

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GREGORY S. HOLLISTER, et al.)	Case Below 08-2254 JR
Appellants,)	
)	
v.)	No 09-5080
)	Consolidating No. 09-5161
Barry S oetoro, et al.)	
Appellees.)	

**OPPOSITION OF THE APPELLANTS GREGORY S. HOLLISTER
AND JOHN D. HEMENWAY TO THE
CORRECTED EMERGENCY MOTION OF LAWRENCE J. JOYCE,
ESQUIRE and PHILIP J. BERG, ESQUIRE TO FILE A BRIEF
AMICUS CURIAE IN
SUPPORT OF APPELLANTS HOLLISTER AND HEMENWAY,
SUPPORTING REVERSAL**

The appellants Gregory S. Hollister and John D. Hemenway, the undersigned, hereby oppose the motion of the former counsel for appellant Hollister to be permitted to file an Amicus brief in this matter.

The primary reason for this opposition is that the proposed *Amicus* brief would bring into this case issues that were not in the record in this case in the lower court and were not appealed to and put before this Court. In noting these grounds for opposition the appellants also make it clear that they do not waive any right on their part to argue that issues that were not

before the lower court in this case and which were not appealed cannot be addressed in this Court on appeal.

The purpose of an *Amicus* brief is to assist the Court in deciding issues that are before it, not to bring into the case issues that are not before the Court. Appellants Hollister and Hemenway do not believe that the proposed *Amicus*, relying as it does on a holding in a different U.S. District Court case in another circuit with different plaintiffs, different issues and many defendants who are not defendants in this case, helps this Court as is the purpose of an *Amicus* brief.

In addition the appellants Hollister and Hemenway would note that the motion to adopt the proposed *Amicus* brief by former counsel does not conform to the 20 page limit set by Federal Rule of Appellate Procedure 27(d)(2). Instead it seeks to go by the word count or type volume limitation, which is for briefs, not motions, set by Federal Rule of Appellate Procedure 32(a)(7)(B)(i). So the motion may be rejected, we submit, on technical grounds for such non compliance with the Rules.

We respectfully submit, also, that the motion filed to request the acceptance of the said *Amicus* brief does little to clarify how it would assist the Court in this case and the appellants believe it would, as stated, not

clarify but rather complicate the issues before the Court by going outside the issues presented.

The motion incorporates a long personal narrative of the history of the involvement of former counsel Lawrence Joyce in the case of plaintiff Hollister and with all due respect recited many alleged facts which differ from the recollection of those facts by both the plaintiff Hollister and the undersigned. Colonel Hollister, for example, does not recall ever contemplating discharging the undersigned from representation of him. Appellants are startled, to say the least, that all of this personal material has been placed in the record as a claimed justification for the acceptance of the *Amicus* brief that has been put forward.

In filing their motion, the attorneys Joyce and Berg mentioned their having e mailed to opposing counsel for consent to their filing and attach as the proposed *Amicus* Brief's only exhibit in the form of an Appendix a copy of that email. A similar consent was sought of the undersigned and Colonel Hollister to their filing of an *Amicus* brief. Denial of that consent is acknowledged in the motion. [Document: 1217859, page 6, line 8]. They did not mention, however, that on behalf of Colonel Hollister and himself, the undersigned sent a reply e mail making clear that not only did both

appellants not consent to their filing of an *Amicus* brief but that both desired that they not file such a brief. See Attachment to this opposition.

Nor does the appellant Hollister believe, as the former client of the two counsel proposing this *Amicus* belief, that they are serving his best interests by proposing it. And he would oppose it on those grounds. Although the motion proposing the brief expresses a reluctance to go against the interests of the undersigned (although, we note, it contains considerable criticism of the undersigned) the undersigned does not believe that it would assist his interests in this appeal either. In fact the undersigned believes that it would distract considerably from, and confuse the issues presented by, his appeal. The new issues that the attorney Joyce seeks to introduce into the appeal from another case do not relate to the Rule 11 issue which is essential to the undersigned.

Both the plaintiff Hollister and the undersigned, as co-appellants at this point, wish to state that there has been a divergence between the interests of the attorney Berg in particular and those of the appellant and plaintiff Hollister, and inattention to plaintiff Hollister's case by the attorney Berg since the inception of this case. The statement made by the attorney Berg in the motion to be allowed to file the *Amicus* brief that he, attorney Berg, "directed the legal effort of Appellant Gregory S. Hollister in the case

at bar during the proceedings of this case in the District Court, subject to a pending motion in that Court for admission *Pro Hac Vice*,” is not correct. In fact the plaintiff Hollister states that it was only the undersigned who kept him informed of the facts of his case during that period. During that period Colonel Hollister states that attorney Berg never returned any of his calls or responded to any of his e mails. Colonel Hollister states that that was the case for a year until attorney Joyce offered for Joyce and Berg to be removed from the case and that at that time the attorney Joyce mentioned their, Joyce and Berg’s, motives of making money on this case.

All along Berg has had the web site mentioned by the court below in its opinion of March 24, 2009 and has been soliciting funds based on the Hollister case as one of three cases that were his, Berg’s, cases, supposedly. Colonel Hollister never received any accounting of the funds donated supposedly to support his case as a result of solicitations made on this web site, which, according to radio interviews of attorney Berg in the first half of October of 2008 had, at that point, received over 32 million hits. The only funds that either Colonel Hollister or the undersigned ever saw put forward by Attorney Berg were for the filing fee and the appeal fee of the main case. Nor were Colonel Hollister and the undersigned ever informed that any proper charity or fund was ever set up to support the Berg litigations

including this one as he has claimed. We do not believe than any formal entity for such funding was set up. This was significant to Colonel Hollister because he had been led to believe that other members of the Reserve with concerns similar to his would be joining him in this case, but that never happened. He thinks that a proper effort would be in order but has not seen it made.

Ultimately the undersigned, in viewing the Berg web site noted by the court below, found that a legal position was being taken on it that was contrary to the positions of the undersigned and Colonel Hollister with regard to the meaning and importance of the Article II, Section 1, Clause 5 requirement that a President be, in order to be eligible for that office, a “natural born citizen.”

It was contrary efforts of Berg and Joyce that created two divergent arguments that required this Court to order Hemenway and Hollister to “coordinate” their submission. In any event, none of the fundraising by Joyce and Berg has inured to the benefit of Hollister or Hemenway’s causes of action before this Court and the lower court with the exception of the payment of the two fees mentioned.

In the case of the undersigned, he has had to advance considerable funds to keep the Hollister case going and has never received any offer to

reimburse any of those additional funds for expenses from Attorney Berg or Joyce, despite their months of soliciting funds on the Berg web site ostensibly for the support of this case, among others. Thus, for both Colonel Hollister and the undersigned, this is but the last of actions that diverge from the best interests of Colonel Hollister and the undersigned.

The undersigned and Colonel Hollister mention these details and differences to emphasize their strong reason for opposing adoption by the Court of the proposed *Amicus* brief.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused the foregoing to be served electronically upon counsel of record this 2nd day of December, 2009.

/s/

John D. Hemenway