EXHIBIT

#10

IN RE: BARON'S STORES, INC., Debtor.

CASE NO. 97-25645-BKC-PGH, Chapter 11

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, WEST PALM BEACH DIVISION

2007 Bankr. LEXIS 1372

April 12, 2007, Decided

COUNSEL: [*1] For Baron's Stores, Inc., dba Baron's Menswear, Debtor: Brian S Behar, Esq, Robert J Edwards, Esq, Aventura, FL.

For Creditors Committee, Creditor Committee: Alan J Perlman, Esq, Miami, FL.; Eric Haber, Esq, Lawrence C Gottlieb, Esq, New York, NY.

JUDGES: Paul G. Hyman, Chief Judge.

OPINION BY: Paul G. Hyman

OPINION

MEMORANDUM OPINION DETERMINING THAT FRAUD HAS HOT BEEN PERPETRATED UPON THE COURT

THIS MATTER came before the Court for an evidentiary hearing January 29-31, 2007 upon Norman Lanson and Meryl Lanson (collectively the "Lansons") *Emergency Motion to Reopen Bankruptcy-Case* (the "Motion to Reopen") in which the Lansons claimed that a fraud had been perpetrated upon this Court. The purpose of the evidentiary hearing was to determine whether Ronald C. Kopplow, Esq., Kopplow & Flynn, P.A. (collectively, "Kopplow"), Marc Cooper, Esq., Cooper & Wolfe, P.A. (collectively, "Cooper"), Sonya Salkin, Esq., and Malnik & Salkin, P.A. (collectively, "Salkin") (all collectively, the "Attorneys"), perpetrated a fraud upon this Court in connection with their applications to be retained as general or special counsel.

Procedural Posture

The Debtor, Baron's Stores, [*2] Inc. ("Baron's"), filed a Chapter 11 petition on September 9, 1997, and Salkin was retained as its bankruptcy counsel. On November 16, 1998, Baron's obtained an *Order Confirming Debtor's and Committee's Joint Amended Plan of Liquidation* ("Confirmation Order"). A Final Decree closing the case was entered on December 10, 1999.

Prior to Baron's seeking bankruptcy relief, Kopplow and Cooper served as counsel for Baron's in a state court lawsuit for professional malpractice (the "MBA Action"), against its former accounting firm, Morrison, Brown, Argiz & Company, P.A. ("MBA"). After Baron's filed for Chapter 11 bankruptcy relief, Kopplow and Cooper were retained as counsel to continue prosecuting the MBA Action.

On September 7, 1999, the Lansons and Baron's filed a legal malpractice action against

Kopplow and Cooper in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (the "Legal Malpractice Action"). In November, 2001 the Lansons amended the Legal Malpractice Action to include Salkin as a defendant. The Lansons and Baron's argued in the Legal Malpractice Action that the Attorneys had perpetrated a fraud on this Court in connection with their retention [*3] as counsel for Baron's during the Chapter 11 case. Judge Norman Gerstein, the presiding judge in the Legal Malpractice Action, advised the Lansons that allegations of fraud upon the Bankruptcy Court should be resolved by the Bankruptcy Court. Consequently on March 11, 2005, the Lansons filed their *Emergency Motion To Reopen Case* with this Court. The Lansons were subsequently joined by Baron's (collectively with the Lansons, the "Movants"). A hearing was held on April 4, 2005, and on April 7, 2005 the Court entered an *Order Reopening* the case "for the purpose of adjudicating the merits of the claims that [the Attorneys] perpetrated a fraud on this Court." *Id.*

On October 5, 2006 the Court entered an *Order Bifurcating Fraud Hearing and Agreed Order Denying Motion for Protective Order as Moot,* in which the Court ruled that "this matter will be bifurcated into a liability hearing and, if necessary upon a finding that the Attorneys perpetrated a fraud, a subsequent hearing concerning the remedy." *Id.*

On January 22, 2007, the parties filed a Bilateral Prehearing Stipulation. The Court, having conducted a three day hearing to receive evidence and testimony with respect [*4] to liability for the "fraud on the Court" allegations, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Lansons were officers of Baron's and were its sole shareholders. Norman Lanson owned 99% of the Debtor's common stock, and his wife, Meryl Lanson, owned 1%. Thus, the Lansons controlled the Debtor at all relevant times.

1. Prepetition Retention of Kopplow and Cooper for the MBA Action

In December 1993, Baron's discovered that its Chief Financial Officer, David Peterson ("Peterson"), had stolen substantial sums of money from Baron's. On January 12, 1994, Baron's and Norman Lanson individually, signed an "Authority to Represent" and "Clients Bill of Rights" (collectively, the "MBA Retention Agreement") whereby they retained Kopplow and Cooper to represent them in the litigation related to the embezzlement on a contingency fee basis. *See* Ex. 1.

In November 1995, Kopplow and Cooper filed the MBA Action on behalf of Baron's against Baron's former auditors, MBA. The MBA Action alleged that MBA had committed professional malpractice by failing to detect Peterson's embezzlement. Baron's was the only named plaintiff in the [*5] MBA Action. Kopplow and Cooper did not file a lawsuit against MBA on behalf of Norman Lanson or Meryl Lanson individually.

2. Retention of Salkin as General Bankruptcy Counsel

When Baron's later experienced financial difficulties, Kopplow referred the Lansons to bankruptcy attorney Salkin. Kopplow testified that he knew Salkin professionally from a previous case in 1994 in which Salkin represented one of Kopplow's clients. On or about July 15, 1997, Salkin met with the Lansons, Kopplow, and others regarding the possibility of Baron's filing for bankruptcy protection. Baron's overall financial condition, the current status of Baron's financing, the MBA Action, and the impact of a Chapter 11 filing on the MBA Action were discussed at this meeting. The retention of counsel for postpetition prosecution of the MBA Action was also discussed at this meeting. Salkin advised that Kopplow and

Cooper would have to be retained as special counsel by the Debtor-in-Possession with the Court's approval or, alternatively, that Baron's could reject its retention agreement with Kopplow and Cooper, and hire new counsel.

The Lansons and Gary S. Tedesco ("Tedesco"), Baron's controller, [*6] signed the retention letter dated July 18, 1997 that Salkin sent to Baron's, and pursuant to which, Baron's retained Salkin as bankruptcy counsel ("Salkin Retention Letter"). *See* Ex. 45. The Salkin Retention Letter states that Salkin was retained for the purpose of preparing and filing a Chapter 11 bankruptcy on behalf of Baron's. The Salkin Retention Letter also addressed in detail the duties and responsibilities of a Debtor-In-Possession in a Chapter 11 case. Salkin's retainer was paid by Baron's on July 22, 1997.

Baron's filed its Chapter 11 petition on September 9, 1997. On September 10, 1997, Salkin filed her *Motion for Authority to Retain Attorney for DIP,* ("General Counsel Retention Motion"). On February 2, 1998, the Court entered an *Order Approving the Retention of Salkin Nunc Pro Tunc to July 18, 1997* ("Order Employing General Counsel"). In Salkin's affidavit in support of the General Counsel Retention Motion ("Salkin's Retention Affidavit"), Salkin states that neither she nor her firm represent any interest adverse to Debtor, and they are disinterested persons as required by 11 U.S.C. § 327(a). In Salkin's Retention Affidavit, Salkin also [*7] states that neither she nor her firm have any connection with "the debtor, creditor, any other party in interest, their respective attorneys and accountants, the U.S. Trustee, or any person employed in the office of the U.S. Trustee in connection with this case."

3. Retention of Kopplow and Cooper as Special Counsel

After filing for bankruptcy, Baron's decided that Kopplow and Cooper should continue as counsel for the MBA Action. On October 23, 1997, Salkin filed a Motion to Authorize Employment of Kopplow as Special Counsel ("Kopplow Special Counsel Retention Motion"), and a *Motion to Authorize Employment of Cooper as Special Counsel* ("Cooper Special Counsel Retention Motion")(collectively, the "Special Counsel Retention Motions"). On October 31, 1997, the Court entered an *Order Granting Motion to Employ Kopplow as Special Counsel,* and an *Order Granting Motion to Employ Cooper as Special Counsel* (collectively, the "Special Counsel Retention Orders").

Although Kopplow testified that he did not remember the specifics of their conversation, Salkin testified that prior to filing the Special Counsel Retention Motions, she discussed with Kopplow the retention [*8] process including the required affidavits in support of retention. Salkin also testified that she told Kopplow that the purpose of the affidavits was to establish that special counsel did not represent any interests adverse to Baron's with respect to the claims asserted against MBA. Salkin testified that she discussed with Kopplow whether he had any relationships with the parties on Baron's creditor list. Salkin further testified that she asked Kopplow to make similar inquiry of Cooper so that he could furnish a similar affidavit in support of the Cooper Special Counsel Retention Motion. Cooper testified that he did not see Baron's petition or its creditor list at the time.

In Kopplow's affidavit in support of Kopplow's Special Counsel Retention Motion and in Cooper's affidavit in support of Cooper's Special Counsel Retention Motion (collectively, the "Special Counsel Affidavits"), both Kopplow and Cooper state that they do not hold or represent any interest adverse to the estate and that they are *disinterested* as required by *11 U.S.C. § 321(a),* Copies of the MBA Retention Agreement were attached to the Special Counsel Affidavits. The Special [*9] Counsel Retention Motions, the Special Counsel Affi-

davits, and the proposed Special Counsel Retention Orders were prepared by Salkin's firm. Based upon the Special Counsel Retention Motions, the Special Counsel Affidavits, and the lack of any objection thereto, the Court signed the proposed Special Counsel Retention Orders which stated that neither Kopplow nor Cooper held any interest adverse to the estate, and that both Kopplow and Cooper were *disinterested* as required by Bankruptcy Rule 2014 and *11 U.S.C. § 327 (a)*. Salkin testified that she failed to properly proof read the retention documents, and that the references therein to § 327 (a), instead of § 327 (e), were mistakes. The Special Counsel Retention Orders also provided for the employment of Kopplow and Cooper as special counsel on a general retainer pursuant to 11 U.S.C. § 330. This was inconsistent with the MBA Retention Agreement attached to the Special Counsel Retention Affidavits in that the MBA Retention Agreement provided for a contingency fee arrangement. The Lansons did not appeal, or seek rehearing of the Special Counsel Retention Orders.

[*10] ***4. Rachlin, Cohen & Holtz***

Morris Hollander ("Hollander") of Rachlin, Cohen & Holtz ("RCH") was Baron's prepetition forensic accounting witness in the MBA Action. Salkin knew RCH principal Laurie Holtz ("Holtz") from the unrelated Premium Sales case in which Holtz served as an accounting expert in opposition to clients represented by Salkin. On October 23, 1997, Salkin filed a *Motion to Authorize Employment of Accounting Expert for Debtor-In-Possession* ("Motion to Employ Accountant") so that Hollander and RCH could continue to work postpetition in the MBA Action as Baron's expert accounting witness. Salkin's office prepared the Motion to Employ Accountant, Hollander's supporting affidavit ("Hollander Affidavit"), and the proposed order thereon. The Motion to Employ Accountant states that Hollander and RCH "do not represent any adverse interest to the debtor, except to the limited extent that they hold a prepetition claim, which claim is duly scheduled on Debtor's Schedule F, pursuant to the attached [Hollander Affidavit]." The attached Hollander Affidavit further discloses that "Rachlin, Cohen & Holtz P.A. holds a prepetition claim against the estate of [sic] the amount [*11] of $ 18,896.00 which sum is duly scheduled in Debtor's Schedule F." *See* Ex. W. On October 30, 1997 the Court signed the proposed *Order Approving the Motion to Employ Accountant* ("Order Retaining Accountant") which stated that the firm of RCH held "no interest adverse to the estate and the matters upon which they are engaged, and that their employment is necessary and would be in the best interests of the estate." Thus, although RCH's prepetition claim was disclosed in both the Motion to Employ Accountant and the Hollander Affidavit, the Order Retaining Accountant was incorrect insofar as it did not include "exception" language indicating that RCH held no adverse interest *except* to the extent that RCH held a prepetition claim.

5. Bank Atlantic Post Petition Financing

At the July 15, 1997 initial meeting in Salkin's office, the Lansons and Tedesco, the officers of Baron's, expressed concern about refinancing Baron's existing loan with its primary lender BankAtlantic. Baron's needed to refinance so that it would be able to buy inventory for the upcoming Christmas season. Salkin testified that she was asked by Tedesco to try to find postpetition financing [*12] that would not require personal guarantees by the officers. Salkin further testified that she sought financing from three entities, City National Bank, First Southern Bank, and BankAtlantic. City National Bank declined the loan. First Southern Bank and BankAtlantic both required personal guarantees by the Lansons, however BankAtlantic's other lending terms were more favorable than those of First Southern Bank. Thus, Salkin sought and obtained Court approval for Baron's BankAtlantic postpetition financing

which required personal guarantees by the Lansons.

6. Court Approval of MBA Settlement & Special Counsel Fees

In February and March of 1998, Salkin, Kopplow, Cooper, the Lansons, and attorneys for several creditors attended two negotiation and mediation sessions related to the MBA Action. Both sessions resulted in impasses.

Ultimately, MBA offered to settle Baron's claims for $ 2.4 million and Baron's accepted. The Lansons approved the settlement on behalf of Baron's, by signing the April 9, 1998 letter sent to them by Salkin ("April 9 Letter"). *See* Ex.15. The Lansons' handwritten notation on the April 9 Letter states, "BankAtlantic is to be paid prior to legal [*13] fees as per our agreement with BankAtlantic." Salkin's April 9 Letter also stated that "by not filing a Joint Plan with the Unsecured Creditors' Committee, you will be foregoing the $ 100,000 offered previously, but you will incur far less expense to the estate by way of attorneys' fees and maintain control during the liquidation process." After signing the April 9 Letter, the Lansons apparently changed their position and decided to file a joint plan with the Committee. Salkin sent a subsequent letter dated April 20, 1998 ("April 20 Letter") in which Salkin stated "you have instructed this office to agree to settle the underlying State Court action against [MBA] for 2.4 million dollars, and to file a Joint Liquidation Plan whereby BankAtlantic will be paid first, after payment of administration and priority claims, followed by the leasing company, the surety company, and the general unsecured creditors." The Lansons signed and returned this letter to Salkin. *See* Ex. Q.

On May 18, 1998, after a hearing on notice to all creditors and parties in interest including the Lansons, the Court entered the *Order Granting Motion For Approval of Settlement of Debtor's Litigation against* [*14] *Morrison, Brown, Argiz & Co., P.A. by Baron's Stores, Inc.* ("MBA Settlement Order"), in which both the settlement of the MBA Action and the award of fees to Kopplow and Cooper were approved. The MBA Settlement Order awarded Kopplow and Cooper a total of $ 600,000.00 in attorneys' fees and $ 146,327.04 in costs.

After the Court approved the MBA settlement, the Lansons refused to sign the proposed release prepared by MBA's counsel because the proposed release included signature lines for the Lansons individually. The Lansons' personal counsel, Harvey Kopelowitz ("Kopelowitz"), reviewed and negotiated the language in the release. *See* Exs. BB, DD, CCCC, EEEE. On June 19, 1998, Norman Lanson signed a release respecting the MBA Action solely in his corporate capacity as President of Baron's.

The Lansons did not appeal, or seek rehearing of the MBA Settlement Order. However, Norman Lanson advised Kopplow and Cooper by letter dated July 8, 1998 that he disputed their fees as follows:

> [S]ince to date my interests, in my opinion, have not been fully protected, and, in fact, you have refrained from taking appropriate steps to protect my personal interests, you are hereby advised [*15] that any attorneys fees you receive are disputed by me and until such time as my personal interests are fully protected and resolved you have no right to any proceeds in any settlement of this matter that does not contemplate, protect and finally resolve my interests... *See* Ex. 17.

On July 17, 1998, Kopplow and Cooper filed a *Motion to Determine Entitlement to Attorney's Fees* ("Fee Entitlement Motion") in which they sought a determination of their enti-

tlement to take into income the fees awarded by the Court on May 18, 1998. On August 27, 1998 the Lansons, individually, filed an *Affidavit in Opposition to Ronald C. Kopplow and Marc Cooper's Entitlement to Attorneys' Fees in the Bankruptcy Court,* asserting that Kopplow and Cooper had deceived the Court by failing to disclose relationships with other parties in interest in connection with their retention as special counsel. On August 31, 1998 the Court held a hearing on the Fee Entitlement Motion. Following the hearing, in which the Lansons were represented by their individual attorney, Mark Osherow ("Osherow"), the Court entered an *Order Determining Entitlement to Attorneys' Fees* ("Fee Entitlement Order"). The Fee [*16] Entitlement Order determined that the fees at issue had been earned by Kopplow and Cooper solely as a result of their representation of the Debtor pursuant to a contingent fee contract previously approved by the Court. The Fee Entitlement Order further determined that the settlement upon which the fee was based was solely that of the Debtor, and that Norman Lanson, individually, was not entitled to any portion of that settlement. Lastly the Fee Entitlement Order determined that Norman Lanson, individually, had no claim to any portion of the contingent fee earned by Kopplow and Cooper. The Lansons did not appeal, or seek rehearing of the Fee Entitlement Order.

7. Plan Confirmation

Baron's commenced plan negotiations with the Official Committee of Unsecured Creditors ("Committee") in, or around, March, 1998. In early April, Committee counsel Larry Gottlieb ("Gottlieb") corresponded with Salkin about the terms of, a liquidating plan, including provisions which would compensate Norman Lanson as an officer of Baron's to ensure his cooperation. *See* Exs. 56-58,61. Salkin's time records for April 16, 1998 indicate that Salkin had a telephone conference with Meryl Lanson [*17] "regarding annuity, life insurance, and again advised of need to obtain personal counsel." *See* Ex. HHH, Bates Stamp No. SS023854.

In an April 23, 1998 letter from Kopelowitz to Gottlieb ("April 23 Letter"), Kopelowitz states that he had been retained by the Lansons. *See* Ex. DDDDD. The April 23 Letter indicated that Kopelowitz would address with the Committee the following issues concerning the Lansons: 1) the ownership of Norman Lanson's One Million Dollar Life insurance policy; 2) the ownership of Meryl Lanson's Mercedes automobile; 3) the $ 100,000 (or $ 75,000) additional consideration due Norman; and 4) the refund of the difference between the guarantee on the utility and equipment lease versus the dividend payable to these creditors as a dividend to Norman. Other correspondence by Kopelowitz indicates that he represented the Lansons personally with respect to their execution of releases required for settling the MBA Action. *See* Exs. BB, DD, CCCC, EEEE. Thus, from at least April 23, 1998, the Lansons were formally represented by personal counsel.

In the summer of 1998, Osherow also appeared in this case as personal counsel representing the Lansons in: 1) opposing [*18] the fees sought by Kopplow and Cooper; 2) concluding negotiations that Kopelowitz had commenced with Committee counsel regarding the Lansons' personal claims and interests in connection with Baron's First Amended Joint Disclosure Statement and the First Amended Joint Plan of Liquidation. *See* Exs. SSSS, WWWW, YYYY; 3) filing the *Motion of Norman Lanson to Determine Ownership of a Certain Annuity Identified in Section VI of Disclosure Statement and for Order Granting Claim of Ownership of Annuity and for Guaranteed Payment Under Plan to Norman Lanson;* and 4) prosecuting a *Motion for Expenses and Costs on Behalf of Norman Lanson and Meryl Lanson and/or to Permit Filing of Administrative Proof of Claim.*

On November 16, 1998, the Court entered the Confirmation Order which confirmed the

Joint Amended Plan of Liquidation filed by the Debtor and the Committee. The record reflects that the Lansons did not object to confirmation of the Joint Amended Plan of Liquidation, and that they each voted individually to accept the plan. *See* Ex. Y.

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a [*19] core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A).

A. Fraud Upon the Court

The Movants contend that the Attorneys perpetrated a fraud upon the Court in connection with their retention as counsel to Baron's during its Chapter 11 case by not disclosing their alleged "litany of connections and conflicts-of-interest". [1] The Movants argue that the Attorneys' allegedly fraudulent non-disclosures vitiate final non-appealable orders of this Court including: 1) the MBA Settlement Order entered May 18, 1998 which approved both the settlement of the MBA Action and the award of fees to Kopplow and Cooper; 2)the Fee Entitlement Order entered August 31, 1998 which granted Kopplow and Cooper's motion determining their entitlement to fees over the objections of the Lansons; and 3) the Confirmation Order entered November 16, 1998. It is nearly nine years since the Court entered the above orders. It is nearly ten years since the Court entered the orders retaining the Attorneys. None of the above-mentioned orders was appealed. In the Court's experience, the lodging of allegations of fraud upon the Court to collaterally attack the Court's final orders nearly [*20] a decade after the alleged fraud was to have taken place is extraordinary. *See also Herring v. United States of America*, 424 F.3d 384, 386 (3d Cir. 2005)("Actions for fraud upon the court are so rare that this Court has not previously had the occasion to articulate a legal definition of the concept. The concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment").

1 The Movants also asserted that the Attorneys violated The Florida Bar Rules of Professional Conduct. The Court offers no opinion with respect to these assertions as such matters are within the purview of the Florida Bar

The theory of "fraud upon the court" and the finality of judgments was discussed in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944).

> Federal courts ...long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally [*21] entered. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.

Id. at 244 (citations omitted).

Courts have held that only the most egregious conduct constitutes a "fraud on the court" for purposes of collaterally attacking an order

or judgment. As stated in *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) [2]:

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the [*22] matter before it, will not ordinarily rise to the level of fraud on the court. *Id.* (citations omitted).

2 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Fraud upon the court must be proven by clear and convincing evidence, and embraces "only that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases." *King v. First American Investigations, Inc.*, 287 F. 3d 91, 95 (2d Cir. 2002). "'Fraud upon the court' is narrowly construed. It has been found only in those instances where the fraud vitiates the court's ability to reach an impartial disposition of the case before it." *Davenport Recycling Assoc. v. C.I.R.*, 220 F.3d 1255, 1262 (11th Cir. 2000) [*23] (citations omitted).

In *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30 (1st Cir. 1999) the Court of Appeals stated:

> "'[F]raud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter." Fraud on the court is an "intentional deflecting of the Court from knowing all the facts necessary to make an appropriate judicial decision on the matter before it."

Id. at 37 (internal citations omitted).

The issue in this case is fraud upon the court. The case law instructs that intent is necessary to a finding of the existence of fraud upon the court. The Movants argue that the Attorneys' subjective intent is not the relevant inquiry and that the Court should determine the Attorneys' intent objectively. [3] The Court does not agree. The Court finds that setting in motion an unconscionable scheme to interfere with the Court's ability to impartially adjudicate a matter requires subjective intent. The question here is whether there was an *intentional* omission [*24] or misstatement in the Attorneys' retention affidavits and motions, not whether there was an omission or misstatement. Fraud upon the Court requires more than a mistake, it requires subjective intent. In reviewing the extensive evidentiary record, the Court finds that the Attorneys did not perpetrate a fraud on this Court.

3 The Movants cite *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30 (1st Cir. 1999) as support for this proposition. The issue in *Pearson* was whether it was error for the bankruptcy court to deny the

movant an evidentiary hearing after the movant claimed there had been a fraud on the court. The *Pearson* court used an objective standard to determine whether the movant had a colorable claim of fraud upon the court. The actual question of whether there had been fraud upon the court was remanded to the lower court for an evidentiary hearing. *Id.* In this matter the Court conducted a 3-day evidentiary hearing on the issue of whether there was a fraud upon the Court. The Movants additional citation to *In re Berz,* 173 B.R. 159 (N.D. Ill. 1994) is inapposite. *Berz* is a § 523(a)(2) credit card debt dischargeability action.

[*25] ***B. Kopplow and Cooper***

The "fraud on the court" claims asserted against Kopplow and Cooper can be considered together and are summarized as follows:

> (1) The claim that statements in the Kopplow and Cooper retention papers were fraudulent because Kopplow and Cooper were not "disinterested as required by 11 U.S.C. § 327 (a)."
>
> (2) The claim that Kopplow and Cooper's retention papers, wherein it stated they represented no interests adverse to the Debtor, were fraudulent because Kopplow and Cooper represented Norman Lanson who was the alleged holder of a competing claim against MBA.
>
> (3) The claim that Kopplow and Cooper defrauded the Court by failing to disclose their prepetition relationships with various creditors and parties in interest.

For the reasons discussed below, the Court finds that Kopplow and Cooper did not intend to deceive the Court or misrepresent any material facts to it, and thus they did not perpetrate a fraud on the Court.

1. *11 U.S.C. § 327(a) & (e) - "Disinterestedness"*

The statements in the Special Counsel Retention Motions and the Special Counsel Retention Affidavits [*26] that Kopplow and Cooper were "disinterested as required by 11 U.S.C. § 327(a)" were incorrect, given that Kopplow and Cooper represented Baron's prepetition and therefore held contingent prepetition claims against Baron's for attorneys' fees and costs. Special counsel are generally employed under 11 U.S.C. § 327(e), and general bankruptcy counsel are employed under 11 U.S.C. § 327 (a). Section 327(a) requires the professional to be "disinterested." In contrast, § 327(e) does not require "disinterestedness." Nevertheless, attorneys employed as special counsel under § 327 (e) cannot represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed. *In re Molten Metal Technology, Inc.,* 289 B.R. 505, 510 (Bankr. D. Mass. 2003). Kopplow and Cooper are not bankruptcy lawyers. Indeed, Cooper testified that this was the first time he had ever been retained as special counsel in a bankruptcy case. Kopplow and Cooper credibly testified that, having no bankruptcy law experience, they did not understand the difference between sections 327 [*27] (a) and (e), or the import of the reference in their affidavits to being "disinterested as required by 11 U.S.C. § 327(a)". They both assumed that the retention papers, which had been prepared by Salkin's office, were accurate and in proper form. While Kopplow stated that he had seen the Special Counsel Retention Motions and Special Counsel Retention Orders, Cooper testified that he had not seen them at or about the time of his and Kopplow's retention. Both Kopplow and Cooper testified that they relied

on Salkin as bankruptcy counsel for preparation of the retention papers, and that they believed all necessary disclosures had been made by virtue of attaching the MBA Retention Agreement to their Special Counsel Retention Affidavits. Both Kopplow and Cooper testified that they did not believe they held any conflict of interest that would have prevented them from continuing their representation of Baron's in the MBA Action. As to the Movants' allegation that Kopplow participated in plan negotiations thereby evidencing his intent to be employed as general counsel, the Court finds that Kopplow's limited participation in plan negotiations subsequent to his retention [*28] as special counsel does not evidence that he intended to be employed as general counsel.

The Court notes that the underlined uppercase titles of the Special Counsel Retention Motions each read: "MOTION TO EMPLOY SPECIAL COUNSEL FOR DEBTOR-IN-POSSESSION." The Special Counsel Retention Orders prepared by Salkin are similarly titled: "ORDER APPROVING EMPLOYMENT OF SPECIAL COUNSEL FOR DEBTOR-IN-POSSESSION." Thus while the Court itself did not notice the inconsistent § 327(a) references in the Special Counsel Retention Orders, it was always the Court's understanding that it was approving retention of special counsel on a contingency fee basis pursuant to § 327 (e) since this is the basis on which special counsel are normally retained for prosecuting state court actions based upon negligence, and because the MBA Retention Agreement clearly provided for a contingency fee arrangement. The Movants argument that the Attorneys "engaged in a scheme to defraud this Court into believing that it had approved the prepetition contingency fee agreement as the postpetition fee agreement, when in point of fact, this Court only approved the retention of Kopplow and Cooper under a 'general retainer'" [*29] is not at all persuasive. The date of the discovery of Peterson's defalcation, December 4, 1993, is displayed prominently on the face of the MBA Retention Agreement. The document was signed January 12, 1994. The 3-page MBA Retention Agreement was attached to a 2-page affidavit. If the Attorneys intended to defraud the Court they would not have attached the MBA Retention Agreement (which provided for a contingency fee arrangement) to their Special Counsel Retention Affidavits. The Attorneys did not attempt to hide or deceive the Court, nor did the Court have to "hunt around and ferret" out this information from thousands of pages of documents. *Compare In re Jennings*, 199 Fed. Appx. 845, 848 (11th Cir. 2006) (rejecting attorneys' argument that disclosures were discernible from the record in a proceeding where 11 related debtors filed for reorganization and their cases had been consolidated for administrative purposes).

Salkin accepted responsibility for the incorrect references to § 327 (a) instead of § 327(e), and the incorrect inclusion of the "disinterested" language in the Kopplow and Cooper retention documents. Salkin testified that these papers were prepared [*30] by a junior lawyer in her firm and that the errors were the result of careless proofreading, as opposed to an intent to deceive the Court. Salkin's explanation is credible. Moreover there was no evidence presented of any plausible motive Salkin could have had to perpetrate an intentional fraud on the Court in connection with a routine matter such as retention of special counsel. The Movants' argument that the Attorneys conspired to get Kopplow and Cooper paid under a void contingency fee agreement is not supported by the evidence. Thus, the Court finds that the references to disinterestedness - which are required by § 327 (a) but not required by § 327 (e) - were mistakes. As noted previously, fraud upon the Court requires more than a mere mistake. The Court finds that there was no intent by any of the Attorneys to mislead the Court.

2. The Lansons Individual Claims Against MBA

The Movants' assert that Kopplow and Cooper fraudulently failed to disclose that they represented Norman Lanson who held an interest adverse to the estate with respect to the matter for which Kopplow and Cooper were engaged, *i.e.*, the MBA Action. The Lansons assert that Kopplow and Cooper [*31] represented them individually in the MBA settlement conferences. The Court notes that Kopplow and Cooper's retention as special counsel required them to participate in the MBA settlement conferences, however the Court finds that their participation was on behalf of Baron's not the Lansons individually. The Court also finds that the Lansons' assertion that Kopplow and Cooper represented them individually in plan negotiations was not supported by the evidence.

The Movants' main argument is that Kopplow and Cooper represented both the Lansons and Baron's, and that the Lansons held individual claims against MBA that put the Lansons in conflict with Baron's because both the Lansons and Baron's were seeking recovery from a common limited fund. The Court need not and does not decide whether the Lansons had meritorious individual claims against MBA. For purposes of determining whether the Attorneys perpetrated a fraud on the Court, the Court must determine only whether the Attorneys *believed* that the Lansons had individual claims against MBA.

The MBA Retention Agreement reflects that Kopplow and Cooper were retained by both Baron's and Norman Lanson individually. [4] *See* Ex. 1. [*32] Cooper testified that the MBA Retention Agreement was drafted that way because Peterson's defalcation had just been discovered and it was unclear at the time whether he had embezzled from Baron's, the Lansons, or both. Cooper further testified however, that by the time they filed the MBA Action in 1995, he and Kopplow had determined that only Baron's had a cause of action against MBA, and therefore they named Baron's as the sole plaintiff in the action.

4 cooper testified that at the time of their prepetition retention, both he and Kopplow thought Norman Lanson was the sole shareholder and that they later learned that Meryl Lanson owned 1% of Baron's stock.

Cooper, who had primary responsibility for identifying appropriate legal theories and for crafting the causes of action in the complaint against MBA, testified at length concerning the basis of his determination that the Lansons did not possess individual claims against MBA. Cooper's analysis was also conveyed in a detailed letter to Osherow, the Lansons' [*33] individual attorney, on August 26, 1998 just prior to the hearing on Cooper and Kopplow's Fee Entitlement Motion. *See* Ex. 91. The Movants argue that even if the Attorneys did not believe the Lansons had individual claims at the inception of the lawsuit, they became aware of the Lansons' individual claims on February 13, 1998 through the deposition testimony of Cynthia Cohen ("Cohen") who stated that the Lansons suffered individual reputational damages. Both Kopplow and Cooper testified that Cohen's testimony did not change their analysis or their conclusion that the Lansons did not have individual claims against MBA. Cooper testified that Cohen was a retail industry specialist, not a lawyer. In Cooper's opinion Cohen had little, if any, understanding of claims cognizable under Florida law. Thus, the Court finds that there was no credible evidence that any of the Attorneys believed that the Lansons had individual claims against MBA which would have made them the holders of adverse interests to the estate with respect to Kopplow and Cooper's retention as special counsel. Cooper testified that when the MBA Action was filed, and later when the bankruptcy petition was filed, he believed [*34] that the interests of the Lansons were one and

the same as Baron's, that being to maximize Baron's recovery from MBA.

> 5 On January 25, 2007 the Attorneys filed a *Memorandum of Law Regarding Lansons' Alleged "Individual Claims"* which discusses the case law relied upon, and the legal analysis pursuant to which, Cooper and Kopplow determined that the Lansons had no individual claims against MBA.

The Court finds that the Attorneys lacked intent to deceive the Court as to this matter. The MBA Retention Agreement identifies Norman Lanson individually as a client retaining Kopplow and Cooper. The inclusion of this document as the *sole* exhibit to the Special Counsel Retention Affidavits is inconsistent with an inference that Kopplow, Cooper, or Salkin sought to conceal this alleged "conflict" from the Court. The Court finds that at all relevant times, the Attorneys believed in good faith that the Lansons did not possess independent individual claims against MBA. Therefore, the Attorneys did not perpetrate [*35] a fraud upon the Court, as alleged, by failing to identify the Lansons as clients who held an interest adverse to the estate with respect to the MBA Action.

3. *Kopplow's and Cooper's Other Prepetition Relationships*

Finally, the Movants assert that Kopplow and Cooper perpetrated a fraud on this Court by failing to disclose the following prepetition relationships:

a. Reef Apartments

Kopplow represented Reef Apartments General Partnership and its general partners in a state court declaratory action relating to an insurance coverage dispute arising out of an automobile accident. The general partners of Reef Apartments included Norman Lanson (who, though not named individually in the Reef lawsuit, shared in the retainer paid to Kopplow); Alan M. Glist (who would become chairman of the Committee in Baron's Chapter 11 case); Glist's father, Hal; Marc Levine, a member of Baron's management team; David Peterson, controller of, and future embezzler from, Baron's; Jeffrey Perlow and Mark Perlman, both of whom were attorneys for Glist.

Kopplow represented Reef Apartments General Partnership and its general partner from 1988 to 1990, approximately seven years before the [*36] 1997 filing of Kopplow's Special Counsel Retention Motion and Affidavit. Kopplow's involvement in the Reef Apartment litigation was unrelated to the MBA Action.

b. Marc Levine

Kopplow also represented Marc Levine in a 1994 personal injury action arising from an automobile accident that was unrelated to his employment at Baron's. That case was dismissed in October, 1996.

c. Charlie Alberts

Between 1997 and 1999, Kopplow represented Charlie Alberts, who was a non-creditor, ex-employee of Baron's on the petition date, in a personal injury action arising from an automobile accident that was unrelated to his employment at Baron's.

d. Laurie Holtz

Laurie Holtz is a principal of RCH, an accounting firm that served, both prepetition and postpetition, as Baron's expert forensic accountant in the MBA Action. Cooper knew Holtz because they were both retained by the Receiver in the unrelated Premium Sales litigation which commenced in the early 1990s. Beyond having a single common client in previous unrelated litigation, Cooper had no personal or professional relationship with Holtz.

e. The Neiman Litigation

Kopplow represented Baron's in a series of lawsuits [*37] seeking to recover homes and

assets purchased by Peterson with funds he embezzled from Baron's. Neiman had contracted to purchase some of these assets. During the ensuing litigation, Kopplow represented Norman Lanson as an officer of Baron's at a deposition. The litigation was eventually settled and releases were executed by Norman Lanson as President of Baron's, and by Norman and Meryl Lanson individually. The assertion that Kopplow represented Norman Lanson in any capacity other than as an officer of Baron's is not supported by the evidence.

The Court finds that the failure to disclose the above described relationships did not constitute a fraud on the Court. There was no evidence that Kopplow or Cooper understood that they were required to disclose these attenuated relationships or connections as part of their retention as special counsel. There was also no evidence that Salkin even knew of these relationships until after the case had been closed and the Lansons filed their Legal Malpractice Action.

The Movants also asserted at the evidentiary hearing that the Attorneys defrauded the Court by failing to disclose that Salkin had previously worked with Kopplow on unrelated cases, [*38] and that Cooper had previously worked with Kopplow on unrelated cases. As to these allegations, the Court notes that if Rule 2014 required disclosure of every occasion on which attorneys worked together on unrelated cases the resulting volume of disclosures would, for all practical purposes, render the disclosure requirement meaningless and thereby thwart the purpose of the Rule which is to disclose all *relevant* connections so as to "subject potentially adverse interests to review before employment is approved." *In re Molten Metal Technology, Inc.*, 289 B.R. 505, 511 (Bankr. D. Mass. 2003) (citations omitted).

Thus, the Court concludes that the failure to disclose the above relationships was not a fraud on the Court.

C. Salkin

As discussed above, Salkin did not perpetrate a fraud on the Court in connection with her role in drafting and filing the retention papers for Kopplow and Cooper. Baron's remaining claims of Salkin's alleged "fraud on the court" can be summarized as follows:

> (1) The claim that Salkin perpetrated a fraud on the Court by concealing RCH's status as a prepetition creditor, in connection with her preparation of the Motion [*39] to Employ Accountant so that RCH could continue to serve as Baron's expert witness in the MBA Action, and that Salkin also failed to disclose that she worked with RCH on a previous unrelated case.
>
> (2) The claim that in addition to representing Baron's, Salkin also represented the Lansons individually during the Chapter 11 case, and that she fraudulently failed to disclose this disqualifying conflict to the Court.

1. RCH Disclosures

The Court finds that Salkin did not perpetrate a fraud on the Court in connection with Baron's postpetition retention of RCH. Contrary to the Lansons and Baron's assertion, the Motion to Employ Accountant and the supporting Hollander Affidavit expressly disclosed that RCH "holds a pre-petition claim against the estate in the amount of $ 18,896.00, which sum is duly scheduled on Debtor's Schedule F." *See* Ex. VV. Salkin and RCH both regularly work on bankruptcy and insolvency matters in this district. Salkin and RCH were on opposite sides in the unrelated Premium Sales case. The non-

disclosure of the fact that they had previously been involved in an unrelated case does not constitute a fraud on the Court. As the court observed in [*40] *In re eToys, Inc.*, 331 B.R. 176, 195 (Bankr. D. Del. 2005):

> It is not unusual for professionals and turnaround specialists to work on the same cases. In fact, given the specialized nature of the bankruptcy practice, it is inevitable.

Id. at 195. The Court finds that Salkin neither intended to, nor did, defraud the Court in connection with RCH's retention.

The Movants cite cases under Fed. R. Bankr. P. 2014 that impose rigorous disclosure requirements upon professionals seeking retention under § 327 of the Code, and ostensibly divest the professionals of any discretion to determine the extent to which prepetition "connections," no matter how trivial or attenuated, must be disclosed. *See, e.g., In re Jennings*, 199 Fed. Appx. 845 (11th Cir. 2006), and cases cited therein. The Court notes that the cases cited by the Movants involve relevant material nondisclosures such as failure to disclose fee arrangements (*see e.g., In re Glenn Electric Sales*, 99 B.R. 596 (D.N.J. 1988); *In re Keller Financial Services of Fla., Inc.*, 248 B.R. 859 (Bankr. M.D. Fla. 2000)), [*41] and actual conflicts of interest (*see e.g., In re Tinley Plaza Assoc., L.P.*, 142 B.R. 272 (Bankr. N.D. Ill. 1992); *In re EWC, Inc.*, 138 B.R. 276 (Bankr. W.D. Okla. 1992)). Not one of the cases cited involve an alleged failure to disclose that an attorney worked with another attorney or an accountant on an unrelated case. The Court does not find that the RCH "connection" was relevant to, or could have had an effect upon, Salkin's judgment in this case. Moreover the issue is not whether there were disclosure omissions but rather whether there were intentional nondisclosures as part of a scheme to mislead the Court. The Court finds that there was no intent on Salkin's part to deceive the Court by not disclosing that Salkin and Holtz of RCH had previously worked on opposite sides in an unrelated case.

2. *Who Did Salkin Represent?*

Finally, the Lansons allege that Salkin perpetrated a fraud upon the Court by not disclosing that Salkin had a disqualifying conflict of interest based upon Salkin's representation of them individually. The Court notes that there is a very fine line between representing a debtor and representing the individual [*42] shareholders in a closely held corporation. When a debtor's attorney gives advice to the principals of the debtor as shareholders concerning payment of insider debt or pledges of personal assets, the attorney could reasonably believe that she is advising the officers of the debtor and the officers could reasonably believe that they were receiving advice as individuals. However based on the totality of the evidence as discussed below, and Salkin's correspondence with the Lansons and others throughout the Chapter 11 case, the Court finds that Salkin did not believe she had taken on the personal representation of the Lansons. *See e.g.*, Exs. 15, 45, 62, 67, 72, Q, FF, WWW, YYY, ZZZ, AAAA, DDDD, EEEE, FFFF GGGG, SSSS. Thus, the Court finds that there was no intentional failure to disclose a conflicting relationship that would constitute fraud upon the Court.

The Court notes that Salkin had no prepetition relationship with either Baron's or the Lansons. The Salkin Retention Letter reflects that Salkin was retained *solely* by Baron's for the bankruptcy case, and Salkin's retainer was paid by Baron's. Thus, Salkin's Retention Affidavit and her General Counsel Retention Motion were [*43] truthful. She was disinterested in that she did not hold an interest adverse to the estate, and she was qualified to represent Baron's under 11 U.S.C. § 327 (a). In addition, the Court finds that initially there was no conflict between the interests of Baron's and its

principals; the Lansons hoped to reorganize Baron's so that they could continue to control and operate the company.

The Court addresses below the Lansons' allegations that Salkin represented them individually: a) by negotiating Baron's postpetition financing which required their personal guarantees; b)by preparing proofs of claims for them; and c) by advancing their interests in plan negotiations with the Committee.

a. Postpetition Financing.

At or about the time of her retention, Salkin was advised by the Lansons and Tedesco that postpetition financing was critical to Baron's for its continued operations and for stocking inventory for the upcoming Christmas season. As requested by Baron's officers, Salkin attempted to secure financing that would not require the officers' guarantees, but she was not successful. As they had done prepetition, the Lansons personally guaranteed Baron's BankAtlantic [*44] postpetition financing. The Lansons assert that Salkin represented them individually in connection with Baron's postpetition financing from BankAtlantic. This assertion rests on several letters that identify the Lansons as Salkin's "clients." *See* Exs. 27-31. The Court finds - and it is important to note - that to the extent the Lansons were corporate officers of Baron's, Salkin was required to report to them and to take direction from them. One letter signed by Salkin states: "We are counsel to the Borrower and Norman Lanson and Meryl Lanson, his wife (hereinafter singularly or collectively referred to as the 'Guarantor') in connection with the Loan." *See* Ex. 31. Salkin testified that this letter was drafted by the bank's representative and presented to Salkin for the purpose of placing it on her firm's letterhead, *see* Ex. BBB, which she did. This "opinion" letter from Salkin as borrower Baron's counsel, was a required closing document for Baron's postpetition loan. Salkin testified that her review of the BankAtlantic loan documents and her execution of the opinion letter was in furtherance of her representation of Baron's, and that she felt it was appropriate to comment [*45] on the terms of the loan documents. Furthermore, there was no conflict insofar as Baron's and the Lansons interests in perpetuating the Debtor's ability to conduct business were aligned. [6] It would have been better practice on Salkin's part to have insisted that the Lansons have personal counsel review the personal guarantees required of them in order for Baron's to obtain critical postpetition financing. However under the circumstances, the Court finds that Salkin's presentation of personal guarantees to the Lansons did not transform the Lansons into individual clients of Salkin. Even more importantly, the Court finds that Salkin did not believe that by negotiating for Baron's postpetition financing she had undertaken the personal representation of the Lansons.

6 The Court notes that no dispute ever arose from the BankAtlantic financing. The postpetition debt was fully satisfied, and the Lansons were never required to honor their guarantees.

b. Proofs of Claim

The Lansons also assert that Salkin represented [*46] them individually because her office prepared form proofs of claim for them to file in their individual capacities. Salkin testified that she had done this for creditors in other cases. While this may have been a questionable act on Salkin's part, the Court finds that Salkin did not intend to represent the Lansons personally by preparing their form proofs of claim. Salkin's failure to disclose that she prepared these proofs of claim does not constitute a fraud upon the Court.

c. Plan Negotiations

The Court notes that Baron's bankruptcy was a fluid situation. Although Baron's hoped to reorganize, it became apparent sometime in March, 1998 that Baron's would not be able to

reorganize under a consensual plan, but would instead have to liquidate. It was at this point that the interests of Baron's and the interests of the Lansons individually began to diverge. On April 8, 1998, Committee counsel corresponded with Salkin regarding the Committee's plan of liquidation and its provisions to compensate Norman Lanson as an officer of Baron's to ensure his cooperation and joinder in the plan. *See* Ex. 57. Salkin testified that during plan negotiations, the Lansons claimed an interest [*47] in a life insurance policy and an automobile, both of which were assets scheduled by the Debtor. In addition, the Committee questioned the ownership of an unscheduled annuity naming Norman Lanson as the annuitant. Salkin testified that it was at this point that she perceived that a conflict had arisen between the estate and the Lansons. Salkin further testified that she advised the Lansons to obtain personal counsel during a March 27, 1998 office conference. Salkin's time record entry for April 16, 1998 indicates that Salkin had a telephone conference with Meryl Lanson in which, among other things, she "*again* advised of need to obtain personal counsel." *See* Ex. HHH, Bates Stamp No. SS023854 (emphasis added). The earliest evidence of the Lansons having actually retained personal counsel is Kopelowitz' April 23 Letter to Committee counsel. Thus, the Court concludes that when the Lansons' interests were no longer aligned with the estate they were advised to retain personal counsel and they in fact did retain personal counsel, first Kopelowitz and later Osherow. It was reasonable for Salkin to assume that these attorneys were representing the Lansons personally. The Court notes [*48] that both Kopelowitz and Osherow participated in plan negotiations on the Lansons' behalf, and that Osherow - not Salkin - concluded the negotiations of the final contested issues between the Lansons and the Committee, resulting in the filing and confirmation of a consensual plan. *See* Exs. EEE, FFF.

The Lansons cite correspondence by Salkin in connection with plan negotiations in which Salkin discussed, or even advocated, favorable treatment or benefits for the Lansons. *See, e.g.*, Exs. 56, 61. The Court finds that such negotiations are not unusual for Chapter 11 debtor's counsel in their efforts to forge consensus among multiple interest groups as to the allocation of a debtor's limited resources. It is common for debtor's counsel, during the course of plan negotiations, to argue for the plan treatment of various constituencies, including equity and management.

The Lansons asserted that they still relied on Salkin for personal advice after they retained personal counsel. Counsel for the Lansons cite *The Florida Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996) for the proposition that the subjective belief of the client is dispositive of whether an attorney-client [*49] relationship exists. However the Beach court qualified this statement by noting that the "subjective belief must be a reasonable one." *Id.* (citations omitted). The Court finds that the Lansons' reliance on Salkin for personal advise after they retained personal counsel was not reasonable.

The Court is not without sympathy for the Lansons who have clearly suffered losses, emotionally and financially, first with the embezzlement and then with the bankruptcy and liquidation of Baron's. Salkin can be criticized for not engaging in the type of defensive letter writing that all attorneys should undertake when representing a closely held debtor company. Salkin was also sloppy in not proof reading the Special Counsel Retention Motions and proposed Special Counsel Retention Orders. While Salkin could have done some things better, there is absolutely no evidence that Salkin intended to perpetrate a fraud upon the Court. In summary, the Court finds that Salkin did not perpetrate a fraud on the Court in connection with her disclosures to the Court.

CONCLUSION

The Court has thoroughly considered the extensive evidentiary record in this case, including three full days of live testimony. [*50] The Movants' claims of fraud on the Court rest upon an interpretation of a few erroneously drawn documents. These documents did not deceive the Court, nor were they drafted or filed with such intent.

The Court expressly finds that there was no evidence that the Attorneys perpetrated a fraud on this Court, or intended, at any time, to do so. The entry of this order moots the necessity of a further hearing on the issue of remedy, and concludes the matter for which the case was reopened. The Court will enter a separate order closing this case.

ORDER

The Court, having heard the testimony of the witnesses, having reviewed the evidence, the record in this case, the applicable law, the submissions of the parties, and being otherwise fully advised in the premises, does hereby:

ORDER AND ADJUDGE that Ronald C. Kopplow, Esq., Kopplow & Flynn, P.A., Marc Cooper, Esq., Cooper & Wolfe, P.A., Sonya Salkin, Esq., and Malnik & Salkin, P.A., did not perpetrate a fraud upon this Court in connection with their applications to be retained as special counsel or general counsel in the Baron's bankruptcy case.

EXHIBIT

#11

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 03-32158-BKC-PGH
Chapter 7 Proceeding

JAMES F. WALKER,

Debtor.

_______________________/

MARY ALICE GWYNN'S MOTION TO STRIKE AND/OR VACATE "ORDER GRANTING DEBTOR'S EMERGENCY MOTION TO STRIKE MARY ALICE GWYNN, ESQUIRE'S MOTION TO CLARIFY RECORD FOR FRAUD UPON THE COURT...." DATED APRIL 8, 2005

COMES NOW Mary Alice Gwynn, an interested party, and files her Motion to Strike and/or Vacate this Honorable Court's Order Granting Debtor's Emergency Motion to Strike Mary Alice Gwynn, Esquire's Motion to Clarify the Record for Fraud Upon the Court... dated April 8, 2005, and states:

1. On April 4, 2005, Mary Alice Gwynn, Esq., filed a Motion to Clarify the Record on behalf of Florida Precision Calipers, Inc. (DE# 777) A Supplement to Motion to Clarify the Record was also filed on April 4, 2005, at DE #781. (See attached Exhibit "A")

2. On April 8, 2005, this Court entered an Order Granting Debtor's Emergency Motion to Strike Mary Alice Gwynn, Esquire's Motion to Clarify the Record for Fraud Upon the Court; Motion to Preclude and Prohibit Mary Alice Gwynn, Esquire From Filing Pleadings on Behalf of Parties Represented by Other Counsel; and Denying Motion for Immediate Referral to the Florida Bar Without Prejudice With Reservation of Jurisdiction based on Debtor's counsel, Gary J. Rotella's interpretation of this Court's ruling at the hearing held before this Court on April 6, 2005. (See Order attached as Exhibit "B")

3. Undersigned counsel is filing this Motion to Strike and/or Vacate only the Order

Granting Debtor's Emergency Motion to Strike Mary Alice Gwynn, Esquire's Motion to Clarify the Record for Fraud Upon the Court... portion of the Order as being an incorrect assessment of the Court's ruling at the April 6, 2005.

4. On April 7, 2005, at 1:28 p.m., attorney Jay Farrow, Esq., from Gary J. Rotella's office, faxed a letter to undersigned counsel with three (3) attached "proposed" Orders allegedly pursuant to this Court's rulings at the hearing on April 6, 2005. (See facsimile attached as Exhibit "C")

5. The letter attached to the fax was signed by Gary Rotella, and instructed that "same will be submitted this afternoon for execution by Judge Hyman **at 4:00 p.m.**" This time constraint for reviewing three (3) rather extensive orders is not only improper, but also unnecessary. Undersigned counsel does not believe this Court has ever issued a time frame in which counsel preparing Orders following a hearing must submit the proposed Orders. Further, it is standard professional courtesy to allow all counsel and interested parties **ample** time to review the orders before they are presented to the Court.

6. Undersigned counsel has repeatedly requested that Gary J. Rotella allow her to review **all orders before being proposed to the court**.

7. Due to client appointments and previous engagements, undersigned counsel was unable to review the proposed orders within the time frame given by Mr. Rotella. Further, when she did review the orders sometime on April 8th, she found several discrepancies in her interpretation of the Court's ruling and Mr. Rotella's. To avoid any unnecessary arguments as to the true interpretation of the Court's rulings, undersigned counsel immediately ordered an expedited copy of the transcript of the April 6, 2005 hearing. The transcript was e-mailed to undersigned counsel on the afternoon of April 8, 2005, but too

late to meet Mr. Rotella's strict deadline for objections to his proposed Orders.

8. Attached as Exhibit "D" is the full transcript of the April 6, 2005 hearing. At page 20, Line 25 and Page 21, Line 1, this Court rules "I am denying Ms. Gwynn's Motion to Clarify the Record on the basis that it's untimely."

9. It is imperative that the Court clarify that Ms. Gwynn's Motion to Clarify was denied, and that is was not based on any type of fraud upon the court, as Mr. Rotella's Order implies. Although Mr. Rotella had filed his "Emergency Motion to Strike Mary Alice Gwynn, Esquire's Motion to Clarify the Record for Fraud Upon the Court" that was not the Motion being heard or ruled on by this Court on April 6, 2005. Mr. Rotella's Motion to Strike was not brought before the Court; therefore, only Ms. Gwynn's Motion to Clarify was ruled on.

10. The only mention of the word "fraud" at the hearing was made by this Court on Page 12, Line 25 – Page 13, Lines 1-2. Ms. Gwynn had made reference to the possibility of a "bait and switch" being made with regard to the loose, unbound documents she and/or Mr. Shuhi had reviewed as Exhibit "KKK", and the actual documents which were admitted into evidence as Exhibit "KKK". The Court replied "then file a motion to set aside a judgment based on fraud on the court". (See attached transcript of April 6, 2005 hearing.)

11. Mr. Rotella continues his attempts to "slide" inaccurate information to this Court by not letting Ms. Gwynn have ample time to review documents, and make changes or comments, before he submits them to the Court under the guise that they have been reviewed by all parties **and approved.**

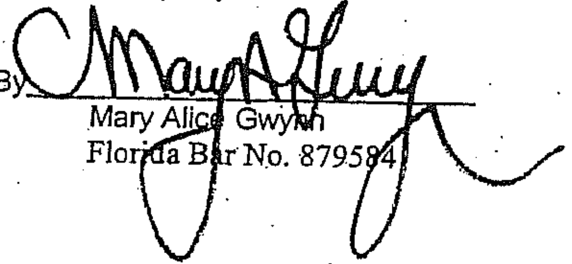
12. Undersigned counsel would like to strike and/or vacate the portion of this Court's Order dated April 8, 2005, entitled Order Granting Debtor's Emergency Motion to Strike Mary Alice Gwynn, Esquire's Motion to Clarify the Record for Fraud Upon the Court, as it

does not represent the Court's actual ruling of April 6, 2005.

WHEREFORE, Mary Alice Gwynn, Esquire, requests this Honorable Court to Strike and/or Vacate its' Order Granting Debtor's Emergency Motion to Strike Mary Alice Gwynn, Esquire's Motion to Clarify the Record for Fraud Upon the Court..., and to allow Ms. Gwynn to submit an appropriate Order that properly cites the language as it appears in the attached transcript. Ms. Gwynn further requests this Court to award attorneys fees and sanctions for having to bring this Motion.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and/or U.S. Mail this 14 day of April, 2005, to all parties listed on the Service List.

MARY ALICE GWYNN, P.A.
805 George Bush Boulevard
Delray Beach, FL 33483
Telephone: (561) 330-0633
Facsimile: (561) 330-8778



By: ______________________
Mary Alice Gwynn
Florida Bar No. 879584

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 03-32158-BKC-PGH
Chapter 7 Proceeding

JAMES F. WALKER,

Debtor.
_______________________/

MOTION TO CLARIFY THE RECORD

COMES NOW, Mary Alice Gwynn, Esq., as an interested party and former counsel for Creditor, Eleanor Cole, and former counsel for Creditor, Florida Precision Calipers, Inc., and files this Motion to Clarify the record transcript of the hearing on Debtor's Motion to Disqualify Linda J. Walden as the Chapter 7 Bankruptcy Trustee, while Ms. Gwynn was representing Florida Precision Calipers, Inc., and further states as follows:

1. It has come to the undersigned's attention that during the continued hearing on the Debtor's Motion to Disqualify Linda J. Walden as Bankruptcy Trustee, documents were accepted into evidence that were all not authenticated by Mr. Carl Shuhi, the President of Florida Precision Calipers, Inc.

2. During the testimony of Steven Utrecht, Debtor's rebuttal witness, Mr. Utrecht brought numerous unauthenticated documents to admit into evidence, which neither the Trustee's counsel, nor Ms. Gwynn had seen prior to the hearing. Carl Shuhi, the President of Florida Precision Calipers, Inc., was not allowed in the Court during the testimony of Steven Utrecht, and was not given an opportunity to take the stand to authenticate each document.

3. To the best of my recollection of the hearing, Mr. Shuhi did not authenticate all of the exhibits listed in Exhibit "KKK". The record seems to reflect that there were

numerous documents in Exhibit "KKK", which were admitted and seemed to be authenticated by me as Mr. Shuhi's counsel,

4. This motion is to clarify the record as to what documents contained in Exhibit "KKK", were actually authenticated by Carl Shuhi.

5. In addition, Carl Shuhi was denied an opportunity to conduct discovery with regard to Elaine Gatsos', his previous counsel, and as a result, he was unable to present the attached Exhibit "A" refuting Elaine Gatsos' testimony.

WHEREFORE, the undersigned counsel, who represented Florida Precision Calipers, Inc. at the Motion to Disqualify Trustee Linda J. Walden hearing, during the testimony of Steven Utrecht and Elaine Gatsos, requests that the Court allow the record to be corrected.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida, and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and/or U.S. Mail this 1 day of April, 2005, to all parties listed on the Service List.

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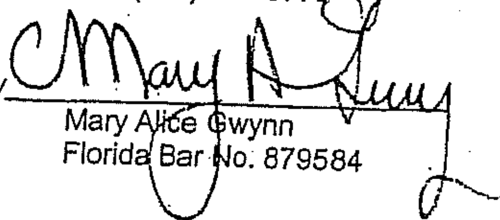

By ______________________
Mary Alice Gwynn
Florida Bar No. 879584

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IN THE SUPREME COURT OF FLORIDA
(Before a Grievance Committee)

THE FLORIDA BAR,

Complainant,

TFB Case No. 2001-51,148(15C)

v.

ELAINE M. GATSOS,

Respondent.

______________________/

GRIEVANCE COMMITTEE REPORT OF MINOR MISCONDUCT

I. Grievance Committee Recommendation: Pursuant to R. Regulating Fla. Bar 3-5.1(b)(3) and 3-7.4(m), the committee recommends that respondent receive an admonishment for minor misconduct, to be administered in person. Respondent must appear before the grievance committee for the purpose. The grievance committee further recommends that respondent be compelled to attend ethics school.

II. Narrative Summary and Rule Violations Found: Respondent's firm represented Randy and Mary Dorfman in both real estate and litigation actions. During said representation, in or about June 1999, respondent requested and received a loan of $50,000 from her clients. Respondent assured her clients that they would be repaid as set forth in the promissory note signed by respondent and the clients. Respondent failed, however, to inform her clients that her receipt of this loan created a potential conflict of interest between them. Respondent also failed to get a written waiver of said conflict from the clients and failed to advise them to seek independent counsel. Finally, respondent did not disclose her full financial situation to her clients.

After accepting this loan, respondent failed to abide by the terms of repayment, as set forth in the promissory note. Thereafter, in or about December 2000, the clients agreed to accept respondent's legal services as partial payment for the loan. This agreement was never reduced to a writing. Further, respondent again failed to inform the clients that a potential conflict of interest existed. She also failed to advise them to seek independent counsel and failed to get a written waiver from them.

By the conduct set forth above, respondent violated R. Regulating Fla. Bar 4-1.8(a) [A lawyer shall not enter into a business transaction with a client or knowing

11/14/02

ly acquire an ownership, possessory, security or other pecuniary interest adverse to a client except a lien granted by law to secure a lawyer's fee or expenses, unless the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction and the client consents in writing thereto.]; **4-1.8(b)** [A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.]; and **4-8.4(c)** [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.].

III. <u>Summary of Additional Charges:</u> The additional charges, if any, that will be dismissed if this report is accepted are summarized as follows:.

The grievance committee considered possible violation of R. Regulating Fla. Bar 3-4.2; and 4-1.8(i) and unanimously found no probable cause to believe that there had been violation of these rules.

IV. <u>Comment on Mitigating, Aggravating or Evidentiary Matters:</u> In arriving at its recommendation, the committee considered the aggravating and mitigating circumstances recognized by the Florida Standards for Imposing Lawyer Sanctions. The grievance committee also considered that the Dorfman's nephew was an associate attorney in respondent's law office, and that she relied upon him , in part, to convey some of the necessary warnings and cautions to his aunt and uncle.

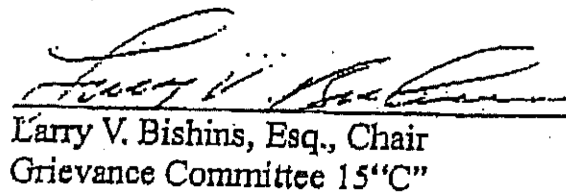
V. <u>Costs:</u> The costs of these proceedings are assessed against the respondent in the amount of seven hundred sixty-one dollars ($761.00), which are for the following:

<u>Administrative Costs</u> [Rule 3-7.6(o)(1)(I)]	$ 750.00
<u>Investigative Costs</u>	
Ethics School	750.00
Investigator's costs	<u>11.00</u>
TOTAL	<u>$1,511.00</u>

VI. <u>Grievance Committee Vote:</u> A quorum of not less than three members of the committee being present, one of whom must be the chair or vice chair, and another on whom must be a lawyer member, the committee by affirmative vote of a majority of the committee present voted in favor of the committee recommendation stated in item I above. In accordance with Rule 3-7.4(g), the committee reports the number of committee members voting for or against this report as follows:

In favor of the report	4
Against the report	0

Dated this 6TH day of NOVEMBER, 2002.



Larry V. Bishins, Esq., Chair
Grievance Committee 15"C"

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IN THE SUPREME COURT OF FLORIDA
(Before a Grievance Committee)

THE FLORIDA BAR,

Complainant,

TFB Case No. 2001-51,148(15C)

v.

ELAINE M. GATSOS,

Respondent.

_____________________________/

ADMONISHMENT FOR MINOR MISCONDUCT

Ms. Gatsos, Fifteenth Judicial Circuit Grievance Committee "C" has recommended that you be admonished for minor misconduct. The designated reviewer on The Florida Bar's Board of Governors concurred with the grievance committee's recommendation. You have not rejected that recommendation.

The sanction being administered today arises from your solicitation and acceptance of a loan from your clients. When you solicited the loan, you failed fully to disclose your true financial situation. Further, you failed to advise your clients to seek independent counsel, as there may have been a conflict of interest between you. You also assured your clients that they would be repaid as set forth in the promissory note. You then failed to abide by the terms of repayment.

In or about December 2000, the clients agreed to accept legal services as partial payment for the loan. This agreement was never reduced to a writing and you again

PUBLIC RECORD
M.D.G.

failed to inform the clients that a potential conflict of interest existed.

Although the committee did not find probable cause to believe that your actions rose to the level of a disciplinary violation, the committee nonetheless warns you that when entering into a business relationship with clients, you must do so with extraordinary care to avoid even the appearance of impropriety. To do so, one must be certain that one's financial status is fully disclosed and the clients must understand the possible conflicts that exist. In the instant case, you borrowed funds, failed to properly disclose your full financial situation, failed to repay the funds as agreed and continually failed to properly inform your clients regarding possible conflicts of interest that could arise. This type of behavior in a business relationship between attorney and client is blatantly unacceptable.

Having experienced this committee's investigation and admonishment, I trust that you will, from this point forward, endeavor to conform your conduct to the mandates of the Rules Regulating The Florida Bar. The Florida Bar demands as much from you, your clients are entitled to no less, and the lawyers and lay people of this committee warn that you will suffer grave professional consequences should you fail. This admonishment is now a part of your permanent Florida Bar record. The lawyers of Florida expect your future conduct to always be in compliance with your oath and your obligations to our profession.

DONE AND ADMINISTERED this 16TH day of JANUARY 2003.

Larry V. Bishins, Esq., Chair, Fifteenth
Judicial Circuit Grievance Committee "C"

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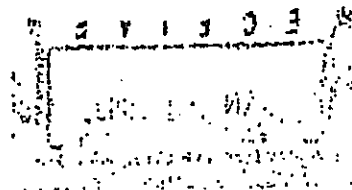

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO: 03-32158-BKC-PGH

JAMES F. WALKER, Chapter 7 Proceedings

Debtor.
_______________________________/

ORDER GRANTING DEBTOR, JAMES F. WALKER' S EMERGENCY MOTION TO STRIKE MARY ALICE GWYNN, ESQUIRE'S MOTION TO CLARIFY RECORD FOR FRAUD UPON THE COURT; MOTION TO PRECLUDE AND PROHIBIT MARY ALICE GWYNN, ESQUIRE FROM FILING PLEADINGS ON BEHALF OF PARTIES REPRESENTED BY OTHER COUNSEL; AND DENYING MOTION FOR IMMEDIATE REFERRAL TO THE FLORIDA BAR WITHOUT PREJUDICE WITH RESERVATION OF JURISDICTION

THIS CAUSE having come before the Court on Wednesday, April 6, 2005 at 8:30 a.m., upon Debtor, James F. Walker's Emergency Motion To Strike Mary Alice Gwynn's Motion To Clarify The Record For Fraud Upon This Court; Motion To Preclude And Prohibit Mary Alice Gwynn, Esquire From Filing Pleadings On Behalf Of Parties Represented By Other Counsel; And Motion For Immediate Referral To The Florida Bar ("Debtor's Motion") by and through his undersigned counsel, and the Court having recognized the appearances of counsel for the respective parties, Gary J. Rotella and Jay L. Farrow on behalf of Debtor, James F. Walker ("Debtor"), John L. Walsh on behalf of the Chapter 7 Trustee, Patricia A. Dzikowski, and Mary Alice Gwynn, Esquire ("Gwynn") appearing on behalf of herself; having heard argument from the respective parties; having reviewed the Court file; and being otherwise more fully and completely advised in the premise, this Court finds and determines as follows:

1. On April 4, 2005, Debtor's counsel was served via facsimile transmission with Mary Alice Gwynn, Esquire's Motion To Clarify The Record ("Gwynn's Motion") bearing Certificate Of

EXHIBIT

Service date of April 1, 2005. On April 5, 2005, Debtor's counsel was served with Mary Alice Gwynn's Supplement To Clarify The Record ("Gwynn's Supplement");

2. Gwynn's Motion and Gwynn's Supplement state that Gwynn is "former counsel for Creditor, Florida Precision Calipers, Inc." Notwithstanding, Gwynn's Motion and Gwynn's Supplement make arguments for and support the interests of her former client, FPC, and its sole director, Carl J. Shuhi ("Shuhi"). Implicitly, Gwynn's Motion and Gwynn's Supplement also support removed Chapter 7 Trustee Linda J. Walden ("Walden") (as they request that this Court reject some of the most damaging admitted evidence presented during the five (5) day Trial on Debtor's James F. Walker's Emergency Motion To Remove Trustee Linda J. Walden For Fraud Upon The Court ("Removal Trial"), so as to mitigate Walden's situation as a consequence of her perjury and manipulation of documents before this Court;

3. At the April 6, 2005 hearing on Debtor's Motion, Gwynn conceded that she does not represent either FPC, Shuhi or Walden and, as such, has no standing to file either Gwynn's Motion or Gwynn's Supplement; and

4. Moreover, Gwynn's Motion and Gwynn's Supplement lack any legal or factual basis and therefore this Court finds that same are frivolous and subject to sanctions under Bankruptcy Rule 9011 and 28 U.S.C. § 1927.

Therefore, it is hereby

ORDER AND ADJUDGED that:

1. Debtor's Motion to strike Gwynn's Motion is granted;
2. Gwynn is hereby precluded from filing any further pleadings on behalf of parties she does not represent;

3. This Court denies, without prejudice, Debtor's Motion for referral to The Florida Bar but reserves jurisdiction to do so if Gwynn violates this Order; and

4. This Court reserves jurisdiction to award attorneys' fees and costs in favor of Debtor's counsel for having to respond to Gwynn's Motion and will hear and determine same on Thursday, April 21, 2005 at 9:30 a.m., Forum Building Complex 1675 Palm Beach Lakes Boulevard, Eighth Floor, West Palm Beach, FL 33401.

DONE AND ORDERED in Chambers in the Southern District of Florida this 8 day of May, 2005.

PAUL G. HYMAN

HONORABLE PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is hereby directed to send a conformed copy of the foregoing Order to all interested parties, immediately upon receipt thereof.)

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ROBERT P. KELLY
JAY L. FARROW

TELEPHONE
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DADE
(305) 757-8054
TELEFAX
(954) 467-2231

TELECOPIER TRANSMITTAL LETTER

Date of Transmittal *April 7, 2005*

PLEASE DELIVER THE ACCOMPANYING TELECOPY TRANSMITTAL TO:

NAME: ***Mary Alice Gwynn, Esquire***

FAX NUMBER: ***1-561-330-8778***

SENDER'S NAME: ***Jay L. Farrow, Esquire for Gary J. Rotella, Esquire***

Total Number of Pages (Including Transmittal Letter): ***13***

COMMENTS: ***Please see attached.***

CONFIDENTIALITY NOTE: The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any use, dissemination, distribution or copy of this telecopy is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone and return the original message to us at the address above via the Uni[illegible]ce. Thank you.

EXHIBIT

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FORT LAUDERDALE, FLORIDA 33301-2276
TELEPHONE (954) 763-2500
TELEFAX (954) 467-2231
MIAMI (305) 757-8054

April 7, 2005

Mary A. Gwynn, Esquire
Mary Alice Gwynn, P.A.
805 George Bush Boulevard
Delray Beach, Florida 33483

VIA FACSIMILE: 1-561-330-8778

RE: __James F. Walker, Debtor__
United States Bankruptcy Court, Southern District of Florida
Case Number: 03-32158-BKC-PGH

Dear Ms. Gwynn:

Enclosed please find under this cover the following Orders emanating from yesterdays hearing before the Honorable Paul G. Hyman, Jr. which comport in all respects with Judge Hyman's rulings:

1. *Order Granting Debtor, James F. Walker's Emergency Motion To Strike Mary Alice Gwynn's Motion To Clarify The Record For Fraud Upon This Court; Motion To Preclude And Prohibit Mary Alice Gwynn, Esquire From Filing Pleadings On Behalf Of Parties Represented By Other Counsel; And Motion For Immediate Referral To The Florida Bar;*

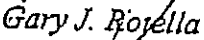
2. *Order denying Mary Alice Gwynn's Motion To Strike Or Dismiss Debtor, James Walker's Motion For Sanctions Against Mary Alice Gwynn Pursuant to Bankruptcy Rule 9011 For Failure To Abide By Rule 11 Of The Federal Rules of Civil Procedure;*

3. *Order denying Mary Alice Gwynn's Motion To Amend, Correct Or Withdraw The Court's Order Granting The Debtor's Motion For Sanctions Pursuant To Rule 9011, Dated June 15, 2004, Pursuant To Rule 60 Of The Federal Rules of Civil Procedure.*

Same will be submitted this afternoon for execution by Judge Hyman at 4:00 p.m. If you have any comments regarding same, contact Mr. Farrow of my office by telephone as the "writing campaign" is over and things cannot happen fast enough.

Additionally, I would like an answer from you regarding our correspondence of yesterday specifically relating to your decision to withdraw your Motion For Protective Order and have your Deposition concluded as same relates to the various pending contested matters scheduled for hearing on April 21, 2005. Without receiving your answer by this afternoon, this "Christian" offer is withdrawn as I believe that you are hell-bent on wasting time and money.

Very truly yours,



Gary J. Rotella

GJR/jlf

Enclosure

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

CASE NO: 03-32158-BKC-PGH

JAMES F. WALKER,

Chapter 7 Proceedings

Debtor.

______________________________/

ORDER GRANTING DEBTOR, JAMES F. WALKER'S EMERGENCY MOTION TO STRIKE MARY ALICE GWYNN, ESQUIRE'S MOTION TO CLARIFY RECORD FOR FRAUD UPON THE COURT; MOTION TO PRECLUDE AND PROHIBIT MARY ALICE GWYNN, ESQUIRE FROM FILING PLEADINGS ON BEHALF OF PARTIES REPRESENTED BY OTHER COUNSEL; AND DENYING MOTION FOR IMMEDIATE REFERRAL TO THE FLORIDA BAR WITHOUT PREJUDICE WITH RESERVATION OF JURISDICTION

THIS CAUSE having come before the Court on Wednesday, April 6, 2005 at 8:30 A.M., upon Debtor, James F. Walker's Emergency Motion To Strike Mary Alice Gwynn's Motion To Clarify The Record For Fraud Upon This Court; Motion To Preclude And Prohibit Mary Alice Gwynn, Esquire From Filing Pleadings On Behalf Of Parties Represented By Other Counsel; And Motion For Immediate Referral To The Florida Bar ("Debtor's Motion") by and through his undersigned counsel, and the Court having recognized the appearances of counsel for the respective parties, Gary J. Rotella and Jay L. Farrow on behalf of Debtor, James F. Walker ("Debtor"), John L. Walsh on behalf of the Chapter 7 Trustee, Patricia A. Dzikowski, and Mary Alice Gwynn, Esquire ("Gwynn") appearing on behalf of herself; having heard argument from the respective parties; having reviewed the Court file; and being otherwise more fully and completely advised in the premise, this Court finds and determines as follows:

1. On April 4, 2005, Debtor's counsel was served via facsimile transmission with Mary Alice Gwynn, Esquire's Motion To Clarify The Record ("Gwynn's Motion") bearing Certificate Of

Service date of April 1, 2005. On April 5, 2005, Debtor's counsel was served with Mary Alice Gwynn's Supplement To Clarify The Record ("Gwynn's Supplement");

2. Gwynn's Motion and Gwynn's Supplement state that Gwynn is "former counsel for Creditor, Florida Precision Calipers, Inc." Notwithstanding, Gwynn's Motion and Gwynn's Supplement make arguments for and support the interests of her former client, FPC, and its sole director, Carl J. Shuhi ("Shuhi"). Implicitly, Gwynn's Motion and Gwynn's Supplement also support removed Chapter 7 Trustee Linda J. Walden ("Walden") (as they request that this Court reject some of the most damaging admitted evidence presented during the five (5) day Trial on Debtor's James F. Walker's Emergency Motion To Remove Trustee Linda J. Walden For Fraud Upon The Court ("Removal Trial")), so as to mitigate Walden's situation as a consequence of her perjury and manipulation of documents before this Court;

3. At the April 6, 2005 hearing on Debtor's Motion, Gwynn conceded that she does not represent either FPC, Shuhi or Walden and, as such, has no standing to file either Gwynn's Motion or Gwynn's Supplement; and

4. Moreover, Gwynn's Motion and Gwynn's Supplement lack any legal or factual basis and therefore this Court finds that same are frivolous and subject to sanctions under Bankruptcy Rule 9011 and 28 U.S.C. § 1927.

Therefore, it is hereby

ORDER AND ADJUDGED that:

1. Debtor's Motion to strike Gwynn's Motion is granted;

2. Gwynn is hereby precluded from filing any further pleadings on behalf of parties she does not represent;

3. This Court denies, without prejudice, Debtor's Motion for referral to The Florida Bar but reserves jurisdiction to do so if Gwynn violates this Order; and

4. This Court reserves jurisdiction to award attorneys' fees and costs in favor of Debtor's counsel for having to respond to Gwynn's Motion and will hear and determine same on Thursday, April 21, 2005 at 9:30 a.m., Forum Building Complex 1675 Palm Beach Lakes Boulevard, Eighth Floor, West Palm Beach, FL 33401.

DONE AND ORDERED in Chambers in the Southern District of Florida this _____ day of May, 2005.

HONORABLE PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is hereby directed to send a conformed copy of the foregoing Order to all interested parties, immediately upon receipt thereof.)

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Francis L. Carter, Esquire

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO: 03-32158-BKC-PGH

JAMES F. WALKER, Chapter 7 Proceedings

Debtor.
_______________________________/

ORDER DENYING MARY ALICE GWYNN'S MOTION TO STRIKE OR DISMISS DEBTOR, JAMES F. WALKER'S MOTION FOR SANCTIONS AGAINST MARY ALICE GWYNN PURSUANT TO BANKRUPTCY RULE 9011 FOR FAILURE TO ABIDE BY RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

THIS CAUSE having come before the Court on Wednesday, April 6, 2005 at 8:30 A.M., upon Mary Alice Gwynn's Motion To Strike Or Dismiss Debtor, James F. Walker's Motion For Sanctions Against Mary Alice Gwynn Pursuant to Bankruptcy Rule 9011 For Failure To Abide By Rule 11 Of The Federal Rules of Civil Procedure ("Gwynn's Motion"), and the Court having recognized the appearances of counsel for the respective parties, Gary J. Rotella and Jay L. Farrow on behalf of Debtor, James F. Walker, John L. Walsh on behalf of the Chapter 7 Trustee, Patricia A. Dzikowski, and Mary Alice Gwynn, Esquire appearing on behalf of herself; having heard argument from the respective parties; having reviewed the Court file; and being otherwise more fully and completely advised in the premise, it is hereby

ORDER AND ADJUDGED that:

1. Gwynn's Motion lacks any factual or legal merit and is therefore denied with prejudice;
2. This Court reserves jurisdiction to award attorneys' fees and costs in favor of Debtor's counsel for having to respond to Gwynn's Motion on Thursday, April 21, 2005 at 9:30 a.m.

DONE AND ORDERED in Chambers in the Southern District of Florida this _____ day of May, 2005.

HONORABLE PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is hereby directed to send a conformed copy of the foregoing Order to all interested parties, immediately upon receipt thereof.)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO: 03-32158-BKC-PGH

JAMES F. WALKER, Chapter 7 Proceedings

Debtor.
_______________________________/

ORDER DENYING MARY ALICE GWYNN'S MOTION TO AMEND, CORRECT OR WITHDRAW THE COURT'S ORDER GRANTING THE DEBTOR'S MOTION FOR SANCTIONS PURSUANT TO RULE 9011 AND RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

THIS CAUSE having come before the Court on Wednesday, April 6, 2005 at 8:30 A.M., upon Mary Alice Gwynn's Motion To Amend, Correct Or Withdraw The Court's Order Granting The Debtor's Motion For Sanctions Pursuant To Rule 9011, Dated June 15, 2004, Pursuant To Rule 60 Of The Federal Rules of Civil Procedure,("Gwynn's Motion"), and the Court having recognized the appearances of counsel for the respective parties, Gary J. Rotella and Jay L. Farrow on behalf of Debtor, James F. Walker, John L. Walsh on behalf of the Chapter 7 Trustee, Patricia A. Dzikowski, and Mary Alice Gwynn, Esquire appearing on behalf of herself; having heard argument from the respective parties; having reviewed the Court file; and being otherwise more fully and completely advised in the premise, it is hereby

ORDER AND ADJUDGED that:

1. Gwynn's Motion lacks any factual or legal merit and is therefore denied with prejudice;
2. This Court reserves jurisdiction to award attorneys' fees and costs in favor of

Debtor's counsel for having to respond to Gwynn's Motion on Thursday, April 21, 2005 at 9:30 a.m.

HONORABLE PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is hereby directed to send a conformed copy of the foregoing Order to all interested parties, immediately upon receipt thereof.)

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1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

2

Judge Paul G. Hyman, Jr.

3

4 In Re:

5

6 Case No. 03-32158-BKC-PGH

7 JAMES F. WALKER,

8 Debtor.

9 ___

10 MOTION BY LAWRENCE TAUBE TO WITHDRAW AS COUNSEL FOR FLORIDA PRECISION, CARL SHUHI AND ELEANOR COLE.
11 EMERGENCY MOTION BY DEBTOR JAMES F. WALKER FOR DEFAULT JUDGMENT AGAINST ELEANOR C. COLE AS SANCTIONS FOR
12 REFUSAL TO OBEY SUBPOENA AND APPEAR AND TESTIFY AT DEPOSITION AND AMENDED MOTION TO STRIKE CLAIM.
13 EMERGENCY MOTION BY JAMES F. WALKER FOR DEFAULT JUDGMENT AGAINST FLORIDA PRECISION CALIPERS, INC. AS SANCTIONS
14 FOR REFUSAL TO OBEY SUBPOENA, APPEAR AND TESTIFY AT DEPOSITION AND AMENDED MOTION TO STRIKE CLAIM.

15

16 April 6, 2005

17

18 The above entitled cause came on for hearing before the HONORABLE PAUL G. HYMAN, JR., one of the Judges in the
19 UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 1675 Forum Place, 8th Floor,
20 West Palm Beach, Palm Beach County, Florida, on April 6, 2005, commencing on or about 8:30 a.m., and the
21 following proceedings were had:

22

23

24 Reported by: Jacquelyn Ann Jones, Court Reporter
OUELLETTE & MAULDIN COURT REPORTERS
25 (305) 358-8875

1 APPEARANCES:

2

GARY J. ROTELLA & ASSOCIATES, P.A.
3 By: GARY J. ROTELLA, ESQUIRE, and
JAY LEWIS FARROW, ESQUIRE
4 On behalf of the Debtor James F. Walker

5

LAW OFFICE OF LAWRENCE TAUBE
6 By: LAWRENCE TAUBE, ESQUIRE
On behalf of Florida Precision Calipers,
7 Carol Shuhi, Eleanor Cole

8

MARY ALICE GWYNN, P.A.
9 By: MARY ALICE GWYNN, ESQUIRE
On behalf of Mary Alice Gwynn
10 and former counsel for Florida Precision Calipers

11

DZIKOWSKI & WALSH
12 By: JOHN L. WALSH, ESQUIRE
On behalf of Patricia Dzikowski, Trustee
13

14 Also Present:

15 Carol Shuhi

16

17

18

19 E X H I B I T S

20 Debtor's Exhibits A through O received Page 22

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1 THE COURT: Ms. Gwynn, I guess I don't need to
2 call you.
3 MS. GWYNN: That's correct, Your Honor.
4 THE COURT: Why don't I take appearances on the
5 Walker case.
6 MR. ROTELLA: Your Honor, Gary Rotella and Jay
7 Farrow on behalf of the debtor, James F. Walker.
8 MR. TAUBE: Larry Taube on behalf of creditors,
9 Florida Precision Calipers, Carl Shuhi, and Eleanor
10 Cole.
11 MS. GWYNN: Mary Alice Gwynn on behalf of
12 herself as an interested party, and as former counsel
13 for Florida Precision Calipers.
14 MR. WALSH: John Walsh on behalf of Patricia
15 Dzikowski, the Chapter 7 trustee.
16 THE COURT: I want to remind everyone we only
17 have an hour this morning because Judge Friedman has a
18 trial starting at 9:30, and we're going to take some
19 things, if we can't get to other matters we'll set them
20 at another point in time. I suggest we take Mr. Taube's
21 motion to withdraw first.
22 MS. GWYNN: Your Honor, Mr. Shuhi is outside.
23 He's parking a car. Is it all right for him to come in?
24 THE COURT: When he gets here, yes. Do you
25 want to wait until Mr. Shuhi is here, Mr. Taube? If

1 he's going to come in, I'll give him ten minutes and
2 let's take a couple of the other matters that are
3 relatively short that don't really relate to you.
4 There's a --
5 MR. ROTELLA: Can we take the Cole matter, Your
6 Honor?
7 THE COURT: Yes, we can take the Cole matter,
8 and Mr. Taube's withdrawal of Ms. Cole. I'll deal with
9 that first. Good point. Ms. Gwynn, Ms. Cole is not
10 there?
11 MS. GWYNN: That's correct.
12 MR. TAUBE: Your Honor, I have a motion to
13 withdraw as counsel for Eleanor Cole. First let me put
14 on the record the notice issues, because I know those
15 were items of concern. After the hearing on Friday,
16 pursuant to instructions, I faxed a copy of the motion
17 to withdraw, as well as the two pending motions that Mr.
18 Rotella has filed, and particularly the motion to strike
19 Ms. Cole's pleadings. I can represent to the Court that
20 I did attempt to fax to the number that I have, which I
21 know is a good number, for probably about a three hour
22 span and was unable to get through, was not able to call
23 on that line either. At approximately 1:00 I personally
24 stuffed the envelope, wherein I mailed a copy of my
25 motion, and I personally dropped it in the mailbox so

1 that there would be no question as to whether or not it
2 was mailed out. So I can represent to the Court that
3 the notice of hearing, my motion, and the motion that is
4 pending regarding the motion to strike were all mailed
5 out on April 1st at approximately 1:30 or so.
6 I'm seeking to withdraw because in this
7 particular case, as a result of correspondence I've had
8 back and forth, it has become apparent to me that I have
9 developed irreconcilable differences between my client
10 and myself regarding the objectives, the strategy, and
11 the tactics of the representation, and that it is
12 impossible for me to represent this client in a manner
13 that is consistent with my obligations under the rules
14 of professional conduct, and in particular to refrain
15 from engaging in activities that I consider to be
16 repugnant and imprudent. I have done my best, Judge, in
17 order to avoid placing myself and my client in this
18 position, but I just think -- I feel that professionally
19 -- that I'm just simply unable to represent this client
20 in this matter any further.
21 THE COURT: Any objection?
22 MR. ROTELLA: No, Your Honor. While Mr. Taube
23 is here, and I expect he's going to get up and walk out
24 once he withdraws, I would only like him to confirm his
25 advice to me that the reason he is withdrawing is

1 because his client, Mr. Shuhi, has asked him to file
2 pleadings --
3 THE COURT: We're dealing with Ms. Cole right
4 now.
5 (Mr. Shuhi enters room.)
6 MR. ROTELLA: Okay.
7 THE COURT: Mr. Shuhi just walked in the
8 courtroom, and we'll deal with him next, but this deals
9 only with Ms. Cole right now.
10 MR. ROTELLA: Yes, Your Honor. Fine, Your
11 Honor.
12 THE COURT: Hearing none, I'll grant that
13 motion.
14 MR. TAUBE: Your Honor, second, with respect to
15 Mr. Shuhi, just briefly with respect -- I presume he
16 must have gotten the notice because he's here, but I'll
17 represent again that I served a copy -- attempted to
18 serve a copy of the motion and the notice of hearing by
19 fax on Friday, I made several attempts over about a
20 three hour span, was unable to do so, the fax number
21 rang busy, and I furnished the Court with a copy of the
22 transmittal sheet, they should be in the court file. I
23 also mailed copies of the motion to withdraw notice of
24 hearing, as well as the motion to strike the claim of
25 Mr. Shuhi in the mail. I personally stuffed the

1 envelopes, I personally put them in the mailbox.
2 Once again, I would basically say this without
3 revealing any client confidences, I feel that I, as an
4 attorney have a duty to represent my clients zealously
5 within the bounds of the law. On the other hand, I also
6 have a duty to refrain from objectives, tactics and
7 strategy that I consider to be imprudent or repugnant.
8 In this particular case I can represent that as a result
9 of correspondence between myself and the client,
10 including certified letters, I feel that I have
11 developed irreconcilable differences regarding the
12 objectives, the strategy, the tactics of the
13 representation, and that I feel that it is impossible
14 for me to conduct this case in a manner that I feel is
15 consistent with my obligations to represent this client
16 under the rules of professional conduct, and therefore,
17 I have no choice but to withdraw. I'd like to say, I
18 wish it hadn't come to this, I do not want myself or my
19 client to be placed in this position, but I feel under
20 the rules I have no choice.
21 THE COURT: Any objection? Mr. Rotella, I
22 think you were going to make some sort of comment about
23 Mr. Shuhi.
24 MR. ROTELLA: I was only, while Mr. Taube was
25 here, Your Honor, Mr. Taube has indicated to me

1 yesterday in reviewing the recently filed pleadings of
2 Mrs. Gwynn, or Ms. Gwynn, that these are the very
3 repugnant and inappropriate pleadings that Mr. Shuhi had
4 asked him to file and he refused to file.
5 THE COURT: Any objection, Mr. Shuhi, now that
6 you're here, for the withdrawal?
7 MR. SHUHI: I object to the withdrawal, yes,
8 based on what he states, yes.
9 THE COURT: Tell me why.
10 MR. SHUHI: I believe Mr. Taube simply wasn't
11 prepared for this. He has an incredible fear of being
12 sanctioned and having bar complaints placed against him.
13 There has been steady communication between the two of
14 us. He's a single practitioner and he cannot be
15 overwhelmed with paper, and that's a fact, and I agree
16 with that.
17 THE COURT: That's frankly, not grounds, in my
18 opinion, to disallow his motion to withdraw, and
19 frankly, any attorney should be concerned about
20 potential sanctions and compliance with Rule 11, and the
21 fact that if you don't you do subject yourself to
22 sanctions. I don't think that's an inappropriate fear.
23 So I'll grant your motion as to that case.
24 MR. TAUBE: Your Honor, I have one order that
25 provides for both, and I'm short one envelope, which is

1 to myself, otherwise --

2 THE COURT: Okay. My law clerk can conform

3 them and you can serve them and certainly make a copy

4 for yourself.

5 MR. TAUBE: Your Honor, may I be excused?

6 (Mr. Taube exits the room.)

7 THE COURT: Yes, sir. Let me take a couple of

8 other quick matters before we go to the default matter.

9 First of all, the motion for protective order,

10 does anyone have a copy of the transcript of the

11 deposition, because without it I frankly, can't rule on

12 it.

13 MS. GWYNN: I ordered it, Your Honor, it's in

14 the process of being transcribed.

15 THE COURT: Okay. When you get a copy of the

16 transcript I'll deal with it. You say one thing, Mr.

17 Rotella says something else. You say you're being

18 truthful and honest and forthcoming, he says you're not.

19 He says he needs to ask additional questions because

20 you're not being forthcoming. I don't know that until I

21 see the transcript. So once you get the transcript you

22 can renotice it. That's all I can really do.

23 MR. ROTELLA: I think you probably need to see

24 the transcript, and I think if it doesn't satisfy you

25 that Mr. Walsh, on behalf of his client, the trustee,

1 sat through the entire deposition, and I believe the
2 trustee would say that Ms. Gwynn was evasive, didn't
3 answer the questions, ran us over the mountainside and
4 through the valleys, and that's only this last sitting,
5 Judge. But if you want to address it all in one fell
6 swoop --
7 THE COURT: I don't know how I can deal with it
8 without seeing the transcript.
9 MR. ROTELLA: Yes, Your Honor.
10 MS. GWYNN: I think the transcript will speak
11 for itself that Mr. Rotella went into areas that were
12 totally inappropriate, like my sex life and things that
13 have nothing to do with this bankruptcy.
14 THE COURT: I will take a look at the
15 transcript. That's all I can do. Now I can set it --
16 set that motion -- when are you going to get the
17 transcript?
18 MS. GWYNN: The court reporter said it would be
19 the middle to the end of next week.
20 THE COURT: I can set it then for the 18th here
21 at 9:30. If it's easier I can set it for -- if you can
22 get me the transcript, get a copy up here, is it easier
23 if I set it at 10:30, because of traffic, or 9:30? I'm
24 going to be here beginning at 9:30 anyway.
25 MR. ROTELLA: 10:30.

1 THE COURT: So set it at 10:30. Renotice it
2 for hearing at 10:30 on the 18th. Get me the transcript
3 beforehand and I'll look through it. Okay.
4 MR. ROTELLA: And at that time the Court will
5 consider the other averments in the response to the
6 motion for protective order as they relate to it?
7 THE COURT: Until I see the transcript I really
8 can't.
9 The other quick matter in my opinion, is this
10 motion to clarify. Frankly, I don't understand what it
11 is you're seeking, Ms. Gwynn, in that the record is what
12 it is, documents that are in evidence, are in evidence.
13 If I did not properly admit them into evidence, then the
14 Appellate Court -- you have a remedy with the Appellate
15 Court, and they can either reverse me or remand it back.
16 Having said that, my recollection is that all
17 of the KKs, triple Ks that is, are in evidence, they
18 went in evidence without objection, with a stipulation
19 of authenticity from you on behalf of your clients.
20 That's my distinct recollection. But having said that,
21 the record is what it is, and I'm not going to change
22 the record at this point after ruling on the matter.
23 Likewise on the Bar complaint, the record is
24 what it is. No one asked me to defer ruling to accept
25 additional evidence at the time or within ten days of me

1 rendering my decision. That's a final order. So I'm
2 going to deny your motion, because frankly, I can't do
3 anything about the record today.
4 MS. GWYNN: But Your Honor, just so I can
5 preserve a record for appeal if necessary in the future,
6 there was some confusion about that Exhibit KKK. I
7 don't know if the Court recalls, but number one, I was
8 out of the courtroom more than I was in because I was a
9 witness and Mr. Rotella invoked the rule. So as a
10 result, I only got bits and pieces of what was going on
11 as far as the testimony of various witnesses. But going
12 back to KKK, Mr. Utrecht showed up that morning with a
13 stack of loose documents --
14 THE COURT: I understand your allegations,
15 ma'am, but it's done.
16 MS. GWYNN: Well, I'm just saying, there was
17 some confusion because we didn't -- when I went back and
18 spoke with my client, Mr. Shuhi, that whole KKK was not
19 a bound, premarked exhibit, there were loose leaf -- so
20 I'm just saying --
21 THE COURT: No question about it.
22 MS. GWYNN: All right. There was some
23 confusion, either a bait and switch or something that
24 needed --
25 THE COURT: Then file a motion to set aside a

1 judgment based on fraud on the court, if that's your
2 allegation. But I'm telling you, I can't do anything on
3 the record today.
4 MR. FARROW: Your Honor, if I may, we actually
5 filed an emergency motion that we filed, I believe
6 yesterday, and we got -- I spoke to Christina,
7 consistent with her instructions, I faxed out a notice
8 of hearing and I contacted all parties on the service
9 list, therefore it is noticed for today, it's our
10 emergency motion to strike Mary Alice Gwynn, Esquire's
11 motion to clarify the record for fraud upon the court,
12 motions to preclude and prohibit Mary Alice Gwynn from
13 filing pleadings on behalf of parties represented by
14 other counsel, and motion for immediate referral to the
15 Florida Bar.
16 And the thrust of our motion, Your Honor is,
17 number one, Ms. Gwynn didn't have any standing
18 whatsoever to file these motions --
19 THE COURT: And frankly, I was going to make
20 that point. Ms. Gwynn, I don't understand your
21 standing. The parties there were the trustee, the
22 debtor, and that's all who was presenting evidence. I'm
23 not quite sure what your standing was.
24 MS. GWYNN: My standing at the hearing for
25 bringing these up was I was representing Mr. Shuhi's

1 corporation at that hearing. There were certain
2 documents that were exchanged that were put into
3 evidence that while I was there that Mr. Shuhi either
4 didn't authenticate or somehow they were put into this
5 composite Exhibit KKK, which we did not authenticate
6 or --
7 THE COURT: That's not your issue. It is the
8 former trustee's issue. She should have objected --
9 her counsel should have objected to the authenticity if
10 there was any question, but as I said, I heard you come
11 in and say, we have no objection.
12 MS. GWYNN: That was to certain --
13 MR. FARROW: Your Honor, may I make -- you're
14 absolutely right and --
15 MS. GWYNN: That was -- I was trying to clarify
16 for the Court that it was --
17 THE COURT: Let her finish.
18 MS. GYWNN: -- it wasn't the entire KKK. There
19 was a stack of loose documents, and suddenly they were
20 bound and they're put into evidence, and I just want to
21 clarify, because it didn't come to my --
22 THE COURT: What is it you want clarified?
23 That they went into evidence? The record is what it is.
24 If the record reflects, which I believe it does, I don't
25 have the record in front of me, that all of them went

1 into evidence, they all went into evidence.

2 MR. FARROW: Your Honor, if I --

3 MS. GWYNN: I just filed my motion to preserve

4 any rights for appeal down the road, if necessary, and I

5 will be able to answer Mr. Farrow's allegations in his

6 motion.

7 MR. FARROW: Your Honor, just for the record,

8 you did inquire as to any objections as to authenticity,

9 this is page 7 of our emergency motion, and you say,

10 let's get -- first of all, there are no evidentiary

11 objections as to the authenticity of these documents.

12 Ms. Gwynn answers, "No, Your Honor."

13 There's a more serious problem going on here,

14 and this is something that's been happening throughout

15 this case, and that is, Ms. Gwynn writes whatever she

16 wants in pleadings without regard to the truth

17 whatsoever. And this is something that we have been

18 dealing with almost on a daily basis for the last two

19 years. And I've spend the better part -- excuse me, the

20 entire day a couple of days ago, almost 11 hours

21 drafting this proceeding in order to preserve the

22 record. And it's something that, as I was saying

23 before, that is a consistent theme here. We have tried

24 to bring this matter to the Bar and to other courts, but

25 this needs to stop, and it needs to stop now. Because

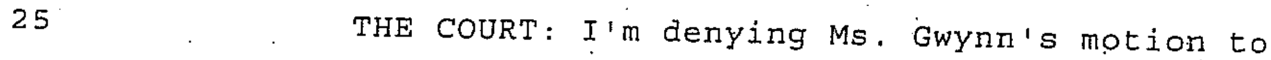
1 her original motion -- excuse me, motion to clarify, her
2 supplemental motion to clarify, which attaches a medical
3 report for Carl Shuhi, and which she says will rebut Ms.
4 Gatsos' testimony that she was physically assaulted
5 outside the courthouse. Now she doesn't represent Mr.
6 Shuhi right now. What business is it of hers to start
7 filing these types of motions. And we're asking as a
8 punitive sanction, as a serious sanction, for immediate
9 referral to the Florida Bar for the continuing filing of
10 frivolous pleadings.
11 One thing I would also say, is that she also
12 filed recently in another matter, bankruptcy matter, in
13 the Jody Hussey and Alex Hussey case, an emergency
14 motion to disqualify not only Mr. Rotella, Mr. Rotella's
15 law firm, the Chapter 7 trustee, Deborah Menotte, and
16 the debtor's counsel all in one swoop.
17 THE COURT: On that case, take it up with Judge
18 Friedman. That's his case, I'm not going to do anything
19 in his case. If she's doing something improper in
20 another case, take it up with him.
21 MR. FARROW: Yes, Your Honor. The only reason
22 why we decided is just showing a consistent pattern.
23 But going back to our motion, which we painstakingly
24 demonstrate that the allegations and averments made in
25 her motion to clarify were untrue, and not only that,

1 there was no standing to bring the motion in the first
2 place. And as I say, we request sanctions for having to
3 draft this motion, and again, an immediate referral to
4 the Florida Bar.
5 MS. GWYNN: Your Honor, in response there's --
6 I was preserving whatever record I needed to preserve
7 for my client for appeal. I believe that I had
8 standing --
9 THE COURT: Stop. Let me just ask a question.
10 What right do you have to appeal the order removing the
11 trustee?
12 MS. GWYNN: I'm not -- I'm not appealing that
13 order. If there's any appellate -- I don't know what's
14 going to happen with Mr. Shuhi's claim. I don't know
15 what's going to happen to Mr. Shuhi as a result of
16 this --
17 THE COURT: But you don't represent him, do
18 you?
19 MS. GWYNN: Excuse me?
20 THE COURT: Do you represent him?
21 MS. GWYNN: Not at this moment, but I did
22 during the motion to disqualify, which I believe certain
23 things are going to be happening down the road, and I
24 want to preserve whatever appellate rights he may have
25 that would result in, I know there's a motion to strike

1 his claim, I know there was some other issues regarding
2 his credibility, and at that time I was representing Mr.
3 Shuhi, and I feel it is my duty to preserve any
4 appellate issues he may have for down the road. I don't
5 know what's coming down the road. And that's why I
6 filed that. In my good faith filing I believe that all
7 of these things needed to be brought up that number one,
8 as I stated in my motion, Ms. Gatsos, she was a surprise
9 witness. No one was really given an opportunity to
10 depose her, no one knew she was coming back, Your Honor.
11 She showed up one day and no one was given notice that
12 she was coming back. She testified on the stand that
13 Mr. Shuhi injured her arm --
14 THE COURT: That's not the issue.
15 MS. GWYNN: Well, I'm just preserving the
16 record, and I would like my motions and whatever is
17 attached just to preserve the record and --
18 THE COURT: The issue is whether you are
19 filing -- to me, the issues are whether you're filing
20 pleadings for people who you don't represent. Mr.
21 Shuhi, you're here, and you're not required to answer
22 this question, does Ms. Gwynn represent you in Florida
23 Calipers in the various recent matters that Ms. Gwynn is
24 filing on your behalf?
25 MR. SHUHI: At that time --

1 THE COURT: And you do not have to answer if
2 there's some reason, attorney-client, whatever.
3 MR. SHUHI: I'll choose not to answer then.
4 MS. GWYNN: I would state for the record, I
5 filed them because I was representing him at that time
6 and this would be retroactive, and request the Court to
7 accept them as retroactively when I represented him at
8 the time to preserve any appellate matters he may have
9 that emanate from them.
10 MR. FARROW: If I could have just one last
11 comment, Your Honor. It's not just Mr. Shuhi that these
12 pleadings are being filed on behalf of, it's also the
13 former and removed Chapter 7 trustee, Linda Walden. If
14 you look at some of the averments, specifically relating
15 to Elaine Gatsos, I believe this is in her response to
16 our motion or supplemental motion to clarify, she states
17 that if the Bar complaint was introduced into evidence
18 that there was some way to demonstrate that it was Ms.
19 Gatsos' associate who attended the initial meeting with
20 Mr. Shuhi, and not Linda Walden.
21 And to make one more comment, what she was
22 just saying about the fact that no one knew about Elaine
23 Gatsos, Elaine Gatsos spent most of the day, actually
24 all day on November 12th outside the court, and she
25 never testified. She actually came back, there was an

1 issue on the 12th, and she came back on the 17th to
2 testify. So when Ms. Gwynn makes a representation to
3 this Court that nobody knew about Gatsos or had an
4 opportunity to request her examination, that's not
5 accurate.
6 MS. GWYNN: Your Honor, if you recall, Ms.
7 Gatsos would not answer any questions outside the hall
8 until she knew what the rules of bankruptcy were and
9 what her rights were, and I believe she asked the Court
10 for --
11 THE COURT: This is my ruling. Number one, I'm
12 going to deny without prejudice the request to refer
13 this matter to the Bar.
14 Number two, Ms. Gwynn, you're instructed not
15 to file any pleadings for anyone who you don't currently
16 represent. Mr. Shuhi or -- either individually or in
17 his -- on behalf of Florida Calipers has a right to file
18 a complaint with the Florida Bar if Ms. Gwynn is filing
19 something with this court, or any court that is
20 unauthorized and in which she does not represent him.
21 As far as monetary sanctions, I will reserve
22 on that. If you'd like to set that portion for the 21st
23 when we have all the other sanctions motions, do it.
24 MR. FARROW: That will be fine, Your Honor.
25 THE COURT: I'm denying Ms. Gwynn's motion to



1 clarify the record on the basis that it's untimely.
2 MR. FARROW: We'll prepare the order, Your
3 Honor.
4 THE COURT: Let's deal with the motion for
5 default against Ms. Cole. Anyone here on behalf of Ms.
6 Cole? Then I will grant that request, strike all
7 pleadings, all claims of Ms. Cole in this bankruptcy
8 proceeding as a sanction for her refusal to appear at
9 her deposition.
10 MR. ROTELLA: Judge, if it please the Court, so
11 that the record is very clear, and so there's no slack
12 in the record, we prepared an amended exhibit register
13 and it principally, Judge, includes the subpoenas, the
14 returns of service, the notice of setting the
15 depositions, the letters back and forth with Taube,
16 which makes it all extremely tight.
17 THE COURT: Fine. And I -- do you have any
18 additional time other than was given to me at the prior
19 hearing?
20 MR. ROTELLA: We do, Your Honor. It hasn't
21 been assembled. We would like -- you'll notice that
22 there are no expenses included there. We'd like a
23 reservation in the order. To be perfectly frank with
24 you, we've attempted to prepare the orders, but we've
25 been swamped with these other incoming pleadings like

1 scuds from Ms. Gwynn.

2 THE COURT: Okay. So as to the amount of the

3 sanctions, if you'd like, renotice it for the 21st, but

4 I will strike all pleadings of Ms. Cole and reserve on

5 the amount of the monetary sanctions.

6 MR. ROTELLA: I think what we'd like to do,

7 just so we can move along, is we'll use these numbers in

8 Exhibits A, B, and C, with a reservation for another

9 day, because I don't know that we can even be ready by

10 the 21st. There's just been so much going on.

11 THE COURT: That's fine. And I have reviewed

12 A, B, and C, the amount of the fees are reasonable, they

13 were necessary, and were properly incurred in defense of

14 the action in the prosecution of your positions, and I

15 will award the fees requested therein as to Ms. Cole in

16 addition to striking her claims.

17 MR. ROTELLA: Thank you, Your Honor.

18 THE COURT: And I've received Exhibits A

19 through O in support of your motion.

20 (Exhibits A through O received.)

21 MR. ROTELLA: Thank you, Your Honor.

22 MS. GWYNN: Your Honor, can I request for the

23 record that Mr. Rotella supply those exhibits? I never

24 received them. I just want to have them for my records.

25 THE COURT: You can have -- give her a copy.

1 MR. ROTELLA: We'll do that, Your Honor. She
2 actually planned to come to my office this Friday to
3 receive whatever it is that I intend to use on the 21st.
4 That is our written arrangement. But I'm happy to
5 attempt to give them to her before then.
6 THE COURT: Okay. Let's go to Mr. Shuhi. Mr.
7 Shuhi, you want to sit up here, or not? It's up to you,
8 to be up at the table, since you're the topic of the
9 last matter. Don't feel like you have to. You seem
10 hesitant.
11 Go ahead, Mr. Rotella.
12 MR. ROTELLA: The remaining matter, Your Honor,
13 is very much identical to the Cole matter, and that's
14 Debtor James F. Walker's emergency motion for default
15 judgment against Florida Precision Calipers, Inc. and
16 sanctions for refusal to obey subpoena and appear and
17 testify at deposition, and amended motion to strike
18 claim. A number of the exhibits that we have given you
19 this morning that are appended to the amended exhibit
20 register pertain to this matter, and our position is
21 very much identical.
22 THE COURT: Mr. Shuhi, first let's talk about
23 why did you not appear at your deposition, why are you
24 refusing to appear?
25 MR. SHUHI: That's not quite accurate. I was

1 noticed -- I was asked by Mr. Taube to appear on Good
2 Friday, and that was just a few days before. I
3 explained to him I take Good Friday and Easter weekend
4 and for me it's a religious holiday. It's in writing
5 too. Also I volunteered myself for any other day. That
6 was open. And as far as a subpoena, it's never been
7 mentioned to me by Mr. Taube or anybody else that that
8 was what was occurring. I was doing it voluntarily.
9 THE COURT: You've never been served with a
10 subpoena is what you're saying?
11 MR. SHUHI: The last time I was served by a
12 subpoena was in 2004. I have never been served since.
13 I have nothing. I'm not aware that that's what I was
14 appearing for. I don't know.
15 MR. ROTELLA: That is the subpoena. The
16 deposition was properly noticed. The file is replete
17 with correspondence back and forth between Messrs Taube,
18 Rotella and Farrow relative to the setting. Mr. Taube
19 confirmed the appearance, or that Mr. Shuhi would
20 appear. Then out of the blue, I believe on March 18th,
21 we got his advice that Mr. Shuhi refused to appear and
22 refused to testify, as did Ms. Cole, whom I believe is
23 governed in some regards by whatever Mr. Shuhi does.
24 There was no motion for protective order, nothing has
25 changed. We went through this in the fall time

1 consistent with the effort to remove the trustee. The
2 production was scare. Nothing has changed.
3 THE COURT: Now, I know you're leaving town.
4 How long are you leaving town for? You're leaving town
5 today, from what I understand from the last hearing.
6 MR. ROTELLA: Yes, Your Honor. I'll be back on
7 Monday.
8 THE COURT: I'm going to give you, Mr. Shuhi,
9 one last time to appear for your deposition.
10 MR. SHUHI: That's fine.
11 THE COURT: When did you want him next week?
12 MR. ROTELLA: I'll have to look, Your Honor.
13 I'm just perplexed as to why that happens here, Judge.
14 You've given everyone --
15 THE COURT: To me it's clear that there was
16 a -- is irreconcilable differences between Mr. Taube and
17 Mr. Shuhi. There's no question there's communication
18 problems between the two.
19 MR. ROTELLA: Then there should have been a
20 motion for protective order.
21 THE COURT: No question about it. But having
22 said that, Mr. Shuhi is pro se now, and I'm going to
23 give him one last chance. Do you want to get on the
24 cell phone or this phone and call your office and -- I
25 think it's preferable to have a date certain, because if

1 he does not appear I will then strike all of his
2 pleadings. And Mr. Shuhi, I'm going to tell you
3 straight up, that's it. And you have to answer all of
4 the questions, subject to any privilege you may have,
5 and this is your last chance.
6 MR. SHUHI: That's fine.
7 THE COURT: I'll make him show up today if
8 you --.
9 MR. ROTELLA: Can't happen today, Judge.
10 10:00 on Wednesday, Your Honor?
11 THE COURT: At your offices.
12 MR. ROTELLA: At my offices.
13 THE COURT: Which is -- make sure you give Mr.
14 Shuhi --
15 MR. ROTELLA: He's been there.
16 MR. SHUHI: May I ask a question?
17 THE COURT: Yes, sir.
18 MR. SHUHI: What is the scope of the deposition
19 going to be about, since my subpoenas last time were for
20 the removal motion?
21 MR. ROTELLA: It's wide open, Your Honor.
22 THE COURT: Well, it's not wide open.
23 MR. ROTELLA: Anything do with this matter,
24 with his claims, and as he says that, Judge --
25 THE COURT: You should deal with the hearings

1 that are set for the 21st. That's the only contested
2 matters I'm aware of that are pending as to Mr. Shuhi.
3 MR. ROTELLA: That's fine, Your Honor. I can
4 deal with that.
5 THE COURT: Which means the motions for
6 sanctions against you, Mr. Shuhi, the basis for the
7 motions for sanctions, and all matters that are
8 reasonably calculated to lead to discoverable evidence
9 concerning the motions for sanctions.
10 MR. SHUHI: So any evidence at all that
11 concerns that motion.
12 MR. ROTELLA: Judge, then what will be your
13 disposition of my motion for default?
14 THE COURT: I'm deferring that until I see if
15 he shows up. If you would like to renotice it for the
16 18th at 10:30, or 10:00, whatever, 10:30 I guess that's
17 fine. If he shows up and doesn't answer, you know,
18 completely, then you can -- we'll revisit it.
19 MR. ROTELLA: Yes, Your Honor.
20 THE COURT: If he doesn't give you appropriate
21 answers. Get a transcript. That's all I can do.
22 MR. ROTELLA: Yes, Judge.
23 THE COURT: Ms. Gwynn, you look like you have a
24 question on your mind.
25 MS. GWYNN: Yes, I do. Just while we're

1 conducting scheduling here, with regards to the debtor's
2 motion for sanctions against myself pursuant to Rule 11
3 that's scheduled for the 21st, I have filed yesterday
4 with the court a motion to amend and correct the Court's
5 order granting the debtor's motion for sanctions
6 pursuant to Rule 11.
7 THE COURT: You want to hear it today?
8 MR. ROTELLA: Can we do it now, Jay?
9 MR. FARROW: I'd be happy to.
10 MR. ROTELLA: We're ready, Judge.
11 THE COURT: We've got a half hour. Let's take
12 care of it. Mr. Shuhi, you're welcome to stay or you're
13 welcome to leave.
14 MR. SHUHI: I'll stay.
15 MS. GWYNN: I wasn't prepared, and I only
16 brought one copy.
17 THE COURT: Let me look at it real quick. I'm
18 fairly familiar with what's happened in this case.
19 MS. GWYNN: That's the motion to strike the
20 underlying order as being inconsistent with the Court's
21 oral ruling on April 28th, 2004 where the Court denied
22 Mr. -- or the debtor's motion to shorten the 21 day
23 period for Rule 11 sanctions.
24 THE COURT: Just let me read the order. Does
25 anyone happen to have the transcript, the pertinent

1 transcript?

2 MR. ROTELLA: Mr. Farrow does, Your Honor.

3 MS. GWYNN: I attached the part where the Court

4 ruled, denied the motion to --

5 THE COURT: Mr. Farrow.

6 MR. FARROW: Your Honor, excuse me, Ms. Gwynn,

7 for the record, I'm handing up an excerpt ruling for the

8 ruling on the motion to disqualify for April 28th, and I

9 have a copy for you as well, Ms. Gwynn.

10 THE COURT: Just everyone be quiet and give me

11 five minutes to read it.

12 MS. GWYNN: Your Honor, I would like -- because

13 I've read that excerpt, it's not correct. We need to

14 have the full transcript, because Mr. Gleason had a

15 motion for sanctions which the Court did award at that

16 hearing, so you need a complete transcript of the 28th.

17 MR. FARROW: Your Honor, actually let me just

18 hand these up all at the same time. This is for various

19 motions. I believe this is the transcript from our

20 motion to shorten the 21 day period on April the 28th.

21 I have a copy for Ms. Gwynn. And I also am going to

22 hand up to the Court the hearing excerpt ruling from the

23 May 28th transcript. I have a copy for Ms. Gwynn as

24 well, Your Honor.

25 THE COURT: Thank you.

1 MS. GWYNN: Your Honor, I would request that
2 this not be heard today because I'm just reviewing this
3 now. I don't know what their argument is going to be,
4 other than what the transcript --
5 THE COURT: Ma'am, you filed the motion.
6 MS. GWYNN: Okay.
7 THE COURT: And I'd like to get this stuff done
8 before the 21st so that people know what the status is.
9 I've read the transcript of my ruling on the
10 motion to disqualify.
11 MR. FARROW: Your Honor, I also have the order
12 denying motion to shorten 21 day notice period for
13 filing a motion for sanctions pursuant to Bankruptcy
14 Rule 9011. It's court paper 350. I'd like to hand it
15 up to the Court, and I have a copy for Ms. Gwynn.
16 Specifically paragraph number 2 authorized the debtor to
17 submit a motion for sanctions, as we did on May 18th
18 pursuant to any applicable statutes or rules. Pursuant
19 to said order on May 18th debtor James F. Walker filed
20 Debtor James F. Walker's motion for sanctions against
21 Mary Alice Gwynn, Esquire and Creditor Eleanor C. Cole
22 pursuant to Bankruptcy Rule 9011, and that's court paper
23 360, and same was heard on May the 28th.
24 If Your Honor would recall, and I believe I've
25 handed up that excerpt ruling from the 28th of May,

1 which also was heard a renewed motion to disqualify our
2 law firm at the same time, and this Court clearly on the
3 record entitled debtor's counsel to Rule 11 sanctions,
4 as well as denied Ms. Gwynn's renewed motion to
5 disqualify the law firm of Gary J. Rotella who
6 represented the debtor.
7 THE COURT: Okay. It would be helpful if I
8 could read the transcripts.
9 Why did you hand me up the April 28th ruling,
10 since -- I'm trying to figure out why they would impact
11 on whether the order of June 12th was properly entered?
12 MS. GWYNN: Your Honor --
13 THE COURT: I asked Mr. Farrow this.
14 MR. FARROW: Your Honor, the April 28th hearing
15 consisted of an emergency motion to disqualify our law
16 firm by supplement thereto and our motion to shorten
17 time, because we received her motion and we realized
18 that this was going to be heard on an emergency basis,
19 but we properly sent her a 9011 letter --
20 THE COURT: No. The April 28th hearing dealt
21 with the motion to shorten time, and on May 12th I
22 granted that motion.
23 MR. FARROW: You denied the motion, Your Honor.
24 MS. GWYNN: You denied the motion.
25 MR. ROTELLA: You denied it as being moot,

1 Judge, because she decided to go forward.
2 THE COURT: Okay. Denied without prejudice.
3 MR. FARROW: Correct.
4 THE COURT: Okay.
5 MR. FARROW: And then we filed a motion
6 pursuant to 9011 on May the 18th which was heard on the
7 28th of May --
8 THE COURT: May the 28th.
9 MR. FARROW: Yes, Your Honor.
10 THE COURT: Okay. So April 28th is just
11 background.
12 MR. FARROW: Correct, Your Honor, but it was --
13 a portion of the transcript was at least attached to her
14 motions that were filed with the court yesterday,
15 therefore I thought it needed to be addressed.
16 MS. GWYNN: Can I -- and just to clarify for
17 the record, the April 28th ruling denying the debtor's
18 motion to shorten time, the 21 day period, in the May
19 12th order also denying, the Court gave Mr. Rotella and
20 the debtor an opportunity to come back with any other
21 authority or any other rule for sanctions. He never
22 did. His present motion is still under Rule 11, and I
23 had submitted --
24 THE COURT: That's not the issue. The issue is
25 whether the June 12th order conforms with my oral ruling

1 on May 28th. That's why I was trying to figure out why
2 the April 28th hearing had anything to do with it.
3 MS. GWYNN: Well, do you know why, is because
4 they impact together. Mr. Rotella, in his motion for
5 sanctions groups both the original motion to disqualify
6 and the renewed motion all in one. And if the 21 day
7 period was not met for the first one because the Court
8 denied the motion to shorten time, it would also apply
9 to the May 28th. So if you read over --
10 THE COURT: That's not -- the issue is, what
11 did I say on May 28th. If I was wrong, I was wrong, and
12 you should have dealt with it then.
13 MS. GWYNN: It didn't come up. Your Honor,
14 I --
15 THE COURT: Can I read the transcript? It's
16 real simple.
17 MS. GWYNN: Okay.
18 THE COURT: Okay. Now Ms. Gwynn.
19 MS. GWYNN: Your Honor, how that June 12th
20 order was entered, right shortly after the May 28th
21 hearing I withdrew as counsel of record for Eleanor Cole
22 for medical reasons, and Ms. Cole was then represented
23 by Art Neiwirth. Apparently Mr. Neiwirth was not
24 really -- was not apprised of what transpired on April
25 28th, and the Court's denial of the debtor's motion to

1 shorten the 21 day period, and when the order was
2 submitted by Mr. Rotella, and in the order itself it
3 contained language that the Court finds that debtor's
4 counsel properly served and notified Creditor Cole's
5 Counsel, Gwynn, of its intention to seek sanctions
6 pursuant to Rule 911, and that Gwynn refused -- that
7 language that he included in that order is inconsistent
8 with the April 28th oral ruling of the Court and
9 subsequently to the May 12th order entered in the court,
10 because the Court did not find that Mr. Rotella had
11 properly given the 21 day notice. It says just the
12 opposite, because the Court denied his motion to shorten
13 time.
14 As a result this order was entered and I
15 didn't have -- I didn't review it and I didn't find out
16 about it until reviewing the record for the upcoming
17 motion for sanctions against me. And after doing quite
18 a bit of research I submitted a memorandum of law, and
19 the case law is very clear, it's an absolute, that if a
20 person is not given the 21 day period afforded under the
21 rule it's an absolute bar to seeking sanctions under
22 that rule.
23 MR. FARROW: Your Honor, if I may. Two points.
24 Number one, I have here a June 8th, 2004 correspondence
25 from Mr. Rotella to Ms. Gwynn, which I do have a copy

1 for you, but at least paragraph number 3 shoots by -- we
2 presented these orders to Ms. Gwynn prior to the filing
3 of -- then with this Court.
4 Number two is, Your Honor what does Ms. Gwynn
5 expect to get around Rule 9011 by circumventing the 21
6 day period. And what I mean by that is that she filed
7 an emergency motion that had -- in which this Court
8 determined that she had absolutely no standing
9 whatsoever to bring. We hear the emergency motion, I
10 think within seven days of the filing. We properly sent
11 a letter and the motion to her over the weekend in the
12 end of April prior to this hearing going forward. She
13 went forward with her motion. And now she says, Your
14 Honor, I can't be sanctioned for filing a frivolous
15 pleading pursuant to Bankruptcy Rule 9011 because they
16 didn't comply with the 21 day period.
17 Your Honor, Ms. Gwynn's citation to Bankruptcy
18 Rule 9011 is a little confused, because that rule
19 provides that -- provides for a 21 day notice period,
20 but it also provides that this Court has the discretion
21 to reduce that 21 days in its discretion.
22 THE COURT: To me the issue is whether the
23 order dated June 12th properly reflected my oral ruling
24 on May 28th. Reading the transcript, the order clearly
25 does. It reflects my oral ruling. I indicate that I

1 find she had no standing, she cannot get around Rule 11
2 by filing a renewed motion that restates the same
3 grounds as the original motion, and then a couple of
4 extra grounds, which I have found to be meritless since
5 I dismissed the adversary proceeding. I hereby award
6 attorneys fees, meaning I award the entitlement to
7 attorneys fees, but not as to the amount. That's what
8 the oral ruling says. You may not like it, you may wish
9 to have it changed, but that's what the ruling says, and
10 if you had a problem with it you should have filed a
11 motion to reconsider within ten days. You didn't. And
12 as far as this Court is concerned, that's the end of the
13 story, because it does accurately reflect my oral
14 ruling.
15 MS. GWYNN: Then for the record, Your Honor, I
16 just want to put on the record that Mr. Gleason was
17 there, the adversary you mentioned just now, the
18 adversary action, the motion that you were referring to
19 was Mr. Gleason's Rule 11 sanctions where the adversary
20 actions ruled against Carol Ann. That's the confusion.
21 THE COURT: I do not call Mr. Gleason she.
22 This refers to a female. It didn't refer to you by
23 name, but you were clearly the person who I was talking
24 about who was subject to this motion for sanctions.
25 MS. GWYNN: That was for Mr. Gleason's motion

1 that she, me, Eleanor Cole did not have standing to
2 bring an adversary against Carol Ann, and Mr. Gleason
3 also filed a Rule 11 sanctions against Ms. Cole and
4 myself and that order was dealing with Mr. Gleason's
5 motion on behalf of Carol Ann.
6 THE COURT: Then you should have filed a motion
7 to reconsider if I ran amuck.
8 MR. FARROW: Your Honor, for the record --
9 MS. GWYNN: Your Honor, at that point I
10 withdrew. It was Mr. Neiwirth.
11 THE COURT: Well, I've denied your motion.
12 MR. FARROW: Just for the benefit of the
13 record, because this is a serious situation. Number
14 one, as you read through the transcript you can clearly
15 tell it's dealing with the motion for disqualification.
16 That's number one.
17 Number two, these motions that she filed are
18 again, a continuing systematic problem that we have been
19 having with Ms. Gwynn. She had absolutely no basis to
20 file these motions, and I would make an ore tenus motion
21 for fees for having to prepare last night --
22 THE COURT: I will reserve on that and rule on
23 that on the 21st, all part and parcel of it.
24 MR. ROTELLA: We'll prepare that order, Your
25 Honor.

1 THE COURT: Thank you.

2 MR. ROTELLA: Thank you, Judge. Hope your day

3 gets better.

4 THE COURT: I hope your trip goes well and your

5 mother --

6 MR. ROTELLA: Thank you very much, Judge. I

7 appreciate your thinking of her.

8 (The proceedings were concluded.)

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1 CERTIFICATE

2

3 The State of Florida)

4 County of Palm Beach)

5

6 I, JACQUELYN ANN JONES, Court Reporter,

7 certify that I was authorized to and did

8 stenographically report the foregoing hearing; and that

9 the transcript is a true record of my stenographic

10 notes. I further certify that I am not a relative,

11 employee, attorney or counsel of any of the parties, nor

12 am I a relative or employee of any of the parties'

13 attorney or counsel connected with the action, nor am I

14 financially interested in the action.

15

16 In witness whereof I have hereunto set my hand

17 and seal this 8th day of April 8, 2005.

18

19

20 JACQUELYN ANN JONES

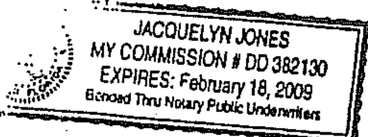
21 Commission No. DD 382130

22 Expires Feb 18, 2009

23

24

25



EXHIBIT

#12

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

2

3 Judge Paul G. Hyman, Jr.

4

5 In Re:

6 Case No. 03-32158-BKC-PGH

7

JAMES F. WALKER,

8

Debtor.

COPY

9

10

11 MOTION BY ELEANOR COLE FOR REHEARING
MOTION BY CARL SHUHI, FLORIDA PRECISION CALIPERS, INC.
12 FOR REHEARING
AMENDED MOTION FOR ATTORNEYS FEES AND COSTS AGAINST
13 ELEANOR C. COLE
MOTION BY MARY A. GWYNN TO STRIKE AND/OR VACATE ORDER
14 GRANTING DEBTOR'S EMERGENCY MOTION TO STRIKE MARY ALICE
GWYNN, ESQUIRE'S MOTION TO CLARIFY RECORD FOR FRAUD UPON
15 THE COURT

16

17 May 20, 2005

18

19 The above entitled cause came on for hearing before the
HONORABLE PAUL G. HYMAN, JR., one of the Judges in the
20 UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN
DISTRICT OF FLORIDA, at 1675 Palm Beach Lakes Boulevard,
21 West Palm Beach, Palm Beach County, Florida, on May 20,
2005, commencing on or about 11:00 a.m., and the
22 following proceedings were had:

23

24 Reported by: Jacquelyn Ann Jones, Court Reporter
OUELLETTE & MAULDIN COURT REPORTERS
25 (305) 358-8875

EXHIBIT 12

1 APPEARANCES:
2 GARY J. ROTELLA & ASSOCIATES, P.A.
By: GARY J. ROTELLA, ESQUIRE, and
3 JAY L. FARROW, ESQUIRE
On behalf of the Debtor
4
MARY ALICE GWYNN, P.A.
5 By: MARY ALICE GWYNN, ESQUIRE
On behalf of herself as interested party
6
LAW OFFICE OF LAWRENCE U. TAUBE
7 By: LAWRENCE U. TAUBE, ESQUIRE
Former counsel for Shuhi and Cole
8
BRUCE I. KRAVITZ, P.A.
9 By: BRUCE I. KRAVITZ, ESQUIRE
On behalf of Ms. Cole, Mr. Shuhi and
10 Florida Precision Calipers
11 DZIKOWSKI & WALSH
By: JOHN WALSH, ESQUIRE
12 On behalf of Trustee Patricia Dzikowski
13 LAW OFFICE OF KEVIN C. GLEASON
By: KEVIN C. GLEASON, ESQUIRE
14 On behalf of Carol Ann Walker
(Appearing telephonically)
15
16
17 I N D E X
18 Page
WITNESS: MARY ALICE GWYNN
19
DIRECT EXAMINATION BY MR. ROTELLA 45
20
21 E X H I B I T S
22 Debtor's Exhibits A - H, K, O received 43
23 Debtor's Exhibit J received 58
24 Debtor's Exhibit N received 63
25

1 we switch places so that the witness is facing her.
2 THE COURT: I've got no objection. I don't
3 care who sits on what side.
4 MR. WALSH: Judge, may I inquire of the Court
5 before Mr. Kravitz leaves, the notice of hearing outside
6 and that I have on the docket reflects that there's an
7 amended motion for attorney fees and costs against
8 Ms. Cole, that I guess has been filed by Mr. Rotella. Is
9 that one of the issues on appeal?
10 MR. ROTELLA: Yes, it is.
11 MR. WALSH: Okay.
12 MS. GWYNN: Your Honor, I guess we're going to
13 go by the --
14 THE COURT: If you object to the order that Mr.
15 Rotella has suggested, let me know. I have no preference
16 one way or the other, Ms. Gwynn.
17 MS. GWYNN: Thank you, Your Honor. Then I'll
18 proceed just with listed as number 3, it's Mary Alice
19 Gwynn's motion to strike and/or vacate order granting the
20 debtor's emergency motion to strike Mary Alice Gwynn's
21 motion to clarify the record for fraud upon the Court.
22 Your Honor, here we are once again. Mr.
23 Rotella seems to have trouble with orders. The
24 transcript says one thing, but the orders that actually
25 come out and are signed say something different. If the

1 Court will recall, I came -- there was a hearing on April
2 8 -- actually, on April 4, 2005 I filed a motion to
3 clarify the record on behalf of Florida Precision
4 Calipers.
5 THE COURT: Can I just suggest, let's turn to
6 the order that you think is improper, that does not
7 reflect the ruling, is that your Exhibit B?
8 MS. GWYNN: Exhibit B. This is what --
9 THE COURT: Tell me what within this order you
10 think does not -- is not properly reflective of the
11 order.
12 MS. GWYNN: Okay. The order says, order
13 granting Debtor James F. Walker's emergency motion to
14 strike Mary Alice Gwynn, Esquire's motion to clarify the
15 record for fraud upon the court. That's giving the
16 inference that I committed fraud upon the court. There
17 was no mention of fraud upon the court, nor did the Court
18 say I committed fraud upon the court. So what I did,
19 Your Honor, and I'll make this real succinct, because the
20 argument --
21 THE COURT: Is the only issue you take is the
22 title of the order?
23 MS. GWYNN: There are other issues, Your Honor.
24 That particular motion was not even heard. If you would
25 refer to paragraph, or page 11 of the transcript, which

1 is attached and tabbed, Your Honor, for your convenience,
2 page 11, like the second paragraph, we were waiting and
3 the Court says, "Until I see -- well, the other quick
4 matter, in my opinion, is the motion to clarify." I'm
5 just reading what the Court said. "Frankly, I don't
6 understand what it is you're seeking, Ms. Gwynn, in that
7 the record is what it is, documents that are in evidence
8 are in evidence. So we're hearing the motion to clarify"
9 --
10 THE COURT: My question was, the title of their
11 motion -- really I guess the real question is, what was
12 the title of your motion?
13 MS. GWYNN: Motion to clarify the record. And
14 that's what was heard. On page 11 the Court says --
15 THE COURT: Where is a copy of your motion?
16 MS. GWYNN: To clarify the record? It's
17 attached as Exhibit A.
18 That order itself infers that there was some
19 fraud upon the court. Okay.
20 THE COURT: Next point.
21 MS. GWYNN: All right. The next point, the only
22 mention of fraud at all in that transcript is when the
23 Court -- when I was referring to the bait and switch of
24 Exhibit KKK, the Court states, "Then file a motion to set
25 aside the judgment based on fraud on the court, if that's

1 your allegation, but I'm telling you, I can't do anything
2 on the record today." That's the only mention of
3 fraud.
4 THE COURT: Let's go line by line on -- I
5 agree, we'll change the title of the order.
6 Now, what else within the order itself is not
7 reflective of the order, the record, rather?
8 MS. GWYNN: Basically the only thing that
9 should be said -- the only --
10 THE COURT: Let's look at the order and tell me
11 what else is not properly reflected in the record.
12 MS. GWYNN: The order should -- number one, the
13 order should be titled, order denying Mary Alice Gwynn,
14 Esquire's motion to clarify the record. Number one, the
15 title should be changed.
16 THE COURT: Well, did it come before the court
17 on Mr. Walker's emergency motion to strike your motion to
18 clarify?
19 MS. GWYNN: No, Your Honor, that was not heard.
20 If you look at the transcript, that was not heard. The
21 only mention of Mr. Walker's order, or that particular
22 emergency motion, in their motion they requested
23 immediate referral to the Florida Bar.
24 THE COURT: Mr. Farrow, do you have a copy of
25 your motion?

1 MR. FARROW: I don't believe I have a copy of
2 our motion, but the -- I know that the motion requested
3 the immediate referral to the Florida --
4 THE COURT: That's not the issue. Let's go
5 back to the title. And I may have spoken too quickly,
6 because it's on -- it's order granting debtor James F.
7 Walker's emergency motion, so my question is, what is the
8 proper title of your motion? Was it James F. Walker's
9 emergency motion to strike Mary Alice Gwynn, Esquire's
10 motion to clarify record for fraud upon the court, is
11 that the proper title?
12 MR. ROTELLA: Yes.
13 MS. GWYNN: That was the title, but that's not
14 what the Court ruled on, and that's not what was heard.
15 The Court only ruled on my motion to clarify the record,
16 and on page 20, Your Honor, word for word, the Court --
17 THE COURT: Let me look at the transcript.
18 MS. GWYNN: Page 20, Your Honor. I put a tab
19 on it.
20 THE COURT: I understand. But I need to look
21 at the transcript. The first part of the transcript
22 deals with Mr. Taube's withdrawal.
23 All right, Ms. Gwynn, do you dispute that the
24 title of their motion was the motion to strike --
25 MS. GWYNN: I dispute that wholeheartedly.

1 THE COURT: -- for fraud on the court. Do you
2 dispute the title of their motion, not what was heard,
3 but the title of their motion?
4 MS. GWYNN: I dispute the title of their
5 motion, yes. And I dispute --
6 THE COURT: Does anyone have a copy of this?
7 MS. GWYNN: That was the title of their motion.
8 I beg your pardon, Your Honor, excuse me, that was of the
9 title of their motion, but that's not what was heard.
10 And that's not what was ruled on. Page 11 states exactly
11 what we were discussing, the motion to clarify. This is
12 what Mr. Rotella does, he does a bait and switch all the
13 time with his orders.
14 MR. ROTELLA: Needless to say, Judge, I take
15 some strenuous objection to that, under all of the
16 circumstances especially.
17 THE COURT: What else do you have a problem
18 with in the order, while I'm going through it, other than
19 the title?
20 MS. GWYNN: All that introductory verbiage,
21 because this is not what -- this cause was not before the
22 Court, this was not heard, that whole introductory
23 paragraph.
24 Paragraph 2, that's certainly not in the
25 record -- in the transcript.

1 Paragraph 3 is inaccurate. At the April the
2 6th, 2005 hearing I did admit that I was not representing
3 Florida Precision Calipers at that time, but I did state
4 I was representing Florida Precision Calipers at the time
5 of the removal hearing, which was the -- the purpose of
6 the motion to clarify was that KKK Exhibit. So I was
7 representing Mr. Shuhi at that time.
8 MR. FARROW: Your Honor, can I make some
9 comments as she goes through that by paragraph?
10 MS. GWYNN: Can I just finish? The Court asked
11 me first, please.
12 There was no mention -- there was mentioning,
13 on paragraph 3 --
14 THE COURT: Ms. Gwynn, before you go further,
15 can you look on page 20, line 14. What do I say?
16 "Number two, Ms. Gwynn, you are instructed not to file
17 any pleadings for anyone who you don't currently
18 represent." Isn't that what paragraph 2 in their ordered
19 and adjudged says?
20 MS. GWYNN: Yes, Your Honor. However, I think
21 I clarified the reason why I filed it, because I was
22 representing Mr. Shuhi at that time.
23 THE COURT: I understand your argument.
24 MS. GWYNN: Where is that reflected in this
25 order?

1 THE COURT: Paragraph 2. You just objected to
2 paragraph 2 of the order.
3 MS. GWYNN: Because paragraph 2 says more.
4 THE COURT: I'm talking about under the ordered
5 and adjudged, Gwynn is a hereby precluded from filing any
6 other --
7 MS. GWYNN: I'm sorry, Your Honor. I'm talking
8 about paragraph 2, the verbiage before the actual order.
9 The verbiage, Gwynn's motion, all of that paragraph,
10 that's what I'm referring that I object to, all that
11 verbiage, because that's not what -- that does not
12 reflect argument -- or anything in the transcript of the
13 Court's order.
14 THE COURT: Paragraph 2, again, tell me -- I
15 was looking at the wrong paragraph 2 when you -- so tell
16 me what is your problem with paragraph 2?
17 MS. GWYNN: Can I go from the beginning,
18 because I think maybe we had -- I was referring to the
19 initial, this cause, all of that I object to, all that
20 verbiage before paragraph 1, page 1. Paragraph 1 is
21 accurate. Paragraph 2, before the Court's ruling is just
22 Mr. Rotella's self serving verbiage, that's not part of
23 the Court's ruling or the transcript. Paragraph 4 is
24 not -- that's again, Mr. Rotella's added verbiage, self
25 serving verbiage, and not part of the transcript.

1 MR. ROTELLA: Judge, I trust you'll receive my
2 comment as it pertains to all this.
3 MS. GWYNN: And then it says, ordered and
4 adjudged, debtor's motion to strike Gwynn's motion is
5 granted. That's not what the Court ruled. There's
6 nowhere in this transcript that the Court granted the
7 debtor's motion. The Court denied my motion to clarify.
8 Somehow the order got switched and granted his motion to
9 strike.
10 THE COURT: What else in the order?
11 MS. GWYNN: Paragraph 3, the Court did make
12 that ruling that you were going -- that the Court is
13 going to deny without prejudice the request to refer the
14 matter to the Florida Bar. That's in the transcript.
15 And again, paragraph 4, I don't believe the Court
16 reserved any jurisdiction to award attorneys fees and
17 costs.
18 THE COURT: Line 21, page 20.
19 MS. GWYNN: Okay. So I'd just like -- we
20 wouldn't be here today if the order would have reflected
21 what the Court heard.
22 THE COURT: Mr. Rotella or Mr. Farrow.
23 MR. FARROW: Your Honor, the comment that I
24 would have is more of a question than a comment. Does
25 Ms. Gwynn really believe that this Court doesn't have

1 discretion to go beyond what happened in the transcript
2 and the record. That's number one.
3 Number two is that, with respect to her
4 objection to paragraph 2, and I'm not under the ordered
5 and adjudged, I'm under the --
6 You know what, let me start -- excuse me, let
7 me back up. Ms. Gwynn objected to what she considered to
8 be the verbiage of the, this cause having come before the
9 Court. I don't see how any of that as far as the
10 appearances --
11 THE COURT: I agree. Move on.
12 MR. FARROW: Paragraph 1, I believe she had no
13 objection to.
14 THE COURT: To me the only real issue is
15 paragraph 2, and whether it should be an order denying
16 her motion to clarify or granting your motion to strike.
17 To me that's the only two issues.
18 MR. FARROW: With respect --
19 THE COURT: And having read the order and
20 remembered the hearing and having reviewed the
21 transcript.
22 MR. FARROW: Your Honor, with respect to
23 paragraph 2, Gwynn's motion to clarify the record clearly
24 indicated, or it was filed on behalf of Florida Precision
25 Calipers, or Carl Shuhi, it was seeking to somehow reach

1 back into the removal trial and have evidence excluded on
2 the basis of authenticity when that issue was decided on
3 that date. As a matter of fact, at that hearing I read a
4 transcript where Ms. Gwynn said, I have no objection to
5 authenticity. The only issue was attorney client
6 privilege.
7 THE COURT: Go to the verbiage in paragraph 2.
8 I think the real only thing that I need argument on is
9 after the second sentence. The first two sentences,
10 I think are completely, absolutely correct, true and
11 correct.
12 MR. FARROW: Could we have a moment, Your
13 Honor?
14 THE COURT: Yes. My only question is the last
15 sentence.
16 MR. FARROW: Your Honor, we made argument at
17 the hearing that Ms. Gwynn implicitly filed this motion
18 not only on behalf of Florida Precision Calipers, but
19 also on behalf of her associate or, I'm not going to say
20 friend, I'm just going to say associate, Linda Walden.
21 And her motion to clarify the record, if it was granted,
22 would have done nothing but help Ms. Walden's cause,
23 especially with regards to Exhibit KKK, which are by far
24 the most damaging evidence ever admitted during the five
25 day removal trial over the course of six weeks.

1 MS. GWYNN: Again, Your Honor, this is
2 improper. He's adding additional information or argument
3 that's not included in the transcript. This is my
4 problem throughout all these orders. Somehow all this
5 extra verbiage appears in these orders.
6 THE COURT: Mr. Farrow, let's talk about
7 whether it should be a motion denying her motion to
8 clarify, or a motion to strike, granting your motion to
9 strike.
10 MR. FARROW: To be honest with the Court, I
11 don't have -- I wouldn't be able to have a position
12 unless I saw --
13 MR. ROTELLA: And it might be helpful to know if
14 both of those matters were on the docket for the same
15 morning.
16 MS. GWYNN: There's not one mention of the
17 Court hearing your motion. The Court stated on page 11,
18 "The other quick matter in my opinion, is the motion to
19 clarify." And that's what this whole rest of this
20 transcript is dealing with.
21 THE COURT: Hold on. This is what I'm going to
22 do. I am going to amend the order to reflect that it is
23 Ms. Gwynn's motion to clarify the record that the Court
24 denied. And that's at paragraph 2, the last sentence.
25 Frankly, I agree, and it was my thought process, reflects

1 my thought process, I guess I should say.
2 MS. GWYNN: So if I understand you correctly,
3 Your Honor, that paragraph 2 is --
4 THE COURT: Well, I am amending the order to
5 reflect that it is not the motion to strike that was
6 granted, it is your motion to clarify that was denied.
7 MS. GWYNN: So paragraph 2, with the exception
8 of the -- I just want to make sure I understand correctly
9 what is going to be included in that paragraph.
10 THE COURT: Paragraph 1 under the ordered and
11 adjudged should reflect debtor's -- Mary Alice Gwynn's
12 motion to strike -- or to clarify, is denied, whatever
13 the proper title of the motion is, the title of the order
14 should reflect that. And in the preamble it should
15 reflect that was what was heard. The rest of the
16 preamble is appropriate, the rest of the findings are
17 appropriate, and the rest of the ordered and adjudged is
18 appropriate. Got it, Mr. Farrow?
19 MR. FARROW: Yes.
20 MR. WALSH: Does that then reopen the motion
21 that the debtor filed as to precluding and prohibiting
22 Ms. Gwynn from filing further pleadings?
23 THE COURT: No. That does not change that
24 whatsoever. I clearly ordered she shall not file
25 pleadings for people, entities, or any other person who

1 she does not represent.
2 MR. WALSH: And the Court also denied referral
3 to the Florida Bar.
4 THE COURT: Without prejudice.
5 MR. WALSH: So that's still contained in this
6 order despite the fact that those reliefs were requested
7 in the motion that was filed here?
8 THE COURT: Yes.
9 MS. GWYNN: Your Honor, so paragraph 2, where
10 we have all that verbiage that was not really argued or
11 mentioned, the Court is admitting that?
12 THE COURT: Yes. I agree with that.
13 MS. GWYNN: You agree with that because that
14 was your thought process, but it wasn't included in the
15 transcript.
16 THE COURT: Yes. And frankly, I think it was
17 in the pleadings and was, at least indirectly argued, and
18 that was certainly my thought process, that you were
19 trying to do something to protect the former trustee who
20 had been removed for comitting perjury, et cetera.
21 MS. GWYNN: Your Honor, again, on Mr. Rotella
22 and myself endless battles on what the order should read
23 and what actually transpired at the hearing, this
24 particular matter, if the Court will remember, this is
25 Mary Alice Gwynn's motion to strike and\or vacate order

1 granting debtor's emergency motion to preclude Mary Alice
2 Gwynn from representing Carl Shuhi and Florida Precision
3 pursuant to Mary Alice Gwynn's notice of limited
4 appearance on behalf of creditor Carl Shuhi.
5 This incident occurred when I filed a notice of
6 limited appearance to represent Mr. Shuhi at his
7 deposition, recent deposition. There was an emergency
8 hearing that was held via telephone, and there was not a
9 court reporter, the way I understood it.
10 THE COURT: I don't --
11 MR. ROTELLA: Of course there was a court
12 reporter.
13 THE COURT: I was going to say, I don't conduct
14 any hearing without a court reporter.
15 MS. GWYNN: Well, I had my paralegal -- I had
16 both to call the court reporter that's used and they said
17 there was no court reporter for this hearing. I couldn't
18 get a transcript.
19 THE COURT: Mr. Rotella, I don't know which
20 court reporter you used --
21 MR. ROTELLA: I don't know, Judge, but
22 certainly we had a court reporter.
23 MR. FARROW: I believe it was Kline Barry and
24 Associates, Your Honor.
25 THE COURT: Okay.

1 MS. GWYNN: So you actually called the court
2 reporter, it was not conducted from your chambers, Your
3 Honor?
4 THE COURT: The way I conduct this type of
5 telephone hearing is, I ask one of the parties, usually
6 the movant, to have a court reporter in their presence,
7 put me on the speaker phone, I will call into that
8 number. I thought frankly, you were present in the room,
9 but I don't recall in this particular instance, but there
10 was -- I always ask one of the parties to have a court
11 reporter, and I always verify, or at least try
12 to remember to verify that there is a court reporter
13 present. Maybe they conferenced you in. I don't recall.
14 But my recollection is Mr. Shuhi was on the phone --
15 MS. GWYNN: He was in -- Mr. Shuhi was in my
16 office, he was on the phone, correct.
17 Well, again, Your Honor, I don't have the
18 transcript to compare, but again --
19 THE COURT: Let's look at the order and tell us
20 what it is you object to.
21 MS. GWYNN: Well, first of all, this is a
22 pattern of practice with Rotella's office.
23 THE COURT: I don't need to hear that again.
24 Just tell me what in the order is not proper.
25 MS. GWYNN: For the record, Your Honor, I

1 didn't even get these -- these were faxed to me at 8 a.m.
2 I believe it was. The hearing was held, if you recall,
3 late in the afternoon.
4 THE COURT: Yes, ma'am.
5 MS. GWYNN: And then the very next day was
6 Mr. Shuhi's deposition. Let me get the time line here.
7 MR. ROTELLA: And of course, Your Honor, the
8 purpose was to have an order in place before Mr. Shuhi
9 and Ms. Gwynn arrived together as they happened to
10 come.
11 THE COURT: I asked what is not reflective of
12 my order.
13 MS. GWYNN: Well, the order, without going into
14 all the verbiage in the order, basically the order was
15 sent to me in route while I was driving to Mr. Rotella's
16 office for the deposition, it said, please review and get
17 back to -- you know, if you have any concerns. Well, by
18 the time I get to Mr. Rotella's office at 10 a.m. the
19 order was already signed. So I never even had --
20 THE COURT: Let's assume that's true. Now what
21 is your problem with the order?
22 MS. GWYNN: The order is, again, Mr. Rotella's
23 pattern of practice that is including self serving
24 verbiage which did not occur during our phone
25 conversation. For instance, on page 2 he's bringing in

1 all the dialogue that went on at the April 4th, 2005
2 hearing. On my motion he brings --
3 THE COURT: Which paragraph are you looking at?
4 MS. GWYNN: Paragraph 1. Your Honor, basically
5 that hearing, there's all the verbiage on page 2, 3, 4,
6 5, leading up to the Court's actual ruling on page 6. If
7 you recall, that actual hearing only took about ten
8 minutes at the most. To get five pages of verbiage,
9 again, this is what Mr. Rotella does, he asserts
10 arguments and things were brought up in previous hearings
11 that were actually not brought up at the present hearing
12 to bolster his position. Then when we get down to the
13 ordered and adjudged, the only thing that I agree with is
14 paragraph 1, paragraph 2.
15 THE COURT: Okay.
16 MS. GWYNN: Paragraph 3.
17 THE COURT: You agree with those?
18 MS. GWYNN: Yes. Because this is what the
19 Court ruled on its -- all the self serving verbiage of
20 arguments that he tried to incorporate to bolster his
21 position. That was not part of the hearing. The hearing
22 took ten minutes.
23 THE COURT: Tell me which part under the
24 ordered and adjudged does not reflect the Court's ruling,
25 please.

1 MS. GWYNN: Paragraph 5.
2 THE COURT: Paragraph 5 does not? I recall
3 reserving jurisdiction to assess sanctions. I routinely
4 do that. Because generally at the time of these types of
5 emergency hearings I do not expect the party prevailing
6 to be able to tell me exactly how much in attorneys fees
7 they are entitled to and how much in costs they've
8 incurred. I routinely reserve.
9 MS. GWYNN: You just do that and then have an
10 entitlement and then make a ruling that -- okay.
11 THE COURT: Frankly, I don't think there's -- I
12 haven't -- I didn't say there was entitlement, I said I
13 reserve jurisdiction to award.
14 MS. GWYNN: I guess, Your Honor, just for the
15 record I just wanted -- this has been a continuous
16 problem.
17 THE COURT: Is there anything in the verbiage
18 that is not accurately reflecting the record?
19 MS. GWYNN: Your Honor, the only thing that
20 reflects the record, without the transcript, would be
21 what is ordered and adjudged. All this other first,
22 second, third, fourth, five pages, is nothing more than
23 Mr. Rotella's self serving verbiage that, if this was all
24 addressed at that telephonic hearing it would have been
25 40 minutes. It was ten.

1 MR. ROTELLA: Those previous pages, Judge, are
2 the record. They are very exacting. They are documented
3 in terms of where the information comes from, or the
4 verbiage, if Ms. Gwynn prefers that word, that order is
5 extremely exacting. We have never given you an order
6 that wasn't exacting. We have painstakingly assured that
7 they are exacting, because we don't want to hear you say,
8 you gave me a bad order.
9 THE COURT: Ms. Gwynn, I think the order does
10 reflect the record. I am intimately familiar with the
11 record in this case. I am intimately familiar with what
12 the court orders say, what the pleadings say, because
13 they are revisited over and over again. And I'm denying
14 your motion concerning that order.
15 MR. FARROW: Your Honor, would you be reserving
16 jurisdiction as to these particular matters as well?
17 MR. ROTELLA: Judge, could we take five or ten
18 minutes to get turned around and maybe run to the men's
19 room or ladies' room as the case may be?
20 THE COURT: Sure.
21 MS. GWYNN: Your Honor, I believe then that my
22 order that we just ruled on the motion to clarify that
23 we're going to correct, I'm also going to reserve for
24 attorney fees and costs for having to bring this to
25 clarify the order.

1 THE COURT: On the last one I'll deny any
2 request for sanctions under the last one because I denied
3 your motion. You'll only get sanctions if your motion is
4 granted, or if your objection is sustained.
5 Before we get started I want to lay out the
6 parameters for this afternoon. Sit down. The last
7 matter that's before me is Mr. Rotella's motion for
8 sanctions based on a pleading filed by you, Ms. Gwynn,
9 wherein the essence of his motion is, you filed a motion
10 making numerous allegations that had no basis in fact,
11 the issues do not relate to anything not alleged.
12 The way I am planning on conducting this
13 hearing is, Mr. Rotella has the initial burden of
14 showing, and it may be his own testimony, that those
15 allegations as to he or his client are incorrect. Once
16 he puts on a prima facie case on that you then have a
17 burden of refuting that, in essence saying yes, I did
18 have a basis in fact to make those allegations.
19 I'm not going to permit testimony or
20 introduction of evidence on any issues not directly
21 related to the allegations in the pleading you filed, Ms.
22 Gwynn.
23 What made me even think about this is the idea
24 that you're going to call Ms. Menotte. My review of the
25 pleadings doesn't have any allegation concerning Ms.

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2 C E R T I F I C A T E

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4 The State of Florida)

5 County of Palm Beach)

6

7 I, JACQUELYN ANN JONES, Court Reporter, certify

8 that I was authorized to and did stenographically report

9 the foregoing hearing; and that the transcript is a true

10 record of my stenographic notes.

11 I further certify that I am not a relative,

12 employee, attorney or counsel of any of the parties, nor

13 am I a relative or employee of any of the parties'

14 attorney or counsel connected with the action, nor am I

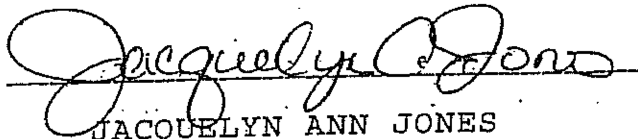
15 financially interested in the action.

16

17 In witness whereof I have hereunto set my hand

18 and seal this 9th day of June, 2005.

19

20 

21 JACQUELYN ANN JONES

22 Commission No. CC 995956

23 Expires Feb 18, 2005

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