

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CASE NO.: 1:09 -cv-1777-ENV-MDG

S.W., by and through his guardian, RENEE MARQUIS-ABRAMS; R.E., T.G., and J.L., by and through their next friend, MILDRED DEL GROSSO; S.B. by and through his guardian, PATRICIA BALDWIN; L.J. and J.G., by and through their guardian, KEVIN HENDRICKSON; J.B., C.B., and T.L.,

Plaintiffs,

vs.

CITY OF NEW YORK, a municipal corporation; ADMINISTRATION FOR CHILDREN'S SERVICES, f/k/a CHILD WELFARE ADMINISTRATION; ST. JOSEPH SERVICES FOR CHILDREN, INC., f/k/a CATHOLIC CHILD CARE SOCIETY OF THE DIOCESE OF BROOKLYN, INC., a New York corporation; HEARTSHARE HUMAN SERVICES, f/k/a CATHOLIC GUARDIAN SOCIETY OF THE DIOCESE OF BROOKLYN, INC., a New York corporation; SCO FAMILY OF SERVICES, f/k/a ST. CHRISTOPHER-OTTILIE, a New York corporation,,

Defendants.

**PLAINTIFFS' MOTION TO APPROVE SETTLEMENT AND FOR
DISBURSEMENT OF COSTS HELD IN ESCROW**

COME NOW the Plaintiffs, by and through their undersigned attorneys, and file their Motion to Approve Settlement and for Disbursement of Costs Held in Escrow and states as follows:

1. This case has been settled with all remaining Defendants for the total sum of \$17,500,000.00 with the parties to bear their own costs and attorney's fees. This settlement is in addition to the \$9,700,000.00 previously obtained in settlement with the City of New York. This settlement is divided as follows:

JL	\$2,500,000.00
CB	\$2,500,000.00
TG	\$2,500,000.00
TL	\$2,500,000.00
RE	\$2,500,000.00
SB	\$2,000,000.00
SW	\$2,000,000.00
JB	\$1,000,000.00

2. This Court previously approved the aforesaid settlement with the City of New York on behalf of the above eight (8) Plaintiffs as well as Plaintiffs, JG and LJ. By its Orders dated December 18, 2012, and May 2, 2013 which are attached hereto as composite Exhibit "A," this Court approved costs in the amount of \$1,172,091.22 which represented 75% of the costs expended by Plaintiffs' counsel, and an attorneys' fee of one-third of the settlement amount after the deduction of these costs. Therefore, \$390,697.07 was retained in the trust account of the undersigned Plaintiffs' attorneys pending approval of the remainder of the costs expended on behalf of the Plaintiffs.

3. The costs of the prior settlement with the City of New York were divided among the Plaintiffs pro rata based upon the percentage of the settlement received by each Plaintiff as shown in the chart attached hereto as Exhibit "B." Close to 62% of those costs were related to the settlement of the Plaintiffs, JG and LJ. By Order filed on January 28, 2014, this Court granted summary judgment as to the Plaintiffs, JG and LJ; consequently these two Plaintiffs did

not receive additional money in the current settlement. The agreement with the Plaintiffs as to costs, marked as composite Exhibit "C," provided on Page 3 that in the event of a settlement with the remaining Defendants other than the City of New York, the pro rata distribution of costs would be adjusted based upon that settlement. Attached hereto as Exhibit "D" is a revision of the pro rata costs so that the Plaintiffs' pro rata costs are adjusted based upon the new settlement. The result of this adjustment is a repayment of \$228,579.10 in costs to Plaintiff, JG, and \$228,873.42 in costs to Plaintiff, LJ.

4. Of the remaining eight Plaintiffs, only SW, RE, and SB remain under guardianship and are, therefore, under this Court's jurisdiction to approve settlement pursuant to Local Civil Rule 83.2.

5. Plaintiffs are requesting an order from the Court under Local Rule 83.2 because these three Plaintiffs who are taking funds out of this settlement are incapacitated and have guardians who, in turn, have approved these settlements. Attached to this application, as composite Exhibit "E," are the orders of the Honorable Dwight Geiger dated August 1, and August 4, 2014, approving these settlements filed in the Probate Court in St. Lucie County. Supplemental Orders were submitted to Judge Geiger once the guardians elected to structure a portion of the settlement proceeds. At this time, we are awaiting the signed orders from Judge Geiger. Copies will be furnished to this court as a supplemental (composite) exhibit once received. In the interim, copies of the unexecuted supplemental orders submitted to Judge Geiger are also enclosed, as composite Exhibits "E-4," "E-5," and "E-6." Judge Geiger is the Judge with jurisdiction over these wards and the guardians were present during the hearings. Judge Geiger previously approved the prior settlement with the City on November 26, 2012, and that Order is attached as Exhibit "F." Judge Geiger and each of the guardians were fully aware

of the costs expended by Plaintiffs' counsel and the attorneys' fee claimed and both the guardians and Judge Geiger approved all of those costs and attorney's fees which are the subject of this Motion. Plaintiffs' attorneys' fees are in accordance with the rules of the state of New York and will be based upon the contract with the guardians in the amount of one-third of the settlement proceeds after deducting costs as shown on the Closing Statements attached hereto as composite Exhibit "G." This attorney's fee is reasonable under these circumstances. There have been over 140 depositions in this case conducted at significant expense all over the country and this case has been ongoing since 2009. Plaintiffs' attorneys have expended thousands of hours collectively and this fee will be divided among four firms all of whom have been active throughout the litigation.

6. Since the last settlement, Plaintiffs' attorneys have expended or incurred the costs shown on the attached composite Exhibit "H¹." These costs have been expended by Plaintiffs' attorneys over a period of two years and were out-of-pocket expenses of the attorneys. Plaintiffs request an Order approving the portion of these costs attributable to the above-named three Plaintiffs in accordance with the attached Closing Statements pursuant to Eastern District of New York Local Rule 83.2.

7. Attached hereto as composite Exhibit "I" are the portion of the costs which are attributable to the Plaintiffs, JG and LJ. Plaintiffs' attorneys do not seek reimbursement of those costs because no recovery was made on behalf of the Plaintiffs, JG and LJ in connection with the current settlement. Thus, those costs will be deducted from the attorney's fees paid to the Plaintiffs' attorneys.

¹ Composite Exhibit "H-2" also contains a cost statement from the prior settlement which, on further review, contained certain costs which had been inadvertently included. Accordingly, these items have been removed, and/or adjusted, and such removals/adjustments are reflected on page 60 of "H-2b."

8. As to the costs retained in the trust account of the undersigned Plaintiffs, Plaintiffs attach as Exhibit "J" the costs previously presented to this Court for approval, 25% of which have been retained as aforesaid. Plaintiffs now request that this Court approve the expenditure of those costs pursuant to the above-cited Local Rule. These costs have also been approved by the Probate Court in St. Lucie County as aforesaid on November 27, 2012, as well as having been approved by the guardians directly responsible for the wards under Florida law. The Court previously questioned the amount of these costs because the total costs were substantial in proportion to the amount of the prior settlement. The amount of the total settlement has now almost tripled and the proportion of the costs is, therefore, much reduced representing approximately 7% of the amount recovered by Plaintiffs. All of these costs were out-of-pocket to Plaintiffs' attorneys and are reasonable.

9. To understand why both the costs expended and the attorney's fees requested are reasonable, it is important to realize the extent of the efforts that Plaintiffs' attorneys undertook in the handling of this case. This case has been pending for nearly five (5) years. Several other law firms declined to participate in this case because of the difficulty it imposed on the firm's involved. While there were four law firms representing the Plaintiffs and the labor was divided in accordance with the talent of each firm, it was still necessary for several of the attorneys involved to spend 100% of their time working on nothing but this case for years at a time. In order to even bring this case to begin with, several attorneys had to spend their significant time in New York City and Albany unearthing documents many of which were hand-written. This required winnowing down thousands of documents amounting to millions of pages spanning 40 years of time. Several law firms were contacted and paid to review their archives as well. A searchable database of such documents had to be created and assembled to find documents to

prepare Plaintiffs' Complaint, provide documents to experts, to prepare for depositions and to respond to discovery. Witnesses had to be uncovered and interviewed from that time period. Plaintiffs' standard of care experts had to review those hundreds of thousands of pages of source documents and depositions and had to be constantly updated as facts were uncovered. The number of hours spent by these experts and Plaintiffs' attorneys stagger the imagination. No one attorney could possibly retain the content or even the location of many of the documents necessary for hearings, depositions and meetings with experts. This necessitated more than one attorney being present at any event, thus incurring travel expenses as well as attorney time.

Plaintiffs were up against Defendants who had unlimited resources whereas the resources of Plaintiffs' counsel were self-funded by essentially small firms who had to take out personally-guaranteed loans over this five (5) year span. These costs totaled nearly \$2 million in a case which was handled entirely on a contingent basis with no assurance that Plaintiffs' counsel would be reimbursed. Unlike corporate counsel who are guaranteed a fee and costs, the payment of a fee and the repayment of costs were entirely contingent in this case. If Plaintiffs were not successful in either settling or winning this case, the Talenfeld and Babbitt firms would have lost approximately \$1 million each in addition to five years of attorney time. Thus, there was no incentive whatsoever to expend costs beyond that required in order to properly prosecute the case. Plaintiffs had to fight fire with fire with respect to the expenditure of costs. A perfect example of that was that the City of New York was charged approximately \$500,000.00 by a relatively minor expert, Gregory Meacham, an ex-FBI agent who testified on the criminal cleverness of Judith Leekin. This single expert's charge approached the total cost of all of Plaintiffs' experts with respect to the City case. Plaintiffs' success was due, in no small part, to

the willingness of Plaintiffs' attorneys to expend both their time and their money on the successful prosecution of this case.

10. Based upon the discussion had with the Honorable Marilyn Go at the time of the last settlement, Plaintiffs below provide a breakdown of the costs expended and an explanation of the concerns voiced by Judge Go where appropriate.

COPIES

The attached cost documents break down the charge for copies. The total cost for copies of all firms for both settlements is \$88,215.00. Of that, the amount paid to outside firms because of the volume of copies was \$24,899.00. Thus, the internal copy costs were \$63,316.00. This was for actual copies charged. The vast majority of copies in the case were printed from a computer rather than using a copy machine. There was no charge to the client for these computerized copies prior to 2012. Ten times the amount of copies in the first settlement were not charged at all.

The combined firms charged different amounts depending upon whether the copies were color or black and white. Based upon the best calculation that we can make, the average cost of internal copies was .32 cents a page. Thus, if the Court wished to adjust the copy cost to the clients down to .15 cents per page, as suggested at the last conference, the Court should deduct from the \$63,316.00 approximately half of that amount.

RESEARCH

The total amount charged for Westlaw and LexisNexis research by all firms was \$29,489.00. Both Westlaw and LexisNexis have a procedure that is outlined in the prior documents sent to the Court on January 31, 2013, which are attached as a composite Exhibit "K." The research firms charge a pro rata share of the monthly charge based upon the number of

minutes spent online. The amount charged to the clients for research was a small fraction of the amount paid by the firms on a monthly basis. As an example, the Babbitt Johnson firm until the first settlement was charged \$180,000.00 for Westlaw services during the period encompassed by the first settlement. The Talenfeld firm paid substantially more because of the number of attorneys in their firm. It is not possible to reconstruct the number of minutes spent each month during this five year period, but the amount of research done was substantial. The amount charged of \$29,489.00 is a very small fraction of what the firms paid for online research during the five year period of this litigation.

TRAVEL EXPENSES

Plaintiffs would refer the Court to Exhibit “K” for discussion of why multiple lawyers were necessary to attend hearings and depositions. Plaintiffs have explained previously as to the necessity for multiple lawyers because of the overwhelming number of documents. This would be true whether at a deposition, at a hearing or at the few meetings which were held. Plaintiffs were always “out gunned” by the number of attorneys present on behalf of the City and Agencies. These were actually out-of-pocket expenses which totaled \$135,957.00 for the first settlement and \$21,955.00 for the second. Plaintiffs would refer the Court to the categorical summary cost expanded explanation of January 31, 2013, Page 5, relative to these travel expenses which is part of Exhibit “K.”

CODING

\$71,039.85 was spent by the Talenfeld firm for coding. On Page 1 of their submission of January 31, 2013, the explanation for this expense is detailed. Suffice it to say that without coding, there is no way that the four Plaintiffs’ firms could have accessed the documents for any purposes from this vast sea of documents.

FEDERAL EXPRESS

The Court questioned why there were so many documents FedExed and whether it was always an emergency or necessary. Transmittal of documents in this case was a nightmare. Usually, documents were transmitted by email or disks. Plaintiffs' counsel used their judgment prior to using federal express. Every document sent to the Plaintiffs had to be FedExed in order to have a tracking number to avoid the necessity of duplicating the effort of copying these documents and re-transmitting them in case they were lost in transit. Much of this was the result of the Plaintiffs' disability because documents would be sent by regular mail and lost or misplaced with no ability to track its delivery. Every time a document was sent to the Plaintiffs that needed to be returned, a return Federal Express envelope had to be included and then the Plaintiffs had to be literally talked through how to deposit the Federal Express envelope into the Federal Express box or have it picked up. Early in this case before Federal Express was used, large volumes of documents sent to the Defendants or to experts would end up getting misplaced on numerous occasions. The only way to avoid the vast amount of time needed to relocate the documents, recopy them and retransmit them was to use the Federal Express tracking system.

NOVEMBER 13, 2009, CONFERENCE

Judge Go questioned why it was necessary to spend over \$4,000.00 for a conference. That conference consisted of the following individuals: Theodore Babbitt, Howard Talenfeld, John Walsh, Jim Walsh, Amanda Sundarsingh, Ami Romanelli, Stephan LeClainche, Shirim Nothenberg, Melissa Cohen, Susan Landry, and Julie Goodman. This was one of the rare times that all of the attorneys met to strategize the handling of this case. The firms spent two days going through how the case would be handled and brainstorming how to respond to the defense. The Court questioned an item during this meeting for a "working dinner." The firms met at the

office of Children's Rights and one individual was sent to Pret A Manger to buy inexpensive meals for each to eat while working to avoid the expense of staying extra days.

JUNE 1, 2010, MEETING IN KNOXVILLE, TENNESSEE

Judge Go questioned the use of a private aircraft to fly to Knoxville, Tennessee, from West Palm Beach. The explanation for this use is contained on Page 8 of Babbitt Johnson's submission of January 31, 2013, attached as Exhibit "K." It was necessary to fly to Knoxville rather than to have the expert witness, Peg Hess, come to West Palm Beach because Ms. Hess had in her home hundreds of thousands of pages of documents that she simply could not bring with her to West Palm Beach on a commercial airliner and did not trust them being shipped because they were indexed and notated by her as a result of hundreds if not thousands of hours of work which she feared would be lost and have to be duplicated if something happened to the documents. The plane carried Theodore Babbitt, Howard Talenfeld, Ami Romanelli, Stephan LeClainche, and Jennifer Pearl as well as the pilot and was less money than the cost of five airline tickets plus the cost of staying overnight. By using the private plane, we were able to return the same day.

JULY 15, 2010, PRIVATE PLANE USE

The explanation for this charge is contained on Page 9 of the January 31, 2013, submission in Exhibit "K."

SUMMATION

The remaining questions raised by Judge Go are detailed in the summaries provided by the Babbitt, Talenfeld and Children's Rights firms on January 31, 2013. Plaintiffs' attorneys are proud of the effort expended and the result obtained in this case on behalf of these deserving Plaintiffs. There are not many firms in this country who would have undertaken this case to

begin with or lasted through the time and effort spent to accomplish this goal. We believe the effort of the attorneys speaks for itself and the formula for the fee now approved by both this Court and twice by the guardianship court is perfectly reasonable. Plaintiffs' attorneys are mindful of this Court's obligation to assure that the costs expended, on behalf of these three Plaintiffs still under guardianship, were both reasonable and necessary. We are confident that they are both. We used our business judgment in expending all costs recognizing that we were expending money out of pocket and necessarily subjecting the financial well-being of our firms to significant risk. Should the Court raise concerns that any submitted costs should be deducted from the attorney's fees earned by Plaintiffs' lawyers, counsel will accept that determination.

This case was settled at mediation on June 13, 2014, with an agreement that the settlement would be funded ninety (90) days from the date of mediation or September 11, 2014. The vast majority of this settlement has been annuitized through a structured settlement. It is vital that those annuities be funded as soon as the funds are received to avoid them lapsing and to ensure that the full measure of the Plaintiffs' settlement is paid to them when the funds are available. The amount of the annuity paid is dependent, in part, on this Court's order on this motion. In addition, the structured payout formed a part of the settlement and will be paid directly from the Defendants to the structure companies. Copies of the structures which have been selected by the Guardians for the benefit of RE, SB, and SW are contained within Exhibits "E-4," "E-5," and "E-6." The Settlement Agreement reached during mediation is attached as Exhibit "L," and the Settlement Agreement and Releases for RE, SB, and SW are attached as composite Exhibits "M-1," "M-2," and "M-3," respectively.

Plaintiffs' attorneys are willing to adjust their schedule in any manner reasonable in order to attend a hearing on this matter if the Court deems that such an in-person or telephone hearing is necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via ECF or as indicated to all counsel of record this 25th day of August, 2014.

BABBITT JOHNSON OSBORNE &
LECLAINCHE, P.A.



THEODORE BABBITT
Fla. Bar No: 091146
tedbabbitt@babbitt-johnson.com
1641 Worthington Road, Suite 100
P. O. Box 4426
West Palm Beach, FL 33402-4426 (33409)
(561) 684-2500
(561) 684-6308 (fax)

Marcia Robinson Lowry, Esq.
William Kapell, Esq.
Melissa Cohen, Esq.
CHILDREN'S RIGHTS, INC.
330 Seventh Avenue, Fourth Floor
New York, New York 10001
Phone: (212) 683-2210
Facsimile: (212) 683-4015
wkapell@childrensrights.org
mlowry@childrensrights.org
mcohen@childrensrights.org
Co-Counsel for Plaintiffs

Howard M. Talenfeld, Esq.
COLODNY, FASS, TALENFELD
KARLINSKY, ABATE & WEBB, P.A.
One Financial Plaza, 23rd Floor
100 S.E. Third Avenue
Fort Lauderdale, Florida 33394
Telephone: (954) 492-4010
Facsimile: (954) 492-1144
htalenfeld@cftlaw.com
ytorres@cftlaw.com
Co-Counsel for Plaintiffs

John Walsh, Esq.,
Admitted Pro Hac Vice
Florida Bar No: 0796360
3067 Commercial Blvd.
Fort Lauderdale, FL 33308
Telephone: (954) 491-3130
Facsimile: (954) 772-2099
jjwalshlaw@gmail.com
Co-Counsel for Plaintiffs

COUNSEL OF RECORD

Via ECF:

Bruce Strikowsky, Esq.
Matthew Kelly, Esq.
Carl Judah Schaerf, Esq.
Allison Fihma, Esq.
SCHNADER HARRISON SEGAL & LEWIS LLP
140 Broadway, Suite 3100
New York, NY 10005
bstrikowsky@schnader.com
mjkelly@schnader.com
cschaerf@schnader.com
afihma@schnader.com

*Co-Counsel for Defendants City of New York and
Administration for Children's Services*

Marc J. Citrin, Esq
John D. Paterniti, Esq.
Craig G. Bienstock, Esq.
SHAUB AHMUTY CITRIN & SPRATT, LLP
77 Water Street, Suite 702
New York, NY 10005
Telephone: (212) 599-8200
Fax: (212) 599-7765
mcitrin@sacslaw.com
JPaterniti@sacslaw.com
cbienstock@sacslaw.com

Sonya A Smith-Valentine
VALENTINE LEGAL GROUP, LLC
P. O. Box 56
Oxon Hill, MD 20750
(301) 513-9500
(866) 301-9155 (fax)
sonya@valentinelegal.com
Counsel for Third-Party Defendant Thelma Bowes

Via U.S. Mail:

Cheryl Jack
805 SW Regency Dr.
Oak Harbor, WA 98277
Appearing Pro Se as Third-Party Defendant

Steven J. Ahmuty, Jr., Esq.
Timothy R. Capowski, Esq.
Jeremy S. Rosof, Esq.
William G. Spratt, Esq.
Judd Cohen, Esq.
Robert Boccio, Esq.
Adam S. Covitt, Esq.
Ralph Morales, Esq.
SHAUB, AHMUTY, CITRIN & SPRATT, LLP
1983 Marcus Avenue, Suite 260
Lake Success, NY 11042
Telephone: (516) 488-3300
Fax: (516) 488-2324
sahmuty@sacslaw.com
tcapowski@sacslaw.com
jrosf@sacslaw.com
wspratt@dsacslaw.com
jcohen@sacslaw.com
rboccio@sacslaw.com
rmorales@sacslaw.com
*Counsel for Defendants St. Joseph Services for
Children, Inc., f/k/a Catholic Child Care Society of
the Diocese of Brooklyn, Inc., Heartshare Human
Services, f/k/a Catholic Guardian Society of the
Diocese of Brooklyn, Inc., and SCO Family of
Services, f/k/a St. Christopher-Otilie*

Richard Eniclerico, Esq.
Thomas A. Catalano, Esq.
Lester Schwab Katz & Dwyer, LLP
120 Broadway
New York, NY 10271
reniclerico@lskdnylaw.com
tcatalano@lskdnylaw.com
*Counsel for Third-Party Defendant Edwin Gould
Services for Children*

Ishmatee Nagassar
105-12 103rd Rd.
Ozone Park, NY 11417
Appearing Pro Se as Third-Party Defendant