

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-02372-CNS

303 CREATIVE LLC, et al,

Plaintiff,

v.

AUBREY ELENIS, et al,

Defendants.

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NOTICE OF FILING

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Defendants-Appellees provide notice of filing their Substantive Response to Plaintiffs-Appellants' Motion for Attorney's Fees in Tenth Circuit Appellate Case 19-1413 today, September 14, 2023, attached as Exhibit A.

PHILIP J. WEISER  
Attorney General

s/ Alison Faryl Kyles

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\*Counsel of Record

### CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September 2023 I electronically filed the foregoing NOTICE OF FILING with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

David Andrew Cortman  
Jeremy David Tedesco  
Katherine Leone Anderson  
Jonathan Andrew Scruggs

*Counsel of record for Plaintiffs*

*s/ Linda Ruth Carter*

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Linda Ruth Carter, Paralegal

**EXHIBIT**

**A**

Case No. 19-1413  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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On Appeal from the United States District Court  
for the District of Colorado

The Honorable Chief Judge Marcia S. Krieger  
D.C. No. 1:16-CV-2372-CNS

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DEFENDANTS-APPELLEES' SUBSTANTIVE RESPONSE TO  
PLAINTIFFS-APPELLANTS' MOTION FOR ATTORNEYS' FEES

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**Defendants-Appellees’ Substantive Response to  
Plaintiffs-Appellants’ Motion for Attorney’s Fees**

Defendants-Appellees recognize that 42 U.S.C. § 1988 gives courts discretion to award attorneys’ fees to prevailing parties in civil-rights cases: “In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs. . . .” 42 U.S.C. § 1988(b).

Defendants also acknowledge that in *Lefemine v. Wideman* 133 S. Ct. 9, 11, 184 L. Ed. 2d 313 (2012) (per curiam) the Supreme Court explained that a plaintiff prevails “when actual relief on the merits of [the plaintiff’s] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” The Court continued that it has “repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy that test.” *Id.* (citing *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988) (per curiam)).

Here, however, Plaintiff is not yet the prevailing party. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Supreme Court stated:

To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, “the moral satisfaction [that] results from any favorable statement of law” cannot bestow prevailing party status.... No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

506 U.S. at 113. “To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought.” *Id.*, at 111, citations omitted. Here, there is no enforceable judgment on the merits and no injunction has issued. Therefore, Defendants oppose an award of attorney’s fees. If this Court disagrees and determines that Plaintiff is a prevailing party, Defendants retain the right to challenge the lodestar amount and other factors that impact the reasonableness of the hourly rate and amount of fees.

Respectfully submitted this September 14, 2023,

PHILIP J. WEISER  
Attorney General

*s/ Alison Faryl Kyles*

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*s/ Alison Faryl Kyles*

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