

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF :
RHODE ISLAND, INC. :

v. :

C.A. No: PC-2017-3856

ST. JOSEPH HEALTH SERVICES OF :
RHODE ISLAND RETIREMENT PLAN, :
as amended :

**MEMORANDUM IN SUPPORT OF THE ATTORNEY GENERAL'S
MOTION TO STRIKE PORTIONS OF THE RECEIVER'S REPLY**

I. INTRODUCTION AND BACKGROUND

On October 27, 2017 this Court appointed a Permanent Receiver empowered to perform a number of functions, one of which was the engagement of special litigating counsel. From the outset, the parties have filed lengthy pleadings containing matters which sometime strayed from the core issues of the case, prompting the Court at one recent hearing to assure the room that it was capable of sorting out the law and the facts from mere commentary. However, on at least on one recent occasion, a pleading filed by the Receiver contained serious and gratuitous allegations of criminal conduct aimed at the Attorney General. These allegations are false, and far exceed the scope of the Receiver's authority, are not necessary to the resolution of the issues in this case, and go beyond the bounds of mere commentary. The Receiver was not authorized to investigate or lodge criminal charges—that power remains with the various law enforcement agencies operating within this State. To make facile allegations of criminal activity in a pleading filed with this Court far exceeds the scope of his authority. Further, as an adjunct of the Court, any allegations of criminality flung at a non-party (here, the Attorney General) carry extra weight and have exceeded what can be termed “mere commentary.” The Receiver's pleading does not rely on any law enforcement investigation and provides no support of criminality.

The Attorney General brings this motion pursuant to the Superior Court Rules of Civil Procedure 12(f), which provides:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

On October 5, 2018, the Receiver filed a Reply to Objection to the Receiver's Petition for Settlement Instructions. The Reply contained routine legal arguments interposed with unrelated and unsupported allegations of illegal and criminal activity. These allegations have no place in the present proceedings and violate, at a minimum, Rule 12(f).

Starting on page 55 and following through page 62, the Reply contains baseless accusations and insinuations of criminal conduct and corruption aimed at the Attorney General's staff:

1. Without any reference to applicable criminal law, the Reply states that "in connection with the 2015 *Cy Pres* Proceeding, the Attorney General completely disregarded, affirmatively violated, and allowed others to violate R.I. General Laws § 23-17.14-22 and related HCA statutes on at least eight levels. Such actions would have been outrageous and **likely criminal** if a private citizen were responsible" (page 55 of the Reply) (emphasis added).
2. The Reply claims that "the Attorney General **violated the law** in order to transfer power over \$8.2 million from the Presiding Justice to himself," and that this "**power grab** . . . ultimately benefited private interests that had no right to the funds" (page 59)(emphasis added).
3. The Reply asserts without evidence that "there will be more revelations of equally or even damaging [sic] serious violations by the Attorney General of the letter and the spirit of the laws governing his role in connection with the 2014 Asset Sale, in favor of private interests" (pages 59-60).
4. The Reply characterizes the Attorney General's assertion of his right—and duty—to uphold the law as the chief legal officer of the State of Rhode Island as making "extortionate threats [that] applied to the facts of the Proposed Settlement are disturbing indeed, when made by an actor with unclean hands" (page 62).

II. ARGUMENT

The Receiver has made allegations that staff in the Office of the Attorney General, and the Attorney General himself, have committed criminal acts and made “extortionate threats” in connection with the 2015 *Cy Pres* Proceeding, the 2014 Asset Sale, and perhaps other unenumerated incidents. But the Receiver fails to present *any* supporting legal authority or *any* factual basis for his extraordinary claims. Indeed, the Receiver’s own amended complaint in the recently filed federal court case characterizes the Attorney General’s Office (along with the Superior Court and Rhode Island Department of Health) as the innocent victims of fraudulent machinations by the Prospect Entities. U.S. D. Ct. Am. Compl. ¶¶ 220, 221, 305, 332, 333, 335, 345, 348, 357-362, 370, 377, 379, 381, 392, 395, 401, 402, 421. It is also important to note that, while litigation is an adversarial proceeding, in this process the Office of the Attorney General is acting in a regulatory capacity and is not a party to these proceedings.

Rule 12(f) reflects the “inherent power of the court to reduce pleadings, to expedite the administration of justice and to prevent abuse of its process.” *In re Johnson*, 236 B.R. 510, 521 (D.C.D.C. 1999). A court has considerable discretion in striking any redundant, immaterial, impertinent or scandalous matter when attorneys flippantly lob charges of wrongdoing at or impugn the character of opposing counsel. *See, e.g., Alvarado-Morales v. Digital Equip. Corp.*, 843 F.2d 613, 618 (1st Cir. 1988) (striking offensive terms from pleadings, and noting that a court has considerable discretion in implementing Rule 12(f) when pleadings contain “superfluous descriptions” and not “substantive elements of the cause of action”); *Nault’s Auto. Sales, Inc. v. American Honda Moto Co., Inc., Acura Auto. Div.*, 148 F.R.D. 25, 31 (D. N.H. 1993) (striking charges leveled against counsel as they were unsubstantiated and had no reasonable basis upon which such charges could be responsibly made) *overruled on other grounds by Colonial Imports*

Corp. v. Volvo Cars of North America, Inc., 2001 WL 274808 (D.N.H. 2001). “In order to insure judicial efficiency, courts must have the power to sanction litigants by striking irrelevant accusations which by their absence cannot prejudice any party.” *In re Johnson, supra*, 236 B.R. at 522 (observing that a Debtor’s counsel’s attack on the credibility and integrity of a U.S. Trustee in bankruptcy court “have only acted to waste precious judicial resources without any justification whatsoever for their use,” and holding that the lower court was justified in the exercise of its power to strike irrelevant and impertinent arguments). “Scandalous material is that which casts an adverse light on the character of an individual or party,” *Nault’s Auto. Sales*, 148 F.R.D. at 30 (internal quotation marks omitted); the granting of a motion to strike scandalous matter is aimed in part at avoiding “giving the allegations any other unnecessary notoriety inasmuch as, once filed, pleadings generally are public documents and become generally available.” 5C Charles Wright & Arthur Miller, *Fed. Prac. & Proc.* § 1382 (3d ed. 2018).

In *Nault’s Auto. Sales*, plaintiff’s counsel accused defense counsel of “fraudulent and criminal conduct” including perjury, suborning perjury, and contemptuously withholding discovery materials. 148 F.R.D. at 30-34. Finding that the “extreme attacks on the personal integrity, ethics and character” of the opposing counsel were unsubstantiated, and the “tone, the language used, and the accusations themselves are unwarranted by the facts, either as they are presently known or as they were known to plaintiffs’ counsel when the challenged pleadings were filed,” the court found the comments to be scandalous and struck them from the record. *Id.* at 35.

Leveling unfounded accusations of wrongdoing at an opposing counsel is a serious matter, yet that has become routine in this case. To date, the pleadings have contained invective, bombast and generally insulting language that have rightly been given short shrift by the Court and by the Attorney General. But the Receiver’s allegations regarding criminal and illegal conduct by

members of the Office of the Attorney General have now crossed a line, and are made more troubling, as they are made as an appointee of the Court, and therefore serve to undermine public trust in the State's top legal officer. "[F]alse statements by a lawyer can unfairly undermine public confidence in the administration of justice." Commentary to R.I. R. Prof'l Conduct 8.2. Moreover, they contradict the Receiver's own pleadings in the companion federal matter. *Cf.* R.I. R. Prof'l Conduct 8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer[.]"). In *Pigford v. Veneman*, 215 F.R.D. 2,4 (D.C.D.C. 2003), that Court granted a Motion to Strike pleadings that "'improperly cast[] a derogatory light' on a dedicated government attorney who has done his best to navigate the deep and murky waters of this litigation." The Attorney General, as a non-party, should not be required to sit idly by while the veracity and competency of his staff is maligned in a manner that has, regrettably, become commonplace.

Finally, there is a reason that only the constitutional office of the Attorney General can prosecute criminal claims—the attorneys in that office are sworn not just to win at all costs, but to "seek justice." *State v. Lead Indus. Ass'n, Inc.* 951 A.2d 428 (R.I. 2008); Commentary to R.I. R. Prof'l Conduct 3.8 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). The staff accused of criminal conduct by the Receiver are "in a peculiar and very definite sense the servant of the law***. [They] may prosecute with earnestness and vigor—indeed, [they] should do so. But, while [they] may strike hard blows, [they are] not at liberty to strike foul ones. It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Lead Indus. Ass'n*, 951 A.2d at 472 (citation omitted). The Receiver is not bound by the

professional, ethical and constitutional considerations that guide every action taken by every staff member at the Office of Attorney General every single day. The Attorney General does not blithely insert allegations of criminal conduct into pleadings—we know the serious consequences of such allegations. This Court should not allow its adjunct—the Receiver—to do so either.

III. CONCLUSION

The Attorney General prays that the sections of the Reply heretofore discussed be stricken as immaterial, impertinent and scandalous matter, and further requests an Order prohibiting any such assertions in future pleadings. Nor should Special Counsel be allowed to draw funds for payment connected with drafting the offending pleadings, or for defending this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 24th day of October 2018, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

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