State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 09-253

Complainant: No. 1373610678A

Judge: No. 1373610678B

ORDER

The complainant alleged the judge ruled on pending motions before the opposing party responded. The commission reviewed the complaint and the judge's response and found no evidence of misconduct on the part of the judge. The complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: February 26, 2010.

FOR THE COMMISSION

\s\ Keith Stott

Executive Director

Copies of this order were mailed to the complainant and the judge on February 26, 2010.

This order may not be used as a basis for disqualification of a judge.

CJC 09-253

ATTORNEY AT LAW

September 17, 2009

E. Keith Stott, Jr., Executive Director
Arizona Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

Re: Complaint – Judge
Rules 1.1, 1.2, 2.2 and 2.6(A), AZ Rules of Judicial Conduct

Dear Director Stott:

This is a complaint regarding four (4) rulings made by Judge in the above-referenced action in violation of Rule 7.1(a), Arizona Rules of Civil Procedure and one (1) ruling in violation of Rule 41(a), Arizona Rules of Civil Procedure. As explained herein, these multiple violations of the Rules did not just result in procedural violations, but in violations of Constitutional rights of both a defendant and a non-party and in the denial of consideration of important Constitutional issues by the State of Maryland's supreme court.

is a publicly-traded company headquartered in Phoenix, Arizona that markets a line of homeopathic cold remedies under its brand name. In December 2002, filed the above-referenced defamation suit against certain pseudonymous Internet message board posters that alleged defamed it.[1]

added as a defendant in the case in September 2003. As explained in Mr. attached Motion to Unseal Records, case against was meritless. postings were true, but involved embarrassing facts about and third parties that attempted to cover up with this suit. (For example, discovered, *inter alia*, that some customers were alleging they lost their sense of smell from using nasal gel and one of the inventors of had a degree from a now defunct school in Spain recognized as a diploma mill by U.S. authorities. Schneider posted this information on

[1]. In addition to a defamation count, the complaint included a count for interference with contractual relations and business expectancies, and trade libel.

the Internet before it was reported in multiple mainstream media publications. never sued the mainstream media publications. In June 2009, the FDA advised consumers to stop using certain products because they are associated with the loss of sense of smell.)

The case dragged on for several years until January 2007 when suddenly moved to dismiss its case. Throughout the time the case was assigned to him, Judge granted all Motion to Continue the case and conduct additional discovery before time to respond per Rule Ariz. R. Civ. P. 7.1(a) had expired. Judge also granted Motion to Dismiss this case before time to respond expired per Ariz. R. Civ. P. 7.1(a) and in violation of Ariz. R. Civ. P. 41(a)(2).

One example of the violations of Ariz. R. Civ. P. 7.1(a) is the following - on November 16, 2005, filed a Motion to Continue this Case on the Inactive Calendar and for an Extension of Time to Serve its Sixth Amended Complaint because wanted more time to conduct discovery to uncover the identity(ies) of certain anonymous Internet message board posters. Judge granted the Motion on November 23, 2005 before time to respond per Ariz. R. Civ. P. 7.1(a) expired on December 1, 2005.[2] *See*, the attached Motion to Unseal Records, Ex. 24.

On December 1, 2005, filed a timely Opposition to Motion, arguing that before the First Amendment rights of other, pseudonymous Internet posters are violated by exposing their identities, should be required to meet the summary judgment standard outlined in *Doe v. Cahill*, 884 A.2d 451 (Del. Sup. Ct. 2005). *See*, Motion to Unseal, Ex. 25.

On December 12, 2005, moved the Court for reconsideration of its premature Order granting motion based on Schneider's timely opposition. *See*, Motion to Unseal, Ex. 26.

On March 3, 2006, Judge denied Motion for Reconsideration with just the following two (2) sentence Minute Entry: "The Court has received and reviewed Defendant Motion for Reconsideration. No good cause shown, IT IS ORDERED denying the Motion for Reconsideration." *See*, Motion to Unseal, Ex. 27.

lawyers, however, realized there was "good cause shown" in motion because, on June 26, 2006, lawyers ( )

[2] Ariz. R. Civ. P. 7.1(a) provides that a party opposing a motion has ten (10) days to oppose the motion. Ariz. R. Civ. P. 6(a) provides that when the period of time prescribed or allowed, exclusive of any additional time allowed under subdivision (e) of this rule, is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall not be included in the computation. Accordingly, the ten day time period to respond to a motion served on November 16, 2005 did not expire until December 1, 2005 (due to the Thanksgiving holiday), not including the additional five calendar days provided for mailing pursuant to Ariz. R. Civ. P. 6(e).

made a similar motion in U.S. District Court in Phoenix in an unrelated case, *Best Western Int. v. Doe*, No. CV- 2006 U.S. Dist. WL , at *4-5 (USDC AZ July 25, 2006). *See*, Motion to Unseal, Ex. 28. In that case (which was also a defamation case), argued on behalf of some anonymous Internet message board posters that the defamation plaintiff must meet the summary judgment standard enunciated in *Doe v. Cahill* before being allowed to conduct discovery that might uncover the identity of anonymous Internet message board posters (*i.e.*, the same argument Schneider made). *Id.*

The U.S. District Court, recognizing "...the significant First Amendment interest at stake..." agreed with the *Doe v. Cahill* decision and concluded "...that a summary judgment standard should be satisfied before [the plaintiff] can discover the identities of the John Doe defendants." *See*, Motion to Unseal Records, Ex. 29, p.4.

Arizona state courts subsequently followed the U.S. District Court for Arizona and adopted the *Cahill* standard. *See*, *Mobilisa v. Doe*, 217 Ariz. 103; 170 P.3d 712, 720 (2007). (Indeed, as commentators have noted, the *Mobilisa* court not only adopted the summary judgment standard of *Doe v. Cahill*, but added a balancing requirement similar to that of *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). *See*, Anthony Ciolli, "Technology Policy, Internet Privacy, and The Federal Rules of Civil Procedure," 11 *Yale J. L. & Tech.* 176, 183-84 (2008)).

Please note – I am not complaining that Judge ruling that Motion had "No good cause shown" was contrary to the Constitution. While it was, I realize that a legally incorrect ruling is not the proper subject of a complaint to your office. But the significant First Amendment interest involved in motion, the subsequent adoption by both Arizona federal and state courts of the standard urged in his motion, the lack of any discussion by Judge of the issues presented in motion and the four (4) violations of Ariz. R. Civ. P. 7.1(a) and one (1) violation of Ariz. R. Civ. P. 41(a)(2) described herein raise the question of whether Judge considered motion at all.[3]

Per the docket sheet, other examples of Judge granting motion before time to respond per Ariz. R. Civ. P. 7.1(a) expired include:

1.) A Motion to Continue filed by on March 14, 2006 that was granted on March 16, 2006; and

2.) A Motion to Continue filed by on August 28, 2006 that was granted on August 29, 2006.

[3] Compare, *e.g.*, the July 2, 2004 Order from Judge in this matter. During the limited time could afford a lawyer to represent him, his lawyer filed a motion to dismiss the case for lack of personal jurisdiction. Judge denied the motion. While I do not agree with all the conclusions Judge reached in her Order, the six (6) page Order demonstrates that Judge at least considered motion. In contrast, Judge two (2) sentence denial raises the distinct possibility Judge never considered motion.

Like November 16, 2005 Motion to Continue, these motions allowed to continue to conduct discovery to uncover the identities of anonymous speakers without adequate Constitutional protection extended to those speakers.[3] *See, Mobilisa v. Doe*, 217 Ariz. 103; 170 P.3d 712, 720 (2007).

Another example involves a violation of both Rules 7.1(a) and 41(a)(2), Arizona Rules of Civil Procedure. On January 26, 2007, filed a Motion for Voluntary Dismissal. Judge signed an Order granting the Motion to Dismiss just three (3) days later - on January 29, 2007. Thus, the Motion was granted before who lives in New Jersey, was provided his ten (10) days to respond per Ariz. R. Civ. P. 7.1(a).

Further, Motion to Dismiss was unilateral and Judge granting of the unilateral Motion to Dismiss was a violation of Ariz. R. Civ. P. 41(a)(2). *See, Osuna v. Wal-mart*, 214 Ariz. 286, 291, 151 P.3d 1267, 1272 (2007) ("Rule 41(a) does not permit a plaintiff to dismiss his or her complaint unilaterally if the adverse party has filed either an answer or a motion for summary judgment."); *Goodman v. Gordon*, 103 Ariz. 538, 540, 447 P.2d 230, 232 (1968) ("It is equally well-settled that under Rule 41(a), para. 2, *supra*, after answer is filed the right to dismiss is discretionary, must be by motion, *notice to defendants*, *hearing*, and court order." (Emphasis supplied)).

Judge granted the Motion to Dismiss without holding a hearing on the Motion, without considering the equities of the defendant, , and without any evidence that even *received* motion (due to the time needed to deliver mail across the country) before the suit was dismissed. Motion to Dismiss claimed it needed to dismiss its suit because it could not ascertain the identity(ies) of certain Internet message board posters. But, this claim was a canard – as explained in Motion to Unseal Records, pp. 8-9.

The dismissal in violation of Ariz. R. Civ. P. 41(a)(2) had multiple ramifications. First, it denied his day in Court – something he had fought years for despite tremendous emotional and financial strain caused by this abusive, meritless suit.

Second, it resulted in dismissal by the State of Maryland's supreme court of the discovery dispute between and my research firm, Inc. As part of this suit. allegedly served a subpoena on Forensic Advisors seeking, *inter alia*, a list of its subscribers and sources. The subsequent discovery dispute eventually led to Maryland's supreme court (called the "Court of Appeals") granting *certiorari* to hear the case on December 14, 2006. *See, Forensic Advisors v. Matrixx Initiatives*, 170

[3]. Unmasking the Internet posters may have been the primary purpose of this suit. As the *Cahill* court noted: "Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, "[t]he sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money." "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." *Doe v. Cahill*, 884 A.2d 451, 457 (citations omitted).

Md. App. 520, 532, 907 A.2d 855, 860-61, *cert. granted*, 396 Md 11, 912 A.2d 648 (2006), *appeal dismissed as moot*, 397 Md 396, 918 A.2d 468 (2007).

filed its Motion for Voluntary Dismissal in this Court the following month – on January 26, 2007, just weeks before its brief was due with Maryland's supreme court. requested an "Expedited Ruling" on its Motion for Voluntary Dismissal, which Judge granted on January 29, 2007.

did not inform Forensic Advisors of Judge January 29, 2007 ruling until *after* Forensic Advisor filed its opening brief with Maryland's supreme court on February 1, 2007. In addition, twelve (12) different public interest groups filed *amicus* briefs with Maryland's supreme court in support of Forensic Advisors.[5] Afterward, on February 6, 2007, Matrixx served a motion to dismiss the Maryland appeal as moot due to Judge dismissal of the underlying case. *See*, Motion to Unseal Records, Ex. 8. As a result of Judge dismissal, Maryland's supreme court dismissed the appeal as moot on March 9, 2007. *See, Forensic Advisors, supra, appeal dismissed as moot*, 397 Md 396, 918 A.2d 468 (2007).

This case has been a matter of both local and national public interest and media attention as evidenced by articles regarding the case in *The Arizona Republic, Forbes* magazine, *The Wall Street Journal, The New York Times* and *The Baltimore Sun*. *See*, Motion to Unseal Records, Exs. 4, 9-12. As recently as June 28, 2009, *The New York Times* published a second article regarding this case. *See, Id.*, Ex. 13.

Despite all the national media attention, Judge continued to rubber-stamp motions virtually as soon as he received them. This violation of the Rules allowed to continue this suit for as long as it wished – and then dismiss it without repercussions.

As described in attached Motion to Unseal Records, case against him was a baseless sham designed to cover up the true, but embarrassing, facts had uncovered. Rather than granting motions prior to the expiration of time to respond, Judge should have awarded his attorney's fees, expenses and double damages pursuant to AZ Rev. Stat. § 12-349(A)

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[5] A copy of the *amicus* brief filed by the Reporters' Committee for Freedom of the Press, Society for Professional Journalists, American Society of Newspaper Editors, Specialized Information Publishers Association and the Maryland-Delaware-D.C. Press Association is available online at: http://www.rcfp.org/news/documents/20070202-amicusbrie.pdf. In addition, an *amicus* brief was filed by Public Citizen, the ACLU of Maryland and the National Capitol Area, the American Booksellers Foundation for Free Expression, the Association of American Publishers, the Electronic Frontier Foundation, the Electronic Privacy Foundation Center and the Freedom to Read Foundation. A copy of Public Citizen's brief filed with Maryland's intermediate appellate court can be found at: http://www.citizen.org/documents/Matrixx%20Amicus%20Brief.pdf.

In reviewing another baseless defamation suit, the Montana Supreme Court recently described such meritless actions as a form of "legal thuggery." *Seltzer v. Morton*, 336 Mont. 225, 292; 154 P.3d 561, 609 (2007). In ruling on the effect of meritless defamation suits, New York Supreme Court Justice J. Nicholas Colabella noted: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." *In the Matter of Allan S. Gordon v. Anna M. Marrone*, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649 (1992).

While I do not know what prompted Judge to ignore the Rules of Procedure and grant the motions of a multi-million dollar, Arizona-based corporate plaintiff represented by the largest law firm in Arizona without allowing the New Jersey-based, *pro se* individual defendant to be heard, I realize this might be an Equal Protection or Privileges and Immunities issue more appropriately referred to the U.S. Department of Justice. *See*, U.S. CONST. art. IV, § 2 & amend. XIV, § 1.

Nevertheless, the above-described rulings appear to violate Rules 1.1, 1.2, 2.2 and 2.6(A) of the Arizona Rules of Judicial Conduct. I would appreciate being apprised as to whether your office investigates this complaint and, if an investigation is made, the results thereof. And, of course, if I am incorrect in my reading of Rules 7 and 41 of the Arizona Rules of Civil Procedure, please inform me and I will extend my apologies to Judge and your Commission.

Should you have any questions, please do not hesitate to contact me. Per the complaint form on your website, the names of all the parties and their counsel are listed below. I affirm, under penalty of perjury, that the foregoing information and the allegations contained in this complaint are true.

Sincerely,

Enclosures: as stated.