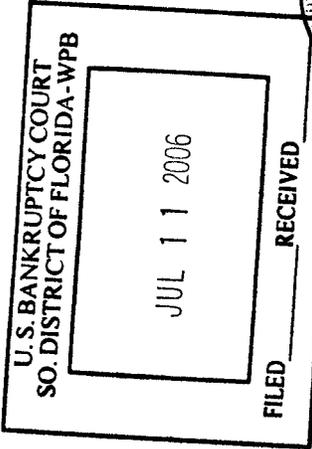


ORDERED in the Southern District of Florida on JUL 11 2006



**Paul G. Hyman, Judge
United States Bankruptcy Court**



**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

IN RE:

CASE NO.: 03-32158-BKC-PGH
CHAPTER 7

James F. Walker,
DEBTOR(S).

ORDER: 1) DENYING DEBTOR, JAMES F. WALKER AND GARY J. ROTELLA & ASSOCIATES, P.A.'S MOTION FOR IMPOSITION OF PUNITIVE SANCTIONS AGAINST CARL J. SHUHI IN THE FORM OF A CRIMINAL REFERRAL TO THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF FLORIDA [C.P. 1590]; AND 2) ORDER DENYING DEBTOR, JAMES F. WALKER AND GARY J. ROTELLA & ASSOCIATES, P.A.'S MOTION TO DETERMINE ANY AND ALL MONETARY SANCTIONS AGAINST CARL J. SHUHI, INCLUDING BUT NOT LIMITED TO, ANY ATTORNEYS' FEES AND EXPENSE ENTITLEMENTS PURSUANT TO 11 U.S.C. §105(a) [C.P. 1591]

THIS MATTER came before the Court on June 19, 2006, upon James F. Walker ("Debtor") and Gary J. Rotella & Associates, P.A.'s (collectively "Rotella") Motion for Imposition of Punitive Sanctions Against Carl J. Shuhi in the Form of a Criminal Referral to the United States Attorney for the Southern District of Florida

[C.P. 1590] (the "Criminal Referral Motion") and upon Rotella's *Motion to Determine Any and All Monetary Sanctions Against Carl J. Shuhi, Including But Not Limited To, Any Attorneys' Fees and Expense Entitlements Pursuant to 11 U.S.C. §105(a)* [C.P. 1591] (the "Third Sanctions Motion").

In 1991 and 1992, Florida Precision Calipers, Inc. ("FPC") obtained a series of final judgments against Debtor in state court. On April 25, 2003, Debtor filed for relief under Chapter 7 of the Bankruptcy Code and scheduled the amount of \$122,482.67 for this debt. On May 30, 2003, FPC filed a Proof of Claim in the amount of \$470,776.49 ("FPC's Proof of Claim").

On March 31, 2005, Debtor filed an *Emergency Motion for Default Judgment Against Florida Precision Calipers, Inc. as Sanctions for Refusal to Obey Subpoena, Appear and Testify at Deposition and Amended Motion to Strike Claim* (the "First Sanctions Motion") [C.P. 773]. On April 15, 2005, Debtor filed a *Supplemental Emergency Motion for Default Judgment Against Florida Precision Calipers, Inc. for Continuing Discovery Abuses, Perjury and Fraud upon the Court and/or for Judgment on the Record* (the "Second Sanctions Motion") [C.P. 817]. In the First Sanctions Motion and the Second Sanctions Motion, Debtor argued that FPC and its president, Carl J. Shuhi ("Shuhi"), should be sanctioned for, *inter alia*, Shuhi's alleged willful and continuous discovery abuses, and Shuhi's alleged perjury in support of Linda J. Walden throughout

the trial on Debtor's *Emergency Motion to Remove Trustee, Linda J. Walden Pursuant to 11 U.S.C. § 324 for Fraud Upon the Court* [C.P. 513]. On April 19, 2005, the Court entered an *Order Granting Debtor, James F. Walker's Emergency Motion for Default Judgment Against Florida Precision Calipers, Inc. and Carl J. Shuhi and Striking Pleadings and Proof of Claim* (the "Order") [C.P. 832]. The Order struck "all of [Shuhi's] and FPC's pleadings in this Proceeding, including FPC's Proof Of Claim" as a sanction for Shuhi's failure to participate in discovery despite Debtor's counsel having scheduled and rescheduled Shuhi's deposition over a period of eight months. Order at 16, ¶ 1.

The Order further stated that:

Shuhi gave perjurious testimony during his April 13, 2005 deposition . . . and, as such, Debtor's counsel is instructed to schedule and notice a separate hearing consistent with the relief requested at Paragraph 31 of Debtor's Supplemental Motion for Default, to wit:

The imposition of a punitive sanction against Shuhi in the form of a criminal referral to the United States Attorney for the Southern District of Florida;

Order at 16, ¶2.

Fourteen months after entry of the Order, Rotella's Criminal Referral Motion now requests that the Court impose punitive sanctions against Shuhi by criminally referring him to the United States Attorney for the Southern District of Florida. Rotella's Third Sanctions Motion further requests that the Court invoke its section 105(a) statutory power to "issue any order process, or judgment that is necessary or appropriate to carry out the

provisions of this title" and impose sanctions against Shuhi, including but not limited to, Rotella's attorneys' fees and expense "entitlements".

The Court is very familiar with the record in this case and the conduct of the parties. The Court finds that it is unnecessary to conduct a separate hearing to consider additional argument relative to the Criminal Referral Motion or the Third Sanctions Motion.

1. The Criminal Referral Motion

The Criminal Referral Motion appears to rely solely on the Order as support for the relief requested as it does not cite any statutory authority or case law. Since entry of the Order on April 19, 2005, the Court has had the opportunity to review the law pertinent to this issue in connection with Rotella's May 27, 2005 filing of *Debtor's Emergency Motion To Strike Susan Lundborg's Proof Of Claim; Motion for Compensatory And Punitive Sanctions Against Lundborg, Wernick, Lubell, and Hughes, LLP Pursuant To 28 U.S.C. § 1927 and 11 U.S.C. § 105 For Filing Fraudulent Proof Of Claim; and Motion To Immediately Refer Lundborg, Wernick, and Lubell To United State's [sic] Attorneys Office For Criminal Prosecution For Filing Fraudulent Proof Of Claim Pursuant to 18 U.S.C. §§ 152 and 3571 [C.P. 926]* (the "Lundborg Criminal Referral Motion"). In the Lundborg Criminal Referral Motion, the Debtor sought criminal referral of Susan Lundborg ("Lundborg"), another

party in this case, as well as criminal referral of her two lawyers for the filing of an allegedly fraudulent proof of claim. The Court's August 9, 2005 *Order Striking Motion to Immediately Refer Lundborg, Wernick, and Lubell to the United States Attorney's Office for Criminal Prosecution for Filing Fraudulent Proof of Claim* [C.P.1109] determined that the Debtor lacked standing to assert a private right of action seeking criminal referral of Lundborg and her lawyers. The Court now finds that Rotella is similarly without standing to seek criminal referral of Shuhi.

The Bankruptcy Investigation statute, 18 U.S.C. § 3057, states in pertinent part:

(a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title [involving bankruptcy fraud] 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.

18 U.S.C. § 3057.

"[Section] 3057 was intended primarily as an administrative measure- a congressional directive to the district offices of the United States Attorneys to become more active in its prosecution of bankruptcy fraud cases." *In re Valentine*, 196 B.R. 386, 388 (Bankr. E.D. Mich. 1996) (citing *United States v. Filiberti*, 353 F. Supp. 252, 253 (D. Conn. 1973)). See also *United States v. Laurenti*, 581

F.2d 37 (2d Cir. 1978). Courts have concluded that in enacting section 3057, Congress did not intend to grant creditors the right to ask the Bankruptcy Court for a criminal referral to the United States Attorney. *In re Valentine*, 196 B.R. at 387 (finding that nothing in § 3057, Titles 11, 18, or 28, or the Federal Rules of Bankruptcy Procedure explicitly authorizes a creditor to ask the Bankruptcy Court for a criminal referral to the United States Attorney). Furthermore, courts have also held that there is no civil cause of action for damages for an alleged violation of 18 U.S.C. § 3057. *Id.* (citing *Winslow v. Romer*, 759 F. Supp. 670, 677 (D. Colo. 1991)). The Court finds that Rotella, being neither a judge, receiver or trustee as enumerated in § 3057, lacks standing to seek criminal referral of Shuhi for his perjurious testimony.

Rotella's lack of standing aside, section 3057 requires a report to the United States Attorney by a judge, receiver or trustee "if it appears or there is reason to believe than any violation of 18 U.S.C. §§ 151 *et seq.* occurred relating to insolvent debtors, receiverships, or reorganization plans." *Phillips v. Burt*, 179 B.R. 297, 300 (Bankr. M.D. 1995). "The primary purpose of the bankruptcy statute (which is indivisibly inked to commerce and credit) is the collection and distribution of the debtor's estate to his creditors." *In re May*, 12 B.R. 618, 621 (N.D. Fla. 1980). "The bulk of the criminal provisions are devoted to protecting creditors against fraudulent conduct. . . Whether

direct or indirect, the principal purpose of the various provisions is to promote commercial honesty." *Id.* at 625. The Court does not find that reasonable grounds exist to believe that Shuhi's testimony violated 18 U.S.C. §151 *et seq.* There has been no evidence of any attempt by Shuhi to conceal estate assets or otherwise engage in any other type of bankruptcy fraud. The record does not provide any basis upon which to form a reasonable belief that a violation of 18 U.S.C. § 151 *et seq.* has been committed by Shuhi.

Nevertheless, the Court is fully aware that Shuhi gave false testimony under oath regarding his relationship with former trustee Linda J. Walden. However Shuhi's testimony, having been thoroughly impeached by Rotella, was totally lacking in credibility. Shuhi's testimony did not influence the Court and it was immaterial to the administration of this case. The Court does not find that his testimony warrants criminal referral for violation of federal criminal perjury statutes, 18 U.S.C. §§ 1621 and 1622. Shuhi has already been severely sanctioned by virtue of the Court's striking of FPC's Proof of Claim. The Court has no reasonable basis to believe that Shuhi violated any laws relating to insolvent debtors, receiverships or reorganizations or that an investigation should be had in connection therewith. In connection with this matter, criminal referral of Shuhi to the United States Attorney for investigation pursuant to 18 U.S.C. §3057 would be inappropriate.

2. The Third Sanctions Motion

Rotella's Third Sanctions Motion requests that the Court invoke its statutory power pursuant to 11 U.S.C. § 105(a) to "issue any order process, or judgment that is necessary or appropriate to carry out the provisions of this title" and impose sanctions against Shuhi, including but not limited to, Rotella's attorneys' fees and expense "entitlements". The Court notes that under the American Rule where each side pays its own legal expenses, there are no "entitlements" to attorneys' fees and expenses. There also are no "entitlements" to attorneys' fees and expenses pursuant to 11 U.S.C. § 105(a). Indeed § 105(a) "is not an independent source of power, [it] can only be used to assist in carrying out other provisions of the Code." *Phillips v. Burt*, 179 B.R. 297, 301 (Bankr. M.D. 1995). The Third Sanctions Motion seeks monetary sanctions above and beyond the monetary sanction already imposed upon Shuhi by virtue of having FPC's Proof of Claim struck. The Debtor scheduled noncontingent, undisputed debt owed to FPC in the amount of \$122,482.67. FPC's Proof of Claim for this debt was significantly higher at \$470,776.49. Although the amount of the allowable claim owed to FPC was never ruled upon by this Court, it would have been at least \$122,482.67, the amount scheduled by the Debtor, and could have been as high as \$470,776.49. The striking of

FPC's Proof of Claim was a severe sanction and sufficient punishment for Shuhi's conduct and testimony. The Court does not find that imposition of additional monetary sanctions, as requested by Rotella, are "necessary or appropriate to carry out the provisions of Title 11" pursuant to 11 U.S.C. § 105(a).

ORDER

Having reviewed the Criminal Referral Motion, the Third Sanctions Motion, the applicable law, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** that:

1. The Criminal Referral Motion is **DENIED**; and
2. The Third Sanctions Motion is **DENIED**.

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