**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

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| In re:<br><br>Rubye E. Taylor,<br><br>Debtor(s).<br><br>Rubye E. Taylor, *et al.*,<br><br>Plaintiff(s),<br><br>v.<br><br>James B. Nutter & Company, *et al.*,<br><br>Defendant(s). | CHAPTER 13<br><br>Case No.: 2:14-bk-31128-NB<br><br>Adv No: 2:15-ap-01183-NB<br><br>**MEMORANDUM DECISION AWARDING ADDITIONAL ATTORNEY FEES AGAINST PLAINTIFFS' COUNSEL**<br><br>Hearing Date<br>Date: August 2, 2016<br>Time: 2:00 p.m.<br>Courtroom: 1545 |

The plaintiffs and their counsel (the "Resnik firm") attempted to delay eviction by letting this adversary proceeding languish, refusing either to prosecute it or dismiss it. That forced the defendants to file a motion to dismiss, which was unopposed and was granted. Since then the parties have litigated whether the defendants are entitled to reimbursement of their attorney fees and costs.

This Bankruptcy Court previously has ruled that the defendants are not entitled to an award of attorney fees for most of this litigation, but are entitled to their reasonable

attorney fees associated with their motion to dismiss. *See* Memorandum Decision Awarding Sanctions Against Plaintiffs And Their Counsel For Failure Either To Prosecute Or Dismiss Action (adv. dkt. 75, part IV.F., *as amended*, adv. dkt. 131) (the "Primary Sanctions Decision"). The plaintiffs and the Resnik firm filed a motion (adv. dkt. 85) for reconsideration of the Primary Sanctions Decision. That motion was denied (adv. dkt. 132).

The parties have now briefed whether the defendants can be awarded fees not only for their work in obtaining dismissal of this adversary proceeding but also for seeking reimbursement of their attorney fees (sometimes referred to as "fees on fees"). This memorandum decision concludes that, although there is binding authority that generally prohibits an award of fees on fees, there is also binding authority that when the litigation regarding fees is itself sanctionable then the prohibition against fees on fees does not apply. Again, this court reluctantly concludes that the opposition to fees on fees is itself sanctionable.

The parties have also briefed whether the defendants' fees are reasonable. This memorandum decision concludes that they are, and should be allowed in the dollar amounts set forth below.

**I. THE DEFENDANTS ARE ENTITLED TO "FEES ON FEES"**

The arguments set forth in the defendants' briefs (adv. dkt. 126, 128) need not be repeated here. Suffice it to say that the Resnik firm's litigation regarding fees was itself brought "in bad faith, vexatiously, wantonly, or for oppressive reasons" (*see* adv. dkt. 107, Ex. A: tentative ruling, adopted as the actual ruling) and therefore the defendants are entitled to an award of their reasonable fees and expenses in litigating over fees. *In re Deville*, 361 F.3d 539, 544 (9th Cir. 2004). The defendants' arguments on that issue are persuasive, and the arguments advanced by the Resnik firm are not, except to the very limited extent described below.

First, to the extent (if any) that the defendants assert that "fees on fees" are allowed as a matter of course, their arguments are not persuasive. To the contrary,

under governing authority it appears that such fees are only allowable when the litigation over fees is itself "in bad faith," "vexatious," "oppressive" or "wanton." (*See Deville*, 361 F.3d at 544, *and* adv. dkt. 75, *as amended,* adv. dkt. 131; adv. dkt. 92; adv. dkt. 107, Ex. A). Once that has been established, however, all reasonable attorney fees and costs flowing from the misconduct should be awarded.

Second, with respect to mediation (*e.g.*, adv. dkt. 126, pp.8:5-9:9), this court is not persuaded that it is appropriate to attempt to assess any party's "good faith" in matters that were assigned to the mediator. That does not mean, however, that a trial court is powerless to compensate a party who has had to participate in mediation as part of its response to bad faith, vexatious, oppressive, or wanton misconduct. To the contrary, consistent with the first point above, all reasonable attorney fees and costs flowing from the Resnik firm's misconduct are compensable, including reasonable fees and costs involved in the attempted mediation.

Applying the foregoing standards, the defendants are entitled to an award of all additional attorney fees and costs requested in their latest papers (*see* adv. dkt. 124) provided that those fees and costs must be reasonable.

## II. THE DEFENDANTS' FEES ARE REASONABLE

### A. Hourly Rates

The hourly rates charged by the Alston firm are admittedly higher than what is typically seen in consumer cases. But, as the defendants argue, that is not the test. In the circumstances of this litigation the Alston firm's rates are entirely reasonable.

First, this litigation required counsel who were both high caliber and careful. It involved an 87 year old "widow" (actually, as it turned out, a close companion of the deceased) who previously had been evicted at night in her dressing gown. Combined with the other facts and circumstances (reviewed in the Primary Sanctions Decision) this litigation required considerable skill to defend. The defendants were entitled to hire counsel of their choice to litigate such a sensitive matter.

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Second, the Alston firm's rates are in keeping with rates charged by similar firms (*see* adv. dkt. 128, pp.6:17-8:21) and are reasonable for the experience and qualifications of the attorneys involved (*see id*.). It must be remembered that it is primarily the defendants who bear the expense of the Alston firm's hourly rates, except to the limited extent that this Bankruptcy Court is persuaded that fees should be "shifted" to the plaintiffs and the Resnik firm; so the defendants' own self-interest reinforces this Bankruptcy Court's conclusion that those rates are within the scope of what is reasonable.

Third, a higher hourly rate does not necessarily translate into higher overall fees. For example, it can be more expensive to litigate frivolous issues at a low hourly rate than to pay a high hourly rate to an attorney who exercises appropriate judgment in what arguments to pursue. In this matter, for example, the Alston firm has exercised appropriate judgment in advancing only colorable arguments (not all of which were persuasive, but again that is not the test); and in contrast the lower hourly rate Resnik firm has not consistently exercised such judgment.

**B. Reasonableness Of Time Spent**

The Resnik firm's objections (adv. dkt. 127) do not have any meaningful analysis of specific daily time entries, and instead address whole categories of fees. Those objections are unpersuasive.

First, the defendants have the better arguments in their responses to those categorical arguments (adv. dkt. 128, pp.8:22-12:18; *see also* adv. dkt. 129). Second, despite the plaintiffs' lack of analysis of specific time entries, this Bankruptcy Court has carefully reviewed all of them (adv. dkt. 50, 84, 124, 129 at p. 4:6-17) and (with some very minor caveats noted below) is satisfied that they are reasonable. Although the prior redaction and current restoration of certain text makes the timesheets somewhat difficult to read, and although there is arguably some "lumping" of time entries and other minor departure from typical bankruptcy requirements, the level of detail is roughly typical of actual timesheets in many bankruptcy cases, and that detail combined with

this Bankruptcy Court's familiarity with this litigation assure that the services can be adequately reviewed. The estimates of fees through entry of a final order on the defendants' request for sanctions (adv. dkt. 124, para.5) also appear to be reasonable, subject to adjustment as provided below.

**III. THE RESNIK FIRM'S REMAINING ARGUMENTS ARE UNPERSUASIVE**

The Resnik firm's remaining arguments are unpersuasive. In fact, they continue the unfortunate pattern of frivolous arguments that constitute bad faith, vexatious, oppressive, or wanton arguments and are themselves sanctionable.

**A. Sanctions Are Not A Vendetta By This Court Against The Resnik Firm: They Were Requested By The Defendants And Are Fully Warranted**

The Resnik firm even now (i) continues to mischaracterize the sanctions as "court initiated" (adv. dkt. 130, p.2:16-17); (ii) conflates two separate concepts by referring to this court's "inherent and/or *sua sponte* powers" (adv. dkt. 125, p.3:9, *see also* adv. dkt. 125, p.6:20; adv. dkt. 127, pp.4:12-14); and (iii) most startling of all, characterizes the current litigation as "a dispute that is really between the Court and the Resnik firm" (adv. dkt. 130, p.4:25-26) (emphasis altered). All of that is just wrong.

As the defendants and this court have pointed out repeatedly (*e.g.*, adv. dkt. 126, p.7:26-28 at n.5; *and* adv. dkt. 128, pp.12:19-13:15) it is the defendants themselves, not this Bankruptcy Court, who have requested reimbursement of their reasonable fees and costs (*see, e.g.*, adv. dkt. 25, p.3:12-18). The fact that the defendants did so by invoking this court's inherent authority does not transform their request into this court's *sua sponte* motion. In fact, this Bankruptcy Court has bent over backwards to attempt to assure that the plaintiffs and the Resnik firm are only subject to sanctions to the extent appropriate under applicable law, as the record clearly demonstrates (*see, e.g.*, adv. dkt. 75, pp.17:18-25:3, *as amended*, adv. dkt. 131, pp. 19:23-27:7; *and see* adv. dkt. 126, pp.1:24-2:5 & n.1).[1]

[1] The Resnik firm's latest brief (dkt. 130) is particularly disappointing because it "doubles down" on and even amplifies the frivolous arguments in the motion for reconsideration (adv. dkt. 85, pp.7:6-12:14). That earlier motion asserted that this court's ruling to

**B. This Court Has Not Blamed The Resnik Firm For Anything Beyond Its Control**

The Resnik firm argues (adv. dkt. 130, p.2:11-14) that it did not have the power to dismiss the adversary proceeding – presumably meaning that only the plaintiffs, not

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award sanctions "clearly began as Rule 9011(c)" (adv. dkt. 85, p.9:7-8), which is simply false. *See* adv. dkt. 29, p.2:6-17 (outlining all the various grounds for sanctions); adv. dkt. 75, pp.12:1-15:17 (explaining that "Rule 9011 Is Inapplicable") (emphasis altered), *as amended* adv. dkt. 131, pp. 14:3-17:20; and adv. dkt. 92, Ex.A, *passim*). That same motion for reconsideration also relied on decisions under Rule 9011 (or the parallel provisions of Rule 11, Fed. R. Civ. P.), including *In re Nakhuda*, 544 B.R. 886 (9th Cir. BAP 2016), which involved court-initiated sanctions under Rule 9011(c)(1)(B), as well as decisions in which the court "simulates the role of an adversary" (adv. dkt. 92, pp.11:22-12:9), all of which are completely inapposite because in this litigation this court is acting in response to the defendants' request for sanctions and not on its own initiative. This has all been explained before, both at hearings and in writing. *See, e.g.*, adv. dkt. 92, Ex.A.

In the most recent papers, especially, Mr. Resnik seems to have approached this litigation as a personal attack against him by this court, which is groundless and unfortunate. Although the briefs are filed on behalf of both the plaintiffs and the Resnik firm as a whole, this court recognizes that it is Mr. Resnik himself who is most personally involved because he has acknowledged responsibility for this litigation, he has signed the briefs on behalf of his firm, and he may well be the person from whom the defendants will principally seek to collect. All of that might explain the following.

Mr. Resnik has written that, at the May 3, 2016 hearing, "Inevitably [sic], the Court was not familiar with [sic] the recent *Nakhuda* case." Adv. dkt. 125, p.6:13-14 (emphases added). That seems to be an awkward attempt to imply that this Bankruptcy Court is making decisions without reading the relevant decisions. Mr. Resnik has not cited to any written argument addressing *Nakhuda* prior to his oral argument at that hearing, and while the undersigned Bankruptcy Judge did not recall *Nakhuda* by name at that hearing (*see* adv. dkt. 78, p. 15:14-16), the tentative ruling issued prior to the June 21, 2016 hearing on the reconsideration motion thoroughly addressed *Nakhuda* and explained why it was not relevant. *See* adv. dkt. 92, pp. 5-6.

Mr. Resnik has also suggested that this court has "implicitly hired" Alston to "do its work." Adv. dkt. 130, p. 5:18-19. That suggestion is belied by the ample record of careful work by this court in addressing the defendants' motion (which, again, was not this court's motion). Mr. Resnik's invective is unworthy of him as an officer of this court. To the extent that his comments can be construed as a motion for recusal, that motion is denied.

Mr. Resnik might do well to have some fresh eyes review his briefs before filing them, to avoid the sort of groundless invective described above. *See also, e.g.*, adv. dkt. 127, p.4:12-14. This court recognizes that, although Mr. Resnik has brought these sanctions on himself, the ongoing litigation has increased them to very substantial dollar amounts, which is undoubtedly stressful, and this court presumes that Mr. Resnik's comments are just an inadvertent outburst.

the Resnik firm, held that power. The firm argues that this court has found to the contrary. That grossly mischaracterizes this court's findings of fact and conclusions of law.

In fact, this court has carefully attempted to distinguish between the plaintiffs and the Resnik firm throughout this litigation (even when the firm itself did not make that distinction). This court has thereby spared the firm from sanctions for acts or omissions such as failing to recognize that this adversary proceeding may have been barred from the outset by claim or issue preclusion. *See, e.g.*, adv. dkt. 75, pp.19:11-14, 20:18-21:10. It turns out, however, that the Resnik firm very much participated in the conscious decision not to dismiss the adversary proceeding, and that is sanctionable.

Starting with the Resnik firm's premise, it is true that it could not have unilaterally dismissed the plaintiffs' complaint. But the Resnik firm could have advised the plaintiffs that without a viable way to prosecute the litigation they had no choice but to accede to the defendants' requests for voluntary dismissal; and if the plaintiffs failed or refused to authorize dismissal then the Resnik firm could have sought to withdraw. Instead the Resnik firm made a conscious decision to "continue the lawsuit," as this court previously has found:

> In sum, after reviewing the defendants' documents on July 1, 2015, the plaintiffs had a choice. On the one hand, if they believed that they had a sufficient basis to do so, they could seek to initiate more formal discovery to "follow the money".... On the other hand, if they lacked the funds to do those things (or if such discovery would have been too speculative or otherwise exceed the scope of what would be permissible for nonborrowers to discover about this loan), then they could voluntarily dismiss their complaint before the defendants had to incur the costs of a motion to dismiss.
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> Instead of doing either of those things, the evidence is that <u>both the plaintiffs and the responsible attorney(s) at the Resnik firm made two conscious decisions</u>: first, several weeks after reviewing the documents on July 1, 2015 they opted to reiterate their informal request for more evidence about the disbursement of the funds (the July 20, 2015 inquiry about the supposed bank account) and, second, meanwhile they failed and refused to dismiss their complaint. Although they might have misunderstood the bank account issue prior to July 28, 2015, they had no basis for any such misunderstanding after the defendants' counsel re-

> confirmed on July 28, 2015 that her understanding was that the disbursement was in cash rather than to any bank account. Yet they still refused to dismiss their complaint, as communicated to the defendants on August 11, 2015. That was a conscious decision: "we spoke with [the plaintiffs] and they made the decision to continue with the lawsuit because the question of where the funds went could not be answered from the documentation available on either side." Resnik Decl. (adv. dkt. 58, *commencing at* PDF p. 44 of 122), para. 33 (emphasis added). *See also* Chelgren Decl. (adv. dkt. 19) p. 3:11-20 (telephonic notice on August 11, 2015 that the plaintiffs refused to dismiss their complaint).
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> In other words, they made a conscious decision to impose the subsequent costs of a motion to dismiss on the defendants, because they were unwilling to concede that they could not prosecute their complaint (regardless whether that was due to lack of lack of funds or lack of merit, or both). This Court finds, by clear and convincing evidence, that in making this conscious decision both the plaintiffs and the responsible attorneys at the Resnik firm acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Deville*, 361 F.3d 539, 544 (9th Cir. 2004) (citation omitted).
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> Additional support for this finding comes from the fact that this decision came after repeated requests to dismiss the complaint, and over six weeks after the Resnik firm had inspected the documents that on their face completely undermined the plaintiffs' claims against the defendants. It was also four months after commencement of the adversary proceeding (on April 13, 2015), nine months after the Petition Date (November 10, 2014), over one and a half years after the foreclosure sale (on January 31, 2014), and over three years after the Decedent's death (in 2011). *See, e.g.*, Case dkt. 26, Ex. B or "2" (Trustee's Deed Upon Sale).
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> [Adv. dkt. 75, pp. 27:11-28:24, *as amended* dkt. 131, pp. 29:16-31:2 (emphases altered to highlight the Resnik firm's role)]

The Resnik firm knew exactly what it was doing. Its attempt to paint the situation as one beyond its control is unavailing. By implementing the plaintiffs' decision to "continue with the lawsuit" it was consciously choosing to impose on the defendants the costs of a motion to dismiss that they had no basis to oppose. That was their choice, and they must bear the consequences.

**C. Other Arguments**

The Resnik firm's briefs are long on invective and short on meaningful analysis. To the extent that the Resnik firm makes any other arguments, they are unpersuasive.

**IV. WHO IS LIABLE**

Ordinarily, a party such as the plaintiffs might be responsible for all of the attorney fees flowing from an initial sanctionable act or omission, including acts or omissions by their own attorneys that exacerbate the sanctions. But in this instance it appears to be inequitable to impose sanctions against the plaintiffs – as distinguished from the Resnik firm – for fees incurred after the May 2, 2016 hearing on whether their prosecution of this adversary proceeding, and refusal to dismiss it, was sanctionable. It does not appear that the plaintiffs themselves would have understood enough about the documents filed by the Resnik firm after that date to realize that the arguments within them were made in bad faith and constituted vexatious, oppressive, or wanton arguments.

The reported decisions appear to encourage the application of equitable principles to tailor sanctions under the court's inherent powers. Accordingly, sanctions for the period after May 2, 2016 will be assessed solely against Mr. Resnik, who has acknowledged responsibility for this litigation.[2] *See Chambers v. NASCO, Inc.*, 503 U.S. 32, 111 S.Ct. 2123, 2132-33 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.") (internal citation omitted, emphasis added).

**V. DOLLAR AMOUNTS**

The Primary Sanctions Decision (adv. dkt. 75, *as amended*, adv. dkt. 131) reserved the issue of the precise dollar amount of fees and expenses to be awarded for the conduct addressed therein, because the defendants' time records needed to be supplemented, as stated in that decision. That has now occurred. Therefore this

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[2] Nothing in this memorandum decision or any prior decision should be interpreted as expressing any opinion whether the Resnik firm as a whole (as opposed to Mr. Resnik individually) is liable under partnership, agency, or other law.

memorandum decision addresses the reasonableness of fees for the entire period of this litigation.

**A. The First Sanctions Period, Through May 2, 2016**

The first sanctions period is from July 28, 2015 (when there was no longer any basis for the plaintiffs or the Resnik firm to refuse to dismiss this adversary proceeding, except for a desire to impose unnecessary costs on the defendants) through May 2, 2016 (the cutoff date for the plaintiffs' liability, as determined above) (the "First Sanctions Period"). The records submitted by the Alston firm for the First Sanctions Period include times entries through May 13, 2016 (adv. dkt. 84, PDF pp. 46-47). To conform to the cutoff date of May 2, 2016, the undersigned Bankruptcy Judge and his staff have manually recalculated the fees billed for the First Sanctions Period to avoid holding the plaintiffs liable for fees incurred after May 2, 2016. Fees billed for May 2, 2016 through May 13, 2016 aggregated $8,236.35, minus $163.50 in services rendered on May 2, 2016, for a total adjustment of $8,072.85. *See* adv. dkt. 84 at PDF pp. 46-47. Fees billed for the First Sanctions Period totaled $86,294.80, minus that adjustment of $8,072.85, result in total fees of **$78,221.95** awarded for the First Sanctions Period.

As set forth in the Primary Sanctions Decision, the plaintiffs and Mr. Resnik each engaged in sanctionable conduct. Therefore these sanctions will be awarded against Rubye E. Taylor, Andre Del Monte Freeman, and Mr. Resnik, jointly and severally.

**B. The Second Sanctions Period, After May 2, 2016**

Based upon the Declaration of Elizabeth A. Sperling Attaching Additional Billing Statements (adv. dkt. 124), and the analysis set forth in this memorandum decision, Mr. Resnik is liable for the reasonable fees and expenses of the Alston firm set forth in that declaration and its exhibits, representing attorneys' fees incurred by the Alston firm for the period of May 3, 2016 through August 16, 2016 totaling $57,652.25, plus estimated additional fees of $18,067.50. As part of its independent review of the Alston firm's fees, this court has noted the need for some minor adjustments (not raised by the Resnik firm).

Total fees requested are $75,934.25, including $214.50 in fees billed for services rendered on May 2, 2016. One of the two May 2, 2016 time entries, for services provided by Ms. Heafner in the amount of $163.50, is already included in this court's award of sanctions for the First Sanctions Period (*see* adv. dkt. 84, PDF p. 46). The second of those time entries, for services performed by Ms. Mizrahie, is disallowed in its entirety ($51.00) because the services provided (scheduling a telephonic appearance) are secretarial/clerical in nature. *See* adv. dkt. 124, PDF p. 7; 28 C.F.R. pt. 58, app. A(b)(5)(vii) (1996) (expenses in the nature of "secretarial and other clerical services" are nonreimbursable), *available at* www.justice.gov/sites/default/files/ust/legacy/2013/06/28/1996_Fee _Guidelines.pdf.

The result is to reduce the requested $75,934.25 by $214.50 for a total of **$75,719.75** for the Second Sanctions Period. As stated above, these sanctions are imposed solely against Mr. Resnick, not the plaintiffs.

**VI. FURTHER PROCEEDINGS**

This court will issue orders implementing its decisions: (1) an order granting the defendants' request for sanctions (contained in the defendants' motion to dismiss, adv. dkt. 18, as amended at adv. dkt. 25, p. 3:12-18) for the reasons stated in the Primary Sanctions Decision (adv. dkt. 75, *as amended*, adv. dkt. 131) and the memorandum decision (dkt. 92) denying the plaintiff's motion for reconsideration, and this memorandum decision; and (2) an order denying the plaintiffs' motion for reconsideration (adv. dkt. 85) for the reasons stated in this court's memorandum decision on that motion (adv. dkt. 92). This court will also issue a judgment for (1) **$78,221.95** against Rubye E. Taylor, Andre Del Monte Freeman, and Mr. Resnik, jointly and severally and (2) an additional **$75,719.75** solely against Mr. Resnick.

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A telephonic status conference will take place on November 1, 2016 at 2:00 p.m. to address any remaining issues appropriate for this trial court after issuance of a final judgment - *e.g.*, a bond pending appeal, any proceedings to enforce the judgment, etc.

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Date: October 13, 2016

Neil W. Bason
United States Bankruptcy Judge