IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DAVID GROCHOCINSKI, not individually but solely in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, INC.,	)	
Plaintiff,	)	
v.	)	No. 06 C 5486
MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN,	)	Judge Virginia M. Kendall
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO DAVID GROCHOCINSKI'S MOTION TO DISMISS DEFENDANTS' MOTION FOR SANCTIONS

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Defendants, by their attorneys, Novack and Macey LLP, submit this Response in Opposition to David Grochocinski's ("Grochocinski") Motion to Dismiss Defendants' Motion for Sanctions (the "Sanctions Motion").

ARGUMENT

On March 31, 2010, the Court issued its detailed Memorandum Opinion and Order ("Op. at __") granting Defendants' Motion for Summary Judgment based on their Unclean Hands Defenses. It did so in order to prevent a "fraud on the judicial system." (Op. at 1.) On April 29, 2010, Defendants filed the Sanctions Motion against Grochocinski and his attorneys pursuant to: (a) the Court's inherent authority to enter sanctions; and/or (b) as to the attorneys, 28 U.S.C. § 1927.

Now, Grochocinski seeks to run from this Court. He asserts that, pursuant to the Barton doctrine, this Court does not have jurisdiction to address litigation conduct in its very own courtroom relating to a case over which the Court has presided for nearly four years. Instead, Grochocinski argues that Defendants must ask permission from the bankruptcy court to allow this Court to consider the Sanctions Motion. On its face, this argument is illogical. Furthermore, Grochocinski has not cited a single case supporting his position. To the contrary, the Seventh Circuit has made clear that courts do not need prior bankruptcy court approval to sanction bankruptcy trustees for filing frivolous lawsuits. In all events, even if the Barton doctrine did apply here, this Court has discretion to withdraw consideration of the Sanctions Motion from the bankruptcy court, which it should exercise. Accordingly, the Court should deny Grochocinski's Motion to Dismiss.

I. THE *BARTON* DOCTRINE DOES NOT APPLY

A. By Its Own Terms, The *Barton* Doctrine Is Inapplicable To Motions For Sanctions

The Barton doctrine provides that a lawsuit cannot be initiated against a bankruptcy trustee without the prior approval of the bankruptcy court. In re Linton, 136 F.3d 544, 545 (7th Cir. 1998). The primary rationale is that a trustee should not be hauled into another court by a third party without the bankruptcy court first finding that it is appropriate to require the trustee to appear and defend him/herself in proceedings outside the bankruptcy. Id. at 545-46.

Neither the Barton doctrine nor this rationale has any application to a motion for sanctions against a trustee in a lawsuit that was filed by the trustee. Such a motion is not a new lawsuit filed by a third party. It is part of a previously filed and pending proceeding. Here, the Sanctions Motion is actually a part of the very litigation that Grochocinski himself initiated.

When a bankruptcy trustee files suit in another court, the trustee must act consistently with and follow all applicable rules governing such a proceeding. Nothing in the Bankruptcy Code or the Barton doctrine exempts a trustee from such rules. Indeed, the trustee cannot avail him/herself of the benefits of another court without submitting to the jurisdiction of that court over his/her conduct in that court. In short, the trustee cannot have it both ways by: (1) enjoying the benefits of the other court; only to (2) seek insulation from the bankruptcy court for his/her conduct in the other court. All of this is particularly true here, given that the Sanctions Motion seeks the exercise of this Court's inherent authority -- and will be decided based on this Court's familiarity with and personal observation of the prosecution of this case by Grochocinski over the last four years. Indeed, this Court -- like all federal courts -- has the inherent power to regulate conduct that occurs before it, and to award sanctions when appropriate. E.g., Chambers

v. Nasco, Inc., 501 U.S. 32, 45-46 (1991). It strains credulity that the Barton doctrine created an exception to that principle.

Even more unusual is the notion that a bankruptcy court has the power to dictate in the first instance whether the District Court (a superior court) may even hear a motion for sanctions arising out of conduct in that District Court. In any event, as a practical matter, any decision by the bankruptcy court in this regard would be subject to appeal by either party to the District Court. Such circular steps are unnecessary and should not be ordered by this Court.

For any one or more of these reasons, the suggestion that the Barton doctrine applies here is completely wrong. As the next section will show, the case law confirms this.

B. The Case Law Confirms The Inapplicability Of The *Barton* Doctrine

The case law demonstrates that the Barton doctrine does not apply to motions for sanctions. And not just any case law, but case law from the Seventh Circuit -- the very Circuit that, in Linton, first extended to bankruptcy trustees the protection afforded to equity receivers in Barton.

In 2008 -- only ten years after deciding Linton -- the Seventh Circuit issued its ruling in Maxwell v. KPMG LLP, 520 F.3d 713 (7th Cir. 2008) [hereinafter "Maxwell I"]. In Maxwell I, the Seventh Circuit affirmed summary judgment against a bankruptcy trustee who brought a frivolous accounting malpractice claim. Id. at 718-19. In its ruling, the court explicitly invited KPMG to "file a motion in the district court . . . and a corresponding motion in this court" for sanctions against the trustee. Id. at 719 (emphasis added). The Seventh Circuit said nothing about seeking bankruptcy court approval before filing those motions. Rather, it directed KPMG to file them -- logically -- in the courts before which the case proceeded. If the Barton doctrine applied to sanctions motions, the Seventh Circuit would have directed KPMG to seek bankruptcy court approval before filing its motions.

Any argument that the Maxwell I court overlooked the Barton doctrine when inviting the sanctions motions is defeated by the Seventh Circuit's second Maxwell opinion. See Maxwell v. KPMG LLP, No. 07-2819, 2008 WL 6140730 (7th Cir. Aug. 19, 2008) [hereinafter "Maxwell II"]. In Maxwell II, without getting bankruptcy court approval, the Seventh Circuit considered the merits of the request for sanctions against the trustee and his attorneys. Ultimately, the court awarded KPMG over $200,000 in attorneys' fees against the trustee's lawyers for prosecuting a frivolous appeal, but denied sanctions against the trustee because he did not willfully violate his fiduciary duties. Id. at *4. In doing so, the court specifically cited Linton -- the very case that applied the Barton doctrine for the first time to bankruptcy trustees -- but again said nothing about bankruptcy court approval of sanctions motions. Id. If the Barton doctrine did apply to sanctions motions, the Seventh Circuit could not have issued Maxwell II without intervening proceedings in the bankruptcy court.

Neither of the cases cited by Grochocinski dictates -- or even suggests -- a different result. In fact, neither case even mentions motions for sanctions. Rather, Linton and Weitzman stand for the narrow proposition that a party must seek bankruptcy court approval prior to filing a new lawsuit against a bankruptcy trustee. In both cases, the bankruptcy trustees were sued in state court for actions taken in connection with their administration of the bankruptcy estates, and both courts held that trustees cannot "be sued without leave of the court that appointed [them]." Linton, 136 F.3d at 545 (emphasis added); see also In re Weitzman, 381 B.R. 874, 878 (Bankr. N.D. Ill. 2008) (Barton requires plaintiffs to obtain the "permission of the appointing court to bring a lawsuit against the trustee.") (emphasis added). Neither case involved the situation here -- where sanctions are sought in a proceeding that was filed by the trustee in the first place and are based on the trustee's misconduct in that very proceeding.

Non-binding authority also holds that the Barton doctrine does not apply to motions for sanctions. See In re Ridley Owens, Inc., 391 B.R. 867, 874 (Bankr. N.D. Fla. 2008). In that case, the trustee voluntarily dismissed her claims because they were precluded by clear Florida Supreme Court authority. Id. at 869. On the defendants' motion, the state court awarded sanctions against the trustee and her special counsel for bringing the meritless claim. Id. at 869-70. The trustee removed the case to bankruptcy court, asserting that the Barton doctrine required leave from the bankruptcy court before sanctions could be imposed on her or her special counsel. Id. at 870.

The bankruptcy court refused to apply the Barton doctrine to the sanctions motion. As the court described it, the case before it (like the instant case) was not a case where the trustee was "unwillingly hauled into state court by a creditor or debtor upset with her decisions regarding the administration of the estate." Id. at 872. Rather (also like the instant case), that sanctions motion was based solely on the trustee's conduct in a case that she chose to pursue in another court. To apply the Barton doctrine under that scenario would "impede the ability of the state courts to control their own proceedings." Id. at 873. Moreover, "[w]hen trustees or their special counsel voluntarily go into . . . court, they must play by the rules of the forum they have selected, even if that means being subjected to potential liability for sanctions." Id.

These principles apply with equal force here. Grochocinski initiated this meritless and fraudulent action in this Court and all of the conduct at issue in the Sanctions Motion occurred in this Court in this case. Accordingly, Grochocinski must be held to account for those actions in this Court, without the interference of the bankruptcy court.

In reaching its decision, the Ridley Owens court distinguished the earlier bankruptcy court decision in In re Solar Financial Services, Inc., 255 B.R. 801, 804-05 (Bankr. S.D. Fla.

2000). The Ridley Owens court correctly distinguished Solar Financial because, among other things: (1) Solar Financial held that the particular conduct of the trustee that was challenged in that case was entitled to "quasi-judicial immunity," 255 B.R. at 805-06; and (2) the Solar Financial trustee was sanctioned for taking "a purely administrative act unrelated to the lawsuit." Ridley Owens, 391 B.R. at 873-74. The instant case is nothing like Solar Financial. Rather, as in Ridley Owens:

> All of the actions or omissions which led up to the [Sanctions Motion] occurred entirely within the confines of [this Court], and accordingly it would not be proper for the bankruptcy court to seize jurisdiction over these matters.

Id. at 874.[1]

In all events, the bankruptcy court decisions in Ridley Owens and Solar Financial are not binding on this Court. Rather, this Court is bound by the Seventh Circuit's decisions in Maxwell I and Maxwell II. Pursuant thereto, the Sanctions Motion should be denied.

II. IN ALL EVENTS, THIS COURT SHOULD HEAR AND DECIDE DEFENDANTS' SANCTIONS MOTION EVEN IF THE *BARTON* DOCTRINE APPLIES

Even if the Court were to hold that the Barton doctrine does apply to Defendants' Sanctions Motion -- which, as the foregoing shows it should not do -- then this Court should exercise its discretion and withdraw any consideration of the Sanctions Motion from the bankruptcy court pursuant to 28 U.S.C. § 157(d) ("Section 157(d)"). Section 157(d) provides in relevant part:

> The district court may withdraw, in whole or in part, any case or proceeding referred [to a bankruptcy judge], on its own motion or on timely motion of any party, for cause shown.

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[1] Indeed, the instant case presents an even stronger context for the non-applicability of the Barton doctrine than was present in Ridley Owens. Here, the "other" proceedings are in federal court, not state court as in Ridley Owens.

Here, there would be cause for withdrawal of bankruptcy court consideration of the propriety of the Sanctions Motion. If the Barton doctrine applies, Defendants would be required to make a prima facie showing in support of their Sanctions Motion before the bankruptcy court in order to proceed. See Weitzman, 381 B.R. at 880. However, any such effort would be wasteful -- for at least two reasons. First, this Court has appellate jurisdiction over the bankruptcy court's decision to allow the Sanctions Motion to be filed. It is therefore inevitable that the Sanctions Motion will be before this Court one way or another. Second, having presided over this case for nearly four years, this Court is in a much better position than the bankruptcy court to evaluate whether the Sanctions Motion should be allowed to proceed. Accordingly, whether on its own motion, or by treating this Response as Defendants' motion to withdraw pursuant to Section 157(d), the Court should shortcut the process by granting leave to Defendants to file the Sanctions Motion and resolving it on the merits in the interest of judicial economy and minimizing the continued expenditure of time and money on the issue by the parties.

CONCLUSION

For the foregoing reasons and for all the reasons set forth in Defendants' Memorandum in Support of Their Motion for Sanctions, the Court should deny Grochocinski's Motion to Dismiss and grant Defendants such other and further relief as is appropriate.

Respectfully submitted,

MAYER BROWN LLP and RONALD B. GIVEN

By: /s/ Stephen Novack
One Of Their Attorneys

CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Response in Opposition to David Grochocinski's Motion to Dismiss Defendants' Motion for Sanctions to be served through the ECF system upon the following:

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on this 3rd day of June, 2010.

By: /s/ Stephen Novack