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March 11, 2008

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Fictitious Liens Amendments

Dear Judge Hinojosa:

I am writing on behalf of the Judicial Conference's Judicial Security Committee, in coordination with the Criminal Law Committee, to convey the views of the two committees while the Sentencing Commission considers sentencing guidelines with respect to the new crimes established under 18 U.S.C. § 1521, criminalizing the knowing filing of false liens against federal judges. For the reasons set forth in the attached statement, the Committees are of the view that classification of the conduct under U.S.S.G. § 2A6.1 is most appropriate.

Although I have provided the statement for the Committees, Judge Henry E. Hudson, Eastern District of Virginia, will testify before the Commission at the hearing on March 13, 2008. Again, the Security Committee is thankful to the Sentencing Commission for taking the Committee's testimony on this important issue.

Sincerely,

Edmund A. Sargus, Jr.

cc: Members Judicial Security Committee
Members Criminal Law Committee

STATEMENT OF JUDGE EDMUND A. SARGUS, JR.
Member, Judicial Security Committee of the Judicial Conference of the United States
United States District Court
Southern District of Ohio
March 10, 2008

Thank you for the opportunity to offer the following comments on behalf of the Judicial Security Committee of the Judicial Conference of the United States. I have coordinated these comments with the chair of the Criminal Law Committee of the Judicial Conference of the United States. The Security Committee appreciates the speed with which the Sentencing Commission has moved to promulgate new Sentencing Guidelines with respect to the new crimes established under 18 U.S.C. § 1521, criminalizing the knowing filing of false liens or encumbrances upon real or personal property owned by federal judges or federal officers and employees in relation to the performance of the official duties of such persons. The offense is punishable by imprisonment not to exceed ten years.

The Sentencing Commission should also take note that according to the U.S. Marshals Service, the number of threats made against federal judges and prosecutors has increased 69 percent from fiscal years 2003 to 2007. In addition, 503 threats were reported in fiscal year 2008, through February 9. Judge Sentelle, chair of the Judicial Security Committee, has noted that ". . . threats are a significant security concern to his (my) colleagues." Kevin Johnson, *More Judges, Prosecutors at Risk; 69% Increase in Threats Since 2003*, U.S.A. Today, March 6, 2008, at 3A.

The filing of fictitious liens against judicial officers has been a problem for the judiciary for many years. For this reason, in September 1997, the Judicial Conference of the United States agreed to support legislation that would create a new federal criminal offense for harassing or intimidating a federal official, including a judicial officer, with respect to the performance of

official duties to include the filing of a lien on the real or personal property of that official (JCUS-SEP 97, p. 66). Such legislation was repeatedly introduced, but never enacted, in Congress during the following years. In January 2008, however, the Court Security Improvement Act of 2007 was enacted and it included a provision to create a new law for the filing, conspiring to file, or attempting to file any false lien or encumbrance against the property of a federal judge or law enforcement officer because of the performance of that individual's official duties (Public Law No. 110-177, 121 Stat. 2534 (2008)).

These liens are usually filed in an effort to harass judicial officers against whom a civil action has been initiated by the individual filing the lien. Liens are placed on the property of judicial officers based on the allegation that the property is at issue in the lawsuit. Judges are generally very careful about listing their home address in public. When filing the lien, the home address of the judge generally is listed on the filing. By this action alone, the filing individual is saying to the judge in essence, "I know where you live," and could be threatening and intimidating to the judge. While the filing of such liens has occurred in all regions of the country, they are most prevalent in the state of Washington and other western states.

The Administrative Office's Office of General Counsel has had experience with this practice since it acts as a liaison between judicial officers and the Department of Justice to obtain representation for judicial officers sued for actions taken in their official capacities. The General Counsel's Office has observed that the practice of filing liens has been going on for some time. Between September 1992, when the practice began to be recorded, and 2007, liens were filed in at least 81 of the civil cases filed against judicial officers; however, multiple liens were filed in several of these cases. While the incidences of filing liens have occurred in all regions of the

country, they are most prevalent in the western states.

The responsibility to initiate legal action to remove these liens is vested in Assistant United States Attorneys, who represent the judicial officers, and their forms of response vary according to the state law and the circumstances. It is sometimes necessary for the AUSA to bring action in state court for the removal of liens. In some circumstances, an action to remove the liens may be brought in federal court, and in others, state court proceedings are commenced and removed to federal court under the provisions of 28 U. S .C. § 1452. In some cases, the AUSA may seek an injunction against further filing of liens by the litigant. All of these methods are time consuming, of course, but experience indicates that they are ultimately successful.

Nonetheless, the pendency of these liens prior to their removal has caused some judicial officers great inconvenience. In supporting a federal criminal statute, the Criminal Law Committee expressed hope that criminal sanctions might act as a deterrent against false filings. Prior to the enactment of this statute, the Department of Justice was encouraged to prosecute persons filing these liens in state court under state false liens statutes; however, there were problems with this approach.

For one, not all states had laws that were reasonably available for this purpose. A review of state provisions discloses only a handful of applicable specific provisions, and most of these were civil remedies. They permit a party who has had a lien or other encumbrance placed on his or her property for malicious purposes to recover damages, sometimes treble damages, and attorneys fees. A few states have criminal penalties for filing such encumbrances. No state statute that specifically penalizes claims against the property of judicial officers has been found, but Wisconsin has both civil and criminal “slander of title” provisions on the subject.

Wis. Stat. § 706.13 and Wis. Stat. § 943.60, respectively. The civil penalty authorizes punitive damages of $1,000 plus any actual damages caused by the false failing. The criminal statute is punishable by a fine not exceeding $10,000 or not more than six years imprisonment. Wis. Stat. § 939.50.

As to the federal judiciary, the core conduct prohibited by § 1521 typically involves the wrongful filing of a lien or encumbrance by a party unwilling to accept a final judgment or sentence. In this context, the filer of the fictitious lien is often engaged in an act of retaliation against a judge, prosecutor, or probation officer. While prompt discovery and subsequent civil litigation may obviate financial harm to parties subject to fictitious liens, the prohibited conduct represents an attack upon the integrity of the judicial system. In the case of an incarcerated filer, or a party with prior criminal involvement in federal court, the conduct indicates that rehabilitation has not occurred. Further, such offender presents a security risk to all parties against whom the fictitious liens have been filed.

I am attaching to my written comments a copy of a decision issued last week in the case of *United States of America v. McCall*, No. C2-06-1051 (S.D. Oh., March 5, 2008). As the opinion describes, Bondary McCall is serving a sentence of 292 months in the federal prison system. From May of 2005 through November of 2006, Bondary McCall filed a series of fictitious claims against me, as well as an Assistant United States Attorney. In November of 2006, McCall attempted to file a U.C.C. financing statement listing me as indebted to him in the amount of $19 million.

Due in part to the fact that I reside in a small, rural community, the filings were recognized as suspicious and sent to the county prosecutor. Shortly thereafter, the United States

Attorney's Office instituted a lawsuit seeking to restrain McCall. I draw your attention to the fact that, in many states, official record keepers – clerks of court, county recorders – are not authorized to screen documents or refuse filings so long as technical requirements are met and proper fees are tendered. This consideration presents a concern that a fictitious lien will be recorded without notice to a judicial officer. As a further example of these concerns, on March 7, 2006, McCall did in fact cause a fictitious lien to be filed in the office of the Washington Secretary of State. Fortunately, the U.C.C. filing lists the AUSA and me as the secured party, rather than the debtor.

The gravity of the offense is not confined to the potential financial harm or inconvenience to a judge. The offense involves conduct which reveals a deep antagonism against the legal system and demonstrates that the perpetrator will not be restrained from unlawful conduct. The Security Committee considered, and rejected, two possible guideline analogues the Sentencing Committee might consider, including obstruction of justice and fraud. Specifically, that although the Sentencing Commission could also consider the use of U.S.S.G. § 2J1.2, Obstruction of Justice, the Security Committee believes that a substantial number of fictitious liens involving judges have been filed after the conclusion of litigation. Such filings were not intended to actually obstruct judicial proceedings, but to instead extract retaliation or vengeance upon a judicial officer. Because the filing of fictitious liens is not necessarily addressed to pending cases, the nexus between the filing and the alleged obstruction may be lacking.

Similarly, in the Security Committee's view, U.S.S.G. § 2B1.1, which addresses fraud and related financial crimes, would not capture the essence of the offense. The Security

Committee believes that the gravamen of the fictitious-lien offense is the threat to the legal process, not to the financial security of a judge, prosecutor or probation officer. The wrongfully filed liens will ultimately be removed through legal proceedings, if necessary. In most instances, there will not be actual economic harm. The filing of fictitious liens, however, clearly indicates that the perpetrator is a threat to the legal process and to a particular jurist.

In light of these concerns, the Security Committee is of the view that classification of the conduct under U.S.S.G. § 2A6.1 is most appropriate. This Guideline currently applies in cases involving threatening or harassing communications. While the base offense level is 12, several specific offense characteristics relevant to § 1521 increase the offense level. For example, § 2A6.1(3) provides for a 3 level increase, if the offense involves violation of a court order. It is likely that a civil action seeking injunctive relief banning a defendant from sending harassing mail from a penal institution may precede the filing of criminal charges. Consequently, a later fictitious-lien filing also violates the earlier injunction and should warrant an increased sentencing guideline range.

The Security Committee is also of the view that the offense level should increase if the defendant has filed multiple fictitious liens. Likewise, the offense level should increase if the conduct causes substantial economic harm or extended litigation to remove the fictitious lien from public records. Finally, because U.S.S.G. § 2A6.1 covers more than fictitious-lien filings against judges, prosecutors and probation officers, the Security Committee believes that a Chapter Three Adjustment, involving official victims, is warranted under U.S.S.G. § 3A1.2.

Again, thank you for the opportunity to share the views of the Security Committee of the Judicial Conference with you as you consider this important issue.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America

Plaintiff,

v. **Case No. 2:06-cv-01051**

Bondary McCall, **Judge Michael H. Watson**

Defendant.

OPINION AND ORDER

Plaintiff the United States of America seeks declaratory and injunctive relief against Defendant Bondary McCall. Plaintiff alleges Defendant has filed and continues to file harassing and frivolous documents against various federal officials in retaliation for prior criminal proceedings against the Defendant. Plaintiff seeks a judgment permanently enjoining Defendant from filing documents with government agencies without first obtaining written leave of this Court. Furthermore, Plaintiff requests a judgment declaring any such documents currently filed or filed in the future without leave of this Court to be void and of no legal effect. For the reasons that follow, the Court grants Plaintiff's motion for summary judgment.

I. FACTS

A. Parties

Plaintiff is the United States of America ("United States"). Defendant, Bondary McCall, is an inmate (federal register number 43827019) confined in federal custody at the Federal Correctional Institution in Williamsburg, South Carolina.

B. Case History

Plaintiff filed the original complaint on December 14, 2006. Plaintiff filed a Motion for Summary Judgment on January 9, 2007. On March 7, 2007, the Court issued an order granting Defendant fourteen days to respond to the pending motion for summary judgment. Defendant did not respond. On March 23, 2007, Plaintiff filed a Supplemental Memorandum Supporting Motion for Summary Judgment. On September 21, 2007, Defendant filed a Response to Plaintiff's Supplemental Motion for Summary Judgment.

Where, as here, a motion for summary judgment goes unopposed, a district court properly relies upon the facts provided by the moving party. *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404-405 (6th Cir. 1992).

C. Defendant's Filings

In December 1994, Defendant was sentenced to 292 months imprisonment for an unrelated offense. Since his sentencing, Defendant has filed over twenty collateral actions and appeals. Each of these cases, naming local and federal officials as defendants, was dismissed by the respective courts.

Subsequent to his incarceration, Defendant has filed numerous documents

alleging a variety of financial claims against various federal officials. Many of these documents allege financial claims against the Hon. Edmund A. Sargus, Jr. ("Judge Sargus"), a United States District Judge in the Southern District of Ohio, and Robyn Jones Hahnert ("Hahnert"), an Assistant United States Attorney for the Southern District of Ohio.

In May 2005, Defendant conveyed a document to the Internal Revenue Service (IRS) in Washington, D.C. entitled "Reporting of 'Tax Delinquents'". The document identified Judge Sargus and Hahnert as "Tax Fugitives".

In June 2005, Defendant sent the United States Department of Justice, via U.S. Mail, a "notice of tort claim" against the United States, in the amount of $19,920,000,000.00, for damages allegedly caused by Judge Sargus, Hahnert and others.

In June 2005, Defendant named Judge Sargus, Hahnert, and others, in a document titled "Affidavit Notice of Default" filed with the United States District Court for the Southern District of Ohio.

In October 2006, Defendant sent to Belmont County, Ohio officials, via U.S. Mail, a document titled "UCC Financing Statement" listing Judge Sargus as the "Debtor" and Defendant as the "Secured Party". The document purported to encumber "all of Debtor's assets, land, and personal property . . . ."

In November 2006, Defendant sent to the Belmont County, Ohio Treasurer, via U.S. Mail, a letter requesting the Treasurer provide tax assessments for Judge Sargus, provide all parcel numbers Judge Sargus is paying taxes on, and list Defendant on the county records.

In November 2006, Defendant sent to Judge Sargus, via U.S. Mail, a letter identifying Judge Sargus as "Debtor Judgment" and claiming to possess a "Security Interest" in Judge Sargus.

Neither Judge Sargus or Hahnert are indebted to Defendant and neither have ever had a commercial relationship with Defendant. There is no valid security agreement between Defendant and the federal officials. There are no judgments entered against either Judge Sargus or Hahnert involving Defendant that would justify the filing by Defendant of any lien, financing statement, or other filing concerning the federal officials' property.

Plaintiff filed this complaint on Dec. 14, 2006. Plaintiff seeks a declaratory judgment that the purported "liens" and or financing statements prepared, attempted to be filed, or filed by Defendant are null, void, and of no legal effect and that Defendant had no factual or legal basis to file such financing statements. Plaintiff also seeks to permanently enjoin Defendant from filing or attempting to file any document claiming financial interests against any federal officer or employee without leave of this Court.

II. SUMMARY JUDGMENT

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

III. DISCUSSION

A. Declaratory Relief

Plaintiff requests a declaratory judgment that the purported "liens" and/or financing statements prepared, attempted to be filed, or filed by Defendant are null, void and of no legal effect and that Defendant had no factual or legal basis to file such financing statements. Given the uncontested facts offered by the Plaintiff, the Defendant's pseudo-financial filings are without merit. The Defendant has demonstrated no contractual relationship with any federal employee and consequently has no property claim against any of the named individuals. This Court declares the Defendant's purported "liens" and/or financing statements to be void and of no legal effect.

B. Injunctive Relief

Plaintiff asks this Court to permanently enjoin the Defendant from filing liens, UCC statements or other documents with government agencies without leave of this Court. Plaintiff alleges the case at bar satisfies the four requirements for permanent injunctive relief as described by the Eastern District of Texas in *Moore v. City of Van,*

Texas. 238 F.Supp.2d 837, 852 (E.D. Tex. 2003). Because this Court agrees, the Defendant is hereby permanently enjoined from filing liens, UCC statements or other documents with governmental agencies without leave of this Court.

While *Moore* is not mandatory authority for this Court, it is instructive to the extent it is a refined version of this Court's discussion of the requirements for permanent injunctive relief in *Dayton Christian Schools v. Ohio Civil Rights Com'n.* 578 F.Supp. 1004 (S.D. Ohio 1984) (*rev'd on other grounds,* 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded on other grounds,* 477 U.S. 619 (1986)). In *Dayton,* this Court explained that permanent injunctive relief is appropriate when the plaintiff has actually prevailed on the merits of his claim, has demonstrated requisite real and present danger of irreparable injury, and the balancing of equities between the parties weighs in favor of an injunction. The factors are similar to those considered when determining whether a preliminary injunction should be issued. "Specifically, the Court must consider whether the plaintiff has demonstrated irreparable injury, whether the issuance of the injunction 'would cause substantial harm to others,' and 'whether the public interest would be served by issuing' an injunction." *Id.* at 1017 (quoting *Friendship Materials, Inc. V. Michigan Brick, Inc.*, 679 F.2d 100 (6th Cir. 1982)).

In *Moore* the Eastern District of Texas neatly clarified the requirements for permanent injunction. "The standard for permanent injunction is 'essentially the same' as for a preliminary injunction, in that the plaintiff must establish each of the following four elements: (1) actual success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury

outweighs any damage that the injunction may cause the defendants; and (4) that the injunction will not impair the public interest." *Moore*, 238 F.Supp.2d at 852. The difference between the standard for a permanent injunction and a preliminary injunction is that a permanent injunction requires the court to determine the plaintiff's actual success on the merits rather than the plaintiff's likelihood of success.

A permanent injunction cannot be granted without careful consideration by the court. The Sixth Circuit quoted Professor Wright in discussing the "ordinary principles of equity" that must be considered prior to issuing a permanent injunction. "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where the courts of law cannot afford an adequate or commensurate remedy in damages." *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No.*, 471 F.2d 872, 876 (6th Cir. 1972) (quoting 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1431). So it is with careful deliberation that this Court evaluates the applicability of a permanent injunction to the case at bar.

1. Plaintiff's Success on the Merits

To win a permanent injunction the Plaintiff must demonstrate actual success on the merits of the case. The Defendant here has filed numerous frivolous documents alleging a variety of financial claims against various federal officials. The undisputed facts demonstrate the Defendant has no legitimate financial claim against any of the

federal officials named in the various filings. In particular, Defendant's October 2006 UCC Financing Statement attempting to encumber the assets of Judge Sargus amounts to fraud. Judge Sargus has no contractual relationship with the Defendant to warrant Defendant's claim to Judge Sargus' assets.

There can be no genuine issue of material fact as to the invalidity of Defendant's filings. The Plaintiff's success on the merits is established.

2. Substantial Threat of Irreparable Injury

Injunctive relief is appropriate only where there exists a substantial threat that failure to grant the injunction will result in irreparable harm. Here, this threshold is satisfied. Defendant's frivolous filings place a constant and irreparable strain on federal employees and the federal offices they serve. By Defendant's own admission ("I have 14 more year (sic) to study, study and study,") he intends to continue his malicious filing campaign. To allow the Defendant to persist would impose a constant burden on the victims of his unwarranted financial filings.

The Supreme Court of North Dakota recognized the problem in a similar situation. "A strong and stable corrections system is necessary to protect the general welfare of the people. We cannot allow that system to be undermined by permitting an inmate to indiscriminately file liens not authorized by law against the property of . . . employees." *State v. Jensen*, 331 N.W.2d 42, 47 (N.D. 1983). In that case, an inmate was permanently enjoined from filing illegitimate, unauthorized liens against state employees. The court explained "[a]ny purported lien filed by [the inmate] would encumber the property of the State employee against whom the lien was filed and effectively inhibit the alienability of that property . . . this unwarranted cloud on the title

could result in damages which would be difficult to ascertain and could cause irreparable harm to the State employee." *Id.*

The Defendant's fraudulent filings are a legitimate concern for federal employees. The Plaintiff appropriately notes the irreparable negative effect such filings might have on a victim's credit score or other financial interests. Because the Defendant has imposed a real harm and apparently wishes to continue to do so, his actions demonstrate a substantial threat of continuing and irreparable injury.

3. Injury Outweighs Damage Caused by Injunction

Injunctive relief is only to be granted if the injury to the Plaintiff outweighs the damage the injunction would cause the Defendant. Here, a balancing of the relative hardships weighs in favor of injunctive relief. A permanent injunction will protect federal officials from the injury described above, but will still enable the Defendant to file public records pending court approval. While the Defendant's ability to file public documents might arguably be delayed, his ability to obtain court approval provides him with a legitimate mechanism to file valid documents.

4. Public Interest

Injunctive relief may only be granted if the injunction will not impair the public interest. In the case at bar, injunctive relief will in fact advance the public interest. Public officials, and the offices they serve, should be protected from frivolous filing campaigns such as this. Further, our nation's financial institutions cannot fall victim to the Defendant's personal vendettas. Left unchecked, the Defendant's illegitimate financial claims would inevitably affect someone's legitimate financial interests. It is in

the public's best interest that Defendant be barred from future filings pending the approval of the court.

IV. DISPOSITION

Based on the foregoing analysis, the Court **GRANTS** Plaintiff's summary judgment motion (Doc. 6). Moreover, the Court **GRANTS** Plaintiff's request for permanent injunctive relief.

The Clerk shall enter a final judgment on the merits in this case in favor of Plaintiff, and against Defendant, as follows:

1. The Court **DECLARES** the Defendant's purported "liens" and/or financing statements filed against federal officials, including Judge Sargus and Robyn Hahnert, to be void and of no legal effect; and
2. Defendant is hereby **PERMANENTLY ENJOINED** from filing liens, UCC statements or other documents with governmental agencies without first seeking and obtaining written leave of this Court.

The Court further warns Defendant that Congress recently passed into law a provision criminalizing the filing of false liens against federal judges and federal law enforcement officers. Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (2008). Violations are punishable by fine and/or up to ten years imprisonment. *Id.*

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT