IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LEONARD SCHWAGER,	**§**	
Individually, RICHARD SCHWAGER,	**§**	
Individually, and as next friend of	**§**	
Z.S., a disabled child,	**§**	
Plaintiffs,	**§**	
	§	
vs.	**§**	**C.A. NO. H-10-1866**
	§	
CLEAR CREEK INDEPENDENT SCHOOL	**§**	
DISTRICT, et al.,	**§**	
Defendants.	**§**	

DEFENDANTS' MOTION FOR SANCTIONS

COME NOW Defendants Jeffrey Rogers ("Rogers"); Rogers, Morris & Grover, L.L.P. ("RMG Law Firm") f/k/a Feldman, Rogers, Morris & Grover, L.L.P.; and Sheila Haddock ("Haddock) (collectively referred to as the "Movants") and file this Motion for Sanctions pursuant to 28 U.S.C. §1927 as follows:

I.
Nature and Stage of Proceedings

On June 2, 2010, Defendants Jeffrey Rogers, David Feldman and RMG Law Firm filed a Rule 12(b)(6) Motion to Dismiss the claims in Plaintiffs' Verified Complaint and Application for Injunctive Relief because Plaintiffs had failed to state a claim upon which relief could be granted. Dkt. No. 4. On June 8, 2010, the CCISD Defendants, including Ms. Haddock, filed a Motion to Dismiss Plaintiffs' Verified Complaint and Application for Injunctive Relief under Rule 12(b)(1) based on Plaintiffs' failure to exhaust administrative remedies. Dkt. No. 5.

Plaintiffs filed a First Amended Verified Complaint and Application for Injunctive Relief on June 25, 2010 (hereinafter "Amended Complaint"). Dkt. No. 30. Movants filed a 12(b)(6) Motion to Dismiss Plaintiffs' Amended Complaint on July 8, 2010. Dkt. No. 33. On August 16, 2010, Plaintiffs filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 41. Dkt. No. 43. Movants now move for sanctions and an award of attorneys fees as authorized by 28 U.S.C. §1927.

II.
Standard of Review

Sanctions are available under §1927 against an attorney who multiplies the proceedings "unreasonably and vexatiously." 28 U.S.C. §1927. While Rule 11 is aimed primarily at pleadings, §1927 "addresses dilatory tactics throughout the entire litigation and is focused solely on attorney conduct." *Amlong & Amlong v. Denny's Inc.*, 500 F.3d 1230, 1241 n.1 (11th Cir. 2006) (internal quotations and citations omitted). In assessing sanctions under §1927, a court must compare the attorney's conduct against the conduct of a "reasonable" attorney and make a judgment about whether the conduct was acceptable according to some objective standard. *Id*. at 1239-40.

III.
Statement of the Issue

Whether Plaintiff Candice Schwager, who is a licensed attorney admitted to practice in the Southern District, unreasonably multiplied the proceeding in violation of §1927 by filing and refiling claims and motions not warranted by existing law and brought for the improper purpose of harassment.

IV.
Argument and Authorities

A. Court's Authority to Sanction Subsequent to Voluntary Dismissal

Section 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.

28 U.S.C. §1927. Where there is evidence of bad faith, improper motive, or reckless prosecution of a meritless claim, sanctions are appropriate. *Riopelle v. Reid*, Civ. No. H-09-2318, 2010 U.S. Dist. LEXIS 48284, *at* *8 (S.D. Tex. May 17, 2010) (citing *Vanderhoff v. Pacheco*, 344 Fed. Appx. 22, 27 (5th Cir. 2009)). Plaintiffs' voluntary dismissal under Rule 41(a) does not divest the district court of jurisdiction to impose sanctions pursuant to §1927. *See Ratliff v. Stewart*, 508 F.3d 225, 231-32 (5th Cir. 2007) (explaining that imposition of §1927 sanctions is part of the court's collateral jurisdiction).

B. Plaintiffs' Original Complaint and Amended Complaint improperly multiplied the proceedings.

In response to Plaintiffs' Original Complaint, Movants filed 12(b) Motions. The Motions to Dismiss established that Plaintiffs failed to plead a single viable claim against Movants in their original Complaint. Dkt. No. 4 (12(b)(6) Motion to Dismiss the attorney defendants and law firm). Within the timeline to amend the pleading as a matter of right under Rule 14, Plaintiffs filed a First Amended Verified Complaint and Application for Injunctive Relief. The filing of the Amended Complaint rendered Movants' 12(b) Motion moot. Dkt. No. 35 (Court's Order denying Defendants' Motions as moot). However,

Plaintiffs also filed a 64-page Response to Defendants' Motions to Dismiss along with 273-pages of exhibits. Plaintiffs' decision to file a response to Defendants' original Motions to Dismiss, despite the fact the Amended Complaint had rendered the Motions moot, only served to waste the Court's time and Movants' time and add to the already vexatious nature of this entire proceeding. Dkt. No. 29 (Plaintiffs' Response).

In Plaintiffs' Amended Complaint, they alleged virtually the same claims including (1) discrimination, retaliation, and disability harassment under 29 U.S.C. §794, Section 504 of the Rehabilitation Act of 1973 ("Section 504"); 20 U.S.C. §1400 *et. seq.*, the Individuals with Disabilities Education Act ("IDEA"); and 42 U.S.C. §12101 *et. seq.*, Title II of the Americans with Disabilities Act ("ADA"), (2) violations of the Equal Protection Clause of the Fourteenth Amendment, (3) conspiracy against rights under 18 U.S.C. §241, (4) the intentional infliction of emotional distress, and (6) violations of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§1961-1968 (with predicate offenses under 18 U.S.C. §1343, 1346, and 1349). All of these claims were in Plaintiffs' Original Complaint and were addressed in the original 12(b) Motions. As demonstrated in the 12(b) Motions filed in response to Plaintiffs' Amended Complaint, the Complaint again failed to state a claim against Movants. Moreover, the claims were brought for the obvious purpose of harassment.

1. Plaintiffs' actions were unreasonable and vexatious.

Not only was the lawsuit frivolous, as explained hereafter, but Ms. Schwager's actions leading up to the filing of the lawsuit make it clear that it was filed for purposes of harassment. Indeed, the filing of the action was the culmination of months of

threatening and abusive behavior designed to harass and intimidate Movants because they dared to disagree with her. Leading up to the filing of the Complaint and subsequent to that time, Ms. Schwager has been engaged in very public dispute with Movants.

In one libelous statement, she wrongly stated that Mr. Rogers "settled" a RICO suit. Exhibit 1 at p.1. She claimed to have "proof" of such settlement but failed to produce it. *Id.* at p.3. Schwager was advised repeatedly that her allegations were false and cautioned to cease. Instead of stopping, however, her behavior became more bold and defiant as she made libelous allegations to the Texas Attorney General and U.S. Department of Education officials Arne Duncan and Carl Harris. *Id.* at p.10 (AG letter), pp.18-21 (Dept. of Education email). She also responded, "Provide proof it isn't true and I'll retract it. I can't retract the hundreds of other parents who've sent it out. I suppose you'll have to marshall [*sic*] the city." *Id.* at p.22. Ms. Schwager even made libelous statements to a Senate Committee on Education on June 16, 2010. *See* Exhibit 2 at p.2 (audio archives available at http://www.senate.state.tx.us/75r/senate/commit/c530/c530.htm). A representative sample of Ms. Schwager's additional misconduct against Movants over the last few months includes:

- A frequent "blogger" and "tweeter," Schwager's internet activity is replete with blatantly false statements, accusations against Mr. Rogers of illegal conduct ranging from child abuse, conspiracy, fraud and racketeering, unethical conduct, as well as threats of criminal prosecution and civil litigation. In her on-line blog and internet radio show, and again identifying herself as an Attorney, Schwager names Movants by first and last name as well as title, calling them dishonest and corrupt and likens them to "the mafia." Her tone ranges from flippant and taunting to angry and distraught. She defended her statements and her behavior became more bizarre and aggressive. *See* Exhibit 3.

- She defamed Movant Haddock by falsely posting that she had been placed on administrative leave without pay as a result of "failing to protect [Schwager's] disabled child." Even after being advised that her statements were false and her posts defamatory, she continued and the warning became fodder for her blog. Exhibit 4.

- In her internet posts and on her "radio show," Ms. Schwager has made her agenda clear: she is determined to "crush" Jeff Rogers and his law firm, Rogers, Morris and Grover, LLP, and expose "corruption" within the school district. Exhibit 5 at p.1.

- She has repeatedly attempted to interfere with Rogers' attorney-client relationship with the District, demanding that Superintendent Smith fire the entire Firm and even offering to drop her son's claims in exchange. *See, e.g.,* Exhibit 6 at pp.1, 2, 5. The communications wrongly state Mr. Rogers "was charged with RICO, racketeering, and corruption." *Id.* at p.1.

- In an effort to disqualify Rogers from continuing to represent CCISD in the IDEA due process hearing, Schwager filed pleadings containing the same baseless and conclusory allegations that the "overwhelming evidence" suggests that Rogers was the "ring leader" in a conspiracy to defraud her son of special education eligibility, calling his actions "blatant fraud" and asserting that Rogers "coached witnesses to lie." Exhibit 7 at pp.8-9. Her wild accusations are now part of the record in the IDEA administrative proceeding. *See* Exhibit 7.

- One of the more disturbing acts of Ms. Schwager is an internet post under the name "Attorney Schwager," in which she wishes Rogers dead:

  > "…It makes me sick to thick [sic] of the school districts cutting checks to this criminal to hurt children, wondering why God does not strike him dead? We'd all be better off. …"

  See Exhibit 8 at p.2.

- Plaintiffs' incoherent representations to the Court led it to grant Plaintiffs' request for an emergency injunction hearing based on the Court's mistaken belief that issues related to the student's educational program for the 2010-2011 school year were at stake. Contrary to the representations made to the Court, at the hearing on July 9, 2010, Schwager specifically disavowed any concerns related to the educational program developed for her son by CCISD

> or any intention to seek reimbursement for a private school placement. The relief Schwager did seek was outrageously broad and well outside the authority of the Court to order; *e.g.*, to order Defendants not to monitor Schwager's activities on public internet sites such as Twitter, to order Defendants not to file grievances with the State Bar, and to not directly contact non-party, non-represented potential witnesses in the case.

Plaintiffs' harassing behavior continued with the filing of the lawsuit and subsequent amendments. Moreover, at every opportunity, Schwager continues to defame Mr. Rogers by stating he is "corrupt" and "relentlessly abusing process."[1] *See* Exhibit 9 (listing of the radio blogs hosted by Ms. Schwager in July and August). In her radio sessions on July 29, 2010, and August 15, 2010 she slanders Mr. Rogers stating he "lies to federal judges."[2]

2. *The Complaint and Amended Complaint Were Frivolous*

Despite an opportunity to amend the Complaint, it was readily apparent that Plaintiffs did not make a reasonable factual or legal inquiry before pursuing the frivolous claims. The claims were brought solely to defame and harass the Movants for representing CCISD in the District's underlying dispute with the Schwagers. Indeed, the allegations in the Amended Complaint were so unfounded and so outrageous that there could have been no other reason for bringing them except to harass. As demonstrated more fully in Movants' 12(b)(6) Motion to Dismiss, each and every claim against Movants required dismissal on one or more grounds. *See* Defendants' Motion to Dismiss (Dkt. No.33)

---

[1] Although Schwager does not name Mr. Rogers by name on these more recent shows, she provides extensive context that leaves no doubt in the mind of the listeners. Moreover, the last reference, on August 15, was to comments made at the preliminary injunction hearing in this case. Schwager should not be allowed to cavalierly state that Rogers lied to this Court. She deserves to be punished.

[2] Again, although not naming Mr. Rogers specifically, there is no other logical conclusion based on the context provided and the reference to a lawsuit that is a matter of public record.

(requesting dismissal of Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P 12(b)(6)). In each case, a simple query into the applicable law would have revealed that they were not appropriate avenues of redress against Movants.

For example, Plaintiffs' retaliation and disability harassment claims under Section 504 were facially invalid because that statute only applies to "program[s] or activit[ies] receiving federal financial assistance"—not to individuals or private entities that do not receive Federal funding. *Id.* at p.6. Plaintiffs did not allege that Movants received such assistance. Amended Complaint at ¶¶82-89.

Likewise, Plaintiffs did not plead a viable claim under the Fourteenth Amendment for a violation of Equal Protection because they utterly failed to establish the violation of a constitutional right – education is not a fundamental right protected by the Constitution. Dkt. No. 33 at pp.6-9. Moreover, Movants are not educational institutions and have no duty to provide an education to anyone. Even a cursory review of the law governing Section 1983 claims against private attorneys and a parent's limited educational rights under the Fourteenth Amendment should have revealed to Candice Schwager that the claims against Movants were frivolous and not warranted by existing law.

Similarly, not only did Plaintiffs fail to allege the elements of a claim for intentional infliction of emotional distress, but it is a "gap-filler" tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. *Id*. at pp.9-11. The actions of Movants clearly did not rise to this level as they were merely acting as the attorneys in the defense of the school district.

Id. Moreover, there is no "gap" as the alleged emotional distress was purportedly inflicted through multiple violations of the IDEA. Plaintiffs could seek redress for those violations as provided for in the IDEA, an avenue of redress specifically abandoned by Schwager.

Finally, the most outrageous of Plaintiffs' claims was that Movants are guilty of racketeering in violation of the RICO Act, 18 U.S.C. §§1961-1968. It is simply inconceivable that RICO was ever intended to reach the events described in Plaintiffs' Amended Complaint. The RICO claims were so lacking in merit that they could only have been asserted for the purpose of harassing Movants. Plaintiffs' RICO claims were conclusory and failed to properly allege the required predicate offenses; to wit, a pattern of racketeering activity, the existence of an enterprise, or an injury within the scope of the statute. Dkt. No. 33 at pp.11-20. Sanctions for filing frivolous RICO claims are especially appropriate in light of the serious nature of such allegations. *See Kaye v. D'Amato*, 357 Fed. Appx. 706, 717 (7th Cir. 2009) (concluding sanctions were appropriate because defendant incurred significant expenses defending plaintiff's "serious yet demonstrably frivolous claims"). As the Seventh Circuit recognized in *Kaye*, RICO was established to target long-term criminal activity, not as a means of resolving routine disputes – a "well-established fact" that should be clear to an attorney after minimal research. *Id*.

C. <u>Monetary sanctions are appropriate</u>

Section 1927 specifically provides that an offending attorney may be required "to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. §1927. When a party is required to respond to a

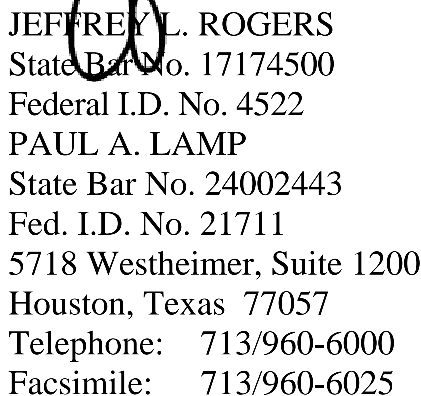
pleading because an attorney has multiplied the proceedings unreasonably, vexatiously, and at a minimum recklessly, attorney fees are appropriate. *Riopelle v. Reid*, Civ. No. H-09-2318, 2010 U.S. Dist. LEXIS 48284, *at* *7-9 (S.D. Tex. 2010) (awarding fees and costs incurred by defendant in having to file summary judgment motion because plaintiff's attorney unreasonably multiplied the proceedings by failing to dismiss the defendant despite repeated notices that defendant was not involved in the actions that formed the basis of the complaint). The evidence establishes that Schwagers' Original Complaint was brought for an improper purpose and that the Amended Complaint served only to multiply the proceedings by requiring Defendants to redraft the 12(b) Motions to address new factual allegations, but equally frivolous claims. Plaintiffs' decisions to file the Original Complaint, the Response to Defendants' Motions to Dismiss and the Amended Complaint were improper, unreasonable, vexatious and reckless.

V.
Conclusion and Prayer

Movants request that the Court find that they are entitled to an award of attorney's fees based on Plaintiffs' improper conduct. Movants request that the Court provide them with an opportunity to file an Application for Attorney's Fees and thereafter order Plaintiffs to pay reasonable attorneys' fees and expenses incurred in defending the vexatious claims, and otherwise enter an appropriate sanction to deter Plaintiffs from further pursuing frivolous claims against these Movants.

Respectfully submitted,

ROGERS, MORRIS & GROVER, L.L.P.



JEFFREY L. ROGERS
State Bar No. 17174500
Federal I.D. No. 4522
PAUL A. LAMP
State Bar No. 24002443
Fed. I.D. No. 21711
5718 Westheimer, Suite 1200
Houston, Texas 77057
Telephone: 713/960-6000
Facsimile: 713/960-6025

ATTORNEYS FOR DEFENDANTS
JEFFREY ROGERS; ROGERS, MORRIS & GROVER, L.L.P.; FELDMAN, ROGERS, MORRIS & GROVER, L.L.P.; SHEILA HADDOCK

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2010, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. I also hereby certify that I have sent by electronic mail and United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

Candice and Richard Schwager
4307 Long Grove Dr.
Seabrook, Texas 77586
(*Email*: schwagerlawfirm@yahoo.com *and Certified Mail RRR*)

Counsel for Defendants