No. 14-14-00666-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

MARK THUESEN,
Appellant,
v.

AMERISURE INSURANCE COMPANY, SWAMPLOT INDUSTRIES LLC, LAURENCE ALBERT, AND BETH BRINSDON,
Appellees.

On Appeal from the 151st Judicial District Court, Harris County, Texas
Trial Court Cause No. 2012-49262

BRIEF OF APPELLEES SWAMPLOT INDUSTRIES LLC, LAURENCE ALBERT, and BETH BRINSDON

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February 26, 2015

ORAL ARGUMENT NOT REQUESTED

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ABBREVIATIONS AND RECORD CITATIONS

The following abbreviations and notations are used in this Response:

CR-I:___	References to the first volume of the two-volume Clerk's Record filed on November 5, 2014.
CR-II:___	References to the second volume of the two-volume Clerk's Record filed on November 5, 2014.
1stSuppCR:___	References to the First Supplemental Clerk's Record filed on December 12, 2014.
Thuesen Brief at ___	References to the Brief of Appellant Mark Thuesen, filed January 28, 2015.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Mark Thuesen has not requested oral argument. Appellees Swamplot Industries LLC, Laurence Albert, and Beth Brinsdon agree that this case should be decided on the briefs without oral argument, and thus do not request oral argument. Should the Court choose to hear oral argument, Appellees conditionally request to participate in oral argument.

STATEMENT OF THE CASE

Nature of the case: Tort claims for damages, including malicious prosecution, abuse of process, defamation, intentional infliction of emotional distress, trespass, and various other torts.

Course of proceedings: Appellees Swamplot Industries LLC, Laurence Albert, and Beth Brinsdon (collectively, "Swamplot") filed suit against Appellant Mark Thuesen ("Thuesen"). CR-I:11 *et seq*. Thuesen brought counter-claims against Swamplot. CR-I:48 *et seq.* Thuesen later filed bankruptcy. CR-I:121 *et seq.* The bankruptcy stay was lifted and Swamplot moved for summary judgment, CR-I:286 *et seq.*, but before a hearing could be held, the bankruptcy stay was temporarily reinstated. CR-I:483 *et seq.*

After filing bankruptcy, Thuesen filed a separate lawsuit against Swamplot and others, in a court different than that in which the original lawsuit was pending. CR-I:231 *et seq*. Swamplot and others moved to consolidate the two actions. CR-I:419 *et seq*. The court presiding over Thuesen's bankruptcy later lifted the stay as to all claims by and against Swamplot, effective as of the date Thuesen filed bankruptcy. 1stSuppCR:498-99.

Swamplot's original claims against Thuesen were settled, resulting in a dismissal of those claims. CR-I:399. Swamplot also moved to dismiss the claims against it originally brought by Thuesen in his separately filed lawsuit. CR-I:632

et seq. Thuesen nonsuited both his original counter-claims and his separately filed claims against Swamplot before Swamplot's motion for summary judgment and motion to dismiss could be heard. CR-II:943.

Swamplot moved to be considered the "prevailing party" as to both sets of Thuesen's claims. CR-II:951 *et seq*.; 1038 *et seq*.

During the course of the litigation, Thuesen filed several pleadings with Star of David watermarks, and proposed orders with bold Stars of David next to the blank for the Court's signature. The trial court ordered Thuesen to appear and show cause why he should not be sanctioned for this conduct. CR-II:1143-45. Thuesen did not appear as ordered; the trial court then struck the pleadings with the watermarks. 1stSuppCR:1187. Thuesen moved to recuse the trial court judge. 1stSuppCR:1201 *et seq*. The motion was referred to another court, which denied Thuesen's motion to recuse. 1stSuppCR:1302.

Trial court's disposition: The trial court disposed of the issues raised in this appeal as follows:

- Swamplot's Motion to Consolidate was granted. CR-I:674.
- Swamplot's motions to be considered the prevailing party were granted. CR-II:1032, 1141.
- The trial court struck Thuesen's pleadings with Star of David watermarks. 1stSuppCR:1187.
- The trial court denied Thuesen's recusal motion. 1stSuppCR:1302.

ISSUES PRESENTED

1. Did the trial court abuse its discretion or violate the bankruptcy stay by consolidating Thuesen's separately filed lawsuit with the already-pending claims between Swamplot and Thuesen? [Restatement of Appellant's Issues 1 and 2]

2. Did the trial court properly grant Swamplot's motions to be considered prevailing parties? [Restatement of Appellant's Issues 3, 4, and 5]

3. Did the trial court abuse its discretion in striking Thuesen's pleadings containing Star of David watermarks? [Restatement of Appellant's Issue 6]

4. Did the trial court abuse its discretion in denying Thuesen's recusal motion? [Restatement of Appellant's Issue 7]

STATEMENT OF FACTS

This case has a somewhat complicated procedural history, due in part to the filing by *pro se* Appellant Mark Thuesen of counter-claims in one state court lawsuit, filing bankruptcy, filing a separate state court lawsuit raising claims related to the original lawsuit, and then filing nonsuits in an attempt to avoid the consequences of bringing claims that Appellees contended were without merit and brought for purposes of harassment. The facts relevant to this lawsuit are most understandably stated in a chronological history of the claims here at issue.

1. The 2012 lawsuit: Swamplot sues Thuesen.

Thuesen was sued by Swamplot Industries LLC, Laurence Albert, and Beth Brinsdon (collectively "Swamplot").[1] Swamplot owns and operates Swamplot.com, a website focusing on commercial real estate in the Houston area. Swamplot alleged that Thuesen had posted false, defamatory, and scandalous material on Swamplot.com and other websites.

Swamplot accused Thuesen of a wide range of remarkably spiteful conduct. Thuesen was accused of the following:

[1] The history of the litigation between Swamplot and Thuesen actually began earlier, when a condo association – of which Thuesen was president – sued Swamplot and others complaining about factual reporting on Swamplot.com about a dispute between the condo association and a neighboring tavern. Thuesen's campaign of online defamation and harassment of Swamplot began even before that lawsuit. *See* CR-I:15-27 (describing the condo association's "frivolous and malicious" lawsuit (which was nonsuited while Swamplot's summary judgment motion was pending) and Thuesen's expressed intent to require Swamplot to expend legal fees defending the lawsuit).

- "Swamplot.com and Mr. Albert continued to receive harassing phone calls and emails …. Mr. Thuesen continually harassed Swamplot.com advertisers, employees, contractors, and even persons that they suspected of having any connection to Swamplot.com, at both their workplaces and residences – attempting to gain access to various electronic/computer accounts and even poring through mail and garbage at the residences of several targets." CR-I:19-20.

- The condo association of which Mr. Thuesen was president, "and Mr. Thuesen, or their representatives, personally intruded into Mr. Albert and Ms. Brindson's residence …. [A]n intruder … entered onto the back yard of Mr. Albert and Ms. Brinsdon's real property." CR-I:20.

- "Mr. Thuesen embarked on a campaign to post false information about Mr. Albert onto various websites under different pseudonyms. … [H]e described in painstaking detail a variety of sexual and criminal activity in which Mr. Thuesen falsely and without any basis claimed that Mr. Albert had engaged. … Mr. Thuesen's writings are lewd, lascivious, racist, homophobic, anti-Semitic, and downright repulsive." CR-I:20.

- "Mr. Thuesen created a website" on which he "posted an altered photograph of Mr. Albert with the caption, 'Swamplot drag queen.'" Postings also included the following: "Laurence David Albert … operates Houston's largest collection of child pornography"; "Katy Police Department is looking into Albert sending nude photos of himself to a 13 year old boy"; "Albert and Beth lured a young pizza hut boy into their house and offered sex for pizza. Houston Police are investigating." CR-I:21-22.

- "Mr. Thuesen went so far as to create multiple Facebook accounts … in which he impersonated Mr. Albert … and publicly 'confessed' to an assortment of heinous and disgraceful acts of criminal conduct. Mr. Thuesen further stated that Mr. Albert was admitting to being a registered sex offender." CR-I at 23-24.

- "In addition to the public comments, Mr. Thuesen was simultaneously threatening Mr. Albert, Ms. Brinsdon, and their family with terroristic threats," including "blood or money either way you gonna pay for your part in it" and "your problems have just started … check facebook again there are 15 [fake] profiles you cant stop all of them wormy jew this will go on for years its gonna get a lot worse alcholic [*sic*] jew." CRI-25.

Swamplot alleged that Thuesen committed these actions while acting as an officer of his condominium association; as a result, the association (2520 Robinhood at Kirby Condominium Association, Inc.) and its management company (Creative Management Company, Inc.) were included as defendants, and the association's insurer provided defense counsel for Thuesen. Swamplot was represented in this lawsuit by attorneys Michael Doyle and Jeffrey Raizner of Doyle Raizner LLP.

Thuesen brought various counter-claims, but in doing so was acting *pro se*. His claims included alleged violation of the Wiretap Act, common law misappropriation, conversion, theft, and defamation. CR-I:48 *et seq.* To provide clarity, claims and counter-claims brought in this lawsuit will be referred to as "2012 Claims."

2. Thuesen files bankruptcy on the brink of settlement.

As the result of a mediation in October 2013, the parties agreed on a conditional settlement. However, two weeks later – before the final settlement agreement could be consummated – Thuesen filed for personal bankruptcy. CR-I:121. After filing his bankruptcy petition, Thuesen sent a document he titled "Offer of Settlement" to Swamplot. 1stSuppCR:351 *et seq*. In that "offer," Thuesen alleged that the conditional settlement from the mediation "is no longer available as I have file [*sic*] a petition for relief under Chapter 13 of the United

States Bankruptcy Code …." Thuesen suggested that Swamplot pay *him* a sum of money, even though the proposed settlement involved the payment of a sum by the insurance carrier providing Thuesen's defense. Thuesen threatened that if Swamplot did not agree to pay him money, "I have no choice but to continue with my counter claims in bankruptcy court to do everything possible to secure funds for my creditors, and you will have almost no opportunity to file any actions against me as it would jeopardize my bankruptcy case." 1stSuppCR:352.

The Bankruptcy Court entered a lift-stay order on February 5, 2014, allowing the settlement to be consummated and allowing the parties to the state court lawsuit to "prosecute, liquidate and settle claims and defenses asserted in such lawsuit." CR-I:324-25. The order also provided that if the condo association's insurer ceased providing a defense for Thuesen, then the claims "shall not be prosecuted without further order of this Court."

3. Swamplot seeks summary judgment, Thuesen files a separate lawsuit, and consolidation is granted.

Less than ten days after the Bankruptcy Court lifted the stay, Swamplot moved for summary judgment on Thuesen's 2012 Claims. CR-I:286 *et seq.* Four days later, on February 18, 2014, Thuesen – acting *pro se* – filed a new state court lawsuit against Swamplot *and* its lawyers (Messrs. Doyle and Raizner, and their law firm), claiming primarily that Swamplot breached the (conditional) settlement agreement by not consummating that agreement, CR-I:231 *et seq.* – despite the fact

that it was Thuesen's own bankruptcy filing that prevented the settlement from being finalized. Because Thuesen also sued the Doyle Raizner parties, undersigned counsel appeared for Swamplot in the 2014 lawsuit. CR-I:416 *et seq.*

The Doyle Raizner parties and Swamplot moved to consolidate the 2014 lawsuit into the pending 2012 lawsuit. CR-I:403 *et seq.*, 419 *et seq.* During the same time frame, Swamplot consummated its settlement of its original claims and nonsuited all the original defendants, including Thuesen, CR-I:399; however, Thuesen's 2012 Claims against Swamplot remained pending.

The nonsuit of Swamplot's claims against Thuesen led to Amerisure no longer providing a lawyer for Thuesen. Counsel informed the trial court and the parties of her withdrawal on April 8, 2014, CR-I483-84, while the motions to consolidate the 2014 lawsuit into the 2012 lawsuit were pending.

Thuesen opposed the consolidation motions, claiming *inter alia* that the withdrawal of his insurer-provided counsel reinstated the bankruptcy stay under the Bankruptcy Court's February 5, 2014 order, and that moving forward with consolidation would violate the stay – even though the stay order addressed only "action against" Thuesen in the 2012 case. CR-I:513 *et seq.*

The trial court granted both motions to consolidate on May 8, 2014. CR-I:674.

4. Thuesen nonsuits his claims before Swamplot's dispositive motions can be heard.

Before consolidation was granted – with the deadline for filing a Rule 91a motion to dismiss approaching, and with no bankruptcy stay in place for the 2014 lawsuit – Swamplot filed its Motion to Dismiss on May 5, 2014. CR-I:632 *et seq.* Thus, at the time of consolidation on May 8, 2014, Swamplot had a pending summary judgment motion on Thuesen's 2012 Claims, and a pending motion to dismiss on his 2014 Claims.

Swamplot could not proceed with its defense of the 2012 Claims, so it sought relief from the bankruptcy stay. Thuesen then filed a motion in the Bankruptcy Court, seeking $1.85 million in sanctions against Swamplot and undersigned counsel, for allegedly violating the stay by pursuing state court consolidation. 1stSuppCR:216 *et seq.*

Meanwhile, in the state court, Thuesen amended his 2014 Claims against Swamplot, CR-I:758 *et seq.*, thus restarting the time period for Swamplot to file a motion to dismiss under Rule 91a – which Swamplot did, CR-I:817 *et seq*.

All bankruptcy obstacles were removed on June 26, 2014, when the Bankruptcy Court granted Swamplot's lift stay motion, stating that "all stays as against Swamplot are hereby annulled effective the date of the filing of the above-styled cause of action," 1stSuppCR:498-99 – that is, the Bankruptcy Court

retroactively removed the stay for the entire pendency of Thuesen's bankruptcy proceedings.

Just four days later, Thuesen filed a notice of nonsuit of all his claims – both his 2012 and 2014 Claims – against Swamplot. CR-II:943 *et seq*. However, the trial court did not sign an order entering a nonsuit at this time. Thuesen still had pending 2014 Claims against one defendant, Amerisure Insurance Company, which Thuesen did not nonsuit until August 7, 2014. CR-II:1151.

5. Swamplot moves for, and is granted, "prevailing party" status on Thuesen's 2012 and 2014 Claims.

Swamplot moved that it be considered the "prevailing party" for purposes of both Thuesen's 2014 Claims and 2012 Claims, under the theory that Thuesen took his nonsuit for the purpose of avoiding adverse rulings on the pending summary judgment motion (on the 2012 Claims, which motion had never been withdrawn) and Rule 91a motion to dismiss (which was set for hearing). CR-II:951 *et seq.*, 1038 *et seq.*[2] The trial court granted both motions. CR-II:1032, 1141.

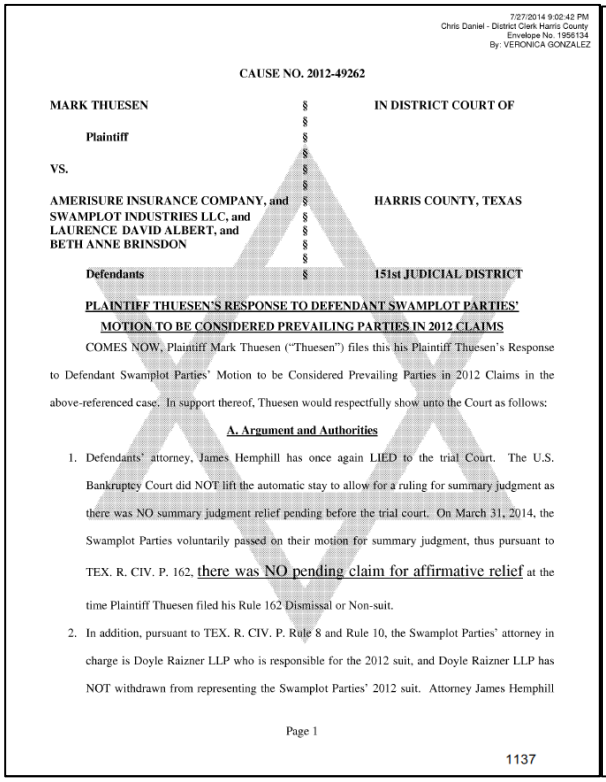
Because attorneys' fees and costs are recoverable by the prevailing party in a Rule 91a motion to dismiss, Swamplot then filed a motion to recover such fees and costs, CR-II:1154 *et seq.*, which was granted by the trial court. CR-II:1232.

[2] Undersigned counsel, which had been representing Swamplot only on the 2014 Claims, filed a notice of appearance as Swamplot's counsel on the 2012 Claims on July 17, 2014, before the filing of Swamplot's motion to be considered the prevailing party on the 2012 Claims.

Thuesen twice moved the trial court to reconsider the relief granted in Swamplot's favor: once on August 19, 2014, and once on October 5, 2014. CR-II:1202 *et seq.*; 1stSuppCR:1310 *et seq.* Both motions were denied. CR-II:1234; 1stSupCR:1354.

6. Thuesen files pleadings with Star of David watermarks, the trial court issues a show cause order, and Thuesen unsuccessfully moves for recusal.

Beginning on July 27, 2014, Thuesen began placing on his pleadings and proposed orders a large Star of David watermark; the proposed orders also included a smaller, bolder Star of David next to the proposed signature line for the Court:



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Envelope No. 1956134
By: VERONICA GONZALEZ

CAUSE NO. 2012-49262

MARK THUESEN	§	IN DISTRICT COURT OF
	§	
Plaintiff	§	
	§	
VS.	§	
	§	
AMERISURE INSURANCE COMPANY, and SWAMPLOT INDUSTRIES LLC, and LAURENCE DAVID ALBERT, and BETH ANNE BRINSDON	§	HARRIS COUNTY, TEXAS
	§	
	§	
	§	
Defendants	§	151st JUDICIAL DISTRICT

PLAINTIFF THUESEN'S RESPONSE TO DEFENDANT SWAMPLOT PARTIES' MOTION TO BE CONSIDERED PREVAILING PARTIES IN 2012 CLAIMS

COMES NOW, Plaintiff Mark Thuesen ("Thuesen") files this his Plaintiff Thuesen's Response to Defendant Swamplot Parties' Motion to be Considered Prevailing Parties in 2012 Claims in the above-referenced case. In support thereof, Thuesen would respectfully show unto the Court as follows:

A. Argument and Authorities

1. Defendants' attorney, James Hemphill has once again LIED to the trial Court. The U.S. Bankruptcy Court did NOT lift the automatic stay to allow for a ruling for summary judgment as there was NO summary judgment relief pending before the trial court. On March 31, 2014, the Swamplot Parties voluntarily passed on their motion for summary judgment, thus pursuant to TEX. R. CIV. P. 162, there was NO pending claim for affirmative relief at the time Plaintiff Thuesen filed his Rule 162 Dismissal or Non-suit.
2. In addition, pursuant to TEX. R. CIV. P. Rule 8 and Rule 10, the Swamplot Parties' attorney in charge is Doyle Raizner LLP who is responsible for the 2012 suit, and Doyle Raizner LLP has NOT withdrawn from representing the Swamplot Parties' 2012 suit. Attorney James Hemphill

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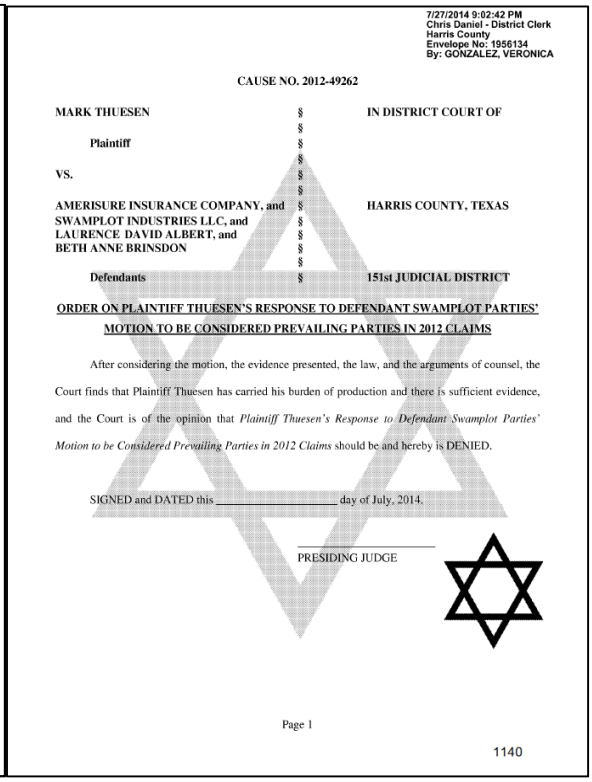

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CAUSE NO. 2012-49262

MARK THUESEN	§	IN DISTRICT COURT OF
	§	
Plaintiff	§	
	§	
VS.	§	
	§	
AMERISURE INSURANCE COMPANY, and SWAMPLOT INDUSTRIES LLC, and LAURENCE DAVID ALBERT, and BETH ANNE BRINSDON	§	HARRIS COUNTY, TEXAS
	§	
	§	
	§	
Defendants	§	151st JUDICIAL DISTRICT

ORDER ON PLAINTIFF THUESEN'S RESPONSE TO DEFENDANT SWAMPLOT PARTIES' MOTION TO BE CONSIDERED PREVAILING PARTIES IN 2012 CLAIMS

After considering the motion, the evidence presented, the law, and the arguments of counsel, the Court finds that Plaintiff Thuesen has carried his burden of production and there is sufficient evidence, and the Court is of the opinion that *Plaintiff Thuesen's Response to Defendant Swamplot Parties' Motion to be Considered Prevailing Parties in 2012 Claims* should be and hereby is DENIED.

SIGNED and DATED this _____ day of July, 2014.

_____
PRESIDING JUDGE

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On July 31, 2014, the trial court entered an order in response to Thuesen's first use of the Star of David, noting that "this inappropriate watermark on his latest filing has the appearance of being a direct attack on the integrity of the Court and an affront to the dignified administration of justice." CR-II:1144. The trial court further noted that "[a]t least one of the opposing parties is Jewish, as is the judge of the 151st District Court." *Id.* The trial court ordered Thuesen to appear on September 8, 2014 to show cause as to why he should not be sanctioned. *Id.*

Thuesen neither appeared for the hearing nor stopped using the watermark. Thuesen included the watermark on at least seven subsequent filings. 1stSuppCR:1187. The trial court struck the nine pleadings via order of September 16, 2014, but gave Thuesen 30 days to move to refile without the watermark. *Id.*

Instead of refiling the pleadings, Thuesen moved to recuse Judge Engelhart. 1stSuppCR:1201 *et seq.* Thuesen claimed that Judge Engelhart's "extreme religious beliefs allow him to punish non-Jews … in the 151st District Court." The stated basis for the assertion that the Judge has "extreme religious beliefs" was that Judge Engelhart is a member of a synagogue, the Anti-Defamation League, and a Jewish community center, and that he raises money for Jewish charities. Thuesen also set forth a conspiracy theory and indicated he knew where both Judge Engelhart and one of Swamplot's lawyers lived (perhaps a veiled threat):

> Nothing in the record, nor any pleadings, exhibits, or oral testimony states that any litigant in this case is Jewish. How did Judge Engelhart

> discover the religious affiliation of Thuesen's opposing party? Judge Engelhart could have only gained knowledge of Defendant Albert's Jewish religion from extrajudicial sources, most likely from wrongful *ex parte* communications with Defendant Albert's attorney Jeffrey Raizner, who is also Jewish and lives in the same neighborhood as Judge Engelhart, just 2.2 miles away from each other ….

1stSuppCR:1207 (underlining in original). Thuesen's assertion about the record is false. In fact, the trial court gained knowledge of Mr. Albert's faith (or at least Thuesen's claim as to such) through the pleadings; Swamplot had accused Thuesen of posting blatantly defamatory and anti-Semitic material, asserting that Mr. Albert is Jewish, on the internet.

The motion to recuse was heard, and denied, by Judge Sharolyn Wood on October 1, 2014. 1stSuppCR:1302.

The trial court on October 2, 2014 again ordered Thuesen to appear for a show cause hearing, this time on October 20, 2014. 1stSuppCR:1307 *et seq.* Thuesen did not appear. On October 21, 2014, the trial court entered its thus-far final order, denying Thuesen's motion to reconsider the granting of Swamplot's "prevailing parties" motions and the striking of Thuesen's Star of David pleadings. 1stSuppCR:1354. The trial court has issued no ruling pursuant to its October 2, 2104 show cause order.

SUMMARY OF THE ARGUMENT

Appellant Mark Thuesen filed a lawsuit complaining about events that had (and had not) occurred in another still-pending lawsuit in which he was a party. The trial court appropriately consolidated the second case with the previously filed case because the claims in the second case were closely related to those in the first case. The consolidation did not violate the stay in Thuesen's bankruptcy. That stay applied only to action against Thuesen in the original lawsuit, and the stay was ultimately lifted retroactive to the date of Thuesen's bankruptcy filing. Seeking to consolidate Thuesen's later-filed affirmative claims with the earlier lawsuit violated neither the spirit nor the letter of the stay order.

Thuesen nonsuited his claims against Appellees (both those brought as counter-claims in the first suit, and those brought in the second suit before consolidation) in order to avoid adverse rulings on pending dispositive motions. The Texas Supreme Court has squarely held that under such circumstances, the defendants, upon motion, can be found to be prevailing parties on those motions, even after nonsuit. Here, the trial court correctly granted Appellees' motions to be considered prevailing parties. The record clearly demonstrates that Thuesen's nonsuit was to avoid adverse merits rulings.

When he became displeased with the trial court's rulings, Thuesen began filing documents with a large Star of David watermark. The trial court correctly

found that Thuesen engaged in bad faith conduct calculated to offend and to interfere with the dignity of the court, and accordingly properly struck Thuesen's offending pleadings.

After the striking of his pleadings by the trial court, Thuesen moved to recuse the judge, claiming that the judge's religious faith made him biased and prejudiced toward Thuesen. The recusal motion itself was bad faith, and part of a calculated plan to get another judge to hear Thuesen's meritless claims against Appellees. The motion to recuse was properly denied by the appointed judge.

ARGUMENT AND AUTHORITIES

I. The Trial Court Did Not Abuse Its Discretion in Granting Consolidation and Did Not Violate Any Bankruptcy Stay. [In response to Appellant's Issues 1 and 2]

Thuesen filed his 2014 Claims, contending that Swamplot had breached an agreement to settle the 2012 Claims. Those cases were clearly related, and consolidation was entirely warranted. Thuesen's contention that consolidation would violate a bankruptcy stay was rightly rejected by the trial court, and the Bankruptcy Court – which is the only court with jurisdiction to hold that its stay was violated – lifted the stay entirely.

A. Thuesen's 2012 and 2014 claims were closely related, and he suffered no prejudice from consolidation.

A trial court enjoys broad discretion in granting motions to consolidate. *Guaranty Federal Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *Santa Fe Drilling Co. v. O'Neill*, 774 S.W.2d 423, 424 (Tex. App. – Houston [14th Dist.] 1989, orig. proceeding). A consolidation order is reviewed for abuse of discretion. *Allison v. Arkansas Louisiana Gas Co.*, 624 S.W.2d 566, 568 (Tex. 1981). Consolidation is appropriate when two separately filed actions relate to substantially the same occurrence or subject matter. Tex. R. Civ. P. 174(a).

Thuesen's 2014 lawsuit was simply an extension of the 2012 lawsuit. Some of his allegations focused on perceived failures to perform certain actions – such as

filing motions with the trial court in the 2012 lawsuit – related to the conditional mediated settlement agreement in the 2012 lawsuit. CR-I:241-276 (setting forth Thuesen's causes of action). He also alleged that had certain actions been taken by some of the parties he named as defendants in the 2014 lawsuit, the trial court would have made certain different rulings in the 2012 lawsuit. Effectively, Thuesen created a collateral lawsuit in which to complain about perceived actions or inactions in the 2012 lawsuit, which was still pending when he filed the 2014 lawsuit. Beyond doubt, the trial court acted well within its discretion when it consolidated the cases.

Thuesen's primary complaint on appeal is that he was prejudiced by the consolidation, because Swamplot's lawyers in the 2012 lawsuit were named by him as defendants in the 2014 lawsuit, allegedly creating an improper "dual role" for these lawyers as both counsel and witnesses. Thus, Thuesen argues, "there will be jury confusion and prejudice" to him because he "would be prevented from … 'placing witnesses under the rule,' during trial," Thuesen Brief at 24. He further argues that "Texas Rule of Disciplinary Conduct 3.08 prohibits the lawyer from acting as both an advocate and a witness in an adjudicatory proceeding." *Id.*

Of course, this argument lays bare Thuesen's attempt to manipulate the judicial process: in his 2014 lawsuit, he sued Swamplot's original lawyers (Doyle Raizner) with no good-faith legal basis, in an attempt to get them disqualified as

Swamplot's counsel in the original lawsuit, and in an attempt to have his claims heard by a court other than the 151st District Court.

Further, Thuesen nowhere argues that he actually *was* prejudiced by the consolidation. Rather, he argues that he *would have been* prejudiced had the case gone to trial and had Doyle Raizner remained Swamplot's lawyers on the 2012 Claims at trial. But of course, this didn't happen. Thuesen *voluntarily nonsuited* his 2012 claims before any trial could occur. A party cannot overturn a consolidation order by claiming only potential prejudice under a scenario that never happened due to that party's own voluntary actions. "[W]e may not presume prejudice; it must be demonstrated. Where the record does not reveal actual prejudice, the consolidation does not provide a basis for reversal." *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 716 (Tex. App. – Dallas 1997, no pet.) (citing *Hall v. Dorsey*, 596 S.W.2d 565, 569 (Tex. Civ. App. – Houston [1st Dist.] 1980, writ ref'd n.r.e.)).

The issue of actual vs. inchoate potential future prejudice is illustrated by the very cases relied upon by Thuesen (at page 28 of his brief). In *In re Guidry*, 316 S.W.3d 729 (Tex. App. – Houston [14th Dist.] 2010, orig. proceeding), which is not a consolidation case, prejudice was imminent: mandamus was granted prohibiting a lawyer from joining the trial team shortly before trial when that lawyer was a witness who had been deposed and testified in a previous trial on the

matter that was reversed on appeal. This Court noted that a lawyer-witness, even if he could not serve as a courtroom advocate,

> can still represent the client in that case by performing out-of-court functions in the case, such as drafting pleadings, assisting with pretrial strategy, engaging in settlement negotiations, and assisting with trial strategy.

In re Guidry, 316 S.W.3d at 738. *See also In re Bohm*, 13 S.W.3d 865, 873 (Tex. App. – Fort Worth 2000, orig. proceeding) ("an attorney who is disqualified from representation at trial can continue to participate in the client's case until trial commences; he may continue to assist in pretrial matters"). Even if the lawyer-as-witness rule would have required the Doyle Raizner lawyers to yield to other counsel had a jury trial taken place – had Thuesen not filed a voluntary nonsuit – there is no prohibition preventing them from doing what they did here. Thuesen simply suffered no prejudice.

Consolidation was appropriate and there was no prejudice. There is no basis to reverse the trial court's consolidation.

B. The consolidation did not violate any bankruptcy stay.

There was no bankruptcy stay in effect when Thuesen filed his 2014 Claims. Arguably, there was a limited stay in effect at the time the trial court consolidated the 2014 lawsuit with the 2012 lawsuit, but (1) the stay did not prohibit the consolidation, and (2) the Bankruptcy Court itself – the ultimate authority regarding stays – later confirmed that the consolidation was appropriate, and

retroactively lifted any stay that had been in effect. The Bankruptcy Court also denied Thuesen's attempt to hold Swamplot and its lawyers in contempt and/or sanction them for allegedly violating the stay. Thus, after the Bankruptcy Court's ruling, there was *no stay at all, at any time*, regarding the claims between Swamplot and Thuesen. Thuesen's argument is meritless and amounts to an improper collateral attack on the Bankruptcy Court's rulings.

The original Bankruptcy Court order, entered on February 5, 2014, *lifted* the stay unless and until Thuesen no longer had an insurer-provided lawyer. CR-I:224-25. Thuesen filed his 2014 Claims on February 18, 2014 – while the stay was still lifted. CR-I:231 *et seq.* Therefore, Thuesen's claim that he could not enforce the alleged settlement agreement in the 2012 lawsuit due to his bankruptcy, Thuesen Brief at 30, is inaccurate.

Swamplot filed its motion to consolidate on March 31, 2014. CR-I:419 *et seq*. Thuesen had emailed Swamplot's counsel in the 2012 lawsuit (Doyle Raizner), on March 14, stating that he no longer had an insurer-provided defense lawyer, and thus, Thuesen claimed, the bankruptcy stay was back in effect. CR-I:308. The carrier-provided lawyer on April 8, 2014 informed the trial court that she was no longer representing Thuesen due to the settlement and nonsuit, which was filed on April 2. CR-I:483-84. Even then, the stay did not prevent consolidation from moving forward, because the stay order affected only "action

against" Thuesen in the 2012 case. CR-I:225 (the stay, if reinstated, would only provide that "no further action may be taken against Mark Thuesen in the state court lawsuit"). A motion to consolidate a suit *filed by Thuesen as plaintiff* with a pre-existing case is not an action against him. The automatic stay does not prohibit defense to actions initiated by debtors; the stay "extends only to actions against the debtor." *In re U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994).

Finally, the Bankruptcy Court itself has settled this issue. Thuesen sought to hold Swamplot and its counsel in contempt for pursuing consolidation. The Bankruptcy Court not only refused to do so, but *retroactively* lifted the stay, ruling that "all stays as against Swamplot are hereby annulled effective the date of the filing of the above-styled cause of action." 1stSuppCR:498-99. The only "above-styled cause of action" in the Bankruptcy Court's order is the bankruptcy itself; therefore, the Bankruptcy Court ruled that no stay was *ever* in effect "as against Swamplot." Thuesen could have challenged this ruling through appeals in federal court, but did not. He cannot mount a collateral attack in this Court on a ruling of a federal bankruptcy court.

There was no violation of any bankruptcy stay. Thuesen's argument otherwise is wholly without merit.

II. The Trial Court Properly Granted Swamplot's Motions to Be Considered the "Prevailing Party," Because Thuesen Filed a Nonsuit for the Purpose of Avoiding an Adverse Judgment. [Response to Appellant's Issues 3, 4, and 5]

A. A party may be declared "prevailing" upon its motion, if the court finds that the opposing party nonsuited to avoid an adverse ruling on the merits.

The Texas Supreme Court has squarely held that when a party takes a nonsuit for the purpose of avoiding an adverse judgment, the trial court may declare the defendant to be a prevailing party. *Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex. 2011).

> [W]e hold that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

Id. The *Epps v. Fowler* Court was clear that some nonsuits are to be encouraged, like those taken "when discovery reveals previously unknown flaws in the plaintiff's claims," *id.* at 871, or when a change or clarification in the law makes a cause of action less viable, *id.* at 868. In such cases, a plaintiff is free to nonsuit without having the defendant considered a prevailing party. However, when a court determines, based on the record, that a "nonsuit was taken to avoid an unfavorable ruling on the merits" – as Thuesen did here – then "a defendant may be a prevailing party." *Id.* at 870.

The logic of *Epps v. Fowler* is clear: a plaintiff cannot impose burdens on a defendant by filing meritless claims, and then take a nonsuit simply to avoid the

consequences of filing such claims when the defendant files a meritorious dispositive motion. Rather, upon a motion and a finding that the nonsuit was taken to avoid an adverse merits ruling, the parties are essentially put in the place they would otherwise have been had the plaintiff not filed a nonsuit, through a declaration of the defendant as the prevailing party. This also enables the defendant to obtain dismissal of the plaintiff's claims with prejudice. *Epps*, 351 S.W.3d at 868-69 (discussing the fact that a dismissal or nonsuit with prejudice is "tantamount to a judgment on the merits" and "works a permanent, inalterable change in the parties' legal relationship to the defendant's benefit"). Prevailing party status under *Epps* also may lead to the award of fees and costs if the pending motion allows such an award. For example, in *Epps v. Fowler*, "prevailing party" status was important because under the contract at issue in the litigation, the prevailing party was entitled to recover attorneys' fees. *Id.* at 865.

B. Swamplot's dispositive motions were pending when Thuesen nonsuited his claims.

When Thuesen filed his nonsuit of all claims against Swamplot on June 30, 2014, two dispositive motions on those claims were pending:

First, Swamplot's motion for summary judgment on the 2012 Claims had been filed on February 14, 2014. CR-I:286 *et seq*. That motion had not been heard yet because the bankruptcy stay as to the 2012 Claims had been reinstated. That

stay was lifted by the Bankruptcy Court on June 26, 2014, clearing the way for a summary judgment hearing. Thuesen nonsuited four days after the stay was lifted.

Second, Swamplot's Rule 91a motion to dismiss the 2014 Claims had initially been filed on May 5, 2014 and set for hearing on June 16. CR-I:632 *et seq*., 672-73. Thuesen amended his 2014 Claims on June 9, triggering new deadlines for the filing and hearing of an amended Rule 91a motion. Swamplot filed that amended motion on June 12, 2104, and set it for hearing on July 7. CR-I:817 *et seq*., 835-36. Thuesen's June 30 nonsuit came 7 days before the hearing was set to take place – the same day Thuesen's response to the dismissal motion was due.

The trial court granted Swamplot's prevailing party motion on the 2014 Claims on July 14, 2014, and granted its motion on the 2012 Claims on July 28, 2014. CR-II:1032, 1141. Swamplot also moved, as the prevailing party[3] under Rule 91a, for recovery of its costs and fees in connection with the 2014 Claims, CR-II:1154 *et seq*.; the trial court granted that motion on August 26, 2014. CR-II:1232.

[3] As noted above, "Swamplot" as used in this Brief refers to all the Swamplot Parties – Swamplot Industries LLC, Laurence Albert, and Beth Brinsdon. All three were declared prevailing parties.

Thuesen makes several claims about the events resulting in Swamplot being declared the prevailing party on their Rule 91a motion to dismiss the 2014 Claims. None has merit.

- Thuesen contends that the Swamplot parties were not entitled to be considered prevailing because they allegedly "passed on their Rule 91a motion to dismiss on July 7, 2014" and/or "dismissed" their motion. Thuesen Brief at 34, 37. Incorrect. Swamplot passed the *hearing* on the Rule 91a motion set for July 7 because Thuesen had nonsuited his claims. Rule 91a.5(a) specifically provides that a court may not rule on a 91a motion if a nonsuit is taken at least three days before the hearing, so having a Rule 91a hearing would have been futile. However, under *Epps v. Fowler*, Swamplot was entitled to be considered the prevailing party if it showed that Thuesen's nonsuit was to avoid an adverse ruling on the pending Rule 91a motion.

- Swamplot amended its Rule 91a motion on June 12, 2014, because Thuesen amended his 2014 Claims. Thuesen argues that there is no authority allowing amendment of a Rule 91a motion. Thuesen Brief at 34. Again, incorrect. Rule 91a.5(b) specifically provides that if a challenged cause of hearing is amended at least three days before a scheduled hearing, "the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action." Further, "[a]n amended motion filed in

accordance with (b) restarts the time periods in this rule." Tex. R. Civ. P. 91a.5(d). The original hearing was set for June 16; Thuesen amended on June 9, triggering Swamplot's ability to amend the motion, which it did on June 12. This, in turn, reset the deadlines for filing, hearing, and ruling on the motion. Swamplot's actions were explicitly authorized by the Rules.

- Thuesen contends that Swamplot was required to set another Rule 91a hearing after passing on its July 7 hearing (because Thuesen had filed a nonsuit). Thuesen Brief at 35. Nonsense. No Rule 91a hearing could take place due to Thuesen's nonsuit – though, as set forth above, Swamplot could still move the court to be considered the prevailing party.

- Thuesen argues that Swamplot was not entitled to fees and costs because it was not the prevailing party on a Rule 91a motion, but was only the prevailing party on its motion to be *considered* the prevailing party on its Rule 91a motion, and the prevailing party motion did not comply with Rule 91a. Thuesen Brief at 35-36. Ridiculous. If accepted, Thuesen's argument would foreclose any meaningful relief to defendants when a plaintiff takes a nonsuit to avoid an adverse ruling on a Rule 91a motion. Again, this is contrary to the Supreme Court's explicit ruling in *Fowler v. Epps*.

- Thuesen claims that there was no pending summary judgment motion on his 2012 Claims because Swamplot allegedly "voluntarily passed on their

motion for summary judgment" on March 31, 2014. Thuesen Brief at 40. Wrong yet again. Thuesen fails to provide any citation to the record to support his assertion. The record reveals what actually happened: on March 14, 2014, Thuesen emailed Swamplot's counsel (Doyle Raizner), stating that he no longer had an insurer-provided defense lawyer, and claiming that the bankruptcy stay was back in effect. CR-I:308. Swamplot had set a hearing on its summary judgment motion for March 31. CR-I:283. Thuesen demanded that Swamplot's counsel "immediately contact the 151st District Court and pass on your Motion for Summary Judgment." CR-I:308. Thuesen's characterization of this passing of the hearing as "voluntary" is inaccurate; the hearing was passed because it appeared that the bankruptcy stay was being reinstated. Swamplot never "passed" or withdrew the summary judgment motion itself. Just four days after the stay was lifted on June 26 (thus clearing the way for a summary judgment hearing), Thuesen filed his nonsuit – before a summary judgment hearing could be set.

C. Thuesen's unilateral nonsuit did not deprive the court of jurisdiction to rule on Swamplot's "prevailing party" motions.

Thuesen claims that his nonsuit "dispos[ed] of all parties and claims" and that, after his nonsuit, "the litigation was rendered a moot controversy." Thuesen Brief at 37, 38. This claim is legally incorrect, and is directly contrary to the Supreme Court's holding in *Epps v. Fowler* – the entire thrust of which is that a nonsuit taken to avoid an adverse ruling does *not* dispose of all parties or claims, or

render every portion of the controversy moot. A party has an absolute right to nonsuit – that is, voluntarily dismiss – his claims, but the simple unilateral act of filing a nonsuit does not bring all pending controversies to a close. For example, Rule of Civil Procedure 162 plainly states that the filing of a nonsuit "shall have no effect on any motions for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." *See also CTL/Thompson Texas LLC v. Starwood Homeowner's Ass'n*, 390 S.W.3d 299 (Tex. 2013); *Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009); *Villafani v. Trejo*, 251 S.W.3d 466 (Tex. 2008) (all allowing defendants to continue to seek relief, such as fees and sanctions, after plaintiff filed a nonsuit).

D. Thuesen's claim that his nonsuit was not taken to avoid an adverse ruling is wholly unsupported.

Thuesen knew that the trial court would grant Swamplot's Rule 91a motion to dismiss, because the court had already granted the Rule 91a motion of the Doyle Raizner parties. CR-I:494 *et seq*. (Doyle Raizner dismissal motion); 695 (order granting Doyle Raizner motion). Swamplot's motion to dismiss was based on many of the same grounds. CR-I:632 *et seq*.

First, Thuesen attempted to avoid dismissal by amending his 2014 Claims against Swamplot on June 9, 2014 (one week before the motion to dismiss was set for submission). He continued to assert most of the same causes of action, but amended the alleged factual bases for the claims; he did not assert any new causes

of action. CR-I:758 *et seq*. Under Rule 91a, Thuesen's amendment reset the time deadlines for dismissal, and allowed for the filing of an amended motion to dismiss.

The Swamplot Parties thus filed an amended Rule 91a motion on June 12, 2014 – demonstrating that Thuesen's amended causes of action were just as meritless as those in his original pleading – and set the motion for submission on July 7, 2014. CR-I:817-36.

Again facing certain dismissal of the 2014 Claims against the Swamplot Parties, Thuesen filed a nonsuit of those claims on June 30, 2014 (just one week before the scheduled submission of the motion to dismiss). CR-II:943-44.

These facts make clear that Thuesen took the nonsuit to avoid an adverse merits ruling on Swamplot's motion to dismiss. As set forth above, under *Epps v. Fowler*, when a plaintiff files a nonsuit after a dispositive motion is filed, but before it is ruled upon, the plaintiff's action is sufficient to support a finding that the plaintiff took the nonsuit for purposes of avoiding an adverse judgment. Here, Thuesen first attempted to amend his claims after the trial court granted the Rule 91a motion to dismiss of the Doyle Raizner parties, and when Swamplot continued to press its own Rule 91a motion, Thuesen nonsuited just one week before submission. Under the standards set forth by the Texas Supreme Court in *Epps v.*

Fowler, a finding by the Court that the nonsuit was filed to avoid an adverse judgment has ample support.

Thuesen contends that he nonsuited not to avoid dismissal, but rather because the Bankruptcy Court had "ruled … that the Federal Bankruptcy Court had jurisdiction over Appellant's Texas District Court claims and was [*sic*] preempted by federal law," Thuesen Brief at 7. He further alleges that he "filed his nonsuit only after discovering previously unknown federal legal impediments to success." Thuesen Brief at 33. But Thuesen provides no appropriate record cites for this proposition, and Swamplot is aware of no Bankruptcy Court order making such a ruling. At page 33 of his brief, Thuesen cites page 1022, paragraph 3 of Volume II of the Clerk's Record to support his assertion about the Bankruptcy Court's alleged ruling. But that citation is to *Thuesen's own pleading* in the trial court where he first made this argument, and he also failed then to cite or attach any Bankruptcy Court order or transcript to support the assertion. "[A]n issue not supported by references to the record is waived." *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (citing Tex. R. App. P. 38.1(h), which requires briefs to include record citations).

The trial court correctly ruled that Thuesen's nonsuit was to avoid a ruling on the merits, and appropriately considered Swamplot to be the prevailing party.

III. The Trial Court's Striking of Thuesen's Pleadings for his Offensive Use of a Watermark Fully Complied with Legal Standards. [In response to Appellant's Issue 6]

After Thuesen's first use of a large Star of David watermark on every page of a pleading, Judge Engelhart issued a show cause order that Thuesen appear and show why he should not be sanctioned for his action that the court observed "has the appearance of being a direct attack on the integrity of the Court and an affront to the dignified administration of justice." CR-II:1143-45. Rather than refraining from this conduct, Thuesen doubled down, including the watermark on several subsequent pleadings. 1stSuppCR:1187-88 (order listing Thuesen pleadings with watermark).

Events occurring both before and after the trial court's original show cause order demonstrate that Thuesen's offensive goading did not arise in a vacuum. Swamplot originally sued Thuesen for (among other claims) impersonating the Swamplot principals online, and for posting false, defamatory, and highly offensive material on various web sites. Many of the postings Swamplot accused Thuesen of making were virulently anti-Semitic. The postings called Swamplot principal Laurence Albert a "California Jew with a DWI conviction" and an "oven dodger," declared that Albert and his family "are funding the Jewish takeover of Houston," alleged that the Swamplot website "has made Laurence Albert and his Jewish family millions of dollars stealing people's homes," claimed that

Swamplot.com "is nothing more than Jewish propaganda aimed at stealing innocent victim's [*sic*] homes," and urged those reading to "[t]ell this foreign Jew to leave Houston with his Swamplot.com trash." CR-I:23.

[Appellees pause here to point out that Thuesen's conduct has been abhorrent, from the events originally giving rise to this litigation forward. In addition to spreading false, defamatory, and wildly offensive material across the internet, Thuesen has also demanded Swamplot and others pay him money to settle his meritless claims, pointing out that as a *pro se* litigant he was not incurring attorneys' fees to bring those claims, but that Swamplot was incurring fees to defend against them (of course, as a corporate entity Swamplot could not represent itself and was required to retain counsel). Dozens of online postings were made accusing Swamplot's principals of criminal misconduct and sexual deviancy; a forensic computer analyst identified the source of those postings as a computer account paid for by Thuesen. In this brief, Swamplot has focused narrowly on the relevant facts and legal issues, but a full understanding of Thuesen's conduct requires at least a mention of his numerous bad-faith, harassing, and offensive actions. These actions are set forth in detail in Swamplot's Brief Regarding Bad-Faith Actions of Mark Thuesen and its exhibits, filed in the trial court, which is in the record at SuppCR:104-514.]

After the trial court struck Thuesen's pleadings that contained the Star of David watermark, Thuesen continued his religion-based tirade by moving to recuse Judge Engelhart because of the judge's Jewish faith. 1stSuppCR:1201 *et seq*. Thuesen's recusal motion spun a wild conspiracy theory that the trial court was ruling against Thuesen because Judge Engelhart was favoring a Jewish party and a Jewish attorney (rather than the reality, which is that Thuesen suffered adverse rulings because his claims and pleadings were unsupported nonsense).

Given this background, Thuesen's attempt to claim doe-eyed innocence is absurd. His contentions such as "the Star of David is no more offensive to the Jewish religion as the Christian Cross is offensive to the Christian religion," and that "[f]or a Jewish person to find the Star of David offensive is absurd; no logical person would ever believe Judge Engelhart was offended by his own religious symbol," Thuesen Brief at 45, are plainly and obviously disingenuous.

Thuesen intended offense to Judge Engelhart and the dignity of the court. Transparently so. Judge Engelhart acted well within his authority when he *sua sponte* ordered Thuesen to appear to show cause why he should not be sanctioned. The show cause order cited the obligation of litigants to not file pleadings in bad faith and for purposes of harassment or other improper purposes, as set forth in Chapters 9 and 10 of the Civil Practice & Remedies Code, CR-II:1143-44, and

discussed a court's duty "to ensure that all proceedings before it shall be conducted in a dignified and orderly manner," *id.* (citing Tex. Gov't Code § 21.001).

The imposition of sanctions against Thuesen complied with all procedural and substantive requirements. The trial court gave explicit notice to Thuesen regarding why Thuesen's use of the Star of David was an attack on the integrity of the court and an affront to the dignified administration of justice. Thuesen ignored the court's show cause order and continued his conduct. In its Order Striking Pleadings, the trial court explicitly found that the watermarks hindered readability, did not comply with document filing rules, were inappropriate and offensive, and interfered with the orderly and dignified business of the trial court. 1stSuppCR:1187-88. Thuesen's claim that the trial court failed to make any findings, Thuesen Brief at 44, is flatly contradicted by the record.

Likewise, Thuesen's contention that his pleadings were stricken "without any evidence" before the trial court, Thuesen Brief at 42, is meritless. All the evidence required is found in Thuesen's repeated and unrepentant use of the offensive watermarks, particularly when judged in context of Thuesen's conduct in this case. In the case upon which Thuesen relies, *Benavides v. Knapp Chevrolet*, 2009 WL 349813 (Tex. App. – Houston [1st Dist.] 2009, no pet.) (not reported in S.W.3d), sanctions were levied when the trial court found that the sanctioned party's pleadings were substantively frivolous and thus brought in bad faith; the

sanctions were vacated because there was no record evidence of bad faith or intent to harass. In stark contrast, here the *only* conceivable purpose for the offensive watermarks was to harass. Thuesen does not even attempt to explain the purpose for using the Star of David on his pleadings. Bad faith is apparent from the record evidence.

Thuesen also alleges – without record citation – that he "was never given notice" of the show cause orders or hearings. Thuesen Brief at 42-43. This strains credulity. Thuesen filed dozens of responsive pleadings, indicating he was receiving notice of everything, but now claims that he failed to receive notice of only the material related to his sanctionable conduct. Further, this complaint has been waived. After his pleadings were stricken, Thuesen could have complained about alleged lack of notice in the trial court and entered evidence to prove this contention, but he failed to do so (instead, he filed a meritless motion to recuse Judge Engelhart). Without any evidence of lack of notice in the record, Thuesen's complaint on appeal cannot be sustained.

The trial court's imposition of sanctions was well within its discretion. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (sanctions are reviewed under abuse of discretion standard).

Finally, even if striking the pleadings was error (it was not), the error was entirely harmless. Only two substantive pleadings were stricken: Thuesen's

response to Swamplot's motion to be considered the prevailing party on the 2012 Claims, and Thuesen's opposition to an attorneys' fee award after a finding of prevailing party status on the 2014 Claims. Even if those pleadings are considered, the trial court committed no error in its rulings on those issues (as set forth above), so striking the pleadings was entirely harmless. *See, e.g.*, *Kennedy v. Kennedy*, 125 S.W.3d 14, 19 (Tex. App. – Austin 2002, pet. denied) (applying harmless error analysis to sanction striking pleadings), *cert. denied*, 540 U.S. 1178 (2004).

IV. Thuesen Failed to Demonstrate Improper Bias or Prejudice by the Trial Court Judge, So Recusal Was Properly Denied. [In response to Appellant's Issue 7]

In response to the trial court's appropriate sanction against him for filing pleadings calculated to attack the dignity of the court and the judicial process, Thuesen moved to recuse Judge Engelhart, contending that Thuesen could not get a fair trial due to the judge's alleged "extrajudicial extreme Jewish religious beliefs." *See* Thuesen Brief at 46. The motion was referred to Judge Sharolyn Wood, who denied recusal after holding a hearing. 1stSuppCR:1302. On appeal, Thuesen continues to argue that Judge Engelhart should have been recused due to his religion. Thuesen's argument is not only meritless; it also lays bare the end game in his scheme that included inserting Star of David watermarks into his pleadings.

Judge Engelhart was aware of Swamplot's claims against Thuesen. Thuesen desperately tried to harass Swamplot further in a forum where Judge Engelhart was

not presiding, by filing a separate lawsuit in another court. But that plan was thwarted when Judge Engelhart appropriately granted consolidation of the two pending related cases. See Argument Section I, above.

The record amply demonstrates that Thuesen, frustrated at being in a trial court with a judge who was familiar with his tactics, cooked up a plan intended to get a recusal. Thuesen began filing pleadings with a watermark that, in context, could only be reasonably interpreted as anti-Semitic goading. When the trial court called him on his offensive actions, Thuesen cried that he was being persecuted due to religion. In other words, Thuesen played the religion card with the intent of concocting alleged "evidence" that the trial court had a religious bias or prejudice against him. This scheme was transparent and offensive, and the denial of recusal was entirely appropriate.

A ruling denying a recusal motion is reviewed for abuse of discretion. *Kniatt v. State*, 239 S.W.3d 910, 912 (Tex. App. – Waco 2007, pet. ref'd); Tex. R. Civ. P. 18a(j)(1)(a).

> When bias is alleged as a ground for recusal, the recusal of a judge is appropriate only if the movant provides sufficient evidence to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the judge.

Abdygapparova v. State, 243 S.W.3d 191, 198 (Tex. App. – San Antonio 2007, pet. ref'd). That court went on to note that to prevail on a motion to recuse for bias or prejudice, a litigant must show:

> a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess ..., or because it is excessive in degree." *Liteky v. United States*, 510 U.S. 540, 550, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). As such, the proponent must show a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555, 114 S.Ct. 1147.

Judge Engelhart's striking of Thuesen's pleadings was based only on the content of those pleadings, and was richly deserved. The trial court's other rulings against Thuesen were based on the utter lack of merit in his contentions, claims, and arguments – not on a deep-seated favoritism or antagonism.

Recusal is appropriate only when "the movant provides sufficient evidence to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the judge." *Abdygapparova*, 243 S.W.3d at 198 (citing *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 918 (1993)). Here, no reasonable person would believe that Judge Engelhart was biased against Thuesen due to religion. The very thought is ludicrous.

Thuesen has cited not a single case in which a judge was recused because of his or her faith, let alone any case where a judge was recused after appropriately reacting to a litigant's improper conduct. Like all his other points, Thuesen's argument is devoid of merit.

CONCLUSION AND PRAYER

Appellees Swamplot Industries LLC, Laurence Albert, and Beth Brinsdon pray that this Court affirm the trial court's judgment in all respects.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(*i*)(3), I certify that the foregoing document complies with the word count limitations set out in TEX. R. APP. P. 9.4(*i*). It contains 8,339 words, excluding any parts exempted by TEX. R. APP. P. 9.4(*i*)(1). In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Times New Roman typeface for body text and 12-point Times New Roman typeface for footnotes.

/s/ James A. Hemphill
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on *via* first class mail and electronic service (for those participating), with courtesy copies *via* email, on the 25th day of February, 2015:

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