

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S. Potomac Street Centennial, Colorado 80112 Phone: 303-649-6355	▲ COURT USE ONLY ▲
STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL, Plaintiff, v. COLORADO HUMANE SOCIETY & S.P.C.A., INC.;; MARY C. WARREN, an individual; ROBERT WARREN, an individual; and STEPHANIE L. GARDNER, an individual; Defendants.	
Attorney for Defendant Mary C. Warren: Fredric M. Winocur, No. 22112 R. Livingston Keithley, No. 35786 KAMLET SHEPHERD & REICHERT, LLP Address: 1515 Arapahoe Street Tower I, Suite 1600 Denver, CO 80202 Phone No.: 303-825-4200 Fax No.: 303-825-1185 E-mail: fwinocur@ksrlaw.com	Case No. 2008 CV 2659 Division: 404
DEFENDANT MARY C. WARREN’S RESPONSE TO PLAINTIFF’S MOTION FOR ISSUANCE OF CONTEMPT CITATION AND ORDER TO SHOW CAUSE UPON DEFENDANTS MARY WARREN, ROBERT WARREN AND STEPHENIE GARDNER	

COMES NOW, Defendant Mary C. Warren (“Mrs. Warren”), by and through her undersigned counsel Kamlet Shepherd & Reichert, LLP, and hereby files her Response opposing Plaintiff’s Motion for Issuance of a Contempt Citation and Order to Show Cause (“Motion”), and states as follows:

INTRODUCTION

Plaintiff’s Motion should be rejected because it is entirely based upon alleged conduct that pre-dates this Court’s Order Appointing Custodian of December 16, 2008 (the “Custodial Order”), and it fundamentally misconstrues the scope of the Custodian’s power under the

Custodial Order. Additionally, Plaintiff lacks authority under the Custodial Order to seek a contempt citation. Further, Plaintiff's motion was filed without first conferring with opposing counsel. For all of these reasons, the Plaintiff's motion for the issuance of a contempt citation should be denied.

ARGUMENT

I. Plaintiff has no authority to seek contempt sanctions against Defendants.

As an initial matter, this Court should reject Plaintiff's Motion because Plaintiff has no authority to move for contempt sanctions under the express terms of the Custodial Order. Instead, only the Custodian has such authority. Specifically, paragraph 10(f) of the Order states that:

If the Custodian determines, after reasonable inquiry, that a person or entity is in violation of the provisions of this Paragraph 10, the Custodian is instructed to give written notice thereof to the person or entity violating the provisions of this Paragraph 10, with a copy of this Order attached, demanding turnover of CHS Assets. If the person or entity in possession or control of CHS Assets fails or refuses to turnover any CHS Assets after receiving notice, the Custodian shall file a Request for an Order to Show Cause with this Court[.]

(emphasis added). The Custodial Order was stipulated by Plaintiff and Defendants. Plaintiff reserved no right to oversee the actions of the Custodian or Defendants, separate from the claims already asserted against Defendants in the Complaint.

The Motion and the Custodian's affidavit attached thereto do not indicate that the Custodian followed the provisions of Paragraph 10(f) at all. The Motion is not brought by the Custodian (who is represented by counsel before this Court). Nor did the Custodian give proper written notice of any violation to Defendants prior to the time the Motion was filed.

II. Plaintiff failed to confer with Defendants as required by C.R.C.P. 121 § 1-15(8) prior to filing the Motion.

Plaintiff failed to confer at all with Defendants in good faith prior to filing his Motion. C.R.C.P. 121 § 1-15(8) ("Moving counsel **shall confer** with opposing counsel before filing a motion. The motion shall, at the beginning, contain a certification that the movant **in good faith** has conferred with opposing counsel.")(emphasis added).

The purpose of the duty to confer is to require the parties to attempt to resolve a dispute before incurring the expense of filing a motion and before requiring the court to expend judicial resources to address the issue. *See* Committee Comment to C.R.C.P. 121 ("moving counsel should confer with opposing counsel before filing a motion to attempt to work out the difference prompting the motion"); *accord Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 635 (D.Colo. 2003)(addressing similar local federal rule 7.1(A), which requires parties to confer prior to any motion other than a motion under Rule 12 or 56, and denying Motion to Compel for failing to confer); *Roth v. Green*, 466 F.3d 1179, 1190 (10th Cir. 2006)(finding duty to confer satisfied following numerous written correspondences between counsel concerning merit of claims, and

warning that they would seek sanctions if deficiencies were not remedied). As further explained in *Hoelzel*:

[t]he language of [the duty to confer] is important. It requires that a moving party, before filing a motion, confer or make a reasonable effort to confer; the requirement is not satisfied by a party making a demand for compliance. To confer means “to hold a conference; compare views; consult together.” The American Heritage Dictionary of the English Language 278-79 (Ninth Printing 1971). The rule is not satisfied by one party sending a single e-mail to another party, and particularly not where, as here, the e-mail merely indicates an intention to file a motion to compel and does not suggest any negotiation or compromise. Nor, in my view, would a single letter or a single voice message satisfy the requirements of Rule 7.1A. [*Pulsecard, Inc. v. Discover Card Services, Inc.*, [168 F.R.D. 295, 302 (D.Kan. 1996)]. Rather, to satisfy the requirements of [the duty to confer], the parties must hold a conference, possibly through the exchange of correspondence but preferably through person-to-person telephone calls or face-to-face meetings, and must compare views and attempt to reach an agreement, including by compromise if appropriate.

Hoelzel, supra, 214 F.R.D. at 635-36. Prior to 2005, the requirement to confer was permissive, see *In re Marriage of Cyr*, 186 P.3d 88, 95-96 (Colo. App. 2008)(noting that, under permissive requirement in effect prior to 2005, there was no requirement to confer prior to filing Rule 107 Motion for Contempt Citation). Effective October 20, 2005, however, C.R.C.P. 121 § 1-15(8) requires that counsel confer prior to filing any motions.

Here, Plaintiff made no attempt to confer with Defendants, and gave no prior notice that he intended to seek sanctions for what he alleges are violations of this Court’s order. As noted below, had Plaintiff attempted to confer, the parties could have initially discussed the relative merits of Plaintiff’s position, and constructively attempted in good faith to resolve the problem. Rather than conferring, however, Plaintiff simply drafted and filed a motion of his own accord, without notice or prior conferral as required.

III. Plaintiff’s request for sanctions should be rejected, because it improperly extends the scope of the Custodial Order.

Plaintiff overinflates the scope of the Custodial Order, and is seeking sanctions for actions that pre-date the Order, or are otherwise completely intertwined with the merits of the underlying Complaint generally. Plaintiff should not be permitted to conduct discovery under the ruse of a contempt action.

A. The Custodian has no legal authority to demand affidavits from Defendants or to impose a burden of proof upon Defendants.

One of the fundamental premises underpinning Plaintiff’s Motion are allegations that Defendants have failed to sign various affidavits demanded by the Custodian, and therefore they are in breach of the Custodial Order. See Motion at 4 (Defendants have not signed affidavits that

they have turned over documents and CHS Assets). However, the Custodian is not empowered to compel affidavits.

The powers and duties of the Custodian are described in the Custodial Order. *See* Custodial Order at ¶¶ 5 (Powers of Custodian), 6 (Duties of Custodian); *see also* C.R.S. § 7-134-303(3); C.R.S. § 7-114-303(3) (concerning appointment of custodian for a for-profit corporation). Nowhere is there the power to compel an affidavit from anyone, seeking an attestation under penalty of perjury concerning the assets of CHS. If the Custodian believes that another individual (whether Defendants or otherwise) is in possession of CHS Assets, he is empowered to institute proper legal action for a determination of that ownership dispute. *See* Custodial Order at ¶ 5(t) (Custodian can institute legal actions to collect accounts and debts, and protect Custodianship Estate); ¶ 10(f) (Custodian can petition Court for Order to Show Cause when CHS Assets not rightfully turned over, after written notice).

The argument that the Custodian can compel affidavits improperly shifts the burden upon an individual to prove he or she is in compliance with the Custodial Order, rather than placing the burden upon the Custodian to prove someone is not in compliance.

Further, the making of an affidavit is a voluntary act, and cannot be compelled in absence of a statute authorizing such procedure. *Thatcher v. Darr*, 27 Wyo. 452, 199 P. 938, 942 (Wyo. 1921); *see Otani v. District Court*, 662 P.2d 1088, 1090 (Colo. 1983)(acknowledgment section of affidavit is to firmly establish that affidavit was executed voluntarily by the person signing it); *see also* 13 D. Knapp Colo. Methods of Practice § 108.1 (2d ed. through 2009)(“An affidavit is a voluntary written statement sworn or affirmed to before someone authorized to administer an oath or affirmation.”).

Any argument that Defendants are subject to contempt of court for refusing to sign a voluntary affidavit is contrary to law and the Custodial Order, and should be rejected. By definition, such a threat would render meaningless the voluntary nature of an affidavit. While Defendants are fully aware of their duty not to interfere with the Custodian, *see* Custodial Order at ¶ 12(h), this duty does not extend to any requirement that Defendants comply with every demand from the Custodian, especially when that demand is not grounded in law.

B. Plaintiff improperly seeks sanctions for actions that pre-date the Order.

In the Motion, Plaintiff alleges that sanctions are proper against Mrs. Warren for allegedly “tampering with financial documents shortly after the Attorney General filed his Complaint and Motion for Appointment of Custodian.” *See* Motion at 4. Based upon the two affidavits attached to the Motion as Exhibits B and C, Plaintiff seeks sanctions against Mrs. Warren based upon actions concerning movement of documents between December 11 and December 13, 2008.

This Court entered its Custodial Order on December 16, 2008. As a matter of law, Mrs. Warren cannot be held in contempt of an Order that was not in force at the time of the alleged conduct. *In re Marriage of Zebedee*, 778 P.2d 694, 697 (Colo. App. 1988); *see e.g. In re Marriage of Cyr*, 186 P.3d 88, 91 (Colo. App. 2008)(duty to comply with court order arises only after order is entered, and party is made aware of the order).

C. The Custodian is not entitled to demand production of documents concerning real property that is not part of the CHS Custodial Estate.

Plaintiff seeks sanctions against Defendants, alleging they have violated the Custodial Order by refusing to produce a copy of a private lease for real property adjoining, but not part of, the CHS leasehold. Plaintiff's argument is without merit, because CHS (and the Custodian) have no legal claim to the real property, and have no right to inspect the Warrens' private lease.

CHS had leased certain property from Dr. Pat Sokolof for use as an animal clinic, located at 4704 W. Bowles Avenue in Littleton, Colorado.¹ See Lease dated June 1, 2008, attached as Exhibit 6 to to Exhibit A of Motion (the "CHS Lease"). In the CHS Lease, CHS specifically rented, for a price of \$3,000 per month on a one-year basis, the following real property:

"Those areas of the Vet Clinic Building including:

1. Waiting Room
2. Exam Room 1
3. Exam Room 2
4. Pharmacy Area
5. Grooming/Iso Area
6. Laundry & Lab Area
7. Surgery Prep.
8. Surgery Room
9. Large Treatment/Iso Room
10. Darkroom/Storage Closet
11. The Parking Area between the Main Door and the N/E Corner of the Yellow Barn area. Ingress and egress are restricted to the driveway situated to the west of the residence."

CHS Lease at ¶¶ 1 - 3, and Exhibit A thereto. The CHS Lease clearly identified specific rooms within the particular building that were leased to CHS, to the exclusion of other rooms within the same building that were not.

Upon entry of the Custodial Order, the Custodian was made aware of other areas at 4704 W. Bowles Avenue, both within and outside of the building, which were not part of the CHS Lease. See Block Affidavit at ¶ 25 (discussing the "portion of the Clinic building leased to [CHS] and the portion Dr. Sokolof reported to be leased to the Warrens"). In his affidavit, the Custodian recounts how he has repeatedly demanded a copy of a lease concerning property which he admits is not subject to his jurisdiction. See Block Affidavit at ¶ 27-29; Motion at 3-4.

Under the terms of the Custodial Order, the Custodian is only empowered to seek control over property of CHS. See Custodial Order at ¶ 5 (defining "CHS Assets"). And, Defendants are only required to turn over books and records related to CHS Assets. See Custodial Order at ¶ 10(a). There is simply no authority for the Custodian to demand a document or record related to property that is, without question, not a CHS Asset.

¹ It is Mrs. Warren's understanding that the Custodian has terminated CHS' Lease with Dr. Sokolof, and in fact has abandoned the premises.

D. The Warrens were entitled to retrieve their personal property from adjacent land, without improper interference by the Custodian.

Plaintiff further alleges that sanctions are proper against Defendants because they retrieved their personal horses before providing “sufficient” proof of ownership to the Custodian. *See* Motion at 4. This argument is groundless, frivolous, and arguably vexatious.

First and foremost, the horses were never located on CHS property. Rather, they were boarded on private land adjacent to the CHS property, and therefore not subject to the Custodial Order.

Second, Plaintiff admits that the horses belong to Mrs. Warren. *See* Steven Day Affidavit, attached to Motion as Exhibit C, at ¶ 4 (referencing “Ms. Warren’s three horses that she currently keeps at Bellflower Farms’ stables.”). Plaintiff submits no evidence that the horses were somehow CHS property subject to the Custodial Order.

Third, because the horses were not subject to the Custodial Order in the first instance, any alleged formatting deficiency in an affidavit regarding their ownership is moot.²

E. The Custodian is not a court-appointed investigator for Plaintiff, and has no duty or authority to investigate past transactions of CHS under penalty of contempt.

The final issue raised by Plaintiff concerns certain accounting records related to donations made to CHS through PayPal.com, an online money transfer website. Specifically, it appears that Plaintiff seeks sanctions because Mr. Warren has not provided sufficient documentation to the Custodian concerning an accounting of donations to the CHS PayPal sites.

Under the Custodial Order, Defendants were only required to give the Custodian “usernames and passwords required for access to any CHS accounts.” *See* Custodial Order at ¶ 10(a). Defendants provided Custodian with access to the accounts as required. Defendants were not required to provide any “accounting” to Custodian.

Moreover, this issue is so intertwined with Plaintiff’s underlying Complaint, that it cannot be a proper basis for contempt sanctions now. Plaintiff alleges in the Complaint *ad nauseum* that the Warrens have misappropriated donated funds. *See e.g.* Complaint at ¶¶ 53-62; 119-136. The Complaint then specifically seeks a “full and complete accounting of CHS assets” as part of its prayer for relief. Complaint at 25. The allegations concerning the PayPal accounts, and any accounting thereof, will form the substance of the litigation on the merits of the Complaint. Plaintiff’s Motion puts the cart before the horse.

² Although not required, Mr. and Mrs. Warren elected to provide the Custodian a duly notarized affidavit of ownership as a gesture of good will and to avoid unnecessary conflict. The Custodian nevertheless rejected it as insufficient in form, apparently because one notary witnessed both signatures. Despite the legal sufficiency of this first affidavit, the Custodian apparently preferred the affidavit contain two separate notary stamps; one for each signature. When this alleged “defect” was brought to the attention of undersigned counsel’s paralegal, another affidavit was emailed to the Custodian within the hour.

Similarly, Plaintiff seeks contempt sanctions against Defendants because they have not provided the Custodian with sufficient documentation “to justify” certain expense reports pre-dating the Custodial Order. *See* Motion at 3. The Custodial Order does not empower the Custodian to investigate the past transactions of CHS, or otherwise continue the Plaintiff’s eighteen-month investigation into how the Warrens ran CHS. *See* Custodial Order at ¶¶ 5-6. Rather, the Custodial Order only empowered the Custodian to pick up where the Warrens left off, and continue to run CHS as a going concern until there may be a final hearing on the merits. *See* Custodial Order at 2 (Court has power under C.R.S. § 7-134-302(3) to appoint a custodian *pendente lite* to “carry on the activities of the nonprofit corporation until a full hearing is held”); *compare* C.R.S. § 7-134-303(3) (powers of receiver to dispose of property and sue and defend) *with* C.R.S. § 7-134-303(4) (duty of custodian is to exercise all of the powers of the nonprofit corporation to the extent necessary to manage the affairs of the nonprofit corporation).

Plaintiff points to no facts that Defendants have violated the terms of the Custodial Order; rather, Plaintiff’s Motion is only grounded in Defendants’ resistance to the Custodian’s continual demands for additional documentation and sworn statements to which he is not entitled as a matter of law.

IV. Mrs. Warren reserves all rights under C.R.C.P. 107 and Colorado law should this Court choose to issue a Contempt Citation.

Under C.R.C.P. 107, there is no explicit requirement that an alleged contemnor respond to a Motion for issuance of a citation under that Rule. For procedural clarity, however, Mrs. Warren submits this Response prior to the Court’s issuance of a contempt citation. Because this would be an indirect contempt proceeding seeking punitive sanctions, Defendants are entitled to certain rights and procedures as identified in C.R.C.P. 107(d)(1) and (2), and Defendants expressly reserve all such rights should this Court decided to issue a citation to appear and show cause.

CONCLUSION

Defendants have complied with the Custodial Order. The Custodian has made demands, however, that go above and beyond the scope of the Custodial Order. The Custodian is not a Court-appointed investigator for the Plaintiff to further elicit testimony and compel production of documents. The Custodian was appointed by this Court to take control of CHS and continue running it as a going concern, until a final trial on the merits of Plaintiff’s claims can be conducted. This Court’s Custodial Order was specifically tailored to give direction about how the Custodian was to take control of all of CHS’s current Assets and move the company forward. There was no instruction to the Custodian to investigate past actions by Defendants in running CHS, or to otherwise seek to compel production of documents supporting those past actions. Plaintiff’s Motion fails because it does not establish any actual violations of the Custodial Order; rather, Plaintiff’s Motion only seeks to establish that Defendants have not been cooperative with invasive and unwarranted requests from the Custodian. This is not a violation of the Court’s Custodial Order, and the issuance of a contempt citation is unwarranted.

Respectfully submitted this 13th day of April, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of April, 2009, service of the foregoing **DEFENDANT MARY C. WARREN'S RESPONSE TO PLAINTIFF'S MOTION FOR ISSUANCE OF CONTEMPT CITATION AND ORDER TO SHOW CAUSE UPON DEFENDANTS MARY WARREN, ROBERT WARREN AND STEPHENIE GARDNER** was effected via LexisNexis, properly addressed to:

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In accord with C.R.C.P. 121 § 1-26(7) & (8) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.

/s/ Livingston Keithley