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 REPLY BRIEF

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When lawyers can forge signatures, fabricate documents, suborn perjury, and obstruct justice, and nobody gets punished but the one lawyer who tried to hold them accountable, something is seriously amiss. Even though this case was decided on the pleadings, the Appellant (acting on behalf of the Plaintiff) did more than allege these crimes. Instead, he offered undisputed evidence. In response, Defendants Patrick Kearney and Michael Bramnick (who purport to appear in this case on behalf of their co-defendant, Appellee William C. Cartinhour) offered a string of straw man arguments and *ad hominem* attacks on the Appellant, all the while ignoring the issues raised by the Appellant.

Mr. Kearney ignored all the authorities demonstrating that the Appellant, by requesting a stay while this case was pending in New York, acted lawfully and reasonably. Instead, Mr. Kearney argued that the Appellant is a bad person, therefore the Court should just brush aside all the legal errors and uphold an unlawful sanction. Mr. Kearney's brief follows a familiar pattern: when he knew the Appellant was right about an issue, he ignored that issue, or he ridiculed it in a conclusory footnote. *See, e.g.*, Appellee's Brief, 31 and 34, n. 11 and n.12. Either way, he never addressed the substance of the argument. Similarly, since he could

not respond substantively to the evidence of his criminal misconduct, he just lied about it in a conclusory footnote. *Id*. at 38, n. 15.

The core issue in this case is whether the Appellant acted reasonably in this case by requesting a stay pending the appeal of *Robertson I*, rather than dismissing it immediately after the verdict as Mr. Kearney and Judge Huvelle wanted him to do. By ignoring that central issue and resorting to distractions, Mr. Kearney conceded the error. Mr. Kearney repeatedly argued that all of the issues in this case could have been brought as counter-claims in *Robertson I*, never mind the fact that some of the claims arose after *Robertson I* was filed. Meanwhile, he failed to address the inherent jurisdictional problems created when a later-assigned judge, *i.e.*, Judge Huvelle, retroactively punishes counsel for actions that the first-assigned judge permitted.

Mr. Kearney falsely alleged that the grounds for Judge Huvelle's recusal have all been considered by this Court and rejected. In reality, *none* of the grounds cited by the Appellant have been considered by this Court, because they all occurred *after* the verdict in *Robertson I*. Finally, Mr. Kearney misrepresented the nature of the Appellant's argument regarding notice. The simple fact remains that the Appellant has been punished with a broad-brush sanction that encompasses a motion for stay, but no one identified that motion as problematic (much less grounds for sanctions) until Judge Huvelle issued her sanctions order. The

Appellant was entitled to notice of the *specific* grounds for sanctions, but such notice was not provided.

Argument

1. Defendant Kearney's brief is unresponsive and dishonest.

Mr. Kearney and Mr. Bramnick are defendants in the underlying case because of their criminal activities in related litigation, *i.e., Robertson I*. Here, they purport to be the attorneys for their co-defendant, Mr. Cartinhour. Rather than deal with the issues before the Court, they offered endless distractions in their response brief. Specifically, Mr. Kearney and Mr. Bramnick presented an extended *ad hominem* against the Appellant, directing the Court to the Appellant's disputes with other judges in other proceedings, even though those events have nothing to do with the issues before this Court. Mr. Kearney also erected numerous straw man arguments, falsely attributing them to the Appellant before tearing them down. For example, Mr. Kearney accused the Appellant of employing a "just following orders" defense, then spent three pages attacking that argument. Appellee's Brief, 28. The Appellant, however, never made that argument *anywhere* in his opening brief. For that matter, the Appellant never made the argument in his motion for summary disposition. Similarly, Mr. Kearney wrote that "Clevenger protests that he should not be sanctioned since he sought stays of *Robertson II* pending the decisions concerning his arguments that the automatic stay, 11 U.S.C. § 362, voided

the Decisions in *Robertson I* and that the Decisions in *Robertson I* would be overturned by this Court." *Id*. at 33-34. In reality, the Appellant never made any argument about a bankruptcy stay. Elsewhere, Mr. Kearney devotes an entire section to attacking an argument that the Appellant never made, *i.e.*, "Clevenger's Request for Proof of [Kearney's] Authority to Represent Cartinhour..." *Id*. at 49.

Finally, Mr. Kearney argues that "there are three distinct claims against Clevenger: (1) filing a Complaint against Cartinhour in New York for tactical advantage; (2) filing an action that is almost entirely made up of allegations that could or should have been brought in *Robertson I*, and (3) continuing to argue his case against Cartinhour even after the jury returned a resounding verdict against Robertson." *Id*. at 24. This is not true. In reality, Judge Huvelle only sanctioned the Appellant for the third reason, *i.e.*, for prosecuting the underlying case after the verdict in *Robertson I*. (Appx. 3:1045).

Such dishonesty is to be expected from a lawyer such as Mr. Kearney, who forges signatures, fabricates affidavits, and suborns perjury. Consider, for example, footnote 15 of the Appellee's Brief, where Mr. Kearney attempts to downplay the evidence of his criminality. In the opening brief, the Appellant directed the Court's attention to Mr. Cartinhour's testimony that his signature had been forged on an affidavit that was subsequently filed by his attorneys, *i.e.*, Mr. Kearney and Mr. Bramnick. Appellant's Brief, 37. In courtroom testimony before Judge Huvelle,

Mr. Cartinhour testified both (1) that his signature had been forged; and (2) that the contents of the purported affidavit were false. (Appx. 2:374-377). Rather than inquire into the evidence that a crime had been committed in her court by officers of the court, Judge Huvelle just ignored the testimony. At the end of footnote 15, Defendant Kearney tried to sweep that problem under the rug: "Clevenger can only continue his claims of fraud in the creation of an affidavit by ignoring and excluding Cartinhour's own testimony that he actually signed the Affidavit that Clevenger waves around as a false Affidavit." To what testimony was Mr. Kearney referring? Note that Defendant Kearney did not cite the record in support of that statement.[1]

Mr. Kearney seems to suggest that, because Judge Huvelle and this Court took no action against him in *Robertson I*, somehow that exonerated him and prohibited the Plaintiff (*i.e.*, Mr. Robertson) from bringing claims against him and his erstwhile client, Mr. Cartinhour. In fact, that seems to be the core of Mr. Kearney's argument, *i.e.*, that because he was not sanctioned in *Robertson I*, and because his misconduct did not result in a reversal of *Robertson I*, that somehow

[1] Even if Mr. Cartinhour later retracted the accusation against Mr. Kearney, that conflict would be a factual issue for the jury. The underlying case was dismissed on the *pleadings*.

equates to *res judicata*. Mr. Kearney cited no authority for this idea and, of course, there is none. In fact, binding case law establishes the exact opposite.

The Appellant directed the Court to a longstanding line of authority from New York and the Second Circuit holding that "absolute immunity does not extend to allegations of conspiracy to present false testimony." *See, e.g., Coggins v. Buonora*, 362 Fed.Appx. 224, 225 (2nd Cir. 2010), quoted in Appellant's Brief at 24. Mr. Kearney completely ignored *Coggins* and all the other cases cited on pages 23-26 of the Appellant's Brief. In fact, Mr. Kearney ignored the entire *argument* on pages 23-26, but for a simplistic footnote: "Clevenger's argument, which tries to raise a question about what law actually applies to this action, is nonsensical." In reality, there is no question about what law applies. In the opening brief, the Appellant cited long-settled Supreme Court precedent:

> [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.

Van Dusen v. Barrack, 376 U.S. 612, 639, 84 S. Ct. 805, 821, 11 L. Ed. 2d 945 (1964), cited in Appellee's Brief, 25-26. In other words, because this case was originally filed in New York, New York law applies to state law claims. Similarly, Second Circuit law applied to this case while it was pending in New York, and the Appellant (on behalf of the Plaintiff) acted reasonably in relying on *Coggins, et al*.

to bring claims against Mr. Kearney, Mr. Bramnick, and Mr. Cartinhour for their conspiracy to present false testimony.

2. The claims in this case could not have been brought in *Robertson I*.

Mr. Kearney repeatedly argued that the Appellant deserved to be sanctioned because he should have asserted counter-claims on behalf of Mr. Robertson in *Robertson I*, rather than filing the case below. Even though Judge Huvelle did *not* sanction the Appellant for filing this case in New York, she caustically criticized the Appellant for so doing, and in the process she faulted the Appellant for not bringing counter-claims in *Robertson I*. (Appx. 3:1040-1041). The Appellant will, therefore, address the issue. As a preliminary matter, the Appellant did not represent Mr. Robertson in *Robertson I*, therefore he could not have presented counter-claims in that case. In fact, this Court will recall that, when the Appellant tried to bring Mr. Kearney's crimes to the attention of Judge Huvelle, she prevented the Appellant from entering an appearance in *Robertson I*. Appellant's Brief, 38, citing Transcript Excerpt (Appx. 2:440-444).[2] Judge Huvelle made it abundantly

[2] In the opening brief, the Appellant noted that Judge Huvelle applied a double standard to the Appellant, ruling that the Appellant need not be permitted to appear in *Robertson I* because Mr. Robertson already had an attorney in that case. Appellant's Brief, 38 n.4. Yet when Mr. Kearney and Mr. Bramnick wanted to appear in *this* case on behalf of a *co-defendant* who already had separate counsel (*i.e.*, Mr. Yuzek and Ms. O'Donnell), she permitted them to do so, notwithstanding obvious conflicts of interest. Mr. Kearney does not and cannot deny the double standard, nor does he try to defend it. Instead, he just ignores it.

clear that she did not care about Mr. Kearney's crimes, and she did not want the issue raised in her courtroom. *Id*.

Accordingly, it is disingenuous for Mr. Kearney and Judge Huvelle to suggest that the Appellant could have entered an appearance in *Robertson I* and asserted counter-claims against not only Mr. Cartinhour, but *against his attorneys in that case*, *i.e.*, Mr. Kearney and Mr. Bramnick. Even if Judge Huvelle had permitted the Appellant to enter an appearance in *Robertson I*, would Mr. Kearney really have wanted the Appellant to sue him in the *same case* where he was appearing as Mr. Cartinhour's attorney? Of course not. And in any event, Judge Huvelle clearly would not have allowed it.

In footnote 9, Mr. Kearney argued that this case had nothing to do with the validity of the claims against him and his colleagues. Appellee's Brief, 26 n.9. That is false. As noted previously, Mr. Cartinhour not only implicated Mr. Kearney and Mr. Bramnick in forgery and fabrication, but in filing false discovery designed to conceal the existence of an adverse witness. Note Mr. Cartinhour's admission that he *should have* disclosed the identity of that adverse witness, Larry Ash, but also note how Mr. Cartinhour pretends that it was just a careless mistake. *See* Transcript of Testimony of William C. Cartinhour, February 1, 2011 (Appx. 2:430). Now compare that with Paragraphs 82 and 83 of the Original Complaint (Appx. 1:46), which recounts how Mr. Kearney and Mr. Bramnick had already learned about Mr.

Ash (from none other than Mr. Cartinhour) *before* the discovery responses were filed, how they had already communicated with Mr. Ash *before* the discovery responses were filed, and how they and Mr. Cartinhour *acted together* to conceal the identity of Mr. Ash by filing false discovery responses. Whether Mr. Kearney realizes it or not, he is therefore arguing that the Plaintiff should have asserted counter-claims against Mr. Cartinhour in *Robertson I*, then filed a *separate* case against Mr. Kearney, Mr. Bramnick, *et al*. based on the exact same event. This is implausible.

The underlying case was originally served on one of the named defendants in New York, thus venue was entirely proper in New York. As set forth in the opening brief, the law was settled in New York (unlike the District of Columbia, where it remains unsettled), and that law was favorable to the Plaintiff's case. Appellant's Brief, 23-26. Finally, Mr. Kearney's and Mr. Bramnick's criminal escapades began after *Robertson I* was filed. Res judicata cannot apply to events that had not happened when *Robertson I* was filed. *See, e.g., Does I through III v. District of Columbia,* 238 F.Supp.2d 212, 219-220 (D.D.C.)(citing cases). Therefore, even if the *Robertson I* jury verdict negated all of Mr. Robertson's claims that occurred prior to *Robertson I*, that verdict did not preclude claims that arose because of the misconduct *during* that case. In this regard, Mr. Kearney makes an interesting admission when he writes that the jury heard and rejected "all

of the facts that constituted the *bulk* of the Complaint in *Robertson I* against Cartinhour." Appellee's Brief, 25 (emphasis added). What about the facts outside "the bulk" of the *Robertson I* complaint, or those facts outside that complaint entirely? The *Robertson I* jury did not reach and could not have reached issues pertaining to the criminal conduct of Mr. Kearney, Mr. Bramnick, and Mr. Cartinhour during *Robertson I* itself.

3. Judge Huvelle erred by second-guessing the decisions of Judge Swain.

If Mr. Kearney was honest, he would have simply conceded that there is a split of authority regarding a court's power to sanction actions pending before another court. *Compare, e.g., John Akridge Company v. Travelers Companies*, 944 F. Supp. 33, 34 (D.D.C. 1996)(imposing sanctions for events in another court) *with Healey v. Labgold*, 271 F. Supp. 2d 303, 305 (D.D.C. 2003)(refusing to impose sanctions for events in another court). Instead, Mr. Kearney misrepresented an earlier iteration of *Healey,* 231 F.Supp.2d 64 (D.D.C. 2002), to lend support to his argument. As another court later explained, the plaintiff in *Healey* "filed a complaint with five claims that had already been deemed part of his bankruptcy estate, and thus claims only the trustee could bring." *In re Greater Se. Cmty. Hosp. Corp., I*, 02-02250, 2010 WL 3123086 (Bankr. D.D.C. Aug. 9, 2010). That scenario is not even remotely similar to the present case. Moreover, the plaintiff in *Healey* had already pursued his claims through appeal to the Fourth Circuit and lost, *then*

brought overlapping claims in the D.C. court. That is dramatically different from this case, where (1) the underlying case was filed *before* the verdict in *Robertson I*, then (2) after the verdict in *Robertson I*, the Appellant asked Judge Swain to stay this case while an appeal from *Robertson I* was pending.

Mr. Kearney's reference to *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (D.C. Cir. 1983), *see* Appellee's Brief, 34, is just another straw man argument. The Appellant never suggested that the *Robertson I* verdict was anything other than final while it was being appealed. Instead, the Appellant explained that, while this case was pending before Judge Swain in New York, he relied on various *binding* Second Circuit cases holding that he could seek a stay after the *Robertson I* verdict rather than dismissing all claims immediately. *See* Appellant's Brief, 23-24 quoting First Motion to Stay, 2-3 (Appx. 1:140-142) and various authorities therein. While Judge Swain did not formally grant a stay, she obviously left the case on "hold" for seven months after the motion was filed. *See* Docket (Appx. 1:13-16). In other words, she granted a *de facto* stay, even if there was no stay *de jure*.

Therein lies one of the most crucial errors in Judge Huvelle's sanctions order, *i.e.*, she second-guessed Judge Swain after the case was transferred to D.C. In his brief, Mr. Kearney cited the later iteration of *Healey v. Labgold* in passing, but he ignored this passage:

> [I]t would be an obvious usurpation of jurisdiction for this court to exercise its inherent authority to sanction behavior before another district court. While this court has inherent authority to sanction misbehavior by litigants in matters before it, no one has ever suggested that this inherent authority extends to misbehavior before another district court. Such behavior can and should be punished by that court if it sees fit.

271 F. Supp. 2d 303, 305 (D.D.C. 2003). Granted, this case differs somewhat insofar as it involves statutory sanctions versus the court's inherent authority, but the jurisdictional principle remains the same. Mr. Kearney and Judge Huvelle fault the Appellant for seeking a stay from Judge Swain, rather than dismissing this case, never mind that (1) Judge Swain had no problem with the request for stay, and (2) the request for a stay was perfectly lawful and reasonable under the law of the Second Circuit.

The rationale offered by Mr. Kearney and Judge Huvelle is pernicious. Citing Judge Huvelle, Mr. Kearney refers to the "warning signals" or "warning bells" that Judge Huvelle issued while this case was pending before Judge Swain. Bear in mind, Judge Huvelle had *denied* Mr. Kearney's request that she enjoin the proceedings in front of Judge Swain, a fact that Judge Huvelle even acknowledged in her sanctions order. (Appx. 3:1045). Yet regardless of what Judge Swain thought about the proceedings in her own courtroom, the Appellant was supposed to know from the "warning signals" that he was supposed to immediately dismiss the proceedings pending before Judge Swain, lest this case be transferred to Judge

Huvelle at a later date, whereupon Judge Huvelle would sanction him $123,802.17 for the perfectly lawful act of requesting a stay of this case while *Robertson I* was pending on appeal. That is not just pernicious, it's Orwellian. If that principle stands, then every lawyer in federal court can be subject to sanctions any time his or her case is transferred to another judge. A newly assigned judge can second-guess anything his or her predecessor has done, and any lawyer can be punished if the new judge doesn't like what the former judge did.

Even where judges have sanctioned attorneys or parties for actions in another court, those cases are fundamentally different from this one. In all those cases, a lawyer or party was sanctioned for *filing* a lawsuit elsewhere. Consider *Akridge Co. v. Travelers Companies*, 944 F.Supp. 33 (D.D.C. 1996), cited by Judge Huvelle, and note that the sanctioned attorney filed claims *after* an entry of judgment in a prior case. In this case, Judge Huvelle expressly refused to enjoin proceedings in Judge Swain's court, and thereafter she refused to sanction the Appellant for filing this case. If the Appellant had no right to file this case on behalf of the Plaintiff, Judge Huvelle should have enjoined it. But once she made the decision that this case did not interfere with *Robertson I*, it was, from that point forward, Judge Swain's right to determine (1) whether this case was foreclosed by the *Robertson I* verdict; (2) whether this case should be stayed pending the appeal of *Robertson I*; and (3) whether that motion for a stay was frivolous.

4. Defendant Kearney ignored the authority regarding the request for stay.

The Appellant cited numerous cases to Judge Swain (Appx. 1:140-142), and later to this Court, Appellant's Brief, 23-24, demonstrating that the decision to seek a stay while *Robertson I* was on appeal was a perfectly lawful course of action under the law of the Second Circuit. In other words, it was neither frivolous nor vexatious *as a matter of law*. (And as noted in the opening brief, it is essentially a tautology that a request to stay proceedings cannot multiply them). Faced with this inconvenient truth, Defendant Kearney completely ignored all the cases cited by the Appellant, and instead resorted to deception. He falsely accused the Appellant of relying on an argument about a bankruptcy stay, then used that as an opportunity to trash the Appellant because he was sanctioned in an appeal related to that bankruptcy case. Appellee's Brief, 33-34. In reality, the Appellant's argument had nothing to do with a bankruptcy stay, as any honest person can see from reading the Appellant's Brief. The issue before this Court is whether the Appellant multiplied proceedings or acted vexatiously by seeking a stay of this case while the appeal was pending in *Robertson I*. That appeal was ultimately resolved against the Plaintiff (*after* Judge Huvelle dismissed the case below and sanctioned the Appellant), but no one – not even Mr. Kearney himself – ever suggested the appeal was frivolous. Accordingly, the Appellant acted appropriately in requesting a stay from Judge

Swain pending the appeal, rather than dismissing the case immediately after the verdict as Mr. Kearney and Judge Huvelle wanted.

5. Defendant Kearney deliberately delayed the filing of the motion for sanctions for almost a year.

Defendant Kearney unwittingly eviscerates his own argument. He cites all the instances where Appellee Cartinhour's other purported counsel *threatened* to file sanctions motions against the Appellant while this case was pending before Judge Swain. Appellee's Brief, 36. What he does not and cannot do is direct the Court to an instance where Mr. Cartinhour's attorneys *filed* a motion for sanctions in New York. That difference is significant for two reasons. First, Mr. Kearney blusters about the fact that Mr. Yuzek and Ms. O'Donnell filed a motion to *dismiss* shortly after the *Robertson I* verdict and sent various threatening letters, but nowhere did the motion or letters explain why it was egregiously wrong to seek a stay pending appeal rather than consenting to dismissal. In fact, Mr. Kearney cannot explain even now why it was wrong to seek a stay, because the authority cited by the Appellant conclusively proves that a request for stay pending appeal was reasonable. Second, the Appellant told Mr. Yuzek, *et al*. time and time again that, instead of blustering threats about sanctions, they needed to follow the requirements of Rule 11 and set forth the *specific* reasons that the *Robertson I* verdict required the Plaintiff to dismiss this case. Appellant's Brief, 20-22 (quoting the record).

They never did. Had they done so, the Appellant would have known up front why they thought he was obligated to dismiss the case voluntarily. Instead, they sat on their hands for nearly a year. Why? Judge Swain was not receptive to their requests for sanctions (because she knew full well that the Appellant had acted reasonably). So they bided their time, hoping to get this case transferred to a deeply conflicted and biased judge, *i.e.*, Judge Huvelle, who would give them what Judge Swain would not. Thus this case is dissimilar to *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 879 (5th Cir. 1988), *et al*. only because it is so much worse. In those cases, the delays were negligent or, at worst, reckless. In this case, the delay was intentional and in bad faith.

6. Judge Huvelle's recusal was necessitated by events that have nothing to do with prior motions for recusal.

As is his wont, Mr. Kearney badly misrepresents the reasons the Appellant sought Judge Huvelle's recusal. "All of the issues which Clevenger complains about is a rehash of his multiple unsuccessful attempts to have Judge Huvelle removed in the prior litigations," he writes. Appellee's Brief, 37. "Nothing has changed." *Id*. This is utterly false. Of all the reasons cited for Judge Huvelle's recusal from this case, *none* had even occurred at the time of the *Robertson I* verdict.

The Appellant did *not*, for example, direct the Court to Judge Huvelle's outrageous comments in *Robertson I*, even though he directed the Judiciary Committee to some of those outrageous comments. Instead, the Appellant directed this Court's attention exclusively to misconduct that occurred subsequent to the verdict in *Robertson I*. Mr. Kearney can try to spin the issue however he wants, but this much is indisputable: Judge Huvelle deliberately assigned herself to a case that implicated her in gross misconduct. If the pleadings were taken as true, as they must have been for purposes of a motion to dismiss, then Judge Huvelle violated Judicial Canon 3(B)(3)(duty to take action against attorney misconduct) at the very least, and at worst she misprisioned a felony by allowing perjury, forgery, etc. in her courtroom.

If the pleadings in this case were truly without merit, then any judge could have seen that and punished the Appellant accordingly. However, when the offended judge assigned herself to this case, dismissed it on the pleadings, and then sanctioned the attorney who identified her misconduct, she inevitably created an appearance of impropriety. Mr. Kearney tried to downplay any suggestion that Judge Huvelle misused her position as chairwoman of the assignments committee, but he did not and could not deny that (1) Judge Huvelle knew that the Appellant had objected to the motion to transfer this case to her (Appx. 1:262); and (2) she

nonetheless transferred it to herself before the expiration of the 14-day period afforded for a response under the local rules. (Appx. 1:269).

Similarly, Mr. Kearney does not deny that Judge Huvelle conducted an extrajudicial investigation and received *ex parte* evidence in *Robertson I* related to Mr. Cartinhour's competence. Instead, he argued that the information exchanged *ex parte* is not relevant to this case. He is wrong. In the opening brief, the Appellant explained how Mr. Cartinhour's competence was relevant to the claims against him in the case below. Appellant's Brief, 35-36. That became all the more apparent when Mr. Kearney filed the sanctions motion, purportedly on behalf of Mr. Cartinhour. As set forth in the opening brief (and below), there is considerable evidence that Mr. Cartinhour is not the real party in interest. If Mr. Cartinhour is not competent, that is acutely relevant to the issue of whether he authorized Dean Yuzek, *et al*. to represent *his* interests, or whether Mr. Kearney and his firm retained Mr. Yuzek to represent *their* interests. Either way, Judge Huvelle has extrajudicial information on that subject that she has not yet disclosed.

Mr. Kearney also tried to downplay the fact that Judge Huvelle falsely accused the Appellant of filing a bankruptcy case for an improper purpose, then refused to correct her false statement when the Appellant proved unequivocally that the accusation was false. As a quick review of PACER reveals, the involuntary bankruptcy petition was filed *against* the Appellant's client by William Wooten, an

attorney in Memphis. *See In re W.A.R., LLP*, Case No.: 10-32530 (W.D. Tenn.). From there, Mr. Kearney resorted to the wildest of speculation and conjecture: because the Appellant spoke with Mr. Wooten before Mr. Wooten filed the involuntary petition, "[a] fact finder can legitimately read that Clevenger and Robertson drove the filing of the involuntary case." Appellee's Brief, 26-27 n.10. According to Mr. Kearney's tormented logic, then, any time he conferred with opposing counsel before a lawsuit was filed, one can legitimately infer that Mr. Kearney "drove the filing" of that lawsuit against his own client. Accordingly, since Mr. Kearney's firm exchanged correspondence with Mr. Robertson before Mr. Robertson filed *Robertson I* against Mr. Cartinhour, one can legitimately infer that *Mr. Kearney* induced Mr. Robertson to file *Robertson I* against Mr. Cartinhour. What nonsense. Below is the relevant excerpt from the Appellant's sworn declaration on the subject:

> Neither I nor Wade Robertson filed *In re W.A.R., LLP*, Case No. 11-00044 (D.C. Bktp.). W.A.R., LLP was originally sued by a creditor in state court in Shelby County, Tennessee. After W.A.R., LLP was served, I contacted the plaintiff's attorney, William Wooten, and I told him that W.A.R., LLP had no funds because its assets had been frozen by this Court in *Robertson I*. Mr. Wooten then filed an involuntary bankruptcy petition in the Western District of Tennessee, and that case ultimately became Case No. 11-00044 in this district.

September 7, 2012 Declaration of Ty Clevenger (Appx. 3:1112). Nobody has ever disputed this account.

Thus the fact remains that Judge Huvelle falsely accused the Appellant of filing a bankruptcy case for an improper purpose, when the Appellant did not file the case at all. In the face of unequivocal evidence that her allegation was false, Judge Huvelle then refused to retract it. Only the most biased and vindictive judge would so such a thing. Accordingly, she first erred by assigning herself to this case, and then by refusing to recuse herself from this case.

7. The district court erred by refusing to permit discovery related to attorney fees.

Mr. Kearney's suggestion that the Appellant sought a "blitzkrieg" of discovery is so disingenuous as to be absurd. What is so burdensome about producing a retainer agreement between Mr. Cartinhour and his purported attorneys? Mr. Kearney rants and raves about the Appellant relying on speculation, but that allegation is demonstrably false. As detailed in the Appellant's Brief:

* Dean Yuzek admitted that he had been retained by and was taking his direction from "intermediaries." (Appx. 1:88).

* The Appellant repeatedly warned Mr. Yuzek in writing about his concerns that the "intermediaries" were none other than Mr. Kearney and/or his colleagues, further warning that Mr. Kearney and his colleagues had a gross conflict of interest with Mr. Cartinhour. (Appx. 3:868, 884-885)

* The Appellant asked Mr. Yuzek whether he had spoken with his purported client, Mr. Cartinhour, and Mr. Yuzek claimed that he had. (Appx. 3:884-885). His own billing records, however, later showed that Mr. Yuzek was lying. (Appx. 2:720-775).

* Mr. Yuzek's billing records demonstrate that the "intermediaries" giving him directions were, in fact, none other than Mr. Kearney and his colleagues. *Id*.

* For *fifteen months*, Mr. Yuzek and his associate, Cherish O'Donnell, did not communicate with their purported client, notwithstanding major developments in the case, including its transfer to the District of Columbia and their subsequent entries of appearance in the district court below. *Id*. Instead, they communicated with Mr. Kearney and Mr. Bramnick, notwithstanding the conflicts of interest. *Id*.

* Mr. Yuzek's billing records reflected an outstanding balance of $82,453.90, (Appx. 2:775), indicating that Mr. Cartinhour had not paid the bill, perhaps because he did not authorize the services performed by Mr. Yuzek.

Appellant's Brief, 27-34.

In the Appellee's Brief, Mr. Kearney derided the Appellant's "wild speculation" that Mr. Kearney (rather than Mr. Cartinhour) was paying Mr. Yuzek's bill, but then he made a curious statement about the allegedly "wild speculation," *i.e.*, that it "ignores the fact that attorneys have trust accounts that contain their clients' funds." Appellee's Brief, 45 n.19. Mr. Kearney seems to be acknowledging that he paid Mr. Yuzek's bill, yet arguing that it was OK because he was doing it from a "trust account" belonging to his "client." Of course, Mr. Cartinhour was not Mr. Kearney's client in the case below; they were co-defendants. Mr. Cartinhour was *Mr. Yuzek's* client in the case below, thus any trust account would properly belong with Mr. Yuzek. Standing alone, this might not be

dispositive. But taken together, the evidence indicates that Mr. Kearney and/or his colleagues (1) retained Mr. Yuzek; (2) paid Mr. Yuzek; (3) and gave Mr. Yuzek directions regarding the purported representation of Mr. Cartinhour, notwithstanding gross conflicts of interest. For the first time on appeal, Mr. Kearney recited Rule 1.7(c) of the D.C. Rules of Professional Conduct, *see* Appellee's Brief, 45 n.18, seemingly *suggesting* that *maybe* Mr. Cartinhour waived the conflicts. Why so vague? Rather than just telling us that the rule exists, which we already knew, why didn't Mr. Kearney tell us plainly whether the conflict was waived? Most likely because a plain statement of the truth, *i.e.*, that the conflicts were *not* waived, would subject Mr. Kearney to professional discipline.

Predictably, Mr. Kearney ignored *Gaston & Co. v. All Russian Zemsky Union*, 221 A.D. 732, 734-35 (1927), which states in relevant part that "[t]he 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." Mr. Kearney and/or Mr. Yuzek are in possession of the facts, not the Appellant. And Mr. Kearney's reactionary, over-the-top response to a request for proof of Mr. Yuzek's authority is telling. Why is Mr. Kearney so hellbent on hiding a retainer agreement? Or, for that matter, a conflict waiver? Because those documents do not exist, and because

Mr. Kearney and his colleagues are the real parties in interest rather than Mr. Cartinhour.

The Court will also recall that Mr. Kearney conditioned settlement of Mr. Cartinhour's claims in *Robertson I* upon the release of all claims against Mr. Kearney and his colleagues in this case. (Appx. 3:944-952). Mr. Kearney further admitted that Mr. Cartinhour had not seen the foregoing counter-proposal, *id.*, and it is near certain that Mr. Kearney did not advise Mr. Cartinhour to seek independent legal advice regarding Mr. Kearney's conflict of interest. In light of all this evidence of chicanery and manipulation, it is entirely appropriate to demand proof that Mr. Cartinhour retained Mr. Yuzek to represent *his* interests, rather than Mr. Kearney and his colleagues retaining Mr. Yuzek to represent *their* interests. After all, both the Court and the Appellant have a right to know the identity of the real parties in interest. *See, e.g., Thrift Depositors of America, Inc. v. Office of Thrift Supervision*, 1996 WL 247971 (D.C. Cir. 1996). And as noted previously, Judge Huvelle's *ex parte* information about Mr. Cartinhour's competence is directly relevant to the question of whether Mr. Cartinhour is even aware of all this chicanery.

8. The issue of Defendant Kearney's authority to represent Defendant Cartinhour was not appealed.

As explained above, Mr. Kearney's entire Section VII, *i.e.*, "Clevenger's Request for Proof of the Undersigned's Authority to Represent Cartinhour is Meritless," Appellee's Brief, 43-45, is just another straw man argument and another excuse for Mr. Kearney to rant and rave.

9. Defendant Kearney misrepresented the Appellant's argument regarding notice.

One of the core problems with Judge Huvelle's sanctions order is the fact that neither she, Mr. Kearney, nor anyone else gave notice that a request for stay pending the appeal of *Robertson I* (rather than an agreed dismissal of all claims as they wanted) was grounds for sanctions. The Appellant cited various authorities for the proposition that a motion for sanctions must give *specific* notice of the alleged misconduct. Appellant's Brief, 17-18. Where was the warning from Mr. Yuzek, Mr. Kearney, or Judge Huvelle that the Appellant was to be sanctioned for seeking a stay rather than consenting to dismissal? There was never any notice that anyone thought the request for a stay was improper, and indeed the request for a stay was *not* improper. *See Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2nd Cir. 2000).

The issue of notice is also closely related to Judge Huvelle's allegations that the Appellant "bad-faith conduct…in direct defiance of the sanctioning court" and that he had "defied the Court by pursuing baseless claims and arguments." As

noted in the opening brief, Judge Huvelle never explained *how* the Appellant engaged in "direct" defiance of her court. Where, exactly, is the order or directive that the Appellent defied? Judge Huvelle had never ordered the Appellant to dismiss the claims in New York. On the contrary, she had *denied* Mr. Kearney's request to enjoin the proceedings in New York. Yet she expected the Appellant to read her mind and know (1) that even though she denied the request for an injunction, she really expected the Appellant to dismiss this case anyway; and (2) that if she ever got her hands on this case, she would sanction the Appellant for failing to read her signals. If Judge Huvelle thought the Appellant was engaging in "direct" defiance by failing to dismiss this case *while it was pending in another judge's court*, then she should have said so plainly. And Mr. Kearney should have plainly stated that he thought the Appellant should be sanctioned for seeking a stay. Of course, neither happened. The sanctions order was the first occasion that anyone suggested the Appellant had engaged in misconduct by seeking a stay rather than dismissing all claims after the *Robertson I* verdict.

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/

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 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:

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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 6,112 words according to a word count performed by Microsoft Word.

_____/s/_____
Ty Clevenger