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July 16, 2010

VIA E-MAIL ocnjlaw@gmail.com
Charles Novins, Esq.
54 East Water Street
Toms River, New Jersey 08753

Re: Charles Novins, Esq., P.C. et al. v. Kevin A. Cannon, et al.
U.S. District Court, District of NJ - Trenton
Civil Action: **09-CV-5354-AET-DEA**

Dear Mr. Novins:

I have reviewed your July 7, 2010 "Second" Motion to Vacate Default and Reinstate Plaintiffs' Answer to Counterclaim of Lamb and to Amend the Complaint. I hereby demand that you immediately withdrawn that frivolous motion. Please consider this letter as your safe harbor letter detailing the frivolous nature and willful bad faith in your July 7, 2010 application. Should you choice to ignore this demand I shall feel free thereafter to move pursuant to 28 U.S.C. § 1927 and *Fed. R. Civ. P.* 11 for sanctions. To provide you with adequate time to consider your options, I will shortly make an application to the Honorable Anne E. Thompson for an extension of time pursuant to *L. Civ. R.* 7(d)(2) to reschedule your motion for a later return date.

As you recall, on June 18, 2010, Judge Thompson denied your application to vacate the default as to the counterclaim of Carl and Yvonne Osterwald. [Hereinafter the "First Vacate Motion"]. The Court made that decision after reviewing your motion papers as well as the opposition papers filed by Mr. Manzo and myself and after hearing oral argument. Accordingly, that decision constitutes an adjudication on the merits.

The very next day, during the June 19, 2010 Telephonic Status Conference with Magistrate Judge Arpert, you announced that despite the outcome of your First Vacate Motion you would be filing a second motion to vacate the default as to the counterclaim of my client, Richard Lamb. [Hereinafter the "Second Vacate Motion"]. As you are aware, my client has a default entered against your PC for the same reasons the Osterwalds had a default entered against that plaintiff. In response to your announcement regarding your plan to file the Second Vacate Motion, Judge Arpert asked how you could move for that relief when *res adjudicate* obviously applied. You indicated, (as you do again in your July 7, 2010 declaration) that you did not receive a copy of the Default. Then Magistrate Judge Arpert asked you whether the entry of default was included in the

removal application. You responded "yes." Accordingly, Magistrate Judge Arpert asked you to thoroughly reconsider your plan for filing the Second Vacate Motion with the Court.

Despite Magistrate Judge Arpert's warning, you nevertheless filed the Second Vacate Motion. Moreover, you did so without filing a timely motion for reconsideration or appeal to overturn the June 18, 2010 ruling denying your First Vacate Motion.

I have reviewed your July 7, 2010 declaration in support of your Second Vacate Motion and I found that it contains the same arguments and operative facts as your First Vacate Motion pertaining to the Osterwalds. Furthermore, there was no change in the applicable court rules or decisions that occurred between the time the First Vacate Motion was denied and the Second Vacate Motion was filed.

The only difference between the instant motion to vacate and your previous application is that you are now claiming that you did not receive notice of the entry of default with respect to the counterclaims of Richard "Vince" Lamb. This is not correct. I served your office with a copy of the entry of default pertaining to Mr. Lamb on or about September 30, 2009. (See July 12, 2010 declaration of Dennis Duncan in Support of Motion to Compel Plaintiffs to provide more specific answers to interrogatories at ¶ 4).

Moreover, as Magistrate Judge Arpert mentioned in the June 19, 2010 Telephonic Status Conference, you had an obligation to review the state court record upon removal to make sure the record was accurate. You simply did not review that record. In other words, had you reviewed that state court record as you were required to do, you would have seen Exhibit C, page two, which clearly sets forth "Defendant Lamb's Default against Plaintiff Charles Novins Esq. PC Exhibit C-25." In other words, the entry of default is not buried in a huge stack of papers as you erroneously suggest in your July 7, 2010 declaration filed in support of the Second Vacate Motion.

You also were given notice of the entry of default with respect to the counterclaims of the Richard "Vince" Lamb at the December 10, 2009 Initial Scheduling Conference before Magistrate Arpert. I have discussed that conference with Joseph Manzo (counsel for the Osterwalds and Cannon) and he recalls telling Magistrate Judge Arpert about the default entered against your PC in favor of his clients. Mr. Manzo (and I) also recall the statements I made to the Court at that conference regarding the fact that my client, Mr. Lamb, also had a default entered against your PC. Your claim that you were unaware of the default entered in favor of my client is simply not accurate.

Besides the above-referenced factual misrepresentations, your Second Vacate Motion also makes additional misstatements of fact and reflects a lack of understanding of both the New Jersey and Federal Court Rules. Your July 7, 2010 declaration in support of the Second Vacate Motion also continues your practice of making ad hominem attacks against me. Examples of the above-referenced problems with your Second Vacate Motion are discussed below.

In paragraph 3 of your declaration you misleadingly state that "Counsel for Defendant Lamb never notified me he was seeking a default." *N.J. Court R.* 4:43-1 does not require notice be provided to a defaulting party of an application for entry of default.

Additionally, paragraph 7 of your declaration shows a complete lack of understanding of the purpose of discovery under the Federal Court Rules. Just because a default is entered against a party does not give that party an opt-out from discovery obligations. If your logic was correct, any party like yourself who seeks in bad faith not to provide answers to discovery could merely get a default entered against him and later have the default lifted in order to avoid providing discovery.

Moreover, paragraph 7 of your declaration makes the accusation that I "intentional mislead by omission." That statement is just plain bizarre. The application for entry default by Lamb was filed in the Ocean County Superior Court Clerk's office on July 24, 2009. Removal of this matter was not possible until months later when you decided not to serve non-diverse parties named in the caption to your complaint, thereby permitting removal on diversity grounds under 29 U.S.C. § 1446(d). Your statements regarding my so-called wrongful intent presume that: 1) a defaulting party can avoid discovery obligations and 2) Lamb somehow conjured up a plan in July 2009 to get plaintiffs to answer an additional 25 interrogatories after the case was removed to federal court. Furthermore, the scenario you offer does not explain why you answered 42 interrogatory questions propounded by the Osterwalds (who likewise has a default against your PC).

Paragraph 8 of your declaration is a misrepresentation of facts as set forth above and contains yet another *ad hominem* attack. Your attempt to somehow imply that I mislead Judge Arpert is outrageous and untrue. That is, you indicate that "Judge Arpert would likely have so required" that you combine similar applications. Judge Arpert entered no specific language in his December 11, 2009 Scheduling Order and was informed of my clients' default the day prior.

Paragraph 10 and 11 of your declaration contain misstatement of facts. Plaintiffs were put on notice over a year ago that they violated the New Jersey Court Rules by not specifically answering each allegation in the 62 paragraphs of Lamb's counterclaim. You choice to ignore my letters of June 24, 2009 and September 29, 2009 which specifically explained your violation of the state court rule (an analog to Fed. R. Civ. p. 8(b)) which required you to separately admit or deny each allegation in my client's counterclaim.

My client has been prejudiced by your tactic of refusing to follow the court rules such as the rule requiring detailed answers to allegations in counterclaims and other pleadings. Furthermore, my client has incurred legal fees and expenses related to your refusal to follow such court rules (e.g., the cost of propounding interrogatories to deal with uncertainties occasioned by your deficient answer to Lamb's counterclaim, the cost of drafting letters to demand a proper answer to Lamb's counterclaim; etc.). Accordingly, it is disingenuous for you to claim in your Second Motion to Vacate that my

client was not prejudiced. Lamb's June 12, 2009 counterclaim was drafted with over 64 paragraphs of factual allegations setting forth the specific dates and other relevant information to reinforce each of the nine (9) counts in that pleading. The counterclaim was plead using a technique sometimes referred to as "evidence pleading" which is utilized to induce the responding party to admit or deny factual contentions to limit the need for discovery and thereby reduce the cost of litigation. Your failure to admit or deny increased the cost of litigation.

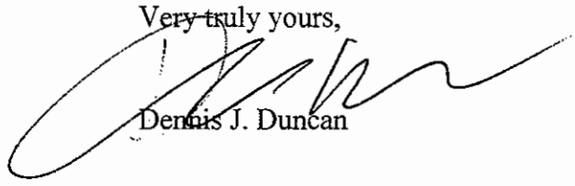
Yet more amazing, is the fact that despite having two federal judges and two licensed attorneys explain *Fed. R. Civ. P.* 8(b) to you, you have submitted a proposed amended answer to my client's counterclaim which still does not comply with that rule (See my July 13, 2010 letter joining in Osterwald's July 7, 2010 motion). In particular, I direct your attention to plaintiffs' statement on page 2 and 3 of the proposed amended answer referring to Lamb's counterclaim paragraphs 14, 17, 24, 29, 34, 41, 46, 51, 56, 58, and 64. Each response to those numbered paragraph is met with the inadequate and improper statement "Denied in part and admitted in part" Each cited paragraph references a paragraph from Lamb's counterclaim. Each paragraph cited contains multiple sentences containing multiple allegations. Is Lamb's counsel supposed to guess which sentence is denied and which sentence is admitted? Similarly, is Lamb supposed to do the same for those sentences containing multiple allegations?

Moreover, your proposed amended answer contains what appear to be general denials. While it is true that *Fed R. Civ. P.* 8(b)(2) allows general denials under certain limited circumstances, they may be tendered only when the pleader intends in good faith to controvert all the averments of the preceding pleading. U.S. v. Long, 10 F.R.D. 443 (D.C. Neb 1950). That is why that type of response is disfavored by courts, which have held that "[c]ourt should seriously question its propriety in light of the likely facts underlying the litigation and the position of the attorney submitting it. U.S. v. Shuster, 11 F.R.D. 151 (D.C. Neb. 1950); Georgia-Pacific Corp. v. Bondurant, 1986, 344 S.C.2d 302, 305, 81 N.C. App. 362. Accordingly, *Fed. R. Civ. P.* 11 sanctions are appropriate where it is shown that some of the averments generally denied were true. U.S. v. Minsee, 113 F.R.D. 121(D.C. Ohio 1986). Lamb's counterclaim taken together with his December 31, 2009 initial disclosure provide and/or specifically refer to 60 documents that support the 62 paragraph in Lamb's counterclaim. Given the specific allegations in Lamb's counterclaim and the extensive evidentiary support for those claims, a general denial by the plaintiffs is clearly inappropriate.

Finally, I again ask that you stop your *ad hominem* attack on me. During your oral argument on June 18, 2009 you launched into yet another *ad hominem* attack on me by bringing to the Courts attention an irrelevant incident which occurred last summer. I apologized to you and then paid you the $750.00 you demanded. Clearly, you mentioned that incident in your oral argument before Judge Thompson to gain an advantage in the litigation. That incident had nothing to do with your motion but was a pure *ad hominem* attack on myself.

In conclusion, if the plaintiffs do not withdrawn their Second Vacate Motion by Friday, August 13, 2010 I will move pursuant to 28 U.S.C. § 1927 and *Fed. R. Civ. P.* 11, *L. Civ. R.* 54.2 and the applicable decisional law for imposition of sanctions, an award of attorney's fees and any other appropriate relief available under the governing legal standards. Please be guided accordingly,

Very truly yours,



Dennis J. Duncan