Case No. 12-3585

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GABRIEL LLANEZ-GARCIA,

Defendant,

DEBRA KANEVSKY MIGDAL,

Interested Party-Appellant.

On Appeal from the United States District Court
For the Northern District of Ohio

BRIEF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF INTERESTED PARTY-APPELLANT AND REVERSAL OF THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, *Amicus Curiae*, National Association of Criminal Defense Lawyers ("NACDL") makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   No. NACDL is a not-for-profit professional association. It is not a publicly held company; does not have any parent corporation; and does not issue or have any stock.

2. Is there a publicly-owned corporation, not a party to the appeal, which has a financial interest in the outcome?

   No.

Dated: November 27, 2012

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crimes or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it representation in its House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and fair administration of justice, including issues involving the sanctioning of criminal defense lawyers for conduct involving the vigorous representation of their clients. In furtherance of this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in the United States Supreme Court and others, addressing a wide

variety of criminal justice issues. NACDL has a particular interest in this case because the sanctions imposed against Debra Kanevsky Migdal, an assistant federal defender, threaten to chill lawyers' good faith discharge of their ethical duties and depress the quality of representation provided to all criminal defendants. Because criminal defense lawyers regularly rely on Fed. R. Crim. P. 17(c) to obtain key evidence for their clients from third-parties, NACDL believes that its views on the question presented here will be of value to the Court.[1]

STATEMENT OF THE CASE AND FACTS

NACDL agrees with and incorporates by reference the Statement of the Case and Statement of Facts of Interested Party-Appellant, Debra Kanevsky Migdal.

SUMMARY OF ARGUMENT

Rule 17(c) permits defendants to subpoena information in criminal discovery. Because information held by the prosecution can be obtained through reciprocal discovery mechanisms, the Supreme Court adopted the restrictive *Nixon* test for subpoenaing information from the prosecution. *United States v. Nixon*, 418 U.S. 683, 698-700, 702 (1974) (following *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)). But the Court expressly left open the question of what standard

[1]All parties have consented to the filing of NACDL's brief as *amicus curiae* in support of Ms. Migdal's request for reversal of the district court's sanctions decision. Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

governs these subpoenas when they are issued to ***third-parties***, which are beyond the reach of other discovery tools. *Id.* at 699 n.12.

In this case, Ms. Migdal first made a general discovery request to the government. R. 43, Order, at PageID#410. She then caused subpoenas to be issued to one state and one federal agency for information she believed to be within their purview that the government had not provided. *Id.* at PageID#404. The prosecution has no obligation to obtain information from third parties; and Rule 17's broad language permitted Ms. Migdal's actions. In spite of the unsettled state of the law and wide-ranging support for her interpretation of Rule 17, the district court sanctioned Ms. Migdal for issuing the subpoenas.

The district court's interpretation—which extended the *Nixon* test beyond its intended reach—contradicts Rule 17's text and would restrict criminal defendants' access to significant information. Based on case law discussed below, NACDL advocates that Rule 17(c) subpoenas to third-parties are proper where they are (1) reasonable, and (2) not unduly oppressive. To be reasonable, third-party subpoenas must ask for information that is material to the defense, bringing defendants' access to third-party information in line with their access to the prosecution. And the rules should be "given their ordinary meaning to carry out the purpose of establishing a more liberal policy" for criminal discovery. *Bowman*, 341 U.S. at 220.

In sum, Ms. Migdal's interpretation of the rules was neither "unreasonable" nor "frivolous," falling far short of the derelict behavior warranting sanctions. Accordingly, the district court's decision should be reversed.

ARGUMENT

I. The *Nixon* Test Does Not Apply to Rule 17(c) Subpoenas to Third-Parties.

A. The District Court Sanctioned Ms. Migdal for Issuing Rule 17(c) Subpoenas to Third-Parties.

Rules 16 and 17 provide two separate mechanisms by which a federal criminal defendant can obtain materials to mount his defense. Under Rule 16, a defendant may obtain documents and objects in the government's "possession, custody, or control" that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E). Rule 16 imposes reciprocal discovery obligations upon the defendant and prosecution only; it does not apply to third-parties. *See* Fed. R. Crim. P. 16(a), (b) (describing disclosure duties of government and defendant).

Under Rule 17(c), a defendant may cause subpoenas to be issued that direct their recipients "to produce any books, papers, documents, data or other objects." Fed. R. Crim. P. 17(c)(1). The court may direct the subpoenaed witness to produce those materials "before trial or before they are to be offered in evidence." *Id.* If compliance with the subpoena would be "unreasonable or oppressive," the district court is authorized to "quash or modify the subpoena." Fed. R. Crim. P. 17(c)(2).

Though unreachable under Rule 16, third-parties can be subject to a Rule 17 subpoena. *See, e.g.*, Fed. R. Crim. P. 17(a), (b), & (c)(1) (authorizing subpoenas directed toward any "witness").

In this case, an assistant federal defender made use of Rule 17 to subpoena information from third-parties. R. 43, Order, PageID#404, 408. First, Ms. Migdal made a general discovery request to the government. *Id.* at PageID#410. After receiving the government's response, she caused Rule 17(c) subpoenas to be issued to the Ohio State Highway Patrol and the U.S. Border Patrol for information she believed to be within their purview that the government had not provided. *Id.* at PageID#404; *see* Migdal Br. at 7, 18, 29. She did not specifically seek the requested information from the prosecutor under Rule 16 before procuring the subpoenas. R. 43, Order, PageID#410-411. The government moved to quash. *Id.* at PageID#403. Concluding that the requested information had already been obtained or could be legitimately requested from the government, the district court dismissed the motion as moot. *Id.* at PageID#405-407. Nonetheless, the court found the subpoenas improper. *Id.* at PageID#405, 407-412; R. 94, Order, PageID#915-917.

Under the Supreme Court's *Nixon* test, Rule 17(c) subpoenas are only permissible if the requested material is not reasonably available through other means. *Nixon*, 418 U.S. at 699-700, 702. Applying *Nixon*, the district court

concluded that the defendant could not subpoena information from third-parties without first using Rule 16 to try to discover the information from the prosecutor. R. 94, Order, PageID#915-917. Because the information might have been in the hands of the prosecution, concluded the district court, the defense attorney was obligated to seek it there first. *Id.*; R. 43, Order, PageID#411. Despite the U.S. Attorney's recognition that Ms. Migdal's interpretation was made in good faith and shared by others, the district court issued sanctions against her. *Id.* at PageID#407-408; R. 94, Order, PageID#917.

B. The *Nixon* Test Applies Only to Subpoenas Issued to the Prosecution.

Contrary to the district court's conclusion, *Bowman* and *Nixon*—the cases the district court relied upon—did not decide the issue here. Their holdings were limited to subpoenas issued to the government, leaving open what standard applies to a criminal defendant's third-party subpoenas. *See Nixon*, 418 U.S. at 699 n.12. The foundation of the court's sanction order, therefore, rests on a flawed premise.

In *Bowman*, the Supreme Court did indicate that Rule 17(c) "was not intended to provide an additional means of discovery" for criminal defendants beyond Rule 16. 341 U.S. at 220. But *Bowman* involved a subpoena by the defendant to ***the government***, not to third-parties. *Id.* at 216-217. Because both Rules 16 and 17 apply to a defendant's discovery from the government, the *Bowman* Court was faced with the task of reconciling two distinct rules governing

a defendant's access to government information. *Id.* at 219-221. Rule 17 affords parties broad leeway; it says little about limits on the type of information a defendant could discover. *See id.*; Fed. R. Crim. P. 17(c). On the other hand, Rule 16 lays out specific parameters for the discovery obligations between defendants and the government; it requires that the requested information be intended for government use at trial or "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(i)-(ii).

Faced with these competing standards, *Bowman* read Rule 17 in light of Rule 16. 341 U.S. at 219-21. The Court determined that it would undercut Rule 16's limitations on the government's discovery obligations to interpret Rule 17 as broadly as the text might otherwise permit. *Id.* at 220. Thus, for purposes of the government's discovery obligations, the two rules were interpreted together. *Id.* at 219-21. Going forward, when seeking information from the prosecution, criminal defendants were limited in their ability to use Rule 17 to seek discovery broader than permitted by Rule 16. *Id.* at 221.

Nixon, the leading case interpreting *Bowman*, expressly acknowledged that it did not reach the situation presented here—subpoenas to third-parties. *Nixon*, 418 U.S. at 699 n.12. In *Nixon*, the government requested that a Rule 17 subpoena be issued to President Nixon. *Id.* at 687-88, 710. Rule 16—the basis for *Bowman*'s interpretation—did not apply. Nonetheless, the *Nixon* Court repeated the principle

that Rule 17 discovery was limited, and announced the restrictive test governing Rule 17(c) government subpoenas. *Id.* at 698-700. Under the *Nixon* test, a party requesting documents under Rule 17(c) must demonstrate:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699-700 (footnote omitted); *see United States v. Hughes*, 895 F.2d 1135, 1145-46 (6th Cir. 1990) (applying *Nixon* factors of "relevance, admissibility, and specificity") (footnotes omitted).

Despite limiting Rule 17 discovery, the Court acknowledged that it was an open question whether its Rule 17 test should apply "in its full vigor" to subpoenas "issued to third parties rather than to government prosecutors." *Nixon*, 418 U.S. at 699 n.12. And the Court expressly saved the answer to that question for another day: "We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown" under the more stringent test. *Id.* (As discussed below, lower courts have recognized that *Nixon* left this question open.)

The NACDL believes "government" under Rule 16 should be interpreted broadly to include federal agencies participating in the investigation of the

defendant. *See, e.g.*, *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). Accordingly, when a defendant seeks discovery from the government, the prosecutor must hand over information in the hands of investigating agencies. However, if the prosecutor does not do so, as in this case, then it is appropriate for the defense to treat those agencies as third-parties. Because the Ohio State Highway Patrol and the U.S. Border Patrol are third-parties under these facts, *Nixon* did not decide the standard to be applied to their subpoenas.

The Ohio State Highway Patrol, a state agency, is indisputably a third-party to this action. Although in some circumstances, the U.S. Border Patrol could be considered part of the "government" for purposes of criminal discovery, the prosecution's conduct in this case defined the Border Patrol as a third-party. In response to Ms. Migdal's general discovery request, the prosecution did not provide information Ms. Migdal believed to be in the Border Patrol's hands. Under these facts, therefore, it was reasonable for Ms. Migdal to treat the Border Patrol as a third-party.

The United States surely would not agree that Rule 16 compels it to scour the files of every governmental agency simply upon a defendant's request. Wielding Rule 16 in the fashion that the district court below envisioned would therefore operate to deprive defendants of access to important information.

II. Rule 17(c) Subpoenas by Defendants to Third-Parties Are Proper Where They Are (1) Reasonable, and (2) Not Unduly Oppressive.

A. The *Bowman/Nixon* Rationale for Limiting the Scope of Rule 17(c) Does Not Apply to Third-Party Subpoenas.

Because *Bowman/Nixon* limited Rule 17 in order to avoid infringing upon Rule 16, and Rule 16 does not apply to third parties, the *Bowman/Nixon* rationale has little application in this context. The role of Rule 17(c) in the discovery of documents was limited by the Supreme Court because Rule 16 provided a more tailored standard for discovery. *Bowman*, 341 U.S. at 219-220. Courts since *Nixon* have recognized that the *Bowman*/*Nixon* standard exists "to reconcile the broad language of Rule 17(c) with the limitations on pretrial discovery inherent in the far narrower language of Rule 16." *United States v. Stein*, 488 F. Supp. 2d 350, 366 (S.D.N.Y. 2007). But "Rule 16 . . . says nothing of the government's or defendant's ability to subpoena documents from third parties." *United States v. Reid*, No. 10-20596, 2011 U.S. Dist. LEXIS 123554, at *9 (E.D. Mich. Oct. 26, 2011). Because Rule 16 permits discovery "only [of] documents in the government's hands . . . , Rule 17(c) may well be a proper device for discovering documents in the hands of third parties." *United States v. Tomison*, 969 F. Supp. 587, 593, n.14 (E.D. Cal. 1997) (concluding government lacked standing to oppose third-party subpoenas).

The broad text of Rule 17 certainly permits discovery directly from third-parties. Despite harmonizing Rule 17 with Rule 16 in the context of government subpoenas, the *Bowman* Court directed that "the plain words of [Rule 17] are not to be ignored." *Bowman*, 341 U.S. at 220. Rather, they "must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial." *Id.* The Court understood that, in the Federal Rules, "[t]here was no intention to exclude from the reach of process of the defendant any material that ... could be used at the trial." *Id.* at 221. Rule 17 on its face contains very broad language. *See Stein*, 488 F. Supp. 2d at 366. If Rule 16 swallows Rule 17 in the third-party context where Rule 16 has no place, Rule 17 would be effectively read out of the Federal Rules; its plain language must be respected.

Even assuming the *Nixon* test should be extended to third-party discovery, it does not follow that defendants must first request that information from the government. Rule 16 requires the government to comply with a defendant's request for "material" information. Fed. R. Crim. P. 16(a)(1)(E)(i). Where the material subpoenaed from third parties is "material" to the defense, "there is no reason to limit the plain language of Rule 17(c)," and foreclose third-party subpoenas. *Stein*, 488 F. Supp. 2d at 366. In that scenario, "there is no conflict between the limited discovery afforded by Rule 16 and the broad words of Rule

17(c)." *Id.* Accordingly, the Rule 17(c) subpoenas would not be "substitut[ing] for the limited discovery otherwise permitted." *United States v. Caro*, 597 F.3d 608, 620 (4th Cir. 2010) (internal quotation marks omitted).

Furthermore, it is not reasonable to demand that criminal defendants first seek third-party information from prosecutors who have no obligation to obtain it. The government is required to produce only those materials within its "possession, custody, or control." Fed. R. Crim. P. 16(a)(1)(E). The prosecution has no duty to obtain third-party information and can avoid handing that information over to defendants by simply not seeking it. *See United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991) ("It is well settled that there is no 'affirmative duty upon the government to take action to discover information which it does not possess.'"); *United States v. Sarras*, 575 F.3d 1191, 1215 (11th Cir. 2009) (concluding that defendant could not use Rule 16 to compel government to obtain third-party evidence); *United States v. Buske*, No. 09-CR-65, 2011 WL 2912707, at *8 (E.D. Wis. July 18, 2011) (collecting cases holding that a defendant seeking exculpatory evidence from third-parties must do so via subpoena under Rule 17(c)).

The district court's approach, however, would impose an absolute duty on the defendant to ask for information from the prosecution that the prosecution has no duty whatsoever to obtain. Nor is it clear what interest the prosecution could independently assert in participating in (or preventing) the defendant's third-party

subpoenas. *United States v. Louis Trauth Dairy, Inc.*, No. CR-1-94-52, 1994 U.S. Dist. LEXIS 20962, at *16-18 (S.D. Ohio Dec. 7, 1994) (concluding that the government did not have the right to challenge the defendant's third-party subpoenas). Simply put, "[n]o rational purpose would be advanced by going through the charade of ordering the government to request the documents from [the third-party] so that the government may turn them over to the defendants." *Stein*, 488 F. Supp. 2d at 366.

B. A Less Stringent Standard Than the *Nixon* Test Comports with Criminal Discovery Principles.

Because defendants cannot rely on the government to obtain discovery of third-party materials, a less stringent standard than the *Nixon* test is the only pragmatic way to apply Rule 17 in the third-party context. Ruling on a motion to quash a Rule 17(c) subpoena to the Bureau of Prisons, the Southern District of New York declined to apply the *Nixon* test to third-party subpoenas. *United States v. Tucker*, 249 F.R.D. 58, 65-66 (S.D.N.Y. 2008). In light of the limited applicability of *Nixon* to the third-party context and the constitutional rights of criminal defendants to mount a defense, the court applied less stringent standards. *Id.* at 60-66. Under *Tucker*, a defendant need only show a third-party subpoena request is "(1) reasonable, construed as 'material to the defense,' and (2) not unduly oppressive for the producing party to respond." *Id.* at 66; *see United States*

v. Rajaratnam, 753 F. Supp. 2d 317, 319-321 n.1 (S.D.N.Y 2011) (citing *Tucker* with approval).

The materiality test is faithful to the discovery principles undergirding both Rules 16 and 17. Requiring the defendant to show materiality "would insure that the defendant has a right to obtain evidentiary material from a third party that is no broader—but also no narrower—than the defendant's right to obtain such material from the government." *Id.* at 321 n.1. Such a test recognizes that the government's power to "discover" is much broader than a criminal defendant's. *See Tucker*, 249 F.R.D. at 60, 63-64. In addition to disclosures from defendants, the government's tools include law enforcement's investigatory powers and grand jury proceedings. *See id.*; John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 Fordham L. Rev. 2097, 2147 (2000). Paradoxically, a criminal defendant—facing loss of life or liberty—has discovery tools are far weaker than those of a civil defendant, who is able to compel production of any documents "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 Fordham Urb. L. J. 1097, 1145-46 (2004) (discussing justice and efficiency rationales for broadened criminal discovery).

The consistent trend in the law, furthermore, has been the expansion of access to information for criminal defendants. *See id.* at 1147-48 ("[M]ost states have significantly broadened pretrial discovery in criminal cases."); Milton C. Lee, *Criminal Discovery: What Truth Do We Seek*, 4 U.D.C. L. Rev. 7, 8, n.5 (1998) (tallying thirty-seven states with discovery statutes that are more progressive than the restrictive federal model). Tellingly, Rule 16, itself, has evolved over time. *Compare* Fed. R. Crim. P. 16, advisory committee's note (1944) ("Whether under existing law discovery may be permitted in criminal cases is doubtful."), *with id.*, advisory committee's note (1966) ("[P]retrial discovery . . . in criminal cases is a complex and controversial issue."), *and with id.*, advisory committee's note (1974) ("[I]t is desirable to promote greater pretrial discovery."). In many courts, however, as these changes have unfolded, Rule 17(c)'s interpretation has not been revisited.

This is not to say that applying a lesser standard to third-party subpoenas would open the floodgates to defendant discovery. On the contrary, significant checks on Rule 17(c) subpoenas would remain. First, the district court is authorized to "quash or modify the subpoena" if compliance for the third-party would be "unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). Second, the materiality test limits the scope of discoverable information. Courts can consider "the logical relationship between the information withheld and the issues in the

case, as well as the importance of the information in light of the evidence as a whole." *United States v. Dobbins*, No. 10-6262, 2012 U.S. App. LEXIS 9735, at *17 (6th Cir. May 14, 2012) (internal quotation marks omitted). Under this inquiry, third-party subpoenas must be "sufficiently narrowly focused" that the defendant "cannot be said to be engaging in a 'fishing expedition.'" *United States v. Weisberg*, No. 08-CR-347, 2011 WL 1327689, at *7 (E.D.N.Y Apr. 5, 2011).

C. At a Minimum, the Case Law Supporting Ms. Migdal's Interpretation Confirms that Her Conduct Was Not Sanctionable.

The district court portrayed the Rule 17 issue as black and white, showing little fidelity to the text of the rule or how other courts have interpreted it. NACDL firmly believes that the analysis that it has walked through above is correct. However, even if this Court were to disagree, it cannot be said that the position is without support.

When issuing the sanctions, the district court invoked both Section 1927 and its inherent authority. R. 94, Order, PageID#914. In this circuit, Section 1927 sanctions are appropriate only "when an attorney knows or reasonably should know" that the rationale for her conduct is "frivolous." *Tareco Props., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003) (internal quotation marks omitted). Ms. Migdal's actions can hardly be unreasonable where the Supreme Court has expressly acknowledged that the issue is unsettled. *See Nixon*, 418 U.S. at 699 n.12. Far from "frivolous," Ms. Migdal's interpretation of Rule 17(c) was

arguably correct. *See, e.g.*, *Tucker*, 249 F.R.D. at 65-66. But even if she were mistaken, "[s]imple inadvertence or negligence . . . will not support sanctions under § 1927." *Salkil v. Mount Sterling Twp. Police Dep't*, 458 F.3d 520, 532 (6th Cir. 2006); *see, e.g.*, *Perkins v. General Motors Corp.*, 129 F.R.D. 655, 669 (W.D. Mo. 1990) (declining to issue sanctions where "the law in this Circuit on this issue is unclear").

As for the second purported basis, it is "questionable whether the inherent authority to sanction even exists in a criminal case" where a statute or rule is applicable and the attorney's conduct does not meet the governing test. *United States v. Aleo*, 681 F.3d 290, 305 n.13 (6th Cir. 2012) (questioning district court's use of "inherent authority" where criminal rule was "sole mechanism" for sanctions); *see id.* at 308 (Sutton, J., concurring) (concluding that district court cannot use inherent authority to "circumvent[]" limitations of contempt power). Assuming the district court is bound by Section 1927's limitations, sanctions are improper here where there is no basis to sanction Ms. Migdal under Section 1927.

In any event, the district court may exercise its inherent power to sanction only when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," or when the conduct was "tantamount to bad faith." *Aleo*, 681 F.3d at 305 (internal quotation marks omitted). To find bad faith, the court must conclude, "(1) that the claims advanced were meritless, (2) that counsel knew or should have

known this, and (3) that the motive for filing suit was for an improper purpose such as harassment." *Id.* As discussed, Ms. Migdal's position was reasonable, not meritless. And no evidence was presented that Ms. Migdal's sought the third-party subpoenas for an improper purpose, precluding sanctions under the court's inherent power.

Because the law governing Rule 17(c) third-party subpoenas is at best unclear, and her interpretation was well-grounded, the sanctions against Ms. Migdal were improper.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 4183.

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CERTIFICATE OF SERVICE

It is hereby certified that on November 27, 2012, the foregoing brief was electronically filed with the Clerk of the Court by using the ECF system. Counsel for the appellants and appellees are registered ECF users and will be served by the ECF system.

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