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**Attorneys for Plaintiffs
and Appellants**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOCIETY OF SEPARATIONISTS, a non-
profit Maryland corporation; et al

:

Case No. 02:03-CV-0839

Plaintiffs,

:

vs.

:

REPLY RE:
PLAINTIFFS'
MOTION TO DISMISS

PLEASANT GROVE CITY,
a municipal corporation;

:

JIM DANKLEF, Mayor; CAROL HARMER, City
Council Member; JEFF WILSON, City Council
Member; G. KEITH CORRY, City Council
Member; DAROLD McDADE, City Council
Member; MARK ATWOOD, City Council
Member; and, FRANK MILLS, City Administrator,

:

Judge Bruce S. Jenkins

Defendants.

:

:

THE PLAINTIFFS, SOCIETY OF SEPARATIONISTS, INC., G. GASTER and R.

KELSEY, by and through counsel moved this Court to dismiss the above captioned matter

pursuant to the Federal Rules of Civil Procedure. Doc. # 51. Defendants have responded. Doc. # 53. Plaintiffs reply in further support of their motion as follows:

1. Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir. 1973) is not longer controlling law in the 10th Circuit.

Society of Separationists filed for judgment on the pleadings, despite a belief that the district court would rule against them, based on a desire to expedite appellate review. They hoped to persuade us to overturn our decision in Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir.1973) (upholding a municipal Ten Commandments display). Anderson is now superceded by Van Orden and McCreary.

Society of Separationists v. Pleasant Grove, 416 F.3d 1239, 1240, n.1, 08/01/2005, rehearing *en banc* denied, 10/11/2005. That was an announced goal, now accomplished, of plaintiffs in their filing of this action.

2. Plaintiffs have made claims under Utah state law which have not been considered or ruled upon by this Court or the Court of Appeals for the 10th Circuit. Those claims should not be dismissed with prejudice.

3. Fed. R. Civ. Pro. 41(d) protects the defendants and will allow an award of attorney fees if these plaintiffs re-file the same claims against these defendants.

WHEREFORE, plaintiffs' motion to dismiss should be granted and the order of dismissal should be without prejudice.

Dated this 17th day of JANUARY 2006.

UTAH LEGAL CLINIC
Attorneys for Plaintiffs

By 

BRIAN M. BARNARD

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing REPLY
RE: PLAINTIFFS' MOTION TO DISMISS to:

PETER STIRBA
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FRANCIS J. MANION
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Attorneys for Defendants
6375 New Hope Road
New Home, Kentucky 40052

on the 17TH day of JANUARY 2006, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Plaintiffs

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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

**SOCIETY OF SEPARATIONISTS, et al.,
Plaintiffs,**

No. 02:03-CV-0839
(Hon. Bruce S. Jenkins)

v.

**PLEASANT GROVE CITY, et al.,
Defendants.**

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO
DISMISS (Doc. 51.)**

Defendants respond as follows to plaintiffs' motion to dismiss, filed on January 11, 2006. (Doc. 51.) Defendants have no objection to the dismissal of this action. This action, however, should be dismissed with prejudice.^{1/}

^{1/} Along with the filing of this response, defendants have filed a motion to abate this court's scheduling order pending the outcome of plaintiffs' motion to dismiss. Should this court deny plaintiffs' motion, defendants request a new scheduling order to permit time to conduct

1. Plaintiffs request that this court enter an order dismissing this action. (Doc. 51.) In their motion, plaintiffs do not indicate whether they seek a dismissal with or without prejudice.

2. Fed. R. Civ. P. 41(a)(2) provides that a district court may dismiss any action by order of the court and on such terms and conditions as the court deems proper. Generally, an order of dismissal, unless otherwise specified in the order, is a dismissal without prejudice. *Id.*

3. According to the United States Court of Appeals for the Tenth Circuit, when a plaintiff does not indicate whether the dismissal is with or without prejudice, a district court should interpret the motion to dismiss. *E.g., GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876, 888 (10th Cir. 2005) (“When a party seeking to voluntarily dismiss a claim pursuant to Rule 41(a)(2) is silent as to whether the dismissal should be with or without prejudice, the district judge is required to interpret the motion one way or the other.”); *United States v. Rockwell International Corp.*, 282 F.3d 787, 810-11 (10th Cir. 2002) (addressing a situation where the government did not request a dismissal without prejudice, and explaining that the district court did not abuse its discretion in granting the dismissal with prejudice).

4. Also, as the Tenth Circuit has explained, when a plaintiff dismisses an action without prejudice, a “district court may seek to reimburse the defendant for his attorneys’ fees because he faces a risk that the plaintiff will refile the suit and impose duplicative expenses upon him. In contrast, when a plaintiff dismisses an action with prejudice, attorneys’ fees are usually

discovery, including the taking of the plaintiffs’ depositions. In light of the pending motion to dismiss, defendants seek to refrain from conducting discovery and from incurring the related expenses, which would have been wasted if this court subsequently dismissed this action.

not a proper condition of dismissal because the defendant cannot be made to defend again.” *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997).

5. Under the circumstances of this action, plaintiffs’ motion to dismiss is properly interpreted as a request to dismiss this action with prejudice.

6. This action has been pending since 2002. In their amended complaint, plaintiffs conceded that their claims were contrary to *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), and *Summum v. Ogden*, 152 F.Supp.2d 1286 (D. Utah 2001) (“*Summum I*”), *aff’d in relevant part*, 297 F.3d 995 (10th Cir. 2002). (Doc. 2 ¶ 22.) Plaintiffs acknowledged that they were filing their amended complaint to seek reconsideration and reversal of *Anderson* and *Summum I*. (*Id.*)

7. Defendants filed their answer and raised various defenses, including the defense that plaintiffs had failed to state a claim on which relief could be granted. (Doc. 5.)

8. Plaintiffs thereafter filed a request for preliminary hearing, with regard to defendants’ defense that plaintiffs’ amended complaint failed to state a claim, and plaintiffs also filed a motion for judgment on the pleadings. (Docs. 3-4.) In their motion, plaintiffs again stated that their action was contrary to the governing decisions in *Anderson* and *Summum I*, and plaintiffs specifically requested a judgment on the pleadings with regard to defendants’ defense that plaintiffs had failed to state a claim. (*Id.*)

9. In response to plaintiffs’ motion for judgment on the pleadings, defendants stated that they did not oppose entry of judgment on the pleadings or the dismissal of plaintiffs’ amended complaint since, as plaintiffs’ had acknowledged, their claims were barred by the governing law in this circuit. (Doc. 9.)

10. In plaintiffs' reply brief, plaintiffs attempted to alter their position by claiming they did not ask this court to enter judgment against them. (Doc. 10.) Yet, in their claim for relief in their reply brief, as in their motion, plaintiffs again specifically requested entry of a judgment on the pleadings. (Docs. 3, 10.)

11. Defendants filed a cross motion for judgment on the pleadings. (Docs. 16-17.) Defendants noted that plaintiffs had alleged that the content of the Ten Commandments monument in the city park in Pleasant Grove City (except for its dedication to the city and county) was identical to the Ten Commandments monument considered and upheld in *Anderson*.^{2/} (*Id.*) Defendants noted that plaintiffs had alleged that the presence of the Ten Commandments monument in the city park in Pleasant Grove City violated the First Amendment to the United States Constitution and Article I, Section 4 of the Utah Constitution. (*Id.*) Defendants explained, however, that plaintiffs had *affirmatively stated* in their amended complaint that their claims were barred by the governing case law. (*Id.*)

12. Plaintiffs filed a response to defendants' motion for judgment on the pleadings to which defendants filed a reply. (Doc. 22.) In their response, plaintiffs did not address, and *therefore conceded*, defendants' argument that plaintiffs could prove no set of facts in support of their claims that would entitle them to relief. (Doc. 22; Doc. 23.) And, plaintiffs did not address, and *therefore conceded*, defendants' argument that their claims are barred by the governing law of this circuit. (Doc. 22; Doc. 23.) Rather than respond to any of defendants arguments,

^{2/} The Fraternal Order of Eagles monument at issue here is also identical, except for its statement of dedication to the municipality, to the monument considered in *Sumnum I*, which in turn was identical to the one in *Anderson*. *Sumnum I*, 152 F.Supp.2d at 1292, 1294.

plaintiffs merely stated that in *plaintiffs' own motion* for judgment on the pleadings that *plaintiffs* did not seek to have their amended complaint dismissed. (Doc. 22; Doc. 23.) Defendants explained that despite the relief *plaintiffs* may have sought in *plaintiffs' motion*, that *defendants*, in contrast, *were seeking* the granting of *defendants' cross motion* for judgment on the pleadings, which would necessarily result in the dismissal of plaintiffs' amended complaint because plaintiffs could prove no set of facts in support of their claims that would entitle them to relief. (Doc. 22; Doc. 23.)

13. After an April 2004 hearing on the pending motions, this court issued its order, which explained that *Anderson* directly addressed the legal issue raised in plaintiffs' amended complaint. (Doc. 34.) This court granted defendants' motion for judgment on the pleadings as to plaintiffs' federal constitutional claims and dismissed without prejudice plaintiffs' state constitutional claims. This court denied plaintiffs' cross-motion for judgment on the pleadings. (*Id.*)

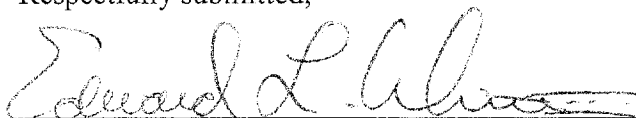
14. Plaintiffs then appealed this court's decision to the Tenth Circuit, where the case was fully briefed and oral argument conducted. In light of the supervening Supreme Court cases in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), and *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), the Tenth Circuit recently remanded this action for further consideration. *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005).

15. Now that the action has been remanded, plaintiffs seek the entry of an order dismissing this action against them. Plaintiffs offer no reasons for the requested dismissal. (Doc. 51.)

16. Defendants have no objection to the entry of a dismissal. Yet, the entry of dismissal should be with prejudice. Defendants should not have to be subjected to another lawsuit over these same issues in the future by these same plaintiffs. *See Aerotech, Inc.*, 110 F.3d at 1528.

In sum, defendants do not object to the granting of plaintiffs' motion to dismiss. This case should be dismissed with prejudice, however.

Respectfully submitted,



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Defense counsel

Dated: January 13, 2006


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was caused to be served on January 13, 2006, to the following counsel by the method of service indicated under each address:

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v.

**PLEASANT GROVE CITY, et al.,
Defendants.**

**DEFENDANTS' MOTION TO
ABATE THIS COURT'S
SCHEDULING ORDER AND
INCORPORATED LEGAL
BRIEF**

Defendants move this court to abate the scheduling order in this case, including the time limits to conduct discovery, pending the resolution of plaintiffs' motion to dismiss this action, (Doc. 51), and, if necessary, to issue a new scheduling order, which would include a new discovery cut-off date that would afford defendants sufficient time to conduct discovery in this action.

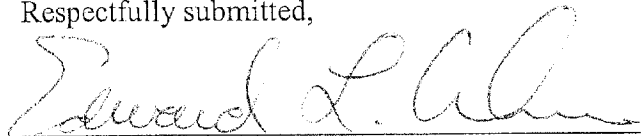
1. On January 5, 2006, this court issued the scheduling order in this case. (Doc. 50.) Pursuant to that order, discovery closes in this action on March 31, 2006.

2. On January 11, 2006, plaintiffs filed a motion to dismiss this action. (Doc. 51.) Defendants have filed a response to the motion. (Doc. 52.)

3. If this action is not dismissed, defendants intend to engage in discovery, including taking the depositions of plaintiffs. In light of the pending motion to dismiss, however, defendants do not want to engage in such discovery, and incur the related expenses, if this action is to be dismissed by this court.

Accordingly, defendants respectfully request that this court abate its scheduling order pending the resolution of plaintiffs' motion to dismiss. Should this court deny plaintiffs' motion to dismiss, defendants respectfully request that this court hold a scheduling conference and that a new scheduling order issue, which would include sufficient time to allow defendants to conduct discovery in the defense of this action.

Respectfully submitted,



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