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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC.; OLD MULTNOMAH BOOK STORE, LTD., DBA Annie Bloom's Books; DARK HORSE COMICS, INC.; COLETTE'S: GOOD FOOD + HUNGRY MINDS, LLC; BLUEJAY, INC., DBA Paulina Springs Books; ST. JOHN'S BOOKSELLERS, LLC; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; FREEDOM TO READ FOUNDATION, INC.; COMIC BOOK LEGAL DEFENSE FUND,

Plaintiffs - Appellants,

and,

AMERICAN CIVIL LIBERTIES UNION OF OREGON; CANDACE MORGAN; PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; CASCADE AIDS PROJECT,

Plaintiffs,

v.

U.S.C.A. No. 09-35153 (Control); 09-35154

DEFENDANT’S OPPOSITION TO PLAINTIFF’S APPLICATION FOR ATTORNEY FEES

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Continued…

JOHN KROGER, Attorney General of the State of Oregon; MATT SHIRTCLIFF, Baker County District Attorney, in his official capacity; JOHN HAROLDSON, Benton County District Attorney, in his official capacity; JOHN FOOTE, Clackamas County District Attorney, in his official capacity; JOSHUA MARQUIS, Clatsop County District Attorney, in his official capacity; STEVE ATCHISON, Columbia County District Attorney, in his official capacity; PAUL FRASIER, Coos County District Attorney, in his official capacity; GARY WILLIAMS, Crook County District Attorney, in his official capacity; EVERETT DIAL, Curry County District Attorney, in his official capacity; MICHAEL DUGAN, Deschutes County District Attorney, in his official capacity; JACK BANTA, Douglas County District Attorney, in his official capacity; MARION WEATHERFORD, Gilliam County District Attorney, in his official capacity; RYAN JOSLIN, Grant County District Attorney, in his official capacity; TIM COLAHAN, Harney County District Attorney, in his official capacity; JOHN SEWELL, Hood River County District Attorney, in his official capacity; MARK HUDDLESTON, Jackson County District Attorney, in his official capacity; PETER L. DEUEL, Jefferson County District Attorney, in his official capacity; STEPHEN D. CAMPBELL, Josephine County District Attorney, in his official capacity; EDWIN I. CALEB, Klamath County District Attorney, in his official capacity; DAVID A. SCHUTT, Lake County District Attorney, in his official capacity; DOUGLASS HARCLEROAD, Lane County District Attorney, in his official capacity;

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BERNICE BARNETT, Lincoln County District Attorney, in her official capacity; JASON CARLILE, Linn County District Attorney, in his official capacity; DAN NORRIS, Malheur County District Attorney, in his official capacity; WALTER M. BEGLAU, Marion County District Attorney, in his official capacity; ELIZABETH BALLARD, Morrow County District Attorney, in her official capacity; MICHAEL D. SCHRUNK, Multnomah County District Attorney, in his official capacity; JOHN FISHER, Polk County District Attorney, in his official capacity; WADE M. MCLEOD, Sherman County District Attorney, in his official capacity; WILLIAM BRYAN PORTER, Tillamook County District Attorney, in his official capacity; DEAN GUSHWA, Umatilla County District Attorney, in his official capacity; TIM THOMPSON, Union County District Attorney, in his official capacity; DANIEL OUSLEY, Wallowa County District Attorney, in his official capacity; ERIC J. NISLEY, Wasco County District Attorney, in his official capacity; ROBERT HERMANN, Washington County District Attorney, in his official capacity; THOMAS W. CUTSFORTH, Wheeler County District Attorney, in his official capacity; BRAD BERRY, Yamhill County District Attorney, in his official capacity,

Defendants - Appellees.

Defendants hereby oppose plaintiffs' applications for attorney fees.

Defendants do not dispute that plaintiffs are a "prevailing" parties and, as such, may be awarded reasonable attorney fees. 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). However, the

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amount of attorney fees that plaintiffs have requested—more than $380,000—is not reasonable. A "reasonable attorney's fee" is one that is "adequate to attract competent counsel, but that does not produce windfalls to attorneys." *Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Given the nature of the issues presented by this case, the extraordinary amount that plaintiffs have requested far exceeds what is necessary to attract competent counsel. As explained below, plaintiffs' requests are unreasonable, both with respect to the hourly rates and the hours expended in connection with this case.

BACKGROUND

At the proceedings in District Court, all of the plaintiffs in these two consolidated appeals filed a single complaint and briefed the case together. They were jointly represented by Stoel Rives, a Portland, Oregon, law firm, as well as SNR Denton (then known as Sonnenschein Nath Rosenthal), located in New York. After the District Court ruled in favor of the State, the plaintiffs broke into two sets on appeal: the American Civil Liberties Union of Oregon, et al. ("ACLU Plaintiffs"), represented by Stoel Rives, and Powell's Books, Inc., et al., ("Powell's Plaintiffs"), represented by SNR Denton.

Both sets of plaintiffs have now filed an application for attorney fees. The total combined fees sought by plaintiffs is $381,200.30. The Powell's

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Plaintiffs seek fees in the amount of $251, 911.80. The ACLU Plaintiffs seek fees in the amount of $129,288.50.

ARGUMENT

A. The Hourly Rates Requested by the Powell's Plaintiffs Grossly Exceed Prevailing Market Rates and Are Not Reasonable.

The Powell's Plaintiffs seeks compensation at a rate of $690 per hour for Mr. Bamberger, its lead counsel, and a rate $500 per hour for his co-counsel, Ms. Balaban. Those rates are far in excess of the prevailing market rate. Given the nature of the issue presented by this case, and the role that counsel for Powell's Books played in litigating it, that request is not reasonable.

In *Blum*, the Supreme Court held that "reasonable fees" in 42 U.S.C. § 1988 claims "are to be calculated according to the prevailing market rates in the relevant community." 465 U.S. at 895. *See also Bell v. Clackamas County*, 341 F.3d 858, 868 (9th Cir.2003) ("A court awarding attorney fees must look to the prevailing market rates in the relevant community."). The relevant community is generally defined as "the forum in which the district court sits." *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir.1997)). In determining what constitutes a reasonable rate, the court considers a variety of factors, including the novelty and complexity of the issues, the special skill and experience of counsel, the

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quality of representation, and the results obtained. *Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th Cir.1996)

In the District of Oregon, as plaintiffs acknowledge, the prevailing market rate is generally determined by referring to the rates set forth in Oregon State Bar's Economic Survey.[1] According to that survey, in 2007, the year before the District Court proceedings, the average hourly compensation in Oregon for a private attorney with Mr. Bamberger's experience was $232 per hour (in Portland it was $287 per hour). Seventy-five percent of Oregon attorneys with Mr. Bamburger's experience earned $350 per hour or less. Oregon lawyers in the very top tier—the 95th percentile—earned $390 per hour ($461 per hour in Portland). Mr. Bamberger is asking for $690 per hour—a rate which far exceeds the prevailing market rate in Oregon even for the highest echelon of attorneys.

The Powell's Plaintiffs argue that Mr. Bamberger is entitled to that extraordinary rate because of his experience litigating First Amendment cases and because local counsel able to properly handle the case were "unavailable." That is incorrect. Particularly given the underlying state law issue presented by this case, Mr. Bamberger's hourly rates are inappropriate.

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[1] Available at http://www.osbar.org/_docs/resources/07EconSurvey.pdf

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The dispositive question presented by this case throughout the proceedings has been the meaning of the challenged statutes, Or. Rev. Stat. §§ 167.054 and 057, which is a question of Oregon law. The parties had sharply divergent views on this issue: Plaintiffs contended that the statutes are extremely broad in scope, and criminalized furnishing to children or minors virtually all sexual education materials, as well as any materials some portion of which is intended to excite the reader. The State conceded that if the statutes were as broad as plaintiffs contended, then they were indeed unconstitutional. But the State argued that, as properly construed under Oregon law and in light of the legislative history, the statutes apply only to a very narrow class of "hardcore" pornography. (State's Br. 28).

In its September 20, 2010 opinion this Court concluded that, notwithstanding the Oregon legislature's intentions, the text of the statutes could not reasonably be construed in the manner argued by the State. The Court agreed with the arguments in the ACLU Plaintiff's briefs that as properly construed the statutes were quite broad in scope and that the statutes as thus construed violated the First Amendment.

Because the fundamental issue presented by this case was the proper application of Oregon law, Mr. Bamberger is not reasonably entitled to a rate

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beyond the prevailing market rate in Oregon. Defendants acknowledge that Mr. Bamberger has extensive experience in litigating First Amendment cases elsewhere. But this was not an ordinary First Amendment case. The State Defendants have acknowledged all along that if, as a matter of state law, the challenged statutes mean what the plaintiffs contended they mean, they would indeed be unconstitutional. There is no indication that Mr. Bamberger or his firm had any expertise or experience with Oregon law.

In fact, according to Ms. Runkles-Pearson, it was *her* firm, not Mr. Bamberger's, which was "primarily responsible for researching the law of this circuit and of Oregon on all the substantive and procedural aspects of the matter" in the District Court. On appeal in this Court, the ACLU plaintiffs were represented solely by Ms. Runkles-Pearson's firm, while Mr. Bamberger represented the Powell's Plaintiffs. It was the ACLU Plaintiffs, not the Powell's Plaintiffs, who briefed the issue of the proper interpretation of the statutes. And it was the ACLU's arguments—not Powell's—which this Court adopted in its opinion. In short, the Powell's Plaintiff's suggestion that no local counsel was available who could properly handle the case is demonstrably false.

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For all of the above reasons, defendants submit that an hourly rate of $690 for Mr. Bamberger is unreasonable. For the same reasons, the hourly rate of $500 requested for Ms. Balaban is also unreasonable. In 2007, the average rate in Oregon for an attorney with Ms. Balaban's level of experience was $202 per hour ($239 in Portland). Seventy-five percent of Oregon lawyers with Ms. Balaban's experience charged $234 per hour or less ($275 in Portland). And lawyer's in the top tier, the 95th percentile, charged $317 per hour ($360 per hour in Portland). There is no basis for an hourly rate of $500.

In light of the issues presented by this matter, and the role played by the SNR attorneys, a reasonable attorney fee would be one that is consistent with the prevailing market rate in Oregon.

B. The Combined Number of Hours expended by both sets of Plaintiffs in this Litigation is Not Reasonable.

Together, plaintiffs seek compensation for an extraordinary total of 941 hours expended on this case.[2] The retention of multiple attorneys often results in a duplication of efforts and an unnecessary increase in the amount of time

[2] Counsel for Powell's books claims 419 hours: 161.1 hours preparing the complaint, 127.6 hours litigating in the District Court, and 130.3 hours litigating the matter in this Court. Counsel for the ACLU plaintiffs has claimed 522.6 hours expended on the case: 365.4 hours litigating in the District Court and 157.2 hours litigating in this Court.

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expended and billed by attorneys. That is the case here. Particularly in light of the nature of the issues presented, 941 hours is not a reasonable amount of time.

The Supreme Court has recognized that courts may exclude from the lodestar amount those hours that were not "reasonably expended." *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933. Thus, the courts must scrutinize requests for attorney's fees and exclude those hours that are excessive, duplicative or unnecessary:

> Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here.

Hensley, 461 U.S. at 434 (internal citations and quotations omitted). *See also McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir 2009) (In determining the appropriate number of hours to be included in a lodestar calculation, the district court should exclude hours "that are excessive, redundant, or otherwise unnecessary.")

In this case, as explained above, the underlying issue was certainly an important one, but the legal question presented was straightforward: how to properly interpret Oregon's statutes. The case was all the more straightforward because the State Defendants conceded that the statutes were unconstitutional if

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interpreted in the manner advanced by plaintiffs. Given the nature of the issue presented, expending 941 hours to litigate this matter is not reasonable.

In their billing records, counsel for Powell's plaintiffs claim 161 hours spent *just in preparing the initial complaint*. Counsel for ACLU plaintiffs identify dozens more hours working on the *same* complaint. Plaintiffs thus claim roughly 200 hours to prepare the complaint, despite the fact that many of the Powell's plaintiffs have filed other similar complaints in other jurisdictions.[3] It is manifestly unreasonable for plaintiffs to request hourly rates well beyond the market rate while at the same time asking to charge for 200 hours to draft a complaint. One of the justifications for high hourly wages for experienced lawyers is that lawyers with experience are more efficient. Defendant's submit that attorneys charging $500 or more per hour may not reasonably expend 200 hours to draft a complaint of the kind filed in this case.

Collectively, the two law firms request fees for more than 650 hours expended during the District Court proceedings. They request those 650 hours despite the fact that they were jointly representing all the plaintiffs and jointly briefing the case. Although there were two hearings before the District Court—

[3] *See* Media Coalition website, available at http://www.mediacoalition.org/litigations.php (detailing first amendment litigation brought by plaintiffs).

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for a preliminary and permanent injunction—the issues presented at both hearings were the same. Expending 650 hours to draft a complaint and brief the legal issues before the District Court is not reasonable.

The hours that plaintiffs have expended on appeal—287 hours between the two firms—are also unreasonable. As noted above, on appeal before this Court, the ACLU plaintiffs and the Powell's Plaintiffs split up and decided to brief the case separately. It is unclear why they did so, because their briefing was essentially redundant. In addition, the briefing of the Powell's Plaintiffs in particular borrowed heavily from the briefing that the parties had presented to the District Court. The 130 hours identified by the ACLU plaintiffs would be a reasonable amount of time to expend on this appeal. The 157 hours identified by the Powell's Plaintiffs might also be a reasonable amount of time. Given that their work was redundant, however, it would be unfair to make Oregon pay for *both*.

The 941 hours expended on this case by plaintiffs is beyond the pale, and it reflects the fact plaintiffs overstaffed the case. Defendants submit that the amount should be significantly reduced to compensate for the redundancy.

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CONCLUSION

For the foregoing reasons, plaintiffs' applications for attorney fees are excessive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2011, I directed the Respondent's Answering Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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