IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 17-30898, 17-30901, 17-30999

MICHAEL W. GAHAGAN,

Plaintiff-Appellant,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,

Defendant-Appellee.

MICHAEL GAHAGAN,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES IMMIGRATION & CUSTOMS ENFORCEMENT; EXECUTIVE OFFICE OF IMMIGRATION REVIEW, UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

MICHAEL W. GAHAGAN,

Plaintiff-Appellant,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; U.S. CUSTOMS & BORDER PROTECTION,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Dec. 20, 2018)

Before DAVIS, COSTA, and OLDHAM, Circuit Judges.

ANDREW S. OLDHAM, Circuit Judge:

The question presented is whether attorneys appearing *pro se* can recover fees under the Freedom of Information Act ("FOIA"). The district court held no. We affirm.

I.

A.

Michael W. Gahagan is an immigration attorney. He uses FOIA to obtain government documents. In these consolidated cases, he requested documents from various federal agencies. Gahagan requested some of these documents to assist immigration clients. Others he requested for personal reasons. He made each request in his own name.

Gahagan was unsatisfied with the Government's response to his requests. So he filed three separate *pro se* lawsuits. In each case, Gahagan was considered the

prevailing party and moved for an award of costs and fees. Each district judge awarded Gahagan costs. But each judge also held Gahagan was ineligible for attorney fees under FOIA.[1] Gahagan appealed each denial of fees.

B.

"Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). Courts "have recognized departures from the American Rule only in 'specific and explicit provisions for the allowance of attorneys' fees under selected statutes.'" *Ibid.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975)). The Supreme Court analyzes a statute's specificity and explicitness in the context of a particular fee request. That a statute is sufficiently specific and explicit to authorize one type of fee award does not make it sufficiently specific and explicit to authorize another type of fee award. *See id.* at 2165.

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[1] There are at least eleven competing terms we could use instead of "attorney fees." *See Haymond v. Lundy*, 205 F. Supp. 2d 403, 406 n.2 (E.D. Pa. 2002). But "[i]n line with the form used in the statute we are interpreting, we will use 'attorney fees' in this case, except where quoting other authorities" or referring to awards under other statutes. *Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 253 n.1 (6th Cir. 1997); *see* 5 U.S.C. § 552(a)(4)(E)(i) ("attorney fees").

FOIA authorizes courts to "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). By authorizing a court to "assess . . . reasonable attorney fees," that provision overcomes the American Rule in at least some circumstances. In this particular circumstance, however, the question is whether FOIA specifically and explicitly authorizes a fee award to an attorney appearing *pro se*.

Three precedents bear on that question. The first is our decision in *Cazalas v. DOJ*, 709 F.2d 1051 (5th Cir. 1983). In that case, we decided "a litigant attorney represent[ing] herself or himself" is eligible for "an award of attorney fees under the FOIA." *Id.* at 1057. Judge Garwood dissented. Circuit precedent denies fees to "a nonattorney *pro se* litigant," and Judge Garwood did "not believe that Congress intended to discriminate between *pro se* FOIA litigants solely on the basis of whether they were licensed to practice law." *Id.* at 1059 (Garwood, J., concurring in part and dissenting in part).

The second key precedent is *Kay v. Ehrler*, 499 U.S. 432 (1991). *Kay* involved 42 U.S.C. § 1988, which authorizes an award of "a reasonable attorney's fee" to "the prevailing party" in a civil rights case. In *Kay*, the Court rejected "[a] rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar," for fear it "would create a disincentive to employ counsel whenever such a plaintiff

considered himself competent to litigate on his own behalf." 499 U.S. at 438. The Court instead emphasized that "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Ibid.* Therefore, the Supreme Court held "a *pro se* litigant who is also a lawyer may [not] be awarded attorney's fees." *Id.* at 435.

The third precedent is *Texas v. ICC*, 935 F.2d 728 (5th Cir. 1991). In *ICC*, "Texas sued the Interstate Commerce Commission under [FOIA] to force the ICC to disclose certain documents." *Id.* at 729. Texas prevailed. The district court nonetheless denied its motion for attorney fees. The ICC defended that result by arguing we had "previously held that some classes of 'complainants'—namely, *pro se* plaintiffs—are not eligible for fee-shifting." *Id*. at 731. The ICC contended legislative history similarly prohibited states from recovering fees. *Ibid.* We disagreed. After all, *Cazalas* had "held that lawyers who represent themselves in FOIA actions may recover under the fee-shifting provision." *Ibid.* (citing *Cazalas*, 709 F.2d at 1055–57). We ultimately concluded "courts can in appropriate circumstances award attorneys fees to states." *Id.* at 733.

In the consolidated cases before us today, three different district judges rejected Gahagan's claims for fees. The lead opinion, by Judge Feldman, is thoughtful and well-reasoned. It notes every other court of appeals to consider the question after *Kay* has held FOIA disallows prevailing-party fees for *pro se* attorneys. And it notes *ICC*—which we decided just three months

after *Kay*—says nary a word about the Supreme Court's unanimous holding in that case. Judge Feldman therefore followed *Kay* and denied Gahagan's fee request. *See Gahagan v. U.S. Citizenship & Immigration Servs.*, No. 16-cv-15438, 2017 WL 4003851, at *3–4, *7 (E.D. La. Sept. 12, 2017). Two other district judges rejected Gahagan's requests for the same reasons. *See Gahagan v. U.S. Citizenship & Immigration Servs.*, No. 15-cv-6218, 2017 WL 6540409, at *1 (E.D. La. Dec. 21, 2017); *Gahagan v. DOJ*, No. 13-cv-5526, 2017 WL 4168409, at *1 (E.D. La. Sept. 20, 2017). Our review is *de novo*. *See ICC*, 935 F.2d at 730.

II.

Everyone agrees we must reverse if *Cazalas* remains binding precedent. Whether *Cazalas* is still binding turns on first- and second-order questions under the rule of orderliness. The first question is whether *ICC* requires us to follow *Cazalas*. It does not. The second question is whether *Kay* requires us to abandon *Cazalas*. It does.

A.

In considering these questions, we follow the well-settled rule of orderliness: "[T]hree-judge panels . . . abide by a prior Fifth Circuit decision until the decision is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc." *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001) (quotation omitted).

Fifth Circuit precedent is implicitly overruled if a subsequent Supreme Court opinion "establishes a rule of law inconsistent with" that precedent. *Gonzalez v. Thaler*, 623 F.3d 222, 226 (5th Cir. 2010); *see also Carter v. S. Cent. Bell*, 912 F.2d 832, 840 (5th Cir. 1990) (requiring adherence to a prior panel's interpretation "unless that interpretation is irreconcilable with" a later Supreme Court decision). "[F]or a Supreme Court decision to override a Fifth Circuit case, the decision must unequivocally overrule prior precedent; mere illumination of a case is insufficient." *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018) (quotation omitted).

The question at the heart of this case is whether *Cazalas* remains precedential after *Kay*. Before we reach that question, however, we must satisfy ourselves that *ICC* did not already answer it. After all, "whether [*Cazalas*] has been abrogated is itself a determination subject to the rule of orderliness." *Stokes v. Sw. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018). So *if* a prior panel already held *Cazalas* survived *Kay*, we'd be duty-bound to say the same.

ICC, however, said no such thing. At no point did *ICC* even cite *Kay*, much less analyze whether it overruled *Cazalas*. That is hardly surprising. Although one party cited *Kay* in a letter filed under Federal Rule of Appellate Procedure 28(j), neither party argued *Kay* had overruled *Cazalas*. And *ICC* considered an altogether different question from both *Kay* and *Cazalas*—namely, whether a state could recover fees. All *ICC* did was cite *Cazalas* on the way to answering that question.

An opinion restating a prior panel's ruling does not *sub silentio* hold that the prior ruling survived an uncited Supreme Court decision. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (explaining decisions are not precedent on "[q]uestions which merely lurk in the record" (quotation omitted)); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (explaining an opinion is not binding precedent on an issue "never squarely addressed" even if the opinion "assumed" one resolution of the issue); *cf. Wilson v. Taylor*, 658 F.2d 1021, 1034–35 (5th Cir. Unit B Oct. 1981) (refusing to apply the rule of orderliness to a Fifth Circuit decision that conflicted with an earlier, uncited Supreme Court opinion). Therefore, neither *ICC* nor any other post-*Kay* decision of this Court triggers the rule of orderliness. *See Chin v. U.S. Dep't of Air Force*, No. 99-31237, 2000 WL 960515, at *1 (5th Cir. June 15, 2000) (per curiam) (declining to "decide whether *Cazalas* . . . is rendered moribund by *Kay*").

B.

The question then is whether *Cazalas* survives of its own accord. Whether a Supreme Court decision implicitly overrules a prior Fifth Circuit decision depends on context. That two decisions involve different statutes is not dispositive. Sometimes a Supreme Court decision involving one statute implicitly overrules our precedent involving another statute. *See Stokes*, 887 F.3d at 204; *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775 (5th Cir. 2003). Sometimes it does not. *See United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013);

Jacobs v. Nat'l Drug Intelligence Ctr., 548 F.3d 375, 378 (5th Cir. 2008).[2] The overriding consideration is the similarity of the issues decided. *Compare Stokes*, 887 F.3d at 204 (refusing to adhere to a Fifth Circuit decision because the issues were similar), *with Petras*, 879 F.3d at 164–65 (adhering to a Fifth Circuit decision because the issues were dissimilar).

Here, *Cazalas* and *Kay* confronted very similar issues. They both interpreted the word "attorney" in a statute authorizing attorney fees. *See* 5 U.S.C. § 552(a)(4)(E)(i) ("attorney fees"); 42 U.S.C. § 1988 ("attorney's fee"). *Cazalas* itself recognized the similarity of the statutes by discussing precedent interpreting § 1988 in its analysis of FOIA. *See Cazalas*, 709 F.2d at 1056 (citing *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980)).

The Supreme Court has repeatedly instructed us to apply consistent interpretations to federal fee-shifting statutes. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001) ("We have interpreted these fee-shifting provisions consistently, and so approach the

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[2] We do not understand *Diaz-Esparza v. Sessions* to suggest Supreme Court precedent *never* implicitly overrules Fifth Circuit precedent "involv[ing] different statutory provisions." 697 F. App'x 338, 340 (5th Cir. 2017) (per curiam). Such a ruling would conflict with the circuit precedent cited above, precedent *Diaz-Esparza* did not cite. Regardless, as an unpublished opinion vacated by the Supreme Court, *Diaz-Esparza* is doubly nonprecedential. *See* 5TH CIR. R. 47.5.4; *Diaz-Esparza v. Sessions*, 138 S. Ct. 1986 (2018) (granting certiorari, vacating, and remanding in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)).

nearly identical provisions at issue here." (citation omitted)); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("This language is similar to that of many other federal fee-shifting statutes; our case law construing what is a 'reasonable' fee applies uniformly to all of them." (citation omitted)); *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) ("We have stated in the past that fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." (quotation omitted)); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' ").[3]

All of our sister circuits have heeded those instructions. Before *Kay*, the eligibility of *pro se* attorneys for fee awards under FOIA split the circuits. *Compare Aronson v. HUD*, 866 F.2d 1, 5 (1st Cir. 1989), *and Falcone v. IRS*, 714 F.2d 646, 646 (6th Cir. 1983), *with Cazalas*,

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[3] Gahagan notes this Court has described "[t]he history, language, and purpose of" FOIA as "differ[ing] significantly from those of the civil rights statutes" and treated "decisions under one of the statutes [as] inapposite to cases arising under the other." *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. Unit B June 1981). But *Cofield* contrasted FOIA and § 1988—over Judge Clark's dissent—to distinguish a D.C. Circuit opinion that was itself overruled by *Kay*. *See Benavides v. Bureau of Prisons*, 993 F.2d 257, 259–60 (D.C. Cir. 1993) (recognizing *Kay* overruled *Cox v. DOJ*, 601 F.2d 1 (D.C. Cir. 1979)). In any event, to the extent *Cofield* suggests decisions interpreting § 1988 do not inform our interpretation of FOIA's fee-shifting provision, it does not survive the subsequent Supreme Court decisions interpreting all federal fee-shifting provisions consistently.

709 F.2d at 1057, *and Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367 (D.C. Cir. 1977). Since *Kay*, however, every circuit to consider the issue has applied *Kay* to FOIA. *See Pietrangelo v. U.S. Army*, 568 F.3d 341, 344–45 (2d Cir. 2009) (per curiam); *Burka v. HHS*, 142 F.3d 1286, 1290 (D.C. Cir. 1998); *Ray v. DOJ*, 87 F.3d 1250, 1252 (11th Cir. 1996); *see also Searcy v. Soc. Sec. Admin.*, No. 91-4181, 1992 WL 43490, at *1, *6 (10th Cir. Mar. 2, 1992). Perhaps most powerfully, the D.C. Circuit expressly abandoned its pre-*Kay* FOIA precedent in light of *Kay*. *See Burka*, 142 F.3d at 1290.

Were we to hold that a *pro se* attorney is eligible for fees, we would be the only court of appeals to do so after *Kay*. "We are always chary to create a circuit split," *United States v. Graves*, 908 F.3d 137, 142 (5th Cir. 2018) (quotation omitted), including when applying the rule of orderliness. *See Stokes*, 887 F.3d at 201, 205. We refuse to create one here.

Of course, the principle that federal fee-shifting statutes are interpreted consistently is not limitless. We would not apply it when statutes have materially different texts. *See Buckhannon*, 532 U.S. at 603 n.4 (noting the provisions at issue were "nearly identical"); *Dague*, 505 U.S. at 562 (similar); *Indep. Fed'n of Flight Attendants*, 491 U.S. at 758 n.2 (similar).[4] But there is

[4] For example, after the Supreme Court rejected the "catalyst theory" of "prevailing party" status, Congress amended FOIA to make it easier for a plaintiff to recover fees. *See Batton v. IRS*, 718 F.3d 522, 524–26, 525 n.2 (5th Cir. 2013); 5 U.S.C. § 552(a)(4)(E)(ii) ("substantially prevailed"). Thus, courts must

no textual difference suggesting a prevailing *pro se* attorney is eligible for an award of fees under FOIA but not § 1988. On that issue, *Kay* interpreted text materially identical to the text of FOIA. *Compare* 5 U.S.C. § 552(a)(4)(E)(i) ("reasonable attorney fees"), *with* 42 U.S.C. § 1988 ("a reasonable attorney's fee").

Thus, the background principle—federal fee-shifting statutes should be interpreted consistently—applies with full force to the eligibility of *pro se* attorneys for fee awards. For that reason, *Kay* provided more than "mere illumination"; it "unequivocally overrule[d]" *Cazalas*. *Petras*, 879 F.3d at 164 (quotation omitted). After *Kay*, *Cazalas* no longer represents binding precedent on the eligibility of *pro se* attorneys to recover fee awards under FOIA.

III.

The parties appropriately focus on precedent. As do we. It is nonetheless appropriate to note FOIA's text supports the result precedent commands. To paraphrase Chief Justice Marshall, it is after all a *statute* we are expounding. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

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interpret FOIA and other fee-shifting statutes differently in that regard.

Kay considered the meaning of "attorney" in § 1988's use of "a reasonable attorney's fee." 499 U.S. at 435–36. As noted above, FOIA is materially identical in that regard. *See* 5 U.S.C. § 552(a)(4)(E)(i) ("reasonable attorney fees"). But "attorney" is not the only relevant word in FOIA.

Unlike § 1988, FOIA limits awards to those fees "reasonably incurred." 5 U.S.C. § 552(a)(4)(E)(i) ("reasonable attorney fees and other litigation costs reasonably incurred"); *see also Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. Unit A July 1981) ("'[R]easonably incurred' can and does modify the larger phrase 'reasonable attorney fees and other litigation costs.'"). The "general rule" is that "fees are 'incurred' when the litigant has a legal obligation to pay them." *United States v. Claro*, 579 F.3d 452, 464 (5th Cir. 2009). Because Gahagan had no legal obligation to pay himself, he did not "incur" any attorney fees under the general rule. *See id.* at 465; *Cazalas*, 709 F.2d at 1059 (Garwood, J., concurring in part and dissenting in part) ("Attorney 'fees' are not generated by a person doing something for himself or herself; and 'incurred' likewise imports a relationship to one or more others.").

Therefore, the textual argument for denying fee awards to *pro se* attorneys is even stronger under FOIA than under § 1988, which does not contain the independent requirement that fees be "incurred." As we noted in *Claro*, other courts "have recognized exceptional situations for which an award of attorney's fees is *not* contingent upon an obligation to pay counsel,"

despite the "incurred" requirement. 579 F.3d at 465. But these exceptions—based on "legislative history" regarding *pro bono* representation and "policy reasons" related to a litigant's insurance coverage, *id.* at 465–66—would not apply to Gahagan in any event. Accordingly, we need not decide their validity here. *See id.* at 467–68 (concluding the exceptions did not apply without resolving their validity).

* * *

In the end, we have (1) *Kay*'s ruling that *pro se* attorneys cannot recover fees under § 1988; (2) Supreme Court instructions that federal fee-shifting statutes should be interpreted consistently; (3) the uniform agreement of our sister circuits that *pro se* attorneys cannot recover attorney fees under FOIA after *Kay*; and (4) statutory text supporting that result. For these reasons, we hold *pro se* attorneys are ineligible for fee awards under FOIA. The judgments are AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MICHAEL W. GAHAGAN	CIVIL ACTION
v.	NO. 16-15438
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES	SECTION "F"

ORDER AND REASONS

(Filed Sep. 12, 2017)

Before the Court are objections by United States Citizenship and Immigration Services (USCIS) to the magistrate judge's Report and Recommendation that the plaintiff shall be awarded attorney's fees and costs in this Freedom of Information Act litigation. For the reasons that follow, the USCIS's objection that the Report errs in allowing attorney's fees under FOIA for a *pro se* attorney is SUSTAINED, but USCIS's objection concerning the Report's public benefit finding and in weighing the entitlement factors is OVERRULED, and USCIS's final objection seeking a more substantial reduction in the plaintiff's fee award is MOOT. Accordingly, the Court hereby REJECTS in part and ADOPTS in part the Report and Recommendation. The plaintiff may recover $451.47 in costs.

Background

This Freedom of Information Act lawsuit arises out of a government agency's failure to adequately search for and produce a single agency record requested by the plaintiff in connection with the

plaintiff's client's ongoing immigration removal proceeding. This Order and Reasons assumes familiarity with extensive prior proceedings. After being ordered to conduct an adequate search for Michael Gahagan's client's I-485 Receipt Notice (I-797C Notice of Action), the United States Citizenship and Immigration Services (USCIS) ultimately produced to Mr. Gahagan what USCIS insists is a "recreated" receipt notice. After Mr. Gahagan acknowledged that he had "no objection to accepting [the I-797C Receipt Notice] produced" by USCIS (the so-called regenerated receipt notice), the Court denied as moot the only remaining portion of plaintiff's motion for summary judgment (that is, the only issue that was under submission after the Court granted, in part, the plaintiff's motion for summary judgment on the issue of the agency's inadequate search). See Order and Reasons dtd. 12/22/16. The Court then denied USCIS's motion for reconsideration, denied as moot USCIS's motion for summary judgment, and referred to the magistrate judge the plaintiff's motion for attorney's fees. See Order and Reasons dtd. 3/8/17.

Magistrate Judge van Meerveld issued a thorough and considered Report and Recommendation, recommending that the Court grant in part the motion for attorney's fees and costs, ultimately recommending that the Court award attorney's fees in an amount less than that requested by the plaintiff. In its objections to the Report and Recommendation, USCIS urges the

Court to sustain its objections, reject the Report, and deny Gahagan's motion for attorney's fees.[1]

I.

Pursuant to Rule 72(a) and 28 U.S.C. § 636(b)(1), USCIS requests that the Court set aside Magistrate Judge van Meerveld's April 27, 2017 Report and Recommendation, in which the plaintiff's motion for attorney's fees and costs was granted in part, recommending that the plaintiff be awarded $8,867.47 (inclusive of $451.47 in costs).

The Court referred Gahagan's motion for attorney's fees to Magistrate Judge van Meerveld pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). Once a party files specific objections, as USCIS has done here, "[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). In resolving objections, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

II.

A.

USCIS presents four objections to Magistrate Judge van Meerveld's Report & Recommendation:

[1] Mr. Gahagan filed a response to USCIS's objections, and USCIS filed reply papers.

(1) The Report errs in allowing attorney's fees under FOIA for a *pro se* attorney. (2) Gahagan is not eligible for attorney's fees under FOIA. (3) The Report errs in finding the existence of a public benefit and in weighing the entitlement factors. (4) The Report errs in reducing Gahagan's fee award by only 20% given his clear absence of billing judgment. USCIS concedes that its second objection is controlled by this Court's prior denial of USCIS's motion to reconsider and motion for summary judgment; therefore, USCIS's second objection is preserved for appellate purposes, but the Court need only address its three remaining objections.

B.

It is undisputed that, under FOIA, the Court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). The magistrate judge correctly observes, and neither side objects, that courts interpret this permissive, statutory language as creating a two-pronged inquiry into whether the complainant is both (1) eligible for attorney's fees because he has substantially prevailed and (2) entitled to attorney's fees considering "a variety of factors to determine whether the plaintiff should receive fees." Batton v. I.R.S., 718 F.3d 522, 525 (5th Cir. 2013) (quoting Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011)).

1. Whether a *pro se* attorney-litigant is eligible to recover attorney's fees under FOIA.

USCIS's first objection to the magistrate judge's Report and Recommendation presents a threshold question of whether Gahagan, who is an attorney proceeding in this litigation *pro se*, is precluded from recovering attorney's fees under FOIA. USCIS submits that the Supreme Court has ruled that an attorney litigant proceeding *pro se* cannot recover attorney's fees under a fee-shifting statute, 42 U.S.C. § 1988 similar to FOIA's, and that, in so ruling, the Supreme Court implicitly overruled Fifth Circuit precedent that previously held that *pro se* attorneys may recover attorney's fees under the FOIA fee-shifting provision. The Court agrees.

USCIS objects to the magistrate judge's finding that Gahagan was not disqualified from recovering attorney's fees simply because he represented himself. In so finding, the magistrate judge rejected USCIS's argument that, as a matter of law, Gahagan cannot be awarded attorney's fees because he is a *pro se* attorney-litigant. In footnote 1 of the Report and Recommendation, the magistrate judge noted that this Court is "bound by Fifth Circuit precedent indicating that FOIA attorney's fee provision is subject to a different analysis than that expressed in Kay and that under such analysis, a *pro se* attorney can obtain attorney's fees in a FOIA action."

To support its contention that the magistrate judge erred in finding that Mr. Gahagan is eligible

to recover attorney's fees, USCIS invokes Kay v. Ehrler, 499 U.S. 432, 438 (1991). There, the Supreme Court held that a *pro se* attorney is not entitled to an award of attorney's fees under the fee-shifting provision of the Civil Rights Act, 42 U.S.C. § 1988. The high court reasoned that "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations" and that "Congress was interested in ensuring the effective prosecution of meritorious claims." Id. at 437-38. In fashioning the bright line rule, the unanimous Court observed that neither the text of the statute nor its legislative history provided a clear answer to the question it faced; the Court underscored that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." Id. at 437. Thus, after examining the words and purpose of the fee-shifting statute, the Court embraced the rule precluding awards of counsel fees to *pro se* litigants. Id. ("A rule that authorizes awards of counsel fees to *pro se* litigants – even if limited to those who are members of the bar – would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.").

Notably, in Kay, the Supreme Court observed that the district court and Sixth Circuit had denied the petitioner's request for attorney's fees under Section

1988 by relying in part on a FOIA case, Falcone v. IRS, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984).[2] In affirming, a unanimous Supreme Court cited with approval to Falcone, the FOIA case, observing:

> In Falcone, the Court of Appeals declined to award attorney's fees to a *pro se* attorney in a successful action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Court of Appeals reasoned that attorney's fees in FOIA actions were inappropriate because the award was intended "to relieve plaintiffs with legitimate claims of the burden of legal costs" and "to encourage potential claimants to seek legal advice before commencing legislation." 714 F.2d at 647. The court relied on the fact that "[a]n attorney who represents himself in litigation may have the necessary

[2] The Sixth Circuit affirmed the district court "based upon our rejection in Falcone of the proposition that opportunity costs constitute actual pecuniary losses for which a *pro se* attorney deserves compensation." 900 F.2d 967, 971 (6th Cir. 1990). Indeed, the Sixth Circuit in Kay stated it was "bound to follow the rationale of Falcone" as equally applicable to section 1988 cases. Id. ("Assuming that Kay spent hours prosecuting this case that he could have billed to clients, he has only failed to add to the wealth of private practice. He has not incurred any expenses for legal representation, and, therefore, he cannot recover under section 1988. Falcone is a FOIA CASE, but that does not distinguish it from this appeal. Were we to hold that Kay's opportunity costs constituted pecuniary losses, when we had previously held that Falcone's opportunity costs were not, we would begin classifying opportunity costs as legal expenses based upon the substance of the *pro se* claim. We find no authority for awarding fees based on such a system.").

> legal expertise but is unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act." Ibid. (citation omitted).

Kay, 499 U.S. at 1436 n.4. In so observing, "Kay implicitly rejected a distinction between fee claims arising under section 1988 and FOIA." See Burka v. U.S. Dept. of Health and Human Services, 142 F.3d 1286, 1289 (D.C. Cir. 1998); see also Benavides v. Bureau of Prisons, 993 F.2d 257, 259 (D.C. Cir.) (finding that Kay was binding on the issue of attorney's fees in FOIA cases because the Supreme Court had implicitly rejected a distinction between fee claims arising under section 1988 and FOIA), cert. denied, 510 U.S. 996 (1993).

Courts have uniformly embraced the bright line rule of Kay, applying it with equal force beyond Section 1988 to preclude the award of attorney's fees to attorney-litigants seeking to recover attorney's fees similarly provided by other federal fee-shifting statutes, notably, including FOIA. See, e.g., Ray v. United States Dept. of Justice, 87 F.3d 1250, 1252 (11th Cir. 1996) (finding that the fee shifting provision of section 1988 and FOIA are substantially similar, and the policies underlying the statutes are the same, and concluding that "the principles announced in Kay apply with equal force in this case to preclude the award of attorney's fees Ray seeks for his own work."). Indeed, since Kay was decided, "virtually all other courts that have considered this issue . . . have reached a similar conclusion." Burka v. U.S. Dept. of Health and Human Services, 142 F.3d 1286, 1289 (D.C. Cir. 1998) ("It is

obvious . . . that the Supreme Court intended its ruling [in Kay] to apply beyond section 1988 cases to other similar fee-shifting statutes, particularly the one in FOIA. It is, in short, impossible to conclude otherwise than that *pro se* litigants who are attorneys are not entitled to attorney's fees under FOIA.").[3]

There is one post-Kay circuit decision, however, that approvingly referenced its pre-Kay precedent (which had held that lawyers who represent themselves in FOIA actions may recover under the fee-shifting provision) and noted, in dicta, that any FOIA complainant who has actually and reasonably incurred legal fees (including a lawyer who is a plaintiff) is included in the class of complainants eligible to recover under the FOIA fee-shifting provision. That outlier position is occupied by the Fifth Circuit. See Texas v. Interstate Commerce Commission (ICC), 935 F.2d 728 (5th Cir. 1991). Notably, however, the Fifth Circuit failed to discuss (or even mention) Kay when it decided ICC, raising doubts about whether or not the Fifth Circuit or the attorneys involved in the case considered Kay at all, both of which were decided in 1991.

To determine whether, as USCIS submits, the Court should apply the bright line rule of Kay to

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[3] Underscoring that Kay's reasoning is not confined to Civil Rights Attorney's Fees Awards Act cases, in addition to applying the rule of Kay to FOIA's fee-shifting provision, courts have applied it to deny fees to *pro se* lawyers under the Equal Access to Justice Act, SEC v. Price Waterhouse, 41 F.3d 805, 808 (2d Cir. 1994) and to the common fund doctrine, Zucker v. Westinghouse Elec., 374 F.3d 221, 228-29 (3d Cir. 2004).

preclude as a matter of law Gahagan's attorney fee award, the Court must examine both Cazalas v. United States Dept. of Justice, 709 F.2d 1051 (5th Cir. 1983), which was decided eight years before Kay, and Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991), which was decided just three months after. Eight years before Kay, in Cazalas, the Fifth Circuit "confront[ed] an issue of first impression[], namely whether an attorney litigant proceeding *pro se* is entitled to an award of attorney fees under the FOIA." 709 F.2d at 1055. "That a litigant attorney represents herself or himself," the 2-1 panel held, "does not preclude an award of attorney fees under the FOIA." Id. at 1057.[4] In reaching its decision, the court noted that: it had previously held that FOIA precluded an award of attorney fees to a *pro se* litigant who was not an attorney; circuit courts had not come to a definitive resolution on the issue, in particular, that the Fourth Circuit had declined to award attorney's fees to *pro se* attorneys in a Truth-in-Lending Act proceeding, but the Ninth Circuit had granted attorney fees to a defendant in a Civil Rights Attorney's Fees Awards Act case; and FOIA's legislative history indicates a "strong national policy of open government and the crucial role that attorney fees play in protecting this interest." Id. at 1055-57. Dissenting from the majority's holding that an attorney litigant proceeding *pro se* is eligible for an attorney fee award under FOIA, Judge Garwood focused

[4] Cazalas was decided 2-1, with Judge Garwood dissenting from the majority's conclusion that an attorney litigant proceeding *pro se* is eligible for an award of attorney fees under the FOIA.

on the text of the statutory fee provision and underscored that Congress did not intend to discriminate between *pro se* FOIA litigants solely on the basis of whether they were licensed to practice law. Id. at 1059-60 (Garwood, J., dissenting). Judge Garwood wrote that: (i) the plain text of the statute (allowing recovery only for "attorney fees . . . incurred" by the litigant) "contemplate[s] . . . a situation where services are performed for the litigant by some other person" and (ii) the court's prior precedent "was . . . influenced by reading the Privacy Act and the FOIA attorney fees provisions as allowing recovery only for 'attorney fees . . . incurred' by the litigant." Id. Judge Garwood reasoned that "the statutory wording plainly contemplates payment for services rendered to the litigant by someone else, not payment for what the litigant does for himself." Id.

The question becomes whether the Cazalas holding survived Kay. Reading Kay and circuit court case literature that expressly considered its impact demonstrates that Kay implicitly overruled Cazalas. The Supreme Court's express holding in Kay is clear: *pro se* attorney litigants are not entitled to attorney's fees under the fee shifting provision of the Civil Rights Attorney's Fees Awards Act of 42 U.S.C. § 1988. In reaching this conclusion, the Supreme Court found it necessary to look beyond the statutory text (and its legislative history), given that on the one hand attorneys proceeding *pro se* are nevertheless "attorneys" within the meaning of the statute, but on the other hand that the word "attorney" necessarily assumes an agency, or

attorney-client, relationship as a predicate for an award under the fee shifting provision. Kay, 499 U.S. at 435-36. Indeed, the high court observed:

> In the end, we agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.
>
> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. . . . The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.
>
> A rule that authorizes awards of counsel fees to *pro se* litigants even if limited to those who are members of the bar would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Id. at 436-437.

Thus, the Supreme Court held that an attorney who represents himself in a successful civil rights action may not be awarded reasonable attorney's fees as

part of the costs. What the Supreme Court impliedly held is equally clear: the same bright line rule applies to attorneys representing themselves in successful actions based on similar federal fee-shifting statutes fulfilling similar statutory policies. Statutes like FOIA. That the Supreme Court affirmed and acknowledged the district court's and Sixth Circuit's reliance on the Sixth Circuit ruling in Falcone, a FOIA case, to reach its conclusion in Kay, the Civil Rights Act fee-shifting case, reinforces this Court's (and other circuit courts') findings that Kay implicitly overruled cases (like Cazalas) holding that attorney litigants are eligible to recover attorney's fees in successful FOIA cases. Id. at 435 n.4 (citing Falcone v. IRS, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984)).

The glitch with this Court's finding that Kay implicitly overruled Cazalas becomes apparent when the Court considers a Fifth Circuit panel's remarks in a case decided mere months after Kay, Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991). There, the panel considered whether a State could be considered a "complainant" eligible to recover attorney fees under FOIA and, deciding that question in the affirmative, went on to consider whether the State of Texas was entitled to attorney fees where it provided no benefit to the public and none of the other discretionary criteria supported a fee award, and, finally, whether the State was entitled to receive attorney fees and costs under FOIA from a private party. Id. at 732-34. In other words, there was no attorney proceeding *pro se* in ICC; the issues presented to the ICC

panel were distinct from the issue confronted by Cazalas, Kay, and this Court. The ICC panel did not need to determine what this Court must: whether an attorney proceeding *pro se* may recover attorney's fees under the fee-shifting provision of FOIA.

Nevertheless, in examining the district court's decision to deny Texas's motion for attorney fees under FOIA, the Fifth Circuit panel observed that in support of the district court decision, "the district court cited several decisions that in dicta discuss the purposes of the FOIA attorneys-fee provision." Id. at 730 and 731 n.8 (noting that the district court found dicta in Cazalas "especially compelling"). Without mentioning or acknowledging the Supreme Court decision in Kay decided just three months prior, the Fifth Circuit reiterated its holding in Cazalas that lawyers who represent themselves in FOIA actions may recover under the fee-shifting provision. But the issue of whether a *pro se* attorney may recover fees in a successful FOIA lawsuit was not presented to the ICC panel. In holding that the State of Texas was eligible to recover attorney fees under FOIA, the panel goes on to observe:

> In sum, if a FOIA plaintiff has actually and reasonably incurred legal fees–that is, a lawyer has handled his case, even if the lawyer is the plaintiff himself–and if the plaintiff substantially prevailed, he may recover reasonable attorneys fees from the federal government, provided that the court finds that the four discretionary criteria are satisfied. Any complainant who meets these conditions is included within the language of the statute.

> No class of complainants–not even state governments–is excluded.

Id. at 731-32. The Court need not determine how to reconcile ICC's remarks about Cazalas in light of Kay because ICC's mere reiteration of Cazalas's holding that a lawyer who is a plaintiff himself is eligible for attorney's fees under FOIA is dicta.[5] To be sure, the Court is not bound by the Fifth Circuit's dicta in the face of Supreme Court precedent to the contrary. Having found that Kay implicitly overruled the holding of Cazalas, that the ICC panel mentioned Cazalas's holding (a holding that was not essential to ICC's holding)[6] does not resurrect the holding of Cazalas.

In other words, the issues presented to and the holdings derived from Cazalas and ICC were distinct. By implicitly rejecting a distinction between fee claims

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[5] The Fifth Circuit instructs that:

> A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it. A statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law.

Netsphere, Inc. v. Baron, 799 F.3d 327, 333 (5th Cir. 2015) (citation omitted).

[6] In reaching its holding that state governments qualify as "complainants" under FOIA, the Fifth Circuit underscored that the statutory language was "clear," but noted that, even if it was "less clear," the legislative history supported its holding that Texas was eligible to recover attorney fees under FOIA. Again, ICC cited to Cazalas, which had "summarized the 'raison d'etre' of the fee-shifting provision."

arising under section 1988 and FOIA, Kay implicitly overruled Cazalas's explicit holding; but neither Kay's implicit holding nor Cazalas's explicit holding were an issue presented in ICC. Insofar as ICC can be read to reinforce Cazalas's holding post-Kay, it was unnecessary to resolve any of the issues presented in ICC. Indeed, the ICC panel itself noted that the district court had relied on cases discussing the purposes of FOIA, characterizing those discussions as dicta. See ICC, 935 F.2d at 730 and 731 n.8 (noting that the district court found dicta in Cazalas "especially compelling"). Had ICC confronted the implication of Kay on Cazalas (and the Court can only speculate as to the short duration of time between the issuance of Kay and ICC as to why it did not),[7] the holding reached by the ICC panel would remain undisturbed: state governments are not categorically excluded as "complainants" under FOIA and, therefore, in appropriate circumstances may be awarded attorney's fees. An issue presented neither to the Supreme Court in Kay nor to this Court. Thus, insofar as ICC's dicta (to reach its holding on a distinct issue) contradicts an implicit holding of the Supreme Court as well as express holdings of the Fifth Circuit's sister circuit (Ray v. U.S. Dept. of Justice, 87 F.3d 1250

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[7] Counsel for USCIS submits that the timing of the Kay and ICC decisions explains why ICC failed to address Kay: neither the attorneys nor the panel knew that the Kay opinion had been rendered because the cases were decided so close in time. Kay was argued on February 25, 1991 and decided on April 16, 1991, just three months before ICC was decided on July 18, 1991. Even though ICC was decided after Kay, USCIS urges the Court to consider Kay intervening precedent.

(11th Cir. 1996)), as well as other Circuits (see, e.g., Pietrangelo v. U.S. Army, 568 F.3d 341 (2d Cir. 2009); Burka v. U.S. Dept. of Health and Human Services, 142 F.3d 1286 (D.C. Cir. 1998)), the Court is not bound by ICC's dicta.[8]

The only Fifth Circuit case to acknowledge the discrepancy between Cazalas and Kay is an unpublished opinion issued 17 years ago in which the Fifth Circuit assumed without deciding that Kay controls, but refused to reconcile the inconsistency. See Chin v. United States Dept. of Air Force, 220 F.3d 587 (5th Cir. 2000). There, Douglas Chin, "the real party in interest" filed a FOIA lawsuit against the Air Force. Chin and his attorney, Carlton Folsom, were both plaintiffs in the lawsuit.[9] Because "Folsom was clearly acting on behalf of Chin and not on behalf of himself," the Fifth Circuit found that it was clear error for the district court to deny attorney's fees on the basis that Folsom was appearing *pro se*; in so doing, the Fifth Circuit assumed without deciding that Kay overruled Cazalas and controlled the issue presented. Id. ("We need not decide whether Cazalas[] is rendered moribund by Kay[]. Assuming, arguendo that [Kay] controls, ..."). Because

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[8] That Kay's bright line rule applies beyond the Civil Rights Act context is clear. The Supreme Court has noted that Kay's interest "in having a party represented by independent counsel even when the party is a lawyer" is not limited to the Civil Rights Act, but is "systemic." McNeil v. United States, 508 U.S. 106, 113 n.10 (1993) (Federal Tort Claims Act case).

[9] Folsom, the attorney, joined as a party in the lawsuit only after the defendant sought to avoid the lawsuit on the grounds of standing.

Kay implicitly overruled Cazalas, insofar as Mr. Gahagan is appearing *pro se*, Kay's bright line rule applies, rendering him ineligible to recover attorney's fees in this FOIA case.[10]

Two issues remain:

2. Whether the magistrate judge erred in finding the existence of a public benefit and in weighing the entitlement factors.

3. Whether a more substantial reduction in Gahagan's fee award is warranted due to absence of billing judgment.

Having determined that Mr. Gahagan is ineligible to recover attorney's fees under Kay, the Court need not reach USCIS's objection regarding whether the magistrate judge erred in finding a public benefit and in weighing entitlement factors. However, insofar as Mr. Gahagan might be eligible to recover costs, the Court leaves undisturbed the magistrate judge's finding as to the existence of a public benefit and in weighing entitlement factors. USCIS's objection to the magistrate judge's finding of a public benefit and weighing of the entitlement factors is OVERRULED and the Court adopts the Report and Recommendation as necessary to support an award of costs under 5

[10] Mr. Gahagan has contended in this proceeding that he brought this FOIA litigation on behalf of a client he represents in immigration removal proceedings. But this does not alter the fact that his client is not named as the real party in interest (see Fed. R. Civ. P. 17(a)), nor does it alter the fact that Mr. Gahagan is, by definition, a *pro se* attorney-litigant, rendering him ineligible for attorney's fees. See Burka, 142 F.3d at 1290-91.

U.S.C. § 552(a)(4)(E)(i).[11] Having determined that Mr. Gahagan is ineligible to recover attorney's fees under Kay, the Court need not reach USCIS's final objection seeking a more substantial reduction in Gahagan's attorney fee award.

Although the Court finds that Mr. Gahagan is not eligible to recover attorney's fees under Kay, considering this Court's prior rulings as to eligibility as well as its *de novo* review of the magistrate judge's thorough consideration of Mr. Gahagan's eligibility and entitlement to costs, Mr. Gahagan may recover $451.47 in costs under 5 U.S.C. § 552(a)(4)(E)(i).[12]

* * *

Accordingly, for the foregoing reasons, IT IS ORDERED: that USCIS's objection to the magistrate judge's finding that Mr. Gahagan is eligible for attorney's fees under ICC is hereby SUSTAINED and the magistrate judge's Report and Recommendation is REJECTED in part, but USCIS's objection to the magistrate judge's finding as to the existence of a public benefit and in weighing entitlement factors is OVERRULED and the magistrate judge's Report and Recommendation is ADOPTED in part. Finally, USCIS's objection concerning the quantum of attorney's fees is

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[11] 5 U.S.C. § 552(a)(4)(E)(i) provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

[12] It is undisputed that Mr. Gahagan incurred costs in the amount of $451.47.

MOOT. Thus, IT IS FURTHER ORDERED: that Mr. Gahagan's motion for attorney's fees is DENIED, but his request for costs is GRANTED. Mr. Gahagan is entitled to recover $451.47 in costs under 5 U.S.C. § 552(a)(4)(E)(i).

New Orleans, Louisiana, September 12th, 2017

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MICHAEL W. GAHAGAN	*	CIVIL ACTION NO.
VERSUS	*	16-15438
UNITED STATES	*	SECTION: "F"(1)
CITIZENSHIP AND	*	JUDGE MARTIN L. C.
IMMIGRATION SERVICES	*	FELDMAN
	*	MAGISTRATE JUDGE
	*	JANIS VAN
	*	MEERVELD
* * * * * * * * * *		

REPORT AND RECOMMENDATION

(Filed Apr. 27, 2017)

The District Court referred plaintiff Michael Gahagan's Motion for Attorney's Fees and Costs (Rec. Doc. 43) to the undersigned Magistrate Judge on March 8, 2017, in its Order denying the motion for reconsideration and motion for summary judgment filed by defendant United States Citizenship and Immigration Services (Rec. Doc. 63). For the following reasons, IT IS RECOMMENDED that the Motion be GRANTED in part.

Background

Michael Gahagan is an immigration attorney. He represents a client in connection with that client's removal proceedings. He says he does so on a *pro bono* basis. As explained by the District Court, Gahagan

maintains that United States Citizenship and Immigration Services ("USCIS") has already ruled that his client has a bona fide marriage with a United States citizen, making the client eligible for lawful Permanent Resident status. Gahagan insists that to apply for Permanent Resident status during the course of a removal proceeding, he must file a copy of the client's Form I-485 Receipt Notice (I-797C, Notice of Action) ("Receipt Notice"). On June 19, 2016, Gahagan (and not his client) filed a request to USCIS for a copy of his client's Receipt Notice pursuant to the Freedom of Information Act ("FOIA"). USCIS acknowledged receipt of his request. On October 11, 2016, Gahagan had not received a production of records, a Vaughn index describing search methods and explaining the lawful basis for each exemption for any documents withheld, or a final disposition from USCIS stating that it had not found any records, so he filed the present lawsuit. (Rec. Doc. 1).

On November 18, 2016, Gahagan had still not received records, a Vaughn index, or a final disposition from USCIS, so he filed a motion for summary judgment asking the Court to order that USCIS conduct an adequate search and produce all non-exempt responsive records (Rec. Doc. 6). At some point before filing its opposition to Gahagan's motion for summary judgment, USCIS obtained a copy of the Receipt Notice sought by Gahagan. USCIS takes the position that the Receipt Notice was *recreated*. It appears that on or about November 29, 2016 (the day before USCIS's opposition memorandum was filed), counsel for USCIS

attempted to email an unredacted copy of the Receipt Notice to Gahagan. (Rec. Doc. 33). In opposition to the motion for summary judgment, USCIS argued that it had satisfied its obligation by providing a "functional equivalent" to the Receipt Notice sought by Gaghagan [sic]. USCIS also argued that its search was adequate and submitted three sworn declarations. As observed by the District Court in partially granting Gahagan's motion for summary judgment, the declaration of Jill A. Eggleston represented that if the Receipt Notice was available, it would be located in the client's A-file. The declarations of Monica Martinez represented that there is no database that retains copies of Receipt Notices, that USCIS does not typically retain copies of Receipt Notices, and that a search of USCIS's Computer Linked Application Information System ("CLAIMS") database would not and did not reveal any Receipt Notices. Ms. Martinez also attested that if a new Receipt Notice is needed, one can be generated from the information in the CLAIMS database.

The District Court concluded that this evidence would typically be sufficient to prove that USCIS had conducted an adequate search. Critically, however, the declarations were called into question by an earlier declaration that Ms. Eggleston had submitted regarding Receipt Notices in a different case. There, Ms. Eggleston stated that USCIS had been "able to retrieve an archive copy of the [Receipt Notice] that was generated by the [CLAIMS] database automatically when USCIS initially received a copy of Plaintiff's application." Concluding that Ms. Eggleston's earlier

declaration indicating that it would be possible to find an archived copy of a Receipt Notice conflicted with Ms. Martinez's declaration that it would not be possible, the District Court ordered USCIS to conduct a supplemental search of CLAIMS. (Rec. Doc. 31, at 15). The District Court also ordered USCIS to explain the conflicting declarations and ordered both parties to brief the issue of whether a "functional equivalent" record would satisfy USCIS's obligations under FOIA. Because Gahagan represented that he had not received an unredacted copy of the recreated Receipt Notice, the District Court further ordered that USCIS produce an unredacted copy of the recreated Receipt Notice to Gahagan within 24 hours. The District Court issued its ruling on December 14, 2016.

In response to the District Court's Order, USCIS filed a supplemental memorandum in which it represented that the supplemental search had been performed and no original Receipt Notice had been found. USCIS also attempted to explain the discrepancies questioned by the District Court by presenting the declaration of a third USCIS representative, Sabrina Kenner, who stated that CLAIMS does not archive or store documents, and can only regenerate a Receipt Notice. USCIS argued that the "apparent discrepancy" between Ms. Eggleston's two declarations was due to "technical language" used. USCIS says that when Ms. Eggleston stated that a Receipt Notice had been generated, she should have said a "new" Receipt Notice had been generated and that Ms. Eggleston's use of the phrase "archived copy" was imprecise because it was a

regenerated Receipt Notice. On December 22, 2016, the District Court ruled that USCIS had satisfied its obligation to perform a supplemental search. Observing that Gahagan had agreed to accept the recreated Receipt Notice, the District Court denied the remaining issues of Gahagan's motion for summary judgment as moot. (Rec. Doc. 42).

On January 4, 2017, Gahagan filed a motion for attorney's fees. USCIS then filed a motion for summary judgment seeking dismissal of Gahagan's claims and a ruling that USCIS had conducted an adequate search. USCIS also filed a motion for reconsideration of the District Court's December 14, 2016, order granting partial summary judgment in favor of Gahagan. In support of its motion for reconsideration, USCIS argued that the declaration of Sabrina Kenner submitted on December 19, 2016, clarified that the agency never keeps copies of Receipt Notices and such records can only be recreated. The District Court denied both USCIS motions and referred the motion for attorney's fees to the undersigned Magistrate Judge. (Rec. Doc. 63). In denying USCIS's motion for reconsideration, the District Court reiterated that it was USCIS's burden to show that it had conducted an adequate search and explained that the Court would "not reconsider its prior ruling based on any clarity finally achieved only after a Court-ordered search and submission that was prompted by the agency's own inadequate submission." Id. at 7.

Law and Analysis

Under FOIA, this court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."[1] 5 U.S.C. § 552(a)(4)(E)(i). Courts have interpreted this permissive, statutory language as creating a two-prong inquiry into whether the complainant is both (1) eligible for attorney's fees because he has substantially prevailed and (2) entitled to attorney's fees considering "a variety of factors to determine

[1] USCIS argues that Gahagan cannot be awarded attorney's fees because he is an attorney appearing pro se. See Kay v. Ehrler, 499 U.S. 432, 438 (1991) (holding that a pro se attorney is not entitled to an award of attorney's fees under 42 U.S.C. § 1988). For example, in Burka v. U.S. Dep't of Health & Human Servs., the D.C. Circuit Court of Appeals applied Kay to hold that "*pro se* attorney-litigants are not entitled to attorney's fees under the fee-shifting provisions of FOIA." 142 F.3d 1286, 1290 (D.C. Cir. 1998). Three months after Kay was decided, the Fifth Circuit explained that "if a FOIA plaintiff has actually and reasonably incurred legal fees—that is, a lawyer has handled his case, even if the lawyer is the plaintiff himself—and if the plaintiff substantially prevailed, he may recover reasonable attorney's fees from the federal government, provided that the court finds that the four discretionary criteria are satisfied. State of Tex. v. I.C.C., 935 F.2d 728, 731–32 (5th Cir. 1991) (footnote omitted). USCIS urges that the Fifth Circuit in I.C.C. did not mention Kay because the I.C.C. decision was rendered only three months after Kay and that although issued before I.C.C., Kay should nonetheless be considered intervening precedent. This Court is not free to make this determination and is instead bound by Fifth Circuit precedent indicating that the FOIA attorney's fee provision is subject to a different analysis than that expressed in Kay and that under such analysis, a pro se attorney can obtain attorney's fees in a FOIA action.

whether the plaintiff *should* receive fees."[2] Batton v. I.R.S., 718 F.3d 522, 525 (5th Cir. 2013) (quoting

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[2] Gahagan insists that the two pronged eligibility-entitlement test was superseded by the OPEN Government Act of 2007 ("OGA") and that he is entitled to attorney's fees as long as he substantially prevailed and his claim is not insubstantial. As Batton made clear, OGA codified the "catalyst" theory, pursuant to which a complainant can show he substantially prevailed in the absence of court ordered relief where the complainant has obtained relief by "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 718 F.3d at 525. This change concerned the eligibility prong. The entitlement prong stems from the fact that a court "may assess," but is not required to assess attorney's fees where a complainant has substantially prevailed. Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011) ("The eligibility prong asks whether a plaintiff has 'substantially prevailed' and thus 'may' receive fees."). The "may assess" portion of the statute was unchanged by OGA. In Batton, the Fifth Circuit Court of Appeals recognized the continued applicability of the two pronged test by employing it. Gahagan spent nine pages of his memorandum in support arguing that he is entitled to attorney's fees without consideration of the "entitlement prong" and failed to mention that three weeks prior to the filing of this motion, the Fifth Circuit Court of Appeals rejected this argument in a case in which Gahagan was also the plaintiff. See Gahagan v. United States Citizenship & Immigration Servs., No. 16-30882, 2016 WL 7240202, at *1–2 (5th Cir. Dec. 14, 2016) (unpublished). Gahagan's attempt in reply to explain this omission by noting that the Fifth Circuit case is unpublished is disingenuous. In addition to finding that Gahagan had waived the argument that the eligibility-entitlement test was superseded by OGA, the Fifth Circuit held that his argument was "foreclosed by our precedent" and that "we are obligated to follow Batton." Id. The Batton opinion was issued by the Fifth Circuit as a published decision eight years after OGA, and it is binding precedent on the courts of this district until the Fifth Circuit *en banc*, the Supreme Court, or an Act of Congress says otherwise. While Gahagan is welcome to challenge that precedent here to preserve it for appeal, the appropriate

Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011)).

A. Eligibility

"[A] complainant has substantially prevailed if the complainant has obtained relief through either--(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii); see Batton, 718 F.3d at 525.

The Court finds that Gahagan substantially prevailed under either theory. First, the District Court's December 14, 2016, Order held that the USCIS search was inadequate and ordered USCIS to produce the Receipt Notice to Gahagan. USCIS submits that this order does not demonstrate that Gahagan substantially prevailed. As an initial matter, since the filing of the Motion for Attorneys' Fees and USCIS's opposition, the District Court has denied USCIS's motion for reconsideration of the December 14, 2016, Order. Thus, the December 14, 2016, Order in Gahagan's favor remains in place. Further, this Court cannot accept USCIS's

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method to do so would be to raise the contrary authority and distinguish it or otherwise argue why it should not apply here. As pointed out by USCIS, the Louisiana Rules of Professional Conduct require lawyers to disclose "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client." See La. Rules of Prof. Conduct 3.3(a)(2). The Court cautions Gahagan to be mindful of his obligations to this tribunal.

argument that its supplemental declarations show that its search was adequate. Not only does the undersigned find that the supplemental declarations fail to fully clarify the search undertaken by USCIS,[3] the District Court has already rejected this argument in denying the motion for reconsideration. USCIS adds that it delivered the Receipt Notice prior to the December 14, 2016, Order. That position remains disputed (and moreover, as addressed below, does not preclude this Court's finding that Gahagan substantially prevailed). USCIS also argues that the District Court's order that a search be performed is insufficient to result in eligibility for attorney's fees. This argument is unavailing because not only did the District Court order a search here, it also ordered production of a USCIS record when the Court required that "not later than 5:00 p.m. twenty-four hours from receipt of this Order and Reasons, counsel for USCIS shall produce to the plaintiff the unredacted recreated Receipt Notice." (Rec. Doc. 31, at 18).

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[3] The most recent declaration claims that the discrepancies between Ms. Eggleston's and Ms. Kenner's declarations "can be attributed to the use of technical language" by Ms. Eggleston in saying that USCIS could "retrieve an archive copy" of the Receipt Notice "that was generated." Instead, Ms. Kenner maintains, Ms. Eggleston should have said that USCIS could generate a new Receipt Notice. The most recent declaration might be more convincing if it was Ms. Eggleston who explained her error. Instead, USCIS expects this Court to believe that the most recent declaration by a new individual is more accurate than previous sworn statements made by agency representatives. See also the Court's concerns expressed in footnote 4 regarding other unexplained inconsistencies.

Moreover, even if Gahagan had not substantially prevailed as a result of the Court's order, it is clear that USCIS produced the Receipt Notice as a result of this lawsuit. Prior to the filing of the lawsuit, Gahagan had waited nearly four months without receiving a substantive response to his FOIA request. Two weeks after he filed his motion for summary judgment, USCIS began attempting to deliver a copy of the Receipt Notice. There is simply no other conclusion but that this lawsuit was required to cause USCIS to deliver the Receipt Notice, particularly given USCIS's position taken in its brief, that at least in this case, USCIS's regeneration of the Receipt Notice was "voluntary" and done "merely as a service to the applicant," but that actually, USCIS "was not required to do so." (Rec. Doc. 50, at 7). Despite locating and producing a document it had heretofore refused to either find or produce, USCIS attempts to argue that it never "changed its position" in response to Gahagan's suit because the *original* Receipt Notice "was not and cannot be found." This argument is absurd. Gahagan requested "a copy of" his client's I-797C Receipt Notice. Whether an archived copy, a printed version of an electronic record, or a recreated record,[4] the Receipt Notice delivered as a result

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[4] As a result of the five sometimes conflicting declarations of three different USCIS representatives, (Rec. Doc. 18-3, 28-1, 28-2, 35-1; Gahagan v. United States Citizenship and Immigration Servs., Civil Action 15-796, Rec. Doc. 8-2 (E.D. La. May 5, 2015)), the Court remains unable to fully understand the record keeping practices of USCIS. These are but some of the questions the Court is left with after five declarations and the government's briefs:

- Is it true that USCIS does not maintain copies of records that appear to be crucial to certain immigration

proceedings? For example, is there really no copy of the I-797C, Notice of Action, kept anywhere, either as a photocopy, as an electronic copy, or in an archive? If not, why does Ms. Eggleston continue to advise that such a document could possibly be found in the applicant's A-file? "Upon reviewing the request for the I-797C receipt notice, NRC concluded that *if the record were available, it would be located in an A-file* at the USCIS' National Records Center in Lee's Summit, Missouri." (Rec. Doc. 28-2, ¶ 10) (emphasis added.)

- Does the "recreation" process simply amount to printing a paper copy of an electronic record? If so, is the new printed version properly classified as a "recreated" record?
- If Ms. Martinez is right in her Supplemental Declaration (Rec. Doc. 28-1, ¶ 4) that CLAIMS provides the biometric data that can be used to recreate an I-797C, does the I-797C repopulate automatically with necessary data from either the I-485 or other data input at the time the I-485 is received? If so, does commanding the computer to auto-populate and produce an I-797C constitute a "recreation" just because that same command was previously given, but the resulting paper copy got lost in the mail or by the applicant?
- Is there any way for an applicant to obtain a lost I-797C? Like the government's brief insisting that USCIS was under no obligation to provide Gahagan with a duplicate of this form, Sabrina Kenner's declaration offers little hope of obtaining a replacement to the applicant who has lost or never received their I-797C. "USCIS does not generally send duplicate Receipt Notices if they have not been returned as undeliverable. Applicants can inquire about the acceptance of cases by contacting USCIS at Lockboxsupport@dhs.gov." (Rec. Doc. 35-1, ¶ 7) This representation was similarly made by Monica Martinez. (Rec. Doc. 18-3, ¶ 4). Thus, while Ms. Martinez and Ms. Kenner reassure the Court that "I-797C Receipt Notices can be recreated by USCIS" (Rec. Doc. 18-3, ¶ 5) it would seem

of this lawsuit was a copy of the Receipt Notice that Gahagan requested pursuant to FOIA. His willingness to accept the record indicates as much. USCIS asserts that because it was not obligated to recreate the record,[5] it went "above its required duties" by doing so. USCIS seems to threaten that an award of attorney's fees would discourage such allegedly cooperative behavior in the future. USCIS fails to comprehend that it could have precluded an attorney's fees award by

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> exceedingly unlikely that, short of a court order, any applicant would be able to prevail upon USCIS to provide them with the "recreated" form. It is little consolation, then, that "[a]n I-797C Receipt Notice regenerated by CLAIMS 3 will serve in all respects as an original Receipt Notice." (Id. ¶ 8) After all, if filing a FOIA request and even a lawsuit requesting production of the I-797C meets with no success, what chance does an applicant or lawyer have in posting a request to Lockboxsupport@dhs.gov?

Given the apparent importance of an I-797C to clients like Gahagan's in this case—as a form of proof that the client should not be removed as he was eligible for permanent resident status by virtue of his valid marriage to a U.S. citizen--surely there must be a mechanism for obtaining a substitute of this document, and one that does not merely rely on the good will of USCIS. If this case has proven anything, it is that at least when it comes to record keeping and record production, USCIS is ***not*** a "steward of good government practices" as it claimed in support of its supposed generosity in providing Gahagan, at long last, with the document he sought for many months. (Rec. Doc. 50, at 8. The District Court similarly took issue with USCIS's record keeping practices and its due diligence in responding to FOIA requests. (Rec. Doc. 63, at 9-10, fn. 2). Numerous other courts have been similarly critical. Id.

[5] As further explained in footnote 4, supra, the Court is not convinced that printing out a Receipt Notice amounts to "recreation."

delivering a copy of the Receipt Notice before this lawsuit was filed.

Gahagan substantially prevailed under either theory and he is eligible for attorney's fees.

B. Entitlement

Under the "entitlement" prong, the Court considers: "(1) the benefit to the public deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law." Batton, 718 F.3d at 527 (quoting I.C.C., 935 F.2d at 730).

"The factor of "public benefit" does not particularly favor attorneys' fees where the award would merely subsidize a matter of private concern; this factor rather speaks for an award where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." Blue v. Bureau of Prisons, 570 F.2d 529, 533–34 (5th Cir. 1978). In Blue, the Fifth Circuit agreed with the district court that this factor weighed against an award of attorney's fees where the plaintiff had sought production of his prison file. Like the prisoner seeking his personal file, Gahagan's request for the Receipt Notice from his client's A-File is primarily for his client's personal use in the client's immigration proceedings. See Gahagan v. United States Citizenship & Immigration Servs., No. CV 15-796, 2016 WL 3127209, at *4 (E.D. La. June 3, 2016), aff'd, No. 16-30882, 2016 WL 7240202 (5th Cir.

Dec. 14, 2016) (considering the same cases cited by Gahagan here and finding that the public benefit factor weighed against an award of attorney's fees because "the I-485 receipt notice will not assist citizens in making vital political choices in any conceivable way"). But, the Court finds that there is some public benefit to this litigation: Gahagan has flushed out USCIS's untenable position that although a copy of a Receipt Notice may be critical to halting a deportation proceeding, USCIS is neither obligated to maintain copies of the Receipt Notices it issues, nor is it obligated to "recreate" such Receipt Notices under FOIA. The information revealed by the present litigation may assist others "making vital political choices." Blue, 570 F.2d at 534; see Mayock v. I.N.S., 736 F. Supp. 1561, 1564 (N.D. Cal. 1990) (finding the public benefit of establishing pattern and practice of Immigration and Naturalization Services not complying with FOIA outweighed the commercial interest of the attorney in the records). Accordingly, the Court finds that this factor weighs in favor of an award of attorney's fees.

The "commercial interest" factor has minimal applicability here. Gahagan says that he represents his client on a pro bono basis. Accordingly, he does not obtain a direct financial benefit from making the FOIA request. While it is true that, as USCIS argues, Gahagan has a financial interest in effectively representing his client and maintaining his law practice, which he is able to do in part through this FOIA request, the Court finds this tangential commercial

benefit is not the type of commercial benefit that weighs against an award of attorney's fees.

The nature of Gahagan's interest weighs in favor of attorney's fees. He sought the Receipt Notice for use in his client's immigration proceeding. The Court is disturbed by USCIS's argument that attorney's fees should be precluded here because they amount to an end run around the discovery in that immigration proceeding. While FOIA requests are not rewarded with attorney's fee awards when they attempt to substitute for civil discovery, this is simply not the case here. The email correspondence submitted by USCIS in its supplemental memorandum (Rec. Doc. 33-1) confirms Gahagan's position that USCIS will not produce a Receipt Notice except through a FOIA request. Indeed, as Judge Brown observed, "there is no right to discovery in deportation proceedings." Gahagan v. United States Citizenship & Immigration Servs., No. CV 14-2233, 2016 WL 1110229, at *13 (E.D. La. Mar. 22, 2016). Gahagan's request is not an end run around the discovery process, but instead amounts to the sole way in which Gahagan can protect his client's interest in a fair immigration proceeding.

The conduct of USCIS in withholding the Receipt Notice also favors an award of attorney's fees. USCIS has attempted to explain the basis for originally failing to produce the Receipt Notice with its most recent declaration stating that USCIS does not keep copies of Receipt Notices. As the Court observed in footnote 4, in light of the conflicting declarations that USCIS has submitted to this and other courts, it remains unclear

whether the electronic information used to "recreate" the Receipt Notice amounts to a record that USCIS was required to produce or not. As the District Court observed in denying the motion for reconsideration, it is "USCIS's own sloppy approach . . . and the confusion created by its own personnel" that has created this situation. Moreover, as the District Court noted, USCIS has been reprimanded in earlier cases for submitting misleading and inadequate declarations and for its internal oversights, yet it continues to submit such declarations. In one such case, Judge Africk concluded that "[w]hether blunder or subterfuge, [this] is the kind of recalcitrant and obdurate conduct that merits attorney's fees." Dasilva v. U.S. Citizenship & Immigration Servs., No. CIV A 13-13, 2014 WL 775606, at *7 (E.D. La. Feb. 24, 2014), aff'd (Dec. 19, 2014) (second alteration in original, internal quotation marks omitted). Here too, the Court finds that the actions of USCIS in delaying delivery of the Receipt Notice and its failure to adequately explain itself call for an award of attorney's fees.

Because the third and fourth factors strongly weigh in favor of an award of attorney's fees, the first factor weighs slightly in favor of an award and the second factor is neutral or weighs slightly against an award of attorney's fees, the Court finds that Gahagan is entitled to attorney's fees in this case.

C. Calculating Reasonable Attorney's Fees

The standard two-step process to determine reasonableness of attorney's fees is applicable in FOIA cases. DaSilva v. U.S. Citizenship & Immigration Servs., 599 F. App'x 535, 541 (5th Cir. 2014). First, the Court computes the lodestar "by multiplying the number of hours reasonably expended by the prevailing hourly rate in the community for similar work." Matter of Fender, 12 F.3d 480, 487 (5th Cir. 1994); see Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."). The party requesting fees bears the burden of proving that the rates charged and hours expended are reasonable. See Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984); Walker v. U.S. Dep't of Hous. & Urban Dev., 99 F.3d 761, 770 (5th Cir. 1996); Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995). "The court then adjusts the lodestar upward or downward depending upon the respective weights of the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir.1974)." Fender, 12 F.3d at 487. The Johnson factors are:

> 1) time and labor required, (2) novelty and difficulty of the issues, (3) skill required to perform the legal services properly, (4) preclusion of other employment, (5) customary fee, (6) whether the fee is fixed or contingent, (7) time

> limitations imposed by client or circumstances, (8) amount involved and results obtained, (9) experience, reputation and ability of the attorneys, (10) undesirability of the case, (11) nature and length of the professional relationship with the client, and (12) award in similar cases.

Id.

1. Hourly Rate

"'[R]easonable' hourly rates 'are to be calculated according to the prevailing market rates in the relevant community.'" McClain v. Lufkin Indus., Inc., 649 F.3d 374, 381 (5th Cir. 2011) (quoting Blum v. Stenson, 465 U.S. 886, 895–96 (1984)). The party claiming attorney's fees has the burden to prove the requested rates satisfy this test. Id. Courts have required attorneys to produce both their own affidavits regarding their customary fees and evidence that these rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 896 n. 11 (1984); see Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 328 (5th Cir. 1995) ("To determine reasonable rates, a court considers the attorneys' regular rates as well as prevailing rates."); Yelton v. PHI Inc., No. CIV.A. 09-04182, 2012 WL 3441826, at *4 (E.D. La. Aug. 14, 2012) ("Satisfactory evidence of the reasonableness of the rate necessarily includes an affidavit of the attorney performing the work and

information of rates actually billed and paid in similar lawsuits.").

Gahagan graduated from Barry University Dwayne O. Andreas School of Law in 2006. It is unclear when he began practicing law, but he has been doing so since at least November 2007 as owner of The Immigration Law Firm of New Orleans. He says he has represented hundreds of clients in all areas of immigration law and has represented more than 100 clients with FOIA requests. He has been selected as a Rising Star by Super Lawyers magazine in 2015, 2016, and 2017. Gahagan argues that a rate of $300 per hour is appropriate for his work in this matter. In his sworn declaration, he states that this is his "normal billing rate."

Gahagan also submits the sworn declarations of five attorneys who say they are personally familiar with Gahagan's qualifications. Robert Pauw, an attorney barred in Washington State, declares that Gahagan is the only attorney he knows that pursues FOIA litigation for immigration clients in the Eastern District of Louisiana and that his rate of $300 is a reasonable market rate for a case "of this complexity." (Rec. Doc. 43-14, at 3). Local attorneys Bradley Egenberg, Christine DeSue, Richard Schulze, and Donglai Yang assert similar conclusions, but each add that he or she is familiar with rates charged by law firms in Louisiana that handle FOIA litigation outside of federal court. (Rec. Doc. 57-1). Raymond Lahoud, an immigration attorney practicing in New York also states that he would not handle a case like this for less than

$300 per hour, that he is not aware of any other immigration litigation specialist who could competently handle a matter like this one, that he is familiar with the rates Louisiana law firms charge for FOIA cases outside of federal court, and that $300 per hour is a reasonable market rate for Gahagan. Id. Gahagan also cites a FOIA case where Judge Barbier awarded fees at a rate of $300 per hour to an attorney with eight years of experience in immigration and employment litigation. Hernandez v. U.S. Customs & Border Prot. Agency, Civ. Act. No. 10-4602, 2012 WL 398328, at *16 (E.D. La. Feb. 7, 2012).

USCIS counters that Gahagan's rate should be adjusted to $200 because in 2014, Judge Africk found that a rate of $200 was more appropriate. DaSilva v. U.S. Citizenship & Immigration Servs., Civ. Act. No. 13-13, 2014 WL 775606, at *9 (E.D. La. Feb. 24, 2014), aff'd (Dec. 19, 2014) (holding that Gahagan had failed to advise the court of his experience with FOIA requests, rather than immigration law, and concluding that a rate of $200 reflected his seven years of experience in immigration law). The Fifth Circuit affirmed that decision, noting that the award in Hernandez, where an attorney with eight years of experience had been awarded $300 per hour, "appeared to be atypically high." DaSilva v. U.S. Citizenship & Immigration Servs., 599 F. App'x 535, 543 (5th Cir. 2014). In 2016, Judge Brown considered affidavits similar to those presented here and cited DaSilva in adjusting the rate to be awarded to Gahagan to $200 per hour. Gahagan

v. United States Customs & Border Prot., No. CV 14-2619, 2016 WL 3090216, at *14 (E.D. La. June 2, 2016).

While Gahagan has submitted declarations of other attorneys attesting to the reasonableness of a rate of $300 per hour, none of these declarations state that such a fee is the market rate for the type of litigation pursued by Gahagan here. Indeed, they all note that Gahagan is the only attorney who does such work. Gahagan has submitted a declaration that $300 is his normal rate, but he has not specified whether this is his normal rate for FOIA litigation or in handling immigration proceedings. In this case, he is doing the work pro bono and, significantly, he has not stated whether he has been able to command a fee for similar FOIA litigation in other cases. The Court recognizes that Gahagan has pursued many FOIA immigration related cases in this district. However, his growing experience in this area does not justify a fee of $300 per hour. The Court takes note that the Fifth Circuit just recently observed that a rate of $300 for an attorney with eight years' experience was atypically high and affirmed a rate of $200 as reasonable for Gahagan. In light of this, because there is no evidence of the market rate in this community for this type of work, because the Fifth Circuit affirmed a $200 per hour fee for this same lawyer in 2014, and because as recently as 2016 Judge Brown awarded Gahagan $200 per hour for similar work, the Court finds that a downward adjustment to $200 is appropriate. DaSilva, 599 F. App'x at 543; Gahagan, 2016 WL 3090216, at *14.

2. Hours Reasonably Expended

Gahagan submits billing records showing that he spent 59 hours on this litigation. The Court provides a copy of those billing records, along with the recommended reductions below. USCIS argues these amounts should be reduced as follows:

- Gahagan billed a total of 2.6 hours for receiving and reviewing notices of electronic filing. Dasilva, 2014 WL 1819753, at *4 (observing that "billing relative to notices of electronic filing is patently unwarranted"). The Court finds that some, but not all, of the 6 minute time entries for review of electronic notices are excessive and should be removed.

- Gahagan billed 1.2 hours for driving to the court to hand deliver documents when this could have been done electronically or by use of a courier. Hagan v. MRS Assocs., Inc., No. CIV. A. 99-3749, 2001 WL 531119, at *9 (E.D. La. May 15, 2001), aff'd sub nom. Hagan v. M.R.S. Assocs., Inc., 281 F.3d 1280 (5th Cir. 2001) ("A prevailing plaintiff should not recover an attorney rate for work that clerical staff could have easily accomplished, regardless of who actually performed the work"). The Court agrees that Gahagan cannot charge an attorney's rate for delivering papers to the Court.

- The motion for entry of default (for which he bills 3.3 hours) was ultimately unsuccessful, was frivolous, and was unrelated to the substance of his claim. Elec. Privacy Info. Ctr. v.

U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 216, 238 (D.D.C. 2011) ("[T]he court will not compensate for 'nonproductive time or for time expended on issues on which [the] plaintiff ultimately did not prevail. . . .'") (quoting Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1499 (D.C. Cir. 1984)). The Court agrees and will not reward such aggressive litigation tactics. Indeed, the motion for entry of default (on the basis of USCIS's failure to file a responsive pleading) was filed on the same day USCIS moved to withdraw its motion to dismiss (which it had filed 11 days earlier). Accordingly, Gahagan could not legitimately have believed that USCIS was failing to defend the claim and would not appear to challenge the entry of default. Indeed, USCIS filed its answer the day after withdrawing its motion to dismiss. Given the posture of the case, the Court agrees that spending 3.3 hours on the motion was a needless expense that did not advance Gahagan's case. He cannot recover for the preparation of this motion.

- USCIS provided a copy of the Receipt Notice on November 29, 2016, and any work after that date should be disallowed. According to Gahagan, however, he had not received the unredacted Receipt Notice until December 14, 2016. Further, USCIS fails to mention that besides filing a reply in further support of his pending motion for summary judgment, the only motion filed by Gahagan after November 29, 2016, was this motion for attorney's fees (Gahagan does not appear to seek reimbursement for the filing of his Motion for

Clarification). It was USCIS that filed a motion for reconsideration and motion for summary judgment. Gahagan was obligated to respond. Gahagan's hours will not be reduced on the basis of the delivery of the Receipt Notice, especially where much of the subsequent work was necessitated by USCIS's filings.

- Gahagan billed .3 for review of USCIS's answer, including reviewing cases cited although there were no cases cited. The Court finds that .3 is not an unreasonable amount of time to review the answer, even if no cases are cited.

- Gahagan billed .5 for review of USCIS's motion for leave to file a supplemental declaration and to "review and research citations" where no such citations were contained in the pleading. The Court agrees that .5 is not a reasonable amount of time to review this form pleading and that reducing this time to .3 is sufficient for the time Gahagan would have spent reviewing and analyzing the declaration attached to the pleading.

- Gahagan's pleadings and motions in his other FOIA cases are similar or identical to those filed here and Gahagan filed statements of uncontested facts when he was not required to do so. In reply, Gahagan indicates that he has agreed to voluntarily reduced [sic] the total hours by 20% "to account for any possible redundant research and writing in his pleadings." (Rec. Doc. 57-5). The Court finds this proposal sufficient to address the similarities with

> Gahagan's other pleadings. After the reductions described above and as provided in the table below, the remaining 52.6 hours shall be reduced by 20%. Accordingly, under the lodestar, Gahagan would be compensated for 42.08 hours at $200 per hour for a total of $8,416.
>
> [Tables Omitted]

3. Johnson Factors

USCIS argues that only the second, fourth, eighth and twelfth Johnson factors were not addressed in the lodestar analysis and these factors militate in favor of a further reduction of the attorney's fee award. Gahagan submits that the Johnson factors support the requested award. The Court has already considered the time and labor required (factor 1); novelty and difficulty of the issues (factor 2); skill required to perform the legal services properly (factor 3); customary fee (factor 5); whether the fee is fixed or contingent (factor 6); experience, reputation, and ability of the attorney (factor 9); and awards in similar cases (factor 12). Gahagan argues that this representation precluded him from taking other work that could command a $5,000 fee (factor 4). It appears Gahagan has made this same argument in other cases before this Court. The claim is unsubstantiated. Further, because Gahagan has repeatedly referred to his FOIA cases taking away from other work commanding a $5,000 fee, the Court cannot determine whether it was the work in this case in particular that resulted in Gahagan turning away

paying work. This factor does not favor an increase. The Court takes note of the time limitations imposed by the client (factor 7) because the Receipt Notice was needed in Gahagan's client's removal proceedings. This factor helps explain why aggressive litigation was necessary to enforce FOIA and supports the Court's award above, although it does not justify an increase. USCIS argues that the results obtained (factor 8) favor a reduction in the award, but the Court disagrees because through this litigation, Gahagan was able to obtain the document he needed and was looking for. This factor supports the award above, but does not favor an increase. Gahagan notes the undesirability of this case because he was required to go through this costly litigation to obtain a document for his client's immigration proceedings. As with factor 7, while this supports the award, it does not merit an increase. Unlike the civil rights litigation Gahagan cites, Gahagan has not vindicated a constitutional right through this action. As to factor 11, the nature and length of professional relationship with the client, Gahagan notes simply that he represented his client pro se. The Court finds this factor does not bear on the award here.

The Johnson factors support the award discussed above, but do not require an increase or decrease. Accordingly, the Court finds that Gahagan is entitled to the attorney's fees calculated using the lodestar ($8,416) plus his costs (which USCIS does not appear to dispute) of $451.47, for a total award of $8,867.47.

RECOMMENDATION

Accordingly, IT IS RECOMMENDED that the Motion for Attorney's Fees and Costs (Rec. Doc. 43) be GRANTED in part and USCIS be ordered to pay Gahagan $8,867.47.

OBJECTIONS

A party's failure to file written objections to the proposed findings, conclusions and recommendations in a magistrate judge's report and recommendation within fourteen (14) calendar days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

New Orleans, Louisiana, this 27th day of April, 2017.

/s/ Janis van Meerveld
Janis van Meerveld
United States Magistrate Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MICHAEL GAHAGAN	CIVIL ACTION
VERSUS	NO: 13-5526
UNITED STATES DEPARTMENT OF JUSTICE, ET AL.	SECTION: "N" (3)

ORDER AND REASONS

(Filed Sep. 20, 2017)

Presently before the Court is "Plaintiff's Motion for Attorney's Fees and Costs Pursuant to the Open Government Act of 2007, 5 U.S.C. §552(a)(4)(E)" (Rec. Doc. 50). As reflected in the record of this matter, Plaintiff seeks an award of attorney's fees and costs relative to the requests for information he previously submitted, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq*., to Defendants United States Department of Justice ("DOJ"), United States Department of Homeland Security ("DHS"), United States Immigration and Customs Enforcement ("ICE"), and the Department of Justice's Executive Office for Immigration Review ("EOIR"). The Court previously resolved those requests in three Orders and Reasons (Rec. Docs. 31, 38, and 47), which denied in part and granted in part four motions for summary judgment filed by Plaintiff (Rec. Docs. 10, 32, 33, and 41). Following entry of judgment (Rec. Doc. 49), Plaintiff filed the instant motion.

Having carefully reviewed the parties' submissions and applicable law, the Court finds Plaintiff's requests for attorney's fees to be precluded, as a matter of law, for the reasons set forth in Judge Feldman's September 12, 2017 Order and Reasons (Rec. Doc. 82) in *Gahagan v. United States Citizenship and Immigration Servs.*, Civil Action No. 16-15438, 2017 WL 4003851 ("F") (E.D. La. Sept. 12, 2017). In short, as thoroughly explained in Judge Feldman's opinion, the Court is compelled to conclude that attorney's fees are not available to a *pro se* plaintiff even if he or she is a licensed attorney-at-law.

On [sic] other hand, however, the Court finds Plaintiff to be eligible for and entitled to an award of costs, as requested by him, in the amount of $506.65. The relief previously granted to Plaintiff in the form of additional details regarding the nature and scope of the searches that were conducted by the DOJ and ICE, along with the additional, more extensive searches ordered by the Court, satisfy the "substantially prevailed" eligibility requirement. *See* 5 U.S.C. §552(a)(4)(E)(ii); *see also*, *e.g.*, *Batton v. I.R.S.*, 718 F.3d 522, 525-26 (5th Cir. 2013). Further, given the record in this matter, the Court finds the relevant entitlement factors sufficiently weigh in Plaintiff's favor for purposes of a cost award. *See*, *e.g.*, *Batton*, 718 F.3d at 527 (district courts are to consider (1) the benefit of the case to the public; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records sought; and (4) whether government's withholding of records had reasonable basis in law).

In support of this conclusion, the Court notes that Plaintiff's FOIA requests sought the production of records for use in responding to a June 5, 2014 disciplinary complaint made against him, by DOJ Attorney Jennifer Barnes, to the Louisiana Attorney Disciplinary Board. Upon completing its investigation, the Louisiana Office of Disciplinary Counsel dismissed the complaint for lack of clear and convincing evidence of unethical conduct. *See* Rec. Doc. 30-1. Although Plaintiff certainly had a personal and commercial interest in obtaining the requested information, the public's interests in the administration of justice and the availability of experienced immigration lawyers likewise were served by Plaintiff's pursuit of judicial relief relative to his FOIA request and by the Court's resulting directives. Plaintiff's information requests and this litigation also have provided important information to the public regarding the pertinent departments' record-keeping systems and clarified necessary search parameters and protocol.

Finally, the limited extent of DOJ's and ICE's initial search efforts were not reasonable under the circumstances presented here. Indeed, as reflected in the multiple motions, memoranda, declarations, and Court orders docketed in the record of this matter, ensuring that appropriate document production and search efforts were made in response to Plaintiff's FOIA request required the exhaustion of far more of the Court's and the parties' limited resources than should have been necessary.

Accordingly, as set forth herein, **IT IS ORDERED** that Plaintiff's motion is **DENIED IN PART** and **GRANTED IN PART**. Specifically, the motion is denied relative to attorney's fees, but granted with respect to Plaintiff's request that he be awarded costs in the amount of $506.65.

New Orleans, Louisiana, this 20th day of September 2017.

/s/ Kurt D. Engelhardt
KURT D. ENGELHARDT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MICHAEL W. GAHAGAN	CIVIL ACTION
VERSUS	NO. 15-6218
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.	SECTION A(3)

ORDER AND REASONS

(Filed Dec. 21, 2017)

The following motion is before the Court: **Motion for Attorney's Fees (Rec. Doc. 110)** filed by plaintiff Michael Gahagan. Defendants United States Citizenship and Immigration Services ("USCIS") and United States Customs and Border Protection ("CBP") (at times collectively "Defendants" or "the Government") oppose the motion. The motion, scheduled for submission on December 13, 2017, is before the Court on the briefs without oral argument.

This Freedom of Information Act ("FOIA") case involves a dispute between Michael W. Gahagan, an immigration attorney, and the defendant federal agencies. Gahagan submitted two FOIA requests in his own name to Defendants seeking the production of agency records for use in representing one of his clients in pending removal proceedings. Gahagan filed FOIA requests with USCIS and CBP on July 27, 2015 and July 29, 2015, respectively, seeking specific agency records. Gahagan's allegation with respect to both agencies is

that they refused to conduct a legally adequate search responsive to his FOIA requests, refused to produce all responsive agency records in their possession, and failed to produce a legally adequate *Vaughn* index. (Rec. Doc. 1, Complaint ¶¶ 21 & 25). Gahagan prayed for declaratory and injunctive relief in order to obtain the agency documents responsive to his FOIA requests as well as attorney's fees. (*Id.* ¶ 35). (Rec. Doc. 53, Court's Order and Reasons at 1-2).

Following several rounds of motions, the case was concluded via a final judgment on November 3, 2017.

Gahagan now moves for attorney's fees and costs in the amount of $23,211.90 pursuant to 5 U.S.C. § 552(a)(4)(E)).

The Court may assess against the United States attorney's fees and litigation costs reasonably incurred in a FOIA case in which the complainant has substantially prevailed. 5 U.S.C. § 552(a)(4)(E)(i). A complainant has substantially prevailed if he has obtained relief through either a judicial order or a voluntary or unilateral change in position by the agency if the complainant's claim is not insubstantial. *Id.* § 552(a)(4)(E)(ii)(I-II).

As to attorney's fees, this Court finds persuasive the thorough opinion recently authored by Judge Feldman in which he concluded that Gahagan could not, as a pro se attorney, recover attorney's fees under the FOIA. *Gahagan v. USCIS*, No. 16-15438, 2017 WL 4003851 (E.D. La. Sept. 12, 2017). Chief Judge Engelhardt has also adopted this opinion when holding that

Gahagan cannot collect attorney's fees as a matter of law. *Gahagan v. USCIS*, No. 13-5526, 2017 WL 4168409 (E.D. La. Sept. 20, 2017). The request for attorney's fees is denied.

The Court notes, however, that both Judge Feldman and Judge Engelhardt awarded Gahagan the litigation costs that he requested. The amount of costs requested in this case totals $1,341.90.

The Government suggests that the timing of the FOIA productions in this case was consistent with mere routine administrative processing delays as opposed to having been catalyzed by the filing of this lawsuit. In fact, the Government adds that Gahagan's aggressive litigation tactics more likely than not caused additional delays in production.

The Court is persuaded that Gahagan is entitled to litigation costs. The FOIA requests at issue in this case were submitted on July 27, 2015 and July 29, 2015. Gahagan did not race to the courthouse but instead filed his Complaint on November 22, 2015, which was four months after submitting his FOIA requests, and after having received no records from either of the defendant agencies. Based on the chronology of the record productions, see Rec .Doc. 110-2 at 7 n.7, the Court finds it more likely than not that the lawsuit served as a catalyst for at the very least the earlier record productions. Plaintiff's claim was not insubstantial.

That said, the Court has no reason to question the Government's assertion that a legally adequate search would have been conducted and the records would

have been produced ultimately following the attendant administrative delays. The Court therefore sees no reason that the printing costs for the various record productions, which presumably are borne by the requesting party under FOIA, should be foisted upon the Government as a litigation cost. The Court deducts those printing costs of $814.50 from the amount requested. The cost award will be $527.40, which more accurately reflects the litigation costs incurred.

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion for Attorney's Fees (Rec. Doc. 110)** filed by plaintiff Michael Gahagan is **GRANTED IN PART AND DENIED IN PART**. The motion is denied as to the request for attorney's fees and granted insofar as the Court awards the plaintiff Michael Gahagan $527.40 in costs.

December 19, 2017

/s/ Jay C. Zainey
JUDGE JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30898

MICHAEL W. GAHAGAN,

Plaintiff - Appellant

v.

UNITED STATES CITIZENSHIP &
IMMIGRATION SERVICES,

Defendant - Appellee

Consolidated with 17-30901

MICHAEL GAHAGAN,

Plaintiff - Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE;
UNITED STATES DEPARTMENT OF HOMELAND
SECURITY; UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT; EXECUTIVE
OFFICE OF IMMIGRATION REVIEW,
United States Department of Justice,

Defendants - Appellees

Consolidated with 17-30999

MICHAEL W. GAHAGAN,

Plaintiff - Appellant

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; U.S. CUSTOMS & BORDER PROTECTION,

Defendants - Appellees

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Feb. 6, 2019)

ORDER:

IT IS ORDERED that appellant's objection to appellees' bill of costs is Granted.

/s/ Andrew S. Oldham
ANDREW S. OLDHAM
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30898

MICHAEL W. GAHAGAN,

Plaintiff - Appellant

v.

UNITED STATES CITIZENSHIP &
IMMIGRATION SERVICES,

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MICHAEL GAHAGAN,

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UNITED STATES DEPARTMENT OF JUSTICE;
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SECURITY; UNITED STATES IMMIGRATION
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OFFICE OF IMMIGRATION REVIEW,
United States Department of Justice,

Defendants – Appellees

Consolidated with 17-30999

MICHAEL W. GAHAGAN,

Plaintiff - Appellant

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; U.S. CUSTOMS & BORDER PROTECTION,

Defendants - Appellees

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC

(Filed Feb. 26, 2019)

(Opinion 12/20/18, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, COSTA, and OLDHAM, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members

of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Andrew S. Oldham
UNITED STATES CIRCUIT JUDGE