IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 15-11223

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

BERNARDO ROMAN, III, et al.

Appellants,

vs.

DEXTER WAYNE LEHTINEN, et al.

Appellees.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS ……..i

TABLE OF AUTHORITIES…….ii

ARGUMENT…….1

I. THE DISTRICT COURT DID NOT EXERCISE APPROPRIATE DISCRETION IN DISQUALIFYING APPELLANTS' COUNSEL OF CHOICE……1

II. THE DISTRICT COURT REVERSIBLY ERRED BY RELYING ON LEWIS TEIN'S MOTION FOR SANCTIONS, WHICH DID NOT COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 11(C)(2)….3

III. THE DISTRICT COURT REVERSIBLY ERRED BY FINDING THERE WERE NO FACTS SUPPORTING THE SECOND AMENDED COMPLAINT……..3

IV. THE DISTRICT COURT DID NOT EXERCISE APPROPRIATE DISCRETION BY SANCTIONING APPELLANTS UNDER RULE 11, 28 U.S.C. § 1927, AND THE COURT'S INHERENT POWERS……...12

V. THE DISTRICT COURT REVERSIBLY ERRED AND VIOLATED APPELLANTS' DUE PROCESS RIGHTS BY BASING THE SANCTION AWARD ON APPELLEES' SEALED BILLING RECORDS……12

TABLE OF AUTHORITIES

Cases

Carlos Bermudez v. Tammy Gwen Billie, Case No. 00-25711 (Fla. 11th Jud. Cir.)……1, 2

Bert v. Bermudez, 95 So.3d 274 (Fla. 3DCA 2012)……..1, 3

Peoria & P.U. Ry. Co. v. United States, 263 U.S. 528, 536 (1924)……..2

T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1528 n.5 (11th Cir. 1985)……..2

Statutes

28 U.S.C. § 1291.....8

28 U.S.C. § 1927 ……12

Rules

FED.R.CIV.P 11…..… ……..3

Rule 4-1.12 of the Rules Regulating the Florida Bar…… ...1

ARGUMENT

I. The District Court Did Not Exercise Appropriate Discretion in Disqualifying Appellants' Counsel of Choice

Appellees Guy Lewis and Michael Tein ("Lewis Tein") argued that the disqualification of Appellants' Counsel of Choice, former State District Court Judge Angel Cortinas, was a valid exercise of the District Court's discretion because Mr. Cortinas had participated as appellate court judge in the review of motions for rehearing en banc in the case of *Carlos Bermudez v. Tammy Gwen Billie,* Case No. 00-25711 (Fla. 11th Jud. Cir.); *Bert v. Bermudez,* 95 So.3d 274 (Fla. 3d DCA 2012). Lewis Tein's argument is not relevant and procedurally barred for the following reasons.

Contrary to Lewis Tein's assertion, the District Court did not disqualify Mr. Cortinas on those grounds. The District Court determined that Mr. Cortinas did not violate any rule of professional responsibility in connection with his former position as an appellate judge. (DE 382 at 34).

Second, Lewis Tein did not enter a cross-appeal from the District Court's decision that Mr. Cortinas was not subject to disqualification under Rule 4-1.12 of the Rules Regulating the Florida Bar. The sole basis on which Lewis argued to disqualify Judge Cortinas concerned his tenure as a judge on Florida's Third

District Court of Appeal. (DE 331 at 1). Lewis Tein's failure to file a cross-appeal from the ruling of the District Court on this issue means that Lewis Tein has failed to preserve the issue for future appeal. *See T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1528 n.5 (11th Cir. 1985). The Supreme Court has made it clear that if a party fails to enter a cross-appeal from the court's action in overruling its objection, the right to insist upon it is lost. *Peoria & P.U. Ry. Co. v. United States*, 263 U.S. 528, 536 (1924).

Third, Lewis Tein does not dispute that the District Court disqualified Mr. Cortinas based on Mr. Cortinas' employment at Dexter Wayne Lehtinen's firm 20 years ago. (DE 382 at 34-35). The District Court alluded to some sort of "unfair informational advantage" as a basis for the disqualification of Mr. Cortinas without once stating what this "information" was and how such information existed. (Id. at 19). The movant never identified the alleged "unfair informational advantage." (DE 283 at 19). Lewis Tein does not dispute that the District Court disqualified Mr. Cortinas without identifying any applicable Rule of Professional Conduct for disqualification and without determining whether he had violated any Rule of Professional Conduct.

Appellants, Bernardo Roman III and Bernardo Roman III, P.A. ("Mr. Roman") dispute the factual allegations and interpretations of the court

proceedings regarding the state cases of *Carlos Bermudez v. Tammy Gwen Billie*, Case No. 00-25711 (Fla. 11th Jud. Cir.); *Bert v. Bermudez*, 95 So.3d 274 (Fla. 3d DCA 2012) as presented by Lewis and Tein throughout its Answer Brief. Mr. Roman also disputes the relation of these state cases to this appeal as represented by Lewis Tein. Although the Miccosukee Tribe relied on some factual and documentary evidence from those cases to support its Complaint, the causes of action, the facts and the documentary evidence in the case at bar was not the same.

In conclusion, Lewis Tein does not present any valid arguments in their Answer Brief which rebut Mr. Roman's contention that the District Court did not exercise appropriate discretion in disqualifying Mr. Roman's Counsel of Choice, Mr. Cortinas. Accordingly, the District Court's decision should be reversed.

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

Regarding this issue, Mr. Roman relies on his previous arguments as presented in Appellants' Brief.

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

Lewis Tein argues that there were no facts to support the Second Amended Complaint. Contrary to Lewis Tein's assertion, there were facts to support the

allegations of a "loan scheme" and a "kickback scheme." Lewis Tein's legal analysis is incorrect for the following reasons.

In the case at bar, the Miccosukee Tribe had already conducted its own internal forensic investigation of its financial records before filing its Complaint and impugning the integrity of those financial records. Based in part on its forensic accounting and the role played by some former employees and a consultant in the preparation of the impugned financial records, the Miccosukee Tribe authorized filing the Complaint against Lewis Tein and the other named Defendants. These former employees and the consultant are the same witnesses Lewis Tein relied on for its defense in the case at bar.

Contrary to Lewis Tein's assertion, these former employees and the consultant did not testify that the "loan system" established by Mr. Cypress to justify his theft of millions of dollars from the Miccosukee Tribe and his payment of millions of dollars in legal fees to Lewis Tein was a legitimate loan system. One of Lewis Tein's witnesses, Jodi Goldenberg, former Senior Accountant for the Miccosukee Tribe described, Mr. Cypress' "loan system" as follows:

> Q. Then let's be clear, the Tribe does not have a regular repayment Schedule for these so-called loans for the legal bills, does it?
> A. **They have whatever they have. Whatever they have in Administration that determines people's loans and how much they are going to pay them back and how often, that is - - I mean, that could be your repayment schedule. But I**

wouldn't have that.
Q. You have never seen that, have you?
A. I mean -- I see the repayments. That's what I see.
Q. Okay. Are there any subaccounts under the general account showing which tribal members owe money to the Tribe?
A. **Just – Billy's is the only one that is separate. As we have been over many, many times, too, what is owed by individual Tribe members is kept track of in administration.**
Q. Okay. So when you say **Billy, Billy Cypress**, unlike all of the other members, had a different accounting system for his loans, correct?
A. **No, he didn't have a different accounting system. We created another code to show it separately because – I think mostly they just wanted to make sure that that was delineated in the financials so that it wouldn't look like it was being buried with the other ones, you know what I mean. It says Billy Cypress so you can see that's being memorialized, that's being recorded, it is right there in the financial statements.**
Q. To be clear, who is they?
A. In which context? I just said a whole paragraph.
Q. I know. What you said was they did not want it to look like Billy Cypress' loans were buried along with the other loans. They did not want it to look like that. Who is they?
A. **No. I don't remember saying it exactly like that. What I I mean is I think it gave a better appearance to have it separate.**
Q. A better appearance to whom?
A. **To anybody that would see the financial statements.**
Q. **Isn't true that "they" started to account for Billy Cypress' loans out of a different loan account after the IRS began inquiring about his payments from the Tribe?**
A. **I have no idea because I don't know at what point they started inquiring about that.** [Emphasis added here].

(D 384 at 166-167).

Ms. Goldenberg's testimony corroborates the Miccosukee Tribe's assertion that the "loan system" was a "loan scheme," (DE 147-190), and a sham prepared for the Internal Revenue Service to benefit Billy Cypress.

In **December 2005**, the Internal Revenue Service officially confirmed to Lewis Tein and Defendant Lehtinen that it was investigating Mr. Cypress. *See also* Plaintiff's Exhibits 41A and 41B (DE 313). The "loan system" that Ms. Goldenberg described and prepared in her capacity as Senior Accountant was incorporated in the "audits" created by another of Lewis Tein's witnesses, Jose Menendez ("Mr. Menendez"). *See also* Plaintiff's Exhibits 24B, 24C, 25A, 25B, 25C, 26A, and 26B (DE 313). These "audits" prepared by Mr. Menendez, like the "loan system" prepared by Ms. Goldenberg, were prepared for the Internal Revenue System that was investigating Billy Cypress. Mr. Menendez's testimony regarding how he prepared these "audits" further confirms this assertion. (DE 388 at 11-33). Mr. Menendez, the "independent" auditor hired by Billy Cypress, worked closely with Ms. Goldenberg in the preparation of the "audits." Billy Cypress would later present these "audits" to the Internal Revenue Service to justify the millions of dollars that he spent from tribal funds for personal expenses. A review credit card charges and ATM withdrawals challenges whether these expenditures were legitimate "loans." The Internal Revenue System reached the

same conclusion Mr. Roman reached about the "loan system" prepared by Ms. Goldenberg and the "audits" prepared by Mr. Menendez.

Contrary to Lewis Tein's assertion, Jeannine Bennett, Esquire ("Ms. Bennett"), former General Counsel (In-House) for the Miccosukee Tribe, did not confirm that the millions in legal fees to Lewis Tein authorized by Mr. Cypress were "loans." (DE 384 at 94-108). According to Ms. Bennett, she was left in the dark about this issue.

The Miccosukee Tribe also presented independent witnesses, other than Mr. Roman, who contradicted the testimony and documentary evidence of these witnesses.

Carlos Trueba, CPA ("Mr. Trueba"), an independent Auditor and expert witness presented by the Miccosukee Tribe, disputed the testimony and work performed by Mr. Menendez and Ms. Goldenberg regarding the accounting and auditing practices employed by Mr. Cypress. (DE 387 at 43-86). Mr. Trueba also disputed whether the millions of dollars in legal fees authorized by Mr. Cypress and paid to Lewis Tein qualified as loans. Id.

Steven Davis, Esquire ("Mr. Davis"), a qualified expert in attorney fees was hired by the Miccosukee Tribe to determine whether Lewis Tein's attorney fees were fraudulent. Mr. Davis concluded that Mr. Lewis' attorney fees were

excessive and billings were 'fictitious." Mr. Davis concluded that in the year 2009, 2200 of the 2700 hours billed were fictitious because "there was no work associated with the entries." Mr. Davis also concluded that Lewis Tein's rates were excessive; *see also* Plaintiff's Exhibits 15 A and 15B (DE 319-1 and DE 319-2). Although Mr. Davis' conclusion contradicted Lewis Tein's position, the District Court erroneously refused to consider this evidence (DE 392 at 36) and excluded Mr. Davis' expert testimony (DE 392 at 61-63).

Charles Morley ("Mr. Morley"), a qualified money laundering expert hired by the Miccosukee Tribe, found a pattern of common money laundering practices involving "Mr. Cypress and the attorneys." (DE 389 at 118-120). The District Court erroneously refused to consider this evidence and excluded Mr. Morley's expert testimony (DE 389 at 23-34).

Contrary to Lewis Tein's assertion, there was substantial evidence submitted to support the allegation of a "kickback scheme" between Billy Cypress and Lewis Tein. (DE 389 at 55, 215-234). Also, evidence was presented that Billy Cypress admitted to this "kickback scheme" with Lewis Tein. (DE 388 at 177-181). Chairman Colley Billie executed Interrogatories confirming Billy Cypress' admission of his "kickback scheme" with Lewis Tein.

> Q. Mr. Roman, in connection with the kickback scheme involving the Lewis and Tein firm, in your investigation,

did you ever discussed with any tribal members Mr. Billy Cypress's admissions abut that kickback scheme?
A. Yes.
Q. Could you please discuss the discussions that you had?
A. **In the summer of 2010, may have been May – I think it was August, the general council at a meeting – at one of their quarterly meetings passed a resolution based on –**
THE COURT: Which general council are we talking, S-E-L or C-I-L?
THE WITNESS: **I am sorry, Your Honor, C-O-U-N-C-I-L, the general council of the Tribe, not the lawyer. The general council had discussed the evidence that had been gathered about the spenditure [sic] of Billy Cypress, and they had passed a resolution where they said that they could not run for office again, that he had done damage to the Tribe, and some specific language. I wasn't there, but the resolution was passed. I had to work on it, after it was passed, on drafting the language. Mr. Jorden Burt [sic] also worked on it, Sonia O'Donnell worked on it.**
Q. I'm sorry. You said Mr. Jorden Burt, you mean Mr. Jim Jorden?
A. Yeah.
Q. Okay.
All right. An after the general council meeting, what happened?
A. **There were general discussions whether the matter was going to be referred to the U.S. Attorney's Office for prosecution, so there was a meeting arranged between the clients and the family.**
MR. CALLI: I object, the question was –
THE COURT: Basis for the objection?
MR. CALLI: Nonresponsive to the initial question.
THE COURT: Objection sustained.
Rephrase, Counsel. Ask a question or I'm goint to direct the witness to answer the question.
MR. HILL: Sure.
Q. To your knowledge, what happened after the general

council meeting involving chairman Billy Cypress?
THE COURT: Happen where? When? To Whom?
MR. HILL: Sure.
Q. Did you discuss – was there a meeting held after the general council meeting in which tribal members discussed with Billy Cypress the allegations of a kickback scheme?
A. Yes.
Q. And what was reported to you about that meeting? First of all, who told you about it?
A. The chairman, Colley Billie, told me about the meeting.
Q. What did he say? Who did he say attended this meeting?
A. **It took place in his conference room. It was attended by Miguel Hernandez and several tribal members representing Billy Cypress's family, and I think there was a – oh, there was a gentleman by the name of Wayne Billie. That's the names that I remember.**
Q. And what was discussed with Mr. Cypress and the others at that meeting?
MR. CALLI: Just for clarity, not to object.
THE COURT: Well, I'm a little confused as well this time, Mr. Calli. He already said he wasn't at the meeting, someone else is telling some else about what was said.
MR. HILL: Yes, Your Honor.
THE COURT: We are so downstream about what could possibly be credible that – Mr. Calli, your objection is sustained.
Q. **Did Chairman Colley Billie tell you that Mr. Billy Cypress said in regards to the kickback scheme?**
A. **Yes. And subsequent to that, he executed answers to interrogatories on that specific issue.**
THE COURT: That's not the question.
MR. HILL: Okay.
Q. **Did he tell you?**
A. **Yes, he did.**
Q. **And what did Billy Cypress say about the kickback scheme?**

A. **That he was receiving money back from Lewis Tein.**
Q. **Did that – did you have that knowledge as related to you by Chairman Colley Billie when you were formulating the complaint that was eventually filed in this case?**
A. **Yes.**
Q. **And did you rely on that as evidence to support the allegations of the kickback scheme?**
A. **Yes.**
Q. **Did Chairman Colley Billie also execute interrogatories in this case?**
A. **Yes, but I'm not sure whether it was in this case, but yes.**
Q. **Okay. You have seen signed interrogatories by Colley Billie also confirming Cypress's statements confirming the kickback scheme?**
A. **Yes. And they were filed.**
MR. HILL: **Your Honor, I would like to move some exhibits into evidence.**
Most of these have been discussed with opposing Counsel, and I don't think we'll have substantial objections to most of these. Exhibits 5A, 5B, and 5C.
THE COURT: Mr. Calli and Mr. Lehtinen, are there any objections to 5A, B, and C?
MR. CALLI: We are stipulating to their admissibility under 104(b) subject to some – at some later time, these lawyers making this relevant to a kickback scheme.
THE COURT: Mr. Lehtinen, any objection?
MR. LEHTINEN: No objection, Your Honor.
THE COURT: **Received.**
(Evidence admitted as Plaintiff Exhibit Nos. 5A, 5B, 5C)
[Emphasis added here].

(DE 388 at 177-181.

Lewis Tein concluded that because its witnesses and documentary evidence rebutted the allegations in the Second Amended Complaint, there were no facts supporting it. However, that is not the legal analysis for imposing Rule 11

Sanctions. The applicable legal analysis is whether there were facts supporting the Second Amended Complaint.

In the case at bar, the record clearly shows an abundance of facts and documentary evidence in support of the Second Amended Complaint. Consequently, the District Court committed reversible error in its finding to the contrary and its decision should be reversed.

IV. The District Court Did Not Exercise Appropriate Discretion By Sanctioning Appellants Under Rule 11, 28 U.S.C. § 1927, And The Court's Inherent Powers

Mr. Roman relies on his previous arguments on this issue as presented in Appellants' Brief.

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

Lewis Tein argues that because it has settled with the Miccosukee Tribe for all but $122,355.36 of the sanction, there is no need for Mr. Roman to review Lewis Tein's billing records. Mr. Roman argues that this partial settlement between Lewis Tein and the Miccosukee Tribe makes it more imperative for Mr. Roman to have access to Lewis Tein's billing records.

It is reasonable to conclude that Lewis Tein has provided its billing records to the Miccosukee Tribe as part of the settlement. Therefore, there is no valid

reason for Mr. Roman to be denied the same right. Contrary to Lewis Tein's assertion, the amount of the settlement is not the issue.

The principles of due process entitle Mr. Roman to independently determine whether the amount of the sanction imposed by the District Court corresponds to work performed by Lewis Tein and reflected in the billing records. Also, the enormous disparity between the sanctions awarded to Defendant Lehtinen ($95,640.00) and those awarded to Lewis Tein ($975,750.00) cause one to question the billing records of the latter. Since Lewis Tein and the Miccosukee Tribe has settled for an amount less than the full amount of the sanctions, Mr. Roman's right to review the billing records is now more critical than ever.

Lewis Tein argues that the Miccosukee Tribe paid Mr. Roman $300,000 per month and $3 million per year to prosecute this case and that Mr. Roman's billing records submitted, in-camera, to the District Court confirm it. This argument is utterly false. First, the Miccosukee Tribe did not pay such monthly or yearly amounts to Mr. Roman. Second, Mr. Roman never testified that the Miccosukee Tribe had paid him such monthly or yearly amounts. Therefore, the billing records submitted to the District Court by Mr. Roman do not substantiate the claims of Lewis Tein. show such amount, either monthly or yearly. Lewis Tein's representation about its knowledge of records submitted, in-camera, under

seal to the District Court, is very novel.

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

Respectfully submitted,

/s/Bernardo Roman III .
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CERTIFICATE OF COMPLIANCE

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

By: /s/ Bernardo Roman III

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2016, the foregoing was served on the following Service List by ECF or through email.

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