

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

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Defendants-Appellees respond to Plaintiffs 303 Creative LLC and Lorie Smith's Motion for Attorney's Fees and Costs and for an Extension of Filing Deadline (ECF 96).

**Procedural Background**

Defendants agree with the Plaintiffs' procedural history description, except that in addition to recalling the district court's mandate and vacating the judgment in this Court's August 9, 2023 Order, this Court also wrote, "Counsel will be notified if this court desires further briefing prior to disposition of this appeal upon remand." Order, *303 Creative LLC v. Elenis*, No. 19-1413 (10th Cir. August 9, 2023), ECF No. 010110900674. Exhibit A.

**Legal Basis**

"The law is well settled [that] the district judge retains jurisdiction over the issue of attorneys' fees even though an appeal on the merits of the case is pending."

*City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 658 (10th Cir. 1992) *overruled on other grounds by Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137 (10th Cir. 1997).

Nevertheless, the interests of judicial efficiency and fairness weigh in favor of waiting for a mandate from the Tenth Circuit before awarding or denying attorney's fees. The 1993 Advisory Committee's notes to Rule 54(d) are instructive. They state that “[i]f an appeal on the merits of the case is taken, the [district] court may rule on the claim for fees, may defer its ruling on the motion, *or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved.*” Fed.R.Civ.P. 54(d) advisory committee's note (emphasis added).

Here, Plaintiffs acknowledge they filed their motion “in an abundance of caution.” Dkt. 96, footnote 1. The Tenth Circuit has informed counsel that they will be notified if this court desires further briefing prior to disposition of this appeal upon remand. Order, *303 Creative LLC v. Elenis*, No. 19-1413 (10th Cir. August 9, 2023), ECF No. 010110900674. Exhibit A. Judicial efficiency and fairness weigh in favor of waiting for a mandate from the Tenth Circuit before awarding or denying attorney's fees.

### **Conclusion**

Defendants respectfully request that this Court deny Plaintiffs’ attorneys’ fees request without prejudice.

Respectfully submitted August 28, 2023,

PHILIP J. WEISER  
Attorney General

*s/ Alison Faryl Kyles*

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ALISON FARYL KYLES  
Assistant Solicitor General

VINCENT E. MORSCHER  
Senior Assistant Attorney General

JACK D. PATTEN  
Second Assistant Attorney General

BILLY LEE SEIBER  
First Assistant Attorney General

Attorneys for Defendants

Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10th Floor  
Denver, Colorado 80203  
Telephone: 720-508-6000  
E-Mail: [Alison.Kyles@coag.gov](mailto:Alison.Kyles@coag.gov)  
[Vincent.Morscher@coag.gov](mailto:Vincent.Morscher@coag.gov)  
[Jack.Patten@coag.gov](mailto:Jack.Patten@coag.gov)  
[Billy.Seiber@coag.gov](mailto:Billy.Seiber@coag.gov)

\*Counsel of Record

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of August 2023, I electronically filed the foregoing 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*  
Linda Ruth Carter, Paralegal

**EXHIBIT A**

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**August 9, 2023**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert  
Clerk of Court**

303 CREATIVE LLC, a limited liability  
company, et al.,

Plaintiffs - Appellants,

v.

AUBREY ELENIS, et al.,

Defendants - Appellees.

No. 19-1413  
(D.C. No. 1:16-CV-02372-MSK-CBS)  
(D. Colo.)

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FOUNDATION FOR MORAL LAW, et  
al.,

Amici Curiae.

**ORDER**

Before **TYMKOVICH, BRISCOE**, and **MURPHY**, Circuit Judges.

The Supreme Court of the United States entered a judgment on June 30, 2023 reversing the judgment of this court and remanding the cause for further proceedings.

Upon further consideration, the mandate issued to the United States District Court for the District of Colorado on August 17, 2021 is recalled and the judgment of this court filed July 26, 2021 is vacated.

Counsel will be notified if this court desires further briefing prior to disposition of this appeal upon remand.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk