No. 13-1398

In The Supreme Court of the United States

RICHARD S. FEDDER,

Petitioner,

v.

ADDUS HEALTHCARE, INC., LORIE HUMPHREY, AND KIM EVANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court must consider an attorney's ability to pay when imposing sanctions pursuant to 28 U.S.C. § 1927.

2. Whether, in the absence of recklessness or subjective bad faith, an attorney's conduct may still warrant sanctions under 28 U.S.C. § 1927.

PARTIES TO THE PROCEEDING BELOW

Petitioner, Richard Fedder, was an appellant and counsel for the plaintiff in the courts below. Respondents, Addus Healthcare, Inc., Lorie Humphrey, and Kim Evans, were named as appellees and defendants in the courts below. The parties to the underlying litigation giving rise to the § 1927 sanctions against Petitioner also included the plaintiff, Edgar Tate, and additional defendants, Jo Gulley Ancell, Jeff Standerfer, Eugene Davis, Al Farmer, and the Illinois Department of Human Services, Division of Rehabilitation Services.

CORPORATE DISCLOSURE STATEMENT

Respondent Addus Healthcare, Inc. is a nongovernmental corporation. There is no parent corporation for Addus Healthcare, Inc. and no publicly-traded corporation owns 10% or more of Addus Healthcare, Inc.'s stock.

Respondent Lorie Humphrey and Respondent Kim Evans are individuals.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Fedder, has requested a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the matter of *Fedder v. Addus Healthcare, Inc., Lorie Humphrey, and Kim Evans*, Appeal No. 12-2694. Respondents respectfully oppose Petitioner's request.

OPINIONS BELOW

The district court's final judgment and order on the defendants' motion to dismiss is unpublished and reported at *Tate v. Ancell*, No. 08-0200-DRH, 2009 U.S. Dist. LEXIS 15798 (S.D. Ill. Mar. 1, 2009). The district court's final judgment and order granting summary judgment against plaintiff Edgar Tate is unpublished, is reported at *Tate v. Ancell*, No. 08-0200-DRH, 2011 U.S. Dist. LEXIS 98820 (S.D. Ill. Sept. 1, 2011), and is included in Petitioner's Appendix at Pet. App. ("App.") 70a-99a. The district court's 42 U.S.C. § 1988 fee decision is unpublished, is reported at *Tate v. Ancell*, No. 08-0200-DRH, 2012 U.S. Dist. LEXIS 17425 (S.D. Ill. Feb. 10, 2012), and is included in Petitioner's Appendix at App. 63a-69a. The district court's 28 U.S.C. § 1927 sanctions opinion is unpublished, is reported at *Tate v. Ancell*, No. 08-0200-DRH, 2012 U.S. Dist. LEXIS 89241 (S.D. Ill. June 28, 2012), and is included in Petitioner's Appendix at App. 49a-62a. The United States Court of

Appeals for the Seventh Circuit's opinion is unpublished, is reported at *Tate v. Ancell*, 551 Fed. App'x 877 (7th Cir. 2014), and is included in Petitioner's Appendix at App. 1a-48a.

JURISDICTIONAL STATEMENT

The Seventh Circuit entered its opinion on January 17, 2014. On April 2, 2014, Justice Elena Kagan granted Petitioner's application for an extension of time within which to file a petition for certiorari and entered an order extending the deadline until May 17, 2014. The Court subsequently requested that Respondents file a response to the petition on or before August 7, 2014. Although this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), there is no compelling reason to exercise that jurisdiction to grant review in this case.

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

COUNTERSTATEMENT OF THE CASE

The petition for writ of certiorari arises out of a suit filed by the plaintiff, Edgar Tate ("Tate") in which Tate sued the Department of Human Services, Division of Rehabilitation Services ("DRS"), the state agency for which he works, as well as Addus Healthcare, Inc. ("Addus") (one of DRS's private contractors), and various DRS and Addus employees, alleging that they conspired to unlawfully discipline him and take other actions against him because of his sleep apnea in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. (the "ADA"), because of his race/national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII") and 42 U.S.C. §§ 1981 and 1983, and because of his opposition to sexual harassment, also in violation of Title VII and §§ 1981 and 1983. App. 2a-3a. As demonstrated by the facts underlying Tate's claims, which are detailed in both the circuit court's opinion and the district court's summary judgment order, *see* App. 4a-9a and 71a-78a, Tate's claims should never have been brought against Respondents, as Respondents were not Tate's employers nor was there any evidence that Respondents participated in, or even had knowledge of, any of the discipline or other actions about which Tate complained. App. 10a. Further, Tate had no evidence of any conspiracy between Respondents and the DRS defendants. App. 10a-11a. In fact, when questioned about the alleged conspiracy at his deposition, Tate repeatedly denied having any knowledge

regarding where, when, or how the alleged conspiracy had formed or whether the defendants had ever communicated about an alleged plan to punish him. App. 11a. Nevertheless, Petitioner, on behalf of his client, filed and blindly pursued a host of frivolous claims against Respondents on the basis of this conspiracy theory. App. 3a.

The original complaint filed by Petitioner (on Tate's behalf) contained seven counts of disability discrimination, national origin discrimination, hostile work environment discrimination, and retaliation in violation of the ADA, Title VII, 42 U.S.C. § 1981, the First and Fourteenth Amendments and Illinois state law. App. 71a. Each count of the complaint was brought against every defendant, including several of the defendants in their individual capacities.

In response to Tate's complaint, Respondents filed a Fed. R. Civ. P. Rule 12(b)(6) motion to dismiss several of Tate's claims for failure to state a claim against Respondents upon which relief could be granted. In response to this motion, Petitioner admitted that, despite what was set forth in the complaint, he had "not stated and, in fact, never intended to state a claim against [Respondents] for violations of Title VII or the ADA," and admitted that such claims could only be brought against DRS, Tate's employer. App. 58a, n.3. Additionally, Petitioner conceded that Tate's First Amendment and state law retaliation claims were factual and legal non-starters, writing that "through additional research", he had determined that Tate did not "have a legal basis at this

time to make a claim for common law retaliation, under Illinois state law" and that "he partially misperceived the time sequence of events when he told his story in his Complaint." *Id.* Tate then withdrew his state law retaliation claim and the district court dismissed Tate's Title VII, ADA, First Amendment, state law retaliation, and loss of consortium claims against Respondents with prejudice and granted Tate leave to file an amended complaint. App. 72a.

On March 25 and December 30, 2009, Petitioner, on Tate's behalf, filed successive amended complaints against Respondents and the other defendants. *Id.* Tate's second amended complaint was filed against Respondents and the DRS defendants and again contained multiple counts of race/national origin discrimination and retaliation by Respondents in violation of 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment (made actionable through 42 U.S.C. § 1983). App. 4a-5a, 72a-74a. Despite being ordered by the district court to separate the claims into separate counts in the amended complaint, Petitioner did not do so. App. 72a. Following discovery, Respondents and the other defendants filed motions for summary judgment regarding all of Tate's remaining claims. App. 71a.

On September 1, 2011, the district court granted summary judgment in favor of all defendants on all of Tate's claims. App. 9a, 99a. In granting Respondents' motion for summary judgment, the district court outlined the many legal and factual deficiencies the district court found with respect to the plaintiff's

claims against Respondents. In particular, the district court noted:

(1) "[T]here is no evidence that [Respondents] took any adverse actions against Tate. [Respondents] did not terminate him, suspend him, or discipline him. Nor did [Respondents] reduce his compensation or employment benefits or alter his job responsibilities." App. 94a;

(2) "[W]hen asked about the alleged conspiracy, Tate repeatedly testified that he had no personal knowledge of when, where or how the conspiracy was formed, or whether he knew if the defendants had ever communicated at all regarding a plan to punish [him]." App. 95a-96a;

(3) Tate's §§ 1981 and 1983 retaliation claims "fail as a matter of law," because he did not allege that he was retaliated against on the basis of his race; App. 96a; and

(4) Tate "has no direct evidence, nor does the record establish that any of the alleged actions (*i.e.*, his support staff was fired, false reports were made against him, and that he was spied on) were taken against him because he is Hispanic. Tate admits he had no proof of conspiracy between [the defendants]. Further, he has no proof that [ ] anyone took any actions against him based on race." App. 20a, 98a.

Given Tate's complete lack of any evidence tying Respondents to a conspiracy to discriminate or retaliate against him, App. 10a-11a, following the district court's entry of summary judgment in favor of all defendants, on October 3, 2011, Respondents moved for an award of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1988, 2000e-5, and 12205 on grounds that Petitioner and Tate had pursued frivolous claims against Respondents and Respondents were prevailing defendants. App. 25a, 64a. Specifically, Respondents sought attorneys' fees and costs from Tate and Petitioner on grounds that they: (1) filed Title VII and ADA claims against Respondents which could only be brought against Tate's employer; and (2) pursued §§ 1981 and 1983 claims against Respondents which were "groundless and lacking in any legal basis." Despite the fact that the district court's local rules provide that "[f]ailure to timely file a response to a motion may, in the Court's discretion, be considered an admission of the merits of the motion", S.D. Ill. L. R. 7.1(c), Petitioner did not file any response to Respondents' motion for attorneys' fees and costs. App. 25a, 64a.

On December 21, 2011, Respondents' counsel sent Petitioner correspondence stating that Respondents' motion for attorneys' fees was pending in the district court and offered to withdraw Respondents' motion for attorneys' fees if Tate was willing to forgo his appeal of the district court's order granting summary judgment to Respondents. App. 34a. Petitioner did not respond to this email. Ultimately, more than four

months passed with no response from Petitioner to Respondents' motion for attorneys' fees. App. 25a.

On February 13, 2012, the district court granted Respondents' motion for attorneys' fees and costs, finding that fees were warranted because Tate's case "was more than just weak, it was frivolous." App. 67a. The district court further noted that "the[ ] claims against [Respondents] were frivolous and pursued without any factual or legal basis." App. 25a, 68a. The district court then directed Respondents to file a fee petition setting forth the costs and fees that they had reasonably incurred in the litigation. App. 25a, 68a. Because the district court's award was entered pursuant to § 1988, Tate would have been responsible for paying this award. App. 25a; *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761, 100 S. Ct. 2455, 2461 (1980); *Hamer v. Cnty. of Lake*, 819 F.2d 1362, 1370 (7th Cir. 1987).

On February 21, 2012, Petitioner filed a motion asking the district court to reconsider its ruling on Respondents' motion for attorneys' fees and arguing primarily that Tate's claims against Respondents were not frivolous. App. 26a. Respondents opposed Tate's motion for reconsideration and, on May 21, 2012, the district court denied Petitioner's motion to reconsider the award of attorneys' fees. App. 26a; *Tate v. Ancell*, No. 08-0200-DRH, 2012 U.S. Dist. LEXIS 70084 (S.D. Ill. May 21, 2012). In denying Tate's motion to reconsider the award of attorneys' fees, the district court again noted that Petitioner did not file any objection or response to Respondents' motion for

attorneys' fees and costs and the district court construed that failure as an admission regarding the merits of the motion. *Id*. at *1 n.1. The district court further found that Petitioner "clearly was inattentive in responding [to] the motion for fees and costs," *id*. at *7, and "his explanation for not responding [did] not hold water based on the fact that [Petitioner] continued to litigate his case in [the Seventh Circuit Court of Appeals]." *Id*. at *8. The district court also concluded that it was "more likely that [Petitioner] saw the motion and he did not think that he needed to respond to the motion based on the pending appeal [in Appeal No. 11-3252]." *Id.* The court noted that "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules." *Id*. (quoting *Prizevoits v. Ind. Bell Tel. Co*., 76 F.3d 132, 133 (7th Cir. 1996)). Finally, the district court rejected Petitioner's argument that its award of attorneys' fees was premature given the pending appeal. *Tate*, 2012 U.S. Dist. LEXIS 70084, at *9.

On June 5, 2012, Respondents filed an amended fee petition and supporting documentation with the district court. App. 26a. Respondents sought $92,226.17, which represented the actual expenditures Respondents made to their counsel in defending against Tate's frivolous claims between April 2008 and September 2011. However, this total did not include any appellate fees, fees related to the preparation of the fee petitions, or fees incurred in defending against Petitioner's motion for reconsideration.

In response to Respondents' amended fee petition, Petitioner argued that the amount of attorneys' fees requested by Respondents was "unconscionable", especially because Respondents "clearly played a lesser role in the [alleged] conspiracy." App. 50a. Petitioner further acknowledged that, from the outset of the case, Tate had not contested the fact that Respondents had no direct control over Tate's employment and admitted that Tate had no knowledge of a personal discriminatory animus on the part of any of Respondents. Petitioner then argued that the district court should have dismissed his claim against Respondents from the outset if the district court believed that the case was frivolous at that time, thus placing the onus on the district court to dismiss his frivolous claims. App. 27a, 56a.

On June 28, 2012, after considering Respondents' fee petitions and Petitioner's submissions, the district court granted Respondents' attorneys' fees motion and entered an order awarding Respondents attorneys' fees totaling $92,226.17. App. 27a. In reaching this decision, the district court concluded that "[t]he case against [Respondents] should have never been brought and had plaintiff's counsel done his homework beforehand these claims would not have been brought." App. 28a. Accordingly, the district court found that the "plaintiff should not have to shoulder th[e] hefty bill based on his lawyer's malfeasance for filing and pursuing such a frivolous case against defendants who did not belong in the case" and ordered that the fee award be paid personally by

Petitioner as a sanction under 28 U.S.C. § 1927. *Id*. In imposing this sanction, the district court noted that § 1927 sanctions were appropriate in "instances of a serious and studied disregard for the orderly process of justice", "when an attorney pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound" and/or "where a claim is without a plausible legal or factual basis and lacking in justification." *Id.* The district court then stated that "[Petitioner]'s conduct in this litigation as to [Respondents] has been unreasonable and vexatious", App. 28a, and identified the following actions by Petitioner which supported his § 1927 sanctions award:

(1) Petitioner brought Title VII and ADA claims against Respondents which were not legally cognizable and which Petitioner conceded he did not intend to bring;

(2) Petitioner filed a complaint that "was a huge ball of confusion . . . that made the task of going through and determining which claims stated a valid claim for relief a daunting task"; App. 27a;

(3) Petitioner failed to comply with the court's directive to file an amended complaint designating and dividing the plaintiff's remaining claims as to each separate defendant into separate counts;

(4) The case Petitioner filed on behalf of Tate against Respondents "was made up of many misrepresentations and was absolutely frivolous from the beginning of the case"; App. 28a; and

(5) Petitioner failed to respond to Respondents' motion for attorney's fees. App. 25a.

On July 17, 2012, Petitioner filed a notice of appeal regarding the district court's § 1927 sanction award and, in a thorough and well-reasoned opinion, the circuit court affirmed the district court's decision. Specifically, the circuit court noted that § 1927 sanctions are "consistent with the American Rule that requires each party to bear its own fees unless one side acts in bad faith." App. 28a-29a (citing *In re TCI Ltd.*, 769 F.2d 441, 445-46 (7th Cir. 1985)). Thus, the circuit court reasoned that § 1927 sanctions may be imposed against an attorney "who has demonstrated 'subjective *or* objective bad faith[,]'" App. 29a (citing various Seventh Circuit cases), and provided the following explanation for this rationale:

> "Bad faith" sounds like a subjective inquiry. . . . Despite its sound, however, "bad faith" has an objective meaning as well as a subjective one. *See* [*Knorr Brake Corp. v. Harbil, Inc.*], . . . , 738 F.2d [223] at 226-27 [(7th Cir. 1984)] (summarizing and reconciling this circuit's cases on § 1927). A lawyer has a duty, which the recent amendment to Rule 11 emphasizes, to limit litigation to contentions "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the

> conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law. Our court has long treated reckless and intentional conduct as similar, *see Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1040 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S. Ct. 224, 54 L. Ed. 2d 155 (1977). *See also Optyl Eyewear Fashion International Corp. v. Style Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985) (§ 1927 allows a remedy in the event of bad "intent, recklessness, or bad faith"). A lawyer's reckless indifference to the law may impose substantial costs on the adverse party. Section 1927 permits a court to insist that the attorney bear the costs of his own lack of care.

769 F.2d at 445; App. 29a-30a. Finally, in keeping with its own precedent, the circuit court concluded that Petitioner's argument regarding his alleged inability to pay the sanction award was a "non-starter" because "section 1927 sanctions are meant to compensate the party injured by an attorney's misconduct and to compel the offending attorney to shoulder the costs that his own lack of care has imposed on the opposing party." App. 37a (citing *Ordower v. Feldman*, 826 F.2d 1569, 1574 (7th Cir. 1987)). The circuit court further stated that, although deterrence was also an underlying purpose of § 1927, § 1927, unlike Rule 11, does not expressly contain a requirement that a court determine "the most modest

sanction that will deter an offending attorney (and others) from further misconduct and then to set the sanction at that amount, regardless of the costs that the offending attorney's conduct has imposed on his opponents." App. 38a. Instead, the circuit court noted that compensating an aggrieved party for the full amount of the party's excess costs and fees, "would be consistent with the language of the statute, which does not mention deterrence but which expressly grants the court discretion to order the offending attorney 'to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such [unreasonable and vexatious] conduct.'" App. 40a.

Applying these principles to Petitioner's appeal, the circuit court concluded that the district court did not abuse its discretion in ordering Petitioner to reimburse Respondents for the fees they incurred as a result of the frivolous claims filed and pursued by Petitioner and Tate. In doing so, the circuit court highlighted the myriad of reasons justifying the district court's sanctions award. According to the circuit court, these reasons included, but were not limited to the following:

(1) Petitioner filed ADA and Title VII claims against Respondents despite the fact that the law only permits such claims to be brought against Tate's employer and admitted that such claims were not viable against Respondents only after

Respondents filed a motion to dismiss the claims; App. 42a;

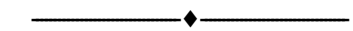
(2) Petitioner pursued § 1981 race discrimination claims against Respondents but "never identified a shred of evidence suggesting that [Respondents] were in any way motivated either by racial animus or a desire to punish Tate for having opposed racial discrimination." App. 44a;

(3) "Retaliation was the gist of Tate's Fourteenth Amendment claim under section 1983. But [the circuit court] has repeatedly held that efforts to oppose unlawful discrimination may be redressed under the First Amendment or Title VII, but not under the equal protection clause of the Fourteenth Amendment." App. 44a (citing *Boyd v. Ill. State Police*, 384 F.3d 888, 898 (7th Cir. 2004)) (collecting cases); App. 44a;

(4) "[D]espite his dogged pursuit of the conspiracy theory on Tate's behalf, [Petitioner] never presented evidence that would support a finding that there was, in fact, a conspiracy between [Respondents] and the [DRS] defendants." App. 45a; and

(5) Petitioner repeatedly misrepresented the record when describing the affidavit testimony that allegedly supported his conspiracy theory. App. 46a-48a.

Consequently, the circuit court concluded that Petitioner's "objective bad faith in pursuing the claims against [Respondents] [was] established by the obvious gaps in the evidentiary basis for those claims and [Petitioner's] misrepresentations of the evidence." App. 48a. Accordingly, because "[h]aving to litigate the case through summary judgment imposed substantial expenses on [Respondents] and also wasted a significant amount of the district court's time", the circuit court concluded that the district court had acted within its discretion in requiring Petitioner to reimburse Respondents for their litigation costs and fees pursuant to § 1927 and affirmed the district court's judgment with respect to such costs and fees. *Id.*



REASONS FOR DENYING CERTIORARI

I. This Case Fails to Satisfy the Criteria for Review.

A grant of certiorari is reserved for those cases that present an issue of such significance that it goes beyond the specific dispute of the parties and, upon resolution, redefines the governing body of law. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (internal quotation marks and quoting citation omitted) (stating that certiorari is only granted in cases involving principles that are important to the public and "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit

courts of appeal"); *see also Hartman v. Moore*, 547 U.S. 250, 256 (2006) (certiorari granted to resolve circuit split); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (certiorari granted to answer important question of law). This case does not present any questions of such significance that would compel, or even justify, the Court's intervention. Instead, with respect to the standard for liability under § 1927, the differences outlined by Petitioner regarding the varying circuit court labels for the standard of liability in § 1927 cases do not reflect a sufficient conflict of opinion among the circuits to justify granting certiorari. This is particularly true given that the standard of liability that Petitioner requests that the Court require (*i.e.*, a standard requiring either subjective bad faith or recklessness), Pet. 22, is essentially the standard applied in the Seventh Circuit.

Additionally, with regard to the requirement that courts consider an offending attorney's ability to pay when assessing sanctions under § 1927, there is nothing in the text of § 1927 that imposes such a requirement. To the contrary, the plain language of the statute is much more in keeping with the view that attorneys may be required to satisfy the entire amount of any excess costs, expenses, or fees caused by their unreasonable or vexatious conduct.

Consequently, because this case is not one in which there is "a real and embarrassing conflict" among the circuit courts of appeals and because there

are no issues of particular significance to the public, certiorari is not warranted in this instance.

A. The Seventh Circuit is in Accord with Other Circuits That Require Either Recklessness or Subjective Bad Faith in Order to Impose Sanctions Under § 1927 and, Therefore, There is No Conflict to Resolve in This Matter.

Petitioner asks this Court to grant certiorari to resolve the issue of whether § 1927 sanctions may be imposed "without a finding of subjective bad faith or recklessness." Pet. 22. In doing so, Petitioner asks the Court to "reverse the low threshold of liability adopted by the Seventh Circuit" and require a finding of subjective bad faith or recklessness before § 1927 sanctions can be imposed. *Id*. However, this action by the Court is not necessary as the Seventh Circuit has already repeatedly held that "[g]arden variety negligence by itself is insufficient to support a fee award under section 1927." App. 31a; *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013); *Jolly Grp., Ltd. v. Medline Indus., Inc*., 435 F.3d 717, 720 (7th Cir. 2006); *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184-85 (7th Cir. 1992). Instead, the Seventh Circuit "has long treated reckless and intentional conduct as similar," App. 30a (citing *Sundstrand Corp*., 553 F.2d at 1040), and holds that "a lawyer engages in bad faith *by acting recklessly or with indifference to the law*, as well as by acting in the teeth of what he knows to be the law." *TCI*, 769

F.2d at 445 (emphasis added). Thus, the Seventh Circuit's standard is in accord with other circuits. *See, e.g.*, *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 64 (1st Cir. 2008) (collecting cases); *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) (requiring a finding that "counsel acted 'recklessly or in bad faith'"); *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) (award under § 1927 requires only recklessness); *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (standard is whether the attorney's conduct "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court"); *Perkins v. Spivey*, 911 F.2d 22, 36 (8th Cir. 1990) (same).

Indeed, Petitioners exaggerate the alleged conflict regarding the § 1927 liability standards articulated by the circuit courts. Notably, although Petitioner claims that this case would have been decided differently by other circuit courts of appeals, the standard applied by the various circuits in the § 1927 sanctions context is not meaningfully different. To the contrary, the circuits are generally in agreement that an attorney's conduct must at least rise to the level of recklessness to be sanctionable under § 1927. *See, e.g.*, *Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 245-46 (1st Cir. 2010) (internal quotation marks and quoting citation omitted) (requiring that the conduct demonstrate "a studied disregard of the need for an orderly judicial process, or add up to a reckless breach of the lawyer's obligations as an officer of the court"); *Enmon v. Prospect Capital Corp.*,

675 F.3d 138, 143-44 (2d Cir. 2012) (requiring "bad faith"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 188-90 (3d Cir. 2002) (requiring bad faith or intentional misconduct); *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 522 (4th Cir. 2012) (requiring bad faith); *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525, 529 (5th Cir. 2002) (internal quotation marks and quoting citation omitted) (requiring "bad faith, improper motive or reckless disregard of the duty owed to the court"); *Red Carpet Studios v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (requiring "something less than subjective bad faith, but something more than negligence or incompetence"); *Jolly Grp.*, 435 F.3d at 720 (requiring "objectively unreasonable" conduct or "studied disregard for the orderly process of justice"); *Jones v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1009, 1011 (8th Cir. 2006) (internal quotation marks and quoting citation omitted) (requiring conduct that, when viewed objectively, "manifests either intentional or reckless disregard of the attorney's duties to the court"); *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010) (concluding that recklessness is sufficient); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) (internal quotation marks and quoting citation omitted) (requiring conduct that, when viewed objectively, "manifests either intentional or reckless disregard of the attorney's duties to the court"); and *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1190 (11th Cir. 2006) (requiring conduct that is "tantamount to bad faith").

Accordingly, because the circuit courts of appeals are generally in agreement regarding the minimum level of conduct required to impose sanctions under § 1927 and because the Seventh Circuit already requires either subjective bad faith or a finding of recklessness or indifference to the law in order to establish objective bad faith sufficient to warrant § 1927 sanctions, there is nothing for the Court to resolve with respect to this issue and the Petition for a Writ of Certiorari should be denied.

B. Section 1927 Does Not Require Consideration of an Attorney's Ability to Pay.

Petitioner also asks the Court to grant certiorari on the issue of whether § 1927 categorically prohibits courts from considering an attorney's ability to pay when determining the amount of § 1927 sanctions. Pet. 14. However, there is nothing in the text of § 1927 that requires a court to consider an attorney's ability to pay when determining the amount of an appropriate sanction. Instead, the plain text of § 1927 explicitly states that any attorney who "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." 28 U.S.C. § 1927. "[W]here . . . [a] statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks and

quoting citation omitted). Indeed, "when a statute speaks with clarity to an issue" judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 475 (1992).

Here, it is clear that the statute expressly authorizes a court, in its discretion, to require that an attorney pay the *full* amount of any excess costs, expenses, and attorneys' fees that were incurred as a result of the attorney's unreasonable and vexatious conduct. Further, as noted by the Seventh Circuit, the legislative history of § 1927 suggests that the statute was designed to both compensate victims for losses incurred as a result of an attorney's malfeasance and to deter attorney misconduct. App. 39a. Moreover, unlike Rule 11 (which has only a deterrent purpose), § 1927 does not require a court to determine the minimum level of sanction necessary to deter future misconduct. And, as the decisions cited by Petitioner reflect, even in circuits outside of the Seventh Circuit, district courts are often free to disregard an attorney's ability to pay if they choose to do so. *See, e.g*., *Oliveri v. Thompson*, 803 F.2d 1265, 1267-68 (2d Cir. 1986) (concluding the district court had the discretion to adjust the amount of a sanction based on the attorney's ability to pay); *Haynes v. City & Cnty. of S.F.*, 688 F.3d 984, 987-89 (9th Cir. 2012) (holding that courts possess the discretion to consider ability to pay). Accordingly, in the absence of any language in the text of § 1927 requiring consideration of mitigating factors such as an attorney's ability to pay and, in

light of the fact that courts in the majority of circuits are not required to consider an attorney's ability to pay when imposing sanctions under § 1927, this case does not involve any issues that are likely to be of particular significance to the public and, thus, does not warrant review on that basis.

II. The Seventh Circuit's Decision is Sound and Well-Reasoned and is Consistent with the Underlying Purposes of § 1927.

It is well-settled that when an attorney recklessly creates needless costs, the other side is entitled to relief. Moreover, it is clear both from the statutory text of § 1927 and the interpreting case law, that bad faith is not limited to situations involving malice or bad intent; instead, bad faith may be premised on an attorney's objective conduct if that conduct evidences a reckless disregard for the law or an attorney's obligations to the court. In this case, there can be no question that Petitioner's conduct in pursuing the case against Respondents (both through and after summary judgment) was unreasonable and reckless at best. At worst, Petitioner's conduct throughout this case evidences a willful and persistent disregard for the law, the applicable court rules, and the unnecessary costs and burdens imposed upon Respondents and the courts as a result of the frivolous claims pursued by Petitioner and his client. Indeed, no reasonable attorney would have pursued Title VII and ADA claims against a company and individuals who did not employ Tate nor would a reasonable

attorney have pursued his retaliation claims under the Fourteenth Amendment. Likewise, no reasonable attorney would have asserted and pursued conspiracy claims under §§ 1981 and 1983 in the absence of some shred of evidence indicating that Respondents had communicated with the DRS defendants (or even with each other) regarding a plan to punish Tate or discriminate against him because of his race/national origin. And a reasonable attorney certainly would not have made repeated misrepresentations to both the district court and the circuit court regarding the content of the affidavits he filed in opposition to Respondents' motion for summary judgment. Finally, no reasonable attorney would have failed to file a response to Respondents' motion for attorney fees and costs. Given that Petitioner engaged in all of this unreasonable conduct (and more) in the context of a single case, § 1927 sanctions were correctly assessed against Petitioner for unreasonably and vexatiously multiplying the proceedings and for creating excess costs, expenses, and fees for Respondents.[1] Further, the district court's decision to award Respondents fees for the fees Respondents incurred in litigating this matter was an appropriate exercise of the district

[1] Notably, this is not a case where the proper defendants in this case – namely Tate's employer, DRS, and the other DRS defendants – were not available or were judgment proof. However, instead of pursuing employment discrimination claims against only legitimate parties, Petitioner used a "kitchen-sink" approach and sued Respondents as well, even though Tate had no legitimate claims against them.

court's discretion, was consistent with both the compensatory and deterrent principles underlying § 1927, and was properly upheld on review. Consequently, the Court should deny the petition for writ of certiorari for this reason as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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