

DISTRICT COURT ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street Centennial, CO 80112	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p style="text-align: center;">Case No. 08CV2659</p> <p style="text-align: center;">Division 202</p>
<p>Plaintiff: STATE OF COLORADO <i>ex rel.</i> JOHN W. SUTHERS, ATTORNEY GENERAL</p> <p>v.</p> <p>Defendants: COLORADO HUMANE SOCIETY & S.P.C.A., INC.; MARY C. WARREN, an individual; ROBERT WARREN, an individual; and STEPHENIE L. GARDNER, an individual</p>	
<p>Ty Gee, #19772 HADDON, MORGAN, MUELLER, JORDAN, MACKEY & FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 Phone: 303.831.7364 Fax: 303.832.2628 E-mail: tgee@hmflaw.com <i>Attorneys for Stephenie L. Gardner</i></p>	
<p style="text-align: center;">Defendant Gardner's Response to the Custodian's Joinder in Plaintiff's Motion for Issuance of Contempt Citation and Order to Show Cause</p>	

Stephenie Gardner, through her attorneys Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C., submits this Response to the Custodian's joinder in plaintiff's "Motion for Issuance of a Contempt Citation and Order to Show Cause upon Defendants Mary Warren, Robert Warren and Stephenie Gardner" (filed Mar. 26, 2009) ("Contempt Motion").

The Custodian styled its joinder as a “*Reply to [the Defendants’] Responses to Motion for Show Cause Order*” (“Joinder”). But in Paragraph 1 of the Joinder, the Custodian states that it “hereby joins in the [Contempt Motion].” That makes the Joinder more like a motion than a “reply.” There would be no need for Ms. Gardner to respond to a simple joinder, but the Custodian makes legal arguments in support of the Contempt Motion that are different from those made by the plaintiff. So Ms. Gardner submits this Response.

1. The objection over who may enforce the Dec. 16 Order is not “moot.”

Ms. Gardner (and the other defendants) has objected to the plaintiff’s attempt to enforce the December 16, 2008, Order, and have argued that the Order must be enforced by the Custodian, not the plaintiff, a party to this litigation. *See* S.Gardner’s Resp. to Contempt Mot., at 11-12; *see also* M.Warren’s Resp. to Contempt Mot., at 2 (filed Apr. 13, 2009).

2. The ostensible purpose of the Custodian’s joinder in the Contempt Motion is to “make[] that objection moot.” Joinder ¶ 1. It does nothing of the kind. As we suggested in Ms. Gardner’s Response to the Contempt Motion, an inherent problem with a party-litigant’s prosecution of a C.R.C.P. 107 proceeding is the temptation to wield contempt as a tool for gaining a strategic litigation advantage rather than as a means of vindicating a court order. *See* S.Gardner’s Resp., at 11-12. The interests of the litigant in a contempt proceeding, in short, will almost always be broader than the interests of the Court.

3. Plaintiff's Contempt Motion has the earmarks of the broader—improper—type of contempt proceeding. Paragraph 10.f. of the Dec. 16 Order explicitly provides that “[i]f the *Custodian* determines” that a person is in violation of, for example, the turn-over provisions of Paragraph 10, “the *Custodian* is instructed to give written notice” to the person; and if the person remains non-compliant, “the *Custodian shall file*” a contempt motion. (Emphasis supplied.) Here, the *Custodian* purportedly found a violation. Rather than file a contempt motion, however, the *Custodian* joined forces with the *plaintiff* and—contrary to Paragraph 10.f.'s mandatory language—invited the *plaintiff* to file the contempt motion.

4. If the plaintiff's Contempt Motion were narrow, one that a detached custodian focused on its specific court-imposed duties would file, there would be nothing to complain about. But it is not. Plaintiff's Motion is a kitchen-sink, baby-and-bath-water contempt motion. It is unnecessary to restate the arguments of Ms. Gardner's Response, but it is worth reexamining the factual gulf between the Contempt Motion and the *Custodian's* affidavit in support. The Motion makes sweeping allegations of “the *defendants*” violations of the Dec. 16 Order, but it makes no allegations about Ms. Gardner specifically.

5. More importantly, the *Custodian's* affidavit does not support plaintiff's argument that Ms. Gardner engaged in these alleged violations of the Order. By way of example, plaintiff alleged that *all* the “Individual Defendants” failed to provide “a copy

of a lease.” Contempt Mot., at 3. Nowhere does the Custodian’s affidavit state that Ms. Gardner ever had possession of any lease or that he believed she possessed and failed to turn over the lease. As another example, plaintiff alleged that *all* the “Individual Defendants” have “ignored” the Custodian’s requests for financial documents. *Id.* at 5. Yet, nowhere does the Custodian’s affidavit state that Ms. Gardner ever possessed the requested financial documents, or possesses and failed to turn them over.

6. The point is this: The Custodian swore an oath to act as an officer of the Court, not as an agent of the plaintiff. *See* Oath of Custodian (filed Dec. 16, 2008). It owes a duty to obey court orders, and to enforce them only to the extent they need enforcement, not to use its enforcement duties and powers to serve the interests of one litigant or to disadvantage another. When the Custodian delegates its authority to a litigant, and joins forces with the litigant, to discharge the Custodian’s duties, it invites the type of contempt motion before the Court now—one that makes scattergun allegations and requests which are unsupported by the facts the Custodian can support under oath.

7. For the Custodian to say that the question of who should enforce the Dec. 16 Order is moot because it has “joined” the plaintiff’s Contempt Motion is to fail to understand the problem. We did not need the Custodian’s “joinder” to see that the Custodian already *had joined* the plaintiff in an objectionable way—in a way that

undermines the Custodian's independence and neutrality. That is the problem. It is not made moot by a formal "joinder."

8. **Whether this is an *in rem* proceeding is irrelevant.** The Custodian argues that in an *in rem* proceeding, "any party to the case may seek to enforce rights regarding the *res*. Whether that is true or not (the Custodian cites no authority) is hardly relevant. The parties stipulated to an order requiring the *Custodian* to bring any contempt motion. The Court approved and entered that Order. The Custodian chose not to comply.

9. **The Order does not give the Custodian the right to demand testimony.** The Custodian argues that it has "the right" to require that Ms. Gardner provide a sworn affidavit testifying that she does not have custody or possession of assets of the Custodianship Estate. The source of this "right," the Custodian says, is Paragraph 9 of the Order. But there is nothing in Paragraph 9 that confers such a right. That paragraph merely provides that "CHS Officers and Directors shall reasonably cooperate." Assuming *arguendo* this provision applies to Ms. Gardner, nothing in it confers upon the Custodian the right to extract testimony at will.

10. The Custodian argues that it "can, should, and does read something" from Ms. Gardner's alleged "refusal" to provide testimony at the Custodian's request, because "the Fifth Amendment . . . does not apply in this civil case." Joinder ¶ 4. As an initial matter, the Custodian is upside down on the breadth of the right against self-incrimination. *See, e.g., Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) ("[The

Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”) (footnotes omitted). Regardless, this is no longer a “civil case.” The plaintiff, with the active assistance and participation of the Custodian, has converted this into a criminal contempt proceeding. *See* Contempt Mot., at 6.

11. In this contempt proceeding, whether the Custodian “can, should and does read something” into a refusal to give testimony upon demand amounts to a trifle. The relevant question is whether the Dec. 16 Order “clear[ly] and specific[ally]”¹ confers upon the Custodian a right to demand testimony such that its “refusal” is ground for criminal contempt. That case has not been made.

12. The Custodian’s final argument is that Ms. Gardner’s execution of an affidavit at the Custodian’s request “would be moot if this Court were to grant the State’s request for an evidentiary hearing wherein [she] could be asked the same questions under oath.” Joinder ¶ 5. It is axiomatic that if the Dec. 16 Order does not authorize the Custodian to demand testimony, the Custodian cannot circumvent its lack of authority by farming out a contempt motion for the purpose of securing “an evidentiary hearing” so that the Custodian and plaintiff can tag-team to elicit testimony from the plaintiff’s adversaries.

¹*Pounders v. Watson*, 521 U.S. 982, 991 (1997).

Dated: May 7, 2009.

Respectfully submitted,

s/ Ty Gee

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Certificate of Service: I certify that on May 7, 2009, a copy of the foregoing *Defendant Gardner's Response to the Custodian's Joinder in Plaintiff's Motion for Issuance of Contempt Citation and Order to Show Cause* was served via LexisNexis File & Serve upon the following:

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