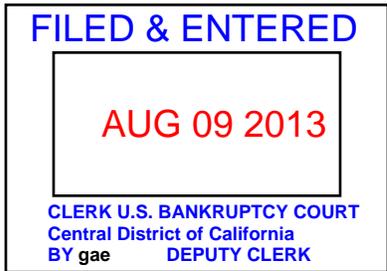


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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re
**MARTIN PEMSTEIN and DIANA
PEMSTEIN,**
Debtors.

MARTIN PEMSTEIN,
Plaintiff,
vs.
HAROLD PEMSTEIN,
Defendant.

Case No. 2:12-bk-15900-RK
Chapter 11
Adv. No. 2:12-ap-02467-RK

**SEPARATE STATEMENT OF DECISION
DENYING DEFENDANT'S MOTION FOR
SANCTIONS AGAINST PLAINTIFF**

Defendant Harold Pemstein has moved for an award of sanctions under Rule 9011 of the Federal Rules of Bankruptcy Procedure against plaintiff Martin Pemstein for filing the complaint in this adversary proceeding.

In its initial statement of decision on the motion, filed on May 30, 2013, the court stated that because it was ruling in favor of defendant on the merits of the adversary complaint and granting defendant's motion to dismiss based on the doctrines of claim or issue preclusion (res judicata or collateral estoppel) and of judicial estoppel, the court also stated its conclusion that plaintiff's claims were not warranted under existing law and

1 its preliminary opinion that defendant's sanctions motion should be granted in favor of
2 defendant and against plaintiff under Rule 9011(b). *Separate Statement of Decision on*
3 *Defendant's Motion for Sanctions against Plaintiff*, filed on May 30, 2013, at 1-2. In
4 making this initial statement of decision, the court stated that its orders determining the
5 validity of defendant's creditor claim and confirming debtor's Chapter 11 reorganization
6 plan are final orders, which bar any further action by plaintiff contesting defendant's
7 creditor claim. *Id.* at 2, *citing, e.g., United Student Aid Funds, Inc. v. Espinosa*, 559 U.S.
8 260, 130 S.Ct. 1367, 1380 (2010); *Siegel v. Federal Home Loan Mortgage Corp.*, 143
9 F.3d 525, 529 (9th Cir. 1998). The court also stated that plaintiff was thus not free to
10 assert a new claim contesting defendant's creditor claim. *Id.* Accordingly, the court
11 stated in its initial statement of decision that it was determining that it would be
12 appropriate to grant defendant's Rule 9011 motion against plaintiff because there was no
13 reasonable basis in fact or law to relitigate the validity of defendant's creditor claims in
14 this case and noted that plaintiff was afforded an opportunity to withdraw the offending
15 adversary complaint under the safe harbor provisions of Rule 9011(c) and failed to do so.
16 *Id.*

17 In its initial statement of decision, the court also observed that Rule 9011(b)
18 expressly provides that if there is a violation under the rule, sanctions are discretionary as
19 the court may, but is not required, to impose sanctions. *Id.*, *citing*, Fed. R. Bankr. P.
20 9011(b). The court also noted that in considering whether sanctions should be imposed
21 and what sanction to impose, the 1997 Advisory Committee note suggests various
22 factors for a court to consider: (1) whether the improper conduct was willful or negligent;
23 (2) whether it was part of a pattern of activity or an isolated event; (3) whether it infected
24 the entire pleading or only one particular count or defense; (4) whether the person has
25 engaged in similar conduct in other litigation; (5) whether it was intended to injure; (6)
26 what effect it had on the litigation process in time or expense; (7) whether the responsible
27 person is trained in the law; (8) that amount, given the financial resources of the
28 responsible person, is needed to deter that person from repetition in the same case; and

1 (9) the amount is needed to deter similar activity by other litigants. *Id.*, citing, 1997
2 Advisory Committee Note to Fed. R. Bankr. P. 9011, reprinted in 10 Resnick and
3 Sommer, *Collier on Bankruptcy*, ¶ 9011.RH[4] at 9011-29 – 9011-30 (16th ed. 2013). In
4 the initial statement of decision, the court further observed that while the parties briefed
5 Rule 9011 in their papers in support and in opposition to defendant's motion for
6 sanctions, their briefing focused on whether there was a Rule 9011 violation and not on
7 the appropriateness of sanctions under Rule 9011. *Id.* Thus, in its initial statement of
8 decision the court stated that in order for the court to consider the appropriateness of
9 Rule 9011 sanctions against plaintiff, the court would order the parties to file
10 supplemental briefing addressing the propriety of sanctions and the type of sanctions
11 which should be imposed. *Id.*

12 The parties have now filed their supplemental briefing as ordered by the court, and
13 the court has heard further argument from the parties on the motion at the hearing
14 conducted on August 6, 2013. Having considered the moving and opposing papers as
15 supplemented by the parties and the other papers and pleadings in this case, and having
16 heard the oral arguments of the parties at the hearing on the motion on August 6, 2013,
17 the court concludes that the motion should be denied.

18 In reaching this conclusion, the court discusses below the various factors in
19 determining the appropriateness of sanctions under Rule 9011 based on the 1997
20 Advisory Committee Note:

21 (1) Whether the improper conduct was willful or negligent - Defendant's comments
22 on this factor in his supplemental briefing assert that plaintiff deliberately filed this
23 adversary against defendant, who is his brother, knowing that his retained counsel
24 refused to file it on his behalf. *Defendant's Supplemental Brief*, filed on June 28, 2013,
25 at 2. Plaintiff in his supplemental brief was non-responsive on this factor, arguing that he
26 has a legitimate claim that defendant violated the stipulation, or contract, in the
27 bankruptcy case involving their businesses. *Plaintiff's Supplemental Brief*, filed on June
28 27, 2013, at 4-5. Although plaintiff is a layperson and not an attorney, he filed the

1 adversary action to stop his brother to collect on the claims allowed by this court in this
2 bankruptcy case and provided for in the confirmed plan of reorganization proposed by
3 plaintiff and his wife in this case. See *Plaintiff's Motion for Preliminary Injunction*, filed on
4 November 29, 2012, at 3-4 ("Plaintiff Martin Pemstein will suffer irreparable injury without
5 the injunction. I have lost my means of support, and my retirement plan. I will loose [sic]
6 my home of 20 years. It is extremely unlikely that the Harold Pemstein will have the
7 funds to pay any award ordered by the court when I prevail on my Adversary Case.").
8 The court determines that the conduct was willful because it was intended to stop
9 defendant from collecting on his allowed claims provided for by plaintiff and his wife in
10 their reorganization plan confirmed by order of this court. This factor supports the
11 imposition of sanctions.

12 (2) Whether it was part of a pattern of activity or an isolated event – No showing
13 has been made that the improper conduct was part of a pattern of activity. Defendant's
14 comments on this factor in his supplemental briefing was non-specific and merely invited
15 the court to take a " cursory " look at the docket in this bankruptcy case, and the adversary
16 actions within it. *Defendant's Supplemental Brief*, filed on June 28, 2013, at 2. For the
17 most part, plaintiff was represented by retained competent bankruptcy counsel in this
18 bankruptcy case and the other adversary proceedings. Plaintiff proposed a plan of
19 reorganization that provided for payment of defendant's claims, though plaintiff had
20 objected to defendant's claims, which objections are successful in part and unsuccessful
21 in part. Pursuant to the reorganization plan, plaintiff has made substantial payments of
22 defendant's allowed claim by selling his business real properties and his residence and
23 using the sales proceeds to pay creditors' claims, including those of defendant. In two
24 other adversary proceedings, plaintiff prevailed in avoiding defendant's liens in one
25 adversary proceeding, and he initially prevailed before the court in the other adversary
26 proceeding to determine dischargeability of debt, but this matter will have to be relitigated
27 because defendant succeeded in his appeal of the court's ruling in favor of plaintiff. This
28 record of litigation as defendant has asked the court to examine does not indicate a

1 pattern of improper conduct. Accordingly, this factor militates against the imposition of
2 sanctions.

3 (3) Whether it infected the entire pleading or only one particular count or defense –
4 The improper conduct of raising claims that are barred by claim or issue preclusion and
5 judicial estoppel infected the entire pleading, the adversary complaint. This factor
6 supports the imposition of sanctions.

7 (4) Whether the person has engaged in similar conduct in other litigation – No
8 showing has been made that plaintiff has engaged in similar conduct in other litigation.
9 Defendant's comments on this factor in his supplemental briefing was non-responsive
10 and simply referred to his comments on factor (3). *Defendant's Supplemental Brief*, filed
11 on June 28, 2013, at 2. The court is unaware of similar conduct by plaintiff. This factor
12 militates against the imposition of sanctions.

13 (5) Whether it was intended to injure – Defendant's comments on this factor in his
14 supplemental briefing was somewhat non-specific and thereby non-responsive, simply
15 referred to plaintiff's unspecified behavior in this bankruptcy case: "Circumstantial
16 evidence consisting of Martin's behavior throughout this bankruptcy strongly suggests
17 that he has nothing but contempt for his brother Harold and will do anything within his
18 power to ruin Harold financially. Only when faced with absolutely no alternatives, has
19 Martin ever paid a dime that he has owed Harold."). *Defendant's Supplemental Brief*,
20 filed on June 28, 2013, at 2-3. Although the court has determined above that plaintiff's
21 conduct was willful, the court is not so sure that plaintiff intended to injure. As indicated
22 above, plaintiff brought this action to stop distributions to defendant on his allowed claims
23 under the confirmed plan of reorganization. *See Plaintiff's Motion for Preliminary*
24 *Injunction*, filed on November 29, 2012, at 3-4 ("Plaintiff Martin Pemstein will suffer
25 irreparable injury without the injunction. I have lost my means of support, and my
26 retirement plan. I will lose [sic] my home of 20 years. It is extremely unlikely that the
27 Harold Pemstein will have the funds to pay any award ordered by the court when I prevail
28 on my Adversary Case."). It appears that this action by plaintiff was more of a defensive

1 move out of desperation because he was losing his home and other valuable real
2 property assets through liquidation of such assets to pay creditors' claims. By bringing
3 this action, plaintiff wanted an adjudication of his rights under the prior settlement in the
4 bankruptcy case involving the parties' businesses before further collection on defendant's
5 claims. *See Complaint for Breach of Contract, Contempt of Court and Declaratory Relief*,
6 filed on November 15, 2012. While this action was misguided for the reasons stated in
7 the court's decision in granting defendant's motion to dismiss, the court determines that
8 the conduct was not intended to injure. *Separate Statement of Decision on Defendant's*
9 *Motion to Dismiss*, filed on May 30, 2013. This factor militates against the imposition of
10 sanctions.

11 (6) What effect it had on the litigation process in time or expense – The improper
12 conduct forced defendant to have engage counsel to represent him because plaintiff
13 sought to enjoin him from collecting on his allowed claims under the confirmed plan of
14 reorganization, resulting in additional expense to him. This factor supports the imposition
15 of sanctions.

16 (7) Whether the responsible person is trained in the law – The party responsible
17 for the offending pleading, the adversary complaint, is plaintiff, who is a layperson and
18 not a lawyer. This factor militates against the imposition of sanctions.

19 (8) That amount, given the financial resources of the responsible person, is
20 needed to deter that person from repetition in the same case – While defendant through
21 counsel protested at the hearing on August 6, 2013 that the court should not consider
22 plaintiff's financial circumstances due to alleged lack of evidence in the record, the court
23 is aware of the record of litigation in this case from confirming the plan of reorganization
24 and granting motions to sell property that plaintiff liquidated substantially all of his assets
25 of value to pay creditors, such as defendant. The liquidated assets included plaintiff's
26 longtime residence and his two business real properties, leaving plaintiff without a home
27 and income and with plaintiff and his wife having to live with her elderly mother. The
28 court determines that no further amount is needed to deter plaintiff from repetition in the

1 same case because the court is granting defendant's other motion for reasonable
2 attorneys' fees and costs of approximately \$18,000 incurred in this adversary proceeding
3 based on the contract between the parties. Even though the court has already granted
4 an award of fees and costs to defendant for defending this action and making plaintiff pay
5 this award, this is not enough for defendant because at the hearing on August 6, 2013,
6 defendant stated that by this motion for sanctions he wants the court to compel plaintiff to
7 pay these expenses twice. In this court's view, to grant additional sums to defendant as
8 sanctions would be "piling on" a litigant who has been reduced to penury and that such
9 deterrence is unnecessary overkill. This factor militates against the imposition of
10 sanctions.

11 (9) The amount needed to deter similar activity by other litigants – The
12 circumstances of this case do not indicate that sanctions in any amount are needed to
13 deter similar activity by other litigants. It is not likely that anyone will want to emulate
14 plaintiff, a self-represented litigant, in bringing this type of action against another party.
15 The court also notes again that plaintiff is being held responsible for paying defendant his
16 attorneys' fees and costs on defendant's separate motion for such an award based on
17 the contract. This factor militates against the imposition of sanctions.

18 The court concludes that it should exercise its discretion not to grant defendant's
19 motion for sanctions against plaintiff based on its consideration of the factors identified in
20 the 1997 Advisory Committee Note to Rule 9011. The court does not feel that it is
21 appropriate to impose sanctions against plaintiff for bringing this adversary action,
22 especially in considering their number (three factors supporting sanctions, six against)
23 and relative weight (the court accords greater weight to the factors that plaintiff is a

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1 layperson and not a lawyer, the conduct in question is not part of a pattern of activity, and
2 the deterrent effect of sanctions is limited based on plaintiff's financial circumstances).

3 IT IS SO ORDERED.

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Date: August 9, 2013



Robert Kwan
United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **SEPARATE STATEMENT OF DECISION DENYING DEFENDANT'S MOTION FOR SANCTIONS AGAINST PLAINTIFF** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **August 8, 2013**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

Christopher L Blank clblank@pacbell.net
Alan W Forsley awf@fl-lawyers.net, awf@fklawfirm.com, addy@fl-lawyers.net, lc@fl-lawyers.net, awf@fl-lawyers.net
United States Trustee (SA) ustpreion16.sa.ecf@usdoj.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Martin Pemstein
38 Calle Aragon, Unit F
Laguna Woods, CA 92637

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: