IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Montrell Carr, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 17-cv-7135
-vs-	)	
	)	
Sheriff of Cook County and Cook County, Illinois,	)	*(Judge Pacold)*
	)	
	)	*(Magistrate Judge Weisman)*
Defendants.	)	

RESPONSE TO MOTIONS TO STAY (ECF Nos. 206 and 208)

The Court should deny defendants' motions to stay (ECF Nos. 206 and 208) because "the great weight of recent, reasoned authority has concluded that [28 U.S.C.] § 2101(f) does not permit a district court to exercise jurisdiction to stay a circuit court's final judgment pending filing or resolution of a *certiorari* petition." *United States v. Lentz*, 352 F. Supp. 2d 718, 726 (E.D. Va. 2005) (footnote omitted). While § 2101(f) permits a stay, it confers this authority "exclusively to the circuit court or to a justice of the Supreme Court." *Id.* at 725. This reading of the statute has been accepted by "many other courts that have considered the issue." *In re A.F. Moore & Associates, Inc.*, 974 F.3d 836, 839 (7th Cir. 2020).

Nor may the Court accept defendants' invitation to ignore the statute by relying on the Court's "inherent authority." Defendants cite a district

court case for this proposition (ECF No. 206 at 6), but overlook the subsequent reversal of that decision by the Court of Appeals, *In re A.F. Moore & Assocs., Inc.*, 974 F.3d 836, 840–41 (7th Cir. 2020).

Even if the Court has the power to grant a stay pending certiorari, defendants fail to "demonstrate a reasonable probability that four Justices will vote to grant certiorari as well as a reasonable possibility that five Justices would vote to reverse our judgment." *Jepson v. Bank of New York Mellon*, 821 F.3d 805, 807 (7th Cir. 2016) (Ripple, J., in chambers).

Nor can defendants show that continued litigation pending certiorari will result in "irreparable harm." They point only to the costs of "continuing to litigate," (ECF No. 206 at 5), but the Supreme Court and the Seventh Circuit have repeatedly held "that the financial costs of litigation are not 'irreparable injury,'" *In re Lewis*, 212 F.3d 908, 983 (7th Cir. 2000) (collecting cases).

The Court should also deny defendants' motion to stay briefing on plaintiff's motion to add additional plaintiffs (ECF No. 208) because defendants are unable to present any legitimate basis for further delay in this case.

I. Procedural History

Montrell Carr filed this case individually and for a putative class on October 3, 2017. Quintin Scott joined the case in an amended complaint

(ECF No. 30), filed in accordance with the district court's order of July 13, 2018. (ECF No. 31.)

After the Court denied plaintiff's motion for class certification, Carr accepted an unconditional offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure on January 19, 2023. (ECF No. 178.)

Scott accepted a conditional offer of judgment, drafted by defendants to follow Seventh Circuit precedent that established a procedure for a class member to settle his individual claim while reserving the right to appeal the class ruling. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012); *Pastor v. State Farm Mut. Auto Ins. Co.*, 487 F.3d 1042 (7th Cir. 2007).

On Scott's appeal, the Seventh Circuit vacated and remanded for reconsideration of two aspects of class certification: Numerosity and adequacy of representation. *Scott v. Dart*, 99 F.4th 1076 (7th Cir. 2024). The mandate of the Court of Appeals issued on July 31, 2024.

Now before the Court is defendants' motion to stay all proceedings pending disposition of their petition for writ of certiorari. (ECF No. 206.) Defendants also seek to stay briefing on plaintiff's motion to add additional plaintiffs. (ECF No. 208.) The Court should deny both motions for the reasons set out below.

II. 28 U.S.C. § 2101(f) Precludes the Court from Granting the Relief Requested by Defendants

Defendants rely on 28 U.S.C. § 2101(f). (ECF No. 206 at 3-5.) The statute, however, does not authorize this Court to grant the requested stay.

Section 2101(f) limits to "a judge of the court rendering the judgment or decree or … a justice of the Supreme Court" the power to grant a stay pending disposition of a petition for writ of certiorari. As the Eighth Circuit held in *In re Stumes*, 681 F.2d 524 (8th Cir. 1982), "only a judge of this Court [of Appeals], or a justice of the Supreme Court, is empowered by 28 U.S.C. Section 2101(f) to stay the execution or enforcement of this Court's judgment." *Id.* at 525. The Fifth Circuit reached the same result in *In re Time Warner Cable, Inc.*, 470 F. App'x 389 (5th Cir. 2012): "Congress has only authorized the court of appeals or a justice of the Supreme Court to stay the execution or enforcement of the court of appeals judgment pending a petition for certiorari." *Id.* at 390.

This interpretation, as the Seventh Circuit wrote in *In re A.F. Moore & Associates, Inc.*, 974 F.3d 836 (7th Cir. 2020), has been accepted by "many other courts that have considered the issue." *Id.* at 839; *see, e.g.*, *United States v. Lentz*, 352 F. Supp. 2d 718, 726, 2005 WL 135092 (E.D. Va. 2005); *Gander v. FMC Corp.*, 733 F. Supp. 1346, 1347 (E.D. Mo. 1990); *Hovater v. Equifax Servs., Inc.*, 669 F. Supp. 392, 393 (N.D. Ala. 1987); *Deretich v. City*

of St. Francis, 650 F. Supp. 645, 647 (D. Minn. 1986); *Studiengesellschaft Kohle v. Novamont Corp.*, 578 F. Supp. 78, 79–80 (S.D.N.Y. 1983).

Thus, to invoke Section 2101(f), defendants must apply to "a judge of the court rendering the judgment or decree or … a justice of the Supreme Court." The Seventh Circuit is the court that rendered the judgment at issue; this Court may not grant a stay under Section 2101(f).

Even if Section 2101(f) authorized this Court to grant a stay pending certiorari, defendants fail to show that their motion satisfies the requirements of a stay pending certiorari.

III. Defendants Fail to Satisfy the Requirements for a Stay Pending Certiorari

To obtain a stay from a judge of the Court of Appeals pending a petition for writ of certiorari, an unsuccessful litigant "must show both a reasonable probability that four Justices will vote to grant certiorari, and that five Justices will vote to reverse the judgment of this court." *United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers) (cleaned up). The petitioner must also show "irreparable injury absent a stay." *Bricklayers Loc. 21 of Illinois Apprenticeship & Training Program v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers). Defendants flunk each test.

A. Defendants are unable to show a reasonable probability that four Justices will vote to grant certiorari

There is no reasonable probability that the Supreme Court will grant certiorari on defendants' petition. Defendants have asked the Supreme Court to decide whether "a putative class representative ha[s] Article III standing solely to seek an 'incentive award.'" (ECF No. 206-1 at i). But that question is doubly irrelevant to this lawsuit.

First, defendants' question presented will become moot once more plaintiffs have been added. As the Supreme Court long has held, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). So Mr. Scott's standing to seek an incentive award will become an academic question.

Second, defendants' purported circuit split does not exist. Even in the Eleventh Circuit, which defendants claim has adopted their view, this case would be able to proceed. There, "a dispute capable of judicial resolution continues to exist with regard to the class certification issue" when a named plaintiff has settled his individual case but reserved the right to "pursue an appeal of the denial of certification." *Love v. Turlington*, 733 F.2d 1562, 1565 (11th Cir. 1984). In that circuit, the named plaintiff's "private attorney general interest" is "sufficient to establish a personal stake" in the lawsuit even

after an individual settlement. *Id.*; *see Jin v. Shanghai Original, Inc.*, 990 F.3d 251, 260 (2d Cir. 2021) (reaching the same result relying on *Love*). So any purported split in authority is irrelevant to the result here.

Third, even if defendants had identified a live circuit conflict, that would not make Supreme Court review probable. "[T]he mere existence of a conflict does not warrant Supreme Court intervention unless the costs created by the conflict outweigh the beneficial effects of further percolation." Estreicher & Sexton, *New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities*, 59 N.Y.U. L. REV. 681, 699 (1984). Thus, the Supreme Court frequently denies certiorari despite an acknowledged conflict among the circuits. *See, e.g.*, *Tingley v. Ferguson*, 144 S. Ct. 33 (2023) (Thomas, J., dissenting from the denial of certiorari); *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027 (2023) (Thomas, Gorsuch, and Barrett, JJ., dissenting from denial of certiorari); *Burns v. Mays*, 143 S. Ct. 1077 (2023) (Sotomayor, Kagan, and Jackson, JJ., dissenting from denial of certiorari).

B. Defendants are unable to show that the Supreme Court would conclude that plaintiff lacked standing to appeal the denial of class certification

Defendants are also unable to establish the second element required for a Circuit Court judge to grant a stay pending certiorari—a showing of

"a reasonable possibility that five Justices would vote to reverse the judgment." *United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers); *Bricklayers Loc. 21 of Illinois Apprenticeship & Training Program v. Banner Restoration, Inc.*, 384 F.3d 911, 911–12 (7th Cir. 2004) (Ripple, J., in chambers). This is a heavy burden, which requires the Court to "make the predictive function of attempting to determine the future court of the Supreme Court's jurisprudence." *Nanda v. Bd. of Trustees of Univ. of Illinois*, 312 F.3d 852, 854 (Ripple, J., in chambers). Such prognostication is "not an appropriate function for this court." *Hovater v. Equifax Servs., Inc.*, 669 F. Supp. 392, 393 (N.D. Ala. 1987). The Court should decline to predict that the Supreme Court will reverse the decision of the Seventh Circuit in this case and conclude that plaintiff lacks jurisdiction to challenge the adverse class ruling.

C. Defendants are unable to show irreparable harm

The Supreme Court and the Seventh Circuit have repeatedly held "that the financial costs of litigation are not 'irreparable injury.'" *In re Lewis*, 212 F.3d 980, 983 (7th Cir. 2000). Since at least the decision of the Supreme Court in *Petroleum Exploration v. Public Service Com'n of Kentucky*, 304 U.S. 209 (1938), the law has been clearly established that the cost

of litigation "is not the sort of irreparable injury against which equity protects." *Id.* at 221. As the Seventh Circuit stated when it rejected this argument in *In re NCR Corp.*, 601 Fed.App'x 450 (7th Cir. 2015):

> The only injury to which it points is the cost of further litigation, but these expenses do not qualify as irreparable harm.

Id. at 451. The Court should therefore reject defendants' mistaken claim of irreparable harm "from continuing to litigate a case." (ECF No. 206 at 5.)

IV. The Court Should Not Rely on a District Court Decision Subsequently Reversed by the Court of Appeals

Defendants cite the district court decision in *A.F. Moore & Associates v. Pappas*, 2020 U.S. Dist. LEXIS 257476, 2020 WL 10501812 (N.D.Ill. 2020), to support their argument that a district court has the power to stay a case pending ruling on a petition filed in the Supreme Court. (ECF No. 206 at 6.) The stay in *A.F. Moore* was short lived. As the Seventh Circuit held in granting a writ of mandamus to vacate the stay,

> "[W]hen a court of appeals has reversed a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court." *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000). Said another way, the court must follow "the spirit as well as the letter of the mandate." [*In re Cont'l Ill. Sec. Litig.*, 985 F.2d 867, 869 (7th Cir. 1993).] The court may believe and even express its belief that our reasoning was flawed, yet it must execute our mandate nevertheless. *Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 910–11 (7th Cir. 1994); *cf. Baez-Sanchez v. Barr*, 947 F.3d 1033, 1036 (7th Cir. 2020).

In re A.F. Moore & Assocs., Inc., 974 F.3d 836, 840 (7th Cir. 2020).

The Court should therefore disregard defendant's citation of the district court ruling in *A.F. Moore*. As the Seventh Circuit holds, this Court must follow the Seventh Circuit's mandate. As in *A.F. Moore*, that means the Court may not grant a stay.

V. The Court Should Deny Defendants' Request to Stay Their Response to the Motion to Add Additional Plaintiffs

Following return of the mandate to this Court, plaintiff asked the Court to permit other persons who have been aggrieved by the policy at issue here to join this lawsuit. (ECF No. 202.) On October 25, 2024, the Court set a generous briefing schedule, allowing defendants to file their response on November 27, 2024. (ECF No. 205.)

Defendants now ask the Court to stay briefing on the motion to add additional plaintiffs. (ECF No. 208.) The only justification offered for the delay is "to conserve the Court's and the parties' resources and to prevent wasting judicial resources." (ECF No. 208 at 2, ¶ 8.) For the reasons explained above at 8-9, this "is not the sort of irreparable injury against which equity protects." *Petroleum Exploration v. Public Service Com'n of Kentucky*, 304 U.S. 209, 221 (1938).

VI. Conclusion

It is therefore respectfully requested that the Court deny defendants motions (ECF Nos. 206 and 208).

Respectfully submitted,

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