UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

Case No. 17-cv-249

STATE OF WISCONSIN, SCOTT WALKER, and THE HO-CHUNK NATION

Defendants.

BRIEF IN SUPPORT OF THE HO-CHUNK NATION'S MOTION FOR SANCTIONS

INTRODUCTION

On October 25, 2017, the Court granted the Ho-Chunk Nation's ("the Nation") motion for judgment on the pleadings and dismissed the Nation from this lawsuit. The Stockbridge-Munsee Community ("SMC") did not seek reconsideration of that order. Instead, on November 29, 2017, SMC filed a motion for leave to file a first amended complaint ("Motion") in which it re-pleads its original causes of action against the Nation that the Court held were time-barred and asserts "new" causes of action that are objectively baseless, as explained in the Nation's opposition to SMC's Motion.[1]

The filing of the Motion, the brief in support of the Motion, and the proposed amended complaint attached thereto presents the rare situation where sanctions under 28 U.S.C. § 1927 are warranted. SMC's Motion is objectively baseless, procedurally and substantively, and vexatiously increases the litigation costs of the Nation. The Nation, therefore, requests that the Court award the Nation its reasonable attorneys' fees and costs incurred in responding to SMC's Motion.

[1] To avoid repetition and to conserve resources, the Nation incorporates its opposition to SMC's Motion by reference as if fully set forth herein.

ARGUMENT

28 U.S.C. § 1927 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 § 1927 is "to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them." *Kapco Mfg. Co. v. C & O Enters., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989) (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 Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013) (quoting *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184-85 (7th Cir. 1992)).

While a lawyer may represent his client zealously, he is an officer of the court and his representation must be "within the bounds of 28 U.S.C. § 1927 . . . ." *Blair v. Shenandoah Women's Ctr., Inc.*, 757 F.2d 1435, 1438 (4th Cir. 1985). Accordingly, if an attorney files a baseless claim, or fails or refuses to dismiss a claim once it becomes clear that the claim is baseless, § 1927 sanctions may be imposed for unreasonable and vexatious multiplication of proceedings. *See, e.g., Aller v. N.Y. Bd. of Elections*, 586 F. Supp. 603, 608 (S.D.N.Y. 1984) (concluding that sanctions under § 1927 were warranted where the complaint was "almost entirely conclusory," "completely devoid of factual particularity," and in some instances factually inaccurate); *Campana v. Muir*, 615 F. Supp. 871 (M.D. Pa. 1985), *aff'd*, 786 F.2d 188 (3rd Cir. 1986) (proceedings may be multiplied within the meaning of § 1927 when the plaintiff

prosecutes a claim after it has become clear that there is no factual or legal basis for it). A pleading does not have to be entirely frivolous for 28 U.S.C. § 1927 sanctions to attach, so long as a finding of bad faith is made. *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 727 (9th Cir. 1984).

In the Seventh Circuit, sanctions may be imposed under § 1927 if an attorney "pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, [and as a result,] the conduct is objectively unreasonable and vexatious." *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985); *see also Walter v. Fiorenzo*, 840 F.2d 427, 433-34 (7th Cir. 1988). Put differently, sanctions are appropriate under § 1927 where the "attorney has acted . . . in a serious and studied disregard for the orderly process of justice or where a *claim* [*is*] *without a plausible legal or factual basis and lacking in justification*." *Walter*, 840 F.2d at 433 (internal quotations and citations omitted) (emphasis in original). Alternatively, sanctions may be appropriate under § 1927 in other situations where counsel engages in "improper procedural conduct." *Id.* at 434.

While circuit case law appears split as to whether bad faith is a prerequisite for awarding sanctions under § 1927—compare *Moriarty ex rel. Local Union No. 727 v. Svec*, 429 F.3d 710, 722 (7th Cir. 2005) with *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987)—a showing of subjective bad faith is not necessary. *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 614 (7th Cir. 2006) (citing *Hill*, 814 F.2d at 1202). "The standard for objective bad faith does not require a finding of malice or ill will; reckless indifference to the law will qualify." *Id.* Further, "[i]n determining whether an attorney's actions were objectively unreasonable, a court may infer intent from a total lack of factual or legal basis for a suit." *Walter*, 840 F.2d at 433 (internal quotation omitted).

Any party that incurred excess costs, expenses, or attorney's fees as a result of an attorney's unreasonable and vexatious multiplication of proceedings may be entitled to seek relief under 28 U.S.C. § 1927. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), *as superseded by* Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156 (Sept. 12, 1980). It is not necessary that a party seeking § 1927 sanctions prevailed in the underlying proceeding. *Id*.

A request for an award of attorney's fees under § 1927 is addressed to the sound judgment of the district court. *Nisenbaum v. Milwaukee Cty.*, 333 F.3d 804, 810-11 (7th Cir. 2003); *see also Corley v. Rosewood Care Ctr., Inc.*, 388 F.3d 990, 1013 (7th Cir. 2004) (concluding that the district courts "are in the best position to determine whether a legal position is far enough off the mark to be frivolous or whether an attorney conducted an adequate inquiry under the particular circumstances of a case").

Of course, the federal courts also enjoy broad powers to sanction parties through the courts' inherent authority. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Senese v. Chi. Area I.B. of T. Pension Fund*, 237 F.3d 819, 823 (7th Cir. 2001); *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 932-33 (7th Cir. 1989) (en banc). Courts have the ability to craft appropriate sanctions to punish wrongful behavior by parties or counsel, including providing monetary relief and payment of attorneys' fees. Using this inherent power, a court may assess attorney's fees "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers*, 501 U.S. at 45-46 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975)). A federal court may also use its inherent power to fashion a sanction not contemplated by § 1927. *See id.* at 46-48. As the Supreme Court has stated:

> The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without resort to

> the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponents obstinacy."

Id. at 46 (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

In *Boyer v. BNSF Railway Co.*, 824 F.3d 694, 708-13 (7th Cir. 2016), the Seventh Circuit reversed a decision of the Western District of Wisconsin denying a motion for sanctions under § 1927, and imposed sanctions against plaintiff's counsel for filing a lawsuit in Arkansas (with new Wisconsin plaintiffs) after a nearly identical lawsuit against BNSF was dismissed by Judge Crabb as statutorily barred under Wisconsin law, which the Seventh Circuit had affirmed. Even though the claims in *Boyer* were not frivolous, the Seventh Circuit still imposed sanctions against plaintiffs' counsel for constantly changing litigation positions and seeking to avoid the preclusive effect of an earlier decision by the Seventh Circuit by filing a new lawsuit in Arkansas—a forum that had no real connection with the underlying facts or parties. *Id.* at 709-10.

Before the district court, the *Boyer* plaintiffs' counsel argued that a Wisconsin statute that barred an identical claim in the earlier lawsuit involving different plaintiffs did not bar the current lawsuit, and advanced the same argument in plaintiffs' appellate brief. However, during oral argument, plaintiffs' counsel changed position on a critical point. The Seventh Circuit admonished:

> This is yet another change of position to an argument that was not raised below. And it is unacceptable. It is one thing to flesh out, winnow, or sharpen one's case as the record develops and counsel responds to the evidence and arguments of his opponent. It is another to repeatedly throw item after item at the wall to see what might stick.

Id. at 709. The court's observation has particular resonance here. Like the plaintiffs' counsel in *Boyer*, SMC's counsel has changed litigation positions in its most recent filings and has filed the

Motion in a transparent attempt to avoid the preclusive effect of the Court's October 25 Order. And worse than in *Boyer*, SMC's old and "new" claims in its proposed amended complaint are frivolous, too.

In filing the Motion, SMC's counsel exhibits behavior that is recklessly indifferent to the rules of civil procedure. Rather than timely seeking reconsideration of the Court's October 25 Order dismissing the Nation from the lawsuit—with the attendant standards for a motion for reconsideration—SMC's counsel improperly seeks to use the so-called "liberal standards" of Rule 15 to seek reconsideration of the October 25 Order.

SMC's proposed amended complaint re-pleads causes of action against the Nation that the Court dismissed as time-barred, and the law of the Seventh Circuit is clear that dismissal of time-barred claims is dismissal on the merits with prejudice. *Pavlovsky v. VanNatta*, 431 F.3d 1063, 1064 (7th Cir. 2005). SMC's counsel ignores this law and cloaks its procedural end-around by alleging, without any factual support whatsoever, that representatives from the State of Wisconsin and representatives of the Nation—*parties on opposite sides of a high-stakes negotiation*—somehow conspired to defraud SMC of the benefits of the Second Amendment to its gaming compact with the State in 2003—before the before the Second Amendment existed—and concealed this conspiracy until May 25, 2017. The cheapest "thriller" at the airport kiosk has a more plausible plot line than SMC's counsel's conspiracy theory.

Indeed, the entire basis of the SMC's "fraudulent concealment" claim is a declaration the Nation filed on May 25, 2017 in opposition to the SMC's motion for preliminary injunction that does not contain any information that would allow a remotely reasonable inference of a conspiracy between the Nation and the State to defraud anyone—the declaration simply recounts the negotiations between the State and the Nation over changes to the "Ancillary Facilities"

provision in the Nation's gaming compact. *See* ECF No. 31, Declaration of Thomas J. Springer. And it is telling that SMC and its counsel had the Springer declaration for over six months before filing the Motion—conveniently, after the Court's October 25 Order—but now suggest to the Court that they just "discovered" the grounds for its motion and the bogus fraudulent concealment claim against the Nation.

Substantively, SMC's two "new" causes of action against the Nation in the proposed first amended complaint are baseless. As explained in detail in the Nation's opposition to the Motion, the proposed "imminent violations" cause of action merely rehashes the already-dismissed "Ancillary Facilities" cause of action in an attempt to conduct a discovery fishing expedition. *See* HCN Opp. Br., pp 11-13. SMC and its counsel now claim they do not know if the Nation was violating the ancillary facilities provision of the Nation's Compact when SMC's counsel filed the original complaint in May 2017—despite alleging in its original complaint that the Nation's gaming activities at the Wittenberg site at that time violated the Ancillary Facilities provision, as well as alleging that the violation would continue with the Wittenberg expansion. *See* ECF No. 5, Compl., ¶¶ 77 – 81. The original allegations were not alleged on "information and belief."

What is more, in SMC's September 15 opposition to the Nation's motion for judgment on the pleadings, its counsel argued that "[i]n both its current and its expanded state, Ho-Chunk's Wittenberg Casino would qualify as a "Gaming Facility' because gaming is the 'Primary Business Purpose' of the facility. . . . Therefore, Ho-Chunk's operation of the Wittenberg Casino – and, especially, its expansion of the Wittenberg Casino – violates the Ho-Chunk Compact." ECF No. 58, SMC Opp. Br., at 21. Yet, in SMC's Motion, its counsel argues that "[t]his Court concluded that SMC is asserting that Ho-Chunk has violated the ancillary facility provision of

the Ho-Chunk Compact since it opened in 2008 (Doc. 67 at 10), but SMC did not make that specific assertion." ECF No. 76, at 8. The record clearly establishes that SMC in fact did make "that specific assertion," and that SMC's counsel will ignore, distort and contradict the record and prior representations to the Court in a desperate attempt to revive SMC's action against the Nation.

SMC and its counsel thus find themselves on the horns of a dilemma. Based on their current position, the relevant "Ancillary Facility" allegations against the Nation in SMC's original complaint and SMC's arguments in its opposition to the Nation's motion for judgment on the pleadings were objectively baseless and asserted in bad faith. There can be no other reasonable conclusion. As the Seventh Circuit noted in *Boyer*, these kinds of abusive litigation tactics typify bad faith, and this conduct provides another basis for imposing sanctions under § 1927.

Finally, SMC's state law "fraudulent concealment" cause of action against the Nation and its public nuisance allegation fail as a matter of law, and SMC's counsel had to know this prior to filing its Motion. As the Nation exhaustively shows in its opposition to the Motion, these state law claims are barred by various preclusion doctrines, are pre-empted by the Indian Gaming Regulatory Act, are barred by Nation's tribal sovereign immunity, and, if that were not enough, SMC fails to allege *any* facts that would support a claim for fraudulent concealment against the Nation. *See* HCN Opp. Br., pp. 16-33.

CONCLUSION

In *Boehm v. Martin*, 2017 WL 5186468, at *6 (W.D. Wis. Nov. 8, 2017), this Court granted a partial award of fees to the defendants as the "prevailing party" under the plaintiffs' copyright infringement action, but denied the defendants' motion for sanctions under § 1927

because the underlying infringement claims were not objectively unreasonable. However, this Court served the following warning on counsel: "But let this serve as a strong warning to counsel to stop pursuing claims without evidentiary support and raising argument that the court has already rejected." *Id.* As evidenced by SMC's proposed amended complaint and counsel for SMC's meritless arguments in support of its Motion, SMC's counsel has failed to heed this warning.

For all of the foregoing reasons, the Court should impose sanctions against SMC's counsel and award the Nation its attorneys' fees and costs in responding to SMC's motion for leave to file a first amended complaint.

Dated: December 13, 2017

Respectfully Submitted,

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