IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NORTH IDAHO BUILDING CONTRACTORS ASSOCIATION, an Idaho non-profit corporation; TERMAC CONSTRUCTION, INC., an Idaho corporation, behalf of itself and all others similarly situated; and JOHN DOES 1-50, whose true names are unknown. *Plaintiffs,* *v.* **CITY OF HAYDEN, an Idaho municipality** *Defendant.*	**CASE NO. CV-12-2818** **ORDER ON PLAINTIFF APPLICATION FOR COSTS AND FEES**

INTRODUCTION

This order stems from the entry of final judgment on this case on April 11, 2017. *See Second Amended Judgment.* Following the entry of judgment, Plaintiffs filed a Memorandum of Costs and Attorneys' Fees, accompanied by a Memorandum of Law in Support of Award of Costs and Fees on May 8, 2017 (hereinafter "*Memorandum in Support*"). Plaintiffs' motion requested attorneys' fees as the prevailing party under 42 U.S.C. § 1988, Idaho Rules of Civil Procedure Rule 54(e), Idaho Code §§ 12-117 and 121. Further, Plaintiffs requested costs as a matter of right under Idaho Rules of Civil Procedure Rule 54(c), and discretionary costs under Idaho Rules of Civil Procedure Rule 54(d).

For the reasons discussed below, Plaintiffs' application for attorneys' fees under 42 U.S.C. § 1988 is granted in part and denied in part. Plaintiffs' request for attorneys' fees pursuant to Rule 54(e), and Idaho Code §§ 12-117 and 121 is denied. Plaintiffs' request for costs as a matter of right is granted, and Plaintiffs' request for discretionary costs under Rule 54(d) is granted.

FACTS AND PROCEDURAL HISTORY

On June 4, 2012, Plaintiffs filed suit against Defendant, challenging the Defendant's ability to raise revenue through an increase in its sewer capitalization fees. Defendant moved for summary judgment in October, 2012. Summary judgment was granted in favor of the Defendant on October 23, 2013. Plaintiffs appealed the judgment to the Idaho Supreme Court. The Idaho Supreme Court vacated the judgment in favor of the Defendant, and held the increase in the sewer capitalization fees constituted an "impermissible tax." *See North Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 158 Idaho 79, 343 P.3d 1086 (2015).

On remand to the district court, Plaintiffs argued that the Idaho Supreme Court's decision was dispositive. On August 17, 2015, the district court issued a Memorandum Decision Regarding Proceedings Following Remand. There, the court determined there was no motion before the court, and declined to make a ruling under the Idaho Rules of Civil Procedure. *See Memorandum Decision Regarding Proceedings Following Remand,* at 3. The district court held the parties were returned to their positions prior to the summary judgment motion. *Id.*

Following that decision, Defendant filed a Motion for Summary Judgment on September 18, 2015. Plaintiff filed its Motion for Summary Judgment on January 19, 2016. On February 29, 2016, the district court issued a Memorandum Decision on Cross-Motions for Summary Judgment. *See Memorandum Decision on Cross-Motions for Summary Judgment* (hereinafter

"*Decision on Cross-Motions*"). There, the district court granted summary judgment in favor of Plaintiffs, and denied Defendant's motion for summary judgment. Defendant filed a Third Motion for Summary Judgment on May 17, 2016. Among other things, Defendant argued that the state law claims at issue should fail because Plaintiffs had not complied with the Idaho Tort Claims Act. On July 15, 2016, Defendant's Third Motion for Summary Judgment was granted in part and the state law claims were dismissed. *See Memorandum Decision on Defendant's Motion for Summary Judgment*, at 15. On September 2, 2016, Plaintiff's motion for class certification was granted. A final amended judgment was entered on April 11, 2017, which declared that Defendant's increase in sewer capitalization fees constituted a taking under 42 U.S.C. §1983. *See Second Amended Judgment*, at 1. Plaintiffs' class members were also awarded a money judgment of $729,403.58. *Id*.

On May 8, 2017, Plaintiffs filed a request for attorneys' fees and costs. On May 22, 2017, Defendant filed a Motion to Disallow Attorney Fees and Costs, accompanied by a Memorandum of Law in Support of City's Motion to Disallow Attorney Fees and Costs (hereinafter "*Memorandum to Disallow Attorney Fees*"). On June 23, 2017, Plaintiffs filed a response to Defendant's motion. On June 30, 2017, Defendant filed a reply memorandum. On September 12, 2017, a hearing on Defendant's Motion to Disallow Attorney Fees and Costs was held before the Honorable Judge Cynthia K.C. Meyer. Defendant was represented by Martin Hendrickson of Givens Pursley, LCC. John Cafferty of Hawley Troxell was also present on behalf of Defendant. Plaintiffs were represented by Jason S. Risch, of Risch Pisca, PLLC.

STANDARD OF REVIEW

Plaintiffs' claims for attorneys' fees and costs are subject to the Court's discretion. The award of attorneys' fees under 42 U.S.C. § 1988 is reviewed under an abuse of discretion

standard. *Nation v. State Dept. of Correction*, 144 Idaho 177, 158 P.3d 953 (2007); *see also Miller v. Ririe Joint School Dist. No. 252,* 132 Idaho 385, 973 P.2d 156 (1999). "Any elements of legal analysis which figure in the district court's decision are, however, subject to de novo review." *Miller*, 132 Idaho at 387, 973 P.2d at 158. Similarly, an award of attorneys' fees under Idaho Code §§12-117 and 12-121 are also subject to an abuse of discretion standard on appeal. *See City of Osborn v. Randel,* 152 Idaho 906, 277 P.3d 353 (2012). Finally, an award of discretionary costs under Idaho Rule of Civil Procedure 54 is reviewed for an abuse of discretion. *See Hayden Lake Fire Protection Dist. v. Alcorn,* 141 Idaho 307, 109 P.3d 161 (2005).

DISCUSSION

Plaintiffs request attorneys' fees under 48 U.S.C. § 1988, Idaho Rules of Civil Procedure Rule 54(e), Idaho Code §§ 12-117 and 121. *See generally Plaintiffs' Memorandum of Law in Support of Attorney Fees and Costs* (hereinafter "*Memorandum in Support*"). Plaintiffs also request costs as a matter of right and discretionary costs pursuant to Idaho Rules of Civil Procedure Rule 54(c) and (d). In order for Plaintiffs to obtain the costs and fees they request, the Court must make an initial determination that Plaintiffs were the prevailing party in the action. *See generally Hanrahan v. Hampton,* 446 U.S. 754, 755 (1980)("[T]he statute by its terms thus permits the award of attorney's fees only to a 'prevailing party."); *see also Kelly v. Wengler,* 7 F.Supp.3d 1069, (D. Idaho 2014);

I. Plaintiffs are the prevailing party with respect to the section 1983 claim, and are entitled to "reasonable attorney fees" pursuant to 42 U.S.C. § 1988.

Under 42 U.S.C. § 1988, "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. Generally, in order for a party to recover attorneys' fees under section 1988, the party must be

considered the prevailing party in the action. *See generally* 42 U.S.C. § 1988. A party is considered to be the prevailing party "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Lefemine v. Wideman*, 568 U.S. 1, 2 (2012) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). Generally, "an injunction or declaratory judgment, like a damages award, will . . . satisfy that test." *Id.* at 2.

In *Lefemine*, the Supreme Court held that a plaintiff was a prevailing party because the declaratory judgment entered in his favor "ordered the defendant officials to change their behavior in a way that directly benefited the plaintiff." *Lefemine v. Wideman*, 568 U.S. 1, 2 (2012). The *Lefemine* court held that "an injunction or declaratory judgment" established the plaintiff as the prevailing party, based on Supreme Court precedent. 568 U.S. at 2 (citing *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988)). Specifically, the fact that the "District Court held that the defendants had violated Lefemine's rights and enjoined them from engaging in similar conduct in the future." *Id.*

Here, as in *Lefemine*, a declaratory judgment was entered in favor of Plaintiffs' section 1983 claim. *See Second Amended Judgment.* Further, Defendants concede that Plaintiffs are the prevailing party with respect to their section 1983 claim. *See Memorandum to Disallow Attorney Fees*, at 2, 4. Thus, Plaintiffs are considered the prevailing party with respect to their federal claim, and are entitled to attorneys' fees under 42 U.S.C. § 1988.

II. Plaintiffs have failed to satisfy their burden to establish that they are entitled to the amount of attorneys' fees requested.

"Section 1988 provides that a prevailing party in certain civil rights actions may recover 'a reasonable attorney's fee as part of the costs.'" *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542, 550 (2010). "[T]he statute does not explain what Congress meant by a 'reasonable' fee . . .

and the task of identifying an appropriate methodology for determining a 'reasonable' fee was left for the courts." *Perdue,* 559 U.S. at 550. Generally, "[t]he district court has a great deal of discretion in determining the reasonableness of the fee . . . including its decision regarding the reasonableness of hours claimed by the prevailing party." *Gates v. Deukmejian,* 987 F.2d 1392, 1398 (9th Cir. 1992). "Despite this general deference, the district court is required to articulate not only the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party's claimed hours or to the lodestar." *Gates,* 987 F.2d at 1398. "In setting a reasonable attorney's fee, the district court should make specific findings as to the rate and hours it has determined to be reasonable." *Kelly v. Wengler*, 7 F.Supp. 3d 1069, 1074 (D. Idaho 2014).

The United States Supreme Court has held that "the proper first step in determining a reasonable attorney's fee is to multiply the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986)(internal quotation marks and citation omitted). Thus, "a critical inquiry in determining a reasonable attorneys' fee for the purposes of § 1988 is the reasonable hourly rate." *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987)(footnote omitted). Generally, "the prevailing market rate in the community is indicative of a reasonable hourly rate." *Jordan,* 815 F.2d at 1262. "Reasonable fees under § 1988 are calculated according to the prevailing market rates in the relevant legal community." *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992).

Under section 1988, "the fee applicant bears the burden of establishing entitlement to an award." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). Specifically, the fee applicant has the burden to "produce satisfactory evidence – *in addition to the attorney's own affidavits* – that the

requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience[,] and reputation." *Blum v. Stenson,* 465 U.S. 886, 895 n. 11 (1984)(emphasis added); *See also Jordan,* 815 F.2d at 1263. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley,* 461 U.S. at 433. "If the applicant satisfies its burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." *Jordan,* 815 F.2d at 1263; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 564 (1986).

The Ninth Circuit Court of Appeals has vacated the district court's award of attorney's fees under section 1988 when the "district judge made no finding on the sufficiency of the evidence," and instead "applied an unsupported 'range' hourly rate to a 'range' of hours to arrive at a fee that he deemed reasonable." *Jordan v. Multnomah County,* 815 F.2d 1258, 1263 (9th Cir. 1987). In *Jordan,* the prevailing party had provided the district court "with evidence in addition to . . . affidavits . . . to show that the claimed rates were in line with those prevailing in the community," as well as records that were "sufficient[ly] detail[ed] that a neutral judge [could] make a fair evaluation of the time expended, the nature and need for service, and the reasonable fees to be allowed." *Jordan,* 815 F.2d at 1263. The *Jordan* court reversed the district court because the district court "remain[ed] silent on how she or he reached the 'reasonableness' conclusion." *Id.*

In contrast to *Jordan,* the Plaintiffs have not provided the Court with sufficient documentation that would allow "a neutral judge [to] make a fair evaluation of . . . the reasonable fees to be allowed." Specifically, Plaintiffs have not furnished the Court with affidavits or other evidence to show that the attorneys' fees they are requesting are 'in line' with the prevailing

market rates in Kootenai County. It is worth noting that Plaintiffs *did* provide the Court with sufficiently detailed timekeeping records. *See Memorandum in Support,* at Ex. B. However, Plaintiffs have not met the burden of showing that the claimed hourly rates are reasonable under *Jordan.*

The Court would be inclined to deny attorney's fees to the Plaintiffs on this basis, however Defendant conceded that Plaintiffs are entitled to attorney's fees under section 1988, and is only contesting the reasonableness of the amount of attorney's fees requested. *See Memorandum to Disallow Attorney Fees,* at 4-5.

A. The Lodestar Amount

The lodestar amount "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983). "The lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A. ex. rel. Winn,* 559 U.S. 542, 551 (2010). Generally, the district court determines a reasonable fee based on the lodestar amount, which can be adjusted upward or downward based on the *Johnson* factors that are not considered to be 'subsumed' in the initial lodestar calculation. *See generally Cunningham v. County of Los Angeles,* 879 F.2d 481, 483 (9th Cir. 1988) (citation omitted); *see also Jordan,* 815 F.2d at 1262. The *Johnson* factors include:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly
(4) the preclusion of employment by the attorney due to the acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983) (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 90 (1989) (holding that contingency-fee agreements did not serve as a cap on the award of attorneys' fees under § 1988)).

The lodestar amount is calculated by multiplying a reasonable number of hours expended on the litigation by a reasonable hourly rate. *See Hensley,* 461 U.S. at 434. The following factors cannot serve as an independent basis for adjusting a fee award, as they are taken into account in the initial lodestar calculation: "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained." *Jordan,* 815 F.2d at 1262 n.6 (citing *Blum v. Stenson,* 465 U.S. 886, 898-900 (1984)). "A strong presumption exists that the lodestar figure represents a reasonable fee." *Kelly v. Wengler,* 7 F.Supp. 3d 1069, 1074 (D. Idaho 20145).

Here, the Court adopts Defendant's calculation of the initial lodestar amount of $219,707.77. *Memorandum to Disallow Attorney Fees*, at 9. Defendant does not contest the amount of hours spent by Plaintiffs on this case, and concedes that 857.2 hours is a reasonable number of hours. *See Memorandum to Disallow Attorney Fees,* at 7; *See also Affidavit of Jason S. Risch,* at Ex. B (hereinafter "*Risch Affidavit*"). The Court agrees that 857.2 hours is a reasonable number of hours to spend, given the nature of the case, and the length of the litigation.

As Plaintiff has not provided documentation relating to the prevailing market rate for similar services, but Defendant concedes that $283.61 is a reasonable hourly rate for Mr. Risch to charge, based on his skill, experience, and role as lead counsel. *Memorandum to Disallow Attorney Fees,* at 7. Based on Defendant's concession, the Court finds that $283.61 is a reasonable hourly rate for Mr. Risch.

Plaintiff has not provided the Court with evidence establishing what the hourly rate charged for Mr. Jameson's work on this case would have been, given that the Plaintiffs had a contingency-fee arrangement. As the Defendant pointed out, Mr. Jameson had less experience as a practitioner at the time of the suit than Mr. Risch. Based on Defendant's concession, the Court finds that a reasonable hourly rate for Mr. Jameson would be $200 per hour, taking into account the difficulty of the case and Mr. Jameson's skill and experience at the time of the litigation.

B. The lodestar amount does not warrant adjustments either upward or downward based on the remaining *Johnson* factors.

"After calculating the lodestar, the trial court may, pursuant to *Hensley,* 'adjust the fee upward or downward,' taking into account the . . . other factors articulated in *Johnson* which are not subsumed in determining the lodestar." *Stanley v. McDaniel,* 128 Idaho 343, 348, 913 P.2d 76, 81 (Idaho Ct. App. 1996). The Court analyses the other *Johnson* factors as follows:

1. The time and labor required.

Defendant concedes that the amount of time spent on this case, approximately 857.2 hours, is reasonable. *See Memorandum to Disallow Attorney Fees,* at 7.

2. The preclusion of employment by the attorney due to the acceptance of the case.

The Court is neutral as to this factor. No evidence was submitted by either side addressing this factor, and it was not challenged by the Defendant.

3. The customary fee.

The Court is neutral as to this factor.

4. Whether the fee is fixed or contingent.

The Court takes into consideration that the fee agreement in this case was a contingency fee agreement. Plaintiffs submitted evidence that under their contingency-fee agreement they were to receive 33.3% of the award in this case. *See Plaintiffs' Memorandum of Law in Support,* at Ex. A.

5. Time limitations imposed by the client or the circumstances.

The Court is neutral as to this factor.

6. The "undesirability" of the case.

The Court is neutral as to this factor.

7. The nature and the length of the professional relationship with the client.

The Court is neutral as to this factor.

8. Awards in similar cases.

The Court is neutral as to this factor.

The lodestar amount does not warrant adjustment based on the above factors. Further, "[t]he burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant." *Blum v. Stenson*, 465 U.S. 886, 898 (1984). Here, Plaintiffs have not claimed that an upward revision of the lodestar amount is necessary. *See Memorandum in Support.* Defendant argues that the Court should reduce the lodestar amount to $173,293.40, based on Plaintiffs' lack of success regarding the state law claims. *Memorandum to Disallow Attorney Fees*, at 11. The Court declines to reduce the attorney's fee award further, as the results obtained are part of the initial calculation of the lodestar.

III. Plaintiffs are not entitled to attorney's fees under Idaho law; specifically, under Idaho Code §§ 12-171 and 121.

Under Idaho Rule of Civil Procedure 54(e), the court "may award reasonable attorney fees . . . to the prevailing party or parties as defined in Rule 54(d)(1)(B) when provided for by any statute or contract." I.R.C.P. 54. Rule 54(d)(1)(B) requires that the trial court determine which party is the prevailing party by, "in its sound discretion, consider[ing] the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54. Further,

> [t]he trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

I.R.C.P. 54.

Generally, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Jorgensen v. Coppedge*, 148 Idaho 536, 539, 224 P.3d 1125, 1128 (2010) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 120, 133 (2005). Further, "[t]he determination of prevailing party status is committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion." *Jorgensen*, 146 Idaho at 538, 224 P.3d at 1127 (quoting *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009).

In *Jorgensen*, the Idaho Supreme Court upheld the district court's decision to deny attorneys' fees because "there was no prevailing party in the case." *Jorgensen*, 148 Idaho at 538, 224 P.2d at 1127. The *Jorgensen* court looked to the fact that "the [Plaintiffs] prevailed on the breach of contract claim and [the Defendant] successfully defended against the fraud, breach of contract, unfair competition, and intentional interference with business advantage

counterclaims." *Id.* The *Jorgensen* court held that the district court "did conduct the appropriate inquiry regarding prevailing party status for attorney fee purposes, [and] he made the discretionary call that neither party had prevailed." *Id.* at 540, 224 P.3d at 1129.

Here, Defendant argues that Plaintiffs should not be considered the prevailing party under Idaho Rules of Civil Procedure 54, because the majority of Plaintiffs state law claims were dismissed. *See Memorandum to Disallow Attorney Fees,* at 11-13, 17-18. Even if Defendant were successful in obtaining the dismissal of several of Plaintiffs' state law claims, in the "overall view" of the case Plaintiffs are the prevailing party under Idaho law because a final declaratory judgment was entered in favor of Plaintiffs. However, for reasons discussed below, Plaintiffs are not entitled to attorneys' fees under Idaho Rule 54(e). *See* Section III, *infra.*

Generally, in order for the prevailing party to be entitled to an award of attorneys' fees under Idaho Code §§ 12-117 or 121, "the party seeking the fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *City of Osborn v. Randel,* 152 Idaho 906, 909, 277 P.3d 353, 356 (2012); *see also* Idaho Code § 12-117(1)-(2). Under Idaho Code § 12-121, "the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Idaho Code § 12-121.

In *O'Boskey v. First Federal Savings & Loan Ass'n of Boise,* the Idaho Supreme Court upheld the district court's award of attorneys' fees under Idaho Code § 12-121 because the defense asserted by the defendant "was unreasonable." 112 Idaho 1002, 1009, 739 P.2d 301, 308 (1987). There defendant raised defenses that were "never an issue" in the case; specifically whether or not the plaintiff in the case "was qualified to . . . take out a new loan," when the issue in the case was "*impairment of security*." *Id.* at 1009, 739 P.3d at 308. Further, the Idaho

Supreme Court upheld the award of attorneys' fees on appeal because the appeal was "unreasonable and without foundation." *Id.* at 1010, 739 P.2d at 309.

Here, Plaintiffs are not entitled to attorneys' fees under Idaho Code §§ 12-117 and 121 because Defendant did not defend this case "unreasonab[ly]" or "frivolously" under *O'Boskey.* In contrast to *O'Boskey,* Defendant's defenses were reasonable. Specifically, Defendant points to the fact that the Defendant was "successful in having the [Plaintiffs'] state law claims dismissed, resulting in the application of a two year statute of limitations being applied to the remaining federal claims and significantly limiting the damages that could be awarded." *Memorandum to Disallow Attorney Fees,* at 19. Plaintiffs argue that they should be awarded attorneys' fees under Idaho Code §§ 12-117 and 121 because of Defendant's attempts to "do over" or re-litigate the holding that the increase in sewer capitalization fees constituted an impermissible tax. *See Plaintiffs' and Class Members' Reply to City's Objection to Plaintiffs' Application for Costs and Fees,* at 4-5; and *Plaintiffs' Memorandum of Law in Support,* at 6, 7. Even if Defendant's sewer capitalization fee was held to be unconstitutional by the Idaho Supreme Court, it does not follow that Defendant's approach to the case was "without foundation."

IV. Plaintiffs' are entitled to costs as a matter of right under Rule 54(d)(1)(C).

Generally, "[e]xcept when otherwise limited by [the Idaho Rules of Civil Procedure], costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." Idaho Rules of Civil Procedure Rule 54(d). Under Rule 54(d)(1)(C), the prevailing party is entitled to costs including "court filing fees," and "actual fees for service of any pleading or document in the action." I.R.C.P. 54.

Here, Defendant concedes that Plaintiffs are entitled to costs as a matter of right under Idaho Rules of Civil Procedure 54. *Memorandum to Disallow Attorney Fees,* at 2. Plaintiffs are

entitled to the following costs: the court filing fee of $88, and the cost of service on the Defendant of $50. Plaintiffs are entitled to costs totaling $138.00 under Rule 54(d)(1)(C).

V. Plaintiffs' discretionary costs are "reasonable," "necessary," and "exceptional" under Rule 54(d)(1)(D). It is "in the interest of justice" for the Court to grant Plaintiffs' request for discretionary costs.

"Except when otherwise limited by the Idaho Rules of Civil Procedure, costs shall be awarded as a matter of right to the prevailing party." *Evans v. State,* 135 Idaho 422, 432, 18 P.3d 227, 237 (Idaho Ct. App. 2001). Under Rule 54(d)(1)(D), discretionary costs "may be allowed on a showing that the costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party." I.R.C.P. 54. "Discretionary costs may include long distance phone calls, photocopying, faxes, travel expenses[,] and additional costs for expert witnesses." *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (internal quotation marks and citation omitted). "A court may evaluate whether the costs are exceptional within the context of the nature of the case." *City of McCall v. Seubert,* 142 Idaho 580, 587, 130 P.3d 1118,1126 (2006). "[I]n ruling on objections to discretionary costs, [the trial court] must make express findings as to why the item of discretionary cost should or should not be allowed." I.R.C.P. 54.

"The grant or denial of discretionary costs is committed to the sound discretion of the trial court, and will only be reviewed by an appellate court for an abuse of that discretion." *Seubert,* 142 Idaho at 588, 130 P.3d at 1126. Further, "[t]he burden is on the party opposing the award to demonstrate an abuse of discretion and, 'absent an abuse of discretion, the district court's award of costs will be upheld.'" *Richard J. and Esther E. Wooley Trust v. DeBest Plumbing Inc.,*133 Idaho 180, 186, 983 P.2d 834, 840 (Idaho 1999) (quoting *Zimmerman v. Volkswagen of America, Inc.,*128 Idaho 851,857, 920 P.2d 67, 73 (1996)) (hereinafter "*Wooley Trust*"). When a trial

court's discretionary decision is reviewed on appeal, the appellate court conducts a three-party inquiry to determine:

> (1) whether the lower court correctly perceived the issue as one of discretion;
> (2) whether the lower court acted consistently within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and
> (3) whether the court reached its decision by an exercise of reason.

Id. at 186, 983 P.2d at 840.

In *Wooley Trust*, the Idaho Supreme Court held that it was not an abuse of discretion for the district court to award discretionary costs to the Defendant for a consulting fee and photographs related to expert witness testimony, and travel expenses for counsel. *Richard J. and Esther E. Wooley Trust v. DeBest Plumbing Inc.*,133 Idaho 180, 186, 983 P.2d 834, 840 (Idaho 1999). The *Wooley Trust* court held that "[d]iscretionary costs under Rule 54(d)(1)(D) can include travel expenses along with other expenses such as photocopying, faxes, postage and long distance telephone calls." *Id.* at 187, 983 P.2d at 841. *Wooley Trust* held the award of discretionary costs by the district court followed "the appropriate legal standard," and met the three-part test established in *Zimmerman*. *Id.* at 187, 938 P.2d at 841. The *Wooley Trust* court explained that the *Fish* decision did not hold that "expert fees and travel costs are not exceptional," as a rule, but that those costs "were not exceptional" in the context of the *Fish* case. *Id.* at 186-87, 938 P.2d at 840-41.

As in *Wooley Trust,* here the Plaintiffs' discretionary costs of $838.78 were necessary, exceptional, and reasonably incurred. The cost of publication and notification were necessary to the litigation, in order to notify potential Class members and for Plaintiffs' to be certified as a Class. These costs fall within discretionary costs as outlined in *Wooley Trust.* 133 Idaho at 187, 983 P.2d at 841. The cost of notification and publication were reasonably incurred by the

Plaintiffs. Further, the cost of notification and publication were exceptional in this case based on the nature of class action lawsuits. As the court stated at the hearing on the Motion for Clarification and Notice of Class Certification, class action lawsuits are rare in Kootenai County, and thus the costs incurred for publication and notification were exceptional.

CONCLUSION

For the above stated reasons, is hereby:

ORDERED that Plaintiffs' Application for Costs and Attorneys' Fees is granted in part and denied in part. Plaintiffs are awarded attorney's fees in the amount of $219,707.77, the amount conceded by Defendant to be an appropriate lodestar amount, and thus presumptively reasonable. Plaintiffs are also awarded costs as a matter of right in the amount of $138.00 and discretionary costs in the amount of $838.78.

DATED this 19th day of October, 2017.

BY THE COURT:

/s/
Cynthia K.C. Meyer
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was placed in the courthouse mailing system, postage prepaid, inter office mail, or by facsimile on the ____ day of October, 2017 to:

Christopher H. Meyer
Martin C. Hendrickson
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Facsimile: (208) 388-1200

[ ] U.S. Mail
[ ] Fax
[ ] Email

Jason S. Risch
RISCH PISCA, PLLC
Attorneys at Law
407 West Jefferson Street
Boise, Idaho 83702-6012
Facsimile: (208) 345-9928

[ ] U.S. Mail
[ ] Fax
[ ] Email

BY: _____
Deputy Clerk