UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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Rodney Rigsby

Case No. 14CV00023-bbc

Plaintiff

v.

American Family Mutual Insurance Company, et al.

Defendants.

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**DEFENDANTS CHRIS MISCIK, J. MICHAEL RILEY, AND AXLEY BRYNELSON, LLP'S BRIEF IN SUPPORT OF MOTION FOR SANCTIONS**

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## INTRODUCTION

Over the past decade, Rodney Rigsby has carved out a cottage industry in southern Wisconsin filing baseless lawsuits against businesses for manufactured claims of copyright infringement. He also has a history of filing baseless lawsuits against attorneys and law firms, including two previous suits against the undersigned and his law firm. By Defendants' count, 20 attorneys and law firms have been forced to defend such lawsuits since 2011. Rigsby has been sanctioned numerous times for his behavior. Despite being assessed over $150,000 in sanctions for his frivolous filings, Rigsby shows no intention of stopping.

The present case is no exception. None of the claims asserted in Rigsby's Complaint have any merit for the reasons discussed in Defendants' briefs in support of their Motion to Dismiss. Not only are his legal theories groundless, but his outrageous factual allegations are directly contradicted by the very documents he attached to his Complaint.

Rigsby was duly served with a 21-day Safe Harbor letter under Fed. R. Civ. P. 11, which attached a copy of Defendants' Motion For Sanctions, advised Rigsby of why his claims were baseless, and warned him the sanctions motion would be filed if he did not withdraw his Complaint within 21 days. Instead of withdrawing his Complaint, Rigsby sent undersigned counsel his own Rule 11 letter, claiming that Defendants' Motion for Sanctions was itself frivolous.

Rigsby knew or should have known that the claims in his Complaint were legally and factually baseless. Rigsby's long history of filing frivolous lawsuits demonstrates that the sole purpose of the present suit was to harass Defendants and leverage a large monetary settlement.

Repeated monetary sanctions have proved ineffective. Rigsby has not paid previous sanction awards and he continues to file baseless lawsuits against attorneys and law firms. Non-monetary sanctions are appropriate and necessary in this case to repel Mr. Rigsby's assault on courts, attorneys, and law firms in this state. Thus, Defendants request that the Court enter

an order enjoining Rigsby from filing any further lawsuits against Defendants, or any attorneys employed by Axley Brynelson, LLP, without first obtaining leave of court. Additionally, or alternatively, Defendants request that the Court order Rigsby to pay Defendants' attorney fees and enjoin him from filing any further suits until such award is paid.

## LEGAL STANDARDS

"Rule 11 authorizes a district court to impose sanctions on lawyers or parties (or both) for submissions that are filed for an improper purpose or without a reasonable investigation of the facts and law necessary to support their claims. *See* Fed.R.Civ.P. 11(b)[.]" *Senese v. Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819, 823 (7th Cir. 2001).

Rule 11 does not require that the Court find a party acted in "bad faith" before awarding sanctions. Rather, the court must "undertake an objective inquiry into whether the party or his counsel 'should have known that his position is groundless.'" *Chicago Newspaper Publishers' Ass'n v. Chicago Web Printing Pressmen's Union No. 7*, 821 F.2d 390, 397 (7th Cir.1987) (citations omitted). "In deciding whether to impose sanctions, the district court must make an objective determination as to whether the party's conduct was reasonable under the circumstances." *Boese v. Milwaukee Cnty.*, 801 F. Supp. 220, 224 (E.D. Wis. 1992).

Pro se litigants are subject to Rule 11, the same as attorneys, and are subject to sanctions if the action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Vitug v. Multistate Tax Com'n*, 883 F.Supp. 215, 218–19 (N.D. Ill. 1995). Additionally, "sanctions may be particularly appropriate when the offending party, although proceeding pro se, has demonstrated ... competence in finding and understanding applicable law." *Smith v. Educ. People, Inc.*, 233 F.R.D. 137, 142 (S.D.N.Y.2005), *aff'd* 2008 WL 749564 (2d Cir. Mar. 20, 2008).

Although a finding of bad faith is not required, finding that Rigsby acted in bad faith in this case would be warranted. At a minimum, Rigsby knew or should have known that his claims were groundless.

## ARGUMENT

### I. Rigsby's Complaint Is Objectively Unreasonable.

Rigsby's claims in this case are based on the fact that he drafted legal documents to "help" his business associate (Chris Miscik) prosecute a personal injury case in Dane County and attempted to settle it himself. When Rigsby's efforts proved ineffective, Mr. Miscik hired Attorney J. Michael Riley to represent him. Attorney Riley secured a settlement for Miscik. Rigsby, who was hoping to get paid a small fortune (Rigsby's initial settlement demand on behalf of Miscik was over $1,000,000.00) from the proceeds of the settlement, was unhappy with the amount Attorney Riley

obtained. Rigsby sued Miscik and Attorney Riley asserting multiple, far-fetched legal theories, including that Attorney Riley defrauded Miscik and was required to add Rigsby and his business to Miscik's lawsuit. Rigsby concocted a story that Attorney Riley conspired to "scam" Miscik and colluded with the other parties in the case to confiscate Miscik's settlement monies. However, the documents Rigsby attached to his Complaint showed nothing more than that Attorney Riley negotiated a settlement on behalf of Miscik, and dispersed the proceeds to Miscik after deducting his agreed-upon attorney fees, costs, and payments to subrogated parties.

Rigsby also filed a copyright application for his "work product" that he illegally prepared on behalf of Miscik. Despite the fact that his own e-mails indicate that Rigsby encouraged Miscik to share his "work product" with Attorney Riley to "get the best deal" for Miscik, Rigsby sued Miscik, Attorney Riley, and Riley's law firm for copyright infringement and "tort conversion" for using Rigsby's "work product" to "profit" and settle the case.

Defendants explained why each and every one of Rigsby's claims in this case is without basis in law or fact in their briefs supporting their Motions to Dismiss. As demonstrated below, Rigsby knew or should have known that his claims were groundless, such that sanctions are appropriate.

## II. Defendants Complied With Rule 11's Safe Harbor Provision.

On February 10, 2013, Defendants sent Rodney Rigsby a Safe Harbor Letter pursuant to Fed. R. Civ. P. 11. (Barber Decl., Exs. 1-4.) The Safe Harbor Letter explained to Rigsby why his Complaint was frivolous and afforded him the required 21 days to withdraw his Complaint. (*Id.*, Ex. 1.) Rigsby did not do so. Instead, he responded with his own Rule 11 letter, claiming that Defendants' Motion For Sanctions was itself frivolous. (*Id.*, Ex. 4.)[1] Defendants have in all respects complied with the requirements of Rule 11, such that the Court may impose sanctions.

## III. Rigsby Knew Or Should Have Known The Claims In His Complaint Were Frivolous

Rigsby knew or should have known that all of the claims asserted in this case lack any basis in law. That should have been evident to him after Defendants served him with a copy of their Safe Harbor Letter and initial brief in support of their Motion to Dismiss. However, even if it was not apparent to Rigsby after reviewing these documents that his lawsuit was groundless, Rigsby nonetheless knew or should have known that his claims were frivolous, as he has previously been sanctioned for bringing similar claims.[2]

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[1] Any Rule 11 Motion filed by Rigsby would be frivolous itself.

[2] In this brief, Defendants focus on prior lawsuits in which Rigsby brought frivolous claims similar to the claims brought in this case. However, in considering this motion, the Court

### A. Rigsby was previously sanctioned for attempting to recover settlement monies from someone else's lawsuit.

At some point in time, Rigsby had a business relationship with one Grant McLaughlin. Mr. McLaughlin sued his employer for allegedly violating the Americans With Disabilities Act in Eastern District of Wisconsin Case No. 2:12-cv-00510-LA. (Barber Decl., Ex. 6.) The case apparently settled. Rigsby then sued McLaughlin and the attorneys who represented McLaughlin in Dane County Case No. 13-CV-377, claiming that he (Rigsby) was entitled to a portion of the proceeds from the settlement in Eastern District of Wisconsin Case No. 2:12-cv-00510-LA. (Barber Decl., Ex. 7 at 8.)

Similar to the claims against Attorney Riley in the present case, Rigsby claimed he was entitled to a portion of the settlement and that McLaughlin's attorneys withheld settlement monies from their client. (*Id.* at 8-10.) Also similar to the present case, Rigsby had no relationship with the law firm he was suing, and the law firm had made no promise to pay him monies received by McLaughlin. (*Id.*)

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may find it useful to review Rigsby's long history of filing frivolous lawsuits and abuse of the legal system, which is recounted in painstaking detail in a brief filed by Attorney Travis West in Dane County Case No. 13-CV-941/14-CV-108 and, which is included as Exhibit 5 to the undersigned's declaration. Pages 5 through 24 set forth a complete history of Mr. Rigsby's numerous frivolous lawsuits that he has filed in state and federal court and his history of being sanctioned for such lawsuits.

In an oral ruling, the Dane County Circuit Court explained to Mr. Rigsby that he could not sue McLaughlin's attorneys because he had no contract with the law firm, and the law firm did not owe him a duty of care:

> There is nothing in the amended complaint that's before the court that would in any way create any liability on the part of Shannon McDonald personally or McDonald & Kloth LLC to these plaintiffs. . . . .
> . . . . Again, it asserts this claim of a duty of care by McDonald and McDonald and Kloth to parties with whom they had no contractual relationship, no attorney/client relationship, nothing at all. It is--there's just no basis there on which the parties could recover.

(*Id.*, at 15.)

The court also imposed sanctions against Rigsby, stating:

> There is clearly no basis in law in either the original complaint, the amended complaint or the proposed second amended complaint. Any belief I think that there was a basis in law for this lawsuit against those parties was an unreasonable belief not grounded in even a self-represented party's consideration of the law in a rational way of the law and facts in this case.

(*Id.* at 17.)

Thus, to the extent Rigsby was attempting to be paid from settlement monies that Attorney Riley secured on behalf of Miscik in Miscik's personal injury lawsuit, Rigsby was clearly on notice that the claims were groundless.

### B. Rigsby knew or should have known that attorney Riley did not owe him a duty of care.

Also, the above-quoted decision should have put Rigsby on notice that Attorney Riley had no duty or care or fiduciary duty to Rigsby, as Rigsby was never his client and Attorney Riley made no promises to Rigsby. *See* Barber Decl., Ex. 5 at 12 ("well, attorneys have duties to their clients, but you were

never Mr. McDonald's client in this case . . . .") Thus, Rigsby knew or should have known that he could not assert a claim for breach of fiduciary duty against Attorney Riley in this case.

### C. Rigsby knew or should have known that he did not have standing to assert any potential claim belonging to Miscik against Attorney Riley.

In his Complaint, Rigsby asserted several claims that properly belong to his former business partner, Mr. Miscik. Rigsby claimed that Attorney Riley committed professional malpractice by not representing Miscik throughout the course of his underlying litigation and "switching to mediator." He also claimed that Attorney Riley committed fraud by misrepresenting the total amount of the settlement he obtained. Clearly, Rigsby does not have standing to assert such claims.

Rigsby knew or should have known he could not assert such claims, as in Dane County Case No. 13-CV-377 Judge Colas put Rigsby on notice that he cannot assert claims belonging to other individuals.

> And so how is that --how do you have standing? I can see where that might give McLaughlin a claim against his attorney, former attorney.
> . . . .
> . . . . You're suing because he violated his duty to McLaughlin, but normally in the law only the people who are -- to whom the duty was owed can sue a person who preaches a duty. Other people can't just step in and say you had a duty – X had a duty to Y and now I'm Mr. Z and I'm going to sue Y or sue X.

(Barber Decl., Ex. 5 at 13-14.) Thus, Rigsby should have known that he could not assert claims against Attorney Riley on behalf of Miscik.

**D Rigsby's copyright claim was groundless and asserted for an improper purpose.**

Defendants have explained why Rigsby's copyright claim lacks any basis in law in their brief in support of their Motion to Dismiss, and will not repeat the argument here. In addition to lacking any basis in law, the present case follows Rigsby's long history of bringing frivolous copyright actions in the hopes of extracting extravagant settlement monies from the parties sued.

In the 1990's, Rigsby sued the National Football League, claiming $1 million in damages after he attempted to trademark "St. Louis Rams" shortly after the team announced it was moving to St. Louis. *Johnny Blasthoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 430-31 (7th Cir. 1999). Unsurprisingly, the case was dismissed.

Mr. Rigsby has also filed numerous frivolous copyright infringement suits along with his business partner Catherine Conrad relating to the "Banana Lady" trademark. In one of these actions, this Court noted that Rigsby's lawsuit was obviously filed in the hopes of extracting a large settlement:

> Plaintiffs' suit was ill-conceived from the beginning, brought without any serious investigation of the law and extended long past the time the plaintiff should have realized its lack of merit. In addition, their statements in their brief in opposition to defendant's motion for fees support defendants' observation that plaintiffs were primarily interested in settling the case for a large sum.

*Conrad v. Bendewald*, Western District of Wisconsin Case: 3:11-cv-00305-bbc; Dckt. # 139 (Nov. 11, 2012).[3]

Likewise, teamed with his partner Quincy Neri, Rigsby has joined numerous suits in state and federal court seeking millions of dollars in damages for alleged violations of a copyright in an unpublished sculpture mounted to the ceiling of a private residence.[4] In one of the state court lawsuits, Rigsby and Neri sued numerous law firms and insurance companies for "bad faith" because they refused to settle the initial copyright litigation in federal court.[5] The case was dismissed and the circuit court's imposition of sanctions upheld on appeal.[6]

Here, Rigsby seeks a monetary judgment of $1,600,000.00 because Defendants allegedly copied and used his copyrighted "work product" to settle Miscik's personal injury lawsuit for $5,000.00. (Dckt. # 1 at 18.) Even ignoring the fact that Rigsby's alleged copyright is based upon his unauthorized practice of law (a crime in Wisconsin), it is flatly unreasonable to suggest that Rigsby could have suffered over $1 million in damages.

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[3] Attached as Exhibit 8 to Barber Decl.

[4] Western District of Wisconsin Case Nos. 3:11-cv-429-slc; 3:12-cv-600-bbc, and 3:13-cv382-bbc; Dane County Case Nos. 12CV4166, 12CV4096, 12CV4181, and 13CV0075.

[5] *See* Neri v. Barber, slip op., No. 2013AP713, 2014 WL 958864 at ¶¶2, 5 (Wis. Ct. App., Mar. 13, 2014) (Rigsby did not participate in the appeal but was a party to the circuit court action).

[6] *Id.*

Rigsby's copyright claim is based on his allegations that Defendants copied legal documents he prepared, as well as police photographs and other public documents. Even if Rigsby's allegations were true, there is no possible way these facts could give rise to a damage claim for over $1 million, under either a lost profits or unjust enrichment theory, for a case worth only $5,000.00.

Additionally, Rigsby's litigation history is further evidence that the present suit was brought for an improper purpose. Despite the fact that Rigsby has never been a client of the firm, he has filed or joined three lawsuits against Axley Brynelson, LLP and three of its attorneys (Attorney Riley, Attorney Lubinsky, and Attorney Barber).[7] Also, Rigsby has an established history of suing at least 20 other attorneys and law firms since 2011.[8] In light of Rigsby's past litigation history, there is no reasonable conclusion other than that Rigsby instituted this lawsuit to harass the Defendants and leverage settlement monies from them.

[7] Dane County Case Nos. 12CV4166, 12CV4096, and the present action.

[8] Dane County Case No. 14-CV-108 (Attorney Travis West, Attorney Staz, and SBG Law); Dane County Case No. 13-CV-377 (Attorney Shannon McDonald and McDonald & Kloth); Dane County Case No. 12CV4096 (Attorney Timothy Barber, Attorney Lori Lubinsky, Axley Brynelson, LLP, Attorney Anthony Anzelmo, Peterson, Johnson and Murray, Attorney Cathleen A. Dettman, Attorney Kevin Palmersheim, Haley Palmersheim S.C., Attorney Carley Peich–Deisling, Attorney Barrett J. Cornielle, Attorney David J. Pliner, Cornielle Law Group LLC); Dane County Case No. 12CV4166 (same defendants as 12CV4096); Dane County Case No. 11CV4860 (Attorneys Bill Abbott, Attorney Mark Fuhrman, and Bell Moore & Richter S.C.)

## IV. Monetary sanctions are appropriate, but not sufficient in this case.

"[T]he purpose of Rule 11 is to deter baseless filings in the district court. *Cooney v. Casady*, 735 F.3d 514, 523 (7th Cir. 2013). As such, Rule 11 authorizes a court to impose an "appropriate sanction" for filing a frivolous claim. While monetary sanctions in the form of an award of attorney fees are a common form of sanction, Rule 11 "is not a fee-shifting measure." *Id.* Instead, "Rule 11 vests in the district court significant discretion to fashion an appropriate remedy" to fulfill the purpose of the statute. *Brandt v. Schal Associates, Inc.,* 960 F.2d 640, 651 (7th Cir. 1992).

Here, while monetary sanctions would certainly be appropriate, they are not sufficient to deter Rigsby's behavior. Mr. Rigsby has been assessed over $150,000.00 by state and federal courts in sanctions, fees, and costs for filing baseless claims, but has satisfied only a single $80 judgment. (*See* Barber Decl., Ex. 5 at 22-23.) Despite repeatedly being sanctioned, Rigsby continues to file baseless lawsuits. And, Defendants harbor no illusions that any monetary award entered against Mr. Rigsby would be collectible.

Although an "extreme remedy," *In re Powell*, 851 F.2d 427, 431 (D.C. Cir. 1998), when a party has a history of unmeritorious filings, a district court may enter an injunction prohibiting him from filing further lawsuits against particular defendants, or without first obtaining leave of court. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1295 (11th Cir. 2002)

(affirming district court injunction prohibiting plaintiff from filing further lawsuits against employer without leave of court when plaintiff had filed several non-meritorious suits against former employer as part of his personal "vendetta"); *Baum v. Blue Moon Ventures, LLC,* 513 F.3d 181, 189 (5th Cir. 2008) (finding district court has jurisdiction to *sua sponte* impose a pre-filing injunction to deter vexatious filings)*; Perry v. Barnard*, No. 89-3575, 911 F.2d 736, 1990 WL 121481 (7th Cir. July 31, 1990) (upholding district court's entry of permanent injunction to restrain litigant from filing further lawsuits without leave of court); *Lysiak v. Commissioner of Internal Revenue*, 816 F.2d 311, 312–13 (7th Cir. 1987) (ordering plaintiff to seek leave before filing new pleadings certifying that such pleadings are in good faith and not frivolous).[9]

Here, in light of Rigsby's apparent "vendetta" against Axley Brynelson, LLP and his "near-obsession" in suing its attorneys, "injunctive relief is the only means that offers any chance of preventing further harassment[.]" *Riccard*, 307 F.3d at 1295 (quoting district court order). Some form of equitable sanction is necessary given Rigsby's demonstrated history of filing

[9] *See also Hobbs v. Las Cruces Pub. Sch. Bd. of Educ.,* CIV 13-0282 JB/WPL, 2013 WL 4401374 (D.N.M. July 29, 2013) (enjoining plaintiff from filing further lawsuits without leave of court*); Davis v. Leavitt,* 4:12-CV-739-A, 2013 WL 1189281 (N.D. Tex. Mar. 22, 2013) (enjoining further lawsuits similar to the dismissed suit without leave of court); *Karas v. Massport Authorities,* 11-40146-FDS, 2011 WL 5330592 (D. Mass. Nov. 4, 2011) (warning plaintiff she could be enjoined from filing further actions without leave of court).

baseless suits against attorneys and law firms. Attorneys should not be required to practice under constant threat of being sued by a pro se opponent in collateral litigation. Law firms should have not to bear the costs of defending repeated baseless lawsuits against their attorneys and be faced with the prospect of paying higher insurance premiums because of a pro se litigant's misuse of the court system. Enough is enough.

An injunction prohibiting Rigsby from filing any further lawsuits against Defendants without first obtaining leave of court strikes an appropriate balance between deterring Rigsby from filing further frivolous suits and preserving his access to the courts. *See Vollmer v. Publishers Clearing House*, 248 F.3d 698, 710-11 (7th Cir. 2001) ("Rule 11 requires that the least severe sanction adequate to serve the purpose of the penalty should be imposed.")

Additionally, or alternatively, the Court could order Rigsby to pay Defendants' attorney fees and enjoin him from filing any further suits until such time as the judgment is satisfied. *See Neri v. Barber*, No. 2013AP1818, 2014 WL 958873 (Wis. Ct. App., Mar. 13, 2014); *Neri v. Barber*, No. 2013AP713, 2014 WL 958864 (Wis. Ct. App., Mar. 13, 2014); *Neri v. Pinckney Holdings*, LLC, No. 2013AP1112, 2014 WL 958875 (Wis. Ct. App., Mar. 13, 2014).

## CONCLUSION

For these reasons, Defendants respectfully request that the Court find that Rigsby's claims against them violate Rule 11. As a sanction, Defendants request that the Court enjoin Rigsby from filing any further lawsuits against them or any attorney employed by Axley Brynelson, LLP, without first obtaining leave of court. Additionally, or alternatively, Defendants request that the Court order Rigsby to pay Defendants' attorney fees and enter an order enjoining him from filing any further suits against them until such time as the judgment is satisfied.

Dated: March 21st, 2014.

**Axley Brynelson, LLP**

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