Dated: May 29, 2020
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re WILLIAM H. THOMAS, JR., Debtor.	Case No. 16-27850-L Chapter 11
Lynn Schadt Thomas, Plaintiff, v. Tennison Brothers, Inc. and Clear Channel Outdoor, Inc., Defendants.	Adv. Proc. No. 20-00038

ORDER GRANTING MOTIONS TO DISMISS AND GRANTING IN PART MOTIONS TO STRIKE

BEFORE THE COURT are motions filed by the Defendants asking the court to dismiss portions of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and/or to strike numerous paragraphs of the complaint pursuant to Federal Rule of Civil Procedure 12(f). [Dkt. Nos. 7 and 8]. The Plaintiff filed a timely response on April 27, 2020. [Dkt. No. 17]. The motions are ripe for decision.

BACKGROUND

This adversary proceeding was commenced with the filing of a *Complaint for Declaratory Relief and for Legal Subordination, Equitable Subordination, and Disallowance of the Claims of Tennison Brothers, Inc., and Clear Channel Outdoor, Inc.,* on February 25, 2020 (the "Complaint"). [Dkt. No. 1].

The adversary proceeding is related to the Chapter 11 bankruptcy case of William H. Thomas, Jr., filed June 2, 2016, in the United States Bankruptcy Court for the Northern District of Florida.

The case was transferred to this court on August 29, 2016. The case was assigned to Chief Bankruptcy Judge David S. Kennedy.

On January 18, 2019, Judge Kennedy granted the motion of Clear Channel, Inc., seeking appointment of a Chapter 11 trustee. *In re Thomas*, 596 B.R. 350 (Bankr. W.D. Tenn. 2019). Michael E. Collins was appointed trustee pursuant to the recommendation of the United States Trustee on January 24, 2019.

The case was transferred to the underlying bankruptcy judge by order entered January 14, 2020.

Underlying the bankruptcy case is a dispute between the Debtor and the Defendants dating back to the summer of 2004 over the erection of what is known as the Southern Millworks billboard by the Debtor.[1] The facts concerning their dispute are fully set out in the opinion of the Court of Appeals of Tennessee in *Tennison Bros., Inc. v. Thomas,* 556 S.W.3d 697 (Tenn. Ct. App. 2017) ("*Tennison II")*. The Supreme Court of Tennessee denied the Debtor permission to appeal.

[1] According to the Tennessee Court of Appeals, Thomas was denied state permits for at least four billboard sites in Shelby County, Tennessee. These sites are referred to as Southern Millworks (1 permit), Kate Bond P.D. (2 structures, 4 permits), Perkins Road 4 (2 permits), and Crossroads Ford (1 permit). *State ex rel. Com'r of Dept. of Transp. v. Thomas,* 336 S.W.3d 588, 592 (Tenn. Ct. App. 2010).

Tennison Bros., Inc. v. Thomas, No. W2016-00795-SC-R11-CV, 2018 Tenn. LEXIS 267 (Tenn. Apr. 23, 2018).

In its opinion, the Tennessee Court of Appeals affirmed judgments of the Chancery Court awarding Tennison Brothers, Inc. ("Tennison Brothers") $1,094,670.94, and Clear Channel Outdoor, Inc. ("Clear Channel") $3,906,000, in damages after the Debtor (the defendant in that case) refused to abide by orders of the chancellor and cooperate in discovery (the "Chancery Court Judgments").

Based upon the Chancery Court Judgments, Tennison Brothers timely filed Proof of Claim Number 7 in the amount of $1,094,670.94, on July 26, 2016, and Clear Channel timely filed Proof of Claim Number 4, in the amount of $3,906,000.00, on June 9, 2016. Clear Channel later amended the amount of its claim to $4,035,487.60.

Both Tennison Brothers and Clear Channel filed complaints against the Debtor in the bankruptcy court seeking a determination that their claims would be excepted from discharge. Judge Kennedy granted summary judgment for both Tennison Brothers and Clear Channel on October 18, 2018, declaring both claims to be nondischargeable. "Memorandum and Order on Plaintiff's Fed. R. Bankr. P. 7056 Motions for Summary Judgment Combined with Notice of the Entry Thereof," *In re Thomas, No.* 16-00260, 2018 WL 6690593, *10 ("Kennedy Opinion I"). The Debtor appealed the decision of Judge Kennedy to the United States District Court. On August 13, 2019, District Judge Sheryl H. Lipman entered her Order Affirming Bankruptcy Court Decision in *Thomas v. Tennison Bros.,* Nos. 2:18-cv-02794-SHL-dkv, and 2:18-cv-02797-SHL-dkv (W.D. Tenn. August 13, 2019) ("Lipman Opinions"). The Debtor's request for rehearing was denied. *Thomas v. Tennison Bros.,* Nos. 2:18-cv-02794-SHL-dkv, and 2:18-cv-02797-SHL-dkv

(W.D. Tenn. March 13, 2020). The Debtor has an appeal pending before the United States Court of Appeals for the Sixth Circuit.

On March 25, 2013, while the state court litigation was proceeding, the Debtor filed a "Complaint and Request for Declaratory Judgment against the Tennessee Department of Transportation ("TDOT")" in the United State District Court for the Western District of Tennessee, *Thomas v. Tennessee Dep't of Transp.,* No. 2:13-cv-2185-JPM-cgc. This complaint sought relief under 28 U.S.C. § 1983 for alleged violations of the Debtor's First and Fourteenth Amendment rights under the United States Constitution based upon TDOT's take down order of another billboard (the "Crossroads Ford Billboard"). This complaint was dismissed based upon the immunity of TDOT from suit. The Debtor appealed and the decision was affirmed on appeal. *Thomas v. Tennessee Dep't of Transp.*, No. 13-6544, slip op. (6th Cir. Aug. 6, 2014).

While that appeal was pending, however, the Debtor filed a second complaint which named multiple state officials in their official capacities as defendants, *Thomas v. Schroer*, No. 2:13-2987-JPM-cgc (W.D. Tenn.). The Debtor argued, among other things, that his Crossroads Ford Billboard was entitled to First Amendment protection as a display of non-commercial speech and that TDOT had filed the Chancery Court action in retaliation against the Debtor. After a four-day trial before an advisory jury, and extensive briefing by the parties and amici curiae, District Judge Jon Phipps McCalla issued his *Order and Memorandum Finding Billboard Act an Unconstitutional, Content-Based Regulation of Speech, Thomas v. Schroer,* 248 F. Supp. 3d 868 (W.D. Tenn. 2017), in which the court declared the Tennessee Billboard Act, Tennessee Code Annotated §§ 54-21-101 *et seq.,* to be an unconstitutional, content-based regulation of speech. TDOT's motion for rehearing was denied. 2017 WL 6489144. On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment of the district court was affirmed in *Thomas*

v. Bright, 937 F.3d 721 (6th Cir. 2019). TDOT's motion for rehearing *en banc* was denied on November 6, 2019. A petition for writ of certiorari to the United States Supreme Court is pending.

The only issue before this court in Kennedy Opinion I was the question of dischargeability. The question of the allowance of the claims of Tennison Brothers and Clear Channel was not before the court. The Debtor filed the first objections to these claims on November 8, 2018, shortly after Kennedy Opinion I was entered. The basis of the Debtor's objection was the decision of Judge McCalla concerning the Tennessee Billboard Act and the assertion that "[n]o Tennessee law, including the Billboard Act prevented Clear Channel from constructing a billboard on the Tennison Brothers property during the periods Clear Channel twice held valid Tennessee billboard permits." *Debtor's Objections to Proof of Claim No. 4 Filed by Clear Channel Outdoor, Inc. and Proof of Claim No. 7 Filed by Tennison Brothers, Inc.*, November 11, 2018. [Bankr. Dkt. No. 451].

The Debtor filed a *Combined Motion for Summary Judgment and Memorandum in Support* of his objections on November 9, 2018 [Bankr. Dkt. No. 455], and a *Supplement to Combined Motion for Summary Judgment Filed by Debtor (ECF #455)* on November 26, 2018. [Bankr. Dkt. No. 463]. The Debtor argued that the claims of Tennison Brothers and Clear Channel should be disallowed because they were predicated upon his violation of a state court statute which had been declared unconstitutional which rendered the judgments invalid. While that motion was pending, the Debtor filed his *Motion for Leave Pursuant to Bankruptcy Rule 8004 for Appeal Under 28 U.S.C. § 158(a)(3)* on December 21, 2018 [Bankr. Dkt. No. 507], in which to appeal "(not a court order but) this Court's calendar agenda of proceedings." "Memorandum and Order re 'Debtor's Motion for Leave Pursuant to Bankruptcy Rule 8004 for Appeal under 28 U.S.C. § 158(a)' Combined with Notice of the Entry Thereof." [Bankr. Dkt. No. 525] ("Kennedy Opinion II"). In Kennedy Opinion II, Judge Kennedy denied the Debtor's motion for permission

to appeal and, in the process, reviewed his findings and conclusions from Kennedy Opinion I that Tennison Brothers and Clear Channel hold both tort and non-tort claims against the estate. Judge Kennedy noted that "those decisions concomitantly also give rise to the triggering of the doctrine of 'law of the case' [i.e., that Tennison Brothers and Clear Channel hold valid, nondischargeable claims against the estate]." Kennedy Opinion II, p. 6.

Judge Kennedy ultimately denied the Debtor's motion for summary judgment on his objections to the claims of Tennison Brothers and Clear Channel in his "Memorandum and Order re 'Debtor's Combined Motion for Summary Judgment and Memorandum in Support' and Notice of the Entry Thereof." [Bankr. Dkt. No. 640] ("Kennedy Opinion III"). In Kennedy Opinion III, Judge Kennedy noted that the Debtor was "once again asking this Court to review the final judgments in favor of Clear Channel and Tennison Brothers, which were rendered by the Tennessee Chancery Court and later affirmed by the Tennessee Court of Appeals," and that "This Court has reiterated on several occasions that it is not a reviewing or relitigating court (or a 'legal playground')." *Id.,* slip op. at 5.

After denying the Debtor's motion for summary judgment, Judge Kennedy issued his order denying the Debtor's objections to the claims of Tennison Brothers and Clear Channel on April 2, 2019, in his "Memorandum and Order RE 'Debtor's Objections to Proof of Claim No. 4 Filed by Clear Channel Outdoor, Inc. and Proof of Claim No. 7 filed by Tennison Brothers, Inc.' Combined with Notice of the Entry Thereof." [Bankr. Dkt. No. 643] ("Kennedy Opinion IV"). Kennedy Opinion IV "integrates in its entirety" Kennedy Opinions I, II, and III. The court noted that the basis of the Debtor's objections was the unconstitutionality of the Tennessee Billboard Act, which, the Debtor asserted, rendered the judgments against him "void and unenforceable." Kennedy Opinion IV, p. 4. Judge Kennedy rejected these arguments yet again:

> In making both judicial determinations, this Court considered (not ignored as previously suggested by Mr. Thomas) the ruling of the Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, which held that the Tennessee Billboard Regulation and Control Act ("Tennessee Billboard Act") was unconstitutional. However, it is expressly reiterated again that the Tennessee Civil Court of Appeals previously discussed and considered the intervening change of law with regards to the constitutionality of the Tennessee Billboard Act but found it essentially to be irrelevant as to the independent tort claims of Clear Channel and Tennison Brothers. Since Mr. Thomas failed to seek further review before the United States Supreme Court, this Court is not inclined to essentially reverse the Tennessee Civil Court of Appeals and act as a de facto United States Supreme Court.
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> As previously stated on numerous prior occasions in this case, the bankruptcy court is not a reviewing, relitigating, or appellate court (or a "legal playground"). As suggested above, Mr. Thomas might have been better served by seeking further judicial review of *Tennison Bros. v. Thomas*, 556 S.W.3d 697 (Tenn. Ct. App. 2017), by filing a petition for a writ of certiorari with the United States Supreme Court, if he felt that the Tennessee lower State courts were misapplying applicable law—not seeking review of these matters in this bankruptcy court. These statements and conclusions continue to reflect this Court's view and position regarding these matters. That is, and in summary, Clear Channel and Tennison Brothers under these particular circumstances and applicable law have valid, nondischargeable claims under 11 U.S.C. § 523(a)(6) against Mr. Thomas, which, inter alia, have previously established the "law of this case," subject, of course, to the ultimate outcome of Mr. Thomas's pending appeals.
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> Accordingly, for the reasons mentioned above, **Mr. Thomas's Objections to Claim Nos. 4 and 7 are hereby denied.** There is no need or reason for this Court under a totality of the background facts and circumstances to relitigate anew these matters nor does applicable law even provide for such a result.

Kennedy Opinion IV, pp. 5-7 (emphasis added; footnotes omitted).

The Debtor has filed appeals from each of Judge Kennedy's Opinions. Kennedy Opinion I was affirmed by the United States District Court. The Debtor filed an appeal to the United States Court of Appeals for the Sixth Circuit on April 11, 2020. The appeal of Kennedy Opinion II was dismissed by the District Court. The Debtor filed an appeal of that order to the Court of Appeals on April 13, 2020. The appeal of Kennedy Opinion III was dismissed by the District Court as moot. No. 2:19-cv-02239-SHL-dkv (August 14, 2019). The Debtor's motion for reconsideration

was denied. No. 2:19-cv-02239-SHL-dkv (March 16, 2020). The Debtor filed an appeal of that order to the Court of Appeals on April 13, 2020. The appeal from Kennedy Opinion IV was dismissed as moot. No. 2:19-cv-02240-SHL-dkv (August 14, 2019). The Debtor's motion for reconsideration was denied. No. 2:19-cv-02240-SHL-dkv (March 16, 2020). All of these decisions were appealed to the Court of Appeals and consolidated. Motion to dismiss them as late were filed by Clear Channel Outdoor, Inc. and Tennison Brothers, Inc. All briefing has been held in abeyance pending the Court of Appeals' decision on the motion to dismiss.

The Plaintiff, Ms. Thomas, and the Trustee, Mr. Collins, were permitted to reserve their right to object to or request to subordinate the claims of Tennison Brothers and Clear Channel independent and separate from the Debtor's claims objections regarding the Billboard Act by order entered February 4, 2019. *See* "Order Granting (I) Lynn Schadt Thomas's Limited Joinder and Response to the Debtor's Objection to Proof of Claim No. 4 Filed by Clear Channel Outdoor, Inc. and Proof of Claim No. 7 Filed by Tennison Brothers, Inc. and (II) Related Relief to the Chapter 11 Trustee and Other Parties in Interest," [Bankr. Dkt. No. 564] (the "Reservation Order"). Plaintiff asserts that the Complaint is the exercise of that right. The Trustee has not objected to either proof of claim but has indicated his intent to subordinate the trebled portion of the judgments in his proposed plan pursuant to 11 U.S.C. §§ 726 and 1129(a)(7). *See* "Trustee's Third Interim Report." [Bankr. Dkt. No. 903, p. 4].

THE PARTIES

According to the Complaint, Tennison Brothers is a corporation organized under the laws of the state of Delaware with its principal place of business in Memphis, Tennessee. It is the holder of Claim Number 7 in the amount of $1,094,670.94.

According to the Complaint, Clear Channel is a corporation organized under the laws of the state of Delaware with its principal place of business in San Antonio, Texas. It is the holder of Claim Number 4 in the amount of $4,035,487.60.

The Plaintiff is the spouse of the Debtor. The Complaint does not indicate that the Plaintiff and Debtor are legally separated from each other.[2] The Plaintiff admits that she is a statutory insider precluded from being included in the count of votes needed to establish an accepting impaired class under section 1129(a)(10) of the Bankruptcy Code. The Plaintiff acquired her claim by purchasing Claim Number 69 filed by RREF ST Acquisitions, LLC, in the amount of $3,171,229.36 secured by real property valued at $48,439.00. [*See* Bankr. Dkt. No. 467].

JURISDICTION AND VENUE

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The Complaint asks for statutory and equitable subordination of the claims of Tennison Brothers and Clear Channel under sections 726 and 1129(a)(7) of the Bankruptcy Code. Thus, this is a proceeding arising under the Bankruptcy Code and is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (B), and (O). Accordingly, the bankruptcy court has authority to consider the motions to strike and/or dismiss subject only to appellate review under section 158 of title 28. 28 U.S.C. § 157(b)(1).

[2] In fact, during the hearing on the Debtor's Motion to Intervene in this adversary proceeding, which was opposed by the Plaintiff, the attorney for the Plaintiff affirmed that the parties are not separated from each other.

This adversary proceeding is related to the bankruptcy case of William H. Thomas, No. 16-27850-L, pending in the Western District of Tennessee, thus venue is proper in this district. 28 U.S.C. § 1409(a).

THE COMPLAINT

At its core, the Complaint in this adversary proceeding asserts that because the Chancery Court Judgments resulted from the refusal of the Debtor to abide by the orders of the chancellor and to cooperate in discovery, and included treble damages, the claims of Tennison Brothers and Clear Channel should be statutorily subordinated to the claims of general unsecured creditors in any Chapter 11 plan pursuant to 11 U.S.C. § 1129(a)(7),[3] incorporating 11 U.S.C. § 726(a)(4),[4] or

[3] Bankruptcy Code § 1129(a)(7) provides:

> (a) The court shall confirm a plan only if all of the following requirements are met:
> ***
> (7) With respect to each impaired class of claims or interests—
> (A) each holder of a claim or interest of such class—
> (i) has accepted the plan; or
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

[4] Bankruptcy Code § 726(a)(4) provides:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed—
> ***
> (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim.

equitably subordinated under 11 U.S.C. §§ 510(c)[5] and 105(a).[6] The Complaint also alleges that other inequitable conduct by the Defendants and TDOT independently support the equitable subordination of the claims of Tennison Brothers and Clear Channel.

The Complaint consists of 267 numbered paragraphs and the following nine requests for relief:

(1) Declaring that the Claims, as penalties, are subordinate to all other unsecured creditors as a matter of law under 11 U.S.C. § 1129(a)(7), incorporating 11 U.S.C. § 726(a)(4);

(2) Declaring that the Claims, as penalties, are subordinate to all other unsecured creditors as a matter of equity under 11 U.S.C. §§ 510(c) and 105(a);

(3) Declaring the Billboard Act unconstitutional content-based regulation of (restriction on) free speech under the First Amendment to the United States Constitution;

(4) Declaring that Claims are not founded upon real debts and shall be disallowed (or subordinated to all other creditors) for purposes of administering the bankruptcy estate and any plan of reorganization in this case;

(5) Declaring the Illegality Finding is founded upon inequitable conduct;

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[5] Bankruptcy Code § 510(c) provides:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> (2) order that any lien securing such a subordinated claim be transferred to the estate.

[6] Bankruptcy Code § 105(a) provides:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(6) Declaring the Claims are founded on inequitable conduct;

(7) Declaring the claims, as founded [on] inequitable conduct, are subordinate to all other unsecured creditors as a matter of equity under 11 U.S.C. §§ 510(c) and 105(a);

(8) Providing for damages due to Tennison and Clear Channel's inequitable conduct, including costs of administration of the bankruptcy case;

(9) Providing for additional or alternative relief that furthers equity and justice and is appropriate under the law and circumstances of the case.

In support of the requests for relief, the Complaint discusses at great length the history of the dispute between the Debtor and Tennison Brothers and Clear Channel, and the administrative proceedings and litigation between them.

THE MOTIONS TO DISMISS AND/OR STRIKE

The motion of Tennison Brothers asks that the Complaint be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6)[7] for failure to state a claim upon which relief may be granted or that most of the numbered paragraphs and requests for relief be stricken pursuant to Federal Rule of Civil Procedure 12(f).[8] Tennison Brothers claims that the Complaint contains "immaterial and

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[7] Fed. R. Civ. P. 12(b)(6) made applicable to proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7012, provides:

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
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> ***
>
> (6) failure to state a claim upon which relief can be granted.

[8] Fed. R. Civ. P. 12(f) made applicable to proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7012, provides:

> (f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
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> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

impertinent allegations which precede the entry of the underlying judgment." [Dkt. No. 8]. It asserts that the Plaintiff is attempting to relitigate matters which her spouse has litigated to conclusion. It states that allegations concerning facts giving rise to the Chancery Court Judgments, which were affirmed on appeal, should be stricken or dismissed. It states that the judgments rendered against the Debtor should be accorded full faith and credit by the Bankruptcy Court pursuant to 28 U.S.C. § 1738, which provides that state judicial proceedings "shall have the same full faith and credit in every court in the United States … as they have by law or usage in the courts of such State." It emphasizes that Federal Rule of Civil Procedure 12(f) permits any redundant, immaterial, impertinent, or scandalous matter to be stricken from a pleading.

The motion of Clear Channel asks that the court strike certain paragraphs and claims pursuant to Federal Rule of Civil Procedure 12(f) for violations of Federal Rule of Civil Procedure 8(a)(2)[9] and/or dismiss requests for relief (3), (4), (5), (6), (7), and (8) for failure to state a claim pursuant to Rule 12(b)(6). Clear Channel asserts that the Complaint fails to state a claim for relief because it attempts to relitigate claims, issues, and matters that have been either waived, or are subject to *res judicata* because they were litigated by the Tennessee state courts, this Bankruptcy Court, the United States District Court, or the United States Court of Appeals for the Sixth Circuit. Clear Channel describes the Complaint as "grossly overly bloated with an extreme amount of surplusage about irrelevant matters." [Dkt. No. 7]. Thus, it says, the Complaint violates Rule 8(a)(2), which requires "a short and plain statement of the grounds showing that the pleader is entitled to the relief." The Complaint, Clear Channel says, attempts to litigate the question of

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[9] Fed. R. Civ. P. 8(a)(2) provides:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
> ***
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

equitable and/or legal subordination of its claim but goes well beyond what is necessary to make a short and plain statement of that claim. Clear Channel notes that the Trustee has indicated his intention to subordinate the trebled portion of its claim to the claims of other creditors but not to file an objection to the proofs of claim. Thus, Clear Channel says, it has been put on notice of the Trustee's position and Plaintiff's claim regarding legal and/or equitable subordination. The remaining portions of the Complaint, it says, are nothing more than a regurgitation of issues and factual determinations that are no longer cognizable based on the law of the case doctrine and/or *res judicata*, and are thus subject to dismissal under Federal Rule of Civil Procedure 12(b)(6).

The Plaintiff filed a lengthy response to the motions to dismiss and/or strike in which she reiterated the claims set forth in the Complaint.

ANALYSIS

The Plaintiff, as a creditor of the bankruptcy estate, has an interest in maximizing the return on her claim. Thus, she is within her rights to seek to subordinate the claims of Tennison Brothers and Clear Channel based upon applicable bankruptcy law set out at 11 U.S.C. §§ 1129(a)(7) and 726(a)(4). As has been pointed out by Clear Channel, the Trustee recognizes this interest, at least as to the trebled portion of the Chancery Court Judgments, and intends to provide for subordination of that portion of the claims in his plan. The Plaintiff, however, wants the entire claims subordinated upon the basis of equitable subordination under a number of theories including the penalty status of the Chancery Court Judgments, inequitable conduct by the claimants, and general inequity. The Plaintiff is within her rights to seek equitable subordination of the Chancery Court Claims.

The Plaintiff is also the spouse of the Debtor. They form an economic unit. The Debtor shares the Plaintiff's interest in having some or all of the Defendants' claims subordinated to her

claim and the claims of other creditors. The Plaintiff and the Debtor also share an interest in having the claim disallowed. Although Kennedy Opinions I - IV found and concluded that the Defendants' claims were valid and nondischargeable as to the Debtor, the Reservation Order left open the possibility that the claims would be disallowed upon objection by the Plaintiff or the Trustee. If the Plaintiff is successful on her claim that the claims should be disallowed, the Debtor will be relieved of an otherwise nondischargeable judgment, again providing a benefit to the economic unit consisting of the Plaintiff and the Debtor. The interests of the Plaintiff and the Debtor in the outcome of this litigation are aligned.[10]

The Motions to Dismiss

Federal Rule of Civil Procedure 8(a), made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7008(a), directs that a pleading provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Pursuant to Bankruptcy Rule 7012(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss a complaint for failure to state a claim upon which relief can be granted the trial court must "(1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009). A motion to dismiss pursuant to Rule 12(b)(6) "should only be granted when the court, upon review of the complaint, is convinced that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Garzoni v. K-Mart Corp. (In re Garzoni),* 35 Fed. Appx. 182 (6th Cir. 2002).

[10] Indeed, the Debtor attempted to employ John Skrmetti and Adam Langley of the law firm of Butler Snow, LLP, as "special counsel for the trustee pursuant to 11 U.S.C. §§ 327(e) and 328(a)" on August 9, 2018. [Bankr. Dkt. No. 395]. Judge Kennedy denied the application in his "Memorandum and Order Re Application to Employ the Law Firm of Butler Snow LLP as Special Counsel for the Debtor Combined with Notice of the Entry Thereof." [Dkt. No. 413]. Mr. Langley now appears as counsel for the Debtor's spouse raising the same or very similar arguments to those raised by the Debtor numerous times.

Although, "[a]s a general rule, matters outside the pleadings may not be considered in ruling on a 12(b)(6) motion to dismiss unless the motion is converted to one for summary judgment under Fed. R. Civ. P. 56. ... [W]hen a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment." *Bash v. Textron Fin. Corp. (In re Fair Fin. Company),* 834 F.3d 651, 656-57, n. 1 (2016). Accordingly, "[i]n addition to the allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice" when determining whether a complaint states a claim upon which relief can be granted. *Wyser-Pratte Management Co., Inc. v. Telxon Corp*., 413 F.3d 553, 560 (6th Cir. 2005).

Statutory Subordination

Bankruptcy Code section 1129(a)(7) directs that each impaired class of claims either accept a plan or receive what it would receive in liquidation under chapter 7. Section 726(a) provides the order of distribution in chapter 7. It stipulates that payment of any allowed claim for any fine, penalty, or forfeiture, or for multiple, exemplary or punitive damages be paid fourth in order after priority claims, timely filed non-priority claims, and tardily-filed unsecured claims. In order to state a claim for statutory subordination, a plaintiff need only plead: (1) a claim against the debtor, (2) arising prior to the earlier of the entry of an order for relief or the appointment of a trustee, and (3) that consists of a fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages.

Equitable Subordination

Section 510(c) of the Bankruptcy Code permits a court to subordinate all or part of an allowed claim to all or part of an allowed claim under principles of equitable subordination. In order to state a claim under section 510(c), a plaintiff need only plead: (1) inequitable conduct by

the claimant; (2) that resulted in injury to the creditors of the debtor or conferred an unfair advantage on the claimant; and (3) that equitable subordination of the claim would not be inconsistent with the provisions of the Bankruptcy Code. *See Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.),* 269 F.3d 726, 744 (6th Cir. 2001) ("This court has adopted a three-part standard for establishing equitable subordination: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act. *See In re Baker & Getty Fin. Servs., Inc*., 974 F.2d 712, 717-18 (6th Cir. 1992) (citing *In re Mobile Steel Co.,* 563 F.2d 692, 699-700 (5th Cir. 1977)). Satisfaction of this three-part standard does not mean that a court is required to equitably subordinate a claim, but rather that the court is permitted to take such action. *See In re Octagon Roofing*, 157 B.R. 852, 857 (N.D. Ill. 1993).").

The Doctrine of Res Judicata

Many paragraphs of the Complaint describe conduct that led to the entry of the Chancery Court Judgments. There is no question, however, that the Chancery Court Judgments are final and not subject to further appeal. *See Tennison II*. This court must give full faith and credit to the decision of the state court pursuant to 28 U.S.C. § 1738.[11] The federal court must refer to the

[11] Section § 1738 of title 28 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
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> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as

preclusion law of the State in which judgment was rendered. *Marese v. American Acad. of Orthopedic Surgeons,* 470 U.S. 373, 380 (1985). Under Tennessee law, "the doctrine of r*es judicata* or claim preclusion bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit." *Jackson v. Smith,* 387 S.W.3d 486, 491-92 (Tenn. 2012). According to the Tennessee court:

> [T]he doctrine of *res judicata* "is a 'rule of rest,' *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1976), and it promotes finality in litigation, prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits. *In re Estate of Boote*, 198 S.W.3d 699, 718 (Tenn. Ct. App. 2005); *Sweatt v. Tennessee Dep't of Corr.*, 88 S.W.3d 567, 570 (Tenn. Ct. App. 2002).

Id. Although generally an affirmative defense, *res judicata* may be raised by motion when "the plaintiff's own allegations in the complaint … show that an affirmative defense exists and that this defense legally defeats the claim for relief." *Id.* In order to establish *res judicata,* a party must show: "(1) that the underlying judgment was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits." *Id.*

The Complaint alleges that in a suit between the Tennison Brothers and Clear Channel as plaintiff, and the Debtor, as defendant, final judgments were rendered against the Debtor arising out of the construction of an unpermitted billboard by the Debtor. [Dkt. No. 1, Complaint, ¶¶ 38-40]. The Complaint further alleges that on or about November 20, 2009, the chancellor "denied [the Debtor's motion for] protective order, struck his answers, and entered Penalty Default Judgments[12] [against the Debtor in favor of Tennison Brothers and Clear Channel]. [Dkt. No. 1,

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they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[12] "Penalty Default Judgment" is the characterization given by the Plaintiff.

Complaint, ¶ 55]. The Complaint alleges that a special master issued a report recommending damage awards to Tennison Brothers (approximately $1.1 million) and Clear Channel (approximately $3.9 million), and that this report was adopted by the chancellor resulting in entry of the Chancery Court Judgments. [Dkt. No. 1, Complaint, ¶ 98]. The Complaint alleges that Tennison Brothers filed Proof of Claim No. 7 in the amount of $1,094,670.94, and Clear Channel filed Proof of Claim No. 4 in the amount of $4,035,487.60, arising from the Shelby County Chancery Court, Case No. CH-08-1310, "whereby Tennison and Clear Channel obtained Penalty Default Judgments as sanctions against Thomas's discovery conduct." [Dkt. No. 1, Complaint, ¶ 1]. The Complaint alleges that the Chancery Court Judgment was affirmed on appeal by the Tennessee Court of Appeals and that the court refused to consider the constitutionality of the Billboard Act. [Dkt. No. 1, Complaint, ¶ 111]. The Complaint acknowledges that permission to appeal this order to the Tennessee Supreme Court was denied. [Dkt. No. 1, Complaint, ¶ 111]. The Complaint alleges that the Plaintiff is a creditor and the spouse of the Debtor. [Complaint, ¶ 13].

Without question, the Complaint demonstrates the presence of elements 1, 3, and 4 needed for the application of *res judicata* to the Plaintiff's attempt to relitigate the claims of Tennison Brothers and Clear Channel against the Debtor. The Complaint shows that judgments were rendered by the Chancery Court of Shelby County, Tennessee, a court of competent jurisdiction; that the same claim was asserted in both actions – i.e., the liability of the Debtor to Tennison Brothers and Clear Channel as the result of his erection of an unpermitted billboard; and that the underlying judgments are final on the merits.[13]

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[13] To be sure, the Plaintiff asserts that the Chancery Court Judgments were not "on the merits" [Dkt. No. 1, Complaint, ¶ 1], but that issue was raised and finally decided by the Tennessee Court of Appeals. *See Tennison II,* 556 S.W.3d at 717. That this is so was recognized by this court in the Kennedy Opinions.

The only remaining element to establish the application of *res judicata* is the element of privity. The Plaintiff was not a party to the Chancery Court litigation. In Tennessee, "[i]n the context of *res judicata*, 'privity' means 'an identity of interests relating to the subject matter of the litigation, and it does not embrace relationships between the parties themselves.'" *Acuity v. McGhee Engineering,* 297 S.W.3d 718, 735 (Tenn. Ct. App. 2008), citing *Carson v. Challenger Corp*., 2007 WL 177575, *3 n. 3 (Tenn. Ct. App. Jan. 25, 2007). The existence of privity depends upon the facts of each case. *Id.,* citing *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 181 (Tenn. App. 2000). "For purposes of res judicata, privity does not denote a legal relationship between the parties. Rather, 'privity concerns a shared identity of interests relating to the subject matter of the litigation.'" *Brooks v. Whirlpool Corp.,* 2011 WL 13186533, slip op. at *4 (W.D. Tenn. June 28, 2011), citing *Keszthelyi v. United States*, 2011 WL 1884007, slip op. at *14 (E.D. Tenn. May 17, 2011).

The fact that the Plaintiff and the Debtor are married to each other does not, by itself, establish privity between them. In the context of this bankruptcy case, however, where one of the primary questions raised in the Complaint is whether the liability of the Debtor to Tennison Brothers and Clear Channel has been established, their pecuniary interests are allied. Both the Plaintiff and the Debtor benefit if the amount that will be paid to the Defendants from the assets of the estate is reduced. Moreover, the financial interests of the Plaintiff and the Debtor were fully allied in the underlying Chancery Court litigation. Insofar as they are married to each other now and during that litigation, sharing income and expenses, they form an economic unit. *See, e.g., In re Ortiz-Feliciano*, 532 B.R. 185, 191-93 (Bankr. D. P.R. 2015) (Discussing the propriety of considering a married couple to be an economic unit in a variety of bankruptcy-related contexts). While not personally liable for the debts of her spouse, it was nonetheless true that any judgment

rendered against him in the Chancery Court litigation would have resulted in fewer assets being available to the married couple as an economic unit. There also can be no question that the interests of the Plaintiff were fully and ably asserted by the Debtor in the underlying Chancery Court litigation. Two trips to the Court of Appeals and denial of permission to appeal to the Tennessee Supreme Court were required to reach the final judgment which forms the basis of the proofs of claim filed by the Defendants. In fact, the most cursory review of the Complaint by someone with knowledge of the chancery, bankruptcy, and district court litigation undertaken demonstrates that most of the allegations of the Complaint have been raised by the Debtor in other contexts.

This court thus holds that the doctrine of *res judicata* applies to the Complaint insofar as it attempts to relitigate the claims of Tennison Brothers and Clear Channel against the Debtor. The Debtor's liability for those claims and the amounts of those claims have been established.[14]

The Rooker-Feldman Doctrine

In addition to the doctrine of *res judicata,* which limits the actions that may be brought by parties and their privies, the court is also aware of the limitation on its own jurisdiction expressed in the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine has been described by the Bankruptcy Appellate Panel for the Sixth Circuit as follows:

> The *Rooker/Feldman* doctrine is derived from two Supreme Court cases decided sixty years apart, *Rooker v. Fidelity Trust Co*., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). The doctrine expresses the principle that "federal trial courts have only original subject matter, and not appellate, jurisdiction [and] ... may not entertain appellate review of [or collateral attack on] a state court judgment." *In re Johnson*, 210 B.R. 1004, 1006 (Bankr. W.D. Tenn. 1997). Rooker/Feldman is a limitation on subject matter jurisdiction in federal courts. *See Blanton v. United States*, 94 F.3d 227, 233-34 (6th Cir. 1996) ("Lower federal courts have no jurisdiction directly to review final decisions of the courts of a state or similar jurisdiction in judicial proceedings.") (citing *Feldman*, 460 U.S. at 476, 103 S. Ct. 1303; *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296, 90 S. Ct. 1739, 1747-48, 26 L. Ed. 2d 234

[14] *See Tennison II,* Kennedy Opinion I, and Lipman Opinions.

> (1970)). The doctrine complements the statutory jurisdictional scheme of the federal courts, including 28 U.S.C. § 1257, that limits federal review of state court proceedings to the United States Supreme Court.

In re Singleton, 230 B.R. 533, 536 (6th Cir. B.A.P. 1999). As Judge Kennedy said in his memorandum denying the Debtor's motion for summary judgment on his objections to the claims of Tennison Brothers and Clear Channel, this court "is not a reviewing or relitigating court (or a 'legal playground')." It has no appellate jurisdiction to review the final decisions of the Tennessee courts.

Law of the Case

Judge Kennedy indicated in his prior opinions that the "law of the case" doctrine would be applied to his prior decisions on legal issues. That doctrine has been articulated by the Supreme Court as follows:

> As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983) (dictum). This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." 1 B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p. 118 (1984).

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). The law of the case does not limit the power of the court, however. '"[T]he law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Id.* at 817, quoting *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152 (1912) (Holmes, J.) As described by the Bankruptcy Court for the District of Delaware, the law of the case doctrine applies even when appeals remain:

> The law of the case doctrine "bars the re-litigation 'of matters once decided during the course of a continuing lawsuit.'" *In re Radnor Holdings Corporation*, 564 B.R. 467, 482 (Bankr. D. Del. 2017) (citing *Casey v. Planned Parenthood*, 14 F.3d 848, 856 (3d Cir. 1994)). The doctrine applies to "'subsequent rulings by the same judge

> in the same case or a closely related one [and] to rulings by different judges at the same level.'" *Id*. The doctrine applies to factual findings made in a main bankruptcy proceeding and is binding on parties to a subsequent adversary proceeding. *Id*.
>
> Solus argues that the law of the case doctrine does not apply to its counterclaim because even though the Court's previous decision was affirmed by the District Court, that decision is still on appeal to the Third Circuit. The Court disagrees. An appeal of a Court's prior ruling does not render the law of the case doctrine inapplicable. *See Vaso*, 500 B. R. at 399. Solus has not cited any new facts or law that would render the Court's prior ruling on the Motion to Enforce the Intercreditor Agreement "clearly erroneous" so as to render the law of the case doctrine inapplicable. Indeed, the affirmance of the Court's prior ruling by the District Court makes the previous factual findings binding on this Court in this adversary. *U.S. v. Local 560 (I.B.T.)*, 974 F.2d 315, 329 (3d Cir. 1992).

In re La Paloma Generating Co., LLC, No. 16-12700 (JTD), 2020 WL 224569, at *3 (Bankr. D. Del. Jan. 13, 2020).

Judge Kennedy previously determined that Tennison Brothers and Clear Channel hold valid, nondischargeable claims against the Debtor and the bankruptcy estate. His decisions were affirmed on appeal. The undersigned judge finds no reason to depart from the well-reasoned decisions of Judge Kennedy.

On the basis of the fundamental precepts of *res judicata, Rooker-Feldman*, and law of the case, the court will review each of the counts set forth in the Complaint to determine which of them states a claim upon which relief can be granted before turning to the question of which allegations of the Complaint should be stricken insofar as they present redundant, immaterial, impertinent, or scandalous matter in light of its conclusions.

Count 1 – Declaration that the Claims are Legally Subordinate to the Claims of All Other Unsecured Creditors

Count 1 of the Complaint alleges that the claims of Tennison Brothers and Clear Channel should be statutorily subordinated to the claims of other creditors pursuant to 11 U.S.C.

§§ 1129(a)(7) and 726(a). Count 1 thus arises under the Bankruptcy Code. It did not form any part of the Chancery Court litigation and the doctrine of *res judicata* does not apply to it.

Bankruptcy Code section 1129(a)(7) directs that each impaired class of claims either accept a plan or receive what it would receive in liquidation under chapter 7. Section 726(a) provides the order of distribution in chapter 7. It stipulates that payment of any allowed claim for any fine, penalty, or forfeiture, or for multiple, exemplary or punitive damages be paid fourth in order after priority claims, timely filed non-priority claims, and tardily-filed unsecured claims. In order to state a claim for statutory subordination, a plaintiff need only plead: (1) a claim against the debtor, (2) arising prior to the earlier of the entry of an order for relief or the appointment of a trustee, and (3) that consists of a fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages.

In order to state claims of statutory subordination, a complaint need only plead that the Chancery Court Judgments, which arose from claims that existed prior to the filing of the Debtor's petition in bankruptcy, consist of a fine, penalty, or forfeiture, or were for multiple, exemplary, or punitive damages. The Complaint alleges that the Chancery Court Judgments arise from claims against the Debtor that were the subject of the *Amended Complaint for Damages* filed by Tennison Brothers on or about August 27, 2008 [Dkt. No. 1, Complaint, ¶ 39], and a cross claim filed by Clear Channel on or about September 8, 2008 [Dkt. No. 1, Complaint, ¶ 44]; that the Debtor filed a chapter 11 bankruptcy petition in June 2016, after the claims arose. [Dkt. No. 1, Complaint, ¶ 106] (The Complaint does not specify that this resulted in the entry of an order for relief but the court takes notice that the filing of a voluntary petition constitutes an order for relief under the chapter under which it is filed. 11 U.S.C. § 301(b)); that resulted in the entry of default judgments [Dkt. No. 1, Complaint, ¶ 55]; and the establishment of damages including treble damages. [Dkt. No. 1, Complaint, ¶¶ 98, 111, 123]. In fact, there is no dispute that this is true as the result of the

entry of the opinion of the Tennessee Court of Appeals. *Tennison II,* 556 S.W.3d at 728-29. The Complaint has sufficiently stated a claim for statutory subordination.

Count 2 – Equitable Subordination – Penalty Status

Count 2 of the Complaint alleges that the claims of Tennison Brothers and Clear Channel should be equitably subordinated to the claims of other creditors pursuant to 11 U.S.C. §§ 510(c) and 105(a). It also arises under the Bankruptcy Code and did not form any part of the Chancery Court litigation. The doctrine of *res judicata* does not apply to the claim in the abstract. As actually pled, however, there are some problems with Count 2 of the Complaint.

In order to establish a claim for equitable subordination, a pleading must state that (1) the claimant engaged in some type of inequitable conduct; (2) the misconduct resulted in injury to the creditors of the debtor or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim is consistent with the provisions of the Bankruptcy Code. The Complaint alleges that the claims of Tennison Brothers and Clear Channel arise from a penalty sanction – the Penalty Default Judgments [Dkt. No. 1, Complaint, ¶ 133]; and that the claims include multiple, exemplary, or punitive damages. [Dkt. No. 1, Complaint, ¶ 134]. The Complaint also includes numerous allegations to the effect that Tennison Brothers and Clear Channel engaged in unfair or inequitable conduct in bringing their complaints against the Debtor and/or in the conduct of that litigation. [See, e.g., Dkt. No. 1, Complaint, ¶¶ 38-99]. Moreover, under Count 2, the Complaint asserts that, "But for the Penalty Default Judgments, Thomas would not be liable to Tennison and Clear Channel." [Dkt. No. 1, Complaint, ¶ 135].

In fact, the Complaint acknowledges that the Chancery Court Judgments resulted from misconduct of the *Debtor* rather than from misconduct of Tennison Brothers and Clear Channel. They resulted from the failure of the Debtor to comply with discovery and orders of the

chancellors, as the Complaint acknowledges. [Dkt. No. 1, Complaint, ¶¶ 55, 56]. As a result, the Debtor's answer was stricken, and the well-pled facts of the complaint and cross-complaint were taken as true. The Debtor would have been permitted to raise all his concerns about the conduct of Tennison Brothers and Clear Channel had he not refused to cooperate in the litigation. The Tennessee Court of Appeals confirmed that the effect of the default judgment was a finding that "Clear Channel and Tennison were precluded from building their billboard *because of* [the Debtor's] erection of his billboard and his refusal to remove it." *Tennison II,* 556 S.W.3d at 721.

Because of the doctrine of *res judicata,* the Plaintiff may not relitigate claims that were litigated in the Chancery Court including claims that, for example, the facts pled by Tennison Brothers or Clear Channel were untrue. It was the judgment of the Tennessee Court of Appeals that Tennison Brothers and Clear Channel were damaged as the result of the misconduct of the Debtor. Moreover, this court is prevented by the *Rooker-Feldman* doctrine from sitting as an appellate judge with respect to the judgments of the state courts.

The Complaint states a claim for equitable subordination for many of the same reasons that it states a claim for statutory subordination. Count 2, however, also raises the question of whether the compensatory portion of the damages award should be subordinated to the claims of other creditors. Collateral estoppel[15] will come to the aid of the Plaintiff here because, for example, the fact that the Chancery Court Judgments resulted from the refusal of the Debtor to abide by the orders of the chancellor or to respond to discovery rather than from trial, has been established.[16]

[15] For a discussion of the application of collateral estoppel to the Chancery Court Judgments, see Kennedy Opinion I, pp. 8-18, and Lipman Opinions, No. 02794 at 15-23, and No. 02797 at 13-21.

[16] The question of whether that fact should result in subordination of any portion of the claims of Tennison Brothers and Clear Channel is the subject of Count 2 but not presently before the court for decision.

Further, the fact that some portion of the damages awarded by the chancellor resulted from trebling the compensatory portion of the award has been established.

Count 3 – Declaration that the Billboard Act is Unconstitutional Content-Based Regulation of (Restriction On) Free Speech Under the First Amendment to the United States Constitution and That Illegality Finding Is Void

Count 3 asks that this court find the Tennessee Billboard Act unconstitutional content-based regulation of free speech, and on that basis, invalidate the so-called "Illegality Finding" of the Commissioner of TDOT, which the Plaintiff asserts formed the basis of the Chancery Court Judgments. Unfortunately for the Plaintiff, the claims set out in Count 3 of the Complaint were made by the Debtor before the Tennessee Court of Appeals and rejected by it:

> On appeal, Thomas argues that any issues or arguments regarding the alleged illegality of his billboard are now moot. He claims that the district court's ruling [in *Schroer*] eliminates all of his past and future liability in this case because the Billboard Act was "unconstitutional ab initio," the billboard he constructed "was thus legal at all times," the plaintiffs "could have" constructed their billboards if they wanted to do so, and the plaintiffs "could never have sustained their causes of action." Thomas argues that because of the district court's ruling regarding unconstitutionality, the parties' complaints in this case failed to state a cause of action as a matter of law.
>
> Once again, we conclude that Thomas cannot pursue this argument on appeal due to the entry of default judgment against him. Because the default judgment established Thomas's liability for the causes of action asserted, he cannot continue to litigate the legality of his billboard or whether his actions actually prevented Clear Channel from constructing its billboard. **The default judgment conclusively established Thomas's liability, admitting that his interference with the contract between Tennison Brothers and Clear Channel resulted in their inability to construct a billboard.**
>
> Thomas claims that the district court's ruling regarding constitutionality renders the plaintiffs unable "to recoup under said unconstitutional provisions" in the future. **However, the plaintiffs in this case are not attempting to "recoup" under the Billboard Act. They are entitled to damages for the tort claims set forth in their complaints, for which they obtained a default judgment.**

Tennison II, 556 S.W.3d at 731 (emphasis added; footnote omitted).

Further, the arguments made by the Plaintiff were made by the Debtor before this court and rejected by it:

> When the default judgment was entered against Mr. Thomas by a Tennessee Court of competent jurisdiction, his liability was firmly established. He has had multiple opportunities in State Court to contest Creditors' default judgments. As the Tennessee Court of Appeals noted …, liability is based on the acts pled by the Creditors and admitted by Mr. Thomas by default, it is not predicated on the earlier ruling by the Administrative Law Judge. Therefore, this Court believes that the "illegality" ruling asserted by Mr. Thomas is irrelevant to this discussion.

Kennedy Opinion I, at 13.

The arguments made by the Plaintiff in Count 3 were made by the Debtor before the District Court and rejected by it as well. *See* Lipman Opinions. In those opinions, Judge Lipman stated:

> [W]hile an intervening change in constitutional law applies retroactively to pending matters, *Harper*, 509 U.S. at 96-97, the change in law must come from the Supreme Court of the United States, *id.* at 97; *Déja Vu*, 421 F.3d at 420-21 (applying *Harper* at 97); *Leggett*, 308 S.W.3d at 871. Whatever effect Schroer had on the constitutionality of the Billboard Act, it was a decision of this court, not of the Supreme Court.
>
> Moreover, Schroer was an as-applied challenge to the Billboard Act, meaning that its holding applied only to Mr. Thomas and TDOT Commissioner John Schroer—it does not apply to Clear Channel. *Nat'l Treasury Emps. Union*, 513 U.S. at 478; *cf. Harper*, 509 U.S. at 97. Even if *Reed*, a decision of the Supreme Court, had been a facial attack on the Billboard Act (and it was not; it was a challenge to a sign ordinance in another jurisdiction), Mr. Thomas did not raise whether it had any retroactive bearing on the basis for default judgments against him in the state court proceedings. *See Tennison Bros., Inc. v. Thomas*, 556 S.W.3d 697 (Tenn. Ct. App. 2017), *perm. app. denied, Tennison Bros., Inc. v. Thomas,* No. W2-16-00795-SC-R11-CV, 2018 Tenn. LEXIS 267 (Tenn. Apr. 23, 2018) (per curiam). Under the *Rooker-Feldman* doctrine, neither the Bankruptcy Court nor this Court can scrutinize and reverse, on this or any other basis, either the decision of the Tennessee Court of Appeals to affirm the Chancery Court's judgment or the Tennessee Supreme Court's decision to deny Mr. Thomas permission to subsequently appeal. *In re Sweeney*, 276 B.R. at 195.

Lipman Opinions, No. 02794 at 21-22; No. 02797 at 20-21.

The law of the case prevents the court from departing from the settled decisions of Judge Kennedy, which have been affirmed on appeal. They in turn were based on the decision of the

Chancery Court, which was affirmed on appeal. Because the Plaintiff is in privity with the Debtor with regard to the application of the doctrine of *res judicata* to the Chancery Court Judgments, she will not be permitted to raise arguments here that were raised and rejected by the state courts in reaching those judgments. Accordingly, Count 3 of the Complaint fails to state a claim upon which relief can be granted and will be dismissed.

Count 4 – Declaration that the Claims of Tennison and Clear Channel Are Not Founded Upon Real Debts

Count 4 of the Complaint contains another argument that the claims of Tennison Brothers and Clear Channel should be disallowed, this time because the Chancery Court Judgments were based upon the TDOT Commissioner's determination that the Debtor's billboard was illegal under the Billboard Act. Count 4 also alleges that subsequent to the judgments, there was a new development in the law rendering the Billboard Act unenforceable. The "new development" referenced by the Complaint is the holding in *Schroer* that the Billboard Act is unconstitutional. For the same reasons that Count 3 of the Complaint will be dismissed, Count 4 will also be dismissed. These arguments attempt to avoid the effect of the final judgments rendered by the Tennessee courts and are precluded by the doctrine of *res judicata.* It was the judgment of the Tennessee Court of Appeals that Tennison Brothers and Clear Channel were damaged as the result of the misconduct of the Debtor. Moreover, the *Rooker-Feldman* doctrine prevents this court from exercising appellate jurisdiction with respect to a state court judgment. Count 4 of the Complaint fails to state a claim upon which relief can be granted.

Count 5 – Declaration that the Claims Finding were Founded Upon TDOT's Inequitable Conduct

Count 5 of the Complaint alleges that inequitable conduct by the TDOT Commissioner and his employees resulted in the so-called "Illegality Finding," which was relied upon by the

chancellor in entering the Chancery Coury Judgments and assessing damages against the Debtor. The Complaint asks for a declaration that the claims of Tennison Brothers and Clear Channel were founded upon TDOT's inequitable conduct. For the same reasons that Count 3 of the Complaint will be dismissed, Count 5 should also be dismissed. These arguments attempt to avoid the effect of the final judgments rendered by the Tennessee courts and are precluded by the doctrine of *res judicata.* It was the judgment of the Tennessee Court of Appeals that Tennison Brothers and Clear Channel were damaged as the result of the misconduct of the Debtor. Moreover, the *Rooker-Feldman* doctrine prevents this court from exercising appellate jurisdiction with respect to a state court judgment. Count 5 of the Complaint fails to state a claim upon which relief can be granted.

Count 6 – Declaration that Tennison's Claim is Founded Upon Inequitable Conduct – Misrepresentations and Omissions

Count 6 of the Complaint alleges that Tennison Brothers made misrepresentations and omissions to the Chancery Court, and that these misrepresentations and omissions prejudiced the court in its entry of the Chancery Court Judgments. This is another attempt at collateral attack on the Chancery Court Judgments. The Tennessee Court of Appeals affirmed the decision of the chancellor that Thomas's answer to the complaint and cross-complaint would be stricken as the result of his refusal to abide by the orders of the chancellor and to respond to discovery requests. As a result, the allegations of the complaint and cross-complaint were taken as true and provided the factual basis for the entry of the Chancery Court Judgments. This court lacks jurisdiction to entertain a collateral attack upon the Chancery Court Judgments as a result of the *Rooker-Feldman* doctrine, and the Plaintiff is precluded from relitigating the claims that were presented in the Chancery Court litigation by the doctrine of *res judicata.* Count 6 will be dismissed because it fails to state a claim upon which relief can be granted.

Count 7 – Declaration that Clear Channel's Claim is Founded Upon Inequitable Conduct – Misrepresentations and Omissions

Count 7 of the Complaint is the counterpart to Count 6 and will be dismissed for the same reasons.

Count 8 – Declaration that Claims of Tennison and Clear Channel are Founded Upon Inequitable Conduct – Concealment

Count 8 alleges that Tennison Brothers and Clear Channel concealed from the chancellor the alleged fact that Clear Channel had been issued permits to construct a billboard pursuant to their lease. These facts, the Complaint alleges, prejudiced the Chancery Court litigation and calculation of damages. These are additional facts, which, if true, the Debtor would have been permitted to raise in the Chancery Court litigation but for his refusal to abide by the orders of the chancellor and cooperate in discovery. As a result, the allegations of the complaint and cross-complaint were taken as true and provided the factual basis for the entry of the Chancery Court Judgments. This court lacks jurisdiction to entertain a collateral attack upon the Chancery Court Judgments as a result of the *Rooker-Feldman* doctrine, and the Plaintiff is precluded from relitigating the claims that were presented in the Chancery Court litigation by the doctrine of *res judicata.* Count 8 will be dismissed because it fails to state a claim upon which relief can be granted.

Count 9 – Declaration that Claims of Tennison and Clear Channel Are Founded Upon Collusion

Count 9 alleges that the misrepresentations and omissions that were alleged in Counts 6, 7, and 8 resulted from collusion between Tennison Brothers and Clear Channel. For the reasons that the court will dismiss those counts, it will also dismiss Count 9.

Count 10 – Equitable Subordination – Inequitable Conduct

Count 10 alleges that the claims of Tennison Brothers and Clear Channel were obtained by "other inequitable conduct" and were based on inequitable conduct. It asks that the claims be equitably subordinated pursuant to 11 U.S.C. §§ 510(c) and 105(a). Factually, this claim contradicts the Chancery Court Judgments and thus may not be considered by this court as set forth above with respect to Counts 5-9. For the same reasons, Count 10 will be dismissed.

Count 10 [sic] – Equitable Subordination – Inequity of the Penalty Default Judgments

This second Count 10 of the Complaint alleges that the "Penalty Default Judgments was not entered in accordance with applicable standards of due process under the Tennessee Constitution and Federal Constitution," which requires the application of certain factors articulated by the United States Court of Appeals for the Sixth Circuit.[17] The Count continues by describing ways in which the Plaintiff alleges the Chancery Court Judgments were improperly rendered. Pursuant to the *Rooker-Feldman* doctrine, this court may not review the decisions of the state courts as if on appellate review. The remedy of the Debtor, if any, lies in the state courts.[18] The Plaintiff, however, is prevented by the doctrine of *res judicata* from relitigating the Chancery Court Judgments. They conclusively establish the claims of Tennison Brothers and Clear Channel for purposes of the Debtor's bankruptcy case. They do not, however, foreclose the Plaintiff's claims that some part or all of them should be subordinated to the claims of other creditors for purposes of distribution under a bankruptcy plan *based upon the facts established as the basis for those*

[17] The Complaint relies upon *Prime Rate Premium Fin. Corp., Inc. v. Larson,* 930 F.3d 759, 769 (6th Cir. 2019), which sets out a federal standard. The Plaintiff has provided no rationale for its application to the Chancery Court Judgments.

[18] It does appear that the Debtor has fully exhausted his state remedies, but that is not a question before this court. Judge Kennedy mentioned in his opinions the fact that the Debtor did not seek review of the decision of the Tennessee courts before the United States Supreme Court.

judgments. Those claims arise under the Bankruptcy Code and have not been adjudicated by any other court. They are the subject of Counts 1 and 2 of the Complaint. The second Count 10 of the Complaint, however, will be dismissed.

The Motions to Strike

As a result of the court's review of each of the counts of the Complaint on the basis of the application of the *res judicata* and the *Rooker-Feldman* doctrines, Counts 1 and 2 of the Complaint remain. The court will now consider the motions to strike in light of the remaining counts.

Rule 12(f) permits the court to strike "any redundant, immaterial, impertinent, or scandalous matter" from a pleading either on its own initiative or upon motion of a party. Motions to strike '"are viewed with disfavor and are not frequently granted.' *Operating Eng'rs Local 324 Health Care Plan v. G & W Const. Co*., 783 F.3d 1045, 1050 (6th Cir. 2015) (citing *Brown & Williamson Tobacco Corp. v. U.S.*, 201 F.2d 819, 822 [(6th Cir 1953)]. Indeed, a "'motion to strike should be granted only when the pleading to be striken [sic] has no possible relation to the controversy.'" *Parlak v. U.S. Immigration & Customs Enf't*, 2006 WL 3634385, at *1 (6th Cir. Apr. 27, 2006) (quoting *Brown,* 201 F.2d at 822)." See, *Fitzgerald Truck Parts & Sales, LLC. v. U.S.,* 391 F. Supp. 3d 794, 801 (M.D. Tenn. 2019).

The decision in *Brown* was aimed at the striking of an entire pleading, rather than some parts of it. In that context, the motion to strike is a more drastic motion than the motion to dismiss because, as the court noted, "because of the practical difficulty of deciding cases without a factual record." *Brown,* 201 F.2d at 801. Tennison Brothers and Clear Channel do not seek to strike the Complaint in its entirety, which would have the effect of removing it from the docket. Rather, they seek to strike portions of the Complaint that are irrelevant to any relief that can be granted to the Plaintiff. Now that the court has narrowed the relief that can possibly be granted to that

requested in Counts 1 and 2 of the Complaint, the allegations that should be stricken from the complaint as immaterial should be readily apparent.

The first 118 paragraphs of the Complaint precede Count 1. Ordinarily, those paragraphs would provide introductory material leaving allegations specific to individual counts to be inserted later. In this case, however, paragraphs 1-118 range over the entire history of the dispute between the Debtor and the Defendants. Many of those facts were incorporated into the Chancery Court Judgments and need not be restated for purposes of alleging that the claims should be statutorily or equitably subordinated to the claims of other creditors. In other words, many of the background facts included in the Complaint, while not objectionable are simply irrelevant. Thus, it would be improper to put the Defendants to the trouble of responding to them. Other paragraphs gratuitously characterize the acts of the Debtor or other persons, characterizations which manifestly cannot have been made on personal knowledge, and which render otherwise routine background paragraphs impertinent. Other paragraphs are contrary to the facts conclusively established in the Chancery Court Judgments.

The following paragraphs will be stricken as immaterial to Counts 1 or 2 of the Complaint: Paragraphs 2, 3, 4, 5.b, c, and d, 6, 9, 19, 23 strike second and third sentences, 28 strike words "in good faith," 30, 33, 34, 35, 36, 38 strike everything in the first sentence after "Thomas, Clear Channel, and other defendants," 41, 42, 46, 48, 51, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, and 99. It is possible that after reviewing the remaining background paragraphs, the Plaintiff will request permission to amend the Complaint to clarify references that may have been lost. The court will consider such a motion to amend upon notice to the Defendants with opportunity to object.

Turning now to the allegations of the various counts of the Complaint, in Count 1, paragraph 119 now incorporates only the preceding paragraphs remaining after immaterial paragraphs have been stricken. The remaining paragraphs of Count 1 stand.

In Count 2, paragraph 129 now incorporates only the preceding paragraphs remaining after immaterial paragraphs have been stricken. The remaining paragraphs of Count 2 stand.

As Counts 3 through the second Count 10 have been dismissed, paragraphs 140 through 267 are stricken.

Turning now to the Requests for Relief, Requests (1), (2), and (9) shall stand. Requests (3), (4), (5), (6), (7), and (8) are stricken.

CONCLUSION

For the foregoing reasons, the court **GRANTS** the motions of Tennison Brothers and Clear Channel seeking the dismissal of Counts 3, 4, 5, 6, 7, 8, 9, 10, and 10 of the Complaint. The court also **GRANTS IN PART** the motions of Tennison Brothers and Clear Channel to strike portions of the Complaint. The court strikes paragraphs 2-4, 5.b, c, and d, 6, 9, 19, 23 strike second and third sentences, 28 strike words "in good faith," 30, 33-36, 38 strike everything in the first sentence after "Thomas, Clear Channel, and other defendants," 41, 42, 46, 48, 51, 56-83, 85-94, 96, 97, 99, 140-267, and Requests for Relief (3) through (8).

The court **DENIES IN PART** the motions of Tennison Brothers and Clear Channel insofar as they ask the court to strike paragraphs 1, 5.a, 7, 8, 10, 20-22, 23 first sentence, 24-29, 31, 32, 37-40, 43-45, 47, 49, 50, 52-55, 84, 95, 98, 100-114, 119, and 129.

cc: Debtor (pro se)
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