2011

Supernova Media v. Pia Anderson Dorius Reynard and Moss LLC, a Utah limited liability company v. Kelly H. Nelson, an individual, et al. : Brief of Appellee Pia Anderson Dorius Reynard & Moss LLC

Utah Supreme Court

IN THE UTAH SUPREME COURT

SUPERNOVA MEDIA, INC., a New York corporation, et al., Appellants, v. PIA ANDERSON DORIUS REYNARD & MOSS, LLC, a Utah limited liability company, Plaintiff and Appellee, v. KELLY H. NELSON, an individual, et al., Defendants and Appellees.	Case No. 20110~~368~~ 417

BRIEF OF APPELLEE PIA ANDERSON DORIUS REYNARD & MOSS, LLC

Appeal from an Order of Dismissal with Prejudice and Upon the Merits entered by The Honorable Glenn K. Iwasaki Third Judicial District Court of Salt Lake County, State of Utah

Mary Anne Q. Wood (3539)
Kathryn Ogden Balmforth (5659)
WOOD JENKINS, LLC
60 East South Temple, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
Attorneys for Appellants

Brennan H. Moss (10267)
Robert K. Reynard (9480)
PIA ANDERSON DORIUS REYNARD & MOSS, LLC
222 South Main Street, Suite 1830
Salt Lake City, Utah 84101
Telephone: (801) 350-9000
Facsimile: (801) 350-9010
Attorneys for Appellee Pia Anderson Dorius Reynard & Moss, LLC

IN THE UTAH SUPREME COURT

SUPERNOVA MEDIA, INC., a New York corporation, et al., Appellants, **v.** PIA ANDERSON DORIUS REYNARD & MOSS, LLC, a Utah limited liability company, Plaintiff and Appellee, **v.** KELLY H. NELSON, an individual, et al., Defendants and Appellees.	Case No. 20110368

BRIEF OF APPELLEE PIA ANDERSON DORIUS REYNARD & MOSS, LLC

Appeal from an Order of Dismissal with Prejudice and Upon the Merits entered by The Honorable Glenn K. Iwasaki Third Judicial District Court of Salt Lake County, State of Utah

Mary Anne Q. Wood (3539)
Kathryn Ogden Balmforth (5659)
WOOD JENKINS, LLC
60 East South Temple, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
Attorneys for Appellants

Brennan H. Moss (10267)
Robert K. Reynard (9480)
PIA ANDERSON DORIUS REYNARD & MOSS, LLC
222 South Main Street, Suite 1830
Salt Lake City, Utah 84101
Telephone: (801) 350-9000
Facsimile: (801) 350-9010
Attorneys for Appellee Pia Anderson Dorius Reynard & Moss, LLC

LIST OF ALL PARTIES

Appellants

SUPERNOVA MEDIA, INC., a New York corporation, Represented by attorneys from the law firm WOOD JENKINS, LLC, 60 East South Temple, Suite 500, Salt Lake City, Utah 84111

Plaintiff and Appellee

PIA ANDERSON DORIUS REYNARD & MOSS, LLC, a Utah limited liability company, Represented by attorneys from the law firm PIA ANDERSON DORIUS REYNARD & MOSS, LLC, 222 South Main Street, Suite 1830, Salt Lake City, Utah 84101

Defendants and Appellees

KELLY H. NELSON, an individual, CHARLES MORRISON, an individual, SUMMITWORKS, LLC, a Utah limited liability company, SHANNON'S RAINBOW, LLC, a Utah limited liability company, SHANNON'S RAINBOW PRODUCTION, LLC, a Pennsylvania limited liability company, FRANK JOHNSON, an individual, LARRY RICHERT, an individual, JOHN MOWOD, an individual, SCREEN ACTORS GUILD, INC., a California corporation, DIRECTORS GUILD OF AMERICA, INC., a California corporation, LAURENCE ROSS, an individual, and Does 1 – 10, previously represented by attorneys from the law firm ANDERSON & KARRENBERG, 50 West Broadway, Suite 700, Salt Lake City, Utah 84101 at the District Court Level. The status of that representation is presently unknown.

TABLE OF CONTENTS

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUE 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. APPELLANT'S UNPROVEN CLAIMS OF INTEREST DO NOT MEET THE INTERVENTION REQUIREMENTS OF RULE 24(A). 7

A. To Determine Whether Appellant has a "Legally Protectable" Interest in this Attorneys' Fee Dispute will Require a Monumental Undertaking that is Presently the Subject of Three Litigation Matters in Utah and New York. 8

B. Threat of Inconsistent Judgments is Too Great to Permit Intervention. 11

II. BECAUSE THE PARTIES HAVE SETTLED AND FILED MOTIONS TO DISMISS WITH PREJUDICE, APPELLANT'S MOTION TO INTERVENE IS OBVIATED. 12

A. The Settlement Cannot be Interfered with by Non-Party Appellant. 14

B. The Court Does Not Need to Approve the Original Parties' Voluntary Settlement Agreement. 16

C. Appellant Misapplies the Millard Standard to this Case. 16

III. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CASE BECAUSE THE ONLY PARTIES TO THE PROCEEDING SETTLED THE UNDERLYING DISPUTE, THEREBY ELIMINATING ANY JUSTICIABLE CONTROVERSY.....19

CONCLUSION.....19

CERTIFICATE OF SERVICE.....21

TABLE OF AUTHORITIES

Cases and Secondary Sources

Airline Stewards and Stewardesses Ass'n v. Am. Airlines, Inc., 575 F.2d 960 (7th Cir. 1978) 13, 15, 16

Black v. Central Motor Lines, Inc., 500 F.2d 407 (4th Cir. 1974).....12

Cessna Aircraft Co. v. Brown, 348 F.2d 689 (10th Cir. 1865) 11, 12

Chemical Waste Management, Inc. v. Broadwater, 758 F.2d 1538 (11th Cir. 1985) 13

Donaldson v. United States, 400 U.S. 517 (1971) 8

Faller v. Chevron Corp., 2008 WL 4831386 (S.D. Tex. Nov. 4, 2004).....18, 19

Florida Trailer & Equipment Cot. V. Deal, 284 F.2d 567 (5th Cir. 1960) 13

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 13

In re EH, 2006 UT 36, 137 P.3d 809 .....7, 14

In re Environmental Elec. Sys., Inc., 11 B.R. 962 (N.D.Ga 1981) 8

In re Integra Realty Resources, Inc., 354 F.3d 1269 (10th Cir. 2004) 13

In re Masters Mates & Pilots Pension Plan and IRAP Litigation, 957 F.2d 1020 (2d Cir. 1992) 16

In re of Kingsley, 802 F.2d 572 (1st Cir. 1986) 13

Johnson v. Lodge # 93 of the Fraternal Order of Police, 393 F.3d 1096 (10th Cir. 2004) 15

Kennecott Corp. v. Salt Lake County, 702 P.2d 451 (Utah 1985) 18

Lima v. Chambers, 657 P.2d 279 (Utah 1982).....7

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 14

Mascaro v. Davis, 741 P.2d 938 (Utah 1987).....14

McClune v. Shamah, 593 F.2d 482 (3d Cir. 1979) 12

Millard County v. Utah State Comm'n ex rel. Intermountain Power Agency, 823 P.2d 459 (Utah 1991) 17, 18, 19, 20

Non-Commissioned Officers Association of the United States v. Army Times Publishing Co., 637 F.2d 372 (5th Cir. 1981) 12

Oprian v. Goldrich, Kest & Associates, 269 Cal.Rptr. 429 13

Perez v. Ausurion Corp., et al., 501 F.Supp.2d 1360 (S.D. Fla. 2007) 17

Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991).....13

Ringgold v. U.S., 553 F.2d 309 (2d Cir. 1977) 13

Salt Lake City v. Tax Comm'n, 813 P.2d 1174 (Utah 1991).....17

San Juan County v. United States 420 F.3d 1197 (10th Cir. 2005).....8, 9

San Juan Valley, 503 F.3d 1163 (10th Cir. 2007) 14, 15

TBG Inc. v. Bendis, 811 F.Supp. 596 (D. Kansas 1992).....16

U.S. Postal Service v. Brennan, 579 F.2d 188 (2d Cir. 1978) 12

Vermejo Park Corp. v. Kaiser Coal Corp., 998 F.2d 783 (10th Cir. 1993) 8, 9

13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2 (2d ed. 1984) 12

7A Wright & Miller, Federal Practice and Procedure: Civil s 1917 (1972).....12

Statutory Provisions

Utah Rule of Civil Procedure 24(a) 7, 8, 18, 20

* * * * *

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from a final order of the district court under Utah Code Ann. § 78A-3-102.

STATEMENT OF THE ISSUE

In its statement of the issue, Appellant fails to include the fact that Appellant had not established a right to intervene and that the underlying dispute was between the only parties with a direct relation to the transaction at issue.

STATUTORY PROVISIONS

The following statutory provision is provided in Appellant's brief: Utah Rule of Civil Procedure 24(a) (Intervention of Right).

STATEMENT OF THE CASE

On February 9, 2011, Appellee Pia Anderson Dorius Reynard & Moss, LLC ("PADRM") filed the action styled PADRM v. Nelson, *et al.*, Case No. 110903223, Judge Iwasaki. R. 1 – 29. The Complaint generally pertains to collecting on legal fees owed by PADRM's former client. *See id.* The Complaint also raises the issue of remedies available to PADRM including the enforcement of a consensual lien and a non-consensual attorneys' lien in the matters that PADRM provided legal services for. *See id.* As a part of enforcing the attorneys' liens, PADRM included parties who are interest holders of record under available UCC-1 searches, including non-clients Screen Actors

Guild, Inc., Directors Guild of America, Inc., and Laurence Ross ("Non-Clients") so that the trial court could assess the rights and priorities of all parties' interests. *See id.*

Two days after filing the Complaint, on February 11, 2011, some of the client Defendants, including Shannon's Rainbow, LLC, a Utah limited liability company, Shannon's Rainbow, LLC a Delaware limited liability company, and Shannon's Rainbow Production, LLC, a Pennsylvania limited liability company (collectively, "Shannon's Rainbow Entities") filed a substantially similar declaratory judgment action styled Shannon's Rainbow, LLC et al. v. PADRM, Case No. 110903542 ("Second Action"). *See* R. 37 – 41. The Second Action was caused to be filed by other Defendants in this action who are managers and/or members of the Shannon's Rainbow Entities, including Kelly Nelson, Charles Morrison, Frank Johnson, Larry Richert, and John Mowod (collectively, the "Shannon's Rainbow Persons"). *See id.*

The Second Action disputes PADRM's consensual and non-consensual liens.. *See id.* Concurrently filed with the Second Action was a Motion for Temporary Restraining Order and Preliminary Injunction to prevent foreclosure of the lien rights. R. 296 – 302. The Temporary Restraining Order was granted the same day (February 11, 2011) and a preliminary injunction hearing was set for February 23, 2011 at 3:00 P.M. ("Hearing"). *Id.* Prior to the Hearing, the parties filed a Stipulated Motion for Continuance of the Preliminary Injunction and Extension of the Temporary Restraining Order because the parties were in active settlement negotiations. *Id.*

On February 23, 2011, a third party Appellant in this matter, Supernova Media, Inc., *et al.* ("Supernova"), filed a Motion to Intervene in the Second Action. *Id.*

Supernova's Motion to Intervene in the Second Action was substantially similar to its Motion to Intervene in this Original Action. *Id.* Supernova is a non-party that has been adverse to the Shannon's Rainbow Entities and the Shannon's Rainbow Persons, as well as their former counsel (PADRM) since 2008. Supernova claims to have a controlling management interest in the Shannon's Rainbow Entities that have been suing it. It is on this basis that Supernova seeks to intervene in both actions.

On February 24, 2011, the parties filed a Stipulated Motion to Seal the Preliminary Injunction hearing in the Second Action, in light of the fact that the dispute centers on evidence that is protected under the attorney-client privilege and work-product doctrine. *See id.* In point of fact Appellant is seeking to discover litigation strategy that has been, and continues to be, used against it. The parties in the Second Action were successful in reaching settlement and codified the same in a confidential settlement agreement. *See id.* The parties also agreed to a Stipulated form to Dismiss with Prejudice not only the Second Action, but also the original Action. *See id.* Notably, there were no proceedings other than filing the Complaint. The TRO was filed in the Second Action only. Supernova has been attempting to stop the effectuation of the settlement between PADRM and its former clients and dismissal of the cases.

The parties to the Second Action rescheduled the Preliminary Injunction/Intervention hearing for Monday, March 21, 2011 at 3:00 p.m. because of efforts to settle the case. *See id.* During the March 21, 2011 hearing, Judge Hilder heard representations by the parties that they had settled their dispute and were prepared to dismiss both the Second Action and the Original Action with prejudice. *See id.* The

Court also heard argument on Supernova's Motion to Intervene, but did not grant the Motion to Intervene. *See id.* Instead, the Court scheduled a follow-up hearing for Monday, March 28, 2011, at 4:00 P.M. to hear argument on the settlement of the parties and the proposed intervenor's Motion to Intervene. *See id.*

On March 21, 2011, PADRM filed a truncated Opposition to the Motion to Intervene. *See id.* The Opposition was "truncated" because the briefing schedule was ambiguous in light of the stay and Rule 7 as to when the opposition was in fact due. *See id.*

On March 25, 2011, the parties (PADRM, Shannon's Rainbow Entities, and Shannon's Rainbow Persons) filed a Joint Supplemental Opposition to the Motion to Intervene as Moot in light of the parties' settlement and agreement to dismiss the Actions with prejudice. *See id.* Also on March 25, 2011, Supernova filed a Reply to the Joint Opposition to the Motion to Intervene. On March 28, 2011, PADRM filed a Sur-Reply to the Reply. *See id.*

Having reviewed the memoranda submitted by the parties both for and against Supernova's Motion to Intervene in the Second Action, and being fully briefed of the issues pertaining thereto, Judge Hilder entered an order dismissing Supernova's Motion to Intervene: "[T]he Court found that the Intervenors had not shown, as required under Rule 24(a) of the Utah Rules of Civil Procedure, that they claimed an interest relating to the property or transaction which is the subject of this action. . . Accordingly, it is hereby ORDERED that Intervenor's Motion to Intervene as of Right shall be, and hereby is,

DENIED." *See id.* Thus, two separate District Court judges reviewed the relevant filings and independently held that Appellant's Motion to Intervene should be denied.

Indeed, the settlement between PADRM, the Shannon's Rainbow Entities, and the Shannon's Rainbow Persons (the "Original Parties") resolved the issue raised in the Original Action, namely the collection of PADRM's legal fees and the foreclosure of its attorneys' lien as against the Shannon's Rainbow Entities and the Shannon's Rainbow Persons (collectively the "Shannon's Rainbow Defendants"). The declaratory judgment claim was made to prioritize the rights of other secured creditors with UCC-1 filings of record, namely the Screen Actors Guild, the Directors' Guild, and Laurence Ross. Now that PADRM has settled with the Shannon's Rainbow Defendants regarding the fee dispute, the declaratory aspect of this case is moot, because PADRM released its claim to any lien or security interest.

Because the parties have settled, a justiciable controversy no longer exists regarding the Original Parties. The trial court's dismissal of the case in its early stages where none of the Defendants made an appearance or filed an Answer is completely within the power and discretion of the trial court. In light of the settlement and stipulated orders, Supernova's Motion to Intervene in the Original Action is obviated, and further action by the trial court or by this Court is unwarranted.

Subsequent to the trial court's dismissal of this Original Action, Appellant Supernova filed the instant appeal.

SUMMARY OF THE ARGUMENT

Appellant seeks intervention based on issues that are irrelevant to the present matter. Indeed, each and every one of the facts listed by Appellant in its Motion to Intervene is copied verbatim out of the many pleadings in six separate federal actions in Utah and New York (the "Other Actions")[1]. Appellant should, and does, have the right

---

[1] Supernova Media, Inc., individually and on behalf of Shannon's Rainbow LLC (Delaware), Shannon's Rainbow LLC (Utah), Joycelyn Engle, Julianne Michelle v. Shannon's Rainbow LLC (Delaware), Shannon's Rainbow, LLC (Utah), SummitWorks, LLC, Frank E. Johnson, Kelly Nelson, Charles Morrison, Carmine Lotito, John Mowod, Lawarence Richert, Case No. 650264/2011 (the "Third New York Action") (pending); DiPalma, Shannon's Rainbow, LLC (Delaware), Shannon's Rainbow, LLC (Utah) v. Shannon's Rainbow, LLC (Utah), SummitWorks, LLC, Johnson, Nelson, Morrison, Lotito (Case No. 102253/2010) ("Second New York Action") (pending); Shannon's Rainbow, LLC, (Delaware), Shannon's Rainbow, LLC (Utah), Shannon's Rainbow Production, LLC (Pennsylvania) v. Supernova Media, Inc., Joycelyn Engle, Julianne Michelle (Case No. 110902679, J. Hilder) (pending); JOSEPH DI PALMA, suing individually and in the right of SHANNON's RAINBOW LLC, a Delaware Limited Liability Company and SHANNON'S RAINBOW LLC, a Utah Limited Liability Company, Plaintiff, v. SUMMITWORKS, LLC, FRANK E. JOHNSON, KELLY NELSON, CHARLES MORRISON, CARMINE "TONY" LOTITO, SHANNON'S RAINBOW, LLC, a Delaware Limited Liability Company and SHANNON'S RAINBOW LLC, a Utah Limited Liability Company, Defendants. (Case No. N.Y. 102253/2010) ("Second New York Action") (pending); Pia v. Supernova Media, Inc., Joycelyn Engle, Joseph DiPalma, Julianne Michelle, Kelly Kent (Case No. 2:09-cv-00840CW) ("pending"); SHANNON'S RAINBOW, LLC, a Utah limited liability company; SHANNON'S RAINBOW, LLC, a Delaware limited liability company, SHANNON'S RAINBOW PRODUCTION, a Pennsylvania limited liability company, Plaintiffs, v. SUPERNOVA MEDIA, Inc. a New York corporation; JOYCELYN ENGLE a/k/a JOYCELYN DIPALMA, an individual; JULIANNE MICHELLE, an individual, and Does 1-100. (Case No. 2:08-cv-00880-TS); SUPERNOVA MEDIA, LLC, on behalf of SHANNON'S RAINBOW LLC, a Delaware Limited Liability Company, JOSEPH DI PALMA, and JOYCELYN ENGLE, Plaintiffs, v. SHANNON'S RAINBOW LLC, et al. Defendants. (Case No. 09 Civ 3820, J. Jones) ("First New York Action") (dismissed); SHANNON'S RAINBOW, LLC, a Utah limited liability company; SHANNON'S RAINBOW, LLC, a Delaware limited liability company, SHANNON'S RAINBOW PRODUCTION, a Pennsylvania limited liability company, Plaintiffs, v. SUPERNOVA MEDIA, Inc. a New York corporation;

to seek adjudication of its rights and interests in the Other Actions. This collection action, however, is simply not the proper forum to address said issues.

Accordingly, the trial court did not err by dismissing the case because the settlement of the fee dispute between the Appellees eliminated the only justiciable controversy at issue, obviating intervention by a third-party.

ARGUMENT

I. APPELLANT'S UNPROVEN CLAIMS OF INTEREST DO NOT MEET THE INTERVENTION REQUIREMENTS OF RULE 24(A).

Intervention is the act by which a third party establishes its standing to become a party in a suit. *In re E.H.*, 137 P.3d 809, 820 (Utah 2006). "To justify intervention, the party seeking intervention must demonstrate a direct interest in the subject matter of the litigation such that the intervenor's rights may be affected, for good or for ill." *Id.* (citing *Lima v. Chambers,* 657 P.2d 279, 282 (Utah 1982)). Utah courts have indicated that "Rule 24(a)(2) of the Utah Rules of Civil Procedure, which governs intervention as of right, describes the connection that must exist between a person's status or circumstances and the lawsuit in order to justify intervention, stating:

> [T]he applicant [must] claim[] an interest relating to the property or transaction which is the subject of the action and [be] so situated that the disposition of the action may as a practical matter *impair or impede* his ability to protect that interest. . .

Id. (citing Utah R. Civ. P. 24(a)(2) (2006)) (emphasis added). The intervenor must establish an interest that is "*direct, substantial*, and *legally protectable*." *San Juan*

JOYCELYN ENGLE a/k/a JOYCELYN DIPALMA, an individual; JULIANNE MICHELLE, an individual, and Does 1-100. (Case No. 2:08-cv-00880-TS) ("dismissed"). The forgoing actions are referred to herein as the "Other Actions."

County v. United States, 420 F.3d 1197, 1207 (10th Cir. 2005) (applying Utah law) (emphasis added); *Vermejo Park Corp. v. Kaiser Coal Corp.,* 998 F.2d 783, 791 (10th Cir.1993) ("[I]ntervention requires that this interest in the proceedings be direct, substantial, and legally protectable."); *Donaldson v. United States,* 400 U.S. 517, 531 (1971) (stating that such an interest must be "significantly protectable"). Moreover, "In order to intervene as a matter of right the intervening party must have an interest relating to the property or transaction that is the *subject of the action.*" *In re Environmental Elec. Sys., Inc.*, 11 B.R. 962, 964 (N.D.Ga. 1981) (cited by the 10th Circuit in *Vermejo Park Corp,* 998 F.2d, at 791) (emphasis added).

Making the required determination of Appellant's alleged interests and whether those interests are related to the attorneys' fee dispute will necessitate an effectual ruling on the merits of central issues that are pending in three separate actions in Utah and New York. The reason is that Appellant's alleged interests all depend upon the allegation that Appellant is a controlling manager of the Shannon's Rainbow Entities. In essence, Appellant's Motion to Intervene attempts to put the trial court in a position where it may have had to trump the analysis of several other jurisdictions on this issue just to determine whether Appellant could intervene in the first place.

A. To Determine Whether Appellant has a "Legally Protectable" Interest in this Attorneys' Fee Dispute Will Require A Monumental Undertaking that is Presently the Subject of Three Litigation Matters in Utah and New York.

Supernova must establish a "substantial," "direct" and "legally protectable" interest in the subject matter of this suit (fee dispute) that will be impaired if it is not

allowed to intervene. *Supra.* "[T]he mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right." *Vermejo Park Corp. v. Kaiser Coal Corp.*, 998 F.2d 783, 791 (10th Cir. 1993). It therefore comes as no surprise that, "the sufficiency of an applicant's interest is a highly fact-specific determination." *San Juan County v. United States*, 420 F.3d 1197, 1207 (10th Cir. 2005) (applying Utah law).

Appellant confronted the trial court with the monumental task of determining whether it has a majority or controlling interest in the film "Shannon's Rainbow" and the companies that produced it, so that it can gain traction in this fee dispute between Defendants and their law firm of over 2 and ½ years. The many claims and issues raised by Appellant deal exclusively with control issues raised in the Other Actions, and do not have any bearing on the attorneys' fee dispute addressed in this action. Appellant does not have an interest in whether the Defendant paid its attorneys' fees. Nor does Appellant have any interest or claim as to whether the Firm can foreclose on its attorneys' lien (consensual or non-consensual).

Appellant asserts that it has a right in the film "Shannon's Rainbow" and in the Defendant entities that produced the film, including managerial and membership rights. However, the present dispute is unrelated to those issues. If Appellant has an issue regarding its membership or management rights, it can (and has) addressed those concerns in the Other Actions.

In order to determine whether Appellant has a "substantial" interest permitting intervention, the Court would need to at a minimum make factual findings as to:

- Whether and to what extent Appellant invested in entities that produced the film "Shannon's Rainbow." (*See* Motion to Intervene, Background Facts, ¶ 1.)
- Whether Appellant is an equal co-manager with SummitWorks, LLC. (*Id.*, at ¶ 2.)
- Whether SummitWorks, LLC fell short of its investment obligations. (*Id.*, at ¶ 4.)
- Whether Appellant has distribution rights in the film. (*Id.*, at ¶ 5.)
- Whether Apellant obtained a 51% ownership interest in the film. (*Id.*, at ¶ 6.)
- Whether Joseph Pia represented SummitWorks, LLC. (*Id.*, at ¶ 10.)
- Whether Mr. Pia encouraged some of the Defendant entities to bring suit against Appellant and Joycelyn Engle. (*Id.*, at ¶ 12.)
- Whether SummitWorks improperly arrogated the names of the Defendant entities to bring suit against Appellant, Joycelyn Engle, and others. (*Id.*, at ¶ 13.)

These issues are not relevant to the present case by any stretch of the imagination. Furthermore, each one of these issues is central in the Other Actions. That Appellant is even raising these issues illustrates its purpose to clutter yet another legal proceeding with the same facts, claims, and issues already being dealt with in the Other Actions. A cursory review of the Complaint in the Original Action attests to this fact.

To make a determination on the forgoing issues and conclude what, if any interest, Appellant has, the Court will need to permit discovery and depositions and hold an evidentiary hearing to weigh the evidence. However, the trial court is not required to make said inquiry to deny Appellant's Motion to Intervene. PADRM was legal counsel for the Shannon's Rainbow Entities against Appellant. Appellant complains that it was

sued, and states that it never should have been sued because of its interests. Whether or not there is any validity to this claim has no relevancy to the present fee dispute. Accordingly, Appellant's Motion to Intervene was properly denied.

B. **Threat of Inconsistent Judgments is Too Great to Permit Intervention.**

Appellant should, and does, have the right to seek adjudication of its rights and interests in the Other Actions. This fee dispute is simply not the proper forum to address the many issues raised in Appellant's Motion. The adjudication of the issues surrounding PADRM's attorneys' liens as well as Shannon's Rainbow's request for declaratory relief has absolutely nothing to do with Appellant or the many claims it has asserted in the Other Actions. Those issues were not before the District Court in the fee dispute. There would be a substantial risk of inconsistent and contrary results should the District Court undertake the daunting task of adjudicating Appellant's purported rights.

The Tenth Circuit admonishes that "[t]he simultaneous prosecution in two different courts of cases relating to the same parties and issues leads to the wastefulness of time, energy and money." *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir. 1965) (internal quotation marks omitted). Permitting the first-filed action to determine the merits of the case "protects parties from the considerable expense and potential for inconsistent judgments that duplicate litigation entails." *Id.* at 335-336.

Appellant can point to no valid reason why the parties should be forced to litigate the same claims, at the same time, in separate actions before different courts or why the Other Actions should be disregarded (whether wholly or partially), which would result if the District Court is required to determine the validity of Appellant's "legally

protectable" interest. For these reasons, Appellant's Motion to Intervene was properly denied.

II. BECAUSE THE PARTIES HAVE SETTLED AND FILED MOTIONS TO DISMISS WITH PREJUDICE, APPELLANT'S MOTION TO INTERVENE IS OBVIATED.

As a general rule, "(a) prerequisite of an intervention (which is an ancillary proceeding in an already instituted suit) is an existing suit within the Court's jurisdiction." *Non-Commissioned Officers Association of the United States v. Army Times Publishing Co.*, 637 F.2d 372, 373 (5th Cir. 1981); *see McClune v. Shamah*, 593 F.2d 482 (3d Cir. 1979), *U.S. Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978); *Black v. Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974); *see also* 7A, Wright & Miller, Federal Practice and Procedure: Civil s 1917 (1972). Appellant's "ancillary" motion to intervene requires the existence of a suit within the Court's jurisdiction. This action has been settled, and the parties jointly filed a stipulated order to dismiss with prejudice, prior to an answer being filed, and prior to any other substantive proceeding.

"A settlement of all claims among all parties removes the necessary element of adversariness and moots the action." 13A C. Wright, A. Miller & E. Cooper, § 3533.2, at 236; *Rand v. Monsanto Co.*, 926 F.2d 596, 597-598 (7th Cir. 1991) (holding that the plaintiff's individual claim was mooted when the defendant offered to satisfy his entire demand; there was "no dispute over which to litigate," because the plaintiff "has no remaining stake"). Moreover, an "argument [of] sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lacks a

continuing interest, as when the parties have settled . . ." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000).

Mootness has been found despite sometimes troubling claims that a settlement was made by a party lacking authority to settle (*Chemical Waste Management, Inc. v. Broadwater*, 758 F.2d 1538 (11th Cir. 1985)), unfairly induced (*Ringgold v. U.S.*, 553 F.2d 309 (2d Cir. 1977)), coerced (*In re of Kingsley*, 802 F.2d 571, 577, 577, 579 (1st Cir. 1986)), or even improperly approved over objections by class members (*In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1269 (10th Cir. 2004), *quoting* Wright, Miller & Cooper). Nevertheless, once a case has been settled, it is over and a would-be intervenor has no action in which to intervene.

The policy behind mootness is the "well-settled principle that the law generally favors the encouragement of settlements." *Airline Stewards and Stewardesses Ass'n v. Am. Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978) (holding that it is "clearly the express intent [of congress] to encourage settlement"); *See Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960) (stating "[t]his is a recognition of the policy of the law generally to encourage settlements."); *Oprian v. Goldrich, Kest & Associates, supra,* 220 Cal.App.3d at pp. 344-345, 269 Cal.Rptr. 429 (holding "it is a well-established policy that settlements of litigation are favored and should be encouraged. . . . It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs . . .")

This Court has previously held:

> [T]he law favors the settlement of disputes. *See In re E.H.*, 2004 UT App 419, ¶ 12, 103 P.3d 177 (*citing Mascaro v. Davis*, 741 P.2d 938, 942 (Utah 1987)). It is indeed chilling to imagine the conditions that would exist within the judicial branch of government and society as a whole were settlements to be treated with hostility. . . . We are at a loss, however, to imagine why a court would insist on a process that preserves adversarial purity for its own sake.

In re E.H., 137 P.3d 809, 814 (Utah 2006).

The issues in this case are resolved. The parties should be permitted to move on to the other pending cases where the substance of Appellant's claims is being addressed. Intervention should be denied.

A. <u>The Settlement Cannot Be Interfered with By Non-Party Appellant</u>.

In the Tenth Circuit case of *San Juan Valley, Utah v. U.S.*, 503 F.3d 1163 (10th Cir. 2007), the court held that a third-party intervenor cannot interfere with a private settlement. *San Juan Valley*, 503 F.3d at 1173 (*citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 528-29 (1986) ("It has never been supposed that one party-whether an original party, a party that was joined later, or an intervenor-could preclude other parties from settling their own disputes . . ."); *citing Johnson v. Lodge # 93 of the Fraternal Order of Police,* 393 F.3d 1096, 1106 (10th Cir. 2004)).

In *San Juan Valley*, the court acknowledged that the intervenor had claims and alleged interests, but commended the intervenor to address those in other proceedings (an amicus brief). *Id.* Appellant can fully vet its claims in the three pending cases in Utah

and New York. Dismissal of the trial court case and a denial of Appellant's Motion to Intervene will not wreak any prejudice on Appellant.

Even in a class action—which *unlike* this case does require settlement approval—courts have rejected attempts by intervenors to demand a determination on the merits once settlement has been reached. In *Airline Stewards and Stewardesses Ass'n*, the APFA filed a motion to intervene and requested a hearing on its objections to the parties' settlement agreement. *Airline Stewards and Stewardesses Ass'n v. Am. Airlines, Inc.*, 573 F.2d 960 (7th Cir. 1978). The court found that "for a complete resolution of the issues that arise out of this proposed settlement, that the APFA should have a voice concerning it" and therefore granted the motion to intervene and conducted a hearing on the issues raised. *Id.* at 962.

After the intervenor's argument, the appellate court upheld the settlement agreement, reasoning that "the equities are on the side of approving the settlement agreement." *Id.* at 962 – 3. The intervenor appealed, arguing that the merits of the case itself, as well as the intervenor's claims, needed to be litigated prior to approval of the settlement. *Id.* at 963. The appellate court disagreed with the intervenor and affirmed approval of the settlement:

> While we believe that . . . the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after trial. *We believe that the issues raised by the intervenor should not be decided on the [merits], but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements*. Relying on those principles, we conclude that the district court correctly declined to decide those issues relevant to the merits of the plaintiffs' claims prior to deciding merely whether the settlement agreement was appropriate.

Id. at 963 – 4 (emphasis added).

As much as Appellant may wish to interfere with Appellees' private settlement and use this case as a channel to obtain discovery, the settlement and interest of the parties to move on should be dispositive. No further analysis is needed.

B. The Court Does Not Need to Approve the Original Parties' Voluntary Settlement Agreement.

"Ordinarily, settlement agreements need not be approved by the court." *TBG Inc., v. Bendis*, 811 F.Supp. 596, 600 (D. Kansas 2992) (*citing In re Masters Mates & Pilots Pension Plan and IRAP Litigation,* 957 F.2d 1020, 1025 (2d Cir. 1992) ("Typically, settlement rests solely in the discretion of the parties, and the judicial system plays no role.")). This suit is not one of the very limited cases where a court must approve a settlement, such as a class action or a bankruptcy proceeding. However, even in class actions, courts have recognized that

> [t]he Court's exercise of discretion in this regard should be informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement. . . . Litigants should be encouraged to determine their respective rights between themselves."

Perez v. Ausurion Corp., et al. 501 F.Supp.2d 1360, 1379 (S.D. Fla. 2007) (internal citations omitted).

The settlement agreement in this case resolves all of the named parties, without prejudice to any of Appellant's claims, and did not need to be approved by the trial court.

C. Appellant Misapplies the Millard Standard to this Case.

Appellant believes that by merely couching its motion to intervene "as of right" that the settlement and mutual agreement of Appellees as the only parties to this litigation to

dismiss the suit with prejudice, does not obviate its motion. Appellant's misapplication and improper extension of *Millard,* a case that dealt with intervention in a tax commission proceeding, does not give Appellant a right where none exists. *Millard County v. Utah State Comm'n ex rel. Intermountain Power Agency,* 823 P.2d 459 (Utah 1991),

In *Millard,* Millard County sought to intervene in a non-judicial Utah State Tax Commission proceeding concerning a large tax payer (Intermountain Power Agency) residing in the county. 823 P.2d at 460. Millard County had a *contractual right* with the Tax Commission to review IPA's tax records. *Id.* This contractual right gave the County the right to participate. *Id.* (*citing Salt Lake City v. Tax Comm'n*, 813 P.2d 1174, 1175 (Utah 1991)). Millard County also had a statutory right under Utah's Local Sales and Use Tax to assess an additional "piggy-back" tax on the Utah Tax Commission's sales tax. *Id.* IPA filed a petition with the Tax Commission to redetermine its tax liability. Millard County sought to intervene, and the Tax Commission denied the request. *Id.* The denial was appealed. *Id.*

The issue before the court was whether a motion to intervene as of right is appealable after settlement and dismissal. *Id.* at 461. A "true" intervenor of right who has met all of the requirements under Rule 24(a)'s mandatory intervention standard may seek to intervene prior to dismissal upon the parties' settlement and may appeal a denial. *Id.* The court had "previously held that counties have standing to challenge determinations by the Commission which directly affect the counties' budgeting and taxing functions." *Id.*

(citing *Kennecott Corp. v. Salt Lake County,* 702 P.2d 451, 454 (Utah 1985)). The court consequently held that Millard County's appeal was not moot. *Id.*

Nevertheless, the issue in this case as to whether a settlement between the parties (client and its prior counsel), and a joint motion to dismiss with prejudice obviates the motion to intervene was not addressed in *Millard County.* Established precedent dictated that Millard County had standing and a statutory right to intervene in that case. This is not present here. Appellant has no contractual right to intervene and certainly no right to the attorneys' fees claimed by Appellee PADRM. Instead, Appellant is the very party Appellees have been suing for well over two years. Appellant has not, and cannot cite any authority justifying intervention by a third-party into a case involving an attorneys' fee dispute in which it has no privity.

The only case that counsel has found addressing intervention in an attorney-client fee dispute, again, involved a *contractual right* of the third-party to intervene. *Faller v. Chevron Corp.,* 2008 WL 4831386, *1 (S.D. Tex. Nov. 4, 2004). In *Faller,* one of the attorneys for the plaintiffs moved to intervene to recover fees the attorney claimed she was owed. *Id.* Similar to this case, "[T]he parties in [*Faller*] have settled their disputes and have jointly moved for an order dismissing all claims with prejudice and entering final judgment." *Id.* After making a detailed analysis of the factual circumstances, and in manifesting a preference towards resolution of attorney-client disputes, the court denied the motion to intervene. *Id.* at 5. The court reasoned that there was other pending litigation where the claims of the proposed intervenor would be best heard and adjudicated. *Id.* At 4.

Similar to the court's decision in *Faller*, this is not the proper forum to adjudicate the many claims that Appellant is asserting. Those claims and issues are being dealt with in the Other Actions. This narrow suit, dealing with attorneys' fees and an attorneys' lien, is now settled. As in *Faller,* judicial economy and comity weigh heavily in favor of the trial court's denial of Appellant's intervention.

III. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CASE BECAUSE THE ONLY PARTIES TO THE PROCEEDING SETTLED THE UNDERLYING DISPUTE, THEREBY ELIMINATING ANY JUSTICIABLE CONTROVERSY.

Appellant relies on *Millard* for the erroneous conclusion that the trial court committed error by dismissing the case upon the merits. As demonstrated above, the contractual and statutory rights addressed in *Millard* are inapplicable to the present matter. Furthermore, *Millard* does not stand for the presumption that a pending motion to intervene should automatically permit intervention as suggested by Appellant. A would-be intervenor must satisfy the requirements of Rule 24(a) as did the intervenor in *Millard.* Accordingly, the trial court committed no error in dismissing the case.

CONCLUSION

Based on the foregoing, Appellee PADRM respectfully requests that this Court affirm the decision of the trial court to grant Appellees' stipulated Motion to Dismiss with Prejudice and Upon the Merits.

DATED this 4th day of November, 2011.

PIA ANDERSON DORIUS REYNARD & MOSS

Brennan H. Moss
Robert K. Reynard
Attorneys for Appellee PADRM

CERTIFICATE OF SERVICE

I certify that on the 4th of November, 2011, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE PIA ANDERSON DORIUS REYNARD & MOSS, LLC**, as well as a courtesy electronic copy on CD in searchable PDF format, to be mailed via U.S. Mail, first class postage prepaid, to the following:

Mary Anne Q. Wood
Kathryn Ogden Balmforth
WOOD JENKINS, LLC
60 East South Temple, Suite 500
Salt Lake City, Utah 84111

Steven W. Dougherty
Jon V. Harper
ANDERSON & KARRENBURG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101