IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IMPACT GEL CORPORATION

and

MATTHEW KRIESL,

Plaintiffs,

and

STEVE GLAZIK, GARY GLAZIK,
MARK DECKER and
PLASTIC DESIGNS, INC.,

Involuntary Plaintiffs,

v.

GERALD R. RODEEN,

Defendant.

OPINION AND ORDER

05-C-223-C

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In an order dated September 1, 2005, I remanded this case to the Circuit Court for Jackson County, Wisconsin, for lack of jurisdiction. In the same order, I granted plaintiffs' motion for attorney fees and costs and gave plaintiffs an opportunity to submit an itemization of their actual fees and costs, noting that the Court of Appeals for the Seventh

Circuit had adopted a presumption in favor of awarding costs and fees when a case is improperly removed to federal court. Sirotzky v. New York Stock Exchange, 347 F.3d 985, 987 (7th Cir. 2003) (citing cases). However, before I resolved the amount of fees and costs due to plaintiff, the United States Supreme Court issued a decision in Martin v. Franklin Capital Corp., No. 04-1140, 2005 WL 3299410, holding that absent "unusual circumstances, courts may award attorney's fees under [28 U.S.C.] § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." Therefore, on December 8, 2005, I directed the parties to submit supplemental briefs regarding the effect of Martin on plaintiff's request for attorney's fees.

In light of the Martin decision, two questions present themselves: (1) Does the interpretation of 28 U.S.C. § 1447(c) announced in Martin apply to this case; and, if so, (2) did defendant have an objectively reasonable basis for removing the case or do unusual circumstances otherwise justify the award of attorney fees?

A. Applicability

Defendant contends that the new standard announced in Martin applies to this case under the holding in Harper v. Virginia Dept. of Transportation, 509 U.S. 86 (1993). Plaintiff disputes this point although it cites no authority in support of its position. In Harper, the United States Supreme Court held that

> when [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. at 90. Retroactive application is justified because judicial construction of a statute is an authoritative statement of what the statute meant before, as well as after, the decision of the case giving rise to that construction. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994). Therefore, because this case is still open with respect to the award of costs and fees, Martin applies. In light of the new standard for the award of attorney fees announced in Martin, it is necessary to re-examine the September 1, 2005 order awarding fees and costs in this case.

B. Attorney Fees

In Martin, the Supreme Court examined the language of 28 U.S.C. § 1447(c) to determine whether it supported a presumption in favor of awarding attorney fees to a party who has successfully obtained remand of a case from federal to state court. The Court held that the statute did not indicate that fees "should either usually be granted or usually be denied." Martin, 2005 WL 3299410 at *4. The Court emphasized that through the removal statute, "Congress granted a right to a federal forum to a limited class of state-court defendants" and that "there is no reason to suppose Congress meant to confer a right to

remove, while at the same time discouraging its exercise in all but obvious cases." Id. at *5. For this reason, the Court held that

> [t]he appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

Id. at *6.

In this case, defendant sought to remove on the theory that diversity could be created by re-aligning the involuntary plaintiffs in this lawsuit. In support of his contention that diversity jurisdiction existed, defendant asserted that the interests of involuntary plaintiffs Steve Glazik, Gary Glazik, Mark Decker and Plastic Designs, Inc. were identical to his own. He supported that proposition with snippets of involuntary plaintiff Steve Glazik's deposition testimony that I found equivocal at best.

Nevertheless, I cannot conclude that defendant removed the case for the purpose of prolonging litigation or increasing plaintiff's costs in prosecuting the case. Although I questioned the evidence supporting re-alignment and ultimately found it unpersuasive, I recognized that involuntary plaintiffs had done all within their power to avoid participating in the lawsuit and clarifying their interests in the outcome of the case. In addition, defendant removed the case promptly, within one month of its filing in the Circuit Court for Jackson County. Therefore, although defendant's ground for removal was far from

"obvious," it was not objectively unreasonable. For this reason, I will rescind the portion of my September 1, 2005 order awarding plaintiff attorney fees and costs in this case. Consequently, I need not address defendant's objections to plaintiff's proposed attorney fees.

ORDER

IT IS ORDERED that, in light of the United States Supreme Court's decision in Martin v. Franklin Capital Corp., No. 04-1140, 2005 WL 3299410, the portion of the court's September 1, 2005 order granting plaintiff's request for attorney fees and costs is RESCINDED and the request for costs and fees DENIED.

IT IS ORDERED that the Clerk of Court will assess costs as provided by 28 U.S.C. § 1920.

Entered this 27th day of December, 2005.

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