IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: TEAM SYSTEMS INTERNATIONAL, LLC, Debtor.	Chapter 7 Case No. 22-10066 (CTG)
GEORGE L. MILLER, Plaintiff, v. DEBORAH EVANS MOTT, *et al.*, Defendants.	Adv. Proc. No. 23-50004 (CTG) **Related Docket Nos. 153, 156, 174, 239**

MEMORANDUM OPINION

This Memorandum Opinion resolves three pending disputes in this adversary proceeding in which the trustee is seeking to recover millions of dollars that were allegedly transferred prepetition from the debtors to the defendants.[1] The defendants are the owners of the debtor and entities those owners controlled. In January 2023 this Court entered a preliminary injunction that froze certain of the defendants' assets.[2] It did so based on evidence suggesting that the defendants had engaged in

[1] Many of the applicable pleadings and orders have been docketed in both the main bankruptcy case as well as the adversary proceeding. In the interest of simplicity, this Memorandum Opinion will refer only to the docket in the adversary proceeding unless otherwise specified.

[2] While other individuals and entities are also defendants in this adversary proceeding, for the purpose of this Memorandum Opinion, the term "defendants" refers to Deborah Evans Mott, Steven M. Acosta, Christopher Mott, John S. Maciorowski, and Addy Road LLC. For clarity, it bears note that the Court originally enjoined the members of the debtor from transferring or encumbering certain real properties by order issued in July 2022 in the main bankruptcy case. *See In re Team Systems International, LLC,* Bankr. D. Del. No. 22-10066,

serious misconduct in the bankruptcy case itself. Specifically, the Court found that the debtor failed to disclose on its Statement of Financial Affairs certain prepetition payments it made to the defendants. And the Court found that the defendants used white-out to alter the debtor's bank statements, which the debtor produced to the trustee, to conceal the fact that the defendants were the recipients of the transfers. The trustee obtained clean copies of the statements directly from the banks, revealing the defendants' alterations to the documents. The three disputes addressed in this Memorandum Opinion are as follows:

1. In February 2024, the defendants moved to set aside the January 2023 preliminary injunction. The defendants sought, as their lawyers put it, to "push back" on the narrative reflected in the Court's preliminary injunction decision by intimating that someone else – most likely counsel for the creditors who obtained judgments against the debtor in a prepetition lawsuit – was responsible for altering the bank statements.

Both the chapter 7 trustee and the judgment creditors responded to that motion by seeking sanctions under 28 U.S.C. § 1927 against the attorneys who filed it. As will be further described below, this Court believes that federal courts' vast powers to impose sanctions on lawyers who appear before them should be used very sparingly. But even so, the Court reluctantly concludes that it has no choice but to

D.I. 222. Matters on the docket of the main bankruptcy case are hereafter cited as "Main Case D.I. __." The January 2023 order that was the subject of the motion to vacate extended that July 2022 order.

impose sanctions against the lawyer who had principal responsibility for the motion to vacate the preliminary injunction.

2. Following the evidentiary hearing on the § 1927 motion, counsel for the defendants sent a letter to the Court that purported to supplement the record and provide additional legal authority in opposition to the motion. The trustee has moved to strike that letter. To the extent that the letter seeks to introduce evidence into the record, that request is denied. The Court accordingly will not consider any of the factual material that defendants have chosen to provide, for the first time, in a letter to the Court sent after the conclusion of the evidentiary hearing. To the extent, however, that the letter simply advances legal arguments and points to authority in support of the defendants' position, the Court has reviewed and considered them (as it has the authorities submitted by the other parties in their post-hearing submissions). There is no need, however, to "strike" the letter from the Court's docket. The motion to strike is therefore denied.

3. In addition to the sanctions motion described above, the trustee has filed a second motion for sanctions. Defendants responded to the trustee's adversary proceeding by counterclaiming against the trustee, though in his personal capacity, alleging that the trustee's actions were inconsistent with his fiduciary duties as trustee. The trustee seeks Rule 11 sanctions against the defendants' attorney for having asserted those counterclaims. Unlike the first motion (which makes baseless and irresponsible factual allegations against others) the counterclaim is more of a plain vanilla legal pleading that advances aggressive and perhaps erroneous legal

theories. Unlike the motion to vacate, the defendants withdrew their offending pleading, though because it was not withdrawn within the Rule's 21-day safe harbor period, that withdrawal does not affect the question whether they should be sanctioned for having filed it. In the typical case, the party whose legal position is incorrect loses on the merits, but the lawyers are not sanctioned. This is such a case. The Rule 11 motion will be denied.

Factual and Procedural Background

The Court addressed the circumstances around the entry of the preliminary injunction in an extensive written opinion issued in January 2023.[3] In 2022, two creditors obtained a substantial judgment against the debtor in the U.S. District Court for the Northern District of Florida.[4] After failing to obtain a stay of the enforcement of that judgment, the debtor filed this bankruptcy case. The judgment creditors moved to dismiss the bankruptcy case alleging that it was filed in bad faith. An evidentiary hearing raised serious questions about the debtor's conduct.

As one example, it turned out that the debtor had falsely claimed, in the Florida litigation, that certain expenses related to the delivery of water to the victims of Hurricane Maria in Puerto Rico. Such expenses operated to reduce the debtor's liability to the judgment creditors. One such claimed expense was for amounts paid to a company called "All Aqua." In fact, discovery provided in connection with the

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[3] D.I. 29. The Court's opinion can also be found at *In re Team Systems International, LLC*, No. 23-50004, 2023 WL 1428572 (Bankr. D. Del. Jan. 31, 2023).

[4] Those creditors, GPDEV, LLC and Simons Exploration, are hereinafter referred to as the "judgment creditors."

motion to dismiss the bankruptcy case revealed that All Aqua did not deliver water supplies. Instead, it installed a custom swimming pool at the house of Deborah Mott, the debtor's principal owner.[5] After the parties agreed that conversion of the case to a chapter 7 would better serve the interests of creditors and the estate than would dismissal, the Court converted the case.[6]

The chapter 7 trustee initiated this adversary proceeding, seeking to avoid and recover certain prepetition transfers that the debtor allegedly made to the defendants as fraudulent conveyances.[7] The trustee thereafter moved the Court to enter a preliminary injunction that would freeze the defendants' assets. The basis for that preliminary injunction was that the debtor failed to disclose certain transfers to its owners (defendants in this adversary) or to companies they controlled, as required. Defendant Mott signed under penalty of perjury the debtor's Statement of Financial Affairs, which failed to disclose these transactions. Even more troubling, bank statements that the defendants produced to the trustee in discovery had whited out information that would have revealed to whom those transfers were made. The trustee obtained clean copies of those statements from the banks, revealing that the defendants were recipients of the transfers.

On account of this misconduct, in January 2023 the Court entered orders, docketed on January 27, 2023, that froze certain of the defendants' assets pending

[5] *In re Team Systems International LLC*, 640 B.R. 296 (Bankr. D. Del. 2022).

[6] Main Case D.I. 151.

[7] D.I. 1.

the disposition of this adversary proceeding.[8] The Court's opinion, which set forth the reasons for the entry of the injunction, issued a few days later – on January 31, 2023.[9]

A year later, on January 31, 2024, defendants moved to vacate that preliminary injunction.[10] It is the briefing that the defendants filed in support of that motion that is the basis for the present sanctions motion. The brief asserts that the injunction arose from "major misrepresentations made by opposing parties."[11] As the Court separately explained in a bench ruling issued during the April 29, 2024 hearing, the motion was untimely filed, as the one-year deadline set forth in Civil Rule 60(c)(1) runs from the entry of the injunction, not the issuance of the opinion explaining the reasons.[12] The merits of the legal arguments advanced in the brief are no longer critical to any matter before this Court. The specific factual assertions in that pleading, however, form the basis for the sanction motions.

In substance, the brief accuses counsel for the judgment creditors (who had also obtained copies of the bank statements in discovery in the Florida litigation) of

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[8] D.I. 25.

[9] D.I. 29. *In re Team Sys. Int'l, LLC*, No. 22-110066, 2023 WL 1428572 (Bankr. D. Del. Jan. 31, 2023).

[10] D.I. 140.

[11] D.I. 141 at 1. An amended motion and memorandum were filed at D.I. 145 and 146. Those changes do not materially affect this analysis.

[12] *See* April 29, 2024 Hr'g Tr. at 35-38 (relying on *Johnson v. Life Ins. Co. of N. Am.*, 626 F. App'x 379, 383 (3d Cir. 2015) (holding that one-year limit in Rule 60(c)(1) must be strictly enforced), and *Cumberland Mut. Fire Ins. Co. v. Express Prods., Inc.*, 529 F. App'x 245, 250 (3d Cir. 2013) (holding that it is the court order, and not the explanatory memorandum, that begins the time for appeal; the same must be true of a motion for relief from a court order).

having made the white-out alterations to the debtor's bank statements. A declaration, submitted by Steven M. Acosta,[13] asserted that the debtor provided bank statements to its original bankruptcy counsel, Robinson & Cole, that did not contain the white-out redactions. Based on that claim, the defendants' brief concludes that the creditors "misrepresented who did the key redactions."[14] And while that statement, standing alone, stops short of pointing the finger at the judgment creditors, the rest of the brief can fairly be read to accuse the judgment creditors of this misconduct. "The only inference possible on this evidence," footnote 15 asserts, "is that the redactions came from the creditors."[15]

The brief in support of the motion to vacate also makes other factual assertions and legal arguments which will not be discussed.[16] The Court has denied the underlying motion to vacate as untimely, and none of the other factual assertions would warrant the imposition of sanctions. Therefore, this Memorandum Opinion focuses on the defendants' assertion (or "inference") that it was the judgment creditors who were responsible for making the white-out redactions to the bank statements. The defendant's brief in support of the motion to vacate was signed by

[13] D.I. 148.

[14] D.I. 141 at 22.

[15] *Id.* at 13 n.15.

[16] For example, one of the other bases for the motion to vacate was that many of the exhibits on which the Court relied in granting the preliminary injunction, all of which came into evidence without objection, should have been excluded *sua sponte* because they contained inadmissible hearsay. *See* D.I. 141 at 3-8.

three lawyers – Frederick B. Rosner from The Rosner Law Group LLC, Michael M. Munoz from Golenbock Assor Bell & Beskoe LLP, and Randy Mott.[17]

The trustee responded to that motion on February 16.[18] The opposition attached a declaration by Bradford Babbitt, who is the general counsel of Robinson & Cole. That declaration asserts, contrary to Acosta's declaration, that the bank statements that the debtor first provided to its lawyers at Robinson & Cole already had the white-out redactions.[19]

Defendants responded by withdrawing, "without prejudice, those portions of the Motion that seek to vacate the Court's finding that the Members were responsible for the white-outs identified" in the Court's January 2023 opinion.[20] The withdrawal states that "[w]hile Defendants continue to stand by the veracity and accuracy of all statements made in the Motion, and all information submitted with the Motion, they also believe that the Robinson & Cole declaration and exhibits thereto create a dispute such that Defendants will not meet their burden to vacate the Court's finding

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[17] D.I. 141 at 22. The judgment creditors objected to the *pro hac vice* admission of Mott on the ground that (among other things) his application "fails to disclose his familial relationship with his clients. Upon information of belief, Mr. Mott is Deborah Mott's ex-husband and Christopher Mott's father." D.I. 165 at 1. While Bankruptcy Rule 2014(a) requires proposed counsel to the trustee or committee to disclose all connections with parties in interest, the Court is not otherwise aware of an obligation to disclose a professional's relationship to that professional's clients, and the judgment creditors pointed to none. The Court accordingly granted the motion to appear *pro hac vice*. D.I. 171.

[18] D.I. 153.

[19] D.I. 153-8. The Babbitt Declaration was not admitted into evidence at the hearing and is not being relied on to establish the truth of the matter asserted. It is described for the purpose of explaining the unusual procedural posture of the matter before the Court.

[20] D.I. 172 at 3.

that the Members were responsible for the white-outs identified in the Decision."[21] Thereafter, both Rosner and Munoz withdrew as counsel for the defendants.[22] Mott remains as counsel.

Needless to say, an allegation that either a party or an attorney fabricated evidence is an exceptionally serious one. As will be described below, this Court would not lightly reach the conclusion that a party's conduct was sufficiently "vexatious" to warrant the imposition of sanctions under § 1927. But the making of such a serious allegation against another lawyer, without strong evidence supporting the truth of that allegation, is precisely the sort of conduct that might require the imposition of sanctions in order to protect the integrity of the judicial process. The April 29, 2024 evidentiary hearing shed further light on how that allegation came to be made. The basic facts as elicited in that evidentiary hearing were as follows:

1. William Homony, a partner at Miller Coffey Tate and a professional retained by the trustee, has been involved in the pursuit of the alleged fraudulent conveyances. He testified at the preliminary injunction hearing, and again took the stand in April 2024. He stated that the whited-out bank statements were produced by the debtor in response to the trustee's request that the debtor turn over, to the trustee, its financial records.[23] This testimony was consistent with his prior statements before the Court.

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[21] *Id.*

[22] D.I. 206, 216.

[23] Apr. 29, 2024 Hr'g Tr. at 101, 133-135. As described above, the Court has not admitted the Babbitt Declaration into evidence. *See supra*, n. 198. The Court relies on Homony's

2. Steven Acosta, a member of Team Systems International and one of the defendants in this action, testified (consistent with his declaration) that the documents that the members produced to the trustee did not have any white-out redactions, except for certain handwritten notes that were on the original documents, that were whited out before the documents were produced.[24]

Significantly, on cross-examination, Acosta testified that he was still in possession of some of the original documents at issue. Those would appear to include the bank statements to which the white-out had been applied, and that the parties refer to as the "painted" documents. Acosta acknowledged that these documents belonged to the debtor, and that he has them "in storage."[25] When pressed, he elaborated that "[w]ell, I mean in storage in a closet. You know, in a closet in my house."[26] Later, however, Acosta suggested that the "set with the paint on it" (referring to the whited-out handwritten notes) is "with Ms. Mott."[27]

Significantly, this Court previously ordered Deborah Evans Mott and Steven Acosta to "turnover all assets, documents, and other property of the Debtor to the Trustee on or before July 13, 2022."[28] In light of Acosta's testimony that he and/or Mott in fact retained copies of the debtor's original bank statements that they had

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testimony in support of its factual determination that the whited-out documents were produced to the trustee by the debtor.

[24] Apr. 29, 2024 Hr'g Tr.at 150, 165, 175.

[25] *Id.* at 181, 193.

[26] *Id.* at 182.

[27] *Id.* at 193.

[28] Main Case D.I. 222 ¶ 2.

long ago been ordered to turn over to the trustee, the Court does not credit Acosta's statements regarding those bank statements.[29]

3. Munoz testified that before he filed the motion to vacate, he had received Acosta's declaration, in which Acosta stated under oath that the documents he had provided to Robinson & Cole did not contain any white-out redactions.[30] On cross-examination, Munoz explained that Randy Mott "did the most work" on the motion to vacate.[31] He further testified that he had asked the defendants whether they had "the painted documents … and I was told that they didn't have those copies to provide to me."[32]

4. Rosner testified that when he was retained, his client "had identified as one of its goals, to push back on the evidentiary record created" in the hearing on the motion for a preliminary injunction.[33] He explained that he was not primarily a litigator. The client had retained David Wilks from the Wilks Law Firm to play that

[29] Further, Acosta presented a document that purported to be the unredacted bank statements with a bates stamp. The purpose of attaching this document to his declaration was to show that the defendants produced "unpainted" documents to Robinson & Cole, who added the bates stamp numbers. Without drawing further conclusions, the Court does not find this to be credible. There were obvious differences between the new document and the ones previously presented in the case. For example, the new document's bates number did not match the "painted" bank statement. The new document's bates stamp was "TSI000038" but the "painted" document previously submitted was labeled "TSI000138." Further, the new document did not have a "CONFIDENTIAL" label affixed to the bottom of the page, whereas the whited-out document did bear such a label. *Compare* D.I. 425-3 at 3 of 4 with Main Case D.I. 436-6 at 3 of 4.

[30] Apr. 29, 2024 Hr'g Tr. at 202.

[31] *Id.* at 203.

[32] *Id.* at 205-206.

[33] *Id.* at 226.

role, but Wilks had thereafter resigned from the representation.[34] The defendants then retained Munoz to serve as lead litigator. Subsequently, "Randy Mott was enlisted … to prepare the pleading that's before the Court today."[35] Rosner explained that Mott "had sufficient time, where I did not, to look at the Florida record and the record before this Court to develop the arguments that he set forth in the 60(b) motion."[36] Rosner noted that "the principal intellectual architect and draftsperson was Mr. Mott working, I believe, with Mr. Munoz, and I played really no role in that endeavor, because that's not my skill set."[37] Rosner also volunteered that the defendants "steadfastly denied throughout the course of [his] representation that they made those [white-out] redactions or any redactions."[38]

5. While Randy Mott did not offer direct testimony, he was cross examined at some length. Much of that cross examination related to an ethics complaint that he filed against Jennifer Kasen, who is the judgment creditors' Delaware counsel, with the Delaware Supreme Court's Office of Disciplinary Counsel.[39] The gist of the complaint is an accusation that Kasen was responsible for the "white-out" redactions.

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[34] *Id.* at 227.

[35] *Id.*

[36] Apr. 29, 2024 Hr'g Tr. at 227.

[37] *Id.*

[38] *Id.* at 228.

[39] While the document was filed under seal, in light of Kasen's cross examination of Mott regarding the substance of its allegations in open court, the Court does not believe that the description of the complaint contained in this opinion to be prejudicial.

"Kasen made either white redactions or knew who did and did not disclose this to the court."[40]

The ethics complaint also asserts Deborah Mott "was deposed early in the proceedings on the same bank documents and no questions were asked about any redactions."[41] And it further alleges that Kasen's co-counsel, Leonard Collins, "is the subject of a pending bar grievance charge in Florida documenting his use of forged evidence and improper litigation practices in the Florida and Delaware cases."[42] On cross-examination, it became clear that both of these allegations were false.

The transcript of Deborah Mott's deposition reveals that she was asked, after being shown a document on the screen: "Do you see here on 2/27 there was an internal transfer to an account and then a large redacted area?"[43] Mott responded: "I do."[44] As to the allegation in the ethics complaint that Collins was the subject of a pending Florida bar grievance, Randy Mott explained that "I declined to file [the bar complaint against Collins] after I wrote that."[45] Mott added that he "didn't have an opportunity to respond, because [the Delaware ethics complaint] was simply thrown out, otherwise, it would have been edited, of course."[46] Mott added that the reason the

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[40] Cr. Ex. 22 at 5 of 58.

[41] *Id.* at 3 of 58.

[42] *Id.*

[43] Cr. Ex. 10 at 113.

[44] *Id.* Randy Mott argues that this testimony should be discounted because the exhibits were not attached to the deposition transcript. One need not review the exhibit, however, to see that Deborah Mott was in fact questioned at the deposition about the redactions.

[45] Apr. 29, 2024 Hr'g Tr. at 248.

[46] *Id.*

Office of Disciplinary Counsel dismissed his bar complaint against Kasen is because "the action is pending in [this] court and they will do nothing with it."[47] As a result, he said that "there was no opportunity to change anything I had submitted."[48] On further cross examination, Mott suggested that the source of the white-outs might not have been Kasen, but could instead have been debtor's former counsel, Robinson & Cole.[49]

Munoz and Rosner testified that they did not participate in the preparation of the bar complaint and were not aware of its filing until Kasen raised it in her papers.[50]

Jurisdiction

The underlying lawsuits in which the sanctions motions are brought are claims that arise under the Bankruptcy Code and thus fall within the district court's "arising under" jurisdiction provided in 11 U.S.C. § 1334(b) and were referred to this Court under 28 U.S.C. § 157(a) and the district court's standing order of reference dated February 29, 2012. As the court before which the underlying dispute is pending, this Court has authority to address the claims for sanctions arising out of conduct in that underlying litigation.

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[47] *Id.*

[48] *Id.*

[49] *Id.* at 250-251, 256-257.

[50] *Id.* at 210, 238-239.

Analysis

I. The Court will reluctantly impose sanctions, under § 1927, on Randy Mott; it will not impose sanctions on Munoz or Rosner.

Section 1927 of title 28 provides that any "attorney or other person admitted to conduct cases in any court of the United States … who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[51]

The Third Circuit explained in *In re Prudential America Insurance Company* that, in order to impose sanctions under this provision, a court must find that "an attorney has (1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) doing so in bad faith or by intentional misconduct."[52] The standard under § 1927 is quite different from that under Civil Rule 11 or Bankruptcy Rule 9011. Rule 11 sanctions are available when an attorney fails to conduct "an inquiry reasonable under the circumstances" into the factual allegations or legal arguments advanced. But sanctions under § 1927 are available only if the court finds "[willful] bad faith on the part of the offending attorney."[53]

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[51] 28 U.S.C. § 1927.

[52] *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 278 F.3d 175, 188 (3d Cir. 2002).

[53] *Id.* (quoting *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 297 (3d Cir. 1996).

All decisions regarding the imposition of sanctions rely, in substantial part, on an exercise of discretion by the trial court.[54] To that end, it bears note that this Court is inclined to exercise that discretion rather sparingly. Common experience teaches that courts best earn the respect of the parties and counsel who appear before them by the evenhanded, patient, and steady application of established legal principles to the facts as established by the evidence. In this Court's view, the imposition of sanctions upon minor errors or perceived transgressions by counsel would detract from rather than enhance such respect for the judicial process. Moreover, if counsel did not have substantial room to advance a position that the court ultimately rejects on the merits, without risking sanctions, attorneys might well be chilled in their vigorous representation of their clients' interests. That vigorous representation is necessary for the proper functioning of an adversarial system. This Court is thus inclined to exercise its discretion to impose sanctions only when it is concludes that respect for the integrity of the court's process truly requires it.

Turning to the conduct at issue here, the Court concludes that the defendants' motion to vacate the preliminary injunction makes false and irresponsible assertions of fact. The Court understands the defendants' desire to "push back on some of the evidentiary findings" made by the Court in its preliminary injunction decision.[55] But the Court expects counsel to exercise common sense before filing a pleading in court.

[54] *Prudential*, 278 F.3d at 181 (observing that, upon a finding of bad faith conduct the "appropriateness of sanctions is a matter entrusted to the discretion of the district court") (internal quotation and citation omitted).

[55] Apr. 29, 2024 Hr'g Tr. at 228.

No one disputes that the debtor (when it was run by the defendants) was required to disclose transfers that it made to the defendants on its Statement of Financial Affairs. No one disputes that the debtor had made substantial transfers that the debtor failed to disclose. Homony testified at the preliminary injunction hearing that the bank statements produced to him by the defendants had white-out redactions. It is undisputed that those redactions concealed the identity of the defendants or entities they control as the recipients of those transfers. Homony learned who the recipients were when he obtained those statements from the banks.

Against that backdrop, the notion that someone other than the defendants might have made the white-out redactions is difficult to square with ordinary common sense. Moreover, accusing an attorney of improperly tampering with evidence is an *extremely* serious allegation. In that context, one would expect counsel to exercise particular care in conducting diligence on such an explosive allegation before making it in a publicly filed pleading.

All that being said, it is not clear from the papers alone that the lawyers who filed them necessarily acted "vexatiously." The attorneys subject to the motion emphasized that they filed their motion only after having obtained a sworn declaration from Acosta saying that the documents that the members provided to Robinson & Cole did not contain the white-out redactions at issue. And while they acknowledge that this declaration is flatly contradicted by the subsequent declaration by Babbitt, the general counsel of Robinson & Cole, they insist that an attorney must

have the latitude to make factual assertions that are backed by their client's own sworn testimony.

That point is fair enough. The Court certainly believes that as a general proposition, counsel should be able to make a factual assertion in a pleading that is backed by a sworn declaration without fear of sanctions. Perhaps there is a limit to that principle. There may well be a circumstance in which a witnesses' declaration so flies in the face of common sense and is so lacking in credibility that a lawyer would be acting unreasonably in relying on it. Indeed, in the circumstances presented, one could perhaps make that argument about Acosta's declaration. For the reasons described below, however, the Court need not address the question whether that declaration was so facially outlandish that a reasonable lawyer could not rely on it for a statement of fact set forth in a pleading filed in court.

The reason for that is that the motion to vacate goes *further* than the Acosta declaration itself. Rather than simply making the factual claim that the defendants did not make the white-out redactions as the Acosta declaration contends, the briefing strongly suggests that counsel for the judgment creditors did. The concluding paragraph of the motion, in substance, accuses the creditors and their counsel of "forging the key documents."[56] At the hearing, counsel argued that they never made

[56] D.I. 141 at 22. The amended pleading changed the language from "forging" to "altering." D.I. 146 at 23.

such an assertion of "fact," but only contended that such an "inference" might be drawn from the "fact" that the defendants had not made the redactions.[57]

In addition, counsel for the defendants argue that even if the motion to vacate did contain such an assertion of fact, sanctions under § 1927 requires more than the making of an unfounded factual assertion, it requires a showing that it was done for an improper purpose. An attorney's conduct is only "vexatious," they point out, if the attorney acts in "willful bad faith."[58]

In this Court's view, the defendants' briefing itself appears in a grey area between directly accusing the judgment creditors of forging the key documents and allowing such an "inference." In fairness, the words of the memorandum itself may well permit the conclusion that all of the lawyers who signed it made a false, unfounded, and irresponsible factual assertion that counsel for the judgment creditors had altered the debtors' bank records before producing them in discovery in this Court. Alternatively, however, one might view the memorandum (perhaps through an overly lawyerly lens) only to assert as a *fact* that the defendants were not the ones who made the redactions and to contend that one could *infer* that the judgment creditors' counsel were the ones who did.

Either way, the Court is far beyond disappointed by the allegation. Accusing another lawyer of having fabricated evidence – whether through a flat-out allegation

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[57] *See* D.I. 141 at 13 n.15 ("The only inference possible on this evidence is that the redactions came from the creditors, as they have control of the clean documents and passed them to the Trustee with alterations.")

[58] *Prudential,* 278 F.3d at 188.

of fact or only through shady innuendo – is an extraordinarily serious thing do. It should not have happened here. And even appreciating that this case is a contentious one, the Court is distressed by the fact that it did.

With respect to the motion seeking sanctions against Munoz and Rosner, the record contains little evidence of their intent beyond their having filed the motion. While the issue is a close one, the Court ultimately concludes that the mere act of signing the memorandum is not itself sufficient evidence of the signers' subjective bad faith to conclude that the attorneys' conduct was "vexatious." For that reason, despite its conclusion that counsel for the defendants made a false and irresponsible allegation against opposing counsel, the Court will deny the motion for § 1927 sanctions against Rosner, Munoz, and their law firms.

With respect to Randy Mott, however, the record contains more than just the filing of the motion to vacate. Mott also filed an ethics complaint against Kasen – one that both Munoz and Rosner said they had not seen before it was filed.[59] This Court accepts the legal proposition that a decision to impose sanctions under § 1927 must be based on the lawyer's conduct before the Court – not the lawyer's conduct in other proceedings.[60] But to the extent the actions taken in this proceeding leave the Court uncertain about whether a lawyer acted in bad faith such that sanctions under § 1927

[59] April 29, 2024 Hr'g Tr. at 238-239, 301.

[60] *See, e.g., In re Case*, 937 F.2d 1014, 1023 (5th Cir. 1991). While the Court may be permitted to rely on extrajudicial conduct when exercising the court's "inherent power" over matters before it recognized in *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), the Court concludes that this matter is more appropriately addressed through the express authority provided by statute in § 1927.

are appropriate, the Court believes it permissible to consider other conduct in reaching that conclusion. That seems particularly appropriate here, where (according to the parties' statements) the Delaware Supreme Court's Office of Disciplinary Counsel dismissed the ethics complaint *because* it related to a matter that was pending in this Court and thus subject to this Court's authority.

Here, the ethics complaint resolves any ambiguity about whether Mott acted with vexatious intent. Whatever hyper-technical arguments might be advanced to suggest that the memorandum in support of the motion to vacate stopped short of "asserting" that the judgment creditors' counsel was responsible for the redactions, Mott's ethics complaint states unambiguously that "creditors' counsel … did the white redactions."[61] It adds that "Kasen [either] made [the] white redactions or knew who did and did not disclose this to the court."[62] In addition to the false statements described above, Mott's entire state bar complaint is premised on the allegation that Kasen was involved in the use of fabricated evidence that would justify disciplinary proceedings.

In view of that fact, the argument that Mott made at the April 29, 2024 hearing that "looking at our motion we never said the creditors did the redactions," rings quite hollow.[63] To the extent there was any ambiguity from the face of motion to vacate what Mott intended to say, his ethics complaint resolves it.

[61] Cr. Ex. 22 at 5 of 58.

[62] *Id.*

[63] Apr. 29, 2024 Hr'g Tr. at 197-198.

The Court accordingly believes that the factual record before it compels the conclusion that Mott, through the filing of the motion to vacate, has (1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) done so in bad faith. The Court will thus direct that Mott pay to both the trustee and to the judgment creditors the attorneys' fees and expenses they reasonably incurred in connection with their response to the motion and the filing of the motions seeking sanctions.

II. The Court will not admit into evidence or consider any of the documents that the defendants submitted to the Court by letter after the April 29, 2024 hearing; it need not, however, "strike" the letter from the Court's docket.

The Court told all parties that it would consider any supplemental legal authority they might submit within two weeks after the April 29, 2024 hearing. Defendants, however, submitted a letter that in addition to making legal argument, attached a series of documents that were not admitted into evidence at the hearing, including a purported expert report that seeks to take issue with the Robinson & Cole document production based on its assessment of the metadata and emails that appeared on the defendants' exhibit list but were never introduced into evidence.[64]

The trustee has moved to strike the letter from the Court's docket, making the unsurprising point that the hearing was the time to present evidence, and that this post-trial submission comes too late.[65] In reply, the defendants point out that the Court did invite supplemental letters, and (in language that the Court now recognizes

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[64] D.I. 234.

[65] D.I. 239.

was too casual) suggested that the Court would consider matters that were "evidentiary."[66]

What the Court had intended to say was that it would consider any arguments that the parties might make with respect to additional legal authorities, including argument about any unresolved issues regarding the admissibility of documents that were moved into evidence at the hearing. The Court certainly did not intend to invite a party to submit brand new evidence by way of letter, on the theory that such documents or testimony might be admitted into evidence without any opportunity for cross-examination or objection.

The Court appreciates that its comments at the end of the hearing, however, could have been construed in good faith as an invitation to the parties to submit new evidence. The Court regrets that its comments might have created such an ambiguity. In any event, regardless of the Court's imprecise language, the Federal Rules of Evidence are fully applicable to evidentiary hearings held in Bankruptcy Court.[67] Those rules, not to mention basic principles of due process, would forbid the Court from admitting into evidence documents and expert testimony that were submitted by post-trial letter without being subject to being tested by opposing parties through cross examination. The Court does not believe it appropriate to

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[66] D.I. 244 (citing April 29, 2024 Hr'g Tr. at 314, and quoting the Court's direction that: "So two weeks from today, you can all write me letters. I'll look at whatever you send me. If there's additional authority, if there are things that you think are evidentiary, what have you, I'll look at it and we'll figure out what – how to rule on any issues about evidence.").

[67] Fed. R. Evid. 1101(a) ("[t]hese rules apply to proceeding before … United States bankruptcy … judges").

reopen the evidentiary hearing, of which all parties had appropriate notice, for the purpose of considering any such new evidentiary material. While the Court has considered the legal authorities provided by all of the parties in their post-trial letters, it will not allow the admission into evidence, and therefore has not considered, any of the documents or the expert report that were attached to the letter. In the Court's view, that is sufficient to protect the trustee. There is no need to strike the letter from the Court's docket.

III. The motions for sanctions against Rosner and Munoz for the defendants' counterclaims against Miller is denied.

Wholly separate from the matters the Court heard at the April 29, 2024 evidentiary hearing, the defendants also filed "counterclaims" in this adversary proceeding against the trustee in his personal capacity.[68] Miller sought sanctions under Civil Rule 11 alleging the defendants' claims were frivolous and were filed to harass the trustee. The counterclaims have since been voluntarily dismissed.

The Court does not believe that the filing of the counterclaims against Miller warrants the imposition of sanctions. Because that motion for sanctions argues primarily that the counterclaim fails as a matter of law, the Court does not believe that an evidentiary hearing is necessary to resolve this dispute, and that it may properly be resolved as a matter of law.

[68] For the purposes of this section, "Miller" refers to George Miller in his personal capacity and "trustee" or "chapter 7 trustee" refers to Miller in his capacity as chapter 7 trustee for Team Systems International, LLC.

In January 2023, George Miller, in his capacity as chapter 7 trustee, filed this adversary proceeding that seeks to recover alleged fraudulent transfers.[69] In the defendants' answer, they asserted counterclaims against Miller in his personal capacity. Those claims were for his removal as chapter 7 trustee under 11 U.S.C. § 324 (alleging certain self-dealing), and a breach of fiduciary duty claim.[70] Regarding the latter, the defendants alleged that Miller owed them fiduciary duties as beneficiaries of the estate and breached those duties "through misrepresentations to the Court, in order to further his personal pecuniary interests." They further claim that such breaches caused the defendants to incur at least $60 million in damages in the form of legal fees, the use of their assets, distributions from the bankruptcy estate, and reputational damages. The papers were signed by Rosner and Munoz.[71]

Miller retained separate counsel (representing him personally, not the bankruptcy estate), who moved for sanctions against Rosner and Munoz under Civil Rule 11, Bankruptcy Rule 9011, and 28 U.S.C. § 1927.[72] In his papers, Miller's counsel stated that he wrote defendants' counsel to dismiss the counts, as they lacked any legal merit, and never received a response. In support of sanctions, he argued first that the removal claim must be pursued through a contested matter, not as a counterclaim in an adversary proceeding. Then, he asserted that the breach of fiduciary duty count fails as a matter of law because a chapter 7 trustee does not owe

[69] D.I. 1.

[70] D.I. 115 at 27-29.

[71] *Id.* at 48-49.

[72] D.I. 126, 156, 157.

fiduciary duties to former members of the debtor LLC. He added that the defendants counterclaimed against a party who was not a party to the adversary proceeding – Miller in his personal capacity. Counterclaims, he argues, must be asserted against an opposing party. In any event, he argued that the counts would fail because chapter 7 trustees enjoy a certain degree of immunity from suit in their personal capacities.

Rosner and Munoz objected to Miller's motion for sanctions. They asserted that they never received Miller's Rule 11 safe-harbor letter.[73] Then they argued that the defendants counterclaims were non-frivolous: *first*, because case law provides that beneficiaries of a bankruptcy estate – including equity holders – may sue a trustee for a breach of fiduciary duty; and *second*, because although the chapter 7 trustee is entitled to some immunity from personal liability, the counterclaims allege conduct that offers a nonfrivolous argument for overcoming that immunity. The members conceded that Miller's procedural claim about the removal count was colorable and offered to withdraw it and the other counterclaim without prejudice.[74]

Miller replied one week later.[75] He argued that no court has found a chapter 7 trustee owed a duty to LLC members, rather than shareholders, and the basis for overcoming the trustee's immunity claims have largely been litigated in this bankruptcy case. He further stated that the offer to withdraw the counterclaims

[73] D.I. 184 at 3.

[74] *Id.* at 11.

[75] D.I. 191.

arrived on the eve of the reply brief – rather than within 21 days as would be necessary to claim the protection of the safe-harbor.

The Court held a status conference over Zoom on April 15, and then placed the following entry on the docket:[76]

> After reviewing the pleadings, the Court held a status conference and proposed that the Court treat the sanctions motion as a motion to dismiss under Rule 12(b)(6). The parties agreed that the motion could be so treated, although the defendants sought the opportunity to file a supplemental brief addressed to the question whether the counterclaims should be dismissed.[77]

The Court then set a schedule for briefing that would conclude on June 6, 2024. As described above, Rosner and Munoz both withdrew as counsel.[78] The counterclaims against Miller were voluntarily dismissed on May 17 by the defendants' new counsel.[79] That dismissal moots the motion to dismiss the counterclaims, leaving only the issue of sanctions.

The Court has discretion both to determine the appropriate procedure for addressing a motion sanction.[80] Rule 11 sets forth requirements for filings made with a court, the violation of which may lead to sanctions imposed on the attorney who signed the pleading.[81] Relevant here, filings must be without any improper purpose, such as to harass, to delay proceedings unnecessarily, or to increase the cost of

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[76] D.I. 201, 203.

[77] D.I. 204.

[78] D.I. 206, 216.

[79] D.I. 241.

[80] 5A Wright and Miller, *Federal Practice and Procedure* § 1337.3 (4th ed. 2024).

[81] Fed. R. Civ. P. 11(c)(1).

litigation needlessly.[82] Claims in any filing must be warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law.[83] When seeking sanctions, the moving party must provide opposing counsel with 21 days' notice before filing such motion, offering them the opportunity to withdraw the offending pleading. The motion for sanctions must certify that such safe harbor was provided.[84]

While Rule 11 serves to protect the integrity of the judicial process, the Court must balance that with counsel's obligation vigorously to advocate on behalf of their client.[85] In deciding whether Rule 11 has been violated, the conduct of counsel must have been "objectively unreasonable."[86] When a claim is dismissed under Civil Rule 12, there is some insufficiency – whether legal, factual, or a combination thereof – but there is a big difference between a claim that is dismissed under Rule 12(b)(6) and one that should subject an attorney to sanctions.

On the record before the Court, the imposition of Rule 11 sanctions against Rosner and Munoz for having asserted the counterclaims against Miller is neither

[82] Fed. R. Civ. P. 11(b)(1)

[83] Fed. R. Civ. P. 11(b)(2).

[84] Fed. R. Civ. P. 11(c)(2). *See also In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 99 (3d Cir. 2008).

[85] *See Gairardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987); *In re Aphton Corp.*, 423 B.R. 76, 96 (Bankr. D. Del. 2010) ("Rule 9011 sanctions are imposed to correct abusive behavior and are reserved for 'exceptional circumstances' where a claim is 'patently unmeritorious or frivolous.' The rule is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.") (internal citations omitted).

[86] *Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995); *In re Taylor*, 655 F.3d 274, 282 (3d Cir. 2011).

necessary nor appropriate. Miller's primary contention is that the counterclaims are not supportable by existing law, so should be dismissed. Without deciding whether the claims would survive a motion to dismiss, the Court assesses whether the counterclaims were so unreasonable as to fall below the Rule 11 standard.

The defendants' first cause of action was the removal of Miller as trustee. Miller countered that the relief sought could not be granted in this proceeding – but only through a contested matter on its own motion in the main bankruptcy case. Miller contends that this count was included "specifically to harass the Trustee and remove him from his position so that he cannot perform his duties."[87] The Court, however, sees no prejudice that flowed from the fact that the motion was filed as a counterclaim in an adversary proceeding rather than as a motion in the main bankruptcy case. That is hardly the kind of transgression that would warrant the imposition of Rule 11 sanctions.

The defendants' second cause of action was a claim for breach of fiduciary duty. Miller principally argued that a chapter 7 trustee does not, as a matter of law, owe former members of a limited liability company a fiduciary duty. The defendants' counsel pointed to cases in which a chapter 7 trustee owed such duties to shareholders of a corporation and argued that members of a limited liability company should be treated the same way.[88] While there is certainly a difference as a matter of corporate law between a member of a limited liability company and a shareholder of a

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[87] D.I. 157 at 5.

[88] *See, e.g, In re Heinsohn*, 231 B.R. 48, 65 (Bankr. E.D. Tenn. 1999).

corporation, both are equity holders. In the case of a fully solvent chapter 7 debtor, both would receive a distribution from the estate. One could perhaps engage the question whether, on the one hand, the duties of the chapter 7 trustee run directly to creditors, shareholders, or members of a limited liability company, or, on the other, are owed only to the bankruptcy estate, in which case creditors and equity holders may enforce those duties only derivatively.[89] Regardless of how one might resolve that issue, the Court does not believe it appropriate to sanction the defendants for arguing that a chapter 7 trustee owes fiduciary duties that may be enforced by the members of a limited liability company.

Lastly, Miller complains that it was improper to counterclaim against him in his personal capacity when the suit was brought in his capacity as chapter 7 trustee. As an argument for dismissing the counterclaims, the points Miller makes are fair ones. For good reason, bankruptcy trustees are typically treated as asserting claims only in their capacity as trustee, and not in the trustee's personal capacity. Stated differently, when a trustee brings a suit in his capacity as trustee, he does not ordinarily open himself up to counterclaims in his personal capacity.[90]

Even if the defendants adequately alleged a claim for breach of fiduciary duty, Miller likely would not be a proper party to *this* litigation. Rather, under the Rules of Civil Procedure (as made applicable through the Federal Rules of Bankruptcy

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[89] *See generally North Am. Catholic Educ. Programming Found., Inc., v. Gheewalla*, 930 A.2d 92 (Del. 2007).

[90] *See* Fed. R. Civ. P. 13(b) (requiring any permissive counterclaim be against an "opposing party").

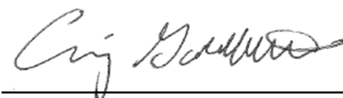
Procedure), such a claim would likely need to be asserted as a separate adversary proceeding rather than as a counterclaim. These, however, may well be reasons to dismiss the counterclaims. The Court does not believe that this procedural misstep provides an appropriate basis for the imposition of sanctions under Rule 11. The motion for sanctions will therefore be denied.

Conclusion

For the foregoing reasons, the Court will impose sanctions under § 1927 against Randy Mott, but not Michael Munoz or Fredrick Rosner, on account of the filing of the motion to vacate the preliminary injunction. The Court will deny the trustee's motion to strike the defendants' post-trial brief but will not admit into evidence or consider any of the documents or proffered testimony set forth therein. And the Court will deny Miller's motion for sanctions against Munoz and Rosner on account of their filing a counterclaim against him in the adversary proceeding.

The parties are directed to settle appropriate orders.

Dated: July 9, 2024



CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY JUDGE