

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SCHUYLER FILE,

Plaintiff,

v.

Case No. 19-CV-1063

JILL M. KASTNER, et al.,

Defendants.

**WISCONSIN SUPREME COURT DEFENDANTS'
MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO STAY PROCEEDINGS
PENDING A DECISION ON THE MOTION TO DISMISS**

INTRODUCTION

The Court should stay proceedings, including discovery, while it resolves the Wisconsin Supreme Court Defendants' motion to dismiss. The motion to dismiss should resolve this case because, as argued, U.S. Supreme Court and Seventh Circuit precedent bars Plaintiff's claims. It would not make sense for the Court or parties to devote more time and resources to this case until the motion to dismiss is resolved. Furthermore, the litigation is at an early stage, Plaintiff will not be prejudiced or disadvantaged by a stay, a stay will streamline and simplify the issues, and it will reduce the burden of litigation. Accordingly, the Court should enter an order staying all other proceedings while it disposes of the motion to dismiss.

LEGAL STANDARD

A court “has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). “How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 254–55. The party requesting a stay must show why it is necessary. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009).

“The general test for imposing a stay requires the court to ‘balance interests favoring a stay against interests frustrated by the action’ in light of the court’s paramount obligation to exercise jurisdiction timely in cases properly before it.” *Feed.Ing BV v. Principle Sols., LLC*, No. 14-C-1241, 2015 WL 13158324, at *1 (E.D. Wis. Apr. 21, 2015) (citation omitted). Courts consider the following factors when deciding whether to stay an action:

(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.

Id. (quoting *Grice Eng’g v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010)).

ARGUMENT

The Court should stay all proceedings and discovery while it resolves the Wisconsin Supreme Court Defendants' motion to dismiss. As argued in the motion, Plaintiff's claims are barred by controlling U.S. Supreme Court and Seventh Circuit precedent. It does not make sense to proceed with litigation—particularly discovery—when the case should be dismissed. Plaintiff will not be disadvantaged, a stay will simplify the case, it will save time for the Court and parties, and it will reduce the litigation burden.

Further, there already are other cases ahead of this matter raising the same or similar issues. For example, an Eighth Circuit case challenging the North Dakota State Bar (that has already been to the Supreme Court once) is far ahead of this one and could bring the same legal issues before the Supreme Court while this case is pending. Similarly, a related case in the Western District of Wisconsin challenging Wisconsin's mandatory State Bar is fully briefed on a motion to dismiss and is itself stayed. The existence of related cases pending on the same constitutional issues supports limiting the litigation to conserve judicial and party resources. Accordingly, this Court should enter an order staying all proceedings and resolve the motion to dismiss.

I. The litigation is at a very early stage.

First, the litigation is at a very early stage. *See Feed.Ing BV*, 2015 WL 13158324, at *1. Plaintiff filed and served his complaint, and the Wisconsin

Supreme Court Defendants moved to dismiss it. Under Eastern District Civil Local Rule 7, Plaintiff will have 21 days to respond, and a reply is due 14 days later. E.D. Wis. Civil L.R. 7(b), (c). Thus, in less than two months, the motion to dismiss will be ready for this Court's disposition, if the Court forgoes oral argument. *See* E.D. Wis. Civil L.R. 7(e).

II. A stay will not unduly prejudice or tactically disadvantage Plaintiff.

Second, staying the proceedings will not unduly prejudice or tactically disadvantage Plaintiff. *See Feed.Ing BV*, 2015 WL 13158324, at *1. While a stay will delay discovery and may impact summary-judgment scheduling, it is not *undue* prejudice because dismissal is warranted under controlling law. There is no reason to conduct discovery or schedule summary judgment or a trial when the case against the Justices may be dismissed. Likewise, Plaintiff will suffer no tactical disadvantage regarding the pending motion to dismiss, which will be decided on the filed briefs and controlling law. He will have the opportunity to respond to the dismissal motion and oppose it, consistent with the rules of procedure.

III. A stay will streamline the issues, as Plaintiff's claims are barred by controlling precedent and should be dismissed.

Third, a stay of all proceedings except the dismissal motion will streamline the issues, which are purely legal. *See Feed.Ing BV*, 2015 WL 13158324, at *1. Plaintiff's claims are barred by controlling precedent and

should be dismissed, as argued in the motion to dismiss. It does not make sense for the parties or the Court to litigate when U.S. Supreme Court and Seventh Circuit precedent controls.

Regarding the legal issues, this case is not the only pending case raising the same First Amendment challenges Plaintiff raises here. Most notably, *Adam Jarchow v. State Bar of Wisconsin*, No. 19-CV-266 (W.D. Wis.), is pending in the Western District of Wisconsin and includes a challenge to Wisconsin's mandatory bar. And *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), is an Eighth Circuit case involving North Dakota's mandatory bar. That case was decided on remand from the U.S. Supreme Court and is likely to return to that court for a decision that will give binding guidance on the controlling issues. These related cases support granting a stay.

In the Western District, *Jarchow* is before U.S. District Judge Barbara Crabb. It was brought by two State Bar of Wisconsin members challenging the allegedly "unconstitutional requirements that attorneys licensed to practice law in Wisconsin must join and pay membership dues to the State of Wisconsin." (Decl. of Clayton P. Kawski Ex. A:2.) The *Jarchow* plaintiffs assert that "[t]he State Bar of Wisconsin regularly engages in advocacy and other speech on matters of intense public interest and concern, and it funds that advocacy through mandatory dues payments." (*Id.*) "Accordingly, those requirements compel Plaintiffs' speech and compel them into an unwanted

expressive association with the State Bar, in violation of Plaintiffs’ rights under the First and Fourteenth Amendments to the United States Constitution.” (*Id.*)

The State Bar of Wisconsin defendants in *Jarchow* filed a motion to dismiss and a motion to stay proceedings. (Decl. of Clayton P. Kowski Exs. B, C.) The Western District granted the stay motion in part, thereby staying proceedings until the court rules on the defendants’ motion to dismiss. (Decl. of Clayton P. Kowski Ex. D.)

The *Jarchow* plaintiffs responded to the motion to dismiss and conceded the district court “is precluded from providing Plaintiff’s requested relief because the Supreme Court, nearly three decades ago, applied the principles *Janus* [*v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018)] directly rejected—and the case law *Janus* expressly overruled—to uphold California’s integrated bar arrangement. *Keller v. State Bar of California*, 496 U.S. 1 (1990).” (Decl. of Clayton P. Kowski Ex. E:2.) “And, previously, [the Supreme Court] upheld compelled bar membership. *See Lathrop v. Donohue*, 367 U.S. 820, 842–43 (1961).” (*Id.*) “Plaintiffs thus do not oppose Defendants’ motion to dismiss their claims as foreclosed under these precedents.” (*Id.*; *see also id.* at 10, 27.) A decision on the motion to dismiss in *Jarchow*, including the plaintiff’s concession, is pending.

In *Fleck*, the Eighth Circuit upheld North Dakota’s integrated bar—which required “every resident lawyer [to] maintain membership in and pay annual dues to the State Bar of North Dakota”—against a First Amendment challenge based upon *Janus*. 937 F.3d at 1113. Procedurally, the district court in *Fleck* had granted summary judgment to the defendants, who prevailed on appeal. *Id.* at 1113–14. *Fleck* appealed to the Supreme Court, and the Court granted a certiorari petition, summarily vacated the Eighth Circuit’s decision, and remanded for further consideration in light of *Janus*. *Id.* at 1114. The Eighth Circuit’s August 2019 decision after remand confirmed *Janus* did not overrule *Keller*. *See id.* at 1118.

Not only does *Fleck* confirm that the motion to dismiss should be granted here, it also already has reached the Supreme Court once, meaning it may likely return there to address the same First Amendment issues Plaintiff is raising here.

As the motion to dismiss explains, the issue here is foreclosed by the precedent. Further, *Jarchow* and *Fleck* each have the potential to further address the First Amendment issue for this Court and for the parties. *See Woodman’s Food Mkt., Inc. v. The Clorox Co.*, No. 14-CV-734, 2015 WL 4858396, at *3 (W.D. Wis. Aug. 13, 2015). It makes sense for the Court and the parties to focus now on the dispositive issues in the dismissal motion rather than engage in discovery, particularly given the potential for these other cases

to impact the First Amendment landscape. A stay of all proceedings except the dismissal motion is appropriate.

IV. Fourth, a stay will reduce the burden of litigation on the parties and the Court.

Fourth, a stay will reduce the burden of litigation on the parties and the Court. *See Feed.Ing BV*, 2015 WL 13158324, at *1. With only the dismissal motion to address, there will be no written discovery propounded, no depositions to prepare for and conduct, and no other motion practice to address. This will significantly reduce the litigation burden.

Furthermore, the Wisconsin Supreme Court Defendants are in session and have a busy schedule. Attached as Exhibit F to the Kowski Declaration is the supreme court's 2019–20 administrative calendar. The supreme court has oral arguments, rules-petition hearings, and petition-for-review and decisional conferences to prepare for and participate in. This is in addition to the Justices' important work of writing and publishing decisions. It does not make sense to burden the Justices with litigation tasks and discovery in this case when the case should be dismissed.

Finally, it is not clear why the Justices are parties to this case at all, and the pending motion to dismiss demonstrates that there is no justiciable case or controversy as to them. Notably, they are not named as defendants in *Jarchow*. Thus, it makes sense to stay the proceedings as to the Justices because their

role in factual development of the case—should it ever occur—does not appear to be necessary to the ultimate resolution of the legal issues.

CONCLUSION

The Court should grant the stay motion and order that all proceedings are stayed pending disposition of the motion to dismiss.

Dated this 15th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 15, 2019, I electronically filed the foregoing Wisconsin Supreme Court Defendants' Memorandum of Law in Support of Their Motion to Stay Proceedings Pending a Decision on the Motion to Dismiss with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 15th day of November, 2019.

s/ Clayton P. Kawski
CLAYTON P. KAWSKI
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