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February 13, 2024

VIA ELECTRONIC FILING AND HAND DELIVERY

Hon. Scott S. Harris
Clerk of the Court
U.S. Supreme Court
One First Street, NE
Washington, DC 20543

**Re: *Powell v. Whitmer*, No. 23-486;
Request for Leave to Lodge Non-Record Materials (Rule 32.3)**

Dear Mr. Harris:

Pursuant to this Court’s Rule 32.3, petitioners in the above-captioned action respectfully seek leave to lodge non-record material with the Court in support of arguments made in their motion to expedite the above-captioned matter filed today. As required by Rule 32.3, this letter describes the material proposed for lodging and explains why the Court properly may consider that material.¹

By way of background, petitioners challenge sanctions issued under Rule 11(c) of the Federal Rules of Civil Procedure, including sanctions issued against counsel who neither signed nor advocated upon a document but whose names appeared as “of counsel” in the signature block of a court filing. *Compare* FED. R. CIV. P. 11(c)(1) (“court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation”) *with* Pet. App. 334a. The issue here is the degree of responsibility necessary for a counsel to be “responsible.” Before the reported decision in this matter, the leading case on responsibility under Rule 11(c)(1) was *Morris v. Wachovia Sec., Inc.*, 2007 U.S. Dist. LEXIS 52675 (E.D. Va. July 20, 2007) (No. 3:02-cv-0797-REP). *See King v. Whitmer*, 556 F. Supp. 3d 680, 699 (E.D. Mich. 2021) (discussing *Wachovia*), *rev’d in part* 71 F.4th 511, 517-18 (6th Cir. 2023). Specifically, based on *Wachovia*, the district court concluded that merely having one’s name in a signature block makes that person sanctionable as a “responsible” counsel:

By agreeing to place their names on pleadings and/or motions, counsel are responsible for those submissions and will be held accountable.

Id. (Pet.App.61a). Petitioners claim that that analysis is contrary to Rule 11(c)(1).

¹ The Court’s rules do not specify a number of copies for requests under Rule 32.3. By analogy to Rule 21.2(c), petitioner accompanies its original with ten copies.

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Relevance of Proffered Data to Petitioners' Case

Sanctions in the *Wachovia* case concerned “three Rule 11(b) violations, one in the investor’s complaints and two in his brief opposing summary judgment.” *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 273 (4th Cir. 2006). Because the district court did not issue sanctions, the Fourth Circuit “remand[ed] for the district court to enter an order that identifies and admonishes the lawyers responsible for the three Rule 11(b) violations committed in this action.” *Id.* Back in district court on remand, the decision dated July 20, 2007, assigns responsibility under Rule 11(c)(1).

While most sanctions were easily resolved, the court-appointed class counsel—Steven G. Schulman—contested sanctions against him based on the argument that he neither signed nor presented the filings. *See Morris v. Wachovia Sec., Inc.*, 2007 U.S. Dist. LEXIS 52675, *5 (E.D. Va. July 20, 2007) (No. 3:02-cv-0797-REP) (Mr. Schulman was court-appointed lead counsel in class-action litigation). The Court found Mr. Schulman responsible for the complaints, *id.* at *35, but not responsible for the two misleading references to testimony in the opposition to summary judgment. *Id.* at *32-33. Petitioners seek the Court’s leave to lodge that opposition with the Court because—at page 36—the document shows that Mr. Schulman’s name and address appear in the signature block, although he did not sign the opposition.

Proffered Material is Judicially Noticeable and Otherwise Admissible

The proffered court filing is available from in federal court records from not only the Eastern District of Virginia in No. 3:02-cv-0797-REP, but also the Fourth Circuit in No. 05-1217 in the joint appendix. Although not available via PACER from those courts, the court filing is available in the “Briefs, Pleadings and Motions” category of the LEXIS database.²

This Court may consider the proffered court filing on appeal because it is a judicially noticeable public record. *See, e.g., New York Indians v. United States*, 170 U.S. 1, 32 (1898) (appellate courts may take judicial notice of “records, or public documents ... or other similar matters of judicial cognizance”); *cf.* FED. R. EVID.

² Court documents in LEXIS’s Briefs, Pleadings and Motions category often have citations (*e.g.*, the petition for a writ of *certiorari* in this matter is available at 2023 U.S. S. Ct. Briefs Lexis 3395). Unfortunately, the proffered document here does not have a LEXIS citation. It is available by searching for “Reference #: 116 Date: 06/28/2004 Corrected Response by Patrick” in Briefs, Pleadings and Motions.

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201(b)(2), (f) (judicial notice); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) ("Federal courts may take judicial notice of proceedings in other courts of record.") (internal quotation marks omitted); *Hurd v. District of Columbia*, 864 F.3d 671, 686 (D.C. Cir. 2017) (same, but explaining that judicial notice is not of the truth of a factual matter asserted in a court filing). Significantly, petitioners do not offer the document for the truth of anything asserted therein: the only relevant issue is whether and how Mr. Schulman's name appeared in the signature block. For all the foregoing reasons, the proffered materials are judicially noticeable and admissible.

Conclusion

For the foregoing reasons, the Court may consider the proffered material pursuant to Rule 32.3. As required by that rule, petitioners will not submit the proposed material until your office requests the material.

* * * * *

Please contact me at 202-355-9452 with any questions about this matter.

Yours sincerely,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Petitioners

cc: Counsel of Record (Certificate of Service attached)

CERTIFICATE OF SERVICE

I hereby certify that, on February 13, 2024, in addition to electronically filing the foregoing document, I caused one copy of that document to be served by Federal Express, next-day service, on the following counsel:

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In addition, I certify that on the same day, I electronically transmitted courtesy copies of the foregoing document to the email addresses identified above.

/s/ Lawrence J. Joseph

Lawrence J. Joseph