IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GIRSCH, *et al.*	)	
Intervening-Plaintiffs,	)	Case No. 01 CH 21984 5785179
v.	)	
DENNIS J. HIFFMAN, *et al.*	)	
Defendants.	)	

HCH'S RESPONSE TO JULY 3 JOINT MOTION TO ENTER "AGREED" ORDER

The Joint Motion and the proposed "agreed"[1] order do not eliminate the Court's concerns regarding the Carey/Sherlock Fee Petition ("CS Fee Petition") and the "appearance of impropriety" that necessarily flows from a sitting judge claiming fees. (Ex. A, May 6 transcript at 57, 60; Ex. B, May 8 transcript at 4-5.) Movants suggest that they have eliminated the need for discovery and the Court's recent directives to consider the CS Fee Petition first by agreeing to take their fees from the same source of funds. The source of the funds to pay the CS Fee Petition, however, was never at the heart of the Court's reasoning regarding discovery and the procedural order in which the remainder of this case would be litigated. The Joint Motion and the proposed "agreed" order do not change the potential for the appearance of impropriety because Judge Sherlock and Mr. Carey are still claimants seeking an award of fees from this Court and the Court's selection of a method for calculating the attorney fee award (*i.e.*, the percentage recovery or the lodestar method) could still significantly impact the amount of any award to Judge Sherlock. HCH's standing is not divested simply because movants now seek to utilize the Joyce firm as a conduit for the flow of fees to Mr. Carey and Judge Sherlock.

The Court was correct when it ordered the CS Fee Petition to be ruled upon first, when it ordered that the Plaintiffs should file their objections to the fee petition by June 25, and when it

[1] Neither defendants nor the limited partnerships agreed to the Joint Motion or agreed order.

ordered that HCH could conduct discovery. The Joint Motion does not eviscerate the Court's rationale for such orders. Accordingly, the Court should deny the Joint Motion.

PROCEDURAL BACKGROUND

Since May 6, 2019, when the Court denied HCH's recusal motion, the Court has been more than clear on how the remainder of this case should proceed. It ruled on May 6, and at least twice thereafter, that it would rule on the CS Fee Petition first, before the other pending post-trial motions, to mitigate the "appearance of impropriety" that flowed from Judge Sherlock and Mr. Carey's request for millions of dollars in fees. (Ex. A, May 6 transcript at 57, 60; Ex. B, May 8 transcript at 4-5, 16; Ex. C (May 21 transcript at 25 ("I'm going to follow what we agreed upon last time for the reasons I enunciated last time, which was, I really do want to deal with the Sherlock motion and its nuances and avoid any appearance of impropriety or any cross-pollenization or arguments that could be made that they're-one affected the other.")).

Plaintiffs now claim that the Court should abandon its reasoned approach because the Joyce firm has recently reached an agreement with Judge Sherlock and Mr. Carey that any fees the Court awards them can be paid out of the Joyce fee award. Notwithstanding this new deal, Judge Sherlock and Mr. Carey reserve their right to appeal any order regarding their fees and, according to the proposed agreed order, "Intervening Plaintiffs [still] have various objections to the Carey/Sherlock Fee Petition." Thus, as Judge Sherlock and Mr. Carey's counsel confirmed at the July 11 hearing: the Joint Motion "still requires me [the Court] to determine what, if anything, Mr. Carey and Judge Sherlock should get…." (Ex. D at 8.) The Court's initial instinct was correct.

ARGUMENT

I. HCH Have Standing To Contest The CS Fee Petition

HCH have standing to contest the CS Fee Petition notwithstanding the alleged new arrangement between the Joyce firm and Judge Sherlock and Mr. Carey. Hulina and Collins

remain the holders of 97.25% of TB's equity and 98.08% of IBP's equity. Their interests in the outcome of the proceedings, including any fee awards, remain notwithstanding the arrangement reached by the movants. This is because Judge Sherlock and Mr. Carey still seek an order from this Court awarding them fees and how the Court rules on their fee claim implicates the same concerns the Court expressed about the appearance of impropriety when it issued its previous orders regarding the CS Fee Petition.

For example, a reasonable observer could still be concerned that the size of the fee award was increased to cover the fees awarded to Judge Sherlock and Mr. Carey. Again, Judge Sherlock and Mr. Carey remain claimants, and seek to ultimately take some undefined cut of the Court's fee award. A reasonable observer could conclude that the size of any fee award was influenced by Judge Sherlock's continuing claimant status, and that circumstance is just as unacceptable now as it was when the Court first recognized it on May 6.

Moreover, there remains a concern that it would appear to the reasonable observer that the method the Court chose for calculating a fee award was impacted by the pending fee request from a fellow sitting judge. For example, that observer might question whether the Court ultimately agreed to the percentage recovery approach, instead of the more common and appropriate lodestar method for awarding fees advocated by HCH, because the Court wanted to ensure there were sufficient funds to cover the CS Fee Petition. Or, there could be claims that the percentages applied to calculate fees awarded were higher because of the CS Fee Petition. Or, if the lodestar method is adopted, there could be claims that the Court unfairly decided to award a higher multiple to cover the fees sought by the CS Fee Petition. Simply put, it could appear to a reasonable observer that the Court awarded a higher amount of fees or chose a certain methodology to accommodate

the fact that Plaintiffs' counsel have apparently agreed to pay some undefined percentage of the fees they are awarded to Mr. Carey and Judge Sherlock.

Admittedly, the circumstances may be markedly different once the Court rules on HCH's three pending, and fully-briefed, post-trial motions, through which the judgment may be reduced to a net judgment to Plaintiffs (as required by Illinois law cited by HCH) or even eliminated based on what HCH submits to be a proper application of the Shaffer settlement setoff. In this respect, HCH may actually be prejudiced by the order of the proceedings, as there are many scenarios where it would have been best for HCH to obtain rulings on those post-trial motions first, before the fee petitions. The complications presented by Judge Sherlock's claimant status, however, understandably disrupted that chronology. The solution, however, is not to allow the movants to reverse the Court's protective measure that the CS Fee Petition be ruled upon first, which would only exacerbate the prejudice to HCH that the Court sought to mitigate.

Because the burden of any fee award is ultimately to be borne by HCH, they have standing to challenge it. That Mr. Joyce, Judge Sherlock, and Mr. Carey have now agreed to seek fees from the same pot of money does not somehow eliminate HCH's standing. To the contrary, irrespective of that agreement, HCH have the right to oppose not only the method used to calculate fees, but the actual amounts awarded. To hold otherwise, would deprive HCH basic rights that all parties have regarding material issues in pending litigation.

II. Discovery Is Still Necessary

The only change in circumstances visible to HCH that led movants to reverse course and to file the Joint Motion were HCH's discovery requests. Not only should the Court decide the CS Fee Petition first, as the Court has thrice ruled, but the Court should also permit discovery on the CS Fee Petition, as the Court has also ruled on several occasions. At the preliminary hearing on

July 11, the Court observed that CS Fee Petition discovery might not be necessary as long as the fees were coming out of the amount being awarded to the Joyce firm. Paraphrasing, the Court commented that HCH does not need discovery regarding the CS Fee Petition because Mr. Joyce is free to give Judge Sherlock and Mr. Carey whatever he wants out of the amount of money this Court awards the Joyce firm.

There are rules against fee-splitting, and obviously Judge Sherlock and Mr. Carey have maintained their fee petition for a reason. Mr. Carey and Judge Sherlock remain claimants who seek an award of fees from this Court and are even preserving their appeal rights. HCH has the right to contest that fee request. And, in order to contest that request, like any other litigant, HCH are entitled to discover information regarding that request, just like they are entitled to do with respect to the Joyce firm's fee request. This was the rationale behind the Court's previous orders allowing discovery. Simply because there is now an agreement between Mr. Joyce, Judge Sherlock, and Mr. Carey to fund the CS Fee Petition from a single source does not eliminate HCH's need for discovery to contest the fees sought by both firms. Further, much of the discovery issued by HCH would also go to the Joyce firm's fee petition, which has not yet been addressed as far as a briefing schedule or discovery.

Relatedly, the appearance of impropriety is only heightened when considering that the Parties litigated the CS Fee Petition issue for months on the basis that Plaintiffs objected to the same and would have to separately appear because they were at odds with the Joyce firm on this point. Now, instead of filing those objections that were promised weeks ago, Plaintiffs have purportedly joined forces with the Joyce firm as to the CS Fee Petition through a Joint Motion that could have been filed months ago, before HCH undertook the time and money to prepare the discovery that movants now say is moot. Thus, discovery is now more necessary to ascertain the

nature of Plaintiffs' objections, and how they are to be raised in the new process suggested by the movants (rule on the other post-trial motions first, then rule on the fee petitions).

III. The Limited Partnership Entities Did Not Agree To The "Agreed Order" and Should be Permitted To Respond through their Separate Counsel

On June 11, the Court determined that the Joyce firm did not represent the Limited Partnership entities with respect to the CS Fee Petition (or the Joyce fee request for that matter) and that the entities themselves were entitled to have their own counsel based on well-settled law in Illinois. (Ex. E, June 11 transcript at 14.) To avoid (but not solve) this issue, Plaintiffs purport through the proposed "agreed order" to the Joint Motion to assign their objections to "Derivative Counsel," glossing over the Court's June 11 pronouncement that the entities needed new counsel. Regardless, such an assignment is ineffective vis-a-vis the rights of the partnership entities themselves. The entities are not represented in this process (they are in the process of retaining separate counsel) and have every right to separately object to the Joint Motion. The entities' response to the Joint Motion, and any objections thereto, should be heard before the Court rules on it.[2]

CONCLUSION

For the foregoing reasons, HCH requests that the Court enter the following relief: (a) allowing the limited partnership entities a period of twenty-eight days to retain counsel and respond to the Joint Motion; (b) (alternatively) denying the Joint Motion; (c) ordering Plaintiffs and third party subpoena recipients to respond to all written discovery requests by August 2; (d)

[2] Prior to trial, at trial, and in their proposed Findings of Fact, HCH have relied on *Caulfield v. Packer Gp., Inc.*, 2016 IL App (1st) 151558 ¶47 ("A derivative plaintiff may be disqualified where there is a conflict between his interests and the interests of the parties he represents.") The Joint Motion, and the proceedings leading to it, only further supports HCH's position that the Plaintiffs are acting more for their individual interests than for the Entities.

ordering the Parties to conclude any necessary ILSCR 201(k) communications by August 9; (e) ordering HCH to file any motions to compel (including as to third party subpoena respondents) by August 16; and (f) maintaining the August 20, 2019 status date for any HCH motions to compel.

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