# IN THE UNITED STATES DISTRICT COURT

# FOR THE DISTRICT OF IDAHO

**GENERATION LIFE, BRANDI SWINDELL, REV. BRYAN FISCHER, PASTORS POLICY COUNCIL,**

**Plaintiffs,**

**vs.**

**CITY OF BOISE, IDAHO, DAVID BIETER, in his official capacity as Mayor of the City of Boise, JEROME MAPP, in his official capacity of City Councilman for the City of Boise, MARYANNE JORDAN, in her official capacity of City Councilman for the City of Boise, VERNON BISTERFELDT, in his official capacity of City Councilman for the City of Boise, ELAINE CLEGG, in her official capacity of City Councilman for the City of Boise DAVID EBERLE in his official capacity of City Councilman for the City of Boise, ALAN SHEALY, in his official capacity of City Councilman for the City of Boise,**

**Defendants.**

CASE NO: CV04-040-S-EJL

**ORDER**

Defendants petition the Court for attorneys' fees. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without a hearing.[1]

The Defendants' motion relies on 42 U.S.C. § 1988 in support of the request for attorneys' fees. Section 1988 allows the court, in its discretion, to award reasonable attorneys' fees to prevailing defendants in a civil rights lawsuit if the plaintiff's action is frivolous, unreasonable or without foundation. Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 619 (9th Cir. 1987).

Having considered the record in light of the applicable standard, the Court finds the Plaintiffs' action against Defendants to be unreasonable and without foundation. As the Court noted in its initial Order addressing the Plaintiffs' Motion for Temporary Restraining Order, the Plaintiffs have relied on a novel theory, unsupported by legal precedent, that does not present a colorable claim. (Order of January 23, 2004). Despite the Court's initial ruling on the weakness of this lawsuit, Plaintiffs insisted on pursuing injunctive relief. Plaintiffs' persistence in going forward even in the absence of favorable case law or evidence to support their position weighs in favor of awarding attorneys' fees. See, e.g., Mitchell v. Office of Los Angeles County, 805 F.2d 844, 847 (1986) (explaining that there is a significant difference between the bringing of cases with no foundation in law or facts at the outset and the failure to present evidence sufficient to justify relief on the merits).

Moreover, as the Court has previously noted, a recent published decision refutes in its entirety the very legal theory asserted by Plaintiffs in this case. McGinley v. Houston, 282 F. Supp.2d 1304 (M.D. Ala. 2003). A lawsuit will be considered unreasonable when there is case law directly apposite. See, e.g., Int'l Bhd. of Teamsters v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1412 (9th

---

[1] In their Response, Plaintiffs "request a hearing to cross-examine [Defendants' counsel] . . . . [and] produce expert testimony." (Pls.' Resp. at 11). Plaintiffs, however, failed to frame this request pursuant to the controlling Rule of Civil Procedure, Fed R. Civ. P. 54(d)(2)(C), which would have permitted the Court to order submissions of depositions and any expert record, Fed. R. Civ. P. 43(e). But, in any event, because the Court will grant all Plaintiffs' objections to the amount of Defendants' requested fee award, further submissions by Plaintiff on this issue are unnecessary.

Cir.1997). Significantly, Plaintiffs' counsel, who also served as counsel in the McGinley action, failed to notify the Court of the McGinley decision. Plaintiffs' effort to justify this failure to disclose and the continuing effort to distinguish McGinley is in itself frivolous. See, e.g., Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir.1994) (explaining that a matter is considered "frivolous" when the result is obvious or the arguments of error are wholly without merit).

Plaintiffs appear to suggest that their lawsuit is justified by the favorable ruling of this Court in a separate and different Monument case. (Pls.' Resp. at 5-6 (citing Albanese v. Bannock County, No. CV 93-01115-E (D. Idaho, filed September 7, 1995))). As the Court previously observed, the Albanese decision is easily distinguished from the present matter on its facts and if read before Plaintiffs initiated this litigation would have made it clear that Plaintiffs' lawsuit would not be supported by the law in that case. The issue in Albanese related to whether or not the Monument could stay in place because of its secular setting. In this case the Monument was clearly not in a secular setting but more importantly the question at issue related to whether or not the City possessed the authority to remove the Monument. The case law is clear that the City has such authority. See, e.g., McGinley v. Houston, 282 F. Supp.2d 1304 (M.D. Ala. 2003).

As the record shows, the City's motivation in removing the Monument was primarily to avoid the costs of litigation. The Plaintiffs forced the issue and they should not be heard to complain now that they must bear the consequence of that decision. The Plaintiffs' argument that no attorneys' fees should be allowed because the City was offered free counsel is without merit. The City, like anyone else, has the right to counsel of its choice.

Having found it appropriate to grant Defendants' petition for attorneys' fees, the Court next must determine what constitutes a reasonable award. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Jordan v. Multnomah County, 815 F.2d 1258, 1262 & n.5 (9th Cir. 1987) (explaining method to arrive at "lodestar" figure). In this respect, the Court agrees with Plaintiffs' objections to the total hours Defendants' counsel claim they have expended on this litigation. The Court finds, as set forth in Plaintiffs' Response, that Defendants' counsel have in several instances requested hourly reimbursement in excess of what is reasonable for completion of the identified task

and have requested reimbursement for what appears to be duplicative efforts by counsel to prepare Defendants' case.

Specifically, with regard to reasonableness of the hours expended by counsel, the Court is going to reduce the time allowed for counsel's participation in a meeting with this Court's chambers from 5.5 hours to 2 hours; reduce the allowed hours to research, draft and finalize Defendants' response to Plaintiffs' Motion for TRO/PI from 45.5 hours to 35.5 hours, disallow the 7 hours spent researching an unfiled motion to dismiss and for sanctions; reduce the allowed hours to research, draft and finalize Defendants' sur-reply from 29.25 hours to 20.25 hours; and reduce the hours spent to prepare the Defendants' motion for attorneys' fees from 8.7 hours to 4 hours.

In sum, the Defendants' request for an award of 126.3 hours will be reduced by 34.2 hours to an allowed 92.1 hours. This amount multiplied by counsel' s requested rate of $110 an hour, which the Court finds is reasonable, results in a total award of $10,131.00 in attorneys' fees.[2]

**ORDER**

Based on the foregoing, and the Court being fully advised in the premises, it is **HEREBY ORDERED** that Defendants' Motion for Attorneys' Fees (Docket No. 28) is **GRANTED in part and DENIED in part** as follows: The Court awards attorneys' fees in favor of Defendants in a total amount of $10,131.00

**IT IS SO ORDERED** this 6th day of April, 2004.

EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

[2] Having considered the factors set forth in Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir.1975), cert. denied, 425 U.S. 951 (1976), the Court concludes that the present case does not represent one of those rare instances where the lodestar figure should be adjusted on the basis of other considerations. Harris v. Marhoefer, 24 F.3d 16, 18 (1994).

F I L E  C O P Y

dkh

United States District Court
for the
District of Idaho
April 8, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:04-cv-00040

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

Brian R Chavez-Ochoa, Esq. 1-209-772-3090
CHAVEZ-OCHOA LAW OFFICES
4 Jean St #4
Valley Springs, CA 95252

Pamela R Boucher, Esq.
4980 W State St
Boise, ID 83703

Kevin S Borger, Esq. 1-208-384-4454
BOISE CITY PROSECUTING ATTORNEY'S OFFICE
PO Box 500
Boise, ID 83701

Ty A Ketlinski, Esq. 1-208-384-4454
BOISE CITY PROSECUTING ATTORNEY'S OFFICE
PO Box 500
Boise, ID 83701

____ Chief Judge B. Lynn Winmill
__✓__ Judge Edward J. Lodge
____ Chief Magistrate Judge Larry M. Boyle
____ Magistrate Judge Mikel H. Williams

Visiting Judges:
____ Judge David O. Carter
____ Judge John C. Coughenour
____ Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 4-8-04

BY: _____
(Deputy Clerk)