IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

LUCKY DEVELOPMENT CO., LTD., Plaintiff, vs. TOKAI U.S.A., INC., VICTORINO N. IGITOL and URSULA L. ALDAN, Defendants.	CIVIL ACTION NO. *90-828* **ORDER ISSUING SANCTIONS**

I. INTRODUCTION

On June 3, 1991, the Court entered its Decision and Order in this case granting the motions for summary judgment filed herein by the Defendants Ursula L. Aldan, Tokai U.S.A., Inc., and Victorino N. Igitol. In this Court's written decision it moved sua sponte for the proposed imposition of Rule 11 sanctions against Theodore R. Mitchell and directed the Defendants to file a brief or briefs in support of the issuance of sanctions. Mr. Mitchell was ordered to respond as to the propriety of sanctions. Both parties filed their briefs in accordance with the Court's instructions. A hearing was had concerning the issue of sanctions on July 31, 1991.

FOR PUBLICATION

11. PROCEDURAL HISTORY

This action was commenced on September 14, 1990, with the filing of a complaint on behalf of Lucky Development Company, Lta. as Plaintiff against U.S. Commonwealth Development Company, Antonio S. Guerrero, Victorino Igitol and Tokai U.S.A., Inc. (Tokai) as Defendants. The law firm of Demapan & Atalig appeared as attorneys for Plaintiff end the Complaint was signed by Antonio M. Atalig Ursula L. Aldan was not named as a defendant in this action.

On October 5, 1990, the Defendant, Tokai U.S.A.,Inc. filed its motion to dismiss pursuant to Com.R.Civ.P. 12(b)(6) on the grounds that the complaint failed to state a claim upon which relief could be granted and presented no genuine issues of disputed fact as to the claims asserted against Tokai. The motion additionally sought the imposition of Rule **11** sanctions based upon the filing of the complaint.

On October 9, 1990, Defendants Antonio S. Guerrero and U.S. Commonwealth Development Company filed their motion to dismiss pursuant to Com.R.Civ.P. 12**(b)**(6) or in the alternative for summary judgment pursuant to Com.R.Civ.P. Rule **56.**

On October 19, 1990, the First Amended Complaint was filed in this action, which superseded the original complaint filed on September 14, 1990. The First Amended Complaint was filed by attorney Theodore R. Mitchell who appeared as Plaintiff's new counsel in the place and stead of the law firm of Demapan & Atalig which had withdrawn from the case. The First Amended Complaint deleted Antonio S. Guerrero and U.S. Commonwealth Development Company as Defendants, but for the first time named Ursula L. Aldan as a Defendant in this

case. Notwithstanding the filing of the First Amended Complaint, the hearing went forward on the motion of Tokai's motion for the imposition of sanctions, and on November 9, 1990, Presiding Judge Robert A. Hefner entered his order imposing sanctions against attorney Antonio M. Atalig.

Thereafter, the deposition of Victorino N. Igitol commenced on October 31, 1990, but it was not completed. It was followed by the depositions of the Defendant, Ursula L. Aldan, attorney Edward Manibusan, Frank Aldan, Lucky Development Company, Ltd. designee Ho Rim Dong, Antonio S. Guerrero [not completed and resumed on March 18, 1991], Manuel A. Sablan, Juan Demapan, Miguel Demapan, Tony Atalig, and Norio Goto, designee of Tokai U.S.A., Inc. and Tokai Saipan, Inc. These depositions consumed all or portions of approximately nine weeks' time.

On March 20, 1991, attorney Theodore R. Mitchell filed Plaintiff's motion for summary judgment on the counterclaim filed by Ursula L. Aldan and for sanctions and also on March 20, 1991, filed Plaintiff's Motion for Summary Judgment on Count II of the counterclaim of Tokai U.S.A., Inc. and for sanctions, together with a motion to dismiss the third party complaint of Tokai Saipan, Inc. or in the alternative for summary judgment on Count II if the third party complaint of Tokai Saipan, Inc. and for sanctions.

On May 1, 1991, Defendant Ursula L. Aldan filed her Notice of Motion and Motion for Summary Judgment, and on that same date the Defendant Tokai U.S.A., Inc. filed its Motion for Summary Judgment on the First Amended Complaint filed by Plaintiff.

On May 7, 1991, attorney Theodore R. Mitchell prepared and signed a stipulation and order which consolidated all of the pending motions for hearing on June 7, 1991. and which required Plaintiff to file its opposition to the motions for summary judgment filed on behalf of Ursula L. Aldan and Tokai U.S.A., Inc. on or before May 28, 1991. This Order further required the Defendants to file their reply to Plaintiff's opposition to their notions for summary judgment on or before June 4, 1991. This same stipulation and order required Plaintiff's counsel to reply to Aldan's opposition to Plaintiff's motion for summary judgment on her counterclaim and for sanctions, *tc* Tokai U.S.A., Inc.'s opposition to Plaintiff's motion for relief from order, to Tokai U.S.A. Inc.'s opposition to Plaintiff's motion for summary judgment on Count II of the counterclaim of Tokai U.S.A.. Inc. and for sanctions, and to Tokai Saipan Inc.'s opposition to Plaintiff's motion to dismiss third-party complaint of Tokai Saipan, Inc. and for sanctions not later than June 4, 1991.

Notwithstanding the entry of the order based upon the stipulation prepared by attorney Theodore R. Mitchell, and notwithstanding that motions for summary judgment, dispositive of all issues in the case had been filed by counsel for Plaintiff and by counsel for all Defendants, attorney Theodore R. Mitchell saw fit to notice the resumption of certain depositions by notice filed May 14, 1991, which purported to notice the resumption of depositions upon oral examination of Tokai Saipan, Inc., Tokai U.S.A., 1 , William I. Heston and Victorino N. Igitol, commencing on May 20, 1991. Counsel for Defendants advised attorney Mitchell that they saw no

need to resume depositions and that sufficient testimony had been taken to permit the determination of all issues presented in the respective motions for summary judgment.

On May 10, 1991, a Notice of Motion and Motion for a Protective Order were fiied on behalf of Tokai U.S.A., Inc. and Tokai Saipan, Inc. By letter dated May 13, 1991, attorney Mitchell cancelled the depositions that he had noticed for resumption on May 20, 1991 and advised all counsel that the "hearing on Tokai's motion for protective [sic] is unnecessary because the motion is moot." Letter of Theodore R. Mitchell dated May 13, 1991. Thereafter, on May 15, 1991, attorney Mitchell filed Plaintiff's Motion to Disqualify Presiding Judge Robert A. Hefner and on May 21, 1991, Judge Hefner entered his order recusing himself and transferring the matter to this court for all further proceedings. On May 28, 1991, Theodore R. Mitchell filed Plaintiff's motion to vacate that portion of Judge Hefner's May 21, 1991 order assigning the case to this court and on the following day, May 29, 1991, filed his motion for this court to disqualify itself,

Theodore R. Mitchell failed to file any written opposition to the motions for summary judgment filed on behalf of Ursula L. Aldan and Tokai U.S.A., Inc. as required by the stipulation and order entered by Judge Hefner on May 7, 1991. Theodore R. Mitchell likewise failed to file any motion seeking additional time within which to file his opposition papers or for the purpose of conducting additional discovery.

The matter came on for healing as scheduled on June 7, 1991,

pursuant to the stipulation and order entered on May 7, 1991. The Court denied attorney Mitchell's motion to vacate that portion of Judge Hefner's May 21, 1991 order assigning the case to Judge Castro, denied the Plaintiff's motion to disqualify Judge Castro and heard argument on the motions for summary judgment filed on behalf of Defendant Ursula L. Aldan and on the motion for summary judgment filed on behalf of Tokai U.S.A., Inc. in which the Defendant Victorino N. Igitol had joined.

The Court's Decision and Order was thereafter entered on July 3, 1991, granting the motions for summary judgment and raising sua sponte the issue of proposed sanctions.

III. THE GROUNDS FOR RULE 11 SANCTIONS

When a party files a complaint with a court in this Commonwealth, the claims asserted therein should be supported by facts that would be admissible if offered into evidence. See, Whittinton v. Ohio River Co,, 115 F.R.D. **201** (E.D. **Ky.** 1987). At a bare minimum, the attorney's files must contain facts that support the probable existence of evidence that would give credibility to the legal claims asserted in the complaint. Id. This Court will never allow the filing of a lawsuit for the purpose of using discovery to uncover some wrongdoing by the defendant. Harris v. Marsh, 679 F. Supp. 1204, 1386 (E.D.N.C. 1987). "It is thus no answer to a motion seeking Rule 11 sanctions for asserting a baseless claim of fraud to suggest that plaintiffs needed discovery to ascertain whether the claim asserted was well-founded." City of Yonkers v, Otis Elevator Co., 306 F.R.D. 524, 525 (S.D.N.Y.1985).

Commonwealth Rule of Civil Procedure 11 states

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he had read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In Tenorio v. Suwerior Court, No. 89-002, slip. op. (N.M.I. March 19, 1990), our Supreme Court described the nature of Rule 11 as follows:

> [Rule 11] 'imposes on counsel a duty to look before leaping and may be seen as a litigation version of the familiar railroad crossing admonition to 'stop, look and listen.' [citation omitted]. This rule has been described as the 'stop and think' rule . . . . The attorneys in this case should have stopped and thought before they filed the sanctionable documents we have analyzed in this action.

Id. at 9-10.

There are basically four purposes served by the imposition of

Rule 11 sanctions. First and foremost, the rule deters the sanctioned party from bringing frivolous actions in the future. White v. Gen. Motors Corp., Inc., 908 F.2d 675, 683 (10th Cir. 1990). Second, the rule punishes the sanctioned party for abusing the litigation process. Id. Third, the rule compensates the opposing party who had to withstand the sanctioned party's abusive tactics. Id. Finally, the rule aids in streamlining the court's docket. Id.

When a plaintiff files a case of questionable validity, the defendant should analyze the pleadings to determine whether the claim is so baseless as to give rise to a violation of Com.R.Civ.Pro. 11. If the claim is baseless, the defendant should file its answer arid notify the court of this fact. If at any point in the proceeding the court suspects that Rule 11 has been violated, it may raise the issue t ____. Commonwealth v. Kawai, No. 89-011 (N.M.I. Jan. 17, 1990). Once a court determines that Rule 11 has been violated, it must impose sanctions. Figueroa-Ruiz v. Alegria, 905 F. 2d 545 (1st Cir. 1990); Collins V. Walden, 834 F.2d 961, 964 (11th Cir. 1987).

There are two components to Commonwealth Rule of Civil Procedure 11. First, the court must determine whether the document submitted is well-grounded in fact or law. Most courts, including our own Supreme Court adopt the term "frivolous" to describe a claim that fails to comply with this requirement. See, e.g., Tenorio v. Superior Court, supra. Second, the court must determine whether the document was filed in bad faith.

A. Were Mr. Mitchell's Amended Complaint and Later Motions to Vacate Assignment, and for Recusal Frivolous?

Rule 11 sanctions may be imposed when a pleading or other document is not well-grounded in fact or law. Tenorio v. Superior Court, supra, at 9-10. This determination must be made in retrospect because the validity of a filing or other writing is measured at the time the attorney or party originally affixed their signature to the document.

In order for a legal position to be warranted under existing Law, it must be supported by a non-frivolous legal argument. Id. at 10. An argument will be found "non-frivolous only if it is likely to succeed on the merits or if reasonable persons could differ as to the likelihood of its success on the merits." Id. citing American Bar Association Section on Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 109 (June, 1988).

In Commonwealth v. Kawai, No. 89-011, at 6 n.4 (N.M.I. Jan. 17, 1990), our Supreme Court further defined a frivolous filing as "one in which no justiciable question has been presented and [one which] is devoid of merit in that there is little prospect that it can ever succeed." Although this definition was derived from an interpretation of Rule 38, the high court's sanctioning tool under its rules of appellate procedure, it is equally applicable here.

An accusation of frivolity can be defended by showing that "to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry [the pleading or paper] is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

Comm.R.Civ.Pro. 11. See, Westlake N. Property Owners v. Thousand Oaks, suwra, 915 F.2d at 1305. An objective standard is applied to test the reasonableness of a party's inquiry. Hudson v. Moore Bus. Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1987). The signer's subjective iritent is irrelevant to a determination of reasonableness. Id.

The sufficiency of an attorney's pre-filing inquiry and research is measured against that which a reasonable competent attorney would have done under the same circumstances. Golden Eagle Distrib. Corp. v. Burrouahs Corw., 801 F.2d 1531, 1538 (9th Cir. 1986).

In order to determine whether a reasonable inquiry has been made, the court should consider:

> the amount of time the attorney had to prepare the document and research the relevant law; whether the document contains a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law. [citations omitted].

Harris v. Marsh, supra, 679 F. Supp. at 1386.

In White v. Gen. Motors Corp., Inc,, 908 F.2d 675, 682 (10th Cir. 1990), the Tenth Circuit stated that a reasonable attorney's pre-filing investigation must also include a determination as to whether any obvious affirmative defenses act as a bar to the suit The White court noted, however, that an attorney may make a colorable argument to refute the applicability of the particular defense to the facts present in the pending case. Id. This argument must be reasonable and based on more than mere speculation. Id. Obviously, this argument must be present in the complaint

The attorney's obligation to evaluate the propriety of his

claims continues throughout the litigation process. Whittington v. Ohio River Co., 115 F.R.D. 208 (E.D. Ky. 1987); Advo System. Inc. v. Walters, 110 F.R.D. 426 (E.D. Mich. 1986). If at any point in the process it becomes apparent that a claim or defense is unreasonable, the attorney must abandon that claim or defense. Woodfork v. Gavin, 105 F.R.D. 100, 106 (N.D. Miss. 1985); Van Berkel v. Fox Farm and Road Machinery, 581 F. Supp. 1248, 1251 (D. Minn. 1984).

In the case at bar, Mr. Mitchell's amended complaint was not supported by potentially admissible facts that would save his claim from being declared frivolous. During oral argument on summary judgment, Mr. Mitchell argued that fraud was the heart of his amended complaint. For several reasons the court finds that his files could not have contained facts supporting the probable existence of a claim for fraud at the time he signed the amended complaint. First, Mr. Mitchell admits that discovery is the only means by which he can establish a claim for fraud. Unfortunately, he may not use discovery as a fishing expedition in an effort to establish an exception to the statute of frauds. That cause of action had to exist when he filed his complaint.

Mr. Mitchell insists that he did not need to prove the existence of fraud at the outset because the proof of the fraud is in the possession of the defendants. The court is puzzled as to why an attorney who files a lawsuit in which a fraud count is the only cause of action that would save his complaint from being frivolous would not name as a defendant one of the participants in the alleged fraud. Mr. Mitchell claims that when he tiled the suit he knew that the

statute of frauds was an issue. He further claims that the alleged fraud perpetrated against his client takes this case out of the statute of frauds. However, he failed to name Antonio Guerrero as a party to this lawsuit. This omission exposes a serious problem in Mr. Mitchell's litigation strategy for which he offers no explanation.

It is obvious that Mr. Mitchell did not file this lawsuit for the purpose of pursuing a claim of fraud. Nowhere in his amended complaint does he assert facts that would support a cause of action for fraud. In fact, the amended complaint lays out seven causes of action, none of which mention a claim for fraud.[1] This, in itself, is proof that Mr. Mitchell did not contemplate fraud as a cause of action at the time of his initial filing. The first time the court and the defendants heard of this theory was at the June 7, 1991, hearing on summary judgment. Therefore, it is clear that the amended complaint was frivolous at the time he placed his signature on it because it neither contemplates the necessity of a writing signed by any of the defendants nor does it contain any arguments supporting the existence of an exception to the statute of frauds.

The court also finds that Mr. Mitchell failed to conduct a reasonable inquiry into the relevant law prior to filing his amended complaint. None of the aforementioned factors that courts weigh in

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[1] It should be noted that Mr. Mitchell's proposed second amended complaint also made no reference to a cause of action for fraud. This is further evidence that Mr. Mitchell's fraud theory was merely manufactured to defend against the Court's sua sponte motion proposing sanctions.

determining whether a reasonable pre-filing legal inquiry occurred tilt in Mr. Mitchell's favor. First, although Mr. Mitchell implied during his oral argument that filing deadlines may have adversely affected his ability to adequately investigate his claims, he also argued ir his Grief in opposition to sanctions that he and hi: associate, Jeanne Rayphand, spent 102.9 hours researching the claims before filing. Memorandum of Theodore R. Mitchell in Opposition to the Court's Order Assessina Sanctions, at 18. Viewed from the perspective of a reasonably competent attorney, one would suspect that in 102.9 hours the statute of frauds defense would have become evident. Second, the amended complaint does not contain a plausible view of the law. Nothing in the complaint refutes the existence of a statute of frauds defense, nor does it state a reasonable case for specific performance. Every document Mr. Mitchell submitted with respect to Mrs. Aldan discusses the need for further agreement in the future. Third, there are no complex legal questions in this case. There simply was no completed agreement. The statute of frauds is neither complicated nor ambiguous. Finally, Mr. Mitchell makes no argument that he was seeking to extend or modify existing law. In analyzing these factors, it is obvious that Mr. Mitchell failed to conduct a reasonable pre-filing inquiry.

Mr. Mitchell also argues that he had no obligation to advise his client to forego the assertion of a claim for specific performance simply because the defendant might raise the statute of frauds as an affirmative defense. Memorandum of Theodore R. Mitchell in Opposition to the Court's Order Assessing Sanctions, at 15 ("Among

other things, the problem with that part of the court's ruling is that an attorney has no obligation to advise a client to forego assertion of a good claim simply because the defendant may be able to assert an affirmative defense in opposition to it."). Mr. Mitchell cited no authority for this proposition. Mitchell's interpretation of his pre and post-filing responsibility is clearly incorrect.

As the court in White v. Gen. Motors Corp., Inc., supra, emphasized, an attorney must foresee the pleading of obvious defenses that act as a bar to his claims. The White court noted that the attorney may, however, make a colorable argument to refute the applicability of a defense to the particular facts and circumstances in the case at bar. As this court has previously emphasized, Mr. Mitchell's amended complaint made no colorable argument to refute the applicability of the statute of frauds. Therefore, the complaint was frivolous on its face.

An attorney cannot file a baseless complaint and hope its frivolous nature will go unnoticed. "If he [or she] knows another rule such as the statute of limitations, res judicata, or collateral estoppel categorically bars his client's claim, he [or she] cannot fail to disclose it in the hope that it will be overlooked." Schwarzer, Sanctions Under the New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 193 (1985). In claiming that he had no duty to forego the filing of the amended complaint simply because the defendants' might raise a statute of frauds defense, Mr. Mitchell admits that he violated Rule 11.

Furthermore, Mr. Mitchell failed to evaluate the propriety of

his claims throughout the litigation process. When the defendants answered the defective first amended complaint they asserted the defense of the statute of frauds. Even if Mr. Mitchell was not aware of this defense at the time of signing the complaint, he should have withdrawn his frivolous claims at this time.

B. Were Mr. Mitchell's Amended Complaint and Motions to Vacate Assignment and for Recusal Interposed for an Improper Purpose?

Rule 11 sanctions may also be imposed where a pleading is interposed for an improper purpose. Westlake N. Property Owners v. Thousand Oaks, 915 F.2d 1301, 1305 (9th Cir. 1990).

> In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent. The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers **or** proceedings caused **delay** that was unnecessary, whether they caused increase in the cost of litigation that was needless, **or** whether they **lacked** any apparent purpose. Findings on these points would suffice to support an inference of an improper purpose.

Schwarzer, Sanctions Under the New federal Rule 11 -- A Closer Look, 104 F.R.D. 181, **195** (1985).

In the present case, the court finds that Mr. Mitchell instituted this action for multiple purposes, none of which can be said to include a good faith effort to obtain a judgment in his client's favor. Where an attorney files suit for reasons other than the vindication of his clients rights, the suit must be improper. In re Kuntsler, 914 F.2d 505, 518 (4th Cir. 1990). The court. believes that Mr. Mitchell instituted and then continued to pursue this action //forthe improper purpose of increasing the defendants' legal fees to a point where they might eventually settle the case. See, Calloway

v. Marvel Entertainment Group, 854 F.2d 1452, 1473 (2d Cir. 1988) (recognizing the possibility that a lawyer may seek to create a fictional factual dispute in the pleadings for the purpose of extorting a settlement). Mr. Mitchell was well-aware of the fact that the filing of this lawsuit would result in great inconvenience to Mrs. Aldan, Mr. Igitol and Tokai. His only hope in filing such a baseless cause of action lied in the hope that he might somehow extort a settlement from the defendants while increasing his own client's fees. This is indeed a classic "harassment suit."

> It seems that plaintiff filed the complaint . . . either in the hope that discovery would uncover evidence of a claim, or in the hope that [the defendant.] would settle rather than face the time and expense of litigating the matter. Whether conducting a fishing expedition or harassing the defendant, counsel's failure to make sure that the original complaint was well grounded in fact is clearly a violation of Rule 11 . . . . It must have been obvious to plaintiff's attorney that the suit against [the defendant] was meritless and yet he insisted **on** taking the defendant's and the court's time to entertain the action.

Barlow v. McLeod, 666 F. Supp 222, 229-30 (D.D.C. 1986)

Mr. Mitchell further compounded his indiscretions by filing frivolous motions to vacate Judge Hefner's assignment of the case to this court and for my recusal in this matter. Both of these motions were filed for the purpose of running up the defendants' and his own client's costs in litigating this matter. These motions were filed one week before the scheduled hearing on defendants' motions for summary judgment. The motions to vacate assignment and for recusal were noticed for hearing at a time after the stipulated date for the hearing on summary judgment. Mr. Mitchell obviously filed these motions to avoid this lawsuit's certain destiny. The court is

convinced that these motions were strategically filed for the improper purpose of delaying the inevitable resolution of this matter on summary judgment.

Mr. Mitchell's habit of inundating tne court with frivolous motions as a dilatory practice will not be tolerated. His use of such "procedural gymnastics' throughout this litigation is both unprofessional and intolerable. See, McLaughlin v. Bradlee, 602 F. Supp. 1412, 1419 (D.D.C. 1985).

> For reasons stated amply herein, the court is absolutely convinced that plaintiff instituted this lawsuit in bad faith, and, faced with the dismissal of the case, proceeded to inundate the Court with one frivolous motion after another. It is clear that plaintiff is bent on harassing these defendants, making them suffer substantial expenses in defending themselves against this scurrilous attack.

Id. at 1420.

Mr. Mitchell argues that his motions to vacate transfer and for recusal were well grounded in fact and law. This court finds that even if this was true, Mr. Mitchell's conduct would still be sanctionable under Rule 11. Federal courts are split on the issue of whether a document that is filed for an improper purpose can ever be sanctioned if it is well-grounded in fact and law. Some courts require that a claim be found frivolous before it can be declared improper. See, e.a., Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986). However, in Tenorio v. Superior Court, supra, our Supreme Court apparently resolved this issue under the

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2 The court notes that Mr. Mitchell's dilatory practices may also violate the Model Rules of Professional Conduct's Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of this client.").

Commonwealth's version of Rule 11. The Tenorio court stated: "Even a document well-grounded in fact a n law can violate this rule if there is evidence of the signer's bad faith." Id. at 10-11.

Mr. Mitchell cannot file a motion for the bad faith purpose of delay and complain that he was advocating a change in the law. Rule 11 only allows "good faith" arguments for changes in existing law. Comm.R.Civ.Pro. 11. Therefore, Mr. Mitchell's obvious bad faith efforts to proiong this lawsuit in order to force a settlement from defendants and increase his own client's fees render moot any arguments he may have concerning the legal viability of his claims. United States v. Allen L. Wright Development Corp., 667 F. Supp. 1218, 1220-21 (N.D. Ill. 1987) (delaying proceedings for purpose of increasing attorney's fees payable constitutes "improper purpose" thus violating Rule **11)**.

The type of excessive motion practice Mr. Mitchell engaged in during the course of this case has also been condemned in other jurisdictions. In Aetna Life Ins. Co. v. All Medical Servs., Inc., 855 F.2d 1470 (9th Cir. 1988), the Ninth Circuit made the following remarks with respect to the type of conduct Mr. Mitchell engaged in throughout this litigation:

> [T]here comes a point when successive motions and papers become so harassing and vexatious that they justify sanctions even if they are not totally frivolous under the standards set forth in our prior cases. If a court finds that a motion or paper, other than a complaint, is filed in the context of a persistent pattern of clearly abusive litigation activity, it will be deemed to have been filed for an improper purpose and sanctionable.

Id. at 1476.

This court adopts the well-reasoned approach stated by the Ninth

Circuit. An attorney may not use successive filings to vex and harass an opponent even if they are well-grounded in fact and law. His pattern of abusive filings in this case exemplifies Mr. Mitchell's total disregard for the proper use of this court's rules and processes. Rather than filing a response to the defendants' motions for summary judgment, he chose to inundate this court with frivolous motions calculated to further delay the resolution of this matter. The Commonwealth's Rules of Civil Procedure were not designed to assist in such practices.

C. Mitigating the Damages Caused by Sanctionable Conduct

It is well established that the victim of sanctionable conduct has a duty to mitigate damages and to avoid further protraction of the underlying frivolous litigation. Hudson v. Moore Bus. Forms, Inc., 898 F.2d **684,** 687 (9th Cir. **1990).** This duty requires the defendant to seek swift termination of the litigation and to prevent excessive costs. Matter of Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986). What constitutes a swift termination of frivolous proceedings is dependent on the facts of the particular case. United Food & Commercial Workers v. Armour and Co., 106 F.R.D. 345, 350 (N.D. Cal. 1985).

Although many courts merely focus on the defendant's responsibility to mitigate damages caused by frivolous litigation, it should not be forgotten that it was the plaintiff's attorney who was responsible for bringing the frivolous suit in the first place. Placing the entire burden of mitigating the damages on the defendants would, in effect, eliminate the plaintiff's attorney's continuing

Rule 11 responsibility to evaluate his suit and abandon claims when it becomes clear that they have no merit. George v. Bethelem Steel Corp., 116 F.R.D. 628, 630 (N.D. Ind. 1987); See, Autotech Corp. v. NSD Corw. supra, at 470 (though attorney cannot avoid sanction by voluntarily dismissing frivoious action, he or she can mitigate the sanctionable conduct through dismissal).

Mr. Mitchell contends that the defendants should have either raised this motion themselves after the filing of the complaint or sought the dismissal of this case under Commonwealth Rules of Civil Procedure 12. At the July 31, 1991 hearing, Mr. Mitchell emphasized the fact that the defendants' should have stopped him. Although the defendants had a duty to mitigate the damages caused by this frivolous suit, Mr. Mitchell had a parallel duty to dismiss his claims when the defendants filed their answers and raised the defense of the statute of frauds.

It is clear that Mr. Mitchell failed to make the requisite pre-filing inquiry into the applicability of the statute of frauds, the most basic defense to a property claim. Therefore, he should not be allowed to benefit from this own apparent ignorance, or oversight of the existence of an obvious defense that rendered his entire claim frivolous. While the defendants should have stopped Mr. Mitchell, his fact does not eliminate his duty to stop himself.

Nevertheless, the court cannot overlook the ease with which the defendants could have disposed of this case. The defendants had other options available to swiftly dispose of this frivolous claim prior to the onset of the extensive discovery that ensued. First,

defendants could have notified Judge Hefner of ths woeful inadequacy of the claims asserted in Mr. Mitchell's amended complaint. Judge Hefner then could have used his power of judicial oversight to dismiss the suit. See, United Food & Commercial Workers v. Armour and . 106 F.R.D. 345, 349 (N.D. Cal. 1985;. Thi- option coul? have saved the expense of a motion to dismiss this case for failure to state a cause of action.

Alternatively, the defendants could have filed a motion to dismiss the amended complaint. Had the defendants selected this option, the costs associated with discovery could have been avoided This court is, therefore, limiting the Rule 11 sanction in this case to those costs reasonably incurred in answering the plaintiff's complaint. The court will address Mr. Mitchell's failure to mitigate damages later in this opinion.

D. The Appropriate Remedy Under Rule 11

Although the court has broad discretion to fashion an appropriate remedy under Rule 11, the severity of the sanction should be limited to that which will serve the purposes of the rule. Traina v. United States, 911 F.2d 1155, 1158 (5th Cir. 1990). Even where the court makes the decision to assess the payment of attorney's fees and costs, the prevailing party is not assured of receiving full compensation for all expenses. Bvnum v. Michiaan State University, 117 F.R.D. 94, 102 (W.D. Mich. 1987). However, depending on the facts and circumstances of a particular case and the amount of the fees, it may be entirely appropriate to sanction a party for the entire amount of fees and costs. See, Borowski v, DePuy, Inc., 876

F.2d 1339, 1340 (7th Cir. 1969) ("Rule 11 provides a 'make-whole' remedy to place the prevailing party in the position it would have been had the frivolous argument not been advanced . . . .").

With respect to the requested attorney's fees, the court has the power to reduce an attorney's hourly fee charge depending on the circumstances of the particular case. Where the frivolousness of the sanctioned party's conduct is borderline, the court may reduce the fee to respond to the flagrance of the violation. Eastway Construction Co. v. City of New York, 637 F. Supp. 558, 572 (E.D.N.Y. 1986). However, where the Rule 11 violation is especially egregious, assessing an award that is in excess of the attorney's market rate fee is entirely acceptable. Id.

The court recognizes that attorney's fees are not the only type of Rule **11** sanction available to protect defendants against frivolously instituted law suits. The court could choose to reprimand Mr. Mitchell, suspend him from practice before this court, or recommend that the local bar association investigate **his** conduct.[3]

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[3] Disciplinary Rule 7-102(A) of the ABA Model Code of Professional Responsibility states that:

> (a) In his representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> (2) Knowingly advance claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

The court should always seek to employ the lease restrictive sanction that will adequately serve the purposes of the rule. Industrial Blda. Metals, Inc. v. Interchemical Corw., 437 F.2d 1336, 1339 (9th Cir. 1970).

The court further realizes that the financial resources and ability of the sanctioned party to pay must be considered when determining the amount of the sanction. Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1359 (3rd. Cir. 1990); Doe v. Keane, 117 F.R.D. 103 (W.D. Mich. 1987). The burden of both asserting and proving an inability to pay rests squarely on the shoulders of the sanctioned party. White v. General Motors Corp., Inc., supra, at 685. In discussing this issue the White court stated that "[i]nability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the part[y] being sanctioned to come forward with evidence of [his] financial status." Id.

In order to potentially save both Mr. Mitchell and the court the time associated with an in camera inspection of his financial condition, the court will assess the sanction and then entertain any motion concerning his inability to pay. If the court does not receive such a motion within ten days of the date it eventually

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ABA Model Code of Professional Responsibility, DH 7-102(A) (1981).

The ABA Model Rules of Professional conduct prohibit the same type of conduct. AHA Model Rules of Professional Conduct Rule 3.1 (1983) ("lawyer shall not bring or defend a proceeding or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . . .").

issues Mr. Mitchell's monetary sanction, it will assume that Mr. Mitchell has the ability to pay the sum in question.

This court also notes that it could seek financial statements from all of the parties involved and weigh Mr. Mitchell's assets against those of the defendants to determine the appropriate sanction. The court recognizes that this is a practice employed in a few jurisdictions. The court declines to employ this balancing test for two reasons. First, the disparity between the financial resources of the defendants and Mr. Mitchell is obvious. If this court allows the appropriate sanction to be affected by the wealth of the defendants, it would be rewarding Mr. Mitchell for bringing a frivolous action against these defendants simply because they can afford to defend against this frivolous complaint. This is not sound public policy. It would be absurd to argue that an attorney should be rewarded for finding a "deep pocket" (in this case, three "deep pockets") against whom to bring his meritless claims.

Second, Mr. Mitchell, by his own admission, will not be deterred by any sanction this court levies against him. See, infra, page 29 of this opinion. It would be an incredible waste of judicial resources to attempt to lessen the impact of a sanction against an attorney who admits that he would refile the same claim again if given the opportunity. Id. Therefore, this court refuses Mr. Mitchell's invitation to weigh the financial conditions of the defendants against his own.

IV. THE SANCTION

In its July 3, 1991 Order, this court requested that the

defendants submit a breakdown of their costs and attorney's fees incurred in defending this suit. Because the court has found that the defendants should have sought dismissal of this action by either notifying Judge Hefner or filing a motion to dismiss the errant amended complaint, the defendants are only entitled to those fees and costs incurred in answering the complaint.

The court will ask that the defendants re-submit a request f.. fees and costs in accordance with this opinion.[4] This request must be submitted within five days of the date of this Order. Mr. Mitchell will tnen have five days tc object to the defendant's fee and cost request. There will be no oral argument with respect t these fees and costs.

This court agrees with the types of costs Judge Hefner omitted from the defendants claim for fees and costs in the Atalig sanction. However, the gravity of the violation in the present case, in conjunction with Mr. Mitchell's admission that he will not be deterred no matter what sanction is levied against him, requires that this court sanction him at the market-rate for the defense attorney's ervices. Eastway Construction Co. v. City of New York, 637 F. Supp. 58, 572 (E.D.N.Y. 1986) (reasonableness of attorney's fee depends on the gravity of the violation). Furthermore, the flagrance of the violation in this case requires that Mr. Mitchell be assessed the

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[4] The court emphasizes to deiense counsel the importance of submitting a fee request that allows this court to dlscern that the fees and costs sought are in accord with this opinion and limited to the preparation for and answer to Mr. Mitchell's amended complaint. If the court cannot understand the reason for a particular billing, or how it relates to the filing of the answer, it will be stricken.

defendant's costs associated with answering the amended complaint.

Since this court believes that Judge Hefner's earlier ruling concerning proper cost requests in cases involving sanctions is also applicable to the facts and circumstances presented here, the following items should be omitted from the fee and cost request:

1) costs resulting from the retention of off-island counsel, including travel costs, hotel costs, long distance telephone conversations, and telecopier (FAX) charges;

2) inter-office consultations and telephone conversations with other attorneys in this case;

3) computer research and photocopying costs. See, Doe v. Keane, 117 F.R.D. (W.D. Mich. 1987) (although firms bill clients for computer research and photocopying costs, these items must be considered overhead when calculating Rule **11** sanction fees).

V. THE INHERENT POWER OF THE COURT **TO ISSUE SANCTIONS**

In its July 3, 1991, Order, this court instructed Mr. Mitchell to file a brief explaining why this court should not exercise its inherent power to require him to return to his clients all fees received in pursuing this matter. Although the court does not wholly agree with Mr. Mitchell's response on this issue, it does agree with his statement that his client has available a cause of action for malpractice. Because a cause of action for malpractice exists, the court need not invoke its equitable power to ensure that justice is done. Therefore, the court will defer to Lucky Development Corporation and let it decide whether it wishes to pursue a malpractice claim against Mr. Mitchell.

This court reiterates its belief, however, that Mr. Mitchell's abusive tactics were designed to increase his own client's costs in litigating this matter. See, Elster v. Alexander, 122 F.R.D. 593 (N.D. Ga. 1988). In the Elster case, the court was faced with a similar situation in which a plaintiff's attorney brought suit when no basis existed for pursuit of the claims. The Elster court determined that the baselessness of the complaint revealed that it obviously was not filed to pursue legitimate claims against the defendants. Rather, it found that the plaintiff brought the suit for the purpose of either coercing a settlement from the defendants or to extract fees from his client while pursuing a suit for which no result in his client's favor was forthcoming. This court similarly finds that Mr. Mitchell pursued this baseless lawsuit in order to increase his own client's legal fees.

In light of Mr. Mitchell's conduct throughout this litigation, including his statements at the July 31, 1991, hearing, the court will strongly recommend that the CNMI Bar Association investigate his continuing ability to practice law in this jurisdiction. The court's exercise of this inherent power is not limited by the imposition of Rule 11 sanctions. Chambers v, Nasco, Inc,, No. 90-256 (U.S. June 6, 1991) (WESTLAW Federal Courts LIbrary, Allfeds File) (where litigation is conducted in bad faith, "the court may safely rely on its inherent power if, in its informed discretion neither the statutes nor the rules are up to the task"). Zaldivar v. City of Los Anaeles, 780 F.2d 830 (9th Cir. 1986) (Rule 11 does not repeal. "the court's inherent power to discipline attorney misconduct").

in summary, Mr. Mitchell failed to investigate the legal and factual propriety of his claims prior to filing this lawsuit. If he was not aware of the frivolousness of his claims, he should have become aware after receiving the defendants' answers and reading their defenses. kt this time, Mr. Mitchell had a legal arid ethical responsibility to review the propriety of his claims. He did not. He then failed to mitigate his damages by voluntarily dismissing the suit when the defendants raised the statute of frauds defense. Instead, he admits that he used discovery to pursue factually and legally groundless claims that were not even present in his complaint. He later failed to file a response to the defendants' motions for summary judgment. He exercised bad faith in attempting to delay the hearing on summary judgment by filing motions to vacate assignment **and** for recusal. His entire pursuit of this matter was intended to increase his own client's fees and the defendants' costs in litigating this matter.

During the course of the hearing on sanctions, Mr. Mitchell made scurrilous and sarcastic remarks concerning other members of the local bar, including defendants' counsel in this case.[5] Mr. Mitchell also admitted to this court that he would not be deterred should it issue sanctions against him based on the frivolous complaint he filed

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5 The court warns Mr. Mitchell that he does not have a constitutional privilege to defame other members of the bar during hearings before any court. State v. Nelson, 504 P.2d 211, 214-15 (Kan. 1972). The court is also of the opinion that Mr. Mitchell's remarks at his sanction hearing may violate his ethical obligation to refrain from "knowingly making false accusations against a judge or other adjudicatory officer[s]." Model Code of Frofessional Responsibility DH 8-102(B) (1983).

in this case. Instead, he declared:

> "Kill me, stifle me, do whatever you like in this case. The purpose of Rule 11 is deterrence. I must tell you now, if I sound like an unrepentent criminal, I'm sorry. If I had it to do again, I would have no choice out of a sense of duty to my client but to file the same complaint. You will not deter me with Four Hundred Twenty Thousand or Five Hundred and Seventy-One Thousand."

Hearing on Prowosed Sanctions Against Theodore-R. Mitchell in the matter of Lucky Development, Inc., v. Tokai, U.S.A. et al, Civil Action No. 90-828 (Super. Ct. July 31, 1991).

Any attorney who could make such a shocking admission obviously has lost sight of the responsibilities inherent in being an officer of this court. He obviously has no appreciation for the serious nature of this proceeding. He has no respect for this court or the proper use of its processes.[6] He has no respect for the members of the local bar. His own words, in addition to the abusive tone he maintained throughout the hearing, lead the court to the conclusion that there is no alternative but to request that he show cause as to why this court should not suspend him from practice before it pending an investigation by the local bar association.

If the court finds Mr. Mitchell's response inadequate, his immediate suspension will be ordered. If the local bar association has not filed a complaint against Mr. Mitchell within two months of the date of that order, he may seek reinstatement. However, his reinstatement will be conditioned upon his taking (or re-taking) and

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6 Mr. Mitchell's abusive tone and remarks throughout his sanctions hearing may also violate his ethical responsibility to refrain from "[e]ngag[ing] in undignified or discourteous conduct which is degrading to a tribunal." Model Code of Professional Responsibility DD 7-106(c)(6) (1983).

passing the Multistate Professional Responsibility Examination to be given by our Supreme Court on November 15, 1991. If the court chooses to suspend him, Mr. Mitchell may seek reinstatement while waiting for the results of the exam. Clearly, Mr. Mitchell is in dire need of a refresher course wit:, respect to the ethical conduct required of members of the local bar. The court will give Mr. Mitchell ten days from the date of this Order to show cause as to why this court should not suspend him from practicing before it. If ordered, the proposed suspension will apply to Mr. Mitchell and anyone filing a pleading under his immediate supervision or instruction. There will be no hearing with respect to the proposed suspension.

Entered this 29 day of August, 1991.

Alexandro C. Castro, Associate Judge