UNITED STATES CIRCUIT COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 15-11223
L.T. Case No. 1:12-cv-22439-MGC

BERNARDO ROMAN, III, ESQUIRE and BERNARDO ROMAN III, P.A.,

Appellants,

v.

DEXTER WAYNE LEHTINEN, ESQUIRE,
GUY LEWIS, ESQUIRE, MICHAEL TEIN, ESQUIRE, and LEWIS TEIN, P.L.,

Appellees.

Appeal from the United States District Court
for the Southern District of Florida

PRINCIPAL BRIEF OF APPELLEES, GUY LEWIS, ESQUIRE, MICHAEL TEIN, ESQUIRE, AND LEWIS TEIN, P.L.

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Miccosukee Tribe of Indians of Florida v. Cypress
Case No. 15-11223

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Appellees, Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L., pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26-2 and 26-3, hereby certify that the following persons or entities may have an interest in the outcome of this litigation:

1. Abney, George B. – Attorney for the Miccosukee Tribe of Indians of Florida
2. Akerman, LLP – Former Counsel for Appellee Dexter W. Lehtinen
3. Avila, Manuel A. – Counsel for Appellee Julio Martinez
4. Barry, Michael J. – Attorney for the Miccosukee Tribe of Indians of Florida
5. Bruce S. Rogow, P.A. – Counsel for Appellee Morgan Stanley Smith Barney, LLC
6. Calli, Paul A. – Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.
7. Campion, Tara A. – Counsel for Appellee Morgan Stanley Smith Barney, LLC
8. Carlton Fields, P.A. – Counsel for Appellees Guy Lewis, Esquire,

Michael Tein, Esquire, and Lewis Tein, P.L.

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

10. Coffey Burlington – Former Counsel for Appellee Billy Cypress

11. Coffey, Kendall B. – Counsel for Appellee Billy Cypress

12. Cohen, Jeffrey M. – Former Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.

13. Cooke, Marcia G. – U.S. District Court Judge

14. Cortinas, Angel – former Counsel for Appellant Miccosukee Tribe of Indians of Florida and Appellants Bernardo Roman III and Bernardo Roman III, P.A.

15. Cypress, Billy – Appellee

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

17. Diffley, Daniel F. – Attorney for the Miccosukee Tribe of Indians of Florida

18. Duffy, Lawrence W. – Counsel for Appellee Jose I. Marrero

19. Goldsmith, Steven M. – Counsel for Appellee Billy Cypress

20. Gunster – Former Counsel for Appellant Miccosukee Tribe of Indians of Fla.
21. Hernandez, Miguel – Appellee
22. Kaskel, Jonathan H. – Former Counsel for Appellant Miccosukee Tribe of Indians of Fla.
23. Keller Landsberg, P.A. – Former Counsel for Appellees Lewis, Tein, and Lewis Tein, P.L.
24. Keller, D. David – Former Counsel for Appellees Lewis, Tein, and Lewis Tein, P.L.
25. Klock, Joseph –Counsel (in state court) for Appellee Dexter W. Lehtinen
26. Klock, Susan – Counsel (in state court) for Appellee Dexter W. Lehtinen
27. Koltun & Lazar, P.A. – Counsel for Appellee Miguel Hernandez
28. Lara, Yesenia F. – Former Counsel for Appellant Miccosukee Tribe of Indians of Fla.; Former Counsel for Law Office of Bernardo Roman, III, P.A. and Bernardo Roman, III
29. Law Office of Bernardo Roman, III, P.A. – Appellant; Former Counsel for Appellant Miccosukee Tribe of Indians of Fla.
30. Lazar, Scott A. – Counsel for Appellee Miguel Hernandez

31. Lehtinen, Dexter Wayne – Appellee

32. Lehtinen, Schultz, Riedi, Catalano, de la Fuente, PLLC – Counsel for Appellee Dexter W. Lehtinen

33. Lewis Tein, P.L. – Appellee

34. Lewis, Guy A. – Appellee

35. Manuel A. Avila & Associates, P.A. – Counsel for Appellee Julio Martinez

36. Martinez, Julio – Appellee

37. McAliley, Chris M. – U.S. District Court Magistrate Judge

38. Meyer, Alice E. – Counsel for Appellee Billy Cypress

39. Miccosukee Tribe of Indians of Florida –Appellant in related appeal 15-11222.

40. Morgan Stanley Smith Barney, LLC – Appellee

41. Pino, Yinet – Former Counsel for Appellant Miccosukee Tribe of Indians of Fla.; Former Counsel for Law Office of Bernardo Roman, III, P.A. and Bernardo Roman, III

42. Rasco, Klock, Reinenger, Perez & Vigil –Counsel (state court) for Appellee Dexter W. Lehtinen

43. Reiter, Jack R. – Former Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.

44. Riedi, Claudio – Former Counsel for Appellee Dexter W. Lehtinen

45. Rogow, Bruce S. – Counsel for Appellee Morgan Stanley Smith Barney, LLC

46. Roman, III, Bernardo – Appellant; Former Counsel for Miccosukee Tribe of Indians of Fla.

47. Rosquete, Armando – Former Counsel for Appellee Billy Cypress

48. Saunooke Law Firm – Counsel for Appellee Billy Cypress

49. Saunooke, Robert O. – Counsel for Appellee Billy Cypress

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

51. Stein, Wendy J. – Former Counsel for Appellees Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, P.L.

52. Steven M. Goldsmith, P.A. – Counsel for Appellee Billy Cypress

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

54. Tein, Michael R. – Appellee

55. Tew Cardenas – Former Counsel for Appellee Dexter W. Lehtinen

56. Thornton, John W. – Judge in state court proceedings: *Miccosukee Tribe of Indians of Fla. v. Cypress, et al.*, Case No. 13-35956-CA-40 (Fla. 11th Cir. Ct., Miami-Dade Cty.); *Miccosukee Tribe of Indians of Fla. v. Goldenberg*, Case No. 13-6038-CA-40 (Fla. 11th Cir. Ct., Miami-Dade Cty.); and *Miccosukee Tribe of Indians of Fla. v. Lehtinen*, Case No. 11-39362-CA-40 (Fla. 11th Cir. Ct., Miami-Dade Cty.)

57. Tuck , Andrew J. – Attorney for the Miccosukee Tribe of Indians of Florida

58. West, Bryan T. – Former Counsel for Appellee Dexter W. Lehtinen

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STATEMENT REGARDING ORAL ARGUMENT

Appellees, Guy Lewis, Michael Tein and Lewis Tien, P.L. ("Lewis Tein"), believe that the issues under consideration are well settled and are capable of resolution without oral argument. Nevertheless, Appellees do not object to Appellant's request for oral argument.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal from a post-final judgment sanction order under 28 U.S.C. § 1291.

STATEMENT OF THE CASE AND FACTS

Appellants, Bernardo Roman III and Bernardo Roman III, P.A., fail to present this Court with a complete picture of the underlying issues in this case that are intertwined with several state court cases. There are many facets to the pin upon which the Tribe and its counsel were, as the district court referred to it, "dancing." [D.E. 421/54]

I. THE GENESIS OF THIS ACTION

The genesis of this lawsuit is tied to a wrongful death action resulting from a car accident involving Miccosukee Tribe member Tammy Gwen Billie and Jimmie Bert, Tammy's father and the owner of the vehicle, when Lewis Tein served as counsel to Billie and Bert. *Carlos Bermudez v. Tammy Gwen Billie,* Case No. 00-25711, (Fla. 11th Jud. Cir.). *See Bert v. Bermudez,* 95 So. 3d 274, 275 (Fla. 3d DCA 2012).

Following entry of a money judgment against Billie and Bert, a series of discovery issues arose in connection with Bermudez's efforts to hold the Tribe personally responsible for the judgment. Bermudez alleged that the Tribe funded and controlled the defense of Billie and Bert and, as a result, should be responsible for the judgment. This controversy generated accusations by Roman, the Tribe's attorney, that Lewis Tein committed perjury based upon a representation by Lewis Tein that the Tribe was not responsible for the individual Tribal member's legal

fees. *Bermudez*, 95 So. 3d at 278. The perjury accusation was purportedly supported by canceled checks delivered by Roman to counsel for Bermudez -- conduct that Florida's Third District Court of Appeal would later characterize as "mystifying." *Miccosukee Tribe of Indians of Fla. v. Bermudez,* 92 So. 3d 232 (Fla. 3d DCA 2012). As the Third District explained in that decision (which was the subject of an en banc motion):

> A few days after the trial court sanction order was entered against Lewis Tein, PL, Miccosukee officer and Tribal counsel, Bernardo Roman III, for reasons mystifying to us—plaintiffs' counsel made clear in these post-judgment proceedings he is pursuing theories he believes would make the Tribe liable to satisfy the judgment as well—supplied plaintiffs' counsel with copies of checks drawn on the Miccosukee Tribe General Account payable to Lewis Tein, PL, in the amount of $3,111,567.63, for the defense of Tammy Gwen Billie and Jimmie Bert in the Bermudez wrongful death and personal injury litigation, from May 2005 through April 2010. At oral argument on this petition, Mr. Roman represented that the Miccosukee Tribe had duly authorized him, as their counsel, to deliver the checks to plaintiffs' counsel and that indeed, the Tribe itself paid Lewis Tein, PL's, fees and costs for the defense of Tammy Gwen Billie and Jimmie Bert. In sharp contrast to Mr. Roman's representations, Lewis Tein, PL, has placed in the record the affidavits of Interim Miccosukee Tribe Chairman (1989–2009), Billy Cypress, and former Miccosukee Tribe Accounting Supervisor/Finance Officer (1990–2009), Julio Martinez, averring that Tammy Billie and Jimmie Bert, together with his wife, Louise Bert, "were solely responsible for Lewis Tein's legal fees," and "[i]n all cases, those payments were either (a) charged against their distributions on a current basis, or (b) loans from the Tribe to them against future distributions.

Id. at 233-34, reh'g denied (July 19, 2012), review denied, 114 So. 3d 935 (Fla. 2013). During those proceedings, Roman, claiming to be the Tribe's records

custodian, filed a sworn affidavit that initially misled the state trial court into believing that there were "no books of accounts or general ledgers reflecting loans or advances" between the Tribe and Lewis Tein's clients for legal fees, when, in fact, those documents were stored in Roman's office. [LT Ex. 5A, admitted DE 389/192].

As discussed below, during those proceedings, the Third District heard eight interlocutory appeals. Angel Cortinas sat as a judge on that court during each of those appeals and personally participated in three cases and personally rendered the panel's decision in one.

II. THE STATE TRIAL COURT REJECTS THE PERJURY ACCUSATIONS

The perjury accusations advanced by the Tribe and Roman in the *Bermudez* litigation resulted in year-long collateral litigation against Lewis Tein. *Bermudez,* 92 So. 3d 232, reflects a consolidated opinion arising out of two separate appeals that the Third District Court of Appeal treated as petitions for writs of certiorari. Case Nos. 3D12-871; 3D12-842. The issue before the Third District in those cases involved whether Lewis Tein could pursue discovery against the Tribe and its counsel in connection with the perjury accusations. The Third District concluded that Lewis Tein could pursue such discovery and denied motions for rehearing en banc filed in both appeals. *Bermudez,* 92 So. 3d at 235. Ultimately, the trial court found that Lewis Tein "did not commit perjury. . . ." [D.E. 347-2/1-2].

III. THE UNDERLYING DISTRICT COURT ACTION

On July 1, 2012, the Tribe and Roman filed the underlying action against Billy Cypress, the Tribe's former Chairman, Lewis Tein and others. The Complaint, signed by Roman, alleged federal racketeering, conspiracy to commit racketeering, fraud, aiding and abetting fraud, embezzlement, civil theft, and breach of fiduciary duty. [D.E. 1].

The Tribe and Roman filed an Amended Complaint on July 30, 2012, which asserted additional counts for violation of the Florida RICO and fraudulent misrepresentation, and sought the additional relief. [D.E. 13].

The district court determined that the Tribe and Roman failed to sufficiently pled the predicate facts to establish the basis for RICO and Florida RICO claims and granted the Tribe leave to file a Second Amended Complaint, which added additional details to the already-pled claims. [D.E. 55].

IV. LEWIS TEIN'S MOTION FOR SANCTIONS

On September 24, 2012, Lewis Tein filed a Motion for Sanctions, seeking sanctions against the Tribe and its attorneys pursuant to Rule 11 and section 57.105, Florida Statutes. [D.E. 38]. Lewis Tein asserted that sanctions were warranted because "the allegations, while provocative, have no basis in law or fact", there is no evidence to support the "central allegations of the claims asserted" in the Amended Complaint, the crux of which is that Defendants Lewis

and Tein "did not disclose information to Plaintiff regarding its now past chairman's activities" and, therefore, are subject to "claims for RICO and related conspiracy, fraud, aiding and abetting fraud, and breach of fiduciary duty." [D.E. 38-1/2]. Lewis Tein argued that this lawsuit is "nothing more than political retribution against counsel engaged and retained by the Tribe while under control of different officials no longer in these positions, and filed at the behest of their successors as 'payback' for the Lewis Tein's perceived allegiance to the Tribe's former leadership." [D.E. 38-1/2].

In their reply in support of the sanctions motion, Lewis Tein also asserted the Tribe and its attorneys filed the complaint in "bad faith" and for "improper purposes" including as "political ploy." [D.E. 66/10].

V. THE TRIBE'S ATTORNEYS ACKNOWLEDGE POTENTIAL PERSONAL LIABILITY

The Tribe and its attorneys responded to Lewis Tein's motion for sanctions on October 11, 2012. [D.E. 60]. They filed a sur-reply on October 29, 2012. [D.E. 73]. Roman, and his associates, Yesenia Lara and Yinet Pino, signed the Tribe's October 2012 sur-reply. [D.E. 73]. They expressly acknowledged that Lewis Tein was seeking sanctions against all three of them personally. [D.E. 73/8 ("The issue before this Court is whether sanctions should be awarded against the Miccosukee Tribe and the undersigned because the allegations in the Amended Complaint are frivolous."); D.E. 73/10 (alleging that "Defendant Lewis Tein's conclusion … the

Tribal Attorney did not investigate the allegations of fraud in the case at bar is without merit" and recognizing that the motion concerned "the issue of whether there had been an investigation of the factual basis for the Miccosukee Tribe's Complaint in this case")]. They also recognized that their good or bad faith was an issue by arguing the point in their sur-reply. [D.E. 73/6-7, 10].

VI. THE SECOND AMENDED COMPLAINT

The Tribe and Roman filed the Second Amended Complaint on November 9, 2012. [D.E. 75]. In it, the Tribe and Roman ramped up the spurious allegations of federal racketeering, conspiracy to commit racketeering, fraud, aiding and abetting fraud, embezzlement, civil theft, fraudulent misrepresentation, and breach of fiduciary duty against the defendants. [D.E. 75/¶ 2; D.E. 419/4].

They also alleged that Lewis Tein engaged in a money laundering and kickback scheme, conspired to defraud the Tribe, and that Lewis Tein was paid for its representation of individual "tribal members by means of 'loans' provided by the Miccosukee Tribe to be paid at a later date by the Tribal members,' which loans were "fictitious" and "never intended to be paid back to the Miccosukee Tribe." [D.E. 75/13-14]. The allegations in the Second Amended Complaint regarding Lewis Tein's involvement in the fictitious loans were not new. They were part of the Amended Complaint's RICO allegations but were pled with more specificity as required by the district court. [D.E. 55/5].

As the district court eventually found, in the Second Amended Complaint, the Tribe and Roman enhanced the factual allegations against Lewis Tein and "doubled-down", including more salacious and astonishing allegations. . . ." [D.E. 75; D.E. 419/4, 19]. *See* [D.E. 419/4-7] (providing a "snippet of the more pointed allegations' in the Second Amended Complaint underlying Plaintiff's major themes of liability.").

VII. LEWIS TEIN'S MOTION FOR SUMMARY JUDGMENT

In April, 2013, Lewis Tein filed a motion for summary judgment in which they reiterated that the Tribe and its lawyers brought and continued to litigate the case in bad faith. [D.E. 191/1-2, 23] (noting that "[t]his lawsuit was a sham" and describing the bad faith underlying it.). In their reply in support of summary judgment, Lewis Tein argued "the Tribe's bad faith conduct during this litigation." [D.E. 222/20].

VIII. DEXTER LEHTINEN'S RULE 11 MOTION

On September 3, 2013, Defendant/Appellee Dexter Lehtinen filed a Rule 11 motion. [D.E. 273, sealed].

IX. THE DISTRICT COURT DISMISSES THIS ACTION

On September 30, 2013, without ruling on the sanctions motions and denying as moot only those motions concerning the substantive claims, the district court entered an Omnibus Order granting the Defendants' motions to dismiss, based upon lack of jurisdiction and, alternatively, under Rule 12(b)(6) for failure to

state a federal cause of action. [D.E. 282]. The district court retained jurisdiction to rule on the sanctions motions as a collateral issue. [D.E. 419/15].

X. THIS COURT AFFIRMS THE DISTRICT COURT'S RULE 12(B)(6) DISMISSAL

This Court affirmed the district court's Rule 12(b)(6) dismissal with prejudice, finding that the Tribe failed to state a claim after having been afforded the opportunity to amend its complaint. *Miccosukee Tribe of Indians of Florida v. Cypress*, 814 F.3d 1202, 1212 (11th Cir. 2015) (finding that the Tribe's amendment to comply with Rule 9(b) specificity standard for pleading RICO claims appears to largely be an attempt to create the impression of specificity through page-number "shock and awe.").

XI. THE STATE COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF LEWIS TEIN

In addition to the federal lawsuit, the Tribe and its attorneys filed a state court action alleging virtually identical allegations against Lewis Tein. *Miccosukee Tribe of Indians of Fla. v. Lewis*, Case No. 12-12816 (Fla. 11th Jud. Cir.). In that case, after nearly two years of discovery and one month before trial, the court granted summary judgment. [D.E. 288-1] (*Miccosukee Tribe v. Lewis,* 21 Fla. L. Weekly Supp. 323(a), 324-25 (Fla. 11th Cir. Dec. 15, 2013)). The court found that there was no evidence to support the Tribe's claims:

> Distilled to its essence, the Complaint alleges that Lewis Tein 'implemented a secret and sophisticated scheme under which the

> Miccosukee Tribe and individual members of the Miccosukee Tribe were . . . fraudulently charged millions of dollars . . . by creating fictitious . . . legal work and . . . expenses.' (Comp. ¶18, 19). The thousands of pages of record evidence in this matter, ranging from affidavits to deposition transcripts, to Special Magistrate Reports and Recommendations and Orders thereon, all disclose no false statements or evidence of fictitious or improperly created or fraudulent legal fees or expenses have been perpetrated by Lewis Tein upon the Tribe.

[D.E. 288-1/ 7]. The state court also found, "[T]here is no evidence in the record of any fraud or overbilling. . . ." The court observed that the Tribe and its lawyers could point to no specific false item, instead (unsuccessfully) trying to turn the case into one dealing with the "reasonableness" of Lewis Tein's fees:

> The Tribe has failed to identify one fictitious time entry, invoice, or legal matter, attributable to Lewis Tein. Instead, the Tribe now contends that Lewis Tein's time was "unreasonable" and that the former Chairman "lacked the authority" to ratify the actions of Lewis Tein.
>
> Importantly, [during] the hearing held on December 9, 2013 this Court made a direct and specific inquiry of all three attorneys representing the Tribe to confirm that the Tribe's expert Steven Davis, was not opining on fraud and was offering no opinion or conclusion on fraud as relates to Lewis Tein's billings. Each lawyer for the Tribe [i.e., Bernardo Roman III, Yesenia Lara, and Yinet Pino] confirmed the Court's understanding. Accordingly, no evidence of fraud on the part of Lewis Tein in connection with their invoices to the Tribe has been produced.

Id. at 324-25. "There is no evidence of fraud or overbilling." *Id.* "Not a single piece of evidence reveals, and no witness testified, that any work was done maliciously or simply not done." *Id.*

The Third District Court of Appeal affirmed. *Miccosukee Tribe of Indians of Fla. v . Lewis*, 165 So. 3d 9, 12 (Fla. 3d DCA 2015) (Noting that there was no evidence to support the claims: "For example, the Tribe's expert was unable to identify a single invoice by the Lawyers that he believed was fraudulent, illegal, or excessive.").

XII. THE TRIBE'S SECOND STATE COURT ACTION AGAINST LEWIS TEIN

Undeterred, the Tribe and Roman continued their vexatious campaign of litigation by filing a second state-court lawsuit against Lewis Tein. Following the district court's dismissal of the Tribe's suit on the alternative basis of lack of subject matter jurisdiction, the Tribe re-filed the *same* complaint in state court. *Miccosukee Tribe of Indians of Florida v. Cypress*, Case No. 13-35956 (11th Jud. Cir.). As Roman admitted: "This case . . . was originally filed in Federal court before Judge Cooke . . . . It was dismissed for lack of jurisdiction . . . . And then the Tribe has re-filed it in state court[.]" [D.E. 395-5/4-5].

XIII. THE DISTRICT COURT'S POST-JUDGMENT SANCTIONS PROCEEDINGS

In the meantime, back in the underlying district court action, on November 22, 2013, Lewis Tein moved to supplement the record on their Rule 11 Motion. [D.E. 286]. The district court granted the motion on May 12, 2014. [D.E. 298].

On May 6, 2014, the district court scheduled the sanctions hearing for May 12, 2014 and, on May 12, scheduled an evidentiary hearing for June 5, 2014. [D.E. 296, 298].

XIV. LEWIS TEIN'S BENCH MEMO ON SANCTIONS

On May 30, 2014, Lewis Tein filed Bench Memo on Sanctions. [D.E. 323]. In it, Lewis Tein stated that it was seeking "the imposition of sanctions against the Tribe's counsel for its vexatious and unfounded litigation" because counsel "relentlessly pursued, with the intent to harass, the Tribe's frivolous claims against Lewis Tein" and because counsel "did not conduct an independent investigation of the Tribe's claims pre-suit or at any time and continued to litigate in the face of contradictory evidence demonstrating that the Tribe's claims against Lewis Tein were baseless." [D.E. 323/1] Lewis Tein also requested that the district court impose sanctions against the Tribe and its counsel under Rule 11 (party or attorney and its law firm), 28 U.S.C. § 1927 (attorney), and the court's inherent power (party or attorney). [D.E. 323].

XV. FORMER THIRD DISTRICT COURT OF APPEAL JUDGE ANGEL CORTINAS FILES A NOTICE OF APPEARANCE AS COUNSEL FOR THE TRIBE AND ITS ATTORNEYS

On May 30, 2014, the Gunster law firm and Angel Cortinas filed an appearance as counsel for the Tribe and its attorneys regarding the sanctions motions. [D.E. 312; D.E. 316]. They waited fifteen days after beginning work

preparing for the sanctions hearing before filing Notices of Appearance. [D.E. 353-1/2].

XVI. LEWIS TEIN AND LEHTINEN MOVE TO DISQUALIFY ANGEL CORTINAS

On June 1, 2014, Lewis Tein filed a motion to disqualify Angel Cortinas based upon his participation, as a judge on the Third District Court of Appeal, in multiple proceedings. [D.E. 331] Lewis Tein identified eight cases in that court involving the *Bermudez* action while Mr. Cortinas was an active judge sitting on that court. [D.E. 331/1-2].

	Case Name	**3d DCA Case No.**	**3d DCA Decision**	**Date**
1	Bermudez v. Bert	3D10-1335	Petition granted	5-28-2010
2	Bermudez v. Bert	3D11-3300	Petition denied as moot, ***Cortinas on panel***.	1-18-2012
3	Bert v. Bermudez	3D12-800	Petition denied	3-30-2012
4	Bert v. Bermudez **TRIBE EX. 19**	3D12-911 95 So. 3d 274	Petition denied	6-20-2012
5	Tribe v. Bermudez	3D12-842 92 232	Reh'g en banc denied ***Cortinas on panel***.	7-19-2012
6	Tribe v. Bermudez	3D12-871 92 232	Reh'g en banc denied ***Cortinas on panel***.	7-19-2012
7	Tribe. v. Tein	3D12-2132	Petition denied	8-17-2012
8	Bermudez v. Bert	3D12-3051	Petition denied	2-5-2013

[D.E. 331/2]. Mr. Cortinas personally participated in three of those cases: he personally participated in the en banc decision for two cases and personally rendered the panel's decision in one. [D.E. 331/2].

All eight appeals concerned issues related to the Tribe and Roman's allegations in the *Bermudez* regarding the "fictitious loan scheme" which the Tribe reiterated in the Second Amended Complaint [D.E. 75/14, 199] and Roman's efforts to avoid being deposed in *Bermudez* after injecting himself and the Tribe into that case. [D.E. 331/2-3] (citing *Bermudez*, 92 So. 3d 232 (Fla. 3d DCA 2012), *reh'g en banc denied* (July 19, 2012)).

Lewis Tein also pointed out Mr. Cortinas personally filed as a Rule 11 hearing exhibit, *Bert v. Bermudez*, 95 So. 3d 274 (Fla. 3d DCA 2012), an opinion that the Third District rendered in that matter while he was sitting on that court. [D.E. 331/1-2] (citing [D.E. 313]).

On June 2, 2014, Lehtinen filed a disqualification motion in which he joined in Lewis Tein's arguments and also argued that disqualification was required because Mr. Cortinas was his former law partner and worked on the very same tax matters that the Tribe claimed in this case were negligently handled. [D.E. 334].

After full briefing and hearing argument, the district court granted both motions, disqualifying Mr. Cortinas but allowing other lawyers from the Gunster law firm to continue the representation. [D.E. 349]. Attorney Jonathan H. Kaskel,

who had entered an appearance along with Mr. Cortinas [D.E. 312], Attorney William K. Hill [D.E. 352], and Attorney Edward Marod [D.E. 353] represented the Tribe and its attorneys during the evidentiary hearing.

The district court rejected Mr. Cortinas' attempts to place distance between the Tribe and Roman's accusations lodged against Lewis Tein in *Bermudez* and the Tribe and Roman's allegations in this case, which are the same allegations Mr. Cortinas was now defending Roman for making. As the district court noted in referring to Mr. Cortinas's service as a Third District Judge:

> I mean I think you can't have your cake and eat it too, you can't say Bermudez has nothing to do with this case, and then have facts from [Bermudez] as part of the underlying facts in this complaint to show at the time which is what I think you were trying to show, that there was this corrupt organization called excuse me, the Lewis Tein firm, the Lehtinen firm, and they were influencing your client to do bad things. [D.E. 382/27].

The district court characterized Mr. Cortinas's involvement in this case as giving rise to an "appearance of impropriety" and subsequently noted that it was obvious that Mr. Cortinas should not have been in this case. [D.E. 382/33-34; D.E. 383/38-39]. The district court recognized that while parties have a right to an attorney of their choice, the paramount scheme of the rules of professional conduct and the ethical rules require disqualification. [D.E. 382/33].

> How does it look for those on the outside who are not attorneys, who are not involved in the matter, who may not have been involved in the matter, to see how we as the legal community are involved and how we police ourselves. Sometimes we just don't do a very good job.

[D.E. 382/33-34].

With respect to Mr. Cortinas's role as Dexter Lehtinen's former law partner, the district court found that the partnership constituted "one activity, one client [and] one representation voice" and imputed to Mr. Cortinas knowledge regarding the allegations in the complaint alleging Lehtinen and the Tribe had a "symbiotic relationship" which Lehtinen and the partnership purportedly abused. [D.E. 382/35-36]. To permit such "an unfair informational advantage" would be improper and warranted Mr. Cortinas's disqualification. [D.E. 382/36].

When asked for clarification regarding the district court's ruling on Lewis Tein's motion based specifically upon Mr. Cortinas's role as a judge, the district court made clear it was granting both motions to disqualify and elaborated that:

> [G]iven the way this complaint and it talks about how things related to the fake loans including the legal fees paid to Lewis and Tein [for] the defense of Tammy Billie and the allegation is that Mr. Lehtinen had a symbiotic relationship with the head of the Tribe, at that time, in order for these loans to take place, it becomes so intertwined to have you [Mr. Cortinas] continue in the representation in any manner, given the nature of the complaint, I think would be inappropriate.

[D.E. 382/36].

XVII. THIS COURT DENIES THE TRIBE AND ITS ATTORNEYS' PETITION FOR WRIT OF MANDAMUS

The Tribe and its attorneys immediately appealed the disqualification order to this Court.[1] [D.E. 351]. This Court treated the appeal as a petition for writ of mandamus and entered a brief stay of the district court proceedings. [D.E. 359]. Following briefing, this Court denied the writ of mandamus because Mr. Cortinas's disqualification did not amount "to an extraordinary situation demonstrating a clear and indispensable right to issuance of the writ." Case No. 14-12495.

XVIII. THE MULTI-DAY EVIDENTIARY HEARING

The district court held an evidentiary hearing on the sanctions motions on June 10 [D.E. 384, 385], June 16 [D.E. 388], June 17 [D.E. 389], June 24 [D.E. 387], June 26 [D.E. 392], and July 1 [D.E. 422]. In lieu of closing arguments, the parties submitted supplemental trial briefs. [D.E. 394; D.E. 395; D.E. 396].

As the district court observed, "[i]t would be a mammoth undertaking to recite here the evidence" from the sanctions hearing which support the district court's conclusion that there was no evidence, or patently frivolous evidence, in

[1] The Tribe and Roman also filed a motion to disqualify Lewis Tein's counsel, which the district court denied, finding it "beyond ludicrous" and stating that "we are going to move beyond the tit for tat. Enough already." [D.E. 383/5]. The Tribe and Roman moved a second time to disqualify Lewis Tein's counsel several days later, which was also denied. [D.E. 371; D.E. 376]. Roman does not appeal from those orders.

support of the Tribe and Roman's contentions. [D.E. 419/7]. The evidence adduced included:

- Roman's admission he could point to no kickback between Lewis Tein and Former Chairman Cypress. [D.E. 389/218].
- The Tribe's outside auditor, its 21-year veteran accountant Jodi Goldenberg, and its in-house counsel before Mr. Roman all testified that they were aware of no fraud or scheme by Lewis Tein. [DE 384/92, 115, 120-21, 136, 140-41]; [D.E. 388/36-37].
- The deposition testimony of the Tribe's elected officials and Business Council members that they had no knowledge of any fraud, RICO conspiracy, or wrongdoing by Lewis Tein. [LT Ex. 15 (Tribe Vice Chairman Jasper Nelson) and LT Ex. 18 (Tribe Lawmaker and Rule 1.310(b)(6)[2] designee in state court proceeding), admitted [D.E. 388/45]].
- Roman himself was paid for representing individual Tribe member clients through the same loan system he alleged was a fraud as to Lewis Tein. [LT. Ex. 13, admitted [D.E. 384/113]]; [D.E. 384/115]; [D.E. 384/75-76].
- The Tribe accounted for the loans Roman claimed were part of a fraud, tracking their repayment over a period of ten years, and disclosing them in

[2] Fla. R. Civ. P. Rule 1.310(b)(6) is the state analogue to Fed. R. Civ. P. Rule 30(b)(6).

the Tribe's audited financials. *See e.g.* [LT Exs. 7A, 7B, and 7C, admitted [D.E. 388/45]]; [LT Exs. 8, 9, 10, & 11, admitted [D.E. 384/211]]; [D.E. 384/74, 111, 120].

- Despite claiming the loans were fraudulent, the Tribe regularly deducted installment payments from Lewis Tein's former client during the entire pendency of this case. [D.E. 419/7] (finding that "there is no doubt that the loan to Tammy Gwen Billie, Jimmie and Louise Bert for legal fees in the Bermudez matter were valid because over the course of several years and continuing until today, the Berts have been repaying on the loans.").

XIX. THE TRIBE AND ROMAN'S MOTION TO DISQUALIFY THE DISTRICT COURT JUDGE

While the sanctions motions remained pending, the Tribe and its attorneys filed a motion to disqualify the district court judge, claiming she should be disqualified for "ma[king] numerous comments demonstrating bias and partiality." [D.E. 408/2] The district court referred the motion to Chief Judge K. Michael Moore, who denied it. [D.E. 414; D.E. 417]

Chief Judge Moore found that the district court's statements "in no way demonstrate bias or partiality" and that "Movants' Motion divorces the Court's comments from their context and mischaracterizes Judge Cooke's statements." [D.E. 417/7]. *See Miccosukee Tribe of Indians of Florida v. Cypress*, 56 F. Supp. 3d 1324, 1329-30 (S.D. Fla. 2014).

Chief Judge Moore agreed with many of Judge Cooke's comments, noting that "If the Court determines that one side is pulling our leg or misstating the law or facts of the case, we express that opinion." [D.E. 417/8-9]. Chief Judge Moore also rejected the claims that Judge Cooke entered the evidentiary hearing with preconceived notions, stating:

> [J]udge Cooke has presided over the instant matter for over two years. During that time she has managed the case and entered a number of orders. Going into a sanctions hearing, judges are equipped, and rightfully so, with the knowledge they have gathered over the course of the case about the dispute, the parties, and the attorneys. This in no way indicates bias or prejudice. [I]nstead, it reminds attorneys that they should conduct themselves appropriately during the entirety of the proceedings, and not just at the point when the threat of sanctions looms large.

[D.E. 417/9]. Roman does not appeal from that order.

XX. THE OMNIBUS ORDER GRANTING DEFENDANTS' MOTIONS FOR SANCTIONS

On January 16, 2015, the district court entered its Omnibus Order Granting Defendants' Motions For Sanctions. [D.E. 419]. The court found that the Tribe's internal feud "blinded its counsel, Bernardo Roman III, Esquire and Roman Law, from adhering to the ethical tenets of our profession while pursuing legal claims against" the Tribe's former administration, "and particularly against Defendants, Guy Lewis, Esquire, Michael Tein, Esquire, and Lewis Tein, PL . . . ." [D.E. 419/1].

XXI. ROMAN'S PRE-SUIT INVESTIGATION WAS INADEQUATE

Based upon the evidence adduced during the multi-day evidentiary hearing, the district court found that Roman's pre-suit investigation was inadequate:

> [I]t appears that rather than conducting an objective investigation to ascertain whether the Tribe had valid claims against the defendants, Roman initiated the investigation with a conclusion in mind and searched for facts to accommodate his presupposed conclusion. Therefore, *Roman's pre-suit investigation was inadequate.* Roman simply disregarded and ignored the findings that did not align with his theory of liability.

[D.E. 419/7] (emphasis added).

XXII. THERE IS NO EVIDENCE OF A "LOAN SCHEME"

The district court found there was no evidence of a "loan scheme", one of the two major premises for the federal RICO claims, [D.E. 419/7] "While the proper procedures according to the Tribe's policies and procedures may not have been adhered to, there is no doubt that the loan to Tammy Gwen Billie, Jimmie and Louise Bert for legal fees in the *Bermudez* matter were valid because over the course of several years and continuing until today, the Berts have been repaying on the loans." [D.E. 419/7] (citing D.E. 384/115–122).

The district court found that Roman knew or should have known this because: (1) relevant documents were found in his office, and (2) he had Jodi Goldenberg, an accountant in the finance department for the Tribe for over 21 years, with whom to consult although he failed to do so before filing the complaints. [D.E. 419/7]. Additionally, Ms. Goldenberg testified that she spoke to

Roman about the loans and their validity before her deposition, but Roman insisted they were "not approved loans." [D.E. 419/7] (citing D.E. 384/123; D.E. 389/180-184). When Ms. Goldenberg refused to provide false testimony in conformity with Roman's theory that the loans were fake, Roman was instrumental in having her terminated shortly before her scheduled deposition. [D.E. 419/11 and n.1] (citing [D.E. 384/123-124]).

The court also found that "Roman failed to interview others who possessed pertinent information about the loans, including the Tribe's outside auditor who reported the loans to tribal members and the Tribe's former general counsel." [D.E. 419/7]; *see also* [D.E. 384/92-93, 132]; [D.E. 388/33-34].

XXIII. THERE IS NO EVIDENCE OF A "KICKBACK SCHEME"

Based upon Roman's testimony during the evidentiary hearing, the court found that "[R]oman had no evidence of a 'kickback scheme' involving Defendants Lewis Tein and former Chairman Cypress. Roman testified explicitly that he cannot identify 'a single transaction of Lewis and Tein giving money to [former Chairman Cypress].'" [D.E. 419/7].

> Q. Okay. So where is your evidence that any of the monies Lewis Tein earned and was paid for its representation of the Tribe or individual Tribe members was given to Billy Cypress?
>
> **A. I have never said that all of the money—**
>
> Q. Any, any.
>
> **A. Can I answer your question?**

> Q. $1, $1.
>
> * * *
>
> Q. Over eight hours of testimony, you haven't pointed to a single transaction of Lewis and Tein giving money to the chairman, is that right?
>
> ***A. That is correct.***
>
> Q. And you can't point to a single dollar from Lewis Tein going to the chairman, can you?
>
> ***A. No, I do not.***

[D.E. 419/7-8] (quoting from D.E. 389/180-184; emphasis in original).

The district court acknowledged the three grounds Roman claimed led him to the conclusion that Lewis Tein was involved in a kickback scheme with former Chairman Cypress. [D.E. 419/8] (citing D.E. 389/217). The district court concluded that "given Roman's admission of the evidence he lacked, his reliance on these three sources is mystifying, at best, particularly when considered with their surrounding circumstances." [D.E. 419/8].

The district court also found that:

- Roman's determination, in his sole discretion, that Lewis Tein's invoices were unreasonably high was because Roman only deemed matters in which Lewis Tein billed the Tribe less than $10,000 as reasonable, regardless of the nature and complexity of the matter and without any knowledge of Lewis Tein's extensive experience in various legal subject matters on which they provided counsel to the Tribe. [D.E. 419/8] (citing D.E. 389/60-105; D.E. 422/19-34).

- "Roman could not, or did not, cite one instance where Defendants Lewis

Tein's billing actually was fake or fraudulent." [D.E. 419/9]

- Roman disregarded that other attorneys for the Tribe, including himself, had invoices for amounts similar to Lewis Tein's invoices which Roman did not deem "unreasonable." [D.E. 419].

- "Roman testified that he charges the Tribe $300,000 monthly, or $3 million a year, for his services. [D.E. 419/8] (citing 389/235–236). On this issue, the district court stated, "Without weighing in on the 'reasonableness' of this expenditure for the Tribe, suffice it to say that Roman's discriminate selection regarding Defendants Lewis Tein's bill is the unreasonable issue here." [D.E. 419].

- While Roman conversed with Michael Diaz, original counsel to Tammie Gwen Billie in the *Bermudez*, who allegedly told Roman about former Chairman Cypress's "kickback scheme", Roman failed to further investigate the scheme and did not report Mr. Diaz or former Chairman Cypress to federal authorities or The Florida Bar. [D.E. 419/9].

- Roman's conversation with Defendant Miguel Hernandez regarding Hernandez's "suspicions" about Lewis Tein's alleged participation in the "kickback scheme" with former Chairman Cypress, in which Mr. Hernandez, when asked if he believed there was a kickback scheme "just laughed and did not give [Roman] an answer, as support for his allegations on this issue" constituted "insufficient – or patently frivolous – evidence on which to base an allegation of a kickback scheme." [D.E. 419/9] (Also noting that Hernandez was defendant in the action and did not testify that he provided Roman with any of the evidence used against him).

After discussing in depth the requirements for the imposition of sanctions under Rule 11, 28 U.S.C. § 1927, and the court's inherent authority [D.E. 419/11-15], the district court concluded that sanctions were warranted against the Tribe, Roman and Roman's law firm in the amount of $975,750 owing to Lewis Tein. [D.E. 419/26].

As to sanctions imposed against Roman, the court expressly stated:

> Rule 11 'stresses the need for some prefiling inquiry....'" The failure to investigate the merits of the law and facts of one's case prior to filing a complaint has "constitute[d] reckless behavior sufficient to rise to the level of bad faith." Therefore, where [as] here, the filing of the Second Amended Complaint occurred after having conducted an investigation that led to results ***differing*** from that alleged in the Second Amended Complaint, Roman willfully abused the judicial process by conduct tantamount to bad faith sufficient to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and this Court's inherent authority. [R]oman's argument that the suspicions he had were buttressed by a mere few, assailable facts is simply indefensible.
>
> * * *
>
> [R]oman's failure to investigate, or rely upon the facts revealed in his investigation, are inexcusable and merit sanctioning, especially given that there is no justifiable reason for an ignorant filing. It cannot be ignored that in this instance, Roman's conduct severely multiplied the litigation, costing both parties significant sums in pursuing discovery and other litigation tools. "Because [Roman] knowingly or recklessly pursued a frivolous claim based on false and unsupported allegations, [I do] not abuse [my] discretion by imposing sanctions against him pursuant to Rule 11 and 28 U.S.C. § 1927."

[D.E. 419/22-23] (citations omitted; emphasis in original).

The district court held that sanctions were warranted against the Tribe and Roman for filing the Second Amended Complaint and the litigation that ensued thereafter.[3] [D.E. 419/20]. When it was filed, "Roman knew or should have known that he had no reasonable evidentiary basis for the averments in the Second Amended Complaint because there was either no evidence or only patently frivolous evidence to support the factual contentions." [D.E. 419/20]. The Tribe

[3] The district court declined to sanction Roman's associates Yesenia Lara and Yinet Pino. [D.E. 419/23].

should be sanctioned because its records contradicted the allegations contained in the Second Amended Complaint and it permitted the Second Amended Complaint to be filed notwithstanding the blatant contradictions. [D.E. 419/23].

Regarding the amount of the sanctions, the district court stated:

> I recognize the monetary sanctions imposed are sizable. However, considering that upon a finding that a party filed a pleading that has no reasonable factual basis, which unreasonably and vexatiously multiplied the proceeding, an appropriate sanction may be the compensation of attorney's fees incurred in combating the wrongful conduct. Here, the wrongful conduct is the filing of the complaints with no reasonable factual basis to support their allegations. Following a review of the Lewis Tein's Sealed Statement of Attorney's Fees (ECF No. 400, SEALED) and Defendant Lehtinen's Filing of Legal Fees and Expenses Pursuant to Court Order (ECF No. 404, SEALED), it is difficult to parse out—given the sweeping nature of the Tribe's allegations, i.e. Defendants Lewis Tein created their law firm "for the main purpose of advancing and perfecting the plundering of the Miccosukee Tribe," Defendants Lewis Tein devised a money laundering/kickback scheme whereby Defendants Lewis Tein "would charge exorbitant fees for fictitious, unnecessary, inflated, substandard and exaggerated legal work to funnel a part thereof to Defendant Cypress," and Defendant Lehtinen "through a pattern of criminal activity ... maintained control of the affairs of the [Tribe] ... resulting in a loss of millions of dollars"—which, if any, of the legal fees incurred were not warranted by the allegations.

[D.E. 419/26] The district court also noted that based upon the history of this action, along with state court actions prior to and subsequent to this action a sizeable monetary sanction may be the only deterrence that resonates with Plaintiff and its counsel. [D.E. 419/22-23]. The district court also referred Roman to the

Florida Bar and Southern District of Florida professional committee "for investigation and appropriate disciplinary action." [D.E. 419/26].

On February 20, 2015, the district court entered Final Judgments as to Sanctions. [D.E. 431; D.E. 432]. Roman filed a Notice of Appeal from those Final Judgments and from the district court's order disqualifying Mr. Cortinas. [D.E. 445]. The Tribe also filed a Notice of Appeal [D.E. 442], but has since paid $854,394.64 of the $975,750.00 sanction [D.E. 459], and dismissed their appeal with prejudice.

STANDARD OF REVIEW

A trial court's decision to disqualify a party's counsel is reviewed for abuse of discretion. *Id.* Applying that standard, a district court has "a range of choice[s]. . . and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make." *Id.* at 310.

A district court's sanction award premised on Rule 11, 28 U.S.C. § 1927 and the district court's inherent powers is reviewed for abuse of discretion. *Cook-Benjamin v. MHM Correctional Servs., Inc.*, 571 Fed. Appx. 944, 948 (11th Cir. 2014); *Dial HD, Inc. v. ClearOne Communications, Inc.*, 536 Fed. Appx. 927, 928 (11th Cir. 2013).

A district court's finding of bad faith is a finding of fact reviewed for clear error. *Dial HD, Inc.,* 536 Fed. Appx. at 928. Appellate courts review for abuse of discretion the district court's imposition of sanctions in a certain amount, as well as the district court's order awarding attorneys' fees. *Id.* at 928.

When employing an abuse-of-discretion standard, the court must affirm unless it finds that the district court has made a clear error of judgment, or has applied the wrong legal standard. *Amlong & Amlong, P.A. v. Denny's Inc.*, 500 F.3d 1230. 1237-38 (11th Cir. 2006); *Cook-Benjamin*, 571 Fed. Appx. at 948.

SUMMARY OF THE ARGUMENT

Roman and his law firm appeal from the district court's order disqualifying Angel Cortinas. Less than a week before a scheduled evidentiary hearing on the Rule 11 Motions, Mr. Cortinas filed a notice of appearance on behalf of the Tribe and its attorneys regarding those motions. Lewis Tein filed a motion to disqualify Mr. Cortinas based upon his participation as a judge on the Third District Court of Appeal in multiple proceedings in the *Bermudez* action. Lehtinen filed a disqualification motion because Mr. Cortinas was his former law partner. The district court granted both motions, characterizing Mr. Cortinas's involvement in the case as giving rise to an "appearance of impropriety."

Regardless of the nomenclature used, the district court correctly disqualified Mr. Cortinas under the settled principle that a lawyer "shall not represent anyone in

connection with a matter in which the lawyer participated personally and substantially as a judge." Rule 4-1.12, Rules Regulating the Florida Bar. The court's ruling was based upon the irrefutable fact that the *Bermudez* case and the allegations at issue in the Rule 11 hearing were inextricably intertwined and that Mr. Cortinas's representation of the Tribe and its attorney would create an appearance of impropriety and an inherent conflict of interest. The district court's intent to prevent a violation from occurring without actually concluding that one occurred is a not clear error of judgment. The district court correctly erred on the side of caution. Of course, this Court can affirm the district court's conclusion for any reason. The district court's rationale and conclusion were accurate because Rule 4-1.12 clearly prohibits Mr. Cortinas's representation of the Tribe and its attorneys in this matter. This Court should affirm.

The district court awarded sanctions against the Tribe and its Tribal counsel, Roman and his law firm, for vexatious and frivolous litigation and the relentless pursuit of unfounded claims. The Tribe and Roman advanced related allegations in a state-court perjury accusation proceeding, and in a separate state-court lawsuit with virtually identical allegations as those advanced before the district court. Discovery taken in both the federal and state proceedings revealed that Roman and his associates never conducted an independent investigation of the Tribe's claims, and continued to litigate in the face of overwhelming evidence demonstrating that

the claims against Lewis Tein were frivolous and manufactured from whole cloth. Based on the Tribe and Roman's disregard for the sanctity of the judicial process, Lewis Tein filed a motion for sanctions which, following a multi-day evidentiary hearing, the district court granted. There is no clear error and no misapplication of the law. The district court acted within its discretion in sanctioning the Tribe and its counsel for their bad faith conduct. The Final Judgments on sanctions should be affirmed.

ARGUMENT

XXIV. THE FINAL JUDGMENT SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT EXERCISED APPROPRIATE DISCRETION IN DISQUALIFYING ANGEL CORTINAS

As a preliminary matter, Roman's contention that the district court's announcement on May 12, 2014 that it was scheduling an evidentiary hearing on Lewis Tein's motion for sanctions was the first time that anyone knew that an evidentiary hearing might occur, should be rejected.

Roman, Pino and Lara knew about their personal jeopardy for Rule 11 sanctions since September 2012, when Lewis Tein filed the Rule 11 motion. [D.E. 38-1]. In their sur-reply, they expressly acknowledged that Lewis Tein was seeking sanctions against each of them personally and not just against the Tribe. [D.E. 73/8, 10] They also recognized that their good or bad faith was at issue. [D.E. 73/6-7, 10].

The Tribe and its attorneys had nearly two years to treat Lewis Tein's Rule 11 motion seriously and to take action, including the retention of additional counsel if needed, to avoid any potential conflict. Their failure to do so falls on Roman. Likewise, Roman's assertions regarding Mr. Cortinas's non-stop, last-minute preparation for the Rule 11 hearing to suggest that he and the Tribe were prejudiced by the last-minute disqualification ring hollow. They waited until the proverbial eleventh hour to retain counsel, who then waited even longer to file their appearances. Prejudice, if any, rests at their feet.

A. The District Court's Disqualification Of Mr. Cortinas Is A Valid Exercise Of Its Discretion

The district court's disqualification of Mr. Cortinas is a valid exercise of its discretion given the interrelated nature between the Tribe's state court case against Lewis Tein and the allegations at issue before the district court. The relationship between *Bermudez* and this action is unmistakable and irrefutable. In *Bermudez*, Roman accused Lewis Tein of perjury and produced canceled checks to create the fiction that Lewis Tein lied about the source of funds for legal representation of certain Tribe members. The Tribe and its attorneys used the same canceled checks to advance frivolous lawsuits in both the district court and in the state court. In this action, the Tribe and its attorneys allege that loans reflected by the same canceled checks produced in *Bermudez* were part of an ongoing fictitious loan scheme and conspiracy to defraud the Tribe by Lewis Tein and other co-conspirators. The trial

judge in *Bermudez* cleared Lewis Tein of perjury or misleading the court; the district court dismissed this action for failure to state claims for federal RICO violations; and the state court granted summary judgment in favor of Lewis Tein finding that there was no evidence supporting the Tribe's claims.

While serving as a state appellate court judge, Mr. Cortinas participated in the review of motions for rehearing en banc that challenged the opinion regarding Lewis Tein's right to obtain discovery on the perjury allegations. In anticipation of the Rule 11 evidentiary hearing, Mr. Cortinas filed a notice of appearance and also filed as an exhibit the Third District's opinion in *Bermudez* regarding the cancelled checks that was the subject of the en banc motion that Mr. Cortinas personally participated in adjudicating. [D.E. 319-10] (Tribe's Ex. 19 for 6/5 evidentiary hearing).

Having served as a member of the en banc panel regarding the opinion that allowed Lewis Tein to pursue discovery on Roman's perjury allegations in state court, the district court acted within its discretion in precluding Mr. Cortinas from advocating on behalf of the Tribe and its attorneys regarding the implications of that decision as it relates to whether the Tribe and its attorneys had a good faith basis for pursuing this lawsuit. That would have exemplified the concern voiced by the district court regarding appearances of impropriety and the public's

perception of judicial proceedings and supports the district court's disqualification order.

Rule 4-1.12, Rules Regulating the Florida Bar, prohibits a former judge who has personally and substantially participated in a matter from serving as a lawyer for one of the parties after leaving the Bench. It is indisputable that the *Bermudez* and district court proceedings are inextricably intertwined and constitute a "matter" as defined by the Rules. *See* Rule 4-1.11(e); *Archuleta v. Turky*, 904 F. Supp. 2d 1185, 1189-90 (D. Utah 2012) ("matter" under the same rule is not limited to a single lawsuit but rather includes the same issue of fact involving the same parties, the same situation, or conduct).

Rule 4-1.12 explains through its Comment that the term "'personally and substantially' signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits."[4]

[4] Substantial participation under a rule that disqualifies a former judge from serving as counsel for a party "is not as simple as a mathematical formula." *See*

There are very few cases addressing Rule 4-1.12, but the Committee Notes to Florida Rule of Appellate Procedure 9.331 are instructive because they illustrate that en banc consideration by an active member of the Court is substantial and personal and cannot be deemed a ministerial act.[5] Specifically, the Committee Notes to the 1982 Amendment provide that "[a]ll judges in regular active service, **not excluded for cause,** will constitute the en banc panel." (emphasis added). This language makes clear that all judges on the court constitute an en banc panel and, importantly, a judge who faces a conflict of interest may not serve as part of an en banc panel. Indeed, Judge Suarez recused himself from the en banc panel considering the *Bermudez* opinion regarding the cancelled checks. [D.E. 345-2, at p. 6]. Mr. Cortinas did not.

In addition to serving on the en banc panel, Mr. Cortinas served on a three-judge panel in connection with one original proceeding and fees motion, and reviewed and denied motions for rehearing en banc of the opinion that directly

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James v. Mississippi Bar, 962 So. 2d 528 (Miss. 2007) (discussing a similar rule under the Mississippi Rules of Professional Conduct).

[5] Pursuant to Florida Rule of Appellate Procedure 9.331(d), Rehearing En Banc, a litigant may move for en banc rehearing on the grounds that a case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. According to the Rule, a vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding or by any judge in regular active service on the court. An attorney who files such a motion is required to separately certify that the panel decision is of exceptional importance or that consideration by the full court is necessary to maintain uniformity of decisions in the court.

implicates the canceled checks that the Tribe and Roman produced in their unsuccessful attempt to prove a perjury claim. Mr. Cortinas's participation in the en banc panels in *Bermudez* is clearly not ministerial and should be deemed both "substantial and personal" as contemplated in Rule 4-1.12.

The policy implications surrounding enforcement of this principle should not be minimized. While the order denying en banc review does not reflect the scope or content of discussions among Judges as to the substantive basis for relief, this should not be the subject of inquiry or of speculation. By disqualifying a former judge who substantially and personally participated in a matter, Rule 4-1.12 avoids the inherent appearance of impropriety that would result if a former judge is allowed to serve as counsel for one of the parties under these circumstances.

The district court seized upon this issue, characterizing *Bermudez* and the federal lawsuit as intertwined and creating an appearance of impropriety, while falling short of finding a "violation." The district court's intent to prevent a violation from occurring without actually concluding that one occurred is not a clear error of judgment. The district court correctly erred on the side of caution. Of course, this Court can affirm the district court's conclusion for any reason, even one not expressly articulated by the district court. *United States v. $121,100 in United States Currency,* 999 F.2d 1503 (11th Cir. 1993); *Collins v. Seaboard Coastline R. Co.*, 681 F.2d 1333, 1335 (11th Cir. 1982) ("If a decision of law is

correct, that the lower court incorrectly reasoned its way to that decision is irrelevant on appeal."). The district court's rationale and conclusion was accurate because Rule 4-1.12 clearly prohibited Mr. Cortinas's representation of the Tribe and its attorneys in this matter.

Mr. Cortinas's public statement to the Daily Business Review on June 2, 2014, also supported the District Court's conclusion. Mr. Cortinas is quoted as stating, "there is not a news story here" "Lewis and Tein's claims are baseless, **but not surprising given their litigation tactics in state court**. I won't stoop down to their level by responding further."[6] (emphasis added). Mr. Cortinas was first consulted by Petitioners on May 15, 2014, and had no involvement as an attorney in the state court proceedings. His reference to Lewis Tein's "litigation tactics in state court" could easily be, or perceived by the public as, a reference to his evaluation of Lewis Tein when he served as a Third District Judge during the State court litigation. Further, Mr. Cortinas's public statement is particularly harmful when one state-court trial judge exonerated Lewis Tein of perjury and another state-court trial judge had granted summary judgment on favor of Lewis Tein (which was later affirmed on appeal) in the Tribe's second lawsuit against Lewis Tein alleging virtually identical allegations as those advanced in this action. [D.E. 288-1].

[6] http://www.dailybusinessreview.com/id=1202657589614/Former-Miccosukee-Attorneys-Want-Current-Attorney-Thrown-Out#ixzz33yj9lOP7

Along these lines, during the disqualification hearing, Mr. Cortinas referred to the Tribe as "honorable" and as an "honorable client." [D.E. 382/ 21]. The district court correctly noted an inherent conflict created by those statements because the issue in the Rule 11 hearing was whether the Tribe made material misrepresentations against Lewis Tein and Mr. Lehtinen. [D.E. 382/ 21-22]. Again, the public could perceive Mr. Cortinas's comment as vouching for the integrity and honesty of the Tribe based upon his experience as a Judge presiding over a dispute involving the Tribe. This further illustrates the conflict that supports the district court's disqualification order.

With respect to Mr. Cortinas's role as Lehtinen's former law partner, the District Court found that the partnership constituted "one activity, one client [and] one representation voice" and imputed to Mr. Cortinas knowledge regarding the allegations in the complaint alleging Lehtinen and the Tribe had a "symbiotic relationship" which Lehtinen and the partnership purportedly abused. [D.E. 382/ 35-36] The district court found that to permit such "an unfair informational advantage" would be improper and warranted Mr. Cortinas's disqualification. [D.E. 382/36]. And, based upon the intertwined allegations in the complaint regarding the fake loans including legal fees paid to Lewis Tein for the defense and Tammy Billie and the allegations regarding Mr. Lehtinen's symbiotic relationship

with the Chairman of the Tribe at the time, it would be inappropriate for Mr. Cortinas to continue in the representation in any manner. [D.E. 382/36].

The disqualification order does not provide a basis for reversal.

II. THE FINAL JUDGMENTS ON SANCTIONS SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT EXERCISED APPROPRIATE DISCRETION BY SANCTIONING APPELLANTS UNDER RULE 11, 28 U.S.C. § 1927, AND THE COURT'S INHERENT POWERS

A. There Was No Violation Of Rule 11's Procedural Requirements

Roman contends that Lewis Tein was required to file a new Rule 11 motion once the Tribe and Roman filed the Second Amended Complaint. Roman is wrong. Any sanction imposed by the district court pursuant to Lewis Tein's Rule 11 Motion applies to the Second Amended Complaint. The Tribe and its lawyers were on notice of the issues warranting sanctions for months.

There was ample evidence adduced during the multi-day evidentiary hearing demonstrating that Roman did not perform due diligence before bringing this case. The original and amended complaints fell far wide of well-established precedents regarding RICO and RICO conspiracy allegations. This is not a case where the factual inadequacy of the complaint and evidence is apparent only in hindsight. The Tribe and Roman and not Lewis Tein were in possession of the evidence contradicting the allegations and demonstrating from day-one that the claims were baseless.

The district court gave the Tribe and Roman a chance to fix the defects in the complaints. They failed to do so, although Lewis Tein had already raised the possibility of sanctions. Certainly after Lewis Tein filed their Rule 11 motion for sanctions Roman was on notice that the amended complaint contained serious false accusations that needed to be deleted. But Roman failed to amend the complaint to correct the falsehoods, nor did he seek to withdraw the complaint or withdraw as the Tribe's counsel. Rather the Tribe and Roman "doubled-down" on the core allegations [D.E. 419/19], "including more salacious and astonishing allegations in the Second Amended Complaint" [*id.*], and continuing to advocate for them during the sanctions hearings. With the exception of the "fictitious loan scheme," the core allegations were made in the initial complaint, and were just as frivolous the second and third time around. No additional notice of their Rule 11 violations or a "re-do" of the 21-day safe harbor was required. The trial court acted within its discretion in sanctioning the Tribe, Roman and his law firm for their violation of Rule 11.

Roman contends that sanctions cannot be based on the "fictitious loans" allegations because they were not in the Amended Complaint, only the Second Amended Complaint. But those allegations were only made explicit in the Second Amended Complaint. *See* [D.E. 75 at ¶41]. The original Complaint alleged that Lewis Tein's legal work was "fictitious" and a "charade." [D.E. 1/¶42-43]. The

First Amended Complaint likewise re-alleged that scheme. [D.E. 13/¶42-44 (alleging a scheme of "fictitious" work). Finding the allegations insufficient, the district court allowed another amendment. [D.E. 55/5].

The only real specificity added to the Second Amended Complaint was the allegation of the "fictitious loan scheme." The Tribe and Roman never receded from these allegations. Rather, they repeated them in their opposition to summary judgment [D.E 210/12-22] their Rule 11 opening statement [D.E 389/34-35, 60, 63-64.], and throughout the Rule 11 evidentiary hearing (including Roman's testimony). *E.g.*, [D.E. 389/110-17].

Lewis Tein's motion for summary judgment [D.E 292/1-2, 23 and its November 2013 Rule 11 supplement [D.E. 286] placed the Tribe on notice that its Second Amended Complaint – including the loan allegations – was frivolous. Rule 11 sanctions are fully applicable to the Second Amended Complaint. *See Messengale v. Ray*, 267 F.3d 1298 (11th Cir. 2001) (affirming imposition of Rule 11 sanctions although plaintiff had amended the complaint several times since the motion was filed); *Petrano v. Nationwide Mutual Fire Ins. Co.*, No. 1:12-cv-86, 2013 WL 1325201, *1 (N.D. Fla. Feb. 4, 2013) (granting Rule 11 motion for sanctions addressing original complaint even though plaintiff later filed amended pleading).

Moreover, the district court could *sua sponte* impose Rule 11 sanctions after notice and an opportunity to be heard, both of which the Tribe and its lawyers were afforded. *iParametrics, LLC v. Howe*, 522 Fed. Appx. 737, 738-39 (11th Cir. 2013); *McDonald v. Emory Healthcare Eye Center*, 391 Fed. Appx. 851, 852-53 (11th Cir. 2010) (affirming district court's dismissal of litigant's complaint as a sanction pursuant to Rule 11).

B. **Lewis Tein's Motion Complied With The Specificity Requirements Of Rule 11**

Roman contends that Lewis Tein violated Rule 11's specificity requirements because their motion failed to identify a "single allegation" that was frivolous. However, as the district court noted:

> [A] review of the Defendants' motions for sanctions show that they directly identify the offending action, namely Plaintiff and its counsel's drafting the First Amended Complaint and Second Amended Complaint to include allegations where the factual bases are without merit. Moreover, Defendants Lewis Tein's Motion to Supplement the Record (ECF No. 286), which is being considered with the original motion as is customary with supplemental information, provides Plaintiff and its counsel with additional grounds Defendants Lewis Tein contend are sanctionable.
>
> This requirement's purpose, [i]s to afford the party threatened with sanctions adequate notice of the alleged wrongful conduct.

[D.E. 419/17].

Ample notice was given that the Tribe and its counsel could avoid Rule 11 sanctions by withdrawing or dismissing their baseless and frivolous complaints.

Nothing more was required. *See Mike Ousley Productions, Inc. v. WJBF-TV*, 952 F.2d 380, 383 (11th Cir. 1992) (There are three types of conduct that warrant Rule 11 sanctions: (1) when a party files a *pleading* that has no reasonable factual basis . . ."); *Cook-Benjamin v. MHM Correctional Servs., Inc.*, 571 Fed. Appx. 944, 949 (11th Cir. 2014) (stating that in analyzing where Rule 11 sanctions are appropriate, a court must first determine whether the *party's claims* are "objectively frivolous" in view of the facts or law and finding Rule 11 sanctions appropriate because if counsel had conducted any meaningful research he would have and should have discovered the lack of evidence to support the *claim*.); *see also Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998) (holding that sanctions are warranted when the claimant exhibits a "deliberate indifference to obvious facts" and affirming sanctions award under Rule 11 where the district court found that "after a reasonable inquiry Plaintiff should have believed that *the pleadings* he filed were not well-grounded in facts and law" because it was "patently clear that Plaintiff's claim had no chance of success from very early on when the complaint was filed. . . .").

Lewis Tein was not required to describe with specificity each allegation they believed to be frivolous when they believe the claims alleged against them are baseless. As the district court correctly observed, "Where this purpose [of

providing adequate notice] is met, sanctions may issue." [D.E. 419/17]. Adequate notice was provided here.

C. Lewis Tein Was Not Required To File A Second Rule 11 Motion So That The Tribe And Its Attorneys Would Have The Benefit Of A Second 21-Day Safe Harbor To Withdraw Their Offending Pleading

Roman contends that Rule 11 motions cannot be filed after dismissal because the plaintiff would not have the benefit of the 21-day safe harbor to withdraw the offending pleading. Thus, according to Roman, Lewis Tein's November 22, 2013 Supplement to Motion for Sanctions did not cure the purported Rule 11 21-day safe harbor violation because it was filed after the district court action was dismissed. This contention is a red herring and should be rejected as it was by the district court.

As previously discussed, Lewis Tein was not required to file a second Rule 11 motion once the Tribe and Roman filed a Second Amended Complaint. *See Messengale*, 267 F.3d 1298; *Petrano*, 2013 WL 1325201, at *1. The Tribe and Roman were not entitled to a 21-day safe harbor do-over.

D. The District Court's Factual Determinations Are Supported By The Voluminous Documentary Evidence And Testimony Presented During The Multi-Day Evidentiary Hearing

The district court's 27-page, detailed sanctions order is filled with references to evidence supporting the sanctions imposed. It is also supported by thousands of additional pages of documentary evidence and testimony.

Nonetheless, Roman cherry-picks a handful of "evidence" that he asserts the district court misconstrued, overlooked or ignored that support the claims alleged. None of these purported factual errors provide a basis for reversal. In fact, some of Roman's factual contentions are as baseless and frivolous as allegations in the complaints for which he was sanctioned.

1. The "Reasonableness" Of Lewis Tein's Fees Is Not An Issue In This Case

Roman contends that his testimony that Lewis Tein's fees were unreasonably high was sufficient to make the claim not frivolous. But the Tribe and Roman did not allege unreasonableness in the complaint, reasonableness was not an issue. [D.E. 384/155-158]. Rather, the complaints alleged Lewis Tien's invoices were fictitious and fraudulent. [D.E. 389/223-225]. Roman's personal belief that Lewis Tein's fees were unreasonably high simply does not support the RICO claims alleging fictitious and fraudulent invoices in the complaints he signed.

Roman asserts that Tribe's expert, who was not permitted to testify because he was not retained until after Roman filed the Second Amended Complaint [D.E. 392/36], found that Lewis Tein's billing was "*fictitious*" because there was no work associated with the entries and Lewis Tein's rates were excessive. This tautological assertion was expressly rejected by trial court in the virtually identical action filed by the Tribe and Roman in state court. "The thousands of pages of

record evidence in this matter . . ., all disclose no false statements or evidence of fictitious or improperly created or fraudulent legal fees or expenses have been perpetrated by Lewis Tein upon the Tribe." [D.E. 288-1, p. 7] (*Lewis,* 21 Fla. L. Weekly Supp. at 324-25). That finding was upheld on appeal. *Lewis*, 165 So. 3d at 12 ("[T]he Tribe's expert was unable to identify a single invoice by the Lawyers that he believed was fraudulent, illegal or excessive."). Moreover, the expert's post-suit analysis could not have supported Roman's pre-suit investigation.

Roman's testimony and bald assertions regarding the "unreasonableness" of Lewis Tein's fees are no more relevant or worthy of belief in this action than they were in state court. The district court did not abuse its discretion by rejecting it.

2. Courts Make Credibility Determinations And Weigh Evidence During Evidentiary Hearings

Roman complains that the district court took him to task for failing to report Attorney Diaz to the authorities for participating in a kickback scheme and that the district court ignored evidence showing that Roman did not report Attorney Diaz because Mr. Lewis was handling the matter. [D.E. 422/115-116]. But the district court was free to reject Roman's self-serving testimony. As Chief Judge Moore stated: "If the Court determines that one side is pulling our leg or misstating the law or facts of the case, we express that opinion." [D.E. 417/8-9].

Roman also contends that the district court improperly drew an inference from the Tribe's failure to call Defendant Miguel Hernandez to corroborate

Roman's testimony that Mr. Hernandez was aware of a kickback scheme; a conclusion that Roman based simply on a laugh. [D.E. 419/9].

He also asserts that the district court should not have weighed the evidence and shifted the burden to the Tribe and its attorneys to prove an ultimate fact rather that making Lewis Tein prove that the claim was frivolous. In support, Roman cites to *Allison v. Parise*, 2014 WL 1763205, at *6 (M.d. Fla. Apr. 30, 2014).

Allison does not stand for the proposition asserted. Regardless and more importantly, who other than the district court was in a better position to hear and weigh the evidence since this was an evidentiary hearing. As noted by Chief Judge Moore, "Judge Cooke has presided over the instant matter for over two years. During that time she has managed the case and entered a number of orders. Going into a sanctions hearing, judges are equipped, and rightfully so, with the knowledge they have gathered over the course of the case about the dispute, the parties, and the attorneys." [D.E. 417/9]. The district court had the ability to make credibility determinations during the multi-day evidentiary hearing and reject Roman's self-serving and uncorroborated assertions.

3. Roman's Continuing Tautological Assertions Regarding A "Fictitious Loan Scheme" Are Baseless

Roman contends that the district court erroneously concluded that the loan scheme claim was frivolous stating that "[t]he Berts noted that it was 'okay to pay' on each of Defendants Lewis Tein's legal bills." was incorrect because Lewis Tein

only submitted five bills from the last few months with unauthenticated handwritten notations. Roman also asserts that the district court ignored Jimmie Bert's deposition testimony that he never received legal bills from Lewis Tein, never authorized payment for nearly $1 million charged by Lewis Tein after the *Bermudez* verdict, and did not request a loan specific to Lewis Tein. [D.E. 422/160]. According to Roman, he was aware of this testimony and it was consistent with his understanding of the facts prior to filing the complaint.

The handwriting was authenticated by the Tribe's former general counsel before Roman, who testified that she was familiar with the signatures on many such bills and reviewed them with Lewis Tein's clients (including Jimmie Bert), who signed in front of her. [D.E. 384/84-87, 90]. Second, a huge amount of other documentary evidence and testimony at the hearing, including repayment schedules, demonstrated the existence and propriety of the loans. *See e.g.* [LT Exs. 7A, 7B, and 7C, admitted [D.E. 388/45]; [LT Exs. 8, 9, 10, & 11, admitted [D.E. 384/211]; [D.E. 384/74, 111, 120]. And third, Jimmie Bert's deposition testimony in fact supports the existence of the loans, including the fact that they were made without regard to who his lawyer would be. [DE 389/207-09, 211-12].

That Roman continues to make these baseless, tautological assertions regarding fictitious loans is outrageous and flies in the face not only of the district court's finding that Roman failed to conduct an adequate pre-suit investigation

based upon the entirety of the evidence presented during the multi-day evidentiary but also wholly ignores that in granting Lewis Tein's motion for summary judgment, the state court ruled that there was *no evidence* to support these allegations. *Lewis*, 21 Fla. L. Weekly Supp. at 324.

E. The District Court Did Not Abuse Its Discretion In Imposing Sanctions On Roman Under Rule 11, 28 U.S.C. § 1927 And The District Court's Inherent Authority

1. The District Court Identified The Authorities Forming The Basis For Sanctions And Those Authorities Support The Sanctions Imposed

Roman contends that the district court identified three potential bases for sanctions but never specified which one applied to the Tribe, Roman and Roman's law firm. This contention is disingenuous, particularly as it concerns Roman.

After discussing in depth the requirements for the imposition of sanctions under Rule 11, 28 U.S.C. 2937, and the court's inherent authority [D.E. 419/11-15], the district court concluded that sanctions were warranted against the Tribe, Roman and Roman's law firm under Rule 11, 28. U.S.C. § 1927, and the court's inherent authority in the amount of $975,750 owing to Lewis Tein. [D.E. 419/26].

As to sanctions imposed against Roman, specifically, the district court stated:

> Rule 11 'stresses the need for some prefiling inquiry....'" [T]herefore, where here, the filing of the Second Amended Complaint occurred after having conducted an investigation that led to results ***differing*** from that alleged in the Second Amended Complaint, Roman willfully

> abused the judicial process by conduct tantamount to bad faith sufficient to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and this Court's inherent authority.
>
> * * *
>
> [R]oman's failure to investigate, or rely upon the facts revealed in his investigation, are inexcusable and merit sanctioning, especially given that there is no justifiable reason for an ignorant filing. It cannot be ignored that in this instance, Roman's conduct severely multiplied the litigation, costing both parties significant sums in pursuing discovery and other litigation tools. ["B]ecause [Roman] knowingly or recklessly pursued a frivolous claim based on false and unsupported allegations, [I do] not abuse [my] discretion by imposing sanctions against him pursuant to Rule 11 and 28 U.S.C. § 1927."

[D.E. 419/22-23] (emphasis in original, citations omitted).

Under Rule 11, Roman's eponymous law firm was jointly responsible for his Rule 11 violation. *See* Rule 11(c)(1) (Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate or employee.).

In any event, when, as here, a district court grounds its sanctions order on multiple sources of authority, the appellate court's basic task in reviewing the sanctions for abuse of discretion is to determine whether the sanctions were permissible under at least one of those sources of authority. *Amlong & Amlong, P.A. v. Denny's Inc.*, 500 F.3d 1230. 1237-38 (11th Cir. 2006). If any one of the sources of authority invoked by the district court provides a sound basis for the sanctions, the appellate court must affirm the order. *Id.* *See also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997) (when the district court bases

its decision to impose sanctions on the basis of two different authorities the appellate court will analyze the propriety of the order under both rules and "the order must stand unless it cannot be supported by either rule."). All three authorities addressed by the district court provide support for the sanctions imposed against the Tribe, Roman and his law firm.

2. Lewis Tein Provided Ample Notice That They Were Seeking Sanctions Under Rule 11, 28 U.S.C. § 1927 And The Court's Inherent Authority

Roman also contends that the closest Lewis Tein came to seeking sanction pursuant to 28 U.S.C. § 1927 was when their attorney stated during opening argument that "the district court may also impose sanctions under 28 U.S.C. § 1927. . ." [D.E. 384/14-15]. Roman claims this was insufficient notice.

Roman ignores that in Lewis Tein's reply in support of the sanctions motion, Lewis Tein asserted the Tribe and its attorneys "bad faith" filing of the complaint and "improper purposes", including that it was a "political ploy." [D.E. 66/10]. Thus, the Tribe and its attorneys were placed on notice that Lewis Tein was accusing them of proceeding with this litigation in bad faith, subjecting themselves to sanctions under 28 U.S.C. § 1927 and the court's inherent powers before they even filed the Second Amended Complaint. Indeed, the Tribe and its attorneys responded to Lewis Tein's motion for sanctions on October 11, 2012 and in a sur-reply on October 29, 2012. [D.E. 60; D.E. 73]. In it, the Tribe and its counsel

recognized the lawyers' potential personal liability for sanctions and also recognized that their good or bad faith was an issue by arguing the point. [D.E. 73/6-7, 10]. Further, in the motion for summary judgment and reply, Lewis Tein reiterated that the Tribe and its attorneys brought and continued to litigate in bad faith. [D.E. 191/1-2, 23; D.E. 222/20].

Additionally, in Lewis Tein's May 30, 2014 Bench Memo on Sanctions. They expressly stated that they were seeking "the imposition of sanctions against the Tribe's counsel for its vexatious and unfounded litigation" because counsel "relentlessly pursued, with the intent to harass, the Tribe's frivolous claims against Lewis Tein" and because counsel "did not conduct an independent investigation of the Tribe's claims pre-suit or at any time and continued to litigate in the face of contradictory evidence demonstrating that the Tribe's claims against Lewis Tein were baseless." [D.E. 323/1] Lewis Tein went on to explain that the district court could sanction the Tribe and its counsel under Rule 11 (party or attorney and its law firm), 28 U.S.C. § 1927 (attorney), and the court's inherent power (party or attorney). [D.E. 323].

Clearly, Lewis Tein's motions and Bench Memo placed the Tribe and its counsel on notice that Lewis Tein was seeking sanctions based upon § 1927. *See Amlong & Amlong v. Denny's, Inc.*, 500 F.3d 1230, 1239-40, 1242 (11th Cir. 2007) ("Bad faith is the touchstone for the imposition of sanctions under § 1927 and it is

measured by the attorneys' objective conduct." "An attorney litigates in an objective bad faith under § 1928 when he knowingly or recklessly pursues a frivolous claim, delaying its dismissal by unreasonably and vexatiously multiplying the proceedings."). Indeed, simply by asserting their "bad faith" conduct, Lewis Tein placed the Tribe and its counsel on notice that they could be subject to sanctions under 28 U.S.C. § 1927 and the court's inherent authority. *See Fellheimer Eichen & Braverman v. Charter Technologies, Inc.*, 57 F.3d 1215, 1224, 1225-26 (3d Cir. 1995) (although the motion for sanctions mentioned Rule 11, the court's statements to counsel prior to the sanctions hearing that "[y]ou're on a knife's edge" and its belief that he had filed the complaint in bad faith provided sufficient notice that he was faced with sanctions under the court's inherent powers for having acted in bad faith.); *Dial HD, Inc.*, 536 Fed. Appx. at 930 (finding sufficient notice where court warned in an earlier order that it would impose sanctions if it found attorney had acted in bad faith and movant raised sanctions under the court's inherent powers in its reply in support of its Rule 11 motion).

Tribe and Roman were on notice that Lewis Tein was seeking sanctions under all three authorities.

3. The District Court Acted Within Its Discretion In Imposing Sanctions Against Roman Under 28 U.S.C. § 1927

Roman claims that the only basis identified for the imposition of sanctions was the filing of the complaints so there was no basis for sanctions under 28 U.S.C. § 1927. According to Roman, the district court necessarily found that by filing a complaint that was frivolous under Rule 11, that Roman "*ipso facto* multiplied the proceedings" in violation of § 1927. Roman is wrong.

The district court specifically stated:

> It cannot be ignored that in this instance, Roman's conduct severely multiplied the litigation, costing both parties significant sums in pursuing discovery and other litigation tools.

[D.E. 419/23].

Moreover, as the district court correctly found, the Tribe and its counsel's litigation is numerous, with this action being one of a handful. [D.E. 419/4]. "Significantly, following dismissal of this action on jurisdictional grounds, the Tribe filed a substantially similar complaint in a state court action demonstrating that the Plaintiff is not relenting with its legal crusade." [D.E. 419/4]. The court went on to note that "The history of this action, along with the attendant state actions prior and subsequent to the instant matter, indicate that a sizeable monetary sanction, in addition to the non-monetary sanction of recommendation to the

Florida Bar for ethical violations, may be the only deterrence that resonates with Plaintiff and its counsel." [D.E. 419/22-23].

It was within the district court's discretion to consider Roman's actions in this case and the other court proceedings when considering the imposition of sanctions under § 1927. *See Dial HD*, 536 Fed. Appx. at 930 (no clear error in finding the plaintiff's actions were tantamount to bad faith where the district court considered the plaintiff's actions in state court cases and finding plaintiff took those actions to retaliate against and harass the defendant).

Further, this argument should be rejected because "[w]here an attorney knowingly or recklessly pursues a frivolous claim . . . [t]he court may impose sanctions under section 1927." *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1193 (11th Cir. 2006).

There was no clear error here. The district court properly exercised its discretion by sanctioning Roman under 28 U.S.C. § 1927.

4. The District Court Did Not State That It Could Sanction Roman's Law Firm Under 28 U.S.C. § 1927

Roman contends that the district court incorrectly concluded that even if Lewis Tein's Rule 11 motion was defective, the court had the power to sanction the Tribe and its counsel under 28 U.S.C. § 1927 because § 1927 sanctions may not be imposed on a law firm. [D.E. 419/19].

Roman misrepresents the district court's statement by failing to reference the entire sentence: "Assuming, *arguendo,* that Plaintiff's argument is correct and the procedural hurdles of Rule 11 have not been cleared with regard to Defendants Lewis Tein's Rule 11 motion for sanctions, I nevertheless have the power to sanction the Tribe and its counsel under 28 U.S.C. § 1927 **and this Court's inherent power,** which, as noted *supra,* are not burdened by Rule 11's safe-harbor provision." [D.E. 419/19].

F. The District Court Acted Within Its Discretion In Basing Its Sanctions Award On Lewis Tein's Sealed Billing Records

Roman contends that the district court violated his due process rights by basing its sanctions award on sealed records which the court viewed in camera, thus, precluding Roman from "confronting that evidence and its reasonableness. This procedure was within the district court's discretion and, because the court reviewed both Lewis Tein's and the Tribe's attorneys' fees documents the court was well-placed to determine what was reasonable.

Roman fails to cite a single authority to support his contention that the district court's procedure violated the Tribe and its counsel's due process rights. This is because there was no due process violation. In fact, the procedure implemented by the district court to determine the amount of the sanction award in this action was approved by this Court in *National Union v. Olympia Holding*, 140 Fed. Appx. 860 (11th Cir. 2005). *National Union* involved a sanctions award

where a party violated an injunction by filing a RICO suit and was held in contempt for doing so. *Id.* at 874. The district court sought to compensate the defending party for costs incurred in defending the RICO complaint and in prosecuting the contempt order. *Id.* In determining the appropriate amount of the sanction, the district court reviewed the unredacted billing records filed under seal and found them reasonable. *Id.* This Court found no abuse of discretion in district court's use of this procedure. *Id.*

Similarly, in *National Union Fire Ins. Co. of Pittsburgh, PA v. Olympia Holding Corp.*, involving a civil contempt proceeding, this Court approved the district court's determination of the amount of sanctions based on the court's review of the unredacted billing records filed under seal and its determination that they were reasonable. 140 Fed Appx. 860, 864 (11th Cir. 2005).

Cassese v. Williams. 503 Fed. Appx. 55 (2d Cir. 2012) is also analogous. The court there addressed the discovery of attorneys' fees information in class actions and expressly found:

> Nor do we identify error in the district court's failure to order disclosure of class counsel's contemporaneous time records, appended to the fee request and filed under seal. While "applications for attorney's fees [must] be supported by contemporaneous [billing] records," . . . we are aware of no authority holding that class counsel must open its books to objectors for inspection by virtue of filing a fee motion. To the contrary, whether to grant objectors access to billing records is a matter within the district court's discretion.

Id. at 58 (citations omitted). The procedure employed by the district court to determine the amount of the sanctions was entirely proper.

Further, Roman's due process claim should be rejected because Roman has the ability to challenge the amount of fees without reviewing Lewis Tein's invoices. He knows the amount of legal fees he billed and that the Tribe incurred in pursuing this baseless action - - $300,000 monthly and $3 million per year - - (an amount the court also knows as a result of Roman's testimony during the hearing and the Tribe's in camera submissions). [D.E. 419/9] (citing [D.E. 398/235-36]).[7] Based upon that knowledge, Roman and the Tribe had the ability to mount a challenge to the reasonableness of the district court's sanction amount. Roman did not need to review Lewis Tein's invoices to make that challenge.

Finally, the Tribe has now paid all but $122,355.36 of the sanction. [D.E. 459]. Roman cannot seriously argue that Lewis Tein's legal fees in defending his 314 page complaint with 460 docket entries were less than that.

The district court acted within its discretion in implementing the filing under seal procedure it used to determine the amount of the sanction award.

[7] Roman admitted that William Osceola testified that Roman billed the Tribe $300,000 monthly and $3 million per year for his services and did not dispute or challenge those amounts. [D.E. 398/235-36]. In this regard, Mr. Osceola's deposition is also in evidence. [LT. Ex. 18 admitted [D.E. 388/45].

CONCLUSION

The district court exercised appropriate discretion by disqualifying Angel Cortinas from representing the Tribe and its attorneys during the sanctions proceedings because Mr. Cortinas would create an appearance of impropriety and an inherent conflict of interest and also because Rule 4-1.12, Rules Regulating the Florida Bar prohibits Mr. Cortinas's representation of the Tribe and its attorneys in this matter. The district court also exercised appropriate discretion in sanctioning the Tribe, Roman and Roman's law firm for this vexatious and frivolous litigation and the relentless pursuit of unfounded claims and continuing to litigate in the face of overwhelming evidence demonstrating that the claims against Lewis Tein were baseless and manufactured from whole cloth. The Final Judgments on sanctions should be affirmed.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 13,882 words and uses a Times New Roman 14 point font.

By: */s/ Nancy C. Ciampa*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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ADDENDUM

1. Section 57.105, Florida Statutes

2. Rule 11 of the Federal Rules of Civil Procedure

3. Rule 4-1.12 of the Rules Regulating The Florida Bar

1

West's Florida Statutes Annotated
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)
Chapter 57. Court Costs (Refs & Annos)

West's F.S.A. § 57.105

57.105. Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation

Effective: July 1, 2010

Currentness

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

(2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based

on the representations of his or her client as to the existence of those material facts.

(c) Under paragraph (1)(b) against a represented party.

(d) On the court's initiative under subsections (1) and (2) unless sanctions are awarded before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Credits

Laws 1978, c. 78-275, § 1; Laws 1986, c. 86-160, § 61; Laws 1988, c. 88-160, § 1, 2; Laws 1990, c. 90-300, § 1. Amended by Laws 1995, c. 95-147, § 316, eff. July 10, 1995; Laws 1999, c. 99-225, § 4, eff. Oct. 1, 1999; Laws 2002, c. 2002-77, § 1, eff. July 1, 2002; Laws 2003, c. 2003-94, § 9, eff. June 4, 2003; Laws 2010, c. 2010-129, § 1, eff. July 1, 2010.

West's F. S. A. § 57.105, FL ST § 57.105
Current with chapters from the 2016 2nd Regular Session of the 24th Legislature in effect through May 10, 2016

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** 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. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., FRCP Rule 11
Including Amendments Received Through 2-1-16

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West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.12

Rule 4-1.12. Former Judge or Arbitrator, Mediator or Other Third-Party Neutral

Currentness

(a) Representation of Private Client by Former Judge, Law Clerk, or Other Third-Party Neutral. Except as stated in subdivision (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) Negotiation of Employment by Judge, Law Clerk, or Other Third-Party Neutral. A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) Imputed Disqualification of Law Firm. If a lawyer is disqualified by subdivision (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) Exemption for Arbitrator as Partisan. An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Credits

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); March 23, 2006, effective May 22, 2006 (933 So.2d 417).

West's F. S. A. Bar Rule 4-1.12, FL ST BAR Rule 4-1.12
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 03/01/16. All other State Court Rules are current with amendments received through 03/01/16.

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