UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHELLE LYNNE KOSILEK, Plaintiff, v. LUIS S. SPENCER, in his official capacity as Commissioner of the Massachusetts Department of Correction, Defendant.	Civil Action No. 00-12455-MLW

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

This hard fought struggle has involved a uniquely unpopular cause: the rights of an inmate -- a convicted murderer sentenced to life in prison -- with an unpopular diagnosis -- Gender Identity Disorder ("GID") -- seeking a little known medical treatment -- sexual reassignment surgery. That reviled trifecta -- inmate, GID and sexual reassignment surgery -- and its inevitable companion -- a fusillade of publicity -- has hardened the Department of Correction's ("DOC's") resolve to fight to the last redoubt necessary medical treatment for Michelle Lynne Kosilek .

On September 16, 2012, this Court ordered the parties to meet regarding attorneys' fees and related issues. Plaintiff offered to waive attorneys' fees if the DOC would agree to comply with this Court's judgment and to provide Kosilek with sexual reassignment surgery. Even before the parties' meeting, Defendant announced his appeal. The parties have conferred, but have not reached any agreement regarding fees or costs. Plaintiff's petition is, therefore, appropriate for decision.

BACKGROUND

The DOC has denied Kosilek her prescribed treatment not because of a lack of belief in the diagnosis, or a failure to understand Kosilek's anguish or the risks of inaction, but motivated, as this Court found, by a desire "to avoid public and political criticism." *Kosilek v. Spencer*, C.A. No. 00-12455-MLW, 2012 WL 3799660, at *28 (D. Mass. Sept. 4, 2012). That desire has motivated the DOC's conduct in this litigation, where it left no avenue unexplored in its efforts to avoid taking unpopular action. Kosilek now seeks an award for the fees and costs directly and reasonably incurred in proving an actual violation of the plaintiff's rights.

The DOC has repeatedly displayed its patent resistance in the courtroom, where two successive commissioners have acted, as this Court found, not in good faith, but solely to avoid public censure. The Court repeatedly used pejoratives to describe Commissioner Dennehy's conduct as: "a pattern of pretense, pretext, and prevarication" (*id.* at *6); "false" (*id.* at *6-7); "pretextual" (*id.* at *7); "not reasonable and made in good faith" (*id.* at *44); "untruthful" (*id.* at *7); "incredible" (*id.*); "falsely claimed" (*id.* at *25); "not credible or correct" (*id.*); and, "not believable" (*id.* at *28 n.11). In the Court's words, Commissioner Dennehy was "determined not to be the first prison official to provide an inmate sex reassignment surgery." *Id.* at *6. Indeed, Dennehy testified, in response to a question from the Court, that she would "retire" before she would "obey an order from the Supreme Court to do so." *Id.* When Dennehy was replaced by Commissioner Harold W. Clarke, his litigation posture similarly "did not result from a process pursued with an open mind in a good faith effort." *Id.* at *45.

The DOC employed no fewer than five false claims to disguise the Commissioners' true motives. Following trial, each of these claims was resolved in favor of plaintiff, including the following:

1) The Failure to Understand the Doctors' Recommendations Claim. Commissioner Dennehy claimed that she did not understand the recommendations of University of Massachusetts doctors Arthur M. Brewer and Kenneth L. Appelbaum. The Court found, however, that "[a]fter a long period of pretense and prevarication," Commissioner Dennehy admitted that she accepted the view of Drs. Appelbaum and Brewer that "surgery is the only adequate treatment for [Kosilek's] condition." *Id.* at *2.

2) The "Hormones Are Enough" Claim. The DOC took the position, via Cynthia Osborne and Chester Schmidt, that treatment with hormones was sufficient to manage Kosilek's GID. The Court found that Kosilek has suffered "intense mental anguish," which "alone constitutes a serious medical need" and "places him at a high risk of killing himself if his major mental illness is not adequately treated." *Id.* at *6. Further, "the DOC doctors responsible for treating Kosilek" and Kosilek's experts "credibly concluded" that sex reassignment surgery "is the only adequate treatment." *Id.*

3) The Claim that Security Concerns Barred Surgery. Commissioner Dennehy and Commissioner Clarke advanced demonstrably false security claims. This Court ultimately concluded that the purported security concerns were a "pretext to mask the real reason" for a denial of treatment, "a fear of controversy, criticism, ridicule and scorn." *Id.* at *2.

4) The Selection of Experts with a Fixed Point of View. The Court found that the DOC's experts were chosen to espouse a particular point of view and were not credible. At the direction of Commissioner Dennehy, the DOC departed from its "standard practice of relying on its doctors to retain specialists." *Id.* at *6. Acting on its own, the DOC hired Cynthia Osborne and Chester Schmidt, both of whom worked in the Johns Hopkins psychiatric department, a department "known for its view that a prisoner should never be provided with sex reassignment

surgery" and "long led by a doctor known for his religious and moral opposition to sex reassignment surgery." *Id.* at *6. As the Court found, the DOC -- a recidivist in this regard (having fired Marshall Forstein in 2000) -- fired Dr. David Seil, initially retained to assess Kosilek, because Commissioner Dennehy did not like his views. *Id.* at *23.

5) Use of the Press to Advance an Anti-Surgery Point of View. The Court also found that Commissioner Dennehy selectively used press interviews to communicate to the public certain views hostile to providing treatment to inmates with sexual reassignment surgery and coordinated with a State Senator to the same end. *Id.* at *49.

Moreover, this is not the only District of Massachusetts Court to find the very same DOC officials obdurate on issues relating to GID. The DOC's policy of deliberate indifference to GID has been unremitting. As this Court noted, "the DOC has repeatedly denied transsexual prisoners prescribed treatment for reasons that the courts have found to be improper." *Id.* at *1 (citing *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Soneeya v. Spencer*, C.A. No. 07-12325, 2012 WL 1057625 (D. Mass. Mar. 29, 2012); *Brugliera v. Comm'r of Mass. Dep't of Corr.*, No. 07-40323, 2009 U.S. Dist. LEXIS 131002 (D. Mass. Dec. 16, 2009); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002) ("Kosilek I")).

The repeated feints and dodges by the DOC have imposed corresponding burden and expense on plaintiff's counsel. Plaintiff's counsel took several pretrial depositions in order to narrow the focus for trial, including the deposition of Dr. Appelbaum, the DOC's psychiatrist-in-chief. *See* Affidavit of Frances S. Cohen in Support of Plaintiff's Motion for Award of Attorneys' Fees and Costs ("Cohen Aff.") ¶ 9. Called to the stand at trial, Dr. Appelbaum's testimony, refreshed at times by extensive notes of meetings with the DOC, provided much of the chronology that underlies the Court's opinion. Cohen Aff. ¶ 10. Plaintiff's counsel also

retained, prepared and called to the stand several experts, including Dr. George R. Brown, Dr. Randy Kaufman, Dr. Marshall Forstein, and Dr. Loren Schechter (by deposition), as well as treating clinician Mark Burrowes. *Id.* ¶ 11.

Plaintiffs' counsel cross-examined the DOC's experts Cynthia Osborne and Chester Schmidt. Those examinations required extensive preparation, and covered a range of subjects, including Ms. Osborne's communications with Dr. Schmidt, the bias of Dr. Schmidt's academic department and his academic expertise, as well as the substance of his opinions. *Id.* ¶ 12. In addition, counsel traveled to Ohio to take the deposition of the court-appointed expert Dr. Stephen Levine. *Id.* ¶ 13. Plaintiff's counsel also cross-examined the two superintendents and the DOC's security experts, including Arthur Beeler and Robert Dumond. *Id.* ¶ 14.

Plaintiff prevailed on virtually every issue in this case (one modest exception is described below). This Court found specifically that plaintiff had a serious medical need for treatment and that defendants have been deliberately indifferent to her need. The Court found that plaintiff's experts were credible and that defendants' were not. Ultimately, the Court ordered the very treatment that Plaintiff requested.

Prosecuting this case was a huge undertaking by many measures. Plaintiff's counsel extensively briefed the legal and factual issues, including opposing a meritless motion for summary judgment. *Id.* ¶ 15. Some 17 witnesses testified at trial. *Id.* ¶ 16. The Court received close to 150 exhibits, and marked another 60 for identification. *Id.* ¶ 17. The docket sheet includes 558 filings between 2003 and September 16, 2012. *Id.* ¶ 18.

The case raised many legal and factual issues of first impression. Plaintiff submitted requests for findings of fact and rulings of law that numbered 192 pages. *Id.* ¶ 19. Ultimately, this Court issued a 126-page opinion and related rulings. *Id.* ¶ 20. In addition, over the course

of this long case, Plaintiff's counsel has borne the burden of keeping an often frantic and distraught client informed. *Id.* ¶ 23.

Plaintiff's core counsel group consisted of a small team of lawyers. *Id.* ¶ 29. This Court appointed Frances S. Cohen to represent Kosilek in early 2000, and Cohen has pursued treatment for Ms. Kosilek's GID for the past 12 years. *Id.* ¶ 2. Cohen, initially at Hill & Barlow, joined Dechert LLP ("Dechert") as a partner from February 1, 2003 through November 13, 2006. *Id.* ¶¶ 1, 35. Since November 14, 2006, she has been a partner in Bingham McCutchen LLP ("Bingham"). *Id.* ¶¶ 1, 3. Co-counsel Joseph L. Sulman began work on this case as a first-year associate in September 2005. *Id.* ¶ 36. Paralegal Anna Rachel Dray-Siegel worked with them during her two years at Dechert from 2005 to 2007. *Id.* ¶ 38. (Dray-Siegel subsequently went to law school and is now in practice at Choate, Hall & Stewart). *Id.* In addition to the Dechert timekeepers, Plaintiff seeks fees for one Bingham associate who assisted with narrow issues, Jared Craft. *Id.* ¶ 30. Sulman does not seek any fee award for his time since leaving Dechert. *Id.* ¶ 36. Over the past twelve years, thirty-one timekeepers at Dechert and Bingham spent time on some aspect of the case. *Id.* ¶ 28. In the interest of simplifying this fee petition, and, more critically, of confining the request to the timekeepers who added significant value to this case, plaintiff does not seek to recover the time of the broader team of more peripheral lawyers. *Id.* ¶ 29.

Both Bingham and Dechert have worked on this matter *pro bono publico*. *Id.* ¶ 52. Neither firm expects to profit from an award of attorneys' fees or costs in this matter. Both firms will apply costs awarded to defray the actual out-of-pocket costs of the firm and fees awarded to a charitable contribution or to support the firms' *pro bono* programs. *Id.*

The sole issue on which plaintiff did not prevail relates to electrolysis. Plaintiff's motion for preliminary relief to compel the DOC to provide Ms. Kosilek with her medically recommended electrolysis treatment while awaiting final judgment in this matter was denied without prejudice to filing a renewed motion for preliminary injunctive relief. Plaintiff has moved for reconsideration on this issue and accordingly, has included the relatively modest amount of time (42.80 hours) spent on this issue in this petition. *Id.* ¶ 22. Should this Court deny that motion, that amount is properly deducted from the fee award.

DISCUSSION

I. PLAINTIFF KOSILEK IS A "PREVAILING PARTY" ENTITLED TO RECOVER HER LEGAL FEES AND EXPENSES PURSUANT TO 42 U.S.C. § 1988

Kosilek prevailed at trial on her Eighth Amendment claim against Defendant. Following the conclusion of the 28-day bench trial, the Court entered judgment for Kosilek on her Eighth Amendment claim and granted permanent injunctive relief. In its September 4, 2012 Memorandum and Order on Eighth Amendment Claim ("9/4/2012 Order"), the Court concluded that:

> Kosilek has proven . . . that the Commissioner's purported security concerns are a pretext to mask the real reason for the decision to deny him sex reassignment surgery - a fear of controversy, criticism, ridicule, and scorn. Therefore, Kosilek has proven that the DOC is violating his rights under the Eighth Amendment. He has also established that this violation will continue if the court does not now order the DOC to provide the treatment its doctors have prescribed. Therefore, such an injunction is being issued.

Kosilek v. Spencer, 2012 WL 3799660, at *2. The Court issued a permanent injunction ordering "Defendant [to] take forthwith all of the actions reasonably necessary to provide Kosilek sex reassignment surgery as promptly as possible." Because the Court's Order constituted a "judicially sanctioned" "material alteration of the legal relationship of the parties," Kosilek is a

"prevailing party" eligible to recover attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 604-05 (2001); *see also Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) ("[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.").

II. ATTORNEYS' FEES

Awarding fees in favor of prevailing civil rights plaintiffs is "virtually obligatory." *Parker v. Town of Swansea*, 310 F. Supp. 2d 376, 387 (D. Mass. 2004); *Nazario v. Rodriguez*, 554 F.3d 196, 200 (1st Cir. 2009) ("[W]e have consistently held that despite the permissive phrasing of the Fees Act, fee awards in favor of prevailing civil rights plaintiffs are virtually obligatory"); *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001) (noting same).

As this district court has recognized, "[p]risoner cases are particularly unpopular" and "[i]n the vast majority of cases, the Court cannot find counsel willing to represent pro se civil rights litigants." *LaPlante v. Pepe*, 307 F. Supp. 2d 219, 223 (D. Mass. 2004). Civil rights cases are "more efficient and more cost-effective when there are competent counsel on both sides than when one party litigates without counsel." *Id.* Thus, "where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee." *Blanchard v. Bergeron*, 489 U.S. 87, 93-94 (1989) (noting the purpose of 42 U.S.C. § 1988 is to "make sure that competent counsel [is] available" and the fact that counsel represents a plaintiff *pro bono publico* "does not bar the award of a reasonable fee."); *United*

Cos. Lending Corp. v. Sargeant, 32 F. Supp. 2d 21, 25 (D. Mass. 1999) ("it would be strange indeed to penalize attorneys who are willing to sacrifice profits to represent the less fortunate.").

A. Billable Rates Under the PLRA

Because Kosilek is incarcerated, her fee petition is subject to the Prison Litigation Reform Act of 1996 ("PLRA"), which requires that the fees be (a) "directly and reasonably incurred in proving an actual violation of the plaintiff's rights"; (b) "proportionately related to the court ordered relief for the violation"; and (c) "directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d)(1)(A)-(B); *Hudson v. Dennehy*, 568 F. Supp. 2d 125, 129-30 (D. Mass. 2008).

The PLRA limits the fees award to "no more than 150 percent of the hourly rate established under the Criminal Justice Act," 18 U.S.C. § 3006A ("CJA"), for payment of court-appointed counsel. *Hudson*, 568 F. Supp. 2d at 129-30; *see* 42 U.S.C. § 1997e(d)(3). The current CJA rate for the District of Massachusetts is $125.00 per hour. *See* Cohen Aff., Exhibit A (attaching D. Mass. Rates for Work on Criminal Justice Act Cases, as of April 17, 2012). Thus, the applicable rate of Kosilek's counsel is $187.50 ($125.00 x 1.5). *See Hudson*, 568 F. Supp. 2d at 132 (calculating rate under the PLRA by applying 150% of the then-current CJA rate of $113 to all work performed by the attorneys during the 3-year period of litigation). In comparison, Dechert's and Bingham's standard hourly billing rates for lawyers on the core litigation team during the time period of this litigation ranged from $235 to $825. Cohen Aff. ¶¶ 47-49.

Paralegal hours are also reimbursable under 42 U.S.C. § 1988 and the PLRA. *See Parker*, 310 F. Supp. 2d at 387 ("It is well settled that time spent by paralegals can be recovered under 42 U.S.C. § 1988.") (citing *Lipsett v. Blanco*, 975 F.2d 934, 939 (1st Cir. 1992)); *Hudson*,

568 F. Supp. 2d at 133 (holding that the PLRA permits a reasonable paralegal rate under 42 U.S.C. § 1988(b) that does not exceed the attorney rate under the PLRA). Thus, paralegal fees are determined by prevailing market rates and prior rates approved by the court. *Lipsett*, 975 F.2d at 939 ("courts generally allow hours reasonably and productively expended by paralegals in civil rights litigation to be compensated at market rates when constructing fee awards"). In the Court's 2008 *Hudson* decision, this Court awarded $100 per hour for paralegal work under the PLRA. *Hudson*, 568 F. Supp. 2d at 133. Kosilek requests the same hourly rate for paralegal work on this case, even though the current prevailing market rate has substantially increased since *Hudson*. In comparison, Dechert's and Bingham's standard billing rates for paralegals during the time period of this litigation ranged from $144 to $185. Cohen Aff. ¶ 50.

B. Reasonable Hours

Since Cohen's appointment as Kosilek's *pro bono* counsel in or about March 2003, Dechert and Bingham attorneys, paralegals and other staff have worked diligently and vigorously on this matter. This case presented a significant issue of first impression, and the substantial work performed by members of the core team yielded an unprecedented result that will have important effects on institutional practices and the standard of medical care provided to incarcerated individuals that are likely to impact future cases in Massachusetts and beyond.

Cohen served as the lead attorney on the case from March 2003 to November 13, 2006 while a partner at the law firm Dechert; and from November 14, 2006 to the present while a partner at the law firm Bingham. Billing records showing the reasonable time spent by attorneys and paralegals at each law firm for the respective time periods are attached as Exhibit B (Dechert) and Exhibit C (Bingham) to the Cohen Affidavit. Over the nine years of litigation in this case, a total of thirty-one attorneys, paralegals, librarians and other staff contributed time to

this matter. However, only time entries for the three core members of the litigation team at Dechert (two attorneys and one paralegal) and the two members of the litigation team at Bingham were included in this request for fees.[1] All time entries in Exhibit B were entered contemporaneously into Dechert's and Bingham's internal billing systems by each individual attorney, paralegal or staff member. Cohen carefully and thoroughly reviewed all time entries to ensure reasonableness of fees and expenses requested in this petition. Entries that lacked sufficient detail, were "duplicative, unproductive, excessive, or otherwise unnecessary" were eliminated from the calculation. *See Parker*, 310 F. Supp. 2d at 391.

Prior to reducing the number of billing attorneys and staff and eliminating duplicative and excessive time entries, the total amount of attorneys' fees associated with this matter totaled $1,512,617.60 and the total number of hours spent were 4,694. The total reduced number of hours spent by each member of the core litigation team and the corresponding billable amounts using the PLRA rate are listed below.

Attorney/Paralegal Name	Total Hours Expended	PLRA Rate	Total Billable Amount
Frances S. Cohen, Esq.	1,040.80	187.50	$195,150.00
Joseph L. Sulman, Esq.	1,743.89	187.50	$326,979.38
Jared Craft, Esq.	61.30	187.50	$11,493.75
Anna Rachel Dray-Siegel	1,109.50	100.00	$110,950.00
Total	3,961.39		$644,573.13

The time entries in Exhibit B reflect the extensive and diligent work the above individuals have dedicated to this complex litigation to achieve such a significant and successful result. The litigation involved fact-intensive discovery (including multiple depositions and preparation of several expert witnesses), pre-trial motion practice (including summary judgment

[1] Of note, Ms. Cohen is counted as one of the "core" members of the litigation team both at Dechert and Bingham. In effect, the number of attorneys consistently working on the case (and whose time this petition seeks to recover) has remained at the leanly staffed number of two.

briefing), and a 28-day bench trial. As seen by the large volume of redacted entries for individuals outside of the core litigation team members, Plaintiff's counsel is seeking reimbursement of only a portion of the time contributed to this case.

III. COSTS UNDER 42 U.S.C. § 1988 AND 28 U.S.C. §1920

42 U.S.C. § 1988 allows successful civil rights plaintiffs to recover certain expenses customarily billed by attorneys to clients. *See Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Alfonso v. Aufiero*, 66 F. Supp. 2d 183, 201 (D. Mass. 1999). The expenses may exceed the normal taxable costs under 28 U.S.C. § 1920. *Parker*, 310 F. Supp. 2d at 400 ("[I]n assessing costs in civil rights cases, the court is not restricted to the costs enumerated in 28 U.S.C. § 1920."); *Ramos Padro v. Commonwealth of Puerto Rico*, 100 F. Supp. 2d 99, 108 (D.P.R. 2000). The PLRA also authorizes reimbursement of these expenses. *Hudson*, 568 F. Supp. 2d at 134 (awarding full amount of costs requested in a PLRA case). Reimbursable expense categories under the PLRA include travel, lodging, expert expenses, courier fees, postage, telephone calls, facsimiles, photocopying, computer-assisted legal research and court reporter and transcript costs. *Id.* at 130 n.10; *Ramos Padro*, 100 F. Supp. 2d at 108; *Rivera-Martinez v. Mun. of Toa Alta*, Civil Action No. 06-1312, 2007 U.S. Dist. LEXIS 53980, at *4-5 (D.P.R. June 27, 2007). In an effort to be judicious, Plaintiff's counsel has carefully reviewed Bingham's and Dechert's costs records and has eliminated any excessive and nonessential expenses. Cost and expense records showing the reasonable costs incurred by attorneys and paralegals at each law firm for the relevant time periods are attached as Exhibit D (Dechert) and Exhibit E (Bingham) to the Cohen Affidavit.

The total costs requested for each expense category are listed below:

Category	Total Costs
Electronic Legal Research[2] (Lexis & Westlaw)	$35,365.11
Expert Expenses[3]	$52,277.50
Depositions & Transcripts[4]	$34,725.68
Photocopying/Scanning Fees[5]	$30,594.08
Postage, Facsimile and Courier Fees[6]	$2,661.74
Library Research and Filing Fees[7]	$2,777.53
Travel[8] (transportation & lodging)	$2,870.67
Telephone[9]	$600.81
Total	$161,873.12

In addition to the above, Kosilek requests reimbursement of various out-of-pocket costs and expenses incurred from November 18, 2000 to September 5, 2012, including costs during the time period Kosilek was proceeding *pro se*. Specific costs Kosilek seeks to recover include:

[2] In calculating the total "Electronic Legal Research" costs, we included the categories "Electronic Research," "Lexis Research," and "Westlaw Research" from the Bingham costs records; and the categories "Courtlink Search," "Westlaw Search Fees," and "Lexis/Legal Research" from the Dechert costs records. *See* Exhibits D and E to Cohen Aff. (Itemized summary of costs and expenses incurred by Dechert and Bingham).

[3] In calculating the total "Expert Expenses," we included the category "Medical Records" from the Bingham costs records; and the category "Expert Witness Fees" and "Miscellaneous Expenses - VENDOR" (only entries regard expert services) from the Dechert costs records. *Id.*

[4] In calculating the total "Depositions & Transcripts" costs, we included the category "Depositions & Transcripts" from the Bingham costs records; and the categories "Transcripts - VENDOR" and "Deposition - VENDOR" from the Dechert costs records. *Id.*

[5] In calculating the total "Photocopying/Scanning Fees," we included the categories "Printer Copy Charges," "Production Scanning," "Document Scanning Charges," "Outside Copy & Printing Services," "Photocopy," "Color Copies - Internal," and "Document Services" from the Bingham costs records; and the categories "Outside Copying" and "Duplication Charges" from the Dechert costs records. *Id.*

[6] In calculating the total "Postage, Facsimile and Courier Fees," we included the categories "Retrieval Services," "Overnight/Express Delivery," "Postage," "Fax," and "Messenger" from the Bingham costs records; and the categories "Certified Document Charges," "Courier Services - VENDOR," "Fax Charges," "Postage" and "Federal Express Charges FX" from the Dechert costs records. *Id.*

[7] In calculating the total "Library Research and Filing Fees," we included the category "Search/Research/Filing Services" from the Bingham costs records; and the categories "Research Fees - VENDOR," "Filing Fees and Related - VENDOR," "Search Fees - VENDOR," "Legal Publication Expense - VENDOR," "Docket Fees - VENDOR," "Library Books - VENDOR," "Periodicals - VENDOR" and "Library Services" from the Dechert costs records. *Id.*

[8] In calculating the total "Travel" costs, we included the categories "Travel," "Parking," and "Out of Town Accommodations" from the Bingham costs records; and the categories "Airfare - VENDOR," "Car Rental Charges - VENDOR," "Hotel - VENDOR" and "Local Parking Charges - VENDOR" from the Dechert costs records. We excluded costs for taxis and corporate limousines. *Id.*

[9] In calculating the total "Telephone" costs, we included the category "Telephone Charges" from the Bingham costs records; and the categories "Telephone CHARGES," "Telephone - VENDOR" and "Long Distance Charges - BO" from the Dechert costs records. *Id.*

stamps, bulk postage, envelopes, copies and filing fees. *See* Affidavit of Michelle Lynne Kosilek ("Kosilek Aff."). The total amount requested is $698.69. *Id.* Because Kosilek's out-of-pocket expenses were incurred in furtherance of the litigation and because the fees statute is "intended to relieve plaintiffs with legitimate claims of the burden of legal costs," *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983), she seeks these costs. *See Domegan v. Ponte*, 972 F.2d 401, 421 (1st Cir. 1992) ("[d]istrict courts have discretion when awarding fees and expenses under 42 U.S.C. § 1988"); *Kay v. Ehrler*, 900 F.2d 967, 968-69 (6th Cir. 1990) (affirming district court's award to prevailing *pro se* plaintiff of his "litigation costs," though not attorney's fees); *see also Kay v. Ehrler*, 499 U.S. 432, 434 n.3 (1991) (noting same).

CONCLUSION

For the foregoing reasons, this Court should allow this Motion for Award of Attorneys' Fees and Costs and award Kosilek's counsel the total amount of $806,446.25 in attorneys' fees and costs.[10]

Respectfully submitted,

For the Plaintiff,
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[10] Plaintiff respectfully requests the right to supplement its motion for award of attorneys' fees and costs to recover fees and costs incurred up to and through the date of filing this petition.

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Dated: October 4, 2012

CERTIFICATE OF SERVICE

I, Frances S. Cohen, hereby certify that this motion was served on all counsel of record by ECF on October 4, 2012.

/s/Frances S. Cohen
Frances S. Cohen