UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

DEFENDANT GOVERNOR EVERS'S BRIEF IN SUPPORT OF HIS PETITION FOR ATTORNEYS' FEES AND SANCTIONS

INTRODUCTION

Plaintiff and his attorneys advanced a lawsuit that, from its inception, was frivolous, dilatory, and without any merit. Plaintiff's complaint did not outline coherent legal claims so much as it flitted among a variety of fringe conspiracy theories, sourced to anonymous declarations submitted by ostensible experts who were later identified and revealed to be extreme partisans with neither experience nor qualifications to provide any type of opinion on the subject matter. (At least one of the anonymous declarants was revealed not to be a declarant at all, having never agreed to the use of her words in this lawsuit.) In sum, none of the "evidence" offered by Plaintiff had any relevance to Wisconsin's 2020 presidential election, and much of it did not meet other standards for admissibility. Compounding the through-the-looking-glass experience of litigating this action, the arguments Plaintiff's attorneys made during the case's short pendency were utterly bereft of legal foundation, and in some instances foreclosed by binding precedent.

Plaintiff and his attorneys should be held jointly responsible for prosecuting this untenable lawsuit. There is no reason for Wisconsin taxpayers to bear the expense of this attempt to hijack the democratic process. Governor Tony Evers petitions for an order awarding attorney fees incurred in defending Wisconsin's November 2020 election results against this baseless, cynical assault and imposing sanctions against Plaintiff and his attorneys for mounting the assault. Working on the extremely condensed timeline demanded by Plaintiff, despite a completely baseless claim, required a team of attorneys to work nearly around the clock performing all the necessary research and drafting the necessary filings to litigate both a motion to dismiss and Plaintiff's motion for preliminary injunctive relief all in one week. Governor Evers respectfully requests that the Court order Plaintiff and his attorneys to pay the expense of defending democracy from their attacks. Governor Evers further requests that the Court exercise its inherent authority to protect the judicial process by imposing sanctions that will deter similar conduct in the future.

STATEMENT OF CASE AND PROCEDURAL HISTORY

Plaintiff and his attorneys delayed filing this case until four weeks after Wisconsin's presidential election, then demanded an expedited response from both Defendants and this Court. Plaintiff and his attorneys repeatedly bungled their way through this case, thereby multiplying the steps necessary to respond to the action, significantly increasing the expenses incurred pursuant thereto, and unjustly wasting judicial resources.

On December 1, 2020, Plaintiff filed a complaint along with a purported motion for declaratory, emergency, and permanent injunctive relief. (Dkt. 1; Dkt. 2) The same day, Plaintiff filed a "corrected" motion (Dkt. 6), but, as this Court explained in an order issued on December 2, neither version was complete or correct as to form (Dkt. 7). On December 3, Plaintiff and his attorneys filed an amended complaint, removing a named co-plaintiff who reportedly had never consented to participating in this lawsuit.[1] (Dkt. 9) The same day, they filed an amended motion for a temporary restraining order ("TRO") and preliminary injunction, attached to which was not a memorandum in support but a proposed briefing schedule requiring a response from Defendants by the end of the next day (December 4) and a reply from Plaintiff two days later (December 5). (Dkt. 10) In a separate filing, Plaintiff asserted that the Court should issue a decision on the TRO by 5:00 p.m. on December 6. (Dkt. 18 at 2)

On December 4, 2020, this Court noted that again Plaintiff's motion was not in proper form, but it charitably construed Plaintiff's motion as one for injunctive relief to be heard in an expedited manner, granted the motion in part, and set a briefing schedule that required Defendants to respond by 5:00 p.m. on December 7, and Plaintiff to file his reply by 5:00 p.m. on December

[1] *See* Molly Beck, *GOP Candidate Says He Was Used Without Permission as a Plaintiff in Lawsuit to Overturn Wisconsin Election Results*, Milwaukee Journal Sentinel, Dec. 1, 2020, https://www.jsonline.com/story/news/politics/elections/2020/12/01/wisconsin-republican-says-he-used-without-permission-trump-suit/3786051001/.

8. (Dkt. 29 at 3) In the same order, this Court pointed out that the document filed as a notice of appearance for lead counsel Sidney Powell was blank so that the Court had no completed notice of appearance on file for Attorney Powell. (*Id*. at 9) Attorney Powell filed a complete notice of appearance that same day, but it inaccurately reflected that she represented both Plaintiff and the former co-plaintiff who had never consented to participate in the case. (Dkt. 35) Fortunately for Plaintiff and Attorney Powell, the Court did not strike the notice.

On December 6, in the middle of the Court's briefing schedule, Plaintiff's counsel moved for a consolidated evidentiary hearing and a trial on the merits (Dkt. 44), which Governor Evers opposed in a brief filed on December 7 (Dkt. 60) and which the Court denied during a status conference held on December 8 (Dkt. 70, 71). Over the same time period, Governor Evers's counsel also drafted and timely filed a full response to Plaintiff's amended motion for a TRO (Dkt. 55) and drafted, fully briefed, and timely filed a motion to dismiss Plaintiff's amended complaint (Dkt. 51, 59). On December 9, Governor Evers's counsel also drafted and filed a reply brief in support of the motion to dismiss. (Dkt. 73)

On the night of December 9, hours after briefing concluded, this Court issued a decision that credited most of the jurisdictional and procedural defects Governor Evers's identified, granted Defendants' motions to dismiss, denied as moot Plaintiff's amended motion for injunctive relief, and dismissed the case. (Dkt. 83) Without waiting for the Court to enter a judgment sufficient for appeal, Plaintiff's attorneys rushed a notice of appeal to the Seventh Circuit. (Dkt. 84) Then, on December 15, they filed an amended notice of appeal from the judgment (Dkt. 93), along with a motion to consolidate the two separate appeals they had filed (No. 20-3396, 7th Cir. Dkt. 17). Unwilling to await the Seventh Circuit untangling the procedural mess that they themselves had created, Plaintiff's counsel ran to the U.S. Supreme Court with an emergency petition for

mandamus under Supreme Court Rule 20 on December 11. (*Id.*, ¶13) After the Supreme Court rejected the petition, Plaintiff's counsel filed a second emergency petition on December 15, which the Supreme Court Clerk's office docketed as case no. 20-859.

On January 25, 2021, after Congress had certified the electoral votes and the presidential inauguration had occurred, Defendants jointly moved to dismiss the appeal as moot. (No. 20-3448, 7th Cir. Dkt. 14) Plaintiff joined the motion the very next day. (No. 20-3448, 7th Cir. Dkt. 15) On February 1, 2021, the Seventh Circuit issued an order to dismiss Plaintiff's appeal as moot and remand the case with instructions to vacate the prior decision and dismiss as moot. (No. 20-3448, 7th Cir. Dkt. 16) The mandate did not issue until February 23, 2021. (Dkt. 96) On February 15, 2021, more than a week before the mandate issued, this Court vacated its decision and dismissed the case as moot. (Dkt. 95) On March 1, 2021, the Supreme Court denied Plaintiff's emergency petition for mandamus. *In re Feehan*, No. 20-859, 2021 WL 769780 (U.S. Mar. 1, 2021). Only then were all of Plaintiff's pending claims finally resolved.

Even more egregious than the slapdash way Plaintiff's attorneys handled the proceedings, was their request that this Court overturn Wisconsin's certified election results, disenfranchising nearly 3.3 million voters, and counterfactually declare by fiat that Donald Trump had won the state's electoral votes. This would be completely unprecedented, but for the fact that Plaintiff's counsel had filed similar cases seeking similar relief—all ending with similar failure—in several other states before filing in Wisconsin. Instead of evidence and legal argument, Plaintiff offered a tangled web of irrelevant (and inaccurate) conspiracy theories, ultimately suggesting that Dominion voting machines had altered individual votes to favor Joseph R. Biden, Jr. Plaintiff advanced this conspiracy theory without factual support and, worse still, deliberately ignored definitive proof disproving his allegations.

Any one of these issues, standing alone, could warrant sanctions; taken as a whole, they demand sanctions. Plaintiff and his attorneys significantly abused the judicial process. They must be held accountable.

LEGAL STANDARD

There are a variety of legal mechanisms available to a court to sanction attorneys, parties, and others who come before it for bad-faith conduct in the course of legal proceedings. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-48 (1991). Whether to impose such sanctions is left to a court's broad discretion. *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1183 (7th Cir. 1992). Governor Evers requests that this Court sanction Plaintiff and his attorneys under 28 U.S.C. § 1927 and inherent judicial authority.[2]

A. 28 U.S.C. § 1927

Congress has expressly authorized courts to tax attorneys' fees against opposing counsel under 28 U.S.C. § 1927. That section provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The purpose of this statutory provision is to limit abuse of judicial process, deter frivolous litigation, and "penalize attorneys who engage in dilatory conduct." *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984); *see also, e.g.*, *Roadway Express, Inc. v. Piper*, 447 U.S.

[2] Had there been sufficient time, Governor Evers would likely have also pursued sanctions under Federal Rule of Civil Procedure 11. However, Rule 11's safe-harbor provision requires the party moving for sanctions to first notify the opposing party and allow 21 days for withdrawal or correction before filing a motion for sanctions. Here, Plaintiff filed his complaint on December 1 and demanded resolution by December 6. Ultimately, the Court issued an order dismissing the case on December 9. There was no time to comply with Rule 11's safe-harbor requirement. But their demand for an expeditious process cannot insulate Plaintiff and his attorneys from appropriate consequences for their egregious conduct.

752, 766-67 (1980); *Custom Shutters, LLC v. Saia Motor Freight Line, LLC*, No. 12-CV-1070-JPS, 2014 WL 2013375, at *2 (E.D. Wis. May 16, 2014) (quoting *Kapco Mfg. Co., Inc. v. C & O Enters., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989)).

Under 28 U.S.C. § 1927, an attorney who files a baseless claim has unreasonably and vexatiously multiplied the proceedings before a court. *See Fredrick v. Clark*, 587 F.Supp. 789, 794 (W.D. Wis. 1984) (where plaintiffs must have known or should have known that their legal position was objectively frivolous, they engaged in bad faith litigation and defendants were entitled to attorney fees under § 1927); *Knorr Brake Corp*., 738 F.2d at 227 (a court may assess fees under § 1927 against an attorney who intentionally files or prosecutes a claim that lacks a plausible legal or factual basis). "Sanctions against counsel under 28 U.S.C. § 1927 are appropriate when 'counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders.'" *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013) (quoting *Kotsilieris*, 966 F.2d at 1184-85).

This Court may assess fees against attorneys whose conduct is both unreasonable and vexatious. *Kotsilieris*, 966 F.2d at 1184. "Vexatious" means exhibiting bad faith, either under a subjective or an objective evaluation. *Id.* Reckless conduct or extreme negligence constitute bad faith. *See Ordower v. Feldman*, 826 F.2d 1569, 1574 (7th Cir. 1987) (intentional ill will or reckless conduct constitutes vexatious conduct); *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (subjective evidence of malice, objective evidence of reckless conduct, or indifference to the law can constitute bad faith). Multiple tactics used by attorneys have warranted section 1927 sanctions. *See, e.g.*, *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752-54 (7th Cir. 1988) (sanctions assessed where counsel pretended potentially dispositive authority did not exist, persisted in

putting forth claims barred by statute of limitations, and acted in bad faith by filing a claim in hopes that discovery would reveal facts to support it); *Walter v. Fiorenzo*, 840 F.2d 427, 435 (7th Cir. 1988) (counsel sanctioned where it should have been obvious to counsel that claim was baseless without alleging more facts); *Ordower*, 826 F.2d at 1575-76 (counsel sanctioned for total indifference to Federal Rules of Civil Procedure); *Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987) (counsel sanctioned for indifference to Federal Rules of Appellate Procedure and court's order).

B. Inherent Judicial Authority

Independent of section 1927, courts have broad authority to sanction a party or attorney who litigates in bad faith. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). "[D]istrict courts possess certain inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That authority includes the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Royce v. Michael R. Needle P.C.*, 950 F.3d 939, 953 (7th Cir. 2020) (internal quotation marks and citations omitted). Sanctionable abuses can include "harassment, unnecessary delay, needless increase in the cost of litigation, willful disobedience, and recklessly making a frivolous claim." *Mach v. Will Cty. Sheriff*, 580 F.3d 495, 501 (7th Cir. 2009). Additionally, courts may consider the totality of the conduct at issue when determining if sanctions are appropriate. *Fuery v. City of Chicago*, 900 F.3d 450, 454 (7th Cir. 2018).

This inherent authority reaches bad-faith conduct "not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973). For example, the Seventh Circuit found bad faith and imposed fees based on "(1) the obvious meritlessness of the … claim; (2) the failure to provide any factual or legal support for the sundry constitutional

claims; (3) counsel's omission of a key sentence from a quotation; and (4) the failure to respond to defendant's motion for fees and costs." *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201 (7th Cir. 1983). Imposing sanctions under inherent authority has two primary purposes: to punish and deter attorneys from litigating frivolous lawsuits. *See Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1396 (7th Cir. 1983). "As with fee awards entered against a party guilty of bad faith litigation, an award against counsel serves only incidentally to compensate the prevailing party for fees that should never have been incurred." *Id.*

Methode Elecs., Inc. v. Adam Techns., Inc., 371 F.3d 923, 924 (7th Cir. 2004) further illustrates the breadth of inherent judicial authority. There, the plaintiff filed suit in the Northern District of Illinois, claiming a press release established venue, even though the defendant had no apparent connection to Illinois. *Id*. at 924. When discovery confirmed the venue allegation was false, the defendant moved for sanctions. *Id.* After briefing and a hearing, the court imposed $45,000 in attorney fees and a $10,000 fine. *Id.* at 926. The Seventh Circuit upheld the attorney fee award and the fine, holding that both were within the district court's broad inherent authority. *Id.* at 928. Further demonstrating the wide discretion available to the Court is that bad-faith conduct has even warranted overturning a jury award. *Fuery*, 900 F.3d at 468.

ARGUMENT

From this case's inception through the staggeringly expedited subsequent proceedings, there is no doubt that Plaintiff and his attorneys brought this lawsuit and litigated in bad faith. Unconscionably, they did so for the purpose of sowing doubt about the legitimacy of the 2020 presidential election, with a goal of disenfranchising nearly 3.3 million Wisconsin voters in order to secure the presidency for their preferred candidate.[3] This Court has both statutory and inherent

[3] Plaintiff himself was one of the ten designees who would have served as Wisconsin's presidential electors had Donald Trump won the statewide vote. *See* https://elections.wi.gov/sites/elections.wi.gov/files/2020-

authority to make the state whole for attorneys' fees necessitated by this frivolous suit and to issue sanctions, for which Plaintiff and his attorneys should be jointly and severally liable, to dissuade future partisans and attorneys from engaging in such reckless abuses of the judicial system.

I. PLAINTIFF AND HIS ATTORNEYS ENGAGED IN VEXATIOUS AND BAD-FAITH LITIGATION.

Plaintiff and his attorneys engaged in unreasonable and vexatious conduct by bringing this meritless, dilatory lawsuit despite publicly available, highly credible evidence defenestrating their claims and then rushing adjudication in a haphazard, procedurally inept way that exacerbated the Defendants' burdens and increased the expenses imposed upon the state treasury. Accordingly, Plaintiff and his counsel should pay the attorneys' fees Governor Evers incurred in defending this suit.

A. Plaintiff Unreasonably Delayed Filing the Claims Adjudicated Here.

Plaintiff's extreme delay in filing this lawsuit justifies imposing fees. He alleged widespread voter fraud based on purported violations of state election law and dubious claims about the use of Dominion Voting Machines. Such serious allegations warrant prompt and thorough review, if at all true, yet Plaintiff's claims regarding violations of state election law called into question guidance and practices from the Wisconsin Elections Commission ("WEC") that had been adopted and were in place well before the 2020 presidential election. WEC guidance relating to missing witness addresses was in place before the 2016 presidential election. The indefinitely confined voter guidance was issued in March of 2020, prior to Wisconsin's presidential primary.

10/Republican%20Elector%20Cert%20form_0.pdf (last visited Mar. 30, 2021). Undeterred by the certified election results or the judgments of this and other courts, on December 14, 2020, Plaintiff joined nine other individuals in holding an unaccredited meeting to pretend that Wisconsin's electoral votes were indeed cast for Donald Trump and to generate fraudulent documents purporting to certify as much. *See* https://static1.squarespace.com/static/5f88891b1bd57b085dc121d1/t/603c60000180d028667e6c0c/1614569472749/Complaint+Exhibit+G.pdf at 1 (last visited Mar. 30, 2021).

Plaintiff supported his claims regarding widespread ballot fraud based on the use of Dominion Voting Machines with publicly available evidence, including witness testimony from 2018. Yet, despite the longstanding publicly available nature of the information upon which Plaintiff based his claims, he waited until after Donald Trump lost the election—and then for nearly another four weeks—to file this lawsuit. As this Court stated, Plaintiff's "delay [was] manifestly unwarranted and unreasonable." (Dkt. 59 at 18)

B. There was No Evidence of Systemic Fraud in Wisconsin's 2020 Election.

As required by state and federal law, Wisconsin election officials conduct an audit of voting machines after every general election. *See* Wis. Stat. § 7.08(6); 52 U.S.C. § 21081. The threshold for error is 1 in 500,000 ballots (0.0002 percent). 52 U.S.C. § 21081(a)(5); Fed. Elections Comm'n, *Voting System Standards* § 3.2.1 (Apr. 2002).[4] The WEC established selection criteria for the audit following the November 2020 election, guaranteeing that the audit included equipment from every county and multiple samples of every machine model used in the state. WEC, *2020 Post-Election Audit of Electronic Voting Equipment Report*, at 2 (Dec. 1, 2020).[5] As part of the post-election audit, the WEC examined 28 Dominion machines. *Id.* at 4-5. The audit found neither any programming errors nor any "identifiable bugs, errors, or failures of the tabulation voting equipment …." *Id.* at 8. The audit results were posted online, and accessible to the public, by at least November 30, 2020 as part of the agenda and meeting packet for the December 1, 2020 WEC public. At that meeting, Commissioner Dean Knudson, a former Republican legislator and immediate-past chair of the WEC, explained that the audit showed "no evidence of systemic

[4] Available at https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf (last visited Mar. 30, 2021).

[5] Available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-12/2020%20Audit%20Program%20Update%20for%2012_1_2020%20Meeting%20FINAL.pdf (last visited Mar. 31, 2021).

problems" or "hacking" or of "switched votes."[6] He specifically noted that the WEC had "audited 15 percent of the Dominion machines"[7] used in the state and had found "no evidence of any Dominion machines changing votes or doing any of the like."[8] Noting that Wisconsin's "election equipment operated with great accuracy," he categorically asserted that he had "yet to see a credible claim of fraudulent activity during this election."[9]

The audit results refuted all of Plaintiff's far-flung conspiracy theories. But Plaintiff made no mention of the audit in either his initial or amended complaint, even though both were filed *after* the audit results were available to the public. Ignoring the facts, he blithely alleged, without even a shred of evidence, that massive fraud tainted Wisconsin's election. (Dkt. 9 at 1). But this lawsuit was never really about Wisconsin or focused on what occurred here. It was simply part of a cookie-cutter approach that most of Plaintiff's attorneys took to achieving their political agenda. Those lawyers filed lawsuits substantially identical to this one in three other states. *See King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich., filed Nov. 25, 2020); *Pearson v. Kemp*, No. 1:20-cv-04809-TCB (N.D. Ga., filed Nov. 25, 2020); *Bowyer v. Ducey*, No. 20-cv-02321 (D. Ariz., filed Dec. 2, 2020).[10] Each suit alleged widespread fraud as part of a grand multi-national conspiracy to "steal" the November 2020 election. None provided specific, or even remotely reliable, evidence

[6] Video available at https://wiseye.org/2020/12/01/wisconsin-elections-commission-december-2020-meeting/ at 2:05:18.

[7] *Id.* at 2:05:34.

[8] *Id.* at 2:08:44.

[9] *Id.* at 2:06:00, 2:06:52.

[10] While it was Plaintiff's out-of-state attorneys who orchestrated these serial filings around the country, Plaintiff's local counsel also filed additional meritless lawsuits. Before this one, working with other national counsel, he had already filed a separate frivolous suit attacking Wisconsin's election results on the basis of nonsensical and baseless claims. *See Langenhorst v. Pecore*, No. 1:20-cv-1701 (E.D. Wis. filed Nov. 12, 2020). That case was voluntarily dismissed within days of initiating litigation, before Judge Griesbach could convene a scheduled initial status conference.

to support those extravagant claims. Each suit was a last-ditch attempt to overturn election results and disenfranchise millions of voters. Ultimately, all of the lawsuits, including this one, were dismissed, underscoring the fact that the claims were without basis to begin with and should never have been filed.[11]

C. Plaintiff's Filings and Legal Conduct Were Riddled with Procedural Errors.

Plaintiff's attorneys made several egregious procedural errors that inflated the time and expense necessary to defend this suit. They originally included a co-plaintiff who never consented to participating in the lawsuit. (Dkt. 83 at 8) It was also apparent that the complaint was a recycled version of a different lawsuit. For instance, the requested relief asked for "production of 48 hours of security camera recordings of all rooms used in the voting process at the TCF Center …." (Dkt. 1 at 50) The TCF center is located in Detroit, Michigan and has no relevance to Wisconsin's 2020 election. These fundamental errors required the filing of an amended complaint, which in turn required review and analysis by defense counsel. But even the amended complaint contained errors, including that it failed to allege that Plaintiff voted in the presidential election, which is an essential detail to establish standing. (Dkt. 83 at 18) These shortcomings were not limited to Plaintiff's initial pleading. Plaintiff's attorneys filed a motion for injunctive relief, but failed to include an order it referenced. (Dkt. 2 at 1; Dkt. 7 at 1) The certificate of service accompanying the motion failed to list addresses for service (at that time, no Defendant had yet filed an appearance so CM-ECF was not sufficient). (Dkt. 2 at 2; Dkt. 7 at 1) And, though Plaintiff's attorneys claimed to file documents under seal, they failed to do so and never requested *in camera* review with that motion. (Dkt. 2 at 2; Dkt. 7 at 1-2) The mistakes made in the first motion for

[11] The decisions in *King v. Whitmer* and *Bowyer v. Ducey* are already part of this Court's docket. (*See* Dkt. 55-5; Dkt. 81)

injunctive relief necessitated the filing of a corrected motion, which the Court explained was also not complete or correct as to form. (Dkt. 6; Dkt. 7 at 2-4) Plaintiff's attorneys then filed an amended motion for injunctive relief, which for the third time was not in the proper form, but was construed by this Court in Plaintiff's favor. (Dkt. 10; Dkt. 29 at 5) Attorney Powell, specifically, filed motions without first filing an appearance and, upon notice from this Court, filed an inaccurate appearance that claimed she still represented the removed co-plaintiff. (Dkt. 29 at 9; Dkt. 35).

Then, following briefing and this Court's decision on the matter, Plaintiff's attorneys mishandled the appeal to the Seventh Circuit. They rushed to file before a judgment sufficient for appeal was entered, necessitating the subsequent filing of an amended notice of appeal and a motion to consolidate the two separate appeals. Without doubt Plaintiff's attorneys unreasonable taxed the resources of the judicial system with their significant procedural errors.

D. Plaintiff's Briefs Misrepresented the Law.

Briefs submitted by Plaintiff's attorneys were riddled with egregious errors. They fabricated a quote and attributed it to an opinion by Judge Stadtmueller. (*See* Dkt. 83 at 32 (noting inaccuracy of Dkt. 72 at 24-25 ostensibly quoting *Swaffer v. Deininger*, No. 08-CV-208 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008)) They argued *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015), established standing "to challenge state laws that collectively reduce the value of one party[]" (Dkt. 72 at 20), without noting that the Supreme Court expressly overruled that exact rationale in that exact case, *see Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018). And they recklessly distorted governing law by relying on outdated precedent to argue notice-pleading standards (Dkt. 72 at 15-17 (citing *Kasper v. Bd. of Election Comm'rs of the City of Chicago*, 814 F.2d 332 (7th Cir. 1987)), without acknowledging "the factual heft required to survive a motion to dismiss after *Twombly* and *Iqbal*," *McCauley v. City of Chicago*, 671 F.3d 611, 617 (7th Cir. 2011)) This is not

a minor or uncommon point. *See also, e.g.*, *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 589 (7th Cir. 2016) (recognizing that *Twombly* and *Iqbal* established "heightened pleading requirements."); *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) ("After *Twombly* and *Iqbal* a plaintiff to survive dismissal must plead some facts that suggest a right to relief that is beyond the speculative level." (internal quotation marks omitted)); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (after *Twombly* and *Iqbal*, the plaintiff must "present a story that holds together"). This gross misstatement of law, along with the fake quote and the misleading citation to *Whitford*, evidence objective bad faith and exemplify the total hash Plaintiff's attorneys made of this litigation.

E. Plaintiff's Claims Were Built upon Unreliable and Inadmissible Evidence.

Plaintiff's attorneys filed this lawsuit without the support of credible, relevant, or remotely admissible evidence. Rather, the claims were supported by unreliable fact witnesses, hearsay, and extreme partisans misrepresented as experts. Plaintiff's amended complaint relied heavily upon the testimony of 13 purported experts and fact witnesses. Of those, five were anonymous (Dkt. 9, Exhs. 1, 4, 12, 13 & 19), making verifying their credentials and assessing their qualifications impossible. Indeed, it was impossible to know whether the affidavits were even verified by the affiants, as required by 28 U.S.C. § 1746. Consequently, these affidavits were inadmissible, as Plaintiff's attorneys knew or should have known.

Two of these anonymous "experts" were later revealed to lack all credibility. Exhibit 12 is a declaration written by "Spyder," a pseudonymous individual who Plaintiff's attorneys proffered as a witness (albeit in disguise), asserting that he worked in military intelligence. It turns out that he never passed the entry-level training course in his battalion.[12] Spyder later admitted that he

[12] *See* Emma Brown, Aaron C. Davis & Alice Crites, *Sidney Powell's Secret "Military Intelligence Expert," Key to Fraud Claims in Election Lawsuits, Never Worked in Military Intelligence,* The Washington Post,

never worked in military intelligence and that his declaration was false. He explained that the "original paperwork that [he] sent in [to Plaintiff's counsel] didn't say" he was an electronic intelligence analyst under 305th Military Intelligence.[13] He blames Plaintiff's lawyers for making that inaccurate assertion.[14] Exhibit 13 is from an anonymous declarant who claimed China was somehow involved with Dominion Voting Systems and affected Wisconsin's presidential election results. That individual was later revealed to be a pro-Trump podcaster who had previously lied about being a medical doctor and having both a Ph.D. and MBA.[15] Indeed, she was found to have unlawfully misspent raised funds and solicited donations; the judge in that case ordered her to pay more than $25,000.[16] The podcaster had never spoken to any of Plaintiff's attorneys or agreed to the use of her declaration in this suit or others brought by Plaintiff's legal team.[17]

There was no greater credibility in the eight declarations and purported expert reports for whom witness identities were given. Whether a witness qualifies as an expert "can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010). Moreover, expert testimony requires a reliable methodology. *Hartman v. EBSCO Indus. Inc.*, 758 F.3d 810, 817 (7th Cir. 2014). Plaintiff's "experts" lacked qualifications and failed to provide methodological information to show their opinions were reliable. Plaintiff's

---

Dec. 11, 2020, https://www.washingtonpost.com/investigations/sidney-powell-spider-spyder-witness/2020/12/11 /0cd567e6-3b2a-11eb-98c4-25dc9f4987e8_story.html (last visited Mar. 30, 2021).

[13] *Id.*

[14] *Id.*

[15] *See* Jon Swaine, *Sidney Powell's Secret Intelligence Contractor Witness is a Pro-Trump Podcaster,* The Washington Post, Dec. 24, 2020, https://www.washingtonpost.com/investigations/sidney-powells-secret-intelligence-contractor-witness-is-a-pro-trump-podcaster/2020/12/24/d5a1ab9e-4403-11eb-a277-49a6d1f9dff1_story.html (last visited Mar. 30, 2021).

[16] *Id.*

[17] *Id.*

named fact witnesses presented only unsupported, speculative assertions, which are inadmissible. *See Zilisch v. R.J. Reynolds Tobacco Co.*, No. 10-cv-474-bbc, 2011 WL 7630628, at *1 (W.D. Wis. June 21, 2011) (statements in affidavit were "inadmissible because they are conclusory and not made on the basis of [affiant's] personal knowledge"); *Ross v. Bd. of Regents of Univ. of Wis. Sys.*, 655 F. Supp. 2d 895, 923 (E.D. Wis. 2009) (declining to consider portions of affidavit "not based upon the affiant's personal knowledge"). For example:

- Exhibit 3 is report from Matthew Braynard, who discussed a survey that he maintained uncovered assorted irregularities in Wisconsin's election results. But his only identified education was a "degree in business administration," and he identified no other qualifications, experience, or publications in survey design, statistical methods in the social sciences or political science. Braynard also failed to provide any sampling method, telephone protocols, scripts used by interviewers, quality-control steps, information about who conducted the phone calls, or information about how voter telephone numbers were located and verified. In short, Braynard's survey had none of the indicia of reliability necessary to admit survey evidence.
- Exhibit 2, a declaration from William Briggs, is based entirely on Braynard's survey results. Briggs also fails to identify any relevant experience or qualifications in survey design. Because Briggs relies upon Braynard's survey results, which were not presented with any methodological information, Briggs's analysis also lacks the methodological information necessary for admissibility.
- Exhibit 6, an affidavit from Joseph Oltmann, purports to recreate a conversation he purportedly overheard, in which someone he speculates was a Dominion employee made representations about the 2020 election. Oltmann layers speculation on top of hearsay to propagate a conspiracy theory about election manipulation.
- Exhibit 7, a declaration from Harri Hursti, contains a lengthy discussion about issues arising out of the primary election in Georgia, but provides no first-hand information about and made no connection to any Wisconsin election.
- Exhibit 8, a declaration by Ana Mercedes Díaz Cardozo, expresses opinions about the security of electronic voting systems, but she is not a computer scientist or information security expert, nor does she claim to possess any other relevant qualifications. She also offers numerous observations about years-old elections in Venezuela, but makes no coherent connection between activity in Venezuela and the 2020 election in Wisconsin.
- Exhibit 9, a declaration from Seth Keshel, is a statistical analysis conducted by a "trained data analyst." But Keshel gives no details about his education, experience, or other qualifications, aside from "political involvement requiring a knowledge

of election trends and voting behavior." This affidavit contains no methodology whatsoever.

- Exhibit 14, the declaration of Ronald Watkins, analyzes the security of electronic of electronic voting systems, but identifies only "experience as a network and information defense analyst and a network security engineer." Watkins does not describe what that experience is with any degree of detail, nor does he explain how that experience qualifies him to testify about the security of electronic voting systems. In reality, Watkins operates the online message board 8kun and is a key propagator of the QAnon conspiracy theory.[18]
- Exhibit 17, the declaration of Russell James Ramsland, Jr., contains both statistical "analysis" and a technical assessment of electronic voting systems, but Ramsland identifies no education, experience, publications or other qualifications in any relevant field. The analysis also does not contain any controls; it ignores obvious explanations for the phenomena discussed; it uses a "random population of Wisconsin votes" as its comparison group, notwithstanding significant and meaningful differences between different areas of the state; and it fails to identify the sources of any of its data or assumptions about voter turnout.

F. Most of Plaintiff's Requests for Relief Were Unprecedented and Impossible to Grant.

The relief Plaintiff's attorneys requested also evidences bad faith, as it was unprecedented and without legal basis. Wisconsin's Supreme Court denied a similar request to invalidate Wisconsin's presidential election results, with a majority explaining that "[t]he relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election." *Wis. Voters All. v. Wis. Elections Comm'n*, 2020AP1930-OA at *3 (Wis. Dec. 4, 2020) (Hagedorn, J., concurring, joined by a majority) (filed in this case at Dkt. 55-1). Without any legal support, Plaintiff asked this Court to unilaterally (and counterfactually) declare that Donald Trump had won Wisconsin's presidential election. Plaintiff and his attorneys did not ask for a new election, or to have the Legislature select electors, like other lawsuits requested. Instead,

[18] *See* Drew Harwell, *To Boost Voter-Fraud Claims, Trump Advocate Sidney Powell Turns to Unusual Source: The Longtime Operator of QAnon's Internet Home,* The Washington Post, Dec. 1, 2020, https://www.washingtonpost.com/technology/2020/12/01/powell-cites-qanon-watkins/ (last visited Mar. 30, 2021).

they went further still and asked this Court to act by fiat, overriding the will of nearly 3.3 million voters and declaring that the losing candidate had in fact won—an act for which they offered no legal justification. Moreover, as this Court noted, Plaintiff and his attorneys requested the Court to enjoin actions that had already occurred and that were "beyond [the Court's] ability to redress absent the mythical time machine." (Dkt. 83 at 33) For example, they requested an order enjoining Governor Evers from transmitting the certified election results to the Electoral College, which had already occurred by the time the lawsuit was filed. Likewise, they requested that certain ballots not be counted, even though the counting of ballots and certification of the statewide results were both completed before the lawsuit was even filed. Furthermore, this Court concluded that the relief requested was far outside the constitutional limitations imposed upon it and "outside the limits of its oath to uphold and [defend] the Constitution." (*Id.* at 44)

II. THE COURT SHOULD SANCTION PLAINTIFF AND HIS ATTORNEYS.

Any one of these issues, standing alone, could warrant sanctions. Taken as a whole, they show that Plaintiff and his attorneys significantly abused the judicial process. Governor Evers had no choice but to respond to their baseless arguments and assault on the democratic process. The conduct of this litigation was unreasonably vexatious by several measures. It follows that Plaintiff and his attorneys should face sanctions pursuant to 28 U.S.C. § 1927 and this Court's inherent authority.

A. The Court Should Sanction Plaintiff's Attorneys under 28 U.S.C. § 1927.

The totality of the actions taken by Plaintiff's attorneys, as discussed above, demonstrate that they vexatiously and unreasonably multiplied the proceedings before the Court. They were dilatory in filing this action, waiting until almost four weeks after the election to challenge its validity, and they created needless delay by making procedural errors that necessitated additional filings. *Knorr Brake Corp*., 738 F.2d at 226 ("The purpose of section 1927 is to penalize attorneys

who engage in dilatory conduct"). The gravamen of the complaint Plaintiff's attorneys filed was that widespread voter fraud, stemming from alleged violations of state election law and the use of certain voting machines, so tainted the presidential election that the results were suspect and should be overturned. But by the time they filed the complaint, the purported evidence they relied upon regarding Dominion Voting Machines dated back to 2018 and the publicly available results of the WEC audit clearly demonstrated the lack of systemic voter fraud in the Wisconsin election. Plaintiff's attorneys neither acknowledged this nor presented any credible evidence to the contrary. Rather, they filed a case based entirely upon inadmissible, outlandish, and speculative testimony that obviously lacked any plausible or factual basis, which they knew or should have known. Plaintiff's attorneys should be held accountable under section 1927 for filing and pursuing a baseless claim. *See Fredrick*, 587 F. Supp. at 794 (where plaintiffs must have known or should have known that their legal position was objectively frivolous, they engaged in bad faith litigation and defendants were entitled to attorney fees under § 1927); *Knorr Brake Corp*., 738 F.2d at 227 (a court may assess fees against an attorney under § 1927 who intentionally files or prosecutes a claim that lacks a plausible legal or factual basis).

By relying upon generally unreliable and inadmissible evidence, Plaintiff's attorneys behaved recklessly and showed indifference to the Federal Rules of Evidence. *Grochocinski*, 719 F.3d at 799 ("Sanctions against counsel under 28 U.S.C. § 1927 are appropriate when counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders" (internal quotation marks omitted)). Even more egregiously, they (1) fabricated a quote to make a point, which they attributed to a judge of this district; (2) cited a case to establish standing, but failed to note the subsequent procedural history in which the Supreme Court expressly overruled the

rationale of the case; and (3) recklessly distorted governing law regarding pleadings by relying upon cases that preceded the sea change augured by *Twombly* and *Iqbal*. Without doubt, these actions constitute unreasonable and vexatious conduct that justify the imposition of sanctions. *See Fred A. Smith Lumber Co.,* 845 F.2d at 752-54 (sanction assessed where counsel pretended potentially dispositive authority did not exist, persisted in putting forth claims despite fact that statute of limitations clearly barred claims, and acted in bad faith in filing a fraud claim in hopes that future discovery would lead to sufficient facts to support such a claim); *Ordower,* 826 F.2d at 1575 (counsel sanctioned for total indifference to Federal Rules of Civil Procedure).

B. The Court Should Exercise its Inherent Authority to Sanction Plaintiff and His Attorneys.

This is an alternate way to assess the attorneys' fees and costs Governor Evers incurred in defending this lawsuit. It also authorizes the Court to levy a fine against Plaintiff and his attorneys for deterrent purposes. Any sanction issued under the Court's inherent authority should be levied jointly and severally against Plaintiff and his attorneys. Where bad-faith litigation conduct cannot be adequately sanctioned otherwise, "the court may safely rely on its inherent power." *Chambers*, 501 U.S. at 50.

As explained above, Plaintiff and his attorneys brought their claims in bad faith. They filed a meritless claim without factual support and fabricated a quote to support their position. *Compare McCandless*, 697 F.2d at 201 (advancing a meritless claim and omitting a key sentence from a quotation warrants sanctions); *Secrease v. W. & S. Life Ins. Co*., 800 F.3d 397, 401 (7th Cir. 2015) (sanction is appropriate for seeking relief based on information known to be false); *Vollmer v. Selden*, 350 F.3d 656, 659 (7th Cir. 2003) ("a judge can sanction a litigant for filing a frivolous suit or claim regardless of the motives for such filing"). They also delayed the proceedings with a series of procedural errors and misrepresented the law on threshold issues of standing and pleading

requirements. *Compare Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989) (deliberately ignoring or misstating case law unfavorable to a party's position warrants sanctions); *Precision Specialty Metals, Inc. v. U.S.*, 315 F.3d 1346, 1355 (Fed. Cir. 2003) (selectively quoting precedent, thus distorting meaning, was sanctionable violation). Such conduct merits exercise of the Court's inherent authority to impose sanctions.

It is especially appropriate that the Court exercise its inherent authority to impose sanctions in this case where, by acting in haste, Plaintiff and his attorneys precluded Defendants' opportunity to move for sanctions under Rule 11. The safe-harbor provision in Rule 11 requires a party to give its opponent 21 days' advance notice before filing a motion for sanctions. Here, Plaintiff filed his claim on December 1, demanded an extremely expedited process, and received a final decision from this Court on December 9. Defendants could not satisfy Rule 11 within that time frame. In *Methode*, because the case was filed and voluntarily dismissed too quickly for the defendant to comply with Rule 11's safe-harbor requirement, the Seventh Circuit held it was appropriate for the district court to exercise its "inherent power to control the proceedings before it" by imposing sanctions. 371 F.3d at 927-28. Likewise, here, where the conduct of Plaintiff and his attorneys was egregious, vexatious, and unreasonable, this Court should exercise its inherent authority to impose sanctions.

C. Imposing Fees Would Discourage Similar Abuse in the Future of the Judicial Process as a Way to Attack Unfavorable Election Results.

The audacity of this lawsuit—an attack on the bedrock principle that ballots decide elections, brought without any legal or factual basis almost four weeks after the election—merits sanctions. This is true not only because Wisconsin taxpayers deserve to be made whole, but also because deterrence demands making an example of Plaintiff and his attorneys to discourage future frivolous litigation. Absent a clear deterrent message here, Wisconsin, which perennially has razor-

thin election results, will likely see similar cases following future elections. Losing candidates, their allies, and associated attorneys will have nothing to lose by challenging results following elections, and could even perceive that they have incentives to do so, if there is not a penalty for bringing litigation like this. Simply put, a message must be sent that this type of behavior cannot be tolerated in the judicial system, and that attorneys should avoid these types of frivolous attempts to disenfranchise voters in the future.

Other courts have reached this conclusion and have imposed sanctions for baseless post-election litigation. An Arizona state court awarded attorneys' fees to the Secretary of State because the Republic Party had filed a groundless lawsuit challenging the outcome of that state's 2020 presidential election.[19] And Judge James Boasberg, on the federal court for the District of D.C., referred a lawyer to a disciplinary panel for bringing a meritless suit as a forum for political grandstanding.[20] That suit, like this one, challenged the results of Wisconsin's 2020 presidential election. Fee petitions in other post-election challenges are pending in Michigan and Georgia.[21] Awarding fees here would not make this Court an outlier. To the contrary, doing so would put this Court on record advancing the deterrent function that the Seventh Circuit has recognized as the purpose of sanctions awarded against counsel. *See Textor*, 711 F.2d at 1396.

---

[19] A copy of the order is available here https://www.democracydocket.com/wp-content/uploads/sites/45/2020/11/m9485207.pdf.

[20] Josh Gerstein, *Lawyer Who Brought Election Suit Referred for Possible Discipline*, Politico, Feb. 19, 2021, https://www.politico.com/news/2021/02/19/lawyer-election-suit-discipline-470369 (last visited Mar. 30, 2021).

[21] Alison Durkee, *Georgia Counties Ask Trump for Nearly $17,000 in Legal Fees as GOP Election Lawyers Face Consequences*, Forbes, Feb. 24, 2021, https://www.forbes.com/sites/alisondurkee/2021/02/24/geor%20gia-counties-ask-trump-for-nearly-17000-in-legal-fees-as-gop-election-lawyers-face-consequences/?sh=22cf93003b0c (last visited Mar. 30, 2021)

III. GOVERNOR EVERS'S FEE REQUEST IS TIMELY.

In *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983), the Seventh Circuit held that "a party must bring a motion for fees and costs either before an appeal is perfected or during the pendency of the appeal on the merits." *Id.* at 793. But both the extraordinary circumstances surrounding this case and *Overnite*'s outlier status—it is in tension (at minimum) with Supreme Court precedent and no other Circuit has adopted the Seventh Circuit's reasoning—militate against its application here.

First, if ever there were a case to distinguish on its facts, it is this one. The extremely expedited nature of this case and the fact that it was part of a national, multi-pronged attempt to overturn the 2020 presidential election made it extremely difficult for Governor Evers or any other defendants to file a motion for fees prior to the conclusion of the appeal. Plaintiff filed the complaint on December 1, and by December 9 this Court had granted Defendants' motion to dismiss. Plaintiff appealed to both the Seventh Circuit and to the Supreme Court, twice each. Simultaneously, Governor Evers and the WEC Defendants were defending against an incredibly similar suit brought by then-President Trump himself. Only after the Seventh Circuit dismissed Plaintiff's appeal as moot and the Supreme Court earlier this month denied Plaintiff's petition for mandamus was it clear that this case was resolved and Governor Evers's attorneys had completed their work. Moreover, from start to finish, Plaintiff's case was pending for only three months. By comparison, in *Overnite*, over eight months elapsed between the filing of the notice of appeal and the Seventh Circuit's docketing of its mandate affirming the district court's dismissal, and the defendant filed its motion for attorneys' fees and costs another two months after that. *Overnite*, 697 F.2d at 792-93. *Overnite* is inapposite to a situation like this one, where the Plaintiff's own actions and demands led to such an expedited schedule. Applying *Overnite* here would allow attorneys to engage in unreasonably vexatious conduct, but escape culpability by losing quickly.

Second, subsequent case law reveals *Overnite* as an outlier decision abrogated by subsequent Supreme Court case law. The Supreme Court rejected *Overnite*'s logic, holding that fee motions under 42 U.S.C. § 1988 need not comply with time limits established by Rule 59(e) because doing so was not "necessary or desirable to promote finality, judicial economy, or fairness." *White v. New Hamp. Dep't of Emp. Sec.*, 455 U.S. 445, 452 (1982). Rather, the *White* Court explained, attorney fees are "uniquely separable from the cause of action to be proved at trial." *Id.*

Other Circuits have recognized the same, refusing to adopt *Overnite*'s approach to section 1927 motions. The Fourth Circuit opined that "[e]ven where, as here, the defendants characterize the plaintiffs' claims as entirely baseless, the appropriateness of the characterization is unsettled as long as there is a pending appeal…. There is some reason to think that such uncertainty should be clarified before counsel and the district judge should be called upon to consider the appropriateness of a fee award and assess the amount." *Hicks v. S. Md. Health Sys. Agency*, 805 F.2d 1165, 1167 (4th Cir. 1986). The *Hicks* Court went on: "The Supreme Court seems to have held in *White* that the district court has jurisdiction to consider and grant a motion for the allowance of fees, though made several months after the conclusion of all appellate proceedings." *Id.* The Third Circuit compared the Seventh Circuit's rationale in *Overnite* with the Fourth Circuit's in *Hicks*, ultimately "agree[ing] with the Court of Appeals for the Fourth Circuit that a Rule 11 motion is 'uniquely separable' and collateral from the decision on the merits" and could be filed even after an appeal was completed. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 98 (3d Cir. 1988); *accord In re Schaefer Salt Recovery, Inc*., 542 F.3d 90, 101-03 (3rd Cir. 2008). The Second, Sixth, and Tenth Circuits have similarly rejected *Overnite*'s reasoning. *See Steinert v. Winn Group, Inc.* 440 F.3d 1214, 1223 (10th Cir. 2006); *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 333 (2d

Cir. 1999); *In re Ruben,* 825 F.2d 977, 982 (6th Cir. 1987). By contrast, no Circuit appears to have adopted *Overnite*'s approach.[22]

Given that the *Overnite* decision is out of step with Supreme Court precedent and that, even on its own terms, it should not apply in the circumstances of this case, there is no doubt that Governor Evers's fee request should be considered timely and granted on its own merits. The request was filed within 30 days of the Supreme Court denying Plaintiff's appeal, and is still within four months of this Court issuing a final order. To consider it otherwise would be to overlook an egregious abuse of the judicial process.

IV. GOVERNOR EVERS'S FEE REQUEST IS REASONABLE.

It is appropriate for a Court to award all expenses incurred to defend this suit because it was filed in bad faith and lacked a plausible factual or legal basis from the start. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1188 (2017) ("If a plaintiff initiates a case in complete bad faith, so that every cost of defense is attributable only to sanctioned behavior, the court may" award the entire amount of legal expenses incurred). In *Chambers v. NASCO, Inc.*, the Supreme Court affirmed an award of full attorneys' fees against the defendant "due to the frequency and severity of [his] abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." 501 U.S. at 56. The Supreme Court agreed that the defendant's actions were "part of [a] sordid scheme of deliberate misuse of the judicial process." *Id.* at 57 (internal quotation marks and citations omitted). In this case, Plaintiff's abuses of the judicial system began with the dilatory filing of this suit and continued through its conclusion, all for the sordid and undemocratic purpose

[22] The *Overnite* rationale has also been rejected by numerous other courts. *See, e.g. In re Veg Liquidation, Inc.*, No. 5:13-BK-73597, 2015 WL 13776226, at *4 (Bankr. W.D. Ark. Sept. 15, 2015); *Kellar v. Van Holtum*, 605 N.W.2d 696, 700 (Minn. 2000), *as amended on denial of reh'g* (Feb. 29, 2000), *superseded in part by rule on other grounds, as stated in In re Com'r of Public Safety*, 735 N.W.2d 706, 710 (Minn. 2007).

of asking this Court to unconstitutionally overturn the certified results of a valid election. But for Plaintiff's abuse of the judicial process, Defendants would have incurred no legal expenses. It follows that this Court should assess, at minimum, all attorneys' fees and costs Governor Evers, and the taxpayers of Wisconsin, incurred defending against Plaintiff's meritless suit.

Governor Evers's request for $106,780 in attorneys' fees is reasonable. (*See* Declaration of Jeffrey A. Mandell ("Mandell Decl."), ¶30) It reflects the time expended by his lead counsel team, necessitated by the filing of Plaintiff's baseless claim and the extraordinarily expedited timeline Plaintiff demanded, the complexity of the issues involved, and the high stakes of the litigation. The hours expended and the hourly rates ascribed are reasonable for this type of case. Calculation of fees begins with the lodestar calculation, which is "the product of the hours reasonably expended on the case multiplied by a reasonable hourly rate." *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014). Governor Evers's legal team on this case was led by a team of three lawyers at Stafford Rosenbaum LLP. While a number of other lawyers provided pro bono counsel to Governor Evers before this Court—including several partners at Susman Godfrey LLP and Paul Smith at the Campaign Legal Center—the Stafford team led the Governor's representation in all post-election litigation. Fees for that team should be taxed against Plaintiff and his lawyers.

The number of hours the Stafford team devoted to litigating this matter was reasonable. Plaintiff waited until nearly four full weeks after the election to file his lawsuit, and then he demanded an expedited schedule to resolve the case in the minimal time available between his belated filing and the meeting of the Electoral College. The Court accommodated Plaintiff, allowing three calendar days (including a Saturday and Sunday) for Defendants to file briefs opposing Plaintiff's motion for injunctive relief. (Dkt. 29) Within that same tight briefing schedule, Governor Evers drafted and briefed a successful motion to dismiss on several jurisdictional,

prudential, and merits grounds. (Dkt. 51, 59) After Plaintiff submitted his opposition to that motion, Governor Evers submitted a reply brief within less than 24 hours. (Dkt. 73)

The hours worked in researching and drafting briefs, as well as preparing for and participating in a conference with the Court, and the merits hearing were all reasonable under the circumstances. (*See* Mandell Decl., ¶27; Declaration of Jeff Scott Olson ("Olson Decl."), ¶¶25-29; Declaration of Matthew O'Neill ("O'Neill Decl."), ¶13; Declaration of Tamara Packard ("Packard Decl."), ¶¶17-18; Declaration of Stacie Rosenzweig ("Rosenzweig Decl."), ¶13; Declaration of Mark Leitner ("Leitner Decl."), ¶16) A team of attorneys had to work together to respond to Plaintiff's claims and also raise a panoply of arguments for dismissal. (*Id*. ¶¶6-7, 10) Governor Evers's legal team worked in concert, at times in shifts around the clock, to research, draft, and refine multiple briefs simultaneously. (*Id*.) That work was necessary to dispatch of this frivolous lawsuit and protect Wisconsin's election results. (*Id*. ¶¶3, 10)

The variety and complexity of issues addressed by Governor Evers's briefs also contributed to the hours consumed. (*Id.* ¶¶9-10) Plaintiff's untimely request for unprecedented injunctive relief required delving into a panoply of constitutional bars to Plaintiff's suit, such as standing for claims under the Constitution's distinct Election Clause and Electors Clause, as well as the Eleventh Amendment's preclusive effect. (Dkt. 55 at 22-31; Dkt. 59 at 7-10, 15-17) Governor Evers also presented arguments asserting laches, mootness, exclusive state remedies, abstention, and failure to state a claim. (Dkt. 59 at 11-15, 17-29) Each of these arguments required research, analysis, and development into a clear, cogent, concise brief. (Mandell Decl., ¶7) The complexity of these issues required a significant time investment from Governor Evers's attorneys. (*Id*. ¶¶7, 9) Thus, the total hours number of hours worked was reasonable. (*Id*. ¶27)

The rates requested by Governor Evers are also reasonable. "A reasonable hourly rate is based on the local market rate for the attorney's services." *Montanez*, 755 F.3d at 553. That market rate can be determined by reference to "rates charged by similarly experienced attorneys in the community." *Id*. Submitted with this motion is a declaration by Jeffrey A. Mandell, lead special counsel for Governor Evers in post-election matters, outlining his qualifications and those of others who represented Governor Evers in this matter. (Mandell Decl., ¶¶13-23) Mandell routinely handles complex and constitutional litigation matters. The rates he and other members of the Stafford team assert here are consistent with the local market for rates in these kinds of cases, as evidenced by the declarations provided with this brief from several other Wisconsin attorneys who handle matters of this complexity and importance. (Olson Decl., ¶¶21-24; O'Neill Decl., ¶14; Packard Decl., ¶16; Rosenzweig Decl., ¶15; Leitner Decl., ¶17) , submitted simultaneously with this brief) They are also consistent with rates paid over the past several years by the Wisconsin Legislature to private outside counsel in litigation matters involving governance issues. (Mandell Decl., ¶29, Ex. B)

Bearing in mind that one purpose of sanctions is deterrence, *Riddle & Assocs., P.C. v. Kelly*, 414 F.3d 832, 835 (7th Cir. 2005), Governor Evers suggests that the fees sought here should be supplemented with a monetary sanction against Plaintiff and his attorneys. In the *Methode Electronics, Inc.*, case, the court imposed a fine payable to the court. 371 F.3d at 926. Governor Evers believes a fine payable to the Court, or alternatively to one or more nonprofit, nonpartisan organizations focused on protecting voting rights in Wisconsin, would also be appropriate.

V. PLAINTIFF AND HIS ATTORNEYS SHOULD BE HELD JOINTLY AND SEVERALLY LIABLE FOR SANCTIONS.

If the Court imposes fees against Plaintiff and his attorneys, it should make all of those against whom they are assessed jointly and severally liable. All fees awarded under 28 U.S.C.

§ 1927 should be joint and several against all counsel who entered appearances on behalf of Plaintiff in this case. All fees and any sanctions levied under the Court's inherent authority should be joint and several against Plaintiff and his attorneys. The Seventh Circuit held that parties and multiple counsel can be made jointly and severally liable for attorney fees. *See Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 710 (7th Cir. 2014). Because Plaintiff and his attorneys all played a role in bringing, prosecuting, and perpetrating this bad faith litigation, the Court should find them all jointly and severally liable for any resulting fees and sanctions.

CONCLUSION

For the forgoing reasons, this Court should find that Plaintiff and his attorneys filed this claim in bad faith, thereby abusing the judicial system. The Court should accordingly sanction Plaintiff and his counsel, on a joint and several basis.

Respectfully submitted this 31st day of March, 2021.

/s/ Jeffrey A. Mandell
Jeffrey A. Mandell
Rachel E. Snyder
Richard A. Manthe
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., Suite 900
Madison, WI 53701-1784
Telephone: 608-256-0226
Email: jmandell@staffordlaw.com
Email: rsnyder@staffordlaw.com
Email: rmanthe@staffordlaw.com

Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:20-cv-04809-TCB
Pearson et al v. Kemp et al
Honorable Timothy C. Batten, Sr.

Minute Sheet for proceedings held In Open Court on 12/07/2020.

TIME COURT COMMENCED: 10:00 A.M.
TIME COURT CONCLUDED: 11:06 A.M. COURT REPORTER: Lori Burgess
TIME IN COURT: 1:06 DEPUTY CLERK: Uzma Wiggins
OFFICE LOCATION: Atlanta

ATTORNEY(S) PRESENT:
Joshua Belinfante representing Brad Raffensperger
Joshua Belinfante representing Brian Kemp
Joshua Belinfante representing David J. Worley
Joshua Belinfante representing Matthew Mashburn
Joshua Belinfante representing Rebecca N. Sullivan
Amanda Callais representing DCCC
Amanda Callais representing DSCC
Amanda Callais representing Democratic Party of Georgia, Inc.
Julia Haller representing Brian Jay Van Gundy
Julia Haller representing Carolyn Hall Fisher
Julia Haller representing Cathleen Alston Latham
Julia Haller representing Coreco Jaqan Pearson
Julia Haller representing Gloria Kay Godwin
Julia Haller representing James Kenneth Carroll
Julia Haller representing Vikki Townsend Consiglio
Harry MacDougald representing Brian Jay Van Gundy
Harry MacDougald representing Carolyn Hall Fisher
Harry MacDougald representing Cathleen Alston Latham
Harry MacDougald representing Coreco Jaqan Pearson
Harry MacDougald representing Gloria Kay Godwin
Harry MacDougald representing James Kenneth Carroll
Harry MacDougald representing Vikki Townsend Consiglio
Charlene McGowan representing Anh Le
Charlene McGowan representing Brad Raffensperger
Charlene McGowan representing Brian Kemp
Charlene McGowan representing David J. Worley

Charlene McGowan representing Matthew Mashburn
Charlene McGowan representing Rebecca N. Sullivan
Carey Miller representing Anh Le
Carey Miller representing Brad Raffensperger
Carey Miller representing Brian Kemp
Carey Miller representing David J. Worley
Carey Miller representing Matthew Mashburn
Carey Miller representing Rebecca N. Sullivan
Sidney Powell representing Brian Jay Van Gundy
Sidney Powell representing Carolyn Hall Fisher
Sidney Powell representing Cathleen Alston Latham
Sidney Powell representing Coreco Jaqan Pearson
Sidney Powell representing Gloria Kay Godwin
Sidney Powell representing James Kenneth Carroll
Sidney Powell representing Vikki Townsend Consiglio
** Abigail Frye

PROCEEDING CATEGORY:	Motion Hearing(PI or TRO Hearing-Evidentiary);
MOTIONS RULED ON:	[43]Motion to Dismiss GRANTED [63]Motion to Dismiss GRANTED
MINUTE TEXT:	Defendants' motions are GRANTED. TRO is DISSOLVED. Case is DISMISSED. Clerk shall close the case.
HEARING STATUS:	Hearing Concluded

2015 WL 13776226
Only the Westlaw citation is currently available.
United States Bankruptcy Court, W.D. Arkansas, Fayetteville Division.

IN RE: VEG LIQUIDATION, INC., f/k/a Allens, Inc. and All Veg, LLC, Debtors
D & E Farms, Inc., H.C. Schmieding Produce Co., Inc., and Hartung Brothers, Inc., Plaintiffs
v.
Freeborn & Peters LLP and Greenberg Traurig, LLP, Defendants
D & E Farms, Inc., H.C. Schmieding Produce Co., Inc., and Hartung Brothers, Inc., Plaintiffs
v.
Alvarez & Marsal North America, LLC and Jonathan Hickman, Defendants
D & E Farms, Inc., H.C. Schmieding Produce Co., Inc., and Hartung Brothers, Inc., Plaintiffs
v.
Lazard Freres & Co. LLC and Lazard Middle Market LLC, Defendants

No. 5:13-bk-73597 Jointly Administered, No. 5:15-ap-07026, No. 5:15-ap-07029, No. 5:15-ap-07042
|
Signed 09/15/2015

Attorneys and Law Firms

Stanley V. Bond, Bond Law Office, Fayetteville, AR, Gregory A. Brown, Mccarron & Diess, Melville, NY, Rickard Hood, Hood & Stacy, PA, Bentonville, AR, for Plaintiffs.

Steven M. Hartmann, Elizabeth L. Janczak, Freeborn & Peters, LLP, Chicago, IL, Rickard Hood, Hood & Stacy, PA, Bentonville, AR, Robert Justin Eichmann, Lucas T. Regnier, Harrington Miller Kieklak Eichmann Brown, Springdale, AR, Gregory E. Garman, Garman Turner Gordon, LLP, Brigid M. Higgins, Gordon Silver, Las Vegas, NV, for Defendants.

ORDER ON MOTIONS TO DISMISS

Ben Barry, United States Bankruptcy Judge

***1** D & E Farms, Inc., H.C. Schmieding Produce Co., Inc., and Hartung Brothers, Inc. [collectively, the PACA creditors] filed three adversary complaints in successive order: against Freeborn & Peters LLC and Greenberg Traurig, LLP on March 20, 2015;[1] against Alvarez & Marsal North America, LLC [Alvarez & Marsal] and Jonathan C. Hickman on March 25, 2015; and against Lazard Freres & Co. LLC and Lazard Middle Market LLC [Lazard entities] on April 1, 2015. Subsequently, the defendants in each of the adversary proceedings filed motions to dismiss. The Court heard the motions on July 29, 2015, and took the matters under advisement. For the following reasons, the Court denies each of the motions to dismiss.

The PACA creditors' complaints assert that each of the defendants received funds from the debtor that are PACA trust assets. The defendants performed services for the debtor prior to and during the debtor's bankruptcy and were paid for those services by the debtor. According to the PACA creditors' complaints, the defendants have received the following amounts from the debtor's estate: Greenberg Traurig received $ 1,427,412.20; Freeborn & Peters received $ 50,000.00; Alvarez & Marsal received $ 2,311,806.25; and the Lazard entities received what the PACA creditors estimate as being more than $ 1,800,000.00. Based on a remaining balance owed to the PACA creditors for their allowed PACA claims, which the PACA creditors believe will not be recoverable from the debtor's estate, they seek to disgorge from the defendants amounts sufficient to pay the remainder of their PACA claims in full.

At the hearing on the motions to dismiss, counsel for Alvarez & Marsal, Jonathan Hickman, and the Lazard entities presented collective arguments on behalf of all of the defendants. In addition to joining the mutual defenses of the other defendants, counsel for Freeborn Peters presented arguments for dismissal of the 28 U.S.C. § 1927 action asserted only as to it. The motions to dismiss were brought under Federal Rule of Civil Procedure 12(b)(1) and (b)(6), made applicable here by Federal Rule of Bankruptcy Procedure 7012, for lack of subject matter jurisdiction, lack of standing, and failure to state a claim. Generally, the defendants challenge the legal viability of the PACA creditors' causes of action. Each of the defendants' arguments in favor of dismissal is addressed below.

1. Collateral attack on the February 12, 2014 sale order

The defendants' primary argument is based on language contained within paragraph 63(ii) of the sale order, which modified section 3.2(c) of the Asset Purchase Agreement [APA] entered into between the debtor and Sager Creek in February 2014. Paragraph 63(ii) states that

> [u]pon the closing, the Assumed PACA Claims and Post-Petition Assumed PACA Liabilities shall be secured by, and to the extent such Assumed PACA Claims become Resolved PACA claims or, in respect of a Post-Petition Assumed PACA Liability, as, when and to the extent a Post-Petition PACA Payment Obligation arises in respect thereof (a **"PACA Claims Payment Event"**), shall be paid exclusively from, the proceeds of (A) the PACA Escrow (as defined below) and (B) the PACA Claims Commitment Letter (as defined below) in accordance with section (iii) below.

***2** The defendants assert that this language dictates that the PACA creditors' sole source for payment of their PACA claims is Sager Creek, and that the PACA creditors do not have standing to disgorge funds from any other source to pay PACA claims. The defendants also argue that the PACA creditors acquiesced to this limitation when they did not object to the APA's language prior to the sale order being approved and entered by the Court on February 12, 2014.

The defendants' argument stands in isolation to other relevant parts of the APA that specifically limit the PACA claim liabilities Sager Creek assumed upon the sale of the debtor's assets. Paragraph 63(v) states, in part, that

> [a]t the Closing, Buyer and Seller shall prepare a schedule setting forth the amount of such Disputed PACA Claims, listing the PACA Claim holder and the amount of its Dispute PACA Claim and serve such statement on all holders of Disputed PACA Claims. *For avoidance of doubt, in no event shall Buyer become responsible for, or be deemed to assume, PACA Claims under this Agreement in excess of the PACA Claims Cap* [emphasis added].

Appendix A to the APA defines the PACA Claims Cap as $ 19,359,144.61. Counsel for Sager Creek, who helped review and draft the APA prior to its acceptance, also testified at a prior hearing before this Court that Sager Creek did not assume unlimited liability on the PACA claims.[2]

Taking the defendants' interpretation of paragraph 63(ii) in conjunction with the plain language of paragraph 63(v), the Court is left with the seemingly incompatible stance that Sager Creek assumed *exclusive* responsibility to pay all PACA claims without assuming *total* liability on the claims themselves. The Court instead holds that the language of those two paragraphs of the APA means that Sager Creek is exclusively responsible for paying up to the $ 19.4 million PACA Claim Cap, with no direction as to how PACA claims in excess would be paid.

Even if the language of the APA attempted to limit the amount of PACA claims to be paid or to bar recovery from third parties, Congress's prioritization of valid PACA claims leads the Court to conclude that a PACA trustee (such as the debtor) and a purchaser of its assets (such as Sager Creek) cannot strip the statutory rights of PACA claimants through self-serving contractual terms made between themselves. A vast body of case law, much of which is in the context of bankruptcy, recognizes a PACA creditor's right to be paid *in full* from trust assets, whether those assets are in the hands of the PACA trustee or others. *See Pac. Int'l. Mktg., Inc. v. A & B Produce, Inc.*, 462 F.3d 279, 285 (3rd Cir. 2006) (Congress's intent is to ensure that PACA trust beneficiaries are paid in full); *Sysco Food Servs. of Seattle, Inc. v. Country Harvest Buffet Rests., Inc.* (*In re Country Harvest Buffet Rests., Inc.*), 245 B.R. 650, 653 (B.A.P. 9th Cir. 2000) (PACA claimants entitled to payment from trust assets before secured and unsecured creditors are paid); *Kingdom Fresh Produce v. Bexar County* (*In re Delta Produce, LP*), 521 B.R. 576, 587 (W.D. Tex. 2014), *appeal pending* (debtor's special PACA counsel not entitled to be paid from PACA trust assets before PACA creditors paid in full). Based on these considerations, the Court dismisses

the defendants' argument that the APA deprives the PACA creditors of standing to pursue their causes of action.

2. 11 U.S.C. § 329 and § 330 Causes of Action

***3** The defendants' second argument supporting dismissal is directed at the PACA creditors' request for disgorgement of professional fees against each of the defendants under 11 U.S.C. § 329 and/or § 330. In their motions to dismiss and at the hearing, the defendants collectively argued that the PACA creditors lack standing to bring a claim belonging to the trustee and that their claims are barred by res judicata and timeliness. Alvarez and Freeborn Peters also asserted that a disgorgement action under § 330 is not applicable to entities hired under § 363, such as themselves.

In support of their standing argument, the defendants cite to cases and other sources that together stand for the general proposition that regulation of professional services is designed to protect the bankruptcy estate and that the trustee has certain duties as a representative of the estate. Only one case cited by the defendants, *In re Preferred Prop. Group, LLC*, actually addresses the issue of a trustee's standing to challenge professional fees. Chapter 11 Case No. 11-91764, 2015 WL 1543193, 2015 Bankr. Lexis 1015 (Bankr. C.D. Ill. March 31, 2015). The Court's own review of case law shows that in the general context of disgorgement of professional fees–where those fees will be returned to the estate to be paid to creditors for various reasons–courts have either considered actions brought by creditors or have specifically acknowledged a creditor's right to bring such actions. *See* *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, 663 (6th Cir. 2004); *In re Kids Creek Partners, L.P.*, 220 B.R. 963, 978 (Bankr. N.D. Ill. 1998). In addition, § 330(a)(2) specifically states that a motion to award less compensation may be made by, among others, "any other party in interest."

The defendants also argue that the PACA creditors are barred by res judicata and timeliness from requesting disgorgement because the PACA creditors did not object to the fees previously noticed out for objection. However, the Court has an independent duty and authority to review fee applications regardless of filed objections, as reflected in § 330(a). *In re Rockaway Bedding, Inc.*, 454 B.R. 592, 596 (Bankr. D.N.J. 2011); *In re Garrison Liquors, Inc.*, 108 B.R. 561, 565 (Bankr. D. Md. 1989); *In the Matter of Paul Pothoven*, 84 B.R. 579, 583 (Bankr. S.D. Iowa 1988) (citing cases). Therefore, the Court declines to dismiss the § 329 and § 330 causes of action.

Alvarez and Freeborn Peters separately assert that the PACA creditors' § 329 and/or § 330 cause of action against each of them must be dismissed because they were hired by the debtor in the ordinary course under § 363.[3] Case law supports their general argument that funds paid by the debtor to entities in the ordinary course of business under § 363 cannot be subsequently disgorged under § 330. *In re Livore*, 473 B.R. 864, 869-70 (Bankr. D.N.J. 2012); *In re Lochmiller Indus., Inc.*, 178 B.R. 241, 249-50 (Bankr. S.D. Cal. 1995). However, in response, the PACA creditors argued at the hearing that regardless of the manner in which these entities were hired, the actual duties performed by Alvarez and Freeborn Peters were in the nature of attorney transactions or professional persons subject to § 329 or § 330. Courts use different definitions to distinguish professionals hired in the ordinary course of business (and paid under § 363) from those professionals retained under and governed by §§ 327, 328, 329, and 330. Regardless of the test adopted, however, the determination is a question of fact. *In re Bartley Lindsay Co.*, 137 B.R. 305, 308 (D. Minn. 1991). The fact that Alvarez and Freeborn Peters may have been *retained* under § 363 does not preclude the inquiry as to whether the parties acted in a different capacity and are subject to § 329 or § 330.

***4** For these reasons, the Court denies the defendants' request for dismissal of the § 329 and/or § 330 actions against each of them.

3. 28 U.S.C. § 1927 action against Freeborn Peters

Freeborn Peters separately seeks dismissal of the PACA creditors' 28 U.S.C. § 1927 cause of action against it. Under § 1927, "[a]ny attorney or other person admitted to conduct cases ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In their complaint against Freeborn Peters, the PACA creditors allege that Freeborn Peters pursued objections to each of the PACA creditors' PACA claims that "were not warranted by existing law, and were

frivolous." Complaint, 5:15-ap-07026, ¶ 55. As a result, the "PACA creditors were required to engage in extensive discovery and participate in multi-day evidentiary hearings before their claims were eventually deemed Allowed PACA Claims virtually in their entirety" and the resulting delay prevented the PACA creditors from being paid from the debtor's estate. Complaint, 5:15-ap-07026, ¶¶ 54, 57.

Freeborn Peters alleges three grounds for dismissal of the § 1927 action. First, that the § 1927 action is untimely based on Freeborn Peters' allegation that the PACA creditors knew or should have known of the alleged misconduct at various points during the case but failed to assert a § 1927 action earlier. The PACA creditors filed their adversary proceeding against Freeborn Peters seeking sanctions under § 1927 on March 20, 2015, a little more than two weeks after the district court entered orders dismissing the appeals of this Court's three rulings on the PACA creditors' PACA claims.[4] Freeborn Peters' argument of untimeliness is based on a single case in which the Seventh Circuit held that a § 1927 motion is too late if filed after the resolution of an appeal. *Overnite Trans. Co. v.* *Chicago Indus. Tire Co.*, 697 F.2d 789 (7th Cir. 1983).

The Third, Fourth, and Tenth Circuits have declined to follow the Seventh Circuit's holding cited by Freeborn Peters. *See* *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 101-03 (3rd Cir. 2008); *Hicks v. S. Md. Health Sys. Agency et al.*, 805 F.2d 1165, 1166-67 (4th Cir. 1986); *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006). This Court does the same. As the Tenth Circuit stated, "the application of § 1927 may become apparent only at or after the litigation's end, given that the § 1927 inquiry is whether the proceedings have been unreasonably and vexatiously multiplied." *Steinert*, 440 F.3d at 1223. This may be especially true, as the Fourth Circuit points out, where the outcome of an appeal either bolsters or dispels § 1927 allegations of unwarranted litigation.

> [W]here, as here, the defendants characterize the plaintiffs' claims as entirely baseless, the appropriateness of the characterization is unsettled as long as there is a pending appeal in which the plaintiffs, with apparent earnestness, assert that there are real issues of disputed fact .... There is some reason to think that such uncertainty should be clarified before counsel and the district judge should be called upon to consider the appropriateness of a fee award and assess the amount.

***5** *Hicks*, 805 F.2d at 1167. This Court finds that the PACA creditors acted within a reasonable time by filing their § 1927 claim against Freeborn Peters approximately two weeks after the appeals were dismissed. It is logical for the Court to consider allegations of unwarranted litigation once that litigation has been reduced to final judgment.

Freeborn Peters' second ground for dismissal is that the PACA creditors are collaterally estopped from pursuing a § 1927 action because the Court previously denied a motion for sanctions against the debtor's counsel. The motion for sanctions was filed on July 7, 2014, by Hartung Brothers, one of the three PACA creditors referenced collectively in this order. The sanctions request was combined with a demand for immediate payment of a portion of Hartung's PACA claim.

In its September 15, 2014 ruling on the combined motion, the Court predicated its denial of the motion on the fact that it had not yet ruled on the debtor's objection to Hartung's PACA claim. In fact, the debtor's objection to Hartung's claim was under advisement at that time and the Court did not issue its ruling on the objection until October 9, 2014, almost one month after its oral ruling on the motion for sanctions and immediate payment. The Court was unwilling to address in detail what it viewed as a "side skirmish" to a larger issue still under advisement. The Court made the statement from the bench that it did not believe there was "ill, inappropriate treatment by debtors' counsel," but it also made clear its reluctance to decide the matter at that juncture of the case. Knowing its own mindset when it made the September 15, 2014 ruling, the Court denies Freeborn Peters' collateral estoppel argument. Additionally, the breadth of the PACA creditors' collective § 1927 action against Freeborn Peters exceeds the matter for which Hartung individually requested sanctions in its previous motion.

Freeborn Peters' third ground for dismissal of the § 1927 action is that the statute applies only to individual attorneys. The circuits are divided as to whether the statute also applies to law firms, based on § 1927's language directing sanctions at "[a]ny attorney or other person ... who so multiplies the proceedings in any case

unreasonably and vexatiously." *See* *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 147 (2d Cir. 2012) (court's inherent powers to sanction law firm encompasses § 1927); *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991) (affirming § 1927 sanctions against law firm); *In re MJS Las Croabas Props., Inc.*, 530 B.R. 25, 42 (Bankr. D. P.R. 2015) (Rule 11 and court's inherent powers permits sanctions against law firm under § 1927); *but see* *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 751 (6th Cir. 2010) (law firm is not a "person" under § 1927); *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005) (noting that circuits are divided and finding that § 1927 is inapplicable to law firms); *Sangui Biotech Int'l., Inc. v. Kappes*, 179 F.Supp.2d 1240, 1245 (D. Col. 2002) (citing cases and finding that law firms are not subject to § 1927). The Eighth Circuit, while not specifically addressing the issue, has affirmed at least one case in which sanctions were awarded against a law firm under § 1927. *See* *Lee v. First Lenders Ins. Servs., Inc.*, 236 F.3d 443 (8th Cir. 2001). At least one court within the Eighth Circuit has also sanctioned a law firm under § 1927, recognizing the Eighth Circuit's *Lee* opinion as an implicit green light to do so. *See* *Gurman v. Metro Hous. and Redev. Auth.*, 884 F.Supp.2d 895, 905 (D. Minn. 2012). Based on this split, as well as the Eighth Circuit's ruling, the Court cannot find that the § 1927 action should be dismissed as a matter of law.

***6** For all of these reasons, the Court finds that dismissal of the PACA creditors' § 1927 action against Freeborn Peters is not warranted.

4. Action asserting unjust enrichment; request for attorney fees, costs, and interest

The PACA creditors allege that each of the defendants was unjustly enriched by receiving PACA trust assets while PACA creditors remained unpaid. The defendants request dismissal on the basis that unjust enrichment is an equitable remedy that is only available where no other remedy is available–and that the PACA creditors' true remedy is under the PACA statute. Freeborn Peters also argues that unjust enrichment cannot be applied in the case of an express contract. Freeborn Peters points to the express contract for legal services that existed between itself and the debtor.

None of the defendants provided the Court with any case law to support the proposition that unjust enrichment is per se incompatible with any action brought under or related to PACA. In addition, Freeborn Peters' argument regarding an express contract between itself and the debtor is wholly irrelevant–no such express contract exists between the parties to this litigation (the PACA creditors and Freeborn Peters). As alleged by the PACA creditors, the defendants have acquired property to which they are not entitled, to the detriment of the PACA creditors. These facts are generally applicable to the remedy of unjust enrichment, and in balancing further considerations–including the defendants' respective duties and obligations in their professional capacities and their alleged knowledge of the requirements of PACA–the Court is unwilling to dismiss the PACA creditors' unjust enrichment causes based on the defendants' arguments currently before it.

Finally, with respect to attorney fees, costs, and interest, the defendants argue that the PACA creditors have failed to state a claim upon which relief can be granted under Rule 12(b)(6) because no contractual or statutory basis exists for the PACA creditors to collect these amounts against the defendants. However, this Court has previously ruled that "sums owed in connection with" a produce transaction that make up a PACA claim include a contractual right to interest (limited by state law as to interest rate). This Court likewise has found that a contractual right to attorney fees and costs also constitutes "sums owed in connection with" a produce transaction and, thus, are part of a valid PACA claim.[5] Therefore, to the extent that each of the PACA creditors reserved the right to be paid attorney fees, costs, and interest by contract with the debtor, the PACA creditors' valid PACA claims include attorney fees, costs, and interest that continue to accrue. The PACA creditors may proceed in their causes of action against the defendants to recover the portion of their valid PACA claims that remain unpaid.

***7** For the foregoing reasons, the Court denies the defendants' respective motions to dismiss.

IT IS SO ORDERED.

All Citations

Slip Copy, 2015 WL 13776226

Footnotes

[1] A third defendant, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C, was named in the complaint but later was dismissed without prejudice by the plaintiffs on May 1, 2015.

[2] On February 20, 2015, at the hearing on the PACA creditors' Rule 60(b) motion for relief from the sale order, Sager Creek counsel Scott Rutsky answered questions regarding the APA:
Q: In the APA that was filed with the Court on February 7th, did the [sic] Sager Creek agree to assume unlimited PACA liability?
A: No. Consistent with our initial bid, it contained a cap on the PACA claims, cap of 19.359 million dollars.

[3] In regard to Alvarez, on November 27, 2013, the Court entered an order at docket entry [256] authorizing its employment by the debtor under § 105(a) and § 363(c). Freeborn Peters' status is less clear according to docket entries made in the case, despite its argument that the record "undisputably" shows that it was hired under § 363. The umbrella *Application of the Debtors for Order Authorizing Retention and Employment of Certain Professionals Utilized by the Debtors in the Ordinary Course of Business*, which included Freeborn Peters, cited bankruptcy code sections §§ 105(a), 327, 328, 330, and 363 and included the statement that the debtor "*believe[d]* that the Ordinary Course Professionals are not 'professionals' as that term is used in sections 327 or 328 of the Bankruptcy Code [emphasis added]." Nevertheless, the order entered on December 13, 2013, at docket entry [286] specifically cited §§ 105(a), 327, 328, and 330 as the basis of employment for "Ordinary Course Professionals" such as Freeborn Peters. Attorneys from Freeborn Peters also have maintained a prominent and sometimes visibly central role in the matters heard in connection with this bankruptcy case.

[4] The district court entered three orders of dismissal on March 3, 2015, for the appeals related to each of the three PACA creditors (D & E Farms, H.C. Schmieding, and Hartung).

[5] See the Court's orders on the *Debtor's Omnibus Objection to PACA Claims* as to the PACA claims of the PACA creditors in bankruptcy case 5:13-bk-73597: as to D & E Farms, Inc. entered on July 30, 2014, at docket entry [1045]; as to H.C. Schmieding entered on August 20, 2014, at docket entry [1068]; and as to Hartung entered on October 9, 2014, at docket entry [1151].

2011 WL 7630628
Only the Westlaw citation is currently available.
United States District Court,
W.D. Wisconsin.

Lorene ZILISCH, Plaintiff,
v.
R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

No. 10–cv–474–bbc.
|
June 21, 2011.

Attorneys and Law Firms

Peter J. Fox, Fox & Fox, S.C., Monona, WI, for Plaintiff.

Jonathan Matthew Linas, Michael Jeffrey Gray, Jones Day, Chicago, IL, for Defendant.

OPINION and ORDER

BARBARA B. CRABB, District Judge.

***1** In May 2008, plaintiff Lorene Zilisch was terminated by her former employer, defendant R.J. Reynolds Tobacco Company, after she signed a customer's name to a contract in violation of company policy. In this civil action brought under the Age Discrimination in Employment Act, 29 U.S.C. § 623, plaintiff contends that defendant fired her not because she violated company policy, but because of her age. Now before the court is defendant's motion for summary judgment in which defendant argues that plaintiff cannot establish a prima facie case that it discriminated against her on the basis of her age. Dkt. # 14. Plaintiff opposes the motion and has filed additional proposed findings of fact in conjunction with her opposition brief.

As an initial matter, several of plaintiff's proposed findings of fact rely on inadmissible evidence. Specifically, several statements in the affidavit of Carlo Fasciani, dkt. # 22, a former division manager for defendant, are inadmissible because they are conclusory and not made on the basis of Fasciani's personal knowledge. For example, plaintiff proposes as fact that "[Defendant] has always followed [its] progressive discipline practice .... ", citing the Fasciani's affidavit containing the same conclusory statement. Plt.'s PFOF, dkt. # 18, ¶ 14 (citing dkt. # 22 at ¶ 30). Also, Fasciani avers that defendant gave older employees "unreasonable goals, unjustly penalized them and gave them unfair performance reviews," *id.* at ¶ 12, while younger employees "were frequently promoted and allowed to perform poorly with less accountability." *Id.* at ¶ 14.

Fasciani worked in discrete divisions of the company and his affidavit provides no factual basis upon which he can make such sweeping conclusions about the disciplinary practices "always" utilized by defendant or statements about how employees were treated outside his own division, let alone in the Minneapolis Region or the Green Bay Division where plaintiff worked. In other words, Fasciani does not show that he has personal knowledge of the matters in his affidavit. Fed.R.Civ.P. 56(c)(4) (affidavits used in opposition to motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). Additionally, much of Fasciani's testimony is vague and conclusory. *Hall v. Bodine Electric Co.*, 276 F.3d 345, 354 (7th Cir.2002) ("It is well-settled that conclusory allegations and self-serving affidavits, without support in the record, do not create a triable issue of fact."); *Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878, 887 (7th Cir.1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."). Thus, I will not consider Fasciani's affidavit it or the statements of fact that rely on averments in the affidavit. *Watson v. Lithonia Lighting,* 304 F.3d 749, 752 (7th Cir.2002) (affidavits used to support or oppose summary judgment must be made on personal knowledge); *see also* *Haka v. Lincoln County,* 533 F.Supp.2d 895, 899 (W.D.Wis.2008) (disregarding proposed facts not properly supported by admissible evidence).

***2** After reviewing the parties' arguments and proposed facts, I conclude that defendant is entitled to summary judgment in its favor because plaintiff cannot establish a prima facie case of age discrimination. No reasonable jury could conclude that plaintiff lost her job because of her

age; rather, the uncontradicted evidence shows that defendant terminated plaintiff because she violated company policy.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. *Plaintiff's Employment with Defendant*

Plaintiff Lorene Zilisch was born in December 1957. She began her employment with defendant R.J. Reynolds Tobacco Co. in 2004 at the age of 46, following a merger between Brown & Williamson Tobacco Company, her previous employer, and defendant. In late 2007, plaintiff began working in the Green Bay Division as a Trade Marketing Representative, reporting directly to Brent Trader, the division manager, who reported to David Williams, the director of regional sales for the Minneapolis region.

As a trade marketing representative for defendant, plaintiff's duties included visiting stores to build customer relationships, negotiating and implementing contracts with defendant's customers, reviewing customer order books to insure that customers ordered the correct products according to their contracts and checking product distribution in customer stores. Defendant uses several different forms of written contracts that trade marking representatives can propose to retail store customers. The terms of these contracts vary in many respects and address issues such as pricing of defendant's products at the store, customer rebates and discounts, space and signage the retailer must make available for display in the store and configuration of defendants' products on merchandising displays.

When a trade marketing representative and a customer agree upon the terms of a contract, the trade marketing representative selects the appropriate contract from a list of electronic contracts on the representative's laptop computer. (Defendant does not use paper contracts with retailers.) The trade marketing representative and the customer then sign the contract using an electric pen on an electronic signature pad that is attached to the representative's laptop through a USB port. Defendant's "Contract Signatures" policy, which is included in the Trade Marketing Employee Handbook, provides:

> It is important that all agreements/contracts between the Company and its retail customers are properly executed. It is your responsibility to ensure that an authorized person signs the agreement/contract on behalf of the retailer. Therefore, ask the person if he or she has the authority to sign the Company agreement/contract. It is not acceptable for you to sign for the retailer under any circumstances. Make sure all agreements/contracts are properly dated and appropriately filed according to company guidelines.
>
> ***3 Signing for the retailer could lead to termination of employment.**

Dkt. # 19–3 at 15 (emphasis in original). The Trade Marketing Employee Handbook is distributed to all trade marketing representatives, including plaintiff. Plaintiff received the handbook at the start of her employment with defendant and signed an agreement stating that she had read and understood the policies contained within it.

Division managers sometimes accompany trade marketing representatives on visits to customers. On April 23, 2008, division manager Trader accompanied plaintiff on her visits to several customers. Plaintiff and Trader traveled together in plaintiff's car to their first appointment at Ace Oil Express, where they planned to meet with the owner of Ace Oil Express, Mary Lis, for the purpose of negotiating a contract between Ace Oil Express and defendant. During their meeting, the parties agreed to specific contract terms that would go into effect on June 2, 2008. Before the meeting concluded, both plaintiff and Lis signed a contract. However, plaintiff had presented the incorrect contract to Lis by mistake. Both plaintiff and Lis signed it without realizing that it did not reflect the terms upon which the parties had agreed.

After leaving Ace Oil Express, plaintiff and Trader proceeded to their next appointment at Stanley Travel Stop, where plaintiff and the manager of Stanley Travel Stop agreed upon the terms of a contract between defendant and the Travel Stop. When plaintiff searched on her laptop for the correct contract, she noticed that she and Mary Lis had signed the wrong contract at their meeting earlier that day. After noticing this error, plaintiff told Trader, "Hey, I made a mistake, I had [Mary Lis] sign, you know, the wrong addendum [to the contract]." Dep. of plaintiff, dkt. # 16–1, at 130, lns. 9–22. Plaintiff opened up a new contract on her laptop that she believed reflected the terms upon which she and Lis had agreed at their meeting. (This contract did not actually contain the correct terms that plaintiff and Lis had agreed upon.) Using the electronic pen and signature pad attached to her

computer, plaintiff signed both her own and Lis's name on the new contract. Trader, who was standing a few feet away from plaintiff, saw her sign Lis's name on the signature pad. (The parties dispute whether plaintiff called Lis and asked for permission to sign the contract on her behalf. Plaintiff testified during her deposition that she did not call Lis before signing Lis's name on the contract and Trader testified that he never saw plaintiff call Lis. However, plaintiff states in her affidavit that she talked to Lis at some point that day about signing her name. Lis also testifies in her affidavit that she talked with plaintiff on the phone and gave her permission to sign the contract. Neither plaintiff nor Lis says when the phone call took place.)

After finishing their business at Stanley Travel Stop, plaintiff and Trader went to plaintiff's car. After entering the car, plaintiff told Trader, "You didn't see me do that," referring to her act of signing Lis's name on the contract. Trader told plaintiff it was inappropriate for her to sign a contract for a retailer and that she should never do it again. He suggested that they return to Ace Oil Express that day to have Lis execute the correct contract on her own behalf. Plaintiff and Trader then went to lunch at a nearby restaurant, where they discussed again why plaintiff had signed Lis's name. Plaintiff told Trader that her previous managers told her that it was acceptable to sign for customers. Trader responded that he was her manager now and that it was not acceptable. After lunch, plaintiff and Trader drove back to Ace Oil Express, but Lis's vehicle was not in the parking lot, so they left. At the end of the day, Trader talked with plaintiff about her performance that day and plaintiff told him that she would never sign a retailer's name to a contract again. Trader told plaintiff to obtain a signature from Lis on the correct contract. He did not tell plaintiff to cancel the contract she had signed on Lis's behalf and did not cancel it himself. (Plaintiff avers that Trader gave her positive feedback about her performance that day, but defendant denies this.)

***4** Immediately after he finished working with plaintiff on April 23, 2008, Trader consulted with his human resources liaison, Jennifer Sanders, to determine whether a recommendation to terminate plaintiff would be fair and within the parameters of company policies. He also consulted with Sanders several times between that date and the date of plaintiff's termination, discussing company termination policies. Also, Trader consulted with his supervisor, David Williams, either on April 23 or 24, regarding termination of plaintiff.

Defendant has a corrective action policy stating that progressive discipline, including a series of oral and written warnings, is appropriate in some circumstances. Dkt. # 19–3 at 71–72. The policy states that

> [I]t is not possible to specify the corrective action step appropriate for each type of behavior. However, it is the responsibility of management *in consultation with Human Resources,* to determine on a case-by-case basis which of the following corrective action steps based on the particular facts and circumstances involved.... Some improper behavior, for example, justifies immediate discharge. The fact that a progressive corrective action system is utilized by the Company neither requires the use of prior corrective action before discharge nor alters the fact that employment with the Company is "atwill" and can be terminated at any time and for any reason by either the Company or the employee.

Id. (emphasis in original).

Additionally, defendant's policy regarding "Reasons for Immediate Termination" provides that "there may be instances where [progressive action] steps may be omitted, due to the nature or severity of the infraction." *Id.* at 73. That policy provides a non-inclusive "list of offenses that will normally result in immediate termination for the first offense," including "gross representation of information as it relates to business practices." *Id.* at 73–74.

Trader decided not to utilize progressive discipline in plaintiff's case because he believed she had engaged in a clear violation of company policy that was a terminable offense. In particular, he believed her actions fell into the category of "gross representation of information as it relates to business practices."

On May 5, 2008, Trader told plaintiff that he needed to meet with her the next day at a restaurant near her house. (Plaintiff had spoken to Trader on several occasions between April 23, 2008 and May 5, but Trader had not mentioned her signing the contract for Lis or any discipline or termination related to it.) After Trader's call,

plaintiff went to Ace Oil Express to meet with Mary Lis. This was the first time since April 23, 2008 that plaintiff had attempted to meet with Lis. At their meeting, plaintiff apologized to Lis for signing Lis's name on the contract and Lis signed a contract that reflected the actual terms upon which Lis and plaintiff agreed previously. Lis was not upset that plaintiff had signed on her behalf and never complained to defendant about plaintiff's signing the contract for her.

***5** The following morning, May 6, 2008, plaintiff met with Trader and May Carroll, another division manager in the Minneapolis regions. Trader read from a document explaining that plaintiff was being terminated from employment because she had "forg[ed] the signature of May Li[s] ... in an attempt to fix [her] contract mistake" in violation of defendant's Contract Signatures policy. Dkt. # 19–1. The letter stated that plaintiff's action amounted to "[g]ross misrepresentation of information as it relates to business practices ." *Id.*

Before May 6, 2008, plaintiff had never been disciplined for any performance or behavior deficiencies and no customer had complained about her to defendant. She felt comfortable with Trader and had a good working relationship with him. Trader had never made comments to plaintiff about her age and plaintiff had never reported any concerns to defendant's human resources department regarding Trader's treatment of her. In addition, Trader had evaluated plaintiff's performance as satisfactory in the past and had considered her a good performer.

Between January 1, 2006 and September 30, 2010, defendant terminated eight trade marketing representatives. Two of them were more than 40 and six were under 40. Dkt. # 26–6. Plaintiff was the oldest employee terminated during this period. Defendant replaced plaintiff with an employee who is under 30.

B. *Other Employees of Defendant*

While Megan Anderson was employed as a trade marketing representative for defendant, she hit a deer with a company car. Anderson had been talking on the company-issued cellular phone while driving, in violation of defendant's cell phone policy. She was approximately 23 years old at the time of the accident. Brent Trader, Anderson's supervisor at the time of the accident, instructed her to not talk on her cell phone anymore while driving. He did not discipline her otherwise.

While Molly Anderson was employed as a trade marketing representative for defendant, she left coupons with one of her customers. (It is not clear whether she left the coupons intentionally or by mistake.) It is a violation of defendant's policy and grounds for immediate termination to leave coupons at a store with a customer. Anderson was approximately 22 years old at the time and was not terminated for violating defendant's policy. Anderson has never been employed in the Green Bay Division and has never reported to Brent Trader.

(The parties dispute whether Brian Hietpas misrepresented the number of products available to a customer or ordered by him while Hietpas was employed as a trade marketing representative for defendant and when he was about 30. Plaintiff says that Hietpas falsified certain records in violation of defendant's policy, and she contends that she reported his behavior to Trader and David Williams but that they did not discipline him. Defendant denies that Hietpas violated company policy and says that even if he did, neither Trader nor Williams was ever made aware of any alleged misbehavior by Heitpas. It is undisputed that Trader was never Hietpas's supervisor.)

OPINION

***6** Under the Age Discrimination in Employment Act (ADEA), it is unlawful for an employer to "discharge any individual or otherwise discriminate against any individual" because of the individual's age. 29 U.S.C. § 623(a)(1). Traditionally, courts in this circuit have explained that a plaintiff asserting age discrimination may prove discrimination under a "direct" or "indirect" method of proof. Under the direct method proof, the plaintiff presents direct evidence of discrimination, such as such as an outright admission from the employer, or circumstantial evidence that points directly to a discriminatory reason for an adverse employment action. *Ptasznik v. St. Joseph Hospital,* 464 F.3d 691, 695 (7th Cir.2006). Under the indirect method, a plaintiff may prove discrimination using the burden-shifting approach in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Burks v. Wisconsin Department of Transportation,* 464 F.3d 744, 750–51 (7th Cir.2006).

The Supreme Court stated recently that to prevail in an action under the ADEA "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that [an unlawful motive] was the

'but-for' cause of the challenged employer decision." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 2351 (2009); *see also* *Lindsey v. Walgreen Co.*, 615 F.3d 873, 876 (7th Cir.2010); *Senske v. Sybase, Inc.*, 588 F.3d 501, 508–09 (7th Cir.2009). Additionally, the Supreme Court noted that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas* [ ], utilized in Title VII cases is appropriate in the ADEA context." *Gross*, 129 S.Ct. at 2349, n. 2. The Seventh Circuit has noted that "[w]hether [the] burden shifting analysis survives the Supreme Court's declaration in *Gross* in non-Title VII cases, remains to be seen." *Kodish v. Oakbrook Terrace Fire Protection District*, 604 F.3d 490, 501 (7th Cir.2010).

Relying on *Gross* and *Kodish,* defendant contends that plaintiff must prove her case through the direct method. However, the Court of Appeals for the Seventh Circuit has long applied the indirect method of proof to ADEA claims, *e.g.,* *Faas v. Sears, Roebuck, & Co.*, 532 F.3d 633, 641–42 (7th Cir.2008), and continues to do so in the wake of *Gross,* despite its comments in *Kodish. E.g., Van Antwerp v. City of Peoria, Illinois,* 627 F.3d 295, 298 (7th Cir.2010) (stating that plaintiff may prove ADEA claim through direct or indirect method); *Naik v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 627 F.3d 596, 599 (7th Cir.2010) (applying *McDonnell Douglas* burden shifting approach to AEDA claim); *Mach v. Will County Sheriff,* 580 F.3d 495, 498 n. 3 (7th Cir.2009); *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447, 452 (7th Cir.2009). Thus, I conclude that plaintiff may still attempt to prove her discrimination case using the indirect method of proof set forth in *McDonnell Douglas.*

A. *Direct Method of Proof*

***7** To survive summary judgment under the direct method, plaintiff must demonstrate "triable issues as to whether discrimination motivated the adverse employment action." *Kodish,* 604 F.3d at 501 (quoting *Darchak v. City of Chicago Board of Education*, 580 F.3d 622, 631 (7th Cir.2009)). "Direct" proof of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (e.g., "You're too old to work here."), but also includes circumstantial evidence which suggests discrimination through a longer chain of inferences." *Id.* Circumstantial evidence can take many forms, including "suspicious timing, ambiguous oral or written statements, [ ] behavior toward or comments directed at other employees in the protected group [and] evidence showing that similarly situated employees outside the protected class received systematically better treatment." *Van Antwerp,* 627 F.3d at 298 (internal citations and quotations omitted). However, all circumstantial evidence must "point directly to a discriminatory reason for the employer's action." *Id.*

Plaintiff presents no evidence suggesting that the timing of her termination was "suspicious" or that the person who made the decision to discharge her, her supervisor Brent Trader, was biased against older workers. Plaintiff concedes that she had a good working relationship with Trader and that he never made comments about her age. She has presented no evidence of improper behavior toward her or any other trade marketing representative who was over 40 and worked in the same division or region. She has identified no improper comments made by Trader to her or to other female employees. Nonetheless, plaintiff contends that there is sufficient circumstantial evidence from which a jury could infer intentional discrimination under the direct method of proof. In particular, she contends that intentional discrimination can be inferred from (1) statistical evidence concerning defendant's hiring practices; and (2) evidence that other employees were treated better than she was.

Plaintiff contends that statistical evidence regarding defendant's hiring practices shows that defendant prefers younger workers. Specifically, she contends that in the last few years, nearly all of defendant's new trade marketing representatives are under the age of 40. However, plaintiff does not explain adequately why evidence concerning the *hiring* of employees has much bearing on defendant's reason for terminating her, particularly when the person who terminated her, Trader, did not have the authority to hire trade marketing representatives. Evidence concerning defendant's *termination* practices is more relevant to the issues in this case; such evidence shows that between January 1, 2006 and August 23, 2010, six out of eight trade marketing representatives who were terminated were *under* the age of 40. More important, plaintiff provides no analysis or context for the hiring statistics she provides. For example, plaintiff has provided no evidence of the age or experience of the applicant pool from which trade marketing representatives were hired in the Minneapolis region. The mere citation of statistics does not create a triable issue. *Barracks v. Eli Lilly & Co.*, 481 F.3d 556, 559 (7th Cir.2007) ("We have frequently discussed

the dangers of relying on raw data without further analysis or context in employment discrimination disputes."); *see also Jarrells v. Select Publishing, Inc.,* 2003 WL 23221278, *5 (W.D.Wis. Feb. 19, 2003) ("Plaintiff has failed to present any evidence tying the statistical disparity to the decision not to hire her.").

***8** Additionally, plaintiff has identified no similarly situated trade marketing representative who was substantially younger and treated more favorably than she was. Plaintiff identifies three younger employees who she asserts committed policy violations comparable to hers: (1) Brian Hietpas, who allegedly falsified information; (2) Molly Anderson, who left coupons with a customer; and (3) Megan Anderson, who used her cell phone while driving. None of these employees, however, is similarly situated to plaintiff.

Similarly situated employees must be "directly comparable to the plaintiff in all material respects, which includes showing that the coworkers engaged in comparable rule or policy violations." *Patterson v. Indiana Newspapers, Inc.,* 589 F.3d 357, 365–66 (7th Cir.2009) (internal quotations and citation omitted). In the course of this inquiry, the court considers all of the relevant factors, including "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications...." *Brummett v. Sinclair Broadcast Group, Inc.,* 414 F.3d 686, 692 (7th Cir.2005) (internal citation and quotation omitted).

Brian Hietpas and Molly Anderson were not supervised by plaintiff's supervisor, Brent Trader, the person who made the decision to terminate plaintiff's employment. *Radue,* 219 F.3d at 618 (noting importance of showing common supervisor because different supervisors make employment decisions in different ways). The only trade marketing representative that plaintiff identified who reported to Trader was Megan Anderson, who was reprimanded by Trader after she violated defendant's policy prohibiting employees from talking on their cell phones while driving. This policy violation is not comparable to a violation of the Contract Signatures policy. *Naik,* 627 F.3d at 600 (similarly situated employee must have violated comparable policy to plaintiff). Not only is it not the same violation, but according to the employee handbook, violation of the cell phone policy is not grounds for immediate termination, unlike the Contract Signatures policy that plaintiff violated.

In sum, plaintiff has produced no evidence "point[ing] directly to a discriminatory reason for [defendant's] actions," *Rhodes v. Illinois Department of Transportation,* 359 F.3d 498, 504 (7th Cir.2004), or that is "directly related to the employment decision" at issue. *Venturelli v. ARC Community Services, Inc.,* 350 F.3d 592, 602 (7th Cir.2003). Thus, plaintiff's claim fails under the direct method.

A. *Indirect Method of Proof*

Because plaintiff has failed to demonstrate any potential claim of direct discrimination, she must attempt to prove her case under the *McDonnell Douglas* burden-shifting approach. Under this approach, plaintiff must demonstrate that (1) she is a member of a protected class; (2) she was performing her job to defendant's legitimate expectations; (3) in spite of her meeting those legitimate expectations, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who are substantially younger. *Naik,* 627 F.3d at 599–600; *Ransom v. CSC Consulting, Inc.,* 217 F.3d 467, 470 (7th Cir.2000). " 'Substantially younger' means at least a ten-year age difference." *Fisher v. Wayne Dalton Corp.,* 139 F.3d 1137, 1141 (7th Cir.1998) (quoting *Kariotis v. Navistar International Transportation Corp.,* 131 F.3d 672, 676 n. 1 (7th Cir.1997)).

***9** Summary judgment for defendant is appropriate if plaintiff fails to establish any of the foregoing elements of the prima facie case. *Atanus v. Perry,* 520 F.3d 662, 673 (7th Cir.2008). If plaintiff can make a prima facie case with respect to all elements, the burden shifts to defendant to offer a nondiscriminatory reason for its actions. *Burks,* 464 F.3d at 751. Once the defendant proffers such a reason, the burden shifts back to plaintiff to show that the reason is pretextual. *Id.*

The second and fourth elements of *McDonnell Douglas* are at issue here. With respect to the second element, defendant contends that plaintiff has not shown that she met its legitimate expectations because she violated company policy by signing a customer's name on a contract. Defendant's policy in this regard was clear, stating that "[s]igning for the retailor could lead to termination of employment." In addition, her supervisor made it clear that plaintiff's actions had been unacceptable. Plaintiff's response is that she was meeting defendant's legitimate expectations because she had performed well in the past, her supervisor was positive in

his assessment of her performance on the same day she signed a customer's name to a contract and defendant did not "cancel" the contract on which she signed a customer's signature.

That plaintiff performed well in the past is not dispositive. *Naik,* 627 F.3d at 598 (plaintiff "must show that he was meeting [his employer's] expectations at the time of his termination, which includes evidence that he did not violate [company] policies."); *Luckie v. Ameritech Corp.,* 389 F.3d 708, 715 (7th Cir.2004). Plaintiff must show that she was meeting defendant's expectations at the time of her termination, which includes evidence that she did not violate defendant's policies. In addition, regardless whether Trader gave plaintiff some positive feedback on the day she signed a customer's name to a contract (a fact that defendant disputes), it is undisputed that Trader told plaintiff repeatedly that her actions were unacceptable and that he began the process of terminating her employment.

Finally, the fact that defendant failed to "cancel" the contract does not imply defendant's approval of plaintiff's behavior, particularly in light of her supervisor's reprimands. In sum, because plaintiff admits that she violated defendant's policies, she has failed to establish the second element of her prima facie case.

Turning to the fourth element, defendant contends that plaintiff cannot show that similarly situated employees not in her protected class were treated more favorably. As discussed above, plaintiff has presented no evidence that any employee who violated defendant's Contract Signatures policy remained on the job. *Naik,* 627 F.3d at 600 (plaintiff cannot satisfy similarly-situated prong with "no evidence that any employee who violated the [same policy as plaintiff] remained on the job"); *Everroad v. Scott Truck Systems, Inc.,* 604 F.3d 471, 479–480 (7th Cir.2010) (no similarly situated employees violated same "insubordination" standard that plaintiff violated).

***10** Plaintiff argues that she satisfies the fourth element of her prima facie case by showing that defendant hired a substantially younger employee to replace her, citing *Hoffman v. Primedia Special Interest Publications,* 217 F.3d 522, 524 (7th Cir.2000). In *Hoffman,* the Court of Appeals for the Seventh Circuit held that the plaintiff had to show only that he was replaced by someone substantially younger. *Id.* However, the court of appeals explained in *Naik* that this more relaxed standard for the fourth element applies only if the plaintiff has proven the second element of the prima facie case. *Naik,* 627 F.3d at 600–01. Because plaintiff has not shown that she was meeting defendant's legitimate expectations when she was terminated, her claim falls outside the more relaxed requirement mentioned in *Hoffman. Id.* Therefore, plaintiff has failed to establish the fourth element of her prima facie case.

Moreover, even if I assume that plaintiff established a prima facie case of age discrimination, she could not prevail because defendant came forth with a legitimate, nondiscriminatory reason for her termination that she fails to rebut: her violation of the Contract Signatures policy. *Naik,* 627 F.3d at 600–01. It is irrelevant whether defendant made a smart business decision or whether it treated plaintiff harshly. *Ineichen v. Ameritech,* 410 F.3d 956, 961 (7th Cir.2005) ("[I]t is not the court's concern that an employer may be wrong about its employee's performance, or be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie.") (quotations and citation omitted). "If it is the true ground and not a pretext, the case is over." *Forrester v. Rauland–Borg Corp.,* 453 F.3d 416, 417 (7th Cir.2006). Defendant offered affidavits and deposition testimony as well as a copy of its Contract Signatures policy to support its contention that it terminated plaintiff on the basis of her violation. Because defendant articulated a credible reason, plaintiff must demonstrate that it was a pretext or lie.

Plaintiff makes two arguments in support of her position that defendant's justification for termination was pretextual. First, she contends that signing a customer's name on a contract was an "accepted practice" for trade marketing representatives. However, the evidence does not support a conclusion that this was an accepted practice. Although plaintiff says that one of her former supervisors (not Trader) told her it was acceptable to initiate a customer contract by signing for the customer, this practice is forbidden specifically by defendant's Contract Signatures policy. In addition, plaintiff testified that she had never signed a customer's name on a contract before April 23, 2008.

Plaintiff's second argument is that defendant did not comply with its own corrective action policy before terminating plaintiff because it did not apply its progressive discipline provisions. However, defendant's corrective action policy does not require that progressive discipline be applied in every situation; rather it states that some offenses merit immediate termination. Plaintiff's belief that her violation warranted progressive discipline is not evidence that defendant's justification for terminating her was pretextual. *Atanus,* 520 F.3d at

674 (plaintiff's "belief that her conduct ... did not warrant a ten-day suspension [is insufficient] to show that the [employer] did not act honestly and in good faith").

***11** Again, plaintiff has not directed the court to any evidence, direct or circumstantial, from which a jury could conclude that the but for cause of her termination was age and not her violation of company policy. Accordingly, defendant is entitled to summary judgment in its favor.

IT IS ORDERED that defendant R.J. Reynolds Tobacco Company's motion for summary judgment, dkt. # 14, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

All Citations

Not Reported in F.Supp.2d, 2011 WL 7630628

2008 WL 5246167
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

John SWAFFER, Jr. and Michael Rasmussen, Plaintiffs,
v.
David DEININGER, Thomas Cane, Gerald Nichol, Michael Brennan, William Eich, James Mohr, and Phillip A. Koss, Defendants.

No. 08-CV-208.
|
Dec. 17, 2008.

West KeySummary

1 **Constitutional Law** Mootness

A voter's claim that a state election law requiring the voter to file a registration statement in order to distribute postcards and signs violated his First Amendment rights was not rendered moot when a referendum the voter had opposed was passed. The voter alleged that he intended to distribute postcards and signs advocating his position on similar referenda and thus, there was a reasonable likelihood that the voter would be subject to the same election law in the future. U.S.C.A. Const.Amend. 1; W.S.A. 11.23, 11.30.

Attorneys and Law Firms

Clayton J. Callen, James Bopp, Jr., Jeffrey P. Gallant, Bopp Coleson & Bostrom, Terre Haute, IN, Michael D. Dean, Michael D. Dean LLC, Waukesha, WI, for Plaintiffs.

Jennifer Sloan Lattis, Christopher J. Blythe, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, for Defendants.

ORDER

J.P. STADTMUELLER, District Judge.

***1** On March 10, 2008, plaintiff John Swaffer, Jr. ("Swaffer") filed a complaint pursuant to 42 U.S.C. § 1983 against the named defendants, who are members of Wisconsin's Government Accountability Board (the "GAB") and the Walworth County District Attorney. The complaint alleged Swaffer's First and Fourteenth Amendment rights were infringed upon by certain Wisconsin state election laws. Swaffer sought declaratory judgment and a permanent injunction barring defendants from enforcing the challenged laws, as well as costs and attorney's fees. On March 10, 2008, Swaffer filed a motion for a temporary restraining order, or a preliminary injunction, seeking to enjoin defendants from enforcing the challenged statutes against Swaffer prior to a referendum that was to be held on April 1, 2008. On March 19, 2008, the parties filed a stipulation and proposed order "enjoining the defendants from enforcing the statutory provisions challenged in this matter as applied to the plaintiff through April 1, 2008, and until a final decision on the merits of this case or such other event as constitutes a final disposition of this matter." (Stipulation and Proposed Order, Docket # 8). On March 20, 2008, the court granted Swaffer's motion for a preliminary injunction pursuant to the parties' stipulation. (Order, March 20, 2008, Docket # 10).

On March 27, 2008, Swaffer amended his complaint to add plaintiff Michael Rasmussen. (Docket # 11). Rasmussen seeks the same relief as Swaffer, and additionally seeks the expungement of a registration statement that he filed pursuant to the challenged state statute. On April 15, 2008, defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Defendants assert that Swaffer's claim has been rendered moot, and that Rasmussen has failed to state a claim for which relief may be granted. Plaintiffs

responded to defendants' motion, and filed their own motions to amend their complaint and for summary judgment. The court now addresses defendants' motion to dismiss.

BACKGROUND

According to the amended complaint, Swaffer is a resident of the Town of Whitewater, a so-called "dry" town in Walworth County, Wisconsin. On April 1, 2008, residents of the Town of Whitewater were asked to vote, via referendum, on whether to turn the town wet and allow liquor sales and licensing of liquor vendors. Swaffer alleges that he opposed the referendum, and wanted to mail postcards to fellow residents urging them to vote against the liquor proposals on the April 1, 2008 ballot. Swaffer also wanted to make yard signs advocating against passage of the referendum. Plaintiffs estimated the cost of producing and distributing the postcards and signs to be approximately five hundred dollars. Plaintiff Rasmussen, a resident of nearby Waterford, Wisconsin, alleges that he sought to contribute to Swaffer's effort to offset the cost of producing and distributing the postcards and signs.

Plaintiffs allege that these activities triggered an obligation under Wisconsin state law to file a registration statement and make certain disclosures. Specifically, Wis. Stat. § 11.23 requires individuals or groups promoting or opposing a referendum to file a registration statement, designate a campaign depository account and treasurer, and disclose contributions and disbursements. Wis. Stat. § 11.30 and Wis. Admin. Code § E1 Bd 1.655 require persons who pay for, or are responsible for campaign communications to disclose their identity. Rasmussen apparently filed a registration statement, complying with the statutes. Swaffer, on the other hand, admits that he did not comply with the statutes. Instead, Swaffer commenced this action challenging the validity of the statutes on its face and as it applies to Swaffer and Rasmussen as individuals.

ANALYSIS

***2** Defendants move to dismiss plaintiffs' claims on two separate grounds: 1) lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1); and 2) failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). In considering a motion to dismiss, the court accepts all factual allegations of the complaint as true and draws all reasonable inferences in favor of the plaintiff. *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616, 625 (7th Cir.2007). The court will grant a motion to dismiss only where it appears beyond doubt from the pleadings that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The court addresses Swaffer's claims first.

1. Swaffer's Claims

As the court noted in its March 20, 2008 order, the power of the federal courts is limited to justiciable cases or controversies under Article III of the Constitution. (Order, March 20, 2008, 2, Docket # 10). Therefore, federal courts lack jurisdiction to hear nonjusticiable cases, including cases that are moot. *See Maher v. FDIC,* 441 F.3d 522, 525 (7th Cir.2006). A case is rendered moot "if there is no possible relief which the court could order that would benefit the party seeking it." *Id.* at 525 (quoting *In re Envirodyne Indus.,* 29 F.3d 301, 303 (7th Cir.1994)). Mootness has been described as "the doctrine of standing set in a time frame," because a plaintiff who loses standing during the course of litigation renders that plaintiff's claims moot. *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (citation omitted). In other words, "a case is moot when it no longer presents a live case or controversy." *Tobin for Governor v. Illinois State Bd. of Elections,* 268 F.3d 517, 528 (7th Cir.2001).

Conversely, a case challenging a statute on First Amendment grounds is ripe for judicial review when the complaint alleges an intent to engage in "conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n,* 149 F.3d 679, 686-87 (7th Cir.1998)(quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). The threat of prosecution is deemed credible if a plaintiff's intended conduct would violate the challenged statute, and the enforcing

government body "fails to indicate affirmatively that it will not enforce the statute." *See* *id.* at 687.

Federal courts may also consider otherwise moot cases or controversies if the questions involved are "capable of repetition, yet evading review." *Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm'n,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911)). This exception to the mootness doctrine applies when "(1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Tobin for Governor,* 268 F.3d at 529.

***3** Defendants assert that because Swaffer received a preliminary injunction, and because the April 1, 2008 election has come and gone, Swaffer's claims have become moot. Defendants argue that once Swaffer completed his anonymous campaign under the protection of the court's preliminary injunction, the controversy ended and Swaffer no longer had standing because he sustained no injury-in-fact. Defendants also argue that the "evading review" exception does not apply because there is no reasonable expectation that Swaffer will be subjected to defendants' enforcement of the election laws at issue. Defendants appear to concede in their brief that enforcing the challenged laws against Swaffer would be unconstitutional under *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Defendants assert that "[t]here is no real prospect that the Government Accountability Board or the Walworth County District Attorney will ever enforce the statute in a situation similar to Swaffer's, as such would be barred by *McIntyre*." (Supp. Br. 6, Docket # 16).

Plaintiffs respond by arguing that their claim for permanent injunctive relief and declaratory judgment remain live. Plaintiffs assert that Swaffer intends to engage in future activities proscribed by the challenged election laws, and that he has an on-going fear of enforcement. Plaintiffs further assert that Swaffer need not subject himself to actual enforcement of the statutes to have standing because the very existence of the challenged statutes cause him injury. Plaintiffs also argue that Swaffer's claim falls within the "evading review" exception of the mootness doctrine.

In support of their argument, plaintiffs direct the court to the First Circuit's opinion in *New Hampshire Right to Life Political Action Committee v. Gardner,* 99 F.3d 8 (1st Cir.1996) (holding plaintiff political action committee had standing to challenge election law after election day because a credible threat of enforcement remained where challenged statute remained on the books and enforcing agency had not disclaimed intention to enforce). In reply to plaintiffs' arguments, defendants direct the court to the Seventh Circuit's opinion in *Wisconsin Right to Life, Inc. v. Schober,* 366 F.3d 485 (7th Cir.2004) (holding plaintiff political action committee lacked standing to challenge election law where the same law had been declared unconstitutional in a previous case and the enforcing agency had publicly disclaimed any intention to enforce).

Here, defendants have failed to persuade the court that plaintiffs' claims have been rendered moot. *See* *Schober,* 366 F.3d at 491 (noting "the party asserting mootness bears the burden of persuasion"). While the April 1, 2008 referendum plaintiffs opposed has passed, the court finds that Swaffer continues to have standing because he has alleged that he intends to violate the challenged statutes in the future, and a credible threat of prosecution remains.

Swaffer conducted part of his campaign activities leading up to the April 1, 2008 election under the protection of the court's preliminary injunction. This has diminished the immediate threat of prosecution. However, Swaffer alleges that he would like to conduct similar activities advocating his position on future referenda relating to liquor sales in his town, or other issues "involving education, traditional marriage, and life issues." (Am. Compl. ¶¶ 18-19, Docket # 11). Swaffer further alleges that the issue of liquor sales is not new to the Town of W hitewater, with the electorate having turned down a similar referendum two years ago. (Am. Compl. ¶ 18, Docket # 11). During the previous referendum, Swaffer alleges that a fellow resident conducted similar activities without registering and was threatened with criminal charges by local law enforcement. (Am. Compl. ¶¶ 14-15, Docket # 11). While defendants' brief implies that enforcing the challenged statutes against Swaffer would run afoul of U.S. Supreme Court precedent in this case, defendants do not affirmatively indicate that they would not enforce the statute in the future. The preliminary injunction only prevents defendants from enforcing the statutes through the duration of this case. (Stipulation and Order, March 18, 2008, Docket # 8); *see also* (Order, March 20, 2008, Docket # 10).

***4** The court also considers Swaffer's claims to fall within the "evading review" exception of the mootness doctrine. As has been demonstrated in this case, the period leading up to an election is often too short to fully litigate constitutional challenges to an election law. *See*

Stewart v. Taylor, 104 F.3d 965, 969 (7th Cir .1997). Swaffer filed a complaint on March 10, 2008, and the referendum was presented to the voters on the April 1, 2008 ballot. Neither the parties nor the court could have reasonably expected a resolution on the merits of plaintiffs' claims in such a short period of time. Therefore, this case has evaded full review. As discussed above, plaintiffs allege that the liquor sales issue remains an open issue in the Town of Whitewater, and Swaffer plans on continuing activities that would trigger the reporting requirements of the challenged statutes when future referenda are placed on the ballot. Therefore, plaintiffs' complaint has set forth sufficient allegations to show a reasonable likelihood that plaintiffs will be subject to the same election laws when voicing their opinions on similar local referenda in the future.

Therefore, the court finds that Swaffer has standing and has alleged a justiciable controversy. The court's finding is not inconsistent with the Seventh Circuit's opinion in *Schober.* Unlike the facts in *Schober,* here the challenged statute has never been declared unconstitutional, and defendants have made no affirmative indication, at least that the court has been made aware of, as to their intentions to enforce the challenged statutes going forward. For the same reasons, the court's finding is also consistent with the First Circuit's opinion in *Gardner.* As a result, the court is obliged to deny defendants' motion to dismiss with respect to Swaffer's claims.

2. Rasmussen's Claims

Defendants seek dismissal of Rasmussen's claims for failing to state a claim upon which relief can be granted. However, defendants' brief principally argues that Rasmussen lacks standing. Defendants argue that Rasmussen has no standing to seek expungement of the registration statement he filed pursuant to the challenged election laws. Defendants assert that Rasmussen has never sought to expunge his registration statement administratively prior to becoming a party in this case, and that the named defendants are not in actual control of the filed statement Rasmussen seeks to expunge. Defendants also argue that Rasmussen has suffered no injury because he voluntarily complied with the challenged laws. Plaintiffs respond by arguing that defendants have the authority to expunge Rasmussen's registration statement. Plaintiffs also argue that Rasmussen suffered an injury when he was compelled by statute to disclose information in the filed registration statement.

A Rule 12(b)(6) motion requires the defendant show that the plaintiff has failed to state a claim upon which relief can be granted. To order to state a claim in federal court, the plaintiff need only specify "the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer." *Higgs v. Carver,* 286 F.3d 437, 439 (7th Cir.2002). Independent of this requirement, a plaintiff must also have standing to bring a claim. In order to have standing under Article III, a plaintiff must allege an injury in fact, that is "fairly traceable" to the complained-of conduct, and that is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). An injury in fact is one that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (Internal citations omitted).

***5** The court finds that Rasmussen has alleged a cognizable and justiciable constitutional claim. Rasmussen alleges that he suffered an actual injury by foregoing his First Amendment rights to comply with the challenged state election laws. Defendants' assertion that Rasmussen could not have been injured by voluntarily complying with the challenged statutes is unavailing. A plaintiff challenging the constitutionality of a statute need not violate the statute in order to assert his or her rights. *See Deida v. City of Milwaukee,* 192 F.Supp. 899, 905-06 (E.D.Wis.2002) (citing *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)). Further, Rasmussen alleges that his injuries were caused by his compliance with the challenged statutes, the enforcement and administration of which depend on defendants. With respect to redressability, Rasmussen seeks the same injunctive and declaratory relief as Swaffer, and additionally seeks expungement of the filings Rasmussen made pursuant to the challenged election laws. The fact that the Town of Whitewater clerk, who is currently not a party to this case, may have actual possession of Rasmussen's filings does not strip Rasmussen of standing to bring his claims. As Rasmussen points out, Wisconsin statutes provide that the GAB is responsible for administering Wisconsin election laws, including enforcement of those laws. *See generally* Wis. Stat. § 5.05. Moreover, plaintiffs have moved for leave to amend their complaint and add the Town of Whitewater clerk as a party defendant.[1] (Docket # 19). Finally, defendants provide no authority for the proposition that Rasmussen was required to exhaust administrative remedies before coming to federal court. Exhaustion of state administrative remedies is not a condition precedent to

bringing a non-prisoner case under 42 U.S.C. § 1983. *See* *Patsy v. Bd. of Regents of State of Florida,* 457 U.S. 496, 501-03, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Therefore, the court denies defendants' motion to dismiss Rasmussen's claims. Because the court is obliged to deny defendants' motion in its entirety, the court will allow defendants to respond to plaintiffs' motions for summary judgment and for leave to amend the complaint pursuant to the court's May 22, 2008 order. (Order, May 22, 2008, Docket # 26).

Accordingly,

IT IS ORDERED that defendants' motion to dismiss (Docket # 15) be and the same is hereby **DENIED;**

IT IS FURTHER ORDERED that defendants shall have thirty (30) days from the filing of this order to file a response to plaintiffs' motion for summary judgment (Docket # 20) and plaintiffs' motion for leave to file an amended complaint (Docket # 19); plaintiffs shall have fifteen (15) days from the filing of defendants' responsive brief to file a reply.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5246167

Footnotes

[1] The court does not address plaintiffs' motion for leave to amend their complaint in this order as defendants have not yet had an opportunity to respond. (Order, May 22, 2008, Docket # 26).

2014 WL 2013375
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

CUSTOM SHUTTERS, LLC, Plaintiff,
v.
SAIA MOTOR FREIGHT LINE, LLC, Defendant.

No. 12–CV–1070–JPS.
|
Signed May 16, 2014.

Attorneys and Law Firms

Bruce C. O'Neill, Fox O'Neill & Shannon SC, Milwaukee, WI, for Plaintiff.

C. Fredric Marcinak, III, Smith Moore Leatherwood, Robert D. Moseley, Jr., Greenville, SC, John J. Laffey, Thomas Gonzalez, Whyte Hirschboeck Dudek SC, Milwaukee, WI, for Defendant.

ORDER

J.P. STADTMUELLER, District Judge.

***1** This matter, originally filed by plaintiff Custom Shutters, LLC ("CS") in the Waukesha County Circuit Court, was randomly assigned to this branch of the court following defendant Saia Motor Freight Line, LLC's ("Saia") removal of the action. (Docket # 1). On November 21, 2013, this court denied Saia's motion for partial summary judgment. (Docket # 31). The matter was set for trial, but the parties notified the court that they had resolved their dispute, save the legal question of entitlement to fees and costs. On December 6, 2013, this court issued an order establishing a briefing schedule for a motion on the subject. (Docket # 33). The motion is now fully briefed and ready for adjudication.

First, a brief review of relevant facts as recounted in this court's summary judgment order. CS is a Wisconsin limited liability company that manufactures and sells custom shutters. Saia is a Louisiana limited liability company, and an interstate motor carrier. In August of 2012, Tracy Woznicki ("Woznicki"), CS's Vice President and part-owner, arranged with Saia to ship a 5,500 pound package of shutters to a Lowe's store in Naples, Florida; the parties agreed to a fee of $1,341.00. Woznicki was not given options or choices of limited liability, and the Saia representatives made no reference to limited liability. A Saia driver picked up the shipment, and when the shipment arrived in Florida, the shutters had been damaged in transit.

Along with its motion for fees, CS filed copies of the parties' communications from the months leading up to the lawsuit. Those communications show that CS initially filed a claim with Saia seeking compensation in the amount of Lowe's purchase price: $33,259 .20. (Docket # 36–1). Saia declined the claim, citing limited liability provisions found in Saia's tariff, and instructing CS to refile its claim for a much lower amount of $1.00 per pound of freight, or $5,500.00. (Docket # 36–2). CS retained counsel, and sent a letter dated August 24, 2012, denying that Saia's tariff limiting liability applies, citing legal authority supporting this position, and demanding the full payment. (Docket # 36–3). On September 11, 2012, CS sent a follow-up letter seeking Saia's response. (Docket # 36–4). By letter dated October 2, 2012, counsel for Saia responded that it believed liability to be limited, and citing its own legal authority for this position. (Docket # 35–5). CS filed suit in Waukesha County Circuit Court, seeking to recover Lowe's purchase price: $33,259.20. (Docket # 35–7). Saia removed the case to federal court and asserted that its liability is limited to $5,500.00. (Docket # 1). Saia also immediately filed a motion to dismiss invoking federal law, which yielded an amended complaint, and Saia's subsequent answer. (Dockets # 3, # 6, # 9). This case thus sought to determine liability for a very small amount of money as compared to most federal cases. Indeed, had this case been removed on the basis of diversity jurisdiction instead of a federal question, it would not have satisfied the required amount in controversy to justify a federal forum. Be that as it may, due to the invocation of federal law, the case was properly brought to a federal court, even though the parties disputed only $27,759.20. The parties engaged in discovery, and on August 30, 2013, Saia filed a motion for partial summary judgment. (Docket # 21). The motion was fully briefed, and on November 21, 2013, the court issued an order denying Saia's motion. (Docket # 31).

***2** In the instant motion, CS seeks attorney's fees and costs of suit, arguing that Saia's litigation strategy was abusive and designed to make it so expensive for CS that CS would simply walk away from the recovery to which

it was entitled. In support of its motion, CS cites two authorities. First, CS cites the court's inherent authority to impose sanctions. A court may assess fees as a sanction when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (citations). Sanctions awarded under this authority serve two purposes: first, they allow the court to vindicate its interests to punish a party for disruption to the system of justice, and second, they shift costs stemming from one party's obstinacy to the prevailing party. *Id.* As a second authority for awarding fees, CS cites 28 U.S.C. § 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The purpose of this statute is "to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them." *Kapco Manufacturing Co., Inc. v. C & O Enterprises, Inc.*, 886 F .2d 1485, 1491 (7th Cir.1989) (internal citation omitted). "Sanctions against counsel under 28 U.S.C. § 1927 are appropriate when 'counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders.' " *Grochocinski v. Mayer Brown Row & Maw, LLP*, 719 F.3d 785, 799 (7th Cir.2013) (*quoting Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184–85 (7th Cir.1992)).

CS raises several aspects of Saia's litigation strategy that, in CS's opinion, expose Saia to liability under one or both of these authorities. The court will discuss some of CS's points below, but first finds it appropriate to dismiss some of CS's points with limited discussion. For example, CS argues that Saia maintained a "rigid insistence" on paying only $5,500.00 and would not negotiate. Brief in Support (Docket # 35) at 16. However, Saia answers this allegation by arguing that it was CS who would not budge from its demand for $33,259.20. Brief in Opposition (Docket # 37) at 6. The court is simply not going to expend any energy deciphering which party's offers to negotiate were genuine, and which party's were less so. Likewise, the court will not award fees based on certain litigation decisions Saia made, such as flying in out-of-state counsel for a deposition and filing a motion for partial judgment on the pleadings instead of "ignoring" the complaint's statements regarding fees. These strike the court as reasonable decisions, for the myriad reasons Saia articulates in its brief. *See* Brief in Opposition at 6–7.

***3** More troubling to the court, however, is Saia's general litigation strategy, including its decision to file a motion for partial summary judgment. Saia's business is interstate shipping of freight, and it certainly knows that a carrier seeking to limit its liability under the Carmack Amendment must show, among other facts, that the shipper agreed to a choice of liability for the shipment. *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir.1987). When presented with Saia's motion for partial summary judgment, the court easily denied it, finding that the facts did not support Saia's contention that CS had agreed to limit its liability for the shipment. The court need not reiterate the analysis from its order denying Saia's motion; it is sufficient for purposes of the instant motion to simply note that Saia's showing as to CS's agreement to limit its liability—again, a fact essential to prevailing on its motion—was a non-starter.

CS's motion asks the court to find that Saia ought be sanctioned for persisting in its position that Saia's liability was, in fact and law, limited in this case. The court so finds, and without hesitation. It is appropriate for a court to impose sanctions when an attorney pursued a claim that is "without a plausible legal or factual basis and lacking in justification," *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 119 (7th Cir.1994), or when counsel "pursue[d] a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound," *Kapco*, 886 F.2d at 1491. In this case, there was no basis in fact to support Saia's argument that CS had agreed to limit its liability. After undertaking an "appropriate inquiry," and then assessing Saia's position given the actual facts of the case, no reasonable attorney would have persisted in arguing that CS agreed to limit its liability. The argument simply lacks "a plausible legal or factual basis." *Pacific Dunlop Holdings Inc.*, 22 F.3d at 119. The court can only conclude that Saia's litigation strategy was intentional, and designed to employ the legal process to yield not justice, but unjustified capitulation. *See Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223,

228 (7th Cir.1984) (a court may infer intent from a "total lack of factual or legal basis for a suit."). The result of Saia's strategy was a draw on CS's resources because it would have to combat the motion, and on the court's limited resources to adjudicate the motion. The court will thus award sanctions to CS, pursuant to its inherent authority, in order to punish Saia for wrongly drawing on the court's and CS's resources. *Chambers v. NASCO, Inc.,* 501 U.S. at 45–46.

Saia maintains that an award of fees in this case would "disrupt the Carmack Amendment's careful balance of rights and remedies between shippers and carriers." Brief in Opposition at 10. The court disagrees. As even Saia admits, the Carmack Amendment "cannot insulate a party from the consequences of unethical or improper conduct." Brief in Opposition at 10.

***4** Having determined that sanctions are appropriate in this case, the court must now determine a suitable amount to award. A district court awarding sanctions must determine the reasonable number of hours expended, and the reasonable hourly rate for such work. *Kotsilieris v. Chalmers,* 966 F.2d 1181, 1187 (7th Cir.1992). CS submitted billing sheets in support of its request for $24,057.29, a figure representing the fees and costs CS incurred in prosecuting this action, but not including the instant motion or the amended complaint. Saia does not contest the reasonableness of hours expended on any specific entry. The court has reviewed the billing sheets and likewise finds the number of hours expended to be reasonable. Additionally, while Saia quibbles about opposing counsel's billing rate in a footnote, Brief in Opposition at 7 n. 2, Saia offers no real argument regarding the reasonableness of the rate. Due to this lack of argument to the contrary, and in combination with the court's knowledge of area rates, the court finds CS's billing rates to be reasonable. Having found the hours expended and the billing rate to be reasonable, the court will order fees and costs totaling $24,057.29 in this case.

The final question to be answered is whether these fees ought be charged to Saia's counsel in his individual capacity, or to Saia itself. *See* *Oliveri v. Thompson,* 803 F.2d 1265, 1273 (2d Cir.1986) (an award of attorney's fees made under the court's inherent power may be made against an attorney, a party, or both.) The court deems it proper to order Saia to pay the fees. As is evident from the materials submitted in opposition to CS's motion, Saia instructed its counsel to defend the case based on the limitation of liability argument, and approved the filing of the motion for partial summary judgment on that basis. Pennison Aff. (Docket # 40) at ¶ 7, ¶ 9. While every attorney has a duty to ensure that the filings bearing his or her name are appropriate, in this case it appears that it was Saia that made the decision to pursue the strategy. Therefore, the court will order that Saia pay the attorney's fees in this case.

The parties earlier notified the court that they settled the underlying dispute in this case. This order adjudicates the sole pending motion. Thus, it appears that this file should be closed. The parties are directed to file appropriate closing papers within thirty (30) days.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Attorney's Fees and Costs (Docket # 34) be and the same is hereby **GRANTED;**

IT IS FURTHER ORDERED that Saia shall, within thirty (30) days of the date of this order, pay Plaintiff's attorney's fees and costs totaling $24,057.29; and

IT IS FURTHER ORDERED that the parties shall, within thirty (30) days of the date of this order, file appropriate papers closing this case.

All Citations

Not Reported in F.Supp.3d, 2014 WL 2013375

End of Document