EXHIBIT

#1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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

JAMES F. WALKER, Chapter 7 Proceedings

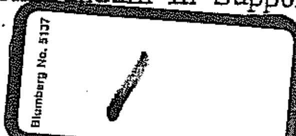
Debtor.
_______________________________/

ORDER GRANTING MOTION FOR SANCTIONS PURSUANT TO BANKRUPTCY RULE 9011

THIS CAUSE having come on to be heard before this Court on Friday, May 28, 2004 at 9:30 a.m. upon Debtor, James F. Walker's Motion For Sanctions Pursuant To Bankruptcy Rule 9011 (hereinafter "Debtor's Motion For Sanctions"), 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"), and Mary Alice Gwynn ("Gwynn"), on behalf of Eleanor C. Cole ("Creditor Cole"), having heard argument from counsel for the respective parties, having reviewed the Court file, and, being otherwise more fully and completely advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. On April 21, 2004, Creditor Cole, through her counsel, Gwynn, filed Creditor Eleanor C. Cole's Emergency Motion To Disqualify The Law Firm Of Gary J. Rotella & Associates, P.A. From Representing The Debtor (hereinafter "Cole's Emergency Motion") [C.P. #292]. On April 26, 2004, Creditor Cole, through her counsel, Gwynn, filed Creditor, Eleanor C. Cole's Supplemental Memorandum In Support Of Her Emergency Motion To



Disqualify The Law Firm Of Gary J. Rotella & Associates, P.A. From Representing The Debtor (hereinafter "Cole's Supplemental Motion") [C.P. #311].

2. Under cover of April 24, 2004, counsel for Debtor, James F. Walker (hereinafter "Debtor") served upon Gwynn a correspondence and a Motion For Sanctions Pursuant To Bankruptcy Rule 9011 (hereinafter "Debtor's 9011 Motion") which were admitted into evidence at the May 28, 2003 Hearing as Debtor's Exhibit "1" and Exhibit "3" respectively. On April 27, 2004, counsel for Debtor served a second correspondence on Gwynn specifically incorporating Cole's Supplemental Memorandum into Debtor's 9011 Motion which was admitted into evidence at the May 28, 2003 Hearing as Debtors Exhibit "2".

3. This Court as well received the April 16, 2004 Status Hearing On Enforcement Of Restitution Transcript in the matter styled *State Of Florida vs. James Walker*, In The Circuit Court Of The Seventeenth Judicial Circuit, In And For Broward County, Florida - Case Number: 90-20599-CF10A, and the March 17, 2004 Motion By Creditor, Eleanor C. Cole For Protective Order Hearing Transcript [C.P. 237] which were admitted into evidence as Exhibits "4" and Exhibit "5" respectively.

4. This Court finds that Creditor Cole had no standing whatsoever to raise the issues in Cole's Emergency Motion or Cole's Supplemental Memorandum. As such, this Court holds that Creditor Cole had no legal basis upon which

to file Cole's Emergency Motion and Cole's Supplemental Memorandum.

5. Accordingly, this Court finds that Debtor's counsel properly served and notified Creditor Cole's counsel, Gwynn of an intention to seek sanctions pursuant to Bankruptcy Rule 9011 and that Gwynn failed and/or refused to withdraw Cole's Emergency Motion and Cole's Supplemental Motion. As such, an award of attorney's fees and expenses is appropriate pursuant to Bankruptcy Rule 9011.

6. Debtor's counsel is hereby directed to submit its attorneys fees and expenses as the same relate to Debtor's Motion For Sanctions which this Court will consider and award upon proper notice and hearing for the same date and time as Carol Ann Walker's Motion For Sanctions is scheduled.

DONE AND ORDERED in Chambers in the Southern District of Florida this 15 day of June, 2004.

PAUL G. HYMAN

PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is directed to mail a conformed copy of the foregoing order to all parties on the Service List immediately upon receipt)

SERVICE LIST

Heidi Feinman, Esquire
Office of the U.S. Trustee
51 Southwest 1st Avenue, Suite 1204
Miami, Florida 33130

Kevin C. Gleason, Esquire
Law Office of Kevin Gleason, P.A.
2699 Stirling Road, Suite A-201
Fort Lauderdale, Florida 33312

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

Francis L. Carter, Esquire
Gary M. Murphree, Esquire
Ferrell Schultz Carter Zumpano & Fertel, P.A.
201 South Biscayne Boulevard, 34th Floor
Miami, Florida 33131-4332

James F. Walker
2145 Northwest 17th Street
Delray Beach, Florida 33445

EXHIBIT

#2

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
2
Judge Paul G. Hyman, Jr.
3

4 In Re:

5 Case No. 03-32158-BKC-PGH

6
JAMES F. WALKER,
7
Debtor.
8

9

10 VARIOUS MOTIONS

11

12 April 28, 2004

13

14
The above entitled cause came on for hearing before the
15 HONORABLE PAUL G. HYMAN, JR., one of the Judges in the
UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN
16 DISTRICT OF FLORIDA, at 701 Clematis Street, West Palm
Beach, Palm Beach County, Florida, on April 28, 2004,
17 commencing on or about 10:30 a.m., and the following
proceedings were had:
18

19

20

21
ORIGINAL
22

23

24 Reported by: Jacquelyn Ann Jones, Court Reporter

25 OUELLETTE & MAULDIN COURT REPORTERS
(305) 358-8875

412

1 MR. GLEASON: So there's no ruling on that
2 motion.
3 THE COURT: None whatsoever.
4 MR. GLEASON: Thank you, Your Honor.
5 THE COURT: Any other matters that I need to
6 deal with? Mr. Rotella, you need to come up here
7 because they can't hear you.
8 MR. ROTELLA: I have one that doesn't involve
9 the parties on the phone, Judge. However, that would be
10 the last item on your calendar. That's my motion to
11 shorten the 21 day notice period for the filing of
12 motion for sanctions pursuant to 9011.
13 Here's what occurred. I received the
14 emergency motion from Ms. Gwynn on Wednesday. I
15 actually learned that the motion was set before I
16 received it. It came by fax, it had no exhibits.
17 Nevertheless we reacted to it. We worked up through the
18 weekend. We were told that this was an evidentiary
19 hearing, we prepared for an evidentiary hearing.
20 THE COURT: Who told you it was an evidentiary
21 hearing?
22 MR. ROTELLA: Ms. Gwynn's office told us it was
23 an evidentiary hearing, and she subpoenaed all of these
24 witnesses.
25 MS. GWYNN: I was under the impression, Your

1 Honor, it was an evidentiary hearing.

2 THE COURT: Ms. Gwynn, on a motion calendar, I
3 do not accept evidence. If you think there's an
4 evidentiary hearing, you need to check with Kristina,
5 and I specially set all evidentiary hearing matters.

6 MS. GWYNN: I apologize, Your Honor. It was a
7 misunderstanding. I thought it was an evidentiary
8 hearing based on the hearing that we had on the phone.

9 MR. ROTELLA: We prepared --

10 THE COURT: I've never said that there was an
11 evidentiary hearing today, if that's what you're telling
12 me.

13 MR. ROTELLA: We prepared a motion for contempt
14 and sanctions. We prepared a 21 day notice letter. I
15 prepared the motion to shorten time. I sent it all to
16 Ms. Gwynn on Saturday. We worked through Saturday and
17 Sunday preparing for the hearing, preparing the
18 evidence. We have it all here. It's available for
19 anyone to review.

20 On Monday evening at 5:05 I get, in response
21 in an effort to correct and make good her original
22 emergency motion, her supplemental memorandum of law,
23 which I believe the Court has seen, a whole other big
24 pleading. We responded to that. I never got the
25 exhibits. That got faxed to me. Today I don't have the

1 exhibits. So it's interesting Ms. Gwynn says I want to
2 move to strike. I had mine couried to her last night.
3 I called and said we just finished our responses, do you
4 want me to fax them without exhibits or would you like
5 them couried. This is just gone down badly, Judge.
6 Within both the emergency motion and the supplemental
7 memorandum of law, there's no legal or factual support
8 for anything she has to say.
9 MS. GWYNN: Your Honor, can I respond? There
10 were only three exhibits attached to the supplemental
11 memorandum of law. Mr. Rotella had them all. One was
12 the assignment that he drafted and he signed, the second
13 exhibit was a letter written by Mr. Rotella to myself,
14 and the third exhibit was the case law that he could
15 have easily looked up in Westlaw, so he's not
16 prejudiced.
17 And lastly, Your Honor, this -- I haven't even
18 responded to his motion from Rule 11 sanctions. I just
19 received it on Saturday. And lastly, Cole is -- if she
20 does, and she's seriously contemplating bringing an
21 adversary action, Mr. Rotella may be in a conflict
22 situation. So the motion was not brought without merit.
23 MR. ROTELLA: May I make a comment, Judge? All
24 of this, and the Court, I wasn't in court last week, I
25 apologize, Mr. Farrow was there, and the Court

1 admonished me through Mr. Farrow, all of this, Judge,
2 what the Court described as animosity, comes as a
3 consequence of my wanting to do one thing, take Ms.
4 Cole's deposition. That's all I've asked for. Other
5 than that, I would have never seen Ms. Gwynn. Ms. Gwynn
6 didn't file a 727, which she's prosecuting through the
7 trustee, she didn't file a 523, she didn't file any
8 objections to claimed exemptions. I would have no
9 reason to see her. We started this in September, our
10 effort to take Ms. Cole's deposition. There have been
11 motions to compel. There have been accommodations by
12 the Court. There have been interrogatories. There have
13 been three sets of answers to interrogatories that have
14 been deficient. Then Judge, you finally said, if you
15 don't get this right I'm striking your pleadings. And
16 that's when this thing heats up. The reason for the Bar
17 complaint, the reason for these other allegations is,
18 quite frankly, Judge, the record will bear it out, that
19 Ms. Gwynn has not been honest with this Court. Ms.
20 Gwynn has said to the Court recently, I believe --
21 THE COURT: Tell me where under Rule 11 I have
22 authority to shorten the notice, if I do.
23 MR. ROTELLA: It says, the period between the
24 final --
25 THE COURT: What paragraph are you reading?

1 MR. ROTELLA: Let me get that, Judge. But the
2 language is, and given the Court's discretion to
3 prescribe another period. 9006(c), Judge.
4 I had hoped, Judge, that Ms. Gwynn might push
5 this off for 21 days, and during that period of time
6 determine for herself that the allegations were not
7 supportable either in fact or in law. And of course, we
8 had no choice, it got set for a week, we worked
9 devilishly hard to get ready for it, and we're ready.
10 MS. GWYNN: Your Honor, the motion was not
11 brought without -- there were grounds for it. They were
12 pretty obvious to me and they were pretty obvious to my
13 client --
14 THE COURT: Ms. Gwynn, I've got news for you. I
15 don't understand why you're coming before me on things
16 that occurred in State Court. You got problems with Mr.
17 Rotella's conduct in State Court, take it to the State
18 Court, not here.
19 MS. GWYNN: Your Honor, but there were other
20 issues. It was the assignment --
21 THE COURT: The only other issue is the issue
22 concerning that he may be a witness. That's the only
23 other issue that I see, frankly, and the issue that your
24 client has no standing to raise. The only potential
25 party who has the standing to raise some of these issues

1 is the Chapter 7 trustee, not your client. I'm going to
2 deny it because it's moot, and frankly, Mr. Rotella, at
3 this point, in that I've ruled on the motion under Rule
4 11. If you wish to seek sanctions under any other
5 authority, you may do so.
6 MR. ROTELLA: Thank you, Your Honor.
7 THE COURT: And believe me, I'm not happy with
8 what happened and the basis of what happened, as I
9 indicated in my ruling. So this should not be in any
10 way a rubber stamp that which she did, the motion was
11 appropriate, or the grounds were appropriate, or the
12 fact that it needed to get set today.
13 MR. ROTELLA: Thank you.
14 THE COURT: Anything else? Then I will see
15 everyone the 5th at 3:00.
16 By the way, one other thing, is the 5th going
17 to be evidentiary? The reason I'm asking, because if it
18 is, I want there to be an exchange of documents, I want
19 everyone to make sure that all the attorneys who are out
20 of town, you need to be familiar with the local rules,
21 you need to have all exhibits premarked with an exhibit
22 register, you need to exchange them before -- by the
23 close of Monday the 3rd, and if you have any witnesses
24 you need to exchange the identities of those witnesses
25 by the close of business Wednesday the 3rd. And when I

1 say exchange, I don't mean put them in the mail on the
2 3rd. The other side is to have receipt of any exhibits
3 or I will exclude them. Is that clear to everyone?
4 MR. CARTER: Yes. Your Honor, I assume it's
5 Monday the 3rd.
6 THE COURT: Monday. What did I say, Wednesday?
7 MR. CARTER: Yes, Your Honor.
8 The other people, do you understand what I
9 just said?
10 MR. CARTER: I don't know whether they're still
11 on the phone, Your Honor.
12 MS. WERNICK: Your Honor, this Aviva Wernick
13 for Ms. Lundborg. I don't believe that the hearing on
14 May 5th would be an evidentiary hearing. To us this is
15 a question of law, of Bahamian law, and whether it
16 was Ms. Lundborg's property pre-petition or not, under
17 Bahamian law.
18 MR. CARTER: We also obviously, put, you know,
19 about 20 exhibits already with our affidavit, Mr.
20 Turnquest's affidavit. And to the extent that any of
21 that is, you know, argue that they're not real or
22 there's something else, we would like to know about it.
23 THE COURT: I qualified my statement with a,
24 if it is an evidentiary hearing. If it's not, it's not
25 a problem. But if it's evidentiary, you need to comply

1 with the local rules, prepare exhibit registers, you
2 need to premark your exhibits, and that needs to be done
3 and circulated by Monday the 3rd, along with a list of
4 any witnesses. Okay. Everyone understand that? Good.
5 I'll see you on Wednesday the 5th.
6 Mr. Rotella, if you could prepare the orders
7 on the motions -- Ms. Gwynn, you prepare the orders on
8 the motions for protective order, you prepare the orders
9 on the motion to disqualify. Mr. Gleason, you're going
10 to renotice the motion to appoint a trustee, if
11 necessary. What other things do I need to worry about?
12 MR. ROTELLA: Motion to shorten.
13 THE COURT: Denied without prejudice to you
14 seeking sanctions on the appropriate grounds. Do I need
15 any other orders?
16 MR. GLEASON: I have my notes, Judge. There
17 were five items.
18 THE COURT: I just want to make sure we get
19 orders.
20 MS. GWYNN: I believe the other order, Your
21 Honor, was regarding the subpoenas.
22 THE COURT: Yes. And you're going to do those.
23 MR. GLEASON: And the motion to continue the
24 hearings. I imagine that Mr. Carter is doing those.
25 THE COURT: Could you please give him a call

1 and suggest that.

2 MR. GLEASON: Yes, I will.

3 THE COURT: In fact, I think we'll ask to

4 renotice it. And are you going to withdraw your motion

5 to reset?

6 MS. GWYNN: Yes, Your Honor.

7 THE COURT: Okay. Please do that. Thank you.

8 (The proceedings were concluded.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1

2 CERTIFICATE

3

4 The State of Florida)

5 County of Palm Beach)

6

7 I, JACQUELYN ANN JONES, Court Reporter,

8 certify that I was authorized to and did

9 stenographically report the foregoing hearing; and that

10 the transcript is a true record of my stenographic

11 notes. 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.

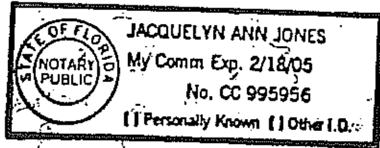
16

17 In witness whereof I have hereunto set my hand

18 and seal this 27 day of May, 2004.

19

20



21 JACQUELYN ANN JONES

22 Commission No. CC 995956

23 Expires Feb 18, 2005

24

25

EXHIBIT

#3

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

FILE COPY

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

JAMES F. WALKER,

Debtor.

______________________/

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 FULES OF CIVIL PROCEDURE

COMES NOW, Mary Alice Gwynn, Esquire, as an interested party and as former counsel to Creditor, Eleanor Cole, and files this Motion to Strike or Dismiss Debtor's Motion for Sanctions Against Mary Alice Gwynn Pursuant to Bankruptcy Rule 9011, for the Debtor's failure to comply with the 21 day notice requirement, known as the "safe harbor" provision of Rule 11 of the Federal Rules of Civil Procedure, and further states:

BACKGROUND FACTS ON DEBTOR'S MOTION FOR SANCTIONS AGAINST MARY ALICE GWYNN PURSUANT TO BANKRUPTCY RULE 9011

1. On **April 21, 2004**, Eleanor Cole filed her Emergency Motion to Disqualify the Law Firm of Gary Rotella, docket entry #292.
2. On **April 26, 2004**, Gary Rotella, Esq., on behalf of Debtor, filed his Motion to Shorten the twenty-one (21) day notice period for filing a Motion for Sanctions Pursuant to Bankruptcy Rule 9011, docket entry #321.
3. On **April 28, 2004**, the Court heard Eleanor Cole's Motion to Disqualify the Law Firm of Gary J. Rotella. At that hearing, Debtor's Motion to Shorten Time was also heard by the Court and the Court ruled as follows:

a. On page 44 of the Court transcript, the Court denied Mr. Rotella's Motion as it was moot. See attached Exhibit "A".

4. On **May 12, 2004**, the Court's Order Denying the Debtor's Motion to Shorten the 21 Day Notice Period for Filing Sanctions Pursuant to Bankruptcy Rule 9011 was entered at docket entry #350.

5. On **May 28, 2004**, the Court heard Eleanor Cole's Renewed Motion to Disqualify the Law Firm of Gary J. Rotella.

6. Shortly thereafter, undersigned counsel, Mary Alice Gwynn, withdrew as counsel for Eleanor Cole, and Arthur Neiwirth took over Ms. Cole's representation.

7. While Ms. Gwynn was out on medical leave, Mr. Rotella prepared the Order Granting the Debtor's Motion for Sanctions Pursuant to Bankruptcy Rule 9011. (See Exhibit "B")

8. In Mr. Rotella's prepared Order at paragraph #5, he includes the following language:

> "Accordingly, this Court finds that Debtor's counsel properly served and notified Creditor Cole's counsel, Gwynn of an intention to seek sanctions pursuant to Bankruptcy Rule 9011 and that Gwynn failed and/or refused to withdraw Cole's Emergency Motion and Cole's Supplemental Motion. As such, an award of attorney's fees and expenses is appropriate pursuant to Bankruptcy Rule 9011."

9. Mr. Rotella conveniently included, or intentionally included, this self-serving language in his Order, which is inconsistent with the Court's prior ruling of April 28, 2004, (See attached Exhibit "A") and Order dated May 12, 2004, denying the Debtor's Motion to Shorten Time under Bankruptcy Rule 9011.

10. Filed contemporaneously with this Motion is Mary Alice Gwynn's Motion to Amend and Correct the Court's Order Granting the Debtor's Motion for Sanctions

Pursuant to Rule 9011.

THE DEBTOR IS BARRED FROM FILING HIS MOTION FOR SANCTIONS PURSUANT TO RULE 11, OF THE FEDERAL RULES OF CIVIL PROCEDURE

11. The Debtor, James Walker, and his counsel, Gary Rotella, Esq. are absolutely barred and precluded from seeking sanctions against Ms. Gwynn, or her former client, for failure to comply with the twenty-one day "safe harbor" rule.

12. A law firm is precluded from seeking sanction as a result of a Court Order disposing of or denying the Motion before the expiration of the twenty-one day.

"First, a party must serve a motion for sanctions on the allegedly offending party, and second, twenty-one or more days after service, the party must file the motion with the court, provided the allegedly offending claim was not withdrawn or corrected during the twenty-one day period. Fed R Civ P 11."

13. As the Advisory Committee's Note and pertinent authority also make clear, the twenty-one day "safe harbor" period guaranteed by the Rule is intended to "give litigants a specific amount of time [after service of a motion for sanctions] in which to withdraw an offending filing or allegation before a motion is filed" with the court. Id. Thus, a motion for sanctions must not be filed if the alleged violation is corrected by the opposing party within the twenty-one day "safe harbor" period. Giganti v. Gen-X Strategies, Inc., 222 F.R.D. 299, 306 (E.D.Va. 2004). Nor can sanctions be imposed where a motion for sanctions is filed earlier than twenty-one days after service of the motion on the opposing party or ***where the allegedly offending claim is dismissed by court order less than twenty-one days after service.*** Id. (Emphasis added).

14. This is so because in both instances one, when the motion is filed less than twenty-one days after service and two, when the claim is dismissed by court

order less than twenty-one days after serve – the allegedly offending party is not afforded the full twenty-one day period during which the party can withdraw the offending claim. Id.

15. In Truelove v. Heath, 86 F.3d 1152 (Table)(4th Cir. 1996) (unpublished disposition) the court denied a Rule 11 motion because the case was dismissed before the twenty-one day period had expired. The moving party in that case argued that they served Truelove (the nonmoving party) twenty-one days before filing for sanctions with the court, and thus, they complied with Rule 11. Id. However, the safe harbor provision was intended to allow the timely withdrawal of pleadings to protect an offending party from sanctions. Id. Eleven days after truelove was served with the motion for sanctions, the district court dismissed the action. Id. Although he was served before the conclusion of the case, the action was dismissed before the twenty-one day period had expired. Id. Rule 11 and the accompanying note both plainly state that a litigant should have twenty-one days in which to rectify an offending allegation or contention. Id. Once the district court dismissed the case, Truelove was no longer able to correct his error. Id. Therefore, Truelove was not given the twenty-one day period mandated by Rule 11. Id. Thus, the moving party's motion for sanctions was denied. Id.

WHEREFORE, Mary Alice Gwynn requests this Honorable Court to strike and/or dismiss the Debtor, James Walker, and his counsel, Gary Rotella, Esq.'s "Motion for Sanctions for Failure Under Rule 9011 of the Federal Rules of Civil Procedure for failing to abide by the 21 day "safe harbor" period. Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011" as the motion is procedurally denied under the "safe

harbor" rule.

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 5 day of April, 2005 to the parties on the following Service List.

MARY ALICE GWYNN, P.A.
Attorney for Eleanor C. Cole
805 George Bush Boulevard
Delray Beach, FL 33483
Telephone: 561-330-0633
Fax: 561-330-8778

By: ______________________
Mary Alice Gwynn
Florida Bar No.: 879584

SERVICE LIST

Gary J. Rotella, Esq.
Gary J. Rotella & Associates, P.A.
New River Center, Suite 1850
200 East Las Olas Blvd.
Ft. Lauderdale, FL 33301-2276

John L. Walsh, Esq.
Dzikowski & Walsh, P.A.
1601 Sawgrass Corporate Parkway
Suite 120
Ft. Lauderdale, FL 33323

Heidi Feinman, Esq.
Office of the U.S. Trustee
51 Southwest 1st Avenue, Suite 1204
Miami, FL 33130

Craig P. Rieders, Esq.
Peter Bellas, Esq.
Genovese Joblove & Battista, P.A.
Bank of America Tower
100 SE 2nd Street, 36th Floor
Miami, FL 33131

Lawrence U. Taube, Esq.
301 Clematis Street, Suite 3000
West Palm Beach, FL 33401

Gary M. Murphree
Ferrell Schultz Carter
Zumpano & Fertel, P.A.
201 South Biscayne Blvd.
34th Floor, Miami Center
Miami, FL 33131

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
2
Judge Paul G. Hyman, Jr.
3
4 In Re:
5
Case No. 03-32158-BKC-PGH
6
JAMES F. WALKER,
7
Debtor.
8
9
10 VARIOUS MOTIONS
11
12 April 28, 2004
13
14
15 The above entitled cause came on for hearing before the HONORABLE PAUL G. HYMAN, JR., one of the Judges in the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 701 Clematis Street, West Palm Beach, Palm Beach County, Florida, on April 28, 2004, commencing on or about 10:30 a.m., and the following proceedings were had:
16
17
18
19
20
21
22
23
24 Reported by: Jacquelyn Ann Jones, Court Reporter
25 OUELLETTE & MAULDIN COURT REPORTERS
(305) 358-8875

1 APPEARANCES:

2

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

5

FERRELL SCHULTZ CARTER & FERTEL, P.A.
6 By: FRANCIS L. CARTER, ESQUIRE, and
GARY MURPHREE, ESQUIRE
7 On behalf of Linda Walden
(Appearing telephonically)
8

9 MARY ALICE GWYNN, P.A.
By: MARY ALICE GWYNN, ESQUIRE
10 On behalf of Eleanor Cole

11

LAW OFFICE OF KEVIN GLEASON
12 By: KEVIN GLEASON, ESQUIRE
On behalf of Carol Ann Walker
13

14 HUGHES HUBBARD & REED, LLP
By: DANIEL S. LUBELL, ESQUIRE, and
15 AVIVA L. WERNICK, ESQUIRE
On behalf of Susan Lundborg
16 (Appearing telephonically)

17

UNITED STATES ATTORNEY'S OFFICE
18 By: MORGAN RUDD, ESQUIRE
TERESA WIDMER, ESQUIRE
19 KATHY HEAVEN, ESQUIRE
(Appearing telephonically)
20

21

22

23

24

25

1 is the Chapter 7 trustee, not your client. I'm going to
2 deny it because it's moot, and frankly, Mr. Rotella, at
3 this point, in that I've ruled on the motion under Rule
4 11. If you wish to seek sanctions under any other
5 authority, you may do so.
6 MR. ROTELLA: Thank you, Your Honor.
7 THE COURT: And believe me, I'm not happy with
8 what happened and the basis of what happened, as I
9 indicated in my ruling. So this should not be in any
10 way a rubber stamp that which she did, the motion was
11 appropriate, or the grounds were appropriate, or the
12 fact that it needed to get set today.
13 MR. ROTELLA: Thank you.
14 THE COURT: Anything else? Then I will see
15 everyone the 5th at 3:00.
16 By the way, one other thing, is the 5th going
17 to be evidentiary? The reason I'm asking, because if it
18 is, I want there to be an exchange of documents, I want
19 everyone to make sure that all the attorneys who are out
20 of town, you need to be familiar with the local rules,
21 you need to have all exhibits premarked with an exhibit
22 register, you need to exchange them before -- by the
23 close of Monday the 3rd, and if you have any witnesses
24 you need to exchange the identities of those witnesses
25 by the close of business Wednesday the 3rd. And when I

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 MOTION FOR SANCTIONS PURSUANT TO BANKRUPTCY RULE 9011

THIS CAUSE having come on to be heard before this Court on Friday, May 28, 2004 at 9:30 a.m. upon Debtor, James F. Walker's Motion For Sanctions Pursuant To Bankruptcy Rule 9011 (hereinafter "Debtor's Motion For Sanctions"), 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"), and Mary Alice Gwynn ("Gwynn"), on behalf of Eleanor C. Cole ("Creditor Cole"), having heard argument from counsel for the respective parties, having reviewed the Court file, and, being otherwise more fully and completely advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. On April 21, 2004, Creditor Cole, through her counsel, Gwynn, filed Creditor Eleanor C. Cole's Emergency Motion To Disqualify The Law Firm Of Gary J. Rotella & Associates, P.A. From Representing The Debtor (hereinafter "Cole's Emergency Motion") [C.P. #292]. On April 26, 2004, Creditor Cole, through her counsel, Gwynn, filed Creditor, Eleanor C. Cole's Supplemental Memorandum In Support Of Her Emergency Motion To

EXHIBIT
D

Disqualify The Law Firm Of Gary J. Rotella & Associates, P.A. From Representing The Debtor (hereinafter "Cole's Supplemental Motion") [C.P. #311].

2. Under cover of April 24, 2004, counsel for Debtor, James F. Walker (hereinafter "Debtor") served upon Gwynn a correspondence and a Motion For Sanctions Pursuant To Bankruptcy Rule 9011 (hereinafter "Debtor's 9011 Motion") which were admitted into evidence at the May 28, 2003 Hearing as Debtor's <u>Exhibit "1"</u> and <u>Exhibit "3"</u> respectively. On April 27, 2004, counsel for Debtor served a second correspondence on Gwynn specifically incorporating Cole's Supplemental Memorandum into Debtor's 9011 Motion which was admitted into evidence at the May 28, 2003 Hearing as Debtors <u>Exhibit "2"</u>.

3. This Court as well received the April 16, 2004 Status Hearing On Enforcement Of Restitution Transcript in the matter styled *State Of Florida vs. James Walker*, In The Circuit Court Of The Seventeenth Judicial Circuit, In And For Broward County, Florida - Case Number: 90-20599-CF10A, and the March 17, 2004 Motion By Creditor, Eleanor C. Cole For Protective Order Hearing Transcript [C.P. 237] which were admitted into evidence as <u>Exhibits "4"</u> and <u>Exhibit "5"</u> respectively.

4. This Court finds that Creditor Cole had no standing whatsoever to raise the issues in Cole's Emergency Motion or Cole's Supplemental Memorandum. As such, this Court holds that Creditor Cole had no legal basis upon which

to file Cole's Emergency Motion and Cole's Supplemental Memorandum.

5. Accordingly, this Court finds that Debtor's counsel properly served and notified Creditor Cole's counsel, Gwynn of an intention to seek sanctions pursuant to Bankruptcy Rule 9011 and that Gwynn failed and/or refused to withdraw Cole's Emergency Motion and Cole's Supplemental Motion. As such, an award of attorney's fees and expenses is appropriate pursuant to Bankruptcy Rule 9011.

6. Debtor's counsel is hereby directed to submit its attorneys fees and expenses as the same relate to Debtor's Motion For Sanctions which this Court will consider and award upon proper notice and hearing for the same date and time as Carol Ann Walker's Motion For Sanctions is scheduled.

DONE AND ORDERED in Chambers in the Southern District of Florida this 15 day of June, 2004.

PAUL G. HYMAN

PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is directed to mail a conformed copy of the foregoing order to all parties on the Service List immediately upon receipt)

SERVICE LIST

Heidi Feinman, Esquire
Office of the U.S. Trustee
51 Southwest 1st Avenue, Suite 1204
Miami, Florida 33130

Kevin C. Gleason, Esquire
Law Office of Kevin Gleason, P.A.
2699 Stirling Road, Suite A-201
Fort Lauderdale, Florida 33312

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

Francis L. Carter, Esquire
Gary M. Murphree, Esquire
Ferrell Schultz Carter Zumpano & Fertel, P.A.
201 South Biscayne Boulevard, 34th Floor
Miami, Florida 33131-4332

James F. Walker
2145 Northwest 17th Street
Delray Beach, Florida 33445

EXHIBIT

#4

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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

JAMES F. WALKER,

Debtor.

_______________________/

FILE COPY

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

COMES NOW, Mary Alice Gwynn, Esq., an interested party and former counsel for Creditor, Eleanor Cole, files her Motion to Amend, Correct or Withdraw the Court's Order Granting the Debtor's Motion for Sanctions Pursuant to Bankruptcy Rule 9011, Dated June 15, 2004, pursuant to Rule 60 of the Federal Rules of Civil Procedure, and further states as follows:

1. On **April 21, 2004**, Eleanor Cole filed her Emergency Motion to Disqualify the Law Firm of Gary Rotella, docket entry #292.

2. On **April 26, 2004**, Gary Rotella, Esq., on behalf of Debtor, filed his Motion to Shorten the twenty-one (21) day notice period for filing a Motion for Sanctions Pursuant to Bankruptcy Rule 9011, docket entry #321.

3. On **April 28, 2004**, the Court heard Eleanor Cole's Motion to Disqualify the Law Firm of Gary J. Rotella. At that hearing, Debtor's Motion to Shorten Time was also heard by the Court and the Court ruled as follows:

   a. On page 44 of the Court transcript, the Court denied Mr. Rotella's Motion as it was moot. See attached Exhibit "A".

4. On <u>May 12, 2004</u>, the Court's Order Denying the Debtor's Motion to Shorten the 21 Day Notice Period for Filing Sanctions Pursuant to Bankruptcy Rule 9011 was entered at docket entry #350.

5. On <u>May 28, 2004</u>, the Court heard Eleanor Cole's Renewed Motion to Disqualify the Law Firm of Gary J. Rotella.

6. Shortly thereafter, undersigned counsel, Mary Alice Gwynn, withdrew as counsel for Eleanor Cole, and Arthur Neiwirth took over Ms. Cole's representation.

7. While Ms. Gwynn was out on medical leave, Mr. Rotella prepared the Order Granting the Debtor's Motion for Sanctions Pursuant to Bankruptcy Rule 9011. (See Exhibit "B")

8. In Mr. Rotella's prepared Order at paragraph #5, he includes the following language:

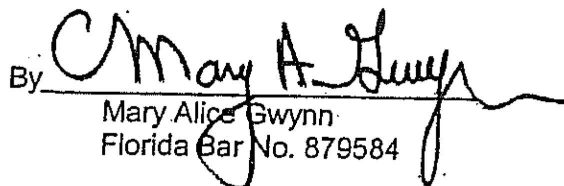
> "Accordingly, this Court finds that Debtor's counsel properly served and notified Creditor Cole's counsel, Gwynn of an intention to seek sanctions pursuant to Bankruptcy Rule 9011 and that Gwynn failed and/or refused to withdraw Cole's Emergency Motion and Cole's Supplemental Motion. As such, an award of attorney's fees and expenses is appropriate pursuant to Bankruptcy Rule 9011."

9. Mr. Rotella conveniently included, or intentionally included this self-serving language in his Order, which is inconsistent with the Court's prior ruling of April 28, 2004, and Order dated May 12, 2004, denying the Debtor's Motion to Shorten Time under Bankruptcy Rule 9011.

WHEREFORE, the undersigned Mary Alice Gwynn, Esq., respectfully requests this Honorable Court to amend, correct or withdraw its' Order dated June 15, 2004, Granting the Debtor's Motion for Sanctions Pursuant to Bankruptcy Rule 9011, to be consistent with the Court's ruling on April 28, 2004, and subsequent Order entered on May 12, 2004.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and/or U.S. Mail this 4 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

SERVICE LIST

Gary J. Rotella, Esq.
Gary J. Rotella & Associates, P.A.
New River Center, Suite 1850
200 East Las Olas Blvd.
Ft. Lauderdale, FL 33301-2276

Lawrence U. Taube, Esq.
301 Clematis Street, Suite 3000
West Palm Beach, FL 33401

John L. Walsh, Esq.
Dzikowski & Walsh, P.A.
1601 Sawgrass Corporate Parkway
Suite 120
Ft. Lauderdale, FL 33323

Gary M. Murphree
Ferrell Schultz Carter
Zumpano & Fertel, P.A.
201 South Biscayne Blvd.
34th Floor, Miami Center
Miami, FL 33131

Heidi Feinman, Esq.
Office of the U.S. Trustee
51 Southwest 1st Avenue, Suite 1204
Miami, FL 33130

Craig P. Rieders, Esq.
Peter Bellas, Esq.
Genovese Joblove & Battista, P.A.
Bank of America Tower
100 SE 2nd Street, 36th Floor
Miami, FL 33131

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

2

Judge Paul G. Hyman, Jr.

3

4 In Re:

5 Case No. 03-32158-BKC-PGH

6

JAMES F. WALKER,

7

Debtor.

8

9 ___

10 VARIOUS MOTIONS

11

12 April 28, 2004

13

14

The above entitled cause came on for hearing before the HONORABLE PAUL G. HYMAN, JR., one of the Judges in the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 701 Clematis Street, West Palm Beach, Palm Beach County, Florida, on April 28, 2004, commencing on or about 10:30 a.m., and the following proceedings were had:

15

16

17

18

19

20

21

22

23

24 Reported by: Jacquelyn Ann Jones, Court Reporter

25 OUELLETTE & MAULDIN COURT REPORTERS
(305) 358-8875

1 APPEARANCES:

2

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

5

FERRELL SCHULTZ CARTER & FERTEL, P.A.
6 By: FRANCIS L. CARTER, ESQUIRE, and
GARY MURPHREE, ESQUIRE
7 On behalf of Linda Walden
(Appearing telephonically)
8

9 MARY ALICE GWYNN, P.A.
By: MARY ALICE GWYNN, ESQUIRE
10 On behalf of Eleanor Cole

11

LAW OFFICE OF KEVIN GLEASON
12 By: KEVIN GLEASON, ESQUIRE
On behalf of Carol Ann Walker
13

14 HUGHES HUBBARD & REED, LLP
By: DANIEL S. LUBELL, ESQUIRE, and
15 AVIVA L. WERNICK, ESQUIRE
On behalf of Susan Lundborg
16 (Appearing telephonically)

17

UNITED STATES ATTORNEY'S OFFICE
18 By: MORGAN RUDD, ESQUIRE
TERESA WIDMER, ESQUIRE
19 KATHY HEAVEN, ESQUIRE
(Appearing telephonically)
20

21

22

23

24

25

1 is the Chapter 7 trustee, not your client. I'm going to
2 deny it because it's moot, and frankly, Mr. Rotella, at
3 this point, in that I've ruled on the motion under Rule
4 11. If you wish to seek sanctions under any other
5 authority, you may do so.
6 MR. ROTELLA: Thank you, Your Honor.
7 THE COURT: And believe me, I'm not happy with
8 what happened and the basis of what happened, as I
9 indicated in my ruling. So this should not be in any
10 way a rubber stamp that which she did, the motion was
11 appropriate, or the grounds were appropriate, or the
12 fact that it needed to get set today.
13 MR. ROTELLA: Thank you.
14 THE COURT: Anything else? Then I will see
15 everyone the 5th at 3:00.
16 By the way, one other thing, is the 5th going
17 to be evidentiary? The reason I'm asking, because if it
18 is, I want there to be an exchange of documents, I want
19 everyone to make sure that all the attorneys who are out
20 of town, you need to be familiar with the local rules,
21 you need to have all exhibits premarked with an exhibit
22 register, you need to exchange them before -- by the
23 close of Monday the 3rd, and if you have any witnesses
24 you need to exchange the identities of those witnesses
25 by the close of business Wednesday the 3rd. And when I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

JAMES F. WALKER,

Debtor.

CASE NO: 03-32158-BKC-PGH

Chapter 7 Proceedings

ORDER GRANTING MOTION FOR SANCTIONS PURSUANT TO BANKRUPTCY RULE 9011

THIS CAUSE having come on to be heard before this Court on Friday, May 28, 2004 at 9:30 a.m. upon Debtor, James F. Walker's Motion For Sanctions Pursuant To Bankruptcy Rule 9011 (hereinafter "Debtor's Motion For Sanctions"), 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"), and Mary Alice Gwynn ("Gwynn"), on behalf of Eleanor C. Cole ("Creditor Cole"), having heard argument from counsel for the respective parties, having reviewed the Court file, and, being otherwise more fully and completely advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. On April 21, 2004, Creditor Cole, through her counsel, Gwynn, filed Creditor Eleanor C. Cole's Emergency Motion To Disqualify The Law Firm Of Gary J. Rotella & Associates, P.A. From Representing The Debtor (hereinafter "Cole's Emergency Motion") [C.P. #292]. On April 26, 2004, Creditor Cole, through her counsel, Gwynn, filed Creditor, Eleanor C. Cole's Supplemental Memorandum In Support Of Her Emergency Motion To

Disqualify The Law Firm Of Gary J. Rotella & Associates, P.A. From Representing The Debtor (hereinafter "Cole's Supplemental Motion") [C.P. #311].

2. Under cover of April 24, 2004, counsel for Debtor, James F. Walker (hereinafter "Debtor") served upon Gwynn a correspondence and a Motion For Sanctions Pursuant To Bankruptcy Rule 9011 (hereinafter "Debtor's 9011 Motion") which were admitted into evidence at the May 28, 2003 Hearing as Debtor's Exhibit "1" and Exhibit "3" respectively. On April 27, 2004, counsel for Debtor served a second correspondence on Gwynn specifically incorporating Cole's Supplemental Memorandum into Debtor's 9011 Motion which was admitted into evidence at the May 28, 2003 Hearing as Debtors Exhibit "2".

3. This Court as well received the April 16, 2004 Status Hearing On Enforcement Of Restitution Transcript in the matter styled *State Of Florida vs. James Walker*, In The Circuit Court Of The Seventeenth Judicial Circuit, In And For Broward County, Florida - Case Number: 90-20599-CF10A, and the March 17, 2004 Motion By Creditor, Eleanor C. Cole For Protective Order Hearing Transcript [C.P. 237] which were admitted into evidence as Exhibits "4" and Exhibit "5" respectively.

4. This Court finds that Creditor Cole had no standing whatsoever to raise the issues in Cole's Emergency Motion or Cole's Supplemental Memorandum. As such, this Court holds that Creditor Cole had no legal basis upon which

to file Cole's Emergency Motion and Cole's Supplemental Memorandum.

5. Accordingly, this Court finds that Debtor's counsel properly served and notified Creditor Cole's counsel, Gwynn of an intention to seek sanctions pursuant to Bankruptcy Rule 9011 and that Gwynn failed and/or refused to withdraw Cole's Emergency Motion and Cole's Supplemental Motion. As such, an award of attorney's fees and expenses is appropriate pursuant to Bankruptcy Rule 9011.

6. Debtor's counsel is hereby directed to submit its attorneys fees and expenses as the same relate to Debtor's Motion For Sanctions which this Court will consider and award upon proper notice and hearing for the same date and time as Carol Ann Walker's Motion For Sanctions is scheduled.

DONE AND ORDERED in Chambers in the Southern District of Florida this 15 day of June, 2004.

PAUL G. HYMAN

PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

(Attorney Gary J. Rotella is directed to mail a conformed copy of the foregoing order to all parties on the Service List immediately upon receipt)

SERVICE LIST

Heidi Feinman, Esquire
Office of the U.S. Trustee
51 Southwest 1st Avenue, Suite 1204
Miami, Florida 33130

Kevin C. Gleason, Esquire
Law Office of Kevin Gleason, P.A.
2699 Stirling Road, Suite A-201
Fort Lauderdale, Florida 33312

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

Francis L. Carter, Esquire
Gary M. Murphree, Esquire
Ferrell Schultz Carter Zumpano & Fertel, P.A.
201 South Biscayne Boulevard, 34th Floor
Miami, Florida 33131-4332

James F. Walker
2145 Northwest 17th Street
Delray Beach, Florida 33445

EXHIBIT

#5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
LEAD CASE NO. 05-80714-CIV-GOLD/TURNOFF
CONSOLIDATED WITH CASE NO. 05-80715-CIV-GOLD/TURNOFF

In re:

JAMES F. WALKER,

Debtor.
_______________/

MARY ALICE GWYNN,

Appellant,

v.

JAMES F. WALKER,

Appellee.
_______________/

CLOSED CIVIL CASE

FILED by D.C.
MAR 2 0 2006
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

ORDER VACATING FINAL JUDGMENT OF BANKRUPTCY COURT

THIS CAUSE is before the Court upon Appellant Mary Alice Gwynn's ("Appellant") Notices of Appeal of two orders issued by the Honorable Paul G. Hyman, Jr. Appellant filed her first Notice of Appeal on August 5, 2005. This Notice of Appeal was assigned case number 05-80714-CIV-GOLD. Appellant also filed her second notice of appeal on August 5, 2005. This Notice of Appeal was assigned case number case number 05-80715-CIV-ALTONAGA. After Judge Altonaga transferred this second appeal to me, I consolidated the two cases on August 17, 2005 **[DE # 7]**.

I. Orders on Appeal

In the two Notices of Appeal, Appellant appeals five orders: (1) an Order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011 (entered on 6/15/04); (2) an Order

37

Awarding Sanctions and Final Judgment (entered 5/11/05); (3) an 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 (entered 4/8/05); (4) an 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 (entered 5/8/05) and (5) an Order Denying as Moot Objection by Eleanor C. Cole to Order Submitted by Gary J. Rotella, Esq. (entered 7/21/04). On October 20, 2005, I entered an Order dismissing Appellant's Notice of Appeal as to the July 21, 2004 Order. Consequently, this fifth order of the bankruptcy court is not an issue on appeal.

Appellant filed her Initial Brief **[DE # 14]** in this matter on September 19, 2005. Appellee, the Debtor in the bankruptcy proceedings, James F. Walker, filed his Answer Brief on November 29, 2005. Appellant filed her Reply Brief **[DE # 26]** on December 7, 2005. I held oral argument on the appeal on March 10, 2006. Upon review of the Initial Brief, the Answer Brief, the Reply Brief and the applicable rules and case law, I conclude that the bankruptcy court abused its discretion in awarding sanctions to Appellee.

II. Factual Background

Debtor/Appellee James F. Walker filed a petition for Chapter 7 bankruptcy relief on April 25, 2003. Attorney Gary J. Rotella ("Rotella") represented Debtor in the bankruptcy proceedings. Appellant represented Eleanor C. Cole and Florida Precision Calipers, Inc. in the bankruptcy proceedings. Ms. Cole and Florida Precision Calipers, Inc. were the two

largest creditors in the bankruptcy.

Appellant alleged that sometime after Debtor filed for bankruptcy, Debtor's wife, Carol Ann Walker, transferred her interest in a piece of real property located in the Bahamas to Rotella. Carol Ann Walker transferred the property to pay Rotella's legal expenses incurred in the representation of her husband in the bankruptcy proceedings. Appellant claims that the real property belonged to Debtor and was the sole asset of the bankruptcy estate.

After Carol Ann Walker transferred the Bahamian property to Rotella, Appellant filed a motion entitled Eleanor C. Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates P.A. From Representing the Debtor (the "Motion to Disqualify") on April 21, 2004. In the Motion to Disqualify, Appellant alleged that Rotella was conflicted from representing the Debtor because Rotella became a person with an interest in the bankruptcy estate upon receipt of the Bahamian property. Appellant further alleged that the receipt of the property gave Rotella an interest adverse to the estate.

On April 23, 2004, Appellant filed a notice setting the Motion to Disqualify for hearing on April 28, 2004. The next day, on April 24, 2004, Rotella served Appellant, by fax, with a proposed Rule 9011 Motion For Sanctions related to the Motion to Disqualify.[1] On April

---

[1] The April 24, 2004 letter reads, in relevant part: "[e]nclosed under this cover is [a] Motion For Sanctions Pursuant to Bankruptcy Rule 9011 that I intend to file against both your client, Eleanor C. Cole and you. The set Rule 9011 is twenty-one (21) days from the date of this correspondence to voluntarily withdraw Creditor, Eleanor C. Cole's Emergency Motion To Disqualify The Law Firm of Gary J. Rotel la & Associates, P.A. [From] Representing Debtor ('Motion to Disqualify'). However, given your attempt to bring this frivolous evidentiary matter on for hearing on Wednesday, April 28, you will also find enclosed under this cover Motion to Shorten 21 Day Notice Period For Filing Motion For Sanctions Pursuant To Bankruptcy Rule 9011 ('Motion to Shorten')."

26, 2004, Rotella filed a Motion to Shorten 21 Day Notice Requirement For Filing a Motion For Sanctions Pursuant to Bankruptcy Rule 9011. That same day Appellant filed a pleading entitled Eleanor C. Cole's Supplemental Memorandum of Law in Support of Emergency Motion to Disqualify the Law Firm of Gary J. Rotella Assoc. P.A. From Representing the Debtor.

On April 27, 2004, Rotella sent Appellant a second letter by fax. Attached to this letter, Rotella served Appellant with his response to the Motion to Disqualify. Rotella also informed Appellant that his response to the Motion to Disqualify was "incorporated by reference into the Motion For Sanctions Pursuant to Bankruptcy Rule 9011 consistent with my correspondence under cover of April 24, 2004."

The bankruptcy court heard oral argument on the Motion to Disqualify on April 28, 2004, seven days after Appellant initially filed the Motion to Disqualify. After hearing argument from the parties, the bankruptcy court denied the Motion to Disqualify. The Honorable Judge Paul G. Hyman, Jr. concluded that Eleanor C. Cole, as a creditor, did not have standing to assert any potential conflict of interest on behalf of any other members of the Debtor's family, including Debtor's uncle and brother. Further, Judge Hyman concluded that Eleanor C. Cole's allegations that Mr. Rotella may be a witness in the bankruptcy proceeding was premature. Lastly, Judge Hyman ruled that Rotella's interest in the Bahamian property might preclude him from representing Carol Ann Walker in an adversary proceeding, however, that issue was not before the Court because no adversary proceeding had been filed.

The bankruptcy court also heard oral argument on Rotella's Motion to Shorten 21 Day Notice Requirement For Filing a Motion For Sanctions Pursuant to Bankruptcy Rule

9011 on April 28, 2004 **[DE # 15, Exhibit 8]**.[2] Judge Hyman orally denied the Motion to Shorten. In denying the Motion to Shorten, Judge Hyman stated: "*I'm going to deny it because it's moot, and frankly, Mr. Rotella, at this point, in that I've ruled on the motion under Rule 11. If you wish to seek sanctions under any other authority, you may do so.*" (emphasis added).

On May 12, 2004, Judge Hyman issued a written Order Denying Motion to Shorten 21 Day Period to File Motion For Sanctions Pursuant to Bankruptcy Rule 9011.[3] Thereafter, on May 18, 2004, Rotella formally filed his Motion For Sanctions Against Mary Alice Gwynn, Esquire. That same date, Appellant, on behalf of Eleanor C. Cole, filed a Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P.A. (the "Renewed Motion to Disqualify"). The Court held a hearing on the Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P.A. on May 28, 2004.

At the May 28, 2004 hearing, Judge Hyman orally denied the Renewed Motion to Disqualify. At the hearing, Judge Hyman stated: "I agree. I am going to grant your request, reserve on the amount of attorney's fees. I find that she did not have standing whatsoever to raise the issues that she did in the *original* motion. She can not get around *Rule 11* by filing a renewed or an amended motion that restates those same grounds and

---

[2] Judge Hyman entertained argument on the Motion to Shorten after it denied the Motion to Disqualify. **[*See* DE # 15, Exhibit 8 at 1]**.

[3] I note that the written order which followed the bankruptcy court's oral ruling on the motion to shorten failed to include any specific reference to the court's admonition that Appellee could move for sanctions "under any other authority" *other than Rule 9011*. This may explain why the Court later granted an award of sanctions under Rule 9011 after the same request was denied and expressly prohibited by the bankruptcy court orally on April 28, 2004. **[DE # 15, Exhibit 9]**.

then a couple of extra grounds, which subsequently I have found to be meritless since I dismissed the adversary proceeding, but as to the original motion, I hereby award attorney's fees." (emphasis added).

Judge Hyman awarded Appellee sanctions under Rule 9011 at the May 28, 2004 hearing after he verbally denied that request on April 28, 2004. Further, he granted Appellee Rule 9011 sanctions after he had already denied the Emergency Motion to Disqualify upon which the Rule 9011 Motion for Sanctions was based. Judge Hyman entered his written Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on June 15, 2004. **[DE # 15, Exhibit 14]**.

On April 6, 2005, Appellant filed a 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. The bankruptcy court denied the Motion on April 8, 2005. Appellant also filed a 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. The bankruptcy court also denied this motion on May 8, 2005.

On April 21, 2005, Judge Hyman held a hearing to determine the amount of sanctions to which Appellee was entitled pursuant to his earlier Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on June 15, 2004. At the hearing, Appellant disputed Rotella's contention that he properly complied with the safe harbor provision in Rule 9011 and she vigorously disputed the amount of sanctions Appellee claimed he incurred. **[*See* DE # 15, Exhibit 16]**.

In response to Appellant's argument that Appellee failed to comply with the safe harbor provision of Rule 9011, Appellee discounted the importance of the safe harbor provision. Appellee argued "I would also like to point out to the Court, *this 21 day thing which we're getting hung up on*, sometimes also the Court has an inherent power under 28 U.S.C. § 1927 to sanction any attorney . . . To the extent necessary, Judge, we would make an *ore tenus* motion for that application". **[DE # 15, Exhibit 21 at 15-16]** (emphasis added). The Court granted Appellee's request for sanctions under Rule 9011 alone. The Court entered a Final Judgment awarding Appellee $80,572.50 in sanctions against Appellant. **[*See* DE # 15, Exhibit 2]**.

III. Applicable Standard of Review

In essence, Appellant takes issue with both the bankruptcy court's determination that sanctions were appropriate and the amount of sanctions awarded. "When reviewing the imposition of sanctions, the primary question before us is whether the sanctioning court abused its discretion." *In re: Mroz*, 65 F.3d 1567, 1571 (11th Cir. 1995); *see also Kaplan v. DaimlerChrysler*, 331 F.3d 1251, 1255 (11th Cir. 2003); *In re Suncoast Airlines*, 188 B.R. 56, 58 (S.D. Fla. 1994).[4] An abuse of discretion occurs where a court "misapplies the law

---

[4] In contrast, Appellant argues that the Court should review the orders of the bankruptcy court under a higher standard. Appellant claims that the bankruptcy court's Order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011 (entered 6/15/04) raises a "mixture of issues of law and fact . . . subject to *de novo* review." Appellant also claims that because the bankruptcy court signed Appellee's proposed draft version of the Order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011, the district court should "adopt a more stringent standard of review" of the bankruptcy court's order. To support this argument, Appellant cites to an opinion of the United States Court of Appeals for the Third Circuit, *Roberts v. Ross*, 344 F.2d 747, 752 (3d Cir. 1965).

Appellant has not cited to any opinions of the United States Court of Appeals for the Eleventh Circuit which require this Court to "adopt a more stringent standard of review".

in reaching its decision or bases its decision on findings of fact that are clearly erroneous." *Arce v. Garcia*, 434 F.3d 1254, 1260 (11th Cir. 2006). The award of sanctions appealed in this case was awarded under Bankruptcy Rule of Procedure 9011. "Bankruptcy Rule 9011 is substantially identical to Federal Rule of Civil Procedure 11." *Id.* at 1572. Where a court enters an award of sanctions as a penalty for the filing of a frivolous pleading, the court should "only focus on the merits of the pleading gleaned from the facts and law known or available to the attorney *at the time of filing.*" *Id.* (citing *Jones v. Intern'l Riding Helmets, Ltd.*, 49 F.3d at 694-95).

In a bankruptcy appeal, the district court functions as an appellate court in reviewing the bankruptcy court's decision. *See In re Sublett*, 895 F. 2d 1381, 1383-84 (11th Cir. 1990) (citing 28 U.S.C. §158(a), (c)). In this capacity, district courts must give considerable deference to a bankruptcy court's findings of fact, and will not overturn its factual findings unless it determines that those findings are clearly erroneous. *See In re Chase & Sanborn Corp.*, 904 F. 2d 588, 593 (11th Cir. 1990); *In re Pepenella*, 103 B.R. 229, 300 (M.D. Fla. 1988). Conclusions of law made by bankruptcy courts are reviewed *de novo*. *See Sublett*, 895 F.2d at 1383.

In *Mroz*, the Eleventh Circuit makes clear that the Court must adopt only an abuse of discretion standard of review. 65 F.3d at 1571. Further, in *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, the Third Circuit rejected the more stringent standard of review approach used in *Roberts.* 4 F.3d 1209, 1216 n.5 (3rd cir. 1993)(holding that "[w]e thus reject the Authority's claim that *Roberts* requires us to review more stringently the district court's factual findings here.") Lastly, the United States Supreme Court also rejected this argument in *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (concluding that although a court may adopt the findings of a party, where the "findings . . . represent the judge's own considered conclusions [t]here is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules").

IV. Analysis

A. The Bankruptcy Court Improperly Awarded Sanctions Under Rule 9011

The purpose of sanctions under Bankruptcy Rule 9011 is to "reduce frivolous claims, defenses or motions, and to deter costly meritless maneuvers." *Kaplan,* 331 F.3d at 1255 (explaining the purpose of Rule 11). In order to further this goal, Bankruptcy Rule 9011 contains a safe harbor provision which "ordinarily gives a lawyer or litigant 21 days within which to correct or withdraw the challenged submission." *Id.* The safe harbor provision was added to the language of Rule 11 in 1993. *See* Rule 11, Advisory Committee Notes 1993 Amendments (explaining that "[e]xplicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed . . . These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.") Bankruptcy Rule 9011 was also amended to include the safe harbor provision in 1997. *See* Bankruptcy Rule 9011, Advisory Committee Notes 1997 Amendment (explaining that the "rule is amended to conform to the 1993 changes to F.R.Civ.P. 11.").

1. The Language of Rule 9011 Prohibits a Party From Requesting Sanctions Prior to the Expiration of the 21 Day Safe Harbor Provision

Rule 9011(c) allows for the award of sanctions in bankruptcy cases. Rule 9011(c) provides, in relevant part:

> **(c) Sanctions.** If after notice and a reasonable opportunity to respond, the court

determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How initiated.*

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may describe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

In addition to the express language of Rule 9011 which requires the expiration of a twenty-one day safe harbor provision, the Advisory Committee Notes to Rule 9011 are also instructive here. The Advisory Notes to Bankruptcy Rule 9011 explain that Rule 9011 was amended to its present form in 1997 to "conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11." *See* Bankruptcy Rule 9011, Advisory Committee Notes; *see also Horenkamp v. Van Winkle & Co., Inc.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (stating that "[a]lthough not binding, the interpretations in the Advisory Committee Notes "are nearly universally accorded great weight in interpreting federal rules.") Consequently, it is appropriate for the Court to look to the Advisory Committee Notes of Rule 11 for guidance.

The Advisory Committee Notes to Rule 11 provide an insightful discussion of the purpose of the most recent amendments to Rule 11. "The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aim of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court." Rule 11, Advisory Committee Notes 1993 Amendments. In specifically addressing the inclusion of the safe harbor provision in the 1993 Amendments to Rule 11, the Advisory Committee explained, "[t]he revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule." *Id.*

Concerning the issue of when a motion for sanctions should be filed and decided, the Advisory Committee explains that "resolution [should be] on a case-by case basis." *Id.* However, the Advisory Committee stressed that "[o]rdinarily the motion should be served promptly after the inappropriate paper is filed, and if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. *Given the 'safe harbor' provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).*" *Id.* (emphasis added).

The Advisory Committee made clear the critical importance of the safe harbor provision: "[t]he motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, *the motion should not be filed with the court.* These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motions unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation." *Id.* (emphasis added).

2. The Case Law Also Requires the Expiration of the 21 Days Before a Party May File a Motion For Sanctions Under Rule 9011

In this case, Appellant argues that Appellee is not entitled to sanctions because the 21 day safe harbor period did not expire before the Court ruled on and denied the

challenged submission - the Motion to Disqualify. As I have explained above, the Advisory Committee Notes discuss that under the circumstances presented in this case, where the motion for sanctions is not filed until after the court rules upon the offending motion, the request for sanctions should be denied. *See* Rule 11, Advisory Committee Notes 1993 Amendment (stating that "[g]iven the 'safe harbor' provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case *(or judicial rejection of the offending contention)).*" Although this issue has not been addressed by the Eleventh Circuit, a number of other circuit courts of appeal and district courts which have addressed the issue agree with the conclusion adopted by the Advisory Committee. *See Brickwood Contractors Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2003) (denying Rule 11 sanctions "because the defendants waited until after summary judgment had been granted, Brickwood could not have withdrawn or otherwise corrected the complaint even if the motion had been served before it was filed."); *In re Pennie & Edmonds LLP*, 323 F.3d 86, 89 n.2 (2d Cir. 2003) (requiring that "[a]t the very least, a party must serve its Rule 11 motion before the court has ruled on the pleading, and thus before the conclusion of the case. Otherwise, the purpose of the 'safe harbor' provision would be nullified. This has been interpreted to mean that Rule 11 motions must be served at least a full 21 days before the court concludes the case or resolves the offending contention."); *see also Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997); *Mitchell v. Osceola Farms Co.*, 408 F.Supp.2d 1275, 1280 (S.D. Fla. 2005) (denying motion for sanctions under Rule 11 where party failed to properly comply with procedural requirements of twenty-one day safe harbor provision); *Smiley v. Summers*, 2005 WL 1595668, at * 1 (S.D. Miss. June 23,

2005) (holding that "[i]f the court disposes of the offending contention before the twenty-one day 'safe harbor' period expires, a motion for sanctions cannot be filed with or presented to the court. Any other interpretation would defeat the rule's explicit requirements."); *Langdon v. County of Columbia*, 321 F.Supp.2d 481, 484 (N.D. N.Y. 2004) (citing *Ridder*); *Hamil v. Mobex Managed Servs. Co.*, 208 F.R.D. 247, 250 (N.D. Ind. 2002) (holding that "this [c]ourt finds that a motion for sanctions may be filed with the court after judgment as long as the moving party has first served the motion for sanctions on the offending party twenty-one (21) or more days prior to final judgment"); *DeShiro v. Branch*, 183 F.R.D. 281, 287 (M.D. Fla. 1998) (finding that a party's "delay of waiting until *after* Counts III, IV and V were already disposed of obviously undermines and attempts to circumvent the statutory purpose now inherent in the Rule 11 sanction process") (emphasis in original); *Nagle Indus., Inc. v. Ford Motor Co.*, 173 F.R.D. 448, 458 (E.D. Mich. 1997) (denying a motion for sanctions where a party failed to comply with Rule 11's twenty-one day safe harbor procedural requirements by filing the motion for sanctions after summary judgment was granted); *In re HNRC Dissolution Co.*, 330 B.R. 555, 558 (Bankr. E.D. Ky. 2005) (concluding that "no sanctions would be imposed as the offending pleading had already been dismissed.") ; *In re M.A.S. Realty Corp.*, 326 B.R. 31, 39 (Bankr. D.Mass. 2005) (concluding that the debtor "rendered the safe harbor a nullity" by waiting until after the court had already issued its decision rejecting the offending motion).

The seminal case on this issue is a case from the United States Court of Appeals for the Sixth Circuit, *Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997). In *Ridder*, the defendant filed a motion for sanctions under both Rule 11 and 28 U.S.C. §

1927 *after* the district court entered summary judgment in the defendant's favor. 109 F. 3d at 290. The defendant sought sanctions for all attorney's fees and expenses it incurred in litigating the entire case because it alleged that all claims made by the plaintiff throughout the litigation were meritless. *See id.* at 291-92. The defendant never served the plaintiff with a copy of the motion for sanctions and failed to file the motion for sanctions until after the court had already entered its order granting the motion for summary judgment. *See id.* at 292. Despite these facts, the magistrate judge granted the defendant's motion for sanctions and awarded the defendant $32,546.02 under Rule 11. *Id.* at 290.

On appeal, one of the issues presented to the Sixth Circuit was whether a court could properly impose sanctions under "under Fed. R. Civ. P. 11, as amended in 1993, when a motion for sanctions is filed without satisfying the requisite 'safe harbor' period and after a court has entered summary judgment." *Id.* at 290. The Sixth Circuit Court of Appeals held that sanctions could not be imposed after the court had already ruled upon the offending motion which was the very subject of the sanctions order. *See id.*

The Sixth Circuit explained that the purpose of the 21 day safe harbor provision was to allow a party the opportunity to withdraw an offensive motion after receiving notice from the opposing party of its intent to seek sanctions if the motion is not withdrawn. *See id.* at 296-297 (stating that "[b]y virtue of its nature, the 'safe harbor' provision cannot have any effect if the court has already rendered its judgment in the case; it is too late for the offending party to withdraw the challenged claim.") In relying on the explanation given in the Advisory Committee Notes, the Sixth Circuit wrote: "[b]y virtue of the fact that under the

1993 amendments, "a Rule 11 motion cannot be made unless there is some paper, claim or contention that can be withdrawn' . . . it follows that a party cannot wait to seek sanctions until after the contention has been judicially disposed." *Id.* at 295 (citations omitted). Consequently, the Sixth Circuit concluded that a "party must now serve a Rule 11 motion on the allegedly offending party at least twenty-one days prior to conclusion of the case or judicial rejection of the offending contention. If the court disposes of the offending contention before the twenty-one day 'safe harbor' period expires, a motion for sanctions cannot be filed with or presented to the court." *Id.*

3. Appellee Was Not Entitled to Sanctions Under Rule 9011 Because the Motion to Disqualify Was Ruled Upon Before Expiration of the 21 Day Safe Harbor Provision

The bankruptcy court abused its discretion in awarding Appellee sanctions under Rule 9011 because he failed to provide Appellant with an opportunity to correct or withdraw her original Motion to Disqualify under the 21 day safe harbor provision. As the Sixth Circuit Court of Appeals held in *Ridder* and as the express language of Rule 9011 makes clear, the "motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may describe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected".

In the instant case, Appellant filed the offending motion, the Motion to Disqualify, on April 21, 2004. The bankruptcy court denied the Motion to Disqualify seven days later on April 28, 2004. Although Appellee filed his Motion for Sanctions on May 18, 2004, more than twenty-one days after Appellant filed the Motion to Disqualify, Appellee filed the Motion For Sanctions *after the bankruptcy court had already ruled upon and denied the*

"offending contention". *See Ridder*, 103 F.3d at 295; *see also* Advisory Committee Notes to Rule 11, 1993 Amendments. Since the bankruptcy court denied the Motion to Disqualify before the expiration of the twenty-one day safe harbor provision, Appellant did not have twenty-one days to withdraw the Motion to Disqualify. Accordingly, Appellee was precluded from filing a motion for sanctions under Rule 9011 as to the Motion to Disqualify. *See Pennie*, 323 F.3d at 89, n.2; *see also Ridder,* 109 F.3d at 295; *Smiley*, 2005 WL 1595668, at * 1; *Hamil*, 208 F.R.D. at 250; *HNRC Dissolution Co.*, 330 B.R. at 558; *M.A.S. Realty Corp.*, 326 B.R. at 39. The bankruptcy court abused its discretion by granting Appellee's Motion for Rule 9011 Sanctions. This Court cannot affirm this abuse of discretion because it would require the Court to disregard the requirements of Rule 9011's safe harbor provision, rendering it a nullity.

B. Sanctions Are Also Inappropriate Here Under the Bankruptcy Court's Inherent Power to Award Sanctions

I have concluded that the bankruptcy court abused its discretion by awarding sanctions under Rule 9011. I now address the issue of whether the bankruptcy court could have awarded sanctions under its inherent power to award sanctions. In *Mroz*, the Eleventh Circuit concluded that a bankruptcy court has inherent power to issue sanctions because Rule 9011 is "not the only basis for imposing sanctions against an attorney or other party." 65 F.3d at 1574. Bankruptcy courts have the inherent power to assess attorney's fees where a party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 1575. The Court's inherent power to award sanctions may be broader than the power to impose sanctions under Rule 9011 because "although certain conduct may or may not be violative of Rule 11 or Bankruptcy Rule 9011, it does not necessarily mean that a party will escape sanctions under the court's inherent power." *Id.*

Sanctions awarded under a court's inherent power requires a finding of bad faith, however. *Id.* Further, the "court must afford the sanctioned party due process, both in determining that the requisite bad faith exists and in assessing fees. Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why." *Id.* (citations omitted).

In this case, the bankruptcy court made no determination that the Emergency Motion to Disqualify was filed in bad faith. Although the Court concluded that the Motion to Disqualify was without merit, the bankruptcy court was specifically required to make a determination of bad faith before it could issue a sanctions order under its inherent power. As there was no such finding here, I refuse to uphold the sanctions order under the bankruptcy court's inherent power.[5]

---

[5]

As I have concluded that the bankruptcy court abused its discretion in awarding sanctions under Rule 9011, I need not determine whether the amount of sanctions awarded was reasonable. However, had I considered this issue, I would have concluded that the award of $ 80,572.50 was also an abuse of discretion.

Bankruptcy Rule 9011(c)(1)(A) specifically states that "[i]f warranted, the court may award to the party prevailing on the motion the *reasonable* expenses and attorney's fees incurred in presenting or opposing *the motion*." (emphasis added). Rule 9011(c)(2) further places limitations on the sanctions award. Rule 9011(c)(2) provides that "the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of *some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.*"

The Advisory Committee Notes to Rule 11 make clear, "[a]ny such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably cause by the violation of the certification requirement." Rule 11, Advisory Committee Notes 1993 Amendments. The Advisory Committee explains that the award should be limited in this regard because "the purpose of Rule 11 sanctions is to deter rather than to compensate [thus], the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty." *Id.*

Here, the bankruptcy court awarded the amount of $ 80,572.50 to Appellee. While the bankruptcy court may award sanctions to Appellee, I find that the amount awarded is excessive. In the Answer Brief, Appellee explains that the $ 80,572.50 award included *all time* Appellant spent working on this case during the "ten (10) month period, i.e. from the date of the filing of Appellant's Original Motion [to Disqualify] through and including the

V. Appellant's Emergency Motion to Stay Writs of Execution and Amended Writs of Execution Issued By the Bankruptcy Court

After the bankruptcy court issued its Final Judgment of sanctions, Appellee filed a motion to obtain a writ of execution on the Final Judgment. On January 18, 2006, the bankruptcy court issued Appellee a writ of execution. On February 27, 2006, Appellee obtained an Ex Parte Motion For Entry of Break Order from the bankruptcy court, authorizing the United States Marshal Service to enter on to Appellant's property to seize items to satisfy the judgment. Appellant filed an Emergency Motion to Stay Writs of Execution and Amended Writs of Execution Issued By the Bankruptcy Court in this Court on March 1, 2006 **[DE # 29]**. Appellee filed a Response in Opposition **[DE # 32]** to the

---

month of April, 2005". (Answer Brief at 37). The amount awarded included compensation for time Rotella spent "attending hearings, performing legal research, attending/taking depositions", "taking Appellant's deposition and traveling to the Bankruptcy Court to attend Motions to Compel pursuant to Appellant's many frivolous objections to reasonable discovery requests". (Answer Brief at 38). The bankruptcy court may not award sanctions for matters unrelated to the offending motion. *See* Bankruptcy Rule 9011(c)(1)(A); *see also* Bankruptcy Rule 9011(c)(2); Rule 11, Advisory Committee Notes 1993 Amendments.

Moreover, the comments Judge Hyman made at the hearing to determine the amount of sanctions makes clear that the $ 80,572.50 sanctions award included compensation for time and expenses unrelated to the Motion to Disqualify. **[*See* DE # 15, Exhibit 15]**. At the hearing Judge Hyman remarked: "[t]his was, in my 11 years, 11 and a half years on the bench, the most heavily litigated case I've had. And Ms. Gwynn, you have filed numerous motions *related to not only these motions for sanctions , but throughout this case* that, in my opinion, were frivolous and unwarranted, were unnecessarily vexatious, and unnecessarily extended, expanded the amount of time Mr. Rotella and his firm had to spend in this matter. . . . Time and time again, *not only dealing with motions to disqualify, but throughout this case*, you have not acted professionally, you're filed frivolous motions and unnecessary pleadings. *I find, yes, the amount of time is very large.* I do not minimize the amount of time Mr. Rotella has spent on *this case. But the* time is not excessive based on *what transpired in the case*, what was being filed in the case, your responses to what was being filed in the case as they relate to your motions to disqualify." (emphasis added). While the bankruptcy court may have been frustrated with the actions of Appellant throughout this case, the amount of sanctions must be limited to the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Bankruptcy Rule 9011(c)(1)(A). Consequently, I would have reversed the amount awarded by the bankruptcy court as sanctions.

Emergency Motion. Appellant filed her Reply **[DE # 33]** in support of the Emergency Motion on March 7, 2006.

In the Emergency Motion, Appellant asked the Court to stay the break order and writs of execution until after the Court rules on the bankruptcy appeal. On March 1, 2006, I issued an Order Granting Emergency Motion to Stay Writs of Execution and Amended Writs of Execution **[DE # 31]** on an emergency basis. I set oral argument on the Emergency Motion for the same time as oral argument on the underlying bankruptcy appeal. In light of my decision to vacate the Final Judgment awarding sanctions, I hereby dissolve the writs of execution and the amended writs of execution issued by the bankruptcy court.[6]

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The June 15, 2004 Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 and the May 11, 2005 Final Judgment entered by the bankruptcy court are hereby VACATED.

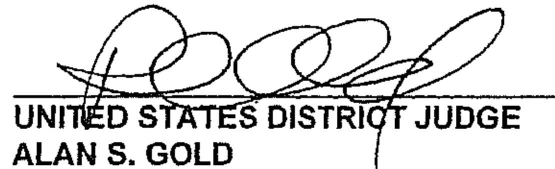
2. In light of the Court's ruling vacating the Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 and the Final Judgment, Appellant's Emergency Motion to Stay Writs of Execution and Amended Writs of Execution Issued By the Bankruptcy

---

[6] Although I vacate the bankruptcy court's order granting Appellee sanctions against Appellant, I stress that this Order in no way prohibits the bankruptcy court from sanctioning any inappropriate conduct by Appellant in the future, if appropriate. It is fairly clear to the undersigned that the bankruptcy court had grown weary of what it deemed to be Appellant's plethora of frivolous filings in the bankruptcy case. Nothing in this Order is intended to limit the bankruptcy court's discretion to impose sanctions in the future, pending that the bankruptcy court's orders comply with the applicable rules and procedure.

Court on March 1, 2006 **[DE # 29]** is GRANTED. The Writs of Execution, the Amended Writs of Execution and the Break Order issued by the bankruptcy court are VACATED.

DONE and **ORDERED** in Chambers at Miami, Florida, this 12 day of March, 2006.



UNITED STATES DISTRICT JUDGE
ALAN S. GOLD

Copies furnished to [via fax from Chambers]:

Magistrate Judge William C. Turnoff

Mary Alice Gwynn, Esq. (561) 330-8778

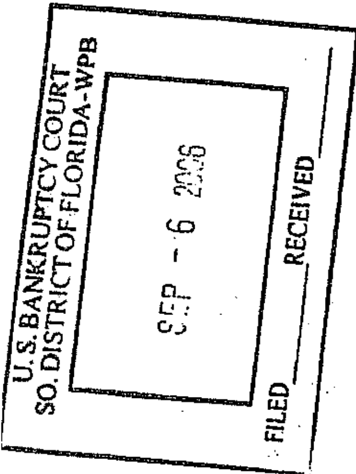
Gary Rotella, Esq. (954) 467-2231

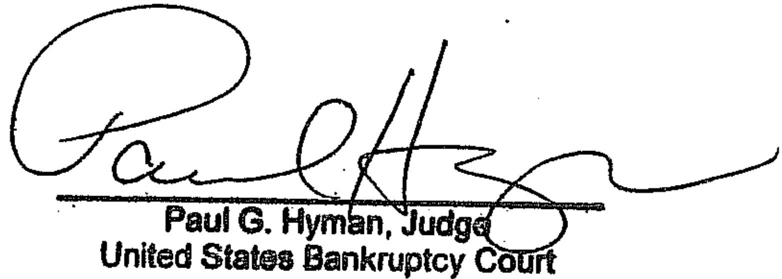
Chambers of the Honorable Paul G. Hyman, Jr. (954) 769-5779

EXHIBIT

#6

ORDERED in the Southern District of Florida on SEP - 6 2006.


U.S. BANKRUPTCY COURT
SO. DISTRICT OF FLORIDA-WPB
SEP - 6 2006
RECEIVED
FILED



Paul G. Hyman, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

IN RE:

JAMES F. WALKER,
Debtor.

CASE NO: 03-32158-BKC-PGH

Chapter 7 Proceedings

ORDER DENYING JAMES F. WALKER, AND GARY J. ROTELLA & ASSOCIATES, P.A.'S MOTION FOR RELIEF FROM ORDER PURSUANT TO RULE 60(b)(1) AND (6), FED.R.CIV. P.

THIS MATTER came before the Court on August 18, 2006 upon James F. Walker ("Debtor") and Gary J. Rotella & Associates, P.A.'s ("Rotella") (collectively, "Movants"), Motion for Relief from Order Pursuant to Rule 60(b)(1) and (6), Fed.R.Civ. P. (C.P. 1712) (the "Motion").

BACKGROUND

On June 15, 2005, Patricia Dzikowski ("Trustee") filed a *Motion By Trustee Patricia Dzikowski to Approve Settlement and Sale of the Bankruptcy Estate's Right Title and Interest in the Bahamian*

Real Property at Cat Cay, Lot 32 [C.P.953] ("Motion to Approve Settlement and Sale") seeking the Court's approval of, among other things, sale of the Estate's interest in Lot 32, North Cat Cay, Bahamas ("Cat Cay Property") to Rotella and the Debtor. The Motion to Approve Settlement and Sale attached as Exhibit "A", a Settlement Agreement between Trustee and Debtor dated March 9, 2005 ("Settlement Agreement"). On July 1, 2005, the Law Firm of Ferrell Law, P.A. ("Ferrell") filed a final application seeking compensation and expenses in the amount of $629,239.86 for Ferrell's representation of Former Trustee Linda Walden ("Ferrell Administrative Claim"). On July 14, 2005, Rotella and the Debtor filed adversary proceeding number 05-3127-BKC-PGH-A against the Trustee seeking attorneys' fees and costs in the amount of $637,559.68 allegedly incurred for services rendered to, and on behalf of, the Estate. After resolving the objection of the United States Trustee, the adversary proceeding was settled as memorialized in the Court's August 18, 2005 *Order Awarding Attorneys' Fees and Costs* [Adv. Proc. 05-3127, C.P.7]. Rotella was awarded $220,492.35 and he was permitted to credit bid the full amount of this award at any sale of the Estate's assets. At a hearing held August 10, 2005, Rotella disclosed that he had acquired the Ferrell Administrative Claim. On August 18, 2005 the Court entered an *Order Awarding Attorneys' Fees and Costs* [C.P.1124] to Ferrell in the amount of $536,552.36. On August 23,

449 35007003456016

2005, the Court entered an *Order of Substitution of Claim* [C.P.1125] which substituted Rotella, transferee for Ferrell, as the claimant for this award of fees. Rotella was also permitted to credit bid the full amount of this award at any sale of the Estate's assets. On September 1, 2005, the Court entered an *Order Granting Motion to Approve Settlement and Sale as Modified* [C.P. 1153] (the "Order Approving Settlement and Sale") which approved sale of the Estate's interest in the Cat Cay Property to Debtor and Rotella. The Order Approving Settlement and Sale states at paragraph 3:

> Mr. Rotella has informed this Court that the Debtor will pay the difference between Fifty Six Thousand Dollars and No/100 ($56,000.00) and the said amount of Fifty Thousand Dollars and No/100 ($50,000.00) and has additionally applied Rotella, P.A.'s entitled credit allowance of Seven Hundred Fifty Seven Thousand Forty Four Dollars and 71/100 ($757,044.71)[1] consistent with the Court's previous Orders to said amount elevating the Debtor's offer to purchase the Cat Cay Property, to the amount of Eight Hundred Thirteen Thousand Forty Four Dollars and 71/100 ($813,044.71) which is accepted as the highest and best offer by this Court.

At the August 25, 2005 hearing, the Court approved the settlement between the Trustee and the Debtor and then conducted a sale of the Estate's interest in the Cat Cay Property. Counsel for Trustee announced that there were two parties bidding, Rotella and counsel for Susan Lundborg ("Lubell"). After Lubell offered

[1]This amount represents the total of Rotella's $220,492.35 award for administrative expenses and Ferrell's $$536,552.36 award for administrative expenses.

$150,000, the Court noted that:

THE COURT: ....any proposed counter offer by Mr. Lubell, or Ms. Lundborg I should say, is really moot, unless she is offering more than Mr. Rotella's administrative claim. Therefore, I will approve the sale.

* * *

MR. ROTELLA: Next, Judge, so that the record is complete, the offer, with the subordination totals $813,044.71.

August 25, 2005 Transcript at p.42-43 [C.P.1184].

CONCLUSIONS OF LAW

The Motion states that Rotella drafted the proposed Order Approving Settlement and Sale which was entered by this Court. The Motion seeks to modify said Order Approving Settlement and Sale such that the offer is reduced from $813,044.71 to $56,000. Rotella maintains he is entitled to the requested relief pursuant to Fed. R. Civ. P. 60(b)(1) and (6). Rotella states that his "so the record is complete, the offer with subordination totals $813,044.71" statement was gratuitous and that the proposed version of the order, which he drafted, was entered in error due to inadvertence or excusable neglect.

Fed. R. Civ. P. 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; .... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

The Eleventh Circuit has "consistently held that 60(b)(1) and

35007003456025

(b)(6) are mutually exclusive. Therefore a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1)." *Solaroll Shade and Shutter Corp, v. Bio-Energy Systems, Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986)(citations omitted). "Moreover, relief under 60(b)(6) is an 'extraordinary remedy which may be invoked only upon a showing of exceptional circumstances.'" *Williams v. North Florida Regional Medical Center, Inc.* 164 Fed. Appx. 896, 898 (11th Cir. 2006)(*quoting Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir.1993). Movants request relief pursuant to Rule 60(b)(6) based upon "fairness and equity" but they have alleged no circumstances surrounding entry of the Order Approving Settlement and Sale that were either unfair or inequitable. The Motion's remaining grounds for relief, i.e, error, inadvertence, and excusable neglect, are properly considered under Rule 60 (b)(6).

The Supreme Court has established a "flexible analysis of excusable neglect". *Advanced Estimating System, Inc., v. Riney*, 77 F.3d 1322, 1324 (11th Cir. 1996)(*citing Pioneer Inv. Servs. Co., v. Brunswick Assoc,. Ltd. Partnership*, 113 S.Ct. 1489 (1993)) . In *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996), the Eleventh Circuit applied *Pioneer* to the meaning of excusable neglect as used in Rule 60(b)(1).

> In *Pioneer*, the Supreme Court held that when analyzing a claim of excusable neglect, courts should "tak[e] account of all relevant circumstances surrounding the party's omission,"

> including "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 113 S.Ct. at 1498. Primary importance should be accorded to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration.

Advanced Estimating, 77 F. 3d at 1325 (*quoting Cheney*, 71 F.3d at 850).

Modification of the Court's Order Approving Settlement and Sale is not warranted in this case. The Motion was filed one week shy of a year having elapsed since the Court's oral ruling as announced at the August 25, 2005 hearing. Rotella offers no reason for his delay in filing the Motion, nor does he explain how his neglect, excusable or not, contributed to entry of an order that he maintains was entered in error. Rotella merely states that his bid of $813,044.71 was gratuitous and that he drafted the proposed order in error. Were the Court to grant the relief requested, there would be substantial prejudice to the non-moving party. In addition, any semblance of efficient judicial administration would be annihilated. The Order Approving Settlement and Sale ***accurately reflects the proceedings and this Court's ruling.***

The Court finds that there was no error or mistake with regard to entry of the Order Approving Settlement and Sale. The Court's entry on May 11, 2005 of the *Order Awarding Sanctions Against Mary Alice Gwynn Esq. Pursuant to Rule 9011* [C.P.881] (the "Erroneous Order") is an example of an order entered in error. At the April

21, 2005 hearing on Rotella's sanctions motion, it was determined that Rotella had failed to send a Rule 9011 communication to Gwynn. On that basis, the Court denied Rotella's sanctions motion without prejudice to it being filed pursuant to other grounds. Nevertheless, Rotella submitted the proposed Erroneous Order,[1] which contrary to the Court's ruling, awarded Rule 9011 sanctions. The proposed Erroneous Order was entered by the Court in misplaced reliance that Rotella would submit a proposed order that accurately reflected the Court's ruling. It did not. The error was corrected when the Erroneous Order was overturned on appeal. Unlike the Erroneous Order, the Order Approving Settlement and Sale accurately reflects the proceedings of August 25, 2005 and the Court's ruling. The Court having reviewed the Motion, and being otherwise fully advised in the premises hereby:

ORDERS AND ADJUDGES that the Motion is **DENIED.**

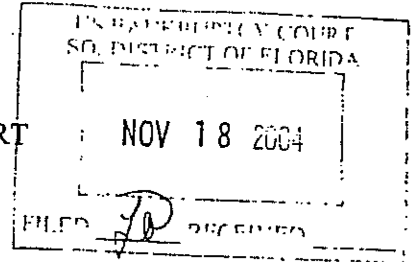
###

Copies Furnished To:
Gary J. Rotella, Esq
Aviva Wernick, Esq.
John L. Walsh, Esq.
Mary Alice Gwynn, Esq.
AUST

[1] Rotella's late submission of the Erroneous Order also violated Local Rule 5005-1(G)(1)(c).

EXHIBIT

#7



IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

Case No. 03-32158-BKC-PGH
Chapter 11

JAMES F. WALKER,

_________________Debtors_____________/

ORDER REMOVING TRUSTEE FROM CHAPTER 7 CASE

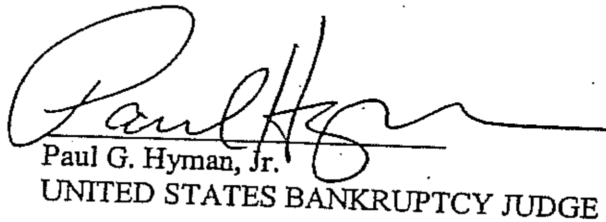
THIS MATTER comes before the Court On November 17, 2004, on the Motion of the Debtor, seeking to remove the Trustee, Linda J. Walden. This Court finds, after notice and hearing, that the motion should be granted, for reasons stated on the record.

It is ORDERED that:

The Trustee, Linda J. Walden, is removed, and further,

It is ORDERED that the United States Trustee shall appoint a successor Trustee.

ORDERED in the Southern District of Florida this 17th day of November, 2004.



Paul G. Hyman, Jr.
UNITED STATES BANKRUPTCY JUDGE

Copies to:
Debtor
Attorney for Debtor
Assistant U.S. Trustee

634

EXHIBIT

#8

SCHULTZ

Ferrell Schultz Carter & Fertel
A PROFESSIONAL ASSOCIATION

PO Box 01-9693
201 South Biscayne Boulevard
34th Floor, Miami Center
Miami, Florida 33131-4325

telephone 305-371-8585
facsimile 305-371-5732
miami@ferrellschultz.com

MI, FLORIDA
INGTON, D.C.
YORK, NEW YORK
ULO, BRAZIL
JANEIRO, BRAZIL
S AIRES, ARGENTINA
LEBANON
the Middle East
S, VENEZUELA
O, CHILE
CITY, PANAMA
America
COLOMBIA

November 29, 2004

VIA FACSIMILE & FED EX

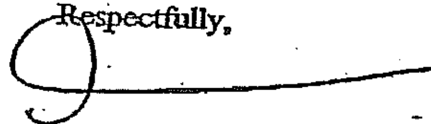
The Honorable Paul G. Hyman, Jr.
United States Bankruptcy Judge
299 E. Broward Blvd.
Judge Hyman's Chambers, Room 403
Fort Lauderdale, FL 33301

Re: **In re: James F. Walker, Case No. 03-32158-BKC-PGH**

Dear Judge Hyman:

We are in receipt of Mr. Rotella's proposed Order Granting Debtor, James F. Walker's Emergency Motion to Remove Trustee, Linda J. Walden Pursuant to 11 U.S.C. § 324 for Fraud Upon the Court. We respectfully submit that since your Honor has already entered the Order Removing Trustee from Chapter 7 Case, dated November 17, 2004, which resolved the Debtor's Motion to Remove, the Court is without jurisdiction to enter a further Order on the matter. Further, the Order dated November 17, 2004 is already the subject of a notice of appeal filed by Genovese, Joblove & Battista.

Respectfully,

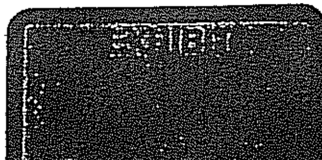


Gary M. Murphree

GMM:ad

cc: Gary Rotella, Esq.
Craig P. Rieders, Esq.
Kevin Gleason, Esq.
Aviva Wernick, Esq.
Heidi Feinman

{00123385.DOC}



EXHIBIT

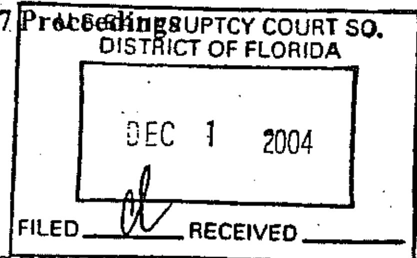
#9

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 REMOVE TRUSTEE, LINDA J. WALDEN PURSUANT TO 11 U.S.C. §324 FOR FRAUD UPON THE COURT

This matter came before this Court on Debtor, James F. Walker's Emergency Motion To Remove Trustee, Linda J. Walden Pursuant To 11 U.S.C. §324 [C.P. 513] ("Debtor's Motion To Remove") with evidentiary hearings conducted on October 8, 22 and 27 and November 12 and 17, 2004.[1]

Preliminarily, this Court emphasizes that this is a serious matter. Removal of a bankruptcy trustee is probably as serious of an action as a bankruptcy judge could possibly decide. Accordingly, any allegations that a trustee should be removed must be proven by clear and convincing evidence, not by a mere preponderance of evidence. The findings of fact that follow are not undertaken lightly.

---

[1] On November 17, 2004, at the conclusion of the Trial on this matter, this Court entered, at the request of the Office of the United States Trustee, an Order Removing Trustee From Chapter 7 Case [C.P. 634] in order to facilitate the immediate removal of Linda J. Walden and appointment of a successor Trustee.

649

BACKGROUND

On April 25, 2003, Debtor, James F. Walker ("Walker" or "Debtor") filed a Voluntary Chapter 7 Bankruptcy Petition with the Clerk of the Bankruptcy Court for the Southern District of Florida ("Bankruptcy Proceeding"). Consistent with 11 U.S.C. §702, an Interim Trustee was appointed upon Walker's filing. Pursuant to Fed.R.Bankr.P. 2003(a), the initial §341(a) Meeting Of Creditors was scheduled for June 3, 2003, however, it was continued to June 11, 2003 by agreement between Walker and the Interim Trustee.

On June 11, the continued §341(a) Meeting Of Creditors was held in West Palm Beach, Florida. Walker and his attorney, Gary J. Rotella ("Rotella"), were present. Also present were Robert S. Pettus ("Pettus"), an unsecured creditor; Carl J. Shuhi ("Shuhi"), president and sole shareholder of Florida Precision Calipers, Inc. ("Florida Precision"), an unsecured creditor; Mary Alice Gwynn, Esquire ("Gwynn"), attorney for unsecured creditors Florida Precision and Eleanor C. Cole ("Cole"); and Robert A. Angueira, Esquire ("Angueira"), also an attorney for Florida Precision and Cole. Cole was not present.

After the §341(a) Meeting Of Creditors was called to order, Angueira announced that creditors Florida Precision and Cole were calling an election to elect a permanent Chapter 7 Trustee. Angueira was in possession of two (2) notarized General Power Of Attorney forms in favor of Gwynn, from Creditors Cole and Florida Precision. The United States Trustee then inquired whether there were any nominations for permanent trustee. Angueira referred to the two Ballots tendered to the United States Trustee, both naming Linda J. Walden ("Walden"). Walker objected to Walden becoming Chapter 7 Trustee.

On June 12, 2003, Walden signed, under oath and penalty of perjury, a Verified Statement To Accompany United States Trustee's Report Of Disputed Election Under Bankruptcy Rule 2007.1(b)(3)(B) ("Verified Statement"), which recites in relevant part:

> "I, LINDA J. WALDEN, the undersigned, hereby state the following under penalty of perjury, 18 U.S.C. Section 1001, in connection with the pending trustee election in this case:
>
> I have the following connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee for Region 21, and/or any person employed in the Office of the United States Trustee: NONE except as disclosed herein:
>
> 1. I was appointed and currently serve as State Court Receiver for the Creditors in the matter styled Eleanor C. Cole, Plaintiff, v. James F. Walker, Defendant Case No. 89-21462-09 before the Honorable Circuit Court Judge Andrews currently pending and stayed in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County."

On June 17, 2003, the United States Trustee filed United States Trustee's Report Of Disputed Election Of Chapter 7 Trustee Pursuant To 11 U.S.C. §702 ("Report Of Disputed Election") which explained, in detail, the election process and reflected that if Walker had not objected, Walden would be elected. The Report Of Disputed Election with Walden's Verified Statement appended thereto was admitted into evidence as Debtor's Exhibit Z.[2]

On June 20, Angueira filed, on behalf of Florida Precision and Cole, a Motion To Resolve The Report Of Disputed Election And To Ratify The Election Of Linda Walden As Permanent Chapter 7 Trustee. On July 9, a hearing was held before this Court to resolve the disputed election.

---

[2] All of the Exhibits referred to herein have been admitted into evidence.

At that hearing, Walker called Walden to the witness stand and inquired into her relationship with Shuhi, the sole officer and shareholder of Florida Precision. Walden testified that she had known Shuhi for approximately one (1) year and that she didn't have any business or personal connections with Shuhi, other than she had acted as the State Court Receiver for all of Walker's creditors in the matter styled *Eleanor C. Cole v. James F. Walker*, In The Circuit Court Of The Seventeenth Judicial Circuit, In And For Broward County, Florida, Case Number 89-21462 (09) ("Receivership Proceeding"). Specifically, Walden testified:

> "Q. [BY ROTELLA]: Have you rendered services on Mr. Shuey's *(sic)* behalf for any of his entities?
>
> A. [WALDEN]: No. I do not do personal work for Mr. Shuey *(sic)*.
>
> Q. Have you received any money in any form from Mr. Shuey *(sic)* at any point in time?
>
> A. Mr. Shuey *(sic)* does not pay me.
>
> Q. Has Mr. Shuey *(sic)* given you any money at any point in time?
>
> A. Mr. Shuey *(sic)* has not given me money."

See July 9 Hearing Transcript admitted into evidence as Debtor's Exhibit MM, Page 56, Lines 5 through 13.

> "Q. **[BY ROTELLA]: What is your business relationship with Mr. Shuey *(sic)*, none?**
>
> **A. [WALDEN]: I do not have a direct business relationship with Mr. Shuey *(sic)*, other than the fact he is a creditor in this particular case, and I have met with Mr. Shuey *(sic)* to get information in the receivership.**
>
> Q. In the receivership, you've met with Mr. Shuey *(sic)* to get information in the receivership. Under the receivership order, aren't

you the fiduciary of Eleanor C. Cole?

A. I am the fiduciary of - - I was appointed the receiver for Ms. Cole and the creditors.

Q. So when you say you don't have any direct business relationship with Mr. Shuey *(sic)*, do you have some indirect business relationship?

A. As I said, I was the appointee for the creditors.

Q. **Do you render any services for any of Mr. Shuey's *(sic)* business entities**?

A. **No. I believe I answered that question**."
(Emphasis added.)

Id. at Page 57, Lines 3 through 22.

Based upon Walden's sworn testimony that she had no relationship with Shuhi, and other relevant criteria, this Court ratified Walden to serve as Walker's Chapter 7 Trustee.

In sum, Walker has alleged two (2) bases to remove Chapter 7 Trustee Walden. First, Walker alleged that Trustee made a false statement in her June 12, 2003 Verified Statement wherein she allegedly did not disclose any relationship or "connection" with Shuhi, as sole corporate officer and shareholder of Florida Precision, the second largest creditor in Walker's Chapter 7 Proceedings, other than pertaining to the Receivership Proceeding.

Rule 2007.1(b)(3)(B), in pertinent part, requires in a disputed election (as was the case in Walker's Bankruptcy Proceedings) that the United States Trustee file a report and, quoting subsection (b):

"[T]he report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute,

> setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, United States trustee, and any person employed in the office of the United States trustee".

The plain language of Bankruptcy Rule 2007.1(b) does not limit such "connections" to present or past.

The second general set of Walker's allegations relate to Walden's alleged perjury in deposition and live testimony before this Court regarding the alleged relationship between she and Shuhi. Walker's attorneys point to two (2) categories of evidence which they assert prove that Trustee had a business relationship with Shuhi commencing in 1999, or thereabouts. First, Walker alleged facts that demonstrate Walden acted as Shuhi's expert witness and accountant in a State Court action, to wit: *Florida Caliper Manufacturers, et. al. v. Alan Richard Simon et al.*, In The Fifteenth Judicial Circuit, In And For Palm Beach County Florida, Case Number 501998CA010597 ("FCM Civil Case"). Second, Walker alleged facts that demonstrate that Trustee was the Registered Agent for companies owned and controlled by Shuhi in 2001 and thereafter.

FINDINGS OF FACT

On October 27, during the Trial on this matter, this Court carefully defined the issues relative to Walden's removal as follows:

> "What's relevant is whether she has lied before the Court as to her representation ofMr. Shuhi, either in the corporate matters, where she is registered agent, or whether she had a business relationship with Mr. Shuhi in the state court action."

See October 27, 2004 Hearing Transcript, Page 65, Lines 10 through 15.

Walden has repeatedly testified in dozens of instances during this Trial, at prior hearings and

throughout her deposition that she had no relationship with Shuhi prior to 2002 other than, in essence, a very casual passing of Shuhi in professional offices wherein she shared space with Eric S. Glatter, Esquire ("Glatter"), who represented Shuhi in matters unrelated to the FCM Civil Case. For example, Walden testified in her October 20, 2004 deposition relative to her relationship with Shuhi:

> "Q. [BY ROTELLA]: Have you ever been employed -- have you ever been an employee of Carl Shuhi or any of his entities?
>
> A. [WALDEN]: No, I have never been an employee of Carl Shuhi or any of his entities.
>
> Q. Have you ever worked for Carl Shuhi or any of his entities?
>
> A. I have never worked for Carl Shuhi or any of his entities.
>
> Q. You previously testified that you have never been retained by Carl Shuhi or any of his entities; is that correct?
>
> A. I do not know if that was my testimony; however, I have not been retained by Carl Shuhi or any of his entities.
>
> Q. And you have never rendered any services, as I suppose is both your testimony and Carl Shuhi's testimony as of October 8th for Carl Shuhi or any of his entities, correct?
>
> A. As of October 8th, I have never rendered any services for Carl Shuhi - -
>
> Q. Or any of his entities?
>
> A. - - or any of his entities."

See Debtor's Exhibit NN, Deposition of Walden, Page 40, Lines 12 through 25 and Page 41, Lines 1 through 9.

> "Q. [BY ROTELLA]: However, you never met him until the end of

2002, that being I'm going to call it receivership time.

A. [WALDEN]: I do not know that I testified to the exact time I met him.

Q. Okay. Tell me when you met him.

A. I don't know the exact year that I met him, but it would have been - - I mean, actually met him, it would have been during the receivership - pre-receivership."

Id. at Page 44, Lines 20 through 25, Page 45, Lines 1 through 4.

"Q. Did you ever sit with Mr. Shuhi and discuss the -- did you ever meet with Mr. Shuhi or speak with Mr. Shuhi by telephone and discuss the matter of Florida Caliper Manufacturing versus Alan Richard Simon?"

Id. at Page 47, Lines 23 through 25, Page 48, Lines 1 through 2.

"THE WITNESS [WALDEN]: Okay. I do not believe that I met with Mr. Shuhi regarding that.

Q. [BY ROTELLA]: Okay. Did you ever speak with him by telephone regarding that case?

A. I do not believe I spoke with Mr. Shuhi regarding that case.

Q. So, to complete the circle, you have never performed any services for Carl Shuhi or any of his entities other than as you swear in the verified Statement to accompany United States trustee's report of disputed election under bankruptcy rule 2007.1(b)(3)(B), other than your role in the receivership, correct?

A. I have not performed services for Mr. Shuhi.

Q. Or any of his entities?

A. Or any of his entities. I have explained the Vicki Bravendar/Utrecht situation clearly.

Q. So, that we're clear and I'll leave this for always. To this day, you've had no business or personal relationship with Carl Shuhi or any of his entities other than your role in the state court receivership matter and now the bankruptcy matter, correct?

A. As I've stated, I have not had any relationship."

Id. at Page 48, Lines 12 through 25, Page 49, Lines 1 through 13. [Emphasis added].

On October 27, 2004, Walden testified that the extent of her relationship with Shuhi was limited to merely seeing Shuhi in Glatter's office:

"Q. [BY ROTELLA]: What was Mr. Utrecht doing or not doing that you are referring to here?

A. [WALDEN]: It appeared continually that Mr. Utrecht was trying to use the work that I was putting together for Ms. Bravender, the report, and use it for his other client, Mr. Shuhi.

Q. Whom you did not know at the time?

A. At which time?

Q. In 2000.

A. No, I said that I saw Mr. Shuhi come into Mr. Glatter's office.

Q. But you didn't know him, you had never done any business with him?

A. I had never done any business with him, that is correct.

Q. You have never done any business with him?

A. That is correct."

See October 27, 2004 Hearing Transcript, Page 27, Lines 4 through 9.

Consistent with Walden's testimony, Shuhi testified during this Trial on October 8, 2004

that he had no relationship, business or personal, with Walden until October, 2002. On October 8, Shuhi testified as follows:

> "Q. [ROTELLA]: You testified that you first met Ms. Walden around the time of Ms. Gwynn's engagement by Ms. Cole, which would be October, 2002; correct?"
>
> "A. [SHUHI]: I don't know. If you say it's October, then it is."
>
> "Q. So you didn't know who Ms. Walden was in March 19 of '01?"
>
> "A. At that point, no."

See October 8, 2004 Hearing Transcript, Page 32, Line 4 through 20.

> "Q. [BY ROTELLA]: How long have you known Ms. Walden?
>
> A. [SHUHI]: Actually known her since <u>about 2002</u>.
>
> Q. And when would that be in 2002, do you remember?
>
> A. No, I do not recall. It had something to do with Eleanor Cole's case.
>
> Q. You didn't know her before Eleanor Cole's case; is that correct?
>
> A. I may have known of her name, <u>but I have not ever met her personally</u>."

Id. at Page 26, Lines 4 through 13. [Emphasis added].

Entirely inconsistent with his testimony before this Court, Shuhi testified in the FCM Civil Case five (5) years ago that Walden was, in fact, the expert witness in that matter and both his personal and business accountant. Specifically, Shuhi testified on June 28, 1999 as follows:

> "Q. [DEFENDANTS' COUNSEL]: Does Florida Caliper Manufacturers file corporate tax returns?

A.[SHUHI]: Yes.

Q. Who files the tax returns, or who prepares them?

A. CPA.

Q. What's the name of the present CPA?

A. **Linda Walden**.

Q. W-A-L-D-E-N?

A. I believe so.

Q. And where is she located?

A. Boca Raton.

Q. Is she with a company?

A. **Walden and Associates**.

Q. And how long has Miss Walden been doing the corporate tax returns?

A. Less than a year."

See Debtor's Exhibit I, Shuhi's June 28, 1999 Deposition Transcript, Page 15, Lines 24 through 25; Page 16, Lines 1 through 15. [Emphasis added].

"Q. [DEFENDANTS' COUNSEL]: Do you file personal tax returns every year?

A. [SHUHI]: Yes. My CPA does the work.

Q. Who is your personal CPA?

A. **Linda Walden**.

Q. How long has Miss Walden been preparing your tax returns?

A. Less than a year.

Q. Have you had any other CPAs for your own personal tax returns other than Ms. Walden and Mr. Bushco?

A. None that I can recall."

Id. at Page 18, Lines 4 through 15. [Emphasis added].

"Q. [DEFENDANTS' COUNSEL]: Do you have a total for the amount of damages that you claimed have resulted from three matters involving the same subject matter being pursued separately?

A. [SHUHI]: I'd have to refer that to my accountant.

Q. And who is your accountant for this purpose?

A. **Linda Walden**.

Q. Has Ms. Walden been retained at this point to provide any testimony or calculate any damages with regard to this litigation?

A. Yes."

Id. at Page 134, Lines 1 through 12. [Emphasis added].

The alleged facts indicating that Trustee represented Shuhi in the FCM Civil Case are established from several sources. First is the testimony of Steven T. Utrecht, Esquire ("Utrecht"). Utecht testified that he represented Shuhi relative to his entities' claims against Simon & Simon Charter Attorneys, P.A. ("Simon Law Firm") in the FCM Civil Case. Utrecht testified that he needed an expert witness and that Shuhi represented to him that Walden would fill that role and hired her. Utrecht testified that he met, spoke and corresponded with Walden several times in connection with the FCM Civil Case and that she was Shuhi's entities' expert witness.

Secondly, Steven W. Gomberg, Esquire ("Gomberg"), Utrecht's successor as attorney of

record for Shuhi's entities in the FCM Civil Case, received the expert witness report from Shuhi, which is attached to Debtor's Exhibit TT, Plaintiffs' Notice Of Filing Unverified Supplemental Response To Interrogatories, and that he believed was prepared by Walden.

Third, Shuhi testified at two (2) separate depositions in 1999 in the FCM Civil Case that Walden was his personal and business accountant, as well as his entities' expert witness.

However, before this Court on October 8, Shuhi stated, under oath, that when he testified in 1999 in the FCM Civil Case that Walden was his expert witness and accountant, he did so because Utrecht told him that was the case. This is directly contradicted by Utrecht's testimony before this Court. Shuhi testified on November 17 in these Proceedings that Utrecht, and not Shuhi himself, retained Walden as the expert witness for his entities in the FCM Civil Case and that Walden was his accountant, as well, but that he never paid her anything.

Fourth, Debtor's Exhibit TT is Plaintiffs' Notice Of Filing Unverified Supplemental Response To Interrogatories in the FCM Civil Case. Appended to Debtor's Exhibit TT allegedly is the expert report of Walden along with the Simon Law Firm's invoices to Shuhi's entities on various litigation matters attached as exhibits and referenced in the four (4) substantive pages of Walden's report. However, Trustee testified during this Trial, and previously at prior hearings, that the report in question, which she did admit preparing, was prepared for Vicki Bravender ("Bravender"), Shuhi's secretary, and not for Shuhi's entities in the FCM Civil Case.

In further support of her position, Trustee produced at her October 20, 2004 deposition what became Debtor's Exhibit SS which contains the exact same four (4) substantive pages of her expert report found in Debtor's Exhibit TT, but contained a cover page indicating that the report was

prepared for Vicki Bravender and also contained a ledger produced by the Simon Law Firm regarding time spent on the matter styled *Vicki Bravender v. State Farm Mutual Automobile Insurance Company*, In The Circuit Court For The Fifteenth Judicial Circuit, In And For Palm Beach County Florida, Case Number: 501996CA001488 ("State Farm Matter"). The Bravender State Farm Matter ledger is not referenced in the four (4) substantive pages of Walden's expert report.

In her October 26, 2004 deposition, Bravender produced yet another version of Walden's expert report which was admitted into evidence as Debtor's Exhibit RRR. Debtor's Exhibit RRR contained the Bravender cover page, the Bravender ledger in the State Farm Matter, Shuhi's entities invoices that are referenced as exhibits in the expert report and a spread sheet analyzing the Simon Law Firm's handling of various Shuhi litigation which is not referenced in Walden's expert report. Each of the three versions of Walden's expert report each contain the identical four (4) page substantive expert report.

As to Walker's allegations that Trustee acted as the Registered Agent for several of Shuhi's various entities, Trustee testified that she did sign several Uniform Business Reports filed with the Florida Secretary of State, Division Of Corporations as the Registered Agent for at least two (2) of Shuhi's entities, i.e. Florida Caliper, LLC ("Florida Caliper") and Royal Crest Farms, LLC ("Royal Crest"). However, Trustee claims she should not have been listed as the Registered Agent for Florida Caliper while Shuhi owned that entity. Trustee testified that at some point in time Glatter was supposed to change the managing member of Florida Caliper from Shuhi to Bravender as ownership of that entity was purportedly given to Bravender from Shuhi. Trustee admits Bravender was her client and that she was appointed to act as the Registered Agent for that company on behalf

of Bravender. There was no evidence presented to indicate that Royal Crest was sold or otherwise given to Bravender from Shuhi.

Bravender, who was Shuhi's secretary for a long period of time, testified that she was the transferee of Florida Caliper, which changed its name subsequently to Globe Centurion, LLC ("Centurion") and that she never owned any other companies. Bravender testified that she contacted Utrecht to represent her in a potential claim against the Simon Law Firm. Utrecht acknowledged that he did have discussions with Bravender regarding her pursuit of potential claims against the Simon Law Firm, but that he never undertook formal representation of her in such regard.

There is no dispute there was never any formal lawsuit commenced on behalf of Bravender against the Simon Law Firm or that Utrecht filed a lawsuit against the Simon Law Firm on behalf of Shuhi's entities as Plaintiffs, one of which was Florida Precision, the second largest creditor in Walker's Chapter 7 Bankruptcy Proceedings.

Bravender testified that the Simon Law Firm handled several matters for her. Bravender claimed that she did not get the proper percentage of a settlement from the Simon Law Firm in a personal injury case referred to as the "Beaver Properties" matter; meaning that the law firm received forty percent (40%) instead of thirty three and one-third percent (33 1/3%), and that she should have received sixty six and one-third percent (66 1/3%) instead of sixty percent (60%). Pursuant to the settlement in that personal injury matter, in which Bravender and Shuhi were co- plaintiffs, there was no deduction for Bravender's costs since all of the expenses were paid by Shuhi, as reflected in the Beaver Properties Settlement Statement admitted into evidence as Debtor's Exhibit MMMM.

Bravender also testified that she retained Utrecht in a cause of action against the Simon Law

Firm based upon their contingency fee based representation of her in the State Farm Matter. However, in that case, Bravender did not receive any recovery which could flow through the Simon Law Firm trust account because she did not accept an offer of judgment after which attorneys' fees and costs were assessed against her. Bravender's claims would then be against the Simon Law Firm related to that firm's alleged failure to properly advise her as to the offer of judgment by State Farm. Bravender does claim that an expert report was prepared for her relative to her claims against the Simon Law Firm.

In rebuttal to Walden and Shuhi's testimony that they never had any relationship or connection until 2002, Elaine M. Gatsos, Esquire ("Gatsos") testified that she represented Shuhi and that such representation began with a referral and introduction by Trustee. In fact, Gatsos testified she met, in person, with both Walden and Shuhi on February 26, 1999 at Shuhi's Delray Beach office for an initial client meeting. Gatsos also testified that during various meetings, Walden repeatedly mentioned that she was filling out answers to expert interrogatories related to a cause of action for Shuhi being handled by Utrecht.

Walden, in sur rebuttal to Gatsos' testimony, again testified that she never had any connection with Shuhi, and that, in essence, Gatsos, Utrecht and Gomberg were not telling the truth.

In determining the credibility of witnesses, the Court looks to the three (3) criteria: extrinsic evidence, the demeanor of witnesses and motivation of the witness. (1)

Going to the extrinsic evidence first, looking at Debtor's Exhibits SS, TT and RRR, the three (3) versions of Walden's expert report only deal with Walden's analysis of Shuhi invoices from the Simon Law Firm and the Shuhi issues handled by the Simon Law Firm. There is no mention of

Bravender. Bravender admitted that the expert report has nothing to do with her lawsuit or her claims against the Simon Law Firm. Significantly, each of the three (3) versions of Walden's expert report contain the identical four (4) page substantive findings and therein there are two (2) references to a "client", and both references reference a male instead of a female, to wit:

> "It appears that Alan Richard Simon began as a solo practitioner at the initial representation of the client and his various entities."

Page 2, Subparagraph (b). [Emphasis added].

> "The client has indicated that there are balance forwards of invoices showing amounts due when in his possession and then showing zero balances after credits are applied when faxed over from the law firm."

Page 3, Subparagraph (g). [Emphasis added].

Again, this is additional evidence that the expert report was prepared for Shuhi in conjunction with the FCM Civil Case and not for Bravender for whom no lawsuit was ever filed against the Simon Law Firm.

The invoices that are attached to Debtor's Exhibit TT are invoices from the Simon Law Firm to Shuhi, not to Bravender. Both of the potential claims Bravender testified to having had against the Simon Law Firm would not deal with billing practices, they would deal with either a contract, i.e. the retainer agreement between the Simon Law Firm and Bravender which would indicate what percentages of the settlement should have been received, or a malpractice claim against the Simon Law Firm based upon the alleged misadvice to Bravender concerning rejection of the offer of judgment. The expert report itself would be completely useless on any claims Bravender had against the Simon Law Firm.

This Court notes, in reviewing Debtor's Exhibits SS and RRR versus Debtor's Exhibit TT, that the cover page of the former Exhibits does reflect the report was prepared by Walden for Bravender. And, although this Court is not a document expert, this Court does have experience, as a former Assistant United States Attorney and sitting on the bench, and it is clear to this Court that the cover page on Debtor's Exhibit SS and Debtor's Exhibit RRR was prepared either on a different typewriter or a different computer than the report appended to Debtor's Exhibit TT. Examining the cover page of Debtor's Exhibits SS and RRR, the letters on the cover page do not have hooks on the ends of the letters, while the letters in the body of the expert report itself do have hooks on the ends. Therefore, it is clear to the Court that the cover page of these Exhibits was not prepared contemporaneously with the expert report and that this was an effort, orchestrated by Walden, to conceal the fact that the initial expert report was really prepared for Shuhi. (2)

In addition, critical to the Court's findings are Debtor's Exhibits KKK-1 through KKK-31 which were produced by Utrecht under Subpoena Duces Tecum In Bankruptcy A Proceeding and originally produced to this Court under privilege log. Noteworthy, any and all of Shuhi's attorney-client privilege assertions as pertaining to documents produced by Utrecht, Gomberg and Gatsos were denied under the crime-fraud exception to the attorney-client privilege. Those documents evidence a history between Utrecht, Shuhi and Walden and demonstrate to this Court that Walden was retained as the expert witness in the FCM Civil Case.

Going through Debtor's Exhibits KKK-1 through KKK-31, the following are just a few of the obvious points that the Court takes into consideration in making this finding. Debtor's Exhibit KKK-1 is the first correspondence to Utrecht from Shuhi dated January 6, 2000 and it gives a general

background, references "Simon & Simon case" and focuses on financial damages and accounting. In it, Shuhi writes: "That is the reason accounting experts have been hired". The only accounting expert in the FCM Civil Case was Walden.

Debtor's Exhibit KKK-2 is a facsimile correspondence, dated January 6, 2000, to Utrecht from Shuhi. In it, Shuhi states: "Linda Walden said she needs to testify at this upcoming fraud hearing". The testimony is clear that there were allegations in the FCM Civil Case that the case should be dismissed based upon alleged fraud upon the court, specifically the doctoring of documents by Shuhi in formal discovery to benefit his claims. It is also clear that this correspondence relates to the FCM Civil Case and it expressly references Walden, the Trustee.

Debtor's Exhibit KKK-3, dated January 19, 2000, is a facsimile correspondence on Walden & Associates letterhead to Shuhi from Walden referencing "Fl. Calipers v. Simon". In Walden's own communication she references "Fl. Calipers", not Bravender. This correspondence to Shuhi, with a carbon copy to Utrecht for his information, states: "While we have an analysis you sent over for payments out we need the ledgers of source documents for prior to1996". Clearly, Walden is working for Shuhi in the FCM Civil Case.

Debtor's Exhibit KKK-4B, dated January 20, 2000, is a facsimile correspondence to Walden from Utrecht, wherein Utrecht discusses pre-marking exhibits. The reference on Utrecht's correspondence is "Carl J. Shuhi v. Alan Richard Simon, et al." As a side note, Utrecht oftentimes does interchange Shuhi and Florida Caliper in his various correspondence, however, at no point does he reference Bravender. Importantly, there is a hand-written note of that same date at the foot of Debtor's Exhibit KKK-4B to Utrecht from Walden. Here, Walden handwrites:

"I am awaiting source documents from the client as the client wants the exhibits to be enhanced. Until I receive those documents, I am on hold. I expect them today. Linda"

Clearly, this is a response directly to the prior correspondence dated January 19, 2000 (Debtor's Exhibit KKK-3) wherein Walden discusses the need for the ledger of source documents for prior to 1996.

Debtor's Exhibit KKK-5, dated January 20, 2000, is a facsimile correspondence to Shuhi from Utrecht referencing "Shuhi v. Simon et al.", wherein Utrecht discusses an upcoming hearing which, again, ties into the previous correspondence and Exhibits that would be necessary for this upcoming hearing. Utrecht writes, again: "I expect Linda's accounting to be done a long time before then", meaning before the hearing on the Motion To Dismiss For Fraud. Debtor's Exhibit KKK-5 evidences a clear understanding by Utrecht that Walden was the expert witness being used by Shuhi in the FCM Civil Case. At no point throughout any of this does Walden say, wait a minute, I'm not the expert witness here.

Debtor's Exhibit KKK-6 is a correspondence, dated January 24, 2000, to Utrecht from Shuhi referencing "Simon & Simon". Even though Shuhi testified that someone else retained Walden, Shuhi states here that: "I have reviewed the flow chart provided by our accountant". This is yet another acknowledgment by Shuhi that Walden was his accountant.

Debtor's Exhibit KKK-7 is a facsimile correspondence, dated February 1, 2000, to Shuhi from Utrecht referencing "Shuhi v. Simon et al." wherein Utrecht writes: "I merely wish to point out that Linda Walden's work up indicating that over $300,000 is owed is not an opinion that she can vouch for in Court". Clearly this evidences that Utrecht believed Walden was Shuhi's expert in the

→ forensic Willis?

FCM Civil Case.

Debtor's Exhibit KKK-8 is a facsimile correspondence, dated February 2, 2000, to Utrecht from Shuhi, which states in relevant part: "I spoke with Linda Walden this morning and she suggests the three of us meet to formulate a settlement strategy". Again, Utrecht and Shuhi believed that Walden was Plaintiffs' expert witness in the FCM Civil Case. When asked about Debtor's Exhibit KKK-8, Shuhi's explained:

> "Q. [BY ROTELLA]: You say here, I spoke with Linda Walden this morning and she suggested that the three of us meet to formulate a settlement strategy, correct?
>
> A. [SHUHI]: I certainly did write that, yes.
>
> Q. How do you write that when you said you never spoke to Linda Walden until October, 2002, how does that happen?
>
> A. That's correct. I wanted to force the issue, and I said that since we were maintaining a strict separation, I wasn't to contact the expert directly. Given the letter he sent a day or two before, which was extremely odd, I said well, there's something strange here, so I threw that out. The meeting never occurred, none of the meetings occurred. I never got to see much of Steven Utrecht, and I did not get to see the expert."

This Court is convinced that Shuhi was being untruthful in his November 12 answer.

Debtor's Exhibit KKK-9 is a correspondence dated February 21, 2000 to Utrecht from Shuhi referencing "Simon & Simon" wherein Shuhi writes: "We have everything we need from our accountant; she has expressed...", not "he", "...she has expressed to me she covered the major portion of work already with you". [Emphasis added]. Utrecht testified that he met and spoke by telephone with Walden to discuss her proposed testimony and what he required from her. This Court finds that

his testimony is honest and true evidence of the relationship by and between Walden and Shuhi.

Debtor's Exhibit KKK-10 referencing "Carl J. Shuhi v. Alan Richard Simon et al.", is a facsimile correspondence, dated March 6, 2000, to Walden from Utrecht. It states, in pertinent part: "In the event you may be a witness, please fill out the appropriate blanks and return same to me at your earliest opportunity so we can complete these interrogatories". The Expert Witness Interrogatories are Debtor's Exhibit KKK-18 and will be discussed more at length hereinbelow.

Debtor's Exhibit KKK-11 is a facsimile correspondence sheet, dated March 17, 2000, to Shuhi from "Barbara" at Utrecht's office referencing "Shuhi vs. Simon" wherein Barbara writes:

> "Let me know as soon as possible where we stand on these Interrogatories and Production. Linda was to have gotten back regarding Interrogatories and I have not heard from her or seen anything to date. Mr. Utrecht is expected back from vacation next week."

This correspondence further establishes that it is Utrecht's office's belief that Shuhi has the contact with Walden, not vice versa.

Debtor's Exhibit KKK-12 is a facsimile cover sheet, dated March 20, 2000, to Walden from Utrecht referencing "Shuhi vs. Simon", not "Bravender v. Simon", from Utrecht, wherein Utrecht is asking Walden:

> "Please advise immediately as to when we can expect to receive your response to the Interrogatories faxed to you several weeks ago. There are becoming due shortly. Thanks."

Clearly, Walden was Shuhi's entities' expert witness.

Debtor's Exhibit KKK-13 is a copy of the same facsimile cover sheet (Debtor's Exhibit KKK-12), only with Walden's

handwritten response at the foot stating: "Welcome back. They're in our office, I will fax them to you tomorrow afternoon". The response does not say that the Answers to Bravender's Interrogatories are ready. The reference is "Shuhi v. Simon". Again, at no point does Walden say I don't represent Shuhi.

Debtor's Exhibit KKK-14 is a facsimile correspondence, dated March 22, 2000, to Utrecht from Shuhi wherein he writes: "Linda will fax to you her ans. to interr. But - I think we should first send interr. to their expert - Before we send over our answers". Unquestionably, Walden is Shuhi's entities' expert witness in the FCM Civil Case.

Debtor's Exhibit KKK-15 is a handwritten correspondence, dated March 24, 2000, to "Barbara/Steve Utrecht" from "Kat/Linda Walden", referencing "Shuhi Interrogatories", not "Bravender's Interrogatories". Barbara, the paralegal within Utrecht's office, writes in relevant part:

> "Client instructed Ms. Walden by fax yesterday to not deliver interrogatories. Ms. Walden has the interrogatories ready but is waiting for further client instructions. This fax sent by instructions of Ms. Walden."

This ties directly back into Shuhi's statement in Debtor's Exhibit KKK-14 that he wanted to see the opposing party's expert interrogatories before he answers their interrogatories.

Debtor's Exhibit KKK-16 is a facsimile correspondence, dated March 27, 2000, to Shuhi from Utrecht reciting that Walden: "...has still not faxed the answers to interrogatories, please get us the information immediately". Again, this memo establishes Utrecht's clear understanding that Walden was the expert witness.

Debtor's Exhibit KKK-17 is a facsimile cover sheet, dated March 6, 2000, to Walden from Utrecht. At the foot is Walden's hand-written note to Utrecht stating: "Please review attached. If you need additional info please advise. Otherwise we'll type and forward to you." Walden is referring to the hand-written Answers To Expert Witness Interrogatories in "Shuhi vs. Simon", not "Bravender vs. Simon", for which there was never any such lawsuit filed.

Debtor's Exhibit KKK-18 is clearly what Walden was referring to in Debtor's Exhibit KKK-17 which are the hand-written Answers To Expert Witness Interrogatories. These Interrogatories and Answers relate to the Motion To Dismiss in the FCM Civil Case for fraud upon the court and clearly indicate that Walden was Shuhi's entities' expert witness. Again, Bravender had no pending action and, as such, there would be no interrogatories for Bravender to answer.

Debtor's Exhibit KKK-19 is the Notice Of Furnishing Answers To Interrogatories which appends the typed Answers To Expert Interrogatories which Shuhi signed under oath and penalty of perjury on March 31, 2000, which, again, establish that Walden was Shuhi's expert witness in the FCM Civil Case.

All of these Exhibits referenced above, and several more for that matter, clearly and convincingly evidence that Walden knew she was considered the expert witness for Shuhi's entities and that she was retained by either Shuhi or Utrecht in that litigation. Walden should have disclosed these connections in her Verified Statement executed under oath and penalty of perjury on June 12, 2003, notwithstanding whether she was retained by Shuhi or Utrecht.

As to Bravender, again, all the evidence establishes that she was testifying falsely. Nothing in Debtor's Exhibit SS, TT or RRR relates to her case(s). In all three (3) versions of Walden's expert

report, as already discussed, there are two (2) references to the client being a male and references that the client had entities. Moreover, Bravender testified she only had one (1) company, Florida Caliper, which changed its name to Centurion, if, in fact, she owned that company at all. In all events, she had no "entities" which is further evidence that Walden's expert report was prepared for Shuhi's entities as Plaintiffs in the FCM Civil Case.

As to motive, Utrecht had no motive to testify falsely before this Court. There's no dispute that the documents produced by Utrecht, all of which this Court reviewed and admitted into evidence, were authentic and all supported his contention that Walden was retained by Shuhi in the FCM Civil Case as Plaintiffs' expert witness.

Likewise, Gatsos had no motive to testify falsely before this Court. Gatsos still has a high opinion of Walden even though, as she also testified, Shuhi attempted to physically intimidate her outside of this courthouse on November 12, 2004. This Court finds that Gatsos' testimony was completely credible.

As to Shuhi, he had no motive to testify falsely back in 1999 in the FCM Civil Case wherein he testified that Walden was the expert witness for his entities in that matter and, as well, both his personal and business accountant as recited hereinabove.

This Court does find that Shuhi testified falsely throughout these Proceedings. It is clear that Shuhi supports Walden and the motive for lying before this Court is his support for Walden.

As for Walden's motive, she obviously has several motives to lie before this Court. First, Walden wishes not to be removed. Second, Walden was the State Court Receiver involving the same Debtor and waived any fee due in the Receivership Proceeding in order to become Trustee.

Recoupment of her fees is a second motivation to testify falsely here.

Finally, as to the demeanor of the witnesses, this Court found that Utrecht, Gomberg and Gatsos' demeanors to be completely consistent with telling the truth. This Court finds Walden and Shuhi's demeanors to be inconsistent with telling the truth and also finds that their body postures and facial expressions are inconsistent with telling the truth.

This Court finds beyond clear and convincing evidence that Walden failed to disclose that she was retained by Shuhi as an expert witness in the FCM Civil Case and thereafter lied in dozens of instances in an intentional effort to prevent this Court from learning the truth.

As to the corporate records, this Court finds that Walden was the Registered Agent for Shuhi's entities, as is represented in the documents marked Debtor's Exhibits A though E, and that this information should have been disclosed in the Verified Statement. This Court does not find Walden's testimony that she signed those Uniform Business Reports with the understanding that Glatter was to remove her as Registered Agent to be truthful. It flies in the face of, number one, Shuhi signing the documents under oath and penalty of perjury before she signed them; and, number two, it flies in the face of Debtor's Exhibit E, which evidences that Walden was Centurion's registered agent until July, 22, 2003, two weeks after the July 9, 2003 Disputed Election Hearing wherein Walden testified under oath that she had no connections with Shuhi.

This Court finds by clear and convincing evidence that the Trustee failed to disclose that she was retained by Shuhi as an expert witness in the FCM Civil Case; that she acted as his accountant or that she was the registered agent for companies controlled by Shuhi; and, that she lied throughout these proceedings in a continuing effort to prevent this Court from learning the truth. This Court

also finds that Walden failed to disclose, under oath, her relationship with Shuhi under oath in her Verified Statement and that she failed to testify truthfully before this Court throughout these proceedings regarding such relationship in a continuing effort to prevent this Court from learning the truth.

CONCLUSIONS OF LAW

11 U.S.C. §324 provides in relevant part:

> The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.

Courts interpreting 11 U.S.C. §324 hold that removal of a trustee is to be examined on a case by case basis. *In re Haugen Construction Service, Inc.*, 104 B.R. 233, 240 (D.N.Dakota 1989). However, courts specifically have determined that cause exists warranting removal in the case of fraud, actual injury and/or breached of fiduciary duties. *Id.* at 240. Specifically, pursuant to long standing case law, where, as here, there has been "fraud in [the] election and approval [of trustee which] relates to qualification and eligibility, and, if discovery thereof is too late for disapproval, it operates to the same end as cause for removal." *In re Judith Gap Commercial Co.* 1 F.2d 508, 509 (D.Mont.1924)(reversed on other grounds 5 F.2d 307).

As demonstrated hereinabove, Walden has committed fraud upon this Court by falsely asserting in her June 12, 2003 Verified Statement that she had no connection with any of Walker's creditors or other parties in interest, as this Court found clear and convincing evidence that she had significant and ongoing connections with Shuhi and his various entities. Moreover, Walden committed numerous acts of fraud upon this Court by consistently lying under oath, and thereby

perjuring herself, throughout this Trial by stating she had no business or personal relationship or other connections with Shuhi or any of his various entities. Further, Walden committed fraud upon this Court by creating a cover page to the expert report she prepared for Shuhi's entities in the FCM Civil Case which indicated same was prepared for Bravender in a clear attempt to conceal her relationship with Shuhi and his various entities.

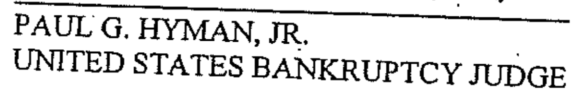
Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1. Linda J. Walden is removed as Chapter 7 Trustee pursuant to 11 U.S.C. §324 for fraud upon this Court;

2. This Court reserves jurisdiction to award fees to Debtor's counsel for the damages caused by Linda J. Walden and her counsel by this action; and

3. This Court's Order Removing Trustee From Chapter 7 Case entered on November 17, 2004 [C.P. 634] is hereby ratified and remains in full force and effect.

DONE AND ORDERED in Chambers in the Southern District of Florida this 1 day of ~~November~~ December, 2004.



PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE

Copies Furnished To:

Gary J Rotella, Esq
200 E Las Olas Blvd #1850
Ft. Lauderdale, FL 33301

DEBORAH MENOTTE, Trustee
POB 211087
West Palm Beach, FL 33421

Gary M Murphree, Esq
201 S Biscayne Blvd #3400
Miami, FL 33131

Kevin C Gleason, Esq
2699 Stirling Rd #A-201
Ft. Lauderdale, FL 33312