IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CYNTHIA B. SCOTT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case No. 3:12-cv-00036-NKM
v.	)	Sr. Judge Norman K. Moon
	)	
HAROLD W. CLARKE, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PETITION FOR AWARD OF ATTORNEYS' FEES AND LITIGATION COSTS PURSUANT TO 42 U.S.C. § 1988

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INTRODUCTION AND STATEMENT OF THE CASE

A. THE LITIGATION

The Plaintiffs, prisoners residing at the Fluvanna Correctional Center for Women (FCCW), a facility of the Virginia Department of Corrections (VDOC), initiated this class-action lawsuit on July 24, 2012, pursuant to the Eighth Amendment to the Constitution of the United States and 42 U.S.C. § 1983, seeking declaratory and injunctive relief with respect to alleged constitutionally-deficient medical care afforded to themselves and all other women residing at FCCW, which the Plaintiffs contend reflects deliberate indifference on the part of the VDOC Defendants to the Plaintiffs' serious medical needs. The VDOC Defendants have consistently denied liability for the alleged constitutional violations.

By Memorandum Opinion and Order dated November 20, 2014, the Court granted the Plaintiffs' Motion for Class Certification and certified a class consisting of "all women who currently reside or will in the future reside at FCCW and have sought, are currently seeking or will seek adequate, appropriate medical care for serious medical needs, as contemplated by the Eighth Amendment to the U.S. Constitution," pursuant to Fed. R. Civ. P. 23(b)(2). (ECF Dkt. No. 188). Thereafter, the Court entered an Order granting Partial Summary Judgment in favor of the Plaintiffs and denying the VDOC Defendants' Motion for Summary Judgment in its entirety on November 25, 2014, holding, *inter alia*, that:

1. the Plaintiffs established, as a matter of law, that they fully and properly exhausted all pre-litigation administrative remedies available to them, as required by applicable provisions of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (*see* Memorandum Opinion dated November 25, 2014, at 23-33 & nn.8-10 (ECF Dkt. No. 201));

2. the Plaintiffs established, as a matter of law, that individually and as a class, they suffer from "serious medical needs" as a predicate to a viable cause of action for "deliberate indifference" under the Eighth Amendment (*id*. at 13-18 & n.7);

3. the Plaintiffs established, as a matter of law, that the VDOC Defendants have a non-delegable duty under the Eighth Amendment to provide constitutionally-adequate medical care to all prisoners within their custody, including the Plaintiffs (*id*. at 8-13); and that

4. the VDOC Defendants failed, as a matter of law, to demonstrate on the basis of material facts as to which there is no genuine issue in dispute, that they could not be found liable for providing insufficient medical care, or failing to provide medical care under circumstances in which such care was due, reflecting "deliberate indifference" to the Plaintiffs' and the class members' serious medical needs in violation of the Eighth Amendment (*id*. at 33-46).

B. THE SETTLEMENT AGREEMENT

Against the backdrop of this Court's rulings granting class certification and the Plaintiffs' Motion for Partial Summary Judgment and denying the Defendants' Motion for Summary Judgment, and with a December 1, 2014 trial date looming, the parties conducted settlement negotiations. Those negotiations culminated in their execution of a Memorandum of Understanding which set forth agreed-upon terms for a comprehensive resolution of this case. Thereafter, the parties' respective counsel and medical consultants and representatives of the VDOC engaged in extensive communications, further negotiations and other activities focused upon performance and implementation of the various measures described in the Memorandum of Understanding as required in order to achieve the terms of the Settlement Agreement to which they had agreed in principle. Upon their completion of this process, the Plaintiffs, subject to the Defendants' express consent, presented their Settlement Agreement to this Court for its preliminary approval on September 15, 2015. *See* ECF Dkt. Nos. 220, 221 & Exhibit 1thereto.

Under the final terms and conditions of the Settlement Agreement, the Defendants have undertaken or agreed to undertake a host of measures that are designed to insure that the medical

care afforded to the Plaintiffs and other Class members residing at FCCW shall meet or exceed constitutional standards under the Eighth Amendment by, *inter alia*:

- adoption and implementation of revisions to existing VDOC Operating Procedures governing or relating to the provision of medical care at FCCW in order to enhance the quality and quantity of care;
- commitment to adhere to specific Guidelines and Standards beyond the VDOC Operating Procedures, as set forth in the Settlement Agreement, in order to maximize the prospects for provision of a constitutionally-adequate level of medical care at FCCW;
- commitment to work cooperatively with the Plaintiffs' counsel and medical consultant on the development of new Operating Procedures designed to assure the VDOC's fulfillment of its legal obligations to women with disabilities under the Americans With Disabilities Act and to provide the VDCO with a basis for self-evaluation of its own performance in providing medical care at FCCW on an on-going basis in accordance with well-established Continuous Quality Improvement principles; and
- commitment to submit the quality and quantity of the medical care provided at FCCW to the critical oversight of a Compliance Monitor agreed upon by the parties, who will develop Performance Measuring Tools to be utilized in performing his periodic evaluations, subject to the continuing supervisory jurisdiction and sanctioning authority of this Court for any persisting or new constitutional violations.

In addition to the foregoing, the Defendants agreed that the Plaintiffs are "prevailing parties" in this litigation, in light of the terms of the Settlement Agreement reached, and that, as such, the Plaintiffs are entitled to the recovery of the reasonable attorneys' fees and litigation costs they have incurred, pursuant to 42 U.S.C. § 1988. *See* ECF Dkt. No. 221, Exh. 1, Sec. VII at 26-27.

GOVERNING LEGAL STANDARDS

Under the Civil Rights Attorney's Fees Awards Act of 1976, Congress has authorized the award of reasonable attorneys' fees to prevailing parties in certain civil rights cases, including actions successfully pursued and resolved under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion,

may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]"); *see generally Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014); *Mercer v. Duke University*, 401 F.3d 199, 202-03 (4th Cir. 2005).

A plaintiff in a Section 1983 action "prevails" for purposes of meriting a fee award under Section 1988 "when actual relief on the merits of [her] clam materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Mercer*, 401 F.3d at 203, *citing Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This "material alteration" may result either from the entry of a judgment on the merits favorable to the plaintiff or through a settlement agreement on terms favorable to the plaintiff that is enforced by the court through a consent decree. *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 604 (2001) ("Although a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.' . . . [E]nforceable judgments on merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorneys fees." (Citations omitted.)); *Hensley v. Eckerhart*, 461 U.S.424, 433 (1983) ("A typical formulation is that 'plaintiffs may be considered "prevailing parties" if they succeed on any significant issue in litigation which achieves some of the benefit [they] sought in bringing suit.'" (Citation omitted.)); *accord Alexander S. v. Boyd*, 113 F.3d 1373, 1389-90 (4th Cir. 1997) (same).

Finally, although Section 1988 by its terms invests the district court with discretion to determine whether attorneys' fees should be awarded to a successful plaintiff in a Section 1983 action, the courts have emphasized that the discretion to deny a fee award is exceeding narrow.

> The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976).

> Accordingly, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. No. 94-1011, p.4 (1976) (*quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

Hensley, 461 U.S. at 429 (footnote omitted); *accord Lefemine v. Wideman*, 758 F.3d at 555 ("'Courts have universally recognized that [the] special circumstances exception is very narrowly limited.'" (*quoting Dee v. Bd. Of Educ. Of Baltimore City*, 165 F.3d 260, 264 (4th Cir. 1998)); *Clark v. Sims*, 894 F. Supp. 868, 870 (D. Md. 1995) ("The district court has limited discretion in not awarding fees to a prevailing party.").

In Section 1983 actions involving prisoners' rights, a prevailing party for purposes of Section 1988 must also satisfy additional requirements imposed by the Prison Litigation Reform Act before fees may be awarded. *Alexander S.*, 113 F.3d at 1380 ("[T]he PLRA . . . restricts the availability and the amount of attorney's fees recoverable by prisoners under 42 U.S.C. § 1988[.]"); *Duvall v. O'Malley*, Civ. Action No. ELH-94-2541, 2014 WL 1379787, at *8 (D. Md. April 7, 2014) ("In prison litigation, 'prevailing parties' under 42 U.S.C.§ 1988 must satisfy additional requirements before becoming entitled to attorney's fees.").

Specifically, 42 U.S.C. § 1977e(d) of the PLRA provides, in pertinent part, as follows:

> (d) Attorneys' Fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that –
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [Section 1988], and
>
> (B)(i) the amount of the fee is proportionately related to the court-ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

* * *

> (3) No award of attorney's fees in an action described in paragraph (1) should be based on an hourly rate greater than 150 percent of the hourly rate established under [S]ection 3006A of title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d)(1)(3).[1] Under these provisions, the Plaintiffs, as prevailing parties for purposes of Section 1988, must further demonstrate that the fees as to which an award is sought were incurred in vindicating their constitutional claim on the merits, and that the amount requested is proportional to the degree of relief obtained *via* favorable judgment or settlement.

ARGUMENT

I. THE PLAINTIFFS ARE PREVAILING PARTIES WITHIN THE CONTEMPLATION OF SECTION 1988 AND THE PLRA

As described above, the terms of the Settlement Agreement between the Plaintiffs and the VDOC Defendants unquestionably reflect a "material alteration of the legal relationship between the parties" in a way that directly benefits the Plaintiffs. *Mercer*, 401 F.3d at 203.

The VDOC has agreed to revisions to its existing Operating Procedures governing or relating to the provision of medical care at FCCW in a manner designed to enhance the quality of the medical care provided pursuant to those Procedures. It has agreed to adhere to additional Guidelines and Standards in the provision of medical care at FCCW beyond its own Operating Procedures, with the objective of maximizing the prospects for achieving a level of care that meets or exceeds constitutional minimum standards under the Eighth Amendment. It has agreed to work cooperatively with the Plaintiffs' representatives to develop new Operating Procedures focused upon Americans With Disabilities Act compliance at FCCW and Continuous Quality

[1] *Cf.* Memorandum Opinion, entered April 15, 2014, at 5-6 (ECF Dkt. No. 109) (recognizing the limitations imposed by the PLRA upon the magnitude of attorneys' fees awards under Section 1988 following the entry of a judgment or approval of a settlement favorable to prisoner plaintiffs on the merits, but holding these limitations inapplicable to fees awarded as discovery sanctions).

Improvement principles to improve the quality of medical care at FCCW on an on-going basis. And the VDOC has agreed that during the effective period of the Settlement Agreement (a minimum of three years from the date it is approved), its provision of medical care at FCCW shall be subject to the periodic critical review and evaluation of a Compliance Monitor selected by the parties, and that deficiencies in its performance of constitutional magnitude, as identified by the Monitor or independently by the Plaintiffs and their counsel, may be made the focus of proceedings in this Court seeking specific performance of the Settlement Agreement, contempt sanctions, or both.

These measures, in very substantial ways, significantly change the legal relationship between the VDOC and the class of Plaintiffs residing at FCCW in a manner that should materially improve the medical care provided at the Prison and the Plaintiffs' overall quality of life as incarcerated persons. As a result, through the parties' Settlement Agreement, the Plaintiffs have unquestionably succeeded on significant issues in this litigation, thereby achieving the benefits they sought in bringing this lawsuit. As such, the Plaintiffs' status as "prevailing parties" in this action is clearly established. *Hensley*, 461 U.S. at 433; *see generally Alexander S.*, 113 F.3d at 1390; *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196, 200 (4th Cir. 1994).

As noted above, the VDOC Defendants have conceded that the Plaintiffs constitute "prevailing parties" under the Settlement Agreement for purposes of Section 1988. Moreover, no "special circumstances" are present in this case that would render an award of attorneys' fees and costs to the Plaintiffs under Section 1988 "unjust". *Hensley*, 461 U.S. at 429; *Lefemine*, 758 F.3d at 555.

In addition, with respect to PLRA requirements, the Settlement Agreement provides, in pertinent part, as follows:

> The Parties hereby stipulate, and request that the Court, upon independent review and consideration, find that this Settlement Agreement complies with the Prison Litigation Reform Act. The Parties agree that the prospective relief established by this Settlement Agreement is narrowly drawn, *extends no further than is necessary to address the violations of federal rights alleged by the Plaintiffs in their pleadings in this action*, is the least intrusive means necessary to correct these alleged violations, and will not have any adverse impact on public safety or the operation of the criminal justice system.

ECF Dkt. No. 221, Exh. 1, Sec. VIII at 27 (emphasis added). This language reflects the Parties' consensus that the Plaintiffs' attorneys fees were "incurred in proving an actual violation of [their] rights protected by a statute under which fees may be awarded under [Section 1988]." *See* 42 U.S.C. § 1977e(d)(1)(A).[2]

Accordingly, all the requirements that must be met to qualify the Plaintiffs as prevailing parties entitled to a fee award in this case are satisfied.

II. THE DETERMINATION OF A REASONABLE FEE AWARD IS GOVERNED BY APPLICATION OF THE LODESTAR ANALYSIS

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court of the United States declared that "[t]he most useful starting point in determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of the lawyer's services." *Id*. at 433; *see also Blum v. Stenson*, 464 U.S. 886, 888 (1984) ("The initial estimate of a reasonably attorney's fee is properly calculated by multiplying the

[2] The proportionality of the fee award sought to the relief obtained by the Plaintiffs under the terms of the Settlement Agreement -- *see* 42 U.S.C. § 1997e(d)(1)(B)(i) -- will be addressed below.

number of hours reasonably expended . . . times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case." (Citation omitted.)).

Following *Hensley* and *Blum*, the Fourth Circuit has repeatedly applied this lodestar methodology in reviewing the reasonableness of fee awards entered by district courts in a host of cases brought pursuant to federal statutes expressly providing that a prevailing party may be awarded the fees its counsel reasonably incurred in successfully representing that party's interests in the subject litigation. *See, e.g.*, *Lefemine*, 758 F.3d at 559 n.4; *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013); *Eastern Assoc. Coal Corp. v. Director, OWCP*, 724 F.3d 561, 569-70 (4th Cir. 2013); *Newport News Shipbuilding and Dry Dock Co. v. Holiday*, 591 F.3d 219, 226-27 (4th Cir. 2009); *Robinson v. Equifax Information Servs., LLC*, 560 F.3d 235, 243-44 (4th Cir. 2009); *Grissom v. The Mills Corp.*, 549 F.3d 313, 320-21 (4th Cir. 2008); *Mercer*, 401 F.3d at 209; *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174-75 (4th Cir. 1994). Moreover, as a guide to aid the lower courts in performing the lodestar analysis to determine the measure of reasonable attorneys' fees in those cases in which they may be awarded, the Fourth Circuit has instructed district judges to consider the following twelve factors originally identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974):

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Robinson, 560 F.3d at 243-44, *citing Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978); *see also Grissom*, 549 F.3d at 320-21 ("Here, the parties agree that in calculating an

appropriate attorneys' fee award, a district court must first determine the lodestar amount (reasonable hourly rate multiplied by hours reasonably expended), applying the *Johnson/Barber* factors when making its lodestar determination." (Citations omitted.)).[3]

Once it is determined that the hours incurred and the hourly rate requested by the prevailing party's attorneys are reasonable, the Court "is obligated to subtract fees for hours spent on unsuccessful claims unrelated to the successful ones." *McAfee*, 738 F.3d at 91, *citing Grissom*, 549 F.3d at 321 ("The parties agree that after calculating the lodestar figure, the 'court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones.'" (*quoting Johnson v. City of Aiken*, 278 F.3d 333, 337 (4th Cir. 2002)). And finally, after deductions for fees associated with unsuccessful and unrelated claims, the Court then awards all or a percentage of the remaining lodestar amount, depending on the degree of success enjoyed by the prevailing party. *Id.*

Accordingly, based on the foregoing authorities, this Court's task in determining the reasonable attorneys' fees the Plaintiffs should be awarded turns on performance of the following analytical steps:

> (i) evaluation of the hourly rates claimed by Plaintiffs in light of the prevailing market rate in the relevant geographic jurisdiction for legal services of the type performed by counsel on Plaintiffs' behalf, including consideration of any pertinent *Johnson* factors, to determine the reasonable hourly rate to be utilized in the lodestar calculation;

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[3] To the extent that any one of the *Johnson* factors is taken into account in determining and/or effectively duplicates either of the lodestar elements (*e.g.*, "hours reasonably expended" is essentially the same as *Johnson* factor No. 1 ("the time and labor expended") and is also necessarily a function of *Johnson* factor No. 2 ("the novelty and difficulty of the questions raised")), such factors may not be "double-counted" by using them as a basis to adjust the lodestar figure further after it has been determined. *See Perdue v. Kenny A. ex rel Winn*, 559 U.S. 542, 553 (2010); *McAfee*, 738 F.3d at 89; *Eastern Assoc. Coal*, 724 F.3d at 570 & n.5.

(ii) evaluation of the time charges claimed by Plaintiffs in light of the nature and extent of the tasks performed, including consideration of any pertinent *Johnson* factors, to determine the number of hours reasonably expended;

(iii) performance of the lodestar calculation;

(iv) deduction from the lodestar amount of any fees specifically attributable to hours devoted to unsuccessful claims distinct from the successful ones; and

(v) determination of whether any other adjustments are necessary or appropriate under the particular circumstances of the case in light of the overall level of success the prevailing party achieved.

Plaintiffs address each of these steps below.

A. THE CAPPED RATE ON RECOVERABLE ATTORNEYS' FEES IMPOSED BY THE PLRA IS $211.50/HR., WITH LESSER RATES FOR COMPENSABLE NON-LAWYER SUPPORT

Under the provisions of the PLRA set forth above, the Court must undertake a three-step process in order to determine the hourly rate to utilize for purposes of its lodestar calculations to arrive at an appropriate fee award. First, the Court must refer to the "rate established" by the Criminal Justice Act, 18 U.S.C. § 3006A (CJA), "for payment of court-appointed counsel" under the provisions of that statute. Then the Court must identify an amount constituting 150% of the applicable CJA rate to derive the maximum rate allowable under the PLRA. Finally, the Court must then compare the PLRA-capped rate against the hourly rate reasonably recoverable by the prevailing party's attorneys in the absence of the PLRA's limitation in order to determine whether the PLRA rate or some lesser rate should apply. *See Alexander S.*, 113 F.3d at 1388 (describing methodology).

The CJA, enacted in 1964, requires every federal district court, subject to the approval of the judicial council for the circuit in which the district court is located, to afford legal representation to criminal defendants without the financial wherewithal to hire an attorney for themselves. 18 U.S.C. § 3006A(a). The statute empowers the U.S. Judicial Conference to

establish the maximum hourly rate that shall be paid to counsel appointed to represent an indigent criminal defendant thereunder. Specifically, it states that "[a]ny attorney appointed pursuant to this section [shall] be compensated at a rate not exceeding $60 per hour for time expended in court . . . unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit." *See* Section 3006A(d)(1). The Act also allows the U.S. Judicial Conference to increase the maximum hourly rate to an amount in excess of $75 per hour, utilizing a complex formula described in the statute. *Id.*

Commencing in September 2000,[4] and gradually at various intervals thereafter up to the present, the U.S. Judicial Conference, employing the formula set forth in Section 3006(a)(d)(1), has increased the maximum hourly rate payable to court-appointed counsel under the CJA. The maximum hourly rate established by the Judicial Conference for the time period 2011 to 2014 was $141.00, and for 2015 increased to $142.00.[5] Because this action was initiated in July 2012 and the parties reached their agreement in principle regarding settlement in November 2014, the Plaintiffs submit that it is appropriate for the Court to utilize the rate of $141.00, the maximum authorized statutory rate under the CJA as determined by the U.S. Judicial Conference for the 2011-2014 time period, as the CJA rate applicable for purposes of its determination under the PLRA here.

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[4] *See* Report of the Proceedings of the Judicial Conference of the United States, September 9, 2000, at 50 (see true and correct copy attached as Exhibit 4 to the Declaration of Theodore A. Howard, dated October 19, 2015 ("Howard Dec.").

[5] *See* U.S. Judicial Conference 2011 Budget Statement to Congress at 13 (reflecting Judicial Conference's request to Congress for funding in accordance with maximum statutory rate of $141.00). *See also* U.S. Jud. Conf. 2014 Budget Justification to Congress at 6.15 (noting that CJA statutory maximum rate remained $141.00 for fiscal year 2014); U.S. Jud. Conf. 2015 Budget Justification to Congress at 6.14 (referencing "fiscal year 2015 statutory maximum rate of $142.00) (*see* Howard Dec., Exh. 4).

Although the Plaintiffs acknowledge the existence of some disagreement among the federal courts in regard to this issue, they submit -- consistent with the plain language of 42 U.S.C. § 1997e(d)(3) and 18 U.S.C. § 3006A(d)(1), when the two provisions are read in harmony with one another -- that the maximum statutory hourly rate *authorized by the Judicial Conference*, not the lower rate actually paid to CJA attorneys in a given district or funded by Congress at particular points in time, serves as the basis for computing the PLRA capped rate. *Hadix v. Johnson*, 398 F.3d 863, 867 (6th Cir. 2005) (holding that "attorney fees under the PLRA should be based on the hourly rate for court-appointed counsel that is authorized by the Judicial Conference, rather than on the rate that is actually paid to such counsel"); *see generally Perez v. Cate*, 632 F.3d 553, 555-56 & n.1 (9th Cir. 2011); *Johnson v. Daley*, 339 F.3d 582, 583-84 (7th Cir. 2003); *Webb v. Ada County*, 285 F.3d 829, 839 (9th Cir. 2002); *Lira v. Cate*, No. C00-0905 SI, 2010 WL 727979, at *4 (N.D. Cal. Feb. 26, 2010); *Hudson v. Dennehy*, 568 F. Supp. 2d 125, 132-33 (D. Mass. 2008); *Laube v. Allen*, 506 F. Supp. 2d 969, 987 (M.D. Ala. 2007); *Ilick v. Miller*, 68 F. Supp. 2d 1169, 1174-75 (D. Nev. 1999); *but see Hernandez v. Kalinowski*, 146 F.3d 196, 201 (3d Cir. 1998) (PLRA capped rate must be based upon CJA rate actually paid, not the rate set by the Judicial Conference).

As was cogently articulated by the Sixth Circuit in this regard in *Hadix*:

> [18 U.S.C. § 3006A] authorizes the Judicial Conference to establish reasonable rates of compensation for court-appointed counsel[.] . . . 18 U.S.C. § 3006A(d)(1) (West Supp. 2004). *The statute contains no reference to congressional appropriations or to rates that are actually paid to court-appointed counsel*.

398 F.3d at 876 (emphasis added); *see also Laube*, 506 F. Supp. 2d at 987 ("Where the PLRA refers to the hourly rate 'established' by § 3006A, that section's unambiguous delegation of authority to the Judicial Conference to raise the rate, without any reservation by Congress of the obligation to approve it, means that the Judicial Conference's rate is controlling in PLRA

cases."). Moreover, the Court in *Hadix* also articulated a practical rationale for utilization of the Judicial Conference-authorized rate, observing as follows:

> [I]n the absence of express statutory language, there is no inherent reason why attorneys fees under the PLRA should be limited by the amount budgeted [by Congress] to pay court-appointed counsel under the CJA. *Attorney fee awards in prisoner civil rights litigation are paid from the pockets of unsuccessful defendants whether they be private individuals or governmental entities; such fees are not paid from funds set aside by Congress to compensate court-appointed counsel under the CJA.* There is no logical reason to limit fee awards in such cases to the amount of money set aside to fund the CJA.

398 F.3d at 867 (emphasis added).

Accordingly, the weight of relevant and better-reasoned authority clearly looks to the rate authorized by the Judicial Conference as appropriate for the compensation of CJA counsel as the base for purposes of determining the PLRA capped rate. As shown above, in the time period during which litigation in the instant case predominantly occurred, the Judicial Conference-authorized rate was $141.00. *See supra* at 12 & n.5; Howard Declaration, Exh. 4.

Thus, under the PLRA, 42 U.S.C. § 1997e(d)(3), this Court's award of fees to Plaintiffs as the prevailing parties under Section 1988 may not exceed 150% of $141.00, the maximum statutory rate established by the CJA, or $211.50 per hour. By comparison, the Declarations submitted in support of the Petition by the attorneys providing representation to the Plaintiffs in this action uniformly reference reasonable hourly rates that, in every instance, substantially exceed the PLRA-capped rate of $211.50.[6] Accordingly, this Court should apply $211.50 as the hourly rate to be utilized for purposes of multiplication by the number of hours reasonably incurred by all of Plaintiffs' counsel to determine a reasonable fee award under the governing lodestar analysis. *See, e.g., Blake v. Maynard*, Case No. 09-cv-2367-AW, 2013 WL 3659421, at

[6] *See* Howard Dec., ¶¶ 15-30 at 6-14 (Wiley Rein rates); *id.*, Exh. 5 (LAJC Declarations and rates); *id.*, Exh. 6 (WLC Declaration and rates).

*1-2 (D. Md. July 11, 2013) (applying then-applicable PLRA-capped maximum hourly rate of $187.50 to all hours accrued by plaintiff's counsel where all of their respective individual hourly rates exceeded the PLRA rate).[7]

B. THE HOURS EXPENDED BY PLAINTIFFS' COUNSEL FOR WHICH AN AWARD IS SOUGHT WERE REASONABLY INCURRED

1. Analysis Of *Johnson* Factors

Fourth Circuit jurisprudence has been clear and consistent on the point that at the stage at which the Court determines the reasonableness of the hours expended by the prevailing party's counsel for which a recovery of fees is requested, the Court must undertake analysis of the *Johnson* factors in assessing the suitability of the time charges at issue to serve as the basis for reimbursement. *See McAfee*, 738 F.3d at 88 ("To ascertain what is reasonable in terms of hours expended . . . the court is bound to apply the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 14, 717-19 (5th Cir. 1974)." (Footnote omitted.)). And, as noted above, *Johnson* factors that are effectively subsumed by the process of determining the hours reasonably incurred for which a fee award is sought generally should not be taken into account more than once. *See supra* Arg. Section II at 10 n.3 (*citing* authorities).

[7] In its Memorandum Opinion with respect to awarding of fees to the Plaintiffs incurred in the preparation and submission of a successful Motion to Compel Discovery from the VDOC Defendants, this Court, in *dictum* addressing the VDOC Defendants' erroneous argument that the PLRA should cap the hourly rate on fees awardable to the Plaintiffs as a discovery sanction, observed that under the PLRA, the maximum hourly rate for the Plaintiffs' lead counsel was $187.50 (*i.e.*, 150% of $125.00). *See* Mem. Opinion, dated April 15, 2014, at 5 (ECF Dkt. No. 109) ("Were the PLRA applicable, Theodore Howard's rate would be capped at $187.50[.]"). The Plaintiffs respectfully submit that because this determination was not based upon the Judicial Conference-authorized maximum hourly rate under the CJA of $141.00 in effect at that time, the Court's conclusion in this regard, which it simply adopted without independent analysis from the VDOC Defendants' misguided Opposition Memorandum, was incorrect.

On this latter point, the Fourth Circuit, in its recent decision in the *McAfee* case, based upon an analysis of the substance and implications of *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), endorsed a modified treatment of the *Johnson* factors articulated by the district court in the case before it for review. *See* 783 F.3d at 89, *citing McAfee v. Boczar*, 906 F. Supp. 2d 484, 490-92 (E.D. Va. 2012).

The district court's decision in *McAfee* (Payne, Sr. Dist. Judge) noted that in *Perdue*, the Supreme Court -- in a departure from its prior analysis in *Hensley*, indicating that the 12-part *Johnson* analysis was a tool to be utilized to inform the lodestar calculation, *see* 461 U.S. at 434 n.9 -- presented the *Johnson* analysis and the lodestar methodology as *distinct alternative approaches* to determining reasonable attorneys' fees, and expressed its clear preference for the lodestar approach, noting that the *Johnson* approach "gave very little actual guidance to district courts. Setting attorney's fees by reference to sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Perdue*, 559 U.S. at 551 (citations omitted). Based on this analysis, Judge Payne concluded in *McAfee* that "the necessary consequence of *Perdue*" is that "the *Johnson* approach ha[s] been relegated to the sidelines in fee analysis." 906 F. Supp. 2d at 491. Elaborating on this concept, the Court stated:

> What then is left of *Johnson* after *Perdue*? That question is best answered by assessing the individual *Johnson* factors to determine if they are subsumed in the lodestar calculus.
>
> The reasonableness of the rate implicates, it seems, Factor [3] (the skill required to properly perform the legal services rendered); Factor 5 (the customary fee); Factor 6 (the attorney's expectation at the outset of the litigation, *i.e.*, whether the fee is fixed or contingent); Factor 9 (the experience, reputation and ability of the attorney); and Factor 4 (the attorney's opportunity cost in pressing the instant litigation). In one way or another, those factors play a role in determination of a reasonable hourly rate, just as they do in a law firm's rat[e] setting process. . . .
>
> The assessment of the number of hours reasonably expended implicates Factor 1 (the time and labor expended); Factor 2 (the novelty and difficulty of the questions raised); and Factor 7 (the time limitations imposed by the client or the

> circumstances). Each of those factors rather obviously bears on the time that reasonably should be devoted to a case.
>
> That leaves four *Johnson* factors: Factor 8 (the amount in controversy and the results obtained); Factor 10 (the undesirability of the case within the legal community within which the case arose); Factor 11 (the nature and length of the professional relationship between the attorney and the client); and Factor 13 (attorney's fees awards in similar cases).

Id. at 491-92. The Fourth Circuit adopted the district court's analysis in this regard in its entirety. *See* 738 F.3d at 89 ("Ultimately, pursuant to the court's lodestar analysis, *Perdue* reserved four *Johnson* factors for use in adjusting the lodestar fee amount: [Factors 8, 10, 11 and 12]." (Citation omitted.)).

Accordingly, in light of *McAfee*, the impact -- if any -- of *Johnson* Factors 8, 10, 11 and 12 will be considered after the reasonableness of the hours expended by Plaintiffs' counsel is addressed, and multiplied by the applicable PLRA-capped hourly rate, below to arrive at the lodestar amount.

2. <u>The Litigation Tasks Performed</u>

Commencing in late 2008, the Plaintiffs' counsel convened and began discussing a strategic approach to the comprehensive due-diligence factual investigation that was needed regarding voluminous complaints of sub-standard medical care being provided to the prisoner population at FCCW. In the Spring of 2009, prospective Plaintiffs and witnesses were identified, visits to FCCW were scheduled, and the Legal Aid Justice Center, the Washington Lawyers' Committee and Wiley Rein LLP, collaborated on scheduling and conducting of interviews of women prisoners at FCCW regarding alleged problems in the receipt of medical care of which they had complained in letters transmitted directly to the Legal Aid Justice Center and in concurrent written grievances to VDOC. At each such interview, confidentiality waivers were procured and medical records were sought and obtained from VDOC and reviewed by counsel.

Ultimately, to satisfy themselves that the prisoners' allegations regarding deficient care that was systemic in nature were a valid basis upon which to commence litigation and seek relief, some 28 women were interviewed, some on multiple occasions, by Plaintiffs' counsel between March 2009 and May 2010.

Attendant to these preliminary interviews and information gathering, Plaintiffs' counsel were specifically designating women who seemed like promising prospects to serve as named plaintiff/class representatives and attempting to advise those designees regarding steps they would need to undertake in order to satisfy the exhaustion-of-administrative-remedies requirements of the PLRA. Because FCCW was notoriously erratic in its manner of acknowledging, processing and responding (if at all) to medical grievances,[8] guiding the women through the process of fully exhausting at least one administrative grievance with respect to their receipt of deficient medical care per prisoner concerning an issue upon which Plaintiffs' counsel wished to focus in the prospective lawsuit was both challenging and time consuming.

Finally, in the Fall of 2011, with Plaintiffs' counsel both: (i) satisfied on the basis of their due diligence investigation that a more-than-adequate good faith basis existed to commence an Eighth Amendment class action; and (ii) reasonably confident that the prospective Named Plaintiffs and other putative class members had adequately exhausted pre-suit remedies for purposes of satisfying the PLRA, the VDOC abruptly changed its for-profit medical care contractor, terminating Corizon Health (formerly Prison Health Services, Inc. and its nominal successor, PHS Healthcare), and replacing Corizon with Armor Correctional Health Services, Inc. (Armor), effective as of November 1, 2011. This development delayed the commencement of this lawsuit by six months while Plaintiffs' counsel, in good faith, waited to see if a change in

[8] *See* Memorandum Opinion, dated November 25, 2014 (ECF Dkt. No. 201), at 23-27 (addressing defective nature of FCCW's grievance response process).

the identity of the VDOC's medical care contractor might signal a change in the direction of more and better medical care at FCCW. When those hopes unfortunately proved unfounded, Plaintiffs' counsel served pre-suit demand letters upon the VDOC and Armor, respectively, on July 13, 2012. When neither prospective Defendant responded to the demand letters, this action was filed on July 24, 2012.

Upon the filing of the original Complaint for Declaratory Judgment and Injunctive Relief, the Plaintiffs were immediately confronted with a double-barreled challenge to the viability of the lawsuit. The VDOC Defendants filed a Motion to Dismiss the case for failure to state claims upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6) (*see* ECF Dkt. No. 10); by contrast, Armor answered the Complaint, but concurrently served Plaintiffs' counsel with a letter asserting that the Complaint was replete with factual efforts and misstatements and threatening the Plaintiffs with a Motion for Sanctions pursuant to Fed. R. Civ. P. 11. As a result, at the very outset of the litigation, Plaintiffs' counsel were obligated to invest substantial amounts of time in researching and drafting an Opposition to the VDOC Defendants' Motion to Dismiss and an in-depth investigation of medical records and grievances supporting the Named Plaintiffs' allegations regarding instances of inadequate medical care in order to respond to Armor's threatened Rule 11 Motion. Plaintiffs' counsel served Armor's counsel with an 18-page letter on September 24, 2012; with minor exceptions, Plaintiffs' letter comprehensively rebutted Armor's accusation that the Complaint contained "a myriad of facts that [are] blatantly erroneous," and Armor abandoned its threats to seek Rule 11 sanctions shortly thereafter.

Following the completion of briefing on the Motion to Dismiss and oral argument on October 15, 2012, this Court issued its decision denying the Motion in its entirety on December 11, 2012. *See* ECF Dkt. No. 33. Thereafter, the Plaintiffs, without opposition from

the Defendants, filed their First Amended Complaint on January 22, 2013, correcting minor factual errors brought to light by Armor and adding an additional individual defendant whose identity had been unknown when the case was initiated. *See* ECF Dkt. Nos. 34, 35. The Amended Complaint was accepted for filing and deemed filed as of February 6, 2013. ECF Dkt. Nos. 38, 39.

The Plaintiffs sought to move expeditiously into the discovery phase of the litigation thereafter, but their efforts in this regard were sidetracked when it was suddenly disclosed that the VDOC's contract with Defendant Armor was expiring as of April 30, 2013; in light of this development, Armor filed a Motion to Dismiss, asserting that as of May 1, the Plaintiffs' claims against it seeking declaratory and injunctive relief would be moot. ECF Dkt. Nos. 43, 44. Although the Plaintiffs opposed Armor's Motion, it was granted by this Court following the completion of briefing and argument, by Memorandum Opinion dated October 4, 2013. ECF Dkt. No. 76.

In the meantime, the Plaintiffs maintained their efforts to conduct discovery of the VDOC Defendants, and also moved for leave to file a Second Amended Complaint in order to name Corizon -- the same medical care contractor that had provided medical care at FCCW through the entire period of the Plaintiffs' pre-suit due diligence factual investigation until November 1, 2011 -- as a Defendant in light of its replacement of Armor as the VDOC's medical care provider effective May 1, 2013. *See* ECF Dkt. No. 50 (June 26, 2013). Plaintiffs concurrently moved to vacate the existing Scheduling Order and trial date, set as of that time for October 15, 2013, due to the disruption of the orderly progression of the litigation resulting from the VDOC's determination to change medical contractors. ECF Dkt. No. 51.

The Second Amended Complaint was accepted for filing, and deemed filed, as of July 15, 2013, and an Amended Scheduling Order, resetting the trial date for May 12, 2014, was issued on the same date. *See* ECF Dkts. Nos. 54-58. Shortly thereafter, newly-named additional Defendant Mark Militana, M.D., Corizon's Medical Director at FCCW, filed a Motion to Dismiss contending that the Second Amended Complaint failed to state any claim upon which relief could be granted against him individually, necessitating further briefing by the Plaintiffs. *See* ECF Dkt. Nos. 68 69 and 71.[9] Meanwhile, within a matter of mere days after the entry of the Amended Scheduling Order establishing a new trial date, counsel representing the Defendant contractors, Mr. McNelis, who serves in the U.S. Army Reserves, advised the Court that due to newly received orders concerning his military service, the reset trial date of May 12, 2014 would no longer be practicable from his standpoint. *See* ECF No. 62. The Motion to further continue the trial date was granted on September 13, 2013 (ECF Dkt. No. 70); the next date for trial mutually available to the parties and the Court was September 22, 2014. ECF Dkt. No.75.

A dispute between the Plaintiffs and the VDOC Defendants regarding their refusal to produce documents responsive to certain of Plaintiffs' Document Requests could not be resolved through negotiations; as a result, Plaintiffs filed a Motion to Compel on September 23, 2013. ECF Dkt. No. 72. After full briefing and argument, the Plaintiffs' Motion to Compel was granted on November 25, 2013 (ECF Dkt. No. 88), and the Plaintiffs were ordered to submit their Petition for attorneys' fees incurred in bringing the Motion, pursuant to Fed. R. Civ. P. 37, within 21 days thereafter. ECF Dkt. No. 89.[10]

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[9] The Court denied Dr. Militana's Motion to Dismiss by Memorandum Opinion and Order dated November 15, 2013. ECF Dkt. Nos. 84, 85.

[10] The Plaintiffs submitted their Petition Regarding Recoverable Attorneys' Fees on December 16, 2013. ECF Dkt. No. 90. A Memorandum Opinion and Order granting the Plaintiffs recovery in the amount of $15, 980.00 was issued on April 15, 2014. ECF Dkt.

Written discovery between the parties continued thereafter, through the end of 2013 and the early part of 2014, on a largely cooperative basis. However, an additional significant development arose during this time period when Defendant Corizon substituted the law firm of McGuire Woods LLP as its defense counsel in place of Rawls, McNelis & Mitchell, P.C. on January 14, 2014. *See* ECF Dkt. Nos. 94, 95. Due, in part, to the involvement of new counsel in the case, the parties jointly requested that the pending Scheduling Order be amended to allow them more time for the completion of discovery and to reset the trial date by Consent Motion filed March 26, 2014. ECF Dkt. No. 104. An Amended Scheduling order issued on March 31, 2014, rescheduling the commencement of trial from December 1, 2014. ECF Dkt. No. 104.

At the request of Defendant Corizon's newly-designated defense counsel, the Plaintiffs' counsel prepared an Outline of Proposed Terms for Settlement, which was transmitted to the Defendants on February 25, 2015.[11] Throughout the remaining pendency of the litigation, neither Corizon (while it remained as a Defendant until the end of July 2014) nor the VDOC Defendants responded to the Plaintiffs' written Settlement proposal. Indeed, although the Amended Scheduling Order entered March 31, 2014 expressly provided for a time period following the close of discovery which would be set aside for settlement discussions or mediation, no meaningful settlement talks occurred during the designated period because of the VDOC Defendants' lack of readiness and/or unwillingness to engage therein.[12]

Commencing as of March 20, 2014 and continuing through mid-September 2014, the parties, largely on a cooperative basis, scheduled and conducted depositions of party and third-

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Nos. 109, 110. The time charges incurred in connection with the Plaintiffs' Motion to Compel, as to which this Court has already awarded fees, are excluded from the current Petition.

11 *See* Howard Dec., Exh. 10.

12 *See id.*, Exh. 11.

party witnesses, while also continuing to produce documents responsive to one another's discovery requests. In addition, the Plaintiffs and Defendants exchanged reports of their respective expert witnesses pursuant to Fed. R. Civ. P. 26(b)(4). During this time period, however, yet another development threatening the orderly progression of this case to trial arose in early June 2014, at which time Defendant Corizon informed the VDOC that it intended to unilaterally cancel its contract to provide medical care at VDOC facilities (including FCCW), effective as of October 1, 2014. Based upon this premise, and the proposition that as of October 2, 2014, it would no longer be a proper party Defendant in the case and that the replacement contractor would need to be added as a "necessary party" in its place, Corizon filed an Emergency Motion to Stay Litigation Pending Joinder of Necessary Party and supporting Memorandum on June 9, 2014. *See* ECF Dkt. Nos. 117, 118. While the VDOC Defendants did not take a position on the merits of Corizon's Emergency Motion, the Plaintiffs vigorously opposed the Motion, principally on the basis that the sub-standard medical care at FCCW serving as the premise for the lawsuit was continuing and that the Plaintiffs should not have to countenance yet another disruption of the trial schedule on the basis of machinations relating entirely to the apparently dysfunctional relationship between the VDOC and its contractors. *See* Plaintiffs' Memorandum in Opposition to Defendant Corizon Health, Inc.'s Emergency Motion to Stay Litigation Pending Joinder of Necessary Party, filed June 17, 2014, at 12-16 (ECF Dkt. No. 121).

In denying the Corizon Emergency Motion, this Court clearly articulated its recognition of the prejudice to the Plaintiffs that would result if the relief sought were granted:

> The progress of this case to trial has already been delayed by more than a year as a result of a previous change in the identity of VDOC's medical care contractor and other complications involving Corizon and its counsel -- events over which plaintiffs have had no control. Now, without any acknowledgement of the

> possible adverse impact that a further delay of the proceedings could have on plaintiffs, *Corizon unilaterally seeks to suspend this litigation as to all parties*, apparently for no better reason than that it would be inconvenient for Corizon to continue to participate as a litigant during the pendency of its status as VDOC's contractor. However, given plaintiffs' allegations regarding defendants' systemic failure to provide medical care at FCCW that meets constitutional minimum standards (including the denial of needed treatment, the failure to refer for outside specialized care, the failure to follow through on outside specialists' treatment instructions, disruptions in the continuity of critical medication, and the like), a further delay of plaintiffs' day in court would be prejudicial to plaintiffs' legitimate interest in a timely resolution of their Eighth Amendment claims.

See Memorandum Opinion, dated July 28, 2014, at 6 (emphasis and boldface print in original) (ECF Dkt. No. 127). On the same date, subject to the understanding that it would continue to cooperate with Plaintiffs' discovery efforts and that as of October 1, 2014, the Plaintiffs' claims against Corizon would become moot, Plaintiffs agreed to voluntarily dismiss Corizon from the lawsuit pursuant to Fed. R. Civ. P. 41(a)(2). *See* ECF Dkt. No. 126. An Order of Dismissal regarding Corizon was entered on July 31, 2014 (ECF Dkt. 129), leaving the VDOC Defendants as the sole Defendants.

Thereafter, pursuant to exhaustive briefing and argument, the parties submitted and this Court resolved Plaintiffs' Motion for Class Certification and the parties' cross-motions for summary judgment. *See* ECF Dkt. No. 188 (granting Plaintiffs' Motion for Class Certification); ECF Dkt. No. 201 (granting Plaintiffs' Motion for Partial Summary Judgment and denying the VDOC Defendants' Motion for Summary Judgment in its entirety). It was against the backdrop of these rulings that the parties reached an agreement-in-principle to settle this matter as the Plaintiffs' counsel were immersed in intensive preparations for the December 1, 2014 trial.

* * *

In sum, if the context of a case that would have been complex and demanding in any event in light of the nature of the Plaintiffs' allegations and its posture as a proposed class action, this litigation was made significantly more complicated and challenging due to the many twists

and turns associated with and resulting from the "revolving door" nature of the VDOC's relationships with Armor and Corizon respectively. Notwithstanding the considerable substantive and procedural challenges presented, the Plaintiffs achieved a consistent level of success throughout the entire course of the litigation. The Plaintiffs effectively rebuffed Defendant Armor's purported threat of a Motion for Rule 11 Sanctions and defeated the VDOC Defendants' Motion to Dismiss at the threshold stages of the case; prevailed against the VDOC Defendants on the only discovery dispute this Court was called upon to resolve; defeated Defendant Corizon's bid to derail the litigation through its request for a stay; prevailed on their Motion for Partial Summary Judgment and defeated the VDOC's Motion for Summary Judgment in its entirety; and ultimately secured a Settlement Agreement that sets the stage for sweeping reforms and improvements in the manner in which medical care will be afforded to the women residing at FCCW essentially equivalent in all material respects to the relief the Plaintiffs could have obtained if they had prevailed following a costly, time-consuming trial, while avoiding the possibility of an appeal. The reasonableness of the hours incurred by Plaintiffs' counsel in successfully prosecuting this case to resolution by an entirely favorable settlement should be assessed with these considerations in mind.

3. Plaintiffs' Counsels' Time Charges

In granting the Plaintiffs' Motion for Class Certification, this Court noted as follows:

> Plaintiffs are represented by experienced and qualified counsel who are competent to conduct this action and fairly represent the interests of plaintiffs and the class as a whole. The Legal Aid Justice Center and the Washington Lawyers' Committee for Civil Rights and Urban Affairs are well-known public interest legal service organizations with substantial experience with respect to and involvement in civil rights litigation, including class actions, in Virginia and, as regards the Washington Lawyers' Committee, other jurisdictions. Those two organizations are joined as co-counsel by the Washington, D.C. law firm of Wiley Rein LLP, which is representing the Plaintiffs in a pro bono capacity. Wiley Rein is a firm of more than 275 attorneys that handles complex civil litigation matters,

> and its lead counsel in this case has significant experience in prisoners' civil rights cases and class actions.

Memorandum Opinion, dated November 20, 2014 at 30 (ECF Dkt. No. 188) (footnote omitted). The hours incurred by each of the three entities providing legal representation to the Plaintiffs in connection with which the fee award is sought are described and quantified below.

a. The Legal Aid Justice Center

The principal office of the Legal Aid Justice Center (LAJC) in Charlottesville, VA is primarily responsible for the initiation and prosecution of this class action. Commencing in or around October 2007, in response to its receipt of an increasing large volume of letters from women prisoners residing at FCCW and their family members, articulating an array of complaints regarding sub-standard medical care at the Prison, or the Prison's failure to provide needed medical care under circumstances in which it was due, the LAJC determined to commence an investigation of these allegations. Helen Trainor, an experienced attorney who was serving as the Project Director for the LAJC's Virginia Institutionalized Persons Project at that time, commenced visiting FCCW and conducting interviews of prisoners from whom she had received letters, and additional women whose medical problems and encounters with alleged deficient medical care she learned of through word of mouth. *See generally* Declaration of Helen C. Trainor ("Trainor Dec."), dated October 17, 2015, ¶¶ 2-4 at 1-2 & contemporaneous Time Records attached thereto. (true and correct copy attached as part of Exh. 5 to the Howard Declaration). In the following months, Ms. Trainor continued to receive and review correspondence, conduct interviews, and generally gather information that, over time, caused her to conclude that the problems regarding the medical care at FCCW that were being described to her were not isolated incidents but rather part of a pattern. *Id*. Mr. Trainor shared her concerns with Abigail Turner, who joined the LAJC's legal staff in January 2007 and was appointed its

Litigation Director in November 2008. *See* Declaration of Abigail Turner ("Turner Decl."), dated October 13, 2015, ¶ 2 at 1 (true and correct copy attached as part of Exh. 5 to the Howard Declaration). As of August 2008, Ms. Turner joined Ms. Trainor in her efforts to investigate the matter of alleged sub-standard medical care at FCCW on a widespread basis and to strategize regarding what action the LAJC might take to try to address what seemed to be an increasingly serious situation.

In November 2008, subject to consultation with and the approval of the LAJC's Executive Director, Alex Gulotta, Ms. Turner and Ms. Trainor initiated contacts with the Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC), in Washington, D.C., seeking advice and assistance in regard to possible collaboration in pursuit of a class action on behalf of the women residing at FCCW on the basis of allegations of inadequate medical care under the Eighth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. Turner Dec., ¶ 28 at 7.[13] On December 17, 2008, representatives of the WLC and LAJC met in Washington with Theodore Howard, a litigation partner in the Washington, D.C. law firm of Wiley Rein LLP (WR), a member of the WLC's Board of Directors and an experienced prisoners' rights advocate, to discuss the on-going problems at FCCW. *See* Trainor Dec., Time Records (12/17/08); Turner Dec., ¶¶ 29-30 at 7-8 and contemporaneous Time Records attached thereto (12/17/08). As a result of this meeting, LAJC, WLC and WR agreed to undertake an additional factual investigation into the medical care issues at FCCW, subject to the

[13] Although the LAJC had determined that litigation was the appropriate means of attempting to obtain redress for the prisoners at FCCW being subject to sub-standard medical care, the LAJC did not have either the human or the financial resources to pursue such litigation in its own. Moreover, the LAJC had serious doubts about its ability to obtain pro bono co-counsel in Virginia with which to collaborate on a prisoners' rights class action. *See* Turner Dec., ¶¶ 25-28 at 6-7.

understanding that if the facts uncovered concerning alleged systemic problems proved credible, litigation would be undertaken.

Thereafter, the LAJC coordinated a substantial effort to further investigate the complaints of the women prisoners at FCCW regarding the inadequate medical care they were experiencing at the Prison, and building a factual record upon which a class action lawsuit could be based. Their activities, which were conducted primarily by Ms. Trainor (until her departure from the LAJC in August 2010), Ms. Turner, LAJC Staff Attorney Brenda Castañeda and LAJC volunteer attorney April Wimberley, included the following significant tasks:

- Corresponding with and conducting dozens of interviews of FCCW residents and obtaining waivers for access to medical records;
- Preparing and submitting FOIA requests to obtain medical records and reviewing the records obtained;
- Advising and assisting women, many presenting significant literacy challenges, with respect to preparation and submission of medical grievances and grievance appeals; and
- Evaluating women as possible named plaintiffs/class representatives or as fact witnesses.

See Trainor Dec., Time Records (12/22/08-7/16/10); Turner Dec., ¶¶ 19-24 at 5-6 & Time Records (2/25/09-7/18/12); Declaration of Brenda Castañeda ("Castañeda Dec."), dated October 18, 2015, ¶¶ 14-15 at 4-6 & contemporaneous Time Records attached thereto (8/19/10-7/20/12) (true and correct copy attached as part of Exh. 5 to the Howard Declaration); Declaration of April Wimberley ("Wimberley Dec."), dated October 9, 2015, ¶ 2 at 1-2 & Contemporaneous Time Records attached thereto (1/12/11-7/18/12) (true and correct copy attached as part of Exh. 5 to the Howard Declaration). As attested to by Ms. Turner and Ms. Castañeda, the amount of time required to perform these pre-suit investigative activities was dramatically increased as a result of difficulties associated with a variety of administrative and

procedural roadblocks periodically erected by FCCW in a seemingly arbitrary fashion in order to make attorney interaction with clients at FCCW more burdensome. Turner Dec., ¶¶ 19-24 at 5-6; Castañeda Dec., ¶¶ 14-15 at 4-6. These diversions not only significantly expanded the amount of time LAJC personnel devoted to pre-suit due diligence, but simultaneously diminished the amount of time they could spend attending to the serious legal problems and needs of other indigent individual clients served by the LAJC in unrelated matters. Turner Dec., ¶ 24 at 6.

Although the attorneys at WR took on principal responsibility for the drafting of the Plaintiffs' Complaint for Declaratory and Injunctive Relief, Ms. Turner and Ms. Castañeda both had substantive input into the crafting of the document, and Ms. Turner was the principal drafter of the Demand Letters that were served upon the VDOC and its medical care contractor, Armor, prior to initiation of the lawsuit.[14]

Once the Court resolved the VDOC Defendants' Motion to Dismiss and active litigation commenced in earnest in late 2012, LAJC attorneys were full and active participants in all aspects of the prosecution of the Plaintiffs' case until a settlement was agreed upon in principle in late November 2014. As the scope of obligations associated with the progression of the litigation expanded, Ms. Turner and Ms. Castañeda were joined on the LAJC team by Ivy Finkenstadt (who had previously been involved in the case while working as a Staff Attorney for the Prisoners' Project of the WLC prior to taking a position at the LAJC), Mary Bauer, Erin Trodden and Angela Ciolfi. The addition of each of these attorneys was required in order to allow the LAJC to meet the demands attendant to its involvement in a major, complex case while also allowing each of its individual lawyers to fulfill their respective obligations to the numerous indigent individuals served by the organization. *See* Declaration of Mary Bauer ("Bauer Dec."),

[14] *Se* ECF Dkt. No. 152, Exh. 8.

dated October 18, 2015, ¶ 7 at 2 (true and correct copy attached as part of Exh. 5 to the Howard Declaration).

In the allocation of responsibilities agreed to among the members of the Plaintiffs' litigation team in order to maximize efficiency and avoid duplication of efforts, the LAJC attorneys assumed primary duties with respect to working with the Named Plaintiffs on the preparation of their extensive narrative written responses to the Defendants' Interrogatories and the assemblage and production of each Named Plaintiffs' documents responsive to the Defendants' Document Requests. The LAJC prepared each of the Named Plaintiffs for their depositions and took the lead on preparing for and conducting a substantial number of the depositions taken of Defendants' witnesses. They had extensive involvement in developing the facts serving as the foundation for the Plaintiffs' Motion for Class Certification and invested substantial amounts of time on work with the Named Plaintiffs and other proposed Class Members on the Sworn Declarations that were a critical element of the evidence supporting the Motion for Class Certification, Plaintiffs' Cross-Motion for Summary Judgment and Plaintiffs' Opposition to the VDOC Defendants' Motion for Summary Judgment. Ms. Castañeda argued the Motion for Class Certification on the Plaintiffs' behalf. Had a trial been necessary, the LAJC attorneys would have shouldered principal responsibilities for the presentation of the witnesses in the Plaintiffs' affirmative case.[15] Ms. Bauer was an integral participant in the negotiation of the parties' Settlement Agreement, and Ms. Turner and Ms. Castañeda played significant roles on behalf of the Plaintiffs in working with the VDOC Defendants to implement all of the elements

[15] In this regard, three additional LAJC attorneys were brought into the case at the late stages of trial preparation in order to assist in preparing witnesses for their trial testimony in light of the extreme demand on the time of the LAJC lawyers already fully immersed in the case. *See* Castañeda Dec., ¶ 18.a., b. & c. at 8-9. Accordingly, the Plaintiffs seek recovery for the modest hours incurred in Kim Rolla, Mary Frances Charlton and Army Walters, respectively, in the context of trial preparation. *Id*.

of the parties' Memorandum of Understanding in order to reach the point at which a finalized Settlement Agreement could be presented to the Court for its preliminary approval, pursuant to Motion papers that the LAJC attorneys principally prepared.

Concurrently with all of the active litigation activities in which they were engaged, the LAJC's attorneys, its volunteer attorneys, and its law clerks and interns maintained constant, on-going contact with the prisoners at FCCW -- providing status updates and answering questions about the case; providing advice and assistance with respect to ongoing medical problems and interceding with the VDOC directly on behalf of particular prisoners to secure needed medical attention and care when it was not being provided; and generally serving as the "eyes and ears" of the Plaintiffs' medical expert, Robert B Greifinger, M.D., in order to keep him informed and advised with respect to new and ongoing problems regarding the medical care at FCCW of which he needed to be aware in order to render his opinions in the case in support of the Plaintiffs' claims.

For all of these activities, as fully documented in the Declarations and Time Records submitted herewith, the Plaintiffs seek an award of fees for the LAJC's attorneys' hours reasonably and necessarily incurred in successfully pursuing relief for the Plaintiffs as follows:

TIMEKEEPER	REASONABLE HOURS	RATE	TOTAL
Helen Trainor	459	$211.50	$ 97,078.50
Abigal Turner[16]	1,517.68	$211.50	$320,989.32
Alex Gulotta	57.50	$211.50	$ 12,161.25
Brenda Castañeda[17]	1233.54	$211.50	$260,893.71
Ivy Finkenstadt	77.50	$211.50	$ 16,391.25
Erin Trodden	761.70	$211.50	$161,099.55
Angela Ciolfi[18]	351.20	$211.50	$ 74,278.80

[16] Ms. Turner also seeks recovery for 6.0 hours of clerical work, charged at $105.75 (one-half the attorney rate), for an additional $634.50. *See* Turner Dec., ¶¶ 15, 17 at 14.

[17] Ms. Castañeda also seeks recovery for an additional 9.60 hours of clerical time charged at $105.75, in a total amount of $1,015.20. *See* Castañeda Dec., ¶ 13 at 4.

Mary Bauer	112.10	$211.50	$ 23,709.15
Amy Walters	10.8	$211.50	$ 2,284.20
Kim Rolla	18.3	$211.50	$ 3,870.45
Mary Frances Charlton	7.0	$211.50	$ 1,480.50

In addition, as explained more fully in Ms. Castañeda's Declaration, although the LAJC has determined to forego seeking recovery for many hundreds of hours committed to the investigation and prosecution of this case by numerous volunteer attorneys, paralegals, law clerks and law student interns, it does seek recovery for a portion of the reasonable hours incurred by volunteer attorney April Wimberley, as well as for the work of two volunteer paralegals, Sami Natour and Catherine Martin,[19] as follows:

April Wimberley	171.10	$211.50	$36,187.65
Sami Natour	25.00	$150.00	$ 3,750.00
Catherine Martin	72.50	$150.00	$10,875.00

In sum, the fees as to which recovery is sought by the Plaintiffs associated with the efforts undertaken on their behalf by the LAJC total $1,026,434.66.

b. <u>The Washington Lawyers' Committee</u>

As noted above, the LAJC approached the Prisoners' Project of the WLC in late 2008, seeking advice and possible assistance with bringing a class action on behalf of the women prisoners at FCCW, and also a possible referral to a Washington, D.C. law firm that might agree to co-counsel the proposed case on a pro bono basis. The WLC Prisoners' Project, which at that time consisted of Project Director Philip Fornaci and Staff Attorneys Deborah Golden and Ivy

[18] Ms. Ciolfi also seeks recovery for an additional 3.90 hours of clerical time charged at $105.75, in a total amount of $412.43. *See* Declaration of Angela Ciolfi, dated October 16, 2015, ¶ 15 at 4 (true and correct copy attached as part of Exh. 5 to the Howard Declaration).

[19] *See* Castañeda Dec., ¶ 16 at 6-7; *see also* Declaration of Sami Natour, dated October 5, 2015, ¶¶ 3-4 at 1; Declaration of Catherine Martin, dated October 9, 2015, ¶¶ 4-5 at 1 (true and correct copies attached as a part of Exh. 5 to the Howard Declaration).

Finkenstadt, agreed to collaborate with the LAJC on the case and also put the LAJC in touch with WR, which also agreed to take on the matter.

Drawing upon their vast experience and expertise and respect to prisoners' rights matters and class action litigation, the WLC -- particularly Ms. Golden -- assisted in the preparation for and prosecution of the litigation by participating in the pre-suit investigation (including helping to develop the questionnaires that were used to elicit pertinent information from the prisoners being interviewed and direct participation in some of the visits to FCCW and interviews that were conducted), providing important advice with respect to PLRA exhaustion-of-remedies issues and strategy, and providing input and insight into the preparation of the Plaintiffs' pre-filing Demand Letters to the Defendants, as well as the Complaint. *See generally* Declaration of Deborah Golden, dated October 19, 2015, ("Golden Dec."), ¶¶ 11-13 at 3-4 (true and correct copy attached as Exh. 6 to the Howard Declaration).

In the course of the litigation, Ms. Golden provided important strategic advice and assistance with respect to discovery strategy in general and deposition strategy in particular, the briefing of the Plaintiffs' Motion for Class Certification and the parties' cross-motions for summary judgment, trial strategy, and proposed terms for settlement. Ms. Golden participated directly in meetings with VDOC counsel and its representatives to resolve various implementation issues arising in connection with the Settlement Agreement and has assisted with preparation of the Fee Petition. *Id.*

Elliot Mincberg, who joined the WLC as Senior Counsel in June 2014 following a distinguished legal career in the private and public sectors in Washington, D.C. including vast

experience as a constitutional and civil rights litigator,[20] provided valuable advice and counsel to the Plaintiffs' litigation team with respect to trial preparation and the framing of the Settlement Agreement. *Id.*, ¶ 22 at 5.

Based on the foregoing activities and involvement, the Plaintiffs seek recovery of fees on the basis of the following hours reasonably and necessarily incurred by the WLC in furtherance of the successful resolution of this case:

TIMEKEEPER	HOURS	RATE	TOTAL
Deborah Golden	125.31	$211.50	$26,503.28
Ivy Finkenstadt	26.97	$211.50	$ 5,703.52
Philip Fornaci	9.58	$211.50	$ 2,026.80
Elliot Mincberg	53.50	$211.50	$11,315.25
Benjamin Schwid[21]	.87	$145.00	$ 125.57
TOTAL	$45,674.42		

Accordingly, the Plaintiffs seek recovery of the fees associated with hours incurred by the WLC on their behalf in the amount of $45,674.42. Golden Dec., ¶ 24 at 5.

c. Wiley Rein LLP

Following the meeting with representatives of the LAJC and WLC on December 17, 2008, WR commenced its involvement in assisting those organizations in preparing to bring this case if the preliminary investigation established a basis to do so. At all times from the earliest stages through the present, the Firm's efforts were led by Ted Howard, an experienced Litigation Partner. At various times throughout the course of the case, Mr. Howard drew on the assistance

[20] Mr. Mincberg's legal career prior to coming to the WLC included a partnership in the Washington, D.C. law firm of Hogan & Hartson (now Hogan Lovells LLP), time as Chief Counsel for Oversight & Investigations of the U.S. House of Representatives Judiciary Committee, and time as the Senior Vice President, General Counsel and Legal Director of People for The American Way.

[21] Mr. Schwid, a law student intern, performed legal research in connection with preparation of the Plaintiffs' Motion to Strike The VDOC Defendants' Demand for Jury Trial (ECF Dkt. No. 158).

and support of other Partners; Senior, Mid-Level and Junior Associates; Summer Associates; Legal Assistants; and Litigation Support and Information Technology personnel.

Wiley Rein attorneys initially conducted substantial legal research with respect to jurisdiction and venue issues, class action practice and procedure in the Fourth Circuit, Section 1983 elements in the Eighth Amendment medical care context, and assessment of the extent to which the presence and involvement of a private medical care contractor acting on behalf of the State might affect potential liability analysis. Concurrently, a number of associate attorneys joined colleagues from the LAJC and, in a few instances, the WLC, in making trips to FCCW to conduct interviews of women residing there regarding the nature of their medical issues and concerns and what they had observed and experienced with respect to medical care. A detailed written summary was prepared on the basis of each of the interviews conducted and the written summaries were then reviewed for purposes of identifying patterns of inadequate care and references to recurring policies or practices on the part of the Prison's medical care providers that appeared to raise constitutional concerns. In connection with each interview conducted, the subject was asked to sign a waiver in order to facilitate access to medical records, and WR attorneys and LAJC personnel collaborated on the preparation and submission of FOIA requests to obtain the records, which were then transmitted to WR for in-depth analysis. In order to facilitate access to information among the Plaintiffs' litigation team, WR litigation support personnel assisted in the creation of a secure, password-protected "extranet" website to which written interview summaries and medical records could be uploaded on a prisoner-specific basis and research memoranda could be posted.

Initial work on the drafting of a proposed Class Action Complaint for Declaratory and Injunctive Relief commenced as early as June 2010. However, the progression of the

prospective lawsuit towards filing was significantly delayed by a host of contributing factors including, but not limited to: transfers of women presenting compelling facts from FCCW to other VDOC facilities or their release from incarceration in a few instances; reluctance of certain prospective plaintiffs to serve in that capacity due to fear of reprisals; the emergence of new and more severe medical problems on the part of some women for whom a full factual workup had been completed regarding a different and less dire condition; and the pervasive, on-going difficulties associated with reaching the point at which potential plaintiffs' medical grievances were fully and properly exhausted for purposes of the PLRA in the context of an administrative grievance process at FCCW that appeared to be designed to frustrate such efforts.

Finally, with the Complaint on the verge of completion and filing in the Fall of 2011, the Plaintiffs learned of a change in the identity of the VDOC's private, for-profit medical care contractor from Corizon to Armor, effective as of November 1, 2011, that again necessarily delayed commencement of the action. Only after it became clear that the change in contractors did not involve any improvement in the quality of the medical care that FCCW was providing did the Plaintiffs proceed with filing the lawsuit in July 2012.

WR attorneys took the lead on researching and briefing the Plaintiffs' Opposition to the VDOC Defendants' Motion to Dismiss and, concurrently, prepared a lengthy, detailed rebuttal to a Motion for Rule 11 Sanctions threatened by Armor based upon an unfounded claim that Plaintiffs' Complaint was replete with factual misrepresentations. Mr. Howard presented the oral argument against the Motion to Dismiss, which the Court subsequently denied.

Thereafter, WR worked cooperatively with co-counsel to formulate and carry out the Plaintiffs' discovery plan, including:

- Screening the Name Plaintiffs' documents responsive to the Defendants' document requests for privilege prior to their production and creating privilege logs for documents withheld;

- Crafting the Plaintiffs' document requests to the Defendants and reviewing Defendants' productions and creating subject matter specific database files for ease of future reference and retrieval;

- Briefing and presenting argument in support of the Plaintiffs' Motion to Compel with respect to relevant documents wrongfully withheld from production by the VDOC Defendants;

- Serving as the point of contact for all discovery conducted of Armor and Corizon, as complicated by their shifting status in the litigation as it progressed and the negotiation of discovery disputes with those entities' counsel; and

- Sharing legal responsibilities with the LAJC in preparation for and conduct some __ depositions of Defendants' representatives, along with defending the depositions of the Plaintiffs conducted by the Defendants.

Mr. Howard individually worked extensively with the Plaintiffs' medical expert, Dr. Greifinger, supplying him with the Plaintiffs' and Class Members' medical records and all other critical information required by Dr. Greifinger to formulate his opinions and prepare and submit his expert reports, the last of which constituted Dr. Greifinger's rebuttal to the expert reports proffered by Defendant Corizon. Mr. Howard likewise prepared Dr. Greifinger for his and defended his deposition. WR worked extensively on Plaintiffs' Motion for Class Certification in collaboration with the LAJC team, and had lead responsibility for preparation and argument of Plaintiffs' Motion for Partial Summary Judgment and their Opposition to the VDOC Defendants' Motion for Summary Judgment.

Mr. Howard worked closely with Mary Bauer of the LAJC in the development and articulation of the Plaintiffs' position regarding settlement, crafted the Memorandum of Understanding that memorialized the parties' agreement-in-principle, and had principal responsibility for working with Dr. Greifinger and interacting with the VDOC Defendants'

counsel and representatives in attending to the implementation of the settlement terms, including the painstaking revision of a host of VDOC Operating Procedures governing the provision of medical care at FCCW. He also was the principal draftsman of the Settlement Agreement itself.

But for the resolution reached, Mr. Howard would have served as lead counsel for the Plaintiffs at trial and he participated fully in all of the intensive trial preparation sessions in which the Plaintiffs' litigation team engaged prior to settlement.

Based on all of these activities and involvement in the litigation, the Plaintiffs seek recovery of fees attributable to the work of Wiley Rein LLP's attorneys as follows:

TIMEKEEPER	REASONABLE HOURS	RATE	TOTAL
Timothy Duree	92.75	$211.50	$ 19,616.62
Laura El-Sabaawi	98.25	$211.50	$ 20,779.87
Stacy Gonsalves	80.00	$211.50	$ 16,920.00
Michael Gridley	177.50	$211.50	$ 37,541.25
Theodore Howard	3,159.50	$211.50	$668,234.25
Rachel Hunnicutt	36.75	$211.50	$ 7,772.63
Cori Lombard	40.75	$211.50	$ 8,618.62
David Markert	69.75	$211.50	$ 14,752.13
Mary Catherine Martin	113.50	$211.50	$ 24,005.25
Christiane McKnight	354.25	$211.50	$ 74,923.88
Brandon Moss	32.25	$211.50	$ 6,820.87
Lori Scheetz	34.25	$211.50	$ 7,243.87
Laura Sherman	31.00	$211.50	$ 6,556.50

In addition, the Plaintiffs seek recovery of fees for the services of the following WR paralegals and litigation support personnel:

Paul Michel	280.00	$150.00	$42,000.00
Garrett Fitzgerald	175.50	$150.00	$26,325.00
Robert Shields	123.00	$150.00	$18,450.00

In sum, the Plaintiffs seek recovery of $991.190.74 in fees based on their behalf.

C. THE LODESTAR AMOUNT OF $2,063,298.82 IS REASONABLE AND SHOULD NOT BE SUBJECT TO ANY DOWNWARD ADJUSTMENT

The combined lodestar amount of fees incurred by the LAJC, WLC and WR in litigating this matter to a successful resolution on behalf of the Plaintiffs is $2,063,298.82.

"The Supreme Court has indulged a 'strong presumption' that the lodestar number represents a reasonable attorney's fee." *McAfee*, 738 F.3d at 88-89; *see generally Perdue*, 559 U.S. at 552 ("the presumption is a 'strong' one" (citations omitted)); *Lefemine*, 758 F.3d at 559 n.4 ("'[A] proper computation of the lodestar fee will, in the great majority of cases, constitute the "reasonable fee" contemplated by [Section] 1988'" (*quoting Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986)). Moreover, "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." *Hensley*, 461 U.S. at 440; *accord In re Abrams & Abrams, P.A.*, 605 F.3d 238, 247 (4th Cir. 2010); *Doe v. Chao*, 435 F.3d 492, 506 (4th Cir. 2006). Thus, "'[w] here a plaintiff has obtained excellent results, [her] attorney should receive a fully compensatory fee.'" *McAfee*, 906 F. Supp. 2d at 502, *quoting Hensley*, 461 U.S. at 435.

There, there is no basis for questioning the "excellent results" obtained by the Plaintiffs through the Settlement Agreement reached to resolve this case. The Declarations submitted in support of the Plaintiffs' Petition by nationally-recognized civil rights attorneys with vast experience in prisoners' rights litigation definitively support this conclusion.[22] Accordingly, the Plaintiffs submit hat substantial basis exists for this Court's determination that the lodestar sum

[22] *See* Declaration of Victor M. Glasberg, dated October 19, 2015, ¶¶ 8-11 at 7-9 (Howard Dec., Exh. 7); Declaration of David C. Fathi, dated October 19, 2015, ¶¶ 6-11 at 5-8 (Howard Dec., Exh. 8); Declaration of Prof. A. Benjamin Spencer, dated October 16, 2015, ¶¶ 7-9 at 2-3 (Howard Dec., Exh. 9).

of $2,054,950.44, should be confirmed as the amount of the attorneys' fees award to the Plaintiff's here.

Consideration of the four *Johnson v. Georgia Highway Express* factors not already subsumed by the lodestar analysis -- *see McAfee*, 738 F.3d at 89 -- does not lead to a different result.

As regards *Johnson*, Factor 8, "the amount in controversy and the results obtained," the Plaintiffs did not seek damages, but rather declaratory and injunctive relief in order to bring about significant meaningful changes in the manner in which medical care is provided to the women incarcerated at FCCW. The Settlement Agreement provides for precisely the forms of relief sought by the Plaintiffs and, as noted above, the results achieved through this litigation are "excellent".

Concerning *Johnson* Factor 10, "the undesirability of the case within the legal community within which the case arose," the "undesirability of prisoner litigation in general" noted by the Court in *Barnard v. Piedmont Reg. Jail Auth.*, Case No. 3:07CV566, 2009 WL 3416228, at *4 n.4 (E.D. Va. 2009), is well confirmed by the Declarations submitted in support of the Plaintiffs' Petition. *See* Turner Dec., ¶¶ 19-24 at 5-6; Castañeda Dec., ¶¶ 14-15 at 4-6; Glasberg Dec., ¶ 10 at 7-8; Spencer Dec., ¶ 8 at 2. These considerations support the sustaining of an award in accordance with the lodestar amount. *Johnson* Factor 11 "the nature and length of the professional relationship between the attorney and the client," to the extent it has any bearing here, likewise weighs in favor of awarding the Plaintiffs the fees indicated by the lodestar calculation. The plaintiffs' counsel have faithfully and vigorously represented their interests in this case, without promise of success or remuneration, since 2008 and will continue

to protect the Plaintiffs' interest throughout the duration of the effective period of the Settlement Agreement.

Finally, *Johnson* Factor 13 -- attorneys' fees awards in similar cases -- the Plaintiffs submit that while the amounts of fees awarded to prevailing plaintiffs in prisoners' conditions-of-confinement lawsuits, including class actions, vary significantly in light of the differences in the nature and scope of the cases, the difficulty of the issues presented, the degree of resistance involved, and the like, the fees sought here are comfortably within the array of awards identified by their research. For example:

> *Craft v. County of San Bernadino*, 624 F. Supp. 1113 (C.D. Cal. 2008) -- In class action brought against County on the basis of allegations that the County Jail engaged in routine violations of the Fourth Amendment by subjecting inmates to strip searches without probable cause or reasonable suspicion, Court found that counsel was entitled to 25% of the $25.6 million damages award, awarding $6,375,000 in attorneys' fees.
>
> *D.M. v. Terhune*, 67 F. Supp. 2d 401 (D.N.J. 1999) -- As part of settlement agreement reached between the plaintiffs and the New Jersey Department of Corrections in resolution of a class action challenging the constitutional sufficiency of mental health are provided by the State and its private contractor, the Court approved an attorneys' fee award of $1,220,000.
>
> *Lira v. Cate*, No. C00-0905-SI, 2010 U.S. Dist. LEXIS 26120 (N.D. Cal. Feb. 26, 2010) -- In civil rights action brought by individual prisoner alleging that the due process rights were violated when the State Prison in which he was incarcerated wrongfully placed him in administrative segregation on the basis of an erroneous "validation" of his status as a gang member, Court awarded his attorneys $1,044,101 after plaintiff obtained a favorable judgment following a bench trial.
>
> *Mitchell v. Cate*, Case NO. 2:08-cv-01196-TLN-EFC, Order Granting Attorneys' Fees (E.D. Cal. October 8, 2015) -- Following Court's approval of settlement favorable to prisoner plaintiffs in class action challenging California Department of Corrections' policy and practice of imposing lengthy race-based lockdowns in violation of the Eighth Amendment, Court approved award of attorneys' fees and expenses in the amount of $2.375 million.
>
> *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2009) -- Following proceeding in which the Maricopa County Sheriff and Board of Supervisors unsuccessfully challenged the continuing effect of a Consent Decree previously entered into in resolution of a class action in which pre-trial detainees challenged the

> constitutionality of their conditions of confinement, Court found that plaintiffs were entitled to a fee award in the amount of $1,239,491.63.

This sampling of results from an array of generally analogous and comparable prisoners' rights cases bears witness to the proposition that presumptively reasonable lodestar amount requested by the Plaintiffs here is well within the mainstream.

Accordingly, none of the *Johnson* factors not otherwise accounted for in the lodestar analysis as recognized by the *Fourth Circuit* in *McAfee* and applied herein suggest any basis for any downward adjustment of the amount requested.

Lastly, the VDOC should not be heard to complain that the amount of the fee award is somehow excessive. The Plaintiffs acknowledge that the amount of the award sought is substantial, but it is neither disproportionate to the nature of the relief obtained by the Plaintiffs under the Settlement Agreement nor in any way unfair to the VDOC Defendants, given their unwillingness to engage the Plaintiffs in good-faith settlement negotiations until the eve of a two-week trial that appeared virtually certain to go badly for them. As noted above, the Plaintiffs, by counsel, provided the Defendants with the outline of a framework for settlement in February 2014 , while the case was in the early stages of discovery and before depositions commenced -- *see* Howard Dec., Exh. 10 -- that bears a strong resemblance in content to the resolution the parties actually reached some nine months later. Even assuming that a negotiated resolution was not possible in the Spring of 2014, the Amended Scheduling Order approved and entered by the Court on March 31, 2014 (ECF Dkt. No. 104) expressly set aside a one-week period in September 2014 following the close of discovery and the filing of any dispositive motions, within which the parties were to conduct settlement negotiations or even possibly participate in mediation. These talks never occurred, however, because the VDOC Defendants insisted on providing a written response to the Plaintiffs' settlement framework as a predicate o

negotiations, but then failed to provide it. *See* Howard Dec., Exh. 11. However, the fact that, with this Court's decisions regarding class certification and the parties' dispositive motions looming and the commencement of trial less than two weeks away, it took the parties only a half-day of discussions on November 19, 2015 to arrive at an agreed-upon outline for a comprehensive settlement agreement in principle constitutes concrete evidence that if the VDOC had been committed to do so, this case could have been settled long before serious trial preparation became necessary. Thus, a substantial portion of the hours incurred by the Plaintiffs' counsel for which the State is now asked to pay could have been avoided but for the VDOC's 11th hour settlement strategy.

For all of these reasons, the lodestar calculations performed above yield a reasonable attorneys' fees award to the Plaintiffs that should be ordered accordingly.

III. THE PLAINTIFFS' DOCUMENTED AND REASONABLY INCURRED LITIGATION COSTS IN THE AMOUNT OF $58,674.13 SHOULD BE INCLUDED IN THE COURT'S AWARD

"A prevailing plaintiffs in a civil rights case is entitled, under [Section] 1988, to recover 'those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (*quoting Northcross v. Bd. Of Educ. Of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979); *see generally Daly v. Hill*, 790 F.2d 1071, 1082-83 (4th Cir. 1986) (citing authorities).

Here, the Plaintiffs seek recovery on the basis of substantial litigation expenses that were incurred by the attorneys at the Legal Aid Justice Center, the Washington Lawyers' Committee and Wiley Rein LLP, respectively. The LAJC's documented costs as to which recovery is sought total $16,893.96. *See* Castañeda Dec., ¶ 17 at 7-8 & LAJC Costs Exhibit attached thereto.

The WLC's documented costs as to which recovery is sought total $903.83. *See* Golden Dec., ¶ 27 at 6.

The Wiley Rein Detailed Billing Records for this action reflect total litigation costs in the amount of $130,973.79. *See* Howard Dec., Exh. 1.

From that total, the sum of $90,096.45 attributable to the Firm's payment of the invoices presented by the Plaintiffs' medical expert, Dr. Greifinger, has been subtracted.[23] This leaves $40,877.34, as to which the Plaintiffs seek recovery. Howard Dec., ¶ 32 at 14.

In total, the Plaintiffs seek an award of $58,674.13 in reasonably and necessarily incurred litigation expenses.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs respectfully request an award of their attorneys' fees in the amount of $2,063,298.82 and their litigation costs in the amount of $58,674.13 as the prevailing parties in this action pursuant to 42 U.S.C. § 1988.

[23] Because Section 1988 on its face, appears to permit the recovery of the expert witness fees incurred by a prevailing party only in actions brought pursuant to 42 U.S.C. §§ 1981 and 1981a, the Plaintiffs do not seek recovery of the amounts paid for Greifinger's services from the VDOC Defendants. *But cf. Cook v. Andrews*, 7 F. Supp. 2d 733, 736-37 (E.D. Va. 1988) (permitting prevailing plaintiff the recovery of a portion of the expert witness fees incurred in a Section 1983 action pursuant to Section 1988).

DATED: October 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2015, a true and correct copy of Plaintiffs' Memorandum of Law in Support of Plaintiffs' Petition for Award of Attorneys' Fees And Litigation Costs Pursuant to 42 U.S.C. § 1988 was served electronically upon the following:

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