UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

PATRICIA JACKSON, an individual, MAC JENKINS, an individual, JOHNATHAN SIMS, an individual, and TRENNA SIMS, an individual,	)	
Plaintiffs,	)	Case No. 5:23-cv-05102-TLB
v.	)	
TYSON FOODS, INC.,	)	
Defendant.	)	

PLAINTIFFS' COUNSEL'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE REGARDING PLAINTIFFS' NUREMBERG CODE CLAIM

I. INTRODUCTION

This court issued a show cause order to counsel concerning counsel's belief that the Nuremberg Code should provide a private cause of action for victims enforceable in American federal courts, a novel legal question of first impression in this Circuit. This answers the court's show-cause order.

II. SUMMARY OF ARGUMENT

First, there is no basis for the court to conclude a Nuremberg claim is frivolous when no other court has ever held that, no opposing counsel has ever made that claim, this court afforded no warning on that basis, and no binding precedent even exists in this Circuit on this novel legal question of first impression. If sanctions can be imposed on counsel for pursuing a claim of first

impression in this Circuit that no court or opposing litigant ever called frivolous, then the definition of frivolous violates due process for being void for vagueness.[1]

Second, it is not frivolous for counsel to believe a Nuremberg claim can be enforced through a private cause of action when federal courts have already held aliens can bring a claim under the Alien Torts Statute for violations of the Nuremberg Code, already held certain universal legal principles are always enforceable in federal courts, and when the very law that authorized the medical treatment at issue codified the informed consent principle as a condition of it even being legally accessible in the first place.

Third, sanctioning counsel will have a chilling effect on young lawyers pursuing new claims in the human rights, civil rights, and employee rights context, often on behalf of politically weaker and disfavored communities without the institutional support of the more powerful and privileged, while sanctioning such lawyers would only have a chilling effect and deter creativity in this complex area of law that has a broad impact on social behavior of powerful corporations across the globe.

III. LEGAL STANDARD

As fellow district courts in Arkansas recognize, "a higher standard is imposed" when a court initiates Rule 11 sanctions. *Regency Hospital Company of Northwest Arkansas, LLC v. Arkansas Blue Cross Blue Shield*, 2010 WL 11646643 at *1 (E.D. Ark. 2010). The court cited fellow federal courts for the standard as "akin to contempt." *Regency Hospital Company of Northwest Arkansas, LLC v. Arkansas Blue Cross Blue Shield*, 2010 WL 11646643 at *1 (E.D. Ark. 2010). This is because the Advisory Committee Notes say as much, noting show-cause

[1] STEPHEN B. BURBANK, RULE 11 IN TRANSITION, THE REPORT OF THE TASK FORCE ON FEDERAL RULE OF PROCEDURE 11 (1989); Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?,* OSCOODE HALL L.J. 353 (1987); Linda Ross Meyer, *When ReasonableMinds Differ* 71 N.Y.U. L. REv. 1467, 1485 (1996) (referring to "[the simple inability of courts to agree on the standard of frivolousness.").

orders would only be in situations "akin to a contempt of court." Fed. R. Civ. P. 11, Advisor Comm. Notes (1993).

This Circuit, like sister Circuits, expressed particular concern about court-initiated Rule 11 sanctions due to the absence of the safe-harbor provisions. *MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 623 (8th Cir. 2003); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002); *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1101, 1118 (9th Cir. 2001). When the court affords no safe-harbor, it must show contempt-like subjective bad faith before sanctioning counsel. *In re Pennie & Edmonds LLP*, 323 F.3d 86 (2d Cir. 2003). This is because the Advisory Committee in recrafting the rules intended court-initiated sanctions for conduct akin to contempt, noting the need for a heightened standard to protect zealous advocacy by counsel. *In re Pennie & Edmonds LLP*, 323 F.3d 86 (2d Cir. 2003). This is why "concerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that we exercise less than total deference to the district court in its decision to impose Rule 11 sanctions." *Thompson v. Duke*, 940 F.2d 192, 195 (7th Cir. 1991) (quoting *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989) (en banc). Special concern applies to court-initiated sanctions because the court acts as "accuser, fact finder and sentencing judge", warranting "restraint" of the power and careful review on appeal. *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 333-334 (2d Cir. 1999). Of note, a finding of dismissal does not constitute a finding of frivolity. *Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, LP*, 171 F.3d 52, 58 (1st Cir. 1999); *Hartman v. Hallmark Cards., Inc.*, 833 F.2d 117, 124 (8th Cir. 1987). Courts should not sanction where no prior warning was given to counsel of alleged frivolity. *Anderson v. Smithfield Foods*, 353 F.3d 912, 915 (11th Cir. 2003).

The lack of a safe harbor requires a court be "obliged to use extra care in imposing sanctions." *Hunter v. Earthgrains Co. Bakery*, 281 F.2d 144, 151 (4th Cir. 2002); *United Nat'l Ins. Co. v. R&D Latex Corp*., 242 F.3d 1102, 1115-1116 (9th Cir. 2001). Indeed, court-initiated sanctions "generally should reserve such sanctions for situations that are akin to a contempt of court." *In re Bees*, 562 f.3d 284, 287 (4th Cir. 2009). This requires a "finding of bad faith" supported by "a high degree of specificity in the factual findings." *Wolters Kluwer Financial Services, Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009). This "court's discretion narrows…when it initiates the subject itself." *Security Nat Bank of Sioux City, IA v. Day*, 800 F.3d 936, 941 (8th Cir. 2015); *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 898 (8th Cir. 2009); *Norsyn, Inc. v. Desai*, 351 F.2d 825, 831 (8th Cir. 2003). Any doubt should be resolved in favor of the attorney. *Edmonds v. Gillmore*, 988 F.Supp. 948, 957 (E.D. Va. 1997); *Calloway v. Marvel Entm't Group*, 854 F.2d 1452, 1469-1470 (2d Cir. 1988). A court should take into consideration counsel's experience level and firm size. *Blue v. United States Dep't of Army*, 914 F.2d 525, 546 (4th Cir. 1990); *Robinson v. Dean Witter Reynolds, Inc.*, 129 F.R.D. 15, 22 (D. Mass. 1989); *Miller v. Borough of Riegelsville*, 131 F.R.D. 90, 93 (E.D. Pa. 1990). Adequate notice requires notice of both the alleged sanctionable conduct and the "nature of a potential sanction." *Security Nat Bank of Sioux City, IA v. Day*, 800 F.3d 936, 944 (8th Cir. 2015). Eighth Circuit precedent further recommends limiting the sanction to that which "constitutes the least severe sanction that will adequately deter the undesirable conduct." *Pope v. Federal Express*, 974 F.2d 982, 984 (8th Cir. 1992).

An argument is not frivolous unless "it is patently clear that a claim has absolutely no chance of success." *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). This requires limiting Rule 11 "should be applied only in exceptional circumstances."

Garr v. U.S. Healthcare, Inc., 22 F.3d 1274 (3d Cir. 1994). There must be "no factual or legal basis at all." *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990). A claim must be "so baseless" to warrant sanctions. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987). An argument can be meritless yet not frivolous. *Waldman v. Stone*, 854 F.3d 853, 855 (6th Cir. 2017). As the Supreme Court held, a claim is only "legally frivolous" if it "is squarely foreclosed by statute, rule or authoritative court decision." *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983). Only Supreme Court precedent can make claims a party plans to take to the Supreme Court frivolous. *McKnight v. General Motors Corp.*, 511 U.S. 659, 659-660 (1994).

In particular, sanctions are not warranted where it addresses a legal question of first impression in that Circuit. *United States v. Alexander*, 981 F.2d 250 (5th Cir. 1993); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4thCir. 1984); *Gehl v. Jahoda*, 1992 U.S. Dist. LEXIS 10246 at *5 (N.D. Ill. July 15, 1992); *Brown Mackie College v. Graham*, 1991 U.S. Dist. LEXIS 18676 at *3 (D. Kan. Dec. 18, 1991). Federal courts warn "will not impose sanctions on the Plaintiffs for asserting claims contrary to existing law when the only existing law comes from jurisdictions whose precedent is not binding on the Court." *Neighborhood Research Inst. v Campus Partners for Cmty Urban Dev.*, 212 F.R.D. 374, 379 (S.D. Ohio 2002); *Winstead v. Indiana Ins. Co.*, 855 F.2d 430, 435 (7th Cir. 1988); *Danese v. City of Roseville*, 757 F.Supp. 827, 830 (E.D. Mich. 1991). Even "painfully weak" argument cannot be frivolous when no prior on-point Circuit or Supreme Court precedent. *Aggregates (Carolina), Inc., v. Kruse*, 134 F.R.D. 23, 26 (D.P.R. 1991). Rule 11 expressly allows counsel to assert any legal contention that counsel believes are warranted by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law.

Therefore, snctions are improper where no precedent on the question exists within the Circuit. *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992); *Scott v. Real Estate Fin. Group, ERA*, 956 F.Supp. 375, 386 (E.D.N.Y. 1997); *American Home Assurance Co. v. Republic Ins. Co.*, 155 F.R.D. 77, 80 (S.D.N.Y. 1994). A party may not be sanctioned merely because later decisions reject it. *Sheets v. Yahama Motors Corp.*, 891 F.2d 533, 536 (5th Cir. 1990). Indeed, "where a particular point of law is unsettled, parties and their attorneys need not accurately prognosticate the correct law in order to avoid sanctions." *Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 321-22 (2d Cir. 1990). In fact, the precise question this court has been answered: counsel should not be sanctioned for urging an argument rejected by multiple district courts when there was no definitive ruling from the circuit court. *Donohoe v. Consolidated Operating & Prod. Corp.*, 139 F.R.D. 626, 633 (N.D. Ill. 1991). Rearguing previously rejected arguments is not frivolous. *Estate of Blas ex rel. Chargualaf v. Winkler*, 792 F.2d 858, 861 n.4 (9th Cir. 1986). Decisions of other district courts do not make a case frivolous. *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990). Advancing an argument that has been rejected by other circuits does not make it frivolous when it is a question of first impression in that Circuit. *Gallo v. United States Dep't of State Foreign Serv. Grievance Bd.*, 776 F.Supp. 1478, 1482 (D. Colo. 1991).

Where on point authority is scant, sanctions are also improper. *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912, 915 (11th Cir. 2003). An argument's novelty and lack of success does not make it frivolous. *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 70 (3d Cir. 1988). The Eighth Circuit disfavors Rule 11 sanctions against attorneys for novel legal arguments. The court must find "the attorney's conduct viewed objectively manifests either intentional or reckless disregard of the attorney's duties to the court." *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006); *Perkins v. Spivey*, 911 F.2d 22, 36 (8th Cir.

1990). The Circuit emphasizes this rule requiring intentionality must be strictly enforced and applied "with particular strictness when sanctions are imposed on the court's own initiative." *MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 623 (8th Cir. 2003). Any argument need only be "a colorable legal argument" to make sanctions an abuse of judicial discretion. *Castleberry v. USAA*, No. 16-3382, (8th Cir. 2017). Sanctions should not be imposed where it would "dampen the legitimate zeal of an attorney in representing his client." *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718 (8th Cir. 1999).

This is especially so for "efforts to secure the court's recognition of new rights." *Larez v. Holcumb*, 16 F.3d 1513, 1522 (9th Cir. 1994). Courts too often routinely abuse Rule 11 to target civil rights and plaintiffs' lawyers, leading to rules' revision. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 63, 64; Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 Iowa L. rev. 1775 (1992); Lawrence C. Marshall, *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943 (1992). The paramount concern by scholars and observers alike was the misuse of Rule 11 to target and cause a chilling effect on "disfavored" claims trying to establish new law in the area of civil rights. Carl Tobias, *Reconsidering Rule 11*, 46 U. Miami. L. Rev. 855, 905 (1992); George Cochran, *Rule 11: The Road to Amendment*, 61 Miss. L.J. 5, 27 (1991).

Even a claim "foreclosed by circuit precedent" is not frivolous where other courts can disagree. *McKnight v. Gen. Motors Corp.*, 511 U.S. 659, 660 (1994). "The court must allow counsel some latitude in testing the uncertain contours of the law – particularly in the dynamic realm of 1983 liability – without facing the wrath of sanctions." *Thomas v. City of Baxter Springs*, 2006 U.S. Dist. LEXIS 11304 at *4 (D. Kan. March 10, 2006). Consider if civil rights lawyers would have not filed suit challenging segregation and other laws due to the then binding

precedents that led to the famous decisions establishing civil rights in places like Arkansas. Under this Court's logic, Thurgood Marshall would be sanctioned.

To protect against chilling creative lawyering for disfavored communities, Rule 11 requires "existing precedents that a pleading has no chance of success" as well as "no reasonable argument to extend, modify or reverse the law as it stands." *Corroon v. Reeve*, 258 F.3d 86, 92 (2d Cir. 2011). That is why claims in the sensitive areas of civil rights, human rights, Constitutional rights, and employee rights should not be sanctioned despite their novelty or their prior rejection by non-binding court decisions. *Murray v. City of Austin*, 947 F.2d 147, 153 (5th Cir. 1991). After all: "[v]ital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and that a rule that penalized such innovation and industry would run counter to our notions of the common law itself." *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). Indeed, "excessive 'sanctionitis' under Rule 11… might discourage and chill vigorous and ingenious advocacy, especially in matters of controversial character." *Aetna Cas. & Sur. Co. v. Fernandez*, 830 F.2d 952, 956 (8th Cir. 1987). "It is often through vigorous advocacy that changes and developments in the law occur and new precedent is created. Innovative, even persistent advocacy of great adversity, must not be unreasonably penalized with hindsight." *Hamer v. County of Lake*, 819 F.2d 1362, 1367 (7th Cir. 1987).

The rampant overuse of Rule 11 in the post-1983 amendments led to the 1993 amendments due to how Rule 11 targeted outsider lawyers zealously advocating for outsider constituencies using creative legal theories, chilling advocacy for the underrepresented, chilling creativity in the law, and chilling important public policy debates in the law entirely. *See* Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 302-

304 (1989); Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buffalo L. Rev. 485, 502-505 (1989); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988); Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 Vill. L. Rev. 575, 598-599 (1987); Nelken, *Sanctions Under Amended Rule 11 – Some Chilling Problems in the Struggle Between Compensation & Punishment*, 74 Geo. L.J. 1313, 1327, 1340 (1986).

Rule 11 has generally harmed, not helped, judicial efficacy. "It is safe to say that Rule 11 generally did not have beneficial impacts on cost, time, and settlement of civil litigation." Gerald Hess, *Rule 11 Practice in Federal and State Court: an Empirical, Comparative Study*, 75 Marquette Law Review, 312, 329 (1992). The usual targets of Rule 11 were lawyers representing political outsiders in civil rights or Constitutional claims. Nelken, *Sanctions Under Amended Rule 11 – Some Chilling Problems in the Struggle Between Compensation & Punishment*, 74 Geo. L.J. 1313, 1327, 1340 (1986).

Sanctioning creative lawyering chills effective lawyering: "forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though thoughtful way." *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988). A tenuous argument is not sanctionable; only patently frivolous arguments are. *Dura Sys., Inc. v. Rothbury Invs., Ltd.*, 886 F.2d 551, 558 (3d Cir. 1989). Federal courts warn against Rule 11 sanctions that would chill attorneys' enthusiasm or creativity in pursuing legal theories. *Thomas v. Capital Sec. Servs. Inc.*, 836 F.2d 866, 877 (5th Cir. 1988); *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) (noting the need to prevent use of Rule that would "chill innovative theories" critical to "vital and positive changes to the law").

IV. THE LEGAL CONTENTION FOR A PRIVATE CAUSE OF ACTION TO ENFORCE THE NUREMBERG CODE IS NOT FRIVOLOUS

You can kill a Nazi; you just can't sue a Nazi. Unless you're a foreigner. That's the logic of this Court. The Court further claims it's sanctionable to say you can sue a Nazi or to try to. The court's sole basis is a scattering of district court decisions that disclaim a cause of action for violations of the Nuremberg Code, including cases of counsel that are still in litigation and unresolved on appeal. By contrast, counsel has support from the prior decisions of Supreme Court jurists, the only federal appellate decision on the topic in the Second Circuit Court of Appeals, and the logic of human rights law around the globe. As such, counsel's belief in a Nuremberg cause of action in American courts is not a frivolous argument for establishing new law or extending existing law, and there is no cause for sanctions against counsel for believing the Nuremberg Code is enforceable by Americans in American court.

A. The Logic of Nuremberg Precedents Supports Enforcement by Victims

In the Nuremberg precedents, American courts established that certain rules of law are so universal, they can be enforced against everyone, everywhere by anyone, anywhere. That is how American courts held German private parties criminally liable for their conduct in Germany toward others in Germany despite their conduct being legally authorized by their German government. The same logic formed the basis for allowing aliens a private cause of action to sue American corporations in American courts for their conduct outside America to non-Americans. Following the same logic, counsel asserts that if the Nuremberg Code authorizes a criminal cause of action by American courts and authorizes a private cause of action for aliens against American corporations, then the Nuremberg Code is enforceable as a private cause of action for Americans against American companies.

The logic of the Nuremberg Code was established by federal courts. *United States of America v. Carl Brandt, et al*, I Trials of War Criminals, Vol. 11 at 181 (1949); 6 F.R.D. 305 (1949). A fellow federal court explained the precedent set:

> "the judges appointed by President Truman to hear the Medical Case were all American judges and lawyers: Walter Beals, a justice from the Washington Supreme Court; Harold Sebring, a Florida Supreme Court Justice; Johnson Crawford, a judge from the Oklahoma District Court; and Victor Swearingen, an assistant attorney general of the State of Michigan. The case was prosecuted by then Supreme Court Justice Robert Jackson, and a military lawyer, Telford Taylor. The Nuremberg tribunal was asked to determine the culpability of twenty-three (23) German physicians under "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.The charges against the physicians included human experimentation involving nonconsenting prisoners. The experiments included studies of the limits of human tolerance to high altitudes and freezing temperatures. Medically-related experiments included inoculation of prisoners with infectious disease pathogens and tests of new antibiotics. Various experiments involving the mutilation of bone, muscle and nerve were also performed on nonconsenting prisoner subjects.Throughout the trial, the question of what were or should be the universal standards for justifying human experimentation recurred. "The lack of a universally accepted principle for carrying out human experimentation was the central issue pressed by the defendant physicians throughout their testimony." The final judgment of the court was delivered on July 19, 1947. The judgment has since become known as the "Nuremberg Code."

In re Cincinnati Radiation Litig., 874 F. Supp. 796, 820 (S.D. Ohio 1995).

Fellow federal courts established the precedence: "The Nuremberg Code is part of the law of humanity. It may be applied in both civil and criminal cases by the federal courts in the United States." *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 821 (S.D. Ohio 1995). This mirrors several Supreme Court jurists. "The United States military developed the Code, which applies to all citizens—soldiers as well as civilians." *United States v. Stanley*, 483 U.S. 669, 687 (Brennan, J., dissenting).

B. Supreme Court Jurist Opinions Support Making the Nuremberg Code Enforceable in Federal Court by Private Cause of Action

Justice O'Connor considered the Nuremberg Code so important, she favored finding it enforceable even against general immunity for torts arising from military service. *United States v. Stanley*, 483 U.S. 669 (1987) (O'Connor, J., dissenting in part) (recognizing the nature of the cause of action for Nuremberg Code's prohibition on non-consensual medical experimentation as so strong, it should overcome the general immunity for torts arising from military service). Justices Brennan and Stevens agreed. *United States v. Stanley*, 483 U.S. 669 (1987) (Brennan, J. & Stevens, J., dissenting). As Justice O'Connor explained, "the standards that the Nuremberg Military Tribunals developed to judge the behavior of the defendants stated that the voluntary consent of the human subject is absolutely essential…to satisfy moral, ethical, and legal concepts…If this principle is violated the very least society can do is to see that the victims are compensated, as best they can be, by the perpetrators." *United States v. Stanley*, 483 U.S. 669 (1987) (O'Connor, J., dissenting in part).

C. Analogous Case Law from the Alien Tort Claims Act Support Making the Nuremberg Code Enforceable in Federal Court by Private Cause of Action

Federal courts have in fact allowed a private cause of action to enforce the Nuremberg Code against private parties for their involvement in taking a drug without informed consent. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2nd Cir. 2009).

The Second Circuit found that Pfizer's conduct was a violation of the Nuremberg Code, the jus cogens norm of customary international law prohibiting medical experimentation on human subjects without their consent. The Second Circuit found that the Nuremberg Code could indeed be enforced through a private cause of action against a private party under the Alien Tort Statute. The court noted a violation of the Nuremberg Code was not only a cognizable tort but was one of those unique torts that violated the law of nations, and violated norms of universal

concern, recognizing federal common law provided the cause of action. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2nd Cir. 2009). The court found the Nuremberg Code "guarantees individuals the right to be free from non-consensual medical experimentation by any entity - state actors, private actors, or state and private actors behaving in concert." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 180 (2nd Cir. 2009). If aliens have the right to sue in American courts, it isn't frivolous to think Americans should enjoy the same right. Universal rights are universally enforceable. That's what the Nuremberg Code precedents established. Believing so may be in conflict with this court, but believing so is not frivolous.

D. Other Jurists & Sources of Law Recognize the Potential Cause of Action

Other courts recognize the possibility of a Nuremberg Code private enforcement right. *In re Cincinnati Radiation Litigation*, 874 F.Supp. 796 (S.D. Ohio 1995). "The breach of obligations imposed on researchers by the Nuremberg Code, might well support actions sounding in negligence in cases such as those at issue here." *Grimes v. Kennedy Krieger Inst., Inc.,* 366 Md. 29, 99, 782 A.2d 807, 849 (Md. 2001). Judge Gibbons, in dissent about military immunity, still found conduct which would violate the Nuremberg Code was in violation of the laws where it occurred or where its effects were felt. *Jaffee v. United States*, 663 F.2d 1226, 1248-1250 (3d Cir. 1981) (Gibbons, J., dissenting). Federal law codifies the right under the Nuremberg Code to informed consent as a precondition of the very drug the defendant demanded the plaintiffs take as a condition of continued employment. 21 USC 360bbb-3. Federal law required this COVID-19 vaccine only be allowed "of the option to accept or refuse administration of the product." 21 USC 360bbb-3. Yet, the coercion imposed by the employer denied the plaintiffs the "option to accept or refuse administration of the product", a right derived from the Nuremberg Code.

E. Decisions Cited by this Court Are Not Binding Precedent, and Those Involving Counsel are Still in Litigation or on Appeal

The court cited other district courts concerning counsel denying a private cause of action for Nuremberg Code violations. Those cases are either still in litigation at the district court level or on appeal, where counsel is challenging that conclusion. Indeed, counsel cannot preserve the issue without including it in the complaint.

Other federal courts recognized Nuremberg Code enforceability, but disputed applicability to vaccine mandates. *Johnson v. Brown*, 567 F.Supp.3d 1230 (D. Oregon 2021) (noting Ninth Circuit precedent in *United States v. Struckman*, 611 F.3d 560, 576 (9th Cir. 2010) (violations of jus cogens norms are enforceable in federal court). Even those courts denying Nuremberg Code enforcement, acknowledge: "Plaintiffs are correct in their general assertion that federal courts have the authority to imply the existence of a private right of action for violations of *jus cogens* norms of international law." *White v. Paulsen*, 997 F.Supp. 1380, 1383 (E.D. Wash. 1998). Jurists often cannot agree on the enforceability of jus cogens principles like the Nuremberg Code, but honest minds can disagree without considering any of their opinions on the subject frivolous. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J, concurring; Edwards, J., concurring).

V. CONCLUSION

Undersigned counsel admits inexperience, youth, and idealism. But that does not make counsel's inclusion of a Nuremberg Code predicated private cause of action frivolous. The logic of the Nuremberg Code supports a private cause of action to enforce the right. The logic of the words of Supreme Court jurists supports a private cause of action to enforce the right. The logic of analogous decisions in analogous areas of law by other federal courts or federal law supports a

private cause of action to enforce the right. Sanctions are not warranted for believing the Nuremberg Code should be enforceable in the very federal courts that created the Code. Disagreement with this court or other courts where litigation is still pending does not make the contention a frivolous one, however novel it may be or however much this court might disagree with it. Sanctions in this case would promote neither effective advocacy nor creative legal argument in the area of human rights and civil rights. Sanctions would compound the litigation rather than improve judicial efficacy or promote judicial equity. As such, cause exists to not issue sanctions against counsel, and counsel respectfully so requests.

Dated: December 7, 2023

Respectfully submitted,

/s/ Lexis Anderson

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CERTIFICATE OF SERVICE

I, Lexis Anderson, certify that on December 7, 2023, I served the attached **PLAINTIFFS' COUNSEL'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE REGARDING PLAINTIFFS' NUREMBERG CODE CLAIM**, by electronically filing the foregoing with the Clerk of the Court for the United States District Court for the Western District of Arkansas by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Lexis Anderson
Lexis Anderson