UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
Lexington Division

IN RE:	:	
	:	**Chapter 7**
B. J. BROWN SHEET METAL, INC.	:	**Case No: 08-53321**
	:	**Judge Joseph M. Scott**
Debtor	:	
	:	
LAGCO, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs:	:	**Adversary Proceeding No: 10-5113**
JOHNNY M. BROWN, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER OVERRULING MOTION TO DISQUALIFY MICHAEL GARTLAND, ESQ. FOR BELIEVED WITNESS TAMPERING

This matter is before the Court on Lagco, Inc.'s Motion to Disqualify Michael Gartland, Esq. for Believed Witness Tampering (the "Motion to Disqualify") (Doc. 34), on the Response (Doc. 44) thereto filed on behalf of Michael Gartland (Doc. 44) and on the sur-reply (Doc. 46) filed by Lagco. An evidentiary hearing was held on this matter on Thursday, February 17, 2011. Having considered all the evidence of the witnesses, the pleadings, exhibits and arguments of counsel, we find that the Motion to Disqualify will be OVERRULED at this time.

JURISDICTION

The Motion to Disqualify asserts that Mr. Gartland violated 18 U.S.C. § 1512(b)(1) of the criminal statutes by tampering with and intimidating a witness. This Court does not sit as a criminal court, and we are, therefore, not deciding this matter under 18 U.S.C. § 1512(b)(1). We have,

however, a responsibility to report to the appropriate United States attorney violations of a criminal nature set forth in Chapter 9 of Title 18 of the United States Code relating to bankruptcy cases, or other laws of the United States. *See* 18 U.S.C. § 3057.[1]

Further, all federal courts have the inherent power to admit and supervise the attorneys practicing before them. *David Cutler Indus., Ltd. v. Direct Group, Inc. (In re David Cutler Indus., Ltd.)*, 432 B.R. 529, 539 (Bankr. E.D. Pa. 2010); *see also El Camino Resources, Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 863, 875 (W.D. Mich. 2007) ("The power to disqualify an attorney from a case is incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession.") (internal quotations and citations omitted). "A motion to disqualify counsel is the proper method for a party to bring to the court's attention [a] . . . breach of ethical duty by opposing counsel." *El Camino Resources, Ltd.*, 623 F. Supp. at 875.

> Courts have vital interests in protecting the integrity of their judgments, *maintaining public confidence in the integrity of the bar*, eliminating conflicts of interest, and protecting confidential communications between attorneys and their clients. To protect these vital interests, courts have the power to disqualify an attorney from representing a particular client.

David Cutler Indus., Ltd., 432 B.R. at 539 (emphasis added) (citations omitted).

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[1] **Bankruptcy investigations.**

(a) Any judge, . . . or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

18 U.S.C. § 3057.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The following constitutes the Court's findings of facts and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

BACKGROUND

On December 22, 2008, B.J. Brown Sheet Metal, Inc. ("B.J. Brown" or "Debtor") filed a chapter 7 petition ("B.J. Brown Bankruptcy"). On October 25, 2010, Lagco was granted derivative standing to pursue claims against John Brown, Bonnie Brown and/or Tammy Brown Simmerman (a/k/a Tammy Brown) (collectively, the "Defendants') to recover avoidable transfers to them or to third parties for which they benefitted under applicable bankruptcy law and/or applicable state law ("Standing Order") [Case No. 08-53321, Doc. 127]. This adversary proceeding was filed on December 21, 2010. Mr. Gartland is the attorney for the Defendants. Mr. Stan Cave is the attorney for Lagco.

One of the questions pending before the Court is whether the adversary proceeding should be dismissed as to Tammy Brown Simmerman ("Ms. Simmerman") on the basis that she received a discharge in a chapter 7 bankruptcy on August 25, 2010 ("Simmerman Bankruptcy"). Lagco asserts that the action is properly filed as to Ms. Simmerman under 11 U.S.C. § 523(a)(3)(B). Ms. Simmerman, through counsel, filed a Motion for Sanctions Pursuant to Bankruptcy Rule 9011 ("Motion for Sanctions") (Doc. 24) against Lagco and its counsel, Mr. Cave, asserting a violation of the discharge injunction and violation of Rule 9011. The parties agreed that the main issue to resolving whether the adversary proceeding could proceed against Ms. Simmerman rested on what knowledge or notice Stephen Palmer, the former trustee in the B.J. Brown Bankruptcy ("Trustee

Palmer"), had as to the filing of the Simmerman Bankruptcy.[2] Such knowledge is imputed to Lagco. In order to establish that knowledge, the Court permitted the parties to take the depositions of individuals who could answer that question. One of the depositions that was taken was that of Stephen Barnes, the attorney for Trustee Palmer. Mr. Barnes' deposition was taken on January 31, 2011. The remainder of the adversary proceeding was to be held in abeyance pending a decision on the Motion for Sanctions. Due to the seriousness of the Motion to Disqualify, however, the Court has chosen to resolve the issues raised in the Motion to Disqualify prior to the decision on the Motion for Sanctions.

THE MOTION TO DISQUALIFY

On February 8, 2011, Lagco filed the Motion to Disqualify asserting that Mr. Gartland had tampered with a witness, Mr. Barnes, by offering Mr. Barnes a job. The Motion to Disqualify further asserts that Mr. Gartland intimidated Mr. Barnes both before and during Mr. Barnes' deposition. The record reflects that Mr. Gartland's actions wrongfully caused Mr. Barnes to decline to answer certain questions at the deposition.

The events prior to the deposition include a string of emails on January 19, 2011, starting at 2:24 p.m. with Mr. Gartland corresponding with only Mr. Barnes.[3] There is no question that Mr. Gartland knew that he was going to take Mr. Barnes' deposition prior to engaging in the email exchange which lasted 43 minutes. In the exchange Mr. Gartland boasts that he was "trained by the

[2]On February 7, 2011, Trustee Palmer was replaced by Ms. Phaedra Spradlin as the trustee in the main case.

[3]Earlier in the day on January 19, 2011, Messrs. Gartland and Barnes had corresponded by email from 11:08 a.m. to 2:19 p.m. regarding a hearing scheduled for January 20, 2011, on Lagco's motion to hold the adversary proceeding in abeyance. Mr. Cave was included in the "To:" line on those emails, and Trustee Palmer, Kent Barber, an associate of Mr. Gartland, and Mr. Gartland's clients, Ms. Simmerman and John Brown, were included in that exchange by being copied on the emails as they were sent. (Defendant's Ex. 1). Five minutes after these business discussions ended with no resolution between the parties as to the motion to hold the adversary proceeding in abeyance, Mr. Gartland began his string of emails with Mr. Barnes.

best to be the best" and as the following reveals, the exchange becomes more sophomoric as it proceeds:

> Barnes to Gartland: "I knew you were good, but I didn't know you were the BEST!
>
> Gartland to Barnes: "You will soon find out. Nobody has a better grasp for the law, the federal rules of civil procedure, the federal rules of evidence, the federal rules of bankruptcy procedure or the Bankruptcy Code than yours truly. I read them as one of my hobbies."
>
> Barnes to Gartland: "Quick–what does Rule 3002(4) deal with?? No peaking?"
>
> Gartland to Barnes: "I'll tell you what. Let's sit down an[d] answer questions at $100 a pop. I'll bring $20,000 in cash (all $100 bills). You bring a similar stack and we will sit there until one of [sic] has $40,000 in cash. Just like the World Series of Poker. Want to play?"
>
> Barnes to Gartland: "I'm afraid such sums are beyond my competence."
>
> Gartland to Barnes: "Then lets play for just $10,000. That is pocket change, no?"
>
> Barnes to Gartland: "That's pocket chance [sic] only for the best litigators. Mediocre small time bankruptcy lawyers like me play for peanuts. Not small change–actual peanuts."
>
> Gartland to Barnes: "I can't go to a cue show for less than $20,000 in cash."
>
> Barnes to Gartland: "I can't go anywhere with $20,000 in cash."
>
> Gartland to Barnes: "*Sounds like you need to start looking for a new job and we are looking.*"
>
> Barnes to Gartland: "No, I'd be uncomfortable working for the best . . ."
>
> Gartland to Barnes: "*Keep joking, but you will not be laughing when this case is over, trust me*."
>
> Barnes to Gartland: I thought this case was over 1 year ago, but then Stan had to go and object to my settlement!
>
> Gartland to Barnes: That's fine. [Redacted material]. I've got the green light to spend it defending the action and that's exactly what I'm going to do.

(Plaintiff's Ex. DQM-G (emphasis added)). At the hearing Mr. Gartland testified that the exchange was of a joking nature between two colleagues and that there was no intended offer of employment. Mr. Gartland testified that while his firm was in fact looking for attorneys to employ at that time, that Mr. Gartland had no authority to offer a position to Mr. Barnes. Mr. Barnes testified that he did not take the exchange as a serious offer and believed that Mr. Gartland was joking. However, it was Mr. Barnes who forwarded all of the foregoing emails on to Mr. Cave with no explanation at all and in particular no explanation that Mr. Barnes considered Mr. Gartland to be joking. Mr. Barnes took this action knowing that Mr. Cave had been on the receiving end of Mr. Gartland's attempts to intimidate.

More troubling than the email exchange, however, is Mr. Gartland's actions prior to and at Mr. Barnes' deposition. At the deposition, Mr. Gartland raised an objection to a line of questioning by Mr. Cave, on the basis that it was leading to disclosure of discussions of a supposed settlement conference between Mr. Gartland and Mr. Barnes. Mr. Gartland testified that the conference had taken place on January 3, 2011. According to Mr. Gartland's testimony he anticipated that Mr. Cave would bring up the conference in questioning Mr. Barnes and that Mr. Gartland was ready to stop any questioning along those lines. In fact, Mr. Gartland planned his actions by having his colleague, Kent Barber, find a case, *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (2003), in which Mr. Gartland recalled the Sixth Circuit stating that settlement discussions are never relevant.

Thereafter during Mr. Gartland's questioning of Mr. Barnes at the deposition, Mr. Gartland himself brought up the discussions of January 3, 2011, inquiring of Mr. Barnes whether he remembered the discussions and why Mr. Barnes had conveyed them to Mr. Cave. Mr. Gartland

acknowledged through his questions to Mr. Barnes that Trustee Palmer was not a party to the adversary proceeding. (Defendant's Ex. 3 at 58-61).

It is indeed important in the analysis of Mr. Gartland's actions to recall that pursuant to the Standing Order, Lagco is the plaintiff in this adversary proceeding, not Trustee Palmer. Mr. Barnes was not and is not the attorney for any party in this adversary proceeding.[4] Therefore, any conference between Mr. Barnes and Mr. Gartland cannot be characterized as settlement conferences protected by Federal Rule of Evidence 408. With all his preparation and planning to disrupt the deposition, Mr. Gartland was well aware of this fact and knew that his objection was unfounded.[5]

At Mr. Barnes' deposition, after Mr. Gartland first raised the issue of the January 3, 2011, discussions, the following exchange took place during Mr. Cave's cross-examination of Mr. Barnes:

8 Q	Okay. Do you recall conversation outside the bankruptcy courtroom in our last hearing that – where you were present, I was present, Mr. Barnes – let's see – excuse me. Where you were present, Mr. Barber was present, I was present and Mr. Lyon was present, where you –
A	(Interrupting) Yes, I do.
9 Q	– reminded Mr. Barber that Mr. Gartland had acknowledged that Tammie Brown Simmerman had embezzled money from –
MR. GARTLAND:	(Interrupting) OBJECTION.
10 Q	– B.J. Brown Sheet Metal?
MR. GARTLAND:	OBJECTION.

[4]Although Mr. Barnes entered an appearance in the adversary case on behalf of Trustee Palmer on January 3, 2011, Trustee Palmer was not at that time and is not now a party to the adversary proceeding.

[5]Oddly, had Mr. Gartland forgone his planning, not opened the door himself to Mr. Cave's questioning on the subject, and merely objected to Mr. Cave's anticipated questions as being outside the scope of the Court's order regarding the depositions, his objection would have been legitimate.

MR. CAVE: You can answer the question.

MR. GARTLAND: No. OBJECTION. And that's inappropriate. That's again getting in – and, first of all, I never used that phrase, but it's getting into –

MR. CAVE: (Interrupting) You weren't there, Mr. Gartland.

MR. GARTLAND: It's getting into the settlement privilege. Acknowledged in that case. If you want to take a break and read that case, that's fine. And it's also getting into 408 – Rule 408 land. It's inappropriate, it's inadmissible and it's not even discoverable, what was discussed during a Rule 408 settlement conference.

11 Q Do you remember that conversation?

MR. GARTLAND: If you pursue this, I'll move to strike it and seek sanctions against you, again, for doing something that's prohibited by the Federal Rules of Evidence. And I'll probably – *and I'll reserve my right to seek them against the witness testifying*. It's inappropriate, settlement discussions, discovery of it is inadmissible and improper, period.

MR. CAVE: I think – I think you're trying to intimidate the witness –

MR. GARTLAND: (Interrupting) No, I'm telling you our position.

MR. CAVE: – and I think that's –

MR. GARTLAND: (Interrupting) That's fine.

MR. CAVE: I think that's inappropriate to threaten the witness.

MR. GARTLAND: That's fine.

COURT REPORTER: Okay. One at a time.

MR. CAVE: I think it's inappropriate to threaten the witness by seeking sanctions, monetary sanction against the witness. That's threatening, that's intimidation, that is against the law, and Mr. Gartland is doing it on the record. And my question –

MR. GARTLAND: (Interrupting) *I'm doing it because you're trying to get into –*

MR. CAVE: (Interrupting) – my question stands.

MR. GARTLAND: – an area that is privileged, Stan. And you know it. And you should know it, if you don't know it.

MR. CAVE: It – it –

MR. GARTLAND: (Interrupting) So my – my OBJECTION stands and I reserve my rights. If you want to take a break and read that case, I think you should do that.

. . .

MR. CAVE: (Interrupting) Well, let the record stand as it is, that Mr. Gartland has threatened this witness with monetary sanctions –

MR. GARTLAND: (Interrupting) Again, that's not what I said. I said I reserved my right –

MR. CAVE: (Interrupting) – concerning –

COURT REPORTER: (Interrupting) Hold on. I can only take one at a time.

MR. CAVE: – concerning his testimony in response to a properly asked question. We can go off the record –

MR. GARTLAND: (Interrupting) It's an improper question, period. Highly improper to ask about settlement discussions.

MR. HUNT: *And it's equally improper to threaten a witness*.

. . . (OFF THE RECORD)

MR. HUNT: Okay, with regard to the OBJECTION raised by Mr. Gartland, at this point, based on the information that we have, I'm going to direct Mr. Barnes not to answer with regard to the substance of the discussions with Mr. Gartland. That, of course, is something that can be taken up further between you–all.

MR. CAVE: Okay. Let me ask my question a different way I just want to get it into the record.

12 Q Mr. Barnes, do you recall there being a conversation with Mr. Barber, you, myself and Mr. Lyon following the most recent hearing in the Bankruptcy Court to hold this case in abeyance, where matters related to settlement discussions were discussed?

A Yes.

MR. CAVE: Okay. And just so we have it clear on the record, I'm going to ask my question again, so you can –

MR. HUNT: (Interrupting) Okay.

MR. CAVE: – make your OBJECTION if you want to.

13 Q Mr. Barnes, do you recall the issue of Mr. Gartland's acknowledgment of Tammi Brown Simmerman's embezzlement from B.J. Brown Sheet Metal, Inc. coming up in those conversations outside the courtroom following the hearing on my Motion to Hold this Adversary in Abeyance?

MR. GARTLAND: OBJECTION on multiple grounds. Hold on, then you can state it. According to the 6th Circuit, any – in sum, any communications – this is a direct quote from the Goodyear case that you gentlemen were kind enough to read: "Any communications made in furtherance of settlement are privileged." Also, under Rule 408, 6th Circuit says, "That statements made in furtherance of settlement are *never* relevant." And the word never is in italicized print. Also, the 6th Circuit says, "We agree with the reasoning of these lower courts, the public policy favoring secret negotiations combined with the inherent questionability of the truthfulness of any statements made therein lead us to conclude that a settlement privilege should exist and the District Court did not abuse its discretion refusing to allow discovery. Okay. Based on that, I'm requesting that Mr. Barnes not answer the question, because I, the holder of the privilege, have never agreed to waive it.

MR. HUNT: And I'll OBJECT to the question, as well, to the extent that it poses the risk that Mr. Barnes will violate the settlement privilege discussed in the Goodyear Tire and Rubber versus Charles Powers' case. I make no comment as far as who holds the privilege, whether the privilege has been waived.

> Based on limited information available, I'm going to direct him not to answer at this time.

MR. CAVE: Okay. We'll certify the question.

(Defendants' Ex. 3 at 70-80 (emphasis added)). It is noted in the text quoted above that Mr. Hunt, counsel for Mr. Barnes, also admonished Mr. Gartland that it was inappropriate to threaten a witness indicating that Mr. Cave was not the only person at the deposition who considered Mr. Gartland's words as threatening the witness.

DISCUSSION

"A decision to disqualify counsel must be based on a factual inquiry conducted in a manner allowing appellate review." *El Camino Resources, Ltd.*, 623 F. Supp. at 876. In discussing the legal standards for a court to consider when determining whether to disqualify an attorney, the court in *David Cutler Industries, Ltd.* stated:

> A party's choice of counsel is entitled to substantial deference and the court should not quickly deprive parties of their freedom to choose the advocate who will represent their claims, particularly due to the risk that motions to disqualify may be motivated by an attempt to achieve a tactical advantage in the litigation. For these reasons, disqualification is viewed as a harsh remedy and generally is disfavored. At the same time, however, a party does not have an absolute right to retain particular counsel, and in each case, the court must consider whether the social need for ethical practice outweighs the party's right to counsel of his own choice.
>
> The party seeking the disqualification of counsel bears the burden of proof on the motion to disqualify and must demonstrate that continuing representation would be impermissible.
>
> . . .
>
> [S]ome courts have stated that any doubts regarding the propriety of the representation should be resolved in favor of disqualification.

Id. at 539-41 (emphasis added) (citations omitted). "A court should only disqualify an attorney when there is a reasonable possibility that some specifically identifiable impropriety actually

occurred." *Moses v. Sterling Commerce (Am.), Inc.*, 122 Fed. Appx. 177, 183-84 (6th Cir. 2005) (internal quotations and citations omitted).

With respect to Mr. Cave's motivation in filing the Motion to Disqualify, based on the arguments of counsel and the Court's own observation of Mr. Cave as an attorney regularly practicing before this Court, we specifically find that Mr. Cave did not bring the Motion to Disqualify for any improper reason.

The evidence with respect to the email exchange presented at the hearing from both Mr. Gartland and Mr. Barnes established to our satisfaction that the exchange, while certainly imprudent and ill-advised given the timing and circumstances, convinces us that the exchange between Messrs. Gartland and Barnes was not considered by Mr. Barnes to be of a serious nature and does not support disqualifying Mr. Gartland. Based on the Court's observation of the demeanor of Mr. Gartland, the Court cannot similarly conclude for Mr. Gartland. Humorous banter and Mr. Gartland's courtroom demeanor are mutually exclusive.

We find that Mr. Gartland's actions prior to and at Mr. Barnes' deposition certainly stretched the limits of the bounds of acceptable zealous representation in this Court. For sure, planning to disrupt a deposition by intimidating a witness into not answering a question on the basis that the response is protected under Rule 408 of the Federal Rules of Evidence as a settlement discussion, knowing full well that the discussion was not with a party or a party's attorney to the adversary proceeding, exceeds the bounds of zealous representation. Particularly when, as boasted by Mr. Gartland himself, such an attorney is supposedly very knowledgeable in the Federal Rules of Civil Procedure and Federal Rules of Evidence. However, in the face of Mr. Barnes' own testimony to the contrary, we cannot find that the witness here, Mr. Barnes, was intimidated or felt threatened by

Mr. Gartland's statements or actions. Given the instructions by the Sixth Circuit that in order to disqualify Mr. Gartland, we must find that a "specifically identifiable impropriety actually occurred," we will not disqualify Mr. Gartland at this time. We trust that Mr. Gartland will realize that his attempts to intimidate parties, witnesses and/or their attorneys will not be tolerated in this Court. Were we not presented with Mr. Barnes' testimony that he was not intimidated, the results of the Motion to Disqualify may well have been different.

Accordingly, it is hereby **ORDERED** that the Motion to Disqualify is **OVERRULED**. As a result of our decision, we find that it is not necessary to report Mr. Gartland's conduct to the appropriate United States attorney pursuant to 18 U.S.C. § 3057.

Copies to:
Michael Gartland, Esq. (for service on interested parties)
Stanton Cave, Esq.

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The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Joseph M. Scott, Jr.
Bankruptcy Judge
Dated: Friday, February 25, 2011
(jms)
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