IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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RALPH DALE ARMSTRONG,

OPINION AND ORDER

Plaintiff,

12-cv-426-bbc

v.

JOHN I. NORSETTER, former Assistant Dane County District Attorney; JOHN DOE #1, Dane County WI prosecutor; MARION G. MORGAN, Madison Police Department Detective; ROBERT LOMBARDO, Madison Police Department Detective; JOHN DOE #2, Madison WI Police Officer; KAREN D. DAILY, Wisconsin Crime Lab Analyst; DANIEL J. CAMPBELL, Wisconsin Crime Lab Analyst; JANE DOE #3, Wisconsin Crime Lab Analyst; VICKI GILBERTSON, Dane County Clerk of Circuit Courts Supervisor; JANE DOE #4, Dane County Clerk of Circuit Court Assistant,

Defendants.

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In this proposed civil suit for money damages, plaintiff Ralph Dale Armstrong alleges that his constitutional right to due process was violated when state and municipal employees engaged in witness and evidence tampering. In an order entered on December 12, 2012, I denied plaintiff leave to proceed on his claims for various reasons, including claim preclusion, witness immunity and his failure to allege sufficient facts to state a claim. Plaintiff has now filed a proposed second amended complaint and renewed his motion for the appointment of counsel. Dkt. #22.

After reviewing plaintiff's second amended complaint, I conclude that plaintiff may proceed on his claims that defendant John Norsetter lost potentially exculpatory evidence in bad faith before plaintiff's initial trial in 1980 and that defendants Norsetter, Karen Daily, Jane Doe #3, Marion Morgan, John Doe #2, Vicki Gilbertson and Jane Doe #4 destroyed exculpatory DNA evidence after plaintiff's case was remanded but before he was retried. However, I will dismiss plaintiff's claim that defendants tampered with the eyewitness because he is precluded from litigating these arguments that were decided in his post conviction motions, as well as his claim that Norsetter and John Doe #1 suppressed another person's confession because these defendants are entitled to absolute prosecutorial immunity. Last, plaintiff's motion for the appointment of counsel will be granted.

BACKGROUND

Plaintiff Ralph Armstrong was convicted on March 24, 1981, of the assault and murder of Charise Kamps and incarcerated for more than 29 years. On his direct appeal, he challenged the state's use of hypnosis to enhance the memory of an eyewitness, an improper lineup that led to his identification and the prosecution's failure to turn over to the defense a parking ticket bearing on plaintiff's alibi. The Wisconsin Supreme Court affirmed his conviction, holding that the hypnosis and lineup were permissible and that plaintiff had equivalent access to the evidence to the parking ticket. State v. Armstrong, 110 Wis. 2d 555, 574-75 & 580, 329 N.W.2d 386 (1983).

Plaintiff filed at least three post conviction motions: a petition for a writ of habeas

corpus in federal court and two motions in state court for a new trial based on newly discovered evidence. In his writ of habeas corpus, he argued, among other things, that his due process rights were violated because the eyewitness was subjected to an unduly suggestive hypnosis session and lineup. Armstrong v. Young, 34 F.3d 421 (7th Cir. 1994). The Court of Appeals for the Seventh Circuit denied plaintiff's petition on the merits, concluding that the neither the lineup nor the hypnosis created a "very substantial likelihood of irreparable misidentification." Id. at 431.

Plaintiff filed his first motion for a new trial based on newly discovered evidence in 1991; the motion was denied and the decision was upheld by the Court of Appeals of Wisconsin in 1993. State v. Armstrong, No.1992AP232-CR, 1993 WL 209119 (Wis. Ct. App. June 17, 1993) (unpublished). On May 17, 2001, he filed a second motion for a new trial based on the following newly discovered evidence: DNA testing excluding him and Kamps's boyfriend as being the source of two hairs found on the scene; a report by an examiner that he had found no traces of blood when examining a cloth accompanying slides allegedly prepared from hemostick swabs and scrapings from plaintiff's thumbs and large toes; and a 1990 DNA analysis that showed he was not the source of semen found on the belt of Kamps's bathrobe, the likely murder weapon. State v. Armstrong, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98. This evidence led the state supreme court to conclude that plaintiff was "entitled to a new trial in the interest of justice because the real controversy was never tried." Id. at ¶ 163, 283 Wis. 2d at 699, 700 N.W.2d at 131.

The case was set for a new trial in the Circuit Court for Dane County, Wisconsin.

On August 26, 2009, that court dismissed the charges against plaintiff for prosecutorial misconduct in violation of California v. Trombetta, 467 U.S. 479 (1984), and Brady v. Maryland, 373 U.S. 83 (1963). The court found that state officials repeatedly and intentionally violated a stipulation to insure that evidence was handled correctly and in one of their unauthorized tests, destroyed the semen stain from the bathrobe and contaminated all the remaining DNA extracted from the stain. Transcript of Oral Ruling Held 7/31/09, dkt. #22-1, at 30, 37-40, 41-43. The court also found that defendant Norsetter learned in 1994 that Stephen Armstrong, plaintiff's brother, had confessed to killing Kamps and withheld that information from defense counsel. Id. at 9-10. As a result, the defense was denied a reference DNA sample, because Stephen Armstrong died and was cremated in July 2005. Id. at 42.

ALLEGATIONS OF FACT

A. Crime Scene Evidence

Kamps was found murdered on June 24, 1980. "[A]lmost immediately after the body was discovered," defendant John Norsetter, then an assistant district attorney for Dane County, came to the crime scene and "advised and directed [the officers on] every aspect of their investigation, from evidence collection and retention[,] . . . to forensic evaluation[,]" to identification procedures. Defendant John Doe #2 (plaintiff seems to include various unidentified Madison police officers under this one name) found a small mirror, a silver razor blade and a straw used for nasal ingestion of cocaine on Kamps's kitchen table.

Officers threw this drug evidence together into a large plastic trash bag and left it in a common storage locker at the police department. The bag was lost before plaintiff could inspect the evidence or perform any tests.

Before removing this drug-related evidence from the crime scene, Madison police officers had obtained statements from various witnesses, including plaintiff. Norsetter and the officers knew that Kamps had sought to purchase cocaine the night of her death, that plaintiff had been accused of being her source and using cocaine with her that night and that he had denied these accusations. During a 2009 hearing on the prosecutorial misconduct, Norsetter testified that he believed from the beginning that plaintiff was guilty and he would never believe otherwise, no matter what evidence exonerated plaintiff or pointed to another suspect.

B. Witness Identification

During their investigation, the police found a witness who had seen a male enter and leave the victim's apartment building several times on the night of the murder. Without evincing hesitation or other signs of memory loss, the witness described the male as shirtless, about 5' 5" to 5' 6" tall and 165 pounds, wearing a moustache and without tattoos. Defendants Norsetter, detective Robert Lombardo and another John Doe #2 Madison police officer chose to subject this witness to hypnosis. During the hypnosis session, the witness was shown large color photographs of plaintiff and his car (and no other people or cars), and the hypnotist encouraged the witness to change his description to a taller person. The police

then performed a "show up" at the scene in which Lombardo and John Doe #2 literally dragged plaintiff through a re-enactment. The witness selected plaintiff as the person entering the building that night, although plaintiff was 6' 2" tall, weighed at least 200 pounds, had no mustache and had noticeable tattoos on both arms.

C. Mishandling of Evidence After Remand in 2005

Norsetter was still employed as an assistant district attorney for Dane County when plaintiff's conviction was reversed in July 2005. He was assigned to the case on remand. In December 2005, plaintiff's counsel, Norsetter and John Doe #1, an unknown assistant district attorney newly assigned to the case, signed a stipulation agreeing to procedures for gaining access to the physical evidence and handling, moving and testing it.

In April 2006, the state performed DNA testing of a semen stain on the victim's bathrobe belt, the likely murder weapon. The test excluded plaintiff and Kamps's boyfriend as the source of the semen. Although plaintiff had been excluded as the source of semen stain and all of the other relevant physical evidence, Norsetter convinced John Doe #1 to re-try plaintiff. The decision was announced during a hearing on June 6, 2006. At the same hearing, plaintiff's counsel declared his intention to conduct further DNA tests of the semen stain to try to identify its source.

Almost immediately after this hearing, defendants Norsetter, Madison police officer Marion Morgan and Wisconsin Crime Lab analysts Karen D. Daily and Daniel J. Campbell met and made arrangements to retest the semen stain on the robe belt. Without providing

notice to the court or plaintiff, as required by the stipulation and state law, defendants removed the belt from the secure evidence vault and subjected the semen stain to a second, less discriminatory DNA test. The results of the second test did not rule out plaintiff as the source of the stain, but the second test was incapable of distinguishing between plaintiff and the other primary suspect. (Plaintiff does not say as much in his complaint, but the other suspect was his brother and the test was incapable of distinguishing between DNA from brothers with the same father. Trial Court Oral Ruling from 7/31/09, dkt. #22-1, at 17-18. Norsetter had known since 1994 that plaintiff's brother had confessed to the murder and knew, at least since May 2006, that the brother had died in July 2005. Id. at 17.) This second test used up or contaminated the remaining semen evidence. Plaintiff was never able to perform additional DNA tests on the stain.

In August 2006, plaintiff's counsel discovered that Wisconsin Crime Lab analysts Daily and Jane Doe #3, Madison police officers Morgan and John Doe #2 and Dane County Clerk of Circuit Courts employees Vicki Gilbertson and Jane Doe #4 had been violating the stipulation repeatedly by accessing the evidence without notice to the court or defense counsel and by opening and examining the evidence in non-sterile and unsecured locations.

D. Suppressed Confession

In 1994, eleven years after plaintiff's conviction became final, Norsetter was personally contacted and informed that another person had confessed to Kamps's murder. That person had been considered a suspect by investigators in 1980. (Again, plaintiff does

not mention in his complaint that Norsetter was told that plaintiff's brother had confessed.) Norsetter did not disclose the confession during plaintiff's post conviction proceedings, even though Norsetter acted as an investigator and advisor to the State Attorney General's Office. After plaintiff's case was remanded, Norsetter played a leadership role until at least December 2005. He retired "at some time prior to 2007" but continued to act in an investigative and advisory role until the case was dismissed in 2009. At some point, John Doe #1, the new assistant district attorney assigned to plaintiff's case, learned about the 1994 confession. Neither Norsetter nor John Doe #1 told plaintiff about the confession.

In 2007, plaintiff's counsel discovered the confession that Norsetter had suppressed. At a subsequent hearing on plaintiff's motion to dismiss, Norsetter testified under oath that he had learned about the confession in 1994 and had suppressed it.

OPINION

Plaintiff's proposed second amended complaint addresses the problems identified in the December 11, 2012 order denying him leave to proceed. He has chosen to withdraw his claims #4 (that defendants withheld the parking ticket) and #5 (that lab analysts testified falsely). I will take up each his remaining claims in order, as renumbered in the second amended complaint.

A. Claims in Complaint

1. Destruction of crime scene evidence

To state a claim that mishandling of crime scene evidence violated his constitutional right to due process, plaintiff must allege that the items in the trash bag had the potential to exculpate him and that the officers acted in bad faith and not just negligently when they mishandled the items. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); Hubanks v. Frank, 392 F.3d 926, 930 (7th Cir. 2004). In the order entered on December 11, 2012, I denied plaintiff leave to proceed because he had not alleged that the material was potentially exculpatory or that defendants had acted in bad faith.

In the second amended complaint, plaintiff alleges facts to suggest the evidence was potentially exculpatory. He denies that he ever used drugs with plaintiff and alleges plausibly that the mirror, razor blade or straw may have contained forensic evidence, such as fingerprints, showing who was present with Kamps on the night of her murder.

It less clear whether plaintiff's allegations suggest that any of the defendants acted in bad faith when they lost the trash bag full of drug evidence. Defendant Norsetter and the unknown officers knew when they collected the evidence that plaintiff had denied being Kamps's drug source or using drugs with her. These allegations are insufficient to allow a finder of fact to infer the John Doe police officers were acting in bad faith, so this claim will be dismissed as to John Doe #2. However, with respect to Norsetter, plaintiff also alleges that Norsetter admitted in 2009 that he had believed plaintiff was guilty from the beginning and was unwilling to consider contrary evidence. This "admission" in 2009 is a very thin

basis for an allegation of bad faith in 1980, but sufficient at this early stage of the litigation. Plaintiff should be aware that if he intends to establish Norsetter's bad faith on summary judgment, he must produce evidence that Norsetter engaged in a "conscious effort to suppress exculpatory evidence," United States v. Chaparro-Alcantara, 226 F.3d 616, 624 (7th Cir. 2000), and had "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Youngblood, 488 U.S. at 56 n. *.

2. Unreliable hypnosis session and lineup

In plaintiff's claim #2 (claims #2 and #3 in his first amended complaint), he contends that defendants Lombardo, Norsetter and John Doe #2 violated his right to due process by introducing the testimony of an eyewitness whose memory was tainted by a suggestive hypnosis session and show up. The Wisconsin Supreme Court rejected both of these arguments during his direct appeal, Armstrong, 110 Wis. 2d at 574-78, 329 N.W.2d at 396-98, as did the Court of Appeals for the Seventh Circuit in plaintiff's habeas petition. Armstrong, 34 F.3d at 427-431. In my previous opinion, I found that plaintiff was precluded from relitigating these issues under § 1983. Allen v. McCurry, 449 U.S. 90, 96 (1980) (res judicata principles apply to civil rights suits brought under § 1983).

In his second amended complaint, Armstrong alleges that he was denied a full and fair opportunity to litigate these claims during his direct appeal because he lacked the evidence about Norsetter's bias in the investigation until 2006. He argues that the lineup and hypnosis presented close questions and the state supreme court interpreted the facts in a

light favorable to the state because it presumed state officials were acting in good faith. A review of the state supreme court opinion shows that plaintiff's assertion is inaccurate. Two previous courts held that the hypnosis session and lineup were not unreliable or impermissibly suggestive, Armstrong, 110 Wis. 2d at 560; Armstrong, 34 F.3d at 431. Norsetter's alleged bias does not change the nature of the hypnosis or lineup. Accordingly, plaintiff's claim #2 will be dismissed.

3. Violation of stipulation on evidence

In his claim #6, plaintiff alleges that defendants Norsetter, Daily, Jane Doe #3, Morgan, John Doe #2, Gilbertson and Jane Doe #4 violated his right to due process by mishandling the physical evidence in the court's custody. Although all of the allegations in claim #6 relate to violations of the evidence stipulation, this claim has distinct sets of allegations: (1) defendants violated the stipulation by moving and examining multiple items of evidence (plaintiff does not explain which) without notifying the court or defense counsel, and (2) defendants violated the stipulation by testing the semen sample on the likely murder weapon, destroying the sample in the process.

In the order entered December 11, 2012, I dismissed this claim because plaintiff had not alleged any compensable injury from the mishandling of the evidence. From the first amended complaint, all that one could infer was that the criminal case against plaintiff was dismissed because defendants had mishandled the evidence. In his second amended complaint, plaintiff still has not identified any injury from the defendants' mishandling of

the evidence in general, so he will not be allowed to proceed on the basis of these allegations.

This issue is more complicated with respect to the semen sample. Plaintiff alleges that the first DNA test excluded him as its source and that immediately after plaintiff's counsel announced his intention in 2006 to test the semen to identify its true source, defendants performed the second test that misleadingly implicated plaintiff and destroyed the sample and any remaining extracted DNA. Plaintiff alleges that these actions deprived him of his best chance to identify the murderer and secure his release, thereby prolonging his incarceration for three more years until the case was dismissed. Accordingly, I find that plaintiff has alleged an injury resulting from the destruction of the semen stain.

As an additional matter, I should also note that it is not clear what standard applies to plaintiff's due process claim based on the destruction of the semen stain. If the "exculpatory value" of the semen was "apparent" before its destruction, then plaintiff can state a claim by alleging both that defendants destroyed the sample and that he could not "obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 488-89. If the semen stain was only potentially exculpatory, then plaintiff must allege that defendants acted in bad faith and not just negligently by destroying the sample. Youngblood, 488 U.S. at 57-58; Hubanks, 392 F.3d at 930. In light of the conflicting DNA tests, it is not evident whether the semen stain was exculpatory or inculpatory, as the state trial court noted in its ruling dismissing the criminal case against plaintiff. Dkt. #22-1, at 23-28. The state court held that the stain's exculpatory value was apparent at the time it was destroyed because the state's first test had excluded plaintiff and, in the alternative, if

it was only potentially exculpatory, that state officials had acted in bad faith by deliberately violating the stipulation in order to retest the sample. Id. at 28-30. For the same reason, I need not decide whether plaintiff must proceed under Trombetta or Youngblood, because his allegations state a claim under either standard.

4. Defendant Norsetter and John Doe #1's suppression of the 1994 confession

Plaintiff's last claim is that defendant Norsetter and John Doe #1 knew that another suspect had confessed in 1994 to the murder of Charise Kamps but never disclosed the confession. In the December 11, 2012 order, I dismissed this claim because defendants had no duty under Brady, 373 U.S. 83, to disclose a confession received after plaintiff's conviction became final. Fields v. Wharrie, 672 F.3d 505, 514-15 (7th Cir. 2012). However, I suggested that defendants likely had a duty to disclose the confession if they were still working as assistant district attorneys during preparation for plaintiff's retrial. Id. ("[A] prosecutor's Brady . . . obligations remain in full effect on direct appeal *and in the event of retrial* because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness.") (emphasis added).

In his second amended complaint, plaintiff alleges that Norsetter was still assigned to his case after it was remanded and continued to work on the case until at least December 2005, when he entered into the stipulation. John Doe #1 was assigned to plaintiff's case on remand. Norsetter stepped down from a leadership role in plaintiff's case after entering into the stipulation in December 2005, but he convinced John Doe #1 to retry plaintiff in June

2006. Although Norsetter retired prior to 2007, he continued to act an advisor on plaintiff's case until 2009.

Although plaintiff's allegations fix the problem identified in my previous order, they also make it clear that defendants have absolute prosecutorial immunity under the court of appeals' opinion in Fields, 672 F.3d at 508-09. In that case, the plaintiff sued the prosecutor who handled his original criminal conviction, alleging that because the prosecutor was worried that the conviction would be overturned, he had solicited false corroborative testimony while the plaintiff's appeal was pending and had suppressed its falsity from the new prosecutor during the retrial of the case. The plaintiff's appeal from his first conviction was denied, but he was granted a new trial ten years later. At that time, the defendant was still an assistant state's attorney but was not reassigned to the plaintiff's case. The plaintiff alleged in his suit against the first prosecutor that he had solicited false testimony and suppressed its falsity from the new prosecutor during the retrial.

The district court denied the defendant's motion for summary judgment that he had based on a claim of absolute immunity, reasoning that the defendant had not been acting as a prosecutor because he had not been directly involved in the plaintiff's appeal or retrial. Id. at 510. The court of appeals reversed. It adopted the rule that a prosecutor is acting in his prosecutorial role when he suppresses evidence as long as he owes a continuing Brady or Giglio obligation to the criminal defendant, even if he is not actively participating on the trial team. Id. at 514. In light of the knowledge that he had gained as the original prosecutor, the defendant had a continuing Brady obligation during the plaintiff's appeal and

the retrial and therefore (somewhat paradoxically) was absolutely immune from suit for soliciting the false testimony and failing to disclose its falsity to the new prosecutor. Id. at 515-16.

Plaintiff's allegations are indistinguishable from the plaintiff's claims in Fields. When Norsetter learned about the confession, plaintiff's conviction was final. Norsetter was not acting as a prosecutor and had no duty to disclose under Brady. After plaintiff was granted a new trial, Norsetter and John Doe #1 served as the prosecutors in plaintiff's case and had a duty to disclose the confession. That duty remained even after Norsetter was no longer involved directly in the case. Therefore, under Fields, Norsetter and John Doe #1 are entitled to absolute immunity for their decision to suppress the confession. Plaintiff's claim #7 must be dismissed. Although this result seems unfair to plaintiff the court of appeals decided in Fields that subjecting prosecutors to civil liability in cases such as this would undermine their incentive to reveal exculpatory information and lead to a less fair system overall. Id. at 514, 516.

B. Motion for Appointment of Counsel

Because the court has no statutory authority to require an attorney to represent plaintiff in this action, I will construe plaintiff's motion as one seeking assistance in recruiting counsel. Before deciding whether to provide plaintiff with assistance in seeking counsel, I must find that he has made reasonable efforts to find a lawyer on his own and been unsuccessful or that he has been prevented from making such efforts. Jackson v.

County of McLean, 953 F.2d 1070 (7 Cir. 1992). Plaintiff has told the court that he was solicited help from at least four lawyers, all of whom have declined to represent him in this matter. Dkt. #23.

Next, I must consider both the complexity of the case and the pro se plaintiff's ability to litigate it himself. Pruitt v. Mote, 503F.3d 647,654-55 (7th Cir. 2007). Plaintiff's claims concerns a criminal case with a lengthy and complicated history, which may face a series of procedural hurdles. Morever, plaintiff is incarcerated in New Mexico, which will hinder his ability to gain access to the relevant records and evidence in Wisconsin. Accordingly, I find that appointment of counsel is appropriate in this case.

A lawyer accepting appointments in cases such as this takes on the representation with no guarantee of compensation for his or her work. Plaintiff should be aware that in any case in which a party is represented by a lawyer, the court communicates only with counsel. Thus, once counsel is appointed, the court will no longer communicate with plaintiff directly about matters pertaining to this case. Plaintiff will be expected to communicate directly with his lawyer about any concerns and allow the lawyer to exercise his or her professional judgment to determine which matters are appropriate to bring to the court's attention and what motions and other documents are appropriate to file. Plaintiff will not have the right to require counsel to raise frivolous arguments or to follow every directive he makes. He should be prepared to accept his lawyer's strategic decisions even if he disagrees with some of them, and he should understand that it is unlikely that this court will appoint another lawyer to represent him should plaintiff choose not to work cooperatively with the first

appointed lawyer.

ORDER

IT IS ORDERED that

1. Plaintiff Ralph Dale Armstrong is GRANTED leave to proceed on his claims that:

a. Defendant John I. Norsetter violated plaintiff's right to due process by losing potentially exculpatory evidence in bad faith prior to plaintiff's initial trial in 1980; and

b. Defendants Norsetter, Karen D. Daily, Daniel J. Campbell, Jane Doe #3, Marion G. Morgan, John Doe #2, Vicki Gilbertson and Jane Doe #4 violated plaintiff's right to due process by destroying the semen stain and DNA evidence after plaintiff's case was remanded.

2. Plaintiff is DENIED leave to proceed on his remaining claims and the complaint is dismissed against defendants John Doe #1 and Robert Lombardo.

3. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants: defendants Karen D. Daily and Daniel J. Campbell. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

4. Copies of plaintiff's complaint and this order are being forwarded to the United States Marshal for service on defendants Norsetter, Morgan and Gilbertson.

5. Plaintiff's motion for appointment of counsel, dkt. #5, is GRANTED. If I find counsel willing to represent plaintiff, I will advise the parties of that fact. Soon thereafter, the court will set a date for the preliminary pretrial conference.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the director of plaintiff's institution informing the director of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 19th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge