UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-60786-Civ-Cooke/Bandstra

COQUINA INVESTMENTS,

Plaintiff,

v.

SCOTT W. ROTHSTEIN and
TD BANK, N.A.

Defendants.
_____/

PLAINTIFF'S FOURTH MOTION FOR SANCTIONS

Plaintiff, Coquina Investments ("Coquina"), pursuant to Fed. R. Civ. P. 37 and 16 and this Court's inherent authority to regulate litigation and sanction parties and their counsel, hereby moves for an order of sanctions against Defendant TD Bank, N.A. for altering a key document and working a fraud on the Court and the jury. In support of its motion, Coquina states as follows:

Background

A centerpiece of TD Bank's defense at trial was that it did not designate Rothstein, Rosenfeldt & Adler (RRA) as a High Risk customer and, therefore, RRA's accounts were not subject to enhanced due diligence by the bank. The Defendant maintained that RRA's Low Risk status meant that RRA's accounts were not subject to robust monitoring or scrutiny, which fully explained and excused its failure to detect the massive money laundering occurring in connection with the Rothstein Ponzi scheme. The Defendant's banking expert testified unequivocally at trial that TD Bank did not consider RRA a high risk customer. Tr. 1/10/12, 46:13-16. In short, the Bank asserted that because RRA was a Low Risk customer it was blameless, and this was a critical point of contention during the trial.

The Bank's Customer Due Diligence Form was relevant in litigating the risk status issue. It was admitted into evidence at trial as Exhibit P-912 (attached hereto as Exhibit 1). However, it is now painfully apparent that the Defendant altered the document with the intent to mislead the jury.

A few days ago, in the related case of *Emess Capital v. TD Bank*, Case No. 10-60882-Civ-Lenard, the Defendant produced a substantially different RRA Customer Due Diligence Form (bates labeled TD/Emess 0006777 and attached as Exhibit 2). Even a cursory examination of the recently produced document shows that P-912, the document admitted into evidence in this case, is a fraud.

In the "true" document, a bright red band at the top of the page states unequivocally and in capital letters that the RRA accounts were designated **"HIGH RISK."** In what can only be characterized as a fraud on the Court and the jury, the **"HIGH RISK"** designation appears to have been blacked out and omitted from Exhibit P-912.[1]

Due to pivotal importance of whether RRA was a High Risk customer to TD Bank's defense, the revelation that the RRA Customer Due Diligence Form has **"HIGH RISK"** across the top of the document in red and capitalized is highly probative and obviously substantially undercuts the defense. TD Bank's production of what amounts to a "sanitized" version of the document, without the vitally important red heading of "High Risk," is so adverse to TD Bank's position that any possible claim of mistake or inadvertent alteration of this document is neither plausible, nor credible.

Having possessed the "true" document throughout the litigation, there is no question that the Defendant and its counsel sat silently as Exhibit P-912, the highly misleading document the Bank produced, was entered into evidence and relied on by trial witnesses. There is simply no excuse for such misconduct. Coquina respectfully requests sanctions sufficient to punish the Defendant and appropriate to deter such egregious conduct against other litigants.

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[1] The Defendant produced Exhibit P-912 in discovery bates labeled TD/Coquina 002483.

ANALYSIS

I. The Defendant Should Be Sanctioned for Repeated Discovery Violations.

This is only the latest example of the Defendant's repeated discovery violations. TD Bank's misconduct throughout this litigation is detailed in Coquina's three other Motions for Sanctions [*see* D.E. 599, 645, 717]. TD Bank buried critical documents, produced them in an non-searchable fashion, mixed up attachments so they would not follow emails, made baseless objections to clearly relevant documents, produced documents late, on the eve of trial, during the trial and refused altogether to produce certain documents. Examined collectively, there can be little doubt that the Defendant's actions have been in bad faith.

Rule 16, Fed. R. Civ. P. provides that:

> On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney ... fails to obey a scheduling or other pretrial order.

"A party's failure to comply with its discovery obligations within the time provided by the Court's Scheduling Order constitutes a violation of Rule 16, *see Albemarle Corp. v. Chemtura Corp.*, 251 F.R.D. 204, 206 (E.D. La.2008), and triggers the Court's authority to impose sanctions under Rule 37. *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 08-CIV-20424, 2009 U.S. Dist. LEXIS 130736, *6-7 (S.D. Fla. Apr. 9, 009) (Simonton, J.). *See also Arbor Int'l Foods, L.L.C. v. Reco Sales Corp.*, 2006 U.S. Dist. LEXIS 40048, *7-8 (N.D. Ga. Jun. 16, 2006) (where plaintiff's failure to produce documents before close of discovery prejudiced defendant and failure to provide evidence excusing its failure to do so, court ruled no lesser sanction than dismissal of complaint with prejudice would "maintain the judicial process").

The district court has broad discretion to fashion appropriate sanctions for the violation of discovery orders. *United States v. Certain Real Property Located at Route 1*, 126 F.3d 1314, 1317

(11th Cir.1997); *Malautea v. Suzuki Motor Company, Ltd.*, 987 F.2d 1536 (11th Cir. 1993). *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 657 (M.D. Fla. 2007). Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process. *Sphinx Int'l, Inc., v. Nat'l Union fire Ins. Co. of Pitt* .,2003 U.S. Dist. LEXIS 27206, *23 (M.D. Fla. Mar. 21, 2003). Other "[p]ermissible purposes of sanctions include: 1) compensating the court and other parties for the added expense caused by the abusive conduct; 2) compelling discovery; 3) deterring others from engaging in similar conduct; and 4) penalizing the guilty party or attorney. *Preferred Care Partners*, 2009 U.S. Dist. LEXIS 130736 at *7-8, *citing Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir.1985).

II. The Court Has Inherent Authority to Punish the Defendant

In addition to the authority expressly provided by the Federal Rules with respect to discovery practices, the Court may also impose sanctions based on its inherent power to manage its docket and its cases. *Preferred Care Partners Holding Corp.*, 2009 U.S. Dist. LEXIS 130736 at *10-13; *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D. Fla.1987); *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 657 (M.D. Fla. 2007); *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir.1995). A finding of bad faith is required to impose sanctions based on the Court's inherent powers. *In re Mroz*, 65 F.3d at 1575; *Preferred Care Partners., supra*; *In re Seroquel Products Liability Litigation, supra.*

Bad faith is found where a party defrauds the court, raises frivolous arguments, delays or disrupts the litigation or hampers the enforcement of a court order. *Quantum Communications Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1268-69 (S.D. Fla.2007). "[T]he inherent powers doctrine is most often invoked where a party commits perjury or destroys or doctors evidence." *Id.* at 1269; *see Action Marine, Inc. v. Continental Carbon Co., Inc.*, 243 F.R.D. 670, 682-84, 686-89 (M.D. Ala. 2007) (granting motion for sanctions and finding bad faith where party "altered and

sanitized documents" of information adverse to party, related to key issue at trial, and timing of disclosure of information after trial); *see, e.g., Carrier Corp. v. G.W. Martin, Inc.*, 2009 U.S. Dist. LEXIS 54769, *19-24 (N.D. Ga. May 27, 2009) (finding sanctionable bad faith conduct, where party failed to produce document regarding key issue of causation, and the witness' conversation set forth in the withheld documents conflicted with his testimony, and due to witness' email being "so adverse" to Plaintiff's position, the court did not believe that witness' testimony was a "mere inadvertent representation").

Furthermore, where a party fails to provide information so adverse to that party's position, inadvertency is not plausible. *See, e.g.,Carrier Corp,* 2009 U.S. Dist. LEXIS 54769 at *22-23. Likewise, a court rejected a party's claim that production of a sanitized version of key documents was "mere oversight" as "disingenuous," where the timing of the disclosure of highly relevant information previously removed from documents was after trial, the party disclosed some non-santized version of these documents in a related case, and the sanitized information benefitted the opposing party. *Action Marine, Inc.*, 243 F.R.D. at 682-83.

Moreover, "[s]everal federal courts have held that the need for sanctions is heightened when the misconduct relates to the pivotal or 'linchpin' issue in the case." *Quantum Communications Corp.*, 473 F. Supp. 2d at 1269 (citing *Vargas v. Peltz*, 901 F. Supp. 1572, 1582 (S.D. Fla. 1995); *Nichols v. Klein Tools, Inc.*,949 F.2d 1047, 1049 (8th Cir. 1991)); *see, Carrier Corp.*, 2009 U.S. Dist. LEXIS 54769 at *19-24; *Action Marine, Inc.*, 243 F.R.D. at 682-84. A party's production of misleading documents regarding vital issues to a case have been a basis for a finding of bad faith. *Id.*; *see also Chemtall, Inc. v. Citi-Chem.*, 992 F. Supp. 1390, 1410 *S.D. Ga. 1998).

Further, the Eleventh Circuit has upheld sanctions against a law firm and its client for egregious sanctionable conduct. *Bank Atlantic v. Blyth Eastman Pain Weber, Inc.*, 12 F.3d 1045 (11th Cir. 1994); *Pespalstic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir. 1986);

Kipperman v. Onex Corp., 260 F.R.D. 682, 699-700 (N.D. Ga. 2009) (granting in part motion for sanctions for withholding documents for three years, and ordering payment of attorney's fees due to defendant's dilatory conduct).

Finally, it is axiomatic that TD Bank submission of a doctored and sanitized version of the RRA Customer Due Diligence form prejudiced Coquina. Withholding the "HIGH RISK" header from the RRA Customer Due Diligence form lent credibility to TD Bank's defense and allowed TD Bank to mislead the jury regarding whether the Bank considered RRA a high risk customer.

Conclusion

Compounded by all of its other misconduct, TD Bank's purposeful withholding of the true original RRA Customer Due Diligence Form constitutes evidence of willful bad faith. Given that the Defendant possessed the true document all along, the Defendant's and its counsel's failure to say anything about the altered document being admitted into evidence demonstrates both intentional malfeasance and a flagrant lack of candor to the Court. Pursuant to the Court's powers, TD Bank should be sanctioned for repeated egregious bad faith conduct. *See, e.g.*, *Bank Atlantic*, 12 F.3d 1045; *Pespalstic, C.A.*, 799 F.2d 1510; *Kipperman*, 260 F.R.D. at 699-700.

WHEREFORE, Coquina Investments prays that the Court enter an Order:

(1) sanctioning TD Bank in the manner and extent that the Court deems just and appropriate;

(2) referring TD Bank to the Office of the United States Attorney for investigation of potential obstruction of justice charges; and

(3) referring Defense counsel to the Florida Bar for investigation into what role, if any, Defense counsel had in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 26, 2012, a true and correct copy of the foregoing was electronically filed via CM/ECF.

/s/ David S. Mandel