The Honorable Judge Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT SR., et al., Plaintiffs, v. J. MARK KELLER, et al., Defendants.	NO. 3:16-CV-05464-RJB STATE DEFENDANT'S REPLY IN SUPPORT OF SANCTIONS NOTED FOR MOTION CALENDAR: March 24, 2017

I. REPLY IN SUPPORT OF SANCTIONS

State Defendants seek appropriate sanctions against Plaintiffs and their attorneys for violating Fed. R. Civ. P. 11(b)(1) and (2) when they certified and filed their motion for leave to amend their complaint (Dkt. 46, Dkt. 46-1). The Court should find that Plaintiffs and their attorneys' certification and filing of Dkt. 46 failed an objectively reasonable test used to determine a Rule 11 violation, and that Plaintiffs and their attorneys' conduct warrants appropriate sanctions to deter future abuses by them.

A. Comenouts' Attorneys Received Due Process Under Rules 5 And 11.

In response to the motion for sanctions, Plaintiffs argue that their attorneys have not received constitutional due process, specifically personal service and an opportunity to independently respond. Dkt. 59 at p. 2. State Defendants have complied with the procedures in Fed. R. Civ. P. 11(c)(1)(A). The Defendants did so by serving a "safe harbor notice" wherein they identified intent to seek Rule 11 sanctions unless Comenouts withdraw or correct Dkt. 46.

Attorney General of Washington
Revenue and Finance Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

See Dkt. 50 at 1, 4, 5. The notice is addressed to each of the identified Plaintiffs and their three attorneys. Dkt. 50. Included with that notice was a filing-ready motion for sanctions against Comenouts and their attorneys. *Id.* Plaintiffs took no action to withdraw or correct within the 21 days that followed. Thereafter, Defendants filed a motion requesting sanctions pursuant to Rule 11 against Comenouts and their attorneys. Dkt. 49.

Comenouts' attorneys appear to argue that they were not "personally" served. But, Federal Rules 5 and 11 permit electronic service of the notice and filed motion. Electronic (not personal) service is permitted because Comenouts' attorneys appeared in the case (under the authority and duty as attorney of record for the Plaintiffs) when they filed a signed complaint (Dkt. 1) and consented to the electronic service of all documents at the email addresses they provided with the filing and use of the electronic filing system. Local Civil Rule 83.2(1), (6); Local Civil Rule 5.

Further, Plaintiffs consented to electronic service of documents through an electronic service agreement. *See* Dkt. 62 at 3-4 (2nd Decl. Krawczyk); Fed. R. Civ. P. 5(b)(2)(E). The process of serving but not filing the safe harbor notice and ready-to-be-filed motion is no different than service of electronic discovery requests. Fed. R. Civ. P. 5(b)(2)(E). And here Defendants served the safe harbor notice with a ready-to-file-motion containing the specific defects in Dkt. 46 upon each of the Comenouts' attorneys at the email address provided to the Court in the complaint and to the State Defendants in an executed electronic service agreement. *See* Dkt. 50 at 4, 5; *see also* Dkt. 51 at 4-5 (prior January letter outlining defects). After providing the twenty-one day opportunity to correct, State Defendants filed a motion for sanctions and served the Plaintiffs using the Court's electronic system. Dkt. 49 at 14. Plaintiffs have offered no evidence which contradicts the service of electronic copies of the safe harbor notice and the motion thru the ECF system.

Plaintiffs also appear to argue that an independent lawsuit was required to seek Rule 11 sanctions against Comenouts' attorneys personally. Dkt. 59 at 2. Specifically, Plaintiffs argue

Attorney General of Washington
Revenue and Finance Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

their attorneys did not get an independent right to respond (Dkt. 59 at 2); that their attorneys enjoy "absolute privilege" or "absolute immunity" (Dkt. 59 at 3-4);[1] and that the Rule 11 conduct would become mooted by the decision on the motion for leave to amend (Dkt. 59 at 3).[2] They also argue in their attorney's declaration that "imposing sanctions implies that the case will never be won." Dkt. 60 at 5. A Rule 11 sanction is not an action on the merits of the case; rather, it is raised as a collateral issue on the representations a person makes to the Court under Rule 11(b)(1)-(4) when signing and filing a pleading. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990); *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1149 (9th Cir. 2003) (sanctioned attorneys have a collateral right to appeal). Here, Plaintiffs' attorneys made themselves subject to Rule 11 when they certified and filed the motion on behalf their clients. Rule 11 provides sufficient due process and opportunity for their attorneys to respond to motion for sanctions. *See* Fed. R. Civ. .P. 11(c)(1). Plaintiffs and their attorneys had ample opportunity to respond, and in fact did respond. *See* Dkt. 59. The State Defendants followed the process due under Rule 11 to request sanctions, and Comenouts and their attorneys have had the notice and opportunity to both correct and then respond. Their "process" arguments are meritless.

B. Sanctions Warranted For Comenout's Attorneys Reasserting Futile Claims.

More than six months ago, this Court issued an order which rejected Comenouts' criminal jurisdiction theories against State prosecutorial and judicial defendants, finding that any amendment of the criminal jurisdictional claims would be futile. *See* Dkt. 18 at 3-5; Dkt. 42 at 4. Comenouts, through their attorneys, have made several unsuccessful requests to amend their action and one of their core purposes is to reassert these futile claims against other State Defendants. Dkts. 26, 35, 43, 46. In this instance, they now seek to relitigate against a Pierce

[1] Absolute privilege refers to a defense against tort claims, primarily defamation. It is not a defense to a violation of Rule 11(b). *See, e.g., Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1077 (D. Ariz. 2012).

[2] *Rawe v. Bosnar*, 167 Wash. App. 509, 512 (2012) cited by Comenouts has nothing to do with mooting CR 11 sanctions, it concerns whether a non-prevailing party in an appeal is entitled to prevailing party fee award.

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County Judge who has already been dismissed. Dkt. 18. Plaintiffs violate Fed. R. Civ. P. 11(b)(2) by re-asserting a claim already deemed futile. State Defendants seek sanctions for this legally unwarranted request which seeks to amend the complaint to reassert claims that this Court already dismissed and determined were "futile."

In their response, the Comenouts' attorneys do not dispute they are engaged in this conduct on behalf of their clients. *See* Dkt. 46 at pp. 4-5; Dkt. 43 at pp. 4-5. Specifically, they continue to challenge that the dismissed claims and theories are futile. *See* Dkt. 59 at 4. And they engage in this conduct despite being cautioned by the Court about the prudence of using the case to relitigate such claims. (Dkt. 42 at 4). They confirm this is their intent again in their response to the motion for sanctions. Dkt. 59 at 4-5 (Comenouts seek the relief of "a declaratory judgment and injunction" specifically "…trying to find out what rights they have to the allotment and to determine who has jurisdiction, whether BIA, city, state or federal and of what type of action" and again citation to cases they claim support their position).

So Plaintiffs' response continues to be that its claims are not futile, and so there is no unreasonable conduct or bad faith. But Plaintiffs or their attorneys just keep missing the point. The unreasonable conduct is not the substantive adjudication of the Comenout's claims on the merits, but their frivolous attempts to relitigate a claim already adjudicated. The act of certifying a motion for leave to amend is an unreasonable disregard of that order. And sanctions are warranted under Rule 11(b)(2) against Comenout's attorneys for trying to use Rule 15 as an end run around the Court's prior order.

C. Sanctions Warranted Against Comenouts And Their Attorneys For Improper And Vexatious Litigation.

State Defendants also seek sanctions against Plaintiffs and their attorneys on grounds that their conduct in continuing to seek leave to amend constitutes improper vexatious and harassing litigation under Rule 11(b)(1) and (2). First, Plaintiffs' attorneys have certified and filed several pleadings (Dkts. 26, 35, 43, 46) which are defective under the Court's rules and

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inconsistent with prior rulings in this case. *See* Dkt. 42 (Order identifying Comenouts' failure to comply with Fed. R. Civ. P. 8 and Local Rule 15). Plaintiffs' have been cautioned by the Court about these mistakes and the attorneys received ample notice of the various defects in Dkt. 46. *See* Dkt. 42 at 3-4 (order cautioning plaintiffs); Dkt. 35 (motion to strike identifying defects); Dkt. 51 at 4-5 (letter identifying defects); Dkt. 50 at 5, 6, 7-18 (second letter, safe harbor notice, ready to file motion). Despite the Court's caution, Plaintiffs continue to file defective and unreasonable pleadings that abuse and harass the Defendants.

Sanctions are also appropriate for violations of Rule 11(b)(1) and (2) for successive or repeated litigation by Plaintiffs. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir.1986)). Here, the State Defendants provide a record of the successive litigation brought by the Comenouts showing cigarette jurisdiction cases dating back to the 1970s. Comenouts wholly fail to acknowledge these prior losses in their pleadings. As this Court has already identified, this is not the Comenout's "first case concerning the mercenary activities on Public Domain Allotment." Dkt. 18 at p. 1. The Plaintiffs continue to revisit the topic over and over hoping to get a different result.

Sanctions may also be appropriate under Rule 11(b)(2) and (3) for successive litigation of frivolous theories by an attorney. *See Roundtree v. United States*, 40 F.3d 1036, 1039-40 (9th Cir. 1994). In *Roundtree*, the Ninth Circuit affirmed sanctions against an attorney who was "enamored" with a frivolous legal theory and repeatedly brought lawsuits under that theory which caused "the government to go through essentially the same expensive exercise", and each time "forced courts to adjudicate essentially the same issues." *Roundtree v. United States*, 40 F.3d 1036, 1039-40 (9th Cir. 1994). The Ninth circuit comments that this conduct is at least as bad as repeated litigation by the same plaintiff "because a lawyer has been able to beguile plaintiff after plaintiff into coming along with him as he rides his hobbyhorse against the government." *Id.* at 1040 (citing *Zaldivar*, 780 F.2d at 832). Here, like the attorney in *Roundtree*, Attorney Kovacevich continues to assert the same legal theories over and over

Attorney General of Washington
Revenue and Finance Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

again, forcing the government and the courts to revisit the *Colville* and prior decisions. Moreover, if sanctions are warranted for violation of Rule 11, evidence of prior conduct by the attorneys and their clients may assist the Court in determining the appropriate sanction which "suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Rule 11(c)(1), (4). In summary, sanctions are warranted against both the Comenout's and their attorneys for the improper purpose of continuing their successive litigation against the State Defendants.

D. Allocating Sanctions Does Not Prevent Granting State Defendant's Motion.

Finally, Plaintiffs' attorneys argue that there is no record before the Court on how to allocate a sanction against both attorneys and clients. Dkt. 59 (*citing Primus Automotive Financial Services v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). This is not a defense to an award of sanction. Rule 11 sanctions are typically levied against the signing attorneys, although the district court is authorized to issue sanctions against the client. Fed. R. Civ. P. 11(c)(1) ("the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation"); *Wright and Miller*, 5A Fed. Prac. & Proc. Civ. § 1336.2 (3d ed. 2017). However, for a violation of Rule 11(b)(2) (not warranted by existing law), as distinguished from Rule 11(b)(1), (3) or (4), Rule 11 sanctions should only be imposed on the offending party's attorney. *See Wright and Miller*, 5A Fed. Prac. & Proc. Civ. § 1336.2 (3d ed. 2017). Here the documents filed with the Court were certified by each of Comenouts' attorneys, and defendants identify Rule 11(c)(1) and (2) violations.

II. CONCLUSION

The District Court should impose appropriate sanctions because the complaint certified by these attorneys continues the trend of alleging frivolous legal propositions, which are unwarranted by existing law, and serve only the improper purpose of harassing the State Defendants through successive complaints and re-litigation.

Attorney General of Washington
Revenue and Finance Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

DATED this 24th day of March, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Andrew Krawczyk
ANDREW KRAWCZYK, WSBA No. 42982
Assistant Attorney General

s/ DAVID HANKINS
DAVID M. HANKINS, WSBA No. 19194
Senior Counsel

7141 Cleanwater Lane SW, P.O. Box 40123
Olympia, WA 98504-0123
Telephone: (360) 586-3506
AndrewK1@atg.wa.gov
DavidH1@arg.wa.gov
OID No. 91027

Attorneys for State Defendants Al Anderson, Raj Velluppillai, and Tom Walsh; Office of Administrative Hearings Administrative Law Judge Terry Schuh and John and Jane Does 1-10

s/ ALICIA YOUNG
ALICIA O. YOUNG, WSBA No. 35553
Assistant Attorney General
Office of the Attorney General
7141 Cleanwater Lane SW, P.O. Box 40123
Olympia, WA 98504-0123
Telephone: (360) 586-6300
E-mail: aliciao@atg.wa.gov

Attorney for Defendants Pierce County Superior Court, and John and Jane Doe Judges 1-10.

PROOF OF SERVICE

I hereby certify that on March 9, 2017, I electronically filed said pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

Randal B. Brown	brownees2@msn.com
Aaron L. Lowe	aaronllowe@yahoo.com
Robert E. Kovacevich	kovacevichrobert@questoffice.net
Sarah Morehead	sarah.morehead@usdoj.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of March 2017, at Tumwater, WA.

s/ Julie Johnson
Julie Johnson, Legal Assistant

Attorney General of Washington
Revenue and Finance Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528