

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 11-CI-119



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NATIONAL COLLEGE

PLAINTIFF

V.

ORDER

COMMONWEALTH OF KENTUCKY, ex rel.  
JACK CONWAY, in his official capacity as  
ATTORNEY GENERAL OF KENTUCKY

DEFENDANT

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This matter is before the Court on the Defendant's Motions to Alter, Amend, or Vacate the Court's December 3, 2013 Opinion and Order imposing Rule 11 Sanctions on ABC, Inc. and Grasc Law, PSC. A hearing was held on Thursday, February 13, 2014. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court hereby **GRANTS IN PART** and **DENIES IN PART** the Defendants' Motions for the reasons set forth below.

ABC, Inc. ("National College") appealed this Court's prior order upholding the issuance of a subpoena and civil investigative demand ("CID") by the Attorney General of Kentucky under the Consumer Protection Act, KRS 367.110, and KRS 367.300. The Court of Appeals, in its Opinion dated August 24, 2012, affirmed summary judgment as to the Attorney General's authority to issue the CID, but reversed and remanded for consideration of the scope of the CID. Upon remand, this Court, in its December 3, 2013 Opinion and Order, after a hearing on the merits of National College's claims, sanctioned National College and its attorneys for disregarding the wording of the Court of Appeals Opinion as well as specific directives by this Court. The Court went on to order National College to tender full responses from the December 15, 2010 CID to the Attorney General. The Court noted that if National College's responses

were in full compliance with the CID within ten (10) days of the entry of the Order, the portion of the fine that exceeded \$10,000 would be probated. On December 11, 2013, National College tendered approximately 3,500 pages of additional material, but due to the timing of the material over the holiday season, the Attorney General did not have ample time to review the documents fully or certify completeness as of January 13, 2014. On January 31, 2014, the Attorney General provided an update to the Court and notified the parties that National College's Responses to the CID request remained deficient and warranted imposition of the full \$1,000 per day sanction. National College tendered additional CID responses on February 11, 2014 and the Attorney General then certified completeness on February 13, 2014 at the hearing before the Court.

As grounds for its Motion to Reconsider, National College argues that it complied with the Court's Order and tendered additional responses within ten days and that the Order should be amended to eliminate any sanction. National College also argues that the Attorney General wrongfully initiated litigation under KRS 367.290 for failing or refusing to obey a CID because National College was exercising its right to challenge the scope and authority of the CID, that the statute does not permit retroactive sanctions, and that National College acted reasonably by litigating this matter as permitted by the Kentucky Consumer Protection Act.

Albert F. Grasc, Jr., James L. Thomerson, and Grasc Law, PSC submitted their Motion to Reconsider the Court's December 13, 2013 Opinion and Order due to the Court's imposition of CR 11 sanctions on the parties as counsel for National College in this matter. Grasc Law argues that the Court is only justified in imposing sanctions if the arguments advanced by counsel throughout the course of litigation were so devoid of merit that they warrant retroactive punishment. Grasc Law asserts that throughout the litigation, counsel always believed they were advancing good faith and reasonable arguments under the Kentucky Consumer Protection

Act, the Civil Rules, the Court of Appeals decision, and this Court's rulings. They maintain there was a good faith and reasonable basis for requesting additional discovery from the Attorney General challenging the scope of the CID as overly broad, as well as raising the FERPA issue.

The Attorney General argues that the sanctions are appropriate under KRS 367.290 and the facts of the case, that there was no reasonable basis for National College's attempt to invoke FERPA and that was another example of a meritless litigation tactic that warranted sanctions. It should not have been necessary for the Attorney General to request certain information again in January after finding the December 11, 2013 materially deficient. If National College had complied with the CID within ten days of the entry of the Court's Order, it would have a legitimate basis for arguing for a reduction. The Attorney General requests that sanctions be imposed at the rate of \$1,000 per day beginning on July 31, 2013 and ending on February 11, 2014, also recognizing that the \$1,000 per day sanction pending full compliance should be reasonably tolled from December 25, 2013 (2 weeks after National College's production of responses) during the Holiday period when the Attorney General was unable to conduct a full review of National College's December 11 production, to January 31, 2013 when the Attorney General had to request the Court's action again. The total calculation presented was 148 days from July 31, 2013 to December 25, 2013, then 12 additional days from January 31, 2014 to February 11, 2014 for a total of 160 days, or \$160,000.

On the issue of sanctions for National College, this Court **AMENDS** its prior ruling in part. The motive behind the imposition of sanctions was to persuade National College to tender full and adequate responses to the CID, and those responses were finally submitted on February 11, 2014. After the July scope hearing, the Court ordered responses to be due on August 5, 2013 (the start date for penalties). Further, this Court agrees with the Attorney General and finds that

had National College produced full responses to the CID within ten days of the entry of the December Order, that it would be entitled to the \$10,000 total sanction. However, it was not until February 11, 2014 that National College fully complied with the CID Request. Therefore, pursuant to KRS 367.290(1)(c), the Court fines National College \$1,000 per day for its failure to fully comply from August 5, 2013 to December 23, 2013 (a reasonable date considering the holiday) and \$500 per day for failure to comply from January 31, 2014 to February 11, 2014 when National College was finally deemed fully compliant. The total fine is therefore reduced to **\$147,000** (141 days from August 5, 2013 when the Responses were first due to December 23, 2013 which allowed two weeks for the Attorney General to conduct a review of the December 11, 2013 production for a total of \$141,000, tolling the calculation during the Holiday period, then fines of \$500 per day for 12 additional days from January 31, 2014 when the Attorney General deemed the productions noncompliant to February 11, 2014 for a total of \$6,000). The Court finds that National College failed to establish a basis for the reduction of the sanctions beyond the credits given for the holiday period.

On the issue of sanctions on Grasc Law, PSC, the Court **AFFIRMS** its prior ruling but modifies the legal basis for the ruling. The Court initially ruled that Rule 11 sanctions were warranted in light of the obstructionist conduct of counsel during the course of the litigation. Upon further review, the Court agrees that the \$10,000 in monetary sanctions are more appropriately awarded under CR 37.02 for failure to comply with a court order on discovery issues. CR 37.02(3) states, “the court shall require the party failing to obey the order or the attorney advising him or both to pay reasonable expenses, including attorney’s fees, caused by the failure...” When a hearing was finally held on the scope of the CID, National College and its counsel still could not present any legitimate objections on its claim that the CID was invalid. At

that point, it became abundantly clear that National College, through counsel, was attempting to delay a valid investigation by the Attorney General. After a review of the comprehensive litigation process, it was unreasonable under the circumstances for Grasc Law's attorneys to continue to engage in obstructionist litigation tactics that resulted in substantial delay in the compliance of National College with the Court's prior orders and its obligations under the Consumer Protection Act. In this respect, the Court is especially mindful that when the hearing was held on the scope of the CID, there were absolutely no reasonable grounds asserted to support withholding the requested documents, and thereafter, it took National College until February 11, 2014 to comply with a CID that all other for profit colleges responded to in a matter of days after being served. National College's responses to the CID requests were continuously deficient and counsel could not establish a credible basis for the incompleteness. Thus this Court is justified in imposing **\$10,000** in sanctions pursuant to CR 37.02(3) for Grasc Law's lack of cooperation and failure to comply with this Court's order for the timely production of the requested documents. These sanctions shall be paid by counsel, rather than the client. The Court re-affirms all of its prior findings regarding the conduct of counsel, and continues to believe the conduct of counsel crossed the line between zealous advocacy and obstructionist tactics. Nevertheless, the Court will grant the request of National College's counsel to impose the sanction under CR 37.02, rather than CR 11.

Accordingly, the Court hereby **GRANTS IN PART** and **DENIES IN PART** the Defendants' Motions to Alter, Amend, or Vacate, as set forth above. National College shall pay the sum of \$147,000 to the Attorney General within 30 days of the entry of this order pursuant to KRS 367.290 and KRS 367.990, and counsel for National College, Mr. Grasc and Mr. Thomerson, shall pay the Attorney General the sum of \$10,000 pursuant to CR 37.02 within 30

days of the entry of this Order. Interest shall accrue from the date of this order at the judgment rate. This is a final and appealable judgment and there is no just cause for delay.

**SO ORDERED** this 24th day of June, 2014.

  
PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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