UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES HARRIS, as an individual and **UNIQUE PRODUCTS AND SERVICES**, a Pennsylvania Corporation	)	
Plaintiffs,	)	
v.	)	No.: 2:10-cv-05655-JD
	)	Judge: Jan E. DuBois
OPRAH WINFREY, as an individual, and **THE OPRAH WINFREY SHOW d/b/a HARPO PRODUCTIONS INC.**, an Illinois Corporation.	)	
Defendants.	)	

DEFENDANTS' RESPONSE AND OPPOSITION TO PLAINTIFFS' ATTORNEY'S MOTION TO WITHDRAW

Defendants Oprah Winfrey, as an individual, and The Oprah Winfrey Show d/b/a Harpo Productions Inc. (hereafter "Harpo") file this Response to Plaintiffs' Attorney's Motion to Withdraw and in support thereof would show the following:

I. INTRODUCTION

Pending before the Court are Defendants' Motions to Dismiss (Docket Nos. 4 and 11) and Defendants' Motion for Sanctions. (Docket No. 12). Both motions have been fully briefed and are awaiting decision. There are no other matters currently scheduled in this case other than a telephone conference on February 23, 2011. Now Plaintiffs' counsel wants to withdraw even though he concedes that "Plaintiffs' claim [is] meritless" (PLAINTIFFS' MOTION at p. 8), an admission his client, Mr. Harris, also makes in a January 4, 2011 memo attached to the motion. (*See* PLAINTIFFS' MOTION at Exhibit 1, p. 1) ("[T]he finished copy of the booklet was not copyrighted.").

Defendants oppose the Motion to Withdraw because they will be further prejudiced if it is granted. Should counsel be permitted to withdraw Mr. Harris will continue to prosecute his meritless claim (presumably *pro se*) thus causing Defendants further expense and aggravation. In addition, the case will have to be abated for some period of time while the other plaintiff (Unique Products and Services) obtains representation because a corporation may not proceed *pro se*. *Pennsylvania Bus. Bank v. Biz Bank Corp.*, 330 F. Supp. 2d 511, 513 n. 1 (E.D. Pa. 2004) ("The individual defendant[] . . . is permitted to appear *pro se*, but the corporate defendant cannot do so."). Under these circumstances we wonder what sane lawyer would accept such representation, suggesting that the period of delay may be substantial—all to the Defendants' (and the Court's) detriment.

Defendants request that the Court decide the pending motions to dismiss and for sanctions first and then take up this Motion to Withdraw. That way Defendants will have the protection of a decision on admittedly meritless claims without the necessity of further expense. In addition, Defendants' Motion for Sanctions is directed against both Plaintiffs and their law firm. The attempted withdrawal should not insulate the lawyers from events preceding the date of their motion. In other words, even a rudimentary investigation at the outset (including whether Plaintiffs had a valid copyright registration) would have revealed to the Plaintiffs' lawyers that the lawsuit had no merit either factually or legally, for all the reasons set out in Defendants' pleadings.

II. ARGUMENT AND AUTHORITIES

The factors this Court is to consider in determining whether to permit Plaintiffs' attorney to withdraw weigh heavily in favor of denying the request: (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to litigants; (3) the harm withdrawal might cause

to the administration of justice; and (4) the degree to which withdrawal will delay resolution of the case. *Brown v. Hyster Co.*, No. CIV. A. 93-2942, 1994 WL 102008, at *1 (E.D. Pa. Mar. 25, 1994).

In addressing those factors, none of Plaintiffs' attorney's purported reasons are grounds for *mandatory* withdrawal pursuant to Pennsylvania's Rules of Professional Conduct[1] or this Court's Local Rules,[2] and a withdrawal will only act to further delay resolution of this case to Defendants' prejudice. Further, Plaintiffs' attorney claims that one of his clients, Charles Harris, has consented to the withdrawal but there is no proof of this or that Mr. Harris was given reasonable notice of the intent to withdraw. *Barefoot v. Direct Mktg. Concepts, Inc.*, No. Civ. A. 02-CV-09526, 2004 WL 3186307, at *1 (E.D. Pa. Oct. 13, 2004) ("Under Pennsylvania law . . . the lawyer may only withdraw from the representation 'for reasonable cause and upon reasonable notice.'") (citation omitted). Requiring Plaintiffs' attorney to remain as counsel will not prejudice the Plaintiffs or create a financial burden on their attorney.

A. The Plaintiffs' Attorney's Withdrawal Will Prejudice the Defendants and Delay Resolution of the Case.

It would work to the Defendants' prejudice to have the case essentially stayed indefinitely while Plaintiffs attempt to seek alternative counsel especially considering that Defendants' Motion to Dismiss and Motion for Sanctions are fully briefed and ripe for decision. *Brown*, 1994 WL 102008, at *1 (denying motion to withdraw because defendants had motion for summary judgment on file which was "ripe for decision" and to allow the withdrawal would

[1] Rule 1.16 provides for mandatory withdrawal from representation of a client only if: (1) the representation will result in violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged. PA. R. PROF'L CONDUCT 1.16(a).

[2] Eastern District of Pennsylvania Local Rule 5.1(c) provides: "An attorney's appearance may not be withdrawn except by leave of court, unless another attorney of this court shall at the same time enter an appearance for the same party." There is no evidence that another attorney has agreed to represent Plaintiffs.

"prejudice the defendants, delay resolution of the case and hinder the administration of justice."); *see also McCune v. First Judicial Dist. of Pa. Probation Dep't*, 99 F.Supp.2d 565, 566 (E.D. Pa. 2000) (denying motion to withdraw where it would act to delay the action to the prejudice of the opposing party). Most telling, Plaintiffs' attorney even admits that the case has no merit:

> In the wake of the newly revealed facts, the Plaintiffs' attorney also feels that there is no merit in pursuing this claim further without any constructive reply from the United States Copyright Office. . . . The Attorney believes that the new developments in the case . . . makes Plaintiffs' claims meritless.

(PLAINTIFFS' MOTION at pp. 5-6, 8). No amount of further investigation will remedy this deficiency.

Plaintiffs' attorney baldly asserts he should be permitted to withdraw because there is a disagreement with his clients as to whether the suit should be dismissed without prejudice so Plaintiffs can resolve the pending complaint with the Copyright Office. (PLAINTIFFS' MOTION at pp. 5, 7-8). This is nothing more than a smoke screen. Regardless of what Plaintiffs registered with the Copyright Office—rough draft or final form—neither version contains copyrightable information.[3] As Plaintiffs plead their claim and made it out in their demand letter for over $100,000,000, the claim fails for all the reasons denoted in Defendants' Motion to Dismiss and Supplement to the Motion to Dismiss. (Docket Nos. 4 and 11). Plaintiffs' attorney's claim that he has had disagreements with his clients amounts to a mere difference of opinion and is not a compelling reason for withdrawal. *Hargrove v. City of Philadelphia*, No. CIV. A. 93-5760, 1995 WL 550441, at *1 (E.D. Pa. Sept. 15, 1995) (denying motion to withdraw based on mere

[3] To be an actionable copyright infringement action, the alleged copying must amount to unlawful appropriation of protectable material. (DEFENDANTS' MOTION TO DISMISS at p. 5). Protectable material includes only the original elements of plaintiff's work, not expressions of ideas, the ideas themselves, or matters in the public domain. *Id.* In this vein, historical facts, such as those claimed by Plaintiffs to be protectable information, are not *per se* copyrightable nor is information in the public domain. *Id.* Plaintiffs' inclusion of historical facts about America's Presidents in his book, such as President Taft's hefty weight, are matters in the public domain and do not owe their origin to the Plaintiffs.

difference of opinion). Further, Plaintiffs' attorney cannot withdraw from representation of Unique Products and Services without proof of substitute counsel as corporations cannot proceed *pro se*. *See Pennsylvania Bus. Bank v. Biz Bank Corp.*, 330 F. Supp. 2d 511, 513 n. 1 (E.D. Pa. 2004) ("The individual defendant[] . . . is permitted to appear *pro se*, but the corporate defendant cannot do so.").

B. There is No Evidence that Plaintiffs' Attorney Will Be Denied Payment for Services.

Plaintiffs' attorney claims he may not receive payment for future services due to the absence of communication with his client. (PLAINTIFFS' MOTION at p. 8). However, besides the February 23, 2011 telephone conference to discuss the Motion to Withdraw, there are no upcoming deadlines; no time or expenses will be incurred until *after* the Court issues its rulings on the Motion to Dismiss and Motion for Sanctions. Plaintiffs' attorney admits as much. ("[T]he matter is not yet set for trial/hearing . . . and the matter is still in its initial stages.") (PLAINTIFFS' MOTION at p. 7). Plaintiffs' attorney will not suffer a financial burden if he is required to continue representation of the Plaintiffs.

C. Withdrawal Should Not Insulate the Plaintiffs or the Plaintiffs' Attorneys From Sanctions.

Plaintiffs' attorney chose his strategy—he filed a Complaint asserting that his client owned a copyright to "How America Elects Her Presidents" and that the Defendants had infringed on that copyright to the tune of over $100,000,000 dollars—and he should not now be permitted to withdraw to avoid sanctions and delay the case because he did not exercise due diligence in researching the claim or amending the Complaint when given the opportunity. *See, e.g., St. Amant v. Bernard*, 859 F.2d 379, 384 (5th Cir. 1988) (holding that attorney could not escape liability for sanctions by moving to withdraw several years after complaint had been filed and only after issue of sanctions had been raised by opposing party); *Ransaw v. Hernando*

County Sch. Bd., No. 8:06-cv-2393-T-23EAJ, 2007 WL 4163396 at *6, n.5 (M.D. Fla. Nov. 20, 2007) ("Plaintiff's counsel's attempt to withdraw from representation in this case does not insulate him from sanctions in this matter.")

In a similar case, the United States District Court of New Jersey recently held that a Rule 11 violation could not be avoided by the attorneys' "belated attempt to rectify the wrong by arguing that, in what represents an insurmountable difference of opinion with their client . . . they have ceased to advocate the Amended Complaint's claims." *Del Giudice v. S.A.C. Capital Mgmt., LLC*, No. 06-1413, 2009 WL 424368, at *9 (D. N.J. Feb. 19, 2009). The court reasoned that this assertion of a difference of opinion "without a corresponding withdrawal of the offending document, does not expunge [the attorneys'] initial wrongdoing in filing the Amended Complaint" and "[c]ounsel's insinuation that their hands are tied with regard to their ability to take corrective action, due to their disagreement with their client as to how to proceed, is similarly unavailing." *Id.* Similarly, here, Plaintiffs' attorney is faced with pending sanctions and in response claims he should be permitted to withdraw based on a mere difference of opinion with his clients. This is insufficient considering that he has not withdrawn the offending document. To permit an attorney to withdraw at this stage would render useless the threat of sanctions because an attorney could simply cure the failure to perform due diligence by withdrawing when faced with pending sanctions.

WHEREFORE PREMISES CONSIDERED, Defendants respectfully pray that the Court deny Plaintiffs' attorney's request to withdraw; and grant such further relief, at law or in equity to which Defendants may justly be entitled.

Respectfully submitted,

OPRAH WINFREY, as an individual and The OPRAH WINFREY SHOW d/b/a HARPO PRODUCTIONS INC.

By: */s/ Charles L. Babcock*

Charles L. Babcock
Nancy W. Hamilton
JACKSON WALKER L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010
(713) 752-4200
Email: cbabcock@jw.com

William T. Hangley
Hangley Aronchick Segal & Pudlin
One Logan Square, 27th Floor
Philadelphia, PA 19103
Phone: 215-496-7001
Email: wth@hangley.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Defendants' Response and Opposition to Plaintiffs' Attorney's Motion to Withdraw* was sent to all counsel of record or parties via electronic filing through the Court's Electronic Filing System and/or via electronic mail this 14th day of February 2011, and by United States Mail, first class postage prepaid, on February 14th, 2011, to:

James Lee, Esquire
1500 Market Street
12th Floor/East Tower
Philadelphia, PA 19102
(312) 328-9511

/s/ Charles L. Babcock