IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 15-11223

S.D. Fla. District Court Case No. 1:12-cv-22439-MGC

BERNARDO ROMAN, III, et al.

Appellants,

vs.

DEXTER WAYNE LEHTINEN, et al.

Appellees.

APPELLANTS' BRIEF

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Pro Se

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

As Appellants, Bernardo Roman III, Esq. and Bernardo Roman III, P.A. submit this list, which includes the names of the Trial Judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the present case, pursuant to the Eleventh Circuit Rules 26.1-1 thru 26.1-3:

The Trial Judge that has an interest in this appeal is the Honorable Marcia G. Cooke.

The parties to this appeal are:

Miccosukee Tribe of Indians of Florida

Bernardo Roman III, Esq.

Bernardo Roman III, P.A.

Guy Lewis, Esq.

Michael Tein, Esq.

Lewis Tein PL

Dexter Wayne Lehtinen, Esq.

The following persons and entities have an interest in this appeal or in related pending litigation:

Akerman, LLP – Counsel for Appellee Dexter Wayne Lehtinen.

Alston & Bird LLP – Counsel for Appellant Miccosukee Tribe of Indians of Florida.

Avila, Manuel – Counsel for Appellee Julio Martinez in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Bailey, The Honorable Jennifer D. - Circuit Court Judge for the Eleventh Judicial Circuit of Florida, Miami-Dade County, in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 13-35956-CA-40.

Barry, Michael J. – Counsel for Appellant Miccosukee Tribe of Indians of Florida.

Bruce S. Rogow, P.A. – Counsels for Appellee Morgan Stanley Smith Barney, LLC in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Bernardo Roman III, P.A., Appellant.

Calli, Paul - Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein P.L.

Campion, Tara A. – Counsel for Apellee Morgan Stanley Smith Barney, LLC in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Ciampa, Nancy – Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Equire, and Lewis Tein P.L.

Carlton Fields Jorden Burt – Counsel for Appellees Guy Lewis, Esquire, Micahel

Tein, Esquire, and Lewis Tein P.L.

Cooke, The Honorable Marcia G. - United States District Court Judge for the Southern District of Florida.

Cypress, Billy – Appellee in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Descalzo, Marissel – Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.

Diffley, Daniel F. – Counsel for Appellant Miccosukee Tribe of Indians of Florida in *Miccosukee Tribe of Indians of Florida v. Cypress,et al.,* Case No. 15-11222.

Duffy, Lawrence – Counsel for Jose I. Marrero in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Goldsmith, Steven – Counsel for Billy Cypress in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Hernandez, Miguel – Appellee in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Koltun & Lazar – Counsels for Appellee Miguel Hernandez in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Lazar, Scott Alan – Counsels for Appellee Miguel Hernandez in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Lehtinen, Dexter Wayne – Appellee.

Lehtinen Schultz Riedi Catalano de la Fuente PLLC – Counsels for Appellee Dexter Wayne Lehtinen.

Lewis, Guy – Appellee.

Lewis Tein P.L. – Appellee.

Manuel A. Avila, Esq. & Associates, P.A. – Counsels for Appellee Julio Martinez in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Marrero, Jose I. – Witness in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Martinez, Julio – Appellee in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

McAliley, The Honorable Chris M. – United States District Court Magistrate Judge for the Southern District of Florida.

Meyer, Alice E. – Counsel for Appellee Billy Cypress in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Miccosukee Tribe of Indians of Florida – Appellant.

Moore, The Honorable Michael K. – United States District Court Chief Judge for the Southern District of Florida.

Morgan Stanley Smith Barney – Appellee in *Miccosukee Tribe of Indians of*

Florida, v. Cypress, et al., Case No. 15-11222.

Rogow, Bruce S. – Counsel for Appellee Morgan Stanley Smith Barney in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Roman, III, Bernardo – Appellant.

Saunooke Law Firm – Counsels for Appellee Billy Cypress in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Saunooke, Robert O. – Counsel for Appellee Billy Cypress in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Short, Charles – Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.

Steven M. Goldsmith, P.A. – Counsels for Appellee Billy Cypress in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 15-11222.

Strader, Yolanda – Counsel for Appellee Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.

Tein, Michael - Appellee.

Thornton, The Honorable John W. – Circuit Court Judge for the Eleventh Judicial Circuit of Florida, Miami-Dade County, in *Miccosukee Tribe of Indians of Florida v. Cypress, et al.,* Case No. 13-35956-CA-40.

Tuck, Andrew – Counsel for Appellant Miccosukee Tribe of Indians of Florida.

Furthermore, Appellants understand the continuing obligation to notify the Court immediately of any additions, deletions, corrections or other changes that should be made to its certificate.

Respectfully submitted this 1st day of April, 2016.

/s/Bernardo Roman III

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument as it would aid the decisional process of this Court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this case under 28 U.S.C. § 1291. *Didie v. Howes,* 988 F.2d 1097, 1103 (11th Cir. 1993) ("[T] he district court's Postjudment order denying Rule 11 sanctions is properly appealable final order …."); *McGregor v. Bd. Of Com'rs of Palm Beach County,* 956 F.2d 1017, 1020 (11th Cir. 1992) (recognizing that the court possessed jurisdiction to review a post- dismissal sanctions order); *TMF Toll Co.; Inc. v. Muller,* 913 F.2d 1185, 1188 (7th Cir. 1990) ("An order granting or denying monetary sanctions against a party or an attorney issued under the provisions of Rule 11 is an appealable decision which constitutes a judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

The Court reviews for abuse of discretion a grant of sanctions under Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, or the District Court‟s inherent authority. *Amlong & Amlong, P.A. v. Denny's, Inc*., 500 F.3d 1230, 1237 (11th Cir. 2007). A District Court abuses its discretion when it misapplies the law or basis its conclusions on clearly erroneous factual findings. *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329, 1338 (11th Cir.2015).

A court may only impose sanctions under Rule 11 where there is absolutely no factual support for a party‟s allegations. *Lawson v. Sec'y, Dept. of Corr*., 563 Fed. Appx. 678, 680 (11th Cir. 2014). It is where "no evidence or only patently frivolous evidence is offered to support factual contentions, sanctions can be imposed." *Id.* (quoting *Thompson v. Relation Serve Media, Inc*., 610 F.3d 628, 665 (11th Cir. 2010) (citation and internal quotation marks omitted)); *Davis v. Carl*, 906 F.2d 533, 536 (11th Cir. 1990) (Rule 11 sanctions based on groundless factual allegations are only appropriate where "plaintiffs offer [ ] no evidence to support their allegations").

In *Lawson*, this Court explained:

> The dispositive issue, however, is not whether the DOC‟s rebuttal evidence is strong enough to defeat Lawson‟s claims on the merits. Rather, it is whether Lawson has provided any evidence supporting his claims. *See Cooter*

> *& Gell*, 496 U.S. at 396, 110 S.Ct. at 2456. He has. The fact that Lawson has provided some evidence showing the sincerity of his beliefs is sufficient to establish that Rule 11 sanctions are inappropriate in this situation. It is entirely possible that Lawson‟s claims will fail on the merits. That does not, however, provide an avenue for dismissing his complaint as a Rule 11 sanction. Accordingly, we REVERSE the district court‟s decision to impose sanctions under Rule 11.

Lawson, 563 Fed. Appx. at 681 ("Where the evidence, although „weak or self-serving, „ is reasonable, sanctions cannot be imposed."); *In re Bank Atlantic Bancorp, Inc. Sec. Litig*., 851 F. Supp. 2d 1299, 1308 (S.D. Fla. 2011) *aff'd sub nom. Hubbard v. Bank Atlantic Bancorp, Inc*., 503 Fed. Appx. 677 (11th Cir. 2012).

STATEMENT OF THE ISSUES

1. Whether the District Court reversibly erred in disqualifying counsel of choice Angel Cortiñas without identifying the ethical rule that was violated.

2. Whether the District Court reversibly erred in determining that Lewis Tein‟s motion for sanctions complied with the procedural requirements of Rule 11(c)(2).

3. Whether the District Court reversibly erred in granting sanctions aimed at a prior complaint and determining that there was no evidence to support the Second Amended Complaint.

4. Whether the District Court reversibly erred in awarding sanctions against the law firm pursuant to 28 U.S.C. § 1927 or its inherent authority.

5. Whether the District Court reversibly erred in basing the sanction amount on Lewis Tein‟s sealed billing records.

STATEMENT OF THE CASE

Statement of the Facts and Course of Proceedings

On July 1, 2012, the Miccosukee Tribe filed its original Complaint. (DE 1). This Complaint was comprised of counts for RICO, RICO conspiracy, embezzlement, civil theft, fraud, aiding and abetting fraud, and breach of fiduciary duty. The named defendants were Morgan Stanley Smith Barney ("Morgan Stanley"), the investment firm; Guy Lewis, Michael Tein, and Lewis Tein P.L.(together "Lewis Tein"), and Dexter Wayne Lehtinen ("Lehtinen"), the attorneys for the Miccosukee Tribe; Miguel Hernandez, former Director of the Miccosukee Finance Department; Julio Martinez, former Chief Financial Officer of the Miccosukee Tribe; and Billy Cypress, former Chairman of the Miccosukee Tribe. The allegations in the Complaint presented a pattern of misappropriation and or acts aiding and abetting the misappropriation of tribal funds by the named parties. On July 30, 2012, the Miccosukee Tribe filed its First Amended Complaint, as of right, in order to request additional relief. (DE 13).

On August 6, 2012, Defendants Lewis Tein filed a Motion to Require the Miccosukee Tribe to file a RICO Case Statement (DE 14). On August 20, 2012, the Miccosukee Tribe responded to the Motion to Require a RICO Case Statement and requested leave to amend in case the District Court found the Complaint to be

deficient. (DE 15). On October 10, 2012, the District Court granted the Miccosukee Tribe‟s request to amend the First Amended Complaint with instructions regarding the areas which required additional detail. (DE 55).

On August 14, 2012, Lewis Tein served their Motion for Sanctions and Memorandum of Law in Support (hereinafter, "Motion for Sanctions") on Tribal Attorney Bernardo Roman III, counsel for the Miccosukee Tribe. The Motion for Sanctions requested sanctions against the Miccosukee Tribe and its counsel[1] pursuant to Rule 11 and Florida Statute, § 57.107 (2012). On September 24, 2012, Lewis Tein filed a Notice of Filing with the served Motion for Sanctions. [DE 38, 38-1]. In the Motion for Sanctions, Lewis Tein argued, in general terms, that the Miccosukee Tribe‟s Complaint contained allegations that had no basis in law or fact. *Id.* at 2. The Motion for Sanctions did not contain or identify any specific allegations or claims to support the request for sanctions. *See generally id.* The Motion for Sanctions referred in general terms to both the Complaint and the Amended Complaint, and alleged that counsel for the Miccosukee Tribe had certified compliance with Rule 11 by the mere act of filing both pleadings. *Id.* at 4. On October 11, 2012, the Miccosukee Tribe filed a Response to the Motion for

[1]In the Motion for Sanctions, Counsel for the Miccosukee Tribe is mentioned as an intended target of the sanctions in the Conclusion and Wherefore Clause of the motion. (DE 38-1).

Sanctions. (DE No. 60). Lewis Tein filed a Reply on October 15, 2012. (DE 66). The Miccosukee Tribe, with leave of court, filed a Sur-Reply on October 29, 2012. (DE 74).

On November 9, 2012, the Miccosukee Tribe filed its Second Amended Complaint. (DE 75). This Second Amended Complaint was filed pursuant to the Court"s Order Granting in Part and Denying in Part Defendants" Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L."s Motion to Require Plaintiff to File a Rico Case Statement. (DE 55). Lewis Tein did not reserve, renew or refile their Motion for Sanctions. On November 22, 2013, Lewis Tein filed a Motion to Supplement the Record on Lewis Tein"s Rule 11 Motion for Sanctions. (DE 286). In this Motion to Supplement the Record, Lewis Tein did not address any of the allegations raised by the Miccosukee Tribe in its Second Amended Complaint. Lewis Tein limited their Motion to Supplement the Record only to the Complaint and First Amended Complaint filed by the Miccosukee Tribe. (DE 286).

The Defendants, except Morgan Stanley, filed motions to dismiss the Second Amended Complaint. (DE 39, 92, 94, 103, 104, and 105). The Miccosukee Tribe filed its Responses to these motions on January 14, 2013. (DE 118, 119, 120, 127, 129). Defendant Morgan Stanley filed a Motion to Dismiss and to Compel

Arbitration. (DE 39). The Miccosukee Tribe filed its Response on October 11, 2012. (DE 61).

On May 17, 2013, the District Court granted Morgan Stanley‟s Motion to Dismiss and to Compel Arbitration. (DE 227). On September 30, 2013, the Court granted the defendants‟ Motion to Dismiss Second Amended Complaint based on lack of subject matter jurisdiction. (DE 282). On October 10, 2013, the Miccosukee Tribe filed a Motion to Reconsider the Order dismissing the Second Amended Complaint. (DE 283).

On May 12, 2004, the District Court held a hearing on the Miccosukee Tribe‟s Motion to Reconsider and the Defendants‟ Motions for Sanctions. The District Court denied the Motion to Reconsider and scheduled the Defendants‟ Motion for Sanctions for an Evidentiary Hearing for June 5, 2014.

Disposition of Case Below

During the first day of the Evidentiary Hearing, June 5, 2014, the District Court disqualified Appellants‟ attorney of choice, Angel Cortiñas. Appellants requested additional time to obtain alternate counsel. The District Court denied Appellants‟ request and adjourned until the next day, June 6, 2014. On June 5, 2014, Appellants filed a Motion to Stay Lower Court Proceedings before this Court, which was granted temporarily until June 9, 2014. After full briefing by the

parties on Appellants‟ Writ of Mandamus, this Court denied the writ. The evidentiary hearing continued on June 10, 16, 17, 24, 26 and July 1, 2014. The District Court requested final briefing by the parties in lieu of closing arguments, which were filed on July 11, 2014. (DE 394, 395, and 396).

On August 25, 2014, the District Court issued an order under which the parties were ordered to file their respective attorneys‟ fees under seal and were prohibited to share such filing with each other. (DE 398). Appellants‟ objected but their objections were denied. Pursuant to the District Court‟s order, the parties submitted their attorneys‟ fees on September 5, 8 and 9 of 2014, under seal and without serving them on opposing parties.

On September 10, 2014, Appellants filed a Motion to Disqualify the Honorable Marcia Cooke based on perceived biased conduct throughout the Rule 11 proceedings. (DE 408). On October 23, 2014, Chief District Court Judge Kevin M. Moore denied the Appellants‟ Motion to Disqualify. (DE 417).

On January 16, 2015, the District Court granted the Defendants‟ motions for sanctions. (DE 419).

SUMMARY OF THE ARGUMENT

On the first day of the Sanctions Hearing, the District Court reversibly erred as a matter of well-established law, and irreparably harmed the Appellants‟ defense, by disqualifying the Appellants‟ counsel of choice, without referencing a single ethical rule that was violated by the disqualified attorney. The District Court then further prejudiced the Appellants by refusing to grant a continuance for the Appellants to secure new counsel.

The District Court also reversibly erred as a matter of law by failing to deny Lewis Tein‟s motion, as the motion violated several mandatory provisions of Rule 11(c) (2), including the requirement that the nonmoving party receive a 21-day safe harbor period to withdraw or correct the challenged claim and the requirement that the moving party state specifically the allegedly frivolous claim. Although, the District Court determined that the Second Amended Complaint was frivolous, Lewis Tein undisputedly never directed a motion for sanctions to the Second Amended Complaint.

Additionally, the District Court reversibly erred by granting Lewis Tein‟s and Lehtinen‟s motions for sanctions because evidence was presented in support of the Second Amended Complaint. Moreover, the District Court erroneously

excluded evidence in support of the Second Amended Complaint because it was not known to Appellants when the lawsuit was filed.

The District Court reversibly erred, and denied the Appellants‟ fundamental due process rights by sealing Lewis Tein‟s billing records, upon which the District Court based the amount of the sanction,

ARGUMENT

I. The District Court Reversibly Erred in Disqualifying Appellants' Counsel of Choice.

On May 12, 2014, the District Court scheduled an evidentiary hearing on motions for sanctions under Rule 11 to be held on June 5, 2014. The evidentiary hearing was scheduled to address motions for sanctions by Defendants Lehtinen (DE 273) and Lewis Tein (DE 38) seeking millions of dollars in sanctions against the Miccosukee Tribe and Appellants. (DE 298).

The District Court‟s May 12, 2014 announcement was the first time that any of the parties knew that an evidentiary hearing might occur on the Rule 11 motions for sanctions. Therefore, it was not until May 12, 2014 that Appellants had to confront the actual conflict of representing themselves at a hearing where they would be called as witnesses and their credibility judged.

On about May 15, 2014, Appellants contacted Angel A. Cortiñas, Esquire, at Gunster, to represent them at the Rule 11 evidentiary proceedings. Mr. Cortiñas began background work immediately, but did not begin preparing for the Rule 11 evidentiary hearing until May 21, 2014, when Gunster completed its internal conflict checks and received an executed retainer from Appellants. Mr. Cortiñas then worked nearly 7 days a week, night and day, to assimilate and organize the tremendous amount of information needed to conduct the evidentiary hearing.

On Friday, May 30, 2014, Mr. Cortiñas filed his Notice of Appearance and, pursuant to District Court Order (DE 298), also filed Witness and Exhibit Lists. (DE 313, 322). Mr. Cortiñas prepared the Witness and Exhibit Lists based on his review of the materials supplied by Appellants and his review of the court file. Mr. Cortiñas, alone, prepared every witness he intended to call at the evidentiary trial and Mr. Cortiñas, alone, developed the cross- examinations he intended to use to elicit testimony from witnesses called by adverse parties.

On May 30, 2014, Lewis Tein moved for an Order to Show Cause why Mr. Cortiñas should not be disqualified. (DE 331). Lewis Tein‟s sole basis to disqualify Mr. Cortiñas concerned his tenure as a judge on Florida‟s Third District Court of Appeal. (DE 331 at 1). Lewis Tein claimed exclusively that Mr. Cortiñas violated Rule 4-1.12 of the Rules Regulating the Florida Bar. Later the same day,

Lehtinen also moved for an Order to Show Cause why Mr. Cortiñas should not be disqualified. (DE 334). Lehtinen's motion joined the arguments in Lewis Tein's disqualification motion and added one additional argument. Lehtinen sought disqualification because, in 1994-1995, Mr. Cortiñas was a non-equity partner, i.e, an employee, of Lehtinen's at Lehtinen's law firm. Lehtinen failed to identify any rule or law to support his additional legal basis for disqualification.

On June 3, 2014, the District Court entered an order requiring Mr. Cortiñas to respond to the motions for Oder to Show Cause by June 4, 2014 at 3:00p.m. (DE 339). Later on June 3, 2014, without having received a response yet from Mr. Cortiñas, the District Court entered an Order to Show Cause Hearing for June 5, 2014, the day of the Rule 11 evidentiary hearing. Mr. Cortiñas timely filed an Omnibus Response to both Lehtinen's and Lewis Tein's disqualification motions. (DE 345). Lewis Tein replied. (DE 347). Lehtinen and Lewis Tein filed no evidence or sworn statements. Further, Lehtinen identified no specific information or conversation that Mr. Cortiñas had that gave rise to any unfair informational advantage or would prejudice Lehtinen in any way.

At the June 5, 2014 Order to Show Cause hearing, after hearing argument from counsel to Lehtinen and Lewis Tein, the District Court determined that Mr. Cortiñas did not violate any rule of professional responsibility in connection with

his former position as an appellate judge. (DE 382 at 34). Instead, the District Court disqualified Mr. Cortiñas based of this employment at Mr. Lehtinen‟s firm 20 years ago. *Id*. at 34-35). Despite expressly denying Lewis Tein‟s sole basis for disqualifying Mr. Cortiñas, the District Court inexplicably granted both Lehtinen‟s and Lewis Tein‟s motions. *Id* at 35-36 4-5; (DE 349). The District Court then denied Appellants‟s request for a brief continuance to allow them to retain substitute counsel. (DE 382 at 91).

A. The District Court Reversibly Erred in Failing to Identify Any Applicable Rule of Professional Conduct for Disqualification and Failing to Determine Whether the Charged Attorney Violated any Rule.

Before any substantial discovery could be undertaken, the Miccosukee Tribe‟s Complaint was dismissed by Judge Cooke on jurisdictional grounds, namely, that it was "an intra-tribal dispute." (DE 282). All pending relevant discovery ceased. The order of dismissal was upheld by this Honorable Court on December 22, 2015 in *Miccosukee Tribe of Indians of Florida v. Cypress,*-- F.3d -- , 2015 WL9310571.

Appellants retained Mr. Cortiñas because of his legal experience and demonstrated abilities, including his prior representation of the Miccosukee Tribe. In addition Mr. Cortiñas had been an appellate court judge for more than 8 years on Florida‟s Third District Court of Appeal. Appellants retained Mr. Cortiñas for

the Rule 11 sanctions proceedings also based on his more than 13 years of experience as a federal prosecutor and because he was formerly Chief of the United States Attorney's Office, Fraud Section, in Miami, Florida. His experience with fraud investigations was particularly pertinent here, where the Miccosukee Tribe and Appellants had alleged fraud against the Defendants in this case.

The basis for disqualification of Appellants' chosen counsel by Judge Cooke was an unidentified "model rule," which presumably imputed knowledge of conduct between lawyers in a small firm. No such ethical rule of conduct exists.

The District Court alluded to some sort of "unfair informational advantage" as a basis for the disqualification of Mr. Cortiñas without once stating what this "information" was, how such information existed, and without the movant ever identifying the supposed "unfair informational advantage." (DE 382 at 19).

Under the law of this Circuit, "where the district court's disqualification order is based on an allegation of ethical violation; the court may not simply rely on its general inherent power to admit and suspend attorneys, without any limit on such power. **The court must clearly identify a specific Rule of Professional Conduct which is applicable to the relevant jurisdiction and must conclude that the attorney violated that rule… for its order to be upheld."**

Schlumberger Technologies, *Inc. v. Wiley*, 113 F.3d 1553, 1560-61 (11th Cir.

1997); *In re BellSouth Corp.*, 334 F.3d 941, 959 (11th Cir.2003). The Eleventh Circuit requires and "insist[s] that district courts rest their disqualification decisions on the violation of specific Rules of Professional Conduct, not on some "transcendental code of conduct …that …exist [s] only in the subjective opinion of the court." *Schlumberger Technologies,* 113 F.3d at 1560-61 (citation omitted). The disqualification was, therefore, patently erroneous and cannot be upheld under *Schumberger Technologies,* 113 F.3d 1553, 1560-61.

II. The District Court Reversibly Erred by Relying on Lewis Tein's Motion for Sanctions, Which Did Not Comply with Federal Rule of Civil Procedure 11(c)(2).

Rule 11 was created to deter frivolous litigation. *Massengale v. Ray,* 267 F.3d 1298, 1302 (11th Cir. 2001) ("The goal of Rule 11 sanctions is to ‚reduce frivolous claims, defenses, or motions, and to deter costly meritless maneuvers'" (quoting *Donaldson v. Clark,* 819 F.2d 1551, 1559 (11th Cir. 1987))). In 1993, the Rule was amended to include procedural safeguards that tempered the Rule's harsh effect and promote its goal of deterrence. These procedural safeguards are strictly construed. *Robinson v. Alutiq- Mele, LLC,* 643 F. Supp. 2d 1342, 1350 (S.D. Fla. 2009) ("Because of the penal nature of the Rule, the procedural requirements of Rule11are strictly construed."). In this case at bar, Lewis Tein did not comply with the 21-day safe harbor period as required by Rule 11(c) (2).

One of Rule 11‟s most critical safeguards requires the party seeking sanctions under Rule 11 to describe in a motion the specific conduct that allegedly violated Rule 11 and to provide the opposing party 21 days to correct the challenged claim before filing the sanctions motion with the Court. Fed.Red.Civ. P.11(c) (2); *Peer v. Lewis,* 606 F.3D 1306, 1315 (11th Cir.2010).

It is undisputed that Lewis Tein directed the Rule 11 motion for sanctions toward the Amended Complaint and never filed a new Rule 11 motion for sanctions directed at the Miccosukee Tribe‟s Second Amended Complaint. Thus, Lewis Tein failed to preserve any claim arising out of Rule11 by not filing a Rule 11 motion directed at the Miccosukee Tribe‟s Second Amended Complaint. Nevertheless, the District Court sanctioned Appellants based allegations in the Second Amended Complaint. DE: 419 at 4. Because Lewis Tein never challenged the Second Amended Complaint through a motion for sanctions under Rule11(or otherwise), Appellants were denied Rule 11‟s safe harbor period to assess the motion and correct the Second Amended Complaint, if appropriate.

Although this Court has not addressed the effect of an amended pleading on a motion for sanctions that was directed to an earlier-filed pleading, the Second Circuit has squarely addressed this issue and determined that the filing of a new pleading “reset[s] the clock for seeking sanctions pursuant to Rule11(c) (2).

Lawrence v. Richman Group of CT LLC, 620 F.3d 153,158 (2d Cir. 2010). The court in *Lawrence* determined that the party moving for sanctions in that case violated Rule 11(c)(2)‟s mandatory safe harbor provision where a renewed motion for sanctions was not filed until after the second amended complaint had been dismissed. *Id*.; *Jimenez v. KLB Foods*, *Inc.,* 2014 WL 2738533, at *4 (S.D. N.Y. Jun. 17, 2014). Although the District Court referenced *Lawrence* in the Sanctions Order; the court inexplicably did not apply it. Instead, the District Court applied this Court‟s legal decisions that predated and were abrogated by the 1993 amendments to Rule 11. Those outdated cases held that "Rule 11 alone should constitute sufficient notice of the attorney‟s responsibilities since the rule explicitly requires the attorney to certify that a complaint is well grounded in fact." (DE 419 at 18); *Ousley Prods., Inc.v. WJBF-TV,* 952 F.2d 380, 383(11th Cir.1992); *Donaldson v. Clark,* 819 F.2D 1551, 1560(11th Cir. 1987).

In addition to not directing any motion toward the Second Amended Complaint, the Rule 11 motion Lewis Tein filed in connection with the Amended Complaint failed to identify a single allegation that was frivolous. Nevertheless, the District Court found that the motion satisfied the specificity requirements of Rule 11 because it identified as Appellants‟ frivolous conduct the filing of the Amended Complaint. (DE 419 at 17). The law requires more. *In re Miller,* 414 F.

Appx. 214, 217 (11th Cir. 2011) (citing *Nagel v. ADM Investor Servs., Inc*., 65 F. Supp. 2d 740,756(N.D.III.1999)); *Robinson v.Alutiq-Mele, LLC,* 643 F. Supp. 2d 1342(S.D.Fla.2009) (motion for sanctions was insufficient where it included five pages of case law setting forth the standard for sanctions under Fla.Stat. § 57.105 and Rule 11 and a general statement that the complaint was frivolous).

Indeed, this federal district has denied enforcement of a Rule 11 motion, inter alia, because of the lack of specificity of the allegations of the motion that was served. *Robinson . Alutiq-Mele, LLC*, 643 F.Supp.2d 1342 (S.D. Fla. 2009) (Magistrate Judge Chris M. McAliley recommended, and District Judge Alan Gold agreed, to denied a Rule 11 motion when the original motion merely recited provisions of Rule 11 in conclusory fashion and did not identify any specific part of the challenged pleading that the moving party demanded be withdrawn).

Here, it was not possible for Appellants to determine what allegations or causes of action Lewis Tein were alleging to be frivolous in the Amended Complaint, let alone the Second Amended Complaint, because Lewis Tein"s motion for Rule 11 sanctions failed to identify a single frivolous allegation, the District Court should have denied the motion at the outset. The subsequent "Supplement" to the motion for sanctions filed by Lewis Tein on November 22,

2013, did not cure this problem because such "Supplement" violated Rule 11 (c)(2).

After the case was dismissed for lack of subject matter jurisdiction on September 30, 2013, the District Court granted leave to Lewis Tein to file a "supplement" to the motion for sanctions. [DE 268 and 298]. The Supplement was effectively a new Rule 11motion filed without notice to Appellants. In this Circuit, Rule 11 motions cannot be filed after dismissal of the challenged complaint. *Robinson,* 643 F. Supp. 2d at 1350 (citing *Gwynn v. Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008).

III. The District Court Reversibly Erred by Finding There Were No Facts Supporting the Second Amended Complaint.

The evidence supported the Miccosukee Tribe's allegations against Lewis Tein and Lehtinen. Lewis Tein and Lehtinen did not meet their very high burden of showing that no evidence existed to support the Miccosukee Tribe's Second Amended Complaint. Lewis Tein's motion for sanctions did not identify the allegedly frivolous allegations, stating very generally, "There is no evidence to support the central allegations of the claims asserted[2]." (DE 38-1 at 2). It was not

[2] Unable to discern from Lewis Tein's Rule 11 motion the supposed basis for sanctions, the District Court effectively rewrote Lewis Tein's Rule 11 motion

until Lewis Tein‟s opening argument at the Evidentiary Hearing that Appellants for the first time learned of the allegations Lewis Tein claimed were frivolous.

First, the District Court concluded that it was only the Tribal Attorney who determined that Lewis Tein‟s fees were unreasonable high. (DE 419 at 8). While that determination by an experienced attorney in this jurisdiction alone would be sufficient to make the claim not frivolous, the District Court is simply wrong in stating that there was no other support for the conclusion. The Miccosukee Tribe presented a qualified attorney‟s fee expert to testify to this very point, but the District Court erroneously refused to consider the evidence. (DE 392 at 36). The District Court excluded the expert‟s testimony (DE 392 at 61-63). Even though the expert had found that Mr. Lewis‟ billings were „fictitious"; that in the year 2009, 2200 out of 2700 hours billed were fictitious because "there was no work associated with the entries"; and that Lewis Tein‟s rates were excessive; see *also* Plaintiff‟s Exhibits 15 A and 15B (DE 319-1 and DE 319-2).

Second, the District Court stated incorrectly that the Tribal Attorney was unaware that Lewis Tein actually had experience in areas of environmental law, tax law, etc. (DE 419 at 8). No evidence, of any sort, was presented to show that

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by cobbling together different sentences in the motion and inserting additional language into the motion. (DE 419 at 3).

Lewis Tein had experience in any of those areas Mr. Lewis and Mr. Tein were listed as witnesses but, tellingly, declined to testify.

Third, the District Court takes Tribal Counsel to task for failing to report Attorney Diaz to the authorities for participating in a kickback scheme. (DE 419 at 9). The District Court ignores the evidence presented that the reason the Tribal Attorney did not report Attorney Diaz was because Mr. Lewis was handling the matter. (DE 422 at 115-116).

Fourth, the District Court draws an inference from the fact that the Miccosukee Tribe did not call as a witness defendant Miguel Hernandez to corroborate the evidence presented by Trial Counsel of his tacit acknowledgement of the kickback scheme. (DE 419 at 9). In doing so, the District Court erroneously weighed evidence and shifted to the respondents to the motion the burden of proving an ultimate fact, rather than leaving it to the moving parties to prove that the claim was frivolous. *Allison v. Parise,* 12-CV-1313-T-17EAJ, 2014WL1763205, at *6 (M.D. Fla. April 30, 2014).

Fifth, as to the District Court‟s conclusion that the loan scheme claim was frivolous, the District Court stated that " [t] he Berts noted that it was „ok to pay‟ on each of Defendants Lewis Tein‟s legal bills." (DE 419 at 20). The District Court was incorrect. Lewis Tein submitted five bills from the last few months of

their representation of Tammie Billie with unauthenticated handwritten notations. Even if there had been sufficient evidence to authenticate those writings (and the Berts did not testify), the notated bills were a small fraction of the dozens of bills submitted by Lewis Tein for the millions of dollars they were paid on this matter. By the District Court‟s reasoning on this issue, if these particular bills established the bona fides of a loan to the Berts, the millions in additional fees billed and paid by the Miccosukee Tribe with no similar notations would be proof of a much greater loan scheme involving the bills for which there were no notations. Moreover, the District Court ignored the testimony of Jimmie Bert himself. Mr. Bert‟s prior deposition testimony showed that he never received legal bills from Lewis Tein, never authorized payment for the nearly $1 million charged by Lewis Tein after the Bermudez verdict, and "did not request a loan specific to Lewis Tein." (DE 422 at 160). Appellants were aware of this testimony, and it was consistent with his understanding of the facts prior to filing the complaint.(DE 388 at 78).

Sixth, as to Lehtinen, the error is abundantly clear. The District Court acknowledged that the Miccosukee Tribe presented a witness, Theresa Willie, a tribal member, testified as to Lehtinen‟s misstatements. (DE 419 at 10). The Tribal Attorney testified that before filing the lawsuit he discussed with other

members of the Miccosukee Tribe Lehtinen‟s misrepresentation pertaining to a monetary reserve account allegedly earmarked only for the payment of taxes. (DE 388 at 166-167).

IV. The District Court Reversibly Erred by Sua Sponte Imposing Sanctions On Appellants Under 28 U.S.C§ 1927 and the District Court's Inherent Authority.[3]

Lewis Tein and Lehtinen did not request and the District Court did not give notice that was considering imposition of sanctions pursuant to §1927 or the District Court‟s inherent authority before the evidentiary hearing concluded.[4]

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[3]The Court identified three potential bases but never stated which it was applying, nor specified which authority applied to the Miccosukee Tribe, which to Mr. Roman, and which to Mr. Roman‟s law firm. This was error. *Fuqua Homes, Inc. v. Beattie,* 388F.3d 618,623(8th Cir.2004) ("These source of authority and basis for the sanctions is critical"); *Arnold v. Fed.Nat.Mortg.Ass'n*, 569 Fed. Appx.223, 224-225 (5th Cir.2014) ("We cannot, however, be left to guess at the basis for the sanctions in this case. Each possible basis for the sanctions has differing legal considerations.").While a District Court may impose sanctions on upon multiple grounds, the court must at the very least identify which of those grounds stands as the basis for the sanction imposed. *Amlong, P.A. v. Denny's,Inc.,*500F.3d 1230,1238 (11th Cir. 2007)(district court „concluded that sanctions against the Amlong were warranted on the basis of four separate sources of judicial authority"); *Chudasama v. Mazda Motor Corp,*123F.3d 1353,1365 (11th Cir.1997)(district court „based its decision to impose sanctions" on two grounds).

[4] The closest Lewis Tein came to seeking sanctions pursuant to §1927 was when their attorney, after conceding that Lewis Tein moved for sanctions only under Rule 11,stated during opening argument „the district court may also impose

Accordingly, Appellants‟ due process rights were violated when the District Court sanctioned them pursuant to § 1927and under its inherent authority. *Kornhauser v.Comm'r of Soc.Sec*. 685F.3d 1254, 1257 (11th Cir.2012); *L.B.Foster Co. v. Am. Piles, Inc*., 138 F.3d 81, 89 (2d Cir. 1998) ("[I]f sanctions are to imposed pursuant to § 1927, a notice that sanctions are sought under Rule 11 is insufficient."); *Eastcott v. Hasselblad USA., Inc*., 564 Fed.Appx.590, 597 (Fed. Cir. 2014). Lewis Tein concedes that the only alleged wrong at issue in this case was the filing of the complaints. (See DE 435 at 3) ("*Here, the wrongful conduct is the filing of the complaints with no reasonable factual basis to support their allegations.*" (emphasis in (DE 435)(citing (DE 419 at 26)). Because the filing of the complaints was the sole basis identified by Lewis Tein and Lehtinen for sanctions, there was no basis for sanctions under §1927. *Kaplan v. Burrows*, No.6:10-CV-95-ORL-35DAB, 2011WL5358180, at *10 (M.D. Fla.2011 Sept. 6, 2011) ("Section 1927 sanctions are not appropriate when based solely on a frivolous complaint."), *report*

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sanctions under 28U.S.C.§1927,which provides that, quote ,any attorney who so multiples the proceedings in any case unreasonably and veraciously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys‟ fees reasonably incurred because of such conduct, end quote, and under the Court‟s inherent powers." (DE 384 at 14-15). When Lewis Tein, for the first time in its post-hearing supplemental brief (DE: 395), request entry of sanctions pursuant to Section 1927 and the Court‟s inherent authority, it was too late.

and recommendation adopted, No.6:10-CV-95-ORL-35DAB, 2011 WL 5358666 (M.D. Fla. Oct.31, 2011).

In recognizing the *potential* deficiencies in Lewis Tein‟s motion for Rule 11 Sanctions, but casting them aside, the District Court stated „I nevertheless have the power to sanction the Tribe and its counsel under 28 U.S.C. § 1927." (DE 419 at 19). The District Court‟s assertion is incorrect. The District Court cannot sanction the law firm pursuant to §1927.28 U.S.C. §1927 ("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…."); *Rodriguez v. Marble Care Int'l, Inc.*, 863 F.Supp. 2d 1168, 1178(S.D. Fla. 2012 (sanctions may not be imposed on law firm pursuant to §1927).

The District Court also ruled that by filing a Complaint that was frivolous under Rule 11, Apellants[5] *ipso facto* multiplied the proceedings in violation of 28 U.S.C.§1927. This ruling was clear error. *Kaplan v. Burrows*, 6:10-CV-95-ORL-35DAB, 2011 WL 5358180, at *10 (M.D. Fla. Sept. 6, 2011) ("Section 1927 sanctions are not appropriate when based solely on a frivolous complaint.") *report*

[10] Sanctions under §1927 may not be brought against a law firm or party, yet it appears the Sanctions Order does just that. 28 U.S.C. §1927, *Rodriguez,* 863 F.Supp.2d at 1178

and recommendation adopted, 6:10-CV-95-ORL-35DAB, 2011 WL 5358666 (M.D. Fla. Oct. 31, 2011). "[T]he mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied." *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997) (*citing Orlett v. Cincinnati Microwave, Inc.,* 954 F.2d. 414, 419 (6th Cir.1992)).

Here, apart from determining that the filing of the complaints was frivolous, the District Court did not find that Appellants multiplied any proceedings, as the District Court acknowledged is the required grounds for issuing a sanction under §1927. (DE: 419 at 14). Because the District Court made no factual findings and no evidence was presented, or argument made, that Appellants multiplied the proceedings or acted to delay the proceedings, it was clear error under well-settled Eleventh Circuit precedent for the District Court to have imposed sanctions pursuant to §1927[6]. Further, sanctions pursuant to §1927 must bear a nexus to the excess proceedings, but here, they do not. *Amlong & Amlong, P.A.,* 500F.3d at, 1242.

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[6]Appellants speculate that the Court imposed sanctions pursuant to §1927 and under its inherent authority because the Sanctions Order discussed these two potential bases for sanctions, but they cannot be certain because the Court never identified the bases under which it imposed sanctions on the Miccosukee Tribe and Appellants.

V. The District Court Reversibly Erred and Violated Appellants' Due Process Rights By Basing the Sanction Award on Appellees' Sealed Billing Records.

Where a District Court uses attorney‟s fees of the Rule 11 movants to fix the sanction award, as the District Court did here, the amount of attorney‟s fees must be reasonable. The Supreme Court has determined that the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Using *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292(11th Cir.1988), the proper emphasis should be placed on the objective lodestar approach.

Accordingly, courts have also used the four factor test outlined in Tenth Circuit where the basis of the sanction should evaluated according to four factor: (1) the reasonableness of the opposing party‟s attorney‟s fees;(2) the minimum necessary to deterrence;(3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation. *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir.1990). The fee must also have been incurred in the District Court. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S.384, 406 (1990).

In the case at bar, concealing from Appellants the attorney‟s fees evidence prevents them from confronting that evidence and its reasonableness. Further, expunging that evidence from the record, as the District Court has or apparently

will do, precludes a meaningful review on appeal and reconsideration. "The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due." *Donaldson,* 819 F.2d at 1561.

The attorney's fees records are not privileged, sensitive, or confidential and they would have represented the sole source of proof available to Appellants, and an appellate court pertaining to the basis for the amount of the Sanctions Order. *In re Grand Jury Investigation,* 769 F.2d 1485, 1487 (11th Cir. 1985). Further, in this case, the billing records were, on information and belief, submitted without an affidavit or declaration attesting to their accuracy or reasonableness and do not constitute admissible evidence. *Thomas v. Evans,* 800 F.2d 1235, 1243 (11th Cir. 1989)[7]. The District Court's *in camera* review of Appellees' attorney's fees was without legal basis and highly prejudicial, and violated Appellants' due process rights. Given that the District Court intended for the sanction of $1,071,390.00 to correspond with attorney's fees and costs allegedly incurred by Lewis Tein and Lehtinen, Appellants are entitled, at a minimum, to inspect and challenge the alleged attorney's fees.

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[7] Lewis Tein relies on *Thomas* (DE 435 at 4-5), even though the court reversed the sanction award. *See Thomas,* 880 F2d at 1237.

CONCLUSION

For the aforementioned reasons, this Court should REVERSE the Omnibus Order Granting Sanctions against Appellants, Bernardo Roman III and Bernardo Roman III, P.A.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains no more than 14,000 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

By: /s/ Bernardo Roman III

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, the foregoing was served on the following Service List by ECF or through email.

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