

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

“CASES PROVISIONALLY CONSOLIDATED”

KLAUS HOFMANN, an individual,

Plaintiff,

vs.

CASE NO.: 09-20526-CIV-GOLD

EMI RESORTS, INC., a foreign corporation,
et al.,

Defendants.

AUREILO AGUILAR, an individual, *et al.*,

Plaintiffs,

vs.

CASE NO.: 09-20657-CIV-GOLD

EMI RESORTS, INC., a foreign corporation,
et al.,

Defendants.

**AGUILAR PLAINTIFFS’ MOTION TO STRIKE DEFENDANTS’ STATUS
REPORT [DE-208], TO STRIKE DEFENDANTS’ PLEADINGS, AND FOR
SANCTIONS PURSUANT TO THE COURT’S INHERENT AUTHORITY,
UNDER 28 U.S.C. § 1927 AND/OR FEDERAL RULE OF CIVIL
PROCEDURE 11 AND INCORPORATED MEMORANDUM OF LAW**

INTRODUCTION

Plaintiffs do not fault Defendants and their lawyers for mounting a vigorous defense to the claims against them. However, Plaintiffs and their counsel take issue with the unsavory and salacious litigation “tactics” employed by Defendants and their lawyers in this case. In a word, their behavior is deplorable. Defendants and their lawyers have set about a strategy that is designed solely to disparage, embarrass, harass, and otherwise impugn the character of Plaintiffs, their witnesses, and their attorneys. All in the hopes of distracting this Court from the obvious – that Defendants have misappropriated Plaintiffs’ monies. There is a proverbial line in the sand that lawyers ought not cross in the course of being zealous advocates for their clients. Defendants and their lawyers here have not simply crossed the line, they have taken a gigantic leap from the side of zealous advocacy to a zone of unchecked personal attacks that should not be countenanced by this Court.

Because the facts are against them (and Defendants certainly feed this assumption, given their refusal to answer this Court’s most basic questions regarding the location of funds, and their plan for completing the development projects at issue), Defendants and their lawyers have set out to destroy the personal and professional reputations of certain Plaintiffs, witnesses, and attorneys. Although several stronger words come to mind, this behavior cannot be politely described as anything less than shameful. The notion that a lawsuit can and should be won on the basis of outright lies, manufactured facts, slander, defamation, and an utter disregard for the effect that unfounded claims can have on a person’s standing and reputation in their community is simply intolerable, and should not be permitted. Yet, that is what Defendants and their lawyers have done here.

From Plaintiff James Catledge to witness Gregory Clark to attorneys Michael Diaz, Jr. and Carlos F. Gonzalez, Defendants and their lawyers have individually targeted these individuals and attempted to cast a cloud over their personal and professional reputations. Even in the case of Plaintiff James Catledge (for whom this Court may not be inclined to feel pity), Defendants and their attorneys have overreached. It is one thing to cross-examine a party or a witness and attempt to impeach their credibility on a good-faith basis; it is an entirely different thing to accuse such people of criminal conduct without any basis in fact whatsoever. Likewise, while it may be fair to challenge an attorney’s legal arguments and factual contentions, it is never acceptable to play a role, no matter how minimal, in perpetuating falsehoods about a colleague

and fellow member of The Florida Bar, particularly when they target the lawyer's most important assets – his good name, credibility before the tribunal, and reputation in the community. Unfortunately, Defendants and their lawyers may not care about the continuing harm they are causing the professional lives and reputations of the individuals discussed below. That harm, however, must be rectified, both in the courts and in the public domain.

Defendants and their counsel's must be held accountable for their improper actions. Accordingly, this Court should strike their status report [DE-208], and sanction Defendants and their counsel under the Court's inherent authority, pursuant to 28 U.S.C. §1927 and FED. R. CIV. P. 11, including the striking of Defendants' pleadings and the award of monetary sanctions.

WHERE IS THE MONEY?

At the April 9 hearing, this Court asked defense counsel for more information regarding the trust account referenced by Frederick Elliott in his October 2008 letter to agents and clients. [DE-196 at 4:4-8]. In that letter, Frederick said that all funds from the proceeds of the sale of promissory note prepayments would be deposited into a trust account and would be dedicated to the completion of the Juan Dolio hotel. *Id.* at 4:10-17. At the April 9 hearing, this Court estimated that approximately \$29 million were deposited into the account, representing \$16 million earned from client prepayments on the promissory notes and an additional \$13 million derived from the sale of certain promissory notes to Defendant Aviati. *Id.* at 6:7-12.

Defense counsel never challenged the Court's estimates. Moreover, defense counsel agreed that their client, Frederick Elliott, would provide the Court with a report as to (1) the current balance of the trust account; (2) Defendants' intentions with respect to the use of these funds; and (3) any deductions made from these monies, such as commissions or fees. *Id.* at 10:5-25. As the Court noted, Frederick's representations to clients in his October 2008 letter regarding the trust account funds "goes to the heart of the representation he's made to the people involved here." *Id.* at 10:18-20.

Following a brief recess, one of Defendants' lawyers confirmed that he had spoken with Frederick Elliott. During their telephone call, Frederick advised "that the trust accounts [were] in Santo Domingo in the Dominican Republic," that he had "an exact accounting of the Juan Dolio Hotel," and that he wanted to "convey to the investors that he's doing everything possible to make sure that we succeed and make a yeoman's efforts to make sure that this project goes forward and succeeds." *Id.* at 44:12-21. There appear to have been gross misstatements of truth,

for in their Status Report, Defendants revealed that only \$605,000 had in fact been deposited into the trust account. [DE-208-Pg-11]. Moreover, Defendants disclosed that the trust account at issue was not located in Santo Domingo, as Frederick's lawyers represented during the April 9 hearing. *Id.* The trust account is actually in Florida. *Id.*

As for the \$13 million in proceeds received from the sale of notes to Aviati, Defendants claim that this amount was not accurate. Defendants now assert that Aviati only paid \$450,000 as an advance. [DE-208-Pg-12]. As for the "exact accounting of the Juan Dolio Hotel," [DE-196 at 44:16-17], that Frederick indicated existed as of April 9, Defendants now claim that they are "gathering this information" and will need until May 1, 2009 to fully inform the Court. [DE-208-Pg-12].

And what of the business plan that this Court requested? What arrangements have Defendants made to salvage the properties, conclude the developments, and work towards fulfilling their investors' expectations? Defendants' Status Report offers little by way of direction, and only confirms that the Elliott Group is adrift at sea, with a captain whose sole focus is hiding the money.

Regardless of what this Court or anyone else thinks of James Catledge, John Thompson, the ECC, the Impact Associates, and even Plaintiffs' counsel, the fact remains that Frederick Elliott, along with his son Derek, collected millions of dollars in investor funds. The question now is where is the money? What happened to the millions of dollars that ended up in the Elliotts' hands? How was that money spent? Is this a case of utter mismanagement, fraud, or a little bit of both? Either way, only this Court has the authority to intervene and protect the investors. Defendants and their attorneys know this all too well. But, they also know that, once the cat is out of the bag and the information this Court is requesting (information which Frederick promised to turn over) is finally produced, the image Frederick is trying to cultivate of the absentee leader who is now taking a more active role in his company to try and turn things around, will be exposed for the lie that it is. Defendants and their lawyers are playing games and for that they should be sanctioned. It is against this factual backdrop that the Court should evaluate Plaintiffs' motion for sanctions.

Defense By Character Assassination

Rather than explain what happened to the millions of dollars investors gave them, the Elliotts are taking a different approach. Because the facts are against them, and because the

information that they will ultimately have to provide this Court is only going to continue to confirm Plaintiffs' assertions, Defendants are trying every dirty trick in the book to discredit Plaintiffs and their lawyers before the ugly truth about Defendants' actions is fully revealed. Such base tactics, however, should not be condoned by this Court. Indeed, the notion that litigation is a blood-sport, where individual reputations and professional standing can and should be shredded on the basis of lies is anathema to every conceivable code of conduct, rule of practice, and basic notion of decency.

Lest there be any confusion, this motion is not an after-the-fact attempt to rehabilitate Messrs Catledge, Rogers and Clark. To the contrary, Plaintiffs contend that Defendants and their lawyers knew all along that their line of cross-examination at the preliminary injunction hearing was based on outright misstatements of fact. Ironically, it was Frederick Elliott himself who put the lie to defense counsels' strategy. During his testimony, Mr. Elliott exposed Defendants' strategy for what it was, an attempt to assassinate the character and reputation of witnesses and blur the distinction between fact and fiction.

A. James Catledge

James Catledge is the bogeyman that Defendants hope to use to derail the *Aguilar* Plaintiffs' case. Yes, Mr. Catledge is a successful businessman. And, yes, Mr. Catledge made a lot of money. However, Mr. Catledge is not the sole Plaintiff in the *Aguilar* action filed by this firm – he is one of 411 individuals who not only sold the Elliotts' real estate products, but invested in those products. Specifically, Mr. Catledge gave the Elliotts \$2,600,000 of his own money. Which is precisely what Defendants don't want this Court to focus on, namely that these 411 individuals didn't just sell the Elliotts' products, they also invested and purchased the products, and even sold them to their own family members and close friends.

Thus, regardless of whether Mr. Catledge is a sinner or a saint, he, and many others like him, lost money to the Elliotts. Indeed, it bears repeating that Mr. Catledge did not create the Elliotts' real estate products, he did not get the bulk of the money, he does not own or control the resorts, and was not the one responsible for making the Non-Use Fee payments. In fact, those characteristics describe only one group - the Elliott Defendants.

Emboldened perhaps by the notion that this Court and others viewed Mr. Catledge with disfavor, defense counsel formulated a line of cross-examination designed to elicit and perpetuate several patently false statements, including that Mr. Catledge: (1) owned 38% of the

Juan Dolio project and 50% of the Elliott Companies, *see* [DE-174 at 23:21-23; 38:5-15; 71:21-22; 230:22-24; 232:22-25; 233:20 – 234:21; 238:9-16; 248:16-18; 248:23-25; 253:13; 304:5-12; 322:5-16; 330:21-24]; (2) created the marketing materials used to sell these real estate products to the public, *see* [DE-174 at 20:15 – 21:2; 150:14 – 151:10; 158:4-24; 178:17 – 179:11; 202:7-10; 203:8-10; 241:13-18; 247:10-14; 248:12-18]; and (3) was the alleged “mastermind” of the non-use fee and fractional interests products which are at the heart of this dispute, *see* [DE-174 at 30:11-13; 39:25 – 40:17; 120:10 – 121:1; 143:24 – 144:18; 177:25 – 178:16; 237:2-24].

Throughout day one of the preliminary injunction hearing, with Frederick Elliott sitting in the courtroom, defense counsel repeatedly asked each and every witness to confirm that Mr. Catledge owned either 38% of the Juan Dolio hotel or 50% of the Elliott Companies. Indeed, this became one of the dominant themes of defense counsel’s cross-examination. [DE-174 at 23:21-23; 38:5-15; 71:21-22; 230:22-24; 232:22-25; 233:20 – 234:21; 238:9-16; 248:16-18; 248:23-25; 253:13; 304:5-12; 322:5-16; 330:21-24]. Incredibly, when he finally testified on day two of the hearing, Frederick made clear that Mr. Catledge held no ownership stake in any of the Elliott Companies [DE-176 at 134:13-19], never owned property with the Elliotts [DE-176 at 134:24 - 35:1], and did not own *any* of Juan Dolio, let alone 38%. [DE-176 at 135:2-3, 8-11, 14-15].

Defense counsel’s repeated insinuation that Catledge created the marketing materials was again belied by Mr. Elliott, who in his declaration states: “To market the sale of the Residence Product, EMISV developed, as is customary, marketing materials which included brochures and other sales literature which were provided to Impact America...” [DE-131-Ex B-¶19].

Defendants’ claim that the Non-Use Fee or Passport Products were both Mr. Catledge’s idea was also proven false. *See* [DE-174 at 30:11-13; 39:25 – 40:17; 120:10 – 121:1; 143:24 – 144:18; 177:25 – 178:16; 237:2-24]. At the hearing, Frederick admitted that in 2001, long before he even knew James Catledge, he participated in the preparation of a document that offered investors a safe investment backed by real estate and offered double digit returns that were payable quarterly. *See* Plaintiff’s Exhibit 9 to Preliminary Injunction Hearing; [DE-176-Pgs-127-28]. This investment vehicle was offered by the Elliott Group before they had any relationship with Catledge or Impact. [DE-176-Pgs-146-47].

While Mr. Catledge and various Impact sales associates received commissions from the sale of the Elliotts’ real estate products, the aggregate commission paid on any given transaction

to Impact and its sales associates never exceeded 20%. *See* [DE-176 at 123:20-25; 174:19-24]. Defendants, however, have yet to account for how the other 80% of the monies received from sales was utilized by them. More importantly, however, not all Impact Associates received commissions. Although many of the *Aguilar* Plaintiffs signed up as Impact Associates, many did not make any sales, or collect any monies. Thus, the notion that Catledge and the Impact Associates as a whole have unclean hands is simply inaccurate.

B. Levi Rogers

Defendants and their lawyers employed the same smear tactics with Levi Rogers. A former Impact Associate who agreed to testify about what he knew, Mr. Rogers was the first to admit that he was no longer close to Mr. Catledge. [DE-174 at 254:14-15]. For his trouble, defense counsel branded Mr. Rogers a liar based upon a fiction, of their own creation, that Mr. Catledge owned a portion of the Juan Dolio. When Mr. Rogers testified – truthfully – that to his knowledge Mr. Catledge did not own a part of the Juan Dolio, defense counsel viciously attacked. [DE-174-Pgs-230-234]. All the while, Frederick Elliott sat in the courtroom, listening to what he knew was a lie perpetrated by defense counsel.

Using an email sent to his former mother-in-law, defense counsel claimed Mr. Rogers was lying and that Mr. Catledge did own 50% of the Juan Dolio. [DE-174-Pg-238]. Again, after excoriating Mr. Rogers, defense counsel’s scheme to mislead the Court was undone by Frederick Elliott who, as set forth above, proved that Mr. Rogers’ initial statement was correct – Mr. Catledge does NOT in fact own any part of the Juan Dolio or any other Elliott Company or property.

C. Greg Clark

The next target of defense counsel’s improper smear tactics and attacks was Gregory Clark. Mr. Clark was the Chief Financial Officer of the Elliott Companies until June of 2008. Rather than utilize their cross examination to probe the merits of Mr. Clark’s extensive Declarations, defense counsel chose to attack him personally.

The attack began well before Mr. Clark ever appeared in court—with the unsigned Declaration of Joaquin Duenas, attached as Exhibit “C” to Defendants Memorandum of Law in Opposition to Motion for Preliminary Injunction. [DE-131-Ex C]. In their memorandum, defense counsel represented that “[t]he Declaration as submitted has been approved by Mr. Duenas but was unable to be executed by him at the time of filing this Response; however, the

executed Declaration shall be submitted forthwith and filed with the Court.” [DE-131-Pg-25 n.9]. Paragraph 8 of the unsigned declaration asserted that Mr. Clark had been terminated for having falsified financial records and having stolen from the company. [DE-131-Ex C-¶8].

Despite defense counsel’s assurance that these scandalous allegations were “approved” by their declarant, Mr. Duenas ultimately crossed out the offending paragraph in the version he signed. Once again, defense counsel’s attempt to mislead the Court was undermined by their own witness. [DE-132]. In fact, as demonstrated by Plaintiffs’ Exhibit 7 to the Preliminary Injunction hearing, Mr. Duenas crossed out those statements because, contrary to counsels’ representation to the Court, he believed Mr. Clark to be an exemplary employee. Having been caught in their deception, Defendants did not produce Mr. Duenas at the hearing for cross-examination, allowing his Declarations to be stricken and, hopefully forgotten. However, there must be some accountability for these outrageous litigation tactics.

Not content to have tried—and failed—to have Mr. Clark called a liar by their own witness, defense counsel pressed the attack, trying next to characterize Mr. Clark as incompetent. [DE-176-Pgs-39-40, 42, 57-60, 62-66]. Again, Defendants’ own corporate officer rebutted that character attack. On February 10, 2009, Mr. Duenas, the Chief Operating Officer of the Elliot Group, stated “Mr. Clark executed his responsibilities in an exemplary manner, demonstrating dedication, commitment and strong management attributes and skills.” Pl. Ex. 7, ¶2. Further, Duenas added that Clark’s responsibilities “were completed in a highly efficient and competent manner.” Pl. Ex. 7, ¶3. Indeed, Duenas’ letter completely undermined defense counsel’s false claim that Mr. Clark had been fired, instead making it clear that the Elliot Group tried twice to retain Mr. Clark after he resigned, and that Mr. Clark was eligible to rejoin the company “at any time in a senior management role.” Pl. Ex. 7, ¶4.

As a last resort, defense counsel falsely claimed that Mr. Clark “stole” a company laptop and/or company documents when he resigned. However, there is no evidence whatsoever from any source to support this contention. To the contrary, the unrebutted evidence makes clear that the only laptop Mr. Clark removed from the Elliott companies upon his departure was his personal laptop, and that he made no specific effort to download or remove company documents. [DE-176 at 42:16-24; 43:6-14]. Unfortunately, Defendants have chosen this specific misstatement of fact to not only attack Mr. Clark’s credibility but, as further discussed below, seriously tarnish the professional reputation of one of Plaintiffs’ attorneys.

D. Michael Diaz, Jr.

While Defendants are certainly entitled to raise legitimate challenges to the credibility of parties and witnesses (something they have failed to do here), nothing can justify the personal attacks they have directed towards one of Plaintiffs' attorneys, Michael Diaz, Jr.

Defense counsel cavalierly accuses the undersigned of unethical conduct, including conflicts of interest and improper solicitation of clients. Ironically, as part of their inept attempt to substantiate the alleged unethical behavior, defense counsel refer to a conflict waiver letter¹ that the undersigned's firm sent to its clients before agreeing to represent them—a conflict waiver letter crafted after legal research and based in part upon the ABA Model for such letters. To be clear, the undersigned's law firm does not have a conflict of interest, and is not acting as a puppet of James Catledge. In October 2008, the firm was contacted by the ECC. The ECC—which was already formed—requested that the firm represent all purchasers of the Elliott real estate products, both Hofmann-like and Impact related. The firm did not agree to do so.

Instead, the firm immediately informed the ECC of the potential for a conflict of interest between these two groups, and recommended that the ECC contact another law firm to represent the Hofmann-like purchasers. The ECC did precisely that. The Diaz firm did agree to represent the Impact-related purchasers, but only after the prospective clients (using a contact list of provided by the ECC of persons wanting to be represented) were first informed of potential conflicts and agreed in writing to waive such conflicts. The *Aguilar* Complaint only lists plaintiffs who have signed a conflict waiver letter. Moreover, the firm did not even speak to James Catledge for the first time until approximately a month and a half after being contacted by the ECC. In March 2009, when Mr. Catledge asked the firm to represent him in other matters, the undersigned promptly advised the *Aguilar* Plaintiffs, before commencing any such representation. Therefore, the allegations of unethical conduct against the undersigned and this firm are wholly unfounded. More to the point, defense counsel knows the allegations are unfounded as they are in possession of the very conflict letters that were sent out by the firm. That they persist in perpetuating the notion that the Diaz firm and its attorneys are engaged in violations of the rules of professional conduct is only evidence of their bad faith.

¹ This letter states on its face that it is an attorney-client privileged communication. The *Aguilar* Plaintiffs have not waived the privilege. Nor should any statements made herein for the sole purpose of addressing the Court's expressed concerns about a potential conflict be deemed or construed as a waiver of the privilege. Notably, this letter was not directed to Hofmann-like plaintiffs.

To heap insult upon injury, defense counsel in questioning the professional ethics of the undersigned, did so utilizing an illegally-recorded attorney-client conference. As noted in Plaintiffs' Joint Response [DE-182] to the Elliott Defendants' Amended Motion to Compel ... [and] Disqualify ... [DE-173], Defendants have utilized a recording of a telephonic conversation between the ECC, various Plaintiffs, and their attorneys, in violation of the Florida Security of Communications Act, §§ 934.01, *et seq.*, Florida Statutes. *See* [DE-182-Pgs-9-10].

Remarkably, defense counsel neglected to disclose that the affiant, who submitted the transcription of the telephone conversation, Rob Buenaflor [DE-173-10], shares the same residence with the Lawter Defendants, whom they also represent. *See* Declaration of G. Mugarra [DE-182-2]. Thus, it is obvious that the conversation was recorded by, or at the instigation of, the Lawter Defendants. Mr. Buenaflor, for his part, appears to have been used as a strawman.

Defendants' and their counsel's unapologetic response merely claims that Plaintiffs' counsel did not have a reasonable expectation of privacy, and that the recording therefore did not violate Chapter 934. *See* [DE-204-Pg-2]. Relying on *Cohen Bros., LLC v. ME Corp.*, 872 So. 2d 321 (Fla. 3d DCA 2004), Defendants assert that Plaintiffs' counsel had no reasonable expectation of privacy in the conference call.

Cohen Bros. is distinguishable on numerous grounds, including the fact that none of the plaintiffs in that case were found to have standing under the statute. 872 So. 2d at 324-325. In order to have standing, "the persons bringing suit must be Florida residents *or* the improper interception must have occurred in Florida. The law is clear that an interception occurs where the words or the communication is uttered, not where it is recorded or heard." *Id.* at 324. Mr. Diaz and Ms. Piloto (counsel for Plaintiff Klaus Hofmann who was also surreptitiously recorded) are both Florida residents, and their words were uttered in Florida.

More significantly, Defendants have selectively edited a quote from the opinion to suggest that the court held that *no one ever* has a reasonable expectation of privacy in a conference call. The complete sentence, however, reveals a more nuanced context: "[W]e don't believe that society would recognize, as reasonable, that such an expectation of privacy exists in a conference call, ***specifically where the call is held to conduct the business of the company.***" *Id.* at 324-325 (emphasis added). Obviously, the intent and expectations of an *attorney-client* conference call are very different from those of a general *corporate* conference call.

Fairly summarized, Defendants' and their counsel's response is that, *maybe*, what they did was not illegal. In other words, in the course of making numerous, scurrilous allegations against Plaintiffs' counsel, and making numerous misrepresentations of fact and law to the Court, defense counsel are willing to be generous with themselves as to whether they and/or the Defendants have intentionally committed a felony, and whether they have intentionally recorded a privileged, attorney-client communication. Just for sheer *hubris*, it is a remarkable position for any attorney (or law firm) to take, much less those who are accustomed to practicing before this Court.

E. Carlos F. Gonzalez

Having opened a new front against Plaintiffs' counsel, Defendants next set their sights on attorney Carlos F. Gonzalez. In their Status Report, defense counsel made the following offensive and untrue statement:

On April 20, 2009, the Court issued its written opinion, concluding that Plaintiffs had submitted an affidavit authored by Carlos Gonzalez, Esquire, counsel of record here, that contained material misrepresentations and non-disclosures regarding the true facts, including that his source of inaccurate information was an **embittered** Gregory Clark. The Court was **sickened** by the behavior of counsel...

[DE-208-Pg-9](emphasis supplied). With this statement, defense counsel abandoned any notion of decency and professionalism that is critical to, and expected from, members of The Florida Bar.

There are several serious problems with defense counsel's statement. First, it mischaracterizes the Turks and Caicos Court's ruling. At no point did the Court state it was "sickened" by any conduct of counsel nor did it describe Mr. Clark as "embittered." Worse still, the Statement of Reasons issued by the Turks and Caicos Court is based on blatant lies perpetuated by Defendants' lawyer, Conrad Griffiths. The Court will recall that Mr. Griffiths also testified here and was present during the April 2, 2009 hearing. To his discredit (and those who have spread his misstatements), Mr. Griffiths made the following misrepresentations to the Turks and Caicos Court on April 9, 2009:

- That Gregory Clark stole a company laptop from the Elliott Group Defendants.
- That Gregory Clark turned over information to Plaintiffs that he had a duty to maintain confidential.

According to defense counsel, Mr. Clark was motivated to do this because he was a disgruntled employee. However, at the time these misrepresentations were made, defense counsel knew that the facts were much different:

- Clark only took a personal laptop when he left the Elliott Group [DE-176 at 42:16-24];
- Clark did not have a written employment agreement [DE-176 at 52:18-53:8];
- Clark only turned over limited documents to the *Aguilar* Plaintiffs' counsel (those attached to his declaration in this action) [DE-176 at 49:15-16];
- Before communicating with the *Aguilar* Plaintiffs' counsel, Clark through his attorney in the Dominican Republic, verified that he had no written, binding confidentiality agreement² and communicated that to the *Aguilar* Plaintiffs' counsel [DE-176 at 46:10-14; 52:18-53:8]; and
- The lawsuit Clark filed in the Dominican Republic was filed on the same day he left the Elliott Group in order to protect his employment rights under Dominican law [DE-176 at 55:6 – 56:9].

Indeed, even if Mr. Griffiths had not been in Miami for the hearing on April 2, these facts would nonetheless have been available to him as the transcript of that hearing was completed on April 4, 2009 (5 days prior to the April 9, 2009 Turks and Caicos Court hearing where these representations were made).

Rather than merely file the Statement of Reasons, and set forth a neutral statement in the Status Report, defense counsel (or at least one of them) instead chose to make inflammatory statements and editorialize. The reason for this is obvious, defense counsel hoped to embarrass and harass Plaintiffs' counsel.³

² Defendants, despite notice that Mr. Clark would be testifying, did not produce any documents claiming to create a duty of confidentiality until after the April 2, 2009 hearing. *See* [DE-173-Ex. B]. However, the putative agreement proffered by Defense counsel was never even fully executed and is thus, invalid. The *Aguilar* Plaintiffs submit that under Dominican Republic law, such an agreement is not legally binding, which would explain why Elliott's counsel informed Mr. Clark's counsel that he had no confidentiality agreement in place. *See* Declaration of Rafael Morales [DE-182-Ex. B].

³ As previously stated in Plaintiffs' Joint Response To The Elliott Defendants' Amended Motion To Compel ... [and] ... Disqualify Plaintiffs' Counsel ... [DE-182], specifically footnote 2, at Page 2, the *Aguilar* Plaintiffs' counsel believe this is motivated in significant part by the personal animus held against them. As set forth below, even if the underlying statement may be legally supported, if its presentation is made in an inflammatory manner or otherwise made for an improper purpose, it violates FED. R. CIV. P. 11.

MEMORANDUM**I. Defendants and Their Counsel Should Be Sanctioned**

This Court possesses the inherent authority to impose sanctions in order to control and supervise its own proceedings, to respond to abusive litigation practices, promote judicial efficiency and deter frivolous filings. *See Chambers v. NASCO*, 501 U.S. 32, 43 (1991); *Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796, 803 (5th Cir. 2003) (“[T]he district judge is independently responsible for maintaining the integrity of judicial proceedings in his court and, concomitantly, must be accorded the necessary authority.”). As referenced above, Defendants and their counsel have purposefully sought to mislead not only the Supreme Court of the Turks and Caicos Islands, but more importantly, this Court.

Three independent grounds support the imposition of sanctions against Defendants and their counsel: (1) Federal Rule of Civil Procedure 11; (2) 28 U.S.C. § 1927; and (3) the Court’s inherent powers. Each will be addressed in turn.

A. Defendants and Their Counsel Should Be Sanctioned Pursuant To This Court’s Inherent Authority

“It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.” *Chambers*, 501 U.S. at 43. A court’s inherent powers “encompasses, among other things, the authority to police lawyer conduct and to guard and to promote civility and collegiality among the members of its bar.” *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, No. 08-10848, 2009 WL 510963, *2 (11th Cir. March 3, 2009). Moreover, “[i]n exercising its powers, a court need not free a client from the acts of his lawyer, especially when the client is aware of or directs those acts.” *Id.* Therefore, “[t]here is no injustice in holding a client responsible for acts of his attorney of which he is aware.” *Anderson v. United Parcel Serv.*, 915 F.2d 313, 316 (7th Cir. 1990).

The inherent power of the courts to sanction errant lawyers may be invoked, “even if procedural rules exist to sanction the same conduct.” *Chambers*, 501 U.S. at 49. The key to unlocking a court’s inherent powers, however, is a finding that “the lawyer’s conduct constituted or was tantamount to bad faith.” *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1321 (11th Cir. 2002). Notwithstanding, “the conscious indifference to lawyer-to-lawyer collegiality

and civility” which amounts to harassing an opposing counsel by causing them unnecessary expense and delay satisfies the bad-faith standard. *Sahyers*, 2009 WL 510963 at *2 n.9.

In *Tenneco*, the district court sanctioned the plaintiff’s attorney for filing various documents with the court which contained “improper, offensive, and insulting statements which amount[ed] to little more than personal attacks on opposing counsel.” 293 F.3d at 1316. The Eleventh Circuit affirmed the district court’s imposition of sanctions pursuant to the court’s inherent powers noting that the documents filed by the sanctioned attorney were “saturated with invective directed at opposing counsel.” *Id.* at 1321. Moreover the court found the documents filed to contain nothing more than “attacks upon the fitness of opposing counsel as a member of the bar” and which impugned his character. *Id.* Key to the court’s holding was its conclusion that the sanctioned attorney had violated several of the ethics rules which governed her conduct before the Middle District of Georgia. *Id.* at 1322. Thus, the court concluded that “[t]he district court’s finding [of bad faith] was correct because the documents serve[d] no purpose other than to harass and intimidate opposing counsel, and thus [were] inconsistent with basic rules of professional conduct” which applied to the sanctioned attorney. *Id.*

Here too, defense counsel’s conduct is grossly inconsistent with the Rules of Professional Conduct which apply to them. This Court’s Local Rule 11.1(C) provides that “[t]he standards of professional conduct of members of the Bar of this Court shall include the current Rules Regulating The Florida Bar.” S.D. FLA. L.R. 11.1(C). In addition, Rule 1(A) of this Court’s Rules Governing Attorney Discipline provides as follows:

Acts and omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Rules of Professional Conduct, Chapter 4 of the Rules Regulating The Florida Bar shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney/client relationship.

S.D. FLA. L.R. 1(A) of the Rules Governing Attorney Discipline.

Rule 4-8.4 of the Rules Regulating The Florida Bar⁴, in turn, provides that:

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct , knowingly assist or induce another to do so , or do so through the acts of another;

. . . .

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . ;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against . . . lawyers on any basis

The Comment to Rule 4-8.4 similarly explains that “[l]awyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.” Similarly, the Creed of Professionalism⁵ promulgated by The Florida Bar’s Henry Latimer Center for Professionalism obligates an attorney to “strictly adhere to the spirit as well as the letter of [his or her] profession’s code of ethics,” to “not knowingly misstate, distort, or improperly exaggerate any fact or opinion,” to “abstain from all rude, disruptive, disrespectful, and abusive behavior and [to] at all times act with dignity, decency, and courtesy,” and lastly to “exercise independent judgment and . . . not be governed by a client’s ill will or deceit.”

The Guidelines for Professional Conduct⁶ which were adopted by the Florida Conference of Circuit Judges and the Executive Council of the Trial Lawyers Section provides even further guidance for attorneys admitted to The Florida Bar. Notably, the “Preamble” reminds the attorney that “[t]o the judiciary, a lawyer owes candor, diligence and utmost respect.” Coupled with that duty, however, “is a lawyer’s duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public

⁴ The Rules Regulating The Florida Bar are available on The Florida Bar’s website and is *available at* <http://www.floridabar.org> (last visited April 21, 2009), under the “Professional Practice” heading.

⁵ The Creed of Professionalism is published on The Florida Bar’s website and is *available at* <http://www.floridabar.org> (last visited April 21, 2009), under the “Professional Practice” heading.

⁶ The Guidelines of Professional Conduct are published on The Florida Bar’s website and is *available at* <http://www.floridabar.org> (last visited April 21, 2009), under the “Professional Practice” heading.

it serves.” Guideline M(1) further reminds attorneys that “[a] lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct which is degrading to the court”; and Guideline M(6) counsels that “[a] lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel.” Finally, Guideline M(31) counsels that “[a]ttorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence.”

Defense counsel’s conduct has repeatedly violated the aforementioned principles and Rules of Professional Conduct. Defense counsel has encouraged others to commit criminal acts (i.e., the unlawful recording of a telephone call in violation of Nevada and Florida law); has used and published in the public record attorney-client privileged communications, *see* [DE-173-Pgs-5-6] (the transcript of the telephone call); has caused or assisted their agents (local TCI counsel) in making flagrant misrepresentations to the TCI court (i.e., that Plaintiffs and their counsel relied or have in their possession documents which were stolen from Defendants); and in the process have engaged in the intentional and malicious character assassination of Plaintiffs’ counsel, Michael Diaz, Jr., and Carlos F. Gonzalez. What is more, defense counsel continues misrepresenting and distorting the facts to this Court by stating in their “status report” that the TCI court was “sickened” by Plaintiffs’ counsel’s behavior – a characterization that patently mischaracterizes the already erroneous perception of that court. [DE-208-Pg-9]. The fact that defense counsel has violated the applicable ethics rules not once, but on repeated occasions, further buttresses the propriety of this Court invoking its inherent powers to sanction counsel and their clients. *See Tenneco*, 293 F.3d at 1323-24.

In *Tenneco*, the Eleventh Circuit took pains to emphasize that “[a]n attorney should not be an unreflecting conduit through which the opinions or desires of a client or witness are permitted to flow unchecked.” *Id.* at 1327. Rather, “[i]ndependent judgment is an essential ingredient of good lawyering, since attorneys have duties not only to their clients, but also as officers of the court, to the ‘system of justice’ as a whole.” *Id.* The Eleventh Circuit’s words have obviously fallen on deaf ears.

B. This Court Should Sanction Defendants' Counsel Pursuant To 18 U.S.C. § 1927

28 U.S.C. § 1927 lends further authority for this Court to levy sanctions. This statute provides that “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required to by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. Thus, the statute “allows district courts to ‘assess attorney’s fees against litigants, counsel, and law firms who willfully abuse the judicial process by conduct tantamount to bad faith.’” *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1544 (11th Cir. 1993). And a court may find that a party or counsel has exhibited “bad faith” by their conduct of the litigation. *See Hall v. Cole*, 412 U.S. 1, 15 (1973).

Alternatively, a court may sanction an attorney for reckless conduct pursuant to § 1927. *See Bernal v. All Am. Investment Realty, Inc.*, 479 F. Supp. 2d 1291, 1332 (S.D. Fla. 2007). To constitute “reckless conduct” the conduct must be such that it grossly deviates from what would be considered as “reasonable conduct.” *Id.* In *Bernal*, the court sanctioned the defendant’s attorney in part for his levying baseless allegations that plaintiff’s counsel had stolen proprietary information shortly before leaving his employ. *Id.* at 1311-12. Pursuant to § 1927, the court sanctioned the defendant’s counsel as these frivolous allegations were made “with the subjective intent to harass and intimidate Plaintiff and her counsel, and thereby obstruct the progress of th[e] lawsuit on the merits.” *Id.* at 1333. Because defendant’s counsel knew that “the information he sought went well beyond Plaintiff’s knowledge and the matters at issue,” the court specifically found that defendant’s counsel’s conduct “met the standard of objective bad faith” and merited sanctions. *Id.*

Similarly, Defendants’ conduct throughout this litigation has been almost exclusively directed at distracting from the merits of this dispute. Specifically, defense counsel continues to level baseless allegations that Plaintiffs’ counsel is in possession of Greg Clark’s laptop computer (and/or the documents contained on his laptop) and that Greg Clark himself stole documents from the Elliotts prior to his termination, despite unrefuted sworn testimony before this Court to the contrary. *See* [DE-208-Pg-10]. To begin with, Greg Clark testified at the preliminary injunction hearing that he did not take or download Defendants’ documents prior to his termination. *See* [DE-176 at 42:16-24]. But even assuming that he did, these matters are

clearly beyond Plaintiffs' knowledge and the matters at issue – i.e., whether *Defendants* engaged in a scheme to defraud Plaintiffs in violation of federal and state law. Thus, defense counsel's vexatious attempts at leading this Court down the rabbit's hole and away from the merits of this dispute meets the standard of objective bad faith and warrants sanctions. *Bernal*, 479 F. Supp. 2d at 1333.

By any reasonable measure, defense counsels' conduct has "unreasonably and vexatiously" multiplied these proceedings. On the eve of the April 1 preliminary injunction hearing, defense counsel filed their Motion to Compel Production of Documents . . . [DE-157] seeking to sanction and disqualify Plaintiffs' counsel for allegedly using attorney-client privileged documents provided by Greg Clark in order to "pencil[]" the RICO complaint. [DE-157-Pg-2]. This Court ordered Plaintiffs to file their response to Defendants' motion [DE-157] on the same day Plaintiffs were obligated to file their supplemental brief [DE-183]. *See* [DE 179]. Then, on April 5, Defendants' filed their Amended Motion to Compel . . . [DE-173] wherein defense counsel relied upon an illegal recording of an attorney-client privileged conference call in further support of Defendants' motion seeking to have this Court disqualify Plaintiffs' counsel and sanction them. *See* [DE-173-Pgs-5-6]. More to the point, defense counsel willfully and intentionally utilized the transcript of a telephone call which under Nevada law constitutes a class D felony and under Florida law gives rise to a third degree felony. *See* [DE-182-Pgs-9-10].

As if that were not enough, defense counsel deliberately omitted citations to controlling case law and other authorities regarding ex parte contacts with former employees of an adverse party. *See* [DE-182-Pgs-11-13]. This was clearly not by accident. As pointed out in footnote 6 of Plaintiffs' response brief, *id.* at 11, one of the key authorities that Defendants omitted from their amended motion had actually been cited in their original motion [DE-157-Pg-8].

Defense counsel also represented to their local TCI lawyer, Conrad Griffiths, over whom this Court has jurisdiction as a witness, that Plaintiffs had obtained the temporary restraining order in the TCI courts through the use of stolen documents provided by Greg Clark, despite his testimony before this Court – under oath – to the contrary. As a result of defense counsel's flagrant misrepresentations, which were furthered by local counsel's false representations to the TCI court, the temporary restraining order was dissolved. Moreover, the TCI court is under the impression, albeit mistaken, that Plaintiffs' counsel purposefully omitted certain material facts in

his affidavit filed in support of Plaintiffs' *ex parte* application for the temporary restraining order. Plaintiffs are now forced to take further action before the TCI court in an attempt to clarify the misrepresentations made by Defendants' local counsel in those proceedings.

Adding insult to injury, defense counsel filed their "status report" [DE-208] wherein they continue their pattern of misrepresentations by asserting that the TCI court was "sickened" by Plaintiffs' counsel's behavior, triggering the filing of this motion and requiring the Court's intervention to resolve this issue. By any reasonable interpretation, defense counsel's conduct has "unreasonably and vexatiously" multiplied these proceedings, thus warranting sanctions. *Bernal*, 479 F.Supp. 2d at 1332-33.

C. Defendants And Their Counsel Should Be Sanctioned Pursuant to Rule 11(b)⁷

Rule 11(b) provides that:

by presenting to the court a pleading, written motion, *or other paper* – whether by signing, filing, submitting, or later advocating it – *an attorney . . . 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

Fed. R. Civ. P. 11(b) (emphasis added). In determining whether an attorney has complied with their obligation, the standard under which an attorney is measured is an objective one which assesses whether the conduct was reasonable under the circumstances and what was reasonable to believe at the time of filing. *See Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002). Thus, "[s]anctions are warranted when a party exhibits a 'deliberate indifference to obvious facts,' but not when the party's evidence to support a claim is 'merely weak.'" *Id.* (quoting *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998)). While the "sanction imposed for a violation of Rule 11 must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, the selection of the type of sanction to

⁷ Rule 11(c)(1)(2)'s "safe harbor" provision does not apply where, as here, the damage caused by the opposing party's conduct cannot be remedied by simply withdrawing the offending paper. *See Whitehead v. Kmart Corp.*, 202 F.Supp. 2d 525, 532-33 (S.D. Miss. 1999) *aff'd*, 332 F.3d 796 (2003) (*en banc*). Defendants' gross misrepresentations to the TCI court, and the resulting opinion from the TCI court which accuses Plaintiffs' counsel of omitting material information on his affidavits, is already published on the internet for all to view. *See* <http://www.ratupdate.com> (last visited April 23, 2009). Moreover, bloggers are already disparaging Plaintiffs' counsel and hailing the Elliott "victory" based in large part on the TCI court's ruling. *See* <http://www.scam.com> (last visited April 23, 2009). Thus, as in *Whitehead*, Defendants' here have no opportunity to comply with Rule 11's "safe harbor" provision. 202 F.Supp. 2d at 533. Rather, "the deed [is] done." *Id.*

be imposed lies with the district court's sound exercise of discretion ." *Id.* at 1295 (internal quotation and citation omitted).

Pursuant to Rule 11(b)(1), this Court may sanction Defendants and their counsel "for presenting a paper to the court for 'any improper purpose, such as to harass'" *Whitehead*, 332 F.3d at 805 (emphasis in original). In *Whitehead*, the plaintiff's attorney obtained from the district clerk a writ of execution for a \$3.4 million judgment against the defendant, Kmart. *Id.* at 800. Thereafter, the attorney went to a local Kmart, accompanied by media representatives and two marshals, and attempted to execute on the judgment by seizing cash from the store's registers and vault. *Id.* While at Kmart, the attorney made "misleading comments" to the media, which were "hyperbolic, intemperate" and otherwise improper. *Id.* As a result of the attorney's actions, several articles were published regarding the incident at the Kmart store. *Id.* at 801. Kmart subsequently moved for sanctions against the attorney pursuant to Rule 11(b)(1). *Id.* In granting Kmart's request, the district court determined that the attorney's actions were solely pursued to "embarrass [Kmart] and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client" *Id.*

In affirming the district court's imposition of sanctions, the Fifth Circuit noted that while generally "district courts do not sanction attorneys who make nonfrivolous representations[,] [a] district court may do so . . . where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose." *Id.* at 805. Thus, "[a]lthough a district court is not to read an ulterior motive into a document 'well grounded in fact and law', it may do so in exceptional cases . . . where the improper purpose is objectively reasonable." *Id.*

One such example of filing otherwise legitimate documents for an improper purpose is where abusive language is used towards opposing counsel. *Id.* For example, in *Coats v. Pierre*, 890 F.2d 728 (5th Cir. 1990), the district court sanctioned a *pro se* litigant for filing a motion with the court which made vitriolic comments of opposing counsel. *Id.* at 734. In affirming, the Fifth Circuit noted that "[a]busive language toward opposing counsel has no place in documents filed with our courts; the filing of a document containing such language is one form of harassment prohibited by Rule 11." *Id.*

Here, Defendants and their counsel have, similarly, grossly mischaracterized the statements made by the court in the Turks and Caicos Islands. Defendants, in their "status report," state as fact that "[t]he Court was *sickened* by the behavior of counsel," Carlos

Gonzalez. [DE-208-Pg-9] (emphasis added). Nowhere, however, does the court state in its order dissolving the temporary restraining order that it was “sickened” by Plaintiffs’ counsel’s behavior. Such a deliberate misrepresentation of the TCI court’s statements exhibits defense counsel’s “deliberate indifference to obvious facts” meriting Rule 11 sanctions. *Riccard*, 307 F.3d at 1294. *See Williams v. Florida Health Sciences Center, Inc.*, No. 8:05-CV-68-T-23EAJ, 2007 WL 641328, *3 (M.D. Fla. Feb. 26, 2007) (holding that it would not “condone [such] ad hominem attacks against counsel that are abusive, offensive, and baseless”). As one district court has noted, “[l]awyers cannot . . . be allowed to make such abusive remarks against opposing counsel and expect to be able to say ‘so sorry, I didn’t really mean it’ and not face sanctions.” *Redd v. Fisher Controls*, 147 F.R.D. 128, 133 (W.D. Tex. 1993).

Accordingly, this Court should sanction Defendants and their counsel pursuant to Rule 11(b)(1).

CONCLUSION

Based on the foregoing, the Aguilar Plaintiffs respectfully request that this Court strike Defendants Status Report [DE-208], and sanction Defendants and their counsel pursuant to the Court’s inherent authority, under 28 U.S.C. § 1927 and/or FED. R. CIV. P. 11, including the striking of the Elliott Defendants’ pleadings, and the award of monetary and other sanctions.

DATE: April 22, 2009

s/Michael Diaz, Jr.
 DIAZ REUS & TARG LLP
 Michael Diaz, Jr. (Florida Bar Number: 606774)
 Attorney E-mail Address: mdiaz@diazreus.com
 Carlos F. Gonzalez (Florida Bar No. 0494631)
 Attorney E-mail Address: cgonzalez@diazreus.com
 Brant C. Hadaway (Florida Bar Number: 0494690)
 Attorney E-mail Address: bhadaway@diazreus.com
 Gary E. Davidson (Fla. Bar No. 0069094)
 Attorney E-mail Address: gdavidson@diazreus.com
 Gerardo J. Rodriguez-Albizu (Fla. Bar No. 61685)
 Attorney E-mail Address: grodriguez@diazreus.com
 100 Southeast 2nd Street
 2600 Bank of America Tower
 Miami, Florida 33131
 Telephone: (305) 375-9220
 Facsimile: (305) 375-8050

Counsel for Aguilar Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2009, 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.

s/ Michael Diaz, Jr.

Michael Diaz, Jr.

SERVICE LIST

Klaus Hofmann

v.

EMI Resorts, Inc., et al.

Case No.: 09-20526-CIV-GOLD/MCALILEY

United States District Court, Southern District of Florida

Nelson C. Bellido (Florida Bar No. 974048)
Attorney E-mail Address: nbellido@cfclaw.com
Carlos F. Concepción (Florida Bar No. 386730)
Attorney E-mail Address: cconcepcion@cfclaw.com
Scott A. Burr (Florida Bar No. 009325)
Attorney E-mail Address: sburr@cfclaw.com
Concepcion, Sexton, & Martinez, P.A.
355 Alhambra Circle, Suite 1250
Coral Gables, Florida 33134
Telephone: (305) 444-6669
Facsimile: (305) 444-3665
Service by CM/ECF

Counsel for Elliott Defendants

Russell M Hayson
Attorney E-Mail Address: russhayson@yahoo.com
Pallotto & Hayson, P.A.
450 North Park Road, #302
Hollywood, Florida 33021
Telephone: (305) 981-6760
Facsimile: (305) 981-9729
Service by CM/ECF

Counsel for Defendant, Inversiones Aviati, S.A.