No. 20-483

In the Supreme Court of the United States

ARTEM KOSHKALDA,

Petitioner.

v.

SEIKO EPSON CORPORATION AND EPSON AMERICA, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit committed reversible error when it found that the District Court did not abuse its discretion by imposing case terminating sanctions against Petitioner for his discovery defaults, failure to appear, and violation of various court orders despite repeated warnings and prior entry of lesser sanctions.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Artem Koshkalda ("Petitioner").

Respondents are Seiko Epson Corporation ("SEC") and Epson America, Inc. (collectively "Respondents"). Pursuant to Supreme Court Rule 29.6, Respondent Epson America, Inc. states that its parent company is co-Respondent SEC. SEC has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Respondents do not dispute this Court's jurisdiction over Ninth Circuit Case No. 18-15124 as to Petitioner, individually, pursuant to 28 U.S.C. § 1254(1), but deny that the case satisfies the standard to grant further review set forth in Supreme Court Rule 10. Petitioner's Petition for Writ of Certiorari was docketed on October 14, 2020.

Respondents dispute this Court's jurisdiction over Ninth Circuit Case No. 18-15245, identified by Petitioner on his cover page. Petitioner was not a party to that appeal which is now time barred for further review.

Respondents dispute this Court's jurisdiction over parties other than Petitioner, individually, despite his efforts to proceed on behalf of his corporation, ART, LLC. Pet. 8, n.3. Corporations must be represented by counsel. Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993).

STATEMENT OF THE CASE

Petitioner seeks this Court's further review of well-informed and fact intensive rulings made in the District Court and affirmed by the Ninth Circuit finding no abuse of discretion in granting terminating sanctions against Petitioner. Petitioner presents no compelling reason for his petition to be granted, instead fabricating facts contrary to the ones established below. Respondents correct Petitioner's material misstatements and accurately recount the record that is unique to Petitioner and particularly ill-suited for additional review by this Court.

Respondents filed their counterfeiting case against Petitioner and his co-defendants in 2016.[1] R.1. Respondents were appropriately granted seizure relief and seized over 15,000 counterfeit ink cartridges from multiple locations, including those related to Petitioner. R.17, 34. All electronic and paper documents removed from the premises were returned within days of the seizure in 2016 pursuant to the District Judge's order. Id. Copies of seized documents, among others, were voluntarily produced to Petitioner which he acknowledged by later producing some of the same copies back to Respondents, including Respondents' redactions and even their page separators, misleadingly passing them off as his own production. R.91-1:2. This was one of many discovery failures for which he was

[1] Citations to the District Court's docket appear as "R. [ECF No.]:[Page Number]."

appropriately sanctioned. It was not until years after the seizure that Petitioner began to claim, without any evidence, that documents were not returned and only in response to Respondents' adversary claims in bankruptcy alleging Petitioner's failure to maintain adequate business records.[2]

Respondents propounded discovery on Petitioner, and others, aimed to ascertain basic facts of the case.[3] App. 34. Discovery was problematic and resulted in no less than eleven hearings before the Magistrate Judge regarding persistent and intentional discovery abuses and violations of court orders including those for which Petitioner was solely responsible. The Magistrate Judge said it best when she stated, with respect to Petitioner and others, that she had "'never encountered th[is] level of obstructionism and failure to respond to the most basic discovery requests' in her 18 years as a judge." App. 34. During the majority of these hearings, Petitioner was represented by counsel.

Petitioner conducted no discovery and did as little as possible to produce information relevant to the merits of the case. Petitioner adopted a strategy of delay and obstruction and Petitioner admitted in the District Court that there were key relevant

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[2] *See* Related Case In re Koshalda/Seiko Epson Corporation, et al. v. Koshkalda, Adversary Proc. No. 18-03020 (N.D. Cal. Bankr.). Pet. iii. Judgment for Respondents was affirmed by the Bankruptcy Appellate Panel in Koshkalda v. Seiko Epson Corporation, Case No. 19-1235, Docket No. 35 (B.A.P. 9th Cir. May 26, 2020).

[3] Citations to Petitioner's Appendix appear as "App. [Page]."

documents that Respondents did not have, that Petitioner did not bother to produce in response to valid discovery requests, and ultimately would refuse to produce. R.91; App. 8-16 (identifying Petitioner and his company specifically, recounting Petitioner's defaults which led to entry of the first sanctions order, and referring to Plaintiffs' accurate recounting of Petitioner's bad faith tactics). These failures, specific to Petitioner, were some of the many cited in support of terminating sanctions ultimately entered in this case. App. 1-5, 8-18, 33-38.

Petitioner frequently complains that he was punished for the misdeeds of others but his transgressions, including his purposeful withholding of documents and information in discovery despite repeated "last" chances, failure to appear as required for hearings, and violation of various court orders, including less drastic sanctions, were acts attributed to him personally. App. 33-34. Petitioner's claim that the exceedingly patient Magistrate Judge's warning on April 17, 2017 did not apply to him is contradicted by not only the record but Petitioner's concessions. Pet. 4 ("if this continues, you are setting yourself up for a motion for a judgment based upon your inability to proceed in this court…".). Petitioner appeared at the subject hearing empty handed despite being ordered to personally appear with "documents responsive to plaintiff's written discovery requests." R.65. Petitioner knew then as he does now that the warning applied to him given Petitioner's added

parentheticals of his own name to the admonitions and the fact he was called out by the Magistrate Judge by name in the instruction to return to court at a later date. Pet. 4. That Petitioner shared in some of the same violations as his co-defendants and that some of them behaved even worse than he did, makes no difference as to the unmistakable conclusion that he was correctly identified as a "disobedient" party.

Petitioner is also incorrect as to the number of sanctions motions filed and regarding his compliance with court orders, but by his own count he was the subject of at least two formal motions for sanctions. Pet. 6. The first motion for sanctions was granted at the seventh appearance before the Magistrate Judge involving discovery issues and included an advisory regarding "additional motions for case ending sanctions." App. 3. Petitioner's statement that Respondents did not raise any issues with Petitioner's disobedience prior to the Report and Recommendation ("RORA") is clearly contradicted by the undisputed record of numerous hearings and his acknowledgment of at least two preceding motions for sanctions as against him and his company. Pet. 6 (reference to prior sanctions order R.84, which was followed by a Renewed Motion to Compel and for Sanctions, R.91). Petitioner continued and escalated the same abuses which were at issue in the first sanctions order, resulting, appropriately, in the subsequent recommendation for case ending sanctions. Petitioner's claim that he "substantively complied" with discovery is an

inadequate excuse for his repeated disregard for court orders unequivocally requiring his full compliance. Pet. 7.

The Ninth Circuit correctly found that it was irrelevant that Petitioner was not a party to one of several lesser sanctions orders, "because the case terminating sanctions were entered as a result of the appellants' overall conduct over several months." App. 34. The Magistrate Judge had "thoroughly reviewed the record" and found Respondents had "accurately recounted the history of defendants' litigation tactics" which outlined numerous defaults specific to Petitioner. App. 8-16. The District Judge adopted the RORA, but only after conducting its own *de novo* review. App. 17-18. The Ninth Circuit appropriately found that Petitioner and others, "were warned repeatedly of the possibility of case terminating sanctions, yet continued to disregard discovery obligations and court orders." App. 34. Petitioner concedes the Ninth Circuit's conclusions "might be true" following the RORA, Pet. 7, but they were certainly true in the time between the Magistrate Judge's recommendation and the District Judge's order adopting it, as Petitioner failed to appear for a required hearing effectively preventing Respondents from taking his individual deposition, among other things. App. 5 (personal appearances required); R.136 ("Defendants: None Appearing"). Petitioner's request for this Court to look yet again at an already well-reviewed, fact rich record, would be an unnecessary and futile exercise.

Petitioner omits the fact he did not file a brief in opposition to the first sanctions motion, and that he also failed to object to the various orders on the grounds he seeks to argue before this Court which support an alternative argument as to waiver. *See* App. 2 and absence of relevant objections in the record.

Petitioner's admitted bad behavior after the RORA made it clear that even the very real threat of case ending sanctions, had no effect on the Petitioner's chronic failures to comply with court orders. Pet. 7. The District Court's decision to issue terminating sanctions to end Petitioner's gamesmanship, and the Ninth Circuit's decision to affirm them, were fully supported by Petitioner's many purposeful and knowing violations.

REASONS FOR DENYING THE PETITION

Petitioner is merely a dissatisfied litigant. Petitioner does not identify any compelling reasons as required by Supreme Court Rule 10 for his petition to be granted. Petitioner identifies no conflicts between any courts, no constitutional issues, and no pressing need for the Court to review this case as none exist. The applicable law is not in dispute and the facts, including those conceded by Petitioner, were correctly applied to reach a conclusion supported on multiple, alternative grounds. Petitioner's misrepresentations and omissions highlight the correctness of the lower courts' unanimous findings in this fact intensive

case that terminating sanctions were appropriate and necessary as against Petitioner, specifically.

I. Compelling Considerations Are Absent Particularly Where Petitioner Concedes the Basis for the Lower Court's Correct Decision Pursuant to Settled Law.

The applicable laws and rules, specifically Fed. R. Civ. P. 37 and the broad discretion afforded to trial courts to manage their dockets, are not in controversy. Specifically as to Rule 37, this Court has already decided that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases…" and the question for the reviewing court is not whether it would have dismissed the action; "it is whether the District Court abused its direction in so doing." NHL v. Metro. Hockey Club, 427 U.S. 639, 642-43 (1976) (per curiam). The Ninth Circuit reviewed the sound findings of two veteran judges and found them to be fully supported by the well-developed record and consistent with the undisputed law. App. 32-38. The only thing unusual about this case is the lengths to which Petitioner is willing to go to avoid being held accountable, a fact pattern unlikely to be repeated and an exceptionally poor vehicle to review long settled law.

The Ninth Circuit's decision is also supported by Petitioner's admissions that he was correctly subject to prior lesser sanctions (Pet. 6, App. 1-5) and repeatedly warned (Pet. 4-5), and that despite

those lesser sanctions and warnings, Petitioner continued to violate court orders even after the Magistrate Judge's RORA. Pet. 7. Not only was the Ninth Circuit's decision correct, Petitioner has not identified any compelling considerations supporting this Court's review.

II. The Ninth Circuit's Decision was Correct on Alternative Grounds Further Supporting Denial of This Petition.

This case is also a bad candidate for further review because the Ninth Circuit's decision is also correct on the alternative basis of waiver which was argued but did not serve the basis of the Ninth Circuit's ruling having found for Respondents on other grounds. It is undisputed that Petitioner either did not oppose or failed to object to numerous of the sanctions orders issued by the Magistrate Judge. Fed. R. Civ. P. 72(a) states, "[a] party may not assign as error a defect in the order not timely objected to." This Court has already endorsed the preclusion of appellate review of any issue not contained in objections to a magistrate judge's report as "supported by sound considerations of judicial economy" and to prevent litigants from "sandbagging" the district judge. Thomas v. Arn, 474 U.S. 140, 147-48 (1985). Petitioner therefore also waived his arguments as to errors in the Magistrate Judge's sanctions orders, and the Ninth Circuit's decision to affirm would have been appropriate on alternative grounds.

Contrary to Petitioner's claims, no finding was required that all defendants be treated as one because he was correctly sanctioned for his own conduct. The Ninth Circuit did not apply the wrong law or misapply the facts. Petitioner was correctly held to account for his repeated and systemic failures. The Petitioner was a disobedient party, many times over, and terminating sanctions were appropriately entered against him as found by all courts who have reviewed Petitioner's well-documented and undeniable defaults in this case.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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