UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

In re:

KEVIN W. KULEK,

Debtor.

_____/

U.S. District Court Appeal
Case No. 1:18-cv-11509-SFC-PTM
Hon. Sean F. Cox

KEITH M. NATHANSON,

Appellant,

v

TIMOTHY J. FIFE,

Appellee.

_____/

Bankruptcy Case No. 16-21030-dob
Adversary Case No. 17-02001-dob

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Bankruptcy Court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 157 and 28 U.S.C. 1334. This Court has jurisdiction over this matter pursuant to 28 U.S.C. 158(a).

COUNTER-STATEMENT OF ISSUES PRESENTED

1. **WHETHER THE BANKRUPTCY COURT CORRECTLY AWARDED SANCTIONS AGAINST APPELLANT UNDER 28 U.S.C. §1927.**

   Appellants answer: No

   Appellees answer: Yes

   Trial Court answered: Yes

2. **WHETHER THE BANKRUPTCY COURT HAD THE AUTHORITY AND DISCRETION TO AWARD SANCTIONS AGAINST THE APPELLANT AS OF THE DATE OF AUGUST 1, 2017 FORWARD?**

   Appellants answer: No

   Appellees answer: Yes

   Trial Court answered: Yes

3. **WHETHER THE BANKRUPTCY COURT PROPERLY REJECTED THE APPELLANT'S ARGUMENT THAT THE BANKRUPCTY COURT SHOULD DECLINE TO AWARD SANCTIONS BASED ON APPELLEE'S COUNSEL'S FAILURE TO SEEK CONCURRENCE?**

   Appellants answer: No

   Appellees answer: Yes

   Trial Court answered: Yes

STANDARD OF REVIEW FOR THE ISSUES PRESENTED

On appeal, a federal district court reviews a bankruptcy court's grant of sanctions pursuant to 28 U.S.C. §1927 for an abuse of discretion. "A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843, 850 (6th Cir. 2010).

COUNTER-STATEMENT OF THE CASE

a. The Complaint

On January 2, 2017, Appellant, on behalf of the Trustee, filed its Complaint in this matter, requesting the avoidance and recovery of two pinball machines allegedly transferred between Kevin Kulek, the Debtor ("Kulek"), and Appellee ("AP Complaint"). The AP Complaint was specifically brought pursuant to 11 USC 548 and 550 as well as Michigan's Uniform Fraudulent Transfer Act, MCL 566.34, *et seq*., and alleged that Appellee was the initial transferee of a Predator Pinball Machine ("Predator Pinball Machine") as well as an Experts of Dangerous Pinball Machine ("EOD Cabinet") that were owned by the Debtor and "on loan" to Appellee for "research purposes." (See DN 31). The basis for the AP Complaint was explicitly stated to be prior testimony offered by Kulek.

However, prior to the filing of the AP Complaint, Appellee had appeared at Appellant's office on September 29, 2016, and gave testimony identifying Mike Magyari ("Magyari"), an acquaintance of Kulek by virtue of his various arcade related businesses/restaurants and a fellow pinball enthusiast who actively buys, sells, and trades hundreds of arcade games each year, as the initial transferee of both the Predator Pinball Machine and EOD Cabinet.[1] (See DN 48). Likewise, Magyari appeared at Appellant's office on October 18, 2016, and gave testimony indicating that he was, in fact, the initial transferee and that Appellee had purchased the Predator Pinball Machine from Magyari and traded Maygari for the EOD Cabinet. Given Appellee's and Magyari's prior testimony, in answering the AP Complaint, Appellee was perplexed as to the basis of the claims. (See DN 48). Accordingly, in his answer to the AP Complaint, Appellee denied as untrue that he was the "initial transferee"; that he had obtained either the Predator Pinball Machine or EOD Cabinet from Kulek; and that either game was "on loan." (See DN 48). Instead, Appellee stated that each game was obtained in good faith and for value from a third-party and specifically asserted an affirmative defense under 11 USC 550(b). (See DN 48).

[1] Appellee was unrepresented by counsel and the time of his September 29, 2016, "examination", but would note that while he was made to believe that he was compelled to appear and provide testimony on September 29, 2016, pursuant to court issued subpoena, a review of the subpoena sent to him as well as the Bankruptcy Court's docket in the primary bankruptcy case has revealed to Appellee's counsel that Appellant issued Appellee an unsigned subpoena and despite verbally telling the Appellee that his testimony was being compelled pursuant to a properly issued subpoena, the Appellant never sought leave of the Bankruptcy Court pursuant to Fed. R. Bankr. Pro. 2004 to take Appellee's examination.

b. The Initial Disclosures, Discovery Responses, and Misrepresentations by Appellant.

On March 23, 2017, in the Rule 26(a) disclosures drafted and signed by Appellant, Appellant "fleshed out" the allegations in the AP Complaint, indicating that "Kulek has previously testified at two §341 meetings of creditors, a §2004 examination, and in a state court proceeding that the Predator pinball machine and the Experts of Dangerous machine (and parts) were loaned to Defendant for 'research purposes.'" (See DN 48). In addition, Appellant identified several "categories of documents" relevant to the Trustee's claims, including transcripts to Kulek's §341 hearing, §2004 examination, and a previous state court proceeding; however, no documents were produced or made available for inspection. (See DN 48). Because the AP Complaint and Rule 26(a) disclosures were fashioned in such a conclusory manner, Appellee served his First Set of Interrogatories and Requests for Production on April 18, 2017. (See DN 48). Appellant failed to provide timely answers to said Interrogatories and Requests for Production, but on May 24, 2017, provided Appellee's counsel with responses that had been drafted by Appellant but remained unsigned/unverified by the Trustee. (See DN 48). As with the Rule 26(a) Disclosures, Appellant provided no additional detail in the responses to discovery, stating that "Debtor has testified, in the State Court proceedings against him, at the two §341 meeting of creditors, and at his §2004(b) examination that the [sic] both pinball games were loaned to Defendant, Fife for

research purposes, and that Debtor retained title and ownership to both games, and has not returned same to Debtor." (See DN 48). Similar to the Rule 26(a) Disclosures, no evidence or documentation supporting said assertion was produced in support of these discovery requests.

Because Appellant had not produced any of the referenced transcripts that supposedly provided the basis for his claim, but had previously identified the transcripts as documents being within his possession and control under Fed. R. Civ. Pro. 26(a)(1)(A)(ii), on May 24, 2017, Appellee's counsel wrote an email requesting that Appellant clarify his position as to whether he had possession or control of the transcripts and requested that they be produced. (See DN 48). Specifically, Appellee's counsel asked:

> Couple of follow up questions on the document requests. In the trustee's initial disclosures, the trustee identified the deposition transcripts from the State Court Proceedings as documents within his control or possession, but in your response you state that the trustee does not have it in his possession. Is that accurate?
>
> I've previously contacted the court reporter and the dep is well over 12 hours, she would not provide me with excerpts of relevant testimony, and she would charge $1300 for a whole transcript when I'm sure 98% of it is irrelevant to the present adversary proceeding. If the trustee is relying on that prior testimony and simply as discoverable information, I'm entitled to have him produce the transcript or recording for inspection so that I may make a copy. Can you please advise?

(See DN 48).[2] Furthermore, at this point in time, because Appellant had produced no documentation to support the allegations he was relying upon , Appellee's counsel procured audio recordings of Kulek's §341hearings and the beginning of Kulek's §2004 examination directly from the Office of Trustee and Court to evaluate the basis of Appellant's assertions. (See DN 48). Accordingly, because Appellee's counsel's review of the testimony seemed to be contrary to Appellant's position, Appellee's counsel noted:

> Also, as a practical matter, do you know at which instance Kulek testified that he loaned the EOD game to my client for research purposes? I've listened to the 341 hearings and the beginning of the 2004 exam on January 27th, and the only mention of the EOD game was at about the 1 hour mark of the January 27th 2004 exam when you asked Kulek if he ever traded an EOD pinball machine, to which he replied, "I don't believe so."

(See DN 48). In response to Appellee's counsel's May 24, 2017, email correspondence, Appellant served an "Amended and Supplemental Rule 26(a) Disclosure," claiming that Appellant did not have any transcripts within his possession and would merely rely on the transcripts for impeachment purposes. (See DN 48). However, notably, Appellant ***still*** maintained that Kulek had previously testified at his §341 hearings, a §2004 examination, and a state court proceeding that Appellee was the initial transferee and that the Predator Pinball

[2] Notably, due to the length of the transcripts, the court reporter retained by Appellant for the depositions was quoting Appellee's counsel approximately $2,000.00 to produce the transcripts upon which Appellant was basing his case. Accordingly, because the Trustee had the burden of proof and Appellee was attempting to be extremely prudent in regards to fees and costs associated with the case, Appellee declined to pay to produce the transcripts.

Machine and EOD Cabinet had been loaned to Appellee by Debtor for "research purposes." (See DN 48).

On June 16, 2017, Appellee appeared for another deposition at Appellant's office and reconfirmed the fact that he was not the initial transferee and had procured both games for value from Magyari. Appellee additionally provided Appellant with further documentary evidence supporting these facts and explained that he had attempted to provide said documents immediately following his September 29, 2016, examination, but that his messages to Appellant's office were not returned.

c. Appellee's Motion for Summary Judgment.

On June 1, 2017, Appellee's counsel, with the permission of Kulek's counsel, conducted a phone interview with Kulek.[3] In that telephone interview,

[3] While Appellant's seems to argue that this telephone interview and its contents were 'hid' from him, Appellee's counsel revealed both this telephone interview and its contents to Appellant in a teleconference during June of 2017. Further, Appellee's counsel acknowledges the hearsay nature of the following summation of his phone interview with Kulek and provides it **only** by way of background in regards to the accumulation of evidence before Appellee's counsel. Appellee's counsel does add that he did simultaneously take notes while conducting the phone interview with Kulek.

Specifically, in the June 1, 2017, telephone interview, Kulek indicated to Appellee's counsel that the EOD Cabinet had been traded or sold to Maygari in 2014 or 2015, and that the EOD Cabinet had never been on "loan" to anyone for "research purposes." Kulek further indicated that he had never testified to anything contrary to that fact. Kulek further indicated that he had given the Predator Pinball Machine to Magyari, because as he put it, "he no longer wanted the game and did not want it in his house" and Magyari had indicated that he knew someone who was building their own custom game and may want the Predator Pinball Machine for "research purposes." Kulek further confirmed that he had delivered the Predator Pinball Machine to Magyari's home at the same time as Magyari was providing Kulek multiple arcade games in a trade. However, while Kulek claimed that it was not his "intent" to include the Predator Pinball Machine as part of the trade with Magyari, and claimed that he did not intend to convey it or transfer title due to his lack of intellectual property license, Kulek indicated that he had not told Magyari that the Predator Pinball Machine was supposedly on "loan" to Magyari and that Debtor could not recall informing Magyari that the Predator Pinball Machine was not part of the "trade" between the two. Debtor specifically indicated that "[he could] see why [Magyari] might have thought it was part of the trade and that [Magyari] owned it." When pushed further, Debtor indicated that maybe he did transfer title, but that "[he's] not a lawyer" and "[he]

Kulek confirmed that he had never transferred the Predator Pinball Machine or EOD Cabinet to Appellee, that both games had been left with Magyari, and that he was not aware that Appellee had purchased/acquired both the Predator Pinball Machine and EOD Cabinet or Appellee's identity until after Appellee had purchased/acquired the games from Magyari. (See DN 48). At the conclusion of the telephone interview, Debtor indicated that he would provide an affidavit embodying the above statements. (See DN 48). However, despite subsequent attempts to contact Kulek on June 12th, June 14th, June 28th, July 6th, July 11th, and July 12th about reviewing the prepared affidavit, Kulek failed to respond prior to the discovery deadline and the dispositive motion deadline. (See DN 48).

Given Kulek's comments during his phone interview with Appellee's counsel and because Appellant had provided absolutely no evidence in discovery to rebut the fact that Appellee was not the initial transferee of either game, Appellee filed his Motion to Dismiss Pursuant to Rule 12(b)(6) and Motion for Summary Judgment Pursuant to Rule 56 on July 18, 2017. (See DN 48). In part, Appellee argued that there was no genuine issue of material fact that Appellee had acquired both the Predator Pinball Machine and EOD Cabinet from Magyari for value and in good faith. In filing the Motion for Summary Judgment, it was Appellee's

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didn't mean to." Further, Debtor confirmed that he did not learn the identity of Fife until after Fife had purchased the game from Magyari, that he had never known Magyari to sell something that Magyari did not own, and that he had never asked Magyari why he sold the game to Fife after learning of the sale.

expectation that Appellant would finally provide evidence supporting the Trustee's claims, as is required in responding to such a motion. (See DN 48). However, the August 2, 2017 Response Brief drafted by Appellant merely regurgitated the previous allegations that "Debtor has testified on numerous occasions including his §341 meeting of creditors and a §2004(b) examination that the Predator machine and the Experts of Dangerous machine were loaned to Defendant for 'research purposes.'" (See DN 48). However, notably, Appellant did not provide any evidentiary support for these allegations.

In his August 14, 2017 Reply Brief, Appellee, in part, called attention to the fact that Appellant had completely failed to produce any evidence of the allegations. (See DN 48). Seemingly in response to Appellee's argument that Appellant had provided no evidence to support the allegations he had made on behalf of the Trustee, Appellant provided an affidavit on August 15, 2017, which alleged that Kulek had testified at his §341 hearings and his §2004 examination that the Predator Pinball Machine and EOD Cabinet were on "loan" to Appellee for "research purposes." (See DN 48). In addition, the day before oral argument on Appellee's Motion for Summary Judgment, Appellant filed on a Motion for Leave to Amend Complaint, claiming that Appellee never alleged that Magyari was a "necessary party" and requesting leave to add Magyari as a party defendant. (See DN 48). In response to the Motion for Leave to Amend Complaint, Appellee

pointed out the futility of the proposed amendment given Appellee's entitlement to an affirmative defense under 11 USC 550(b)(1) and that Appellee had, in fact, been alleging and testifying all along that Magyari was the initial transfer and that the transfer between Magyari and Kulek would need to be avoided prior to the Trustee being able to pursue an action against Appellee. (See DN 48).

Following oral argument on August 18, 2017, the Bankruptcy Court took the matter under advisement and issued its Opinion and Order granting Appellee's Motion for Summary Judgment in its entirety on November 27, 2017, finding that there was no genuine issue of fact as to Appellee not being the initial transferee as well as the fact that Appellee had taken the Predator Pinball Machine and EOD Cabinet "for value" from a subsequent transferee. (See DN 48). The Court's Opinion and Order was subsequently embodied into an Order on November 29, 2017. (See DN 48).

d. Appellee's Motion for Sanctions and the Bankruptcy Court's Order on Sanctions.

Because a review of the information accumulated by Appellee's counsel during the course of this proceeding indicated that there never was evidence to support the allegations made by Appellant, on December 15, 2017, Appellee filed his Motion for Sanctions Pursuant to 28 USC 1927 and 11 USC 105(A) ("Sanctions Motion"). (See DN 48). The Appellee's Sanctions Motion specifically alleged that the facts and circumstances presented over the course of the litigation demonstrated that

Appellant never had any evidence to support the claims made by him on behalf of the Trustee in relation to the EOD Cabinet, and that besides Appellant's self-serving affidavit filed in opposition to Appellee's Motion for Summary Judgment there was absolutely zero testimony or documentary evidence presented to support said allegations. (See DN 48). Further, despite this apparent lack of evidence, Appellant continued to "double down" on the allegations in the Rule 26(a) Disclosures, Discovery Responses, and virtually every single pleading filed by Appellant. (See DN 48).

On December 28, 2018, the day before Appellee's response to the Sanctions Motion was due, Appellant contacted Appellee's counsel requesting an extension of time to file his response due to his work schedule and the holiday season. Appellee's counsel initially offered a two week extension, but ultimately agreed via electronic mail to a 21 day extension based on Appellant's representations regarding his "busy schedule." (See DN 82). This representation regarding Appellant's schedule was similarly made in Appellant's Motion to Extend Time to Answer Motion for Sanctions which specifically noted Appellee's counsel's concurrence to the relief requested. (See DN 82). However, the true reason for Appellant's request for a 21 day extension was revealed the very next day when Appellant served Appellee's counsel with a frivolous safe harbor notice under Bankr. R. Pro. 9011, claiming that the Sanctions Motion was filed merely for the

improper purpose of harassment and demanding its dismissal. (See DN 82). Ultimately, however, Appellee did not dismiss the Sanctions Motion and Appellant filed his response to the Sanctions Motion on January 19, 2018, asserting that the Sanctions Motion should be denied due to the fact that, among other things, 1) Appellee had failed to seek concurrence 2) no proceedings had been "multiplied," and 3) Appellant reasonably believed the claim against Appellee to be meritorious. (See DN 51). Appellee filed his reply to Appellant's response on January 31, 2018, acknowledging that concurrence had not been requested, but that such a failure was not a basis for a denial of the Sanctions Motion and that Appellant's continual doubling down on the baseless allegations contained in the AP Complaint, despite the lack of evidence supporting said allegations, was an unreasonable and vexatious multiplication of the proceedings. (See DN 54).

Following oral argument on the Sanctions Motion on February 8, 2018, the Bankruptcy Court issued its Opinion Regarding Appellee's Motion for Sanctions Pursuant to 28 USC § 1927 on April 2, 2018. The Bankruptcy Court, in relevant part, ruled:

> At very early stages, including the filing of this adversary proceeding complaint, neither the Trustee or his counsel can be faulted for relying upon preliminary investigation with the hopes that discovery would uncover additional facts supporting the Trustee's claims.
>
> That did not happen in this case. The Defendant and Defendant's counsel skillfully responded to the Trustee's complaint and aggressively pursued discovery. These efforts revealed that the Plaintiff did not have a basis for his claims such that this Court

> granted the Defendant's Motion for Summary Judgment. The question in this case, therefore, is when did Plaintiff's counsel realize that continuing this adversary proceeding would unreasonably and vexatious multiply litigation.
>
> While perhaps arbitrary, this Court concludes that August 1, 2017 is that date. …. By the summer of 2017, when hard-pressed by Defendant's counsel to support his case, Plaintiff's counsel should have realized that the necessary facts either through documents or testimony did not exist. Plaintiff's counsel's response to the Defendant's Motion for Summary Judgment, as well as the filing of a request to amend the complaint on the eve of the hearing on the Motion for Summary Judgment all point to one conclusion: by August 1, 2017, Plaintiff's counsel realized that he did not have a case against the Defendant, but continued.

(See DN 57). Accordingly, the Bankruptcy Court found that Appellant had unreasonably and vexatiously added to the litigation by continuing to pursue Appellee after August 1, 2017. (See DN 57). The Bankruptcy Court further ordered Appellee to submit a bill of costs that Appellee believed to be associated with Appellant's actions and allowed Appellant 21 days to object to Appellee's claimed costs after being served. (See DN 57). Appellee was then given 7 days to respond to any objections. (See DN 57). On May 10, 2018, prior to the Bankruptcy Court issuing a decision on the amount of fees and costs for which Appellant should be liable, Appellant filed the current appeal (See DN 70). Although no stay is in effect, the Bankruptcy Court has taken the position of waiting to the conclusion of the current appeal prior to issuing an award as to the amount of fees and costs for which Appellant is liable.

e. Additional Evidence of Appellant's Unreasonable and Vexatious Conduct Revealed After Appellee's Motion for Sanctions.

In May 2018, while Appellant was filing his "objections" to Appellee's Statement of Fees and Costs (See DN 68), Appellee had the opportunity to review the March 17, 2017, transcript of Kulek's 2004 examination that Appellant had never produced during the course of the proceedings. Specifically, this transcript was provided to Appellee's counsel by Shanna Kaminski, counsel for a defendant in another adversary proceeding prosecuted by the Appellant. (See DN 82). In obtaining the transcript from the court reporter retained by Appellant for the 2004 Exam, the court reporter made Ms. Kaminski explicitly agree in writing that she not provide a copy of the transcript to Appellant due to amounts of money owed by Appellant and/or his firm to the court reporter. (See DN 82). The review of the March 17, 2017, 2004 examination transcript indicates that, despite Appellant's claims to the contrary, Kulek had not offered the testimony that Appellant had claimed, but rather had, in fact, testified that 1) he did not know how Appellee obtained the Predator Pinball Machine or EOD Cabinet, 2) he left the games with Magyari, because Magyri knew "someone who wanted" them, and 3) he was not aware of Appellee's identity at the time he left the games with Magyari. (See DN 82). Specifically, a mere **six days** prior to providing the Rule 26(a) Disclosures on March 24, 2017, Appellant had garnered the following testimony from Kulek:

Q: How did Mr. Fife come to have [the Predator Pinball Machine] in his possession?
A: ***I really don't know.***
Q: Okay. What did you do with the machine after it left your possession? Who did you put it in the hands or custody of?
A: ***I left it with Mike.***
Q: Magyari?
A: Mike Magyari, yes.
Q: ***Why?***
A: ***Because he told me that his friend wanted it for research purposes.***
Q: Did Mike Magyari pay you any money for it?
A: No.
Q: Did he trade you any pinball machines, video games, redemption machines or any type of equipment or hardware for it?
A: No.
Q: So Mike Magyari just came and picked it up or did you deliver it to him?
A: I brought it to him.

***

Q: How about the Experts of Dangerous machine? How did that wind up in Mr. Fife's possession?
A: ***That was through Mike as well.***
Q: Did you deliver it to Mike at the same time?
A: No.
Q: Different time?
A: Yeah.
Q: And why did you deliver it to Mike?
A: ***Because he said he knew somebody who wanted it.***
Q: Wanted to buy it?
A: He said he knew somebody who wanted it.
Q: Wanted it for what?
A: I don't know.
Q: He didn't tell you what for?
A: No.
Q: And you didn't receive any sort of compensation whatsoever in any form for the Experts of Dangerous machine?

(See DN 82). This testimony absolutely verified Appellee's affirmative defense that he was not the initial transferee and further clarified that Kulek's testimony did not, and could not, contradict that of Magyari and Appellee as to Appellee's purchase/trade for the pinball machines, as Kulek admittedly was not present and had no knowledge as to how Appellee obtained the machines from Magyari. However, despite this testimony, Appellant never disclosed the nature of this testimony and, again, represented in the Rule 26(a) Disclosure, just six days after he listened to this testimony, that Kulek had testified that both the Predator Pinball Machine and EOD Cabinet were loaned to Appellee and that Appellee was the initial transferee. Further, the exact same representations were reaffirmed continuously in discovery responses and subsequent pleadings.

In addition, after initiating the current appeal on May 10, 2018, Appellant filed his objections to Appellee's Statement of Fees and Costs. (See DN 81). In reviewing those objections, Appellee's counsel came across a certain passage that seemed peculiar to Appellee's counsel, given the fact that it referenced a term in Appellee's counsel's retainer agreement with Appellee, yet Appellee's counsel had not produced the retainer agreement as part of or as an exhibit to any pleading in this proceeding. Specifically, on page 4 of Appellant's objections (See DN 81), Appellant referenced a five percent (5%) discount that Appellee's counsel provides on any invoice paid within ten days of the invoice date. This provision

was not something that was revealed by Appellee and was not public knowledge, and accordingly, raised Appellee's counsel's curiosity as to how Appellant was privy to that information. (See DN 82). Appellee's counsel then recalled that, following the deposition of Appellee by Appellant at Appellant's office on June 16, 2017, Appellee's counsel forgot a volume of his physical client file at Appellant's office. (See DN 82). Immediately after forgetting the client file at Appellant's office, Appellee's counsel emailed Appellant's legal assistant and stated:

> Thank you Monica. I think I forgot my pleadings file at your office, did I? If so, can you hold it until I can pick it up next week? Thank you.

(See DN 82). Appellant's legal assistant replied, "Sure. Keith was going to have me mail it to you, but we can hold onto it if you prefer to pick it up." (See DN 82). To which Appellee's counsel immediately responded, "[a]ctually mailing it would be fine. Thanks so much. I should have had another cup of coffee this morning." (See DN 82). Because Appellee's counsel almost entirely relies on electronic files and rarely utilizes a physical file, and as Appellant never mentioned it in any subsequent conversation, Appellee's counsel completely failed to notice the absence of this file and failed to follow-up on its status. However, to be sure, Appellee's counsel never received the client file back via mail, and subsequently confirmed that it had been in Appellant's possession all along. (See DN 82).

Appellee's counsel also subsequently confirmed that this volume of the client file contained a subfolder for correspondence and engagement documents, which included the retainer agreement. This volume of the client file also included a subfolder for initial pleadings, and possibly a subfolder for case related documents. (See DN 82).

When confronted with this fact, Appellant had feigned knowledge of the client file still being in his possession, claiming he had not realized it was at his office until Appellee's counsel had demanded its return. However, given the fact that Appellant cited a specific provision on page 2 of Appellee's counsel's retainer agreement with Appellee, Appellant undoubtedly opened the subfolder entitled "Correspondence" and reviewed, at least, the retainer agreement, which contains a bold heading that it is subject to attorney-client privilege and attorney-client confidentiality. Appellant has never been able to proffer an alternative reason for how he had obtained knowledge of the "discount" provision in Appellee's counsel's retainer agreement. Further, the physical state of the "Correspondence" subfolder upon retrieval from Appellant's office, confirms to Appellee's counsel that Appellant or someone at his office opened the client file.

III. ARGUMENT

A. The Bankruptcy Court Correctly Awarded Sanctions Under 28 U.S.C. §1927

In his current brief, Appellant misrepresents Appellee's arguments, the Bankruptcy Court's findings and reality itself, claiming that Appellee has merely claimed that Appellant "should have produced more evidence to support the Trustee's claims against [Appellee]." See Appellant's Br. p. 2. Appellant goes on to assert that "an attorney that reasonably believes his claim is meritorious is not subject to sanctions" and that there is no evidence to suggest that Appellant's continued pursuit of the claims against Appellee were in anything but good faith. See Appellant's Br. pp. 4-7. These statements of fact and law, however, are misleading at best and outright misrepresentations at worst.

A motion for excess costs and attorney fees under § 1927 is not predicated upon a "safe harbor" period, nor is the motion untimely if made after the final judgment in a case. See *In re Ruben*, 825 F.2d 977, 981-82 (6th Cir. 1987) (finding motion for § 1927 fees filed four months after district judge's entry of judgment and two weeks after dismissal of the appeal timely under "reasonableness" test), cert. denied sub nom. *Swan v. Ruben*, 485 U.S. 934, 99 L. Ed. 2d 269, 108 S. Ct. 1108 (1988). 28 USC 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof ***who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.***

(emphasis added). § 1927 "authorizes a court to assess fees against an attorney or other person for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety." *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). "Bad faith is not required to support a sanction under § 1927." *Garner v. Cuyahoga Cty. Juvenile Court*, 554 F.3d 624, 645 (6th Cir. 2009) (quoting *Wilson-Simmons v. Lake Cty. Sheriff's Dep't*, 207 F.3d 818, 824 (6th Cir. 2000)). Fees may be assessed "when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." *Jones*, 789 F.2d at 1230; see also *Kempter v. Mich. Bell Tel. Co.*, 534 F. App'x 487, 493 (6th Cir. 2013) (sanctioning an attorney under § 1927 for misrepresentations that were not accompanied by any "overt signs of bad faith" but nonetheless amounted to a "misleadingly selective[] reading of the record."). Sanctions are warranted under § 1927 if counsel "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 (6th Cir. 2009)(citation omitted).

While Appellant claims that the Bankruptcy Court "misapplied" 28 USC § 1927 and that he believed the claims to be meritorious, it's indisputable that the direct evidence and circumstantial evidence indicate that Appellant knew or should

have known that the claims lacked any evidentiary merit and that the Bankruptcy Court, in fact, applied § 1927 in a much more lenient fashion. Specifically, Appellant asserts that there were instances of testimony were Kulek indicated that the Predator Pinball Machine was on "loan" to Appellee for "research purposes" and that Kulek indicated that he had not traded or sold any arcade games to Magyari and had not disclosed any such transfers in his bankruptcy schedules. See Appellant's Br. p. 7. It is these "facts" that Appellant indicates show that he had a justifiable belief in the merit of the claims he was prosecuting. However, as set forth above, the direct and circumstantial evidence irrefutability demonstrate that Appellant, at a minimum, should have known the claims lacked merit and, in all actuality, likely knew that the claims did lack factual merit.

First and foremost, it is worth noting that the Bankruptcy Court limited its award of sanctions to the time period where the Bankruptcy Court found that the Appellant "***knew"*** the claims he was continuing to assert lacked evidentiary merit. (Doc 57). Specifically, the Bankruptcy Court noted that while "[Appellant] should have realized that the necessary facts either through documents or testimony did not exist" by the summer of 2017, Appellant's response to Appellee's Motion for Summary Judgment, as well as his request to amend the complaint, conclusively indicated that "by August 1, 2017, [Appellant] realized that he did not have a case against the [Appellee], but he continued." (Doc 57). Specifically, the Bankruptcy

Court had found that Appellant ***knew*** that his claims lacked merit because in response to Appellee's Motion for Summary Judgment, which was filed on August 1, 2017, he was unable to present ***any*** evidence to suggest that Appellee was the "initial transferee" as alleged, or to present any contrary evidence as to the transaction between Appellee and Magyari. (Doc 57).

This failure to produce any evidence to support his allegations must be considered, as the Bankruptcy Court did, against the fact that Appellant had asserted throughout the proceeding that he had a plethora of testimony from Kulek that provided a basis for the allegations he was inserting. These repeated assertions included:

1) in the AP Complaint Appellant alleged that Kulek had previously testified that both pinball machines were "on loan" to Appellee and that Appellee was the initial transferee;

2) in the Rule 26(a) Disclosures Appellant alleged that Kulek had testified that "at two §341 meetings of creditors, a §2004(b) examination, and in a state court proceeding" that the pinball machines "were loaned to" Appellee;

3) in interrogatory response, when asked to "specify in detail the facts and circumstances…as well as the individuals present" in relation to the alleged transfers of the pinball machines, Appellant did not identify any individuals besides Kulek and stated that Kulek had "testified, in the State Court proceedings against him, at the two §341 meeting of creditors and at his §2004(b) examination" that the pinball machines were "loaned to" Appellee;

4) in response to Appellee's Motion for Summary Judgment, the Appellant stated that Kulek had testified at his §341 meeting of creditors and a §2004(b) examination that the Predator machine

and the Experts of Dangerous machine were loaned to Defendant for 'research purposes'"; and

5) in a self-serving affidavit in support of the Trustee's response to Appellee's Motion for Summary Judgment, Appellant swore under oath that Kulek had testified that both machines were on loan to Appellee for "research purposes".

(Doc 48, 51, and 54). However, when the time came to lay all the cards on the table in response to Appellee's Motion for Summary Judgment, Appellant was unable to present any evidence that Appellee was the "initial transferee" of either pinball machine, that Appellee had not purchased/traded for the pinball machines from Magyari, or that Appellant ever had a scintilla of alleged testimony in relation to the EOD Cabinet.

Furthermore, quite to the contrary, as discovered by Appellee following the Sanctions Motion and revealed to the Bankruptcy Court on May 29, 2018 in Appellee's Reply to Plaintiff's Brief in Response to Defendant's Fee Statement, Kulek had actually testified at his §2004 Examination that Appellee **was not the initial transferee** and the pinball machines had been left with Magyari because Magyari "knew someone who wanted them." The fact that Kulek had testified that he had left the pinball machine with Magyari was never disclosed by Appellant and the failure to disclose this fact in the Rule 26(a) disclosures, interrogatory responses, motion for summary judgment response, or Appellant's affidavit has never been explained. In fact, it appears that this was done intentionally given that

Appellant acknowledged in his response to Appellee's Motion for Summary Judgment that avoidance of the initial transfer is a precondition of asserting a recovery action, which lead Appellant to file a motion to amend the AP Complaint. See Pl.'s Mot. Sum. Jud. Resp. Br. pp 6-7. Had this fact been disclosed by Appellant, the AP Complaint would have been subject to dismissal no later than March 17, 2017.

Moreover, while Appellant attempts to argue that he continued to pursue the meritless claims in "good faith" and honestly believed in their merit, the subjective beliefs of Appellant are irrelevant. See Appellant's Br. p. 7. Specifically, as properly noted by the Bankruptcy Court, the presence of "bad faith" is not necessary for an award of sanctions under §1927, but rather when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims. Given the complete lack of supporting evidence presented in response to Appellee's Motion for Summary Judgment, despite having repeatedly alleged that an excess of testimony existed, it is clear that the Bankruptcy Court did not abuse its discretion in finding that Appellant knew the claims he was attempting to prosecute lacked a factual basis, and were thus frivolous, as of August 1, 2017. In addition, even if the standard for awarding sanctions under §1927 required "overt bad faith", the circumstantial evidence present indicates that such bad faith was

present, as Appellant failed to disclose relevant testimony and misreported the relevant testimony in pleadings and in affidavits. This intentional and inappropriate conduct is highlighted by Appellant's other litigation tactics, which, as mentioned in the counter statement of facts, included 1) informing an unrepresented Appellee that he was under a valid subpoena when no such subpoena had been issued by the Bankruptcy Court; 2) feigning surprise in his response to the Sanctions Motion by Appellee's counsel's disclosure of the contents of a telephone interview with Kulek when the contents of same had been disclosed to Appellant in a telephone call in June 2017; 3) requesting a 21 day extension to file his answer to the Sanctions Motion only to serve a completely meritless Rule 9011 safe harbor notice the following day; and 4) opening a client file that Appellee's counsel had left at Appellant's office and reviewing a retainer agreement that was marked "attorney-client privileged" and "attorney-client confidentiality." Simply put, the circumstantial evidence points to one inescapable conclusion—that Appellant knew of the meritless nature of the claims against Appellee, yet continued to pursue them. Given the facts and circumstances of this case, the Bankruptcy Court cannot be said to have erred or abused its discretion.[4]

[4] It is also worth noting that Appellant's attempts to deflect from the apparent lack of merit of the claims by claiming that Appellee should have filed a motion to dismiss at the outset of the case. However, the motion that resulted in the dismissal of the AP Complaint was one for Summary Judgment and, as both a legal and practical matter, would very likely not have been granted by the Bankruptcy Court until the close of discovery. In addition, the conclusive nonexistence of such facts was not known until after Appellant failed to produce evidence in response to Appellee's Motion for Summary Judgment.

B. The Bankruptcy Court Correctly Granted Sanctions as of August 1, 2017, and the Date is Not Arbitrary.

While the Bankruptcy Court noted that August 1, 2017, was "perhaps arbitrary" as a date for the start of the sanctions award, the Bankruptcy Court specifically set forth why that date was chosen, explaining that the evidence indicated that as of August 1, 2017, Appellant knew he lacked evidence to support the claims. Accordingly, while Appellant attempts to grasp onto the nomenclature utilized by the Bankruptcy Court, he ignores the substance of the Bankruptcy Court's findings and the Bankruptcy Court's selecting August 1, 2017, as the start date for sanctions was not an abuse of discretion.

In addition, not surprisingly, Appellant misrepresents the basis underlying Appellee's Sanctions Motion, as the Sanctions Motion was not merely for "extra work" related to the EOD Cabinet claim. However, while Appellant attempts to minimize Appellee's Sanctions Motion, there has notably never been a reference to "extra work," because, as admitted by Appellant in his brief, given the near identical nature of the legal basis and factual allegations in relation to both the EOD Cabinet and Predator Pinball Machine the work undertaken in relation to both was identical (i.e. the exact same "work" would have been undertaken for the EOD Cabinet claims or the Predator Pinball Machine claims or vice versa). Appellant seemingly attempts to argue that because Appellee's Sanctions Motion was initially limited to the EOD Cabinet claims and Appellee's counsel

would have had to complete the same work if Appellant had just pursued the Predator Pinball Machine claims, Appellant should be relieved of any liability for the frivolous nature of the EOD Cabinet claims and that the Bankruptcy Court erred in granting sanctions as to all claims from August 1, 2017, forward. Not only is it preposterous that Appellant's pursuit of a meritless position should be rewarded, especially given Appellee's review of what Kulek actually testified to in his §2004 examination, but it is also preposterous to claim that the Bankruptcy Court lacked the authority to award sanctions as to all claims. Not only does a court possess broad discretion to award sanctions under 28 USC §1927, but court's also possess the authority to act *sua sponte* under §1927. Furthermore, as discussed above, the subsequently revealed §2004 examination testimony indicated that **all** of the Appellant's claims were meritless. Accordingly, the Bankruptcy Court did not abuse its discretion in structuring its award of sanctions, and to be frank, the Appellant should consider himself fortunate that the Bankruptcy Court's award was as limited in scope as it was.

C. The Bankruptcy Court Correctly found that Appellee's counsel's failure to seek concurrence was not a basis for denying the Sanctions Motion.

Appellant's argument regarding L.B.R. 9014-1(h) and Appellee's counsel's failure to seek concurrence was already made to the Bankruptcy Court and properly rejected by the Bankruptcy Court, and Appellant's continued reliance on

the argument in this appeal demonstrates not only the frivolity of the appeal itself, but the fact that the appeal is brought for an improper purpose—delay and harassment. Specifically, while Appellee's counsel has acknowledged that he did not seek concurrence prior to filing Sanctions Motion, Appellant's legal arguments about the consequences of such an action are simply incorrect as Appellant has vehemently argued against Appellee's position and has not provided the slightest indication that he would have concurred in the grant of sanctions against himself. As Court's have routinely found, "enforcement of the rule [to seek concurrence] under these circumstances would result in a waste of time and judicial resources, ***as it is abundantly clear that [Plaintiff] would not have concurred in the requested relief***." See *In re Birmingham Cosmetic Surgery, PLLC,* 2015 Bankr. LEXIS 687, at *3-4 (E. D. Mich. March 5, 2015); quoting *Kim v. City of Ionia*, 2013 U.S. Dist. LEXIS 106860, 2013 WL 3944267, at *3 n.6 (W.D. Mich. July 31, 2013); s*ee also Bourne v. Arruda*, 2011 U.S. Dist. LEXIS 62332, 2011 WL 2357504, at *19 (D.N.H. June 10, 2011) ("The nature of defendants' objection and their failure to show any willingness to concur in the relief requested makes it clear that [plaintiff's] failure to seek concurrence had no real impact on the litigation."). Further, as noted by *Berryman v. Hofbauer*, 161 F.R.D. 341, 343-44 (E.D. Mich. 1995), in relation to a motion for the taxation of costs, "[e]ven if defendants had not sought concurrence and had violated the rule, . . . the Court would waive this

requirement in this case as obviously plaintiff would not concur — and has not — in the relief requested. To deny the motion on this technical point would not serve the interests of judicial fairness and economy." Because Appellant neither demonstrated prejudice nor that he would have concurred to the relief requested, the Bankruptcy Court properly addressed the merits of the Sanctions Motion and denied Appellant's request to deny the Sanctions Motion.

IV. CONCLUSION AND RELIEF REQUESTED.

For the reasons set forth above, Appellee respectfully requests that this Honorable Court enter an order: 1) affirming the Bankruptcy Court's April 26, 2018, Order granting Appellee's Motion for Sanctions Pursuant to 28 U.S.C. §1927, and 2) awarding sanctions pursuant to Bankr. R. Pro 8020 and 28 USC §1927, finding that Appellant's current appeal is frivolous and as evidenced by the facts underlying this appeal that it is brought solely for the improper purpose of delay and harassment as well as any such other relief as this Honorable Court deems just and equitable.

Dated: September 24, 2018

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