

BER
MEF
TDC

Hale Lane Peek Dennison and Howard
3930 Howard Hughes Parkway, Fourth Floor
Las Vegas, Nevada 89169

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

0024
J. Stephen Peek, Esq.
Nevada Bar No. 1758
Brad M. Johnston, Esq.
Nevada Bar No. 8515
David J. Freeman
Nevada Bar No. 10045
Hale Lane Peek Dennison
and Howard
3930 Howard Hughes Parkway
Fourth Floor
Las Vegas, Nevada 89169
Telephone (702) 222-2500
Facsimile (702) 365-6940

Received by KKBR&F
Received by: gmg

MAR - 7 2007

*Attorneys for Plaintiffs NAPA VALLEY I, LLC,;
NAPA VALLEY II, LLC,; NAPA VALLEY III, LLC,
HOWARD W. BASSHAM and JUDITH K. BASSHAM
as Trustees of the Bassham Trust dated May 29, 1984;
DAVID M. BASSHAM and DEBORAH E. PARKER*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SUNSET-PECOS LIMITED PARTNERSHIP, a Nevada limited partnership, Case No.: A535439
Dept. No.: XI

Plaintiffs,

Consolidated with Case Nos. A535440
A535469
A535509
A535513
A535517
A535629
A535644
A535674
A535911
A536215

vs.

SOUTHWEST EXCHANGE, INC, a Nevada Corporation; DONALD MCGHAN, an Individual; DOES I - V; and ROE CORPORATIONS I - V, inclusive,

Defendants.

MOTION FOR RULE 11 SANCTIONS


AND ALL RELATED ACTIONS.

Plaintiffs Napa Valley I, LLC ("Napa I"), Napa Valley II, LLC ("Napa II"), Napa Valley III, LLC ("Napa III") (Napa I, Napa II, and Napa III are hereinafter collectively referred to as the "Napa Plaintiffs"), Howard W. Bassham ("Howard"), Judith K. Bassham ("Judith"), David M. Bassham

Hale Lane Peek Dennison and Howard
3930 Howard Hughes Parkway, Fourth Floor
Las Vegas, Nevada 89169

1 (“David”), and Deborah E. Parker (“Deborah”) (Howard, Judith, David, and Deborah are hereinafter
2 collectively referred to as the “Individual Plaintiffs”), by and through their undersigned counsel, Hale
3 Lane Peek Dennison and Howard, hereby move this Court for an order imposing monetary sanctions
4 against Defendant Donald McGhan (“McGhan”), and his counsel Mark S. Dzarnoski, Esq., of the law
5 firm of Gentile & DePalma, Ltd. This Motion is made pursuant to NRCP 11 and is based on the
6 attached Memorandum of Points and Authorities and supporting documentation, the papers and
7 pleadings on file in this action, and any oral argument this Court may allow.

8 DATED this 6 day of March, 2007.

9
10 

J. Stephen Peek, Esq.

Brad M. Johnston, Esq.

David J. Freeman, Esq.

Hale Lane Peek Dennison and Howard

3930 Howard Hughes Parkway, Fourth Floor

Las Vegas, Nevada 89169

11
12
13
14
15 *Attorneys for Plaintiffs NAPA VALLEY I, LLC,;*
16 *NAPA VALLEY II, LLC,; NAPA VALLEY III, LLC,*
17 *HOWARD W. BASSHAM and JUDITH K. BASSHAM*
18 *as Trustees of the Bassham Trust dated May 29, 1984;*
19 *DAVID M. BASSHAM and DEBORAH E. PARKER*
20
21
22
23
24
25
26
27
28

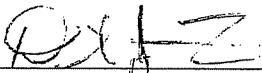
Hale Lane Peek Dennison and Howard
3930 Howard Hughes Parkway, Fourth Floor
Las Vegas, Nevada 89169

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD.

YOU WILL PLEASE TAKE NOTICE that the foregoing **MOTION FOR RULE 11 SANCTIONS** will be brought before Department XI of the above-entitled court, on the ____ day of _____ 2007, at _____ a.m./p.m.

DATED this 6 day of March, 2007.



J. Stephen Peck, Esq.
Brad M. Johnston, Esq.
David J. Freeman, Esq.
Hale Lane Peek Dennison and Howard
3930 Howard Hughes Parkway, Fourth Floor
Las Vegas, Nevada 89169

*Attorneys for Plaintiffs NAPA VALLEY I, LLC,;
NAPA VALLEY II, LLC,; NAPA VALLEY III, LLC,
HOWARD W. BASSHAM and JUDITH K. BASSHAM
as Trustees of the Bassham Trust dated May 29, 1984;
DAVID M. BASSHAM and DEBORAH E. PARKER*

1 In particular, McGhan’s counsel has stated that exchange funds were diverted from Southwest to
2 International Integrated Industries (“III”), an entity wholly owned by McGhan, and then subsequently
3 loaned from III to Medicor Ltd., pursuant to a revolving loan, to finance Medicor’s day-to-day
4 operations and acquisition of certain subsidiaries. Notably, McGhan served as Medicor’s chairman
5 until the end of January, when he resigned as Medicor’s chairman at about the same time Southwest
6 shutdown its operations. Accordingly, based on information provided by McGhan’s counsel, the
7 President, CEO, and licensed intermediary of Southwest – McGhan – pilfered the exchange funds
8 entrusted to Southwest to fund his other business interests – Medicor – resulting in Southwest’s
9 eventual collapse.

10 Despite the foregoing, McGhan, on or about February 20, 2007, filed his *Motion to Dismiss*
11 *Case No. 535440 Pursuant to NRCP 12(B)(5) and/or Motion for Summary Judgment Pursuant to*
12 *NRCP 56* (the “Motion to Dismiss”). In the Motion to Dismiss, McGhan effectively argues that this
13 case involves nothing more than Southwest’s failure to fulfill its contractual obligations under the
14 Exchange Agreements, and therefore, he bears no personal responsibility or legal liability for the
15 downfall of Southwest. McGhan also argues in the Motion to Dismiss that once the Plaintiffs’
16 exchange funds were entrusted to Southwest, the funds became the property of Southwest and
17 Southwest could use the funds in any manner it saw fit. McGhan’s motion, as discussed more fully
18 below, is legally and factually frivolous and a transparent litigation tactic intended to do nothing more
19 than delay McGhan’s obligation to answer the Plaintiffs’ complaint, which will likely result in
20 McGhan asserting his Fifth Amendment right against self incrimination. Accordingly, McGhan and
21 his counsel should be sanctioned pursuant to NRCP 11 for maintaining the Motion to Dismiss.

22 **II.**

23 **ARGUMENT**

24 **A. *Legal Standard***

25 Rule 11 of the Nevada Rules of Civil procedure (which is substantially identical to Rule 11 of
26 the Federal Rules of Civil Procedure) provides, in pertinent part, as follows:

27 ///

28 ///

- 1 (b) Representations to Court. By presenting to the court
2 (whether by signing, filing, submitting, or later advocating)
3 a pleading, written motion, or other paper, an attorney or
4 unrepresented party is certifying that to the best of the
5 person's knowledge, information, and belief, formed after
6 an inquiry reasonable under the circumstances,--
7 (1) it is *not being presented for any improper purpose*,
8 such as to harass or to cause unnecessary delay or
9 needless increase in the cost of litigation;
10 (2) the claims, defenses, and other *legal contentions*
11 *therein are warranted by existing law* or by a
12 nonfrivolous argument for the extension, modification,
13 or reversal of existing law or the establishment of new
14 law;
15 (3) the allegations and other *factual contentions have*
16 *evidentiary support* or, if specifically so identified, are
17 likely to have evidentiary support after a reasonable
18 opportunity for further investigation or discovery; and
19 (4) the *denials of factual contentions are warranted on*
20 *the evidence* or, if specifically so identified, are
21 reasonably based on a lack of information or belief.
22 (c) Sanctions. If, after notice and a reasonable opportunity to
23 respond, the court determines that subdivision (b) has been
24 violated, the court may, subject to the conditions stated
25 below, impose an appropriate sanction upon the attorneys,
26 law firms, or parties that have violated subdivision (b) or
27 are responsible for the violation.

18 NRCP 11 (emphasis added).

19 "Rule 11 is to be applied vigorously to 'curb widely acknowledged abuse from the filing of
20 frivolous pleadings.'" *In re Grantham Bros.*, 922 F.2d 1438, 1441 (9th Cir. 1991) (quoting *Zaldivar*
21 *v. City of Los Angeles*, 780 F.2d 823, 829-30 (9th Cir. 1986)). Accordingly, if a party or his counsel
22 files a paper in violation of Rule 11, a court "may impose an appropriate sanction upon the attorneys,
23 law firms, or parties that have violated [the rule] or are responsible for the violation." Nev. R. Civ. P.
24 11(c). Appropriate sanctions may include "an order directing payment to the [Rule 11] movant of
25 some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the
26 violation." Nev. R. Civ. P. 11(c)(2). Rule 11 also authorizes the award of non-monetary sanctions.
27 *Id.* When appropriate, for example, a court may deny an offending motion to dismiss. *See, e.g.*,
28 *Virgin Atlantic Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1254-1255 (2nd Cir. 1979).

1 Lastly, Rule 11 can be invoked either by motion or on the Court's own initiative. NRC P 11(c)(1).

2 ***B. Pursuant to NRC P 11, McGhan Must Be Sanctioned Because the Motion to Dismiss was***
3 ***Filed for an Improper Purpose.***

4 Sanctions are an appropriate remedy when a motion, filed with the court, is presented for an
5 improper purpose. See NRC P 11(b)(1). Rule 11 specifies that motions which harass, cause
6 unnecessary delay, or needlessly increase the cost of litigation are presented for an improper purpose.

7 ***Id.*** In the current matter, McGhan's Motion to Dismiss is clearly being maintained for an improper
8 purpose – delay.

9 After receiving McGhan's Motion to Dismiss, Plaintiffs' counsel contacted McGhan's counsel,
10 asking that McGhan withdraw the Motion to Dismiss in light of the Plaintiffs' plan to file an amended
11 complaint based upon the information McGhan's counsel disclosed with respect to McGhan's scheme
12 to pilfer Southwest to finance his other business interests. Mr. Dzarnoski, for no apparent reason,
13 refused to withdraw the Motion to Dismiss. As a result, the Motion to Dismiss has needlessly
14 increased the cost of litigation and caused unnecessary delay because it seeks dismissal of a complaint
15 that will be amended. Indeed, it is apparent that McGhan is using the Motion to Dismiss as nothing
16 more than a delay tactic to avoid answering the Plaintiffs' allegations because once McGhan is forced
17 to answer the Plaintiffs' complaint, he will, in all likelihood, invoke his Fifth Amendment right against
18 self-incrimination. While McGhan may want to avoid the inevitable for as long as possible, neither he
19 nor his counsel can use motion practice to delay these proceedings improperly, and therefore, they
20 should both be sanctioned pursuant to NRC P 11 for maintaining the Motion to Dismiss.

21 ***C. Pursuant to NRC P 11, McGhan Must Be Sanctioned Because Legal and Factual***
22 ***Contentions Within the Motion to Dismiss are Unwarranted.***

23 Under Rule 11, sanctions are appropriate if it appears that a party has asserted in a filing a
24 claim for relief or factual allegation that is either legally frivolous or factually misleading. *Lewis v.*
25 *Second Judicial Dist. Court*, 113 Nev. 106, 113 (1997) (citing *Marshall v. District Court*, 108 Nev.
26 459, 465 (1992). Importantly, this is true even where other portions of the pleading, motion or paper
27 are nonfrivolous or otherwise do not violate Rule 11. *Townsend v. Holman Consulting Corp.*, 929
28 F.2d 1358, 1367 (9th Cir. 1990) (holding that Rule 11 sanctions are appropriate where the pleadings

