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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

Sealed
Unsealed per Order 436

LOUIS ALEKSICH, RAINELLE ALEKSICH, and BRENT ALEKSICH,

Plaintiffs,

vs.

REMINGTON ARMS COMPANY, INC., and E. I. DuPONT DE NEMOURS AND COMPANY,

Defendants.

Cause No. CV-91-5-BU-PGH

PLAINTIFFS' COUNSEL'S RESPONSE TO DEFENDANTS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE AND FOR FINDING OF CONTEMPT

Defendants filed their initial application for Order to Show Cause And For Finding Of Contempt without requesting a copy of the transcript of the March 28, 1995 settlement hearing before the Court. Then, when it was apparent that Plaintiffs' counsel had not violated either the confidentiality agreement of the parties nor the order of this Court, Defendants moved to expand their efforts rather than concede the issue. Defendants sought permission to transcribe the

settlement hearing in hopes that they could find some language to save their unfounded Application. The best they could come up with as a basis for continuing their efforts to sanction Plaintiffs' counsel is the imprecise phrase, "the whole nine yards." Settlement Hearing Transcript, p. 47, lines 5-6. But the remainder of the precise language used by both parties in the settlement hearing clearly belies their position.

Mr. Carlson, in announcing the settlement to the Court, states that its "terms and conditions" will be confidential, making only one specific request for confidentiality

> And we would also request that all of the record that has been taken by the court reporter the last couple of days, including the record right now, be not transcribed and be sealed, so that the terms and conditions of the settlement are strictly confidential. Settlement Hearing Transcript P.45, L. 12-16

The record shows that Defendants sought to protect first, the "terms" of the settlement and second, its "conditions." The only specific item Defendants wanted to conceal was the record of the proceedings before the Court in Montana over the "last couple of days" and any discussion of same. Settlement Hearing Transcript P. 45, Lines 13-14. Mr. Carlson went on to explain Defendants' reason for asking that the record taken in Montana over these couple of days remain confidential:

> Just to explain, your Honor, what we do not want to have happen in another case somewhere else, a discussion about what a court in Montana was going to do about a specific issue. Settlement Hearing Transcript P. 47, Lines 5-7.

No discussion about what this Court said it was going to do with respect to the sanctions issue has ever taken place in any other Court. Plaintiffs' counsel has complied not only with the parties' agreement and the Court's Order with respect to confidentiality, but also with the Defendants' specific request that the

record and all discussions in Montana be protected. Defendants make no claim to the contrary.

The context of this settlement hearing is also important because it puts Defendants' present claim into perspective. Defendants settled the instant case under threat of sanctions for failure to timely produce documents only after this Court advised them of the investigation it intended to conduct. The Defendants' overriding settlement goal was to prevent that transcript and other comments by the Court and counsel in Montana from being used against them in other Remington bolt action rifle cases. Defendants knew they had defrauded literally dozens of other Plaintiffs by denying them important evidence that existed long before their unfortunate experience with a Remington bolt action rifle. Defendants knew they would face motions for sanctions based on the same discovery abuses in numerous other cases. Finally, Defendants knew Plaintiffs' counsel would not trade the rights of his other clients to seek appropriate relief in order to settle the instant case.

What Defendants' counsel could request and Plaintiffs' counsel would agree to without affecting the rights of other clients, was to seal the record after withdrawal of Plaintiffs' Motion For Sanctions and not discuss what transpired in Montana over these "couple of days." As the transcript shows, it was the Montana proceedings which Defendants dearly sought to conceal because they might suggest a similar response by another Court when presented with the sanctions issue.

After waiting for a transcription of the hearing that Defendants wanted to protect in the first place, it is even more clear that Plaintiffs' counsel did not violate either the letter or the intent of confidentiality in this case. If anything, the settlement hearing transcript proves that confidentiality does not

extend to Plaintiffs' Motion for sanctions itself, nor could it. The Motion For Sanctions, including Exhibit C, provided to attorney Jerome Kiger, was drafted before any such discussions took place and before the parties ever travelled to Montana. Therefore, it could not contain any of the discussions which occurred in Montana during the "couple of days" referenced by Defendants' counsel. Even though Exhibit C to Plaintiffs' Motion For Sanctions had been withdrawn with the rest of Plaintiffs' Motion by agreement of the parties before the record was sealed, Plaintiffs' counsel redacted any prospective discussion of the sanctions issue. This left only an explanation of the significance of the belatedly produced documents, a fact Defendants conveniently omitted from the Reply Brief. Remington has never claimed that these documents themselves are confidential; consequently, there is no way a discussion of the importance of those documents to Remington bolt action rifle litigation could be confidential. Most importantly, Defendants' reply brief, like their initial brief, fails to refer to any portion of Exhibit C which contains any discussion, even prospective, of the Aleksich sanctions issue. That is because the redacted Exhibit C does not even mention the issue.

The purpose of Defendants' Application For Order To Show Cause And For Finding Of Contempt is not merely to "chill" sanctions proceedings in other cases but to actually intimidate Plaintiffs' counsel from even filing similar motions. This is the only way Defendants can avoid clear liability for its repeated abuse of the discovery process. This Application itself is an example of the way Defendants do business. Perhaps the best example is the Nigro case itself. Remington's counsel in both, John Shaw, never disclosed the existence of the belatedly produced Aleksich documents to opposing counsel or to the Court despite a clear opportunity and obligation to do so. If it had not been for the sharing

of information contained in Plaintiffs' Motion For Sanctions with Plaintiffs' counsel in Nigro, Jerome Kiger, Defendants fraudulent conduct in that case would never have been uncovered. Certainly Defendants and their counsel breached any duty of candor by failing to disclose the existence of these documents, not only to the Nigro Court, but all other Courts in which they should have been produced.

Just because Mr. Kiger concluded the sanctions motion in this case had something to do with the settlement does not mean that Plaintiffs' counsel violated the terms of confidentiality ordered in this case. Furthermore, Mr. Kiger's erroneous statement that the sanctions motion had been the subject of formal, oral argument before this Court proves his lack of knowledge about any of the proceedings which occurred during the couple of days spent in Montana with this Court. Just because Mr. Kiger is aware of the fact that Plaintiffs sought sanctions in the Aleksich case, a matter that was never confidential, does not mean that he is aware of what happened with respect to that motion, as evidenced by his Affidavit. See Exhibit C to Response Of Plaintiffs' Counsel Richard C. Miller to Defendants' Application For Order To Show Cause And For Finding Of Contempt.

Defendants should not be allowed to violate their discovery obligations, defraud Plaintiffs and this Court in the process, then buy their way out of that misconduct only to turn around and file a frivolous Application in order to intimidate Plaintiffs' counsel. There has been no violation of the Court's confidentiality Order in this case nor the agreement of parties, much less the representations of counsel during the March 28, 1995 settlement hearing. This Court should not condone Defendants' conduct with respect to the filing of their Application For Order To Show Cause And For Finding Of Contempt as it did not condone their underlying conduct with respect to discovery. But, more

importantly, the Court should react even more vigorously to this continued abuse of the legal process. First, the Court should clearly and fully exonerate Plaintiffs' counsel from any claims of misconduct. Second, it should assist his clients by whatever means are at the disposal of this Court to insure that other Plaintiffs similarly situated are not similarly treated. Finally, it should consider appropriate sanctions in response.

WHEREFORE, Plaintiffs' counsel, Richard C. Miller, respectfully requests the Court to deny Defendants' Application For Order to Show Cause And For Finding Of Contempt and any sanctions or other relief sought by them.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed to all attorneys of record by placing same in the United States Mail, postage prepaid, duly addressed to their business address on the 8th day of November, 1995.

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