

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
PARIS DIVISION

LINDA FREW, et al.

Plaintiffs,

v.

ALBERT HAWKINS, et al.

Defendants.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

CIVIL ACTION NO. 3:93CV65  
SENIOR JUDGE WILLIAM  
WAYNE JUSTICE

ORDER APPROVING AGREED INTERIM  
ATTORNEYS' FEES, COSTS AND EXPENSES  
(Second Half, 2007)

In their Joint Motion, the parties ask the Court to approve payment of interim attorneys' fees, costs and expenses to Plaintiffs' counsel. 42 U.S.C. §1988. DOCKET NO. 680. By their Joint Motion, the parties seek to resolve Defendants' liability to Plaintiffs' counsel for attorneys' fees, costs and expenses incurred from July 10 through December 31, 2007.<sup>1</sup>

BRIEF PROCEDURAL HISTORY

This Court's prior decisions describe the earlier procedural history of this complex case. *Frew v Gilbert*, 109 F.Supp.2d 579, 587-89 (E.D. Tex. 2000)(*Frew 2000*); *Frew v Hawkins*, 401 F.Supp.2d 619, 623-25 (E.D. Tex. 2005)(*Frew 2005*), *aff'd sub nom*, *Frazar v Ladd*, 457 F.3d 432 (5<sup>th</sup> Cir. 2006), *cert. denied*, 127 S.Ct. 1039 (2007).

In April, 2007, the parties' announcement of settlement eliminated the need for an evidentiary hearing about remedial orders that had been set for April 9, 2007. DOCKET NO. 630. After an evidentiary hearing on July 9, 2007, the Court approved the proposed

Corrective Action Order because it is “fair, reasonable and adequate.” DOCKET NOS.645; 663 (Opinion Approving CAO); F.R.Civ.P. 23(e)(2).

During the July 9 hearing, the Court permitted the parties to draft a proposed Order to formally approve the Corrective Action Order. TR at 181; F.R.Civ.P. 23(e)(2). The parties submitted a proposed Memorandum Opinion and the Court approved it on September 5, 2008. DOCKET NOS.657; 663.

#### NOTICE TO THE CLASS

Since this is a class action, the class must be notified of this Motion. F.R.Civ. P. 23(h)(1). As required by this Court’s Order, DOCKET NO 685, as of May 26, 2008, Defendants posted the Court-approved notice about this Motion in all Texas Health and Human Services Commission eligibility offices. DOCKET NO. 686.

Lead counsel for the class notified the Court on August 29, 2008 that she did not receive any comments from class members about the interim fee issue. DOCKET NO. 696.

Notice to the class was provided in a “reasonable manner.” F.R.Civ.P. 23(h)(1).

#### THE JOINT MOTION

The parties jointly ask the Court to approve payment to Plaintiffs’ counsel in the total amount of \$180,000 for attorney time, costs and expenses as follows:

Susan F. Zinn	fees	\$104,579.29
	costs/expenses	\$ 1,919.65
Jane K. Swanson	fees	\$ 72,673.76
	costs/expenses	\$ 827.30

#### FINDINGS OF FACT

---

<sup>1</sup> The parties do not seek to resolve fees, costs or expenses related to Plaintiffs’ Supplemental Complaint.

#### PREVAILING PARTIES

Plaintiffs prevailed during the time period at issue here, which is July 10 through December 31, 2007. The Court has already found that the Corrective Action Order provides “very substantial relief to the class.” DOCKET NO. 673 at 4.

#### LODESTAR CALCULATIONS

##### REASONABLE HOURLY RATE

Susan Zinn is Plaintiffs’ lead counsel. She was licensed to practice law in Texas since 1983, after graduating with honors from the University of Texas School of Law that year. She is admitted to practice in all federal district courts in Texas, the Fifth Circuit Court of Appeals and the United States Supreme Court. Partly because of her work in this case, Ms. Zinn was honored with the Texas State Bar’s J. Chrys Dougherty Award in 2004.

The Court has already concluded that Ms. Zinn is a highly capable, experienced lawyer who has done excellent work in this case. *Fairness Order*, DOCKET NO. 133 at 1, n. 2, 23-24; *Memorandum Opinion Approving CAO*, DOCKET NO. 663 at 10-11; 57; DOCKET NO. 673 at 4. The Court concludes that this remains true.

Jane Swanson is Plaintiffs’ second chair counsel. Like Ms. Zinn, Ms. Swanson is capable, experienced and has represented Plaintiffs and the class well in this case. She is admitted to practice in Texas and before the United States District Courts for the Southern and Eastern Districts of Texas, the Courts of Appeals for the 5<sup>th</sup> and 10<sup>th</sup> Circuits and the United States Supreme Court. *See also, Memorandum Opinion Approving CAO*, DOCKET NO. 663 at 10-11; 57; DOCKET NO. 673 at 4-5.

Moreover, the skill of Plaintiffs' counsel is well demonstrated by their work in this case, as observed by this Court. The results achieved have been excellent in all regards in this complex and important litigation.

Several attorneys testified by declaration or affidavit about reasonable hourly rates for attorneys in the Eastern and Western Districts of Texas. They are not counsel in this case. DOCKET NO. 400, Affidavits/declarations of Samuel Baxter, Otis Carroll, Jose Garza, Ralph Lopez, Curtis Stuckey (2004); DOCKET NO. 680-9, Supplemental affidavit of Samuel Baxter (2007). Rates in both Districts are relevant because a) this case is filed in the Eastern District but b) beginning in 2000, evidentiary hearings have been held in Austin, Texas, in the Western District. As a practical matter, it is not necessary to pick between the two Districts because attorneys' hourly rates are the same in both Districts. Baxter supplemental affidavit at 2 (2007).

Mr. Baxter's 2007 affidavit is before the Court in 2008. DOCKET NO. 680-9. In 2007, \$450/hour was "at the low end of reasonable rates for attorneys' fees in complex civil litigation in the Eastern District and/or the Western District, particularly in the class action context." Baxter supplemental affidavit at 2.

Plaintiffs' currently seek reimbursement in the amount of \$370.20 per hour for time expended in this case from July 10 through December 31, 2007. This hourly rate is only minimally higher than the \$360/hour approved in 2007. DOCKET NO. 673. Of course, hourly rates increase as time passes. *Missouri v Jenkins*, 491 U.S. 274, 284 (1989). Moreover, \$370.20 is below reasonable hourly rates for complex civil litigation – like this case - in both the Eastern and Western Districts of Texas.

#### REASONABLE NUMBER OF HOURS EXPENDED

Plaintiffs' counsel expended the following hours, at issue in this Motion:

Susan F. Zinn	283.45 hours
Jane K. Swanson	195.35 hours <sup>2</sup>
Total	478.8 hours

It was reasonable and necessary for counsel to expend this time on this case from July 10 through December 31, 2007. They had to draft the proposed Memorandum Opinion approving the Corrective Action Order, as directed by this Court. In addition, Plaintiffs' counsel has had to expend a significant amount of time monitoring Defendants' compliance with the Consent Decree entered in 1996 and Defendants' commencement of implementation of the 11-part Corrective Action Order. Monitoring required a major time commitment because this case involves the varied health care needs of more than 2.8 million indigent children in Texas, which is a large, diverse state.

Plaintiffs' counsel has also expended a relatively small amount of time addressing issues relating to collection of interim fees, costs and expenses.

Furthermore, Plaintiffs' counsel's records are all sufficiently clear and detailed so that this Court can evaluate them. Moreover, the lawyers discount time to indicate the exercise of billing judgment. For example, Ms. Zinn and Ms. Swanson indicate discounted time in italics in their descriptions of tasks performed. *See*, DOCKET NO. 680-3; Zinn declaration, ¶ 13; DOCKET NO. 680-6; Swanson declaration, ¶ 6.

Moreover, Plaintiffs do not include hours expended by Mr. Heard during this time period. Zinn declaration, ¶ 15. The exclusion of Mr. Heard's time inherently increases the reasonableness of the requested fee award.

Last, the Court finds no unnecessary duplication of time by counsel.

### LODESTAR CALCULATION

The parties agree that the total amount due to Plaintiffs' counsel is \$180,000 in fees, costs and expenses. The evidence currently before the Court is sufficient to determine that the proposed settlement is fair, reasonable and adequate. The evidence shows that reasonable hourly rates for counsel in a complex case like this one range from a low of \$450/hour to a high of \$800/hour. Using the low end of this range as a guide, if the Court had been forced to resolve a disputed fee motion, the Court could easily have approved a lodestar amount of \$215,460.00 (\$450/hour x 478.8 hours). The agreed amount of \$180,000 (which also includes costs and expenses) is reasonable and necessary

The \$180,000 amount is even more reasonable when considered in light of:

- the significant complexity of this case. *Fairness Order* at 14, 23, 26, 28; *Memorandum Opinion Approving CAO*, DOCKET NO. 663 at 6-9; 12-13; 56-57; Zinn declaration at ¶¶ 21-22.
- preclusion of other employment by the attorneys due to acceptance of the case and time limitations imposed by the case. Ms. Zinn and Ms. Swanson were substantially precluded from other work because of this case. Ms. Zinn was precluded from other work during the second half of 2007 when she was drafting the proposed Memorandum Opinion and negotiating with Defendants' counsel about it. Notably, Ms. Swanson was out of the country during about half of this time period, so she was not available to assist. Zinn declaration at ¶¶ 6, 23.
- the undesirability of this case to most lawyers particularly because of the contingent nature of payment and lengthy delays in payment, Zinn declaration at ¶ 28.

---

<sup>2</sup> Many cases as large and complicated as this one would have been staffed by a much

- the high level of skill required to prosecute the case, Zinn declaration, ¶ 22.

Based on all of these factors, the Court determines that the proposed settlement is fair, reasonable and adequate, and that the proposed lodestar amount is reasonable and necessary.

#### COSTS AND EXPENSES

Plaintiffs seek reimbursement for costs and expenses in the amount of \$2,746.95. These costs and expenses are all properly documented and are all reasonable expenses that had to be incurred in the prosecution of this phase of this case. Indeed, counsel did not include some expenses that they reasonably and necessarily incurred while working on this case. Zinn declaration at ¶¶ 30-33; Swanson declaration at ¶ 8.

#### CONCLUSIONS OF LAW

The first question is whether Plaintiffs are prevailing parties. There is no question that Plaintiffs in this case have prevailed on a significant issue, so that they have achieved the status of “prevailing parties.” *Texas State Teachers Ass’n v Garland ISD*, 489 U.S. 782, 788 (1989); *Maher v Gagne*, 448 U.S. 122, 129-30 (1980).

Since Plaintiffs prevailed, the next issue is whether the time claimed was “reasonably expended on the litigation.” *Webb v Bd. Of Educ.*, 471 U.S. 234, 242 (1985). The Court concludes that Plaintiffs’ counsel only claim time that was reasonable and necessary for them to expend in this case.

Courts determine a reasonable fee amount by multiplying “the number of hours reasonably expended on the litigation ... by a reasonable hourly rate.” *Hensley v*

---

larger group of lawyers. Zinn declaration, ¶ 18.

*Eckerhart*, 461 U.S. 424, 433 (1983).<sup>3</sup> As noted above, the parties agree that \$180,000. is a reasonable and necessary fee award.

Moreover, the agreed amount is lower than the low end of reasonable using the 2007 rate of \$450 per hour. If the parties had litigated this Motion instead of settling it, the Court could have concluded that a higher lodestar amount was reasonable.<sup>4</sup> Moreover, the Court concludes that the minor increase in counsel's hourly rate from 2007 (\$360/hour) to the current rate in 2008 (\$370.20/hour) is reasonable and fully justified. *Missouri v Jenkins*, 491 U.S. 274, 284 (1989).

#### CONCLUSION

THEREFORE, it is ORDERED that the parties' proposed settlement concerning Plaintiffs' interim fees, costs and expenses is APPROVED. Defendants SHALL make payment to Plaintiffs' counsel as follows:

Susan F. Zinn	fees	\$104,579.29
	costs/expenses	\$ 1,919.65
Jane K. Swanson	fees	\$ 72,673.76
	costs/expenses	\$ 827.30

---


<sup>3</sup> Plaintiffs' counsel properly exercise billing judgement, which assists the Court to determine that their time records include only time that was reasonably and necessarily expended on this case. *Walker v HUD*, 99 F.3d 761, 769-70 (5<sup>th</sup> Cir. 1996). Furthermore, Plaintiffs' counsel's time records are clear enough so that the Court may evaluate them. *Hensley*, 461 U.S. at 437, n. 12.

<sup>4</sup> The agreed amount is particularly reasonable in light of several of the traditional factors established in *Johnson v Georgia Highway Express*, 488 F.2d 717, 717-19 (5<sup>th</sup> Cir. 1974), which the Court incorporates into its lodestar analysis. *See, Heidtman v County of El Paso*, 171 F.3d 1038, 1043 (5<sup>th</sup> Cir. 1999). Here, the Court considers: complexity of the litigation, preclusion of other work by Ms. Zinn and Ms. Swanson, time limitations imposed by the case, the undesirability of the case to many other lawyers and the very high level of skill required to handle this case for Plaintiffs and the class.



Defendants are hereby ORDERED to make payment to Plaintiffs' counsel no earlier than January 2, 2009 and no later than January 16, 2009.

SIGNED this 14<sup>th</sup> day of November, 2008.

  
William Wayne Justice  
Senior United States District Judge