IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-181-MPT
	)	
THE HON. JOHN CARNEY,	)	
Governor of the State of Delaware,	)	
	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR A RULE TO SHOW CAUSE

Plaintiff's "Motion for a Rule to Show Cause Why Defendant the Hon. John Carney Should Not Be Held in Contempt of Court and for Expedited Consideration" ("Motion") (D.I. 57) has no merit and should be denied. As Plaintiff implicitly recognizes in his Motion (D.I. 57 ¶ 10), there is no order that can support a finding of contempt. Furthermore, in tandem with Defendant's Motion for Reconsideration/Clarification (D.I. 42) of the Court's summary judgment ruling, Defendant has acted in good faith and has taken no actions contrary to the Court's summary judgment ruling.

In any event, even if Plaintiff were to actually move for an injunction order based on the Court's summary judgment ruling, and after the Court has resolved Defendant's Motion for Reconsideration/Clarification, such injunction should be denied and the Court should instead stay its decision pending appeal, given Defendant's obligation to fill numerous judicial vacancies in compliance with the Court's ruling and with the remaining provisions of Article IV, Section 3 of the Delaware State Constitution.

I. There is No Order to Support a Contempt Finding.

There is no basis for finding Defendant in contempt, absent an order specifically directing him to do or refrain from doing anything. *See Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) ("The judicial contempt power is a potent weapon," and a federal court's orders must be framed "so that those who must obey them will know what the court intends to require and what it means to forbid."); *Inmates of Allegheny Cty. Jail v. Wecht*, 754 F.2d 120, 129 (3d Cir. 1985) ("Persons may not be placed at risk of contempt unless they have been given specific notice of the norm to which they must pattern their conduct."); *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1006 (3d Cir. 1972) ("[A] person will not be held in contempt of an order unless the order has given him fair warning that his acts were forbidden."); *Lichtenstein v. Lichtenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970) ("Civil contempt of course is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts.").

Because there is no order with a specific and definite requirement to act or refrain from acting, none of the elements of civil contempt can be established here. It is undisputed that the elements for civil contempt are (1) the existence of a valid order, (2) defendant's knowledge of that order, and (3) defendant's disobedience of the order. *Marshak v. Treadwell*, 595 F.3d 478, 485 (3d Cir. 2009). Nor could it be disputed that "[t]he plaintiff has a heavy burden to show a defendant guilty of civil contempt. It must be done by 'clear and convincing evidence,' and where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt." *Schauffler for and on Behalf of N.L.R.B. v. Local 1291, Int'l*

Longshoremen's Ass'n, 292 F.2d 182, 190 (3d Cir. 1961) (quoting *Fox v. Capital Co.*, 96 F.2d 684, 686 (3d Cir. 1938)).

The Court has not entered an order that can support a finding of contempt in this case. The Judgment Order (D.I. 39) simply granted Plaintiff's Motion for Summary Judgment (D.I. 31) and denied Defendant's Motion for Summary Judgment (D.I. 28). The Judgment Order does not direct the Defendant to do or refrain from doing anything regarding judicial appointments, nor does the Court's Memorandum Opinion (D.I. 40). Plaintiff acknowledges as much, stating in his Motion that he "**will** seek an injunction prohibiting political affiliation to be included in applications for judicial appointments and prohibiting judicial appointments to include political affiliation as a factor." D.I. 57 ¶ 10 (emphasis added). Plaintiff's Motion is an inexplicable attempt to have the Court find Defendant in contempt of an order that Plaintiff has yet to ask the Court to enter. Such a request is entirely without merit and should be denied.

Moreover, "[t]he long-standing, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971). While Plaintiff contends the Court's ruling was "clearly" violated, Plaintiff's own interpretation reveals ambiguity therein. For example, Plaintiff asserts, based on the Court's ruling, "the Governor has no 'discretion' to make political affiliation a factor." D.I. 57 ¶ 6. That statement contradicts the Court's Memorandum Opinion, which found the decisions of *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993) and *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988) to be "highly distinguishable" and "not applicable to the current situation," precisely because they "addressed situations in which political affiliation could be considered, but was not constitutionally mandated"—*i.e.*, situations involving "discretion." D.I. 40 at 11, 13. On the other hand, Defendant has taken the reasonable position,

as reflected in Defendant's Motion for Reconsideration/Clarification (D.I. 42), that the Court did not hold the First Amendment to prohibit Delaware's governor or legislature—or other governors and legislatures, or the United States President and Senate—from discretionary consideration of political affiliation in judicial appointments. Regardless, as Plaintiff's own struggle to construe the Memorandum Opinion demonstrates, and as Defendant's Motion for Reconsideration/Clarification reflects, the Court has not entered an order specifically directing Defendant to do or refrain from doing anything, as required for a contempt finding. Given the absence of such an order, Plaintiff's Motion presents no legal basis for a contempt finding, and it should be denied.

II. Defendant Has Otherwise Complied with the Court's Ruling in Good Faith.

Defendant has strived in good faith to comply with the Court's ruling on Article IV, Section 3 of the Delaware Constitution.[1] Defendant has interpreted the Court's Memorandum Opinion not to reach the Family Court or the Court of Common Pleas, given the Court's finding that Plaintiff lacked standing to challenge those provisions. *See* D.I. 42 at 2 (citing D.I. 40 at 7). Defendant has also interpreted the Court's Memorandum Opinion not to reach the bare majority provisions of Article IV, Section 3, given the Court's finding that "Plaintiff does not have standing under provisions four and five [the "bare minimum" requirement]." In addition, the Court found a lack of futility in Plaintiff's challenging the bare majority component for the

[1] If Plaintiff had concerns, counsel should have raised those concerns with Defendant's counsel prior to filing his Motion, as required by this Court's longstanding guidelines and the Local Rule requiring him not only to engage in a "reasonable effort" to meet and confer, but to aver that he has done so in a statement with the Motion. *See* D. Del. Local R. 7.1.1 ("Unless otherwise ordered, failure to so aver may result in dismissal of the motion."). Had Plaintiff's counsel made a reasonable effort to discuss this matter with Defendant, Plaintiff's concerns may have been resolved through a simple conversation. Instead, Defendant learned of Plaintiff's concerns upon the public filing of his Motion, which was perhaps the intent (a publicity stunt) —to leave the people of Delaware to wonder whether their governor was "ignoring" the Court's ruling, based solely on Plaintiff's inappropriate Motion and Plaintiff's counsel's statements to the press.

Family Court and the Court of Common Pleas, which is equally applicable to the bare majority provisions for the other courts. *See id.* (citing D.I. 40 at 7).

As is evident, the Plaintiff and Defendant have a different understanding of the scope of this Court's summary judgment ruling on two issues: whether this Court declared the "bare majority" provision of the Delaware Constitution to violate the First Amendment and whether the Court's ruling deprives the Delaware Governor and State Senate from considering party affiliation in nominating and voting upon judicial nominees. Given Defendant's duties under both the Delaware Constitution and the First Amendment, Defendant sought clarification of the Court's ruling to make sure that the judicial nomination process complies with both. *See* D.I. 42. While awaiting resolution of Defendant's Motion for Reconsideration/Clarification, Defendant has proceeded under his good-faith interpretation of the Court's ruling, seeking at every turn to comply with his obligations under both state and federal constitutional law. Specifically, with respect to Plaintiff's application for a judicial position, Defendant has given the Plaintiff the benefit of his own interpretation of this Court's ruling. The Governor directed his Judicial Nominating Commission to review Plaintiff's application for a Delaware Superior Court judicial seat by considering only the merits of his application and disregarding political affiliation. *See* Letter from Counsel to Governor John Carney to Chair of Judicial Nominating Commission (January 10, 2018) (attached hereto as Exhibit A). Ultimately, Plaintiff was not nominated by the Governor for the Superior Court seat, and his name was not submitted to the Senate.

With respect to other judicial vacancies, Defendant has otherwise proceeded under his understanding of the Court's ruling, subject to resolution of Defendant's Motion for Reconsideration/Clarification, and has narrowly tailored postings for future judicial nominations to be consistent with this Court's ruling on the major political party component by disregarding

such provision and complying with the remaining bare majority component of Article IV, Section 3. In addition, the Governor has expressed his view that this Court did not rule that party affiliation could not be considered by the Governor or the State Senate when nominating and voting on judicial nominees. For example, the instructions for the position of Resident Judge of the Superior Court for Sussex County, posted February 19, 2018, provide that the "bare majority" provision will be applied, but that the Governor has the discretion to take party affiliation into account, so long as not violating the "bare majority" provision. *See* D.I. 57-4. In addition, unless ordered by this Court to do otherwise, the Defendant intends to post a notice to fill an anticipated vacancy on the Court of Common Pleas, in keeping with Defendant's understanding that the Court's ruling does not touch upon that court, the "bare majority" provision of Article IV, Section 3 or the discretion of the Governor or State Senate to take party affiliation into account as long as he does not violate the "bare majority" provision. In proceeding with judicial appointments, Defendant has recognized the Court's distinction, as stated in the Memorandum Opinion, between Delaware's constitutional requirement compelling consideration of political affiliation based on the major political party component, and a governor's discretion to consider political affiliation independent of such a requirement. *See* D.I. 40 at 11, 13.

In sum, Defendant has operated consistently with the Court's ruling. Plaintiff's contention that political affiliation may never be considered in a judicial appointment, even in Defendant's discretion, does not reflect the Court's ruling and, if followed, would upend the judicial appointment process in states throughout the country and at the federal level.[2] Absent

[2] Plaintiff's claim (for which he lacks standing) that political affiliation may never be considered in a judicial appointment is nonsensical. Under such reasoning, the federal courts would now have the permanent job of supervising and ruling on the legality of any challenged judicial

contrary direction from the Court, Defendant has closely followed the Court's ruling based on the reasonable interpretations above.

III. If Plaintiff Seeks an Injunction, The Court Should Stay Its Summary Judgment Order Pending Appeal.

After Defendant's Motion for Reconsideration/Clarification is resolved, and should Plaintiff ever seek an injunction based on the Court's ruling, Defendant would oppose an injunction and would seek a stay of the Court's summary judgment decision pending appeal. A stay of the Court's decision, and likewise a denial of any injunction, is appropriate for several reasons: the import of this Court's ruling, which touches on an unprecedented issue of constitutional law; Defendant's obligations to comply with the Delaware State Constitution; and the pressing need to fill judicial vacancies in the State of Delaware. On this last point, Defendant notes that not only will he need to fill the anticipated vacancy mentioned above, but also, at the very least, four additional vacancies on Delaware's courts for the remainder of this year. Delaware has a highly renowned and respected judiciary. Delaware policy, imbedded in its Constitution, is the preservation of a bipartisan judiciary—an important value that has served the state well for decades. Absent a stay of the Court's ruling, the impact of any judicial appointments filled by the Governor prior to the resolution of this appeal will be felt by the public, and could disrupt the bipartisan nature of the Delaware judiciary, for years to come. Until Defendant's appeal is resolved, and this unique constitutional issue is decided with certainty, the constitutional nomination and consent function of the Delaware Governor and

---

nomination made by the Governor, and hold evidentiary hearings to determine if the Governor considered membership in the Democrat or Republican parties as a factor. And what if the Senate rejected a nominee? Would all the members of the Senate be subject to depositions so the federal court can determine if the political affiliation of the Governor's nominee was improperly considered by each Senator? Plaintiff's claim is both meritless and unprecedented.

Senate should not be supervised by a federal court based on a prior case brought by a plaintiff who lacks standing. Moreover, a stay would cause no prejudice to Plaintiff, as he obtained the full relief he sought on the merits. His application for the Superior Court vacancy was considered solely on the merits of his candidacy, and without regard to political party.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court deny Plaintiff's Motion.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ David C. McBride
David C. McBride (No. 408)
Martin S. Lessner (No. 3109)
Pilar G. Kraman (No. 5199)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600
dmcbride@ycst.com
mlessner@ycst.com
pkraman@ycst.com

Attorneys for Defendant

Dated: March 7, 2018

CERTIFICATE OF SERVICE

I, David C. McBride, hereby certify that on March 7, 2018, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

David L. Finger, Esquire
Finger & Slannina, LLC
One Commerce Center
1201 N. Orange St., 7th Floor
Wilmington, DE 19801
dfinger@delawgroup.com

Attorneys for Plaintiff

I further certify that on March 7, 2018**,** I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: March 7, 2018

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ David C. McBride
David C. McBride (No. 408)
Martin S. Lessner (No. 3109)
Pilar G. Kraman (No. 5199)
Rodney Square
1000 N. King Street
Wilmington, Delaware 19801
dmcbride@ycst.com
mlessner@ycst.com
pkraman@ycst.com

Attorneys for Defendant,
The Hon. John Carney