IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

R.M.A.,	
Plaintiff,	Case No. 1516-CV20874
v.	Division 17
BLUE SPRINGS R-IV SCHOOL DISTRICT,	**ORAL ARGUMENT IS REQUESTED**
Defendant.	

SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS, EQUITABLE RELIEF, AND INTEREST

COMES NOW Defendant Blue Springs R-IV School District (the "School District"), by and through its undersigned counsel, and submits the following Suggestions in Opposition to Plaintiff's Motion for Attorneys' Fees, Costs, Equitable Relief, and Interest.

I. INTRODUCTION

Plaintiff's request for attorney fees should be denied, or if granted, the amount awarded should be substantially less than the amount requested ($1,183,635.00). The requested amount is derived by an attorneys' fees lodestar calculation of $591,817.50 plus a multiplier of 2.0. However, the requested award should be denied or substantially reduced because (1) the amount alleged as attorneys' fees is patently unreasonable, and (2) the requested multiplier (2.0) is unjustified and contrary to Missouri law.

In regard to the Plaintiff's request of equitable relief, specifically a permanent restraining order "requiring Defendant to end its discriminatory policies of excluding transgender students from using the correct restroom," speaks volumes as to what Plaintiff wishes this case was truly about but is without any legal basis. This relief was not plead, is barred by collateral estoppel and res judicata, is without legal or evidentiary basis, and violates the separation of powers.

Additionally, Plaintiff lacks standing to bring such a claim. Plaintiff already was denied this same relief by the Court in a previous action brought by Plaintiff against the School District. Additionally, the School District's policy is not prohibited by the MHRA, as recognized by this Court and the Missouri Court of Appeals. Finally, the issue of the School District's policy regarding transgender students was not before the Court. As dictated by the Missouri Supreme Court, this was not a transgender discrimination case, it was a simple male sex discrimination case.

II. REASONABLE ATTORNEYS' FEES

A. Attorneys' Fees Under the MHRA

The attorneys' fees requested are not just unreasonable and inappropriate, they are outrageous. As noted by Plaintiff, the purpose of an award of reasonable attorneys' fees in MHRA cases is "to make an MHRA plaintiff whole by compensating [that plaintiff] for the costs of bringing suit." *Wilson v. City of Kansas City*, 598 S.W. 3d 888, 897 (Mo. banc 2020)(internal quotation omitted). The Missouri Supreme Court also noted in *Wilson* "Federal courts have interpreted a reasonable attorney fee to be one that grants the successful civil rights plaintiff a fully compensatory fee comparable to what traditional for an attorney compensated by a fee-paying client . . ." *Id.* (internal quotation omitted). However, an award of attorneys' fees is not intended to produce a windfall to attorneys. *See generally City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986).

To determine the amount of a reasonable attorneys' fee award, the Court calculates the "lodestar". "The lodestar is determined by multiplying the number of hours ***reasonably*** expended on the case by a ***reasonable*** hourly rate." *Terpstra v. State*, 565 S.W.3d 229, 250 (Mo. App. W.D. 2019) (emphasis added). As noted by Plaintiff, when determining how much, if any, attorneys' fees should be awarded, the Court should consider the following factors: (1) the rates customarily charged by the attorneys involved in the case and by other attorneys in the community for similar

services; (2) the number of hours reasonably expended on the litigation; (3) the nature and character of the services rendered; (4) the degree of professional ability required; (5) the nature and importance of the subject matter; (6) the amount involved or the result obtained; and (7) the vigor of the opposition. *Wilson* at 896. As explained before, these factors do not support the Plaintiff's requested award.

B. No Evidence That Plaintiff Owes Attorneys' Fees

As noted above, and by Plaintiff, the purpose of an award of reasonable attorneys' fees in MHRA cases is "to make an MHRA plaintiff whole by compensating [that plaintiff] for the costs of bringing suit." *Wilson at* 897. However, as a threshold issue, Plaintiff must establish that he owes attorneys' fees to be awarded such fees pursuant to the Missouri Supreme Court's decision in *Ehlert v. Ward*, 588 S.W. 2d 500 (Mo. banc 1979). In *Ehlert*, the Missouri Supreme Court determined whether a prevailing party plaintiff in a case alleging violations of Truth in Lending Act ("TLA") was entitled to attorneys' fees when the plaintiff was represented by Legal Aid and was not obligated to pay the attorney. Despite the fact that under the statute a prevailing party is entitled to attorneys' fees, the Missouri Supreme Court determined attorneys' fees could not be awarded because it would be unnecessary to make the plaintiff whole and an award would impose a punishment on the defendant. *Id* at 504-505.

Plaintiff did not submit a copy of his fee agreement with his counsel with his Motion. The School District's counsel requested from Plaintiff's counsel a copy of the agreement following the filing of Plaintiff's motion, but Plaintiff's counsel refused, in writing, to provide the document(s). It begs the question-What is Plaintiff hiding? Without a copy of the fee agreement or other competent evidence of the fee arrangement between Plaintiff and Plaintiff's counsel, Plaintiff has not provided the Court a basis to award attorneys' fees. In other words, Plaintiff has not provided the Court with the necessary evidence to find that an award of attorneys' fees is necessary to make

Plaintiff whole.[1] *See Elhert*. Given the lack of evidence that fees are owed it leaves one to assume the purpose of the request for fees serves no other purpose but to punish the District in this case or provide a windfall.

C. Plaintiff's Counsel's Claimed Rates are not Customarily Charged by Them or Other Attorneys

In order to prevail on his Motion, Plaintiff must prove the rates he is claiming are (1) customarily charged by the Plaintiff's attorneys, and (2) customarily charged by other attorneys in the community for similar services. However, as shown below, Plaintiff fails to prove either.

1. No Evidence Plaintiff's Counsel Customarily Charges These Rates

Plaintiff claims each of his four attorneys have an hourly rate of $475. This alleged "rate" appears to be completely fabricated. There is no evidence that it is an amount Plaintiff's attorneys have ever actually charged a paying client. Each of Plaintiff's four attorneys state in affidavits that they "currently bill at this rate". However, **none of them** have provided evidence to the Court that establishes they have ever billed a paying client that amount, much less do they provide any such billing to establish that amount was charged in any other matter. Without such evidence, the Court has insufficient basis to make the finding that this is a rate Plaintiff's counsel customarily charges.

There is also no evidence that the sizable paralegal rates claimed by Plaintiff (which are higher than the rates of some attorneys in the metropolitan area) have ever been charged by them. Likewise, evidence to establish the reasonable rate charged for a law clerk's time is nowhere to be found.

2. Plaintiff's Attorneys have Recently Testified to Lower Rates in Other Divisions of this Court

[1] Without the fee agreement(s), it is also impossible to determine if Plaintiff agreed to billable rate.

Plaintiff's counsel has testified to having lower rates in recent cases in other divisions of this Court. In *Lavanden Darks v. Jackson County, Missouri*, Case No. 1716-CV09262, the plaintiff was also represented by Alexander Edelman, Katherine Myers, and Sarah Liesen. The *Darks* case also alleged discrimination under the MHRA. In March of 2019, the plaintiff requested attorneys' fees after prevailing at trial and attached affidavits from his attorneys, which are substantially similar to the affidavits submitted in this case ("2019 Affidavits"). However, in the 2019 Affidavits, these same attorneys testified to much lower rates for work performed **at the same time as much of the work performed on the present case**. In fact, Plaintiff's counsel worked on Plaintiff's case before the time they worked for the plaintiff in *Darks*. These attorneys testified as of March 2019, their billing rates were **$350** or **$375** an hour.

Even more recently, on July 6, 2020, in *Darks* the plaintiff filed a motion for attorneys' fees for work by attorneys Ms. Myers and Mr. Edelman for plaintiff's appeal and submitted affidavits from them ("2020 Affidavits"). claiming their rate had risen to **$400** an hour. Similarly, a few days earlier, on June 28, 2020, in *J.L. Wilson v. City of Kansas City, Missouri,* Case No. 1416-CV23151, Mr. Edelman submitted an affidavit calming his rate was **$400** and hour. Now, ***less than a year and half later***, without explanation or support, they claim their rates have skyrocketed to **$475** an hour.

a. Katherine Myers

As shown in her March 2019 Affidavit, attached as **Exhibit A**, Ms. Myers testified "**As of January 1, 2018, I increased my litigation hourly rate to $375 per hour . . .**" She did not indicate her prior billing rate. However, in her July 2020 Affidavit, attached as **Exhibit B**, Ms. Myers testified "**As of May 15, 2020, I increased my litigation hourly rate to $400 per hour . .** ."

b. Alexander Edelman

As shown in his March 2019 Affidavit, attached as **Exhibit C**, Mr. Edelman testified "**My hourly rate is $375.00/hour . . . My former hourly rate, $300/hour was approved in 2017 in *J.L. Wilson v. City of Kansas City, Mo* . . .**" However, in his July 2020 Affidavit, attached as **Exhibit D**, Mr. Edelman testified "**In February 2019, I increased my appellate hourly rate to $400 per hour . . .**"

c. Sarah Liesen

As shown in her March 2019 Affidavit, attached as **Exhibit E**, Ms. Liesen testified "**My hourly rate is $350/hr . . My former hourly rate of $300 was approved in 2017 for my work in *J.L. Wilson v. City of Kansas City, Mo* . . .**"

The standard is customary rates charged, not the rates they would like to charge given the opportunity.

3. Plaintiff's Counsel's Rates are (1) not the Rates They "Charged" When Performing the Work and (2) not the Appropriate Rate Based on Their Experience

This is not a typical case in which an attorneys' work on it spans a couple of years. Instead, Plaintiff's counsel first started working on this case in May 2014. As noted above, Plaintiff's counsel testified they "charged" much lower rates during the vast majority of time they were working on Plaintiff's case. Even assuming, *arguendo*, Plaintiff's counsel's current rate is deemed appropriate, such rates should not be retroactively applied to work performed as far back as seven and a half years ago.

Plaintiff argues such rates should be applied retroactively "so that Plaintiff's attorneys will be compensated for the loss of use of the money since the time the work was performed." However, there is no support in Missouri law to award a higher fee in order to account for interest. Furthermore, Plaintiff has not provided any evidence (or attempted to provide evidence) the

claimed current rates reflect the present value of the rates charged at the time the services were rendered.

Calculating attorneys' fees using the rate at the time the services were rendered and ***not*** the rates at the time of judgment has been upheld. *See Pollock v. Weiterau Food Distribution Group*, 11 S.W.3d 754 (Mo. App. E.D. 1999). In *Pollock*, the plaintiff appealed the trial court's award of attorneys' fees. As the Court should do in the present case, the trial court in *Pollock* calculated the attorneys' fees for prevailing plaintiff in a MHRA case using the rate of the attorney at the time the services were rendered and *not* the attorneys' rate at the time of judgment. The Court of Appeals upheld the trial court's use of the prior rates and rejected the application of federal court cases cited by the plaintiff, stating "careful review of these cases revels that **they do not create a presumption that an attorney's current hourly rate should be used in all cases**, but rather in those cases where the trial court determines that there is a need to compensate the attorney for a delay in payment of fees." *Id.* at 774 (emphasis added). As noted above, Plaintiff has not presented any evidence the claimed current rates reflect the present value of the rates charged at the time the services were rendered. Plaintiff's reliance on *Alhalabi v. Missouri Dept. of Natural Resources*, 300 S.W.3d 518 (Mo. App. E.D. 2009) is misplaced. In *Alhalab*i, the Court of Appeals upheld the award of attorneys' fees based on the attorneys' rate at judgment in part because "[plaintiff's] contract with his attorneys stated they would be paid at the amount in effect at the time of the judgment." *Id.* at 531. In the present case, since Plaintiff has refused to submit his attorney contract, there is no basis to find such a provision applies or even exists .

Plaintiff bases the extremely high rate for his counsel on their alleged extensive experience. However, Ms. Myers, Mr. Edelman, and Ms. Liesen did not begin practicing law until September of 2012. Additionally, although she practiced in criminal and family law since 2005, Ms. Johnson

did not begin practicing civil rights law until 2014, *the same year she started representing Plaintiff*. Plaintiff's attorneys were extremely inexperienced when they began representing Plaintiff and could fairly be described as lacking substantial experience during most of their representation of Plaintiff. Plaintiff's attorneys have represented Plaintiff during the vast majority of their legal careers. The rise in counsel's claimed rates (as shown in the 2019 and 2020 Affidavits) reflects the substantial difference in experience possessed by counsel at different points during their representation of Plaintiff, and not simply the passage of time. Accordingly, there is no basis to award attorneys' fees based on a rate for a highly experienced attorney for work that was performed when said attorneys were extremely inexperienced.

4. <u>There is Insufficient Evidence the Rates Claimed by Plaintiff are Customarily Charged by Other Attorneys in the Community for Similar Services</u>

In support of Plaintiff's claim that the rates charged are customarily charged by other attorneys in the community for similar services, Plaintiff has submitted multiple affidavits from other attorneys who represent plaintiffs in civil rights cases. These affidavits should be taken with a large grain of salt. This is because the affiants have an indirect pecuniary interest in raising the awarded rates of attorneys working on similar cases. As is well known, plaintiffs' attorneys help each other out by executing affidavits stating the attorney whose fees are being requested are reasonable and in line with what other attorneys are "charging", including themselves. Obviously, it benefits the affiants to have the awarded rates for civil rights attorneys to be as high as possible. However, as with Plaintiff's counsel's affidavits, the supporting affidavits from other attorneys contain opinions and conclusions without supporting evidence. These affidavits, like those of Plaintiff's counsel, fail to identify actual billing they have done to fee-paying clients with rates they allegedly charge.

As shown by the meteoric rise of the rates asserted by Plaintiff's counsel over just the last three years, awarded rates will continue to irrationally spiral upward at an alarming rate unless courts review the requested fees critically and tether awards to some objective evidence.

D. <u>The Number of Hours Claimed are Unreasonable</u>

In order to be awarded, the hours claimed must be "reasonably expended on the litigation." *Wilson* at 896. The number of hours claimed by Plaintiff (1410.4 hours) are clearly excessive. These hours are excessive because they include work that was duplicative, inefficient, unnecessary and unrelated to the litigation.

One test to determine whether the hours expended by Plaintiff's counsel is excessive is to compare it to those of defense counsel. The School District's attorneys' hours (including paralegal work) totaled only **1096.2** hours. See **Exhibit F.** Accordingly, Plaintiff's counsel is claiming they worked about **129%** of the hours the School District's counsel did to litigate the same case.

A cursory review of the billing statements of Plaintiff's counsel reveals much of the claimed work was duplicative, inefficient, unnecessary and unrelated to the litigation. First, the time entries show multiple attorneys working on tasks which should only require one attorney to perform. For example, Plaintiff's counsel charges for three of the attorneys to work on one attorney's opening statement. December 4, 2021, Ms. Liesen and Ms. Johnson worked together several hours on *Ms. Johnson's* opening statement. Mr. Edelman and Ms. Liesen then continued working on *Ms. Johnson's* opening statement the next day. In another example of inefficiency, there are many instances where multiple attorneys bill for meeting with each other regarding one task. There are even instances where ***all four attorneys*** bill for meeting to discuss the case (see entries on January 12, 2021 and November 9, 2021). Internal office meetings are not typically billable. The fact Plaintiff retained four attorneys does not translate into the need for four attorneys

and certainly does not mean that it is reasonable to pay four times the amount necessary to accomplish a task.

The arguments advanced by Plaintiff contradict logic. In his motion, Plaintiff claims the excessive rate of $475 is justified because "Plaintiff's counsel were able to efficiently litigate the matter, their hourly rates reflect their experience and knowledge which allows them to complete tasks more quickly." Logic dictates that an experienced attorney does not require additional attorneys to perform one task, such as to prepare an opening statement. Accordingly, Plaintiff wants an excessively high rate for attorneys based on their efficiency, but then offers billing statements that demonstrate a clear lack of efficiency.

Some of Plaintiff's claimed fees appear to be simply erroneous or duplicative. On December 4, 2021, paralegal Ellen Crawford billed for two entries, one for 4.3 hours and the other for 3.6 hours, with *identical* descriptions, namely "Assisted trial team with organization and preparation of trial notebooks." At the exorbitant claimed rate of $150 an hour, those entries amount to a $1,185 charge.

Plaintiff also claims fees for work that was clearly unnecessary. The most striking example of this is for work performed by law clerk, Luke Kalp. At a claimed rate of $125 an hour, Plaintiff seeks fees for several thousands of dollars for Mr. Kulp ***to take notes*** at trial, at the pre-trial conference, and at client meetings. This is outrageous and supports the argument that Plaintiff's entire request for fees is subject to scrutiny

Finally, Plaintiff can only be awarded fees for his counsel's work that is "related to the *litigation*". *Wilson* at 896 (emphasis added). However, a portion of Plaintiff's requested fee award is for work not related to the litigation, but instead for negotiating access to the restrooms several months before Plaintiff even began drafting his charge of discrimination. For example, Madeline

Johnson's entry for work on June 7, 2014 was "Meeting with BSSD at district office: Scott Young, Ryan Fry (attorney for BSSD) Rachelle Appleberry Rob Appleberry: negotiation and discussion of access to boys' bathrooms and locker rooms." This clearly is **not work related to the litigation**.

E. <u>The Nature and Character of the Legal Work Does not Justify the Requested Award</u>

In regard to the "the nature and character of the services rendered", such do not justify the requested award. Plaintiff's counsel is requesting an award of attorneys' fees for work that was not consistent with that of experienced attorneys. It should be noted Plaintiff justifies his claims for an exorbitant rate of $475 on counsel's extensive experience, including trial experience. However, Plaintiff's counsel's work often did not reflect such experience.

The Court can recall the Plaintiff's counsel's submissions, arguments, and trial work and determine for itself the nature and character of the legal work by Plaintiff's counsel. However, the School District points out an example of the quality of the services provided-the fact that Plaintiff's counsel failed to offer evidence required to make a submissible case. As set forth in the School District's Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial, Plaintiff's counsel failed to offer **<u>any evidence</u>** at trial that (1) Plaintiff's sex (not his gender) was male, or (2) Plaintiff's male sex was a contributing factor to the School District's decisions. In fact, Plaintiff's counsel plead facts and offered evidence **<u>to the opposite</u>**.

The Missouri Supreme Court declared what the verdict director instruction for Plaintiff's claims should be, thereby establishing the elements the Plaintiff must prove to succeed in his cause of action. The Missouri Supreme Court declared the verdict director instruction to be ("in substance if not in form") as follows:

> Your verdict must be for plaintiff [R.M.A.] if you believe:
>
> - First, defendants [School District and School Board] denied plaintiff full and equal use and enjoyment of the males'

restroom and locker room facilities at defendants' school, and

- Second, plaintiff's male sex was a contributing factor in such denial, and
- Third, as a direct result of such conduct, plaintiff sustained damage.

As noted by the Court during the pre-trial conference, this Petition was never amended, even after the Missouri Supreme Court's decision declaring the verdict director instruction was entered in 2019.

It is incontrovertible that Plaintiff's counsel offered no evidence that Plaintiff being a member of the male sex was a contributing factor in the School District's decisions. The fact that the jury overlooked this complete lack of required evidence does not change the reality that no evidence was offered on these two elements. Every lawyer knows that evidence must be offered to satisfy each and every required element of a cause of action.

Instead of amending Plaintiff's petition to make it one for transgender discrimination, Plaintiff chose to do nothing and hope this Court would disobey the mandate of the Missouri Supreme Court and offer different instructions. When that failed, Plaintiff's counsel clearly decided to simply offer evidence for the cause of action they wished they had (a transgender discrimination case) as opposed to the cause of action they had (a male discrimination case) and hope the jury would be confused enough to ignore the instructions. Despite the jury's verdict, it is never proper to not offer evidence to satisfy the necessary elements of a cause of action.

F. Plaintiff Did Not Obtain His Desired Result of Expanding Transgender Rights; Instead, He Tried a Simple Sex Discrimination Case

In this case, three of the factors are somewhat interrelated. Accordingly, they will be addressed together. These three factors are (1) the degree of professional ability required; (2) the nature and importance of the subject matter; and (3) the amount involved, or the result obtained.

Although Plaintiff obtained a large verdict from the jury, Plaintiff failed to achieve his desired result. Plaintiff's goal in this litigation was to have the protections afforded by the MHRA extended to transgender individuals. Specifically, Plaintiff fought to change Missouri law to have it be unlawful under the MHRA to not allow transgender students to use facilities consistent with their gender identity/have the MHRA protections extended to transgender students. Despite Plaintiff's counsel's assertion to the contrary, Plaintiff failed to accomplish this goal.[2] The Missouri Court of Appeals determined that in enacting the MHRA, the General Assembly did not intend "discrimination on the grounds of sex" to include the deprivation of a public accommodation--the boys' restroom and locker room--because a person is transitioning from female to male.

On appeal, the Missouri Supreme Court did not reach a decision on whether transgender status is a type of sex under the MHRA (calling the debate premature) because it found that Plaintiff had not claimed protection under the MHRA based on his transgender status but, rather, based on his male sex. Accordingly, since the Missouri Supreme Court's decision in February 2019, this case has been a simple male sex discrimination case. Plaintiff never sought leave to amend his Petition to make his case one for transgender rights. Even though Plaintiff's counsel

[2] Madeline Johnson's affidavit states "Together we continued to pursue vindication of our client's rights and eventually gained recognition for protections of transgender persons in Missouri under the definition of 'sex' under Missouri's human rights statute." As the Court knows from its review of the Missouri Supreme Court's decision, this statement is a gross mischaracterization.

tried the case as if it were a transgender rights case, as shown by the instructions, it was not. This was not a "landmark" case, as it did not change Missouri law regarding transgender rights. **Transgender persons have no more protections under the MHRA now than they did prior to Plaintiff's lawsuit**.

The Missouri Supreme Court recognized this case as a male sex discrimination case. The subject matter, male sex discrimination, was not particularly novel. The School District does not deny Plaintiff was successful in many regards, including a sizeable jury verdict. However, in considering Plaintiff's motion, the Court should strongly consider the fact that much of the legal work claimed was to expand of the protections of the MHRA to transgender persons. Plaintiff often noted and continues to state, "it was never about the money". Clearly, Plaintiff failed to accomplish the goal of expanding the protections of the MHRA.

Given the Missouri Supreme Court's decision, this case was somewhat uncomplicated and straightforward, as it was a simple male sex discrimination case where most of the facts were not contested. Accordingly, it did not require a particular high level of professionalism to prosecute post February 2019.

G. <u>Vigor of the Opposition</u>

The School District does not deny its counsel vigorously defended it. However, none of the criticized billing was necessitated as a result of defense counsel's vigor. Accordingly, vigor of the opposition is not an applicable factor in this case.

H. <u>Correct Lodestar</u>

Plaintiff has failed to provide evidence or reasonable arguments supporting his grossly inflated lodestar amount ($591,817.50). As noted above, this amount is unjustified for several reasons. These reasons have a cumulative effect, which has resulted in a grossly inflated requested lodestar. Accordingly, the Court is fully justified in exercising its discretion to deny Plaintiff's

motion entirely. However, if the Court chooses to award an attorneys' fee amount, Defendant suggests it reduce the requested lodestar amount by at least 50%. This would still provide Plaintiff a substantial award and make him more than whole.

I. A Multiplier is Improper Under Missouri Law

In addition to the excessive lodestar amount, Plaintiff requests the claimed lodestar amount be multiplied ***by 200%.***[3] However, under Missouri law, any lodestar multiplier (much less a 2.0 one) would be improper because Plaintiff has not, and cannot, provide evidence for the Court to base such as award.

As stated by the Missouri Supreme Court in *Berry v. Volkswagen Group of America, Inc*. (Mo banc 2013)

> In *Perdue*, the Supreme Court state **there is a strong presumption that the lodestar amount is the mount of reasonable attorneys' fees**, but that presumption could be overcome . . . a reasonable fee is a fee that is sufficient to persuade an attorney to commence representation of a meritorious case; **it is not provide an economic windfall to the attorney**. . . an enhancement to the lodestar amount may be awarded **in rare and exceptional circumstances**.

Id. at 430 (internal quotation and citations omitted)(emphasis added).

In the present case, Plaintiff alleges the following bases in support of a multiplier to his claimed lodestar amount: (1) the risk involved because the case was taken on a contingency basis; (2) "for obtaining excellent results"; (3) "commitment of time and resources precluded them from working on any other cases, and from accepting any new clients"; and (4) the need to deter the School District and to "shake it out of its brazenly discriminatory behavior". However, as shown below, these alleged bases are improper and/or unsupported.

[3] Plaintiff fails to provide any reasoning as to why a 2.0 multiplier, as opposed to a much lesser multiplier, is appropriate. It appears the requested multiplier was pulled out of thin air.

1. Plaintiff Improperly Asserts the Same Facts to Base His Inflated Lodestar Amount as His Request for a Multiplier

The Missouri Supreme Court noted "When a trial court must determine whether to apply a multiplier, **it should avoid awarding a multiplier based upon facts that it considered in its initial determination of the lodestar amounts**." *Id.* at 431(emphasis added). Plaintiff claims the risk involved because the case was taken on a contingency basis as a basis to award a lodestar multiplier. However, Plaintiff also asserts *this same fact* as one to base the claimed lodestar amount. This same fact cannot be used both as a basis for the lodestar amount and for a lodestar multiplier.

Similarly, Plaintiff alleges his "excellent result" as a basis for his lodestar calculation. As explained above, Plaintiff's result was not "excellent". However, irrespective of the success of the claim, success of the claim cannot be used a basis for the lodestar *and* for a lodestar multiplier pursuant to *Berry*.

2. No Evidence Plaintiff's Counsel was Precluded from Working on Other Cases and Accepting New Clients

In *Berry*, a lodestar multiplier was upheld by the Missouri Supreme Court because the trial court made specific factual findings, including (1) "taking the case precluded class counsel from accepting other employment that would be less risky", and (2) the "the time required by the demand of preparing this cause for trial delayed work on class counsel's other work. . . These findings support a finding that a multiplier was necessary to ensure a market fee that compensated class counsel for taking this case **in lieu of working less risky cases on an hourly fee**" *Berry* at 433 (emphasis added).

In the present case, Plaintiff claims his lodestar amount should be doubled because his attorneys' "commitment of time and resources precluded them from working on any other cases, and from accepting any new clients". In support, he submits affidavits from his counsel. However,

none of the affidavits support a finding that Plaintiff's counsel's work on Plaintiff's case precluded them from (1) accepting new clients, or (2) delayed work on other cases. In fact, all evidence is to the contrary.

a. Work on the Case did not Preclude Accepting New Less Risky Hourly Fee Clients

There is simply no evidence Plaintiff's counsel's work on this case precluded them from accepting new clients. **Nowhere in the affidavits** of Plaintiff's four attorneys is there testimony that any of them could not, or did not, accept new clients based on their work on Plaintiffs' case, much less new clients that are less risky.[4] Certainly, if they exist, Plaintiff's counsel should be able to identify how many clients they could not have accepted because of their work on this case, and why.

Plaintiff's counsel's evidence actually establishes the opposite is true. In an effort to prove how experienced they are, Plaintiff's counsel's affidavits go into great detail about the many cases which they have tried and litigated during the time they were also representing Plaintiff. Accordingly, these affidavits provide evidence counsel did not turn away any client because of their representation of Plaintiff. Based on their own testimony, their practices appear to have thrived during the time they have represented Plaintiff. Also, Plaintiff's counsel's affidavits tout that they take high risk civil rights cases. As Mr. Edelman states in his affidavit "We are committed to take on the hard fights; we are dedicated to taking cases involving complex, difficult and/or novel issues which, while meritorious, other attorneys may find undesirable due to the time required and uncertainty of the outcome." Accordingly, it is reasonable to conclude that even if

[4] Mr. Edelman and Ms. Johnson's affidavits state they did not "have time to engage new clients or prosecute pending cases at the same rate" as they would absent work/jury trial. This is extremely ambiguous. However, they did not testify they (1) were precluded from accepting work because of demand of this case, or (2) that precluded work would have been less risky.

there were cases that could not be accepted because of work on this case (which there is no evidence to support), such cases would not have been less risky.

As noted above, the necessary finding for a lodestar multiplier is that such enhanced fee is "necessary to ensure a market fee that compensated class counsel for taking this case **in lieu of working less risky cases on an hourly fee**" *Berry* at 433 (emphasis added). The Court cannot make this finding, since there is no evidence Plaintiff's counsel's work on the present case precluded them from accepting new cases, much less cases that would have paid counsel on an hourly fee.

b. No Consequential Delay in Work on Other Matters

There is no evidence that Plaintiff's counsel's work on Plaintiff's case caused consequential delay in work for other cases. Due to the simple fact that a lawyer cannot work on two client matters at the same time or be at two places at the same time, an attorneys' work on any matter necessarily delays work on another matter. The fact that work on a case might be delayed a few days while an attorney works on another matter is expected and is a normal part of legal practice (for both plaintiff and defense attorneys). Such minor delay is certainly not a basis to grant a multiplier. The question is whether there was a consequential delay in work on other cases because of the work on this case. Plaintiff's counsel has not identified any cases in which there was a consequential delay in work as a result of preparing for trial on this matter. It should be noted that only two of Plaintiff's four attorneys tried this case, and one attorney helped try a case going on simultaneously in another division of the Court.

3. Deterrence is an Inappropriate and Unwarranted Factor in the Case

Plaintiff claims the Court should double the lodestar amount "to deter the Blue Springs School District and to shake it out of its brazenly discriminatory behavior". As explained below, deterrence is an inappropriate and unwarranted factor to consider in this case.

a. Deterrence/Punishment is Inappropriate

Awarding a lodestar multiplier to deter the School District would be inappropriate and unconstitutional. Deterrence is already assessed in determining punitive damages. Pursuant to the punitive damage instruction, Instruction No. 14 in this case, the jury assessed a punitive damage award in an amount that "will serve to deter defendant and other from like conduct." Accordingly, whether an amount is warranted to deter the School District is already determined with regard to punitive damages. To award a lodestar multiplier would result in a double punishment for the same conduct. The multiplier would essentially be a second punitive damage award.

The jury awarded $4 million in punitive damages. The School District has filed a motion for Judgment Notwithstanding the Verdict ("JNOV") on the basis there was no evidence, much less clear and convincing evidence, establishing entitlement to punitive damages. The Court has not ruled on the Motion for JNOV. However, irrespective of whether JNOV is granted, deterrence/punishment is not appropriate or necessary in this case. If the Court grants JNOV on punitive damages, then the Court has made a finding the evidence does not warrant punishment under Missouri law. It would then be inconsistent for the Court to award a multiplier to deter/punish the School District. Additionally, such punishment would violate Missouri law because it would effectively set a lower standard for punitive damages.

If the Court does not grant JNOV, then the judgment would already include the full amount deemed necessary to deter/punish the School District. Granting a multiplier in addition to the punitive damage award would be a double punishment for the same conduct.

b. Deterrence/Punishment is Unwarranted

Plaintiff claims the lodestar should be doubled to deter/punish the School District. However, such deterrence/punishment is unwarranted for the same reasons why a punitive damage award is unwarranted, namely that there is no evidence the School District acted with evil motive

or with reckless disregard to Plaintiff's rights. Instead, the evidence established the School District's motive was to protect the privacy and safety of children. It is worth noting the School District was not alone in this concern, as evidence was presented that parents of other students contacted the School District to express their objections to Plaintiff undressing with their sons in the locker room. All of the evidence was that Plaintiff was treated well and held up by teachers, administrators, and staff as an exemplary and well-liked student. Moreover, Plaintiff liked the teachers, administrators, and staff, and held some of them as his moral exemplars (his efforts to paint them otherwise at trial notwithstanding). There was no evidence of reckless disregard of Plaintiff's alleged right to use the boys' room or boys' locker room since no such right was established. Furthermore, the School District's actions were consistent with the determinations made by the Court in its ruling on Plaintiff's Petition in Mandamus.

4. The Reasoning Behind Lodestar Multipliers does not Apply in this Matter

A lodestar multiplier should only be awarded in "rare and exceptional cases". *Berry* at 430. The reasons why a multiplier may be applicable to a case are not present in this case. The rare case in which a multiplier might be warranted is where counsel for a plaintiff has essentially devoted their entire practice over a substantial time period to the plaintiff's case, requiring an extraordinary outlay of both time and expenses. This is not the situation in the present case.

III. POST-JUDGMENT INTEREST

Plaintiff acknowledges the Court has discretion to award a post-judgment interest between 5.0% and 5.25%. Given that the School District is a public entity responsible for the education of children, the School District request the Court set any post-judgment interest at 5.0%.

IV. EQUITABLE RELIEF

Plaintiff seeks outlandish equitable relief, specifically "a permanent restraining ordering [sic], requiring defendant to end its discriminatory policy and practices of excluding transgender students from using the correct restroom." Although 213.111.1 authorized the Court to grant as relief equitable relief, Plaintiff has not cited ***any*** Missouri case in which a court granted equitable relief in a MHRA case, much less the extreme equitable relief sought by Plaintiff. For the reasons set forth below, this request must be denied.

A. The Equitable Relief was Not Plead

The Court does not have the authority to grant Plaintiff's request for a permanent restraining order because it was not sought in Plaintiff's Petition. "[A] trial court's authority to grant equitable relief is inherently limited to the relief sought." *Evers as Trustee of Evers Trust Dated 5/19/2016 v. Choate*, 589 S.W.3d 717, 723 (Mo. App. E.D. 2019).

Nowhere in Plaintiff's Petition does Plaintiff request a permanent restraining order against the School District. Plaintiff's Petition did not set forth any allegations that a permanent restraining order is appropriate, much less on what basis. Plaintiff simply listed in his prayer a general request "for appropriate equitable relief." This is wholly inadequate under Missouri law.

The City of Greenwood v. Martin Marietta Materials, Inc., 311 S.W.3d 258 (*Mo. App. W.D. 2010) case is instructive. In *City of Greenwood*, after granting judgment on jury verdict in favor of the plaintiff, the trial court entered a permanent injunction against the defendant. The defendant appealed the grant of the injunction, arguing among other things that the plaintiff did not adequately plead the sought equitable relief. The Court of Appeals reversed, finding the granting of injunctive relief was in error. The Court of Appeals summarized the pleading requirements for equitable relief as follows:

> It is well established that the "powers of a court of equity to adjudicate are broad but are limited to the *claim for relief and issues* made by the pleadings." *Blando v. Reid,* 886 S.W.2d 60, 67 (Mo.App. W.D.1994) (emphasis added). "**To the extent that [a] judgment goes beyond the pleadings, it is void**." *Residential & Resort Assocs., Inc. v. Wolfe,* 274 S.W.3d 566, 569 (Mo.App. W.D.2009). **Therefore, a trial court has the authority to grant relief only if: (1) the relief is requested, and (2) issues are raised that support the granting of such relief.** In this case the trial court exceeded its authority in considering Greenwood's motion for injunctive relief.
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> **Generally, the prayer for relief is not considered part of the petition**. *City of Kansas City v. N.Y.–Kan. Bldg. Assocs., L.P.,* 96 S.W.3d 846, 853 (Mo.App. W.D.2002). "**This rule is particularly applicable to equitable proceedings**." *Id.* **Thus, granting relief not specifically prayed for in the pleadings is appropriate only if it resolves "issues raised by the allegations in the cause pleaded**." *Blando,* 886 S.W.2d at 67. Courts are restrained from deciding an *unpleaded* factual issue. . .
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> Greenwood maintains that the grant of an injunction in this case is supported by facts pleaded and tried to establish its public nuisance claim. **However, a party cannot plead an action in law and recover in equity**. *Carlton v. Wilson,* 618 S.W.2d 731, 732 (Mo.App. S.D.1981). Because Greenwood's public nuisance claim was a claim at law, **Greenwood cannot rely on the pleading of the facts supporting the public nuisance claim to also support its motion for injunction, an equitable remedy** . . .

Id. at 264-265.(emphasis added).

In *Swift v. Federal Home Loan Mortg. Corp*., 417 S.W.3d 342 (Mo. App. S.D. 2013), citing *City of Greenwood*, the Court of Appeals explained

> "**The purpose of a pleading is to limit and define the issues to be tried in a case and [to] put the adversary on notice thereof**." *Smith v. City of St. Louis*, 395 S.W.3d 20, 24 (Mo. banc 2013). "**The trial court's authority is limited to such questions as are presented by the parties in their pleadings**." *McClain v. Hartley*, 320 S.W.3d 183, 185 (Mo.App.E.D.2010). **Mentioning an alternate theory for relief in a later motion does not invest the**

> **trial court with authority to address claims not presented in a pleading**. *See City of Greenwood v. Martin Marietta Materials, Inc*., 311 S.W.3d 258, 264–68 (Mo.App.W.D.2010) (reversing a trial court's grant of injunctive relief where the claim for injunctive relief was raised by motion but not in the pleadings). Federal Home did not present its requests for an equitable lien or restitution in the pleadings, and the trial court had no opportunity to decide these issues. We have no basis for ruling on these claims.

Id. at 348. (emphasis added).

Plaintiff failed to plead a claim for a permanent restraining order. A general request for "appropriate equitable relief" in the prayer is inadequate. *See City of Greenwood* at 264. Plaintiff suffers other pleading deficiencies which result in the Court not having authority (or justification) to enter the permanent restraining order. Plaintiff failed to allege facts in support of a permanent restraining order. There is no allegation regarding the inadequacy of a remedy at law or irreparable harm, what the policies are towards transgender students in general, etc. Furthermore, Plaintiff failed to not only plead such supporting facts, but to do so separately from his action in law. *Id.*

Without pleading a request for a permanent restraining order, the School District was not put on notice of such a claim. Accordingly, the School District did not offer any evidence concerning the claim. The School District defended the sole claim against it, namely whether Plaintiff was discriminated against based on his being a member of the male sex.

Pursuant to the above authority, in order to seek a permanent restraining order, Plaintiff needed to request it specifically and plead separate facts supporting the entering of the order. Plaintiff failed to meet these requirements. Accordingly, the Court is without authority to enter the requested equitable relief.

B. <u>The Equitable Relief is Barred by Collateral Estoppel and Res Judicata</u>

Plaintiff has already come before the Court seeking this same relief *In Re the Matter: R.M.A. by His Next Friend Rachelle Appleberry*, Case No. 1416-CV17208 ("Mandamus Action").

Plaintiff filed a Petition in Mandamus requesting the Court enter a writ "commanding Respondents to grant Relator and all other transgendered students of the Blue Springs R-IV School District full and equal access to the appropriate restroom, locker room, and any other facilities segregated by sex as is consistent with their gender identity." The Court denied the Petition, making specific findings in its Judgment. The Court found

> **In the present case, Relators have failed to present evidence of an existing, clear, and unconditional legal right allowing R.M.A. full access to the boys' restrooms and locker rooms. . . Relators have admitted that no specific Missouri law or case provides R.M.A. with a specific right, as a transgender student, to utilize the restroom or locker room facilities of R.M.A.'s choice. . . No direct authority exists in this jurisdiction that clearly and unconditionally imposes a duty on the Respondents to provide Relator R.M.A., a female to male transgender minor child, with unhindered access to the boys' restrooms, locker rooms, and any other boys' facilities within the Blue Springs R-IV School District on the basis of Relator's chosen gender identity.**

The Court's Judgment was upheld on appeal. Plaintiff now asks the Court for the same relief against the same party. Accordingly, Plaintiff's claim is barred by collateral estoppel and res judicata.

1. Collateral Estoppel

In *Kesler v. Curators of the University of Missouri*, 516 S.W.3d 884 (Mo. App. W.D. 2017), the Court of Appeals found collateral estoppel barred the plaintiff's claim because the plaintiff's petition for writ of mandamus had been denied (**just as in the present case**). The Court of Appeals explained the doctrine of collateral estoppel as follows:

> Collateral estoppel, or issue preclusion, prohibits the relitigation of an issue that was necessary and unambiguously already decided in a different cause of action. Courts consider four factors in determining whether to apply collateral estoppel: 1) the identity of the issues involved in the prior adjudication and the present action, 2) whether the prior judgment was on the merits, 3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and 4) whether the

> party had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted.

Id. at 896 (*quoting In Re Caranchini*, 956 S.W.2d 910, 912–13 (Mo. banc 1997)).

Here, (1) the issues involved in the present matter and the Mandamus Action are identical, (2) the Mandamus Action was decided on the merits, (3) the parties are the same, (4) Plaintiff had a full and fair opportunity to litigate the issue of whether he had a right under the MHRA (whether transgender students have the right under the MHRA to use the facilities consistent with their gender identity). Accordingly, the claim is barred by collateral estoppel.

2. <u>Res Judicata</u>

Res Judicata is similar to collateral estoppel in many respects. The Missouri Court of Appeals explained the doctrine of res judicata as follows:

> "Res judicata applies to prevent repetitive suits involving the same cause of action." *Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Eng'rs*, 440 F.3d 1038, 1042 (8th Cir.2006). The doctrine will bar a second suit if the prior judgment (1) was entered by a court of competent jurisdiction; (2) disposed of the same causes of action involved in the second suit; (3) involved the same parties (or those in privity with them) who are involved in the second suit; and (4) constituted a final judgment on the merits. *Id.* Implicit within these elements is that the plaintiff must have had a full and fair opportunity to litigate the issues in the prior action. *Brown*, 270 S.W.3d at 513 (applying federal law). If these elements are met, the plaintiff in the second suit is barred from raising causes of action that were or could have been raised in the first suit. *Ripplin Shoals*, 440 F.3d at 1042.

Bugg v. Rutter, 330 S.W.3d 148, 153 (Mo. App. W.D. 2010).

Here, (1) the prior judgment was entered by a court of competent jurisdiction, (2) the same relief (equitable order requiring the School District to grant full and equal access to restrooms, locker rooms, and any other facilities segregated by sex as is consistent with their gender identity) was sought in the Mandamus Action, (3) the parties are the same in both actions, and (4) the

Mandamus Action constituted a final judgment on the merits. Accordingly, the claim is barred by res judicata.

C. No Legal or Evidentiary Basis to Grant an Order

There is no legal or evidentiary basis to enter a permanent restraining order. As recognized by the Court in the Mandamus Action, there is no Missouri authority that recognizes a transgender student's right to use a facility consistent with their gender identity. As noted above, this case was a male sex discrimination case, not a transgender sex discrimination case. Missouri law is no different than when the Court entered its Judgment in the Mandamus Action.

The Court also does not possess the necessary evidence on which to base a permanent restraining order. Unlike Plaintiff, the School District offered evidence relevant to the only issue, namely whether Plaintiff was discriminated against on Plaintiff's male sex. No evidence was provided about what the ramifications of such an order would be, including how it would impact other children, costs, etc. There is also no evidence of what constitutes "correct restroom". Without support, Plaintiff presumes to know what the "correct bathroom" is for all transgender students at the School District. There was no evidence presented a trial that all or any current transgender students wish to use facilities other than what they currently use.

D. Plaintiff Lacks Standing

Since Plaintiff is no longer a student in the School District, he lacks standing to bring the claim for relief. Plaintiff must have standing to bring an action. *Schweich v. Nixon*, 408 S.W.3d 769 (Mo. banc 2013). "**Standing requires that a party have a personal stake arising from a threatened or actual injury**." *State ex rel Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo. banc 1986). Plaintiff has no personal stake from the alleged injury. He is no longer a student at the School District. He is not the parent of a student at the School District. Additionally, he appears

to not even be a resident within the School District. Accordingly, he has no standing to bring this claim for equitable relief.

E. Plaintiff's Request Violates the Separation of Powers

Plaintiff is asking the Court to assume the role of the Missouri Legislature. Making a new law that mandates the School District permit students unhindered access to the restrooms, locker rooms, and any other facilities on the basis of their chosen gender identity is for the Missouri Legislature alone to decide. It is for the legislative branch to make law, not the judicial branch.

Respectfully submitted,

BATY OTTO CORONADO SCHEER PC

/s/ Steven F. Coronado

Steven F. Coronado MO 36392
Mark D. Katz MO 35776
Paul F. Gordon MO 47618
4435 Main Street, Suite 1100
Kansas City, Missouri 64111
Telephone: (816) 531-7200
Facsimile: (816) 531-7201
scoronado@batyotto.com
mkatz@batyotto.com
pgordon@batyotto.com
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2022, the original of the above and foregoing was filed with the Court via ECF Filing system, with a copy going by electronic mail to:

Mary Madeline Johnson
220 Main Street, Suite 201
Platte City, MO 64079
Kansas City, MO 64111
Telephone: (816) 607-1836
Fax: (816) 463-8449
mmjohnsonlaw@gmail.com
madeline@lgbtlawkc.cl
ATTORNEYS FOR PLAINTIFF

Alexander Edelman
Katherine Myers
Edelman, Liesen & Myers LLP
208 W. Linwood
Kansas City, MO 64111
Telephone: (816) 808-6910
Fax: 816-463-8449
aedelman@elmlawkc.com
kmyers@elmlawkc.com
ATTORNEYS FOR PLAINTIFF

/s/ Steven F. Coronado
Attorney for Defendant