UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al.,

Plaintiffs,

v.

County of Mille Lacs, Minnesota, et al.,

Defendants.

CASE NO. 17-CV-05155-SRN-LIB

DEFENDANTS WALSH AND LORGE'S REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The Court should dismiss Walsh and Lorge from this lawsuit and enter final judgment as to them under Fed. R. Civ. P. 54(b). Their presence in this case is unnecessary for Plaintiffs to proceed against the County. Plaintiffs lack standing against them in their individual capacities. Further, Plaintiffs' interference claims against them in their official capacities are simply redundant for purposes of the relief sought.

ARGUMENT

I. Plaintiffs agree the Court should dismiss their individual-capacity claims against Walsh and Lorge

A. Plaintiffs do not contest that their individual-capacity claims are nonjusticiable

Plaintiffs do not contest and therefore concede they lack standing against Walsh and Lorge in their individual capacities.[1] Accordingly, the parties agree the Court should grant Walsh and Lorge's motion and dismiss those nonjusticiable individual-capacity claims.

The rule is clear that *Ex parte Young*, 209 U.S. 123 (1908), can be invoked against government officials only in their official-capacities because individual-capacity claims for equitable relief against government officials are nonjusticiable. This case is a textbook example. (*See* ECF 321 at 2-8); *Ex parte Young*, 209 U.S. 123, 197-98 (1908) (Harlan, J., dissenting) (Plaintiffs' "suit could not be alleged against [Young] as an individual.… The plaintiffs recognized this fact, and hence did not proceed in their suit upon the ground that

[1] Plaintiffs admit they seek "no personal relief against Walsh and Lorge (including attorneys' fees and costs)," (Pls's Resp. (ECF 326) at 7), conceding that the relief they explicitly requested in their Complaint is "nonexistent" against Walsh and Lorge in their individual capacities, (*id.* at 2, 8.)

[Young] was individually liable. They sued him only as attorney general, and sought a decree against him in his official capacity, not otherwise."). Though Plaintiffs recite precedent articulating how the *Young* fiction affords litigants an Eleventh-Amendment-immunity workaround through simply naming an official (the post of which an *individual* must necessarily occupy) rather than naming the state entity itself, (Pls.' Resp. (ECF 326) at 4-6), Plaintiffs do not attempt to reconcile their naming Walsh and Lorge in *an individual capacity* with the uncontested argument that claims to enjoin official government conduct against government officials in an individual capacity fail the '"irreducible constitutional minimum' of [Article III] standing." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Plaintiffs presumably did so to avoid an untenable proposition: if invocation of *Ex parte Young* requires the naming of a government official in an individual capacity, then invocation of *Ex parte Young* requires a violation of Article III. *Ex parte Young* jurisprudence, however, cannot contradict the irreducible and minimum requirements of Article III jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Therefore, *Ex parte Young* can be invoked against government officials only in their official capacities.

B. Plaintiffs cannot invoke *Ex parte Young* in this case

Plaintiffs contend "Walsh and Lorge expressly acknowledged that the official capacity claims [*i.e.*, Plaintiffs' official-capacity claims in this case] were sufficient to invoke *Young*" and thus "it appears undisputed that plaintiffs can invoke *Young* by proceeding against Walsh and Lorge in their official capacities." (ECF 326 at 2 (citing ECF 198 at 13).) However, Walsh and Lorge never previously acknowledged—and disavow—that Plaintiffs' official-capacity claims *in this case* are sufficient to invoke *Ex parte Young*.

Walsh and Lorge previously acknowledged only the general rule that only official-capacity claims are necessary to invoke *Ex parte Young*. (ECF 198 at 13.)

Recognizing that official-capacity claims are required to invoke *Ex parte Young*, however, is not an acknowledgment that Plaintiffs' official-capacity claims sufficiently invoke *Ex parte Young*. Defendants have argued before this Court[2] and the Eighth Circuit that Plaintiffs cannot invoke *Ex parte Young* in this case. Plaintiffs ignore that *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), precludes them from invoking *Ex parte Young*. (*See* Appellants' Eighth Circuit Br. in 21-1138 (filed May 1, 2021) at 53; Appellants' Eighth Circuit Reply, in 21-1138 (filed June 24, 2021) at 27.) To be clear, however, Defendants do not waive their Eleventh Amendment defense and previous arguments that an injunction by this Court against Walsh and Lorge will bind the State of Minnesota (a PL-280 state) from exercising criminal law-enforcement jurisdiction over its own land—an area over which Minnesota has jurisdictional primacy. *See Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2499-500 (2022).

Plaintiffs suggest incorrectly that qualified immunity is not available here because "it was clearly established that the Band had inherent law enforcement authority to investigate violations of state law, at least on trust lands." (ECF 326 at 12 n.10.) The Supreme Court has explained that "clearly established" means "settled law," which means it is dictated by "controlling authority" or "a robust consensus of cases of persuasive

[2] (*See* ECF 164 at 38-42 (arguing Plaintiffs cannot invoke *Ex parte Young* because the real party in interest here is the State of Minnesota); *see also* ECF 198 at 9.)

authority." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotations omitted). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that *every* reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *Ashcroft v. Al-kidd*, 563 U.S. 731, 741 (2011). That means "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Plaintiffs cite *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005) as supporting their view of the Band's authority on trust lands (ECF 326 p. 12 n.10), but that opinion never mentioned trust lands. Plaintiffs cite no authority that their rule of law was "beyond debate" when Walsh issued his opinion and protocol. And the later grant of *certiorari* in *United States v. Cooley*, 141 S. Ct. 1638 (2021), where the traffic stop occurred within the *exterior* boundaries of the Crow reservation, strongly suggests that reasonable legal minds could have disagreed prior to 2021.

Plaintiffs do not contest that their individual-capacity claims against Walsh and Lorge are nonjusticiable, and the parties appear to agree that only official capacity claims are generally sufficient to invoke *Ex parte Young*. Plaintiffs' individual-capacity claims against Walsh and Lorge must therefore be dismissed. Such dismissal will moot Walsh and Lorge's alternative request for qualified immunity from attorney's fees and costs.

II. Plaintiffs' claims are redundant and therefore should be dismissed

Plaintiffs' opposition to a redundancy-based dismissal of the claims against Walsh and Lorge fails because Plaintiffs do not dispute that any injunctive relief against the County can bind them in their official capacities pursuant to Fed. R. Civ. P. 65(d)(2). And

Plaintiffs do not identify any prejudice to them at this stage if Walsh and Lorge are dismissed.

Plaintiffs argue their "official-capacity claims against Walsh and Lorge are not redundant and should not be dismissed" because "Walsh and Lorge did not properly bring this issue before the Court until the case is nearing completion." (ECF 326 at 2.) First, Plaintiffs are incorrect about the history of this action. Walsh and Lorge raised this issue before the Court at the early dispositive phase. (ECF 164 at 46-48; ECF 198 at 11-13.) The Court, however, declined to consider their arguments at Plaintiffs' insistence and did not permit Defendants to raise them until now. (ECF 217 at 46). In fact, at the November 15, 2021, hearing, Defendants requested that, along with the pending decision on the reservation boundaries, the Court also rule on Defendants' arguments that the Court deferred ruling on in December 2020.[3] Plaintiffs argued that the Court should not address them until after the boundary ruling,[4] and the Court agreed.[5] It is ironic that Plaintiffs, who two years ago and again in November 2021 urged the Court to forgo considering Defendants' Rule-65 argument, now say Defendants should not have waited until now to raise it. Second, this case is not in its final stage; Plaintiffs have yet to prove the merits of their injuries. (*See* ECF 327 at 2-9.)

[3] Hr'g Tr. (Nov. 15, 2021) at 18:17-19:4, 20:3-13; *id.* at 21:6-9 ("I think it would be prudent to address [the defenses on which the Court deferred ruling] now so they are all in front of the Eighth Circuit at the same time.").
[4] *Id.* at 19:6-25.
[5] *Id.* at 20:14-20; 20:23-21:5; 21:10-22:6. Despite claiming that Defendants could have raised this issue during the parties' motions for summary judgment on the Reservation-boundary issue, the parties did not agree to such proposition. (*See* ECF 211.)

On substance, Plaintiffs overlook Eighth Circuit case law and direct this Court to consider reasons other lower courts outside the Eighth Circuit have considered when rejecting redundant official-capacity claims. (ECF 326 at 13.) The text of Rule 65 is clear without resorting to out-of-circuit decisions. The rule makes clear that an injunction can bind not only parties, but also "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation" with parties or with their attorneys. Fed. R. Civ. P. 65(d)(2).

Plaintiffs' opposition ignores the text of Rule 65, which defines the Court's power, and instead discusses the County's power, or lack thereof, over Walsh and Lorge. For example, Plaintiffs note that Walsh and Lorge act on behalf of the state in certain ways. (ECF 3266 at 14-15.) Though true, that fact is not relevant to the Court's power under Rule 65, and their resulting status as redundant parties here. Likewise, Plaintiffs note that in some respects, the County Attorney and Sheriff are not County employees. (ECF 326 at 15.) Again true, and again irrelevant: Rule 65 allows an injunction to bind a party's "attorneys," "agents," and "other persons who are in active concert or participation" with them. Fed. R. Civ. P. 65(d)(2).

Plaintiffs do not even attempt to argue that Walsh is not the County's attorney, or that Lorge is the County's sheriff (or acts in concert with Walsh). Plaintiffs have not asserted any claims directly against the County. All of Plaintiffs' claims are asserted against the County Attorney and the County Sheriff. It is thus inconsistent for Plaintiffs to argue that the County Attorney and County Sheriff are not acting on behalf of the County nor able to be bound from any injunctive or declaratory relief awarded against the County.

And the Minnesota Supreme Court recently held that county attorneys act for their respective counties. *Walsh v. State*, 975 N.W.2d 118, 126 (Minn. 2022). Plaintiffs cannot dispute that sheriffs and county attorneys fall squarely within the types of persons described in Fed. R. Civ. P. 65(d)(2).

Plaintiffs' long summary of the legal-powers distinction between the County on one hand, and the County Attorney and Sheriff (ECF 326 at 15-18), simply has no bearing on an analysis under Rule 65. Plaintiffs cite for support a footnote from an out-of-circuit case, *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 305 n.4 (7th Cir. 2009). That footnote by its own admission addresses a "somewhat undeveloped argument," *id.*, effectively, dictum. In *Thomas*, the Illinois county in that case would not be liable based on the actions of the Sheriff's officers alone. In contrast, in this case, Plaintiffs' complaint asserts claims directly against Mille Lacs County and attributes to it all the allegations against Walsh and Lorge. (ECF 1 at ¶5.R.) Plaintiffs fail to show what relief they would lose if Walsh and Lorge were dismissed as redundant. (ECF 326 at 18.)

The Eighth Circuit, however, does not consider the reasons that Plaintiffs' cited authority (ECF 326 at 13-14), considers when deciding whether dismissal of redundant official-capacity claims is warranted. Rather, the Eighth Circuit considers dismissal of redundant official-capacity claims appropriate *because* they are redundant to official claims against an entity. *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010); *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998). Indeed, the only reason the district court in *Veatch* considered before dismissing with prejudice the defendant City police officer was that "the claim against [the defendant

City police officer] is redundant to the claim against the City itself." *Veatch v. Bartels Lutheran Home*, 08-CV-2044-LRR, 2009 WL 3270823, at *5 (N.D. Iowa Oct. 9, 2009), *aff'd*, 627 F.3d 1254, 1257 (8th Cir. 2010) (citing *Artis*, 161 F.3d at 1182); *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 ("There is no longer a need to bring official-capacity actions against local government officials, for under *Monell*, local government units can be sued directly for damages and injunctive or declaratory relief.")[7]; *Price v. District of Columbia*, 545 F. Supp. 2d 89, 94 n. 7 (D.D.C. 2008) (rule "would seemingly apply to actions seeking declaratory and injunctive relief as well.); *cf. M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 43 F. Supp. 3d 412, 419 (M.D. Pa. 2014) (noting "it is a well-established practice in [the Third Circuit] to dismiss redundant § 1983 claims asserted against public officers in their official capacities where a claim has also been made against the public entity that employs them") (citation omitted). For that same reason, this Court should likewise dismiss the redundant official-capacity claims against Walsh and Lorge.[8]

Plaintiffs also note that Walsh and Lorge have separate counsel from the County and served slightly different discovery responses. (ECF 326 at 19.) Like Plaintiffs' other arguments, this is a red herring as to the relevant inquiry under Rule 65(d). Moreover, discovery is over. Even if Walsh and Lorge were necessary for Plaintiffs' discovery, that does not make them necessary for relief. Plaintiffs make a general reference for needing Walsh and Lorge as being "important to shape the relief," but Plaintiffs have no analysis

[7] *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978).
[8] If the Court dismisses Walsh and Lorge entirely, then it has discretion under Rule 54(b) to enter partial final judgment as to them. *Guerrero v. J.W. Hutton, Inc.*, 458 F.3d 830, 833 (8th Cir. 2006).

to support the vagaries of that phrase. That assertion also reinforces Defendants' argument that Plaintiffs' relief will inexorably involve the Court supervising the County Attorney and Sheriff in performing their duties. (ECF 327 at 26-30.) Plaintiffs cite no case from any court holding that an injunction against a county under Rule 65 cannot run against its county attorney and sheriff.

Plaintiffs misconstrue a statement in Walsh and Lorge's opening brief to suggest Walsh and Lorge admit final judgment is warranted regardless of the Court's rulings on the pending motions. (ECF 326 at 1, 4 (citing ECF 321 at 1). However, Plaintiffs critically omit the sentence preceding the one they misread. When read together, Walsh and Lorge stated: "In sum, the Court should dismiss Walsh and Lorge in their individual and official capacities. Resolution of this motion, when coupled with the Court's ruling on the Band's motion for declaratory and injunctive relief, should allow for entry of final judgment." (ECF 321 at 1.)

Taken as a whole, Walsh and Lorge's statement does not suggest what Plaintiffs' contend. Dismissal of Walsh and Lorge in their individual and official capacities *may* enable the Court to issue final judgment depending on the Court's rulings. For example, if the Court grants Walsh and Lorge's motion in its entirety, the Court may issue final judgment dismissing Walsh and Lorge as parties under Fed. R. Civ. P. 54(b). *See, e.g.*, *Jones v. W. Plains Bank & Tr. Co.*, 813 F.3d 700, 702-03 (8th Cir. 2015) (explaining application of Rule 54(b)).

CONCLUSION

For the foregoing reasons, the Court should grant Walsh and Lorge's motion and dismiss them from this suit.

Respectfully submitted,

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