BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

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| In the Matter of:<br><br>MARK STEVEN LENZ,<br><br>Attorney-Respondent,<br><br>No. 6192658. | Commission No. 2022PR00029 |

**RESPONDENT'S ANSWER TO THE COMPLAINT**

NOW COMES Respondent, Mark Steven Lenz, by and through his attorney, Stephanie Stewart of the law firm of Robinson, Stewart, Montgomery and Doppke, LLC, and for his answer to the Administrator's Complaint, states as follows:

A. DISCLOSURE PURSUANT TO COMMISSION RULE 231

a. Respondent was admitted to the practice of law in the state of Illinois in 1986. Respondent was admitted to practice law in the state of Michigan in 2005, and his license has never been subject to discipline. Respondent was admitted to the U.S. District Court for the Northern District of Illinois in 2015, and his license has never been subject to discipline.

b. Respondent has never held any other professional licenses.

*(Filing frivolous pleadings and making false statements of law to a court)*

1. At all times alleged in this complaint, Lenz was an associate attorney at the law firm Fisher Cohen Waldman Shapiro, located in Glenview, and practiced primarily in real estate law.

**ANSWER:** Respondent admits that he is an attorney employed by the law firm of Fisher Cohen Waldman Shapiro, LLP, based in Glenview, Illinois. In further answering, Respondent has been practicing law for 37 years and has never before been the subject of a disciplinary complaint.

2. On February 17, 2016, Harlem Irving Plaza ("HIP") filed a complaint in the circuit court of Cook County against its former employee, Edan Gelt ("Gelt). The clerk docketed the case 2016CH02178. In the suit, HIP alleged that Gelt violated her fiduciary duties to HIP by conduct including diverting HIP funds to limited liability companies she controlled, submitting false expense reports to HIP, and by using the proceeds of those activities to obtain various parcels of real estate. On the same day, HIP filed *lis pendens* notices as to the four different parcels of real estate HIP alleged were funded by Gelt's activities.

**ANSWER:** Respondent admits the allegation as contained in paragraph 2. In further answering, Respondent states that the client provided information indicating that there were inaccuracies in the complaint regarding the parcels of real estate.

3. Respondent's law firm Fisher Cohen Waldman Shapiro, LLP filed its appearance on behalf of Gelt on November 18, 2016. In or about January of 2017, Respondent and Gelt agreed that Respondent would represent Gelt on behalf of the firm in matters relating to the defense of HIP's suit against her. Daniel Mathless ("Mathless") represented HIP in the suit.

**ANSWER:** Respondent admits the allegations as contained in paragraph 3.

4. On June 13, 2017, Respondent drafted four different complaints against HIP and against Mathless personally regarding each of the four *lis pendens* notices described in paragraph two, above. In each of the four complaints, Respondent alleged that HIP and Mathless slandered the title of one of the four properties by virtue of HIP's filings of the four *lis pendens*. Respondent

filed four separate actions, even though the *lis pendens* all arose from HIP's single suit described in paragraph two, above, which remained pending at the time Respondent filed the four separate suits. The clerk of the circuit court of Cook County docketed the four matters 2017CH8229, 2017CH08230, 2017CH08232, and 2017CH08235, respectively.

**ANSWER:** Respondent admits that he filed four separate lawsuits representing four Illinois limited liability companies: Gedan LLC 6417 Bell Series LLC, Gedan LLC 2110 Arthur Series LLC, Gedan LLC 838 Wolcott Series LLC and Gedan LLC 3326 West Hutchinson Series LLC, the respective owners of the properties. Respondent filed these lawsuits on behalf of the four companies as actions for "slander of title" in good faith based on his understanding of the facts and the law at that time. Respondent admits that the clerk of the circuit court of Cook County docketed the four matters 2017CH8229, 2017CH08230, 2017CH08232, and 2017CH08235.

5. In *Ringier America Inc. v. Enviro-Technics, Ltd*., 284 Ill. App. 3d 1002 (1996), ("*Ringier*"), the Illinois appellate court held that the filing of a *lis pendens* is absolutely privileged as to a claim of slander of title, regardless of any malice by the filer.

**ANSWER:** Respondent admits to the allegations contained in paragraph 5. Answering further, Respondent was not aware of the *Ringier* case at the time that he filed the lawsuits.

6. On June 20, 2017, Mathless emailed Respondent and, citing the *Ringier* case, informed him that a party to a lawsuit had an absolute privilege to file a *lis pendens* whenever there was a lawsuit pending concerning the property at issue, and that the *lis pendens* filer was immune from a claim of slander of title. In an email message dated June 20, 2017, Mathless asked Respondent, in light of the controlling caselaw, to voluntarily dismiss the four complaints within

ten days. Respondent received the email, but did not respond to it, and did not procure a dismissal of the complaints.

**ANSWER:** Respondent admits that he received the email from Mathless, but believed, at the time, that there was a good faith basis in the filing of the lawsuits and that it was appropriate to let the Courts decide the merits of each respective case.

7. On August 1, 2017, Mathless and HIP appeared in each of the Chancery matters described in paragraph four, above. On August 4, 2017, HIP filed motions to dismiss the complaints referenced in paragraph 4, above, again citing the holding in *Ringier* described in paragraph five, above. On August 9, 2017, Mathless filed similar motions to dismiss the complaints, also citing the holding in *Ringier.* Respondent received the various motions to dismiss at or about the time they were filed.

**ANSWER:** Respondent admits the allegations contained in paragraph 7.

8. Between September 12, 2017 and September 27, 2017, Respondent filed combined responses to HIP's and Mathless's motions to dismiss in the four chancery cases. The responses Respondent filed were nearly identical to each other.

**ANSWER:** Respondent admits the allegations contained in paragraph 8.

9. In each of the responses, Respondent cited the case of *Kurtz v. Hubbard*, 2012 IL App. (1st) 111360 ("*Kurtz*"). *Kurtz* discussed the issue of whether a lien was accorded an absolute privilege, like a *lis pendens*, or rather a qualified privilege. In *Kurtz*, the court held, citing *Ringier*, that: "In general, the defense of absolute privilege is available against both false light and slander of title claims. However, the narrower issue of whether statements made in an assessment lien are absolutely privileged in the same way as statements made as part of judicial or quasi-judicial proceedings is one of first impression in Illinois." *Kurt*z, P11. In distinguishing a *lis pendens*,

which enjoys an absolute privilege, and a lien, which enjoys a qualified privilege, the court in *Kurtz* held that "an absolute privilege provides complete immunity from civil action even though the statements were made with malice. On the other hand, proof of malice will defeat a qualified privilege." *Kurtz*, at P19. The court wrote:

> "Illinois courts have long held that the act of maliciously recording a document, **such as a lien**, that clouds title to real estate is sufficient to support a claim for slander of title. This precedent provides the basis for our holding that statements in a lien must be conditionally rather than absolutely privileged. As defendants acknowledge, if an absolute privilege were accorded to statements made in a lien, a showing of malice would be insufficient to defeat this privilege. ([A]n absolute privilege provides a complete immunity from civil action even though statements are made with malice.) On the other hand, **proof of malice will defeat a qualified privilege**. Therefore, implicit in the requirement that malice must be shown in an action for disparagement of title based on a lien is the existence of a qualified privilege for statements made in the lien." (Internal citations omitted.) (Emphasis added.

**ANSWER:** Respondent admits that he misinterpreted the *Kurtz* case, that the misinterpretation was a result of an honest mistake, and that he regrets the mistake. Respondent has an unblemished 37-year legal career and he takes his ethical obligations very seriously. Respondent filed the lawsuits and advanced legal argument in support of the lawsuits in good faith and pursuant to his understanding of the fact and the law at that time.

10. In paragraph three of the combined responses to HIP's and Mathless's Motions to Dismiss, Respondent wrote:

> Defendants allege that Plaintiff's Complaint fails to state a cause of action as the recording of a *lis pendens* notice is subject to an "absolute privilege" under Illinois law, citing the case of [*Ringie*r]. Defendants, however, ignore more recent Illinois law. 16 years after the [*Ringier*] case, in *Kurtz v. Hubbard*, 2012 IL App (1st) 111360 ("*Kurtz*"), the court found that "Illinois courts have long held that the act of maliciously recording a document… that clouds title to real estate is sufficient to support a claim of slander of title…" and that "**Proof of malice *will* defeat an absolute privilege**." [Ellipsis placed by Respondent in the motion.] [Emphasis added.]

**ANSWER:** Respondent admits that he misinterpreted the *Kurtz* case, that the misinterpretation was a result of an honest mistake, and that he regrets the mistake. Respondent has an unblemished 37-year legal career and he takes his ethical obligations very seriously. Respondent filed the lawsuits and advanced legal argument in support of the lawsuits in good faith and pursuant to his understanding of the facts and the law at the time.

11. By asserting that the filer of a *lis pendens* does not have absolute immunity, Respondent misrepresented the holding in *Kurtz*. The court in *Kurtz* specifically referenced *Ringier*, stating, "In [*Ringier*], cited by the defendants, we held, as a matter of first impression, that the absolute privilege afforded statements contained in judicial pleadings extended to the filing of an associated *lis pendens* notice, where the underling complaint made allegations affecting an ownership interest in the subject property." *Kurtz*, P14.

**ANSWER:** Respondent admits that he misinterpreted the *Kurtz* case, that the misinterpretation was a result of an honest mistake, and that he regrets the mistake. Respondent has an unblemished 37-year legal career and he takes his ethical obligations very seriously. Respondent filed the lawsuits and advanced legal argument in support of the lawsuits in good faith and pursuant to his understanding of the fact and the law at that time.

12. In paragraph 24 of his responses, Respondent reiterated his misrepresentation of the holding of the court in *Kurtz* by stating that a *lis pendens* was to be accorded a qualified and not an absolute privilege, and again misquoted the court's opinion in *Kurtz*, by writing, "as discussed above, 'proof of malice' will defeat an absolute privilege."

**ANSWER:** Respondent admits that he misinterpreted the *Kurtz* case, that the misinterpretation was a result of an honest mistake, and that he regrets the mistake. Respondent has an unblemished 37-year legal career and he takes his ethical obligations very seriously.

Respondent filed the lawsuits and advanced legal argument in support of the lawsuits in good faith and pursuant to his understanding of the fact and the law at that time.

13. In his responses, Respondent did not make an argument for the extension, modification, or reversal of existing law. Instead, Respondent misrepresented the holding in *Kurtz* and cited *Kurtz* to falsely argue that his position was supported by that decision.

**ANSWER:** Respondent admits that the written responses in opposition to the respective motions to dismiss did not contain an argument for the extension, modification, or reversal of existing law. Respondent admits he misinterpreted the holding in Kurtz, but denies he cited *Kurtz* to falsely argue its holding. Answering further, Respondent affirmatively states he did not include an argument for the extension, modification, or reversal of existing law because at the time of filing, he (mistakenly) believed the law was in his favor and that he was properly citing *Kurtz*. However, Respondent and a partner at Fisher Cohen Waldman Shapiro, LLP later argued in the alternative for the extension, modification, or reversal of existing law at oral argument on each of the respective motions to dismiss.

14. Between September 29, 2017 and October 20, 2017, HIP and Mathless filed replies to Respondent's responses, described in paragraphs nine through 12, above. Each of those replies pointed out Respondent's mischaracterization of the holding in *Kurtz* and the false quotes Respondent attributed to the court in *Kurtz*.

**ANSWER:** Respondent admits the allegations contained in Paragraph 14.

15. Respondent did not, in any of the four courts hearing the various motions, withdraw the false quotes he attributed to the court in *Kurtz* or correct his mischaracterization of the court's holding in *Kurtz.*

**ANSWER:** Respondent denies the allegations of Paragraph 15, as Respondent orally argued in the alternative for the extension, modification or reversal of existing law.

16. On November 15, 2017, Judge Neil Cohen granted HIP's and Mathless's motions to dismiss with prejudice in case number 2017 CH 08229. On November 30, 2017, Judge Thomas Allen and Judge Sanjay Tailor granted HIP's and Mathless's motions to dismiss with prejudice in case number 2017CH08230 and 2017CH08232. On December 18, 2017, Judge Raymond Mitchell granted HIP's and Mathless's motions to dismiss with prejudice in case number 2017CH08235.

**ANSWER:** Respondent admits the allegations in Paragraph 16.

17. On each of the four matters, HIP and Mathless sought that the court impose sanctions upon Respondent pursuant to Illinois Supreme Court Rule 137. On January 3, 2018, Judge Allen denied the motion for sanctions without providing a written opinion. On March 1, 2018, Judge Mitchell denied the motion for sanctions and, in a written opinion, found that Respondent merely misinterpreted the holding in *Kurtz*.

**ANSWER:** Respondent admits the allegations contained in paragraph 17. In further answering, Judge Mitchell, in his Opinion, states the following:

> Sanctions are not warranted in this case. Rule 137 is strictly construed in part so that litigants are not punished for litigating cases that they are unlikely to win. See *Rubino,* 324 Ill. App 3d at 946 (strict construction of Rule 137): *Toland,* 295 Ill. App. 3d 657-58 ("Litigation is inherently uncertain, and it would be unjust to punish litigants for exercising their right to file or defend a lawsuit. The poor would be discouraged from vindicating their rights, not based on the merits of their cases, but for fear of being penalized with their opponents' attorney fees."). Gedan's interpretation of *Kurtz v. Hubbard,* 2012 IL App. (1st) 111360, was erroneous, and as a consequence, Defendants prevailed on their motions to dismiss. But interpreting the law in the light most favorable to one's clients is a basic aspect of the practice of law. The purpose of Rule 137 is not served when their non-prevailing arguments are later attacked as sanctionable. Sanctions in connection with Count I are denied.

18. On March 1, 2018, Judge Cohen granted HIP's and Mathless's motions for sanctions. In Judge Cohen's written opinion, he stated:

> When Defendants filed their motions to dismiss, Gedan did not concede the lack of any legal basis for a slander of title claim. Nor did Gedan attempt to cite any authority which would support a good faith argument for the modification of existing law. Instead, Gedan provided false quotations from *Kurtz* in an effort to support its meritless position. Specifically, Gedan manufactured the quotation "[p]roof of malice *will* defeat an absolute privilege." In actuality, *Kurtz* states that: (1) *a lis pendens* notice, unlike the lien claim at issue in *Kurtz*, is absolutely privileged regardless of the existence of malice; and (2) "proof of malice will defeat a qualified privilege." Gedan did not only fail to make a reasonable inquiry as to the law when it was put on notice shortly after the filing of this suit, but it also attempted to manufacture caselaw to support its meritless position. Gedan's combined response offers no excuse for manufacturing a false quotation from *Kurtz*. Nor does Gedan offer any support for its contention that it was making a good faith argument for modification of well-established caselaw.

**ANSWER:** Respondent admits to the allegations contained in Paragraph 18.

19. On May 3, 2018, Judge Tailor granted HIP's and Mathless's motion for sanctions. In his written opinion, Judge Tailor stated:

> "Most strikingly, plaintiff's counsel fails to own up to his flagrant misquotation of *Kurtz*, despite having filed a brief and sur-reply in opposition to defendants' motion for sanctions. Even at argument on the sanctions motion, plaintiff's counsel stuck to his position that he merely misinterpreted *Kurtz*. Moreover, plaintiff's argument that sanctions are not warranted because it had a good faith basis to argue for a change to existing law does not stave off Rule 137 sanctions because no such argument was advanced in response to defendants' motion to dismiss. Instead, plaintiff argued that *Kurtz* supported its claim, even though it clearly didn't."

**ANSWER:** Respondent admits to the allegations contained in Paragraph 19.

20. By reason of the conduct described above, Respondent has engaged in the following misconduct:

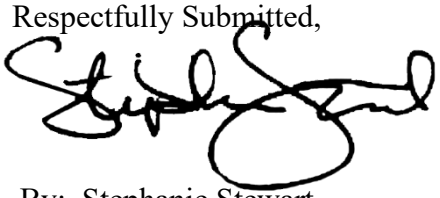
a. Bringing or defending a proceeding without a basis in law and fact, by conduct including filing the four slander of title claims against HIP and Mathless, in violation of Rule 3.1 of the Illinois Rules of Professional Conduct (2010); and

b. Knowingly making a false statement of law to a tribunal, by conduct including micharacterizing the holding in *Kurtz v. Hubbard,* and for providing false quotes purportedly attributable to the holding in that case, in violation of Rule 3.3(a)(1) of the Illinois Rules of Professional Conduct (2010).

**ANSWER:** Respondent denies the allegations of Paragraph 20 including its subparts.

Wherefore, Respondent respectfully requests that the Hearing Board dismiss the complaint in its entirety, and for any other relief the Board deems just.

Respectfully Submitted,



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