2003 WL 21782650
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United States District Court,
S.D. New York.

THE CARLTON GROUP, LTD.,
Carlton Advisory Services, Inc., and
Carlton Debt Advisors, Inc., Plaintiffs,
v.
William David TOBIN, Joseph A. Runk, Jr., John B. Guy, Jeffrey N. Phelps, Kenneth Bauerenfreund, Mission Capital Advisors, Inc., Southshore Capital Co., Inc., Gulfstream Capital Partners, Inc., Prolific Solutions, Inc., Thomas P. Tobin, Giselle Handel, PDP Capital, LLC, and Stacey Schurter, Defendants.

No. 02 Civ.5065 SAS. | July 31, 2003.

Synopsis
Background: Financial services company sued competitor, alleging appropriation of proprietary information, and also sued firm occupying same office building as competitor, claiming that firm's computer served as link for movement of information from company to competitor. Company voluntarily dismissed claims against firm, firm moved for Rule 11 sanctions against company, for filing frivolous complaint, and company moved to sanction firm for filing of sanctions motion.

Holdings: The District Court, Scheindlin, J., held that:

[1] attorneys for company conducted adequate investigation prior to suing firm, precluding Rule 11 sanctions;

[2] attorneys were not required to withdraw complaint, upon disclosure of fact that firm's computer could only receive and not extract information from company's computer; and

[3] competitor would not be sanctioned, for filing Rule 11 motion.

Motions denied.

West Headnotes (3)

[1] Federal Civil Procedure
Particular types of cases

Federal Civil Procedure
As to Facts

Imposition of Rule 11 sanctions for filing of frivolous complaint was not appropriate when attorneys for financial services company conducted adequate pre-service investigation of claim that firm which had no business relationship with competitor other than occupancy of same office building conspired with competitor to steal information from company's computer through creation of link between its computers and those of competitor, allowing for storage of appropriated financial information away from competitor's computer; after becoming aware of link, attorneys had situation investigated by two computer experts, and failure to discuss matter with firm was excusable on grounds that contact might provoke further evasive action. Fed. Rules Civ. Proc, Rule 11, 28 U.S.C.A.

2 Cases that cite this headnote

[2] Federal Civil Procedure
Refusal to dismiss or withdraw

Attorneys for financial services company were not required, in order to avoid Rule 11 liability for filing of frivolous complaint, to withdraw complaint alleging that firm which had no business relationship with competitor other than occupancy of same office building conspired with competitor to steal information from company's computer through creation of link between firm's computers and those of competitor, allowing for storage of appropriated financial information away from competitor's computer, after it was established that firm could only receive information from company's computer and could not affirmatively access information; it was possible that cooperating employee of company extracted information from company's files and transmitted it to firm's

computer, from which it was passed on to competitor through link. Fed. Rules Civ. Proc, Rule 11, 28 U.S.C.A.

2 Cases that cite this headnote

[3] Federal Civil Procedure

Sanctions motions

Rule 11 sanctions would not be imposed upon competitor of financial services company for filing frivolous motion to sanction company, after court determined that company had reasonable grounds for filing of complaint against competitor and did not violate Rule 11 by doing so; company's case was not very strong. Fed. Rules Civ. Proc, Rule 11, 28 U.S.C.A.

2 Cases that cite this headnote

Attorneys and Law Firms

James B. Zane, Edward S. Rudofsky, Zane and Rudofsky, New York, New York, Steven M. Kayman, Kevin J. Perra, Proskauer Rose LLP, New York, New York, for Plaintiffs.

Brian S. Dervishi, John Borgo, Weissman, Dervishi, Borgo & Nordlund, P.A., Bank of America Tower at International Place, Miami, Florida, for Defendants.

OPINION AND ORDER

SCHEINDLIN, J.

***1** Defendants PDP Capital, LLC, and Stacey Schurter (collectively "PDP") are seeking sanctions against plaintiffs (collectively "Carlton"); their attorney, Edward S. Rudofsky; and Rudofsky's law firm, Zane and Rudofsky ("Z & R") pursuant to Rule 11 of the Federal Rules of Civil Procedure for filing a claim against PDP lacking in evidentiary support. Carlton maintains that because its allegations against PDP were factually supported, PDP's motion should be denied.

Carlton further claims that PDP should itself be subject to Rule 11 sanctions due to the meritless nature of the instant motion. Accordingly, Carlton argues that PDP should reimburse it for the attorney's fees and expenses incurred in defending this motion. For the reasons set forth below, PDP's motion for Rule 11 sanctions is denied, as is Carlton's request for sanctions. [1]

1 This case was originally assigned to Judge Allen G. Schwartz. It was transferred to the undersigned in April 2003.

I. FACTUAL BACKGROUND

This lawsuit arose out of a business dispute between Carlton and defendants William Tobin, Joseph Runk, John Guy, Jeffrey Phelps, Kenneth Bauernfreund, Thomas Tobin, Giselle Handel, and Mission Capital Advisors, L.L.P. (collectively "the Mission defendants"). *See* Defendants PDP Capital, LLC, and Stacey Schurter's Memorandum in Support of Defendants' Motion for Sanctions Pursuant to Rule 11 ("Def.Mem.") at 1. Carlton is a financial services company whose activities include assisting banks and other financial institutions in selling real estate mortgage pools. *See id.* Defendant Mission Capital Advisors, L.L.C. ("Mission Capital") competes directly with Carlton. *See id.* The individual Mission defendants were formerly Carlton employees. *See id.* at 5. In essence, Carlton accuses the Mission defendants of deleting files from Carlton's computers, conspiring to steal confidential and proprietary information from its computer network, and using that information to compete unlawfully with Carlton. *See* Plaintiff's Memorandum of Law in Opposition to PDP's Motion for Rule 11 Sanctions ("Pl.Mem.") at 1.

PDP is an investment advisor and fund manager, and does not compete with Carlton or Mission Capital. *See id.* Its only connection with Carlton and the Mission defendants is that it maintains its office in the same business suite as Carlton and Mission Capital. *See id.* At least four other companies maintain offices in that suite ("the Flagler Suite"), which is located in West Palm Beach, Florida. *See id.* at 2. The tenants of the Flagler Suite share a communication switch and data transmission line which connect the tenants' computers to the Internet; as such, all the computers in the Flagler Suite constitute a "network," although the tenants do not have access to each other's computers. *See id.*

Notwithstanding the absence of any business relationship between PDP and the Mission defendants, on July 1, 2002, Carlton filed a Complaint which named PDP as a member of the Mission defendants' alleged conspiracy. [2] Complaint ("Compl.") ¶¶ 136–41. Carlton based this claim on its discovery of an electronic shortcut that linked its computer system to the computer used by Stacey Schurter, an employee

of PDP ("the PDP Capital Link"). [3] *Id.* According to Carlton, its proprietary information was transferred from its own computer in the Flagler Suite to PDP's computer, and then from PDP's computer to Mission Capital's computer through the PDP Capital Link. *Id.* Specifically, Carlton alleged that (1) PDP deliberately created, or at least was aware of, the link; (2) PDP participated or acquiesced in transferring data from Carlton's computer to PDP's, and from PDP's to Mission's; and therefore (3) PDP participated in the Mission defendants' conspiracy against Carlton. *Id.*

2 PDP is no longer a defendant in Carlton's action against the Mission defendants. Carlton voluntarily dismissed all of its claims against PDP on March 6, 2003.

3 Carlton alleged that the PDP Capital Link was created "[o]n a date presently unknown to plaintiffs, but prior to April 25, 2002," the date on which the Mission defendants resigned from Carlton's employ. *Id.* ¶ 136.

***2** Based on this theory, Carlton brought thirteen claims against PDP and the Mission defendants—five of which specifically alleged that PDP violated: (1) the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701 *et seq.* (Count 1); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (Count 2); the Copyright Act, 17 U.S.C. §§ 101 *et seq.* (Count 4); and the common-law torts of misappropriation of trade secrets (Count 9) and fraud (Count 13). Compl. ¶¶ 167–211.

On March 4, 2003, PDP moved to dismiss Carlton's claims for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. In the alternative, PDP moved for summary judgment pursuant to Rule 56(b). PDP also separately filed the current motion the same day. [4]

4 The Federal Rules require that motions brought under Rule 11 be filed separately from other motions or requests. *See* Fed.R.Civ.P. 11(c)(1)(A). In addition, a Rule 11 motion must be served upon the opposing party 21 days before it is filed with the court. *See id.* While technically in compliance with the separate-motion requirement, PDP's filing of its Rule 11 and Rule 12(b)(2) motions on the same day is inappropriate. Furthermore, PDP has not provided any proof that it served Carlton 21 days before filing its Rule 11 motion. However, PDP did send a letter to Carlton on November 4, 2002, indicating its intention to bring a motion for sanctions pursuant to Rule 11. *See* 11/4/02 Letter to Carlton from PDP ("PDP Letter"), Ex. 3 to Pl. Mem., at 1. The letter was sent to Carlton more than twenty-one days before PDP filed its formal motion. *See id.* Thus, Carlton was given sufficient notice of PDP's intent to move for sanctions and it had an opportunity to withdraw the offending papers. *See Nisenbaum v. Milwaukee County*, 333 F.3d 804, 808 (7th Cir.2003) (finding that defendants' "letter" or "demand" rather than "motion" constituted substantial compliance with Rule 11(c)(1)(A) because defendants "alerted [plaintiff] to the problem and gave him more than 21 days to desist"). *But see Lancaster v. Zufle*, 170 F.R.D. 7, 7 (S.D.N.Y.1996) (finding letter requesting that lawsuit be withdrawn did not comply with "safe harbor" provisions of Rule 11 because letter did not indicate Rule 11 sanctions were sought and therefore failed to provide adequate notice).

Two days later, on March 6, Carlton voluntarily dismissed all of its claims against PDP, [5] rendering PDP's dismissal and summary judgment motions moot. Nonetheless, PDP declined to withdraw its Rule 11 motion.

5 On January 14, 2003, Carlton appointed Proskauer Rose as new lead counsel. While PDP claims that Carlton withdrew its claims because Proskauer "quickly realized that the claims against PDP should never have been filed," Def. Mem. at 9 n.12, such an assumption is impermissible. *See Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1509 n. 15 (11th Cir.1993) (holding that a voluntary dismissal cannot be construed as evidence of sanctionable conduct since it might well reflect litigation strategy rather than a claim's frivolity).

II. RULE 11 LEGAL STANDARD

Rule 11(b) provides in relevant part:

> By presenting to the court ... 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 ... 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 ... [and that] 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.

Fed.R.Civ.P. 11(b). If after notice and reasonable opportunity to respond, the court determines that the standards set forth in section (b) have been violated, the court may impose sanctions upon the attorneys, law firms, or parties. *See* Fed.R.Civ.P. 11(c). [6]

6 The type of sanction to be imposed is within the discretion of the district court. *See Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n. 7 (2d Cir.1985); *see also* Rule 11 Advisory Committee Note ("The court ... retains the necessary flexibility to deal appropriately with violations of the Rule. It has discretion to tailor sanctions to the particular facts of the case...."). Among the types of sanctions that the court may choose are: a fine or penalty paid to the court, an award of reasonable expenses and attorneys' fees incurred as a result of the misconduct, an order precluding the introduction of certain evidence, and dismissal of the action. *See* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 259–60 (3d ed.2000); *see also Murray v. Dominick Corp. of Canada, Ltd.*, 117 F.R.D. 512, 515–16 (S.D.N.Y.1987) (acknowledging that, like Rule 37, Rule 11 provides for the sanction of dismissal of a pleading, motion, or other paper).

A pleading, motion or other paper violates Rule 11 either when it " 'has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact and warranted by existing law....' " *W.K. Webster & Co. v. American President Lines, Ltd.*, 32 F.3d 665, 670 (2d Cir.1994) (quoting *Eastway*, 762 F.2d at 254). Sanctions should only be imposed " 'where it is patently clear that a claim has absolutely no chance of success.' " *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 626 (2d Cir.1991) (quoting *Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1005 (2d Cir.1988) (internal quotation marks and citation omitted)). Circumstantial evidence is sufficient to support allegations in a pleading. *See Rounseville v. Zahl*, 13 F.3d 625, 633 (2d Cir.1994). Furthermore, all doubts must be resolved in favor of the signer of the pleading. *See Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir.1993) (citing *Associated Indem. Corp. v. Fairchild Indus.*, 961 F.2d 32, 34 (2d Cir.1992) (internal quotation marks and citations omitted)).

***3** In determining whether a Rule 11 violation has occurred, a court should use an objective standard of reasonableness. *See MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253 (2d Cir.1996) (citing *Business Guides, Inc., v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 548, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991)). Whether an attorney's conduct was reasonable should be determined without the benefit of hindsight, based on what was objectively reasonable to believe at the time the pleading, motion or other paper was submitted. *See Kamen v. AT & T*, 791 F.2d 1006, 1011–12 (2d Cir.1986). "Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel of another member of the bar." *Id.* at 1012 (quoting Fed.R.Civ.P. 11 Advisory Committee Note on 1983 Amendment). In addition, attorneys are entitled to rely on the objectively reasonable representations of their clients. *See Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329–30 (2d Cir.1995).

The Supreme Court has cautioned that Rule 11 "must be read in light of concerns that it will ... chill vigorous advocacy." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *see also MacDraw*, 73 F.3d at 1259. "[J]udges should always reflect seriously upon the nuances of the particular case, and the implications the case has on the nature of the legal representation, before imposing sanctions." *Thompson v. Duke*, 940 F.2d 192, 195 (7th Cir.1991).

III. DISCUSSION

A. PDP's Request For Rule 11 Sanctions

[1] PDP claims that Carlton's allegations against it were factually unsupported—arguing that the mere existence of the PDP Capital Link was insufficient to establish Carlton's theory of conspiracy. *See* Def. Mem. at 2. Additionally, PDP contends that Carlton's allegations were "inherently incredible," as "transferring data indirectly through PDP's computer rather than directly to Mission Capital's makes the alleged conspiracy more complicated, but does not increase its chances of success." Def. Mem. at 4. In light of this "counter-intuitive" theory, PDP argues that Carlton should have thoroughly investigated its claims before making them. *Id.* PDP contends that Carlton failed to do so and should

therefore be sanctioned. *See id.* at 5. Furthermore, PDP argues that Carlton's attorney, Rudofsky, and his firm, Z & R, should also be sanctioned because they "knew it was unreasonable not to investigate further before asserting claims against PDP." *Id.* at 12.

[2] Assuming *arguendo* that Carlton had sufficient evidentiary support for its claims when it filed the Complaint, PDP further argues that Carlton had a continuing duty to withdraw those claims when it became clear that they had no factual basis. *See id.* PDP asserts that Carlton's refusal to do so in a timely manner constitutes a violation of Rule 11. *See id.*

1. Carlton's Evidentiary Support for Its Claims

***4** Carlton maintains that its allegations against PDP were objectively reasonable. *See* Pl. Mem. at 8. As a threshold matter, Carlton argues that those allegations must be evaluated within the greater context of this dispute. *See* Pl. Mem. at 4. As such, Carlton provides the following facts. [7]

[7] For purposes of this motion only, Carlton's allegations against the Mission defendants are assumed to be true.

Immediately prior to its discovery of the PDP Capital Link, Carlton uncovered evidence demonstrating that the Mission defendants, while working for Carlton, secretly began competing against Carlton in the loan sales industry. *See* 7/1/02 Affidavit of Luis Guevara, Carlton's New York-based Information Technology ("IT") administrator, ("Guevara Aff."), Ex. A to 4/1/03 Combined Declaration of James B. Zane and Edward S. Rudofsky, Carlton's counsel, in Opposition to Motion for Sanctions ("Combined Decl."), ¶ 27. Guevara asserts that the Mission defendants stole Carlton's material and deleted its computer files. *See id.* ¶¶ 14, 27. For example, the Mission defendants copied Carlton's computerized client databases prior to their departure, and then continued to use and update those databases for their own benefit. *See id.* ¶¶ 13–14, 26. The Mission defendants also took Carlton's laptop computers, which contained Carlton's proprietary information, when they resigned on April 25, 2002. *See id.* ¶ 4. In addition, Carlton has evidence that the Mission defendants corrupted or deleted files on Carlton's computers prior to their departure. *See id.* ¶¶ 13–15, 21–24, 61–62.

It was against this backdrop that Carlton uncovered evidence which implicated PDP in the alleged conspiracy. On May 15, 2002, Guevara flew to Carlton's office in West Palm Beach where he discovered the PDP Capital Link by examining Carlton's computer system. *See id.* ¶¶ 28–35. Guevara determined that there was no bona fide reason for such a link to have been created. *See id.* ¶ 30.

Following Guevara's return to New York, on May 21, 2002, Carlton retained Jason Paroff, a computer forensic expert from Kroll Associates, Inc. ("Kroll"), to review and confirm the information gathered by Guevara with respect to the PDP Capital Link. *See* Combined Decl. ¶¶ 11–12; 3/28/03 Declaration of Jason Paroff, Director of Computer Forensics at Kroll, ("Paroff Decl."), ¶¶ 2–7. Paroff determined that the PDP Capital Link could not have been created on the Carlton computer system without the knowledge and permission of an operator of the PDP computer. *See* Paroff Decl. ¶ 7. Paroff further indicated that such a link would give someone on the Carlton system the ability to move data back and forth between the Carlton computer network and the PDP computer. *See id.* ¶ 6.

Carlton then retained another computer forensic expert, Eric Friedberg, from Stroz Associates ("Stroz") to review the Complaint and other motion papers before the Complaint had been filed. *See* 4/1/03 Declaration of Eric Friedberg, Executive Vice President and General Counsel of Stroz, ("Friedberg Decl."), ¶ 4. Friedberg did not refute the allegation that a PDP employee had deliberately established the PDP Capital Link in an illegal and unauthorized manner. *See* Combined Decl. ¶ 18.

***5** Ultimately, discussions between Carlton, Z & R, Kroll, and Stroz concerning the potential misuse of the PDP Capital Link by the Mission defendants and PDP led Carlton to conclude that PDP had participated in the conspiracy. *See* Pl. Mem. at 6.

2. Carlton's Allegations Were Reasonable

Carlton's conclusion that PDP conspired with the Mission defendants was objectively reasonable in light of all the circumstances surrounding this dispute. Carlton discovered the PDP Capital Link after learning that a substantial portion of its confidential and proprietary information had been stolen. *See* Pl. Mem. at 1. The link was highly suspicious, as it was unauthorized and could not have been created without the knowledge and consent of those in control of the PDP computer. *See id.* at 2. Furthermore, there was no legitimate reason for the link's existence, as Carlton and PDP had no need to share files or communicate for any business purpose. *See* Guevara Aff. ¶ ¶ 30, 33.

While PDP argues that Carlton should have questioned PDP or the Mission defendants about the link prior to filing suit, *see* Def. Mem. at 5, Carlton had a good reason for not doing so. Given the extensive evidence of computer fraud by the Mission defendants, Carlton was concerned that such inquiries would alert the Mission defendants of the impending action against them and would result in their taking further unlawful steps to conceal and delete relevant information. [8] *See* Pl. Mem. at 6 n.2. Because Carlton had a strong interest in recovering its confidential information, notifying PDP or the Mission defendants of its intention to bring suit would have been counter-productive. Accordingly, its decision to delay questioning PDP was objectively reasonable at that time.

8 Immediately upon filing the Complaint on July 1, 2002, Carlton made an ex parte application for a temporary restraining order and related relief in order to locate and recover the stolen information. *See* Pl. Mem. at 6 n.6. Judge Schwartz ordered bit stream copying of the Mission defendants' computers (to preserve deleted data) and directed the Mission defendants to return Carlton's laptop computers. *See* 7/2/02 Transcript of Order to Show Cause Conference at 22–24, 28. In addition, he warned that "no one shall remove, destroy, modify, change, [or] alter whatever ... is presently [on the computers] under penalty of law." *Id.* at 11.

Although Carlton did not question PDP before filing its Complaint, it did investigate the link to determine how it was created and whether it had been used to steal Carlton's computer files. *See* Pl. Mem. at 2, 5, 6. Carlton's IT administrator, Guevara, personally conducted an investigation and advised Carlton and Z & R that the PDP Capital Link was purposely created by a PDP employee. *See* Pl. Mem. 2. Carlton then consulted an outside computer forensics expert, Paroff, who confirmed Guevara's finding and reported that the link was capable of transferring the stolen files. *See* Paroff Decl. ¶¶ 6, 7. Finally, Carlton retained Friedberg, another computer forensics expert, who reviewed the allegations against PDP in the Complaint before it was filed and found them to be reasonable. *See* Friedberg Decl. ¶ 4.

In sum, Carlton and Z & R made a substantial and reasonable pre-filing inquiry that gave them a reasonable basis for believing that PDP conspired with the Mission defendants. Accordingly, neither Carlton nor its attorneys violated Rule 11 upon filing the Complaint. *See Macmillian, Inc. v. American Express Co.*, 125 F.R.D. 71, 80 (S.D.N.Y.1989) (Rule 11 sanctions not warranted where counsel conducted reasonable prefiling investigation and had reasonable basis for claims); *see also Wigton v. Rosenthall*, 137 F.R.D. 4, 5 (S.D.N.Y.1991) (prefiling inquiry was not manifestly unreasonable where counsel did not rely solely on client's explanation, but also had independent testimonial support); *Servicemaster Co., L.P. v. FTR Transport, Inc.*, 868 F.Supp. 90, 97 (E.D.Pa.1994) (Rule 11 motion denied where two experts supported plaintiff's view of the facts); *Wagner v. Allied Chem. Corp.*, 623 F.Supp. 1407, 1411–12 (D.Md.1985) (prefiling inquiry, which included consultation with expert, was sufficient to avert sanctions under Rule 11).

***6** PDP's assertion that Carlton's claims were frivolous because they were "inherently incredible" warrants brief discussion. *First*, PDP argues that it had no incentive to conspire with the Mission defendants since it does not compete within the same industry. PDP's lack of competition with the Mission defendants and Carlton, however, does not make Carlton's allegations against PDP so "incredible" that it was "patently clear that [the claims had] absolutely no chance of success." *Healey*, 947 F.2d at 626. A PDP employee certainly could have conspired with the Mission defendants for a reason other than industry competition, *e.g.*, the Mission defendants may have simply paid a PDP employee to assist in stealing Carlton files.

Second, PDP suggests that Carlton should have discounted its conspiracy theory as illogical since the inclusion of a PDP employee would not have increased the conspiracy's chance of success. PDP's suggestion, however, ignores the fact that the Mission defendants may have had good reason to steal the files through the PDP Capital Link. It is possible, for instance, that the Mission defendants transferred Carlton files through an unrelated third-party (rather than directly using their own computers) in an attempt to cover their tracks. In any event, whatever the Mission defendants' particular motive may have been, it was not objectively unreasonable for Carlton to have concluded that the Mission defendants had *some* reason for utilizing the PDP Capital Link. Considering that the unauthorized link had the capability to transmit Carlton's stolen files to PDP's computer network, Carlton's suspicions of PDP's involvement was justified.

3. Carlton Was Under No Duty to Withdraw Its Claims

PDP contends that Carlton had a "duty to abandon its claims when it [became] clear that they [had] no factual basis." Def. Mem. at 11. PDP asserts that this should have occurred on July 11, 2002, when Matthew Swanson, the administrator of the computer network in the Flagler suite, stated that

the PDP Capital Link "appears to have resulted from an error on PDP's part." Declaration of Matthew Swanson in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Swanson Decl.") ¶ 6. Swanson stated that while the link provided Carlton with access to PDP's computers, it did not permit PDP's computer to access Carlton's network. *See id.* Furthermore, Swanson testified that the PDP Capital Link did not only appear on Carlton's computer, but rather appeared on the network of every tenant in the Flagler Suite. *See id.* PDP claims that Swanson's statements "eliminated the possibility of a factual basis for the claims against PDP" since "[i]t defies belief that PDP would open its business files to all its co-tenants in order to accomplish a data transfer that could just as easily be done directly from Carlton's computer to Mission Capital's." Def. Mem. at 11.

It is well established that "Rule 11 does not impose a continuing obligation on the presenter to update, correct or withdraw any pleading, written motion or other paper which, when presented, satisfies the requirements of the Rule." Joseph, *Sanctions* 125 (citing *Edwards v. General Motors Corp.*, 153 F.3d 242, 245 (5th Cir.1998)); *see also Mareno v. Jet Aviation of America, Inc.*, 970 F.2d 1126, 1128 (2d Cir.1992) ("Rule 11 deals exclusively with the certification flowing from the signature to a pleading, motion, or other paper in a law suit, and imposes no continuing duty on the parties or their attorneys.") (internal quotation marks and citations omitted). However, Rule 11 sanctions are appropriate where an attorney or party declines to withdraw a claim "upon an express request by his or her adversary after learning that [the claim] was groundless." *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1472 (2d Cir.1988), *rev'd. in part on other grounds*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).

***7** PDP argues that Swanson's testimony demonstrates that Carlton's allegations were groundless. Furthermore, PDP expressly requested that Carlton dismiss its claims against PDP after Carlton had learned of Swanson's testimony: "Unless your clients are willing to dismiss PDP and Ms. Schurter ... PDP will file the Rule 11 motion and seek appropriate relief including fees and costs." PDP Letter at 1–2.

Swanson's testimony, however, did not eliminate the factual basis for Carlton's claims. His determination that the PDP Capital Link allowed only one-way access from Carlton's network to PDP's computers is not inconsistent with Carlton's conspiracy theory. Carlton alleged that the Mission defendants transferred Carlton files to PDP's computers, and then forwarded those files to the Mission computers. *See* Compl. ¶¶ 139, 140. It is entirely possible that the Mission defendants transferred the files to the PDP computer from Carlton's network before resigning on April 25, 2002. As such, Swanson's testimony did little to contest Carlton's justified belief that PDP conspired with the Mission defendants.

In addition, Swanson's statement that PDP accidentally created the PDP Capital Link was mere speculation, as he offered no factual support for his determination. Rather, Swanson inferred that the link was the result of a mistake simply because the link appeared on all of the Flagler Suite computers. *See* Swanson Decl. ¶ 6. Swanson's inference directly contradicts the opinions of Carlton's IT administrator and computer expert, who specifically found that the link had been purposefully created by a PDP employee. At most, Swanson's testimony establishes that a question of fact existed as to whether the link had been created deliberately. It did not, therefore, irrefutably demonstrate that Carlton's claims had no merit.

When considering a Rule 11 motion, all doubts must be resolved in favor of the signer of the pleading. *See Rodick*, 1 F.3d at 1350. Accordingly, even considering Swanson's testimony, Carlton's claims were well-supported by Carlton's experts. Because Carlton was under no obligation to dismiss its claims after the Complaint was filed, PDP's motion for sanctions pursuant to Rule 11 is denied.

B. Carlton's Request for Attorney's Fees

[3] A party may seek reimbursement of its reasonable expenses and attorney's fees incurred in opposing a frivolous Rule 11 motion without filing a cross-motion. *See* Fed.R.Civ.P. 11(c)(1)(A) ("[i]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in ... opposing the motion"); Fed.R.Civ.P. 11, Advisory Committee Note to 1993 Amendments ("service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11 ... reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion").

***8** "Requests for sanctions pursuant to Rule 11 'seek court orders and are, therefore, subject to the same Rule 11 analysis as all other motions." ' *Bonacci v. Lone Star Int'l Energy, Inc.*, No. 98 Civ. 0634, 1999 WL 76942, at *3 (S.D.N.Y.

Feb. 16, 1999) (quoting *Nakash v. U.S. Dept. Of Justice*, 708 F.Supp. 1354, 1368 (S.D.N.Y.1988)). In determining whether requests for sanctions constitute independent violations of Rule 11, courts must determine whether at the time the request was signed a competent attorney would have concluded that it "was destined to fail." *Eastway*, 762 F.2d at 254; *see also Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir.1986). If this is the case, then pursuing sanctions itself constitutes a violation of Rule 11, mandating the imposition of sanctions. *See Eastway*, 762 F.2d at 254 n. 7.

1. PDP's Request for Sanctions Was Not Frivolous

While Carlton's allegations against PDP were reasonable and did not violate Rule 11, I decline to find that PDP's request for sanctions was "destined to fail." *Id.* Carlton's evidence implicating PDP in the conspiracy was far from overwhelming. Carlton relied heavily on circumstantial evidence when drafting the Complaint and failed to uncover any information which directly indicated PDP's involvement. As such, Carlton's slim evidentiary support, although sufficient to withstand Rule 11 sanctions, did not make it manifestly unreasonable for PDP to question the propriety of Carlton's claims. Accordingly, Carlton's request for sanctions is denied.

IV. CONCLUSION

For the reasons stated above, PDP's motion for sanctions pursuant to Rule 11 is denied. Furthermore, Carlton's request that PDP reimburse it for the legal fees it incurred in defending this motion is also denied. The Clerk of the Court is directed to close this motion [docket number 60].

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