NO. 15-3225

In the United States Court of Appeals for the Eighth Circuit

Sheldon Wolfchild, et al.,

Plaintiffs-Appellants,

v.

Redwood County, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

SEPARATE BRIEF OF PLAINTIFFS-APPELLANTS SHELDON PETERS WOLFCHILD, ERNIE PETERS LONGWALKER, SCOTT ADOLPHSON, MORRIS PENDLETON, BARBARA BUTTES AND THOMAS SMITH

Paul C. Peterson (#151543)
William L. Davidson (#201777)
LIND, JENSEN, SULLIVAN
& PETERSON, P.A.
1300 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402
(612) 333-3637
paul.peterson@lindjensen.com
william.davidson@lindjensen.com

Attorneys for Plaintiffs-Appellants Sheldon Peters Wolfchild, Ernie Peters Longwalker, Scott Adolphson, Morris Pendleton, Barbara Buttes and Thomas Smith

2015 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Summary of the Case and Request for Oral Argument

Appellants are the six plaintiffs who were sanctioned along with their attorneys for pursuing claims and asserting arguments that the district court concluded no "reasonable and competent attorney" would assert. The six Individual Plaintiff Appellants submit this separate and independent brief challenging the award of sanctions to various appellees against the Individual Plaintiff Appellants jointly and severally.[1]

Appellants request 45 minutes for oral argument for all of the consolidated and related appeals. The undersigned do not anticipate using any time for oral argument, but will be available to address any questions members of the panel may have regarding the limited arguments in this brief as to the sanctions awarded against the Individual Plaintiff Appellants personally.

[1] The undersigned appear in this matter, 15-3225, for the limited purpose of contesting the award of sanctions personally against Appellants, and do so because of the potential conflict of interest that Appellants' primary counsel might face while advocating all other issues and arguments in this matter and in the related appeals. Appellants remain represented by their primary counsel in this matter and in each of the related appeals, 15-1580, 15-2375, and 15-3277.

Table of Contents

Table of Authorities

Cases **Page**

Statutes and Rules

Other Authority

Jurisdictional Statement

The Individual Plaintiff Appellants adopt and join in the Jurisdictional Statement from Appellants' Principal Brief concerning the June 9 and September 29, 2015 sanctions orders.

Statement of Issues

1. Whether the district court erred in imposing monetary sanctions personally against the six Individual Plaintiff Appellants despite explicit language under Rule 11 that prohibits such sanctions against represented parties.

***Apposite authorities*:**

Fed. R. Civ. P. 11
Dearborn St. Bldg. Assocs., LLC v. Huntington Nat'l Bank, 411 Fed. Appx. 847 (6th Cir. 2011)
28 U.S.C. Section 1927
Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., 165 F.3d 627 (8th Cir. 1999)

2. Whether the district court erred in imposing monetary sanctions personally against the six Individual Plaintiff Appellants for pursuing legal claims and setting forth legal arguments that the district court concluded were frivolous, but without any specific finding that they engaged in bad-faith conduct.

***Apposite authorities*:**

Roadway Exp., Inc. v. Piper, 447 U.S. 752, 100 S. Ct. 2455 (1980)
Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123 (1991)
Plaintiffs' Baycol Steering Comm. v. Bayer Corp., 419 F.3d 794 (8th Cir. 2005)
Hoover v. Armco, Inc., 915 F.2d 355 (8th Cir. 1990)

Statement of the Case

The district court sanctioned the six Individual Plaintiff Appellants, jointly and severally, over $281,000. It did so citing Rule 11 and the district court's "inherent authority." The monetary sanctions awarded in favor of three groups of appellees – the Lower Sioux Indian Community, Municipal Defendants, and Landowner Defendants – were for various attorney fees these appellee groups alleged they incurred in moving to dismiss the complaint the Individual Plaintiff Appellants brought by and through their counsel. The Individual Plaintiff Appellants join in the Statement of the Case in the principal brief they and the Law Firm Appellants jointly filed.

Summary of Individual Plaintiff Appellants' Argument

The district court erred in imposing monetary sanctions on the Individual Plaintiff Appellants under Rule 11 when they were represented by counsel. The alleged sanctionable conduct concerned the assertion of legal claims and arguments. Under the explicit language of Rule 11, and under the express heading "**Limitations on Monetary Sanctions,**" a "court must not impose a monetary sanction . . . against a represented party for violating Rule 11(b)(2)." Fed. R. Civ. P. 11(c)(5)(A) (original emphasis). The district

court erred in sanctioning the Individual Plaintiff Appellants jointly and severally with the attorneys who represent them.

The district court similarly erred in sanctioning the Individual Plaintiff Appellants under the court's "inherent authority." The court failed to provide due process to the Individual Plaintiff Appellants and made no finding that they engaged in conduct that would warrant sanctions personally. The conduct the district court found objectionable – the assertion of legal claims and arguments – was the responsibility of counsel for the Individual Plaintiff Appellants. If any sanction is affirmed, it must only be against their counsel.

Argument and Authorities

I. Because Rule 11 expressly prohibits a monetary sanction against a represented party for a violation of Rule 11(b)(2) – the assertion of claims or other legal contentions not warranted by existing law or by a nonfrivolous argument for a change in the law – the district court erred in imposing sanctions personally against the six Individual Plaintiff Appellants.

This Court reviews a district court's imposition of sanctions under Rule 11 for an abuse of discretion. *MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 624 (8th Cir. 2003). A district court abuses its discretion in awarding sanctions when the sanctions award is based "on an erroneous view of the law." *Id.*

(quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461 (1990)).

The district court based its Rule 11 sanction decision on its conclusion "that Plaintiffs and their counsel knowingly commenced and prosecuted this frivolous action on legal theories that are not supported by existing law or that involve a nonfrivolous argument for extending, modifying, or reversing existing law or to establish new law." *Wolfchild v. Redwood Cnty.*, Civil No. 14-1597 (MJD/FLN), 2015 WL 3616058, at *2 (D. Minn. June 9, 2015). Thus, the court determined that prosecuting the action violated Rule 11(b)(2), which requires an attorney or unrepresented party to certify that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2).

Significantly, "Rule 11 carefully assigns responsibility between represented parties and their counsel, [and] only attorneys may be held liable where the basis of a sanctions award is the frivolousness of a party's legal position." *Dearborn St. Bldg. Assocs., LLC v. Huntington Nat'l Bank*, 411 Fed. Appx. 847, 852 (6th Cir. 2011); *accord Mitchel v. City of Santa Rosa*, 601 Fed. Appx. 466, 469 (9th Cir. 2015); *Skidmore Energy, Inc. v. KPMG*, 455 F.3d

564, 567 (5th Cir. 2006); *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52, 57 (2d Cir. 2000). As a result, the Federal Rules expressly state a district court "must not impose a monetary sanction" against "a represented party for violating Rule 11(b)(2)." Fed. R. Civ. P. 11(c)(5). Because the six Individual Plaintiff Appellants were represented, a direct monetary sanction against them was unauthorized under Rule 11(b)(2). Instead, "[m]onetary responsibility for such violations is more properly placed solely on the party's attorneys." *Mitchel*, 601 Fed. Appx. at 469 (quoting Fed. R. Civ. P. 11(c)(5)(A) advisory committee's note (1993 amendment)).

The district court's sanctions orders are not models of clarity. The court summarized the different sanction arguments the various appellee groups raised, and then ultimately made sweeping statements that sanctions were warranted against the Individual Plaintiff Appellants and their counsel. But importantly, the district court made no specific factual findings to support its sweeping statements as to the Individual Plaintiff Appellants.

Notably, the district court did not identify any unsupported factual assertions or any factual misrepresentations from any of the six Individual Plaintiff Appellants. As well, the district court made no findings that the

Individual Plaintiff Appellants engaged in an improper purpose in bringing suit.

Instead, the only basis the district court articulated when imposing sanctions was its conclusion that the claims asserted and arguments that counsel made were *legally* frivolous. Counsel represented the six Individual Plaintiff Appellants during the entirety of the proceedings before the district court. Because monetary sanctions for pursuing *legally* frivolous claims or arguments "must not" be imposed on represented parties, Rule 11(c)(5), the district court's imposition of monetary sanctions on the Individual Plaintiff Appellants was based on "an erroneous view of the law" and the court "necessarily abuse[d] its discretion. *Cooter & Gell*, 496 U.S. at 405, 110 S. Ct. at 2461. To the extent any monetary sanctions are affirmed – and the Individual Plaintiff Appellants contend no sanction award should be affirmed – any affirmance should be limited to imposing sanctions only against their counsel. This Court must reverse the district court's imposition of Rule 11 sanctions against the six Individual Plaintiff Appellants.[2]

[2] To the extent the district court awarded sanctions under 28 U.S.C. § 1927 against the six Individual Plaintiff Appellants, it similarly erred. In reviewing a district court's award of sanctions under Section 1927, this Court reviews the factual findings for clear error and the award for an abuse of discretion.

II. The district court erred in exercising its "inherent authority" to levy monetary sanctions personally against the six Individual Plaintiff Appellants.

The district court referenced its "inherent authority" as a basis for sanctions, apparently because the Municipal Appellees failed to comply with the safe-harbor requirements of Rule 11. The district court erred in sanctioning the Individual Plaintiff Appellants for two reasons. One, it denied them due process by invoking its inherent authority without notice so that they could address any supposed "bad-faith" conduct. Two, the district court made no specific finding that the Individual Plaintiff Appellants engaged in bad faith that warrants sanctions, and there is nothing

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Wagner v. Gallup, Inc., 788 F.3d 877, 882 (8th Cir. 2015). Section 1927 provides that "[a]ny attorney or other person admitted to conduct cases in a court of the United States or any Territory thereof" may be sanctioned if the attorney unreasonably and vexatiously multiplies the proceedings. The statute is "strictly construed" because of its penal nature. *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 719 (8th Cir. 1999). By its plain language, the statute's reach is limited to attorneys. Thus, this Court has stated that Section 1927 does not authorize the imposition of a sanction on a represented party. *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 165 F.3d 627, 630 (8th Cir. 1999) (modifying sanction award of attorney fees to require payment by appellant's attorney rather than appellant). Here, the district court referenced Section 1927 in its sanction orders. If the court sanctioned the six Individual Plaintiff Appellants jointly and severally pursuant to Section 1927, such a sanction was unauthorized and an abuse of discretion. *Id.* Accordingly, this Court must reverse the district court's award.

in the record that would support such a finding. In its zeal to dismiss the claims and compensate appellees for what it believed to be frivolous legal claims and arguments, the district court mistakenly sanctioned the Individual Plaintiff Appellants.

A district court's imposition of sanctions under its inherent authority is reviewed for an abuse of discretion. *Anderson v. Citimortgage, Inc.*, 519 Fed. Appx. 415, 417 (8th Cir. 2013) (per curium). A district court necessarily abuses its discretion if it bases its ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quoting *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 802 (8th Cir. 2005)). To properly exercise its discretion, a trial court must balance the equities among the parties and determine that "overriding considerations indicate the need for such a recovery." *Actors' Equity Ass'n v. Am. Dinner Theatre Inst.*, 802 F.2d 1038, 1043 (8th Cir. 1986) (quoting Hall v. Cole, 412 U.S. 1, 5, 93 S. Ct. 1943, 1946 (1973)). The district court did not balance the equities. If the district court fails to balance the equities, then it has not exercised its discretion and this Court balances the equities de novo. *Id.* at 1045.

Under the general American Rule, "a litigant cannot recover its attorney fees." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765, 100 S. Ct. 2455,

2463 (1980). This rule has at its foundation 28 U.S.C. § 1923. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 251–57, 95 S. Ct. 1612, 1618–22 (1975). However, this rule is subject to a limited "bad-faith exception" that may be applied when a party has behaved "in bad faith, vexatiously, wantonly, or for oppressive reasons" in the pursuit of its claim. *Roadway Exp., Inc.* at 766, 100 S. Ct. at 2464 (quoting *F.D. Rich Co. v. U.S. ex rel. Use of Indus. Lumber Co.*, 417 U.S. 116, 130 94 S. Ct. 2157, 2165 (1974)). "A bad faith finding is specifically required in order to assess attorneys fees" under the bad-faith exception to the American Rule. *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 458 F.3d 733, 740 (8th Cir. 2006). Notably, the district court identified no bad-faith conduct that the Individual Plaintiff Appellants engaged in, and made no specific findings that they had an improper purpose in bringing suit.

A court imposing sanctions under the bad-faith exception to the American Rule also must comply with due process, both in determining that the requisite bad faith exists and in assessing fees. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S. Ct. 2123, 2135-36 (1991). Thus, notice and an opportunity to be heard are required when a district court is considering the imposition of sanctions. *Plaintiffs' Baycol Steering Comm.*, 419 F.3d at 802. Due process

distinguishes between "general notice" about potential bases for the imposition of sanctions and specific notice that sanctions could be imposed. *Jensen v. Fed. Land Bank of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989) (citing *Tom Growney Equip. v. Shelley Irrigation Dev.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987)). The notice should be sufficient to permit the party to prepare a response to the charge. *Id.* at 341–42. Thus, where a district court considers issuing a ruling affecting the rights of a party based on grounds other than those addressed in briefing, due process requires the court to provide the party with notice of such intent. *Jenkins v. Missouri*, 216 F.3d 720, 726–27 (8th Cir. 2000).

"The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link v. Wabash R. Co.*, 370 U.S. 626, 632, 82 S. Ct. 1386, 1389–90 (1962). Therefore, in considering the imposition of sanctions pursuant to a court's inherent power, "'due process will demand more specific notice' for a client than for an attorney." *Dial HD v. ClearOne Commc'ns*, 536 Fed. Appx. 927, 929 (11th Cir. 2013).

Despite the need for notice so that a party could respond and address the specific basis for any claimed sanctions, the district court failed to provide the Individual Plaintiff Appellants such notice and an opportunity to respond. Instead, as part of its consideration of motions for Rule 11 sanctions, the district court invoked its "inherent authority" and sanctioned the Individual Plaintiff Appellants. In doing so, it erred because it denied them the opportunity to contest any suggestion that they engaged in bad-faith conduct. And as noted below, the district court never found (and on this record could not find) that the Individual Plaintiff Appellants themselves engaged in such bad-faith conduct so as to warrant "inherent authority" sanctions.

The bad-faith exception to the American Rule is grounded in the inherent powers of a federal court, ones that are deemed necessary to the exercise of all other judicial power. *Roadway Exp., Inc.*, 447 U.S. at 764, 100 S. Ct. at 2463. "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44, 111 S. Ct. at 2132. Thus, a court must not forget that the bad-faith exception remains just that: a "narrow exception[] to the American Rule [, which] effectively limit[s] a court's inherent power to impose attorney's fees as a sanction." *Id.* at 47, 111

S. Ct. at 2134. If there is "bad-faith conduct in the course of litigation that could adequately be sanctioned under the Rules [of Civil Procedure], the court ordinarily should rely on the Rules rather than the inherent power." *Id.* at 50, 111 S. Ct. at 2136. "Courts' inherent sanctioning powers are likewise subordinate to valid statutory directives and prohibitions." *Law v. Siegel*, — U.S. —, —, 134 S. Ct. 1188, 1195 (2014). Indeed, the Supreme Court has cautioned that the extent of a court's inherent authority "must be delimited with great care, for there is a danger of overreaching when one branch of Government, without benefit or cooperation or correction from the others, undertakes to define its own authority." *Degen v. U.S.*, 517 U.S. 820, 823, 116 S. Ct. 1777, 1780 (1996). Thus, "[i]n many instances the inherent powers of the courts may be controlled or overridden by statute or rule." *Id.* at 823, 116 S. Ct. at 1780.

Under the American Rule, the inherent authority of a court to award attorney fees has been circumscribed by Congressional action. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 258–59, 95 S. Ct. at 1621–23. Thus, while Congress has not repudiated the bad-faith exception to the American Rule, it has denied the courts the right to expand the reach of the exception. *See id.* at 260, 95 S. Ct. at 1623 (stating that Congress has not "extended any roving

authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted").

This inherent authority is understood to be of ancient origin, and frequent reference is made to the inherent powers assumed by the English courts of common law particularly in the arena of contempt-based sanctions used to "protect[] the due and orderly administration of justice and . . . maintain[] the authority and dignity of the court." *Roadway Exp., Inc.*, 447 U.S. at 764, 100 S. Ct. at 2463. The bad-faith exception to the American Rule may be invoked "if a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled'" and the court may then "assess attorney's fees against the responsible party" for such transgressions as "'delaying or disrupting the litigation or by hampering enforcement of a court order.'" *Chambers*, 501 U.S. at 46, 111 S. Ct. at 2133 (quoting *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S. Ct. 1176, 1179 (1946) and *Hutto v. Finney*, 437 U.S. 678, 689 n.14, 98 S. Ct. 2565, 2573 n.14 (1978)). Thus, the bad-faith exception does not provide a basis for fee-shifting as part of a merits award, but is instead directed towards sanctioning procedural abuses. *Lamb Eng'g & Const. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1437

(8th Cir. 1997) (citing *Chambers*, 501 U.S. at 59, 111 S. Ct. at 2140 (Scalia, J., dissenting)).

Notably, the district court made no finding and did not conclude that it had been defrauded or defiled. There is nothing to suggest the Individual Plaintiff Appellants engaged in egregious conduct or procedural abuses that would warrant a sanction under the court's inherent authority. This court should reverse the sanction against the Individual Plaintiff Appellants.

Even assuming counsel engaged in bad faith through the pursuit of legal claims and arguments, a party is not subject to the bad-faith exception merely because a party's attorney engaged in bad-faith conduct. Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 499–500 (5th ed. 2013). Rather, a court must consider a party's personal bad faith before invoking its inherent authority to sanction a party alongside the attorney. *Id.* Indeed, "'impos[ing] a fine of several thousand dollars upon the plaintiff because of his lawyer's neglect,'" would be a sanction that "is repugnant to our system of justice." *Herring v. City of Whitehall*, 804 F.2d 464, 468 & n.5 (8th Cir. 1986) (per curium) (quoting *Link*, 370 U.S. at 646, 82 S. Ct. at 1397 (Black, J., dissenting)). Instead, "[i]f the fault lies with the attorneys, that is where the impact of sanction should be lodged. If the fault lies with the

clients, that is where the impact of the sanction should be lodged." *Id.* at 468 (quoting *In re Baker*, 744 F.2d 1438, 1442 (10th Cir. 1984) (en banc)).

The Individual Plaintiff Appellants do not suggest that their primary counsel engaged in bad-faith conduct. But the district court did not conclude that any of the Individual Plaintiff Appellants themselves engaged in sanctionable conduct. Instead, it appears the district court improperly sought to compensate certain appellees for the fees they allegedly incurred in defending against the claims brought in this case.

And even if counsel engaged in bad-faith conduct, a sanction against the Individual Plaintiff Appellants must be reversed. For example, in *Byrne v. Nezhat*, "[d]espite its cognizance that plaintiff's counsel, not plaintiff, were behind . . . the baseless RICO allegations . . ., the district court summarily stated that '[defendant] Northside has shown that plaintiff and plaintiff's counsel have acted with bad faith so as to recover sanctions pursuant to section 1927 and the inherent power of the court.'" 261 F.3d 1075, 1122 (11th Cir. 2001), *abrogated on other grounds by Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146 (11th Cir. 2011). *Byrne* held that it was improper for the district court to parlay the sanctionable conduct of the attorney into a sanction against the party without examining the party's conduct and making

findings as to whether the party's conduct warranted sanctions. *Id.* at 1123. Because such findings were not made with respect to the party, *Byrne* vacated the sanctions imposed on the client even while affirming the award against the attorney. *Id.* at 1134.

This Court has permitted the application of the bad-faith exception in cases where a litigant pursues a frivolous claim. *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990). But the factual contention that a litigant brought a claim in bad faith must be supported by a showing that the sanctioned litigant "intentionally advanced a frivolous contention for an ulterior purpose, such as harassment or delay." *Actors' Equity Ass'n*, 802 F.2d at 1043. No such showing exists here, and the district court made no finding that any of the six Individual Plaintiff Appellants brought suit for an improper ulterior purpose.

Significantly, the mere fact that a claim may be subject to an affirmative defense is not a basis for finding bad faith. This is so because a litigant is not required to anticipate that the affirmative defense will be asserted. *Hoover*, 915 F.2d at 357. In *Hoover*, for example, the fact that the plaintiff brought a claim that was barred under the applicable statute of limitations was by itself insufficient to prove bad faith. *Id*. Here, the district

court erred in its unstated but apparent assumption that the Individual Plaintiff Appellants should be sanctioned because their claims failed. But the claims were dismissed because of arguments based on affirmative defenses – *Sherrill* laches and sovereign immunity – and a conclusion that the 1863 Act did not provide a private cause of action (a straw-man legal argument that the Individual Plaintiff Appellants, through their primary counsel, never asserted). Under *Hoover*, that is not enough to sanction the Individual Plaintiff Appellants. Because there was no finding that the Individual Plaintiff Appellants engaged in bad-faith conduct, this Court should reverse.

Conclusion

The district court's monetary sanction against the Individual Plaintiff Appellants must be reversed. The district court's sanction award was based on the legal claims and arguments asserted. Under Rule 11, no monetary sanction can be imposed on the Individual Plaintiff Appellants because they were represented by counsel in asserting those legal claims and arguments. Similarly, Section 1927 only permits a sanction against attorneys, and not represented parties. As for the sanction based on the district court's "inherent authority," it failed to give notice and an opportunity to the Individual Plaintiff Appellants to respond to any specific charge of bad-faith

conduct in which they engaged. And as to the sanctions generally, no findings were made or can be supported that the Individual Plaintiff Appellants made unsupported factual assertions or misrepresentations, or that they brought suit for an improper purpose. Even assuming their legal claims were properly dismissed, there is no basis to affirm any sanction against the Individual Plaintiff Appellants personally.

Dated: October 19, 2015

Lind, Jensen, Sullivan & Peterson
A Professional Association

s/ William L. Davidson
William L. Davidson, I.D. No.: 201777
Paul C. Peterson, I.D. No.: 151543
Attorneys for Individual Plaintiff Appellants
1300 AT&T Tower
901 Marquette Avenue South
Minneapolis, Minnesota 55402
(612) 333-3637

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,272 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 19, 2015

s/ William L. Davidson
William L. Davidson, I.D. No.: 201777
Lind, Jensen, Sullivan & Peterson
1300 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402
(612) 333-3637