IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

Civil Action File No.
1:12-CV-1996-TWT

BENJAMIN DANIEL DEHAAN, et al.
Defendants.

S. GREGORY HAYS, Receiver for
LIGHTHOUSE FINANCIAL PARTNERS, LLC,
Plaintiff,

v.

Ancillary Proceeding
1:13-CV-03925-TWT

PAGE PERRY, LLC, et al.
Defendants.

DEFENDANTS' REPLY TO PLAINTIFF'S SUPPLEMENTAL RESPONSE TO MOTION FOR RULE 11 SANCTIONS

Defendants Page Perry, LLC, Estate of J. Boyd Page, Alan R. Perry, Jr., J. Steven Parker, Robert D. Terry, and Daniel I. MacIntyre ("Defendants") and reply to Plaintiff's Supplemental Response to Defendants' Motion for Rule 11 Sanctions Against Plaintiff and Plaintiff's Counsel showing the Court as follows:

I. Plaintiff and his counsel are not cloaked with immunity protecting them from violations of Rule 11.

Plaintiff initially contends both he and his counsel are shielded by a heightened standard of culpability pursuant to the language of the Appointment Order. *SEC v. DeHaan et al.*, Case No. 1:12-CV-1996-TWT, Order (July 2, 2012 N.D. Ga.). According to Plaintiff, both he and his counsel are entitled to qualified immunity except for actions involving either gross negligence or intentional misconduct. Notably absent from Plaintiff's argument is any authority demonstrating the language of the Appointment Order alters the *objective reasonableness* standard of Rule 11. *Homecare CRM, LLC v. Adam Group, Inc.*, 952 F. Supp. 2d 1373, 1380 (N.D. Ga. 2013) ("The objective standard for testing conduct under Rule 11 is reasonableness under the circumstances and what was reasonable to believe at the time the pleading was submitted." (quoting *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998))). Plaintiff fails to cite any legal authority showing he and his counsel are *less* accountable for filing frivolous lawsuits.

While Rule 11 motions against receivers are not typical, the case law demonstrates receivers are not entitled to a more lenient standard of culpability

under Rule 11 simply by virtue of their appointment. For instance, in *Friedlob v. Trustees of the Alpine Mut. Fund Trust*, 905 F. Supp. 843 (D. Colo. 1995), the district court entertained a Rule 11 motion against a receiver after granting defendant's motion to dismiss. *Id.* at 860-61. While the Rule 11 motion was ultimately unsuccessful, *Friedlob* demonstrates receivers are held to a reasonableness standard like any other litigant. *See also FDIC v. MAXXAM, Inc.*, 523 F.3d 566 (5th Cir. 2008) (affirming Rule 11 sanctions order under reasonableness standard against FDIC for improperly pursing damages against businessman for involvement in company's failure); *FDIC v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994) (reversing Rule 11 award against FDIC-R under reasonableness standard because claims were warranted by existing law); *Federal Sav. & Loan Ins. Corp. v. Sutherlin*, 109 B.R. 700, 706 (E.D. La. 1989) (reversing grant of Rule 11 and Bankruptcy Rule 9011 sanctions against Receiver without suggesting receiver entitled to a lesser standard of scrutiny).

The invalidity of Plaintiff's argument is further demonstrated by the intrinsic similarities between bankruptcy and receivership. Like a receiver, a trustee is imbued with court-appointed power to marshal assets of an estate and sue third-parties. When it comes to sanctions for filing frivolous lawsuits, Federal Rule of

Bankruptcy Procedure 9011 is the functional equivalent of Rule 11. *Abrams v. Felix (In re Miller)*, 414 Fed. Appx. 214, 217 n.3 (11th Cir. 2011); Fed. R. Bankr. P. 9011. Like Rule 11, Bankruptcy Rule 9011 makes no concessions for a trustee and applies equally to both trustees and debtors alike. *See, e.g., Cuthill v. Averett, Warmus, Durkee, Bauder & Thompson, P.A. (In re Evergreen Sec., Ltd.)*, 318 B.R. 220, 225-26 (Bankr. M.D. Fla. 2004) (addressing merits of Bankruptcy Rule 9011 claim against trustee under reasonableness standard). The omission of collateral support in the bankruptcy code demonstrates Plaintiff's claim is predicated more on expedience rather than law.

In a more fundamental sense, Plaintiff's argument is flawed because it fails to recognize the distinct interests that qualified immunity and Rule 11 serve. The qualified immunity provision of the Appointment Order is protective in nature. Immunity allows a receiver to carry out his duties without becoming "a lightning rod for harassing litigation . . . ." *Kermit Constr. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976). On the other hand, Rule 11 sanctions are punitive. *McDonald v. Emory Healthcare Eye Ctr.*, 391 Fed. Appx. 851, 852 (11th Cir. 2010). "Their purpose is to punish a party who has already violated the rules of the court." *U.S. v. Straub*, 508 F.3d 1003, 1009 (11th Cir. 2007) (citing *Willy v.*

Coastal Corp., 503 U.S. 131, 139 (1992)). The gap in Plaintiff's argument stems from the fact that he attempts to use an immunity provision intended to *protect* him from lawsuits as a license to *pursue* frivolous lawsuits. The Court should not countenance such a perverse result.

Plaintiff and his counsel are bound to the same level of review afforded all litigants and their counsel under Rule 11.[1] As demonstrated in Defendants' principal brief, Plaintiff and his counsel are liable under Rule 11 because the complaint was objectively frivolous and should never have been filed.

II. A gross negligence standard does not insulate Plaintiff or his counsel from sanctions.

Even if the Court were to apply a gross negligence standard pursuant to the Appointment Order, sanctions would still be warranted here. Gross negligence implies a knowing indifference to red flags and selective ignorance. *FDIC v.*

[1] Plaintiff tries to bring this case under the purview of Georgia's elevated level of receiver immunity stated in *Considine v. Murphy*, 327 Ga. App. 110 (2014). *Considine* calls for immunity except in cases of actual malice or intent to injure. *Id.* at 114. Like the rest of the cases Plaintiff cites, *Considine* does not address Rule 11. The case concerns a lawsuit of a former disgruntled owner of the company under receivership against a receiver for carrying out his duties. More importantly, *Considine* is based on Georgia law. This case turns on Plaintiff's federal appointment and federal law under Rule 11. *Considine* is thus not applicable.

Cincinnati Ins. Cos., 981 F. Supp. 2d 1324, 1337 (N.D. Ga. 2013). As is evident from the Court's findings in its Order granting Defendants' motions to dismiss, the decision to file the Complaint would unquestionably qualify under this standard.

With respect to the legal theories, Plaintiff and his counsel's primary claim of legal malpractice was entirely predicated upon a non-existent duty. As this Court well knows, Plaintiff and his counsel failed to offer a single citation of authority even intimating that an attorney has a duty to notify regulatory authorities of a client's malfeasance.[2] Perhaps even worse than the *lack* of support for their position is the mountain of authority Plaintiff and his counsel were obligated to ignore to bring their claim. Plaintiff and his counsel disregarded both the basic elements of the attorney-client relationship and the governing Bar Rules.

The individual claims against Page, Perry and MacIntyre were similarly flawed. In response to Defendants' motion to dismiss, Plaintiff and his counsel were unable to even suggest a valid basis for these claims. The Court correctly found arguments for vicarious liability, negligent supervision, and voluntary

[2] The Court also found Plaintiff and his counsel blatantly misstated the law with respect to the applicability of O.C.G.A. § 9-11-9.1 in federal court. [Doc. 27, 8-9.]

undertaking were incognizable and nothing but a post-hoc attempt to justify their allegations. [Doc. 27, 18-20.]

The frivolity of the Complaint was not limited to the law. As this Court pointed out in its Order, Plaintiff and his counsel supported their alleged claims with evidence that directly *contradicted* their factual allegations. [*Id.* at 11.] The Court properly characterized these factual allegations as "wild exaggerations, implausible inferences and selective quotations . . . ." [*Id.* at 15.]

It is clear Plaintiff and his counsel turned a blind eye to the realities of what occurred between Defendants and Lighthouse/DeHaan. When the law did not support their claims, they ignored the law. When the facts did not support their allegations, they ignored the facts. Perhaps even worse, Plaintiff and his counsel possessed court-sanctioned access to pre-litigation evidence that a typical putative plaintiff would lack. Instead of acknowledging the facts did not support their allegations, Plaintiff and his counsel chose to ignore and sue after settlement demands failed to intimidate Defendants into submission. Such misconduct is not

only grossly negligent, but also willful. Rule 11 sanctions are warranted against Plaintiff and his counsel under *any* standard of review.[3]

III. Hays's affidavit offers nothing to preclude imposition of sanctions under Rule 11 upon either him or his counsel.

The affidavit Hays submits is undoubtedly modeled after a similar affidavit discussed in *Maxwell v. KPMG, LLP*, No. 07-2819, 2008 U.S. App. LEXIS 23708 (7th Cir. 2008), and cited by Plaintiff.[4] In that affidavit, trustee Maxwell testified he did not have any expertise in the areas of accounting or auditing malpractice so he relied on counsel's judgment on whether to bring suit. *Id.* at *10-11. Plaintiff similarly attempts to deflect responsibility for bringing this frivolous lawsuit against Defendants.

While Maxwell may have been able to plead ignorance and escape personal sanctions, Hays is not so inexperienced. Hays has a litany of receiver/trustee appointments. *See, e.g.*, *Hays v. Paul, Hastings, Janofsky & Walker LLP*, Civil

---

[3] The Court may also impose sanctions under its inherent power separate and apart from Defendants' motion. *Peer v. Lewis*, No. 13-11554, 2014 U.S. App. LEXIS 13259, at *10-11 (11th Cir. 2014).

[4] *Maxwell* came on the heels of *Maxwell v. KPMG, LLP*, 520 F.3d 713 (7th Cir. 2008), which was issued about five months earlier. In that decision, Judge Posner issued a scathing assessment of the trustee's lawsuit (as to both liability and damages) brought against KPMG. *Id.*

Action No. 1:06-CV-754-CAP, 2006 U.S. Dist. LEXIS 95849 (N.D. Ga. 2006); *U.S. CFTC v. Lake Dow Capital, LLC*, Case No. 1:05-CV-02709-CC, 2005 U.S. Dist. LEXIS 40807, at *8-9 (N.D. Ga. 2005); *Hays v. Curry (In re Maxxis Group)*, Adv. Case No. 06-06554, 2009 Bankr. LEXIS 4249 (Bankr. N.D. Ga. 2009); *Hays v. Nano-Tex, Inc. (In re Galey & Lord, Inc.)*, Adv. Case No. 06-4134, 2008 Bankr. LEXIS 4794 (Bankr. N.D. Ga. 2008); *Hays v. Morgan Stanley DW Inc. (In re Stewart Fin. Co.)*, 367 B.R. 909 (Bankr. M.D. Ga. 2007). While Hays is perhaps not a seasoned litigator, it strains credulity to presume Hays was not well-versed in both the legal issues in the suit and the implications of his conduct.

Hays also considers himself an expert in this field. In an article penned by Hays himself, he warns that an inexperienced receiver may "not adequately understand court procedures, legal implications or tax consequences of particular acts . . . ." S. Gregory Hays, *If You Think That it is Expensive to Hire an Experienced Receiver, Wait Until You Hire an Amateur*, NAFER Receiver, 14 (Spring 2014), *available at* http://haysconsulting.net/news/recent-news/. He also extols the benefits of hiring a competent receiver who can "understand the nuances of receivership law . . . ." *Id.*

With respect to the affidavit itself, it is rife with hearsay, including out of court statements allegedly made by the SEC. [Doc. 37-1, ¶¶9, 10, 11, 17.] In addition, Plaintiff audaciously equates an undisclosed eve-of-trial settlement in an action by a private plaintiff with claims distinct from Hays's with "prior successful litigation." [*Id.* at ¶17.]

The most troublesome aspect of the affidavit, however, implicates the findings of the Court in its Order dismissing the Complaint. Despite unparalleled access to evidence pre-suit, Hays states that the factual assertions raised in the complaint were based on Mercer Bullard's "*own* factual allegations . . . ." [*Id.* at ¶9 (emphasis added).] As the Court very well knows, these factual allegations were both unsupported and contradictory. To the extent Hays provided Bullard with incomplete facts to prepare his affidavit, Hays is liable. To the extent Hays incorporated Bullard's purported factual allegations (really conclusions) that were patently contradicted by the exhibits and related evidence, Hays is liable. While Hays may be excused from knowing aspects of the law, he cannot escape culpability when a fact is simply unsupported or contradicted by the evidence he was appointed to collect, investigate, and assess.

With respect to counsel, nothing in the affidavit or the supplemental response excuses them from sanctionable conduct. While the Seventh Circuit in *Maxwell* ultimately spared the trustee, his counsel was not so lucky. The Court of Appeals sanctioned counsel for engaging in "ostrich-like" tactics. *Maxwell v. KPMG, LLP*, No. 07-2819, 2008 U.S. App. LEXIS 23708, at *12 (7th Cir. 2008).

The same occurred here. Like Hays, his counsel had the benefit of access to pre-suit evidence as well as an understanding of the law. Even if counsel did consult with Bullard, counsel possessed the legal acumen and experience in this field to determine *objectively* the case was frivolous. While Hays may claim to be a novice in this field, the same cannot be said of counsel. Counsel pursued this lawsuit against Defendants with a willful refusal to acknowledge that neither the law nor the facts supported their claims (and actually rebutted them). Such willful ignorance is tantamount not only to gross negligence, but even to intentional misconduct, and sanctions are warranted.

IV. The *Barton* doctrine is inapplicable because this Court appointed Plaintiff as receiver.

Plaintiff's final argument contends that the *Barton* doctrine precludes the Rule 11 motion because Defendants did not seek leave of court before filing the

motion.[5] The *Barton* doctrine is derived from the Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126 (1881), wherein the Court stated, "[i]t is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained." *Id.* at 128.

The fundamental problem with Plaintiff's argument is evident from the underlying reasoning from *Barton* itself. In *Barton*, the plaintiff filed a lawsuit against a receiver in a state court different from the one that appointed the receiver. The Court explained leave of the appointing court was required because of the adverse impact an ancillary suit could have on the property under receivership.

> If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could [seize upon the property of the trust], and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. . . . A suit therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit . . . to take the property of the trust from his hands and apply it to the payment of

[5] The only party that failed to obtain leave was Plaintiff in bringing this Supplemental Response. Plaintiff did not obtain permission to file an untimely amendment to his Response. *See* LR 7.1(F), NDGa. In addition, by filing two responses, Plaintiff attempts to avoid the 25 page limitation pursuant to LR 7.1(D) as the Responses together span 37 pages. LR 7.1(D), NDGa. The Court should strike the Supplemental Response as Plaintiff could have and should have included all arguments in his principal Response within the prescribed 25 page limit. [Doc. 26.]

> the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property.

Id. at 128-29 (emphasis added).

But the same reasoning does not apply to an action commenced in the *same* court that appointed the receiver. Unlike *Barton*, this Court retains plenary control of both the property under receivership *and* the Rule 11 motion seeking sanctions. The relief afforded Defendants under Rule 11 would not constitute a collateral attack on the receivership's assets. No leave is required because the threat of unilateral dissipation (and fundamental basis for the *Barton* doctrine) simply do not exist when there is no infringement on this Court's jurisdiction. *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996) ("A well-recognized line of cases starting with *Barton* . . . extends such protection by requiring leave of the appointing court before a suit may go forward in another court against the trustee." (emphasis added)); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) ("It is well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee . . . ." (emphasis added)).

It is therefore not surprising Plaintiff fails to offer a single case wherein a court precluded an action against a receiver in the same court that appointed him. In *Barbee v. Price Waterhouse, LLP (In re Solar Fin. Servs.)*, 255 B.R. 801 (Bankr. S.D. Fla. 2000), the only authority Plaintiff cites besides *Barton* to support his argument, the Bankruptcy Court applied the doctrine to preclude an action against a trustee in a state court of Florida. *Id.* at 804-05. In fact, research has not revealed a single instance in more than 130 years since *Barton* wherein the doctrine was applied in the same court. *See, e.g.*, *Carter v. Rodgers*, 220 F.3d 1249 (11th Cir. 2000) (applying *Barton* doctrine when debtor failed to obtain leave in bankruptcy court before initiating suit in district court); *In re Linton*, 136 F.3d 544 (7th Cir. 1998) (affirming bankruptcy court's denial of leave to litigants seeking to file state court action); *Vass v. Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932) (L. Hand, J.) (enjoining state court suit against federally appointed receiver/trustee); *In re Krikava*, 217 B.R. 275, 279 (Bankr. D. Neb. 1998) ("Consent of the appointing bankruptcy court is required even when the plaintiff seeks to sue in another federal court."). In sum, neither *Barton* nor its eponymous

doctrine lends any support to Plaintiff and his counsel's attempt to avoid Rule 11 sanctions.[6]

CONCLUSION

For the foregoing reasons, the District Court should grant Defendants' motion for sanctions under Rule 11 and impose sanctions upon both Plaintiff and his counsel. In the alternative, Plaintiff and his counsel should be sanctioned pursuant to the District Court's inherent authority.

This 2nd day of September, 2014.

HAWKINS PARNELL THACKSTON & YOUNG LLP

/s/ Christine L. Mast

Christine L. Mast
Georgia Bar No. 461349
H. Lane Young II
Georgia Bar No. 781950
Zachary Lewis
Georgia Bar No. 689146
Counsel for Defendants

4000 SunTrust Plaza
303 Peachtree Street
Atlanta, GA 30308-3243
(404) 614-7400 *(telephone)*
(404) 614-7500 *(facsimile)*

[6] Even if the *Barton* doctrine were applicable to a court with concurrent jurisdiction, Plaintiff has failed to demonstrate the doctrine would be applicable to a Rule 11 motion as opposed to a separate lawsuit. *Barbee* merely offers dictum that a motion for fees falls within the purview of the *Barton* doctrine. *Barbee*, 255 B.R. at 805, n.2.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

Civil Action File No.
1:12-CV-1996-TWT

BENJAMIN DANIEL DEHAAN, et al.
Defendants.

S. GREGORY HAYS, Receiver for
LIGHTHOUSE FINANCIAL PARTNERS, LLC,
Plaintiff,

v.

Ancillary Proceeding
1:13-CV-03925-TWT

PAGE PERRY, LLC, et al.
Defendants.

CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing **DEFENDANTS' REPLY TO PLAINTIFF'S SUPPLEMENTAL RESPONSE TO MOTION FOR RULE 11 SANCTIONS** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail documentation of such filing to the following attorneys of record for Plaintiff:

Allison S. Hines Ficken, Esq.
Edward Joseph Dovin, Esq.
Dovin Malkin & Ficken, LLC
Suite 2775
Five Concourse Parkway
Atlanta, GA 30328
ahficken@dmflawfirm.com
ejdovin@dmflawfirm.com

I also certify that, pursuant to LR 5.1B, ND Ga., the above document was prepared in Times New Roman 14 pt. font.

This 2nd day of September, 2014.

HAWKINS PARNELL THACKSTON & YOUNG LLP

/s/ Christine L. Mast

Christine L. Mast
Georgia Bar No. 461349
H. Lane Young II
Georgia Bar No. 781950
Zachary Lewis
Georgia Bar No. 689146
Counsel for Defendants

4000 SunTrust Plaza
303 Peachtree Street
Atlanta, GA 30308-3243
(404) 614-7400 *(telephone)*
(404) 614-7500 *(facsimile)*
cmast@hptylaw.com
lyoung@hptylaw.com
zlewis@hptylaw.com