

IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 15-000072

BRADLEY J. EDWARDS and  
PAUL G. CASSELL,

Plaintiffs/Counterclaim Defendants,

vs.

ALAN M. DERSHOWITZ,

Defendant/Counterclaim Plaintiff.

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**DEFENDANT / COUNTERCLAIM PLAINTIFF ALAN DERSHOWITZ'S**  
**OPPOSITION TO NON-PARTY [REDACTED]'S**  
**SUPPLEMENTAL MOTION TO STRIKE AND FOR SANCTIONS**

Non-Party [REDACTED]s ("Roberts") supplemental motion to strike the Affidavit of Alan M. Dershowitz ("Dershowitz") and for sanctions (" [REDACTED]'s Motion") has no more support in the law or the facts than the original motion. It is likewise entirely meritless and should be denied.

**INTRODUCTION AND EXECUTIVE SUMMARY**

First, [REDACTED]'s counsel, Sigrid McCawley, now claims, for the first time, that she too had settlement negotiations with Dershowitz, making that naked assertion with no supporting affidavit. Roberts's counsel is creating quite a crowd of lawyers all purportedly discussing settlement of this defamation action with Dershowitz notwithstanding that none of those lawyers – whether McCawley, David Boies, David Stone, etc. – represents any party to this case. Dershowitz, for his part, denies that the discussions to which objections have been made were settlement discussions. *See* Affidavit of Alan Dershowitz, filed herewith as Exhibit A.

Second, fatal to the motion, McCawley does not assert that her discussion with Dershowitz was a “mediation communication,” but rather merely that it was a confidential settlement communication. Unlike a mediation communication, there is no “privilege” that precludes a party from repeating a settlement communication, and so Dershowitz would not have violated any rule or court order by repeating a conversation with McCawley, even if that conversation could qualify as a “settlement” discussion. Unlike a lawyer or a doctor who may not disclose communications from their clients, parties negotiating a settlement outside of mediation have no legal obligation not to disclose what are discussions between adverse parties; the notion that there is some “privilege” that attaches to ordinary settlement discussions is flat wrong and makes no sense. Such discussions may not be admissible but they are not privileged in the sense that one participant may forbid another from disclosing the discussions.

In any event, this was not a “settlement” communication. And, frankly, since McCawley disputes she ever made the statement at issue, that would seem to undercut the entire premise of it being a demonstrable “statement” of any sort.

Lastly, [REDACTED]'s motion hinges on the implicit argument that every single thing that McCawley ever even allegedly said to Dershowitz was a “settlement” communication – a proposition that is absurd on its face. Regardless, to the extent the Court determines it matters whether this particular statement by McCawley which she disputes she even made was a “settlement” discussion, an evidentiary hearing is necessary before any findings properly can be made by this Court. There is no basis on which the Court could decide the dispute without hearing sworn testimony from the discussion’s participants, Dershowitz, Boies, and now McCawley, as well as the witnesses to many of the conversations.

The Court's prior sealing order regarding the filing of a transcript that referred to certain communications between Dershowitz and Boies does not afford a basis to seek sanctions against Dershowitz for responding truthfully and accurately to a question during his deposition about a different communication between Dershowitz and McCawley. ██████'s counsel made her (baseless) objection during the deposition. The Special Magistrate acted on that objection based on ██████'s counsel's mischaracterization of this Court's prior ruling. Dershowitz even volunteered to have his testimony sealed and has done nothing to challenge or evade the Special Magistrate's order. That is the end of the matter with respect to Dershowitz.

With respect to ██████'s counsel, Ms. McCawley, that is not the end of the matter. ██████'s counsel made an inaccurate representation to the Special Magistrate regarding the breadth of "settlement" communications that were the subject of the Court's prior order and thereby obtained a ruling striking Dershowitz's testimony about his communication with ██████'s counsel. The Court should reprimand ██████'s counsel to remind her of her duty of candor to the tribunal, which requires that she be forthcoming and accurate in her statements to the Special Magistrate, and that in any further deposition of Dershowitz, Dershowitz is permitted to testify as to the same.

### ARGUMENT

#### **I. AT A MINIMUM THERE IS A DISPUTED ISSUE OF FACT ABOUT THE CONTEXT OF THE COMMUNICATION BETWEEN MCCAWLEY AND DERSHOWITZ**

██████'s motion asserts, without any support, that the referenced communication between McCawley and Dershowitz was a "settlement" communication. ██████ adduces no evidence whatsoever about where, when, or the circumstances of the disputed statement from McCawley to Dershowitz to support her argument.

When the disputed communication was first mentioned in deposition, ██████'s counsel said:

I'm sorry, I'm going to object. This again -- so **I have no idea what context, or if you're referring to a context where we were having settlement discussions,** that violates the seal order that's already in place. There's a motion for sanctions pending. We will be supplementing with this. You know, how many times do we have to go over this, Alan? It's not appropriate. First of all, you're misrepresenting things. And I'll state for the record, I did not say that.

Dersh. Tr. at 793:22–794:7 (emphasis added). Now, instead of sticking with Ms. McCawley's original story that she has “no idea what context” the statement was made in, ██████ has a new story, asserting, without affidavit, that the statement to Dershowitz was a settlement communication. Incongruously, ██████'s counsel also says that she never made the statement at all. These various contradictory positions (none supported by an affidavit) can't all be true.

Dershowitz, for his part, flatly denies that the disputed statement was in the context of a settlement discussion. As set forth in the Affidavit of Alan Dershowitz that is being filed with this opposition brief, the disputed “communication with Ms. McCawley was not for the purpose of settling this defamation case or any other lawsuit or claim.” Dershowitz Aff., ¶ 2.

More importantly, ██████ does not assert that the communication between McCawley and Dershowitz was a “mediation communication.” This defect is fatal to her supplemental motion for sanctions. As set forth in Dershowitz's Motion In Limine To Overrule Settlement Objections and his opposition to the original Motion To Strike And For Sanctions, settlement communications are not protected by Florida's mediation statute. Mot. in Limine at 5; Opp'n to Mot. To Strike at 7. Mere settlement communications that are not made during a court-ordered

mediation do not qualify under the statute as “Mediation Communications.” *See* Fla. Stat. 44.403(1) (“‘Mediation communication’ means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant **made during the course of a mediation, or prior to mediation if made in furtherance of a mediation.**”) (emphasis added). There is no privilege under Florida law that precludes a party from repeating a settlement communication, and ██████ cites none.<sup>1</sup> The case law that ██████ cites in her motion to support sanctions for disclosure of communications pertains, as Roberts admits, to “making public discussion that took place **during mediation.**” Supp. Mot. Sanctions at 5 (citing *Paranzino v. Barnett Bank of S. Fla., N.A.*, 690 So. 2d 725 (Fla. 4th DCA 1997)) (emphasis added). Accordingly, even if the Court were to conclude that the disputed communication between McCawley and Dershowitz were a “settlement” communication – which the Court cannot do on the current record and which would require an evidentiary hearing – Dershowitz would not have violated any rule or court order by repeating that communication. Dershowitz was the one who offered to have his testimony about that communication sealed at his deposition. ██████’s counsel made no effort in that regard, and instead filed this baseless motion, apparently in an effort to bury potentially embarrassing comments she has made to Dershowitz. And, as Dershowitz has stated under oath, this was not a “settlement” communication.

At a minimum, the Court could not properly conclude that (1) the disputed statement was made; or (2) the disputed statement was made as part of settlement discussions – based on the

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<sup>1</sup> Again, whether or not the settlement communication would be admissible at trial is a different issue. And even then the question of admissibility will depend upon the reasons for which the evidence is offered. But the issue presented by the current motion is whether responding at deposition to a question with a reference to a non-mediation statement (and non-settlement statement) from Ms. McCawley is per se sanctionable. The answer is plainly: no.

current record. The one thing the court can properly conclude is that the statement was not a “mediation communication.” If the Court does not reject ██████’s supplemental motion out of hand, as it should, it cannot grant ██████ any relief without first holding an evidentiary hearing at which the participants in the disputed communication have an opportunity to present testimony about the circumstances of the disputed communication.

**II. THE PRIOR SEALING ORDER FOR HOW CERTAIN EVIDENCE MAY BE PUBLICLY FILED HAS NO APPLICATION TO THE DISCOVERY OF DISPUTED COMMUNICATION BETWEEN DERSHOWITZ AND MCCAWLEY**

The Court’s prior sealing order addressed only the issue whether a transcript that referred to certain communications between Dershowitz and Boies could be publicly filed. *See* Order on Boies Schiller Flexner, LLP’s Motion to Seal, dated Dec. 18, 2015 (the “Sealing Order”) & Roberts’s Emergency Motion to Seal, filed Dec. 11, 2015 (“Motion to Seal”). That order did not address Dershowitz’s communications with anyone other than Boies, nor could it have given that ██████ moved to seal only a declaration concerning disputed communications between Dershowitz and Boies. *See* Motion to Seal. And it only proscribed public filing of the Dershowitz affidavit describing the Dershowitz/Boies communication. *See* Sealing Order. It did not address discovery at all, much less discovery of different communications. *Id.* That order certainly does not afford a basis to seek sanctions against Dershowitz for responding truthfully and accurately to a question during his deposition about a different communication between Dershowitz and McCawley.

While the Court did initially make a finding during the hearing on the Motion to Seal that the communication between Dershowitz and Boies was a settlement communication, the Court then clarified its position. When asked about Dershowitz’s Motion in Limine Concerning Application of Settlement Rules – which is the motion that raised the issue about the use of the

communication between Dershowitz and Boies – the Court explained: “I’ll listen to any argument anyone has on any issue. **We’re not doing that today.**” *See* Supp. Mot. Sanctions at 3 (emphasis added). In other words, the Court did not make and could not have made a final factual determination about the disputed nature of the communications between Dershowitz and Boies. That motion was not before the Court. Certainly the Court made no findings of any sort about communications between Dershowitz and the rest of the world.

██████’s counsel made an inaccurate and improper objection during Dershowitz’s deposition when he answered a question from Plaintiffs (to which no objection had been asserted). ██████’s counsel inaccurately informed the Special Magistrate that:

I’m denying the allegation that you just made on the record. I’m making my record that you are not entitled to discuss anything that deals with confidential settlement discussions. Misrepresenting those is a violation of that, and I’ll go back to the judge and get another order if I need to.

Dershowitz Tr. at 794:13-19. The Special Magistrate acted on that objection based on ██████’s counsel’s mischaracterization of this Court’s prior Sealing Order. The Sealing Order addressed sealing a publicly filed affidavit. It did not address simply answering discovery when a deposition question was pending and no objection had been made. Even though the Special Magistrate’s ruling striking the testimony was wrong because of the misinformation he was given by ██████’s counsel, Dershowitz has done nothing to challenge or evade the Special Magistrate’s order. He has not filed that testimony in any public pleading. Dershowitz even offered to have that deposition testimony sealed to address Roberts’s counsel’s improper objection. *Id.* at 796:1-2. Having simply answered the Plaintiffs’ deposition question to which no objection was made, Dershowitz has comported himself exactly as the Rules require.

██████'s counsel, however, must be reprimanded and reminded by the Court about her duties and responsibilities in making objections and providing accurate representations to the Special Magistrate about this Court's prior orders. Her misrepresentation to the Special Magistrate led to error in striking testimony, which impacts the record in this case. At a minimum, ██████'s counsel should be admonished to adhere to the canons of ethics, including the duty of candor to the tribunal. *See Fla. Rule of Prof. Conduct 4-3.3.*

### **CONCLUSION**

There can be no valid dispute that the communication at issue between Dershowitz and ██████'s counsel is not a "mediation communication" and therefore is not confidential. No "privilege" attaches to settlement discussions. Because Dershowitz did not violate any Court order in simply answering in discovery a question posed to him for which no objection had been asserted, the supplemental sanctions motion should be denied.

Respectfully submitted,

s/ Thomas E. Scott

Thomas E. Scott

Florida Bar No. 149100  
[REDACTED]

Steven R. Safra

Florida Bar No. 057028  
[REDACTED]

COLE, SCOTT & KISSANE, P.A.

Dadeland Centre II, 14th Floor

9150 South Dadeland Boulevard

Miami, Florida 33156

Phone: [REDACTED]

Fax: [REDACTED]

Richard A. Simpson (*pro hac vice*)  
[REDACTED]

Mary E. Borja (*pro hac vice*)  
[REDACTED]

Ashley E. Eiler (*pro hac vice*)  
[REDACTED]

Nicole A. Richardson (*pro hac vice*)  
[REDACTED]

WILEY REIN LLP

1776 K Street NW

Washington, DC 20006

Phone: [REDACTED]

Fax: [REDACTED]

Kenneth A. Sweder (*pro hac vice*)  
[REDACTED]

SWEDER & ROSS

131 Oliver Street

Boston, MA 02110

Phone: [REDACTED]

Fax: [REDACTED]

*Counsel for Alan M. Dershowitz*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed through the Clerk of Broward County by using the Florida Courts eFiling Portal and thus served by electronic mail: [REDACTED] to: Jack Scarola, Esq, Searcy Denney Scarola Barnhart & Shipley, P.A., Counsel for Plaintiff, 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409; [REDACTED] to: Joni J. Jones, Esq., Assistant Utah Attorney General, Counsel for Plaintiff Cassell, 160 East 300 South, Salt Lake City, Utah 84114; [REDACTED] to: Bradley J. Edwards, Esq, Farmer, Jaffe et al, 425 North Andrews Avenue, Suite 2, Ft. Lauderdale, FL 33301; [REDACTED], to: Paul G. Cassell, Esq., s [REDACTED] to: Sigrid S. McCawley, Esq., Boies Schiller & Flexner, LLP, 401 E. Las Olas Blvd, Suite 1200, Ft. Lauderdale, FL 33301, this 10th day of February, 2016.

COLE, SCOTT & KISSANE, P.A.  
Attorneys for Defendant  
9150 S. Dadeland Blvd.  
Suite 1400  
Miami, Florida 33156

[REDACTED]  
Phone: [REDACTED]

Fax: [REDACTED]

By: s/ Thomas E. Scott  
THOMAS E. SCOTT  
FBN: 149100  
STEVEN R. SAFRA  
FBN: 057028

# **EXHIBIT A**

IN THE CIRCUIT COURT OF  
THE SEVENTEENTH  
JUDICIAL CIRCUIT  
IN AND FOR BROWARD  
COUNTY, FLORIDA

CASE NO.: CACE 15-000072

EDWARDS, *et al.*,

Plaintiffs / Counterclaim Defendants,

v.

DERSHOWITZ,

Defendant / Counterclaim Plaintiff.

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**AFFIDAVIT OF ALAN M. DERSHOWITZ**

1. My name is Alan M. Dershowitz. I submit this Affidavit based on personal knowledge in support of my opposition to [REDACTED]'s Supplemental Motion to Strike and for Sanctions filed in the above-captioned action.
2. In the Supplemental Motion to Strike and for Sanctions, [REDACTED] quotes from my deposition where I answered a question by Plaintiffs' counsel. My answer referred to a brief discussion that I previously had privately with [REDACTED]'s counsel, Sigrid McCawley. That communication with Ms.

McCawley was not for the purpose of settling this defamation case or any other lawsuit or claim.

There is no lawsuit or claim between me and Ms. McCawley's client.

- 3. That communication with Ms. McCawley was not made during the course of a mediation, or prior to mediation and made in furtherance of a mediation.

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this affidavit and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: 2/10  
2016

[Redacted signature area]

Alan M. Dershowitz

STATE OF FLORIDA

COUNTY OF

Sworn to or affirmed and signed before me on 2-10-2016  
by Etienne Brown



NOTARY PUBLIC or DEPUTY  
CLERK

[Redacted name area]

[Print, type, or stamp  
commissioned name of

notary or clerk.]

1

