NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: KENNETH WAYNE BASE and KATJA-KASSANDRA BASE, Debtor(s).	Case No.: 2:11-bk-48131-WB CHAPTER 11 **MEMORANDUM OF DECISION ON MOTION FOR SANCTIONS UNDER RULE 9011 AGAINST BROOKSTONE LAW, APC** Date: July 26, 2012 Time: 10:00 a.m. Courtroom: 1375

Debtors Kenneth Wayne Base and Katja-Kassandra Base's ("Debtors") motion for sanctions under Rule 9011 ("Sanctions Motion") against Brookstone Law, APC ("Brookstone"), former counsel for Debtors, came on for hearing before this court on July 26, 2012 at 10:00 a.m. Appearances were made as noted on the record. Debtors filed their Sanctions Motion seeking sanctions from Brookstone because Brookstone, through its former attorney Aalok Sikand ("Sikand"), filed two successive chapter 13 petitions when Brookstone knew that Debtors did not qualify for chapter 13 relief but filed in order to avoid the imminent foreclosure on the Debtors' property and because Debtors' had not provided the retainer required by Brookstone for filing a

chapter 11 case. Debtors seek sanctions in the amount of $27,450.00.[1] Brookstone filed its opposition to the Sanctions Motion asserting that the first chapter 13 bankruptcy was not filed for an improper purpose, that the second chapter 13 case was filed by its former associate Sikand after Sikand's association with Brookstone had been terminated, and that the requested sanctions were excessive and unreasonable. Debtors filed a reply to the opposition. Following oral argument as noted on the record, the Court took the matter under submission. The Court, having considered all pleadings and oral argument, makes the following findings of fact and conclusions of law.

I. STATEMENT OF FACTS

On June 5, 2011, Debtors filed a voluntary chapter 13 petition bearing Case No. 11-34264-ER (the "First Bankruptcy"). The First Bankruptcy was filed by Sikand of Brookstone on behalf of Debtors. Debtors state that they initially retained Brookstone to perform services, including forensic audits of real properties and other services to determine whether the properties should be included in a mass joinder lawsuit against a lender. Also, Debtors state that they retained Brookstone to file their bankruptcy case when they were faced with an imminent foreclosure on their property. The Schedule of Assets and Liabilities in the First Bankruptcy, filed on June 20, 2012 indicated on Schedule D secured debt of $2,515,990.28 and on Schedule F unsecured debt of $338,300.00. On August 30, 2011, the First Bankruptcy case was dismissed for Debtors' failure to appear at their § 341(a) meeting.

On September 7, 2011, Debtors filed the second bankruptcy case under chapter 13 (the "Second Bankruptcy"). The Second Bankruptcy was also filed by Sikand.

On October 7, 2011, Debtors filed a substitution of attorney and replaced their then counsel Sikand with current counsel David G. Epstein ("Epstein").

On October 13, 2011, Debtors filed a motion to convert their Second Bankruptcy from a chapter 13 to a chapter 11. An order was entered converting the case to a chapter 11 on December 22, 2011.

[1] This amount was later reduced at the time of the hearing on the Motion based on the Court's prior denial of a portion of the fees requested by Debtors' present counsel in their first interim fee application.

On October 14, 2011, the Debtors filed a Motion for Disgorgement of Attorneys' Fees ("Motion to Disgorge") against Brookstone and Sikand which was set for hearing on February 9, 2012. On November 17, 2011, Brookstone filed an opposition to the Motion to Disgorge asserting that Debtors had retained Brookstone to file a chapter 13 bankruptcy which would eventually be converted to a chapter 11 upon receipt of the full fee of $20,000.00 for the chapter 11 bankruptcy case. Following on hearing, on February 28, 2012 the Court entered an order on the Motion to Disgorge approving the stipulation between Debtors and Sikand for disgorgement of $1,000.00 from Sikand. Further, the Court's order granted the motion as against Brookstone and ordered disgorgement of $3,726.00, representing the fees received by Brookstone from Debtors in connection with the First Bankruptcy.[2]

On June 30, 2012, Debtors filed the Sanctions Motion requesting that Brookstone be required to pay their current counsel's attorney's fees as sanctions for the improper filings of Brookstone and Sikand. The attorney's fees Debtors' seek as sanctions relate to the following actions taken by Epstein: (1) an initial client meting, case investigation, and attorney substitution filing; (2) attendance at the § 341(a) meeting in chapter 13 case; (3) drafting the motion and order to convert case; (4) drafting the moving papers and orders on disgorgement of funds and attendance at two hearings therein; and (5) drafting the present motion for sanctions, reply, and anticipated attendance at hearing.

II. DISCUSSION

The Court finds that Brookstone was retained by the Debtors in 2011 to file the First Bankruptcy case; that Brookstone filed the First Bankruptcy as a chapter 13 case because Debtors had failed to provide a sufficient retainer for filing a chapter 11 case and that the case was filed to prevent the imminent foreclosure on property owned by Debtors. These actions were taken notwithstanding the fact that Debtors were ineligible to be debtors under chapter 13 given their secured debt exceeded the maximum limit for such debt provided in section 109(e) of

[2] The Court takes judicial notice of the pleadings filed in connection with the Motion for Disgorgement and has reviewed such pleadings, which raise nearly identical factual issues to those raised in the present Sanctions Motion.

the Bankruptcy Code[3]. The Court also finds that Sikand filed the Second Bankruptcy case after he had separated from Brookstone.

Rule 9011(b)(1) prohibits the filing of a pleading for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. "Because FRCP 11 and Bankruptcy Rule 9011 use virtually identical language, [bankruptcy courts] often rely on cases interpreting the former when construing the latter." Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th Cir. 1994) (citing In re Grantham Bros., 922 F.2d 1438, 1441 (9th Cir. 1991). In deciding whether to impose Rule 9011 sanctions, bankruptcy courts must consider, on a sliding scale, both the possible "frivolousness" of pleading and whether pleading was filed for "improper purpose"; the more compelling the showing as to one element, the less decisive need be the showing as to the other. Id. at 830.

"Our cases have established that sanctions must be imposed on the signer of a paper if either a) the paper is filed for an improper purpose, or b) the paper is 'frivolous.' " Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1991) (emphasis added). Thus, case law supports that the bankruptcy court is required to impose sanctions on the signer of a paper if he or she files a frivolous paper or files a paper for an improper purpose. See Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 892 F.2d 802, 809 (9th Cir. 1989) ("[T]he rule clearly authorizes, indeed requires, a judge to sanction a represented party for violations**."**).

Rule 11 establishes an objective standard that looks to the reasonableness of the conduct under the circumstances**.** Business Guides, Inc., 498 U.S. at 552. In applying the objective standard, courts may infer the purpose of a filing from the consequences of a pleading or motion. Ninth Circuit courts have sanctioned parties for a variety of conduct that has been found to be improper. See, e.g., Buster v. Greisen, 104 F.3d 1186, 1191 (9th Cir. 1997) (successive complaints based on proposition of law previously rejected may constitute harassment); Marsch,

[3] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California ("LBR").

36 F.3d at 830–31 (petition filed solely to delay collection of judgment and to avoid posting an appeal bond when debtor had financial ability to post bond); In re Rainbow Magazine, Inc. (Caldwell v. Farris), 136 B.R. 545, 551–52 (9th Cir. BAP 1992), overruled on other grounds by Lockary v. Kayfetz, 974 F.2d 1166 (9th Cir. 1992) (petition frivolous and filed for an improper purpose where debtor's principal engaged in self-dealing and diverted assets from the estate and secured creditor); In re Villa Madrid, 110 B.R. 919, 923–24 (9th Cir. BAP 1990) (second bankruptcy petition was filed in bad faith and to delay proceedings).

Under this standard, the Court finds that the First Bankruptcy filed under chapter 13 was frivolous and filed for an improper purpose given the Debtors' ineligibility under section 109(e). Further, Brookstone, through Vito Torchia, Jr.[4], admits that the Debtors' First Bankruptcy filed under chapter 13 was filed as a "placeholder" until the Debtors' paid the full $20,000.00 to have their case converted to a chapter 11.[5] This is not a proper purpose for filing a chapter 13 bankruptcy case.

Accordingly, the Court finds that the filing of the First Bankruptcy petition is sanctionable under Rule 9011. However, the evidence establishes that the Second Bankruptcy was filed by Sikand, not Brookstone. Therefore, Brookstone cannot be sanctioned for the filing of the Second Bankruptcy.

In considering the requested sanctions, the Court finds that it is unreasonable to expect Brookstone to pay for all of Debtors' present counsel's fees requested. First, the Court notes that it disallowed a portion of the fees requested by present counsel in his fee application based on the Court's finding that such fees were not reasonable. Accordingly, the Court makes the specific finding that a certain amount of the fees incurred by Debtors through their present counsel are recoverable as sanctions from Brookstone.

The Sanctions Motion is granted in part and denied in part. The Court awards sanctions against Brookstone for Debtors' attorney's fees in connection with work performed as follows: (1) on the motion to extend the stay ($1,000.00); (2) on the motion to convert case ($1,000.00);

[4] Vito Torchia, Jr. is the managing attorney of Brookstone.
[5] See Declaration in Opposition to Motion to Compel Disgorgement at 4:8-18 (Docket No. 45).

and (3) on the motion to disgorge fees ($1,000), for a total of $3,000.00. The Court finds that these amounts are reasonable under § 330(a)(2) for the types of services provided. The Court will not provide an award for present counsel's initial interview and case commencement work and for attendance at the § 341(a) meeting. These services would have been required in any event. Further, the Court declines to award sanctions in the form of attorney's fees incurred in filing the Sanctions Motion and the Motion to Disgorge. All other requested fees are denied.

The Court will enter an order consistent with this Memorandum of Decision.

DATED: September 28, 2012

Julia W. Brand

United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): **MEMORANDUM OF DECISION ON MOTION FOR SANCTIONS UNDER RULE 9011 AGAINST BROOKSTONE LAW, APC** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) B Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (*date*) *09/28/12*, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

David G Epstein david@epsteinlitigation.com
Ron Maroko ron.maroko@usdoj.gov
Vito Torchia vjt@brookstone-law.com, bankruptcy@brookstonelaw.com
United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Debtors
Kenneth Wayne Base
Katja-Kassandra Base
Po Box 15028
Long Beach, CA 90815

☐ Service information continued on attached page

3. 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 United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

☐ Service information continued on attached page