[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13576

Non-Argument Calendar

AIM IMMUNOTECH, INC,

Plaintiff-Appellant,

versus

FRANZ TUDOR,
TODD DEUTSCH,
TED KELLNER,
JONATHAN JORGL,
WALTER LAUTZ, et al.,

Defendants-Appellees,

ROBERT CHIOINI, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:22-cv-00323-GAP-PRL

Before JORDAN, JILL PRYOR, and WILSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant AIM Immunotech, Inc. (AIM) appeals the dismissal of its Amended Complaint against Defendants-Appellees Franz Tudor, Todd Deutsch, Ted Kellner, Jonathan Jorgl, Walter Lautz, and MCEF Capital, LLC (collectively, the Stockholders) as moot. Because we agree that the case is moot, and because we find that the district court did not abuse its discretion in awarding sanctions, we affirm.

I.

In July 2022, AIM sued the Stockholders for violating Section 13(d) of the Securities Exchange Act of 1934, alleging that the Stockholders were attempting to engage in a hostile takeover of AIM without filing the required disclosures under the Act. *See* 15 U.S.C. § 78m(d)(1), (d)(3). Section 13(d) of the Act requires a group of stockholders with beneficial ownership of more than five percent of an issuer's outstanding shares who act together to acquire,

hold, vote, or dispose of those shares to file a Schedule 13D form disclosing their arrangement. *Id.*; 17 C.F.R. § 240.13d-1(a). The stockholder group must file the form no later than ten days after the group crosses the five percent threshold. 17 C.F.R. § 240.13d–1(a). AIM sued the Stockholders in the Middle District of Florida, alleging they owned more than five percent of AIM's outstanding shares and orchestrated proxy contests to seize control of AIM in 2022 but failed to file the required 13D form.

The Stockholders, except for Tudor, moved to dismiss for various reasons under Federal Rule of Civil Procedure 12(b), including lack of personal jurisdiction and failure to state a claim. The district court dismissed AIM's Complaint sua sponte for lack of standing.[1] The court allowed AIM leave to amend, and AIM filed an Amended Complaint. But six days before it filed its Amended Complaint, AIM reelected three of its stockholders as directors. Thus, the hypothetical 2022 hostile takeover did not occur, and the district court dismissed AIM's Amended Complaint as moot.

Lautz and Jorgl both sought sanctions against AIM and its counsel under Federal Rules of Civil Procedure 11(b) and 59(e) and the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u–4(c), for pursuing this case against them after it became frivolous. The district court granted the sanctions, finding the Amended

[1] The district court found that AIM, as the stock-issuing entity, did not have standing to sue under section 13(d) based on our decision in *Liberty National Insurance Holding Co. v. Charter Co.* 734 F.2d 545, 566–67 (11th Cir. 1984).

Complaint was already moot because it was filed after the board election.

AIM appealed, arguing (1) the district court erred in dismissing as moot AIM's Amended Complaint against the Stockholders for violations of Section 13(d) of the Act; and (2) the district court erred in sanctioning AIM.

II.

We turn first to the mootness issue. We review mootness de novo as "a question of law." *Via Mat Intern. S. Am. Ltd. v. United States*, 446 F.3d 1258, 1262 (11th Cir. 2006).

As a threshold matter, AIM argues that the district court erred in applying the mootness doctrine when the proper jurisdictional requirement to apply was standing. *See Johnson v. Bd. of Regents*, 263 F.3d 1234, 1267 (11th Cir. 2001) (explaining that "a party's standing to sue is generally measured at the time of the complaint," while "mootness principles" are used to analyze "the effect of subsequent events"). The Stockholders respond that the district court properly invoked mootness, that the filing of a case-initiating complaint starts the clock for determining whether subsequent events render the relief sought by the suit moot, and a plaintiff's decision to amend its pleading does not, on its own, reset that clock to the date of the amended filing.

We agree with the Stockholders that the district court was justified in turning to mootness. "The Supreme Court has clarified that a reviewing court can 'choose among threshold grounds for denying audience to a case on the merits,' and we have routinely

availed ourselves of that flexibility." *Gardner v. Mutz*, 962 F.3d 1329, 1336 (11th Cir. 2020) (citations omitted) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). And the Amended Complaint here relates back to the date of the original Complaint. *See* Fed. R. Civ. P. 15(c)(1)(B). As a result, AIM's argument that mootness is the incorrect standard—because the 2022 Annual Meeting occurred before the filing of the Amended Complaint—is unavailing.

III.

Since we find that the district court was justified in making its decision based on mootness, we turn next to the issue of whether this action is moot. Mootness concerns whether "events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief." *Schultz v. Alabama*, 42 F.4th 1298, 1319 (11th Cir. 2022) (quotation marks omitted). The party asserting mootness bears the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). AIM argues the case is not moot because it still seeks a mandatory injunction to force the Stockholders to remedy their failure to file a 13D form.

Several events after AIM initiated this lawsuit in July 2022 support our conclusion that the district court's mootness

determination was correct. First, Jorgl sold all his AIM stock.[2] As Jorgl is no longer a stockholder or beneficial owner of AIM stock, he cannot be compelled by the district court or this court to file section 13(d) disclosures for AIM. *See Hemispherx Biopharma, Inc. v. Johannesburg Consol. Inv.*, 553 F.3d 1351, 1365–66 (11th Cir. 2008) ("[A] beneficial ownership interest in securities is necessary to become a member of a group within the meaning of section 13(d)(3) of the Exchange Act.").

Second, Lautz testified in his September 2022 deposition that he announced his decision not to participate in the Stockholders' plan because he feared it would "smear" his reputation. At that point, he too was no longer involved in the group contemplated by Section 13(d) because he expressly withdrew from the group.[3] Third, and most importantly, on November 3, 2022, AIM held its Annual Meeting of Stockholders. At that meeting, AIM's

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[2] AIM raises a voluntary cessation argument with respect to Jorgl, but we agree with the district court's conclusion that voluntary cessation standard is inapplicable. A defendant's voluntary cessation of the complained-of behavior does not moot a case unless it is "clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1355–56 (11th Cir. 2019) (quotation marks omitted). Here, rather than simply agreeing to stop his behavior, Jorgl divested ownership of his shares entirely and submitted a sworn declaration that he has "no intention of investing in AIM in the future." As Jorgl is no longer a stockholder, his failure to file section 13(d) disclosures required cannot reasonably be expected to recur.

[3] The "group" contemplated by the statute is a "group of persons . . . colluding to structure their interests in a company in a pool." *See Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.*, 553 F.3d 1351, 1364 (11th Cir. 2008).

stockholders reelected its preferred nominees, not the Stockholders'. Thus, the concerns AIM raised in its Amended Complaint about needing to "understand the [Stockholders'] true intentions" and "evaluate the consequences" of their actions should they attempt a hostile takeover are no longer relevant.[4] And due to these three events, the district court can no longer provide the relief AIM seeks—a mandatory injunction requiring the Stockholders to file the 13D.[5]

For these reasons, we affirm the district court's determination that the case is moot.

IV.

"In any private action arising under [the PSLRA], upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) . . . as

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[4] Additionally, "[t]he purpose of [section 13(d) is] to protect the investors in target corporations from takeover bidders who up to that point had been able to operate in secrecy." *Fla. Com. Banks v. Culverhouse*, 772 F.2d 1513, 1515 (11th Cir. 1985). But here, the company learned about the potential takeover and sued. And then the takeover was unsuccessful.

[5] AIM also argues that their claims are not moot because AIM seeks to "permanently [enjoin] Defendants from committing any further violations of federal securities law." But we agree with the court's conclusion that this is an impermissible and unenforceable form of injunctive relief because it would do no more than instruct the Stockholders to "obey the law." *See Elend v. Basham*, 471 F.3d 1199, 1209 (11th Cir. 2006) ("It is well-established in this circuit that an injunction demanding that a party do nothing more specific than 'obey the law' is impermissible.").

to any complaint, responsive pleading, or dispositive motion." 15 U.S.C. § 78u–4(c)(1). This statute limits the court's discretion "on two fronts: (1) in choosing whether to conduct the Rule 11(b) inquiry and (2) in determining whether to impose sanctions following a finding of a Rule 11(b) violation." *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 636 (11th Cir. 2010).

A court may impose sanctions under Rule 11 only after concluding that a "party's claims are objectively frivolous" and "the person who signed the pleadings should have been aware that they were frivolous." *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998). "A factual claim is frivolous when it has no reasonable factual basis," whereas a "legal claim is frivolous when it has no reasonable chance of succeeding." *Golisano*, 34 F.4th at 942.

The district court found that sanctions were appropriate against AIM and its counsel for pursuing its claim "past the point when the claim transformed from a permissible shield . . . into a sanctionable sword." We review an award of sanctions under Rule 11 "for abuse of discretion." *Baker*, 158 F.3d at 521. "An abuse of discretion can occur where the district court applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment." *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005).

The district court found that AIM's Amended Complaint substantially failed to comply with Rule 11(b) to the extent that AIM reasserted its § 13(d) claim against Lautz even though it had no factual support for that claim. Similarly, Jorgl moved to dismiss

AIM's amended § 13(d) claim for lack of subject matter jurisdiction because he sold his stock, and under our decision in *Hemispherx*, a person who does not own AIM stock has no obligation to provide the section 13(d) disclosures at issue. *See* 553 F.3d at 1365–66. The district court found that from that point forward, AIM's arguments to the contrary were factually and legally frivolous and advanced for an improper purpose and "without any care for the relevant facts or applicable law."

On that basis, the district court found that Lautz and Jorgl were entitled to reasonable attorneys' fees and costs. Nothing in the record indicates that, in assessing these sanctions against AIM and its counsel, the district court applied the wrong law, followed the wrong procedure, based its decision on clearly erroneous facts, or committed a clear error in judgment. Therefore, we affirm the district court's award of sanctions against AIM and its counsel.[6]

V.

Because we agree with the district court that this case is moot, and because the district court did not abuse its discretion in

[6] In this court, Lautz and Jorgl also moved for sanctions under Federal Rule of Appellate Procedure 38. The Rule permits an award of damages, "[i]f a court of appeals . . . determine[s] that an appeal is frivolous." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 407 (1990) (quoting Fed. R. App. P. 38). It is permissible for us to find that the district court did not abuse its discretion in awarding sanctions but to also find that an appeal is not frivolous and that sanctions are, therefore, not warranted at the appellate level. *See id.* That is what we do here—we do not find this appeal frivolous, and we deny Lautz and Jorgl's motions for sanctions.

assessing sanctions against AIM and its counsel, we affirm the district court on both issues.

AFFIRMED.