



**SO ORDERED,**

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: August 3, 2016**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**MICHAEL T. LONG AND  
JENNIFER LONG,**

**CASE NO. 15-52052-KMS**

**DEBTORS.**

**CHAPTER 11**

**IN RE:**

**COWAN ROAD AND HIGHWAY 90, LLC,**

**CASE NO. 15-52053-KMS**

**DEBTOR.**

**CHAPTER 11**

**ORDER DENYING MOTION TO ALTER OR AMEND  
ORDER GRANTING IN PART AND DENYING IN PART APPLICATIONS  
TO EMPLOY MCHARD & ASSOCIATES, PLLC AS SPECIAL COUNSEL**

In two (2) separate but related chapter 11 cases, the debtors, Michael T. Long and Jennifer Long (the “Longs”), in Case No. 15-52052-KMS (the “Longs Case”), and the debtor, Cowan Road and Highway 90, LLC (“Cowan Road” or, together with the Longs, the “Debtors”), in Case No. 15-52053-KMS (the “Cowan Road Case”) filed a nearly identical Motion to Alter or Amend Order (the “Motion to Amend”) (Longs Case, Dkt. 127; Cowan Road Case, Dkt. 133) in which they ask this Court<sup>1</sup> to alter or amend the Order Granting in Part and Denying in Part

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<sup>1</sup> On April 25, 2016, these contested matters were referred to the oversigned Judge for final resolution. In all other respects, the above-referenced bankruptcy cases remain before U.S. Bankruptcy Judge Katharine M. Samson.

Applications to Employ McHard & Associates, PLLC as Special Counsel (the “Order”) (Longs Case, Dkt. 117; Cowan Road Case, Dkt. 126). The Court, after considering the matter, finds that the Motion to Amend should be denied.<sup>2</sup>

### **Jurisdiction**

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Motion to Amend was proper under the circumstances.

### **Facts**

The facts are stated fully in the Order issued on July 6, 2016. Only a brief summary of the facts necessary for an understanding of the issues raised in the Motion to Amend are set forth below.

The Debtors filed separate petitions for relief under chapter 11 of the Bankruptcy Code on December 14, 2015. (*Longs Case*, Dkt. 1; *Cowan Rd. Case*, Dkt. 1) They continue to act as debtors in possession under 11 U.S.C. § 1107 and § 1108. According to their bankruptcy schedules, the Longs are the sole owners of Cowan Road. (*Longs Case*, Dkt 29 at 7).

Pursuant to 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy Procedure 2014(a), the Debtors filed separate applications to employ McHard & Associates, PLLC (the “McHard Law Firm”) as special counsel to assist them in various litigation matters (the “Applications”) (*Longs Case*, Dkt. 46; *Cowan Rd. Case*, Dkt. 54). In the Order, which is the subject of the Motion to Amend, the Court approved the employment of the McHard Law Firm as special counsel for the Longs in all matters except a matter involving a property dispute. As to this matter, the Court

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<sup>2</sup> Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

also denied Cowan Road's request to retain the McHard Law Firm. The Motion to Amend asks the Court to revisit this aspect of its decision.

Both Applications describe the "various litigation issues" for which the Debtors seek to retain the McHard Law Firm by referring to the contracts of employment signed by Michael Long, acting on his own behalf and on behalf of Cowan Road as its manager. (*Longs Case*, Dkt. 46 at 1; *Cowan Rd.*, Dkt. 54 at 1). Under the agreements, the Debtors retained the McHard Law Firm "to prosecute all claims[] in connection with property dispute against the City of Gulfport, Mississippi" (the "Gulfport Claims") (*Longs Case*, Dkt. 46, Ex. A at 7; *Cowan Rd. Case*, Dkt. 54, Ex. A at 5). This description is the only one provided by the Debtors in support of their Applications. According to PriorityOne Bank ("POB"), a creditor of Cowan Road that opposed the Applications, the Gulfport Claims encompass the following litigation:

1. *Cowan Road & Hwy 90, LLC v. City of Gulfport, Mississippi, a Mississippi Municipal Corporation, Chateau Mississippi Investments, LLC, a Louisiana Limited Liability Company, and PriorityOne Bank*, Cause No. D2401-13-1315 (the "Inverse Condemnation Case");
2. *Harrison County Utility Authority v. Cowan Road & Hwy 90, LLC, Record Title Owner; David V. Larosa, Sr., Tax Collector; Robert J. Barnes, Trustee; Steven D. Peters, Interested Party; BBB Certificates, Interested Party*, Cause No. D2401-13-898 (the "Eminent Domain Case I"); and
3. *Harrison County Utility Authority v. Cowan Road & Hwy 90, LLC, Record Title Owner; David V. Larosa, Sr., Tax Collector; Robert J. Barnes, Trustee; Steven D. Peters, Interested Party; BBB Certificates, Interested Party*, Cause No. D2401-13-900 (the "Eminent Domain Case II").

(*Longs Case*, Dkt. 55 at 1-2). The Court was not provided copies of any of the pleadings filed in the above-referenced litigation, but the testimony at the hearing on the Applications held on June 6, 2016 (the "June Hearing"), indicated that Eminent Domain Case I and Eminent Domain Case II (the "Eminent Domain Cases") and the Inverse Condemnation Case involved the same nine (9) acres of land located in Gulfport, Mississippi (the "Cowan Road Property").

Before the McHard Law Firm's involvement in this litigation, Joe Sam Owen ("Owen") of the law firm Owen, Galloway & Myers, P.L.L.C. ("OGM") represented Michael Long and Cowan Road for any claims they "may have as a result of any actions or inactions on the part of the City of Gulfport and/or Harrison County Utility Authority and/or any other Federal or State agency concerning the taking and use of certain real property located on Cowan Road." (*Longs Case*, Dkt. 52). In 2010, Michael Long signed an Employment Contract and Contingent Fee Agreement with OGM (*Longs Case*, Dkt. 52-1), assigning a lien of forty percent (40%) of any amounts recovered to OGM. Owen then filed the Inverse Condemnation Case in 2011, and defended Cowan Road in the Eminent Domain Cases later filed by the Harrison County Utility Authority ("HCUA"). The litigation of the Gulfport Claims has a long and complicated history. During the past six (6) years, there have been multiple hearings before four (4) different state court judges in both the Chancery Court of Harrison County, Mississippi, and the Special Court of Eminent Domain in Harrison County, Mississippi. (*Longs Case*, Dkt. 52 at 2).

POB is a named defendant in the Inverse Condemnation Case and the Eminent Domain Cases. Before the bankruptcy filings, Cowan Road executed a note and deed of trust in favor of POB on the Cowan Road Property, and Michael Long guaranteed the note. (*Cowan Rd. Case*, Dkt. 13 at 2). In 2012, POB agreed to subordinate its lien position to the attorneys' fees and expenses of OGM as to any recovery from the litigation of the Gulfport Claims. (*Longs Case*, Ex. B, Dkt. 52-2).

At some point during the litigation of the Gulfport Claims, Michael Long became dissatisfied with Owen's legal representation and retained the McHard Law Firm. In the fall of 2015, the McHard Law Firm entered its appearance in the Inverse Condemnation Case and the

Eminent Domain Cases. (June H'rg Tr. at 62, *Longs Case*, Dkt. 131). The McHard Law Firm also filed a fourth lawsuit involving the Cowan Road Property.

On December 17, 2015, before the Applications were filed, POB filed the Motion for Abandonment and Request for Relief from § 362 Automatic Stay Regarding Real Property (*Cowan Rd. Case*, Dkt. 13), alleging that Cowan Road owed \$2,962,977.79 on the note secured by the deed of trust on the Cowan Road Property. POB further alleged that the current value of the Cowan Road Property was insufficient to pay the indebtedness owed to POB. For that reason, and because Cowan Road defaulted under the loan documents and had no source of income to pay the debt, POB asked the Court to terminate the automatic stay pursuant to 11 U.S.C. § 362(d) to allow POB “to take any and all steps to foreclose on, liquidate, or otherwise take possession, custody or control” of the Cowan Road Property. (*Cowan Rd. Case*, Dkt. 13 at 12). POB also asked the Court to order Cowan Road to abandon the Cowan Road Property pursuant to 11 U.S.C. § 554(b) as “being of inconsequential value and benefit to the bankruptcy estate.” (*Cowan Rd. Case*, Dkt. 13 at 13).

The parties resolved their dispute and the Agreed Order on Motion for Abandonment and Request for Relief from § 362 Automatic Stay Regarding Real Property (the “Agreed Order”) (*Cowan Rd. Case*, Dkt. 77) and Final Judgment (*Cowan Rd. Case*, Dkt. 78) were entered on March 9, 2016. Pursuant to the Agreed Order, the Cowan Road Property would be abandoned from the bankruptcy estate of Cowan Road on May 31, 2016, and the § 362 automatic stay would also be terminated on that same date. Notwithstanding the Agreed Order, on May 31, 2016, Cowan Road filed the Motion for Authority to Sell Property of the Estate Free and Clear of Liens, Claims and Interests (the “Motion to Sell”) (*Cowan Rd. Case*, Dkt. 106), seeking

permission from the Court to sell the Cowan Road Property to The Hyneman Companies, LLC for a purchase price of \$1,600,000.00.

Cowan Road then filed a Complaint (the “*Cowan Rd. Complaint*”) and an emergency Motion for Injunctive Relief (the “Motion for Preliminary Injunction”) (*Cowan Rd. Adv.*, Dkt. 3), on June 16, 2016, in Adv. No. 16-06024-KMS (*Cowan Rd. Adv.*, Dkt. 1), asking the Court to enjoin POB from prosecuting its foreclosure sale against the Cowan Road Property (scheduled to take place on June 30, 2016) pending the Court’s ruling on the Motion to Sell. After a hearing held on June 23, 2016, the Court<sup>3</sup> denied the Motion for Preliminary Injunction (*Cowan Rd. Adv.*, Dkt. 14), and dismissed the *Cowan Rd. Complaint* (*Cowan Rd. Adv.*, Dkt. 15) in the adversary proceeding and denied the Motion to Sell (*Cowan Rd. Case*, Dkt. 123) in the Cowan Road Case.<sup>4</sup>

After the June Hearing, the Court entered the Order finding that the employment of the McHard Law Firm as special counsel to prosecute and defend the Gulfport Claims was not in the best interest of the Debtors’ bankruptcy estates. Simply put, the Debtors failed to satisfy their burden of proving that there was an actual need for the legal services of the McHard Law Firm in light of the abandonment of the Cowan Road Property. *See In re Duque*, 48 B.R 965, 974-75 (S.D. Fla. 1984). Because the litigation regarding the Gulfport Claims no longer involved assets of the bankruptcy estate of Cowan Road, the Court concluded that the Debtors failed to show that their respective bankruptcy estates would receive any benefit from the approval of the Applications with respect to the Gulfport Claims. Aggrieved by the Order, the Debtors filed the Motion to Amend.

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<sup>3</sup> *See supra* note 1.

<sup>4</sup> POB presumably foreclosed on the Cowan Road Property on June 30, 2016.

## Discussion

The two (2)-page Motion to Amend does not cite any Federal Rule of Bankruptcy Procedure or any other authority in support of the relief requested by the Debtors. Rule 59(e) of the Federal Rules of Civil Procedure (“Rule 59(e)”), as made applicable by Rule 9023 of the Federal Rules of Bankruptcy Procedure, permits a court to alter or amend its findings of fact in certain circumstances. *Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5th Cir. 2004) (holding that Rule 59 “calls into question the correctness of a judgment”) (quotation omitted). Because the Motion to Amend was filed within the time frame required by Rule 59, it could procedurally qualify as a Rule 59(e) motion. For that reason and because the Motion to Amend uses the language “alter or amend” found in Rule 59(e), the Court considers it a motion filed under Rule 59.

A final judgment under Rule 59(e) may be amended if: (1) there is a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in controlling law. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003)). The Debtors’ contention in the Motion to Amend that the Court failed to address “additional issues” in the Order appears to fall under the first prong. The Court, therefore, considers whether it “misapprehended the facts, a party’s position, or the controlling law.” *Servants of Pavaclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

The Debtors maintain for the first time in the Motion to Amend that the causes of action for which they seek to employ the McHard Law firm “should ‘survive’ any foreclosure conducted by [POB]” (Mot. to Am. ¶ 3) and “exceed the amount of the indebtedness of [POB]” (*Id.* ¶ 4). “In fact, loss of value resulting from the [POB] foreclosure is simply another element

of the Debtor's [*sic*] damages." (*Id.* ¶ 5). The Debtors provide no greater description of these causes of action and cite no legal authority.

The only causes of action mentioned at the June Hearing in connection with the Cowan Road Property were the Inverse Condemnation Case, the Eminent Domain Cases, and the more recent case filed by the McHard Law Firm on behalf of Cowan Road. There was testimony that an appraiser appointed by the state court had valued the property taken by the City of Gulfport and/or the HCUA at \$150,000.00. Michael Long contested that amount as being too low, but provided no other evidence of the amount of monetary damages incurred by the Debtors. Counsel for the Debtors who signed the Motion to Amend is not the same counsel who appeared at the June Hearing on behalf of the Debtors. The counsel who appeared at the June Hearing could have presented evidence showing that the causes of action described in the Applications would "survive" a foreclosure, but he did not do so. Given the amount that Cowan Road proposed to sell the Cowan Road Property (\$1,600,000.00) and the amount of damages appraised (\$150,000.00), it is difficult to imagine any recovery in excess of POB's lien (\$2,962,977.79) and OGM's lien for its attorneys' fees and expenses. The Court cannot misapprehend facts or overlook issues that were never presented to it in the first place.

At the end of the June hearing, counsel for the Debtors was specifically asked about the effect of the abandonment of the Cowan Road Property on the Applications. His response was, "I was under the impression that there was going to have to be litigation to determine whether that – until you just mentioned the final order being entered I thought we were still litigating that issue." (June H'rg Tr. at 80-81, *Long's Case*, Dkt. 131). Indeed, shortly after the June Hearing, Cowan Road filed the Cowan Road Complaint and Motion for Preliminary Injunction for the purpose of preventing the foreclosure from taking place, albeit without success.



## **Conclusion**

Based on the foregoing, the Court finds that the Motion to Amend should be denied. Rule 59(e) “serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). A Rule 59(e) motion is not the proper “vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.” *Templet*, 367 F.3d at 479 (citation omitted). In other words, Rule 59(e) does not provide a method for a litigant to redo its failure to present evidence or make legal arguments. *See Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (holding that court orders “are not intended as mere first drafts, subject to revision and reconsideration at a litigant’s pleasure”).

It is entirely possible that the causes of action mentioned in the Motion to Amend are separate and distinct from the Gulfport Claims described in the Applications. The Motion to Amend is too general for the Court to make that determination. To the extent that there are additional claims, the Debtors may file a new application stating the specific facts showing the necessity for the employment of the McHard Law Firm.

IT IS, THEREFORE, ORDERED that the Motion to Amend is hereby denied.

##END OF ORDER##