IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-181-MPT
	)	
THE HON. JOHN CARNEY,	)	
Governor of the State of Delaware,	)	
	)	
Defendant.	)	

DEFENDANT'S COMBINED BRIEF (1) IN SUPPORT OF DEFENDANT'S MOTION TO DEFER RULING ON ATTORNEY'S FEES AND COSTS PENDING APPEAL AND (2) IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN AWARD OF FEES AND COSTS

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Dated: January 9, 2018

This is Defendant's Opening Brief in support of his Motion to Defer Ruling on Attorney's Fees and Costs Pending Appeal ("Defendant's Motion"), and Answering Brief in Response to Plaintiff's Motion for an Award of Fees and Costs Pursuant to 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 54(d) ("Plaintiff's Motion").

For the reasons below, the Court should grant Defendant's Motion and defer ruling on Plaintiff's Motion pending appeal. But in any event, when the Court does rule on Plaintiff's Motion, the Court should reduce any award of attorney's fees and costs based on Plaintiff's partial success in this action and unnecessary work performed by Plaintiff's counsel before filing the Amended Complaint. Moreover, the Court should not apply any contingency multiplier because Plaintiff has failed to satisfy the relevant standards.

I. A Ruling on Plaintiff's Motion Should Be Deferred Pending the Outcome of Defendant's Appeal to the Third Circuit

Under Federal Rule of Civil Procedure 54(d)(2), "if an appeal on the merits of a case is pending, a court 'may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (2)(d)(B) a new period for filing after the appeal has been resolved.'" *Walker Digital, LLC v. Expedia, Inc.*, No. 11-313-SLR, 2013 WL 5662145, at *2 (D. Del. Oct. 16, 2013) (quoting Fed. R. Civ. P. 54, Advisory Committee Note, 1993 Amendment, Paragraph (2), Subparagraph (B)).

A ruling on Plaintiff's Motion at this juncture could lead to unnecessary expenditure of the Court's resources. Should Defendant prevail on his appeal to the United States Court of Appeals for the Third Circuit, *see* D.I. 50, Plaintiff would not be a prevailing party and would therefore be ineligible for an award of attorney's fees and costs under Section 1988, entirely mooting Plaintiff's Motion. *Wootten v. Virginia*, 2017 WL 1208676, at *1 (W.D. Va. Mar. 31, 2017) ("If the merits judgment is reversed, the parties' and Court's resources on the fee motion

will have been wasted[.]"). Moreover, given that this matter will persist at least through Defendant's appeal to the Third Circuit, a ruling on Plaintiff's Motion before that appeal is resolved would result in an incomplete determination of what, if anything, Plaintiff may be awarded in terms of attorney's fees and costs. *Id.* ("[A]nd if the merits judgment is affirmed, the parties and the Court can consider the entirety of the fee issue all at once, including fees incident to the appeal and post-judgment proceedings."). Finally, the circumstances of this case do not reveal that any prejudice would result from the deferral of a ruling on Plaintiff's Motion.

Accordingly, for the sake of judicial economy, Defendant's Motion should be granted, and the Court should exercise its discretion under Rule 54 to defer ruling on Plaintiff's Motion pending the outcome of Defendant's appeal to the Third Circuit. *See id.* (affirming report and recommendation to defer ruling on plaintiff's motion for attorney fees under Section 1988); *see also Mhany Mgmt. Inc. v. Inc. Village of Garden City*, 44 F. Supp. 3d 283 (E.D.N.Y. 2014) (granting a defendant's motion to defer ruling on plaintiffs' attorney's fees motion under Section 1988 pending the outcome of an appeal to the Second Circuit, and denying without prejudice the plaintiffs' motion without prejudice to renew after the Second Circuit's ruling).

II. Any Award of Plaintiff's Attorney's Fees Should Receive a Downward Adjustment Based on Plaintiff's Partial Success and Unnecessary Work Performed by Counsel, and No Contingency Multiplier Should Apply

When the Court does rule on Plaintiff's Motion, the Court should adjust the fees and costs requested. Defendant does not dispute that, if the Court's judgment is affirmed on appeal, Plaintiff may be deemed a "prevailing party" for the purposes of a Section 1988 award. *Inmates of Allegheny Cty. Jail v. Pierce*, 716 F.2d 177, 181 (3d Cir. 1983). However, while a prevailing party typically receives a grant of attorney's fees and costs within the court's discretion, *see Cty. of Morris v. Nationalist Movement*, 273 F.3d 527, 535 (3d Cir. 2001), the Court should reduce

any grant of attorney's fees based on: (1) Plaintiff's partial success in this action, and (2) a proper calculation of the lodestar that eliminates hours unnecessarily expended by Plaintiff's counsel in opposing Defendant's motion to dismiss. Moreover, the Court should not apply any contingency multiplier, as Plaintiff has failed to satisfy the relevant standards.

A. Reduction Based on Partial Success

Plaintiff claims that this action resulted in a "complete victory" because he "is no longer ineligible for any State judicial opening." D.I. 41 at 2. This is not correct. Despite being the "prevailing party" for purposes of a Section 1988 award, Plaintiff only partially succeeded on summary judgment. Plaintiff's partial success is significant, because while a plaintiff who achieves only partial success under Section 1983 may still be a "prevailing party" for the purpose of a Section 1988 award, a district court should reduce any amount awarded based upon such partial success. *See Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."); *Pierce*, 716 F.2d at 180-81 (explaining that "the extent of the fee-petitioner's success on the merits is of importance in determining the amount of a fee award") (citing *Hughes v. Repko*, 578 F.2d 483 (3d Cir.1978)). Indeed, a district court must "properly consider the relationship between the extent of success and the amount of the fee award." *Hensley*, 461 U.S. at 438; *see also Pierce*, 716 F.2d at 177 (remanding "so that the district court may reexamine the proper amount of the award in light of the extent of appellees' success on the merits").

Plaintiff brought this action "to have that portion of Article IV, Section 3 of the Constitution of the State of Delaware requiring that judges in Delaware be selected based, in part, on their political affiliation, and excluding members of minority political parties, be

declared unconstitutional" under the First Amendment. D.I. 10 at ¶ 1. The Court, however, determined that Plaintiff lacked standing to challenge the constitutional provisions relating to the Family Court and the Court of Common Pleas, and by noting the lack of a party requirement in those courts' Bare Majority provisions, the Court left untouched not only those provisions, but also the Bare Majority provisions relating to the remaining Delaware courts. *See* D.I. 40 at 7.

While "a plaintiff who has won substantial relief [on related claims] should not have his attorney's fee reduced simply because the district court did not adopt each contention raised," *Hensley*, 461 U.S. at 440, a plaintiff's challenges of distinct statutory provisions, as is the case here, will not be considered "related" for this purpose. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1513-14 (10th Cir. 1995) (holding that while the plaintiff had succeeded in challenging one statutory provision as unconstitutional, "unsuccessful statutory challenges were unrelated for purposes of determining the limited success reduction"). Instead, "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Hensley*, 461 U.S. at 440. Because the Court did not reach certain portions of Article IV, Section 3 that Plaintiff challenged in this action, Plaintiff achieved only partial success, and any award of attorney's fees should be reduced accordingly. *See id.* ("[T]he district court should award only that amount of fees that is reasonable in relation to the results obtained.").

Although Plaintiff's counsel did not differentiate time dedicated to the respective statutory provisions challenged by the Amended Complaint, "[w]hen a Court is unable to differentiate services for claims that were successful from services for claims that were unsuccessful . . . , the district court may consider a reduction based on the percentage of success achieved." *A.V. v. Burlington Twp. Bd. of Educ.*, 2007 WL 1892469, at *9 (D.N.J. June 27,

2007) (citing *Field v. Haddonfield Bd. of Educ.*, 769 F. Supp. 1313, 1323 (D.N.J. 1991)); *see also Hensley*, 461 U.S. at 436-37 ("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."); *Brown v. Eichler*, 680 F. Supp. 138, 143-44 (D. Del. 1988) ("The Court will exercise its discretion to reduce the lodestar figure rather than eliminate the specific hours spent on unsuccessful claims. This is because counsel did not report their time in such a way as to enable the Court to determine what time was spent on the unsuccessful claims . . . .").

Because Plaintiff did not achieve success in challenging the constitutional provisions relating to the Family Court and the Court of Common Pleas, or in challenging the Bare Majority provisions for the Delaware Supreme Court, the Superior Court, or the Court of Chancery, Defendant requests a 40-percent reduction in any award the Court may choose to grant, as such a reduction would reflect Plaintiff's partial success in challenging Delaware's constitutional provisions governing the composition of its courts.

B. Reduction Based on Exclusion of Unnecessary Work

Courts base Section 1988 awards of attorney's fees on a "lodestar" calculation, "which is equivalent to the appropriate hourly rate multiplied by the reasonable amount of hours expended." *Tobin v. Gordon*, 614 F. Supp. 2d 514, 520 (D. Del. 2009) (citing *Hensley*, 461 U.S. at 433). In this case, Plaintiff requests an award of $22,920.00 using an hourly rate of $400.00 multiplied by 57.3 hours, plus an award of costs in the amount of $537.00. *See* D.I. 41 at 3-5.

Defendant does not challenge Plaintiff's requested costs. Nor does Defendant challenge Plaintiff's hourly rate. However, Plaintiff's lodestar calculation should be reduced based on hours unnecessarily expended in this litigation.

Specifically, Plaintiff seeks compensation for fourteen hours expended by Plaintiff's counsel in conducting legal research to respond to Defendant's motion to dismiss the original Complaint for lack of subject matter jurisdiction. *See* D.I. 41-1 at 3. As stated in Defendant's motion to dismiss, Plaintiff's original Complaint failed to provide the Court with subject matter jurisdiction over this action, including failure to state a concrete injury in fact and to demonstrate ripeness. *See* D.I. 7. Plaintiff's subsequently filed Amended Complaint mooted Defendant's motion by addressing the flaws identified by Defendant's motion. Plaintiff's unnecessary response to the motion to dismiss served no purpose in advancing this litigation, and such work that is unnecessary for achieving the final result should be excluded from the lodestar calculation. *See Tobin*, 614 F. Supp. 2d at 525. Moreover, given that Plaintiff's counsel has stated an expertise in civil rights litigation, such extensive research should not have been necessary given the simple flaws in pleading that Defendant's motion identified. *See id.* at 524.

Accordingly, the fourteen hours Plaintiff's counsel dedicated toward legal research in responding to Defendant's motion to dismiss should be excised from the lodestar calculation, reducing the lodestar by $5,600.00.

C. The Court Should Not Apply Any Contingency Multiplier

In order to obtain a contingency multiplier, a party must establish: "1) how the market treats contingency cases differently from hourly fee cases; 2) the degree to which the market compensates for the contingency; 3) that the market rate of compensation is not more than would be necessary to attract competent counsel; and 4) that without a risk adjustment, the prevailing party would have had substantial difficulty in obtaining counsel." *Swan by Carello v. Daniels*, 917 F. Supp. 292, 301-02 (D. Del. 1995) (citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1184 (3d Cir. 1990)). Far from meeting this standard, Plaintiff states only that a contingency multiplier is

warranted simply because Plaintiff's counsel took this case on a contingent basis. *See* D.I. 41 at 3 n.1. Based on Plaintiff's complete absence of evidence supporting a contingency multiplier, the Court should not apply one in this case. *Swan*, 917 F. Supp. at 302 (denying contingency multiplier because the plaintiff "failed to offer any evidence satisfying" the relevant standards).

III. CONCLUSION

For the foregoing reasons, the Court should grant Defendant's Motion and defer ruling on Plaintiff's Motion pending appeal. When the Court does rule on Plaintiff's Motion, the Court should reduce any grant of attorney's fees, by excluding unnecessary work performed by Plaintiff's counsel, by reducing any overall award by 40 percent to reflect Plaintiff's partial success in this action, and by rejecting Plaintiff's request for a contingency multiplier.

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Dated: January 9, 2018

CERTIFICATE OF SERVICE

I, Pilar G. Kraman, hereby certify that on January 9, 2018, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on January 9, 2018**,** I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: January 9, 2018

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