

FILED
2010 JAN 29 A 9:02
U.S. DISTRICT COURT
DISTRICT OF NEVADA

1 **JAMES KIMSEY**
Post Office Box 8147
2 Naples, Florida 34101
Tele: 239-352-0841
3 **Interested Party**

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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 KIRK and AMY HENRY,
8 Plaintiffs,
9 vs.
10 RICK RIZZOLO, et al.,
11 Defendants.

CASE NO. 2:08-CV-00635-PMP-GWF
**PRE-HEARING BRIEF
STATEMENT**
Date of Hearing: January 29, 2010
Time of Hearing: 09:30 a.m.

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13 JAMES KIMSEY, made an Interested Party in this matter, having accepted service of the
14 Order to Show Cause (#242), on January 21, 2010, submits the following hearing brief:

15 I.

16 **NATURE OF THE ACTION**

17 Plaintiffs allege Conspiracy to Defraud, Common Law Fraud and Violation of Uniform
18 Fraudulent Transfer Act involving a *Settlement Agreement* in an underlying criminal case, Case
19 2:06-cr-00186-PMP-PAL. The charging information does not seek to set aside any provision of
20 the *Settlement Agreement*, but claimed a right to seek payment and right of enforcement of the
21 *Settlement Agreement* previously available in the abandoned state court action by redetermination
22 of the domestic and divorce status of the Defendants and the reallocation of the property and assets
23 awarded in the *Decree of Divorce*. Defendant Lisa Rizzolo has answered and filed cross-claim
24 against Defendant Rick Rizzolo for Indemnification and Contribution.

25 Defendant Rick Rizzolo has not answered the *Second Amended Complaint*.

26 On November 30, 2009, an *Order to Show Cause* (#242) was entered pertaining to
27 allegations of criminal unauthorized practice of law by the Interested Party allegedly acting as
28 "ghost writer" for unrepresented Defendant Rick Rizzolo.

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II.

STATEMENT OF JURISDICTION

The Order (#242) references jurisdiction pursuant to 28 U.S.C. §636(e)(6), and Fed.R.Crim.Pro 42.

Local Rules, IA 10-7(f) providing for alleged unauthorized practice of law as contempt of court refers only to certain attorneys.

The Interested Party, incorporating the documents and pleadings of the record of the Court, further objects to and disputes jurisdiction on several grounds:

1. The primary underlying cause of action is predicated on a valid *Decree of Divorce* over which this Court cannot exercise jurisdiction. If subject matter jurisdiction is not present, this individual case for contempt cannot proceed.

2. Subject matter jurisdiction is also not present as Plaintiffs waived certain remedies of collection by executing an agreement (#68) with the Government in the related criminal case, an agreement entered as an order (#70). Plaintiffs, in that criminal case stated (Docket 191, pg. 3, Ins. 19-24):

The bargain struck by Docket #68 is simple. In order to clear the way for the Government's sale of the property and remove any clear title issues,

"The Henrys knowingly and voluntarily agree to the abandonment, the civil administrative forfeiture, the civil judicial forfeiture, or the criminal forfeiture of the property" (p.3, ¶19).

What the Henrys receive in return:

"After the property is forfeited with the final Order of Forfeiture . . . the United States knowingly and voluntarily agrees the Henrys will be the first to receive payment from the proceeds of the sale." (p.4, ¶140).

As a result of that agreement, the Government, with the consent and agreement of the Plaintiffs, expressly cited to 28 U.S.C. §3001, et seq., for the purpose of obtaining "assets owned by defendants for the payment of forfeiture, restitution, assessments, fines, etc." (Exhibit No. 1 Docket No. 59, pg. 2, Ins. 15-16), and obtained property valued in excess of \$30,000,000.00 towards that obligation. and all other fines and forfeitures, thus satisfying the obligation.

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V.

CONTESTED FACTS

1. Whether purported non-attorney committed any act which could result in a finding of contempt.
2. Whether purported non-attorney entered any appearance in court, executed a notice of appearance or otherwise attempted to conduct hearing or trial as stated in the Magistrate Judge's citation to *United States v. Marthaler*, 571 F.2d 1104 (9th Cir. 1978).
2. Whether Defendant directed research and exercised controlling judgment as to any submission sufficient to dispel unauthorized practice of law by purported non-attorney.
3. Whether alleged actions by purported non-attorney were permissible clerical actions common in the local jurisdiction.
4. Whether any form of attorney supervision and communication was present sufficient to dispel unauthorized practice of law by purported non-attorney.
5. Whether purported non-attorney is a "non-attorney" or otherwise authorized to practice law within the meaning of NRS 7.285 and/or definition as stated in 20 C.F.R. §802, et seq. such as with a tribal court or similar entity.
6. Whether purported "non-attorney" is presently involved in any manner with the underlying case, and if so, whether that involvement is under attorney supervision.
7. Interested Party, as the purported non-attorney, reserves the right to submit additional contested facts as may be discovered on reasonable due diligence.

VI.

ISSUES OF LAW


1. Whether Court has subject matter jurisdiction in the underlying case, without which a contempt cannot proceed.
2. Whether Defendant, while in constructive custody of supervised release, was entitled to rely on non-attorney assistance to protect First Amendment access to the judicial process.
3. If the alleged acts involving contemptuous conduct occurred in view of the Court, and if so, whether the Court is disqualified from hearing the matter.

1 (J) Interested Party will reserve the right to call any witness listed by the
2 prosecution and to present rebuttal witnesses, as well as to challenge any witness presented by the
3 prosecution on the basis of foundation, relevance, hearsay, and other objections necessary to
4 protect the rights of the Interested Party.

5 Accordingly, the Interested Party prays this matter be dismissed.

6 DATED this 28th Day of January, 2010.

7 **INTERESTED PARTY**

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10 **JAMES KIMSEY**

11 **CERTIFICATE OF SERVICE**

12 The Undersigned, an individual not a party to the within cause of action, pursuant to
13 Fed.R.Civ.P. 5, did serve a true and correct copy the foregoing document by:

- 14 By United States Mail on all parties in said action, by placing a true copy thereof enclosed
15 in a sealed envelope in a designated area for outgoing United States Mail, addressed as set
16 forth below.
- 17 Personal delivery by causing a true copy thereof to be hand delivered this date to the
18 address(es) at the address(es) set forth below.
- 19 Facsimile on the parties in said action by causing a true copy thereof to be telecopied to the
20 number indicated after the address(es) noted below.

21 Hon. Phillip Pro, J.
22 United States District Court
23 Fax: (702) 464-5511

United States Attorney
Attn: Phillip Levitt
Fax: (702) 388-6418

24 DATED this 28th Day of January 2010.

25 **INTERESTED PARTY**

26 
27
28 **JAMES KIMSEY**