UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEOR EXPLORATION &
PRODUCTION LLC, *et al.*, **CASE NO. 09-60136-CIV-SEITZ/O'SULLIVAN**

Plaintiffs,

vs.

GUMA AGUIAR,

Defendant.

GUMA AGUIAR, **CASE NO. 09-60683-CIV-SEITZ/O'SULLIVAN**

Plaintiff,

v.

WILLIAM NATBONY, et al.,

Defendants.

AGUIAR'S OPPOSITION TO MOTION FOR SANCTIONS

Petitioners[1] rely entirely on the affidavit of Thomas Kaplan – which is one part false and the other part wishful thinking – as the sole support for their claim that Kaplan's emails must have been "hacked" because he thinks he did not share his password. Kaplan's recollection is entirely unreliable. His claimed memory as to which email addresses he used and at which points in time is demonstrably inaccurate. Regarding the password, Kaplan has now admitted in

[1] The term "Petitioners" as used in this motion does not include Katten Muchin Rosenmann ("Katten Muchin"), as the Petitioners who filed the motion at Leor Dkt. # 135 and Malpractice Dkt. # 51 are Thomas Kaplan, Leor Exploration & Production LLC, Pardus Petroleum L.P., Pardus Petroleum LLC, and William Natbony, both individually and as Trustee of the Dafna Kaplan 2003 Eight-Year Grantor Retained Annuity Trust and the Thomas Kaplan 2004 Ten-Year Grantor Retained Annuity Trust (together, the "GRATs").

testimony in the separate proceeding he filed in Israel that *the email address at issue*[2] – *kaplan600@aol.com – was created by Aguiar*. In that testimony Kaplan continued to insist (as he must to avoid perjury charges) that he kept the password secret, but he is not credible. Viewing the circumstances of how, when and where the kaplan600 address was created, it is apparent that Aguiar had the password from early 2004 when the account was opened.

Kaplan's false sworn declaration has additional ramifications. Because he is unable to credibly establish that his password was kept confidential, Kaplan had no reasonable expectation of privacy in the kaplan600 address, and the communications contained therein are not privileged. Further, through the use of Kaplan's false declaration in these matters and in the action Kaplan filed in Israel to gain access to emails between Aguiar and his counsel, Petitioners' unclean hands preclude the drastic relief they seek.

I. BACKGROUND

A. Kaplan600 Address

Kaplan attests that he started using the kaplan600 address at least as early as January 2001, and that he used it "exclusively" from mid-2002 forward. (Declaration of Thomas Kaplan ("Kaplan Dec.") at ¶ 2, Leor Dkt. # 135-3, Malpractice Dkt. # 51-3). These statements are incorrect, being squarely contradicted by the documents produced in this lawsuit. At least 12 emails have been produced in this litigation, dating from November 2002 to December 2003, in which Kaplan used an address other than kaplan600@aol.com. (Ex. 1, Collection of Emails with Kaplan at "silver@cybercable.fr" and "silver@noos.fr").[3] The earliest communication produced

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[2] The term "kaplan600 address" refers to that address.

[3] Exhibits 1 and 2 contain emails designated as "confidential" by the producing party under the Agreed Protective Order previously entered by the Court. (Leor Dkt. # 86). Accordingly, those emails are being filed in the public record only in redacted form, and the unredacted emails are being filed under seal pursuant to paragraph 11 of the Agreed Protective Order.

in this litigation in which the kaplan600 address appears is dated April 27, 2004, not January, 2001. (Ex. 2, Collection of Emails Using the kaplan600 address, at SLEEB000235). There are at least two emails using the kaplan600 address in April 2004, at least six in May 2004, and at least eight in June 2004. (Ex. 2). The evidence will show that the reason the kaplan600 address is first used in 2004 is because this is when Aguiar created it while the two of them were together in a Florida hotel.

Kaplan admitted this week on October 14, during cross examination in the Israeli action, that Aguiar set up the kaplan600 address, that the two of them indeed may have been sitting in the same hotel room in Florida as Aguiar entered the keystrokes creating the kaplan600 address, and that no one ever changed the password for that address from that moment until September, 2009. (The transcript of that testimony is not yet available, but will be submitted to the Court upon receipt.) As for the password, Kaplan claimed he did not share it with Aguiar, but his cross-examination shows this claim to be a tactical position rather than an actual recollection. Kaplan, who admitted to no computer or other technical skills, does not recall how, if not entered by Aguiar, the password was entered in order for the kaplan600 address to be created. Combined with the other plainly inaccurate statements in his affidavit regarding the dates when he swore he was and was not using certain email addresses, Kaplan's alleged recollection that he did not let anyone, including Aguiar, "know [his] password or use [his] email account" (Kaplan Dec. at ¶ 2, Leor Dkt. # 135-3, Malpractice Dkt. # 51-3) is thus shown to be wishful at best, and not credible in any event.

B. Israeli Proceedings And Seizure Of *Aguiar's* Emails

Kaplan supplied the same unsupported assertion – that the password to the kaplan600 address was "kept secret" – to a district court in Israel earlier this month in an *ex parte* proceeding he instigated against an internet service provider ("ISP")[4] to convince that court to issue a warrant authorizing the seizure and search of computers in Israel. (Receiver Opinion at pp.1, 6, Leor Dkt. # 135-6, Malpractice Dkt. # 51-6). The "expert" Kaplan retained concluded that "*if the owner of the E-mail Account did not give his password to anybody else*, the copying of information from the E-mail Account . . . . shows that the E-mail Account was hacked." (Opinion of Maglan Group at p. 5, Leor Dkt. # 135-5, Malpractice Dkt. # 51-5) (emphasis added). The court, in an *ex parte* proceeding, had no choice but to take at face value Kaplan's alleged memory regarding his password and the reliant "expert" opinion. The court thus granted Kaplan's motion, authorizing the seizure of a computer server from a third-party company that provided services to Aguiar.

Kaplan then leveraged his suspect recollection to gain access to *Aguiar's* emails. Specifically, Kaplan's counsel in Israel worded the requested warrant contrary to Israeli law by having it authorize the receiver (who was chosen by Kaplan) to seize a computer server from the ISP using police power, and to then immediately review the contents of the computer and provide the contents of that computer server directly to Kaplan.[5] (Receiver Opinion at p. 2, Leor Dkt. # 135-6, Malpractice Dkt. # 51-6). The court indicated it would approve the *ex parte* request for an order, but no order was signed that afternoon appointing the receiver and thus the receiver had no authority to act. Nevertheless, Kaplan's receiver seized the computer server that very evening and, when he secured the server after 11:00 p.m., brought the server immediately to the lab and started reviewing its contents. The receiver accessed the computer server and copied

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[4] Kaplan did not name Aguiar as a party to the case or otherwise provide him notice of the proceedings.

[5] This issue has been raised with the Israeli court, but has not been ruled upon.

emails from Aguiar's account, gumaaguiar@aol.com.[6] By the next morning, Respondents in the Israeli proceedings had obtained an order that the receiver not be allowed to review the server or to disclose any information to Kaplan's counsel, but it appears to have been too late. By then these materials presumably were transferred to Kaplan according to plan.

C. Sanctions Motion

After pursuing the Israeli Proceedings but being stymied there by the court that froze any further intrusions into the seized computer server, Petitioners filed the instant Motion, premised as in the Israeli action entirely on the issue of whether Kaplan shared his password with Aguiar. Petitioners' "expert" opinion that the address must have been "hacked" is conditioned on the question of whether Kaplan maintained the "confidentiality" of the password to the kaplan600 address. (*See* Opinion of Maglan Group at p. 5, Leor Dkt. # 135-5, Malpractice Dkt. # 51-5; Obuchowski Declaration ("Obuchowski Dec.") at ¶ 2, Leor Dkt. # 135-4, Malpractice Dkt. # 51-4). Neither Kaplan nor his experts offer *any* evidence to support the main thrust of Petitioners' Motion – there is no evidence that Aguiar hired computer experts to bypass security walls and thus "hack" into an email account, and no evidence that Aguiar actually reviewed emails that are privileged or that relate to the subject matter of this litigation.

D. Fears Of Harm

Among the 14 emails Petitioners claim Aguiar accessed are communications with Itzhak Dar. (Obuchowski Dec. at ¶ 3, Leor Dkt. # 135-4, Malpractice Dkt. # 51-4). Dar is a former member of the Mossad, the Israeli intelligence and covert operations agency, who now works as Managing Director, Counterterrorism Systems for Shafran USA (*see*

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[6] The intended actions of Kaplan's receiver created the very "injury" to Aguiar that Kaplan is currently claiming in this case – that somehow the capacity of a person whose emails have been accessed to litigate a civil claim has been irreparably compromised. Absent specific proof of prejudice, however, proof that is wholly lacking in Kaplan's filings, no such irreparable injury to the litigation rights of either party can be presumed as a matter of law.

www.shafranusa.com/management.html), and has been the head of Kaplan's security team for a long time. (Obuchowski Dec. at ¶ 3, Leor Dkt. # 135-4, Malpractice Dkt. # 51-4). In 2008, at Kaplan's suggestion, Dar became the head of security services to Aguiar as well, and thus Dar became intimately familiar with Aguiar's comings and goings and knowledgeable about Aguiar's residences and potential security weaknesses. Aguiar also knows well that Kaplan made a very serious threat to kill his own father (and Aguiar's grandfather) Jason Kaplan when they were estranged. As stated by Jason Kaplan's wife, who witnessed the threat, the "blood rushed out of [Tom Kaplan's] face" and he stated to his father, "I could have you killed. All I have to do is make a couple phone calls and you would be killed." (Ex. 3, Joint Recording of Jason and Patricia Kaplan with Guma Aguiar, at pp. 9-10.) Given Kaplan's motives and willingness along with Dar's capacity and knowledge, Aguiar is wise to fear for his safety.[7] Allegations of accessing the emails of Dar are the antithesis of any improper gaining of litigation or trade secrets.

II. LEGAL STANDARD

Petitioners have requested that the Court exercise its inherent powers to impose litigation-ending sanctions on Aguiar. This power to sanction "for *litigation misconduct*" (*see Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1306 (11th Cir. 2009) (emphasis added)), "derives from the court's need 'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). Thus, in order to invoke the Court's powers, Petitioners must establish that

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[7] Aguiar anticipates Petitioners might dispute whether such fear is rational. Such criticism would miss the mark as Petitioners' opinion of the reasonableness of the fear does not diminish Aguiar's faith in it. *See United States v. Mann*, 884 F.2d 532, 537 (10th Cir. 1989) (citing *Mathews v. United States*, 485 U.S. 58 (1988)) (noting even an irrational fear can be held in good faith). Moreover, no evidence has been presented to the Court to contradict the good faith of Aguiar's belief. Indeed, Aguiar has testified previously that Kaplan issued a threat to kill Jason Kaplan. (Ex. 4, Aguiar Dep. at 90:13-25).

the complained-of conduct constitutes litigation abuse in the case before it. *See generally Chambers*, 501 U.S. at 46; *Atchison, Topeka and Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1073 (9th Cir. 1998) ("The effect of a district court's sanction may not pervade beyond the action in which the violation occurred.").

The Court must then evaluate this request with "restraint and discretion." *See generally Chambers*, 501 U.S. at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion"); *see also McCarthy v. Am. Airlines, Inc.*, No. 07-61016-CIV, 2008 WL 2517129, at *2 (S.D. Fla. Jun. 23, 2008) (litigation-ending sanctions are "an extreme remedy, and should not lightly be engaged") (citation omitted). Although the Court does have "inherent power to impose sanctions on litigants, up to and including dismissal with prejudice, based on their perpetration of fraud," *id*. (citing *Aoude v. Mobil Oil Corp*., 892 F.2d 1115, 1118 (1st Cir. 1989)), the Court may exercise that discretion only where Petitioners demonstrate "*clearly and convincingly*, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Id*. (citation omitted) (emphasis added). Further, Petitioners must also demonstrate that the alleged misconduct has prejudiced them. *See Barnhill v. United* States, 11 F.3d 1360, 1367-68 (7th Cir. 1993) (in "absence of prejudicial effect, adverse judgment was too severe a form of discipline").

Even where such a showing is made, the Court's discretion is further "governed, of course, by the most fundamental safeguard of fairness: the Due Process Clause of the Fifth Amendment," *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV, 2009 WL 982460, at *4 (S.D. Fla. Apr. 9, 2009) (quoting *Serra Chevrolet, Inc. v. General*

Motors Corp., 446 F.3d 1137, 1151 (11th Cir. 2006) (holding that neither $700,000 fine nor the striking of the affirmative defenses of *res judicata* and other doctrines of issue preclusion satisfied "the basic standard of due process")), and by the party's right to trial by jury under the Seventh Amendment. *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 129 (S.D. Fla. 1987) (Marcus, J.) (acknowledging that the sanction of dismissal "represents, in effect, an infringement upon a party's right to trial by jury under the Seventh Amendment"). Accordingly, and "[t]o comply with the Due Process Clause, a court must impose sanctions that are both just and specifically related to the particular claim or defense affected by the misconduct." *Serra*, 446 F.3d at 1151 (internal quotations omitted) (reasoning that default is not appropriate without such a "nexus"); *see also Richardson v. Union Oil Co. of California*, 167 F.R.D. 1, 4 (D.D.C. 1996) ("the Court must then calibrate the scales in determining what sanction corresponds to the misconduct and whether a sanction less than the draconian one of default would sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits") (internal quotations and citations omitted). Thus a court should not impose any sanction, let alone a terminating one, that "in light of the entire record, is not proportionate to the circumstances surrounding a party's failure to comply with discovery rules." 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2284 (2d ed. 2009) (citing *Salgado by Salgado v. General Motors Corp.*, 150 F.3d 735 (7th Cir. 1998)). This requirement that sanctions be proportionate is based in part on the "strong presumption in favor of adjudication on the merits" since a "default judgment would obviously not just frustrate, but obliterate, that presumption." *Richardson*, 167 F.R.D. at 4-5.

III. ARGUMENT

A. Evidence Of The Alleged Hacking Is Deficient, Thus Petitioners Have Failed To Meet Their Burden.

The urged conclusion that Aguiar acted in bad faith rests on the conclusion that the kaplan600 address was "hacked," which in turn is premised entirely on the unsupportable notion that Kaplan "has kept confidential his password to access the emails in his AOL Account, and has never granted authorization to Guma Aguiar or anyone else to use or access Kaplan's AOL Email Account." (Mot. at 3). But Kaplan's recollection, on which the entire house of cards rests, is demonstrably inaccurate and thus unreliable. Kaplan is not able to prove that he never shared the password for the kaplan600 address, and he is left to rely entirely on his faulty recollection and his need to avoid admitting that he perjured himself in his affidavit. To be sure, nowhere do Petitioners show, whether in Kaplan's declaration, Obuchowski's declaration, or otherwise, that any emails were accessed by bypassing security walls or any other nefarious activity – indeed it would appear that any access was obtained by using the password.

B. Petitioners Have Not Established A Connection Between Aguiar's Conduct And This Litigation.

Petitioners also fail to demonstrate bad faith on the part of Aguiar because they are not able to show that the complained-of conduct – the alleged "hacking" Petitioners would attribute to Aguiar – is related to this litigation. This failure of proof is critical. *See Atchison*, 146 F.3d at 1073 (9th Cir. 1998); *see also Matter of Case*, 937 F.2d 1014, 1023 (5th Cir. 1991) (ruling that bankruptcy court's inherent power to sanction does not extend to bad faith conduct in related proceedings because "[i]nherent power must arise from the litigation before that court"). Contrary to the cases by Petitioners – where materials were not only obtained in bad faith, but obtained for the purpose of the litigation at issue[8] – Petitioners offer no evidence to support their speculation that Aguiar is engaged in "improper means to further his financial and litigation agenda." (Mot. at ¶ 15.) Not only do Petitioners fail to meet that burden, but in this case there indeed would be an understandable motive that is entirely separate from any assumed desire to see legal discussions – the safety and security of Aguiar and his family. (*See, supra,* I.D.) Further, Petitioners acknowledge Kaplan converses with his security chief Dar in some portion of the 45,000 emails at issue, and Petitioners make no claim of privilege as to that material. Thus even if Petitioners could demonstrate the other elements needed to consider a sanction, which they clearly have not, Petitioners' failure to make a showing that any access to emails would be related to this case – as opposed to, for example, the reasonable chance that any access to emails could have been for the purpose of evaluating security concerns or protecting against dangers – is fatal to their Motion.

C. Kaplan Does Not Meet His Burden To Demonstrate That Privilege Can Attach To Any Emails On Kaplan600.

Kaplan's inability to demonstrate that he kept secret the password to kaplan600 address for over five years, especially where he admits he did not once change it until on the eve of his Motion, undermines any claim of privilege he might otherwise try to assert over communications he conducted using the address. Under Florida law, communications are not attorney-client

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8 *See, e.g., Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, No. 1:04-CV-1015-JOF, 2007 WL 2479290 (N.D. Ga. Aug. 28, 2008), *aff'd Eagle Hosp.*, 561 F.3d at 1298 *et seq*. (party obtained privileged communications discussing, *inter alia*, "the draft complaint in the instant case" and attached those communications in support of an affidavit he submitted to the court); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 431-32 (W.D. Wash. 2002) (plaintiff stole or otherwise wrongfully obtained material including proprietary, privileged, and confidential information of former employer and used that information in preparation of case against employer); *Perna v. Electronic Data Systems*, 916 F. Supp. 388 (D.N.J. 1995) (plaintiff copied papers relevant to the litigation from opposing counsel's briefcase in effort to take "whatever measures he could, no matter how improper, to prevail in this lawsuit"); *Lipin v. Bender*, 644 N.E. 2d 1300, 1301 (N.Y. 1994) (plaintiff obtained opposing counsel's work product during hearing and retained it as "material evidence" for use in litigation).

privileged if made without a reasonable expectation of privacy. *See* Fla. Stat. § 90.507 ("A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person… makes the communication when he or she does not have a reasonable expectation of privacy."). Courts have consistently held that there is no reasonable expectation of privacy in password-protected files when a party reveals that password to other parties. *See, e.g., Olson v. Holland Computers*, No. 06CA008941, 2007 WL 2694202 (Ohio Ct. App. Sept. 17, 2007) (finding no reasonable expectation of privacy in email account where plaintiff was aware defendant knew her email password); *United States v. D'Andrea*, 497 F. Supp. 2d 117, 123 (D. Mass. 2007) (finding no reasonable expectation of privacy in password protected files where it appeared password was revealed to a third party, despite the fact that the defendants claimed they never revealed the password); *Wilson v. Moreau*, 440 F.Supp.2d 81, 104 (D.R.I. 2006) (revelation of a password to law enforcement officials "underscored" the "consensual nature of [a] search"). In addition, at least one court has found no reasonable expectation of privacy when a party was careless with their password, thus allowing a third party to learn their password. *See United States v. David*, 756 F. Supp. 1385, 1390 (D. Nev. 1991) (finding no expectation of privacy in password-protected files where defendant typed his password while law enforcement officer looked over his shoulder).

In this case, Kaplan did not have a reasonable expectation of privacy in the materials contained in the kaplan600 address if there is a reasonable possibility that he shared the password with Aguiar. Kaplan and Aguiar had an extremely close relationship at the time Aguiar set up the address in 2004, in which Kaplan shared with Aguiar information that he would not share with anyone else, and Kaplan is not able to demonstrate that he kept the password confidential, either then or since that time. No privilege applies to the contents of the kaplan600 address. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) ("the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege . . . if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels-if not crown jewels"); J. WIGMORE, EVIDENCE § 2325 (4th ed. 2009) ("[I]t leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents.") Thus even if Plaintiffs could establish that any communications were reviewed, they fail to show that the communications are privileged. Axiomatically, Kaplan's communications with others can be afforded no more protection than communications with attorneys, thus Petitioners also cannot claim that any business or trade secret communications can support their Motion.

D. The Drastic Remedy Petitioners Seek Is Out Of Proportion To The Alleged Misconduct And Unsupported By Law And Equity.

Next, even if Petitioners were able to show that "hacking" occurred, which they cannot, their Motion fails because again they are assuming, rather than showing, "irreparable prejudice" that they argue precludes them from litigating "on an even playing field." (Mot. at 2, 10).[9] Petitioners have made no showing of any prejudice, much less that any conduct has so tainted the proceedings that the Leor Plaintiffs are incapable of prosecuting their case against Aguiar or that the Malpractice Defendants are incapable of presenting a defense on the merits.[10] *See*

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9 In an effort to verify Petitioners' unsupported allegations of prejudice, Special Counsel for Aguiar requested Petitioners make the disputed emails available for review. Special Counsel moved the Court to grant them access after Petitioners denied that request. (*See* Emergency Motion for Access to Materials in Order to Respond to Motion for Sanctions and Incorporated Memo of Law, Leor Dkt. # 151). The Court denied Aguiar's motion without prejudice on October 13, 2009.

10 For example, there is no evidence as to the content of any of the emails that were allegedly available to be viewed. Indeed, the suggestion is only that materials in the kaplan600 address would have been accessible. Even if those emails are determined to be privileged despite Kaplan's lack of a

Telectron, 116 F.R.D. at 131 ("Before the ultimate sanction of default judgment may be entered," the Court must find "that Plaintiff was prejudiced by Defendant's conduct." This finding of prejudice is among the "prerequisites . . . developed as a means of ensuring the proper balance between the need to engender good-faith adherence to the rules of discovery, on the one hand, and a commitment to protecting the parties' constitutional and policy interests in a full and fair adjudication of their claims, on the other."); *Barnhill*, 11 F.3d at 1370 (holding that the "drastic sanction of dismissal or judgment" is inappropriate where "no meaningful impact upon the course of the litigation has been shown," and that "in the absence of prejudicial effect, adverse judgment was too severe a form of discipline . . . . ").

The differences between Plaintiffs' principal authority – *Eagle Hospital* – and the instant case illustrate this point. Here, unlike in *Eagle Hospital*, there is no evidence that Aguiar "hacked" the account at issue, much less that the account contained privileged emails concerning the litigation, that Aguiar accessed those emails, or that he made use of them in this litigation. Further, in *Eagle Hospital*, the court concluded that "all of Eagle's confidential email communications had been *and would continue to be monitored*." *Eagle Hosp.*, 561 F.3d at 1307 (emphasis added) Petitioners have made no such allegation here.[11]

Even if Petitioners were able to establish some resulting prejudice – which they have not and cannot – this Court should deny their Motion because the relief they request is excessive and unsupported by the law, and because they do not come with clean hands. Petitioners seek the ultimate sanction – default judgment in the Leor Case brought *against* Aguiar and dismissal with

reasonable expectation of privacy in them, there is no evidence that they contained anything material relating to Natbony, Katten Muchin, the GRATs, or the pending litigation. Nor is there evidence that Aguiar actually read them or shared them with his lawyers.

[11] Moreover, there were no unclean hands on the other side in *Eagle Hospital*, much less, as here, unclean hands tantamount to the original alleged misconduct. *See, infra*, III.F.

prejudice of his claims in the Malpractice Case. Petitioners contend this relief is warranted because of Aguiar's alleged access to a wide variety of materials, some unknown portion of which is alleged to be privileged and material to the claims in one or both of these cases. But the authority on which Petitioners rely to justify this sanction involved circumstances where the offending party not only had clearly accessed privileged material, but also made use of that material in the litigation.[12] There has been no showing here on either issue.

Further, none of Petitioners' authority involves a request for litigation-ending sanctions where, as here, more than $1 billion is at stake. Courts faced with such a request have considered the amount in controversy in declining to grant such an extreme sanction, even where faced with a "textbook case of discovery abuse" and evidence of prejudice. *See Kipperman v. Onex Corp.*, No. 1:05-CV-1242-JOF, 2009 WL 1473708, at *19 (N.D. Ga. May 27, 2009) (declining to award "the ultimate sanction" in case where hundreds of millions of dollars were at stake and acknowledging that, "[w]ere this court to avoid trying this case on the merits, it might be granting the largest default judgment sought by a defendant in the history of the nation").

E. Because Petitioners Failed To Meet Their Burden, It Would Violate Due Process To Require Aguiar To Present Evidence On This Record At This Time.

In this Motion Petitioners ask the Court to force Aguiar to take the stand and testify about what they assert is arguably a criminal matter (Oct. 13, 2009 Tr., Leor Dkt. # 164, at 12:6-8), without making a *prima facie* showing[13] that Aguiar "hacked" the kaplan600 address, without

[12] *See, e.g.*, *Eagle Hosp.*, 561 F.3d at 1302 (party attached privileged emails to an affidavit submitted to the court); *Jackson*, 211 F.R.D. at 431-32 (there was "clear reliance on the stolen documents in the preparation of [plaintiff's] case" and plaintiff sent copies of stolen documents to his attorneys); *Lipin*, 644 N.E.2d at 1301 (plaintiff's counsel used the privileged documents in a settlement conference to demand a large settlement).

[13] In the "normal order of presentation" of evidence, the party which bears the burden of persuasion presents its physical evidence and witnesses, who testify on direct and then cross examination. *See* 28

showing that any accessed material relates to this case, and without Kaplan affirmatively proving his reasonable unwaived expectation of privacy in the kaplan600 address in the period at issue.[14] As Petitioners' authority acknowledges, however, Aguiar has the opportunity to invoke the Fifth Amendment in response to questions concerning the serious allegations Petitioners have leveled against him, and Petitioners may ask the Court to draw adverse inferences against him for doing so. *See Eagle Hosp.*, 561 F.3d at 1304. Accordingly, the Court should require Petitioners to meet their burden, including showing that Aguiar reviewed and used privileged communications, *before* requiring Aguiar to present evidence on this record.[15] *See generally In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 910-11 (9th Cir. 2004) (overturning finding of contempt for refusal to turn over documents under claim of Fifth Amendment privilege where government had failed "to establish the existence of the documents sought and [appellant's] possession of them with 'reasonable particularity'").

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 6164 (citations omitted). It is only after this process is completed that the other party presents its evidence. *See id*. (citations omitted). While courts are permitted to vary the "mode and order of proof," variations from this normal order are limited by the "constitutional rights of litigants to present evidence," including the requirement of due process in civil cases. *See id.* Indeed "[i]n criminal cases, severe constitutional rights may be implicated by rulings [changing the normal order of presentation of evidence] which are adverse to the accused." *Id*. In addition, in non-trial settings, a movant is generally required to meet his burden of production before forcing a non-movant to defend herself in an evidentiary hearing. *See, e.g., United States v. Tudoran*, 476 F. Supp. 2d 205, 216-17 (N.D.N.Y. 2007) (requiring a defendant to meet his burden of production before allowing a suppression hearing).

[14] Petitioners' request is especially troubling because the scope of conduct triggering criminal laws governing interception of electronic communications is not limited to communications regarding this litigation, and thus is broader than the conduct on which civil sanctions can be predicated in this litigation.

[15] For example, the movant in *Eagle Hospital* had satisfied that burden through the non-movant's use in the litigation of the movant's privileged attorney-client email communications, thereby shifting to the non-movant the burden to rebut that showing. *Eagle Hosp.*, 2007 WL 2479290 at *1. In sharp contrast, Petitioners have failed to make any showing at all that Aguiar accessed any privileged emails related to this litigation. If Petitioners are able to present evidence sufficient to meet their burden on showing bad faith, and that it relates to this litigation, this Court should reconsider the Emergency Motion for Access to Materials in Order to Respond to Motion for Sanctions and Incorporated Memo of Law, Leor Dkt. # 151, because of the necessity that Petitioners prove all elements of the claimed offense before shifting the burden to Aguiar.

F. Petitioners' Own Misconduct Precludes The Relief They Seek.

Petitioners' own misconduct mitigates against granting the extreme relief they seek. "[A] court considering sanctions can and should consider the equities involved before rendering a decision," *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 341 (2d Cir. 1999), including the doctrine of unclean hands. *See generally Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319 (S.D.N.Y. 1997); *In re Kingsley*, 518 F.3d 874, 878 (11th Cir. 2008) ("one who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice or unfairness will appeal in vain to a court of conscience") (internal quotations and citations omitted). Here Kaplan made false statements in his affidavit in this case, whether cavalierly or intentionally, and the ultimate fact issue as to whether he shared his password is even more suspect. Further, Kaplan's activity in his Israeli action, where he relied on the same dubious contention in seeking an improper seizure order in an *ex parte* hearing, then had the receiver seize computers without any signed order, and then work through the night to obtain from the computers *Aguiar's* emails, evidences that he has "resorted to" the very sort of "trickery and deception[]… or fraud" that the unclean hands doctrine is designed to prevent. *See generally Kingsley*, 518 F.3d at 878; *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1355 (11th Cir. 1983).

The fact that Kaplan presents false sworn statements to this court further taints Petitioners' Motion. *See United States v. Holland*, 22 F.3d 1040, 1047 (11th Cir. 1994) ("Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals."). Other courts, when confronted with motions for sanctions brought by parties with unclean hands, have denied sanctions on these grounds. *See Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319, 326-27

(S.D.N.Y. 1997) (declining to impose sanctions for theft of documents related to the litigation because of the defendant's unclean hands in failing to preserve the files containing the stolen documents); *see also Boron v. W. Texas Exports, Inc.*, 680 F. Supp. 1532, 1535-37 (S.D. Fla. 1988) (false affidavits filed in support of motions violate Rule 11); *Safe-Strap Co., Inc. v. Koala Corp.*, 270 F.Supp.2d 407, 421 (S.D.N.Y. 2003) ("'the filing of a motion for sanctions is itself subject to the requirements of [Rule 11] and can lead to sanctions'") (quoting Fed. R. Civ. P. 11 Advisory Committee's Note (1993 Amendments)). Further, that Kaplan shielded from Aguiar an *ex parte* hearing, that Kaplan's chosen receiver then seized computers without authority and embarked on an all-night vigil to obtain for Kaplan Aguiar's confidential communications prior to morning, and that the Israeli court precluded the receiver from any review of the seized server, should further dissuade the Court from granting the requested relief. *See Happy Chef Sys., Inc. v. John Hancock Mut. Life Ins. Co.*, 933 F.2d 1433, 1438-39 (8th Cir. 1991) (upholding district court's refusal to apply sanctions in "a case of the pot calling the kettle black"); *Bruno v. Scarkino*, CIV. A. NO. 93-931, 1993 WL 302717, at *1 (E.D. La. July 29, 1993) (cited in *Exime v. E.W. Ventures, Inc.*, 591 F.Supp.2d 1364, 1376 n. 15 (S.D. Fla. 2008) (Seitz, J.)); *Fleet Nat. Bank v. Exp.-Imp. Bank*, 612 F. Supp. 859, 870-71 (D.D.C. 1985) (denying motion for sanctions in part because both sides in litigation were guilty of some degree of misconduct); *In re Bailey*, 145 B.R. 919, 933 (Bankr. N.D. Ill. 1992) ("This court reminds the Debtor that those who live in glass houses (even extensively renovated glass houses) should not throw stones. This is a case in which a witness offered by *both* the Debtor and the Bank have been caught presenting perjured testimony. To sanction only the Bank would be unthinkable.") (emphasis in original).

Conclusion

For the foregoing reasons, Aguiar respectfully requests that this Court deny Petitioners' Motion.[16]

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[16] In the event this Court were to consider granting Petitioners' Motion, Aguiar further requests, consistent with Petitioners' authority, that he be allowed the opportunity to brief the appropriate damages and remedies. *See, e.g.*, *Eagle Hosp.*, 2007 WL 2479290 at *7 (granting motion for sanctions but ordering further briefing concerning damages and remedies). In the Leor Case, the Leor Plaintiffs seek not only declaratory relief but, through their claims of breach of fiduciary duty and fraudulent inducement, "rescissionary damages consisting of all funds Aguiar received through his participatory interest in Pardus LP." This relief alone – estimated at $200 million – is unsupported by the allegations of the Complaint, even accepted as pled, for reasons that warrant further inspection by the Court. *See, e.g., Mazzoni Farms v. E. I. Dupont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000) ("Generally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status."); *Casey v. Cohan*, 740 So. 2d 59, 63 (Fla. 4th DCA 1999) (affirming the trial court's finding that rescission was not appropriate where the value of stock was not impacted by the defendant's failure to disclose secret agreement regarding stock sales); *Branch Banking and Trust Co. v. U.S. Bank Nat. Ass'n*, No. 07-80508-CIV, 2008 WL 4186982, at *4 (S.D. Fla., Sept. 8, 2008) (Florida's economic loss rule bars recovery in tort where the allegedly wrongful acts relate to the performance of a contract).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF notification on October 16, 2009. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached service list via transmission of Notices of Electronic Filing generated by CM/ECF.

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