

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

	§	
	§	
NETSPHERE, INC.,	§	Civil Action No. 3-09CV0988-F
MANILA INDUSTRIES, INC., and	§	
MUNISH KRISHAN,	§	
Plaintiffs.	§	
	§	
	§	
v.	§	
	§	
JEFFREY BARON, and	§	
ONDOVA LIMITED COMPANY,	§	
Defendants.	§	

REPLY IN SUPPORT OF STEPHEN R. COCHELL’S MOTION FOR APPOINTMENT AS COUNSEL FOR JEFF BROWN IN UNDERLYING MATTER

In response to Stephen R. Cochell’s (“Cochell”) Motion for Appointment as Counsel for Jeff Baron, the Receiver launches a fusillade of arguments based on personal *ad hominem* attacks on Mr. Cochell that are grossly inaccurate and untrue. The Receiver’s vitriol underscores the need for Mr. Baron to be represented by an attorney and advocate who will protect his interests.

I. Summary of Argument

As a threshold matter, the Court ordered Jeffrey Baron to retain counsel of choice. [Dkt. 904]. Because Mr. Baron has no access to his funds, counsel filed the instant motion to ensure that the Court approved payment of fees for Mr. Baron’s representation. [Dkt. 960].

The Receiver initially asserts the Court should not appoint Mr. Cochell because it there is no need to appoint counsel because Mr. Schepps has been acting as trial counsel. This argument is flatly contradicted by the Court’s order, which finds that Mr. Schepps is not Mr. Baron’s trial

counsel. [Dkt. 904 at 1 fn. 1]. The Receiver then asserts appointment is premature and unnecessary because the action has been stayed. However, this argument ignores the fact that the Court ordered that Mr. Baron retain counsel to represent him in the underlying suit. It appears that the Court may have stayed the time for responding to the Amended Complaint until the issue of Mr. Baron's representation is resolved. Even *assuming* that the case is stayed for a lengthy period of time, Mr. Baron needs the assistance of counsel to conduct informal, as well as formal discovery to preserve evidence while the case is still relatively fresh.

The Receiver then argues that the Court should reconsider its prior order and refuse to appoint counsel or to reject Mr. Baron's counsel of choice, thereby leaving Mr. Baron without the benefit of trial counsel. Instead of addressing the issues raised by Mr. Cochell regarding the lack of diversity jurisdiction supporting the Netsphere lawsuit, the Receiver attacks Mr. Cochell, alleging that he violated a gag order entered by Judge Hittner in the Stanford criminal proceeding. [Dkt. 979 at 5-6]. Counsel for the Receiver is flat wrong about Mr. Cochell violating a gag order. The Receiver failed to advise the Court of a fact material to this argument. A Motion to Vacate and Set Aside Judge Hittner's Preclusion Order was filed, at which time, it became apparent that a pleading filed by Mr. Cochell had been misquoted by two separate internet news organizations, which misled Judge Hittner into believing that the gag order was violated. [Exhibit A, Dkt. 610, *USA v. Stanford*]. Judge Hittner withdrew the Order removing the sanctions. [Exhibit B, Dkt. 646, *USA v. Stanford*]. In matters involving the reputation of counsel, the Court should not allow any party to smear opposing counsel with inaccurate, false or misleading facts. Either the Receiver set out to mislead this Court, or is guilty of gross negligence in failing to determine whether the order was set aside.

The Receiver further asserts that one of Mr. Cochell's clients, R. Allen Stanford, had no right to file a lawsuit challenging unlawful conduct by the authorities and that, because he filed a lawsuit for a client, he should be disqualified from acting as counsel. *Id.* The Receiver's argument is myopic and short-sighted. It is axiomatic that individuals are entitled to file lawsuits against the Government for redress of wrongs. Counsel for the Receiver should recognize this principle because one of his partners at Gardere Wynn represents, or represented Mr. Stanford in the criminal case before Judge Hittner. The attacks on Mr. Stanford breach a fundamental fiduciary duty, the duty of loyalty. As set out in the first page of the lawsuit, the case was filed to preserve Mr. Stanford's rights and avoid a statute of limitations problem. Barely three weeks later, and after discussion by Mr. Stanford's counsel with the government attorneys, a Notice of Dismissal was filed reserving the right to re-file the case after the criminal trial. The issues raised in the complaint were addressed to Judge Hittner in the criminal case. Regardless of one's opinion about the issues raised in the lawsuit, counsel had a duty to preserve his client's rights.

For whatever reason, the record reflects that Mr. Baron has been unrepresented by *trial* counsel since the beginning of the receivership. The record also reflects that, on May 15, 2012, the Receiver argued that Mr. Baron would probably engage in vexatious litigation if he was not represented by counsel; yet, a month later, the Receiver *flip-flops* and now claims that if counsel is appointed, Mr. Baron will engage in vexatious litigation.¹ [Dkt. 928] (“retaining new counsel would be a step towards ending the receivership in an orderly fashion (contravening Mr. Baron's apparent goal of driving the Receivership into administrative insolvency.”). As set out below,

¹ Counsel does not plan to review the entire file of this case unless there is a need to do so in litigating the underlying lawsuit. From a review of some of the Receiver's pleadings, however, it does not appear that Mr. Baron has engaged in vexatious litigation, but has reportedly hired counsel and allegedly failed to pay them, or objected to their fees. Counsel is not currently in a position to address the merits of these claims.

the Receiver's arguments possess some of the hallmarks of vexatious litigation and are a waste of Mr. Baron's resources.

III. The Receiver's Counsel Omitted Material Facts in his Unsupported Assertions of Sanctionable Conduct by Mr. Cochell.

As this Court knows, vexatious litigators frequently launch personal attacks on opposing counsel to deflect the Court from the real issues in a case, citing facts out of context or even misleading the court by omitting mention of material facts in their pleadings. In some cases, counsel are simply "churning" the file and attempting to create non-existent conflict and discovery disputes. In his Response, the Receiver alleges that Mr. Cochell violated a gag order and was sanctioned by Judge Hittner. However, the Receiver failed to disclose a material fact to this Court----- Judge Hittner's order was vacated.²

The undersigned attorney has never been sanctioned by a court for violating a court order. The Receiver asks: "So, who is Mr. Cochell?" Mr. Cochell has been a practicing attorney since 1979 and served as an Assistant United States Attorney, as a Judge Advocate in the Naval Reserve and also served as Chief Disciplinary Counsel of the Utah State Bar, where he *prosecuted* lawyers who engaged in excessive billing practices, vexatious litigation tactics, defrauded clients and failed to exercise candor and professional responsibility before the courts of that state. Mr. Cochell takes his duty as an officer of the Court seriously, and intends to become thoroughly grounded in the facts and law of this case, and not devolve to bickering and unsupported attacks on counsel for the Receiver.

² The Receiver also makes much of the fact that Mr. Cochell referred to the Receiver as "firing" prior counsel for Mr. Baron. [Dkt. 960 at ¶ 4]. Regardless of word choice, the Receiver did terminate compensation to prior counsel at the inception of the litigation and the attorneys ceased to represent Mr. Baron. [Dkt. 169, Declaration of Sidney Chesnin]

As this Court knows, civility has become a scarce commodity in the legal profession. Counsel for the Receiver did not contact Mr. Cochell or ask about Judge Hittner's order, nor did he review the record to see if the order was challenged and set aside. The concept of civility encompasses the basic idea that one must provide this Court, or any court, of accurate, truthful facts about an attorney before attacking his reputation in a public record. Mr. Golden would, no doubt, expect that counsel exercise diligence before smearing his reputation.³

The facts surrounding the gag order are as follows: Judge Hittner found a violation of a gag order and sanctioned the undersigned attorney based on inaccurate information, and without a third party investigating the allegations prior to issuance of an order. [Dkt. 510, USA v. Stanford] Mr. Cochell was never asked about news articles published by Bloomberg News and Courthouse News Service that *erroneously* attributed public statements to Cochell, which led Judge Hittner to believe there was a violation of the gag order. [Dkt. 612, USA v. Stanford]. Mr. Cochell filed an appropriate motion to vacate and set aside the order. *Id.* Judge Hittner essentially granted the Motion and withdrew the Order. [Dkt. 646, USA v. Stanford]. Counsel for the Receiver, however, failed to investigate this issue before making an allegation that is and was obviously untrue.

Attorneys are expected to represent clients zealously and within the bounds of the law, but they are also expected to act with civility when appearing before the Courts. Civility, in

³ Section III, ¶10 of the Texas Lawyer's Creed was adopted by the Supreme Court of Texas in 1989, and provides: "I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel." (emphasis supplied).

part, dictates *some* sensitivity to checking the facts before make false, untrue as part of an effort to deny counsel appointment in this case. The mark of a vexatious litigator is one who needlessly proliferates pleadings and wastes the Court's time and resources on motions that are unsupported by the law or the facts, and who unfairly smears the reputation of opposing counsel. It is ironic that, in a case purportedly about "vexatious litigation", counsel for the Receiver failed to advise the court that the sanctions against the undersigned counsel were vacated by Judge Hittner. See Rule 3.03, Tex. Disc. Rules of Professional Conduct (Candor to the Tribunal).⁴

IV. Attacking Counsel for Filing a Lawsuit Against Government Agents is Misguided. Moreover, the Receiver Breached His Duty of Loyalty to His Own Client in Making This Argument.

It is axiomatic that citizens have a right to petition their government for redress. The Receiver *suggests* that counsel filed frivolous litigation in an action filed on behalf of Robert Allen Stanford alleging constitutional violations by various SEC and Department of Justice personnel. There is no evidence to support the Receivers' suggestion that the lawsuit was improperly filed. Indeed, the issue was never even raised by the Government in that lawsuit.⁵

There is no question that Mr. Stanford is an unpopular public figure. However, counsel for the Receiver should not impute evil motive to the undersigned counsel for filing a lawsuit for Mr. Stanford where, as here, Mr. Golden's own law firm, Gardere Wynn, represented Mr. Stanford in his criminal case. *United States of America v. Robert Allen Stanford*, 4:09-cr-00342.

⁴ The undersigned counsel concludes that the representation was either calculated, or was the result of gross negligence by counsel for the Receiver.

⁵ The Receiver's reliance on a "commentator's" unsupported opinion in a Bloomberg News article is not helpful, nor is it reliable. As set out in Exhibit A, Bloomberg was partially responsible for misquoting Mr. Cochell, resulting in the issuance of the vacated gag order.

Mark W. Bayer, a partner in Gardere Wynn's Dallas office, is listed as counsel of record for Mr. Stanford in the criminal case. Mr. Golden also practices out of that firm's Dallas office.

Gardere Wynn, through Mr. Golden, breaches its duty of loyalty to Mr. Stanford when it accuses Mr. Stanford of vexatious litigation and further refers to their *own* client as an alleged Ponzi-schemer. Regardless of what one thinks of Mr. Stanford, his *own* lawyers should not be casting their client in an unfavorable light. Every client, including Mr. Stanford, is entitled to loyalty from his attorneys.

The issues of government misconduct in *Stanford v. Korotosh, et.al.*, were subsequently raised by trial counsel in *USA v. Stanford*. In *Korotosh*, there was no finding, or even an allegation of sanctionable conduct for a pleading that was detailed, fact specific and challenged the right of the government to engage in certain types of investigative conduct.⁶ After discussions with Government prosecutors by Stanford's counsel, a Notice of Dismissal was filed stating that Counsel determined that the claims in the case could be preserved through the proceedings in the criminal case. Counsel made it clear that the action was being filed to preserve Mr. Stanford's rights due to running of the statute of limitations. [Dkt. 979, Ex. B at 1 fn.1]. Once it was clear that Mr. Stanford's rights were preserved through the criminal case, counsel filed the Notice of Dismissal without prejudice to Mr. Stanford re-filing the action after his criminal trial was resolved. Thus, the Receiver again fails to mention facts that are material to any allegations about the undersigned counsel.

⁶ The Receiver generally asserts that the defendants in *Korotosh* possessed immunity, which is only partially true. The SEC personnel possessed qualified immunity. The issue of immunity for government prosecutors during the investigative phase of a case is questionable where there is no grand jury investigation, or where prosecutors are acting jointly with civil government lawyers to obtain evidence for purposes of criminal prosecution. Regardless of one's philosophical or judicial view of immunity, the *Korotosh* lawsuit raised legitimate legal and factual issues for a court to decide.

In casting aspersions against Mr. Cochell, Mr. Golden has violated a *fiduciary* duty of loyalty to Mr. Stanford, as Mr. Bayer's fiduciary loyalty to Mr. Stanford is equally binding on other partners of Gardere Wynn, including Mr. Golden.

V. Mr. Baron is Unrepresented by Trial Counsel

The Receiver's argument that Mr. Schepps is Mr. Baron's trial counsel is confusing at best. The Court recently found that Mr. Schepps is not Mr. Baron's trial counsel and ordered Mr. Baron to retain trial counsel. [Dkt. 904 at 1 fn.1]. Even *assuming* that Mr. Schepps was an advocate for a client he represents on appeal, he is apparently unpaid and clearly not representing Mr. Baron as trial counsel. In light of the Court's ruling that Mr. Schepps was not Mr. Baron's trial counsel and ordering Mr. Baron to retain trial counsel for the underlying suit, the Receiver's insistence that Mr. Schepps formally withdraw as trial counsel is without merit.

VI. Mr. Baron Requested Mr. Cochell Act As Counsel of Choice.

Barely a month ago, the Receiver argued that Mr. Baron needed an attorney to eliminate the possibility of vexatious litigation. The Receiver now argues that Mr. Baron does not need a trial attorney and the Court should not appoint Mr. Cochell and pay him for his services. The Receiver's position on appointing trial counsel for Mr. Baron is hopelessly contradictory and appears to support a conclusion that the Receiver would prefer Mr. Baron to be unrepresented and unable to defend his interests.

Mr. Cochell is an attorney and officer of the Court filing a Motion for Appointment as Counsel for a client. The pleading was filed subject to F.R.Civ.P. 11 and was made after full consultation, and at the request of Jeffrey Baron. The Receiver's argument that the Court should require Mr. Baron to file an affidavit is extraordinary and is nothing more than hyperbole.

VII. Conclusion

The Court should not allow any party, including the Receiver, to engage in satellite litigation needlessly smearing the reputation of counsel while: (1) failing to contact counsel prior to filing this motion and discussing their assertions; (2) omitting material facts to the Court that were highly relevant and negate their arguments; and (3) violating their fiduciary duty to another client in their zeal to disqualify Mr. Cochell, and deprive Mr. Baron of his counsel of choice.

Accordingly, Mr. Cochell requests the Court award him reasonable attorney's fees for having to expend four hours of time responding to these spurious allegations. The Court has the inherent power to award such fees and should do so where, as here, counsel has far exceeded the bounds of civility, the facts or the law. Moreover, the Court should not allow Gardere Wynn to bill Mr. Baron's estate for its fees in filing this response.

Very respectfully,

/s/Stephen R. Cochell
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic on June 21, 2011.

/s/ Stephen R. Cochell

