No. 22-2704

In the United States Court of Appeals for the Seventh Circuit

WILLIAM FEEHAN,

Plaintiff-Appellee,

v.

TONY EVERS,
in his official capacity as Wisconsin's Governor,

Defendant-Appellant.

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT GOVERNOR TONY EVERS

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 2:20-cv-01771
The Honorable Chief Judge Pamela Pepper

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2704

Short Caption: William Feehan v. Tony Evers, in his official capacity of Wisconsin's Governor

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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N/A

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N.A

Attorney's Signature: /s/ Jeffrey A. Mandell Date: December 16, 2022

Attorney's Printed Name: Jeffrey A. Mandell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Rachel E. Snyder Date: December 16, 2022

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Richard A. Manthe Date: December 16, 2022

Attorney's Printed Name: Richard A. Manthe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Jonathan L. Williams Date: December 16, 2022

Attorney's Printed Name: Jonathan L. Williams

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Marina Eisner Date: December 16, 2022

Attorney's Printed Name: Marina Eisner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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STATEMENT REGARDING ORAL ARGUMENT

This appeal turns on important but straightforward legal issues involving a district court's authority to sanction parties and counsel for meritless litigation. Governor Evers submits that the brief adequately explains the district court's erroneous assessment of its authority to reach the merits of his arguments for sanctions and the critical importance of preserving a district court's authority to impose sanctions in a post-election challenge like this one. While Governor Evers would welcome the opportunity to address any questions the Court may have at oral argument, it does not appear that this is a case in which the decisional process would be significantly aided by oral argument.

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JURISDICTIONAL STATEMENT

This is an appeal from a post-judgment order denying a motion for sanctions under 28 U.S.C. § 1927 and the court's inherent authority.

Subject-matter jurisdiction was based upon federal-question jurisdiction under 28 U.S.C. § 1331. The amended complaint asserted claims under 42 U.S.C. § 1983 for alleged violations of article I, section 4, clause 1 (Count I) and the Fourteenth Amendment (Counts II and III) of the United States Constitution. (Dkt. 9.) The district court dismissed this case on December 9, 2020, and this Court vacated that order upon determining that the case had become moot on February 1, 2021. (Dkt. 83, 96.) The district court's jurisdiction to consider sanctions despite the lack of subject-matter jurisdiction is briefed in part I of the argument.

Appellate jurisdiction exists under 28 U.S.C. § 1291. The order denying sanctions was entered on August 24, 2022, and the notice of appeal was filed on September 23, 2022. (App.; Dkt. 114.)

STATEMENT OF THE ISSUES

This case involves review of an order denying a motion for sanctions. There are two issues presented:

1. Whether the district court erred when it concluded that the issuance of the mandate issued in the previous appeal terminated its jurisdiction to impose sanctions.

2. Whether the district court erred when it concluded that it could not impose sanctions for asserting meritless claims because it dismissed this case on procedural grounds.

INTRODUCTION

On November 3, 2020, Wisconsin voters chose Joseph R. Biden to be the next President of the United States. After Biden was certified as the winner in Wisconsin, a team of lawyers filed this case seeking to throw out the results. This case was not alone; they filed similar claims alleging "massive election fraud" in three other states. All four cases failed. Condemning the litigation as a "historic and profound abuse of the judicial process," one court sanctioned these lawyers for their attempt to "deceive[]a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated."[1]

Wisconsin Governor Tony Evers sought sanctions to reimburse the taxpayers for

[1] *King v. Whitmer*, 556 F.Supp.3d 680, 688 (E.D. Mich. 2021), *appeal pending as* No. 22-1010 (6th Cir.).

the cost of defending this lawsuit, but the district court denied his motion. It did so not because it concluded that the plaintiff's claims had merit, but because it believed it was powerless to impose sanctions. The district court mistook the scope of its authority. This Court should vacate the order denying sanctions and remand for the district court to consider sanctions under the correct legal standards.

STATEMENT OF THE CASE

On November 3, 2020, 3,297,352 Wisconsin voters cast their votes for President of the United States. (Dkt. 83, at 2.) Joseph R. Biden received 1,630,673 of those votes—over 20,000 more than the incumbent, Donald J. Trump. (*Id.* at 2-3.) Fifteen days later, Trump petitioned under Wisconsin law for a recount of the state's two largest counties: Dane and Milwaukee. (*Id.* at 3.) The partial recount affirmed the result, and pursuant to Wis. Stat. § 7.70(3), the Chair of the Wisconsin Elections Commission (WEC) certified the results on November 30. *(Id.*) The same day, Governor Evers fulfilled his obligations under Wis. Stat. § 7.70(5)(b) by signing the certificate of ascertainment for Biden's slate of presidential electors to cast Wisconsin's votes in the Electoral College. (*Id.*) Under federal law, Governor Evers's certificate was "conclusive . . . so far as the ascertainment of the electors appointed by [Wisconsin] is concerned," absent a successful contest under Wisconsin law. *See* 3 U.S.C. § 5.

On the same day as the certification, WEC made available the results of its post-election voting machine audit conducted pursuant to state and federal law. (Dkt. 98, at 10.) At a public meeting the next day, WEC's immediate past chair (a former Republican legislator, Dean Knudson) explained that the audit found "no evidence

of systemic problems," "hacking," or "switched votes." (*Id.* at 10-11.) The audit included equipment from Dominion Voting Systems and found "no evidence of any Dominion machines changing votes or doing anything of the like." (*Id.* at 11.) Knudson announced that the audit showed that Wisconsin's "election equipment operated with great accuracy" and that he had "yet to see a credible claim of fraudulent activity during this election." (*Id.*)

On December 1, the day after WEC released its audit results, a team of lawyers including Sidney Powell, John Eastman, and L. Lin Wood filed this case on behalf of a would-be Trump elector, William Feehan, and a candidate for the U.S. House of Representatives, Derrick Van Orden. (Dkt. 1, at 7-8.) This complaint did not last long. Van Orden issued a statement saying that his name was "[u]sed [w]ithout [p]ermission," and on December 3 counsel filed an amended complaint omitting him. (Dkt. 9; Dkt. 98, at 2 n.1.)

Despite WEC's audit demonstrating the election results' "great accuracy," the amended complaint claimed to "bring[] to light a massive election fraud." (Dkt. 98, at 11; Dkt. 9, at 1.)[2] It claimed to rest upon "statistical anomalies and mathematical impossibilities" discovered by various "experts," one of whom allegedly "demonstrate[d] it is statistically impossible for Joe Biden to have won Wisconsin." (Dkt. 9, at 1-2.) It claimed that this "massive election fraud" had been both

[2] Powell and others filed nearly identical cases in Arizona, Georgia, and Michigan. *See Bowyer v. Ducey*, No. CV-20-cv-02321-PHX-DJH (D. Ariz.); *King v. Whitmer*, Civ. Case No. 20-13134 (E.D. Mich.); *Pearson v. Kemp*, Civ. A. No. 1:20-cv-4809-TCB (N.D. Ga.).

"amplified and rendered virtually invisible by computer software created and run by domestic and foreign actors for that very purpose." (*Id.* at 2.) The allegations traced this "fraud" to Dominion, which they alleged was "founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election." (*Id.* at 3.) The amended complaint alleged that "agents acting on behalf of China and Iran" accessed Dominion software to "monitor and manipulate" the 2020 election, relying in part on a pseudonymous affiant called "Spyder," who was falsely identified as a "former US Military Intelligence expert." (*Id.* at 7, 24; Dkt. 98, at 14.)

Feehan also claimed that WEC violated Wisconsin law through directives that he acknowledged were issued months or years before the 2020 general election. (Dkt. 9, at 11-13.) To get around the rule that federal courts cannot order state officials to "conform their conduct to state law," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1983), Feehan cast his claims as violations of the Electors Clause, U.S. Const. art. I, § 4, cl. 1, and the Fourteenth Amendment. (*Id.* at 37-46.) Even though it has long been the law that "any claim against a state electoral procedure must be expressed expeditiously," *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990), the amended complaint did not explain why Feehan failed to challenge these practices until after Governor Evers had already certified the election results. *See Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925-26 (7th Cir. 2020) (rejecting a similarly timed challenge to WEC's guidance because the

delay imposed "unquestionable harm on . . . the State's voters, many of whom cast ballots in reliance on the guidance").

Because Feehan filed so late, the case proceeded rapidly. A request for a temporary restraining order and supporting brief accompanied the original complaint on December 1, and along with the amended complaint on December 3, Feehan filed an amended motion for injunctive relief, requesting that briefing conclude within just two days. (App. 4.) On Friday, December 4, the district court ordered Governor Evers and WEC to respond to the motion for preliminary injunction by the following Monday, December 7. (Dkt. 29, at 8.) Governor Evers filed his response on December 7, along with a motion to dismiss. (Dkt. 51, 55, 59.)

The district court denied Feehan's request for injunctive relief and dismissed the case on December 9. (Dkt. 83.) The court identified four separate bases for dismissal: (1) a lack of standing, (2) the court's inability to grant the requested relief because, for example, the plaintiff sought to enjoin acts that had already occurred, (3) the Eleventh Amendment, and (4) abstention. (App. 5 (summarizing the dismissal order).) Because the district court concluded that it lacked subject-matter jurisdiction, it never addressed Governor Evers's arguments for dismissal under Rule 12(b)(6). (Dkt. 83, at 43.)

Feehan appealed the next day, December 10. (Dkt. 84.) Feehan did not seek temporary injunctive relief from this Court or otherwise seek to expedite his appeal. *See* Fed. R. App. P. 8, 18. Instead, he sought emergency relief from the Supreme Court on December 12, asking for a ruling before Congress met to certify the

Electoral College results on January 6, 2021. (*See* Mot. to Consolidate & Expedite Consideration 2, *King v. Whitmer*, No. 20-815 (U.S. filed Dec. 18, 2020).) He then filed an amended notice of appeal to this Court on December 15 (Dkt. 90), but again took no steps to ask this court for expedited treatment or immediate relief. On December 18 and again on December 30, Feehan's counsel asked the Supreme Court to expedite its consideration of his petitions in this and their three other cases. (Mot. to Consolidate & Expedite Consideration 7), *King v. Whitmer*, No. 20-815 (U.S. filed Dec. 18, 2020; Ltr. to Scott Harris 2, *King v. Whitmer*, No. 20-815 (U.S. filed Dec. 30, 2020).)

Inauguration day came and went, and Feehan did not act to dismiss either his appeal in this Court or his petition to the Supreme Court. On January 25, 2021, Governor Evers and WEC moved to dismiss the appeal, and Feehan concurred the following day. (Joint Mot. of Defs.-Appellees to Dismiss Appeal as Moot, *Feehan v. Wis. Elections Comm'n*, No. 20-3448 (7th Cir. filed Jan. 25, 2021); Not. of Pl.-Appellant's Concurrence, *Feehan v. Wis. Elections Comm'n*, No. 20-3448 (7th Cir. filed Jan. 26, 2021).) This Court granted the motion on February 1, and the mandate issued on February 23. (Dkt. 96.) Feehan's counsel did not withdraw his Supreme Court petition, which remained pending until the Court denied it on March 1. (Orders in Pending Cases 4 (U.S. Mar. 1, 2021).)

With the dust finally settled, Governor Evers moved for sanctions under 28 U.S.C. § 1927 and the court's inherent authority on March 31. (Dkt. 98.) The motion contended that Feehan's claims were so frivolous as to justify requiring Feehan and

his counsel to reimburse the taxpayers of Wisconsin for all of Governor Evers's attorney's fees.[3] (*Id.* at 26, 28.) Governor Evers identified a litany of factors supporting this request. Chief among them were Feehan's unreasonable delay in waiting until after Biden's Wisconsin victory was certified and WEC's audit had demonstrated that the complaint's allegations of fraud were false. (*Id.* at 9-12.) Feehan had misrepresented case law, including by making up a quote that had significantly misrepresented the cited case. (*Id.* at 13-14 (citing Dkt. 83, at 32).) His claims relied on a motley assortment of purported "experts"—some of whom were anonymous, others of whom had inflated credentials, and still others whose credentials were obviously lacking. (*Id.* at 14-17.) Despite all of this, Feehan had sought to have Wisconsin's election results overturned—an unprecedented form of relief—and asked the court to enjoin actions that had already occurred. (*Id.* at 17-18.) The motion also identified Feehan's attorneys' many failures to follow proper procedures, resulting in additional work for the parties and the court. (*Id.* at 12-13.)

The district court denied Governor Evers's sanctions motion, concluding that it lacked jurisdiction to consider the motion because this Court's mandate issued before the motion was filed. (App. 19-20.) It reached that conclusion based solely on this Court's decision in *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983), which it understood to hold that "once the mandate issues, there no longer is a case or controversy over which the district court may

[3] Governor Evers was sued in his official capacity as governor, not in his personal capacity. (Dkt. 9, at 9.)

exercise Article III jurisdiction." (App. 21.) The district court acknowledged that the appeal in *Overnite* was pending more than eight months after judgment, whereas the appeal in this case lasted only two. (App. 20.) And it recognized that "[Governor Evers] and others were involved in other, similar lawsuits and were working . . . around the clock to address pleadings filed in multiple cases in multiple forums" while the appeal was pending, leaving "little time" to file before the mandate issued. (App.21.) But because it understood *Overnite* to deprive it of jurisdiction, the district court deemed these factors irrelevant. (App. 21.)

The district court then addressed the merits "[i]n an abundance of caution." (App. 24.) The district court determined that it would not award sanctions under § 1927, principally because the case was dismissed on non-merits grounds. The district court recognized that filing a case that is "patently without merit" would justify sanctions under § 1927, that other courts had determined that similar claims were "meritless," and that it might have reached the same conclusion "had it reached the merits." (App. 24-25.) But having "dismissed the case on procedural grounds," it never "ha[d] the opportunity to" determine whether Feehan's claims were "wholly meritless and frivolous" and it thus lacked any "basis" to award sanctions for filing a meritless claim. (App. 24-25.) Having determined itself powerless to act on what it deemed the "heart" of Governor Evers's argument, the district court declined to award sanctions under § 1927. (App. 24-26.)

The district court reached a different conclusion under its inherent authority. If the court had jurisdiction, it would hold a hearing to determine whether Feehan

had "fabricated a quote" from another case on a critical point: whether the district court had power to grant relief even though Wisconsin had already certified the election results. (*See* App. 26-27, 29.) Although this misrepresentation was among the bases for seeking § 1927 sanctions, the district court did not explain why this conduct would not warrant sanctions under § 1927. (*See* Dkt. 98, at 13, 19.)

SUMMARY OF THE ARGUMENT

The district court never reached what it recognized as the "heart" of Governor Evers's sanctions motion: whether Feehan and his counsel had advanced meritless claims in their last-ditch effort to overturn the will of the people and have Donald J. Trump judicially declared the winner of Wisconsin's 2020 presidential election. Two legal errors blocked its path.

I. The district court erroneously concluded that it lacked jurisdiction to impose sanctions after Feehan's appeal was dismissed as moot. The district court believed it could no longer award sanctions because no Article III case or controversy existed after the mandate issued. But the Supreme Court has repeatedly held that the power to impose sanctions is independent of Article III's case-or-controversy requirement. And all five federal appellate courts to consider the issue have held that district courts maintain jurisdiction to impose sanctions after appellate proceedings end.

The district court read *Overnite* to reach a contrary conclusion, but it was mistaken. Although *Overnite* contains some language supporting that interpretation, it is principally a case about unreasonable delay. It turned heavily on the unexplained failure to move for sanctions during the eight months the case

was on appeal—a far different situation from here, where the appeal lasted only two months and it was unclear until after the mandate issued that the appellate process was complete. Insofar as *Overnite* imposes a jurisdictional rule against a district court considering sanctions after the mandate, the Court should overrule it. Such a rule would conflict with Supreme Court precedent, the view of every other circuit to consider the issue, and more recent Seventh Circuit cases recognizing that a live case or controversy is not a prerequisite to imposing sanctions.

II. The district court also erred in its consideration of the sanctions motion's merits. Although it recognized that bringing meritless claims can subject a party to sanctions, the district court determined that it could not sanction meritless claims in a case dismissed on procedural grounds. This conclusion was mistaken in two respects. First, seeking relief that is barred for procedural reasons can justify sanctions. Second, a district court may sanction meritless claims even when it does not rule on the merits before judgment. Cases imposing sanctions after frivolous claims are voluntarily dismissed prove this point.

For these reasons, the Court should vacate the district court's order denying sanctions and remand so that the district court can consider sanctions under the appropriate legal standards.

STANDARD OF REVIEW

The district court's jurisdictional decision is reviewed de novo. *Victoria-Faustino v. Sessions*, 865 F.3d 869, 872 (7th Cir. 2017). The decision to deny sanctions on the merits is reviewed for abuse of discretion. *Riddle & Assocs., P.C. v. Kelly*, 414 F.3d 832, 837 (7th Cir. 2005). When a district court "applies an incorrect legal rule as

part of its decision, then the framework within which it has applied its discretion is flawed, and the decision must be set aside as an abuse." *Ervin v. OS Restaurant Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990)).

ARGUMENT

I. The district court had jurisdiction to consider Governor Evers's sanctions motion.

The district court erred when it concluded that it lacked jurisdiction to impose sanctions after the mandate issued because no live case or controversy remained. District courts' jurisdiction to impose sanctions does not depend on ongoing jurisdiction over the underlying case. Every circuit to consider the issue has agreed that district courts retain the power to impose sanctions after an appeal concludes. This Court's decision in *Overnite* is not to the contrary. That case turned on unreasonable delay—a movant who inexplicably waited more than eight months until after this Court affirmed the judgment to move for sanctions. This case, with its extraordinarily accelerated pace, is nothing like *Overnite*. Insofar as *Overnite* does deprive a district court of jurisdiction to impose sanctions post-appeal, the Court should overrule it. It is contrary to Supreme Court precedent, the decisions of all five circuits that have considered the issue, and more recent cases from this Court recognizing that a district court's power to impose sanctions does not depend on the existence of an Article III case or controversy.

A. A district court's power to impose sanctions exists independent of its Article III jurisdiction, regardless of any appellate proceedings.

The district court erred by concluding that it lacked jurisdiction to impose sanctions after the mandate because there was "no longer a case or controversy over which the district court may exercise Article III jurisdiction." (*See* App. 21.) District courts do not need Article III jurisdiction over the underlying case to impose sanctions, so a case's conclusion is no barrier to imposing sanctions.

"It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter*, 496 U.S. at 395. As a result, a court has the power to entertain a motion for attorney's fees "even years after the entry of a judgment on the merits." *Id.* This power to tax fees after a case has otherwise concluded exists equally when fees are taxed as sanctions. *Id.* at 396 (holding that Rule 11 sanctions may be imposed after a voluntary dismissal). And it exists even when there was no Article III "case or controversy" to begin with. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137-38 (1992) (holding that a court may impose attorney's fees as sanctions even when it lacks subject-matter jurisdiction over the case). That is because a sanctions determination "is not a decision on the merits of an action." *Id.* Rather, it is a decision on "a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction is appropriate." *Id.*

The Supreme Court developed these principles in a string of cases beginning shortly before *Overnite* in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982). The question in *White* was whether a party seeking attorney's fees post-judgment had to meet Rule 59(e)'s deadline for modifying a

judgment. *Id.* at 446-47. The Supreme Court's answer was no. *Id.* at 450-52. Whether to tax attorney's fees, the Court reasoned, is "uniquely separable from the cause of action to be proved at trial." *Id.* at 452. It "raises legal issues collateral to the main cause of action," and "[r]egardless of when attorney's fees are requested, the court's decision of entitlement to fees will . . . require an inquiry separate from the decision on the merits." *Id.* at 451-52.

In *Cooter & Gell v. Hartmarx Co.*, 496 U.S. 384 (1990), the Supreme Court applied *White* to attorney's fees awarded as sanctions. Noting the "well established" principle that "a federal court may consider collateral issues after an action is no longer pending," the Court held that a district court has jurisdiction to enter Rule 11 sanctions after a case is voluntarily dismissed. *Id.* at 395. A sanctions order "is not a judgment on the merits," but rather a "collateral" decision that a party has "abused the judicial process" in a way that warrants sanctions. *Id.* at 396. Thus, even three-and-a-half years after dismissing the case, the district court had jurisdiction to award attorney's fees under Rule 11. *Id.* at 389.

The Court extended *White* and *Cooter* to their logical conclusion in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), holding that a district court has jurisdiction to impose Rule 11 sanctions even if it never had subject-matter jurisdiction over the underlying case. *Id.* at 138. Again, the key concept was that a sanctions decision is "collateral to the merits." *Id.* at 137. "It therefore does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction." *Id.* at 138.

Since *Willy*, the courts of appeals have uniformly applied these principles to hold that a district court has the power to impose sanctions under 28 U.S.C. § 1927 and courts' inherent authority even when no Article III "case or controversy" exists. *Hyde v. Irish*, 962 F.3d 1306, 1310 (11th Cir. 2020) (so holding and collecting authority from the Third, Fourth, Fifth, Sixth, and Eighth Circuits); *Matos v. Richard A. Nellis, Inc.*, 101 F.3d 1193, 1196 (7th Cir. 1996) (so holding as to § 1927). A court's jurisdiction to impose sanctions is thus "ever present." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006).

An appeal does not change this analysis. Although "[t]he filing of a notice of appeal is an act of jurisdictional significance," it only "divests the district court of its control over [the] aspects of the case involved in the appeal." *Griggs v. Provident Cons. Discount Co.*, 459 U.S. 56, 58 (1982). It does not "transfer[] jurisdiction over the entire case to the court of appeals," *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985), and courts may examine collateral issues, such as attorney's fees, even after a notice of appeal is filed, *Wine & Canvas Dev., LLC v. Muylle*, 868 F.3d 534, 542 (7th Cir. 2017); *Terket v. Lund*, 623 F.2d 29, 33 (7th Cir. 1980). Regardless, once the mandate issues, jurisdiction returns to the district court. *Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 886 (7th Cir. 2020); *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.").

Leaving *Overnite* aside for the moment, all five circuits to consider the issue

have held that district courts maintain jurisdiction to award attorney's fees after appellate proceedings conclude. *Schlaifer Nance & Co., Inc. v. Est. of Warhol*, 194 F.3d 323, 333 (2d Cir. 1999); *Fechter v. Goebel*, No. 96-16470, 1998 WL 196650 (9th Cir. Apr. 23, 1998) (unpublished); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 98 (3d Cir. 1988); *In re Ruben*, 825 F.2d 977, 981-82 (6th Cir. 1987); *Hicks v. S. Md. Health Sys. Agency*, 805 F.2d 1165, 1166-67 (4th Cir. 1986).

None of this is to say that timing is irrelevant to whether a court should order a party's attorney's fees reimbursed. District courts have discretion to deny sanctions motions under § 1927 and other authorities when the motions are "unreasonably delayed." *Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 707 (7th Cir. 2014); *see also White*, 455 U.S. at 454; *Kaplan v. Zenner*, 956 F.2d 149, 151-52 (7th Cir. 1992). And a post-*White* revision to Rule 54 of the Federal Rules of Civil Procedure requires most fee motions based on a judgment to be filed within 14 days of the judgment. Fed. R. Civ. P. 54(d)(2)(B)(i); Fed. R. Civ. P. 54, 1993 advisory committee notes.[4] But none of this is jurisdictional. Indeed, when establishing Rule 54's 14-day limit, the advisory committee recognized that district courts would still have jurisdiction to award attorney fees even after an appeal. *See* Fed. R. Civ. P. 54, 1993 advisory committee notes (explaining that a district court may "extend the period by permitting claims to be filed after resolution of the appeal").

[4] Feehan did not contend that the sanctions motion was untimely under Rule 54(d)(2)(B)(i), nor could he. The deadline applies only to motions premised on a final judgment. *See* Fed. R. Civ. P. 54(d)(2)(B)(ii) (requiring a motion filed under the rule to "specify the judgment" on which it is based); *see also* Fed. R. Civ. P. 54(d)(2)(E) (expressly excluding § 1927 motions from the deadline).

For these reasons, the issuance of the mandate does not terminate a district court's authority to impose sanctions for meritless litigation.

B. *Overnite* does not hold that a district court loses jurisdiction to impose sanctions after the mandate issues.

As just explained, district courts have jurisdiction to impose sanctions after judgment, regardless of any appellate proceedings. The district court read *Overnite* to require a different result, but it was mistaken.

To be sure, *Overnite* contains language supporting the district court's reading. It says that once the mandate issues, the district court cannot impose sanctions because "no case or controversy any longer exist[s] between the litigants." 697 F.2d at 792. But this language must be read in context with the rest of the opinion. *United States v. Yang*, 799 F.3d 750, 754-55 (7th Cir. 2015) (warning against the "hazards of reading too literally the language of judicial opinions" emphasizing the need to "read [judicial language] in context"). As the opinion goes on to explain, the reason that the district court "was without jurisdiction" was because the movant did not file its motion "within a reasonable time." *Id.* at 793-94. The appeal lasted "over eight months" before the mandate issued; yet the movant did not seek sanctions "until two months" after the court affirmed. *Id.* at 792-93. The court explained that its "holding [was] that the motion for fees and costs must be made within a reasonable time after the entry of a judgment *regardless of whether or not an appeal has been taken on the merits of the case*." *Id.* at 793 n.4 (emphasis added). Far from articulating a special rule for cases involving appeals, the *Overnite* court understood itself to be applying the same reasonable-timing rule to all cases, whether appealed

or not. *Overnite*'s language about the mandate's jurisdictional effect thus cannot be divorced from the context of the movant's lengthy, unexplained delay.

This Court has since read *Overnite* as standing for the uncontroversial proposition that "motions under § 1927 must not be unreasonably delayed." *Lightspeed Media*, 761 F.3d at 707 (affirming sanctions requested at least six months post-judgment).[5] Summarizing *Overnite*, *Lightspeed Media* identified the "eight months [that] elapsed between the filing of the notice of appeal and this court's affirmance on appeal" as a key factor underlying *Overnite*'s outcome. *Id.* The court went on to distinguish *Overnite* as involving "entirely different" circumstances—noting both the lack of an appeal *and* the reasonable timing of the sanctions motion. *Id.* at 708.[6]

As the district court recognized, this case is nothing like *Overnite*. The appeal here lasted only two months, as opposed to *Overnite*'s eight. (App. 20.) And where there was no apparent explanation for the delay in *Overnite*, here "[Governor Evers]

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[5] This approach accords with that of other circuits. *See In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 102 (3d Cir. 2008) (§ 1927 motions should be filed "within a reasonable time"); *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006) ("[R]esort to § 1927 should not be unnecessarily or unreasonably delayed.").

[6] The district court noted that this Court has "cited and quoted *Overnite*" without giving any indication that the case is no longer "good law." (App. 23.) The argument in this section is not that *Overnite* is not "good law," but rather that *Overnite*'s holding is not as broad as the district court believed. In any event, the cases cited by district court do not discuss *Overnite*'s jurisdictional analysis. *See Knorr Brake Corp. v. Harbil*, 738 F.2d 223, 226-27 (7th Cir. 1984) (citing *Overnite*'s discussion of the standard for imposing sanctions under § 1927); *Badillo v. Cent. Steel & Wire Co.*, 717 F.2d 1160, 1166 (7th Cir. 1984) (same).

and others were involved in other, similar lawsuits and were working . . . around the clock to address pleadings filed in multiple cases in multiple forums." (App. 21.) Indeed, the post-dismissal pace of this case was extraordinary. The district court dismissed this case on December 9. (Dkt. 83.) A day later, Feehan appealed. (Dkt. 83, 84.) And by December 12—three days after dismissal—Feehan had petitioned the Supreme Court for emergency relief before Congress met to certify the Electoral College results on January 6, 2021. *See supra* p. 6. Less than a week later, on December 18, Feehan sought to require Governor Evers to file an expedited response. *See supra* p. 7. On December 30, Feehan again requested that the Supreme Court establish a schedule that would permit a ruling no later than January 5, 2021. *See supra* p. 7. This sequence, the district court recognized, left Governor Evers with "little time to file a sanctions motion before the mandate issued." (App. 21.) But because the district court understood *Overnite* to attach jurisdictional significance to the mandate, it deemed these reasons irrelevant. (*Id.*)

This case's frenetic pace also rendered *Overnite*'s judicial-economy concerns inapplicable. *Overnite* reasoned that requiring sanctions motions to be filed during the appeal would allow the same panel to resolve the appeal of the underlying judgment and that of any fee award. 697 F.2d at 793. But in this case, it took far longer to resolve the sanctions motion than the appeal. Briefing on the sanctions motion alone consumed more than a month after it was filed, and the district court did not deny the motion until nearly a year and a half later. (*See* Dkt. 97 (Mar. 31, 2021 motion); Dkt. 110 (May 5, 2021 reply); App. (Aug. 24, 2022 order)). The appeal

lasted a mere two months before being dismissed as moot (Dkt. 84 (December 10, 2020 notice of appeal); Dkt. 96 (Feb. 23, 2021 mandate))—less time even than the standard briefing schedule in an appeal, to say nothing of the usual time for resolving one. *See* Circuit Rule 31(a) (providing 91 days from docketing for briefing to occur). Requiring the sanctions motion to be filed pre-mandate in this case would thus be "ill adapted" to *Overnite*'s hopes that the merits and fee entitlement could be considered together. *See Hicks*, 805 F.2d at 1167.

What is more, because this Court dismissed the previous appeal before briefing even began, this case does not involve the kind of duplication of effort that *Overnite* sought to avoid. In a case where the first appeal was dismissed before briefing, the Sixth Circuit distinguished *Overnite*, reasoning that the second appeal did not call on the court to "reconstruct a case previously reviewed in detail." *In re Ruben*, 825 F.2d at 982. So too here. As a result of the parties' pre-briefing agreement that the appeal was moot, the earlier appeal did not require detailed review of this case.

Interpreting *Overnite* to prohibit imposing sanctions after the mandate issues would be particularly harmful in elections cases like this one. Election litigation ordinarily proceeds rapidly—even more so when, as here, a party sits on its hands until after the results are in. Paradoxically, requiring sanctions motions to be filed before the mandate issues would allow litigants to escape sanctions when the costs and burdens of baseless litigation are especially intense. Given the potential for unfounded allegations of election fraud to poison trust in our democracy, courts need full access to the power to sanction those who do not "stop, think and

investigate" before lodging such explosive allegations. *Cooter*, 496 U.S. at 398. Conversely, requiring sanctions motions to be filed before the mandate in fast-moving cases would discourage litigants from taking time to reflect about whether a case represented a legitimate legal dispute, as opposed to sanctionable misconduct. It could result in more sanctions motions, not fewer. Such a rule would benefit no one. And properly understood, *Overnite* does not require it.

C. The Court should overturn *Overnite* insofar as it deprived the district court of jurisdiction to impose sanctions.

Insofar as *Overnite* may be understood to hold that a district court lacks jurisdiction to impose sanctions post-mandate, the Court should overturn it. Panels of this Court may overturn earlier decisions for "compelling reasons." *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 776 (7th Cir. 2019). Three independently sufficient reasons exist here.

1. Later Supreme Court decisions have "displace[d] the rationale" of *Overnite*'s jurisdictional analysis. *Id.*; *Glaser v. Wound Care Consultants*, 570 F.3d 907, 915 (7th Cir. 2009). The premise of *Overnite*'s jurisdictional discussion is that a court cannot impose sanctions after the mandate issues because "no case or controversy any longer exist[s] between the litigants." 697 F.2d at 792. A string of cases including *White*, *Cooter*, and *Willy* demonstrates that there need not be a live Article III "case or controversy" for a district court to award attorney's fees. *Supra* pp. 13-15.[7] *Overnite*'s rationale is incompatible with these cases.

[7] Although *White* was decided the year before *Overnite*, the *Overnite* decision did not address it.

2. Every circuit to consider the issue since *Overnite* has held that the district court has jurisdiction to impose sanctions after the mandate issues. "When a number of other circuits reject [this Court's view], and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts" justifies re-examining precedent. *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005). Relying on *White*, *Cooter*, and *Willy*, five other circuits have now rejected *Overnite*'s jurisdictional analysis. *Supra* p. 16. Most recently, the Second Circuit flatly dismissed as "meritless" an *Overnite*-based argument that district courts lack jurisdiction to enter sanctions post-mandate "because no case or controversy existed over which the District Court could exercise jurisdiction over a sanctions motion." *Schlaifer Nance & Co.*, 194 F.3d at 333. Relying on *Cooter* and *Willy*, the Second Circuit held that the issuance of the mandate "prior to the motion for sanctions . . . did not deprive the District Court of jurisdiction to impose sanctions." *Id.* This uniform and unambiguous rejection of *Overnite*'s jurisdictional analysis further supports revisiting and overturning it.

3. Even this Court has left *Overnite* behind. Since *Overnite*, this Court's cases have repeatedly recognized the rule that the power to impose sanctions exists independent of Article III jurisdiction over the underlying dispute. *E.g.*, *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 927-28 (7th Cir. 2000) (holding that a court may tax attorney's fees "regardless whether or not the fees were incurred in proceedings that were cases or controversies under Article III"); *Matos*, 101 F.3d at 1196 (7th Cir. 1996) (explaining that whether case was "moot" was irrelevant to

court's power to impose sanctions under § 1927); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987) ("A district court that loses its power to decide the merits . . . does not also lose power to award attorneys' fees that may be in order as a result of what happened before the final decision."). The interest in avoiding intracircuit conflict separately justifies overturning *Overnite*. *Glaser*, 570 F.3d at 915-16.

Any one of these three reasons justifies overturning *Overnite* insofar as it holds that a district court lacks jurisdiction to impose sanctions post-mandate.

II. The Court should vacate the order denying sanctions and remand for the district court to consider sanctions under the correct legal standard.

On the merits, the district court acknowledged that inherent authority sanctions for fabricating a quotation could be appropriate if it had jurisdiction. But based on a misunderstanding of the law, it refused to consider sanctions more broadly. It erroneously concluded that having dismissed the case on procedural grounds, it could not impose sanctions for filing meritless claims. The Court should correct this legal error so that the district court may consider whether sanctions are appropriate under the correct legal framework.

Courts may impose sanctions under § 1927 and their inherent authority for bad-faith conduct by parties and their counsel. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *In re Lisse*, 921 F.3d 629, 641 (7th Cir. 2019).[8] This standard does not

[8] Governor Evers sought sanctions against counsel under both inherent

require subjective bad faith. *See In re Lisse*, 921 F.3d at 641 (explaining that subjective bad faith is "sufficient, but not necessary"). Instead, sanctions are available whenever counsel "pursue a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." *Id.* This rule requires lawyers, before filing, to "ascertain the facts and review the law to determine whether the facts sit within a recognized entitlement to relief." *Walter v. Fiorenzo*, 840 F.2d 427, 435 (7th Cir. 1988). "Counsel may not drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989). When lawyers pursue "baseless claims," they may become liable for the other side's fees "from the inception of the suit." *Lightspeed Media*, 761 F.3d at 709 (affirming sanctions under § 1927); *see Riddle & Assocs.*, 414 F.3d at 837 (holding that court abused discretion by not awarding entire cost, including attorney's fees, of defending frivolous counterclaim under § 1927); *Walter*, 840 F.2d at 436 (approving § 1927 sanctions "of the entire case").

Feehan and his counsel's failings in this case were both manifold and manifest, as the sanctions motion explained in detail. (Dkt. 98.) Despite the requirement to bring election lawsuits "expeditiously," *Fulani*, 917 F.2d at 1031, they waited until after the votes had been counted, the partial recount and equipment audit had been

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authority and § 1927 and against Feehan under the court's inherent authority. (Dkt. 98, at 18, 20.) Because the relevant considerations for § 1927 and inherent-authority sanctions are essentially the same, this brief cites cases dealing with these authorities interchangeably. *See Schlaifer Nance & Co.*, 194 F.3d at 336.

completed, and Biden had been certified the winner to challenge election procedures that had been in place for months and years before the election (Dkt. 98, at 9-10); *see also Trump*, 983 F.3d at 925-26 (denying similar claims as untimely). And even though WEC's post-election audit had already determined that there was "no evidence of systemic problems," "hacking," or "switched votes," Feehan and his counsel filed a lawsuit preposterously alleging "massive election fraud" in which China and Iran had infiltrated voting machines and imperceptibly switched votes. (Dkt. 9, at 1, 7; Dkt. 98, at 10-11.) They ignored the basic fact that Dominion machines are not widely used in Wisconsin, as well as WEC's audit finding "no evidence of any Dominion machines changing votes or doing anything of the like." (Dkt. 98, at 10-11.) And they based their claims on the opinions of so-called experts with few if any relevant qualifications. In one notable, but unfortunately not unique, example, they concealed the identity of a purported expert behind the pseudonym Spyder and misrepresented him as a military intelligence analyst. (Dkt. 98, at 14-15.)

Feehan's counsel also disregarded procedural rules, even naming as a plaintiff someone who never consented to participate in the case. (Dkt. 98, at 2, 12-13.) Naturally, these defaults made "more work for the defendants and the court." (App. 25.) Feehan's counsel misrepresented controlling authority and made up a quote addressing a key aspect of the case—whether the court had power to grant relief even though Feehan filed after the election's certification. (Dkt. 98, at 13-14; *see* App. 27.) Despite all these failings, Feehan and his counsel sought extraordinary

and unprecedented relief, including ordering Governor Evers to "transmit certified election results that state that President Donald Trump is the winner of the election." (Dkt. 9, at 48.) And they did so while "pushing an extremely expedited schedule, which the court and the defendants struggled to accommodate." (App. 24.) The district court rightly rejected this ploy when it dismissed the case. "Federal judges do not appoint the president in this country"—a point so plain that the court "wonder[ed] why [they] came to federal court and asked a federal judge to do so." (Dkt. 83, at 2.).

The district court has already concluded that it would hold a hearing to "consider sanctions under its inherent authority for possible fabrication of a quote and possible misstatement of applicable law" if it had jurisdiction. (App. 29.)[9] The district court should consider whether this conduct warrants sanctions under § 1927, as well. (*See* Dkt. 98, at 19 (requesting § 1927 sanctions because counsel "fabricated a quote to make a point"). Both types of sanctions can apply to the same circumstances. *Schlaifer Nance & Co.*, 194 F.3d at 336. But the district court did not explain why it would consider sanctions only under its inherent authority. *See Ross v. City of Waukegan*, 5 F.3d 1084, 1089 & n.6 (7th Cir. 1993) (vacating and remanding denial of § 1927 sanctions where the lack of explanation prevented "meaningful review").

The district court should also consider Governor Evers's argument that Feehan's

[9] This reference is to a quotation that Feehan's attorneys "seem[ed] to have made up": that "even though the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." (App. 26 (quoting Dkt. 83, at 32-33).)

claims were sufficiently meritless to justify sanctions under § 1927 and its inherent authority. The district court recognized that advancing claims that are "patently without merit" could warrant sanctions. (App. 24.) But it considered itself powerless to analyze whether Feehan's claims met this standard because it "dismissed the case on procedural grounds" and thus "never reached the merits of the plaintiff's claims." (App. 24). This decision embodied two separate legal errors.

First, the district court's conclusion that the procedural infirmities resulting in dismissal categorically cannot justify sanctions is incorrect as a matter of law. Bringing claims over which a court lacks subject-matter jurisdiction or that are barred by the Eleventh Amendment can support sanctions just as surely as a merits problem can. *See, e.g.*, *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 264 (7th Cir. 1999) (affirming award of sanctions when "basic research . . . would have revealed that [the action was] barred by the Eleventh Amendment"); *Pollution Control Indus. of Am., Inc. v. Van Gundy*, 21 F.3d 152, 155 (7th Cir. 1994) (holding that sanctions were appropriate when based on invocation of subject-matter jurisdiction).

Second, a dismissal on non-merits grounds does not prevent sanctions against a meritless case. The Supreme Court's decision in *Cooter* makes this clear. The case considered whether a district court may impose Rule 11 sanctions for "allegations in the complaint" that are "baseless" when a plaintiff voluntarily dismisses a case. 496 U.S. at 390. Although the voluntary dismissal left the district court without the opportunity to resolve the case on the merits, the Supreme Court held that it was free to impose sanctions. *Id.* at 395. Resolving the merits and assessing sanctions,

the Court explained, involve two distinct concepts. Despite turning on a finding that a "complaint was not legally tenable or factually well founded," Rule 11 sanctions involve a "collateral" inquiry that "does not signify a district court's assessment of the legal merits of a complaint." *Id.* at 396. Contrary to the district court's understanding, this kind of inquiry "may be made after the principal suit has been terminated." *Id.* This rule is consistent with the reasons for sanctioning meritless claims. "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Id.* at 398. And while quick dismissal may limit the duration of the harm (and thus the magnitude of sanctions imposed) it does not eliminate the need for sanctions. "Even if the careless litigant quickly dismisses the action, the harm [justifying sanctions] has already occurred." *Id.*

This rationale applies with the same force to sanctions under § 1927 and courts' inherent authority. "Like Rule 11 sanctions, neither bears on the merits of the case, and both empower the court to command obedience to the judiciary and deter and punish those who abuse the judicial process." *Red Carpet*, 465 F.3d at 645; *see Ratliff v. Stewart*, 508 F.3d 225, 231-32 (5th Cir. 2007) (endorsing the analogy to § 1927). Thus, the Seventh Circuit has affirmed sanctions for baseless claims even when the district court did not resolve the merits before the case ended. *See Lightspeed Media*, 761 F.3d at 703-04, 708 (affirming sanctions under § 1927 for claims lacking "any conceivable merit" that were voluntarily dismissed); *Claiborne v. Wisdom*, 414 F.3d 715, 721-22 (7th Cir. 2005) (affirming § 1927 sanctions

covering the entire cost of defense for misconduct including "pursu[ing] a number of claims without any factual basis" even though the case was voluntarily dismissed).

The case for imposing sanctions is even greater here than in a case that is voluntarily dismissed. When a plaintiff voluntarily dismisses, a plaintiff at least spares the court and the opposing party the effort of resolving the merits by dismissing voluntarily. But when plaintiffs and counsel press meritless claims on "an extremely expedited schedule [that] the court and the defendants struggle[] to accommodate" (App. 24), they maximize the harm that sanctions are designed to deter. It makes no sense for "parties who abuse the judicial procedures [to] get off scot-free anytime it turned out that the district court lacked subject-matter jurisdiction" or some other non-merits issue led to dismissal. *See Hyde*, 962 F.3d at 1310. The district court's failure to "recognize and exercise" its power to sanction meritless litigation in this case constituted an abuse of discretion. *Dolin*, 951 F.3d at 889.

The Court should vacate and remand so that the district court can apply the correct legal framework to determine whether to award sanctions. *See Ervin*, 632 F.3d at 976. When it does, the district court should not consider each instance of misconduct "in isolation." *Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 507 (7th Cir. 2016). It should consider the "the entire pattern" of misconduct to determine if sanctions are warranted, *id.*, including the procedural failings and extraordinary requests for relief that it concluded did not on their own merit sanctions (App. 25-26).

CONCLUSION

The Court should vacate the order denying Governor Evers's sanctions motion and remand for the district court to consider sanctions under the correct legal standards.

Dated: December 16, 2022

Respectfully Submitted,

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/s/ Jeffrey A. Mandell
Jeffrey A. Mandell

REQUIRED SHORT APPENDIX

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I certify that this appendix contains all materials required by Circuit Rule 30(a) and 30(b) are contained in the appendix.

/s/ Jeffrey A. Mandell
Jeffrey A. Mandell

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION,
COMMISSIONER ANN S. JACOBS,
MARK L. THOMSEN, JULIE M. GLANCEY,
COMMISSIONER MARGE BOSTELMANN,
COMMISSIONER DEAN KNUDSON,
ROBERT F. SPINDELL, JR., and TONY EVERS,

Defendants.

ORDER DENYING DEFENDANT EVERS'S MOTION FOR ATTORNEY FEES (DKT. NO. 97), DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S MOTION FOR SANCTIONS (DKT. NO. 105) AND DENYING DEFENDANT EVERS'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF (DKT. NO. 112)

On December 1, 2020, the plaintiff filed this lawsuit alleging "massive election fraud, multiple violations of the Wisconsin Election Code, see e.g., Wis. Stat. §§5.03, et seq., in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses." Dkt. No. 1 at ¶1. Eight days later, the court granted the defendants' motions to dismiss, denied the plaintiff's motion for injunctive relief as moot and dismissed the case. Dkt. No. 83. The plaintiff appealed, dkt. no. 84, then filed an amended notice of appeal, dkt. no.

90. The plaintiff voluntarily dismissed the appeal. Dkt. No. 94. Three months later, defendant Governor Tony Evers filed a motion to recover attorney fees, dkt. no. 97, and the plaintiff filed a "Motion to Strike Defendant's Motion for Sanctions," dkt. no. 105. Several months later, defendant Evers filed a motion for leave to file a supplemental brief. Dkt. No. 112.

Because the court lacks jurisdiction over defendant Evers's motion to recover attorney fees, it will deny the motion. The court will deny for lack of jurisdiction and as moot the plaintiff's motion to strike the defendant's motion to recover fees and the defendant's motion for leave to file a supplemental brief.

I. Background

The fifty-two-page complaint, filed on December 1, 2020, asserted four causes of action: (1) violation of the Elections and Electors Clauses and 42 U.S.C. §1983; (2) violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1983 and the "invalid enactment of regulations & disparate treatment of absentee vs. mail-in ballots"; (3) denial of the Fourteenth Amendment due process right to vote and 42 U.S.C. §1983; and (4) "wide-spread ballot fraud." Dkt. No. 1 at ¶¶106-138. As relief, the plaintiffs requested

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;
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> 2. An order enjoining Governor Evers from transmitting the currently certified election results [sic] the Electoral College;
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> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
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> 4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media,

logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11 related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;

5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;

6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. Const. Amend. XIV;

8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;

11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center1 for November 3, 2020 and November 4, 2020;

12. Plaintiffs further request the Court grant such relief as is just and proper including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. §1988.

Id. at ¶143. There were twenty-eight attachments to the complaint, totaling 331 pages. Dkt. Nos. 1-1 through 1-28.

On the same date that he filed the complaint, the plaintiff[1] filed a motion for a temporary restraining order, dkt. no. 2, and a supporting brief, dkt. no. 3. Almost seven hours later, the plaintiff filed a motion to amend or correct the motion for injunctive relief. Dkt. No. 6.

Two days later, the plaintiff filed an amended complaint, dkt. no. 9, accompanied by nineteen attachments, dkt. nos. 9-1 through 9-19. The amended complaint was fifty-one pages and the attachments totaled 303 pages. The plaintiff also filed another amended motion for injunctive relief, which asked the court to consider it in an "expedited manner." Dkt. No. 10. The plaintiff attached a proposed briefing schedule, indicating that the briefing would be conducted over the next two days (Friday, December 4 and Saturday, December 5). Dkt. No. 10-1.

Between December 3 and December 4, other parties—a proposed intervenor, defendant Evers—filed motions, but the next motion the plaintiff filed was his December 4, 2020 motion for leave to file excess pages. Dkt. No. 34. Two days later—on December 6, 2020—the plaintiff filed a brief in support of the second amended motion for injunctive relief. Dkt. No. 42. That same day, he filed a motion to file separate reply briefs, dkt. no. 43, and a motion to hold a consolidated evidentiary hearing, dkt. no. 44.

On December 7, 2020, the defendants moved to dismiss the amended complaint. Dkt. Nos. 51, 53. Over the next two days, the parties (and others

[1] There were two named plaintiffs in the original complaint—the plaintiff and "Derrick Van Orden." Dkt. No. 1 at 1. The December 3, 2020 amended complaint removed Van Orden as a defendant. Dkt. No. 9.

seeking to file *amicus* briefs or to intervene) filed numerous pleadings, but only one was a new motion filed by the plaintiff—a December 9, 2020 motion to restrict some exhibits. Dkt. No. 76.

On December 9, 2020—eight days after the plaintiff had filed the complaint—the court granted the defendants' motions to dismiss. Dkt. No. 83. It concluded that (1) the plaintiff's status as a registered voter did not give him standing to sue, id. at 23; (2) the plaintiff's status as a nominee to be a Republican elector did not give him standing to sue, id. at 28, (3) most of the relief the plaintiff had requested was beyond the court's ability to grant, id. at 33; (4) the Eleventh Amendment barred the plaintiff's claims against the defendants in their official capacities and almost all the requested relief, id. at 37-38; and (5) the plaintiff's request for relief constituted "an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent," id. at 40.

The following day—*before* the clerk had docketed the judgment—the plaintiff filed a notice of appeal. Dkt. No. 84. A week later, *after* the clerk had docketed the judgment, the plaintiff filed an amended notice of appeal. Dkt. No. 90.

On February 1, 2021, the Seventh Circuit issued an order granting the joint motion of the parties to dismiss the appeal as moot. Dkt. No. 96. The court's order stated:

> Appellees have moved to dismiss this appeal as moot and appellant has filed a concurrence. We agree with the litigants that there is no ongoing case or controversy. Accordingly,

> **IT IS ORDERED** that the motion to dismiss is **GRANTED** to the extent that we **VACATE** the district court's decision and **REMAND** with instructions to dismiss the case is moot. This is the routine disposition of civil cases that become moot while on appeal, *see United State[s] v. Munsingwear*, 340 U.S. 36 (1950), and this court's instructions reflect no criticism of the district court's timely decision on the merits.

Dkt. No. 96 at 1-2.

On February 16, 2021[2] this court vacated its prior judgment and dismissed the case as moot. Dkt. No. 95. Six weeks later, defendant Evers filed the instant "Motion to Recover Attorney Fees." Dkt. No. 97.

II. Defendant's Motion to Recover Attorney Fees (Dkt. No. 97)

A. The Parties' Arguments

Defendant Evers asks the court to tax both the plaintiff and the plaintiff's attorneys for Evers's attorneys' fees of "approximately $106,000 to date" "using both statutory authority and the Court's inherent power to sanction attorneys for engaging in bad faith litigation." Dkt. No. 97 at 2 (citing 28 U.S.C. §1927; Roadway Exp., Inc. v. Piper, 447 U.S. 752, 766 (1980)).

The defendant filed a twenty-nine-page brief in support of this motion. Dkt. No. 98. He began by asserting that the plaintiff's lawsuit was frivolous from inception, based on "fringe conspiracy theories, sourced to anonymous declarations submitted by ostensible experts who were later identified and

[2] The Seventh Circuit issued the decision on February 1, 2021. The mandate did not issue until February 23, 2021, see Fed. R. App. P. 41(b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later."), but because the parties had agreed to dismiss the appeal, this court did not wait until the mandate issued to dismiss the case.

revealed to be extreme partisans with neither experience nor qualifications to provide any type of opinion on the subject matter." Id. at 2. He argued that there was "no reason for Wisconsin taxpayers to bear the expense of this attempt to hijack the democratic process." Id. He says that "[w]orking 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." Id.

After recounting the history of the litigation, the defendant listed "legal mechanisms" that he indicated give the court the authority to impose sanctions "for bad-faith conduct in the course of legal proceedings." Id. at 6. First, he cited 28 U.S.C. §1927, arguing that this statute was designed to limit abuses of the judicial process, deter frivolous litigation and penalize attorneys who engage in dilatory conduct. Id. (citations omitted). Second, the defendant argued that the court could rely on its inherent authority to impose sanctions. Id. at 8. The defendant explained that because the case was pending for only eight days—because "Plaintiff field his complaint on December 1 and demanded resolution by December 6"—the defendant could not seek sanctions under Fed. R. Civ. P. 11, due to the rule's twenty-one-day safe harbor requirement; he argued that the plaintiff's "demand for an expeditious process cannot insulate Plaintiff and his attorneys from appropriate consequences for their egregious conduct." Id. at 6 n.2.

The defendant then detailed allegedly vexatious and bad-faith conduct by the plaintiff and his lawyers. Id. at 9-18. He alleged that the plaintiff had unreasonably delayed in filing the lawsuit, id. at 9; that there was no evidence of the election fraud the plaintiff had alleged, id. at 10; that the plaintiff's filings were rife with procedural errors, id. at 13; that the plaintiff's briefs misrepresented the applicable law, id. at 14; that the plaintiff based his claims on unreliable and inadmissible evidence, id. at 15; and that the relief the plaintiff had requested was, for the most part, unprecedented and impossible to grant, id. at 18. The defendant asked the court to impose sanctions, not only to punish the plaintiff, but to discourage similar behavior in the wake of future elections. Id. at 22.

The defendant also argued that his fee request was "timely," asserting that the Seventh Circuit's decision in Overnite Transportation Co. v. Chi. Industrial Tire Co., 697 F.2d 789 (7th Cir. 1983) is an "outlier," "in tension (at minimum) with Supreme Court precedent and no other Circuit has adopted the Seventh Circuit's reasoning." Id. at 24. He argued that in White v. New Hampshire Dep't of Emp. Sec., 455 U.S. 445, 452 (1982), the Supreme Court had "rejected" the logic of Overnite, "holding that fee motions under 42 U.S.C. § 1988 need not comply with time limits established by Rule 59(e) . . . ." Id. at 25. The defendant asserted that the Fourth, Third, Second, Sixth and Tenth Circuits had rejected the Overnite court's reasoning. Id. He argued that because Overnite "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 the court should consider his motion timely, because he filed it within thirty days of the U.S. Supreme Court denying the plaintiff's appeal and within four months of this court issuing its order. Id. at 26. He concluded, "To consider it otherwise would be to overlook an egregious abuse of the judicial process." Id. Finally, the defendant argued that the fees he requested were reasonable. Id. And he asserted that the plaintiff and his lawyers should be held jointly and severally liable for the sanctions. Id. at 29.

The plaintiff responded that the court should deny the motion because "a request for sanctions based upon a well-plead, factually supported civil lawsuit is patently without merit." Dkt. No. 109 at 3. The plaintiff argued that the request was untimely under 28 U.S.C. §1927 and should be stricken. Id. He noted that the court had dismissed the case on procedural grounds, and on a motion to dismiss, rather than at the summary judgment stage after discovery. Id. The plaintiff asked that if the court did not grant his motion to strike the motion for sanctions, it schedule an evidentiary hearing and require the plaintiff to present evidence. Id. at 4.

In support of his argument that the sanctions motion was "out of time," the plaintiff cited Overnite, the Seventh Circuit decision that the defendant had characterized as an "outlier." Id. at 5. The plaintiff argued—citing several cases and making liberal use of the "bold" function in Word—that the defedant had not met the standard for sanctions under §1927. Id. at 5-6. The plaintiff opined that although the defendant had characterized the plaintiff's filing as dilatory, most of the defendant's §1927 argument asserted that the litigation had moved

too quickly. Id. at 6. He opined that the plaintiff had not been forced to file numerous pleadings, pointing out that the case had survived only nine days. Id. at 8. The plaintiff maintained that if his claims had been as frivolous as the defendant characterized them to be, the defendant would not have been required to expend significant time with a team of attorneys to address them. Id.

The plaintiff argued that the defendant's assertion that his claims lacked a legal and factual basis ignored the fact the court never reached the merits of those claims. Id. at 9. Nonetheless, the plaintiff insisted that his claims had merit and that other courts had found as much. Id. at 9-13. He argued that while this court had concluded that he did not have standing, the Eighth Circuit had come to a different conclusion. Id. at 13. The plaintiff explained why he believed he had a good-faith basis for arguing that the Eleventh Amendment did not bar his claims. Id. at 16. He asserted that in finding that laches barred his claims, this court had failed to "take an in depth look at" a Ninth Circuit case relied upon by the defendant. Id. at 17-18. He referenced evidence that he had cited in the amended complaint and its attachments. Id. at 18-23 (although he reiterated that this court dismissed the case on procedural grounds, not on the merits). Finally, he argued that dismissal on "equitable grounds" such as laches or mootness "are not grounds for a court to hold the relief requested is factually or legally baseless because of the purposefully flexible nature of equity." Id. at 23.

The defendant replied that the plaintiff "fundamentally misapprehend[ed] the issue" he presented in his motion for fees. Dkt. No. 110 at 1. He asserted that the question at the heart of his motion "is whether [the plaintiff's] lawsuit was filed in a proper way for a proper purpose;" asserting that it was not, the defendant said that both fees and sanctions are appropriate. Id. The defendant found it "worth briefly reviewing just how egregious Plaintiff and his attorneys' conduct was," listing seven bullet points in the review. Id. at 2. The defendant characterized as "bizarre" the plaintiff's argument that because the litigation moved so quickly it could not be characterized as "vexatious," asserting that under 28 U.S.C. §1927, a "vexatious" action is one that exhibits bad faith. Id. at 3. The defendant asserted that this case was not a matter of first impression, as evidenced by the fact that "many of Plaintiff's lawyers here were peddling the same conspiratorial claims around the country and uniformly failing on the same grounds this case was dismissed." Id. at 5. He alleged that both the original and the amended complaints were riddled with errors. Id. at 6. He criticized the experts the plaintiff cited in the amended complaint. Id. at 7.

The defendant pointed out that the plaintiff cited no authority in support of his argument that a dismissal on equitable grounds cannot provide a basis for sanctions. Id. at 8. He disputed the plaintiff's argument that the First Amendment forbids sanctions in these circumstances. Id. at 9. He distinguished—or, more accurately, deemed irrelevant—out-of-circuit cases cited by the plaintiff. Id. at 9-10.

The defendant argued that several of the attorneys who signed the amended complaint did not sign the plaintiff's response to the motion for sanctions, despite his explicit request that the court impose sanctions on the plaintiff and all his counsel. Id. at 11. He asserted that by failing to respond or "associate themselves with any filed response within the relevant time allotted, Julia Z. Haller, Brandon Johnson, Emily P. Newman, and L. Lin Wood have conceded that the Court can impose fees against them and that Governor Evers's fee request is reasonable." Id. Finally, he reiterated that his motion was timely because Overnite is an "outlier," distinguishable, is "of questionable validity" and is "in significant tension" with the Federal Rules of Civil Procedure. Id. at 12.

B. Governing Law

1. *28 U.S.C. § 1927*

Under 28 U.S.C. §1927,

> [a]ny 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.

In its earlier iteration, the statute "permit[ted] a court to tax the excess 'costs' of a proceeding against a lawyer 'who so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously . . . .'" Roadway Exp., Inc. v. Piper, 447 U.S. 752, 756 (1980). It provided "only for *excess* costs caused by the . . . attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." Id. at 756 n.3 (quoting

Monk v. Roadway Express, Inc., 599 F.2d 1378, 1383 (5th Cir. 1979) (emphasis in the original)). The Piper Court focused on the vexatious multiplication of proceedings. Id. at 757, 757 n.4 ("Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. Cf. C. Dickens, Bleak House 2-5 (1948)."). Ten years later, in a brief comment in a separate opinion in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 412 (1990), Justice Stevens also focused on the multiplication of proceedings, agreeing that a court may "impose sanctions under 28 U.S.C. § 1927 against lawyers who have multiplied court proceedings vexatiously."

The statute allows a court to impose sanctions only against attorneys; it "says nothing about a court's power to assess fees against a party." Chambers v. NASCO, Inc., 501 U.S. 32, 48 (1991). Under the current version of the statute, a court "may require an attorney who unreasonably multiplies proceedings to pay attorney's fees incurred 'because of' that misconduct," which requires the court to "establish a causal link between misconduct and fees . . . ." Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 137 S. Ct. 1178, 1186 n.5 (2017) (citing Piper, 447 U.S. at 764).

As best the court can tell, the Seventh Circuit first approved a taxing of costs against an attorney under §1927 in Kiefel v. Las Vegas Hcienda, Inc., 404 F.2d 1163 (7th Cir. 1968). The court concluded that the attorney's conduct had caused "additional proceedings" and remanded the case to the district court to award expenses for printing a brief and additional appendix, as well as attorneys' fees. Id. at 1171.

In 1983, the Seventh Circuit examined §1927 more closely. In Overnite, 697 F.2d at 791, the plaintiff sued in federal district court under the Interstate Commerce Act. The district court granted the defendant's motion to dismiss for lack of subject-matter jurisdiction and the plaintiff appealed. Id. Two weeks after the Seventh Circuit had affirmed the district court's decision and issued the mandate, the defendant returned to the district court and filed a motion under 28 U.S.C. §1927 to recover the costs and attorneys' fees it incurred in defending the lawsuit in federal court. Id. "The defendant argued that the plaintiff's filing of the lawsuit in federal court and the appeal of its dismissal constituted an unreasonable and vexatious multiplication of the proceedings entitling the defendant to the recovery of attorney's fees and expenses." Id. The district court agreed, granted the motion and awarded $1,392.50 in attorney's fees and costs based on "'[t]he vexatious character of plaintiff attorney's conduct in initiating this . . . lawsuit in federal court and [then] appealing its dismissal . . . .'" Id. at 791-92 (quoting Overnite Transportation Co. v. Chicago Industrial Tire Co., 535 F. Supp. 114, 115 (N.D. Ill. 1982)).

The plaintiff's attorneys appealed that decision to the Seventh Circuit. Id. at 792. The Seventh Circuit framed the issues on appeal this way:

> *Issue 1:* Did the district court have jurisdiction to entertain a motion to compel the payment of attorney's fees and costs after the district court's dismissal of the underlying action had been affirmed on appeal prior to the date of the motion for costs and attorney's fees? *Issue 2:* Did the district court abuse its discretion in awarding attorney's fees and costs?

Id.

Regarding the first issue—the issue of the district court's jurisdiction—the court began by observing the "well established general rule that the perfection of an appeal 'vests jurisdiction in the court of appeals [and] further proceedings in the district court cannot then take place without leave of the court of appeals.'" Id. (quoting Asher v. Harrington, 461 F.2d 890, 895 (7th Cir. 1972)). The court concluded that jurisdiction had vested in the appellate court on the date the plaintiff properly filed his notice of appeal—July 9, 1981. Id.

The court explained, however, that there were exceptions to the rule that jurisdiction vests with the court of appeals upon the filing of a notice of appeal; as examples, it recounted that "jurisdiction continues in the district court if jurisdiction is reserved expressly by statute, or if the court expressly reserves or retains such jurisdiction, or while the court is entertaining motions collateral to the judgment or motions which would aid in resolution of the appeal." Id. (citations omitted). It clarified that "these exceptions only apply to those motions filed with the district court while the appeal on the merits is pending." Id. The court stated that once it had issued its decision and docketed the mandate affirming the district court's dismissal of the case, "no case or controversy any longer existed between the litigants herein." Id. The court of appeals concluded that the district court lacked jurisdiction to rule on the motion for costs and attorney's fees because (1) "the plaintiff properly filed a notice of appeal," (2) no party had filed a §1927 motion in the eight-month period that had elapsed between the filing of the notice of appeal and issuance of the mandate affirming the district court's dismissal, (3) the district court had

not reserved jurisdiction over the case, (4) no statute provided that the district court reserved jurisdiction and (5) "no motions concerning the case in chief were directed to either [the court of appeals] or the district court during the eight months the appeal on the merits was pending." Id.

Observing the wasted delay and effort caused by "piecemeal appeals," the Seventh Circuit also concluded that "a motion for attorney's fees and costs under section 1927 is so inexorably bound to the underlying merits of the case 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.

Nonetheless, the court went on to address the second issue—whether the district court had abused its discretion in awarding fees and costs under §1927. Id. at 794. It stated that §1927 "envisions a sanction against an attorney only when that attorney both (1) multiplies the proceedings, and (2) does so in a vexatious and unreasonable fashion." Id. The court looked at the legislative history—specifically, the House Conference Report—surrounding §1927, observing that the report stated that the statute's purpose

> is "to broaden the range of increased expenses which an attorney who engages in *dilatory litigation practices* may be required by the judge to satisfy personally.... The amendment to section 1927 is one of several measures taken in this legislation to deter unnecessary *delays* in litigation." House Conference Report No. 96-1234, 96th Congress 2d Session, Reported in 1980 U.S. Code. Cong. & Admin. News 2716, 2781 at 2782 (emphasis supplied).

Id. (emphasis in the original).

The Seventh Circuit observed that while some courts had used §1927 to sanction lawyers for filing and prosecuting lawsuits that the court deemed to

be meritless, "these cases are limited to situations where the suit was without either a legal or factual basis and the attorney was or should have been aware of this fact." Id. The court found that the Overnite suit did not fall into that category; Overnite's claim "was one of first impression." Id. The court concluded that the lawsuit was "not 'frivolous' and therefore Overnite's attorneys did not 'multiply' the proceedings by filing an action in the federal district court." Id. The court also concluded that the appeal was not frivolous, stating that "[l]itigants and their attorneys must be free to pursue their appellate remedies except in truly unmeritorious and frivolous cases." Id. at 795. Noting its holding in Kiefel that "the power to assess costs on the attorney involved 'is a power which the courts should exercise *only* in instances of a *serious and studied disregard for the orderly process of justice*,'" the Seventh Circuit explained that the district court had identified no vexatious conduct other than the filing of the lawsuit and the subsequent appeal of its dismissal. Id. (quoting Kiefel, 404 F.2d at 1167). The court found that the defendant had "pointed to no instances where the attorneys for Overnite either at trial or on appeal engaged in intentional misconduct which was in 'disregard for the orderly process of justice.'" Id. It stated, "[t]he term 'vexatious' is defined as 'lacking justification and intended to harass.'" Id. (quoting Webster's International Dictionary (1971)). The court held that the district court had abused its discretion in taxing fees and costs under §1927. Id.

Since Overnite, the Seventh Circuit has held that vexatious means "either subjective or objective bad faith." Kotsilieris v. Chalmers, 966 F.2d

1181, 1184 (7th Cir. 1992) (citations omitted). It has reiterated that "Section 1927 sanctions should only be awarded when an attorney 'unreasonably and vexatiously' multiplies the proceedings." Pacific Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113, 120 (7th Cir. 1994) (quoting 28 U.S.C. §1927). It has explained that the statute is "punitive and thus must be construed strictly." Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226 (7th Cir. 1984) (citing Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983)). It has emphasized that its purpose is "to penalize attorneys who engage in dilatory conduct," and a "court may impose section 1927 fees only to sanction needless delay by counsel." Id. "[S]ome degree of culpability on the part of counsel is required." Id. at 227 (citations omitted). "[B]efore a court may assess fees under section 1927, the attorney must intentionally file or prosecute a claim that lacks a plausible legal or factual basis," but the court "need not find that the attorney acted because of malice." Id. (citations omitted).

2. *Inherent Authority*

The Supreme Court has made clear that a statutory or rule-based sanctions scheme does not "displace[] the inherent power to impose sanctions" to discipline attorneys who appear before the court, to punish contempt, to vacate judgments secured by fraud, for willful disobedience of a court order and to punish a party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Chambers, 501 U.S. at 44-46 (citations omitted). "'It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot

be dispensed with in a Court, because they are necessary to the exercise of all others.'" Sanders v. Melvin, 25 F.4th 475, 481 (7th Cir. 2022) (quoting Chambers, 501 U.S. at 43). "'For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."'" Id. (quoting Chambers, 501 U.S. at 43). However, "implied powers, '[b]ecause of their very potency, … must be exercised with restraint and discretion.'" Id. (quoting Chambers, 501 U.S. at 44). "Among these powers is the ability of 'a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.'" Id. (quoting Chambers, 501 U.S. at 44). "And if fraud is discovered prior to judgment, a court 'may impose appropriate sanctions to penalize and discourage misconduct.'" Id. (quoting Ramirez v. T & H Lemont, Inc., 845 F.3d 772, 776 (7th Cir. 2016)). A court's inherent authority to impose sanctions is "subordinate to valid statutory directives and prohibitions." Greyer v. Ill. Dept. of Corrs., 933 F.3d 871, 877 (7th Cir. 2019) (quoting Law v. Siegel, 571 U.S. 415, 421 (2014)).

C. Analysis

1. *Jurisdiction*

The parties spilled some ink arguing whether the defendant's motion for an award of attorney's fees was "timely." But §1927 does not include a deadline by which such motions must be filed. The issue, as the Seventh Circuit explained in Overnite, is not "timelines," but whether this court has jurisdiction to decide a sanctions motion filed after the appellate court has

affirmed this court's order dismissing the case and issued its mandate. Overnite made clear that it does not. The plaintiff filed the amended notice of appeal on December 15, 2020. Dkt. No. 90. At that point, jurisdiction vested with the Seventh Circuit. That court issued the mandate on February 23, 2021, vacating this court's order and dismissing the case as moot. Dkt. No. 96. This court did not reserve jurisdiction, no statute provided it with post-appeal jurisdiction and no party filed motions regarding the case during the two months that the appeal was pending. The defendant filed his motion for fees on March 31, 2021—over a month after the Seventh Circuit issued the mandate. Dkt. No. 97.

The defendant says that "both the extraordinary circumstances surrounding this case and *Overnite's* outlier status . . . militate against its application here." Dkt. No. 98 at 24. In attempting to distinguish Overnite, the defendant stresses the expedited schedule of this case and argues that the fact that the case was part of a "national, multi-pronged" effort to overturn the results of 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." Id. The defendant asserts that "[o]nly after the Seventh Circuit dismissed Plaintiff's appeal as moot and the Supreme Court . . . denied Plaintiff's petition for mandamus was it clear that this case was resolved." Id.

The court agrees that in Overnite, the appeal was pending for eight months, while in this case it was pending for only two. The court also

understands that while the appeal in this case was pending, the defendant and others were involved in other, similar lawsuits and were working—as the defendant has indicated—around the clock to address pleadings filed in multiple cases in multiple forums. But the Overnite court held once the mandate issues, there no longer is a case or controversy over which the district court may exercise Article III jurisdiction. The fact that counsel had little time to file a sanctions motion before the mandate issued cannot vest the court with jurisdiction.

As to the defendant's argument that Overnite effectively has been abrogated by the Supreme Court's decision in White v. New Hampshire Dep't of Emp. Sec., the court cannot agree. In White, the parties settled civil rights litigation and the court entered judgment; one and a half months later, the petitioner filed a request for an award of fees under 42 U.S.C. §1988. White, 455 U.S. at 447-448. Opposing counsel objected, asserting that he had believed that because the consent decree that effectuated the settlement was silent on the issue of fees, any claim to a fee award had been implicitly waived. Id. at 448. The district court granted the request for an award of fees and the opposing party moved to vacate the consent decree, arguing it would not have entered into the settlement had it known it could face further liability. Id. The district court denied the motion to vacate the consent decree and the opposing party appealed. Id. On appeal, the First Circuit concluded that because the movant filed the motion for attorney's fees after the court had entered judgment, the motion constituted a motion to alter or amend the judgment

under Fed. R. Civ. P. 59(e) and thus was required to be filed under the rule's then-applicable ten-day[3] deadline. Id.

The White Court focused its discussion on the relationship between Rule 59(e) and post-judgment attorney's fee requests, concluding that treating such requests as Rule 59(e) motions to alter or amend "could yield harsh and unintended consequences" in civil rights cases—particularly those involving requests for injunctive relief—which could make it difficult for counsel to determine which orders were final under Rule 59(e). Id. at 453. The Court found that Rule 59(e)'s then-applicable ten-day limit "also could deprive counsel of the time necessary to negotiate private settlements of fee questions." Id.

White did not involve a sanctions motion filed after appeal. It involved a post-*judgment* but pre-*appeal* motion for statutorily authorized attorney's fees. The jurisdictional problem identified by the Overnite court did not exist in White; the district court still had jurisdiction when it granted the award of attorney's fees. And even if the Supreme Court's expressed concerns about treating 42 U.S.C. §1988 requests for fees as Rule 59(e) motions having application outside the context of civil rights litigation that seeks injunctive relief, the problem the Court identified—that a litigant might not be able to determine when a final order had issued—was not present here. This court

[3] Currently, Rule 59(e) requires motions to alter or amend judgment to be filed within twenty-eight days of entry of judgment.

dismissed the case. There could have been no confusion about whether that order was a final, dispositive order.

Further, as noted by another judge on this court in rejecting this same argument by the defendant in a different case, the Seventh Circuit has given no indication that it does not consider Overnite to be good law. See Trump v. The Wisconsin Elections Commission, *et al.*, Case No. 20-cv-1785-BHL (E.D. Wis.), Dkt. No. 178. The Seventh Circuit has cited and quoted Overnite in several decisions over the past forty years, including in Badillo, Knorr Brake Corp. and, most recently, Lightspeed Media Corp. v. Smith, 761 F.3d 699, 707 (7th Cir. 2014) (the appellants were "correct that motions under section 1927 must not be unreasonably delayed," citing Overnite).

Overnite precludes not only an award of sanctions under §1927, but an award of sanctions under the court's inherent authority. Because there was no live case or controversy sufficient to give this court jurisdiction at the time the defendant asked for sanctions under the court's inherent authority, the court does not have jurisdiction to grant that request.

The defendant did not file his motion for sanctions until almost four months after this court dismissed the case, two months after the Seventh Circuit issued its decision and over a month after the mandate issued. This court did not reserve jurisdiction. No statute gave the court post-appellate jurisdiction. This court does not have jurisdiction to decide the motion and the court must deny it.

2. *Merits*

In an abundance of caution, the court notes that if it did have jurisdiction to rule on the motion, it would not have awarded fees under 28 U.S.C. §1927. The court would be hard-pressed to find that the plaintiff unreasonably and vexatiously "multiplied" the litigation; other than the original complaint, the plaintiff filed only eight affirmative pleadings—the original motion for injunctive relief and supporting brief, the motion to amend the motion for injunctive relief, the amended complaint, the second motion to amend the motion for injunctive relief, the motion for leave to file excess pages, the motion to file separate reply briefs, the motion for a consolidated evidentiary hearing and a motion to restrict. Some of the motions were extremely lengthy and accompanied by voluminous attachments. Others were sloppy. But the court has no basis on which to conclude that the plaintiff was "dilatory" or that he needlessly delayed proceedings; if anything (as the defendant also has argued), the plaintiff was pushing an extremely expedited schedule, which the court and the defendants struggled to accommodate.

The heart of the defendant's motion is his argument that the plaintiff should not have filed suit to begin with and that the claims the plaintiff brought were not just meritless, but frivolous. This argument harkens back to the Overnite court's reference to other courts that had imposed §1927 sanctions for cases that were patently without merit. But this court never reached the merits of the plaintiff's claims. As the plaintiff has argued, the court dismissed the case on procedural grounds. The court is aware that other

judges have dismissed as meritless claims similar to those made by the plaintiff in this case. Perhaps, had this court reached the merits of the plaintiff's claims, it would have come to the same conclusion. But it cannot agree that if it had jurisdiction to consider the defendant's motion, it would have had a basis for imposing §1927 sanctions on the ground that the plaintiff's claims were wholly meritless and frivolous, because the court did not have the opportunity to make that determination.

The defendant also argues repeatedly that the pleadings the plaintiff's counsel filed were "riddled" with procedural errors. The court noted some of those in its order regarding the amended motion for injunctive relief (Dkt. No. 7), its order ruling on the amended motion for injunctive relief (Dkt. No. 29) and its order denying the plaintiff's motion to restrict (Dkt. No. 82). This is not, however, the first or only case the court has had in which attorneys have made procedural errors—even multiple procedural errors. And when the court issued orders identifying the plaintiff's errors, plaintiff's counsel attempted to address them. The procedural errors made more work for the defendants and the court, but they did not delay the proceedings.

As in Trump v. WEC, the allegation that comes closest to presenting a valid basis for an award of fees is the argument that much of the relief the plaintiff requested was not relief that a federal court either had the authority to grant or had the practical ability to grant. See Trump v. Wisconsin Elections Commission, No. 20-cv-1785-BHL, 2021 WL 5771011, at *4 (E.D. Wis. Dec. 6, 2021). The plaintiff did not get to argue the bases for those requests for relief

because the defendants (including the movant) successfully argued that the court should not reach those bases. Perhaps if the case had progressed further, the plaintiff might have withdrawn some of the requests for relief or retreated from certain arguments. While, as Judge Ludwig stated in the Trump decision, "[r]eady, fire, aim is not the preferred approach when litigating constitutional claims in federal court," id., and while asking for the impossible in the hope that one may achieve the improbable is no less desirable an approach, the fact that the plaintiff's counsel did so is not a sufficient basis for awarding fees under §1927.

The defendant's argument that the court should use its inherent authority to award sanctions is brief. Aside from arguing that the plaintiff brought meritless claims, he argues that the plaintiff "fabricated a quote to support their position." Dkt. No. 98 at 20. This is a reference to the following passage from this court's order of dismissal:

> The plaintiff also asserts that the "cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification." Dkt. No. 72 at 24. He cites Swaffer v. Deininger, No. 08-CV-208, 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008). Swaffer is not a Seventh Circuit case, and the court is not aware of a Seventh Circuit case that establishes a "cutoff for election-related challenges." And the plaintiff seems to have made up the "quote" in his brief that purports to be from Swaffer. The plaintiff asserts that these words appear on page 4 of the Swaffer decision: "even though the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." Dkt. No. 72 at 24-25. The court has read page 4 of Swaffer—a decision by this court's colleague, Judge J.P. Stadtmueller—three times and cannot find these words. In fact, Swaffer did not involve a challenge to a presidential election and it did not involve electors. Mr. Swaffer sought to challenge a Wisconsin statute requiring individuals or groups promoting or opposing a referendum to file a registration statement and take other actions.

> Swaffer, 2008 WL 5246167, at *1. The defendants argued that the election (in which the plaintiff had taken steps to oppose a referendum on whether to allow liquor sales in the Town of Whitewater) was over and that Swaffer's claims thus were moot. Id. at 2. Judge Stadtmueller disagreed, finding that because Swaffer alleged that he intended to violate the statutes at issue in the future, a credible threat of prosecution remained. Id. at 3.

Dkt. No. 83 at 32-33.

This court did not hold that the plaintiff had fabricated a quote—it stated, based on its review of the case the plaintiff had cited, that he *appeared* to have done so. Even if the court had jurisdiction to decide the sanctions motion, it would not have awarded sanctions—under its inherent authority or any other authority—for this misrepresentation without giving the plaintiff's counsel an opportunity to explain whether the drafter of the pleading mistakenly cited the wrong case or whether there was some other innocent reason for the apparently "fabrication."

The defendant asserts that the court should use its inherent authority to sanction the plaintiff and his lawyers because they "delayed the proceedings with a series of procedural errors and misrepresented the law on threshold issues of standing and pleading requirements." Dkt. No. 98 at 21-22. The court already has concluded that the procedural errors did not delay the proceedings. As for the plaintiff's legal arguments, the court disagreed with the plaintiff's interpretation of some cases he cited and found that others did not stand for the propositions he put forth. Dkt. No. 83. The court would not use its inherent authority to impose sanctions, however, without some further hearing to determine whether the plaintiff's counsel made deliberate

misrepresentations of the law, as opposed to errors made in the context of extensive litigation proceeding in federal and state courts around the country at the same time.

Finally, the defendant argues that the court should exercise its inherent authority to sanction the plaintiff and his lawyers because "by acting in haste, Plaintiff and his attorneys precluded Defendants' opportunity to move for sanctions under Rule 11." Dkt. No. 98 at 22. He cites Methode Electronics, Inc. v. Adam Technologies, Inc., 371 F.3d 923, 927-28 (7th Cir. 2004) for the proposition that it is appropriate for a district court to exercise its inherent power to control proceedings by imposing sanctions.[4] Id. Even if the court had jurisdiction to entertain this claim, it would not have used its inherent power to impose sanctions on this basis. The defendant is correct that the court issued its order dismissing the case on December 9, 2020 because that was the date on which the plaintiff's counsel asked the court to rule. See Dkt. No. 71 at 1 (minutes of the December 8, 2020 status conference). But it was the court's decision to issue the order by that date; the court was not required to acquiesce to the plaintiff's scheduling requests. And while it is true that the defendant did not have time between the December 1, 2020 filing of the complaint and the December 9, 2020 order dismissing the case to comply with Rule 11's twenty-one-day safe-harbor provision, he had more than twenty-one

[4] Methode contributes nothing to the analysis; it reiterated only what the Supreme Court had held in Chambers—that a court may invoke its inherent powers even if there is a statute or rule that would sanction the same conduct. Methode, 371 F.3d at 927.

days between the date of that order and the date the Seventh Circuit issued its decision.

If the court had jurisdiction, it would not impose sanctions under §1927. It would consider sanctions under its inherent authority for possible fabrication of a quote and possible misstatement of applicable law only after a hearing at which the plaintiff's counsel would have the opportunity to explain whether those were innocent errors.

III. Plaintiff's Motion to Strike Defendant's Motion for Sanctions (Dkt. No. 105); Defendant Governor Tony Evers's Motion for Leave to File Supplemental Brief (Dkt. No. 112)

Just as the court does not have jurisdiction to decide the motion for an award of attorney's fees, it also does not have jurisdiction to decide the plaintiff's motion to strike or the defendant's motion for leave to file a supplemental brief. Given the fact that the court is denying the motion for sanctions, these motions also are moot.

IV. Conclusion

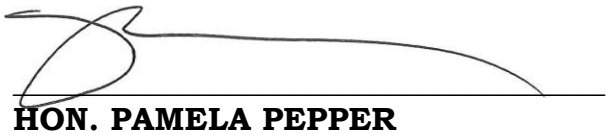
The court **DENIES** for lack of jurisdiction defendant Evers's motion to recover attorney fees. Dkt. No. 97.

The court **DENIES** for lack of jurisdiction and as moot the plaintiff's motion to strike the defendant's motion to recover attorney fees. Dkt. No. 105.

The court **DENIES** for lack of jurisdiction and as moot the defendant's motion for leave to file supplemental brief. Dkt. No. 112.

Dated in Milwaukee, Wisconsin this 24th day of August, 2022.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge