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, et al., Appellees.

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

ANSWER BRIEF OF APPELLEE CHRISTINE HERENDEEN, CHAPTER 7 TRUSTEE

BOYD RICHARDS PARKER & COLONNELLI, P.L.
100 SE 2nd Street, Suite 2600
Miami, Florida 33131
Telephone: (786) 425-1045
Facsimile: (786) 425-3905
Service Pleadings: ServiceMIA@boydlawgroup.com

JAMES K. PARKER, ESQ.
Florida Bar No. 157526
Email: jparker@boydlawgroup.com

YVETTE R. LAVELLE, ESQ.
Florida Bar No. 48107
Email: ylavelle@boydlawgroup.com

Counsel for Appellee, Christine Herendeen, Chapter 7 Trustee

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Christine Herendeen, does not believe oral argument is necessary to decide the issues of this Appeal, but is prepared to make oral argument upon request.

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STATEMENT OF THE ISSUES

Pursuant to Federal Rule of Bankruptcy Procedure 8014 (e), Appellee Christine Herendeen, Chapter 7 Trustee, ("Appellee Trustee Herendeen") hereby joins in and adopts by reference Appellees Thomas A. Lash, Esq. and Lash & Wilcox, PL (collectively referred to as "Lash & Wilcox Appellees") Statement of Issues Presented portion of Lash & Wilcox Appellees' Answer and Response Brief.

STANDARD OF REVIEW

Pursuant to Federal Rule of Bankruptcy Procedure 8014 (e), Appellee Trustee Herendeen hereby joins in and adopts by reference Appellees Thomas A. Lash, Esq. and Lash & Wilcox, PL (collectively referred to as "Lash & Wilcox Appellees") Standard of Review portion of Lash & Wilcox Appellees' Answer and Response Brief.

STATEMENT OF THE CASE

Pursuant to Federal Rule of Bankruptcy Procedure 8014 (e), Appellee Trustee Herendeen hereby joins in and adopts by reference Appellees Thomas A. Lash, Esq. and Lash & Wilcox, PL (collectively referred to as "Lash & Wilcox Appellees") Statement of the Case portion of Lash & Wilcox Appellees' Answer and Response Brief.

SUMMARY OF ARGUMENT AND ARGUMENT

Pursuant to Federal Rule of Bankruptcy Procedure 8014 (e), Appellee Trustee Herendeen hereby joins in and adopts by reference Lash & Wilcox Appellees summary of the argument and arguments set forth in the Answer and Response Brief of Lash & Wilcox. In addition to the arguments adopted by Appellee Trustee Herendeen as set forth in the Lash & Wilcox Appellees Answer Brief, Appellee Trustee Herendeen presents the below summary of argument and argument in addition to the arguments presented by the Lash & Wilcox Appellees.

SUMMARY OF THE ARGUMENT IN ADDITION TO ARGUMENTS PRESENTED BY THE LASH & WILCOX APPELLEES

Appellant attempts to use the "law of the case" doctrine to argue that Judge Moody's affirmance of the Bankruptcy Court's Order Denying Appellant's first Motion to Reopen somehow precludes the Bankruptcy Court's Order granting Appellees' Amended Summary Judgment and denying Appellant's Motion for Sanctions, however that argument is inapplicable and untenable under these circumstances. Judge May acted in accordance with well settled federal law in entering summary judgment in favor of Appellees and against Appellant finding that there was absolutely no evidence even hinting at the type of conduct that would support a claim for sanctions and properly exercised the Court's inherent discretion in denying Appellant's Motion for Sanctions. Appellants claim for

sanctions against Appellee Trustee Herendeen pursuant to 28 U.S.C. § 1927 fails as a matter of law because Appellee Trustee Herendeen was the Lash & Wilcox Appellees client in the Adversary Proceeding. The law is clear that 28 U.S.C. § 1927 applies only to attorneys representing parties in litigation not the parties themselves. Furthermore, Appellant failed to support a claim for sanctions pursuant to 11 U.S.C. § 105 (a) and in fact is precluded from same based on the voluntary dismissal of the Adversary Proceeding with prejudice within the safe harbor time allowed by Federal Rule of Bankruptcy Procedure 9011.

At the end of the day, the impetus behind Cadlerock's protracted and vexatious litigation and numerous appeals against Appellees lies in its owner, Daniel Cadles, general distrust of the Bankruptcy Court and the lawyers that practice before it. Based on Cadlerock's theories and requested relief, no Bankruptcy Court could ever review Cadlerock's Motion for Sanctions because the system is inherently unjust and wrought with conspiracy amongst the Judges, Trustees, and Special Counsel. Daniel Cadle testified that he always follows the money and the money led him to the conclusion that the Bankruptcy Court system is using the filing of sham lawsuits to generate funds to dump into the "kitty" "for the judges to distribute as they deem necessary" because there are not enough bankruptcies being filed and the Bankruptcy Courts need money (2-144, PageID

2023-2024). This unfounded distrust was evidenced in the fact that Cadlerock's Second Motion for Sanctions not only sought to terminate and bar Herenden as serving as a trustee in any bankruptcy court and disbarring Thomas Lash and all lawyers that have ever worked for Lash & Wilcox and represented trustees in asserting consumer protection claims in bankruptcy court, but in addition sought nothing less than a system wide investigation and mass disbarring of all Middle District trustees associated with any consumer protection claims. (Doc. 2-54, PageID 613). It's hard to argue with a straight face that an Adversary Proceeding that was instituted and dismissed with prejudice within one month, containing only 10 docket entries, only 3 of which were substantive filings, is bad faith and vexatious when Appellant has drug Appellees through litigation and appeals for over two years with the record on appeal in the instant appeal spanning 3,867 pages.

ARGUMENT

I. THE LAW OF THE CASE DOCTRINE IS INAPPLICABLE-THE ISSUE OF SANCTIONS WAS NOT ADDRESSED IN THE APPEAL OF THE ORDER DENYING MOTION TO REOPEN

Appellant makes the remarkable argument that the May 18, 2015 Order of this Court *affirming* the Bankruptcy Court's denial of Appellant's Motion to Reopen somehow (i) *reverses* the Bankruptcy Court's Order on appeal in the instant appeal granting summary judgment in favor of Appellees' on the issue of

sanctions; and (ii) decides *sua sponte*—for the first time on appeal—the issue of whether Appellant's claim for sanctions under § 105 fails as a matter of law based on Appellees' compliance with Rule 9011 and dismissal of the Adversary Complaint before expiration of the Rule's safe harbor time period. As set forth below this argument is incorrect and untenable.

Without any supporting law, Appellant represents to this Court that the argument that Appellant's request for sanctions under §105 fails as a matter of law because Appellees complied with Rule 9011 by dismissing the Adversary Complaint before the deadline specified in Rule 9011's safe harbor provision "was already presented and rejected in the appeal of the denial of Appellant's first Motion to Reopen." (I.B., Pg. 29). This is absolutely incorrect as the language of this Court's May 18, 2015 Order affirming the Bankruptcy Court's denial of Appellant's Motion to Reopen specifically states that: "Accordingly, the Bankruptcy Court did not abuse its discretion in denying the Motion to Reopen. The corollary to this conclusion is that the only potential relief to Creditor is through sanctions from the Bankruptcy Court, ***a relief not specifically sought in the Motion to Reopen***." (emphasis added)(Doc. 2-51, PageID 587). This Court goes on to provide:

> Though sanctions under the Code may not be the precise remedy Creditor requested, its search for relief need not come to a

> halt, notwithstanding the Bankruptcy Court's denial of its Motion to Reopen.
>
> To that end, this Court's review of Creditor's substantive allegations leads it to the conclusion that, in its motion, Creditor presented sufficient "cause" under 11 U.S.C. §350 (b) to reopen the bankruptcy case to pursue a remedy under the Bankruptcy Code. ***Had this been Creditor's requested relief***, the denial of its motion may very well have constituted an abuse of discretion…..***But that is not the issue on appeal***, and, therefore, this Court is obliged to affirm the decision below. (emphasis added)(Doc. 2-51, PageID 593).

Appellant misinterprets the *dicta* found in footnotes 2 and 3 and the *dicta* found in the very last line of the May 18, 2015 Order that "Appellant is free to file another motion to reopen to seek sanctions" as this Court's ruling on that specific issue as the law of the case. Suffice it to say there is nothing in the May 18, 2015 Order that is "law of the case" with respect to any issue now before this Court on the instant appeal. The law of the case doctrine is well settled. As far back as 1930, the United States Supreme Court made clear that:

> It is settled here that all points adjudicated by an appellate court upon writ of error or upon an appeal become the law of the case and are no longer open to discussion or consideration. But we have also held that ***this principle has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon the former writ of error and consequently were not before the appellate court of adjudication***. *Wilder v. Punta Gorda State Bank*, 129 So. 865, 866 (1930) (internal citations omitted)(emphasis added).

Furthermore, "Under the law of the case doctrine, an issue ***decided*** at one stage of a case is binding at later stages of the same case." *United States v. Escobar-Urrego*, 110 F. 3d 1556, 1560 (11th Cir. 1997)(emphasis added)

The Florida Supreme Court has explained that:

> The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.
>
> ***
>
> As to the scope of the law of the case doctrine, the Court in U.S. Concrete, 437 So.2d at 1063, explained that the doctrine is 'limited to rulings on questions of law actually presented and considered on a former appeal.'

This Court made clear in its May 18, 2015 Order that the issue of sanctions pursuant to 11 U.S.C. § 105 (a) was not one of the requested areas of relief before the Court and was NOT an issue on appeal. Therefore, it is absurd to suggest that this Court, in *affirming* the Bankruptcy Court's Order Denying Appellant's Motion to Reopen, somehow ruled on the issue of sanctions when it was not even before the Court, and therefore somehow *reversed*, a ruling of the Bankruptcy Court on the issue of sanctions that had not yet come before or been decided by the Bankruptcy Court. Such a scenario would require a psychic ability on the part of this Court to foresee the future and pre-empt it. Accordingly, Appellant's law of the case argument fails in its entirety and should not be considered by this Court.

II. JUDGE MAY PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF APPELLEE TRUSTEE HERENDEEN AND PROPERLY DENIED APPELLANT'S MOTION FOR SANCTIONS-THERE WAS NO ABUSE OF DISCRETION

When the issue of sanctions against the Appellees did come before the Bankruptcy Court, the Bankruptcy Court weighed the evidence before it, including numerous deposition transcripts, reviewed the pleadings, motions, supporting exhibits, heard the oral arguments of the parties, and reviewed the Florida Bar's letter closing the disciplinary proceedings against Appellee Thomas Lash, Esq. that found insufficient evidence that there was any violation of any rule adopted by the Florida Supreme Court governing attorney discipline. Pursuant to the court's discretion, the Bankruptcy Court determined that there was not even a "whiff of an abuse of process here" on the part of Appellees. Further, there was no evidence of conduct on the part of the Appellees that exhibited any wrongdoing, conduct that endangered the public or created a mockery of the court warranting sanctions against Appellees.

A. 28 U.S.C. § 1927 Does Not Apply To Appellee Herendeen; Therefore, As A Matter Of Law Summary Judgment In Favor Of Appellee Trustee Herendeen Was Correct

One basis on which Appellant sought sanctions against Appellees' Lash & Wilcox and Appellee Trustee Herendeen was pursuant to 28 U.S.C. § 1927. However, Appellant is barred from bringing any claim for sanctions against

Appellee Trustee Herendeen under this section of the United States Code because Appellees' Lash & Wilcox were Special Counsel to Appellee Trustee Herendeen as Chapter 7 Trustee and were employed to represent Appellee Trustee Herendeen as the client in the adversary proceeding. It is undisputed that on November 2, 2013, the Trustee filed an application to Employ Thomas A. Lash, Esquire, and the Lash & Wilcox law firm as Special Counsel. (Doc. 2-12). The Bankruptcy Court approved the application to employ the Lash & Wilcox Appellees. (Doc. 2-13). Put simply, Appellee Trustee Herendeen was the Lash & Wilcox Appellees' client in the adversary proceeding at issue. 28 U.S.C. § 1927 "Counsel's Liability for Excessive Costs" states as follows:

> 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 attorney's fees reasonably incurred because of such conduct.

Accordingly, "By its very terms…Section 1927 authorizes sanctions only against attorneys—not their clients." *Ettinger & Assocs. LLC v. Miller* (In re Miller), 529 B.R. 73, 92 (Bank., E.D. Penn. 2015). Appellee Trustee Herendeen testified that in her role as Trustee she obtains legal representation on a case-by-case basis when there is litigation that needs to be done that is outside her area of expertise. (2-147, PageID 2564). Appellee Trustee Herendeen testified further that she was the Lash

& Wilcox Appellees' client, was not involved in the drafting of the Adversary Complaint, and that she did not review the Adversary Complaint before it was filed. (Doc. 2-147, PageID 2634). Appellee Trustee Herendeen further testified that as the client in the Adversary Proceeding she does not do any filing or conduct discovery. (2-147, PageID 2642).

Appellant makes the improper argument that simply because Appellee Trustee Herendeen is an attorney she can be sanctioned under 28 U.S.C. § 1927. However, the *Amlong* case cited to by Appellant in support of Appellant's argument, actually supports Appellee Trustee Herendeen's position that as the Lash & Wilcox Appellees' client in the adversary proceeding at issue, it is improper to move for sanctions against Appellee Trustee Herendeen under 28 U.S.C. § 1927. The Eleventh Circuit Court of Appeals succinctly set forth the distinction between sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, which sheds light on the scope and legal standard of 28 U.S.C. § 1927 that is helpful to an analysis supporting the impropriety of sanctions against Appellee Trustee Herendeen pursuant to 28 U.S.C. § 1927:

> While many of the same general principles apply to sanctions under Rule 11 and sanctions under § 1927, Rule 11 and § 1927 are distinct sources of authority. They are aimed at addressing different kinds of misconduct, are different in scope, and are governed by quite different legal standards. *See e.g., Byrne v. Nezhat*, 261 F.3d 1075, 1106(11th Cir. 2001) (noting that Rule 11 is aimed primarily at pleadings and

> addresses the conduct of both parties and attorneys ***while § 1927 addresses dilatory tactics throughout the entire litigation and is focused solely on attorney conduct***)(internal quotations omitted)(emphasis added). *Amlong & Amlong, P.A. v. Denny's, Inc*., 500 F.3d 1230, 1241 n.1 (11th Cir. 2006).

Even if this Court were to find that section 28 U.S.C. § 1927 somehow applies to Appellee Trustee Herendeen, which as a matter if law it should not, § 1927 imposes three essential requirements that must be met for an award of sanctions:

- The attorney must engage in unreasonable and vexatious conduct;
- That unreasonable and vexatious conduct must be conduct that multiplies proceedings; and
- The dollar amount of the sanctions must bear a financial nexus to the excess pleadings, i.e., the sanction may not exceed costs, expenses, and attorneys' fees reasonably incurred because of such conduct. *Amlong & Amlong, P.A. v. Denny's, Inc*., 500 F.3d at 1239.

There is absolutely no evidence of unreasonable or vexatious conduct by Appellant that multiplied the proceedings. Quite the opposite. The timeline of the Adversary proceeding alone negates a § 1927 claim for sanctions against any of the Appellees. The Complaint for Unlawful Debt Collection Practices and Telephone Consumer Protection Act Violations was filed against Appellant on November 8, 2013. (Doc. 2-22) (Case No. 8:13-ap-01004-KRM, Doc. 1). On December 10, 2013, Counsel for Appellant served a Federal Rule of Bankruptcy Procedure Rule 9011 letter on the Lash &

Wilcox Appellees. (Doc. 2-29). On December 17, 2013, well within Rule 9011's safe harbor time period, Appellee Trustee Herendeen through the Lash & Wilcox Appellees filed a notice of voluntary dismissal of the Adversary Proceeding with prejudice. (Doc. 2-173). The entire Adversary Proceeding consisted of three (3) substantive filings. (Doc. 2-5, PageID 38-40). Appellant had only 1 substantive filing, which was an Unopposed Motion to Extend Time to Respond to Complaint. (Doc. 2-5, PageID 39, (Docket Entry 6)). This does not evidence unreasonable and vexatious conduct that multiplied the proceedings. It evidences counsel recognizing a mistake had been made and acting quickly to voluntarily dismiss the complaint with prejudice as soon as this mistake was brought to counsel's attention by opposing counsel.

Based on the above, Appellant's claim for sanctions pursuant to § 1927 fails as a matter of law. Appellant has no § 1927 claim for sanctions against Appellee Trustee Herendeen and, even if it did it cannot meet the requirements for justifying an award of sanctions pursuant to § 1927. As such, there was no abuse of discretion in granting summary judgment in favor of the Lash & Wilcox Appellees and Appellee Trustee Herendeen and

the exercise of judicial discretion in finding that sanctions under § 1927 are not warranted against the Appellees.

B. **There Was No Abuse of Discretion By The Bankruptcy Court In Finding That Sanctions Under 11 U.S.C. § 105 (a) Were Not Appropriate In The Case At Bar**

There is no question that the Bankruptcy Court has discretion pursuant to 11 U.S.C. § 105 to sanction conduct that the Bankruptcy Court deems constituted wrongdoing, that the public was endangered by such conduct, or that evidenced a mockery of the Court's processes. The bottom line is that the Bankruptcy Court, in its discretion, *after* reviewing extensive discovery including nine (9) deposition transcripts, reviewing the filings of all parties and hearing oral argument at the hearing on Appellees' Amended Motion for Summary Judgment, determined that there was not even a "whiff of an abuse of process" on the part of the Appellees. (Doc. 2-2, pg. 20). The Bankruptcy Court specifically set forth in its Order granting Appellees' Amended Motion for Summary Judgment on the issue of sanctions that "the Court does not believe in its discretion that sanctions under § 105 are appropriate under these circumstances." (Doc. 2-2, pg. 21). The Bankruptcy Court went on to explain that it has "imposed sanctions before" and if the Court "believed that the Trustee and Special Counsel had engaged in any wrongdoing, that the public was endangered by their conduct, or that there was any

mockery of the Court's processes, the Court would impose sanctions…." (Doc. 2-2, pg. 21). The Bankruptcy Court did not find any such conduct in the case at bar because none existed. It was well within the Courts discretionary power to deny Appellant sanctions against the Appellees. The Bankruptcy Court also found the fact that the Florida Bar determined further investigation into Appellant's alleged claims of solicitation was not necessary and continuation of disciplinary proceedings in the matter were inappropriate and making the decision to close the file was significant. (Doc. 2-2, PageID 19, ¶ 20; PageID 21, ¶ 27; Doc. 2-106). The Florida Bar made a compelling point in its letter to Appellant closing the file that "a disciplinary investigation is not a parallel proceeding nor should it be used to bolster arguments made by one or both parties to the court." (Doc. 2-106, PageID 1361). The Florida Bar saw through Appellant's attempt to use an unsupported sham Florida Bar grievance as fuel for its Motion for Sanctions and called it out in its letter to Appellant. Again, the only evidence of bad faith, vexatious conduct is on the part of Appellant.

The proper vehicle for an award of sanctions where the alleged sanctionable conduct is based on improper representations to the court in the form of a "petition, pleading, written motion, or other paper" would be pursuant to Federal Rule of Bankruptcy Procedure 9011. *See* Federal Rule of Bankruptcy Procedure 9011 (b).

However, because the adversary proceeding filed against Appellant was voluntarily dismissed within the 21 day "safe harbor provision" provided under the Rule, Appellant is precluded from seeking sanctions. Clearly, the case at bar is a perfect example of Rule 9011 doing exactly what it was meant to when a party is faced with inaccurate facts. Appellant brought those inaccurate facts to Appellees' attention and the Adversary Proceeding was dismissed. The Bankruptcy Court, in ruling on Appellees' Amended Motion for Summary Judgment on the issue of sanctions, very clearly laid out why it did not find that there was any sanctionable conduct that would warrant the Bankruptcy Court using its discretionary judgment to impose sanctions pursuant to 11 U.S.C. § 105 when the Adversary Proceeding was dismissed within the safe harbor provisions of Rule 9011. (Doc. 2-2). In short, Rule 9011 did what it was meant to do. There was no conduct evidencing an abuse of process that would lead the Bankruptcy Court to finding that sanctions were warranted after Appellees compliance with Rule 9011. Under the set of facts before this Court, and that were before the Bankruptcy Court, the discretionary ability to sanction pursuant to 11 U.S.C. § 105 acts as a heightened degree of punishment against parties that comply with Rule 9011 and dismiss a complaint when issues are brought to the parties attention via a Rule 9011 letter. Here Appellants attempt to use § 105 to defeat the whole purpose and intent of Rule

9011. That is not to say there could never be conduct warranting sanctions where a party dismissed an action within the safe harbor provisions found in Rule 9011, but that conduct would have to rise to a level of an abuse of process that simply is not present in the case at bar.

Appellant is attempting to circumvent Federal Rule of Bankruptcy Procedure 9011 based on the fact that it simply wants to run Appellees out of business and ruin their careers and reputation without any justification for doing so. This is obvious in Appellant's laundry list of sanctions it demanded against the Appellees. These included a total ban against Appellee Trustee Herendeen form serving as a trustee in any United States Bankruptcy Court (Doc. 2-69, PageID 918-919). However, under the set of facts present in this case, Appellees' voluntary dismissal of the Adversary Proceeding within the safe harbor time allowed by Rule 9011 precludes Appellant from obtaining sanctions under either of the other two (2) United States Code sections relied on by Appellant where, as here, the Court found that there "has been absolutely no showing that Special Counsel knowingly or recklessly filed a frivolous claim or did anything else inappropriate." (Doc. 2-2, pg. 18).

Section 105(a) provides as follows:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title

> providing for the raising of an issue by a party in interest 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).

"The Supreme Court has cautioned that because of the 'very potency' of a court's inherent power, it should be exercised 'with restraint and discretion'." *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991) (quoting *Chambers v. NASCO, Inc*., 501 U.S. 32, 44 (1991)). Furthermore, "sanctions imposed under a court's inherent power--commonly known as the bad faith exception to the "American Rule" against fee shifting--depend not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *United States v. International Brotherhood of Teamsters*, 948 F.2d at 1345 *quoting Chambers*, 111 S. Ct. at 2137 (internal quotations omitted).The law is clear that Courts should not use inherent powers if the applicable rules are up to the task. *See Chambers v. NASCO, Inc*., 501 U.S. 32, 50 (1991) (holding that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power."); *see also In re Gordon*, 484 B.R. 825, 832-33 (Bkrtcy. N.D. Okla., 2013) (holding that bankruptcy court cannot use Section 105 to order sanctions if another

rule or statute already provides the remedy the movant is seeking); *Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005) (recognizing that caution should be used because "there is a real risk that more particular restrictions found throughout the Code would amount to nothing, because the court could always use the residual equitable authority of § 105(a)"); *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1058–59 (7th Cir. 1998)) (holding "inherent power must be invoked with the utmost caution, particularly where the matter under consideration is governed by other procedural rules, lest ... the restrictions in those rules become meaningless.").

In *Chambers*, the Court permitted sanctions under the trial court's inherent authority only after concluding that much of the complained-of conduct was beyond the reach of the rules. 501 U.S. at 50 (1991). Had that conduct fallen under Rule 11, the court would not have permitted sanctions under the trial court's inherent authority. *Id*. The movant in *Gordon* claimed that the complaint never should have been filed, and as such, was sanctionable under the court's inherent sanctions authority pursuant to Section 105 of the Bankruptcy Code. 484 B.R. at 832-33. The court concluded to the contrary, holding that Rule 9011 was a more than an adequate tool to deal with the conduct at issue. *Id*. The court held that addressing a bad faith filing is the purpose of Rule 9011. *Id*.

In *Disch*, the court stated that "courts have carefully limited the circumstances in which" Section 105 may be used, cautioning that "[o]therwise, there is a real risk that more particular restrictions found throughout the Code would amount to nothing, because the court could always use he residual equitable authority of § 105 (a)." 417 F.3d at 777. The court therefore held that the powers conferred by Section 105(a) must be exercised "within the confines of the Bankruptcy Code." *Id.* (citing *In re Lloyd*, 37 F.3d 271, 275 (7th Cir. 1994)). Courts may not use their "equitable power to circumvent the Code." *Id*. (citing *Matter of Chicago, Milwaukee, St. Paul, & Pac. R.R. Co*., 791 F.2d 524, 528 (7th Cir. 1986)). The court went on to hold Section 105(a) does not create discretion to set aside the Code's rules and a court exceeds its equitable power by doing so. *Id.* (citing *In re Kmart Corp*., 359 F.3d 866, 871 (7th Cir. 2004)).

Furthermore in *Corley*, the appellate court reversed and remanded an order of sanctions imposed by the trial court where the requirements of Rule 11 were not satisfied. 142 F.3d at 1059. In so doing, the court stated, "inherent power must be invoked with the utmost caution, particularly where the matter under consideration is governed by other procedural rules, lest ... the restrictions in those rules become meaningless." *Id.* The court explained that allowing the imposition of a sanction under the court's inherent authority where the procedural requirements of Rule 11

were not met "would have the effect of rendering Rule 11's separate motion and safe harbor provisions meaningless." *Id.*

Finally, the ruling of the Eleventh Circuit in the *In re Mroz* matter supports – arguably requires – denial of Appellant's Motion for Sanctions. *See In re Mroz*, 65 F.3d 1567 (11th Cir. 1995). In *Mroz*, the Bankruptcy Court imposed sanctions that the district court affirmed; the Eleventh Circuit reversed and remanded. *See id*. at 1576-77. The trustee in *Mroz*, after interviewing the debtor and acquiring an affidavit from him, filed a complaint for recovery of a preferential transfer to the debtor's former spouse (Ms. Mroz). *Id.* at 1570. Ms. Mroz denied the allegations in the complaint, provided an affidavit affirmatively denying she received any monies, and requested that sanctions be imposed against the trustee. *Id.* at 1570-71. The trustee did not dismiss the complaint, and hearing was set. *Id*. at 1570-71. While Ms. Mroz's attorney engaged in some limited discovery, the trustee engaged in no discovery. *Id.* at 1571. At the hearing, the trustee had failed to subpoena the debtor, had no witness and no admissible evidence to support the complaint, and was unable to answer any questions about the alleged fraudulent transfer. *Id.* Ms. Mroz's counsel moved to dismiss the action and for sanctions, both of which were granted. *Id.* The sanctions, which were imposed under Rule 9011 and the court's inherent authority, were the subject of an appeal. *Id.*

In evaluating the sanctions imposed under Rule 9011, the court noted that "a complaint is factually groundless and merits sanctions only where the plaintiff has absolutely no evidence to support its allegations", and the relevant inquiry is what evidence was available at the time the complaint was filed. *See* 65 F.3d at 1573. The court went on to hold that the trustee's conversations with the debtor and counsel, along with the debtor's affidavit, which was made under penalty of perjury, was a sufficient basis to file the complaint, and that the facts as alleged if true would have established a claim for preferential transfer. *See Id*. The court also stated that while the affidavit "may have been insufficient to succeed at trial", "it was sufficient to warrant the filing of the complaint." *See Id*. Indeed, the Court stated, based on the information the trustee had, he "had a duty to act based on the Debtor's affidavit which provided at that time the sole evidence of the alleged preferential transfer." *Id.* at 1574. As a result, the court held that the complaint against Ms. Mroz was reasonably filed and sanctions under Rule 9011 based on the filing of the complaint were improper. *See Id*.

The Eleventh Circuit recognized that, although the filing of the complaint provided no basis for sanctions, the trustee's continuation of the litigation without developing evidence to support its claim and potentially after learning that the complaint was factually unsupported could justify sanctions under the court's

inherent authority. *Mroz*, 65 F.3d at 1576. The court noted that a court's inherent authority to sanction "is both broader and narrower than these other means of imposing sanctions", in that such authority extends to conduct not sanctionable under other rules, but the exercise of such authority requires bad faith. *See id*. Importantly, the facts in *Mroz* included the failure of the trustee and counsel to develop evidence in support of the claim, to subpoena their witness to the hearing on their claim, or to dismiss the case if unsupported. None of these factors exist in the case before this Court. In *Mroz*, had further investigation or discovery revealed evidence of the preferential transfer, had the debtor provided testimony at the hearing as to the preferential transfer, or had the trustee dismissed the matter earlier, there could have been no finding of bad faith and no grounds for sanctions.

In this case, by contrast, the lawsuit was voluntarily dismissed with prejudice approximately one month after the lawsuit was initiated. The Adversary Proceeding was dismissed before an answer was filed, before any motions were filed, before discovery, and within the Rule 9011 safe harbor time period. Other than the filing of an allegedly "frivolous complaint" (which is specifically covered by Rule 9011), Trustee and Special Counsel engaged in no potentially sanctionable conduct. That is, there was no conduct at issue implicating a wider range of litigation abuse; in fact, quite the opposite. The Bankruptcy Court addressed the

central issue which was that the Lash & Wilcox Appellees and Appellee Trustee Herendeen "should be sanctioned based on a process that involved having a paralegal attend §341 Meetings of Creditors, the use of a form questionnaire, and the preparation of a complaint based on debtor's §341 hearing testimony without further inquiry." (Doc. 2-2, PageID 18). The Bankruptcy Court found that relying on the debtor's "sworn testimony rather than the unsworn questionnaire is not negligence, malpractice, or bad faith." (Doc. 2-2, PageID 18). There was "absolutely no showing that Special Counsel knowingly or recklessly filed a frivolous claim or did anything else inappropriate." The debtor testified under oath that "Cadlerock continued to call him after it was notified that the debtor could not pay and was instructed to stop calling." (Doc. 2-2, PageID 18). It was entirely reasonable for the Bankruptcy Court to find that under these sets of facts, that while the Adversary Complaint contained some allegations that were erroneous, the Adversary Complaint itself was not frivolous.

In this case, the specific, relevant, and applicable rule is Rule 9011. Rule 9011 was designed to provide a mechanism for dealing with allegedly frivolous pleadings. Rule 9011 worked here. Cadlerock wrote a letter requesting that the Complaint be dismissed, triggering the safe harbor period. Special Counsel received the letter, evaluated the case, and dismissed the Complaint before the end

of the safe harbor period. This is precisely what legislators and rule making authorities had in mind when they implemented Rule 9011. Because Rule 9011 is the operative rule, and because nothing more than the filing of the complaint occurred, Cadlerock cannot use a less specific, less relevant, less applicable mechanism to seek sanctions. Allowing it to do so would constitute an end run around Rule 9011 and would decimate the "safe harbor" the legislature and rule making authority require. Rule 9011 is more than adequate to address the issues presented, and there is nothing else that Section 105 is needed to remedy.

a. Section 105(a) does not apply because Trustee Herendeen did not act in bad faith.

"One component of a court's inherent power is the power to assess costs and attorneys' fees against either the client or his attorney where a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'". *United States v. International Bhd. of Teamsters*, 948 F.2d at 1345 *quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974)). A finding of bad faith is 'the key to unlocking the court's inherent power' to impose sanctions. *In re Porto*, 645 F.3d 1294, 1304 (11th Cir. 2011). Such a finding "is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a

meritorious claim for the purpose of harassing an opponent." *In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008). A party also demonstrates bad faith by "delaying or disrupting the litigation or hampering enforcement of a court order." *Id*.

The Bankruptcy Court specifically found that there was no bad faith on the part of the Lash & Wilcox Appellees, which most certainly precludes a finding of bad faith as against Appellee Trustee Herendeen, a client of the Lash & Wilcox Appellees in the Adversary Proceeding at issue. The undisputed testimony of Appellee Thomas A. Lash, Esq. presented in this matter established that the erroneous allegations in the adversary proceeding complaint where an inadvertent "mistake." (Doc. 2-148, PageID 2775, 2801, 2831).

CONCLUSION

This Court should affirm the Bankruptcy Court's rulings. There was no genuine issue of fact preventing summary judgment. The Bankruptcy Court did not abuse its discretion when it denied Appellant's Motion for Sanctions.

Respectfully submitted,

/s/ James K. Parker
James K. Parker, Esq.
Florida Bar No.: 157526
BOYD RICHARDS PARKER & COLONNELLI, P.L.
100 SE 2nd Street, Suite 2600
Miami, Florida 33131
Telephone: (786) 425-1045
Facsimile: (786) 425-3905
ServiceMIA@boydlawgroup.com
tboyd@boydlawgroup.com
Counsel for Appellee, Christine Herendeen

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Rule 8015(a)(7)(B) because this brief contains 5,907 words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii).

/s/ James K. Parker
James K. Parker
Florida Bar No.: 157526

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 6, 2017, a true and correct copy of the Appellee's Answer Brief was filed with the Clerk of the Court using CM/ECF. I ALSO CERTIFY that the foregoing Brief is being served this day on all counsel of record identified on the below Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ James K. Parker
James K. Parker
Florida Bar No.: 157526

SERVICE LIST

Brendan A. McQuaid, Esq., Fergeson Skipper, Shaw, Keyser, Baron & Tirabassi, P.A. 1515 Ringling Blvd., 10th Floor Sarasota, Florida 34236 bmcquaid@fergesonskipper.com	**David S. Maglich, Esq.** Ferguson, Skipper, Shaw, Keyser, Baron & Tirabassi, P.A. P.O. Box 3018 Sarasota, Florida 34230-3018 dmaglich@fergesonskipper.com
Thomas A. Lash, Esq. Lash, Wilcox & Grace, P.L. 4950 W. Kennedy Blvd., Suite 320 Tampa, Florida 33609 tlash@lashandwilcox.com	**Christine L. Herendeen** P.O. Box 152348 Tampa, Florida 33684 clh@herendeenlaw.com
Raul Cabrera, Esq. Cabrera Law, P.L. 1228 East 7th Avenue, 2nd Floor Tampa, Florida 33605 raulcabreralaw@yahoo.com	**Katherine E. Yanes, Esq.** Kynes, Markman & Felman, P.A. 100 S. Ashley Drive, Suite 1300 Tampa, Florida 33602-5309 kyanes@kmf-law.com
Oiledkin Gonzalez 9508 Paces Ferry Drive Tampa, Florida 33615	