IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALDSON TWYMAN, Plaintiff, v. S&M AUTO BROKERS, INC., SAED IHMOUD and MOHAMMED IHMOUD, Defendants.	))))))))	No. 16-cv-04182 Honorable Virginia Kendall Magistrate Judge Sheila Finnegan

RESPONSE TO JOEL A. BRODSKY'S MOTION TO STRIKE
PLAINTIFF'S "EXHIBITS" FILED AFTER THE JULY 7, 2017 HEARING

Mr. Brodsky's motion to strike Plaintiff's exhibits to the July 7, 2017 sanctions hearing should be denied. Nothing contained in the binder of exhibits Plaintiff provided the Court and opposing counsel at the sanctions hearing is objectionable. Mr. Brodsky's sanctionable conduct is contained in the filings and communications he made in the course of this case and in a deposition transcript—all of which have previously been made part of the record in this case. Plaintiff's motions for sanctions (and exhibits thereto) identified and discussed in great detail why Mr. Brodsky's filings and emails and conduct at a deposition in this case were sanctionable. *See* Dkts. 166, 194, 197, and 209. Thus, Mr. Brodsky cannot claim surprise to find any of these filings or statements in Plaintiff's binder of exhibits.

Moreover, Mr. Brodsky's objections to the table of contents titled "Twyman Sanctions Hearing Exhibits List" that was included with the exhibits are baseless. Mr. Brodsky first objects that he was not provided a copy of the table at the hearing. This is simply untrue. The packet provided to Mr. Brodsky's counsel at the hearing did contain a copy of the table of contents filed with the exhibits. During the hearing, Plaintiff's counsel held up a copy of the table and explained exactly what it contained. Plaintiff's counsel did this *after* providing Mr. Brodsky's attorneys and

the Court with a copy of the exhibits and table of contents. If Mr. Brodsky had not been provided a copy of the table surely when Plaintiff's counsel was discussing it one of his three attorneys would have objected or commented on its absence but none did.

Mr. Brodsky next objects to the table on the basis that it contains argument. By definition, any assertion by Plaintiff that a filing is sanctionable is an argument. Thus, this is not a basis for striking the table or exhibits. Again Mr. Brodsky cannot claim to be surprised by anything in the table as anything in it was in Plaintiff's sanctions motions first and then summarized at oral argument. The table merely distills Plaintiff's sanctions motions and presents those motions in a different format. Mr. Brodsky also couldn't have been surprised by the table because Plaintiff's counsel explained exactly what it contained at the sanctions hearing—and again none of Mr. Brodsky's attorneys made any objection.

Of the 40 exhibits in the binder, 37 of those exhibits were already in the record.[1] Contrary to Mr. Brodsky's argument, there was no need to specifically address each one or introduce them into evidence. The Court may take judicial notice of its own orders and documents previously filed in this case. *White v. Keely*, 814 F.3d 883, 886 n.2 (7th Cir. 2016); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983).

The premise of the argument is that only filings introduced into evidence at the hearing can be the basis for sanctions. Mr. Brodsky cites no authority for this premise and indeed none exists. An uncivil statement in a brief is subject to sanctions regardless of whether that filing has been formally introduced into evidence. Likewise, a motion can be frivolous and sanctionable regardless of whether it has been introduced into evidence. The premise is further undermined by the fact that

[1] Mr. Brodsky incorrectly argues that Plaintiff's counsel represented that all the exhibits were already in the record. Plaintiff's counsel did not and would not state this, knowing that 3 of the exhibits (Exhibits 19, 29, and 35) were not already in the record—clearly indicated in the table by the absence of a docket number next to the exhibit number.

sanctions can be imposed *sua sponte* by the Court or on briefs alone. *See* Fed. R. Civ. Pro. 11(c)(3); *see also Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 886 F.2d 1485, 1494-95 (7th Cir. 1989) (party not entitled to evidentiary hearing before imposition of sanctions); *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1022 (8th Cir. 1999) (explaining that "there is no requirement for an evidentiary hearing prior to the imposition of sanctions" and that "[d]ue process is satisfied if the sanctioned party has a real and full opportunity to explain its questionable conduct before sanctions are imposed."); *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) ("[P]rior to imposing fees and costs upon an attorney for whatever reason, the district court should provide the attorney with an opportunity to fully brief the issue. An oral or evidentiary hearing, however, is not required.").

The three exhibits not previously part of the record consisted of emails containing Mr. Brodsky's own statements. There is no basis for objecting to these emails because (1) they are Brodsky's own statements; (2) they are not being introduced for the truth of the matter asserted; (3) Mr. Brodsky's attorneys had these emails throughout the sanctions hearing and break and could have objected to them or cross-examined Mr. Lubin about them yet chose not to; and (4) Mr. Brodsky's motion does not articulate any reason why the exhibits are objectionable.

Exhibits 29 and 35, emails between Mr. Brodsky and Mr. Lubin, were included to demonstrate how Mr. Brodsky unreasonably and vexatiously multiplied the proceedings by being uncooperative. Exhibit 29 demonstrates how Mr. Brodsky's refusal to comply with a simple request to verify interrogatory answers required multiple emails and ultimately a motion to compel, (Ex. 28), which the Court granted, (Ex. 30). Exhibit 35 further exemplifies Mr. Brodsky's unreasonable behavior. These emails show the difficulty Plaintiff's counsel had scheduling the deposition of Mr. Moorehouse and dealing with Mr. Brodsky's demands to make it possible for him to attend remotely—even though he had objected to Plaintiff's motion to take Mr.

Moorehouse's deposition remotely. As a result, Plaintiff's counsel was forced to incur the cost of traveling to Indianapolis and staying a night in a hotel for the deposition. In addition, the witness was forced to travel to a remote location so that Mr. Brodsky could attend remotely via video conferencing—Mr. Moorehouse had requested to have the deposition at his body shop to minimize the interruption to his workday.

Exhibit 19 consists of Mr. Brodsky's own statements. *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973–74 (C.D. Cal. 2006) (emails from a party are admissible as party admissions). Mr. Brodsky's statements were not offered for their truth—or even as a basis for sanctions. They were included to further rebut the claim that Mr. Brodsky's behavior was unique to this case and to Mr. Lubin (i.e. that Mr. Lubin somehow caused the bad behavior). They also emphasize the need to sanction Mr. Brodsky's conduct in this case to deter similar conduct in the future. *Kapco*, 886 F.2d at 1491. Exhibits 18 and 20 were included for similar reasons.

Further, Mr. Brodsky's motion does not even contend that there is anything inaccurate in the emails. Even if he did, he could have taken the stand at the sanctions hearing to testify about any supposed inaccuracies. His attorneys had the emails in their possession throughout the sanctions hearing including during the break taken prior to Mr. Brodsky's rebuttal case. Yet, his counsel chose not to put him on the stand in an effort to prevent him from being cross examined.

As explained in Plaintiff's motion for sanctions, no evidentiary hearing was needed to determine whether Mr. Brodsky's statements and filings in this case were sanctionable. *See* Dkt. 166-1, p. 16. All the sanctionable statements Mr. Brodsky made and positions he advanced were in the record; thus, there could be no dispute over what those statements or positions were. Accordingly, the Court could make its determination by reviewing the record. Thus, there was no need to go over each exhibit during the evidentiary phase of the sanctions hearing. Mr. Brodsky's

motion doesn't even describe what testimony he believes should have been offered. Were the statements in Exhibit X uncivil? Was position Y frivolous? Those are determinations to be made by the Court and not the subject of evidentiary testimony.

As the Court explained, the limited purpose of the evidentiary phase of the hearing was to determine the one potentially disputed issue: whether Mr. Brodsky made false statements to the Court.[2] Plaintiff presented evidence that he did. Messrs. Lubin and Szczesniak testified that they did not fabricate individuals or submit false affidavit testimony to the Court as Mr. Brodsky had claimed. They also testified that they did not engage in a "criminal enterprise" or conspire to fabricate a case against the Defendant as Mr. Brodsky had also accused them of doing. To further rebut these accusations, Mr. Lubin testified regarding the pre-suit evidence Plaintiff had to support the Complaint's allegations and the additional evidence obtained during discovery.

In sum, Mr. Brodsky's motion fails to identify any reason for striking Plaintiff's exhibits or table of contents. Consequently, the Court should deny the motion.

DONALDSON TWYMAN

By: /s/ Andrew C. Murphy
One of his attorneys

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[2] In the end, even this issue was not disputed as Mr. Brodsky's attorneys conceded during oral argument that Mr. Brodsky's accusations were false.

CERTIFICATE OF SERVICE

I, Andrew C. Murphy, the undersigned attorney, hereby certify that on the July 13, 2017, I caused a true and correct copy of the foregoing RESPONSE TO JOEL A. BRODSKY'S MOTION TO STRIKE PLAINTIFF'S "EXHIBITS" FILED AFTER THE JULY 7, 2017 HEARING to be served all counsel of record via the Court's CM/ECF System

/s/ Andrew C. Murphy