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September 13, 2019

VIA EFILE

Honorable Barbara B. Crabb
U.S. District Court
Western District of Wisconsin
120 N. Henry Street
Madison, WI 53703

Re: *Jarchow v. State Bar of Wisconsin*, 3:19-CV-266
Defendants' Provision of Supplemental Authority in Support of
their Motion to Dismiss

Dear Judge Crabb:

This letter is to notify the Court of the Eighth Circuit's recent decision in *Fleck v. Wetch*, ___ F.3d ___, No. 16-1564, 2019 WL 4126356 (8th Cir. Aug. 30, 2019), a copy of which is included for the Court's convenience. This supplemental authority supports Defendants' (collectively referred to as "the State Bar") Motion to Dismiss Plaintiffs' Complaint in the above-captioned case, which is currently pending before this Court.¹

Fleck upheld North Dakota's integrated bar—which required "every resident lawyer [to] maintain membership and pay annual dues to the State Bar Association of North Dakota"—against a First Amendment challenge based on the Supreme Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). 2019 WL 4126356, at *1.² As the Eighth Circuit explained, in *Keller v. State Bar of California*, 496 U.S. 1, 13–15 (1990), the Supreme Court held that an integrated bar like North Dakota's does not run afoul of the First Amendment. 2019 WL 4126356, at *1. Further, *Janus*, which "held that public sector unions

¹ The Defendants are State Bar of Wisconsin; the State Bar of Wisconsin Board of Governors; Christopher E. Rogers, President of the State Bar of Wisconsin; Jill M. Kastner, President-Elect of the State Bar of Wisconsin; Starlyn R. Tourtillott, Secretary of the State Bar of Wisconsin; John E. Danner, Treasurer of the State Bar of Wisconsin; Odalo J. Ohiku, Chairperson of the State Bar of Wisconsin Board of Governors, and Paul G. Swanson, Immediate Past-President of the State Bar of Wisconsin, in their official capacities.

² The Eighth Circuit originally affirmed the constitutionality of North Dakota's integrated bar in *Fleck* in 2017, before the Supreme Court decided *Janus*. However, after the Supreme Court decided *Janus*, the Court vacated the Eighth Circuit's original *Fleck* decision and remanded for reconsideration in light of *Janus*. *Fleck v. Wetch*, 139 S. Ct. 590 (2018) (mem.).

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may not deduct agency fees or any other payment to the union from the wages of [nonconsenting] nonmember employees,” “did not overrule *Keller*.” 2019 WL 4126356, at *1–*2, *5 (citations omitted). Indeed, the “majority in *Janus* did not discuss *Keller* nor respond to the dissent’s assertion [based on] *Keller*.” *Id.* at *2. And in *Harris v. Quinn*, 573 U.S. 616 (2014), a predecessor to *Janus*, “the Court specifically stated that its holding should not be assumed to call into question . . . *Keller*.” *Id.*

Fleck also affirmed that the North Dakota State Bar’s procedure for collecting mandatory dues and informing members of the availability of the *Keller* Dues Reduction comports with the First Amendment. 2019 WL 4126356, at *4. Under that procedure, “[e]ach member must determine how much he or she owes in annual dues[, including whether the member opts to take the *Keller* dues reduction,] and then write a check to [the North Dakota State Bar] to pay that amount. The member’s right to pay or refuse to pay dues to subsidize non-chargeable expenses is clearly explained on the fee statement and accompanying instructions, in advance of the member consenting to pay by delivering a check . . .” *Id.* This satisfies any First Amendment requirements. *See id.* at *4–*5.

The First Amendment claims in *Fleck* are identical to Plaintiffs’ First Amendment claims here, so *Fleck* supports this Court granting the State Bar’s Motion to Dismiss. *See generally* Brief in Support of Defendants’ Motion to Dismiss at 1–6, Dkt. 16 (hereinafter “Br.”) (describing Wisconsin’s integrated bar and Plaintiffs’ Complaint). As in *Fleck*, Plaintiffs here challenge Wisconsin’s integrated bar, which requires lawyers licensed in Wisconsin to “join the State Bar and pay mandatory membership dues.” Br. 1. As in *Fleck*, the State Bar argues that *Keller* affirmed the constitutionality of the integrated bar, that *Janus* did not overrule *Keller*, and that *Harris* additionally supports the continued viability of *Keller*. Br. 7–10. Finally—while not directly challenged by Plaintiffs here—as in *Fleck*, the State Bar has adopted procedures for collecting dues and informing members of the availability of the *Keller* dues reduction that comport with the First Amendment. Reply Brief in Support of Defendants’ Motion to Dismiss at 7–8, Dkt. 28. Specifically, the State Bar’s payment notices clearly explain the members’ payment obligations and require members to “calculate the correct amount” owed (including a calculation for the choice to take the *Keller* Dues Reduction), and then members must “send that payment to the State Bar.” Dkt. 28:8.

Accordingly, for the same reasons that the court rejected the claims by the plaintiffs in *Fleck*, the Plaintiffs’ claims in this case should also be rejected.

Sincerely,

s/Roberta F. Howell

Attachment