CASE NO. 8:16-cv-02046-JSM
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In Re: OILEDKIN GONZALEZ, Debtor.

CADLEROCK JOINT VENTURE, L.P.
Appellant

v.

CHRISTINE HERENDEEN, Chapter 7 Trustee,
THOMAS A. LASH, ESQUIRE and LASH & WILCOX, P.
Appellees.

Appeal from the United States Bankruptcy Court
For the Middle District of Florida
Case No. 8:12-bk-19213-KRM

APPELLANT'S INITIAL BRIEF

Respectfully submitted,

DAVID S. MAGLICH
Florida Bar No. 441708
Email: dmaglich@fergesonskipper.com
Brendan A. McQuaid
Florida Bar No. 018024
Email: bmcquaid@fergesonskipper.com
FERGESON, SKIPPER, SHAW,
KEYSER, BARON & TIRABASSI, P.A.
1515 Ringling Boulevard, 10th Floor
Sarasota, FL 34236-6756
Telephone: (941) 957-1900
Attorneys for Appellant,
CADLEROCK JOINT VENTURE, L.P.

CORPORATE DISCLOSURE STATEMENT

Appellant certifies the following information under Federal Rule of Bankruptcy Procedure 8012:

1. Appellant is an Ohio limited partnership.

2. The following entities own 10% or more interest in Appellant:

The Cadle Company II, Inc., an Ohio corporation – 32.15%; and

D.A.N. Joint Venture II, an Ohio limited partnership – 32.85%.

None of these entities is publicly held.

3. This appeal is from the U.S. Bankruptcy Court for the Middle District of Florida, Tampa Division, Hon. K. Rodney May presiding. The Debtor is Oiledkin Gonzalez, and the Trustee is Christine Herendeen. The Bankruptcy Court case was Chapter 7, and no creditors committee was formed.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

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APPELLANT'S BRIEF REGARDING APPEAL FROM BANKRUPTCY COURT

Statement of Jurisdiction

This appeal arises from the Order of the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, in Chapter 7 Case No. 8:12-bk-19213-KRM granting Appellees' Amended Motion for Summary Judgment. Doc. #2. The Bankruptcy Court had jurisdiction to enter the Order pursuant to 28 U.S.C. Sections 157(a), 157(b)(1) and 1334. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. Section 158.

Further, an Order that is final and appealable as a Final Judgment incorporates and brings up for review all preceding non-final Orders. Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367 (11th Cir. 1989); Bevan v. Lee County So., 213 Fed.Appx. 824 (11th Cir. 2007). As a result, CadleRock also seeks review of the Order Denying Motion to Recuse and Order Granting Motion for Reconsideration. Doc. #81 and Doc. #115, respectively.

Statement of Issues Presented

Whether the Bankruptcy Court made clearly erroneous findings of fact, committed an error of law and/or abused its discretion by limiting discovery and the sanctions proceedings to only the sole adversary proceeding involving CadleRock and then granting Appellees' Amended Motion for Summary Judgment and denying CadleRock's Motion for Sanctions without conducting a trial. In

addition, whether the Bankruptcy Court abused its discretion by denying CadleRock's Motion to Recuse.

Standard of Review

The District Court reviews the Bankruptcy Court's findings of fact under the clearly erroneous standard of review. In re: Optical Technologies, Inc., 252 B.R. 531 (M.D. Fla. 2000). The Bankruptcy Court's conclusions of law are reviewed under the *de novo* standard of review. *Id*. The Bankruptcy Court's equitable determinations are reviewed under an abuse of discretion standard.

Background of Trustee Activity

In Chapter 7 bankruptcy cases, a few weeks after the bankruptcy petition is filed, a trustee holds a creditors' meeting pursuant to 11 U.S.C. §341(a) (the "341 Meeting"). Chapter 7 Bankruptcy Trustee Christine Herendeen ("Herendeen"), Thomas Lash ("Lash") and his law firm Lash & Wilcox, PL ("L&W") (collectively "Appellees") know that debtors in Chapter 7 bankruptcy cases can be questioned regarding debt-related telephone communications at the 341 Meeting. As a result, L&W prepares a questionnaire related to debt-related telephone communications in order to collect information to use in pursuit of claims under certain consumer protection acts. Doc #31[1].

[1] 341 Meetings are public; however, only the trustee and creditors are allowed to participate and ask questions. L&W and their paralegal appear to violate 11 U.S.C. Section 341 by handing out a questionnaire, taking notes and retaining both their own notes as well as the trustee's notes before L&W has even been hired by the trustee on the case or appointed by the Bankruptcy Court.

A paralegal employed by L&W attends every 341 Meeting held by Herendeen and hands out the questionnaire to the debtor before the 341 meeting begins. At the 341 Meeting, Herendeen asks the questions on the L&W questionnaire regarding debt-related telephone communications, hoping that the debtor provides answers which suggest potential violations of certain consumer protection acts. For example, a trustee will ask the debtor questions "under oath" such as: When did they start calling? When did they stop calling? How many calls per day? How many calls per week, etc.? Herendeen and the paralegal employed by L&W each take notes. The paralegal keeps both sets of notes which rarely, if ever, become a part of the official case file. At the 341 meeting and in the questionnaire, the debtors authorize L&W to contact the debtors regarding questions relating to the potential assertion of consumer protection claims. Lash determines whether Herendeen will file an adversary proceeding and instructs her accordingly before Lash has even been hired or appointed as counsel of record by the Bankruptcy Court.

At the 341 Meeting, Herendeen asks no questions related to whether the debtor, in writing, requested creditors to cease further communications, how many communications resulted in actual conversations, what the content was in any communications or how many telephone calls resulted in messages or voicemails. There is never an indication that the debtor, in writing, requested a creditor to stop

communication efforts. There is no evidence or indication that a debtor or Appellees ever asked for, obtained or reviewed phone records or a call log to confirm the debtor's testimony prior to filing an adversary proceeding against a creditor asserting consumer protection acts (primarily harassment) claims relating to the number of telephone communications made to the debtor.

The majority of the debtors are already represented by attorneys. Neither these debtors nor their attorneys ever brought their own claims under the consumer protection acts. None of the debtors indicated that he or she had a potential lawsuit as an asset on the Statement of Financial Affairs filed with the bankruptcy petition. If a debtor or the debtor's attorney believed the debtor had a valid claim under the consumer protection acts, a claim would be asserted or at least disclosed on the debtor's schedule of assets or Statement of Financial Affairs.

Appellees, with few if any exceptions, conduct no investigation or follow-up regarding the debtors' alleged creditor-related telephone communications after the 341 Meeting. Appellees then file adversary proceedings asserting consumer protection acts claims without having done any further investigation to determine whether the claims have merit, i.e., they have not determined whether, and have no good-faith basis to believe that, the claims are supported by the facts or the law. The number of alleged calls made to a debtor is based on an estimate from the

debtor's testimony and is not based on a review of the debtor's phone records or call logs.

Most of the bankruptcy estates assigned to bankruptcy trustees have no assets. When a bankruptcy trustee administers an estate with no assets, the compensation the bankruptcy trustee earns is a portion of the filing fee (approximately $60.00). When a bankruptcy trustee administers a bankruptcy estate with assets, the bankruptcy trustee earns compensation based on the amount of money disbursed or recovered in the case. 11 U.S.C. Section 326(a). Thus, a bankruptcy trustee's compensation is based on the existence and value of the assets in the bankruptcy estate the bankruptcy trustee is administering. The crux of CadleRock's Motion is that Lash and L&W create assets in the form of consumer protection claims through the trustees and their questionnaires, and the bankruptcy system, in particular Chapter 7 proceedings, is the platform for Appellees to enrich themselves at the expense of creditors. The greater the value of the assets, the greater the compensation.

Statement of the Case and Statement of Facts

Oiledkin Gonzalez ("Debtor") filed his voluntary Chapter 7 bankruptcy petition on December 24, 2012. Doc. #6. In his financial disclosures, the Debtor swore under penalty of perjury that he had no pending claims or potential lawsuits,

and did not list as assets any claims against CadleRock for consumer collection violations.

On December 26, 2012, Herendeen was appointed as Trustee. During the 341 Meeting in February 2013 the Debtor indicated that he had been contacted by CadleRock Joint Venture, L.P. ("CadleRock"), a company engaged in the purchase and collection of debts, three or four times total and received a call every two or three weeks. Doc. #46.

After the 341 meeting, Herendeen then requested that the Bankruptcy Court appoint and authorize Lash and L&W to file a meritless adversary proceeding against CadleRock. This adversary proceeding, commenced on or about November 8, 2013, appears on the docket of the Bankruptcy Court as Case No. 8:13-ap-01004-KRM (the "Adversary Proceeding"). Doc. #164.

In the Adversary Proceeding, Herendeen, Lash and L&W alleged in Paragraphs 21, 23 and 31 of the Complaint (Doc. #164, pp. 5-8) that CadleRock violated the Florida Consumer Collection Practices Act ("FCCPA") and the Telephone Consumer Protection Act ("TCPA") in three particulars:

21. Defendant violated Fla. Stat. §559.72(7) when Defendant (1) made multiple Collection Calls, on multiple days, in multiple weeks, over multiple months, from August 1, 2011 through September 25, 2012 to Debtor attempting to collect the Alleged Debt; (2) made three to four Collection Calls to Debtor's cell phone, every two to three weeks; (3) made Collection Calls to Debtor's cell phone after Debtor told Defendant that Debtor could not pay the Alleged Debt; and (4) made Collection Calls to Debtor's cell phone, <u>for a total of more than fifty Collection Calls to Debtor's cell phone</u>, after Debtor told Defendant to stop calling

Debtor's cell phone; all of which is a willful communication with the Debtor with such frequency that Defendant could reasonably expect such communication to harass Debtor, or which is a willful engagement by Defendant in other conduct, including violation of the TCPA, which could reasonably be expected to abuse or harass Debtor….

23**.** Defendant violated Fla. Stat. §559.72(9), second half, when Defendant (1) made multiple Collection Calls, on multiple days, in multiple weeks, over multiple months, from August 1, 2011 through September 25, 2012 to Debtor attempting to collect the Alleged Debt; (2) made three to four Collection Calls to Debtor's cell phone, every two to three weeks; (3) made Collection calls to Debtor's cell phone after Debtor told Defendant that Debtor could not pay the Alleged Debt; and (4) made Collection Calls to Debtor's cell phone, for a total of more than fifty Collection Calls to Debtor's cell phone, after Debtor told Defendant to stop calling Debtor's cell phone; all of which is an assertion of the existence of the legal right to attempt to collect the Alleged Debt, including by violations of the TCPA and by unfair and deceptive practices, which are rights Defendant knows do not exist, in violation of the FCCPA including Fla. Stat. §559.72(9), second half….

31**.** Defendant violated 47 U.S.C. §227(b)(1)(A)(iii) when Defendant (1) made multiple Collection Calls, on multiple days, in multiple weeks, over multiple months, from August 1, 2011 through September 25, 2012 to Debtor attempting to collect the Alleged Debt; (2) made three to four Collection Calls to Debtor's cell phone, every two to three weeks; (3) made Collection Calls to Debtor's cell phone after Debtor told Defendant that Debtor could not pay the Alleged Debt; and (4) made Collection Calls to Debtor's cell phone, for a total of more than fifty Collection Calls to Debtor's cell phone, after Debtor told Defendant to stop calling Debtor's cell phone; which is Defendant's use of an automatic telephone dialing system to make multiple Collection Calls to Debtor on Debtor's personal cell phone after Debtor told Defendant that Defendant did not have permission to call Debtor…. (emphasis added)

In a letter dated November 20, 213, CadleRock advised Appellees that the claims in the lawsuit were false and requested that they verify same and dismiss the lawsuit. Doc. #144, Exh. 7. However, after Appellees ignored this *pro se*

request from an out-of-state company, CadleRock was then forced to retain counsel to defend itself.

In a letter dated December 5, 2013, CadleRock, through its counsel, advised Appellees that the claims asserted in the Adversary Proceeding were frivolous and contrary to applicable law and the express testimony of the Debtor (i.e., legally meritless and factually inaccurate). Doc. #29. In particular, CadleRock, through counsel, pointed out to Appellees that the frivolous Adversary Proceeding alleges CadleRock communicated with the Debtor more than fifty times. Also, the Complaint contains at least three allegations falsifying and grossly exaggerating the number of telephone communications CadleRock had with the Debtor, including falsely alleging that CadleRock utilized an automated telephone dialing system to call the Debtor.

In response, Appellees then dismissed the Adversary Proceeding with prejudice on December 27, 2013. Doc. #173. The immediate voluntary dismissal of the Adversary Proceeding with prejudice confirmed that Appellees knew it was meritless, performed no due diligence before filing it to support their allegations, and when faced with CadleRock's initial defense, knew they were unable to produce any evidence in support of the claims asserted therein.

After the Adversary Proceeding was dismissed and the bankruptcy case was closed, CadleRock continued to investigate the activities of Appellees, including a

review of other consumer protection acts claims brought against other creditors. A review of Herendeen's bankruptcy cases indicates that she, Lash and L&W asserted and then dismissed with prejudice similar consumer protection acts claims in adversary proceedings filed against at least 44 other defendant creditors (and at least 600 other creditors in cases brought by L&W and Lash on behalf of five other Bankruptcy Trustees in the Tampa Division). Doc. #31. The vast number of dismissals with prejudice demonstrates that Appellees know the actions lack merit but file them anyway in an attempt to extort money from creditors, because they know the creditors settle these meritless cases seeking statutory damages rather than spend significant legal fees to defend them.

Under the statutes supporting the adversary proceedings filed against creditors, proof of actual damages is not required and a claimant may be awarded statutory damages of $1,000.00 for each violation, plus attorneys' fees. Thus, Appellees know that creditors have little, if any, economic incentive to defend the claims, as it is less expensive to settle than to defend and prevail on the merits.

Appellees know, or should know, that many creditors collecting consumer debts operate in multiple states other than Florida. Appellees know, or should know, that creditors need to apply for and obtain a license to operate in Florida and/or many of these other states. Appellees know, or should know, that creditors have to list consumer protection acts claims against them on license applications or

on reports to governing authorities such as the FDIC, the OCC or the SEC and their state equivalents. Appellees know, or should know, that it adversely affects a creditor's ability to get a license or to conduct their business when harassment claims appear on their record.

Appellees filed claims against creditors, including CadleRock, without first attempting to settle the claims, or even contacting the creditors, even though this would reduce the burdens placed upon the Bankruptcy Court and potentially reduce the financial exposure of, and reputation damage to, the creditor. Appellees have no regard for whether a creditor can obtain a license in Florida or another jurisdiction or otherwise carry on its business as a result of it being sued in a meritless adversary proceeding asserting consumer protection act claims.

Upon learning of this improper practice, CadleRock sought leave of Court to file a lawsuit against Appellees. Doc. #20 and #21. Specifically, CadleRock sought authorization to file a class action lawsuit alleging that Appellees had violated federal and state laws by engaging in a pattern of wrongful conduct through the filing of frivolous lawsuits asserting Consumer Protection Laws claims against CadleRock and other creditors. In response, Appellees filed a response claiming that the filing of the Complaint was the result of a mere scrivener's error as to the number of calls, despite the fact that the questionnaire, bankruptcy schedules and 341 transcript showed otherwise. Notwithstanding, in reliance upon

this claim and other potential defenses asserted by Appellees at the hearing, the Bankruptcy Court, Judge May presiding, denied CadleRock's Motion to Reopen. Doc. #42. CadleRock then appealed the denial of its Motion to Reopen. Doc. #43; United States District Court, Middle District of Florida, Tampa Division, case no. 8:14-cv-03212-JSM.

During oral argument on appeal before the District Court, Judge Moody stated that there was a genuine question of whether Lash and L&W had improperly solicited consumer protection law cases and that the Florida Bar agreed that Lash and L&W may have violated the Rules of Professional Conduct in doing so. Doc. #65. In response, opposing counsel argued that this could not be solicitation since Lash and L&W represented the Trustee, not the Debtor. As detailed below, however, the Trustee steps into the shoes of the Debtor, assumes all of his or her rights and obligations, and is responsible for administering the bankruptcy estate. Therefore, whether Lash and L&W solicited cases from the Trustee or the Debtor is immaterial; both are improper and sanctionable. In addition, Lash and L&W create these claims with their questionnaire, where the debtors do not list them in their Statements of Financial Affairs.

The District Court ultimately affirmed Judge May's holding that he had not abused his discretion because CadleRock had not yet stated a claim upon which relief could be granted in its proposed class action lawsuit. Doc. #66. The District

Court also held, however, that CadleRock had presented sufficient cause to reopen the case, and that CadleRock could file another Motion to Reopen to pursue sanctions against Appellees based on 11 U.S.C. §105. *Id.* at pp. 9-10.

As directed by Judge Moody, CadleRock then filed its second Motion to Reopen Case for the purpose of filing a Motion for Sanctions against Appellees. Doc. #52.

Since Appellees continue to file similar cases and have appeared in the past, and continue to appear, before Judge May on numerous occasions, and Lash & L&W are directly appointed by Judge May to file adversary proceedings, CadleRock also filed a Motion to Recuse based on concerns that Judge May might not be able to remain impartial and decide this matter solely on the merits. Doc. #53.

The Motion to Recuse specifically stated that in light of the longstanding relationship and interaction between Judge May and Appellees, CadleRock was concerned that it would not receive a fair and impartial ruling on its Motion for Sanctions. This concern extended to other Bankruptcy Court Judges within the Tampa Division of the Middle District of Florida who interact with Appellees and who also routinely appoint counsel for the purpose of commencing adversary proceedings against creditors. As a result, CadleRock requested that its Motion for

Sanctions be heard by Judge Moody, another District Court Judge or a Bankruptcy Court Judge not within the Tampa Division of the Middle District of Florida.

On August 31, 2015, Judge May granted CadleRock's Motion to Reopen for the purpose of filing its Motion for Sanctions. Doc. #80. However, Judge May denied CadleRock's Motion to Recuse without even allowing CadleRock's counsel to argue its position. Doc. #81.

CadleRock then filed its Motion for Sanctions against Appellees. Doc. #69-78. CadleRock requested sanctions based on 28 U.S.C. §1927 and the Bankruptcy Court's inherent power to regulate the proceedings and parties before it under 11 U.S.C. §105(a).

CadleRock then issued written discovery to Appellees requesting documents pertaining to the adversary action filed against CadleRock as well as numerous other adversary proceedings filed against creditors for alleged consumer collection violations. Doc. #84.

On September 21, 2015, Appellees filed a Motion for Protective Order and Stay alleging that the scope of CadleRock's discovery requests was overbroad and should be limited to the sole adversary proceeding filed against CadleRock. Doc. #85-93.

On October 20, 2015, the Bankruptcy Court entered an Order on Appellees' Motion for Protective Order and Stay regarding the scope of permissible discovery

to be conducted by the parties. Doc. #101.

On November 16, 2015, Appellees filed a Motion for Reconsideration of the aforementioned Order alleging that the Bankruptcy Court's ruling regarding permissible discovery was still overbroad and that CadleRock was allegedly pursuing discovery for an improper purpose. Doc. #102.

On January 20, 2016, the Bankruptcy Court entered an Order on Appellees' Motion for Reconsideration which further limited the scope of permissible discovery and the relief available to CadleRock in this proceeding. Doc. #115.

Specifically, the Bankruptcy Court ruled that all discovery and relief sought by CadleRock in its Motion for Sanctions would be conducted in two stages. During the first stage, CadleRock would be limited to discovery and sanctions proceedings pertaining only to the sole adversary proceeding filed by Appellees against CadleRock. Only if CadleRock was able to establish the threshold issue that the adversary proceeding filed against it violated 11 U.S.C. §105(a) or 28 U.S.C. §1927, would the Bankruptcy Court then allow CadleRock to conduct discovery and present evidence of sanctionable conduct by Appellees in other adversary proceedings filed against creditors.

Thereafter, the parties participated in written discovery and multiple depositions regarding the allegations set forth in the Motion for Sanctions

pertaining only to the Adversary Proceeding against CadleRock per the Bankruptcy Court's Order.

The final hearing on CadleRock's Motion for Sanctions was then scheduled for October 3-5, 2016.

On June 1, 2016, after the conclusion of discovery as to the sole Adversary Proceeding, Appellees filed an Amended Motion for Summary Judgment directed to CadleRock's pending Motion for Sanctions alleging that CadleRock could not establish that Appellees acted in bad faith in the sole Adversary Proceeding filed by Appellees against CadleRock and that, as a result, its request for sanctions under 11 U.S.C. §105(a) and 28 U.S.C. §1927 failed as a matter of law. The Amended Motion for Summary Judgment incorporated the deposition testimony of certain parties and witnesses, as well as the exhibits to same, and attached other documents previously filed in the case. Doc. #142-152.

On June 15, 2016, Appellant filed its Response to Appellees' Amended Motion for Summary Judgment alleging that the allegations of the Amended Motion were contrary to the actual evidence presented and that: (1) Appellees presented no legal authority permitting the Bankruptcy Court to grant summary judgment on a Motion for Sanctions; (2) the Amended Motion directly contradicted the law of the case and controlling case law; (3) Appellees cannot avoid the entry of sanctions by deflecting the blame to CadleRock for actions that

are unrelated and occurred years earlier; and (4) fact issues remain regarding whether the conduct of Appellees was unreasonable, reckless or in bad faith to support the imposition of sanctions for bringing false and unsupported claims. Doc. #155-156.

In support of its Response to the Amended Motion for Summary Judgment, CadleRock filed an additional witness deposition as well as the Affidavit of Gary Elston, the manager of CadleRock's Information Technology Department, confirming the number of telephone calls made to the Debtor and that CadleRock did not use an automatic dialer during the relevant time period. Doc. #154.

The Bankruptcy Court entered an Order on July 8, 2016, granting Appellees' Amended Motion for Summary Judgment, denying CadleRock's Motion for Sanctions and reserving jurisdiction to consider a motion for attorneys' fees and costs from Appellees. Doc. #2.

On July 13, 2016, CadleRock then filed a timely Notice of Appeal of the Order on Appellees' Amended Motion for Summary Judgment and the instant appeal ensued. Doc. #1. CadleRock also seeks review of the Order Denying Motion to Recuse and Order Granting Motion for Reconsideration. Doc. #81 and Doc. #115, respectively.

Argument

Summary of Argument

Appellees alleged in their Amended Motion for Summary Judgment that there was no possible way that CadleRock could ever prove any of the allegations in their Motion for Sanctions and that they were therefore entitled to summary judgment as a matter of law.

However, Appellees failed to establish that there were no genuine issues as to any material facts regarding the actions and omissions of Appellees prior to commencing the Adversary Proceeding against CadleRock, and whether such conduct was unreasonable, reckless, vexatious or in bad faith so as to support the imposition of sanctions. Further, the Bankruptcy Court disregarded the law of the case and controlling case law concerning false and unsupported claims.

CadleRock presented evidence that would support an objective finding that Appellees acted in bad faith and knowingly or recklessly filed false and/or frivolous actions below. The deposition testimony and the documents filed show that the instant case is just one example of Appellees doing no investigation or verification of the facts and ignoring blatant deficiencies in the evidence for pecuniary gain. The multiple contradictions between the Debtor's 341 testimony, the questionnaire he completed and the allegations of the adversary Complaint are not a coincidence. Appellees wrongfully ignored these contradictions and did

absolutely no investigation into the facts before filing the Adversary Proceeding against CadleRock for the sole purpose of personal financial gain. Potential discovery of material after the fact is irrelevant to the filing of the initial meritless claim.

Since the Bankruptcy Court cannot weigh evidence at the summary judgment stage, determining whether Appellees acted recklessly, in bad faith, or with an improper monetary motive involved the resolution of material factual disputes that was not proper for summary judgment.

Appellees routinely file several hundred (if not thousands) of adversary Complaints for alleged consumer protection law violations each year and have engaged in a pattern or practice of filing meritless adversary Complaints against creditors containing "mistakes" and "claims totaling millions of dollars" for the sole purpose of personal financial gain. Further, Appellees, Lash and L&W, routinely engage in improper solicitation of claims that may have violated the Florida Rules of Professional Conduct by their use of questionnaires, and the bankruptcy system is their platform for personal gain at the expense of creditors. However, the Bankruptcy Court improperly limited these proceedings to only the Adversary Proceeding against CadleRock and then ignored all of the facts set forth in the testimony and evidence presented.

Limiting discovery and these sanctions proceedings to only the singular case against CadleRock and then denying CadleRock's Motion for Sanctions at the summary judgment stage was clear error by the Bankruptcy Court and contrary to the ruling of Judge Moody in the prior appeal. Further, given the longstanding interaction between Judge May and Appellees, the Bankruptcy Court should not have denied CadleRock's Motion to Recuse.

As a result, Judge May erred by bifurcating discovery and the sanctions proceedings, refusing to recuse himself and then granting Appellees' Amended Motion for Summary Judgment and denying CadleRock's Motion for Sanctions without conducting a trial.

I. The Bankruptcy Court Made Clearly Erroneous Findings of Fact, Committed an Error of Law and/or Abused its Discretion by Granting Appellees' Amended Motion for Summary Judgment and Denying CadleRock's Motion for Sanctions Without Conducting a Trial

A. Neither Appellees nor the Bankruptcy Court Provided Any Legal Authority Permitting the Bankruptcy Court to Grant Summary Judgment on a Motion for Sanctions Against a Party and Her Attorneys

Neither Appellees nor the Bankruptcy Court cited any legal authority permitting the Bankruptcy Court to grant summary judgment on a pending Motion for Sanctions, especially where the Motion seeks sanctions against a party and her attorneys relating to conduct occurring prior to the filing of a lawsuit or the actual filing of a meritless lawsuit.

Federal Rule of Civil Procedure 56(a) required Appellees to show that there are no disputed issues of material fact and that they are entitled to *judgment as a matter of law*. (emphasis added) Therefore, Rule 56 applies to the entry of judgment on the pleadings and makes no provision for resolving a pending Motion.

Further, the knowledge, intent, motive, representations and actions of Appellees, as well as the underlying collection activity by CadleRock employees, were all disputed fact issues which could not be determined upon summary judgment. Given the multiple contested factual and legal issues raised, CadleRock's Motion for Sanctions could not be resolved *as a matter of law*.

Rule 56 contemplates entering judgment as a matter of law. Appellees failed to provide any authority authorizing the Bankruptcy Court to enter summary judgment on a pending Motion. If this were permissible, a party could move for summary judgment on every Motion filed so as to avoid a hearing on the merits as long as the movant believed that the law and facts were on its side. That is clearly not the intent of Rule 56. As a result, summary judgment was procedurally improper on a pending Motion, particularly a Motion for Sanctions that involves the knowledge, intent, motive, representations and actions of Appellees.

B. The Ruling of the Bankruptcy Court Directly Contradicted the Law of the Case and Controlling Case Law

i. Summary Judgment Standard

As the moving parties on a Motion for Summary Judgment, Appellees bear the burden of establishing that no genuine issues of material fact remain. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In ruling on a Motion for Summary Judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). At the summary judgment stage, the Judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue of fact for trial. Id. at 249.

ii. The Law of the Case Directly Contradicts Appellees' Arguments

Appellees alleged that CadleRock's request for sanctions under Section 105 fails as a matter of law because Appellees complied with Rule 9011 by dismissing the Complaint before the deadline specified in Rule 9011's safe harbor provision. However, this argument was already presented and rejected in the appeal of the denial of CadleRock's first Motion to Reopen.

At the May 12, 2015, oral argument before Judge Moody, Appellees argued that CadleRock was limited to requesting relief under Rule 9011 and that Rule 9011 worked as intended. However, as noted by Judge Moody, CadleRock was

left without a remedy under Rule 9011 once the case was dismissed with prejudice. As stated in the Court's May 18, 2015, Order:

> "Rule 9011 authorizes the court to impose monetary sanctions against a party for filing a frivolous petition. However, it appears that Creditor already took advantage of Rule 9011 when it challenged the suit as frivolous. Rule 9011 contains a safe harbor provision that insulated Trustee and Counsel from a motion for sanctions as soon as the Trustee voluntarily dismissed the case. See Fed. R. Br. P. 9011(c)(1)(a). Moreover, the rule mandates that monetary sanctions are not available against a represented party (Trustee) and may not be awarded on the court's own initiative after the petitioner has voluntarily dismissed the case. See Fed. R. Br. P. 9011(c)(1)(b). *Given the facts of this case, then, Rule 9011 is of no utility to Creditor…. 11 U.S.C. §105(a) appears to be the only viable option*." (emphasis added) Doc. #66 at 9.

As a result, the District Court recognized that Appellees deprived CadleRock of its ability to pursue sanctions under Rule 9011 upon dismissal of the adversary proceeding, and that CadleRock was expressly authorized to pursue sanctions under 11 U.S.C. §105(a).

Judge May ruled that the Bankruptcy Court was not bound by the findings of Judge Moody since the issues that were litigated in the prior appeal involved whether CadleRock could file a class action lawsuit against Appellees, not whether they should be sanctioned for their conduct. This finding by Judge May mischaracterizes the relief sought by CadleRock. The entire purpose of these proceedings, whether by class action lawsuit or a Motion for Sanctions, is to put an end to, and sanction Appellees for, filing meritless lawsuits against creditors

without any investigation or contact with the Debtor or the creditor being sued. In fact, the proposed class action Complaint contained the exact same factual allegations and alleged improper conduct by Appellees as contained in the Motion for Sanctions. To state that the issues were different because the appeal involved the filing of a lawsuit as opposed to a Motion for Sanctions misconstrues the entire basis for these proceedings. As a result, the Bankruptcy Court should not have disregarded the findings of Judge Moody and was bound by same.

It would be nonsensical for Judge Moody to expressly authorize CadleRock to file a Motion for Sanctions against Appellees if no legal basis existed for the Motion and it would be subject to summary judgment as a matter of law. Therefore, the relief requested in Appellees' Amended Motion for Summary Judgment was directly contrary to the law of the case and the Bankruptcy Court was bound by the findings of Judge Moody and his express statement off 11 U.S.C. §105 as the avenue to proceed.

iii. Controlling Case Law Authorized the Relief Requested by CadleRock

Pursuant to its inherent power under 11 U.S.C. §105(a), the Bankruptcy Court may issue any Order, process, or judgment that is necessary or appropriate to carry out the provisions of the United States Bankruptcy Code. Further, the Court may *sua sponte* take any action or make 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).

Pursuant to 28 U.S.C. §1927, any attorney or other person who 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.

Appellees argued that the Bankruptcy Court lacked authority to impose sanctions pursuant to 11 U.S.C. §105(a) and under 28 U.S.C. §1927 because Rule 9011 applies and governs the specific problem at issue and that CadleRock could not show that Appellees engaged in unreasonable and vexatious conduct that multiplied the proceedings. These arguments were misplaced, as controlling case law expressly authorizes the Bankruptcy Court to impose sanctions under both 11 U.S.C. §105(a) and 28 U.S.C. §1927, separate and apart from Rule 9011.

The United States Supreme Court has recognized that the sanctioning schemes of certain statutes and the Rules, taken alone or together, are not substitutes for the Court's inherent power to sanction attorneys and parties. Chambers v. Nasco, Inc., 501 U.S. 32, 46 (1991). Whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. Id. at 46. At the very least, the inherent power must continue to exist to fill in the interstices. Id. at 46.

As further stated by the United States Supreme Court in Chambers, "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." Id. at 49. A federal court is not forbidden from sanctioning bad faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. Id. at 50. If neither the statute nor the Rules are up to the task, the Court may safely rely on its inherent power. Id. at 50. Such inherent power equally applies to sanctioning a party for abuses of process occurring beyond the courtroom. Id. at 57.

In Chambers, the United States Supreme Court upheld an award of sanctions against Mr. Chambers based on the Court's inherent power due to acts of fraud performed outside the confines of the Court, filing false and frivolous pleadings, and attempting by other tactics of delay, oppression, harassment and massive expense, to reduce the opposing party to exhausted compliance. Id. at 32. CadleRock set forth similar allegations against Appellees in its Motion for Sanctions.

The Eleventh Circuit Court of Appeals has also authorized the imposition of sanctions pursuant to the Court's inherent power based on the failure of an attorney and law firm to make adequate investigation prior to filing a lawsuit. In In re Mroz, the bankruptcy trustee and her attorneys filed a Complaint for Recovery of a Preferential Transfer against the Debtor's ex-wife. The ex-wife consistently

maintained that the action was frivolous and was instituted without a reasonable inquiry into the underlying facts. In re Mroz, 65 F.3d 1567 (11th Cir. 1995).

Citing Chambers, the Eleventh Circuit stated that "although certain conduct may or may not be violative of Rule 11 or Bankruptcy Rule 9011, it does not necessarily mean that a party will escape sanctions under the Court's inherent power." Id. at 1575. The Court further stated that "there is nothing preventing a federal court from exercising its inherent power to sanction an attorney, a party or a law firm for their subjective bad faith." Id. at 1576. The Eleventh Circuit then stated that the law firm's conduct in failing to verify the facts alleged in the Complaint may constitute bad faith subjecting it to sanctions on remand. Id. at 1576.

Appellees also argued that CadleRock could not show that Appellees acted in bad faith or engaged in vexatious litigation under 28 U.S.C. §1927. First, the Eleventh Circuit has held that failing to conduct a reasonable inquiry into the underlying facts set forth in a Complaint may constitute bad faith warranting sanctions. Id. at 1576.

Further, the Eleventh Circuit stated that "a district court's authority to issue sanctions for attorney misconduct under 28 U.S.C. §1927 is either broader than or equally as broad as the district court's authority to issue a sanctions order under its inherent powers." Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230 (11th

Cir. 2006). Since Trustee Herendeen is a licensed attorney who appears before this Court and has taken an oath as Trustee, she is also subject to the Bankruptcy Court's inherent power to address abuses of process under 28 U.S.C. §1927. Accordingly, the Bankruptcy Court clearly had authority to issue sanctions against all Appellees under both 11 U.S.C. §105(a) and 28 U.S.C. §1927, and should not have granted Appellees' Amended Motion for Summary Judgement without a trial on the issues.

Moreover, whether a party acted unreasonably, vexatiously or in bad faith was not appropriate for summary judgment, as it was clearly a factual issue which depended on the evidence presented. For purposes of 28 U.S.C. §1927, bad faith turns not on the attorney's subjective intent, but on the attorney's objective intent. Amlong at 1239. The Court must compare the attorney's conduct against the conduct of a "reasonable" attorney and make a judgment about whether the conduct was acceptable according to some objective standard. Id. at 1239-1240. The term "vexatiously" similarly requires an evaluation of the attorney's objective conduct. Id. at 1240. Therefore, the Bankruptcy Court could not resolve factual issues of whether Appellees' conduct was reasonable or in bad faith at the summary judgment stage.

Findings of recklessness, bad faith, or improper motive are sufficient to justify sanctions under 28 U.S.C. §1927. Id. at 1240. Sanctions under 28 U.S.C.

§1927 are permissible where an attorney recklessly pursues a frivolous claim, even if the attorney does not act knowingly or malevolently. Id. at 1241. "In short, a district court may impose sanctions for egregious conduct by an attorney even if the attorney acted without the specific purpose or intent to multiply the proceedings." Id. at 1241.

Further, at the May 12, 2015, oral argument on CadleRock's appeal of the Order denying its first Motion to Reopen, when discussing the inability of CadleRock to utilize Rule 9011 after the case was dismissed, Judge Moody stated that the "Bankruptcy Court has inherent power to issue sanctions." Appellees' counsel conceded "Absolutely it does." Doc. #65.

In light of the above, the Bankruptcy Court clearly had authority to impose sanctions against Appellees under both 11 U.S.C. §105(a) and 28 U.S.C. §1927 and should not have resolved the factual allegations and defenses at the summary judgment stage.

Since the Trustee has taken an oath and is an attorney appearing before this Court, the Bankruptcy Court can utilize its inherent power to sanction any improper conduct. The sanctions available to punish an attorney or party for misconduct include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, default judgments, drawing adverse evidentiary inferences or precluding the admission of evidence. Shephard

v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1475 (D.C. Cir. 1995). While CadleRock set forth multiple types of possible sanctions in its Motion for Sanctions, the specific sanctions to impose were left to the discretion of the Bankruptcy Court.

Although the specific sanctions to be imposed were left to the discretion of the Bankruptcy Court, it is clear that Judge May was more concerned with the potential consequences of sanctioning Appellees than whether Appellees actually engaged in improper conduct. This is confirmed by his reference to certain sanctions having "the effect of putting Special Counsel out of business if successful." The Bankruptcy Court should not have been swayed by the sanctions proposed by CadleRock, as it was not bound to these suggestions. Instead, the Bankruptcy Court was free to impose any type and degree of sanctions it deemed fit. Denying CadleRock's Motion for Sanctions because of the potential effect that sanctions may or may not have on Appellees' business was not a proper consideration by the Bankruptcy Court and is contrary to controlling law regarding sanctions available to the Court.

C. Appellees Could Not Avoid the Entry of Sanctions for Their Own Conduct by Deflecting the Blame to CadleRock

Appellees also alleged that CadleRock's Motion for Sanctions "should be denied" because an award of sanctions to CadleRock would be inequitable. In support of this claim, Appellees argued that CadleRock had unclean hands due to

alleged misrepresentations and double standards regarding CadleRock's purchase of debt and their process for filing lawsuits against third parties to collect same. However, the only issue before the Court is whether the filing of frivolous lawsuits support the imposition of sanctions against Appellees.

Because CadleRock denies having unclean hands, summary judgment is not the proper vehicle to resolve the defense of unclean hands since it requires the resolution of disputed facts. Cohen v. Karvit Estate Buyers, Inc., 843 So.2d 989 (Fla. 4th DCA 2003); Dery v. Occhiuzzo and Occhiuzzo Enterprises, Inc., 771 So.2d 1276 (Fla. 4th DCA 2000). As a result, any issues involving alleged unclean hands or inequitable conduct by CadleRock involved disputed facts that were not appropriate for summary judgment.

Further, Appellees had no standing to assert unclean hands regarding conduct to which they were not a party. For the doctrine of unclean hands to apply, the misconduct complained of must be connected to the matter in litigation and concern *the opposite* party. In re Barry, 170 B.R. 179 (S.D. Fla. 1994). Further, a party asserting unclean hands must prove that it was injured in order for the unclean hands doctrine to apply. In re King, 463 B.R. 555 (M.D. Fla. 2011). Since the process that CadleRock uses to purchase debt and then file lawsuits against third parties to collect same is irrelevant and misleading, does not involve

Appellees and resulted in no injuries to Appellees, the Bankruptcy Court should not have considered this doctrine in its ruling.

Appellees' allegation that CadleRock is imposing a double standard is another attempt to obfuscate the issues and deflect the attention from their own improper conduct. Judge May stated that the allegation that Special Counsel was reckless is "undermined by the fact that CadleRock apparently does no more or does less to investigate the validity of the claims it files than Special Counsel does." Doc. #2. This is an improper consideration for CadleRock's Motion for Sanctions.

These sanctions proceedings involve Appellees filing a meritless adversary proceeding against CadleRock that contained multiple false allegations. What occurred nearly a decade ago between non-parties when CadleRock purchased the underlying debt from GMAC Mortgage has nothing to do with the allegations against Appellees in the instant matter.

Notwithstanding, the deposition testimony of the CadleRock representatives confirmed that CadleRock had no reason to believe that the Note was unenforceable or that it could not rely on the physical and electronic documents and data provided to it by GMAC Mortgage. In fact, the Debtor's Answer to the state court action admitted that the debt was valid and that he would like to pay it back. Doc. #146. To the contrary, Appellees had absolutely no evidence that

CadleRock used an auto dialer and had the Debtor's questionnaire that directly contradicted his 341 testimony, but still proceeded to file the adversary Complaint anyway without any further inquiry or communication. Accordingly, Appellees could not avoid liability for their own actions by raising irrelevant issues pertaining to CadleRock.

While Appellees also attempted to dissect the language of the Unsecured Mortgage Note Sale Agreement in an effort to deflect the attention to CadleRock, they failed to mention that the Sale Agreement made multiple representations regarding the enforceability of the loans purchased, including that all information was "complete, true and accurate" and that "each Note is valid and enforceable in accordance with its terms." Doc. #144 at 170-171. Further, Mr. Daniel Cadle did not testify that CadleRock never had the original Note. Mr. Cadle testified that he does not know who presently has the original Note, as it may be with the Florida attorney or the state court where the lawsuit was filed against the Debtor. Doc. #144 at 34. Regardless, these allegations were irrelevant to the pending Motion for Sanctions.

Moreover, Appellees could not compare their conduct to that of CadleRock in enforcing the underlying Note. In the adversary proceeding at issue, Appellees filed suit against CadleRock based solely on the 341 meeting without any subsequent investigation, communication or attempts to settle. Unlike Appellees,

CadleRock called the Debtor and sent him two demand letters before filing a lawsuit in state court. Doc. #146 at 3, 6. As a result, the Debtor was given several opportunities to address the merits of CadleRock's claims or to avoid litigation.

Had Appellees sent a demand letter to CadleRock or made any attempt to contact them or obtain additional information prior to filing suit, these entire proceedings likely would have been avoided. Accordingly, Appellees cannot avoid liability and deflect blame by attempting to compare their actions or inaction to those of CadleRock.

Appellees also allege that CadleRock "had extensively researched other similar lawsuits by Special Counsel and the Trustee" and therefore had all of the information it needed to file a class action Complaint at that time. However, while representatives of CadleRock may have started printing the dockets and filings from over 900 cases involving Special Counsel, Mr. Daniel Cadle testified that "it took months in order to get enough paperwork and proof to file an action" and that the investigation remains ongoing. Doc. #144 at 173-174.

Mr. Greg Cadle also testified that the three boxes of documents he compiled and the nearly 100 hours of time he spent in November and December 2013 were to prepare for and prevail in the adversary proceeding. Doc. #145 at 134. Simply because CadleRock had printed 900 case dockets and the filings in those cases for use in the adversary proceeding does not mean that CadleRock had reviewed all of

the necessary materials, completed its investigation, conferred with its attorneys or determined how (or if) to proceed against Appellees at that time. CadleRock's counsel stated at the oral argument that it took time to discover the *extent* of the conduct in other cases, and that remains an accurate statement. (emphasis added). As stated by Judge Moody at the oral argument, "You are entitled to time to do some investigation, and your motion was timely." Doc. #65 at 36.

Moreover, it was not until the May 12, 2015, hearing before Judge Moody that CadleRock obtained confirmation that the actions of Appellees may have constituted solicitation in violation of the Florida Rules of Professional Conduct.

At the May 12, 2015, oral argument, the following exchange took place between Judge Moody and counsel for Appellees:

> **The Court**: The bottom line is you don't think that would be---having a paralegal sitting in, you don't think that would be solicitation contrary to the Bar rules?"
>
> **Ms. Yanes**: No, I certainly do not.
>
> **The Court**: So when I tell you that I called the Florida Bar, and they took a contrary position, you'd be surprised? Doc. #65 at 21.

While CadleRock's initial investigation and Motion for Sanctions referenced the attendance of a paralegal at 341 meetings, it was only after the May 12, 2015, oral argument that CadleRock learned that such actions constituted solicitation in violation of the Florida Rules of Professional Conduct.

Further, CadleRock was not aware of the existence of a questionnaire completed by the Debtor in this matter until the instant sanctions proceedings were commenced, and did not even receive the subject questionnaire from Appellees until April 2016. As a result, CadleRock could not have known about the inconsistencies between the Debtor's completed questionnaire and his 341 testimony described below until April 2016.

Appellees' Amended Motion for Summary Judgment attempts to deflect the blame for their own actions in the underlying adversary proceeding by pointing the finger at CadleRock and its counsel. Appellees' attempt to deflect attention from their actions is improper and should not have been entertained by the Bankruptcy Court.

D. Fact Issues Remain Regarding Whether the Conduct of Appellees was Unreasonable, Reckless or in Bad Faith

CadleRock's Motion for Sanctions alleged that Appellees made false allegations in the Complaint filed in the underlying Adversary Proceeding, engaged in solicitation of claims at the §341 meeting, failed to investigate the merits of the case or confirm the testimony of the Debtor prior to filing the Complaint, made no attempt to contact CadleRock or settle the dispute before filing the Complaint, and filed the adversary proceeding in an apparent effort to improperly extract funds from a creditor of the Debtor for their own personal benefit.

To be entitled to summary judgment, Appellees were required to prove that there were no genuine issues of material fact regarding the aforementioned allegations. Appellees failed to do so. Rather, Appellees merely recited, and the Bankruptcy Court relied upon, 17 pages of what they contended were "undisputed facts" and thereafter concluded that, based on these "undisputed facts", CadleRock was not entitled to sanctions. However, Appellees wholly failed to address multiple specific factual allegations in CadleRock's Motion for Sanctions. As such, Appellees failed to prove that there are no disputed issues of material fact on these issues.

Specifically, Appellees alleged "there had been no bad faith by Special Counsel here. Special Counsel did not knowingly or recklessly raise a frivolous argument." As set forth above, whether conduct constitutes bad faith or is reckless or harassing is determined based on objective intent, not the subjective self-serving statements of Special Counsel that he did not act knowingly or recklessly. This determination involves the resolution of fact issues and was not proper for summary judgment. Notwithstanding, there is ample evidence to support the allegations of CadleRock's Motion for Sanctions.

i. <u>Background/Procedure for Filing Adversary Complaints</u>

Through discovery, CadleRock learned additional information regarding the process implemented by Appellees for identifying and pursuing consumer

collection claims against Creditors, including the adversary proceeding against CadleRock. The following actions and procedures were contained within the documents filed by the parties prior to the hearing on Appellees' Amended Motion for Summary Judgment.

Trustee Herendeen testified that in 2012 she established a relationship with L&W for the purpose of sending a paralegal to 341 meetings to assist with reviewing what she thought were potential claims in her cases. If L&W concurred with her opinion then she would proceed with employing them to handle the claim. Doc. #147 at 18.

Trustee Herendeen confirmed that she is required to obtain approval from the Bankruptcy Court prior to retaining special counsel, but that she does not do so or file a written application to employ counsel before the 341 meetings. Doc. #147 at 24-25.

In the instant bankruptcy case, Ms. Samperisi-Gomez was the representative of L&W who attended the subject 341 meeting. Ms. Samperisi-Gomez is an independent contractor of the law firm, and is the only individual who attends 341 meetings conducted by Trustee Herendeen. Doc. #149 at 56. Ms. Samperisi-Gomez allegedly attends 341 meetings to see if there are any potential intangible assets (i.e., consumer collection claims) that can be created or pursued by the estate. Doc. #149 at 18.

Prior to working as an independent contractor for L&W, Ms. Samperisi-Gomez's legal experience consisted of working for approximately one year as a part-time receptionist for a personal injury/criminal law firm, and as a legal secretary for 90 days before being let go. Doc. #149 at 7-9. Ms. Samperisi-Gomez is not a certified paralegal, nor does she have any legal or paralegal education. Doc. #149 at 6.

At L&W, Ms. Samperisi-Gomez received training consisting of how to prepare settlement agreements and attend 341 meetings. No written materials on substantive law were provided to her. Doc. #149 at 13. She initially attended 341 meetings with another paralegal who showed her "how to hand out questionnaires, and then how to take notes on the debtor's testimony, and basically help the trustee, our client, with any other procedural logistical tasks. For example, making sure debtors are in the correct room, giving pro se debtors a form that must be filled out from the U.S. Trustee's Office, and communicating with the bankruptcy attorneys." Doc. #149 at 15.

At the 341 meeting Ms. Samperisi-Gomez provides a consumer collection questionnaire to either the Debtor or the Debtor's attorney. When providing the questionnaire to the Debtor directly, she tells him or her to fill it out and does not identify herself unless specifically asked. She tells the Debtors that she cannot discuss the questionnaire or any legal issues with them and to ask their attorneys if

they have any questions. Doc. #149 at 25-26. She does not advise Debtors that they are not required to complete the questionnaire or that it is optional. Doc. #149 at 30.

Ms. Samperisi-Gomez then collects the completed questionnaires from the Debtors and provides them to Trustee Herendeen. Doc. #149 at 34. Ms. Samperisi-Gomez makes notes on a blank questionnaire while the Debtor is testifying, and collects the Debtors' completed questionnaires from Trustee Herendeen at the end of the 341 meeting. Doc. #149 at 34-35. She then either writes the word "No" at the top of the questionnaire to indicate the lack of a consumer collection claim, or writes the letter "P" to identify a potential claim. Doc. #149 at 30-31. She then returns to the office, rewrites her form in an Excel spread sheet, shreds the original, and provides the documents to Attorney Lash for his review. Doc. #149 at 35, 39-40.

Lash testified that Ms. Samperisi-Gomez provides him with her typed summary together with the Debtor's completed questionnaire and any other materials from the 341 meeting that the Trustee wanted him to have so that he can review them to see whether he wishes to be retained on a contingency fee basis. Doc. #148 at 17-18, 23. If so, he will review the bankruptcy schedules and Statement of Financial Affairs if they have been filed, conduct a conflicts check,

and then send the executed Declaration of Proposed Special Counsel to Trustee Herendeen. Doc. #148 at 29-30.

Once the Bankruptcy Court approves the hiring of L&W, a paralegal then enters data into the law firm's internal software, and this information is then merged into the outline of a Complaint to be reviewed by an associate attorney. This merged Complaint is a Word document that contains numbered paragraphs, headings and subtitles. Doc. #156 at 43, 49. Certain of the information is specific to the Debtor while much of it is standard language that is incorporated into all Complaints. Doc. #156 at 48. The proposed Complaint is then reviewed by Lash prior to it being filed by a paralegal. Doc. #148 at 52.

ii. Failure to Confirm/Investigate Allegations of Adversary Complaint

The evidence filed in this case demonstrates that Appellees failed to adequately investigate the merits of the Adversary Proceeding against CadleRock prior to filing the Complaint against CadleRock. Specifically, Appellees have repeatedly defended their actions by alleging that the adversary Complaint was inaccurate due to a ***single*** typographical error regarding the number of collection calls.

It is undisputed that one of the errors in the underlying adversary Complaint was that the calls were alleged to have occurred from August 1, 2011 through September 25, 2012, instead of August 1, 2012, through September 25, 2012.

Judge May explained that Special Counsel for the Trustee "made allegations that were incorrect in terms of the time period in which calls were made, multiplying that by the *two or three calls per week*, led to an error in the number of calls made which led to an inference that an auto-dialer was used…" (emphasis added). Doc. #2.

However, these statements by Judge May misstate the Debtor's testimony at the 341 meeting regarding the number and frequency of calls. The Debtor testified that CadleRock called him "three or four times" <u>*total*</u> and that he was called "every two to three weeks." The Debtor did not testify that there were "*two or three calls per week*" as Judge May stated at the hearing. Therefore, Judge May's statement that two or three calls per week for a year led to an inference that an auto-dialer was used was erroneous based on the evidence presented.

Moreover, there were additional allegations in the boilerplate adversary Complaint which contradicted information provided to Appellees by the Debtor at the 341 meeting. Appellees had possession of the Debtor's completed questionnaire regarding the alleged consumer collection activity involving CadleRock. A simple review of the Debtor's completed questionnaire by the Trustee or a representative of L&W would have disclosed multiple inconsistencies that required further inquiry prior to filing the adversary Complaint.

Specifically, there were at least four separate questions and answers on the Debtor's completed questionnaire which should have alerted Appellees that additional investigation was required:

2(a): Q. Did you tell them that you could not pay? Answer: Yes

Q. Did they continue calling anyway? Answer: ***No***

Q. Did you tell them to stop calling you? Answer: Yes

Q. Did they continue calling anyway? Answer: ***No***

2(b): Q. Did you tell them not to call your cell phone: Answer: Yes

Q. Did they continue to call your cell phone after that? Answer: ***No***

2(e): Q. Have any calls contained: bad language, yelling, screaming, insults or any threats? Answer: ***No*** Doc. #148, Exh. 1.

Despite the aforementioned responses in the Debtor's questionnaire, Trustee Herendeen asked no follow up questions of the Debtor or his attorney at the 341 meeting, and Appellees made no effort to verify the merits of the case or the accuracy of the 341 testimony. Instead, they simply filed the adversary Complaint against CadleRock alleging, in addition to the false allegations regarding the number of calls, that:

13(b): Defendant made Collection Calls to Debtor's cell phone after Debtor told Defendant that Debtor could not pay the Alleged Debt;

13(c): Defendant made Collection Calls to Debtor's cell phone after Debtor told Defendant to stop calling Debtor's cell phone;

> 21: …which is a willful engagement by Defendant in other conduct, including a violation of the TCPA, which could reasonably be expected to abuse or harass Debtor. Doc. #148, Exh. 8.

These allegations of the adversary Complaint directly contradicted the Debtor's responses to the questionnaire from the 341 meeting. However, no further questions were asked of the Debtor and no investigation was made by Appellees to resolve these contradictions or to verify the facts.

The testimony further confirmed that neither Trustee Herendeen nor any representative of L&W requested any phone records of the Debtor, and none of the Appellees spoke with the Debtor or his attorney at any time between the 341 meeting and the filing of the adversary Complaint. Doc. #147 at 62, 98, 108; Doc. #148 at 43-46.

Further, Trustee Herendeen did not review the Complaint or speak with anyone at L&W regarding the allegations of the adversary Complaint prior to it being filed. Doc. #147 at 80-81. In fact, she took no action after the 341 meeting and relied upon L&W to review the information, prepare the Complaint and proceed accordingly. Doc. #147 at 66. Essentially, L&W acted in the place of Trustee Herendeen instead of advising her of the legal issues and following her instruction in the case.

Appellees alleged that an adversary Complaint is filed "if Special Counsel concur with her (the Trustee's) opinion that a potential claim exists in a particular

case." However, other than reading the questions from the subject questionnaire at the 341 meeting and returning the questionnaire to Ms. Samperisi-Gomez as a "potential" claim, the Trustee plays no role in the decision to file an adversary Complaint and defers entirely to L&W to draft, file and prosecute the Complaint without any further investigation or input regarding the facts of the case.

Likewise, Mr. Greg Cadle, the account officer at CadleRock who called and spoke with the Debtor, testified that the Debtor never told him to stop calling, but instead told Mr. Cadle to call him back tomorrow. Doc. #145 at 145. However, Appellees never contacted Mr. Cadle or any person at CadleRock to investigate or verify the subject claims prior to filing a lawsuit.

Appellees repeatedly asserted that the Trustee has a duty to investigate claims and to thereafter pursue those claims, if plausible. However, the Trustee conducted no investigation after the 341 meeting and did not even speak with the Debtor or anyone at L&W regarding the allegations of the Complaint prior to it being filed. As stated by Judge Moody at the May 12, 2015, oral argument, "the Debtor's sworn testimony has been insufficient in a lot of cases." This is especially true in the current case where the Debtor thought Trustee Herendeen was a Judge, and completed the questionnaire with the help of his attorney since he spoke Spanish and only limited English. Therefore, despite the fact that there were multiple inconsistencies between the Debtor's completed questionnaire and his 341

testimony and that he spoke limited English, Appellees proceeded with the filing of the adversary proceeding without any investigation or verification of the boilerplate allegations.

In addition, Mr. David Friedman, the administrator of L&W, testified that he is occasionally asked to listen to 341 meeting recordings if certain areas of testimony are inaudible or if there is a discrepancy between the Debtor's 341 testimony and his or her completed questionnaire. However, Mr. Friedman does not recall being asked to listen to the 341 meeting recording in the instant matter. Doc. #156 at 28-29.

Further, at no point did the questionnaire or the Trustee ask the Debtor about the use of an automated dialer. Nonetheless, Count II of the adversary Complaint alleged that Debtor used an "automatic telephone dialing system" in violation of the Telephone Consumer Protection Act. The evidence has now confirmed that CadleRock was not utilizing an automatic dialer during this time period and that this was another "mistake" by Lash. Doc. #148 at 62-63. Therefore, the Trustee is not pursuing a "plausible" claim if there is no legal or factual basis for same and the claim is based on multiple "mistakes." As a result, Count II had no factual basis and was included solely as an additional attempt to extract a settlement from CadleRock. Attorney Lash claims that the allegation regarding the use of an auto

dialer was based on his "prior experience." However, this allegation was not specified to be made "upon informed belief" but rather was unqualified.

Further, L&W's Prebill confirms that the adversary Complaint against CadleRock was finalized before any employee of L&W, even reviewed the 341 meeting recording. Doc. #148, Exh. 15. On October 4, 2013, a paralegal drafted the preliminary information for the Complaint. On October 7, 2013, the Complaint was reviewed and revised by another paralegal. On October 12, 2013, the Complaint was reviewed by Lash and finalized for filing. Notably, no further review or revisions to the Complaint were documented after that date. Then, on October 20, 2013, the 341 meeting recording was allegedly reviewed by an associate attorney and a memo to the file was drafted. The Prebill confirms that no additional revisions to the Complaint were made, and the Complaint was then filed on November 7, 2013. Doc. #148, Exh. 15.

Upon receiving the Prebill and the testimony of Lash, CadleRock served a Request for Production requesting proof of when the 341 meeting recording was ordered and received by L&W. This Request remained pending at the time the Bankruptcy Court entered the Order on appeal. However, assuming that Appellees' billing entries are accurate, the adversary Complaint was finalized before the 341 recording was even reviewed. As a result, it is clear that Appellees drafted and filed the adversary proceeding based only on the notes of Ms.

Samperisi-Gomez and the Debtor's completed questionnaire, which expressly contradicted the allegations of the Complaint. Even if Appellees could have later amended the adversary Complaint instead of dismissing it with prejudice, it does not excuse their practice of filing meritless lawsuits that directly contradict the facts of the case, with no investigation or attempts to contact the Debtor or the potential defendant.

Appellees also alleged, and the Bankruptcy Court agreed, that there can be no finding of solicitation since the Trustee and Special Counsel had a prior working relationship. However, Appellees continue to try to separate themselves from the Debtor and maintain that this is a normal attorney-client relationship. That is simply not the case.

Although Judge May stated in the Order on appeal that "it is a misstatement to suggest that a bankruptcy trustee stands in the shoes of the debtor", binding case law specifically provides that a bankruptcy trustee stands in the shoes of the Debtor and has standing to bring any suit that the Debtor could have instituted had he not filed for bankruptcy protection. O'Halloran v. First Union National Bank of Florida, 350 F.3d 1197 (11th Cir. 2003). Therefore, since the 11th Circuit expressly stated that the Trustee stands in the Debtor's shoes, Appellees cannot in good faith argue that there can never be solicitation involving a claim brought by a Trustee. When an adversary proceeding is litigated, it is the Debtor, not the Trustee, who

provides the claim and all of the testimony and evidence in support of same. The current situation is no different from Appellees attending hearings or depositions of *pro se* parties in state court for the sole purpose of soliciting new clients by creating new claims with solicited testimony, and then claiming it is permissible because they were asked to attend by a client who was also in attendance.

While it is true that L&W may have a prior working relationship with Trustee Herendeen, they clearly have a paralegal attend the 341 meetings and provide the questionnaire for the sole purpose of creating, acquiring and filing causes of action belonging to Debtors and to receive any resulting settlement proceeds. It is the method of creating and acquiring the Debtor's cause of action that is problematic, not the technical identity of the "client." There is no denying that Appellees are attempting to use the Trustee as a vehicle to skirt the prohibition against direct solicitation of a prospective client. This is the exact conduct that Judge Moody found "quite troublesome" and that may have violated the Florida Rules of Professional Conduct. Doc. #65 at 10.

The solicitation is further evidenced by the Prebill of L&W which confirms that Appellees commenced billing for legal services on February 7, 2013, before the 341 meeting even took place, and nearly 9 months before the Court approved their retention as counsel for the Trustee on November 4, 2013. Doc. #148, Exh. 15.

Further, the Florida Bar did not condone Appellees' conduct as they suggested. Instead, the October 26, 2015, letter from the Florida Bar states that "[T]he matters at issue must be determined by a court of competent jurisdiction if the parties are unable to come to an amicable resolution. If you obtain an order imposing sanctions on the attorney for solicitation or other ethical violations you may provide a copy to the Florida Bar." Doc. #152. Accordingly, since there are pending civil proceedings regarding the alleged solicitation, the Florida Bar deferred to the Bankruptcy Court and awaited its ruling on the Motion for Sanctions.

As noted above, Appellees' Amended Motion for Summary Judgment sets forth 17 pages of "undisputed facts." However, merely because Appellees made statements at their depositions attempting to defend or explain their conduct does not make them "undisputed facts." Pursuant to the evidence and deposition testimony submitted to date, there are multiple potential grounds for sanctioning Appellees for their conduct in this case and the countless other meritless adversary proceedings filed against creditors.

The evidence will show that Appellees routinely file hundreds (if not thousands) of adversary Complaints each year and have engaged in a pattern or practice of filing meritless adversary Complaints against creditors containing "mistakes" for the sole purpose of personal financial gain. The instant case is just

one example of Appellees doing no investigation or verification of the facts and ignoring blatant deficiencies in the evidence for pecuniary gain. The multiple contradictions between the Debtor's 341 testimony, the questionnaire and the adversary Complaint are not a coincidence. Therefore, if Appellees continue to assert that they are bound to pursue these consumer collection claims under the Bankruptcy Code, then they should be held to the same standards as other attorneys and parties appearing before the Bankruptcy Court.

CadleRock presented evidence that would support an objective finding that Appellees acted in bad faith and knowingly or recklessly raised a frivolous argument in the underlying action. Appellees presented evidence in response to these claims. Since the Bankruptcy Court could not weigh evidence at the summary judgment stage, determining whether Appellees acted recklessly, in bad faith, or with an improper motive involved the resolution of material factual disputes that was not proper for summary judgment, and therefore, the decision of the Bankruptcy Court should be reversed.

II. The Bankruptcy Court Erred By Bifurcating These Proceedings and Limiting Discovery and the Sanctions Proceedings to the Sole Adversary Proceeding Against CadleRock

The Bankruptcy Court also erred by limiting discovery and these sanctions proceedings to the singular case against CadleRock, as the case law confirms that

the Court should consider Respondents' pattern of advancing meritless claims when ruling on the issue of sanctions.

"A relevant and proper consideration in the Court's analysis of whether sanctions are appropriate includes an attorney's litigation history." Goodman v. Tatton Enterprises, Inc., 2012 WL 1886529 (S.D.Fla. 2012). See also Johnson v. Comm'r of Internal Revenue, 289 F.3d 452, 456 (7th Cir. 2002) ("Once the district court has recognized a pattern of misbehavior on an attorneys' part, the court would be blinking reality in not taking counsel's proven propensities into account."); Republic of the Philippines v. Westinghouse Electric Corp., 43 F.3d 65, 73 (7th 3d Cir. 1995) ("Court was not required to ignore [the attorney's] bad conduct in other cases; indeed it would have been remiss not to consider it."); Moody v. Miller, 864 F.2d 1178, 1182 (5th Cir. 1989) ("Obviously, a pattern of wrongdoing may require a stiffer sanction than an isolated incident…"); Atkins v. Fischer, 232 F.R.D. 116, 129-130 (D.D.C. 2005) ("In making a sanctions determination, a court should consider whether the attorney's conduct was repetitious as opposed to isolated, willful as opposed to negligent, and whether the attorney has a history of similar conduct in other cases."); Issa v. Provident Funding Group, Inc., 2010 WL 3245408 (E.D. Mich. 2010) (considering the filing of frivolous lawsuits in imposing sanctions against attorney and law firm in one particular case).

In addition, "if a court becomes aware of a pattern of abusive litigation conduct by a particular attorney or litigant, it is incumbent upon the court to take appropriate steps to put an end to such opprobrious behavior." Goodman at 3. "Furthermore, the matters addressed in the filings of other cases may well be relevant to the determinations of notice and bad faith." Id .at 3.

Accordingly, the Court should not have limited discovery and the sanctions proceedings to the sole case against CadleRock and should have looked at Respondents' pattern of conduct in cases against other creditors.

III. The Bankruptcy Court Committed an Error of Law or Abuse of Discretion by Denying CadleRock's Motion to Recuse

Given the longstanding relationship and interaction between Judge May and Appellees, CadleRock was concerned that it would will not receive a fair and impartial ruling on its Motion for Sanctions. The facts and circumstances surrounding the relationship between Judge May and Appellees would lead a reasonable person to believe that Judge May's involvement in the respective appointments of Lash and L&W and their frequent interaction would make fair judgment impossible. The rulings of Judge May have now confirmed CadleRock's concerns.

Because a reasonable person could conclude that Judge May's prior interaction with Appellees influenced his ruling on the merits of this matter and made him less likely to enter sanctions against Appellees, CadleRock respectfully

requests that this Court reverse the Order on the Motion to Recuse and direct Judge May to recuse himself from presiding over any further proceedings in this case so that the Motion for Sanctions can be heard by Judge Moody, another District Court Judge or a Bankruptcy Court Judge not within the Tampa Division of the Middle District of Florida.

28 U.S.C. §445(a) directs presiding judicial officers as follows:

> [a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The appropriate test is whether a reasonable person knowing all of the circumstances would be led to the conclusion that the judge's "impartiality might reasonably be questioned." Smith v. Pepsico, Inc., 434 F.Supp. 524, 525 (S.D. Fla. 1977). This standard is sufficiently broad to require recusal both in those circumstances where partiality is in fact present and where only the appearance of partiality is present. Id. Nonetheless this standard is still one of reasonableness and should not be interpreted to require recusal on spurious or vague charges of partiality. Id.

The Supreme Court has discussed 28 U.S.C. §445 and its goal of promoting public confidence in the integrity of the judicial process. In Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), the United States Supreme Court

held that scienter is not required in order to find a violation of §445. The Supreme Court stated:

> The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons.... Moreover, advancement of the purpose of the provision--to promote public confidence in the integrity of the judicial process ... does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.

Id. at 486 U.S. at 859-60 (citations omitted).

Inherent in §445's requirement that a Judge disqualify himself if his impartiality might reasonably be questioned is the principle that our legal system "must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954). "The very purpose of §445 is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible**."** Liljeberg, 486 U.S. at 865.

As set forth above, recusal should be granted where an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the Judge's impartiality, and any doubts must be resolved in favor of recusal. U.S. v. Patti, 337 F.3d 1317 at 1321.

The Appearance of Partiality in Favor of Herendeen and Lash Requires that Judge May be Recused from Further Proceedings in this Case

A review of Judge May's docket indicates that Herendeen has appeared before Judge May in hundreds, if not thousands, of prior bankruptcy cases. Herendeen has also appeared before Judge May in dozens of adversary proceedings. Additionally, Judge May has authorized Herendeen to hire Lash and L&W in numerous cases, including the instant case. Thus, Judge May has appointed Lash and L&W and interacted with Appellees countless times. The implication a reasonable person may draw from these appointments and frequent interactions between Judge May and Appellees is a familiarity which adversely impacted his ability to remain neutral when adjudicating matters seeking personal relief and sanctions against Appellees.

Lash has represented several Trustees, including Herendeen, as parties in connection with the filing of thousands of consumer protection lawsuits in adversary proceedings claiming creditors had harassed debtors due to the telephone calls they made to the debtors. In his Opinion on the appeal of the denial of the first Motion to Reopen, Judge Moody stated that there was a genuine question of whether these cases were improperly solicited and that one should view a debtor's uncorroborated testimony in an 11 U.S.C. §341 creditors' meeting as unreliable. Judge May presided over hundreds, if not thousands, of the bankruptcy cases in which these adversary proceedings occurred, including hundreds for Herendeen.

CadleRock believes that Judge May's prior rulings and statements in this case indicate that Judge May perceived that Appellees did not engage in wrongful conduct even before receiving the evidence. This is apparent by the fact that Judge May refused to investigate the Appellees' actions even after they confirmed that the underlying lawsuit contained multiple false allegations.

In the oral arguments on appeal, however, Judge Moody stated that Lash had solicited these cases and indicated that the Florida Bar had opined that Lash and L&W may have violated the Rules of Professional Conduct. Therefore, a reasonable person could find that due to his prior rulings and long history of interaction with Appellees, Judge May was not able to remain impartial and decide this matter solely on the merits. This is especially true where, as here, personal relief and sanctions were being sought against Appellees by CadleRock in its Motion for Sanctions. Furthermore, the docket indicates that Herendeen and Lash continue to file these adversary proceedings even after Judge Moody indicated that they had solicited cases and likely engaged in an abuse of process by knowingly or recklessly filing frivolous actions.

CadleRock respectfully requests that this Court reverse the Order on the Motion to Recuse and direct Judge May to recuse himself from the case in order to avoid even the slightest perception of partiality. If Judge May recuses himself from the case, CadleRock requests that the case not be assigned or transferred to another

Bankruptcy Court Judge in the Tampa Division of the Middle District of Florida. The impartiality of any other Bankruptcy Court Judge in the Tampa Division of the Middle District of Florida may be questioned for the same reasons set forth above, regardless of whether they have previously presided over this particular bankruptcy case and the subject adversary proceeding.

CONCLUSION

In light of the ruling of Judge Moody, the controlling case law set forth above and the deposition testimony and evidence presented by the parties, Appellees' Amended Motion for Summary Judgment should have been denied so that CadleRock could proceed with an trial on its Motion for Sanctions.

Further, the Bankruptcy Court should not have limited discovery and the sanctions proceedings to only the sole adversary proceeding against CadleRock and should not have denied CadleRock's Motion to Recuse.

Accordingly, the Bankruptcy Court erred by entering the Order on the Motion for Reconsideration, failing to grant CadleRock's Motion to Recuse, and by failing to deny Appellees' Amended Motion for Summary Judgment so that CadleRock could proceed with a trial on its Motion for Sanctions.

Prayer for Relief

WHEREFORE CadleRock prays that this Court find that the Bankruptcy Court made clearly erroneous findings of fact, committed an error of law and/or

abused its discretion by granting Appellees' Amended Motion for Summary Judgment and denying CadleRock's Motion for Sanctions, remand the case to the Bankruptcy Court with instructions for further proceedings consistent with reversal, and award such other legal and equitable relief as it deems appropriate.

Respectfully submitted on September 15, 2016.

DAVID S. MAGLICH

By: /s/ David S. Maglich

CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 8015 of the Federal Rules of Bankruptcy Procedure, and Local Rule 3.01(a), because this Brief contains 13,176 words.

Date: September 15, 2016

Respectfully submitted,

/s/ David S. Maglich
DAVID S. MAGLICH
Florida Bar No. 441708
Brendan A. McQuaid
Florida Bar No. 018024
FERGESON, SKIPPER, SHAW,
KEYSER, BARON & TIRABASSI, P.A.
1515 Ringling Boulevard, 10th Floor
Sarasota, FL 34236-6756
Phone: (941)957-1900 / Fax: (941)957-1800
Email: dmaglich@fergesonskipper.com
bmcquaid@fergesonskipper.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the CM/ECF system and electronic mail to counsel of record, and via U.S. Mail to Debtor on September 15, 2016.

FERGESON, SKIPPER, SHAW, KEYSER,
BARON & TIRABASSI, P.A.
1515 Ringling Boulevard, 10th Floor
Sarasota, Florida 34236
Telephone: (941) 957-1900
Fax: (941) 957-1800
Attorneys for Appellant, CADLEROCK JOINT VENTURE, LP

By: /s/DAVID S. MAGLICH
DAVID S. MAGLICH
Florida Bar No. 441708
E-Mail: dmaglich@fergesonskipper.com
BRENDAN A. MCQUAID
Florida Bar No. 018024
E-mail: bmcquaid@fergesonskipper.com

Copies furnished to:

W. Todd Boyd, Esquire
James K. Parker, Esquire
Bennett C. Lofaro, Esquire
Boyd, Richards, Parker & Colonnelli, P.L.
400 North Ashley Drive
Suite 1150
Tampa, FL 33602
tboyd@boydlawgroup.com
ntorrado@boydlawgroup.com
servicemia@boydlawgroup.com
blofaro@boydlawgroup.com

KATHERINE E. YANES, ESQUIRE
Kynes, Markman & Felman, P.A.
100 S. Ashley Drive – Suite 1300
Tampa, FL 33602
Attorneys for Special Counsel for Chapter 7 Trustee Lash & Wilcox, PL & Thomas A. Lash, Esquire
kyanes@kmf-law.com

OILEDKIN GONZALEZ, Debtor
9508 Paces Ferry Drive
Tampa, FL 33615