UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

2311 RACING LLC d/b/a 23XI RACING and FRONT ROW MOTORSPORTS, INC., Plaintiffs, v. NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, LLC and JAMES FRANCE, Defendants.	Civil Action No. 3:24-cv-886-KDB-SCR

OPPOSITION TO MOTION TO STRIKE

From the outset, Plaintiffs' preliminary injunction requests have always asked the Court to address Defendants' anticompetitive and exclusionary conduct that could block Plaintiffs' acquisition of charters from Stewart-Haas Racing, LLC ("SHR"). *See* Compl. ¶¶ 23, 35, 41; *id.* at 41; Dkt. 20 ¶ 3; Dkt. 51 ¶ 3. At the time of the Plaintiffs' first motion for a preliminary injunction (October 9) and the time of its renewed motion (November 26), there was no need to ask the Court to order Defendants to approve the transfer because by September 12, NASCAR president Steve Phelps had twice confirmed to Front Row that the transfer was approved and that Front Row just needed to complete the ministerial task of submitting the paperwork. Dkt. 67 at 3-4; Dkt. 67-1 ¶ 7. NASCAR told SHR the same. Dkt. 66-10 ¶ 5. Plaintiffs had no reason to suspect that NASCAR would abruptly reverse course and reject the transfer on December 5—after Plaintiffs filed their renewed motion, but before Defendants filed their opposition. *See* Dkt. 60-1 at 50 (Ex. 11).

Defendants claim that Plaintiffs' reply brief contains "brand-new argument and evidence directed towards the newly-raised requests for relief." MTS at 1. Wrong. Defendants' opposition introduces the transfer rejection, *see* Dkt. 60 at 5, and includes six new exhibits documenting the correspondence between NASCAR and Front Row dated from December 5 to December 9 in which NASCAR objects to the transfer and says it will continue to assert its objection until Front Row drops its antitrust claims, *see* Dkt. 60-1 at 44-64 (Exs. 9-14). Defendants' counsel also submitted a declaration that selectively quotes argumentative portions of these exhibits regarding the release provision in the SHR charter agreement, the customary release and indemnity provision in the joinder agreement, and NASCAR's objection to the transfer. *Id.* ¶¶ 11-14. Defendants' new exhibits even include an accusation that Front Row "fail[ed] to timely submit the transfer request … intentionally to manufacture a crisis," *id.* ¶ 15, but neglects to mention that NASCAR had told Front Row the transfer was already approved, and so Front Row did not expect any kind of "crisis."

Plaintiffs' reply properly responds to Defendants' new evidence and arguments, which is precisely what a reply brief is supposed to do. *Lismont v. Alexander Binzel Corp.*, 2014 WL 12527239, at *2 (E.D. Va. May 23, 2014) ("the purpose of a reply brief is to allow the movant to rebut the nonmovant's response, thereby persuading the Court that the movant is entitled to the requested relief"); LCvR 7.1(e) ("A reply brief should be limited to a discussion of matters newly raised in the response."). And to the extent anything in Plaintiffs' reply is considered a new argument or evidence, neither is impaired by the categorical bar that Defendants suggest. *See* MTS at 2-3.

As an initial matter, "a district court may consider an argument raised for the first time on reply under appropriate circumstances." *De Simone v. VSL Pharms., Inc.*, 36 F.4th 518, 531 (4th Cir. 2022); *see also Marshall v. James B. Nutter & Co.*, 816 F. Supp. 2d 259, 264 (D. Md. 2011)

(declining to strike portions of reply and noting courts have "broad discretion to decline to consider arguments or issues first raised in a reply brief"). In deciding whether to exercise that discretion, courts consider whether the argument is "intimately related" to the original grounds for the motion, and whether the non-movant has an opportunity to contest the argument. *De Simone*, 36 F.4th at 531. Both favor Plaintiffs since NASCAR's objection is designed to undermine this Court's ability to grant Front Row's originally requested relief concerning its SHR charter transfer, and, again, because *Defendants initiated the argument*.

Defendants also suggest that the declarations Plaintiffs submitted in support of their reply are improper and the court must strike not only the declarations, but also any "new arguments" the declarations support. MTS at 2. Yet Defendants do not identify these "new arguments" that must be stricken, and they cannot deputize the Court to carry out that investigation on their behalf.[1] *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Nor is there any basis for striking these declarations that (1) are based on facts that post-date Plaintiffs' motion because of Defendants' exclusionary actions *after* Plaintiffs filed their motion, and (2) respond directly to new issues raised in Defendants' opposition. Not only does Defendants' cited authority not apply, *see* MTS at 2-3 (citing *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 4288103, at *6 (M.D.N.C. July 27, 2020) ("[R]eply affidavits should not *present new issues* to which the opposing party will *not have an opportunity to respond*.") (emphases added)), but this particular situation also invites the Court to consider this evidence, *see Champion-Cain v. MacDonald*, 2015 WL 3775659, at *2 (S.D. Cal. June 17, 2015) (exercising discretion to consider emails sent after briefing where emails

[1] Defendants' casual assertion that Plaintiffs' declarations contradict each other (and the associated perjury implication) should be disregarded since Defendants make no attempt whatsoever to identify even a single contradictory statement. *See* MTS at 2 n.2.

were "directly relevant to Plaintiffs' showing of irreparable harm," "could not have included them in their briefing on the motion," and defendants had opportunity to "present their arguments [regarding the emails] in their opposition briefs").

Similarly unsupported are the "numerous substantive reasons" that Defendants contend doom Plaintiffs' requested relief. Neither arbitration nor Defendants' novel joinder release are relevant to Plaintiffs' request—that the Court enforce Defendants' now long-broken promise and require approval of the SHR charter transfer.

Finally, the Court should deny Defendants' alternative request to further respond to Plaintiffs' "new grounds" for a preliminary injunction. Not only have Defendants already had that opportunity, but also they created those "new grounds" and then fired the first salvo in briefing. Defendants are well aware that Plaintiffs have requested a ruling on their renewed motion by December 18, and they should not be permitted to further delay the proceedings and benefit because they engaged in additional exclusionary acts.

Defendants' position is that they should be able to continue their exclusionary acts in violation of the Sherman Act and inflict ever greater irreparable harm on Plaintiffs while the preliminary injunction motion is pending, but Plaintiffs should not be able to present that developing evidence of irreparable harm and unlawful conduct to the Court. This would require Plaintiffs to file successive PI motions as Defendants' non-stop effort to try to force Plaintiffs to relinquish their antitrust rights proceeds unabated. The rules of procedure do not tie the Court's hands in this fashion or allow Defendants to invoke the rules in this manner to evade scrutiny of their ongoing unlawful behavior.

The Court should deny Defendants' motion.

Dated: December 13, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No artificial intelligence was employed in doing the research for the preparation of this document, with the exception of such artificial intelligence embedded in the standard on-line legal research sources Westlaw, Lexis, FastCase, and Bloomberg. Every statement and every citation to an authority in this document has been checked by an attorney in this case and/or a paralegal working at his/her direction (or the party making the filing if acting pro se) as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO MOTION TO STRIKE** was electronically filed using the Court's CM/ECF system, which will automatically send notice of this filing to counsel of record for all parties, including:

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