

**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.

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**ORDER TO SHOW CAUSE**

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. § 1927 (Doc. No. 1624) (collectively, the “Sanctions Motions”) filed by the Debtor Evergreen Security Ltd. (“Evergreen”) through R.W. Cuthill, Jr., the President of Evergreen (“Cuthill”), seeking sanctions against the attorneys Scott W. Spradley (“Spradley”), Maureen A. Vitucci (“Vitucci”), and Peter R. Ginsberg (“Ginsberg”) and the law firms of GrayRobinson, P.A. and Peter R. Ginsberg, P.C. (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”). Also before the Court is Evergreen’s Notice of Withdrawal (Doc. No. 1698).

A hearing was held on August 15, 2007 at which Evergreen, Cuthill, Vitucci, Spradley, GrayRobinson, Ginsberg, and Ginsberg, P.C. appeared through counsel and Leigh R. Meininger, the Chapter 7 Trustee of three related involuntary cases (“Chapter 7 Trustee”), appeared.

The Respondents were provided notice several months ago they may be subject to sanctions for their actions relating to their filing and advocating of the Recusal Motion. The issue of sanctions was first presented in the Rule 9011 Motion filed on October 10, 2006 in the Evergreen case. Evergreen subsequently filed the Section 1927 Motion on January 25, 2007 in the Evergreen case. The Sanctions Motions substantively address Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. Section 1927. A final evidentiary hearing on the Sanctions Motions is set for August 28, 2007 at 10:00 a.m.

The Court, to afford the Respondents due process, must provide the Respondents fair notice of the Court’s intention to address whether sanctions should be imposed against the Respondents pursuant to 11 U.S.C. Section 105(a) and the reasons by their conduct may warrant sanctions. The Respondents must be given an opportunity to respond to the invocation of sanctions and to justify their actions.

Notice was provided to the Respondents on several occasions, beginning with the February 27, 2007 Order denying the Recusal Motion, that they could be subject to sanctions pursuant to the Court’s inherent powers through 11 U.S.C. Section 105(a), for their actions relating to their signing, filing, presentation, and advocating of the Recusal Motion. The Respondents have been provided ample and repeated notice the Court intends to consider at the final evidentiary hearing the imposition of Section 105(a) sanctions against them. The proposed withdrawal of the Sanctions Motion does not affect the Court’s Section 105 powers to impose sanctions for wrongful conduct.

The purpose of this Order is to recapitulate the Court will conduct the final evidentiary hearing as scheduled and consider, pursuant to the Court’s inherent and Section 105 powers, whether the Respondents should be sanctioned for their signing, filing, presenting, and/or advocating of the Recusal Motion. The sanctions matters should be addressed in one comprehensive, non-bifurcated hearing.

***Chronology***

The Respondents had notice as early as February 27, 2007 through the entry of the Order denying the Recusal Motion (Doc. No. 1643) (“February 27, 2007 Order”) the Court may exercise its inherent powers pursuant to Section 105 to sanction the Respondents for their conduct relating to the signing, filing, presenting and advocating of the Recusal Motion.<sup>1</sup> The February 27, 2007 Order details within its fifty-seven pages the Respondents’ specific wrongful actions and concludes they acted in bad faith:

The Recusal Motion was not filed in good faith . . . The Recusal Motion is devoid of substance and is unfounded . . . The Movants and their attorneys were

<sup>1</sup> Evergreen cites to Section 105(a) as a basis for the Sanctions Motions, but does not substantively address the Code provision in its Sanctions Motions. (See Rule 9011 Motion at ¶ 13; Section 1927 Motion at ¶ 12).

unyielding in their litigation of the Recusal Motion, even when the Recusal Motion was exposed as unfounded at trial . . . The Movants and their counsel abused the recusal statutes, this Court, Evergreen and its counsel by filing the Recusal Motion for an improper purpose. They subverted the Rules of Professional Conduct by invoking the Rules as offensive procedural weapons. Their actions are corrosive to the proper functioning and the integrity of the judicial system.

February 27, 2007 Order at pp. 55-57. The Respondents were provided notice their actions may be subject to sanctions, including sanctions issued through the Court's inherent powers:

An imposition of sanctions against them, their clients, and/or their firms may be appropriate if it is determined the pleading was presented in violation of Rule 9011. Their actions may also be subject to sanctions pursuant to the Court's inherent powers to address wrongful conduct.

Id. at p. 13. No reconsideration or appeal was sought of the February 27, 2007 Order. It constitutes a final, non-appealable order.

A status conference was held on the Sanctions Motions on June 13, 2007 at which the Respondents appeared through their respective counsel. The issue of whether the Court has inherent authority to award sanctions pursuant to 11 U.S.C. Section 105 was raised and argued by counsel.<sup>2</sup> The Respondents were invited to file briefs addressing this issue. A hearing memorandum was entered at Doc. No. 1665 reiterating the hearing events and the Court's briefing directive.

The Respondents filed supplemental briefs (Doc. Nos. 1672, 1676, 1677, and 1678). GrayRobinson recognized the Court's inherent power to determine whether the Respondents' actions are sanctionable: "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). Ginsberg contended in his brief he

<sup>2</sup> The Court inquired of counsel: "If in fact [Evergreen] can't travel under [Rule] 9011, then don't I have an inherent authority on sanctions under 105?" The Respondents' counsel each addressed the question and indicated they would like to brief the issue. *See*, Transcript of June 13, 2007 hearing beginning at p. 24, l. 5.

and his firm were not afforded due process regarding the possible imposition of sanctions pursuant to Section 105. (Doc. No. 1676 at pp. 11-12). Ginsberg challenged Evergreen's filings as insufficient to provide due process. He, however, failed to address or recognize the Court's actions that provided the parties notice the Court may consider the imposition of sanctions through the Court's inherent powers.

An Order was entered on July 17, 2007 (Doc. No. 1685) ("July 17, 2007 Order") addressing the Section 105 issue and concluded:

The Court has an inherent power to sanction conduct *independent* of Rule 9011 . . . A Bankruptcy Court has statutory powers deriving from Section 105 of the Bankruptcy Code to address wrongful conduct . . . The Respondents presented the Recusal Motion through their signing, filing, submitting, and advocating of the pleading. Their actions are governed by Rule 9011 and may be subject to sanctions pursuant to Rule 9011 and the Court's Section 105(a) powers to address wrongful conduct.

July 17, 2007 Order at pp. 9, 10. The Court ordered, adjudged and decreed in the Order's closing:

that this Court is empowered by 11 U.S.C. Section 105(a) to determine whether sanctions should be imposed against the Respondents in connection with their actions relating to the Recusal Motion . . . ."

Id. at p. 12. No reconsideration or appeal was sought of the July 17, 2007 Order.

A hearing was held on July 26, 2007 at which counsel for the Respondents appeared and addressed various discovery and final evidentiary hearing exhibit matters. No party raised any issue relating to the July 17, 2007 Order.<sup>3</sup>

Various other cases relating to Evergreen, including three involuntary Chapter 7 bankruptcy cases and an adversary proceeding filed by Evergreen against GrayRobinson, are pending (collectively, the "Evergreen Proceedings").<sup>4</sup> A

<sup>3</sup> *See* hearing transcript at Doc. No. 1692.

<sup>4</sup> *In re* Jon M. Knight, Case No. 6:06-bk-01547-ABB; *In re* J. Anthony Huggins, Case No. 6:06-bk-01546-ABB; *In re* Atlantic Portfolio Analytics & Management, Inc., Case No.

pretrial conference was held in the GrayRobinson AP on August 6, 2007 during which counsel advised the Court a global settlement was anticipated resolving all matters between Evergreen, the Chapter 7 Trustee, GrayRobinson, Vitucci, and Spradley and Evergreen intended to withdraw the Sanctions Motions as to GrayRobinson, Vitucci, and Spradley.

The Court advised the parties the possibility of sanctions being imposed pursuant to the Court's inherent powers of Section 105(a) continues regardless of any pleading seeking to withdraw the Sanctions Motions. Evergreen, GrayRobinson, Vitucci, and Spradley were provided notice the issue of Section 105 sanctions continues to be an issue for determination at the final evidentiary hearing.

The parties to the global settlement memorialized their resolution in three separate agreements: (i) a Settlement Agreement bearing the captions of the three involuntary cases and attached to the Chapter 7 Trustee's Motions for Approval and Notice of Compromise and Settlement filed on August 10, 2007 in the involuntary cases; (ii) a settlement agreement by and between Evergreen, R. Scott Shuker, Latham Shuker Eden & Beaudine L.L.P., GrayRobinson, Vitucci, and Spradley resolving the Sanctions Motions; and (iii) a settlement agreement by and between the Chapter 7 Trustee and GrayRobinson resolving the GrayRobinson AP. Evergreen, on August 15, 2007, filed the Notice of Withdrawal seeking to withdraw the Sanctions Motion as to GrayRobinson, Spradley, and Vitucci.

The Court conducted a status conference in the Evergreen main case on August 15, 2007 to have the parties identify their positions in light of the settlement agreements and address time estimates for the final evidentiary hearing. All parties were present through counsel. Evergreen's counsel advised the Court all three settlement agreements had been presented to Evergreen's Steering Committee and had been approved.

The Court again informed the parties it may consider at the final evidentiary hearing, pursuant to its Section 105 powers, whether sanctions should be imposed against the Respondents in connection with their actions relating to the Recusal Motion.

Counsel for the Respondents raised whether the imposition of sanctions pursuant to Section 105 continues to be an issue. The Respondents, as the chronology reflects, were provided notice the Court would be evaluating whether to impose sanctions against the Respondents pursuant to Section 105 for their actions relating to the Recusal Motion. The July 17, 2007 Order and the Court's statements made to counsel at subsequent hearings unequivocally provided the parties notice Section 105 sanctions continues to be an issue to be determined at the final evidentiary hearing.

### *Conclusion*

The Respondents have been provided fair, ample, and repeated notice the Court has the inherent power pursuant to 11 U.S.C. Section 105 to consider the imposition of sanctions against the Respondents relating to their signing, filing, presenting, and/or advocating of the Recusal Motion, and may exercise that power at the final evidentiary hearing. They have the opportunity at the final evidentiary hearing to explain and justify their actions regarding the Recusal Motion. The Respondents have been afforded due process. The Court, to eliminate any possible misunderstanding the Respondents or their counsel may have, hereby issues this Order to Show Cause pursuant to the Court's inherent powers including its 11 U.S.C. Section 105(a) powers.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that Scott W. Spradley, Maureen A. Vitucci, Peter R. Ginsberg, law firm of GrayRobinson, P.A., and the law firm of Peter R. Ginsberg, P.C. are hereby directed to appear on August 28, 2007 at 10:00 a.m., in Courtroom A, Fifth Floor, 135 West Central Boulevard, Orlando, Florida, to show cause: (i) why their signing, filing, presenting, and/or advocating of the Recusal Motion was not done in bad faith; (ii) why their presenting of the Recusal Motion was not for any improper purpose; (iii) why and/or how the claims and contentions in the Recusal Motion were warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (iv) why and/or how the allegations and other factual contentions of the Recusal Motion have evidentiary support; (v) whether and how they made a reasonable inquiry into the allegations set forth in the Recusal Motion; (vi) why their filing, presenting, and advocating of the Recusal Motion did not unreasonably and vexatiously

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6:06-bk-01549-ABB; and Evergreen Security, Ltd. v. Gray Robinson, P.A., AP No. 6:07-ap-00030-ABB (the "GrayRobinson AP").

multiply the Evergreen Proceedings; and (vii) why sanctions should not be imposed against them, jointly and/or individually and/or severally, pursuant to 11 U.S.C. Section. 105(a), for their signing, filing, presenting, and advocating the Recusal Motion.

Dated this 17 day of August, 2007.

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