CAUSE NO. 14-20128

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN RAMON TORRES; EUGENE ROBISON
PLAINTIFFS-APPELLEES,
V.
SGEMANAGEMENT, LLC; ET AL.,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Civil Action No. 4:09-cv-2056

REPLY TO RESPONDENTS' RESPONSE TO EX PARTE MOTION FOR CONTEMPT

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CLEARMAN'S REPLY TO RESPONDENTS' RESPONSE TO EX PARTE MOTION FOR CONTEMPT

Scott M. Clearman ("Clearman"), class counsel for the plaintiffs' class, files this Reply to the Response of Mathew Prebeg ("Prebeg") and Andrew Kochanowski ("Kochanowski") (collectively, "Respondents") to Clearman's Motion for Contempt of this court's March 3, 2014 stay order.[1]

I. INTRODUCTION.

Respondents demonstrate a lack of comprehension of the import of the Fifth Circuit's order, and also of the import of the District Court's order below. It is not up to Respondents and Defendants' counsel to agree to file a motion in the District Court in violation of this Court's order. Informing the District Court that they were doing so is of no import. The proper course would have been for Respondents to seek leave from the Fifth Circuit to proceed with their motion.

The Court should decline to lift the stay for this purpose. If this Court reverses the certification order, the question of appointment of class counsel would be moot. Thus, judicial economy would best be achieved by this Court's enforcing the stay. If, however, the Court lifts the stay with respect to Respondents' motion, Clearman respectfully moves that he also be permitted to file a motion seeking to be retained and appointed as lead counsel for the class in the trial court, pursuant to

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[1] Prebeg and Kochanowski were also appointed as class counsel in the Direct Court order on class certification. See *Torres v. SGE Mgmt. LLC*, No. 4:09-CV-2056, 2014 WL 129793, at *4 (S.D. Tex. Jan. 13, 2014).

FED. R. CIV. P. 23(g), and to present arguments and evidence in support thereof. The order appointing class counsel is not merely administrative, but essential to the certification order. *See*, FED. R. CIV. P. 23(a)(4) & (g). Because circumstances and issues have changed, the District Court may wish to revisit the entire question of appointment of all class counsel and adequacy of class counsel, especially including Respondents, assuming the certification order is affirmed.

II. THE LETTER FROM THE NAMED PLAINTIFFS "FIRING" CLEARMAN

A. How Clearman was "fired" is suspect and requires factual discovery.

When Clearman became seriously ill due to his alcoholism, he decided to temporarily step down as attorney-in-charge, during his treatment and recovery. Rather than being vilified for his illness, Clearman should be applauded for taking steps to protect the interests of the class during his treatment and recovery. By agreement, Prebeg (Clearman's then law partner) took on a greater role as attorney-in-charge, but not removing or otherwise interfering with Clearman's role as a lead counsel.[2] At that time, fact discovery was closed and what remained to be done in the short term was expert discovery and certification briefing.

The clients never complained about Clearman taking time away for treatment -- that is, until December 15, 2014, nearly a year later, when Prebeg

[2] TC Dkt. 140 (date 10/20/2013).

asked for and got the clients' signature on a letter dismissing Clearman.[3] Strangely, after Prebeg received this letter, he neither informed the Court nor Clearman. During a January 28, 2015 mediation of Clearman's lawsuit against Prebeg (a partnership dissolution suit),[4] Prebeg mentioned for the first time to Clearman's attorney that the named plaintiffs in *Torres* had "fired" Clearman.[5] Still, Prebeg did not provide a copy of the letter until his February 26, 2015 production of documents in the *Clearman v. Prebeg* suit.[6] In early April 2015, again during settlement discussions in *Clearman v. Prebeg*, Prebeg asked if Clearman would withdraw as counsel for the class in *Torres*, and Clearman refused.[7] Only after Clearman filed the *Griggs* suit did Prebeg act.

Clearman will seek to present this and other events to demonstrate that Prebeg's intent in getting the letter "firing" Clearman was always for leverage in his defense of the *Clearman v. Prebeg* lawsuit, and not in furtherance of the class' interests. Prebeg's reasons for concealing this information, even from Clearman, are unknown; however, this further demonstrates Prebeg's contempt of this Court.

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3 TC Dkt. 203 (Exhibit A) & 208-1 (Exhibit A-7).

4 *Scott M. Clearman v. Matthew J.M. Prebeg*, Cause No. 2, In the 164th Harris County District Court, Jan. 28. 2014.

5 TC Dkt. 208-1 (Exhibit A-7).

6 Prebeg never provided Clearman with the letter in any instance other than in connection with his defense of the *Clearman v. Prebeg* suit.

7 TC Dkt. 208-1 (Exhibit A-6)

B. The named plaintiffs are not empowered to "fire" Clearman once he was appointed by the District Court.

The District Court appointed Clearman to act as counsel on behalf of a class of plaintiffs. These include not only the named plaintiffs, but also the plaintiff class. If, in fact, the class certification order is upheld by the Fifth Circuit, Clearman's duty will remain as it is, to act in the best interests of the certified class of plaintiffs, as opposed to representing any individual plaintiffs – such as Robison or Torres. FED. R. CIV. P. 23(g). As stated in the advisory committee notes accompanying the 2003 amendments to Rule 23:

> Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. ***The class representatives do not have an unfettered right to "fire" class counsel.*** *In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal ...*[8]

Nowhere does Rule 23 say that the trial court may only appoint attorneys currently representing named plaintiffs. The Advisory Committee Notes further state, with regard to appointment of class counsel:

> For counsel who filed the action [**Clearman**], the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily

[8] FED. R. CIV. P. 23(f) Advisory Committee's Notes (2003 amendments) (emphasis added).

> would file a formal application detailing their suitability for the position.[9]

The only known retention and fee agreement between the named plaintiffs and any attorney, are between each of the clients, and attorneys Jeff Burnett and Scott Clearman. Since Clearman brought this action and is the only appointed class counsel with any significant class action experience, it would be in the best interest of the plaintiff class for Clearman to remain counsel for the class. Respondent Prebeg, a patent attorney, is only involved in this case at all by virtue of having been Clearman's former law partner (which occurred well after Clearman filed this case, and had conducted significant litigation, including an appeal to this Court).[10] Kochanowski, brought to the case by Prebeg late in the proceedings, has no class action experience. Prebeg and Kochanowski's participating in the case has been limited to helping with discovery and in filing and arguing the certification motion during Clearman's absence. Prebeg and Kochanowski retained outside counsel to defend the appeal to the Fifth Circuit of the certification order.[11]

The reasons for Clearman stepping aside temporarily, *i.e.*, his health, have now been resolved, and Clearman is well able to continue to fulfill his duties to the

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9 *Id.*

10 *Torres v. S.G.E. Mgmt., L.L.C.*, 397 F. App'x 63 (5th Cir. 2010).

11 Clearman handled the first appeal to the Fifth Circuit on his own. Hiring outside counsel to handle such an important issue hardly meets the demanding duties required of class counsel.

class. He is in the best position to be class counsel, due to his extensive experience with the very formation of this case and in other class actions, which is unmatched by any of the other applicants.[12]

III. CLEARMAN'S RECENT FILING OF THE GRIGGS ACTION CREATES NO CONFLICT

Respondents cannot articulate, nor will they be able to demonstrate any conflict of interest.

> [A] mere claim of a conflict is not enough; there must be proof. Moreover, the Court must make its decision in the interest of justice to all concerned, and it must balance the need to ensure proper conduct on the part of lawyers appearing before it against the harm to other social interests which may ensure if disqualification is improvidently granted.[13]

Respondents provide no evidence or arguments supporting their assertion that Clearman has a conflict of interest, simply because he is representing another plaintiff class in a similar action seeking relief against these defendants (and more).

Respondents state that Clearman filed a "copycat" case in the Western District of Texas ("Griggs"). Clearman, in fact, filed both the *Torres* and the *Griggs* actions on his own, without any participation or help from Respondents. In

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[12] While Defendants' position about Respondents' Motion to Remove Clearman as Class Counsel is not necessarily relevant, the fact that Defendants support Respondents' motion is a good sign that Clearman should be retained as class counsel, not the opposite. Why would Defendants not want to remove the attorney who brought this case against them, and who is the only plaintiff attorney in the case with significant class action experience?

[13] *Laker Airways, Ltd. v. Pan Am. World Airways,* 103 F.R.D. 22, 27 (D.D.C. 1984).

so doing, Clearman utilized his extensive research and knowledge of class actions and RICO claims. He did not "copy," or use any other attorney's work product.

There is no conflict created by Clearman filing the *Griggs* case pending the appeal of *Torres* before the Fifth Circuit. Although the cases involve many, but not all, of the same defendants, the parties, claims and class definitions are sufficiently separate and distinct. To the extent the cases overlap, the positions taken by Clearman in *Griggs* can only benefit the *Torres* class as well, because the putative class in *Griggs* is broader, and *Griggs* includes Defendants' Classes designed to include more defendants, to maximize potential recovery for the class.

Respondents cite the possibility of future, hypothetical "collateral rulings," but provide no details about how this could create a conflict of interest for Clearman. There is no support whatsoever for Respondents' contention that a possibility of future collateral rulings should require removal of an attorney.

IV. TWO SCENARIOS ARE POSSIBLE

If the Fifth Circuit declines to uphold the District Court's certification of a class in this case, Respondents' motion to remove Clearman as class counsel would be moot. The named plaintiffs would be free to continue to pursue their individual claims against Defendants below, through their individual attorneys. Nothing about the *Griggs* case would prevent them from doing so.

On the other hand, if the Fifth Circuit upholds the lower court's certification, the case may proceed in the District Court, which will be in a position to rule on Respondents' motion and to revisit the question of appointment of class counsel, and adequacy of counsel, at the appropriate time, after the stay is lifted.

Respondents refer to the question of class counsel as merely "administrative." On the contrary, appointment of class counsel is one of the essential requirements of a class certification order. FED. R. CIV. P. 23(g) ("Unless a statute provides otherwise, a court that certifies a class *must* appoint class counsel." (emphasis added)). Further, the District Court may not assume adequacy of counsel; rather, the court is required consider evidence and make findings on the all of the elements relating to adequacy.[14] (However, even if the matter were merely "administrative," as urged by Respondents, it would no less be subject to this Court's stay order, which applies to ***all proceedings*** in the District Court.)[15]

In order to change the designation of class counsel, the District Court may consider evidence as to which counsel would best represent the interests of the class. Usually, this requires consideration of evidence, including an evidentiary

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[14] FED. R. CIV. P. 23(g)(2).

[15] This Court's order of Mar. 3, 2015.

hearing in the District Court.[16] In advance of such a hearing, Clearman should be entitled to conduct depositions of the named plaintiffs.[17]

V. RESPONDENTS' ARGUMENTS ARE WITHOUT MERIT

Respondents make several other arguments that they portray as meaningful but that are meaningless, even deceptive. First, Respondents complain that Clearman did not file the Response "under seal." But Respondents state no reason it should have been filed under seal. In fact, Rule 23 requires that all class members be given notice of attorney fee arrangements and potential awards of fees. FED. R. CIV. P. 23 (g) & (h).[18]

Second, Respondents say that Clearman's Response in the trial court was late. Factually, the Response was timely but Clearman's Declaration was filed late, by about 43 minutes. When able (*i.e.*, when not prohibited by this Court's stay), Clearman will seek the trial court's forgiveness due to technical difficulties – specifically that the original exhibits were too large for ECF and had to be

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16 *Id.*

17 The purpose will be to show that Prebeg has attempted to remove Clearman as class counsel for the improper purpose of assisting himself in his defense of the *Clearman v. Prebeg* suit, and not for any legitimate purpose that would serve the interests of the class.

18 While Respondents' modus operandi is to operate in secret, that is not how class actions are conducted, nor should it be.

condensed to file. While regrettable, a technical difficulty is not a sufficient reason to dismiss Clearman as class counsel, as urged by Respondents.[19]

Finally, Respondents point out, incongruously, that Defendants previously filed a motion in the District Court to assess sanctions against Clearman for "misconduct." They fail to disclose that the District Court denied that motion in its entirety. This is another instance of Respondents' lack of candor before this Court.

VI. CONCLUSION

Clearman asks that this Court issue an order holding Prebeg and Kochanowski in contempt of its March 2, 2014 order until such time as they withdraw the motion before the District Court. In the event this Court lifts the stay, Clearman requests leave to file a motion and to present evidence asking the District Court to reconsider its appointment of class counsel in *Torres*, and an opportunity to present evidence and to be heard regarding this issue. Clearman asks for any and all other relief deemed necessary.

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[19] The 5TH CIR. L.R.25.2.12 provides that "[a] Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court." There is no reason to believe the District Court will not acknowledge the realities of computer filings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2015, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on counsel for all parties.

By: **/s/ Scott M. Clearman**
SCOTT M. CLEARMAN