UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

***Plaintiff*,**

Case No. 10-CV-457
(GLS/DRH)

-against-

McGINN, SMITH & CO., INC., *et al.*,

Defendants.

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NOTICE OF OBJECTIONS/APPEAL

Notice is hereby given that, pursuant to 28 U.S.C. § 636(b)(1), Rule 72(a) and (b), Fed. R. Civ. P., and Local Rule 72.1(a) and (b), non-party Jill Dunn, Esq. ("Dunn") objects and appeals to the United States District Court for the Northern District of New York (Hon. Gary L. Sharpe, *U.S.D.J.*) from the following portions of the Memorandum–Decision and Order issued by United States Magistrate Judge David R. Homer on July 20, 2011 (Dkt. No. 342) ("July 20, 2011, Decision"):

- "On July 20, 2010 . . . David Smith telefaxed *a copy of the Annuity Agreement* and related documents to Wojeski and on July 21, 2010, Wojeski electronically mailed those same documents to Dunn. Dunn Decl. (Dkt. No. 188) at ¶ 3; Wojeski Decl. (Dkt. No. 191) at ¶ 3." July 20, 2011, Decision, p. 21 (emphasis added).

- " 'In assisting with the Trust's response to Plaintiff's discovery demands, and in preparing for the evidentiary hearing scheduled for November 16, 2010, I became aware that on July 21, 2010, David Wojeski e-mailed to me the *[Annuity Agreement]*. I did not recall receiving or seeing the *[Annuity Agreement]* at the time I prepared the September Declaration, and my recollection has not been refreshed by seeing *[the Annuity Agreement]*.

  " 'My attention on July 20, 21, and 22, 2010, was focused heavily on the Trust's real estate closing which took place on July 22, 2010, and on other unrelated client matters and personal issues, including a death in the family. This might explain why I failed to remember *the [Annuity Agreement]* when I prepared my

September Declaration.' Dunn Decl. (Dkt. No. 188) at ¶ 3-4." July 20, 2011, Decision, pp. 23-24 (bracketed alterations in July 20, 2011, Decision; emphasis added).

- "It is beyond dispute that Dunn's assertions in her September 2010 declaration that she was unaware of the existence of the Annuity Agreement at the time of the conversation with the SEC on July 22, 2010 and that she did not learn of its existence until she received a copy of the agreement from Urbelis on July 27, 2010 were false. *Dunn had in fact received a copy of the Annuity Agreement from Wojeski on July 21, 2010,* the day prior to the conversation." July 20, 2011, Decision, p. 24 (emphasis added).

- "The claim that she [Dunn] did not review Wojeski's communication at least until after July 27, 2010 is belied by substantial evidence to the contrary." July 20, 2011, Decision, p. 25.

- "The record here thus demonstrates by clear and convincing evidence that Dunn's false statement in her declaration filed September 3, 2010 that she did not learn of the Annuity Agreement until it was provided to her on July 27, 2010 by Urbelis was knowingly false." July 20, 2011, Decision, p. 27.

- "The second [payment], however, was received after Dunn became aware of the existence of the Annuity Agreement and this wrongful depletion of the Trust's assets thus occurred with Dunn's complicity." July 20, 2011, Decision, pp. 47-48.

- "Dunn and Wojeski both knowingly filed declarations containing false statements in support of the Trust's opposition to the SEC's motion for reconsideration. The bad faith with which Dunn and Wojeski acted in filing these false declarations was mitigated only minimally by their last minute filings of corrective declarations." July 20, 2011, Decision, p. 49.

Dunn also objects to and appeals from the sanctions imposed on her by Magistrate Judge Homer's July 20, 2011, Decision, namely: disgorgement of $5,355 paid to her on July 31, 2010; public admonishment; and Magistrate Judge Homer's direction to the Clerk of the Court to forward a copy of the decision to the Committee on Professional Standards for the Appellate Division, Third Department.

Dated: August 1, 2011

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UNITED STATES DISTRICT COURT
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SECURITIES AND EXCHANGE COMMISSION,

***Plaintiff*,**

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NON-PARTY JILL A. DUNN'S OBJECTIONS TO MEMORANDUM–DECISION AND ORDER OF UNITED STATES MAGISTRATE JUDGE DAVID R. HOMER FILED JULY 20, 2011, AND MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS

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Table of Contents

Page

Table of Authorities

Cases

Page

Page

Statutes and Rules

Introduction

Pursuant to 28 U.S.C. § 636(b)(1), Rule 72(a) and (b), Fed. R. Civ. P., and Local Rule 72.1(a) and (b), non-party Jill Dunn, Esq. ("Dunn") appeals from and objects to the following portions of the Memorandum–Decision and Order issued by United States Magistrate Judge David R. Homer on July 20, 2011 (Dkt. No. 342) ("July 20, 2011, Decision"):

- "On July 20, 2010 . . . David Smith telefaxed *a copy of the Annuity Agreement* and related documents to Wojeski and on July 21, 2010, Wojeski electronically mailed those same documents to Dunn. Dunn Decl. (Dkt. No. 188) at ¶ 3; Wojeski Decl. (Dkt. No. 191) at ¶ 3." July 20, 2011, Decision, p. 21 (emphasis added).

- " 'In assisting with the Trust's response to Plaintiff's discovery demands, and in preparing for the evidentiary hearing scheduled for November 16, 2010, I became aware that on July 21, 2010, David Wojeski e-mailed to me the *[Annuity Agreement]*. I did not recall receiving or seeing the *[Annuity Agreement]* at the time I prepared the September Declaration, and my recollection has not been refreshed by seeing *[the Annuity Agreement]*.

  " 'My attention on July 20, 21, and 22, 2010, was focused heavily on the Trust's real estate closing which took place on July 22, 2010, and on other unrelated client matters and personal issues, including a death in the family. This might explain why I failed to remember *the [Annuity Agreement]* when I prepared my September Declaration.' Dunn Decl. (Dkt. No. 188) at ¶ 3-4." July 20, 2011, Decision, pp. 23-24 (bracketed alterations in July 20, 2011, Decision; emphasis added).

- "It is beyond dispute that Dunn's assertions in her September 2010 declaration that she was unaware of the existence of the Annuity Agreement at the time of the conversation with the SEC on July 22, 2010 and that she did not learn of its existence until she received a copy of the agreement from Urbelis on July 27, 2010 were false. *Dunn had in fact received a copy of the Annuity Agreement from Wojeski on July 21, 2010,* the day prior to the conversation." July 20, 2011, Decision, p. 24 (emphasis added).

- "The claim that she [Dunn] did not review Wojeski's communication at least until after July 27, 2010 is belied by substantial evidence to the contrary." July 20, 2011, Decision, p. 25.

- "The record here thus demonstrates by clear and convincing evidence that Dunn's false statement in her declaration filed September 3, 2010 that she did not learn of the Annuity Agreement until it was provided to her on July 27, 2010 by Urbelis was knowingly false." July 20, 2011, Decision, p. 27.

- "The second [payment], however, was received after Dunn became aware of the existence of the Annuity Agreement and this wrongful depletion of the Trust's assets thus occurred with Dunn's complicity." July 20, 2011, Decision, pp. 47-48.

- "Dunn and Wojeski both knowingly filed declarations containing false statements in support of the Trust's opposition to the SEC's motion for reconsideration. The bad faith with which Dunn and Wojeski acted in filing these false declarations was mitigated only minimally by their last minute filings of corrective declarations." July 20, 2011, Decision, p. 49.

Dunn also objects to and appeals from the sanctions imposed on her by Magistrate Judge Homer's July 20, 2011, Decision: disgorgement of $5,355 paid to her on July 31, 2010; public admonishment; and Magistrate Judge Homer's direction to the Clerk of the Court to forward a copy of the decision to the Committee on Professional Standards for the Appellate Division, Third Department.

The Court of Appeals has expressly recognized the importance of an attorney's reputation, the "reputational consequences" and the potential costs of the imposition of sanctions and referral to a disciplinary committee. *In re Goldstein,* 430 F.3d 106, 111-12 (2nd Cir. 2005); *Keach v. County of Schenectady,* 593 F.3d 218, 225 (2nd Cir. 2010). The Court has repeatedly cautioned that because of their potency, decisions to impose sanctions must be made with "restraint and discretion." *E.g., Schlaifer Nance & Co., Inc. v. Estate of Warhol,* 194 F.3d 323, 333-34 (2nd Cir. 1999); *Eisemann v. Greene,* 204 F.3d 393, 396 (2nd Cir. 2000).

Paying lip service to these principles (July 20, 2011, Decision, pp. 11-12), Magistrate Judge Homer throws caution to the wind and abandons all pretense of discretion. His adverse

findings and conclusions flow from a shocking, albeit fundamental, factual error: Magistrate Judge Homer repeatedly insists (as quoted above) that David Smith faxed a copy of an *Annuity Agreement*—a "smoking gun," according to Magistrate Judge Homer (July 20, 2011, Decision, p. 25)—to David Wojeski on July 20, 2010, which Wojeski transmitted to Dunn by e-mail the next day; however, as plainly evidenced by the documents themselves, the materials faxed to Wojeski on July 20 and re-transmitted to Dunn on July 21, 2010, *do not include a copy of the Annuity Agreement*. Simple comparison of the documents attached to Wojeski's e-mail to Dunn and the Annuity Agreement produced to the SEC by Thomas Urbelis on July 27, 2010, establishes beyond any doubt that Dunn did *not* receive a copy of the Annuity Agreement on July 21, 2010. Thus, the foundation for Magistrate Judge Homer's adverse findings and conclusions as to Dunn is entirely illusory, and the edifice which Magistrate Judge Homer constructed on that foundation—monetary sanctions, public admonishment and referral to disciplinary authorities—cannot stand.

Jurisdiction and Standard of Review

In *Kiobel v. Millson,* 592 F.3d 78, 79-80 (2nd Cir. 2010), the Court of Appeals left open the question whether magistrate judges have the authority to impose sanctions under Rule 11. Magistrate judges' authority to impose sanctions under 28 U.S.C § 1927 or under a court's "inherent authority" appears to be equally unsettled in this Circuit. *See Montgomery v. Etreppid Technologies, LLC,* 2010 WL 1416771 at *12 (D. Nev. April 5, 2010), *citing, inter alia,* the multiple Second Circuit opinions in *Kiobel v. Millson.*

Dunn also questioned Magistrate Judge Homer's authority to decide the SEC's motion for sanctions without her consent. Under 28 U.S.C. § 636 and Rule 73, Fed. R. Civ. P., consent of *all* parties is a prerequisite to a magistrate judge's jurisdiction to enter a binding judgment. *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.,* 996 F.2d 21, 23-24 (2nd Cir. 1993). When a new party enters a case after the existing parties have consented to a matter being decided by a magistrate judge, the new party's consent is also required. *New York Chinese TV Programs, Inc. v. U.S., Enterprises, Inc.,* 996 F.2d at 24, *citing Guess v. Chenault,* 108 F.R.D. 446, 449-50 (N.D. Ind. 1985); *Stackhouse v. McKnight,* 168 Fed. Appx. 464, 466 (2nd Cir. 2006).[1] Consistent with this principle, Local Rule 72.2(b)(4) requires the Clerk of the Court to notify parties who are added to an action after consent and reference to a magistrate judge of their right to consent; if an added party does not consent, the action is returned to the referring judge. Dunn did not consent to a reference of the SEC's motion for sanctions to Magistrate Judge Homer.

Relegating this jurisdictional issue to a footnote (July 20, 2011, Decision, pp. 12-13, n. 8), Magistrate Judge Homer offers four alternative responses, but no conclusion. First, he observes that the parties to the action at the time the SEC moved for a preliminary injunction consented to the reference. This response disregards the authority cited above, as well as Local Rule 72.2(b)(4), which requires that a new party be afforded an opportunity to grant or withhold consent. Second, Magistrate Judge Homer asserts that the sanctions motion was "ancillary" to the motion for a preliminary injunction, as to which all parties had consented to the

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1 A motion for sanctions frequently involves parties who are different from the original parties (*see Kiobel v. Millson, supra,* 592 F.3d at 87; Cabranbes, *J.*, *concurring*).

reference—*i.e.,* all parties *at the time the motion for a preliminary injunction was made*, a group which does not include Dunn. Third, Magistrate Judge Homer states that the sanctions motion was "non-dispositive" and therefore no consent was required. This suggestion is contradicted by the sanctions imposed: an order requiring payment and directing the entry of *judgment* if payment is not made; instant public admonishment; and a direction to the Clerk of the Court to forward the decision to disciplinary authorities, all without awaiting further action or review. Finally, Magistrate Judge Homer suggested that his decision could be considered a "report-recommendation" to be reviewed *de novo*. This too, is flatly inconsistent with the grant of immediate relief.

As in *Kiobel v. Millson,* there is no need to labor over the standard of review in this case. Whether Magistrate Judge Homer's findings should be reviewed *de novo* or by a more deferential standard, his adverse rulings are clearly wrong and must be rejected. Moreover, because of the irreparable harm they will do—public admonishment has already occurred and the Clerk of the Court has been directed to forward the decision to discliplinary authorities—as well as the serious doubt regarding Magistrate Judge Homer's jurisdiction, the sanctions he imposed should be stayed pending review.[2]

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2 The standards for the issuance of a stay pending appeal, a strong showing of likelihood of success on appeal, irreparable injury in the absence of a stay, the absence of injury to the other parties and the public interest, *Hilton v. Braunskill,* 481 U.S. 770, 776-77 (1987); *Newspaper Guild/CWA of Albany, TNG/CWA, AFL-CIO-CLC v. Hearst Corp.,* 2011 WL 541821 at *1 (N.D.N.Y. Feb. 8, 2011); *In re Junod*, 1991 WL 33257 at *2 (N.D.N.Y. Feb. 25, 1991); are clearly satisfied.

Statement of Facts

With a few exceptions, one of them glaring, the pertinent facts can be gleaned from Magistrate Judge Homer's Memorandum–Decisions and Orders dated July 7, 2010 (Dkt. No. 86; "July 7, 2010, Decision"), November 22, 2010 (Dkt. No. 194; "November 22 Decision"), January 11, 2011 (Dkt. No. 254; "January 11 Decision"), and the July 11, 2011, Decision.

The SEC's Motion for a Preliminary Injunction

The SEC commenced this action on April 20, 2010, alleging violations of the federal securities laws. July 20, 2011, Decision, p. 3. Simultaneously, the SEC obtained a Temporary Restraining Order appointing a receiver to take possession of the defendants' assets and freezing specified property, including assets of a Trust established by defendants David L. and Lynn A. Smith in 2004 (the "Trust"). July 20, 2011, Decision, pp. 3-4. At the same time, law enforcement authorities executed search warrants relating to the defendants; the Annuity Agreement that is the focal point of this proceeding was seized at that time, but was not turned over to the SEC until October 2010. July 20, 2011, Decision, p. 7, n. 5.

On May 28, 2010, the Trust, represented by Dunn, was granted leave to intervene for the limited purpose of opposing the SEC's motion for a preliminary injunction continuing the freeze of the Trust's assets. July 20, 2011, Decision, pp. 4-5. Magistrate Judge Homer conducted an evidentiary hearing on June 9, 10 and 11, 2010. July 20, 2011, Decision, p. 5. On July 7, 2010, Magistrate Judge Homer found, *inter alia,* that "[t]he SEC has also failed to demonstrate that David Smith was an equitable owner in the Trust Account" and "there is no likelihood that the SEC will prove that David Smith was the beneficial owner of the Trust." July 7, 2010, Decision,

pp. 39, 41. Magistrate Judge Homer denied the SEC's motion for a preliminary injunction continuing the freeze of the Trust's assets. July 20, 2011, Decision, p. 5. After July 7, 2010, the Trust disbursed approximately $1,000,000, including payment of legal fees and expenses to Dunn on July 9, 2010 ($95,741.40), and July 31, 2010 ($5,355.00). July 20, 2011, Decision, pp. 5, 40-41, 47-48.

The SEC's Second Motion

On July 22, 2010, SEC attorneys arranged a telephone conference with Magistrate Judge Homer for the purpose of requesting that the Trust's account be re-frozen, having been advised by its tax expert that the Smiths owed (but failed to pay) gift taxes when the Trust was formed in 2004. Dkt. No. 301-6 (excerpts from transcript of November 16, 2010, hearing), pp. 4-5. After the conference, the SEC attorneys called Dunn to ask why she had said (during the conference) that no taxes were due. Dkt. No. 301-6, p. 5. According to SEC attorney David Stoelting, Dunn said, "It's a private annuity agreement." Dkt. No. 301-6, p. 6.[3] According to Dunn, she said "that it was [her] understanding that because this was a private annuity trust, no gains were realized and no gift tax returns were required to be filed." Dkt. No. 301-6, pp. 58-59. The SEC attorneys consulted their tax expert again, who said that if there was an irrevocable trust and an annuity agreement, no gift tax would be due. Dkt. No. 301-6, p. 11. The SEC then contacted Thomas Urbelis, the original trustee of the Trust ("Urbelis"); on July 27, 2010, Urbelis produced a copy of the Annuity Agreement to the SEC and Dunn. July 20, 2011, Decision, pp. 7-8; Dkt. No. 103-3 (Exhibit 1 to Declaration of David Stoelting, August 3, 2010, Dkt. No. 103-2, ¶¶ 4-5).

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3 Kevin P. McGrath, the other SEC attorney involved in the call, did not remember hearing the words supposedly uttered by Dunn. November 22 Decision, pp. 8, 9.

On August 3, 2010, the SEC filed a motion requesting that the July 7 Decision be "revised" pursuant to Rule 54(b), Fed. R. Civ. P., principally on the ground that the Annuity Agreement established defendant David Smith's interest in the assets of the Trust, thereby justifying reimposition of the asset freeze. Dkt. No. 103-1 (SEC Memo of Law in Support), p. 11. The SEC contended that Lynn Smith and Urbelis failed to produce the Annuity Agreement despite numerous requests and repeated questioning (Dkt. No. 103-1, pp. 5-6), and that David Wojeski (Urbelis's successor as Trustee of the Trust) failed to mention the Annuity Agreement during his testimony at the hearing in June 2010 (Dkt. No. 103-1, p. 6).

The Trust opposed the SEC's new motion on numerous grounds. The most significant, for the purposes of the SEC's motion for sanctions, was that the Annuity Agreement was not "newly-discovered" evidence because the SEC, in the exercise of due diligence, could have discovered it earlier (November 22 Decision, pp. 8-9), an argument based principally on an August 2004 letter from David Smith to Urbelis which described the Trust as a "Private Annuity Trust." November 22 Decision, pp. 10, 14-15.

On September 3, 2010, Dunn filed a Declaration in opposition to the SEC's motion. Dkt. No. 134. As quoted in the July 20, 2011, Decision, Dunn stated, *inter alia*:

> . . . I did not know of the existence of the private annuity agreement until I received it from Thomas Urbelis on July 27, 2010, the same day that the SEC received it. . . . Neither I nor Mr. Wojeski had any documents in our possession relating to the private annuity other than the courtesy copy of the documents I received from Mr. Urbelis on July 27 when Mr. Stoelting received them. Dkt. No. 134, ¶ 36.
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> * * *
>
> . . . I never used the phrase "private annuity agreement" even once, because I didn't know a private annuity agreement existed until July 27. Dkt. No. 134, ¶ 45.

Magistrate Judge Homer then scheduled an evidentiary hearing for November 16, 2010. July 20, 2011, Decision, p. 23. On November 15, 2010, Dunn filed a two-page Declaration (Dkt. No. 188) in which she acknowledged that certain statements in her September 3, 2010, Declaration were incorrect:

> 2. In paragraph 36 of my September Declaration I stated as follows: "Neither I nor Mr. Wojeski had any documents in our possession relating to the private annuity other than the courtesy copy of the documents I received from Mr. Urbelis on July 27 when Mr. Stoelting received them."
>
> 3. In assisting with the Trust's response to Plaintiff's discovery demands, and in preparing for the evidentiary hearing scheduled for November 16, 2010, I became aware that on July 21, 2010, David Wojeski e-mailed to me the *documents attached to this Declaration as Exhibit A*. I did not recall receiving or seeing the *document attached as Exhibit A* at the time I prepared the September Declaration, and my recollection has not been refreshed by seeing *Exhibit A*.
>
> 4. My attention on July 20, 21, and 22, 2010, was focused heavily on the Trust's real estate closing which took place on July 22, 2010, and on other unrelated client matters and personal issues, including a death in the family. This might explain why I failed to remember the *documents attached as Exhibit A* when I prepared my September Declaration. Dkt. No. 188, ¶¶ 2, 3, 4 (emphasis added).[4]

As set forth in the transcript of the November 16, 2010, hearing (Dkt. No. 301-6, pp. 69-71), the "documents attached as Exhibit A" to Dunn's November 15, 2010, Declaration comprise seven pages:

- a cover page, bearing the label, "Exhibit A" (Dkt. No. 188-1, p. 1);

.

4 As discussed below, in his July 20, 2011, Decision, Magistrate Judge Homer replaced the phrases italicized above with the bracketed words, "Annuity Agreement" (July 20, 2011, Decision, pp. 23-24), dramatically altering the meaning of Dunn's November 15, 2010, Declaration.

- a one-page e-mail from Wojeski, which served merely to re-transmit to Dunn the fax Wojeski received the day before, without comment or any other message (Dkt. No. 188-1, p. 2);

- a one-page fax or e-mail from "Nanci Pipo" to "Dave" (Dkt. No. 188-1, p. 3);

- a single page titled, "Policy Delivery Receipt" and "PRIVATE ANNUITY CONTRACT," with an acknowledgment of receipt apparently signed by "David L. Smith" (Dkt. No. 188-1, p. 4);

- a single page titled, "PRIVATE ANNUITY CONTRACT," listing "CONTRACT TERMS" (Dkt. No. 188-1, p. 5);

- a single page headed "Private Annuity" and bearing the date "9/7/2004," listing items such as "FMV of Property," "Client's Basis," "Annuity Factor," and "Joint Life Expectancy" (Dkt. No. 188-1, p. 6); and

- a single page of computations (Dkt. No. 188-1, p. 7).

Contrary to Magistrate's Judge Homer's deliberate revision of Dunn's Declaration, "the documents attached as Exhibit A" to Dunn's November 15, 2010, Declaration *do not include the Annuity Agreement*—Dkt. No. 103-3.

Magistrate Judge Homer found that the SEC did not discover the Annuity Agreement until Dunn disclosed its existence in the July 22 telephone conversation with SEC attorneys (November 22 Decision, p. 13) and ruled that the Annuity Agreement demonstrated David Smith's "substantial interest" in the Trust (November 22 Decision, pp. 21-22). Based on these conclusions, Magistrate Judge Homer granted the SEC's motion and reimposed a freeze on the Trust's account. November 22 Decision, pp. 22-23. In addition, Magistrate Judge Homer, *sua sponte*, granted the SEC leave to move for sanctions against the Trust, Urbelis, Wojeski, Dunn, Lynn Smith and James Featherstonhaugh, Lynn Smith's attorney. November 22 Decision, p. 24.

Argument

MAGISTRATE JUDGE HOMER'S CONCLUSION THAT DUNN DELIBERATELY FILED A FALSE DECLARATION IS FLATLY CONTRADICTED BY THE RECORD AND SHOULD BE REJECTED; THE SANCTIONS IMPOSED ON DUNN SHOULD BE VACATED

A. The Applicable Legal Standard for Sanctions

Magistrate Judge Homer correctly found that the SEC failed to satisfy the prerequisites of a motion for sanctions under Rule 11(c)(2), since it failed to serve its motion 21 days before filing the motion, and therefore did not provide the required "safe harbor." July 20, 2011, Decision, p. 10. *See Martens v. Thomann,* 273 F.3d 159, 178 (2nd Cir. 2001); *In re Pennie & Edmonds LLP,* 323 F.3d 86, 89 (2nd Cir. 2003); *Langdon v. County of Columbia,* 321 F. Supp. 2d 481, 484-85 (N.D.N.Y. 2004). Dunn submits that Magistrate Judge Homer's November 22 Decision did not satisfy the requirements of Rule 11(c)(3), because it did not describe the specific conduct that appeared to violate the rule or the standard by which that conduct would be judged. *Martens v. Thomann, supra,* 273 F.3d at 177-78; *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.,* 174 F.3d 87, 92 (2nd Cir. 1999).

Nevertheless, in evaluating the SEC's motion, Magistrate Judge Homer articulated the correct legal standard under 28 U.S.C. § 1927, the court's "inherent authority" *and* Rule 11(c)(3): whether the SEC established, by clear and convincing evidence, that the conduct for which sanctions are sought "was not merely negligent but was undertaken with subjective bad faith." July 20, 2011, Decision, pp. 10-12. *See Schlaifer Nance & Co., Inc. v. Estate of Warhol, supra,* 194 F.3d at 336, *quoting Shafii v. British Airways, PLC,* 83 F.3d 566, 571 (2nd Cir. 1996);

Oliveri v. Thompson, 803 F.2d 1265, 1272 (2nd Cir. 1986), *cert. denied,* 480 U.S. 918 (1987); *McMunn v. Memorial Sloan-Kettering Cancer Center,* 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002).

B. Magistrate Judge Homer's Findings and Conclusions

Magistrate Judge Homer correctly found that the SEC "failed to demonstrate by clear and convincing evidence that Dunn possessed the requisite knowledge of the existence of the Annuity Agreement prior to July 7, 2010 or that she acted in bad faith, either objectively or subjectively, prior to that date" and properly denied the SEC's motion as to Dunn for any conduct prior to July 7, 2010. July 20, 2011, Decision, pp. 20-21. Accordingly, Magistrate Judge Homer also correctly ruled that Dunn "cannot be responsible for any disbursements from the Trust before July 20, 2010." July 20, 2011, Decision, p. 47.

However, Magistrate's Judge Homer's finding that Dunn received a copy of the Annuity Agreement from Wojeski on July 21, 2010, and therefore the statement in her September 3, 2010, Declaration that she was unaware of the existence of the Annuity Agreement prior to receiving a copy on July 27, 2010, was false (July 20, 2011, Decision, p. 24), is flatly contradicted by the evidence and simply wrong, as discussed in detail below.

Since Magistrate Judge Homer was so clearly wrong in finding that Dunn received a copy of the Annuity Agreement on July 21, 2010, and therefore her denial of receipt or knowledge of that document was *not false*, it should not be necessary to discuss the question whether her denial was *deliberately* false. Should this Court find it necessary to address the question, Magistrate Judge Homer's conclusion that the statement in Dunn's September 3, 2010,

Declaration that she was unaware of the existence of the Annuity Agreement prior to receiving a copy on July 27, 2010, was "knowingly false" (July 20, 2011, Decision, p. 27), is *not* supported by "substantial evidence to the contrary" (July 20, 2011, Decision, p. 25), but only by Magistrate Judge Homer's mischaracterization of the documents attached to Wojeski's e-mail and by sheer conjecture. It is plain that Magistrate Judge Homer did not approach this question with the caution, restraint and discretion required when sanctions are considered, especially when an attorney's previously unblemished reputation is at stake.

Magistrate Judge Homer's errors begin with the finding that David Smith faxed a copy of the Annuity Agreement to Wojeski on July 20, 2010, and the next day, Wojeski e-mailed "those same documents" to Dunn. July 20, 2011, Decision, p. 21. As discussed above (at pages 9-10), comparison of Wojeski's e-mail to Dunn—Dkt. No. 188-1—and the Annuity Agreement produced by Urbelis—Dkt. No. 103-3—demonstrates beyond any doubt that the documents transmitted by Wojeski to Dunn on July 21, 2010, *did not include a copy of the Annuity Agreement.* While the documents e-mailed to Dunn *refer* to an "annuity contract" (Dkt. No. 188-1, p. 3), a "Private Annuity Contract" (Dkt. No. 188-1, pp. 4, 5), and a "Private Annuity" (Dkt No. 188-1, p. 6), they do not constitute or establish the existence of the Private Annuity Agreement produced by Urbelis on July 27 (Dkt. No. 103-3, p. 3).

Magistrate Judge Homer then purports to *quote* from Dunn's Declaration of November 15, 2010 (Dkt. No. 188), in which Dunn voluntarily brought to the attention of the SEC and Magistrate Judge Homer the fact that her earlier statement that neither she nor Wojeski possessed any "documents . . . *relating to* the private annuity" prior receiving a copy of the Annuity Agreement on July 27, 2010 (Dkt. No. 134, ¶ 36; emphasis added), was incorrect (Dkt.

No. 188, ¶¶ 2-4). Magnifying his distortion of the documents attached to Wojeski's July 21, 2010, e-mail (Dkt. No. 188-1), Magistrate Judge Homer substitutes the words, "Annuity Agreement," for the phrase, "document(s) attached as Exhibit A" (July 20, 2011, Decision, pp. 23-24). Magistrate Judge Homer thus transmogrifies Dunn's correction regarding her receipt of documents *relating to* the private annuity into an admission that she received the *Annuity Agreement* itself on July 21, 2010.

The culmination of Magistrate Judge Homer's factual errors occurs at page 24 of the July 20, 2011, Decision:

> It is beyond dispute that Dunn's assertions in her September 2010 declaration that she was unaware of the existence of the Annuity Agreement at the time of the conversation with the SEC on July 22, 2010 and that she did not learn of its existence until she received a copy of the agreement from Urbelis on July 27, 2010 were false. *Dunn had in fact received a copy of the Annuity Agreement from Wojeski on July 21, 2010, the day prior to the conversation.* (Emphasis added.)

As shown above, this conclusion is just plain wrong.

Magistrate Judge Homer begins his analysis of whether Dunn's September 2010 Declaration was *deliberately* false by misreading Dunn's November 2010 Declaration. Magistrate Judge Homer states:

> Dunn's explanation for the false statements in the September 2010 declaration is that *she did not read the communication from Wojeski when she received it on July 21, 2010,* she was distracted by a Trust-related real estate closing, other clients' business, and personal matters, and did not recall ever seeing the July 21, 2010 communication from Wojeski until shortly before November 15, 2010 when preparing for the November 16 evidentiary hearing. Dunn Decl. (Dkt. No. 188) at ¶¶ 3, 4. The claim that *she did not review Wojeski's communication at least until after July 27, 2010* is belied by substantial evidence to the contrary. July 20, 2011, Decision, p. 25 (emphasis added).

Dunn's November 2010 Declaration did *not* say that she "did not read" or "did not review" Wojeski's July 21, 2010, e-mail when she received it; Dunn's Declaration states:

> 3. . . . *I did not recall* receiving or seeing the document attached as Exhibit A at the time I prepared the September Declaration . . . .
>
> 4. My attention on July 20, 21, and 22, 2010, was focused heavily on the Trust's real estate closing which took place on July 22, 2010, and on other unrelated client matters and personal issues, including a death in the family. This might explain why *I failed to remember* the documents attached as Exhibit A when I prepared my September Declaration. Dkt No. 188, ¶¶ 3, 4 (emphasis added).

Magistrate Judge Homer then proceeds to examine "substantial evidence" contradicting Dunn's non-existent denial that she did not review Wojeski's e-mail until after July 27, 2010. First, Magistrate Judge Homer speculates that it is only the "rare" lawyer "who does not immediately receive and respond to clients' electronic communications." July 20, 2011, Decision, p. 25. Magistrate Judge Homer cites no evidence to support his surmise, nor pause to consider the myriad devices and diversity of capabilities available in the marketplace.[5] In any event, the July 20, 2011, Decision does not point to evidence concerning Dunn's electronic

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5 Quoted in full, Magistrate Judge Homer's comment reads:

> In this day and age, with electronic mail, smart phones, blackberries, and other methods of instant access to electronic communications, it is the rare, and probably less employed lawyer, who does not immediately receive and respond to clients' electronic communications. July 20, 2011, Decision, p. 25.

One might suggest—with at least equal validity—that in light of the continuous deluge of incoming electronic communications to which most lawyers (and the rest of humanity) are subjected "[i]n this day and age," it is all too easy—perhaps inevitable and unavoidable—for an attorney (or anyone else) to fail to notice immediately at least some messages or attachments. Left unchecked, Magistrate Judge Homer's unsupported supposition subjects attorneys—at least those practicing in this District—to a new ethical burden: to read and respond to all electronic communications immediately, on pain of sanctions.

devices or their capacities or her practice in this regard or that Dunn responded to Wojeski's e-mail—because there is no such evidence.

Next, Magistrate Judge Homer argues that Dunn's claim that "if she did read it, she took no notice of the attached Annuity Agreement" is not credible. July 20, 2011, Decision, p. 25. Once again, Magistrate Judge Homer invents and rebuts a claim Dunn did not make: She did not say "she took no notice" of the documents attached to Wojeski's e-mail, but only that she *did not recall* seeing them. Dkt. No. 188, ¶¶ 3, 4. And again, the Annuity Agreement *was not attached* to Wojeski's e-mail. Dkt No. 188-1. This simple fact makes hash of Magistrate Judge Homer's proposition that Dunn could not have failed to appreciate the significance of the Annuity Agreement:

> The central issue . . . was whether David Smith possessed any ongoing interest in the Trust. The conclusion . . . that he did not was the finding critical to denial of the SEC's motion to freeze the Trust's assets. The Annuity Agreement self-evidently constituted the proverbial "smoking gun" on this issue. . . . Dunn could not have read the Annuity Agreement and failed to note its significance to her client. July 20, 2011, Decision, p. 25.

"Smoking gun" or not, Dunn could not have noted the significance of a document that was *not* attached to the e-mail she received.

Magistrate Judge Homer suggests that "the timing of Wojeski's communication discredits Dunn's claim," pointing to Dunn's "first ever reference to a 'private annuity agreement'" on July 22, 2010, one day after "learning of the Private Annuity Agreement." July 20, 2011, Decision, pp. 25-26.[6] Once more, the documents attached to Wojeski's e-mail did *not* include the Annuity Agreement and none of them refers to either a "private annuity

6 The term, "private annuity trust," had been used earlier in the case. November 22 Decision, pp. 10, 14-15.

agreement" or an "Annuity Agreement." Dkt. No. 188-1. Dunn did not learn the term to which she supposedly referred from Wojeski's e-mail. In any case, Magistrate Judge Homer's speculation is no substitute for clear and convincing evidence of subjective bad faith.

Finally, Magistrate Judge Homer suggests that Dunn "possessed strong motive to deny learning of the Annuity Agreement on July 21, 2010," since her opposition to the SEC's second motion to freeze the Trust's assets centered on discrediting the SEC's assertion that it first learned of the existence of a private annuity agreement from Dunn during a telephone conversation on July 22, 2010, and if the SEC prevailed on its motion, the funds otherwise available to the Trust and its lawyers, including Dunn, "would be lost . . . ." July 20, 2011, Decision, pp. 26-27.

Well before September 3, 2010, however, Urbelis had provided copies of the Annuity Agreement to the SEC, the SEC had made its second motion and the assets of the Trust had been refrozen. Dunn was paid for her services in July and there is no evidence that suggests she had any greater concern regarding future payment than every attorney in private practice suffers. Moreover, Magistrate Judge Homer's rumination on Dunn's motives is contradicted not only by the undisputed fact that it was Dunn who voluntarily corrected her prior mis-statement regarding documents in her possession *relating to* the Annuity Agreement—an act of disclosure inconsistent with an intent to conceal—but by Magistrate Judge Homer's conclusion that in opposing the SEC's second motion, Dunn's "arguments, while intemperate and ultimately unsuccessful, were colorably based on facts and law with the exceptions noted below." July 20, 2011, Decision, p. 48. (The "exception" is, of course, Dunn's September 3, 2010, Declaration, which caused *no* "demonstrable harm" to the SEC. July 20, 2011, Decision, p. 49.) Moreover,

"[t]he mere fact that [Dunn] and the Trust opposed the SEC's motion rather than conceding it did not constitute bad faith and did not increase the unnecessary costs to the SEC." July 20, 2011, Decision, p. 48.

Magistrate Judge Homer ruled that Dunn "committed no sanctionable conduct prior to the release of the Trust's assets from the restraining order" and therefore "cannot be held responsible for any disbursements from the Trust before July 20, 2010" (the date of the fax to Wojeski). July 20, 2011, Decision, p. 47. However, Magistrate Judge Homer also ruled, "the conduct of Dunn and Wojeski after July 20 and 21, 2010 when they received notice of the existence of the Annuity Agreement is sanctionable." July 20, 2011, Decision, p. 47. Despite finding, as noted above, that Dunn's September 2010 Declaration caused no demonstrable harm to the SEC (July 20, 2011, Decision, p. 49), and despite his further finding that Dunn's Declaration "did not cause any disbursements from the Trust" (July 20, 2011, Decision, pp. 48-49), the July 20, 2011, Decision orders Dunn to disgorge $5,355—the payment made to her on July 31, 2010—because the payment "was received after Dunn became aware of the existence of the Annuity Agreement and this wrongful depletion of the Trust's assets thus occurred with Dunn's complicity." July 20, 2011, Decision, pp. 47-48. Just what Dunn's purported "complicity" consisted of, Magistrate Judge Homer does not say.

As Magistrate Judge Homer acknowledged (July 20, 2011, Decision, p. 47), disgorgement is a non-punitive remedy whose purpose is to deprive wrongdoers of their "ill-gotten" gains. *S.E.C. v. Cavanagh,* 445 F.3d 105, 117 (2nd Cir. 2006); *Commodity Futures Trading Comm'n v. Vartuli,* 228 F.3d 94, 113 (2nd Cir. 2000). "Because the remedy is remedial rather than punitive, the court may not order disgorgement above [the] amount" acquired

through wrongdoing. *S.E.C. v. Cavanagh,* 445 F.3d at 116, n. 25. Having found that Dunn's September 2010 Declaration, "did not cause any disbursements from the Trust" (July 20, 2011, Decision, pp. 48-49)—indeed, how could a declaration filed in September cause a disbursement to have been made the previous July?—there is no basis for Magistrate Judge Homer's disgorgement order.

Conclusion

Magistrate Judge Homer's decision utterly fails to reflect the caution, restraint and discretion required when sanctions are considered. For the reasons appearing above, Dunn's objections to Magistrate Judge Homer's July 20, 2011, Decision should be sustained; the findings and conclusions adverse to Dunn should be rejected; the sanctions imposed—disgorgement, publicly admonishing Dunn and directing the Clerk of the Court to forward a copy of the decision to the Committee on Professional Standards for the Appellate Division, Third Department—should be stayed pending review and, upon review, vacated in their entirety.

August 1, 2011

Respectfully submitted,

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APPENDIX: WESTLAW DECISIONS

Not Reported in F.Supp., 1991 WL 33257 (N.D.N.Y.)
(Cite as: 1991 WL 33257 (N.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court, N.D. New York.
In re David N. JUNOD and Arlene F. Junod, Debtors.
William H. BURKEY, Individually and as statutory trustee of Automation Plus, Inc., Cary T. Magillian, a/k/a Cary M. Burkey, an individual, and Automation Plus, Inc., a forfeited corporation, Plaintiffs,
v.
David N. JUNOD, an individual, Arlene F. Junod, an individual, Eastern Copy Products, Inc., a corporation, Eastern Management Systems, Inc., a corporation, Michael Kleinhans, an individual, and Harold Eugene Kious, Defendants.

Bankruptcy No. 88-01858.
No. 90-CV-840.
Feb. 25, 1991.

Order

McAVOY, District Judge.

***1** Before the court are seven motions pertaining to certain matters in *Burkey v. Junod*, 90-CV-840: (1) plaintiffs' motion to have this court alter/amend or reconsider the order of November 16, 1990 awarding, after revisiting the court's initial decision to impose sanctions, $3,741 in sanctions against plaintiffs' attorney; (2) plaintiffs' motion for a stay of execution of the sanctions award pending a determination of plaintiffs' motion to alter/amend/reconsider or pending an appeal; (3) plaintiffs' motion for judgment on the pleadings essentially seeking dismissal of the Junod defendants' first counterclaim for failure to state a claim upon which relief can be granted; (4) plaintiffs' motion for judgment on the pleadings essentially seeking dismissal of the first counterclaim of defendants Eastern Copy Products, Eastern Management Systems and Michael Kleinhaus (hereafter referred to as the "Eastern defendants") for failure to state a claim upon which relief can be granted; (5) plaintiffs' motion for a more definite statement of the Eastern defendants' second counterclaim; (6) the Eastern defendants' first motion for contempt against attorney Canice Timothy Rice, Jr; and (7) the Eastern defendants' second motion for contempt against attorney Canice Timothy Rice, Jr. Prior to ruling on these motions the court offers the following by way of background.

Prompted by Bankruptcy Case No. 88-01858 involving debtors David N. Junod and Arlene F. Junod pending in the Northern District of New York, plaintiffs William H. Burkey, Cary T. Magilligan (unsecured creditors of the Junods) and Automation Plus, Inc. (a forfeited corporation) commenced an "adversary proceeding" stylized by them as an "action to determine [the] dischargeability of debt and for damages pursuant to 11 U.S.C. § 523"; a jury trial was been demanded. A reading of the seven-count complaint filed by plaintiffs on March 24, 1989, however, revealed that they asserted a single federal law claim for copyright infringement under "the Copyright Act of 1976, as amended by the Computer Software Protection Act of 1980, 17 U.S.C. Section 101," (count seven) and what appears to be six State law claims, five for conversion and one for "indemnification". Counts three (conversion of computer programs) and seven (copyright infringement) are asserted against defendants "Eastern" and Kleinhaus only; those are the only two counts asserted against them.

Pursuant to 28 U.S.C. § 157(a), the matter was referred to the Bankruptcy Court which, following the filing of answers seeking, in part, Rule 11 sanctions because of the allegedly frivolous nature of plaintiffs' suit, issued a report recommending, upon its own motion, *see* 28 U.S.C. § 157(b)(3) (Supp.1990), that the District Court withdraw the reference pursuant to 28 U.S.C. § 157(d). The Bankruptcy Court pointed out essentially that the defendants' liability under non-bankruptcy law, involving matters at best only related to a case under title 11 and perhaps outside the expertise of the Bankruptcy Court, is a condition precedent to a finding by it of the nondischargeability of any such liability. In short, the non-bankruptcy law matters entail non-core proceedings with respect to which, given the lack of consent by the parties, the Bankruptcy Court may not enter final judgment but would be limited to the preparation of proposed findings of fact and conclusions of law, the review of which, given the demand for a jury trial, would raise Seventh Amendment concerns.

***2** The court, in June 1990, reviewed Judge Gerling's report and plaintiffs' response thereto and concluded as follows: "in the prudent exercise of the court's discretion, the reference of all of plaintiffs' non-bankruptcy law claims as against all the defendants is withdrawn; upon a finding of liability as to any defendant in this action, the issue of the nondischargeability of that liability will be referred again to

the Bankruptcy Court because of its greater expertise in such matters; the stay issued by Judge Gerling pursuant to Bankruptcy Rule 5011(c) (Supp.1990) pending final determination of the motion to withdraw the reference is no longer needed and is lifted because the case is now before the District Court." Order (dated June 11, 1990). The order also noted that the bankruptcy case out of which the "adversary proceeding" arose is separate and distinct from the case presently before the court.

The parties moved for a variety of relief before Judge Gerling, who "reserved decision" on defendants' motion for judgment in their favor on two counterclaims. Defendants renewed their motion for judgment in their favor before this court, which was as a practical matter denied; plaintiffs moved for a change of venue to the Eastern District of Missouri, which the court at oral argument on October 26, 1990 denied as patently frivolous, warranting, upon defendants' request (raised in their memorandum of law in opposition to plaintiffs' motion for a change of venue), the imposition of sanctions. Defendants' counsel was directed to submit an itemized statement of account pertaining to attorney's fees and costs associated with time spent responding to plaintiffs' motion. The court received that documentation and also received a letter from plaintiffs' counsel complaining about the imposition of sanctions and asking the court to reconsider its decision.

By order dated and filed November 16, 1990, the court reconsidered its decision rendered at oral argument to impose sanctions. The court adhered to its prior determination and, despite not having received any response from Mr. Rice regarding the specific amount requested by counsel for the Eastern defendants, upon review of counsel's submissions, awarded $3,741 in attorney's fees for which Mr. Rice was held personally liable. Mr. Rice has steadfastly refused to pay the sanctions imposed against him. Discovery has been attempted; it is unclear whether any discovery has taken place. The motions detailed above are currently before the court for disposition. The court rules as follows.

A. Motions pertaining to the sanctions order

Mr. Rice's arguments in support of his motion, filed November 26, for alteration, amendment, or reconsideration of this court's November 16, 1990 order (essentially that his motion for a change of venue following this court's withdrawal of its reference to the bankruptcy court of the action he filed on March 24, 1989 was well grounded in fact and warranted by existing law) are utterly incomprehensible. The court has already reconsidered its decision to impose **sanctions**; it will not do so again. In any event, the court fails to understand how the withdrawal of the reference to the Bankruptcy Court for the Northern District of New York of a complaint purporting to state one federal claim and six State law claims can somehow be interpreted as rationally laying the basis for a motion by plaintiff for a change of venue. Additionally, Mr. Rice's argument that he was somehow deprived of due process of law in that, in his view, he was not notified "of the court's intention to hear and consider evidence or argument concerning the propriety of awarding **sanctions** prior to the court's decision to do so" is simply without merit. In short, Mr. Rice's motion to have this court alter, amend or reconsider its November 16 order is denied, as is his motion for a stay, subsequently filed on December 6. In the court's view, Mr. Rice has not demonstrated the requisite likelihood of success on the merits. *See* ***Hilton v. Braunskill***, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119 (1987); *United States v. Eastern Air Lines, Inc.*, 90-8118, 91-1006, slip op. 1299, 1304 (2d Cir. January 14, 1991). As the court noted in its November 16 order,

***3** the court is of the view that counsel did not conduct a reasonable inquiry to determine whether the motion was well grounded in fact and warranted by existing law; such a baseless motion brought some eighteen months after the complaint was filed was destined to fail and counsel should have known that; the court cannot but conclude that the motion was brought to cause unnecessary delay and a needless increase in the cost of litigation.

In passing, the court observes that *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497 (2d Cir.1989), which Mr. Rice invokes for the proposition that "[c]ourts should ... resolve all doubts in favor of the signer," *id.* at 504, also states that courts "should impose sanctions when ' "it is patently clear that a claim has absolutely no chance of success," ' " *id.* (quoting *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2d Cir.1988), *rev'd on other grounds sub nom. Pavelic & Leflore v. Marvel Entertainment Group*, 110 S.Ct. 456 (1989), (quoting

Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir.1985)).

Nor has Mr. Rice demonstrated irreparable injury absent a stay and, it seems to the court, that the public interest lies in seeing this case proceed to a determination of the merits of the underlying claims, which, in the court's view, will be inhibited were a stay to issue. *See Hilton*, 471 U.S. at 776, 107 S.Ct. at 2119.

The court now turns its attention to the Eastern defendants' motions for contempt.

In their first motion for contempt, filed December 14, for which the Eastern defendants invoke 18 U.S.C. § 401, the Eastern defendants seek to have Mr. Rice sanctioned for the costs incurred by defendants to make this cross motion, fined for his "reprehensible conduct" and barred from the privilege of practicing *pro hac vice* before this court for his willful refusal to obey the court's November 16 order. The Eastern defendants' second motion for contempt, filed January 25, 1991, is directed at Mr. Rice's failure to obey this court's November 23, 1990 order requiring plaintiff William H. Burkey to appear at a deposition scheduled for the week of January 21, 1991.

Not looking kindly upon Mr. Rice's actions in regard to the matter of this court's sanctions order and understanding the frustration felt by defendants' counsel, based upon the record as it has developed, the court grants defendants' first motion for contempt, construed by the court to be a motion for civil contempt. The court expressly directed Mr. Rice to pay to the Eastern defendants sanctions in the amount of $3,741 by certified check to be delivered to the office of defendants' counsel. As such the predicate for the imposition of equitable remedies, including civil contempt, pursuant to Rule 70 of the Federal Rules of Civil Procedure has been established. Additionally, the record reveals instances of conduct on Mr. Rice's part, not disputed by him, amply supporting a finding that Mr. Rice has willfully disobeyed this court's order to pay the sanctions: for example, he informed defendants' counsel that he did not need to be "lectured" and stated that he did not "care what some Law Clerk thinks I should do" regarding the obligations imposed by the November 16 order; Mr. Rice also categorically rejected any suggestions that he place the sanctions proceeds into an escrow account pending resolution of his motion for alteration/amendment/reconsideration of this court's order. Lastly, the court fails to understand how the appealability of the order imposing sanctions prevents this court from holding Mr. Rice in contempt. (The court notes in passing that Mr. Rice has not, as of yet, taken an appeal of the November 16 order.) In view of the foregoing, that is, because Mr. Rice willfully disobeyed a specific and definite order requiring him to do an act, this court adjudges Mr. Rice in civil contempt of the court's November 16 order. *See Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir.1983); *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808 (2d Cir.1981). In accordance with *Shuffler* and *Perfect Fit*, the court has chosen to impose a compensatory fine, *see Shuffler*, 720 F.2d at 1147-1148; *Perfect Fit*, 646 F.2d at 810, which in this case will entail the payment of interest that has accrued and is accruing as a result of Mr. Rice's failure to pay the sanctions already ordered. Defendants' counsel is directed to submit the appropriate statement of account detailing such interest. The court will then order Mr. Rice to pay that amount of money within a certain time. Defendants are also advised to avail themselves of the procedures attending a writ of execution, unless they can demonstrate to the court some exceptional circumstances warranting the imposition of a coercive fine. *See Shuffler*, 720 F.2d at 1148. Hopefully, however, Mr. Rice will purge himself of contempt by either paying the amount ordered in the court's November 16 order in the manner set forth therein within 15 days of the date the present order is filed or by placing that same amount in an escrow account (as was previously suggested by defendants' counsel) within 15 days of the date the present order is filed. The court deems Mr. Rice on notice that his future disregard of this court's orders will not be looked upon so kindly.

***4** As for the second motion for contempt, although, as noted above, it is certainly within the power of the court to impose a coercive fine for civil contempt, and although the court is rather annoyed with the manner in which this case has been proceeding and particularly with Mr. Rice in connection with the events occurring just prior to the long-ago scheduled January 21st date for the deposition of plaintiff William Burkey, the court prefers, at this point, simply to order that the deposition sought by defendants' counsel take place on a date and at a time and place to be chosen by defendants' counsel subject only to a prior court-ordered appearance, or similar circumstances of sufficient magnitude, requiring Mr. Rice's or Mr. Burkey's presence elsewhere. In other words, to as

great an extent as possible both Mr. Rice and Mr. Burkey will have as little say as possible in the selection of the time, date and place of this deposition. (For what it is worth, when one court orders a party and his attorney to appear at a certain time and place, that attorney and the party should schedule all subsequent matters accordingly.) Defendants' request for fines and other sanctions is denied (without prejudice to renew if efforts to secure Mr. Burkey's attendance at the deposition prove unsuccessful).

B. Motions pertaining to the counterclaims

The court is at a loss to understand how Rule 11 of the Federal Rules of Civil Procedure can serve as the basis of a counterclaim. Accordingly, without anymore discussion, the court dismisses the first counterclaim asserted by the Junod defendants in their answer and the first counterclaim asserted by the Eastern defendants in their answer upon motion by plaintiffs. If the complaint is so lacking in merit, counsel ought to make the appropriate dispositive motion.

Lastly, the court turns to plaintiffs' motion for a more definite statement of the Eastern defendants' second counterclaim alleging fraud. The motion is denied. If plaintiffs believe that fraud has not been pled with the requisite particularity, then they, too, ought to make the appropriate dispositive motion. Upon consideration of that motion, the court will take whatever course of action it feels is warranted.

N.D.N.Y.,1991.
In re Junod
Not Reported in F.Supp., 1991 WL 33257 (N.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2010 WL 1416771 (D.Nev.)
(Cite as: 2010 WL 1416771 (D.Nev.))

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Nevada.
Dennis MONTGOMERY and the Montgomery Family Trust, Plaintiffs,
v.
ETREPPID TECHNOLOGIES, LLC; Warren Trepp; and the United States Department of Defense, Defendants.
And All Related Matters.

Nos. 3:06-CV-00056-PMP-VPC,
3:06-CV-00145-PMP-VPC.
April 5, 2010.

J. Stephen Peek, Holland & Hart, LLP, Las Vegas, NV, Jerry M. Snyder, Holland & Hart LLP, Reno, NV, for Plaintiffs.

Eric A. Pulver, Logar & Pulver, Jerry M. Snyder, Holland & Hart LLP, Ronald J. Logar, Law Office of Logar & Pulver, PC, Reno, NV, Philip H. Stillman, Flynn & Stillman, Cardiff, CA, for Defendants.

ORDER

PHILIP M. PRO, District Judge.

***1** Presently before the Court is the Objections of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP to Order Re: Motion for Sanctions (Doc. # 1035) with supporting declaration (Doc. # 1036), filed on May 11, 2009. Interested Party Michael Flynn filed a Response (Doc. # 1102) on June 25, 2009.

Also before the Court is the Objections of Dennis Montgomery to Order Re: Motion for Sanctions (Doc. # 1037) with supporting declaration (Doc. # 1038), filed on May 11, 2009. Interested Party Michael Flynn filed a Response (Doc. # 1099) on June 25, 2009.

Also before the Court is Teri Pham's Objection to Magistrate Judge's Order (Doc. # 1040), filed on May 11, 2009. A supporting letter (Doc. # 1050) was filed on May 15, 2009, and an errata (Doc. # 1051) was filed on May 19, 2009. Non-Party Deborah Klar filed a Joinder (Doc. # 1057) on May 27, 2009. Interested Party Michael Flynn filed a Response (Doc. # 1098) on June 25, 2009. Teri Pham filed a Notice of Relevant New Case Law (Doc. # 1127) on October 9, 2009.

Also before the Court is the Objections of Non-Party Deborah A. Klar to Findings of Magistrate Judge in Stayed Order Re: Motion for Sanctions (Doc. # 1042) with supporting declaration (Doc. # 1043), filed on May 11, 2009. Interested Party Michael Flynn filed a Response (Doc. # 1100) on June 25, 2009. Deborah Klar filed a Notice of Relevant Case Law (Doc. # 1128) on October 19, 2009.

I. BACKGROUND

This case arises out of a dispute between Dennis Montgomery ("Montgomery") and Warren Trepp ("Trepp") over the ownership of certain computer software codes. During the course of the underlying actions, Montgomery terminated the representation of his counsel, refused to pay his former counsel's attorneys' fees, and sought the return of his client file. Montgomery obtained new counsel who represented him both in the underlying action and in various efforts to obtain his client file from his former counsel. Montgomery's former counsel ultimately filed a motion for sanctions in this Court against Montgomery and his new counsel for, among other things, their conduct in seeking to obtain the client file in various other forums. The Magistrate Judge in this action, the Honorable Valerie P. Cooke, held an evidentiary hearing and subsequently awarded sanctions against Montgomery, his new counsel, and new counsels' law firm. The sanctioned parties object to the sanctions award.

The underlying lawsuits commenced when Trepp filed suit in Nevada state court on January 19, 2006. (Status Report (Doc. # 16 in 3:06-CV-00145-PMP-VPC).) On January 31, 2006, Montgomery filed suit against Trepp in this Court. (Compl. (Doc.# 1).) [FN1] In the state court action, Montgomery asserted a third party claim against the United States Department of Defense. (Notice of Removal (Doc. # 1 in 3:06-CV-00145-PMP-VPC), Ex. 1.) The Department of Defense removed the state court action to this Court. (Notice of Removal (Doc. # 1 in 3:06-CV-00145-PMP-VPC).) The Court subsequently consolidated these two actions. (Mins. of

Proceedings (Doc. # 123).)

> FN1. Citations are to the base file docket in this case, 3:06-CV-00056-PMP-VPC, unless otherwise indicated.

***2** Prior to removal to this Court, the state court held a preliminary injunction hearing. (Snyder Decl. (Doc. # 33 in 3:06-CV-00145-PMP-VPC), Trans. of Proceedings.) At that hearing, Montgomery was represented by local counsel Ronald Logar ("Logar") and Eric Pulver ("Pulver"), as well as Michael Flynn ("Flynn"), who was appearing pro hac vice. (Id.; Verified Pet. for Permission to Practice Pro Hac Vice (Doc. # 9 in 3:06-CV00145-PMP-VPC).) Flynn's pro hac vice petition identified a Massachusetts bar number for Flynn, and listed his address in California. (Verified Pet. for Permission to Practice Pro Hac Vice (Doc. # 9 in 3:06-CV-00145-PMP-VPC).) At the hearing, which Montgomery attended in person, Logar introduced Flynn to the state court as "a member of the Massachusetts Bar," indicated that Flynn had applied for pro hac vice status, and stated that the Massachusetts bar had sent a certificate of good standing to the Nevada State Bar. (*Id.* at 5-6.) Logar requested the court permit Flynn to appear at the hearing, and the state court permitted it. *(Id.)*

Around this same time period, the Federal Bureau of Investigation sought and obtained search warrants to search Montgomery's house and several storage units. (Application & Aff. for Search Warrant (Doc. # 1, # 4, # 6, # 8, # 10, # 12 in 3:06-CV-00263-PMP-VPC).) Montgomery subsequently filed a motion to unseal the search warrant affidavits and for the return of his property. (Mot. to (1) Unseal Search Warrant Affs.; (2) For the Return of Property; and (3) For the Segregation and Sealing of All Attorney-Client & Trade Secret Materials Seized (Doc. # 21 in 3:06-CV-00263-PMP-VPC).)

In the search warrant proceedings, the United States moved in February 2007 to strike pleadings filed by Flynn and to preclude Flynn's pro hac vice admission in the case. (Gov't's Mot. to Strike (Doc. # 110 in 3:06-CV-00263-PMP-VPC).) The Government contended that Flynn was admitted proc hac vice only in the related civil suits, not in the search warrant proceedings. (*Id.* at 2.) The Government further contended that Flynn should not be admitted because his pro hac vice petitions in the consolidated civil actions contained what the Government asserted were misleading statements. *(Id.)* Specifically, the Government argued that although the application stated Flynn was licensed only in Massachusetts, Flynn actually maintained a residence and phone number in California, and practiced in California. (*Id.* at 2-4.) The Government included as an exhibit a February 7, 2007 letter which Flynn wrote on Montgomery's behalf to certain high ranking government officials. (*Id.*, Ex. 1.) On the letterheard beneath Flynn's name it states "admitted only in Massachusetts." *(Id.)*

Flynn, Logar, and Pulver opposed the motion on Montgomery's behalf. (Montgomery's Opp'n to the Gov't's Mot. to Strike (Doc. # 113 in 3:06-CV-00263-PMPVPC).) In support of the opposition, Flynn filed a declaration in which he averred that he is a member of the Massachusetts bar, he maintains residences in both Massachusetts and California, and he maintains an office address in Boston, Massachusetts. (Flynn Decl. (Doc. # 114 in 3:06-CV-00263-PMP-VPC) at 1-3.) Flynn also included two letters he sent in February 2007 on Montgomery's behalf to various government officials which stated beneath his name that he was admitted only in Massachusetts. (*Id.*, Exs.1-2.)

***3** Montgomery also filed a declaration in support of the opposition, which hereafter will be referred to as the February 2007 Declaration. (Montgomery Decl. (Doc. # 115 in 3:06-CV-00263-PMP-VPC).) Montgomery averred, among other things, that he had read the motion to disqualify Flynn, that he had read letters Flynn had sent on Montgomery's behalf to government officials, that the Government's attempt to remove Flynn "would gravely damage" his constitutional protections, and that Flynn was Montgomery's counsel of choice due to Flynn's "experience, integrity, and litigation expertise." (*Id.* at ¶¶ 4, 13-14.) [FN2] Montgomery attached as an exhibit to his declaration a March 1, 2006 letter Flynn sent to various government officials on Montgomery's behalf. (*Id.*, Ex. 1.) The letterhead states beneath Flynn's name, "only admitted in Massachusetts." (*Id.*)

> FN2. The February 2007 Declaration contains two paragraphs numbered "13" and "14." The Court refers to paragraphs 13 and 14 contained on page 8 of the Declaration.

This Court denied the motion to strike Flynn's

filings in the search warrant proceedings. (Order (Doc. # 122 in 3:06-CV-00263-PMP-VPC).) The Court also ordered the entire search warrant proceedings, which up to this point had been sealed, to be unsealed subject to objections by the United States regarding the states secret privilege and objections by the parties to the civil action regarding trade secrets or other privileges. *(Id.)* The Court set forth a procedure by which the United States would complete review and redaction of the privileged material in the search warrant proceedings, after which the parties to the civil cases would have access to the redacted materials. (Order (Doc. # 147 in 3:06-CV00056-PMP-VPC).) The parties then would have a certain period of time within which to review the materials and assert any objections to the unsealing of any unredacted materials. *(Id.)*

Montgomery filed an objection to the Government's decision not to redact certain information which Montgomery contended was protected by the states secret privilege. (Montgomery's Opp'n to the Gov't's Designations of State Secrets & Classified Information in the Search Warrant Case File (Doc. # 168).) At a hearing on the parties' various objections, Flynn proposed submitting a declaration signed by Montgomery under oath which stated, among other things, that an attached exhibit was a true and correct copy of an email. (Mins. of Proceedings (Doc. # 188).) The Court permitted the Trepp parties and the Government to review the declaration and file any objections thereto. (Mins. of Proceedings (Doc. # 188).) The Government determined that Montgomery's declaration contained material subject to the states secrets privilege and the related protective order entered in the case, and provided redactions thereto. (United States' Notice of Filing (Doc. # 197).) The Trepp parties also filed an objection, claiming that the email which Montgomery averred was a "true and accurate copy" of the original was fabricated. (Defs. eTreppid Tech., LLC & Warren Trepp's Notice of Obj. to the Public Filing of a Fabricated Document by Dennis Montgomery (Doc. # 198).)

***4** On July 9, 2007, Flynn and out-of-state co-counsel Carla DiMare [FN3] ("DiMare") moved to withdraw as Montgomery's attorneys. (Ex Parte Mot. to Withdraw as Counsel for Montgomery (Doc. # 204).) Flynn and DiMare gave as grounds for their withdrawal that Montgomery breached an obligation for payment of fees and engaged in conduct that made continued representation unreasonably difficult. *(Id.)*

FN3. DiMare was admitted pro hac vice in this Court on February 6, 2007. (Order (Doc. # 113).)

In response to Flynn's motion to withdraw, the United States requested Flynn's withdrawal be subject to various conditions related to the protection of states secrets privileged materials that may be contained in Flynn's client files. (United States' Response to Ex Parte Mot. to Withdraw as Counsel for Montgomery (Doc. # 209).) Montgomery, through Logar and Pulver, indicated he did not oppose Flynn's motion to withdraw, and he already had retained the law firm of Liner Yankelevitz Sunshine & Regenstrief LLP ("Liner Firm") to substitute into the case. (Pls.' Reply to Michael J. Flynn's & Carla A. DiMare's Mot. to Withdraw & the United States' Response Thereto (Doc. # 213).) Montgomery opposed the Government's efforts to place as conditions upon Flynn's withdrawal a governmental review of the client file because such a review would intrude on attorney-client privileged materials. (*Id.*) Montgomery also made reference to Nevada and California professional rules of conduct which he contended would require Flynn to turn over the client file to Montgomery. *(Id.)* Montgomery supported this filing with a declaration from Deborah Klar ("Klar"), a partner of the Liner Firm. (*Id.*, Klar Decl.) Klar averred that the Liner Firm was ready, willing, and able to substitute into the case upon receipt of the client file from Flynn. *(Id.)* Klar requested the Court reject the Government's requested conditions on Flynn's withdrawal and "require Mr. Flynn and Ms. DiMare to turn over all client files in their possession." *(Id.)*

On July 31, the Court set an August 17 date for hearing Flynn's motion to withdraw. (Min. Order (Doc. # 223).) On August 1, Montgomery filed a notice with the Court indicating that Flynn and DiMare had been terminated as counsel of record. (Notice of Termination of Counsel (Doc. # 227).)

On August 3, Klar and another partner of the Liner Firm, Teri Pham ("Pham"), filed a Complaint in Los Angeles Superior Court on Montgomery's behalf against Flynn (the "LA Action"). (Request for Judicial Notice (Doc. # 262), Ex. 1.) The Complaint alleged that Flynn led Montgomery to believe that Flynn was licensed to practice law in California, and that

"[t]hroughout the course of his representation, Flynn held himself out to [Montgomery] as a California lawyer." *(Id.)* The Complaint further alleged that Flynn refused to return the client file and that Flynn has "threatened to disclose, and has disclosed confidential and privileged attorney-client communications to others." *(Id.)* The Complaint sought as relief a preliminary injunction requiring Flynn to return the client file and enjoining Flynn from disclosing privileged communications to any third party. *(Id.)*

***5** On August 6, Flynn removed the LA Action to the United States District Court for the Central District of California and sought transfer to this Court. (Request for Judicial Notice (Doc. # 275), Ex. 2.) Two days later, Flynn lodged a number of exhibits regarding his representation of Montgomery which he contended demonstrated he consistently represented himself as an attorney licensed only in Massachusetts. (Tr. (Doc.# 873) at 217).)

On August 14, the Liner Firm entered an appearance in the action on Montgomery's behalf, subject to the approval of a pro hac vice application. (Notice of Assoc. of Counsel (Doc. # 236).) That same date, Liner Firm partners Klar and Pham filed petitions for pro hac vice admission, and the Court granted the petitions. (Verified Pets. (Doc. # 233, # 234); Orders (Doc. # 237, # 239).)

Also on that same date, Flynn filed a declaration in this Court referencing the LA Action and attaching as an exhibit Flynn's motion to dismiss that action against him. (Flynn Decl. (Doc. # 240).) In the motion to dismiss in the LA Action, Flynn identified various statements in the LA Action Complaint which he contended were false, specifically with respect to Montgomery's knowledge about Flynn's status as admitted to practice only in Massachusetts. (*Id.*, Ex. 1.)

On August 17, Flynn and DiMare filed in this action notices of liens and/or retaining liens for unpaid fees and costs. (Notices (Doc. # 243, # 245.) Flynn asserted over $600,000 in unpaid fees. *(Id.)*

That same date, the Court held a hearing on Flynn's motion to withdraw as Montgomery's counsel in this action. (Mins. of Proceedings (Doc. # 247).) At the hearing, the undersigned indicated the Court was aware of the LA Action, but indicated the Court did not have "the details of that and don't know to the extent to which I have to." (Tr. of Hrg. (Doc. # 267) at 4-5.) Klar advised the Court that Montgomery had a pending suit in California regarding turnover of the client file. (*Id.* at 12.) Klar stated that Montgomery understood Flynn was California counsel, and that under both California and Massachusetts law, there is no authority for a retaining lien. *(Id.)* As to the scope of documents which Klar was seeking, Klar indicated Montgomery gave Flynn original documents which had not been returned. (*Id.* at 19.) However, Klar had access to local counsel's file, which consisted of pleadings and exhibits filed with the Court. (*Id.* at 19-20.) Additionally, Flynn indicated that much of the representation was performed via emails between Flynn and Montgomery, many of which were copied to Logar and Pulver. (*Id.* at 20-21.) Flynn estimated that he had maybe one or two original documents of Montgomery's. (*Id.* at 22.) When the Court questioned Klar about the emails, Klar responded that she did have access to Montgomery's emails. (*Id.* at 23-24.)

At the hearing, the Court questioned Flynn regarding the fee and file dispute and whether the Court should-

> ***6** more appropriately simply leave that issue to the court in California that's addressing the lawsuit between counsel, including, I would imagine, fees and with some secure knowledge that while it may not constitute a bond, it's a forum, in which your fee interests and Montgomery's position on the matter can be vindicated. Why do we need to tie this litigation up with regard to a fee dispute, if that fee dispute is encompassed in the relationship of attorney/client as encompassed in the California litigation?

(*Id.* at 25.) Flynn responded by noting, among other things, that the LA Action did not involve a fee dispute. (*Id.* at 27.) Rather, the action only sought injunctive relief for return of the file and to enjoin Flynn from disclosing privileged materials. (*Id.* at 27-28.) The Court took the matter under submission. (Mins. of Proceedings (Doc. # 247).)

On August 21, Flynn filed a motion for attorneys' fees and costs in this Court, seeking the outstanding fees and costs owed to Flynn and DiMare for their work in the underlying action. (Mot. for Attorney Fees & Costs (Doc. # 248).) On August 31, Montgomery

filed an objection to Flynn's notice of lien, asserting the parties' attorney-client relationship was governed by California law which does not permit retaining liens, the amount of fees requested was unreasonable, an action already was pending in the Los Angeles Superior Court regarding the attorney-client relationship between the parties, Flynn was licensed to practice only in Massachusetts which does not allow retaining liens, and even under Nevada law Flynn was not entitled to a retaining lien because he voluntarily withdrew. (Notice of Obj. to Notice of Lien (Doc. # 254).)

On August 22, the United States District Court for the Central District of California denied Montgomery's motion to transfer the case to this Court, and ordered the action remanded to the Los Angeles Superior Court. (Request for Judicial Notice (Doc. # 262), Ex. 3.) The court remanded for lack of diversity jurisdiction, finding Flynn failed to establish more than $75,000 was at stake with respect to the requested injunctive relief. *(Id.)*

On September 4, the undersigned issued an order granting Flynn's motion to withdraw. (Order (Doc. # 256).) In the Order, the Court noted that the Government sought to condition Flynn's withdrawal on four conditions in relation to protection of state secrets privileged material potentially residing in Flynn's files. *(Id.)* The Court also noted the dispute between Flynn and Montgomery's new counsel over the turnover of the client file. (*Id.*) The Court granted the motion to withdraw subject to two of the Government's requested conditions, but denied the Government's other two requested conditions. (*Id.*) As for the client file dispute, the Court stated:

> to the extent the Montgomery Plaintiffs seek to condition the withdrawal of Flynn and DiMare on Flynn and DiMare surrendering their complete "client file" to new counsel of record for Plaintiffs (Doc. # 213), said precondition is rejected by the Court. In this regard, the record before the Court does not support a finding that Flynn and DiMare have withdrawn "voluntary" [sic] as counsel for Montgomery Plaintiffs, *In the Matter of Kaufman,* 93 Nev. 452, 567 P.3d 957 (1977), nor does it appear on the record before the Court that Flynn and DiMare should be compelled to surrender their files to new counsel of record. *Figliuzzi v. Fed. Dist. Court,* 111 Nev. 338, 890 P.2d 798 (1995).
>
> ***7** (*Id.*)

On September 7, Montgomery filed an application for arbitration of the fee dispute with the San Diego County Bar Association. (Request for Judicial Notice (Doc. # 262), Ex. 2.) The application is signed by Montgomery and indicates he will be represented by Klar and Pham of the Liner Firm. *(Id.)* In the statement of facts section, Montgomery asserted that Flynn held himself out as a California attorney throughout the representation. *(Id.)*

On September 10, Klar and Pham filed on Montgomery's behalf an opposition to Flynn's motion for attorneys' fees in this action. (The Montgomery Parties' Opp'n to Michael J. Flynn's Mot. for Attorneys Fees & Costs (Doc. # 261).) In support, Klar and Pham attached a declaration by Montgomery, hereinafter referred to as the September 2007 Declaration. (*Id.*, Montgomery Decl.) In the September 2007 Declaration, Montgomery made the following statements:

- "Mr. Flynn led me to believe at that time and throughout the course of his representation that he was a California attorney, and I believed that I was engaging a California lawyer to represent me. Specifically, he told me he had a law firm, Flynn & Stillman, in California, and I met with him at his offices in Cardiff, California." (*Id.* at ¶ 3.)

- "[a]ll of the papers he filed with the Court listed a California address." (*Id.* at ¶ 6.)

- "At no time did Mr. Flynn ever inform me that he was not and is not licensed to practice in the State of California, or that he is licensed to practice only in Massachusetts. I only learned of this after I retained new counsel." (*Id.* at ¶ 7.)

On September 12, Klar and Pham, on Montgomery's behalf, filed an ex parte application for writ of possession in the LA Action. (Request for Judicial Notice (Doc. # 597, Ex. 2.) Montgomery requested that court to "enter an immediate routine turnover order and Writ of Possession." (*Id.* at 2.) On September 13, the Los Angeles Superior Court heard Montgomery's ex parte application for writ of possession in chambers. (Exs. to Flynn Decl. (Doc. # 548), Ex. 3.) Montgomery withdrew the ex parte ap-

plication and subsequently noticed the motion for hearing, which was set for October 18. (*Id.*, Request for Judicial Notice (Doc. # 597), Ex. 4, Ex. 7 at 3.)

On September 18, Klar and Pham filed on Montgomery's behalf an emergency request for clarification of this Court's September 4 Order. (Emergency Ex Parte Application for Clarification of Order (Doc. # 274).) Montgomery referenced the LA Action and stated that Flynn was asserting the position in the LA Action that this Court already had adjudicated the issue of the disposition of Montgomery's client file. (Id.) Montgomery argued the Court had made no such ruling and the parties had not briefed the issue, including which state law would apply to the dispute. (Id.) Montgomery requested the opportunity to brief the issue in the event the Court intended to adjudicate the issue. *(Id.)*

***8** On that same date, in the LA Action, Pham submitted a memorandum of points and authorities in support of Montgomery's Application for Writ of Possession. (Request for Judicial Notice (Doc. # 275), Ex. 4 .) Pham filed a declaration similar to the September 2007 Declaration in support. (*Id.*, Montgomery Decl.)

On September 25, Montgomery filed a request for an investigation of Flynn with the Massachusetts State Bar. (Request for Judicial Notice (Doc. # 597), Ex. 13.) In the request for investigation, Montgomery stated that "[a]t all times during the representation, Flynn led the Montgomery Parties to believe that he was authorized to practice law in California." *(Id.)*

On October 4, the undersigned denied Montgomery's motion for clarification of the September 4 Order. (Order (Doc. # 291).) The Court stated that the prior order was "clear and unambiguous, dealing solely with the matter then before the Court as to whether to condition Flynn's withdrawal as an attorney in this matter on the return of Montgomery's client file." *(Id.)* The Court further noted that Montgomery "has not moved in this Court for return of his client files under Nevada or any other applicable law. The Court's denial of Montgomery's Motion for Clarification therefore is without prejudice to file a fully briefed motion for return of the file, including any argument that law other than Nevada's applies to such an inquiry." (*Id.*)

On October 12, the Magistrate Judge entered an order regarding Flynn's motion for attorneys' fees. (Order (Doc. # 296).) In that Order, the Magistrate Judge referenced the LA Action and, in a footnote, stated that "in the face of the District Court's September 4, 2007 order that Flynn and DiMare would not be compelled to surrender their files to new counsel of record ..., Montgomery has continued to pursue another forum to adjudicate the fee dispute, namely California. In his California Superior Court action, Montgomery seeks relief that is contrary to the District Court's order." (*Id.* at 3 n. 3.) In a separate footnote, the Magistrate Judge acknowledged that Montgomery's new counsel had indicated Montgomery had or would file complaints with the California and/or Massachusetts State Bars. (*Id.* at 5 n. 5.) The Magistrate Judge stated, "[t]he court takes no position on the propriety of such potential complaints. By this order, this court only takes jurisdiction over the attorney's fees and client file dispute." (*Id.*)

The Magistrate Judge granted Flynn's motion for attorneys' fees to the extent that the Court would determine the amount of fees due, but the Court would not order Montgomery to pay the fees at that juncture. *(Id.)* As to the retaining lien issue, the Magistrate Judge noted that Montgomery never had filed a motion with this Court for return of his files, and the Court therefore could not order Flynn to return the files absent a motion by the client and presentation of adequate security or bond for the payment of the fees. (*Id.*)

***9** In conclusion, the Magistrate Judge stated that she had jurisdiction to adjudicate the amount of attorneys' fees due to Flynn and set forth a procedure by which she would make that determination. *(Id.)* With respect to the retaining lien, the Magistrate Judge stated "the court concludes that should Montgomery desire the client files currently in Flynn's possession, Montgomery must file a motion requesting the return of the files and post adequate security or bond." (Id.) The Magistrate Judge further ordered that Montgomery's counsel "shall deliver, either via facsimile or hand delivery, a copy of this order to the chambers of the presiding judge" in the LA Action prior to the scheduled October 18 hearing in that action. *(Id.)*

Pham and Klar thereafter attended the October 18 hearing in the LA Action. (Tr. (Doc.# 323).) As directed by the Magistrate Judge, Pham and Klar pro-

vided the Magistrate Judge's October 12 order to the presiding judge in the LA Action. (Notice of Lodging USDC Nevada Order of Oct. 12, 2007).) At the hearing, Pham stated the Los Angeles Superior Court was "the only court with jurisdiction to decide whether or not the files should get turned over because the files are located here in California," and "[o]nly this court could order the files to get turned over because the files are located here in California." (Tr. (Doc.# 323) at 5-6.) Pham also stated that the only issue before the Magistrate Judge in this action was the attorneys' fee dispute, "it's not with respect to possession of the files." (*Id.* at 9.) Later in the hearing, after DiMare referenced footnote 5 of the Magistrate Judge's October 12 order, Pham stated that she was "not contentesting that [the Nevada District Court] has jurisdiction, we're simply saying we believe this court also has jurisdiction, it is concurrent jurisdiction." (*Id.* at 12-13.)

Klar also attended the hearing and suggested government counsel's appearance at the hearing was to get "another bite at the apple and to try to circumvent [this Court's] order." (*Id.* at 8.) Klar stated government counsel was at the hearing "to muddy the waters and to somewhat intimidate Your Honor to refrain in giving us the relief that we believe Mr. Montgomery and Mrs. Montgomery and the Montgomery Trust is entitled to." (*Id.*) The Los Angeles Superior Court denied Montgomery's motion for writ of possession, finding that Montgomery had not met his burden of establishing he was entitled to possession of the client file. (*Id.* at 13.)

On October 31, the Massachusetts State Bar closed Montgomery's bar complaint. (Exs. to Flynn Decl. (Doc. # 548), Ex. 5.) In its letter, the Bar stated that Montgomery "did not mention in [his] complaint that the United States District Court, District of Nevada, entered detailed and comprehensive orders with respect to the transmission of the file. Attorney Flynn was admitted pro hac vice in the Nevada Court and as such, in connection with that proceeding, is subject to the standards of professional conduct as adopted by the Nevada Supreme Court." (*Id.* at 1.) The Bar also noted that the client file may contain state secrets, and that this Court had maintained jurisdiction over such issues. *(Id.)*

***10** On November 9, the Magistrate Judge held a hearing to discuss with the parties the fact that although the Court previously had ordered the unredacted materials in the search warrant proceedings be unsealed, Montgomery's February 2007 Declaration inadvertently never was unsealed. (Order (Doc. # 270); Mins. of Proceedings (Doc. # 331).) The Magistrate Judge ordered the declaration be unsealed. (*Id.*)

On November 1, the Los Angeles Superior Court dismissed the LA Action. (Exs. to Flynn Decl. (Doc. # 548), Ex. 1.) In dismissing the action, the presiding judge stated:

> California is only involved in this matter due to an unsubstantiated allegation by the plaintiff that defendant misrepresented to him that defendant was licensed to practice in California. This case is before a California court for the transparent purpose of having this court countermand the orders of the Nevada District Court. California has no interest in doing so.

(*Id.* at 3.) Approximately two weeks later, the San Diego Bar Association dismissed without prejudice the request for arbitration of the fee dispute. (Exs. to Flynn Decl. (Doc. # 548), Ex. 4.) The Bar Association stated that based on the orders of this Court and the Los Angeles Superior Court, "it is clear that the U.S. District for Nevada has taken control of the entire case filed by ... Montgomery including the issue of attorney fees and costs." (*Id.*)

On March 24, 2008, the Magistrate Judge entered an order granting Flynn's motion for attorneys' fees and costs in the amount of $557,522.18. (Order (Doc. # 502).) On April 24, Flynn moved for sanctions pursuant to 28 U.S.C. § 1927 and/or the Court's inherent power against the Montgomery parties and "their counsel of record, Deborah Klar and her firm, Liner Yankelevitz Sunshine & Regenstreif, LLP." (Mot. for Sanctions (Doc. # 545) at 1.) Among other things, Flynn argued that Montgomery and his counsel vexatiously multiplied the proceedings by attempting to circumvent this Court's Orders regarding the client files by filing actions or complaints in three different forums and using the September 2007 Declaration, which Flynn asserted was perjured. (Id. at 2.) Flynn also contended that Montgomery and his counsel misrepresented this Court's orders at the October 18 hearing before the Los Angeles Superior Court. (*Id.* at 3.) Flynn requested over $200,000 in attorney's fees for the period of August 1, 2007 through December 5,

2007, and he requested "the revocation of Ms. Klar's pro hac vice admission in these cases ." (*Id.* at 24.) Montgomery opposed the motion, and included declarations from Pham and Klar. (Opp'n to Mot. for Sanctions Filed by Attorney Michael J. Flynn (Doc. # 601); Pham Decl. (Doc. # 599); Klar Decl. (Doc. # 600).)

The Magistrate Judge set an evidentiary hearing related to the motion for sanctions and indicated the evidentiary hearing would address only the September 2007 Declaration and the Montgomery parties' litigation against Flynn in the LA Action, the San Diego fee arbitration, and the Massachusetts Bar complaint. (Order (Doc. # 770).) The order required Montgomery to "appear in person and to testify concerning these matters." *(Id.)* The order also stated that Flynn, Klar, and Pham "shall attend the hearing in person and shall be prepared to address the court concerning these matters." (*Id.*) The Magistrate Judge held a sealed evidentiary hearing on August 21, at which Montgomery and Pham testified under oath. (Mins. of Proceedings (Doc. # 826).) Klar was present but did not testify. *(Id.)*

***11** Montgomery and Trepp subsequently settled the underlying lawsuit. (Mins. of Proceedings (Doc. # 856).) After Montgomery defaulted on a payment required under the settlement agreement, judgments by confession were entered against the Montgomery parties and other parties in the litigation. (Judgment (Doc. # 897, # 898).) The Court also entered judgment on the award of attorneys' fees to Flynn. (Judgment (Doc. # 902).) Subsequent efforts at settling the Flynn fee dispute were unsuccessful. (Mins of Proceedings (Doc. # 933).) On February 19, 2009, the Court entered an order dismissing all claims and counterclaims in the underlying action. (Order (Doc. # 962).) However, the Court retained jurisdiction over, among other things, Flynn's motion for sanctions. *(Id.)*

On March 31, 2009, the Magistrate Judge entered a 54-page order granting Flynn's motion for sanctions under 28 U.S.C. § 1927 and the Court's inherent power. (Order (Doc. # 985).) The Magistrate Judge sanctioned Montgomery for perjuring himself in the September 2007 Declaration regarding his knowledge about Flynn's admission status, and that he signed the declaration "in bad faith, vexatiously, wantonly, and for oppressive reasons." (*Id.* at 49.) The Magistrate Judge also sanctioned Klar and Pham, finding that Klar and Pham "acted in bad faith or conduct tantamount to bad faith with the intention to undermine this court's orders for the improper purpose of obtaining a more favorable forum for resolution of the fee dispute and the turnover of the client files." (*Id.* at 37.) The Magistrate Judge also sanctioned the Liner Firm, concluding that it allowed Klar to operate "unchecked and unquestioned," and the Firm "acquiesced to or willingly carried out Ms. Klar's litigation strategy." (*Id.* at 48.)

Based on her findings, the Magistrate Judge awarded Flynn and DiMare attorneys' fees in the amount of $201,990 and costs in the amount of $2,421. (*Id.* at 51-52.) The Magistrate Judge apportioned the sanctions as follows: Klar 50%, Montgomery 30%, Pham 10%, and the Liner Firm 10%, and imposed joint and several liability among the sanctioned parties. (*Id.* at 52.)

The Magistrate Judge also imposed non-monetary sanctions on Klar, Pham, and Montgomery. The Magistrate Judge ordered that the Clerk of Court send a copy of the sanctions order to the Nevada and California State Bars; that Klar and Pham be prohibited from applying for pro hac vice admission to this Court for five years, after which time they may apply but must attach a copy of the sanctions order along with a declaration identifying all the legal ethics courses they have completed in the interim; that the Court would publish the sanctions order as a form of public reprimand; and that Klar and Pham must perform 200 and 100 hours of pro bono legal services, respectively. (*Id.* at 52-53.) As to Montgomery, the Magistrate Judge ordered that a copy of the sanctions order be sent to the United States Attorney's Office. (*Id.* at 53.)

***12** The Magistrate Judge indicated that pursuant to Local Rule IB 3-1(a), any party could object to the sanctions order. (*Id.* at 54.) The Magistrate Judge therefore stayed the sanction order's effect until after the undersigned issued a final order with respect to any objections. *(Id.)* The Liner Firm, Klar, Pham, and Montgomery subsequently filed objections to the sanctions order.

Prior to this Court resolving the objections to the sanctions order, Dennis and Brenda Montgomery filed a Notice of Filing of Voluntary Petition Under Chapter 7 of the Bankruptcy Code and of Automatic Stay (Doc. # 1104). Flynn moved in the bankruptcy pro-

ceedings for relief from the automatic stay for this Court to rule upon the objections to the Magistrate Judge's sanctions order. (Status Report Re: Montgomery Bankruptcy (Doc. # 1143).) On January 8, 2010, the United States Bankruptcy Court for the Central District of California granted Flynn's motion, effective as of December 31, 2009. (*Id.*, Ex. A.) The stay having been lifted, the Court now will address the various objections to the sanctions order.

II. LEGAL STANDARD

Magistrate judges statutorily are authorized to resolve "pretrial matter[s]" subject to review by district judges under a clearly erroneous or contrary to law standard. 28 U.S.C. § 636(b)(1)(A). Excluded from this grant of authority are dispositive motions, such as motions "for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information ..., to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, ... to involuntarily dismiss an action," and analogous motions. *Id.*; *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1067-68 (9th Cir.2004). Dispositive motions may be submitted to a magistrate judge for a report and recommendation, which the district court then reviews de novo. 28 U.S.C. § 636(b)(1)(B).

Thus, nondispositive pretrial matters are governed by § 636(b)(1)(A) and are subject to the clearly erroneous or contrary to law standard of review, while dispositive matters are governed by § 636(b)(1)(B) and are subject to de novo review. *Gomez v. United States*, 490 U.S. 858, 873-74, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989); *see also* Fed.R.Civ.P. 72(a). Which standard of review applies is determined by whether the motion's effect properly is characterized as "dispositive or non-dispositive of a claim or defense of a party." *Rivera-Guerrero*, 377 F.3d at 1068 (quotation omitted).

The United States Court of Appeals for the Ninth Circuit has not addressed specifically whether a magistrate judge's order sanctioning a party or counsel under 28 U.S.C. § 1927 or the Court's inherent power is dispositive or non-dispositive. However, the Ninth Circuit has determined that sanctions under Federal Rules of Civil Procedure 11 and 37 are non-dispositive and thus fall under § 636(b)(1)(A). *See Grimes v. City & County of San Francisco*, 951 F.2d 236, 240 (9th Cir.1991) (Rule 37); *Maisonville v. F2 Am., Inc.*, 902 F.2d 746, 747-48 (9th Cir.1990) (Rule 11). The Ninth Circuit has analogized sanctions under § 1927 and its inherent power to Rule 11 or Rule 37 sanctions. *See Stanley v. Woodford*, 449 F.3d 1060, 1064 (9th Cir.2006) (stating "the policies undergirding Rule 37(a) sanctions are not relevantly different from those justifying sanctions under § 1927 or a court's inherent powers"); *Grimes*, 951 F.2d at 240 (indicating there is "no material distinctions between Rule 11 sanctions and Rule 37 [discovery] sanctions" (quotation omitted)); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 n. 4 (9th Cir.1990) ("Although this case involves only a Rule 37 default, we have held that dismissal sanctions under Rule 37 and a court's inherent powers are similar."). Sanctions under § 1927 or the Court's inherent power therefore are non-dispositive,[FN4] and subject to the clearly erroneous or contrary to law standard of review.[FN5]

FN4. To the extent a sanction imposed is case dispositive, such as striking an answer or entering a default, then the sanctions order would be dispositive, and would be subject to de novo review.

FN5. Other circuits have disagreed or are undecided as to the appropriate standard of review for a magistrate judge's award of sanctions. *See Kiobel v. Millson*, 592 F.3d 78, 86 (2d Cir.2010) (declining to decide the issue, but in three separate concurring opinions expressing the view that the de novo standard applied, the clearly erroneous or contrary to law standard applied, or that Congress or the Supreme Court ought to make the standard clear); *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 869 (7th Cir.1996) (holding "a sanctions request is a dispositive matter capable of being referred to a magistrate judge only under § 636(b)(1)(B) or § 636(b)(3), where the district judge must review the magistrate judge's report and recommendations de novo"); *Bennett v. Gen. Caster Serv. of N. Gordon Co., Inc.*, 976 F.2d 995, 998 (6th Cir.1992) (same).

***13** "A finding is clearly erroneous when although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

United States v. Ressam, 593 F.3d 1095, 1118 (9th Cir.2010) (quotation omitted). This Court may not substitute its judgment for that of the Magistrate Judge. *Grimes*, 951 F.2d at 241.

III. DISCUSSION

The Court has inherent power to sanction counsel or a party who acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir.2006) (quotation omitted). A court must exercise its inherent powers " 'with restraint and discretion,' " and must make a specific finding of bad faith before sanctioning under its inherent powers. *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir.1993) (quoting *Chambers v. Nasco*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)); *Fink v. Gomez*, 239 F.3d 989, 992-93 (9th Cir.2001). Bad faith "includes a broad range of willful improper conduct," including "delaying or disrupting the litigation or ... hampering enforcement of a court order." Fink, 239 F.3d at 992 (quotation omitted); *Leon*, 464 F.3d at 961. "Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Fink*, 239 F.3d at 994. Indeed, the Court may exercise its inherent power to sanction a party or attorney who acts for an improper purpose even if the sanctioned act "consists of making a truthful statement or a non-frivolous argument or objection." *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir.2001) (quotation omitted). Whether to impose sanctions under the Court's inherent power lies within the Court's discretion. *Id.*

In addition to inherent powers, the Court may sanction an attorney under 28 U.S.C. § 1927 for unreasonably and vexatiously prolonging the proceedings. To impose sanctions under § 1927, the Court must make a finding that counsel acted with subjective bad faith. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir.2002); *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.2000). The standard is met when "an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *B.K.B.*, 276 F.3d at 1107 (quotation and emphasis omitted). Whether to impose sanctions under § 1927 lies within the Court's discretion. *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir.1996).

A. Liner Firm

The Liner Firm contends the Magistrate Judge sanctioned it only under § 1927, and § 1927 provides for sanctions only against an attorney, not a law firm. Flynn responds that the Magistrate Judge intended to sanction the Liner Firm under both the Court's inherent power and § 1927, and indicated in the order that the Firm acted in bad faith. Flynn also argues sanctions may be awarded against a law firm under § 1927.

***14** Although the sanctions order generally referenced both § 1927 and the Court's inherent powers, the sanctions order imposed sanctions against the Liner Firm only pursuant to § 1927. (Order (Doc. # 982) at 48 (stating "sanctions against the Liner Firm are warranted pursuant to 28 U.S.C. § 1927").) The sanctions order referenced both the Court's inherent power and § 1927 when grouping the sanctioned parties together. For example, page one of the order states that the "court concludes that the conduct of the Liner firm and its attorneys, Ms. Klar and Ms. Pham, was willfully reckless, intended to harass, done for an improper purpose, and was suffused with bad faith." (*Id.* at 1.) On page 51, the order stated: "[b]ased on the foregoing, the court finds that pursuant to its inherent powers and 28 U.S.C. § 1927, the following sanctions shall issue." [FN6] (*Id.* at 51.) The order then itemized the sanctions against all of the sanctioned parties, including the Liner Firm. (*Id.* at 51-53.) However, in the order's discussion specifically related to the Liner Firm, the order cited only § 1927 and did not make an explicit finding of bad faith on the Firm's part. To the extent the Magistrate Judge intended to sanction the Liner Firm under the Court's inherent power, the sanctions order does not make that intention clear.

> FN6. This sentence could not mean the Magistrate Judge intended to sanction all of the parties under both sources of authority, as Montgomery is a party and thus is not sanctionable under § 1927. *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir.1986) (stating § 1927 "does not authorize recovery from a party").

Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in

any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Some Circuit Courts of Appeal have permitted § 1927 sanctions against a law firm, but have done so without analyzing whether such sanctions are permissible under the statutory language. *See Jensen v. Phillips Screw Co.*, 546 F.3d 59, 61-69 (1st Cir.2008); *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 904-07 (D.C.Cir.1998); *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir.1991); *Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 208-09 (3d Cir.1985). In contrast, the Sixth and Seventh Circuits have indicated that § 1927 sanctions are not awardable against a law firm based on the statute's plain language. *See Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 n. 6 (6th Cir.2009); *Claiborne v. Wisdom*, 414 F.3d 715, 722-23 (7th Cir.2005). The United States Court of Appeals for the Ninth Circuit has not decided whether a law firm, as opposed to an individual attorney, may be sanctioned under § 1927, although it has indicated § 1927 sanctions were not permissible against a non-profit organization that varyingly described itself as a representative of the plaintiffs, an employer of the plaintiffs' lawyers, and as the entity directing the litigation. *Lockary v. Kayfetz*, 974 F.2d 1166, 1168-70 (9th Cir.1992) (stating the district court recognized it did not have the power to sanction the non-profit entity under § 1927).

***15** When construing a statute, the Court begins with the statute's plain language. *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1175 (9th Cir.2007). If the language is unambiguous, the Court's inquiry is complete. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1268 (9th Cir.2009.)

Section 1927 by its plain terms applies only to an "attorney or other person admitted to conduct cases in any court of the United States." A law firm is not an attorney. Nor is it a person admitted to conduct cases in federal courts. "Individual lawyers, not firms, are admitted to practice before both the state courts and the federal courts." *Claiborne*, 414 F.3d at 723. Further, the statute requires the sanctioned person to "satisfy personally" the costs and expenses incurred as a result of the sanctionable conduct.

The conclusion that § 1927 does not apply to law firms is supported by the United States Supreme Court's analysis of whether a prior version of Federal Rule of Civil Procedure 11 applied to law firms. In *Pavelic & LeFlore v. Marvel Entertainment Group*, the Supreme Court held that Rule 1 1's plain language permitted the imposition of sanctions on "the person who signed" the paper at issue. 493 U.S. 120, 123, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). Because the Rule required an attorney or unrepresented party to sign the paper in his or her "individual name," the Supreme Court concluded that the signature requirement, and the consequences attached thereto, ran to the individual attorney and not to his or her law firm. *Id.* at 123-24. Following this decision, Rule 11 was amended to allow sanctions against law firms. *See* Fed.R.Civ.P. 11(c)(1) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."); *see also* Fed. R. Bankr.P. 9011(c) (listing law firms among persons or entities that may be sanctioned).

The Court therefore concludes § 1927 sanctions may not be imposed against a law firm. The Magistrate Judge's order imposing such sanctions thus is contrary to law. *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d at 435 ("For a sanction to be validly imposed, the conduct in question must be sanctionable under the authority relied on." (quotation omitted)). The Liner Firm's objection to the sanctions order is affirmed, and the sanctions order as to the Liner Firm is reversed without prejudice to any further proceedings consistent with this Order with respect to Flynn's motion for sanctions.[FN7]

FN7. Because the Court affirms the Liner Firm's objections on this basis, the Court need not address the Liner Firm's other objections.

B. Montgomery

Montgomery argues the sanctions against him are based on perceived differences in his two declarations, but there is insufficient evidence to support a finding that the September 2007 Declaration was made in bad faith. Montgomery argues his two declarations do not contradict each other because the February Declaration does not mention anything about where Flynn was licensed. Even if the declarations are inconsistent,

Montgomery contends the evidence adduced at the evidentiary hearing demonstrated Montgomery did not understand what it meant to be licensed or admitted in a certain jurisdiction and the significance of that in relation to practicing law in a particular state. Montgomery further argues his September 2007 Declaration does not amount to perjury because the record does not disclose what Montgomery meant by referring to Flynn as a "California lawyer" and in any event, the statements were not material. Montgomery also argues he cannot be sanctioned for conduct occurring outside the proceedings in this Court, the Magistrate Judge failed to assess the reasonableness of Flynn's fees, and she should not have made liability joint and several. Finally, Montgomery requests that in the event any further proceedings are necessary, the Court assign a different Magistrate Judge.

***16** Flynn responds that there is clear and convincing evidence that the September 2007 Declaration is perjured, as evidenced by the exhibits on file which show Montgomery knew Flynn was licensed only in Massachusetts based on various documents in the record. Flynn further argues that because Montgomery did not raise below his inability to pay, that argument is waived. As to joint and several liability, Flynn contends it is appropriate because Montgomery, Klar, and Pham were jointly engaged in the misconduct at issue. Finally, Flynn argues the request for a new judge is unsupported, as the Magistrate Judge has been unbiased in this action, ruling against Flynn on several occasions, and Flynn contends she could have sanctioned the objecting parties even more than she did. Flynn requests the Court modify the sanctions award to include fees expended in having to respond to the various objections to the Sanctions.

1. The September 2007 Declaration

Under the federal perjury statute, a person commits perjury when he "willfully subscribes as true any material matter which he does not believe to be true" in a declaration signed under penalty of perjury. 18 U.S.C.A. § 1621. A declarant's statement under oath or affirmation violates this statute if he makes a false statement concerning a material matter "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993).

The Magistrate Judge's finding that Montgomery perjured himself is not clearly erroneous or contrary to law. Montgomery filed the September 2007 Declaration under penalty of perjury. Montgomery's statements in the September 2007 Declaration regarding Flynn's representations to Montgomery about Flynn's status as a California attorney were material because Montgomery was attempting to convince this Court, and other forums, that the file and fee disputes should be heard somewhere other than in this District. The September 2007 Declaration was filed in support of Montgomery's opposition to Flynn's motion for attorneys' fees. In that motion, Montgomery argued that California, not Nevada, was the proper forum to resolve the fee dispute and cited the September 2007 Declaration in support. (The Montgomery Parties' Opp'n to Michael J. Flynn's Mot. for Attorneys Fees & Costs (Doc. # 261) at 2-5.)

The Magistrate Judge held an evidentiary hearing in this matter at which Montgomery testified. In the sanctions order, she made an adverse credibility finding against Montgomery regarding his understanding of the words "admitted" or "licensed." (Order (Doc. # 985).) The Magistrate Judge concluded Montgomery knew or should have know what that meant because he attended the preliminary injunction hearing in state court at which Flynn's admission and ability to practice in front of the Nevada state court was discussed in front of Montgomery. (*Id.* at 18.) Even if Montgomery was not aware then, he certainly was by February 2007, when the United States attempted to disqualify Flynn based on the fact that Flynn was licensed only in Massachusetts, but allegedly was practicing in California. (*Id.* at 19.)

***17** These findings are not clearly erroneous or contrary to law. The Magistrate Judge presided over the evidentiary hearing and thus had an opportunity to observe Montgomery's demeanor while testifying. She thus uniquely was situated to evaluate Montgomery's credibility. Moreover, the adverse credibility finding has ample support in the record. Montgomery attended the preliminary injunction hearing and was present while local counsel introduced Flynn to the state court as a member of the Massachusetts Bar, indicated that Flynn had applied for pro hac vice status, and stated that the Massachusetts Bar had sent a certificate of good standing to the Nevada State Bar.

Further, Montgomery was aware of and participated in opposing the Government's efforts to disqua-

lify Flynn on the very basis that Flynn's pro hac vice application contained misstatements because Flynn was licensed only in Massachusetts, but was residing and practicing in California. In his February 2007 Declaration, Montgomery averred that he had read both the motion to disqualify Flynn, and letters which Flynn had sent to high ranking officials on Montgomery's behalf. The Government's motion stated that Flynn was licensed only in Massachusetts. One of the referenced letters was attached as an exhibit to Montgomery's own declaration. On the letterhead it states beneath Flynn's name "only admitted in Massachusetts."

At the sealed evidentiary hearing on the motion for sanctions, Montgomery testified that he "probably" read Flynn's declaration in February 2008 in which Flynn stated that he was licensed only in Massachusetts. (Sealed Tr. (Doc. # 873) at 26.) Montgomery subsequently stated that he did not know whether he read it at the time. (Id. at 26-27.) When questioned about reading the Government's motion to disqualify in which the Government raised the issue that Flynn had only a Massachusetts license and not a California license, Montgomery stated "What's that mean to me? That didn't mean to me that you couldn't practice in California." (*Id.* at 29.) Montgomery further testified that he did not know what the term "licensed" meant, and he "assumed" Flynn could practice in California, even though Flynn did not represent Montgomery in any California courts at any time during the representation. (*Id.* at 40.) When questioned regarding whether, in their first meeting, Flynn advised Montgomery that Flynn was licensed in Massachusetts, Montgomery responded "[w]hether [Flynn] said [he was] licensed in Massachusetts, didn't mean to me that [Flynn wasn't] in California." (*Id.* at 42.)

When asked whether it was his position that he never saw Flynn's letterhead that stated "admitted only in Massachusetts," Montgomery stated, "[n]o. That is not my testimony." (*Id.* at 49-50.) When asked directly whether he had ever seen any letters stating "admitted only in Massachusetts," Montgomery answered, "Yes." (*Id.* at 50.) Montgomery's counsel offered to stipulate that Montgomery had received letters with the letterhead on it. (*Id.* at 87, 101-02.) Montgomery also stated that he "must have seen" Flynn's Massachusetts bar number next to Flynn's name on numerous pleadings on file in this Court. (*Id.* at 129.)

***18** The course of the proceedings, Montgomery's February 2007 Declaration, and his testimony at the evidentiary hearing support the Magistrate Judge's adverse credibility finding against Montgomery regarding his professed lack of knowledge as to the meaning of "admitted" or "licensed." Montgomery is not an unsophisticated individual, and even if he had no understanding regarding what these terms meant prior to this litigation, the evidence shows he knew what it meant by the time he filed the February 2007 Declaration in support of his opposition to the Government's motion to disqualify. The Magistrate Judge's conclusion that Montgomery therefore perjured himself in the September 2007 Declaration when he averred that Flynn led him to believe throughout the course of representation that Flynn was a California attorney, that at no time did Flynn ever inform Montgomery that Flynn was licensed to practice only in Massachusetts, and that Montgomery learned of Flynn's status only this after he retained new counsel is neither clearly erroneous nor contrary to law. Perjury is sufficient grounds for a bad faith finding to support a sanction under the Court's inherent power. *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 14 (1st Cir.1995).

2. Joint and Several Liability

A court may hold sanctioned parties jointly and severally liable. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir.1994). Pursuant to general tort law, joint and several liability is appropriate when the independent tortious conduct of each of two or more persons is a legal cause of a single and indivisible harm to the injured party. Restatement (Third) of Torts § A18 (2000). That the Court may apportion fault "does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule." *Rudelson v. U.S.*, 602 F.2d 1326, 1332 n. 2 (9th Cir.1979) (quotation omitted). Joint and several liability as between a client and his or her attorney may be appropriate where the client willfully participates in the sanctionable conduct. *See Avirgan v. Hull*, 125 F.R.D. 189, 190-91 (S.D.Fla.1989).

The Magistrate Judge's decision to make the award joint and several is not clearly erroneous or contrary to law. Although Montgomery's Declaration was not filed in this Court until September 2007, the "facts" therein were the foundation for the efforts to pursue the fee and file disputes in three other forums. The Complaint in the LA Action, the petition for ar-

bitration of the fee, and the Massachusetts Bar complaint all referenced Montgomery's assertion that Flynn held himself out to Montgomery as a California lawyer throughout Flynn's representation of Montgomery. The harm to Flynn was indivisible, even if the Magistrate Judge found the relative fault as between Montgomery and his attorneys was capable of being apportioned.

3. Power to Sanction for Conduct Outside Court Proceedings

Contrary to Montgomery's position, the Court has inherent power to sanction a party's misconduct occurring outside the Court's proceedings so long as the sanctionable conduct has a "nexus with the conduct of the litigation before the court." *United States v. Wunsch*, 84 F.3d 1110, 1115-16 (9th Cir.1996) (holding that court had inherent power to sanction attorney who had appeared in case and sent sexist letter to opposing counsel following his disqualification from the case but concluding no sanction was authorized under cited local rules); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 57, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("Chambers challenges the District Court's imposition of sanctions for conduct before other tribunals, including the FCC, the Court of Appeals, and this Court, asserting that a court may sanction only conduct occurring in its presence. Our cases are to the contrary, however."). For example, the Court may invoke its inherent power to sanction conduct occurring before a federal agency. *See Gadda v. Ashcroft*, 377 F.3d 934, 947 (9th Cir.2004) ("We hold that we also have inherent authority respecting the suspension and disbarment of attorneys who perform incompetently in federal immigration proceedings."); *In re Pacific Land Sales, Inc.*, 187 B.R. 302, 312 (9th Cir.BAP1995) (stating a court "may hold a party in contempt for actions performed before the FCC"). The Court also may sanction conduct in related state court proceedings. *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 873 (9th Cir.1992).

***19** Montgomery's reliance on *Atchison, Topeka and Santa Fe Railway Company v. Hercules Inc.* is misplaced. In that case, the Ninth Circuit held that a district court may not use its inherent power to dismiss a separate action not pending before it where the Federal Rules of Civil Procedure specifically granted the litigant the right to proceed in the separate action. 146 F.3d 1071, 1074 (9th Cir.1998). As the Magistrate Judge did not dismiss or attempt to dismiss any separate action as a sanction under the Court's inherent power, *Hercules Inc.* is inapplicable.

4. Reasonableness of Fees

Where a sanction is appropriate, the amount of the sanction award must be reasonable. *Matter of Yagman*, 796 F.2d 1165, 1184 (9th Cir.1986). "This is particularly so where, as here, the amount of the sanction is based upon the attorney's fees claimed by the other party." *Id.* The Court should avoid issuing a lump-sum sanctions award based on different sources of authority to sanction and covering a host of misconduct over a period of time. *Id.* Rather, the sanctions award must be "quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." *Id.*

"When the sanctions award is based upon attorney's fees and related expenses, an essential part of determining the reasonableness of the award is inquiring into the reasonableness of the claimed fees." *Id.* at 1184-85. The Court "must make some evaluation of the fee breakdown submitted by counsel" to determine not the actual fees and expenses incurred, but what amount of fees and expenses are reasonable. *Id.* at 1185. Additionally, the Court should consider the sanctioned party's ability to pay to determine the award's reasonableness. *Id.* However, "the sanctioned party has the burden to produce evidence of inability to pay." *Gaskell v. Weir*, 10 F.3d 626, 629 (9th Cir.1993). Failure to present such evidence or raise the issue below waives the argument regarding inability to pay. *Fed. Election Comm'n. v. Toledano*, 317 F.3d 939, 949 (9th Cir.2002).

The sanction here was measured with reference to Flynn's attorneys' fees and costs. The Magistrate Judge reviewed Flynn's submissions and made several adjustments from Flynn's requested amount. First, the Magistrate Judge lowered Flynn's requested hourly rates. (Order (Doc. # 985) at 51.) Second, she reviewed Flynn's time entries "line-by-line" and declined to award fees for work on the fee application that resulted in a separate award of attorney's fees in March 2008 or for work performed on a separate motion Flynn filed under Rule 3.3 of the Nevada Rules of Professional Conduct. (*Id.*) Third, the Magistrate Judge deducted time for entries that were vague or duplicative. (*Id.*)

The sanctions award is sufficiently itemized, as

the Magistrate Judge limited the sanction to the tasks reflected in Flynn's time sheets related only to defense of the various different proceedings Montgomery initiated against Flynn. She specifically deducted time that was, or might be, related to other matters. The Magistrate Judge also reviewed the reasonableness of the fees, reducing the rate Flynn and DiMare sought for their services, deducting any vague or duplicative entries, and conducting a "line-by-line" review of Flynn's time entries. The sanctions award is not a blanket, lump-sum award and it adequately ties the fees incurred as result of the sanctionable conduct.

***20** As to Montgomery's ability to pay, Montgomery did not present any evidence on his inability to pay, despite the fact that Flynn requested even more in fees than the Magistrate Judge awarded. Montgomery therefore has waived the argument by failing to present evidence or raise the argument before the Magistrate Judge. The Court therefore will affirm the sanctions award against Montgomery. The Court denies Flynn's request for fees in responding to the objections to the Magistrate Judge's sanctions order.

4. Reassign

"Absent personal bias, remand to a new judge is warranted only in rare circumstances." *United States v. Rapal*, 146 F.3d 661, 666 (9th Cir.1998). To determine whether reassignment is warranted, the Court must consider:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Hunt v. Pliler, 384 F.3d 1118, 1126 (9th Cir.2004) (quotation omitted). "The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge." *Id.* (quotation omitted).

As an initial matter, Montgomery's request for reassignment is largely moot. The underlying case has settled and the sanctions proceedings as to Montgomery are now complete. Consequently, it is unclear whether Montgomery will be a participant in any further proceedings before the Magistrate Judge. In any event, there is no evidence the Magistrate Judge would have any difficulty putting out of her mind previously expressed views on any pertinent matters. Reassignment is not necessary to preserve the appearance of justice, and reassignment would result in waste and duplication substantially disproportionate to any perceived gain in preserving the appearance of fairness. The Magistrate Judge has expended considerable time and effort on these matters, presided over the evidentiary hearing, and has intimate familiarity with the facts related to this matter. The Court therefore denies Montgomery's request for reassignment at this time.

C. Pham

Pham argues the sanctions order violates her due process rights because Pham was not on notice that she personally might be subject to sanctions. Flynn responds that Pham had adequate notice and an opportunity to be heard, as he mentioned her by name in his motion for sanctions, requested her pro hac vice admission be revoked, and described her conduct in the motion and supporting declaration. Flynn also argues Pham had an opportunity to be heard because she filed a declaration in support of the Montgomery parties' opposition to Flynn's motion for sanctions, she testified at the hearing, and she filed an offer of proof in support of her objections.

***21** Prior to imposing sanctions, a Court must provide the party or attorney facing potential sanctions notice and an opportunity to be heard. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109-10 (9th Cir.2005); *see also Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). The Court must give notice as to the potential sanctions, the particular alleged misconduct, and "the particular disciplinary authority under which the court is planning to proceed." *In re DeVille*, 361 F.3d 539, 548 (9th Cir.2004); *Cole v. U.S. Dist. Ct. For Dist. of Idaho*, 366 F.3d 813, 822 (9th Cir.2004); *see also Mendez v. County of San Bernardino*, 540 F.3d 1109, 1132 (9th Cir.2008) ("To the extent the district court was focused on punishing [counsel] for his trial misbehavior, it was incumbent on the court to give him fair notice of that personal exposure and obligation to appear in person.").

"These minimal procedural requirements give an attorney an opportunity to argue that his actions were an acceptable means of representing his client, to present mitigating circumstances, or to apologize to the court for his conduct." Lasar, 399 F.3d at 1110. Further, the procedural requirements ensure that the attorney has an opportunity to prepare a defense and explain his or her questionable conduct, that the judge will consider the propriety and severity of the sanction in light of the attorney's explanation of his or her conduct, and that "the facts supporting the sanction will appear in the record, facilitating appellate review." *Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc.*, 834 F.2d 833, 836 (9th Cir.1987). The Court need not hold an evidentiary hearing, however, as the opportunity to brief the issue will suffice to comply with due process. *Lasar*, 399 F.3d at 1112; *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.2000).

The Magistrate Judge's sanctions order is contrary to law because the Magistrate Judge did not provide adequate notice to Pham prior to imposing the sanctions in this matter. Flynn's motion for sanctions did not explicitly seek sanctions against Pham. Flynn's motion sometimes referenced Montgomery's counsel in the plural, and discussed some of the actions Pham took. However, Flynn specifically requested sanctions against the Montgomery parties "and their counsel of record, Deborah Klar and her firm." (Mot. for Sanctions (Doc. # 545) at 1.)

More importantly, the Magistrate Judge's order setting the evidentiary hearing did not advise Pham she may be subject to sanctions personally. The order setting the evidentiary hearing stated that the hearing would address only two matters, Montgomery's September 2007 Declaration and matters related thereto, and the Montgomery parties' litigation against Flynn in the various other forums. (Order (Doc. # 770).) The order setting the hearing thus was narrower than Flynn's requested sanctions as set forth in his motion, as he sought sanctions related to other alleged misconduct. Even if Flynn's motion could be read to seek sanctions against Pham, the Magistrate Judge narrowed the scope of Flynn's motion and was not considering the full panoply of misconduct or relief set forth in Flynn's motion. Consequently, Flynn's motion alone could not have put Pham on notice that she personally might be sanctioned.

***22** The order setting the hearing also stated the following:

> 4. Dennis Montgomery shall appear in person to testify concerning these matters.
>
> 5. Michael Flynn, Esq., Deborah Klar, Esq., and Terri Pham, Esq. shall attend the hearing in person and shall be prepared to address the court concerning these matters.

(*Id.*) Although Pham's attendance at the hearing was required, the order does not make clear that Pham would be required to show cause why she would not be personally sanctioned or what sanctions she might face. By grouping Pham with Flynn, the party seeking sanctions, the order setting the hearing did not give Pham adequate notice that she personally was facing the possibility of sanctions.

The text of this order is in contrast to another order to show cause in this case issued by the Magistrate Judge which made it clear the attorney, as well as her clients, was facing sanctions. On July 24, 2008, the Magistrate Judge entered an order setting a hearing "to show cause as to why the Montgomery parties and Deborah A. Klar, counsel for the Montgomery parties, should not be held in contempt" for failure to comply with one of the Court's discovery-related orders. (Order (Doc. # 769).)

The magnitude and scope of the sanctions issued supports this conclusion. The sanctions order makes Pham jointly and severally liable for over $200,000 in fees and costs, and revokes her pro hac vice application, which is the relief referred to in Flynn's motion for sanctions. However, the sanctions order also bars her from seeking pro hac vice admission in this Court for five years, publishes the order as a public reprimand, refers Pham to the Nevada and California Bars, and orders Pham to perform 100 hours of community service. The order setting the hearing in this matter did not adequately advise Pham she would be subject to these considerable sanctions.

Flynn argues that Pham's due process rights were not violated because she provided an offer of proof to this Court along with her objection to the Magistrate Judge's order, and hence she has been afforded an opportunity to be heard. However, Pham's offer of proof was provided after the Magistrate Judge made

her findings. Pham did not have the opportunity to provide this material to the Magistrate Judge, who was the fact finder in this matter. The undersigned is reviewing the Magistrate Judge's findings on a clearly erroneous or contrary to law standard. Pham's provision of materials after the fact does not cure the pre-deprivation due process violation. The Court therefore will sustain Pham's objections to the Magistrate Judge's sanctions order, without prejudice to any further proceedings consistent with this Order with respect to Flynn's motion for sanctions.[FN8]

FN8. Because the Court affirms Pham's objections on this basis, the Court need not address Pham's other objections.

D. Klar

Klar argues she was not afforded procedural due process protections for the punitive sanctions set forth in the sanctions order. Flynn responds that Klar received notice of the charges against her, including the possible revocation of her pro hac vice admission, as set forth in Flynn's motion for sanctions.

***23** The Magistrate Judge's sanctions order is contrary to law because the Magistrate Judge did not provide adequate notice to Klar prior to imposing the sanctions in this matter. Flynn's motion for sanctions explicitly sought sanctions against Klar. However, as discussed above, the Magistrate Judge's order setting the evidentiary hearing was narrower than Flynn's requested sanctions as set forth in his motion, as he sought sanctions related to other alleged misconduct. The Magistrate Judge narrowed the scope of Flynn's motion and was not considering the full panoply of misconduct or relief set forth in Flynn's motion. Consequently, Flynn's motion alone did not suffice to put Klar on notice as to the sanctions the Magistrate Judge was considering.

As with Pham, although Klar's attendance at the hearing was required, the order does not make clear that Klar would be required to show cause why she should not be personally sanctioned or what sanctions she might face. By grouping Klar with Flynn, the party seeking sanctions, the order setting the hearing did not give Klar adequate notice that she personally was facing the possibility of sanctions. Unlike the Magistrate Judge's July 24, 2008 order setting a hearing "to show cause as to why the Montgomery parties and Deborah A. Klar, counsel for the Montgomery parties, should not be held in contempt," the order setting the evidentiary hearing on Flynn's motion for sanctions did not adequately place Klar on notice that she personally may be subject to sanctions.

As discussed above, the magnitude and scope of the sanctions issued supports this conclusion. The sanctions order makes Klar jointly and severally liable for over $200,000 in fees and costs and revokes her pro hac vice application, which is the relief referred to in Flynn's motion for sanctions. But the sanctions order also bars her from seeking pro hac vice admission in this Court for five years, publishes the order as a public reprimand, refers Klar to the Nevada and California Bars, and orders her to perform 200 hours of community service. The order setting the hearing in this matter did not adequately advise Klar she would be subject to these considerable sanctions.

Moreover, the sanctions order appears to consider Klar's conduct beyond the two subjects mentioned in the order setting the hearing. The sanctions order stated that Klar's misconduct "did not occur in a vacuum; instead it was part of a vexing pattern of conduct throughout her tenure as lead counsel until she was replaced in July 2008." (Order (Doc. # 985) at 44.) The sanctions order noted that Klar "continued to invite sanctions against her clients and herself," and discussed subsequent orders of this Court regarding Klar and the Montgomery parties' failure to abide by this Court's orders, ultimately resulting in sanctions against Montgomery in the amount of $2,500 per day. (*Id.* at 44-45.) The Magistrate Judge may have recounted these events as further support for her findings as to Klar's bad faith in relation to the two areas of inquiry in the order setting the evidentiary hearing. However, it is unclear whether the Magistrate Judge was limiting her use of Klar's subsequent conduct as evidence of her earlier bad faith or as further sanctionable conduct. The Court therefore will sustain Klar's objections to the Magistrate Judge's sanctions order, without prejudice to any further proceedings consistent with this Order with respect to Flynn's motion for sanctions. [FN9]

FN9. Because the Court affirms Klar's objections on this basis, the Court need not address Klar's other objections.

IV. CONCLUSION

***24** IT IS THEREFORE ORDERED that the

Objections of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP to Order Re: Motion for Sanctions (Doc. # 1035) with supporting declaration (Doc. # 1036) are SUSTAINED without prejudice to any further proceedings consistent with this Order with respect to Flynn's motion for sanctions.

IT IS FURTHER ORDERED that the Objections of Dennis Montgomery to Order Re: Motion for Sanctions (Doc. # 1037) are hereby OVERRULED.

IT IS FURTHER ORDERED that Teri Pham's Objection to Magistrate Judge's Order (Doc. # 1040) are hereby SUSTAINED without prejudice to any further proceedings consistent with this Order with respect to Flynn's motion for sanctions.

IT IS FURTHER ORDERED that the Objections of Non-Party Deborah A. Klar to Findings of Magistrate Judge in Stayed Order Re: Motion for Sanctions (Doc. # 1042) are hereby SUSTAINED without prejudice to any further proceedings consistent with this Order with respect to Flynn's motion for sanctions.

D.Nev.,2010.
Montgomery v. Etreppid Technologies, LLC
Not Reported in F.Supp.2d, 2010 WL 1416771 (D.Nev.)

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(Cite as: 2011 WL 541821 (N.D.N.Y.))

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
N.D. New York.
The NEWSPAPER GUILD/CWA OF ALBANY, TNG/CWA, AFL-CIO-CLC, Plaintiff,
v.
HEARST CORPORATION, d/b/a Capital Newspaper Division, the Hearst Corporation, Defendant.

No. 1:09-cv-764 GLS\DRH.
Feb. 8, 2011.

Barr, Camens Law Firm, Barbara L. Camens, Esq.,Quinn Philbin, Esq ., of Counsel, Washington, DC, Pozefsky, Bramley Law Firm, William Pozefsky, Esq., of Counsel, Albany, NY, for the Plaintiff.

Proskauer, Rose Law Firm, Elise M. Bloom, Esq., Mark W. Batten, Esq., of Counsel, Boston, MA, for the Defendant.

MEMORANDUM-DECISION AND ORDER
GARY L. SHARPE, District Judge.

I. *Introduction*

***1** Plaintiff The Newspaper Guild/CWA of Albany, AFL-CIO-CLC, commenced this action against defendant The Hearst Corporation, doing business as The Capital Newspaper Division, The Hearst Corporation, seeking to compel arbitration under a collective bargaining agreement. (*See* Compl., Dkt. No. 1:2.) On June 11, 2010, this court denied Hearst's motion for summary judgment, granted the Guild's motion for summary judgment, and ordered the parties to submit the matter to arbitration. (Dkt. No. 31.) Pending is Hearst's motion to stay enforcement of that order pending appeal to the Second Circuit Court of Appeals.[FN1] (Dkt. No. 35.) For the reasons that follow, Hearst's motion is denied.

FN1. Additionally pending is Hearst's motion for leave to file a reply to the Guild's opposition. (*See* Dkt. No. 39.) In light of the issues at hand and the parties' interest in fully briefing these issues, the court grants the motion and will receive Hearst's reply papers.

II. *Discussion*[FN2]

FN2. For a full discussion of the facts, the court refers the parties to its June 11, 2010 Memorandum-Decision and Order. (*See* June 11, 2010 Order at 2-6, Dkt. No. 31.)

In deciding whether to grant a stay pending appeal, the court must consider four factors:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

***Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)** (citations omitted); *see, e.g.*, *Cayuga Indian Nation of N.Y. v. Pataki*, 188 F.Supp.2d 223, 251 (N.D.N.Y.2002). These factors are to be applied flexibly rather than mechanically, mindful of the particular facts and equities of the case. *See Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 702 F.Supp. 60, 65 (S.D.N.Y.1988). Accordingly, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the appellant] will suffer absent the stay ... [such that] more of one excuses less of the other." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir.2002) (internal quotation marks and citations omitted).

Here, Hearst has failed to demonstrate sufficient grounds for a stay. First, as to the question of arbitrability, the court has already found that resolution of that question favors the Guild's position that the dues checkoff issue should be submitted to arbitration. (*See generally* June 11, 2010 Order, Dkt. No. 31.) Moreover, since the court's holding was largely based on the nature of the Collective Bargaining Agreement's arbitration clause, the dues checkoff clause, and the unique factual circumstances, it is of little moment that the issues presented on appeal may technically be of "first impression." (*See* Def. Mot. at 5, Dkt. No. 35.) Second, the court is disinclined to find that Hearst will be irreparably harmed without a stay. Rather, Hearst retains its rights to object to arbitrability in the

arbitration proceeding and to dispute arbitrability during the enforcement proceeding. And depending on the outcome of the arbitration, Hearst may either seek to enforce or annul the arbitration decision. *See Camping Constr. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333, 1349 (9th Cir.1990) ("[T]he party objecting to arbitration might well suffer no harm at all ... for the arbitration panel might decide in its favor."). Insofar as Hearst's irreparable harm allegation is premised on either delay or the incurrence of arbitration expenses, such concerns cannot constitute irreparable injury.[FN3] *See id.; see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980); *AT & T Broadband, LLC v. Int'l Bhd. of Elec. Workers*, 317 F.3d 758, 762 (7th Cir.2003). Third, although it is unlikely that the issuance of a stay will substantially injure the Guild, the court does appreciate the impact that delay has had and continues to have on the Guild regarding its receipt of dues checkoff revenues. (*See* Pl. Opp'n at 11-12, Dkt. No. 38.) Lastly, notwithstanding the cardinal doctrine of consent or the policy favoring arbitration, the court treats as neutral the fourth factor, the public interest.

FN3. While somewhat novel, Hearst's attempt to equate its status with the doctrine of qualified immunity is misplaced and unconvincing. (*See* Def. Reply at 4-5, Dkt. No. 39:1.)

2** Ultimately, because the ***Hilton factors weigh predominantly against granting a stay, the court denies Hearst's motion.

III. *Conclusion*

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Hearst's motion for leave to file a reply (Dkt. No. 39) is GRANTED; and it is further

ORDERED that Hearst's motion to stay enforcement pending appeal (Dkt. No. 35) is DENIED; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

N.D.N.Y.,2011.
Newspaper Guild/CWA of Albany v. Hearst Corp.
Slip Copy, 2011 WL 541821 (N.D.N.Y.), 190 L.R.R.M. (BNA) 2354

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