Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN JACOBSEN, CONNIE JACOBSEN, RYAN KILDEA and ARICA KILDEA, Plaintiffs, vs. MARK DRISCOLL and JOHN SUTTON TURNER, Defendants.	No. 2:16-cv-00298 JLR **DEFENDANT JOHN SUTTON TURNER'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE PURSUANT TO FED. R. CIV. P. 4(m) AND FOR SANCTIONS BASED ON THE COURT'S INHERENT POWER** **NOTE ON MOTION CALENDAR: FRIDAY, JULY 8, 2016** **WITHOUT ORAL ARGUMENT**

REPLY

Plaintiffs' excuses for the failure to serve the complaint are nothing more than an attempt to avoid a justifiable sanction. This last effort to sully Mr. Turner's name, again with unsworn facts, is a "hail mary" by Plaintiffs and their counsel to justify what is an obvious bad faith use of the legal process. Plaintiffs claim that they were justified in not proceeding with service because they failed to raise the funds necessary for attorney fees. The lawsuit never should have been filed on the hope that funds would be raised. This excuse by Plaintiffs should not be accepted by the Court because there was no reason to file the lawsuit at the time it was filed. As explained below, bad faith exists here and the

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bad faith was continued through a lengthy statement of unsworn facts. In order to decrease the impact of being called a racketeer with unsworn facts, Mr. Turner is forced to further address the defamatory statements made by Plaintiffs and their attorney. Also included in this reply is additional legal analysis supporting the claim that filing a lawsuit like this, without making any effort to serve it was in bad faith.

A. RESPONSE TO PLAINTIFFS' MISLEADING OR INCORRECT STATEMENTS OF FACT

Mr. Fahling references his letter to Mars Hill Church in December 24, 2014, as some sort of opportunity for Mr. Turner to respond and engage in communication. This claim by Mr. Fahling and his clients is disingenuous. Mr. Turner resigned from Mars Hill Church three months earlier in September 2014. The letter was sent directly to the Church and not to Mr. Turner or anyone representing him. Mr. Turner was not a named defendant at that time nor was it ever disclosed to him that he would be individually named in a lawsuit. Mr. Turner could have been contacted directly as he was living in Seattle and was no longer an employee of Mars Hill Church. No such attempts were made.

Six months before the lawsuit was filed, Mr. Turner was in contact with Rob Smith and he offered to discuss with Mr. Smith and anyone else the issues. Mr. Smith was believed to be the leader in pursuing the RICO claims. At no time did the Kildeas or the Jacobsens take Mr. Turner up on this offer. At this point, it was not known by Mr. Turner that he would be singled out as one of two named defendants.

Mr. Fahling incorrectly states that Mr. Turner was represented by counsel on March 6, 2016, when Mr. Turner reached out to the Kildeas and Jacobsens. In fact, Mr. Turner specifically stated in his email to the Plaintiffs that he did not yet have counsel. The declarations of the Plaintiffs, presumably written by Mr. Fahling are false in this regard.

Much time is devoted in Plaintiffs' brief to justifying the failure to pursue this claim as being a financial decision by the Jacobsens and Mr. Fahling. It is claimed that Mr. Jacobsen has not worked in two years and that Mr. Fahling did not want to utilize the retirement savings of Mr. Jacobsen for attorney fees. This analysis should have been done prior to filing the lawsuit. Presumably, discussions

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were engaged in about Mr. Fahling's reasoning for not taking this case on a contingency verses hourly and the prospects for building their $250,000 war chest to pursue this case. Choosing to file this lawsuit knowing that they would not raise the funds (or at least knowing they did not yet have the funds) was irresponsible and in our opinion bad faith on the part of counsel and his clients. As for the financial ability of the Jacobsens to fund this lawsuit, the Jacobsens live on the 3rd hole of TPC Snoqualmie in a house valued at just under $1 million dollars by Zillow.[1] Claiming poverty to pursue this case is an attempt to garner sympathy that should not be given. Mr. Jacobsen is 62 years old, worked at a prestigious law firm in Seattle for almost 22 years and is presumably retired as opposed to looking for work as is inferred in the brief. [2] He is hardly poor and unemployed and such a claim is an insult to those struggling financially.

As for the raising of funds for this litigation, prior to filing the lawsuit, the Plaintiffs and their counsel knew or should have known that the funds would never be raised based on prior donations. Mr. Fahling even claims that donations were continuing as a basis for him to reasonably believe that funds would come in supporting an alleged good faith belief that the lawsuit could be filed. This belief is not reasonable and should have prompted Mr. Fahling to hold off rather than continue with this reckless filing of a RICO lawsuit. The prior donations to the Go Fund Me account shows that the Plaintiffs and counsel knew they would not raise the money and that they filed the lawsuit despite this knowledge for improper purposes. Prior to the filing of the lawsuit, total funds raised were $33,925.00.[3] Total attorney fees and filing fees were $41,660.00.[4] Legal fees due at that time were $7,735.00.[5] They had a negative

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[1] http://www.zillow.com/homes/7210-Laurel-Ave-SE,-Snoqualmie,-WA-98065_rb/?fromHomePage=true

[2] https://www.linkedin.com/in/brianljacobsen?authType=NAME_SEARCH&authToken=Uxzp&locale=en_US&trk=tyah&trkInfo=clickedVertical%3Amynetwork%2CentityType%3AentityHistoryName%2CclickedEntityId%3Amynetwork_3057414%2Cidx%3A0

[3] https://www.gofundme.com/marshilllawsuit (look at updates section)

[4] https://www.gofundme.com/marshilllawsuit (look at updates section)

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balance with counsel and chose to file the lawsuit anyway. After they filed the lawsuit, only $4,725.00 was raised and $4,000 of that was donated by Jason and Elissa Laxdal who are the daughter and son-in-law of Plaintiffs Mr. and Ms. Jacobsen.[6] There is absolutely no evidence to suggest that the Plaintiffs would raise these funds in 90 days as they claim they thought would happen.

Plaintiffs infer in their briefing that there was some urgency in filing this lawsuit. There was no urgency. The statute of limitations is 4 years and was nowhere near the four year mark. Furthermore, if the Plaintiffs knew they only had 90 days to collect fees and get this lawsuit served then they should have dismissed voluntarily the case at the 90 day mark which was on the Tuesday following Memorial day, May 31, 2016. Instead they consciously chose to leave the case open knowing that the time had passed and their alleged goal of raising money within 90 days had not been met. If the goal to raise funds within 90 days was truly a goal acknowledged by Plaintiffs and their counsel then they should have known by the end of May it was time to dismiss the case. This alleged goal of 90 days to raise funds is created after the fact to avoid sanctions. If it were true, the Plaintiffs would have filed a dismissal. It was irresponsible and a deliberate decision to defame Mr. Turner and label him a racketeer without ever giving an opportunity to Mr. Turner to clear his name. Plaintiffs and Mr. Fahling are to blame and all should be sanctioned for this irresponsible behavior.

The Plaintiffs try to mitigate the harm of the lawsuit by claiming that the allegations were previously reported in the media. The Plaintiffs and their counsel know that the filing of a lawsuit has formality and significance in the eyes of the public. This lawsuit was assumed by the public to be an accurate reflection of the facts in spite of the obvious failure of any of the Plaintiffs to swear under oath that any of the facts were true. In fact, when given the opportunity to swear under oath that the facts alleged in the complaint are true, the Plaintiffs chose not to put their reputations on the line and swear under oath in their response to Defendant Turner's motion. The harm of a lawsuit is far more significant

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[5] https://www.gofundme.com/marshilllawsuit (look at updates section)

[6] https://www.gofundme.com/markdriscollrico

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in the eyes of prospective employers and other members of the public than the Plaintiffs admit in their response. The filing of the lawsuit was a designed attack on the reputation of Mr. Turner facilitated in bad faith by a lawyer.

Finally, Plaintiffs make the claim that the facts were well founded and that they would have survived the pleading requirements required for a RICO claim and a claim of fraud. This baseless claim cannot be proven since the failure to serve the lawsuit never gave Mr. Turner the opportunity to challenge the sufficiency of the pleadings. In any event, it is our position that the case would have been dismissed on the pleadings very early on in the litigation.

B. LEGAL RESPONSE TO THE ARGUMENTS OF PLAINTIFFS

There is an obvious harm to a reputation when a RICO claim or Fraud claim is brought verses some other type of claim. Because of its criminal purpose, the "mere assertion of a [civil] RICO claim….has an almost inevitable stigmatizing effect on those named as defendants." (*Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) aff'd 113 F.3d 1229 (2d Cir. 1997)). Notably the *Katzman* case also involved sanctions in the context of a civil RICO claim. As a result, "[c]ivil RICO is an unusually potent weapon-the litigation equivalent of a thermonuclear device." (*Id*). In order to allege civil RICO correctly, the Plaintiffs must allege facts that establish "continuity" and a "relationship" between those acts and it is the "continuity" that the Plaintiffs were never going to be able to prove and that is likely why they chose to give up the case. The Supreme Court has explained that "[c]ontinuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." (*H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)). To allege closed-ended continuity, a plaintiff must allege facts showing that a "series of related predicates extending over a substantial period of time." (*Id*).

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To allege open-ended continuity, on the other hand, a plaintiff must plead facts that refer to "past conduct that by its nature projects into the future with a threat of repetition" (*Id*). Because Mr. Turner left the church in September 2014 and the acts were only for a finite period, they can't establish an open ended continuity and because 2.5-3 years is likely not a "substantial period of time" under the case law, they also could not prove closed ended continuity. The Plaintiffs knew their case was doomed from the beginning and simply wanted to put a disparaging and defamatory story into an official looking document so as to look credible. This type of irresponsibility should not be condoned.

Contrary to the claims of Plaintiffs, it is not Defendant's contention that FRCP 4(m) allows for a dismissal with prejudice. However, the power to sanction includes not just the ability of monetary sanctions but also the sanction of a dismissal with prejudice. The power to sanction in this instance is entirely discretionary by the court. In this case, to avail himself of the Court's inherent power, Mr. Turner must establish that the Plaintiffs and/or their lawyer "acted in bad faith, vexatiously, wantonly or for oppressive reasons." (*Chambers v. NASCO, Inc.* 501 US 32, 45-46, 11 S.Ct. 2123, 2133 (1991)). In a similar case of RICO allegations the Court did find that CR 11 sanctions could be appropriate where the motive for filing the suit and not serving it was to simply place the claims in the public eye gaining notoriety and publicity for their cause. (*Bryant v. Brooklyn Barbeque Corp.*, 130 F.R.D. 165 (1990)). The *Bryant* Court said the following regarding sanctions in this same scenario but under Rule 11:

> Even if, however, the court found that plaintiff had established that a reasonable basis existed for the filing of the original complaint, the court would find that sanctions must be assessed based on the Rule 11 language prohibiting the filing of a pleading for an improper purpose. As noted earlier, plaintiff admits that the pleading was filed to coincide with the sentencing of one of the defendants and that plaintiff made absolutely no effort to serve the complaint after it was filed. From these two admissions the court can reasonably conclude that the complaint was filed solely to attract publicity to plaintiff's claims and to harass defendants, and not because plaintiff's attorney had conducted an inquiry revealing that the claims had a reasonable basis in law or in fact.
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> Indeed, the mere fact plaintiff filed a complaint without attempting to serve it within the 120 day period constitutes evidence that rule 11 sanctions are appropriate. In *Ordower v. Feldman*, 826 F.2d 1569 (7th Cir.1987), the Seventh Circuit affirmed the

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> district court's award of rule 11 sanctions when plaintiffs did not serve defendants until more than 150 days after filing their complaint. *Id.* at 1570. Like plaintiff in the instant case, plaintiffs in *Ordower* attempted to serve defendants after the 120 day service period of Fed.R.Civ.P. 4(j) had expired. The appellate court affirmed the district court's finding that "plaintiffs vexatiously and unreasonably multiplied the proceedings by serving [defendant] even though [they] must have been aware that [defendant] would move to dismiss under Rule 4(j)...." *Id.* at 1574.

(*Bryant v. Brooklyn Barbeque Corp.*, 130 F.R.D. 665, 670 (W.D. Mo. 1990), *aff'd sub nom. Bryant v. Brooklyn Barbecue Corp.*, 932 F.2d 697 (8th Cir. 1991)).

As in the *Bryant* case, the Plaintiffs filed a suit apparently for the sole purpose of creating media attention and either to drive funders to their Go Fund Me account or for the purpose of disparaging Mr. Turner. Either way, it is bad faith to file a lawsuit, especially a RICO claim that labels Mr. Turner a racketeer. Plaintiffs knew this would be dismissed after 90 days and still chose to wait until a motion was filed rather than dismiss the case voluntarily. This failure to dismiss voluntarily is another sign that they pursued this case in bad faith with no intention of ever serving Mr. Turner.

It is our position that the conduct here satisfies the standard in the *Chambers* case, namely that the Plaintiffs acted in bad faith, vexatiously, wantonly or for oppressive reasons. (*Id.*) "But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." (*Chambers v. NASCO, Inc.*, 501 US 32, 46-48, 111 S.Ct. 2123, 2136 (1991)). Here the inherent power of the court supports a sanction and it is our opinion the harshest sanction possible, a dismissal with prejudice, should be permitted.

"A finding of bad faith does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides* the assertion of a colorable claim will not bar the assessment of attorney's fees." (*Mark Industries, Ltd. v. Sea Captain's Choice, Inc.* (9th Cir. 1995) 50 F.3d 730, 732, quoting *Lipsig v. National Student Marketing Corp.*, (DC Cir. 1980) 663 F2d 178, 181). Here, the Court need not find that the facts are frivolous or false. Here the act of filing the lawsuit, with no intention of serving it or filing it on the

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misplaced hope of raising $100,000 in 90 days and then failing to dismiss at the end of those 90 days voluntarily is an act of bad faith admitted by the Plaintiffs and their counsel. Thanks to the Plaintiffs, Mr. Turner has been labelled a "racketeer" just with the filing of an unverified lawsuit. Undoubtedly, this stigma of labelling Mr. Turner was made with a purpose to disparage him and perhaps to orchestrate an early settlement. The plaintiffs apparently believed they would have no repercussions and Mr. Fahling apparently thought there was nothing improper about filing a lawsuit with allegations of racketeering knowing that he would never actually serve the lawsuit.

If the court is hesitant to sanction in this circumstance, Defendant simply would ask the court to consider why the filing of the lawsuit could not have been postponed until funds were raised. Defendant and his attorney do not believe there is any reason to have filed the lawsuit at the time it was filed. Plaintiffs could have postponed the filing of the lawsuit and attempted to raise the money for litigation. It was a misuse of the legal process to file the lawsuit with the distinct possibility that the funds would never be raised. Sanctions are justified and should be awarded. Here the sanction of dismissal with prejudice is the most appropriate sanction.

CONCLUSION

Defendant John Sutton Turner respectfully asks the Court to enter the proposed order dismissing Plaintiffs' claims against him with prejudice and to grant an award of fees against both Plaintiffs and their counsel to dissuade this type of conduct in the future.

DATED this 8th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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DATED this 8th day of July, 2016, in Seattle, Washington.

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