No. 18-520

In The
Supreme Court of the United States

WECONNECT, INCORPORATED,

Petitioner,

v.

BROOKS GOPLIN,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

GEORGE BURNETT
Counsel of Record
LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
231 S. Adams Street
Green Bay, WI 54301
(920) 437-0476
gb@lcojlaw.com

December 3, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF IN SUPPORT OF CERTIORARI	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Proceedings in the Courts Below	2
ARGUMENT	3
I. The Courts of Appeals Divide on Whether the Court May, *Sua Sponte*, Consider Facts Outside the Record From a Website	3
A. The Decisions Below Conflict With the Third and Sixth Circuits' Position That Courts May Not Consider Facts Outside the Record on an Unauthenticated Website	3
B. The Decisions Below Conflict with Seventh Circuit Precedent	5
C. The Decisions Below Comport With the Ninth Circuit's Position That Courts May Consider Facts Outside the Record on an Unauthenticated Website	8
II. The District Courts Divide on Whether a Court May Consider Facts Outside the Record From a Website	8
III. This Case is the Appropriate Vehicle for this Court to Establish When Courts May Consider Facts Outside the Record From a Website	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Ayala v. County of Imperial, 2017 WL 469016 (S.D. Cal. Feb. 3, 2017) 9

Cary v. Cordish Co., 731 Fed.Appx. 401 (6th Cir. 2018) 5, 8, 10

Fenner v. Suthers, 194 F.Supp.2d 1146 (D. Colo. 2002) 9

Mendler v. Winterland Production, Ltd., 207 F.3d 1119 (9th Cir. 2000).....8

Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015) 5, 6, 7, 8, 10

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F.Supp.2d 773 (S.D. Tex. 1999) 9

Victaulic Co. v. Tieman, 2007 WL 1000552 (E.D. Pa. Mar. 29, 2007).....4

Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007) 4, 8, 10

RULES

Fed. R. Evid. 201 .....1, 5, 10

Fed. R. Evid. 901 .....5, 10

Fed. R. Evid. 902 10

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

The Federal Rules of Evidence make clear that courts may properly consider evidence that is introduced through one of two methods: (1) through sworn testimony (written or verbal); or (2) through a court's proper exercise of judicial notice. Goplin does not dispute that the district court below used neither of these methods when it *sua sponte* accessed and utilized information from WeConnect's website before ruling on WeConnect's motion to dismiss and compel arbitration. (Br. in Opp. 10-11).

As WeConnect's petition for a writ of certiorari explains, the decisions of the courts below relying on information from WeConnect's website deepened a split among the circuits and district courts regarding the manner in which courts may consider information found on websites. (Pet. 7-12, 16-18). Goplin, however, denies the existence of such a split and argues that the courts below did not base their decisions on the information from WeConnect's website. (Br. in Opp. 6). Yet, a split plainly exists and the district court expressly referenced WeConnect's website in its ruling and, in fact, used the website to counter the sworn evidence introduced by WeConnect. (Pet. App. 22).

Like the circuit courts, the district courts are also divided with respect to the issue of how courts may consider and utilize information from websites. (Pet. 16-18). Yet, with respect to this split, Goplin states that courts "are properly applying Fed. R. Evid. 201 to

determine whether judicial notice is appropriate" in situations such as this one, something, ironically, the district court below failed to do here. (Br. in Opp. 8).

Because the courts below relied on outside information from an unauthenticated website in denying WeConnect's motion to compel arbitration, WeConnect's petition is the ideal vehicle to address the split among the circuits regarding how and when courts may consider outside information from the internet.

STATEMENT OF THE CASE

I. Proceedings in the Courts Below.

As WeConnect previously recounted,[1] this petition arises from the denial of WeConnect's motion to compel arbitration of a Fair Labor Standards Act claim brought by Goplin. (Pet. 4-7). In support of its motion, WeConnect submitted sworn testimony that AEI and WeConnect were two names for a single entity. (Pet. 4). In opposition, Goplin vaguely referenced WeConnect's website to claim that AEI was not the previous name of WeConnect. Goplin provided no sworn testimony or other evidence in opposition to WeConnect's motion. Contrary to Goplin's factual recitation in opposition to WeConnect's petition (Br. in Opp. 4), WeConnect used

[1] WeConnect incorporates by reference its Statement of the Case from its initial Petition for a Writ of Certiorari. WeConnect only adds additional factual background in its reply to address new factual characterizations made by Goplin in his Brief in Opposition to WeConnect's Petition.

its reply brief below to refute Goplin's citation with sworn evidence, expressly stating that "'WeConnect' and 'AEI' are two names for the same entity," and noting that "Goplin acknowledges there is no difference between AEI and WeConnect."

ARGUMENT

I. The Courts of Appeals Divide on Whether the Court May, *Sua Sponte*, Consider Facts Outside the Record From a Website.

A. The Decisions Below Conflict With the Third and Sixth Circuits' Position That Courts May Not Consider Facts Outside the Record on an Unauthenticated Website.

Goplin's principal argument against this Court's review is that the district court below "did not premise its ruling on facts deduced from internet resources." (Br. in Opp. 6). The district court below did, however, expressly reference the contents of WeConnect's website when it ruled against WeConnect's motion to dismiss. (Pet. App. 22). After WeConnect introduced sworn evidence indicating that AEI and WeConnect were two names for the same entity, the district court concluded that "AEI isn't just another name for WeConnect. As Goplin notes, WeConnect's own website indicates that AEI ceased to exist in September 2016, when it merged with WeConnect Enterprise Solutions to form WeConnect, Inc." (Pet. App. 22). Based on that conclusion, the district court held that WeConnect could not enforce its

arbitration agreement with Goplin. (*Id.*; *see also* Pet. App. 4 ("Because the [district] court found that 'AEI isn't just another name for WeConnect,' it denied WeConnect's motion to compel arbitration.")). This direct reference to the website is the only support the district court cited, so Goplin's position that the district court never relied on the website is puzzling.

The Seventh Circuit held that the district court's reliance on WeConnect's website did not violate the rules of judicial notice. (Pet. App. 6). Because the district court did, in fact, rely on WeConnect's website as a basis for its decisions, the Seventh Circuit's acceptance of the district court's conduct conflicts with prior decisions of the Third and Sixth Circuits.

Contrary to Goplin's representations, the Third Circuit case of *Victaulic Co. v. Tieman*, 499 F.3d 227, 236-37, (3d Cir. 2007) cannot be distinguished from the factual situation here on the basis that *Victaulic* involved a party's request for judicial notice. That distinction is wrong. In *Victaulic*, the district court actually took judicial notice of a party's website *sua sponte*, and the Third Circuit held that the district court's *sua sponte* consideration of Victaulic's website was improper. *Victaulic Co. v. Tieman*, 2007 WL 1000552, at *3, n. 8 (E.D. Pa. Mar. 29, 2007). Likewise, neither WeConnect nor Goplin expressly asked the district court to take judicial notice of WeConnect's website. Like *Victaulic*, this case concerned a district court's consideration of a party's website outside the context of an evidentiary proceeding. Whereas the Third Circuit in *Victaulic* overturned the district

court's consideration of such information as improper under Federal Rules of Evidence 201 and 901, the Seventh Circuit affirmed the district court's consideration of such information here and stated that the use of such information by the district court below did not violate Federal Rule of Evidence 201. (Pet. App. 6). There can be no clearer conflict between the circuits.

While *Cary v. Cordish Co.*, 731 Fed.Appx. 401 (6th Cir. 2018) did involve a party's request for judicial notice, that request does not erase a split between the Sixth and Seventh Circuits following the Seventh Circuit's opinion below. *Cary* provides that courts may not take judicial notice of information on unauthenticated websites. *Id.* at 406. Yet, the Seventh Circuit below upheld the district court's reliance on inaccurate information from an unauthenticated website. This too constitutes a conflict between the circuits that is ripe for this Court's review.

B. The Decisions Below Conflict with Seventh Circuit Precedent.

Goplin inaccurately argues that the decisions below do not conflict with Seventh Circuit precedence under *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015). Goplin claims that the district court's use of information from WeConnect's website was merely a search for background information that confirmed the facts already in the court record. (Br. in Opp. 9-10). At the time the district court accessed and used information from WeConnect's website, the only facts in the record

showed: (1) that AEI and WeConnect were two names for the same entity; and (2) that the single entity (AEI/WeConnect) entered into an arbitration agreement with Goplin. (Pet. App. 37-47). Goplin never introduced any evidence to the contrary; he only made a vague reference to WeConnect's website. The district court's use of online information contradicted the only facts in the record, did not confirm anything already in the court's record, and thus went beyond a search for "mere background information" in violation of *Rowe*.

Rowe confirmed that there is a difference between "judicial web searches for mere background information that will help the judges and the readers of their opinions understand the case" and "web searches for facts normally determined by the fact-finder after an adversary procedure that produces a district court or administrative record." *Rowe*, 798 F.3d at 628. While judicial web searches for background information may be proper, searches for critical facts are not. *Id.* Yet, the Seventh Circuit below violated this holding of *Rowe* by affirming the district court's use of online information to refute the only evidence presented by either party. (Pet. 6). *Rowe* further made clear that the use of a judicial web search for background information was only appropriate when "the information gleaned from [the web searches] did not create a dispute of fact that was not already in the record." *Id.* at 630. Yet, the decision of the panel below also conflicts with this holding of *Rowe* and implicitly endorses judicial web searches, even

when the information is new and creates a factual dispute absent from the existing record. (Pet. App. 6-7).

This case is not, as Goplin argues, distinguishable from *Rowe* on the basis that this case "is a failure of Petitioner, not an error of the district court." While litigants have a duty to respond to evidence, they do not have a duty to respond to unsupported allegations. WeConnect had no obligation to directly respond to Goplin's unsupported allegations unless the district court notified the parties of its plan to take judicial notice under Fed. R. Evid. 201.

Allusions to a website are no substitute for properly authenticated evidentiary proof. Only WeConnect presented sworn evidence to the district court of the fact that AEI and WeConnect were a single entity, and WeConnect used such sworn evidence to respond to Goplin's vague reference to WeConnect's website. Despite Goplin introducing no actual evidence to counter WeConnect, the district court violated *Rowe* by going outside the record and using WeConnect's website to refute WeConnect's evidence. WeConnect's conduct was appropriate, but the district court's was not appropriate under *Rowe*. Review is necessary to clarify this conflict on the important question of when independent judicial fact-finding through the internet is appropriate.

C. The Decisions Below Comport With the Ninth Circuit's Position That Courts May Consider Facts Outside the Record on an Unauthenticated Website.

The decisions below join the Ninth Circuit's decision in *Mendler v. Winterland Production, Ltd.*, 207 F.3d 1119 (9th Cir. 2000), in conflicting with *Victaulic*, *Cary*, and *Rowe*. While Goplin contends the *Mendler* decision did not make any determination with respect to the proprietary of relying upon internet information to establish facts, the decision shows otherwise. In *Mendler*, the Court plainly relied on information from two websites to establish facts that were cited in the court's opinion. *Mendler*, 207 F.3d 1121-23, nn. 4, 12. At a minimum, this reliance is an implicit determination that courts may rely upon such outside information from online sources. The dissent in *Mendler* further thwarts Goplin's claim, as former Ninth Circuit Judge Rymer's dissent chastised the majority's reliance on outside internet information. *Id.* at 1125 (Rymer, J., dissenting). Like the decisions below, the Ninth Circuit's decision in *Mendler* conflicts with the decisions in *Victaulic*, *Cary*, and *Rowe*, and review is appropriate here to resolve this conflict.

II. The District Courts Divide on Whether a Court May Consider Facts Outside the Record From a Website.

Contrary to Goplin's claim, the conflicting district court decisions referenced in WeConnect's petition do not "show [that] district courts are developing an

appropriate approach to internet resources." Indeed, Goplin highlights that the district courts have reached diverging conclusions on whether courts may consider outside facts from government websites. *See Fenner v. Suthers*, 194 F.Supp.2d 1146, 1148-49 (D. Colo. 2002) (declining to take judicial notice of information on the National Institute of Health website); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774-75 (S.D. Tex. 1999) (declining to consider any information from the United States Coast Guard's website); *but see Ayala v. County of Imperial*, 2017 WL 469016, at *2 (S.D. Cal. Feb. 3, 2017) (taking judicial notice of information on the Drug Enforcement Agency's website). These conflicting decisions confirm that the district courts have not been able to develop an "appropriate," much less uniform approach to evaluating how courts should consider information from outside online sources.

Even if the aforementioned cases did represent an appropriate approach to the handling of online information, the courts below did not follow the purported "appropriate approach" highlighted by Goplin here. Goplin claims that courts are properly "refus[ing] to base rulings on internet information" "where the internet resource was not authenticated." (Br. in Opp. 8). Here, however, the district court did just that by relying on information from WeConnect's unauthenticated website, and the Seventh Circuit ruled that such reliance was appropriate. (Pet. App. 22). This conflict further highlights the lack of uniformity and confusion among the federal courts with respect to the courts' use

of online information. Because the courts below relied on outside information from the internet, without notice to the parties and an opportunity to be heard, this case is the ideal vessel for this Court to evaluate how and what manner federal courts may utilize information from the internet.

III. This Case is the Appropriate Vehicle for this Court to Establish When Courts May Consider Facts Outside the Record From a Website.

This case is an appropriate vehicle for this Court to establish when courts may consider online information outside the court record. The district court indisputably relied on information from WeConnect's unauthenticated website in reaching its decision. Notably, the district court referenced WeConnect's website as its only factual basis for refuting the sworn evidence presented by WeConnect. (Pet. App. 22). After the district court's conduct came to light, it denied WeConnect's request for an opportunity to be heard on the issue. (Pet. App. 8-15). That WeConnect's request came in the form of a motion for reconsideration does not make that request any less valid. Regardless, the district court's reliance on information from WeConnect's website is improper under *Rowe*, *Victaulic*, *Cary*, and the Federal Rules of Evidence.[2] Accordingly, the Court may use this case to resolve the conflicting decisions

[2] Specifically, the district court violated Federal Rules of Evidence 201, 901, and 902. (Pet. 12-14).

on the issue of when courts may consider information outside the record from online sources – whether through judicial notice or otherwise.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE BURNETT
Counsel of Record
LAW FIRM OF CONWAY,
OLEJNICZAK & JERRY, S.C.
231 S. Adams Street
Green Bay, WI 54301
(920) 437-0476
gb@lcojlaw.com