NO ARGUMENT DATE SET
No. 12-7100

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TY CLEVENGER,

Appellant

v.

WILLIAM C. CARTINHOUR, JR.

Appellee.

On appeal from the United States District Court
for the District of Columbia
D.D.C. Case No. 11-cv-1919 (ESH)

APPELLANT'S BRIEF

Ty Clevenger
1095 Meadow Hill Drive
Lavon, Texas 75166
(979) 985-5289
(979) 530-9523 (fax)
Appellant Pro Se

Circuit Rule 28(a)(1)
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Wade Robertson,

William C. Cartinhour, Jr.,

Michael Bramnick,

James G. Dattaro,

Neil Gurvitch,

Patrick J. Kearney,

Carlton T. Obecny,

Andrew R. Polott,

H. Mark Rabin,

Albert Schibani,

Robert S. Selzer,

Elyse L. Strickland,

Tanja Milicevic (a.k.a. Tanja Popovic)

Aleksandar Popovic

Vesna Kustudic

There are no amici.

B. Rulings

The rulings under review consist of the rulings of the United States District Court of the District of Columbia, the Honorable Ellen Segal Huvelle presiding, Dist. Ct. No. 11-cv-01919 (ESH), as follows:

- March 16, 2012 "Memorandum Opinion & Order" (Doc. No. 94)
- **August 10, 2012 "Memorandum Opinion" (Doc. No. 116)**
- August 10, 2012 "Order" (Doc. No. 117)
- August 30, 2012 "Memorandum Opinion & Order" (Doc. No. 121)
- September 27, 2012 "Memorandum Opinion & Order" (Doc. No. 127)
- September 27, 2012 "Order" (Doc. No. 128)

C. Related Cases

Pursuant to Circuit Rule 28 (c), Appellant submits the following:

1) This case was not previously before this court or any other court as defined by Circuit Rule 28(c).

2) No other related cases are pending in this court or in any other court.

3) A prior case before this Court-- D.C. U.S.C.A. Case No. 11-7026 (consolidated with 11-7076)—involved the Appellant and one of the Defendants/Appellees in this case (William Cartinhour). None of the other thirteen Defendants/Appellees were parties. There is, however, some factual overlap.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291. The district court granted a motion to dismiss on behalf of the Defendants and entered an order dismissing this case with prejudice on March 16, 2012. (Appx. 2:712). The Appellant then filed a motion for reconsideration of that order of dismissal on April 13, 2012. (Appx. 2:780-3:783). Thereafter, on May 7, 2012, the district court issued an order granting in part, and denying in part Appellant's motion for reconsideration. (Appx. 3:1015-1017). Meanwhile, the district court entered an order on August 10, 2012 sanctioning the Appellant. (Appx. 3:1051). The Appellant filed a timely motion to amend / correct the sanctions order pursuant to Fed. R. Civ. P. 59 on September 7, 2012 (Appx. 1104-1153), and another Rule 59 motion on September 24, 2012 to correct the August 30, 2012 order setting the sanctions amount. (Appx. 3:1159-1162). Both motions were denied on September 27, 2012 (Appx. 3:1163-1165), and the Appellant filed a timely notice of appeal the next day. (Appx. 3:1166).

The district court had jurisdiction under 28 U.S.C. § 1331 because the Plaintiff brought federal claims, and further under 28 US.C. §1332 because there was complete diversity of citizenship between the parties, and the amount in controversy exceeded $75,000 exclusive of interest and costs.

TABLE OF AUTHORITIES

CASES

STATUTES

Federal

STATEMENT OF THE ISSUES

1. The Appellant did not multiply proceedings unreasonably or vexatiously, therefore the district court had no basis for awarding sanctions under 28 U.S.C. §1927.

   (a) The Appellant did not act unreasonably or vexatiously merely because he sought a stay rather than dismissal.

   (b) The presiding judge lacked authority to second-guess another judge and punish conduct that occurred in the other judge's court.

   (c) The Appellant was denied due process because he was not afforded adequate notice of his allegedly unreasonable or vexatious acts.

   (d) The Defendants, not the Appellant, are responsible for the multiplication of proceedings and the resulting costs.

   (e) The Appellant stated legitimate claims on behalf of the Plaintiff.

2. The lower court erred by refusing to consider counsel's lack of authority, and by refusing to permit discovery related to counsel's authority.

3. The presiding judge never should have assigned herself to the present case, and her failure to disqualify herself violated the Due Process Clause as well as the recusal statutes.

STANDARD OF REVIEW

A trial court's award of sanctions is generally reviewed for an abuse of discretion. *U.S. v. Wallace*, 964 F.2d 1214, 1217 (D.C. Cir. 1992). However, a finding of bad faith is reviewed for clear error, *id.*, while any legal conclusions underlying the sanction are reviewed de novo:

> [A] "district court abuses its discretion if it did not apply the correct legal standard ... or if it misapprehended the underlying substantive law." *Kickapoo Tribe v. Babbitt,* 43 F.3d 1491, 1497 (D.C.Cir.1995). In such instances the court must "examine *de novo* whether the district court applied the correct legal standard." *Brayton,* 641 F.3d at 524 (citing *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 713 (D.C.Cir.2001)).

Conservation Force v. Salazar, 699 F.3d 538, 542 (D.C. Cir. 2012). A district court's refusal to compel counsel to show authority is reviewed for an abuse of discretion in this circuit, as is its refusal to permit discovery. *See Thrift Depositors of America, Inc. v. Office of Thrift Supervision*, 1996 WL 247971 (D.C. Cir. 1996).[1] Constitutional challenges regarding a right to a fair and impartial trial are reviewed *de novo*, but otherwise the denial of a statutory motion to recuse is reviewed for an abuse of discretion. *See United States v. Roach*, 108 F.3d 1477, 1484-1485 (D.C.Cir.1997), *vacated in part on other grounds*, 136 F.3d 794 (D.C.Cir.1998).

[1] As set forth below, however, it is not entirely clear whether the law of New York, the District of Columbia, or federal common law should govern this question.

STATEMENT OF FACTS

This appeal arises from a $123,802.17 sanction assessed against Ty Clevenger (Appx. 3:1101-1103), the Appellant, who was the attorney for Plaintiff Wade A. Robertson in the case below. (Appx. 1:6). The Plaintiff alleged a racketeering conspiracy involving his former business partner, Defendant William C. Cartinhour, Jr., and some of Defendant Cartinhour's attorneys and associates. *See* Original Complaint (Appx. 1:25-63). The Plaintiff alleged that Defendant Cartinhour and some young Serbian women were operating a fraudulent Serbian charity for purposes of immigration fraud and tax evasion, with help from an attorney, Defendant Albert Schibani. *Id*. The Plaintiff further alleged that some of the Defendants tried to extort money from him, *id*. (Appx. 1:43-45), leading him to file *Wade A. Robertson v. William C. Cartinhour, Jr.*, Case No. 09-cv-01642 (D.D.C.)(herinafter "*Robertson I*"), which was assigned to Judge Ellen S. Huvelle. Defendant Cartinhour filed counter-claims in *Robertson I* against the Plaintiff, and he was represented by three attorneys, Defendants Patrick Kearney, Michael Bramnick, and Carlton Obecny (collectively the "Attorney Defendants"). Original Complaint at ¶¶79-80 (Appx. 1:45). Early in those proceedings, Defendant Cartinhour testified that his signature had been forged onto a fabricated affidavit that had been filed by the Attorney Defendants. *Id*. at ¶¶91-94 (Appx. 1:50-51); *see also* March 26, 2010 Transcript Excerpt (Appx. 1:372-377). The Plaintiff also

learned that the Attorney Defendants suborned perjury and knowingly filed false discovery responses in order to conceal the identity of Larry Ash, an adverse witness. *Id*. at ¶¶82-83, 90, 95-100 (Appx. 1:46, et seq.).

On November 9, 2010, Appellant Ty Clevenger, an attorney, filed this case on behalf of the Plaintiff in the Southern District of New York, where it was assigned to Judge Laura Taylor Swain. *See* Docket (Appx. 1:6-7). On November 17, 2010, the Attorney Defendants asked Judge Huvelle to enjoin the Plaintiff from proceeding with this case, alleging that it interfered with *Robertson I*. *See* Cartinhour's Emergency Motion for Injunction Against Abuse of Federal Courts (Appx. 1:389-390) and supporting memorandum (Appx. 2:391-398). Judge Huvelle denied the request and proceeded with the trial in *Robertson I*. (Appx. 2:418-423). Attorneys Dean Yuzek and Cherish O'Donnell then purported to enter appearances on behalf of Defendant Cartinhour in this case. *See* Docket (Appx. 1:7). Mr. Yuzek admitted to the Appellant on November 30, 2010 that he had not spoken with Defendant Cartinhour, but he said he had been retained by "intermediaries," whom he did not identify. *See* First Motion to Show Authority, 1 n. 1 (authenticating declaration)(Appx. 1:88). The Appellant warned Mr. Yuzek and Ms. O'Donnell, as well as Judge Swain, of his concern that the Attorney Defendants were actually "pulling the strings" rather than Mr. Yuzek's purported client, Defendant Cartinhour. *See, e.g.*, *id.* at 90 and December 28, 2011 E-mail Exchange Among

Ty Clevenger, Dean Yuzek, and Cherish O'Donnell (Appx. 3:884-885). The Appellant warned Mr. Yuzek and Ms. O'Donnell that the Attorney Defendants had a conflict of interest with Defendant Cartinhour, and that it appeared Defendant Kearney was trying to take advantage of Defendant Cartinhour. *Id*. Specifically, Defendant Kearney sabotaged settlement negotiations in *Robertson I* by making settlement of Defendant Cartinhour's claims contingent upon the release of claims against Defendant Kearney and the other Attorney Defendants. *See* Second Motion to Show Authority (Appx. 3:877), referencing attached letter from Patrick Kearney and proposed settlement agreement (Appx. 3:1003-1011). Defendant Kearney even admitted that Defendant Cartinhour had not seen the proposed settlement agreement, though he claimed that Defendant Cartinhour had "approved the major terms." (Appx. 3:1003). Despite repeated requests from the Appellant, neither Mr. Yuzek nor Ms. O'Donnell offered any proof that Defendant Cartinhour had retained them, and Judge Swain never acted on the First Motion to Show Authority.

Judge Huvelle proceeded with the trial in *Robertson I* and, on February 9, 2011, the Appellant tried to enter an appearance in *Robertson I* for the purpose of seeking default judgment based on forgery, fabrication of evidence, perjury, and subornation of perjury by Defendant Cartinhour and/or his attorneys, particularly Defendants Kearney and Bramnick. *See* Transcript (Appx. 2:441-444). Judge Huvelle refused to allow the Appellant to appear in that case, and she refused to

consider the evidence that the Attorney Defendants had committed crimes in her courtroom. *Id*. On February 25, 2011, Judge Huvelle entered judgment in favor of Defendant Cartinhour's counter-claims, awarding him $7 million in damages. *See* August 10, 2012 Memorandum Opinion at 11 (Appx. 3:1045), citing Judgment in *Robertson I*. Mr. Yuzek and Ms. O'Donnell soon demanded that the Appellant dismiss this case, citing the verdict in *Robertson I*. *See* February 24, 2011 Letter from Cherish O'Donnell to Ty Clevenger (Appx. 1031-1033).

Rather than dismiss this case, the Appellant asked Judge Swain on March 16, 2011 to stay the case pending the outcome of appeals in *Robertson I*. *See* Corrected Motion for Stay (Appx. 1:139-142). Seven months later, on October 28, 2011, Judge Swain transferred this case to the D.C. District, *see* Memorandum Order (Appx. 1:243), where it was randomly assigned to Judge John Bates. (Appx. 1:255). The Plaintiffs notified Judge Bates that a related case was pending before Judge Royce Lamberth. *See* Notice of Related Case (Appx. 1:260-261). On November 17, 2011, the Defendants moved to transfer this case to either Judge Huvelle or Judge Lamberth, and they notified the Court that they had conferred with the Plaintiff. *See* Motion to Reassign Case (Appx. 1:262-268). The Defendants informed the court that they had consulted with the Plaintiff, and he consented to transferring the case to Judge Lamberth, but he objected to any transfer to Judge Huvelle. *Id*. at 1:262. Under Local Rule 7(b), the Plaintiff had 14 days to file a

response in opposition that motion. Before he could respond, however, Judge Huvelle used her position as chair of the assignments committee to assign this case to herself. (Appx. 1:269).

The Appellant, on behalf of the Plaintiff, filed a motion to recuse Judge Huvelle on February 12, 2012, as well as a supporting memorandum. (Appx. 1:328-2:487). The Appellant argued, among other things, that Judge Huvelle was conflicted because this case implicated her in judicial misconduct, namely, failing to protect the integrity of the court in *Robertson I* when Defendants Kearney and Bramnick fabricated evidence, forged a signature, suborned perjury, etc. *Id*. In support of that motion, the Appellant submitted transcripts and documents proving that Defendants Kearney and Bramnick had committed the foregoing crimes. *See, e.g.*, Exhibit B (Appx. 1:372-377) and Exhibits I-K (Appx. 2:428-444). Judge Huvelle denied the motion on March 16, 2012 (Appx. 2:672-679). The Defendants presented motions to dismiss this case on January 10, 2012, (Appx. 1:280-281), which the Plaintiff opposed. (Appx. 1:286-327). Judge Huvelle dismissed the case on March 16, 2012 (Appx. 2:712).

On April 13, 2012, Defendants Kearney and Bramnick purported to enter appearances on behalf of their co-defendant, Defendant Cartinhour. (Appx. 2:713-716). On the same day, they moved for sanctions against the Appellant under the authority of 28 U.S.C. §1927, and they submitted billing statements Mr. Yuzek and

Ms. O'Donnell. (Appx. 2:717-779). Those billing statements revealed that the "intermediaries" who retained Mr. Yuzek and Ms. O'Donnell were, in fact, none other than the Attorney Defendants, and *not* Defendant Cartinhour. *Id*. at 2:723.

On May 7, 2012, the Appellant again sought proof that Mr. Yuzek and Ms. O'Donnell had authority to represent Defendant Cartinhour. *See* Second Motion to Show Authority (Appx. 3:865-1013). On August 10, 2012, Judge Huvelle denied that motion, refusing to compel the production of even a retainer agreement, and accusing the Appellant of seeking "burdensome" discovery. (Appx. 1:1049). Judge Huvelle sanctioned the Appellant $123,802.17 (Appx. 3:1101), and the Appellant filed this appeal. (Appx. 3:1166).

ARGUMENT AND AUTHORITIES

Summary of Argument

In essence, Judge Huvelle has sanctioned the Appellant $123,802.17 because he asked Judge Swain (who was presiding over this case at the time while it was pending in New York) to stay this case during the pendency of a related appeal, whereas Judge Huvelle believes the Appellant should have dismissed this case immediately and outright rather than requesting the stay. Though Judge Swain found no fault with the request for a stay, Judge Huvelle second-guessed that decision after the case was transferred here from New York, and she ordered the Appellant to pay most of the attorney fees that were purportedly incurred by Defendant Cartinhour. Notwithstanding evidence that Defendant Cartinhour never authorized his purported attorneys to represent him, Judge Huvelle blocked all inquiry into the authority of his purported attorneys, refusing to compel production of even a retainer agreement. Finally, Judge Huvelle assigned this case to herself in apparent violation of the local rules, even though this case alleges facts that implicate her in judicial misconduct.

The Appellant avers that Judge Huvelle lacked authority to second-guess the decisions that Judge Swain made while this case was pending in New York, much less punish the Appellant for actions in Judge Swain's court. Moreover, Judge Huvelle disregarded binding authority by blocking all inquiry into the authority of

the attorneys purporting to represent Defendant Cartinhour, and she violated the Due Process rights and statutory rights of the Appellant by assigning herself to a case that implicated her in misconduct.

Argument

1. The Appellant did not multiply proceedings unreasonably or vexatiously, therefore the district court had no basis for awarding sanctions under 28 U.S.C. §1927.

   (a) The Appellant did not act unreasonably or vexatiously merely because he sought a stay rather than dismissal.

The district court condemned the Appellant because he did not dismiss this case immediately after the verdict in *Robertson I*, but the district court refused to consider the reason that the Appellant did not dismiss this case sooner. As explained to the district court, the Appellant was awaiting the outcome of the appeal from *Robertson I*. *See* Ty Clevenger's Rule 59 Motion and Objections at 4 (Appx. 3:1107). If this case had been dismissed immediately after the jury verdict in *Robertson I*, and then filed again after *Robertson I* was overturned, the limitations period would have lapsed on many of the Plaintiff's claims, thus it was entirely reasonable to request a stay.

Moreover, the Appellant did not charge ahead with this case after the *Robertson I* verdict, thereby running up Mr. Cartinhour's expenses while the appeal was pending. Instead, the Appellant moved Judge Swain to stay this case while that

appeal was pending, relying on the general authority of *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2nd Cir. 2000)(where cases are duplicative, the court may dismiss without prejudice, stay the second case, or transfer it). *See* First Motion for Stay (Appx. 1:139-172). It was Mr. Cartinhour's purported lawyers – not the Appellant – who opposed the stay and kept churning out more legal bills. The appeal from *Robertson I* was not decided until April 3, 2012, *i.e.*, *after* the district court dismissed this case. *See Robertson v. Cartinhour*, 475 Fed.Appx. 767 (D.C. Cir. 2012). The petition for en banc review was not decided until May 15, 2012. *See* Doc. No. Document #1373869, Case No. 11-7026. No one ever suggested that the appeal was frivolous, and thus it was entirely reasonable to request a stay of proceedings in this case, pending the outcome of the appeal from *Robertson I*, rather than dismissing all claims and losing them to limitations. In fact, the Appellant submits that he was *entitled* to rely on *Curtis* in requesting a stay, particularly since *Curtis* was binding authority while this case was pending in New York. (For that matter, *Curtis* is widely cited outside of the Second Circuit, and the Appellant is not aware of any contrary holding from the D.C. Circuit).

Other courts have expressly held that a stay is proper in circumstances analogous to this case, *i.e.*, where limitations may bar claims if the case is dismissed rather than stayed. In *Aulston v. United States*, for example, the lower court dismissed all claims based on a ruling from an administrative agency that the

plaintiffs' lacked ownership of disputed property and, therefore, lacked standing. 823 F.2d 510 (Fed. Cir. 1987). The Federal Circuit reversed and ordered a stay, noting that the administrative decision was on appeal, and that the plaintiffs' claims would likely be time-barred if the case was dismissed rather than stayed. *Id*. at 514; *see also Ingersoll Mill. Mach. Co. v. Granger*, 833 F.2d 680, 684-85 (7th Cir. 1987)(case stayed during pendency of appeal from related case in foreign court); and *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.,* 677 F. Supp. 478, 481 (S.D. Miss. 1988), *reversed on other grounds* 870 F.2d 1044 (5th Cir. 1989).

> Ordinarily, the determination that a suit is barred by res judicata requires a dismissal. Since, however, the [plaintiff's] state suit is pending on appeal and the possibility of reversal exists, the appropriate action of this Court is to stay this proceeding until final resolution of the state suit is achieved.

Sillers v. Washington Suburban Sanitary Commission, 2008 WL 3822176 (D. Md. 2008), quoting *Superior Oil Co. v. City of Port Arthur,* 535 F.Supp. 916, 921 (E.D.Tex.1982), in turn citing *Glen Oaks Utils., Inc. v. City of Houston,* 280 F.2d 330, 334 (5th Cir.1960) ("Since appeal was pending from the state court judgment it would have been improper to dismiss the federal action on the ground of res judicata, but it was proper that the proceedings in the federal court be stayed until the final termination of the proceedings in the state court.").

The Appellant has found no contrary authority from this circuit, but in either case he is *not* asking this Court to rule that Judge Swain abused her discretion

because she did not stay this case while it was pending in New York. Instead, the Appellant contends that the foregoing authority proves he acted *reasonably* in requesting a stay rather than dismissing all claims immediately as Judge Huvelle now claims he should have done. Neither Judge Swain nor any of the Defendants ever suggested that the request for a stay was frivolous or otherwise improper. Yet Judge Huvelle has now implicitly held that the request for a stay was improper – and grossly improper at that – because she has severely punished the Appellant for requesting the stay rather than immediately dismissing all of the Plaintiff's claims. This, in turn, brings to light some additional problems with Judge Huvelle's sanctions decision.

(b) The presiding judge lacked authority to second-guess another judge and punish conduct that occurred in the other judge's court.

Judge Huvelle is effectively second-guessing Judge Swain, because Judge Swain found nothing improper about the request for a stay, even though she ultimately did not grant the stay. And as set forth below, the Defendants (including Mr. Cartinhour's purported attorneys in New York) repeatedly suggested that Judge Swain sanction the Appellant under Fed. R. Civ. P. 11 because of the purported effects of res judicata and collateral estoppel from *Robertson I*, so it is not as if Judge Swain was unaware of the Defendants' argument (subsequently adopted by Judge Huvelle), *i.e.*, that this case should have been dismissed immediately and

voluntarily after the judgment in *Robertson I*. Yet Judge Huvelle sanctioned the Appellant for *everything* that transpired after the verdict in *Robertson I*, and that includes the filing of the motion for stay before Judge Swain. In other words, Judge Huvelle sanctioned the Appellant for filing a non-frivolous motion in another judge's court.

The Appellant previously directed Judge Huvelle's attention to *Grid Systems Corp. v. John Fluke Mfg. Co.*, where the Ninth Circuit held that a district court could not grant §1927 sanctions based on proceedings in another court. 41 F.3d 1318, 1319-20 (1994); *see also Healey v. Labgold*, 271 F. Supp. 2d 303, 305 (D.D.C. 2003)(Facciola, J.)("it would be an obvious usurpation of jurisdiction for this court to exercise its inherent authority to sanction behavior before another district court"). *See* Response to Motion for Sanctions Purportedly Filed on Behalf of Defendant Cartinhour, 4 (Appx. 3:1023). That rule is sensible and even necessary where, as here, a later-assigned judge wants to second-guess the decisions of a previously-assigned judge. Judge Huvelle attempted to distinguish *Grid Systems* in her order, arguing that it "is neither binding nor persuasive since the Fifth Circuit case on which it relied was subsequently qualified by *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791,793-94 (5th Cir. 1993), which explained that courts can impose sanctions for actions occurring in other courts when a litigant perpetrates 'bad-faith conduct . . . in direct defiance of the

sanctioning court.'" August 10, 2012 Memorandum Opinion, 12 n.28 (Appx. 3:1046). Such reasoning is incoherent and even nonsensical. A Ninth Circuit holding is not modified simply because the Fifth Circuit later modifies case cited by the Ninth Circuit. Moreover, the Fifth Circuit case on which *Grid Systems* relied is still good law in the Fifth Circuit. *See Matter of Case,* 937 F.2d 1014 (5th Cir.1991). In fact, Judge Huvelle seriously misstated the holding of *CJC Holdings*, which did not purport to modify *Matter of Case*. Read in context, the *CJC Holdings* court was considering whether a lawyer should have been sanctioned for arguing that his case was more akin to *Chambers v. Nasco*, 501 U.S. 32 (1991), than *Matter of Case*, and the Fifth Circuit reversed the district court's sanctions order, holding that the argument was at least plausible. The full quote – rather than Judge Huvelle's selective excerpt – argues strongly *against* her position:

> By contrast [with *Matter of Case*], the bad-faith conduct in *Chambers* was undertaken in direct defiance of the sanctioning court. *Chambers* was an action for specific performance of a contract to sell a television station. After signing the contract the owner, Chambers, changed his mind. His efforts to avoid the sale included, inter alia, a filing with the Federal Communications Commission seeking permission to replace existing transmission facilities with a new transmission tower to be built on a site beyond the reach of the contract. This filing not only directly violated the district court's order to maintain the status quo pending the outcome of the litigation but also, if successful, would have eviscerated the court's ability to enforce specific performance if it so ordered.

CJC Holdings, Inc. v. Wright & Lato, Inc., 989 F.2d 791, 794 (5th Cir. 1993).

Judge Huvelle's accusation that the Appellant engaged in "bad-faith

conduct…in direct defiance of the sanctioning court" is reckless and false. What order did the Appellant defy? None. Instead, he asked Judge Swain to stay proceedings in this case pending the outcome of the *Robertson I* appeal. And unlike *Chambers*, Judge Huvelle had not ordered the Plaintiff or the Appellant to maintain the status quo, nor had she enjoined from bringing claims that arose after the filing of *Robertson I*. Quite the contrary, Judge Huvelle *denied* the Defendants' request that she enjoin this case from proceeding. *See* August 10, 2012 Memorandum Opinion at 7-8 (Appx. 3:1041-1042), quoting December 30, 2010 Order in *Robertson I*. Yet somehow she expected the Appellant to read her mind and know that he was engaging in "bad-faith conduct…in direct defiance of the sanctioning court" and that he had "defied the Court by pursuing baseless claims and arguments" in another court. It seems self-evident that "direct defiance" requires an explicit statement or order that can be defied, particularly when the offended judge seeks to govern what a party or an attorney is doing in another judge's court. Judge Huvelle cited her December 30, 2010 Memorandum in *Robertson I* as proof of "clear notice," (Appx. 3:1044), but at most it warned the Plaintiff and the Appellant against filing any cases beyond this one. Absolutely nothing in that memorandum put the Appellant on notice that she expected the Appellant to dismiss this case voluntarily – while it was pending before Judge Swain – either as of December 30, 2010 (the date of her memorandum) or February

25, 2011 (the date judgment was entered in *Robertson I*).

(c) The Appellant was denied due process because he was not afforded adequate notice of his allegedly unreasonable or vexatious acts.

Most likely, Judge Huvelle did not ponder the fact that she was punishing the Appellant for filing the motion for stay, but that only illustrates how thoroughly Defendants Kearney and Bramnick failed to meet their burden under 28 U.S.C. §1927. The Defendants, as movants for sanctions, were obligated to point out *specific* acts or documents that multiplied proceedings unreasonably or vexatiously. *See Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96-97 (2d Cir.1997) ("a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter"), cited with approval in *Alexander v. F.B.I.*, 541 F. Supp. 2d 274, 300 (D.D.C. 2008). As the Appellant noted below, the Defendants never even made an effort:

> The Motion [for sanctions] and Memorandum are reminiscent of the motion for sanctions in *Cobell v. Norton*, 319 F. Supp.2d 36 (D.D.C. 2004), where the plaintiff sought to recover all its fees via sanctions motion:
>
> > Plaintiffs also request that this Court order "a broad compensatory award of attorney's fees" as sanction for defendants' "well-documented history of litigation misconduct from the outset." Mot. for Litigation Misconduct Fees at 9-10. Plaintiffs have not, however, identified specific instances of misconduct nor detailed any costs or expenses they incurred as a result. This failure is fatal to plaintiffs' request and it therefore shall be denied, except as discussed below.

> *Cobell*, 319 F.Supp.2d at 40 (none of the exceptions are relevant to this case). In this case, Defendant Kearney has not identified any *specific* instances of misconduct, nor has he detailed any costs or expenses that he or his purported client incurred as a result of those *specific* instances of misconduct. He had that burden, and he failed to meet it. It is not the Court's responsibility nor even the Court's right to fill in the blanks for Defendant Kearney's pleading deficiencies, and the undersigned is not required to guess at what Defendant Kearney is aiming for. The undersigned would be deprived of his due process right to notice if the Court were to grant sanctions on the basis of Defendant Kearney's deficient Motion. Accordingly, the Motion must fail.

Response to Motion for Sanctions Purportedly Filed on Behalf of Defendant Cartinhour at 2 (Appx. 3:1021). By haphazardly awarding attorney fees for *everything* that happened after the *Robertson I* verdict, Judge Huvelle has effectively converted a §1927 motion into a common-law malicious prosecution claim, but without the procedural due process protections or the right to a jury trial. *Compare, e.g., Rogers v. Kroger Co.*, 586 F. Supp. 597, 602 (S.D. Tex. 1984)("The Fifth Circuit has made clear that § 1927, being penal in nature, should be strictly construed so that only excess costs caused by plaintiff's attorney's vexatious behavior and consequent multiplication of the proceedings should be tabulated. In no event should those fees amount to the total cost of the litigation"), citing *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1382 (5th Cir.1979) and *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1292 (5th Cir.1984) (*per curiam*). Even within the confines of §1927, the Appellant was denied due process because he was not afforded notice of the *specific* conduct that was allegedly unreasonable or

vexatious.

(d) The Defendants, not the Appellant, are responsible for the multiplication of proceedings and the resulting costs.

Various sister courts of this Court have held that sanction awards are improper where the proponent failed to move for timely dismissal:

> Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper.
>
> In assessing the damage done, the court should consider the extent to which it is self-inflicted due to the failure to mitigate. If a baseless claim could have been readily disposed of by summary procedures, there is little justification for a claim for attorney's fees and expenses engendered in lengthy and elaborate proceedings in opposition. The rule's purpose would be frustrated if it encouraged the offended party to play the very game at which it is aimed.

Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 879 (5th Cir. 1988), quoting Judge William Schwarzer, *Sanctions Under the New Federal Rule 11 – A Closer Look*, 104 F.R.D. 181, 200-201 (1985); *see also INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391 (6th Cir. 1987) and *Dubisky v. Owens*, 849 F.2d 1034, 1037 (7th Cir. 1988). While those cases dealt with Rule 11 sanctions, the Northern District of Illinois has observed that the rationale applies equally to sanctions arising under 28 U.S.C. §1927 or the court's inherent powers, *see Northlake Mktg. & Supply, Inc. v. Glaverbel, S.A.*, 194 F.R.D. 633, 636 (2000),

and the Fifth Circuit later applied the reasoning of *Thomas* expressly to §1927. *See Topalian v. Ehrman*, 3 F.3d 931 (1993). "The [trial court's] findings must reflect some consideration of the reasonableness of the nonviolating party's actions in connection with the sanctionable conduct." *Id*. at 937.

In this case, however, the trial court refused to consider the delays of Defendant Cartinhour and his purported counsel. The court entered judgment in *Robertson I* on February 25, 2011, *i.e.*, nearly a year before the Defendants' motion to dismiss based on the verdict in *Robertson I*. Shortly thereafter, Defendant Cartinhour's purported lawyers argued that this case was foreclosed by the verdict in *Robertson I*. *See* February 24, 2011 letter from Cherish O'Donnell to Ty Clevenger (Appx. 1031-1033). The Appellant responded repeatedly, telling Defendant Cartinhour's purported lawyers to quit blustering and make their case:

> As the Court knows from [prior] documents, the Defendants have been threatening the Plaintiff with sanctions if he does not dismiss his claims, citing Rule 11 of the Federal Rules of Civil Procedure. The Defendants would do well to read Rule 11 – particularly subsection 11(c)(2) – before purporting to invoke it. The Defendants have not yet complied with subsection 11(c)(2), and if they had it might have gone a long way toward resolving the dispute before the Court:
>
> > At a minimum, the notice requirement mandates that the subject of a [Rule 11] sanctions motion be informed of: ... [inter alia] the *specific conduct or omission* for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense. Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable.

> *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 389 (2nd Cir. 2003)(emphasis added). Instead, the Defendants have made nothing more than open-ended, conclusory statements that this case should be dismissed based on the purported *res judicata* effect of the D.C. Action. "[T]he party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Austin v. Downs, Rachlin & Martin Burlington St. Johnsbury*, 270 Fed. Appx. 52, 53 (2d Cir.2008), quoting *BBS Norwalk One, Inc. v. Raccolta,Inc.*, 117 F.3d 674, 677 (2d Cir.1997); *see also Bear, Stearns & Co., Inc., Bear, Stearns Securities Corp. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 93 (2nd Cir. 2005) ("The party asserting collateral estoppel bears the burden of demonstrating that it is entitled to this relief."). How *exactly* does the judgment in the D.C. Action preclude claims in this case? The Defendants have not even attempted to explain this. Perhaps they know they cannot meet their burden, which might explain why they've spent their time blustering, posturing, and making threats.

Supplement to Preliminary Pre-Trial Statement, 11-12 (Appx. 1:183-184). Five weeks later, the Plaintiff wrote as follows:

> The Defendants seem to think that if they threaten the Plaintiff with sanctions and keep repeating the words "res judicata" and "collateral estoppel" often enough, somehow this whole case will disappear. It is long past time for the Defendants to put up or shut up. As the Court knows, the Defendants tried to get the Court to impose Rule 11 sanctions on the undersigned without bothering to follow Rule 11. Specifically, the Defendants did not – and still have not – produced any kind of draft motion showing why they think it is so obvious that the D.C. judgment forecloses this case. If it's so obvious, let's see it.

Reply in Support of Motion for Stay and Motion for Entry of Default, 4 (Appx. 1:227). If this case was always without merit, as Mr. Cartinhour's purported attorneys have long said, then why did they sit on their hands for so long? More to

the point, if the motion for stay was frivolous and somehow multiplied proceedings[2] in Judge Swain's courtroom, why didn't the Defendants say something to Judge Swain at the time rather than waiting *more than a year*? There is only one plausible explanation: the Defendants realized the motion for stay was *not* frivolous and they were *not* going to get sanctions from Judge Swain, so they decided to mothball the issue until they could get the case in front of a favorably disposed judge, *i.e.*, Judge Huvelle.

In any event, a one-year delay is unreasonable, and the Defendants can only thank themselves for the number of pleadings (and the resulting fees and costs) during that period. Their inexcusable delay is somewhat reminiscent of a case from the Northern District of New York:

> In calculating a reasonable amount of attorney's fees and/or sanctions, the Court takes into consideration the failure of Defendants' attorneys to bring a motion to dismiss at an earlier stage in this case. As described above, it was clear that Plaintiffs' claims were barred by res judicata. As such, the Defendants' attorneys should have brought a motion to dismiss as soon as they received the complaint in August 1994. Instead, Defendants' motion for summary judgment was not filed until March 24, 1995, after extensive discovery had already occurred.

Kahre-Richardes Family Found., Inc. v. Vill. of Baldwinsville, N.Y., 953 F. Supp. 39, 42 (N.D.N.Y. 1997) *aff'd sub nom. Kahre-Richardes Family Found., Inc. v. Cillage of Baldwinsville*, 141 F.3d 1151 (2d Cir. 1998).

---

[2] It's hard to imagine how a *stay* of proceedings can instead multiply them.

(e) The Appellant stated legitimate claims on behalf of the Plaintiff.

Judge Huvelle's entire sanctions order is premised on her March 16, 2012 order dismissing the case below in its entirety, and that order is deeply flawed. Consider, for example, the claims related to forgery, fabrication of evidence, subornation of perjury, and obstruction of justice perpetrated by Defendants Kearney and Bramnick. Those claims could not have been brought in *Robertson I*, because they arose after *Robertson I* was filed, a point the Appellant made when requesting a stay from Judge Swain:

> This case should be stayed rather than dismissed, because at most the D.C. judgment might affect *some* claims and/or *some* parties. "As a matter of logic, when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play." *Legnani v. Alitalia Linee Aeree Italiane, S.p.A.*, 400 F.3d 139, 141 (2nd Cir. 2005), quoting *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2nd Cir.1997). "Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by *res judicata* regardless of whether they are premised on facts representing a continuance of the same course of conduct." *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 383 (2nd Cir.2003) (internal quotation marks omitted). "The crucial date is the date the complaint was filed." *Curtis*, 226 F.3d at 139. Only Dr. Cartinhour was a party to the D.C. case, which was initiated on August 28, 2009, and many of the claims in this case pertain to events that occurred after the complaint was filed in the D.C. case. *See, e.g.*, Original Complaint at ¶87 (Cartinhour's revelatory statements on January 11, 2010); ¶¶89 and 107 (Defendants' tortious interference in January or February 2010 with the Plaintiff's business relationship with a third party). Moreover, Defendants Kustidic and Popovic already have defaulted, therefore the claims against them should proceed to judgment. *See Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 367. (2nd Cir. 1995) ("When a litigant files consecutive lawsuits against separate parties for the same injury, the entry of a judgment

> in the prior action does not bar the claims against other potentially liable parties.")

First Motion to Stay, 2-3 (Appx. 1:140-142). In throwing out the claims against Defendants Kearney and Bramnick, Judge Huvelle also cited the judicial proceedings privilege, but she overlooked something critical, namely, the law of the Second Circuit. In that circuit, "absolute immunity does not extend to allegations of conspiracy to present false testimony." *Coggins v. Buonora*, 362 Fed.Appx. 224, 225 (2nd Cir. 2010), citing *Dory v. Ryan*, 25 F.3d 81, 84 (2nd Cir.1994) and *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246, 255 (2nd Cir.1984). Admittedly, the Second Circuit is in the minority among the circuits, *see Franklin v. Terr*, 201 F.3d 1098, 1102 (9th Cir. 2000)(gathering cases from other circuits), but this case was filed in the Second Circuit, and its law governed at least up until the time this case was transferred. And contrary to Judge Huvelle's suggestion, the issue is *not* settled in the District of Columbia. *See, e.g., Franklin*, 201 F.3d at 1102 (where this circuit is not among those that have decided whether the exception applies). None of the local and federal D.C. cases reviewed by the Appellant (including the various cases cited by Judge Huvelle) are on point, mainly because most of them deal with common-law defamation claims. By contrast, the Plaintiff in this case alleged that the Defendants' forgery, fabrication of evidence, subornation of perjury, and obstruction of justice were part of a racketeering conspiracy.

A significant body of authority restricts application of the judicial proceedings privilege beyond garden-variety defamation claims:

> [T]he privilege does not provide a "blanket immunity against all claims raised against [attorneys] merely because they are acting as [attorneys] in litigation." *Taylor* [*v. McNichols*, 243 P.3d 642, 655 (Idaho 2010)]. Rather, "where attorneys are being sued by the opponent of their client in a current or former lawsuit, and that suit arises out of the attorneys' legitimate representation of that client pursuant to that litigation, the privilege does apply." *Id.* But the judicial proceedings privilege is not without limits. Where a plaintiff pleads that an "attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's," the privilege can be lost. *Id.* at 657; *accord Clark* [*v. Druckman*, 624 S.E.2d 864, 871 (W.Va. 2004)]. Additionally, where an attorney has committed fraud or otherwise acted in bad faith, which is inherently "acting in a manner foreign to his duties as an attorney," the privilege will not shield an attorney from civil liability. *Taylor,* 243 P.3d at 656; *accord Vega v. Jones, Day, Reavis & Pogue,* 121 Cal.App.4th 282, 17 Cal.Rptr.3d 26, 31–32 (2004); *Alpert* [*v. Crain, Caton & James, P.C.*, 178 S.W.3d 398*,* 406 (Tex.App. – Houston [1st Dist.] 2005)]; *Clark,* 624 S.E.2d at 870.

Moss v. Parr Waddoups Brown Gee & Loveless, 285 P.3d 1157, 1166 (Utah 2012); *see also Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732 (Hawaii 2007)(collecting cases and identifying exceptions to the litigation privilege) and *Unarco Material Handling, Inc. v. Liberato*, 317 S.W.3d 227, 235 (Tenn. Ct. App. 2010)(same). For purposes of state law (*e.g.*, the Plaintiff's fraud and tortious interference claims), the relevant question in this case is whether New York law would permit claims based on the Defendants' crimes against justice. *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S. Ct. 805, 821, 11 L. Ed. 2d 945

(1964) ("[W]here the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under s 1404(a) generally should be, with respect to state law, but a change of courtrooms."). And, clearly, New York law does permit such claims:

> Under New York law an attorney generally cannot be held liable to third parties for actions taken in furtherance of his role as counsel unless it is shown that he "did something either tortious in character or beyond the scope of his honorable employment." *Dallas v. Fassnacht*, 42 N.Y.S.2d 415, 418 (Sup.Ct.N.Y. County 1943). Thus, while an attorney is privileged to give honest advice, even if erroneous, and generally is not responsible for the motives of his clients, admission to the bar does not create a license to act maliciously, fraudulently, or knowingly to tread upon the legal rights of others. *See Steinberg v. Guild*, 22 App.Div.2d 775, 776, 254 N.Y.S.2d 4 (1st Dept. 1964), *aff'd*, 16 N.Y.2d 791, 262 N.Y.S.2d 715, 209 N.E.2d 887 (1965); *D. & C. Textile Corp. v. Rudin*, 41 Misc.2d 916, 918-19, 246 N.Y.S.2d 813 (Sup.Ct.N.Y. County 1964); *Kasen v. Morrell*, 18 Misc.2d 158, 162, 183 N.Y.S.2d 928 (Sup.Ct.Kings County 1959).

Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1080 (2nd Cir. 1977). Judge Huvelle erred, therefore, in relying on D.C. authority that conflicts with New York authority. If Judge Swain had granted the stay, and *Robertson I* had been overturned, then the Plaintiff clearly could have proceeded on the state law claims against the Defendants. It was reasonable, therefore, to request a stay rather than dismissing all claims immediately after judgment in *Robertson I*.

2. The lower court erred by refusing to consider counsel's lack of authority, and by refusing to permit discovery related to counsel's authority.

In a November 30, 2010 e-mail to Mr. Yuzek, the Appellant warned him about Defendant Kearney's conflicts of interest with Defendant Cartinhour:

> I do not know if you have spoken with Dr. Cartinhour yet, but I doubt he is aware of much of what Mr. Kearney has been doing.
>
> Wade [Robertson] made some very reasonable settlement offers in the DC case (including settlement of the NY claims), but Mr. Kearney countered with a proposal to dismiss all claims against all NY defendants, *i.e.*, settlement was conditioned on the dismissal of claims against Mr. Kearney. I'd be surprised if Dr. Cartinhour was aware of this. In any event, I'm glad you're on the case now, because Wade is still willing to entertain settlement discussions directly w/ Dr. Cartinhour. Please let me know if Dr. Cartinhour is interested. Thanks.

November 30, 2010 e-mail exchange between Ty Clevenger and Dean Yuzek (Appx. 3:881). On December 2, 2010, Mr. Yuzek told the undersigned that he not spoken with Defendant Cartinhour but had only been communicating with "intermediaries". (Appx. 1:88). Mr. Yuzek did not identify the intermediaries, but the undersigned repeatedly warned Mr. Yuzek of his suspicions that Defendant Cartinhour was being manipulated by his co-defendants, *see* Motion to Permit Discovery, to Compel Disclosure, and to Compel a Showing of Authority to Act ("Second Motion to Show Authority") at 4, n. 2 (Appx. 3:868), specifically Defendants Kearney and Bramnick:

> Per my earlier e-mail, we must discuss settlement as part of the Rule 26 conference, and I think it is very likely that we can settle the claims against

> Dr. Cartinhour. Please let me know whether you or Dean have spoken with Dr. Cartinhour. As of my last conversation with Dean, he had only spoken through intermediaries. I am concerned that those intermediaries might be Patrick Kearney and/or his colleagues, i.e., Dr. Cartinhour's co-defendants. If so, I believe Mr. Kearney and his colleagues have a serious conflict of interest with Dr. Cartinhour.
>
> During one of our conversations, Dean mentioned getting documentation of Dr. Cartinhour's medical condition. If Dr. Cartinhour is truly incapacitated by his condition, then I certainly want to be accommodating. I am concerned, however, that Mr. Kearney might be "pulling the strings" on behalf of Dr. Cartinhour. If you can provide documentation of Dr. Cartinhour's medical condition, *e.g.*, the reason he was unable to attend the trial in D.C., that would certainly help alleviate my concerns.
>
> If we do not receive some proof of Dr. Cartinhour's medical condition, I plan to propound discovery on that subject. I also plan to propound discovery regarding your firm's authority to represent Dr. Cartinhour. In any event, please let me know your availability this week for a Rule 26 conference. Thank you.

December 28, 2011 E-mail Exchange Among Ty Clevenger, Cherish O'Donnell and Dean Yuzek (Appx. 3:884-885). The Appellant brought his concerns to the attention of Judge Swain on December 2, 2011:

> To be perfectly clear, Mr. Robertson believes that Defendant Kearney may be "pulling the strings" with respect to Defendant Cartinhour's purported actions in this case and the D.C. case. Mr. Robertson proposed, for example, to settle all claims in this case and in the D.C. case with respect to Defendant Cartinhour. Defendant Kearney responded with a settlement agreement that would release claims not only against Defendant Cartinhour, but against Defendant Kearney and all his colleagues. Defendant Kearney admitted that Defendant Cartinhour had not seen all the terms of the settlement agreement, [*see* November 24, 2010 Letter and Settlement Proposal from Patrick Kearney to Edward Griffin (Appx. 3:944-952)] and Mr. Robertson strongly suspects that Defendant Cartinhour was unaware that Defendant Kearney had conditioned settlement on the release of claims against Defendant Kearney

> and his colleagues.
>
> In light of the foregoing, Mr. Robertson moves the Court to require Mr. Yuzek to provide proof that he has been retained by Defendant Cartinhour. Mr. Robertson is certain that Mr. Yezek is acting in good faith, but he must ask whether the intermediaries who are purporting to represent Defendant Cartinhour are truly representing Defendant Cartinhour, as opposed to Defendant Kearney or someone else.

First Motion to Show Authority at 3 (Appx. 1:90). Mr. Yuzek steadfastly resisted the efforts to compel a showing of authority, and the Appellant asked Mr. Yuzek again if he had even spoken with his purported client. In response to the Appellant's December 28, 2010 e-mail, Mr. Yuzek got rather thin-skinned about the requests that he show authority:

> Your purported issue regarding my firm's authority to represent Dr. Cartinhour is without merit, and the Court has already signaled you regarding its negative view of this line of inquiry. Although the nature and extent of my firm's communication with Dr. Cartinhour is none of your business, we have spoken with him directly and have been duly retained by him. We do not intend further to discuss this non-issue with you.

December 28, 2010 E-mail exchange (Appx. 3:884-885). After that nasty little missive, the Appellant quit pushing the issue. In retrospect, that was a mistake. The Appellant later obtained Mr. Yuzek's billing records when Defendant Kearney submitted them in support of his request for sanctions (Appx. 2:720-775), and those billing records show that Mr. Yuzek lied to the Appellant. According to those records, Mr. Yuzek did not speak to his purported client until January 7, 2011.

(Appx. 2:727). That's 10 days *after* the December 28, 2010 e-mail wherein Mr. Yuzek claimed he had already spoken "directly" with Defendant Cartinhour, and more than a month *after* the motion to show authority had been presented to Judge Swain. In other words, if Mr. Yuzek's billing records are correct, then he lied to the Appellant in order to conceal the fact that he had never spoken with his purported client.

Why would he do that? The Court will recall that Mr. Yuzek originally said he was receiving direction from "intermediaries" other than Defendant Cartinhour. Those unredacted records now reveal that the purported intermediaries were, in fact, none other than the conflicted co-defendants that Mr. Yuzek had been warned about. According to the first billing entry on November 30, 2010, Mr. Yuzek and Ms. O'Donnell were retained by "Mike B. and Carl O." – presumably Defendant Kearney's law firm colleagues, Defendants Michael Bramnick and Carlton Obecny – but *not* by Defendant Cartinhour. (Appx. 2:723). Mr. Yuzek was expressly aware that Defendants Kearney and Bramnick (and the other Attorney Defendants) had a conflict of interest with his purported client, Defendant Cartinhour, yet he took all his direction from these conflicted co-defendants *without ever talking to his purported client*. Worse, Mr. Yuzek lied to the Appellant in order to conceal the fact that (1) he had never spoken with his purported client; (2) that he was actually retained by the conflicted co-defendants of his purported client; and (3) that he was

taking his orders from the conflicted co-defendants notwithstanding the evidence that they were acting contrary to the interests of his purported client (*i.e.*, by conditioning settlement of *Robertson I* on their interests rather than Defendant Cartinhour's interests).

Thereafter, Mr. Yuzek spoke to his purported client only twice, and both times in a teleconference with none other than Defendant Kearney. *Id*. On the other hand, Mr. Yuzek (or his associate) were in regular communication with Defendants Kearney and Bramnick. (Appx. 2:720-775). The only other communications with Defendant Cartinhour are a voice message to Defendant Cartinhour from Mr. Yuzek's associate, *i.e.*, Ms. O'Donnell, on January 21, 2011, and a very brief conversation between Ms. O'Donnell and Defendant Cartinhour on January 24, 2011. (Appx. 2:729). More important, however, is the fact that Mr. Yuzek and Ms. O'Donnell did not communicate with their purported client in more than *fifteen months* between the January 24, 2011 conversation and the submission of the billing statements. During that time, this case was transferred from New York to the District of Columbia, and Mr. Yuzek and Ms. O'Donnell entered appearances and filed various motions in D.C. without ever notifying their purported client. *See, generally*, District Court Docket (Appx. 1:1-24). That does not pass the smell test.

There is only one plausible reason for the Defendants' steadfast refusal to

produce even a retainer agreement: it does not exist. That would explain why Defendant Cartinnhour has an outstanding balance of $82,453.90, (Appx. 2:775) *i.e.*, he most likely has refused to pay attorneys whom he never hired. It would further explain the ethically dubious decision of Defendants Kearney and Bramnick to enter appearances on behalf of their co-defendant. If Defendant Cartinhour never retained Mr. Yuzek, then Defendant Cartinhour is not liable for the bill, but Defendants Kearney and Bramnick – as well as their law firm – are on the hook. Thus they would have a strong incentive to seek recovery for themselves while making it appear they were seeking recovery for Defendant Cartinhour.

In any event, the Plaintiff was legally entitled to proof of authority, and he provided Judge Swain with binding authority from the Second Circuit. *See* First Motion to Show Authority (Appx. 1:88-91), and cases cited therein. This Court has likewise held that "[c]ounsel's authority can be questioned before trial, by a motion that he be required to show it." *Alamo v. Del Rosario*, 98 F.2d 328, 329 (D.C. Cir. 1938). In *Alamo*, as in most other cases, the Court held that the burden of proof lies with the party challenging counsel's authority. *Id.*; *but see Gaston & Co. v. All Russian Zemsky Union*, 221 A.D. 732, 734-35 (1927) ("The authority of the defendant's attorney to appear upon its behalf having been questioned, the burden is cast, and naturally so, upon the one asserting the authority to prove the same, since

he is in possession of the facts.").[3]

Regardless of whether the Appellant or the Defendants bear the burden of proving or disproving counsel's authority, it makes no sense to place that burden on the Appellant and then prevent him from getting the evidence that would prove or disprove counsel's authority. And yet that is exactly what Judge Huvelle did below, notwithstanding the fact that the Appellant directed her attention to case law from this circuit showing that he was entitled, at the very least, to see a retainer agreement:

> [T]hat principle is so well established that the D.C. Circuit has summarily reversed [the district court] for refusing to permit discovery:
>
> > The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). An opponent of a fee application "is entitled to the information it requires ... in order that it may present any legitimate challenges to the application to the District Court." *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1329 (D.C. Cir. 1982). Appellant raised a legitimate challenge that appellee is not the real party in interest responsible for paying its legal fees. *See Unification Church v. INS*, 762 F.2d 1077, 1081- 83 (D.C. Cir. 1985). Therefore, the district court abused its discretion in denying the motion to compel discovery. On remand the district court shall permit reasonable discovery into the identity of the real party in interest obligated to pay appellee's attorney's fees.

---

[3] The Fifth Circuit applies the state law of the forum court in determining the law governing the authority of counsel. *See Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of Republic of Venezuela*, 575 F.3d 491, 73 Fed.R.Serv.3d 1747 (5th Cir. 2009). The Appellant is not aware of any case deciding whether the law of the transferor court or the transferee court would apply. Even in New York, the Appellant has discovered conflicting cases regarding proof of authority. *Compare, e.g., Gaston & Co. v. All Russian Zemsky Union*, 221 A.D. 732, 734-35, 224 N.Y.S. 522, 524 (1927) *with Danish v. Guardian Life Ins. Co. of Am.*, 151 F. Supp. 17, 19 (S.D.N.Y. 1957).

> *Thrift Depositors of America, Inc. v. Office of Thrift Supervision*, 1996 WL 247971 (D.C. Cir. 1996). While *Thrift* was unpublished, *Concerned Veterans* and *Unification Church* are still binding on this Court. If I am to pay Defendant Cartinhour's attorney fees, I am entitled to proof that he was actually liable for those fees. Moreover, a retainer agreement clearly is subject to discovery. *See National Union Fire Ins. Co. of Pittsburgh v. Aetna Cas. & Sur. Co.*, 384 F.2d 316, 317 n.4 (D.C. Cir. 1967).

Ty Clevenger's Rule 59 Motion and Objections, 5 (Appx. 3:1109). At the very least, Judge Huvelle abused her discretion, and her decision must be reversed.

3. The presiding judge never should have assigned herself to the present case, and her failure to disqualify herself violated the Due Process Clause as well as the recusal statutes.

After Judge Swain transferred this case from New York to D.C., Judge John Bates was randomly assigned as the presiding judge. The Plaintiffs notified Judge Bates that a related case was pending before Judge Royce Lamberth. (Appx. 1:260). According to Local Rule 50.5(c)(2), the case should have been transferred, if at all, to Judge Lamberth (because he was the only judge presiding over a still-pending related case). On November 17, 2011, the Defendants moved to transfer this case to either Judge Huvelle or Judge Lamberth, and they notified the Court that they had conferred with the Plaintiff, and he consented to a transfer to Judge Lamberth, but objected to a transfer to Judge Huvelle. (Appx. 1:262). Under the local rules, the Plaintiff had 14 days to respond to that motion. *See* LCvR 7(b). Before the Plaintiff could respond, however, Judge Huvelle used her position as chair of the assignments committee to assign this case to herself. (Appx. 1:269).

Following the verdict in *Robertson I*, Judge Huvelle conducted an extrajudicial investigation and engaged in direct *ex parte* communications with attorneys Phil O'Donoghue or Rob Grant (and indirect *ex parte* communications with Defendants Cartinhour and Kearney) related to Defendant Cartinhour's competence. *See* Plaintiff's Memorandum of Law in Support of Motion to Recuse Pursuant to 28 U.S.C. §455, 16-18 (Appx. 1:347-349) and evidentiary citations therein. As the Plaintiff explained below, that created problems in this case:

> Defendant Kearney tried to use Defendant Cartinhour as a bargaining chip in [*Robertson I*], offering to settle Defendant Cartinhour's claims in [*Robertson I*] in exchange for the Plaintiff dismissing claims against Defendants Kearney, et al. in this case. Even if Defendant Kearney did tell Defendant Cartinhour about the proffered *quid pro quo*, was Defendant Cartinhour competent to understand it? In other words, is Defendant a co-conspirator with Defendants Kearney, et al., or is he more of a victim? These critical questions relate to Defendant Cartinhour's competency, and Judge Huvelle has already conducted an extrajudicial investigation and engaged in *ex parte* communications regarding that very issue.

Id. at 21 (Appx. 1:352). In fact, those *ex parte* communications have direct bearing on Judge Huvelle's sanctions order. She caustically rejected any suggestion that Defendant Kearney was manipulating Defendant Cartinhour in this case, but the Appellant must ask whether she reached that conclusion as a result of her extrajudicial investigation. Either way, Judge Huvelle violated Canon 3(A)(4) of the Code of Conduct for United States Judges by engaging in *ex parte* communications, and recusal is mandatory where a judge has "personal knowledge

of disputed evidentiary facts concerning the proceeding," 28 U.S.C. § 455 (b)(1), thus Judge Huvelle erred by refusing to recuse herself.

Similarly, Judge Huvelle prejudged this case before it was assigned to her, as reflected by her comments about this case while it was pending before Judge Swain. At the time of her extrajudicial comments, Judge Huvelle had no jurisdiction whatsoever over this case. Moreover, the parties were not identical, the claims were different, and the complaints were very dissimilar. Yet she penned a December 30, 2010 memorandum commenting upon the merits of Judge Swain's case. Judge Huvelle stated (incorrectly) that "the New York action centers largely on the same set of operative facts at issue in this case." (Appx. 2:420). And even though no motions to dismiss had yet been filed in Judge Swain's court, Judge Huvelle opined that "the New York complaint raises serious questions as to jurisdiction, venue, and whether Robertson can survive a Rule 12(b)(6) motion challenging the federal cause of action." (Appx. 2:423). Judge Huvelle further opined that "many of the issues raised in the New York action could well be barred by the doctrine of collateral estoppel." *Id*.

None of these extrajudicial comments should have been made, and all were prohibited by Canon 3(A)(6). Judge MacKinnon explained in his famous dissent that "[p]rejudgment of a material issue constitutes disqualifying prejudice under Section 144." *Mitchell v. Sirica*, 502 F.2d 375, 387 (D.C. Cir. 1974) (MacKinnon,

J., dissenting) (citing Knapp, supra, 232 F.2d 458), cert. denied, 418 U.S. 955 (1974). Prejudgment exists where the statements of a judge "plainly reveale[d]" that he had, prior to the commencement of the proceedings before him, reached a conclusion as to the merits of a case that involved complex questions of fact and law. *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *see also Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commis*sion, 425 F.2d 583, 591 (D.C. Cir. 1970).

The foremost reason for recusal, however, is Judge Huvelle's conflict of interest. As noted previously, Defendant Cartinhour had implicated Defendants Kearney and Bramnick in the fabrication of a document that bore Defendant Cartinhour's forged signature in *Robertson I*. *See* Original Complaint, ¶94 and Recusal Memorandum, 4-6 (quoting Mr. Cartinhour's testimony)(Appx. 1:335-337). Defendants Kearney and Bramnick also suborned perjury from Defendant Cartinhour and knowingly filed false discovery responses in order to conceal the identity of an adverse witness. *Id*. at ¶¶82, 83, 90, 91, 94-100. Moreover, the Plaintiff did not merely allege these crimes – he provided uncontested evidence. *See, e.g.,* Exhibit B (transcript of Defendant Cartinhour's testimony, *in the presence of Judge Huvelle*, that his signature had been forged on a document filed by Defendant Bramnick) and Exhibits I-K (Appx. 2:428-444).

These facts were brought to Judge Huvelle's attention in *Robertson I*, but she refused to take action. *See* Recusal Memorandum, 4-5 and 14-15 (Appx. 1:335-336 and 1:345-346). Instead, she diligently fought the Appellant's efforts to bring the matter to her attention, arbitrarily prohibiting the Appellant from entering an appearance in *Robertson I*. *See* Transcript Excerpt (2:440-444).[4] If this case had proceeded to trial, the Appellant would have presented evidence that Defendants Kearney and Bramnick committed crimes against justice in *Robertson I*. If so proven, that would necessarily infer that Judge Huvelle had engaged in gross judicial misconduct by permitting these crimes in her courtroom:

> A Court has a duty to refer the matter of false testimony and false declarations to the United States Attorney's Office. As the Court of Appeals has explained:
>
> > By reason of their performance of duties clearly assigned, the facts and evidence which suggest criminal conduct upon the part of […]officials are revealed to such officers. It is the duty of all citizens to reveal such evidence, of which they may have knowledge, **at the risk of being guilty of misprision of felony for failing to do so**. **In the case of an official, his failure to act under such circumstances would, in addition, constitute serious malfeasance in office.**
>
> *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F.2d 135 (D.C. Cir. 1938)(emphasis added). Indeed, one would otherwise run afoul of 18 U.S.C. § 4 (misprision of a felony) as the Court of Appeals described in *Cooper*, 69 App. D.C. 100.

[4] The Appellant urges the Court to read that transcript excerpt, where Judge Huvelle argued that Mr. Robertson already had an attorney, and contrast it with her treatment of Defendants Bramnick and Kearney in this case. Mr. Yuzek and Ms. O'Donnell already purported to represent Defendant Cartinhour, yet she allowed two conflicted co-defendants (*i.e.*, Defendants Bramnick and Kearney) to enter appearances as attorneys for Defendant Cartinhour in this case.

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. 4; *See also Suntrust Mortgage, Inc. v. Busby*, 2009 WL 4801347 (W.D.N.C.).

> Equally, federal civil litigants should be aware that unlike the privilege that attaches to disclosures made to priests, lawyers, and physicians, all federal judicial officers take a oath to "perform all the duties incumbent ... under the Constitution and laws of the United States." 28 U.S.C. § 453. **Among those duties is an obligation to uphold and obey the laws of the United States, not the least of which is 18, United States Code, Section 4, which criminalizes misprision of a felony**.

Suntrust at *3 (emphasis added). By her own admission, Judge Huvelle was aware of the allegations that various Defendants herein obstructed justice and committed felonies in her courtroom in the Former Case. Judge Huvelle refused to make further inquiry, she took no action to protect the integrity of the Court, and there is no indication that the alleged crimes were reported.

Recusal Memorandum, 28-29 (Appx. 1:359-360). By her own admission, Judge Huvelle was aware of the evidence that various Defendants had obstructed justice and committed felonies in her courtroom in *Robertson I*. Judge Huvelle refused to make further inquiry, she took no action to protect the integrity of the court, and there is no indication that the alleged crimes were reported. The Appellant is aware of only two possible inferences: (1) Judge Huvelle previously decided that none of these allegations of criminal activity were true (because otherwise she would have

reported them); or (2) Judge Huvelle did not care whether the allegations were true. In the former case, it would appear that Judge Huvelle prejudged the factual allegations in this case. In the latter case, Judge Huvelle would have a conflict of interest in presiding over a trial that might implicate her in misconduct. In either case, recusal was necessary.

The general purpose of § 455(a) is "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858, n. 7 (1988). "People who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Id*. at 864-865 (citations omitted). "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Id*. at 865, n.12 (citation and internal quotations omitted).

As noted in the Appellant's letter to the chairman of the Judiciary Committee, Judge Huvelle created an unmistakable appearance of impropriety:

> …Judge Huvelle knowingly assigned herself to a case that implicated her in a crime, then refused to step aside when I objected to her conflict of interest. Shortly thereafter, she summarily dismissed the case with prejudice and

sanctioned me $123,802.17 in retaliation.

See Letter from Ty Clevenger to The Hon. Lamar Smith (Appx. 3:1114-1119). Judge Huvelle has, at the very least, created the appearance that she is trying to silence a critic with crippling sanctions, and that she does not really care whether the attorney fees in question were actually incurred by Defendant Cartinhour.

Finally, the Appellant would direct the Court's attention to his Rule 59 motion (Appx. 3:1104-1109), and contrast that with Judge Huvelle's September 27, 2012 order (Appx. 3:1163-1164). In one instance, Judge Huvelle falsely accused the Appellant of filing a bankruptcy case for an improper purpose. The Appellant pointed out that he did not file the bankruptcy case in question; instead, another attorney filed the involuntary bankruptcy petition *against* the Appellant's client. Judge Huvelle refused to correct the mistake on the grounds that she had correctly quoted another judge. In other words, it's alright to repeat a false accusation so long as someone else made the accusation first, even when the accusation's falsity can readily be determined by consulting PACER. Likewise, Judge Huvelle's opinion gave the false impression that Judge Swain agreed with her that this case had been filed for an improper purpose. In reality, Judge Swain never said any such thing, yet Judge Huvelle refused to correct the false statement.

If a judge knowingly makes false and defamatory statements about a party or an attorney, it is hard to imagine a clearer display of bias and animosity. This case

should be reassigned on remand, and Judge Huvelle's opinions should be ordered stricken from the record.

CONCLUSION

The sanctions order should be reversed and ordered stricken for all the reasons set forth above. If this case is remanded for any reason, it should be assigned to a new judge.

Respectfully submitted,

/s/
Ty Clevenger
Texas Bar No. 24034380
1095 Meadow Hill Drive
Lavon, Texas 75166
(979) 985-5289
(979) 530-9523 (cell)

Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2013 a true and correct copy of the above and foregoing pleading was filed with the Courts electronic filing system, which should automatically provide copies to the individuals below:

Patrick J. Kearney &
Michael J. Bramnick
Selzer Gurvitch Rabin & Obecny, Chtd.;
4416 East West Highway, Suite 400
Bethesda, Maryland 20814-4568
(301) 986-9600
pkearney@sgrwlaw.com
mbramnick@sgrwlaw.com

Purported Attorneys for Appellee William C. Cartinhour, Jr.

/s/
Ty Clevenger

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief is in compliance with Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure insofar as it contains 10,885 words according to a word count performed by Microsoft Word.

_____/s/_____
Ty Clevenger