

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCHIED, an individual

Plaintiff,

Case No. 2:15-cv-11840

Judge Avern Cohn

vs.

Magistrate Judge Michael Hluchaniuk

KAREN KHALIL; CATHLEEN DUNN;
JOSEPH BOMMARITO; JAMES TURNER;
DAVID HOLT; JONATHAN STRONG; POLICE
OFFICER BUTLER; JOHN SCHIPANI; REDFORD
TOWNSHIP POLICE DEPARTMENT; REDFORD
TOWNSHIP 17TH DISTRICT COURT; TRACEY
SCHULTZ-KOBYLARZ; CHARTER TOWNSHIP
OF REDFORD; CHARTER COUNTY OF WAYNE,
MICHIGAN MUNICIPAL RISK MANAGEMENT
AUTHORITY; THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA; AMERICAN
INTERNATIONAL GROUP, INC; DOES 1-10.

Defendants.

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In Pro Per

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**MMRMA'S MOTION TO STRIKE PLAINTIFF'S REPLY TO
MMRMA'S RESPONSE TO PLAINTIFF'S "WRIT" OF ERROR AND
REVERSAL IN ASSIGNMENT OF MAGISTRATE AND
ENGAGEMENT OF EX PARTE PROCEEDINGS AND MANDAMUS
FOR PROCEEDING IN COMMON LAW (DKT. #98)**

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NOW COMES Defendant MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY ("MMRMA"), by and through its attorneys, Mellon Pries P.C., and for its Motion to Strike Plaintiff's Reply to MMRMA's Response to Plaintiff's "Writ" of Error and Reversal in Assignment of Magistrate and Engagement of Ex Parte Proceedings and Mandamus for Proceeding in Common Law (Dkt. #98), states as follows:

1. On December 10, 2015, Plaintiff filed his Reply to MMRMA's Response to Plaintiff's "Writ" of Error and Reversal in Assignment of Magistrate and Engagement of Ex Parte Proceedings and Mandamus for Proceeding in Common Law, which contains reference to an "obligation to issue criminal arrest warrants instead." (Dkt. #98, Pg ID 7751) ("Plaintiff's Reply Brief").

2. Plaintiff's Reply Brief is ten numbered pages long, plus seven pages identified by Roman numerals, and the seven pages far exceed the scope of an index or table required by this Court's briefing guidelines. (Dkt. #98, Pg ID 7751-7767).¹

¹ Excluding the title page (Dkt. #98, Pg ID 7751) and the table of contents (*Id.* at Pg ID 7757), Plaintiff's Reply Brief is still 15 pages long, 8 pages longer than that permitted of a reply brief. In fact, for reasons unknown, Plaintiff presents a Statement of Questions Presented, when there is no such recitation required for a reply brief. L.R. 7.1(d)(2). Further, the "questions" are patently nothing more than additional argument. (Dkt. #98, Pg ID 7756).

3. Plaintiff has been previously warned by this Court that he must observe the Local Rules regarding briefing requirements, including, but not limited to, page limitations. (Dkt. #78, Pg ID 6399-6400).

4. Plaintiff has also been warned on numerous occasions, by both federal and state appellate courts, that he cannot seek criminal redress in a civil lawsuit. *Schied v. Snyder*, No. 10-1176, slip op. at 3 (6th Cir. January 19, 2011) (Dkt. #93-5, Pg ID 7594); *Schied v. Rezmierski*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 22, 2013 (Docket No 303715) (Dkt. #93-6, Pg ID 7598 n2, 7603)

8. L.R. 7.1(d)(3)(B) states that a reply brief, including footnotes and signatures, may not exceed 7 pages.

9. Plaintiff's Reply Brief violates the Local Rules of this Court, including, but not limited to L.R. 7.1(d)(3)(B).

10. The United States Court of Appeals for the Sixth Circuit has concluded:

[W]hile pro se litigants may be entitled to some latitude when dealing with sophisticated legal issues, acknowledging their lack of formal training, there is no cause for extending this margin to straightforward procedural requirements that a layperson can comprehend as easily as a lawyer.

Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991)

11. L.R. 7.1 is a procedural requirement that any layperson can comprehend as easily as a lawyer.

12. Further, pursuant to L.R. 83.20(a)(1), "A person practicing in this court must know these rules, including the provisions for sanctions for violating the rules."

13. Plaintiff's violation is all the more egregious because he was specifically warned by this Court previously regarding the length of his briefs, was specifically instructed that he must comply with the Local Rules, and was even provided helpful links to assist in his compliance. (Dkt. #78, Pg ID 6399-6400).

WHEREFORE, for all these reasons, and for those in the accompanying Brief, MMRMA requests this Honorable Court enter an Order striking Plaintiff's Reply Brief (Dkt. #98).

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DATED: December 10, 2015

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**BRIEF IN SUPPORT OF MMRMA'S MOTION TO STRIKE
PLAINTIFF'S REPLY TO MMRMA'S RESPONSE TO PLAINTIFF'S
"WRIT" OF ERROR AND REVERSAL IN ASSIGNMENT OF
MAGISTRATE AND ENGAGEMENT OF EX PARTE PROCEEDINGS
AND MANDAMUS FOR PROCEEDING IN COMMON LAW (DKT. #98)**

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CONCISE STATEMENT OF ISSUES PRESENTED

- I. Whether Plaintiff is excused from complying with this Court's Local Rules regarding the form and length of his Brief?

MMRMA States: "No."

Plaintiff Will State: "Yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Abner v. Scott Mem'l Hosp., 634 F.3d 962 (7th Cir. 2011)

Gilleland v. Schanhals, 55 Fed. Appx. 257 (6th Cir. Jan. 7, 2003) (unpublished)
(**Exhibit B**)

In re Prevot, 59 F.3d 556 (6th Cir. 1995)

Jourdan v. Jabe, 951 F.2d 108 (6th Cir. 1991)

Roadway Exp., Inc. v. Piper, 447 U.S. 752 (1980)

Numatics, Inc. v. Balluff, Inc., No. 13-11049 (E.D. Mich. Nov. 6, 2014) (order granting motion to strike) (**Exhibit A**)

Fed. R. Civ. P. 12(f)

L.R. 7.1(d)(3)(B)

L.R. 83.20

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STATEMENT OF FACTS

Plaintiff has filed a reply brief which is ten numbered pages long, plus seven pages identified by Roman numerals, and the seven pages far exceed the scope of an index or table required by this Court's briefing guidelines. (Dkt. #98, Pg ID7751-7767). In fact, even if one were to exclude the title page and table of contents, Plaintiff's Reply Brief still contains 15 pages. (*Id.*). Being exceedingly generous, and excluding all of the pages numbered by Roman numerals (even though there is substantive text contained therein, and not merely tables or indices), Plaintiff's Reply Brief is still 10 pages long. (*Id.* at Pg ID 7758-7767). Plaintiff has been previously warned by this Court that he must comply with this Court's Local Rules regarding briefing. (Dkt. #78, Pg ID 6399-6400).

ARGUMENT

Plaintiff's Reply Brief fails to comply with the seven-page limitation of L.R. 7.1(d)(3)(B). (Dkt. #98). The United States Court of Appeals for the Sixth Circuit has concluded:

[W]hile pro se litigants may be entitled to some latitude when dealing with sophisticated legal issues, acknowledging their lack of formal training, there is no cause for extending this margin to straightforward procedural requirements that a layperson can comprehend as easily as a lawyer.

Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991). L.R. 7.1 is a procedural requirement that any layperson can comprehend as easily as a lawyer.

Furthermore, pursuant to L.R. 83.20(a)(1), "A person practicing in this court must know these rules, including the provisions for sanctions for violating the rules." Thus, in choosing to represent himself, Plaintiff has agreed to be bound by this Court's rules.

This Court has inherent authority to compel compliance with its Local Rules. "The inherent powers of federal courts are those which are necessary to the exercise of all others." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) (internal quotation and citation omitted). Indeed, this Court has inherent power to "manage its own affairs." *In re Prevot*, 59 F.3d 556, 565 (6th Cir. 1995). Indeed, this Court has previously stricken briefs which do not conform to the Local Rules. *Numatics, Inc. v. Balluff, Inc.*, No. 13-11049 (E.D. Mich. Nov. 6, 2014) (order granting motion to strike) (**Exhibit A**). In fact, this Court, in this very case, has already stricken several of Plaintiff's filings for failure to comply with briefing requirements. (**Dkt. #78**, Pg ID 6399-6400). Failure to comply to briefing requirements frequently results in the brief being stricken, or even harsher sanctions. *E.g., Abner v. Scott Mem'l Hosp.*, 634 F.3d 962, 964 (7th Cir. 2011).

Finally, Fed. R. Civ. P. 12(f) provides that material which is "redundant, immaterial, impertinent, or scandalous" is subject to being stricken. While it is true that Fed. R. Civ. P. 12(f) references "pleadings" and Plaintiff's Reply Brief is not a "pleading," the U.S. Court of Appeals for the Sixth Circuit has stated that the rule

can apply to briefing as well. *Gilleland v. Schanhals*, 55 Fed. Appx. 257, 261 (6th Cir. Jan. 7, 2003) (unpublished) (**Exhibit B**).

CONCLUSION

For all these reasons, and for those in the accompanying Motion, MMRMA requests this Honorable Court enter an Order striking Plaintiff's Reply Brief (**Dkt. #98**).

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DATED: December 10, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2015, I electronically filed the preceding **MMRMA'S MOTION TO STRIKE PLAINTIFF'S REPLY TO MMRMA'S RESPONSE TO PLAINTIFF'S "WRIT" OF ERROR AND REVERSAL IN ASSIGNMENT OF MAGISTRATE AND ENGAGEMENT OF EX PARTE PROCEEDINGS AND MANDAMUS FOR PROCEEDING IN COMMON LAW (DKT. #98)** using the ECF system, which will electronically serve all counsel of record. I have further mailed a copy of **MMRMA'S MOTION TO STRIKE PLAINTIFF'S REPLY TO MMRMA'S RESPONSE TO PLAINTIFF'S "WRIT" OF ERROR AND REVERSAL IN ASSIGNMENT OF MAGISTRATE AND ENGAGEMENT OF EX PARTE PROCEEDINGS AND MANDAMUS FOR PROCEEDING IN COMMON LAW (DKT. #98)** to Plaintiff via United States Post Office, First Class Mail at the following address:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCHIED, an individual

Plaintiff,

Case No. 2:15-cv-11840

Judge Sean F. Cox

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KAREN KHALIL; CATHLEEN DUNN;
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Defendants.

INDEX OF EXHIBITS

Exhibit	Description
A	<i>Numatics, Inc. v. Balluff, Inc.</i> , No. 13-11049 (E.D. Mich. Nov. 6, 2014) (order granting motion to strike)
B	<i>Gilleland v. Schanhals</i> , 55 Fed. Appx. 257 (6th Cir. Jan. 7, 2003) (unpublished)

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NUMATICS, INC.,

Plaintiff,

Case Number 13-11049

Honorable David M. Lawson

v.

BALLUFF, INC. and H.H. BARNUM
COMPANY,

Defendants.

ORDER GRANTING NUMATICS'S MOTION TO STRIKE

Presently before the Court is Numatics's motion to strike the defendants' motion for summary judgment and defendants' memorandum in support thereof.

The Case Management and Scheduling Order entered in this case states that the "Court *strictly* enforces the requirements of Eastern District of Michigan Local Rules 5.1 and 7.1 . . . for all motions" and that "[f]ailure to follow these rules likely will result in a denial of the motion and may lead to sanctions." (emphasis added). Section VI of the Case Management and Scheduling Order specifies that

When filing motions for summary judgment, parties must adhere to the following guidelines: . . . B. Briefs in support of motions for summary judgment must contain a recitation of the undisputed facts with specific references to the record. If facts are disputed, the moving party must explain how the fact is not material to the dispute.

Section VII of the Case Management and Scheduling Order states that "[m]otions must be clear and succinct without extensive factual development . . . [and] briefs must contain a concise statement of facts supported by reference to the record."

Courts in this district have clearly stated that a statement of facts must be *in* the brief and not attached as an appendix to the brief. "In this Court, a party must set forth its version of the facts that

support or contradict a dispositive motion in its supporting brief. . . and the facts must be included within the supporting brief (*i.e.*, within the 25-page limit)." *End Prod. Results, LLC v. Dental USA, Inc.*, No. 12-1146, 2014 4861647, at *4 (E.D. Mich., Sept. 30, 2014).

Further, Local Rule 5.1 provides that "all texts and footnotes must be no smaller than 10.5 characters per inch (non-proportional) or 14 point (proportional)." LR 5.1(a)(3). Additionally, Local Rule 7.1 provides that "[t]he text of a brief supporting a motion or response, including footnotes and signatures, may not exceed 25 pages." LR 7.1(d)(3). "A person seeking to file a longer brief may apply *ex parte* in writing setting forth the reasons." *Ibid.*

The defendants have violated the Local Rules and Case Management and Scheduling Order for two reasons. *First*, the defendants included their statement of facts in a 15-page appendix to circumvent the 25-page limit for summary judgment briefs. Rule 7.1 states that briefs "may contain a table of contents, an index of authorities, and an index of exhibits attached to the brief." LR 7.1(d)(2). The Local Rules do not contemplate separate briefing attached as an appendix. *Second*, the defendants filed their motion in 12-point Times New Roman, a proportional font, rather than the 14-point font that the Local Rules and Case Management and Scheduling Order requires. The defendants could have filed a motion seeking to extend the page limit for their brief. But, rather than practicing above-board, the defendants attempted a sleight of hand — filing the equivalent of a 51-page brief while implicitly representing to the Court that they had complied with the local rules. The Court will grant the plaintiff's motion to strike the defendants' motion for summary judgment and memorandum in support thereof because the defendants violated the Local Rules and the Case Management and Scheduling Order. For the same reasons, the Court will also strike the defendants' reply brief to their motion to exclude expert testimony under *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Federal Rule of Evidence 702.

Accordingly, it is **ORDERED** that the plaintiff's motion to strike the defendants' motion for summary judgment and defendants' memorandum in support thereof [dkt. #131] is **GRANTED**.

It is further **ORDERED** that the defendants' motion for summary judgment of invalidity of all asserted claims and memorandum in support thereof [dkt. #109] is **STRICKEN** from the record in this case and the image removed from the CM/ECF system.

It is further **ORDERED** that the defendants' reply brief to their motion to exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702 [dkt. #126] is **STRICKEN** from the record in this case and the image removed from the CM/ECF system.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: November 6, 2014

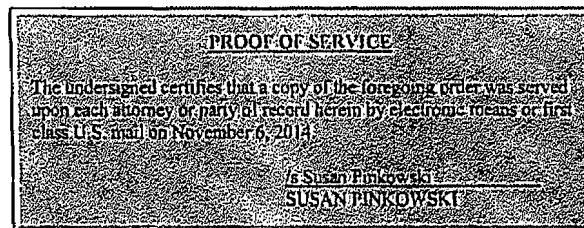


EXHIBIT B

55 Fed.Appx. 257

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28) United States Court of Appeals, Sixth Circuit.

J.B. GILLELAND, D.O., Plaintiff-Appellant,

v.

Richard SCHANHALS, et al., Defendants-Appellees.

No. 01-1839. | Jan. 7, 2003.

Plaintiff brought action seeking declaratory judgment that he was co-owner of copyright to software program. The United States District Court for the Western District of Michigan entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Gilman, Circuit Judge, held that: (1) district court properly considered defendants' summary judgment affidavit, and (2) parol evidence rule did not bar use of affidavit.

Affirmed.

West Headnotes (2)

[1] **Federal Civil Procedure**

☞ Affidavits

District court properly considered defendants' summary judgment affidavit in copyright dispute, even though affidavit was filed along with defendants' reply memorandum, as opposed to accompanying their initial memorandum, where plaintiff contended that summary judgment was not warranted because record was silent as to reason why license agreement was entered into by parties, affidavit directly addressed issue, and plaintiff had opportunity to respond to affidavit or to file motion to strike affidavit, but failed to do so.

8 Cases that cite this headnote

[2] **Evidence**

☞ Identification of Parties

Under Michigan law, parol evidence rule did not preclude use of software licensor's president's affidavit regarding reason why superseding license agreement was signed by consultant in his individual capacity; agreement was ambiguous as to why consultant also signed agreement as co-grantor, and affidavit clarified that licensor's largest customer insisted that parties sign new licensing agreement indicating that consultant had no individual ownership interest in software.

1 Cases that cite this headnote

*257 On Appeal from the United States District Court for the Western District of Michigan.

*258 Before KENNEDY and GILMAN, Circuit Judges; and SARGUS, District Judge. *

* The Honorable Edmund A. Sargus Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

GILMAN, Circuit Judge.

**1 Douglas Carson, Richard Schanhals, and J.B. Gilleland are the sole shareholders of MedTrak Systems, Inc. MedTrak Systems is the licensee of the MedTrak Program, a software program that tracks medical patient care. Micom Systems of Michigan, Inc., a corporation owned solely by Carson and Schanhals, is the licensor. In January of 1994, Micom and MedTrak Systems entered into a license agreement providing that "Micom hereby grants to MedTrak an exclusive license to use [the MedTrak program].... Title to all intellectual property rights [in the MedTrak Program] ... is, and shall remain, in Micom." Carson, Schanhals, and Gilleland adopted nearly identical language in a 1997 agreement that completely superseded the 1994 agreement. The 1997 agreement, however, stated that "Micom and Gilleland hereby grant to MedTrak an exclusive license to use and license the [MedTrak Program]" (emphasis added).

Gilleland filed a complaint on March 31, 2000, asserting state-law claims against Carson and Schanhals, among others, and seeking a declaratory judgment that Gilleland is the co-owner of the copyright to the MedTrak Program. Carson and Schanhals moved for summary judgment on the copyright claim, which the district court granted. Gilleland has timely appealed, contending that the district court erred in (1) applying § 204(a) of the Copyright Act, (2) misconstruing the language in the two licensing agreements regarding the parties' intent to transfer ownership to Micom, (3) granting summary judgment based on ambiguous agreements that contravened the intent of the parties, and (4) considering Schanhals's affidavit. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

Micom originally sold computer software programs to law firms throughout the country. In the early 1990s, however, Carson and Schanhals decided to expand the scope of Micom's business. They contacted Gilleland to discuss the prospect of marketing a computer program for occupational health and urgent care clinics.

Carson, Schanhals, and Gilleland agreed in 1991 to form a new company, MedTrak Systems, to market the MedTrak Program. They executed an agreement later that year, pursuant to which each of them contributed \$75,000 to fund MedTrak Systems. As part of the agreement, they became equal shareholders.

On January 7, 1994, Micom and MedTrak Systems entered into an agreement granting MedTrak Systems an exclusive license to use the MedTrak Program for five years, with MedTrak Systems having an option to purchase the software at the expiration of the agreement. The licensing agreement provided in pertinent part as follows:

Micom and ... Gilleland have developed the MedTrak [Program] ("Software") for use in the medical field which MedTrak [Systems] desires to market to the medical field.

Micom hereby grants to MedTrak [Systems] an exclusive license to use the Soft *259 ware.... The license granted hereby transfers neither title nor any proprietary rights to the

Software. Title to all intellectual property rights, including patent, trademark, copyright, and trade secret rights ... is, and shall remain, in Micom until such time, if ever, that the Software is sold. Gilleland signed this agreement as the Vice-President of MedTrak Systems.

**2 Micom and MedTrak Systems entered into a nearly identical licensing agreement on August 8, 1997. The 1997 agreement stated that it "supersedes all prior agreements and understanding[s] ... with respect to the [MedTrak Program]." Aside from lengthening the term of MedTrak System's license from 5 to 15 years, the two most significant differences between the 1994 and 1997 agreements was that (1) Gilleland signed the 1997 agreement in his individual capacity in addition to signing as the Vice President of MedTrak Systems, and (2) Gilleland was listed as a co-grantor of the license along with Micom.

B. Procedural background

The relationship between the parties deteriorated sometime after they executed the 1997 agreement. Unable to resolve their differences, Gilleland sued Carson, Schanhals, MedTrak Systems, and Micom, asserting various state-law claims and seeking a declaration that he owned an interest in the copyright in the MedTrak Program.

The defendants filed a motion for summary judgment, contending that Gilleland does not have an ownership interest in the MedTrak Program. In support of their motion, the defendants submitted the 1994 and 1997 agreements, and, in conjunction with their reply brief, the defendants submitted an affidavit by Schanhals. The Schanhals affidavit states that the parties signed the 1997 agreement because U.S. Health Works, Inc., which had entered into an agreement with MedTrak Systems to use the MedTrak Program, insisted that Gilleland acknowledge in writing that he had no *individual* ownership interest in the software. Although Gilleland filed a memorandum in opposition to the motion, he did not proffer any evidence in support of his position.

On May 25, 2001, the district court granted the defendants' motion for summary judgment on Gilleland's federal claim. It then declined to exercise pendant jurisdiction over his state-law claims. This timely appeal followed.

II. ANALYSIS

A. Standard of review

We review the district court's grant of summary judgment de novo. *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 490 (6th Cir.2002). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering such a motion, the court construes all reasonable factual inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Defendants' motion for summary judgment

1. Application of the Copyright Act to the 1997 Agreement

Section 201(d) of the Copyright Act provides that "ownership of a copyright may be transferred in whole or in part by any *260 means of conveyance." 17 U.S.C. § 201(d) (2002). The Copyright Act also delineates the parameters by which a party may convey a copyright: "A transfer of copyright ownership ... is not valid unless an instrument of conveyance ... is in writing and signed by the owner of the rights conveyed..." 17 U.S.C. § 204(a). These provisions accomplish "Congress's paramount goal ... of enhancing predictability and certainty of copyright ownership." *Comy. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989).

**3 So long as the parties' intent is clear, a transfer of copyright need not include any particular language. *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 927 (9th Cir.1999) ("No magic words must be included in a document to satisfy § 204(a)."). Cf. 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 10.03[A] [2] (Rel. 53 2000) ("As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties."). As such, "Section 204(a)'s requirement is not unduly burdensome. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn't have to be the Magna Carta; a one-line pro forma statement will do." *Radio Television Espanola*, 183 F.3d at 927 (internal quotation marks omitted) (ellipsis omitted).

Because the 1997 agreement by its own terms completely supersedes the 1994 agreement, we need interpret only the 1997 agreement. See 1997 agreement, at ¶ 6 ("This agreement constitutes the entire agreement and supersedes all prior agreements and understanding[s], both written and oral, with respect to the subject matter hereof."). Gilleland does not contend to the contrary.

The 1997 agreement is, as the district court found, ambiguous and inconsistent on its face. On the one hand, it declares that it does not transfer any rights to the MedTrak Program and that the copyright to the MedTrak Program "is, and shall remain, in Micom." On the other hand, Gilleland signed the agreement as a co-grantor, which indicates that he possessed an ownership interest in the MedTrak Program at the time he signed the agreement.

As the defendants contend and the district court found, Schanhals's affidavit clears up the apparent inconsistency. The affidavit explains that U.S. HealthWorks, Inc., MedTrak's largest customer, insisted that the parties sign a new licensing agreement and that Gilleland "execute the new agreement individually, stating that he had no individual ownership interest in the software." While the 1997 agreement is not a model of clarity, the affidavit establishes the parties' intent that Gilleland, to the extent that he had previously possessed an ownership interest in the copyright of the MedTrak Program, was relinquishing such rights in the 1997 agreement. With this clarification, the 1997 agreement satisfied the Copyright Act, so long as the district court did not err in considering Schanhals's affidavit.

2. Schanhals's affidavit

Gilleland maintains that the district court's consideration of the affidavit was improper because it "essentially reopened the record after it had been closed." He also claims that the district court erred by considering Schanhals's affidavit because the affidavit allegedly violated the parol evidence rule and contained hearsay, conclusory statements, and information about which Schanhals had no personal knowledge.

*261 **4 [1] Gilleland's first argument is premised on the fact that the affidavit was filed along with the defendants' reply memorandum, as opposed to accompanying their initial memorandum. But this court has explicitly approved of such filings, provided that two conditions are satisfied: (1) the affidavit responds only to the nonmoving party's

opposition memorandum, and (2) the nonmoving party has an opportunity to respond. *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 476 (6th Cir.2002) (affirming the district court's consideration of an affidavit filed with a reply memorandum in support of a motion for summary judgment); *see also Fisher v. Trinova Corp.*, No. 96-3918, 1998 WL 774111, *8 (6th Cir. Oct.13, 1998) (affirming the district court's consideration of affidavits filed with a reply memorandum in support of a motion for summary judgment because the nonmoving party "had ... time available to respond to the reply-brief affidavits"). Here, there is no question that Schanhals's affidavit responded to Gilleland's memorandum opposing the motion for summary judgment. Gilleland's opposition memorandum argued that the motion should be denied because "the record is silent as to the reason why the 1997 License Agreement was entered into by the parties or why Dr. Gilleland's signature now appears but did not appear in the 1994 agreement."

In addition, Gilleland had an opportunity to respond to Schanhals's affidavit. The defendants filed the affidavit on March 30, 2001, and the district court did not issue its order granting the motion until May 21, 2001. More than seven weeks thus elapsed between the filing of the affidavit and the issuance of the order. In that time, Gilleland could have sought leave to file a response or could have filed a motion to strike the affidavit pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. He also could have filed a motion for reconsideration pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure in light of the alleged late filing of the affidavit. Instead, Gilleland sat on his hands and did not raise the issue prior to filing this appeal. We thus conclude that there was no procedural deficiency concerning the filing of the affidavit.

[2] Regarding Gilleland's challenge to the admissibility of the affidavit, we find his arguments to be without merit. Affidavits submitted in support of a motion for summary

judgment must "set forth such facts as would be admissible in evidence." Fed.R.Civ.P. 56(e). Contrary to Gilleland's contentions, however, the affidavit contains no inadmissible facts. Schanhals, as the President of MedTrak, certainly had personal knowledge of U.S. Healthworks' conditions for entering into a contract with MedTrak. Moreover, the parol evidence rule does not bar the consideration of the affidavit because, under Michigan law, the parol evidence rule does not preclude the consideration of a document that "indicate[s] the actual intent of the parties where an actual ambiguity exists." *Wonderland Shopping Ctr. Venture, Ltd. P'ship v. CDC Mortgage Capital, Inc.*, 274 F.3d 1085, 1095 (6th Cir.2001) ("Michigan permits the use of extrinsic evidence to dispose of a potential ambiguity ... or to indicate the actual intent of the parties where an actual ambiguity exists.").

**5 The affidavit similarly contains no conclusory statements. *See, e.g.*, Schanhals affidavit, at ¶ 4 ("As a condition of execution of a contract with Medtrak Systems, Inc., U.S. HealthWorks, Inc. insisted that a new licensing agreement ... be executed by all the principals. U.S. HealthWorks, Inc. also insisted that [Gilleland] execute the agreement individually, stating that he had no individual ownership interest in the software."). Finally, the affidavit does not contain hearsay statements because the *262 alleged motivations of U.S. HealthWorks were not submitted for the truth of the matter asserted, but rather to establish why the parties entered into the 1997 agreement.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

All Citations

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December 10, 2015

David S. Schied
P.O. Box 1378
Novi, MI 48376

RE: David Schied v MMRMA, et al
Case No: 2:15-cv-11840
Our File: 1-1368-22870

Dear Mr. Schied:

Enclosed please find MMRMA's Motion to Strike Plaintiff's Reply to MMRMA's Response to Plaintiff's "Writ" of Error and Reversal in Assignment of Magistrate and Engagement of Ex Parte Proceedings and Mandamus for Proceeding in Common Law (Dkt. #98), which has been electronically filed in this matter.

Sincerely,



James T. Mellon

JTM/smr
Enclosure