

2009

Merrick Young Incorporated v. Engineered Structures Inc., an Idaho corporation; et al. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MERRICK YOUNG INCORPORATED,

Plaintiff, Appellant, and Cross-
appellee,

v.

ENGINEERED STRUCTURES, INC., an
Idaho corporation; et al.,

Defendants, Appellees, and Cross-
appellant.

Appellate Case No. 20090227-CA

REPLY BRIEF OF CROSS-APPELLANT

Appeal from Judgment of the Fifth District Court, Washington County
Judge G. Rand Beacham

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Oral Argument and Published Decision

Requested
UTAH APPELLATE COURTS

MAY 25 2010

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ARGUMENT IN SUPPORT OF CROSS-APPEAL

By way of cross-appeal, ESI has appealed the trial court's denial of its Motion for Rule 11 Sanctions. In support of its cross-appeal, ESI identified three (3) issues which are controlling:

1. Whether the trial court erred in failing to describe the conduct constituting the basis for its denial of ESI's Motion or, *alternatively*, whether the trial court's findings are unsupported by the evidence;
2. Whether the trial court's legal conclusion that no Rule 11(b) violation had been committed is an error of law; and
3. Whether the trial court abused its discretion by not awarding sanctions against MYI and its counsel.

See Br. of Appellees and Cross-Appellant (hereinafter "ESI Opening Br.") at pp. 24, 27, 44. Because it was unclear whether the trial court's single "finding" - "the Court finds insufficient evidence of violation of Rule 11" - was a finding of law or a finding of fact or conclusion of law, ESI addressed both scenarios. *Id.*, §§ I.B; II. ESI first argued the trial court's failure to make any factual findings to support its legal conclusion denying the Motion was clearly erroneous based upon the Court's failure to address each alleged misrepresentation or action and specify why each did not violate the provisions of Rule 11 of the Utah Rules of Civil Procedure. *Id.* § I, pp. 25-27. Second, ESI argued the trial court's legal conclusion was an error of law and marshaled the relevant evidence to demonstrate why the findings were clearly erroneous. *Id.*, § II, pp. 27- 43.

In response, MYI argues the trial court's finding was sufficient and, without specifically responding to the other issues identified by ESI, claimed three (3) separate "issues" had been raised by ESI's cross-appeal. *See* Br. of Appellant and Cross-Appellee (hereinafter "MYI Reply Br.") at p. 19. Specifically, MYI contends the relevant "issues" include the following:

1. Whether MYI and its counsel could 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 Claim and, even if there had been, when Utah R. Civ. P. 25(c) ("Rule 25(c)") legally authorized the continued prosecution, as ruled by the district court. *Id.* at p. 19 (*citing* R. 3993-4013, 4014-4100); *see also id.*, § II, pp. 30-35.

2. Whether ESI misused 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. *Id.* at p. 19 (*citing* R. 3993-4013, 4014-4100); *see also id.*, § III, pp. 35-39.

3. Whether, 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 *pendent 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 *pendent lite* transfer of those claims? *Id.* at p. 19 (*citing* R. 3993-4013, 4014-4100); *see also id.* at § IV., pp. 39-50.

ESI recognizes that Rule 24(b)(1) of the Utah Rules of Appellate Procedure permits an appellee to submit a statement of the issues if it is dissatisfied with the statement of the appellant; however, the “issues” as identified by MYI appear to be its effort to marshal evidence to support the trial court’s ruling denying the Rule 11 Motion. MYI’s issues will, therefore, be individually addressed where appropriate in Sections II and III of this Reply Brief. *See* n.1, *infra*.

I. MYI FAILED TO CREDIBLY REBUT ESI’S CLAIM THAT THE DISTRICT COURT’S CONCLUSORY FINDING IS INSUFFICIENT AS A MATTER OF LAW AND REMAND IS APPROPRIATE OR ALTERNATIVELY, THAT THE TRIAL COURT’S FINDINGS ARE UNSUPPORTED BY THE EVIDENCE.

In Section I of its Argument in Support of Cross Appeal, ESI argued the district court’s failure to meet the standard imposed in *Barnard v. Sutliff*, 846 P.2d 1229 (Utah 1992) justified remand so an order could be entered more fully explaining its rationale in denying ESI’s Rule 11 Motion. *Alternatively*, ESI argued that even if the appellate court found the trial court’s explanation supporting its denial sufficiently met the *Sutliff* standard, the trial court’s findings were clearly erroneous in light of the evidence in the record. *See* ESI Opening Br. at § I, pp. 24-27.

In response, MYI does not dispute that the trial court's single "finding" – "the Court finds insufficient evidence of Rule 11" – is a conclusion of law. Rather, MYI argues the district court's findings were sufficient, claiming the district court was not "required" to make any findings beyond its conclusory finding of "insufficient evidence of violation of Rule 11(b)." See MYI Reply Br., § I, pp. 28-30. Specifically, MYI argues that this honorable court has recently "reviewed" similar "conclusory findings" in *Gillmor v. Family Link, LLC*, 2010 UT App. 2, ¶ 20, 224 P.3d 741 and found such findings "sufficient." In addition, MYI argues that 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). See MYI Reply Br. at p. 29. MYI asserts that ESI did not seek retraction of particular allegations, statements or denials with its Rule 11 Motion, but, instead, sought dismissal of the Amended Complaint with prejudice and an award of all of its attorney fees. *Id.* MYI's arguments are without legal merit.

First, contrary to MYI's claim, the *Gillmor* Court did not "review" the sufficiency of the district court's findings. There is no argument in that case, by either party or by the appellate court, that the findings made by the district court in *Gillmor* were insufficient to support the district court's order. In fact, it is obvious from the appellate court decision that the district court analysis was fairly detailed. See, e.g., *id.* at ¶ 17 (describing the district court's finding, the district court's analysis with respect to the subject matter of the suit on appeal with early suits, and its conclusion that a Rule 11(b)(2) violation had occurred given the plaintiff's failure to identify an applicable

exception to the bar imposed by *res judicata*); *see also* ¶ 20 (describing the district court’s finding of lack of evidence *and* its finding of plaintiff’s purpose in filing the litigation). Moreover, the trial court’s decision reflects the district court’s analysis supporting its ruling was quite extensive and detailed. A copy of the trial court’s decision is attached as Tab 1 of the Addendum to this Reply Brief.

In *Morse v. Packer*, 1999 UT 5, 973 P.2d 422, the Utah Supreme Court explicitly recognized that where application of the *Sutliff* standard is impossible because of the lack of meaningful explanation supporting the district court’s order denying sanctions, remand is appropriate. MYI’s brief only highlights the fact that remand is appropriate in this situation. For example, MYI speculates that “ESI’s Rule 11 Motion . . . 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.” *See* MYI Reply Br. at p. 27. However, the trial court never made this finding. In fact, neither party knows why the Rule 11 Motion was denied *because the district court did not make any specific findings related to its denial*. While MYI argued below that this would be a proper basis for denial of the Rule 11 Motion, (R. 3996, 4009-4011), the district court did not refer to MYI’s argument – or any other defense – when it concluded there was “insufficient evidence of violation of Rule 11(b).”

Moreover, ESI’s alleged failure to seek Rule 11 sanctions based on a particular filing (*see* MYI Reply Br. at p. 29) is not only false but it does not support MYI’s claim that the district court made sufficient findings. As is set forth in detail on this appeal, below ESI identified both facts and arguments made by MYI which lacked evidentiary

support and/or were unwarranted by the evidence – all in violation of Rule 11. In addition, ESI requested that MYI correct (and gave MYI the opportunity to correct) MYI’s pleadings *before* ESI filed its Motion for Rule 11 Sanctions. *See* ESI Opening Br. at p. 41 (citing Statement of Relevant Facts (hereinafter “SRF”) at ¶ 35). The choice of sanction does not diminish the argument. As set forth in more detail in § II.C., *infra*, the requested sanction was appropriate and warranted in the instant case. MYI pursued and continues to pursue claims that it does not own. Dismissal of these claims is not outside the realm of appropriateness under the circumstances. The trial court has great leeway to tailor the sanction to fit the requirements of a particular case. *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180, 195 (Utah 1997); *see also Barton v. Utah Transit Authority*, 872 P.2d 1036, 1040, n.6 (Utah 1994).

MYI has failed to credibly rebut ESI’s first argument on appeal - that the trial court erred in failing to describe the conduct constituting the basis for its denial of ESI’s Motion and that remand is appropriate. MYI’s argument that the district court was not “required” to make any findings, *see* MYI Reply at p. 29, is not supported by *Gillmor* and, in fact, is completely contrary to the Utah Supreme Court’s holding in *Morse* wherein it stated, “When denying a rule 11 motion for sanctions, a trial court must likewise describe the conduct constituting a basis for the denial.” *Morse, supra* at ¶13 (emphasis added).

Given the foregoing, ESI respectfully requests that this Court determine the district court’s “findings” to be insufficient as a matter of law and remand so the trial court may enter an order more fully explaining its rationale in denying sanctions.

II. TO THE EXTENT THE TRIAL COURT'S FINDING BELOW WAS DEEMED TO BE ONE OF FACT, ESI MARSHALED SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE TRIAL COURT'S LEGAL CONCLUSION OF NO RULE 11(b) VIOLATION IS AN ERROR OF LAW.

When challenging a court's findings as erroneous, it is the appellant's burden to marshal all relevant evidence in support of the findings and then demonstrate why the findings are clearly erroneous. *Kealamakia v. Kealamakia*, ¶ 10, 2009 UT App 148. Below, and on appeal, ESI argued MYI violated subsection (b)(2) of Rule 11 by asserting claims, defenses, and/or other legal contentions that were not warranted by existing law and violated subsection (b)(3) of Rule 11 by making allegations and other factual contentions that had no evidentiary support. Specifically, ESI alleged these violations occurred when MYI (1) concealed and/or confused the issue regarding ownership of the Subject Claim and (2) represented itself to be the real party in interest without a basis in law or fact. (R. 3301.) In response, MYI argues the following:

- MYI Issue II: ESI's Rule 11 Motion failed as a matter of law because MYI never "lost" the right to prosecute the subject claims. *See* MYI Reply at § II, pp. 30-34.
- MYI Issue 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. *See* MYI Reply at § III, pp. 35-39.

- MYI Issue 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 Motions 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 *pendent light* transfer. See MYI Reply at ¶ IV, pp. 39-50.

As noted *supra*, these “issues,” as identified by MYI, appear to be MYI's effort to marshal evidence to support the trial court's ruling denying the Rule 11 Motion. MYI's issues will, therefore, be individually addressed herein.¹

As a preliminary matter, however, in its Reply MYI claims that ESI, below, merely contended that particular arguments, statements, and denials were a “continuing” Rule 11 violation, as opposed to separate violations. See *e.g.*, MYI Reply at p. 26. MYI argues that ESI cannot challenge the denial of its Motion on this basis because the issue was not raised below. See MYI Reply at pp. 47-48. MYI's argument is completely without merit. In the introduction to its Motion below ESI specifically stated:

Since March 25, 2004, Merrick Young Incorporated (hereinafter “MYI”) and its' counsel of record have **repeatedly violated** the provision of Rule

¹ The argument identified herein as “*MYI Issue II*” includes arguments related to transfer of ownership of the subject claims and Rule 25(c). The ownership issue will be addressed herein at section II.B.3. The Rule 25(c) issue will be addressed herein at section II.B.2.

The argument identified herein as “*MYI Issue III*” purports to assert a legal basis upon which ESI's Rule 11 Motion could be properly denied but, as will be seen *infra*, is not a basis for denial of a Rule 11 Motion. This argument will be addressed herein at section II.C.

The argument identified here as *MYI Issue IV*” deals specifically with the facts relied upon by ESI in support of its Motion and the present appeal. This issue will, therefore, be addressed as appropriate at §§ II.A. and II.B, *infra*.

11 by continuing in the prosecution of the above-entitled matter without a legal basis to do so.

(R. 3301 (bold emphasis added)). ESI went on to identify “categories” of misconduct which it believed summarizes these repeated violations. Specifically, ESI first argued MYI concealed/confused the “issue regarding ownership of the claim(s) at issue” (R. 3301) by flatly misrepresenting the identity of the purported owner, obfuscating ownership thereof, and taking inconsistent positions regarding ownership. *See e.g.*, R. 3308, 3311-3318 (identifying Mr. Farley’s April 2004 Representation and MYI’s use thereof to defeat ESI’s efforts to depose and/or join Mr. Seely, and identifying the pleadings which evidence the inconsistent positions taken by MYI with respect to ownership of the claims). Next, ESI argued MYI represented itself to be the real party in interest without a basis in law or fact by improperly representing it was authorized by Utah Code Ann. § 48-2c-1302(6) to wind up its affairs and sue to protect its assets and by arguing it was authorized under Rule 25(c) to prosecute the claim as the assignor of the Subject Claims. (R. 3301; R. 3311-14.) Clearly therefore, ESI did not argue, for the first time on appeal, that the independent actions of MYI and its counsel each represent violations of Rule 11. MYI’s argument in this regard should be summarily rejected.²

² MYI also asserts that in the trial court below, ESI failed to challenge MYI’s assertion that “ESI was claiming MYI’s entire post-April 2004 prosecution of the Subject Claims was the alleged Rule 11 violation.” *See* MYI Reply at p. 28, n.5. While ESI did not file a reply memorandum, its memorandum in support of its Motion clearly, repeatedly, and specifically stated its Motion was based on “repeated violations.” MYI’s attempted re-characterization of ESI’s Motion does not change the basis upon which ESI’s Motion was originally and clearly filed.

A. MYI and/or its Counsel Violated Subsections (b)(1) and (b)(3) of Rule 11 by Concealing and Confusing the Issue Regarding Ownership of the Subject Claims.

Below and on appeal, ESI contended MYI, through its counsel of record, violated Rule 11(b)(1) and (b)(3) by deliberately and intentionally concealing and confusing the issue regarding ownership of the Subject Claims by flatly misrepresenting the identity of the purported owner and by obfuscating ownership thereof. For the sake of clarity, each asserted violation will be individually addressed.

1. Mr. Farley's April 2004 Representation and MYI's Use Thereof.

Below and on appeal, ESI argued that Mr. Farley's April 12, 2004 letter (hereinafter sometimes referred to as "the Farley Letter") and MYI's use thereof concealed and confused the issue regarding ownership of the subject claims because Mr. Farley's representation regarding ownership was false and, in addition, was filed in support of various pleadings to oppose ESI's efforts to take Mr. Seely's Deposition, object to MYI's status as real party in interest, and/or substitute or join Mr. Seely as a party. *See* ESI Opening Br. at pp. 28-29. For the first time in this appeal,³ MYI claims the Farley Letter "does not show that MYI transferred the Subject Claims to Mr. Seely or MYI's counsel's actual or constructive knowledge of such an alleged transfer." *See* MYI Reply at pp. 43-44. MYI further argues the Farley Letter was simply attached to the pleadings to demonstrate that ESI was "on notice of the alleged ownership issue." *See id.*

³ Below, MYI did not dispute the existence of the letter or its use but argued that because it was not made in the form of a pleading, it was not a filing subject to Rule 11. (R. 4009.) As noted in ESI's Opening Brief however, Rule 11(b) specifies a violation may occur in "any other paper to the court (whether by signing, filing, submitting, or later advocating)." U.R.C.P. 11(b).

at pp. 48-49, n. 14. MYI's present (and new) arguments do not excuse it from running afoul of Rule 11.

As a preliminary matter, MYI's claim that the Farley Letter does not "show" a transfer of the Subject Claims and/or that its attorneys lacked actual or constructive knowledge of a transfer is completely irrelevant to whether a Rule 11 violation occurred. 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. *Morse v. Packer*, 2000 UT 86, ¶ 28, 15 P.3d 1021. While Rule 11 does not impose a duty to perform perfect or exhaustive research, the research must have been objectively reasonable under all the circumstances. *Id.*

In this case, MYI's substitute counsel (Dennis Farley) received a letter from MYI's former counsel (Robert Jensen) notifying him that "MYI is controlled and essentially owned" by the bond company. *See* ESI Opening Br., SRF at ¶ 10. There is nothing in the record to indicate whether Mr. Farley conducted *any* reasonable inquiry regarding the truth of this statement; however, approximately two (2) weeks later on April 12, 2004, Mr. Farley notified counsel for ESI that MYI was "controlled and essentially owned by its Bond Company." *Id.* at ¶ 13. Mr. Farley further stated, "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." *Id.* Given the fact that the Subject Claims were based upon MYI's accounts receivable, Rule 11 imposed upon Mr. Farley the responsibility of investigating whether his client

owned the Subject Claims and could continue to prosecute the pending litigation.

Thereafter, MYI referenced the Farley Letter in three (3) separate pleadings, attaching the letter to two (2) of those pleadings. (R. 3701 (referencing attachment “F” (R. 3708-3752); R. 3840 at ¶ 3 (referencing attachment “F” (R. 3708-3752); R. 3849 (referencing attachment “F” at R. 3708-3752 and reattaching the Farley Letter as attachment “F” (R. 3863-3907)). For the first time in this Appeal, MYI argues the Farley Letter was attached to the pleadings simply to “demonstrate” ESI’s receipt of the Farley Letter over two years earlier, “such that ESI was on notice of the alleged ownership issue.” *See* MYI Reply Br. at pp. 48-49, n. 14. MYI further claims no Rule 11 violation occurred because the Farley Letter did not contain “a false statement.” *See id.* MYI’s argument not only requires a revision of the pleadings to which the Farley Letter was attached, but its argument is also without merit.

A Rule 11 violation occurs if factual or legal contentions are made which lack support, *see* U.R.C.P. 11(b)(2) – (b)(4), or if a representation is made for an improper purpose, such as to harass, cause unnecessary delay, or needless increase in the cost of litigation. *See id.*; *see also Morse v. Packer, supra*, 2000 UT 86, at ¶¶ 28-29 (“[W]here [counsel] had access to, and must have seen, information flatly contradicting an allegation in his complaint, a reasonable inquiry would have necessitated more adequate research of the facts. [Counsel’s] failure to adequately research the facts resulted in his making a statement in his pleading that clearly lacked evidentiary support. In so doing, [counsel] violated Rule 11.”) Moreover, a litigant’s obligations with respect to the contents of its pleadings are not measured solely as of the time they are filed with or

submitted to the court, but include reaffirming to the court the positions contained in those pleadings and motions after learning that they cease to have any merit. *See Morse v. Packer, supra*, at ¶ 31 (quoting the advisory committee for the federal rule).

In this case, it is undisputed the Farley Letter instructed counsel for ESI that the “Bond Company” owned MYI’s assets. *See* SFR at ¶ 13. At the time this statement was made, Mr. Farley either failed to make a reasonable inquiry into the basis for the claims which his “new client” was attempting to prosecute *or* Mr. Farley knew about the Settlement Agreement and intentionally misrepresented the ownership of the Subject Claims.⁴ Thereafter, MYI’s counsel indisputably became aware of the Settlement Agreement, *see* R. 3849 (wherein MYI acknowledges possession of the Settlement Agreement), but nevertheless used the Farley Letter (knowing the statements therein to be false) to claim ESI was aware of the transfer/sale of the assets, to stop ESI from taking Mr. Seely’s deposition (R. 3700-3706), and to oppose ESI’s efforts to join Mr. Seely as a Plaintiff in the litigation. (R. 3839-3856; R. 3848-3857.) While MYI claims it only used the Farley Letter to “demonstrate” ESI’s knowledge of the “alleged ownership issue,” *see* MYI Reply at pp. 48-49, n. 14, this is not true and it does not rebut ESI’s claims that MYI violated Rule 11 by confusing/concealing the ownership issue. In fact, referencing the Farley Letter, MYI argued in its various pleadings that ESI knew of Seely’s

⁴ It is irrelevant whether Mr. Farley understood the Settlement Agreement transferred the Subject Claims to Mr. Seely or whether he believed MYI had retained the Subject Claims. The Farley Letter was nonetheless false when written, false when relied upon by MYI in its pleadings - and the false content was never corrected by MYI’s counsel. The Farley Letter explicitly states Developers (“the Bond Company”) owns and essentially controls MYI. The Farley Letter further unequivocally stated the Bond Company owned the assets of MYI, including the accounts receivable.

“involvement with,” “interest in,” and/or “ownership of” MYI’s assets. (R. 3701, 3705, 3845, 3850, 1523⁵, 3855-3856.)

The representations concerning ownership of MYI assets, including MYI’s accounts receivable, set forth in the Farley Letter were not true when written and despite MYI’s subsequent knowledge of the falsity, MYI again used the false Farley Letter in an attempt to ascribe “knowledge of the transfer” to ESI and stop ESI’s efforts to discover or uncover the real party in interest and join that party in the instant litigation.⁶ As such, the Farley Letter was presented for an improper purpose, such as to harass, cause unnecessary delay and/or needless increase in the cost of litigation – all in violation of subsection (b)(1) and (b)(3) of Rule 11.⁷

2. MYI’s Inconsistent Positions Regarding Ownership.

Below and on appeal, ESI argued that MYI and/or its counsel of record further violated Rule 11 in a series of pleadings filed in early 2007 wherein it began taking

⁵ Plaintiff’s Memorandum in Opposition to Motion for Substitution is first identified in the Appellate Record as R. 1517 – 1702. This Memorandum was subsequently re-filed as an Attachment to ESI’s Motion for Sanctions. As an Attachment the Memorandum was renumbered R. 3848 – 3975. The seventh page of the of the Memorandum (between R. 3853 and R. 3854) was not numbered; therefore, the appellate number designated on the original filing has been used.

⁶ Now, ironically, MYI claims there was no transfer at all but ESI should have had “knowledge of the ownership issue.”

⁷ MYI’s argument that ESI’s Rule 11 Motion fails as a matter of law because the Subject Claims were never “lost” does not preclude a finding of a Rule 11 violation with respect to the Farley Letter. MYI’s counsel informed ESI’s counsel that Developers owned the assets of MYI, including all accounts receivable, etc. MYI then used the Farley Letter in support of pleadings to argue that ESI “knew” that the claims had been transferred. If the Subject Claims were never “lost,” the Farley Letter did not need to be written. Alternatively, the Farley Letter could have been written in a fashion to establish that an issue concerning ownership of the Subject Claims did, in fact, exist.

inconsistent positions regarding ownership of the Subject Claims. *See* ESI Opening Br. at pp. 29-30. Specifically, ESI argued MYI's claim of continued ownership was directly contrary to the Farley Letter and also inconsistent with the testimony of MYI's principals. *Id.* In response, and for the first time in this appeal, MYI simply states that ESI has given the testimony of MYI's principals "too much significance." *See* MYI's Opp. at p. 45. Ironically, this testimony (which confirmed that MYI had no assets and had transferred all its accounts receivable to Mr. Seely) is the only actual evidence in the record of the intent and knowledge of the parties regarding ownership of assets. MYI's present attempt to explain or justify the testimony of MYI's principal(s) is only argument – not evidence – and should not be considered by this Court. Below, MYI ignored ESI's argument when it presented this testimony in support of its Motion. (R. 3309-3310.) The Court should not now consider MYI's arguments to change the impact of the only evidence in the record. *See Timm v. Dewsnap*, 2003 UT 47, ¶ 39, 86 P.3d 699. MYI's counsel obviously could have clarified its client's testimony at the depositions or by affidavit in one of the many motions which has been filed on this issue. MYI's counsel did not do so and should not be permitted to do so now – at a time when ESI cannot cross-examine MYI's principals regarding their counsel's "explanation" of their prior testimony. MYI's inconsistent positions, which are further discussed at § II.A.4 and § II.B.1-2, lack evidentiary support and were clearly presented for an improper purpose, such as to harass, cause unnecessary delay, and/or an increase in the cost of litigation in violation of Rule 11(b)(3) and (b)(1).

3. MYI's Reply to Second Amended Counterclaim.

Below and on appeal, ESI argued MYI and/or its counsel of record violated Rule 11 in responding to the Second Amended Counterclaim. *See* ESI Opening Br. at pp. 30-31. In response, MYI argues that because it unambiguously denied ESI's allegations that MYI had transferred the Subject Claims to Mr. Seely, its Reply to the Second Amended Counterclaim did not establish a Rule 11 violation. *See* MYI Reply at p. 46. MYI "claims" its denial was supported by the evidence – "specifically, Mr. Seely's and MYI's understandings and the March 2004 Settlement Agreement itself." *Id.* MYI is conveniently cherry picking "evidence" in this case. MYI ignores the statements of Mr. Farley in the Farley Letter, MYI's admitted production of draft release/assignment/purchase documents in discovery, MYI's discussion of the draft documents in its pleadings, MYI's admission that it entered into the Settlement Agreement and its representations in pleadings regarding the effect of that document, and the testimonial evidence of Alan and Merrick Young.

Moreover, MYI's Reply to the Second Amended Complaint likewise ran afoul of Rule 11 to the extent MYI continued to assert it had a right to continue to prosecute the Subject Claims. On May 15, 2007, the Trial Court granted ESI's Motion for Substitution and joined Mr. Seely as a plaintiff. (R. 2906). Pursuant to Rule 25(c), an "original plaintiff" may only continue to prosecute an action until the court substitutes or joins the person to whom the interest was transferred. *See* U.R.C.P. 25(c): ("In 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 be substituted in the action or joined with the original party.")

(Bold emphasis added.) Accordingly, *even if* Mr. Seely had authorized MYI to continue the prosecution of the instant action (a fact MYI has not established), that right was divested on May 15, 2007 when the trial court joined Mr. Seely as a plaintiff.

4. MYI's Misrepresentations and Inconsistent Positions Were Not Warranted by Evidence or Likely to Have Evidentiary Support After Reasonable Opportunity for Further Investigation or Discovery.

Below and on appeal, ESI pointed out that MYI did not dispute making any of the identified representations/misrepresentations. Rather, MYI relied solely on the argument that because the ownership of the Subject Claims had not been finally adjudicated, none of the statements it made in any of its pleadings were in violation of Rule 11. *See* ESI Opening Br. at p. 31. In its Reply Brief, MYI addresses, for the first time, some of the representations/misrepresentations identified by ESI.

MYI's repeated use of the Farley Letter to show ESI's purported "knowledge" of the ownership of the Subject Claims has been discussed at § II.A.1., *supra*, and is incorporated herein by reference. As noted by ESI in its Opening Brief, MYI has not and cannot explain the purpose of the use of the disclosure in the Farley Letter if, in fact, MYI believed ownership of the Subject Claims to be an unresolved legal issue. If MYI relies upon the Farley Letter to argue ESI knew or should have known since 2004 of the ownership of the Subject Claims, its later arguments that ownership of the Subject Claims is unresolved are without legal or factual merit. On the other hand, if there is any merit to MYI's assertion that the ownership of the Subject Claims is unresolved, there was no merit to MYI's prior argument that ESI should be precluded from deposing Mr. Seely or

amending the pleadings because of its “knowledge” of the ownership of the Subject Claims.

MYI does not dispute ESI’s contention that MYI misrepresented to the Court, on numerous occasions, that MYI produced a “fully executed” Settlement Agreement. *See* ESI Opening Br. at p. 31, n. 16. As previously noted, MYI never produced a copy of the fully executed Settlement Agreement to ESI. *Id.* MYI does assert, however, that this is a discovery/disclosure issue which does not fall within the purview of Rule 11. *See* MYI Reply at p. 49. ESI does not dispute that Rule 11 does not govern discovery or disclosure issues. *See* U.R.C.P. 11(d). Moreover, ESI does not identify the actual disclosure/discovery response as a Rule 11 violation. Rather, ESI claims that MYI violated Rule 11 when it improperly represented to the Court, on multiple occasions, that it had produced a “fully executed” Settlement Agreement and relied upon the alleged disclosure to claim it did not withhold information from ESI related to the transfer of the Subject Claims. *See* ESI Opening Br. at pp. 31-32, n. 16.

With respect to the inconsistent representations made by MYI between January and March 2007, *see* ESI Opening Br. at p. 32, MYI claims ESI is ignoring portions of the pleadings and MYI 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.” MYI Reply Br. at pp. 44-46. MYI’s response only bolsters ESI’s position that MYI’s misrepresentations and inconsistent positions were not warranted by evidence or likely to have evidentiary support after reasonable opportunity for further investigation and discovery. ESI did not ignore portions of the pleadings that were filed by MYI during this time frame. ESI’s

argument is that the pleadings were obscure regarding ownership of the claims. On the one hand, MYI relied upon the contents of the Farley Letter to represent that ownership of MYI's assets, including all accounts receivable, was held by Developers. (R. 3701 at ¶ 1.) MYI claimed Mr. Seely's deposition was "not necessary" because Utah's corporate winding up statute permitted MYI to sue to collect amounts due and owing. (R. 3702.) MYI claimed it had "disclosed Mr. Seely's **interest** in [MYI's] assets" (bold emphasis added) for over a year and used such "disclosure" (including the false claim of disclosure of the fully executed Settlement Agreement (R. 3705)) as a basis to quash the deposition notice. In a subsequent pleading, MYI continued to rely upon the Farley Letter and the alleged production of the executed Settlement Agreement stating it had produced information "concerning Developers' **acquisition** of MYI assets." (R. 3840 at ¶¶ 3-4; bold emphasis added) Therein, MYI admits the Settlement Agreement assigned "**all** interest, rights, and title to MYI's assets" (R. 3841 at ¶ 5; bold emphasis added); however, citing the Settlement Agreement, MYI also vaguely asserted the omission of certain assets in the transfer between Developers and Seely. (R. 3841 at ¶ 6.) This argument was not developed in MYI's pleading and was not supported by the language of the Settlement Agreement.⁸ In a March 2007 memorandum, filed by MYI in Opposition

⁸ In its Reply Brief, MYI asserts this pleading "stated that the Subject Claims were not included in the assets that had been transferred to Mr. Seely." MYI Reply Br. at pp. 44-45. At that time, MYI did not rely upon the "limited definition" of "Indemnitor's Assets." Instead, MYI appeared to be claiming that the litigation was *excepted* from transfer pursuant to paragraphs 2(d) and 2(g) (R. 3841 at ¶ 6) - which it was not. See R. 1676-1677 at ¶¶ 2(d), 2(g). MYI also appeared to assert that the accounts receivable may not have been assigned pursuant to Article III(1) of the Settlement Agreement. See R. 3841 at ¶ 6. This reference was likewise completely without merit (see R. 1678 at § III, ¶

to ESI's Motion for Substitution, MYI summarized ESI's argument by stating ESI "alleged that [MYI] failed to provide defendants with notice of Mr. Seely's purchase of MYI's assets." (R. 3849.) In response to that argument, MYI specifically detailed the alleged efforts it took in notifying ESI of the loss and transfer of assets. *Id.* MYI identified both the Farley Letter and the Settlement Agreement stating, "The Settlement Agreement transferred MYI assets from MYI to Developers and subsequently from Developers to Seely." (R. 3849-3850.) Thereafter, MYI objected to substituting Mr. Seely as Plaintiff – not because he didn't own the claims⁹ – but because there was "no express provision in the Settlement Agreement requiring or authorizing Seely to substitute himself as plaintiff in the present litigation or to prosecute, compromise, dismiss, or otherwise dispose of the current lawsuit." (R. 3851 at ¶ 7.) MYI attempts to justify this ambiguity by stating it "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." *See* MYI Reply at p. 45. MYI also asserts that its argument was stated in the alternative – positing that it remained the valid plaintiff regardless of the transfer of the Subject Claims pursuant to Rule 25(c). The "legal merits" of MYI's Rule 25(c) argument will be addressed, *infra*, at § II.B.2. MYI's assertion, however, that it could make

1), was not developed by MYI in its pleading, and has not been pursued by MYI in its present assertion of ownership of the Subject Claims.

⁹ *See* R. 3850 ("Clyde Seely ('Seely') is the present owner of MYI assets pursuant to the Settlement Agreement executed by MYI on March 25, 2004"); *see also* R. 3855 ("[Seely] did not even purchase MYI's assets from MYI, he purchased MYI's assets from Developers"); *see also* R. 3856 ("[ESI] knew that MYI's assets had been attached by Developers no later than April 2004, and that they had been acquired by Seely no later than November 2005 . . .").

inconsistent factual representations and conceal or otherwise confuse the issue of ownership of the Subject Claims without running afoul of Rule 11 is completely without merit and should be rejected by this Court.¹⁰

B. MYI and/or its Counsel Violated Rule 11 by Representing MYI to be the Real Party in Interest Without Basis in Law or Fact.

Below and on appeal, ESI contended MYI violated Rule 11 by representing itself to be the real party in interest without basis in law or fact. See ESI Opening Br. at pp. 33-37. ESI further argued there was not a valid purpose for MYI's continued role as Plaintiff after April 2004. *Id.* at pp. 37-43. MYI's reply to this issue is not easy to follow as, in its Reply Brief, MYI attempts to "change" the issues raised on appeal by ESI. ESI will, therefore, identify the issues raised by ESI and the apparent responses asserted by MYI. Thereafter, ESI will address any lingering arguments that remain by virtue of MYI's identification of "new issues."

1. MYI and/or its Counsel Violated Rule 11(b)(1)-(3) by Representing it Was Authorized by Utah Code Ann. § 48-2c-1302(6) to Wind Up Affairs and Sue to Protect its Assets Without Basis in Law or Fact.

Below and on appeal, ESI first argued MYI and/or its counsel violated Rule 11 by

¹⁰ In its Reply Brief, MYI argues it was "ESI who was claiming there had been a *pendente lite* transfer of the Subject Claims" and therefore ESI, and not MYI, had the burden of proving this claim. See MYI Reply at pp. 46-47. MYI's argument with respect to burden is a red herring. ESI alleged MYI violated Rule 11 by, *inter alia*, making contentions unsupported by fact and law. ESI met its burden in identifying MYI's false and inconsistent statements and improper legal arguments, which will be discussed in more detail at § II.B.1-2. MYI's burden in responding to the Rule 11 violation was to establish that its factual contentions had evidentiary support and its legal contentions were warranted by law. MYI did not meet its burden in this regard.

improperly claiming MYI was authorized by Utah Code Ann. § 48-2c-1302(6) to wind up affairs and sue to protect its assets when MYI filed a protective order and a motion to quash subpoena in response to ESI's efforts to take the deposition of Clyde G. Seely. *See* ESI Opening Br. at pp. 34-35. As noted in ESI's Opening Brief, MYI did not address ESI's contentions in this regard at all in the motion papers below. *Id.* at p. 33. On appeal, however, MYI claims this argument did not violate Rule 11 because the "contention was warranted by existing law" and the argument did not become moot until MYI was reinstated. *See* MYI Reply at p. 44.

MYI's newly asserted defense is completely without merit. In January 2007, MYI was *not* a dissolved company. MYI's suggestion to this Court to the contrary is absolutely false. While MYI was administratively dissolved on March 30, 2003, Alan Young reinstated the corporation on September 29, 2004. *See* ESI Opening Br., SRF ¶¶ 6, 16. Pursuant to Utah Code Ann. § 16-10a-1422, because the reinstatement occurred within two (2) years of the dissolution, the administrative dissolution is revoked and the company can resume as if no dissolution ever occurred. Contrary to MYI's original claims below (R. 4005-4009) and on this appeal, Utah Code Ann. § 48-2c-1302(6) is irrelevant to the litigation and had no basis in law or fact when the argument was made.

2. MYI and/or its Counsel of Record Violated Rule 11(b)(1)-(3) in Arguing it was Authorized by Rule 25(c) to continue to Prosecute as the Assignor of the Subject Claims

Below and on appeal, ESI next argued Rule 11 was violated by MYI and/or its counsel of record when MYI claimed Rule 25(c) authorized it to continue to prosecute

the Subject Claims as assignor of the Subject Claims. ESI argued there is nothing in the record to support MYI's assertion that it "assigned" the Subject Claims to Mr. Seely. *See* ESI Opening Br. at p. 36. In addition, ESI asserted that Rule 25(c) does not provide the means for a party to continue to pursue, *without authorization*, a claim which it lost after inception of the litigation. *Id.* In its Reply Brief, MYI argues it never "lost" the right to prosecute the Subject Claims in the first instance. *See* MYI Reply at p. 30. Next, MYI asserts the district court ruled that MYI's continued role as the plaintiff after April 2004 was proper under Rule 25(c). *See* MYI Reply at pp. 24-25 at ¶ 3; *see also id.* at p. 32. Finally, MYI asserts that *even if the Subject Claims were lost and sold*, ESI failed to offer any "legal authority" for its proposition that Mr. Seely (or Developers) would have to authorize MYI's continued prosecution. *See* MYI Reply at pp. 30-34. MYI's arguments are without merit and do not justify its conduct after 2004.

a. MYI Has Waived and/or Should be Estopped from Asserting it Never "Lost" the Right to Prosecute the Subject Claims.

As noted *supra*, MYI first claims that it never "lost" the right to prosecute the Subject Claims in the first instance. *See* MYI Reply at p. 30. A necessary corollary of that argument is that Mr. Seely does not own the Subject Claims, is not a proper party, and was not properly joined pursuant to Rule 25(c). MYI has waived and/or should be estopped from making this argument.

As is evidenced by the record below, it was MYI – and not ESI – who first proposed consideration and application of Rule 25(c). Below, ESI originally filed a Rule 17(a) Objection, claiming MYI was not the real party in interest. In response, MYI

argued Rule 25(c) was the appropriate Rule for consideration because Rule 25(c) governs “[a]ssignments of assets subsequent to the original filing of an action.” (R. 3839-3846.) On May 21, 2007, the trial court found “MYI essentially concedes [a] transfer and assignment [of the Subject Claims] took place” and thereafter granted ESI’s Motion for Substitution, finding Seely has “a clear personal interest in the subject matter of the action and in its outcome.” (R. 2905-2906.) MYI never appealed the May 21, 2007 ruling or sought reconsideration. Thereafter, on April 10, 2008, the trial court denied Clyde G. Seely’s Motion to Dismiss Second Amended Counterclaim, finding Seely had “acquired all of the assets of MYI and its principals during the pendency of th[e] action by MYI.” (R. 3991.) MYI did not appeal the trial court’s April 10, 2008 Ruling, either. In November 2008, following ESI’s Motion for Dismissal with Prejudice (which was filed based upon ESI’s and Seely’s stipulation to dismiss their respective claims against one another), MYI opposed the dismissal arguing ownership of the Subject Claims had not been adjudicated and, therefore, Seely lacked standing to stipulate to dismissal of the same. (R. 4124, 4126, 4129.) MYI claimed the trial court’s prior rulings were simply an exercise of “judicial economy” to “insure that all parties who might have an interest in the litigation were before the [trial court].” (R. 4128.) MYI then requested that the trial court “reconsider” full and final adjudication of the ownership issue because it purportedly had “evidence” to present, *id.*; however, MYI did not articulate any of the factors contemplated by Rule 54(b) and required by Utah case law. (R. 4135 (citing U.R.C.P. 54(b) and *Trembly v. Mrs. Field’s Cookies*, 884 P.2d 1306, 1310, n.2 (Utah App. 1994)). Thereafter, on January 21, 2009, the court granted ESI’s Motion for

Dismissal with Prejudice. Therein, the trial court “restate[d] in greater detail its analysis of the “Settlement Agreement” because “MYI does not appear to understand that Ruling completely.” (R. 4152.)

In order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. *See Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366; *see also Berry v. Berry*, 738 P.2d 246, 249-50 (Utah App. 1987) (wherein the Utah Court of Appeals applied collateral estoppel because appellant failed to fully raise her arguments before the trial court); *see also Timm v. Dewsnup*, 2003 UT 47, ¶ 39, 86 P.3d 699 (appellate courts will review issues raised for the first time on appeal only if exceptional circumstances or plain error exists). In this case, the trial court found Rule 25(c) applicable and joined Mr. Seely (R. 2903-2909), ruled Mr. Seely owned the Subject Claims (R. 3988-3992), and dismissed the Subject Claims, restating in “greater detail” its analysis in ruling Mr. Seely owned the Subject Claims (R. 4152-4156.). MYI has only appealed the trial court’s final order, entered January 21, 2009 (R. 4152-4156), wherein the trial court dismissed the Subject Claims and simply restated in “greater detail” its prior analysis.

Here, it was MYI – not ESI – who first raised the applicability of Rule 25(c). (R. 3842-3845). Rule 25(c) is *only* applicable when a chose in action is transferred during the pendency of litigation. Utah R. Civ. P. 25(c). MYI did not appeal that ruling; therefore MYI has waived its right to make, and should be estopped from making, any arguments (including the argument that it never “lost” the right to prosecute the Subject Claims) that would necessarily result in the analysis of an issue (whether Seely was a

properly joined party pursuant to Rule 25(c)) which was never properly preserved for appeal. MYI fails to point to exceptional circumstances or plain error, such that the appellate court may review this issue for the first time on appeal, and none exist.

- b. The District Court Did Not Rule that MYI's Continued Role as the Plaintiff After April 2004 was Proper Under Rule 25(c).

Contrary to MYI's repeated allegations, *see e.g.*, MYI Reply at pp. 32-33, the district court in this case never ruled that MYI's continued role as the "plaintiff" after April 2004 was proper under Rule 25(c). Rather, the trial court recognized that it would "not be prudent to substitute Mr. Seely in place of MYI" because of the counterclaims asserted by ESI against MYI. (R. 2906.) The trial court's recognition of MYI's potential liability on the affirmative claims against it (which are still pending), should not be read as an excuse or justification for MYI's conduct in taking inconsistent positions with respect to ownership of the Subject Claims and obstructing ESI in its efforts to resolve the issue by asserting improper legal arguments and false factual allegations.

- c. Rule 25(c) Is Not a "Substitute" for the Real Party in Interest Requirement and Does Not Permit the Unauthorized Pursuit of a Cause of Action.

Finally, MYI's claim that an assignor can pursue a claim without authority is absolutely contrary to application of Rules 17 and 25. In *RMA Ventures California v. SunAmerica Life Ins. Co.*, 576 F.3d 1070 (10th Cir. 2009) the Tenth Circuit recently analyzed the interplay between Rule 17 and Rule 25 wherein the interest in the basis for the underlying litigation was transferred during the pendency of the action. In *RMA*, plaintiff RMA Ventures California originally filed suit against defendants Sun America

Life Insurance and Midland Loan Services for breach of contract and misrepresentation. Plaintiff alleged that defendants failed to implement a required interest rate reduction pursuant to the parties' mortgage agreement. The district court granted summary judgment for the defendants, holding that plaintiff's voluntary interest payments over a four-year period precluded recovery on its claim. Plaintiff appealed the district court's decision. On appeal, defendants contended the appellate court should dismiss plaintiff's appeal for lack of standing. Specifically, defendants argued plaintiff no longer owned the legal rights to the cause of action because defendants purchased the rights at a public action sale. The Tenth Circuit recognized defendants' argument as the "proverbial 'curve ball'" which was further complicated by the fact that the execution sale was held to satisfy defendants' award of attorneys' fees – an award based solely on the grant of summary judgment which plaintiff attacked on appeal.

Ultimately, the Tenth Circuit concluded that plaintiff did, in fact, lack standing to pursue its appeal. In so ruling the Court recognized a "well-founded prudential-standing limitation" is that litigants "cannot sue to enforce the right of others." *Id.* at 1073 (citing Fed. R. Civ. P. 17(a)). A litigant's standing is contingent upon the entitlement to enforce an asserted right. *Id.* (citing *Rawoof v. Texor Petrol. Co., Inc.*, 521 F.3d 750, 756 (7th Cir. 2008)). The Tenth Circuit noted at the outset of the litigation, "Plaintiff was clearly the real party in interest." The question, however, the Tenth Circuit ruled had to be resolved is whether defendants obtained plaintiff's rights to the lawsuit, "thereby divesting Plaintiff of standing." *Id.* In concluding this was precisely what happened, the Tenth Circuit noted the Utah Supreme Court has expressly held "that a defendant can purchase

claims, i.e., choses in action, pending against itself and then move to dismiss those claims.” *Id.* at 1075 (citing *Applied Medical Tech. Inc. v. Eames*, 2002 UT 18, ¶ 13, 44 P.3d 699, 701-02).

The Mississippi Supreme Court has likewise analyzed the interplay of Rules 17 and 25 when choses in action are purchased during the pendency of the action. In *Citizens National Bank v. Dixieland Forest Pros., LLC*, 935 So.2d 1004 (2006), borrowers brought a lender-liability action against the bank, alleging the bank cancelled lines of credit without justification, and sought general damages and punitive damages. The bank counterclaimed, seeking payment on debts owed by the borrowers and a third party. The trial court granted in part and denied in part the bank’s various motions for summary judgment. After an execution sale was held wherein the bank purchased the borrowers’ chose in action, the trial court denied the bank’s motion to substitute itself as plaintiff and have the lender-liability action dismissed. The bank appealed. On appeal, the Mississippi Supreme Court reversed and remanded. In concluding that the trial court erred in not granting the bank’s motion for substitution, the Mississippi Supreme Court reasoned:

Although Rule 25(c) transfers are generally permissive, in this case, the execution sale and purchase of the lawsuits left only one party, the bank, with *any* interest in the litigation. Because Rule 17 allows only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the 03-CV-030-B actions.

Id., ¶ 38, 935 So.2d at 1013. The court was unpersuaded by borrowers’ inequity argument.

While Rule 25(c) contemplates the continued pursuit of a chose in action by an

original plaintiff, the Rule does not provide the means for a party to continue to pursue, *without authorization*, a claim which it lost after the inception of the litigation. The Tenth Circuit and Mississippi Supreme Court case, both analyzing identical rules, are directly on point on this issue. It is the party who is the real party in interest, or its assign (if the assignment occurs during the course of litigation), who is permitted to prosecute a cause of action. MYI had no such authority from Seely and did not appeal either the trial court's May 21, 2007 order granting ESI's Motion for Substitution (R. 2903-2909) or the April 10, 2008 ruling wherein the trial court denied Mr. Seely's Motion to Dismiss and found Seely owned the Subject Claims (R. 3988-3992).

3. There Was Not a Valid Purpose for MYI's Continued Role as Plaintiff After April 2004.

Below, MYI contended that even without considering Rule 25(c), there was a "valid purpose and basis" for its continued role as Plaintiff after April 2004. (R. 4005-4009.) Specifically, MYI asserted ownership of the Subject Claims is a legal issue and there was well more than "some" basis in law for MYI's continued prosecution of the Subject Claims. (R. 4006.) In this appeal, MYI asserts Rule 11 did not require it to "simply concede the alleged merits of ESI's claim" if there was a factual and legal basis to contest the claim. *See* MYI Reply at p. 40. Citing *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, 54 P.3d 1139, MYI then argues that "Mr. Seely's understanding" and "Developers' understanding" that the subject claims had not been transferred provided a sufficient legal and factual justification for MYI to contest ESI's claim. *Id.* In addition, MYI asserts the language of the Settlement Agreement gave it

justification for such reliance. Finally, MYI argues ESI itself acknowledge that there was a basis for MYI's continued role as plaintiff after April 2004. These arguments are without merit.

- a. The Intent of Mr. Seely is Irrelevant Because the Settlement Agreement is Not Ambiguous. MYI's continued reliance on pre- *Daines* cases is unwarranted by Utah law.

As a preliminary matter, and as argued by ESI in opposition to MYI's appeal, the underlying Settlement Agreement in this case is not ambiguous and, therefore, the intent of Mr. Seely is irrelevant. *See Daines v. Vincent*, 2008 UT 51 ¶¶ 25, 31, 190 P.3d 1269 (clarifying that the rule in *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264 (Utah 1995) justifies a finding of ambiguity only if the competing interpretations are reasonably supported by the language of the contract.) MYI's repeated citations to pre-*Daines* cases, including *WebBank*, are not controlling on contract interpretation. While Mr. Seely may not have "understood" he was specifically purchasing the Subject Claims, the Settlement Agreement plainly states that MYI retained no assets and Seely purchased everything not reserved to Developers. (R. 1676 at ¶ H ("Seely's interest is in purchasing assets of Indemnitors owned by Developers **or** which are subject to the judgment, injunction, and garnishment") (emphasis added); R. 1677 at ¶ 2(g) ("[A]s of the date of this Agreement, all of Indemnitors' assets and all interests therein (except those reserved to Developers), which have been **or could be attached by Developers via the GIA or otherwise**, are hereby conveyed to Developers and then to Seely" (emphasis added).) In the context of ambiguity with regard to the intent of the contracting parties, the *Daines* court clearly stated, "[B]efore permitting recourse to parol evidence, a court must make a

determination of facial ambiguity.” *Daines* at ¶ 25 (underline emphasis added). In discussing *Ward*, the *Daines* court clarified that it never intended for a judge to allow surrounding circumstances to “create ambiguity” where the language of a contract would not otherwise permit. *Id.* at ¶ 27. A correct application of the *Ward* rule to determine what the writing means still “begins and ends with the language of the contract.” *Id.* at ¶ 30. Therefore, contrary to MYI’s arguments, the “intentions” of Mr. Seely and Developers (the “alleged transferees”) is *not* “controlling as a matter of law.” A party cannot make a successful claim of ambiguity based on usage of a term that is not reasonable or is the product of “forced or strained construction.” *Id.* at n. 5 (citing *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 17, 133 P.3d 428).

As noted by ESI in its response to MYI’s appeal, MYI’s efforts to create ambiguity are not credible or reasonably supported by the language of the contract. While MYI strenuously argues that the Court cannot ignore the plain “limiting language” defining “Indemnitors Assets,” it casually (and without evidence) claims the use of the term “assets” in other areas of the Settlement Agreement should be characterized as “mistakenly not capitalized.” Nothing in the ten (10) year history of this matter – or seven (7) year history of this litigation – has been identified or produced to support MYI’s argument on this point. *See* MYI Reply at p. 11. MYI accuses ESI of “cobbling the Settlement Agreement” to reach its conclusion. However, the interpretation of ESI (and the district court) does not require a finding that certain terms were “mistakenly not capitalized,” does not require looking outside the four corners at the belated “intent” of

the parties to interpret the Settlement Agreement, and does not require qualifying the testimony of the principals of MYI.¹¹

- b. Even if Mr. Seely's "Intent" were Relevant, there is No Evidence In this Case that MYI had any Knowledge of Such Intent when it Continued Its Prosecution of the Subject Claims and Concealed/Confused Ownership of the Subject Claims.

Moreover, with respect to Seely's intent, there is no evidence in this case (by affidavit or otherwise) that MYI had any knowledge of Seely's purported intent until he signed his affidavit on September 26, 2007. MYI argues that ESI had "confused the distinction between evidence and the record." See MYI Reply at p. 41. This statement fails to address the single fundamental issue at the core of this Rule 11 Motion – that is, MYI's concealment/confusion of the ownership issue and improper prosecution of the Subject Claims. MYI would have this Court accept the argument (without any supporting evidence) that MYI was aware of Seely's intent on or around the date of the Settlement Agreement and, therefore, it had a reasonable basis upon which to continue its prosecution of the Subject Claims. If that is true, why did Merrick Young testify he was no longer going to be in business in 2002 – following the initiation of the Developers' Litigation? SRF at ¶ 18, n.2. Why did Mr. Jensen attempt to withdraw as counsel in this

¹¹ In its Reply Brief, MYI asserts, "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." See MYI Reply at p. 41. ESI has adequately made its record in this case concerning which of MYI's arguments are without basis in law or fact in violation of Rule 11. ESI recognizes that MYI has a right to appeal the trial court's Order of Dismissal. The fact that ESI did not pursue Rule 11 sanctions in this appeal in no way impacts the validity of its arguments on the record below and herein and certainly does not "undercut" ESI's claims.

litigation in March 2004 – following the execution of the Settlement Agreement? SRF at ¶ 9. Why did Mr. Farley send a letter to counsel for ESI stating the Bond Company “owns the assets of [MYI], including all accounts receivable, etc.”? SRF at ¶ 13. Why did Alan Young testify MYI had no assets at the time of the September 2004 reinstatement? SRF at ¶¶ 16, 18. Why did Merrick Young testify that accounts receivable had been transferred to Seely? SRF at ¶ 19.¹² Why did MYI file the Motion for Protective Order and to Quash the Deposition of Clyde G. Seely relying on Utah Code Ann. § 48-2c-1302(6) instead of for the reason that the Subject Claims were not transferred? (R. 3700-3706.) Why did MYI move to quash Mr. Seely’s deposition at all? The deposition clearly would have given ESI the opportunity to discover what Mr. Seely knew and/or what his intentions were with respect to the Subject Claims. Why did MYI oppose joining Seely for the reason that Rule 25(c) allowed MYI to continue the prosecution of the claims instead of for the reason that the Subject Claims were not transferred? (R. 3839-3846; R. 3848-3857). The only way the history of this case can be reconciled is to conclude MYI (and Mr. Jensen and Mr. Farley) believed the Subject Claims had been lost--transferred and sold--and MYI’s present counsel is now simply looking for a way to justify its prior conduct.

¹² MYI attempts to qualify this testimony by pointing to Merrick’s statement that the accounts receivable had been transferred “in some form” does not change the impact of the testimony. There is no dispute in this case that the Subject Claims are based upon monies allegedly due and owing pursuant to the Subcontract (the alleged ESI account receivable). SRF at 3. Therefore, regardless of the “form” in which they were transferred, Merrick admitted the transfer of the basis of the Subject Claims to Seely “personally.” SRF 19.

c. There is No Evidence in the Record of Developers' Intent – MYI's Reference to Such Misrepresents the Testimony of Clark Fetzer.

MYI's reliance upon Developer's purported intent is also without merit. *See e.g.*, MYI Reply at pp. 19, ¶ 3; pp. 27-28, 33-34. First, as noted at § II.B.3.a., *supra*, the intent of Developers is irrelevant. *Daines, supra*, at ¶ 25 (“[B]efore permitting recourse to parol evidence, a court must make a determination of facial ambiguity.”) Moreover, MYI has misrepresented the evidence in the record.

Even a cursory review of the affidavit of Clark Fetzer, which was filed in support of ESI's Rule 17(a) Objection/Rule 25 Motion (R. 1431-1433), clearly shows it provides no “evidence” regarding the intent of Developers regarding the acquisition or transfer of assets. Rather, the affidavit simply establishes that in September 2005, months after the Settlement Agreement was executed, Developers did not believe it then owned the Subject Claims and did not hire Mr. Farley to prosecute the action on behalf of Developers. (R. 1432 at ¶ 4-5.) MYI's claim that Mr. Fetzer's testimony in this regard evidences the “intent” of Developers with respect to the acquisition and transfer of claims is completely without merit and should be disregarded.

d. ESI did Not Acknowledge MYI to be a Proper “Plaintiff” After April 2004.

Finally, MYI incorrectly contends that ESI itself acknowledged that there was a basis for MYI's continued role as plaintiff after April 2004 because “ESI's February 2007 motion for substitution did not claim MYI's continued role as plaintiff was wrongful.” *See* MYI Reply at p. 24, ¶ 3; *see also id.* at p. 33. This statement absolutely

misrepresents the record below. First, in the February 2007 pleading referenced by MYI in its Reply Brief, ESI specifically argued, “[U]nlike the situation in *Tisch* [*Federal Deposit Ins. Corp. v. Tisch*, 89 F.R.D. 446, 32 Fed. R. Serv.2d 1167 (E.D.N.Y. 1981)], it appears that MYI has not retained any interest in the claims, and so it is appropriate that Mr. Seely be substituted for MYI rather than merely joined as a party.” (R. 1481.) Ultimately, ESI pled that Mr. Seely be joined to avoid a multiplicity of suits. (R. 1884.) However, ESI is on record for specifically asserting that MYI’s continued prosecution of the Subject Claims is wrongful. *See e.g.*, R. 3019-3020; *see also* R. 3025 at ¶ 59. MYI’s present claim to the contrary is completely without merit.

Nevertheless, and as argued below, MYI does have a proper place in this litigation. Specifically, it must answer to the affirmative claims which have been asserted (and which are still pending) against it. (R. 3020-3022.) Moreover, *even if MYI’s present misrepresentation were true*, ESI’s “belief” does not excuse MYI’s conduct in this matter after 2003 wherein it asserted claims, defenses, and other legal contentions that were not warranted by existing law and asserted allegations and other factual contentions that lacked evidentiary support. Nor does the fact that ESI was required to file claims seeking declaratory relief as to the ownership of the Subject Claims excuse MYI’s improper conduct between 2004 and 2007. As noted in its Opening Brief, ESI’s Second Amended Complaint was not filed until late 2007. *Id.* at p. 40. Therefore, neither that pleading nor the issues raised therein justify or excuse MYI’s conduct. ESI was required to raise the ownership issue of the Subject Claims because of the various inconsistent positions taken by MYI with respect to ownership. *Id.* (citing SRF at ¶ 28).

ESI has never acknowledged MYI to be a “proper plaintiff” after it lost the Subject Claims to Developers. MYI’s assertions are simply yet another example of MYI’s revision of the evidence and underlying pleadings.

C. MYI’s Argument that ESI’s Rule 11 Motion Failed as a Matter of Law Because of the Remedy Sought Is Unsupported by Utah Law.

As a “new issue” on appeal, MYI asserts ESI’s Rule 11 Motion failed as a matter of law because it was filed for the improper purpose of obtaining a final disposition of the subject claims. *See* MYI Reply at p. 35-39. MYI apparently claims its misstatements were not significant, *see id.* at p. 35, and further claims “Rule 11 does not allow for the ‘ultimate’ sanction of dismissal of a pleading that was not filed in violation of Rule 11.” *Id.* at pp. 27, 37. Finally, though not entirely clear, MYI appears to argue that Rule 11 sanctions cannot be awarded based upon the merits of a party’s claim. *Id.* at p. 36¹³ For the reasons set forth herein, MYI’s arguments are without merit and should be summarily rejected.

As a preliminary matter, MYI’s present argument that its “misstatements” were not significant and/or that its counsel’s failure in 2004 to conduct a reasonable inquiry regarding ownership of the Subject Claims is excusable are completely without merit and have been well rebutted herein. Facts and arguments set forth by ESI in this appeal, and below, are incorporated herein by reference.

¹³ MYI further asserts that ESI did not file its Rule 11 Motion to remedy any alleged harm or prejudice to it. *See* MYI Reply at p. 36. This is absolutely without merit. As noted in its Opening Brief, both below and on appeal ESI demonstrated the great significance the ownership issue had in the Action. *See* ESI Opening Br. at p. 44-48. Those arguments will not be repeated here but are incorporated herein by reference.

MYI's argument that Rule 11 does not "allow" for the ultimate sanction of dismissal of a pleading is likewise without merit. Not surprisingly, MYI cites no authority for its proposition. Rule 11(c) provides for "impos[ition of] *an appropriate sanction* upon the attorneys, law firms, or parties." U.R.C.P. 11(c) (emphasis added). It continues,

A sanction imposed for violation of this rule . . . may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

Id. Rule 11(c)(2) (emphasis added). Rule 11 gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case. *Edwards v. Powder Mountain Water and Sewer*, 2009 UT App 185, ¶ 27, 214 P.3d 120 (citing *R & R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1080 (Utah 1997)). The rule provides trial courts with a list of punishments from which an appropriate sanction may be tailored. *Id.* (citing U.R.C.P. 11(c)(2)). Appellate courts afford trial courts considerable discretion to determine what sanction will be most effective to deter undesirable conduct. *Id.* (citing *Archuleta v. Galetka*, 2008 UT 76, ¶ 7, 197 P.3d 650 and *Kaiserman Assocs., Inc. v. Francis Town*, 977 P.2d 462, 464 (Utah 1998)).

To the extent MYI suggests that Rule 11 sanctions are not appropriate in this case because they are a purely collateral issue, ESI would simply refer this Court to its recent ruling in *Edwards v. Powder Mountain Water and Sewer*, *supra*, wherein this Court affirmed a trial court's Rule 11 sanction of both dismissal of the complaint without prejudice and a fine. MYI's citation to *Utah Dept. of Transp. v. Osguthorpe*, 892 P.2d 4

(1995) is inapposite to the issues before this court as it addresses a discovery sanction – not a Rule 11 sanction.

MYI cites absolutely no legal authority to support its argument that ESI's Rule 11 Motion failed as a matter of law because of the sanction sought. MYI lost its right to pursue the claims either in 2004, when the Subject Claims were lost to Developers and sold to Seely, or in 2007, when the trial court joined Seely as the plaintiff because of his "clear personal interest in the subject matter of the action and in its outcome." (R. 2906.) MYI pursued the claims without the authority of Seely and continued to pursue the claims after the court joined Seely on May 15, 2007, which, as noted *supra*, is not permitted by Rule 25(c). Requesting dismissal of a complaint as an appropriate sanction against a party who is not the real party in interest (and who had no authority to continue its prosecution of the claims) is certainly contemplated within Rule 11 which allows a court to enter a sanction, as appropriate, to "deter repetition" of such improper conduct.

D. MYI's Argument that ESI Failed to Offer Evidence Showing a Rule 11 Violation Under *Morse* is Without Merit.

In section IV of its Reply, MYI generally argues that ESI failed to offer any evidence showing a Rule 11 violation as required by *Morse v. Packer*, *supra*, 2000 UT 86. *See* MYI Reply at pp. 42-43. MYI claims ESI failed to show that the order denying ESI's Rule 11 Motion was erroneous because:

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.

MYI Reply at p. 43. MYI's argument in this regard is not entirely clear and is not supported by a reasonable reading of *Morse*. Nevertheless, regardless of whether the Subject Claims were transferred, MYI's Rule 11 violation is based upon statements and arguments made which were unsupported by facts and/or legal authority. See e.g., *Gillmor v. Family Link*, ¶ 18 (“[I]t is not that [counsel’s] arguments below were wrong but that those arguments were not supported by any legal authority – especially given the fact that [counsel] had anticipated the res judicata issue before filing this suit”).

Below and on appeal, ESI's evidence establishing MYI's and/or its counsel's violations of Rule 11 have been clearly set forth and are adopted herein as if reinstated in full. There is absolutely no evidence that, despite being put on notice the Bond Company (Developers) controlled and essentially owned MYI, including all of its accounts receivable, Mr. Farley made a reasonable investigation into the ownership of the Subject Claims before pursuing the litigation in this case. Thereafter MYI and/or its counsel confused and concealed the issue of ownership of the Subject Claims and used the April 2004 Letter and other false representations regarding production to prevent ESI from conducting its own discovery on the issue. Finally, as has been described herein, MYI and/or its counsel **asserted** legal arguments that had no basis in law or fact – all of which ESI was required to defend.

Contrary to MYI's claim, ESI has marshaled sufficient evidence to support a finding that MYI and/or its counsel violated Rule 11 and that the trial court's Order denying such Motion was erroneous.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT AWARDING SANCTIONS AGAINST MYI AND ITS COUNSEL.

The final issue raised by ESI below is whether the trial court abused its discretion by not awarding sanctions against MYI and its counsel. In its Reply, MYI does not appear to specifically respond to this issue except to state the abuse of discretion standard is not "applicable here because the court did not impose any Rule 11 sanctions, having determined there was no Rule 11 violation." *See* MYI Reply at p. 20, n. 4. MYI cites *Archuleta v. Galetka*, 2008 UT 76, ¶ 6, 197 P.3d 650, in support of its argument. ESI respectfully disagrees that *Archuleta* supports MYI's argument. Paragraph 6 of the *Archuleta* opinion sets forth the standard of review in Rule 11 cases and specifically states, "The trial court's determination regarding the type and amount of sanctions to be imposed is reviewed for abuse of discretion" *Archuleta v. Galetka, supra* at ¶ 6 (citing *Griffith v. Griffith*, 1999 UT 78, ¶ 10, 985 P.2d 255). In fact, in *Gillmor v. Family Link, supra* (a case cited by MYI in its Reply Brief; *see* MYI Reply Br. at p. 30), this Honorable Court recently reviewed the denial of a Rule 11 Motion and request to impose sanctions pursuant to Rule 11(b)(1). In upholding the lower court's denial, the *Gillmor* court could not say that the district court's findings were against the clear weight of the evidence and, therefore, it would not "disturb the district court's decision not to impose

sanctions against Mrs. Gillmor and Mr. Baird for violating rule 11(b)(1).” *Gillmor, supra*, at ¶ 20.

Below and on appeal, ESI demonstrated the great significance the ownership issue had in the Action. MYI does not rebut any of ESI’s arguments in this regard but claims that they are mere speculation and are merely a “variation of [ESI’s] ineffective argument that it should not have had to defend against the Subject Claims.” *See* MYI Reply at p. 30, n. 9. ESI respectfully clarifies that the prejudice comes not from having to defend against the “merits” of the Subject Claims – but against a party who lacked the authority to prosecute or, alternatively, who concealed or confused the identity of the owner to such an extent that ESI was required to file the numerous motions referenced by MYI in its Reply. *See* MYI Reply Br. at pp. 25-26, ¶ 5. Had MYI argued in January 2007 that the Subject Claims were not lost to Developers because they had been “excepted” from the Settlement Agreement, ESI could have sought a ruling on the terms of the Settlement Agreement at that time. Instead, as was noted below, and has been addressed herein, MYI set forth numerous factual and legal contentions which were unsupported by fact or law.

MYI has not effectively rebutted ESI’s argument that the trial court abused its discretion by not awarding sanctions against MYI and its counsel. The arguments made by ESI below and on this appeal, *see* ESI Opening Br. at pp. 44-48, are incorporated herein as if set forth in full.

CONCLUSION

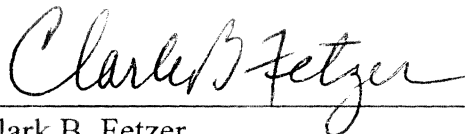
The trial court erred when it denied ESI's Rule 11 Motion. Contrary to MYI's contention, there is no "exception" to the requirement that a trial court must describe the conduct constituting a basis for its denial. Moreover, the trial court's finding of "insufficient evidence" was clearly erroneous as it is unsupported by the record. MYI incorrectly assumes ESI's Rule 11 Motion is based solely upon the loss of the Subject Claims by MYI and the subsequent transfer of the claims to Mr. Seely. *See e.g.*, MYI Reply at p. 18, *see also id.* at pp. 22-23, ¶ 2. However, as is evidenced herein, the basis of ESI's Rule 11 Motion is MYI's conduct between 2004 and 2007. As noted herein and below, during that period of time, MYI deliberately and intentionally concealed and confused the issue regarding ownership of the claims. *Even if there was a legitimate question regarding ownership of the Subject Claims*, MYI asserted arguments, which ESI was required to defend, that lacked any basis in law or fact. Just one example of this violation is MYI's claim in January 2007 that it was authorized pursuant to Utah's winding up statute to prosecute the subject claims, when at the time MYI made this argument it was not a dissolved corporation! As noted by MYI in its Reply Brief, "[a]ll of MYI's litigation responses" were made to, *inter alia*, prevent Mr. Seely from being "dragged into the lawsuit." *See* MYI Reply at p. 50. Unfortunately, MYI and its counsel ran afoul of Rule 11 when their efforts included concealing and confusing the issue of ownership and making claims unsupported by facts and arguments unsupported by law.

Despite MYI's claims to the contrary, whether the Subject Claims were ever transferred does not matter in determining that MYI violated Rule 11 in this case. As is

amply set forth herein, MYI made a number of factual and legal contentions and denials in its pleadings which support both a finding of a Rule 11 violation and an imposition of sanctions. By concealing and confusing the issue regarding ownership of the Subject Claims and making contentions and arguments which were unsupported by fact or law, MYI and its counsel hindered the process of adjudication and made the task of the underlying court more difficult. This conduct, which was admittedly to avoid having Mr. Seely "dragged into the lawsuit," *see* MYI Reply at p. 50, was also clearly harassing and caused unnecessary delay and needless increase in the cost of litigation. This is precisely the type of conduct sanctionable under Rule 11. Rule 11 should be enforced in this case and sanctions should be awarded against MYI *and* its counsel of record. In the alternative, the case should be remanded for the entry of findings and conclusions.

DATED this 24~~th~~ day of May, 2010.

RINEHART FETZER SIMONSEN & BOOTH, P.C.

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

Clark B. Fetzer

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of May, 2010, I sent two true and correct copies of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** to each of the parties below:

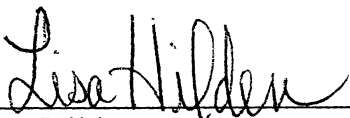
E. Scott Savage (#2865)
Stephen R. Waldron (#6810)
SAVAGE, YEATES, & WALDRON, P.C.
170 S. Main Street, Ste 500
Salt Lake City, Utah 84101

☒ (x) U.S. Mail, Postage Prepaid
☐ () Hand Delivered
☐ () Overnight Mail
☐ () Facsimile

and

Jon Lear
LEAR & LEAR
The Downey Mansion
808 East South Temple
Salt Lake City, Utah 84012

☒ (x) U.S. Mail, Postage Prepaid
☐ () Hand Delivered
☐ () Overnight Mail
☐ () Facsimile



Lisa Hilden
Legal Assistant

Addendum

ADDENDUM

1. A copy of the trial court's decision in *Gillmor v. Family Link, LLC*, 2010 UT App. 2, ¶ 20, 224 P.3d 741

Tab 1

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

JUL - 1 2008

SUMMIT COUNTY

By _____ *AKS*
Deputy Clerk

NADINE GILLMOR,

Plaintiff,

vs.

FAMILY LINK, LLC, a Utah Limited Liability Company, DAVID K. RICHARDS, an individual, BARRY TODD MILLER, an individual, JOAN ELLEN MILLER, an individual, DOUG CARL DOHRING, as an individual and as Trustee, LAURIE ANN DOHRING, an individual, KENNETH W. MACEY, an individual, ROBIN A. MACEY, an individual, and JOHN DOES 1-40,

Defendants.

RULING AND ORDER
(Rule 11)

Civil No. 070500385

Judge Robert K. Hilder

All defendants in this action except Barry Todd Miller and Joan Ellen Miller have requested Rule 11, Utah Rules of Civil Procedure, sanctions against plaintiff Nadine Gillmor and her attorney, Bruce R. Baird. Defendants Family Link and the Maceys (hereinafter "Maceys"), and defendant David K. Richards (hereinafter "Richards") filed the initial Motion jointly, and counsel for these defendants have taken the laboring oar in briefing and arguing the Motion. Defendants Doug Dohring and Laurie Dohring (hereinafter "Dohrings") subsequently joined in the other defendants' Motion, but Dohrings did not add any independent analysis to the briefing. I also note that counsel for Maceys and Richards are the same counsel who represented these

parties in the prior 2001 litigation (Nadine Gillmor v. Family Link, *et al.*, Summit County Civil No. 010600155) that played a critical part in my dismissal of this case on defendants' Motion, and that now plays an important part in determination of the present Rule 11 Motion. I also note that I was the trial judge for that action. Mr. Baird was not Ms. Gillmor's counsel in that action.

The Motion was argued to me on April 4, 2008, and should have been decided before this date. I apologize to counsel and parties for the delay, but as I explained at the close of argument, I can think of few more difficult decisions than one that raises the spectre of sanctions against a respected and able member of the Bar, and I have taken perhaps excessive care in researching and deciding this matter for that reason.

BACKGROUND

The present Motion for Rule 11 sanctions arises from plaintiff's Complaint in this action, which asserts two Causes of Action. The first is styled "Condemnation," and the second "Declaration of Highway by Use." The Complaint was filed July 12, 2007. Defendants moved to dismiss the claims, and plaintiff filed a Motion for Partial Summary Judgment. Following argument on December 19, 2007, I dismissed both claims on the basis of *res judicata* (the 2001 action), and denied plaintiff's Motion for Partial Summary Judgment. I denied defendants' Motion to Dismiss on the alternative grounds of judicial estoppel, and because I decided the Motion based on *res judicata*, I expressly did not reach defendants' separate claims that the Cause of Action for condemnation should be dismissed because (1) plaintiff has no authority to condemn defendants' property, or (2) the proposed condemnation is not for a public use. (See Order entered February 20, 2008).

I will not recite the history of this case. It is well-summarized in the briefing, and for more

details reference should be made to my Findings of Fact and Conclusions of Law dated May 23, 2002, and the Judgment dated and entered September 24, 2002, in the prior action, and the subsequent Court of Appeals opinion found at 2005 UT App. 351, 121 P.3d 57 (Ut.Ct.App. 2005).

APPLICABLE PROVISIONS OF RULE 11

Although defendants' original Motion at least referenced Rule 11(b)(2) (non-frivolous basis in law) and (3) (factual claims must have evidentiary support) (Memorandum in Support dated August 6, 2007, p. 6), as the briefing evolved (and after the court granted the Motion to Dismiss), the focus shifted to Rule 11(b)(1) (improper purpose) and (2) (non-frivolous basis in law). (Reply Memorandum dated March 5, 2008). Defendants identify factual problems contained in plaintiff's arguments opposing the sanctions Motion, but they do not specifically argue that the facts alleged in the Complaint initiating this action lack evidentiary support or "are [not] likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." (Rule 11(b)(3)).

After considering all of the filings in this case, I cannot say that the facts underlying the nineteen specific allegations in the Complaint are not likely to have evidentiary support (which is not the same as saying those facts would be persuasive, but that is not the standard), particularly in light of the more than 100 years of history upon which plaintiff appears to rely. The one allegation that skates closest to the line is No. 1: "Gillmor's property is essentially landlocked." That allegation appears inconsistent with my Findings of Fact in the prior action, but the word "essentially" at least opens the door to a determination through investigation and discovery that the alternate routes are so impractical, at least for the purposes desired, that the land may be "essentially" landlocked. Defendants also note that the defendants are not all of the surrounding

landowners, but that suggestion appears only in a memorandum, and not in the Complaint. At paragraphs 16 and 17 plaintiff makes the relevant allegations; namely, that defendants own the land between plaintiff's property and the Weber Canyon Road, and that the Perdue Creek and Neil Creek roads run across defendants' properties. These are probably accurate statements.

For the foregoing reasons, I will not analyze the Rule 11 Motion under sub-sections (b)(3) or (4), but will limit analysis to sub-sections (b)(1) and (2). With this in mind, I note that any monetary sanctions under subsection (b)(2) may only be imposed on counsel, Mr. Baird, but that if I find a violation of subsection (b)(1), sanctions (monetary or other) may be assessed against either or both Ms. Gillmor and Mr. Baird. (Rule 11(c)(2)(A), U.R.C.P.)

IMPROPER PURPOSE, RULE 11(b)(1)

The Rule states that an action may “not [be] presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Rule 11(b)(1).

The defendants bear the burden of showing the improper purpose. The recent case law (since at least 1998 with the Pennington case, through 2005 with Mt. Vida) creates some confusion, at least in my mind, whether a Rule 11(b)(1) claim requires a showing of subjective bad faith. There is no question, either now or in 1998, that under the previously codified § 78-27-56 (now § 78B-5-825), an action must be without merit, and brought in bad faith (or an absence of good faith) and the standard is subjective good or bad faith. See, Pennington v. Allstate, 973 P.2d 932, 938, n.3 (Utah 1998), Cady v. Johnson, 671 P.2d 149, 152 (Utah 1983), and Still Standing Stable, LLC. v. Allen, 2005 UT 46, 122 P.3d 556, 560-61 (Utah 2005).

Plaintiff argues that the standard is the same under both § 78-27-56 and Rule 11(b)(1).

Defendants argue that it is not. Both have support. In Pennington, the court stated that: “[R]ule 11 sanctions do not require a party to act with a lack of good faith.” 973 P.3d at 938, n.3. In Mt. Vida Enterprises v. Steen, 2005 UT App. 400, 122 P.3d 144 (Ut.Ct.App. 2005), the Court of Appeals stated that: “[B]oth of these theories [Rule 11 and abuse of process], like Utah Code section 78-27-56(1), would require a showing of bad faith or its equivalent.” Id. at 149, n.6.

I cannot readily reconcile the two cases, except to note that one is the Utah Supreme court, and it should control, but perhaps the difference is not material in this case. That is, all cases that address the improper purpose standard under either Rule 11(b)(1) or the statute appear to treat the issue as one of fact, see, e.g. Pennington, 973 P.2d at 936, which implies an evidentiary hearing (either the underlying trial or a specific hearing on the fee motion), and I have never awarded § 78-27-56 fees without such a hearing.¹

The language of Rule 11(b)(1) (set forth above) suggests at least some overlap between the standards of the Rule, and § 78-27-56. That is, Utah courts have defined the statutory standard with some specificity: To show a lack of good faith, or the existence of bad faith, for purposes of § 78-27-56, it must be shown that one of the following three factors is lacking:

(1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others.

Still Standing Stable, 122 P.3d at 560 (quoting In re Sonnenreich, 2004 UT 3, ¶ 48, 86 P.3d 712 (Utah 2004)).

¹ Under § 78-27-56, the necessary bad faith inquiry is identified in Cady v. Johnson, 671 P.2d 149 (Utah 1983) and subsequent cases. It is not a simple standard, it is factual, and parties have been warned by the Utah Supreme Court to avoid conflating the two requirements of lack of merit and bad faith into one. See Still Standing Stable, LLC. v. Allen, 2005 UT 46, 122 P.3d 556, 560-61 (Utah 2005).

Whether the standard is subjective bad faith, as identified above, or objective improper purpose, the record in this case does not provide a sufficient basis to attribute either such motive to plaintiff or Mr. Baird. In the present case, I see no evidence of a purpose to harass, delay or impose unnecessary cost. The purpose is clear—to obtain access that has not been obtained through previously advanced theories. Neither can I find sufficient evidence in the record to show the absence of an honest belief that the action might be justified, or that the action was filed to take unconscionable advantage of defendants. There is no question that the action (the present and prior actions, in fact) have cost defendants very large sums, but I cannot conclude that there was ever, now or in the past, a purpose to needlessly increase the costs of litigation.

Finally, I note that defendants point to statements of what actions may be brought in the future, by other parties who may or may not be represented by Mr. Baird, but until such actions are filed there is no way for this court to assess the merits of such actions, and I do not see how the threat of such actions shows the improper purpose required by the Rule. Excessive zeal in a cause is not necessarily an improper purpose or evidence of bad faith, and I hereby **DENY** the sanctions Motion based on Rule 11(b)(1), U.R.C.P. What may require sanctions, however, is an action prompted by such zeal, but which cannot be legally justified by this plaintiff against these defendants, and that is the next inquiry.

WITHOUT BASIS IN LAW, RULE 11(b)(2)

I start this section by clarifying that I am not now addressing whether the two claims advanced by plaintiff, Nadine Gillmor, have any basis in law, or a in a reasonable extension of existing law. For the sake of argument (but only for that purpose) I will concede that one or both theories, highway by use or private condemnation, may be viable. The sole inquiry in the context

of this case, with its inextricable ties to the prior action (and, indeed, to the settlement of the 1984 action that is referenced throughout the record), is whether Nadine Gillmor had a basis in law, or in a reasonable extension of existing law, to bring a new action seeking increased access to her property over and across the defendants' properties. Stated a little differently, is there an objectively reasonable basis in law justifying this new approach to Ms. Gillmor's apparently intractable problem of how to obtain access to her property that meets her needs and desires?

I will start by sketching the law of *res judicata*:

The doctrine of *res judicata* serves the important policy of preventing previously litigated issues from being relitigated. *Res judicata* encompasses two distinct doctrines: claim preclusion and issue preclusion.

Generally, claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously. In order for a claim to be precluded under this doctrine the party seeking preclusion must establish three elements:

First, both cases must involve the same parties or their privies. Second the claim that is alleged to be barred must have been presented in the first suit **or be one that could and should have been raised in the first action**. Third, the first suit must have resulted in a final judgment on the merits.

Snyder v. Murray City Corporation, 2003 UT 13, ¶ 34, 73 P.3d 325, 332 (Utah 2003) (all internal citations omitted; emphasis added).

I will not define issue preclusion, because that doctrine is not the specific bar to plaintiff's present action. Addressing the three elements of claim preclusion: (1) This action involves the same parties and/or privies as the prior action. (2) The claim for access over the properties was the heart of the prior action. It is plaintiff's argument that (a) the present legal theories supporting access were not presented in the prior action, which they were not, and (b) there was no need to argue the present theories until this court and the Utah Court of Appeals ruled against plaintiff's

claims which were advanced through different theories. Both arguments fail, because the present arguments were always available (and according to plaintiff they have been legally and factually available for many decades), and the claims or theories could and should have been presented in the first case, either as alternative theories, or as the theories that best fit the facts alleged. (3) There is no question that the prior action was fully adjudicated, at trial, on appeal to the Utah Court of Appeals, and through denial of a writ of certiorari to the Utah Supreme Court.

The foregoing is a brief statement of this court's reason for dismissing the present action, and I am at a loss to understand how plaintiff could have brought the present action without violating Rule 11(b)(2), U.R.C.P. That is, once the three elements are satisfied, I am unaware of any exceptions to application of the bar imposed by *res judicata*, and plaintiff has not identified any such exception. She argues, as already noted, that her present "legal causes of action . . . were utterly unnecessary" until the Court of Appeals ruled against her, but that argument only suggests that litigation choices were made, as they should be, and not every possible theory was advanced. Nevertheless, the claim for access was aggressively pursued, and resolved. *Res judicata* has several purposes, one of which is "relieve parties of the cost and vexation of multiple lawsuits." Office of Recovery Services v. V.G.P. 845 P.2D 944, 946 (Ut.Ct.App. 1992).

If an appellate court disagrees with my application of the doctrine of *res judicata* to the present action, then any determination of a violation of Rule 11(b)(2), and imposition of sanctions, will be similarly flawed, but unless and until that happens, I am constrained to follow the logic of the underlying dismissal, and my analysis of Rule 11(b)(2), to find that the present action was filed in contravention of the Rule. I note the particular force of Schoney v. Memorial Estates, Inc. 863 P.2d 59, 62 (Ut.Ct.App. 1993), in support of this conclusion.

To summarize, I do not disagree that Mr. Baird's research of underlying theories may not, in fact, be flawed *per se*. Indeed, one or both theories may support his conclusion that some plaintiff, some day, may have an argument for a highway by use or private condemnation claim. I do not reach that issue. The flaw in the filing is that this plaintiff, Nadine Gillmor, may not now bring such a claim, because of the prior fully litigated claims between these parties or their privies. The *res judicata* bar is clear, it is ancient, and it applies conclusively in this case. Ms. Gillmor has had her day in court on the claims presented in this action, albeit presented now in a new form.

SANCTIONS

Because the only Rule violated in this case is Rule 11(b)(2), a monetary sanction may not be imposed against Ms. Gillmor. Monetary sanctions may be imposed against Mr. Baird, counsel for plaintiff, and other sanctions may be imposed against either or both Mr. Baird and Ms. Gillmor. The Rule specifically provides that: "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." (Rule 11(c)(2)) Sanctions may include "an order directing payment of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." Id.

Defendants have all sought payment of attorney's fees, and the affidavits to date support very substantial amounts incurred, all related to the filing of this action and defendants' successful motions to dismiss. The courts have, however, given guidance on the meaning of the sanctions language, and the purpose of sanctions, which guidance persuades me that an award of all fees and costs is not mandated by the Rule, and this court should exercise its sound discretion in

determining the appropriate sanction. See, e.g. Pennington v. Allstate, 973 P.2d 932, 939 (Utah 1998), and Schoney v. Memorial Estates, Inc. 863 P.2d 59, 62 (Ut.Ct.App. 1993). Specifically, “a violation of Rule 11(b) does not mandate the sanction of attorney fees.” Crank v. The Utah Judicial Council, 2001 UT 8, 20 P.3d 307, 316 (Utah 2001).

Federal cases give further direction. Some of the guiding principles include the following: “The purpose of sanctions under Rule 11 is to deter baseless filings and streamline the administration of justice. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 393 (1990). Sanctions should therefore be educational and rehabilitative in character and, as such, tailored to the particular wrong. Topalian v. Ehrman, 3 F.3d 931, 936-37 (5th Cir. 1993).” Jordaan v. Hall, 275 F.Supp.2d 778, 790-91 (N.D.Tex. 2003). Finally, “Rule 11 is not a fee-shifting statute in the sense that the loser pays. It is a law imposing sanctions if counsel files with improper motives or inadequate investigation.” Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989) (*en banc*).

In this case, plaintiff did not obtain the property access she sought in the 2001 action, which in turn interpreted the settlement agreement arising from a 1984 action. In this action, new and experienced counsel advanced theories not asserted in the prior action, but which could have been, in an attempt to gain rights of access probably even greater than argued for in the 2001 action, or bargained for in prior agreements. I have found that the action is not legally justified, at least not an action brought by Nadine Gillmor to expand her access rights across the land owned by defendants. Nothing in the proceedings in this action persuades me that Ms. Gillmor will seek personally to advance such an action in her name, but it is patently clear that she may seek to create certain rights to access through others. I do not see how sanctions seeking to deter Ms.

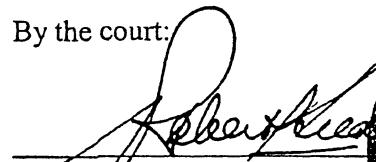
Gillmor or Mr. Baird from such an effort are justified by Rule 11 if the action is otherwise justified, but a sanction should be imposed in this case, pursuant to the Rule, to deter others generally from bringing claims barred by either claim preclusion or issue preclusion, when all the elements are present.

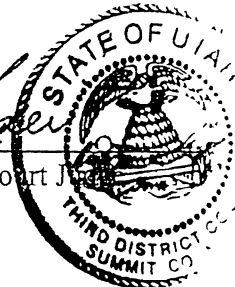
I determine that Mr. Baird, counsel for plaintiff, shall pay \$5,000 each to the Macey and Richards defendants, and \$2,500 to the Dohring defendants, for a total of \$12,500.00. As an additional sanction, Nadine Gillmor is hereby enjoined from filing any further action seeking access to her property, or modification of the access she presently enjoys, across any of the defendants' properties unless she first seeks leave of court to file such an action, with notice to all intended defendants. In any request for such leave, Ms. Gillmor is ordered to reveal the full history of agreements and litigation, including the 2001 action, this action, and the sanctions imposed herein.

No further Order is required, but defendants' counsel shall prepare appropriate Judgments based on this Order, which judgments will provide for post-judgment interest at the 2008 rate from the date of this Order. The court, however, further Orders that any execution of judgments shall be stayed until the appeal time from this Order and the underlying dismissal Order has expired. If a timely appeal is filed, then plaintiff shall have ten business days to seek a further stay on appeal, and the parties may address the issue of any appropriate bond at that time.

DATED this 30th day of June, 2008.

By the court:


Robert K. Hilder, District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070500385 by the method and on the date specified.

METHOD	NAME
Mail	BRUCE R BAIRD Attorney PLA 9537 S 700 E SANDY, UT 84070
Mail	STEVEN E CLYDE Attorney DEF ONE UTAH CENTER 13TH FLR 201 S MAIN ST SALT LAKE CITY UT 84111-2216
Mail	ELIZABETH T DUNNING Attorney DEF 299 S MAIN ST STE 1800 SALT LAKE CITY UT 84111-2263
Mail	KEITH W MEADE Attorney DEF POB 11008 SALT LAKE CITY UT 84147-0008

Dated this 1st day of July, 2008.



Deputy Court Clerk