UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ARNOLD H. LICHTENSTEIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 95-34-P-C***
	)	
CONSOLIDATED SERVICES GROUP, INC., et al.,	***)***	
	)	
Defendants	***)***	

DECISION ON MOTION BY DEFENDANT JONATHAN FRYER FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11

This dispute among shareholders of a closely-held Maine corporation resulted in the plaintiff, a minority shareholder in the corporation, naming as one of the defendants Jonathan Fryer, the attorney who drafted the incorporation papers and thereafter held the corporation's stock as the trustee of a voting trust. Fryer ultimately responded by filing motions for summary judgment pursuant to Fed. R. Civ. P. 56 and for sanctions against the plaintiff and/or counsel to the plaintiff pursuant to Fed. R. Civ. P. 11. The court has granted Fryer's summary judgment motion. Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 116) at 2. The remaining issue is whether Fryer is entitled to the requested sanctions. For the reasons that follow, I grant Fryer's Rule 11 motion.[1]

[1] In my opinion, the written submissions of the parties are sufficient for fully and fairly resolving the issues raised by the Rule 11 motion. Therefore, Fryer's request for oral argument (Docket No. 87) is denied.

I. Background

The context in which this case arises is set forth in my recommended decision on the defendants' motions for summary judgment ("Recommended Decision") (Docket No. 110), ultimately adopted by the court. Familiarity with the matters discussed therein is assumed and I shall recite here only those matters that are relevant to the dispute between the plaintiff and Fryer.

The plaintiff filed his initial complaint in January 1995. Count II alleged that Fryer breached his fiduciary duties as trustee of the voting trust that held all shares of defendant Consolidated Services Group, Inc ("Consolidated"). Specifically, the complaint alleged that Fryer breached his duties:

> by failing and refusing to act for the benefit of all beneficiaries taken together and by participating in the ouster of Plaintiff Lichtenstein from Consolidated and otherwise cooperating and conspiring with Defendants [John G.] Salterio and [Peter E.] Butera to the prejudice of Plaintiff Lichtenstein.

Complaint (Docket No. 1) at ¶ 48. The complaint further recited that Fryer's improper activities included "breach of the Voting Trust contract, intentional fraud and misrepresentation of the organizational status of Consolidated, the financial position of Consolidated and Plaintiff's rights as a beneficiary of the Voting Trust." *Id*. at ¶ 49. These fraudulent misrepresentations, the complaint continued, "were made in several communications to Plaintiff including, without limitation, by letter dated May 16, 1991." *Id*. A copy of the letter at issue was attached to the complaint. Count V of the complaint sought the dissolution of Consolidated by virtue, *inter alia*, of Fryer's acts, although this count did not specifically seek affirmative relief against Fryer. *Id*. at ¶¶ 60-64. The remainder of the complaint relates solely to the dispute between the plaintiff and the other defendants. Fryer duly answered the complaint, denying the allegations against him.

Answer (Docket No. 6).

On May 1, 1995 the parties commenced the plaintiff's deposition. The plaintiff was shown a copy of the instrument that created the voting trust, including a provision therein reciting that "[t]he sole obligation of the Trustee shall be to cast the vote of each share of stock pursuant to the written direction of each beneficiary entitled to such share." Deposition of Arnold H. Lichtenstein ("Lichtenstein Dep. I") at 127 and Exh. 2 thereto at 4. The plaintiff testified that, as a Consolidated shareholder, he never gave any voting instructions to Fryer. *Id*. at 50, 127. He further testified that he was not aware of any obligation that Fryer had failed to discharge in his capacity as trustee. *Id*. at 127.

It was the plaintiff's further deposition testimony that he had no knowledge of Fryer having had anything to do with the plaintiff's ouster from Consolidated. *Id*. at 136. But, as evidence of what he regarded as a conspiracy among Fryer, Salterio and Butera to deprive the plaintiff of his rights *vis à vis* Consolidated, the plaintiff cited the letter he appended to his complaint, which appears as Exhibit 7 to the deposition. *Id*. at 137. The letter, dated May 16, 1991 and addressed to the plaintiff,[2] purports to be a response to the plaintiff's request for information about Consolidated, written by Fryer in his capacity as trustee. *Id*. at Exh. 7. In it, Fryer states that, although Consolidated was incorporated, the corporation "never came into operation and was abandoned as a venture by the stockholders." *Id*. The plaintiff testified at his initial deposition that he regarded

[2] There are suggestions in various places in the record that Fryer never sent this letter to the plaintiff, and that it was actually Salterio who did so. *See, e.g.*, Letter of Harold J. Friedman, Esq. to Ralph A. Dyer, Esq. dated March 9, 1995, Exh. A to Affidavit of Harold J. Friedman, Esq. (Docket No. 66), at 2. (This affidavit is unsigned; the affiant later supplied a signed version (Docket No. 72) but did not reattach the exhibits to it.) The depositions of the plaintiff and Fryer shed no light on how the plaintiff received this written communication. Resolution of the ambiguity is not material to my recommendation on the sanctions motion.

these assertions as "untrue," and Fryer's having made them as evidence that Fryer had taken the side of Salterio in the dispute among the Consolidated shareholders. *Id*. at 137-38. The plaintiff therefore took no action, adverse to his interest in Consolidated or otherwise, in reaction to the letter upon reading it. *Id*. at 95.

The plaintiff's deposition was continued until June 26, 1995. *Id*. at 170; Continued Deposition of Arnold H. Lichtenstein ("Lichtenstein Dep. II"). In the interim, several events of great procedural significance to the case occurred. The court dismissed three counts of the complaint, unrelated to the instant motion, on the ground that they were derivative of Consolidated and therefore could not be pursued except as shareholder derivative claims pursuant to Fed. R. Civ. P. 23.1. Order on Motions by Defendants Butera and Salterio to Dismiss Counts III, IV, V, and VI of the Complaint (Docket No. 20) at 1. At the same time, the court conditionally dismissed the dissolution claim (Count V), subject to its reassertion by the plaintiff in an amended pleading asserting the allegations of fraud, fraudulent acts or fraudulent statements with greater particularity. *Id*. at 1-2. Two days later, Salterio and Butera stipulated to the dismissal of the cross-claim they had filed against Fryer. Stipulation and Order Dismissing Cross-Claims (Docket No. 21). Finally, by leave of court, the plaintiff filed an amended complaint on June 14, 1995.[3] Motion to Amend Complaint (endorsement) (Docket No. 22); First Amended Complaint (Docket No. 27).

As did the original complaint, the First Amended Complaint included an appended copy of Fryer's May 16, 1991 letter. *Id*. at ¶ 37 and Exh. G thereto. As did the Complaint, the First Amended Complaint alleged that this letter "falsely stated to Mr. Lichtenstein that Consolidated had

[3] The plaintiff also separately filed a shareholder derivative suit (Civil Docket No. 95-170-P-C), naming Salterio and Butera as defendants. This suit was subsequently consolidated with the instant action. Order on Motion to Consolidate (Docket No. 25).

never been formed, had not commenced business, had no assets and had been abandoned by the beneficial owners." Complaint and First Amended Complaint at ¶ 37. The First Amended Complaint also repeated the allegation from the original Complaint that,

> [a]t all times since November, 1990, Mr. Fryer has wilfully and intentionally failed and refused to perform his duties as Trustee under the Voting Trust for the benefit of all beneficiaries of the Voting Trust, and has allied himself with Mr. Salterio and Mr. Butera to the disadvantage, prejudice and damage of Mr. Lichtenstein as a beneficiary of the Voting Trust.

Complaint and First Amended Complaint at ¶ 36. The plaintiff reasserted his claim against Fryer for breach of fiduciary duty, realleging that Fryer failed to exercise his duty as trustee and that he "participat[ed] in the ouster of [the plaintiff] from Consolidated and otherwise cooperat[ed] and conspir[ed] with Defendants Salterio and Butera to the prejudice of [the plaintiff]." First Amended Complaint at ¶¶ 47-48. This count also accused Fryer of "intentional fraud and misrepresentation of the organizational status of Consolidated." *Id*. at ¶ 49.

The First Amended Complaint also reasserted the claim for dissolution of Consolidated, in the process making several specific allegations against Fryer, *viz*: that he, along with Salterio and Butera, refused to hold annual meetings of the Consolidated shareholders, refused the plaintiff's request to inspect the corporation's books and records, failed to keep accurate corporate books and records, and violated the duty to exercise the requisite care, skill and diligence in the best interests of the corporation and its shareholders. *Id*. at ¶ 61. The dissolution claim also accused Fryer of assisting Salterio in the usurpation of business opportunities that properly belonged to Consolidated. *Id*. at ¶ 62(b).

Upon the subsequent resumption of the plaintiff's deposition the state of his knowledge as to Fryer's role became more clear. The plaintiff confirmed that he had never actually spoken to Fryer

prior to his deposition, indicating that he never made a request to Fryer for a meeting of the Consolidated shareholders or directors, or for inspection of the corporate books and records. Lichtenstein Dep. II at 94-95. The plaintiff also stated that, to his knowledge, Fryer had nothing to do with the alleged diversion of Consolidated business in connection with certain transactions between Salterio and a concern known as New England Coffee Company. *Id*. at 95-96.

In July 1995 the plaintiff rejected Fryer's written request that the claims against him be withdrawn. Affidavit of Thomas A. Cox, Esq. (Docket No. 59) at ¶¶ 4-5. Rule 11 requires a party intending to invoke its sanctions mechanism to serve an appropriate motion on the opponent to be sanctioned, whereupon that party has 21 days to withdraw or correct the assertion or assertions at issue before the sanctions motion may be filed with the court. Fed. R. Civ. P. 11(c)(1)(A). Such a motion was served and, when more than 21 days elapsed with no such corrective action by the plaintiff, Cox Aff. at ¶¶ 6-7, Fryer filed his sanctions motion with the court.[4]

[4] The plaintiff has resisted the sanctions motion with a memorandum of law (Docket No. 86) and an affidavit from plaintiff's counsel (Docket No. 85). On motion of Fryer, the court initially struck these submissions as untimely. Motion to Strike (endorsement) (Docket No. 88). On motion of the plaintiff, and with the consent of Fryer, the court has reconsidered its action in this regard and has restored the stricken filings to the record of the case. Motion for Reconsideration (endorsement) (Docket No. 121). Fryer thereafter filed a reply memorandum (Docket No. 125).

II. Discussion

The Federal Rules of Civil Procedure have been promulgated with the broad purpose of securing "the just, speedy and inexpensive determination of every action." Fed. R. Civ. 1. "[A]ttorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1." Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments ("Advisory Notes"). Hence the existence of Rule 11, substantially rewritten in 1993 to "broaden[] the scope of this obligation" but with additional constraints on the court's ability to sanction transgressions. *Id*. In its present form, Rule 11 sets out the obligation mentioned by the advisory committee with notable precision:

> **(b) Representations to Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Civ. P. 11(b). The rule further vests the court with the explicit authority, "after notice and

a reasonable opportunity to respond," to impose sanctions on attorneys, law firms or parties found to be in violation of subsection (b). *Id*. at subsection (c).

Fryer contends that sanctions are appropriate here because the plaintiff's attorney, at the time of the filing of the initial complaint, knew that the allegations asserted therein against Fryer lacked evidentiary support. He points out that none of the allegations against him in the initial complaint were specifically identified as contentions that were likely to gain evidentiary support after a reasonable opportunity for further investigation or discovery. Fryer further contends that sanctions are especially appropriate here because the plaintiff's counsel persisted with the allegations, reasserting them in the First Amended Complaint, well after the plaintiff made numerous statements at his own deposition that were at variance with the formal allegations he was making through counsel before the court.

Separately, Fryer suggests that the plaintiff's attorney violated the provision of Rule 11 enjoining the submission of pleadings for an improper purpose. Fryer speculates that he was named as a defendant in this litigation "in order to force him to settle so as to avoid the costs of defense, or to use his presence to aid Plaintiff in his claims against the other Defendants." Legal Memorandum in Support of Motion of Defendant Jonathan Fryer for Sanctions Under F.R. Civ. P. 11 (Docket No. 58) at 8.

In resisting the sanctions motion, the plaintiff and his attorney make several contentions. First they assert that sanctions may not be imposed unless the court finds that counsel has violated all three requirements set forth in subsection (b) of the rule.[5] Such an interpretation is at variance

[5] Subsection (b), of course, actually sets forth four requirements. As the plaintiff and his attorney correctly point out, paragraphs 3 and 4 articulate the same standard -- the former pertaining (continued...)

with the plain language of the rule, which explicitly authorizes sanctions upon a determination that "subdivision (b) has been violated." Fed. R. Civ. P. 11(c). Subsection (b), in turn, sets out its requirements in the conjunctive, the only plausible construction of which is that attorneys who make representations to a federal court must meet each of the requirements in Rule 11(b), i.e., no "improper purpose," existence of a "legal basis" or "nonfrivolous argument" for extension of law, and the existence of evidentiary support or likelihood thereof after reasonable further inquiry. To adopt the plaintiff's construction of the rule would be to place beyond its reach allegations that, although devoid of factual support, would if true provide a legal basis for relief and are not interposed for any purpose other than to obtain a judgment.

I agree with the plaintiff and his counsel that Fryer's assertions of improper purpose are, given the present state of the record, conjectural. Indeed, Fryer's motion papers are themselves careful to point out that he cannot offer more than circumstantial evidence to support this assertion. I view Fryer's motion as depending solely on his contention that the allegations against him lack evidentiary support, and I therefore need not resolve the "improper purpose" issue.

Next, the plaintiff and his attorney contend that Fryer advances an improperly narrow view of his fiduciary duties as trustee of the voting trust. This issue has already been resolved against the plaintiff in the summary judgment proceedings. As I concluded in that context, "Fryer breached no duty, fiduciary or otherwise, in his role as voting trustee." Recommended Decision at 13.

Finally, the plaintiff and his counsel assert that sanctions are inappropriate because the allegations made against Fryer were "well supported by evidence ascertained before the pleadings

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[5](...continued)
to allegations and the latter to denials.

were filed and have been confirmed by discovery and the cross claims of the parties." Plaintiff's Memorandum of Law in Opposition to Defendant Fryer's Motion for Sanctions ("Plaintiff's Memorandum") (Docket No. 86) at 4. Specifically, the plaintiff and his counsel refer the court to "plaintiff's testimony taken as a whole," the depositions of Salterio and Fryer, and Salterio's cross-claim against Fryer. *Id.* at 5. They also refer the court to an affidavit executed by counsel to the plaintiff ("Dyer Affidavit") (Docket No. 85) to contend that counsel did nothing sanctionable.

Prior to the 1993 amendment to Rule 11, the First Circuit made clear that, in measuring an attorney's conduct against the standards in the rule, trial courts must apply an objective test of reasonableness, rather than assessing what the attorney actually believed at the time of filing the pleading in question. *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604-05 (1st Cir. 1988). Under the present version of the rule, the test is whether the attorney has made "an inquiry reasonable under the circumstances" concerning the factors enumerated therein. Rule 11(b). "The revision in part expands the responsibilities of litigants to the court" and "continues to require litigants to 'stop-and-think' before initially making legal or factual contentions." Advisory Notes. Thus, courts that have had an opportunity to construe the present version of Rule 11 have continued to regard it as imposing an objective rather than subjective standard. *See, e.g., O'Brien v. Alexander*, 101 F.3d 1479, 1490 (2d Cir. 1996); *Downey v. United Food & Commercial Workers Union Local 1262*, 946 F. Supp. 1141, 1160 (D.N.J. 1996); *Mitchell Plastics, Inc. v. Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union*, 946 F. Supp. 401, 406 (W.D. Pa. 1996). Counsel to the plaintiff contends that "the test of reasonableness is based on the information in the possession of counsel at the time the pleadings were filed." Plaintiff's Memorandum at 5. To the extent this assertion is inconsistent with the objective standard articulated in the cases cited, *supra*, I must reject

it.

Fryer invokes this court's decision in *Dewilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55 (D. Me. 1992), in suggesting that Rule 11 sanctions are appropriate here. In *Dewilde*, the court noted that "[r]easonable inquiry by defense counsel at Plaintiff's deposition ascertained very quickly that her state law claims for emotional distress and breach of contract had no basis." *Id*. at 64. "Plaintiff's counsel was required by Rule 11 to conduct such a basic inquiry himself before filing the claim." *Id*. Therefore, as I read the *Dewilde* opinion, sanctions as to these claims were appropriate -- not because the deposition revealed their lack of foundation, but because the deposition confirmed something that the deponent's attorney should already have ascertained and acted upon.

All the more so here, where the amended version of Rule 11 explicitly vests attorneys with the responsibility to cease advocating positions that they know to be without evidentiary basis. I am willing to indulge, *arguendo*, the presumption that counsel to the plaintiff might reasonably have named Fryer as a defendant in the original complaint based on the assumption that he would have had to play a role, as trustee of the voting trust and the attorney who drew up the original incorporation papers, in what the plaintiff regards as the deprivation of his rights as a Consolidated shareholder.[6] By indulging such an assumption I am, of course, overlooking the requirement in Rule

[6] Supporting this assumption are certain assertions made by counsel to the plaintiff in his affidavit. In a paragraph discussing his preliminary discussions with the plaintiff and Ronald Axelrod, the plaintiff's New York attorney, counsel to the plaintiff stated that negotiations between the plaintiff and Salterio, in which the plaintiff sought to sell his Consolidated shares to Salterio, "involved Fryer." Dyer Dep. at ¶ 4. The affidavit recites that, "[o]n the one hand Fryer said that [the plaintiff] had no shares to sell because the corporation was never capitalized; on the other hand Fryer said the employment contact was binding and [the plaintiff] could not compete [with Consolidated]." *Id*. The affidavit is poorly drafted in that it does not identify the source of this information. I assume (continued...)

11 that allegations for which evidentiary support is still sought must be explicitly so identified. What is objectively unreasonable, and therefore unassailably sanctionable, is the renewal of the allegations against Fryer in the First Amended Complaint after everyone involved in the lawsuit -- including the plaintiff's counsel -- had been put on notice that the plaintiff had no basis for accusing Fryer of fraud or of breaching the trust agreement.

None of what counsel to the plaintiff offers, by way of contending that he acted reasonably, is at all convincing. He refers to the cross-claims. The cross-claim against Fryer accused him of attorney malpractice, pointing to an alleged failure to advise the principals of Consolidated of certain conflicts of interest and potential conflicts of interest occasioned by his representation of the corporation and its four shareholders. Fryer's cross-claim alleges that Salterio and Butera negligently or intentionally provided Fryer with misinformation that he, in turn, relied upon in preparing the May 16, 1991 letter addressed to the plaintiff.[7] Counsel to the plaintiff states that he interpreted Fryer's denial of the cross-claim allegations against him, and his assertion of his own

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[6](...continued)
that if counsel had received this information from anyone other than the plaintiff or Axelrod, counsel would have so stated. Counsel to the plaintiff describes a January 17, 1995 meeting at which Salterio "said that Fryer was responsible for any errors" involving the status of Consolidated as a corporate entity. *Id*. at ¶ 6.

All of this suggests at least a possibility that it was reasonable for counsel to the plaintiff to assume that Fryer had acted wrongfully at the time that counsel to the plaintiff was drafting and filing the initial complaint. Still, allegations made during informal meetings and/or negotiating sessions have a way of evaporating during sworn testimony. None of these allegations against Fryer turned up when either the plaintiff or Salterio was deposed. It thus ceased to be objectively reasonable for counsel to rely upon them.

[7] There is no record in this court of the filing of Fryer's cross-claim, although the cover letter Fryer's counsel submitted with his answer to the Salterio and Butera cross-claim suggests Fryer intended to do so. Nevertheless, Salterio and Butera answered the Fryer cross-claim (Docket No. 15) and then stipulated to its dismissal. The document that would have been Fryer's cross-claim appears as part of Exhibit O to the Dyer Affidavit.

cross-claim, as "an acknowledgment of his role in the formation of the corporation and trust, alliance with Salterio and representation of Salterio's interests in the Lichtenstein ouster." Dyer Affidavit at ¶ 12. This is objectively unreasonable. Fryer denied the allegations levied against him by the other defendants. Answer of Defendant Fryer to Cross-Claim of Defendants Salterio and Butera (Docket No. 9). As to the allegations he made in his own cross-claim, the most plaintiff-favorable reading one could reasonably make is that Fryer was prepared to acknowledge that some harm inured to the plaintiff by virtue of the May 16, 1991 letter and that Fryer was involved in its drafting -- not that Fryer had committed fraud or violated his duties as a trustee. In any event, both cross-claims were dismissed by stipulation on May 17, 1995 -- nearly a month before the filing of the First Amended Complaint. As of that date, the cross-claim pleadings simply drop out of the equation for purposes of determining what was objectively reasonable conduct on the part of plaintiff's counsel thereafter. For whatever reason, the allegations in the cross-claim were no longer viable as of the dismissal by stipulation and plaintiff's counsel could no longer reasonably accord them any significance.

Counsel to the plaintiff also refers to Salterio's deposition as supporting the reasonableness of accusing Fryer of fraud and violation of fiduciary duties. Salterio was deposed on May 9, 1995 -- again, well before the filing of the First Amended Complaint -- by counsel to the plaintiff. Deposition of John G. Salterio, appended to Plaintiff's Objection to Motions of the Defendants for Summary Judgment ("Summary Judgment Opposition") (Docket No. 81). I have reviewed the deposition in its entirety and find nothing in it that fails to confirm Fryer's position here. Salterio testified that he remembered "documents going back and forth" at the time of Consolidated's incorporation, and that he believed Fryer was involved, *id*. at 57, that the plan called for Fryer to hold

the corporation's shares as trustee and to vote them according to the trust agreement, *id*. at 68, and that Salterio contacted Fryer upon receiving an inquiry from the plaintiff concerning the status of Consolidated, *id*. at 84. This is the event that triggered Fryer's letter of May 16, 1991 to the plaintiff. *Id*. at 128-29. Salterio recalled only one other interaction with Fryer after the formation of the corporation and before May 1991, was uncertain of its subject, but believed it to concern an earlier inquiry by the plaintiff of his status *vis à vis* Consolidated. *Id*. at 128, 133-34. Salterio unequivocally testified that he had no knowledge of anything Fryer had done in an effort to ally himself with Salterio and Butera, as against the plaintiff, had done nothing to prejudice the plaintiff's interest as a beneficiary of the voting trust, had no day-to-day involvement with Consolidated and had no responsibility for the books and records of Consolidated other than the original corporate formation documents. *Id*. at 131-32, 134. The latter records were kept by an accountant, according to Salterio. *Id*. 133. Again, this testimony -- which counsel to the plaintiff personally elicited from Salterio and presumably heard and understood -- only buttresses the notion that, as of the filing of the First Amended Complaint, there was no reasonable basis for accusing Fryer of fraud or breach of fiduciary duty.[8]

The remaining arrow in the quiver of plaintiff's counsel is his contention that his client's deposition, taken as a whole, supports the reasonableness of his actions whereas the reading of the deposition offered by Fryer amounts to taking out of context responses by the plaintiff that

[8] I have also reviewed Fryer's deposition, taken on June 26, 1995. *See* Deposition of Jonathan P. Fryer, appended to Summary Judgment Opposition. It corroborates the factual assertions made by Salterio in his deposition testimony. The Fryer deposition took place after the filing of the First Amended Complaint, and it is therefore not appropriate to expect counsel to the plaintiff to have taken anything Fryer said into consideration in drafting the allegations in the First Amended Complaint.

improperly called on him to state legal conclusions rather than facts. I have reviewed the plaintiff's entire deposition and find its whole to be equal to the sum of its parts. The issue of whether the plaintiff was being improperly called upon to draw legal conclusions was a point made by plaintiff's counsel at the deposition. *See* Lichtenstein Dep. I at 39, 139. I agree that the plaintiff was not in a position to opine definitively at his deposition as to the scope of Fryer's duties to him, either as a trustee or otherwise. But the plaintiff could certainly testify competently as to what his factual understandings were concerning what Fryer did or did not do in his transactions with the plaintiff or others involved in this litigation. Asked on more than one occasion to disclose what Fryer had failed to do, the plaintiff stated that Fryer did not "[p]rotect [the plaintiff] as a minority shareholder" and did not "[p]rotect the rights of the shareholders." *Id*. at 123, 130. This says nothing of significance concerning Fryer's legal obligations, but everything concerning what the plaintiff knew or even believed as a factual matter concerning Fryer's actions.

All of the foregoing illustrates why this is precisely the sort of case that is appropriate for sanctions pursuant to the new language in Rule 11 enjoining litigants from persisting with factual positions after the non-existence of appropriate factual underpinnings has become obvious.

> Tolerance of factual contentions in initial pleadings by plaintiffs or defendants . . . does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention.

Advisory Notes. As were the drafters of Rule 11, I am mindful of the chilling effect that the sanctions mechanism can have on attorneys who are often called upon to marshal such qualities as creativity and tenacity in the zealous pursuit of their clients' interests. *See id.* (noting the "greater

constraints" in dealing with Rule 11 violations in 1993 version of rule); Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."). But legal advocacy also demands astuteness, at least to the extent of discerning the difference between facts that can be proven and assertions that cannot. I therefore have no hesitancy in imposing sanctions here.

The appropriate object of the sanctions is the plaintiff's attorney, as distinct from the plaintiff himself. The rule authorizes the imposition of sanctions against "attorneys, law firms, or parties that have violated [the rule] or are responsible for the violation." Fed. R. Civ. P. 11(c). "The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation." Advisory Notes. As counsel to the plaintiff himself has asserted, the plaintiff cannot be charged with knowledge of the legal principles involved in drafting, filing and advocating the positions advanced in the plaintiff's pleadings. I know of no circumstances in this case that would justify imposing sanctions on the plaintiff personally.

Moreover, counsel to the plaintiff has been personally placed on notice on at least two prior occasions that his duties as a member of the bar of this court require him to take greater care in framing the written positions he asserts here. As Fryer points out, counsel to the plaintiff received a warning in *Tri-State Rubbish, Inc. v. Waste Management, Inc*., 838 F. Supp. 17 (D. Me. 1993) concerning the need for "a greater sense of discretion when making written assertions of law to this Court." *Id*. at 18 (emphasis omitted). I myself had occasion to impose Rule 11 sanctions against him in another, more recent case, *Carroll Reed, Inc. v. CRSS Ski & Sport, Inc.* (Docket No. 91-419-P-DMC). In that proceeding, it was actually two Rule 11 motions filed by this attorney that were

themselves deemed worthy of sanction.

At issue in *Tri-State Rubbish* was a paper he filed following remand of the case by the First Circuit. *Tri-State Rubbish,* 838 F. Supp. at 18. The assertions contained in the paper were found to be both "disingenuous" and "in flat contradiction" to the specific language of the appellate panel's order of remand. *Id*. Here the problem is contentions of fact rather than assertions of law, but the theme -- disingenuousness -- is a constant. Among the factors the court may consider in ruling on a Rule 11 motion is "whether the person has engaged in similar conduct in other litigation." Advisory Notes. I would impose sanctions here notwithstanding this history, but the court's previous admonitions to the plaintiff's counsel erase any possible doubt as to how responsibility should be allocated between attorney and client.

IV. Scope of Sanctions

What remains to be determined is the scope and extent of the sanctions to be imposed. "A sanction imposed for violation of [Rule 11] shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). Subject to limitations not applicable here, sanctions may include "directives of a nonmonetary 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 attorneys' fees and other expenses incurred as a direct result of the violation." *Id.; see also* Advisory Notes (listing as possible sanctions "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities . . ., etc.")

> The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Id.

The sanctions requested by Fryer are that the allegations against him in the First Amended Complaint be stricken, that Count II be dismissed, and that the plaintiff and/or counsel to the plaintiff be assessed all reasonable attorney fees and expenses incurred as a result of Fryer's being named a defendant in this action. Count II has already been dismissed and that aspect of Fryer's request is therefore moot. Indeed, inasmuch as Fryer obtained a judgment entirely in his favor as a result of the summary judgment proceedings, striking the allegations against him would be a futile gesture.

However, with an eye toward the deterrence that is the purpose of Rule 11 sanctions, I believe it is appropriate to assess against the plaintiff's counsel part of Fryer's attorney fees and expenses associated with his defense in this litigation, including the costs and expenses associated with the prosecution of the sanctions motion itself. I therefore assess against the plaintiff's counsel all of Fryer's attorney fees and expenses in connection with this litigation beginning on May 18, 1995 -- more than two weeks after the plaintiff's initial deposition made manifest the lack of basis for the plaintiff's allegations against Fryer. More significantly, this was the day after the cross-claim against Fryer was dismissed and, therefore, marked the beginning of the period when it was unassailably true that Fryer's appearance in this litigation was purely a function of allegations against him that had no reasonable basis.

This result carries the message that the court cannot and will not permit an attorney to reassert factual positions once it becomes clear that they lack anything resembling the requisite

evidentiary basis. On the other hand, I strongly caution against overreading what has been determined here. Happily, Rule 11 sanctions -- both before and after the 1993 amendment to the rule -- have been an extreme rarity in this court, and I expect them to remain so.

V. Conclusion

For the foregoing reasons, Fryer's motion for sanctions pursuant to Fed. R. Civ. P. 11 is **GRANTED**, and it is ordered that counsel to the plaintiff pay to Fryer an amount equal to the reasonable attorney fees and expenses associated with defending Fryer in this litigation from May 18, 1995 forward. Counsel shall endeavor in good faith to reach agreement on the amount due and owing, failing which Fryer shall submit and support his claim in affidavit form and the plaintiff's counsel shall have an opportunity to respond thereto within the period provided for such

a response by the Local Rules.

Dated this 11th day of March, 1997.

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David M. Cohen
United States Magistrate Judge