UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 1:16-CV-21296 –SCOLA/OTAZO

SETAI HOTEL ACQUISITION,
Plaintiff,
v.

MIAMI BEACH LUXURY RENTALS, INC.
and ALLEN TULLER,
Defendants.
_____/

DEFENDANTS' MOTION TO DISQUALIFY AND
ISOLATE LAW CLERK FROM THIS CASE

Defendants ("MBLR" and Tuller), through undersigned counsel, files this Motion to Disqualify and Isolate the Law Clerk, Ana Romes, from this Case *and* to Deny Plaintiff's Motion to Determine Facts as Established in the Case [DE 239] and Motion for Reconsideration [DE 250] states:

Defendants reluctantly make this motion to avoid the appearance of partiality and ensure a fair trial. On Thursday, August 24, 2017 at 6:12 p.m. Plaintiff's counsel, Dan Barsky, advised the undersigned counsel that, *over 24 hours earlier at some time on Wednesday*, he purportedly just learned that the law clerk assigned to this case is Ana Romes, who was employed with Shutts & Bowen before clerking for this Court. Mr. Barsky did not explain why he did not inform the undersigned counsel *during business hours on Wednesday or Thursday* and instead waited over 24 hours (and after the court closed) to advise the undersigned counsel of Ms. Romes' employment with his law firm. It is unclear exactly when Plaintiff's attorneys purportedly recalled that Ms. Romes had left their law firm for a prominent clerkship with the judge involved

in their case.[1] However, there is little doubt that they were hoping for a prompt ruling from this Court on Plaintiff's pending Motion to Determine Facts as Established. Mr. Barsky's actions also precluded Defendants from addressing this issue in their Response to Plaintiff's Motion filed on Wednesday. Mr. Barsky was also already drafting yet another motion, as part of his motion practice leading up to trial, and promptly filed that Motion for Reconsideration early Friday Morning (again with the hope of having his former associated involved in the ruling on that Motion). [DE 250].

This case was filed by Shutts & Bowen with this Court in April 2016. At that time, Ms. Romes worked with Shutts & Bowen and continued to work with that law firm while this case remained pending with this Court. Ms. Romes then began working with this Court in August 2016. With respect to law clerks working on cases involving a former employer, the Eleventh Circuit has held:

> Because precedent approves the isolation of a law clerk who has accepted future employment with counsel appearing before the court (*see e.g., Hunt*, 783 F.2d at 1015-16) it follows that ***isolating a law clerk should also be acceptable when the clerk's former employer appears before the court***.
>
> Second, we note that a law clerk has no incentive to violate a court's instruction that he isolate himself from the case and thereby subject himself to discharge. In this case, the district judge explained that, as a matter of course, he isolates law clerks from cases involving past or future employers. The obvious purpose of this procedure is to ***ensure that the appearance of partiality does not arise***; as such, only a foolhardy law clerk would purposely circumvent the court's instruction by attempting to pass on information about a case.
> *Byrne v. Nezhat*, 261 F.3d 1075, 1101–02 (11th Cir. 2001).

Defendants believe it is not asking much of this Court to have the clerk disqualified and isolated from the case. Defendants have valid concerns. Immediately following calendar call, and *before* this Court entered its order on the summary judgment motion, Mr. Barsky told the

[1] It is difficult to believe that Plaintiff's attorneys did not realize their former associated was not working with the Court. But it is clear that Plaintiff has three (3) partners working on this case and are engaged in motion practice to try to prevent Defendants from preparing for trial.

undersigned counsel that the Court was going to find that they had standing. Now that Mr. Barsky has made this recent disclosure, one must necessarily wonder how Mr. Barsky would know how the Court would decide the standing issue. Moreover, this Court's denied Defendants' motion to strike, but indicated it would rely solely on admissible evidence. [DE 217]. Thereafter, the Court entered its summary judgment order, which relied on the opinion of Robert Siegleman as to the purported "common ownership" of BPI and SHA and based on hearsay, documents that were neither attached to his declaration nor produced in this case. The Court also relied on the affidavit of Dan Barsky regarding unauthenticated letters purportedly sent to Mr. Tuller by some other attorney at another law firm and emails, which Mr. Barsky mislead this Court to believe were from one of Defendant's customers. Not only did Mr. Barsky lack any personal knowledge of any facts stated in his Declaration, he mislead this Court as to the most important factor on the issue of likelihood of confusion—that being proof of actual confusion. The undisputed evidence was that those emails were not from Defendants' customers. The Court's ruling gives the appearance of partiality in this case.[2] The law clerk should have been disqualified and isolated from the inception. To avoid such appearance of partiality and to ensure a fair trial, no facts should be found in favor of Plaintiff based on the Court's summary judgment order and Plaintiff should be required to prove its case at trial.[3]

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[2] Plaintiff did not even respond to Defendants' Statement of Facts. Under this Court's Local Rules, those facts are to be deemed admitted, as long as they are supported by evidence. Defendants' facts were supported by evidence. The Court's summary judgment order did not address Defendants' argument on this issue. The Court acknowledge that Defendants' evidence showed the prior owner of the Mark approved of Defendant's website and the use of the Setai name. This was undisputed, but the Court did not state it as an undisputed fact. Thus, based on the record, there appears to be a partiality in favor of Plaintiff. The Court has made findings in favor of Plaintiff that were not even listed in Plaintiff's Statement of Facts, yet the Court did not make findings against Plaintiff, when Plaintiff failed to contest Defendants' Statement of Facts.

[3] The Court found that Defendants failed to address the issues of "fancifulness" and "priority," even though those issues were never raised in Plaintiff's Statement of Facts. The Court's summary judgment order also never mentioned Defendants' argument regarding Plaintiff's lack

WHEREFORE, Defendants request that the Court disqualify the law clerk and isolate her from the case, deny Plaintiff's request for determination of facts as established, and deny the Motion for Reconsideration [DE 250] and require Plaintiff to prove all issues at trial, and for such other relief as this Court deems just and proper.

Respectfully submitted,

THE STABENOW LAW FIRM, PLLC
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By: */s/ Tony Stabenow*
Tony L. Stabenow, Esq.
Florida Bar No.: 0033328

CERTIFICATE OF GOOD FAITH CONFERENCE

I HEREBY CERTIFY that before filing this Motion the undersigned communicated and conferred with SHA's counsel regarding the relief requested herein before filing this Motion with the Court and Plaintiff does not take a position and leaves the decision up to the Court.

By: */s/ Tony Stabenow*
Tony L. Stabenow, Esq.
Florida Bar No.: 0033328

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, PURSUANT TO Rule 5(b) of the Federal Rules of Civil Procedure and Rule 5.2 of the Local Rules for the United States District Court for the Southern District of Florida, I served the foregoing upon Daniel Barsky, Esq. and Daniel Benavides, Esq. at: 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 34401 and DBarsky@shutts.com

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of proof of damages.

and DBenavides@shutts.com counsel for Plaintiff, this 25th day of August 2017.

By: */s/ Tony Lee Stabenow, Esq.*
Tony L. Stabenow, Esq.
Florida Bar No.: 0033328