

ENTERED **MAR 21 2011**  
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**MAR 18 2011**

CLERK, U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTY

**NOT FOR PUBLICATION**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

<p>In re</p> <p>EQUIPOINT FINANCIAL NETWORK,</p> <p style="text-align: right;">Debtor.</p> <hr/> <p>EQUIPOINT FINANCIAL NETWORK,</p> <p style="text-align: right;">Plaintiff,</p> <p>v.</p> <p>BRIAN PIERCE, SR. AND BRIAN PEIRCE, JR.,</p> <p style="text-align: right;">Defendants.</p>	<p>Bankruptcy No. 08-05555-JM11</p> <p>Adversary No. 08-90488-JM</p> <p>MEMORANDUM DECISION DENYING PLAINTIFF'S REQUEST FOR RECONSIDERATION AND GRANTING DEFENDANTS' MOTION FOR SANCTIONS</p>
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I

On June 11, 2010, the Court issued a Memorandum Decision Requiring Additional Briefing and Declarations for Sanctions ("June 11 Decision"). In the June 11 Decision,<sup>1</sup> the Court concluded that it was appropriate to impose sanctions against the Plaintiff as

<sup>1</sup> Rather than repeat the relevant facts and background, or define terms included in the June 11 Decision, the Court incorporates that Decision in this Memorandum and will use the same terms herein.

1 requested by Defendants in the Discovery Motion and the Rule 9011  
2 Motion. However, the Court requested additional briefing and  
3 declarations to determine the appropriate sanctions to impose.

4 In response to the June 11 Decision, the Defendants supplied  
5 declarations which itemized all fees and costs incurred as a result  
6 of the Complaint, and requested a minimum award of the full amount  
7 itemized as sanctions. The total fees at that time were \$22,259.00.  
8 They also separately itemized fees of \$7,672.50 incurred to pursue  
9 the Rule 9011 Motion and \$704.00 for the Discovery Motion.

10 The Plaintiff<sup>2</sup> did not object to the reasonableness of the fees  
11 and costs incurred by Defendants. Instead, the Debtor filed an  
12 Additional Brief on Defendants' Motion for Sanctions Under FRBP 9011  
13 ("Additional Brief"). The Additional Brief asks the Court to  
14 reconsider the imposition of sanctions, or alternatively limit the  
15 monetary sanction to the amount for the Discovery Motion (\$704.00)  
16 and the fees and costs related to the cancelled depositions  
17 (\$2,495.29). The Debtor argued that the June 11 Decision was based  
18 on incomplete information, and submitted six declarations to support  
19 this position.<sup>3</sup>

20 The Defendants filed objections to the Six Declarations as  
21 untimely and irrelevant to the issue of the amount of sanctions.  
22 Defendants also objected to various paragraphs of the Six  
23 Declarations as lacking foundation or personal knowledge, or as

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25 <sup>2</sup> All references to Debtor or Plaintiff concerning papers filed and  
26 contentions or arguments made to the Court are intended to include the Smaha Law  
27 Firm, which signed, filed, submitted and advocated the positions set forth in the  
documents.

28 <sup>3</sup> The declarations were signed by Tim Rost, Bruce Barnes, Diana Clegg,  
Christina Naugle, John L. Smaha and Lawrence Wodarski ("Six Declarations").

1 containing hearsay, improper opinion testimony and legal  
2 conclusions. The matter was taken under submission after a hearing.  
3 After significant review and reflection, the Court issues this  
4 Memorandum Decision denying Debtor's request for reconsideration and  
5 awarding sanctions against the Reorganized Debtor and the Smaha Law  
6 Firm for the full amount of fees and costs itemized by the  
7 Defendants.

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9 II

10 **FACTS AND PROCEDURAL BACKGROUND**

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12 In addition to the information set forth in the June 11  
13 Decision, the following facts influenced the Court's decision. On  
14 November 15, 2006, the Debtor acquired Mortgage Net, USA ("Mortgage  
15 Net"), a mortgage company owned by Brian Pierce, Sr. The Debtor and  
16 Brian Pierce, Sr. entered a written employment contract dated  
17 November 16, 2006 ("Employment Agreement"). The Employment  
18 Agreement entitled him to a salary of \$180,000.00 per year and other  
19 benefits. Paragraph 9 of the Employment Agreement provides:

20 **9. Reimbursement of Expenses.** The Employee may  
21 incur reasonable expenses for furthering the Company's  
22 business, including expenses for entertainment, travel,  
23 and similar items. The Company shall reimburse Employee  
for all business expenses after the Employee presents an  
itemized account of expenditures, pursuant to Company  
policy.

24 Brian Pierce, Jr. was also employed by the Debtor, but  
25 apparently did not have a written contract. The record indicates  
26 that Brian Pierce, Jr. was also reimbursed by the Debtor for  
27 expenses that he properly itemized during the term of his

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1 employment.<sup>4</sup>

2       The Defendants each filed a proof of claim in this Chapter 11  
3 case for wages and reimbursement of expenses. Brian Pierce, Sr.  
4 filed Claim 28 for \$46,790.82. The Debtor filed an objection to  
5 Claim 28. The first ground for the objection was that the  
6 employment agreement "provided Claimant with salary only, with no  
7 agreement to reimburse Claimant for any expenses." The remaining  
8 grounds referred to allegations in the Complaint. A copy of the  
9 Employment Agreement, including Paragraph 9, was attached to the  
10 Complaint and to the objection to Claim 28. Brian Pierce, Jr. filed  
11 Claim 27 in the amount of \$32,480.15. The Debtor objected to Claim  
12 27 on the same grounds recited in the objection to Claim 28.

13       The Debtor filed the Complaint and objections to claims on  
14 November 5, 2008. The Defendants requested a hearing on the  
15 objections to claims, and the initial hearing was conducted on  
16 January 9, 2009, at the same time as the hearing on objections to  
17 the Debtor's second amended disclosure statement. The objections to  
18 Claims 27 and 28 were consolidated with the Complaint, and continued  
19 to February 27, 2009, for a pre-trial conference. The disclosure  
20 statement was to be amended. The Fourth Amended Disclosure  
21 Statement was approved by order entered January 22, 2009  
22 ("Disclosure Statement").

23       The Disclosure Statement described the source of the Debtor's  
24 financial difficulties arising from the losses incurred on seventeen

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27       <sup>4</sup> Based on e-mail correspondence dated January 8 -10, 2008, between Christina  
28 Naugle and Brian Pierce, Jr., which was attached to the Debtor's July 15  
Application.

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1 loans after investment criteria changed, and the attempts to raise  
2 additional capital in early 2008. The final blow was dealt when the  
3 warehouse line provider stopped funding small mortgage banks, such  
4 as the Debtor, so the Debtor was no longer able to operate as a  
5 mortgage bank after March 31, 2008. The Disclosure Statement  
6 indicates this change led to the withdrawal of all the Debtor's  
7 Midwest Branches from the company on May 1, 2008.

8       On June 20, 2008, the Board of Directors authorized Lawrence  
9 Wodarski to file Chapter 11 as president of the Debtor. After the  
10 petition was filed, the Board of Directors conducted a telephonic  
11 conference, and elected Bruce Barnes as the president and secretary  
12 of the Debtor. The other directors on the board resigned, and Mr.  
13 Barnes acted as the responsible officer for the Debtor-in-Possession  
14 during the reorganization.

15       The Debtor filed it's original plan and disclosure statement on  
16 October 8, 2008, followed by four amended versions. Each version of  
17 the plan proposed to cancel the shares of the Debtor and issue new  
18 common stock in the Reorganized Debtor to Safe Harbor Homes, Inc.  
19 ("Safe Harbor"). After negotiations and several revisions, the  
20 Official Creditors' Committee supported the final version of the  
21 Plan and Disclosure Statement.

22       Safe Harbor bought the stock of Reorganized Debtor for a  
23 payment of \$375,000.00<sup>5</sup>. Bruce Barnes and Daniel Farnsworth were  
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25       <sup>5</sup> The Plan called for a funding commitment of \$400,000.00, but that amount was  
26 reduced by \$25,000.00, an amount Safe Harbor had apparently provided to the Debtor  
27 for post-petition financing. There is no record on the docket that this financing  
28 was approved by the Court. The funding commitment in the initial plan was  
\$100,000.00.

1 identified as the managing partners of Safe Harbor, as the two  
2 members of the initial Board of Directors, and as the President and  
3 Treasurer of the Reorganized Debtor. Diana Clegg was identified as  
4 the Secretary of the Reorganized Debtor.

5       The Plan proposed to pay unsecured creditors a pro rata share  
6 of periodic distributions from a disbursement account maintained by  
7 a Plan Trust. The Reorganized Debtor would fund the Plan Trust from  
8 the \$375,000.00 paid by Safe Harbor, plus 50% of the net recovery of  
9 avoidance actions. The Reorganized Debtor was entitled to keep the  
10 other 50% of net proceeds, and was responsible for litigation  
11 expenses if there was no recovery on an action. The Disclosure  
12 Statement identified avoidance actions with a total potential  
13 recovery of \$1,000,000.00. This total included the \$500,000.00  
14 claim against the Defendants, so the claims in the Complaint were a  
15 significant portion of the amount the unsecured creditors could  
16 anticipate receiving.

17       The funds in the Plan Trust would be used to pay trust expenses  
18 of up to \$15,000.00, with the balance disbursed to the unsecured  
19 creditors. The Disclosure Statement estimated the total amount of  
20 unsecured claims to share in the pro rata distribution at between  
21 \$2,661,434.82 and \$3,241,091.79. The Disclosure Statement projected  
22 the dividend to the unsecured between 9.2% and 18.7%. Bruce Barnes  
23 was identified as the trustee for the Plan Trust.

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1 III

2 RECONSIDERATION OF THE JUNE 11 DECISION

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4 The Debtor contends that the June 11 Decision was based on  
5 incomplete information and the additional background on the  
6 passwords needed to access the computer and available documents  
7 explained in the Six Declarations should convince the Court to  
8 reconsider the June 11 Decision. The Court disagrees. The  
9 Additional Brief and the Six Declarations continue to follow the  
10 same path as the Complaint, the objections to Claims 27 and 28, the  
11 July 15 Application and the Debtor's Opposition to the Rule 9011  
12 Motion: by making arguments based on hearsay from unidentified  
13 sources or without sufficient foundation.

14 While the Six Declarations are marginally relevant to the issue  
15 of the amount of sanctions to award, most of the statements made in  
16 the declarations are not admissible. The detailed objections to the  
17 Six Declarations are well taken. Each declaration contains  
18 statements based on hearsay, information and belief, or lacks facts  
19 to explain what document or person is referred to, or where, when or  
20 how things happened. Rather than provide verified facts to support  
21 the allegations of the Complaint that the Defendants damaged the  
22 Debtor in an amount exceeding \$500,000.00 by diverting funds and  
23 requesting false or overstated expense reimbursements, the Six  
24 Declarations and Additional Brief are filled with inferences and  
25 conclusions that are based on rumor, innuendo and supposition.

26 Lawrence Wodarski was the Debtor's President when the Debtor  
27 acquired Mortgage Net and hired the Defendants as employees. He

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1 says he was personally involved with the decision and execution of  
2 shutting down the office controlled by the Defendants in December  
3 2007. His declaration provides no evidence that the Defendants  
4 improperly diverted funds<sup>6</sup>. The Wodarski declaration leaves the  
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6 <sup>6</sup> Mr. Wodarski mentions that the Defendants' agenda was to protect their  
7 family, they were insubordinate and refused to cooperate with the parent company.  
8 The declaration includes statements such as "a well known consultant spent a day  
9 with EFN early on in the acquisition period and he confided that the Pierces were  
10 'turf takers' of the first magnitude" and "an officer of EFN observed employees  
11 taking bankers boxes out of the office". He explained that the server with  
12 financial information recovered from the Defendants was "unaccessible because  
13 passwords were not provided by the Pierces. Further requests to get those passwords  
14 were refused by the Pierces." The declaration does not state who made the  
15 requests, when or how the requests were communicated to the Defendants or how the  
16 Defendants responded.

17 Similarly, the declaration states that the Debtor "continually made inquiries  
18 to the Pierces related to its operations, revenues and expenses. However, the  
19 Pierces made every effort to obfuscate a detailed examination of the income flow  
20 of their operations." Again, the Declaration lacks any facts about who made the  
21 inquiries, when or how they were communicated to the Defendants or what efforts the  
22 Pierces made to obfuscate an examination of the income flow of the operations.

23 The Wodarski declaration states that the Debtor's auditing firm noted serious  
24 deficiencies in the Pierces' internal controls, and refers to a report from the  
25 accountants dated April 5, 2007 ("Report"). The Report does note inadequate  
26 internal controls in the segregation of duties of the Mortgage Net subsidiary, and  
27 recommends the Debtor implement procedures and oversight to correct the deficiency.  
28 The Report also concluded that "no adjustment to reported financial statement  
balances resulted from the condition noted", and that the cause of the condition  
was "the Company purchased Mortgage Net, USA ... and did not undertake the necessary  
review of its internal control procedures." The Report also noted deficiencies in  
the Debtor's manual journal entries and capital stock records, which were not  
related to the Mortgage Net subsidiary.

The Wodarski declaration also mentions that the board had directed Brian  
Pierce, Sr. to find a buyer for his branch network or face action that could include  
closing the Tigard operation. To support this statement, he attached a letter dated  
November 13, 2007, which Mr. Wodarski sent to Mr. Pierce. The letter leads the  
reader to understand that the Board of Directors had authorized the Pierces to  
operate Mortgage Net as a separate subsidiary, and that the Board and the Defendants  
were in the process of modifying their relationship in November 2007. These changes  
ultimately resulted in the take over of the Tigard location on December 7, 2007,  
and termination of the Defendants by letters delivered on December 8, 2007.

The Wodarski declaration also mentions that Brian Pierce, Sr. had the Mortgage  
Net accounting department increase his salary in violation of written instructions  
from the Debtor. The Employment Agreement provided Mr. Pierce with an annual salary  
of \$180,000. The only evidence of an instruction to reduce salary was in the letter  
dated November 13, 2007, mandating Mr. Pierce to reduce his salary to that of Mr.  
Wodarski, \$7,500.00 per month. The declaration does not indicate any other changes  
in the salary, or how the employer could unilaterally modify the salary amount

1 Court with more questions than answers. The Court is puzzled how  
2 the Board of Directors was going to freeze all accounts for the  
3 Tigard office in December 2007, but was not able to locate these  
4 same accounts during this litigation.

5 The Declaration of the Debtor's Technology officer, Tim Rost,  
6 states the Debtor was never able to access the information stored on  
7 the computer for lack of a BIOS level password. Mr. Rost does not  
8 claim to have contacted the Defendants for the password, but  
9 provided this testimony based on his "understanding" that Mr.  
10 Wodarski requested the password(s) from the Pierces, and that to the  
11 best of Mr. Rost's recollection, the password was never provided to  
12 the Debtor.

13 The Barnes Declaration acknowledges that he has no personal  
14 knowledge of any wrong doing by the Defendants, but decided to sue  
15 the Defendants and object to their claims based on conversations he  
16 had with the other declarants. Rather than ask the Defendants to  
17 explain any problems with the Mortgage Net financial documents, he  
18 chose to request information from outside sources based on "a  
19 history of obfuscation from the Pierces" communicated to Mr. Barnes  
20 by other people. He attempts to justify the litigation with:

21 the simple fact that the Pierce's branch bank accounts  
22 were opened in unusual and confusing manner, with strange  
23 identifiers, is a strong indication of their efforts to  
24 hide facts and control all information. The accountants  
with whom EFN discussed the strange bank account

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included in the Employment Agreement.

26 Mr. Wodarski then discusses events concerning the December 7, 2007, closure  
27 of the Tigard office. It is not clear from the declaration that Mr. Wodarski was  
28 present for these events or how he knows what the US Bank manager may have done  
without knowledge of the Debtor's employee or consultant. This entire discussion  
appears to be based on hearsay.

1 identifiers informed EFN that this behavior could be  
2 indicative of people who are intent on keeping things  
hidden from transparent view.

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4 The Barnes declaration lacks any foundation or explanation of  
5 the unusual and confusing manner by which the bank accounts were  
6 opened, what or how the identifiers were strange, and who the  
7 accountants were that speculated on the intent of the Defendants, or  
8 what else the behavior could have indicated. The declaration ends  
9 with the statement "the Debtor, finally, and reluctantly, concluded  
10 that trying to get the Pierces to be open and cooperative with the  
11 discovery of information that rightly belonged to [the Debtor] was a  
12 completely hopeless adventure." The Court finds it odd that Mr.  
13 Barnes reached this conclusion on the eve of the Defendants'  
14 depositions, and without interviewing or deposing the Defendants or  
15 apparently anyone else from the Tigard office.

16 Christina Naugle is the Human Resources Manager for the  
17 Debtor. She testifies that Brian Pierce, Sr. operated his office  
18 completely independent of the Debtor. The declaration then refers  
19 to executive level vacation the Pierce family members were accruing  
20 and questions hours and salary of Helen Allen (Mr. Pierce, Sr.'s  
21 daughter), during her maternity leave. It is apparent that the  
22 Board of Directors allowed Mr. Pierce to operate Mortgage Net as a  
23 separate unit. There is nothing in the record to enable the Court  
24 to discern whether the Board imposed any specific parameters on Mr.  
25 Pierce's ability to run the operations of Mortgage Net before they  
26 decided to take control of the subsidiary on December 7, 2007.

27 John Smaha supplies a declaration about issuing subpoenas to US  
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1 Bank, instructions he received from his client, settlement offers he  
2 relayed to the Defendants and background on why the depositions were  
3 cancelled at the last minute. The Court has already described the  
4 Exhibit to the Non-Opposition as fulfilling the purpose of initial  
5 disclosures<sup>7</sup>. In spite of this finding, Mr. Smaha continues to  
6 point to the lack of initial disclosures in his declaration and in  
7 the Additional Brief as a reason to issue subpoenas for thousands of  
8 pages of bank records.

9 The Smaha declaration does not provide specific information  
10 about the contents of the subpoenas, or what records the Debtor  
11 reviewed to try and find the account information. The Exhibit  
12 disclosed that all accounts were transferred to Ron Oliveira on  
13 December 7, 2007. It also disclosed that all the accounts were  
14 established at the same US Bank branch in Wilsonville, Oregon.  
15 Finally, the Defendants responses to interrogatories identified  
16 Emilee O'Neill at US Bank in Wilsonville as the person responsible  
17 for opening or maintaining the accounts, and included her address  
18 and telephone number. The Smaha declaration does not indicate the  
19 Debtor or the law firm made any attempt to interview Mr. Oliviera or  
20 Ms. O'Neill while conducting discovery.

21 The Clegg Declaration complains that the Defendants did not  
22 comply with the Debtor's policies and procedures, reports were  
23 untimely and that her experience with the Senior Pierce was not  
24 positive. This declaration provides no facts to support the  
25 allegations of fraud, conversion or improper diversion of the

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<sup>7</sup> June 11 Decision, page 7 at lines 23 -24, and page 14 at line 10.

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1 Debtor's assets found in the Complaint. It does indicate that the  
2 Defendants did submit financial reports to the Plaintiff.

3 In short, the Debtor has provided no basis reconsider the June  
4 11 Decision. The Debtor had the information in the Six Declarations  
5 before opposing the Rule 9011 Motion. To the limited extent the  
6 information in the Six Declarations is admissible, there are still  
7 no facts presented to the Court to show that the Debtor or the Smaha  
8 Law Firm conducted a reasonable inquiry to determine that the  
9 allegations in the Complaint had evidentiary support. The Debtor's  
10 last minute attempts to settle the case by walking away was too  
11 little, too late. The Debtor had the opportunity to do just that  
12 during the safe harbor period provided by Rule 9011. Rather than  
13 move to dismiss the Complaint without prejudice during the safe  
14 harbor period, the Debtor chose to conduct expensive discovery,  
15 filed emergency motions, and was granted lengthy extensions that it  
16 requested from the Court.

17 The Barnes declaration and the Additional Brief justify the  
18 filing of the Complaint before locating any evidence to support the  
19 allegations in the Complaint because "the Debtor felt a sense of  
20 obligation and responsibility to the creditors to recover money from  
21 individuals that knowingly caused material harm to the Debtor." The  
22 Debtor relied on the Complaint as a method of funding the Plan.  
23 This is at best an irrelevant basis to file a complaint without any  
24 evidence, and at worst an improper motive to influence creditors  
25 into voting for a Plan based on the potential distributions from a  
26 lawsuit that lacked evidentiary support.

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1 IV

2 SMAHA LAW FIRM

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4 The Additional Brief ends with the assumptions and  
5 understandings of Debtor's counsel by stating:

6 Finally, Debtor's counsel notes that the Court's  
7 Memorandum does not make any specific reference to the  
8 potential liability of Debtor's counsel. The Court did  
9 not identify any document that Debtor's counsel signed  
10 with an improper purpose by Debtor's counsel. As such,  
11 Debtor and Debtor's counsel have operated under the  
12 assumption that the finding of sanctionable activity has  
13 been limited to the actions of the Debtor and Debtor only.  
14 If the Court intended for Debtor's counsel to be  
15 sanctioned under Rule 9011, then Debtor's counsel would  
16 request specific findings as to why Debtor's counsel  
17 should be sanctioned and would respectfully request a  
18 further opportunity to respond to any such findings that  
19 would find fault with Debtor's counsel. It is Debtor's  
20 counsel (sic) understanding that the Court has found fault  
21 with Debtor's actions after the filing of the Complaint  
22 and not with the Complaint itself. If this understanding  
23 is mistaken, Debtor's counsel will hopefully have an  
24 opportunity to present further briefing on any such  
25 findings.

16 The Rule 9011 Motion and the June 11 Decision were directed at  
17 the lack of investigation and evidentiary support for the  
18 allegations in the Complaint. The Complaint was signed by Debtor's  
19 counsel. The Debtor's Opposition to the Rule 9011 Motion ("9011  
20 Opposition"), was filed by the Smaha Law Group. The 9011 Opposition  
21 contained five sections and a conclusion. Section I, the statement  
22 of facts, was presented by "Plaintiff and their attorney John  
23 Smaha." Section II proclaims that "Rule 11 sanctions are  
24 inappropriate against Plaintiff and its counsel." Section III is  
25 titled "the allegation(s) in the complaint were and are supported by  
26 evidence." That section proceeds to explain that Mr. Barnes was  
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1 to the principle that the sanctions should not be more severe than  
2 necessary to deter repetition of the conduct by the offending  
3 person, or similarly situated people. In re DeVille, 361 F.3d 539,  
4 553 (9<sup>th</sup> Cir. 2004). Some factors relevant to determine an  
5 appropriate amount of monetary sanctions include the reasonableness  
6 of the amount requested, the minimum necessary to deter a repetition  
7 of the conduct, the ability to pay the sanction, and things such as  
8 the offending party's history, experience, the extent malice or bad  
9 faith played in the violation, and the risk of chilling the type of  
10 litigation involved. White v. General Motors Corp., Inc., 908 F.2d  
11 675, 684-85 (10<sup>th</sup> Cir. 1990).

12 The Defendants itemized their fees and expenses and request the  
13 sanction include payment of these amounts to the Defendants, plus  
14 any additional penalty to the Court that the Court deems  
15 appropriate. As noted earlier, there was no objection to the  
16 reasonableness of the lodestar calculation of fees and expenses  
17 incurred by the Defendants. The Court has reviewed the itemization  
18 and finds the amounts to be reasonable under a lodestar analysis,  
19 both the hourly rate charged and the amount of time spent on this  
20 matter. All of these fees and expenses result from the sanctionable  
21 conduct in filing and pursuing the Complaint without adequate  
22 investigation and in failing to dismiss the Complaint during the  
23 safe harbor period.

24 The Court concurs with Defendants. The minimum appropriate  
25 sanction is payment to the Defendants of the full amount of fees and  
26 costs they itemized to defend this proceeding. The Court recognizes  
27 that Rule 9011 is not a fee shifting statute. However, anything

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1 less would not effectively deter repetition of the violations by the  
2 Debtor, the Smaha Law Firm, or those similarly situated. The Debtor  
3 and the Smaha Law Firm have proven they were undeterred after the  
4 June 11 Decision.

5 A lack of experience offers no excuse. The Smaha Law Firm has  
6 been representing debtors before bankruptcy courts for many years.  
7 The attorneys have a duty as officers of the court to act as the  
8 gatekeeper to prevent a client from filing frivolous pleadings. The  
9 firm had to satisfy itself that there were facts to support the  
10 allegations in the Complaint. Blind reliance on the client is  
11 seldom a sufficient inquiry. In re Kunstler, 914 F.2d 505, 514 (4<sup>th</sup>  
12 Cir. 1990). It is definitely not so in a case like this where there  
13 was no pressure from a statute of limitations, and the Plaintiff had  
14 already seized control of the subsidiary almost year earlier.

15 The Court may consider the ability of a party to pay the  
16 sanction when deciding the appropriate amount to award. Gaskell v.  
17 Weir, 10 F.3d 626, 629 (9<sup>th</sup> Cir. 1993). The sanctioned party has  
18 the burden to produce evidence of the inability to pay. Id. The  
19 Debtor did not provide any evidence of an inability to pay, and only  
20 made a passing reference that it was "obviously a reorganized debtor  
21 with scarce resources."<sup>8</sup> The Court considered imposing an  
22 additional penalty payable into Court, but has decided against doing  
23 so, in large part because the Smaha Law Firm was denied a portion of  
24 their fees requested in this Chapter 11. The conduct in submitting,  
25 filing and advocating the papers in this case is exacerbated by the

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27 <sup>8</sup> Additional Brief, page 7, line 4.

1 arguments presented in the Additional Brief and the lack of  
2 admissible evidence found in the Six Declarations. The  
3 inappropriate advocacy reaches a crescendo with the request for a  
4 further opportunity to present briefing if Mr. Smaha's assumptions  
5 and understandings are mistaken. The Debtor and the Smaha Law Firm  
6 were provided ample time to submit all declarations and briefing on  
7 the amount of sanctions after the June 11 Decision.

8       Given the lack of investigation before filing the Complaint,  
9 the apparent failure to review the documents in their possession,  
10 the inaction during the safe harbor period, and continued arguments  
11 presented in the July 15 Application and the Additional Brief, these  
12 sums are necessary to deter repetition of similar actions.

13 These sanctions are awarded against the Reorganized Debtor and the  
14 Smaha Law Firm. The sanctions amount is not to come from the Plan  
15 Trust held for the benefit of the creditors.

16       Although the Complaint was filed before the Plan was confirmed,  
17 it was Bruce Barnes, the Reorganized Debtor and the Smaha Law Firm  
18 that had the opportunity to dismiss the Complaint during the safe  
19 harbor period. Had they dismissed the Complaint during that period,  
20 they could have avoided all liability. Instead, they chose to  
21 proceed with the Complaint, and ignore the reminders and reasonable  
22 questions raised by Mr. Thompson in the correspondence between him  
23 and Mr. Bravo during May and June 2008.<sup>9</sup> They continued to pursue  
24 the Quixotic quest after the Court issued the June 11 Decision.

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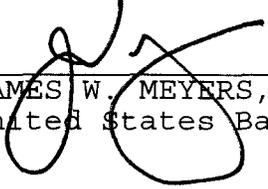
27       <sup>9</sup> Copies of these letters are attached to the declaration of Harold Thompson  
28 filed in support of the Discovery Motion on July 6, 2009.

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VII  
CONCLUSION

Debtor's request for reconsideration of the June 11 Decision is denied. Defendants' Rule 9011 Motion is granted. Monetary sanctions payable to the Defendants and their attorney, for the full amount itemized by Defendants in the declarations are awarded against the Reorganized Debtor and the Smaha Law Firm, jointly and severally. Counsel for Defendants is instructed to submit a judgment consistent with this Decision within 14 days.

Dated: **MAR 18 2011**

  
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JAMES W. MEYERS, Judge  
United States Bankruptcy Court