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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEANS FOR SENSIBLE ELECTION LAWS,	)	
Plaintiff,	)	
vs.	)	**No. 18-821-III**
TENNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE, and DAVIDSON COUNTY DISTRICT ATTORNEY GENERAL,	)	
Defendants.	)	

MEMORANDUM AND FINAL ORDER: (1) GRANTING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS; (2) AWARDING PLAINTIFF $25,543.17 IN REASONABLE ATTORNEY'S FEES AND COSTS PURSUANT TO 42 U.S.C. § 1988(b) AND TENN. SUP. CT. R. 8, RPC 1.5; AND (3) PLACING PLAINTIFF'S COLLECTIVE EXHIBIT #2 UNDER SEAL

On October 11, 2018, the Court granted judgment in favor of the Plaintiff and entered "[a] declaratory judgment that Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121, both facially and as applied, violate the First and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Tennessee Constitution." In addition, the Court permanently enjoined the Defendant Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance from enforcing Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121.

In addition, the Plaintiff had requested an award of its reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988(b). To determine this final issue, the Court

provided the Plaintiff a deadline of October 12, 2018 to file its application for attorney's fees and discretionary costs and the Defendants a deadline of October 24, 2018 to respond. Following these filings, the Court ordered that it would adjudicate the motion on the papers and enter a final order.

On October 12, 2018, the Plaintiffs filed a *Motion For Attorney's Fees And Costs* requesting an award of $25,543.17 pursuant to 42 U.S.C. § 1988(b). Attached to the *Motion* was the *Plaintiff's Memorandum In Support Of Its Motion For Attorney's Fees And Costs* and four (4) accompanying exhibits, including Attorney Daniel A. Horwitz's affidavit, claimed receipts and time entries supporting the award claimed.

On October 24, 2018, the Defendants filed their response in opposition to the *Motion* and argued that "Plaintiff's fees and costs request is deficient under RPC 1.5 and Local Rule 5.05" because (1) the *Motion* does not address the required RPC 1.5 factors, but instead erroneously relies on the lodestar method; (2) the Plaintiff has failed to present competent proof for the 14.3 hours incurred by Attorney Jamie R. Hollin; and (3) the proof submitted on the amount typically charged in the locality is insufficient and unpersuasive.

After considering the arguments of Counsel, the record in this case and the applicable law, it is ORDERED that (1) the *Plaintiff's Motion For Attorney's Fees And Costs* is granted and (2) the Plaintiff is awarded $25,543.17 pursuant to 42 U.S.C. § 1988(b) and in accordance with TENN. SUP. CT. R. 8, RPC 1.5.

It is additionally ORDERED that to protect attorney-client communications and work product, *Collective Exhibit #2* attached to the *Plaintiff's Motion For Attorney's*

Fees And Costs shall be placed under seal.[1]

It is further ORDERED that this is a final order and court costs are taxed to the Defendants.

The Court's reasoning and analysis is as follows.

42 U.S.C. § 1988(b) Authorizes Attorney's Fees And Costs To Prevailing Party

The Plaintiff's *Verified Complaint* in this case sought injunctive and declaratory relief prohibiting the enforcement of Tennessee Code Annotated sections 2-10-117 and 2-10-121 on the grounds that the statutes were unconstitutional, both facially and as applied, on a variety of First and Fourteenth Amendment grounds. In obtaining a judgment and injunction in its favor, the Plaintiff has secured civil rights relief as to the unconstitutionality of two statutes of statewide effect triggering an award of attorney's fees pursuant to 42 U.S.C. § 1988(b).

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such

[1] In its *Memorandum In Support Of Its Motion For Attorney's Fees And Costs*, the Plaintiff stated that because the task descriptions in *Collective Exhibit #2* attached to the *Plaintiff's Motion For Attorney's Fees And Costs* "reference privileged communications and work product—the disclosure of which the Plaintiff has authorized for purposes of this motion—the Plaintiff respectfully requests that the document disclosing counsel's task descriptions be redacted or sealed following this Court's resolution of the instant motion to safeguard the confidentiality of Plaintiff's representation." The Defendants did not address this request to seal in their *Response In Opposition To Plaintiff's Motion For Attorney's Fees And Costs*. Finding no opposition, the Court grants the request to place Collective Exhibit #2 under seal.

> officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (West 2018).

"The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks omitted). Accordingly, the United States Supreme Court has held that "one who succeeds in obtaining an injunction under [§ 1983] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). *See also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("In *Newman, supra*, 390 U.S., at 402, 88 S.Ct., at 966, we held that in absence of special circumstances a district court not merely 'may' but must award fees to the prevailing plaintiff"); *Hensley*, 461 U.S. at 429 ("a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.") (internal quotation marks omitted).

In this case, the Plaintiff obtained the entirety of the relief requested in its *Verified Complaint* which included both injunctive and declaratory relief that the statutes at issue, Tennessee Code Annotated sections 2-10-117 and 2-10-121 are both facially and as applied unconstitutional. Given this result, the Plaintiff is unquestionably a "prevailing party" within the meaning of 42 U.S.C. § 1988(b) and is entitled to an award of its reasonable attorney's fees and costs.[2]

[2] The Defendants do not appear to dispute that the Plaintiff is a "prevailing party" entitled to reasonable

TENN. SUP. CT. R. 8, RPC 1.5. Factors

In Tennessee, when assessing the reasonableness of an attorney's fee award, the Court is required to apply the following factors in TENN. SUP. CT. R. 8, RPC 1.5:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent;
>
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
>
> (10) whether the fee agreement is in writing.

TENN. SUP. CT. R. 8, RPC 1.5 (West 2018).

Counsel for the State is correct that the Plaintiff did not analyze its request for attorney's fees strictly factor-by-factor through TENN. SUP. CT. R. 8, RPC 1.5, but instead

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attorney's fees within the meaning of 42 U.S.C. § 1988(b), as the Defendants' challenge to an award of attorney's fees only addresses TENN. SUP. CT. R. 8, RPC 1.5 and Local Rule of Davidson County 5.05.

focused on federal law on determining the reasonableness of attorney's fees under 42 U.S.C. § 1988(b). Nevertheless, this omission is not fatal to the Plaintiff's request for fees because (1) under federal law, a prevailing plaintiff should ordinarily recover an attorney's fee under 42 U.S.C. § 1988(b) unless special circumstances would render such an award unjust; and (2) the documentation and briefing supplied by the Plaintiff can easily be translated and analyzed by the Court under the applicable TENN. SUP. CT. R. 8, RPC 1.5. Similarly, as to the Defendants' argument that Plaintiff's Counsel "relies primarily on the lodestar method, contrary to Tennessee case law, and consequently, only addresses three of the ten factors involved in the analysis of a reasonable attorney's fee under RPC 1.5", the Court concludes that the documentation and briefing supplied by Plaintiff's Counsel is easily translated under the analytical framework of TENN. SUP. CT. R. 8, RPC 1.5.

In applying the applicable[3] factors of TENN. SUP. CT. R. 8, RPC 1.5, the Court concludes that an award of $25,543.17 in attorney's fees and costs is reasonable based upon the record.

First, as to factor one, this case involved complex constitutional claims addressing restrictions on speech. Specialized skill and training were needed to address these novel and difficult questions of law which required extensive legal research by the Plaintiff. As evidenced by the *Affidavit of Daniel A. Horwitz*, Plaintiff's Counsel spent over 100 hours working on this case in a span of approximately three months. Furthermore, the fact that

[3] Factors two, six, eight, nine and ten are not applicable to this case and therefore have not been analyzed by the Court in determining the reasonableness of the fee.

the Plaintiffs had brought a similar lawsuit in another Court, as argued by the Defendants, does not detract from the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly in this case.

With regard to factor three, the fee customarily charged in the locality for similar legal services, the Court finds from the *Affidavit of Daniel A. Horwitz* that the two Plaintiff's attorneys have reduced their normal hourly rate for this litigation from $400 an hour to $300 an hour for Mr. Hollin and from $280 an hour to $260 an hour for Mr. Horwitz. In addition, the *Affidavit* establishes that the Plaintiff's Counsel reduced and/or omitted certain items to avoid any redundancy and even self-proposed a 10% reduction in the total amount to the Court. Independent of the self-applied reductions and based upon this Court's independent familiarity with customary fees charged in the Nashville area, the Court finds that the fees are in line with fees customarily charged in Nashville, especially given Counsels' extensive experience in this area of litigation and the complexity of this case.

In making these findings, the Court accredits the following paragraphs from the *Affidavit of Daniel A. Horwitz.*

> 14. To date, neither of the Plaintiff's attorneys has been paid for their representation in this matter. Instead, Plaintiff's attorneys accepted this matter pro bono with an expectation of seeking attorney's fees from the losing party if the Plaintiff prevailed. I also assumed 100% of the costs of the Plaintiff's representation as out-of-pocket expenses. Counsel's receipts for all claimed, as-yet-unreimbursed out of pocket costs are appended to this Affidavit.

15. When privately retained, I charge $280.00 per hour. For purposes of this fee claim, however, I am instead seeking a reduced fee of $260.00 per hour.

16. My co-counsel, Mr. Jamie Hollin, has been licensed to practice law since 2006; his practice carries a heavy emphasis on election and political law cases; and he charges his private clients $400 per hour when billing them hourly. Even so, with respect to Mr. Hollin, the Plaintiff seeks only a $300 per hour award.

17. I have reviewed Mr. Hollin's time entries in this case. Like my own time entries, they are accurate representations of the time and tasks devoted to the Plaintiff's representation, and they are true and accurate to the best of my knowledge. A detailed list of all entries claimed for purposes of this award is attached to this Affidavit for the Court's review and convenience.

18. The rates that the Plaintiff seeks for its attorneys are considerably lower than those called for by the *Laffey* Matrix, and they are also lower than rates that have been awarded to comparably experienced counsel in similar cases within the jurisdiction. *See, e.g.*, Exhibit #3 (setting forth rates for recent fee award in *Tanco v. Haslam*, Middle District Case 3:13-cv-01159, Doc. 106-1, PageID ## 2231-32).

19. Notwithstanding the actual time devoted to the Plaintiff's representation, counsel's billing entries have been reduced or omitted to avoid duplication and redundancy. Counsel has additionally made a good-faith effort to exclude all hours that were even plausibly excessive or otherwise unnecessary. In total, Plaintiff's seeks: (1) an award for costs in the amount of $717.31, with applicable receipts attached; and (2) a lodestar determination reflecting 14.3 hours for Mr. Hollin, at a rate of $300 per hour ($4,290.00) and 89.9 hours for the undersigned, at a rate of $260 per hour ($23,374.00).

20. However, out of an abundance of caution to ensure the overall reasonableness of Plaintiff's total claimed award, counsel has additionally proposed cutting the total lodestar amount—which is presumptively reasonable and has already been substantially reduced—by an additional 10.00%, reflecting a total claimed award of $25,543.17.

21. Given the subject matter of this case; the high and indisputable degree of success achieved; and the expertise necessary to prosecute the Plaintiff's case properly; the Plaintiff respectfully submits that an overall award of $25,543.17 is reasonable.

Affidavit of Daniel A. Horwitz, pp. 5-7, ¶¶ 14-21 (Oct. 12, 2018).

In addition, the Court dismisses the Defendants' argument that the fee award should, at a minimum, be reduced "for the time incurred by Mr. Hollin" because "Plaintiff's request for attorney's fees seeks to recover fees for 14.3 hours of work allegedly performed by Mr. Hollin, but Mr. Hollin has not submitted an affidavit testifying that he in fact worked 14.3 hours and that his fees are reasonable."

The case cited by the Defendants on this point is *Hosier v. Crye-Leike Commercial, Inc.*, which states "[o]rdinarily, the party requesting attorney's fees carries this burden by presenting the affidavit of the lawyer who performed the work." No. M2000-01182-COA-R3CV, 2001 WL 799740, at *6 (Tenn. Ct. App. July 17, 2001) (citing *Hennessee v. Wood Group Enters., Inc.*, 816 S.W.2d 35, 37 (Tenn.Ct.App.1991)). In *Hennessee v. Wood Group Enters.*, the Court stated "[w]hile it is preferable to prove the reasonableness of such fees through the affidavit of the attorney doing the work, the Court can determine a reasonable fee upon consideration of all facts and circumstances presented by the record." 816 S.W.2d 35, 37 (Tenn. Ct. App. 1991). Neither of these cases stand for the legal proposition that a party attempting to prove the reasonableness of attorney's fees is required to present an affidavit from each lawyer in the firm who performed legal work on the case. In this case, it is sufficient for the attorney who performed the bulk of the work to submit an affidavit that details his work and a smaller portion of work by associated counsel. The *Affidavit* submitted by Attorney Horwitz is sufficient and is not in violation of Tennessee law.

As to factors four and five, concerning the results obtained and the time limitations, the facts are that this lawsuit was filed on July 26, 2018 and sought a preliminary injunction to halt enforcement of Tennessee Code Annotated section § 2-10-117 to the, then, upcoming August 2, 2018 primary elections in Tennessee. Despite denying this preliminary injunctive relief, the Court agreed to adjudicate this case on an expedited basis as requested by the parties to conclude the case prior to the November 6, 2018 midterm election.

The Defendants' argument that "the supposed exigent circumstances were manufactured by the Plaintiff as it could have brought this suit at any time following its voluntary dismissal of the federal suit" does not detract from the Court's determination. Whether this case could have been brought sooner or taken longer to litigate is not dispositive. Rather, the fact that Plaintiff's Counsel choose to proceed in an expedited manner and still obtained favorable results for their client is significant and provides perspective and context that weigh in favor of the Plaintiff as to factors four and five when considering the time limitations and results obtained.

Finally, as to factor seven, the Court concludes that both of the Plaintiff's lawyers are experienced, have good reputations, and demonstrated the ability to perform the services to succeed in this lawsuit. Specifically, the Court accredits paragraphs 6-13 of the *Affidavit of Daniel A. Horwitz* which supports the Court's conclusion on this factor. The Defendants' attempt to discredit Counsel's qualifications by arguing that the proof submitted by Plaintiff's Counsel only showed their experience in First Amendment cases, but not necessarily cases involving *campaign finance laws or issues* is not weighty.

Trying to parse out Plaintiff's qualifications or lack thereof through this type of over-technical distinction regarding election and campaign finance related matters as a subset of First Amendment law is inconsistent with the spirit of TENN. SUP. CT. R. 8, RPC 1.5 and with the Court's role in evaluating the factors. *See, e.g., Hosier v. Crye-Leike Commercial, Inc.*, No. M2000-01182-COA-R3CV, 2001 WL 799740, at *7 (Tenn. Ct. App. July 17, 2001) ("Parties seeking to recover their attorney's fees are not expected to march in a parade of witnesses to testify at length about how the requested fee measures up to the factors in Tenn. S.Ct. R. 8, DR 2-106(B).").

For all these reasons, the Court grants the *Plaintiff's Motion For Attorney's Fees And Costs* and awards $25,543.17 in reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988(b) and in accordance with TENN. SUP. CT. R. 8, RPC 1.5.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, email, or efiling as applicable to:
Daniel A. Horwitz
Jamie R. Hollin
Janet M. Kleinfelter
Erin Merrick
Kelley Groover