

SUPER SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

STEVEN J. ROSEN	:	
	:	
Plaintiff	:	
	:	
v.	:	Case No.: 2009 CA 001256
	:	Judge Erik Christian
AMERICAN ISRAEL PUBLIC	:	Next Event: Pretrial
AFFAIRS COMMITTEE, INC., <i>et. al.</i>	:	Date: April 19, 2011
	:	
Defendants	:	

REPLY MEMORANDUM OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFF'S OPPOSITION MEMORANDUM AND FOR SANCTIONS

I. ARGUMENT

On December 23, 2010, Defendants filed a *Motion to Strike Plaintiff's Opposition Memorandum and for Sanctions* ("Motion for Sanctions"), establishing that Plaintiff knowingly, intentionally, and flagrantly violated the express terms of the Protective Order that was entered in this matter. In their Motion, Defendants established that immediately after becoming aware that Plaintiff had wrongfully taken possession of numerous materials belonging to AIPAC, Defendants demanded the return of all such materials. Defendants took the additional and appropriate step of obtaining a Protective Order to protect the confidentiality of all such documents, as well as to protect the privileged nature of documents subject to a joint defense privilege. Defendants consistently reminded Plaintiff of his obligations to act in accordance with the terms of the Protective Order.

Despite these facts, Plaintiff and his attorneys knowingly, intentionally, and willfully violated the terms of the Protective Order. In fact, in Plaintiff's Opposition to the Motion for Sanctions, Plaintiff smugly admits to the public filing of extensive documentation that had been

designated, without objection, as being subject to the terms of the Protective Order. Plaintiff does not dispute that, as Plaintiff himself promised to the press, Plaintiff filed a pleading that contained a plethora of internal AIPAC materials that Plaintiff wrongfully maintained in his possession.

Plaintiff's defense to the Motion for Sanctions is not that the disclosure was inadvertent or unintentional. In fact, Plaintiff has conceded both in the press and in his Opposition that the public filing of confidential and privileged documents was, in fact, intentional. Incredibly, Plaintiff maintains that because *he* was in possession of the documents – albeit wrongfully – that the documents fall outside the scope of the Protective Order. By doing so, Plaintiff essentially requests this Court to allow a party to apply a backwards version of the doctrine of unclean hands in a manner that is completely inconsistent with the law of this jurisdiction. One wrongful act cannot be used to justify another.

The simple issue before the Court is the undisputed and admitted fact is that Plaintiff has failed to comply with the Protective Order issued in this case, has breached the confidentiality provisions of the employment manual agreement he signed with AIPAC, and has acted in a manner that is inconsistent with law.

Plaintiff claims he “supported his contentions with deposition testimony and documents that he had accumulated during his 23-year career with AIPAC” but omits the fact that Plaintiff *surreptitiously and improperly took the documents from AIPAC after his termination in violation of the employee handbook and applicable law*. Having improperly taken those documents from AIPAC, Plaintiff has no right to now attempt to circumvent the Court's Protective Order by disclosing the documents himself. In fact, the doctrine of unclean hands bars Plaintiff from attempting to benefit from his wrongdoing. *See International Tours & Travel, Inc. v. Khalil*, 491

A.2d 1149, 1155 (D.C.1985) (“The equitable doctrine of unclean hands only applies where there is misconduct by the plaintiff *in the same transaction* that is the subject of his claim.”)

Plaintiff fails to address in his Opposition that Defendants demanded the return of AIPAC documents and opposed his production of privileged documents when they communicated Plaintiff’s violation of the employee handbook on May 14, 2010.¹ Defendants cited the below provisions to Plaintiff, and demanded the return of AIPAC’s confidential documents in that letter and at depositions.² Despite, Defendants’ repeated attempts, Plaintiff never responded to Defendants and he did not contest the continued assertion of attorney-client privilege or work product protection.

The provisions of the employee handbook relating to confidential information and tangible property state:

CONFIDENTIAL INFORMATION

An employee shall not, either during the term of his/her employment or any time thereafter, disclose to any person, corporation or other entity any confidential information learned by the employee as a result of his or her employment by AIPAC. The term “confidential information” includes, but is not limited to: a) the names and addresses of members or contributors to AIPAC; b) non-public information relating to any activity of AIPAC; c) non-public information relating to any officer, director, employee, or member of AIPAC or any contributor to AIPAC; d) non-public information relating to any program or contemplated program of AIPAC; or e) any documents or information which contain or are derived from confidential information concerning AIPAC, its members or its activities.

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AIPAC TANGIBLE PROPERTY

Employees are expected to exercise care in the use of AIPAC’s property and to use such property only for authorized purposes. Negligence in the care and use of AIPAC’s property or unauthorized removal of AIPAC’s property from the premises or its conversion to personal use will be considered cause for suspension and/or dismissal.

¹ See Exhibit A, May 14 Letter to David Shapiro re: Proprietary Documents.

² See Exhibit C, Bernice Manocherian Dep. 25-26 (Specifically referencing the document attached as Exhibit A to Plaintiff’s Opposition Brief); Exhibit D, Nathan Lewin Dep. 92-93 (Specifically referencing the document attached as Exhibit 3 to Plaintiff’s Statement of Genuine Issues); Exhibit E, Richard Fishman Dep. 296 (requesting the return of AIPAC proprietary documents).

Upon termination of employment with AIPAC for any reason, or when the employee's department head/regional director or a designated representative otherwise requests its return, employees are required to immediately return to AIPAC all documents, property (including computers), or materials of any nature which are in the employee's possession or control which he/she obtained from AIPAC or compiled or produced for AIPAC during the employee's employment and any and all copies thereof.

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Plaintiff concedes a Protective Order was entered and that Defendants, pursuant to Paragraph 8 of the Protective Order, designated portions of deposition testimony *and* various deposition exhibits as confidential pursuant to the Protective Order³, yet he denies that the exhibits underlying that confidential testimony were also protected by that very designation. That is absurd, inconsistent with the terms of the Protective Order and the record, and would render Protective Orders useless.

Plaintiff's Opposition would have the Court condone his behavior and argument that he has done nothing improper simply because *he* produced the documents during discovery. The issue is not who initially disclosed the documents. The undisputed fact is the documents were marked confidential at depositions pursuant to the Protective Order, and Plaintiff has conceded there was no formal objection to those designations. Thus, the documents should have been filed under seal with the Court when supporting the deposition testimony cited in his Opposition and attached as exhibits to the filing.

It is telling that Plaintiff and his counsel do not dispute that the documents were clearly marked and stamped with "Attorney-Client Privilege," "Work Product", or "Joint Defense" on

³ See Exhibit B, Paragraph 8, ("Parties (and deponents) may, within fifteen days after receiving the transcript of a deposition taken after the entry of this Order, designate pages of the transcript (and exhibits thereto) as "Confidential" if the material so designated is entitled to be designated as "Confidential" under the terms of this Protective Order. Confidential Information within deposition transcript may be designated by underlining the transcript lines that contain Confidential Information and marking such pages with "Confidential" and serving copies of the marked pages on counsel for all other parties. If no party or deponent timely designates Confidential Information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under separate seal from the portions and exhibits not so marked.")

their face, but even more so that Plaintiff would knowingly produce the documents in the first place with a total disregard for even Plaintiff's own privilege between his criminal defense counsel.⁴

Plaintiff makes the absurd argument that the Defendants "failed to show that any of the documents 'contain confidential or proprietary information, or other commercially sensitive or personally sensitive information of a nonpublic nature.'"⁵ *By their nature*, an organization's bylaws, and documents stamped "Attorney-Client Privilege", "Work Product", or "Joint Defense" are documents containing confidential or proprietary information, or other commercially sensitive or personally sensitive information of a nonpublic nature. Moreover, Plaintiff has conceded that he failed to object to the designation of such documents as being subject to the terms of the Protective Order. Any objection to the designation was therefore waived, and Plaintiff cannot now challenge the designation after intentionally violating the terms of the Protective Order by public disclosure of the documents in question.

Plaintiff's Opposition also concedes that Mr. Rosen was personally involved in the misconduct of violating the Protective Order by giving interviews to the press in which he claimed he intended to publicly file the confidential documents.⁶

⁴ Plaintiff, arguably, has unequivocally waived his attorney-client privilege with his criminal defense counsel by disclosing and filing in the public record communications between himself and his defense counsel.

⁵ Plf.'s Opp. at 6.

⁶ Plf.'s Opp. at 3.

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	:	Judge Erik Christian
AMERICAN ISRAEL PUBLIC	:	Next Event: Pre-Trial
AFFAIRS COMMITTEE, INC., <i>et. al.</i>	:	Date: April 19, 2011
	:	
<u>Defendants</u>	:	

ORDER

Upon consideration of Defendants' *Motion for Leave to File Defendants' Reply Memorandum in support of their Motion to Strike Plaintiff's Opposition and for Sanctions* and any opposition thereto, it is, this _____ day of January, 2011;

ORDERED, that the Motion for Leave is GRANTED; and it is further,

ORDERED, that Defendants' *Reply Memorandum in support of their Motion to Strike Plaintiff's Opposition and for Sanctions* shall be considered as part of the record of this case.

SO ORDERED.

Judge Erik Christian

cc: David H. Shapiro
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