Nos. 18-1290 & 18-1459

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FABIAN GREYER,
Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF CORRECTIONS, et al.,
Defendant-Appellees.

MICHAEL JOHNSON,
Plaintiff-Appellant,

v.

JASON DALKE, et al.,
Defendant-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Western Division
The Honorable Philip G. Reinhard
Case Nos. 17-CV-07840 & 17-CV-50384

CONSOLIDATED REPLY BRIEF OF PLAINTIFF-APPELLANTS FABIAN GREYER AND MICHAEL JOHNSON

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Amicus contends that these cases represent nothing more than a "straightforward application" of this Court's precedent in *Hoskins v. Dart*. Amicus Resp. Br. 15; *see* 633 F.3d 541 (7th Cir. 2011) (per curiam). If, however, *Hoskins* means what Amicus claims, and if what the district court did here satisfies *Hoskins*, then the combined result is surely something this Court could not have intended: a per se rule for fraud such that *any* omission of a prior lawsuit on the court-provided complaint form is fraudulent and may result in the permanent extinguishing of a prisoner's constitutional claims before merit review. Although Amicus protests that its proposed standard does not amount to a strict liability standard or a per se rule of fraud, there is really no other way to describe it. The reason for the omission does not matter under Amicus's approach, because the district court is not required to ask the prisoner to explain the omission before dismissing the case. *See* Amicus Resp. Br. 28–29. And even if the district court asks for an explanation, it is permitted either to ignore those reasons or to presume bad faith. The district court does not even need to make a finding of willfulness, bad faith, or fault. Amicus Resp. Br. 27.

In truth, Amicus's approach relies on a carefully constructed series of assumptions that are unfounded or just plain wrong. First, Amicus stretches this Court's opinion in *Hoskins*—a one-party, pro se appeal resulting in a per curiam order—to its limits.[1] It likewise ignores the crucial factual differences between

[1] Although per curiam opinions have precedential value in this circuit, *see* Seventh Cir. R. 32.1(b), per curiam opinions typically are not intended to effect a sweeping change in the

Hoskins and these two appeals. From there, it builds its case for intentionality and materiality—two standards left undefined in *Hoskins*—on several flawed presumptions about prisoner-plaintiffs, the PLRA's requirements and purpose, and the outsized role that the warnings on a confusing form complaint play in justifying permanent dismissal of a prisoner's constitutional claims.

Once these faulty assumptions are peeled away, what remains is only a standard for fraud that finds no bearing in the PLRA or the common law doctrine of "fraud on the court." This Court should reverse and remand so that Mr. Greyer and Mr. Johnson can proceed with their cases. In so doing, this Court should clarify which standard animates its "fraud on the court" rule in the context of pro se prisoner § 1983 claims. It should also provide guidance to lower courts as to what constitutes materiality and intentionality within this test, and what facts are sufficient to satisfy them. Finally, at a minimum, this Court should find that *Hoskins* is factually distinguishable from these two cases.

I. Amicus's proposed standard of fraud amounts to a rule that *any* omission is presumptively intentional and material, expanding *Hoskins* beyond its appropriate limits.

This Court in *Hoskins* found that an omission is fraudulent when it is intentional and material. *Hoskins*, 633 F.3d at 543. In the opinion, however, these terms remained undefined. Amicus capitalizes on this absence by proposing a troubling interpretation: that any prisoner who omits prior litigation from the

law. *See Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987) ("The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument.").

complaint form presumptively does so intentionally and materially. Amicus Resp. Br. 33, 38. Reading *Hoskins* in this way would effect a dramatic shift in the law of fraud.[2] In any event, this Court should limit *Hoskins* to its distinct facts.

Amicus disguises its standard of strict-liability fraud with a murky discussion about how the district court simply chose not to consider alternative plausible explanations and how the court acted within its discretion to *infer* intentionality and materiality. Amicus Resp. Br. 32. Under its standard, however, there is no room for a counter this "inference." Regarding intentionality, Amicus claims that the signed certification renders intentional *all* information included and omitted in a complaint. Amicus Resp. Br. 33. Regarding materiality, Amicus plainly states that any omission is material. Amicus Resp. Br. 38. Under this standard, a court is free to find fraud whenever a prisoner makes a simple mistake.

A. *Intentionality*

Amicus claims that when a prisoner-litigant submits a complaint, a court can conclude that any omissions in the complaint were made intentionally. Amicus Resp. Br. 33. Seeking support for this proposition, Amicus relies on the language of the certification form, along with a misguided reading of *Hoskins*. Amicus Resp. Br. 33.

Regarding the certification form, Amicus acknowledges that a plaintiff's signed verification is qualified by this caveat: "the facts stated in this [c]omplaint are true to the best of my knowledge, information and belief." Amicus Resp. Br. 33.

[2] *See* Johnson Br. 14–15 (explaining that all Seventh Circuit PLRA three-strike opinions preceding and following *Hoskins* dealt with litigants who concealed "strikes").

But Amicus draws an anomalous conclusion: that from this language a court "may infer that the litigant's . . . omissions in the complaint were made intentionally." Amicus Resp. Br. 33. This language, however, supports the opposite conclusion. If a prisoner-litigant certifies anything by signing this form, it is that he filled out the complaint not perfectly but rather to the best of his ability given his knowledge and the information available to him. Any omission, according to the language of the form, could in fact be due to the litigant forgetting about or failing to find records of those past cases, and that inference should prevail.[3] If that prisoner has no strikes to hide in the omitted cases, the only reasonable interpretation of those omissions is that they were unintentional.[4] Even for the cases Mr. Johnson listed, for example, he made "???" notations and wrote "don't remember" for various details, Johnson Br. App. A.4–6, indicating exactly what the form's language presumes: that he may not recall everything about his prior litigation and filled the form out *to the best* of his knowledge, information, and belief.

It is not reasonable to infer that a prisoner-litigant intentionally omits cases that have no bearing on his IFP eligibility. Amicus would like this Court to believe that IFP-eligible prisoners strategically omit some prior litigation, "perhaps to seem less litigious," Amicus Resp. Br. 34–35, despite the complaint's warning that failure

[3] This inference should prevail particularly in the context of pro se prisoner claims due to the liberal pleading standards they are afforded. *See* Johnson Br. 18–21.

[4] Amicus proposes that a court may infer that "a prisoner plaintiff is aware of the cases he himself has commenced." Amicus Resp. Br. 33. Notably, however, its support for that proposition comes from a case where the prisoner-plaintiff concealed a prior strike, a fact he certainly would have known. *Id.* (citing *Thompson v. Taylor*, 473 F. App'x 507, 509 (7th Cir. 2012)). That inference is not warranted in every case, particularly ones without prior strikes.

to disclose cases may result in dismissal of their case.[5] The notion that a plaintiff would jeopardize a meritorious civil rights claim—risking dismissal and the ability to ever bring that claim again—simply to appear marginally less litigious is far-fetched. Both Mr. Johnson and Mr. Greyer, at most, failed to disclose two prior lawsuits each. Two. That hardly moves the litigious needle for Mr. Johnson, who had already disclosed *eight* lawsuits, or for Mr. Greyer, who would appear to be an infrequent litigator regardless of disclosures, having filed only two lawsuits over a ten-year period in prison, one of them on the same day or shortly after this case. *See* Greyer Br. App. A.6–7, 12/19/17 Order (stating that Greyer's second omitted case was "filed within three days of the instant suit"); Complaint, *Greyer v. Ill. Dep't of Corr.*, No. 17-CV-01133 (S.D. Ill. Oct. 23, 2017). Additionally, adopting Amicus's stance would imply that district courts treat plaintiffs more or less fairly depending on how many grievances they have sought to redress. Finally, contrary to Amicus's assertion, *see* Amicus Resp. Br. 45, Plaintiff-Appellants do not ask for a presumption that any errors in the disclosure form are unintentional. Rather, Plaintiff-Appellants contend that an omission of a case that has *no bearing on the plaintiff's ability to proceed in forma pauperis* is unintentional when that plaintiff either explained that it was a mistake or provides a reason for the omission.

[5] Amicus also transforms the permissive language that omissions *may* result in dismissal into an assertion that Plaintiff-Appellants knew dismissal *would* result. *See* Amicus Resp. Br. 16 ("[I]n spite of a prominent warning that incomplete disclosure *would* result in dismissal.") (emphasis added).

B. *Materiality*

In addition to its troubling presumptions about intentionality, Amicus also proposes a strict liability inquiry for materiality, and it does so plainly. *See* Amicus Resp. Br. 38 (claiming that "the complete omission of one or more cases from a complaint is material, regardless of whether any of the omitted cases is a PLRA 'strike'"). The requirement that district courts find materiality before finding fraud would be an empty exercise if any omissions are material by default. Amicus's reasoning for this materiality standard is that courts enlist the assistance of prisoner-litigants in enforcing the PLRA's three-strike provision, dividing the labor where the plaintiff discloses "facts" (the prior lawsuits) and the district court applies the "law" to those facts (determining whether the plaintiff has struck out under the PLRA). Amicus claims that the court is materially hindered in its docket management when a plaintiff fails to put it on notice about his prior cases. *See* Amicus Resp. Br. 39–40.

Amicus's proposed labor division, however, runs contrary to the PLRA and is not a valid basis for presuming fraud. As Amicus recognizes, a prisoner's obligation to disclose his prior litigation on the complaint form does not stem from the PLRA itself. *See* Amicus Resp. Br. 19–20. Rather, district courts established this disclosure rule to aid in their enforcement of the PLRA's three-strike rule. But the fact that district courts created this disclosure rule to help them enforce the three-strike requirement does not change the fact that it is ultimately the district court's task to determine whether the plaintiff has struck out under the PLRA. *See*

Fourstar v. Garden City Grp., Inc., 875 F.3d 1147, 1152 (D.C. Cir. 2017) (holding that "[d]istrict courts must *independently* evaluate prisoners' prior dismissals to determine whether there are three strikes" and stating that a district court cannot rely on a prior court's determination that a prisoner has accumulated a strike but rather must make its own determination). Amicus recognizes that district courts, under this division of labor, analyze a plaintiff's prior litigation regardless of disclosure. Amicus Resp. Br. 39. Even if a plaintiff discloses all his prior lawsuits, the court still must look up those lawsuits and determine whether their dispositions constitute strikes under the PLRA. This is not a situation where the plaintiff uniquely holds information that the court cannot access on its own. The district court below is a prime example. *See, e.g.*, Johnson Br. App. A.10 (district court order claiming it found three additional lawsuits beyond plaintiff's disclosures); Greyer Br. App. A.6 (district court order noting two lawsuits that Mr. Greyer failed to disclose). In short, because courts are the entities responsible for determining IFP eligibility under the PLRA, courts necessarily must investigate a plaintiff's litigation history. The fact that district courts have enlisted the aid of prisoners in fulfilling their own duties does not make those prisoners fraudulent when they fail to assist with 100 percent accuracy.

C. *Hoskins*

Amicus relies heavily on *Hoskins* to justify its stance on intentionality and materiality. Amicus Resp. Br. 38–39. As mentioned above, however, *Hoskins* did not articulate a standard for either materiality or intentionality, and was fueled by its

own unique facts, distinctions that Amicus ignores in its brief. In *Hoskins*, the plaintiff filed five § 1983 suits contemporaneously. 633 F.3d at 542. At the time he filed those suits, Hoskins was actively litigating three other suits addressing similar claims that he had filed within the past year. *Id.* at 543. Despite the fact that Hoskins was presently litigating three other § 1983 claims, he did not disclose any of these three cases on the court-provided complaint form and instead made large X's through the prior litigation section. *Id.*

Unlike Hoskins, who did not disclose any of his prior suits on the form, Mr. Johnson did list most of his previous claims. These disclosures show that Mr. Johnson intended to disclose his litigation history. Furthermore, Mr. Johnson was not actively litigating any suits at the time he filed the complaint in this case. Finally, Amicus recognizes but downplays the fact that the district court erroneously identified a third omitted case for Mr. Johnson, one to which he was never a party: *Turner v. Wexford*, No. 13-cv-03072 (C.D. Ill. Mar. 14, 2013). Amicus Resp. Br. 35 n.6. Amicus goes on to claim that "there is no basis for inferring that the district court's inclusion of this case had any bearing on its ultimate conclusion that Johnson materially misrepresented his litigation history." Amicus Resp. Br. 36 n.6. The fact that the district court listed it, however, is ample proof that it factored the case into its decision-making. And if it did, this would constitute reversible error because the district court relied on incorrect facts in finding that Mr. Johnson defrauded the court.

Also unlike Hoskins, Mr. Greyer was not actively litigating three federal civil rights claims at the same time he filed the complaint in this case. The only lawsuit Mr. Greyer had initiated prior to filing this suit was a 2007 petition for habeas relief. A litigant is much more likely to forget about a case he filed ten years ago than to forget about three similar cases he is actively litigating. Mr. Greyer also filed another § 1983 suit on or around the time he filed the complaint in this case. *See* Complaint, *Greyer v. Ill. Dep't of Corr.*, No. 17-CV-01133 (S.D. Ill. Oct. 23, 2017).

Unlike Hoskins, who omitted active and ongoing cases, Mr. Greyer did no such thing. Rather, the form's confusing language was likely the culprit for Mr. Greyer's misstep in failing to name the complaint filed on the same day or shortly after. The form asks the litigant: "Have you begun any other lawsuits relating to your imprisonment?" *See* G.A.1. The language of "have you begun" is in past participle form, indicating completed action. *See past participle, Merriam-Webster* (2019) (defining "past participle" as a participle that typically expresses completed action). When the form uses the past tense, a litigant should not be penalized for failing to disclose cases he filed in real time (*i.e.*, in the present) or shortly after (*i.e.*, in the future). Furthermore, whereas the three claims Hoskins had filed in the past year presented similar claims, *Hoskins*, 633 F.3d at 543, Mr. Greyer's contemporaneous complaint alleges violations against correctional officers in other facilities. *See* Complaint, *Greyer v. Ill. Dep't of Corr.*, No. 17-CV-1133 (S.D. Ill. Oct.

23, 2017) (including claims against officers at Graham and Pinckneyville Correctional Centers).

Lastly, this Court in *Hoskins* found that the litigant failed to disclose *three* prior lawsuits. 633 F.3d at 543. The number of omitted lawsuits is relevant, because three cases could theoretically amount to a strikeout under the PLRA's three-strike rule. Meanwhile, neither Mr. Johnson nor Mr. Greyer omitted three prior lawsuits. In short, given the significant differences between *Hoskins* and these cases, *Hoskins* should not dictate the outcome here.

II. Amicus's proposed per se standard of fraud undermines the PLRA and the common law "fraud on the court" doctrine and also threatens due process.

A. *Local rules cannot be used in a way that defeats the PLRA's language or purpose.*

Amicus's interpretation of *Hoskins*, amounting to a per se standard for fraud, undermines the purpose and text of the PLRA. When a pro se prisoner files a § 1983 complaint, the PLRA mandates that the district court engage in two preliminary reviews before serving the defendant. First, pursuant to 28 U.S.C. § 1915A, the district court must dismiss the complaint if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). Second, if the pro se plaintiff seeks to proceed *in forma pauperis*, 28 U.S.C. § 1915(g) requires the court to determine whether the plaintiff has accumulated three "strikes"; *i.e.*, whether three of the plaintiff's prior complaints have been dismissed as frivolous, malicious, or for failure to state a claim. Neither § 1915A nor § 1915(g) requires prisoner-plaintiffs to disclose their prior litigation history.

To enforce § 1915(g)'s three-strike rule, district courts have adopted local rules requiring pro se prisoner-plaintiffs to disclose their prior litigation history on a court-provided complaint form. *See* U.S. District Court for the Southern District of Illinois, Instructions for Filing a Pro Se Civil Complaint for Civil Rights Violations or Other Civil Claims by a Person in Custody ¶ 10, http://www.ilsd.uscourts.gov/Forms/PrisonerInstructionSheet.pdf (last visited Feb. 28, 2019). Here, the district court dismissed Mr. Johnson's and Mr. Greyer's complaints for failing to comply with instructions on this complaint form. Johnson Br. App. A.12–13; Greyer Br. App. A.6–7.

The local rule, however, cannot operate in a manner that undermines the PLRA's statutory scheme. *See Jones v. Bock*, 549 U.S. 199, 204 (2007) ("Given that the PLRA does not itself require plaintiffs to plead exhaustion, such a result must be obtained by amending the Federal Rules, and not by judicial interpretation.") (internal quotations omitted); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) ("Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.") (quotations omitted); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) ("Obviously, the district court, in devising means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute.").

Here, the local rule imposes a heightened pleading standard on plaintiffs, requiring them to fully include all prior lawsuits on the face of their complaint or face potential dismissal. The obligation to ascertain strikes, however, rests

exclusively with the district court. *See Fourstar*, 875 F.3d at 1152 ("District courts must *independently* evaluate prisoners' prior dismissals to determine whether there are three strikes.").

The local rule also undermines the purpose of the PLRA and § 1983. As Amicus correctly notes, Congress designed the PLRA's three-strike rule to aid courts in "filter[ing] out the bad claims and facilitat[ing] consideration of the good." *Jones*, 549 U.S. at 204; Amicus Resp. Br. 23. And of course, Congress created § 1983 to provide a method of redress for constitutional violations. Taken together, these provisions demonstrate a goal of balancing access to the courts for significant constitutional claims with preventing abuse of the litigation process. Importantly, in the PLRA, Congress gave litigants *three chances* before depriving the litigant the privilege of filing *in forma pauperis*. And, once the litigant has "struck out," he *still may proceed* if he pays the filing fee. *See* 28 U.S.C. § 1915(g). Amicus's efficiency and docket-management rationales, *see* Amicus Resp. Br. 23, create a rule where *any* omission of a prior lawsuit allows district courts to extinguish a prisoner's claim without notice on *their first attempt*, all before merit review.[6] This rule runs afoul of

[6] Amicus also asserts that district courts must be able to wield the harsh sanction of dismissal with prejudice because "the district court cannot rely on the usual adversarial system of justice" in assessing IFP eligibility. Amicus Resp. Br. 22. But this assertion is simply not true. In fact, if the district court itself is unable to fully ascertain a plaintiff's strike history, one can be sure that a defendant can and will bring it to the court's attention via a motion to dismiss or otherwise. *See, e.g.*, *Fleming v. United States*, 538 F. App'x 423, 424 (5th Cir. 2013) (defendant moved to dismiss on the grounds that the plaintiff had struck out and was not eligible to proceed *in forma pauperis*); *Polanco v. Hopkins*, 510 F.3d 152, 154 (2d Cir. 2007) (same).

the fundamental purposes of these two statutes: to permit courts to consider meritorious constitutional claims.

Finally, there is something patently unfair about a local rule that foists a court's statutorily imposed responsibilities onto parties and then permits the court to use that rule to their detriment. As an example, a district court is obligated when sentencing a defendant to consider "the history and characteristics of the defendant." *See* 18 U.S.C. § 3553(a). Imagine a court adopts a local rule that says: "You must alert the district court to any characteristics or history relevant to your sentencing in your sentencing memorandum," even though much of this information would also be available in the Presentence Investigation Report. If the defendant fails to submit this information, then the local rule permits the district court to refuse to consider any § 3553(a) factors in defendant's favor that would warrant a lower sentence. Just as this procedure would not pass muster, nor does a regime that extinguishes a prisoner-plaintiff's non-merit-reviewed claims simply because the plaintiff did not adequately perform the district court's own task to its satisfaction.

B. *Amicus's watered-down standard departs from this Court's fraud jurisprudence.*

Amicus's approach, where a court can "infer" intentionality and materiality from the simple fact of filing the warning-laden complaint form, Amicus Resp. Br. 15–16, is at odds with this Court's fraud cases. Different courts use different terms to describe the conduct at issue here. *Compare Hoskins v. Dart*, No. 10 C 0677, 2010 WL 11545927, at *2 (N.D. Ill. Feb. 26, 2010), *aff'd*, 633 F.3d 541 (7th Cir. 2011)

(Manning, J.) (finding that Hoskins committed "fraud on the court" without articulating the standard for fraud); *with Hoskins v. Dart*, 633 F.3d 541, 543 (7th Cir. 2011) (applying the materiality and intentionality elements of common law fraud, and labeling the conduct fraudulent but not using the term "fraud on the court"); *Allison v. Phillips*, No. 14 C 6925, 2015 WL 3505181, at *1–2 (N.D. Ill. June 2, 2015) (framing the question as "whether Plaintiff's complaint should be dismissed for committing fraud on the Court pursuant to *Hoskins*"); *Sloan v. Lesza*, 181 F.3d 857, 859 (7th Cir. 1999) (stating that the plaintiff "committed a fraud on the federal judiciary").[7]

Regardless of whether the doctrine originates in common law fraud or from Fed. R. Civ. P. 60, fraud is a serious matter, such that parties leveling the claim against each other must plead with specificity, Fed. R. Civ. P. 9(b), and courts determining "fraud on the court" must take care to ensure its elements are met. *See, e.g.*, *Citizens for Appropriate Rural Rds. v. Foxx*, 815 F.3d 1068, 1080 (7th Cir. 2016) ("Fraud on the court occurs only in the most extraordinary and egregious circumstances and relates to conduct that might be thought to corrupt the judicial process itself, such as where a party bribes a judge or inserts bogus documents into the record. A party alleging fraud on the court must support their allegations with a meaningful evidentiary showing.") (internal citations omitted); *Old Republic Ins. Co. v. Ness*, No. 03 C 5238, 2005 WL 6525249, at *6 (N.D. Ill. July 22, 2005)

[7] Typically, "fraud on the court" is used in the relief-from-judgment context under Federal Rule of Civil Procedure 60. *See, e.g.*, *Wickens v. Shell Oil Co.*, 620 F.3d 747, 758 (7th Cir. 2010). The concept, however, has seemingly seeped into this prior-litigation-disclosure context.

(Manning, J.) (stating that "given the serious nature of the accusation of a fraud on the court, the court is not willing to dismiss a case as a sanction . . . unless it has been provided with clear and convincing evidence that such a fraud has occurred"); *Dotson v. Bravo*, 202 F.R.D. 559, 569 (N.D. Ill. 2001), *aff'd*, 321 F.3d 663 (7th Cir. 2003) (defining "fraud on the court" as a fraud that "seriously affects the integrity of the normal process of adjudication" and "is more serious than fraud on the litigants"). In the typical case of fraud on the court, dismissal is not appropriate unless the court first finds "willfulness, bad faith, or any fault." *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016). Amicus, however, downplays the serious nature of fraud on the court, reading *Hoskins* to allow dismissal with prejudice without any such finding of willfulness, bad faith, or fault so long as the court indicates that it considered a lesser sanction. Amicus Resp. Br. 27. If Amicus is correct, then *Hoskins* stands as a stark outlier in this Court's own precedent.

When viewed through the proper lens, Mr. Johnson's and Mr. Greyer's failures to comply with the court's rule requiring disclosure of all prior litigation do not constitute "fraud on the court" as understood in this circuit. Plaintiff-Appellants' non-disclosures did not "serious[ly] affect[] the integrity of the normal process of adjudication," *Dotson*, 202 F.R.D. at 569, because the district court had equal (if not superior) access to the Plaintiff-Appellants' prior litigation history. Not only do the district courts have access to this information but, as noted above, they have a duty to independently inquire into this information, regardless of what the prisoner lists on his complaint. *See Fourstar*, 875 F.3d at 1152.

C. *Amicus is incorrect that plaintiffs are entitled to no notice or process before a district court dismisses their cases with prejudice.*

As this Court has stated, "[u]nder circumstances where the underlying rules do not include dismissals as a potential sanction for their violation, the need to be aware of the due process consequences of a dismissal for the hapless client . . . is even greater." *Kovilic Const. Co. v. Missbrenner*, 106 F.3d 768, 773 (7th Cir. 1997). This is particularly true here, given that the PLRA does not authorize dismissal for a plaintiff's failure to disclose his prior litigation history and given the absence of a Federal Rule of Civil Procedure providing guidance as to how issues arising under § 1915(g) should be resolved. *See Sanders v. Melvin*, 873 F.3d 957, 962 (7th Cir. 2017) (suggesting that for the time being, disputes regarding § 1915(g) "should be handled the same way judges resolve disputes about jurisdiction or venue, with hearings and findings of fact under Rule 12(b)"). If this Court were to adopt a standard where any omission of a pro se plaintiff's prior litigation on the complaint form constituted fraud, prisoners would be deprived of the process that permits meaningful pursuit of constitutional violations.

Citing to *Hoskins*, Amicus argues that the district court could have dismissed the Plaintiff-Appellants' claims with prejudice without *any* notice beyond the warning on the complaint form. Amicus Resp. Br. 28–29. Thus, Amicus argues, giving the plaintiffs an opportunity to explain themselves went beyond what due process requires. Amicus Resp. Br. 28–29. But this argument ignores the well-established rule that a party may be sanctioned only after it receives an appropriate hearing. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991) ("As long as a party

receives an appropriate hearing . . . the party may be sanctioned for . . . disobeying the court's orders.").

Furthermore, this Court has explicitly noted the necessity of not automatically according a plaintiff's claims the worst possible interpretation in the PLRA context. Rather, when a district court finds a plaintiff's facially plausible statements "fishy," as the district court did here,[8] it must do just a bit more, either via affidavits or a hearing. *See Sanders*, 873 F.3d at 961 (explaining that "[*e*]*verything* a litigant says in support of a claim is self-serving . . . . Yet self-serving statements are not necessarily false; they may be put to the test before being accepted, but they cannot be ignored."). It may well turn out that affidavits and hearings confirm the district court's suspicions, or it may be that a plaintiff can credibly support his original statements in a way that satisfies the court that the omission was a simple mistake. What is not acceptable, however, is for a court to presume intentional bad faith from a plaintiff's justifications and automatically dismiss on that basis. Here, both Plaintiff-Appellants' explanations of innocent mistake were plausible, and should not have been ignored automatically or "swept aside," *id.* at 960, as the district court did here. *See* Greyer Br. App. A.7 (district court stating that "plaintiff has offered no explanation for failing to disclose his

[8] The Amicus is wrong when it asserts that a district court could not disbelieve a plaintiff without holding telephonic hearings first. Amicus Resp. Br. 29–30. As this Court in *Sanders* made clear, additional inquiry is required when the plaintiff's statements are plausible, yet the district court suspects something "fishy" is afoot. 873 F.3d at 961. If the plaintiff's reasons were far-fetched or were conclusively belied by other facts, *i.e.*, proof that another court had informed the plaintiff that he had struck out, as was the case in *Isby v. Brown*, 856 F.3d 508, 519 (7th Cir. 2017), dismissal with prejudice might be appropriate without further inquiry.

prior lawsuits"); Greyer Br. App. A.10 ("[P]laintiff reiterates the same excuses he made in response to the show cause order . . . But plaintiff has not explained why he failed to disclose his prior lawsuits.").

III. The district court's actions here constitute reversible error.

The district court's findings were woefully inadequate—they were wholly absent in Mr. Greyer's case, incorrect in Mr. Johnson's, and in both cases, the district court failed to even mention this Court's intentionality and materiality standards. All of this suggests that it did not actually apply this Court's fraud standard. As a result, this Court should review the district court's actions below *de novo*.[9] *See United States v. Kokenis*, 662 F.3d 919, 928 (7th Cir. 2011). Even if this Court reviews for clear error, however, reversal is nonetheless required. First, as noted above, the quality of findings in the district court are problematic. In *Montaño v. City of Chicago*, this Court found that a district court's findings of perjury was clearly erroneous, after the district court made findings that were "entirely conclusory" and "failed to apply or even identify *any* legal definition of perjury." 535 F.3d 558, 561, 564 (7th Cir. 2008). Amicus suggests the district court's

[9] Amicus implies that this Court's holding in *Montaño v. City of Chicago* stands for the proposition that only clear error review, not *de novo*, is appropriate in this context. Amicus Resp. Br. 42 (referencing Mr. Greyer's *de novo* argument and stating that *Montaño* "demonstrates that the clear error standard of review applies . . ."). In *Montaño*, the plaintiffs argued that this Court should review the factual findings of perjury *de novo* and this Court did not expressly reject that standard. 535 F.3d 558, 564 (7th Cir. 2008). Rather, this Court said it need not reach the question, because the district court's findings failed under the more deferential tests of clear error and abuse of discretion. *Id.* Thus, this Court has not decided this question in this context, but it has recognized more generally that a district court's failure to apply the proper legal standard is reviewed *de novo*. *Kokenis*, 662 F.3d at 928.

findings can be inferred. *See* Amicus Resp. Br. 16 ("This appropriately led to an *inference* that each Plaintiff-Appellant intentionally omitted his litigation history . . .") (emphasis added); Amicus Resp. Br. 34 ("This appropriately led to an *inference* that each Plaintiff-Appellant intentionally omitted his litigation history.") (emphasis added); Amicus Resp. Br. 36 ("[T]he district court at the very least did not clearly err in *inferring* that the omission was intentional.") (emphasis added). But the district court's orders said so little that any such inferences now supplied by Amicus are mere speculation.

Amicus also complains that requiring actual findings would amount to appellate micromanaging of the district courts. Amicus Resp. Br. 42. Yet this Court routinely requires adequate findings and holds the absence of them to be error. *See, e.g.*, *United States v. Loughry*, 660 F.3d 965, 972 (7th Cir. 2011) (pro forma recitation of the Rule 403 balancing test is not sufficient because it "does not allow an appellate court to conduct a proper review of the district court's analysis"); *United States v. Robinson*, 537 F.3d 798, 804 (7th Cir. 2008) (remanding for failure to "formally explain" why the facts supported a sentencing enhancement); *United States v. Schaefer*, 291 F.3d 932, 939 (7th Cir. 2002) (requiring the district court to make findings clearly identifying relevant conduct and explaining how that conduct leads to the sentence); *Cengr v. Fusibond Piping Sys. Inc.*, 135 F.3d 445, 454 (7th Cir. 1998) ("With nothing more to go on, we find that there was to discretion for the district court to abuse—it used none. Once again we reiterate our mandate that district court judges provide at least a modicum of explanation when entering an

award of costs."); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 313 F.2d 864, 865 (7th Cir. 1963) ("The failure of the District Court to make any findings of fact or to state its conclusions of law with respect to the claims asserted by the plaintiff's complaint requires that we reverse as to the judgment of dismissal . . .") (citing Fed. R. Civ. P. 52(a)).

Furthermore, the few statements that the district court actually made run afoul of the clear error standard. This Court reverses if after reviewing the district court's orders, it is left with a definite and firm conviction that a mistake has been made. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). This conviction can be supplied if "the trial judge's interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence." *Furry v. United States*, 712 F.3d 988, 992 (7th Cir. 2013) (internal quotations omitted).

Here, several of the district court's findings for both Plaintiff-Appellants were illogical, internally inconsistent, and contradicted by documents or other extrinsic evidence. With respect to Mr. Greyer, the district court ignored two pieces of extrinsic evidence—Mr. Greyer's motion to show cause and post-dismissal letter to the court. *See* Greyer Br. App. A.4–5, A.8. Both these documents contradict the district court's finding that Mr. Greyer intended to deceive the court, as they explain that Mr. Greyer omitted the cases due to his lack of education, mental illness, and inability to understand what had been written for him. Furthermore, the district court's finding that Mr. Greyer offered "no explanation" for the omission,

see Greyer Br. App. A.7, contradicts the court's recognition that Mr. Greyer provided "excuses" for the omission. *See* Greyer Br. App. A.10. When a litigant responds to a motion to show cause, an "explanation" and "excuse" are one in the same. Lastly, the district court's finding of fraud contradicts the fact that the complaint form used the past participle tense of "have [you] begun," *see* Greyer Br. App. A.1, and one of the two cases Mr. Greyer did not disclose was filed on the same day or shortly after the complaint in this case.

With respect to Mr. Johnson, the district court's finding of fraud contradicted extrinsic evidence when it found that Mr. Johnson failed to disclose a case to which he was never a party. *See* Johnson Br. App. A.10 (district court's order listing *Turner v. Wexford* as one of the cases Mr. Johnson omitted). Because Mr. Johnson never signed the complaint in that case, the court in *Turner* immediately dismissed Mr. Johnson as a plaintiff upon filing. *See* Case No. 13 CV 3072 (C.D. Ill. Mar. 14, 2013). The finding that Mr. Johnson acted fraudulently is also contradicted by documentary evidence, given that Mr. Johnson certified the complaint form with the following statement: "the facts stated in this [c]omplaint are true to the best of my knowledge, information and belief." Johnson R.1. Mr. Johnson did provide his prior litigation history *to the best of his knowledge*—he disclosed eight prior suits and made note on the complaint form of any details he could not remember, Johnson Br. App. A.7 ("N/A Don't Remember"), or was uncertain about by including "???" symbols. Johnson Br. App. A.4–7. Lastly, the district court explained that Mr. Johnson's "significant litigation history informs the court that plaintiff is

experienced in court filing and understands the importance of providing complete information, including information about prior cases" to find fraud. *See* Johnson Br. App. A.13. This finding, however, is built on the logical fallacy of non-sequitur because the conclusion does not necessarily follow from the premise. Even if Mr. Johnson *did* understand the importance of providing complete information (which he did as shown by the volume of information he provided about his eight prior cases and his expressing uncertainty when it existed), it does not follow that any failure to provide information with 100 percent accuracy reflects an intent to deceive.

CONCLUSION

Because this Court could not have intended *Hoskins v. Dart* to establish a per se standard for fraud and because the district court's actions here constitute reversible error, this Court should reverse and remand for the reinstatement of Mr. Greyer's and Mr. Johnson's cases.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,237 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Plaintiff-Appellants, Fabian Greyer and Michael Johnson, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on March 4, 2019, which will send notice of the filing to counsel of record in the case.

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