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

M.B. and **S.E.** through their next friend Katharyn McIntyre, **R.M.** through his next friend Allan Hazlett, **C.A.** through his next friend Allan Hazlett, **E.B.** through his next friend Allan Hazlett, **J.P.** through her next friend Allan Hazlett, **Z.Z.** through her next friend Ashley Thorne, and **M.A.** through his next friend Ashley Thorne, for themselves and those similarly situated, **Plaintiffs,** **v.** **Laura Howard** in her official capacity as Kansas Department for Children and Families Secretary, **Dr. Lee A. Norman** in his official capacity as Kansas Department of Health and Environment Secretary, and **Laura Howard** in her official capacity as Kansas Department for Aging and Disability Services Secretary, **Defendants.**	Case No. 2:18-cv-02617-DDC-GEB

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

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I. Introduction

Plaintiffs submitted a detailed, fully supported application for reasonable fees and expenses. That application presents a reasonable lodestar figure, based on reasonable local rates derived from ample market evidence, given the complexity of this case and counsel's expertise and experience. The lodestar includes reasonable hours, already accounting for a rigorous application of billing judgment, resulting in an effective write-off of over $1.5 million or over 30% of Plaintiffs' expended fees. Plaintiffs applied significant billing judgment to their well-supported request for reimbursable expenses, which they have voluntarily reduced by more than 15%.

As presented in the unopposed motion for final approval of the settlement, "[i]n the context of this case, the value of immediate relief is immense. The Settlement Agreement promises a class of vulnerable children in foster care both significant structural change and measurable improvements in outcomes in the critical areas of housing stability and mental health services." ECF 150 at 20. The settlement, if approved, presents an enforceable federal injunctive order under the Court's ongoing jurisdiction to remedy alleged systemic constitutional and statutory deficiencies currently harming children in foster care across Kansas and putting their lives at risk.

The settlement before the Court, *signed by Defendants*, states: "Defendants stipulate that Class Counsel is entitled to Class Counsel Fees and Expenses but reserve the right to dispute the appropriate amount." Settlement Agreement, ECF 139-1 ("Settlement") § 1.4. Yet, reflecting the hyperbolic tone of their entire opposition, Defendants frivolously, if not sanctionably, argue that Plaintiffs be denied any award of fees and expenses altogether. Beyond contradicting their express agreement, this argument flouts the governing law and facts. It should be summarily rejected.

On the issue properly before the Court—the amount of reasonable fees and expenses—Defendants offer unsupported claims about Plaintiffs' proposed rates that ignore Plaintiffs'

credible evidence of market rates. For example, Defendants offer no rebuttal to the impartial conclusions in the Declaration of J. Nick Badgerow (ECF 149), a widely respected litigator and expert on local market rates, that Plaintiffs' hourly rates, hours submitted, and requested award are all reasonable. Defendants then attempt to chip away at various categories of Plaintiffs' request, using arbitrary and internally inconsistent distinctions of their own creation, exhibits that repackage the same arguments, offensive and unprofessional rhetoric, and faulty logic that often contravenes the law. The Court should reject Defendants' improper and unpersuasive assertions, and grant Plaintiffs' motion for reasonable attorneys' fees and expenses.

II. Under the Parties' Express Stipulation in the Settlement Agreement and Under Governing Law, Plaintiffs Are Prevailing Parties Entitled to Attorneys' Fees.

Defendants failed to present to the Court the explicit language in the Settlement that "Defendants stipulate that Class Counsel is entitled to Class Counsel Fees and Expenses but reserve the right to dispute the appropriate amount." Settlement § 1.4. Instead, Defendants expend nine pages arguing that Plaintiffs are not entitled to any fees whatsoever. ECF 157 ("Opp.") at 4-13. This frivolous argument is easily defeated. Plaintiffs are entitled to fees under the express terms of the Settlement and as prevailing parties who have materially altered their legal relationship with Defendants by successfully obtaining significant relief addressing all claims to protect the civil rights of thousands of vulnerable foster youth in Kansas. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1194 (10th Cir. 1998).

Plaintiffs' entitlement to reasonable attorneys' fees and expenses under Settlement § 1.4[1]

[1] This section unambiguously states: "'Class Counsel Fees and Expenses' shall mean reasonable fees and expenses of Class Counsel in an amount determined to be reasonable by the Court. The Court shall retain jurisdiction to make this determination. Defendants stipulate that Class Counsel is entitled to Class Counsel Fees and Expenses but reserve the right to dispute the appropriate amount."

is part of an indisputably binding and enforceable contract. *Id.* § 6.6; *see Beetle Plastics v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of United States & Canada*, 97 F.3d 1464 (Table), 1996 WL 531924, at *1 (10th Cir. 1996) ("a settlement agreement is 'a contract, part of the consideration for which [i]s dismissal of a[ ] suit'"). Defendants reiterate their "commitment to the terms agreed to in [the] Settlement." Opp. at 2. That commitment, of course, includes Plaintiffs' threshold entitlement to reasonable fees and expenses.

Beyond the parties' express agreement on fee entitlement, Plaintiffs are prevailing parties under 42 U.S.C. § 1988. Defendants agree that plaintiffs prevail where a settlement agreement "materially alters the legal relationship between the parties." Opp. at 5 (citing *Ellis*, 163 F.3d at 1194). The law is clear that "court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (internal quotation marks omitted). Plaintiffs' unopposed Motion for Final Approval of the Settlement (ECF 150), if granted, will result in a court-ordered consent decree.[2]

Material alteration occurs by "modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). The First Amended Complaint alleges constitutional and Medicaid Act violations due to Defendants' practices causing extreme housing disruption and denial of mental and behavioral health services—exactly the areas rectified by the requirements of the court-enforceable Settlement. *See generally* ECF 63 ¶ 257; Settlement §§ 2.5, 2.9, 4.6.[3] "That the plaintiffs in this case obtained significant relief is evidenced

[2] *See* Settlement §§ 1.12, 4.5, 4.6 (discussing Court's jurisdiction over Settlement approval and its continuing jurisdiction over enforcement). Defendants' citation (Opp. at 6) to *Sanchez v. Bd. of E. N.M.*, 361 F. App'x 980, 983 (10th Cir. 2010), is inapposite. *Sanchez* involved a purely private settlement agreement after which the parties immediately dismissed the case; the court only reserved limited jurisdiction to determine *any* reasonable fees. *Id.* at 982. In contrast, the Settlement here has the "judicial imprimatur on the material terms of the Agreement" that was lacking in *Sanchez*, because it provides that the court will retain jurisdiction to enforce its obligations. *Id.* at 984.

[3] Defendants falsely assert that Plaintiffs abandoned their claims made under the Medicaid Act. Opp. at 5 n.2. Rather, the practice improvements and measurable outcomes relating to access to mental health services directly relate to Plaintiffs' Medicaid claims. *See, e.g.*, Settlement §§ 2.5.3, 2.5.4, 2.9.5.

by the comprehensive settlement . . . . [that] imposes detailed responsibilities on the defendants . . . in regard to virtually all of the areas addressed in the plaintiffs' complaint." *T.Y. v. Bd. of Cty. Comm'rs of Shawnee*, 912 F. Supp. 1416, 1420 (D. Kan. 1995).

No grounds exist to completely deny a fee award under § 1988 here, especially given the purpose of § 1988 to ensure "effective access to the judicial process" for individuals with civil rights grievances. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). "If no compensation were provided for the delay in payment, the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large." *Missouri v. Jenkins*, 491 U.S. 274, 283 n.6 (1989).

The Settlement's express terms and the material alteration in this case end the inquiry. Defendants further seek to apply the "catalyst" test, which is inapplicable to the consent decree before the Court.[4] However, even if the Court applied that test here (which it should not), Plaintiffs prevail. Under the catalyst test, a party is "prevailing" where (1) the legal action is causally linked to securing the relief obtained; and (2) the defendant's conduct was required by law rather than a gratuitous response to a frivolous or groundless action. *Ellis*, 163 F.3d at 1194.

First, the Court should disregard Defendants' disingenuous attempt to try this case on the merits now and argue that the enforceable improvements mandated in the Settlement were already underway. Far from Defendants' suggestion that Plaintiffs hitched a ride on a reform train (*see* Opp. at 9), such a train had never left the station. Instead, Plaintiffs brought thoroughly supported legal claims to fix specific problems in a dysfunctional and dangerous system that put children's lives at risk—problems that remain today two years into the current administration. Even now,

[4] The "catalyst theory" is inapplicable here. The Supreme Court has expressly recognized "that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees," in contrast with the "catalyst theory" where a "lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 602-05. Here, the parties have negotiated a settlement that is enforced as a court-ordered consent decree.

Defendants can only write in generalities of "commitment" and "plans" for improving the foster care system. *See* Opp. at 7-9; ECF 157-2 (Def. Ex. B). Indeed, Kansas officials have pledged for years to fix the major issues identified by Plaintiffs in the Complaint, but the promised reforms have still not materialized.[5] *See T.Y.*, 912 F. Supp. at 1420-21 (rejecting defendants' contention that their actions, and not the plaintiffs', were the catalyst for change, as there was "no indication" defendants would have made changes absent the suit).[6] Troubling news about Defendants' gross failures in overseeing Kansas foster care contractors continues to surface, highlighting the continuing need for the specific reforms and measureable outcomes identified in the Settlement. For example, in early December, the news surfaced that St. Francis, the largest foster care contractor in Kansas, has "tumbled into financial chaos," and has been falsely "logging visits by social workers with children when the visits never occurred."[7] Defendants' failure to properly oversee its contractors is just one issue that the Settlement directly addresses. Settlement § 2.1.1.

Plaintiffs appreciate that the Settlement reflects unaccomplished goals of the current administration. However, the Settlement "provides the plaintiffs with mechanisms for enforcement and monitoring, at the defendants' expense, that would not be available to plaintiffs" otherwise. *T.Y.*, 912 F. Supp. at 1420 (finding such mechanisms evidence that the lawsuit was a "substantial factor" in obtaining relief set forth in settlement). Together, Defendants' lack of progress on the systemic issues identified in the Complaint and Defendants' commitments in the

[5] *See* Opp. to Defs.' 12(b)(1) Mot., ECF 96, at 11 & n.27 (despite promises by the current administration, "the failures Plaintiffs challenge have persisted, if not worsened, since Plaintiffs filed their Complaint," providing recent examples); *see also* Celia Llopis-Jepsen, *Colyer Calls For Kansas School Funding Hike, Plus Medicaid And Foster Care Fixes*, KMUW (Feb. 7, 2018), https://www kmuw.org/post/colyer-calls-kansas-school-funding-hike-plus-medicaid-and-foster-care-fixes (similar empty promises by prior administration).

[6] Defendants' citation to *Robinson v. Kansas*, 506 F. Supp. 2d 488, 502 (D. Kan. 2007) (Opp. at 9-10) is entirely unpersuasive. As Defendants note, that case was resolved by completely unrelated means, a concurrent state court suit, and the plaintiffs failed on their federal claims. *Id.* at 503. Here, there has been no alternative path to resolution.

[7] Sherman Smith, *Kansas Agency Serving 3,100 Foster Children Accused of 'Rampant' Financial Mismanagement*, KAN. REFLECTOR (Dec. 4, 2020), https://kansasreflector.com/2020/12/04/kansas-agency-serving-3100-foster-children-accused-of-rampant-financial-mismanagement/.

Settlement to remedy these issues amply satisfy the "causal link" prong of the catalyst test.

Under the second prong of the catalyst test, Defendants' conduct in response to the lawsuit is required by law. *Ellis*, 163 F.3d at 1194. The Court should reject Defendants' invitation to "conduct the very trial the consent decree was signed to avoid" in order to find that Plaintiffs prevailed under the catalyst test. *T.Y.*, 912 F. Supp. at 1421; *see also Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation.").[8] The Tenth Circuit has held that conduct is "required by law" where an action was "not frivolous or groundless," and the resulting conduct by the other party was "not wholly gratuitous." *Ellis*, 163 F.3d at 1199. The constitutional and statutory Medicaid Act claims here were the culmination of over a year of intensive, on-the-ground fact investigation, including interviews with knowledgeable local stakeholders, review of performance data, and pursuit of a public records request.[9] Tellingly, Defendants never challenged the sufficiency of any of the well-pled legal claims (other than moving to dismiss the Governor for jurisdictional reasons). Despite Defendants' baseless claims now, the allegations were all well-grounded in law.[10] Plaintiffs' allegations are not frivolous or groundless, and Defendants' obligations in the Settlement, which directly address the allegations, are not gratuitous.[11] Thus, even under the catalyst test, Plaintiffs are the prevailing party and are

[8] Defendants cite *Foremaster v. St. George*, 882 F.2d 1485, 1488 (10th Cir. 1989), for the proposition that the "required by law" element of the catalyst test means that Plaintiffs must demonstrate that they would have prevailed on the merits of their claims. More recent case law has noted inconsistencies in the Tenth Circuit's interpretation of "required by law." *See Bravos v. E.P.A.*, 324 F.3d 1166, 1174 (10th Cir. 2003). *Bravos* explained that "[w]hen a full-scale evidentiary hearing would be required to determine whether the plaintiff would have prevailed," courts should instead look to whether the suit was frivolous or groundless. *Id.* at 1175. Here, adjudicating the merits would entail a full trial, and without question, Plaintiffs' suit was neither frivolous nor groundless.

[9] *See* Lustbader Decl. ¶¶ 21-24; Welch Decl. ¶ 16; Woody Decl. ¶ 19; Burns-Bucklew Decl. ¶¶ 10-11.

[10] *See, e.g.*, *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS, 2004 WL 5503780, at *5 (N.D. Ga. Dec. 13, 2004) (denying defendants' motion for summary judgment where defendants "unnecessarily shuffle[d] [foster children] from one unsuitable home to another"); *Katie A., ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1158 (9th Cir. 2007) (under Medicaid Act, "states have an obligation to cover every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under § 1396d(a)").

[11] Defendants' reference to *M.D. v. Abbott*, 907 F.3d 237, 248 (5th Cir. 2018), misconstrues the nature of Plaintiffs' extreme placement instability claim. In *M.D.*, the plaintiffs alleged inadequate placement array (i.e., not having sufficient number and kind of placements to meet children's needs). *Id.* at 268. In contrast, the Complaint here alleged

entitled to reimbursement.

III. Plaintiffs Have Proposed Reasonable Rates, Which Defendants Fail to Rebut.

Defendants explicitly do not object to the rates proposed for Ira Lustbader of Children's Rights, or any Kansas Appleseed attorney. Opp. at 19. Defendants also do not dispute the rates proposed for attorneys Loretta Burns-Bucklew, David Sager, Stephen Dixon, and Poonam Juneja. Defendants take issue only with those rates proposed for other NCYL, CR, and DLA attorneys, Plaintiffs' paralegals, and a single law student. Defendants' arguments with respect to these members of Plaintiffs' co-counsel team fail to rebut the evidence supporting the proposed rates.

A. Plaintiffs Provide Ample Market Evidence in Support of the Proposed Rates.

Plaintiffs provided ample market evidence from a number of sources that demonstrate the reasonableness of Plaintiffs' proposed local rates. *See* ECF 144 ("Lustbader Decl.") ¶¶ 4-20, Ex. A (detailing the qualifications and roles of CR team members); ECF 145 ("Welch Decl.") ¶¶ 2-14, Ex. A (same as to NCYL); ECF 148 ("Schechtman Decl.") ¶¶ 5-17 (same as to DLA); ECF 149 ("Badgerow Decl.") ¶¶ 14, 34-37 (opining, based on over forty years of practice in the Kansas City legal market, on the reasonableness of all proposed rates); Lustbader Decl. Ex. E (the 2019 Missouri Lawyers' Media study of Missouri legal rates); Lustbader Decl. Ex. F (a 2017 Kansas Bar Association survey of billing rates in Kansas); Lustbader Decl. Ex. G (a chart of 2017 billing rate survey data for NLJ-500-ranked law firms); Welch Decl. Exs. D-I (examples of rates recently awarded to NCYL attorneys for work representing youth in impact litigation and class actions). Defendants largely ignore these sources.[12]

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extreme use of night-to-night placements, and foster children experiencing in excess of 50 or even 100 moves, effectively *rendering children homeless and denying children basic shelter*, harming their physical brain development, and exposing them to dangerous conditions. *See, e.g.*, ECF 63 ¶¶ 2-5, 140-72. Plaintiffs further brought claims surrounding Defendants' ongoing, devastating failure to provide children in their custody with adequate mental health care. *See, e.g.*, ECF 63 ¶¶ 6, 173-207.

[12] *See generally* Opp. at 19-27 (with respect to attorney rates, failing to even mention the Badgerow Declaration, 2019 Missouri Lawyers' Media study, the 2017 Kansas Bar Association survey, or the NLJ survey).

Persuasive sources align with Plaintiffs' rates,[13] and Defendants' select examples of slightly lower rates do not undermine the reasonableness of the rates proposed here. *See, e.g., Fox v. Vice*, 563 U.S. 826, 838 (2011) ("essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection"). This Circuit is clear that courts, "in order to comply with precedent, must award rates compatible with competent, trustworthy evidence of the market." *Case v. Unified Sch. Dist. No. 233, Johnson Cty., Kan.*, 157 F.3d 1243, 1256 (10th Cir. 1998). "Only if the district court does not have before it adequate evidence of prevailing market rates may the court, in its discretion, use other relevant factors, including its own knowledge, to establish the rate." *Rogers v. Bank of Am., N.A.*, No. 13-1333-CM-TJJ, 2014 WL 6632944, at *2 (D. Kan. Nov. 21, 2014).

Defendants all but ignore the submitted declaration of J. Nick Badgerow, a highly experienced local attorney and respected fee expert. *See* ECF 149.[14] As explained in his declaration, Mr. Badgerow is deeply familiar with the typical attorneys' fees charged in the Kansas market, including in complex civil rights cases and class actions. *See* Badgerow Decl. ¶¶ 7-10. Mr. Badgerow painstakingly explained the principles he routinely applies to questions of reasonableness of attorneys' fees, and proceeded to apply those principles to the facts of this case. *Id*. ¶¶ 8-18. With respect to rates, Mr. Badgerow explained why each firm's requested rates are reasonable, noting that the "non-Kansas lawyers' rates would be much higher in their respective communities, but they have reduced the rates charged in this case to those within what is reasonable in this jurisdiction." *Id*. ¶ 35. Mr. Badgerow further noted that the "maximum rate charged by even the most senior lawyers in this case was capped at $500 per hour, which is well below the rates charged by experienced senior lawyers in this community." *Id*. Mr. Badgerow

[13] *See, e.g., supra* at 7; *Lawson v. Spirit AeroSystems, Inc*., No. 18-1100-EFM-ADM, 2020 WL 6343292, at *17-18 (D. Kan. Oct. 29, 2020), *report and recommendation adopted*, 2020 WL 6939752 (D. Kan. Nov. 24, 2020).
[14] Defendants acknowledge its existence only in passing in a single sentence of their 51-page brief. *See* Opp. at 25.

concluded that "[t]he hourly rates charged by [each firm] during the applicable time periods when those rates were applied in the present case were reasonable in the community where the services were provided." *Id.* ¶ 14. Defendants offer no third party expert source to rebut the reasonable rates supported by Plaintiffs (or any aspect of Plaintiffs' fee application), and Defendants fail to dispute (because they cannot) that Mr. Badgerow's declaration is credible evidence of the reasonableness of Plaintiffs' counsel's rates in the context of the Kansas market.

Plaintiffs' proposed rates are also in line with those awarded in recent, complex cases in Kansas, yet Defendants seek to set an arbitrary cap on Plaintiffs' rates based only on rates awarded over two years ago.[15] "The hourly rate at which compensation is awarded should reflect rates in effect at the time the fee is being established by the court, rather than those in effect at the time the services were performed." *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983), *disapproved of on other grounds by Pa. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987).

The rates proposed by Plaintiffs are reasonable in light of "past rates for comparable experience and similar—but not identical—work, with some consideration for inflation." *Ross*, 325 F. Supp. 3d at 1181.[16] Indeed, more recent District of Kansas case law includes rates in line with, and even higher than, those sought by Plaintiffs. *See, e.g.*, *Lawson*, 2020 WL 6343292, at *17-18 (2020 case approving rates up to $625 for partners, $425 for "of counsel" attorneys, and $350 for an associate with seven years of experience in the Kansas City area).

[15] *See* Opp. at 22-23 (proposing rates capped at those awarded in *Fish v. Kobach*, No. 16-2105-JAR, 2018 WL 3647132 (D. Kan. Aug. 1, 2018); *Ross v. Jenkins*, 325 F. Supp. 3d 1141 (D. Kan. 2018).

[16] For example, in *M.B. v. Tidball*, a recent case litigated by NCYL and CR in the Western District of Missouri, the plaintiffs sought fees in August 2019 for work performed beginning in 2016. *See M.B. v. Tidball* ("*Tidball*"), No. 2:17-cv-4102-NKL, 2020 WL 1666159 (Apr. 3, 2020). It is not surprising that the rates Plaintiffs seek here are marginally higher. Defendants' attempt to compare rates sought in this case to those sought for certain attorneys who also litigated *Tidball* is also flawed. Those attorneys have since gained additional experience, warranting higher rates. Moreover, the chart Defendants have created to compare this case to *Tidball* (Opp. at 24) is misleading, as it relies solely on each individual's years of legal experience, to the exclusion of important information that impacts the appropriate rate, such as the individual's title, role, and substantive experience.

B. The Proposed Rates Are Reasonable in Light of Plaintiffs' Counsel's Experience and Expertise.

In addition to the market evidence Plaintiffs supplied, Plaintiffs explained in detail the qualifications of the counsel team that support the proposed rates. As set forth in Plaintiffs' opening papers, NCYL and CR attorneys have extensive experience in litigating complex class action lawsuits and those involving child welfare and mental health institutional reform. *See* ECF 143 ("Pl. Br.") at 25. DLA's attorneys have significant federal class action and electronic discovery experience, and typically charge significantly higher rates for their private clients. *See* Pl. Br. at 26; Schechtman Decl. ¶¶ 5, 7, 10-17, 20. All of Plaintiffs' counsel could have reasonably sought to recover fees at their regular home rates based on their significant specialized expertise, but each elected to request significantly lower rates to align with local Kansas rates. *See* Badgerow Decl. ¶ 35; ECF 146 ("Woody Decl.") ¶ 28; Welch Decl. ¶¶ 34-39.[17] As explained, all of this expertise was critical to achieving the successful Settlement. *See, e.g.*, Badgerow Decl. at 13-14 (opining that "[s]kills in litigation and knowledge of constitutional and regulatory law, as well as class actions, were all required in the highest order to prosecute this case successfully").

C. Plaintiffs Proposed Reasonable Rates for Junior Team Members, Whose Work Increased Plaintiffs' Efficiency.

Defendants take particular issue with the rates sought for mid-level and junior lawyers, paralegals, and one law student, but these team members made the Plaintiffs' counsel team more efficient by doing work that would otherwise be performed by people with higher rates. *See, e.g.*,

[17] Defendants' argument that DLA's lawyers do not have sufficient experience or expertise to warrant the requested rates is absurd. It is common for non-profit organizations bringing complex civil rights cases to partner with large law firms precisely because of those firms' expertise and resources in electronic discovery and complex civil litigation. This case involved complex issues not only of child welfare, Medicaid, constitutional, and class action law, but also of document management and data systems, especially given Defendants' antiquated systems and document production problems that warranted a 30(b)(6) deposition addressing spoliation. *See, e.g.*, Lustbader Decl. ¶¶ 32-35. DLA's expertise in handling document management and data systems issues was critical to litigating and resolving this matter efficiently. *See id.* ¶¶ 25, 28.

Lawson, 2020 WL 6343292, at *17 (movant "responsibly managed expenses by trying to push work down, to the extent practicable, to the attorneys with the lowest billing rates").

With respect to paralegals, in addition to Mr. Badgerow's declaration, Plaintiffs put forth evidence that paralegals at Kansas City firms charged up to $305 per hour, with a median rate of $225 per hour. *See* Pl. Br. at 22; Lustbader Decl., Ex. E.[18] And, as noted in *Tidball*, the 2018 Missouri Lawyers Weekly survey showed that paralegals who worked on class action or civil rights cases received between $215 and $275 per hour that year, *higher* than the rates sought here. 2020 WL 1666159, at *13. Plaintiffs also provided ample evidence of the utility of paralegals in driving the efficiency of this case. *See, e.g.*, Lustbader Decl. ¶¶ 19-20; Welch Decl. ¶ 26; Woody Decl. ¶ 16; Schechtman Decl. ¶ 10. This is in line with the Supreme Court's recognition that, "by encouraging the use of lower cost paralegals rather than attorneys whenever possible, permitting market rate billing for paralegal hours encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." *Missouri v. Jenkins*, 491 U.S. at 288. Defendants' argument that paralegal rates should be capped at $125—lower even then the rate awarded in *Tidball* earlier this year—is meritless.

Defendants' claim that the hours of a law student intern should be reimbursed at the rate of $100 per hour (Opp. at 26-27) is similarly unreasonable. Plaintiffs submit limited fees for this one law student, to the exclusion of others who worked on the matter, because he performed necessary work typical of junior attorneys. *See* Welch Decl. ¶ 26. Nonetheless, Plaintiffs proposed a paralegal rate for their law student intern.[19]

[18] Plaintiffs provided evidence that Kansas City paralegals charge up to $305 per hour. *See, e.g.*, ECF 144-5 at 7 (Stinson Leonard Street paralegal in Kansas City with rate of $305 in 2019). Plaintiffs also calculated the median of $225 for all paralegals listed in Kansas City in the 2019 Missouri Lawyers' Survey. *See* ECF 144-5 at 5-8.

[19] *See, e.g.*, *Bancroft v. Trizechahn Corp.*, No. CV 02–2373, 2006 WL 5878143, at *3 (C.D. Cal. Jan. 17, 2006) (reimbursing fees for law student interns, regardless of "whether the . . . law clerks were . . . unpaid volunteers"). Defendants' comparison to contract attorneys, whose fees are typically billed directly to a paying client (Opp. at 26-

Finally, the fact that Defendants augmented their in-house counsel team with a private firm at negotiated capitated rates is irrelevant. *See* ECF 157-1 ¶ 8 (Def. Ex. A). Defense counsel's decision to charge below-market rates evidences a business strategy to be an attractive choice for government clients, and it is irrelevant to current market rates for complex civil rights litigation. Further, information about opposing counsel's charged rate should be "discounted" where "the opposing counsel represents a governmental entity." *Sussman v. Patterson*, 108 F.3d 1206, 1212 (10th Cir. 1997). This is because "[p]laintiffs' and defendants' civil rights work . . . are markedly dissimilar. Attorneys in defendants' civil rights cases are typically paid regardless of their success in a case and receive payment on a shorter billing cycle." *Malloy v. Monahan*, 73 F.3d 1012, 1018-19 (10th Cir. 1996). Plaintiffs' counsel devoted significant time on this risky litigation, to the exclusion of other important work, all without certainty of receiving compensation. Lustbader Decl. ¶ 72; Welch Decl. ¶ 41; Woody Decl. ¶ 23; ECF 147 ("Burns-Bucklew Decl.") ¶ 14; *see also* Badgerow Decl. ¶ 39(4).

For all of the above reasons, all of the rates presented by Plaintiffs are reasonable market rates that should be applied by the Court in setting a reasonable fee.[20]

27) is similarly meritless. *See Lawson*, 2020 WL 6343292, at *4, n.2. Plaintiffs' counsel have received no reimbursement for the work performed, including for the valuable work of the team's junior members.

[20] Plaintiffs note three inadvertent errors in their original fee application. One concerns the errata sheet filed on December 17, 2020 (ECF 158). Plaintiffs inadvertently submitted the incorrect document for an exhibit in their original filing (ECF 144-3), listing incorrect "hourly rate" and "payment" in that document alone, so Plaintiffs filed the correct document as the errata (ECF 158). This does not affect the total fees Plaintiffs seek in any way. Second, Plaintiffs' submitted expenses included Plaintiffs' full payment of $36,036.16 to the mediator, all of which DLA advanced (ECF 148-2 at 3-5), but also submitted $13,673.42 that NCYL and CR provided to DLA to contribute to the total DLA advanced. *See* ECF 145-2 at 11 (NCYL provided $4,664.39); ECF 144-4 at 1 (CR provided $9,009.03). Since Plaintiffs realized that this $13,673.42 was also inadvertently included as part of DLA's total, Plaintiffs agree to deduct $13,673.42 from its original expense total of $128,476.01. Accordingly, Plaintiffs' corrected total request for reimbursement of expenses is $114,802.59. Lastly, Plaintiffs inadvertently submitted fees twice for a person's attendance at a single mediation session, which was purely a clerical error. *See* ECF 146-2 at 28 (two identical entries for 7 hours, or $3,500, each). After deducting the excess $3,500 from its original fee total of $3,753,896.50, Plaintiffs' corrected total fee request is $3,750,396.50. In summary, Plaintiffs' corrected total requested award, including corrected expenses ($114,802.59) and corrected fees ($3,750,396.50), is $3,865,199.09.

IV. Plaintiffs Have Requested Fees for a Reasonable Amount of Time.

A. Plaintiffs' Counsel's Fee Submission Reflects a Substantial Exercise of Billing Judgment and Yields a Reasonable Lodestar.

All of the time for which Plaintiffs' counsel requests reimbursement for investigating, litigating, and negotiating a resolution was necessary, useful, and reasonably expended to achieve the excellent result obtained. Contrary to Defendants' characterization of the law, the lodestar is the preferred method of calculating reasonable a fee award in civil rights cases, yielding a calculation that is presumptively reasonable.[21] *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). This "presumption is a strong one." *Id*.

As demonstrated in the ample support attached to Plaintiffs' motion, Plaintiffs made a good faith effort, through numerous steps, to ensure the time for which they have sought compensation is not excessive. First, Plaintiffs entirely excluded from the application the work of several team members who each performed less than 50 total hours on the case, prior to any other reductions. *See, e.g.*, Lustbader Decl. ¶ 67. Plaintiffs then waived fees for all work performed prior to November 16, 2017—a year prior to the filing date, as well as the significant, ongoing work performed after July 27, 2020—when Plaintiffs filed their motion for preliminary approval. *Id*. Plaintiffs further declined to seek fees for any hours performed to prepare the fee application, even for work conducted prior to July 27, 2020. *Id*. Plaintiffs excluded all hours spent doing true background research (contrary to Defendants' attempt to cast all of Plaintiffs' counsel's research as "background research," discussed *infra*), hours spent working on media matters, any vague time slips, slips showing block billing for multiple tasks, and any time on clerical work. *Id*. These

[21] Defendants incorrectly claim the Court may depart from the lodestar method, using its "discretion to fashion a fee award under any method which is reasonable," quoting *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2016 WL 4445438, at *12 (D. Kan. Aug. 24, 2016). That case made clear that departure from the lodestar was only warranted because the case involved a common settlement fund, not statutory fees. *Id*. at *13. Here, there is simply no reason to depart from the lodestar analysis.

steps, on their own, show Plaintiffs' good faith exercise of billing judgment.

But Plaintiffs went much further, applying a set of detailed rules to ensure the fees submitted reasonably avoided duplication. For example, Plaintiffs limited their fee request significantly for meetings with key stakeholders, court hearings, conferences with Defendants, regularly scheduled co-counsel meetings, and any other internal conferences or calls among co-counsel. Lustbader Decl. ¶ 68.[22] Plaintiffs' counsel billed for no more than two attorneys in attendance at a deposition, even where more than two attorneys helped prepare for that deposition. *Id.*[23] In addition, all counsel reduced fees billed for travel by fifty percent. Lustbader Decl. ¶ 69.[24] Steps like these are routinely viewed as evidence of good faith billing judgment. *See, e.g.*, *S.C. v. Riverview Gardens Sch. Dist.*, No. 18-4162-CV-C-NKL, 2020 WL 5262267, at *10 (W.D. Mo. Sept. 3, 2020). Together, these reductions amounted to more than 3,300 hours reduced through July 27, 2020—or more than 25% of Plaintiffs' billable time and over $1.1 million. Lustbader Decl. ¶ 70. After considering the additional time excluded after July 27, 2020, Plaintiffs have effectively excluded more than 30% of the time expended on this matter, equating to a *write-off of over $1.5 million*. *Id.* Defendants completely ignore this exercise of billing judgment.

Defendants' unsupported assertion that Plaintiffs' counsel unnecessarily "churned" in an attempt to run up a bill ignores the reality of complex civil rights litigation. "[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning." *Moreno v.*

[22] *See, e.g.*, ECF 158-1 at 83 (CR billed for one attorney at a 11/1/2019 meet and confer, though more than one attended); *id*. at 166 (same for 4/17/2020 meet and confer); *id*. at 167 (same for 4/21/2020 meet and confer).
[23] Although four attorneys attended the Koehn deposition, Plaintiffs reasonably submitted attendance time for only two of them. *See* ECF 148-1 at 36; ECF 145-3 at 101.
[24] *See, e.g.*, ECF 145-3 at 15 (time entry for 11/27/18 travel indicating 50% reduction); ECF 148-1 at 8 (similar, for 4/18/2019 travel).

Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008); *see also Riverview Gardens*, 2020 WL 5262267, at *11 ("[b]ecause Plaintiffs did not know if they would be compensated for their efforts in this case, they had an incentive to be efficient"). Defendants also repeatedly reference "taxpayers" and Kansas's budgetary constraints in an attempt to paint Plaintiffs' request for fees as unreasonable (Opp. at 3, 9), but "[t]axpayers of some sort typically bear the cost of litigation in civil rights cases when the plaintiff succeeds. If a special discount were warranted for that reason alone, then the legislature would have built a discount into Section 1983. However, the legislature did not do so." *Riverview Gardens*, 2020 WL 5262267, at *16.[25]

B. Plaintiffs Submitted Time for a Reasonable Number of Attorneys, Who Worked Efficiently, With Different Focuses During the Case.

Defendants' complaint that too many lawyers worked on this case should be rejected. The use of multiple attorneys is a well-accepted practice in non-routine litigation, like complex civil rights class actions such as this one. *See, e.g., Johnson v. Univ. Coll. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983); *see Tidball*, 2020 WL 1666159, at *14 (the case was "sufficiently complicated and time-intensive as to warrant the participation of numerous attorneys"). Thus, reductions for overstaffing or "duplication" are warranted "only if the attorneys are *unreasonably* doing the same work." *Johnson*, 706 F.2d at 1208 (emphasis in original). That was not the case here. Moreover, this Court has recognized that concerns about overstaffing are less salient in cases without a paying client: "A paying client might infer that this array [of attorneys and paralegals] manifests inefficiency. But the important words in that sentence are these three: a paying client. Plaintiff's counsel here didn't have such a client and they nonetheless

[25] The Court should reject Defendants' attempt to claim an "automatic" reduction (Opp. at 27) based on a clerical error in one document that has been corrected. *See* ECF 158 (errata). The error did not affect the total amount for which CR seeks reimbursement. The figures listed everywhere else in Plaintiffs' application reflect CR's correct proposed rates. *See, e.g.*, Pl. Br. at 6, 17, 34; Lustbader Decl. at 18-19; Lustbader Decl., Ex. B; Badgerow Decl. at 17-18.

volunteered to accept this difficult representation." *Ross*, 325 F. Supp. at 1181.

As Plaintiffs explained in detail, each firm's work was necessary to the successful investigation, litigation, and resolution of this complex case. *See* Pl. Br. at 25. For example, NCYL and CR partnered to combine the two firms' extensive experience in child welfare institutional reform litigation, including expertise in foster care reform and Medicaid Act litigation. *See, e.g.*, Lustbader Decl. ¶ 7; Welch Decl. ¶ 5.[26] The two firms coordinated closely to divide the majority of the work between them, depending on the needs of the case at any given time.[27] Ms. Burns-Bucklew provided deep knowledge of the Kansas child welfare system, while Kansas Appleseed brought extensive experience with reform efforts across the state, and brought localized legal and policy expertise. Lustbader Decl. ¶¶ 21, 24. The team partnered with DLA in recognition of the additional resources and strategic, legal experience that would be necessary to effectively and efficiently litigate this case. Lustbader Decl. ¶ 25; Welch Decl. ¶ 40.[28]

As also explained in detail, each firm took the lead on different tasks, including by becoming experts on different areas of the law, facts, and strategy. Pl. Br. at 25; Lustbader Decl. ¶¶ 27-29; Welch Decl. ¶¶ 20-21; Woody Decl. ¶ 25; Burns-Bucklew Decl. ¶ 11; Schechtman Decl. ¶ 8; *see also* Badgerow Decl. ¶ 39(3) ("[t]he use of law firms with experience in similar litigation on a national basis benefited plaintiffs by avoiding duplication of effort and the time and expense associated with making new counsel familiar with the law, the facts and the history of prior cases").

[26] NCYL and CR had recently partnered and achieved a successful result on behalf of a class of foster youth in Missouri, making the continued partnership a logical choice. *See Tidball*, 2020 WL 1666159, at *9; Lustbader Decl. ¶ 21; Burns-Bucklew Decl. ¶ 8.

[27] For instance, NCYL and CR split up thousands of pages of Named Plaintiff case file review, along with DLA. While NCYL focused deeply on mental health issues throughout the case, CR focused deeply on placement issues. While one firm drafted the fee application, the other drafted the settlement approval papers.

[28] Defendants falsely claim that "Plaintiffs make no indication that they sought but could not obtain the services of a local law firm in Kansas, or even Missouri, to assist in this matter." Opp. at 17 n.5. As Ms. Burns-Bucklew explains, "[s]everal major local law firms who were approached to participate in this matter had conflicts of interest due to prior or current relationships with the State of Kansas or were unable to devote the resources necessary to go forward." Burns-Bucklew Decl. ¶ 9; *see also* Welch Decl. ¶ 40 (describing efforts to identify additional local co-counsel).

This division of work served Plaintiffs' counsel's obligation to advance this case as quickly and efficiently as reasonably possible to protect Kansas children from ongoing harms.

Despite the complexity of the case, Plaintiffs made every effort to ensure that the number of team members for whom Plaintiffs submit time was kept to a minimum. Each firm staffed the matter with as few individuals as reasonably possible. Lustbader Decl. ¶¶ 64-65; Welch Decl. ¶ 20; Woody Decl. ¶ 24. As noted, Plaintiffs entirely eliminated the time of any individuals whose work on the matter was less substantial. *See* Lustbader Decl. ¶ 67; Welch Decl. ¶ 28; Schechtman Decl. ¶ 19; *see also* Badgerow Decl. ¶ 39(1)(b). Plaintiffs further reduced the fee request significantly by eliminating time spent by many attorneys and paralegals, such that Plaintiffs rarely, if ever, billed for all of the team members at any one time. Lustbader Decl. ¶ 68; Welch Decl. ¶ 30; *see also* Woody Decl. ¶ 24.[29]

Defendants point to their "current team . . . made up of just five attorneys and two paralegals," and claim (without support) that they expended roughly $1 million in the defense of this case at their current firms' capitated rates. Opp. at 4; ECF 157-1 ¶ 7 (Def. Ex. A). While any comparison between the parties' respective representation choices is fraught, Defendants themselves had close to a dozen lawyers enter appearances in this case, in addition to government lawyers who participated without entering an appearance and support staff who interacted directly with Plaintiffs' counsel.[30] This does not include any other more junior lawyers and staff with

[29] The statement in *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 297 (1st Cir. 2001), that "a court should not hesitate to discount hours if it sees signs that a prevailing party has overstaffed a case," does not help Defendants. The court continues: "Given the complexity of modern litigation, the deployment of multiple attorneys is sometimes an eminently reasonable tactic. Consequently, the mere fact that more than one lawyer toils on the same general task does not necessarily constitute excessive staffing. Effective preparation and presentation of a case often involve the kind of collaboration that only occurs when several attorneys are working on a single issue." *Id*. If any case embodies the "eminently reasonable tactic" of deploying multiple attorneys to achieve effective collaboration, it is this one.

[30] As just two examples, Defendants do not appear to include Mr. Depew, the declarant in Defendants' Exhibit A, who appeared early in this litigation. Defendants also do not account for the time expended by Ms. Corliss Scroggins Lawson, counsel for Defendant Howard, who consistently played an active role in defending and settling this case.

whom Plaintiffs' counsel may not have interacted, but who likely spent time on this matter. Thus, notwithstanding Defendants' attempt to minimize the import of this dispute while casting Plaintiffs' staffing as excessive, Defendants' own staffing underscores the reality of this litigation: a class action seeking systemic reform at three state-wide agencies to protect the health and safety of approximately 7,000 children. *See, e.g., Tidball*, 2020 WL 1666159, at *14 (noting defendants' substantial staffing "demonstrates that this case was sufficiently complicated and time-intensive as to warrant the participation of numerous attorneys").

C. The Court Should Reject Defendants' Attempts to Discount Necessary Time Expended by Plaintiffs' Counsel.

The Court should reject Defendants' attempts to use arbitrary categories of their own creation to undermine Plaintiffs' good faith efforts at exercising billing judgment. Defendants fail to rebut the accuracy and reasonableness of the time necessarily expended by Plaintiffs' counsel.

The Court should wholly disregard Defendants' exhibits attempting to cluster Plaintiffs' time into arbitrary categories.[31] These exhibits are misleading, often inaccurate, and riddled with other problems. First, there is no way to verify the accuracy of these documents, and no one has attested to the process used to create them. Many appear to compile all time entries that resulted from a rudimentary shortcut key search of text for certain words, but what has been included or excluded is entirely unclear. At times, dates are included, at others—apparently when those dates do not make the point Defendants hope they would—they are excluded.[32] Second, Defendants count entries multiple times in making claims that Plaintiffs' fees should be reduced by arbitrary

[31] *See* ECF 157-4 (Def. Ex. D-1); ECF 157-5 (Def. Ex. D-2); ECF 157-7 (Def. Ex. F); ECF 157-8 (Def. Ex. G-1); ECF 157-9 (Def. Ex. G-2); ECF 157-10 (Def. Ex. H); ECF 157-11 (Def. Ex. I); ECF 157-12 (Def. Ex. J); ECF 157-13 (Def. Ex. K); ECF 157-14 (Def. Ex. L); ECF 157-15 (Def. Ex. M).

[32] *See, e.g.*, ECF 157-4 (Def. Ex. D-1) (excluding dates while claiming all research entries were impermissible "background research" conducted prior to filing the Complaint).

amounts.[33] While on first glance these exhibits may have seemed to Defendants an easy way to justify reductions to Plaintiffs' fee award, on a closer look they are an unhelpful compilation of arbitrarily inflated figures. In any event, none of Defendants' specific objections to categories of time warrants reduction of Plaintiffs' reasonable fees for the reasons discussed below.

1. Pre-Complaint Investigation

Defendants' argument that Plaintiffs should be denied all hours prior to the filing of the complaint misrepresents the law. The key inquiry for the Court is whether time has been "reasonably expended on the litigation." *Webb v. Bd. of Educ. of Dyer Cty.*, 471 U.S. 234, 242 (1985) (quoting *Hensley*, 461 U.S. at 433). The "[m]ost obvious examples" of services performed before a lawsuit is filed and reasonably expended on the litigation are "the drafting of the initial pleadings and the work associated with the development of the theory of the case." *Webb*, 471 U.S. at 243. All of the work performed before the complaint was filed, and for which Plaintiffs have submitted fees, developed the theory of the case. The Tenth Circuit has further explained that "attorneys may be awarded time necessary to determine who should be the appropriate plaintiffs or whether the suit may even be brought," and that "[p]re-recruitment time also may be awarded where attorneys have done pre-recruitment work with an advocacy group representing a class." *Case*, 157 F.3d at 1251.[34]

[33] As just one example, *compare* ECF 157-10 at 61 (entry dated 1/15/20 in Exhibit H, being used to argue for a reduction in time related to mediation) *with* ECF 157-15 at 5 (same entry in Exhibit M, now being used to argue for a reduction in time related to the motion for class certification). Defendants' exhibits are filled with numerous examples of this double counting. *Compare* ECF 157-5 at 6 (entry dated 9/7/2018 describing legal research for 1.38 hours) *with* ECF 157-7 at 10 (same entry); *compare* ECF 157-5 at 6 (entries dated 9/12/2018 and 9/13/2018 describing legal research for 3.98 hours and 4.52 hours, respectively) *with* ECF 157-7 at 11 (same entries); *compare* ECF 157-7 at 5 (two entries dated 8/15/2018 describing team meeting attended for 0.98 hours) *with* ECF 157-12 at 6 (same entries); *compare* ECF 157-7 at 7 (entry dated 8/22/2018 describing telephone call for 0.35 hours) *with* ECF 157-12 at 6 (same entry); *compare* ECF 157-12 at 50 (entry dated 3/25/2020 for 5.5 hours) *with* ECF 157-14 at 4 (same entry); *compare* ECF 157-12 at 51 (two entries dated 4/1/2020 for 0.8 hours each) *with* ECF 157-14 at 8 (same entries); *compare* ECF 157-12 at 57 (entry dated 4/13/2020 for 0.5 hours) *with* ECF 157-14 at 10 (same entry); *compare* ECF 157-12 at 22 (entry dated 4/24/2020 for 1.6 hours) *with* ECF 157-15 at 4 (same entry).

[34] This is in line with other courts that have recognized the importance of investigative work to the filing of a meritorious lawsuit. *See, e.g.*, *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984) (investigation time compensable);

Both of the scenarios the Tenth Circuit identified in *Case* apply here. During the pre-filing investigation, Plaintiffs' counsel determined that the conditions of the Kansas foster care system were ripe for the filing of a lawsuit, ensured that youth in the class had actionable claims, located youth with standing to serve as Named Plaintiffs, and identified appropriate adult Next Friends. *See, e.g.*, Lustbader Decl. ¶ 23. In addition, much of Plaintiffs' pre-filing investigation involved work with local advocates, including Ms. Burns-Bucklew and Kansas Appleseed, to determine the extent of the problems in Kansas's foster care system. *See, e.g.*, Burns-Bucklew Decl. ¶ 10. This work was necessary to developing the facts underlying the complaint, and in the best interests of Defendants, given that it ensured the case had merit. *See, e.g.*, *James v. Runyon*, 868 F. Supp. 911, 915-16 (S.D. Ohio 1994) (awarding fees for investigative work "to encourage counsel to engage in the sort of thorough pre-filing preparation which can prevent improvidently filed claims").

Moreover, as part of Plaintiffs' overall exercise of billing judgment, Plaintiffs have already voluntarily reduced the time expended prior to the complaint's filing, waiving fees for all work performed prior to November 16, 2017. Lustbader Decl. ¶ 67; *see also Tidball*, 2020 WL 1666159, at *19 (acknowledging that the case required two years of pre-filing investigation and research, only one of which was being billed by plaintiffs). Defendants have not shown that any further reduction of time spent on this litigation prior to the filing of the complaint is warranted.

2. Meetings with Key Stakeholders Identified with Sufficient Particularity

Defendants' complaints about Plaintiffs' time spent meeting with stakeholders are also misplaced, as attorneys regularly bill for time spent speaking to potential plaintiffs and witnesses who might have relevant factual information. *See, e.g.*, *Tidball*, 2020 WL 1666159, at *15

Ryan v. Dreyfus, No. C09-0908 RAJ, 2010 WL 1692057, at *6 (W.D. Wash. Apr. 26, 2010) (pre-filing activities compensable as "responsible case preparation"); *Barrett v. W. Chester Univ. of Pa. of St. Sys. of Higher Educ.*, No. 03-CV-4978, 2006 WL 859714, at *7 (E.D. Pa. Mar. 31, 2006) (finding "it perfectly reasonable" that plaintiffs' counsel "would preliminarily gather facts and research before agreeing to represent" plaintiffs).

("Plaintiffs' efforts to meet with 'stakeholders' in person to gain their trust and collect information relevant to this lawsuit were reasonable and appropriate"); *Kelly v. Wengler*, 7 F. Supp. 3d 1069, 1078 (D. Idaho 2014) (time spent interviewing potential witnesses compensable). This on-the-ground fact-finding was key to Plaintiffs' understanding of the problems in Kansas's foster care system and the need to file a lawsuit. *See* Lustbader Decl. ¶ 23; Welch Decl. ¶ 16; Burns-Bucklew Decl. ¶ 10. It was entirely reasonable for in-state attorneys Ms. Burns-Bucklew and Kansas Appleseed to conduct the investigation with on-the-ground assistance from out-of-state counsel.[35]

Moreover, Plaintiffs' time entries referring to stakeholder contacts were sufficiently descript to show their relevance to this litigation. Plaintiffs maintained the confidentiality of their contacts, including because of fears of potential retribution, while still providing details that clearly showed the interviews' relevance. *See* Lustbader Decl. ¶ 23. For example, entries typically listed the type of stakeholder with whom Plaintiffs' counsel were communicating.[36] The entries also typically listed the subject of the meeting.[37] And, contrary to Defendants' claim, time entries

[35] *See* Burns-Bucklew Decl. ¶ 8 (explaining that Ms. Burns-Bucklew is a solo practitioner who did not have the resources to pursue this litigation on her own); Woody Decl. ¶ 18 (explaining that Kansas Appleseed joined the ongoing investigation and hired Ms. Woody as litigation director specifically to pursue this case and other impact litigation). The Court should reject any objection to Plaintiffs' travel time, as Defendants have not presented any evidence that local attorneys do not bill for this time. *See Tidball*, 2020 WL 1666159, at *17. Plaintiffs' 50 percent reduction is presumptively reasonable. *See Fox v. Pittsburg St. Univ.*, 258 F. Supp. 3d 1243, 1259 (D. Kan. 2017).

[36] Defendants take issue with time entries reflecting stakeholder meetings on March 1, 2018, but those specify the meetings were with a "former GAL [guardian ad litem]," "former DCF employee," local American Civil Liberties Union chapter, Kansas Appleseed, current guardian ad litem, and "relative caregiver"). *See* ECF 145-3 at 4. Plaintiffs' time entries consistently identify the type of stakeholder met with. *See, e.g.*, ECF 158-1 at 37 (indicating meeting with "stakeholder who worked for a private child welfare agency in Wichita"); ECF 158-1 at 208 (time entries noting meeting with guardian ad litem and potential Next Friend); ECF 145-3 at 8 (time entries noting meetings with "school admin[istrator]," "mental health practitioner," "foster parent," and "homeless youth advocate").

[37] For example, the March 1, 2018 entries identify discussion of "issues in [the Kansas] child welfare system and possible remedies" for the Class. ECF 145-3 at 4. Others similarly identify topics of discussion. *See, e.g.*, ECF 145-3 at 8 (discussing foster care placement issues and problems mental health practices face in serving foster youth); ECF 158-1 at 208 (discussing "placement moves for children in DCF custody" and facts for potential Named Plaintiff); *id.* at 42 (noting stakeholder meetings discussing foster care contractor and placement array issues), 43 (noting stakeholder meetings discussing provision of mental health services for children in Kansas foster care).

provide a basis for determining the existence of an attorney-client relationship.[38]

3. Necessary Pre-Filing Research

That Plaintiffs conducted extensive research into the relevant facts and law before filing is unsurprising. Defendants' objection to Plaintiffs' time spent on research wrongly presumes that highly experienced lawyers need not conduct factual and legal research prior to filing a state-wide class action. Of course, it was both prudent and necessary for Plaintiffs' counsel to conduct targeted legal research on potential claims, especially as those claims have been interpreted in this jurisdiction, in order to understand the relevant legal interpretations, pleading requirements, and holdings in analogous factual scenarios. *See, e.g.*, *Ryan*, 2010 WL 1692057, at *3 ("legal research regarding claims brought in analogous cases" "constitute[s] responsible case preparation" and "should be compensated along with post-filing work"); *Schlimgen v. Rapid City*, 83 F. Supp. 2d 1061, 1071 (D.S.D. 2000) (compensable work includes "fees for time spent investigating facts and researching potential legal claims").

While Defendants characterize the time entries listed in Defendants' Exhibit D-1 as "[b]ackground [r]esearch," the timeslips listed in this exhibit show specific legal research tasks necessary for the development and prosecution of this case. *See* ECF 157-4.[39] In addition, Defendants' Exhibit D-2 shows only that Plaintiffs' counsel responsibly researched the complex Medicaid Act claims they sought to advance before and during this lawsuit. Precisely because of Plaintiffs' counsel's experience litigating Medicaid Act claims, Plaintiffs advanced a relatively novel application of the Medicaid Act in pursuing trauma-related screenings under that statute.

[38] *See, e.g.*, ECF 158-1 at 228 (entry stating "[m]eeting with potential client re potentially joining lawsuit, fact patterns"); ECF 158-1 at 225 (similar entry dated October 26, 2018); ECF 145-3 at 9 (entry stating "[m]eeting with GAL [guardian ad litem] re potential litigation and serving as a next friend").

[39] Defendants also appear to have excluded the dates of entries selectively included in Exhibit D-1, likely because some of the entries included in Exhibit D-1 actually occurred *after* the suit was filed. *Compare* ECF 157-4 at 13 (Exhibit D-1 listing entry including "Legal research re: in camera review of child in need of care records in the District of Kansas") *with* ECF 145-3 at 116 (showing same entry with a date of December 21, 2018).

Indeed, the Settlement, if approved, requires Defendants to provide every child who enters the foster care system with a timely trauma screen. *See also* Badgerow Decl. at 13 (this case "involved very novel, unique and unusual questions involving class claims, the interpretation and application of law, and enforcement of statutory obligations imposed upon a major state agency, the impacts of state agency actions, as well as the application of constitutional protections").

4. Preparation of Complaint, Amended Complaint, and Class Certification Motion

Similarly, Defendants ignore the fact that drafting a complaint is not simply a matter of putting together existing research. *See, e.g., Chiddix Excavating, Inc. v. Colo. Springs Utilities*, No. 14-cv-03355-RBJ, 2016 WL 6777829, at *3 (D. Colo. Nov. 7, 2016) (awarding fees for researching potential claims and drafting complaint). As Defendants are aware, drafting a complaint—especially about statewide systemic deficiencies affecting thousands of children—is an iterative process based on legal and factual research conducted as facts change in real-time. The complaint in this case thoroughly alleged systemic problems across the Kansas foster care system and ongoing violations of law.[40] The complaint was 68 pages, including detailed allegations about the complexities of Kansas's foster care and mental health delivery and oversight structures and the ongoing harms caused by those structures. *See* ECF 1. It relied upon over 100 sources gathered during Plaintiffs' investigation, including agency data, published social science research, and facts about harms experienced by ten Named Plaintiffs. The Amended Complaint expanded upon those allegations with additional Named Plaintiffs. *See* ECF 63. Plaintiffs reasonably expended significant time preparing these pleadings, which set the foundation for the successful result obtained in the Settlement.

[40] Plaintiffs' thorough preparation of the complaint made this litigation even more efficient. If Plaintiffs had not included extensive factual allegations, Defendants surely would have moved to dismiss the entire case. As previously noted, Defendants did not move to dismiss *any* of Plaintiffs' substantive legal claims.

Moreover, Defendants create arbitrary distinctions between what they have deemed "substantive" and supposedly non-substantive time spent on the pleadings. *See* Def. Exs. G-1, G-2. It appears that Defendants have categorized any entry in which the amended complaint was discussed as "other" and argue that time should not be recovered. A significant portion of the time entries in Ex. G-2 include discussion of other issues besides the amended complaint. *See, e.g.*, ECF 157-9 at 3 (noting subjects of meeting include "claims and strategy for complaint amendment, class certification, and discovery"). Obviously, coordination of strategy among co-counsel, including in advance of filing pleadings or amended pleadings, is a necessary part of litigation. Defendants provide no reason for reducing Plaintiffs' fees according to these arbitrary categories.

In addition, Defendants take issue with the fact that Plaintiffs took steps to prepare for filing a motion for class certification. Plaintiffs reasonably prepared in advance for an upcoming deadline for filing a class certification motion on June 30, 2020. Such work was also key to informing their strategy on the timing of their motion and to ensuring their discovery efforts were informed by an understanding of what was needed for a successful motion for class certification. Unsurprisingly, Defendants cite no case law stating it would be unreasonable to prepare for class certification in a class action.

5. Successful Mediation Efforts

Defendants' objections to Plaintiffs' team present at mediation are similarly meritless. Each team member present at the mediation was necessary and integral to the process of resolving this case and obtaining the excellent result in the Settlement.[41] Given the complexity of the facts underlying Plaintiffs' allegations and claims and the detailed nature of the proposed resolutions in

[41] Defendants' statement that they were represented by just one outside attorney (Opp. at 37) is intentionally misleading. Multiple attorneys and other officials employed by the state of Kansas also participated in each session. Plaintiffs also vehemently dispute that supposed disagreements among Plaintiffs' counsel prolonged the mediation process, a statement for which Defendants have no support whatsoever. *See* Opp. at 19.

the Settlement, the amount of time spent and resources expended during mediation are unsurprising. Unlike the relatively straightforward negotiations described in *Tripp v. Berman & Rabin P.A.*, No. 14-CV-2646-DDC-GEB, 2017 WL 2289500, at *3-4 (D. Kan. May 25, 2017), where two attorneys were equally capable of handling a mediation session individually, mediation here was an involved and complicated process. The parties exchanged multiple drafts of detailed term sheets and mediation statements, and Plaintiffs' counsel prepared settlement proposals and materials to aid discussion, in addition to spending time analyzing the parties' positions and strategizing on achieving a favorable resolution. Lustbader Decl. ¶ 45.[42] While in-person negotiations were agreed upon by the parties for the first round of talks, the second round took place via video-conference due to COVID-19, thus reducing travel costs. *Id.* ¶ 46.

Defendants' Exhibit H continues Defendants' trend of displaying Plaintiffs' time entries in arbitrary, misleading, and unhelpful categories. Defendants created this chart by compiling time entries containing the word "mediation." Opp. at 36. Once again, many of the entries refer to coordination among co-counsel on a number of subjects. *See, e.g.*, ECF 157-10 at 86 (time entry listing meeting discussing "mediation updates, Kline deposition, review of materials produced by Defs, ESI and discovery responses"). None of these entries are surprising given the dual track litigation and mediation efforts that were ongoing throughout much of this case.

[42] Specifically, CR primarily researched and drafted the mediation statements prepared for the mediator. *See, e.g.*, ECF 158-1 at 2, 10, 24-25, 61, 81-82, 109-11, 142-45. Ira Lustbader prepared enforceable outcomes with respect to placement issues (*see, e.g.*, *id*. at 84-87, 91-92) while Leecia Welch prepared outcomes with respect to mental health issues. *See generally* Welch Decl. ¶ 23. Marissa Nardi and Freya Pitts edited different sections of the Agreement during and between sessions, as well as analyzed and propounded discovery to inform the sessions. *See, e.g.*, ECF 158-1 at 154, 158; ECF 145-3 at 146-47. Loretta Burns-Bucklew provided key information from stakeholders about recent placement failures that informed mediation, while Martha Hodgesmith did the same with respect to mental health failures. *See* Burns-Bucklew Decl. ¶¶ 11, 13; Lustbader Decl. ¶ 28; Woody Decl. ¶ 14. Larry Rute helped direct mediation strategy based on his decades of experience as a mediator. *See* Woody Decl. ¶ 11. Teresa Woody employed her vast knowledge of Kansas-specific politics, state agencies, and state laws to advise the team on the practicality of the proposed measures as well as the application of Kansas statutes that Defendants raised during the mediation. *See, e.g.*, ECF 146-2 at 27-28.

6. Plaintiffs' Opposition to Defendants' Jurisdictional Motion to Dismiss the Governor

The Court should reject Defendants' cursory and unsupported argument that Plaintiffs cannot recover fees associated with opposing Defendants' jurisdictional Rule 12(b)(1) Motion to Dismiss Governor Kelly. Defendants decided to bring this permissive motion but now attempt to fault Plaintiffs for doing the necessary work to respond to Defendants' motion.

The Court need not exclude hours associated with unsuccessful claims against the Governor where, as here, the distinction concerned a party rather than the claims asserted and "all of the unsuccessful claims were intertwined with the successful claims through a common core of facts or related legal theories." *Robinson v. Edmond*, 160 F.3d 1275, 1283 (10th Cir. 1998).[43] Defendants do not deny that the dismissal of the Governor did not reduce the scope of any claims, or the substance of the relief obtained in the Settlement. Opp. at 42.[44]

Plaintiffs exercised due diligence in vigorously opposing Defendants' Motion to Dismiss; the research was not excessive. Objections that the hours billed were "too much" are insufficient without more about why the amount of time taken was unreasonable. *See McGee v. Equicor-Equitable HCA Corp.*, No. 87-1721-K, 1990 WL 86225, at *2 (D. Kan. June 11, 1990) ("in order to successfully challenge the reasonableness of the hours claimed, the opposing party must generally identify the work being challenged and specifically identify the grounds for contending that the hours claimed in that area are unreasonable"); *United States ex rel. John Doe I v. Pa. Blue Shield*, 54 F. Supp. 2d 410, 415 (M.D. Pa. 1999) ("No evidence was provided by defendant as to the amount of time the drafting should have taken" and given the complicated nature of the action,

[43] *See also Moralez v. Whole Foods Mkt., Inc.*, No. C 12-01072, 2013 WL 3967639, at *3 (N.D. Cal. July 31, 2013) (awarding fees against one defendant for time spent litigating against another, where claims against both arose from the same nucleus of operative fact or the same legal theory).

[44] Contrary to Defendants' claims (Opp. at 42), Plaintiffs do not argue that Governor Kelly was "not a necessary litigant"—simply that the claims are intertwined.

the court could not hold the hours were unreasonable).[45] Defendants notably styled their motion as challenging a lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), which required targeted research.[46] Furthermore, as noted, the Court should disregard Defendants' Exhibit I, which is only helpful in showing Defendants' double-counting of time entries into arbitrary categories. The total amount of time Defendants claim to be represented by Exhibit I is therefore meaningless.

7. Reasonable Time for Meetings, Including Discovery Meet and Confers

Defendants express surprise at Plaintiffs' diligence in regularly meeting to discuss and develop litigation strategy, including preparing for contentious meet and confers on discovery. *See* Opp. at 42-46. However, "[t]here is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 616 F.3d 1098, 1105 (10th Cir. 2010). As Defendants admit, Plaintiffs have gone to great effort to remove duplicative entries in the exercise of billing judgment. *See* Opp. at 42-43; *see also* Lustbader Decl. ¶ 68. And as explained, meetings were very often helpful to ensure efforts were coordinated and that duplication of efforts could be kept to a minimum. *See* Lustbader Decl. ¶¶ 27-29.

Moreover, Defendants' apparent strategy to repeatedly delay the discovery process and

[45] Plaintiffs' research into this topic was not duplicative. Prior to the start of litigation, two team members analyzed success in naming governors as defendants in similar lawsuits. *See* ECF 158-1 at 18; ECF 146-2 at 2. On November 21, 2018, another team member briefly researched and outlined Judge Lungstrum's rulings on motions to dismiss. *See* ECF 158-1 at 99 (0.73 hours). On March 28, 2019, that attorney circulated research on abstention issues under *Younger* in the Tenth Circuit and District of Kansas. *See* ECF 158-1 at 103-4. After Governor Kelly's motion to dismiss was filed, Plaintiffs' counsel reviewed the case law cited in the motion and researched additional case law in opposition. *See, e.g.*, ECF 158-1 at 112-14, 149 (entries for legal research for the motion to dismiss opposition).

[46] Neither of the motion to dismiss opinions cited by Defendants as involving Plaintiffs' counsel (Opp. at 39) were brought pursuant to Rule 12(b)(1). Plaintiffs' opposition to the jurisdictional motion Defendants brought here involved targeted discovery (*see* ECF 81), numerous letters to Defendants, and a meet and confer.

their failure to cooperate with Plaintiffs in producing documents created a need for an unprecedented number of meet and confer negotiations and follow-up communications with Defendants, and thus more time spent preparing for meet and confers and drafting letters and emails regarding discovery. Lustbader Decl. ¶¶ 30-42. Defendants imply that there were no discovery disputes because there were no motions filed with the Court, but that is false. As Defendants are aware, Plaintiffs sent Defendants approximately a dozen letters and emails regarding discovery delays, in the interest of collaboration and resolving issues amicably without unnecessarily involving the Court. That these negotiations obviated further cost and delay in formal motion practice is why the rules require meet and confer efforts.

8. Pro Hac Vice Applications

Defendants take issue with the limited number of hours spent preparing pro hac vice applications for members of Plaintiffs' co-counsel team.[47] Time spent on pro hac vice motions is compensable. *See Animal Legal Def. Fund v. Kelly*, 2020 WL 4000905, at *5 (noting that defendants offered "no authority that such time is not compensable," and collecting cases holding the contrary). Paralegals efficiently prepared these applications where possible, under the supervision of attorneys, including by collecting attorney standing information from individual courts.[48] Defendants have not provided any reason for a reduction for this time.[49]

9. Work Related to Protecting Class From COVID-19

Defendants' claim that any reference to COVID-19 in Plaintiffs' fee application should warrant a reduction in fees is particularly strained, given the urgency of the pandemic and

[47] This category of time amounts to a total of 44.5 hours. *See* Opp. at 46.
[48] For instance, the CR paralegal prepared four CR pro hac vice applications that were filed, which involved checking attorney admissions and standing with at least twelve courts. *See, e.g.*, ECF 5, 6, 7, 8.
[49] In Defendants' Exhibit K, Defendants selectively excluded any hour information, for reasons unknown to Plaintiffs. Defendants again include any time entry where a pro hac vice application was even discussed, accounting for many of the attorney entries they attack, conflating those with actual preparation of the applications. *See, e.g.*, ECF 157-13 at 3 (entries from attorneys for 11/21/2018 reflecting discussion of pro hac vice applications as well as other topics).

Defendants' disclosure of discovery regarding COVID-19. Plaintiffs' counsel certainly had reason to be concerned about whether the thousands of youth in DCF custody continued to be moved from placement to placement, including unsafe placements like agency offices, while the rest of the world was instructed to quarantine and socially distance.[50] COVID-19 has also exacerbated the mental health issues discussed in the complaint, leaving youth more vulnerable.[51] Plaintiffs' counsel therefore had an ethical duty to their clients to understand Defendants' COVID-19 contingency plans and protocols for children in DCF care. After correspondence and discussion at meet and confers, Defendants agreed to provide limited discovery on this topic, which Plaintiffs' counsel spent time reviewing, analyzing, and responding to. *See* Lustbader Decl. ¶ 40. The COVID-19 pandemic made the issues in this case only more urgent, contributing to Plaintiffs' counsel's push to obtain a successful resolution to the case as efficiently as possible.[52] Plaintiffs' counsel should be compensated for their reasonable time spent securing COVID-19-related discovery to ensure their clients were safe.

V. Plaintiffs' Submitted Expenses Are Reasonable.

As with fees, Defendants agreed in the Settlement that Plaintiffs are entitled to recover reasonable expenses. Settlement § 1.4. Defendants' only challenge to Plaintiffs' expenses is to travel expenses incurred 1) prior to filing the complaint, and 2) in connection with in-person mediation sessions. *See* Opp. at 31-32, 36. Defendants' entire challenge is that because they claim

[50] *See, e.g.*, Eli Hager, *Coronavirus Leaves Foster Children With Nowhere to Go*, THE MARSHALL PROJECT (Mar. 24, 2020), https://www.themarshallproject.org/2020/03/24/coronavirus-leaves-foster-children-with-nowhere-to-go (explaining the impact of COVID-19, including that placements were reluctant to "accept new foster children at this time, because it's never clear where these youth have been living or whom they've been in contact with").

[51] *See, e.g.*, Nomin Ujiyediin, *Coronavirus Is The Latest Strain On Kansas Foster Families*, KCUR (May 7, 2020), https://www.kcur.org/news/2020-05-07/coronavirus-is-the-latest-strain-on-kansas-foster-families (describing the ongoing mental health impact on foster youth in Kansas caused by COVID-19).

[52] As with their other exhibits, many of the time entries included in Exhibit L include reference to other topics alongside "COVID." *See, e.g.*, ECF 157-14 at 12 (entry reflecting discussion of "litigation strategy, including COVID-related discovery issues, experts, M&C [meet and confer], and updates from NFs [Next Friends]"). Again, it was not surprising that COVID-19 was one topic that required significant coordination during the life of this case.

those categories of fees are non-compensable, the expenses associated with those trips are also non-compensable. As discussed above, Plaintiffs' counsel's investigative work prior to filing this lawsuit was necessary for the successful prosecution of this case and adequately described in Plaintiffs' billing records. With respect to mediation, *supra* at 24-25, all of the participants at the mediation sessions performed critical work toward achieving a successful resolution.

Defendants lodge no other substantive objections to the expenses sought.[53] These limited objections should be rejected, as all of the expenses submitted represent reasonable expenses associated with travel. Defendants cite no authority to dispute that these expenses are customarily billed by attorneys to their clients, and are therefore reimbursable, as Plaintiffs' expert Mr. Badgerow opines. *See* Badgerow Decl. ¶ 41.

VI. Conclusion

Plaintiffs respectfully request that the Court award their reasonable attorneys' fees in the amount of $3,750,396.50 and expenses in the amount of $114,802.59, totaling $3,865,199.09, payable within thirty days of entry of the Court order granting such fees and expenses.

Dated: December 23, 2020

Respectfully submitted,

KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.

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[53] Defendants cite *Wirtz v. Kans. Farm Bureau Servs., Inc.*, 355 F. Supp. 2d 1190 (D. Kan. 2005), where the plaintiff "made absolutely no attempt to substantiate any of [their] 'travel expense' entries." *Id*. at 1209. Here, Plaintiffs' entries state clearly the trip's destination and purpose. *See, e.g.*, ECF 144-4 (meetings with potential and actual clients and experts, mediation); ECF 145-2 (meetings with clients and those connected to KS foster care system, mediation).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of the Court on December 23, 2020, to be served by the operation of the Court's CM/ECF electronic filing system upon all parties.

DATED: December 23, 2020

/s/ Teresa A. Woody
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