

1 WRITTEN DECISION - NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT	
SOUTHERN DISTRICT OF CALIFORNIA	
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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re:) CASE NO. 07-00052-H11
11 ECV DEVELOPMENT, LLC,) MEMORANDUM DECISION
12 Debtor.)
13 _____)

14 C.N.A. Foreclosure Services, Inc., Emerald Bay Financial,
15 Inc., Unified Mortgage Services, Inc., Stuart Weinshanker, FBO
16 First Trust Corp., Norm Bennett, Betty Wallace, Milan Kiser, Marika
17 Molin, Note and Trust Deed Holders (collectively "Creditors") move
18 for sanctions under Federal Rule Bankruptcy Procedure 9011 ("Rule
19 11"), against counsel for ECV Development, LLC ("debtor" or "ECV"),
20 Suppa, Trucchi, and Henein ("Suppa"), and debtor's principal,
21 Daniel Holbrook ("Holbrook").

22 On May 16, 2007, the Court heard Creditors' motion and found
23 that sanctions were appropriate under Rule 9011(b)(1) and (2).¹ At
24 issue is the amount of the monetary sanctions and whether, as an
25 additional sanction, Suppa should be suspended from practicing in
26 this Court until the sanctions are paid.

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¹ The Court found the petition was filed for an improper purpose and that the filing was not warranted by existing law. See Transcript pp. 12-18; 22:16-18; 31:8-21.

1 For the reasons set forth below, the Court finds that monetary
2 sanctions in the amount of \$13,016.00 will serve as a sufficient
3 deterrent.

4 I.

5 FACTS

6 Debtor's real property,² which is its sole asset, has an
7 extensive history with this bankruptcy court.

8 The real property was originally involved in the bankruptcy
9 filed by Olive XXIII, LLC ("Olive"), the original borrower from
10 Emerald Bay Financial Inc. ("Emerald Bay"). Olive filed its
11 petition on October 7, 2003 (Bankruptcy Case No. 03-09209), the day
12 prior to a scheduled foreclosure sale. Olive's bankruptcy was
13 dismissed on June 24, 2004, with a 180-day bar.³

14 On June 27, 2006, Olive filed its second chapter 11 bankruptcy
15 (Bankruptcy Case No. 06-01614) and listed the real property as an
16 asset of the estate. This Court dismissed the case on September 8,
17 2006, with a 180-day bar.

18 On July 28, 2006, ECV filed a bare bones chapter 11 petition
19 listing the real property as an asset of the estate (Bankruptcy
20 Case No. 06-02001.) On November 9, 2006, this Court dismissed the
21 case on the grounds it was filed in bad faith. Debtor filed its
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23 ² The real property consists of 23 vacant lots and one lot with a house on it.

24 ³ Olive thereafter sought an injunction in state superior court to prevent the
25 foreclosure. The injunction was denied. Shortly thereafter, Olive executed a
26 quitclaim deed in favor of AtVantage. AtVantage transferred title to the property
27 to ECV by grant deed on March 23, 2005. On March 29, 2005, ECV filed a suit against
28 Emerald Bay and Olive in superior court. ECV was granted a preliminary injunction
preventing foreclosure. Emerald Bay and other defendants moved for summary judgment
and the state court granted the motion. A judgment was entered in state court on
June 6, 2006, dismissing all counts of ECV's complaint.

1 notice of appeal on December 7, 2006. Recently, the Bankruptcy
2 Appellate Panel ("BAP") affirmed this Court's dismissal order.

3 Following the dismissal of ECV's bankruptcy case, the
4 foreclosure sale was rescheduled for January 9, 2007.⁴ Debtor
5 filed the instant case on January 8, 2007. Creditors moved for,
6 and obtained, relief from stay. Thereafter, Creditors sought
7 sanctions against Suppa and Holbrook.

8 II.

9 DISCUSSION

10 Creditors request monetary sanctions and also request that the
11 Court suspend Suppa from practicing in this Court until the
12 sanctions are paid.

13 Rule 9011(c) (2) provides in relevant part:

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

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

24 "A bankruptcy court has wide discretion to determine the
25 appropriate sanction under Rule 9011." In re Rainbow Magazine,
26 Inc., 136 B.R. 545 (B.A.P. 9th Cir. 1991) (citation omitted). The

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28 ⁴ Debtor also moved for a stay pending appeal on January 9, 2007, which this
Court denied on January 18, 2007.

1 Ninth Circuit in Rainbow Magazine explained:

2 Rule 9011 provides that in determining the
3 appropriate sanction, a court may include an
4 order to pay to the other party or parties the
5 amount of reasonable expenses incurred because
6 of the filing of the document, including a
7 reasonable attorney's fee. The measure of
8 sanctions under this language is not the actual
9 fees and expenses incurred, but those that the
10 court determines to be reasonable. Another
11 factor guiding a court's discretion is that a
12 court should impose the least severe sanction
13 likely to serve Rule 11's principal
14 goal--deterrence.

10 A. SUSPENSION FROM PRACTICE OF LAW

11 Suspension from the practice of law is a sanction available
12 for violation of Rule 9011. In re Brooks-Hamilton, 329 B.R. 270,
13 287 (B.A.P. 9th Cir. 2005) citing Weissman v. Quail Lodge, Inc.,
14 179 F.3d 1194, 1197 (9th Cir. 1999) (noting that temporary
15 suspension of counsel is a permissible sanction). "However, the
16 question a court must answer in deciding what sanction to impose is
17 what is the least severe sanction that will likely accomplish the
18 purpose of deterrence." Brooks-Hamilton, 329 B.R. at 291.

19 In Brooks-Hamilton, the bankruptcy court took into
20 consideration counsel's prior conduct in other cases in determining
21 what sanction would be appropriate to deter him from filing further
22 frivolous pleadings. The bankruptcy court noted that the attorney
23 had been sanctioned "over ten years ago" by being advised that the
24 three bankruptcy judges in the Oakland division would not appoint
25 him to represent chapter 11 debtors. More recently, the attorney
26 was sanctioned \$6,000 and required to complete 40 hours of
27 continuing legal education for filing a frivolous motion. After
28 considering the attorney's prior conduct and corresponding

1 sanctions, the court concluded that a "greater sanction" was
2 necessary to deter his conduct in the future. The court imposed a
3 six-month suspension from practice before the district's bankruptcy
4 courts.

5 Unlike the attorney in Brooks-Hamilton, there is no evidence
6 before the Court that Suppa has previously been sanctioned under
7 Rule 9011 in this Court. Further, Suppa was not involved in either
8 of Olive's bankruptcy filings.⁵ The Court therefore concludes that
9 monetary sanctions against Suppa, and not suspension, are the least
10 severe sanction likely to serve the purpose of deterrence.
11 Additionally, because the Court finds Holbrook, who is not an
12 attorney, jointly and severally liable for the monetary sanctions,
13 it would inequitable to suspend Suppa until the sanctions were
14 paid.

15 B. ATTORNEYS' FEES AND EXPENSES

16 "The starting point in determining an appropriate sanction
17 based upon the cost of attorneys' fees is 'the calculation of the
18 time reasonably expended in responding to the improper signing which
19 is then multiplied by a reasonable hourly rate.'" In Re Cedar Tide
20 Corp., 164 B.R. 808, 818-19 (E.D.N.Y. 1994) (citation omitted); see
21 also In re Express America, Inc., 132 B.R. 542, 545 (Bankr. W.D.
22 Penn. 1991). "The party seeking the sanction must provide the Court
23 with contemporaneous time and expense records that specify, for each
24 attorney, the date, amount of time, and nature of the work

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26 ⁵ In Olive's first bankruptcy case, James N. Maynard was listed as the
27 attorney for the debtor, and in Olive's second bankruptcy, Joseph C. La Costa was
28 listed as the attorney for the debtor. Although Suppa did not represent the debtor
in the Olive bankruptcies, it did represent ECV in the state court action mentioned
in n. 3, as well as the two successive ECV bankruptcies. [Transcript 17:4-6].

1 performed, and must also show that the fees and expenses were
2 reasonable and necessary." In re Spectee Group, Inc., 185 B.R. 146,
3 160 (Bankr. S.D.N.Y. 1995) (finding that court normally begins with
4 the lodestar amount, and may then adjust it upwards or downwards)
5 (citations omitted); see also In re American Telecom Corp., 319 B.R.
6 857, 874 (Bankr. N.D. Ill. 2004).⁶

7 "The plain language of Rule 9011 requires the court to
8 independently analyze the reasonableness of the requested fees and
9 expenses." In Re Davis, 246 B.R. 646, 657 (B.A.P. 10th Cir. 2000)
10 (case a remanded back to bankruptcy court to reexamine the attorney
11 fee request and permit response in writing to the reasonableness of
12 the fees) (citation omitted). Thus, when awarding attorneys' fees
13 and expenses to the Creditors, the Court must analyze the
14 reasonableness of such fees and expenses and also keep in mind that
15 the main purpose of the sanction is deterrence. "The Court need not
16 routinely award the loadstar amount, but only the portion of the
17 attorney's fee 'thought reasonable to serve the sanctioning purpose
18 of the Rule [11].'" Spectee Group, 185 B.R. at 160.

19 Creditors seek monetary sanctions for the legal fees of the
20 Law Offices of John W. Sunnen in the amount of \$13,522.50 from
21 January 9 - February 23, 2007. Suppa objects to several entries as
22 duplicative or improper, but fails to provide any authority or
23 analysis for their objections. The Court examines the time records
24 as submitted.

25 The time records primarily involve work on the motion for
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27 ⁶ The Court issued a "Notice of Opportunity for Additional Briefing,"
28 requesting Creditors' attorney, John W. Sunnen, to submit his time records and gave
Suppa and Holbrook an opportunity to respond.

1 relief from stay.⁷ The Court finds the following time entries of
2 Christopher J. Sunnen are disallowed:

3 * The entry on 1/10/07 is blocked out and the Court cannot
4 discern what work was done. A reduction of \$99 is appropriate.

5 * The entries on January 26, 2007, are secretarial in nature
6 and cannot be billed at a law clerk's rate. Missouri v. Jenkins,
7 491 U.S. 274, 288 at n.10 (1989) (stating that "purely clerical or
8 secretarial tasks should not be billed at paralegal rate, regardless
9 of who performs them...."). A reduction of \$274.50 is appropriate.

10 * The entries on February 15, 2007, which include preparing
11 the package for service, travel time to the court, and service of
12 the reply package with court, are also secretarial in nature. Id.
13 Therefore, a reduction of \$61 is appropriate.

14 * The entries on February 23, 2007, which relate to
15 reviewing the tentative ruling, attending the relief from stay
16 hearing, and travel to and from the court for the hearing on the
17 relief from stay, are disallowed as duplicative of the services
18 provided by John W. Sunnen. A reduction of \$72 is appropriate.

19 The Court also notes that the law firm has lumped the entries
20 making it somewhat difficult to determine how much time was spent
21 on particular activities. Nonetheless, based upon this Court's
22 knowledge of the issues and in trying similar matters, the Court
23 finds that the time associated with the lumped entries is reasonable
24 for the activities performed. See In re Addon Corp., 231 B.R. 385,
25 391 (Bankr. N.D. Ga. 1999) (court relied on its own experience and
26 expertise in determining hourly rates). The Court also finds the

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28 ⁷ Rule 9011(c)(1)(A) authorizes the Court to award fees to the prevailing party, but no fees were requested for the work on the motion for sanctions.

1 hourly rates charged by both Christopher and John Sunnen reasonable
2 and in line with prevailing market rates. Id. No other deductions
3 are warranted. The Court therefore awards \$13,016.00 in sanctions.

4 "All the signatories to a voluntary petition, including
5 bankruptcy counsel and a corporate debtor's president, subject
6 themselves to Bankruptcy Rule 9011." American Telecom Corp., 319
7 B.R. 857, 875 (Bankr. N.D. Ill. 2004); see also In re Start the
8 Engines, Inc., 219 B.R. 264, 271 (Bankr. C.D. Cal. 1998) (finding
9 corporation's attorney and president jointly and severally liable
10 for filing debtor's petition in violation of Rule 9011(b)(1)). The
11 Court made findings that the debtor filed its petition for an
12 improper purpose in violation of Rule 9011(b)(1). The Court
13 therefore imposes joint and several liability on Suppa and Holbrook
14 in the amount of \$12,016.00 because they are equally culpable for
15 filing the debtor's petition in violation of Rule 9011(b)(1).⁸

16 The remainder, \$1,000, will be imposed solely on Suppa because
17 it alone can be responsible for violations of Rule 9011(b)(2).

18 CONCLUSION

19 For the reasons noted above, the Court imposes joint and
20 several liability on Holbrook and Suppa in the amount of \$12,016.00.
21 The amount of \$1,000 will be imposed solely on Suppa.

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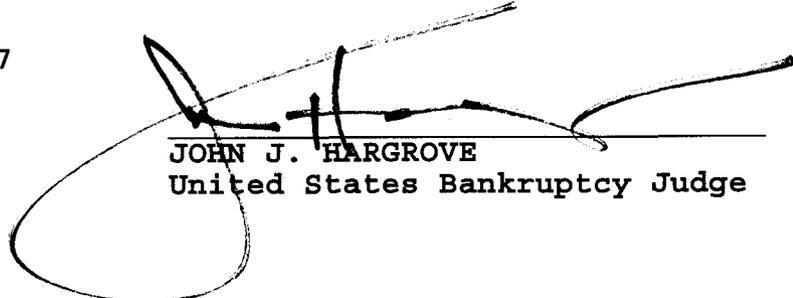
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27 ⁸ The Creditors did not seek sanctions against Attorney Raymond Lee who signed
28 the petition. Nonetheless, Rule 9011 (c)(1)(A) provides that absent exceptional
circumstances, a law firm shall be held jointly responsible for violations committed
by its partners, associates, and employees. No exceptional circumstances exist in
this case.

1 This Memorandum Decision constitutes findings of fact and
2 conclusions of law pursuant to Federal Rule of Bankruptcy Procedure
3 7052. Counsel for the Creditors is directed to file with this Court
4 an order in conformance with this Memorandum Decision within ten
5 (10) days from the date of the entry hereof.

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7 Dated: August 7, 2007



JOHN J. HARGROVE
United States Bankruptcy Judge

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