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Hon. C. Kathryn Preston
U.S. Bankruptcy Court (S.D. Ohio); Columbus

Hon. Jessica E. Price Smith
U.S. Bankruptcy Court (N.D. Ohio); Cleveland

Sexism in Legal Profession

Sexual Harassment Is a Big Problem at Big Law Firms – (Bigger Law Firm, May 24, 2017)

Justice is Blind, but not Always in a Good Way – (Huffington Post, Apr 27, 2017)

Gender Bias in the Legal Workplace: Words Matter (Perspective) - (Bloomberg Law Big Law Business, Nov 14, 2016)

Tracking 10 Years Of Women's Progress In The Legal Profession - (Above the Law, Sept 14, 2016)

What No One Tells You Before You Go to Law School: You're Entering a Sexist Profession - (Ms. JD blog, 2012)

Women Battle Law Firm Bias (Womensrightswriter.com, 2012)

The Universal Phenomenon of Men Interrupting Women (New York Times, June 14, 2017)

National Association of Women Lawyers – The following articles were linked on NAWL website:

Male Mentors Shouldn't Hesitate to Challenge Their Female Mentees - (Harvard Business Review, May 29, 2017)

Do This the Next Time You Notice Sexism at Work - (Fortune, May 22, 2017)

Confronting sexual harassment in the legal industry - (Law360 In-Depth, October 31, 2016)

Sexual Harassment: What If It Happened at Your Firm? - (FindLaw)

Emotional Health of Lawyers

One Factor That May Be Affecting Lawyer Mental Health – (Law360, June 28, 2017)

Realizing Your Dreams In Recovery (Above The Law, June 21, 2017)

Younger lawyers are most at risk for substance abuse and mental health problems, a new study reports – (ABA Journal, Feb 7, 2016)

Lawyers with Depression: Blog about depression

The Heart of the Matter: Lawyers, Anger, and Depression

Hope Counts: One Lawyer With Depression's Testimony

The Science of Well-Being and the Legal Profession (Wisconsin Lawyer, 2010)

Law Firms Finally Say It's OK to See a Therapist (Wall Street Journal, May 24, 2017)

Saving Lawyers 1 Breath At A Time: Mindfulness In The Law (Law360, Jan 12, 2017)

Alcohol Abuse and Dependence – (ABA): This page has a number of linked articles on alcohol

Drug Abuse & Dependence – (ABA): articles on drug abuse

Depression (ABA): This page has a number of articles on depression

Stress (ABA): articles on stress

8 of 26 DOCUMENTS

In re: JONATHAN B. JONES, Debtor. DEAN S. HOOVER, Appellant, RYAN HARGER; JENNIFER HARGER, Plaintiffs, v. JONATHAN B. JONES, Defendant-Appellee.

No. 14-8006

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE SIXTH CIRCUIT

546 B.R. 12*; *2016 Bankr. LEXIS 651*; *62 Bankr. Ct. Dec. 76

May 11, 2015, Argued
March 3, 2016, Decided
March 3, 2016, Filed

PRIOR HISTORY: [**1] Appeal from the United States Bankruptcy Court for the Northern District of Ohio. Case No. 12-51440; Adv. No. 12-5238.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The bankruptcy court abused its discretion in sanctioning plaintiffs' counsel under *Fed. R. Bankr. P. 9011* for filing a motion for stay relief and an adversary complaint because, in part, it did not clearly demonstrate that it was able to distinguish what counsel knew or should have known regarding his clients' credibility as of the filing of the motion and complaint from what was discovered at later hearings; [2]-The bankruptcy court also made an error of law when it imposed attorneys' fees as a sanction under *Rule 9011* given that the order to show cause was issued sua sponte because *Rule 9011* did not permit "fee shifting" when the court entered an order to show cause on its own initiative.

OUTCOME: Judgment reversed and order vacated.

LexisNexis(R) Headnotes

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

[HN1] Under *28 U.S.C.S. § 158(a)(1)*, the bankruptcy appellate panel has jurisdiction to hear appeals from final judgments, orders, and decrees issued by the bankruptcy court. For purposes of appeal, an order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. The concept of finality in the bankruptcy context, however, should be viewed functionally, with appellate courts enforcing this threshold requirement in a more pragmatic and less technical way in bankruptcy cases than in other situations. The U.S. Court of Appeals for the Sixth Circuit allows appeals from an order in a bankruptcy case that finally disposes of discrete disputes within the larger case. An order imposing *Rule 9011* sanctions is only final upon assessment of fees and expenses.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion
Bankruptcy Law > Practice & Proceedings > Professional Responsibility

[HN2] The bankruptcy appellate panel reviews the bankruptcy court's imposition of sanctions using the

abuse-of-discretion standard. An abuse of discretion occurs where the reviewing court has a definite and firm conviction that the court below committed a clear error of judgment. The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion
[HN3] An abuse of discretion is defined as a definite and firm conviction that the court below committed a clear error of judgment. The abuse of discretion must be more than harmless error to provide cause for reversal. Sanctions based upon an erroneous view of the law or an erroneous assessment of the evidence is necessarily an abuse of discretion.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
[HN4] *Fed. R. Bankr. P. 9011(c)(2)* only allows a court to award attorneys' fees as a sanction when a motion is brought by opposing counsel, and there is no such authority when an order to show cause is issued by the court sua sponte. *Rule 9011(c)(2)* states, in part: (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. *Fed. R. Bankr. P. 9011(c)(2).* Where the *Rule 9011* matter was initiated by the court rather than by a motion filed by a party, the only available sanctions expressly authorized by *Rule 9011(c)(2)* are (1) nonmonetary directives; and (2) a penalty to be paid into court.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review
[HN5] Findings of fact are reviewed under the clearly erroneous standard. Under the clearly erroneous standard, the bankruptcy appellate panel must give deference to the bankruptcy court as the finder of fact. The bankruptcy court is in the best position to assess the testimony and credibility of witnesses. Thus, however it might individually view the evidence if it were the triers of fact, it is clear that the panel is required to give great weight to the findings of the trial court which had the opportunity to see the witnesses, to weigh their evidence as it was presented, to view the demeanor of the persons who testified in court, and to determine all issues of credibility.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review
[HN6] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
[HN7] To determine whether reliance on the client is reasonable, the bankruptcy court must evaluate the attorney's conduct based on what was reasonable to believe at the time the motion was submitted.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
[HN8] The U.S. Court of Appeals for the Fourth Circuit has explained the standard for a determining whether the filing of a complaint is grounds for *Fed. R. Bankr. P. 9011* sanctions: The Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed. The Rule attempts to discourage the needless filing of groundless lawsuits. And creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
[HN9] It is not generally unreasonable for an attorney to

file a motion for stay relief to allow a pending lawsuit to proceed. Further, failure to file an adversary proceeding can be malpractice under certain circumstances.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

[HN10] An abuse of discretion is defined as a definite and firm conviction that the court below committed a clear error of judgment. The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion.

COUNSEL: ARGUED: Scott H. Scharf, SCOTT H. SCHARF CO., LPA, Beachwood, Ohio, for Appellant.

ON BRIEF: Scott H. Scharf, SCOTT H. SCHARF CO., LPA, Beachwood, Ohio, for Appellant.

Karen H. Brouse, BROUSE LAW OFFICE, Fort Myers, Florida, for Appellee.

JUDGES: Before: HARRISON, HUMPHREY and PRESTON, Bankruptcy Appellate Panel Judges.

OPINION BY: C. KATHRYN PRESTON

OPINION

[*14] **C. KATHRYN PRESTON**, Chief Bankruptcy Appellate Panel Judge. An attorney who was sanctioned pursuant to *Federal Rule of Bankruptcy Procedure 9011* ("*Rule 9011*") filed an appeal asserting error by the bankruptcy court when it awarded opposing counsel attorneys' fees pursuant to *Rule 9011(c)(2)*. Additionally, the attorney argued that the bankruptcy court abused its discretion by levying sanctions based on clearly erroneous factual findings. For the reasons stated below, the Panel holds that the bankruptcy court erred as a matter of law in awarding attorney fees as sanctions on a *sua sponte* basis and abused its discretion in imposing any sanctions.

I. ISSUES ON APPEAL

Appellant Dean S. Hoover ("Hoover") raised many issues on appeal. The Panel has determined that there are two dispositive issues:

1. Did the bankruptcy [**2] court's sanctions order violate *Rule 9011(c)(2)* because it awarded attorneys' fees on the bankruptcy court's own initiative?

2. Did the bankruptcy court abuse its discretion in awarding sanctions under *Rule 9011* by relying on clearly erroneous factual findings?

[*15] The Panel declines to address the other issues raised by Hoover as unnecessary based on the disposition of this appeal.

II. JURISDICTION AND STANDARD OF REVIEW

[HN1] Under *28 U.S.C. § 158(a)(1)*, this Panel has jurisdiction to hear appeals "from final judgments, orders, and decrees" issued by the bankruptcy court. For purposes of appeal, an order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States, 489 U.S. 794, 798, 109 S. Ct. 1494, 1497, 103 L. Ed. 2d 879 (1989)* (citation and quotation marks omitted). "The concept of finality in the bankruptcy context, however, should be viewed functionally, with appellate courts enforcing this threshold requirement in a more pragmatic and less technical way in bankruptcy cases than in other situations." *In re Thomas, 511 B.R. 89, 91 (B.A.P. 6th Cir. 2014)* (quoting *Simon v. Lis (In re Graves), 483 B.R. 113, 115 (E.D. Mich. 2012)* (internal quotation marks and citations omitted)). *See also In re Cyberco Holdings, Inc., 734 F.3d 432, 437 (6th Cir. 2013)*. The Sixth Circuit allows appeals from "an order in a bankruptcy case [that] finally disposes of discrete disputes within the larger case." *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 488 (6th Cir.1996)* (internal quotation marks, alteration, [**3] and citation omitted). "An order imposing *Rule 9011* sanctions is only final upon assessment of fees and expenses." *In re Wingerter, 394 B.R. 859, 862 (B.A.P. 6th Cir. 2008) rev'd on other grounds, 594 F.3d 931 (6th Cir. 2010)* (citations omitted).

Hoover's notice of appeal includes the following orders: (1) Order Dismissing Complaint and Counterclaim and Setting Show Cause Hearing Re: *Rule 9011* ("Order to Show Cause"), Adv. Case ECF No. 17, Jan. 29, 2013; (2) Order Setting [Evidentiary] Hearing Re: *Rule 9011* ("Second Order to Show Cause")[1], Adv. Case ECF No. 24, Feb. 13, 2013; (3) Order Setting Deadline for Evidentiary Hearing ("Order Adjourning Hearing"), Adv. Case ECF No. 27, March 8, 2013; and

(4) Order Re: *Rule 9011* ("Sanctions Order"), Adv. Case ECF No. 33, Jan. 6, 2014. The Sanctions Order is a final order. Accordingly, Hoover's arguments regarding the three interlocutory orders issued prior to the Sanctions Order are ripe for review.

> [HN2] We review the bankruptcy court's imposition of sanctions using the abuse-of-discretion standard. *Corzin v. Fordu (In re Fordu), 201 F.3d 693, 711 (6th Cir.1999).* An abuse of discretion occurs where the reviewing court has "a definite and firm conviction that the court below committed a clear error of judgment."
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> *Barlow v. M.J. Waterman & Assocs., Inc. (In re M.J. Waterman & Assocs., Inc.), 227 F.3d 604, 607-08 (6th Cir. 2000)* (citation, alterations, and internal quotation marks omitted). "The question is not how the reviewing court would have ruled, [**4] but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion." *Id. at 608.*
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> *B-Line, LLC. v. Wingerter (In re Wingerter), 594 F.3d 931, 936 (6th Cir. 2010).*
>
> "[HN3] An abuse of discretion is defined as a definite and firm conviction that the [court below] committed a clear [*16] error of judgment." *Mayor of Baltimore v. W. Va. (In re Eagle Picher Indus., Inc.), 285 F.3d 522, 529 (6th Cir. 2002)* (internal quotation marks and citation omitted). The abuse of discretion must be more than harmless error to provide cause for reversal. *Tompkin v. Philip Morris USA, Inc., 362 F.3d 882, 897 (6th Cir. 2004)* (citations omitted). Sanctions based upon an erroneous view of the law or an erroneous assessment of the evidence is necessarily an abuse of discretion. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)*; *Salkil v. Mount Sterling Twp. Police Dep't, 458 F.3d 520, 527-528 (6th Cir. 2006). See also Parrott v. Corley, 266 F. App'x 412, 415 n. 1 (6th Cir. 2008)* (arguments concerning an error in statutory interpretation or due process related to sanctions are reviewed de novo).

In re Royal Manor Mgmt., Inc., 525 B.R. 338, 346 (B.A.P. 6th Cir. 2015).

1 The Order to Show Cause and Second Order to Show Cause are referred to collectively as the "Orders to Show Cause."

III. FACTS

A. Procedural History

Hoover represented Plaintiffs, Ryan and Jennifer Harger (collectively "the Hargers"), in a state court action against Jonathan B. Jones ("Jones")[2] for intentional infliction of emotional distress, civil conspiracy, and malicious prosecution. After Jones filed a bankruptcy petition, Hoover sought relief from the automatic [**5] stay to continue the proceedings in state court. Hoover also filed an adversary proceeding pursuant to *11 U.S.C. §§ 727(a)(3)*, *727(a)(4)(A)*, and *523(a)(6)*, seeking denial of Jones' discharge and a determination that the Hargers were owed a non-dischargeable debt arising from the same facts as the state court proceeding. In the adversary proceeding, Jones filed a counterclaim which alleged abuse of process with the purpose of harassment.

2 Jones is sometimes referred to as "Debtor" in quotations taken from the record.

Ultimately, the Hargers withdrew their motion for relief from the automatic stay and filed a motion to dismiss the adversary proceeding. The bankruptcy court granted the motion to dismiss the complaint and contemporaneously determined that it did not have jurisdiction over the counter-claim. However, in the order dismissing the complaint and counterclaim, the bankruptcy court *sua sponte* entered the Order to Show Cause why the bankruptcy court should not find that the Hargers and their counsel violated *Rule 9011(b)* by filing the complaint and prosecuting the adversary proceeding and by seeking relief from the automatic stay in order to pursue matters in state court.

Prior to the hearing, counsel on both sides filed briefs and supplemental [**6] affidavits. On February 6, 2013, the bankruptcy court held a hearing on the Order to

Show Cause. At this hearing, Hoover requested and the bankruptcy court agreed to limit any sanctions to Hoover directly and not to sanction the Hargers. The bankruptcy court issued the Second Order to Show Cause following the February 6, 2013 hearing. On March 8, 2013, the bankruptcy court entered the Order Adjourning Hearing to March 15, 2013, to consider whether Hoover had further violated *Rule 9011* in response to the Order to Show Cause. The Order Adjourning Hearing also required Hoover to submit his direct testimony by affidavit. The bankruptcy court conducted an evidentiary hearing on March 15, 2013, and May 9, 2013. On January 7, 2014, the bankruptcy court entered an order (the "Sanctions Order") which found that Hoover had repeatedly violated *Rule 9011*, directed him to pay over $26,000 in attorneys' fees to Jones' attorney, and revoked Hoover's electronic [*17] bankruptcy filing authority, commonly referred to as "CM/ECF privileges." The bankruptcy court also referred the matter to both the District Court and the United States Attorney for consideration of whether Hoover's conduct should be criminally prosecuted. Hoover [**7] timely filed this appeal.

B. Background Facts

The Hargers were Jones' next door neighbors. Police reports indicate that there had been issues between the neighbors dating back five or six years prior to the filing of the bankruptcy petition. Both sides filed police reports alleging incidents of harassment by the other side.

Central to the underlying adversary proceeding is an incident involving a third party, Jonathan Grad ("Grad"). At the time of the incident, Grad was an employee of CarMeds. CarMeds was a limited liability company ostensibly owned by Jones' mother and run by Jones. Grad worked directly with Jones, occasionally meeting at Jones' home for business purposes. Grad claimed to have been assaulted by an unknown individual, after a meeting at Jones' home. At the police station, Grad identified Ryan Harger from a photo line-up as the assailant. Ryan Harger was arrested in relation to the incident (the "State Criminal Case"). Ultimately, the charges were dropped without prejudice. The Hargers filed a civil action against Grad and Jones asserting that they conspired to have Ryan Harger falsely arrested (the "State Court Action").

During the litigation, Jones filed a petition for [**8] relief under Chapter 7 of the Bankruptcy Code, *11 U.S.C. § 101, et seq*. The State Court Action was automatically stayed upon the filing. Hoover, as the Hargers' attorney, filed a Motion to Modify Automatic Stay ("Motion for Relief")[3] in order to pursue the State Court Action. Bankr. Case ECF No. 16, July 10, 2012. Hoover also filed a complaint in the bankruptcy court ("Adversary Complaint") seeking: (1) a determination that the debt owed by Jones is non-dischargeable based on the same facts as the State Court Action, and (2) denial of Jones' discharge based on the assertion that Jones lied about the ownership of CarMeds. However, the Hargers ultimately withdrew the Motion for Relief and filed a motion to dismiss the adversary proceeding prior to any rulings from the bankruptcy court.

3 The Sanctions Order also refers to this motion as the "Motion for Relief."

The bankruptcy court dismissed the adversary proceeding on the Hargers' motion, and the counter-claim on jurisdictional grounds. In the order dismissing the adversary proceeding, the bankruptcy court set a hearing *sua sponte*, directing the Hargers and Hoover, as their attorney, to show that they had reasonable grounds to file the Motion for Relief and the [**9] Adversary Complaint. Order to Show Cause, Adv. Case ECF No. 17, Jan. 29, 2013. In a response to the Order to Show Cause, Hoover made several factual assertions that Jones' counsel, Karen Brouse ("Brouse"), vehemently contested. Brouse obtained affidavits from Noah Munyer ("Munyer"), Grad's attorney in the State Court Action and Christopher Parker ("Parker"), the prosecuting attorney in the State Criminal Case, which accused Hoover of misrepresenting facts in his filings in the bankruptcy court.

The bankruptcy court found that Hoover violated *Rule 9011* by bringing the Motion for Relief and filing the Adversary Complaint without specific evidence. Additionally, the bankruptcy court found that Hoover made knowing and intentional misrepresentations in his filings regarding certain facts.

[*18] **IV. DISCUSSION**

A. Attorneys' Fees Under *Federal Rule of Bankruptcy Procedure 9011(c)(2)*

[HN4] *Rule 9011(c)(2)* only allows a court to award attorneys' fees as a sanction when a motion is brought by opposing counsel, and there is no such authority when an order to show cause is issued by the court *sua sponte*.

Rule 9011(c)(2) states, in part:

> (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 [**10] 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.

Fed. R. Bankr. P. 9011(c)(2) (emphasis added). *See also In re Opra, 365 B.R. 728, 741 (Bankr. E.D. Mich. 2007)* ("Because this *Rule 9011* matter was initiated by the Court rather than by a motion filed by a party, the only available sanctions expressly authorized by *Rule 9011(c)(2)* are (1) nonmonetary 'directives;' and (2) a 'penalty' to be paid into court."); *Miller v. Cardinale (In re Deville), 280 B.R. 483, 494 (B.A.P. 9th Cir. 2002) aff'd,361 F.3d 539 (9th Cir. 2004)*.

In some cases, a court may award attorneys' fees under its inherent authority following a *Rule 9011* inquiry. In *First Bank of Marietta v. Hartford Underwriters Insurance Co.*, the Sixth Circuit Court of Appeals held that "'in addition to *Rule 11* and *28 U.S.C. § 1927*, a district court may award sanctions pursuant to its inherent powers when bad faith occurs.'" *307 F.3d 501, 512 (6th Cir. 2002)* (quoting *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368, 375 (6th Cir. 1996))*. "The district court has the inherent authority to award fees when a party litigates 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Hartford Underwriters, 307 F.3d at 512* (quoting [**11] *Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 313 (6th Cir.1997)* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 95 S. Ct. 1612, 1622, 44 L. Ed. 2d 141 (1975)* (internal quotation marks omitted)) In *Hartford Underwriters*, the district court had given notice that it was considering using its inherent authority to sanction. The Sixth Circuit made a point of noting:

> We initially note that the district court exercised caution in exercising its inherent powers by giving notice of its consideration, conducting a separate hearing and considering post-hearing briefs in determining whether First Bank acted in bad faith and filed its claim without a colorable basis. This is in accord with our precedents. *Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc., 858 F.2d 317, 320 (6th Cir. 1988)*.

Hartford Underwriters, 307 F.3d at 519.

In this case, the bankruptcy court's Sanctions Order is titled "Order Re: *Rule 9011*." It only cites *Rule 9011* as the basis for sanctions. It does not refer to any other statutory authority, such as *28 U.S.C. § 1927* or *11 U.S.C. § 105*, or its own inherent authority. Thus, the Panel is compelled to find that the sanctions were awarded solely pursuant to *Rule 9011* and not on any other basis. Accordingly, the bankruptcy court erred in awarding attorneys' fees to Jones' counsel because *Rule 9011* does not permit "fee shifting" when the court enters an order to show [*19] cause on its own initiative. This leaves for consideration the propriety of the other sanctions imposed by the bankruptcy court.

B. Clearly Erroneous [**12] **Factual Findings**

Hoover challenges many of the factual findings made by the bankruptcy court in its Sanctions Order. [HN5] Findings of fact are reviewed under the clearly erroneous standard. *Brock v. Hammonds (In re Triton Enters., Inc.), 464 B.R. 62 (B.A.P. 6th Cir. 2011)*.

> Under the clearly erroneous standard, the Panel must give deference to the bankruptcy court as the finder of fact. The bankruptcy court is in the best position to assess the testimony and credibility of witnesses. Thus, however we might individually view the evidence if we were the triers of fact, it is clear that we are required to give great weight to the findings of the trial court which had the opportunity to see the witnesses, to weigh their evidence as it was presented, to view the demeanor of the persons who testified

> in court, and to determine all issues of credibility.

Triton Enters., 464 B.R. at 62 (internal quotations marks and citations omitted). *See also Fed. R. Civ. P. 52(a).*[4] The Supreme Court has explained the clearly erroneous standard as follows:

> [HN6] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible [**13] views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1166 (6th Cir.1996) (quoting *Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985))*. With this standard in mind, the Panel has carefully reviewed the voluminous record in this appeal.

4

> Prior to December 2014, *Federal Rule of Bankruptcy Procedure 8013* reiterated the language of *Federal Rule of Civil Procedure 52(a)(6)* governing appeals. In December 2014, Part VIII of the Federal Rules of Bankruptcy Procedure (addressing appeals in bankruptcy cases) was extensively amended and renumbered. The language of *Bankruptcy Rule 8013* was omitted. However, the Panel holds that the standard of review, which is well established by case law, has not changed.
>
> *In re Aubiel, 534 B.R. 300, 302 n.2 (B.A.P. 6th Cir. 2015).*

The bankruptcy court set forth two sections of factual findings in the Sanctions Order. The bankruptcy court titled one section: "Background Facts." The bankruptcy court labeled the other section: "Findings of Fact re: *Rule 9011*." Within these two sections the bankruptcy court went back and forth between making specific findings of fact regarding representations made by Hoover during the hearings and in his pleadings, and general factual conclusions about the merits of the underlying cause of action that is the basis for the adversary proceeding. We now address each factual finding regarding Hoover's representations. To the extent that any [**14] factual finding is related to whether or not there is an evidentiary basis for the underlying cause of action, it will be addressed in that context in Part C of this opinion.

1. Representations Regarding State Court Action

The bankruptcy court found that Hoover made several representations that the State Court Action was "ready for trial." Sanctions Order at 1, 3, 4. For example, [*20] the bankruptcy court noted that in his Proposed Findings of Fact and Conclusions of Law filed on September 7, 2012 in the bankruptcy case in support of the Motion for Relief, Hoover asserted: "The parties are ready for trial in the State Court Action." Sanctions Order at 3 (citing Bankr. Case ECF No. 32 ¶ 16). Additionally, the bankruptcy court cited paragraphs 8 and 9 of Hoover's Proposed Findings of Fact and Conclusions of Law for the assertion that "Mr. Hoover represented to this Court that discovery in the State Court Action had been conducted and the trial of the matter was set to commence on August 27, 2012." Sanctions Order at 3. The bankruptcy court's Sanctions Order appears to interpret Hoover's statements as indicating that discovery was complete. In actuality, when taken as a whole the Proposed Findings [**15] of Fact and Conclusions of Law show only that: discovery was ongoing (¶ 7); Jones had actively participated in discovery (¶ 8); trial had been scheduled (¶ 9); but the trial had been postponed and the matter stayed pending a decision on the Motion for Relief from the automatic stay (¶ 11). Hoover does not convey any indication that the State Court Action trial would start on August 27, 2012, or even that discovery had been fully completed.

The Sanctions Order also noted that Hoover represented to the bankruptcy court that the State Court Action was viable as evidenced by the fact that it was going to trial. Sanctions Order at 4. Hoover made this statement in closing argument during the hearing on the Motion for Relief ("R/S Final Hearing")[5] to counter Brouse's argument that the Hargers had not shown

compelling evidence that the State Court Action had merit. See R/S Final Hearing Tr. 66:13-16, Bankr. Case ECF No. 58, September 17, 2012. Hoover's assertions that the State Court Action was going to trial and that this proved the viability of the case were, of course, self-serving, and were clearly argument, not statements of fact. It is obvious that Hoover's argument during the R/S Final [**16] Hearing was that the State Court Action was further along than the bankruptcy court adversary proceeding.[6] Near the end of his argument Hoover stated: "The parties, as I said, are **nearly** ready for trial in State Court up here [sic]. And if we have to handle this through an adversary, we're going to have to work our way through that -- that procedure up here. I don't think its going to be any faster up here than it would be down there." R/S Final Hearing Tr. 68:8-13 (emphasis added).[7] The bankruptcy court's finding that Hoover misrepresented the status of the State Court Action is clearly erroneous.

5 The Sanctions Order refers to the September 17, 2012 hearing on the Motion for Relief as the "R/S Final Hearing."

6 The adversary proceeding had been filed just shortly prior to the R/S Final Hearing.

7 At different times the bankruptcy court corrected both parties' use of "up here and down there" as indicating an inappropriate hierarchy of federal versus state courts.

2. Representations Regarding Civil Protection Order ("CPO") Hearing

In the Sanctions Order, the bankruptcy court found: "During the course of the hearings on the Motion for Relief in this Court, Hoover implied to the Court that he was [**17] not involved in the CPO hearing in state court." Sanctions Order at 3. The bankruptcy court noted the following exchange that occurred during Hoover's examination of Jones at the hearing on the Motion for Relief:

> [*21] **Hoover**: There was this civil protective order sought by my client, I wasn't involved in that, as you know, correct?
>
> **Jones**: No, I think you were involved.

Sanctions Order at 3 (citing R/S Final Hearing Tr. 19:14-18). The bankruptcy court then found that "[i]n contrast to the suggestion by Mr. Hoover during the R/S Final Hearing, the transcript of the CPO hearing filed in support of the Debtor's opposition to granting relief from stay clearly shows that Hoover had been retained by the Hargers to represent them and that Hoover told Magistrate Shoemaker that he failed to appear at the hearing due to a scheduling error." Sanctions Order at 4.[8] The bankruptcy court noted that Ryan Harger did proceed without counsel and that the CPO was denied because the state court found Ryan Harger's testimony lacked credibility and failed to establish a basis for the relief sought. *Id*.

8 Again, this example appears to be cited by the bankruptcy court both as a specific example of a misrepresentation made [**18] by Hoover and as support for finding that he should have known he did not have an evidentiary basis for filing his pleading. The latter will be addressed in Part C.

Because the bankruptcy court found this to be a specific misrepresentation by Hoover, it is important to look at exactly what Hoover said. During the R/S Final Hearing, Hoover stated to the court: "I wasn't counsel in the CPO hearing." R/S Final Hearing Tr. 6:12-13. The statement "I wasn't counsel in the CPO hearing" is not a misrepresentation. The initial CPO petition indicates that Ryan Harger was proceeding *pro se*. Bankr. Case ECF No. 44. The transcript of the CPO full hearing indicates that Ryan Harger stated that he had paid an attorney, Hoover, who he thought would be present for the hearing. Ryan Harger also implies that Hoover was involved in obtaining an earlier continuance of the hearing. But when the magistrate refused to grant a continuance at Ryan Harger's request, Ryan Harger decided to proceed *pro se*. CPO Hr'g Tr. 46:2-47:17, Bankr. Case ECF No. 45, December 28, 2011. Later, on the record, the magistrate stopped the proceeding to take a phone call from Hoover. The call took place in the magistrate's chambers, [**19] but the magistrate had the call recorded by a court reporter. During the phone call, Hoover stated "I do represent the Hargers, and I appeared for the previous hearing." Phone Conference Tr. 3:23-24, Bankr. Case ECF No. 45, December 28, 2011. The magistrate and the opposing counsel both pointed out to Hoover that he had not filed an official appearance in the case and that his client had decided to proceed *pro se*. It appears that the phone call was very collegial. When the magistrate went back on the record in court, he stated that the phone call cleared things up and that Ryan Harger would continue

pro se. Finally, at the conclusion of the hearing, the magistrate stated: "It appears that Mr. Dean Hoover is not counsel of record in this case. He's not filed anything so everything will be sent to your house as a *pro se* party." CPO Hr'g Tr. 115:7-13, Bankr. Case ECF No. 45, December 28, 2011.

Accordingly, the record supports Hoover's assertion that he was not "counsel in the CPO hearing." Further, even the implication that he "wasn't involved in the CPO hearing" was reasonable based on what the record reflects. Although it appears that some time during the CPO process the Hargers retained [**20] Hoover to file the State Court Action and Hoover may have been involved in obtaining a continuance of the CPO hearing, he did not file an official appearance or any pleadings in the CPO process, nor was he involved in the [*22] hearing other than a quick phone call that verified that he was not counsel of record for the matter. Accordingly, the bankruptcy court's treatment of this statement as a misrepresentation is clearly erroneous, and its reliance on it in determining sanctions is an abuse of discretion.

3. Representations Regarding Mediation

In a footnote in the Sanctions Order, the bankruptcy court found: "Hoover represented to the Court that mediation failed. However, the fact is that mediation never took place in the State Court Action." Sanctions Order at 5, n.4. The footnote followed a paragraph where the court explained:

> After the R/S Final Hearing, the Court held an in chambers conference with counsel wherein it was agreed that counsel would talk to their clients about the possibility of pursuing mediation in state court. The Court agreed to grant limited relief from stay for the purpose of pursuing mediation of this dispute in state court if the parties so agreed. On September [**21] 27, 2012, Hoover filed a motion he styled as an "unopposed" motion to modify the stay to permit mediation in state court. No proposed order reflecting this agreement was submitted to the Court. Instead, on October 23, 2012, Plaintiffs filed a motion to dismiss their motion for relief from stay and a motion to dismiss their adversarial complaint and the counterclaim asserted by the Debtor.

Sanctions Order at 4-5. In the Sanctions Order, the bankruptcy court did not articulate when and where Hoover made this representation to the court. Neither the motion to withdraw the Motion for Relief, nor the motion to dismiss the adversary proceeding mentioned any mediation attempt. Likewise, Hoover never made any representations regarding any mediation attempt in his pleadings in response to the Order to Show Cause and Second Order to Show Cause.

The record reflects two instances when mediation was referenced during the hearing on the Orders to Show Cause. After Hoover rested his case, Brouse was allowed to cross examine him on his affidavit. Brouse asked Hoover why he elected to dismiss the adversary proceeding just before serious discovery was to begin. In response to that question, Hoover mentioned [**22] mediation:

> Several reasons. First, I believe you made a demand for $53,000 and you wanted my clients to enter into some kind of agreed judgment that would be forgiven if they moved out of their house. I saw -- I saw that as bad faith when I believed that we were trying to resolve this issue through mediation. We also started formulating the opinion that the remedy was worse than the disease. . . . So we talked about it and I decided that -- we decided jointly that instead of engaging with you any longer, wasting our time in mediation where you were making demands that were--we thought outrageous, with all due respect, that we would -- we would try a new course. And that is a nonlegal course, dismiss everything. . . . And the Hargers came up with a plan to -- with the help of their parents, Mr. Harger's parents in particular -- to get the house fixed up enough that they could sell it and just let Mr. Jones win.

Orders to Show Cause Hr'g. Tr. 142:9-143:22 Adv. Case ECF No. 54, March 15, 2013 ("March 15, 2013 Hr'g Tr.").

Following these comments by Hoover, the following exchange occurred:

> **Brouse**: Sir, did you file a complaint against me in this court for negotiating in bad faith?
>
> [*23] **Hoover**: No.
>
> **Brouse** [**23] : Do you happen to have a copy of this purported letter where I claimed $53,000 in damages?
>
> **Hoover**: I do somewhere.
>
> **Brouse**: I'd be interested to see that.
>
> **Hoover**: I know you know it.
>
> **Brouse**: What steps did you take to engage in mediation? Did you prepare the order for this court?
>
> **Hoover**: No. Neither one of us did. I think I contacted-- I believe-- I'm a little foggy on what the court's direction was with regard to that. But I know that I contacted the Summit County Mediation Department and kind of took the -- made the effort to get it going.
>
> **Brouse**: But you did not?
>
> **Hoover**: Neither did you.

March 15, 2013 Hr'g. Tr: 144:18-145:9.[9]

> 9 To the extent that the bankruptcy court sanctioned Hoover for an alleged misrepresentation that mediation had failed, it appears that Hoover did not have specific notice as required by *Rule 9011(c)(1)(B)* because his comments regarding mediation occurred after the Orders to Show Cause were entered. However, due to the disposition of this appeal on other grounds the Panel will not reach this issue.

The record reflects that both Brouse and Hoover were accurate in their accusation of the other. In fact, it appears that neither of them submitted an order for the case to be mediated in state court [**24] in spite of the bankruptcy court order directed at both of them to do so. However, the record reflects that Hoover at least attempted to start the process. On September 27, 2012, he filed a motion entitled Unopposed Motion to Modify Automatic Stay to Permit State Court Mediation ("Mediation Motion"). Bankr. Case ECF No. 49. The exhibit attached to the Mediation Motion, consisting of an email stream between Hoover and Brouse, appears to reflect a lack of cooperation from Brouse on the issue of mediation. Bankr. Case ECF No. 49. In the email, Hoover asked Brouse to prepare the order for the bankruptcy court while he prepared the motion for the state court but she refused to do so, calling it "his motion." Brouse never filed a response to the motion, and Hoover never submitted a proposed order. In the adversary proceeding, the bankruptcy court entered an order on October 10, 2012 regarding the pre-trial conference. In that order the bankruptcy court stated: "Counsel shall promptly submit a proposed order with respect to the motion for relief from stay in the main case to pursue mediation in state court." Order and Memorandum of Pre-trial Conference Held on October 12, 2012, Adv. Case [**25] ECF No. 9. Neither counsel submitted a proposed order regarding mediation following the October 10, 2012 order, however, on October 23, 2013, Hoover filed the Movants['] Withdrawal of Motion to Modify Automatic Stay ("Withdrawal") in the bankruptcy case and Plaintiffs' Motion to Dismiss Claims and Counterclaims ("Motion to Dismiss") in the adversary proceeding.

Additionally, during his closing argument on the Orders to Show Cause, Hoover stated: "At the end of that hearing the Court suggested that we consider mediation. We agreed to attempt mediation. That attempt failed and it was at that point we decided to move to withdraw our motion and to dismiss our case." Orders to Show Cause Hr'g. Tr. 65:5-9, Adv. Case ECF No. 55, May 9, 2013 ("May 9, 2013 Hr'g Tr."). During her closing argument, Brouse repeatedly asserted that Hoover's representation that "mediation failed" is a "complete mischaracterization" because "it didn't fail because it never happened." May 9, 2013 Hr'g Tr. 71:18-20;74:2-5. The court appears to have completely adopted Brouse's position. The language [*24] of the Sanctions Order mirrors Brouse's argument.

The record does reflect an attempt by Hoover to seek leave to go to state [**26] court for mediation, albeit a half-hearted attempt, in the form of an unopposed motion for which no proposed order was submitted. Moreover, Hoover alleged that a demand was made outside of the

formal process that he and his clients considered "outrageous" and an indication that mediation would not be productive. Hoover did not state that mediation had occurred and failed. Rather, he stated that the *attempt* at mediation had failed. While formal mediation in state court may not have occurred, Hoover's statement during closing argument that the attempt at mediation had failed was not a misrepresentation of the facts. Therefore, the bankruptcy court's finding that Hoover "misrepresented the status of mediation of the State Court Action" is clearly erroneous. Sanctions Order at 11.

4. Representations Regarding CarMeds Ownership

One of the reasons the bankruptcy court sanctioned Hoover was its finding that Hoover engaged in "intentional mischaracterization of evidence." Sanctions Order at 6. The bankruptcy court cited Hoover's description of Jones' deposition testimony regarding CarMeds as an example of this intentional mischaracterization.

In his responsive brief to the Order to Show Cause, [**27] Hoover stated: "Debtor admitted that he routes the money from the CarMeds business through his mother who gives it back to him." Plaintiffs' Hr'g Br. Re: *Rule 9011* ("Responsive Brief"), Adv. Case ECF No. 19 at 5, Feb. 5, 2013. Hoover cited specific page and line numbers and attached a partial transcript of Jones' deposition to his brief. In the same section of his brief, Hoover also pointed the bankruptcy court to other evidence that had been attached to the complaint, namely Grad's deposition transcript wherein Grad frequently refers to Jones as his employer and indicates that Jones' mother had little involvement in the business, and a letter from CarMeds to Grad which Jones signed as President of CarMeds.

There are two problems with the way that Hoover characterized Jones' testimony. First is the use of the word "admitted." Second is use of the word "routes." Jones did not "admit" that he "routes" money through the CarMeds business. Rather, Jones stated: "My mother benefits from CarMeds and gives me money." The words "admit" or "admission" are legal terms of art. Jones' statement does not amount to an "admission." Further, the word "routes" implies that Jones controls the money coming into [**28] CarMeds and how it is used. Jones' statement does not admit or even imply this level of control.

However, it appears to the Panel that Hoover was not trying to mislead the bankruptcy court. If he was trying to mislead the bankruptcy court, he would not have cited to the exact page and line number and provided the court with a copy of the deposition. Rather, Hoover was making an argument that, based on Grad's deposition, the letter signed by Jones as president, and Jones' own deposition, a court or jury could conclude that Jones was the defacto owner of CarMeds. Hoover was just being a zealous advocate. The Panel holds that the bankruptcy court's finding that Hoover "intentionally mischaracterized" Jones' testimony is clearly erroneous. Accordingly, the bankruptcy court abused its discretion by imposing sanctions beyond a simple admonition for Hoover's characterization of Jones' testimony.[10]

> 10 The Panel admonishes Hoover to more clearly distinguish when he is making an argument rather than stating fact. Hoover should also be more precise in the use of legal terms of art such as the words "admits" or "admission."

[*25] **5. Representations Regarding Grad's Story**

In response to the Order to Show Cause, [**29] Hoover made the following representation:

> During the proceedings on the Hargers' state court civil claims against Mr. Grad and Mr. Jones, to possibly extricate his client from the case, Mr. Grad's attorney admitted to me that his client, Mr. Grad, was considering changing his story about what happened and about Mr. Jones' involvement but was afraid to do so because his client might be charged with falsifying a police report. Mr. Grad's attorney told me he intended to talk to the prosecutor about that and later told me the prosecutor threatened to prosecute if Mr. Grad changed his story.

Affidavit of Dean S. Hoover ("Initial Affidavit"), Adv. Case ECF No. 19-6 ¶ 6, Feb. 5, 2013.

In response to Hoover's Initial Affidavit, Brouse obtained and filed affidavits from Munyer, Grad's attorney, and Parker, the prosecuting attorney. Both affidavits directly challenged Hoover's representations made in his Initial Affidavit. In his affidavit, Parker stated: "Paragraph 6 represents that I threatened to

prosecute Grad if he changed his story. This never happened." Affidavit of Christopher Parker ("Parker Affidavit"), Adv. Case ECF No. 21, Feb. 6, 2013. Munyer's affidavit refuted Hoover's representations [**30] regarding the possibility of Grad changing his story.

> 6. During the pendency of that case, Attorney Hoover **approached me** claiming his client had an alibi and asked if my client would change his story to inculpate Jones (in a conspiracy to have Mr. Harger falsely arrested) in exchange for an agreement that Mr. Grad would be dismissed from the case.
>
> . . . .
>
> 10. I never, at any point, expressly or impliedly, told, conveyed, or "admitted to [Attorney Hoover] that [my] client, Mr. Grad, was considering changing his story about what happened and about Mr. Jones' involvement but was afraid to do so because [my] client might be charged with falsifying a police report."

Affidavit of Noah Munyer ("Munyer Affidavit"), Adv. Case ECF No. 22 ¶¶ 6, 10 (emphasis and alterations in original), Feb. 6, 2013.

The discrepancies between these affidavits caused the bankruptcy court great concern because, as the court explained at the February 6, 2013 hearing, in addition to its concern that Hoover had brought a case for which he should have known he did not have sufficient evidence to corroborate his clients' allegations, it appeared to the bankruptcy court that Hoover himself had filed an affidavit that manufactured [**31] a story to support his clients' case. In fact, the Sanctions Order quotes a colloquy the bankruptcy court had with Hoover on the record which reveals the court's view of what it called "Hoover's wholly unprofessional mindset."

> **Hoover**: . . . What we basically have here is two very different stories, each of which has evidentiary value. . . . I believe *Rule 9011* requires us to have a story. Not that it's
>
> **Court (interrupting)**: *Rule 9011* doesn't require you to have a story.
>
> **Hoover (interrupting)**: Evidence is what
>
> [*26] **Court (continuing)**: *Rule 9011* requires you to deal with facts.
>
> **Hoover**: I agree. I didn't mean to be -- to use "story" in a sense that it was fiction. We believe that we have an obligation to deal with objective facts as we see those facts. And we believe that we have those facts. And if you put Grad's testimony aside, we still have those facts. . . . So we went through each of the elements in 9011 and marshaled some of the evidence that shows we have facts. . . .
>
> **Court**: The question that I put to you was statements that you made in the pleading that you filed with this court yesterday dealing with a show cause with respect to *Rule 9011* in which Mr. Munyez (sic, Mr. Munyer) has provided an affidavit that is
>
> **Hoover (interrupting)** [**32] : disputed
>
> **Court**: is at total odds
>
> **Hoover (interrupting again)**: and disputed . . . and disputed -- his affidavit is false -- there's a lot of parsing of words going on in the two affidavits from Parker and Munyer and we have a different version -- what we consider to be the true version of what happened. Now if the court wants to proceed on a 9011 against me for what I filed as opposed to motion to lift stay and the adversary proceeding, I would welcome the opportunity, but I would right now -- those affidavits are hearsay and I would move to strike them. I haven't had an opportunity to discover the full story from those two individuals. . . .

Sanctions Order at 9 (quoting Feb. 6, 2013 Hr'g Tr. 11:49:42-11:52:23).

The bankruptcy court cited this colloquy to demonstrate that Hoover just told "stories" and spun "a convenient yarn that contradicts historical facts." Sanctions Order at 9. A large portion of the bankruptcy court's Sanctions Order focused on the discrepancies between Hoover's Affidavits and the Munyer and Parker Affidavits as proof that Hoover's narrative was contradictory to the facts of the case. Sanctions Order at 6-8. When comparing Hoover's Initial Affidavit to the Munyer Affidavit [**33] and Parker Affidavit, there appears to be a huge difference in "stories." The Munyer and Parker Affidavits can be read as completely refuting the idea that Grad ever considered changing his version of the facts. However, when all of the affidavits are compared along with the testimony given at trial, it is clear that there were discussions between Hoover and Munyer regarding whether Grad would alter his prospective testimony.

The bankruptcy court stated:

> The Court also credits Munyer's testimony that this conversation was initiated by Hoover and took place following a conference at the state court, not in the presence of Mrs. Dana Hoover following the deposition of Mr. Grad, as suggested by Hoover in the Responding Affidavit and by Dana Hoover's Affidavit, paragraph 4. The Court also credits Munyer's testimony that Hoover approached him. Dana Hoover's Affidavit, particularly with respect to her having overheard conversations between Hoover and Munyer, appears to this court to be yet another part of the story "manufactured" by Hoover.

Sanctions Order at 7-8 (discussing Affidavit of Dean S. Hoover ("Responding Affidavit") Adv. Case ECF No. 29, March 12, 2013). Thus, there are four factual [**34] findings to be addressed in this decision regarding the bankruptcy court's conclusions as to the discussions about a possible change in Grad's version of events: (1) how the conversation was initiated; (2) whether Munyer approached Hoover; (3) the location(s) of conversation(s); and (4) [*27] whether Dana Hoover, Hoover's wife/legal assistant, overheard any conversation(s).

During the hearing on the Orders to Show Cause, Munyer confirmed that there was a conversation between himself and Hoover about Grad changing his testimony. March 15, 2013 Hr'g Tr. 60:21-23. Munyer's version of the conversation was that he and Hoover were discussing the case following a pre-trial hearing in state court. The conversation took place in the hallway outside of the courtroom. Munyer testified that he stated "something like my guy doesn't have any money . . . what are we going to do here?" In that conversation Hoover raised the idea of Grad changing his story. March 15, 2013 Hr'g Tr. 61:2-62:3. The bankruptcy court found Munyer's version of events believable, describing Munyer's testimony as "completely trustworthy in contrast to the self-serving Initial Hoover Affidavit, Responding Affidavit and affidavit of [**35] Dana Hoover[.]" Sanctions Order at 8. The bankruptcy court did not explain in the Sanctions Order why it did not credit Munyer's own testimony on re-cross examination.

On re-cross examination, Munyer testified that the concept that Grad might change his story was Hoover's idea, that Munyer indicated that he would discuss it with his client, and that he did so on June 25, 2012 when he met with his client and his client's mother. March 15, 2013 Hr'g Tr. 65:6-19. Munyer also testified that the first time the idea was discussed between himself and Hoover was after one of two hearings, but he was not sure which one. Tr. 66:21-25. Munyer agreed that they had a pre-trial hearing in February, but he did not remember the conversation with Hoover taking place at that time. He testified that it could have been June 18, 2012, or May 25, 2012. Tr. 67:3-23. Munyer also testified regarding an email exchange that took place on June 25, 2012 and a possible phone call on July 5, 2012. When Hoover asked him how many times they talked about the possibility of Grad changing his story, Munyer responded: "I'm not sure. I know we talked once in court in person and we probably spoke once on the telephone." [**36] Tr. 72:4-7. When Hoover asked Munyer if he could put a date on the conversation that occurred in the courthouse, Munyer responded "I thought it was after the Magistrate Shoemaker date, which was in -- I think May 25. Is that what it was? . . . I'm not -- but, again, I'm not sure. I didn't -- I didn't keep copious notes on those conversations." Tr. 72:12-19.

When Munyer's testimony on redirect and re-cross examination is compared to Hoover's Responding Affidavit, they are very similar. Hoover stated that he did

not initially approach Munyer, but rather Munyer approached him after their first in-person meeting, which he believed was the pre-trial conference in the State Court Action on February 27, 2012. Hoover asserted that Munyer raised the subject by a comment that his client, Grad, did not have the money to pay any judgment and asked what he could do to get his client out of the lawsuit. Hoover's narrative was that he shared his theory of the case that Grad was lying for Jones, and he offered to consider letting Grad out if he changed his story and told the truth. Responding Affidavit ¶ 19, In his Responding Affidavit, Hoover accused Munyer of making false assertions in his affidavit [**37] when he denied that he ever indicated that Grad was considering changing his story and denied that Grad was afraid to do so because of potential criminal charges for falsifying a police report. Hoover reiterated: "The conversations I recall took place over the time period from the above pretrial conference on February 27, 2012, at my office on [*28] March 27, 2012 after Mr. Grad's deposition, in the hallway of the Summit County courthouse after [a] hearing on June 18, 2012 and ending about July 5, 2012 when I returned Mr. Munyer's phone message as well as points in between." Responding Affidavit ¶ 24. Clearly, Munyer and Hoover agree that an ongoing conversation occurred on multiple dates through multiple methods of communication. Moreover, the parties agreed that Munyer walked up to Hoover and started a conversation intended to reach a resolution for his client and in that conversation Hoover raised the idea of Grad changing his story. March 15, 2013 Hr'g Tr. 61:2-62:3.

Generally, appellate courts give great weight to a trial court's determinations of credibility because the trial court is the court that observes the parties' demeanor. However, in this case the bankruptcy court seemed to [**38] credit Munyer and discredit Hoover on points where their testimonies are actually consistent. Both Munyer and Hoover testified that Hoover was the one who raised the concept of Grad changing his story after Munyer opened a conversation with a comment about Grad's limited means. It appears that Munyer interpreted Hoover's Initial Affidavit as claiming that the concept of Grad changing his story was Munyer's idea. In his affidavit, Munyer so vehemently rejected this concept, that it ended up reading as if Munyer denied that there was ever any discussion or possibility that Grad might change his story. However, during Munyer's testimony on cross and re-cross examination, he clearly admitted that there was some sort of on-going discussion about the possibility of Grad changing his testimony (although he insisted it was never likely). In his Initial Affidavit, Hoover did not say that Munyer approached him and did not say that the concept of Grad changing his story was Munyer's idea. Additionally, in his Responding Affidavit, when Hoover stated that Munyer approached him, Hoover only conveyed that Munyer walked up to him and started a conversation. Hoover stated that during this conversation, [**39] Munyer raised the idea of getting Grad out of the case, and that Hoover was the one who suggested that Grad change his story. Hoover also indicated that this first conversation occurred at the courthouse. Responding Affidavit ¶ 19. Accordingly, two of the matters that the bankruptcy court found to be misrepresentations by Hoover, i.e. who initiated the conversation and whether Munyer approached Hoover, were areas where the parties were not actually in disagreement.

Two details that Munyer and Hoover disagreed about are whether they had a conversation at Hoover's office following Grad's deposition and whether Dana Hoover could have overheard any of their conversations. Munyer testified about a conversation with Jones in the parking lot of Hoover's office but clearly recalls being in a hurry to leave because it had been his first deposition and he had found it "contentious." March 15, 2013 Hr'g Tr. 62:7-22. On re-cross examination, Hoover attempted to elicit testimony from Munyer regarding the possibility of Dana Hoover having overheard any of the conversations. When asked if he denied ever having a conversation in front of Dana Hoover, Munyer responded: "I don't think that ever occurred. [**40] I don't know when it would have occurred, because she wasn't at the court with us and you and I were on the telephone[.]" Tr. 72:23-25. Hoover then prompted Munyer "and you and I were in my office, correct?" Tr. 73:2. At that point the bankruptcy court interrupted, stating that Munyer had already answered the question about what had happened after [*29] the deposition. The bankruptcy court then instructed Hoover to "Move on." Tr. 73:6.[11]

> 11 During Hoover's own testimony at the hearing (under cross examination by Brouse), Hoover attempted to explain the layout of his office. It appears that this testimony may have been going to the possibility that Dana Hoover could have overheard a conversation between him and Munyer without being noticed. This testimony was cut off by the court as "irrelevant."

> Tr. 132:18-23. The court was correct that the testimony was not responsive to the question asked on cross examination. In her affidavit, Dana Hoover stated that she was in the office on March 27, 2012, for the deposition of Grad and that after the deposition Munyer and Hoover talked in her presence. Affidavit of Dana T. Hoover ("Dana Hoover Affidavit"), ECF No. 30 ¶ 4, March 12, 2013. Dana Hoover also [**41] asserted that over the next few months, she had several conversations and emails with Munyer while trying to schedule more discovery and during those conversations she urged Munyer to get Grad to tell the truth. Dana Hoover Affidavit ¶ 5. Finally, Dana Hoover claimed to have overheard a telephone conversation between Munyer and Hoover on July 5, 2012, in which Munyer indicated that Grad would not change his story and that Parker would pursue penalties against Grad if he did. Dana Hoover Affidavit ¶ 6.

Munyer never directly addressed Dana Hoover's claims that she had communicated directly with Munyer via telephone and email. Dana Hoover Affidavit ¶ 5. Nor did he ever address her claim that she overheard the July 5, 2012 phone conversation. Dana Hoover Affidavit ¶ 6. Dana Hoover was not called to testify at the hearing on the Orders to Show Cause. The bankruptcy court's conclusion that Dana Hoover's affidavit was not credible appears to be based solely on its comparison to the limited statement from Munyer that the bankruptcy court found credible. Even if Dana Hoover's statements about overhearing conversations are not credible, those statements are not misrepresentations made by Hoover [**42] inasmuch as he was not the affiant and did not sign the affidavit. While Hoover does assert that he remembers a conversation following Grad's deposition (Responding Affidavit ¶ 24), he does not assert that Dana Hoover overheard that conversation. Accordingly, the Panel holds that to the extent that sanctions were awarded against Hoover for statements made in Dana Hoover's affidavit, the bankruptcy court abused its discretion.

6. Representations Regarding State Criminal Case

Another key part of the bankruptcy court's reasoning for sanctioning Hoover was that the bankruptcy court believed that Hoover mischaracterized why the State Criminal Case was dismissed. The bankruptcy court observed that "[t]he story Hoover tells is that the State Court Criminal Case against Mr. Harger was dismissed because Mr. Grad wanted to recant and instead place responsibility [for the plot to inculpate Mr. Harger] on the Debtor." Sanctions Order at 6. The bankruptcy court also observed that it was "Hoover's assertion that the reason the prosecutor dropped the case was because Grad was going to change his story." Sanctions Order at 8. The bankruptcy court did not give any citations to the record for these alleged [**43] statements.

Conversely, the bankruptcy court found credible "Munyer's testimony that Grad had no intention of and never considered changing his testimony." Sanctions Order at 7. Additionally, the bankruptcy court found:

> During the cross examination of Mr. Munyer, Hoover attempted to show that Munyer's statement that Mr. Grad was prepared to testify against Harger . . . was a false statement. Hoover was not successful in this attempt. Rather this [*30] is another example of Hoover's inability to discern fiction from fact.

Sanctions Order at 7. Later in the order, the bankruptcy court stated: "In short, Grad would have testified against Harger in the State Court Criminal Case, had it not been dropped by the prosecutor for reasons not related in any way to a change in position by Grad." *Id*.

The record, however, demonstrates that Hoover never asserted that the State Criminal Case was dropped because Grad was going to change his story. Rather, he posited two reasons why the State Criminal Case was dismissed. First, he stated that the State Criminal Case was dismissed because Parker knew that Grad's statements were inconsistent with the facts. Initial Affidavit ¶ 5; Pl. Hr'g Br. RE: *Rule 9011* ("Pl. 9011 Br."), [**44] Adv. Case ECF No. 19, Feb. 5, 2013 at 19; Responding Affidavit ¶ 13. Second, Hoover asserted that Parker dismissed the State Criminal Case because Grad refused to cooperate. Responding Affidavit ¶ 13.

In his Responding Affidavit, Hoover described a phone call between himself and Parker two days before trial in the State Criminal Case: Parker had called Hoover to tell Hoover that the case would be dismissed. Hoover explained:

> I agreed with the dismissal because, if he

> had looked at any of the discovery materials, he would know Mr. Grad was lying and so Mr. Parker would lose. I went over the evidence . . . . I then asked whether Mr. Parker was dismissing the charges "with prejudice" or "without prejudice". Mr Parker said "without". I told him I would object to a dismissal without prejudice because the defense was prepared for trial, we thought we would win based on what I had just told him, we did not want a "without prejudice" dismissal to possibly stand in our way of filing following civil suits and we did not want any possibility remaining that the charges might be re-filed. Mr. Parker responded that he would not agree to dismiss with prejudice but added words similar to "I will never re-file [**45] the charges". I remember he put emphasis on the word "I" which I took to be further confirmation that he did not believe in the case. I attempted to pry out Mr. Parker's reasoning for a dismissal without prejudice . . . and Mr. Parker simply did not respond. . . . For all of the above reasons, I had good grounds for what I said at paragraph 5 of my previous affidavit. If Mr. Parker had any other reasons for dismissing the case, they were not known to me until I appealed his dismissal without prejudice . . . . In the appellate brief he filed, Mr. Parker said he dismissed because Mr. Grad refused to cooperate or words to that effect.

Responding Affidavit ¶ 13.

During the trial on the Orders to Show Cause, Parker agreed with Hoover's general assessment of the phone conversation. May 9, 2013 Hr'g Tr. 15:10-16:21. Hoover asked Parker: "Now, did you disagree with any of those statements?" Parker responded: "I don't know if I said, I disagree with that. I just listened to you . . . ." Parker also stated that he did not know whether Hoover took his silence as an agreement of Hoover's assessment of the evidence. During his cross examination, Parker acknowledged that some of the inconsistencies [**46] between his own affidavit and Hoover's could be reconciled, as they were based on perspective. May 9, 2013 Hr'g Tr. 42:2-4. Parker also twice agreed that some of what he had labeled as "false statements" in Hoover's Initial Affidavit were really matters of opinion. May 9, 2013 Hr'g Tr. 47:2-5; 49:6-8.

Thus, the Panel finds that the trial testimony from Parker shows that he knew [*31] prior to dismissal about Hoover's insistence that inconsistencies existed between Grad's statements and the evidence. While his testimony clarifies that those inconsistencies were not the reason he dismissed the State Criminal Case, his testimony also indicates that, from Hoover's perspective, the inconsistencies might have seemed like a reason for dismissal. More importantly, Parker's testimony shows that Hoover was absolutely correct when he represented to the bankruptcy court that the State Criminal Case was dropped because Grad no longer wanted to proceed. May 9, 2013 Hr'g. Tr. 17:6-10. In addition to Parker's testimony, Hoover elicited testimony at the trial from Munyer about a *pro se* handwritten pleading filed by Grad in the State Court Case wherein Grad stated that he had "revoked the charges" against [**47] Ryan Harger rather than the prosecutor dismissing for his own reasons. Munyer did not deny that Grad made the statement, although he attempted to discount it by noting that it was "a layman's written response without the advice of counsel." March 15, 2013 Hr'g Tr. 43:19-44:12. Munyer testified:

> I've spoken to Chris Parker and to Jonathan Grad about this exact issue, and they're both in sync. [B]efore the trial Chris Parker contacted his victim, who was Jonathan Grad, and said something to the effect of, do you care about this case? You know, do you want to prosecute? Do you want to go forward? Something of that nature. And he [Grad] said, I don't live there. I don't know those people. I'm never coming back. I don't care what happens with it.

Tr. 44:17-25.

The statement by Parker, who the bankruptcy court found credible, and Grad's own statement support Hoover's representation that the State Criminal Case was dropped because Grad did not want to proceed. Even Jones testified that Parker advised him that the matter was not going forward because Grad was not going to

pursue it. R/S Final Hearing Tr. 16:17-18. While the parties may not agree on what story Grad would have told if he had been forced [**48] to testify, all of the witnesses' statements lead to the conclusion that Grad's lack of desire to proceed led Parker to drop the case. Accordingly, the bankruptcy court's finding that Hoover had asserted that the case was dropped because Grad was going to change his story is clearly erroneous. Further, the bankruptcy court's finding that this was "another example of Hoover's inability to discern fiction from fact" is clearly erroneous. To the extent sanctions were based on these findings, they are an abuse of discretion.[12]

> 12 In his affidavit, Parker stated: "Paragraph 6 [of Hoover's Initial Affidavit] represents that I threatened to prosecute Grad if he changed his story. This never happened." Parker Affidavit ¶ 8. Hoover responded that his Initial Affidavit only relayed statements by Munyer, not statements of fact from personal knowledge. Responding Affidavit ¶ 14. Later, during cross examination, Parker admitted that in Hoover's affidavit, Hoover merely reported what he claimed that Munyer told him and that Parker would not know whether or not Munyer had said that. May 9, 2013 Hr'g Tr. 21:22-22:19.
>
> In his Responding Affidavit, Hoover attempted to make sense of the seemingly conflicting [**49] accounts of Grad's possible prosecution if he changed his story. Hoover recounted that "it was my recommendation to Mr. Munyer that, before Mr. Grad changed his story, Mr. Munyer had better confer with Mr. Parker to make sure Mr. Grad would not end up being prosecuted." Responding Affidavit ¶ 14 (emphasis in original). Additionally, Hoover noted that Laura Grad had testified in a deposition that Munyer had told her that "Mr. Grad faced prosecution if Mr. Grad changed his story[.]" *Id*. (Jonathan Grad's mother, Laura, was present during a meeting between Munyer and Grad when they discussed Hoover's suggestion that Grad reconsider his prospective testimony. Her deposition is not part of the record on appeal.)
>
> The Panel notes that in the Sanctions Order the bankruptcy court did not focus on whether Munyer made any representations regarding what Parker said about the possible prosecution of Grad. The Panel finds that the bankruptcy court imposed sanctions based in part on its findings that Hoover had made assertions that the State Criminal Case was dismissed because Grad was going to change his story. Those findings were clearly erroneous. Therefore, the Panel does not need to reconcile [**50] the different accounts regarding whether prosecution of Grad was threatened or who reported such.

[*32] **7. Alleged Misconduct in the State Court Action**

In its Sanctions Order, the bankruptcy court recounted an allegation made by Munyer of misconduct by Hoover in the State Court Action. Sanctions Order at 7, n.5 (quoting Munyer Affidavit ¶ 14).

> Mr. Hoover attempted to obtain sanctions and attorney fees of $1,378.50 against Jonathan Grad for failure to appear at a deposition without excuse. Sanctions were denied. What Mr. Hoover did not know when he moved for sanctions was that Mr. Grad had contacted the court, at or around the deposition date, and advised the court of his attempts to reschedule the deposition. Mr. Hoover hung up on him. The court noted in its order that Mr. Hoover did not deny Mr. Grad's claims. Sanctions against Mr. Grad were denied.

Id. The bankruptcy court then noted, "As Munyer points out, the story Hoover told to the [state] Court failed to mention that Mr. Grad had called him to attempt to reschedule." *Id*.

During his cross examination of Munyer, Hoover was able to establish that Munyer's affidavit had not related the complete story of this event to the bankruptcy court. [**51] Munyer admitted that Grad had "probably" told him that Hoover had informed Grad that Grad still had to appear at the deposition. Munyer also admitted that Hoover had told Grad that he could not talk to Grad because Grad had retained an attorney. March 15, 2013 Hr'g. Tr. 33:1-36:6. Further, the state court did not sanction Hoover for a misrepresentation, and, although the state court did not sanction Grad for his failure to appear at the deposition, it did grant Hoover's motion to compel. Debtor's Reply Br. RE: 9011 Sanctions, Ex. 3,

Adv. Case ECF. No. 20-3, March 2, 2012.

In the Sanctions Order, the bankruptcy court recounted this "misconduct" by Hoover in a footnote. Perhaps the bankruptcy court recognized that because it was not misconduct during the bankruptcy case, it was not sanctionable by the bankruptcy court. But the inclusion of this footnote in the order is an example of how the bankruptcy court credited Munyer's affidavit, even when Munyer's own testimony at trial contradicted it or cast doubt on it. The inclusion of this footnote is an indication that the bankruptcy court considered this allegation as part of the cumulative evidence of Hoover's dishonesty and the need for [**52] severe sanctions. In fact, the bankruptcy court specifically stated in the Sanctions Order: "Hoover has mischaracterized to this Court matters that have taken place elsewhere." Sanctions Order at 11. The Panel finds that the bankruptcy court abused its discretion when it considered this allegation in determining sanctions. Not only did this alleged misconduct occur in a nonbankruptcy forum, Munyer's own testimony cast serious doubt about whether Hoover's conduct in the state case even amounted to misconduct at all.

8. Conclusion Regarding Factual Findings

The bankruptcy court summarized its factual findings regarding Hoover's mischaracterizations thus:

> [*33] Hoover appears to misunderstand the nature of his role. He is not to be the author of an uncorroborated story. In his advocacy, he can frame a narrative of prior events that is supported by admissible evidence. As an officer of the court, however, he cannot simply spin a convenient yarn that contradicts historical facts. Examining affidavits executed by Hoover and filed in this case in relation to the *Rule 9011* issues leads me to conclude that he sought to defend against *Rule 9011* issues with further violations of that rule and worse. When the assertions [**53] in the Initial Hoover Affidavit were promptly controverted in the Munyer and Parker Affidavits, Hoover continued to expand the scope of his self-serving and inaccurate prior statements by filing a Responding Affidavit.

Sanctions Order at 8-9. Setting aside that the last sentence seems to ignore the fact that the bankruptcy court required Hoover to file the Responding Affidavit as his direct testimony, the bankruptcy court appears to have been so offended by the discrepancies between the Hoover's Initial Affidavit and the Munyer and Parker Affidavits that it rejected all evidence presented that countered the version of events described in the Munyer Affidavit, even when that evidence was Munyer's own later testimony at trial.[13] In its Sanctions Order, the bankruptcy court did not address any of the trial testimony by Munyer and Parker that corroborated parts of Hoover's affidavits or contradicted their own. This one-sided analysis of the evidence led to the bankruptcy court making several clearly erroneous factual findings. All of the attorneys were advocates in a highly contentious legal battle that involved both the state court and bankruptcy court in civil and criminal matters. Parker, [**54] the state court prosecutor, who appeared to be the most neutral, admitted that much of Hoover's Initial Affidavit that he had originally declared false could be attributed to perspective or advocacy. The bankruptcy court should have come to the same conclusion. The bankruptcy court's conclusion that Hoover's narrative contradicted historical fact is clearly erroneous. While there are some inconsistencies between Hoover's narrative and others', those differences do not rise to the level required to support sanctions pursuant to *Rule 9011*.

13 *See* Section IV.B.5.

C. Evidentiary Basis for Filings

The original issue to be addressed by the Order to Show Cause was whether Hoover was justified in filing the Motion for Relief and the Adversary Complaint. The bankruptcy court cited the correct standard for making its determination. "[HN7] To determine whether the reliance is reasonable, the bankruptcy court must evaluate the attorney's conduct based on what was reasonable to believe at the time the motion was submitted." Sanctions Order at 10 (citing *In re Downs, 103 F.3d 472, 481 (6th Cir. 1996)*; *McGhee v. Sanilac County, 934 F.2d 89 (6th Cir. 1991))*. The bankruptcy court then held:

> At the time this case was filed, none of the Harger's [sic] allegations against the Debtor had been independently verified,

> and Hoover [**55] knew that the evidence on which he had intended to rely in the state court did not exist. Hoover's continued insistence that he had evidence to prove his clients' claims, without identifying the evidence specifically, is not reasonable. Hoover had a duty to verify the existence of the alleged video evidence. He was remiss in relying upon its purported existence without having seen it for himself. Prior to the point of commencing an adversary proceeding [*34] seeking a determination of non dischargeability, verifying the existence of such purported evidence was essential under the circumstances. His failure to do so was unreasonable, again particularly as Harger's lack of credibility grew.

Sanctions Order at 11. The bankruptcy court had previously found:

> Hoover, though he may initially have credited the statements of his clients, was not reasonable in continuing to believe their claim. According to Hoover, he conducted extensive discovery in the State Court Action and claimed to have been prepared for trial in the State Court Action; given these representations to this court, he is charged with knowledge that there were no videos and no police reports to corroborate his clients' version of [**56] events.

Sanctions Order at 6. Additionally, the bankruptcy court stated:

> Hoover continues to suggest that he has an evidentiary basis for the allegations in the State Court Action, the Motion for Relief and the Adversary Complaint. However, he has not pointed to any specific evidence supporting any of his allegations. As previously noted, perhaps at first he could have reasonably believed Harger's factual contentions had evidentiary support. However, as it became clear that the Hargers did not have the video tape evidence as they originally claimed, nor the police reports to show they were upset by the alleged harassment by Mr. Jones, Mr. Hoover's reliance on his clients' self-serving and uncorroborated statements became unreasonable, particularly in light of his client's documented aggressive actions.

Sanctions Order at 8.

The problem with the bankruptcy court's findings is that, even though the bankruptcy court acknowledged that it must judge Hoover's actions based on what was reasonable for him to believe about his clients' case at the time he filed the Motion for Relief and the Adversary Complaint, the Sanctions Order does not demonstrate that the bankruptcy court applied that standard. [**57] The bankruptcy court stated: "Hoover knew that the evidence on which he had intended to rely in the state court did not exist." Sanctions Order at 11. However, the Sanctions Order did not directly cite to the record where Hoover described what he would rely on in the state court. Because the Sanctions Order repeatedly stated Hoover was charged with the knowledge that there were no video tapes or police reports, the Panel presumes that this is the evidence that the bankruptcy court referred to. Additionally, the bankruptcy court specifically noted that: "During the R/S Final Hearing, Hoover submitted no exhibits for use during the hearing." Sanctions Order at 4. The Panel will consider that statement in the context of the bankruptcy court's conclusion that Hoover violated *Rule 9011* by filing the Motion for Relief and Adversary Complaint without a sufficient evidentiary basis. Finally, the Panel will consider whether the bankruptcy court's findings regarding the outcome of the CPO hearing had any impact on its conclusion. The Panel will consider each of these in turn.

Because Hoover is judged on what he knew at the time the pleadings were filed, not on future discovery or the outcome of the case, [**58] it is important to note the timing of the proceedings. After the State Criminal Case was dropped, Ryan Harger sought the CPO against Jones based on alleged threats against his family. The Hargers hired Hoover sometime during the CPO process but Hoover was not counsel [*35] of record for that proceeding.[14] On behalf of the Hargers, Hoover filed the State Court Action against Grad and Jones alleging conspiracy and intentional infliction of emotional distress on the theory that they had conspired to have Ryan Harger arrested on false assault charges. The state court denied the CPO, but discovery in the State Court Action

was ongoing and a trial date had been set prior to the filing of Jones' bankruptcy petition. While the State Court Action was stayed as to Jones, there was still some discovery as to Grad until July 5, 2012, when the state court decided to stay the case as to Grad as well. Hoover filed the Motion for Relief on July 10, 2012. The bankruptcy court held a preliminary hearing regarding the Motion for Relief on August 15, 2012, and scheduled a final hearing for September 17, 2012. Hoover timely filed the Adversary Complaint on August 17, 2012. Hoover did not file the Adversary Complaint [**59] until after he attempted to obtain relief from the stay to pursue the action in state court. He asserts that he filed the Adversary Complaint in order to preserve his clients' rights. Responding Affidavit ¶ 8.

14 *See* Section IV.B.2.

1. Lack of Video Tape Evidence

In the Sanctions Order, the bankruptcy court repeatedly mentioned the lack of video tape evidence as proof that Hoover should have known that there was not a sufficient evidentiary basis for the underlying cause of action. But the bankruptcy court failed to make a factual finding regarding when Hoover knew or should have known there were no video tapes. Sanction Order at 8. The bankruptcy court noted that at the R/S Final Hearing, Ryan Harger testified that he thought there were some videos. Sanctions Order at 4, n.3; R/S Final Hearing Tr. 52:12-23. Jennifer Harger admitted in her testimony during the *Rule 9011* hearing that although they have surveillance cameras, they did not have video evidence because they were either recorded over or erased. Sanctions Order at 4, n.3. Hoover testified that he did not know if there was video evidence. He had never been given any. He had been told there was, the Hargers had previously thought there was, [**60] but he and they no longer believed so. March 15, 2013 Hr'g Tr. 127:25-128:11. The bottom line is that the vast majority of cases do not have video evidence of alleged events. The fact that they have cameras, but no video evidence might weaken the Hargers' case, but the lack of video evidence alone does not mean that they never should have brought the case. More importantly, there is absolutely nothing in the record showing that Hoover either lied to the bankruptcy court regarding video evidence or that he knew conclusively that his clients were lying about video evidence prior to his filing the Motion for Relief or the Adversary Complaint. In fact, during the hearing on the Motion for Relief, Hoover never asserted that he was relying on video evidence.

2. Lack of Police Reports

In the Sanctions Order, the bankruptcy court found that there were no police reports that corroborated the Hargers' version of events. However, Exhibit F attached to Hoover's response to the Order to Show Cause is such a report. Adv. Case ECF No. 19-7. Although the weight of this report may be questionable since, as Jennifer Harger stated to the officer at the time she made the report, it was "for documentation [**61] purposes," it is a report that was made prior to the bankruptcy filing and it corroborates the story that Hoover's clients told him. Again, the question is not whether Hoover would win [*36] the underlying case, the question is whether at the time he filed the Motion for Relief and Adversary Complaint, Hoover, as an attorney, was unreasonable in believing his clients. Moreover, at the hearing on the Motion for Relief, Jones testified that there had been numerous reports to the police of alleged infractions on both sides. R/S Final Hearing Tr. 10:19-22. Accordingly, the bankruptcy court's factual finding that there were no police reports that corroborated the Hargers' version was clearly erroneous.

3. Lack of Exhibits

In the Sanctions Order, the bankruptcy court found: "During the R/S Final Hearing, Hoover submitted no exhibits for use during the hearing. He continued to maintain, however, that the State Court Action was ready for trial in state court." Sanctions Order at 4. While it is true that Hoover did not submit exhibits during the R/S Final Hearing, this fact does not have the significance attributed to it by the bankruptcy court. Because of the way Hoover interpreted the factors to [**62] consider when determining a motion for relief from the automatic stay set forth in *Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.), 907 F.2d 1280 (2d Cir. 1990)*,[15] he relied solely on the State Court Action docket, complaint, answer, and order staying the State Court Action due to the bankruptcy case. The bankruptcy court took judicial notice of these state court documents at the beginning of the hearing, and Hoover offered no additional exhibits during the hearing. R/S Final Hearing Tr. 4:7-13, 7:24-8:3.

15 In *Sonnax*, the Second Circuit Court of Appeals listed a number of factors ("the *Sonnax*

Factors") that may be relevant in deciding whether the stay should be lifted in order to permit litigation to continue in another forum. These factors include:

> (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would [**63] prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

Sonnax, 907 F.2d at 1285-86. While citing *Sonnax* with approval regarding the standard of review, the Sixth Circuit Court of Appeals has not expressly adopted these factors in reviewing a bankruptcy court's decision whether or not to grant relief from the automatic stay. *See Garzoni v. K-Mart Corp. (In re Garzoni), 35 Fed. App'x 179, 2002 WL 962154 at *2 (6th Cir. 2002)* ("The bankruptcy court considers the following factors in deciding whether to lift a stay: 1) judicial economy; 2) trial readiness; 3) the resolution of preliminary bankruptcy issues; 4) the creditor's chance of success on the merits; and 5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors.") The bankruptcy court did not expressly state that it would follow the *Sonnax* Factors, but the [**64] court did give some indication that it was not looking for substantial evidence on the merits of the underlying State Court Action, stating: "What I'm hearing today is a motion for relief from stay. . . . You've been allowed a lot of latitude. With respect to this matter. . . . But the relevance of this testimony to the motion for relief from stay is certainly not clear to me." R/S Final Hearing Tr. 38:14-22.

Nonetheless, the bankruptcy court noted that "when Debtor's counsel requested [*37] production of such evidence [from Hoover in support of the Motion for Relief], he produced none." Sanctions Order at 3. The bankruptcy case docket reflects that Brouse served Hoover with the notice of request for production of documents and interrogatories on August 16, 2012, which were due the day before the R/S Final Hearing. The bankruptcy court seemed to attribute the failure to offer exhibits at the hearing and the failure to respond to the discovery request to be an admission that evidence does not exist. However, the bankruptcy court never made a specific ruling that any issue or fact was deemed admitted due to a discovery violation. Even if that were the case, such an admission would not support [**65] the conclusion that, as the attorney, Hoover knew that evidence did not exist prior to the time he filed the Motion for Relief and the Adversary Complaint.

The bankruptcy court concluded that Hoover should have known just how weak his case was prior to filing the Motion for Relief and the Adversary Complaint; in drawing this conclusion, the bankruptcy court relied on an erroneous factual finding that discovery in the State Court Action was complete. As the Panel has already noted, Hoover did not represent to the bankruptcy court that discovery was complete. In his Motion for Relief, Hoover asserted that discovery in the State Court Action was "ongoing" at the time the bankruptcy petition was filed. See Motion for Relief, Bankr. Case ECF No. 16. During the hearing on the Motion for Relief, Hoover asserted only that the State Court action was "nearly ready for trial." R/S Final Hearing Tr. 68:9. In both of his affidavits, Hoover again asserted that if discovery in the State Court Action were to proceed, he expected to uncover further evidence to corroborate his clients' case.

Initial Affidavit ¶ 7, Responding Affidavit ¶ 7.

During the March 15, 2012 show cause hearing, Hoover admitted [**66] he had a circumstantial case when he was asked to point to specific evidence. He stated that he was relying primarily on the parties' testimony, depositions, and police reports. March 15, 2013 Hr'g Tr. 120:18-123:10. Thus, it is apparent that Hoover was not relying on videos and had specific evidence in support of the underlying State Court Action, and by extension, the Motion for Relief and the Adversary Complaint.

4. CPO Hearing

The bankruptcy court held that Hoover should have known that the Hargers were not credible and lacked evidence in support of their case, apparently relying on the outcome of the CPO hearing. This ruling was clearly erroneous. The bankruptcy court noted that at the CPO hearing, Ryan Harger asserted that he would have video evidence of some of the alleged incidents of Jones' aggression. But since Hoover was not present at this hearing and was not counsel of record,[16] Ryan Harger's statements at this hearing cannot be impugned to Hoover. Indeed, the State Court Action had just been filed at that point in time; so clearly, there had been no discovery upon which Hoover could reach any conclusions regarding his clients' credibility.

16 *See* Section IV.B.2.

The bankruptcy [**67] court stated: "The CPO was denied because the state court found Mr. Harger's testimony lacked credibility and failed to establish a basis for the relief sought." Sanctions Order at 4. It is unclear what the bankruptcy court was relying on as support for this statement. In the CPO case, the magistrate found: "[Ryan Harger's] oral testimony failed to [*38] support his claim that [Jones] is or has been guilty of menacing by stalking . . . ." January 13, 2012 CPO Judgment Entry, Bankr. Case ECF No. 44. In the Judgment Entry, the magistrate did not state that the testimony lacked credibility. Perhaps the bankruptcy court assumed that the magistrate reached his conclusion due to a finding that Ryan Harger lacked credibility, but the magistrate's decision simply did not state that. It is possible that the magistrate believed everything that Ryan Harger said and still did not find cause for a protective order.

Therefore, the bankruptcy court abused its discretion in holding that Hoover violated *Rule 9011* for believing his clients.

5. Evidence Regarding the Objection to Discharge

The Adversary Complaint included a count objecting to Jones' discharge, alleging that Jones failed to disclose an ownership interest [**68] in CarMeds. The Panel finds that there is at least some evidence to support Hoover's theory. In Grad's deposition, he called himself an employee of Jones. In Jones' deposition, he seemed to admit that Grad was his employee. Jones' deposition testimony can be interpreted to at least imply that Jones runs the CarMeds business even though his mother is the owner. Further, Jones signed a letter identifying himself as "President" of CarMeds. Finally, Jones stated that his mother gives him money, although he did not say why. These factors lead the Panel to conclude that there is at least a colorable argument that Jones is a de facto owner of CarMeds. Moreover, although the bankruptcy court focused on what it viewed as Hoover's mischaracterization of Jones' deposition testimony, Hoover did present this evidence to the bankruptcy court in response to the Order to Show Cause. Accordingly, the factual finding that Hoover did not present specific evidence in support of this cause of action is clearly erroneous.

6. Conclusion Regarding Evidentiary Support

[HN8] The Fourth Circuit has explained the standard for a determining whether the filing of a complaint is grounds for *Rule 9011* sanctions:

> We have aptly observed [**69] that "the Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed. The Rule attempts to discourage the needless filing of groundless lawsuits." *Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir.1987).* And we have recognized that "creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." *Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir.1991)* (quoting *Davis v. Carl, 906 F.2d 533, 536 (11th Cir.1990)).*

Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153

(4th Cir. 2002).

There are several problems with the bankruptcy court's conclusion that Hoover should have known that the cause of action lacked merit at the time he filed the Motion for Relief and the Adversary Complaint. First, nothing in the record supports a finding that Hoover intended to rely upon video evidence in the State Court Action but then knew that none existed prior to the filing of the Motion for Relief. Second, the bankruptcy court's conclusion that there were no police reports that supported the Hargers' "story" is clearly erroneous. Third, the bankruptcy court did not clearly demonstrate that it was able to distinguish what Hoover knew or should have known regarding his clients' credibility as of the filing of the [*39] Motion for Relief and the Adversary Complaint from what was discovered at later hearings. The [**70] bankruptcy court stated: "Mr. Hoover's reliance on his clients' self-serving and uncorroborated statement became unreasonable, particularly in light of his client's documented aggressive actions." Sanctions Order at 8. The bankruptcy court did not state when Hoover's reliance became unreasonable, but the implication is that the bankruptcy court was judging the Hargers' credibility based on their testimony at the hearings held during the pendency of the bankruptcy. The bankruptcy court's conclusion failed to recognize that Hoover filed the Motion for Relief and the Adversary Complaint prior to that testimony. Moreover, the statement regarding Mr. Harger's "documented aggressive actions" implies that the bankruptcy court had already determined what it believed as to the outcome of the underlying case.

[HN9] It is not generally unreasonable for an attorney to file a Motion for Relief to allow a pending lawsuit to proceed. Further, failure to file an adversary proceeding can be malpractice under certain circumstances. Thus, Hoover's actions were not *per se* egregious. Moreover, Hoover cannot be sanctioned based on the bankruptcy court's anticipation of the result of the case. The record in this [**71] case reveals conflicting stories from all the players. It is extremely difficult to tell how a jury would rule. The Panel concludes that the evidence is not so clearly one sided that Hoover is guilty of *Rule 9011* violations for bringing a frivolous Motion for Relief and filing a baseless Adversary Complaint. The bankruptcy court does not cite sufficient support in its Sanctions Order for its finding that Hoover was unreasonable in filing the Motion for Relief and the Adversary Complaint. Accordingly, the Panel holds that the bankruptcy court abused its discretion.

V. CONCLUSION

[HN10] "An abuse of discretion is defined as a definite and firm conviction that the court below committed a clear error of judgment." *Mayor of Baltimore v. W. Va. (In re Eagle-Picher Indus., Inc.), 285 F.3d 522, 529 (6th Cir. 2002)* (internal quotation marks and citation omitted). "The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion." *Id.* (citations omitted). In this case, the Panel has a firm and definite conviction that the bankruptcy court abused its discretion in sanctioning Hoover because it relied on multiple clearly erroneous factual [**72] findings. Moreover, the Panel finds that, having reviewed the record as a whole, no reasonable person could agree with the bankruptcy court's decision. Further, the bankruptcy court also made an error of law when it imposed attorneys' fees as a sanction under *Rule 9011* given that the Order to Show Cause was issued *sua sponte*. Accordingly, the bankruptcy court's decision is **REVERSED** and the Sanctions Order is **VACATED**.

1 of 26 DOCUMENTS

IN RE ROYAL MANOR MANAGEMENT, INC., Debtor. DENNIS ALLAN GROSSMAN, Plaintiff-Appellant, v. DAVID WEHRLE, Trustee, Liquidation Trustee, Successor-in-interest to Official Committee of Unsecured Creditors, Defendant-Appellee.

16a0324n.06

No. 15-3146

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

652 Fed. Appx. 330*; *2016 U.S. App. LEXIS 11018*; *2016 FED App. 0324N (6th Cir.)

June 15, 2016, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Grossman v. Wehrle, 2017 U.S. LEXIS 840 (U.S., Jan. 23, 2017)*

PRIOR HISTORY: [**1] ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT.
In re Royal Manor Mgmt., 525 B.R. 338, 2015 Bankr. LEXIS 358 (B.A.P. 6th Cir., 2015)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Bankruptcy court did not err in imposing sanctions under *28 U.S.C.S. § 1927* and *11 U.S.C.S. § 105(a)* against an attorney who represented claimants pursuing a non-priority unsecured proof of claim in jointly administered Chapter 11 bankruptcy cases; [2]-Bankruptcy court's conclusions regarding the vexatious and unsupported nature of the filings were amply supported and not an abuse of discretion; [3]-Attorney had fair notice of the allegations against him and was not denied due process; [4]-Court did not abuse its discretion in expanding its deadline for filing the motion for sanctions by one day; [5]-Bankruptcy court did not abuse its discretion by denying the attorney's motions to recuse; [6]-Bankruptcy court properly ordered the attorney to appear at a debtor's examination under *Ohio Rev. Code Ann. § 2333.09* and *Fed. R. Civ. P. 69(a)(2)*.

OUTCOME: The court affirmed the orders.

LexisNexis(R) Headnotes

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures
[HN1] A court of appeals' review is of the underlying decisions of a bankruptcy court, rather than the

bankruptcy appellate panel or district court.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review
[HN2] A court of appeals reviews a bankruptcy court's sanctions award for an abuse of discretion, its factual findings for clear error, and its conclusions of law de novo.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior
[HN3] See *28 U.S.C.S. § 1927*.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior
[HN4] *28 U.S.C.S. § 1927* sanctions are warranted when an attorney objectively falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.

Bankruptcy Law > Case Administration > Court Powers
[HN5] *11 U.S.C.S. § 105(a)* provides that a bankruptcy court may issue any order, process, or judgment that is necessary or appropriate, and no provision of this title shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Bankruptcy Law > Case Administration > Court Powers
Civil Procedure > Sanctions > Misconduct & Unethical Behavior
[HN6] Neither authority for imposing sanctions -- *28 U.S.C.S. § 1927* and *11 U.S.C.S. § 105* -- requires a finding that the underlying claim is frivolous.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior
[HN7] Sanctions are generally improper where a successful motion could have avoided any additional legal expenses by defendants.

Civil Procedure > Sanctions
[HN8] A court must give notice and an opportunity to be heard before imposing sanctions against an attorney.

Civil Procedure > Judicial Officers > Judges > Discretion
[HN9] Federal courts have inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior
[HN10] Sanctions under *28 U.S.C.S. § 1927* are limited to attorneys or other persons admitted to conduct cases.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior
Bankruptcy Law > Case Administration > Court Powers
[HN11] There is a split of authority regarding whether a bankruptcy court is a "court of the United States" within the meaning of *28 U.S.C.S. § 1927*; the Ninth and Tenth Circuits answering in the negative and the Second, Third, and Seventh Circuits answering in the positive. No published decision of the Sixth Circuit addresses this question, but in Maloof, the court affirmed a bankruptcy court's sanctions order under *§ 1927*, observing that federal courts, including bankruptcy courts, have inherent and statutory authority to impose sanctions. And more recently, in Followell, the court vacated a bankruptcy court's denial of sanctions under *§ 1927* and remanded for reconsideration of the appropriateness of sanctions without questioning the bankruptcy court's authority under the statute.

Civil Procedure > Sanctions
[HN12] A court's inherent authority to impose sanctions is not displaced by sanctions schemes available through statutes or court rules; rather, such inherent authority provides an independent basis for sanctioning bad-faith conduct in litigation.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Federal Judges
[HN13] A court of appeals reviews a bankruptcy court's denial of a motion for disqualification for abuse of

discretion.

Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Federal Judges
Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Appearance of Partiality
Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals > Grounds > Personal Bias
[HN14] Recusal is required where a judge's impartiality might reasonably be questioned, or where a judge has a personal bias or prejudice concerning a party. *28 U.S.C.S. § 455(a)* and *(b)(1)*. Bias must either be based on an extrajudicial source or because it is undeserved or excessive in degree or the behavior is so extreme as to display clear inability to render fair judgment.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Discovery of Assets
[HN15] A bankruptcy judge's authority to apply *Ohio Rev. Code Ann. § 2333.09* is found in *Fed. R. Civ. P. 69(a)(2)*.

COUNSEL: For Dennis Allan Grossman, Plaintiff - Appellant: Dennis Allan Grossman, Law Office, Great Neck, NY.

For DAVID WEHRLE, Trustee, Liquidation Trustee, Successor-in-interest to Official Committee of Unsecured Creditors, Defendant - Appellee: Louise M. Mazur, Marc Bryan Merklin, Law Office, Akron, OH; Caroline Louisa Marks, Brouse McDowell, Cleveland, OH.

JUDGES: BEFORE: NORRIS, McKEAGUE, and WHITE, Circuit Judges.

OPINION BY: HELENE N. WHITE

OPINION

[*332] **HELENE N. WHITE, Circuit Judge**. Dennis Grossman, an attorney who represented claimants pursuing a non-priority unsecured proof of claim in jointly administered Chapter 11 bankruptcy cases, appeals the Bankruptcy Appellate Panel's affirmance of the bankruptcy-court orders imposing $207,004 in sanctions against him and ordering post-judgment discovery. We AFFIRM the bankruptcy court's sanctions and post-judgment discovery orders.

I.

Debtor Royal Manor Management filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in February 2008. Darlington Nursing & Rehabilitation Center, Ltd. (Darlington), and Dani Family, Ltd. (Dani), filed voluntary petitions for relief under Chapter 11 [**2] soon after. The cases were jointly administered. Darlington operated a nursing home located on real property owned by Dani. Sally and Abraham Schwartz were the majority owners of Royal Manor, Darlington, and Dani.

The U.S. Trustee, David Wehrle, appointed an Official Committee of Unsecured Creditors (Committee), which retained Brouse & McDowell as its counsel. The bankruptcy court set a July 1, 2008 deadline for the filing of general unsecured claims.

On June 26, 2008, Gertrude Gordon, Sally Schwartz's sister, filed a proof of claim pro se, asserting a non-priority unsecured claim against Darlington in the amount of $2,142,200 on behalf of her adult children, Alison and David Gordon, through a power of attorney. Gertrude Gordon submitted a redacted copy of an agreement dated July 27, 2000, on which the Gordon claim was based.

The Committee objected to the claim and the bankruptcy court set an October 7, 2008 hearing date. When no response to the Committee's objection was filed, the bankruptcy court sustained the objection on October 29, without a hearing, and disallowed the Gordon claim. Soon after, Grossman sought pro hac vice admission to represent the Gordons and moved to vacate the [**3] order disallowing the Gordon claim. The bankruptcy court granted him admission.

Various orders of the bankruptcy court and the BAP opinion set forth in detail the protracted proceedings that followed; such detail is not necessary here. *See In re Royal Manor Mgmt., Inc., 2013 Bankr. LEXIS 1273 , 2013 WL 1310881 (Bankr. N.D. Ohio Mar. 28, 2013)*, supplemented by *2013 Bankr. LEXIS 5078, 2013 WL 6229151 (Bankr. N.D. Ohio Dec. 2, 2013)*; affirmed by *In re Royal Manor Mgmt., Inc., 525 B.R. 338 (B.A.P. 6th Cir. 2015)*. The bankruptcy court denied the Gordon claim on the merits following an evidentiary hearing. Grossman's clients unsuccessfully appealed to the district

court, which agreed with the bankruptcy court that the July 27, 2000 agreement on which the Gordon claim was based was a personal obligation of the Schwartzes, and that the Gordons had an equity interest in Darlington and were not [*333] creditors. *Gordon v. Wehrle, Nos. 5:09 CV 2687, 5:10 CV 1431, 2010 U.S. Dist. LEXIS 103186, 2010 WL 3835223 at *8, 13 (N.D. Ohio Sept. 29, 2010).*[1]

1 Grossman also appealed the denial of his motion to file a new claim. The district court affirmed and strongly admonished Grossman for "blatantly mischaracterizing the [bankruptcy court] record." *Gordon v. Wehrle, Nos. 5:09-cv-01506, 2009 U.S. Dist. LEXIS 134180 (N.D. Ohio Oct. 16, 2009).*

In response to Grossman's motion for pro hac vice admission to represent the Gordons in their appeal to the district court, the Trustee asserted that Grossman did not meet [**4] the standards of conduct expected of attorneys practicing in the Northern District of Ohio and should be denied admission; the Trustee also moved for sanctions against Grossman. The district court denied Grossman pro hac vice admission[2] and left the issue of monetary sanctions to the bankruptcy court. *Gordon v. Wehrle, Nos. 5:09 CV 2687, 5:09 CV 1506, 2009 U.S. Dist. LEXIS 132864 (N.D. Ohio Dec. 17, 2009)* (emphasis added). Grossman filed a motion for reconsideration of the order denying pro hac vice admission, which the district court denied. *Gordon v. Wehrle, No. 5:09 CV 2687, 2010 U.S. Dist. LEXIS 2664, 2010 WL 234807 at *2-3 (N.D. Ohio Jan. 14, 2010).*

2 Local counsel David Mucklow represented the Gordons until December 17, 2009, when the district court granted his motion to withdraw.

Trustee's Motion for Sanctions and Order to Show Cause why Sanctions Should not Enter

In the meantime, on October 21, 2009, the Trustee filed a motion for sanctions in the bankruptcy court, under *Fed. R. Bankr. P. 9011*, against Gertrude, Alison, and David Gordon, their local counsel, and Grossman. Grossman objected and moved to recuse the bankruptcy court judge in the sanctions proceeding. The Trustee opposed Grossman's motion for recusal.

On January 29, 2010, the bankruptcy court sua sponte issued a show cause order requiring Grossman to explain [**5] why the bankruptcy court should not adopt the Trustee's statement of facts and issue sanctions against Grossman under *28 U.S.C. § 1927.*

Appeals to the Sixth Circuit

Grossman appealed from the district court's affirmance of the bankruptcy-court order denying the original claim and a separate order denying Grossman's motion to file a new claim. This court consolidated the cases and affirmed. *In re Royal Manor Mgmt., Inc., 480 F. App'x 362, 363-65 (6th Cir. 2012).* We denied the Gordons' petition for rehearing en banc, but stayed the mandate to allow them to seek certiorari. The Supreme Court denied certiorari without comment on September 26, 2012. *Gordon v. Wehrle, 133 S. Ct. 653, 184 L. Ed. 2d 460 (2012).*

Renewed Motion For Sanctions -- December 2012

On December 11, 2012, the Trustee filed a renewed motion for sanctions against Gertrude Gordon and Grossman under *28 U.S.C. § 1927* and, separately, pursuant to the bankruptcy court's inherent power under *11 U.S.C. § 105*, seeking $326,410.18 in sanctions for fees and costs incurred through November 30, 2012, and all costs associated with pursuing the renewed motion for sanctions. The renewed motion for sanctions argued that there was no credible evidence or legal basis to support that the Gordons were general unsecured creditors of Dani, Darlington, or any other debtor entity, yet Gertrude and Grossman continued to [**6] file frivolous pleadings to vexatiously multiply the proceedings. The Trustee asserted that the bankruptcy court could properly award sanctions pursuant to its inherent authority under *§ 105(a) of the Bankruptcy Code* given [*334] Gordon's and Grossman's vexatious litigating of the matter, and under *28 U.S.C. § 1927* because Grossman's actions fell short of the obligations owed by a member of the bar to the court and caused additional expense to the Trustee.

However, before the hearing on the Trustee's renewed motion for sanctions, Gertrude Gordon entered into a compromise settlement with the Trustee. Grossman objected to this settlement, which resulted in a hearing. *See* R. 971 (response to Trustee's Mot. to Compromise); R. 984 (supplemental response to Trustee's Mot. to Approve Proposed Settlement), R. 986 (response to Trustee's Latest Amended Proposed Settlement Order). Following the hearing, the bankruptcy court authorized the compromise settlement in an order stating that Gertrude Gordon shall pay $50,000.00 to the Trustee and

that "[t]he Trustee and the Gordons shall mutually release each other and all professionals retained by either . . . with the exception of Attorney Dennis Grossman, from all claims, liabilities, and causes of action [**7] in relation to the Gordons' claim (and any appeals therefrom) and the sanctions issues in this Court." R. 988 at 3-4. Grossman moved for reconsideration, the Trustee opposed the motion, and the bankruptcy court denied reconsideration by order dated March 18, 2013.

Hearings on Trustee's Motions for Sanctions

Following extensive briefing, a hearing was held on the Trustee's motions for sanctions on January 15, 2013, at which Grossman and Trustee's counsel, Louise Mazur, testified. The Trustee reduced the amount of sanctions sought against Grossman to $159,335.23, representing fees and costs the Trustee incurred at the bankruptcy-court level only, and only after Grossman entered his appearance.

The bankruptcy court opinion and order entered March 28, 2013 noted, "[a]s confirmed by the Sixth Circuit, the characterization of the Gordon Claim as not a claim against the bankruptcy estate was a straight forward matter," and explained its sanctions award:

> 7. For more than four years and continuing to the present Grossman seemed to find any and every occasion to multiply the ongoing proceedings. Attached to this opinion as Appendix A and incorporated herein is a summary of the pleadings that Grossman [**8] had filed in this Court and the arguments contained therein between November 2008 and the date of the hearing of this motion; it does not include the pleadings in the three appeals that he has pursued, variously in the District Court, the Court of Appeals and in the Supreme Court, where certiorari was denied. The summary shows at a glance not only [the] number of documents filed by Grossman, but also the repetitive and vexatious nature of the filings. Since the January 15, 2013 hearing, he has filed an additional seven pleadings in this Court. (Dkt. 971, 976, 984, 986, 991, 994 and 998).
>
> 8. [T]he Liquidation Trustee's initial distribution to holders of allowed Class 5 claims was reduced as a result of the reserve he was required to maintain, should the Gordon Claim be found meritorious on appeal. In fact, Grossman argued that no distribution should be made to Class 5 claims holders until the Gordons' appeals had concluded. [Dkt. 820 and 826.] Those holders of allowed claims waited another 29 months for a second distribution that had been eroded by the activity occasioned by Grossman's multitudinous filings. The Liquidation Trustee made an interim distribution on allowed Class 5 claims, reserving [**9] for the possibility of reversal on appeal.
>
> [*335] 9. In short, Grossman well understood that his effort to convert the Gordon[] claim against their aunt and uncle into a claim against the bankruptcy estate was delaying the distribution of approximately $750,000 to holders of allowed claims, while also causing the erosion of funds available for distribution due to the fees that the Liquidation Trust was incurring when . . . counsel responded to Grossman's ever swelling and often frivolous filings. He compounded his absence of compelling arguments with needless multiplication and repetition of specious arguments . . . .
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> . . . .
>
> 11. On numerous occasions both the Liquidation Trustee's counsel and this Court reminded Grossman that his actions in delaying the final administration of the funds available to holders of allowed claims exposed him to sanctions . . . .
>
> Following are this Court's conclusions of law:
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> . . . .
>
> 5. Litigation tactics that hinder a final resolution of controversies are always unwelcome. In the context of the collective creditor remedy that bankruptcy

provides, tactics that delay and reduce the percentage dividend to holders of allowed claims warrant special scrutiny. When repeated [**10] reminders to a counsel of his obligations under *28 U.S.C. § 1927* prove unavailing, a trustee's pursuit of sanctions is a most appropriate exercise of his business judgment. *See In re Tenn--Fla Partners, 226 F.3d 746, 748-751 (6th Cir. 2000)* (awarding attorney's fees for debtor's fraudulent conduct for providing "misleading and incomplete disclosures," in securing confirmation of its Chapter 11 reorganization plan); *In re Downs, 103 F.3d 472, 478-79 (6th Cir. 1996)* (affirming a bankruptcy judge's sanctions and denying all fees to a bankruptcy attorney who failed to disclose his compensation arrangement with the debtor as required by *11 U.S.C. § 329*); *Trulis v. Barton, 107 F.3d 685 (9th Cir. 1995)* (continuing to pursue action against chapter 11 debtor's principals after entry of bankruptcy court order confirming plan that explicitly barred such claims found to be unreasonable and vexatious multiplications of proceedings as a matter of law).

Not long after Grossman began his representation, he received the unredacted document on which Gertrude Gordon had "relied," after certain artful copying, in filing the Gordon Claim. What that document memorialized was a loan from one set of family members to another with the possibility of an equity position . . . . At no time in this case did Grossman produce a shred of documentation [**11] that the Gordons were creditors of Dani or Darlington or any other debtor in this case. Grossman must . . . be sanctioned because his conduct,

> from an objective standpoint, [fell] short of the obligations owed by a member of the bar to the court and ... cause[d] additional expense to the opposing party . . . . . Accordingly ... when an attorney knows or reasonably should know that . . . his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. Bad faith is not required to support a sanction under *§ 1927*.

Wilson-Simmons v. Lake County Sherriff's Department, 207 F.3d 818, 824 (6th Cir. 2000).

. . . .

[*336] 7. In awarding sanctions under *§ 1927*, some courts have considered the respondent's ability to pay. *Kapco Mfg. Co., Inc. v. C & O Enterprises, 886 F.2d 1485 (7th Cir. 1989)*. Grossman did not raise the issue of ability to pay in his pleadings, and he certainly did not present any competent evidence of inability to pay despite having been afforded a full day hearing.

8. In discharging his fiduciary duties, the Liquidation Trustee needed to defend against Grossman's pleadings. The fees incurred by the Liquidation Trustee at the bankruptcy court level were proportionate to controversies that Grossman chose to frame.

[**12] *In re Royal Manor Mgmt., Inc., Nos. 08-50421, 08-50657, 08-50722, 2013 Bankr. LEXIS 1273, 2013 WL 1310881, at *4-7 (Bankr. N.D. Ohio Mar. 28, 2013).* After noting that the Liquidation Trustee incurred "approximately $150,000.00 in fees prior to the hearing of this motion," the bankruptcy court allowed the Trustee five days to notify the court whether he would seek an additional hearing to address fees incurred as a result of the hearing on the motion and the additional pleadings that Grossman filed after the hearing.

The Trustee sought additional fees relating to the additional filings by Grossman after the January 15 hearing. Grossman objected to the Trustee's request for additional fees, and the Trustee responded to Grossman's objection. The court held a hearing on August 27, 2013, at which Grossman, Trustee Wehrle, and Mazur testified, and entered a final judgment awarding $57,004 in additional sanctions to cover the attorney fees incurred by the Trustee after November 30, 2012; resulting in a total amount of $207,004:

> The Sixth Circuit has held that when an attorney's unreasonable and vexatious conduct begins at the outset of his/her representation and persists through the pendency of the case, the attorney is properly liable under *§ 1927* to pay attorney fees that began to accrue at the commencement [**13] of the case. *Ridder v. City of Springfield, 109 F.3d 288, 299 (6th Cir. 1997)* [(affirming *§ 1927* award of attorney fees from filing of the complaint where counsel's "unreasonable and vexatious behavior began with the filing of the complaint and persisted throughout the pendency of the case.")]; *accord Garner v. Cuyahoga County Juvenile Court, 554 F.3d 624, 645-46 (6th Cir. 2009)* [(same)]. In this case, one appropriate measure of the sanctions to be imposed upon Grossman under *§ 1927* consists of the attorney fees incurred by the Liquidation Trustee from the point in time when Grossman's conduct became frivolous, unreasonable and/or vexatious. As the Court noted in its Opinion, Grossman's conduct became unreasonable very early on in the course of the litigation over the claim asserted by Gertrude Gordon on behalf of David and Alison Gordon. The fees incurred by the Liquidation Trustee in the course of having to respond to the vexatious and unreasonable filings of Grossman leading up to and even after the Court conducted the January 15, 2013 hearing on sanctions are properly included as a part of the appropriate sanctions in this case.
>
> Citing *Gonter v. Hunt Valve Co., 510 F.3d 610, 620 (6th Cir. 2007)*[,] . . . Grossman . . . argues that a fee award is limited to a certain percentage of the lodestar calculation of reasonable and necessary fees. However . . . . [t]he Liquidation Trustee is seeking an [**14] award of an appropriate amount of sanctions for Grossman's conduct; he is not seeking to recover fees for preparing a fee application or request for fees based on the outcome of substantive litigation. Furthermore, the general rule relied upon [*337] by Grossman regarding the limitation of awarding fees for preparing and litigating an attorney fee case is just that--a general rule, which applies only in the absence of unusual circumstances. *Coulter [v. Tenn.], 805 F.2d 146, 151 (6th Cir. 1986)* [(affirming district court's reducing fee requested for preparing and litigating attorney fee matter to 3% of the hours allowed in main case, noting that "[t] he attorney fee case is not the case Congress expressed its intent to encourage; and in order to be included, it must ride piggyback on the civil rights case.")], *see also Gonter v. Hunt Valve Co., 510 F.3d at 620* [(applying 3% rule of *Coulter*)]. Even assuming that the holding in *Coulter* is applicable to this case, the facts of this case warrant departure from the general rule to allow the appropriate amount of sanctions to be meted out . . . [T]he amount of fees incurred by the Liquidation Trust has a direct impact on the sum available for distribution to creditors in this case. It would be inequitable to deny those creditors the [**15] ability to recover the fees incurred by the Liquidation Trustee as the result of the repetitive, frivolous, and vexatious conduct of Grossman.

*In re Royal Mgmt., Inc., Nos. 08-50421, 08-50657, 08-50722, 2013 Bankr. LEXIS 5078, 2013 WL 6229151, at *6-7 (Bankr. N.D. Ohio, Dec. 2, 2013).*

Post-Judgment Discovery and Collection Issues

After the bankruptcy court entered the sanctions

judgment, the Liquidation Trustee served Grossman with interrogatories and document requests. While the sanctions judgment was on appeal to the BAP, the Trustee filed, and the bankruptcy court held a hearing and granted, a motion to compel Grossman to respond to written discovery and appear for a debtor's examination, and a motion to employ two law firms as special counsel (one in New York and one in Florida) to attempt to collect the sanctions judgment against Grossman on a contingent-fee arrangement. Grossman appealed the bankruptcy court orders granting the Trustee's two motions, as well as the denial of his renewed motions to recuse. The BAP affirmed the bankruptcy court orders in a sixty-page opinion.

The Instant Appeal

Grossman appeals the final judgment of the BAP affirming the bankruptcy court orders imposing $207,004 in sanctions and ordering post-judgment discovery against him. [HN1] Our [**16] review is of the underlying decisions of the bankruptcy court, rather than the BAP or district court. [HN2] We review the court's sanctions award for an abuse of discretion, *Jordan v. Cleveland, 464 F.3d 584, 600 (6th Cir. 2006)*, its factual findings for clear error, and its conclusions of law de novo, *In re Rembert, 141 F.3d 277, 280 (6th Cir. 1998)*.

II.

The bankruptcy court imposed sanctions under *28 U.S.C. § 1927* and *11 U.S.C. § 105*. [HN3] *Section 1927* provides: "Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *28 U.S.C. § 1927*. [HN4] "*Section 1927* sanctions are warranted when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642, 646 (6th Cir. 2006)* (quoting *Ruben v. Warren City Schs., 825 F.2d 977, 984 (6th Cir. 1987)*).

[*338] [HN5] *Section 105(a) of the Bankruptcy Code* provides that a bankruptcy court may issue "any order, process, or judgment that is necessary or appropriate," and "[n]o provision of this title . . . shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *11 U.S.C. § 105(a)*.

A.

We [**17] reject Grossman's assertion that the bankruptcy court erred in imposing sanctions for an allegedly frivolous claim. Although the bankruptcy court used the term "frivolous filing," it sanctioned Grossman for multiplying the proceedings unreasonably and vexatiously after finding that Grossman knew that his "multitudinous" and repetitive filings would needlessly delay distribution to legitimate claim holders and erode funds available for distribution. Thus, it is not clear that the bankruptcy court sanctioned Grossman for pursuing a "frivolous claim."[3] In any event, [HN6] neither authority for imposing sanctions--*28 U.S.C. § 1927* and *§ 105 of the Bankruptcy Code*--requires a finding that the underlying claim is frivolous. The bankruptcy court's conclusions regarding the vexatious and unsupported nature of the filings were amply supported and not an abuse of discretion, and such findings are adequate to support an award of sanctions.

> 3 The BAP's discussion regarding the bankruptcy court's award of sanctions characterized as "frivolous" the theories underlying the Gordon claim and various filings, *see id., 525 B.R. at 368*, but the bankruptcy court at no point explicitly stated that the Gordon claim itself was frivolous, as opposed to various filings.

B.

Grossman's [**18] sub-argument that the district court and this court saw no need for sanctions is unfounded. One of the district court's opinions stated that the Gordons' first appeal did not rise to the level of "being truly frivolous," and left the issue of monetary sanctions against Grossman to the bankruptcy court, noting that its denial of pro hac vice admission was a sufficient sanction for Grossman's misconduct before the district court. *See Gordon v. Wehrle, No. 5:09 CV 2687, 2009 U.S. Dist. LEXIS 132864, 2010 WL 234807, at *1 (N.D. Ohio Dec. 17, 2009)*. A subsequent district-court order that Grossman appealed to this court did not involve the issue of sanctions, *Gordon v. Wehrle, Nos. 5:09 CV 2687, 5:10 CV 1431, 2010 U.S. Dist. LEXIS 103186, 2010 WL 3835223 (N.D. Ohio Sep. 29, 2010)*, nor did this court's decision, *Gordon v. Wehrle (In re*

Royal Mgmt., Inc.), 480 F. App'x 362 (2012).

III.

Also meritless is Grossman's argument that the bankruptcy court abused its discretion by declining to limit the sanctions award on the basis that the Trustee failed to move for summary judgment early in the proceedings. *See Ruben v. Warren City Schs. (In re Ruben), 825 F.2d 977, 988 (6th Cir. 1987)* ([HN7] sanctions are "generally improper where a successful motion could have avoided any additional legal expenses by defendants."). The Gordon claim went through several permutations (original claim for money loaned based solely on the July 2000 Agreement between the Gordons and Schwartzes; amended claim for money loaned [**19] based on parole evidence; amended claim for unpaid dividends; new claims of rescission and unjust enrichment based on alleged forgery of Gordon signatures on different agreements; and new claim of priority payments based on same alleged forgeries). [*339] In the face of these shifting theories, the Trustee's piecemeal filing of dispositive motions on the various claims could have delayed the proceedings and distributions to legitimate claim holders. The bankruptcy court did not abuse its discretion in declining to limit the sanctions on this basis.

IV.

[HN8] A court must give notice and an opportunity to be heard before imposing sanctions against an attorney, *Cook v. Am. S.S. Co., 134 F.3d 771 (6th Cir. 1998)*. However, contrary to Grossman's characterization of the record, he had fair notice of the allegations against him and was not denied due process. The Trustee's motion asserted that sanctions should be awarded against Gertrude Gordon and Grossman because they acted vexatiously and in bad faith throughout the proceedings and abused the bankruptcy process. The Trustee's renewed motion sought as sanctions all attorney fees incurred in defending against the Gordon claim, attached billing statements related to the Gordon claim showing fees and expenses, [**20] and sought recovery of the amounts expended by the Committee and Trustee only at the bankruptcy-court level. Grossman responded to the Trustee's motions and participated in hearings. Grossman's claim of deprivation of due process thus fails.

V.

Grossman asserts that the bankruptcy court erred by failing to specify which of his filings it found frivolous or vexatious and, instead, grouping them together "in one amorphous undifferentiated mass." Grossman is correct in the sense that two appendices to the bankruptcy court's second opinion awarding sanctions summarize Grossman's many filings and arguments therein, R. 999 at 13-50 (op. 3/28/13). But the bankruptcy court's reasoning in sanctioning Grossman is crystal clear--that throughout the proceedings his actions rose "to the level of vexatious conduct designed to delay, multiply and increase the cost of the proceedings. It is not one particular filing or the actions . . . in one hearing . . . it is the pervasive and constant behavior . . . over the course of the four plus years since he was admitted pro hac vice." R. 1057 at 4. Under these circumstances, the bankruptcy court was not required to address each filing and billing separately, [**21] and we find no error or abuse of discretion.

VI.

Also without merit is Grossman's assertion that the bankruptcy court should have denied the Trustee's sanctions motion for being a day late. The bankruptcy court acted within its broad discretion when it expanded its deadline for filing the renewed motion for sanctions by one day. *See Link v. Wabash R.R. Co., 370 U.S. 626, 630-31, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* ([HN9] federal courts have inherent power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); *ACLU of Ky. v. McCreary Cnty., 607 F.3d 439, 451 (6th Cir. 2010)* ("a district court has broad discretion to manage its docket"). The cases Grossman cites in support of his argument that this circuit and the Supreme Court "consistently require denial of one-day-late filings to ensure deadline integrity" (Appellant Br. 66) involve deadlines over which courts have no authority, including notice-of-appeal and statute-of-limitations deadlines. *See Carlisle v. United States, 517 U.S. 416, 430, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996)* (district court lacked authority to consider motion for judgment of acquittal filed outside time limit set by *Fed. R. Crim. P. 29(c)*); *United States v.* [*340] *Locke, 471 U.S. 84, 100, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985)* (court could not extend congressionally set deadline to file claims under Federal Land Policy & Management Act, *43 U.S.C. § 1744*); *FHC Equities, LLC v. MBL Life Assur. Corp., 188 F.3d 678, 682 (6th Cir. 1999)* (extension of time permitted under *Fed. R. Civ. P. 6(e)* [now *6(d)*] does not apply to *Rule 59(e)* motions to

alter or amend judgment and district court [**22] had no authority to extend deadline); *Cook v. Comm'r, 480 F.3d 432, 437 (6th Cir. 2007)* (Social Security civil action filed one day after 60-day limitations period should be dismissed); *Merriweather v. Memphis, 107 F.3d 396, 400 (6th Cir. 1997)* (claim barred where plaintiff missed Tennessee's one-year limitations period for tort actions brought under federal civil rights statutes by one day); *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000)* (affirming district court's dismissal of Title VII employment discrimination complaint filed late as time barred); *Johnson v. U.S. Postal Serv., 863 F.2d 48, 1988 U.S. App. LEXIS 15325, 1988 WL 122962, at *3, (6th Cir. 1988)* (because appeal to EEOC was untimely, plaintiff failed to exhaust administrative remedies and district court thus lacked jurisdiction over her claim); *Watson v. Brady, 9 F.3d 1548* [published in full-text format at *1993 U.S. App. LEXIS 29723*], 1993 WL 469078, at *1 (6th Cir. 1993) (affirming dismissal of civil rights complaint against federal government for failure to serve proper parties under *Fed. R. Civ. P. 4* within statutorily mandated time). The instant deadline, in contrast, was court imposed and could properly be modified by the court.

Grossman relatedly argues that sanctions proceedings under *28 U.S.C. § 1927*, although possessing civil features, are also penal and quasi-criminal, and that the ex-post facto clause prohibits changes in criminal filing deadlines to resurrect an untimely prosecution after the deadline has expired. Appellant Br. 70. But here, the Trustee's renewed motion for sanctions reactivated the already-pending issue of [**23] sanctions; it did not "resurrect" an untimely motion for sanctions.

VII.

Grossman next asserts that the bankruptcy court erred by failing to address the Trustee's purportedly excessive and frivolous filings as a defense or offset to sanctions against him, and by failing to address the bankruptcy court's own delays caused by its inconsistent orders directing the parties to switch back and forth between different issues. Grossman advanced the first two arguments in support of his argument that the bankruptcy court should have limited sanctions because the Trustee did not move for summary judgment early in the proceedings, i.e., failed to mitigate. We have addressed and rejected that argument in section III. Other than in that context, Grossman asserted in two short alternative arguments that the Trustee's "excessive filings" and the bankruptcy court's "constantly changing directions" should negate any proposed sanctions against him. R. 957 at 41-42. The record supports neither argument. At one point, it appeared that disposing of the case on an alternative ground would quickly resolve the claim; when that proved not to be the case, the bankruptcy court returned to the controlling issues. [**24] This hardly undermines the bankruptcy court's determination that the Trustee incurred the fees to defend against Grossman's excessive filings.

Grossman's third and final "defense"--that the bankruptcy court erred by denying credit in the amount Gertrude Gordon paid the Trustee to settle the sanctions motion against her is also meritless. The bankruptcy court did not abuse its [*341] discretion in concluding that Gertrude Gordon's separate actions "supported an independent sanction against her pursuant to *§ 105* [of the Bankruptcy Code], i.e., the filing of the Gordon Claim with an altered document in support thereof." As the bankruptcy court explained, because Grossman began his representation of Gertrude Gordon more than three months after she filed the proof of claim with an altered document, there was a separate basis for the Trustee's ultimately consensual recovery from Gertrude Gordon, and Grossman is not entitled to a reduction. Further, [HN10] sanctions under *§ 1927* are limited to "attorneys or other persons admitted to conduct cases." The bankruptcy court did not abuse its discretion in concluding that the liquidation estate was harmed in an amount that is greater than just the fees that the Liquidation [**25] Trustee incurred at the bankruptcy court level, including by the long delay in distributing the available funds, or in its determination that sanctions serve several purposes.[4]

> 4 The bankruptcy court determined that because Gertrude Gordon "was settling a claim filed against her asking that she be held jointly and severally liable for an amount in excess of $300,000 . . . there is no basis for reducing the sanction against Grossman by that settlement amount." The court further determined that the purpose of the sanction against Grossman "is at least two-fold: (1) underscoring the need for him to abide the minimum standards required under *28 U.S.C. § 1927* in the future and (2) making up some of the value lost to the holders of legitimate claims in this case." R. 999 at 8.

VIII.

Next, Grossman contends that neither *28 U.S.C. § 1927* nor the bankruptcy court's inherent authority under *§ 105 of the Bankruptcy Code* authorizes the imposition of the sanctions awarded by the bankruptcy court. [HN11] There is a split of authority regarding whether a bankruptcy court is a "court of the United States" within the meaning of *28 U.S.C. § 1927*; the Ninth and Tenth Circuits answering in the negative and the Second, Third, and Seventh Circuits answering in the positive. *Compare Miller v. Cardinale (In re Deville), 280 B.R. 483, 494 (B.A.P. 9th Cir. 2002), judgment* [**26] *aff'd, 361 F.3d 539 (9th Cir. 2004)* ("the Ninth Circuit does not regard a bankruptcy court as a 'court of the United States'"); *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1086 (10th Cir. 1994)* ("bankruptcy courts are not within the contemplation of *§ 1927*"), *with In re Schaefer Salt Recovery, Inc., 542 F.3d 90, 105 (3d Cir. 2008)* (bankruptcy court has authority to impose sanctions under *§ 1927* because it is a unit of the district court, which is a "court of the United States"), *Adair v. Sherman, 230 F.3d 890, 895 n.8 (7th Cir. 2000)* (bankruptcy courts have authority to sanction attorneys under *§ 1927*); *Baker v. Latham Sparrowbush Assoc. (In re Matter of Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 230 (2d Cir. 1991)* (bankruptcy courts have authority to impose *§ 1927* sanctions). No published decision of this court addresses this question, but in *Maloof v. Level Propane Gasses, Inc., 316 F. App'x 373, 376 (6th Cir. 2008)* (per curiam), this court affirmed a bankruptcy court's sanctions order under *§ 1927*, observing that federal courts, including bankruptcy courts, have inherent and statutory authority to impose sanctions (citing *Rathbun v. Warren City Schs. (In re Ruben), 825 F.2d 977, 982-84 (6th Cir. 1987))*. And more recently, in *Followell v. Mills, 317 F. App'x 501, 513-14 (6th Cir. 2013)*, this court vacated the bankruptcy court's denial of sanctions under *§ 1927* and remanded for reconsideration of the appropriateness of sanctions without questioning the bankruptcy court's authority under the statute. [*342] We find *Followel* and *Maloof* persuasive and follow them here.

As for the bankruptcy court's inherent authority under *§ 105 of the Bankruptcy Code*, Grossman asserts that such authority "is available only if the sanctions rules are not up to the task, typically where disputed actions did [**27] not involve Court filings." Appellant Br. 86. Grossman is incorrect. [HN12] A court's inherent authority to impose sanctions is not displaced by sanctions schemes available through statutes or court rules, *Chambers v. NASCO, Inc., 501 U.S. at 32, 46, 50 (1991)*; rather, such inherent authority provides an independent basis for sanctioning bad-faith conduct in litigation, *First Bank of Marietta v. Hartford Underwriters Ins. Co., 307 F.3d 501, 518 n.14 (6th Cir. 2002)*.

IX.

Grossman also challenges the bankruptcy court's refusal to recuse itself. [HN13] We review the bankruptcy court's denials of Grossman's motions for disqualification for abuse of discretion. *Schilling v. Heavrin (In re Triple S. Rests., Inc.), 422 F.3d 405, 417 (6th Cir. 2005)*. As pertinent here, [HN14] recusal is required where a judge's impartiality might reasonably be questioned, or where a judge has a personal bias or prejudice concerning a party. *28 U.S.C. § 455(a) & (b)(1)*.

As the BAP noted, "bias must either be based on an extrajudicial source, which is not alleged, or because it is undeserved or excessive in degree or the behavior is 'so extreme as to display clear inability to render fair judgment.'" *In re Royal Manor Mgmt., Inc., 525 B.R. at 380* (quoting *Liteky v. United States, 510 U.S. 540, 550-51, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994))*. We agree with and adopt the portion of the BAP opinion addressing recusal, and its determination that the bankruptcy court did not abuse its discretion by denying Grossman's motions to recuse, *In re Royal Manor, 525 B.R. at 380-84*.

X.

Finally, regarding the order for post-judgment discovery, we agree with the BAP that [**28] "the bankruptcy court was within its discretion to determine that special counsel was needed to collect a judgment that the Trustee believed Grossman was not going to willingly pay." *Id., 525 B.R. at 387*. We further agree with the BAP's affirmance of the bankruptcy court's order compelling Grossman to appear at a debtor's examination, i.e., that "this type of examination is an entitlement of a judgment creditor pursuant to *Ohio Revised Code § 2333.09* and [HN15] the Bankruptcy Judge's authority to apply this Ohio statute is found in *Federal Rule of Civil Procedure 69(a)(2)*." *Id.* For these reasons, we AFFIRM the bankruptcy court orders

imposing sanctions and ordering post-judgment discovery against Grossman.

2 of 7 DOCUMENTS

In re: EARL BENARD BLASINGAME; MARGARET GOOCH BLASINGAME, Debtors. CHURCH JOINT VENTURE, L.P.; FARMERS & MERCHANTS BANK, Plaintiffs-Appellees, EDWARD L. MONTEDONICO, JR., Plaintiff, v. EARL BENARD BLASINGAME, et al., Defendants, MARTIN A. GRUSIN, Appellant.

No. 14-8046

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE SIXTH CIRCUIT

559 B.R. 676*; *2016 Bankr. LEXIS 3926*; *Bankr. L. Rep. (CCH) P83,031*; *76 Collier Bankr. Cas. 2d (MB) 1110*; *63 Bankr. Ct. Dec. 87

March 1, 2016, Argued
November 7, 2016, Decided
November 7, 2016, Filed

PRIOR HISTORY: [**1] Appeal from the United States Bankruptcy Court for the Western District of Tennessee at Memphis. No. 08-28289--Jennie D. Latta, Judge.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The bankruptcy court erred when it imposed sanctions under *Fed. R. Bankr. P. 9011* on an attorney who provided advice to Chapter 7 debtors during their bankruptcy case, but who was not the debtors' primary bankruptcy attorney, because a creditor who moved for sanctions did not comply with the safe harbor provision of *Rule 9011*, which limited court's ability under *Rule 9011* to impose sanctions, and the attorney had not signed or filed the debtors' petition; [2]-The bankruptcy court also erred when it imposed sanctions on the attorney pursuant to *28 U.S.C.S. § 1927* because the record did not support its conclusion that the attorney provided "shadow representation" to the debtors during their case and vexatiously and unreasonably multiplied the proceedings.

OUTCOME: The bankruptcy appellate panel vacated the bankruptcy court's July 16, 2014, order granting the creditor's motion for sanctions and the bankruptcy court's August 5, 2015, amended order setting amounts of additional sanctions to the extent they imposed sanctions against the debtors' attorney.

LexisNexis(R) Headnotes

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Sanctions > Misconduct & Unethical Behavior

Legal Ethics > Professional Conduct > Frivolous Claims

[HN1] The United States Bankruptcy Appellate Panel for the Sixth Circuit reviews a bankruptcy court's imposition of sanctions under the abuse of discretion standard. An order granting sanctions under *28 U.S.C.S. § 1927* is reviewed for an abuse of discretion. An "abuse of discretion" is defined as a definite and firm conviction that the court below committed a clear error of judgment. The abuse of discretion must be more than harmless error to provide cause for reversal. Sanctions based upon an erroneous view of the law or an erroneous assessment of the evidence are necessarily an abuse of discretion.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN2] *28 U.S.C.S. § 1927* authorizes a court to assess fees against an attorney for unreasonable and vexatious multiplication of litigation despite the absence of any conscious impropriety. However, simple inadvertence or negligence that frustrates a trial judge will not support a sanction under *§ 1927*.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN3] *Fed. R. Bankr. P. 9011(b)* provides that by presenting to a court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
Legal Ethics > Professional Conduct > Frivolous Claims

[HN4] *Fed. R. Bankr. P. 9011* requires at least one individual attorney or pro se litigant to sign every petition, pleading, motion, and other paper served or filed in a case under the Bankruptcy Code. *Fed. R. Bankr. P. 9011(a)*. Through his or her signature, the attorney effectively certifies that the document is well grounded in fact, legally tenable, and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a court finds that a document is frivolous or interposed for an improper purpose, *Rule 9011* requires the court to impose an appropriate sanction. *Fed. R. Bankr. P. 9011(a)*.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility

Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN5] In order to seek sanctions pursuant to *Fed. R. Bankr. P. 9011*, a two-step process must be followed. The motion must first be served on the opposing party. Then, after the twenty-one day "safe harbor" has passed, the party seeking sanctions may file the motion with the court. Unlike *Fed. R. Civ. P. 11*, though, the safe harbor in *Rule 9011* has an exception. *Rule 9011(c)(1)(A)* states that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of *Rule 9011(b)*. Numerous courts have observed that a party seeking sanctions based on the filing of a petition need not comply with the safe harbor requirement.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN6] *Fed. R. Bankr. P. 9011(b)* broadly defines the manner by which a party may present a petition, pleading, written motion, or other paper to a court, to include signing, filing, submitting, or later advocating. However, *Rule 9011*'s safe harbor provision contains one very limited exception: it does not apply to the filing of a petition in violation of *Rule 9011(b)*. *Fed. R. Bankr. P. 9011(c)(1)(A)*. The reason is simple: the filing of a petition has immediate serious consequences which may not be avoided by the subsequent withdrawal of the petition. As the United States Court of Appeals for the Third Circuit recognized in In re Schaefer Salt Recovery, Inc., the exception evidences a concern that a party subject to an automatic stay would be forced to choose between seeking sanctions, which would require it to wait up to twenty-one days before seeking dismissal of the petition, and the immediate filing of a motion to dismiss a bad faith petition. Without the exception, a party would be forced to abandon its request for sanctions in order to seek dismissal of a petition as quickly as possible.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
Governments > Legislation > Interpretation
[HN7] Courts have frequently recognized that when a court can discern an unambiguous and plain meaning from the language of a rule, the court's task is at an end. The plain language of *Fed. R. Bankr. P. 9011(c)(1)(A)* limits the exception to the safe harbor provision to the act of filing a petition. Accordingly, an attorney cannot be sanctioned for later advocating a position taken in a petition unless a party seeking sanctions complies with the safe harbor provision.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN8] *Fed. R. Bankr. P. 9011*'s exception to the safe harbor provision only applies to the act of filing the petition.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims
[HN9] *28 U.S.C.S. § 1927* provides that any attorney or other person admitted to conduct

cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN10] The purpose of sanctions under *28 U.S.C.S. § 1927* is to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy. Sanctions are warranted under *§ 1927* if counsel falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to an opposing party. Sanctions require more than negligence or incompetence but something less than subjective bad faith. Discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, even if bad faith was not present, whether they multiplied the proceedings pursuant to *§ 1927*.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN11] In In re Royal Manor Mgmt., Inc., the United States Bankruptcy Appellate Panel for the Sixth Circuit ("BAP") explained the Sixth Circuit's standards for imposing sanctions under *28 U.S.C.S. § 1927*. The BAP stated that litigation conduct is reviewed for unreasonable and vexatious multiplication of litigation despite the absence of any conscious impropriety. Absent a showing of bad faith, sanctions may be imposed at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims. The mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN12] An attorney is liable under *28 U.S.C.S. § 1927* solely for excessive costs resulting from violative conduct, and simple inadvertence or negligence that frustrates a trial judge will not support a sanction under *§ 1927*. There must be some conduct on the part of an attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. A sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants. In summary, *§ 1927* is implicated when a party has (1) multiplied proceedings, (2) unreasonably and vexatiously, (3) in bad faith or when an attorney knows or reasonably should know that a claim or litigation tactics pursued are frivolous or will impede the litigation of proper claims, and (4) which has resulted in additional expense to the other parties.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants

Legal Ethics > Professional Conduct > Frivolous Claims

[HN13] The United States Court of Appeals for the Sixth Circuit provided a helpful perspective on the distinction between "zealous representation" and "vexatious conduct" in Jones v. Continental Corp., when it stated that an attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to carte blanche to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise unreasonable and vexatious. Accordingly, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. Jones makes clear that the standard for *28 U.S.C.S. § 1927* determinations in the Sixth Circuit is an objective one, entirely different from determinations under the bad faith rule.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN14] The United States Court of Appeals for the Sixth Circuit's decision in Rathburn v. Warren City Schools (In re Ruben) noted a relaxed standard applicable to *28 U.S.C.S. § 1927* determinations subsequent to the Sixth Circuit's decision in United States v. Ross. As stated in Jones v. Continental Corp., the Sixth Circuit has authorized *§ 1927* sanctions despite the absence of any conscious impropriety. Still, the Sixth Circuit also noted that it does not read these subsequent cases as overruling the thrust of Ross, to wit, that simple inadvertence or negligence that frustrates a trial judge will not support a sanction under *§ 1927*. The conduct must be such that trial judges applying the collective wisdom of their experience on the bench could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to an opposing party.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN15] To award fees and costs pursuant to *28 U.S.C.S. § 1927*, a court must find that an attorney not only multiplied the proceeding, but that the attorney did so in objective bad faith or knew or should have known the actions were frivolous. Mere incompetence or negligence does not justify *§ 1927* sanctions.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims

[HN16] The purpose of sanctions under *28 U.S.C.S. § 1927* is to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy. A finding that an attorney was simply a zealous advocate cannot be squared with the objective standard for *§ 1927* sanctions which is intended to punish aggressive tactics that far exceed zealous advocacy.

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies
Bankruptcy Law > Practice & Proceedings > Professional Responsibility

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims
[HN17] A response to a motion for summary judgment and a motion to alter or amend a judgment are commonplace and anticipated in litigation. To grant *28 U.S.C.S. § 1927* sanctions for the filing of such documents, a court must find that the documents were objectively filed in bad faith, that is, that an attorney knew or should have known they were frivolous or would unnecessarily multiply the litigation.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims
[HN18] *28 U.S.C.S. § 1927* sanctions are generally improper when a successful motion or response to a filing could have avoided any additional legal expenses to an opposing party.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Sanctions > Baseless Filings > Vexatious Litigants
Legal Ethics > Professional Conduct > Frivolous Claims
[HN19] Sanctions are warranted under *28 U.S.C.S. § 1927* if counsel falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.

COUNSEL: ARGUED: Edward M. Bearman, Memphis, Tennessee, for Appellant.

Bruce W. Akerly, CANTEY HANGER LLP, Dallas, Texas, for Appellees.

ON BRIEF: Edward M. Bearman, Gary E. Veazey, Memphis, Tennessee, for Appellant.

Bruce W. Akerly, CANTEY HANGER LLP, Dallas, Texas, for Appellees.

JUDGES: Before: HARRISON, HUMPREY, and PRESTON, Bankruptcy Appellate Judges.

OPINION BY: C. KATHRYN PRESTON

OPINION

[*678] **OPINION**

C. KATHRYN PRESTON, Chief Bankruptcy Appellate Panel Judge. Attorney Martin A. Grusin ("Grusin") appeals the bankruptcy court's orders imposing sanctions against him. Sanctions were separately awarded against attorney Tommy L. Fullen ("Fullen"), but he did not appeal. The bankruptcy court imposed monetary sanctions pursuant to *Federal Rule of Bankruptcy Procedure 9011* and *28 U.S.C. § 1927* in the form of attorney fees [*679] and expenses that Chapter 7 Trustee Edward L. Montedonico ("Trustee") and creditors Church Joint Venture ("CJV") and Farmers and Merchants Bank, Adamsville, TN ("FMB") (together, "Church Joint Venture"),[1] incurred relating to Debtors' bankruptcy case and litigation arising in that case.

1 Throughout the bankruptcy case and various adversary proceedings, [**2] CJV and FMB were represented by the same attorney, Bruce Akerly ("Akerly"). Akerly represents both parties in this current appeal. The bankruptcy court referred to CJV and FMB collectively as "Church Joint Venture," as will this opinion. This opinion will refer to these creditors by their initials when referring to one of them singularly.

ISSUES ON APPEAL

In analyzing Grusin's assertions that the bankruptcy court abused its discretion in awarding sanctions against him pursuant to *Federal Rule of Bankruptcy Procedure 9011* and *28 U.S.C. § 1927*, the Panel will address the following issues:

> 1. Did the bankruptcy court err in sanctioning Grusin pursuant to *Federal Rule of Bankruptcy Procedure 9011* when the movant had not complied with the safe harbor requirement?
>
> 2. Did the bankruptcy court err in awarding sanctions pursuant to *28 U.S.C. § 1927* based upon an erroneous determination that Grusin's conduct vexatiously multiplied the proceedings?

JURISDICTION AND STANDARD OF REVIEW

On January 21, 2015, the Panel entered an order finding that it has jurisdiction over this appeal because the Amended Order Setting Amount of Additional Sanctions was a final order and Appellant's Amended/Corrected Notice of Appeal was filed within the time provided by *Federal Rule of Civil Procedure 58*.

[HN1] The Panel reviews the bankruptcy court's imposition of sanctions [**3] under the abuse of discretion standard. *Corzin v. Fordu (In re Fordu), 201 F.3d 693, 711 (6th Cir. 1999)*.

> [A]n order granting sanctions under *28 U.S.C. § 1927* is . . . reviewed for an abuse of discretion. *Dixon v. Clem, 492 F.3d 665, 671 (6th Cir. 2007)*. "An abuse of discretion is defined as a definite and firm conviction that the [court below] committed a clear error of judgment." *Mayor and City Council of Baltimore, Md. v. W. Va. (In re Eagle-Picher Indus., Inc.), 285 F.3d 522, 529 (6th Cir. 2002)* (internal quotation marks and citation omitted). The abuse of discretion must be more than harmless error to provide cause for reversal. *Tompkin v. Philip Morris USA, Inc., 362 F.3d 882, 897 (6th Cir. 2004)* (citations omitted). Sanctions based upon an erroneous view of the law or an erroneous assessment of the evidence are necessarily an abuse of discretion. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)*; *Salkil v. Mount Sterling Tp. Police Dept., 458 F.3d 520, 527-28 (6th Cir.2006)*. *See also Parrott v. Corley, 266 F. Appx 412, 415 n. 1 (6th Cir. 2008)* (arguments concerning an error in statutory interpretation or due process related to sanctions are reviewed de novo).

In re Royal Manor Mgmt., Inc., 525 B.R. 338, 346 (B.A.P. 6th Cir. 2015), *aff'd sub nom. Grossman v. Wehrle (In re Royal Manor Mgmt., Inc.), 652 Fed. Appx. 330, 2016 WL 3268743 (6th Cir. 2016)*.

FACTS

In July and August of 2008, Earl Benard Blasingame ("Benard Blasingame") and Margaret Gooch Blasingame ("Margaret Blasingame") (together, "Debtors") met [*680] with Grusin and attorney Hank Shackelford ("Shackelford"), to discuss their financial situation, including their personal ex-

posure in pending garnishment and debt collection proceedings.[2] On August 8, 2008, Margaret Blasingame executed an engagement letter with Grusin. Margaret Blasingame assigned to Grusin her interest in $20,000 held by the McNairy [**4] Circuit Court [Tennessee] as payment for representation in connection with *Church Joint Venture v. Aqua Air Aviation*, and related issues arising from that case. Grusin, who was not a bankruptcy attorney, referred Debtors to Fullen, a local bankruptcy attorney. Debtors hired Fullen to represent them in a bankruptcy case. On August 15, 2008, Fullen signed a voluntary chapter 7 petition as the attorney for Debtors and filed it on their behalf.

> 2 Grusin and Shackleford both had prior business relationships with Debtors but do not appear to have worked with each other on Debtors' behalf prior to this meeting. Based on Debtors' testimony it appears that this meeting was a general meeting, at which Benard Blasingame and the two attorneys discussed possible strategies, including having Debtors file personal bankruptcy. Neither Shackleford nor Grusin were bankruptcy experts, each recommended a bankruptcy attorney, and ultimately Debtors chose the attorney recommended by Grusin. Both Shackelford and Grusin continued to provide advice to Debtors throughout the case. However, Shackelford never filed a formal appearance in either the bankruptcy case or adversary proceeding. The bankruptcy court did [**5] not sanction Shackelford.

The petition, schedules, and statement of financial affairs ("SoFA"), as initially filed, did not disclose several trusts for which Debtors were trustees[3] (collectively, the "Trusts"), certain household goods, and the pre-petition assignment to Grusin. Debtors amended these documents multiple times throughout the proceedings. Following lengthy discovery, including 2004 examinations, Trustee and Church Joint Venture filed an adversary proceeding (Adv. No. 09- 00482) against Debtors, the Trusts, the Corporations[4] and Debtors' children[5] on September 29, 2009. Pursuant to the complaint, Trustee and Church Joint Venture sought a declaration that the Trusts are alter egos or reverse alter egos of Debtors, sought avoidance of certain transfers, sought denial of Debtors' discharges under several Bankruptcy Code sections, and objected to Debtors' claim to certain exemptions. On April 26, 2010, Church Joint Venture and Trustee filed Plaintiffs' Motion for Partial Summary Judgment ("PSJ Motion") seeking judgment on those counts of the complaint objecting to Debtors' discharges.

> 3 The Blasingame Family Business Investment Trust, The Blasingame Family Residence Generation Skipping [**6] Trust, and The Blasingame Family Development Generation Skipping Trust.
>
> 4 Debtors' original SoFA listed business interests in six corporations. The adversary proceeding named the following as defendants: Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms Inc., GF Corporation; and Aqua Dynamics Group Corporation (collectively, the "Corporations").
>
> 5 Katherine Blasingame Church and Earl Benard "Ben" Blasingame, Jr., Debtors' adult children, were named as "necessary parties" to the adversary proceeding.

On June 30, 2010, attorney Joseph Townsend ("Townsend")[6] filed Defendants' Response To Plaintiffs' Motion For Partial Summary Judgment On Discharge Claims [*681] ("Response to PSJ Motion"). Grusin co-signed this filing as the attorney for the Trusts, the Corporations, Katherine Blasingame Church and Earl Benard Blasingame, Jr. (collectively with Debtors, "Defendants"). In the opening paragraph of the Response to PSJ Motion, Debtors asserted an "advice of counsel" defense

and posited that the petition, schedules, SoFA, and amendments were correctly completed, arguing that the Trusts were not assets of Debtors. In their Response to PSJ Motion, Defendants also incorporated by reference [**7] an appendix of exhibits, including a Joint Affidavit[7] filed in support of a previous motion to dismiss the complaint as to the children, the Trusts, and the Corporations. Grusin co-signed the Joint Affidavit as attorney for the Corporations, the Trusts, Katherine Blasingame Church, and Earl Benard Blasingame, Jr. Defendants also requested the dismissal of the adversary proceeding against the non-debtor defendants in their Response to PSJ Motion. On February 22, 2011, the bankruptcy court entered an Order Granting in Part, Denying in Part Plaintiff's Motion for Partial Summary Judgment. The bankruptcy court denied Debtors' discharges pursuant to *11 U.S.C. § 727(a)(4)* based on the errors and omissions in the petition and schedules. The bankruptcy court also denied Benard Blasingame's discharge pursuant to *11 U.S.C. § 727(a)(5)* for failure to explain loss of assets. The bankruptcy court rejected Debtors' advice of counsel defense.

> 6 The record is not clear regarding the exact legal nature of the relationship between Fullen and Townsend. In the signature block for most of the adversary proceeding documents, Townsend signed the documents with his name, under which appeared "The Law Offices of Tommy L. Fullen" and Fullen's office address. [**8] The legal relationship between Fullen and Townsend is not significant to this appeal.
>
> 7 The full title of the document is Joint Affidavit in Support of Amended Motion to Dismiss Aqua Dynamics Group Corporation, Flozone Services, Inc., Fiberzone Technologies, Inc., G.F. Corporation, Blasingame Farms, Inc., the Blasingame Family Business Investment Trust, the Blasingame Family Development Generation Skipping Trust, the Blasingame Residence Trust, the Blasingame Trust, Katherine Blasingame Church and Earl Benard Blasingame, Jr. as Defendants in Adversary Action Number 09-000482 ("Joint Affidavit"). (Adv. No. 09-00482 ECF No. 73).

On March 8, 2011, Debtors filed Debtors' Motion to Alter or Amend Judgment. This filing was signed by Townsend, on behalf of the Law Offices of Tommy L. Fullen, and included Fullen's name in the signature block. Debtors attempted to bolster their advice of counsel defense by filing two similar affidavits executed by Grusin and Fullen. In his affidavit, Fullen admitted his mistake in failing to disclose the Trusts. Grusin's affidavit admitted that he offered advice to Fullen and Debtors that the Trusts were not assets of the bankruptcy estate and that "there was no [**9] need for the Debtors to add those Trusts and/or Corporations nor the benefits they received from those Trusts and/or Corporations, on their Petition for Bankruptcy." (Grusin Aff. at 2-3, Adv. No. 09-00482 ECF No. 126-1). The bankruptcy court denied the motion.

Following a motion by Church Joint Venture, the bankruptcy court entered an order disqualifying Grusin, Fullen, and Townsend as counsel for Debtors and other defendants. On April 8, 2013, the bankruptcy court granted a motion to set aside the judgment pursuant to *Federal Rule of Civil Procedure 60(b)* (the "*Rule 60(b)* Motion"), brought by Debtors' new counsel, David Cocke ("Cocke").[8] Grusin gave deposition and direct testimony in connection [*682] with the trial on the complaint seeking denial of Debtors' discharge, during which he attempted to explain the advice he had given Debtors: Grusin asserted that he had spoken "inartfully" in his affidavit. He explained that the advice he had given Debtors related only to whether the Trusts were protected under Tennessee law and, thus, not a part of the estate. He

further asserted that he did not know whether Debtors had a duty to disclose the Trusts on their bankruptcy petition, schedules, and SoFA and had not intended to give Debtors advice [**10] on that question.

> 8 Cocke filed the *Rule 60(b)* Motion on behalf of Debtors on February 22, 2012. The bankruptcy court conducted evidentiary hearings on this motion on July 25, 2012 and August 8, 2012. The bankruptcy court entered a provisional order granting the motion which stated that Debtors needed to obtain a remand from the Bankruptcy Appellate Panel ("BAP") before a final order could be entered because the appeal of the judgment was still pending. The BAP remanded, and the bankruptcy court entered a Final Order Granting Motion for Relief from Judgment on April 8, 2013.

On January 30, 2012, the bankruptcy court entered an Order Granting Motion for Derivative Standing, allowing Church Joint Venture to bring a malpractice action against Grusin and Fullen on behalf of the bankruptcy estate. Following the filing of the malpractice action, Church Joint Venture filed a Motion for Sanctions Against Tommy L. Fullen and Martin A. Grusin ("Sanctions Motion").

In the Sanctions Motion, Church Joint Venture requested sanctions for abuse of the litigation process, relying on *Federal Rule of Bankruptcy Procedure 9011*, *28 U.S.C. § 1927*, and the inherent power of the court. Church Joint Venture asserted that the bankruptcy case should never have been filed and that [**11] Fullen and Grusin exhibited gross negligence in handling the case from the start, which, parenthetically, would likely cost Debtors their discharge. Church Joint Venture posited that Grusin and Fullen exhibited a total lack of responsibility toward the completion of Debtors' Schedules and SoFA, and total failure to responsibly advise Debtors post-petition with respect to timely filing amendments or supplements and defending Debtors in the adversary proceeding. Further, they accused Fullen and Grusin of changing their stories under oath and being "less than candid with the Court." *Id.* at 26. Church Joint Venture sought payment of attorney fees, costs, and expenses related to attendance at 2004 examinations, filing and prosecution of the objection to discharge, responding to the motions for reconsideration of the order granting partial summary judgment, and the prosecution of the appeal from the order that granted the *Rule 60(b)* Motion. Church Joint Venture also requested that Fullen and Grusin be ordered to disgorge all fees and/or property received from Debtors for legal services related to the case, attend 25 hours of ethics courses, provide 40 hours of *pro bono* work and make a $5000 donation to a local [**12] *pro bono* or legal services organization or program. Additionally, Church Joint Venture requested that Fullen and Grusin be banned from practicing law in the bankruptcy court for the Western District of Tennessee and be referred to the State Bar of Tennessee for additional discipline.

The bankruptcy court entered its Order Granting Sanctions on July 16, 2014. (Order Granting Sanctions, Adv. No. 09-00482 ECF No. 528). At the outset, the bankruptcy court recounted the procedural history of the case, noting that the discharge trial and malpractice case were on-going. The court then undertook an analysis of each of the possible grounds for sanctions as it was applicable to Fullen and Grusin individually.

With regard to *Rule 9011*, the bankruptcy court noted that Church Joint Venture did not comply with the safe harbor provision. Therefore, the bankruptcy court concluded that the only documents it could consider in determining whether *Rule 9011* sanctions were appropriate were the initial petition, the schedules, and SoFA. The bankruptcy court noted that only Fullen had signed the bankruptcy petition.

However, based upon Grusin's activities in the adversary proceeding and the affidavit [*683] Grusin filed with the Motion [**13] to Alter or Amend, the bankruptcy court found that "Grusin was actively involved in the decision to withhold information from the bankruptcy schedules and statement of financial affairs." (Order Granting Sanctions at 13). The bankruptcy court concluded, therefore, that Grusin was acting as the lead counsel from the shadows and found that Grusin could be sanctioned for errors in the petition, schedules, and SOFA. The Order Granting Sanctions imposed sanctions against both Fullen and Grusin pursuant to *Rule 9011*.[9]

> 9 The August 1, 2014 and August 5, 2014 Orders clarified that the sanctions imposed on the basis of *Rule 9011* were the disgorgement of fees paid in anticipation of filing the bankruptcy petition and the requirement to attend continuing legal education in professional responsibility or ethics.

Regarding *§ 1927*, the bankruptcy court correctly articulated the objective standard for determining whether sanctions are appropriate. [HN2] "*Section 1927* authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety." (Order Granting Sanctions at 22 (citing *Ridder v. City of Springfield, 109 F.3d 288, 298 (6th Cir. 1997)* (internal quotation marks omitted))). The bankruptcy court recognized that [**14] "[s]imple inadvertence or negligence that frustrates the trial judge will not support a sanction under *section 1927*." *Id.* The bankruptcy court then found that Fullen "accepted full responsibility for the errors and omissions in the filing of the initial papers" and "did everything in his power, after the petition was filed, to obtain required information and file necessary amendments to the schedules and statements." *Id.* Accordingly, the bankruptcy court held that Fullen had not vexatiously multiplied the proceedings. As to Grusin, however, the bankruptcy court concluded that he was "the mastermind behind the entire endeavor and has yet to accept full responsibility for his actions." *Id.* at 23. The bankruptcy court held that Grusin's "shadow representation of Debtors in the bankruptcy case and in the adversary proceeding vexatiously and unreasonably multiplied the proceedings." *Id.*

The bankruptcy court declined to use its inherent power under *11 U.S.C. § 105* to award sanctions against either Grusin or Fullen, finding that their conduct fell short of "subjective bad faith." (Order Granting Sanctions at 26).

Because Church Joint Venture did not sufficiently describe the services rendered for the attorney fees requested in their [**15] Sanctions Motion, the bankruptcy court ordered them to supplement the record. The parties did so and the bankruptcy court entered an Order Setting Amounts of Additional Sanctions on August 1, 2014. On August 5, 2014, the bankruptcy court entered an Amended Order Setting Amounts of Additional Sanctions.[10] Grusin appealed.

> 10 The two orders were identical except for the amount of expenses awarded to Akerly. The basis for the reduction in expenses in the Amended Order is not clear to the Panel.

DISCUSSION

I. *Federal Rule of Bankruptcy Procedure 9011*

[HN3] *Federal Rule of Bankruptcy Procedure 9011(b)* provides that:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to

the best of the person's knowledge, information, [*684] and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new [**16] law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr. P. 9011(b).

[HN4] *Rule 9011* requires at least one individual attorney or *pro se* litigant to sign "[e]very petition, pleading, motion and other paper served or filed in a case under the [Bankruptcy] Code. . . ." *Fed. R. Bankr. P. 9011(a)*. Through his or her signature, the attorney effectively certifies that the document is "well grounded in fact," legally tenable, and "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case." *Id.*; *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S. Ct. 2447, 2454, 110 L. Ed.2d 359 (1990)*. If a court finds that a document is frivolous or interposed for an improper purpose, *Rule 9011* requires the court to impose an "appropriate sanction," see *Fed. R. Bankr. P. 9011(a)*.

In re Palumbo Family Ltd. P'ship, 182 B.R. 447, 472 (Bankr. E.D. Va. 1995).

[HN5] In order to seek sanctions pursuant to *Rule 9011*, a two-step process must be followed. The motion must first be served on the opposing party. Then, after the twenty-one day "safe harbor" [**17] has passed, the party seeking sanctions may file the motion with the court. *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 389 (4th Cir. 2004)*; *In re Sammon, 253 B.R. 672, 678 (Bankr. D.S.C. 2000)* (citing *Ridder v. City of Springfield, 109 F.3d 288, 294 (6th Cir. 1997))*.

In re Varona, 388 B.R. 705, 711 n. 5 (Bankr. E.D. Va. 2008). "Unlike *Rule 11*, though, the safe harbor in *Rule 9011* has an exception. *Rule 9011(c)(1)(A)* continues: 'this limitation shall not apply if the conduct alleged is the filing of a petition in violation of *subdivision (b)*.' *Id.*" *In re Meltzer, 516 B.R. 504, 522 (Bankr. N.D. Ill. 2014)*. Numerous courts have observed that a party seeking sanctions based on the filing of a petition need not comply with the safe harbor requirement. *See, e.g., In re Schaefer Salt Recovery, Inc., 542 F.3d 90, 100 (3d Cir. 2008)*; *In re Silberkraus, 336 F.3d 864, 868 (9th Cir. 2003)*; *In re Dental Profile, Inc., 446 B.R. 885, 899 (Bankr. N.D. Ill. 2011)*; *In re Brown, 319 B.R. 876, 878 n. 1 (Bankr. N.D. Ill. 2005)*.

The bankruptcy court noted that Church Joint Venture did not comply with the twenty-one day safe harbor provision when they filed the Sanctions Motion. The bankruptcy court recognized that it could only impose sanctions under *Rule 9011* to the extent allowed by the exception contained in *Rule 9011(c)(1)(A)*. (Order Granting Sanctions at 6). The bankruptcy court determined that under the exception the only documents it could consider were the petition, the schedules, and SoFA.

The bankruptcy court acknowledged that it was Fullen who signed and filed the bankruptcy petition, schedules, and SoFA, [*685] but concluded that Grusin was the shadow lead counsel for Debtors. Thus, Grusin was subjected to sanctions under *Rule 9011(b)* for presenting to the court the bankruptcy schedules and statement of financial affairs [**18] and for later advocating them. On appeal, Grusin argues that the bankruptcy court's reading of the exception is overly broad. The Panel agrees.

[HN6] *Rule 9011(b)* broadly defines the manner by which a party may present "a petition, pleading, written motion, or other paper" to the court to include "signing, filing, submitting, or later advocating." However, *Rule 9011*'s safe harbor provision contains one very limited exception: It does not apply to "the *filing* of *a petition* in violation of *subdivision (b)*." *Fed. R. Bankr. P. 9011(c)(1)(A)* (emphasis added). "The reason is simple: 'The filing of a petition has immediate serious consequences . . . which may not be avoided by the subsequent withdrawal of the petition.'" *Meltzer, 516 B.R. at 522* (quoting *Fed. R. Bankr. P. 9011* advisory committee's note (1997)). *See also Dental Profile, Inc., 446 B.R. at 899*; *In re McNichols, 258 B.R. 892, 902 (Bankr. N.D. Ill. 2001)*. As the Third Circuit Court of Appeals has recognized:

> The exception evidences a concern that a party subject to an automatic stay would be forced to choose between seeking sanctions, which would require it to wait up to twenty-one days before seeking dismissal of the petition, and the immediate filing of a motion to dismiss the bad faith petition. Without the exception, a party would be forced to abandon its request for sanctions in order to seek dismissal of the petition as quickly as possible. [**19]

Schaefer Salt Recovery, 542 F.3d at 100.

[HN7] Courts have frequently recognized that "[w]hen we can discern an unambiguous and plain meaning from the language of a rule, our task is at an end." *Mitan v. Duval (In re Mitan), 573 F.3d 237, 244 (6th Cir. 2009)* (quotation marks and citation omitted). The plain language of *Rule 9011(c)(1)(A)* limits the exception to the safe harbor provision to the act of filing a petition. Accordingly, an attorney cannot be sanctioned for "later advocating" a position taken in the petition unless the moving party complies with the safe harbor provision. To the extent that the bankruptcy court sanctioned Grusin on the basis that he later advocated the allegations in the petition, the bankruptcy court made a clear error of law and the sanctions must be vacated.

In addition to finding that Grusin later advocated the positions taken by Fullen in the completion of the bankruptcy schedules and SoFA, the bankruptcy court also found that Grusin was responsible for those positions from the start. The crux of the bankruptcy court's findings in the Order Granting Sanctions was that Grusin unduly influenced Fullen regarding the disclosures, or lack thereof, that Debtors made in the petition, schedules, and SoFA. Thus, the bankruptcy court tried to avoid the ramifications of Church Joint Ventures' [**20] failure to comply with the safe harbor provision by treating Grusin as if he had filed the peti-

tion. The bankruptcy court cited no legal authority, and the Panel has found none, for the concept that influence over the contents of the petition, schedules, and SoFA is the equivalent to having filed them. Grusin neither signed the petition nor did he file it. [HN8] *Rule 9011*'s exception to the safe harbor provision only applies to the act of filing the petition. Because Grusin did not sign or file the petition in this case, he cannot be sanctioned under the plain meaning of *Rule 9011*.[11] *See also Fed. R. Bankr. P. 9011(a)* [*686] ("Every petition . . . shall be signed by at least one attorney of record in the attorney's individual name.").

> 11 The question of whether Grusin, or Fullen for that matter, committed malpractice is not pending before this Panel. Based on the record as a whole, it appears that Grusin was heavily involved in advising Debtors regarding the bankruptcy proceedings. The Panel reaches its conclusion regarding *Rule 9011* based on a plain reading of the safe harbor exception and the undisputed fact that Grusin neither signed the Petition as attorney of record nor filed it. Thus, this opinion makes no findings of fact nor conclusions of law [**21] regarding whether Grusin (or Fullen) committed malpractice or is otherwise responsible for any advice he may have given prior to the filing of the petition or during the bankruptcy proceedings.

II. *28 U.S.C. § 1927*

[HN9] *Section 1927* of Title 28 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. [HN10] "The purpose of sanctions under *§ 1927* is '"to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy."' *In re Royal Manor Mgmt., Inc., 525 B.R. 338, 365-66 (B.A.P. 6th Cir. 2015)* (quoting *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642, 646 (6th Cir. 2006)* (citing *Jones v. Continental Corp., 789 F.2d 1225, 1230-31 (6th Cir. 1986))*, *aff'd sub nom. Grossman v. Wehrle (In re Royal Manor Mgmt., Inc.), 652 Fed. Appx. 330, 2016 WL 3268743 (6th Cir. 2016)*.

> Sanctions are warranted under *§ 1927* if counsel "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389, 396 (6th Cir. 2009)* (citation omitted). Sanctions require "**more than negligence or incompetence**" but "something less than subjective bad faith." *Hall v. Liberty Life Assurance Co. of Boston, 595 F.3d 270, 276 (6th Cir. 2010)* (citation omitted). . . . "**Discrete acts of vexatious conduct should be identified** and a determination made whether they were done in bad faith or, [**22] even if bad faith was not present, whether they multiplied the proceedings pursuant to *28 U.S.C. § 1927*." *Riddle v. Egensperger, 266 F.3d 542, 556 (6th Cir. 2001)* (quoting *In re Ruben, 825 F.2d 977, 990 (6th Cir.1987))*.

Royal Manor, 525 B.R. at 365 (emphasis added). [HN11] In *Royal Manor*, the Bankruptcy Appellate Panel explained the Sixth Circuit's standards:

> Litigation conduct is reviewed "for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety." *Jones, 789 F.2d at 1230*. Absent a showing of bad faith, sanctions may be imposed "at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or hem r litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." [*Ridder v. City of Springfield, 109 F.3d 288, 298 (6th Cir. 1997)]*, *quoting Jones, 789 F.2d at 1230*. "[T]he mere finding that an attorney failed to undertake a reasonable inquiry into the basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied." *Ridder, 109 F.3d at 298*. [HN12] "An attorney is liable under *§ 1927* solely for excessive costs resulting from the violative [*687] conduct." *Id. at 299*. **Simple inadvertence or negligence that frustrates the trial judge will not support a sanction under *§ 1927*.** *In re Ruben, 825 F.2d at 984*. "There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the [**23] obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Id.* "A sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants." *Id. at 988*.

Royal Manor, 525 B.R. at 365 (quoting *Riddle v. Egensperger, 266 F.3d at 553*) (emphasis added). In summary, *§ 1927* is implicated when a party has (1) multiplied proceedings, (2) unreasonably and vexatiously, (3) in bad faith or when an attorney knows or reasonably should know that the claim or litigation tactics pursued is frivolous or will impede the litigation of proper claims, and (4) which has resulted in additional expense to the other parties. The bankruptcy court held that Grusin vexatiously multiplied the litigation in the adversary proceeding, but that Fullen did not. (Order Granting Sanctions at 28-29).

Grusin asserts that the bankruptcy court erred in concluding that he vexatiously multiplied the litigation. He insists that his actions were not intended to cause delay or create litigation expense for the opposing parties. He additionally asserts that the bankruptcy court sanctioned him due to personal bias against him, as indicated by the fact that neither Townsend nor Fullen were sanctioned [**24] for their roles in the adversary proceeding (*e.g.*, Townsend had signed the same documents as had Grusin, on behalf of Fullen's office). The Panel agrees that Grusin's actions were not unreasonable and vexatious. The Panel does not reach the question of whether the bankruptcy court had personal bias or perturbations against him.[12]

> 12 Grusin also argues that the bankruptcy court sanctioned him due to "pre-existing ill will or bias against Grusin that clearly occurred outside the record[.]" (Appellant's Br. at 62, BAP Case No. 14-8046 ECF No. 22). Grusin asserts that the bankruptcy court asked its own questions of witnesses which were designed to lead those witnesses to blame

Grusin. Further, Grusin asserts that during the sanctions hearing, the bankruptcy court showed a personal bias when the court stated: "I have known Mr. Grusin a long time and he knows that. He can talk a really good game and sometimes he talks about stuff he doesn't know anything about. It is just the way it is." (Tr. of Sanctions Hr'g at 86:12-15, Adv. No. 09-00482 ECF No. 514). During the trial, the bankruptcy court admitted it was frustrated by what it felt was Grusin's undue influence over Debtors:

> I am frustrated and [**25] I think you have seen that because it is just hard for me to understand, especially after you have told me this history with Mr. Grusin, that you just turned everything over to him to make decisions for you when Mr. Shackelford, who had been helping you, is telling you to do something else.

(Tr. of Discharge Trial at 1268, Adv. No. 09-00482 ECF No. 545).

The bankruptcy court's statement characterizing Grusin as having a propensity to "talk a good game" is troubling. The record reflects the bankruptcy court's frustration with Grusin. This frustration may indicate some level of personal perturbation with Grusin which may have contributed to the bankruptcy court's conclusion that Grusin's conduct was sanctionable pursuant to *§ 1927*, while finding that the conduct of Townsend and Fullen was not. However, the Panel need not reach this issue due to its conclusion that Grusin's conduct was not vexatious and unreasonable.

The bankruptcy court held that:

> Grusin's shadow representation of the Debtors in the bankruptcy case and in the adversary proceeding vexatiously and unreasonably multiplied the proceedings resulting in excess cost to the [*688] Trustee and to Church Joint Venture. . . . As a result of the [**26] wholly inadequate pleadings and affidavits filed in the adversary proceeding, the Plaintiffs and the court were put to unnecessary effort and expense to sort out what the positions of the Debtors were and whether they were supported by the record.

(Order Granting Sanctions at 23). The issues "raised by the Debtors' complex financial affairs . . . were needlessly compounded by the positions propounded by Mr. Grusin and the work product produced by him." *Id.* The discharge litigation "was needlessly prolonged as the result of the attempts of Mr. Grusin to defend it." *Id.* at 24. "The proceeding was protracted . . . due to the pleadings prepared or overseen by Mr. Grusin with respect to the discharge." *Id.* at 29. Notwithstanding this broad language, the bankruptcy court referenced only two filings, and their supporting documents, in the adversary proceeding when the court awarded *§1927* sanctions: the Response to the PSJ Motion which incorporated the Joint Affidavit and the Motion to Alter or Amend Judgment supported by Grusin's and Fullen's individual affidavits. The bankruptcy court held that these documents "vexatiously and unreasonably prolonged the proceedings and caused Church Joint Venture and the bankruptcy [**27] estate to incur additional attorney fees and expenses that they should not have borne." *Id.* at 29.[13] The bankruptcy court also concluded that "the Motion for Relief from

Judgment, filed by Mr. Cocke . . . was the fruit of and was necessitated by the prior named pleadings." *Id.*

> 13 Notably, while not condoning Grusin's conduct, the bankruptcy court observed that the 2004 examinations would have been conducted regardless. *Id.* at 28.

[HN13] The Sixth Circuit has provided a helpful perspective on the distinction between "zealous representation" and "vexatious conduct:"

> An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to *carte blanche* to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious." Accordingly, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. [**28]

Jones v. Continental Corp., 789 F.2d 1225, 1230 (6th Cir. 1986) "*Jones* makes clear that the standard for *section 1927* determinations in this circuit is an objective one, entirely different from determinations under the bad faith rule." *Rogers v. Salvation Army, No. 14-12656, 2015 U.S. Dist. LEXIS 95816, 2015 WL 4488512, at *3 (E.D. Mich. July 23, 2015)*.[14]

14 The Sixth Circuit Court of Appeals discussed the evolution of the standard under *28 U.S.C. § 1927*, in *Rathburn v. Warren City Schools (In re Ruben), 825 F.2d 977 (6th Cir. 1987)*. In that case, the court noted that an earlier Sixth Circuit decision, *United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976)*, had defined the "unreasonably and vexatiously" language of *§ 1927* as "an intentional departure from proper conduct, or, at a minimum, . . . a reckless disregard of the duty owed by counsel to the court." *Ruben, 825 F.2d at 983* (quoting *Ross, 535 F2d at 349*). However, [HN14] the *Ruben* decision also "noted a relaxed standard applicable to *section 1927* determinations" subsequent to *Ross*. *Ruben, 825 F.2d at 983*. As stated in *Jones*, the Sixth Circuit has authorized *§ 1927* sanctions "*despite the absence of any conscious impropriety.*" *Jones, 789 F.2d at 1230* (emphasis added). Still, the Sixth Circuit also noted that "we do not read these subsequent cases as overruling the thrust of *Ross*, to wit, that simple inadvertence or negligence that frustrates the trial judge will not support a sanction under 1927." *Ruben, 825 F.2d at 984*. The conduct must be such that "trial judges applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court [**29] and which, as a result, causes additional expense to the opposing party." *Id. See also Ridder v. City of Springfield, 109 F.3d 288, 298 (6th Cir. 1997)* ("Fees may be assessed without a finding of bad faith, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." (citation and internal quotation marks omitted)).

[*689] [HN15] To award fees and costs pursuant to *§ 1927*, the court must find that the attorney not only multiplied the proceeding, but that the attorney did so in objective bad faith or knew or should have known the actions were frivolous. Mere incompetence or negligence does not justify *§ 1927* sanctions.

Here, the bankruptcy court did not find that Grusin multiplied the proceedings or filed the documents at issue in bad faith. (Order Granting Sanctions at 26). Nor did the court find that Grusin knew or should have known that the claim he was pressing was frivolous. In connection with the bankruptcy court's analysis of its inherent power to sanction abuses of the litigation process, the bankruptcy court specifically stated:

> [Mr. Grusin's] conduct falls short of subjective bad faith . . . . I do not find any indication that Mr. [**30] Grusin stepped beyond the role of a zealous, if misguided, advocate. He was not competent to provide advice to the Debtors concerning their bankruptcy case, and he certainly should not have attempted to represent them "from the shadows" by using Mr. Townsend to sign and file pleadings for him, but I do not find that his actions were motivated by any purpose other than to try to obtain relief for his clients.

(Order Granting Sanctions at 26 (emphasis added)). Although it appears to be made in the context of the bankruptcy court's decision whether to sanction Grusin under its inherent authority, the bankruptcy court's factual finding that Grusin was simply a zealous advocate not only supports its conclusion that it could not sanction Grusin under its inherent authority, but also undermines the court's imposition of sanctions under *§ 1927*. As previously noted, [HN16] the purpose of sanctions under *§ 1927* is "to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Royal Manor, 525 B.R. at 365-66* (citations omitted). Finding that Grusin was simply a zealous advocate cannot be squared with the objective standard for *§ 1927* sanctions which is intended to punish "aggressive tactics that far exceed [**31] zealous advocacy."

The bankruptcy court did find that Grusin's shadow representation of Debtors vexatiously and unreasonably multiplied the proceedings. Specifically, the bankruptcy court found that the PSJ Motion would not have been granted but for Grusin's failure "to discuss the advice of counsel defense with [Debtors] and to advise them to consult and/or engage other counsel to assist them in evaluating that defense." (Order Granting Sanctions at 4). On that basis, the bankruptcy court concluded that the Response to the PSJ Motion, which incorporated the Joint Affidavit, and the Motion to Alter or Amend Judgment, which was supported by the affidavits of Grusin and Fullen, were the documents which vexatiously and unreasonably prolonged the adversary proceeding. The bankruptcy court also concluded that Grusin's filing of these documents caused Church Joint Venture and the bankruptcy estate to incur additional attorney [*690] fees and expenses they should not have borne.

The Panel determines, for several reasons, that the bankruptcy court erred as a matter of law in concluding that Grusin's "shadow representation" of Debtors in this case vexatiously and unreasonably multiplied the proceedings. [**32] [15] First, as noted, the bankruptcy court only referenced two filings, plus the affidavits which supported those filings, which it found resulted in the unnecessary multiplication of the proceeding, all of which it attributed to Grusin. While a limited number of filings could in a given case have such an effect as to warrant sanctions under *§ 1927*, the panel finds that

the two filings with their supporting documents referenced by the bankruptcy court in this case do not rise to that level.

> 15 The Panel is not finding that the bankruptcy court erred in its factual determination that Grusin engaged in "shadow representation" of Debtors in advocating that other assets were properly omitted from the schedules and SoFA, or in advocating any other strategy in Debtors' bankruptcy case and related adversary proceedings. There is evidence in the record to support the bankruptcy court's finding of fact on that issue. Also, as previously noted, the Panel is not opining on any allegation of malpractice by any attorney. This decision is solely confined to whether the bankruptcy court erred in sanctioning Grusin under *Bankruptcy Rule 9011* and *28 U.S.C. § 1927*.

[HN17] A response to a motion for summary judgment and a motion to alter or amend a judgment [**33] are commonplace and anticipated in litigation. To grant *§ 1927* sanctions for the filing of such documents, a court must find the documents were objectively filed in bad faith, that is, that Grusin knew or should have known they were frivolous or would unnecessarily multiply the litigation. The bankruptcy court did not make such findings.

Second, while the Panel understands why the Response to the PSJ Motion and the Motion to Alter or Amend Judgment were perceived by the bankruptcy court to be unhelpful to it in determining whether Debtors' discharges should be denied, those documents were not frivolous. Nor can those documents, from an objective viewpoint, be determined to have been interposed for delay or to obstruct the litigation concerning Debtors' discharges. The adversary proceeding which sought to deny Debtors' discharges also sought a declaratory judgment that the Trusts which Grusin represented, and their assets, were property of the bankruptcy estate. While the Response raised the advice of counsel defense on behalf of Debtors, the bulk of that filing was spent explaining why under Tennessee law the nondisclosed assets were not property of the bankruptcy estate.[16] The defense posed [**34] by Debtors and Grusin's clients was that Debtors "relied upon the advice of their attorneys that [they] have correctly completed their petition, schedules, statement of financial affairs and amendments thereto . . . ." (Response to PSJ Motion at 1). Grusin and Townsend advocating for a declaration that the undisclosed property interests were not property of the bankruptcy estate in response to the PSJ Motion, while perhaps inapposite as relates to the PSJ Motion, was not objectively unreasonable. Presumably, Grusin advocated that position for the benefit of his clients, the Corporations, [*691] Trusts, and Debtors' children. His clients' interests were to keep those assets from being determined to be property of the bankruptcy estate.[17] Legally, from his clients' perspective, Debtors' discharges were of no concern.

> 16 The Response, and its accompanying affidavit, appear to have been written from the vantage point of Grusin's clients -- the Corporations, Trusts, and Debtors' children -- with little focus on Debtors or their state of mind or personal knowledge. This point is highlighted by the fact that the conclusion of the Response requests that "the corporations, trusts, and adult children of [**35] the Debtors be dismissed from this proceeding as a matter of law since there are no facts in dispute." (Response to PSJ Motion at 23).
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> 17 The bankruptcy court specifically found that Grusin's actions were not "motivated by any purpose other than to try to obtain relief for his clients." (Order Granting Sanctions at 26).

Even if the bankruptcy court perceived the arguments posed by Grusin and Townsend in the Response to the PSJ Motion and the Motion to Alter or Amend to be unresponsive to the discharge issues, [HN18] *§ 1927* sanctions are generally improper when a successful motion or response to the filing could have avoided any additional legal expenses to the opposing party. *Royal Manor, 525 B.R. at 365* (quoting *Riddle v. Egensperger, 266 F.3d at 553*). Thus, either that defense to the PSJ Motion was irrelevant to the Motion and, thus, should have been easily dispensed with by opposing counsel and the court; or it was relevant and, therefore, could not have been frivolous. Accordingly, Grusin's litigation strategy in filing these documents, without more, is not the type of conduct that *§ 1927* was designed to redress.

Finally, sanctioning Grusin under *§ 1927* for his failure "to discuss the advice of counsel defense with [Debtors] and to advise them to consult and/or engage other [**36] counsel to assist them in evaluating that defense" when he was not counsel of record for Debtors is erroneous as a matter of law. [HN19] Sanctions are warranted under *§ 1927* if counsel "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389, 396 (6th Cir. 2009)* (citation omitted). As counsel of record for the non-debtor defendants in the adversary proceeding, Grusin's obligations to the court did not include the duty to advise Debtors and to consult with them as to the advice of counsel defense. The record shows Fullen was the named bankruptcy counsel, with Townsend sometimes signing filings on behalf of Debtors. The Response to the PSJ Motion was signed by Townsend on behalf of Debtors and by Grusin on behalf of the Corporations, Trusts, Katherine Blasingame Church, and Earl Benard Blasingame, Jr. While Grusin's and his clients' joinder in the Response to the PSJ Motion can be questioned since the PSJ Motion did not seek relief against Grusin's clients, the joinder in the Response does not render him responsible to the court for the failures of counsel noted by the bankruptcy court.[18]

> 18 To be clear, the Panel need not and is not [**37] addressing through this decision what Grusin's responsibilities, if any, may have been to Debtors from an ethical, professional responsibility, or malpractice perspective. The Panel is only determining that Grusin did not violate *Bankruptcy Rule 9011* and *28 U.S.C. § 1927* in failing "to discuss the advice of counsel defense with [Debtors] and to advise them to consult and/or engage other counsel to assist them in evaluating that defense." (Order Granting Sanctions at 4).

CONCLUSION

For the reasons set forth herein, the Panel concludes that the bankruptcy court erred in awarding *Rule 9011* sanctions because Church Joint Venture did not comply with the safe harbor provision and the exception to the safe harbor provision does not apply to Grusin's actions. Additionally, the Panel concludes that the bankruptcy court erred in awarding sanctions pursuant to *28 U.S.C. § 1927* because the bankruptcy court's factual findings do not support the conclusion that Grusin vexatiously [*692] multiplied the proceedings. Accordingly, the Order Granting Motion for Sanctions entered by the bankruptcy court on July 16, 2014 and the Amended Order Setting Amounts of Additional Sanctions entered by the bankruptcy court on August 5, 2015 are vacated to the extent that they impose [**38] sanctions against Grusin.