

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 24

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L. G.,

Plaintiff,

Index No. 310479/10

-against-

**DECISION AND ORDER**

Motion Sequences 4 and 5

M. G.,

Hon. Ellen Gesmer

Defendant.

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In the portion of Motion Sequence 4 now before the court,<sup>1</sup> plaintiff L. G. (Mother) seeks sanctions, pursuant to 22 NYCRR §130-1.1, against Mallow, Konstam, Mazur, Bocketti & Nisonoff, P.C. (the Konstam Firm) (which represented defendant M. G. [Father] and his parents, H. and O. G. [respectively, the Paternal Grandfather, the Paternal Grandmother and, collectively, the Paternal Grandparents]), for engaging in frivolous conduct by repeatedly making misrepresentations and knowingly false statements and claims to the court; and an order directing the Konstam Firm to pay sanctions in the amount of \$10,000 to the Mother. In the remaining portion of Motion Sequence 5, the Mother seeks sanctions pursuant to 22 NYCRR 130-1.1 against the Konstam Firm, and Abe Konstam, Esq. and Madeline Nisonoff, Esq. individually (with the Konstam Firm, the Attorneys), for engaging in frivolous conduct, and asks that the court direct them to pay sanctions to the Mother in the form of reimbursement for the reasonable counsel fees and expenses she incurred as a result of their conduct in the amount of \$928,292.35,<sup>2</sup> in connection with: 1) the Bronx Family Court custody and access schedule proceeding, *L. G. v M. G.*, Docket Number V- xxxx/09 (the Mother's Bronx Action); 2) the Bronx Family Court access schedule proceeding, *M. G. v L. G.*, Docket Number V-xxxx/10 (the Father's Bronx Action); 3) the Special Proceeding filed by the Father, titled *M. G. v L. G. and the Beth Din of America*, Index Number xxxx/10 (the Special Proceeding); and 4) this divorce action (the Divorce Action), and specifically: a) the financial issues, settled by Stipulation of Settlement dated March 4, 2012, and so ordered by the Court on March 5, 2013 (the Financial Stipulation); b) the access schedule issues, tried over six days in December 2012 and January 2013 (the Access Trial); and c) the post-trial application for counsel fees.

In this court's decision and order dated December 23, 2013 concerning the Access Trial and Motion Sequences 2, 3, 4 and 5 (the 2013 Decision), the court declined to address the Mother's applications for sanctions against the Attorneys, since counsel could not properly defend themselves while representing the Father. Accordingly, the court scheduled a hearing to provide the Konstam Firm, Konstam and Nisonoff an opportunity to litigate these issues.

The court held a hearing on October 20, 2014 (the Motion Hearing). The Mother called as witnesses Abe Konstam and Madeline Nisonoff. The Attorneys called Madeline Nisonoff. The parties then submitted extensive memoranda.<sup>3</sup>

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<sup>1</sup> The remaining portions of Motions Sequences 4 and 5, and the cross-motion to Motion Sequence 4, were decided in this court's decision and order dated December 13, 2013.

<sup>2</sup> In her brief in support of this motion, the Mother states that the remedy she seeks is an order directing the Konstam Firm to reimburse her for her reasonable counsel fees incurred in the amount of \$524,926.11, and that the court impose sanctions against the Konstam Firm, and Konstam and Nisonoff individually, each in the amount of \$10,000, payable to the Lawyers' Fund for Client Protection, for engaging in frivolous litigation in this matter. However, that is not the relief sought in her motions, and accordingly, the court will not consider it.

<sup>3</sup> The court will disregard the first exhibit attached to the Attorneys' brief since that document had not been introduced into evidence at the Motion Hearing. The court will also disregard the many statements in the Attorneys' brief not supported by any of the testimony or exhibits at the Motion Hearing. For example, the brief states that the Father "truly believed that he had not signed the arbitration agreement." However, while there is evidence that he had said that to the

## FACTS

Based on the testimony and evidence at the Motion Hearing, the court makes the following findings.

### Credibility

Abe Konstam was not credible. He was evasive and uncooperative, even when identifying the bills from his own law firm.

Madeline Nisonoff was not credible. Many of her statements were contradicted by her own exhibits. For example, although she swore that she had conversations with the Father between the first half of the Access Trial in December 2012 and the second half in 2013, there are no entries on her billing records that reflect those conversations. Similarly, although she swore that she met with the Father in October 2011 to discuss withdrawing the Special Proceeding, there are no entries for that meeting on her bills either. Therefore, either her records are incomplete or the conversations she testified to did not occur.

### Facts Concerning the Proceedings between the Parties

The background facts are set out in detail in this court's prior orders, including the 2013 Decision, and will only be repeated as relevant to the instant motions.

The parties were married on January 2, 2005. They have one child I. G., born in April 2007. On October 5, 2008, the Father suffered a brain aneurism at the parties' residence located in Riverdale, New York, and was taken by ambulance to Columbia Presbyterian Hospital. The Father was in a coma for several weeks, and underwent four surgeries at Columbia Presbyterian in the next month. He then lived in a series of rehabilitation facilities.

The Father retained the Konstam Firm on December 17, 2009 by signing a retainer agreement with the Konstam Firm. Although he had suffered an aneurism less than a year earlier, and continued to reside in a rehabilitation facility, he appeared at every court proceeding, submitted numerous sworn statements to the court, and testified both at his deposition and at the Access Trial. There has never been an application for an appointment of a guardian or a *guardian ad litem* for the Father since this matter has been before this court.<sup>4</sup>

After the Father retained the Konstam Firm, a member of the Konstam Firm certified each document signed by the Father, including affidavits and net worth statements. A member of the Konstam Firm also notarized and/or acknowledged the Father's signature on many documents, including stipulations and affidavits.

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Attorneys once, there is certainly no evidence that he "truly believed" it.

<sup>4</sup> As this court found in its decision and order dated August 18, 2010 in the Special Proceeding, **Error! Main Document Only.** on or about February 2, 2010, Special Referee Guarino of the Bronx Family Court on its own motion, appointed Pierre Janvier, Esq. to meet with the Father and report back to the Family Court as to whether or not the Father required a guardian ad litem. On April 23, 2010, the parties' counsel advised this court that Family Court had determined that the Father did not require a guardian ad litem.

### Misrepresentations and Knowingly False Statements and Claims to the Court

During the summer of 2009, the Konstam Firm did not advise the Mother where the Father was living.

The Konstam Firm failed to disclose to the Mother that the Father was willing to travel to go to a family wedding at a time when he claimed he was not well enough to travel to Riverdale to see his daughter.

On August 22, 2011, the Maternal Grandmother emailed Nisonoff advising her that they wished to cancel the visit on August 22,<sup>5</sup> and stating that they “do not wish to divulge the real reason that the visit cannot take place.”

### The Bronx Family Court Proceedings

The Mother commenced a proceeding for custody in the Bronx Family Court on October 6, 2009 (the Mother's Bronx Action). The Konstam Firm was substituted in as the Father's counsel on January 19, 2010.

In an email dated January 4, 2010, the Paternal Grandfather stated to Nisonoff, “... delay this hearing as long as you can.” However, there is no evidence that the Attorneys in fact did so.

The Konstam Firm appeared for the Father in the Mother's Bronx Action on February 2 and 17, 2010 and April 21, 2010. At the last appearance, the Father withdrew his objection to the Mother's petition and the court awarded custody to the Mother.

The Father then began a proceeding seeking access in the Bronx Family Court (the Father's Bronx Action).

In an email dated August 8, 2010, the Paternal Grandfather advised Nisonoff that he was concerned that the Father might state to the Referee that he had no objection to the Mother remaining in the room during his visits with I. G.

On November 26, 2010, the Paternal Grandfather emailed Nisonoff stating that he suggested they put all visits on hold until “everything is resolved,” and directing her to “go after [the Mother] with a vengeance.”

By Order dated January 27, 2011, the Father's Bronx Action was consolidated into the divorce action.

### The Special Proceeding

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<sup>5</sup> The email was ambiguous as to whether it was the Father or the Paternal Grandparents who wished to cancel the visit.

On March 16, 2010, the Konstam Firm brought an Article 75 proceeding on behalf of the Father, seeking to vacate the Notice of Arbitration sent pursuant to the Arbitration Agreement between the parties dated November 9, 2004 (the Arbitration Agreement) on the grounds, *inter alia*, that the Father had not signed the Arbitration Agreement, was not legally competent to participate in any hearing required by it and was not physically able to participate in such a hearing. Nisonoff signed an affirmation dated March 11, 2010 in support of the Special Proceeding, which stated, *inter alia*, that

- the Father “denies signing” the Agreement.
- “the signature on the [Agreement] is not that of [the Father];”
- “the signature that allegedly was made by the [Father] is a forgery.”

In his affidavit in opposition to motion sequence 5, signed on July 1, 2013, the Father for the first time submits a sworn statement that he told Ms. Nisonoff in 2010 that he had not signed the Agreement.

On April 3, 2010, the Father told the Mother on the telephone that he did not believe that she had forged his signature on the Agreement. Nisonoff did not so advise the court. In an affirmation dated April 7, 2010 submitted in in the Special Proceeding, Nisonoff stated that she had met with the Father “on two separate occasions, each time for several hours,” and that she based litigation decisions on “very specific conversation[s]” with him.

In this court's decision dated August 23, 2010, the court rejected the claim that the Father lacked mental competence to execute the Agreement, noting that the Bronx Family Court had already determined that the Father did not require a guardian ad litem.

At his deposition on October 11, 2011, the Father acknowledged that the signature on the Agreement was his.

On October 23, 2011, the Paternal Grandfather sent an email to Konstam, stating that he had told Ms. Nisonoff “MANY MANY times that we were not going to trial on [the Special Proceeding]. I just do not see what the urgency is to alert the court at this particular time.” On October 24, Nisonoff sent an email to the Paternal Grandparents stating that it was best for them to withdraw their application. On October 24, the Paternal Grandfather sent an email to Konstam, asking that he get the trial in the Special Proceeding postponed “till after the financial trial.” On October 25, 2011, Konstam forwarded the Paternal Grandfather’s email to Nisonoff, to both her office and personal email. On October 27, 2011, Nisonoff faxed a letter to the court stating that her client would withdraw the Special Proceeding.

On November 7, 2011, on the date the trial was scheduled to begin, the Father and Nisonoff signed a stipulation which provided that the Father withdrew his petition and agreed not to dispute the validity of his signature on the Agreement

The Divorce Action

Financial Issues

Nisonoff sent an email to the Father's doctor asking that he "write a letter stating it would be too stressful for [the Father] to be deposed." There is no evidence that this request was based on any medical evidence.

On February 4, 2012, Nisonoff advised the Paternal Grandfather to delete one expense from the Father's Net Worth Statement because including it would not be "wise." On February 12, 2012, the Paternal Grandfather advised Nisonoff to disclose one invoice from the Father's care facility but not another one.

On March 4, 2012, the parties entered into a stipulation settling all of the financial issues, and the court allocated the stipulation on the record on March 5, 2012.

Custody and Access issues

On August 22, 2011, the Konstam Firm followed the direction of the Paternal Grandparents to conceal from the Mother's attorneys the reason for the cancellation of the Father's visit with I. G.

Dr. Kuchuk, the court appointed forensic, issued her report on March 15, 2012.

On May 14, 2012, the Paternal Grandfather sent an email to Konstam stating that there was no reason to attend a pretrial conference "since we are not going to trial."

The Access Trial was scheduled to begin in March 2012. It was adjourned first to June, then to October and ultimately to December.

On November 20, 2012, the Konstam Firm sent a bill for services rendered to the Father for the period from December 4, 2011 through November 20, 2012.

On November 21, 2012, the Paternal Grandfather stated in an email to Nisonoff and Konstam, "I therefore don't see the point in advising them in advance of the trial, that Mordechai has graduated [from the rehabilitation facility] and will be coming home. Let them be caught off guard, and find out at the trial. I also want to strongly impress upon you that Mordechai does NOT get tired the way he used to. He is up and about all day." As requested, the Konstam Firm concealed from the Mother and her attorneys that the Father would be leaving the facility shortly.

On December 5, 2012, the Paternal Grandfather asked that the Konstam Firm add to the Father's affidavit that he owed them for their payment of his legal bills.

The Access Trial began on December 10, 2012 and ended on January 9, 2013.

On December 17, 2012, the Paternal Grandmother sent an email to Nisonoff stating, "When notifying the courts or [the Mother's attorney], Please do not let them know how much Mordechai is

against seeing I. G. at all. Please keep that to yourself.” Nisonoff responded, seven minutes later, “Okay, got it. Making the calls now.” Konstam, Nisonoff and the Konstam Firm did not advise either the Mother, her counsel or the court of this, and proceeded to trial seeking visitation on the Father’s behalf.<sup>6</sup>

On December 24, 2012, the Paternal Grandfather sent an email to Nisonoff and Konstam stating that they would not “go thru with the trial....” The Konstam Firm did not advise the Mother, her counsel, or the court of this.

On January 7, 2013, the Konstam Firm sent a bill for services rendered to the Father. It next sent a bill on June 6, 2013.

On January 17, 2013, the Paternal Grandparents each signed a retainer agreement with the Konstam Firm. They had not had retainer agreements with the Konstam Firm prior to that date.

The Mother’s witnesses during the Access Trial were the Mother, the Father, the Paternal Grandparents and Michelle Renchner, the therapist for the Mother and I. G. The court accepted into evidence, with the consent of both parties, the report of Dr. Kuchuk, and both parties cross-examined her. The only witness that the Father put on during the Access Trial was the Paternal Grandmother, who testified very briefly. He presented no testimony to rebut or contradict the testimony of Dr. Kuchuk. The Father did not testify on his own behalf.

#### The Subpoenas

On or about June 1, 2012, the Mother’s attorneys served Subpoenas on the Paternal Grandparents (the Subpoenas) seeking the production of specific documentation relative to the custody issues in the underlying matrimonial matter, by sending them to the Konstam Firm. The Konstam Firm refused to accept them on behalf of the Paternal Grandparents but accepted service only for the Father. On August 23, 2012, the Mother’s attorneys had the Subpoenas personally served on the Paternal Grandparents. In response, on or about November 28, 2012, the Paternal Grandparents produced only one of the documents requested. On January 8, 2013, the Konstam Firm, on behalf of the Paternal Grandparents, made an oral application to quash the August 2012 Subpoenas. This Court denied counsel’s request because it was not made “promptly,” in clear violation” of CPLR §2301, and it was not made at or before the pre-trial conference, in violation of the Rules for Part 24. This Court then ordered the Paternal Grandparents to produce the documents listed in the Subpoenas on the following morning, January 9, 2013.

On January 9, the court asked the Paternal Grandmother if she had brought the documents. Nisonoff responded that she had not produced the “writings, and letters, and correspondence between [the Paternal Grandmother] and our firm, and the firm of Andrew Wigler.” In response to a question from the court, she stated that she had not done so because she disagreed with the denial of her oral motion to quash on the previous day.

On January 22, 2013, the Mother’s attorneys filed Motion Sequence 4 against the Paternal Grandparents and the Konstam Firm. The Konstam Firm accepted service on the Paternal Grandparents

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<sup>6</sup> Eventually, his lack of interest in visiting his daughter became apparent, since he did not visit her from at least November 2012 through at least the beginning of July 2013.

only as to those portions of the Order to Show Cause seeking contempt against them. This Court provided the Paternal Grandparents with one week to comply with the Subpoenas and cure their default. The Paternal Grandparents only produced a portion of the requested documents but failed to produce a significant amount of the documents requested.

On February 21, 2013, Nisonoff submitted an affirmation in opposition to Motion Sequence 4 in which she stated, “The truth is, and as I will show this Court, the Plaintiff has received all the financial information requested in the Subpoenas to the extent it is in [the Paternal Grandparents'] possession,” and “[the Paternal Grandparents] have turned over the financial records to the Plaintiff’s attorneys.” Neither of these statements was fully accurate when made.

On March 8, 2013, the court entered a further order directing the Paternal Grandparents to produce the documents by March 15, 2013. As of March 29, 2013, the Paternal Grandparents had still not produced certain documents. Of the documents not produced as of that date, the following documents were in the care and control of the Konstam Firm: 1) the Konstam Firm bills, since November 20, 2012; 2) additional proof of payment for legal fees, such as checks and/or receipts; 3) the Konstam Firm’s responses to correspondence from the Paternal Grandparents; 4) correspondence with the Konstam Firm after November 28, 2012; 5) email exchanges with the Konstam Firm; 5) various missing or incomplete emails and email chains; 6) attachments to various emails with the Konstam Firm; and 7) a CD sent by the Paternal Grandfather to Konstam on May 31, 2012, including a recording made secretly by the Paternal Grandparents of their interview with Dr. Kuchuk.

On April 3 and 8, 2013, the Paternal Grandparents produced some but not all of the additional documents.

On April 5, 2013, the parties stipulated that all documents produced by the Paternal Grandparents and the Konstam Firm in responses to the Subpoenas would be deemed admitted into evidence in the Access Trial *nunc pro tunc*.

In the 2013 Decision, the court found, *inter alia*, that:

“The Mother was prejudiced by [the Paternal Grandparents’] failure to produce items in conformity with the Subpoenas either in a timely manner or at all because it hindered her ability to show that, in fact, the Paternal Grandparents had instructed the Husband’s attorneys, whose fees they were paying, to take actions, or not take actions, that delayed the [Access Trial], caused the Mother to incur unnecessary counsel fees fighting these tactics, and, most importantly, were contrary to [the parties’ daughter’s] best interests because they had a negative impact on her relationship with her Father.”

The Paternal Grandparents sent emails to the Konstam Firm to conceal pertinent information relative to the parties’ matrimonial litigation, and the Konstam Firm followed the Paternal Grandparents’ instructions.

There was no evidence introduced at the Motion Hearing to rebut these findings.

The Post-trial Application for Counsel Fees

The Wife incurred legal fees for the following purposes:

<b>Issue</b>	<b>Fees Incurred</b>
1) Special Proceeding, after October 11, 2011	\$25,412.50.
2) Conduct of Access Trial, after Dec 18, 2012	\$78,812
2) Post-Access Trial memorandum	\$75,935
4) Addendum to post-Access Trial memorandum, necessitated by the Paternal Grandparents' failure to comply with the Subpoenas	\$28,135.35
5) Motion sequence four (seeking contempt against the Paternal Grandparents for violating the Subpoenas and the January Order)	\$28,675
6) Motion sequence five (for counsel fees and/or fees as sanctions)	\$18,510.82
7) Motion Hearing	\$62,000
<b>TOTAL</b>	<b>\$317,480.67</b>

ANALYSIS

According to 22 NYCRR 130-1.1(c), a Court shall consider conduct frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

The Court “may award any party . . . in a civil proceeding[] . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys’ fees, resulting from frivolous conduct” (*Id.*). The Court “may make such award of costs . . . against either an attorney, or a party to the litigation or both” (22 NYCRR §130-1.1(b). When the award is



“against the attorney,” the Court has the power to award costs against a law firm or attorney, individually (*Id.*).

In this case, this Court made specific findings regarding the frivolous conduct of the Father, the Paternal Grandparents, and the Konstam Firm in the 2013 Decision.

The Konstam Firm failed to present any evidence to mitigate this court’s previous Findings contained in the 2013 Decision. In fact, the testimony elicited and evidence presented at the Motion Hearing further supports this court’s previous findings against the Konstam Firm, Abe Konstam, and Madeleine Nisonoff.

#### Bronx Family Court Proceedings

Although there is some evidence that the Paternal Grandparents asked the Konstam Firm to engage in questionable behavior during the Bronx Proceedings, there is no evidence that the Konstam Firm did so.

#### Special Proceeding

The Mother argues that the Konstam Firm had no good faith basis for either of their contentions in the Special Proceeding: that the Father was not competent and that he had not signed the Agreement. However, in his affidavit in opposition to this motion, signed on July 1, 2013, the Father swears that he told Ms. Nisonoff in 2010 that he had not signed the Agreement. That evidence has not been rebutted. Moreover, at that time, the Family Court had appointed a court examiner to determine if the Father was competent. Accordingly, the Konstam Firm had a good faith basis for commencing the Special Proceeding.

However, on October 11, 2011, at his deposition, the Father identified his signature on the Agreement. He then notified the Konstam Firm that he did not want to proceed with the Arbitration Proceeding. Nonetheless, the Konstam Firm did not actually withdraw its claim until the hearing was scheduled to begin on November 7, 2011. Their failure to do so is sanctionable. As a result of their conduct, the Mother incurred fees totaling \$25,412.50 during that period to prepare for trial. Accordingly, the court assesses sanctions against them individually and collectively in the amount of \$25,412.50.

Divorce Action

Financial issues

Although some of the actions taken by the Attorneys in connection with the financial issues are questionable, there is no evidence that their conduct caused any actual damage to the Mother, and accordingly, the court declines to grant sanctions against them.

The Custody Issues

The Konstam firm was clearly at fault for:

1. Failing to notify the Mother's attorneys, on December 17, 2012, that the Father no longer wanted to see I. G. at all, and, on December 24, 2012, that the Father no longer wanted to proceed with the Access Trial;
2. On January 8, 2013, making a totally frivolous motion to quash the subpoena on the Paternal Grandparents;
3. Directing the Paternal Grandparents not to comply with the court's order to produce documents called for by the Subpoenas, both before and after the unsuccessful motion to quash; and
4. Misrepresenting to the court the extent of the Paternal Grandparents' compliance with the subpoenas.

The Attorneys present no justification for having failed to notify opposing counsel and the court that the Father no longer wanted to have access with I. G., and to continue the Access Trial. In fact, they repeatedly contended until the very end of the testimony and in their brief that the Father wanted access with I. G. Had the Attorneys not done so, the Mother would not have incurred the costs, after December 17, of continuing to prepare for trial, participating in the trial and writing a post-trial memorandum.

The Attorneys argue at length in their papers that they cannot be sanctioned for making the motion to quash because the court was wrong in denying that motion. The court rejects this argument for several reasons.

First, that ruling is the law of the case. The Father and the Paternal Grandparents cross-moved, in Motion Sequence 4, to reargue the court's denial of their oral motion to quash, and the court denied it, in the 2013 Decision. The only remedy as to that ruling is an appeal.

Second, the Attorneys waived any claim as to the motion to quash by stipulating that the documents produced by the Paternal Grandparents pursuant to the subpoenas would be deemed admitted into evidence in the Access Trial *nunc pro tunc*.

Third, even if the court were to consider the arguments as to the correctness of the ruling, the court would still reject the Attorneys' arguments, since the Attorneys do not address the tardiness of the motion to quash, which was the sole basis for the court's decision.<sup>7</sup>

Fourth, even if the motion to quash had not been barred as untimely, the court would have denied it in any event. The Attorneys argued that the subpoenas improperly sought documents barred by the attorney-client privilege since the Father's claimed inability to act on his own behalf required that the Paternal Grandparents communicate with the Attorneys on his behalf and otherwise act as his agents. However, this argument is contradicted by the Father's consistent position throughout this litigation that he was competent to act on his own behalf. He personally signed the Retainer Agreement with the Konstam Firm, as well as all pleadings, his Statement of Net Worth, his Affidavits and the settlement agreements. He personally appeared and testified, both at his deposition and at the Access Trial. The Konstam Firm addressed its bills to him. His competence was confirmed by the report of the Court Examiner appointed by the Family Court to the effect that the Father did not require appointment of a guardian ad litem, by his medical records and by his own assessment. Moreover, even if there had been a genuine basis to believe that the Father needed someone to act on his behalf, he, his parents, or any person concerned with the Father's welfare could have commenced an Article 81 guardianship proceeding (MHL §81.06). In the absence of a specific award of authority to act on the Father's behalf, the Paternal Grandparents were not empowered to do so. Therefore, had the motion to quash been timely made, the court would have denied it, and rejected the Attorneys' arguments that the subpoenas were void because they sought documents protected by the attorney-client privilege.

Once the court ruled on the motion to quash, the Attorneys continued to direct the Paternal Grandparents not to comply with it, falsely believing that their own view of the law justified them in doing so. This is incorrect.

Finally, the Attorneys acted improperly in continuing to obfuscate the extent of the compliance by the Paternal Grandparents with the Subpoenas. For example, Nisonoff made inaccurate statements in her affirmation on Motion Sequence 4 concerning the extent of the compliance by the Paternal Grandparents with the Subpoenas. Moreover, she continues to stand by those statements, since she attached that affirmation to her post-hearing memorandum and specifically directed the court's attention to it.

As a result of the Attorneys' frivolous conduct with respect to the Subpoenas, the Mother incurred substantial additional legal fees.

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<sup>7</sup> The Konstam Firm's objection to the subpoena based on the failure to tender mileage fees was waived.

On the other hand, the court disagrees with the Mother that the Konstam Firm is at fault for failing to advise the Paternal Grandparents to pay Dr. Kuchuk's fees. Although the Paternal Grandparents paid all of the Father's legal fees, that did not render them responsible for paying for Dr. Kuchuk's services pursuant to this court's order, which directed the Father to do so.

Accordingly, the court will award sanctions against the Attorneys representing the attorneys' fees incurred by the Wife in the Access Trial after December 17, 2012, and in making and proceeding with Motion Sequences 4 and 5.

#### Misrepresentations to the Court

The Mother argues that the misrepresentations by the Attorneys provide a separate basis for an award of sanctions against them. However, I find that the misrepresentations identified by the Mother as having been made by the Attorneys were either discussed above, or the Mother has failed to show that she was damaged by them. Similarly, although the Konstam Firm acted improperly in not billing the Father in the manner required by the matrimonial rules (22 NYCRR §1400.3), the Wife has not shown that she was damaged thereby.

#### Counsel Fees

Domestic Relations Law §237 provides that, in an action for a divorce, the court may award counsel fees "to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and the respective parties." Indigence is not a prerequisite to an award of counsel fees pursuant to Domestic Relation Law §237 (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]). In considering an application for an award of counsel fees, the court shall consider the "equities and circumstances" of the case before it (*Basile v Basile*, 122 AD2d 759 [2d Dept 1986]), including the financial circumstances of the parties, the relative merits of the positions taken at trial, and any dilatory tactics the court finds that a party undertook during the litigation (*Warner v Houghton*, 43 AD3d 376 [1<sup>st</sup> Dept 2007]). The court finds no basis for directing that the Attorneys pay the Mother her fees in litigating this motion.

Therefore, the Attorneys shall pay \$317,480.67 to the Mother.

Accordingly, it is hereby

ORDERED that, pursuant to 22 NYCRR §130-1.1, the court sanctions the Konstam Firm, Konstam and Nisonoff for their conduct, and, as a consequence thereof, directs them to pay the Mother \$317,480.67, representing the attorneys' fees incurred by her as a result of their misconduct; and it is further

ORDERED that the Attorneys shall pay the sanction by September 30, 2015; and it is further

ORDERED that a copy of this decision shall be sent to the Departmental Disciplinary Committee.

Dated: August 21, 2015

ENTER:

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Hon. Ellen Gesmer, JSC