

Dated: August 30, 2010
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

LAMAR CROSSING APARTMENTS, L.P.,

Debtor.

Case No. 09-30194-L
Chapter 11

Arvest Bank,
Movant,
v.
Samuel Jones and
Preston Byrd,
Respondents.

(Motion for Sanctions)

MEMORANDUM OPINION

BEFORE THE COURT is the motion of Arvest Bank, a creditor of the Lamar Crossing Apartments, LP (“Debtor”)for sanctions against Samuel Jones, an attorney, and Preston Byrd, an individual, arising out of the filing of the Chapter 11 petition that commenced this case. The petition

was filed September 16, 2009, at 9:37 a.m. Without knowledge of this filing, a foreclosure sale was conducted with respect to the unfinished apartment complex that was the Debtor's sole asset at noon of the same day. Arvest Bank, the lienholder, was the successful bidder. The following day, Arvest Bank and BCP-Michigan, LLC, general partner of the Debtor, filed their Expedited Motion to Dismiss Case, to Vacate Order for Relief, and/or to Determine that Automatic Stay Does not Apply to Foreclosure Sale, which was granted following an evidentiary hearing by the Order Dismissing Bankruptcy Case and Annuling Automatic Stay entered November 12, 2009. Doc. No. 60. In that order, the court found that the bankruptcy petition had been filed without authority and in bad faith.

Arvest Bank and BCP-Michigan filed a joint motion for sanctions against Mr. Jones and Mr. Byrd on September 18, 2009. Although the motion was initially set for hearing together with the motion to dismiss on October 28, 2009, the court set the motion for sanctions off for hearing until December 16, 2009. On December 7, Mr. Byrd asked for additional time to retain counsel, which was granted. The motion was continued until March 3, 2010. The court conducted an evidentiary hearing on that date. Arvest Bank was represented by attorneys Paul Matthews and John Heflin. BCP-Michigan was represented by attorney Kemper Durand. Samuel Jones and Preston Byrd appeared without counsel.

On April 26, 2010, while the motion for sanctions was under submission, BCP-Michigan filed a motion seeking to withdraw the motion for sanctions. Doc. No. 104. Mr. Byrd filed a response indicating that he and Horizon Holding Company, LLC, the initial general partner of the Debtor ("Horizon"), had entered into a global settlement with BCP-Michigan. Doc. No. 105. The purpose of the response seems to have been to reiterate Mr. Byrd's position that BCP-Michigan had never been the sole general partner of the Debtor. The court set the motion for hearing on May 26,

2010, and Arvest Bank filed a limited objection on May 18, 2010. Doc. No. 115. Arvest Bank wished to clarify that the motion for sanctions was a joint motion filed by it and BCP-Michigan, and that while it did not intend to withdraw the motion, it had no objection to BCP-Michigan withdrawing its joinder in the motion. BCP-Michigan filed a response clarifying that it “believe[d] that the motion by Arvest Bank for sanctions and damages should remain intact and should not be affected by BCP’s Motion to Withdraw.” *See* Doc. No. 117. Mr. Byrd then filed a response to Arvest Bank’s limited objection in which he asserts that the withdrawal of BCP-Michigan’s joinder should nullify the sanctions proceeding altogether. He asserts that Arvest Bank lacks standing to challenge the authority of Horizon to file a bankruptcy petition for the Debtor. *See* Doc. No. 119. Mr. Byrd asks that the motion for sanctions be dismissed with prejudice and further that the court rescind its prior order dismissing the bankruptcy case.

The court conducted a hearing on these matters on May 26, 2010, and determined that BCP-Michigan should be permitted to withdraw its joinder in the motion for sanctions, but gave Mr. Byrd additional time to brief the issues raised in his response to Arvest Bank. *See* Doc. No. 127. When some time went by with no additional filing by Mr. Byrd, the court issued a show cause order on July 29, 2010, directing Mr. Byrd to file any additional pleadings on or before August 9, 2010, failing which the court would enter its ruling. No additional filing was made by Mr. Byrd.

JURISDICTION

Although the court previously dismissed this bankruptcy case, the court nevertheless retains jurisdiction to consider the motion for sanctions. *See, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S.Ct. 2447 (1990)(“It is well-established that a federal court may consider collateral issues after an action is not longer pending.”); *Red Carpet Studios Div. Of Source Advantage, Ltd.*

v. Sater, 465 F.3d 642, 645 (6th Cir. 2007). Motions for Rule 9011 sanctions are matters ‘arising in’ a bankruptcy case and thus are core proceedings over which bankruptcy courts have jurisdiction to enter final orders. *In re Tbyrd Enterprises, LLC*, 354 Fed. App. 837, 2009 WL 3199593, slip op. at *1 (5th Cir. 2009); 28 U.S.C. § 157(b)(1) and § 1334(b).”

After carefully considering the pleadings, testimony and exhibits from this and the prior hearing, the court makes the following findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

FACTS

The background facts that led to the dismissal of the bankruptcy case are set forth in the prior Order Dismissing Bankruptcy Case and Annulling Automatic Stay. Doc. No. 60. They will be briefly summarized here. This bankruptcy case was commenced by the filing of a voluntary petition pursuant to Chapter 11 filed September 16, 2009, at 9:37 a.m., signed by Samuel Jones as attorney for the Debtor, and Preston Byrd as “Chief Manager.” Preston Byrd was not the Chief Manager of the Debtor, but was apparently the Chief Manager of Horizon, which was the original General Partner of the Debtor.

Pursuant to the terms of the Lamar Crossing Apartments, L.P, First Amended and Restated Agreement of Limited Partnership, dated as of June 14, 2007, the Investor Limited Partner (Boston Capital Corporate Tax Credit Fund XXVI) gave notice of default to Horizon on May 8, 2008. On November 10, 2008, the Special Limited Partner (BCCC, Inc.) gave notice of the removal of Horizon as General Partner and the appointment of BCP-Michigan, LLC, as General Partner. The Special Limited Partner caused to be filed with the Tennessee Secretary of State an Amendment to the Certificate of Limited Partnership reflecting this action. In connection with a lawsuit styled

James Hutton and Orson Sykes, individually and derivatively on behalf of Horizon Holding Company, LLC v. Preston Byrd, Horizon Financial Group, LLC, Donette Byrd, and the Preston Byrd Irrevocable Insurance Trust, Cause No. CH-08-1063-III, pending in the Chancery Court of Shelby County, Tennessee, a receiver was appointed for Horizon who was charged to “take all actions necessary to preserve and safeguard the PILOT status and the tax credits available to the real estate development known as the Lamar Crossings Project.” Further, the Receiver was empowered to determine that “the withdrawal of Horizon Holding Company, LLC’s opposition to its removal as General Partner on the Project is necessary to preserve and safeguard the PILOT status and tax credits.” The Receiver determined that the removal of Horizon was necessary and on December 30, 2008 filed a Notice by Defendant Horizon Holding Company, LLC, of Withdrawal of Motion to Stay Its Removal as General Partner Crossing Apartments, L.P. Based upon this filing, this court found that, “At the time the bankruptcy petition was filed, the Special Limited Partner had taken all steps necessary to remove Horizon and substitute BCP-Michigan as General Partner for the Debtor.” The court further found that, “at the time of the filing of the bankruptcy petition, BCP-Michigan was the General Partner of the Debtor, and Byrd was not authorized by the Limited Partnership Agreement to hire counsel for or sign the petition on behalf of the Debtor.” Finally, the court found that: “The Limited Partnership Agreement prohibits the General Partner from filing a petition in bankruptcy for the Partnership (Debtor) without the consent of the Special [Limited] Partner. The Special Limited Partner did not consent to the filing of the bankruptcy petition. For this additional reason, the filing of the bankruptcy petition was not authorized by the Limited Partnership Agreement.” Based upon these findings, the court concluded that the bankruptcy case should be dismissed because the filing of the petition was filed without authority.

In addition to finding that the bankruptcy petition was filed without authority, the court further concluded that the filing of the bankruptcy petition was not in good faith based upon the totality of the circumstances and the presence of numerous traditional indicia of bad faith. The court noted that in another Chancery Court proceeding, *Lamar Crossing Apartments, LP and Horizon Holding Co., LLC v. Arvest Bank*, Cause No. CH-09-1425-I, an order had been entered September 15, 2009, dissolving a previously entered Temporary Restraining Order and authorizing Arvest Bank “to proceed with the foreclosure scheduled for September 16, 2009.” It was evident that the bankruptcy petition was filed in order to stop the foreclosure sale authorized by the Chancery Court. Further, it was evident that the bankruptcy case represented a two-party dispute, which had been exhaustively litigated in state court ending in a ruling that was not favorable to Mr. Byrd.

In written pleadings and at the hearing on March 3, 2009, Mr. Jones admitted that Mr. Byrd and Mr. Byrd’s father came to his office on September 16, 2009, at 9:00 a.m., without an appointment, asking that he file a Chapter 11 bankruptcy petition for the Debtor. At the time that Mr. Byrd arrived, Mr. Jones had a client in his office and was preparing for a 10:00 hearing in another matter. Mr. Byrd represented to him that he had authority to file a Chapter 11 petition on behalf of the Debtor. In order to corroborate Mr. Byrd’s statements, Mr. Jones performed an online search of the records of the Tennessee Secretary of State and determined that Horizon was the registered agent for service of process for Lamar Crossing Apartments, LP, and that Preston Byrd was the registered agent for service of process for Horizon Holding Company, LLC. Mr. Jones did not review the Limited Partnership Agreement because it was not made available at that initial meeting. In response to questions by the court, Mr. Jones stated that there was no discussion concerning pending litigation at this meeting. Mr. Byrd, however, later indicated that there was

some discussion about the hearing in Chancery Court that had occurred two days before resulting in the order permitting the foreclosure sale to proceed. Mr. Jones prepared a one-page Client Information Sheet and Agreement, in the name of “Lamar Crossing Apartments, LP/Preston Byrd.” In addition to contact information for Mr. Byrd, including his residence address, telephone numbers, driver’s license number, and emergency contact, the substance of the agreement is as follows:

YOU, THE UNDERSIGNED CLIENT(S), AGREE(S) THAT,

1. You will pay Samuel Jones \$150.00 an hour for all work related to this matter.
2. The Chapter 13 fee [sic] is \$3,000.00. You will pay **\$10,000 upfront** to take your case.
3. You will pay all fees and collection expenses to collect any amount due under this agreement.
4. You will immediately provide Samuel Jones with written notice of any change in the information that you provided above. The above information is correct.
5. **PAID TODAY:** You paid \$500.00 today,
6. **YOU WILL PAY:** \$2,000 on 9/18, plus \$7,500 on 9/30.

The agreement is signed by Preston Byrd with no representative capacity indicated. The name Horizon Holding Company, LLC, does not appear anywhere on the agreement. *See* Exhibit A to Further Response to Motion of Arvest Bank and BCP-Michigan, LLC For Sanctions Against Samuel Jones and Preston Byrd for Filing Bankruptcy Petition on Behalf of Debtor in Bad Faith and in Violation of F.R.B.P. 9011, Doc. No. 71 (Docketed as “Response to (related document(s) 54 Application to Employ Samuel Jones as Attorney for the Debtor filed by Debtor Lamar Crossing Apartments, L.P.)”) Mr. Byrd testified that \$500.00 was paid to Mr. Jones in cash by his father as

a down payment toward the retainer.

Mr. Jones testified that he has been licensed to practice law in Tennessee since 1989, in Mississippi since 1990, and in Arkansas since 2006. He said that prior to this case, he had filed one prior Chapter 11 petition, for a church, that was dismissed. He said that he has not represented a limited partnership before.

Mr. Jones testified that in Mr. Byrd's presence, he typed information provided by Mr. Byrd into his computer in order to prepare the voluntary petition, which was filed electronically at 9:37 a.m. Even though the petition was filed for a limited liability company, the box next to "Filing Fee to be paid in installments (**Applicable to individuals only**)" (emphasis added) was checked on the bankruptcy petition. Mr. Jones testified that he knew that if the filing fee were not paid, he would be "locked out of CM/ECF" until it was paid. He said that was why he indicated that the filing fee would be paid in installments, hoping that the system would not lock him out right away even though he knew that the Debtor was not entitled to pay the filing fee in installments. He said that he marked "installments," even though he meant that only one installment would be paid when his client provided the funds to pay the filing fee. He said that he expected to get the money from Mr. Byrd that day, but that it was more days than that before the funds were provided to him. The docket reflects that the filing fee was paid September 17. The court fears that Mr. Jones paid this from his own funds because Mr. Byrd introduced a copy of a cancelled check for \$3,039.00 drawn on the account of Horizon Holding LLC payable to Mr. Jones dated September 18. This check appears not to have been negotiated until September 23, 2009. Trial Ex. 18.

In addition to indicating that the filing fee would be paid in installments, a false statement, the petition indicates that, "A plan is being filed with this petition." This also is a false statement.

No plan was filed in this case, and Mr. Jones knew that no plan was filed with the petition.

When asked by the court what Mr. Jones saw or heard that led him to conclude that Mr. Byrd was authorized to file a petition on behalf of Lamar Crossing Apartments, L.P., Mr. Jones said that Mr. Byrd represented to him that “he was in a position of authority or a management position - a manager or person in authority at Horizon and that Horizon was a partner of Lamar Crossing.” In addition to that, Mr. Jones said that he relied upon the report that he obtained from the Tennessee Secretary of State, Exhibit C to Document No. 71, which indicates that both Lamar Crossing Apartments, L.P., and Horizon existed; that Mr. Byrd held a position with Horizon; and that Horizon was the agent for service of process for Lamar Crossing. Mr. Jones did not review the limited partnership agreement at the initial interview because it was not made available to him. Mr. Jones could not recall when he first saw the limited partnership agreement, but thought that it was before the hearing on October 28, 2009.

The petition was signed by Mr. Jones as attorney for the Debtor, and by Mr. Byrd as “Chief Manager.” Mr. Jones stated that in fact, he did not obtain the actual signature of Mr. Byrd on a copy of the petition that day, but said that Mr. Byrd was sitting next to him as he typed the information that was included in the petition. By this, Mr. Jones seemed to indicate that Mr. Byrd was aware of the content of the petition. Mr. Jones did not recall whether he printed out a copy of the petition for Mr. Byrd that morning, but said that he was certain that he did at a later time.

Even though the bankruptcy petition was filed on September 16, 2009, information necessary to prepare the bankruptcy schedules and statement of financial affairs was not supplied by Mr. Byrd to Mr. Jones until October 20, 2009. Mr. Jones indicated that he sent a fillable PDF file to Mr. Byrd on October 20, requesting the required information. Mr. Byrd completed the schedules and returned

the PDF file to Mr. Jones. Mr. Jones then input the information and filed the schedules. Mr. Jones said that he did not change any information provided by Mr. Byrd. The initial schedules contained no information concerning pending litigation. Mr. Jones said that he could not recall whether he asked whether there was any pending litigation concerning the Debtor. He did not recall any discussion about litigation prior to the filing of the petition. The initial schedules also showed no personal property for the Debtor from which it might pay the ongoing administrative expenses of the bankruptcy case. Mr. Jones indicated that he expected Mr. Byrd and/or Horizon to pay any charges, including United States trustee fees, that the Debtor might incur. Mr. Jones indicated that there were discussions with Mr. Byrd about what a reorganization plan might look like. Mr. Byrd indicated that he was looking for a buyer for the property.

On October 21, 2009, Mr. Jones filed two motions for extension of time with respect to the motion to dismiss and the motion for sanctions. He asked for additional time “to further research, investigate and respond” to these motions. In response to questions by Mr. Matthews, counsel for Arvest Bank, Mr. Jones indicated that no additional investigation was undertaken by him after October 21.

Following the hearing on October 28, 2009, an amended petition, schedules and statement of financial affairs were filed. The petition was amended to indicate that Mr. Byrd signed the petition as “Chief Manager of Horizon Holding Company, LLC, G.P. of Debtor.” Schedule B was amended to indicate that “Boston Capital Tax Credit Fund XXVI owes the Debtor as an equity contribution to the Debtor - \$3,000,000.” No other personal property was listed. Schedule F was amended to list some additional unsecured creditors, including the architect, engineer, and general contractor for the project. The Statement of Financial Affairs was amended to list six lawsuits

involving the Debtor pending at the time of filing.

In response to questions by Mr. Byrd, Mr. Jones indicated that Mr. Byrd presented himself to Mr. Jones as acting on behalf of the general partner of Lamar Crossing. Mr. Jones also identified the check that was given to him by Mr. Byrd, which was drawn on the account of Horizon Holding Company. Tr. Ex. 18. Mr. Byrd intended by these questions to bolster his position that Mr. Jones knew that he, Mr. Byrd, was acting on behalf of Horizon, and not in his individual capacity, in hiring Mr. Jones to prepare the bankruptcy papers for the Debtor.

Mr. Byrd introduced a copy of his employment agreement with Horizon Holding Company, LLC, in order to show that he was acting only on behalf of Horizon and not in an individual capacity when engaging Mr. Jones and filing the bankruptcy petition. He asserts that as the result of his employment agreement, he is entitled to indemnification from Horizon Holding Company. The court notes, however, that the name Horizon Holding Company appears nowhere on the agreement with Mr. Jones and the original payment to Mr. Jones was made in cash by Mr. Byrd's father. In fact, Mr. Byrd said at one point that, "Horizon is essentially defunct."¹

Mr. Byrd was also questioned by the court. Mr. Byrd indicated that he was present at the hearing in the Chancery Court on September 14, 2009, and understood the ruling of the Chancellor that the foreclosure by Arvest Bank by go forward. He testified that he also received a copy of the written report filed by the Receiver in December of 2008. Mr. Byrd indicated that Mr. Michael McCullar, the attorney for Horizon in the Chancery Court, was the person who advised him that bankruptcy might be the only alternative and gave him Mr. Jones' name, as an attorney who files

¹ The court has formed no opinion about whether Mr. Byrd is entitled to indemnification from Horizon or any other entity for his actions in connection with this case as that issue was not presented by the pleadings.

bankruptcy petitions. Mr. Byrd initially said that there had been no discussion with Mr. Jones about pending litigation before the bankruptcy petition was filed, but then said that he told Mr. Jones about the hearing in Chancery Court on the Monday before the filing. He said that he told Mr. Jones in general that the company had been surrounded by litigation and that the Chancellor had terminated a temporary restraining order in order to allow the plaintiffs to foreclose. He said that he felt that he needed to try to protect the asset of the Debtor.

Mr. Byrd testified that he is 38 years old and holds a Bachelor of Science degree in Mass Communications from the University of Phoenix. He testified that he worked for one year for the National Marrow Donor Program before starting his first company, a medical staffing firm, which was sold 5-6 years later. Prior to selling the medical staffing firm, he started an internet company, which was organized as an LLC. Mr. Byrd said that he served as chief manager from 2001-2004. This company was also sold. After that, Mr. Byrd began buying and selling rental properties before moving on to development of apartment properties. Horizon Holding Company was formed in March of 2006. Mr. Byrd testified that he serves as chief manager of Horizon Holding Company, but that he is not an equity holder. The equity holders are Orson T. Sykes, James D. Hutton and Horizon Financial Group, LLC. Mr. Byrd signed the Amended Operating Agreement for Horizon Holding Company, LLC, on behalf of Horizon Financial Group, LLC, but he indicated that he is not an equity holder in Horizon Financial Group.

Mr. Byrd said that he discussed the filing of a bankruptcy petition for Lamar Crossing Apartments with one other attorney recommended by Mr. McCullar, but not with anyone else. He said that the attorney in question refused to undertake the representation. Mr. Byrd said that in connection with his various companies, he has engaged a number of attorneys over the years. He

named a number of the leading Memphis law firms. He said that he had a good deal of experience in dealing with attorneys in connection with the business that he is in, and that Horizon has worked on other apartment projects, as a consultant or in connection with the developer.

Mr. Byrd said that he did not know what to expect when he went to Mr. Jones office. He said that he went to Mr. Jones for advice. He acknowledged that another attorney had told him that he did not have sufficient time to evaluate the case. Mr. Byrd indicated that Mr. Jones could have told him that filing the petition was not possible. He said that he expressed urgency, but that Mr. Jones could have told him that he did not have enough time to “get his arms around that.” He said that he went to an attorney for advice to the company on how to proceed, or even if we could proceed.

Mr. Byrd initially denied that either he or any of the entities that he had been involved with had filed a prior bankruptcy case, but later indicated that he had filed a personal bankruptcy case in 1993-1994. The court has reviewed the records of this court and determined that Mr. Byrd filed two Chapter 13 cases in 1996, both of which were dismissed. Mr. Byrd indicated that the cases were dismissed at his request. The dockets reflect that the cases were dismissed upon the recommendation of the Chapter 13 trustee, the first because Mr. Byrd did not attend the meeting of creditors, and the second because Mr. Byrd did not timely commence making payments.

The court has taken great pains to set out Mr. Byrd’s testimony at some length. While Mr. Byrd went to great pains to portray himself as an inexperienced young man in need of legal assistance, the facts are otherwise. Ironically, if anyone is a victim in this case, it is Mr. Jones. Mr. Jones allowed himself to be taken in by Mr. Byrd, who was in fact a highly experienced and sophisticated businessman completely aware that he was using Mr. Jones to further his ongoing feud with Boston Capital and Arvest Bank. Mr. Jones was in a hurry because he had another client and

another hearing to attend. He was convinced by Mr. Byrd of the urgency of the matter by the pending foreclosure, and did not insist, as he should have, that he simply did not have time to help Mr. Byrd. Mr. Jones further filed a Chapter 11 petition with less than an hours' notice for an entity he knew nothing about and without sufficient funds in hand to pay the filing fee, much less a suitable retainer. The court realizes that it will be difficult for any reviewing court to appreciate how persuasive Mr. Byrd can be, and does not seek to completely excuse Mr. Jones thereby, but only to clearly state that the wrongdoer in this case is Mr. Byrd. Mr. Jones, unfortunately, was duped, and allowed his license to practice law to be used for an improper purpose. The court is impressed that notwithstanding these facts and unlike Mr. Byrd, Mr. Jones has taken full responsibility for his actions.

The court asked that both Mr. Jones and Mr. Byrd submit written balance sheets and income statements within ten days. Both of them submitted indications of the their income and expenses. Mr. Byrd also submitted a balance sheet. Neither of them has significant income in excess of expenses. Mr. Jones has indicated that any monetary sanction imposed against him would have to be paid in installments. Mr. Byrd has tried to shift responsibility to Horizon, an entity that he has testified is "essentially defunct."

Information was provided concerning the expenses incurred by Arvest Bank and BCP-Michigan as the result of the filing of the bankruptcy petition. Mr. Donald Bourland, one of the attorneys for Arvest Bank, testified that Arvest Bank had incurred and paid attorney fees related to the bankruptcy case in the amount of \$42,299.08. In addition, Mr. Bourland testified that Arvest Bank had incurred expenses including security, insurance and utilities related to the property in the amount of \$51,390.08, but admitted that Arvest Bank has had physical control of the property since

November of 2008 and had borne these expenses prior to the filing of the petition. Mr. Bourland further admitted that although the City of Memphis had expressed interest in purchasing the property and had entered into a term sheet and paid earnest money, there is no pending contract to purchase the property.

Mr. Kemper Durand introduced an affidavits of fees and expenses charged to BCP-Michigan by his firm and the Boston, Massachusetts firm of Eckert Seamans, Cherin & Mellott, LLC related to the bankruptcy case in the amount of \$24,833.31.

DISCUSSION

Arvest has asked for the imposition of sanctions upon Mr. Jones and Mr. Byrd pursuant to 11 U.S.C. § 105(a) and Federal Rule of Bankruptcy Procedure 9011. The Respondents assert that the motion should be denied.

There is no question that, “[f]ederal courts, including bankruptcy courts, have inherent and statutory authority to impose sanctions upon parties for their abuse of the litigation process.” *Maloof v. Level Propane Gasses, Inc.*, 316 Fed. App. 373 (6th Cir. 2008). Section 105(a) of the Bankruptcy Code permits the court to, “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” It continues, “No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.” 11 U.S.C. § 105(a).

The United States Supreme Court acknowledged the inherent powers of federal courts in *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S.Ct. 2123 (1991). Among the inherent powers of any federal court are the powers to control admission to its bar and discipline attorneys who appear

before it; to punish contempts; to vacate its own judgment upon proof that a fraud has been perpetrated upon the court; to bar from the courtroom a criminal defendant who disrupts a trial; to dismiss an action on the grounds of *forum non conveniens*; and to act *sua sponte* to dismiss a suit for failure to prosecute. *Id.*, 501 U.S. at 44, 111 S.Ct at 2132 (citations omitted). Among the inherent powers of a federal court is “the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Id.*, 501 U.S. at 45, 111 S.Ct. at 2133. This may include the relatively severe sanction of dismissal of a lawsuit, or the less severe sanction of assessment of attorney fees. *Id.* “A court may assess attorney fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Id.* quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622-23 (1975). The power to impose sanctions for bad faith conduct pursuant to a federal court’s inherent powers is both broader and narrower than other means of imposing sanctions. *Id.*, 501 U.S. at 46, 111 S.Ct. at 2134. It is not limited only to certain individuals or conduct, but “extends to the full range of litigation abuses.” *Id.* A court’s inherent power to award attorney fees is limited to cases in which a litigant has engaged in bad faith conduct or willful disobedience to court orders. *Id.*, 501 U.S. at 47, 111 S.Ct. at 2134. When there is bad faith conduct that may be adequately sanctioned under the Rules of Civil Procedure, a court should ordinarily rely upon the Rules, but “if in the informed discretion of the court, neither the statute [28 U.S.C. §1927] or the Rules [Fed. R. Civ. P. 11 or 26(g)] are up to the task, the court may safely rely upon its inherent power.” *Id.*, 501 U.S. at 50, 111 S.Ct. at 2136.

Given the Court’s instruction that a court must determine whether a more specific statute or rule is “up to the task” of confronting the conduct complained of, this court turns first to consideration of Rule 9011 of the Federal Rules of Bankruptcy Procedure, which for the most part

incorporates Rule 11 of the Federal Rules of Civil Procedure. Cases interpreting Rule 11 serve as precedent for construing Rule 9011. *E.g.*, *Cadle Co. v. Pratt (In re Pratt)*, 524 F.3d 580, 586 (5th Cir. 2008); *Snyder v. Dewoskin (In re Mahendra)*, 131 F.3d 750, 759 (8th Cir. 1997).

Rule 9011 provides:

(a) **SIGNATURE.** Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless the omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) **REPRESENTATIONS TO THE COURT.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying to the best of the person's knowledge information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations or other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **SANCTIONS.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) **How Initiated.**

(A) **By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is

not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of the petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates or employees.

* * *

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations of subparagraph (A) or (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

* * *

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Fed. R. Bank. R. 9011. Bankruptcy Rule 9011 was amended in 1997 to conform to the 1993 amendments to Rule 11. *See* Fed. R. Bankr. P. 9011 Advisory Committee Note (1997). The purpose of Rule 9011 is to deter the filing of frivolous pleadings. *In re Dixon*, 976 F.2d 733 (table), 1992 WL 233900, slip op. at *3 (6th Cir. 1992); *accord Heavrin v. Schilling (In re Triple S Restaurants, Inc.)*, 342 B.R. 508, 513 (Bankr. W.D. Ky. 2006) (“The purpose of Rule 9011 is to impose sanctions in order to deter baseless filings and thus avoid the expenditure of unnecessary resources.”); *In re mpX Technology, Inc.*, 310 B.R. 453, 458 (Bankr. M.D. Fla. 2004) (“The purpose of F.R.B.P. 9011 is to deter litigation abuse and unnecessary filings.”). The test for the imposition of sanctions under Rule 9011 is “whether the individual’s conduct was reasonable under the circumstances.” *Maloof*

v. Level Propane Gasses, Inc., 316 Fed. App.. 373, 376 (6th Cir. 2008); *Silverman v. Mut. Trust Life Ins. Co. (In re Big Rapids Mall Assocs.)*, 98 F.3d 926 (6th Cir. 1996). As amended, the imposition of sanctions under Rule 9011 is discretionary, rather than mandatory. See *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 526 (6th Cir. 2002). Sanctions for violation of Rule 9011 may be imposed upon an attorney, a law firm, or a party, including a represented party, except that monetary sanctions may not be imposed upon a represented party for violation of subdivision (b)(2). See *Buckeye Retirement Co. v. Hake (In re Hake)*, 2006 WL 2621116, slip op. At *9 (BAP 6th Cir. 2006); *In re Russ*, 218 B.R. 461, 468 and n.9 (Bankr. D. Mn. 1998), *rev'd in part on other grounds* 187 F.3d 978 (8th Cir. 1999)(“Rather than limit such sanctions to the signer of the documents, new Rule 9011 permits sanctions to be imposed against lawyers, law firms, pro se litigants, or represented parties.”). The sanction to be imposed is limited to “what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” *Triple S Restaurants*, 342 B.R. at 513, quoting Fed. R. Bankr. P. 9011(c)(2); *Arcari v. Marder*, 225 B.R. 253, 257 (D. Mass. 1998). The proper measure of sanctions is not necessarily the actual fees or expenses incurred, but an amount that is reasonable. *Railroad Ctr. v. Thompson (In re Thompson)*, 165 B.R. 30, 33 (Bankr. M.D. Tenn. 1994). The court must consider the deterrent effect of the sanction and the party’s ability to pay. *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 420 (6th Cir. 1992).

ANALYSIS

In this case, the court has previously determined that the bankruptcy petition was filed in this case without authority and not in good faith. The filing of a bankruptcy petition without authority has been found to violate Rule 9011. See *In re mpX Technology*, 310 B.R. 453 (Bankr. M.D. Fla. 2004); *Manfredi v. D&V Constr., Inc. (In re D&V Construction, Inc.)*, 150 B.R. 362 (Bankr. W.D.

Pa. 1993); *In re AT Engineering, Inc.*, 142 B.R. 990 (Bankr. M.D. Fla. 1992). The court has dismissed the bankruptcy petition, which is itself a very serious sanction. The court must separately consider whether the actions of Mr. Jones and/or Mr. Byrd require additional sanction in order deter them or others from engaging in similar conduct in the future.

STANDING OF ARVEST BANK TO PURSUE THE MOTION FOR SANCTIONS

Before the court gets to that issue, however, it must deal with the question of standing raised by Mr. Byrd. Mr. Byrd asserts that as the result of his settlement with BCP-Michigan, Arvest Bank lacks standing to proceed. Mr. Byrd provided no factual support for this position, even though he was given a generous amount of time to do so. In a Chapter 11 case, a party in interest may appear and be heard on any issue. 11 U.S.C. § 1109. While “party in interest” is not defined, it clearly includes a creditor. Arvest Bank was a creditor of the Debtor. More to the point, Arvest Bank was the creditor most directly harmed by the filing of this unauthorized bankruptcy petition. The court has found and reiterates that the bankruptcy petition was filed for the sole and unauthorized purpose of thwarting Arvest Bank’s scheduled foreclosure sale after lengthy state court litigation had been concluded adversely to Mr. Byrd’s interests. Mr. Byrd’s argument that Arvest Bank lacks standing to pursue the motion for sanctions is without merit.

SANCTION OF MR. JONES

Mr. Jones is a licensed attorney, experienced in filing consumer bankruptcy cases, but not in filing Chapter 11 cases or cases for limited partnerships or limited liability companies. Mr. Jones has accepted responsibility for his actions and has stated that if he had it to do over again, he would not agree to file a Chapter 11 petition under the circumstances of this case. Mr. Jones was faced by a young man expressing some urgency about the filing who avoided telling Mr. Jones the whole

story. Specifically, it seems clear, and the court finds, that Mr. Byrd did not tell Mr. Jones about the removal of Horizon as General Partner, or about the appointment of a Receiver, or about the Receiver's determination that withdrawal of the motion to stay removal of Horizon as General Partner was necessary to preserve and safeguard the PILOT status and tax credits available to Lamar Crossings. Mr. Byrd did not provide this information to Mr. Jones and did not provide Mr. Jones with a copy of the limited partnership agreement before the petition was filed. The court finds that these omissions were deliberate. Had Mr. Jones simply reviewed the limited partnership agreement, he would have discovered that the consent of the Special Limited Partner was necessary for the filing of a bankruptcy petition. Mr. Byrd was counting on the urgency of the pending foreclosure sale and perhaps upon the presence of his father, to override Mr. Jones' better judgment, and he was successful.

Based on the limited inquiry that he did make, the court finds that Mr. Jones believed that Mr. Byrd was authorized to file the bankruptcy petition. Based upon his experience as a consumer bankruptcy attorney, Mr. Jones believed that delay of the foreclosure would give the parties time to work out some arrangement, and Mr. Jones believed that Mr. Byrd should be given the opportunity to try. Mr. Jones was in a hurry to get to court and did not take time to reflect on the seriousness of what he was doing. He simply knew that the filing of a petition would stop the foreclosure set for noon that day and give him time to see what could be done on behalf of Mr. Byrd.

The court has no trouble in finding that Mr. Jones acted in subjective good faith. He did not file the bankruptcy petition for an improper purpose. Nevertheless, his actions violated Rule 9011(b)(2), which requires that the court make an objective inquiry. Mr. Jones' signature on the

petition constituted a representation to the court that the petition was authorized under applicable law. It was not, and a reasonable inquiry, including review of the limited partnership agreement, would have revealed that it was not. Further, Mr. Jones made other representations in the petition that he knew were not accurate or warranted by existing law. He knew that the Debtor was not an individual and was not entitled to pay the filing fee in installments. He knew that an application to pay the filing fee in installments was not filed with the petition and he knew that a plan was not filed with the petition. While the second factual inaccuracy may have resulted from inadvertence, the first admittedly did not. Mr. Jones candidly told the court that by checking the box indicating that the filing fee would be paid in installments he might be able to avoid being locked out of the CM/ECF system.

With respect to Mr. Jones, the court must determine what sanction would deter him from engaging in similar conduct in the future. Mr. Jones has already suffered the uncertainty of having the sanction motion pending and unresolved for a lengthy period of time. Mr. Jones told the court at the hearing on Mr. Byrd's motion for continuance in December that he had never faced a motion for sanctions before and that it was on his mind day and night. The court finds Mr. Jones to be truthful. Therefore, the court finds that an appropriate sanction for Mr. Jones is to require him to attend 24 hours of continuing legal education, one-half of which shall be ethics hours and one-half of which shall be related to Chapter 11 bankruptcy. Mr. Jones must complete this continuing education within 12 months of the entry of this order, and must certify to the court that he has done so. Should he fail to comply with this requirement, Mr. Jones shall be barred from practicing before this court until he has paid the sum of \$10,000 into the treasury of the court, which sum shall be used for the education of lawyers who agree to participate in the Memphis Bankruptcy Pro Bono Initiative

and/or for the payment of expenses of litigants who have obtained representation through that initiative.

SANCTION OF MR. BYRD

With respect to Mr. Byrd, the facts are different. The court must determine whether, at the time he caused the bankruptcy petition to be filed, Mr. Byrd had a reasonable basis to believe that he had the authority to cause it to be filed. *See In re mpX Technology*, 310 B.R. at 458. Although Mr. Byrd is not an attorney, he is a sophisticated businessman who has broad prior experience with the formation of business entities, the hiring of counsel, litigation, and the purchase and sale of real estate. Mr. Byrd has shown himself to be very capable of reading and understanding complex legal documents. Mr. Byrd acknowledged that he received the notice of the removal of Horizon as General Partner for the Debtor on November 10, 2008, and further that he received the report of the Receiver and the notice of the withdrawal of the motion to stay the removal of Horizon as general partner. Although the copy of the Limited Partnership Agreement that was made an exhibit in this proceeding is not signed by Mr. Byrd, the document indicated that he was the intended signatory on behalf of Horizon, the general partner. At a minimum, Mr. Byrd knew that there was a dispute with the Boston Capital entities about whether Horizon continued to serve as general partner. Further, as Chief Manager of the initial limited partner and signatory to the Limited Partnership Agreement, Mr. Byrd is charged with knowledge of the terms of the Limited Partnership Agreement. It would have taken very little for him to discover that the Limited Partnership Agreement required the consent of the Special Limited Partner for the filing of a bankruptcy petition. Mr. Byrd represented to the court twice at the hearing on March 3, 2010, that the question of whether Horizon was properly removed as general partner of the Debtor had not been determined by the Chancery Court

and was set for hearing in April, indicating that Mr. Byrd was fully aware of the significance of that issue. For purposes of this bankruptcy case, this court has determined that Horizon was removed as general partner before the filing of the bankruptcy case and further that the filing of the bankruptcy petition was not authorized.

Unlike Mr. Jones, who took responsibility for his actions and carefully avoided negative comments about his client, Mr. Byrd went out of his way to blame Mr. Jones, Mr. Heflin, and Mr. Bourland for his troubles. He claimed that he relied upon the advice of Mr. Jones in deciding whether to file a bankruptcy petition for the Debtor, and that Mr. Jones should have exercised better “client control.” He claimed that he did not “sign” the original petition, as if that would exculpate him, and even though Mr. Jones indicated that Mr. Byrd sat next to him as he input all the information that appears on the original petition. As the court has previously indicated, Mr. Byrd withheld crucial information from Mr. Jones, information that perhaps would have permitted Mr. Jones to give him appropriate legal advice. By the time Mr. Byrd arrived at Mr. Jones office, he had already been told by one experienced attorney that there was not sufficient time before the scheduled foreclosure to determine whether a Chapter 11 petition should be filed for the Debtor. As Mr. Byrd acknowledged in his closing statement, he had been involved in litigation with Arvest Bank and the Boston Capital entities since the summer of 2008. He knew that Arvest Bank had been in possession of the Debtor’s property since November of 2008. He knew that Horizon’s status as general partner of the Debtor had been and according to him was the subject of ongoing litigation. He admitted that he consulted no one else except Mr. Jones and the attorney who declined to represent him concerning the filing of the petition. Thus, Mr. Byrd failed to consult with anyone who had a financial interest in the filing of a bankruptcy petition on behalf of the Debtor. In his “Amended

Motion to Deny Movants Motion of Arvest Bank and BCP-Michigan, LLC, for Sanctions against Preston Byrd for Filing Bankruptcy Petition on Behalf of Debtor in Bad Faith and in Violation of F.R.B.P. 9011,” filed March 1, 2010, Byrd indicates that in filing the petition, he was exercising his “fiduciary duties and obligations to *HHC [Horizon]* to take all necessary actions to protect any and all assets that HHC has to include its interest in LCA [Lamar Crossing Apartments].” Doc. No. 78. Mr. Byrd indicates that he acted to protect Horizon’s equity position in the Debtor, yet he consulted no one with a financial interest in Horizon in reaching the decision to file the petition. Notwithstanding his self-serving statements about his fiduciary duties, Mr. Byrd acted on his own behalf and had no objectively reasonable basis for believing that the filing of the bankruptcy petition was authorized. As a result, the court can only conclude that in order to deter Mr. Byrd from acting in a similar fashion in the future, a very severe sanction should be imposed. Despite Mr. Byrd’s claim that he has no ability to pay any sanction that might be imposed against him, Mr. Byrd has proven himself to be extremely sophisticated and resourceful, and the court has little confidence in the truth of the matters asserted by Mr. Byrd in his statements concerning his financial condition. Mr. Byrd has caused a great deal of harm to a number of parties, including Arvest Bank, Mr. Jones, and the court. Arvest Bank has stepped forward to ask that this harm be redressed. Therefore, the court finds that judgment should be entered against Mr. Byrd in favor of Arvest Bank in the full amount of the attorney fees and expenses incurred by it, \$42,299.08. The court does not find, however, that Mr. Byrd should be required to reimburse Arvest Bank for the cost of maintaining the property as the result of the bankruptcy filing as these expenses began to be borne by Arvest Bank well in advance of the filing.

CONCLUSION

The court finds and concludes that as a party in interest and party aggrieved, Arvest Bank has standing to pursue the motion for sanctions against Mr. Jones and Mr. Byrd notwithstanding the withdrawal of its joinder by BCP-Michigan. In addition to the dismissal of the bankruptcy case, which is itself a serious sanction, the court finds and concludes that Mr. Samuel Jones should be sanctioned for his misconduct by having him provide proof to the court of his completion of 24 hours of continuing legal education within the next 12 months, one-half of which should be ethics hours and one-half of which should be related to Chapter 11 bankruptcy. Should he fail to comply with this requirement, Mr. Jones should be barred from practicing before this court until he has paid the sum of \$10,000 into the treasury of the court, which sum may be used for the education of lawyers who agree to participate in the Memphis Bankruptcy Pro Bono Initiative and/or for the payment of expenses of litigants who have obtained representation through that initiative.

The court further finds and concludes that Mr. Preston Byrd should be sanctioned by having him pay to Arvest Bank its attorneys fees and expenses in the amount of \$42,299.08.

The court will issue separate orders conforming to this opinion.