

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

Case No. 6:01-bk-00533-ABB
Chapter 11

EVERGREEN SECURITY, LTD.,

Debtor.

ORDER

This matter came before the Court on the Motion for Sanctions Pursuant to Federal Rule of Bankruptcy Procedure 9011 (Doc. 1542) and the Motion for Fees and Costs Pursuant to 28 U.S.C. Section 1927 (Doc. No. 1624) (collectively, the "Sanctions Motions") filed by the Debtor Evergreen Security Ltd. ("Evergreen") through its President R.W. Cuthill, Jr. seeking sanctions against the attorneys Scott W. Spradley ("Spradley"), Maureen A. Vitucci ("Vitucci"), and Peter R. Ginsberg ("Ginsberg"), the law firms of GrayRobinson, P.A. ("GrayRobinson") and Peter R. Ginsberg, P.C.¹ (collectively, the "Respondents") relating to the Respondents' Motion for Recusal, Motion to Disqualify, Disclosure of All Ex Parte Communications and Revocation of All Prior Orders (Doc. No. 1508) ("Recusal Motion"). The Respondents filed various responses to the Sanctions Motions.²

Also before the Court is the Order to Show Cause entered on August 17, 2007 (Doc. No. 1700) directing the Respondents to appear on August 28, 2007 and show cause, among other things, why their signing, filing, presenting, and/or advocating of the Recusal Motion was not done in bad faith.

A final evidentiary hearing on the Sanctions Motions and Order to Show Cause was held on August 28, 2007 at which the Respondents, their respective counsel, counsel for Evergreen, counsel for Cuthill, and Biff

Marshal, a representative of GrayRobinson, appeared. The parties, pursuant to being granted leave to file and serve closing statements, filed post-hearing briefs (*see* Doc. Nos. 1717, 1722, and 1723).

The Court, after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises, makes the following findings and conclusions regarding the imposition of sanctions against Spradley, Vitucci, and GrayRobinson. A subsequent order will be entered addressing all remaining sanctions matters.

GrayRobinson is a Florida law firm with approximately 200 attorneys and ten offices. Spradley and Vitucci are members of the firm's Creditors' Rights and Bankruptcy Department. Spradley has been practicing law since 1988 and has been a partner with GrayRobinson for nine years. He has appeared before this Court for fourteen years. His demeanor before this Court has consistently been composed and professional.

Vitucci is an associate attorney in GrayRobinson's bankruptcy department who has been in private practice for approximately four years. She formerly clerked for the Honorable Karen S. Jennemann with this Court. Spradley is Vitucci's immediate supervisor.

Spradley and Vitucci are members of the Florida Bar, the District Court Bar, and the Bar of this Court. They are active members of local Orlando bar organizations. Each has a high level of expertise in creditors' rights and bankruptcy matters.

Spradley, Vitucci, GrayRobinson, and Ginsberg jointly represented Jon M. Knight, J. Anthony Huggins, Mataeka, Ltd., Atlantic Portfolio Analytics & Management, Inc. a/k/a APAM, and International Portfolio Analytics, Inc. (collectively, the "Clients") in the above-captioned Evergreen main case and other related adversary and involuntary bankruptcy proceedings.

The Clients, through their counsel, filed the Recusal Motion seeking the recusal of the undersigned Judge from further involvement in the Evergreen case and all other cases involving the Clients. They also sought the

¹ Ginsberg and his firm Peter R. Ginsberg, P.C. shall be referred to collectively herein from time to time as "Ginsberg."

² *See* Doc. Nos. 1655, 1656, 1657, 1658, 1659, 1676, 1677, and 1678.

disqualification of Evergreen's counsel and the revocation of *all* orders entered in the Evergreen main case and in *all* other proceedings involving the Clients.

The Clients' primary contentions in the Recusal Motion are: (i) the Judicial Council of the Eleventh Circuit Court of Appeals³ ("Judicial Council") was conducting an "investigation" of the undersigned Judge stemming from an alleged complaint filed by attorney Phillip M. Hudson, III against the undersigned Judge in relation to events in an unrelated case; (ii) the undersigned Judge, as a result of the investigation, was not impartial and was required to recuse himself in all matters in the Evergreen case and all other adversary proceedings, contested matters and related cases in which the Clients are parties; (iii) the undersigned Judge engaged in *ex parte* communications with Evergreen's counsel, and, as a result, the undersigned was required to recuse himself; and (iv) Evergreen's counsel committed violations of the Florida Rules of Professional Conduct.

A significant portion of the Recusal Motion is devoted to the Clients revisiting unfavorable rulings. None of their contentions regarding this Court's rulings constitutes a proper basis for a recusal motion. The timing of the filing of the Recusal Motion evidences its filing was driven by the Respondents' and Clients' displeasure with adverse rulings.

The Respondents, despite numerous opportunities, never corrected, withdrew, or attempted to withdraw the Recusal Motion.

They litigated the Recusal Motion through trial. The Respondents, while the Recusal Motion was pending, filed and advocated petitions in the District Court seeking the issuance of writs of mandamus against the undersigned Judge.⁴ Their District Court

pleadings repeat the Recusal Motion allegations. The District Court denied each of their petitions. The Recusal Motion was denied by the Order entered on February 27, 2007. No reconsideration of the Order was sought nor was it appealed.

The Recusal Motion violates subdivisions (b)(1), (2), and (3) of Rule 9011. The Respondents did not conduct a reasonable pre-filing investigation of the allegations contained in the Recusal Motion. They conducted no reasonable inquiry into the law. It was objectively unreasonable to make the allegations contained in the Recusal Motion. Not a single claim has factual or legal merit. The Respondents signed, filed and advocated the Recusal Motion in bad faith. They engaged in unreasonable, vexatious, and dilatory litigation tactics and willfully abused the judicial process.

Vitucci signed the Recusal Motion. The block beneath her signature sets forth her name and Spradley as GrayRobinson counsel representing "Mataeka, Ltd., International Portfolio Analytics, Inc., Atlantic Portfolio Analytics & Management, Inc., and J. Anthony Huggins." A block follows containing Ginsberg's name, his New York City firm address and contact information, and the statement "Attorneys for Jon M. Knight." Ginsberg was the driving force behind the Recusal Motion. Spradley read the Recusal Motion before it was filed and authorized its filing. Vitucci played a minor role in the drafting and filing of the Recusal Motion.

Spradley, Ginsberg, Vitucci and the Clients are signers, submitters, and advocates of the Recusal Motion and are subject to Federal Rule of Bankruptcy Procedure 9011. They, by signing, filing, submitting, and advocating the Recusal Motion, certified to the Court, pursuant to Rule 9011(b), that to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

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

³ The Respondents erroneously refer to the Judicial Council of the Eleventh Circuit Court of Appeals throughout their pleadings and presentations as the "11th Circuit Court of Appeals."

⁴ They instituted two District Court cases through filing petitions for writs of mandamus: Mataeka, Ltd., et al. v. United States District Court, et al., Case No. 6:06-cv-01210-JA-KRS (in which they filed a Petition, a second petition titled "Supplemental Petition," and a third petition); Mataeka, Ltd., et al. v. Briskman, Case No. 6:06-cv-01807-JA-JGG (in which they re-filed the third petition filed originally in 6:06-

cv-01210-JA-KRS). In essence, four petitions were filed.

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

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

GrayRobinson is culpable, pursuant to Rule 9011(c), for any violations of Rule 9011 by Spradley or Vitucci.

The Respondents were provided repeated and ample notice the imposition of sanctions pursuant to Section 105 of the Bankruptcy Code would be considered. They were afforded due process in conformity with the standards set forth by the Eleventh Circuit Court of Appeals. Glatter v. Mroz (In re Mroz), 65 F.3d 1567, 1575 (11th Cir. 1995); Donaldson v. Clark, 819 F.2d 1551, 1559-60 (11th Cir. 1987) (*en banc*). GrayRobinson recognizes the Court's inherent power to determine whether the Respondents' actions are sanctionable.⁵

GrayRobinson, Vitucci, and Spradley failed to show cause why sanctions should not be imposed against them pursuant to 11 U.S.C. Section 105(a) and the Court's inherent authority to sanction wrongful conduct. Sanctions are due to be imposed against them pursuant to Federal Rule of Bankruptcy Procedure 9011, 11 U.S.C. Section 105(a), and the Court's inherent powers.

Evergreen established it incurred fees of \$632,174.48 and costs of \$39,343.21, for a total of \$671,517.60, in defending the Recusal Motion, addressing the mandamus matters, and prosecuting the Sanctions Motions. Evergreen requests an award of its fees and costs as sanctions. Evergreen's fees and costs, after an examination of the In the Matter of First

Colonial Corp. of America, 544 F.2d 1291, 1299 (5th Cir. 1977) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) criteria, are reasonable.

Sanctions in the amount of \$300,000.00, representing approximately forty-five percent of Evergreen's fees and costs incurred in the recusal litigation, are due to be imposed against GrayRobinson, Vitucci, and Spradley, jointly and severally, pursuant to Rule 9011(c), 11 U.S.C. Section 105(a), and the Court's inherent powers, for their signing, filing, and advocating of the Recusal Motion and their unreasonable and vexatious litigation of the pleading, which acts were done in bad faith.

GrayRobinson, Vitucci, and Spradley, pursuant to the August 8, 2007 settlement agreement with Evergreen, agreed to pay Evergreen \$300,000.00 on or before October 1, 2007 in resolution of the Sanctions Motions. The Court is satisfied the settlement amount of \$300,000.00 is an appropriate sanction to redress all wrongful acts of GrayRobinson, Vitucci, and Spradley falling within the purview of Federal Rule of Bankruptcy Procedure 9011, Section 105(a) of the Bankruptcy Code, the Court's inherent powers to sanction wrongful conduct, and 28 U.S.C. Section 1927. The sanction, pursuant to Rule 9011(c)(2), is sufficient to deter repetition of the wrongful conduct or comparable conduct by others similarly situated. No additional monetary or other sanctions against GrayRobinson, Vitucci, or Spradley are necessary.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that sanctions of \$300,000.00 are hereby awarded to Evergreen and against GrayRobinson, Vitucci, and Spradley, jointly and severally, pursuant to Federal Rule of Bankruptcy Procedure 9011(c), 11 U.S.C. Section 105(a), and the Court's inherent powers, with such amount to be paid to Evergreen in accordance with the August 8, 2007 settlement agreement.

Dated this 16th day of November, 2007.

/s/Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

⁵ "GrayRobinson did not act in bad faith and this Court should exercise restraint and discretion in exercising its § 105 powers." (Doc. Nos. 1677 at ¶ 23; 1678 at ¶ 23). "GrayRobinson does not dispute the jurisdiction of this Court to impose sanctions under the authority of 11 U.S.C. § 105(a)." (Doc. No. 1717 at ¶ 29).