Case No. 20-483

In The Supreme Court of the United States

Case No.18-15124 /18-15245

ARTEM KOSHKALDA,

Petitioner

v.

SEIKO EPSON CORPORATION, ET. Al.,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITIONERS' REPLY BRIEF ISO PETITION FOR A WRIT OF CERTIORARI

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Appearing *Pro Se*
November 16, 2020

Minor discrepancies in Opening Brief.

Opening Brief ("OB") contains the following three (3) minor discrepancies:

(i). Koshkalda identified Report and Recommendation Order [ECF 112] as RORA. [OB, 5]. But on page 6 of OB Koshkalda states it as RARO. Please note that RARO and RORA are meant to be the same;

(ii) "unopposed ECF 84" [OB, 6] means that ECF 84 order resulted from non-opposition;

(iii) similarly "unopposed ECF 88" [OB, 6] means that ECF 88 order resulted from non-opposition.

Brief summary of what was (important) alleged in Opening Brief

In Opening Brief Petitioner asserted the following facts:

1. **Period prior to April 17, 2017.** In September 2016 NV Action started from an *ex parte* seizure during which Epson seized everything from the Koshkalda's location. [OB, 3]. In October 2016 Epson conducted a "second" seizure. [OB, 3]. In March 2017, Epson deposed Koshkalda. [OB. 3]. Epson raised no issues with Koshkalda's compliance.

2. **During April 17, 2017,** hearing NV Court marked no problems with the Koshkalda's compliance with discovery obligations, but warned Koshkalda that if other (non-compliant) defendants would not start to comply with "their" discovery obligations — Koshkalda would suffer. [OB, 4-5]. NV Court did exactly that, which became a central piece of the issue brought for this Court's review.

3. **Period after April 17, 2017.** Right after (and not before) NV Court (erroneously) stated that NV Court would punish obedient Koshkalda for disobedience of other parties, Epson filed "first" motion to compel and included Koshkalda. [ECF 80]. It was unopposed. NV entered an order granting the motion. [ECF 84]. Koshkalda complied with all requirements of the order.

Then, Epson filed "second" motion to compel. [ECF 85]. It was against "some" defendants and Koshkalda and ART LLC (owned by Koshkalda) was not among them. NV Court entered an order granting it, with a notice that it was the last warning before NV Court would enter case terminating sanctions order. [ECF 88]. Koshkalda was "not" subject to ECF 88.

Respondents to ECF 88 order did "not" comply with the order, and Epson filed the "third" motion to compel, this time alleging violation of ECF 88. [ECF 91]. Koshkalda opposed. [ECF 94]. NV Court issued an order granting "third" motion to compel. [RARO, ECF 112]. In RARO NV Court "erroneously" concluded that "all" defendants violated ECF 88 order on "second" motion to compel which contained a final warning notice, while completely disregarding the fact that ECF 88 was limited only to "some" defendants, and Koshkalda was not among them.

Bottom line is that Epson seized all documents from the Koshkalda's location on an *ex parte* basis, then made another seizure, then deposed Koshkalda raising no issues whatsoever against Koshkalda. Epson started to include Koshkalda with other non-obedient defendants **ONLY AFTER** NV Court erroneously stated (verbatim):

THE COURT ... But this — so what's going to happen is — and I do have sympathy for particularly Mr. Koshkalda who I think is doing the very best he can... I know you're trying to get these other people [Kravchuk and Bielov] to get in line and to do what they need to do, but if this continues, you are setting yourself up for a motion for a judgment based upon your inability to proceed in this court, and I don't know what that judgment would end up looking like, sounds to me like it would be a significant amount of money which should concern you [Koshkalda and Maliuk] and should concern the other two codefendants [Kravchuk and Bielov]. So everybody comes back here. Mr. Koshkalda, you understand that, sir?" But the defendants [Kravchuk and Bielov] need to understand if they — not you two [Koshkalda and Maliuk], but if the other defendants continue to be in Ukraine or continue to ignore this case, there are going to be problems with that, and they need to get — understand that, and it's going to be a motion by the — by this very big company that could be potentially very devastating to all of you, and that would be bad.

Reply in support of Opening-Brief.

In Opposition-Brief Epson:

1. asserts that Koshkalda's count of sanctioning motions filed by Epson against Koshkalda prior to RARO is not correct [Opp. 5];
2. disagrees with Koshkalda's interpretation of what Magistrate Judge stated during April 17, 2017, hearing;
3. Continues to make (irrelevant) general allegations about "all" defendants without separating facts relevant only to Koshkalda and ART LLC;
4. alleged the importance of the fact that Ninth

Circuit in order to affirm NV Court's orders searched for "alternative grounds."

5. makes an argument that this Court should not pick this case because the situation will not be repeated in the future.
6. makes an argument based on a disputed fact in another Writ of Certiorari filed before this Court concurrently with this Reply-Brief.

In this Reply-Brief Koshkalda disagrees with Epson's assertions and alleges that this case is appropriate for this Court's review. Koshkalda will address each point in turn.

A. Epson claims that Koshkalda's count of Epson's sanctioning motions against Koshkalda prior to RARO is incorrect.

In Opening-Brief Koshkalda claimed that there were a total of three Epson's motions to compel and for sanctions "prior" to RARO. [OB, 6].

In Opposition-Brief Epson disputed the Koshkalda's count of sanctioning motions against Koshkalda and ART LLC prior to RARO, Epson stated (verbatim):

> *Petitioner is also incorrect as to the number of sanctions motions filed and regarding his compliance with court orders ...*
>
> *Opp. 5*

In support, Epson does not identify any other Epson's sanctions motions that Koshkalda missed.

Instead, Epson provided irrelevant facts which do not support the Epson's assertion that Koshkalda's count of sanctions motions is incorrect. Epson

identified that the first sanction motion was during the seventh appearance before the Magistrate Judge. [Opp. 5]. Epson conflates appearances for "case management hearings" with appearances on motions to compel and for sanctions.

In addition, it does not matter (nor is it relevant) that the first motion to compel and for sanctions occurred during the seventh appearance, because on the sixth appearance the Magistrate Judge specifically praised the Koshkalda's compliance and erroneously stated that the Court would punish Koshkalda if other non-obedient parties would not start their compliance. [OB, 4-5].

Thus, Epson's assertion that Koshkalda's count was incorrect is not true and was not supported by Epson.

B. Epson's interpretation of the NV Court's statements during the April 17, 2017, hearing is also without merit.

In Opposition-Brief Epson stated:

> *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."*
>
> *Opp. 4*

Epson's interpretation is wrong. Epson did cherry-picking of what the Magistrate Judge stated. The full statement is as follows (verbatim):

> *THE COURT ... But this — so what's going to happen is — and I do have sympathy for particularly Mr. Koshkalda who I think is doing the very best he can... I know you're trying to get these other people [Kravchuk and Bielov] to get in line and to do what they need to do, but if this continues, you are setting yourself up for a motion for a judgment based upon your inability to proceed in this court, and I don't know what that judgment would end up looking like, sounds to me like it would be a significant amount of money which should concern you [Koshkalda and Maliuk] and should concern the other two codefendants [Kravchuk and Bielov]. So everybody comes back here. Mr. Koshkalda, you understand that, sir?" But the defendants [Kravchuk and Bielov] need to understand if they — not you two [Koshkalda and Maliuk], but if the other defendants continue to be in Ukraine or continue to ignore this case, there are going to be problems with that, and they need to get — understand that, and it's going to be a motion by the — by this very big company that could be potentially very devastating to all of you, and that would be bad.* (emphasis added)
>
> OB, 4-5

By stating *"if this continues"* the Magistrate Judge was referring to non-appearance and non-compliance by other defendants. And Magistrate Judge made it very clear. The full sentence states:

> *I know you're trying to get these other people [Kravchuk and Bielov] to get in line and to do what they need to do, but if this continues, you are setting yourself up for a motion for a judgment based upon your inability to proceed in this court, and I don't know what that judgment would end up looking like, sounds to me like it would be a significant amount of money which should concern you [Koshkalda and Maliuk] and should concern the other two codefendants [Kravchuk and Bielov]. So everybody comes back here.*
>
> *OB, 4-5.*

There was not a word about failure to produce documents, nor does it fit into the context where Magistrate Judge was praising the Koshkalda's compliance.

Other defendants, unlike Koshkalda, refused to cooperate and to obey the NV Court orders.

Thus, Epson's assertion is without merit.

C. *While unable to provide specific facts as to Koshkalda and ART LLC, Epson continues its approach to commingle facts by making general statements about "all" defendants.*

In Opposition Epson stated (verbatim):

> *Respondents were appropriately granted seizure relief and seized over 15,000 counterfeit ink cartridges from multiple locations, including those related to Petitioner.*
>
> *Opp. 2*

Epson conceals the fact that from Koshkalda's and ART LLC's locations Epson did not seize a single counterfeit ink cartridge.

Furthermore, the dispute as to what was seized and what was returned by Epson is subject to another petition for Writ of Certiorari before this Court — appeal from the case No. 19-56187 before Ninth Circuit, and Case No. 2:18-cv-05087-FMO-AGR before the United States District Court Central District of California, Opening Brief for which is filed concurrently with this Reply-Brief. [1] That petition for Writ of Certiorari is regarding Epson's wrongful seizure in NV Court which was (wrongfully) dismissed by Epson's lawyers with prejudice after the Bankruptcy Court (erroneously) allowed non-disinterested Epson's lawyers to represent Koshkalda's Estate in cases of the Koshkalda's Estate against Epson.

Next, Epson stated (verbatim):

> *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*

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[1] Pursuant to Supreme Court Rule 27(3) Koshkalda requests this Court to review both cases together, because they are exactly on the same subject.

18 years as a judge." App. 34. During the majority of these hearings, Petitioner was represented by counsel.

Opp. 3

Epson's position is without merit. *First,* Epson conflates "case management conferences" with hearings on motions to compel.

Second, Epson again is referring to hearings where Magistrate Judge was giving explanations, directions and warnings to other defendants, not to Koshkalda or ART LLC.

Third, as stated above Epson raised no issues whatsoever with Koshkalda providing premises for inspections and with Koshkalda's deposition testimony, while against all other defendants Epson kept raising complaints to the NV Court. It was only after (and not before) April 17, 2017, hearing when Epson stated to include Koshkalda with other disobedient defendants.

Fourth, as to the NV Court's statement that NV Court never experience such behavior for 18 years, that is again not related to the Koshkalda's performance, but rather it was related to the fact that others were not present during one of the hearings. By no means it should be an excuse to sanction obedient Koshkalda for violative actions of non-obedient parties. [RARO, ECF 112].

D. Epson's argument that Ninth Circuit affirmed NV Court's orders on "alternative grounds" is against Epson and is in favor of this Court granting the Koshkalda's petition.

In Opposition-Brief Epson stated (verbatim):

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

Opp. 9

Think for a second about the reason Ninth Court was looking for *"alternative grounds"* to affirm the NV Court's orders. The answer is simple — NV Court orders were clearly erroneous and could not be affirmed without "something else." More importantly, Koshkalda did not argue "everything" on appeal, and limited his briefs to the specific issues with the NV Court's orders which were clearly erroneous. Ninth Circuit on its own initiative reviewed the record without Koshkalda having a due process right to dispute, let alone to argument, "something else" which led to the Ninth Circuit's erroneous findings that Koshkalda missed hearings and did not comply with NV Court's orders, all of which occurred after (not before) RARO, thus should not have justified erroneous RARO issued by NV Court. Erroneous rulings cannot be justified with future actions not occurred at the moment NV Court entered RARO.

E. Epson's argument that this Court should not pick this case because the situation will not be repeated in the future is the reason this Court should choose to review it.

In Opposition-Brief Epson stated (verbatim):

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.

Opp. 8

The Epson's position is fundamentally wrong. Case terminating sanctions is a very drastic measure depriving a party from a case review on merits, which should be used (but was not) sparingly with caution. The obedient party should not be punished for violations of others without a clear record. Here, Epson got a $12,000,000.00 default judgment against Koshkalda just because Koshkalda's answer was stricken as a result of case terminating sanctions.

Furthermore, Epson does not explain the reasons for its assertion that *"a fact pattern unlikely to be repeated."* Koshkalda agrees that most people rather accept the injustice, than keep fighting for the truth till the highest Court's review, or, as it is in this case, fighting for just a "tiny chance" for the highest Court's review.

Here, Koshkalda is fighting for a review of the case on merits. Koshkalda needs not to be the best litigant to deserve a decision on merits. Koshkalda has to be reasonably complying with his discovery obligations. As stated above numerous times the moment Epson started to include Koshkalda with other disobedient defendants was after (not before) NV Court praised Koshkalda but warned Koshkalda that if others would not start their compliance, then Koshkalda would not get a decision on merits.

Thus, the issue here deserves this Court's review — the Koshkalda's right for a decision on merits.

F. Epson makes an argument based on a disputed fact in another Writ of Certiorari filed before this Court concurrently with this Reply-Brief.

In Opposition Epson states that it seized and returned everything from the Koshkalda's and ART LLC's locations. [Opp. 2].

That argument is disputed by a separate petition for Writ of Certiorari, Opening Brief for which is filed concurrently with this Reply-Brief.

Brief summary of the whole picture.

After NV Court entered clearly erroneous RARO and before NV Court entered a default judgment, Koshkalda filed for Chapter 11 reorganization bankruptcy protection. Case No. 18bk30016-HLB pending before the United States Bankruptcy Court Norther District of California.

Upon Epson's request the Case was converted to Chapter 7 liquidation. Trustee got assigned and trustee got in a possession of all Koshkalda's and ART LLC's assets. Bankruptcy Court (erroneously) allowed Epson's lawyers to be hired as counsel for Koshkalda's Estate, which acted in favor of Epson against the interest of the Koshkalda's Estate, including filing a dismissal with prejudice of the Koshkalda's Estate's wrongful seizure action against Epson without authorization. Koshkalda requested abandonment after dismissal with prejudice. Bankruptcy Court granted and abandoned it. Koshkalda requested the dismissal with prejudice to be set aside, but the United States District Court for the Central District of California denied the request and stated that it is the Trustee's responsibility.

Bottom line is that after "voluntarily" filing for a reorganization, the case was "involuntarily"

converted to liquidation and Epson's lawyers was allowed to represent Koshkalda's claims against Epson. But that is subject for another petition for Writ of Certiorari with a "tiny chance" to be chosen for review.

Pursuant to Supreme Court Rule 27(3) Koshkalda requests this Court to review both petitions for writ of certiorari together for a full picture of injustice that Koshkalda has experienced while fighting against Epson.

CONCLUSION.

Based on the arguments presented in Opening-Brief and in Reply-Brief Koshkalda requests to grant this petition.

DATED: November 16, 2020.

By: Artem Koshkalda

Artem Koshkalda, Petitioner