United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy No. 00 B 37405

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Judge: John H. Squires

Appearance of Counsel:

Attorneys for Trustee: Terence G. Banich, Esq. and Mark L. Radtke, Esq.

Attorneys for National Association for the Exchange of Industrial Resouces, Inc.:
Fred C. Prillaman, Esq. and Patrick D. Shaw, Esq.

Trustee: Alex D. Moglia, Esq.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Bankruptcy No. 00 B 37405
	)	Chapter 7
OUTBOARD MARINE CORPORATION,	)	Judge John H. Squires
et al.,	)	
	)	
Debtors.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Alex D. Moglia, not personally but as Chapter 7 trustee (the "Trustee") for Outboard Marine Corporation ("OMC") and its related debtor entities (the "Debtors") for sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. § 1927 against National Association for the Exchange of Industrial Resources, Inc. ("NAEIR") and its counsel, Fred C. Prillaman ("Prillaman"), Patrick D. Shaw ("Shaw") and the law firm of Mohan, Alewelt, Prillaman & Adami (collectively, "Counsel"). For the reasons set forth herein, the Court grants the Trustee's motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

On December 22, 2000 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code which were jointly administered in case number

00 B 37405 (the "Bankruptcy Case"). (Tr. Motion ¶ 1.) On August 20, 2001, the Bankruptcy Case was converted to a Chapter 7 case. (*Id.* at ¶ 2.) The Trustee was appointed as the Chapter 7 trustee. (*Id.*) On March 4, 2003, the Bankruptcy Cases were substantively consolidated. (*Id.* at ¶ 3.)

The Trustee filed an adversary proceeding in 2004 entitled *Moglia v. U.S. Envtl. Prot. Agency et al.*, 03 A 4469, which was subsequently settled by compromise with NAEIR, among other parties, with what was termed the "Liberty Settlement Proceeds." In April 2006, Shaw, on behalf of NAEIR, executed a stipulation and mutual releases (the "Stipulation") which provided that NAEIR had

> (a) an allowed, nonpriority, general unsecured claim in the amount of $1,300,000 for purposes of determining the pro rata share of the Liberty Settlement Proceeds (as that term is defined in the Compromise Order and related motion), which is equivalent to a cash distribution of $81,807.89 (the "Liberty Distribution"); plus (b) an allowed, nonpriority, general unsecured claim in the amount of $1,218,192.11 to be paid pro rata from the general funds of the OMC estate in the same time and manner as similarly situated creditors . . . .

(*Id.*, Ex. A.) The Stipulation released each of the parties:

> from and against <u>all</u> manner of <u>actions</u>, causes of action, suits, debts, accounts, promises, warranties, damages and consequential damages, demands, agreements, bonds, bills, specialties, covenants, controversies, variances, trespasses, judgments, executions, costs, expenses, <u>and claims whatsoever</u>, in law or equity<u>, whether presently known or whether presently not known</u>, arising out of, under, or <u>related to OMC, the Bankruptcy Case, and/or the Adversary</u> . . . <u>which any</u> of the [parties] <u>now</u> has or ever had, or <u>hereafter</u> can, shall, or <u>may have</u> for, upon, or <u>by reason of any matter</u>, cause or thing whatsoever, on or at any time

> prior to the date of these presents, it being the intention and desire of each of the [parties] to reserve nothing whatsoever hereunder and to assure each and every one of the [parties] their peace and freedom from all Claims.

(*Id.*) (emphasis added).

The Stipulation specifically referenced an order in a related adversary proceeding (the "Compromise Order"), stating that "subject to the terms of the [Compromise Order] . . . which by express reference is incorporated herein, each of the Parties agrees as follows . . . ." (*Id.*) The Compromise Order stated that "[t]he Trustee is authorized to take such further actions and execute such documents as may be necessary to document the Proposed Compromises as set forth in the Motion." (NAEIR Objection, Ex. B.)

The Trustee was involved in other litigation with a number of insurance companies over coverage issues relating to certain general liability policies owned by the Debtors (the "ACE GL Policies"). This litigation was settled in a sale of the policies to ACE American Insurance Company ("ACE"). On December 16, 2010, this Court approved a settlement between the Trustee and ACE pursuant to 11 U.S.C. § 363(b) of the ACE GL Policies ACE had issued to OMC prior the Petition Date. (Docket No. 4750.)[1] The consideration for the sale was $415,000 which ACE paid to the Trustee free and clear of any liens, claims, encumbrances, obligations, and/or interests pursuant to 11 U.S.C. § 363(f). (Tr. Motion ¶ 8.)

The Trustee provided notice of the proposed sale by mail and publication on November 23, 2010. (*Id.*, Ex. B.) The notice provided that by December 14, 2010, "any person or entity that has a Known Claim, must file with the Bankruptcy Court and serve an appropriate statement

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[1] The Court takes judicial notice of the docket in this Bankruptcy Case. *See In re Salem*, 465 F.3d 767, 771 (7th Cir. 2006) (taking judicial notice of dockets and opinions).

of interest . . . that explains in detail the basis for such claim against or interest in the [ACE GL Policies] and provides all appropriate supporting documentation." (*Id.*)

On December 14, 2010, NAEIR filed a statement of interest ("Statement of Interest"). (Docket No. 4746.) The Statement of Interest explained that pursuant to a final order of the Court, it had an environmental claim of $1,300,000 in a prior adversary proceeding and the Compromise Order from the same adversary proceeding left it with a $1,218,192.11 nonpriority, general unsecured claim. (*Id.*) The Statement of Interest asserted a claim in excess of $1 million in the ACE GL Policies. (*Id.*) Both Prillaman and Shaw signed the Statement of Interest.

On January 26, 2011, the Trustee's counsel contacted Shaw to inform him that the release contained in the above Stipulation in this prior litigation barred NAEIR's claim as set forth in the Statement of Interest, and the Trustee's counsel requested that NAEIR voluntarily withdraw the Statement of Interest. (Tr. Motion ¶ 12.) On February 9, 2011, counsel for the Trustee sent a letter to Shaw again stating that NAEIR had released any and all claims against OMC and ACE and requesting that NAEIR return a signed acknowledgment that it was withdrawing its Statement of Interest and cautioning Shaw that failure to do so may result in sanctions against Counsel and NAEIR. (*Id.* at ¶ 13.)

Shaw delivered a letter by facsimile and mail to the Trustee's counsel on February 15, 2011. (*Id.* ¶ 14.) That letter acknowledged receipt of the Trustee's counsel's letter, but refused to withdraw the Statement of Interest. (*Id.*) In a letter dated February 18, 2011, NAEIR was served with a copy of the motion at bar. (*Id.*, Ex. C.) On March 9, 2011, Shaw responded, arguing that the scope of the Stipulation was limited by the Compromise Order and applied only to the Liberty policies (the "Liberty GL Policies"). (*Id.*, Ex. D.) On March 14, 2011, the Trustee

filed this motion for sanctions against NAEIR and its Counsel pursuant to pursuant to Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. § 1927.

III. DISCUSSION

A. Request for Sanctions Under Federal Rule of Bankruptcy Procedure 9011

Bankruptcy Rule 9011 is modeled after Federal Rule of Civil Procedure 11 and is "essentially identical" to Rule 11. *In re Park Place Assocs.*, 118 B.R. 613, 616 (Bankr. N.D. Ill. 1990). Rule 11 was amended in 1993 to add certain notice requirements and these same amendments were later made to Bankruptcy Rule 9011, effective in 1997. Thus, courts look frequently to cases that interpret Rule 11 when construing Bankruptcy Rule 9011. *In re Famisaran*, 224 B.R. 886, 894 (Bankr. N.D. Ill. 1998). Some Rule 11 cases decided prior to the procedural amendment are still applicable today in analyzing Bankruptcy Rule 9011 because the substantive provisions were not altered. *See In re Collins*, 250 B.R. 645, 659 (Bankr. N.D. Ill. 2000); *State Bank of India v. Kaliana (In re Kaliana)*, 207 B.R. 597, 601 (Bankr. N.D. Ill. 1997).

The goal of the sanctions remedy provided under Bankruptcy Rule 9011 is to deter unnecessary complaints and other filings. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987). The Rule is not intended to function as a fee-shifting statute that would require the losing party to pay fees and costs. *Kaliana*, 207 B.R. at 601 (*citing Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) ("Rule 11 is not a fee-shifting statute in the sense that the loser pays.")). Thus, the Rule focuses on the conduct of the parties and not the results of the litigation. "Rule 11 sanctions are only to be granted sparingly, and should not be imposed lightly." *Lefkovitz v. Wagner*, 219 F.R.D. 592, 592-93 (N.D. Ill. 2004)

(citation omitted).

Bankruptcy Rule 9011 provides in relevant part as follows:

> (a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. . . .
> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,–
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> > (1) How Initiated.
> >
> > (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the

> motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. . . .
>
> . . .
>
> (2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
>
> . . .
>
> (3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

FED. R. BANKR. P. 9011.

A court may impose sanctions if it finds a violation of any one of the four subdivisions of Bankruptcy Rule 9011(b). *Collins*, 250 B.R. at 661. Bankruptcy Rule 9011 provides that upon presenting in the manner of signing, filing, submitting, or later advocating documents to the court, a party or their counsel represents that to the best of that person's knowledge, information and belief, formed after a reasonable inquiry under the circumstances, such document is not presented (1) for any improper purpose, (2) based upon frivolous legal arguments, (3) without

adequate evidentiary support for its allegations, and (4) without a basis for denials of fact. *See* FED. R. BANKR. P. 9011(b)(1)-(4). "[T]he four subdivisions of Rule 9011(b) fall into two general categories: the 'frivolousness' clauses (or the 'objective component') and the 'improper purpose' clause (or the 'subjective component')." *In re Am. Telecom Corp.*, 319 B.R. 857, 867 (Bankr. N.D. Ill. 2004), *aff'd, Am. Telecom Corp. v. Siemens Info. & Commc'ns Network, Inc.*, No. 04 C 8053, 2005 U.S. Dist. LEXIS 19633 (N.D. Ill. Sept. 7, 2005); *Kaliana*, 207 B.R. at 601.

Bankruptcy Rule 9011(b)(1) prohibits the filing of a pleading for an improper purpose, such as delay, harassment, or causing expense, even if the filing relates to a claim that is otherwise colorable. *Am. Telecom*, 319 B.R. at 867. Bankruptcy Rule 9011(b)(2)-(4) requires a party's attorney to perform a reasonable preliminary investigation of the facts and the applicable law before filing a paper in federal court. *Id.*

The "improper purpose clause," under Bankruptcy Rule 9011(b)(1) is directed at abusive litigation practices and encompasses papers filed to cause unnecessary delay, to increase litigation costs, or filed to harass. *Troost v. Kitchin (In re Kitchin)*, 327 B.R. 337, 366 (Bankr. N.D. Ill. 2005); *Am. Telecom*, 319 B.R. at 872. In order to determine whether a paper was interposed for any improper purpose, a court must look to "objectively ascertainable circumstances that support an inference" that the non-movant's purpose for filing a paper was improper within the meaning of Bankruptcy Rule 9011(b)(1). *Collins*, 250 B.R. at 662. "A paper interposed for any improper purpose is sanctionable whether or not it is supported by the facts and the law, and no matter how careful the pre-filing investigation." *Kitchin*, 327 B.R. at 366.

With respect to the "frivolousness clauses," the relevant inquiry has two prongs: (1) whether the attorney made a reasonable inquiry into the facts and (2) whether the attorney made a reasonable investigation of the law. *Home Sav. Ass'n of Kansas City, F.A. v. Woodstock Assocs. I, Inc. (In re Woodstock Assocs. I, Inc.)*, 121 B.R. 238, 242 (Bankr. N.D. Ill. 1990). "The legal papers an attorney files in any case must be grounded in both a nonfrivolous legal theory and well-founded factual contentions and/or denials that, at a minimum, have a reasonable possibility of having evidentiary support after further investigation and discovery." *Am. Telecom*, 319 B.R. at 867. Good faith alone is not enough to comply with the frivolousness clauses of Bankruptcy Rule 9011. *Id.* Indeed, "Rule 9011 imposes an affirmative obligation upon counsel to conduct a reasonable inquiry into both the law and the facts before advancing a particular position to the court." *In re Martin*, 350 B.R. 812, 817 (Bankr. N.D. Ind. 2006).

In making the determination of whether a reasonable inquiry was made with respect to the facts of a case, courts must consider five factors: (1) whether the signer of the document had sufficient time for investigation; (2) the extent to which the attorney had to rely on the client for the factual foundation underlying the pleading; (3) whether the case was accepted from another attorney; (4) the complexity of the facts and the attorney's ability to perform a sufficient pre-filing investigation; and (5) whether discovery would have been beneficial to the development of the underlying facts. *Woodstock*, 121 B.R. at 242. In sum, the investigation of the facts must have been reasonable under the particular circumstances of the case. *In re Excello Press, Inc.*, 967 F.2d 1109, 1112-13 (7th Cir. 1992) (citation omitted). A pleading is well grounded in fact if it has some reasonable basis in fact. *Woodstock*, 121 B.R. at 242. On the other hand, a pleading is not well-grounded in fact if it is contradicted by uncontroverted evidence that was or

should have been known by the attorney signing the document. *Id.* Nonetheless, the Rule does not require investigation to the point of absolute certainty. *Kaliana*, 207 B.R. at 601.

Under Bankruptcy Rule 9011(c)(1), "sanctions proceedings may be initiated in two ways, by motion or at the initiative of the trial court." *Divane v. Krull Elec. Co., Inc.*, 200 F.3d 1020, 1025 (7th Cir. 1999). When sanctions are requested upon a party's motion pursuant to Bankruptcy Rule 9011(c)(1)(A), two requirements must be met: (1) the motion must be made separate and apart from other motions or requests and "[must] describe the specific conduct alleged to violate subdivision (b)[,]" and (2) "the motion may not be presented to the court unless, within twenty-one days of service, the non-movant has not withdrawn or corrected the challenged behavior." *Id.* The separate motion requirement prevents the sanctions request "'from being tacked onto or buried in motions on the merits, such as motions to dismiss or for summary judgment.'" *Kitchin*, 327 B.R. at 362 (*quoting Ridder v. Springfield*, 109 F.3d 288, 294 n.7 (6th Cir. 1997)). Here, the Trustee seeks sanctions under Bankruptcy Rule 9011 and 28 U.S.C. § 1927 by way of separate motion. Thus, the Court finds that the "separateness" requirement under Bankruptcy Rule 9011(c)(1)(A) has been met. *See Kitchin*, 327 B.R. at 362-63.

If a court sanctions by motion without adhering to the twenty-one day safe harbor it abuses its discretion. *Divane*, 200 F.3d at 1025 (*citing Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 150-51 (7th Cir. 1996)). The "safe harbor" provision in Bankruptcy Rule 9011(c)(1)(A) is a mandatory procedural prerequisite and sanctions imposed without compliance are improper. *In re McNichols*, 258 B.R. 892, 902-03 (Bankr. N.D. Ill. 2001). "The purpose of the safe harbor provision is to give the offending party the opportunity, within twenty-one days after service of the motions for sanctions, to withdraw the offending pleading and thereby escape sanctions."

Kitchin, 327 B.R. at 359-60 (citation omitted). This provision "serves the laudable purpose of requiring litigants to dispose of frivolous claims without judicial involvement." *Id.* at 361. Rule 11(c) was designed to ensure due process and give the potentially offending party a "full and fair opportunity to respond and show cause before sanctions are imposed." *Divane*, 200 F.3d at 1025. The Court finds that this motion complies with the safe harbor provision. The Trustee's counsel demonstrated that he sent a copy of the motion to Counsel by U.S. mail and electronic mail on February 18, 2011, and filed this motion on March 14, 2011, more than twenty-one days after serving Counsel with the motion.

The Trustee argues that the Statement of Interest filed by Counsel on behalf of NAEIR warrants sanctions under Rule 9011 because the Stipulation released any right NAEIR had to assert a claim against the proceeds of the ACE GL Policies and, as such, the Statement of Interest is not reasonably based in law or fact. Specifically, the Trustee proceeds under subsections (b)(2) and (b)(3) of Rule 9011 which encompass frivolous legal arguments and inadequate evidentiary support for allegations. *See* FED. R. BANKR. P. 9011(b)(2)-(3). The real issue at bar is not one of fact, it is one of law–the proper interpretation of the Stipulation and the release contained therein. A distinction must be drawn between factual allegations and legal conclusions. The Trustee does not dispute any factual allegations, but only the legal conclusion to be drawn from the facts. Therefore, the Court will only address subsection (b)(2) of Rule 9011.

NAEIR argues that the Stipulation was limited to the Liberty GL Policies by the Compromise Order which was incorporated by reference and that the Stipulation did not apply to subsequent assets identified by the Trustee for sale. On these bases, NAEIR contends that sanctions are inappropriate because the Trustee has failed to demonstrate that the Statement of

Interest had no basis in law or fact. NAEIR argues that a release cannot be extended to cover claims that may arise in the future. *See Feltmeier v. Feltmeier*, 798 N.E.2d 75, 89-90 (Ill. 2003). The Court notes that NAEIR does not argue that the Stipulation did not release its interest in the ACE GL Policies because it could not have discovered its interest upon a reasonable inquiry.

Courts apply contract law in interpreting release provisions. *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667 (Ill. 1991.) "The intention of the parties to contract must be determined from the instrument itself, and construction of the instrument, where no ambiguity exists is a matter of law." *Id.* Ambiguity exists if it is capable of being understood in more than one sense. *Id.* If a contract is ambiguous, its interpretation becomes a question of fact and parol evidence is admissible to ascertain the parties' intent. *Id.*

The salient issue is whether the parties intended for NAEIR to release its right in any future insurance policies to be offered for sale. The language used in the Stipulation's release is very broad, releasing NAEIR and the Trustee and OMC as well as their agents, including insurers, from all claims and causes of action arising out of or related to the Bankruptcy Case. However, NAEIR did not release its entire claim in the Bankruptcy Case. The Stipulation provided that NAEIR would, after the distribution from the Liberty GL Policies, have an allowed, nonpriority, general unsecured claim in the amount $1,218,192.11. NAEIR acknowledges in its Statement of Interest that it has received two interim distributions as a holder of an allowed unsecured claim: $62,127.80 in April of 2006 and $109,637.29 in November of 2008. (Docket No. 4746.) Nonpriority, general unsecured claimants do not typically have an interest in the proceeds of an insurance policy buy-back agreement; one must have suffered the type of injury covered by the insurance policy. *See* 215 ILL. COMP. STAT. 5/388 (2008); *In re Allied Prods.*

Corp., 03 C 1361, 2004 WL 635212, at *3, *6-7 (N.D. Ill. Mar. 31, 2004.) Based on the plain language of the Stipulation quoted above, NAEIR released any interest it might have had in any insurance policies to be sold in the future and, instead, has a nonpriority, general unsecured claim which has no rights in the ACE GL Policies.

It is likewise clear from the Compromise Motion that future insurance policies were contemplated by the Stipulation. The Stipulation incorporated the Compromise Order which granted the Compromise Motion in full. The Compromise Motion sought to "resolve the issues for each of [the defendants'] respective Environmental Claims (the 'Remaining Claims')." (NAEIR Objection, Ex. A at p. 5.) It explained that the "Environmental Claims" were "certain claims asserted in OMC's bankruptcy case relating to alleged violations of federal, state, or international environmental laws . . . ." (*Id.* at p. 3.) Clearly the claims sought to be addressed were the creditors' bankruptcy claims, not simply a claim against the Liberty GL Policies. Thus, the Compromise Motion and Compromise Order did not simply resolve issues with respect to the Liberty GL Policies; they set forth the rights of the parties going forward.

NAEIR argues that one cannot release claims that may arise in the future, citing *Feltmeier*. NAEIR's situation is distinguishable from *Feltmeier*. In that case, a woman had sued her ex-husband for intentional infliction of emotional distress, but the ex-husband argued that she released him from liability pursuant to their marital settlement agreement. *Feltmeier*, 798 N.E.2d at 89. The Illinois Supreme Court found that the woman's cause of action did not accrue until almost two years after the agreement was executed. *Id.* As such, that claim was not within the contemplation of the parties and the release did not apply. *Id.* at 89-90. NAEIR fails to understand that any interest it may have had in the ACE GL Policies was not a claim that might

have arisen in the future. It was based upon its original environmental claim, not a new cause of action.

NAEIR's argument that it has a cognizable claim in the ACE GL Policies is unpersuasive. NAEIR argues that "[w]hatever the scope of the release from the first insurance buyback, it does not purport to release liens and interests in any property later identified by the Trustee as appropriate for a Section 363 sale." (NAEIR Objection at p. 6.) On the contrary, that is precisely what the broad release language in the Stipulation provides. The Stipulation released any claim or interest NAEIR may have had against the Trustee and OMC and any of its agents, including its insurers, except for its $1,218,192.11 nonpriority, general unsecured claim against the bankruptcy estate.

The Court must determine whether NAEIR's failure to withdraw the Statement of Interest warrants sanctions under Rule 9011. As mentioned previously, the Court will address this under Rule 9011(b)(2). The relevant inquiry asks whether NAEIR's filing of the Statement of Interest reflects a reasonable investigation of the law by Counsel. The Court finds that it does not. The Statement of Interest itself made a distinction between NAEIR's current claim and the claim it had with respect to the Liberty GL Policies. It explained that the Compromise Order allowed "an environmental claim of $1,300,000, for which it received $81,807.89 upon distribution of the proceeds of the insurance settlement, and the difference of $1,218,192.11, was allowed as a nonpriority, general unsecured claim." (Docket No. 4746.) NAEIR cites *Allied Products* which is inapplicable to the issue in this case. *Allied Products* did not involve a release, but only addressed the issue of whether an environmental claimant has an interest in insurance policies of the debtor, which typically it does. *See Allied Prods.*, 2004 WL 635212 at *3, *6-7. NAEIR

fails to acknowledge that the Stipulation provided that NAEIR would be treated as a general unsecured claimant and paid in the same manner as all other general unsecured claimants. The Trustee's counsel repeatedly pointed out the scope of the release in the Stipulation and Counsel failed to heed that advice. As such, the Court finds that the Statement of Interest violates Rule 9011(b)(2) and its failure to be withdrawn warrants sanctions.

The Court must now decide what sanctions are appropriate. The imposition of sanctions is discretionary rather than mandatory. *In re Generes*, 69 F.3d 821, 827 (7th Cir. 1995). The Court may impose a variety of sanctions including fines payable to the clerk of the court, an award of attorneys' fees of the moving party, disgorgement of fees paid to the sanctioned attorney, an injunction prohibiting specific types of future filings, mandatory legal education, referrals to disciplinary bodies, stricken pleadings, and reprimands on and off the record. *Am. Telecom*, 319 B.R. at 873. In determining the appropriate sanction, a court may consider Rule 9011's multiple purposes of punishment, deterrence, and compensation; the severity of the violation; any resultant delay; and a sanctioned party's ability to pay the sanctions. *Id.* The Trustee requests that NAEIR and Counsel be sanctioned, but he does not request any specific sanctions, such as attorneys' fees. "The Court cannot award damages, costs or fees where none [has] been clearly proven." *In re Alberto*, 119 B.R. 985, 995 (Bankr. N.D. Ill. 1990). The Court, therefore, declines to impose attorneys' fees.

The Court finds that based on the evidence before it and the purposes of Rule 9011, Counsel and NAEIR violated Rule 9011. The Court orders that the Statement of Interest shall be stricken because it is based upon a frivolous legal argument.

B. Request for Sanctions Under 28 U.S.C. § 1927

Next, the Trustee seeks sanctions against Counsel pursuant to 28 U.S.C. § 1927, which provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

Attorneys can be sanctioned under § 1927 if they unreasonably and vexatiously multiply proceedings in any case. *Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of the Fox Masonry & Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998); *In re Volpert*, 110 F.3d 494, 500-01 (7th Cir. 1997). The Seventh Circuit Court of Appeals has held that a bankruptcy judge can sanction an attorney under the authority of 28 U.S.C. § 1927. *Adair v. Sherman*, 230 F.3d 890, 895 n.8 (7th Cir. 2000).

The purpose of § 1927 "'is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them.'" *Riddle & Assocs., P.C. v. Kelly*, 414 F.3d 832, 835 (7th Cir. 2005) (*quoting Kapco Mfg. Co. v. C & O Enters., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989)). Either subjective or objective bad faith is a prerequisite for awarding sanctions under this section. *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 614 (7th Cir. 2006). "Subjective bad faith, the more difficult type of bad faith to prove, is not always necessary. Subjective bad faith must be shown only if the conduct under consideration had an objectively colorable basis." *Id.* (citations omitted) The standard for objective bad faith, on the other hand, "does not require a finding of malice or ill will; reckless indifference to the law will

qualify." *Id.* A court has discretion to impose § 1927 sanctions

> when an attorney has acted in an "objectively unreasonable manner" by engaging in "serious and studied disregard for the orderly process of justice," pursued a claim that is "without a plausible legal or factual basis and lacking in justification," or "pursue[d] a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound[.]"

The Jolly Group, Ltd. v. Medline Indus., Inc., 435 F.3d 717, 720 (7th Cir. 2006) (*quoting Kapco Mfg.*, 886 F.2d at 1491) (citations omitted).

Based on the discussion with respect to Rule 9011, Counsel should have known that the filing of the Statement of Interest had no basis in law. The Stipulation clearly left NAEIR with only a nonpriority, general unsecured claim and released any claim it might have had against any of OMC's other insurance policies. Counsel appeared to recognize the distinction between the claim NAEIR currently holds as a result of the Stipulation and the claim it had previously when it acknowledged that it now holds a nonpriority, general unsecured claim. Counsel executed the Stipulation on behalf of NAEIR and had ample opportunity to recognize that its legal basis was unsound, including several attempts by the Trustee's counsel to bring that to the attention of Counsel. Given the information before it, a reasonable attorney would not have pursued the same course of action. The Court finds that Counsel acted in an objectively unreasonable manner and sanctions are appropriate.

However, as explained above, the Court will not award attorneys' fees, costs, or expenses as the Trustee's counsel has not provided the Court with any evidence of what has been incurred.

Therefore, the Court finds that the sanctions found pursuant to Rule 9011 are sufficient to address the Trustee's concerns under § 1927.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Trustee's motion for sanctions for the legally frivolous pleading and strikes the Statement of Interest.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rules of Bankruptcy Procedure 5003 and 9021.

ENTERED:

DATE: ________________

____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List