that the fees being claimed by CCDC in this action far exceed what is reasonable, both in terms of the rate applied, and the services for which CCDC claims fees are proper. The excessive fees are the result of the intentional churning of this case by CCDC and this court should not reward such conduct. (Testimony of Mr. Dave Brougham).

I. Plaintiff's Hourly Rate is Unreasonable

Attorneys Kevin Williams and Andrew Montoya have each requested premium hourly rates that are not commensurate with the local market rates or consistent with their experience. ($345 per hour and $200 per hour respectively). Both in his affidavit (Affidavit ¶ 11) and at the reasonableness hearing conducted by this Court Wednesday, July 21, 2011, defense expert Dave Brougham testified that a reasonable rate for Kevin Williams would be $250-275 per hour. In support of his testimony, Mr.

Brougham testified that he has been practicing since 1969, handling civil rights litigation for nearly forty years, and that his hourly rate for similar litigation is $160-$175 per hour. Mr. Brougham testified further that attorneys such as former Supreme Court Justice Jean Dubofsky, whose superior qualifications, experience, and credentials are well known, are currently charging $300 an hour or less.[1]

In further support for Mr. Brougham's position, the Colorado Bar Association 2008 Economic Survey (attached to the affidavit of Timothy Fox) reflects that the mean hourly rate being charged by those attorneys handling civil rights cases is $259 per hour, with the median hourly rate established at $225 per hour. Likewise, in a custom survey conducted for Isaacson Rosenbaum P.C. in 2007, reflecting standard hourly billing rates by number of years' experience, in the Denver-Boulder-Greeley area, the average rate charged for attorneys with 11-15 years in practice averages $249 per hour.[2] (The relevant 2005 and 2007 Survey pages are attached as Defendant's Exhibit 2).

In support of his request for premium rates, Mr. Williams cites this Court to a number of cases including one case over which the Court presided. However, Plaintiffs' expert Timothy Fox acknowledged that the cases cited were distinguishable from the case at bar. For example, Mr. Fox acknowledged that the *Rossart* case was a protracted and complex case where a class was certified and the fee agreement was the result of a stipulation

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[1] According to defense expert Dave Brougham, in a recent case involving the complex matter of Amendment 54 campaign financing, Justice Dubofsky charged $300 per hour. The case involved significant discovery and many depositions, multiple-day hearings and an appeal to the State Supreme Court.

[2] When contrasted to the 2005 Isaacson Rosenbaum Survey, the average hourly rate decreased from $271 per hour to an average of $249 in 2007, for attorneys with 11-15 years' experience. This decrease supports testimony from Defendants' expert that rates are not increasing in today's market.

among the parties.[3] Further, Mr. Fox testified that the *K-Mart* case cited by Mr. Williams was a complex case spanning more than seven years and continuing even now, with a class certified. Because of the distinctions drawn between those cases and the case at bar, they should not be utilized to determine a reasonable rate for the attorneys for CCDC.

State Defendants request this Court reduce the billing rate authorized for Mr. Williams to $259 per hour, consistent with the market rate for attorneys with Mr. Williams experience and qualifications.

II. CCDC Has Billed For Impermissible Matters

CCDC's fee application in this case reflects a number of impermissible billing entries for matters not sufficiently related to the advancement of the § 1983 claims, thousands of dollars billed for tasks considered overhead, substantial hours for spent on matters for which CCDC was not successful, press releases and related matters, and for substantial duplications. State Defendants will address the impermissible billing entries below.

A. Overhead

This Court heard testimony from Defendants' expert that CCDC has billed thousands of dollars for secretarial or administrative functions that are ordinarily considered to be "overhead." These hours are for transcribing, mailing, copying and other administrative/secretarial tasks. At first blush, other entries that may appear to be for research, are instead for time spent "researching addresses."

At the reasonableness hearing, CCDC attempted to persuade the Court that the entries listed for Briana McCarten as "transcribing" were spent *drafting*. The State Defendants encourage this Court to apply the plain and ordinary meaning to

[3] This case was presided over by the Honorable Judge Morris Hoffman.

CCDC's billing entries rather than this contorted meaning. In support of this request, the billing entries of Mr. Williams list "drafting" as just that-drafting. Mr. Williams asserts that he exercised billing judgment or billing discretion before submitting his fees application to the Defendants. If, during the exercise of billing discretion he felt the entries were subject to being misconstrued, he would have clarified them. Further, within other billing entries made by Ms. McCarten, Ms. McCarten was specific with her language. For example, her 9/30/2010, entry reads "prepare fee petition." Similarly, her 2/9/2011 entry reflects that she "created" an amended exhibit. Plaintiffs' own expert, Timothy Fox, testified at the reasonableness hearing that he did not believe it is appropriate to charge for items considered overhead such a transcribing, copying, and hand deliveries.

As testimony by Mr. Brougham established, a careful review of CCDC's billing entries reflects conservatively that approximately $8000 was billed for overhead. In accordance with precedent, CCDC's fee award should be reduced by $8000 to eliminate billing entries for overhead. *See Ramos*, 713 F.2d at 554.

B. Discussions with Potential Outside Counsel Are Not Recoverable

CCDC also billed in excess of $2000 talking to potential outside counsel regarding the role he or she might play in this case. Outside counsel was never hired and those hours should be eliminated from the fee award as hours that would normally be subsumed in overhead. *See Ramos*, 713 F.2d at 554.

C. Fees by Attorney Montoya

Mr. Brougham testified that the hours billed by new attorney Montoya were largely spent learning the subject matter and they did not advance the § 1983 litigation. In his expert opinion, the hours billed by attorney Montoya should be eliminated entirely. (Brougham Affidavit ¶ 14).

D. Duplicative Billing Entries

In its fee application, CCDC has billed for a substantial number of impermissible duplications. For example, there were three mediations conducted in this case, on June 23, 2010, September 15, 2010 and October 12, 2010. The first two mediations were attended by both attorney Kevin Williams and his legal assistant Briana McCarten. Mr. Williams billed 9 hours at $345 per hour and in a duplicate billing Ms. McCarten also billed 8.5 hours at $100 per hour. Similarly, Mr. Williams billed 5.5 hours for the September mediation and Ms. McCarten billed 6.0 hours. Counsel was also accompanied by his legal assistant and his new associate Mr. Montoya at the reasonableness hearing. Neither Mr. Montoya nor Ms. McCarten participated in any manner at the hearing. The Tenth Circuit has said that billing for a legal assistant or another attorney to attend the same mediation or hearing is impermissible and must be eliminated. *Jane L. v. Bangerter*, 61 F. 3d 1505, 1509,10 (10th Cir. 1995). As a result of these duplications, CCDC's fee application should be reduced by the sum of $1450.

III. Time Billed for Matters for which CCDC Was Not Successful

A. Class Certification

In this putative class action, Plaintiffs alleged that Defendants violated state and federal law in implementing an across the board reduction to allocation amounts provided to CDASS recipients. They alleged that the budget cuts were implemented without providing adequate notice to Plaintiffs, in violation of their due process rights. Plaintiffs claimed these actions violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, various provisions of the federal Medicaid Act, 42 U.S.C. § 1396, and state law regarding Defendants' obligations with respect to Medicaid Services. Plaintiffs sought injunctive relief enjoining Defendants from implementing and maintaining the cuts, and requiring

Defendants to restore services already cut. Plaintiffs claim they were successful in each of their claims. Plaintiffs cannot claim success for these changes because they had already been undertaken by the Department when the suit was filed. Dave Brougham testified at the reasonableness hearing, and it is uncontroverted, that despite Plaintiffs depiction that CDASS allocations had been cut, no adjustments were ever made to the allocation amounts because of the Governor's budget cuts of 2009, and no allocation amounts were ever reduced because of the change in fees charged by SEPs. These matters were placed on hold by the Department prior to the filing of this action.

Plaintiffs' counsel billed in excess of $9000 for various matters relating to class certification. In this case, a class was never certified. It is not sufficient to claim that work benefitted a class. *See Ramos*, 713 P.2d at 556. Because the class was never certified, those hours should be eliminated from any fee award. *Id.* Further, Plaintiffs' counsel and his team spent substantial time in the pursuit of additional clients the unsuccessful class action. These hours were incurred before counsel was engaged by the additional Plaintiffs. Such investigation and solicitations are not properly billable to a paying client. As a result they must be eliminated from this billing. *Id.*

B. Full Hearing on Allocation Changes Due to Governor's Budget Cuts

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 at the September 15, 2010 mediation. However, the theory was not abandoned before Plaintiffs spent substantial time on unnecessary discovery and conducting research on the issue. As a result of Plaintiffs' refusal to concede this issue, substantial time, resources and money were spent on discovery that could have been avoided.

C. Relief Sought by CCDC Already Undertaken by the Department

Plaintiffs conducted discovery that was unnecessary because the Defendants 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.

Mr. Brougham testified that, in his opinion, this entire case was likely unnecessary, as the State had already undertaken the relief sought at the time the case was filed. Likewise, in her Affidavit, Barbara B. Prehmus, M.P.H., Federal Policy and Rules Officer for the Department of Health Care Policy and Financing, testified that the Rates Division was already in the process of assembling information gathered from case managers statewide, programming spreadsheet functions and recalculating all CDASS recipients' rates when the CCDC Complaint was filed on December 22, 2009. (Prehmus Affidavit ¶ 4).

Mr. Brougham further testified that no later than the June, 2010 mediation, counsel for CCDC knew that no changes or reductions had been made or would be made to any CDASS recipient's allocation until the problems with the notification could be resolved. In fact, Mr. Brougham pointed out that no reduction to any CDASS member allocation was ever made and that this accommodation was made by the Department of Health Care and Financing early in the proceedings.

Mr. Brougham testified further in the reasonableness hearing that from June, 2010 the litigation should properly have been stayed, but, instead, counsel for Plaintiff churned the litigation in a manner that was not necessary to resolve the case. As Mr. Brougham testified, Plaintiffs' fee award should be reduced due to the fact that the remedies sought by Plaintiffs were already

being undertaken by the Defendants at the time the case was filed. (Brougham Affidavit ¶ 19).

Mr. Brougham has substantial experience representing governmental entities and as an expert witness on the issue of fees in Section 1983 cases. Mr. Brougham testified that "This case represents a situation I see all too often in civil rights cases where no effort is made to 'budget' the time spent on a given piece of litigation because the presumption by the involved lawyers is that the 'deep pocket' public entity will be expected to pay the fees for the time spent, as opposed to a private, paying client." (Brougham Affidavit ¶ 20)

IV. Complexity

Mr. Brougham testified that this was a due process case and it was not complex. He further testified that time was unnecessarily spent on research and learning the subject matter. Mr. Brougham testified that the hours spent learning the subject matter were unreasonable in light of the fact that counsel for CCDC has substantial experience in the field of class action suits and in civil rights matters, particularly those involving Medicaid and Medicare regulations, and was presumably already well versed in the applicable case law. (Brougham affidavit ¶¶ 12, 13, 14) Mr. Brougham opined that hours billed by counsel for CCDC learning the subject matter should be excluded because such hours would ordinarily be absorbed in a firm's overhead costs. *See Ramos*. 713 F. 3d at 554.

V. Miscellaneous Billing Errors

There are a number of additional billing errors in CCDC's fee application. For example, there are a number of block billing entries for which there is no way to determine the time spent on a particular entry and whether such time is reasonable; CCDC bills for revising its Amended Complaint the day **after** it has been e-filed with the court; and CCDC bills for researching 1015c

application[4] among other improper billing entries. *See Ramos,* 713 F.2d 553-556.

The State Defendants ask this Court to reduce CCDC's fee award by $1500 or make whatever downward adjust the court deems appropriate to account for these billing errors.

VI. Intentional Protraction of Litigation

As noted in the testimony of State Defendants' expert, and in the sworn affidavit of Joan Smith, attorney for the Department of Health Care Policy and Financing, counsel for Plaintiff has intentionally protracted this litigation. He sought relief that he knew or should have known was improper, such as demanding that his private corporation logo be placed on State letterhead when sending out future notices to CDASS recipients. He also demanded that notices be sent to CDASS recipients within 24 hours of any proposed allocation change, and made other similar unreasonable demands. By creating these straw issues, Mr. Williams was able to unnecessarily and unreasonably protract the litigation.

Similarly, when Mr. Williams was asked to provide information about his "legal assistant" and disclose whether she was a paralegal, he refused to disclose any information that would be helpful to the undersigned in her efforts to properly assess CCDC's fee application. Testimony from Mr. Brougham at the reasonableness hearing articulated additional times when Mr. Williams intentionally caused the litigation to be protracted. Mr. Williams has asserted that the State Defendants conducted a "sham" mediation regarding fees. Mr. Brougham testified to the contrary, that in fact, it was Mr. Williams who sabotaged the fees mediation when he intentionally refused to provide the undersigned with the correct fee application[5]. By intentionally refusing to provide the fee application, the mediator and defense

[4] 1015(c) refers to the I.R.S. Code provision relating to non-profit corporations.

[5] Mr. Williams acknowledges in his pleadings that he intentionally failed to provide the fee application to counsel for Risk Management. (Plaintiffs; Brief in Support of Award of Attorney Fees at page 13)

counsel spent more than two hours trying to determine why the entries on her fee application were different from the one being used by the undersigned. The result was as Mr. Williams intended: frustration caused a collapse of the mediation and the parties left without resolution. Counsel for the State Defendants requests that this Court take into account these incidents of intentional protraction and reduce CCDC's fee award accordingly.

VII. ERROR TO AWARD COSTS

This Court properly denied costs to CCDC in this case based on the language of the September 15, 2010 Settlement Agreement signed by the parties. CCDC has asked for reconsideration of this issue and an award costs in the amount of $5437.52. It would be error for this court to award costs against the State, its officers or its agencies. Although generally costs may be awarded to the prevailing party in the court's discretion, costs against the State of Colorado, its officers or agencies may be imposed "only to the extent permitted by law." C.R.C.P. 54(d). Unless the General Assembly so directs, costs are not taxable against the State, its officers, or agenies." *McFarland v. Gunter*, 829 P.2d 510, 511 (Colo. App. 1992). Because C.R.S. § 13-16-104 "contains only general provisions entitling a prevailing party to recover costs. . . it is not an express authorization allowing the assessment of costs against the State." *Id* at 511. *See also Rocky Mountain Animal Defense v. Colo. Div. of Wildlife,* 100 P.2d 508, 519-20. Not only does the Settlement Agreement require each side to pay their own costs, the imposition of costs against the State is prohibited. Thus, The State Defendants ask this court to reduce CCDC's fee application by $5437.52 to reflect the elimination of all costs sought by Plaintiff.

VIII. FEES ON FEES

By order dated October 18, 2010 the Court held that Plaintiff is entitled to an award of attorney fees pursuant to the Settlement Agreement executed by the parties on September 15, 2010, subject to a determination of reasonableness. There is no authority in the

Settlement Agreement for an award of fees on fees. Plaintiff seeks an award of nearly $50,000 for fees incurred *after* all substantive issues were settled. As such, CCDC's request for additional fees beyond those sought in its initial fee application and, under the Court's analysis of the Settlement Agreement, contemplated by the parties at the time the Agreement was executed, should be denied. Plaintiff's initial fee application sought $67,540. As of this date, Plaintiff seeks a fee award nearly $114,000 inclusive of costs.

In its order of October 18, 2010, the Court also invited CCDC to explore whether the position taken by the State Defendants in defense of fees was frivolous, and if so, whether a finding by the Court that the defense was frivolous would entitle CCDC to fees on fees.

CCDC can recover attorney fees (fees on fees) if the court determines that the State Defendants' position in defending the fees application was substantially frivolous or substantially vexatious. C.R.S.A. §13-17-102(4). In circumstances where such an award is appropriate, it should be reasonable and should reflect only those hours necessary to brief the issue of entitlement to fees. A claim is "substantially frivolous," subjecting claimant to assessment of attorney fees, if the claimant can present no rational argument based on the evidence or law in support of that claim or defense. *Collins v. Colorado Mountain College*, 56 P.3d 1132, 1133, (Colo. App. 2003).

In relevant part, C.R.S. § 13-17-102 (4), provides:

> "The Court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification. . ."

Defendants' position that no fees were owed was justified by the admittedly imprecise language of the Settlement Agreement, which made no plain provision for the payment of fees. It is undisputed that in a number of prior unsigned draft Settlement

Agreements proposed in this case, a provision for the payment of attorney fees was included. It is also undisputed that in August, 2010, because of the conduct of counsel for CCDC, counsel for HCPF advised counsel for Plaintiff that it no longer agreed to pay fees. Additionally, it is undisputed that Mr. Williams drafted the Settlement Agreement of September 15, 2010 with the assistance of counsel for HCPF.

As the testimony of Mr. Brougham reflected, the Settlement Agreement of September 15, 2010 is less than a model of clarity. It contains provisions that are unclear and it contains provisions in one paragraph that directly conflict with provisions contained in other paragraphs. Although paragraph 6 of the Agreement can be interpreted to say that the parties agree to pay fees to Plaintiff in an amount to be determined, the Agreement also contains a specific provision requiring that absent an agreement, the parties shall pay their own fees and costs. (Settlement Agreement ¶ 12).

The Court has noted that the Agreement twice used the phrase "an award of attorney fees," and refered to the second mediation session with Judge Barr as a process by which the parties would attempt to "determine fees." Paragraph 6 states "If the parties cannot agree *on an award* of attorney fees . . ." This language is susceptible to more than one interpretation.

The drafters of this Settlement Agreement are attorneys with substantial experience drafting such agreements. As evidenced by the multiple, prior unexecuted draft Settlement Agreements, each containing specific provisions calling for an award of fees to CCDC, these attorneys knew how to draft clear and concise provisions calling for the payment of fees. A clear provision calling for fees to be paid to CCDC was not included in the final executed Settlement Agreement. If fees were to be paid by agreement of the parties, one would have expected to see a provision in the Agreement calling for fees to be paid to CCDC, a rate at which the fees would be paid and perhaps a "not to exceed" provision. It might have helped clarify the intent of the parties if, rather than using the language "If the parties cannot agree *on an*

award", if the Agreement contained a provision calling for the mediator to determine the reasonableness of CCDC's fees application if the parties could not agree on reasonableness. Reading paragraph 6 of the Settlement Agreement as described above in conjunction with the plain language of paragraph 12 stating specifically that "Except as may be provided above, each side shall bear its own costs and attorneys' fees" it is not frivolous to interpret the Agreement to call for each side to be responsible for their own fees and costs if attempts to agree or mediate fail.

In addition, Plaintiff asserted claims for Constitutional deprivations pursuant to 42 U.S.C. § 1983 in his Complaint and he asserted entitlement to relief pursuant to 42 U.S.C. § 1988. As the testimony of Mr. Brougham indicated, it is fundamental to all Section 1983 actions that only the prevailing party is entitled to relief.

Although the "prevailing party" analysis formerly involved the *catalyst theory* which held, in essence, that if a party filed suit and the filing of the suit was the "catalyst" for accomplishing the relief sought, then the party filing suit could, under certain circumstances, be considered the prevailing party and receive a fees award. However, since 2001, the Supreme Court has stated that a "prevailing party" must receive some form of "judicial imprimatur" and there must be a "judicially sanctioned change in the legal relationship of the parties." It is no longer sufficient to file suit which prompts a change in the position of the parties. *Buckhannon 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).

In this case, all substantive issues were resolved without court intervention, by agreement of the parties. Because CCDC sought an award of fees pursuant to Section 1988 for the claims made pursuant to 42 U.S.C.§ 1983, Mr. Brougham testified it was reasonable to analyze the entitlement to fees under the

Buckhannon analysis, particularly in light of the lack of clarity in the Settlement Agreement.

CCDC seeks an award of approximately $50,000 greater than the amount sought in their initial fee application for fees on fees. For the reasons set forth in this section, the State Defendants ask this Court to make a finding that the defense pursued by the State Defendants was not frivolous and to disallow the CCDC's request for fees on fees.

Conclusion

For the reasons set forth herein, the State defendants seek the reductions in Plaintiffs' fees application set for above. The State Defendants further seek an order denying Plaintiffs' renewed request for costs and for fees on fees.

Respectfully submitted this 1st day of August, 2011.

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In accordance with Colo.R.Civ.P. 121 § 1-26(7), a printed or printable copy of this document with original signatures is being maintained by the filing party and will be made available 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' CLOSING ARGUMENT** 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, this 1st day of August, 2011 addressed as follows:

Kevin W. Williams
Anthony Montoya
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203

s/Patricia D. Herron