American Booksellers Foundation for Free Expression et al v. Sullivan Doc. 87

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, et al. **Plaintiffs,** **v.** **JOHN BURNS, in his official capacity as ATTORNEY GENERAL OF THE STATE OF ALASKA,** **Defendant.**	**Civil No. 3:10-cv-00193-RRB**

PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiffs American Booksellers Foundation for Free Expression; American Civil Liberties Union of Alaska; Association of American Publishers, Inc.; Freedom to Read Foundation, Inc.; Comic Book Legal Defense Fund; David & Melissa LLC; Book Blizzard LLC; Bosco's, Inc.; Donald R. Douglas and Alaska Library Association through their attorneys, SNR Denton US LLP, D. John McKay, and Thomas Stenson respectfully move this Court, pursuant to FED. R. CIV. P. 54(d)(2) and 42 U.S.C. § 1988, for an award of attorneys' fees and expenses.

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In support of this motion, plaintiffs rely upon this application, together with: (a) the declarations of Michael A. Bamberger, Esq., Richard M. Zuckerman, Esq., Devereux Chatillon, Esq., Thomas Stenson, Esq., and D. John McKay, Esq., the principal attorneys who rendered services in this matter; (b) the declarations of Jonathan Bloom, Esq. and Stephen E. Jenkins, Esq., with respect to the reasonableness of the fees charged for Mr. Bamberger and Mr. Zuckerman, respectively, and (c) the declaration of David Horowitz, Executive Director of Media Coalition, Inc., which describes the efforts of several of the plaintiffs in this matter to urge the Alaska Legislature to correct the constitutional infirmities of the bill, prior to its enactment.

ARGUMENT

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PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES SHOULD BE GRANTED IN THE AMOUNT REQUESTED

I. PLAINTIFFS ARE ENTITLED TO RECOVER REASONABLE FEES UNDER 42 U.S.C. § 1988

This Court found in favor of plaintiffs in this action under 42 U.S.C. § 1983 and gave plaintiffs total relief, by granting plaintiffs' motion for summary judgment and declaring the challenged Alaska statute unconstitutional. Under 42 U.S.C. § 1988, there is no question that plaintiffs are the "prevailing party" entitled to recover attorneys' fees. Judgment was entered on July 11, 2011 (Docket 85). This application is being filed within 14 days of entry of Judgment, and is thus timely. FED. R. CIV. P. 54 (d)(2).

The only issue to be addressed is the reasonableness of the fee. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). The starting point for any reasonableness determination under Section 1988 is the "lodestar" method. *Id.* The lodestar method is computed by multiplying hours reasonably expended by a reasonable hourly rate. *McGrath v. County of Nevada,* 67. F.3d 248, 252 (9th Cir. 1995). The fee may then be increased above the lodestar

amount, through a multiplier based upon, among other factors, "the skill requisite to perform the legal services properly," "time limitations imposed by the client or the circumstances," "the results obtained," "the experience, reputation, and ability of the attorneys," the " 'undesirability' of the case"—that is, the prospect that the nature of the case may not be "pleasantly received by the community," and the "nature and length of the professional relationship with the client." *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974); *Cunningham v. County of Los Angeles,* 879 F.2d 481, 487 (9th Cir. 1988).

In this case, plaintiffs' counsel has decided —if the basic lodestar amount is accepted by defendants and the Court—not to seek any multiplier. However, to the extent that defendants challenge either the rates requested or the time expended in computing the lodestar, or the Court determines that a lower lodestar is appropriate, plaintiffs respectfully request that the factors established by *Johnson* that are quoted above should be applied, and a multiplier used to bring the fee to the level sought in the lodestar proposed by plaintiffs.

It also bears noting that plaintiffs did everything that they could to make this litigation unnecessary. As detailed in the accompanying declaration of Mr. Horowitz, before the enactment of the Alaska statute which was the subject matter of this litigation, many of the plaintiffs in this action, through a trade association named Media Coalition, Inc., undertook a concerted effort to point out the constitutional infirmities of the statute, and to urge the Legislature to modify the bill so that its efforts to protect children did not run afoul of the First, Fifth, and Fourteenth Amendments. Had the Alaska Legislature heeded those statements and enacted a constitutional law, this litigation would not have been necessary. Under those circumstances, it is all the more appropriate that defendants bear the burden of plaintiffs' attorneys' fees and costs.

II. PLAINTIFFS' REQUESTED HOURLY RATES ARE REASONABLE

Plaintiffs were represented in this case by Michael A. Bamberger, Esq., Richard M. Zuckerman, Esq., Devereux Chatillon, Esq., and Joshua Kroot, Esq., all in the New York office of SNR Denton US LLP; D. John McKay, Esq., who is engaged in private practice in Alaska; and Thomas Stenson, Esq., an attorney with the ACLU of Alaska Foundation

The rates requested for Mr. Bamberger, Mr. Zuckerman, Ms. Chatillon, and Mr. Kroot are significantly below their regular billing rates—but are at the high end (or perhaps above) the range of rates charged by members of the Alaska Bar of comparable experience. The fees requested for Mr. McKay are computed at his usual billing rate. The fees requested for Mr. Stenson are computed at the usual billing rates of members of the Alaska Bar of comparable experience. The following rates are requested:

Attorney	Position	Billing Rate Requested	Regular Billing Rates
Michael A. Bamberger	Partner, SNR Denton	$600	$815 - $895
Richard M. Zuckerman	Partner, SNR Denton	$550	$730 - $810
Devereux Chatillon	Partner, SNR Denton	$500	$625 - $685
Joshua Kroot	Associate, SNR Denton	$175	$290 - $350
D. John McKay	Attorney in Private Practice	$225	$225
Thomas Stenson	Attorney, ACLU of Alaska Foundation	$225	N/A

These requested rates are reasonable in light of the issues raised by the State's arguments, and the significant level of First Amendment expertise provided by lead counsel, Mr. Bamberger and his partners, Mr. Zuckerman and Ms. Chatillon.

While non-local counsel are generally limited to the lower rates of the forum district, higher-priced non-local counsel rates are permitted where non-local counsel has specialized expertise not available in the forum district. Thus, in *Gates v. Deukmejian,* 987 F.2d 1392, 1404-06 (9th Cir. 1993), the Ninth Circuit permitted the San Francisco-based prevailing attorneys to collect San Francisco rates in a Sacramento prison institution reform case because no local counsel with the requisite equivalent was available. 987 F.2d at 1405.[1]

The federal district court in Indiana previously accepted that Mr. Bamberger is an expert in First Amendment issues and found him entitled to New York City rates for legal work in that court and on appeal before the Seventh Circuit, even when there were local attorneys available who could have competently handled the case for plaintiffs. In *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), the Seventh Circuit struck down an anti-pornography law as unconstitutional under the First Amendment. In awarding attorney fees, the Southern District of Indiana applied New York City rates where the attorneys had a longstanding professional relationship with the plaintiffs, and "services of equal quality were not readily available" in the local Indianapolis area. *American Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324, 328-30 (S.D. Ind. 1986):

> Although this court certainly recognizes and acknowledges that there are Indiana attorneys who could have competently handled this case on behalf of plaintiffs, it must also acknowledge that based on the breadth of experience that Finley Kumble [Mr. Bamberger's law firm at the time] possesses in litigating first amendment questions, it is unlikely that 'services of like quality [were] truly

[1] *See also Guam Society of Obstetricians & Gynecologists v. ADA*, 100 F.3d 691, 702 (9th Cir. 1996) (approving attorneys fees for the New York City-based counsel challenging Guam statute); *Corbett v. Wild West Enters., Inc.*, 713 F. Supp. 1360, 1364 (D. Nev. 1989) ("[A]n out-of-town specialist may be able to command a somewhat higher price for his talents, both because of his specialty and because he is likely to be from a larger city, where rates are higher.").

> available' locally. . . . The broad experience of [Mr. Bamberger's law firm], including its handling of several other significant first amendment cases in the federal courts and its filing of numerous amicus briefs before the Supreme Court, makes it unlikely that the plaintiffs could have obtained equal representation locally.

Because the Ninth Circuit permits higher attorney fees for experienced non-local counsel, and Mr. Bamberger, Mr. Zuckerman and Ms. Chatillon have proven themselves as highly experienced in First Amendment litigation, this Court of should award fees computed based on the discounted New York City rates requested.

The experience and qualifications of each of the attorneys, described in greater detail in the accompanying declarations, warrants the rates requested:

Michael A. Bamberger. Mr. Bamberger is one of the leading First Amendment attorneys in the nation. Even more relevant to this case, he is the nation's leading expert on laws, such as those in this case, regarding restrictions on juvenile access to sexually frank material ("harmful to minors" laws). For over 30 years, Mr. Bamberger has litigated such laws and related issues in the U.S. Supreme Court, seven of the Courts of Appeals, thirteen District Courts and seven state Supreme Courts, often representing the institutional Plaintiffs. (Bamberger Decl., **Exhibit D**). There simply is no one in Alaska with such a depth of experience and knowledge on the federal constitutional issues involved in "harmful to minors" laws. Plaintiffs are requesting fees for Mr. Bamberger's services at the hourly rate of $600.

Richard M. Zuckerman. Mr. Zuckerman has been a practicing litigator for thirty-five years. Mr. Zuckerman regularly works with Mr. Bamberger on First Amendment issues, often representing members of Media Coalition. As a result of Mr. Zuckerman's experience litigating First Amendment cases and his extensive federal trial and appellate knowledge, plaintiffs are requesting fees for his services at the hourly rate of $550.

Devereux Chatillon. Ms. Chatillon has been a practicing media and entertainment attorney for thirty years. Ms. Chatillon worked at SNR Denton from 2003 to 2006 and again from 2009 until early 2011, concentrating mainly in intellectual property and litigation. From 2006 to 2009, Ms. Chatillon served as Senior Vice President, General Counsel, and Corporate Secretary of Scholastic Corporation, responsible for all legal affairs of Scholastic's $2 billion education, book publishing, education technology, and distribution business. Currently, Ms. Chatillon serves as outside counsel to a number of digital and traditional publishing and entertainment entities. Plaintiffs are requesting fees for her services at the hourly rate of $500.

Joshua Kroot. Mr. Kroot graduated from the University of Michigan with a B.A. in 2002, graduated from the University of Southern California School of Law with his J.D. degree in 2009, and graduated from the London School of Economics and Political Science with his LL.M. degree, also in 2009. He was admitted to the bar in 2010, and became an associate with SNR Denton that year. Plaintiffs are requesting fees for his services at the hourly rate of $175.

D. John McKay. Mr. McKay is engaged in private practice in Anchorage, Alaska. His qualifications are set forth in his accompanying declaration. Plaintiffs are requesting fees for his services at the hourly rate of $225.

Thomas Stenson. Mr. Stenson has worked as an attorney for the ACLU of Alaska Foundation since September 2008. He graduated the University of Pennsylvania Law School in 2005, thereafter serving as an assistant defender for the Defender Association of Philadelphia, the public defender for the city of Philadelphia until August 2008. Plaintiffs are requesting fees for his services at the hourly rate of $225.

III. OVERVIEW OF ATTORNEYS' FEES SOUGHT

The following is a brief overview of the fees requested for SNR Denton US LLP (known as Sonnenschein Nath & Rosenthal LLP when this action was commenced). For convenience and organization the case been divided generally into several phases. The divisions between the phases are not sharp and the purpose is to give the Court an idea of the general development of the case.

A detailed schedule of legal services provided by SNR Denton throughout this litigation is annexed to the declaration of Mr. Bamberger as **Exhibit B** Descriptions of the services rendered by Mr. McKay and Mr. Stenson are in their declarations. In compiling this Application, plaintiffs' counsel exercised billing judgment in eliminating time entries that were not deemed appropriate, such as time expended by a litigation partner, who has substantial First Amendment experience but did not regularly work on this case, in assisting Mr. Bamberger in preparation for oral argument. Calls and conferences with co-counsel, where not otherwise specifically designated, involved discussions of strategy and status.

A. April 2010 – August 2010: Preparation of the Complaint, Motion for Preliminary Injunction, Memorandum of Law, 10 Factual Declarations and One Expert Declaration

The fees sought could easily have been avoided by the State. When Senate Bill 222 was being considered by the Alaska Legislature, Plaintiffs American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, and Freedom to Read Foundation, through an association of which they are members, Media Coalition, Inc., repeatedly pointed out the constitutional defects in the Bill, urged the Legislature to re-draft the Bill so that it would protect children without violating the First Amendment, and advised the legislators that a successful constitution

challenge would be costly to the State. (Horowitz Decl. ¶¶ 6-16.) These efforts were unsuccessful. The Legislature passed SB 222 without remedying the constitutional defects. While SNR Denton participated in these efforts, no fees are sought relating thereto.

In April 2010, SNR Denton began work on this litigation. Between that date and August 31, 2010, this action was commenced, legal research was conducted and the Complaint (Docket 1), a Motion for a Preliminary Injunction (Docket 5), a Memorandum of Law (Docket 7), declarations of 10 fact witnesses (Docket 10, 11, 12, 13, 14, 15, 16, 17, 18, 26-1), and a declaration of an expert witness (Docket 20) were drafted and filed.[2]

The fees claimed by SNR Denton for this portion of the case aggregate $65,690, by Mr. McKay $7,875, and by Mr. Stenson $337.

B. September 2010 – October 20, 2010: Preparation of Proposed Order on Preliminary Injunction; Receipt and Review of Defendants' Opposition to Motion for Preliminary Injunction; Preparation of Reply Brief on Motion for Preliminary Injunction; and Receipt and Review of Court's Decision Granting Preliminary Injunction

On September 22, 2010, Defendants filed their Opposition to our Motion for a Preliminary Injunction (Docket 33) and, on September 29, 2010, Defendants filed their Answer to the Complaint (Docket 43). Plaintiffs' counsel reviewed Defendants' papers, and prepared a Reply Memorandum (Docket 45) and a Reply Declaration (Docket 46) in further support of their Motion for a Preliminary Injunction, which was filed on October 8, 2010.

On October 20, 2010, this Court granted the Motion for a Preliminary Injunction (Docket 47).

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[2] As reflected in SNR Denton's records, an additional declaration was prepared but not filed.

The fees claimed by SNR Denton for this portion of the case aggregate $22,613 and by Mr. McKay $3,172.50.

C. October 21, 2010 – December 2010: Preparation of Response to Defendants' First Motion to Clarify; and Preparation of Motion for Summary Judgment, Including Motion and Memorandum of Law

On October 26, 2010, Defendants filed a Motion to Clarify this Court's Order granting the Preliminary Injunction (Docket 48), to which Plaintiffs prepared a Response (Docket 49). On November 17, 2010, this Court entered an Order thereon (Docket 50).

In November and December 2010, Plaintiffs prepared a Motion for Summary Judgment (Docket 51) and supporting Memorandum (Docket 52), which was filed on December 27, 2010.

The fees claimed by SNR Denton for this portion of the case aggregate $21,888 and by Mr. McKay $810.

D. January 2011 – March 2011: Preparation of Response to Defendants' Second Motion to Clarify; Receipt and Review of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, and Defendants' Motion to Certify; Preparation of Reply on Plaintiffs' Motion for Summary Judgment, Opposition to Defendants' Cross-Motion for Summary Judgment, and Response to Defendants' Motion to Certify

On January 5, 2011, Defendants filed a Second Motion to Clarify this Court's Order granting a Preliminary Injunction (Docket 54), to which Plaintiffs prepared and filed a Response on January 6, 2011 (Docket 57). This Court issued its Order thereon on February 8, 2011 (Docket 67).

On January 18, 2011, Defendants filed their Opposition to Plaintiffs' Motion for Summary Judgment (Docket 58), Defendants' Cross-Motion for Summary Judgment (Docket 59), and Defendants' Motion to Certify to the Alaska Supreme Court (Docket 60).

Plaintiffs prepared a Combined Memorandum as a Reply on Plaintiffs' Motion for Summary Judgment, Opposition to Defendants' Cross-Motion for Summary Judgment, and Response to Defendants' Motion to Certify, which was filed on March 24, 2011 (Docket 70).

The fees claimed by SNR Denton for this portion of the case aggregate $25,285, by Mr. McKay $877.50, and by Mr. Stenson $1,237.

E. April 2011 – May 2011: Receipt and Review of Defendants' Reply on Defendants' Cross-Motion for Summary Judgment and Defendants' Motion to Certify; Receipt and Review of this Court's Order Granting Motion to Certify; Joint Drafting with Attorney General's Office of Certified Questions; Filing of Certified Questions with Alaska Supreme Court

Defendants filed their Reply papers on their Motion to Certify (Docket 72) and Cross-Motion for Summary Judgment (Docket 73) on April 7, 2011, which Plaintiffs reviewed.

On April 19, 2011, this Court entered an Order (Docket 74) granting Defendants' Motion to Certify questions to the Alaska Supreme Court, and dismissing the Motion and Cross-Motion for Summary Judgment without prejudice to renewal after proceedings in the Alaska Supreme Court.

Plaintiffs reviewed the Order, drafted proposed questions to be certified, negotiated the language of the proposed questions with the Attorney General's Office, and, with the cooperation of the Attorney General's Office, were able to prepare and file a Stipulated Proposed Order of Certification, including the specific questions, on April 29, 2011 (Docket 75). That same day, this Court approved the Stipulation, and entered it as a Stipulated Order of Certification (Docket 76).

The Clerk of this Court transmitted the Stipulated Order of Certification to the Alaska Supreme Court, which sent this Court notice that it had opened the case (Docket 77).

The fees claimed by SNR Denton for this portion of the case aggregate $9,728 and by Mr. McKay $877.50.

F. June 2011: Receipt and Review of Decision of Alaska Supreme Court Declining to Answer Certified Questions; Preparation and Filing of Plaintiffs' Renewed Motion for Summary Judgment; Receipt and Review of Defendants' Renewed Cross-Motion for Summary Judgment; Initial Preparation of Reply Papers on Plaintiffs' Renewed Motion; Receipt and Review of this Court's Decision Granting Summary Judgment

On June 8, 2011, this Court received notice that the Alaska Supreme Court declined to answer the certified questions (Docket 79).

Plaintiffs prepared papers to renew Plaintiffs' Motion for Summary Judgment, which were filed on June 16, 2011 (Docket 80, 81). Defendants filed a Response (Docket 82) and renewed their Cross-Motion for Summary Judgment (Docket 83). Plaintiffs began to prepare a Reply, which was not filed..

On June 30, 2011, this Court entered its Order granting Plaintiffs' Motion for Summary Judgment, and denying Defendants' Cross-Motion for Summary Judgment (Docket 84).

The fees claimed by SNR Denton for this portion of the case aggregate $3,080 and by Mr. McKay $405.

G. July 11: Proceedings Relating to the Judgment

In July 2011, we received the Judgment entered by the Court, reviewed the Judgment, conferred with the Attorney General's Office regarding possible modifications to the Judgment (so that the Judgment would reflect the issuance of a permanent injunction) and submitted a motion to alter or amend the Judgment. The fees claimed by SNR Denton for this portion of the case aggregate $1,870, and by Mr. McKay and by Mr. McKay $540.

H. July 2011: This Fee Applications

In July 2011, we also prepared this fee application. The fees claimed by SNR Denton for this portion of the case aggregate $7,680, and by Mr. McKay $67.50.

IV. TOTAL FEES AND EXPENSES

Plaintiff respectfully requests attorneys' fees in the total amount of $174,033, of which $157,833 is for services of SNR Denton, $14,625 for the services of Mr. McKay and $1,575 for the services of Mr. Stenson. These amounts are for services through July 22, 2011. Plaintiffs reserve the right to supplement this application for additional services rendered after that date.

Duplicating, messenger , travel, computer research and court expenses were incurred in connection with Plaintiffs' counsel's work in this action. Full compensation of these reasonable and necessary expenses in the amount of $5,576.29 is requested. An itemized list of the expenses incurred by SNR Denton is attached the declaration of Michael A. Bamberger as **Exhibit C.** All of these expenses are the sort that are normally billed to Plaintiffs' counsel's clients as they are incurred. Plaintiffs reserve the right to supplement this application for additional expenses incurred after the above expenses were compiled.

V. CONCLUSION

The time spent by Plaintiffs' counsel was reasonable, their rates are reasonable and the expenses incurred are reasonable. Plaintiffs therefore respectfully request that this Court grant them a reasonable fee award of $174,033, plus reasonable expenses of $5,576.29, for an aggregate award of $179,609.29.

Dated: July 25, 2011

/s/ Michael A. Bamberger
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Attorneys for Plaintiffs

The undersigned certifies that a true and correct copy of the foregoing Plaintiffs' Application for Attorneys' Fees and Expenses, and the accompanying Declarations and Exhibits was served via electronic filing this 25th day of July, 2011, upon counsel for Defendants.

s/ Michael A. Bamberger
Michael A. Bamberger