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RESPOND TO NEW YORK

September 4, 2006

BY OVERNIGHT

Honorable Kenneth C. MacKenzie, J.S.C.
Superior Court of New Jersey
General Equity Division
Washington & Court Sts.
Morristown, NJ 07963-0910

Re: ***University Communications Inc. v. Net Access Corp.***
Docket No. MRS-C-87-04

Dear Judge MacKenzie:

We submit this letter brief in support of plaintiff/counterclaim defendants' once-again renewed motion to strike defendants' answer, enter a Judgment of Default, dismiss defendants' counterclaim with prejudice, and to award sanctions, attorneys' fees and costs for defendants' failure to comply with discovery requests and court orders.

Plaintiffs previously moved for this relief under Rule 4:23-4 of the New Jersey Rules of Court and renewed that motion in April of this year also pursuant to Rule 4:23-2. Under that latter Rule, a court may order the above requested relief as follows:

> If a party or an officer, director, or managing or authorized agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under R. 4:23-1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

The Court has denied all the previous motions, never finding that there was justification for defendants' contumacious behavior and demonstrating literally limitless patience for defendants' antics. Defendants have, once again, failed to obey a court order to provide discovery, this time refusing to answer proper questions at the deposition of Blake Ellman as well as by making a complete mockery of the entire proceeding, causing the deposition to end prematurely and making it impossible even to proceed with the court-ordered deposition of Alex Rubinstein.

The trail of events in this case is well known to the Court at this point; nonetheless, we continue to believe, for completeness of the record here, that it is useful instructive once again to summarize them (all facts contained herein are described in the included Certification of Ronald D. Coleman submitted with this brief and its attachments, as well as in the Certification of Counsel submitted by predecessor counsel Marianne Tolomeo in March 2005, which was resubmitted to the court by plaintiffs during motion practice in December 2005 and is again appended without its exhibits) in the margin[1]. We proceed

[1] Essentially, this motion is the latest in a series of discovery violations by defendants that has stretched back now for more about a year and a half. Defendants routinely ignore discovery deadlines and make little or no effort to conduct or provide discovery in the time allotted by the court. They make no requests to plaintiffs, request no conferences with the court, file no motion. Then, *after* plaintiffs seek guidance or formal relief from the court, defendants at the eleventh hour file a cross motion in which they claim they need more time for discovery and, giving the Court a basis to pronounce "a pox in both your houses," claim – in unauthenticated papers that do not comply with the Rules of Court – some "equivalent" abuse by plaintiffs. The Court typically agrees that "everyone is responsible" for the problem and the defendants continue their abuse.

In December of 2005, plaintiffs filed a motion for various sanctions under Rule 4:23, based upon defendants' (a) refusal to cooperate with plaintiffs' attempts to take defendants' depositions, and (b) failure to take any discovery of their own. After various procedural delays by defendants, the motion was heard. At that time, defendants insisted that the remedy requested was too harsh, that the court should simply order that discovery be completed. Plaintiffs strenuously objected to defendants' requests, arguing that defendants' history strongly suggested that they would not cooperate in completing discovery. Defendants, however, claimed that once a court order was in place, there would be real force behind the discovery schedule, so it would proceed smoothly. Based upon that representation by defendants, Your Honor issued an Order – whose language was drafted by defendants – specifying an **exact** discovery schedule.

Unfortunately, exactly what plaintiffs were worried about came to pass. Although plaintiffs provided all the documents defendants claimed they needed in order to commence depositions, defendants refused to reciprocate, despite several requests from plaintiffs. **To this date**, defendants have not produced the documents requested, and this Court did not order them to do so, actually relieving them of their burden to obey the Rules of Court and its own discovery orders by barring any further discovery, in its most recent Order Respecting Discovery dated July 28, 2006. Moreover, although defendants produced one of their three deponents, Kenneth Ellman, for a deposition, they unilaterally decided to cancel other scheduled depositions in contravention of the Court's Order, without justification or legitimate excuse. It should be noted that defendants did not request consent from plaintiffs, nor did they seek leave from the Court.

here with a recounting of the latest version of defendants' contempt for this Court, its Rules, its orders and other litigants.

Plaintiff's previous motion resulted in an order of this Court, dated and filed July 28, 2006, which mandated that plaintiff Jason Silverglate be deposed on August 8, 2006. That deposition went forward on that date without incident and without a timely, or any other, application to the Court by defendants for relief with respect to the nature of his answers, his level of preparation as a corporate representative, or any other aspect of the proceedings.

One notable aspect of the Silverglate deposition, however, was that defendants recorded it by videotape. Because the July 28, 2006 order stated that this deposition session was essentially a continuation of the earlier deposition noticed by defendants, which had been videotaped, we did not stand on this matter of form nor did we object to the defendants proceeding with what was essentially their deposition in the manner they saw fit.

The Court's July 28, 2006 order also required the appearance of Blake Ellman and Alex Rubenstein, officers of defendant Net Access Corporation, at the Morris County Courthouse, for depositions at August 21, 2006, at 10:30 AM and 2 PM, respectively. On that date, we were prepared to begin the deposition of Black Ellman at approximately 11:00 AM, our court reporter having been delayed. Blake Ellman had been present at this time and was by all appearances prepared to begin testimony, but his attorney, Mr. Feng Li, urged us not to proceed until Kenneth Ellman, allegedly a "real party in interest" in this matter and an amateur attorney at law, appeared, which did happen approximately forty minutes after the deposition was scheduled by court order to begin. Mr. Ellman was reminding everyone involved who was really in charge.

During this period it was evident to us that the same videographer who had recorded the Silverglate deposition on behalf of defendants was present as well. The Blake Ellman and Alex Rubinstein depositions were ordered by the Court in response to the defendants' earlier flouting of court-ordered deposition dates. These dates, in turn, had been mandated when earlier deposition notices to these parties had been ignored by the defendants as well. The Court declined, upon motion by plaintiff, to enter sanctions against plaintiff for any of the previous incidents of their disobeying court-ordered

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Rather, they simply announced that they were not going to comply with the Order. They were not sanctioned for this, the Court's order reading only "Plaintiffs are as responsible for delay in completing discovery as are defendants" with no specification as to how that is so.

deposition dates, though it did bar any of the third-party discovery sought by defendants.

As to the original notices for the Blake Ellman and Rubinstein depositions, they did not notice video depositions pursuant to R. 4:14-9(b). The Court did not, in its July 28, 2006 Order, order a video deposition for Blake Ellman or Alex Rubinstein. Defendants did not **ask** the court to order a video deposition for Blake Ellman or Alex Rubinstein. Defendants did not **request** that plaintiff stipulate to a video deposition as provided for by R. 4:13. Defendants did not in any other way, informally or otherwise, give **notice** that they intended or wished to videotape the depositions of Blake Ellman and Alex Rubinstein. Based on the clear requirements of the aforementioned Rules of Court, I informed defendants that plaintiff would not accede to the videotaping of the deposition of Blake Ellman.

Defendants nonetheless instructed their videographer to set up his video camera and record the testimony, essentially physically forcing the matter in violation of the Rules of Court right in the Morris County Courthouse.

At or around this juncture I went off the record, went into the hallway, explained the situation to a uniformed court officer and asked him to remove the videographer as he was an unauthorized person present at a court-ordered deposition in the courthouse. The officer did not believe he had the authority to act, however. At some point during this period, we learned that Your Honor, who has intimate familiarity with the proceedings and personalities in this case, was not in the courthouse. I did not have confidence that the duty judge would fully appreciate what was going on at this deposition, and I was not prepared to have a deposition I had sought for months be derailed by running to a judge unfamiliar with the case and having yet another screaming match with Mr. Li and Kenneth Ellman as I sought "permission" to take my deposition according to the Rules, especially considering that the deposition had already started late due to Kenneth Ellman's tardy arrival – at a location he insisted on because of its proximity to his home – and that two depositions were to be taken that day. In short, the problem was not mine; I had a right to conduct the deposition and intended to do so, not to spend the afternoon arguing about it in front of a judge unfamiliar with the case.

I returned to the deposition and placed the lens cap over the unauthorized video camera, which was shooting over my shoulder from the gallery in the courtroom we were using for the deposition. My use of physical action to allow the deposition to proceed was not threatening or intimidating to any person, and was certainly no less justifiable than that of defendants inserting an unauthorized individual and unauthorized equipment into the deposition.

The defendants then moved the video camera away from me and removed the lens cap. I instructed my client, who was present, to cover the lens with a legal pad while I took the deposition. The defendants, hell-bent on making a total circus out of this court-ordered deposition, then attempted to make an audio recording of the deposition.

My client produced white noise on his laptop computer to prevent the unauthorized sound recording of the deposition. While this was going on, I attempted to question Blake Ellman. The results of that questioning speak for themselves. The transcript is attached as Exhibit B to my Certification.

Before his deposition descended entirely into a circus, Blake Ellman – significantly – refused to give substantive answers to wholly proper questions, which along with defendants' upending of the deposition is the basis of plaintiffs' seeking dismissal pursuant to R. 4:23-2. The most telling exchange is as follows:

> Q: Are there any other officers of Net Access Corporation?
>
> A: The officers of Net Access Corporation are confidential.
>
> Q: Based on? What is your legal basis for asserting that you don't have to answer this question?
>
> A: We believe that information is confidential.
>
> Q: You believe that information is confidential. You recognize that if the judge reviews this transcript and determines that you do have to answer that question, that you will have to come back for another deposition?
>
> A: Yes.
>
> Q: Okay. Is Mr. Ellman an officer of Net Access Corporation?
>
> A: The officers of Net Access Corporation are confidential.
>
> Q: Didn't Mr. Ellman actually testify that he was an officer in his deposition?
>
> A: I don't know what he testified to. You have to ask Mr. Ellman.

. . .

Q: What I'm going to [is] represent to you [that this] is testimony from that deposition [reading]:

> QUESTION: -- this [is a] question for me to Mr. Ellman: "Are you a shareholder?
>
> "ANSWER: Yes.
>
> "QUESTION: How much of the stock of Net Access do you hold?"
>
> "ANSWER: That would depend upon confidential agreements among the shareholders. But I am a shareholder, yes."
>
> Now, do you still believe that it's confidential information whether or not Mr. Ellman is a shareholder of the corporation?

A: I believe so.

MR. LI: Objection. That's confidential.

Q: Was Mr. Ellman lying on the record when he testified that he was a shareholder of the corporation?

A: I wasn't at Mr. Ellman's deposition, and I have no idea what he said.

Q: If I represent to you that in his sworn testimony that he testified to the fact –

MR. LI: Objection.

MR. COLEMAN: Don't interrupt my question, Mr. Li.

Q: - that he testified to the fact that he was a shareholder, would he have been lying at that time?

> MR. LI: Objection. That's an improper question. That question shouldn't be answered, please.

During all this Kenneth Ellman stood on the side, fulminating over the frustration of his plan to make an unauthorized recording of the deposition in flagrant abuse of the Rules of Court – rules he is evidently under no obligation to follow because he is supposedly a *pro se* party. As the transcript shows, during this testimony he also attempted to involve a court officer in the proceedings, again interrupting my questioning, which was not being answered by the witness in any case:

> MR. COLEMAN: Go on the record, please.
>
> MR. K. ELLMAN: I'm on the phone.
>
> Q: Have you been directed to not answer one of these questions by an attorney in this litigation?
>
> MR. COLEMAN: Let the record reflect that there was no answer to the pending question. Another question.
>
> A: I'm waiting for the judge as to whether or not she can continue the deposition.
>
> Q: Did your attorney instruct you to not answer while the answer is pending?
>
> A: I said, I'm waiting for an answer by the judge.
>
> Q: Did Mr. Ellman tell you not to answer?
>
> A: He repeated the same thing that I said.
>
> Q: Is it your position that you need the judge's permission to answer questions in this deposition?
>
> MR. K. ELLMAN: It is our position that you interrupted the deposition.

What followed were more outrageous demonstrations by Kenneth Ellman, who essentially took over the deposition ordered by the Court at my request, in furtherance of

my clients' need for discovery, even attempting, after I announced that I would waste no more time with the deposition, that he was going to proceed with "cross-examination" of his company's CEO – in a deposition in which no substantive answers were given. Mr. Ellman, of course, is and always was free to take a deposition of his own son at any time, but we had no interest in being any further part of his show. Believing that the deposition was necessarily over, I asked the court reporter to leave the building with me.

It must be noted at this juncture that at not time did Mr. Li, the attorney actually representing Blake Ellman, state that **he** wished to make an application to the Court pursuant to R. 4:14-4. The only phone call was made by Mr. Ellman, who represents only himself, as indicated in the transcript ("MR. K. ELLMAN: I'm on the phone."). Although the Rule does state that "a party" can make an application for a ruling, it is clear from the transcript that Kenneth Ellman was doing so not in his own right but solely as the *de facto* attorney for the witness and hence for the corporate defendant, in violation of New Jersey law. R. 1:21-1(c). Kenneth Ellman, of course, is not an attorney.

I understand that the court reporter is required to record colloquy as well as any questioning by either side. This "colloquy" in this deposition, however, as well as the purported cross-examination, was highly irregular and was not part of the normal conduct of depositions as provided by our Rules of Court, the cases interpreting those Rules and the customs of conduct of discovery in courts in this State. I was not given the opportunity to ask my questions, or to get answers to them, and the record was constantly interrupted by the baseless objections, cross talk and stage managing of Mr. Li and Kenneth Ellman.

As the attorney doing the questioning and at whose behest the deposition was being taken, I believed I had the prerogative to decided when the record would and would not be made, and while I may have erred on the side of exclusion here, I am hard pressed to think of any experienced litigation attorney who practices in this Court who would have permitted a deposition, already scheduled for the third time by court order, to be so outrageously manipulated, held up and turned into a circus by this crew.

By "this crew" I refer to Kenneth Ellman, the highly intelligent non-attorney and, in our view, non-party (he has refused to produce a single page of documentation that he actually owns any interest in this litigation, despite repeated demands for the same in discovery); a non-answering witness; a figurehead lawyer, Mr. Li; an unauthorized cameraman; Mr. Ellman's daughter, who is neither a party to this litigation, an attorney or any other person with good reason to be present; and another unidentified young woman who evidently was in attendance solely to enjoy the show.

It was also my perception that the court reporter was quite agitated and intimidated by the wild proceedings and somewhat fearful of the shouting, hand-waving and generally hostile atmosphere. Having engaged her and being determined not to remain any longer as part of the sideshow being put on by defendants, I instructed her not to give her name to a screaming Kenneth Ellman, who vowed that her agency would not be permitted to participate in further proceedings in this case, and to escort her out of the building because my client and I were leaving. Later that day I received a call from the chambers of Superior Court Judge Catherine M. Langlois, requesting that I participate in a telephone conference, to which of course I agreed. Evidently she had heard a substantial amount of ex parte representations regarding the adventures at this deposition.

Judge Langlois's main concern, she said, was that she had been left with the impression that I had forbidden the court reporter from giving information as to the identity of the court reporting service utilized at the deposition, which I assured the Court was not the case, and for the record reiterated that the court reporter was an employee of Rizman Rappaport Dillon & Rose, LLC. She declined to enter any order or provide any judicial "relief" to defendants.

Your Honor, I have never been involved in a more outrageous travesty of civil proceedings, much less ones taking place right within the courthouse. I respectfully submit that the Court's failure to sanction any of the past abominations by Mr. Ellman and his legal team (Ms. Anne Kiernan is named as counsel here along with Mr. Li but has not appeared at any deposition or hearing in the time I have been involved with this matter), including simply refusing to appear for numerous noticed depositions and court-ordered depositions, has resulted in a belief by them that they can "get away" with anything as long as they provoke some degree of reaction from plaintiff's counsel such that the Court can employ the "a pox on your both your houses" approach to any request for meaningful sanction.

This is especially true because the ringmaster of the circus, Mr. Ellman, is a talented amateur but still a non-attorney, not educated in or subject to the Rules of Ethics or the disciplinary authority of this Court. He has been permitted to act in all respects with the privileges, but none of the responsibility, of an attorney, far beyond the scope of even his apparently fraudulent claim to be the owner of an interest in this litigation. Why the attorneys of record of Mr. Ellman's company have not been held responsible for his making this Court and this litigation a playground is not clear to plaintiffs.

Given these circumstances, we respectfully request that this Court grant the relief sought, as defendants have demonstrated that, regardless of their representations to the Court, they are not interested in moving this case along, not willing to comply with the

Rules of Court, and, now, not willing to comply with Orders of the Court. This is precisely the sort of contemptuous behavior which requires severe sanctions, as our Supreme Court noted in Abtrax Pharmaceuticals v. Elikins-Sinn, Inc., 139 NJ 499 at 1515 (1995), "not only to penalize those whose conduct warrant it, but to deter others who [might] be tempted to violate the rules absent such a deterrent.'" (quoting Zaccardi v. Becker, 162 N.J. Super. 329, 332 (App.Div.), cert. denied, 79 NJ 464, (1978).)

We firmly believe that the sanctions sought herein are justified, even abstracting from the behavior of Mr. Ellman and Mr. Li at the Blake Ellman deposition, solely on the basis of Blake Ellman's refusal to answer questions at this deposition. It is bad enough that this Court has to order that depositions be taken **twice** in order to elicit appearances by defendants' representatives. It is even worse that defendants appear, turn the deposition into a carnival and refuse to answer obviously proper questions.[2]

The entire adventure described above was simply one more attempt in a series going back to 2004 to make it impossible for plaintiffs to conduct discovery in this case. We pray that the Court take meaningful action at this juncture to regain control over its authority and dignity and to afford plaintiffs a modicum of their rights as litigants. In the event that the Court cannot see fit, despite this extensive record of outrageous behavior, to dismiss the pleadings of all the defendants, we request that the Court order that the depositions of Blake Ellman and Alex Rubenstein be taken before Your Honor or another judge of the Superior Court, in a courtroom at the Morris County Courthouse, so that the decorum and substance of that deposition will be assured.

Finally, short of the dismissal that is appropriate here, we also ask that the Court take up the matter of the uncontrolled and uncontrollable Mr. Ellman, who refuses to authenticate the legal basis of his involvement of this case; who acts even granting the legitimacy of that basis as *de facto* attorney for Net Access Corporation in all aspects of this litigation; to strike any papers filed as unauthorized "joint certifications" by defendants in violation of Rule 1:6-6; and to strike and going forward refuse consider papers filed out of time by defendants, which the Court has, without a finding of good cause, repeatedly done in this case.

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[2] The claim that the identities of the owners of Net Access Corporation are "confidential" cannot be taken seriously for several reasons. One is that defendants have had adequate opportunity to apply to the Court for a protective order regarding this information, and have never done so. Secondly, there is no legal basis for such an assertion of confidentiality – why would the identity of shareholders, much less Kenneth Ellman's status as one, be confidential in this case? Thirdly, Kenneth Ellman has **already testified** that he was a shareholder, so any confidentiality as to whether indeed was a shareholder was been waived.

Respectfully submitted,

Ronald D. Coleman

cc: Feng Li, Esq.
Mr. Kenneth Ellman