UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF STATE DEFENDANTS' EMERGENCY MOTION FOR STAY, OR IN THE ALTERNATIVE, TO AMEND THE PRELIMINARY INJUNCTION (R.72)

*** EXPEDITED CONSIDERATION REQUESTED ***

STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF STATE DEFENDANTS' EMERGENCY MOTION FOR STAY OR, IN THE ALTERNATIVE, TO AMEND THE PRELIMINARY INJUNCTION (R.72)

Defendants Michigan Department of Health and Human Services (DHHS) Director Robert Gordon, DHHS Children's Services Agency Executive Director

JooYeun Chang,[1] and Michigan Attorney General Dana Nessel (collectively, "State Defendants"), for their brief in support of their Motion for Leave to File Reply Brief, state as follows:

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this motion reflects the substitution of Children's Services Agency Executive Director JooYeun Chang for former Children's Services Agency Executive Director Herman McCall, who was named in his official capacity.

CONCISE STATEMENT OF REASONS SUPPORTING STATE DEFENDANTS' POSITION

This Court should exercise its discretion to grant leave to file a reply to ensure the Court's decision is based on an accurate record relating to Plaintiff St. Vincent Catholic Charities' (SVCC's) new claim that its contracts with MDHHS do not require it to facilitate placement of children with same-sex couples or LGBTQ individuals approved as adoptive parents by the State through another agency.

INTRODUCTION AND BACKGROUND

The Court granted SVCC's request for a preliminary injunction per Opinion and Order dated September 26, 2019 (R.69, 70). The Court's analysis in its Opinion found, and relied upon its understanding, that "St. Vincent has placed children for adoption with same-sex couples certified by the State." (*See, e.g.,* Op., R.69, PageID.2498.) Such activity by SVCC would be consistent with its contractual obligation. However, SVCC failed to submit evidence supporting the Court's conclusion, nor is it consistent with the allegations in the complaint. While SVCC avers that children in its care have been placed with a same-sex couple or LGBTQ individual, SVCC does not state that SVCC itself has, or will, carry out such placements. (Compl., R.1, PageID.14-15, ¶¶29-33.)

Its Response to the State Defendants' Motion provides no comfort here. Instead of affirming SVCC's commitment to act consistently with the Court's understanding and its contractual obligations, SVCC now claims it does not have to do so – under the terms of its contract. As shown in examples below, the contractual language that SVCC cites does *not* support its interpretation here. And, MDHHS's policy directly refutes it.

The State Defendants respectfully request this Court grant leave to file a reply brief addressing this issue, and respectfully request a short amount of time – three business days—to confer with their client and provide the Court a more developed record and detailed analysis.

ARGUMENT

I. This Court should exercise its discretion and allow leave to file a reply.

Not only does this Court have discretion to grant leave for a reply, but the exercise of this discretion is well-warranted here.

A. Granting leave to reply is well within this Court's discretion.

Under Local Rule 7.3(c), a reply brief may be filed in response to a non-dispositive motion upon leave of the Court. *See* W.D. Mich. L.Civ.R. 7.3(c). Such discretion has been exercised on numerous occasions – including in circumstances like this where the issue at hand requires a complete briefing on the arguments and where SVCC will suffer no prejudice from granting the relief requested. See, e.g., *Silver v. Giles*, No. 07-cv-103, 2007 WL 2219355, at *1 (W.D. Mich. July 27, 2007) (attached as Ex. A); see also *Volunteer Energy Services, Inc. v. Option Energy, LLC*, No. 1:11–CV–554, 2013 WL 1500433, at *1 (W.D. Mich. April 10, 2013) (attached as Ex. B).

B. A reply is warranted to address SVCC's new claim that it is not contractually required to facilitate placement of a child in its care with a same-sex or LGBTQ adoptive family approved by the State through another agency.

Contrary to this Court's finding, and for the first time in its Response to the State Defendants' Motion, SVCC claims that its publicly-funded adoption contracts do not require it to facilitate placement of a child for whom it has accepted an

adoption referral with a same-sex or LGBTQ adoptive family approved by the State through another agency. (Pls.' Resp., R.80, PageID.2714-15.)

The contract provision that SVCC relies on does not support its analysis. In fact, the contract and MDHHS policy directly refute SVCC's claim. Specifically, SVCC asserts that the following contract provision requires the agency working with a prospective adoptive family to facilitate placement of a child for whom SVCC has accepted an adoption referral:

> The ***Contractor*** that has identified adoptive family *shall be* the agency to perform adoptive activities, including: placement, case management, supervision, and court related requirements. [R.80, PageID.2714 (emphasis added).]

This language – when read in the context of the contract as a whole— requires the opposite. "Contractor" is a defined term in this contract to reference "St. Vincent Catholic Charities" – and not other agencies with whom SVCC may work in connection with placing a child. (*See, e.g.,* R. 6-8, PageID.296.) These other agencies are referenced in the contract, but through identification as the "child's agency" or the "adoptive family's agency." PageID.307. The use of "Contractor" refers to SVCC alone. SVCC is prohibited by contract from transferring the child to another CPA to place and finalize the adoption. (R.6-8, PageID.305-06; R.34-4, PageID.1001.) [this cite states: "once they accept the referral and sign the 3600 Agreement, the CPA must fulfill all of the terms of its contract and cannot discriminate in the provision of services. This means that a CPA cannot refuse to evaluate, recommend for licensure or otherwise work with prospective foster or

adoptive parents based on a characteristic like race, religion, sexual orientation or opposite sex or marital status."]

In other words, when read in context, this provision requires SVCC to perform adoptive services, *including placement*, when it has identified and selected an adoptive family for a State-supervised child within SVCC's care. In its Response, the contract language relied on by SVCC applies when SVCC notifies another agency that an adoptive family working with SVCC is interested in adopting a child in the care of another CPA. In this case, SVCC is required only to perform a supportive role. (R.6-4, PageID.307.) Moreover, in the event placement is disrupted or the adoption fails, the child returns to the agency that had the child's case. *Id.* This would be SVCC for those children for whom it serves as the Contractor, under the terms of its contract with MDHHS.

This contract language affirms applicable MDHHS policy, which makes clear that the CPA which accepted the referral of the child is the CPA that ultimately decides whether a State-supervised child in its care should be placed with a prospective family licensed through another agency. This policy is set forth in ADM 0720, available at https://dhhs.michigan.gov/OLMWeb/ex/AD/Mobile/ADM/ADM%20Mobile.pdf, and also attached as Exhibit C hereto. The process described therein is that families interested in adopting a child through MARE contact the "child's adoption worker," and this worker "must" evaluate prospective adoptive parents to determine whether a single inquiring family, or which of a number of inquiring families, can meet the

documented best interests of that child. If so, the child's adoption worker must send a referral packet to the prospective adoptive family's agency, and "must follow through with the placement decision" if the prospective family accepts.

In sum, if SVCC accepts a referral of a child for adoption, both contract and policy require it carry out duties related to placing that child with a prospective adoptive parent, including making a determination whether a prospective adoptive family approved through another agency can meet the child's best interests. MDHHS expects that SVCC – and all its CPAs—will carry out these duties without discrimination on the basis of sexual orientation, marital status, religious affiliation or otherwise. SVCC's filings in this lawsuit provide no assurance that it will do that. In fact, in its Response to the State Defendants' Motion, SVCC disavows this responsibility entirely.

C. SVCC's obligation to facilitate placement of children within its care is an issue of importance to this Court and to MDHHS.

The Court's September 26, 2019 Order granted extraordinary relief. See *Leary v. Daeschner,* 228 F.3d 729, 739 (6th Cir. 2000). And, its understanding that SVCC would place children with same-sex or unmarried couples, or LGBTQ individuals who were licensed by another agency was significant to the Court's analysis.

The Court's understanding is repeated throughout the Opinion in which the Court determined that the non-discrimination clause was "not likely to survive strict scrutiny on the record." (Op., R.69, PageID.2519.) Specifically, the Court

found that St. Vincent's placement of children with same-sex couples rendered void the State Defendants' interest in "preventing discriminatory conduct in services for which the State pays." *Id.* The Court reasoned that since SVCC is paid "based on the children [it] places," and it "places its children with any certified parent – unmarried couples, same-sex, or otherwise," enforcement of the non-discrimination clause as to licensing activities did not satisfy a compelling interest. *Id.* The State Defendants respectfully disagree.

However, for purposes of this Motion, the State Defendants merely request an opportunity to file a reply brief to clarify the record and correct SVCC's misstatements. SVCC's Response does not affirm the Court's understanding but, rather, claims that the contracts do not require this. Leave to file a reply is warranted.

The State Defendants respectfully request leave to file a reply brief to address this issue after counsel has had time to consult with their clients.

D. No prejudice will result to SVCC if leave is granted.

No prejudice will result to SVCC if leave to file reply is granted. The Court's preliminary injunction will continue during the few days requested to prepare the reply, and no harm will arise to SVCC from this. In fact, the opportunity to file a more complete analysis may provide SVCC an understanding of its contractual obligations and the relevant MDHHS policy, which is not evident in its Response.

CONCLUSION

As explained above, Plaintiff's Response to State's Motion contradicts the clear record on an issue of significant importance to the Court's analysis in its September 26, 2019 Opinion, and to the State Defendants charged with serving the best interests of the children in State-supervised care. State Defendants respectfully request that the Court grant leave to file a reply brief in support of State Defendants' Emergency Motion to Stay or, in the Alternative, to Amend the Preliminary Injunction. The State Defendants respectfully request that the Court allow such reply brief to be filed on or before Wednesday, October 23, 2019.

Respectfully submitted,

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October 19, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of W.D. Mich. LCivR 7.3(b)(i) because, excluding the parts exempted by W.D. Mich. LCivR 7.3(b)(i), it contains **1,624** words. The word count was generated using Microsoft Word 2016.

Respectfully submitted,

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Dated: October 19, 2019

Exhibit A

2007 WL 2219355
Only the Westlaw citation is currently available.

United States District Court,
W.D. Michigan,
Southern Division.

Stephen SILVER, Plaintiff/Counterclaim Defendant,
v.
Mark GILES, Mark Lytle, Richard Rosenberg, Tino Reyes, William Giles, the Saugatuck-Douglas Police Department, the City of Saugatuck, the City of Douglas, and Lance Rutledge, Defendants,
and
Gail Rutledge, Defendant/Counterclaim Plaintiff.

No. 1:07-cv-103.
|
July 27, 2007.

Attorneys and Law Firms

Michael C. Bingen, Bingen & Associates, PLLC, Kalamazoo, MI, for Plaintiff/Counterclaim Defendant.

G. Gus Morris, Kupelian Ormond & Magy PC, Southfield, MI, Michael S. Bogren, Plunkett & Cooney PC, Kalamazoo, MI, for Defendants.

Elizabeth J. Fossel, Varnum Riddering Schmidt & Howlett LLP, Grand Rapids, MI, for Defendant/Counterclaim Plaintiff.

ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO FILE REPLY BRIEF AND "PETITION" FOR ALTERNATE SERVICE

WENDELL A. MILES, Senior Judge.

***1** This is an action filed by plaintiff Stephen Silver against ten named defendants. The five-count complaint asserts a claim against eight official defendants under 42 U.S.C. § 1983, in addition to four state law-based claims against plaintiff's ex-wife, Gail Rutledge, and her brother Lance Rutledge. Gail Rutledge has asserted a state law counterclaim. Plaintiff Silver and Gail Rutledge were divorced in 2003, and the case appears to arise from plaintiff's alleged violation of a "no contact" order included in the divorce decree as well as his alleged violation of personal protection orders issued thereafter.

The matter is now currently before the court on a motion by Stephen Silver captioned "Petition for Alternate Service" (docket no. 21). Gail Rutledge has opposed the motion. Stephen Silver has also filed a motion for leave to file a reply brief in support (docket no. 25). For the following reasons, the motion for leave to file a reply brief is **GRANTED** but the motion for alternate service is **DENIED.**

Discussion

Stephen Silver filed this action on February 1, 2007. All of the defendants have appeared in the action, with the exception of Lance Rutledge, who has not yet been served. Lance Rutledge is alleged to be a resident of New York. On May 24, 2007, the court granted a motion by plaintiff for an extension of time in which to serve this defendant. The court's order granted Stephen Silver until August 22, 2007 in which to serve Lance Rutledge.

The affidavits filed both with the current motion and in support of the prior motion for extension indicate that plaintiff Silver has made the following unsuccessful attempts to serve Lance Rutledge:

By registered mail sent to his last known address on February 9, 2007. The mailing was returned undelivered on April 16, 2007.

By forwarding copies of the summons and complaint to the Sheriff's Department in Kings County, New York, where it is believed Lance Rutledge currently resides. Although the court has not been advised regarding how or when the Kings County Sheriffs' Department attempted to serve this defendant, plaintiff Silver alleges that he has been told that service has not yet been accomplished.

By attempting personal service at Lance Rutledge's parents' home in Douglas, Michigan on June 10, 2007. Plaintiff Silver alleges that he was notified that

Lance Rutledge was visiting his parents' residence at that time.

In his current motion, plaintiff Silver requests that the court order that service on Lance Rutledge be made (1) by mailing copies of the summons and complaint to his last known residence in New York, and (2) by mailing copies to his parents' residence in Douglas, Michigan.

Plaintiff's "petition" is in fact a motion, filed without being accompanied by the supporting brief required by W.D.Mich.L.Civ.R. 7.1(a). However, plaintiff has subsequently moved for leave to file what he deems a "reply" brief. The court permits this filing in view of the court's need for a complete briefing of plaintiff's arguments, notwithstanding the deficiencies in plaintiff's original motion.[1]

[1] In addition to failing to supply a supporting brief, plaintiff's motion failed to contain the affirmative statement of attempt to obtain concurrence required by Local Rule 7.1(d). Plaintiff is hereby notified that any future motions filed without full compliance with these requirements will be stricken.

***2** Plaintiff argues that service "must be made pursuant to the law of the state in which the District Court is located." However, this is not the only option. Fed.R.Civ.P. 4(e) provides as follows:

> **(e) Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Under this rule, service may be made either by personal delivery to the defendant or a suitable individual at his residence, or pursuant to the law of the state where the district court sits-Michigan-or where service is to be effected-in this instance, New York.

Based on the information which has been provided to the court in sworn affidavits, all that is known is that (1) registered mail directed to Lance Rutledge at his last known residence in New York was "undeliverable" for unspecified reasons, and (2) an attempt to personally serve Lance Rutledge at his parents' home in Michigan-where he is not known to currently reside-was unsuccessful. Although plaintiff states that copies of the summons and complaint were provided to the sheriff's department in Kings County, New York, plaintiff has not indicated why, under either Michigan or New York law, this represents a reasonable attempt at service. Moreover, plaintiff has not provided the court with the affidavit of anyone employed by the sheriff's department who has attempted service, or anyone procured by it to do so. To date, plaintiff has failed to adequately allege sufficient facts to support the inference that service cannot be made directly on Lance Rutledge. In sum, plaintiff has simply not justified why alternate service on Lance Rutledge is either necessary or even reasonable.

Moreover, even if plaintiff had established a reasonable need for alternate service, the court is not inclined to order that alternate service be made by mail to Lance Rutledge's parents home. Although plaintiff contends that Lance Rutledge has visited his parents' home on one occasion, no allegation is made that he currently lives there. In addition, the circumstances of this case counsel against involving the parents in a dispute between plaintiff and his former wife. In her opposition to plaintiff's motion, Gail Rutledge has provided affidavits of the parents (who are her parents), indicating that they are elderly and suffer from health problems. They also state that their son Lance has never lived with them at their current address, and that plaintiff's attempt to involve them in this matter has already caused them distress.[2] The court is not convinced that it would be reasonable to involve any more of plaintiff's former wife's family members in this lawsuit at this time.

[2] In his reply brief, plaintiff argues that Gail Rutledge lacks "standing" to object to his motion. However, as a party to this case, Gail Rutledge has the right to respond to the motion. *See* W.D.Mich.L.Civ.R. 7.3(c) (permitting "[a]ny party opposing a nondispositive motion" to file a timely response).

***3** In his reply brief, plaintiff also makes an alternative request that he be permitted to make service on Lance Rutledge by forwarding copies of the summons and complaint to counsel for Gail Rutledge. However, even if

plaintiff had substantiated the need for alternate service, the court would not conclude that this would represent reasonable service. Plaintiff himself has conceded that counsel for Gail Rutledge does not represent Lance Rutledge. Plaintiff's Brief in Support of Motion for Leave to File a Reply Brief at 5.

The motion for alternate service on Lance Rutledge is DENIED.

So ordered.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2219355

End of Document

Exhibit B

2013 WL 1500433
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

VOLUNTEER ENERGY SERVICES, INC.,
Plaintiff,
v.
OPTION ENERGY, LLC, et al., Defendants.

No. 1:11–CV–554.
|
April 10, 2013.

Attorneys and Law Firms

Matthew S. Brown, Carlile Patchen & Murphy LLP, Columbus, OH, Shaun Patrick Willis, Willis Law, Kalamazoo, MI, for Plaintiff.

Warren Henry Krueger III, Kevin J. Roragen, Loomis Ewert Parsley Davis & Gotting PC, Lansing, MI, for Defendants.

OPINION

ROBERT HOLMES BELL, District Judge.

***1** This matter is before the Court on Defendant Option Energy, LLC's ("Option") motion to amend judgment pursuant to Fed.R.Civ.P. 59(e), motion to stay enforcement of judgment, and motion for leave to file a reply brief. (Dkt.Nos.159, 160, 168.) For the reasons that follow, the motion to amend judgment will be granted in part and denied in part, the motion for leave to file a reply brief will be granted, and the motion to stay enforcement of judgment will be denied as moot.

I.

Following a non-jury trial, this Court entered judgment in favor of Volunteer Energy Services, Inc., ("Volunteer") and against Defendant Option in the amount of $509,000; judgment of no cause of action in favor of Defendant Jonathan Rockwood; and judgment in the amount of $159,000, together with reasonable attorney's fees and court costs in favor of Counter–Plaintiff Option and against Counter–Defendant Volunteer. (Dkt. No. 154, Am. J.)

Option has filed a motion to amend judgment and a motion for leave to file a reply to Volunteer's memorandum in opposition. (Dkt. No. 168.) Volunteer opposes the motion for leave to file a reply based on its contention that the reply merely reiterates the same arguments previously raised. (Dkt. No. 169.) Because it appears that Volunteer will not be prejudiced by the filing of the reply, the motion for leave to file a reply will be granted.

Option's motion to amend judgment is based on its contention that the award of damages in favor of Volunteer is not supported by any evidence and is clearly erroneous, and that the relief granted to Option on its counterclaim is incomplete. "[A] district court may alter a judgment under Rule 59 based on (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 551–52 (6th Cir.2012) (citing *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir.2010)).

A. VOLUNTEER'S DAMAGES

Option contends Volunteer failed to meet its burden of proving lost profits with reasonable certainty as required by Ohio law. Option contends that because the award of damages is not supported by the evidence, entry of anything more than nominal damages on behalf of Volunteer constitutes a clear error of law.

At trial, Volunteer presented the testimony of Shawn Hall, Volunteer's regional manager for the State of Michigan. Mr. Hall testified that he obtained from Integrys a list of former Volunteer customers that had switched to Integrys and on whose accounts Option was receiving a commission from Integrys. (Dkt. No. 155, Trial Tr. 94.) Mr. Hall testified that the total annual load for the list of disputed customers was 485,493.8 mcf. (Tr. 95.) He testified that Volunteer's profit margin for these customers was $1.20 per mcf, and that the total profit margin that Volunteer would have earned on these

disputed customers, after subtracting commissions of $72,823.95 ($.15 per mcf) that Option would have been paid, was $509,768.61. (Tr. 96.)

***2** Under Ohio law, "in order for a plaintiff to recover lost profits in a breach of contract action the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty." *City of Gahanna v. Eastgate Props., Inc.*, 36 Ohio St.3d 65, 521 N.E.2d 814, 818 (Ohio 1988). "There must be more than a conclusory statement as to the amount of lost profits. An explanation of how that sum was determined is required. Lost profits must be substantiated by calculations based on facts available or in evidence, otherwise they are speculative and uncertain." *Rhodes v. Rhodes Indus., Inc.*, 71 Ohio App.3d 797, 595 N.E.2d 441, 448 (Ohio Ct.App.1991) (citations omitted).

Option contends that this case is factually similar to *Kinetico, Inc. v. Independent Ohio Nail Co.*, 19 Ohio App.3d 26, 482 N.E.2d 1345 (Ohio App.1984), where the court of appeals reversed and remanded for a new trial on damages because the evidence was insufficient to support a claim for lost profits. The *Kinetico* court noted that the plaintiff's evidence regarding lost profits was speculative, conclusory, and not based on personal knowledge. *Id.* at 1349. Option contends that Volunteer's evidence of lost profits, like the evidence in *Kinetico*, was insufficient because it was based on Shawn Hall's conclusory and unsupported statements as to the annual load of gas purchased by the customers switched by Option and his conclusory and unsupported statement that Volunteer would earn $1.20 per mcf profit on this gas.

In reversing the award of damages for lost profits in *Kinetico*, the Ohio Court of Appeals noted that the evidence of lost sales was based on projected sales in new territories, rather than on historical evidence, and that the testimony of the plaintiff's damages witness regarding these lost sales was not based on personal knowledge. 482 N.E.2d at 1349. Moreover, on cross-examination, the witness admitted that the figure he had described as "net margin or net profit" was not the profit per unit, and that the profit per unit would be a very small portion of the margin on the unit. *Id.* The court of appeals noted that the witness had been effectively impeached and that no effort had been made to rehabilitate him on redirect examination. *Id.* at 1349–50. In sum, the court concluded that the evidence as to both the existence and the amount of lost profits was insufficient: the evidence of lost sales was speculative, and the evidence of the plaintiff's anticipated profit on each unit that would have been sold was uncertain at best. The court accordingly remanded for a new trial solely on the issue of damages. *Id.* at 1353.

The evidence of damages presented in this case differs materially from the evidence discussed in *Kinetico.* At trial, Mr. Hall testified that "I was able to determine" that the annual load was 485,493.8 mcf based on information from the utility company regarding each individual customer's actual 12–month history of gas usage. (Tr. 95.) In calculating the total profit margin, Mr. Hall testified that "we" looked at the annual load for each individual account for a 12–month period, "[w]e then took our margin, multiplied it times that load, and that gave us our net loss in this case, and then we of course deducted commissions from that number." (Tr. 96.) Option objected for lack of foundation because Hall was not qualified to testify as to the standard profit margin for the industry or for Volunteer. (Tr. 96.) Volunteer's counsel responded that Mr. Hall's testimony was based on his own personal knowledge of matters that came within his role as a regional manager. (Tr. 96–97 .) The Court received the testimony subject to cross-examination. (Tr. 97.)

***3** Thereafter, Mr. Hall testified as to how he determined that $1.20 was the appropriate profit margin:

> Well, we identified again the list of customers, the time frame that these customers were enrolled with Volunteer Energy. From there we look at what our selling price was. Of course, that's not all profit. We have to deduct the various expenses, which again include the delivery cost or basis points, the interstate transportation costs. We have fuel shrinking charges, so there's several variables that we have to deduct from our selling price. Once we've made those deductions, we are then left with a margin, and that margin in this case for that set group of customers was $1.20 per MCF.

(Tr. 97.)

Although Mr. Hall's testimony was received subject to cross-examination, Option essentially opted not to cross-examine Mr. Hall on the issue of damages. Option asked Mr. Hall only a few questions about the annual load, in response to which Mr. Hall confirmed that the

annual load was based on historical usage. (Tr. 108–09.) Option did not attempt to impeach Mr. Hall with respect to the calculation of the profit margin or his asserted personal knowledge regarding the calculation of damages, nor did it attempt to ascertain whether Mr. Hall could produce the background facts that supported his testimony.

In contrast to the damages testimony that was deemed insufficient in *Kinetico*, Mr. Hall's testimony was based on first-hand knowledge of the methodology used in calculating the damages, relied on historical usage, and was not impeached on cross-examination. The Court is satisfied that Volunteer demonstrated its lost profits with reasonable certainty based on competent and credible evidence. Option's motion to alter the judgment against it will accordingly be denied.

B. OPTION'S COMMISSIONS

Option has also moved to amend the judgment based on its contention that the relief granted on Option's counterclaim is incomplete because it does not account for future commissions due.

The Court awarded Option a judgment of $159,000 on its counterclaim for the willful withholding of commissions. The amount of the judgment was based on a trebling of the parties' stipulated amount of withheld commissions through March 2012.[1] (Dkt. No. 152, Op.16, 21.) Option contends that the stipulated amount only included withheld commissions through March 31, 2012, and that pursuant to the Agent Agreement, Volunteer continues to be obligated to pay Option commissions for 48 months from the termination date., i.e., through April 21, 2015.

[1] The Final Pretrial Order lists the following as an uncontroverted fact: "The amount of accrued but unpaid commissions that is at issue in this case from February 1, 2011 through March, 2012 is $53,000." (Dkt. No. 140, Final Pretrial Order 5, ¶ 2(i).)

Volunteer objects to Option's request because Option is seeking damages that it never tried to prove at trial. Volunteer notes that Option did not present any evidence as to what commissions were due between March 2012 and trial, and that Option is essentially seeking declaratory relief, a form of relief that was not requested in Option's counterclaim. In addition, Volunteer contends that Option is limited to 12 months of commissions because Option breached the Agreement.

***4** The Court was not informed before trial that there was an issue concerning the length of time commissions were due. Option did not assert that it was owed commissions for 48 months after termination of the Agreement in its counterclaim. (Dkt. No. 130, First Am. Countercl.) The counterclaim simply states: "As a result of VESI's breach, Option has suffered in excess of $75,000.00 in damages, the amount of all unpaid commissions **due and owing to date."** (Countercl. ¶ 17 (emphasis added).) The relief requested by Option in its counterclaim was a judgment "in an amount exceeding $75,000.00, along with Option's attorneys' fees and costs." (Countercl. Count I, Wherefore Clause.) Option's counterclaim did not request declaratory relief. Neither did Option specify that it was seeking commissions for 48 months in the final pretrial order (Dkt. No. 140, Final Pretrial Order 5, ¶ 2(i)), or in its trial brief (Dkt. No. 145). The question of whether Option was owed commissions for 12 months or 48 months was never directly presented to the Court prior to trial. It was only in its closing argument that Option first asserted that it was entitled to commissions for 48 months:

> The agreement provides that upon termination by Option Energy, that commissions will continue to be paid for a period of 48 months. Obviously we're still within that 48–month period. You also heard testimony, Your Honor, that Volunteer Energy is in complete control of the information in order to be able to calculate the commissions that are owed but have not been paid. We know what the amount is through March of 2012. That's $53,000. But obviously, there are additional commissions that would have accrued since that time and will continue to accrue as they have an obligation to continue paying Option Energy for a total of 48 months, and that would be until April of 2015.

(Tr. 153.) Even then, Option did not request any specific relief associated with commissions that became due after March of 2012 or that had not yet become due.[2] In its closing request for relief on its counterclaim, Option argued as follows: "Therefore, Option Energy is not only

entitled to commissions that have been withheld, but an award of treble damages as well under the statutory scheme, as well as costs and attorney's fees which are provided for by both the Ohio and Michigan acts to a prevailing party." (Tr. 154.)

[2] Option's assertion that as part of its requested relief at trial it asked the Court "to order VESI to produce the information regarding all commissions to be paid, and also to declare that the commissions under the Agent Agreement must be paid through April 2015" (Dkt. No. 168, Reply Br. 6) is not supported by the trial transcript.

Although Option did not clearly present this issue to the Court, that may be because it did not believe the issue was in contention. The Agreement contains the following provision regarding commissions after termination of the Agreement:

> **On and after the Termination Date, Agent will continue to be paid commissions in full:** (1) on orders solicited by Agent prior to the Termination Date and accepted by the Company as New or Renewal Contracts within three (3) months after the Termination Date; and (2) on sales of natural gas to Agent's Customers for the remaining term of the New or Renewal Contracts or renewals thereof; and that VESI shall not be obligated to pay any commission to Agent with respect to New or Renewal Contracts after **forty-eight (48) months from the Termination Date** even if the term of any such New or Renewal Contract extends beyond that date. Notwithstanding the preceding sentence, **should there be a Termination for Cause due to Agent's material breach of this Agreement, the commissions payable to Agent shall cease twelve (12) months after the Termination Date.**

***5** (Agreement ¶ 10 (emphasis added).)

The Agreement provides for two types of termination. Either party may terminate the Agreement for any reason whatsoever upon giving at least 60 days prior written notice. (Agreement ¶ 9(a).) The Agreement provides for terminations for cause:

> If VESI or Agent is in material default of any of its obligations and duties under the Agreement and has not cured such default within twenty (20) days after the non-defaulting party's written notice to the other specifying the particulars of such default, or if VESI or Agent files bankruptcy, goes into compulsory liquidation, or makes an assignment for the benefit of creditors, the non-defaulting party thereafter may terminate this Agreement (a "Termination for Cause") immediately upon written notice to the other party.

(Agreement ¶ 9(b).)

The 12–month limitation on commissions only applies where there has been a "Termination for Cause due to Agent's material breach of this Agreement." (Agreement ¶ 10.) In this case there was no "Termination for Cause due to Agent's material breach of this Agreement." Volunteer did not terminate the Agreement. As Mr. Hall confirmed at trial, the Agreement was terminated by Option. (Tr. 132–33.) Option terminated the Agreement pursuant to ¶ 9(b), by specifying the particulars of Volunteer's alleged breach and by giving Volunteer 20 days notice to cure. (Ex. 2.) Because Volunteer did not terminate the Agreement for cause, it is clearly not entitled to rely on the twelve-month limitation on commissions. Rather, the standard 48–month provision applies.

Volunteer did not have any opportunity to respond to this argument when it was raised at trial, but Volunteer has had an opportunity to present its arguments in response to Option's Rule 59(e) motion. The Court finds no merit to Volunteer's contention that the twelve-month limitation applies.

Although Option did not specifically alert the Court to this issue before trial, neither does it appear that Option intentionally relinquished or abandoned its claim to commissions for 48 months following the termination of the Agreement. It does not appear that Option made any statements that were inconsistent with its current contention that it is entitled to commissions for 48 months. The uncontroverted fact that "[t]he amount of accrued but unpaid commissions that is at issue in this case from February 1, 2011 through March, 2012 is $53,000," can be understood to be limited to the time period and does not necessarily indicate that these are the only unpaid commissions at issue in the case. Similarly, the parties' identification that an issue for trial was "[w]hether any amounts claimed by Option Energy for commissions are due to Option Energy or may be set-off

against damages sustained by VESI," can be understood to have incorporated a claim to 48 months of commissions. A waiver requires " 'the intentional relinquishment or abandonment of a known right.' " *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 905 (6th Cir.2006) (quoting *United States v. Osborne*, 402 F.3d 626, 630 (6th Cir.2005)). The Court does not find that Option has waived its argument that it is entitled to commissions for 48 months after termination. Although no specific evidence on this issue was presented at trial, Volunteer does not contend, and it does not appear to the Court, that resolution of this issue requires any additional evidence. The Court agrees with Option that it would be a manifest injustice not to amend the judgment to require the payment of additional commissions through April 21, 2015, pursuant to the terms of the Agreement, as they come due. Past due amounts from March 2012 to the date of this opinion are not subject to treble damages under the Ohio Sales Representative Commission Act, Ohio Rev.Code § 1335.11 if they are paid within 30 days of this order.

III.

***6** In light of the Court's disposition of the motion to amend the judgment, Option's motion to stay enforcement of the amended judgment until disposition on the motion to amend will be denied as moot.

For the reasons stated herein, Option's motion to amend the judgment will be granted in part and denied in part. To the extent Option requests the court to amend the judgment against Option, the motion is denied. To the extent Option requests the Court to amend the judgment to declare that Option is entitled to commissions from April 1, 2012 through April 21, 2015, the motion is granted.

An order consistent with this opinion will be entered.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1500433

End of Document

Exhibit C

PROCEDURE

Families interested in adopting a photolisted child or sibling group may submit an inquiry through the Michigan Adoption Resource Exchange (MARE) website www.MARE.org or by contacting the MARE Office. Familes approved for adoption and unstudied families are able to submit inquires.

Once the child's adoption worker is notified by MARE or another licensed adoption agency that a studied and approved family is interested, the child's adoption worker must document the date each inquiry was received using social worker contacts in the case record. Adoption workers are required to contact the adoptive family's worker when the family has been approved for adoption and has inquired about a photolisted child on MARE.

Note: Approved adoptive families from jurisdictions (counties or states) other than the child's county of commitment or county of residence who express an interest in adopting a child **must be given consideration** as adoptive parents when the child has no identified adoptive family; see ADM 0640, Interjurisdictional Adoptions.

DECISION TIME FRAME

Once notified by MARE or the prospective adoptive family's agency, the child's adoption worker has 21 calendar days to collect information on studied and approved families, including, but not limited to, requesting the BCAL-3130, Initial Foster Home/Adoption Evaluation. **In all cases, if a family has not been selected after three months of photolisting, the case must be referred to the Adoption Unit in the Department of Human Services (DHS) Central Office for further review.**

MULTIPLE INQUIRIES

By the end of the 21 calendar day time frame, the child's adoption worker **must** decide which prospective adoptive family is most appropriate to meet the child's needs and forward the child referral packet to that family's agency. The child's referral packet must be sent only to the selected prospective adoptive family's worker and not to every prospective adoptive family that inquires.

MARE is a recruitment resource that identifies waiting children. It is not intended to share in-depth, detailed information about children or their history.

MARE Inquiry Follow up

The child's adoption worker and the adoption worker for each approved adoptive family must complete the MARE inquiry follow up report within 30 calendar days from receipt of the inquiry.

SINGLE INQUIRY

If only one approved prospective adoptive family inquires, the child's referral packet must be forwarded to that family's agency. If the prospective adoptive family chooses not to proceed with adoption or cannot meet the documented best interest criteria of the child, the adoption worker must continue to recruit for and gather information on other families.

ADOPTION REFERRAL PACKET

The DHS-4748, Child's Adoption Referral Packet Transmittal, must accompany the packet sent to the prospective adoptive family's agency. The adoption referral packet must include:

- Order terminating parental rights (PCA 318).
- Initial court order removing the child:
  - Order to Take Child(ren) into protective custody and place (JC05), or
  - Order After Preliminary hearing in Child Protective Proceeding (JC11a).
- Order Following Hearing to Terminate Parental Rights (JC 63) and/or Order Committing to Agency (PCA 322).
- Releases, if appropriate (PCA 305).
- Birth certificate or birth verification.
- DHS-1927, Child Adoption Assessment, and any addenda.
- Medical information on the child and birth parents.

- Medical, mental health and dental records for the child.
- School records.
- DHS-65, Initial Service Plan, and DHS-66, Updated Service Plans.
- Other court orders not listed above.
- Other documentation as requested for completion of an adoption or request for adoption subsidy.
- Name and address of the child's current foster parents.
- Report on preparation of the child for adoption.
- Other documentation as requested by the requesting agency.

Decision to Adopt

Upon the receipt of the referral packet, the decision to adopt rests with the prospective adoptive family and the family's adoption worker. The family has 21 calendar days to decide whether to proceed with adoption planning. Unless the prospective adoptive family decides not to proceed with adoption, the child's adoption worker must follow through with the placement decision.

The child's adoption worker must inform the prospective adoptive family's agency within the 21 day time frame about the decision concerning placement of a child.

Notification to Non-selected families

The child's adoption worker must notify each non-selected family's agency when a decision has been made, by sending each family's agency a letter indicating that another adoptive family has been selected.

Identified Family

When the decision is made to proceed with the adoption process, the prospective adoptive family becomes the "identified family" and the child's agency must place the child on "Hold" with MARE; see ADM 0710.

The child's adoption worker and family's agency must develop a plan for the following:

- Sharing additional information with the family.
- Preparing the child and family for placement and adoption.
- Scheduling an initial visit between the child and family.
- Arranging for subsequent visits.
- Establishing subsidy eligibility.
- Sharing responsibility in providing or arranging transportation for the child during visitation.
- Developing the quarterly adoption progress reports for judicial review.

ADOPTION DID NOT PROCEED

If the adoption does not proceed and no other family has been identified, the child's adoption worker must immediately re-register the child with Michigan Adoption Resource Exchange (MARE) for photolisting (see ADM 0710) and implement a child-specific plan to recruit an adoptive family for the child.