

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

ROBERT S. BENNETT, NACHAEL  
FOSTER, ANDREW BAYLEY, and others  
similarly situated,

Plaintiffs,

v.

STATE BAR OF TEXAS,

Defendant.

Civil Action No. 4:21-cv-02829

**DEFENDANT STATE BAR OF TEXAS' OPPOSITION TO PLAINTIFFS' MOTION  
FOR THE DEFENDANT TO SHOW AUTHORITY TO BE REPRESENTED BY ITS  
PRESENT LEGAL COUNSEL**

Plaintiffs in this case are three active members of the State Bar of Texas. Compl. ¶¶ 10-12 (Aug. 30, 2021), ECF No. 2. Based on the Fifth Circuit's decision in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *petitions for cert. filed*, No. 21-800 (U.S. Nov. 24, 2021), and No. 21-974 (U.S. Dec. 30, 2021), Plaintiffs allege that the Bar has violated their First Amendment rights. The only named defendant in Plaintiffs' complaint is the "State Bar of Texas." Compl. ¶ 13. Although the complaint's caption and first paragraph also refer to "culpable officials" within the Bar, *id.* at 1, the complaint does not specifically name any such officials as defendants. On January 24, the Bar filed motions to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) or, in the alternative, to transfer this case to the U.S. District Court for the Western District of Texas, Austin Division, under 28 U.S.C. § 1404(a). Plaintiffs' responses to those motions are currently due by February 14.

On February 7, Plaintiffs filed a "Motion for the Defendant to Show Authority to Be Represented by its Present Legal Counsel" ("Show Authority Motion") (ECF No. 14). In that

motion, Plaintiffs allege that the Texas State Bar “lack[s] authority to be represented by [its] present legal counsel and law firm.” Show Authority Motion ¶ 2.

Plaintiffs concede that they filed their motion without first conferring with the Bar, which itself is grounds for denying the motion. *Id.* at 5; *see also* Local Civil R. 7.1(D); Court Procedures and Practices B.5(c). Regardless, Plaintiffs’ motion is meritless. Attorneys “are presumed to have authority to act on behalf of the party they claim to represent.” *Badaiki v. Cameron Int’l Corp.*, No. 4:19-cv-371, 2020 WL 8990868, at \*2 (S.D. Tex. Nov. 20, 2020) (quoting *Cervantes v. Ocwen Loan Servicing LLC*, No. 5:16-cv-129, 2016 WL 10951818, at \*1 (S.D. Tex. Oct. 25, 2016), *appeal dismissed*, 749 F. App’x 242 (5th Cir. 2018) (per curiam)). Plaintiffs have not provided any reason for the Court to question that presumption here.

Plaintiffs do not dispute that the Texas State Bar has in fact retained the undersigned’s law firm to represent the Bar in this matter. Indeed, the Bar has published the motions to dismiss or transfer filed by the undersigned on the Bar’s website. *See* State Bar of Texas, Mandatory Bar Challenges, <https://bit.ly/33ahg0e> (last visited Feb. 10, 2022).

Instead, Plaintiffs’ primary contention appears to be that, under Tex. Gov’t Code Ann. § 2155.132, the Bar’s engagement of outside counsel to represent it in this litigation should have been subject to “competitive bidding.” Show Authority Motion ¶¶ 5, 7, 15. As a preliminary matter, however, Plaintiffs do not cite any authority that would allow them to use an alleged violation of Texas state procurement law to challenge the authority of the Bar’s chosen counsel to represent it in this matter.<sup>1</sup> Plaintiffs do cite “Federal Rule of Civil Procedure 9(2)” (presumably, they mean Federal Rule of Civil Procedure 9(a)(2)). *Id.* ¶ 13. But Rule 9(a)(2) addresses the

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<sup>1</sup> Plaintiffs also cite no authority for their extraordinary request that this Court order that the Bar’s “procurement of legal representation in this dispute” be subject to a special referendum of Bar members. Show Authority Motion ¶ 15.

procedure for denying “a party’s capacity to sue or be sued,” “a party’s authority to sue or be sued in a representative capacity,” or “the legal existence of an organized association of persons that is made a party.” Fed. R. Civ. P. 9(a). The Bar here has not been sued “in a representative capacity” (e.g., as the guardian for “a minor or an incompetent person,” Fed. R. Civ. P. 17(c)(1)). Plaintiffs also do not—and could not—deny the Bar’s legal existence and capacity to be sued; to the contrary, they have listed the Bar as the only named defendant in their complaint. *See supra* p. 1; *see also* Tex. Gov’t Code Ann. § 81.014 (“The state bar may sue and be sued in its own name.”). Rule 9(a) does not authorize Plaintiffs’ motion challenging the undersigned’s authority to represent the Bar based on an alleged procurement-law violation.<sup>2</sup>

In any event, Plaintiffs’ contention that Tex. Gov’t Code Ann. § 2155.132 required the Bar to solicit competitive bids for legal services in this matter is patently meritless. Among other problems with Plaintiffs’ argument, Tex. Gov’t Code Ann. § 2151.005 expressly provides that Subtitle D of Title 10 of the Texas Government Code—which includes Tex. Gov’t Code Ann. § 2155.132—“does not apply to[] (1) obtaining outside legal counsel services; (2) obtaining expert witnesses; or (3) procuring litigation-related goods and services for which competitive procurement is not feasible under the circumstances.” Therefore, the very state procurement laws on which Plaintiffs rely expressly exempt the engagement of outside legal counsel from the laws’

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<sup>2</sup> Although the Supreme Court has held that a court may “require an attorney . . . to show his authority to appear,” *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927), the authority of the undersigned to appear for the Bar is established by the undisputed fact that the Bar has retained the undersigned’s law firm to represent it in this matter, *cf. id.* at 319-20 (finding that attorneys lacked authority to assert land claims on behalf of Indian villages based on documents that were never approved by the requisite Indian council and that purported to “improvident[ly]” convey the Indians’ interest in “an enormous tract of country, without [meaningful] consideration”). As explained above, Plaintiffs have not established that they have any right in this lawsuit to litigate whether the Bar’s undisputed engagement of the undersigned’s law firm may have violated the procedural requirements of state procurement law.

requirements. Plaintiffs' contention that the Bar violated alleged competitive-bidding requirements in retaining the undersigned's law firm is thus groundless.

Plaintiffs' Show Authority Motion is baseless and should be denied.

Dated: February 10, 2022

Respectfully submitted,

*Of Counsel:*

Thomas S. Leatherbury  
State Bar No. 12095275  
VINSON & ELKINS LLP  
2001 Ross Avenue  
Suite 3900  
Dallas, TX 75201  
Tel: (214) 220-7792  
Fax: (214) 999-7792  
tleatherbury@velaw.com

Joshua S. Johnson  
State Bar No. 24070002  
Morgan A. Kelley  
State Bar No. 1617261  
VINSON & ELKINS LLP  
2200 Pennsylvania Avenue NW  
Suite 500 West  
Washington, DC 20037  
Tel: (202) 639-6623  
Fax: (202) 879-8934  
joshjohnson@velaw.com  
mkelley@velaw.com

/s/ Patrick W. Mizell

Patrick W. Mizell  
Attorney-in-Charge  
State Bar No. 14233980  
S.D. Tex. Bar No. 36390  
VINSON & ELKINS LLP  
1001 Fannin Street  
Suite 2500  
Houston, TX 77002  
Tel: (713) 758-2932  
Fax: (713) 615-5912  
pmizell@velaw.com

*Counsel for Defendant State Bar of Texas*

**CERTIFICATE OF SERVICE**

I certify that on February 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the Southern District of Texas by using the Court's CM/ECF system, which will send notification of such filing to the following:

Richard Robins  
2450 Louisiana St. #400-155  
Houston, TX 77006  
(832) 350-1030  
rich@TexasBarSunset.com

Dated: February 10, 2022

/s/ Patrick W. Mizell  
Patrick W. Mizell  
*Counsel for Defendant State Bar of Texas*

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CIVIL ACTION NO. 4:21-CV-02829

**ORDER**

Plaintiffs' Motion for the Defendant to Show Authority to Be Represented by its Present  
Legal Counsel is hereby DENIED.

It is so ORDERED.

\_\_\_\_\_  
Date

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The Honorable Alfred H. Bennett  
United States District Judge