

2009

# Merrick Young Incorporated v. Wal-Mart Real Estate Resources Trusts, Engineered Structures Inc., and the American Insurance Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MERRICK YOUNG INCORPORATED, :

Plaintiff/Appellant, :

v. :

WAL-MART REAL ESTATE RESOURCES :  
TRUSTS, ENGINEERED STRUCTURES, :  
INC., AND THE AMERICAN INSURANCE :  
COMPANY, :

Appellate Case No. 20090227-CA

Defendants/Appellees.

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REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

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APPEAL FROM ORDER OF DISMISSAL OF CLAIMS FOR RELIEF OF AMENDED  
COMPLAINT AND RELATED RULINGS FROM THE FIFTH DISTRICT COURT,  
WASHINGTON COUNTY, THE HONORABLE G. RAND BEACHAM PRESIDING

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## REPLY BRIEF OF APPELLANT ON APPEAL

### ARGUMENT

#### **I. ESI Fails To Demonstrate Either (1) The Alleged Implausibility Of MYI's Interpretation Of The Term "Indemnitors' Assets" As Not Including The Subject Claims, Or (2) The Alleged Reasonableness Of ESI's Interpretation Of The Term "Indemnitors' Assets" As Not Limited To The Eight Categories Of Assets By Which That Term Was Defined So As To Include The Subject Claims**

The validity of the Order of Dismissal turns upon whether the Subject Claims were transferred to and owned by Mr. Seely under the March 2004 Settlement Agreement.<sup>1</sup> The threshold issue as to whether the Subject Claims were transferred to Mr. Seely is whether the contract language reasonably allows for the interpretation that the Subject Claims were not transferred to Mr. Seely. If so, the "Ward rule" requires the interpretation of the March 2004 Settlement Agreement in accordance with relevant and credible extrinsic evidence regarding the parties' intentions as to whether the Subject Claims were transferred to Mr. Seely. *See Ward v. Intermountain Farmers Ass'n.*, 907 P.2d 264, 268 (Utah 1995); *Daines v. Vincent*, 2008 UT 51, ¶¶ 26-31, 190 P.3d 1269. ESI does not take issue with the "Ward rule."

MYI demonstrated in its Brief of Appellant that a reasonable interpretation of the March 2004 Settlement Agreement was that it did not provide for the transfer of the Subject Claims for the following reasons: (1) the March 2004 Settlement Agreement expressly provided that only the "Indemnitors' Assets" were transferred to Developers and then to Mr. Seely; (2) the term "Indemnitors' Assets" was expressly defined to be limited to only eight categories of specifically listed assets rather than all of MYI's assets; and (3) the Subject

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<sup>1</sup> The capitalized terms in this brief have the same meaning as in the Brief of Appellant.

Claims, unlike other accounts receivable, were not expressly listed in any of the eight categories of assets that comprised the “Indemnitors’ Assets,” and none of those eight categories could be reasonably interpreted to cover the Subject Claims.

MYI submits that not only is it reasonable to interpret the March 2004 Settlement Agreement to not include the Subject Claims in the assets that were transferred to Mr. Seely, but that the only reasonable interpretation of “Indemnitors’ Assets” is that the Subject Claims were not transferred. This is because ESI, in its Brief of Appellee, fails to demonstrate either that MYI’s interpretation is implausible or that ESI’s interpretation of the March 2004 Settlement Agreement as providing for the transfer of the Subject Claims is reasonable. As such, under the “Ward rule,” the March 2004 Settlement Agreement cannot be interpreted as providing for the transfer of the Subject Claims to Mr. Seely.

**A. ESI Fails to Demonstrate that Its Interpretation of the March 2004 Settlement Agreement Is Reasonable and, Thus, Does Not Show that MYI’s Interpretation Is Implausible**

ESI attempts to demonstrate that MYI’s interpretation is implausible by both interpreting what assets were transferred under the March 2004 Settlement Agreement by reference to statements in the Recitals of that agreement, without regard to the defined term “Indemnitors’ Assets,” and by interpreting the term “Indemnitors’ Assets” to not be limited to the eight categories of assets by which that term was defined. ESI argues that the March 2004 Settlement Agreement, read in its entirety, “clearly and unambiguously contemplates the transfer of all of Indemnitors’ [MYI’s and the Youngs’] assets to Developers and the subsequent sale of some of those assets by Developers to Mr. Seely.” (ESI’s Br. of Appellee

at 19.) ESI also argues that the language of the March 2004 Settlement Agreement allegedly “negates MYI’s narrow interpretation of [the term “Indemnitors’ Assets”] as including only the assets listed in categories 1 through 8” (ESI’s Br. of Appellee at 20 (emphasis in original)).

ESI fails to show that it is implausible to limit the assets that were transferred to Mr. Seely to the “Indemnitors’ Assets” and to limit the “Indemnitors’ Assets” to the eight categories of assets by which that term was expressly defined. ESI also fails to show that it is reasonable to interpret what assets were transferred to Mr. Seely without reference to the defined term “Indemnitors’ Assets,” or to interpret the term “Indemnitors’ Assets” to include assets in addition to the eight categories of assets by which that term was defined.

Fundamentally, the only provisions of the March 2004 Settlement Agreement that provided for the transfer of assets were paragraphs 2(b) and 2(d) and they did **not** state that all of MYI’s assets were being transferred. Instead, paragraph 2(b) stated that **only** the “Indemnitors’ Assets” were transferred from MYI and the Youngs, and paragraph 2(d) stated that **only** the “Indemnitors’ Assets” (with two exceptions) were transferred from Developers to Mr. Seely. (R. 1676-77 (Tab A at 5-6, ¶ 2).)<sup>2</sup> Paragraph 2 stated, in relevant part, as follows:

In consideration of such resolution and assignments, Developers, Indemnitors [MYI and the Youngs], and Seely Agree as follows: . . .

b) Indemnitors confirm and aver that Indemnitors have assigned,

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<sup>2</sup> Citations to Tabs A through I are to the documents included in the Addendum to MYI’s Brief of Appellant at the cited tab. Citations to Tabs J through O are to documents included in the Addendum to the portion of this Brief that responds to ESI’s cross-appeal.

transferred and set over to Developers any and all interests, rights, and title that Indemnitors possess or may possess to **Indemnitors' Assets**.

c) Concurrent with Developers' execution of this Agreement, Seely shall pay Developers a lump sum payment of One Hundred Fifty Thousand Dollars (\$150,000) in certified funds.

d) In consideration of Seely's payment to Developers of One Hundred Fifty Thousand Dollars (\$150,000) in certified funds, Developers . . . hereby assigns, transfers, and sets over to Seely all **Indemnitors' Assets**  
....

(R. 1676-77 (Tab A at 5-6, ¶ 2) (emphasis added).) Given that the only operative transfer provisions stated that only the "Indemnitors' Assets" were transferred, and did **not** state that all of MYI's assets were transferred, it plainly is not implausible to interpret the March 2004 Settlement Agreement as providing for the transfer of only the "Indemnitors' Assets." Nor is it reasonable to interpret the agreement as providing for the transfer of assets that were not included in the "Indemnitors' Assets."

The term "Indemnitors' Assets" was expressly defined in Recital F to be limited to eight categories of assets, rather than to consist of all of MYI's assets. (R. 1673-74 (Tab A at 2-3, Recital F).) The term "Indemnitors' Assets" was defined in Recital F by reference to Developers' execution order from Developers' Separate Action. (*Id.*) As shown in Recital F, that execution order had allowed Developers to execute upon **all** of MYI's assets, **including but not limited** to eight categories of specifically listed assets that were set forth in paragraphs 1 through 8 of the execution order. (*Id.*) However, the term "Indemnitors' Assets" expressly was defined to be limited to **only** the eight categories of specific assets listed in paragraphs 1 through 8. (R. 1674 (Tab A at 3).) Specifically, the parties added to

the end of the Recital F quotation of paragraph 8 of the execution order the following language: “**All assets referenced in paragraphs 1 through 8 of [the execution order] are referred to in this Agreement as ‘Indemnitors’ Assets.’”** (*Id.* (emphasis added).) This language did not appear in the execution order. The Recital F modified quotation of the execution order, referred to as “the Court’s Order,” was as follows:

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to URCP 64C and URCP 64D, Developers may execute, attach and garnish, in the amount of \$540,668.61, the **accounts receivable, assets, interest, money, stocks, memberships, bonds, real property, and personal property in which the Indemnitors [MYI and the Youngs] have an interest, including but not limited to the following:**

1. Merrick Young  
Stephanie Young  
3511 Paiute Road  
St. George or Bloomington, Utah 84790-7741  
The above real property known as 3511 Paiute Road and any funds obtained from its sale, including all other assets of the Indemnitors.

...

8. Any interest in Black Ridge Commercial Center, LLC; Black Ridge, LLC, or any other partnership, limited partnership, limited liability company, sole proprietorship, corporation, or other business entity in which any Indemnitor has an interest, and any real property in which these entities have an interest. **[All assets referenced in paragraphs 1 though 8 of the Court’s Order are referred to in this Agreement as “Indemnitors’ Assets”].**

(R. 1673-74 (Tab A at 2-3, Recital F (emphasis added)).)

Given this language and paragraphs 2(b) and 2(d), ESI fails to show that it is



implausible to interpret the contract language as providing for the transfer to Mr. Seely of only the eight categories of assets listed in paragraphs 1 through 8 of the Recital F quotation of the execution order (less the specific “Indemnitors’ Assets” left with Developers under paragraph 2(d)). Given this language, it is unreasonable to interpret the contract language as providing for the transfer of assets not included in the “Indemnitors’ Assets.”

ESI cobbles together various statements in the Recitals of the March 2004 Settlement Agreement to make its argument. However, none of those statements is an operative transfer provision. None of those statements demonstrates an intent either that the assets being transferred were not limited to the “Indemnitors’ Assets” or that the “Indemnitors’ Assets” were not limited to the eight categories of assets by which that term was defined.

ESI relies upon the language in Recital D that stated that MYI and the Youngs (the “Indemnitors”) had entered into the Indemnity Agreement with Developers (referred to as the “GIA”), under which they pledged all of their accounts receivable to Developers as collateral, and the language in Recital F that quoted Developers’ execution order as providing that Developers “may” execute upon all of MYI’s assets. (R. 1672-73 (Tab A at 1, 2, Recitals D, F).). However, the term “Indemnitors’ Assets” was **not** defined by reference to either the GIA, MYI’s and the Youngs’ pledge of assets to Developers, nor to the entire execution order that Developers had obtained. As such, neither MYI’s pledge of all of its assets to Developers, nor the fact that Developers had obtained an execution order allowing it to execute upon all of MYI’s assets, meant that the “Indemnitors’ Assets” covered all of MYI’s assets. Moreover, the issue is whether the Subject Claims were transferred to and

owned by **Mr. Seely**. ESI's theory would show only a transfer of the Subject Claims to Developers, not to Mr. Seely.

What is relevant to determining the parties' intent based upon the language of the March 2004 Settlement Agreement is the fact that Developers' execution order had allowed it to execute on **all** of MYI's' assets, including the eight categories of specific assets listed in paragraphs 1 through 8 of the execution order, **but the March 2004 Settlement Agreement defined the term "Indemnitors' Assets" to be limited to only the eight categories of specific assets listed in paragraphs 1 through 8**. This demonstrated the parties' intent that the "Indemnitors' Assets" did not include all of MYI's assets. The fact that the parties limited the definition of the term "Indemnitors' Assets" to only the eight categories of specific assets listed in paragraphs 1 through 8 can be explained only as an intention to include less than all of MYI's assets in the "Indemnitors' Assets." This is bolstered by the fact that the eight categories themselves, on their face, do not cover all of MYI's assets.

Moreover, contrary to ESI's assumption with its argument, MYI's pledge of all of its accounts receivable to Developers as collateral and Developers obtaining the execution order did not mean that, prior to the March 2004 Settlement Agreement, Developers already owned all of MYI's accounts receivable. A mere pledge of an asset as collateral is not a transfer of title to the asset. *See Gowans v. Rockport Irr. Co.*, 293 P. 4, 6 (Utah 1930). Before Developers could have owned the pledged accounts receivable, MYI and the Youngs had to default and Developers had to institute an action to assert its equitable interest in the pledged

assets, obtain an execution order, and then actually seize the accounts receivable. This is the only explanation for Developers' Separate Action and Developers' execution order. With that execution order, Developers was poised to become the owner of all of MYI's accounts receivable because it could seize them. However, Developers entered into the March 2004 Settlement Agreement instead of seizing all of MYI's accounts receivable. If Developers already had owned all of MYI's assets, including all of its accounts receivable, before entering into the March 2004 Settlement Agreement, there would have been no need for the parties to limit the assets that were transferred under that agreement to the eight categories of assets by which the "Indemnitors' Assets" were defined. Paragraph 2(b) confirmed that only the "Indemnitors' Assets" had been transferred to Developers. (R. 1676 (Tab A at 5, ¶ 2(b)).)

ESI also relies upon the language in Recital H that stated Mr. Seely was interested in purchasing "assets of Indemnitors owned by Developers or which are subject to the judgment, injunction, and garnishment." (R. 1676 (Tab A at 5, Recital H).) However, contrary to ESI's contention (ESI Br. of Appellee at 19), Recital H did **not** state either that MYI had or was transferring "all" of its assets to Developers or that Mr. Seely's interest was in purchasing "all" of MYI's assets. ESI ignores that Recital H stated in its first sentence that Mr. Seely was interested in purchasing "**certain** assets of MYI," thus supporting the interpretation of "Indemnitors' Assets" as not including all of MYI's assets. (R. 1676 (Tab A at 5, Recital H (emphasis added)).)

ESI also relies upon the language of paragraph 2(d)(ii) that stated Developers

transferred to Mr. Seely “all Indemnitors’ Assets with the exception of the Black Ridge Drive Project, the MYI Black Ridge Drive Project Litigation, and Developers’ Black Ridge Drive Project Litigation.” (R. 1677 (Tab A at 6, ¶ 2(d)(ii)).) ESI argues that this “exception” clause demonstrates that MYI’s and Developers’ Black Ridge Drive Project litigations were intended to be included in the “Indemnitors’ Assets,” but those litigations allegedly were not listed in the eight categories of assets defining the “Indemnitors’ Assets.” As such, ESI argues, the term “Indemnitors’ Assets” cannot be limited to those eight categories of assets. ESI’s argument is not supported by the language of the March 2004 Settlement Agreement.

First, category 2 **did** include “MYI’s Black Ridge Drive Project Litigation.” Category 2 stated “[f]unds due and owing to [MYI and the Youngs] . . . for the project known as Black Ridge Drive, 250 West Improvement, Project SIC 99-4, Inquiry No. 00-1260.” (R. 1674 (Tab A at 3, Recital F).) This reference to all accounts receivable related to the Black Ridge Drive Project plainly included “MYI’s Black Ridge Drive Project Litigation.” Indeed, if one of the eight categories had included “funds due and owing” to MYI for the Wal-Mart Project that was the subject of the Subject Claims, then the Subject Claims clearly would have been included. The fact that accounts receivable for the Wal-Mart Project were not listed shows that the Subject Claims were not intended to be included in the “Indemnitors’ Assets.” *See Mifflin v. Shiki*, 293 P. 1, 3 (Utah 1930). ESI has no answer to this point.

Second, contrary to ESI’s argument, the provision in paragraph 2(d)(ii) stating that Developers transferred the “Indemnitors’ Assets” to Mr. Seely “with the exception of” the listed Black Ridge Drive Project related assets could not have expressed an intent that all of

those Black Ridge Drive Project related assets were included in the “Indemnitors’ Assets.” This is because one of those listed Black Ridge Drive Project related assets was “**Developers’** Black Ridge Drive Project Litigation.” (R. 1677 (Tab A at 6, ¶ 2(d)).) “Developers’ Black Ridge Drive Project Litigation” was never an asset of MYI. Therefore, that chose in action never could have been included in the “Indemnitors’ Assets” in the first instance so as to have been excluded from the “Indemnitors’ Assets” that were transferred to Mr. Seely under paragraph 2(d)(ii). Plainly, the “exception” clause in paragraph 2(d)(ii) merely identified particular assets that were not being transferred to Mr. Seely (only some of which were “Indemnitors’ Assets”), rather than identified only particular “Indemnitors’ Assets” that were not being transferred to Mr. Seely.

Finally, ESI argues that paragraph 2(g) shows the parties intended that all of MYI’s assets were transferred to Developers and then to Mr. Seely. Paragraph 2(g) stated:

**As stated in paragraphs 2(b) and 2(d) . . . all of Indemnitors’ assets** and all interests therein (except those reserved to Developers), which have been or could have been attached by Developers via the GIA or otherwise, **are hereby conveyed to Developers and then to Seely**. Developers retains no interest in any such assets.

(R. 1677 (Tab A at 6, ¶ 2(g) (emphasis added)).) However, this contract language merely restated the parties’ intent that all of the “Indemnitors’ Assets” were transferred under the March 2004 Settlement Agreement. Paragraph 2(g) only restated the parties’ intent that was stated in the referenced operative transfer provisions of paragraph 2(b) and 2(d). That intent was that MYI had transferred to Developers, and Developers transferred to Mr. Seely, only the “Indemnitors’ Assets” (with exceptions). The fact that the word “assets” in the term

“Indemnitors’ Assets” in paragraph 2(g) mistakenly was not capitalized cannot be read to express an intent that is contrary to the intent plainly expressed in the primary operative transfer paragraphs of paragraphs 2(b) and 2(d). Thus, paragraph 2(g)’s use of “all” simply means all of the “Indemnitors’ Assets,” and not all of MYI’s assets.

In sum, ESI does not show, with any of the contract language that it relies upon, either that it is implausible to interpret the March 2004 Settlement Agreement to limit the assets that were transferred under it to the eight categories of assets by which the “Indemnitors’ Assets” were defined, or that it is reasonable to interpret that agreement to provide for the transfer of all of MYI’s assets.

**B. ESI’s Limited Attempt to Demonstrate that the Subject Claims Were Covered by One of the Eight Categories of Specifically Listed Assets by Which the Term “Indemnitors’ Assets” Was Defined Fails**

MYI demonstrates with its Brief of Appellant that none of the eight categories of assets that comprised the “Indemnitors’ Assets” covered the Subject Claims, such that the Subject Claims were not transferred to Mr. Seely (because only the “Indemnitors’ Assets” were transferred to Mr. Seely). ESI attempts to show otherwise by arguing that category 7 covered the Subject Claims. Notably, this is ESI’s only attempt to demonstrate that the Subject Claims were covered by one of the eight categories of assets that comprised the “Indemnitors’ Assets.” ESI does not attempt to defend the district court’s ruling that the Subject Claims were covered by category 6. ESI, thereby, concedes that none of the categories other than allegedly category 7 covered the Subject Claims.

Category 7 covered “[a]ny money, stocks, bonds, or other assets of any Indemnitor.”

(R. 1674 (Tab A at 3, Recital F).) ESI contends that the “or other assets” language meant all of MYI’s assets so as to include the Subject Claims. However, category 7 was just one of eight categories of specific assets included in the “Indemnitors’ Assets,” so it makes no sense that the phrase “or other assets” in category 7 meant all of MYI’s assets. Otherwise, the remaining seven categories would have been redundant, and defining the “Indemnitors’ Assets” by reference to the eight categories of assets would have served no purpose. *See Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 28, 210 P.3d 263. Category 7 plainly refers to specific liquid assets. As such, by law, the reference to “other assets” in category 7 necessarily was to other assets of a similar character, that is, other liquid assets. *See Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶¶ 25, 34, 207 P.3d 1235. The Subject Claims manifestly do not have the same character (liquid assets as opposed to a chose in action) as the assets covered by category 7. Therefore, as a matter of law, category 7 does not express an intent to cover the Subject Claims. *Id.* ESI summarily argues this interpretation lacks merit without support or analysis.

In sum, ESI fails to show that it is implausible to interpret category 7 to not cover the Subject Claims. Nor does ESI demonstrate that it is reasonable to interpret category 7 to cover all of MYI’s assets so as to include the Subject Claims. Given that this was ESI’s only attempt to show that the Subject Claims were covered by any of the eight categories of assets by which the term “Indemnitors’ Assets” was defined and only the “Indemnitors’ Assets” were transferred to Mr. Seely under the March 2004 Settlement Agreement, ESI fails to demonstrate either that it is implausible to exclude the Subject Claims from the assets that

were transferred to Mr. Seely, or that it is reasonable that the Subject Claims were transferred to Mr. Seely, considering only the language of the March 2004 Settlement Agreement. As such, MYI does not offer extrinsic evidence “in an attempt to obscure otherwise plain contractual terms.” *See Daines*, 2008 UT 51 at ¶ 31.

**II. Extrinsic Evidence Of The Parties’ Intentions Should Be Considered And That Evidence Conclusively Shows That There Was No Intent To Transfer The Subject Claims**

Because MYI offered extrinsic evidence to support a reasonable interpretation of the March 2004 Settlement Agreement, extrinsic evidence regarding the intentions of the parties to the March 2004 Settlement Agreement as to the transfer of the Subject Claims should be considered, under the “Ward rule,” in order to resolve the issue of whether the only reasonable interpretation of that agreement is that the Subject Claims were not transferred to Mr. Seely under that agreement. *Ward*, 907 P.2d at 268; *Daines*, 2008 UT 51 at ¶¶ 26-31. Or, if ESI’s interpretation that the Subject Claims were transferred to Mr. Seely also is deemed reasonable (which should not be the outcome), such extrinsic evidence should be considered in order to resolve the resulting facial ambiguity. *Ward*, 907 P.2d at 268; *Daines*, 2008 UT 51 at ¶¶ 26-31.

ESI argues that the district court properly considered the extrinsic evidence regarding the intentions of the parties to the March 2004 Settlement Agreement as to the transfer of the Subject Claims by finding that the evidence proved a “different” intent than that allegedly expressed by the unambiguous language of the March 2004 Settlement Agreement. However, the “Ward rule” requires the consideration of the extrinsic evidence in order to



determine whether the March 2004 Settlement Agreement is facially ambiguous and then, if it is facially ambiguous, to interpret the March 2004 Settlement Agreement in a manner consistent with that extrinsic evidence. *See Ward*, 907 P.2d at 268; *Daines*, 2008 UT 51 at ¶¶ 26-31. The district court plainly did neither.

ESI also argues that certain of the extrinsic evidence relied upon by MYI is not “credible” and, thus, cannot be considered by this Court under the “Ward rule.” This argument leaves ESI short from disqualifying all of the extrinsic evidence from consideration and, in any event, fails to raise an issue of fact as to the parties’ intentions.<sup>3</sup>

ESI leaves itself short because it does not challenge the credibility of either (1) Mr. Seely’s declaration testimony that he did not understand that the Subject Claims had been transferred to him (R. 3217-17b (Tab E)), or (2) Developers’ representation to ESI’s counsel that Developers did not understand that the Subject Claims had been transferred to Developers (R. 1432). ESI cites no evidence that shows that either Mr. Seely or Developers actually had a different understanding. Indeed, ESI cites no extrinsic evidence supporting its interpretation of the term “Indemnitors’ Assets.” Given that the evidence of Mr. Seely’s and Developer’s understandings is uncontroverted and they were the alleged transferees, that evidence is controlling. Mr. Seely’s understanding, supported by Developers’ understanding, conclusively shows under the “Ward rule” either that the only reasonable interpretation of the March 2004 Settlement Agreement was that the Subject Claims were not transferred to

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<sup>3</sup> At best for ESI, its challenge would raise an issue of fact as to the parties’ intentions that would need to be decided based upon the allegedly conflicting extrinsic evidence. *See Daines*, 2008 UT 51 at ¶ 24. The March 2004 Settlement Agreement still would need to be interpreted in accordance with the intent of the parties, once that intent was sorted out. *Id.*

Mr. Seely or that any alleged ambiguity as to the transfer of the Subject Claims must be resolved by an interpretation consistent with Mr. Seely's and Developers' understanding. *See Ward*, 907 P.2d at 268; *Daines*, 2008 UT 51 at ¶¶ 26-31.

ESI challenges only the credibility of the extrinsic evidence offered by MYI as to the understanding of MYI's principal that the Subject Claims had remained with MYI. ESI's challenge is not successful.

ESI challenges the credibility of the offered testimony of MYI's principal primarily on the basis of an April 12, 2004 letter from Dennis Farley, MYI's then-counsel of record in the case below, to ESI's counsel of record, by which Mr. Farley transmitted to ESI's counsel a March 30, 2004 letter from Robert Jensen, MYI's counsel in Developers' Separate Action, to Mr. Farley. (R. 3708-52.) In his letter, Mr. Jensen wrote to update Mr. Farley as to the "financial status" of MYI. (R. 3709.) Mr. Jensen wrote that:

The following Court pleadings clearly establish that [MYI] is currently controlled and essentially owned by [Developers]. . . . Pursuant to the attached documents, [Developers] essentially owns [MYI], its assets, all accounts receivables, etc.

(R. 3709.) ESI argues this letter would controvert testimony by MYI's principal that the Subject Claims had not been transferred to Mr. Seely under the March 2004 Settlement Agreement. However, the letter, on its face, would have no such effect.

First, Mr. Jensen manifestly was not writing about the March 2004 Settlement Agreement. This is shown by the fact that he did not include that agreement in the documents he referenced and attached to his letter. (R. 3709-52.) Mr. Jensen, instead, was writing about the interim asset freeze order and the execution order that Developers had

obtained in Developers' Separate Action. (R. 3709.) This is demonstrated by the only documents referred to in and attached to his letter, which were: (1) Developers' complaint initiating Developers' Separate Action; (2) the interim asset freeze order and its stipulated extension; and (3) the execution order. (R. 3709-52.) These were the only documents upon which Mr. Jensen based his assertion that Developers "controlled" and "essentially owned" all of MYI's accounts receivable. (R. 3709.) Under Developers' interim asset freeze order and execution order, Developers did control and "essentially" owned MYI's assets; MYI was prohibited from disposing of any of its assets and Developers was then poised to seize all of MYI's assets. However, Developers entered into the March 2004 Settlement Agreement, resolving the asset freeze, **in lieu of executing on any or all of MYI's assets**. As such, Mr. Jensen's assertion that Developers "essentially" owned all of MYI's accounts receivables was supplanted by the March 2004 Settlement Agreement (which Developers executed on April 5, 2005, subsequent to Mr. Jensen's letter (R. 3178)). Mr. Farley merely forwarded on Mr. Jensen's letter and its attachments, repeating Mr. Jensen's assertion, based upon the same orders and not the March 2004 Settlement Agreement. (R. 3708.) As such, Messrs. Jensen's and Farley's assertions had nothing to do with MYI's intentions under March 2004 Settlement Agreement.

Second, at issue is whether the March 2004 Settlement Agreement transferred the Subject Claims to **Mr. Seely**, as the validity of the Order of Dismissal turns on Mr. Seely's alleged ownership of the Subject Claims. Mr. Jensen's letter clearly took no position as to Mr. Seely's ownership of any asset of MYI, much less the Subject Claims. This further

demonstrates that Mr. Jensen was not addressing the March 2004 Settlement Agreement.

As such, Mr. Jensen's letter, and Mr. Farley's forwarding of the letter, is not "evidence" that would controvert testimony by MYI's principal that he understood that the March 2004 Settlement Agreement did not transfer the Subject Claims to Mr. Seely.

Otherwise, ESI bases its challenge to the credibility of such testimony by MYI's principal upon arguments, contentions and statements made by MYI's counsel in MYI's filings in the case below. MYI addresses each of these arguments, contentions and statements below, as ESI also argues they support its theory that MYI's entire post-April 2004 prosecution of the Subject Claims was a "continuing" violation of U.R.C.P. 11. MYI consistently took the position below, in response to ESI's focus upon the issue of the ownership of the Subject Claims in order to defend against those claims, that MYI continued to own the Subject Claims after April 2004. (R. 3186, 3192 at ¶ 32, 3195 at ¶ 52.) Of note, ESI points to no evidence showing that MYI's principal directed MYI's counsel to take the position that Mr. Seely owned the Subject Claims such as would contradict testimony by the principal that he did not understand that Mr. Seely took ownership of the Subject Claims under the March 2004 Settlement Agreement. What is left is the fact that MYI's continued prosecution of the Subject Claims after April 2004, as if it owned the claims, supports its interpretation of the March 2004 Settlement Agreement.

In sum, ESI neither challenges the credibility of Mr. Seely's and Developers' understanding that the Subject Claims were not transferred under the March 2004 Settlement Agreement, nor cites to any extrinsic evidence that supports its interpretation of that

agreement. As such, that agreement should be interpreted consistent with Mr. Seely's and Developers' understanding, as they were the intended transferees. ESI fails to raise an issue of fact as to the parties' intentions with its challenge to the credibility of the offered testimony of MYI's principal.

## **CONCLUSION**

ESI fails to demonstrate that the March 2004 Settlement Agreement should be interpreted to have transferred the Subject Claims from MYI to Mr. Seely. MYI's interpretation is the only reasonable interpretation. The language of that agreement and the understanding of the parties to that agreement dictate that there was no intent to transfer the Subject Claims to Developers and then to Mr. Seely. As such, the Order of Dismissal, which depended upon Mr. Seely being the owner of the Subject Claims, should be reversed and the action remanded with instructions as to the proper interpretation of the March 2004 Settlement Agreement regarding the transfer of the Subject Claims.

## **BRIEF OF CROSS-APPELLEE, RESPONDING TO BRIEF OF CROSS-APPELLANT**

### **ISSUE ON CROSS-APPEAL**

ESI cross-appeals the denial of its motion for sanctions against MYI and its counsel under U.R.C.P. 11 ("Rule 11"). ESI sought to have MYI and its counsel sanctioned under Rule 11 for continuing to prosecute the Subject Claims after April 2004. ESI's theory was that, with the March 2004 Settlement Agreement, MYI allegedly had "lost" the right to prosecute the Subject Claims because those claims allegedly had been transferred to Mr. Seely under that agreement. ESI sought, as Rule 11 sanctions, the dismissal of the Amended

Complaint, by which the Subject Claims had been asserted, and an award of all of its post-April 2004 attorneys' fees and costs incurred in the action below. The issues presented by ESI's cross-appeal are:

1. Could MYI and its counsel have violated Rule 11(b) by continuing to prosecute the Subject Claims after April 2004 when there was no *pendente lite* transfer of the Subject Claims and, even if there had been, when U.R.C.P. 25(c) ("Rule 25(c)") legally authorized the continued prosecution, as ruled by the district court? (R. 3993-4013, 4014-4100.)

2. Did ESI misuse Rule 11 to seek a final disposition of the Subject Claims in its favor based upon its claim that there had been a *pendente lite* transfer of the Subject claims when ESI's Rule 11 motion turned on the merits of that claim and ESI sought the dismissal of the Amended Complaint with prejudice as a sanction even though ESI did not claim the Amended Complaint had been filed in violation of Rule 11? (R. 3993-4013, 4014-4100.)

3. Even incorrectly assuming MYI and its counsel could have violated Rule 11(b) by continuing to prosecute the Subject Claims after April 2004, did they violate Rule 11(b) by doing so and asserting MYI's continued right to prosecute those claims when: (1) ESI first asserted its claim that there had been a *pendente lite* transfer of the Subject Claims in January 2007; (2) Mr. Seely and Developers, the alleged transferees, each understood there had not been a *pendente lite* transfer of the Subject Claims; and (3) there is no evidence that conclusively established there had been a *pendente lite* transfer of those claims? (R. 3993-4013, 4014-4100.)

"Decisions regarding Rule 11 sanctions are best left in the hands of the trial court."

*Archuleta v. Galetka*, 2008 UT 76, ¶ 7, 197 P.3d 650. Therefore, a trial court’s decision regarding Rule 11 sanctions is accorded “reasonable discretion.” *Id.* Review of a denial of a Rule 11 motion can involve two different standards of review. Findings of fact are reviewed under a clear error standard, while conclusions of law are reviewed for correctness.<sup>4</sup> *Id.* at ¶ 6. Whether a party seeks a Rule 11 motion on a basis provided for by the rule is a question of law. *See, e.g., Chase v. Shop ‘n Save Warehouse Foods, Inc.* 110 F.3d 424, 430 (7th Cir. 1997).

## STATEMENT OF THE CASE

### **I. Nature Of The Case, Course Of Proceedings, And Disposition In The Court Below**

MYI incorporates by reference herein section I of its “Statement of the Case” in its Brief of Appellant. To that discussion, MYI adds the following facts regarding the course of proceedings and disposition in the court below that pertain to ESI’s cross-appeal:

1. On July 11, 2008, ESI filed its Motion For Sanctions Against MYI And Its Counsel Of Record under Rule 11, seeking the sanction of dismissal with prejudice of the Amended Complaint and award of all its attorneys’ fees and costs incurred in the case below after April 2004 (the “Rule 11 Motion”). (R. 3297-98, 3300-20 (Tab J (7/11/08 Defendant ESI’s Memorandum in Support of Motion for Sanctions Against MYI And Its’ Counsel of Record))).) The Rule 11 Motion was ESI’s third motion for Rule 11 sanctions below and was

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<sup>4</sup> ESI mistakenly applies an “abuse of discretion” standard of review in section III of its Brief of Appellee. The “abuse of discretion” standard applies to a review of the “type and amount” of Rule 11 sanctions that are imposed. *See Archuleta*, 2008 UT 76 at ¶ 6. That standard is not applicable here because the district court did not impose any Rule 11 sanctions, having determined there was no Rule 11 violation.

based upon ESI's claim that MYI had transferred the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement. (R. 3300-20 (Tab J), 3994.) The Rule 11 Motion was ESI's first attempt to obtain a dismissal with prejudice of the Amended Complaint using the March 2004 Settlement Agreement (the second attempt was ESI's November 24, 2008 Motion to Dismiss with Prejudice). (R. 3297-98, 4107-09.)

2. MYI and its counsel opposed the Rule 11 Motion on August 7, 2008. (R. 3993-4012 (Tab L (8/7/08 Merrick Young Incorporated's And Its Counsel's Opposition To ESI's Motion for Sanctions Against MYI And Its Counsel Of Record)), R. 4014-4100, 4101.)

3. ESI submitted its Rule 11 Motion for decision on August 18, 2009 without filing a reply memorandum, stating that the issue of ownership of the Subject Claims already had been briefed thoroughly. (R. 4103-05 (Tab M (8/18/08 Request To Submit For Decision And Request For Hearing))). As such, ESI did not challenge MYI's assertions, in its opposition to the Rule 11 Motion: (a) of the theory of ESI's Rule 11 Motion and, in particular, that it hinged on ESI's claim that there had been a *pendente lite* transfer of the Subject Claims by which MYI allegedly had "lost" the right to prosecute those claims, (b) that ESI was not claiming any particular litigation statement was separately a Rule 11 violation, (c) that ESI was not claiming harm or prejudice with its Rule 11 Motion, but merely was complaining of having to defend against the Subject Claims, and (d) that ESI's Rule 11 Motion was improperly filed to obtain a disposition of the Subject Claims.

4. The district court denied the Rule 11 Motion by written ruling and order dated January 9, 2009, and entered on January 21, 2009 ("Order Denying ESI's Rule 11 Motion").



(R. 4160.) In the Order Denying ESI's Rule 11 Motion, the district court found and ruled as follows:

Having reviewed the voluminous material filed in support, and the considerable materials filed in opposition, the Court finds insufficient evidence of violation of Rule 11(b). The motion for sanctions is denied. The parties bear their own costs and fees for the motion.

(R. 4160.) On March 13, 2009, the district court entered an amended Order Denying ESI's Rule 11 Motion, which certified that order as a final order for appeal pursuant to U.R.C.P. 54(b). (R. 4191-92 (Tab O (3/13/09 Amended Order Denying ESI's Motion For Sanctions Against MYI And Its Counsel Of Record))).)

## **II. Statement Of Facts Relevant To The Cross-Appeal**

MYI incorporates by reference herein section II of its "Statement of the Case" in its Brief of Appellant. To that discussion, MYI adds the following facts that are relevant to ESI's cross-appeal:

1. The Subject Claims were asserted by MYI in the Amended Complaint, filed on June 7, 2001. (R. 13.) **ESI does not claim that the Amended Complaint was filed in violation of Rule 11.** To the contrary, ESI admitted below, and on appeal, that "ESI does not dispute that at the time of the initial filing of the Amended Complaint, MYI owned the alleged ESI account receivable." (R. 3305 (Tab J at 6)); *see also* ESI's Brief Appellee at 4, ¶ 3 ("There is no dispute that at the time of the filing of the Amended Complaint, MYI owned the alleged ESI account receivable.")

2. ESI's Rule 11 Motion was based upon its claim that, after April 2004, MYI no longer owned the Subject Claims under the March 2004 Settlement Agreement and, thus,

allegedly had “lost” the right to prosecute the Subject Claims. Based upon that claim, ESI contended that MYI’s entire post-April 2004 prosecution of the Subject Claims was without basis in fact or law and, thus, allegedly a “continuing” Rule 11 violation.

a. In its June 13, 2008 Rule 11(c)(1)(A) letter to MYI’s counsel announcing its intention to file the Rule 11 Motion, ESI’s counsel asserted that MYI had not presented “documentary or testimonial evidence” that MYI owned the Subject Claims. (R. 3344h (Tab K (6/13/08 letter at 10)).) ESI’s counsel asserted as fact that MYI did not own the Subject Claims as a result of the March 2004 Settlement Agreement such that MYI’s continued assertions that it was the proper plaintiff were not warranted by existing law and without any evidentiary support. (R. 3344h-i (Tab K at 10-11).) ESI requested that, to avoid having the Rule 11 Motion filed, “MYI dismiss its claims against ESI, the Wal-Mart Trust and American Insurance Company.” (R. 3344i (Tab K at 11).)

b. ESI argued with its Rule 11 Motion that:

Since March 25, 2004, [MYI] and its’ counsel of record have repeatedly violated the provisions of Rule 11 by continuing in the prosecution of the [Subject Claims] without a legal basis to do so.

(R. 3301 (Tab J at 2).)

c. ESI argued with its Rule 11 Motion that, in April 2004, MYI allegedly “lost the right to pursue” and “lost the right to continue to prosecute” the Subject Claims, because the Subject Claims allegedly were transferred to Mr. Seely under the March 2004 Settlement Agreement. (R. 3304, 3305 (Tab J at 5, 6).)

d. ESI argued as follows with its Rule 11 Motion:

Despite multiple opportunities for MYI and/or Seely to present documentary or testimonial evidence to the Court that the claims at issue are owned and/or otherwise controlled by MYI, such proof has not been made. **MYI's continued assertion that it is a proper plaintiff and/or that it owns the claims against ESI, the Trust and American Insurance are not warranted by existing law and the allegation/arguments that have been made in support of such claim(s) have absolutely no evidentiary or legal support.** Based on the foregoing, ESI can only conclude that MYI's prosecution of this claim after it assigned the alleged ESI account receivable asset to Developers in April 2004 was for the express purpose of harassing ESI and/or to cause unnecessary delay in the resolution of the matter or needless (and substantial) increase in the cost of litigation.

(R. 3318-19 (Tab J at 19-20 (underscored emphasis in original, bold emphasis added)).)

3. Before ESI filed its Rule 11 Motion, the district court ruled upon the propriety of MYI's post-April 2004 prosecution of the Subject Claims in response to ESI's February 16, 2007 Motion for Substitution under Rule 25(c). With that motion, ESI argued that there had been a transfer of interest to Mr. Seely under the March 2004 Settlement Agreement, but did not argue that MYI's continued role as the plaintiff was wrongful. (R. 1470, 1478-82.) Instead, ESI argued that Mr. Seely should be joined or substituted as a plaintiff for reasons of judicial economy. (R. 1478-82.) On May 21, 2007, the district court granted ESI's motion, ordering that Mr. Seely be joined as a plaintiff **in addition to MYI**. (R. 2906 (Tab N (5/21/07 Corrected Rulings on Pending Motions; Associated Orders) at 4).) The district court ruled as follows:

There is no advantage to leaving Mr. Seely out of the case, and it is far too late for any party to complain about delaying litigation. While **Rule 25(c) would**

**allow the case to proceed with only MYI as plaintiff**, such a course would virtually guarantee future litigation among MYI, ESI and Mr. Seely. There is also an issue as to whether Mr Seely may be liable to ESI on some of its counterclaims against MYI, **so it would not be prudent to substitute Mr. Seely in place of MYI**. In the circumstances as they currently appear, the only reasonable course is to join Mr. Seely as a plaintiff.

(R. 2906 (Tab N at 4 (emphasis added))).)

4. Before the Rule 11 Motion was filed, the district court also addressed the propriety of MYI's continued role as plaintiff in the action in response to Mr. Seely's September 28, 2007 Motion to Dismiss. In the April 16, 2008 Ruling on Seely's Motion to Dismiss, the district court ruled as follows:

The chose in action upon which MYI sued defendants in this case is one such asset, and Mr. Seely owns it. For these reasons, this Court has previously ruled that Mr. Seely as the assignee and real party in interest, should be joined as a plaintiff.

**This does not mean that Mr. Seely steps into MYI's shoes for all purposes.** ESI does not seek to subject Mr. Seely to its original counterclaims against MYI, but ESI does assert that it has claims against Mr. Seely which accrued after he acquired his rights to MYI's claims in 2004. Having acquired all of the assets of MYI and its principals during the pendency of this action by MYI, Mr. Seely could and should have anticipated that this would subject him to the jurisdiction of this Court for his acts and omissions as to the ownership of the chose of action in this case. Consequently, there is nothing wrong or unreasonable or unfair in requiring Mr. Seely to respond to ESI's claims, and this Court has jurisdiction sufficient to do so.

(R. 3283 (Tab B at 4 (emphasis added))).)

5. ESI's defense of the Subject Claims after January 2007 focused almost exclusively upon its claim that MYI allegedly had transferred the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement and, thus, allegedly had lost the right to prosecute the Subject Claims. Out of the approximately 26 pleadings, motions, memoranda

and objections on non-procedural issues filed below by ESI on or after January 19, 2007, when ESI made its Rule 17(a) objection, 15 involved the issue of the ownership of the Subject Claims. (R. 4015-17 at ¶ 2.) ESI asserted claims for relief in its August 11, 2007, Second Amended Counterclaim based upon its claim that MYI had transferred the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement and, thus, allegedly could no longer prosecute the claims. (R. 3014-32.)

### **SUMMARY OF ARGUMENT ON CROSS-APPEAL**

Whether ESI's Rule 11 Motion properly was denied presents only a question of law, such that the district court's finding that there was no evidence of a Rule 11 violation was sufficient to allow this Court to review it for correctness.

ESI moved for Rule 11 sanctions on the basis that MYI's entire post-April 2004 prosecution of the Subject Claims allegedly was without legal justification and a "continuing" Rule 11 violation. According to ESI, MYI allegedly had transferred the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement and thus allegedly had "lost" the right to prosecute the Subject Claims. In reality, however, MYI did not transfer the Subject Claims to Mr. Seely. MYI demonstrates this with its briefs on its appeal of the Order of Dismissal. Moreover, Rule 25(c) provided a legal justification for MYI's continued prosecution of the Subject Claims after April 2004, even if there had been a *pendente lite* transfer of the Subject Claims. Rule 25(c) expressly provides that, "[i]n case of any transfer of interest, the action **may be continued by or against the original party . . . .**" U.R.C.P. 25(c) (emphasis added).

ESI's Rule 11 Motion also was properly denied as a matter of law because it was made for the purpose of obtaining a final disposition of the Subject Claims in ESI's favor, rather than seeking a remedy for any alleged harm or prejudice. ESI's only alleged "harm" was having to defend against the concededly valid Subject Claims after April 2004, which, as a matter of law, is not prejudice. ESI's misuse of Rule 11 to achieve a result not authorized by that rule is demonstrated by the fact that ESI sought the dismissal of the Amended Complaint with prejudice as the sanction, even though the Amended Complaint concededly had not been filed in violation of Rule 11. Rule 11 does not permit the dismissal with prejudice of a complaint that was not filed in violation of Rule 11. ESI also improperly sought as the sanction all of its post-April 2004 attorneys' fees, as if it were the prevailing party. ESI's misuse of Rule 11 to seek a final disposition of the Subject Claims also is demonstrated by the fact that the Rule 11 Motion, under ESI's theory of that motion, turned upon the merits of its claim that there had been a *pendente lite* transfer of the Subject Claims. That claim was entirely irrelevant to the merits of the concededly valid Subject Claims, yet was the basis of ESI's attempt to have the Subject Claims dismissed with prejudice.

Lastly, even incorrectly assuming there had been a *pendente lite* transfer of the Subject Claims and ownership of the Subject Claims had mattered as to whether MYI's post-April 2004 prosecution of those claims was legally justified, MYI still would not have violated Rule 11 by continuing to prosecute the Subject Claims because there was a factual and legal basis for it to contest ESI's claim that there had been a *pendente lite* transfer. The language of the March 2004 Settlement Agreement, as well as Mr. Seely's, Developers' and MYI's

understandings that there had been no transfer of the Subject Claims under that agreement, manifestly provided ample legal and factual justification for MYI to contest ESI's claim and to continue as the plaintiff.

## **ARGUMENT ON CROSS-APPEAL**

### **I. The District Court Made Sufficient Findings**

ESI's challenge to the sufficiency of the district court's findings in the Order Denying ESI's Rule 11 Motion ignores that its Rule 11 Motion was properly denied as a matter of law.

The thrust of ESI's Rule 11 Motion was not any particular pleading or filing by MYI, but MYI's entire post-April 2004 prosecution of the Subject Claims, which ESI claimed was a "continuing" Rule 11 violation.<sup>5</sup> With its Rule 11 Motion, ESI claimed that MYI and its counsel of record "have repeatedly violated the provisions of Rule 11 by continuing in the prosecution of the above-entitled matter without a legal basis to do so." (R. 3301 (Tab J at 2).) The central claim underlying ESI's entire Rule 11 Motion was that MYI allegedly had transferred the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement such that MYI allegedly had "lost the right to continue the prosecution of the instant case." (R. 3304, 3305 (Tab J at 5, 6).) ESI pointed to particular contentions, statements and denials of MYI, all concededly going to the issue of ownership of the Subject Claims, merely to support its claim that MYI allegedly had "lost" the right to prosecute the Subject Claims under the March 2004 Settlement Agreement. ESI cited those particular actions merely as

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<sup>5</sup> ESI did not challenge MYI's assertion in opposition to the ESI's Rule 11 Motion below that ESI was claiming MYI's entire post-April 2004 prosecution of the Subject Claims was the alleged Rule 11 violation. (R. 4103-05 (Tab M).)

instances where MYI allegedly concealed, or revealed, that it allegedly had “lost” the right to prosecute the Subject Claims. (R. 3304-18 (Tab J at 5-19).) ESI contended that, as a result of allegedly having “lost” the right to prosecute the Subject Claims, MYI’s entire post-April 2004 prosecution of the Subject Claims allegedly was without basis in the law and a “continuing” violation of Rule 11(b)(2). (R. 3318-19 (Tab J at 19-20).) Based upon its claim that MYI allegedly had “lost” the right to prosecute the Subject Claims after April 2004, ESI also claimed it had to be assumed that MYI’s post-April 2004 prosecution of the Subject Claims was only to harass ESI and cause unnecessary delays in “continuing” violation of Rule 11(b)(1). (R. 3319 (Tab J at 20).)

ESI did not seek Rule 11 sanctions based upon any claim that any particular filing was false in violation of Rule 11(b)(3) or (4). This is demonstrated by the fact that ESI did not seek the retraction of any particular allegation, statement or denial with its Rule 11 Motion, but sought the dismissal of the Amended Complaint with prejudice and an award of all of its post-April 2004 attorneys’ fees. (R. 3319 (Tab J at 20).)

As such, ESI’s Rule 11 Motion only raised an issue of law – in particular, whether there was a legal or factual basis for MYI’s post-April 2004 prosecution of the Subject Claims, or a proper basis for the Rule 11 Motion itself. Thus, the district court was not required to make any findings beyond its finding that “the Court finds insufficient evidence of violation of Rule 11(b).” (R. 4192 (Tab O).)

Indeed, the extent of findings in the Order Denying ESI’s Rule 11 Motion was the equivalent of the conclusory findings regarding a denial of Rule 11 sanctions that this Court



recently reviewed in *Gillmor v. Family Link, LLC*, 2010 UT App 2, ¶ 20, 224 P.3d 741. In *Gillmor*, the trial court denied the defendants' Rule 11 motion claiming plaintiffs had filed a claim for relief for improper purposes in violation of Rule 11(b)(1). This Court described the trial court's findings as follows:

[T]he district court wrote that it could "see no evidence of a purpose to harass, delay, . . . impose unnecessary cost[,] . . . or needlessly increase the costs of litigation." Rather, the district stated that [plaintiff's] purpose was clear: "to obtain access that has not been obtained through previously advanced theories."

*Id.* Even though this Court's review in *Gillmor* involved a question of fact, these conclusory findings were sufficient. In the present case, the district court's conclusory finding that there was no evidence of a Rule 11 violation as a matter of law was sufficient.

## **II. ESI's Rule 11 Motion Failed As A Matter Of Law Because MYI Never "Lost" The Right To Prosecute The Subject Claims**

ESI's underlying claim that MYI allegedly "lost" the right to prosecute the Subject Claims under the March 2004 Settlement Agreement fails as a matter of law. Therefore, ESI's Rule 11 Motion was correctly denied.

### **A. MYI's Post-April 2004 Prosecution of the Subject Claims Was Legally Justified**

MYI never "lost" the right to prosecute the Subject Claims in the first instance because, contrary to ESI's claim underlying its Rule 11 Motion, MYI did not transfer the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement. MYI demonstrates with its briefing on its appeal of the Order of Dismissal that the Subject Claims were not included in the "Indemnitors' Assets" that were transferred to Developers and then

to Mr. Seely under the March 2004 Settlement Agreement. The entire predicate of MYI's Rule 11 Motion fails, so the motion fails as a matter of law.

Moreover, MYI never "lost" the right to prosecute the Subject Claims, even incorrectly assuming the Subject Claims had been transferred to Mr. Seely under the March 2004 Settlement Agreement.

Rule 25(c) allows a party, who was the real party in interest at the time an action was filed, to continue as the plaintiff even though there is a *pendente lite* transfer of the claims for relief. Rule 25(c) states:

In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

U.R.C.P. 25(c). Under Rule 25(c), a plaintiff who was the original real party in interest may seamlessly continue as the plaintiff after a *pendente lite* assignment of the subject claims for relief. *Id.* ("In the case of any transfer of interest, the action **may be continued by . . . the original party**" (emphasis added)). *See also Meagher v. Uintah Gas Co.*, 255 P.2d 989, 992 (Utah 1953) ("We think Meagher's transfer of interest during pendency of the action **does not deny him a continued role as plaintiff**, nor does that role do violence to former Title 104-3-19, U.C.A. 1943, or Rule 25(c), U.R.C.P., both of which allow prosecution of an action in the name of either grantor or grantee." (emphasis added)); Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d* § 1958, at 555 ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment

will be binding on successor in interest even though he is not named.”).

The purpose of Rule 25(c) is to allow for the original parties to continue a lawsuit to a determinative conclusion, despite any *pendente lite* transfer of interest, so as to avoid endless lawsuits. This purpose was noted by the Utah Supreme Court in *Briggs v. Hess*, 252 P.2d 538 (Utah 1953):

The answer to any contention that the court lost jurisdiction in the suit between Tree and Hess when the latter conveyed during the pendency of the action, well might be found in Rule 25(c), Utah Rules of Civil Procedure, designed to continue the litigation with the same litigants to a determinative conclusion. Were it otherwise, litigation might arrive at a stalemate by the simple device of a conveyance *pendente lite*, resulting in a series of endless lawsuits.

*Id.* at 539.

There is no dispute that MYI was the real party in interest when the Amended Complaint was filed. (R. 3305; Brief of Appellees and Cross-Appellant at 4, ¶ 3.) As such, MYI’s continued role as plaintiff after April 2004 was proper under Rule 25(c), even if there had been a *pendente lite* transfer of the Subject Claims. Given that MYI concededly was the original real party in interest, it simply did not matter, under Rule 25(c), who owned the Subject Claims as to whether MYI was legally authorized to continue as the plaintiff. MYI never “lost the right to continue the prosecution of the instant case.”

The district court ruled that MYI’s continued role as the plaintiff after April 2004 was proper under Rule 25(c). Upon ESI’s Rule 25(c) motion to join or substitute Mr. Seely as a plaintiff in this action, the district court ruled in May 2007 that “**Rule 25(c) would allow the case to proceed with only MYI as plaintiff.**” (R. 2906 (Tab N at 4 (emphasis added)).) Recognizing the propriety of MYI’s continued role as plaintiff, the district court then ordered

that Mr. Seely be joined as a plaintiff, **in addition to MYI**. (*Id.*) Even with its first ruling that Mr. Seely owned the Subject Claims, the district court continued to view MYI's role as the plaintiff to be proper. (R. 3283 (Tab B at 4 ("This does not mean that Mr. Seely steps into MYI's shoes for all purposes."))).)

ESI itself acknowledged that there was a basis for MYI's continued role as plaintiff after April 2004. ESI's February 2007 motion for substitution did not claim MYI's continued role as plaintiff was wrongful. Instead, the motion sought to have Mr. Seely either substituted or joined as a plaintiff. (R. 1470, 1478-82.) ESI continued to assert claims in the Second Amended Counterclaim against MYI alone. (R. 3014-22.) ESI also asserted claims seeking declaratory judgment that Mr. Seely owned the Subject Claims and MYI was not the real party in interest, which required MYI as the plaintiff. (R. 3022-26.)

ESI argues on appeal that, for Rule 25(c) to have provided a legal justification for MYI's post-April 2004 prosecution of the Subject Claims, Mr. Seely (or Developers) had to have authorized MYI to continue to prosecute the Subject Claims after April 2004. ESI offers no legal authority for this argument, which is contrary to the plain terms of Rule 25(c), as well as to legal authority interpreting the rule. As noted above, Rule 25(c) allows the original plaintiff to seamlessly continue as the plaintiff after a *pendente lite* transfer without any additional requirement. U.R.C.P. 25(c); Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d* § 1958, at 555 ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred."). Moreover, neither Mr. Seely nor Developers could have provided such authorization because neither understood

that they had become the owner of the Subject Claims.<sup>6</sup>

In sum, ESI's contention that MYI's entire post-April 2004 prosecution of the Subject Claims was without legal justification and, therefore, a "continuing" Rule 11(b)(2) violation fails as a matter of law. There was no transfer of the Subject Claims under the March 2004 Settlement Agreement. Moreover, even had there been, Rule 25(c) would have provided a clear and certain legal justification, as ruled by the district court, for MYI's continued prosecution of the Subject Claims.

**B. ESI's Claim that MYI's Entire Post-April 2004 Prosecution of the Subject Claims Was for Improper Purposes Fails as a Matter Of Law**

The fact that MYI never "lost" the right to prosecute the Subject Claims also demonstrates that ESI's claim that MYI's entire post-April 2004 prosecution of the Subject Claims was only to harass ESI and cause unnecessary delays fails as a matter of law. ESI did not offer any independent evidence, as required, supporting its claim that MYI prosecuted the Subject Claims after April 2004 only to harass ESI and to cause unnecessary delay.<sup>7</sup>

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<sup>6</sup> ESI's argument on appeal that MYI's assertion below in its January 2007 opposition to ESI's Rule 17(a) Objection that its prosecution of the Subject Claims was justified under Rule 25(c) "as the assignor of the claims" itself was a Rule 11 violation is bizarre. (ESI's Br. of Appellee at 36.) At the page of that opposition cited by ESI (R. 3845), MYI did not assert it was the "assignor" of the Subject Claims. In that opposition, MYI merely argued, while maintaining that no *pendente lite* assignment had taken place, that, if there had been a *pendente lite* assignment, its continued prosecution was justified under Rule 25(c). (R. 3842-45 ("Even assuming that the [March 2004] Settlement Agreement transferred this action from MYI to Developers and then to Seely . . .").) This clearly is a correct statement of the law. MYI agrees with ESI's assertion on appeal that there was no record of an assignment of the Subject Claims. However, ESI's assertion is contrary to its claim underlying its Rule 11 Motion that there was an assignment of the Subject Claims.

<sup>7</sup> As such, ESI's claim that MYI's entire post-April 2004 prosecution of the Subject  
(continued...)

Instead, ESI merely **assumed** that MYI's post-April 2004 prosecution of the Subject Claims was only to harass and unduly delay, based strictly upon its central claim that, under the March 2004 Settlement Agreement, MYI allegedly had "lost" the right to continue as the plaintiff. (R. 3318-19 (Tab J at 20 ("Based on the foregoing, **ESI can only conclude** that MYI's prosecution of this claim after it assigned the alleged ESI account receivable asset to Developers in April 2004 was for the express purpose of harassing ESI and/or to cause unnecessary delay."))).) Since MYI's post-April 2004 prosecution of the Subject Claims was legally authorized, both because there was no *pendente lite* transfer of the Subject Claims and by Rule 25(c) even if there had been such a transfer, there is no basis for ESI's assumption that MYI's entire post-April 2004 prosecution of the Subject Claims was only to harass and unduly delay.

**III. ESI's Rule 11 Motion Also Failed As A Matter Of Law Because It Was Not Filed To Remedy Any Alleged Harm Or Prejudice To ESI, But Was Filed For The Improper Purpose Of Obtaining A Final Disposition Of The Subject Claims**

Two additional rules also show the lack of merit of ESI's Rule 11 Motion as a matter of law. First, only misstatements or errors that cause harm or prejudice can result in sanctions. *Morse v. Packer*, 2000 UT 86, ¶28, 15 P.3d 1021 ("rule 11 does not call for the imposition of sanctions whenever there are factual errors; the misstatements must be significant and sanctions will not be imposed when they are not critical and the surrounding circumstances indicate that counsel did conduct a reasonable inquiry." (citing 5A Charles

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<sup>7</sup>(...continued)

Claims was a Rule 11(b)(1) violation can be decided as a matter of law, even though typically claims for Rule 11(b)(1) sanctions involve findings of fact that are reviewed for sufficiency of the evidence. See *Gillmor*, 2010 UT App 2 at ¶ 19.

Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1335, at 67 (1990)); *K.F.K. v. T.W.*, 2005 UT App 85, ¶ 4, 110 P.3d 162; *Utah State Bar v. Sorensen*, 910 P.2d 1227, 1228 (Utah 1996) (“The misnomer of plaintiff in the original complaint was a technical error which did not cause appellants any prejudice . . .”).

Second, Rule 11 sanctions are a purely collateral issue and do not address the merits of a party’s claim; the only issue is whether a claim, contention, allegation, defense or denial in a filing had sufficient legal or factual justification. *Barton v. Utah Transit Authority*, 872 P.2d 1036, 1040 (Utah 1994) (“[B]y their very nature, rule 11 sanctions are a collateral issue and do not address the merits of the party’s cause of action.”); *see also Morse*, 2000 UT 86 at ¶ 28 (“[T]he fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate.” (citation omitted)).

ESI did not file its Rule 11 Motion to remedy any alleged harm or prejudice to it.<sup>8</sup> ESI, with its Rule 11 Motion, only complained of having to defend against the concededly valid Subject Claims after April 2004.<sup>9</sup> This is confirmed by the fact that the only sanctions

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<sup>8</sup> ESI did not challenge MYI’s assertion in opposition to the ESI’s Rule 11 Motion below that ESI was not claiming any prejudice or harm. (R. 4103-05 (Tab M).)

<sup>9</sup> On appeal, ESI argues that, if it had known Mr. Seely owned the Subject Claims earlier, it could have gotten Mr. Seely to stipulate to the dismissal of the Subject Claims earlier than it did. This is merely a variation of its ineffective argument that it should not have had to defend against the Subject Claims. Moreover, ESI may not argue on appeal Mr. Seely’s eventual willingness to conditionally stipulate to the dismissal of the Subject Claims as grounds for Rule 11 sanctions because Mr. Seely had not stipulated to the dismissal of the Subject Claims as of the time ESI made its Rule 11 Motion. Also, Mr. Seely could not have stipulated to the dismissal of the Subject Claims before the April 10, 2008 Ruling on Seely’s Motion to Dismiss, as before that ruling he would have had no standing to make that stipulation. Lastly, the argument incorrectly assumes Mr. Seely owned the Subject Claims  
(continued...)

it sought were dismissal with prejudice of the Amended Complaint and all of its attorneys' fees incurred below after April 2004. It is axiomatic that having to defend against valid claims for relief is not harm or prejudice. *See, e.g., Sorensen*, 910 P.2d at 1228 (affirming a determination that no Rule 11 violation had occurred where a plaintiff had filed a complaint asserting a position on which there was no Utah case law at the time of filing, even though the Utah Supreme Court decided a case that precluded plaintiff's position during the pendency of the litigation.)

Instead of seeking Rule 11 sanctions in order to remedy any alleged harm or prejudice to it, ESI misused Rule 11 in order to obtain a final disposition of the Subject Claims in its favor based upon the purported merit of its claim that Mr. Seely and not MYI owned the Subject Claims after April 2004. This is demonstrated by the fact that ESI improperly sought, as Rule 11 sanctions, the dismissal of the Amended Complaint with prejudice, **even though it did not claim the Amended Complaint had been filed in violation of Rule 11** and even though ownership of the Subject Claims had no bearing on the merits of the Subject Claims. This also is demonstrated by the fact that ESI also improperly sought, as Rule 11 sanctions, all of its post-April 2004 attorneys' fees, as if it was the prevailing party.

Rule 11 does not allow for the "ultimate" sanction of dismissal of a pleading that was not filed in violation of Rule 11. U.R.C.P. 11(c)(2) ("A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or

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<sup>9</sup>(...continued)  
and is a matter of pure speculation, given Mr. Seely's position that he did not own the Subject Claims.



comparable conduct by others similarly situation.”); *see also Featherstone v. Schaerrer*, 2001 UT 86, ¶ 41, 34 P.3d 194, (stating, “under rule 11 the trial court is not *required* to assess *costs and fees*, but is *allowed* to award *sanctions* only to the extent necessary ‘to deter repetition of [the inappropriate] conduct.’ . . .”) (emphasis and modification in original.) This is a necessary corollary of the rule that Rule 11 sanctions are an entirely collateral issue that do not address the merits of a party’s claims for relief. *See Barton*, 872 P.2d at 1040. Final disposition of claims for relief under Rule 11 would be a violation of due process. *See Utah Dept. of Transp. v. Osguthorpe*, 892 P.2d 4, 7 (Utah 1995) (““The courts, in the interest of justice and fair play, favor, where possible, a full and complete *opportunity* for a hearing on the merits of every case.”” (quoting *Heathman v. Fabian & Clendenin*, 377 P.2d 189, 190 (Utah 1962) (emphasis in *Osguthorpe*))).

ESI’s misuse of Rule 11 to obtain a final disposition of the Subject Claims in its favor also is demonstrated by the fact that its Rule 11 Motion entirely turned on the merits of its claim that there had been a *pendente lite* transfer of the Subject Claims. ESI made the same claim as formal claims for relief in its Second Amended Counterclaim. (R. 3022-30.) A Rule 11 motion that turns on the merits of a claim necessarily is an improper Rule 11 motion because Rule 11 motions, by their nature, are collateral motions that do not concern the merits of any claim. *See Barton*, 872 P.2d at 1040; *Cooter & Gell v. Hartmarx, Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 2456 (1990).

ESI’s Rule 11 Motion manifestly was predicated upon ESI prevailing upon its claim that there had been a *pendente lite* transfer of the Subject Claims. ESI made the Rule 11

Motion upon its theory that MYI had “lost” the right to prosecute the Subject Claims under the March 2004 Settlement Agreement. ESI squarely admitted that its Rule 11 Motion turned on the merits of its claim that Mr. Seely, rather than MYI, owned the Subject Claims when ESI submitted its Rule 11 Motion for decision without filing a reply memorandum because, according to ESI, “claim ownership and Rule 25 issues were thoroughly briefed by the parties.” (R. 4104-05 (Tab M at 2-3).)

Below, ESI introduced into the case and vigorously pursued its claim that there had been a *pendente lite* transfer of the Subject Claims, even though ownership of those claims had no bearing on MYI’s right to prosecute, or the merits of, the claims. ESI then sought dismissal of the Subject Claims with prejudice as a Rule 11 sanction based upon that ownership claim. ESI did so on the alleged basis that MYI’s opposition to ESI’s ownership claim was without legal or factual justification, simply because, according to ESI, its ownership claim had merit. A significant portion of the attorneys fees that ESI sought as an additional sanction were incurred pursuing its ownership claim (based upon the number of its filings involving this issue), even though that claim had no relevance to the merits of, or MYI’s right to prosecute, the Subject Claims. (R. 4014-17 at ¶ 2.) ESI’s Rule 11 Motion was properly denied as a matter of law.

**IV. Even Incorrectly Assuming There Had Been A *Pendente Lite* Transfer Of The Subject Claims And Ownership Of The Subject Claims Mattered, ESI’s Rule 11 Motion Still Would Fail As A Matter Of Law Because There Was A Legal And Factual Justification For MYI To Contest ESI’s Claim That There Had Been A *Pendente Lite* Transfer**

A litigant and its counsel complies with Rule 11 if there is some factual and legal

justification for its litigation statements. *Sorensen*, 910 P.2d at 1228; *Morse*, 2000 UT 86 at ¶ 28 (“Rule 11 places an affirmative duty on attorneys and litigants to make a reasonable investigation (under the circumstances) of the facts and the law before signing and submitting any pleading, motion, or other paper.”); *Robinson v. Morrow*, 2004 UT App 285, ¶ 24 n.3, 99 P.3d 341 (observing that Rule 11(b) “sets a relatively low standard requiring some factual basis after a reasonable inquiry”)).

Under this rule, even if it is incorrectly assumed that there had been a *pendente lite* transfer of the Subject Claims to Mr. Seely and Rule 25(c) is ignored, ESI’s mere assertion, first made in January 2007, of its claim that there had been a *pendente lite* transfer of the Subject Claims would not have put MYI or its counsel in retroactive or on-going violation of Rule 11 by continuing to prosecute the Subject Claims. ESI’s claim was the subject of dispute and subsequent decision by the district court. Rule 11 did not require MYI to simply concede the alleged merits of ESI’s claim if there was a legal and factual basis for MYI to contest the claim. There clearly was such a legal and factual justification for MYI to contest that claim.

Mr. Seely’s understanding (R. 3217a (Tab E at ¶ 5) and Developers’ understanding (R. 1431-32) that the Subject Claims had not been transferred under the March 2004 Settlement Agreement alone provided a sufficient legal and factual justification for MYI to contest ESI’s claim that there had been a *pendente lite* transfer of the Subject Claims. Those parties were the alleged transferees, so their intentions are controlling as a matter of law. *See WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139. Mr. Seely

was the alleged final transferee with an interest in establishing as large a transfer as possible.<sup>10</sup>

In addition, the language of the March 2004 Settlement Agreement provided a sufficient legal and factual justification for MYI to contest ESI's claim of a *pendente lite* transfer. *See Ward*, 907 P.2d at 268; *Daines*, 2008 UT 51 at ¶¶ 26-31. The March 2004 Settlement Agreement did not expressly provide for the transfer of the Subject Claims. ESI does not even attempt to argue, much less show, on appeal that MYI's arguments in support of its appeal of the Order of Dismissal have no legal or factual justification so as to constitute a further Rule 11 violation. This completely undercuts ESI's claim that there was no legal or factual justification for MYI to contest ESI's claim of a *pendente lite* transfer of the Subject Claims.

ESI argues that MYI cannot rely upon Mr. Seely's September 26, 2007 declaration, wherein Mr. Seely testified he did not understand he had received the Subject Claims, because that declaration came after MYI first contested ESI's claim that MYI had transferred the Subject Claims. However, ESI confuses the distinction between evidence and the record. MYI relied upon the evidence of Mr. Seely's **understanding** that the Subject Claims were

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<sup>10</sup> ESI argues that Mr. Seely's understanding that the Subject Claims were not transferred to him is insufficient legal or factual justification under Rule 11 because, if true, the Subject Claims allegedly still would have been transferred to Developers. This ignores Developers' understanding that it did not receive the Subject Claims. (R. 1431-32.) Moreover, if Mr. Seely did not own the Subject Claims under the March 2004 Settlement Agreement, then neither did Developers. Under paragraphs 2(b) and 2(d) of the March 2004 Settlement Agreement, the only assets of MYI that were transferred were the "Indemnitors' Assets" and the only "Indemnitors' Assets" that were not transferred to Mr. Seely (and stayed with Developers) was the Black Ridge Drive Project and MYI's Black Ridge Drive Project Litigation. (R. 1676-77 (Tab A at 5-6, ¶¶ 2(b), 2(d)).)

not transferred to him under the March 2004 Settlement Agreement. Mr. Seely's declaration was merely a record of that evidence; the declaration established the separate fact that Mr. Seely had such an understanding. The date that evidence became part of the record does not alter the independent existence of Mr. Seely's understanding. Mr. Seely's understanding is what provided sufficient factual justification under Rule 11 for MYI to contest ESI's claim that there had been a *pendente lite* transfer of the Subject Claims. Rule 11(b)(3) requires evidentiary support, which means evidence of existing facts, regardless of when the evidentiary record is created.<sup>11</sup>

Moreover, ESI offered no evidence showing there was a Rule 11 violation. A violation of Rule 11(b)(3) or (4) is shown where there is evidence, independent of the allegedly false litigation position, that conclusively demonstrates that a factual allegation, statement or denial was false when made, and there also is evidence establishing that the litigant or counsel knew or reasonably should have known, at the time the litigation position was made, of the evidence that conclusively controverts the statement, allegation, or denial. *Morse*, 2000 UT 86 at ¶¶ 22, 29. In *Morse*, the Utah Supreme Court held that an attorney who had signed a verified complaint had violated Rule 11 by alleging in the complaint that the plaintiff had not been removed as an officer of a California corporation because of dishonesty. The court found the allegation was a Rule 11 violation on the basis that (1) an SEC filing by the corporation conclusively established that the plaintiff, in fact, had been

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<sup>11</sup> According to ESI's argument, parties could not rely upon testimony, gathered after their pleadings were filed, that proved facts existing at the time the pleadings were filed in order to factually justify the pleadings under Rule 11.

removed as a corporate officer because of dishonesty and (2) a previous filing by the attorney in another case conclusively established that the attorney had knowledge of that SEC filing. *Id.* Whether a party or counsel violates Rule 11(b) is a question of law. *Id.* at ¶ 26.

ESI fails to show that the Order Denying ESI's Rule 11 Motion was error, even incorrectly assuming there had been a *pendente lite* transfer of the Subject Claims and Rule 259(c) is ignored, because ESI cites no evidence (and offered no evidence below), as necessary to show a Rule 11(b)(3) or (4) violation under *Morse*. ESI cites no evidence that (1) conclusively established, independent from the allegedly false litigation statements or positions, that MYI, in fact, had transferred the Subject Claims to Mr. Seely under the March 2004 Settlement Agreement, or (2) that conclusively established that MYI or its counsel knew or reasonably should have known, in April 2004 or thereafter, of such independent evidence:

- ESI relied upon the March 2004 Settlement Agreement. This is the only evidence independent from any alleged false litigation position or statement upon which ESI relies. However, the March 2004 Settlement Agreement itself in no manner conclusively established that there had been a *pendente lite* transfer of the Subject Claims.

- ESI also relied upon Mr. Farley's April 12, 2004 letter ESI's counsel, to which Mr. Farley attached Mr. Jensen's March 30, 2004 letter with its attachments, which stated that Developers "essentially owns [MYI], its assets, all accounts receivable, etc." (R. 3709-52.) However, as shown in the Reply portion of this Brief, these letters did not address the March 2004 Settlement Agreement or Mr. Seely's ownership of any asset of MYI, much less

the Subject Claims. As such, they do not show either that MYI, in fact, had transferred the Subject Claims to Mr. Seely or MYI's counsel's actual or constructive knowledge of such an alleged transfer.

- ESI relied upon MYI's argument in its January 16, 2007 Plaintiff's Reply Memorandum to Defendants' Opposition to Motion, filed in support of MYI's Motion for Protective Order and to Quash, that it had the right to prosecute the Subject Claims under U.C.A. § 48-2c-1302(6), which authorizes a dissolved corporation to wind up its affairs by suing to collect on accounts receivable. (R. 3702.) This is argument, not independent evidence regarding the alleged *pendente lite* transfer of interest. Moreover, the argument did not even address ESI's claim that there had been a *pendente lite* transfer of interest; it addressed the fact that MYI had allowed its corporate registration to lapse. (R. 3660, 3190 at ¶ 22.) The contention was warranted by existing law, as U.C.A. § 48-2c-1302(6) clearly allows a dissolved corporation to be a plaintiff in an action to collect on an account receivable. The argument became moot when MYI was reinstated. The contention was consistent with MYI's position that there had not been a *pendente lite* transfer of interest.

- ESI relied upon the statement in MYI's January 26, 2007 Memorandum In Opposition To Defendants' Rule 17(a) Objection that MYI had assigned all of its interests in the Black Ridge Drive Project and the Black Ridge Drive Project litigation "as well as all interest, rights, and title to MYI's assets." (R. 1312.) ESI ignores that, in the next paragraph in that brief, **MYI stated that the Subject Claims were not included in the assets that had been transferred to Mr. Seely.** (R. 1312 at ¶ 6.) MYI stated in that brief:

In exchange for \$150,000 . . . , Developers assigned and transferred to Seely all interests, rights and title that Developers had acquired from MYI to **certain projects and litigation matters (not including the MYI v ESI and Wal-Mart litigation)** and assigned, transferred and sent over to Seely all of MYI's assets with the exception of certain litigation matters (**not including the case at bar**).

(R. 1316 at ¶ 6.) The factual justification for that statement is discussed above.

- ESI relied upon the deposition testimony of Merrick Young and his father, Alan Young. Alan testified that MYI generally had no assets when it was reinstated. (R. 3661.) Merrick testified that MYI generally had transferred accounts receivable to Mr. Seely. (R. 3278.) ESI gives the testimony too much significance. Neither witness was asked whether MYI owned the Subject Claims or had transferred the Subject Claims under the March 2004 Settlement Agreement. (R. 3661, 3278.) Neither witness was asked whether he was considering that the Subject Claims were assets of MYI so as to be considered within the question being asked. (*Id.*) Merrick's testimony was qualified as he testified that accounts receivable had been transferred to Mr. Seely "in some form." There was no evidence establishing a foundation for Alan to testify as to an understanding of the March 2004 Settlement Agreement. There was no foundation for either witness to testify as to the legal effect of that agreement.

- ESI relied upon MYI's statement in its March 12, 2007 Plaintiff's Memorandum In Opposition To Motion For Substitution that Mr. Seely generally had purchased assets of MYI from Developers and generally was the owner of assets of MYI. (R. 3850.) ESI ignores that MYI already was on record as asserting that only certain of MYI's assets had been transferred to Mr. Seely, which did not include the Subject Claims.



(R. 1312.) Moreover, MYI's argument in its opposition to ESI's motion for substitution was stated in the alternative; MYI argued it remained the valid plaintiff regardless of whether there had been *pendente lite* transfer of the Subject Claims. This is made clear by the fact that MYI asserted in that opposition that "Defendants now assert that Mr. Seely is the owner of MYI's interest in this litigation" without conceding the truth of that assertion. (R. 3850.) Rule 25(c) provided the legal justification for that argument.

- ESI relied upon MYI's response in its Reply to the Second Amended Counterclaim to argue that MYI was being "ambiguous" as to ownership of the Subject Claims. That Reply did not independently evidence either that there had been a *pendente lite* transfer of the Subject Claims or MYI's counsel actual or constructive knowledge of such an alleged transfer. **MYI unambiguously denied ESI's allegations that MYI had transferred the Subject Claims to Mr. Seely.** (R. 3192 at ¶ 32, 3195 at ¶ 52.) This denial was supported by evidence (specifically, Mr. Seely's and MYI's understandings and the March 2004 Settlement Agreement itself).<sup>12</sup>

ESI fails to point to any evidence, independent from the alleged Rule 11 violation, that conclusively established that MYI, in fact, had transferred the Subject Claims. As such, ESI

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<sup>12</sup> ESI also pointed to MYI's responses in that Reply to ESI's allegations regarding the legal effect of Developer's execution order and the March 2004 Settlement Agreement. However, MYI properly admitted that those documents existed, and alleged that those documents spoke for themselves. (R. 3189-90 at ¶¶ 21, 24-25, 3195 at ¶ 51.) ESI also relied upon MYI's denials of ESI's allegations that there was a need to resolve the issue of who owned the Subject Claims. (R. 3196 at ¶¶ 56-57.) This was not a denial of a factual contention and so did not come within the purview of Rule 11(b)(4). Moreover, those denials had a legal justification under Rule 25(c), which made post-April 2004 ownership of the Subject Claims of no relevance to the resolution of those claims.

necessarily fails to establish the actual or constructive knowledge of MYI's counsel of such evidence needed for ESI to show that the Order Denying ESI's Rule 11 Motion was error. ESI contended with its Rule 11 Motion that MYI had violated Rule 11 by not coming forth with evidence showing it continued to own the Subject Claims. (R. 3318-19 (Tab J at 19-20 ("Despite multiple opportunities for MYI and/or Seely to present documentary or testimonial evidence to the Court that the claims at issue are owned and/or otherwise controlled by MYI, such proof has not been made." (emphasis in original))).) However, it was ESI who was claiming there had been a *pendente lite* transfer of the Subject Claims and so it was ESI who had the burden of proving that claim. That mere claim by ESI, which was not decided by the district court against MYI until the January 21, 2009 Ruling of Dismissal as to the Subject Claims, is not evidence that could have established that MYI's entire post-April 2004 prosecution of the Subject Claims was a "continuing" Rule 11 violation. *See Morse*, 2000 UT 86 at ¶28 ("[T]he fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate." (citation omitted)).

With its Rule 11 Motion, ESI merely contended that the particular arguments, statements and denials upon which it relied allegedly showed that MYI's entire post-April 2004 prosecution of the Subject Claims was a "continuing" Rule 11 violation.<sup>13</sup> (R. 3301, 3318-19 (Tab J at 2, 19-20).) However, on appeal, ESI now apparently claims that each or

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<sup>13</sup> ESI did not challenge MYI's assertion in opposition to the ESI's Rule 11 Motion below that ESI was not claiming any particular filing was a Rule 11 violation. (R. 4103-05 (Tab M).)

any of those particular arguments, statements or denials separately were Rule 11 violations. ESI cannot challenge the denial of its Rule 11 Motion on the basis of an issue not raised by that motion, especially when this Court's review of issues raised for the first time on appeal is limited to circumstances that are not present here. *See Timm v. Dewsnup*, 2003 UT 47, ¶ 39, 86 P.3d 699 (“[W]e will review issues raised for the first time on appeal only if exceptional circumstances or ‘plain error’ exists.” (citation omitted)). Moreover, that claim is inconsistent with ESI's position that the various statements and arguments it relies upon allegedly proved that MYI allegedly had “lost” the right to prosecute the Subject Claims. As shown by *Morse*, such “proof” must exist independently from the alleged Rule 11 violation. *Morse*, 2000 UT 86 at ¶¶ 22, 29. Also, that claim would fail as a matter of law as demonstrated above in the discussion as to each particular action and by the fact that ESI inconsistently relies upon both instances where MYI allegedly revealed there had been a *pendente lite* transfer of interest and instances where MYI allegedly concealed there had been such a transfer. There was no harm to ESI, especially considering the first instance was an alleged revelation, Mr. Farley's April 12, 2004 letter, which ESI received over two and a half years before ESI first claimed there had been a *pendente lite* transfer and over four years before ESI's Rule 11 Motion.<sup>14</sup>

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<sup>14</sup> To the extent ESI now claims Mr. Farley's April 12, 2004 letter, by which he forwarded Mr. Jensen's March 30 letter and its attachments to ESI's counsel, was a Rule 11 violation, the claim fails. By the time Mr. Farley forwarded on Mr. Jensen's letter on April 12, 2004, the March 2004 Settlement Agreement had been executed by Developers. However, there is no evidence that Mr. Farley knew this or should have known of either the March 2004 Settlement Agreement, or that Developers had executed that agreement, when he forwarded Mr. Jensen's letter. In any event, Mr. Farley's letter was not a court filing  
(continued...)

Without citing any independent evidence, ESI also merely assumes on appeal that each of the particular arguments, statements and denials upon which it bases its “continuing” Rule 11 claim were only to harass ESI and to cause unnecessary delay because there allegedly was no legal or factual justification for MYI to contest ESI’s claim that there had been a *pendente lite* transfer of the Subject Claims. Given that there was a sufficient factual and legal justification for MYI’s arguments, statements and denials, ESI’s mere argument that these filings were for improper purposes in violation of Rule 11(b)(1) falls away as a matter of law.

Lastly, a major theme of ESI’s Rule 11 Motion, and ESI’s appeal, is that MYI allegedly concealed from ESI that there allegedly had been a *pendente lite* transfer of the Subject Claims. For instance, ESI argues that MYI allegedly was not forthcoming in producing the March 2004 Settlement Agreement and that MYI tried to block ESI from deposing Mr. Seely. These arguments are misguided and inappropriate. They concern discovery/disclosure issues that do not fall within the purview of Rule 11. Rule 11 concerns false statements, allegations or denials, or contentions and allegations without any basis in the law, and not disclosure issues. U.R.C.P. 11(b). U.R.C.P. 37, not at issue here, concerns failures to make disclosures. Moreover, ESI’s arguments that it can be **assumed** from these alleged concealments that MYI did not own the Subject Claims and was acting to harass and

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<sup>14</sup>(...continued)

within Rule 11’s purview. ESI argues the letter fell under Rule 11 when it was attached to MYI’s memoranda filed in opposition to ESI’s motions to compel Mr. Seely’s deposition, ESI’s Rule 17 objection and ESI’s Rule 25(c) motion. However, the letter was attached to demonstrate the ESI’s receipt of the letter over two years earlier, such that ESI was on notice of the alleged ownership issue. This was not a false statement.


cause undue delay is without basis. All of MYI's litigation responses to ESI's vigorous prosecution of its irrelevant claim that there had been a *pendente lite* transfer of the Subject Claims can all be explained on the basis that (1) MYI did not understand that it had transferred the Subject Claims to Mr. Seely, (2) ownership of the Subject Claims was immaterial to whether MYI could continue to prosecute the Subject Claims, and (3) Merrick Young did not want his father-in-law, Mr. Seely, dragged into the lawsuit after Mr. Seely already had assisted MYI with its debts. In addition, ESI's arguments fail to address why it waited until January 2007, over two and a half years after it received Mr. Farley's April 12, 2004 letter, before it so actively litigated the alleged ownership issue, if it thought that issue was dispositive.

### CONCLUSION

For the foregoing reasons, ESI fails to demonstrate that the Order Denying ESI's Rule 11 Motion was incorrectly decided. As such, that order should be affirmed.

DATED: April 22, 2010.

SAVAGE, YEATES & WALDRON, P.C.

A handwritten signature in black ink, appearing to read "E. Scott Savage", is written over a horizontal line.

E. Scott Savage  
Stephen R. Waldron  
Kyle C. Thompson

Attorneys for Appellant/Cross-Appellee  
Merrick Young Incorporated

**CERTIFICATE OF MAILING**

Pursuant to Utah Rule of Appellate Procedure 26(b), I hereby certify that on this 22 day of April, 2010, I caused two true and correct copies of the within and foregoing to be mailed, postage prepaid, to the following:

Clark B. Fetzer  
Rinehart Fetzer Simonsen & Booth, P.C.  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, Utah 84101

Kim Trout  
Trout Jones Gledhill Fuhrman, P.A.  
P.O. Box 1097  
Boise, Idaho 83701

A handwritten signature in black ink, appearing to read "Clark B. Fetzer", is written over a horizontal line.

# **ADDENDUM**

## INDEX OF EXHIBITS

Tab J	7/11/08 Defendant ESI's Memorandum in Support of Motion for Sanctions Against MYI And Its' Counsel of Record
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Tab O	3/13/09 Amended Order Denying ESI's Motion For Sanctions Against MYI And Its Counsel Of Record



Tab A

2008 JUL 11 PM 2:49

WASHINGTON COUNTY

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*Attorneys for Defendants*

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**IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

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MERRICK YOUNG INCORPORATED, a  
Utah corporation; and CLYDE G. SEELY, an  
individual,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

**DEFENDANT ESI'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR SANCTIONS  
AGAINST MYI AND  
ITS' COUNSEL OF RECORD**

Civil No. 010500909

Judge G. Rand Beacham

Engineered Structures, Inc., (“ESI”), by and through its counsel of record, hereby submit this Memorandum in Support of its Motion for Sanctions, filed concurrently herewith.

### **INTRODUCTION**

Since March 25, 2004, Merrick Young Incorporated (hereinafter “MYI”) and its’ counsel of record have repeatedly violated the provisions of Rule 11 by continuing in the prosecution of the above-entitled matter without a legal basis to do so. MYI has continued with such prosecution by (1) concealing/confusing the issue regarding ownership of the claim(s) at issue; (2) representing it is the real party in interest without a basis in law or fact; (3) improperly representing that it is authorized by Utah Code Ann. § 48-2c-1302(6) to wind up its affairs and sue to protect its assets; and (4) improperly representing that it is authorized under Rule 25(c) of the Utah Rules of Civil Procedure to continue to prosecute the claim as the assignor of the claim(s) which have been alleged against ESI, Wal-Mart Real Estate Business Trust (hereinafter referred to as “the Trust”) and The American Insurance Company (hereinafter referred to as “American Insurance”) in the above-entitled litigation. The conduct of MYI and its’ counsel of record is not only unreasonable under the circumstances but has caused unnecessary delay and a needless (and substantial) increase in the cost of the above-entitled litigation thereby warranting an award of sanctions pursuant to Rule 11 of the Utah Rules of Civil Procedure.

### **RULE 11**

Rule 11 of the Utah Rules of Civil Procedure provides, in pertinent part:

**Signing of pleadings, motions, and other papers; representations to court; sanctions. . . . (b) Representations to court.** By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting or later

advocating), an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (b)(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; (b)(2) the claims . . . and other legal contentions therein are warranted by existing law . . . ; (b)(3) the allegations and 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; . . . **(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

U.R.C.P. 11. The text of Rule 11 is quite explicit that the district court may sanction the attorneys, law firms, *or* parties which have violated Rule 11 and/or are responsible for the violation. And, while Utah courts do not appear to have specifically addressed that portion of the rule providing for joint responsibility on the part of the law firm and/or its partners, members and/or employees, the Federal Advisory Committee Note on this topic is helpful<sup>1</sup>:

[t]he Advisory Committee Note to the 1993 amendment specifically states that this provision [regarding the sanctioning of attorneys, law firms, or parties] is 'designed to remove the restrictions of the former rule,' which had been interpreted in *Pavelic [& LeFlore v. Marvel Entertainment Group]*, 1989, 110 S. Ct. 456, 493 U.S. 120] to prohibit the district court from sanctioning a law firm when an attorney from the firm signed the paper. The Advisory Committee Note to the 1993 amendment of Rule 11 further explains that

[t]he sanction should be imposed on the persons – whether attorneys, law firms, or parties – who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional

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<sup>1</sup> The 1997 amendment to Rule 11 of the Utah Rule of Civil Procedure conformed state Rule 11 with federal Rule 11; therefore, where the Utah court has not examined a particular subpart of rule 11, guidance from authorities examining federal rule 11 may be sought. *Morse v. Packer*, 2000 UT 86, ¶ 27, 15 P.3d 1021. And, while Utah courts are not bound by these authorities, "they are helpful to [the] understanding of the rule." *Id.*

circumstances, a law firm is to be held also responsible when \* \* \* one of its partners, associates, or employees is determined to have violated the rule. \* \* \* [I]t is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency.

5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1333, pp. 523-524 (3d ed. 2004). Whether specific conduct amounts to a violation of Rule 11 is a question of law. *Bailey-Allen Co., Inc. v. Kurzet*, 1997, 945 P.2d 180, 193. The trial court has great leeway to tailor the sanction to fit the requirements of the particular case. *Id.* at 195. *Barton, supra* at 1040, n. 6.

Imposition of Rule 11 sanctions does not necessarily indicate that a complaint was filed without basis, but only that “the attorney has abused the judicial process.” *Barton v. Utah Transit Authority*, 1994, 872 P.2d 1036, 1040 (citing *Cooter v. Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, 2456 (1990)). Indeed, by their very nature, Rule 11 sanctions are a collateral issue and do not address the merits of the party’s cause of action. *Barton, supra*, (citing *Cooter* at 395, 110 S. Ct. at 2455). The *Barton* Court further noted:

It is proper for a trial court to enforce rule 11 sanctions after a plaintiff has voluntarily dismissed an action under rule 41(a). *Cooter*, 496 U.S. at 395, 110 S. Ct. at 2455. If a trial court could not do so, rule 11 sanctions would lose their bite. A sanctioned plaintiff could always voluntarily dismiss to avoid sanctions and then later refile a complaint with a clean slate. However, the violation of rule 11 is complete when the party files the pleading, motion or other paper with the court, and a subsequent voluntary dismissal does not eradicate the rule 11 violation. *Id.* Indeed, rule 11 affirmatively states that the trial court “shall impose” sanctions on a violator. Thus, once a trial court finds a violation, it must (1) impose sanctions and (2) be able to retain jurisdiction to enforce those sanctions.

*Barton, supra.*

## **ARGUMENT AND RELEVANT BACKGROUND FACTS**

Since April, 2004, MYI and its' counsel of record have violated the provisions of Rule 11 by filing papers and pleadings unsupported by fact and unwarranted in law. MYI, and its' counsels' conduct, is in clear violation of Rule 11 and has caused unnecessary delay and enormous increase in the cost of litigation of the above-entitled matter. By way of appropriate sanction, the claims against ESI, the Trust and American Insurance should be dismissed. Moreover, ESI should be awarded attorney's fees incurred since April, 2004 when MYI assigned all of its assets to Developers and lost the right to pursue the above-entitled litigation. A summary of relevant background facts, and the arguments supporting this appropriate sanction, follow.

On or about June 22, 2000, Wal-Mart Stores, Inc. and ESI entered into a Construction Agreement between Owner and Contractor under which ESI would act as the general contractor for the construction of a Wal-Mart Super Store located at 625 West Telegraph Street in Washington City, Utah (the "Wal-Mart Project") on land owned by the Trust.<sup>2</sup> On August 18, 2000, ESI entered into a Subcontract Agreement, #00023-02200-SUB (the "ESI/MYI Subcontract") with MYI under which MYI promised to provide certain construction materials and excavation services in accordance with the plans and specifications for the Wal-Mart Project.<sup>3</sup>

On December 4, 2000, less than four (4) months after entering into the ESI/MYI

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<sup>2</sup> See Second Am. Countercl., ¶ 8; *see also* Merrick Young Inc.'s Reply to Second Am. Countercl., ¶ 8.

<sup>3</sup> See Second Am. Countercl., ¶ 9; *see also* Merrick Young Inc.'s Reply to Second Am. Countercl., ¶ 9.

Subcontract Agreement, MYI entered into certain bonding arrangements (hereinafter “the Bonds”) with Developers Surety and Indemnity Company (hereinafter “Developers”).<sup>4</sup> As part of the consideration for issuing the Bonds, Merrick Young (hereinafter individually referred to as “Merrick”), his wife Stephanie Young (hereinafter individually referred to as “Stephanie”) and MYI (Merrick, Stephanie and MYI will hereinafter be collectively referred to as “the Indemnitors”) executed an Indemnity Agreement which, among other things, granted Developers a security interest in MYI’s assets, including:

any and all sums due or to become due on all other contracts, covenants and agreements whether bonded or unbonded, in which the Principal [MYI] or Indemnitor [Merrick and Stephanie, individually] has any interest, together with any notes, accounts receivable or chose in action related thereto.<sup>5</sup>

On or about June 5, 2001, MYI filed an Amended Complaint in the instant case alleging four (4) causes of action against Defendants Trust, American Insurance and ESI.<sup>6</sup> Each claim was based upon monies allegedly due and owing pursuant to the ESI/MYI Subcontract (hereinafter referred to as “the alleged ESI account receivable”). ESI does not dispute that at the time of the initial filing of the Amended Complaint, MYI owned the alleged ESI account receivable; however, MYI would soon lose all of its’ assets to Developers - including the alleged ESI account receivable and the right to continue to prosecute the above-entitled action.

In or about November, 2002, after receiving numerous claims against the Bonds from

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<sup>4</sup> See Second Am. Countercl., ¶ 17; *see also* Merrick Young Inc.’s Reply to Second Am. Countercl., ¶ 17; *see also* Affidavit of Kim J. Trout, filed concurrently herewith, Ex. A, Rule 11 Notice Letter (hereinafter “Trout Aff., Ex. A”), Attach. 1.

<sup>5</sup> *See* Trout Aff., Ex. A, Attach. 1 (Indemnity Agreement).

<sup>6</sup> Count One alleged Breach of Contract against ESI. Count Two alleged Mechanic’s Lien and Foreclosure against the Trust. Count Three alleged a claim against American Insurance and ESI on ESI’s payment bond. Count Four alleged Unjust Enrichment against both the Trust and ESI. *See* Am. Compl.

suppliers and subcontractors of MYI, Developers sued MYI, Merrick, and Stephanie in the Fifth District Court, Washington County, State of Utah, Civil Case No. 02-0502319 (hereinafter "Developers Litigation"). On or about March 18, 2003, an Order for Prejudgment Writ of Attachment/Garnishment; Preliminary Injunction Freezing Assets; and Findings of Fact and Conclusions of Law was entered which, *inter alia*, allowed Developers to execute, attach and garnish on the accounts receivable, assets, interests, money, stocks, memberships, bonds, real property and personal property in which the Indemnitors had an interest.<sup>7</sup>

Shortly thereafter, MYI was involuntarily administratively dissolved. This action was consistent with the dictates of the March 18, 2003 Order which restrained, enjoined and prevented MYI from selling, transferring, disposing, distributing, pledging, or encumbering any asset or real or personal property pending further order of the Court.<sup>8</sup>

In the fall of 2003, Developers began negotiating an assignment, release and sale of the Indemnitors' assets with MYI, Merrick, Stephanie, and Clyde G. Seely.<sup>9</sup> On March 25, 2004, the Indemnitors and Seely signed a document titled Settlement Agreement, Mutual Release, and Assignment whereby the Indemnitors assigned "any and all interests, rights and title to Indemnitors' assets" to Developers and Developers sold certain assets to Seely in exchange for \$150,000. The assets sold to Seely included the alleged ESI account receivable.<sup>10</sup> Developers

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<sup>7</sup> See Trout Aff., Ex. A, Attach. 2 (March 18, 2003 Order (with Exhibits)).

<sup>8</sup> See Trout Aff., Ex. A, Attach. 2 (March 18, 2003 Order (with Exhibits)).

<sup>9</sup> See Trout Aff., Ex. A, Attach. 13 (Pl.'s Reply Mem. to Defs.' Opp. to Mot.) at Ex. H (Bates Nos. Plaintiff MYI 11.10.05 02701 – 02721 (reflecting draft agreements with a facsimile stamp dated November, 2003)).

<sup>10</sup> The only assets excepted from the Developers/Seely sale were specifically identified on page 6 of the document in Paragraph 2.d)(ii) as "the Black Ridge Drive Project, the MYI Black Ridge Drive Project Litigation, and Developers Black Ridge Drive Project Litigation." See Second Am. Countercl., Ex. 3 (fully executed Settlement Agreement, Mutual Release, and Assignment).



signed the Settlement Agreement on April 5, 2004.

On March 22, 2004 – three (3) days before the Indemnitors and Seely signed the Settlement Agreement, Mutual Release, and Assignment - Robert Jensen, MYI's original counsel of record, attempted to withdraw as counsel of record in the instant litigation.<sup>11</sup> At this point in time, ESI was unaware of the Developers' Litigation, the assignment and sale of the Indemnitors' assets, and the administrative dissolution of MYI. *See* Affidavit of Kim J. Trout, filed concurrently herewith (hereinafter "Trout Aff.") at ¶ 6; *See* Affidavit of Thomas D. Hill, filed concurrently herewith (hereinafter "Hill Aff.") at ¶ 4.

On March 30, 2004 – five days after the Indemnitors and Seely had signed the Settlement Agreement, Mutual Release, and Assignment but approximately one (1) week before Developers signed off on the deal - Robert Jensen advised Dennis Farley that "MYI is controlled and essentially owned" by the Bond Company." Mr. Jensen's letter further informed Mr. Farley that the Bond Company owned the assets of MYI, including all accounts receivable, etc., and the assets of Merrick Young individually and his wife individually.<sup>12</sup>

On April 5, 2004, Developers signed the Settlement Agreement, Mutual Release, and Assignment thereby effectuating the transfer of ownership of the claims against ESI to Mr. Seely.<sup>13</sup> Although the Settlement Agreement, Mutual Release, and Assignment was fully executed on April 5, 2004, neither ESI nor this Court were specifically advised of the

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<sup>11</sup> *See* Trout Aff., Ex. A, Attach. 3 (Withdrawal of Counsel).

<sup>12</sup> *See* Trout Aff., Ex. A, Attach. 4 (March 30, 2004 Letter).

<sup>13</sup> *See* Second Am. Countercl., Ex. 3 (fully executed Settlement Agreement, Mutual Release, and Assignment); *see also* Merrick Young, Inc.'s Reply to Second Am. Countercl., ¶ 24 (acknowledging the Settlement Agreement, Mutual Release, and Assignment was entered into by Developers, Seely and the Indemnitors).

transaction. Seventeen (17) months later, MYI produced unexecuted copies of the document in a production of documents exceeding 3,500 pages.<sup>14</sup>

On April 12, 2004, Dennis Farley sent a letter to Clark Fetzer (Utah counsel for defendants) and Michael Leavitt (counsel for Western Rock Products and White Hills) attaching the March 30, 2004 letter from Jensen and stating:

Re: Merrick Young Incorporated Financial Standing

Gentlemen:

Enclosed is a letter dated March 30, 2004, from Robert M. Jensen with attachments advising that Merrick Young Incorporated is controlled and essentially owned by its Bond Company. The Bond Company owns the assets of Merrick Young, Incorporated, including all accounts receivable, etc., and the assets of Merrick Young individually and his wife individually.<sup>15]</sup>

At the time the April 12, 2004 letter was sent, Mr. Farley's representation was *absolutely false* as, by this date, Mr. Seely owned some of MYI's assets – including the alleged ESI account receivable.<sup>16</sup> MYI and its counsel of record clearly had either actual or constructive knowledge of this fact. Nevertheless, MYI did not alert the Court or counsel. Moreover, as noted *supra*, MYI did not even produce the unexecuted copy of Settlement Agreement, Mutual Release, and Assignment until sometime after November 10, 2005 – over one and one-half (1½) years after the document was executed.

Despite the dissolution of MYI and the loss of any and all interest, rights and title to MYI assets; on or about April 14, 2004, Dennis Farley filed a Substitution of Counsel and Notice

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<sup>14</sup> See Trout Aff., Ex. A, Attach. 5 (produced copies of Settlement Agreement, Mutual Release and Assignment).

<sup>15</sup> See Trout Aff., Ex. A, Attach. 6 (April 12, 2004 Letter).

<sup>16</sup> Compare Second Am. Countercl., Ex. 3 (fully executed Settlement Agreement, Mutual Release, and Assignment) with Trout Aff., Ex. A, Attach 6 (April 12, 2004 Letter).

of Substitution of Counsel. The documents were signed by Robert Jensen on March 31, 2004 and March 16, 2004, respectively, and by Mr. Farley on April 6, 2004. It is not clear why Mr. Farley waited an additional week to file these documents. However, it is clear that, at the time these documents were signed and filed, Mr. Farley knew or should have known that MYI no longer owned the alleged ESI account receivable that served as the basis for the claims against ESI, the Trust and American Insurance in the underlying litigation.<sup>17</sup>

On or about September 29, 2004, Alan Young “reorganized” and reinstated MYI and, in so doing, assigned himself 90,000 shares of stock thereby making himself a majority owner of MYI.<sup>18</sup> ESI first learned of MYI’s reorganization and reinstatement during Alan Young’s deposition in November, 2005 at which time Alan testified (1) that he did not pay anyone for his shares of stock in MYI;<sup>19</sup> (2) that the remaining shares of stock are owned by Merrick Young;<sup>20</sup> and (3) that at the time of reinstatement, MYI had no assets.<sup>21</sup> Despite his purported role in reorganizing and reinstating MYI and his purported status as the majority shareholder in the company, Alan Young was not completely forthcoming about MYI’s corporate structure. Although identified in the corporate reinstatement documents as “President” of MYI, Alan Young acted evasively during his deposition – refusing to respond to the question of the identity of MYI’s President.<sup>22</sup> This testimony seemed particularly unusual as, the day before, Merrick

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<sup>17</sup> See Trout Aff., Ex. A, Attach. 7 (Substitution of Counsel, Notice of Substitution of Counsel and Excerpt from Docket Sheet).

<sup>18</sup> See Trout Aff., Ex. A, Attach. 8 (Application for Reinstatement and related documents); *see also id.*, Attach. 9 (Excerpts from the Deposition of Alan Young), p. 14, li. 7 – p. 15, li. 11.

<sup>19</sup> See Trout Aff., Ex. A, Attach. 9 (Excerpts from the Deposition of Alan Young, p. 15, li. 12 – p. 16, li. 12).

<sup>20</sup> *See id.*

<sup>21</sup> *Id.*, p. 16, li. 16-21.

<sup>22</sup> *Id.*, p. 173, li. 8 – p. 176, li. 4.

Young had testified that he was the President of MYI and had been since “about 1994”.<sup>23</sup>

Merrick went on to testify that in 2002 – the same year the Developers Litigation was initiated and a few months before Merrick Young allowed MYI to administratively dissolve in March, 2003 - Alan Young started Sunland Corporation because “I was no longer going to be in business.”<sup>24</sup>

Regardless of whether Alan Young or Merrick Young was the acting President of MYI following its reinstatement in September, 2004, there is no dispute that MYI actively continued to prosecute the claims against ESI, the Trust and American Insurance by filing in excess of 10 motions (including a dispositive motion), opposing each motion filed by ESI, issuing new discovery requests, conducting discovery depositions (including the issuance of over 10 subpoenas), issuing expert witness reports, and supplementing initial disclosures. However, MYI’s deceptive conduct did not end with its continued prosecution of a claim which it did not own or its’ continued concealment and obfuscation of facts. In the fall of 2005, MYI’s counsel was forced to supplement discovery responses and acknowledge that Alan Young had *altered* evidence which had been produced to ESI during discovery.<sup>25</sup> MYI also refused to adequately produce damage information and was ultimately sanctioned by the Court for its behavior.<sup>26</sup> To date, MYI has never paid ESI the \$11,397.62 which was awarded by the Court in November,

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<sup>23</sup> See Trout Aff., Ex. A, Attach. 10 (Excerpts from the Deposition of Merrick Young), p. 5, ll. 18-24.

<sup>24</sup> *Id.*, p. 124, li. 25 – p. 125, li. 14.

<sup>25</sup> See Trout Aff., Ex. A, Attach. 11 (September 6, 2005 Letter).

<sup>26</sup> See Trout Aff., Ex. A, Attach. 12 (October 16, 2006 Summary Rulings and Order).

2006.<sup>27</sup>

The transfer of the ownership interest of MYI's claim against ESI fully came to light during the continued deposition of Merrick Young on or about January 9, 2007. Thereafter, ESI sought to resolve the question while counsel for MYI fought to prevent such discovery and took affirmative steps to conceal and confuse the issue. For example, when ESI sought to take the deposition of Clyde G. Seely, MYI moved for a protective order and to quash the subpoena. In addition, in response to ESI's Opposition to MYI's Motion to Quash, MYI claimed "Merrick Young, Inc. [to be] the real party in interest."<sup>28</sup> By way of justification for this statement, MYI and its counsel of record argued:

Utah Code Annot. § 48-2c-1302(6) authorizes a dissolved company to wind up its affairs and has the same power as a company to sue to collect amounts owed to the company and to recover property or rights belonging to the company. It is unknown whether Merrick Young, Inc. will have any assets to convey to any party under the Settlement Agreement, Mutual Release, and Assignment, that determination must await the winding up of Merrick Young, Inc. as authorized by law.<sup>[29]</sup>

However, when these arguments were made, MYI and its' counsel of record knew, or should have known, that these arguments were not warranted by the evidence *or* existing law and were frivolous/irrelevant. First, MYI was not a dissolved company. While MYI had been administratively dissolved on March 30, 2003; Alan Young, with or without the requisite corporate authority, reinstated the corporation on September 29, 2004. Pursuant to Utah Code Ann. § 16-10a-1422, because the reinstatement occurred within two (2) years of the dissolution,

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<sup>27</sup> ESI recognizes that Rule 11 Sanctions are not applicable to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37. *See* U.R.C.P. 11(d).

<sup>28</sup> *See* Trout Aff, Ex. A, Attach. 13 (Pl.'s Reply Mem. to Defs.' Opp. to Mot. (with Exhibits referenced therein)).

<sup>29</sup> *See id.* Attach. 13 at p. 3.

the administrative dissolution was revoked and the company was permitted to resume activity as if no dissolution had occurred. Therefore, contrary to MYI's/Mr. Farley's/Mr. Savage's argument in Plaintiff's Reply Memorandum to Defendants' Opposition to Motion, Utah Code Ann. § 48-2c-1302(6) was irrelevant to the litigation and ESI's claim that MYI may not be the real party in interest.

In addition, MYI's (and/or Mr. Farley's and Mr. Savage's) claim that no assets had yet been conveyed under the Settlement Agreement, Mutual Release, and Assignment was absolutely untrue when made. Not only had Mr. Farley been advised by Developers that MYI had no assets but MYI was certainly aware of the Settlement Agreement, Mutual Release, and Assignment, and, consistent with his testimony, Alan Young had knowledge that MYI had no assets when he reinstated the company. Given the lack of evidentiary support and lack of legal basis, the arguments made by MYI and its' counsel of record were clearly presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

When ESI filed a supplemental rebuttal memorandum to clarify the record as to the speciousness, deceptiveness and obvious inaccuracy of MYI's arguments, MYI moved to strike ESI's pleading.<sup>30</sup> MYI's pleadings, and claims asserted therein, continued to become progressively more evasive/deceptive:

- a. In response to ESI's Rule 17(a) Objection, MYI asserted that ESI should have been aware of the ownership of the claim because MYI dutifully transmitted all

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<sup>30</sup> See Trout Aff., Ex. A, Attach. 14 (Pl.'s Mot. to Strike Defs.' Supp. Mem. in Opp. to Mot. to Quash).

documents regarding the Developers Litigation. *However*, MYI (and/or its counsel) also argued that Developers did not acquire the claims which were the subject of the instant litigation and, therefore, those assets were not transferred to Seely.<sup>31</sup>

b. Shortly thereafter, and in stark contract to earlier argument advanced by MYI regarding the ownership of its assets, in Plaintiff's Memorandum in Opposition to Motion for Substitution, MYI (and/or its counsel) further confused the issue by stating "Clyde Seely ("Seely") is the present owner of MYI assets pursuant to the Settlement Agreement executed by MYI on March 25, 2004"<sup>32</sup> but argued substitution was improper because there was no express provision in the Settlement Agreement "authorizing Seely to substitute himself as a plaintiff in the present litigation or to prosecute, compromise, dismiss, or otherwise dispose of the current lawsuit"<sup>33</sup> and because ESI "knew"<sup>34</sup> that MYI's assets had been attached by Developers no later than April, 2004 and "acquired" by Seely no later than November, 2005.<sup>35</sup> *However*, despite MYI's claims to the contrary, Seely's ownership of MYI's assets, including the alleged ESI account receivable which served as the basis for the claims against ESI, the Trust and American

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<sup>31</sup> See Trout Aff, Ex. A, Attach. 15 (Mem. in Opp. to Defs.' Rule 17(a) Obj.)

<sup>32</sup> See Trout Aff., Ex. A, Attach. 16 (Pl.'s Mem. in Opp. to Mot. for Substitution (with Exhibits)) at p. 4.

<sup>33</sup> *Id.*

<sup>34</sup> As has been explained, *supra*, Mr. Farley's April 12, 2004 letter was not even factually accurate. Seely owned the claims at the time MYI and its' counsel of record transmitted the April 12, 2004 correspondence to ESI's counsel of record. Moreover, MYI never provided an executed copy of the Settlement Agreement, Mutual Release, and Assignment. MYI produced two (2) unexecuted copies of the document (along with three unexecuted drafts of the November, 2003 "draft" version of the Settlement Agreement) along with a production of no less than 3,500 pieces of paper. At no time did MYI advise ESI that the transaction which served as a basis for the Settlement Agreement, Mutual Release, and Assignment had occurred and/or that the final agreement (though not fully executed) along with various drafts had been produced. See Trout Aff. at ¶ 7.

<sup>35</sup> *Id.* at p. 10.

Insurance in the case at bar, authorized Seely to “prosecute, compromise, dismiss or otherwise dispose of the current lawsuit.” MYI does not own the claim nor does MYI have any right or interest in the claim. Absent an agreement between MYI and Seely, MYI is **not** entitled to any recovery had against ESI as a result of the claims.

On March 12, 2007, this Court found that “Seely has a clear personal interest in the subject matter of this action and in its outcome” and joined Seely as an additional plaintiff. ESI was given the opportunity to serve Seely with appropriate pleadings and Mr. Seely was given the time prescribed by the Utah Rules of Civil Procedure to respond to those pleadings.<sup>36</sup>

On July 10, 2007, MYI was, again, administratively dissolved after its corporate officers failed to file a renewal.<sup>37</sup>

ESI filed its Second Amended Counterclaim in August, 2007. On or about August 28, 2007, counsel for ESI learned that Mr. Farley had retired and left this case in the hands of Jon Lear and Scott Savage.<sup>38</sup> The reafter, on or about September 7, 2007, Mr. Savage filed a response to ESI’s Second Amended Counterclaim. In that Answer, MYI was again ambiguous with respect to the ownership of the claims answering as follows:

- a. MYI admitted the entry of the March 18, 2003 Order in the Developers Litigation, but asserted the document “speaks for itself” in response to the allegations that
  - (i) Developers was given the right to execute, attach and garnish on the accounts receivable, assets, interests, money, stocks, memberships, bonds, real property and

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<sup>36</sup> See Trout Aff., Ex. A, Attach. 17 (Corrected Rulings on Pending Motions; Associated Orders).

<sup>37</sup> See Trout Aff., Ex. A, Attach. 18 (Business Entity Search Results).

<sup>38</sup> See Trout Aff. at ¶ 8.



personal property in which the Indemnitors had an interest; and (ii) an injunction was issued against the Indemnitors which precluded them from disbursing funds or conveying any assets.<sup>39</sup>

b. Despite having produced draft documents of Release and Assignment Agreements, Settlement Agreements and Purchase Agreements and having discussed those documents in its pleadings, MYI denied having knowledge of the negotiations of the release and sale of its' assets, and the assets of the other Indemnitors.<sup>40</sup>

c. MYI admitted entering into the Settlement Agreement, Mutual Release, and Assignment, but asserted the document "speaks for itself" in response to the allegation that the Indemnitors assigned all their Assets to Developers and Developers sold certain Assets to Seely in exchange for \$150,000.<sup>41</sup> However, MYI then inconsistently denied having real or constructive knowledge of the transfer of MYI's Assets and subsequent sale of MYI's Assets since March 25, 2004.<sup>42</sup> In addition, MYI denied that the claims alleged in the instant litigation against ESI and the other defendants were acquired by Developers and sold to Seely.<sup>43</sup> This present denial is particularly troublesome given MYI's previous admissions that "Clyde Seely ('Seely') is the present owner of MYI assets pursuant to the Settlement Agreement executed by MYI

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<sup>39</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶¶ 21, 50.

<sup>40</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶ 23; *see also* Trout Aff., Ex. A, Attach. 13 (Pl.'s Reply Mem. to Defs.' Opp. to Mot. at Ex. H (Bates Plaintiff MYI 11 10.05 02699 – 02721)).

<sup>41</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶¶ 24, 51.

<sup>42</sup> *Id.* at ¶ 34.

<sup>43</sup> *Id.* at ¶ 52.

on March 12, 2004,<sup>44</sup> and Mr. Farley's letter dated April, 2004 whereby he states "[t]he Bond Company owns the assets of Merrick Young Incorporated, including all accounts receivable, etc., and the assets of Merrick Young individually and his wife individually."<sup>45</sup>

c. MYI denied the existence of a controversy concerning the ownership of the claim, real party in interest and rights/duties and obligations, if any, of Seely to prosecute the instant action. MYI further denied that a judicial determination is necessary and appropriate to decide these issues.<sup>46</sup> Contrary to MYI's former answer that the Settlement Agreement, Mutual Release, and Assignment "speaks for itself" with respect to the ownership of the claims at issue, MYI denied that ESI is entitled to a declaration that Seely owns all right, title and interest in the claims.<sup>47</sup>

d. MYI denied that it had no "right, title or interest in the Claims and is not, therefore, the real party in interest."<sup>48</sup>

e. Despite the contrary testimony of Alan Young, MYI's reinstator and one of its' purported Presidents, MYI denied that at the time of reinstatement MYI had no assets.<sup>49</sup> MYI further denied that it lacked the capacity or standing to sue ESI in the instant litigation and, in fact, affirmatively stated that certain actions (i.e., administrative

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<sup>44</sup> See Trout Aff., Ex. A, Attach. 16 (Pl.'s Mem. in Opp. to Mot. for Substitution) at p. 3, ¶ 1.

<sup>45</sup> See Trout Aff., Ex. A, Attach. 6 (April 12, 2004 Letter).

<sup>46</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶¶ 55, 56, 60, 63, 64, 70, 71.

<sup>47</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶ 57.

<sup>48</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶ 59.

<sup>49</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶ 32.

dissolution, loss of its assets, Alan Young's reinstatement of company) did not affect MYI's standing or capacity to sue.<sup>50</sup>

f. Finally, MYI denied that Seely acquired the claims from Developers and either refused to respond or categorically denied that Seely willfully, deliberately and fraudulently allowed MYI to pursue the litigation.<sup>51</sup>

On April 10, 2008, this Court entered its Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim. In denying Seely's Motion to Dismiss, the Court made the following specific findings:

According to the evidence currently available to this Court, the facts appear to be as follows: The claims made in this case by MYI constituted a chose in action which was an asset of MYI. That chose in action was attached by Developers in its lawsuit against MYI and its principals, and it was transferred to Mr. Seely in accordance with the 'Settlement Agreement, Mutual Release, and Assignment' signed by Mr. Seely in 2004. This litigation continued thereafter, with MYI continuing to prosecute the case in its own name, in spite of the transfer of its assets to Developers and then to Mr. Seely.

...  
Regardless of whether Mr. Seely covertly controlled the prosecution in this action after 2004 or he deliberately or negligently allowed MYI to continue to control it, Mr. Seely had the right to control MYI's claims in this case. The specification of certain lawsuits transferred to Mr. Seely in the 'Settlement Agreement, Mutual Release, and Assignment' does not obviate the general language therein which also gave Mr. Seely "[a]ny equity in any other . . . asset in which any Indemnitor has an interest" and "[a]ny . . . other assets of any Indemnitor." The chose in action upon which MYI sued the defendants in this case is one such asset, and Mr. Seely owns it.<sup>[52]</sup>

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<sup>50</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶¶ 22, 26, 28, 29-31.

<sup>51</sup> See Merrick Young, Inc.'s Reply to Second Am. Countercl. at ¶¶ 52, 73. In response to the allegations specific to the claims for relief against Mr. Seely, MYI stated: "MYI does not respond to the allegations in remaining paragraphs 73 – 95 of ESI's Second Amended Counterclaim, because the Claims for Relief and allegations therein are directed against Clyde G. Seely and not MYI. To the extent any of these allegations is directed at MYI, MYI denies the same."

<sup>52</sup> See Trout Aff., Ex. A, Attach. 19 (Ruling on Clyde G. Seely's Mot. to Dismiss Second Amended Counterclaim).

On or about April 25, 2008, Clyde G. Seely filed his Answer to ESI's Second Amended Counterclaim. Therein, Mr. Seely denied being aware of MYI's prosecution of the instant litigation in its' own name and further denied consenting to such prosecution/representation. Mr. Seely also affirmatively disavowed any right or interest in the litigation.<sup>53</sup>

MYI has not, to date, amended its Answer to ESI's Second Amended Counterclaim and despite the clear law of the case continues to claim an ownership in the claims against ESI.

On June 13, 2008, pursuant to Rule 11 of the Utah Rules of Civil Procedure, ESI delivered to MYI's counsel of record a Notice of Intent to Request Sanctions Pursuant to U.R.C.P. 11, along with a copy of this Motion. Therein, MYI and its counsel of record were advised of the factual basis of this motion along with ESI's arguments in support.

ESI has expended in excess of \$800,000 in attorney's fees in this case since April, 2004 when MYI lost and/or otherwise assigned its' assets to Developers and, therefore, lost the right to continue the prosecution of the instant case. *See Hill Aff.*, ¶ 11.

### CONCLUSION

Despite multiple opportunities for MYI and/or Seely to present documentary or testimonial evidence to the Court that the claims at issue are owned and/or otherwise controlled by MYI, such proof has not been made. MYI's continued assertion that it is a proper plaintiff and/or that it owns the claims against ESI, the Trust and American Insurance are not warranted by existing law and the allegations/arguments that have been made in support of such claim(s)

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<sup>53</sup> See [Seely] Ans. to Second Am. Countercl., ¶¶ 36, 54.

have absolutely no evidentiary or legal support. Based on the foregoing, ESI can only conclude that MYI's prosecution of this claim after it assigned the alleged ESI account receivable asset to Developers in April 2004 was for the express purpose of harassing ESI and/or to cause unnecessary delay in the resolution of the matter or needless (and substantial) increase in the cost of litigation.

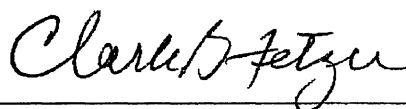
The attorneys handling this lawsuit knew or should have known of the loss of MYI's assets, knew or should have known of the assignment of MYI's assets (including the alleged ESI account receivable), knew or should have known of the sale from Developers to Seely, knew or should have known of the lack of any subsequent assignment by Seely to MYI of the claims in the underlying litigation, and knew or should have known that the continued prosecution by MYI (which had been suspiciously reinstated by Alan Young after Merrick allowed the business to administratively dissolve and moved to Montana) was improper and unwarranted by existing law. Seely has taken no interest in pursuing the claim(s) filed against ESI by MYI. MYI's continued prosecution is, therefore, improper and violative of Rule 11 of the Utah Rules of Civil Procedure. MYI and its' attorneys of record are responsible for ESI having incurred hundreds of thousands of dollars in rebutting these clearly baseless and/or fraudulent arguments. There can be no dispute that the pleadings that MYI and its' counsel of record have filed, and continue to file, are in clear violation of Rule 11.

ESI respectfully requests that this Court sanction MYI and its' counsel of record jointly by dismissing the Amended Complaint of MYI and awarding ESI its' fees and costs incurred since April, 2004 when MYI and its' counsel chose to pursue and prosecute a claim it no longer

owned and proceeded to repeatedly violate Rule 11 by filing pleadings, motions and other papers which were presented for an improper purposes, contained claims, defenses and legal contentions which were not warranted by existing law, contained allegations and other factual contentions that lacked evidentiary support, contained unreasonable denials which were not warranted on the evidence and/or were filed without inquiry which would be deemed reasonable under the circumstances which exist in this case.

DATED this 13<sup>th</sup> day of June, 2008.

**RINEHART FETZER SIMONSEN & BOOTH, P.C.**

A handwritten signature in cursive script, reading "Clark B. Fetzer", written in black ink.

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Clark B. Fetzer

**CERTIFICATE OF SERVICE**

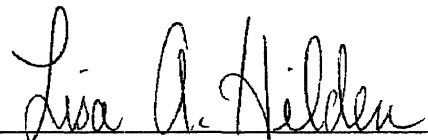
I hereby certify that on June 13, 2008, I caused to be sent, via hand-delivery, a true and correct copy of **ESI'S MEMORANDUM IN SUPPORT OF ITS' MOTION FOR SANCTIONS AGAINST MYI AND ITS' COUNSEL OF RECORD** to the parties listed below:

Jon M. Lear  
Dennis C. Farley  
LEAR & LEAR  
The Downey Mansion  
808 E. South Temple  
Salt Lake City, UT 84102  
*Attorneys for MYI*

E. Scott Savage  
BERMAN & SAVAGE, P.C.  
170 S. Main Street, Ste 500  
Salt Lake City, UT 84101  
*Attorneys for MYI*

Michael W. Spence  
Greggory J. Savage  
RAY QUINNEY & NEBEKER P.C.  
36 South State Street, Suite 1400  
P.O. Box 45385  
Salt Lake City, UT 84145-0385  
*Attorneys for Clyde G. Seely*

Dated this 13<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
Lisa A. Hilden  
Legal Assistant

FILED  
FIFTH JUDICIAL DISTRICT COURT  
2008 JUL 11 PM 2:49  
WASHINGTON COUNTY

CLARK B. FETZER (USB 1069)  
**RINEHART FETZER SIMONSEN & BOOTH, P.C.**  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, UT 84101  
Phone: (801) 328-0266 ext. 103  
Fax: (801) 328-0269

KIM J. TROUT (ISB 2468)  
VICKY J. ELKIN (ISB 5978)  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.**  
225 N. 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701  
Phone (208) 331-1170  
Facsimile (208) 331-1529

*Attorneys for Defendants*

---

**IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

---

MERRICK YOUNG INCORPORATED, a  
Utah corporation; and CLYDE G. SEELY, an  
individual,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

**ESI'S MOTION FOR SANCTIONS  
AGAINST MYI  
AND ITS' COUNSEL OF RECORD**

Civil No. 010500909

Judge G. Rand Beacham



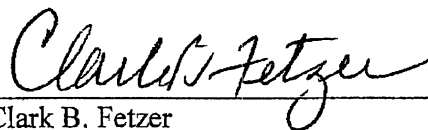
**COMES NOW** Engineered Structures, Inc., ("ESI"), by and through its counsel of record, and moves for Rule 11 Sanctions against MYI and its' counsel for the filing of pleadings for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, for asserting claims, defenses and other legal contentions that are unwarranted by existing law, and for pursuing litigation as the real party in interest without a legal basis for doing so.

Notice of this Motion was served upon all parties, including MYI and its' Counsel of Record, on June 13, 2008.

This Motion is supported by the Affidavits of Kim J. Trout and Thomas D. Hill and a Memorandum, all filed concurrently herewith.

DATED this 13<sup>th</sup> day of June, 2008.

**RINEHART FETZER SIMONSEN & BOOTH, P.C.**

  
Clark B. Fetzer

**CERTIFICATE OF SERVICE**

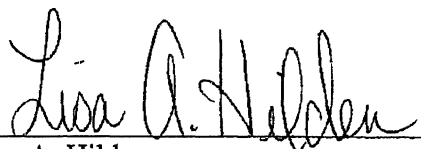
I hereby certify that on June 13, 2008, I caused to be sent, via hand-delivery, a true and correct copy of **ESI'S MOTION FOR SANCTIONS AGAINST MYI AND ITS' COUNSEL OF RECORD** to the parties listed below:

Jon M. Lear  
Dennis C. Farley  
LEAR & LEAR  
The Downey Mansion  
808 E. South Temple  
Salt Lake City, UT 84102  
*Attorneys for MYI*

E. Scott Savage  
BERMAN & SAVAGE, P.C.  
170 S. Main Street, Ste 500  
Salt Lake City, UT 84101  
*Attorneys for MYI*

Michael W. Spence  
Greggory J. Savage  
RAY QUINNEY & NEBEKER P.C.  
36 South State Street, Suite 1400  
P.O. Box 45385  
Salt Lake City, UT 84145-0385  
*Attorneys for Clyde G. Seely*

Dated this 13<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
Lisa A. Hilden  
Legal Assistant

Tab B

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.  
A T T O R N E Y S A T L A W

Kim J. Trout  
Vicky J. Elkin

June 13, 2008

VIA CERTIFIED MAIL

Jon Lear and/or Managing Partner  
LEAR & LEAR  
Attorneys at Law  
299 South Main, Suite 2200  
Salt Lake City, UT 84111

E. Scott Savage and Stephen R. Waldron  
170 South Main, Suite 500  
Salt Lake City, UT 84101

Re: Merrick Young Incorporated v. ESI, et al.  
Civil Case No. 010500909

Dear Mr. Lear and/or Managing Partner of Lear & Lear, Mr. Savage and Mr. Waldron:

It is with great reluctance that ESI and its' counsel send this letter. However, the conduct engaged in by the counsel of record in this case and your client, Merrick Young, Inc. ("MYI"), have caused such unnecessary and needless expense to ESI that it believes that no alternatives presently exist.

Pursuant to Rule 11 of the Utah Rules of Civil Procedure, this letter serves as official notice of ESI's intent to seek sanctions against MYI and its counsel of record, jointly, for prosecuting a claim in violation of that rule.

Following the expiration of twenty-one (21) days, ESI will be filing the enclosed Motion for Sanctions based upon the pleadings and orders in the above-entitled matter which specifically set forth, *inter alia*, the following:

The 9<sup>th</sup> & Idaho Center ♦ 225 North 9<sup>th</sup> Street Suite 820  
P. O. Box 1097 ♦ Boise, Idaho 83701  
Phone (208) 331-1170 ♦ Facsimile (208) 331-1529  
Email [ktrout@idlaw.com](mailto:ktrout@idlaw.com) [vjelin@idlaw.com](mailto:vjelin@idlaw.com)

*Notice of Intent to Request Sanction Pursuant to U.R.C.P. 11*

Jon Lear and/or Managing Partner

E. Scott Savage and Stephen R. Waldron

June 13, 2008

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1. On December 4, 2000, MYI entered into a bonding arrangement with Developers Surety and Indemnity Company which, among other things, included an Indemnity Agreement in which MYI granted Developers a security interest in the assets of Merrick Young and Stephanie Young, individually, and MYI's assets, including:

*any and all sums due or to become due on all other contracts, covenants and agreements whether bonded or unbonded, in which the Principal [MYI] or Indemnitor [Merrick Young and Stephanie Young, individually] has any interest, together with any notes, accounts receivable or chose in action related thereto.*

*See Attachment 1, Indemnity Agreement.*

2. On or about November, 2002, Developers sued MYI, Merrick Young and his wife, Stephanie Young (hereinafter referred to as "Developers Litigation").

3. On March 18, 2003, Developers received Judgment against MYI, Merrick Young and Stephanie Young (hereinafter collectively referred to as "the Indemnitors"), and an injunction against the Indemnitors from disbursing funds or conveying any assets, and garnishments. In the Developers Litigation, Judgment was entered allowing Developers to attach the assets of the Indemnitors, which included specific funds and claims as well as "[a]ny equity in any other . . . asset in which any Indemnitor has an interest" and "[a]ny . . . other assets of any Indemnitor", which included MYI's then existing claims in the pending case at bar against ESI. *See Attachment 2, Order for Prejudgment Writ of Attachment/Garnishment; Preliminary Injunction Freezing Assets; and Findings of Fact and Conclusions of Law (along with Exhibits referenced by said order); see also Attachment 19, Ruling on Clyde G. Seely's Motion to Dismiss Second Amended, Counterclaim.*

4. Merrick Young allowed MYI to administratively dissolve in or about March 30, 2003. This action was consistent with the Court's order which restrained, enjoined and prevented MYI from selling, transferring, disposing, distributing, pledging, or encumbering any asset or real or personal property pending further order of the Court.

5. In late fall of 2003, Developers began negotiating a release and sale of the Indemnitors' assets with MYI, Merrick, Stephanie and Clyde G. Seely.

*Notice of Intent to Request Sanction Pursuant to U.R.C.P. 11*

Jon Lear and/or Managing Partner

E. Scott Savage and Stephen R. Waldron

June 13, 2008

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6. On March 22, 2004, Robert Jensen, MYI's original counsel of record attempted to withdraw as counsel of record in the instant litigation. *See Attachment 3, Withdrawal of Counsel.*

7. On March 25, 2004, the Indemnitors (Merrick, Stephanie and MYI) and Seely signed a document titled Settlement Agreement, Mutual Release and Assignment whereby the Indemnitors assigned "any and all interests, rights and title to Indemnitors' assets" to Developers and Developers sold many of the "Indemnitors' Assts" to Seely in exchange for \$150,000. Developers signed the Settlement Agreement on April 5, 2004.

ESI had no knowledge of the assignment of the Indemnitors' assets, which clearly included the underlying claims in the instant litigation, to Developers.

8. On March 30, 2004, Robert Jensen advised Mr. Farley that "MYI is controlled and essentially owned" by the Bond Company. The letter states that the Bond Company owns the assets of MYI, including all accounts receivable, etc., and the assets of Merrick Young individually and his wife individually. *See Attachment 4, March 30, 2004 letter (with attachments referenced therein).*

9. On April 5, 2004, Developers signed the Settlement Agreement, Mutual Release and Assignment thereby effectuating the transfer of the claims against ESI to Mr. Seely.

Though fully executed on April 5, 2004, ESI was not advised of the Settlement Agreement. ESI did receive unexecuted copies of the document on or about November 10 and/or November 14, 2005 when the document was produced with a production of documents in excess of 3,500 pages from MYI (November 10, 2005 and November 14, 2005). *See Attachment 5, produced copies of Settlement Agreement, Mutual Release, and Assignment.*

10. On April 12, 2004, Dennis Farley sent a letter to Clark Fetzer and Michael Leavitt attaching the March 30, 2004 letter from Jensen. At the time the letter was sent, Mr. Farley's representation that MYI's Bond Company owned all its assets, including MYI's accounts receivable, was absolutely false as, by this date, Mr. Seely owned some of MYI's assets – including the claim(s) against ESI which are the subject of the instant litigation. *See Attachment 6, Letter dated April 12, 2004 (with Enclosures).*

11. On April 14, 2004, Dennis Farley filed a Substitution of Counsel and Notice of Substitution of Counsel. The documents were signed by Robert Jensen on

*Notice of Intent to Request Sanction Pursuant to U.R.C.P. 11*

Jon Lear and/or Managing Partner

E. Scott Savage and Stephen R. Waldron

June 13, 2008

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March 31, 2004 and March 16, 2004, respectively, and by Mr. Farley on April 6, 2004. It is not clear why Mr. Farley waited an additional week to file these documents. However, it is clear that, at the time these documents were signed and filed, Mr. Farley knew or should have known that MYI no longer owned the claims against ESI that were the subject of the underlying litigation. *See Attachment 7, Substitution of Counsel, Notice of Substitution of Counsel and Excerpt from Docket Sheet.*

12. On September 29, 2004, Alan Young reinstated MYI and, in so doing, assigned himself 90,000 shares of stock thereby making himself a majority owner of MYI. The Application for Reinstatement identifies Alan Young as "President" of Merrick Young, Incorporated as do the Amended Articles of Incorporation of Merrick Young Incorporated. *See Attachment 8, Application for Reinstatement, Letter of Good Standing, Amended Articles of Incorporation, Corporate Resolution, Original Articles of Incorporation of Merrick Young Incorporated and related documents for original filing; See also Attachment 9, Excerpts from the Deposition of Alan Young, p. 14, li. 7 – p. 15, li. 11.*

13. Alan Young did not pay anyone for his new shares of stock in MYI. The remaining shares of stock are purportedly owned by Merrick Young. *See Attachment 9 at p. 15, li. 12 – p. 16, li. 12.*

14. Alan Young testified, in his November 2005 deposition, that at the time of reinstatement, MYI had no assets. *See Attachment 9 at p. 16, ll. 16-21.*

15. Despite Alan Young's representation in the corporate reinstatement documents as "President" of MYI, Alan Young acted evasively during his deposition - refusing to respond to the question of the identity of MYI's President. *See Attachment 9 at p. 173, li. 8 – p. 176, li. 4.*

16. On the contrary, Merrick Young testified during his deposition (which occurred the day before Alan's deposition) that he was the President of MYI and had been since "about 1994". *See Attachment 10, Excerpts from the Deposition of Merrick Young, p. 5, ll. 18-24.*

17. Merrick went on to testify that in 2002 – the same year the Developers Litigation was initiated and a few months before Merrick Young allowed MYI to administratively dissolve in March, 2003, - that Alan Young started Sunland Corporation because "I was no longer going to be in business." *See Attachment 10 at p. 124, li. 25 – p. 125, li. 14.*

*Notice of Intent to Request Sanction Pursuant to U.R.C.P. 11*

Jon Lear and/or Managing Partner

E. Scott Savage and Stephen R. Waldron

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18. Regardless of whether Alan Young or Merrick Young was the acting President of MYI following its reinstatement in September, 2004, there is no dispute that MYI actively continued to actively prosecute the claim against ESI by filing in excess of 10 motions, opposing each motion filed by ESI, issuing new discovery, supplementing initial disclosures and issuing in excess of 10 subpoenas.

19. MYI's deceptive conduct did not end with its continued prosecution of a claim which it did not own. In the fall of 2005, MYI's counsel was forced to supplement discovery responses and acknowledge that Alan Young had altered evidence which had been produced in discovery. *See Attachment 11, Letter dated September 6, 2005.*

20. MYI also refused to adequately produce damage information and was ultimately sanctioned by the Court for its behavior. *See Attachment 12, Summary Rulings and Order and Order for Attorney's Fees.*

21. To date, MYI has never paid ESI the \$11,397.62 which was awarded by this Court in November, 2006.<sup>1</sup>

22. The transfer of the ownership interest of MYI's claim against ESI fully came to light during the continued deposition of Merrick Young on or about January 9, 2007. Thereafter, ESI sought to resolve the question while counsel for MYI fought to prevent such discovery and took affirmative steps to further conceal and confuse the issue:

a. ESI sought to take the deposition of Clyde G. Seely and MYI moved for protective order and to quash the subpoena.

b. In response to ESI's Opposition to MYI's Motion to Quash, MYI claimed "Merrick Young, Inc. is the real party in interest." *See Attachment 13, Plaintiff's Reply Memorandum to Defendants' Opposition to Motion (with Exhibits referenced therein).* By way of justification for this statement, MYI and its counsel of record argued:

Utah Code Annot. § 48-2c-1302(6) authorizes a dissolved company to wind up its affairs and has the same power as a company to sue to collect amounts owed to the company and to recover property or rights belonging to the company. It is unknown whether Merrick Young, Inc. will have any assets to convey to any party under the Settlement Agreement, Mutual Release, and

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<sup>1</sup> The court further awarded interest on this sum at the rate of 6.36% per annum until paid.



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Assignment, that determination must await the winding up of Merrick Young, Inc. as authorized by law.

*See Attachment 13 at p. 3.*

As you are certainly aware, when these arguments were made, Mr. Farley (and/or Mr. Savage) knew, or should have known, that these arguments were irrelevant, not warranted by the evidence *or* existing law and were frivolous. First, MYI was not a dissolved company. While MYI had been administratively dissolved on March 30, 2003; Alan Young, with or without the requisite corporate authority, reinstated the corporation on September 29, 2004. Pursuant to Utah Code § 16-10a-1422, because the reinstatement occurred within two (2) years of the dissolution, the administrative dissolution was revoked and the company was permitted to resume activity as if no dissolution had occurred. Therefore, contrary to MYI's/Mr. Farley's/Mr. Savage's argument in Plaintiff's Reply Memorandum to Defendants' Opposition to Motion, Utah Code § 48-2c-1302(6) was irrelevant to the litigation and ESI's claim that MYI may not be the real party in interest.

In addition, MYI's (and/or Mr. Farley's and Mr. Savage's) claim that no assets had yet been conveyed under the Settlement Agreement, Mutual Release, and Assignment was absolutely untrue when made. Not only had Mr. Farley been advised by Developers that MYI had no assets but MYI was certainly aware of the Settlement Agreement, Mutual Release and Assignment, and, consistent with his testimony, Alan Young had knowledge that MYI had no assets when he reinstated the company. The arguments made by Mr. Farley, Mr. Savage and MYI were clearly presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

c. When ESI filed a supplemental rebuttal memorandum to clarify the record as to the speciousness, deceptiveness and obvious inaccuracy of MYI's arguments, MYI moved to strike ESI's pleading. *See Attachment 14, Plaintiff's Motion to Strike Defendants' Supplemental Memorandum in Opposition to Motion to Quash.*

d. Mr. Farley's, Mr. Savage's and MYI's pleadings, and claims asserted therein, continued to become progressively more evasive/deceptive:

i. In response to ESI's Rule 17(a) Objection, MYI asserted that ESI should have been aware of the ownership of the claim because MYI dutifully transmitted all documents regarding the Developers Litigation. *However*, MYI (and/or its counsel) also argued that Developers did not acquire the claims which were the subject of the instant litigation and, therefore, those assets were not transferred to

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Seely. *See Attachment 15, Memorandum in Opposition to Defendants' Rule 17(a) Objection.*

ii. Shortly thereafter, in Plaintiff's Memorandum in Opposition to Motion for Substitution, MYI (and/or its counsel) stated "Clyde Seely ("Seely") is the present owner of MYI assets pursuant to the Settlement Agreement executed by MYI on March 25, 2004. *See Attachment 16, Plaintiff's Memorandum in Opposition to Motion for Substitution (with Exhibits).*

23. On March 12, 2007, this Court found that "Seely has a clear personal interest in the subject matter of this action and in its outcome" and joined Seely as an additional plaintiff. ESI was given the opportunity to serve Seely with appropriate pleadings and Mr. Seely was given the time prescribed by the Utah Rules of Civil Procedure to respond to those pleadings. *See Attachment 17, Corrected Rulings on Pending Motions; Associated Orders.*

24. On July 10, 2007, MYI was, again, administratively dissolved after its corporate officers failed to file a renewal. *See Attachment 18, Business Entity Search Results.*

25. ESI filed its Second Amended Counterclaim in August, 2007. On or about August 28, 2007, counsel for ESI learned that Mr. Farley had retired and left this case in the hands of Jon Lear and Scott Savage. Thereafter, on or about September 7, 2007, Mr. Savage filed a response to ESI's Second Amended Counterclaim. In that Answer, MYI was again ambiguous with respect to the ownership of the ESI claim answering as follows:

a. MYI admitted the entry of the March 18, 2003 Order in the Developers/Indemnitors Litigation, but asserted the document "speaks for itself" in response to the allegations that (i) Developers was given the right to execute, attach and garnish on the accounts receivable, assets, interests, money, stocks, memberships, bonds, real property and personal property in which the Indemnitors had an interest; and (ii) an injunction was issued against the Indemnitors which precluded them from disbursing funds or conveying any assets. *See MYI Reply to Second Amended Counterclaim at ¶¶ 21, 50.*

b. Despite having produced draft documents of Release and Assignment Agreements, Settlement Agreements and Purchase Agreements and having discussed those documents in its pleadings, MYI denied having

knowledge of the negotiations of the release and sale of its' assets, and the assets of the other Indemnitors. *See* MYI Reply to Second Amended Counterclaim at ¶ 23; *see also Attachment 13 at Ex. H (Bates Plaintiff MYI 11.10.05 02699 – 02721)*.

c. MYI admitted entering into the Settlement Agreement, Mutual Release and Assignment, but asserted the document "speaks for itself" in response to the allegation that the Indemnitors assigned all their Assets to Developers and Developers sold certain Assets to Seely in exchange for \$150,000. *See* MYI Reply to Second Amended Counterclaim at ¶¶ 24, 51. However, MYI then inconsistently denied having real or constructive knowledge of the transfer of MYI's Assets and subsequent sale of MYI's Assets since March 25, 2004. *Id.* at ¶ 34. In addition, MYI denied that the claims alleged in the instant litigation against ESI and the other defendants were acquired by Developers and sold to Seely. *Id.* at ¶ 52. This present denial is particularly troublesome given MYI's previous admissions that "Clyde Seely ('Seely') is the present owner of MYI assets pursuant to the Settlement Agreement executed by MYI on March 12, 2004, *see Attachment 16 at p. 3, ¶ 1, and* Mr. Farley's letter dated April, 2004 whereby he states "[t]he Bond Company owns the assets of Merrick Young Incorporated, including all accounts receivable, etc., and the assets of Merrick Young individually and his wife individually." *See Attachment 6.*

d. MYI denied the existence of a controversy concerning the ownership of the claim, real party in interest and rights/duties and obligations, if any, of Seely to prosecute the instant action. MYI further denied that a judicial determination is necessary and appropriate to decide these issues. *See* MYI Reply to Second Amended Counterclaim at ¶¶ 55, 56, 60, 63, 64, 70, 71.

e. Contrary to MYI's former answer that the Settlement Agreement, Mutual Release and Assignment "speaks for itself" with respect to the ownership of the claims at issue, MYI denied that ESI is entitled to a declaration that Seely owns all right, title and interest in the claims. *See* MYI Reply to Second Amended Counterclaim at ¶ 57.

f. MYI denied that it had no "right, title or interest in the Claims and is not, therefore, the real party in interest." *See* MYI Reply to Second Amended Counterclaim at ¶ 59.

g. Despite the contrary testimony of Alan Young, MYI's reinstator and one of its' purported Presidents, MYI denied that, at the time of

reinstatement MYI had no assets. See MYI Reply to Second Amended Counterclaim at ¶ 32.

h. MYI further denied that it lacked the capacity or standing to sue ESI in the instant litigation and, in fact, affirmatively stated that certain actions (i.e., administrative dissolution, loss of its assets, Alan Young's reinstatement of company) did not effect MYI's standing or capacity to sue. See MYI Reply to Second Amended Counterclaim at ¶¶ 22, 26, 28, 29-31.

i. Finally, MYI denied that Seely acquired the Claims from Developers and either refused to respond or categorically denied that Seely willfully, deliberately and fraudulently allowed MYI to pursue the litigation.<sup>2</sup> See MYI Reply to Second Amended Counterclaim at ¶¶ 52, 73.

26. On April 28, 2008, this Court entered its Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim. In denying Seely's Motion to Dismiss, the Court made the following specific findings:

According to the evidence currently available to this Court, the facts appear to be as follows: The claims made in this case by MYI constituted a chose in action which was an asset of MYI. That chose in action was attached by Developers in its lawsuit against MYI and its principals, and it was transferred to Mr. Seely in accordance with the 'Settlement Agreement, Mutual Release, and Assignment' signed by Mr. Seely in 2004. This litigation continued thereafter, with MYI continuing to prosecute the case in its own name, in spite of the transfer of its assets to Developers and then to Mr. Seely.

...  
Regardless of whether Mr. Seely covertly controlled the prosecution in this action after 2004 or he deliberately or negligently allowed MYI to continue to control it, Mr. Seely had the right to control MYI's claims in this case. The specification of certain lawsuits transferred to Mr. Seely in the 'Settlement Agreement, Mutual Release, and Assignment' does not obviate the general language therein which also gave Mr. Seely "[a]ny equity in any other . . . asset in which any Indemnitor has an interest" and "[a]ny . . . other assets of any Indemnitor." The chose in action upon which MYI sued the defendants in

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<sup>2</sup> In response to the allegations specific to the claims for relief against Mr. Seely, MYI stated: "MYI does not respond to the allegations in remaining paragraphs 73 – 95 of ESI's Second Amended Counterclaim, because the Claims for Relief and allegations therein are directed against Clyde G. Seely and not MYI. To the extent any of these allegations is directed at MYI, MYI denies the same."

this case is one such asset, and Mr. Seely owns it.

*See Attachment 19, Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim.*

27. On or about April 25, 2008, Clyde G. Seely filed his Answer to ESI's Second Amended Counterclaim. Therein, Mr. Seely denied being aware of MYI's prosecution of the instant litigation in its own name and further denied consenting to such prosecution/representation. Mr. Seely also affirmatively disavowed any right or interest in the litigation.

28. MYI has not, to date, amended its Answer to ESI's Second Amended Counterclaim and despite the clear law of the case continues to claim an ownership in the claims against ESI.

Contrary to representations which have been repeatedly made by the attorneys of record in this case, MYI does not presently own the claims against ESI, the Wal-Mart Trust and American Insurance Company. MYI lost those claims to Developers pursuant to an Order entered by Judge Beacham. Developers then sold the claims to Mr. Seely. The attorneys handling this lawsuit knew or should have known of the loss of the assets, knew or should have known of the lack of any assignment, and knew or should have known that the continued prosecution by MYI (which had been suspiciously reinstated by Alan Young after Merrick left the business and moved to Montana) was improper and unwarranted by existing law.

Moreover, despite multiple opportunities for MYI and/or Seely to present documentary or testimonial evidence to the Court that the Claims at issue are owned and/or otherwise controlled by MYI, such proof has not been made. ESI is presently reserving judgment on whether Mr. Seely is an innocent bystander in MYI's deception but is prepared to pursue the answer to that question if you (and MYI) are unwilling to recognize and admit that MYI has absolutely no right to continue prosecuting the instant claim. And, in addition, has not had such right since March, 2003 when Merrick Young, individually and on behalf of MYI, acknowledged that MYI assigned all of its assets to Developers.

Based on the foregoing, ESI can only conclude that MYI's prosecution of this claim after it lost the asset to Developers in March, 2004 and MYI's improper conduct throughout the course of this litigation<sup>3</sup> was for the express purpose of harassing ESI and/or to cause

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unnecessary delay in the resolution of the matter or needless (and substantial) increase in the cost of litigation. You should be advised that between 2004 and 2008, ESI has spent in excess of \$800,000 in attorney's fees and costs in defending and prosecuting this case.

MYI's continued assertion that it is a proper plaintiff and/or that it owns the claims against ESI are not warranted by existing law and the allegations/arguments that you have made in support of such claim(s) have absolutely no evidentiary support. The attorneys of record in this case are responsible for ESI's having incurred hundreds of thousands of dollars in rebutting these clearly baseless and/or fraudulent arguments. There can be no dispute that the pleadings that you have filed, and continue to file, are clearly in violation of Rule 11.

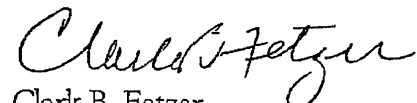
ESI hereby requests that MYI dismiss its claims against ESI, the Wal-Mart Trust and American Insurance Company and amend its' Answer to the Second Amended Counterclaim to properly reflect it has no ownership interest in the claims against ESI and is not, therefore, the proper party to pursue such litigation. ESI is presently reserving its right to seek sanctions against MYI and its' attorneys of record jointly for the damage caused to date;<sup>4</sup> however, the failure of MYI to dismiss its' claims within twenty-one (21) days from the date of this letter will necessarily ensure that ESI will move for sanctions against MYI and its' attorneys of record jointly and will attach a copy of this Notice to its pleading. ESI's sanction request will include all costs and fees related to this litigation which have been incurred by ESI since March, 2004, when MYI, Merrick Young and Stephanie Young signed the Settlement Agreement, Mutual Release and Assignment confirming the transfer of all of their respective assets to Developers.

I look forward to your prompt attention and response to this matter.

Very truly yours,



Kim J. Trout



Clark B. Fetzer

Cc: Tom Hill; Rob Shockley

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<sup>4</sup> Utah Courts have recognized that it is proper for a trial court to enforce rule 11 sanctions after a party voluntarily withdraws the offending pleading/paper. *Barton v Utah Transit Authority*, 1994, 872 P.2d 1036, 1040, n.1. (citing *Cooter & Gell v Hartmarx Corp.*, 1990, 496 U.S. 384, 396, 110 S. Ct. 2447, 2456). The violation of Rule 11 is complete when the party files the pleadings, motion, or other paper with the court, and a subsequent voluntary dismissal does not eradicate the rule 11 violation. *Id.*

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Michael W. Spence, Gregory J. Savage, Michael D. Mayfield, *attorneys for* *Chyle G. Seely*

Tab C



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FIFTH JUDICIAL DISTRICT COURT  
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WASHINGTON COUNTY  
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IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

MERRICK YOUNG INCORPORATED, a )  
Utah corporation; and CLYDE G. SEELY, )  
an individual, )

Plaintiffs, )

vs. )

WAL-MART REAL ESTATE BUSINESS )  
TRUST, a Delaware business trust; )  
ENGINEERED STRUCTURES, INC., an )  
Idaho corporation; THE AMERICAN )  
INSURANCE COMPANY, a Nebraska )  
corporation; WESTERN ROCK )  
PRODUCTS CORPORATION, a Utah )  
corporation, and DOES 1-100, )

Defendants. )

**MERRICK YOUNG  
INCORPORATED'S AND ITS  
COUNSEL'S OPPOSITION TO  
ESI'S MOTION FOR SANCTIONS  
AGAINST MYI AND ITS  
COUNSEL OF RECORD**

Civil No. 010500909

Honorable G. Rand Beacham

Plaintiff Merrick Young, Inc. ("MYI") and its counsel, E. Scott Savage and Stephen R. Waldron of Berman & Savage, PC respectfully submit the following memorandum in opposition to "ESI's Motion for Sanctions Against MYI and Its Counsel of Record," filed on July 15, 2008 ("ESI's Rule 11 motion").

## INTRODUCTION

Defendant Engineered Structures, Inc.'s ("ESI") Rule 11 motion is ESI's third request for sanctions under Utah R. Civ. P. 11 ("Rule 11") in this case. This time ESI seeks the sanction of dismissal of the Amended Complaint (as well as an award of fees and costs it has incurred in this case since April 2004) in an improper attempt to use Rule 11 to obtain an adjudication of the claims of the Amended Complaint. ESI's latest Rule 11 motion is without merit and a mis-use of Rule 11.

ESI does not claim a Rule 11 violation in any particular pleading or filing. Instead, ESI claims the alleged Rule 11 violation was MYI's continued prosecution of the claims for relief of the Amended Complaint after the alleged April 2004 transfer of interest in those claims to plaintiff Clyde G. Seely ("Mr. Seely"). The central premise of ESI's Rule 11 motion is that, upon the alleged April 2004 transfer of interest, MYI "lost the right to continue the prosecution of the instant case." (ESI's Memorandum in Support of Motion for Sanctions Against MYI and Its Counsel of Record ("ESI's Memorandum"), at 19.) Thus, ESI argues, MYI's post-April 2004 prosecution of this action allegedly had no basis in fact or law, and allegedly was merely for the purpose of delay and harassment, in violation of Rule 11, and the Amended Complaint should be dismissed as a sanction.

However, the central premise of ESI's Rule 11 motion is wrong. MYI's continued role as plaintiff after the alleged April 2004 transfer of interest was proper under Utah R. Civ. P. 25(c) ("Rule 25(c)"), and **this Court already has ruled that MYI's continued prosecution of the action after April 2004 was proper.**

ESI concedes that MYI owned the claims asserted in the Amended Complaint when that pleading was filed, which meant MYI was the real party in interest for asserting the claims. As such, under Rule 25(c), MYI could lawfully continue as the sole plaintiff even if there had been a pendente lite transfer of interest of the claims. Rule 25(c) states, “In the case of any transfer of interest, the action **may be continued by . . . the original party . . .**” Utah R. Civ. P. 25(c) (emphasis added). The Court ruled that “Rule 25(c) would allow the case to proceed with only MYI as the plaintiff.” (5/21/07 Corrected Rulings on Pending Motions; Associated Order, at 4.) This is the law of the case. As such, MYI’s post-April 2004 prosecution of the action was proper and cannot be a Rule 11 violation. ESI’s motion fails for this reason alone.

In addition, even without considering Rule 25(c), ESI has not and cannot show that MYI’s post-April 2004 prosecution of the action was without any basis in law or fact or for improper purposes. Several facts show there was a valid basis for MYI’s continued prosecution of the claims of the Amended Complaint after April 2004, even if it were wrongfully assumed that the propriety of that continued prosecution depended upon MYI’s continued ownership of those claims. These facts include the following:

(1) The agreement that allegedly transferred the claims of the Amended Complaint to Mr. Seely did not specifically identify those claims as being transferred; (2) Mr. Seely has taken, and continues to take, the firm position that he never became the owner of those claims; (3) ESI continues to assert claims against MYI alone that are based upon those parties’ subcontract (which is the basis of the claims of the Amended Complaint); (4) ESI asserts a claim for relief in its Second Amended Counterclaim that raises the issue of ownership of the claims of the Amended Complaint,

and claims there is a need for a determination of that ownership. There has not been an adjudication of this claim for relief; and (5) the Court has ruled that it has jurisdiction over Mr. Seely, based upon the Court's analysis that the claims of the Amended Complaint were transferred to Mr. Seely in April 2004. However, this ruling was only recently entered, on April 28, 2008, and was entered upon a motion to dismiss, not a motion for summary judgment.

Indeed, given that the alleged transfer agreement did not specify that the claims of the Amended Complaint had been transferred and the person to whom the claims allegedly were transferred takes the position that he did not become the owner of the claims, MYI and its counsel had a duty, as well as a valid basis, to continue MYI's prosecution of the action after April 2004, even incorrectly assuming that its continued ownership of the claims mattered. Under these facts, there also was a valid basis in law and fact for MYI's statements and denials regarding ownership of the claims of the Amended Complaint, which ESI relies upon to support its failed theory that MYI's post-April 2004 prosecution of the action was a Rule 11 violation.

ESI's Rule 11 motion also should be denied, and MYI should be awarded its attorneys fees and expenses incurred in opposing the motion (as allowed by Rule 11(c)(2) to the prevailing party on a Rule 11 motion), because ESI mis-uses Rule 11.

Regardless of who owned the claims of the Amended Complaint after April 2004, MYI could continue as the plaintiff. The owner of the claims of the Amended Complaint was irrelevant to ESI's defense of those claims. Yet, ESI introduced and has vigorously pursued this issue, even though it had no bearing on the claims of the Amended Complaint, and now uses various MYI statements and denials on that issue to argue that the Amended Complaint should be dismissed as

a sanction (and that ESI should recover its attorneys fees incurred in pursuing the irrelevant issue). ESI does so when Rule 11 does not allow for dismissal of claims, and ESI does not even claim the Amended Complaint itself was a Rule 11 violation.

### **STATEMENT OF FACTS**

MYI and its counsel of record submit that ESI's Rule 11 motion should be denied based upon the following facts:

1. ESI's Rule 11 motion is based upon its theory that MYI's continued prosecution of the claims of the Amended Complaint after April 2004 was wrongful and, thus, a Rule 11 violation. ESI argues in its Memorandum that, in April 2004, MYI "lost the right to continue the prosecution of the instant case," and argues as follows:

Despite multiple opportunities for MYI and/or Seely to present documentary or testimonial evidence to the Court that the claims at issue are owned and/or otherwise controlled by MYI, such proof has not been made. MYI's continued assertion that it is a proper plaintiff and/or that it owns the claims against ESI, the Trust and American Insurance are not warranted by existing law and the allegation/arguments that have been made in support of such claim(s) have absolutely no evidentiary or legal support. Based on the foregoing, ESI can only conclude that MYI's prosecution of this claim after it assigned the alleged ESI account receivable to Developers in April 2004 was for the express purpose of harassing ESI and/or to cause unnecessary delay in the resolution of the matter or needless (and substantial) increase in the cost of litigation.

(ESI's Memorandum, at 19-20.)

2. MYI filed the Amended Complaint on June 7, 2001, alleging claims for relief based upon a subcontract between it and ESI for construction work on a Wal-Mart project. ESI states in

its Memorandum that “ESI does not dispute that at the time of the initial filing of the Amended Complaint, MYI owned the alleged ESI account receivable.” (ESI’s Memorandum, at 6).

3. MYI, Merrick and Stephanie Young, Developers Surety and Indemnity Company (“Developers”) and Mr. Seely entered into a “Settlement Agreement, Mutual Release, And Assignment” (the “Settlement Agreement”) that resolved a separate action against MYI by Developers, who was MYI’s bonding company. MYI, Merrick Young and Stephanie Young (who were collectively referred to as the “Indemnitors”) and Mr. Seely executed the Settlement Agreement on March 25, 2004. Developers executed it on April 5, 2004. (Ex. A (Settlement Agreement) )<sup>1</sup>

4. The Settlement Agreement stated that the Indemnitors (MYI and the Youngs) transferred “certain assets,” comprising eight listed categories of assets, to Developers, who in turn assigned them to Mr. Seely (with the exception of certain specified accounts receivable that were retained by Developers). The eight categories of transferred assets that were listed identified several specific assets, including MYI’s accounts receivable from several specified projects, but did not specifically identify the claims asserted in the Amended Complaint or funds owed MYI by ESI. Two of the eight categories of transferred assets were generally stated as follows. “Any equity in any other real property , business or assets in which any Indemnitor has an interest,” and “Any money, stocks, bonds or other assets of any Indemnitor.” (Exhibit A (Settlement Agreement), at 3, 5-6.)

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<sup>1</sup> Citations to “Exs ” are to exhibits attached to the Affidavit of Stephen R. Waldron that is being filed with this Memorandum

5. On February 16, 2007, ESI moved under Rule 25(c) to have Mr. Seely joined or substituted as a plaintiff in this action. ESI argued that there had been a transfer of interest to Mr. Seely under the Settlement Agreement, but did not argue that MYI's continued role as the plaintiff was wrongful. Instead, ESI argued that Mr. Seely should be joined or substituted as a plaintiff in order to ensure that Mr. Seely would be liable on ESI's claims for relief asserted in ESI's then pending Amended Counterclaim, and in order to facilitate the conduct of the case. MYI opposed ESI's Rule 25(c) motion on the grounds that the time for joining new parties had passed and the joinder would cause unnecessary delay as Mr. Seely, if an assignee of claims, could not be liable on the ESI's breach of contract and specific performance claims asserted in the Amended Counterclaim (which were based upon the subcontract to which MYI, not Mr. Seely, was a party) and Mr. Seely would be bound under Rule 25(c) by any judgment on the Amended Complaint so there was no need to join him. (2/16/07 Motion for Substitution; 2/16/07 Memorandum of Points and Authorities in Support of ESI's Motion for Substitution; 3/12/07 Plaintiff's Memorandum in Opposition to Motion for Substitution.)

6. On May 21, 2007, the Court entered "Corrected Rulings on Pending Motions; Associated Orders" that ruled, in part, upon ESI's Rule 25(c) Motion for Substitution. The Court granted the motion, ordering that Mr. Seely be joined as a plaintiff in addition to MYI. The Court ruled as follows:

There is no advantage to leaving Mr. Seely out of the case, and it is far too late for any party to complain about delaying litigation. While Rule 25(c) would allow the case to proceed with only MYI as plaintiff, such a course would virtually guarantee future litigation among MYI, ESI and Mr. Seely. There is also an issue as to whether Mr Seely may be liable to ESI on some of its counterclaims against MYI, so

it would not be prudent to substitute Mr. Seely in place of MYI. In the circumstances as they currently appear, the only reasonable course is to join Mr. Seely as a plaintiff.

(Exhibit B (5/21/07 Corrected Rulings on Pending Motions; Associated Orders), at 4 (emphasis added).)

7. On August 10, 2007, ESI filed a Second Amended Counterclaim. The Second Amended Counterclaim continued to assert claims for breach of contract and specific performance against only MYI, based upon the same subcontract that is the subject of the claims of the Amended Complaint. ESI added three new claims for declaratory relief that raised the issue of ownership of the claims asserted in the Amended Complaint, as well as three new claims against Mr. Seely alone for abuse of process and recovery of attorneys fees, which are based upon the allegation that MYI's continued prosecution of the action after April 2004 was wrongful. One of ESI's new claims for declaratory judgment seeks a declaration that Mr. Seely owns the claims for relief of the Amended Complaint. There has not been an adjudication of any of the claims asserted in the Second Amended Counterclaim. (Exhibit C (8/10/07 Second Amended Counterclaim).)

8. On September 7, 2007, MYI filed a Reply to Second Amended Counterclaim. This was the only pleading or filing in the entire action that was signed by attorneys from Berman & Savage (previous to this filing). All previous post-April 2004 pleadings and filings by MYI in this action had been signed by attorneys from Lear & Lear. (Exhibit D (9/7/07 Reply to Second Amended Counterclaim); Affidavit of Stephen R. Waldron, at ¶ 6)

9. On September 28, 2007, Mr. Seely moved to dismiss the Second Amended Counterclaim under Utah R. Civ. P. 12(b) on the grounds of lack of jurisdiction and failure to state



claims for relief against Mr. Seely. Attached to Mr. Seely's Motion to Dismiss was a declaration of Mr. Seely dated September 26, 2007. In that declaration, Mr. Seely declared under oath as follows:

At the time I signed the Settlement Agreement, I was generally aware of a dispute between MYI, Wal-Mart and others. I did not understand that the Settlement Agreement gave me any right or interest with respect to the above-captioned litigation [the instant action] nor did I expect to receive any such right or interest. The first time I learned that anyone was asserting that I had any right or interest with respect to the litigation was when the defendants sought to join me as a party in this litigation. I have not at any time, nor do I now, claim any right or interest in or with respect to the above-captioned litigation.

(Exhibit E (9/26/07 Declaration of Clyde G. Seely) at ¶ 5 (emphasis added).)

10. On April 16, 2008, the Court entered a "Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim." The Court treated the motion as a Utah R. Civ. P. 12(b) motion to dismiss, but denied it. The Court ruled that it had jurisdiction over Mr. Seely. The Court's analysis, in part, was as follows:

Regardless of whether Mr. Seely covertly controlled the prosecution of this action after 2004 or he deliberately or negligently allowed MYI to continue to control it, Mr. Seely had the right to control MYI's claims in this case. The specification of certain lawsuits transferred to Mr. Seely in the "Settlement Agreement, Mutual Release, and Assignment" does not obviate the general language therein which also gave Mr. Seely "[a]ny equity in any other . . . asset in which any Indemnitor has an interest" and "[a]ny . . . other assets of any Indemnitor." The chose in action upon which MYI sued defendants in this case is one such asset, and Mr. Seely owns it. For these reasons, this Court has previously ruled that Mr. Seely as the assignee and real party in interest, should be joined as a plaintiff.

This does not mean that Mr. Seely steps into MYI's shoes for all purposes. ESI does not seek to subject Mr. Seely to its original counterclaims against MYI, but ESI does assert that it has claims against Mr. Seely which accrued after he acquired his rights to MYI's claims in 2004. Having acquired all of the assets of MYI and its principals during the pendency of this action by MYI, Mr. Seely could and should have anticipated that this would subject him to the jurisdiction of this Court for his acts and omissions as to the ownership of the chose of action in this case.

Consequently, there is nothing wrong or unreasonable or unfair in requiring Mr. Seely to respond to ESI's claims, and this Court has jurisdiction sufficient to do so.

(Exhibit F (4/16/08 Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim), at 3-4.)

11. On April 25, 2008, Mr. Seely filed an "Answer to Second Amended Counterclaim." In this reply to the Second Amended Counterclaim, Mr. Seely denies that: (a) he owns the claims of the Amended Complaint, under the Settlement Agreement or otherwise, (b) he is the proper plaintiff on those claims, and (c) MYT's prosecution of those claims after April 2004 was improper. Mr. Seely affirmatively alleges that the claims against him are barred "because Seely does not claim any right or interest in or with respect to the above-captioned litigation." (Exhibit G (4/24/08 Answer to Second Amended Counterclaim), at 7-9, 12.)

12. Out of the approximately 26 pleadings, motions, memoranda and objections on non-procedural issues filed by ESI in this action on or since January 19, 2007, when ESI made its Rule 17(a) objection as to MYT's status as plaintiff in this action, 15 involved the issue of the ownership of the claims of the Amended Complaint. (Affidavit of Stephen R. Waldron, at ¶ 2.)

## ARGUMENT

### **I. MYI'S POST-APRIL 2004 PROSECUTION OF THE ACTION WAS NOT A RULE II VIOLATION BECAUSE THAT CONTINUED PROSECUTION WAS PROPER UNDER RULE 25(c), EVEN IF THERE WAS A TRANSFER OF INTEREST**

The central premise of ESI's Rule 11 motion, that in April 2004 MYI "lost the right to continue the prosecution of the instant case," is wrong. It is the law of this case that MYI could and did properly continue as the plaintiff after the alleged transfer of interest, under Rule 25(c).

Rule 25(c) allows a party, who was the real party in interest at the time an action was filed, to continue as the plaintiff even though there is a pendente lite (during the pendency of the action) transfer of the claims for relief. Rule 25(c) states:

In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Utah R. Civ. P. 25(c). The purpose of Rule 25(c) is to allow for the original parties to continue a lawsuit to a determinative conclusion, despite any pendente lite transfer of interest, so as to avoid endless lawsuits. This purpose was noted by the Utah Supreme Court in *Briggs v. Hess*, 252 P.2d 538 (Utah 1953):

The answer to any contention that the court lost jurisdiction in the suit between Tree and Hess when the latter conveyed during the pendency of the action, well might be found in Rule 25(c), Utah Rules of Civil Procedure, designed to continue litigation with the same litigants to a determinative conclusion. Were it otherwise, litigation might arrive at a stalemate by the simple device of a conveyance pendente lite, resulting in a series of endless lawsuits.

*Id.* at 539.

There is no question that Rule 25(c) allows an original plaintiff in an action to continue in that role after a pendente lite transfer of interest of the subject claims for relief. Utah R. Civ. P.

25(c) (“In the case of any transfer of interest, the action may be continued by . . . the original party” (emphasis added)); *Meagher v. Uintah Gas Co.*, 255 P.2d 989, 992 (Utah 1953) (“We think Meagher’s transfer of interest during pendency of the action does not deny him a continued role as plaintiff, nor does that role do violence to former Tile 104-3-19, U.C.A. 1943, or Rule 25(c), U.R.C.P., both of which allow prosecution of any action in the name of either grantor or grantee.” (emphasis added)); Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 1958, at 555 (“The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party . . .” (emphasis added)).

ESI concedes that MYI was the real party in interest when the Amended Complaint was filed. (MYI Fact No. 1.)<sup>2</sup> As such, MYI’s continued role as plaintiff after the alleged April 2004 pendente lite transfer of interest to Mr. Seely was proper under Rule 25(c). MYI never “lost the right to continue the prosecution of the instant case.”

Indeed, it is the law of this case that MYI’s continued role as the plaintiff after April 2004 was proper under Rule 25(c). Upon ESI’s Rule 25(c) motion to join or substitute Mr. Seely as a plaintiff in this action, the Court ruled in May 2007 that “**Rule 25(c) would allow the case to proceed with only MYI as plaintiff.**” (MYI Fact No. 6; Ex. B, at 4 (emphasis added).) Recognizing the propriety of MYI’s continued role as plaintiff, the Court then ordered that Seely be joined as a plaintiff, in addition to MYI. (*Id.*)

As such, ESI’s claim that MYI’s post-April 2004 prosecution of the action was a Rule 11 violation fails. ESI fails to show that there is no basis in law for MYI’s post-April 2004

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<sup>2</sup> Citations to “MYI Fact Nos.” are to the numbered facts in the Statement of Facts above.

prosecution of the action. *See* Utah R. Civ. P. 11(b)(2). To the contrary, Rule 25(c) and the law of this case applying Rule 25(c) provide a clear and certain basis.

Moreover, because MYI's post-April 2004 role as the plaintiff was proper under Rule 25(c), ESI fails to show, as required under Rule 11(b)(1), that MYI's continuing as the plaintiff was for improper purposes. *See* Utah R. Civ. P. 11(b)(1). ESI argues that it merely **assumes** that MYI's post-April 2004 prosecution of the action was for improper purposes, based strictly upon its central premise that MYI's post-April 2004 prosecution was improper. (ESI's Memorandum at 19-20 ("Based on the foregoing, ESI can only conclude that MYI's prosecution of this claim after it assigned the alleged ESI account receivable to Developers in April 2004 was for the express purpose of harassing ESI and/or to cause unnecessary delay.")) Because ESI's premise is incorrect, its mere assumption based upon that premise that there was an improper purpose fails.

**II. EVEN WITHOUT CONSIDERING RULE 25(c), THERE WAS A VALID PURPOSE AND BASIS FOR MYI'S CONTINUED ROLE AS PLAINTIFF AFTER APRIL 2004**

ESI also fails to show that MYI's post-April 2004 prosecution of the action was a Rule 11 violation, even without considering Rule 25(c) and incorrectly assuming continued ownership of the claims of the Amended Complaint determined MYI's right to continue as the plaintiff.

A claim, defense, legal contention, allegation or denial that has some or a possible basis in fact or law (including a non-frivolous argument for extension, modification or reversal of existing law), such as where the law is uncertain, cannot be a violation of Rule 11(b)(2),(3) or (4). Utah R. Civ. P. 11(b)(2), (3), (4); *Morse v. Packer*, 2000 UT 86, ¶28, 15 P.3d 1021 ("[T]he fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that sanction is appropriate." (citing Wright & Miller *Federal Practice &*

*Procedure Civil 2d* § 1335, at 67)); *Utah State Bar v. Sorensen*, 910 P.2d 1227,1228 (Utah 1996); *Robinson v. Morrow*, 2004 UT App 285, ¶24 n.3, 99 P.3d 341 (observing that Rule 11(b) “sets a relatively low standard requiring some factual basis after a reasonable inquiry”).

Ownership of the claims of the Amended Complaint is a legal issue. There was well more than “some” basis in law for MYI’s continued prosecution of the claims of the Amended Complaint after April 2004, even incorrectly assuming ownership of those claims determined whether MYI’s continued prosecution was proper. This is demonstrated by the following:

- The Settlement Agreement specifically identified several particular assets of MYI, including particular accounts receivable, that were transferred to Mr. Seely, but did not specifically identify the claims of the Amended Complaint. (MYI Fact Nos. 3-4.)
- Mr. Seely has taken the firm position that he did not become the owner of the claims of the Amended Complaint under the Settlement Agreement. (MYI Fact Nos. 9, 11.)
- ESI, in its Second Amended Counterclaim, raised the issue of the ownership of the claims of the Amended Complaint as a triable issue of fact, and there has been no adjudication of ESI’s claims. (MYI Fact No. 7.) Mr. Seely, in response to the Second Amended Counterclaim, continues to denies that he owns those claims. (MYI Fact No. 11.)
- ESI has acknowledged that there was a basis for MYI’s continued role as plaintiff. ESI’s February 2007 Motion for Substitution did not claim MYI’s continued role as plaintiff was wrongful and sought to have Mr. Seely joined as an additional plaintiff. (MYI Fact No. 5.) ESI continued to assert claims in the Second Amended Counterclaim against MYI alone, which arose out of the subcontract that is the subject of the claims of the Amended Complaint. (MYI Fact No.

7.) Also, ESI alleges in its Second Amended Counterclaim that there needs to be an adjudication of the issue of who owns the claims of the Amended Complaint. (*Id.*)

- The Court ruled that it had jurisdiction over Mr. Seely based upon the Court's analysis that the claims of the Amended Complaint had been transferred to Mr. Seely. (MYI Fact No. 10.) However, this ruling was only recently made, in April 2008 (after the filing of all of pleadings and filings that ESI relies upon to support its Rule 11 motion), and was made in a ruling upon a Rule 12(b) motion to dismiss, rather than in a summary judgment ruling. (*Id.*) In that ruling, the Court acknowledged a continued role for MYI as a plaintiff. (*Id.*)

Plainly, given that the Settlement Agreement did not expressly state that the claims of the Amended Complaint had been transferred and the person to whom those claims allegedly were transferred says he does not own the claims, MYI and its counsel had a duty, as well as a valid basis, to continue MYI's prosecution of the claims of the Amended Complaint, even incorrectly assuming MYI's continued ownership of those claims mattered.

Moreover, these same facts show that there was, and remains, a valid purpose and basis in law and fact for MYI's statements and denials regarding post-April 2004 ownership of the claims of the Amended Complaint, which ESI relies upon to support its failed theory of its Rule 11 motion (even incorrectly assuming that ESI was claiming any of these statements or denials in themselves, rather than MYI's post-April 2004 prosecution of the action, was a Rule 11 violation).

The only pleading or filing signed by a lawyer from Berman & Savage that ESI relies upon to support its claim that MYI's post-April 2004 prosecution was a Rule 11 violation is MYI's September 7, 2007 Reply to ESI's Second Amended Counterclaim. (MYI Fact No. 8.) ESI argues that MYI's responses and denials regarding the ownership issue in this Reply were "ambiguous."

However, none were without basis, under the facts set forth above. Even if the Court's April 2008 ruling regarding its jurisdiction over Mr. Seely had finally determined the issue of the ownership of the claims of the Amended Complaint, Berman and Savage filed the Reply for MYI well before that ruling, when that ownership issue would have been unresolved.

ESI relies upon MYI's responses in that Reply to ESI's allegations regarding the Settlement Agreement, and the attachment order in the separate Developers' case that led to the Settlement Agreement, to support its theory. However, ESI's allegations went to the legal effect of those documents and, in response, MYI admitted the existence of both of the documents and stated that the documents speak for themselves. This was not a denial of a factual contention and, as such was entirely proper and not a possible violation of Rule 11. *See* Utah R. Civ. P. 11(b)(4) (stating it applies only to denials of "factual contentions"). ESI also relies upon MYI's denial of ESI's allegation that there is a need to resolve the ownership issue. This denial also was not of a factual contention, and it had a valid basis in law, because, under Rule 25(c), post-April 2004 ownership of the claims of the Amended Complaint has no relevance to the resolution of those claims. Moreover, ESI's allegation is directly contrary to its Rule 11 violation theory: if there is a need to resolve the ownership issue, then it is a valid and unresolved issue such that MYI's positions on that issue cannot be a Rule 11 violation.

ESI does not even attempt to argue that the Reply, or any denial in it, was made for improper purposes (other than to support its presumption that MYI's post-April 2004 prosecution was for improper purposes because that continued prosecution allegedly had no basis in law). The Reply manifestly was not filed for improper purposes because ESI had asserted claims for relief against MYI in the Second Amended Counterclaim and MYI had to respond or be in default.



The other filings by MYI that ESI relies upon to support its failed Rule 11 violation theory likewise addressed the post April 2004 ownership issue, and likewise were not Rule 11 violations given the valid basis of MYI's statements and denials regarding post-April 2004 ownership of the claims of the Amended Complaint, discussed above. All of these filings were filed well before the Court's April 2008 ruling on the jurisdiction issue, even assuming it was a final adjudication of that ownership issue. Of course, the letters of counsel that ESI relies upon were not filings subject to Rule 11. *See* Utah R. Civ. P. 11(b) ("By presenting a pleading, written motion, or other paper to the court" an attorney represents there is no Rule 11 violation); *Morse*, 2000 UT 86 at ¶31.

**III. ESI FAILS TO DEMONSTRATE THAT THE OWNERSHIP ISSUE HAD ANY SIGNIFICANCE AND, INSTEAD, IMPROPERLY USES RULE 11 TO SEEK DISMISSAL OF CLAIMS AGAINST IT**

ESI's Rule 11 motion also should be denied because ESI fails to show the significance of the alleged mis-statements that ESI relies upon to support its claim that MYI's post-April 2004 prosecution of the action was a Rule 11 violation, and thus fails to show any harm or prejudice. Instead, ESI's Rule 11 motion is an improper attempt to obtain a disposition of the claims of the Amended Complaint based upon MYI's positions on an issue that has no relevance to those claims.

Only "significant" factual errors or mis-statements may be Rule 11 violations, and only mis-statements or errors that cause some harm or prejudice could result in sanctions. *Morse*, 2000 UT 86 at ¶28; *K.F.K. v. T.W.*, 2005 UT App 85, ¶ 4, 110 P.3d 162; *Utah State Bar*, 910 P.2d at 1228 ("The misnomer of plaintiff in the original complaint was a technical error which did not cause appellants any prejudice . . . ."); *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507, 509 (Utah 1976) ("[T]here should be no penalty or adverse effect for mere error which causes no harm.").

Whether MYI continued to own the subject claims after April 2004 has no bearing on whether it remained a proper plaintiff. *See* Utah R. Civ. P. 25(c). The issue of who owned the claims of the Amended Complaint after April 2004 has no bearing on ESI's defense of those claims. If Mr. Seely was the assignee of the claims of the Amended Complaint, he would be bound by the adjudication of those claims regardless of whether he was joined in the action. *See* Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 1958, at 555 ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named.").

Moreover, Mr. Seely has been joined. Yet, Mr. Seely was not named on ESI's claims in its Second Amended Counterclaim arising from the subcontract that is the subject of the claims of the Amended Complaint – underscoring the irrelevance of the ownership issue to the claims of the Amended Complaint. (MYI Fact No. 7.) Instead, ESI named Mr. Seely only on its claims that allege MYI's continued prosecution after April 2004 was wrongful. (*Id.*)

As a result, the various statements and denials ESI relies upon to support its Rule 11 violation theory have no significance, and ESI fails to show any harm or prejudice. Regardless of those statements and denials, it remained that MYI was a proper plaintiff under Rule 25(c) after April 2004, as demonstrated by the fact that ESI's opposing claims on the subject subcontract continued to be asserted against only MYI. ESI does not even claim any of the statements or denials that it relies upon were Rule 11 violations be themselves; ESI, instead, merely relies upon the statements and denials to support its failed theory that MYI's post-April 2004 prosecution of the

action was a Rule 11 violation. Without showing any significance, ESI fails to show it is entitled to any sanction under Rule 11.

What ESI has done is introduce and vigorously pursue the issue of ownership of the claims of the Amended Complaint for no purpose. That issue has no impact on ESI's defense of the claims of the Amended Complaint. The only "substantive" result of ESI's pursuit of the issue is its claims against Mr. Seely that are based upon its failed premise that MYI's post-April 2004 prosecution of the action was wrongful. A significant portion of the attorneys fees that ESI seeks as sanctions were incurred in pursuit of this irrelevant issue (based upon the number of its filings involving this issue). (MYI Fact No. 12.) Now, with the present Rule 11 motion, ESI is using MYI's statements and denials regarding this issue to seek a dismissal of the claims of the Amended Complaint against it, even though the issue has no bearing on those claims.

The impropriety of ESI's Rule 11 motion is vividly demonstrated by the fact that, without precedent, ESI seeks the dismissal of the Amended Complaint as the sanction. Rule 11 does not allow for the "ultimate" sanction of dismissal of claims. Utah R. Civ. P. 11(c)(2) ("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."). This is because, as ESI points out, Rule 11 sanctions are an entirely collateral issue and do not address the merits of a party's claims for relief. *Barton v. Utah Transit Authority*, 872 P.2d 1036, 1040 (Utah 1994). Dismissal of claims for a Rule 11 violation would be a violation of due process. *See Utah Dep't of Transp. v. Osguthorpe*, 892 P.2d 4, 7 (Utah 1995) ("The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case." (citing *Heathman v. Fabian & Clendenin*, 377 P.2d 189, 190 (Utah 1962))).

Moreover, ESI incredibly claims the Amended Complaint should be dismissed as a sanction, without even claiming that any aspect of the Amended Complaint was a Rule 11 violation. Even if striking a pleading was warranted as a sanction under Rule 11, Rule 11 would not allow a pleading to be stricken that was not filed in violation of Rule 11.

**IV. MYI SHOULD BE AWARDED ITS FEES AND EXPENSES INCURRED IN RESPONDING TO ESI'S RULE 11 MOTION AS THE PREVAILING PARTY**

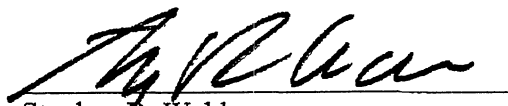
Rule 11 provides that: "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorneys fees incurred in . . . opposing the [Rule 11] motion." Utah R. Civ. P. 11(c)(1)(A). *See also K.F.K.*, 2005 UT App 85 at ¶ 3. An award to MYI of its attorneys fees and expenses incurred in opposing ESI's Rule 11 motion is warranted, given the utter lack of merit of the motion, as shown by this Court's own rulings.

**CONCLUSION**

For the foregoing reasons, MYI and Berman & Savage respectfully submit that ESI's Rule 11 motion should be denied in full. MYI requests an award of its fees and expenses incurred in opposing ESI's Rule 11 motion.

DATED: August 6, 2008

BERMAN & SAVAGE, P.C.



Stephen R. Waldron  
Attorneys for Merrick Young Incorporated

**CERTIFICATE OF MAILING**

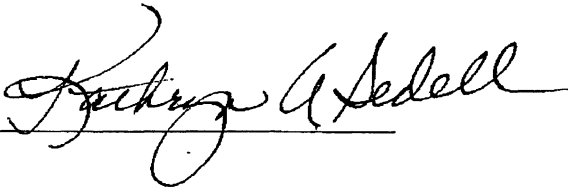
I hereby certify that I caused a true and correct copy of the within and foregoing **MERRICK YOUNG INCORPORATED'S AND ITS COUNSEL'S OPPOSITION TO ESI'S MOTION FOR SANCTIONS AGAINST MYI AND ITS COUNSEL OF RECORD** to be mailed, postage prepaid, this 24 day of August, 2008, to the following:

Clark B. Fetzer  
Rinehart Fetzer Simonsen & Booth, P.C.  
1200 Chase Tower  
50 West Broadway  
Salt Lake City, Utah 84101

Kim Trout  
Trout Jones Gledhill Fuhrman, P.A.  
P.O. Box 1097  
Boise, Idaho 83701

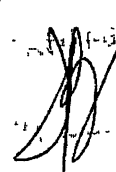
Greggory J. Savage  
Ray Quinney & Nebeker, P.C.  
36 South State Street, Suite 1400  
Salt Lake City, UT 84111

Dennis C. Farley  
Lear & Lear  
299 South Main, Suite 2200  
Wells Fargo Center  
Salt Lake City, UT 84111

  
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Tab D

FILED  
DISTRICT COURT  
2008 AUG 18 PM 2:42

WASHINGTON COUNTY  


CLARK B. FETZER (USB# 1069)  
**RINEHART FETZER SIMONSEN & BOOTH, P.C.**  
1200 Chase Tower  
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KIM J. TROUT (ISB# 2468)  
VICKY J. ELKIN (ISB# 5978)  
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Phone: (208) 331-1170  
Facsimile: (208) 331-1529

*Attorneys for Defendants*

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**IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

---

MERRICK YOUNG INCORPORATED, a  
Utah corporation; and CLYDE G. SEELY, an  
individual,

Plaintiffs,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

**REQUEST TO SUBMIT  
FOR DECISION AND  
REQUEST FOR HEARING**

Civil No. 010500909

Judge G. Rand Beacham

Defendant Engineered Structures, Inc. ("ESI") hereby submits for decision pursuant to Rule 7 of the Utah Rules of Civil Procedure its Motion for Sanctions Against MYI and Its Counsel of Record, filed on or about July 8, 2008, and states as follows:

1. On or about June 13, 2008, ESI served Notice upon Dennis C. Farley and E. Scott Savage of its intent to seek sanctions pursuant to Rule 11 of the Utah Rules of Civil Procedure.

2. On or about July 8, 2008, ESI served its Motion for Sanctions Against MYI and Its Counsel of Record and memorandum in support.

3. On or about August 7, 2008, counsel for Merrick Young, MYI served the following documents:

a. Merrick Young Incorporated's and Its Counsel's Opposition to ESI's Motion for Sanctions Against MYI and Its Counsel of Record;

b. Affidavit of Stephen R. Waldron in Support of Merrick Young Incorporated's and Its Counsel's Opposition to ESI's Motion for Sanctions Against MYI and Its Counsel of Record;

c. Merrick young Incorporated's Co-Counsel's Joinder in Response to ESI's Motion for Sanctions Against MYI and Its Counsel of Record.

4. Rule 7(c) provides the moving party *may* file a reply memorandum within five (5) days after service of the memorandum in opposition. Rule 7(c) does not require a reply brief to such a response. In light of the fact that claim ownership and Rule 25 issues were thoroughly



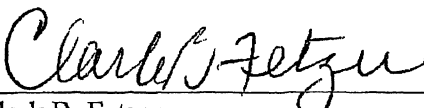
briefed by the parties in January/February 2007<sup>1</sup>, February/March 2007<sup>2</sup> and in September/October 2007<sup>3</sup>, and mindful of this Court's knowledge of the proceedings which are the subject matter of ESI's Rule 11 Motion as well as this Court's corrected ruling on May 21, 2007, Defendant Engineered Structures, Inc. ("ESI") hereby submits for decision its Motion for Sanctions on the pleadings previously filed and the record herein.

### REQUEST FOR HEARING

ESI hereby requests a hearing on its Motion for Sanctions Against MYI and Its' Counsel of Record.

DATED this 4<sup>th</sup> day of August, 2008.

RINEHART FETZER SIMONSEN & BOOTH, P.C.

  
Clark B. Fetzer

<sup>1</sup> See ESI's Rule 17(a) Objection, filed on or about January 19, 2007, and related pleadings including, but not necessarily limited to: (1) Supplemental Memorandum in Opposition to Motion to Quash and in Support of Rule 17(a) Objection, filed on or about January 19, 2007; (2) Affidavit of Kim J. Trout, filed on or about January 19, 2007; (3) [MYI's] Memorandum in Opposition to Defendants' Rule 17(a) Objection, filed on or about January 25, 2007; (4) ESI's Reply Memorandum in Support of Rule 17(a) Objection, filed on or about February 5, 2007; (5) Affidavit of Clark B. Fetzer in Support of Rule 17(a) Objection/Rule 25 Motion, filed on or about February 5, 2007. See also (6) ESI's Memorandum in Opposition to [MYI's] Motion to Quash Deposition of Clyde G. Seely, filed on or about January 16, 2007; (7) Affidavit of Kim J. Trout in Opposition to Motion to Quash, filed on or about January 17, 2007; and (8) Plaintiff's Reply Memorandum to Defendants' Opposition to Motion, filed on or about January 16, 2007.

<sup>2</sup> See ESI's Motion for Substitution, filed on or about February 16, 2007, and related pleadings including, but not necessarily limited to: (1) [ESI's] Memorandum of Points and Authorities in Support of ESI's Motion for Substitution, filed on or about February 16, 2007; (2) Plaintiff's Memorandum in Opposition to Motion for Substitution, filed on or about March 12, 2007; and (3) ESI's Reply Memorandum In Support of its Motion for Substitution, filed on or about March 22, 2007.

<sup>3</sup> See Seely's Motion to Dismiss Second Amended Counterclaim, filed on or about September 28, 2007, and related pleadings and orders including but not necessarily limited to: (1) [Seely's] Memorandum in Support of Motion to Dismiss Second Amended Counterclaim, filed on or about September 28, 2007; (2) ESI's Memorandum in Opposition to Motion to Dismiss and in Support of ESI's Objection to Seely Affidavit and Rule 56(f) Motion for Additional Time, filed on or about October 18, 2007; (3) Affidavit of Kim J. Trout Filed in Support of: (1) ESI's Opposition to Motion to Dismiss and (2) ESI's Objection to Seely Affidavit and Rule 56(f) Motion for Additional Time, filed on or about October 18, 2007; (4) [Seely's] Reply Memorandum in Support of Motion to Dismiss Second Amended Counterclaim, filed on or about October 31, 2007; and (5) Ruling on Clyde G. Seely's Motion to Dismiss Second Amended Counterclaim, issued on or about April 10, 2008.

**CERTIFICATE OF SERVICE**

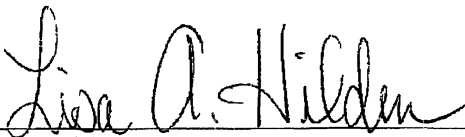
I hereby certify that on the 14<sup>th</sup> day of August, 2008 I sent a true and correct copy of  
**REQUEST TO SUBMIT FOR DECISION AND REQUEST FOR HEARING** to the parties  
listed below via U.S. Mail.

Jon M. Lear  
Dennis C. Farley  
LEAR & LEAR  
The Downey Mansion  
808 E. South Temple  
Salt Lake City, UT 84102

E. Scott Savage  
BERMAN & SAVAGE, P.C.  
170 S. Main Street #500  
Salt Lake City, UT 84101

Michael W. Spence  
Greggory J. Savage  
RAY QUINNEY & NEBEKER, P.C.  
36 South State Street, Suite 1400  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385

Dated this 14<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_  
Lisa A. Hilden

Tab E

2007 MAY 21 PM 3:27

IN THE FIFTH DISTRICT COURT FOR  
WASHINGTON COUNTY, STATE OF UTAH

MERRICK YOUNG INCORPORATED,

Plaintiff,

vs.

WAL-MART REAL ESTATE  
BUSINESS TRUST, et al.,

Defendant.

CORRECTED<sup>1</sup> RULINGS ON  
PENDING MOTIONS;  
ASSOCIATED ORDERS

Civil No. 010500909  
Judge G. Rand Beacham

Between January and March of 2007, Plaintiff Merrick Young Incorporated (hereafter "MYI") and Defendant Engineered Structures, Inc. (hereafter "ESI") filed more than 10 motions. Since several motions were made in response to other motions, I elected to wait for the flow of paper to ebb before dealing with them.

The last requests to submit for decision were filed in April. The 10 motions upon which I will now rule involve at least 61 individual papers, and many of those have numerous exhibits. ESI's attorneys provided me with a very useful list of motions and related papers, which has helped me and my law clerk, Kathryn Lusty, sort through it all.

There were requests for hearings with respect to several motions. None of these motions is dispositive, however, so no hearings are required.

Having fully reviewed each motion, I will deal with each major motion and those subsidiary to it as a group:

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<sup>1</sup>The name "Young" has been corrected to "Seely" in several instances.

## MYI MOTION FOR RELIEF FROM SUMMARY RULINGS AND ORDER

In October 2006, I issued my “Summary Rulings and Order” regarding an earlier group of motions from these parties. MYI now moves for relief from those Summary Rulings and Order pursuant to Rule 60(b) of the Utah Rules of Civil Procedure.

I find no valid basis for MYI’s motion. Regardless of whether the Summary Rulings and Order contain anything which is properly subject to a Rule 60(b) motion, MYI has not identified any mistake, inadvertence, surprise or excusable neglect by a party which could support its motion. Instead, MYI argues, somewhat surreptitiously, that the mistake was made by me in the Summary Rulings and Order. Consequently, Rule 60(b) is not appropriate for the relief requested, and it would have been more appropriate for MYI to file a motion to reconsider which, even after *Gillett v. Price*, would be permissible with respect to the Summary Rulings and Order.

Having also considered MYI’s motion as if it were one for reconsideration, I am not persuaded that it should be granted. The problems created by MYI’s obstructionist actions were fully considered last fall, and MYI’s characterizations still do not change those problems. MYI’s Motion for Relief from Summary Rulings and Order is denied.

ESI’s Motion to Strike Exhibits is moot, since MYI’s Motion for Relief is denied regardless of the exhibits. ESI’s requests for sanctions and for fees, as well as MYI’s “Motion to Strike ESI’s Request for Sanctions Under Rule 11” and “Motion to Strike Request for Fees Pursuant to Rule 11,” are all denied.

### MYI'S (FIRST) MOTION FOR PROTECTIVE ORDER

This motion was filed to prevent the taking of the deposition of Mr. Clyde Seely in another state. The motion was opposed by ESI, and MYI filed a reply and a notice to submit. Thereafter, a court of the other state apparently quashed the subpoena for the deposition, and MYI filed a notice of that order and of MYI's resulting intent to withdraw the Motion for Protective Order. ESI objected to the withdrawal.

Despite ESI's desire to use its opposing materials for other purposes, I find nothing is left for me to consider on the merits of MYI's motion. Accordingly, the first Motion for Protective Order, and MYI's related Motion to Strike Defendant's Supplemental Memorandum, are both denied as moot.

### ESI'S RULE 17(a) OBJECTION and MOTION FOR SUBSTITUTION

ESI alleges it has discovered that all of MYI's interest in the subject matter of its Complaint has been transferred and assigned to Mr. Clyde Seely, making him the real party in interest. MYI essentially concedes that such a transfer and assignment took place, although it asserts that it was the real party in interest when the Complaint was filed. As noted both above and below, some considerable difficulty has attended ESI's attempts to take Mr. Seely's deposition to determine the extent and effect of the transfer and assignment.

After ESI made its objection to MYI's continuing as plaintiff pursuant to Rule 17(a) and MYI filed its opposing memorandum, ESI then moved under Rule 25(c) for

an order substituting Mr. Seely as plaintiff or joining him as an additional plaintiff. MYI also opposed that motion. MYI filed a Request for Leave of Court to File a Sur-Reply, but that request is contrary to Rule 7 and is denied.

Mr. Seely apparently has a clear personal interest in the subject matter of this action and in its outcome. After Mr. Seely received service of all the papers related to ESI's Motion for Substitution, however, he filed no opposition or response. In addition, MYI has prevented ESI from taking Mr. Seely's deposition as a non-party witness in order to determine his interest in this litigation. Consequently, it is impossible for me to determine whether Mr. Seely claims or acknowledges any interest in the outcome of this case.

There is no advantage to leaving Mr. Seely out of the case, and it is far too late for any party to complain about delaying this litigation. While Rule 25(c) would allow the case to proceed with only MYI as plaintiff, such a course would virtually guarantee future litigation among MYI, ESI and Mr. Seely. There is also an issue as to whether Mr. Seely may be liable to ESI on some of its counterclaims against MYI, so it would not be prudent to substitute Mr. Seely in place of MYI. In the circumstances as they currently appear, the only reasonable course is to join Mr. Seely as a plaintiff.

Accordingly, ESI's Motion for Substitution is granted, and Mr. Seely will be joined as an additional plaintiff. ESI may serve Mr. Seely with appropriate pleadings and Mr. Seely may have the time prescribed by the Utah Rules of Civil Procedure for

response. If Mr. Seely fails to make an appearance, he may be considered to be an involuntary plaintiff and discovery may be obtained from him under the rules applying to any other party.

### MYI'S (SECOND) MOTION FOR PROTECTIVE ORDER

The assignment of rights and transfer of assets by MYI to Mr. Seely, as noted above, remains somewhat unclear in its details. Although the timing is contested, ESI asserts that it first fully understood MYI's assertions about the assignment in early January 2007, a few days before the fact discovery deadline of the current Case Management Order. ESI's first attempt to take the deposition of Mr. Seely would have been successful, within the deadline, except that it was defeated when MYI obtained orders from a court in another state preventing the deposition.

ESI again hopes to take Mr. Seely's deposition, but MYI has again sought a protective order preventing the deposition. MYI's only argument now is that the fact discovery deadline has now passed. MYI fails to acknowledge that it obstructed the taking of Mr. Seely's deposition before the deadline had passed. MYI also failed to certify, pursuant to Rule 26(c), that it "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." It appears from the record of this case that MYI would be unable to so certify.

I am satisfied that the deposition of Mr. Seely is a necessary step toward the resolution of this action. MYI's prevention of that deposition, followed by its present



attempt to take advantage of a deadline which passed only because MYI prevented ESI from taking the deposition, appears to be another instance of the obstructionist tactics against which I warned MYI in my Summary Rulings and Order last October.

Accordingly, MYI's motion is denied, and my Rule 11 order to MYI's attorneys appears below.

#### ORDERS

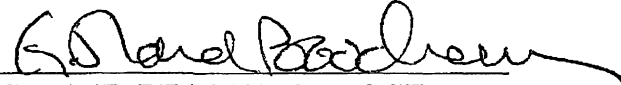
In relation to the foregoing rulings on 10 pending motions, and due to the manner in which they were presented, the Court hereby orders:

- A. ESI's Motion for Substitution is granted, and all other motions are denied.
- B. For the duration of this action, the parties shall not:
  - 1. Attempt to file any document by facsimile.
  - 2. File any papers which are not attached together with staples or other appropriate binding materials, which shall not include "bulldog" clips or other impermanent fasteners.
  - 3. File any exhibits without attaching them to an affidavit providing an evidentiary foundation therefor.
  - 4. File any motions to strike in response to or in opposition to any other motion, memorandum, or affidavit.
  - 5. File any request to submit an over-length memorandum.
  - 6. File any request to submit a "sur-reply" memorandum.

7. File any request for an expedited hearing or decision.

C. Since it appears to me that MYT's attorneys have opposed the deposition of Mr. Seely for the improper purposes of preventing legitimate discovery by ESI, causing unnecessary delay, and needlessly increasing the cost of this litigation, and in doing so have made frivolous arguments to me, Mr. Farley and Mr. Savage are hereby ordered to appear before this Court on **Wednesday, June 6, 2007 at 11:00 a.m.** to show cause why they have not violated Rule 11(b) of the Utah Rules of Civil Procedure.

Dated this 21 day of May, 2007.

  
G. RAND BEACHAM, JUDGE

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 23 day of May, 2007, I provided true and correct copies of the foregoing CORRECTED RULINGS and ORDERS to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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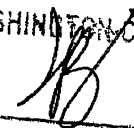
  
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DEPUTY CLERK OF COURT

Tab F

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*Attorneys for Defendants*

FILED  
FIFTH DISTRICT COURT  
2009 MAR 13 AM 11:26  
WASHINGTON COUNTY  
BY 

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**IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

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MERRICK YOUNG INCORPORATED,  
  
Plaintiff,

vs.

WAL-MART REAL ESTATE BUSINESS  
TRUST, a Delaware business trust;  
ENGINEERED STRUCTURES, INC., an  
Idaho corporation; THE AMERICAN  
INSURANCE COMPANY, a Nebraska  
corporation; WESTERN ROCK PRODUCTS  
CORPORATION, a Utah corporation, and  
DOES 1-100,

Defendants.

**AMENDED ORDER DENYING ESI'S  
MOTION FOR SANCTIONS AGAINST  
MYI AND ITS COUNSEL OF RECORD**

Civil No. 010500909

Judge G. Rand Beacham

The Court has considered ESI's Motion for Sanctions against MYI and Its Counsel of Record. Having reviewed the voluminous materials in support, and the considerable materials filed in opposition, the Court finds insufficient evidence of violation of Rule 11(b). The motion for sanctions is denied. The parties shall bear their own costs and fees for the motion.

Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay of an appeal of this Order, and expressly directs entry of a final judgment in favor of Merrick Young Incorporated as to the motion for sanctions.

DATED: 3-12-08

  
HONORABLE G. RAND BEACHAM  
Fifth District Court Judge