

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 97-03746
)	Chapter 11
UPLAND PARTNERS,)	
)	
Debtor.)	Re: Docket No. 3361, 3378
_____)	

MEMORANDUM OF DECISION REGARDING
ORDER TO SHOW CAUSE

This chapter 11 case was filed in November 1997, and has remained open for the past eight years due largely to the litigious conduct of William S. Ellis, Jr., an alleged creditor and party in interest. Mr. Ellis has unreasonably multiplied this litigation for no proper purpose. To date, over 3,400 papers have been filed and entered in the docket. The trustee, Richard Emery, has worked diligently to bring this case to conclusion, but Mr. Ellis' continued antics have derailed the trustee's efforts.

On November 14, 2005, the court issued an Amended Order Directing William S. Ellis, Jr. to Show Cause Why He Should Not Be Sanctioned (docket no. 3361, "OSC").¹ Mr. Ellis submitted a written response on December 2, 2005.² A

¹ The court previously entered an order identical in substance to the amended order. Due to an administrative error, Mr. Ellis was not served with the original order.

² Mr. Ellis filed a Memorandum in Response to Order to Show Cause (docket no. 3378), a Declaration Responsive to Order to Show Cause (docket no. 3379), and a Demand for Trial by Jury (docket no. 3380). Mr. Ellis did not request an evidentiary hearing.

non-evidentiary hearing was held on December 12, 2005, and the matter was taken under advisement.

I. BACKGROUND

When this case began, the bankruptcy estate of Upland Partners (“Upland”) consisted of approximately 50 acres of land in upcountry Maui referred to as the “Kulamanu project.” Quadrant Holdings Pty. Ltd. (“Quadrant”) held a first mortgage and Kula-Olinda Associates (“KOA”)³ held a second mortgage on the property.

Upland and predecessor entities controlled by Mr. Ellis owned the Kulamanu project since about 1960. From 1960 to 2002, only modest progress was made toward developing the project. Although the Kulamanu project faced physical and regulatory challenges, the biggest impediment to the project was the conduct of its principals, including Mr. Ellis. After an eight day trial in Adv. Pro. No. 99-0081 (an adversary proceeding brought by Mr. Ellis to challenge the claims of a secured creditor), the court found that:

8. In the context of this litigation, the Kulamanu Project, and the related agreements, Ellis, Upland, and KOA have never had the financial or the organizational ability to accomplish

³Mr. Ellis is the president of Olinda Land Corp., the sole general partner of KOA. Mr. Ellis apparently controlled KOA until the court authorized certain of its limited partners to act on behalf of KOA in 2003.

anything, without the assistance of others.

9. For Ellis, Upland, and KOA, nonperformance of obligations, litigation, bankruptcies, and the use of an array of Ellis-related entities have been the regular course of behavior.
10. The conduct of Ellis has greatly complicated both this adversary proceeding and the underlying bankruptcy case, in which Upland is the debtor-in-possession. As an example, on May 4, 2000, during the course of this trial, Ellis assigned or attempted to assign the claims of KOA to a third party. . . . This was done without notice to KOA's trial counsel, who appears to have worked closely with Ellis for many years. . . .
11. In the Upland chapter 11 case which is currently pending, Ellis filed claims 18, 19, 20, and 21. During the course of hearings on objections to those claims, it was discovered that Ellis had altered promissory notes attached to the proofs of claim by removing language of rescission. . . .
12. Ellis is a litigious person. According to his own testimony, lenders are reluctant to finance projects in which he has a role, because of his tenacity in resisting mortgage foreclosures.
13. Ellis has had three personal bankruptcies in this district. The last one, Case No. 72-391, was open for more than 20 years. The Kulamanu Project, which is involved in this adversary proceeding and is part of the bankruptcy estate of Upland, was part of that Ellis bankruptcy case.

14. Ellis has been a party to decades of failed efforts to develop the Kulamanu Project into residential subdivisions.

Mr. Ellis did not appeal from the judgment based on these findings.

As these findings note, Mr. Ellis has engineered or been involved in a series of bankruptcy cases in this court involving the Kulamanu project. These include:

- In re William S. Ellis, Jr., Case No. 72-00391, a case commenced under chapter XII of the former Bankruptcy Act on December 29, 1972, and closed on April 18, 1994;
- In re Upland Associates, Case No. 85-00501, an involuntary case commenced on October 16, 1985, and dismissed on August 9, 1987;
- In re Kulalani Associates, Case No. 85-00559, an involuntary case commenced on November 6, 1985, and dismissed on November 25, 1986;
- In re Kulamanu Associates, Case No. 85-00565, an involuntary case commenced on November 7, 1985, and dismissed on August 9, 1987;
- In re Kulamanu Associates, Case No. 91-00283, an involuntary case commenced on April 8, 1991, and closed on April 1, 1993 (although Mr. Ellis made several unsuccessful attempts to reopen the case in 1996 and 1997);

- In re Upland Partners, Case No. 94-01308, a voluntary chapter 11 case commenced on October 7, 1994, converted to chapter 7 on October 25, 1995, and closed as a no asset case on December 20, 1996; and
- In re Kula Olinda Associates, Case No. 01-03855, an involuntary case commenced on October 1, 2001, and dismissed on February 19, 2002.

This case began when creditor Richard Ferguson filed an involuntary chapter 11 petition against Upland on November 6, 1997. The timing was significant; the next day, a state court judge was scheduled to hear a motion for summary judgment in a proceeding to foreclose liens on the Kulamanu project. On November 7, 1997, Mr. Ellis joined in the petition. (docket nos. 2 and 4).

The Upland case exemplifies Mr. Ellis' habitual litigation conduct. As of January 27, 2006, 3,426 documents have been filed and docketed in this bankruptcy case. Since 1991, when the court implemented a computerized docketing system, only three cases commenced in the bankruptcy court for this district have had more docket entries. The debtors in those cases were Liberty House, Inc. (3,510 filings), the owner of a chain of department stores, Hamakua Sugar Company, Ltd. (3,490 filings), the owner of a large sugar plantation on the island of Hawaii, and Hawaiian Airlines, Inc. (5,824),⁴ a regional air carrier and

⁴ In re Hawaiian Airlines, Inc., Case No. 03-00817, filed in 2003.

public company. As a point of comparison, Aloha Airlines, Inc., a regional air carrier, had 2,163 docket entries and the first Hawaiian Airlines bankruptcy filed in 1993 had 2,143 filings. There is no good reason why the effort to reorganize this debtor with relatively modest assets and liabilities has spawned nearly as much litigation as the largest and most complex cases. Mr. Ellis has contributed more than his share of the filings in this case, and he has forced the other parties to make unnecessary filings and incur needless expense.

Mr. Ellis' conduct in this case is consistent with a larger pattern. That pattern is a matter of public record. Mr. Ellis has a long track record as an obstructive pro se litigant in Hawaii's state and federal courts for decades. The earliest published decision in which he appears is James v. Kula Development Corp., 49 Haw. 508, 421 P.2d 296 (1966). Many courts have commented adversely on his conduct in and out of court. See, e.g., In re Corey (Corey v. Loui), 892 F.2d 829 (9th Cir. 1989); Ellis v. Cassidy, 625 F.2d 227, 230 (9th Cir. 1980) (affirming the district court's decision that Mr. Ellis had "brought suit 'in bad faith and vexatiously'" and that his claims "were 'frivolous' or 'meritless'"); Sumida v. Yumen, 444 F.2d 1281, 1282 (9th Cir. 1971) ("[T]here seems to be no end to the multitudinous applications, briefs and maneuverings of the appellants through counsel and William S. Ellis, Jr., appearing in pro. per."); Ellis v. J-R-M Corp.,

324 F.Supp. 768, 773, 780 (D. Haw. 1971) (where the court stated that “This retroactive shifting of dates is typical of the various documents and maneuvers engineered by Ellis throughout . . .” and found that Ellis’ conduct “amount[ed] to a fraud on the court”); MDG Supply, Inc., v. Diversified Investments, Inc., 51 Haw. 375, 375-76, 463 P.2d 525, 526 (1969) (“Originally, Kula Development Corporation and William S. Ellis, Jr., had also joined as appellants. But they have withdrawn after considerably muddying the record.”); Harada v. Ellis, 4 Haw. App. 439, 444, 667 P.2d 834, 838 (Haw. App. 1983) (stating, in reference to the conduct of Mr. Ellis and his co-defendants, “We abhor such deplorable tactics. We will not tolerate them, and we encourage trial courts not to tolerate them,” and finding that the defendant’s appeal was frivolous); Ellis v. Harland Bartholomew and Assoc., 1 Haw. App. 420, 428, 620 P.2d 744, 749 (Haw. App. 1980) (“Th[e] record is replete with delay, maneuvering, contrivance and artful dodging of diligent prosecution We agree with the defendants-appellees’ assessment that [Mr. Ellis] has ‘impeded the progress of this litigation by every obstacle and maneuver which (his) ingenuity could command.’”)

Several motions for relief based on Mr. Ellis’ misconduct in this case have been filed.

- On May 26, 2000, Mr. Ferguson filed a motion to strike all objections and

future filings of Mr. Ellis related to a proposed plan of reorganization (docket no. 835). It appears that due to changes in the circumstances of the case, that motion was abandoned and not decided.

- In response to Mr. Ellis' objections and reconsideration of allowance or disallowance of claims, Mr. Ferguson and creditors Taylor Leong & Chee and Hugh Menefee Development Corporation moved to strike all of the objections filed by Mr. Ellis and requested that the court reject all future filings by Mr. Ellis unless such pleadings were filed and signed by an attorney (docket no. 934). The court ruled that the issue had to be presented in an adversary proceeding, but no one filed such a proceeding.
- Quadrant filed a motion for sanctions against Mr. Ellis on November 5, 2001 (docket no. 1619). That motion was denied because the court was reluctant to interfere with any party's ability to file pleadings with the court.
- Trustee Richard Emery filed a motion for sanctions against Mr. Ellis on April 8, 2002, for conveying real property interests belonging to the bankruptcy estate (docket no. 1879). The trustee's motion was granted in part and Mr. Ellis was cited for civil contempt and ordered to pay \$4,119.76. Mr. Ellis appealed the order and the district court affirmed.
- On December 23, 2002, trustee Emery moved for sanctions against Mr. Ellis

and KOA for obstructing and disrupting discovery (docket no. 2326). The court ordered Mr. Ellis to appear at a scheduled deposition but did not impose any sanction.

- Trustee Emery filed a Motion to Compel Discovery and for Sanctions (docket no. 2482) on June 25, 2003. Mr. Ellis was ordered to pay the trustee's attorney's fees and costs regarding the motion in the amount of \$1,345.
- On July 8, 2003, trustee Emery filed a second application for temporary restraining order against Mr. Ellis (docket no. 2500) to prevent Mr. Ellis from interfering with the property sold to KRS. That motion was denied because the injunctive relief sought should have been pursued in an adversary proceeding and the alleged conduct did not affect the bankruptcy estate.
- On July 29, 2003, trustee Emery filed a Motion to Declare William S. Ellis, Jr. A Vexatious Litigant (docket no. 2538). The court denied the motion on the ground that the motion sought injunctive relief which, pursuant to Fed. R. Bankr. P. 7001, must be sought in an adversary proceeding.
- On July 5, 2005, trustee Emery filed a Motion and Memorandum in Support of Motion to Distribute Remaining Assets of the Estate and Close the Case

(docket nos. 3245, 3246). In the memorandum the trustee asserted that Mr. Ellis should be declared a vexatious litigant and appropriately sanctioned. The court denied this aspect of the motion out of an abundance of caution to avoid possible procedural infirmities.

II. Examples of Improper and Vexatious Conduct by Mr. Ellis

Mr. Ellis has engaged and continues to engage in a type of gamesmanship like no other. As evidenced below, Mr. Ellis has changed positions throughout the case, filed motions, joinders, and objections then withdrew them,⁵ and filed numerous motions to vacate, alter or amend, and reconsider orders⁶ - all of which have unnecessarily prolonged this case and increased the cost to all parties involved. In most cases, Mr. Ellis' course of conduct has not served even his own economic interest. The only possible explanation for Mr. Ellis' consistent conduct is that he enjoys litigation for its own sake and desires to inflict harm on those who oppose him.

The best example of this pattern is Mr. Ellis' frequent, 180-degree reversals of position. For example:

⁵ See Exhibit A for a detailed but nonexhaustive list of motions, joinders, and objections Mr. Ellis filed then withdrew.

⁶ See Exhibit B for a detailed but nonexhaustive list of motions to vacate, alter or amend, and reconsider orders filed by Mr. Ellis.

- As noted above, Mr. Ellis joined in the involuntary petition, thus agreeing with Mr. Ferguson that Upland should be in bankruptcy. The order for relief was not entered until March 9, 1998 (docket no. 29), however, because Mr. Ellis filed a series of pleadings (docket nos. 9, 15 and 17) quibbling about service of the involuntary petition. If Mr. Ellis had sincerely believed (as his joinder in the petition indicated) that Upland belonged in bankruptcy, Mr. Ellis would have waived any objection to service. He must have been motivated by the desire to create delay and confusion.
- Almost a year later and long after the order for relief was entered, Mr. Ellis reversed his position on whether Upland should be in bankruptcy. He purported to withdraw his joinders, claiming he joined because he wanted the automatic stay to delay the foreclosure case while he was undergoing cancer treatment but he no longer wanted the stay since his initial treatment was complete (docket nos. 253 and 254). This statement proves that Mr. Ellis' motivations were improper from the outset. It is bad faith to commence a bankruptcy case solely for the purpose of invoking the automatic stay and interfering with litigation. Dressler v. Seeley Co. (In re Silberkraus), 336 F.3d 864 (9th Cir. 2003).

Mr. Ellis has established a pattern of objecting to claims and then

withdrawing the objections after the claimants have incurred the expense of preparing a response. For example, in September 1998, Upland, controlled and joined by Mr. Ellis,⁷ objected to various proofs of claims. These objections were all withdrawn after the initial hearing. In 1999, Mr. Ellis objected to various claims, including claims he previously objected to. Most of those objections were withdrawn. Again, in mid-2000, Mr. Ellis objected to various claims and later withdrew his objections.⁸

Mr. Ellis has also established a pattern of filing (or supporting) a plan of reorganization, withdrawing it, moving for dismissal based on the infeasibility of reorganization, withdrawing that motion, and then starting over with another plan.

- On July 6, 1998, Upland (under Mr. Ellis' control) filed a plan of reorganization and a disclosure statement (docket nos. 101 and 102). After numerous parties filed objections, Upland withdrew the plan and disclosure statement (docket no. 139).
- On November 18, 1998, Mr. Ellis filed a motion to dismiss the case (docket no. 275). He stated that dismissal was warranted "because of the inability of

⁷Upland designated Mr. Ellis as the debtor-in-possession's responsible person (docket nos. 52 and 53). Therefore, Mr. Ellis was effectively joining in his own motion.

⁸ See Exhibit A.

the Debtor in Possession and/or any other party in interest to effectuate a plan of reorganization.” The court then issued an order to show cause why the case should not be dismissed (docket no. 281). Three days later, Mr. Ellis reversed course and withdrew his motion to dismiss (docket no. 283).

- On December 15, 1998, Mr. Ferguson filed a plan and disclosure statement (docket no. 305). Soon after, Mr. Ellis filed a motion to approve the sale of eleven lots in the ordinary course of business (docket no. 314). After creditors objected, Mr. Ellis withdrew his motion (docket no. 333).
- On February 16, 1999, Mr. Ellis filed his own plan and disclosure statement (docket nos. 382 and 383). He later withdrew both (docket no. 478).
- Mr. Ellis filed another plan and disclosure statement on September 13, 1999 (docket nos. 606 and 607). A few months later, Mr. Ellis filed an amended plan and amended disclosure statement (docket nos. 729 and 730). Mr. Ellis reversed himself by withdrawing the plan (docket no. 883) and filing his second motion to dismiss the case (docket no. 868). He claimed that a chapter 11 reorganization or liquidation was not necessary since the property could be sold in the ordinary course of business. He later withdrew the motion (docket no. 894).
- On January 19, 2000, Mr. Ferguson filed an amended plan and amended

disclosure statement (docket no. 700). Mr. Ellis filed numerous objections (docket nos. 791, 792, 795, 797, 799, 800, 801, 803, 814, 820, 853, 860, 861, 862 and 863) which he later withdrew (docket no. 881).

- On June 19, 2000, Mr. Ferguson filed another amended plan and amended disclosure statement (docket nos. 892 and 893). Mr. Ellis objected (docket no. 970) but then withdrew his objection (docket no. 1004).
- Upland filed a second plan and disclosure statement on September 14, 2000 (docket nos. 1067 and 1068), which it withdrew on December 26, 2000 (docket no. 1178).
- On September 25, 2001, KOA (which Mr. Ellis controlled) filed a plan and disclosure statement (docket nos. 1566 and 1567). Mr. Ellis reversed course again by causing KOA to withdraw its plan and disclosure statement (docket no. 1789) and filing a motion to dismiss the bankruptcy case (docket no. 1785) based on the debtor's inability to effectuate a plan. That motion was withdrawn on March 25, 2002 (docket no. 1848).
- Mr. Ellis filed a fourth motion to dismiss on June 24, 2002 (docket no. 2034), arguing again that reorganization was impossible. That motion was denied at hearing on July 26, 2002.

Although Upland's only feasible plan was to sell the property which it

had failed to develop, Upland made little progress toward that goal. The court approved several sales proposed by Mr. Ellis and Upland, but very few of the sales closed. By late 2001 and early 2002, the situation appeared hopeless; the prior trustee withdrew his proposed plan of reorganization and resigned, and the court lifted the automatic stay to permit Quadrant and KOA to resume foreclosure proceedings. At this point, Richard Emery became successor trustee. Faced with imminent foreclosure sales, he negotiated a sale of the real property to KRS Development for \$2.2 million. The court approved the sale over Mr. Ellis' strenuous objections (docket no. 2043). The sale was consummated on August 15, 2002. Mr. Ellis unsuccessfully exhausted all appeals from the order approving the sale.

Once the sale was completed and Mr. Ellis' appeals were rejected, the estate consisted of a fixed amount of cash. In such a situation, a rational creditor or equity security holder who wished to maximize his or her recovery would have sought a prompt conclusion of the case with the least possible administrative expense. Mr. Ellis embarked on precisely the opposite course. He has litigated virtually every issue that can be litigated, compelling the trustee and his professionals to respond at the expense of the estate. Mr. Ellis' conduct has significantly reduced the amount which all creditors and interested parties,

including Mr. Ellis himself, will receive from the estate. The fact that Mr. Ellis' actions are contrary to his own economic interest demonstrates that he is acting for the improper purposes of delaying this litigation and punishing his adversaries, including the trustee and his counsel.

Mr. Ellis has tellingly described his own intentions and motivations as follows:

There's no basis in law for what [the trustee is] trying to do and so for as long as I can resist it I will. It's not – and I told Mr. Hosoda the other day, and he's quoting me, but basically I said I've got nothing to lose. I've been ripped off my life savings, basically two million from me, three million from my partners, and nothing to lose. And I believe I'm here on this earth to persist in this matter. There's never been anybody like me and hopefully there's nobody like me again. But this is my mission in life. You can slap me around, call me vexatious or whatever . . .

These statements are revealing. Mr. Ellis thinks that the property was sold for too little, that he was “ripped off,” that it is his “mission in life” to “persist in this matter,” and that he will not stop because he has “nothing to lose.” Mr. Ellis will continue to drag out this litigation as long as he can in order to carry out his self-imposed mission and punish the trustee and his professionals for “ripp[ing] off [his] life savings.”

III. LEGAL BASIS FOR SANCTIONS

Two primary sources of authority enable a bankruptcy court to sanction parties and their lawyers for improper conduct: (1) Rule 9011 of the Federal Rules of Bankruptcy Procedure and (2) the court's inherent power.⁹

A. Rule 9011 of the Federal Rules of Bankruptcy Procedure

Rule 9011 of the Federal Rules of Bankruptcy Procedure authorizes the bankruptcy court to impose sanctions. The language of rule 9011 is virtually identical to that of rule 11 of the Federal Rules of Civil Procedure, and therefore courts considering sanctions under rule 9011 rely on rule 11 cases. In re Grantham Bros., 922 F.2d 1438, 1441 (9th Cir. 1991). Rule 9011 imposes on parties the obligation to insure that all submissions to a bankruptcy court are truthful and for proper litigation purposes. Fed. R. Bankr. P. 9011(b). The Supreme Court has held that rule 11 is applicable to non-attorney parties as well as to lawyers, see Business Guides, Inc. v. Chromatic Communications Enter., Inc., 498 U.S. 533 (1991).

Rule 9011 states in part,

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading,

⁹28 U.S.C. § 1927 is unavailable because the Ninth Circuit has held that a bankruptcy court is not a "court of the United States" as defined in 28 U.S.C. § 451 and therefore it lacks the authority to impose sanctions under § 1927. In re Perroton, 958 F.2d 889, 896 (9th Cir. 1992). Thus, although the requirements of § 1927 are met here, the bankruptcy court may not impose sanctions pursuant to this section.

written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Fed. R. Bankr. P. 9011. Pursuant to Fed. R. Bankr. P. 9001(c)(1)(B), the bankruptcy court may award an appropriate sanction on its own motion if it first issues an order to show cause describing the specific misconduct. In determining whether sanctions are warranted under Rule 9011(b), the court “must consider both

frivolousness and improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other.” In re Silberkraus, 336 F.3d 864, 870 (9th Cir. 2003), citing Marsch v. Marsch, 36 F.3d 825, 830 (9th Cir. 1994). The imposition of rule 11 sanctions requires a showing of objectively unreasonable conduct. In re DeVille, 361 F.3d 539 (2004).

Mr. Ellis has consistently filed papers and pleadings for the improper purpose of delaying this case and increasing the expense incurred by other parties. Rule 9011 sanctions are amply justified.

B. Inherent Power

In Chambers v. NASCO, Inc., 501 U.S. 32, 42-47, 111 S.Ct. 2123 (1991), the Supreme Court held that Article III courts have an “inherent authority” to sanction “bad faith” or “willful misconduct,” even in the absence of express statutory authority to do so. In Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284-85 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that bankruptcy courts, like district courts, also possess that inherent power and noted that § 105(a) impliedly recognized this inherent power. Section 105(a) provides:

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. The court may impose inherent power sanctions sua sponte. See Link v. Wabash R. Co., 370 U.S. 626, 629-32 (1962). A court may impose sanctions pursuant to its inherent authority even when the same conduct may also be punished under another sanctioning statute or rule. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991). To impose inherent power sanctions, a court must find that a party acted in bad faith, vexatiously, wantonly, or for oppressive reasons or took actions in the litigation for an improper purpose. Fink v. Gomez, 239 F.3d 989, 992 (9th Cir. 2001), citing Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 & n.10 (1991). The court must make a specific finding of bad faith or conduct tantamount to bad faith. Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001). “For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith ‘does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorney’s fees.’” In re Itel Securities Litigation, 791 F.2d 672, 675 (9th Cir. 1986). Sanctions are available for a variety of types of willful actions, including

recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose. Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001). Sanctions should be reserved for the “rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose.” Operating Engineers Pension Trust v. AC Co., 859 F.2d 1336, 1344 (9th Cir. 1988).

In this case, inherent power is a proper basis for imposing sanctions upon Mr. Ellis. Mr. Ellis has acted in bad faith by filing meritless motions and objections for the improper purposes of indulging his propensity for recreational litigation and causing unnecessary expenses to the estate and his adversaries. Mr. Ellis has admitted to persisting in this matter because he has “nothing to lose” and because it is his “mission in life.” Mr. Ellis will continue this course of conduct unless restrained.

IV. DUE PROCESS REQUIREMENTS MET

In general, the notice regarding sanctions must specify the authority for the sanction, as well as the sanctionable conduct. In re Deville, 280 B.R. 483, 496 (B.A.P. 9th Cir. 2002). Here, the requirements of due process were met. The OSC stated that Mr. Ellis has “engaged in a pattern of filing meritless motions and objections for the improper purposes of indulging his propensity for

recreational litigation and attempting to punish the trustee and his professionals for selling the estate's assets contrary to Mr. Ellis' wishes." The OSC specifically indicated that the imposition of sanctions would be made based on Fed. R. Bankr. P. 9011, 28 U.S.C. § 1927, the court's inherent power, or other appropriate authorities. Mr. Ellis was also given the opportunity to respond in writing, and to appear at a hearing.

V. AVAILABLE SANCTIONS

A. Sanctions Under Fed. R. Bankr. P. 9011

A sanction imposed for violation of rule 9011 is limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Fed. R. Bankr. P. 9011(c)(2). The sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. Fed. R. Bankr. P. 9011(c)(2). An award to an adverse party of reasonable attorneys' fees and other expenses can only be made pursuant to a motion by that party. Fed. R. Bankr. P. 9011(c)(1)(A).

Courts have ordered non-monetary sanctions including enjoining litigants, particularly pro se plaintiffs, from bringing similar suits without leave of the court.

See Jean v. Dugan, 29 F.Supp.2d 939 (N.D.Ind. 1998) (prohibiting counsel from filing any paper on behalf of plaintiff until monetary sanctions were paid into court, and then only if counsel posted an additional \$5,000 bond to cover possible future sanctions); Vasile v. Dean Witter Reynolds, Inc., 20 F.Supp.2d 465 (E.D.N.Y. 1998), aff'd, 205 F.3d 1327 (2nd Cir. 2000) (imposing \$10,000 sanction and enjoining pro se litigant with history of ignoring court orders from initiating new civil actions in district court without prior approval of court); Fariello v. Campbell, 860 F.Supp. 54 (E.D.N.Y. 1994) (requiring particularly vexatious pro se plaintiff to seek leave of court before filing any future actions).

Based on Mr. Ellis' track record and admitted intentions, nothing will deter Mr. Ellis from future improper litigation conduct short of an order prohibiting him from filing papers without leave of court.

B. Sanctions Under the Court's Inherent Power

The inherent sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics. In re Dyer, 322 F.3d 1178, 1196 (9th Cir. 2003). Only compensatory as opposed to punitive sanctions are authorized under this authority. See In re Dyer, 322 F.3d 1178, 1197 (9th Cir. 2003); In re Deville, 280 B.R. 483, 494-98 (B.A.P. 9th Cir. 2002). "Because of their very potency, inherent powers must be exercised with

restraint and discretion.” Chambers, 501 U.S. at 44. However, “[a] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” Id. at 44-45. The Chambers court delineated a broad range of situations for which a variety of sanctions were deemed appropriate and noted that even outright dismissal of a lawsuit lies within the court’s inherent power. Id. at 43-45. Sanctions may include awarding attorneys’ fees and related expenses for bad faith conduct. Chambers v. NASCO, Inc., 501 U.S. 32 (1991). Sanctions may also include enjoining a party from filing pleadings when and to the extent necessary to protect the court and other parties from the chaos and burdens of vexatious, duplicative, and frivolous litigation. Reilly v. Hussey (In re Reilly), 112 B.R. 1014, 1017 (B.A.P. 9th Cir. 1990). The issuance of such an injunction is in the trial court’s discretion, but such injunctions may be imposed only in extreme circumstances, and the scope of the injunction must be narrowly prescribed to fit the abuse that the court seeks to prevent. Id.

A court may also impose a complete bar to filing pleadings or may condition filings on obtaining leave of court. An order imposing pre-filing review conditions must satisfy the following requirements: (1) the party must have had adequate notice and an opportunity to oppose the order; (2) there must be an adequate record for review showing, at least, that the litigant’s activities were

numerous or abusive; (3) the court must make a substantive finding as to the frivolous or harassing nature of the litigant's actions; and (4) the order must be narrowly tailored to fit the particular problem involved. De Long v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990), cert. denied, 498 U.S. 1001 (1990). These requirements are met in this case.

VI. MR. ELLIS' ARGUMENTS ARE WITHOUT MERIT

A. The Order To Show Cause Is Not Barred By Res Judicata

In his memorandum filed in response to the Order to Show Cause, Mr. Ellis argues that the OSC is barred by the Order Denying Trustee Richard Emery's Motion to Declare William S. Ellis, Jr. A Vexatious Litigant entered September 26, 2003 ("Order"). This argument fails for three reasons. First, the Trustee's motion was denied on the grounds that it sought injunctive relief which, pursuant to Fed. R. Bankr. P. 7001, must be sought in an adversary proceeding. This purely procedural disposition has no claim preclusive effect. Second, the denial was not "with prejudice." Lastly, the motion and order were filed more than two years ago and Mr. Ellis has multiplied his improper conduct since then. Res judicata, therefore, is inapplicable.

B. No Finding of Contempt of Court

Mr. Ellis argues that this court's inherent powers are inapplicable to

the OSC because Mr. Ellis was not found to be in contempt of court under § 105(d).¹⁰ Inherent power may be employed without resort to contempt proceedings so long as the sanctions are compensatory. In re Deville, 280 B.R. 483, 497 (B.A.P. 9th Cir. 2002), citing Chambers, 501 U.S. at 42-51. The Ninth Circuit has concluded that there is a difference between the civil contempt authority and the inherent sanction authority provided by § 105. In re Dyer, 322 F.3d 1178, 1196 (9th Cir. 2003). Civil contempt authority allows a court to remedy a violation of a specific order while the inherent power sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics. In re Dyer, 322 F.3d 1178, 1196 (9th Cir. 2003); citing Fink v. Gomez, 239 F.3d 989, 992-93 (9th Cir. 2001). In addition, before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct. Dyer, 322 F.3d at 1196. Thus, the court's inherent powers are applicable to the OSC and Mr. Ellis' assertion is incorrect.

C. No Violation of First and Fifth Amendment Rights

Mr. Ellis argues that any orders precluding him from filing papers in this case and any related adversary proceeding, or providing that he may file some

¹⁰ Mr. Ellis cites to § 105(d). However, the correct citation is § 105(a).

or all such papers only with prior court permission, would be a denial of his Fifth Amendment due process rights under § 1109(b) of the Bankruptcy Code and his freedom of speech guaranteed by the First Amendment. He further argues that “injunctive relief under § 105 must be ‘necessary or appropriate to carry out the [reorganization or discharge] provisions of the Code’” and that this court lacks jurisdiction to enjoin his First Amendment rights as a sanction.

Bankruptcy Code § 1109(b) provides that any party in interest may raise, appear, and be heard on any issue in a chapter 11 proceeding. 11 U.S.C. § 1109(b). Courts have held, however, that “the right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious.” In re Armstrong, 297 B.R. 154, 161 (Bankr. D. Utah 2003), citing Tripati v. Beaman, 878 F.2d 351, 353 (10th Cir. 1989). As discussed above, a court may impose pre-filing requirements as long as the party had adequate notice and an opportunity to oppose the order, there is an adequate record for review, the court makes a substantive finding as to the frivolous or harassing nature of the litigant’s actions, and the order is narrowly tailored to fit the particular problem involved. De Long v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990), cert. denied, 498 U.S. 1001 (1990). Here, a pre-filing screening is acceptable because it is not an excessive response to Mr.

Ellis' clear abuse of the system and he will still have access to the court.

Further, Mr. Ellis' First Amendment right is not violated because the First Amendment does not shield improper tactics used by litigants to advance their interests, even if those tactics involve communication of a message. See, e.g., United States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997). In De Long v. Hennessey, 912 F.2d 1144 (9th Cir. 1990), the Ninth Circuit Court of Appeals observed that “[t]here is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.” Id. at 1147. Courts have issued restrictive pre-filing orders against vexatious litigants with abusive and lengthy histories of litigation. Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1197 (9th Cir. 1999). Such pre-filing orders may require the litigant to obtain leave of the court or file declarations that support the merits of the case before filing further actions or papers. See e.g., In re Burnely, 988 F.2d 1, 3-4 (4th Cir. 1992) (approving district court's order imposing pre-filing review system on litigant); Ketchum v. Cruz, 961 F.2d 916, 921 (10th Cir. 1992) (upholding district court's order restricting plaintiff's pro se access to the district court and requiring litigant to obtain leave of court to file actions pro se); Cofield v. Alabama Public Service Commission, 936 F.2d 512, 518 (11th Cir. 1991) (affirming district court's order

requiring pre-filing screening of litigants' pleadings).

D. Lack of Financial Resources Does Not Bar Sanctions

Mr. Ellis contends that he lacks the financial resources to pay monetary sanctions. This argument is irrelevant because no monetary sanctions will be imposed at this time. All sanctioning power for past, present, and future conduct is, however, reserved.

E. No Appellate Sanctions Imposed

Mr. Ellis argues that appellate courts have exclusive jurisdiction to sanction appellants because of frivolous appeals and that appellate sanctions are limited to attorney's fees and costs. This is not relevant because the sanctions imposed on Mr. Ellis are based solely on his actions in this court. The appeals brought by Mr. Ellis were mentioned in the OSC simply to point out that the appellate courts have rejected Mr. Ellis' argument that this court has violated his rights.

F. No Right to Trial by Jury

Mr. Ellis filed a demand for trial by jury regarding the order to show cause. "A jury of one's peers is of the utmost importance when a court uses its inherent powers to impose a serious criminal sanction." F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc., 244 F.3d 1128, 1140 (9th Cir. 2001).

Here, Mr. Ellis does not have a right to a jury trial because no criminal sanction is being imposed. United States v. Powers, 629 F.2d 619, 625 (9th Cir. 1980).

VII. CONCLUSION

The only way to preclude Mr. Ellis from engaging in vindictive and recreational litigation is to enjoin him from doing so. Mr. Ellis' consistent course of conduct and his own statements make it clear that he will persist unless prevented.

Accordingly, an appropriate separate order will enter enjoining Mr. Ellis, as well as his agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from filing any paper in this court or appearing at any hearing in this or any other case, without prior leave of court, except that they may (subject to Fed. R. Bankr. P. 9011 and all other applicable provisions of law regulating the conduct of litigants) (1) file a notice of appeal from the order and any papers necessary to perfect that appeal (such as designations of the record), (2) file requests for leave to file other papers, and (3) file papers and appear solely for defensive purposes in Emery v. Ellis, Adv. Pro. No. 05-90128.



/s/ Robert J. Faris

United States Bankruptcy Judge

Dated: 03/15/2006

Date	Docket No.	Motion/Joinder/Objection filed by Mr. Ellis	Withdrawal Date	Docket No.
11/07/1997	2	Joinder to involuntary petition as trustee in dissolution for Ferguson, Inc.	11/05/1998	253
11/07/1997	4	Joinder to involuntary petition as unsecured creditor	11/05/1998	254
07/16/1998	110	Joinder in motion to extend 180-day exclusive period for acceptance of plan	08/11/1998	141
09/01/1998	155	Joinder in debtor's objection to claim 12	10/14/1998	222
09/10/1998	162	Joinder in debtor's objections to claims 26, 27, 28 & 29	10/14/1998	224
09/11/1998	170	Joinder in debtor's objection to claim 22	10/14/1998	230
09/11/1998	172	Joinder in debtor's objections to claims 31, 32 & 33	10/14/1998	226
09/25/1998	191	Memorandum opposing intervention by limited partners of creditors	10/14/1998	227
10/09/1998	216	Objection to Sept. 16, 1998 and Oct. 2, 1998 declarations of Stanley Unten	10/14/1998	228
11/18/1998	275	Motion to Dismiss	11/23/1998	283
12/21/1998	314	Motion for Authority to Sell Real Property Free & Clear of Liens	01/06/1999	333
01/14/1999	341	Objection to Claim nos. 36 & 7	03/04/1999	399
01/21/1999	352	Objection to Claim no. 11	03/04/1999	401
02/08/1999	368	Response to OSC	03/22/1999	420
02/16/1999	382, 383	Plan and Disclosure Statement	06/01/1999	478
03/12/1999	412	Objection to Claim no. 37	04/08/1999	442
05/18/1999	466	Objection to Claim nos. 18, 19, 20 & 21	07/30/1999	565
07/13/1999	510	Objection to Claim no. 37	07/29/1999	547
07/14/1999	515	Objection to Claim no. 36	07/29/1999	549
07/30/1999	557	Objection to Claim no. 12	09/02/1999	592
02/22/2000	729, 730	Amended Plan and Disclosure Statement	06/14/2000	883
05/11/2000	791	Objection (First) to Confirmation of Plan by Ferguson, Menefee & Leong (various)	06/13/2000	881
05/22/2000	816	Motion to Vacate or Amend Order Approving Disclosure Statement	06/14/2000	890
06/07/2000	868	Motion to Dismiss	06/20/2000	894
06/23/2000	907	Objection to Claim no. 37	01/29/2002	1756
06/23/2000	909	Objection to Claim no. 41	10/15/2003	2649
06/26/2000	915	Motion to Determine Value of Secured Claims nos. 23, 39 & 40	08/16/2000	1021
06/26/2000	921	Motion for Evidentiary Hearing to Determine Applicability of Equitable Subordination	07/28/2000	997
07/18/2000	970	Objection to Confirmation of Plan by Ferguson, Menefee & Leong	07/31/2000	1004
10/27/2000	1124	Joinder in Motion for Use of Cash Collateral	12/27/2000	1181
12/08/2000	1154	Motion to Amend Findings and Order re: Motion to Appoint Ch 11 Trustee	04/23/2001	1307
04/25/2001	1310	Motion to Clarify Order re: Motion to Appoint Ch 11 Trustee	05/29/2001	1338
07/05/2001	1390	Motion to Amend Findings on Motion to Terminate Trusteeship and Make Additional Findings	08/29/2001	1513
08/06/2001	1421	Motion to Enforce Carve-Out or to Vacate Order re: Motion to Appoint Ch 11 Trustee	08/29/2001	1514
08/13/2001	1435	Motion to Approve Sale of All Real Property of Estate w/ Entitlements	09/07/2001	1536
08/28/2001	1485	Evidence that Luersen Architects and Austine, Tsutsumi & Assoc have no obj to revised offer of sale	09/10/2001	1538
08/30/2001	1523	Reply to Opposition to Motion to Approve Bulk Sale of 8 Lots	09/10/2001	1539
12/04/2001	1686	Ex Parte Requests for Entry of Order Approving Sale of Lot 4 other than in ordinary course	12/27/2001	1718
01/02/2002	1725	Motion to Terminate Trusteeship	03/25/2002	1847
01/02/2002	1728	Motion to Vacate Order Approving Bulk Sale of 8 Lots	02/14/2002	1787
02/14/2002	1785	Motion to Dismiss	03/25/2002	1848
02/28/2002	1805	Joinder in Motion to Authorize and Direct Payment of Water Bills and Loans	03/25/2002	1845
04/22/2002	1918	Motion for Authority to Sell 5 Residential Lots other than in ordinary course	05/16/2002	1979
05/08/2002	1956	Objections to and Joinder in, Motions to Reinstate Automatic Stay	05/16/2002	1980
09/19/2003	2420	Motion to approve Withdrawal of Secured Claim nos. 50 and 51	04/07/2003	2426
09/24/2003	2598	Objection to M/Approve Settlement w/ Ferguson	10/15/2003	2648
08/16/2005	3313	Objection to Handout on Aug. 15, 2005	12/16/2005	3386

Date	Docket No.	Motions to Vacate, Alter or Amend, and Reconsider	Outcome	Date	Docket No.
06/15/2001	1370	Motion to Amend Findings and Make Additional Findings and to Amend Order	denied	08/28/2001	1488
07/13/2001	1396	Motion for Findings on Application by Nunokawa and to Amend Order	denied	08/31/2001	1524
04/18/2002	1910	Motion to Amend Order entered April 9, 2002 re: Use of Cash Collateral	denied	04/29/2002	1933
06/27/2003	2488	Motion to Vacate Null and Void Order Awarding Fees and Expenses	denied	07/01/2003	2492
02/02/2004	2742	Motion to Vacate Null and Void Order entered January 23, 2004 Awarding Fees and Expenses to Duca, et al.	denied	02/11/2004	2752
05/07/2004	2867	Motion to Vacate Order entered April 28, 2004, Awarding Fees and Expenses to Trustee and Counsel	denied	05/11/2004	2872
			granted in part,		
			denied in part		
12/23/2004	3086	Motion to Amend Findings, Conclusions, and Judgment entered December 15, 2004 re: Duca Fees	denied	01/13/2005	3099
01/14/2005	3106	Motion to Set Aside or Amend January 5, 2005 Judgement	denied	02/01/2005	3147
05/02/2005	3221	Motion to Vacate Judgment Approving Settlement entered April 20, 2005	denied	06/28/2005	3239
07/22/2005	3267	Motion to Amend Orders entered July 14, 2005 re: Conveyance of Roadway and Common Area Lots	denied	08/02/2005	3285
01/13/2006	3403	Motion to Amend Order entered January 4, 2006 Awarding Fees and Costs to Duca et al.	denied	01/20/2006	3411

Exhibit B