UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:	
WILLIAM CLIFFORD HALL, III, LEE'SA BALLARD HALL,	Case No. C-B-89-30220 Chapter 13
Debtors.	JUDGMENT ENTERED ON DEC 14 1989

MEMORANDUM OPINION AND ORDER SETTING ASIDE CONSENT ORDER DATED SEPTEMBER 5, 1989; DENYING APPLICATION OF JAMES C. HORD FOR LEGAL FEES PREVIOUSLY ALLOWED; DENYING MOTION FOR RULE 9011 SANCTIONS AGAINST KAREN A. ROBOZ; AND IMPOSING RULE 9011 SANCTIONS AGAINST JAMES C. HORD

This matter is before the court on: (1) Motion by the debtors and the Chapter 13 Standing Trustee to set aside a Consent Order dated September 5, 1989, and Objection to that motion by creditors Mr. and Mrs. Bryant G. Barnes (hereinafter "the Barnes") and James C. Hord, the debtors' former counsel (hereinafter "Hord"); (2) Debtors' Objection to Claim of the Barnes; (3) Debtors' Objection to Hord's Application for $1,270.00 for legal fees previously allowed by this court; (4) Hord's Motion for Rule 9011 Sanctions against Karen A. Roboz (hereinafter "Roboz"), debtors' present attorney, and Roboz's Response seeking Rule 9011 Sanctions against Hord.

For the reasons stated below, the court has concluded that: (1) the September 5, 1989 Consent Order should be set aside; (2) the Barnes' claim should be objected to by the debtors and determined by the court in the normal course; (3) Hord must refund the $1,270.00 in legal fees awarded by the court's previous Order; (4) Hord's Rule 9011 motion against Roboz is

meritless, not well grounded in fact and therefore, the Motion for Sanctions against Roboz should be denied; and finally, (5) Rule 9011 Sanctions should be imposed upon Hord for his filing of the meritless Motion for Sanctions against Roboz.

FINDING OF FACTS

The debtors, represented by Hord, filed a Chapter 13 petition on February 28, 1989. Prior to the filing of their petition, the debtors operated an electrolysis business which they had purchased from the Barnes. Pursuant to their petition, the debtors were to pay $500.00 per month for 48 months to repay a total debt of $37,220.80, of which $15,320.80 was unsecured. Their petition stated that the debtors were to return the electrolysis business to the Barnes, whose debt was secured by the business collateral.

Lee'sa Hall, one of the debtors, testified that the Barnes' collateral was returned to them, with the exception of a few minor pieces of equipment which the debtors purchased outright from the Barnes.

However, before the debtors' proposed Plan was confirmed, the Barnes filed an Objection to Confirmation. Mrs. Hall testified that because of the debtors' dissatisfaction with Hord's representation, she negotiated a settlement directly with the Barnes and their counsel. Mrs. Hall testified that she thought that the settlement involved only the extension of their Plan's duration from 48 to 60 months with the payments remaining $500.00 per month. Thereafter, a Settlement of Claim was forwarded by

the Barnes' counsel to Hord. The Settlement of Claim called for the Barnes to hold, in addition to their $9,392.75 unsecured claim, an additional $9,000.00 secured claim -- although, in fact, there was no security for the claim. Mrs. Hall testified that she did not sign the settlement, was not present at its execution, and had not reviewed it, as she was seven months pregnant and distraught over the transactions with the Barnes and with Hord. Her signature was executed by her husband. Mrs. Hall testified that Hord did not explain to either debtor the contents of the Settlement of Claim, nor did he explain the ramifications of adding a secured claim of $9,000.00 to the debtors' Chapter 13 Plan. Because of the statement of intention to return the business set out in the Petition, and the duty of reasonable inquiry, Hord either knew or should have known that there was no security for the Barnes' claim, and that an increase in the debtors' monthly plan payment would be necessary.

Thereafter, a Consent Order was entered as a result of the settlement, incorporating the terms of the Settlement of Claim. As a result of that Consent Order, on October 6, 1989, a Motion to Modify and Notice of Opportunity for Hearing was filed by the Chapter 13 Standing Trustee to include a $9,000.00 secured claim and a $9,392.75 unsecured claim on behalf of the Barnes, which would require an increase in the debtors' monthly plan payments from $500.00 to $823.00. On October 18, 1989, the debtors consulted Roboz, who immediately contacted the Trustee after unsuccessfully attempting to reach Hord. On October 27, 1989,

the Trustee and Roboz filed a Motion to Set Aside the Consent Order. In that motion they objected to the Barnes' claim and also objected to Hord's application for $1,270.00 in legal fees which previously had been allowed by the court.

Hord responded by filing a motion that sanctions be imposed against Roboz, alleging, among other things, that the debtors had failed to return the Barnes' "numerous items of property," (emphasis in the original); that the settlement was "contrary to (his) legal advice," that the objection to Hord's attorney's fees was made "out of malice, and with an intent to harass Mr. Hord," on the part of Roboz; that Roboz "engaged in dishonesty and deceit," and that the Objection to Hord's attorney's fees was part of a scheme on the part of David R. Badger, Roboz's employer, to harass Hord. No such allegations were made against the Chapter 13 Standing Trustee, although he was a party to the Motion. Meanwhile, Hord withdrew as debtors' counsel, but refused after reasonable requests to turn over their file, either to the debtors or to Roboz. The trial brief submitted by Hord repeated on his Rule 9011 allegations.

At trial, in addition to Mrs. Hall's testimony, the court heard the testimony of Marcus Johnson, the Chapter 13 Standing Trustee. The Trustee testified that he had joined Roboz in the Motion to Set Aside the Consent Order and Objection to the attorney's fees award to Hord. He characterized Hord's action -- or inaction -- regarding the entry of the settlement and Consent Order as "debtor dumping," that is, inattention to the needs of

one's clients after one has been paid the initial filing fee. Although the Trustee was complimentary of Hord's preparation of his Chapter 13 petitions and schedules, he also testified that Hord seldom appears on behalf of his clients in contested matters unless his work has been criticized, such as by an objection to his attorney's fees. The court has also observed that pattern over the past two years.

The court also heard the testimony of R. Keith Johnson, Esq. and Richard M. Mitchell, Esq., each of whom is an experienced bankruptcy attorney, and each of whom is a North Carolina State Bar board certified specialist in bankruptcy law (as is Hord). Mitchell and Keith Johnson testified that in their experience it is common practice of Hord to respond with vicious personal attacks when his work product is questioned, and they cited, as examples, Hord's actions in the following cases in this court: In re Henry Samuel Brank, Case No. C-B-85-00033; In re William Lofty, Case No. C-B-83-00096; In re General Piping, Case No. C-B-86-00091; In re Global Research, Case No. C-B-85-00737; and In re David and Priscilla Golden, Case No. C-B-82-00300. In the Golden case, United States Bankruptcy Chief Judge Marvin R. Wooten entered an Order disallowing Hord's attorney's fees stating that "after observing the witnesses and reviewing their testimony this court can conclude only that James C. Hord has not been honest with this Court and that his testimony is untrue."

Mitchell testified that he had reviewed the case under consideration, and that in his opinion, Hord had incompetently

represented the debtors with regard to the Barnes' claim and that any attorney's fees to Hord were undeserved.

Hord testified in his own defense/offense. His testimony was a demonstration of evasiveness that declined into mendacity with each successive attempt to avoid a damaging truthful answer. For example, Hord stated that he keeps contemporaneous time records, at least in some matters, and did so in this case. But, he could produce only one example of such a record -- a handwritten notation in the corner of a letter from Hord to counsel for the Barnes (Debtors' Exhibit 8). Not only did this notation indicate one and one-half hours time for a one paragraph letter(!), but the content of the letter directly contradicted Hord's prior testimony that he had not had contact with the attorney for the Barnes regarding settlement of the Barnes' objection, and that the settlement had been contrary to Hord's legal advice!! Hord produced no other contemporaneous time records to support the $1,270.00 fee Application that the court had previously approved (in the absence of objection), notwithstanding the fact that his fee Application was designed to appear to have been prepared from such records.

Hord also testified that the notice of his Application for attorney's fees was given, as required, to the debtors, Trustee, Bankruptcy Administrator, and all creditors, although the Certificate of Service he signed and attached to the Application did not mention service on all creditors. Hord's testimony that this was merely a "typo" defies credulity.

Several self-serving memoranda attached to Hord's brief appear to have been concocted months after the events in question and designed solely for the purpose of this hearing (they are typed, not dated, and are clearly not contemporaneous records). To the extent that Hord's testimony conflicts with that of Mrs. Hall, the court believes Mrs. Hall. The court observed Hord's answers to be evasive and believes them to be untrue.

Further, the court does not believe Hord's testimony regarding the alleged "scheme" to harass him -- by Roboz or by Badger's law firm. There is nothing factual to support that allegation. The prior challenges to Hord by Badger, et al., all appear justified in their filing (even if sanctions were not ultimately imposed). Hord offered nothing rising to the dignity of credible factual evidence of any of the allegations of his sanctions motion -- no evidence of malice, harassment, dishonesty and deceit, or of any scheme whatsoever. The request for sanctions is based at most on Hord's imagination. The court can find no factual basis for Hord's allegations against Roboz. They are totally without merit and are baseless untruths at best, and defamation at worst. Hord's selective motion against Roboz (a relatively young practitioner) and omitting the Trustee -- who joined in the motion against him -- is further evidence of the impropriety of his motion.

DISCUSSION

Pursuant to F.R. Civ. Pro. Rule 60 (b)(2)(3) and (6), made applicable by Bankruptcy Rule 9024, and pursuant to 11 U.S.C.

§ 502(j), this court has the authority to reconsider the Consent Order. The court has determined that the Consent Order was entered inappropriately in light of the present evidence (which was not available at the time the order was entered), or by misconduct by Hord, and that that merits relief from the Consent Order. It is in the best interest of all parties for the debtors to have the opportunity to object to the claim of the Barnes in another proceeding. Consequently, the Consent Order should be set aside and the debtors given leave to object to the Barnes' claim. This objection will be determined in the ordinary course of this case.

With respect to Hord's attorney's fees, pursuant to 11 U.S.C. § 328(a) and § 329(b), the court has determined that the $1,270.00 awarded to Hord exceeds the reasonable value of Hord's services to the debtors and that it was improvident due to reasons not anticipated at the time, to award the fees. Hord prepared the debtors' petition and allowed the Consent Order to be entered contrary to the facts of the situation. Further, he failed to advise his clients that the effect of the Consent Order would be a drastic increase in their required monthly payments to the Trustee, although it should have been obvious that when adding a $9,000.00 secured debt to a previous secured debt total of $21,000.00, a substantial payment increase would result. Any supposed valuable services that Hord initially rendered in filing the debtors' petition or with respect to the Consent Order were more than offset by the cost to the debtors in dealing with Hord

in the mess he created (or allowed to be created) over the Barnes' claim. Therefore, the court has determined that the net effect is that Hord has rendered no valuable services to the estate, 11 U.S.C. § 329(b), and that the court's previous award of $1,270.00 to Hord was improvidently granted. 11 U.S.C. § 328(a). This decision is also justified by Hord's failure to keep contemporaneous time records and his inability to support his original Application for fees -- which on this record appears to be fabricated. Therefore, the court will strike its previous award and order Hord to remit to the Trustee all funds he has received from the debtors or from the Trustee.

With respect to Hord's Rule 9011 Motion against Roboz, the court has determined that there is no merit in that motion. The assertions contained in his motion are not well grounded in fact, and are not supported at all by fact, but at most, only by Hord's pride and imagination. The court finds there is no evidence of any malice, deceit or harassment against Hord by Roboz or any member of the Badger law firm.

Bankruptcy Rule 9011 provides that:

> ... The signature of an attorney ... constitutes a certificate that the attorney... has read the document... that to the best of the attorney's... knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact...; and that it is not interposed for improper purpose.... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it... an appropriate sanction, which may include an order to pay... the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Bankruptcy Rule 9011(a).

The court is generally reluctant to grant Rule 9011 sanctions, but the facts in this case mandate imposing them against Hord, given Hord's exaggerated, unsupported and untrue statements contained in his motion and brief. See, Bankruptcy Rule 9011 ("shall impose"); and NCNB National Bank of North Carolina v. Tiller, 814 F.2d, 931 (4th Cir. 1987). In Tiller, the Court held that if an attorney's conduct appears to fall within the scope of Rule 11, requiring an examination of the facts and the law before instituting legal process, the court must inquire whether a reasonable attorney in like circumstances would believe his actions to be factually and legally justified. If this standard of objective reasonableness is not met, sanctions are mandatory. The evidence mandating sanctions in this case is overwhelming. No reasonable attorney in like circumstances would have filed the Rule 9011 motion and brief that Hord filed and signed. The motion and brief filed by Hord contain plain misstatements of fact and misstatements that are nothing short of defamatory. Moreover, these are his statements and not representations originated by his client. The court finds from the evidence presented that Hord wilfully misstated his understanding that only "some items" of business property had been returned to the Barnes; that Hord misstated his involvement in preparation of the Consent Order; that Hord misstated that the Objection to his fee was made "out of malice, and with intent to harass;" that Hord misstated that Roboz made a "false statement" and that she "engaged in dishonesty and deceit;" and that Badger had engaged in a "scheme

to harass" him. The court finds that those statements contained in documents signed by Hord are untrue and known to him to be false. As such, the statements are certainly not "well grounded in fact" and are made for an improper purpose (either to intimidate a young lawyer or to mislead the court). Thus, Hord's motion and brief were signed in violation of Rule 9011(a) and require imposition of sanctions. The court has determined that the appropriate sanction in this case is that Hord pay the fees and costs incurred in defending his sanctions motion against Roboz.

The court has determined that the amount of sanctions against Hord should be the reasonable attorney's fees and expenses required by Roboz, Badger and others for preparation for the hearing on these motions, appearance at the hearing and for preparation of a proposed order and fee petition as requested by the court. See, Bankruptcy Rule 9011. The court has reviewed the detailed fee Application and Hord's letter response to it (and to the proposed order) using the standards and guidelines established by the Fourth Circuit and Supreme Court in determining "reasonable" attorney's fees. See, Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984); Pennsylvania v. Delaware Valley Cit. Council, ___ U.S. ___, 107 S.C. 3078 (1987); Missouri v. Jenkins, ____ U.S. ____, 109 S.Ct. 2463 (1989); Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496, 1510 (4th Cir. 1988); Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986); and Barber v. Kimbrell's, Inc., 577 F.2d 216, cert. denied, 439 U.S.

934 (1978), which adopted the standards of Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

Without going into a full exposition of its analysis here, the court states in summary that it has followed its analysis as fully stated in In re Maxway Corp., C-B-88-01027, pp. 5-18 (Bankr. W.D.N.C. March 4, 1989). Summarily stated, the court has examined the fee Application against the standard of "reasonable fee" charged and "reasonable hours" expended. Hensley v. Eckerhart, 461 U.S. at 433.

The "reasonable hours" are determined by considering such factors as: the skill and experience of the attorney; how the case was staffed (or over-staffed); the existence of excessive, redundant or unnecessary hours; the results obtained; the time and labor required by the case; and the novelty and difficulty of the issues involved. See, Hensley v. Eckerhart, 461 U.S. at 434-37; and Johnson v. Ga. Highway Express, 488 F.2d at 717-19. The court has examined the detailed time records submitted by counsel against these standards and against its own observation of what occurred in this matter (most of which took place in the court's presence). Although several lawyers have participated in this, there was no unnecessary effort or duplication of time and effort. It was necessary for both Roboz and Badger to be present at the hearing since Roboz had been accused by Hord and was a potential witness as well as the debtors' attorney. Hord himself associated separate counsel to represent him at the hearing. The efforts of other attorneys in the case involved wholly appropri-

ate assignments and division of the labor. This matter did not involve novel issues, but it did involve a personal assault on the attorneys, and preparation for the hearing was required. That preparation, the hearing and preparation of the proposed order were carried out by the attorneys skillfully and efficiently with no excessive, unnecessary, redundant or wasted hours. Consequently, the court concludes that the full amount of hours requested are reasonable.

The "reasonable fee" is to be calculated according to the prevailing market rates in the relevant community. Blum v. Stenson, 465 U.S. at 895. The Supreme Court there recognized that determining the "market rate" for the services of a lawyer is inherently difficult; and it suggested that that was at least partly a function of the type of services rendered and the lawyer's experience, skill and reputation. Id. at 895-96 n. 11. Other factors which bear on determining a reasonable hourly rate are: the skill requisite to properly perform the legal service; the preclusion or other employment by the attorney due to acceptance of the case; the customary fee; the contingent nature of the fee; the amount involved and the results obtained; the experience, reputation, and ability of the attorney; the undesirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases. Johnson v. Ga. Highway Express, 448 F.2d at 717-19. The court is fully aware of the backgrounds, skills and abilities of the lawyers involved here. They all are regular practitioners in this court

-- they appear before the court on virtually a daily basis and are well known to the court. The court is also cognizant of the normal rates charged by attorneys in this market by its regular review of fee petitions numbering in the hundreds each month. The fees sought in the present application are well within the range of customary fees in this market for services of the type involved in this case by lawyers of the experience and ability of those involved here. Consequently, the court concludes that the "reasonable rate" here is that requested in the Application.

Based upon the foregoing, the court has concluded that the reasonable fee (and expenses) to be awarded to Badger and Associates, P.A. as sanctions is the full amount applied for -- $5,022.50.

Finally, it was necessary for the debtor's to call as witnesses other members of the local bankruptcy bar. These witnesses were professionals whose testimony was necessary and helpful to the court and, as a result, their time should be compensated. After reviewing their time statements on the standards discussed above, the court has concluded that $765.00 should be paid to R. Keith Johnson, Esq., and $690.00 to Richard M. Mitchell, Esq. by Hord, whose motion necessitated their testimony.

Although Rule 9011 refers to payment to "a party," that would merely amount to a pass-through here. So, the award will be made directly to the attorneys involved.

These sanctions are also fully justified by 11 U.S.C. § 105 and 29 U.S.C. § 1927 as alternative and cumulative bases to Bankruptcy Rule 9011.

It is therefore **ORDERED** that:

1. The Consent Order dated September 5, 1989, is vacated;

2. The debtors may file an objection to the Barnes' claim in the normal course of the case;

3. The attorney's fee award of $1,270.00 previously awarded Hord is stricken, Hord's application for any fees is denied, and Hord is ordered to forward to the Trustee all of the $1,270.00 has received to date, within fourteen days of the date of this Order;

4. Hord's Motion for Sanctions against Roboz is denied;

5. Hord is ordered to pay sanctions in the amount of $5,022.50 to David R. Badger & Associates, P.A.; $690.00 to Richard M. Mitchell; and $765.00 to R. Keith Johnson, all within thirty days of the date of this order.

This the 14th day of December, 1989.

George R. Hodges
United States Bankruptcy Judge