No. 19-5276

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM H. THOMAS, JR., Plaintiff-Appellee,

v.

JOHN SCHROER, Commissioner of Tennessee Department of Transportation, Defendant-Appellant,

and

JOHN H. REINBOLD; PATTI C. BOWLAN; ROBERT SHELBY; SHAWN BIBLE; and CONNIE GILLIAM, Defendants,

and

GEORGE R. FUSNER, JR. and JONATHAN L. MILEY, Proposed Intervenors.

On Appeal from the United States District Court for the Western District of Tennessee No. 2:13-cv-02987-JPM-cgc

MOTION TO DISMISS APPEAL

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Sixth

Circuit Rules 27(d) and 45(a)(8), Plaintiff-Appellee William Thomas respectfully

moves to dismiss Mr. Schroer's appeal. As follows, Mr. Schroer has doubly forfeited¹ the appeal and this Court lacks jurisdiction:

Mr. Schroer forfeited any appeal that Mr. Thomas is the prevailing party

1. Mr. Schroer forfeited any appeal of the district court's decision that Mr. Thomas was the prevailing party, as Mr. Schroer already appealed the order underlying that decision, at Case No. 17-6238. Yet the only issue in this appeal is whether Mr. Thomas "is a prevailing party." ECF No. 4 at 1.

2. The district court held that Mr. Thomas was the prevailing party in its Order Denying Motion for Reconsideration and Order Concerning Remedies. *See* RE 374 at 21-22 (PageID ## 7211-12). That omnibus order also rejected the State's untimely motion to reconsider severability, *see id.* at 5 (PageID # 7195), and ruled on multiple requests for relief by Mr. Thomas. In particular, the district court granted Mr. Thomas an injunction protecting his Crossroads Ford sign and attorney's fees for Mr. Thomas's first counsel in the district court litigation (from the firm Webb, Klase & Lemond). *Id.* at 20 and 21-24 (PageID ## 7210 and 7211-14).

¹ Although courts sometimes use the terms "forfeiture" and "waiver" interchangeably, the Supreme Court has noted a "distinction between defenses that are 'waived' and those that are 'forfeited." *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012). In particular, "[a] waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." *Id.* Because Mr. Schroer's actions and the applicable precedent concern forfeiture under the Supreme Court's definition, Mr. Thomas uses that term throughout this motion.

3. Mr. Schroer already appealed the Order Denying Motion for Reconsideration and Order Concerning Remedies. *See* Notice of Appeal, RE 381 (PageID # 7603) (noting appeal from final judgment and "the earlier orders on which that judgment is based ([RE] 356, 374, 375)"). That appeal was docketed with this Court as Case No. 17-6238, the parties fully briefed the issues then raised by Mr. Schroer, and oral argument was held on January 30, 2019. *See* Case No. 17-6238, ECF Nos. 24, 32, 48, and 69).

4. Although the district court specifically named Mr. Thomas the prevailing party and granted fees as part of the judgment and orders already appealed, Mr. Schroer did not raise those issues in his appeal. *See* Case No. 17-6238, ECF No. 9.² Nor did Mr. Schroer raise whether Mr. Thomas was a prevailing party in any of his briefing in that appeal. *See* Case No. 17-6238, ECF Nos. 24 and 48.

5. With limited exceptions not applicable here, "a party is entitled to a single appeal," *Dig. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994), and therefore "must ordinarily raise all claims of error in a single appeal," *Firestone Tire*

² In the current appeal, Mr. Schroer challenges the district court's Order Adopting the Report and Recommendations for Attorneys' Fees "entered on March 13, 2019 ([RE] 425)." RE 426 at 1 (PageID # 7970). Neither that order nor the underlying magistrate judge's report reconsidered the district court's ruling that Mr. Thomas was the prevailing party. *See* RE 425 (PageID ## 7963-69); RE 409 (PageID ## 7809-33); *cf.* RE 409 at 3 (PageID # 7811) (noting that the district court had already concluded that Mr. Thomas was the prevailing party).

& Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). Under this fundamental rule, this and other courts have therefore dismissed as duplicative multiple appeals from the same order. See, e.g., United States v. Stephenson, No. 91-5074, 1991 U.S. App. LEXIS 3005, at *2 (6th Cir. Feb. 25, 1991) (unpublished) (dismissing appeal of "the same order"); 6 Cir. R. 45(a)(8) (empowering the Clerk of the Court to dismiss duplicative appeals); see also Contreras-Buritica v. United States, No. 18-2694, 2018 U.S. App. LEXIS 36888, at *1 (3d Cir. Dec. 18, 2018) (unpublished) (holding that a party "may not appeal the same order a second time," such that the second appeal was "not properly before th[e] Court" (quoting United States v. Arlt, 567 F.2d 1295, 1297 (5th Cir. 1978))); United States v. Farmer, 693 F. App'x 239, 239 (4th Cir. 2017) (unpublished) (dismissing "appeal from the same order"); United States v. Fulton, No. 16-14999-E, 2016 U.S. App. LEXIS 24159, at *1 (11th Cir. Oct. 19, 2016) (unpublished) (dismissing as duplicative an appeal from the "same order").

6. Furthermore, Mr. Schroer did not file this duplicative appeal within 30 days of the order it in fact challenges. *See State v. Thrower*, No. 90-4097, 1991 U.S. App. LEXIS 2544, at *2 (6th Cir. Feb. 13, 1991) (unpublished) (dismissing "duplicate appeal" that "was not filed within the 30 day appeal period"); *cf.* Fed. R. App. P. 4(a)(1)(A) (requiring that "the notice of appeal . . . be filed with the district clerk within 30 days after entry of the judgment or order appealed from"). Because

Mr. Schroer is seeking a second appeal from the same order, and because any appeal from that order is untimely, this appeal should be dismissed.

Mr. Schroer forfeited any appeal of the attorney's fees and costs

7. Even if Mr. Schroer were appealing the amount of the fees rather than the prevailing party status, he forfeited that appeal because he failed to object to the magistrate judge's report and recommendations. In his notice underlying the instant appeal, Mr. Schroer stated that he was appealing the district court's Order Adopting the Report and Recommendations for Attorneys' Fees "entered on March 13, 2019 ([RE] 425)." RE 426 at 1 (PageID # 7970).

8. That district court order adopted "in full" the Magistrate Judge's "Report and Recommendations," which concluded that attorney's fees and costs should be paid for Mr. Thomas's later counsel in the district court litigation. RE 425 at 7 (PageID # 7969); *see* RE 409 at 25 (PageID # 7833) (recommending fees and costs related to work done by George Fusner's firm and costs to Mr. Thomas).

9. The Magistrate Judge's Report and Recommendations warned the parties that "[a]ny objections or exceptions to this report must be filed within fourteen (14) days after being served with a copy of the report. 28 U.S.C. § 636(b)(1)(C). Failure to file them within fourteen (14) days may constitute a waiver of objections, exceptions, and any further appeal." RE 409 at 25 (PageID # 7833) (emphasis removed).

10. This Court has held that a party forfeits any appeal of a district court's order adopting a magistrate judge's report and recommendations if that party fails to file objections with the district court. See, e.g., Howard v. Sec'y of Health and Human Servs., 932 F.2d 505, 508-09 (6th Cir. 1991) (holding that both failure to object and merely filing general objections result in forfeiture). The Supreme Court affirmed the Circuit's forfeiture rule, as described in United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See Thomas v. Arn, 474 U.S. 140, 144-45, 155 (1985). This Court has repeatedly used the rule since Walters. See, e.g., Bd. of Trs. v. Moore, 800 F.3d 214, 223 (6th Cir. 2015) (holding that a party forfeited the issue on appeal—an error in the magistrate judge's ruling about the "fiduciary exception"— where the party did not file an objection); Frontier Ins. Co. v. Blaty, 454 F.3d 590, 596 (6th Cir. 2006) (holding appeal forfeited, even though intervenor was not a party before the deadline for objections, because intervenor could have intervened and filed objections at the appropriate time); Trzebuckowski v. City of Cleveland, 319 F.3d 853, 855 (6th Cir. 2003) (holding "state law claims" forfeited on appeal, citing Walters).

11. Because Mr. Schroer did not file objections to the Magistrate Judge's Report, he has forfeited any appeal of the attorney's fees and costs.³

³ Mr. Thomas and intervenor George Fusner have preserved their right to appeal the district court's fees order. *See* RE 414 (PageID # 7873) (noting

This Court lacks jurisdiction over any appeal of the fees and costs awarded

12. Even if Mr. Schroer had not doubly forfeited this appeal, the Court would lack jurisdiction over it as prematurely filed. Under 28 U.S.C. § 1291, this Court has jurisdiction only over final decisions.⁴ When determining whether this Court has jurisdiction over an appeal of a fees award, it must examine when the fees were awarded and whether there was a final decision. *See JPMorgan Chase Bank, N.A. v. Winget*, No. 18-1143, _____, F.3d _____, 2019 U.S. App. LEXIS 10549, at *4-10 (6th Cir. Apr. 10, 2019).

13. When a district court awards fees before it decides the merits of the case, this Court lacks jurisdiction over any appeal of the fees "until final judgment has been entered." *Id.* at *4-5 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)) (internal quotation marks omitted). Similarly, "[w]hen the district court resolves the merits of the case and the issue of fees *together*," the merits and the fees must be appealed at the same time. *Id.* at *5 (emphasis in original).

objections) and RE 416 (PageID #7892) (same). They have not prematurely appealed, however, as the district court's fees order is not final.

⁴ Mr. Schroer has asserted jurisdiction only under 28 U.S.C. § 1291. *See* RE 426 at 1 (PageID # 7970). The other statutory bases for jurisdiction are inapplicable here. The awarding of attorney's fees or prevailing party status is not enumerated in 28 U.S.C. § 1292 as a basis for an interlocutory appeal. And this is not an appeal of a federal agency action under to 28 U.S.C. § 1296.

14. When a district court awards attorney's fees and costs after it decides the merits of the case, however, such post-judgment proceedings are "viewed as a separate lawsuit from the action which produced the underlying judgment." *Id.* at *6 (internal quotation marks omitted) (collecting cases). With post-judgment fees determinations, there is no "final decision' under § 1291 until the district court completes the post-judgment proceedings." *Id.* at *7. In that situation, appellate jurisdiction is triggered only by "the last order to be entered in the action." *Id.* at *10; *see also id.* at *8-9 ("Only if a postjudgment order is apparently the last order to be entered in the action marks omitted)).

15. Mr. Schroer has appealed an order for a post-judgment award of fees, but by its own terms it is not the last order to be entered in the post-judgment action. The district court noted that the appeal on the merits is still pending before this Court, and it decided that "[t]he awarded attorneys' fees will not be payable until the conclusion of the appeal currently before the Sixth Circuit." RE 425 at 7 (PageID # 7969). At that time, the district court will have to calculate post-judgment interest, as well as any fees and costs accrued since the fees order, potentially including attorney's fees and costs from appeals. *See Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 586 (6th Cir. 2002) ("district courts are required to award postjudgment interest"); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482, 485

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(6th Cir. 2001) (noting that "the term 'any money judgment" in 28 U.S.C. § 1961 "include[es] a judgment awarding attorney fees") (collecting cases); 28 U.S.C. § 1961 ("Interest shall be allowed on any money judgment in a civil case recovered in a district court.").

16. Thus, this is not a situation in which there is "nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 571 U.S. 177, 183 (2014). Because there is no final order in the post-judgment fees proceedings, this Court lacks jurisdiction and the appeal should be dismissed.

17. For the reasons above, Mr. Thomas respectfully requests that the Court dismiss Mr. Schroer's appeal on the merits. Should this Court decline to rule on the merits, however, Mr. Thomas respectfully requests that the Court dismiss the appeal for lack of jurisdiction.

Respectfully submitted,

Allen Dickerson

/s/ Owen Yeates

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Dated: April 30, 2019

CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Rule 27(d)(2) of the Federal Rules of Appellate Procedure because it contains 2,029 words (does not exceed 5,200 words), excluding the items and documents exempted by Rules 27(a)(2)(B) and 32(f). It also complies with the typeface and style requirements of Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) of the Federal Rules of Appellate Procedure, because this document has been prepared using a proportionally spaced typeface in Microsoft Word 2016 in Times New Roman, 14-point font.

Dated: April 30, 2019

/s/ Owen Yeates
Owen Yeates

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing MOTION TO DISMISS using the Court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting

service on those attorneys:

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Counsel for John Schroer

Dated: April 30, 2019

/s/ Owen Yeates Owen Yeates

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WILLIAM H. THOMAS, JR.,)
Plaintiff, v.)) No. 13-cv-02987-JPM-cgc
JOHN SCHROER, Commissioner of the Tennessee Department of Transportation in his official capacity, Defendant.	/))))

ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER CONCERNING REMEDIES

Before the Court is Defendant John Schroer, in his official capacity as Commissioner of the Tennessee Department of Transportation ("TDOT"), (hereinafter "the State")'s Rule 54(b) Motion to Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable, filed May 17, 2017. (ECF No. 371.) Plaintiff William H. Thomas, Jr. ("Thomas") filed a response in opposition on May 22, 2017. (ECF No. 373.) Also before the Court is the issue of remedies in this action. (See ECF Nos. 360, 361, 363, 364, 365, 368, 370, & 372.) Thomas specifically requested injunctive relief, declaratory relief, attorneys' fees and costs, pre- and post-judgment interest, restitution of real property, reconsideration of the Court's quasi-immunity determination, and other additional relief. (ECF No. 360.) For the reasons stated below, the Court **DENIES** the State's Motion Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable, and **GRANTS** in part and **DENIES** in part Plaintiff's requests for remedies.

I. BACKGROUND

A. Factual Background

This action concerns First Amendment violations that occurred when agents of the State of Tennessee ("the State") sought to remove Plaintiff William H. Thomas's non-commercial billboard pursuant to the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tennessee Code Annotated §§ 54-21-101, *et seq.* (ECF No. 356.)

B. Procedural Background

On March 31, 2017, the Court found the Billboard Act, as applied to Thomas's noncommercial messages on his Crossroads Ford sign, a violation of the Free Speech provision of the First Amendment of the United States Constitution. (ECF No. 356.) The Court specifically found the Billboard Act's distinction between on-premises/off-premises signs, T.C.A. §§ 54-21-103(1)-(3) and §§ 54-21-107(a)(1)-(2), constituted an unconstitutional content-based restriction on speech. The procedure and background preceding the Court's March 31, 2017 Order can be found at ECF No. 356 at PageIDs 6911-19. Following the March 31, 2017 Order, the Court entered an Order for Supplemental Briefing on the Issue of Remedies. (ECF No. 357.) The parties timely filed their briefs. (ECF Nos. 360, 365, 368.) Plaintiff also moved for attorney's fees and expenses accrued by his former counsel, Webb, Klase & Lemond, LLC on April 18, 2017. (ECF No. 361.) The State did not respond.

The Court held a Telephonic Status Conference on May 12, 2017 to discuss remedies. (Min. Entry, ECF No. 369.) After discussion of the issues raised in the parties' briefs, the Court granted the parties leave to file additional supplemental briefs and/or motions by May 17, 2017 and responses by May 22, 2017. (<u>Id.</u>) The parties made timely filings. (ECF Nos. 370-73.)

II. DISCUSSION

A. Motion to Reconsider Pursuant to Federal Rule of Civil Procedure 54

The State moves for the Court to reconsider its determination that the Billboard Act is not severable because the Court "did not consider whether the State should be allowed to continue enforcing the Billboard Act with respect to *commercial* speech." (ECF No. 371-2 at PageID 7173 (emphasis in original).) The State specifically contends that because Plaintiff brought an as-applied challenge, a severability analysis of the Billboard Act is unnecessary. (Id. at PageID 7174.) Alternatively, if the severability analysis applies, the State argues the Billboard Act's provisions application to commercial speech should be severed from their application to non-commercial speech. (Id. at PageIDs 7174-75.) Plaintiff contends he brought a facial and not an as-applied challenge, and thus the State's first argument fails. (ECF No. 373 at PageID 7186.) Plaintiff further avers the Billboard Act is not severable because it not clear on the Billboard Act's face that the Tennessee legislature would have enacted it absent the unconstitutional provisions. (Id. at PageIDs 7187-89.)

A district court has the inherent power to reconsider, rescind, or modify an interlocutory order before entry of a final judgment. <u>Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.</u>, 118 Fed. App'x. 942, 945-46 (6th Cir. 2004) (citing <u>Mallory v. Eyrich</u>, 922 F.2d 1273, 1282 (6th Cir. 1991)). Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, "any [interlocutory] order or other decision . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ.

P. 54(b); see also Rodriguez v. Tenn. Laborers Health & Welfare Fund, 89 Fed. App'x. 949, 959 (6th Cir. 2004) ("District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment."). "Traditionally, courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." Rodriguez, 89 Fed. App'x. at 959. Parties may not use a motion for revision to "repeat any oral or written argument made by the movant in support of or in opposition to the interlocutory order that the party seeks to have revised." LR 7.3(c).

In this district, motions for revision of interlocutory orders are governed by Local Rule 7.3, which provides that "any party may move, pursuant to Fed. R. Civ. P. 54(b), for the revision of any interlocutory order made by that Court on any ground set forth in subsection (b) of this rule. Motions to reconsider interlocutory orders are not otherwise permitted." LR 7.3(a). Reconsideration of an interlocutory order is only appropriate when the movant specifically shows:

(1) a material difference in fact or law from that which was presented to the Court before entry of the interlocutory order for which revision is sought, and that in the exercise of reasonable diligence the party applying for revision did not know such fact or law at the time of the interlocutory order; or (2) the occurrence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order.

LR 7.3(b).

The State does not allege a material difference in fact or law that it failed to bring to the Court's attention despite the State's reasonable diligence, or that new facts or a change in law have occurred since the Court's Order. Consequently, neither LR 7.3(b)(1) or (2) apply. It appears that the State contends there was "a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order." LR 7.3(b)(3). But the State fails on this ground as well because the argument that the Billboard Act is severable with respect to commercial speech was not presented to the Court prior to its March 31, 2017 Order. (See ECF Nos. 110, 163, 356.)

Accordingly, the Court **DENIES** the State's Motion to Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable (ECF No. 371). The Court, out of an abundance of caution, reiterates its finding below.

Typically, when a portion of a state law is found to be unconstitutional, the Court will sever that portion from the remaining constitutional portions of the law. <u>Ayotte v. Planned</u> <u>Parenthood of N. New England</u>, 546 U.S. 320, 328–29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force ... or to sever its problematic portions while leaving the remainder intact. . . ."). In determining severability, "[f]irst, the Court seeks to avoid 'nullify[ing] more of a legislature's work than is necessary,' because doing so 'frustrates the intent of the elected representatives of the people.' For this reason where partial, rather than facial, invalidation is possible, it is the 'required course.'" <u>Northland Family Planning Clinic, Inc. v. Cox</u>, 487 F.3d 323, 333 (6th Cir. 2007) (quoting <u>Ayotte</u>, 546 U.S. at 329). Second, "mindful that [the Court's] constitutional mandate and institutional competence are limited, [the Court] restrain[s] [itself] from rewriting state law to conform it to constitutional requirements even as [the Court] strive[s] to salvage it." <u>Ayotte</u>, 546 U.S. at 329 (internal alteration and quotation

marks omitted). "[W]here the Court has established a bright line constitutional rule, it is more appropriate to invalidate parts of the statute that go beyond the constitutional line, whereas 'making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake." <u>Northland Family Planning Clinic</u>, 487 F.3d at 333 (quoting <u>Ayotte</u>, 546 U.S. at 330). "Finally, the Court considers legislative intent, and inquires whether the legislature would prefer to have part of the statute remain in force." <u>Id.</u> "A court's conclusion that the legislature would have enacted a statute absent an unconstitutional provision must be based on evidence that is obvious on the 'face of the statute' . . . ; otherwise the court risks overstepping into functions reserved for the legislature." <u>E. Brooks Books, Inc. v. City of Memphis</u>, 633 F.3d 459, 466 (6th Cir. 2011) (quoting <u>Memphis Planned Parenthood, Inc. v. Sundquist</u>, 175 F.3d 456, 466 (6th Cir. 1999)).

The second and third factors control. Turning first to the third factor, nothing indicates the Tennessee legislature would have enacted the Billboard Act without the unconstitutional provisions. Under Tennessee law, severance of unconstitutional portions of a statute is generally disfavored. <u>Gibson Cty. Special Sch. Dist. v. Palmer</u>, 691 S.W.2d 544, 551 (Tenn. 1985) (citing <u>Smith v. City of Pigeon Forge</u>, 600 S.W.2d 231 (1980)). "Tennessee law permits severance only when '*it is made to appear from the face of the statute* that the legislature would have enacted it with the objectionable features omitted," <u>Memphis Planned Parenthood, Inc. v. Sundquist</u>, 175 F.3d 456, 466 (6th Cir. 1999) (emphasis added) (citing <u>State v. Harmon</u>, 882 S.W.2d 352, 355 (Tenn. 1994)). "In determining whether a provision should be severed, the proper inquiry is whether the legislature "would choose, on the one hand, having no [Billboard Act] at all and, on the other, passing [the Billboard Act] without"

subsections § 54–21–103(1) and §§ 54–21–107(a)(1)–(2). Memphis Planned Parenthood,

Inc., 175 F.3d at 466. Moreover, the Tennessee Court of Appeals has specifically stated:

The inclusion by the legislature of a severability clause in the statute is evidence of the legislature's intent that valid portions of the statute be enforced where the court determines that other portions are unconstitutional. <u>State v.</u> <u>Tester</u>, 879 S.W.2d 823, 830 (Tenn. 1994). However, there must be enough left of the statute "for a complete law capable of enforcement and fairly answering the object of its passage." <u>Id.</u> Further, "[w]here a clause is so interwoven with other portions of an act that we cannot suppose that the legislature would have passed the act with that clause omitted, then if such clause is declared void, it renders the whole act null." <u>Id.</u> (quoting <u>Hart v. City of Johnson City</u>, 801 S.W.2d 512, 517 (Tenn. 1990)).

Am. Chariot v. City of Memphis, 164 S.W.3d 600, 605 (Tenn. Ct. App. 2004). The General

Assembly has approved severability by the enactment of a general severability statute, which

provides:

It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be exscinded if the [C]ode would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid....

Tenn.Code Ann. § 1–3–110 (2014). But "[t]his legislative endorsement of severability 'does

not automatically make it applicable to every situation " State v. Crank, 468 S.W.3d 15,

29 (Tenn. 2015) (quoting In re Swanson, 2 S.W.3d 180, 189 (Tenn. 1999)). Severability

"cannot be used as a license 'to completely re-write or make-over a statute."" Wells v. State,

No. E201501715COAR3CV, 2016 WL 7009209, at *3 (Tenn. Ct. App. Dec. 1, 2016), appeal

denied (Feb. 7, 2017) (quoting Crank, 468 S.W.3d at 29).

In the instant case, there is no indication that the General Assembly would have

enacted the Billboard Act without subsections § 54-21-103(1) and §§ 54-21-107(a)(1)-(2),

and there is no severability clause in the Billboard Act. Moreover, the State does not argue that the Court should sever these subsections from the Billboard Act. Rather, the State argues that the subsections should remain in place, but the application of those subsections should be limited to commercial speech, severing only the State's ability to apply those subsections to non-commercial speech. (ECF No. 365 at PageID 7106.) In short, the subsections should remain enforceable as to only commercial speech. The State does not point to an express intent by the legislature in the Billboard Act in support of this separation, but contends that "[g]iven the significant federal funding that hinges on the State's regulation of outdoor advertising, the General Assembly no doubt would have preferred some billboard regulations to none." (ECF No. 365 at PageID 7108.)

The State also contends that there is "no indication[] that concerns about noncommercial speech were what prompted or induced the [Billboard Act's] legislation." (Id.) Yet, the State concedes that "the definition of 'outdoor advertising' in the Act is broad enough to reach both commercial and non-commercial speech. . . ." (ECF No. 365 at PageID 7108.) Moreover, the Billboard Act defines "Outdoor advertising" as "any outdoor sign, display, device, bulletin, figure, painting, drawing, message, placard, poster, billboard or other thing that is used to advertise or inform, any part of the advertising or informative contents of which is located within an adjacent area and is visible from any place on the main traveled way of the state, interstate, or primary highway systems." Tenn. Code Ann. § 54–21–102(12). This argument also directly contradicts the State's previous argument that exempting noncommercial speech from regulation, and only regulating commercial speech, would not advance the State's interests because it would allow non-commercial signs to proliferate. (ECF No. 343 at PageIDs 6797-98.) Preventing billboard proliferation, the State argued, was central to the Billboard Act's function. (ECF No. 336 at PageIDs 6733-37.) Accordingly, the State's opportunistic argument that the Billboard Act's regulation of non-commercial speech did not induce its legislation is not persuasive.

Accordingly, the Court declines (1) to find the Billboard Act's provisions concerning outdoor advertising severable as to the challenged provisions or (2) to sever the noncommercial application of those provisions. The Billboard Act does not explicitly address whether it could function without the on-premises/off-premises provision or without application to non-commercial speech.

[A] conclusion by the Court that the Legislature would have enacted the [Billboard Act] in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. Probably that may be a reason why the doctrine of elision is not favored.

Davidson Cty. v. Elrod, 191 Tenn. 109, 112, 232 S.W.2d 1, 2 (1950).

Similarly, the Court considers the rejection of the same arguments regarding the Texas Highway Beautification Act. <u>Auspro Enterprises, LP v. Texas Dep't of Transportation</u>, 506 S.W.3d 688, 702 (Tex. App. 2016). The Texas Court of Appeals' holding hinged on the second factor—restraint from rewriting law. The Texas Court held that finding the Texas billboard statute unconstitutional as applied to non-commercial speech did not permit the court to sever the statute's application to non-commercial speech while leaving its application to commercial speech in place. The Texas Court stated as follows:

The Department's motion for rehearing asserts that our remedy is unnecessarily broad because it "prohibit[s] state regulations on commercial speech" that were not implicated in <u>Reed</u> or in the underlying facts of this case. The Department urges us to leave standing Subchapters B and C and sever only the State's ability to apply those subchapters to noncommercial speech.

While we have acknowledged that <u>Reed</u>'s holding seems to affect only restrictions of noncommercial speech, the plain language of the Texas Act

defines "outdoor advertising" so broadly that the Act's restrictions on speech apply to both commercial and noncommercial speech. . . . Whatever the desirability of rendering a judgment that merely severs the Act's application to noncommercial speech, such a remedy would essentially rewrite the Act contrary to its plain language with no indication that the Legislature would have intended such a resulting regulatory scheme. Moreover, such a severance would present the risk of substituting one set of constitutional problems for another.

Finally, we note that our opinion here does not hold that the State lacks the power to regulate billboards along Texas highways. Rather, our opinion holds that under <u>Reed</u> the Texas Highway Beautification Act's outdoor-advertising regulations and related Department rules are, as written, unconstitutional "content-based" regulations (as defined by <u>Reed</u>) of noncommercial speech because they do not pass strict-scrutiny analysis. The Legislature may see fit to amend the Act in an attempt to conform to <u>Reed</u> or to amend it such that it regulates only commercial speech within the applicable constitutional bounds. In short, it is for the Legislature, not this Court, to clarify its intent regarding the Texas Highway Beautification Act in the wake of <u>Reed</u>.

Auspro Enterprises, LP v. Texas Dep't of Transportation, 506 S.W.3d 688, 706–07 (Tex. App.

2016).

For the same reasons, the Court finds that in the instant case, it is for the Tennessee

State Legislature—and not this Court—to clarify the Legislature's intent regarding the

Billboard Act in the wake of Reed. Thus, the Court finds that the Billboard Act is not

severable, either by severing the challenged provisions or by limiting the application of those

provisions to only commercial speech.

B. Remedies

After upholding the determination that the Billboard Act is not severable, the Court now turns to the Plaintiff's remedies. In his original brief regarding remedies, Thomas requested injunctive relief, declaratory relief, attorneys' fees and costs, pre- and postjudgment interest, restitution of real property, reconsideration of the Court's quasi-immunity determination, and other additional relief. (ECF No. 360.) Thomas specifically requested that the Court convert the preliminary injunction as to his Crossroads Ford sign into a permanent injunction. (Id. at PageID 6960.) Thomas also requested a permanent injunction, enjoining enforcement of the Billboard Act against any of Thomas's billboards in Tennessee. (Id.) Thomas also sought declaratory relief, directing Commissioner Schroer to dismiss all non-final, pending litigation with prejudice at the cost of Defendant, granting Thomas unrestricted access across the State of Tennessee's property for ingress and egress to his billboard with permit nos. 79-3056 and 79-3057, and directing the State notify all current state billboard permit holders that the Tennessee Billboard Act has been held unconstitutional in this proceeding and therefore the Tennessee Billboard Act will no longer be enforced. (Id. at PageIDs 6960-61.) Thomas further sought attorneys' fees and costs. (Id. at PageID 6961.) Specifically, Thomas sought such fees and costs associated with this lawsuit, those associated with his Crossroads Ford lawsuit in state court, and those associated with defending other state law suits based on the Billboard Act. (Id. at PageIDs 6993-95.)

After the May 12, 2017 status conference concerning remedies (Min. Entry, ECF No. 369), however, Plaintiff amended his request for relief. (ECF No. 370.) Thomas conceded that he cannot seek either attorneys' fees for litigation in state court or pre-judgment interest. (Id. at PageID 7165.) Thomas confirmed that he still seeks the above-referenced injunctive relief—converting the temporary injunction to a permanent injunction and enjoining the State from interfering with any of Thomas's existing billboards or his erection of billboards anywhere in the State of Tennessee—and declaratory relief—directing Commissioner Schroer to dismiss all non-final, pending litigation with prejudice at the cost of Defendant. (Id. at 7161.) Thomas further contends he made a facial overbreadth challenge to the Billboard Act

rather than an as-applied challenge, and that as a result, his relief should be more expansive than the relief available in an as-applied challenge. (<u>Id.</u> at PageIDs 7163-65.)

The State contends Plaintiff's Amended Complaint did not seek declaratory relief as to all of Plaintiff's billboards, but only as to his Crossroads Ford and Perkins Road signs containing non-commercial speech. (ECF No. 372 at PageIDs 7179-80.) The State further argues that Plaintiff did not request such relief in the pretrial order. (Id. at PageID 7180.) Additionally, the State contends that Plaintiff brought only an as-applied challenge, and even if he had brought both an as-applied and facial challenge, it would be imprudent for the Court to find the Billboard Act facially invalid if the Court found the Billboard Act invalid as-applied. (Id. at PageIDs 7181-82.) The Court first addresses whether Thomas sufficiently brought a facial rather than as-applied challenge, and then addresses each claim of relief sought by Plaintiff.

1. Facial vs. As-Applied Challenges Under First Amendment

Despite not asserting a facial challenge in his original Complaint in 2013 (ECF No. 1), his Amended Complaint in 2014 (ECF No. 45), or in his motion for summary judgment (ECF No. 142-1 at PageID 1871 ("This Honorable Court is currently deciding whether the provisions of the Billboard Act under which Defendant Schroer acted regarding[] all the above stated properties are in fact unconstitutional.")), Plaintiff now contends he "has made a valid facial and as-applied challenge to the Tennessee Billboard Act based upon the First Amendment." (ECF No. 370 at PageID 7165.) Plaintiff asserts that he made a valid facial challenge when he "took issue with the Act's other exemptions," "challenged the Act's onpremises exemption" as content-based, and made "a facial challenge to the entire Act" in the

pre-trial order. (<u>Id.</u> (emphasis in original).) Plaintiff then cites to authority pertaining to facial challenges and the overbreadth doctrine. (<u>Id.</u> at PageIDs 7163-64.)

As a threshold matter, the Court defines the parameters of facial and overbreadth challenges. A facial challenge can succeed only "by establishing that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." <u>Wash. State Grange v. Wash. State Republican Party</u>, 552 U.S. 442, 449 (2008) (quotation marks and alteration omitted); <u>United States v. Salerno</u>, 481 U.S. 739, 745 (1987). An overbreadth challenge, on the other hand, requires a showing that a "substantial number of [a statute's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." <u>Wash. State Grange</u>, 552 U.S. at 449 n.6 (quotation marks omitted). "The difference is between having to show that all applications of the statute are unconstitutional and having to show that a substantial number of them are. [An as-applied challenge] is still a difficult showing to make, and the burden of making it is on the challenger." <u>United States v.</u> <u>Martinez</u>, 736 F.3d 981, 991 (11th Cir. 2013) (Carnes, C.J., concurring), <u>vacated on other grounds</u>, <u>Martinez v. United States</u>, 135 S.Ct. 2798 (2015). Generally, courts strongly disfavor facial challenges:

Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008).

Upon review of the record, it is clear that Plaintiff has not alleged the Billboard Act is unconstitutional in all its applications, or even unconstitutional as to a substantial number of applications. In this way, Plaintiff has not met his burden. Nevertheless, the Court assesses whether Plaintiff's claim is as-applied or facial.

The Supreme Court has recognized that facial and as-applied challenges are not mutually exclusive or diametric constructs, because a First Amendment claim may plausibly have both characteristics. John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). In the claim at issue in John Doe No. 1 v. Reed, the plaintiffs averred that the public-records statute ("PRA") "violates the First Amendment as applied to referendum petitions." <u>Id.</u> at 194 (quoting Count I of the Complaint). The Court recognized that

[t]he claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim [also] is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

<u>Id.</u> The Court then offered guidance on how—in the face of such duality—to determine which analytical construct is most appropriate for resolution of the underlying substantive claim. It began by observing that "[t]he label [i.e., facial or as-applied] is not what matters." <u>Id.</u> "The important point" is whether the "plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of the [] plaintiffs." <u>Id.</u> The Court concluded that the plaintiffs' claim and relief reached beyond the plaintiffs' particular circumstances, where the plaintiffs sought in the claim at issue "an injunction barring the secretary of state 'from making referendum petitions available to the public," not just an injunction barring the public disclosure of the referendum petition involving them. <u>Id.</u> (quoting Count I of the Complaint). The Court concluded that, irrespective of the "label" that the plaintiffs attached to their claim, "[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach." Id.

In short, the expanse of the claim is dictated by the relief sought by the plaintiff. Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 522 (6th Cir. 2012) ("In this case, Plaintiffs label their claims as both facial and as-applied challenges to the Act, but because the 'plaintiffs' claim and the relief that would follow ... reach beyond the particular circumstances of these plaintiffs,' the claims that are raised are properly reviewed as facial challenges to the Act." (quoting John Doe No. 1 v. Reed, 561 U.S. at 194)); Showtime Entm't, LLC v. Town of Mendon, 769 F.3d 61, 70 (1st Cir. 2014) (holding that facial standards apply, stating "[w]e understand the relief sought here to be the invalidation of the zoning bylaws, not merely a change in their application to Showtime[;] it is clear that this is a request that 'reach[es] beyond' the precise circumstances of Showtime's license application" (third alteration in original) (quoting John Doe No. 1 v. Reed, 561 U.S. at 194, 130 S.Ct. 2811)); Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 426 (5th Cir. 2014) ("[T]o categorize a challenge as facial or as-applied we look to see whether the 'claim and the relief that would follow . . . reach beyond the particular circumstances of the [] plaintiffs.' If so, regardless of how the challenge is labeled by a plaintiff, '[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach."" (second and third alterations in original) (citation omitted) (quoting John Doe No. 1 v. Reed, 561 U.S. at 194, 130 S.Ct. 2811)); Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott, 717 F.3d 851, 862 (11th Cir. 2013) ("We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature."); United States v. Supreme Court of New Mexico, 839 F.3d 888, 914 (10th Cir. 2016).

In the instant case, Thomas sought relief only concerning himself and his own signs.

(ECF No. 45.) Specifically, the relief Thomas sought, in its entirety, is:

(1) For this Court to find that the Defendants have violated [Plaintiff's] free speech rights;

(2) For this Court to find that the Defendants have violated [Plaintiff's] equal protection rights;

(3) For a declaration that [Plaintiff's] sign at Perkins Road was displaying onpremise, constitutionally protected speech that was exempt from the permitting requirements of T.C.A. § 54-21-104 and an order requiring Defendants to return said sign to Plaintiff;

(4) For a prospective declaration that [Plaintiff's] sign at Crossroads Ford is displaying on-premise, constitutionally protected speech that is exempt from the permitting requirements of T.C.A. § 54-21-104;

(5) For prospective injunctive relief preventing Defendants from continuing to pursue their Chancery Court action against [Plaintiff] until this matter is concluded;

(6) For an award of such damages, including punitive damages against the Individual Defendants, as are authorized by law;

(7) For an award against the Defendants, pursuant to 42 U.S.C. § 1988, of all reasonable costs and attorneys' fees incurred by Plaintiff in defending its constitutional rights;

(8) For a trial by jury on any issue that should not be resolved by the Court as a matter of law; and

(9) For such other and further relief as the Court may deem just and equitable.

(<u>Id.</u> at PageIDs 580-81.)

Without doubt, the relief sought by Plaintiff narrows his claim to an as-applied

challenge. Accordingly, the Court declines to construe Plaintiff's claim as a facial challenge;

not only did Plaintiff failed to satisfy his burden in bringing either a facial or overbreadth

claim, but he also failed to request relief beyond his particular circumstances.

Having concluded Plaintiff claim is as-applied and not facial, the Court turns to

Plaintiff's remedies.

2. Injunctive Relief

Both parties have briefed the merits of Plaintiff's request for injunctive relief. However, the threshold issue is whether Plaintiff waived his claims for injunctive relief by failing to include those claims in the Joint Pretrial Order.

The State contends the injunctive relief sought by Thomas is overly broad, and that any injunctive relief should be limited to the Billboard Act's application to Thomas's noncommercial signs. (ECF No. 365 at PageID 7110.) Before determining whether Thomas's requested injunctive relief is overly broad, however, the Court addresses waiver and timeliness.

The Supreme Court has held that a final pretrial order supersedes all prior pleadings and controls the subsequent course of the action. <u>Rockwell Int't Corp. v. U.S.</u>, 549 U.S. 457, 474 (2007). Accordingly, if a request for injunctive relief is not included in the final pretrial order, it is ordinarily deemed to be waived. <u>Id.</u> (citing <u>Wilson v, Muckala</u>, 303 F.3d 1207, 1215 (10th Cir. 2002)). <u>See also Alexander v. Riga</u>, 208 F.3d 419 (3rd Cir. 2000), <u>cert.</u> <u>denied</u>, 531 U.S. 1069 (2001) (holding that plaintiffs who sought injunctive relief in their complaint, but failed to raise the issue again until six days after the jury rendered a verdict, waived the claim); <u>see Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.</u>, No. 3:10-CV-83, 2015 WL 9582550, at *4 (S.D. Ohio Dec. 31, 2015).

In the instant case, Thomas did not request any injunctive relief in the pre-trial order. (See ECF No. 287.) Accordingly, the Court could find that Thomas has waived his right to injunctive relief in this matter. However, the Court does not find such a waiver as to the conversion of Thomas's temporary restraining order into a permanent injunction, because the failure to include such relief in the pre-trial order likely arises from mistake, and was not intentional. Moreover, the issue before the jury was the strict scrutiny inquiry, and not the case as a whole.

Nevertheless, the Court finds that Thomas's new request to enjoin the State from enforcing the Billboard Act as to any of Thomas's signs is untimely. Our sister courts reject untimely claims for injunctive relief. <u>See Alexander v. Riga</u>, 208 F.3d 419 (3rd Cir. 2000) (rejecting a claim for injunctive relief asserted after trial that was not included in the pretrial order as untimely); <u>Carpet Group Intern. v. Oriental Rug Importers Ass'n</u>, 2005 WL 3988699, at *8 (D. N.J. 2005), <u>aff'd</u>, 173 Fed. Appx. 178 (3rd Cir. 2006) (disallowing a petition to enjoin what the jury found to be anticompetitive conduct, because plaintiffs "did not assert their prayer for injunctive relief in the final pretrial order nor in the trial brief"); <u>Florida v.</u> <u>Elsberry</u>, 1985 WL 6278 (N.D. Fla. 1985) (holding that a plaintiff waived the request for injunctive relief in its complaint and amended complaint, where it did not reiterate that claim anywhere in the exhaustive pretrial stipulation or mention it in any of the pretrial conferences or orders).

Even if the Court considered Thomas's request to enjoin the State from enforcing the Billboard Act as to any of Thomas's signs to be timely, the Court declines to grant such relief, because it is not narrowly tailored to the as-applied constitutional violation found in the instant case.

While district courts have broad discretion when fashioning injunctive relief, their powers are not boundless. "Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d

851 (1977) (internal quotations omitted); <u>see Missouri v. Jenkins</u>, 515 U.S. 70, 88, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) ("[T]]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation." (internal quotations omitted)). This is especially true in the as-applied challenge context, where both the inquiry and relief focus on the fact-specific harm. <u>Ross v. Duggan</u>, 402 F.3d 575, 583 (6th Cir. 2004) ("In an as-applied challenge, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. Therefore, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation.") (citation omitted); <u>Legal Aid Servs. of Oregon v. Legal Servs. Corp.</u>, 608 F.3d 1084, 1096 (9th Cir. 2010) ("An as-applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity."). When evaluating an as-applied challenge. <u>Edenfield v. Fane</u>, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

Such a limit on injunctive relief is appropriate in light of the four-factor inquiry courts must balance before granting a permanent injunction:

(1) that [Plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

<u>eBay Inc. v. MercExchange, L.L.C.</u>, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (citations omitted). Thomas has not met this burden. In fact, Thomas's briefs do not even address these factors, nor the appropriateness of permanent injunctive relief as to the application of the Billboard Act to any kind of sign in this case. Without a showing by

Thomas of his entitlement to permanent injunctive relief, the court is unable to exercise its discretion in granting such relief. <u>See Swaffer v. Cane</u>, 610 F. Supp. 2d 962, 971 (E.D. Wis. 2009).

In sum, the Court finds that a permanent injunction is warranted against the enforcement of the Billboard Act as to Thomas's Crossroads Ford sign. (See Order Granting Preliminary Injunction for Crossroads Ford Sign, ECF No. 163.) The Court finds that a permanent injunction against the enforcement of the Billboard Act as to any of Thomas's other signs is not warranted, as this injunctive relief is either waived or untimely, and even if not waived or untimely such an injunction constitutes impermissible relief under the asapplied challenge.

3. Declaratory Relief

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . . " 28 U.S.C. § 2201. The Federal Rules of Civil Procedure "govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201." Fed.R.Civ.P. 57. Accordingly, "the requirements of pleading and practice in actions for declaratory relief are exactly the same as in other civil actions;" thus, "the action is commenced by filing a complaint." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2768 (3ed.1998). In other words, "[a] request for declaratory relief is properly before the court when it is pleaded in a complaint for declaratory judgment. Requests for declaratory judgment are not properly before the court if raised only in passing, or by motion." <u>Arizona v. City of Tucson</u>, 761 F.3d 1005, 1010 (9th Cir. 2014) (citation omitted).

In the instant case, Thomas did not seek declaratory relief directing Commissioner Schroer to dismiss all non-final, pending litigation with prejudice at the cost of Defendant in his Amended Complaint. He is therefore precluded from seeking such relief now.

The declaratory relief sought in the Amended Complaint was two-fold: (1) a declaration that Plaintiff's "Perkins Road [sign] was displaying on-premise, constitutionally protected speech that was exempt from the permitting requirements of T.C.A. § 54-21-104 and an order requiring Defendants to return said sign to Plaintiff;" and (2) "that his sign at Crossroads Ford is displaying on-premise, constitutionally protected speech that is exempt from the permitting requirements of T.C.A. § 54-21-104." (ECF No. 45 at PageID 580.) These requests for relief are now moot in light of the Court's March 31, 2017 Order. (ECF No. 356.)

3. Attorneys' Fees and Costs

Thomas seeks costs and attorneys' fees under 42 U.S.C. § 1988. The State argues that Thomas's fees and costs "should be reduced accordingly based on the limited success that Plaintiff achieved." (ECF No. 365 at PageID 7716.)

a. Attorneys' Fees

In general, a prevailing party is entitled to costs, but not attorneys' fees. <u>See</u> Fed.R.Civ.P. 54(d). However, the Civil Rights Attorneys' Fees Awards Act of 1976, as amended, 42 U.S.C. § 1988, grants the court discretion to award reasonable attorneys' fees to the prevailing party in an action brought pursuant to 42 U.S.C. § 1983. A prevailing party is one that succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." <u>Farrar v. Hobby</u>, 506 U.S. 103, 109, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (citation omitted) (interpreting 42 U.S.C. § 1988). Although the Court has not granted all the relief Plaintiff sought in this case, the Court considers Plaintiff to be the

prevailing party under 42 U.S.C. § 1988(b), and will allow Plaintiff to seek reasonable attorneys' fees as part of its costs. <u>See Green Party of Tennessee v. Hargett</u>, 767 F.3d 533 (6th Cir. 2014); <u>Woods v. Willis</u>, 631 F. App'x 359, 364 (6th Cir. 2015) ("[T]he plaintiff must have 'been awarded some relief by the court,' resulting in the plaintiff receiving a 'judicially sanctioned change in the legal relationship of the parties.""). Having found that Thomas is entitled to a permanent injunction preventing the enforcement of the Billboard Act as to the non-commercial messages displayed on his Crossroads Ford sign, Thomas is the prevailing party, and thus the Court finds that reasonable attorneys' fees are appropriate.

Thomas also seeks a "multiplier of the fee award because of Defendant's complete disregard of the Supreme Court's decision in <u>Reed</u>. . . . " (ECF No. 360 at PageID 6964.) Although the Court finds Thomas is entitled to fees, "multipliers, or fee enhancements to the lodestar calculation, are permissible [only] in some cases of 'exceptional success.'" <u>Barnes v.</u> <u>City of Cincinnati</u>, 401 F.3d 729, 745 (6th Cir. 2005) (quoting <u>Blum v. Stenson</u>, 465 U.S. 886, 895 (1984)); <u>see also Perdue v. Kenny A. ex rel. Winn</u>, 559 U.S. 542, 552 (2010) ("[E]nhancements may be awarded in 'rare' and 'exceptional' circumstances."). The party seeking to enhance attorney fees "bears the burden of showing that such an adjustment is necessary to the determination of a reasonable fee." <u>Gonter v. Hunt Valve Co.</u>, 510 F.3d 610, 621 (6th Cir. 2007) (internal quotations and citations omitted). In fact, "a fee applicant seeking an enhancement must produce 'specific evidence' that supports the award." <u>Perdue</u>, 559 U.S. at 553. The Sixth Circuit Court of Appeals considers the same twelve factors¹ as it

¹ The twelve factors are as follows:

⁽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 other 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;

does in adjusting a lodestar award to determine the appropriateness of a fee enhancement in cases of exceptional success. Barnes v. City of Cincinnati, 401 F.3d at 745-46 (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)) (affirming a 75% enhancement because the district court found that counsel could not be obtained without applying this multiplier); see also Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 697 (9th Cir. 1996) (noting that a 100% fee enhancement was appropriate in part because of the "likelihood that no other attorney... would have accepted the case"). In the majority of cases, the lodestar amount already reflects these factors within the Court's calculation of a reasonable hourly rate and hours billed. See Gonter, 510 F.3d at 621; Blum, 465 U.S. at 898. Accordingly, "an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. . . ." Perdue, 559 U.S. at 553. Nor should "the novelty and complexity of a case generally... be used as a ground for an enhancement because these factors presumably [are] fully reflected in the number of billable hours recorded by counsel." Id. (internal quotation marks and citations omitted). "[T]he quality of an attorney's performance generally should [also] not be used to adjust the lodestar [b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." Id. (internal quotation marks and citations omitted).

Despite the "strong presumption" that the lodestar figure is reasonable, the presumption may be overcome in the rare circumstances where the lodestar figure does not adequately take into account a factor that may be considered to determine fees. <u>Id.</u> at 554.

⁽¹⁰⁾ the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) and awards in similar cases.

Paschal v. Flagstar Bank, FSB, 297 F.3d 431, 435 (6th Cir. 2002) (quoting Blanchard v. Bergeron, 489 U.S. 87, 91 n.5 (1989)).

The Supreme Court has set out three examples of such factors: (1) "the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value;" (2) "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" or (3) "an attorney's performance involves exceptional delay in the payment of fees." <u>Id.</u> at 554-55.

In the instant case, Thomas has failed to produce 'specific evidence' that supports how this case rises to an exceptional level requiring a multiplier of the attorneys' fee award. Plaintiff's assertion that the State disregarded <u>Reed</u> has no impact under either a lodestar or multiplier analysis. Accordingly, the Court **DENIES** Thomas's request for a multiplier of the attorneys' fees award.

As to the attorneys' fees award, the only motion pending is by Webb, Klase & Lemond, LLC, Thomas's former counsel, filed on April 18, 2017. (ECF No. 361.) The State filed no response. Thus, the amount of attorneys' fees articulated by Webb, Klase & Lemond, LLC is not at issue before this Court because the State elected not to contest it. Nevertheless, based on a thorough review of the information and supporting documents before the Court, in conjunction with an analysis of the aforementioned lodestar factors, the Court finds that the hours expended and rates charged by Plaintiff's attorneys are reasonable, and expenses requested are recoverable. Accordingly, the Court **GRANTS** Thomas \$83,322.50 in attorneys' fees accrued by Webb, Klase & Lemond, LLC. (See ECF No. 361-1 at PageID 6983.)
b. Costs

Fed. R. Civ. P. 54(d) creates a presumption that the cost of litigation will be awarded to the prevailing party unless the Court finds otherwise, and 28 U.S.C. § 1920² sets forth the scope of costs that are properly recoverable. The only specific costs sought are those articulated by Webb, Klase & Lemond, LLC, Thomas's former counsel, in its Motion for Attorneys' Fees and Expenses. (ECF No. 361.) Finding the expenses include primarily filing fees, deposition transcript fees, copies, and postage, and that the proposed expenses are not opposed, the Court **GRANTS** Thomas \$1,543.11 in costs accrued by Webb, Klase & Lemond, LLC. (<u>Id.</u> at PageID 6984.)

4. Post-Judgment Interest

Thomas also requests post-judgment interest. (ECF No. 360 at PageID 6965.) Title "28 U.S.C. § 1961(a) requires district courts to award post-judgment interest on all money judgments." <u>Spizizen v. Nat'l City Corp.</u>, 516 Fed.Appx. 426, 432 (6th Cir. 2013) (emphasis added). As this Order awards only the attorneys' fees and costs expressed in Webb, Klase & Lemond, LLC's motion, the Court only grants post-judgment interest as those monetary awards. Accordingly, the Court **GRANTS** Thomas post-judgment interest to the monetary awards in this Order.

² 28 U.S.C. § 1920 states:

A judge or clerk of any court of the United States may tax as costs the following:

⁽¹⁾ Fees of the clerk and marshal;

⁽²⁾ Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

⁽³⁾ Fees and disbursements for printing and witnesses;

⁽⁴⁾ Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

⁽⁵⁾ Docket fees under section 1923 of this title;

⁽⁶⁾ Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

5. Restitution of Real Property

Thomas also requests "restitution of real property" (ECF No. 360 at PageID 6966), such as replacement and re-installation of billboards unrelated to this action at the State's cost (<u>id.</u> at PageID 6968). This request goes beyond the issues before this Court, and also goes far beyond the limits of <u>Ex parte Young</u>, 209 U.S. 123 (1908). Plaintiff cannot avoid Eleventh Amendment immunity by presenting his claim for relief as an equitable remedy. In <u>Edelman v. Jordan</u>, 415 U.S. 651 (1974), the Supreme Court held that the Eleventh Amendment barred the recovery of "equitable restitution" in the form of the retroactive release and payment of AABD (Aid to the Aged, Blind, and Disabled) benefits wrongfully withheld by the State of Illinois. The Supreme Court explained that the funds to satisfy such an award would inevitably be paid from the general revenues of the State of Illinois, not the pocket of the named defendants, and that such relief would run afoul of the Eleventh Amendment. <u>Id.</u> at 665. Responding to the argument that the award was in the form of "equitable restitution," the Supreme Court stated:

We do not read <u>Ex parte Young</u> or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature. The Court's opinion in <u>Ex parte Young</u> hewed to no such line.

Id. at 666. The relief requested by Thomas is similar to the relief denied in Edelman.

Thomas's relief necessitates that the costs derive from the state. Also, the relief would impermissibly provide retroactive relief, running afoul of the Eleventh Amendment. Thus, the Court **DENIES** Thomas's relief for restitution of real property.

3. Damages

Thomas also seeks damages, requesting the court revisit its determination that Schroer is entitled to qualified immunity (ECF No. 170). (ECF No. 360 at PageID 6969.) The Court

construes Thomas's request to "revisit" as a motion for reconsideration. As stated above, reconsideration of an interlocutory order is appropriate only when the movant specifically shows:

(1) a material difference in fact or law from that which was presented to the Court before entry of the interlocutory order for which revision is sought, and that in the exercise of reasonable diligence the party applying for revision did not know such fact or law at the time of the interlocutory order; or (2) the occurrence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order.

LR 7.3(b).

Thomas specifically seeks relief under LR 7.3(b)(2)—change of law occurring after the time of the order to be reconsidered. (ECF No. 360 at PageID 6969.) Thomas, however, fails to point to any change in law after the Court made its determination that Defendant Schroer was entitled to qualified immunity in its October 2, 2015 Order. (ECF No. 170.) Moreover, the Court finds that its March 31, 2017 Order does not affect its analysis of Schroer's qualified immunity. As stated in the Court's October 2, 2015 determination, "[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." <u>Pearson v. Callahan</u>, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). Moreover, a constitutional right is clearly established if a reasonable person in the official's position would have known of the right. <u>Scarbrough v. Morgan Cnty. Bd. of Educ.</u>, 470 F.3d 250, 263 (6th Cir. 2006). In fact, until March 31, 2017, no binding precedent existed that expressly addressed the constitutionality of the Billboard Act and the First Amendment issues raised by Thomas. Thus, the fact that the Court ultimately came to that conclusion in this case does not change the fact that Schroer would not have known of this right prior to the Court's order. Rather, the only binding precedent, which pre-dated <u>Reed</u>, seemed to support the contrary proposition. <u>See Wheeler v. Comm'r of Highways, Commonwealth of Ky.</u>, 822 F.2d 586 (6th Cir. 1987). Thus, the Court finds Schroer remains entitled to qualified immunity, and thus **DENIES** Thomas's construed motion to reconsider.

4. Additional Relief

Finally, Thomas makes three additional requests: (1) a hearing to determine whether Defendant Schroer violated Thomas's First Amendment Rights by using a false affidavit by Richard Copeland when he knew Copeland had no legal authority to provide such affidavit based upon Ted Illsley's letter confirming the zoning and Thomas's authorization to use the Perkins Road sign structure; (2) a hearing on whether Thomas's constitutional rights of free speech and due process were violated when former Commissioner Nicely reversed and remanded Administrative Judge Hornsby's order of December 8, 2006; and (3) an additional remedy hearing before the Court on his offer of proof (ECF No. 262). (ECF No. 360 at PageID 6971.)

None of these requests are properly brought to the Court's attention, and/or these requests go far beyond the issues in this action. Thomas's first request forms the basis for an entirely separate action not before this Court. Thomas's second request names Commissioner Nicely, who is not named as a defendant in this action. Moreover, it appears any new claims against Commissioner Nicely's actions are time-barred. Finally, Thomas proffers no legal or factual reason the why a hearing on his offer of proof is necessary or permissible. The Court, therefore, **DENIES** these requests for additional relief.

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IV. CONCLUSION

For the reasons stated above, the Court **DENIES** the State's Motion to Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable, and **GRANTS** in part and **DENIES** in part Plaintiff's requests for remedies.

IT IS SO ORDERED, this 20th day of September, 2017.

/s/ Jon P. McCalla JON P. McCALLA UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WILLIAM H. THOMAS, JR.,

Plaintiff,

v.

Case 2:13-cv-02987-JPM-cgc

JOHN SCHROER, Commissioner of TDOT,

Defendant.

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

Before the Court is Plaintiff William H. Thomas, Jr.'s Motion for Attorneys' Fees, Costs and Expenses. (Docket Entry ("D.E.") #376). The instant motion was referred to the United States Magistrate Judge for Report and Recommendation. (D.E. #404). For the reasons set forth herein, it is RECOMMENDED that Plaintiff's Motion be GRANTED IN PART AND DENIED IN PART. Specifically, the Court RECOMMENDS that Plaintiff be awarded as follows: \$170,100.00 in attorneys' fees to attorney George R. Fusner ("Fusner"); \$2,900.00 in paralegal fees to Fusner; \$162,450.00 in attorneys' fees to attorney Jonathan L. Miley ("Miley"); \$5,834.74 in costs incurred by Fusner; \$312.90 in costs incurred by Miley; and, \$4,565.56 in costs incurred by Plaintiff.

I. Introduction

This action concerns First Amendment violations that occurred when agents of the State of Tennessee (the "State") sought to remove one of Plaintiff's non-commercial billboards, also known as the Crossroads Ford sign, pursuant to the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tennessee Code Annotated Section 54-21-101, *et seq*. An advisory jury trial was held from September 19, 2016 until September 22, 2016. On March 31, 2017, United States District Judge Jon P. McCalla concluded that the Billboard Act is an unconstitutional, content-based regulation of speech. Following Defendant Schorer's Rule 54(b) motion to reconsider the Court's ruling, which the Court denied, judgment was entered on October 6, 2017. The Judgment enjoined the State and its agents from removing or seeking removal of Plaintiff's Crossroads Ford sign pursuant to the Billboard Act.

Plaintiff was initially represented in this action by attorney Edward Webb ("Webb") of the law firm of Webb, Klase & Lemond, LLC ("WKL"). WKL served as Plaintiff's counsel of record from the filing of his Complaint on December 17, 2013 until Webb's Motion to Withdraw as Attorney was granted on June 15, 2015. Plaintiff, who is a licensed attorney,¹ then proceeded *pro se*² until May 13, 2016 when attorney Fusner of the Law Office of George R. Fusner Jr. filed

¹ Plaintiff states that he has been licensed to practice law in Tennessee since 1973. (Declaration of William H. Thomas, Jr., ¶¶ 1-2, filed at D.E. #376-7). Plaintiff states that he was engaged in the active practice of law until approximately fifteen years ago. (*Id.*) Since that time, Plaintiff states that he has continued to practice law but only as to cases which he is a party. (*Id.*) Plaintiff states that he has represented himself in "numerous state and federal proceedings in the State of Tennessee" and "numerous administrative proceedings in the State of Tennessee involving TDOT." (*Id.*)

² Plaintiff did not file a Notice of Appearance for his period of *pro se* representation from June 15, 2015 until May 13, 2016; instead, the record reflects that he began proceeding *pro se* on June 18, 2015 after WKL was permitted to withdraw from the case and continued to do so until Fusner filed a Notice of Appearance on May 13, 2016. (*See* D.E. #104, #231). Although not

his Notice of Appearance. Fusner represented Plaintiff until February 27, 2018, when his Motion to Withdraw as Attorney was granted. From February 27 to date, Plaintiff has again represented himself.

On April 18, 2017, Plaintiff filed a Motion for Attorneys' Fees relating to WKL's period of representation. The State did not file a response thereto. On September 20, 2017, the District Court determined that, "[a]lthough the Court has not granted all the relief Plaintiff sought in this case, the Court considers Plaintiff to be the prevailing party under 42 U.S.C. § 1988(b), and will allow Plaintiff to seek reasonable attorneys' fees and costs." With no contest by the State, the District Court granted Plaintiff's request for \$83,322.50 in attorneys' fees for WKL; however, the District Court denied Plaintiff's request that the award be enhanced by a multiplier, stating that Plaintiff had failed to produce specific evidence demonstrating that this case was so exceptional as to deserve an enhanced award.

On October 3, 2017, Plaintiff filed the instant Motion, which seeks an additional \$671,750.00³ in attorneys' fees and costs. Plaintiff states that this request represents the work done by Fusner, including his office's paralegals, as well as the work done by Fusner's "writing and research attorney," Miley, of The Law Office of Jonathan L. Miley / Tennessee Appellate &

pertinent to the instant motion, Plaintiff did file a Notice of Appearance on February 22, 2018—the date Fusner's Motion to Withdraw as attorney was filed. (*See* D.E. #400).

³ Plaintiff states that the "total sought as of the date of this filing is \$672,092.37" with the costs and expenses totaling \$15,934.61. Relying upon these figures to remove the proposed costs from the total proposed award, the proposed lodestar for the attorneys' fees would be \$656,157.76. However, the Court calculates the sum of all of the individual fee requests to be \$671,750.00. Given these discrepancies, the Court will rely upon the proposed hours and rates set forth in the motion for each attorney and paralegal and will then subtract any hours the Court recommends to be removed from the lodestar. The Court will then multiply each attorney and paralegal's hours to be awarded by his or her proposed rate. The Court will recommend that the sum total of these fees be the lodestar amount for the attorneys' fees calculation.

Research Solutions, and Plaintiff's personally employed administrative assistant, Ricky Tan ("Tan"). This request contains their fees and costs through October 2, 2017.

It is critical at the outset of this motion to describe the roles of the individuals for whom Plaintiff seeks an award of fees. Fusner acted in a traditional role as Plaintiff's counsel of record; Miley and Tan had somewhat more unconventional roles. Miley was neither counsel of record in the instant case nor was he an attorney with Fusner's firm; instead, Miley describes his role as follows: "I was engaged by the Plaintiff in March of 2015 to assist with the legal strategy of the case. However, once Plaintiff's first counsels of record . . . withdrew from the case in May of 2015, my role on the case changed. I continued with consulting and legal strategy for Plaintiff; however, I then began doing all of the legal research and legal writing on the case. Every pleading that has been filed by Plaintiff since May 22, 2015, has been drafting [sic] by me." (Miley Decl. ¶ 5). Fusner states that he "directed" Miley and utilized him because his fees are billed at a lower rate, which reduced the total fee request. (Fusner Decl. ¶ 7). It is imperative to note that Plaintiff himself retained Miley longer than he was represented by Fusner, including overlapping his representation by WKL and the period during which he proceeded *pro se*.

Tan serves as the executive assistant to Plaintiff at his law office, The Law Office of William H. Thomas, Jr. Plaintiff asserts that Tan "performed paralegal type services in this case," such as maintaining and organizing litigation files, editing pleadings and correspondence, filing pleadings, transmitting documents between Plaintiff, Fusner, and Miley, performing legal research, arranging depositions, coordinating court reporter services, attending depositions in a supporting role, and assisting in court with document retrieval. (Decl. of William H. Thomas, Jr.

at ¶ 6, filed at D.E. #376-7). Tan worked for Plaintiff's firm on the case from November 2013 until September 2017. (Ricky Tan's Time Sheet at 2-48, filed at D.E. #376-8).

II. Proposed Analysis

Section 1988 of the Civil Rights Act authorizes an award of fees and costs to the party who has prevailed in litigation under Section 1983. A party prevails if, because of the party's initiative, the judiciary has materially altered the legal relationship between the parties, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001), or if he "has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," *State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). "Normally this will encompass all hours reasonably expended on this litigation," and "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). "Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* "Such a lawsuit cannot be viewed as a series of discrete claims." *Id.* "Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

If an award of Section 1988 fees is appropriate, the Court must then determine what fee is "reasonable." *Hensley*, 461 U.S. at 433; *Adcock-Ladd v. Secy. of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000). In determining a "reasonable" fee, the Court must first determine the "lodestar" amount, which is the product of multiplying the number of hours reasonably spent on the litigation by a reasonable hourly fee. *Id.* at 433-437. The party seeking to recover fees bears the

initial burden of substantiating the hours worked and the rate claimed. *Id.* at 433. The Court may then increase or decrease that amount by considering other case-specific factors such as the quality of the plaintiff's results. *Id.* However, the lodestar is presumed to be the reasonable fee contemplated by Section 1988. *Blum v. Stenson*, 465 U.F. 886, 887 (1984).

A. Attorneys' Fees

Here, Plaintiff sets forth the number of hours expended and the rates charged by Fusner, by Miley, by paralegals, and by his administrative assistant, Tan, as follows: Fusner—559.50 hours at \$350.00 per hour for a total fee request of \$195,825.00; Miley—1296.5 hours at \$250.00 per hour for a total fee request of \$324,125.00; paralegals—29 hours at \$100 per hour for a total fee request of \$2900.00; and, administrative assistant—1489 hours at \$100 per hour for a total fee request of \$148,900.00. (Pl.'s Mot. for Attorneys' Fees at 10). Defendant does not contest the rates charged by Fusner, Miley, Fusner's paralegals, or Tan; however, Defendant asserts that the number of hours reflected in the lodestar amount is unreasonable and should be reduced for numerous reasons.

i. Attorneys' Fees for Miley during WKL's Representation

First, Plaintiff seeks an award of fees for Miley for work performed during the time that WKL served as his counsel of record. WKL represented Plaintiff from December 17, 2013 until June 15, 2015. Miley's records show that his work for Plaintiff overlapped with that of WKL from March 4, 2015 until June 13, 2015.

Plaintiff has already been awarded attorneys' fees and costs for WKL's representation. Plaintiff's motion for attorneys' fees for WKL's representation, which the District Court granted, stated that it sought "the reasonable fees and costs incurred in this case through May 31, 2015 (plus the fees incurred preparing this request) . . ." (Pl.'s Mot. for Attorneys' Fees and Expenses, filed on April 18, 2017 at D.E. #361). Although the initial motion states that a "separate motion may be filed for later fees," the Court is unaware of any basis, and Plaintiff has cited none, for which Plaintiff may seek attorneys' fees for Miley during a period when he was represented by other counsel of record and when that counsel of record has not stated that its firm was relying upon Miley's services in any way to accomplish his representation. In fact, Miley explicitly states that he was retained by *Plaintiff* beginning in 2015 and continuing throughout WKL's period of representation as what appears to be Plaintiff's second independent counsel. (Miley Decl. at $2 \P 5$). Miley states that he was "engaged" by Plaintiff "to assist with the legal strategy of the case" until WKL withdrew and his "role on the case changed." (*Id.*) Specifically, after WKL's representation ended, Miley states that he "continued with consulting and legal strategy for Plaintiff" but then "began doing all of the legal research and legal writing on the case" such that "[e]very pleading that has been filed by Plaintiff since May 22, 2015" was drafted by Miley. (*Id.*)

Although Defendant does not cite authority for the proposition that Miley should not be awarded attorneys' fees during WKL's representation,⁴ the United States Supreme Court has recognized that "[c]ases may be overstaffed" and that such fees should be excluded from the lodestar calculation as unreasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). There is no indication why Miley's assistance was reasonable given that Plaintiff was represented by Webb, who was also assisted by attorney G. Franklin Lemond, Jr. of WKL. In fact, Webb's

⁴ Defendant instead broadly requests that all of Miley's fees be stricken because Plaintiff was proceeding *pro se* (Def.'s Resp. to Pl.'s Mot. for Attys' Fees at 2-3, 6); however, as already set forth, Plaintiff was not proceeding *pro se* during the period of WKL's representation, a time period during which Miley also requests fees. Thus, as this Court is required to propose a reasonable fee, the Court specifically continued to consider the reasonableness of Plaintiff's request for Miley's fees during WKL's representation.

Declaration states that, since 1996, his law practice has focused on First Amendment litigation with a particular emphasis on the representation of both outdoor advertising companies and individuals in challenges to local sign regulations. (Decl. of E. Adam Webb ¶ 2, filed at D.E. #361-3). Webb has acted as lead counsel in more than 100 such cases in federal and state courts across the country. (*Id.*) Additionally, Lemond's Declaration states that the focus of his practice has been First Amendment cases since 2004 with an emphasis on the representation of outdoor advertisers in challenges to municipal and county sign regulatory schemes. (Decl. of G. Franklin Lemond ¶ 5, filed at D.E. #361-4). Lemond also states that he has successfully litigated "dozens of such cases." (*Id.*) Accordingly, it is RECOMMENDED that 73.4 hours be removed from the lodestar calculation of Miley's award of attorneys' fees for the time during which Miley's legal work overlaps Plaintiff's representation by WKL.

ii. Attorneys' Fees for Miley During Plaintiff's pro se Representation

Next, Defendant argues that Plaintiff seeks to recover attorneys' fees for Miley during the period when the record reflects that Plaintiff was proceeding *pro se*. Here, Plaintiff began representing himself on June 15, 2015, and Miley's invoices overlap with Plaintiff's *pro se* representation from June 16, 2015 until May 12, 2016 when Fusner's invoices state that his representation began.

Citing *Kay v. Ehrler*, 499 U.S. 432 (1991), Defendant argues that a *pro se* Plaintiff may not be awarded attorneys' fees, even if he himself is an attorney. *Id.* at 433-438. However, *Kay* does not answer the question of whether Plaintiff, an attorney who is proceeding *pro se*, may recover attorneys' fees for another attorney whom he has hired to assist him with his case during his "*pro se*" representation. However, as discussed, supra, attorneys' fees are unreasonable when

a case is "overstaffed." *Hensley v. Eckerhart*, 461 U.S. at 434. Essentially, this is the situation presented here, albeit with additional concerns. Plaintiff, as a matter of record, was acting as his own counsel; Plaintiff, in reality, had hired an attorney to assist him. While "[m]ultiple lawyer litigation is common and not inherently unreasonable," *see The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 704 (6t Cir. 2016), the Court RECOMMENDS that a *pro se* litigant requesting attorneys' fees for retained counsel for a period of time during which he is representing himself as a matter of record is highly unreasonable. Accordingly, it is RECOMMENDED that 467.7 hours be removed from the lodestar calculation of Miley's award of attorneys' fees for the time when Miley's legal work overlaps Plaintiff's *pro se* representation.

iii. Plaintiff's Executive Assistant's Fees

Next, Defendant asserts that there is no authority allowing for Plaintiff to recover fees incurred by Tan, his executive assistant. Section 1988 explicitly provides that the prevailing party may be awarded "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Fees for paralegal services are recoverable, as the term "attorney fees" embraces fees of paralegals as well as attorneys. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 580 (2008). Defendant does not contest an award of fees to Fusner's paralegals, and it is RECOMMENDED that Fusner's paralegals may be awarded their fees.

However, "'[p]urely clerical or secretarial tasks, that is, non-legal work, should not be billed—even at a paralegal rate—regardless of who performs the work." *William Howe v. City of Akron*, No. 5:06-cv-2779, 2016 WL 916701, at *15 (N.D. Ohio Mar. 10, 2016) (citing *Bernhart v. Comm'r of Soc. Sec.*, NO. 5:12CV2367, 2013 WL 3822141, at *2 (N.D. Ohio July 23, 2013)); *see also Richlin*, 553 U.S. at 585 (noting that reimbursement for costs typically included in "office overhead," including wages paid to office staff, is not customarily charged to clients or awarded as "attorney fees"). Plaintiff's declaration clarifies that Tan is neither a paralegal nor a lawyer. (Pl.'s Decl. at \P 6). Accordingly, Tan may not be awarded fees for the clerical or secretarial tasks he performed. Thus, it is RECOMMENDED that Tan's 1,489 hours at \$100 per hour be removed from the lodestar calculation.

iv. Fees for Unrelated Matters

Next, Defendant contests Fusner's request for attorneys' fees for work unrelated to this case, including as follows: work on another of Plaintiff's lawsuits, *William H. Thomas, Jr. v. Richard Copeland*, 2:16-cv-02660-SHL-cgc; work on Plaintiff's bankruptcy matter; work on the "Kate Bond administrative action"; work on a letter that the State sent to Plaintiff about trespassing on State property; and, work on a "TI Properties Appeal." Defendant asserts that Fusner requests a total of 10.5 hours on unrelated matters for a total of \$3,675.00. Further, Defendant asserts that Miley seeks to recover 1.5 hours in fees for the withdrawal of WKL and one hour of fees for a Shelby County court matter involving the billboard at issue here, Crossroads Ford. Upon review, the Court finds that it is unreasonable that Plaintiff be compensated for fees related to other matters. Accordingly, it is RECOMMENDED that the following hours be removed from the lodestar calculation—10.5 hours by Fusner; and, 2.5 hours by Miley.⁵

⁵ Defendant also notes that Plaintiff requested that Tan be compensated for work unrelated to the instant case, including as follows: work done in Plaintiff's lawsuit against TDOT, *William H. Thomas Jr. v. TDOT*, 2:13-cv-02185-JPM-cgc; matters involving Plaintiff's various administrative cases; withdrawal of Plaintiff's attorney from this lawsuit; and, a Davidson County Chancery Court matter in which TDOT seeks reimbursement for taking down Plaintiff's illegal signs. The Court has already RECOMMENDED that Plaintiff may not recover a fee for Tan's services as an executive assistant. However, if the District Court finds that Tan's fees should be awarded, it is alternatively RECOMMENDED that the time that Tan billed for work performed on other cases should be removed from the lodestar calculation as unreasonable.

v. Fusner's Fees for Unsuccessful Pursuits

Next, Defendant asserts that Plaintiff requests fees for "[m]atters that he [l]ost," arguing that these hours were not "expended in the pursuit of the ultimate result achieved." Defendant explains Fusner's request for \$16,395.00 in fees for failed pursuits in the case as follows:

Fees for work done on "damages"—16.3 hours. (No damages awarded).

Fees for work done on the Motion for Protective Order (Brian Carroll)—1.3 hours. (Protective order granted).

Fees for direct examination of Plaintiff—1.0 hours. (Plaintiff never testified).

Offer of Proof—1.7 hours.

Objection to Amicus Brief—4.7 hours.

"Work on Whether Jury Trial is Appropriate"—.6 hours.

"Motion for Additional Facts"—13.4 hours.

Offer of Proof—22.1 hours for Fusner; 6.1 paralegal hours.

SUB-TOTAL: 45.1 hours at \$350.00 per hour=\$15,785.00. 6.1 hours at \$100.00 per hour=\$610.00.

TOTAL: \$16,395.00.

(Def.'s Resp. to Pl.'s Mot. for Attorneys' Fees and Expenses at 5).

Both Plaintiff and Defendant rely upon the guidance provided in *Hensley* in their analysis

of whether recovery is appropriate for these hours. With respect to the successes and failures in

a given case, the Hensley Court reasons as follows:

The product of reasonable hours and a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of the claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants—often an institution and its officers . . . —counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

. . . .

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may

simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 434-435 (footnotes and internal citations omitted).

First, Defendant asserts that Fusner should not receive an award of 1.0 hours of the fees incurred related to the direct examination of Plaintiff. Citing Miller v. Dugan, 764 F.3d 826 (8th Cir. 2014), Defendant argues that time spent on a witness who was not used at trial is "unnecessary." (Id. at n.5). However, in *Miller*, the Eighth Circuit considered an attorney billing for fees in which the witness testified in a separate case. Although Defendant cites no other authority for his proposition that this time is unreasonable, in Huizinga v. Genzink Steel Supply and Welding Company, 984 F. Supp. 2d 741 (W.D. Mich. 2013), the court stated that, "although a party may sometimes recover fees related to a witness who did not testify, in this case [Plaintiff] has made no showing as to [the individual's] necessity as a witness." Id. at 754 (citing 10 Wright & Miller, et al., Fed. Prac. & Proc. § 2678, at 467-468 (3d. ed. 1998) ("Ordinarily, no fee may be taxed for someone who comes to the courthouse but does not testify at the trial, the presumption being that the person was not a necessary witness. But this is no more than a presumption."). In this case, however, Fusner billed for preparing Plaintiff to testify. Whether or not he ultimately testified, Plaintiff is a party to the case and, potentially, a necessary witness. As such, the Court RECOMMENDS that it was not unreasonable for the very brief time of one hour to be spent by Fusner for the possibility of Plaintiff testifying, even if Plaintiff did not eventually testify. Accordingly, the Court will not remove this time from the lodestar calculation.

Next, Defendant argues that Plaintiff should not recover for Fusner and his paralegal's time relating to the offer of proof, Fusner's time relating to an objection to the amicus brief, Fusner's time for the Motion for Additional Facts, Fusner's work on whether a jury trial is appropriate, and Fusner's opposition to a protective order that was ultimately granted. Defendant does not provide any basis for these objections other than generally stating that they were not "expended in pursuit of the ultimate result achieved." (Def.'s Resp. to Plaintiff's Mot. for Attys. Fees at 4-5). This brief statement does not provide the Court with sufficient basis to analyze these billing entries under *Hensley*, which is primarily concerned with the success on claims raised in the litigation rather than the success on individual filings. Accordingly, the Court RECOMMENDS that these hours are not unreasonable and should not be removed from the lodestar calculation.

Finally, Defendant asserts that it is unreasonable for Fusner to be awarded 16.3 hours for work done on damages when no damages were awarded in the case. Upon review, the District Court stated that "monetary damages hinge on separate factual and legal determinations" than the constitutionality of the Billboard Act. (Sept. 6, 2016 Order Regarding Def.'s Mot. in Limine as to Money Damages). After concluding that the Billboard Act was unconstitutional, the District Court ordered supplemental briefing on the issue of remedies. (April 4, 2017 Order for Supp. Briefing on the Issue of Remedies, filed at D.E. #357). The parties' respective briefing was filed thereafter. (*See* D.E. #360, #361, #363, #364, #365, #368). The Court additionally held a status conference on the issue and permitted further briefing. (D.E. #369, #370, #372). Ultimately, Plaintiff requested injunctive relief, declaratory relief, post-judgment interest, restitution of real property, and other additional relief. The District Court denied the requested

injunctive relief, declaratory relief, restitution of real property, and additional relief but granted the request for post-judgment interest. (Order Denying Mot. for Reconsideration and Order Concerning Remedies at 10-29, filed at D.E. #374). Thus, Plaintiff had limited success obtaining the remedies sought, and the pursuit of remedies was distinct from the claim on which Plaintiff was successful. Accordingly, it is RECOMMENDED that the 16.3 hours for work done on damages and other remedies be removed from the lodestar calculation of Fusner's fees.

vi. Miley's Fees for Unsuccessful Pursuits

Next, Defendant further that Miley requested a total of 507.7 hours of fees "on matters which plaintiff lost." (Def.'s Resp. to Pl.'s Mot. for Attorneys' Fees at 6 & Exh. 5). Exhibit 5 to Defendant's Response to the instant Motion details the specific entries he proposed should be removed from the lodestar calculation of Miley's attorneys' fees as unsuccessful pursuits. The majority of these fees the Court has already recommended to be removed as overlapping Plaintiff's representation by WKL or his pro se representation. (See id. at 1-9 & 17). The remaining requests are as follows: (1) 93.7 hours spent on "damages claims"; (2) 10.8 hours spent on Plaintiff's Motion for Additional Findings of Fact (D.E. #242), which was filed in relation to this Court's Order Granting Defendant's Motion for Summary Judgment (D.E. #233), which this Court denied (D.E. #273); (3) 11.9 hours spent on a disclosure of Plaintiff's proposed fact witnesses at trial when none of whom were ultimately called at trial; (4) 9.5 hours spent on Plaintiff's late-filed notice of deposition for Brian Carroll, which this Court quashed upon Defendant's request (D.E. #251, #259); (5) 2.7 hours spent on consideration of an expert witness when no expert witness was ultimately submitted; (6) 33 hours spent on Plaintiff's offer of proof on damages, none of which were granted by the Court (D.E. #263); (7) 9.5 hours spent on

Plaintiff's objection to the jury trial (D.E. #307), which the Court denied (D.E. #314); (8) 19.5 hours spent on Plaintiff's opposition to a Motion for Amicus (D.E. #347), which this Court denied (D.E. #348); and, (9) 73.1 hours spent for work on the jury trial.

First, Plaintiff's requests for Miley to be awarded 93.7 hours for time spent on Plaintiff's damages claims. As discussed above, *supra* Section II.a.v., Plaintiff achieved limited success on his pursuit of remedies, which the District Court found to be a distinct pursuit from the claim on which he was successful. Accordingly, it is RECOMMENDED that these 93.7 hours be removed from the lodestar calculation of Miley's attorneys' fees.

Next, Defendant asserts that Plaintiff should not be awarded the time that Miley spent on the jury trial because Plaintiff was not successful at the jury trial. As discussed above, *supra*, Section II.a.v., the District Court determined that an advisory jury trial was an appropriate and necessary step for the resolution Plaintiffs claims. Further, the District Court ultimately ruled in Plaintiff's favor on the constitutionality of the Billboard Act. Accordingly, it is RECOMMENDED that these 39.1 hours spent by Miley on the jury trial should not be removed from the lodestar calculation.⁶

Finally, the remaining requests that Defendant believes should be stricken from Miley's lodestar calculation fall into two categories: (1) futile efforts by Plaintiff; and, (2) unsuccessful motions filed by Plaintiff. As to futile efforts, Defendant asserts that Miley expended 11.7 hours preparing a witness list for trial when ultimately none of the witnesses were relied upon and 2.7

⁶ Plaintiff's full request was for 73.5 hours for Miley's time spent on the jury trial (*Id.* at 16-17); however, it has already been RECOMMENDED that 34.4 of those hours be removed from the lodestar calculation as overlapping WKL and Plaintiff's *pro se* representation. Thus, only 39.1 hours remain to be considered. If the District Court were to determine that the 34.4 hours should not be stricken for overlapping WKL and Plaintiff's *pro se* representation, it is RECOMMENDED, in the alternative, that all 73.5 hours of Miley's time spent on the jury trial be stricken for the reasons stated herein in regards to time spent on that phase.

hours attempting to find an expert witness when no expert witness was ultimately submitted. While the Court understands that the consideration of fact and expert witnesses is a necessary step in preparation for a jury trial, the Court also RECOMMENDS that is unreasonable to award payment for 14.4 hours expended on these matters when, ultimately, none of the fact witnesses were presented and no expert witness was designated. Thus, the Court RECOMMENDS that only 5 hours be awarded for Miley's consideration of potential fact and expert witnesses at the jury trial.

With respect to the fees on unsuccessful efforts, including various motions and a noticed deposition that was quashed, Defendant does not provide any basis for these objections other than generally stating that Plaintiff did not succeed in these steps taken during the litigation. (Def.'s Resp. to Plaintiff's Mot. for Attys. Fees at Exh. 5). This brief statement does not provide the Court with sufficient basis to analyze these billing entries under *Hensley*, which is primarily concerned with the success on the overarching claims raised in the litigation rather than the success achieved by individual filings. Accordingly, the Court RECOMMENDS that these hours are not unreasonable and should not be removed from the lodestar calculation of Miley's fees.

vii. Excessive, Redundant, and Unnecessary Fees

Defendant's final challenge regarding the lodestar calculation of Plaintiff's attorneys' fees is that Plaintiff should not recover for excessive, redundant, and unnecessary fees. Defendant again relies upon *Hensley*, *supra*, Section II.A.v., for the proposition that the fee award should be reduced because his relief is limited in comparison to the scope of the litigation as a whole. Defendant further argues that Plaintiff did not achieve "significant success" because he "lost on all of his damages claims," he "lost on the 5 TRO requests (other than the Cross

Roads Ford of course)," he "lost the jury trial," and he "caused all parties and this Court to undergo needless work on many frivolous claims." (Def.'s Resp. to Plaintiff's Mot. for Attys. Fees at 6). Specifically, Defendant challenges the following of Fusner's fees as excessive, redundant, and/or unnecessary:

Fees for consultation with "Braden" with Beacon Group-4.3 hours

Fees for reviewing the Order on the Motion to Dismiss—1.0 hours

Fees on the Motion for Additional Time—.5 hours

Fees for PACER on 8/26—.4 hours

Fees for the preparation and taking of Brian Carroll's deposition—14.9 hours

Work on the trial, including pre-trial preparation, taking depositions of trial witnesses, and time at trial—237.3 hours

Work on the "Remedies Memorandum"—46.7 hours

(*Id.* at 6-7).

With respect to Fusner's fee for consultation with "Braden" of the Beacon Group, the record reflects that attorney Braden H. Boucek ("Boucek") is counsel of record for one of the amicus curiae in this case, Beacon Center of Tennessee ("Beacon Center"). The Beacon Center filed an amicus curiae brief (D.E. #188) asserting that the Billboard Act's content-based exceptions violate the First Amendment in light of *Reed v. Gilbert*, 135 S.Ct. 2218 (2015). For this reason, the Beacon Center argued that the Court should grant summary judgment in favor of the Plaintiff.

Defendant challenges Fusner's 4.3 hours of fees for consultation with Boucek because there is "no indication" that he "provided any input into the case at hand other than filing a general amicus brief on the Billboard Act." (Def.'s Resp. to Plaintiff's Mot. for Attys. Fees at 6). Defendant cites no authority, other than the overarching principles in *Hensley*, to support its proposition that these hours are unreasonable. Upon review, the Court finds it to be imminently reasonable that Plaintiff's attorney should spend time consulting with Boucek, whose amicus curiae brief is thorough and exhaustive in support of Plaintiff's proposition that the Billboard Act impinges upon constitutional freedoms. Further, the District Court ultimately concluded that the Billboard Act is unconstitutional, making this time particularly reasonable under *Hensley*. Accordingly, it is RECOMMENDED that these hours not be removed from the lodestar calculation of Fusner's attorneys' fees.

Next, Defendant asserts that Fusner's billing for reviewing the Order on Motion to Dismiss, which was issued at a time when Plaintiff was proceeding *pro se*, is excessive, redundant, or unnecessary. Specifically, Defendant states that there is "nothing to indicate why there was a need to review the Order," especially when Fusner charged a significant number of hours other for his review of the file. (Def.'s Resp. to Plaintiff's Mot. for Attys. Fees at 6). Although this Court did enter an order on a motion to dismiss while Plaintiff was proceeding *pro se*, (*see* D.E. #165, #167, #170), Defendant does not provide a date on which Fusner billed for this hour for the Court to consider the reasonableness of this entry.⁷ Further, Fusner's billing records begin on May 12, 2016, the date before he filed his notice of appearance in this case, and continue until October 2, 2017, nearly five months before he ceased his representation of Plaintiff. Thus, unlike Miley, they do not contain billing entries overlapping the time Plaintiff proceeded *pro se*; at most, they only include a brief review of a step taken while Plaintiff

⁷ In an attempt to determine the date of the challenged billing, the Court has reviewed Defendant's Exhibit 1, which includes its analysis of Fusner's billing records, including all entries highlighted in yellow which Defendant notes indicate excessive, redundant, and/or unnecessary charges.

represented himself, which is not unreasonable. Accordingly, it is RECOMMENDED that this hour not be removed from the lodestar calculation of Fusner's attorneys' fees.

Next, Defendant asserts that Plaintiff should not be awarded 0.50 hours in time for the Motion for Additional Time. Defendant relies upon *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988), for the proposition that motions for extension are "unnecessary." *Id.* at 1496. In *Steele*, the attorney requested 26.7 hours for obtaining an extension and continuances. *Id.* The court did not entirely disallow the fees but instead removed 11.7 hours for the attorney's "failure to meet court deadlines." *Id.* Here, 0.50 hours for a single Motion for Additional Time is not only reasonable but to be expected during the pendency of a case of this nature. Accordingly, it is RECOMMENDED that this time is reasonable and should not be deducted from the lodestar calculation of attorneys' fees.

Next, Defendant argues that Fusner's 0.40 hours expended to utilize Public Access to Court Electronic Records ("PACER") was unreasonable because he had already billed for many hours to review Plaintiff's file. While certainly Fusner performed other file review over the course of this litigation, Defendant provides no reason why this particular charge to access records is unreasonable. Accordingly, it is RECOMMENDED that Plaintiff's 0.40 spent accessing PACER is reasonable and should not be deducted from the lodestar calculation of attorneys' fees.

Next, Defendant argues that Fusner's 14.9 hours billed for preparing and taking the deposition of Brian Carroll is unreasonable because Plaintiff never used the deposition for any purpose related to the injunction or declaratory judgment. Defendant cites no authority that such fees are unreasonable, and the Court finds that it is reasonable to conduct a complete and

thorough investigation into the evidence in the case regardless of whether specific evidence is used to support relief or not. Accordingly, it is RECOMMENDED that Plaintiff's 14.9 hours spent preparing for and taking the deposition of Brian Carroll is reasonable and should not be deducted from the lodestar calculation of attorneys' fees.

Next, Defendant argues that Plaintiff's 237.3 hours for work on the advisory jury trial, including pre-trial preparation, taking depositions of trial witnesses, and time spent at trial, is unreasonable because Plaintiff lost the trial. In the alternative, Defendant argues that Fusner should only be awarded 10% of the time spent on the jury trial. A thorough consideration of this issue requires an examination of the parties' positions as to the role of the jury and ultimately the District Court's exhaustive consideration and determination of the appropriate role of the jury in this matter.

Plaintiff requested a trial by jury from the initiation of the case until the final amendment to the complaint. (Third Am. Compl. at 44 \P 8, filed at D.E. #232). Defendant also demanded a jury trial. (Answer at 9 \P 9, filed at D.E. #17; Amended Answer at 9 \P 9, filed at D.E. #79). On March 30, 2016, the District Court entered an Order Denying Plaintiff's Motion for Partial Summary Judgment (D.E. #216), which concluded as to the constitutionality of the Billboard Act that, while it is "unlikely to survive strict scrutiny, Plaintiff is not entitled to summary judgment because there are disputed issues of material fact as to whether the governmental interests asserted by Defendants are compelling." (Order Denying Pl.'s Mot. for Summ. J. at 13). On May 16, 2016, the District Court entered an Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (D.E. #233), which again stated that the Billboard Act is likely an unconstitutional content-based restriction on speech but concluded that the fact finder must make a determination on the question of whether the restrictions are "narrowly tailored to serve compelling state interests." (Order Granting in Part and Denying in Part Def.'s Mot. for Summ. J. at 15-16).

On May 16, 2016, Plaintiff waived his demand for a jury, stating that he believed the "issues and facts are of a legal complexity to render a jury trial ineffectual and lengthy." (Pl.'s Waiver of Jury Trial Demand at 1, filed at D.E. #378). Defendant did not agree to waive its demand for a jury. (*Id.*) On September 6, 2016, the Court entered an Order Regarding Defendants' Motion in Limine as to Money Damages (D.E. #301) stating that the jury would decide two issues: (1) whether the State has a compelling interest that is furthered by the Billboard Act; and, (2) whether the Billboard Act is narrowly tailored to the State's interest. (Order Regarding Defendants' Motion in Limine as to Money Damages at 1). The District Court made clear that the jury would not make the final determination on the constitutionality of the Billboard Act. (*Id.*)

The four-day advisory jury trial began on September 19, 2016. (D.E. #320, #321, #322, #328). On September 22, 2016, a jury found that the State had a compelling interest that is furthered by the Billboard Act and that it was narrowly tailored to that interest. (D.E. #329). On the same day, Plaintiff filed a Rule 52 Motion for Verdict as a Matter of Law (D.E. #325). The State filed a response in opposition on Plaintiff's Rule 52 motion on October 7, 2016 (D.E. #336), and Plaintiff replied on October 21, 2016 (D.E. #340). On October 26, 2016, the Court entered an Order Concerning Least Restrictive Means, ordering the parties to file supplemental briefing on that issue (D.E. #342), and the parties complied (D.E. #343, #344). Additional briefing by the Amici Curiae was also sought and permitted, as was Plaintiff's response thereto.

(D.E. #346, #347, #348, #352, #354). On March 31, 2017, the District Court entered its Order & Memorandum Finding Billboard Act an Unconstitutional, Content-Based Regulation of Speech.(D.E. #356).

This procedural history makes clear the following: (1) Plaintiff ultimately opposed a jury trial; (2) Defendant continued to demand a jury trial; and, (3) the District Court, after exhaustive consideration and briefing, determined that an advisory jury trial on two issues was appropriate. Although the jury's findings were in favor of the State, the District Court's ultimate ruling was that the Billboard Act was unconstitutional. Fusner's work in preparation for and throughout the jury trial was an essential part of what the District Court determined to be the proper manner to resolve this case. Accordingly, it is RECOMMENDED that Fusner's 237.3 hours for work on the trial, including pre-trial preparation, taking depositions of witnesses, and the time at trial, are all reasonable and should not be removed from the lodestar calculation.

Finally, Plaintiff requests that Fusner be compensated for 46.7 hours spent preparing his "Remedies Memorandum." (*See* D.E. #360). As discussed above, *supra* Section II.a.v., Plaintiff achieved limited success on his pursuit of remedies, which was a distinct pursuit from the claim on which he was successful. Accordingly, it is RECOMMENDED that Fusner's 46.7 hours spent preparing his "Remedies Memorandum" be removed from the lodestar calculation.

B. Costs

Plaintiff further requests cost in the amount of \$15,934.71, which were incurred by Fusner, Miley, and Plaintiff.⁸ Specifically, Plaintiff requests \$5,834.74 in costs incurred by Fusner. \$320.90 in costs incurred by Miley, and \$9,787.07 in his own costs. Defendant asserts that various costs sought incurred by Fusner and by Plaintiff are not recoverable. As to Fusner's

⁸ Plaintiff states that the total of the requested costs is \$15,934.61; however, by the Court's calculation, the sum of the requested costs is \$15,934.71.

costs, Defendant states that a \$13.00 parking fee for meeting with Attorney Boucek is unreasonable; however, the Court has already determined that it was reasonable for Fusner to coordinate Plaintiff's efforts with Boucek, who filed an amicus curiae brief supporting Plaintiff's position that the Billboard Act was unconstitutional. Accordingly, it is RECOMMENDED that this \$13.00 cost is reasonable and should be awarded.

Defendant also asserts that Fusner's request for \$1,319.00 in costs related to Brian Carroll's deposition is not recoverable because his deposition was not used. However, the Court has RECOMMENDED, *supra*, Sections II.A.v, II.A.vi, and II.A.vii, that the attorneys' fees incurred in relation to Carroll's deposition should not be removed from the lodestar calculation. Likewise, it is RECOMMENDED that the costs should be awarded.

As to the costs incurred by Plaintiff (*see* Pl.'s Mot. for Attys.' Fees, Exh. 9, filed at D.E. #376-9), Defendant asserts that \$6,341.08 in costs were incurred for various depositions that were ultimately not used. These costs were incurred from July 28, 2015 until December 1, 2015, when Plaintiff was representing himself *pro se*. Although costs may be awarded to an attorney proceeding *pro se*, the Court is concerned that this appears to be an excessive amount of fees for depositions that were not used and were taken by a *pro se* attorney. Accordingly, it is RECOMMENDED that twenty-five percent of the costs incurred related to these depositions be awarded (\$1,585.27) and that seventy-five percent of the costs incurred related to these depositions be removed (\$4,755.81).

Defendant further asserts that Plaintiff incurred \$400.00, which was the filing fee for Case 2:16-CV-2660, and \$65.70 for various mailings, of which the contents are unknown. It is RECOMMENDED that these costs are unreasonable, as the filing fee for another case may not

be awarded in this case and the mailings are not described with sufficient detail to determine if they should be awarded. Accordingly, it is RECOMMENDED that these two entries, in the amount of \$465.70, be deducted from Plaintiff's award of costs.

In sum, it is RECOMMENDED that \$5834.74 in costs be awarded to Fusner, \$312.90 be awarded to Miley, and \$4,565.56 be awarded to Plaintiff.

III. Conclusion

For the reasons set forth herein, it is RECOMMENDED that Plaintiff's Motion for Attorneys' Fees, Costs, and Expenses be GRANTED IN PART and DENIED IN PART. It is RECOMMENDED that the following attorneys' fees and costs be awarded: \$170,100.00 in attorneys' fees to attorney George R. Fusner ("Fusner"); \$2,900.00 in paralegal fees to Fusner; \$162,450.00 in attorneys' fees to attorney Jonathan L. Miley ("Miley"); \$5,834.74 in costs incurred by Fusner; \$312.90 in costs incurred by Miley; and, \$4,565.56 in costs incurred by Plaintiff.

Signed this 12th day of December, 2018.

<u>s/ Charmiane G. Claxton</u> CHARMIANE G. CLAXTON UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WILLIAM H. THOMAS, JR.,)
Plaintiff,)) Case No. 2:13-cv-2987-JPM-cgc
v.)
JOHN SCHROER, Commissioner of the Tennessee Department of Transportation in))
his official capacity,)
Defendant.)

ORDER ADOPTING THE REPORT AND RECOMMENDATIONS FOR ATTORNEYS' FEES

Before the Court are the Report and Recommendations filed by U.S. Magistrate Judge Charmiane G. Claxton on December 12, 2018 (ECF No. 409) with respect to Plaintiff William H. Thomas, Jr.'s Motion for Attorneys' Fees, Costs and Expenses. (ECF No. 376.) The Magistrate Judge submits that Plaintiff's motion should be granted in part and denied in part. (ECF No. 409 at PageID 7858.) The Magistrate Judge recommends "that Plaintiff be awarded as follows: \$170,100.00 in attorneys' fees to attorney George R. Fusner ('Fusner'); \$2,900.00 in paralegal fees to Fusner; \$162,450.00 in attorneys' fees to attorney Jonathan L. Miley ('Miley'); \$5,834.74 in costs incurred by Fusner; \$312.90 in costs incurred by Miley; and, \$4,565.56 in costs incurred by Plaintiff." (Id. at PageID 7834.) For the below reasons the Court OVERRULES Plaintiff's objections and ADOPTS the Magistrate Judge's Report and Recommendations in its entirety.

Procedural Background

Plaintiff filed a Motion for Attorneys' Fees and Expenses on October 3, 2017. (ECF No. 376.) Defendant responded on October 13, 2017. (ECF No. 378.) Plaintiff replied on October 23, 2017. (ECF No. 382.) The motion was referred to the Magistrate Judge on August 3, 2018. (ECF No. 404.) The Magistrate Judge's Report and Recommendations were filed December 12, 2018. (ECF No. 409.) Fusner filed a Motion to Withdraw as attorney (ECF No. 399) which was granted on February 27, 2018. (ECF No. 401.) Fusner filed objections to the Report and Recommendations on December 19, 2018. (ECF No. 413.) Fusner filed an amended replacement of his objections the same day. (ECF No. 414.) Thomas filed objections to the Report and Recommendations on December 21, 2018. (ECF No. 416.) Defendant did not file any objections to the Report and Recommendations. Defendant filed a Motion to Stay Ruling on Attorneys' Fees until after the appeal is resolved on December 19, 2018. (ECF No. 411.) Plaintiff responded on December 21, 2018. (ECF No. 415.)

Legal Standard

"Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b) advisory committee note.

When a timely objection has been filed, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). The portions of a magistrate judge's recommendation as to which no specific objections were filed are reviewed for clear error. <u>See</u> Fed. R. Civ. P. 72(b) advisory committee notes; <u>Howard v. Sec'y of Health and Human Servs.</u>, 932 F.2d 505, 509 (6th Cir. 1991) (noting that when a party makes a general objection, "[t]he district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless."). "A general objection to the entirety of the magistrate's report has the same effects as would a failure to object." <u>Howard</u>, 932 F.2d at 509. Moreover, the "failure to properly file objections constitutes a waiver of appeal." <u>See Howard</u>, 932 F.2d at 508 (citing <u>United States v. Walters</u>, 638 F.2d 947, 950 (6th Cir. 1981)).

Analysis

The portions of the Report and Recommendations that Plaintiff objects to will be reviewed de novo. The remainder of the Report and Recommendations will be reviewed for clear error. Fed. R. Civ. P. 72(b)(3).

The Magistrate Judge used the lodestar method to determine reasonable fees based on what hours should be counted given the facts of this case. (ECF No. 409 at PageIDs 7838-39.) Defendant does not contest the rates charged by Fusner, Miley, Fusner's paralegals, or executive assistant Ricky Tan. (Response to Mot. for Fees, ECF No. 378.)

Plaintiff's objections

Plaintiff objects to four aspects of the Report and Recommendations : (1) the reduction of hours spent on remedies and damages, (2) the hours spent while Plaintiff was *pro se*, (3) the Plaintiff's Executive Assistant's fees, and (4) the costs for depositions and travel. (ECF Nos. 414, 416.)

3

Hours spent on remedies and damages

In its response to Plaintiff's original motion, Defendant asserts that the 16.3 hours for Fusner's work on "Damages" is unreasonable because Plaintiff never obtained a damages award. (Def. Response, ECF No. 378 at PageID 7421.) Miley also documented 93.7 hours for damages and remedies work. (Miley Invoices, ECF No. 376-6.) The Court previously determined that "monetary damages hinge on separate factual and legal determinations" than the constitutionality of the Billboard Act. (ECF No. 301 at PageID 5964.) The Court found the Billboard Act was unconstitutional and ordered supplemental briefing on the issues of remedies. (ECF No. 357.)

Plaintiff objects to the removal of Fusner's 16.3 hours and Miley's 93.7 hours of work on damages being excluded from the lodestar calculation because "Plaintiff's counsels were required to perform work per order of this Honorable Court as well as to preserve all remedies and damages issues on appeal." (Pl's Obj., ECF No. 414 at PageID 7874.) In support, Plaintiff notes his success on his request for attorney fees and post judgment interest.

No damages were awarded in this case. Attorney fees and post judgment interest are different from damages. Plaintiff argues that "the fee award should not be reduced simply because the Plaintiff failed to prevail on every contention raised in the lawsuit." (Id. (citing Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)).) Hensley also states:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Hensley, 461 U.S. at 436.

Plaintiff did not succeed in obtaining damages. Based on that lack of success, Fusner's 16.3 hours and Miley's 93.7 hours of work on damages and remedies will be excluded from the lodestar calculation.

Hours spent while Plaintiff was pro se

Defendant argues attorneys' fees should not be awarded for work performed while Thomas was proceeding *pro se*. (Def. Response, ECF No. 378 at PageIDs 7418-19.) While Thomas was *pro se*, Miley recorded 467.7 hours of work for which Plaintiff requests attorneys' fees. (Miley Invoices, ECF No. 376-6.)

Plaintiff argues attorneys' fees can be recovered by an attorney working for a *pro se* litigant. (ECF No. 414 at PageIDs 7875-76.) Plaintiff references the Supreme Court's dicta in <u>Kay v. Ehrler</u> that "it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." 499 U.S. 432, 436 (1991).

While the dicta in <u>Kay</u> may be correct, it does not address the issue of awarding attorneys' fees for overstaffing.

Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Hensley, 461 U.S. at 434.

By proceeding *pro se* Thomas signaled to the court that additional attorneys were not necessary for the litigation. If counsel, such as Miley, were necessary, they should have filed an appearance. This would allow the Court to set the litigation schedule accordingly. Miley was not an attorney of record while Thomas was proceeding *pro se*. That indicates Miley's

work during that period resulted in overstaffing. Miley's 467.7 hours while Thomas was *pro se* will, therefore, be excluded from the lodestar calculation.

Plaintiff's Executive Assistant's Fees

Defendant argues Ricky Tan, Fusner's executive assistant, is not entitled to attorneys' fees. (Def. Response, ECF No. 378 at PageID 7419.) Defendant asserts there "is no case law that suggests that secretaries and executive assistants are entitled to attorney's fees." (Id.) Plaintiff argues that Tan's hours should be included in the attorneys' fees because Tan "performed services of a nature greater than that of an experienced paralegal" and was "instrumental in organizing and keeping documents." (ECF No. 416 at PageID 7891 (quoting Fusner Decl., ECF No. 376-1 at ¶ 16).)

"Purely clerical or secretarial tasks, that is, non-legal work, should not be billed—even at a paralegal rate—regardless of who performs the work." <u>William Howe v. City of Akron</u>, No. 5:06-cv-2779, 2016 WL 916701, at *15 (N.D. Ohio Mar. 10, 2016) (citing <u>Bernhart v.</u> <u>Comm'r of Soc. Sec.</u>, No. 5:12CV2367, 2013 WL 3822141, at *2 (N.D. Ohio July 23, 2013)); <u>see also Richlin Sec. Serv. Co. v. Chertoff</u>, 553 U.S. 571, 585 (2008) (noting that reimbursement for costs typically included in "office overhead," including wages paid to office staff, is not customarily charged to clients or awarded as "attorney fees"). Plaintiff's declaration clarifies that Tan is neither a paralegal nor a lawyer. (Thomas Decl., ECF No. 376-7 at ¶ 6). Organizing and keeping documents, as Tan did, is not work that can be awarded as attorneys' fees. (Fusner Decl., ECF No. 376-1 at ¶ 16.) Tan's 1,489 hours will be excluded from the lodestar calculation.

Reduction in costs related to depositions

Defendant asserts that \$6,341.08 in costs accrued from unused depositions should not be awarded as attorneys' fees. (Def. Response, ECF No. 378 at PageID 7424.) Plaintiff incurred these costs while representing himself *pro se.* (See id.) By not using any of those depositions to achieve the success that attorneys' fees would be granted for, awarding the full amount is excessive. See Hensley, 461 U.S. at 436. While some of Plaintiff's efforts related to those depositions are understandable, the fact that they were not used indicates that only a portion should be awarded as attorneys' fees. Based on the number of depositions taken and the lack of their use related to Plaintiff's success, the Court in its discretion finds that only twenty-five percent of the costs incurred (\$1,585.27) will be awarded. The other seventy-five percent of the costs (\$4,755.81) will be excluded.

Conclusion

After a de novo review of Plaintiff's objections and the record related thereto, the Court has reached the same conclusions as the Magistrate Judge. Plaintiff's objections are overruled. Upon review of the remainder of the Magistrate Judge's Report and Recommendations, the Court has not identified any clear error and concurs with the Magistrate Judge's findings. The Report and Recommendations are, therefore, ADOPTED in full. Defendant's Motion to Stay (ECF No. 411) is DENIED AS MOOT. The awarded attorneys' fees will not be payable until the conclusion of the appeal currently before the Sixth Circuit.

SO ORDERED, this 13th day of March, 2019.

/s/ Jon P. McCalla JON P. McCALLA UNITED STATES DISTRICT JUDGE