No. 20-40643

In the United States Court of Appeals for the Fifth Circuit

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; DCCC,

Plaintiffs-Appellees,

v.

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS THE TEXAS SECRETARY OF STATE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Laredo Division

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO RECONSIDER THE SANCTIONS ORDER

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Certificate of Interested Persons

No. 20-40643

Texas Alliance for Retired Americans; Sylvia Bruni; DSCC; DCCC,

Plaintiffs-Appellees,

v.

Ruth Hughs, in her official capacity as the Texas Secretary of State,

Defendant-Appellant.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Secretary Hughs, as a governmental party, need not furnish a certificate of interested persons.

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Introduction

Plaintiffs' counsel still has not learned its lesson. In September 2020, the Court denied plaintiffs' request to supplement the record. Six months and as many motions later, plaintiffs' counsel continues to waste the Court's time with ancillary motion practice about this ancillary motion. Counsel begins its reconsideration motion by promising it does not seek to disturb the Court's order denying the motion to supplement—but then devotes most of its argument to rehashing the merits of that earlier motion.

I. The Court need not wade back into those murky waters because the reasons for sanctions are clear. After the September denial, plaintiffs could have sought timely three-judge reconsideration of the one-judge order. They did not, instead raising the issue four months late, in violation of local rules. Plaintiffs also could have used their appellees' brief to ask the merits panel to reconsider the earlier denial. They did not, instead filing a near-identical motion before the motions panel—a result that could *also* have been avoided through compliance with the Court's rules. These elementary missteps, standing alone, merit sanctions.

II. But the procedural violations do not stand alone. Plaintiffs' counsel chose to omit any reference to the September motion and denial in its February motion to supplement, framing the latter motion in a manner that implied it was the only one of its kind. This was a paradigmatic breach of the duty of candor: a knowing misrepresentation to the Court of a material fact. Plaintiffs' experienced appellate counsel should have known—and did in fact know—better. The excuses for this misconduct pressed in the reconsideration motion are no more credible than they were the first

time they were raised by counsel and rejected by the Court. Counsel's misrepresentation and continued prosecution of the misleading and untimely motion unreasonably and vexatiously multiplied proceedings, necessitating section 1927 sanctions.

III. Finally, the attorneys' apology rings hollow. The nuance now discovered by plaintiffs' counsel stands in stark contrast to the invective that preceded the imposition of sanctions. And the remorse expressed in the reconsideration motion would appear more sincere if the attorneys had not also issued a press release announcing they had done nothing wrong. As counsel notes, "[t]here is a time for punishment and a time for grace." *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396, 397 (5th Cir. 2020). The time for grace—and for apologies—was five filings ago. Belated regret cannot restore the resources wasted by the Court and the Secretary in responding to counsel's disregard for its ethical obligations.

ARGUMENT

I. The Court Appropriately Sanctioned Counsel for Violating Local Rules.

Plaintiffs' counsel finally acknowledges it violated the Court's rules regarding the timing and manner for seeking reconsideration. Reconsideration Mot. 2. Counsel claims reconsideration of the sanctions is nevertheless appropriate because it did not act in bad faith. *See id.* at 8, 14-17. This "bad-faith argument fails for the simple reason that there is no bad-faith requirement." *In re Luttrell*, 749 F. App'x 281, 286 (5th Cir. 2018) (per curiam). "This Court has consistently distinguished between a court's inherent power and its local rules." *In re Goode*, 821 F.3d 553, 558 (5th Cir. 2016). Sanctions under the Court's inherent power require "a specific finding that

the attorney acted in bad faith." *Id.* at 559. No such requirement applies "to sanctions imposed pursuant to a local rule," *id.*, or for violation of a local rule. *In re Ramos*, 679 F. App'x 353, 357 n.3 (5th Cir. 2017) (per curiam).

This Circuit's local rules permit a panel to discipline "any member of the bar of this Court for failure to comply with the rules of this Court." 5th Cir. R. 46 I.O.P., *Disciplinary Action* (capitalization altered). No bad-faith finding was necessary to sanction counsel for violating "Fifth Circuit Rules 27.2 and 40." Sanctions Order 2; *see Luttrell*, 749 F. App'x at 286. As for "sanctions under the [C]ourt's inherent powers," Reconsideration Mot. 9, the panel reserved them for "*[f]urther* violations of this [C]ourt's rules." Sanctions Order 3 (emphasis added).[1]

Plaintiffs' counsel also contends it should not have been sanctioned because the rules "were far from clear," "complicated[,] and ambiguous." Reconsideration Mot. 1, 2. That is incorrect and irrelevant. The issue is not that the attorneys simply "fail[ed] to appreciate . . . the available means to seek reconsideration," *id.* at 14—it is that they violated the rules for *any* of the means they might have chosen.

The rules are clear that a single-judge order is "subject to review by a panel upon a motion for reconsideration made within the 14 . . . day period set forth in FED. R. APP. P. 40." 5th Cir. R. 27.2. Counsel ignored that rule and filed a reconsideration motion five months late. The rules are clear that motions are sent to the motions panel unless the case has been fully briefed and "assigned to the oral argument

[1] Were bad faith necessary, the history of these proceedings is redolent of it. Part II.B., *infra*.

calendar." 5th Cir. R. 27 I.O.P., *Motions After Assignment to Calendar* (capitalization altered). Counsel ignored that rule and asserted without authority it "had a good faith and reasonable belief that their request was properly made to the merits panel." Sanctions Opp. 18-19. Counsel persists in making that argument even now. *See* Reconsideration Mot. 16-17. The rules are also clear that a "motions panel's denial . . . is subject to reconsideration by [a merits] panel." *Newby v. Enron Corp.*, 443 F.3d 416, 419 (5th Cir. 2006); *see* Strike Opp. 5 (citing *Newby*). Counsel didn't follow this route either—never once telling the Court in its February motion that it was seeking reconsideration of *anything*.

Assuming this series of errors *was* a "mere mistake," that still would "not preclude sanctions." *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990) (discussing Fed. R. Civ. P. 37(d) sanctions). "The federal courts are not a playground for the petulant or absent-minded; [the] rules and orders exist, in part, to ensure that the administration of justice occurs in a manner that most efficiently utilizes limited judicial resources." *U.S. ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853, 856 (10th Cir. 2005). Here, rather than attempt to determine the appropriate rule for seeking reconsideration, counsel chose to follow none of them. Even if not willful, this "mistake was inexcusable" and therefore sanctionable. *Coane*, 898 F.2d at 1032.

Because these rules are "clearly established," Reconsideration Mot. 2, 10, 17, the "attorneys are presumed to know that refusal to comply will subject them" "to sanctions" after the first violation, "not after two or three warnings," "and not after

lesser sanctions are imposed." *Chilcutt v. United States*, 4 F.3d 1313, 1324 (5th Cir. 1993).

II. Section 1927 Sanctions Were Warranted for the Unjustified Breach of the Duty of Candor.

"All that is required to support § 1927 sanctions is a determination, supported by the record, that an attorney multiplied proceedings in a case in an unreasonable [and vexatious] manner." *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 291 (5th Cir. 2002). The Court correctly found that standard met here. *See* Sanctions Order 2-3. Counsel's violation of the duty of candor and of the local rules unnecessarily prolonged proceedings. And the obstinate refusal to withdraw or alter the February motion prolonged this ancillary litigation even further.

A. Plaintiffs' counsel violated the duty of candor.

An attorney breaches his duty of candor when he knowingly "misrepresents [a] court's actions," or fails to "disclose material facts," *Schlafly v. Schlafly*, 33 S.W.3d 863, 872-73 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), including matters that "could conceivably [] affect[] the outcome of the litigation." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 459 (4th Cir. 1993). Plaintiffs' counsel violated its duty to the Court when it knowingly failed to mention the fact of the September motion and denial in its February motion. *See* Sanctions Reply 9-10; *In re Moity*, 320 F. App'x 244, 249 (5th Cir. 2009) (per curiam) (holding appellant "violated his obligations as an attorney" by failing to mention a previous hearing); *Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067-68 (7th Cir. 2000).

As before, *see* Sanctions Opp. 8-9, counsel skirts the issue by discussing the application of the law-of-the-case doctrine to a one-judge order. Reconsideration Mot. 14-17. The issue here is not whether the September order bound the merits panel: Whatever the *legal* effect of a one-judge order, counsel cannot (and does not) deny that the *fact* of a prior identical motion and prior denial of relief is material because it "could conceivably [] affect[] the outcome of" a subsequent request for the same relief in the same appeal. *Shaffer*, 11 F.3d at 459. Indeed, it is unclear how a merits panel can "reconsider[]" a motions-panel "denial," Reconsideration Mot. 14, when it does not know there is an earlier order for it to reconsider. It is similarly unclear what purpose the reconsideration rules would serve if a party on the losing end of a denial could file a new motion for identical relief at any time, with no reference to the earlier loss.

To "challenge the legal effect of unfavorable facts," an attorney must first "fairly disclose and portray them in [his] brief." *Schlafly*, 33 S.W.3d at 873-74. Counsel here did not. Rather, by omitting any mention of the September proceedings, counsel improperly attempted to transform what was in fact a motion for reconsideration into a document that appeared to request relief for the first time. That was a plain violation of the duty of candor. *See Moity*, 320 F. App'x at 249; *Cleveland Hair Clinic*, 200 F.3d at 1067-68.

B. Counsel's misconduct was unreasonable and vexatious.

Counsel's misconduct was unreasonable and vexatious: There is considerable "evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court." *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998).

1. First, the September denial was unambiguous. The September motion to supplement "was not limited to the stay proceeding, nor was the order denying it so limited." Sanctions Order 2. It takes no special familiarity with the Fifth Circuit to understand that when a court unequivocally states, "DENIED," *see* Sept. Order, it does not mean "try again later."

Although counsel now claims it harbored a "good-faith misunderstanding[]" that the September denial was "a ruling that governed only the stay proceedings," Reconsideration Mot. 14-15, counsel had firsthand knowledge of the form of order used when a motions panel leaves a decision up to the merits panel. Two months before the February motion, the Court ruled on another of plaintiffs' motions: "IT IS ORDERED that Appellee's opposed motion to dismiss appeal as moot is CARRIED WITH THE CASE." Order, Doc. 00515657414 (Dec. 2, 2020).

By contrast, the September motion was *not* carried with the case; nor was it denied with a qualification such as "as unnecessary," "without prejudice," or "as moot." Thus, it remains "wholly reasonable not to credit th[e] excuse" that the "earlier denial was . . . a ruling that governed only the stay proceedings." *Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 175 (5th Cir. 2018); Reconsideration Mot. 15. As the Court noted, if the attorneys found the September order "ambigu[ous]," Reconsideration Mot. 22, or "had any confusion about the application of the order, they could have and should have disclosed the previously denied motion in their new motion." Sanctions Order 2. Counsel has no response—only its already-rejected "*post hoc* contention[s]" with "no legal basis." *Id.*; *see id.* at n.1.

2. Counsel also knew how to re-urge a failed motion. In *Newby* (on which plaintiffs relied, *see* Strike Opp. 5), the party whose motion to dismiss was denied by a motions panel used its merits brief to inform the Court of the denial and "reurge[] the jurisdictional issue" first raised in the motion. Br. of Tex. State Bd. of Pub. Accountancy, *Newby v. Enron Corp.* No. 05-20462, 2005 WL 6142080, at *1 (5th Cir. 2005).

In a recent appeal, the plaintiffs in that case argued in their appellees' brief that the motions panel's reasoning was not binding, and that it was wrong. *See* Br. of Pls.-Appellees, *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 4026191, at *29 & n.3 (5th Cir. July 7, 2020). In that same case, counsel's firm—including some of the sanctioned lawyers here—represented an amicus curiae whose brief "directly respond[ed] to potential concerns raised by the motions panel." Br. of Nat'l Redistricting Found., *Tex. Democratic Party*, *supra*, 2020 WL 4573584, at *2 (5th Cir. July 29, 2020). In other words, counsel was aware that a party asking a merits panel to depart from the views of a motions panel should at the very least inform the Court of the existence of the unfavorable motions-panel decision.

Counsel's assertion that its law-of-the case arguments have merit, *see* Reconsideration Mot. 15, does not make the non-disclosure any less a violation of the duty of candor. *See* Part II.A., *supra*. Nor does it supply cause to escape section 1927 sanctions. Section 1927 "is indifferent to the equities of a dispute . . . . It is concerned only with limiting the abuse of court processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980). So bad faith, improper motive, or reckless disregard of a duty "may be found[] not only" when "the substantive claim [is] without merit," "but

also in the conduct of the litigation." *Id.* at 766. For that reason, the Court has awarded section 1927 sanctions even when the sanctioned party "ultimately prevailed" on appeal. *Religious Tech. Ctr. v. Liebreich*, 98 F. App'x 979, 985 (5th Cir. 2004) (per curiam). What matters here is the improper "*manner* in which [] counsel asserted its arguments"—the misrepresentation and rule violations—not the arguments' underlying merit. *Greer v. Richardson Indep. Sch. Dist.*, 471 F. App'x 336, 340 (5th Cir. 2012) (per curiam) (emphasis added).

Even assuming it is relevant that counsel had "reasonable doubt" as to the effect of the September Order, Reconsideration Mot. 15, it was within counsel's ken to seek clarification. Take counsel's conduct during this appeal. After this Court stayed the preliminary injunction, plaintiffs filed a "Motion for Clarification" in the district court, asking the court to "clarify" that the injunction expired immediately after the November 2020 general election. *See* Sec'y's Resp. to MTD 2, Doc. 00515655540 (Nov. 30, 2020). The district court obliged, even though the notice of appeal had divested it of jurisdiction. *Id.* at 3. It was this alteration to the injunction that formed the basis for plaintiffs' subsequent mootness motion on appeal. *Id.* at 1.

Counsel knows how to seek clarification—but it failed to do so regarding the order denying the September motion. That deliberate failure, given counsel's request for clarification earlier in this case, cannot be the result of good-faith confusion.

3. Or consider plaintiffs' merits brief, which was submitted at the same time as the February motion. In a section of the brief devoted to the procedural history of "This Appeal," plaintiffs mentioned the Secretary's request for "a stay of the preliminary injunction," "which this Court granted"; the "district court['s]

clarifi[cation] [of] its preliminary injunction"; plaintiffs' motion "to dismiss the Secretary's appeal" as moot; and the fact that the mootness motion "remains pending." Red Br. 11. Plaintiffs also told the Court they had "filed with this brief a Motion to Supplement the Record containing declarations, signed on September 29, 2020." *Id.* at 32.

That is, plaintiffs mentioned every meaningful procedural development *except for* the September motion and denial. The brief referred—in the singular—to "Plaintiffs' Motion to Supplement the Record." *Id.* at 34. And the February motion said not one word about the functionally identical September motion. Taken together, there can be little doubt that counsel intended to convey the impression that there was no prior motion to supplement. *See Moity*, 320 F. App'x at 249.

The attorneys believe it is significant that "the chance that this Court would not 'learn' of [the] order . . . is exactly nil," "given Defendant's zealous advocacy." Reconsideration Mot. 19; *but see Blackwell v. Dep't of Offender Rehab.*, 807 F.2d 914, 915 (11th Cir. 1987) (per curiam). They neglect, however, to mention the cardinal reason for the Secretary's "zealous advocacy" in this regard—counsel's ongoing refusal to abide by the rules.

Following the denial of the September motion, counsel engaged in increasingly inappropriate tactics to secure an advantage, all of which led to unnecessary motion practice: the October attempt to have the district court—divested of jurisdiction—alter the preliminary injunction in this case, *see* Sec'y's Resp. to MTD 2; the November motion to dismiss as moot based on this improper revision, *id.*; the December filing in a related appeal of an appendix of non-record material without an

accompanying motion to supplement, *see* Strike & Sanctions Reply 7; and the February insertion of new evidence in the appellees' brief without a motion to supplement *or* request for judicial notice. *See id.* at 7-8.

Given this pattern of conduct, the Secretary's identification of and objection to the February motion's omission *was* likely inevitable. Rather than suggest an innocent oversight, however, this inevitability further demonstrates how brazen counsel has become in its noncompliance with basic procedural rules.

Additionally, the circumstances surrounding the non-disclosure set this case far apart from those on which counsel relies. *See* Reconsideration Mot. 11-12. In *MAO-MSO Recovery II, LLC v. State Farm Mutual Automobile Insurance Co.*, counsel made no "material omissions," the record was "confused and confusing," and the "supposed misrepresentations" "look[ed] more like honest mistakes" because there was "no basis" to conclude the "attorneys knew anything about" the undisclosed facts. 935 F.3d 573, 584 (7th Cir. 2019). And in *In re Plaza-Martínez*, sanctions were reversed because "the appellant neither misrepresented material facts nor withheld important information." 747 F.3d 10, 13-14 (1st Cir. 2014). Here, however, the appellate docket is straightforward. The attorneys indisputably knew of the September motion and denial. The same lawyers and signatory appeared on both motions. Strike & Sanctions Mot. 11. The February motion is a near-identical copy of the earlier one.

Id. And the facts omitted were material even if there was a colorable argument they were not dispositive. *See* Part II.A, *supra*.[2]

Thus, "the copy-and-paste jobs before [the Court] reflect a dereliction of duty, not an honest mistake." *Conboy v. U.S. Small Bus. Admin.*, --- F.3d ----, 2021 WL 1081089, at *3 (3d Cir. Mar. 19, 2021). Counsel made a conscious decision to re-date the September motion, reattach the declarations, and make a few changes—but not to alert the Court to the earlier motion or the September order.

4. Finally, the attorneys' legal experience is also relevant. *See, e.g.*, *Ramos*, 679 F. App'x at 358; *Cigna Ins. Co. v. Huddleston*, 986 F.2d 1418, 1993 WL 58742, at *13 (5th Cir. 1993) (per curiam). For that reason, this Court might understandably decide to relieve the associates of sanctions. The same consideration, however, militates in favor of maintaining the sanctions against the partners and of-counsel.

Messrs. Elias and Spiva are senior partners, have each been practicing for nearly thirty years, and hold themselves out as "successful[]" and "experienced appellate lawyer[s]." *Marc E. Elias: Overview*, Perkins Coie, https://tinyurl.com/66352fbf (last visited Apr. 5, 2021); *Bruce V. Spiva: Overview*, Perkins Coie, https://tinyurl.com/bbdv2c6 (last visited Apr. 5, 2021). Ms. Howton, the attorney who signed the September and February motions, is of-counsel and has been in practice for eight

[2] Counsel (at 12) also relies on *Level 3 Communications, LLC v. United States*, 724 F. App'x 931 (Fed. Cir. 2018), a case that considered only the existence of bad faith, *see id.* at 935, which is present here but unnecessary to sustain the sanctions. And the Federal Circuit appears to have adopted a subjective-bad-faith requirement, *see id.* at 934-35, rejected by this Court. *See* Part II.B.4, *infra*.

to nine years. *Skyler M. Howton: Overview*, Perkins Coie, https://tinyurl.com/6bm7knhd (last visited Apr. 5, 2021).

Because these lawyers "are clearly not inexperienced," *In re Kunstler*, 914 F.2d 505, 519 (4th Cir. 1990), the Court may "assume that [they are] familiar with the standards and rules under which lawyers practice their profession." *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127 (2d Cir. 1989). When it comes to the attorneys' violations of ethical and procedural rules, then, "willfulness or deliberate choice" are considerably more plausible explanations for this behavior than mere "incompetence." *Kunstler*, 914 F.2d at 519; *cf. In re Ray*, 951 F.3d 650, 655 n.4 (5th Cir. 2020) (rejecting an inexperience justification from an attorney "in his fifth year of practice"). Improper motive, recklessness, or a "bad-faith finding may [therefore] be predicated on a single point: [the attorneys] knew better." *Deutsch*, 882 F.3d at 175 (quotation marks omitted); *see In re Sealed Appellant*, 194 F.3d 666, 672 (5th Cir. 1999) (inferring bad faith from "deliberately misleading" conduct).

Counsel nonetheless insists it acted in good faith because it would have followed the rules if it had understood them. *See* Reconsideration Mot. 14-15. But "deliberate misbehavior" and "subjective bad faith [are] not necessary" for an attorney to be "held accountable" under section 1927. *Arthur A. Collins, Inc. v. Am. Tel. & Tel. Co.*, 103 F.3d 125, 1996 WL 731410, at *3 & n.6 (5th Cir. 1996) (emphasis omitted). Rather, the Court is "entitled to demand that an attorney exhibit some judgment. To excuse objectively unreasonable conduct by an attorney would be to state that one who acts with an empty head and a pure heart is not responsible for the

consequences." *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) (quotation marks omitted).

At any rate, counsel's assertion is difficult to square with the unwavering vitriol that preceded the Sanctions Order. The attorneys now say they would have "file[d] a prompt motion for reconsideration" if they "had understood that they needed to." Reconsideration Mot. 8. When the Secretary flagged the reconsideration rule, however, *see* Strike & Sanctions Mot. 3 (citing 5th Cir. R. 27.2), the attorneys claimed its application here "ma[de] no sense." Strike Opp. 6. They did not even ask the Court in the alternative to excuse the late filing, should the panel consider the February motion untimely—as one might expect from a party intent on following the Court's rules. *See United States v. Smith*, 953 F.2d 1060, 1067-68 (7th Cir. 1992) ("We cannot fathom why a lawyer, alerted to a rule, would fail to correct the shortcoming and instead certify that he has complied in full.").

The attorneys also say their lack of candor was the "product of a genuine mistake on a difficult question with conflicting authority, . . . not bad faith." Reconsideration Mot. 8; *see id.* at 2. But they found the question much less difficult and the authority much less conflicting *before* they were sanctioned, inveighing against the notion they had a disclosure obligation as "plainly wrong," Sanctions Opp. 1, "wholly without merit," *id.* at 2, contrary to "well-established precedents," *id.*, "vague," *id.* at 15, "def[ying] explanation," *id.*, "meritless," *id.* at 18, "truly extraordinary and completely meritless," *id.*, and "baseless." *Id.* at 3, 12, 15.

Plaintiffs' counsel went further still, doubling down on the misrepresentation and asserting "it [was] the *Secretary* who ha[d] failed to act in good faith" by not

"allow[ing] [plaintiffs] an opportunity for correction." *Id.* at 3, 17 (emphasis added); *but see* Strike & Sanctions Reply Exh. 1 at 2 (Secretary's email alerting plaintiffs to her position prior to filing the sanctions motion); *id.* Exh. 1 at 1 (the attorneys' response, dismissing that position as "entirely meritless"). Far from demonstrating good faith, these "unrestrained accusations and innuendos . . . simply reinforce the perception of the reckless [conduct] in which . . . counsel ha[s] engaged." *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1411 (5th Cir. 1994).

C. Counsel's improper conduct multiplied proceedings.

"It is a waste of everyone's time when one motion metastasizes into two or three." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 749 n.11 (8th Cir. 2018). For that reason, the Court has not hesitated to impose section 1927 sanctions based on the dilatory consequences of a single act of misconduct. *E.g.*, *Lyn-Lea Travel*, 283 F.3d at 292; *Eagan v. LaPlace Towing, Inc.*, 43 F.3d 670, 1994 WL 725059, at *2 (5th Cir. 1994) (per curiam); *Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992) (per curiam); *contra* Reconsideration Mot. 18.

Take *Engra*, on which this Court relied. *See* Sanctions Order 3. There, as here, the attorney filed a motion months later than a "prudent counsel would have," even though the "time and place to do so" was "obvious." *Engra*, 958 F.2d at 645. In the absence of an "excuse for following this unreasonable course of conduct that was burdensome to both the court and [the opposing party]," the Court imposed section 1927 sanctions. *Id.* Here, plaintiffs' counsel multiplied proceedings *twice*—first, by filing the untimely, misleading February motion. Sanctions would have been warranted for that "first offence" alone—the attorneys are "presumed to have

understood that [their] actions would delay the proceedings at a burden to [their] opponent[] and the [C]ourt." *Deutsch*, 882 F.3d at 176.

The second offence made that presumption a certainty: "[A]fter Appellant notified Appellees that they intended to file a motion for sanctions based on this lack of candor and violation of local rules, Appellees could have withdrawn their motion. But they did not. Instead, they stood by a motion that multiplied the proceedings unreasonably and vexatiously." Sanctions Order 2-3.

III. There Is No Reason To Reconsider the Sanctions Order.

A. The sanctions were not excessive.

Plaintiffs' counsel argues the "severe" sanctions here should be reserved only for "egregious" misconduct "or the violation of clearly established rules." Reconsideration Mot. 2, 10, 14, 19, 20. That is not the test, and the premise is wrong. "The assessment of excess costs, expenses, or attorney's fees is a relatively mild sanction, especially when compared to dismissal." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987); *see Coane*, 898 F.2d at 1032 (describing Rule 37(d) sanctions, which include attorney's fees caused by failure to follow procedural rules, as "light"); *cf. John v. Louisiana*, 899 F.2d 1441, 1448 (5th Cir. 1990) ("[W]e have affirmed sanctions of dismissal with prejudice where a plaintiff's attorney engaged in intentional misconduct.").

What's more, the award of pecuniary sanctions is not limited to cases "of egregious bad faith." *Cigna*, 1993 WL 58742, at *14. This Court in *Deutsch*, for example, affirmed a fine imposed on an attorney whose failure to read a court order caused

him to instruct a witness not to appear at the scheduled time. 882 F.3d at 172, 175. For purposes of section 1927, what matters is whether sanctions will "dampen the legitimate zeal of an attorney in representing his client." *Braley*, 832 F.2d at 1512. Counsel cannot credibly claim the breach of the duty of candor was merely a "somewhat exuberant filing strategy." Reconsideration Mot. 13. There is "no justification, under the banner of vigorous advocacy or otherwise," for the breach or the complete abandonment of this Circuit's rules that accompanied the February motion. *Arthur A. Collins*, 1996 WL 731410, at *7.

In any event, the attorneys' misconduct falls within their definition of sanctionable behavior. The obligation to disclose material facts is clearly established. *E.g.*, *Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam). And "[e]ven the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." *Shaffer*, 11 F.3d at 457. "The system," therefore, "can provide no harbor for clever devices to . . . mislead opposing counsel or the court." *Id.* at 457-58.

B. Counsel's apology comes too late.

Although the attorneys offer their apologies to the Court, *see* Reconsideration Mot. 1, 2, 7, 22—a courtesy not extended to the Secretary, whom they accused of bad faith, *see* Sanctions Opp. 17—counsel's firm took a different tone in a press release sent to and published by "news outlets across the country," Reconsideration Mot. 21:

> "[T]he firm and the attorneys involved in this matter strongly disagree with the appellate court's ruling and its order of sanctions in this case,"

> [Perkins Coie] said in a statement. "The firm fully and completely supports our attorneys in this case."

Erik Larson, *Top Democratic Election Lawyer Sanctioned in Suit Against Texas*, Bloomberg (Mar. 12, 2021), https://bloom.bg/3s8x9v9. As far as the Secretary is aware, this statement has not been retracted or amended.

"The [firm's] lack of concern about the behavior of its counsel," and the attorneys' continued and public adamance that they have done nothing wrong, "clearly demonstrate[] that [the attorneys] deserved the type of sanctions meted out here." *Chilcutt*, 4 F.3d at 1325. Indeed, given this obstinacy, it seems likely that any relief from sanctions will result in another public statement claiming vindication.

"However, even if the [attorneys] were to become penitent for [their] behavior, . . . a lesser sanction would [not] serve the deterrent purposes of" the Sanctions Order. *Id.*; *see* Sanctions Order 3 ("Sanctions are warranted in this case to deter future violations."). Were the Court to reconsider sanctions, "it might well be that [counsel] would faithfully comply with all future" orders and rules "in this case. But other parties to other lawsuits would feel freer than . . . they should feel to flout other" rules in other cases. *Chilcutt*, 4 F.3d at 1325.

The requested release from section 1927 sanctions would also undermine their statutory "purpose to compensate victims of abusive litigation practices." *Hamilton*, 519 F.3d at 1205. Thus, whatever the benefit of an apology in other contexts, *see* Reconsideration Mot. 19, granting relief on that basis here "would also be unfair to [the] opposing part[y] whose rights the sanctions were in part imposed to vindicate." *Blue v. U.S. Dep't of Army*, 914 F.2d 525, 547 (4th Cir. 1990). Here, it is Texas taxpayers

who have been "burden[ed] . . . with unnecessary expenditures of time and effort." *Batson v. Neal Spelce Assocs., Inc.*, 805 F.2d 546, 550 (5th Cir. 1986). Despite the attorneys' dubious new-found regret, their extended abuse of process "clearly warrants recompense." *Id.*

Last, the attorneys bemoan the effect of sanctions on their public reputations and careers. Reconsideration Mot. 20-21. But this Court is not charged with the "impossible task of reputational measurement." *Blue*, 914 F.2d at 547. Counsel had the opportunity to consider the consequences of its actions when it was first alerted to the impropriety of the non-disclosure. Still, the Secretary agrees that relief from sanctions may be warranted with respect to the associates (Madduri, Osher, and Command). *See* Part **Error! Reference source not found.**.4, *supra*. After all, it is Elias and Spiva (as partners) and Howton (as of-counsel and the signing attorney) who are "responsible for the actions of the several [associates] from [their] law firm whom [they] directed into the fray." *Coane*, 898 F.2d at 1033. It is *their* conduct that is inexcusable—and that should not be excused.

Conclusion

The Court should deny the motion to reconsider.

Respectfully submitted.

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Certificate of Service

On April 5, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,187 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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