

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA**

KEITH REED, ELIZABETH SCHENKEL,
EMILY WINES, MARK GARAN, and
AUGUST ULLUM, individually and on
behalf of others similarly situated,

Plaintiffs,

v.

ALECTO HEALTHCARE SERVICES LLC,
and ALECTO HEALTHCARE SERVICES
WHEELING, LLC d/b/a OHIO VALLEY
MEDICAL GROUP and d/b/a OVMC
PHYSICIANS,

Defendants.

Case No. 5:19-cv-00263-JPB

Judge John Preston Bailey

CLASS ACTION

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS**

Timothy F. Cogan, Esq. (WVSB # 764)
Cassidy, Cogan, Shapell & Voegelin, LC
The First State Capitol Building
1413 Eoff Street
Wheeling, WV 26003
T.: (304) 232-8100

F. Alex Risovich, Esq. (WVSB # 10866)
Risovich Law Offices, PLLC
3023 Pennsylvania Avenue
Weirton, WV 26062
T.: (304) 723-2588

Dated: October 11 2022

Bren Pomponio, Esq. (WVSB # 7774)
Laura Davidson, Esq. (WVSB # 13832)
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 25301
T.: (304) 344-3144

Maureen Davidson-Welling, Esq. (*pro hac vice*)
John Stember, Esq. (*pro hac vice*)
Stember Cohn & Davidson-Welling, LLC
The Hartley Rose Building
425 First Avenue, 7th Floor
Pittsburgh, PA 15219
T.: (412) 338-1445

Attorneys for Plaintiffs

I. INTRODUCTION

This class action case arises from the 2019 decision of Defendants Alecto Healthcare Services, LLC (“AHS”) and Alecto Healthcare Services Wheeling, LLC (“AHSW”) (collectively, “Defendants”) to close the Ohio Valley Medical Center (“OVMC”) without providing Plaintiffs and hundreds of other affected employees with the 60-days advance notice required by the Worker Retraining and Notification Act of 1988 (the “WARN Act”), 29 U.S.C. § 2101, et seq. Instead of providing 60-days’ notice, or 60-days’ full pay and benefits in lieu of notice, Defendants ordered plant closure and wrongfully cut employees’ hours and pay and tried to circumvent the WARN Act by keeping employees formally on their books during the violation period without paying them.

Since case filing three years ago, this Court has certified and ordered notice to the Class, granted judgment to the certified Class on liability, resolved legal issues related to damages calculations, and will, once the parties finalize their calculations, rule on the amount of class damages. Accordingly, Plaintiffs now submit their Fee Motion, in accordance with FRCP 23(h), in advance of the schedule November 7, 2022, fairness hearing. As explained herein, Plaintiffs’ counsel have litigated vigorously on behalf of the Class; they have collectively expended 1,273 hours of time and thousands of dollars in expenses; they have achieved great results on behalf of the certified class; and their request for award of reasonable attorneys’ fees and reimbursement of expenses should be granted.

II. PROCEDURAL HISTORY

This action commenced on September 9, 2019. See [Doc. 1]. Plaintiffs filed an Amended Complaint on August 24, 2020. See [Doc. 37] and a Motion to Certify Class on April 7, 2022. See [Doc. 123]. Thereafter, both parties moved for summary judgment. See [Docs. 163 & 165]. The

Court held a Class Certification Hearing on July 25, 2022. See [Doc. 147] and certified the Class on July 27, 2022. See [Doc. 175] On August 2, 2022, the Court granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Rule 56 Motion. See [Doc. 193].

On August 15, 2022, Plaintiffs filed their itemized Damages Report. See [Doc. 195]. Defendants filed a Response [Doc. 196] on August 22, 2022, raising a variety of objections to Plaintiffs' proposed damages calculations. On August 25, 2022, a damages hearing was held. See [Doc 198]. On August 31, 2022, Plaintiffs filed a Motion to Alter or Amend Judgment See [Doc. 199]. On September 9, 2022, Defendants filed their opposition. See [Doc. 202]. On September 12, 2022, the Court denied Plaintiffs' motion. See [Doc. 205].

Since September 12, the parties have worked together to try to resolve the remaining damages issues, as reflected in the Joint Status Reports filed on September 22, 2022, and October 7, 2022, and are close to completing that process. See [Doc. 206, Doc. 211-212]. While the parties are still working out damages' issues, Plaintiffs' latest calculations reflect Class damages under the Court's rulings are in excess of 2.7 Million. See Ex.A to Motion (Stember Decl. Para. 4)

III. PLAINTIFFS SHOULD BE GRANTED REASONABLE ATTORNEYS' FEES AND LITIGATION COSTS

A. Standard for Attorneys' Fee Award

A district court has discretion to determine an appropriate attorney fee award. See, e.g., Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009); 29 USC 2104(a)(6). Fee awards are typically calculated using the lodestar method, that is, by multiplying the reasonable numbers of hours spent on the case by a reasonable hourly rate. Id. Reasonableness is based on consideration of the following factors:

- (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.

Id. at 243-44.

Here, based on amount of time and skill required to litigate this case, the difficulty of the facts presented, and issues raised, the results obtained, the record and evidence submitted, and the other factors outlined above to the extent they apply, an award of fees and costs in the amount and at the rates requested is appropriate.

B. Plaintiffs Have Expended Significant Time and Labor in Service to the Class Supporting the Award of Fees

Prosecuting this class action case has required considerable time and effort—1,273 hours to-date—and this factor strongly supports the award of fees.

Plaintiffs' counsel have: (1) investigated the facts and law relating to these claims; (2) drafted well-pleaded Complaints; (3) met and conferred with defense counsel pursuant to Rule 26(f), and assisted in preparing a Rule 26(f) Report; (4) attended several Court conferences in-person; (5) prepared a mediation statement and attended mediation; (6) reviewed Defendants' discovery production, which is nearly 40,000 pages; (7) briefed and won class certification over Defendants' opposition; (8) briefed and obtained summary judgment on Plaintiffs' WARN Act claim and Defendants' affirmative defenses; (9) drafted and served interrogatories, requests for documents, requests for admissions, and third party subpoenas, and conferred on related objections; (10) maintained contact with Class representatives; (11) responded to interrogatories, document requests, and admissions requests to named Plaintiffs and defended their depositions;

(12) taken depositions of defense witnesses; calculated class damages and conferred on damages calculations with defense counsel; and (13) drafted notice to the Class. See Ex. A (Stember Decl. ¶4). Moreover, Defendants were represented by one of West Virginia's largest law firms, which vigorously defended this case and put Plaintiffs' counsel through their paces, including fully briefing pretrial and dispositive motions.

As reflected by the declarations submitted in support of Plaintiffs' Fee Motion, Plaintiffs' attorneys spent a combined 1273 hours on this case over the course of three years of litigation. Given the case complexity, multiple defendants, wide scope of discovery, and vigorous motions practice, including dispositive summary judgment motions, the amount of time spent on this matter is reasonable and commensurate with the facts and issues presented.

C. The Novelty and Difficulty of the Case Support the Award of Fees

The novelty and difficulty of the case support the award of attorneys' fees. This case was extremely fact-intensive and involved voluminous ESI productions of nearly 40,000 pages from two defendants, and additional documents from third parties. The case was complicated by the fact that it involved two separate hospitals with entangled operational and record-keeping systems that made it difficult to narrow down the correct records and identify class members. The litigation required extensive research and skill to protect Plaintiffs' and Class interests, and advanced knowledge of ESI discovery protocols to resolve discovery issues and ferret out the specific ESI records that were necessary to prove the claims and reach a successful result. This case also raised a number of complex issues of fact and law—including damages issues—that had not previously been decided by the Fourth Circuit. All of these challenges support the requested fee award.

D. The Skill, Reputation, Experience & Ability of Counsel Support the Award of Attorneys' Fees

The skill, reputation, and experience of Plaintiffs' attorneys is considerable and recognized locally and nationally.

With respect to Plaintiffs' Mountain State Justice counsel: Bren Pomponio is Litigation Director for Mountain State Justice, has practiced law in West Virginia for over 24 years, and has litigated multiple employment and class cases. (See Ex. B to Motion.) Daniel Hedges founded Mountain State Justice, Inc. and has practiced law in West Virginia for over 40 years, during which time he has handled more than 3,000 consumer cases. (See Ex. B to Motion.) He was awarded his full hourly rate of \$495 per hour by the Circuit Court of Kanawha County and the Southern District of West Virginia. Jennifer Wagner was Executive Director of Mountain State Justice, Inc. graduated *magna cum laude* from NYU School of Law and Harvard University and is a member of the Order of the *Coif*. (See Ex. B to Motion.) She has argued before the West Virginia Supreme Court of Appeals and United States Circuit Court of Appeals for the Fourth Circuit, where she also clerked. She has also presented at several national conferences on consumer mortgage issues. (Id.) Aubrey Sparks is a Charleston, WV attorney, who has practiced for four years and litigated numerous employment cases. She was awarded \$250.00 per hour in Livingood v. Public Defender Corp., Fifth Judicial Cir., ES-192-18 (FY 2021) (See Ex. B to Motion.). Michael Nisam-Sabat is a Mountain State Justice staff attorney with nine years of litigation experience, including multiple class actions (See Ex. B to Motion.). Laura Davidson is a Mountain State Justice staff attorney who has practiced employment law for two years and who was awarded \$250.00 per hour in Livingood v. Public Defender Corp., Fifth Judicial Cir., ES-192-18 (FY 2021. (See Ex. C to Motion.)).

With respect to Plaintiffs' attorneys from Stember Cohn and Davidson-Welling, LLC ("SCDW), they have extensive combined experience in class action and employment litigation.

John Stember has practiced law for 46 years; Maureen Davidson-Welling has practiced law since October 2007 (approx. 15 years), and Vincent Mersich has practiced law for 14 years. Both Mr. Stember and Ms. Davidson-Welling have served as class counsel in other class action cases, including retiree public pension/annuity benefits class actions, ERISA cases, and FLSA/state law wages and hours class actions. See Ex. A (Stember Decl. at Paras. 8-11 and Ex. A thereto).

As his declaration states, Timothy F. Cogan has skill and experience commensurate with his many years as an attorney. His skills also reflect his association from time to time with top-flight lawyers such as Arthur M. Recht, for whom he clerked on Pauley-Bailey case, dealing with funding of public schools in West Virginia; G. Charles Hughes; William Payne and David Fusco. (See Ex. D to Motion.) Likewise, F. Alex Risovich has practiced law in West Virginia for 14 years, where he has litigated numerous labor and employment law cases. (See Ex. E to Motion.)

The Paralegals working on this case have routinely been awarded fees of \$130.00 per hour. (See Ex. B to Motion.) See Livingood v. Public Defender Corp., Fifth Judicial Cir., ES-192-18 (FY 2021).

E. The Opportunity Cost Factor Supports the Award of Fees

This litigation required significant cost. All of Plaintiffs' counsel have represented these Plaintiffs with any payment or cost reimbursement. (Mountain State is a non-profit corporation that only represents low income and financially distressed West Virginians who cannot afford to pay for legal representation, and represents them without compensation, unless they are ultimately successful.) In this case, all counsel have represented Plaintiffs for more than three years with significant out-of-pocket expense.

F. The Undesirability Factor Supports the Award of Fees

This case was filed on behalf of terminated employees who could not afford to pay counsel. Additionally, representation of employees based on a WARN violation is difficult, time consuming, costly, and unlikely to yield significant profit.

G. Successful Case Outcome Supports the Award of Attorneys' Fees

Plaintiffs were successful in pursuing their claims and counsel achieved an excellent result for Plaintiffs and the Class. As noted, this Court certified the Class in July 2022, and subsequently granted Plaintiffs' motion for summary judgment. Damages are still being calculated and will be filed with the Court soon.

H. Customary Fee Factor & Prevailing Rates

Finally, Plaintiffs have presented evidence of counsel's customary fee and rates prevailing in the West Virginia market. Plaintiffs have attached affidavits of several prominent members of the West Virginia legal community. (See Ex. F.) These include a declaration from **Lonnie Simmons**, a member of DiPiero Simmons McGinley & Bastress, PLLC, who has litigated multiple employment and class cases; **Sam Petsonk** of Petsonk PLLC, who has litigated numerous employment and WARN Act cases, including WARN Act class action cases; **Walt Auvil** of the Employment Law Center, who specializes in litigating employment cases in West Virginia; **Amy Crossan** of Bouchillom, Crossan & Colburn, L.C., who has litigated numerous employment cases; and **Jason Causey** of Bordas & Bordas, PLLC, who has litigated complex civil class litigation and numerous consumer credit cases on behalf of plaintiffs in West Virginia. Each of these attorneys is familiar with the work of Mountain State Justice, Inc., and each can attest that the rates requested by Plaintiffs are reasonable for Plaintiffs' counsel's experience and background. (See Ex. F.)

Plaintiffs have further presented evidence that counsel has customarily been awarded the rates requested herein, and that the rates requested are within the range for this market. See supra.

In sum, all applicable factors support the award of fees.

IV. PLAINTIFFS SHOULD BE GRANTED REIMBURSEMENT OF COSTS

As prevailing parties, Plaintiffs should be reimbursed for their costs expended in obtaining judgment in favor of Plaintiffs and the Class. See Fed.R.Civ.P. 23(h)(district court has discretion to award nontaxable costs allowed by law); 29 USC 2104(a)(6); 28 USC 1920. Accordingly, Plaintiffs request that the Court order reimbursement of costs in the amount of \$20,303.62.

V. CONCLUSION

In conclusion, as set forth above, Plaintiffs respectfully request this this Court grant them reasonable attorneys' fees and reimbursement of costs in the amounts of \$472,118.00 and \$20,303.62, respectively. Plaintiffs will supplement this petition to the extent they incur additional fees or expenses before case end and ask the Court to grant them such amounts as well.

Respectfully submitted,

/s/ Bren J. Pomponio

Timothy F. Cogan, Esq. (WVSB # 764)
tfc@walslaw.com
Cassidy, Cogan, Shapell & Voegelin, LC
The First State Capitol Building
1413 Eoff Street
Wheeling, WV 26003
T.: (304) 232-8100

F. Alex Risovich, Esq. (WVSB # 10866)
alex.risovich@risovichlaw.com
Risovich Law Offices, PLLC
3023 Pennsylvania Avenue
Weirton, WV 26062
T.: (304)723-2588
F.: (304)723-2504

Bren Pomponio, Esq. (WVSB # 7774)
bren@msjlaw.org
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 25301
T.: (304) 344-3144

Maureen Davidson-Welling, Esq. (*pro hac vice*)
mdw@stembercohn.com
John Stember, Esq. (*pro hac vice*)
jstember@stembercohn.com
Stember Cohn & Davidson-Welling, LLC
The Hartley Rose Building
425 First Avenue, 7th Floor
Pittsburgh, PA 15219
T.: (412) 338-1445

Attorneys for Plaintiffs