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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re FLASHCOM, INC., a California corporation, Debtor.	Case No. 2:12-bk-16351-RK Chapter 11 Adv. No. 2:12-ap-01339-RK
CAROLYN A. DYE, Liquidating Trustee Plaintiff, vs. ANDRA SACHS; COMMUNICATIONS VENTURES III, L.P.; COMMUNICATIONS VENTURES III CEO & ENTREPRENEURS FUNDS L.P.; MAYFIELD IX, a Delaware Limited Partnership; MAYFIELD ASSOCIATES FUNDS IV, A Delaware Limited Partnership; DAVID HELFRICH; TODD BROOKS; BRADFORD SACHS; RICHARD RASMUS; and KEVIN FONG, Defendants.	MEMORANDUM DECISION RE: VC DEFENDANTS' MOTION FOR SANCTIONS PURSUANT TO FED. R. BANKR. P. 9011

This case came on for hearing before the undersigned United States Bankruptcy Judge on November 22, 2011, December 13, 2011 and April 3, 2012 on the motion of defendants Communications Ventures III, L.P., Communications Ventures III CEO & Entrepreneurs' Fund L.P., Mayfield IX, Mayfield Associates Funds IV, the Estate of Todd Brooks, Kevin Fong, and David Helfrich (referred to herein as the "VC Defendants," which is short for Venture Capital Defendants) for sanctions against Liquidating Trustee Carolyn Dye ("Plaintiff") and her counsel, then the law firm of Richardson & Patel LLP, David R. Weinstein, Elan S. Levey and Andy S. Kong, for Plaintiff pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. Robert A. Franklin, of the law firm of Murray & Murray, and Daniel Scott Schecter, of the law firm of Latham & Watkins LLP, appeared for the Movants, VC Defendants. David R. Weinstein and Natalie Boyajian Deghbandan, of the law firm Bryan Cave LLP, appeared for Plaintiff as Respondent.[1]

BACKGROUND

On September 23, 2011 and November 3, 2011, respectively, the court entered its Memorandum Decision and Judgment on Plaintiff's remaining claims of the first amended complaint, which was tried before the court. *Memorandum Decision re Third and Eighth Causes of Action of Plaintiff's Amended Complaint*, filed on September 23, 3011 ("Memorandum Decision); *Judgment*, filed on November 3, 2011 ("Judgment"). On October 26, 2011, the VC Defendants renoticed for hearing on November 22, 2011 the instant motion for sanctions against Plaintiff and her counsel originally filed on October 9, 2008, relating to costs incurred defending against Plaintiff's motion in limine, filed on September 2, 2008, in which Plaintiff sought to preclude introduction of evidence concerning the avoidability of the $9 million transfer between Andra Sachs and the VC Defendants as a preference (the "motion in limine").

[1] At the time the subject motion in limine was filed, lead counsel for Plaintiff, David Weinstein was affiliated with Richardson & Patel, which had acquired his prior law firm, Weinstein Weiss & Ordubegian, LLP, by merger. *See Transcript of Pretrial Conference,* June 3, 2008, at 26:17-20. When the sanctions motion was filed, Mr. Weinstein became affiliated with the law firm of Holme, Roberts & Owen. When the supplemental briefing was filed, Mr. Weinstein then became affiliated with his current law firm, Bryan Cave LLP.

At the hearing on VC Defendants' motion for sanctions on December 13, 2011, the court indicated that it would grant the motion, and continued the hearing to March 13, 2012 for further briefing to address the amount of damages and the proper apportionment of sanctions between Plaintiff and Plaintiff's counsel. On January 24, 2012, the VC Defendants filed a supplemental brief, requesting sanctions in the amount of $97,047.00 ($35,183.00 representing the costs and fees associated with defending the motion in limine, and $61,864.00 incurred in connection with the present motion for sanctions). On February 29, 2012, Plaintiff filed a response to this supplemental brief, arguing that the requested amount of sanctions was "on its face, outlandish," that the VC Defendants in their submission completely fail to establish or justify a monetary award and that any sanctions award should be stayed. By stipulation and order, the further hearing was rescheduled for April 3, 2012. At the hearing on April 3, 2012, the court requested the VC Defendants to submit supplemental documentation regarding their motion for sanctions, which they filed on April 13, 2012. On May 14, 2012, Plaintiff filed her response to this supplemental submission, and after Plaintiff filed this response, the court took the motion for sanctions under submission.

After careful consideration of the parties' initial and supplemental briefing, and the oral and written arguments of the parties, the court now rules on the motion for sanctions previously taken under submission.

DISCUSSION

I. SANCTIONS SHOULD BE IMPOSED

Rule 9011(c) of the Federal Rules of Bankruptcy Procedure expressly provides that if there is a violation under the rule, sanctions are discretionary, and the court may, but is not required to, impose sanctions.[2] Fed. R. Bankr. P. 9011(c); *see also*, *10 Resnick and Sommer, Collier on Bankruptcy*, ¶ 9011.06[1] at 9011-16 (16th ed. 2012).

[2] It is undisputed that pursuant to Fed. R. Bankr. P. 9011(c)(1)(A), on September 17, 2008, the VC Defendants served Plaintiff with the sanctions motion before filing it with the court, and Plaintiff did not withdraw the motion in limine during the 21-day "safe harbor" period.

"In determining whether sanctions are warranted under Rule 9011(b), we 'must consider both frivolousness *and* improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other.'" *Dressler v. The Seeley Co. (In re Silberkraus)*, 336 F.3d 864, 870 (9th Cir. 2003), *citing*, *Marsch v. Marsch (In re Marsch),* 36 F.3d 825, 830 (9th Cir.1994) (emphasis in original). "The courts have interpreted Rule 9011 in the same way as the courts have interpreted Civil Rule 11 as establishing an objective standard of conduct for litigants and attorneys." *10 Resnick and Sommer, Collier on Bankruptcy*, ¶ 9011.04[3] at 9011-9, *citing inter alia, Business Guides, Inc. v. Chromatic Communications Enters., Inc.,* 498 U.S. 533 (1991), (Civil Rule 11); *see also, Miller v. Cardinale (In re DeVille),* 361 F.3d 539, 550 n. 5 (9th Cir. 2004) ("The language of Fed. R. Bankr. P. 9011 parallels that of Fed. R. Civ. P. 11, so courts analyzing sanctions under Rule 9011 commonly rely on cases interpreting Rule 11."), *citing, Valley National Bank of Arizona v. Needler (In re Grantham Brothers)*, 922 F.2d 1438, 1441 (9th Cir. 1991). If a pleading is "interposed for any improper purpose," it is sanctionable even if it is warranted by existing law and supported by the facts. *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 931–932 (7th Cir. 1989). On the other hand, a pleading filed with the purest of intentions is sanctionable if its assertions and arguments lack a reasonable basis in fact and law. *Id.* at 932. Moreover, "[w]hile either prong is alone sufficient to warrant a sanction, this court must consider both because of the effect on the nature and severity of the sanction." *In re Grantham Brothers*, 922 F.2d at 1441.

In considering whether sanctions should be imposed and what sanction to impose, the 1997 Advisory Committee note to Rule 9011 suggests various factors for a court to consider, including the following: (1) whether the improper conduct was willful or negligent; (2) whether it was part of a pattern of activity or an isolated event; (3) whether it infected the entire pleading or only one particular count or defense; (4) whether the person has engaged in similar conduct in other litigation; (5) whether it was intended to injure; (6) what effect it had on the litigation process in time or expense; (7) whether the

responsible person is trained in the law; (8) what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and (9) the amount needed to deter similar activity by other litigants. 1997 Advisory Committee Note to Fed. R. Bankr. P. 9011, *reprinted in 10 Resnick and Sommer*, *Collier on Bankruptcy,* ¶ 9011.RH[4] at 9011-29–9011-30. The court finds that the existence of a number of these factors warrants the granting of the motion and the imposition of sanctions against Plaintiff and Plaintiff's Counsel.

In deciding whether to award sanctions, this court is mindful of the policy that "[p]arties must be allowed to fully advocate the position of their client within the parameters of Bankruptcy Rule 9011 without the specter of fee awards looming in the shadows." *In re Nichols*, 221 B.R. 275, 279 (Bankr. N.D. Okla. 1998). Accordingly, the advancement of a "colorable argument" is sufficient in and of itself to deny the award of attorneys' fees. *Id.*, *citing, In re Edmonds,* 924 F.2d 176, 181–182 (10th Cir. 1991). "Bankruptcy Rule 9011 sanctions should not be utilized to penalize attorneys for taking novel, innovative positions." *In re Nichols*, 221 B.R. at 279*, quoting, In re Kaliana*, 207 B.R. 597, 603 (Bankr. N.D. Ill. 1997). Thus, "[t]he mere absence of legal precedent, the presentation of unreasonable legal argument, or the failure to prevail on the merits of a particular contention does not justify the imposition of sanctions." *In re Nichols*, 221 B.R. at 279.

As discussed below, based on applying the factors outlined in the 1997 Advisory Committee note, the VC Defendants' motion for sanctions should be granted.

A. Whether the Improper Conduct was Willful or Negligent

The court concludes that the motion for sanctions should be granted because Plaintiff's motion in limine lacked a reasonable basis in fact in law, as Judge Ryan's decision of February 5, 2007 – denying Trustee's request to enter judgment against the VC Defendants based on the stipulated judgment between Trustee and Andra Sachs avoiding the $9 million preferential transfer – was the law of the case. *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 815-816 (1988) (the law of the case

doctrine "posits that when the court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.") (citations and internal quotation marks omitted).

In this case, Plaintiff moved for summary judgment against the VC Defendants on August 25, 2006, based on the grounds that the stipulated judgment between Plaintiff and Andra Sachs, debtor's principal, determined that the transfer of $9 million to her was preferential and avoidable under Sections 547 and 550 of the Bankruptcy Code, 11 U.S.C., was binding on the VC Defendants as the purported beneficiaries of the transfer and precluded them from defending the claim of avoidability of the transfer. The court by Judge Ryan in its memorandum opinion and order filed on February 5, 2007 denied Plaintiff's summary judgment motion because the VC Defendants, who were not parties to the settlement reflected in the stipulated judgment had a constitutional right to due process of law to defend the avoidability action under Section 547 of the Bankruptcy Code before being deprived of their property rights in determining their liability for the transfer, and genuine issues of material fact existed for trial as to whether the transfer was made to benefit them within the meaning of Section 550 of the Bankruptcy Code.

On July 26, 2007, Plaintiff filed her cross-motion for partial summary judgment seeking reconsideration of Judge Ryan's decision denying Plaintiff's summary judgment motion against the VC Defendants. In this partial summary judgment motion seeking reconsideration of Judge Ryan's decision, Plaintiff argued that his decision denying summary judgment was interlocutory and could be "revisited," i.e., reconsidered, and that it should be revisited and vacated because it was erroneous in concluding that precluding the VC Defendants from contesting the stipulated avoidance judgment between her and Andra Sachs violated their constitutional due process rights and that Plaintiff was not entitled to summary judgment on grounds that there were genuine issues of material fact for trial and she was not entitled to judgment as a matter of law. By order filed on August 15, 2007, this court denied Plaintiff's cross-motion for partial summary judgment seeking

reconsideration of Judge Ryan's decision for insufficient grounds because Plaintiff had not demonstrated that the prior ruling that the VC Defendants had a constitutional due process right to defend was legally erroneous, nor that there were no genuine issues of material fact for trial.

After this court issued its order denying Plaintiff's partial summary judgment motion seeking reconsideration of Judge Ryan's decision, on September 13, 2007, Plaintiff filed a motion for leave to take an interlocutory appeal of this order. On October 29, 2007, the district court denied Plaintiff's motion for leave to take an interlocutory appeal for jurisdictional reasons because it was untimely to challenge Judge Ryan's decision on an interlocutory appeal and the motion otherwise lacked sufficient grounds to warrant an interlocutory appeal. On November 8, 2007, Plaintiff filed a motion for reconsideration of the district court's denial of her motion to take an interlocutory appeal of the court's order denying Plaintiff's partial summary judgment motion. On November 27, 2007, the district court denied Plaintiff's reconsideration motion.

On September 2, 2008, Plaintiff filed her motion in limine to preclude the VC Defendants from introducing evidence concerning the avoidability of the transfer as a preference and for entry of a liability judgment against the VC Defendants. In the motion in limine, Plaintiff argued again that Judge Ryan's decision denying her summary judgment motion was interlocutory and "could be revisited and revised at any time." In these moving papers, Plaintiff argued again that the stipulated avoidance judgment between her and Andra Sachs precluded the VC Defendants from defending the avoidance action because that judgment had preclusive effect as res judicata.

While Plaintiff had the right to contest Judge Ryan's decision on appeal after the court entered its final judgment resolving this adversary proceeding (which right she is now pursuing), Plaintiff had exhausted her remedies of reconsideration and interlocutory appeal when she filed the motion in limine. Judge Ryan's decision, which had been the subject of reconsideration motions in this court and by the district court, was the law of the case; that is, the VC Defendants had a constitutional due process right to defend in

the avoidability action, and genuine issues of material fact existed for trial. Plaintiff thus did not have the right to relitigate the issues decided by Judge Ryan by filing yet another motion in this court, the subject motion in limine, and accordingly, Plaintiff lacked a reasonable basis in fact and law for filing this motion.

The court finds that Plaintiff's conduct was willful. In filing the motion in limine, Plaintiff sought the same relief as was requested in the original motion for summary judgment, filed in August 2006, which sought to bind the VC Defendants to the stipulated judgment between Plaintiff and Andra Sachs, to which the VC Defendants did not stipulate, and the reconsideration motion in the form of the cross-motion for partial summary judgment, filed in June 2007. While in the motion in limine, Plaintiff changed up some of the arguments in different dress, the basic thrust of the motion was the same as the original motion for summary judgment and the reconsideration motion: that Judge Ryan's decision to recognize the VC Defendants' constitutional rights of due process to be heard was erroneous and should be revisited and disregarded. Nor did the new motion raise any particular *evidentiary* issues; instead, the new motion focused on the merits of the case, that is, Plaintiff should prevail based on the stipulated avoidance judgment. This is not a proper purpose for a motion in limine. *See, e.g.*, *Provident Life & Accident Insurance Co. v. Adie*, 176 F.R.D. 246, 250 (E.D. Mich. 1997) (explaining that a motion in limine should not be used as a substitute motion for summary judgment). Indeed, Plaintiff's request for relief in the motion in limine reads as follows: "Accordingly, this Court should enter a liability judgment in favor of the Plaintiff and against VC Defendants . . . ." *Motion in Limine* at 6. In the motion in limine, Plaintiff proceeded to argue again as in the summary judgment motions (original and reconsideration), and the interlocutory appeal motions, that the principles of res judicata to the stipulated judgment between Andra Sachs and Plaintiff preclude the VC Defendants from contesting the avoidability of the subject transfer at trial.

Judge Ryan's February 5, 2007 Memorandum Decision re Plaintiff's motion for summary judgment determined the following issues: "(A) *whether the entry of the*

[stipulated judgment between Plaintiff and Andra Sachs] precludes [the VC Defendants] from defending the avoidability of the Transfer under § 547(b); and (B) whether [the VC Defendants] are entities for whose benefit the Transfer was made." *Memorandum Opinion*, filed February 6, 2007 (Bankr. Docket No. 241) (emphasis added). Judge Ryan for the court concluded that summary judgment should be denied because the stipulated judgment between Plaintiff and Andra Sachs did not preclude the VC Defendants from defending the avoidability of the transfer under Section 547(b) of the Bankruptcy Code and genuine issues of material fact existed as to whether the VC Defendants were entities for those benefit the transfer was made under Section 550(a) of the Bankruptcy Code. In the motion in limine, Plaintiff sought reconsideration of the court's denial of her partial summary judgment motion seeking reconsideration by this court of Judge Ryan's denial of her original summary judgment motion. This is improper because Plaintiff cannot seek a reconsideration of a denial of a reconsideration motion. *See Benson v. St. Joseph Regional Health Center*, 575 F.3d 542, 547 (5th Cir. 2009) ("The federal rules do not provide for a motion requesting a reconsideration of a denial of a reconsideration. Were such motions permitted, it is conceivable a dissatisfied litigant could continually seek reconsideration and prevent finality to the judgment.") (citation omitted). Plaintiff stated in the motion in limine:

> It is significant that while the Court [i.e., Judge Ryan] concluded that the VC Defendants had a right to contest avoidability, it never reconciled how that could be the case, in the face of unambiguous language that avoided the transfer in question with finality. As a result, after-the-fact, interlocutory comments cannot affect the impact of this unambiguous judicial event. Said otherwise, if a choice must be made as between the final Avoidance Judgment and a passing sentence in an interlocutory memorandum, the former must be held to have greater, indeed conclusive, legal effect.

Motion in Limine at 19:15-22 (citation omitted). In other words, Plaintiff in the motion in limine again sought reconsideration of Judge Ryan's decision recognizing the constitutional due process rights of the VC Defendants to defend in this case. Regardless of whether Plaintiff was satisfied with Judge Ryan's reasoning, Plaintiff and

Plaintiff's counsel knew, and certainly should have known, that the instant motion in limine was an improper attempt to relitigate the specific issues determined by Judge Ryan's ruling of February 5, 2007, which had also been reconsidered by this court and the subject of an attempted interlocutory appeal to the district court.

In fact, this court specifically addressed the effect of Judge Ryan's rulings at the pretrial conference on June 3, 2008, which Plaintiff by her counsel was present, with the court stating: "The Court will follow Judge Ryan's rulings because he considered those motions. He made a ruling after expending . . . the parties and the Court spending time and effort to litigate those matters, and there doesn't seem to be . . . an efficient use of judicial resources having to revisit those issues unless there's a good reason to do so." *See Transcript of Pretrial Conference,* June 3, 2008, at 42:17-23. Counsel for the VC Defendants also addressed the effect of Judge Ryan's ruling at the pretrial conference: "This is not a [Rule] 56(d) motion, your Honor. What he's talking about, as I understand it, is a wholesale revisitation of the merits of the order, which to my understanding could only be brought under Rule 60, and one of the issues will be how that can be brought four years after the order issued and after there was a motion for reconsideration." *See Transcript of Pretrial Conference,* June 3, 2008, at 45:12-18. Despite these warnings, Plaintiff and her counsel plowed ahead with the improper second motion for reconsideration of Judge Ryan's ruling in the form of the motion in limine. At oral argument on the motion for sanctions, counsel for Plaintiff argued that these statements by the court and counsel for the VC Defendants indicated that it would be proper for Plaintiff to bring a new motion to challenge Judge Ryan's ruling. Plaintiff simply did not have a legal basis for challenging Judge Ryan's decision at this point in the litigation. Judge Ryan's decision became the law of the case after the district court denied reconsideration of its dismissal of the interlocutory appeal, and Plaintiff did not seek a further interlocutory appeal to the Ninth Circuit. Instead, Plaintiff brought a disguised and improper repetitive motion for reconsideration in the form of the motion in limine.

B. Whether it was Part of a Pattern of Activity, or an Isolated Event

Plaintiff's conduct has been part of a continuing pattern of activity throughout this adversary proceeding. The VC Defendants have spent the better part of five years defending against Plaintiff's numerous attempts at establishing the avoidability of the transfer based on the stipulated judgment between her and Andra Sachs. [3] Plaintiff has insisted on bringing a repetitive motion in the guise of a motion in limine at trial, either as second untimely motion for reconsideration or a similarly untimely renewed motion for summary judgment.

C. Whether It Infected the Entire Pleading or Only One Particular Count or Defense

The court finds that conduct of Plaintiff and her counsel infected this entire adversary proceeding as to the VC Defendants. At the time the motion in limine was brought and after multiple rounds of dispositive motions, the only remaining claims

[3] To use the vernacular, the circumstances regarding this motion are: Plaintiff and Andra Sachs, a defendant not related to the VC Defendants, agreed to settle their dispute in a stipulated judgment to avoid a transfer of $9 million from Plaintiff to Sachs. The VC Defendants were not parties to this settlement. In her first summary judgment motion, Plaintiff argued that the VC Defendants were liable for the stipulated judgment between her and Sachs for $9 million, even though they were not parties to the judgment, based on res judicata principles. Judge Ryan denied Plaintiff's summary judgment motion on grounds that the stipulated judgment between Plaintiff and Sachs was not res judicata as to the VC Defendants and did not preclude them from litigating liability because they were not parties to the stipulated judgment, did not have adequate notice of any purported binding res judicata effect of the stipulated judgment and had a right to be heard and defend themselves to Plaintiff's $9 million claim against them as required by constitutional principles of due process of law. Plaintiff filed another summary judgment motion arguing that Judge Ryan was wrong and that the stipulated judgment between her and Sachs was res judicata as to the VC Defendants. This court denied that motion. Plaintiff took an interlocutory appeal of this court's denial of her second summary judgment motion to the district court. The district court denied that motion for lack of jurisdiction because Plaintiff's appeal should have been from Judge Ryan's decision and any such appeal was untimely. Plaintiff filed a motion for reconsideration of the district court's denial of the interlocutory appeal, and the district court denied that motion. Finally, Plaintiff filed the instant motion in limine again arguing that Judge Ryan was wrong and that the stipulated judgment between her was res judicata as to the VC Defendants. According to the VC Defendants, they had to defend Plaintiff's argument that the stipulated judgment was res judicata and barred them from defending themselves five separate times. However many times the VC Defendants had to defend against Plaintiff's arguments is not the dispositive issue, but whether the reassertion of the arguments was improper. After Plaintiff exhausted reconsideration and Judge Ryan's decision became law of the case, it became improper for Plaintiff to reassert the argument in this court, the trial court, through the motion in limine.

related to avoidance of preferential transfer under 11 U.S.C. § 547(b) and impairment of capital under Delaware General Corporation Law, § 160. Between these two claims, the outcome of the preference claim determined, at least in part, the outcome of the claim under Delaware General Corporation Law. Because this court determined that the Plaintiff failed to establish that the Debtor's $9 million transfer to Andra Sachs was made for the benefit of the VC Defendants, the court applied the business judgment rule to determine that the VC Directors, Brad and Richard Rasmus, acted within their business judgment to approve such a payment. *See Memorandum Decision*, filed on September 23, 2011, at 38-40. With her repetitive motions in this court asserting res judicata, Plaintiff and her counsel unreasonably attempted to limit the VC Defendants' ability to defend against the actions that comprised the remainder of Plaintiff's complaint at trial.

D. Whether the Person has Engaged in Similar Conduct in Other Litigation

The court makes no finding as to this element; the parties did not address whether Plaintiff or Plaintiff's counsel has engaged in similar conduct in other litigation outside the litigation related to this adversary proceeding. On balance, however, the presence of all other factors outlined in the 1997 Advisory Committee note to Rule 9011 demonstrates that the imposition of sanctions on both Plaintiff and Plaintiff's counsel is appropriate.

E. Whether it was Intended to Injure

The court finds that the actions displayed by both Plaintiff and Plaintiff's counsel indicate an intent to injure the VC Defendants. The motion in limine was an attempt to obtain second reconsideration of Judge Ryan's memorandum decision denying Plaintiff's summary judgment motion and allowing the VC Defendants to defend in this case, which was improper, and was brought without alleging any new facts or law that the court had not already considered in previous motions. The court finds that Plaintiff's motion in limine amounts to presentation for an improper purpose to harass or cause unnecessary increase in the cost of litigation to the VC Defendants, because Plaintiff sought a third bite at the apple with this motion, which was really a second reconsideration motion, forcing the VC Defendants to defend it again and again—after defending the original

motion, reconsideration of that ruling, an interlocutory appeal, and reconsideration of the dismissal of the interlocutory appeal. By bringing the motion in limine to preclude the VC Defendants from introducing evidence on the avoidability action, Plaintiff was essentially seeking to deny the right of the VC Defendants to defend in the action, which Judge Ryan had recognized in his memorandum opinion as constitutionally required.

F. What Effect it had on the Litigation Process in Time or Expense

The court also finds that Plaintiff's conduct had a deleterious effect on the litigation process in time and expense in this case. Counsel for VC Defendants had already expended large amounts of time and effort defending Plaintiff's original motion for summary judgment. In defending the motion in limine, the VC Defendants had to relitigate issues of their right to defend in this avoidability action that were already decided by Judge Ryan and constituted the law of the case, which was a costly and time-wasting distraction from their trial preparation at the same time on the remaining issues to be adjudicated at trial. The VC Defendants should not have had to re-defend a second motion for reconsideration of the court's denial of summary judgment in favor of Plaintiff cloaked as a so-called motion in limine. Plaintiff's conduct also caused the VC Defendants to spend even more litigation resources pursuing this motion for sanctions—not to mention the drain on this court's time and resources that Plaintiff's conduct has caused.

G. Whether the Responsible Person is Trained in the Law

Both Plaintiff and Plaintiff's counsel are responsible persons trained in the law. Plaintiff and her counsel are attorneys licensed to practice law in the State of California, and presumably knew—and at least should have known—that the motion in limine was clearly an improper attempt to seek an additional reconsideration of Judge Ryan's memorandum decision, which had been considered by this court and by the district court.

II. AMOUNT AND APPORTIONMENT OF SANCTIONS

The final two factors stated above address the purpose of Rule 9011, which is to deter bad conduct rather than compensate the injured party. Indeed, a sanction "shall be

limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Bankr. P. 9011(c)(2). As discussed herein, the court determines that sanctions of $60,000.00 should be imposed against Plaintiff and her counsel to deter vexatious litigation through the improper filing of repetitive motions.

The court realizes that this monetary award is a severe sanction, but severity is warranted here. The court by Judge Ryan determined that Plaintiff's summary judgment motion seeking to impose liability on the VC Defendants as purported beneficiaries of a preferential transfer should be denied because the stipulated judgment between Plaintiff and Andra Sachs, debtor's principal, to avoid the transfer as preferential was not binding on the VC Defendants as the alleged beneficiaries of the transfer, the VC defendants who were not parties to the stipulated judgment had the constitutional right of due process of law to be heard and defend themselves against the avoidance liability claim seeking imposition of liability for the transfer of $9 million and that genuine issues of material fact existed for trial to determine their liability. Judge Ryan issued an extensive written memorandum decision setting forth his reasons for his ruling, which he had published in the official case reports. *Dye v. Sachs (In re Flashcom, Inc.),* 361 B.R. 519 (Bankr. C.D. Cal. 2007). Believing that the court had erred in its memorandum decision, Plaintiff filed her partial summary judgment motion seeking reconsideration of Judge Ryan's decision. This court denied that motion seeking reconsideration of Judge Ryan's decision. Plaintiff filed a motion for leave to take an interlocutory appeal of this court's denial of reconsideration of Judge Ryan's decision, and the district court denied this motion. Plaintiff filed a motion for reconsideration of the district court's denial of her motion to take an interlocutory appeal, and the district court denied that motion as well. At this point, Judge Ryan's decision became the law of the case. Despite Judge Ryan's decision becoming the law of the case, Plaintiff filed a third motion in this court seeking to impose liability on the VC Defendants based on the stipulated avoidance judgment between her and Andra Sachs, to which they were not parties.

There is a need for deterrence here to restrain overzealous litigants and counsel who persist in their efforts to bypass the law of the case as reflected in Judge Ryan's memorandum decision holding that the VC Defendants are not bound by the stipulated judgment between Plaintiff and Andra Sachs in violation of their due process rights. In litigating the res judicata (or claim preclusion) effect of the stipulated avoidance judgment between Plaintiff and Sachs as to the VC Defendants, Plaintiff is legally justified to litigate the issue in this court once on her original summary judgment, and perhaps twice upon reconsideration. However, thrice in this court on Plaintiff's motion in limine is vexatious. Litigation is not a game of Whac-A-Mole™, where a litigant gets to keep filing motions until she gets the result she wants, which shows an improper purpose here to harass the VC Defendants, and that is why the doctrine of the law of the case is needed to "promote[] the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Industries Operating Corp*., 486 U.S. at 815-816 (1988); *Nugget Hydroelectric, L.P. v. Pacific Gas and Electric Co.,* 981 F.2d 429, 439 (9th Cir. 1992)(Rule 11 sanctions imposed for filing duplicate motions to harass other parties); *see also, Wikipedia entry for "Whac-A-Mole,* http://en.wikipedia.org/wiki/Whac-A-Mole (downloaded on October 11, 2012) ("Colloquial usage: The connotation of 'Whac-a-mole"—or "Whack-a-mole—in colloquial usage is that of a repetitious and futile task: each time an adversary is 'whacked,' or kicked off a service, he only pops up somewhere else.") (citations omitted); *Official Whac-a-Mole website maintained by Bob's Space Racers, Inc.* (http://www.bobsspaceracers.com/) (the original manufacturer and current trademark holder of Whac-A-Mole as noted in Wikipedia entry). The amount of awarded sanctions is based on the court's consideration of the totality of the circumstances, including the vexatious nature of Plaintiff's repetitive motions indicating an improper purpose to harass the VC Defendants by filing repeated motions in this court to get the relief sought after prior denials, the compensatory loss to the VC Defendants in having to defend Plaintiff's improper motion in limine, and the need to deter vexatious litigation through improper filing of repetitive motions.

In awarding sanctions, a court may award the injured party "attorney's fees incurred attributable to investigating, researching and fighting" a meritless motion as well as fees incurred "to research, prepare and prosecute" its sanctions motion. *PaineWebber, Inc. v. Can Am Financial Group, Ltd*., 121 F.R.D. 324, 334-335 (N.D. Ill. 1988), *affirmed without opinion*, 885 F.2d 873 (7th Cir. 1989). "The party seeking the sanction must provide the Court with contemporaneous time and expense records that specify, for each attorney, the date, amount of time, and nature of the work performed, and must also show that the fees and expenses were reasonable and necessary." *In re ECV Development, LLC*, 2007 WL 7230979, at *2-3 (Bankr. S.D. Cal., Aug. 7, 2007), *quoting, In re Spectee Group,* Inc., 185 B.R. 146, 160 (Bankr. S.D.N.Y. 1995). In determining the proper amount of attorneys' fees as sanctions, "[t]he Court normally begins with the lodestar amount, and may then adjust it upwards or downwards." *In re Spectee Group, Inc*., 185 B.R. at 160. The "lodestar" is calculated by determining the "number of hours reasonably expended" multiplied by a "reasonable hourly rate" for the persons providing the services. *Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 598 (9th Cir. 2006), *citing, Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Counsel for VC Defendants are requesting sanctions in the amount of $97,047, which represents attorneys fees' and costs incurred opposing Plaintiff's motion in limine as well as those incurred on the motion for sanctions. The VC Defendants claimed that their counsel expended a total of 216.4 hours in attorney time on these matters, which reflects a blended hourly rate of $448.46. The hourly rate of attorneys who expended time on this particular matter on behalf of the VC Defendants ranged from $180 to $810. The hourly rates and the blended hourly rate for their attorneys claimed by the VC Defendants seem reasonable given the size and complexity of this case. Moreover, the number of hours expended by counsel for the VC Defendants appear to be reasonable. It is clear that the counsel for the VC Defendants had to conduct a large amount of research in order to the address the myriad arguments in the motion in limine why Judge Ryan's decision was wrong and should be reconsidered again and to respond to

Plaintiff's vigorous opposition to the motion. As discussed above, Plaintiff's motion in limine was either a second motion for reconsideration of Judge Ryan's decision or a second motion for summary judgment; both types of motions generally require a substantial amount of time and effort to adequately address all issues raised by Plaintiff's moving papers, particularly, at the same time as preparing for trial. Much of the work in opposing Plaintiff's motion and in preparing the sanctions motion was performed by associate attorneys charging relatively lower rates, and it appears that the law partners did not spend much time performing work that would otherwise be duplicative of the associates' efforts.

Mindful of the overall purpose of Rule 9011 to deter bad conduct, the court determines that the monetary sanction that should be imposed here against Plaintiff, her then counsel, Richardson & Patel LLP, and her lead bankruptcy counsel, David R. Weinstein, to deter them from engaging in similar conduct in the future is $60,000. The sanctions are payable to the VC Defendants in care of their counsel. However, to adequately deter similar conduct by Plaintiff and Plaintiff's counsel in the future, the court concludes that both Plaintiff and Plaintiff's counsel should be jointly and severally liable for the reasonable amount of attorney's fees incurred by their opponents.

As to the issue of apportionment of liability, the court finds that joint and several liability is warranted against Trustee Carolyn Dye and lead bankruptcy counsel, the law firm of Richardson & Patel LLP, and David R. Weinstein. Courts may impose sanctions jointly against attorneys and their clients depending on their relative culpability. *See In re Eighty South Lake, Inc*., 63 B.R. 501, 511 (Bankr. C.D. Cal. 1986) (imposing $40,860 sanction against debtor and attorney jointly for bad faith filing). Counsel for Plaintiff having prepared and filed the motion in limine is liable for submitting the motion for Rule 9011 purposes. "Counsel for Plaintiff" for the purposes of this memorandum decision refers to Richardson & Patel LLP and David R. Weinstein, under whose names the motion in limine was filed or submitted on behalf of Plaintiff. Although the motion in limine was signed by Elan S. Levey, an associate at the law firm of Richardson & Patel

LLP, the court determines that based on the pleadings filed in this case and its observations of counsel at the hearings, the filing of the improper motion in limine is attributable to David R. Weinstein as partner of the firm, lead bankruptcy counsel for Plaintiff, and as the supervising attorney who reviewed the work of the associates (such as Ms. Levey and Jacquelyn Choi), and the law firm, Richardson & Patel LLP. At hearings before the court in this case, Mr. Weinstein argued the various summary judgment motions as well as the motion in limine at trial, and therefore, the court finds that he is responsible for presenting the motion in limine to the court for purposes of determining liability under Rule 9011. Additionally, Plaintiff-Trustee is a sophisticated client as an attorney at law herself and the appointed Chapter 11 trustee, experienced in both bankruptcy issues and general procedural matters, and authorized the filing of the repetitive motion seeking summary judgment styled as a motion in limine by Richardson & Patel and Mr. Weinstein on her behalf. Thus, the court concludes that Plaintiff and Plaintiff's counsel should be held jointly and severally liable for the sanctions award.

Finally, in the supplemental papers, Plaintiff request a stay of any monetary award of sanctions on grounds that the Flashcom bankruptcy estate only holds $97,047 at this time. *See Amended Trustee's Response to Submission in Support of Motion for Sanctions* at 12. First, it should be noted that sanctions imposed against a trustee are to be paid personally by the trustee, rather than from the bankruptcy estate. *See Maxwell v. KPMG LLP*, 520 F.3d 713, 718, 719 (7th Cir. 2008) (noting that "the Bankruptcy Code forbids reimbursing trustees for expenses incurred in actions not 'reasonably likely to benefit the debtor's estate,'" and indicating that the defendant "can file a motion . . . for an award of reasonable attorney's fees . . . *of course to be paid by the trustee personally, not by the bankrupt estate* . . . .") (emphasis added)). Second, any request for a stay of the award pending the outcome of an appeal is premature and is therefore denied without prejudice at this time. The court will not entertain such a request without a properly noticed motion, which adequately addresses and establishes the relevant factors as stated in *Wymer v. Wymer (In re Wymer)*, 5 B.R. 802, 806 (9th Cir. BAP 1980).

This memorandum decision constitutes the court's findings of fact and conclusions of law on the motion for sanctions. Counsel for the VC Defendants is ordered to submit a proposed form of final order on the motion consistent with this memorandum decision within 30 days of entry of the decision.

IT IS SO ORDERED.

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DATED: October 11, 2012

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 DECISION RE: VC DEFENDANTS' MOTION FOR SANCTIONS PURSUANT TO FED. R. BANKR. P. 9011** 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 **October 11, 2012**, 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:

Natalie C Boyajian natalie.daghbandan@bryancave.com, raul.morales@bryancave.com;trish.penn@bryancave.com
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Shelly Rothschild rothschildlaw@yahoo.com
David R Weinstein david.weinstein@bryancave.com, raul.morales@bryancave.com;trish.penn@bryancave.com

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:

Mohamed A Malik
Jackson DeMarco Tidus & Peckenpaugh
2030 Main Street #1200
Irvine, CA 92614

Stutman Treister & Glatt
Attn: K John Shaffer
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067

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: