

Maxwell regarding the appropriateness of sanctions as means of “policing” the filing of “frivolous suits.” Because defendants’ motion was (and is) based on the premise that plaintiff’s lawsuit is “frivolous,” defendants’ argument in their Reply that the merits of this case are irrelevant is both “new” and inconsistent with the premise of their motion.

Defendants’ opening brief argued that this Court should police the litigation judgment exercised by the plaintiff trustee, pursuant to the Seventh Circuit’s holding in *Maxwell v. KPMG*, 520 F. 3d 713 (7th Cir. 2008). In *Maxwell*, the Seventh Circuit affirmed the district court’s entry of summary judgment against a plaintiff trustee on the ground that his claim was completely lacking on the element of loss causation. The Court then invited the defendant to file a motion for sanctions with the district court, explaining:

Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy, and in an appropriate case must give consideration to imposing sanctions for the filing of a frivolous suit.

520 F.3d at 718 (emphasis added).

Because the Seventh Circuit’s comment about policing a trustee’s litigation judgment was directed at the filing of “frivolous” suits, we responded to defendants’ motion by demonstrating that, even without the benefit of merits discovery, the trustee has already obtained several contemporaneous documents supporting his claims.¹ In other words, the trustee’s response focused on the merits of his claims in order to dispel any notion that the claims are frivolous. In defendants’ reply brief, however, they now argue that the merits of this case are totally irrelevant to their motion. (Reply at 1-2.) Plaintiff therefore requests the opportunity to respond to this new argument within 14 days.

¹ The trustee already has the majority of these contemporaneous documents because he obtained them from defendants’ own files (pursuant to a request he made to defendants before this case was filed.) See Pl. Appendix of Exhibits in Support of His Response to Defs. Mot for Summary Judgment and Exhibit 1 therein; see also Pl. Resp. to Defs. Rule 56.1 Stmt at Ans. No. 69.

B. Defendants' Second New Argument--That Some Of The Contemporaneous Documents Contain Inadmissable Hearsay.

If defendants had filed a traditional summary judgment motion, it would make sense to engage in a point by point analysis of defendants' hearsay objections. In such an analysis, the court would consider three questions as to each challenged portion of a contemporaneous document:

- (1) Does that portion of the document contain a "statement," defined by Rule 801(a) as a "written assertion";²
- (2) If that portion contains an assertive "statement," is plaintiff offering that statement to prove the truth of the matter asserted (see Rule 801(c));³ and
- (3) If the challenged portion contains a "statement" that plaintiff is offering to prove the truth of the matter asserted--i.e., if the statement is "hearsay"--is there an applicable hearsay exception?

As stated above, application of this three-part analysis would make sense if defendants had filed a traditional summary judgment motion (at the close of merits discovery) directed at one or more elements of the trustee's claims. But defendants have not filed that type of motion. Instead, defendants have filed a motion asking the Court to dismiss this case--before any merits discovery--on the purported basis that the trustee should be policed under *Maxwell* for filing a frivolous suit. Indeed, the introduction to defendants' reply argues that the trustee's complaint is "contrived" (Reply at 1), and the conclusion to defendants' reply argues that this is a "baseless lawsuit." (Reply at p. 25.)

² If the challenged portion of the document is not even an assertive "statement," there would be no need to go to step (2).

³ If the challenged portion of the document is an assertive statement but is not offered to prove the truth of the matter asserted, there would be no need to go to step (3) because the statement would not be "hearsay" as defined in Rule 801(c).

In this context, where the issue before the Court is whether the trustee has filed a frivolous suit, it does not make sense to engage in that three-part analysis for defendants' hearsay objections because the contemporaneous documents as a whole readily demonstrate that this case is anything but frivolous. Moreover, most of the key contemporaneous documents were authored by defendants and, accordingly, the admissions contained therein cannot be inadmissible hearsay. Nevertheless, if this Court believes it necessary to address defendants' hearsay objections, the trustee should be allowed to respond to those objections within 14 days.⁴

C. Defendants Third New Argument--That The Documents Produced From Defendants' Own Files Need Further Authentication In This Context.

As explained above, defendants filed a motion asserting that the trustee's claims are frivolous, and that he should therefore be "policed" by a dismissal before any merits discovery. In response, the trustee used the contemporaneous documents produced (pre-lawsuit) from defendants' own files to demonstrate that he has an entirely reasonable basis to proceed with this suit. Now, however, despite emphasizing that they are not attacking the elements of the trustee's claims, defendants want to challenge the authenticity of the very documents they produced to the trustee. Plaintiff respectfully requests leave to file a sur-reply explaining why defendants' authenticity objections do not apply in the context of defendants' *Maxwell*-policing type of motion.⁵

⁴ It is ironic that defendants are now asserting hearsay and authentication objections even though the affidavits they rely upon are chock full of inadmissible lay opinions and hearsay. Regardless, the rules of evidence are not relevant to the issue before this Court: whether the contemporaneous documents obtained by the Trustee pre-lawsuit demonstrate that this case is not "frivolous."

⁵ Defendants complain that Plaintiff did not produce "71 of the 109" exhibits to them during the Unclean Hands discovery phase. But defendants do not deny that they produced those 71 documents to Plaintiff before this lawsuit was filed. Plaintiff is not required to produce to defendants the very documents that defendants previously produced to him. Nonetheless, most of those 71 documents were produced to defendants on a compact disc. The production number of that disc is PL 00082. (The disc itself was Bate stamped, but the documents contained on the disc were not individually Bate stamped.)

II. Alternatively, Merits Discovery Should be Opened For the Limited Purpose of Giving Plaintiff the Opportunity to Authenticate the Documents Upon Which he Relies

Defendants' evidentiary objections should be overruled because they are based on the false and unsupported premise that a bankruptcy trustee is required to rely only on non-hearsay statements and authenticated documents when deciding whether to file a case. Nonetheless, if, in the context of defendants' *Maxwell*-policing type of motion, this Court is willing to allow defendants to challenge the authenticity of the documents relied upon by plaintiff -- most of which came from defendants' own files -- then merits discovery should be opened for the limited purpose of allowing plaintiff to respond to that challenge.

III. Conclusion

For all of the above reasons, plaintiff respectfully requests leave to file (within 14 days) a sur-reply to defendants' new arguments. Alternatively, if this Court is going to allow defendants to challenge the authenticity of the documents relied upon by plaintiff, most of which came from defendants' own files, then plaintiff respectfully requests that merits discovery be opened for the limited purpose of allowing plaintiff to respond to that challenge.

Dated: August 25, 2009

Respectfully submitted,
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solely as the trustee in bankruptcy, for THE
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