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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: SKI TRAIN FIRE IN KAPRUN AUSTRIA ON NOVEMBER 11, 2000

01 MDL # 1428 (SAS)

This document relates to the following actions:

JOHANN BLAIMAUER, et al.,

Plaintiffs,

- against -

OMNIGLOW CORPORATION, et al.,

Defendants.

03–CV–8960 (SAS)

OPINION & ORDER

05058

HERMAN GEIER, et al.,

Plaintiffs,

- against -

OMNIGLOW CORPORATION, et al.,

Defendants.

03–CV–8961 (SAS)

NANAE MITSUMOTO, et al.,

Plaintiffs,

- against -

THE REPUBLIC OF AUSTRIA, et al.,

Defendants.

06–CV–2811 (SAS)

NANAE MITSUMOTO, et al.,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	07–CV–935 (SAS)
	:	
ROBERT BOSCH CORPORATION, et al.,	:	
	:	
Defendants.	:	

JOOP H. STADMAN, et al.,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	07–CV–3881 (SAS)
	:	
AUSTRIAN NATIONAL TOURIST OFFICE INC., et al.,	:	
	:	
Defendants.	:	

RASTKO and DRAGICA FERK, et al.,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	07–CV–4104 (SAS)
	:	
OMNIGLOW CORPORATION, et al.,	:	
	:	
Defendants.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

These cases arise from a disaster that occurred on November 11, 2000, in which a ski train in Kaprun, Austria caught fire, killing 155 people. American

and foreign survivors and/or relatives of those who died in the fire brought a number of lawsuits in federal court against numerous defendants alleging, *inter alia*, negligence and strict liability. The Judicial Panel on Multidistrict Litigation assigned these actions to this Court for coordinated or consolidated pretrial proceedings. The actions within this multidistrict litigation ("MDL") fall easily into two groups – those filed on behalf of American plaintiffs,[1] and those filed on behalf of foreign plaintiffs. There are five actions falling in the latter category, all of which are being prosecuted by Edward D. Fagan, James F. Lowy, and Robert J. Hantman.[2]

Defendants now jointly move to disqualify Fagan as counsel in these proceedings on several grounds, including the filing of a personal bankruptcy petition giving rise to a conflict of interest with his clients in violation of ethical rules.[3] In addition, defendants jointly move, pursuant to section 1927 of title 28 of

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[1] *See, e.g.*, *Habblett v. Omni-Glow Corp.*, Nos. 01 MDL 1428, 02 Civ. 2492 (filed April 1, 2002); *Habblett v. Siemens AG*, Nos. 01 MDL 1428, 01 Civ. 6554 (filed July 19, 2001).

[2] The underlying facts related to the instant matters are summarized in Part III below. For a more thorough discussion of the procedural history of this MDL, see *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, Nos. 01 MDL 1428, 01 Civ. 6554, 01 Civ. 7242, 04 Civ. 1402, 2005 WL 1523508, at *1-2 (S.D.N.Y. June 27, 2005); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 403, 404 (S.D.N.Y. 2002).

[3] By letter to the Court dated May 23, 2007, the American plaintiffs joined in defendants' motion to disqualify Fagan. *See* 5/23/07 Letter from Jay J. Rice,

the United States Code, for an order imposing sanctions against all three foreign plaintiffs' counsel for alleged misrepresentations made by them concerning the testimony of two so-called "whistleblower" witnesses who were deposed by defense counsel in Germany in April 2007.[4] For the reasons stated below, defendants' motion is granted in part with respect to Fagan; it is denied with respect to Hantman and Lowy.

II. DISQUALIFICATION OF COUNSEL

A. Applicable Law

"'The power of federal courts to disqualify attorneys in litigation pending before them has long been assumed without discussion.'"[5] Whether to disqualify an attorney lies within the court's discretion.[6] Disqualification is only warranted, however, in the rare circumstance where an attorney's conduct "might

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counsel for American plaintiffs, to the Court ("5/23/07 Rice Letter").

[4] To avoid duplicative briefing, only two defendants, Siemens Transportations Systems, Inc. and Bosch Rexroth Corporation, filed briefs in support of defendants' motion for disqualification and sanctions.

[5] 1 M. Silberberg, *Civil Practice in the Southern District of New York* § 4.17 at 4-21 (quoting *Board of Educ of City of N.Y. v. Nyquist*, 590 F.2d 1241, 1245-46 (2d Cir. 1979)).

[6] *See Cheng v. GAF Corp.*, 631 F.2d 1052, 1055 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981).

taint the case."[7] For even where a motion to disqualify opposing counsel is "made in the best of faith," courts must be mindful that such motions, when granted, invariably cause delay and have the immediate adverse effect of separating parties from their chosen representative.[8] "In general, then, a district judge should disqualify the offending counsel [only] when the integrity of the adversarial process is at stake."[9]

Thus, in this Circuit, "disqualification has been ordered only in essentially two kinds of cases," the more relevant of which is "where an attorney's conflict of interests in violation of Canon 5 . . . of [The American Bar Association] Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client."[10] The American Bar Association Code of Professional Responsibility ("Code"), as adopted by the New York courts,

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[7] *Papanicolaou v. Chase Manhattan, N.A.*, 720 F. Supp. 1080, 1083 (S.D.N.Y. 1989) (citing *Nyquist*, 590 F.2d at 1246).

[8] *Nyquist*, 590 F.2d at 1246.

[9] *Papanicolaou*, 720 F. Supp. at 1083 (citing *Nyquist*, 590 F.2d at 1246).

[10] *Nyquist*, 590 F.2d at 1246 (citations omitted). Canon 5 of the New York Code of Professional Responsibility is entitled "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." The other basis for disqualification is where an attorney is in a position to potentially use or misuse privileged information, in violation of Canons 4 and 9 of the Code of Professional Responsibility. *See Nyquist*, 590 F.2d at 1246.

sets forth the appropriate guidelines for attorneys' professional conduct in the United States District Courts in this state.[11] The Code consists of three separate but interrelated parts, including Canons, which are "statements of axiomatic norms."[12] Within each Canon are corresponding Ethical Considerations and Disciplinary Rules. The Ethical Considerations are "aspirational in character and represent the objectives toward which every member of the profession should strive."[13] The Disciplinary Rules, however, are "mandatory in character;"[14] they "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[15] Applications of the Code to resolve disqualification motions necessarily require a fact-specific analysis.[16]

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11 *See NCK Organization Ltd. v. Bregman*, 542 F.2d 128, 129 n.2 (2d Cir. 1976); *King v. Fox*, No. 97 Civ. 4134, 2005 WL 741760, at *2-3 (S.D.N.Y. Mar. 31, 2005); *Arifi v. de Transport du Cocher, Inc.*, 290 F. Supp. 2d 344, 348 (E.D.N.Y. 2003).

12 New York Code of Prof. Resp., Preliminary Statement, *reprinted in* N.Y. Jud. Law App.

13 *Id.*

14 *Id.*

15 *Kittay v. Kornstein*, 230 F.3d 531, 538 n.3 (2d Cir. 2000).

16 *See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975) ("'When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and

For the purposes of this motion, the most critical rules are those embodied in Canon 5 of the Code and its related Ethical Considerations and Disciplinary Rules.[17] Specifically, Disciplinary Rule 5-101 provides:

> A lawyer shall not . . . continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.[18]

Ethical Consideration 5-1 is also relevant and states that: "[t]he professional judgment of a lawyer should be exercised . . . solely for the benefit of the client and

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precise application of precedent.'" (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955)).

[17] *See Nyquist*, 590 F.2d at 1246 (emphasizing that trial judges in this Circuit utilize their power to disqualify counsel only "where necessary to preserve the integrity of the adversary process," such as where an attorney's conflict of interest violates Canon 5 of the Code).

[18] DR 5-101, 22 N.Y. Comp. Codes R. & Regs. § 1200.20. Additionally, Disciplinary Rule 5-103 provides that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client . . . ." DR 5-103, 22 N.Y. Comp. Codes R. & Regs. § 1200.22(a). Although "reasonable" contingent fees in civil cases are one exception to this rule, *id.* § 1200.22(a)(2), the fact that Fagan's financial survival depends on the size of his share of any settlement proceeds in these cases renders Fagan's contingent fee arrangement unreasonable under the circumstances. *See Landsman v. Moss*, 579 N.Y.S.2d 450, 453 (2d Dep't 1992) (contingent fee agreement unreasonable where it created a genuine risk that a conflict of interest could arise which might affect attorney's ability to zealously represent client's interests).

free of compromising influences and loyalties . . . . [T]he lawyer's personal interests . . . should [not] be permitted to dilute the lawyer's loyalty to the client."[19]

B. Fagan's Personal Bankruptcy[20]

On June 1, 2006, Fagan's creditors filed an involuntary Chapter 7 bankruptcy petition against him in the United States Bankruptcy Court for the District of New Jersey.[21] On February 14, 2007, the date on which the bankruptcy proceedings against Fagan were to begin, Fagan superseded the proceedings by filing a *pro se* Chapter 11 Bankruptcy Petition in the Middle District of Florida.[22] According to Fagan's Chapter 11 filings, he has accumulated $13.6 million in outstanding debts.[23] Notably, among Fagan's creditors are two of foreign plaintiffs' expert witnesses in this case: Dr. Carl Abraham (a purported scientific expert), to whom Fagan owes $75,000 in "professional fees," and Norbert

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19 EC 5-1, N.Y. Code of Prof. Responsibility.

20 Unless otherwise stated, all facts cited herein are taken from the parties' submissions and are undisputed.

21 Case No. 06-14863-NLW.

22 Case No. 8:07-bk-1109-PMG ("*In re Fagan*").

23 *See In re Fagan*, Chapter 11 Case Management Summary filed March 30, 2007 ("Chapter 11 Summary"), Exhibit ("Ex.") 11 to Declaration of Paul P. Rooney, counsel for defendant Bosch Rexroth Corporation ("Rooney Decl."), at 2.

Gschwend (a purported marketing expert), to whom Fagan owes $3,000,000 in "loans".[24]

Most importantly, Fagan has admitted that his *single most significant* source of funding for his Chapter 11 reorganization plan is a hoped-for settlement of the Kaprun-related litigation pending before this Court.[25] Indeed, Fagan's Chapter 11 Summary gives a brief outline of the facts underlying this litigation and then pointedly states: "Fagan represents approximately 100 victims in that case. Upon reason and belief, there was a $16,000,000.00 offer for a global settlement and it is expected that this litigation will result in a substantial recovery which will also fund the Plan of Reorganization."[26] The Summary is silent as to what portion of this settlement will go to his clients and how much he will recover in fees.

During a May 7, 2007 deposition related to his bankruptcy, Fagan also revealed that until April 23, 2007, he failed to file his federal income tax returns

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[24] *In re Fagan*, List of Creditors Holding 20 Largest Claims filed March 30, 2007, Ex. 12 to Rooney Decl. at 1-2. Fagan also owes, *inter alia*, $100,000 in personal loans to his co-counsel Lowy; $3,000,000 in alimony and child support to his former wife; and four separate default judgments which collectively total over $4,000,000. *See id.*

[25] *See* Chapter 11 Summary at 1; Transcript of 341 Meeting of Creditors held March 14, 2007 ("3/14/07 341 Mtg. Tr."), Ex. 17 to Rooney Decl., at 83 ("[T]he only way that I'm going to be able to fund this thing is if I can settle the Kaprun case and some of the others . . . ." (Fagan)).

[26] Chapter 11 Summary at 1.

for the seven years from 2000 through 2006.[27] Fagan also admitted that he had not filed his state or local tax returns for that same seven-year period.[28]

C. Disqualification Is Required

In recent years, Fagan has engaged in a pattern of unethical behavior. Indeed, this is not the first court to find Fagan's conduct worthy of reproach and sanctions.[29] Fagan's continued participation in the cases at bar presents one of the rare situations in which an attorney's violations of ethical rules warrant his

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[27] See *In re Fagan*, Unofficial Transcript of the Deposition of Edward D. Fagan taken by the U.S. Trustee on May 7, 2007 ("5/7/07 Fagan Tr."), Ex. 18 to Rooney Decl., at 7-8. The willful failure to file federal tax returns is a felony punishable by up to five years in prison. *See* 26 U.S.C. § 7203.

[28] *See* 5/7/07 Fagan Tr. at 86.

[29] Fagan's misconduct is not limited to his misrepresentations to this Court regarding foreign plaintiffs' so-called "whistleblower" witnesses. As further discussed below, Fagan was sanctioned by Judge Shirley Wohl Kram of this Court in August 2005, and by Magistrate Judge Viktor Pohorelsky of the United States District Court for the Eastern District of New York in February of this year. *See infra* Part III. Additionally, the New Jersey Office of Attorney Ethics has charged Fagan with misappropriating approximately $400,000 from the trust accounts of two Holocaust survivors whom Fagan represented in lawsuits filed against Swiss banks; these charges could lead to disbarment. *See Credit-Counseling Provision No Bar to Involuntary Bankruptcy Petitions*, 185 N.J. Law J. 659, 660 (2006); *Holocaust Lawyer Disputes Ethics Charges: Disciplinary Case Against Fagan Proceeds Slowly*, Newark Star-Ledger, Mar. 23, 2006, at 50; *Holocaust Lawyer Fights His Own Court Battle Victims' Attorney Mounts Defense in Ethics Hearing*, Newark Star-Ledger, Nov. 17, 2005, at 14.

disqualification.[30] Although an attorney's personal bankruptcy does not in itself constitute adequate grounds for disqualification, Fagan's Chapter 11 case gives rise to an impermissible conflict of interest between himself and his clients, and illustrates a degree of financial irresponsibility which severely undermines this Court's confidence in his ability to adequately represent foreign plaintiffs in this MDL.

A review of Fagan's Chapter 11 submissions makes plain that he has no means to represent his clients. He lacks any staff and has no business or trust accounts. Nor does Fagan have any malpractice insurance, which is particularly troubling given that he currently has two judgments entered against him for malpractice.[31] Experts and court reporters he has retained in this case have not been paid. Moreover, several of the cases in this MDL were only recently filed by Fagan and are likely to impose heavy costs.[32] If they are ever to make it through

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30 A "district court bears the responsibility for the supervision of the members of its bar." *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975) (also noting that the court's "dispatch of this duty is discretionary in nature" and "will be upset only upon a showing that an abuse of discretion has taken place").

31 *See In re Fagan*, Transcript of Proceedings held April 23, 2007 ("4/23/07 Bankr. Tr."), Ex. 19 to Rooney Decl., at 7.

32 *See Stadman v. Austrian Nat'l Tourist Office Inc.*, No. 07 Civ. 3881 (filed May 17, 2007); *Ferk v. Omniglow Corp.*, No. 07 Civ. 4104 (filed May 25, 2007). *See also* 6/27/07 Letter from Fagan to the Court (arguing that this Court's June 19, 2007 ruling dismissing foreign plaintiffs' actions on the ground of *forum non conveniens*, is inapplicable to *Ferk* because *Ferk* is predicated on different legal

rounds of discovery -- let alone trial – they will require hundreds of thousands of dollars to cover depositions, document productions, and other litigation costs. Against this backdrop, Fagan's lack of financial resources and his personal history of financial irresponsibility render him incompetent to continue prosecuting these actions.

As counsel for the American plaintiffs observes, Fagan's inadequate finances violate several disciplinary rules, especially those embodied in Canon 5 of the Code.[33] There can be little doubt that Fagan's professional judgment in these cases has been and will continue to be seriously affected by his personal interests in this litigation.[34] Fagan has staked his financial future on the outcome of this

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theories, including fraudulent conveyance).

[33] *See* 5/23/07 Rice Letter at 2 (citing DR 6-101, 22 N.Y. Comp. Codes R. & Regs. § 1200.38, which provides, in pertinent part, that a lawyer shall not "[h]andle a legal matter without preparation adequate to the circumstances").

[34] Apart from this violation of Canon 5 of the Code, the extent to which Fagan is personally and financially invested in the outcome of this litigation violates "the broad admonition of Canon 9 of the Code that an attorney . . . avoid even the *appearance* of impropriety." *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225, 232 (2d Cir. 1977) (emphasis added) (citing DR 9-101). *See also id.* (finding that the district court erroneously "glossed over the teaching of Canon 9 that even an appearance of impropriety requires prompt remedial action"); *Silver Chrysler Plymouth*, 518 F.2d at 757 (recognizing that Canon 9's requirement that attorneys avoid even the appearance of professional impropriety "dictates that doubts should be resolved in favor of disqualification" (citing *Hull*, 513 F.2d at 571)). Because it is clear that Fagan must be disqualified under Canon 5, I do not reach the issue of whether Fagan's violations of Canon 9, or any other Canon of the Code, would alone support disqualification. *See Fund of Funds*, 567 F.2d at

litigation; he himself told the Florida Bankruptcy Court that the linchpin of his Chapter 11 plan is the attorney's fees he hopes to recover if and when a global settlement is reached in the Kaprun cases. The fact that Fagan is relying on this case to cover such substantial personal debts seriously undermines this Court's confidence in his ability to devise a prudent litigation strategy for his clients, to assess whether any proposed settlement offer is fair to his clients, or to otherwise conduct himself as a fiduciary of his clients' interests.[35]

Additionally, there is no indication in the record that Fagan's clients are aware they have entrusted their claims to someone who (a) has no means to properly prosecute them and (b) is relying on earning a large fee in order to cover substantial personal debts. In the absence of detailed, explicit consent waivers from each of his purported clients, Fagan's blatant conflict of interest cannot be countenanced.[36]

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[35] "In New York, as elsewhere, it is beyond doubt that a lawyer is bound to conduct himself as a fiduciary or trustee of his or her client's interests, and that he or she must exercise the utmost good faith, honesty, integrity and fidelity." *Fund of Funds*, 567 F.2d at 234 (invoking Canon 5 in disqualifying an attorney from further participating in litigation) (citations omitted).

[36] It remains unclear whether Fagan possesses powers of attorney for each of his purported clients. By Order dated May 18, 2007, the Court directed counsel to provide the Court with sworn affidavits from each foreign plaintiff affirming his or her respective fee agreement. Counsel has yet to fully comply with this Order. I thus harbor doubts as to whether Fagan's clients are fully aware of the current

It is also obvious that the reason Fagan finally filed his federal income tax returns in April 2007 was to prevent the dismissal or conversion of his Chapter 11 proceeding.[37] Defendants argue that Fagan's delay in filing his federal taxes is, in itself, grounds for immediate disbarment from this Court.[38] But the issue of

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procedural posture of their claims, let alone the extent to which Fagan has a personal financial interest in their claims.

[37] Under federal bankruptcy law, a party-in-interest to a Chapter 11 proceeding may move to have the case dismissed or converted into a Chapter 7 proceeding upon showing that the debtor failed to timely file his tax returns. *See* 11 U.S.C. § 1112(b)(4). *Accord Matter of Santiago Vela*, 87 B.R. 229, 232 (D.P.R. Bankr. 1988) (failure to file tax returns is unreasonable delay allowing for conversion of Chapter 11 case into a Chapter 7). At the hearing before the bankruptcy court in Florida concerning the U.S. Trustee's motion to dismiss Fagan's Chapter 11 case for cause, the U.S. Trustee stated that immediately prior to the hearing, Fagan's attorney handed her what appeared to be originals of tax returns for the years 2000 through 2006. The trustee further commented "frankly, I have never seen anything quite like them. For instance, for the year – I'll just pick one here. Oh, there's no tax liability for any year. Not one single year is there tax liability." 4/23/07 Bankr. Tr. at 7.

[38] *See* Defendant Bosch Rexroth Corporation's Memorandum of Law in Support of Motion for Sanctions Under 28 U.S.C. § 1927 and to Disqualify Edward D. Fagan, Esq. as Plaintiffs' Counsel ("Def. Mem.") at 19. Geoffrey C. Hazard, a well-recognized expert on attorney ethics, has described the connection between being an honest tax payer and an ethical lawyer this way: "Criminal violations of the tax laws are almost always related to fitness to practice law, even if the offense arises in the lawyer's private rather than professional life. Lawyers who engage in intentional tax fraud ought to be punished professionally . . . because [they have] taken advantage of a system that relies upon self-discipline and self-reporting . . . . Those who wish to challenge their tax liability are given ample opportunity to do so through legal procedures; tax cheats are thus violating the very concept of the rule of law, and this is intolerable in a lawyer." 2 Geoffrey C. Hazard, Jr., *The Law of Lawyering* § 65.4 at 65-69 (2007).

disbarment is properly dealt with by institutional disciplinary mechanisms, not by this Court.[39] For disqualification purposes, the lesson to be drawn from Fagan's egregious delay in filing his federal taxes is that his extreme lack of financial responsibility and accountability seriously calls into question his ability to prosecute these actions.

Specifically, Fagan's tax-related conduct demonstrates an unequivocal inability to handle finances.[40] While this is not typically grounds for disqualification, it does gives rise to a conflict of interest here, because plaintiffs' counsel is currently prosecuting these cases (and continuing to file new ones) solely on a contingency-fee basis. Additionally, as noted below in Part II.B., Fagan has engaged in bad faith litigation tactics which themselves warrant sanctions and fines. Fagan thus perpetuates a cycle whereby his personal

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[39] The Court is referring this matter to this Court's Disciplinary Committee.

[40] It bears emphasis that whether an attorney's personal bankruptcy or failure to pay taxes displays financial irresponsibility warranting court intervention is a very fact-specific inquiry that turns on the particulars of the attorney and the underlying litigation being prosecuted or defended. Here, the fact that Fagan has pointedly admitted that his Kaprun-related attorneys' fees will be the single most significant source of financing for his Chapter 11 reorganization is critical to my finding that his financial irresponsibility will negatively affect the outcome of this litigation. *Cf. In re van Riper*, 808 N.Y.S.2d 815 (3d Dep't 2006) (disbarring attorney after conviction of one count of tax fraud); *In re Anonymous*, 74 N.Y.2d 938, 939 (1989) (noting that in evaluating a bar applicant's moral character, "[a] determination of unfitness must rest not on the fact of bankruptcy but on conduct reasonably viewed as incompatible with a lawyer's duties and responsibilities as a member of the Bar").

indebtedness continues to grow – in significant part as result of expenses related to this litigation – and he thereby becomes increasingly dependent on obtaining a settlement sufficiently sizeable to fund his Chapter 11 plan.

It is worth noting that another conflict of interest exists between Fagan and foreign plaintiffs' two retained experts, to whom Fagan is personally indebted. Because Fagan cannot confirm his Chapter 11 plan absent a positive result for the foreign plaintiffs in these cases, Fagan's debts to Dr. Abraham (who is owed $75,000) and Gschwend (who is owed $3,000,000) will remain unpaid until Fagan is able to obtain a favorable settlement or verdict in this litigation. Dr. Abraham and Mr. Gschwend are thus in a position whereby their compensation as expert witnesses is contingent on the outcome of these cases. Under these circumstances, Fagan's retention of them violates Disciplinary Rule 7-109 of the Code, which provides that "[a] lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the outcome of his or her testimony *or the outcome of the case.*"[41] This violation of the Code not only constitutes an impermissible conflict of interest, but also underscores the overall appearance of professional impropriety that Fagan brings to this litigation.

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[41] DR 7-109, 22 N.Y. Comp. Codes R. & Regs. § 1200.40(c) (emphasis added).

Moreover, Fagan has already been sanctioned by this Court for having a remarkably similar conflict of interest with respect to litigation he prosecuted on behalf of victims of the Nazi Holocaust.[42] The court in that litigation determined that, in reality, Fagan was "seeking damages on behalf of a fictitious entity" and dismissed the action for lack of subject matter jurisdiction.[43] The court also held that "most seriously, however, Fagan [was] proceeding in direct violation of New York's Champerty Statute and Applicable Disciplinary Rules. Champerty is defined as 'maintaining a suit in return for financial interest in the outcome.'"[44] Apparently, Fagan had purchased interests in stolen artwork for the sole purpose of bringing actions involving that artwork. Citing various provisions of New York law, including Disciplinary Rule 5-103, the court held that Fagan's proprietary interest in the litigation ran afoul of legal and ethical rules.[45] As a result of this interest and additional misconduct – including Fagan's various "deceptions" – the court imposed sanctions on Fagan, ordering him to pay his adversary's litigation

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42 *See Association of Holocaust Victims for Restitution of Artwork & Masterpieces v. Bank Austria Creditanstalt AG ("Association of Holocaust Victims I")*, No. 04 Civ. 3600, 2005 WL 2001888, at *5 (S.D.N.Y. Aug. 19, 2005).

43 *Id.*

44 *Id.* (quoting *In re Primus*, 436 U.S. 412, 425 n.15 (1978)).

45 *See id.* (citations omitted).

costs and fees, and fining him $5,000.[46] The court also noted with dismay that Fagan's litigation tactics "appear[ed] to be part of a pervasive and disturbing [personal] trend."[47]

This past February, Fagan was again formally sanctioned, this time by the Eastern District of New York.[48] By way of background, Fagan had been terminated as co-counsel for plaintiffs in well-publicized litigation involving the now abolished South African apartheid regime. In response to his termination, Fagan "hastily instituted" a related action in the same district and, in "full view of the international and national media," personally served a subpoena on his former co-counsel.[49] The court quashed the subpoena on the ground that it was purely

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[46] Fagan moved for reconsideration of and a stay of these rulings, which the court denied. *See Association of Holocaust Victims for Restitution of Artwork & Masterpieces v. Bank Austria Creditanstalt AG ("Association of Holocaust Victims II")*, No. 04 Civ. 3600, 2005 WL 3099592 (S.D.N.Y. Nov. 17, 2005). The court further held that Fagan owed a total of $345,520.64 in litigation costs and expenses, and ordered him to immediately either pay a $5,000 fine or post a supersedeas bond. *See id.* at *8.

[47] *Association of Holocaust Victims I*, 2005 WL 20001888, at *5 (listing related actions being prosecuted by Fagan).

[48] *See Molefi v. The Oppenheimer Trust*, No. 03 Civ. 5361, 2007 WL 538547, at *2-4 (E.D.N.Y. Feb. 15, 2007).

[49] *Id.* at *1.

"retaliatory" and "patently frivolous" and awarded Fagan's former co-counsel nearly $15,000 in attorneys' fees and costs.[50]

These prior sanctions bolster my finding that his disqualification in the instant cases is required. Although Fagan's personal stake in this MDL differs from that which he had in the Holocaust litigation discussed above, it is just as unprofessional and deserving of rebuke. In resolving this motion in favor of disqualification, the Court has attempted to strike a balance between foreign plaintiffs' interest in being represented by counsel of their choice, and the need to maintain high ethical standards within the profession.[51] By Fagan's own admissions, he has been forced into bankruptcy due to massive debts totaling millions of dollars, and the main source of funding for his Chapter 11 plan are proceeds from a hypothetical global settlement of Kaprun-related litigation. With such a flagrant personal interest in the outcome of these cases, Fagan simply cannot be allowed to continue participating as counsel.[52]

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50 *Id.* at *8.

51 *See Fund of Funds*, 567 F.2d at 236-37 ("[A]bove all else, we must maintain public trust in the integrity of the Bar.").

52 In opposition to the motion for his disqualification, Fagan submitted a memorandum of law which cites to relevant case law, but neglects to apply the law to these facts. *See* Consolidated Submissions in Opposition to Motion for Sanctions Against Edward Fagan, Robert Hantman and James Lowy Related to Whistleblower Depositions and to Disqualify Edward Fagan ("Pl. Mem.") at 9-14. Rather, Fagan's memorandum is rife with unsupported and conclusory statements,

III. SANCTIONS

A. Applicable Law

A district court has the "inherent authority to sanction parties appearing before it for acting in bad faith, vexatiously, wantonly, or for oppressive reasons."[53] This authority "stems from the very nature of the courts and their need to be able to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[54]

In addition to this inherent power, section 1927 of title 28 of the United States Code allows a court to impose sanctions when an attorney "'so

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such as: "There is abundant evidence that the Motion to Disqualify is a litigation tactic designed to prejudice the Kaprun victims and survivor claims." *Id.* at 14. Fagan also attaches declarations of "independent ethics counsel" who opine that Fagan's continued participation in these cases raises no improper conflict of interests. *See, e.g.*, Declaration of Ethics Expert Richard Grayson. Upon review, these declarations are useless. They cite no case law, contain only vague summaries of the law (*e.g.*, "There is no per se rule that prohibits a lawyer from continuing to represent clients when the lawyer has filed a bankruptcy petition."), and unsupported assertions of fact (*e.g.*, "The cooperating lawyers, together with their clients, want Fagan to continue representing them."). *Id.* at 2. Nowhere do these declarations address the conflict raised by Fagan's bankruptcy or otherwise allude to Fagan's substantial debts, or his important admission that his Chapter 11 plan presumes he will receive a large fee from a settlement of this litigation, or the fact that he owes millions of dollars to two of foreign plaintiffs' expert witnesses.

[53] *Association of Holocaust Victims I*, 2007 WL 2001888, at *3 (citing *Sassower v. Abrams*, 833 F. Supp. 253, 272 (S.D.N.Y. 1993)).

[54] *Id.* (citation omitted).

multiplies the proceedings in any case unreasonably and vexatiously.'"[55] Thus, the statute "imposes an obligation upon attorneys throughout the entire litigation to avoid dilatory tactics."[56] Where an attorney fails to meet this obligation, courts may order him "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[57]

An award of sanctions under either the court's inherent authority or section 1927 requires a finding of bad faith on the part of the offending attorney.[58] Bad faith may be inferred when counsel's actions are "'so completely without merit so as to require the conclusion that they must have been undertaken for some improper purpose such as delay.'"[59]

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[55] *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) (quoting 28 U.S.C. § 1927)).

[56] *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253, 1261 (2d Cir. 1996).

[57] 28 U.S.C. § 1927.

[58] *See United States v. International Bd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991) ("Bad faith is the touchstone of an award under [section 1927]."); *Association of Holocaust Victims I*, 2007 WL 2001888, at *4 (citing *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997)).

[59] *Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 72 (2d Cir. 1996) (quoting *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986)). *Accord Keller v. Mobil Corp.*, 55 F.3d 94, 99 (2d Cir. 1995) (listing acts which could justify sanctions under the "bad faith" test, including "'making several insupportable bias recusal motions and repeated motions to reargue . . . [and] continually engaging in obfuscation of the issues, hyperbolism and groundless presumptions in addition to

B. Whistleblower Testimony

On April 12 and 13, 2007, foreign plaintiffs' counsel and a majority of defendants' counsel traveled to Germany to depose foreign plaintiffs' so-called "whistleblower" witnesses. Although Fagan refused to disclose the identities of these witnesses, they were eventually revealed to be Maria Steiner and Georg Schwarz, both of whom had testified at the already-concluded Austrian criminal proceedings related to the Kaprun ski train disaster.

Defendants assert that they were forced to depose Ms. Steiner and Mr. Schwarz in Germany at great expense only to learn that these individuals were not, in fact, "secret," nor were they whistleblowers, and that they lacked the knowledge Fagan said they had. Specifically, defendants point to representations made by Fagan during a conference before this Court on December 28, 2006.[60] Defendants illustrate this point with a side-by-side comparison chart – one column quotes Fagan's representations regarding the whistleblowers' purported knowledge; the other column quotes their actual deposition testimony.[61] The evidence is clear and overwhelming: Fagan drastically misrepresented the knowledge of these witnesses

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insinuating the court [is] biased'" (quoting *Hudson Motors P'ship v. Crest Leasing Enters.*, 845 F. Supp. 969, 978 (E.D.N.Y. 1994))).

60 *See* 12/18/06 Conference Transcript ("12/18/06 Conf. Tr.") at 40-43.

61 *See* Def. Mem. at 2-6.

– indeed, they had practically no relevant information whatsoever. For instance, Fagan told the Court that one of his whistleblowers – later identified as Georg Schwarz – "is a person who has technical knowledge of the train operations . . . has technical knowledge about the products, parts and systems that were on the train and in the tunnel . . . has knowledge about the dangerous products that were put on the train or were allowed to be put on the train . . . ."[62] But at his deposition, Mr. Schwarz – who had once been employed as a ski lift operator at the Kaprun ski resort – candidly admitted that he lacked any such knowledge.[63] The same is true with respect to Fagan's representations regarding the other purported whistleblower, Maria Steiner.[64] In short, while some of Fagan's representations as to his so-called whistleblowers could generously be construed as mere exaggeration, others were quite patently false.

C. Fagan's Conduct in this Litigation Warrants Sanctions

"Mr. Fagan's actions in [these cases] go beyond (but certainly include) a lack of preparation and lack of professionalism. In addition to glaringly

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62 12/18/06 Conf. Tr. at 41-42.

63 *See* April 12 and 13, 2007 Deposition of Georg Schwarz Transcript, Ex. 2 to Rooney Decl. ("Schwarz Tr."), at 44-45.

64 *See* Def. Mem. at 4-6 (comparing Fagan's representations about Ms. Steiner to Ms. Steiner's actual testimony).

inadequate filings, [and] utter disregard for [ethical standards of conduct] . . . it is obvious that Mr. Fagan has misrepresented critical facts" relating to his so-called whistleblower witnesses.[65]

Not only did Fagan misrepresent the knowledge of his so-called whistleblowers, he also misrepresented the status of Ms. Steiner and Mr. Schwarz as secret witnesses whose identity needed to remain confidential for the sake of their safety. On several occasions, in Court and in sworn affidavits, Fagan characterized Ms. Steiner and Mr. Schwarz as "whistleblowers" who were fearful and afraid of intimidating tactics by defendants and their counsel.[66] Under this pretext, Fagan obtained an order of confidentiality from this Court. It is now clear, however, that Fagan's representations were patently false and served absolutely no purpose save to instill a melodramatic air of menace to these proceedings.[67]

In his January 10, 2007 Declaration, under the boldfaced heading "FEAR FOR HIS FAMILY'S SAFETY AND WELL-BEING," Fagan wrote the following about Mr. Schwarz:

> It was common knowledge that other [employees of defendant Gletscherbahnen Kaprun Aktiengesellschaft ("GBK"), which

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65 *Association of Holocaust Victims I*, 2005 WL 2001888, at *4.

66 *See, e.g.*, 12/18/07 Conf. Tr. at 41-42; 4/25/07 Conf. Tr. at 29-32.

67 Def. Mem. at 8.

> owns the ski resort] (such as engineer [Walter] Steiner[68]) after coming forward, were ostracized, alienated, and subjected to ridicule and economic and social isolation in Kaprun. According to the witness, after [Walter] Steiner came forward, he, his wife and his family were "dead" in Kaprun. He is very concerned that certain [ski resort] lawyers, such as Dr. Thomas Frad and his firm, not be given access to this information as he is fearful of retribution and retaliation. He is fearful for his and his families' safety and welfare in Austria.[69]

Mr. Schwarz's deposition testimony completely contradicts Fagan's assertions. Several times during his deposition, Mr. Schwarz was asked, point-blank, whether he was ever threatened or intimidated because of anything he might have said or might know in connection with the ski train disaster; each time, Mr. Schwarz gave a resounding "No."[70]

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68 Walter Steiner, the husband of Maria Steiner, worked as an engineer and conductor at the Kaprun ski resort for twenty-five years. He died in February 2007. *See* April 13, 2007 Deposition Transcript of Maria Steiner, Ex. 7 to Rooney Decl. ("Steiner Tr."), at 8-9.

69 *See* "Fagan Jan. 10, 2007 Declaration Related to 'Whistleblower'" dated January 16, 2007, Ex. 3 to Rooney Decl., ¶ 33. I also note that in practically all of Fagan's submissions to the Court, various words and phrases are capitalized, boldfaced, italicized and/or underlined. Whether this is stylistic or for emphasis or simply random is unclear. Numerous sentences are also incomplete and lack punctuation. This is not only peculiar, but also incomprehensible given that Fagan has been previously reprimanded in this Court for filing such hap-hazardly drafted papers. *See Association of Holocaust Victims I*, 2005 WL 2001888, at *4 n.7.

70 *See* Schwarz Tr. at 52.

Nor was Ms. Steiner a stealth witness with reason to fear for her safety upon a disclosure of her identity. Indeed, Ms. Steiner was already well-known to all parties because she was mentioned *by name* in the written opinion of the judge in the Austrian criminal case arising out of the ski train disaster which took place in 2002. In that decision, the Austrian judge wrote:

> The statements made by Maria Steiner were not convincing to the Court at all. The witness left a psychologically striking impression upon the Court, hid behind rumors, and gave no specific comments. The information provided by the witness could not be used at all in establishing the truth, and the identification and naming of the witness on the part of the private parties *is not viable.*[71]

Nevertheless, Fagan noticed Ms. Steiner's deposition and insisted that her identity remain confidential. Fagan further claimed, in submissions to this Court, that Ms. Steiner would testify to, among other things, that her husband was an employee at the ski resort and that she has firsthand knowledge relevant to defendant GBK's liability and spoliation of evidence.[72] Not surprisingly, however, Ms. Steiner's deposition, taken in April 2007, provided no such evidence.[73]

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[71] Def. Mem. at 7 (quoting the report of the Austrian criminal court) (emphasis added).

[72] *See* Foreign Plaintiffs' "Summary of 2nd Whistleblower," Ex. 6 to Rooney Decl.

[73] *See* Steiner Tr. at 85-86; 93-94.

In sum, Fagan made false representations concerning the so-called whistleblowers and he obtained an order of confidentiality from this Court under false pretenses. Aside from being highly unprofessional, such tactics suggest utter disregard for the Court. In light of the preceding, this Court finds that Fagan's claims regarding his witnesses were made in bad faith. This finding is bolstered by the fact that Fagan had been previously warned and sanctioned by Judge Kram of this Court for working similar deceptions that wasted judicial resources. As a result, pursuant to this Court's inherent power and section 1927, Edward D. Fagan is hereby fined $5,000 and is ordered to reimburse defendants for litigation costs and expenses relating to the depositions of Ms. Steiner and Mr. Schwarz.

D. Messrs. Hantman and Lowy

Defendants' request for sanctions against Hantman and Lowy, in addition to Fagan, are not unfounded. Either of their own volition or at the prompting of Fagan, Hantman and Lowy have written inflammatory letters to parties and the Court accusing defendants and non-parties of plotting to intimidate and threaten plaintiffs' witnesses.[74] Apparently, prior to Mr. Schwarz's deposition,

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[74] *See* 4/12/07 Email from Hantman to all parties, Ex. 8 to Rooney Decl. ("As one of the lawyers for the plaintiffs, I was advised that one of the plaintiffs witnesses – a whistle blower – received a very disturbing and intimidating phone call over the weekend. Fagan has the details."); 4/13/07 Letter from Lowy to the Court, Ex. 10 to Rooney Decl. (claiming that prior to the depositions in Germany, "one or more of defendants or GBK" violated the Court's orders and engaged in "witness tampering").

he received at least one telephone call from Dr. Johannes Stieldorf – an Austrian attorney who is currently prosecuting civil cases in Austria on behalf of victims of the ski train disaster – who attempted to discourage Mr. Schwarz from participating in the U.S. litigation.[75] Based on this telephone call, Fagan, Hantman and Lowy sent a flurry of communications to the Court about a scandal involving a conspiracy amongst certain defendants to bribe and intimidate witnesses and to "leak" information about the U.S. litigation to Dr. Stieldorf, who plaintiffs' counsel persistently characterize as an agent of GBK, despite the fact that he represents *plaintiffs* in the Austrian litigation.[76] This brief summary does not do justice to the urgency and sensationalism of Fagan and his co-counsel's communications to the Court.[77]

Additionally, both before and after the depositions in Germany, Hantman and Lowy repeatedly stated in correspondence to the Court that they represent the foreign plaintiffs together with Fagan. And as recently as this past June, Fagan also requested that all correspondence for this litigation be sent to him

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75 *See* 4/25/07 Conf. Tr. at 29-32.

76 *See id.* at 32.

77 In response to Fagan's conspiracy theory this Court was driven to inquire whether he was hallucinating. *See* 4/25/07 Conf. Tr. at 29-32.

care of Hantman's office.[78] Nevertheless, because the overwhelming majority of misrepresentations concerning the whistleblowers were made solely by Fagan, and because there is little evidence in the record supporting an inference of bad faith on behalf of Hantman and Lowy, who hardly ever broke their courtroom silence, I decline to sanction them.[79]

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78 *See* 6/6/07 Conf. Tr. at 44.

79 Indeed, when Hantman and Lowy attended conferences in these actions, they sat silently next to Fagan at plaintiffs' table; the Court cannot recall a single instance where they interjected or otherwise addressed the Court, either to agree, supplement, or disagree with Fagan's representations. *See also* Declaration of Robert J. Hantman dated June 14, 2007 (Docket No. 164; Case No. 03 Civ. 8960) ¶ 7 ("[D]efendants [sic] counsel seeks to impute certain knowledge to me as a result of my standing next to Fagan, when he addressed the Court."); *id.* ¶ 12 (". . . I find it incredulous that any of the defendants seriously relied upon my representations in attending the depositions when I made none and I have no authority or decision making power to do so as all defense counsel are aware."); *id.* ¶¶ 15-16 ("As to my e-mail, I do believe it is not proper to discourage a witness from testifying regardless of who discourages that person while I did not know [sic] who called the witnesses at the time this information was conveyed to me by Mr. Fagan. I submit that my e-mail was neither threatening nor improper under the circumstances and, if those who received it had no participation [sic], it is hard to believe that it would have had any impact on anyone.").

IV. CONCLUSION

For the reasons stated above, defendants' motion – in which the American plaintiffs join – to disqualify Edward D. Fagan from further participating in these proceedings is granted.[80] It is furthered ordered that

1. Fagan is fined $5,000.00, which is due immediately and should be remitted to the Clerk of the Court, United States District Court, Southern District of New York, 500 Pearl Street, New York, New York 10007.

2. Defendants are directed to submit to the Court, within thirty (30) days of receipt of this Order, statements of reasonable litigation costs and fees in connection with the depositions of Maria Steiner and Georg Schwarz that took place in Germany on April 12 and 13, 2007.

3. If Hantman and Lowy are retained to represent any foreign plaintiffs, they shall enter appearances within thirty (30) days of the date of this Order, together with copies of all retainer agreements.

4. If no counsel has entered an appearance on behalf of any foreign plaintiff within thirty (30) days from the filing of

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[80] Foreign plaintiffs have also filed a motion for sanctions against certain defendants and non-parties, as well as a motion for the disqualification of Gordon E. Haesloop and his firm, Bartlett McDonough, Bastone & Monaghan, LLP, counsel for defendant Omniglow Corporation. *See* Motion to Disqualify Haesloop & Firm (filed March 23, 2007) and Motion for Sanctions against Omniglow, Cyalume, Haesloop & Firm and St. Paul / Travelers based on Spoliation of Evidence (filed March 26, 2007). Both of these motions, as well as their accompanying affidavits and declarations, are rife with incomplete sentences, conclusory and illogical legal arguments, and unsupported factual allegations. What *is* clear from foreign plaintiffs' moving papers, however, is that their motions are predicated on disputed issues of material fact – *i.e.*, GBK's alleged spoliation of evidence. Accordingly, foreign plaintiffs' motions are denied at this time.

this Order, that plaintiff must notify the Court of his or her intention to proceed *pro se.* If no such notice is received within sixty (60) days of this Order, the Clerk of Court shall enter a Judgment dismissing these actions.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
August 16, 2007

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