STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 17, 2014)

A. RALPH MOLLIS, in his official capacity as Rhode Island Secretary of State, and not in his individual capacity	:	
V.	:	**C.A. No. PM 14-3703**
MICHAEL D. CORSO	:	

DECISION

PROCACCINI, J. United States Supreme Court Justice Felix Frankfurter once observed that: "Litigation is the pursuit of practical ends, not a game of chess."[1] The matter now before the Court requires it to decide whether or not this is an appropriate case in which to impose Super. R. Civ. P. 11 (Rule 11) sanctions; it must decide if Attorney Mark Welch (Attorney Welch) and his client A. Ralph Mollis (collectively, the Petitioners) properly used the Court to pursue practical ends when they subjected it to a rushed, poorly conceived filing which they ultimately abandoned without explanation.

On July 25, 2014, Attorney Welch, on behalf of Secretary Mollis, filed a Miscellaneous Petition for Perpetuation of Testimony & Preservation of Documents and/or Items (the Petition)—according to the Petitioners, the Petition was filed in accordance with Super. R. Civ. P. 27(a) (Rule 27(a)) and G.L. 1956 § 9-18-12. However, despite that, the Petition was voluntarily dismissed by the Petitioners on August 25, 2014. Accordingly, the Court does not address the merits of the Petition itself but rather the

[1] City of Indianapolis v. Chase Nat'l Bank of City of New York, 314 U.S. 63, 69 (1941).

conduct of the Petitioners in the filing of the Petition and whether that conduct merits sanctions.[2] Jurisdiction is pursuant to § 9-29-21 and Rule 11.[3]

I

Facts and Travel

The facts in the instant case are largely not in dispute. Mr. Mollis is currently serving as the Rhode Island Secretary of State (hereinafter Secretary Mollis) and was acting in that capacity during the events forming the basis of this action. Importantly, during the period at issue in this case, Secretary Mollis was also a candidate in the democratic primary for Rhode Island Lieutenant Governor—a primary he eventually lost on September 9, 2014.

Pursuant to G.L. 1956 § 22-10-10, the Secretary of State is empowered and required to:

> "(2) Develop one register for legislative lobbyists and one register for limited-activity lobbyists . . . (5) Prepare and publish a manual for all persons, corporations, or associations that engage any person as a lobbyist and for all lobbyists that sets forth the requirements of this chapter . . . (6) Ascertain whether any person, corporation, association, or lobbyist has failed to register or file reports or has filed an incomplete or inaccurate report; and the secretary may, for good cause shown, extend the dates upon which reports are required to be filed[] [and] (7) Conduct investigations and/or hearings relative to alleged violations of this chapter . . . on his or her own initiative . . . Upon completion of the investigation, if the

[2] Sanctions must be considered against both Secretary Mollis and Attorney Welch. See 61A Am. Jur. 2d Pleadings § 588 at 589-90 (2010) (stating that apportioning Rule 11 sanctions jointly and severally between the client and the attorney may, at times, be appropriate and that determination is left to the court's discretion).

[3] See also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393-96 (1990) (stating that a district court retains jurisdiction for the purpose of imposing sanctions under Rule 11 even after an action has been voluntarily dismissed); accord Burns v. Moorland Farm Condo. Ass'n, 86 A.3d 354, 360 (R.I. 2014).

> secretary of state has reason to believe that a violation has occurred, the secretary may convene a hearing for the purpose of taking evidence and receiving testimony regarding the alleged violation. At this hearing, the person alleged to have committed the violation shall be afforded the opportunity to present evidence and offer testimony in his or her defense. Upon completion of the hearing, if the secretary of state determines by a preponderance of the evidence that a violation has occurred, the secretary shall order the lobbyist or person engaging a lobbyist to file any report or amended report that is necessary to immediately correct the violation. If the secretary determines by clear and convincing evidence that the violation was intentional and that the violator failed to comply when given notice of the deficiency, then he or she may impose an administrative penalty as provided in § 22-10-11(a). Any determination and/or administrative penalty imposed by the secretary of state may be appealed by the aggrieved party to superior court pursuant to the provisions of chapter 35 of title 42. If the secretary of state determines that the nature of the violation was of such seriousness and willfulness as to warrant a criminal complaint, he or she may refer the violation to the attorney general for prosecution as provided for in § 22-10-11(b)." See also G.L. 1956 § 42-139-7.

According to Michael D. Corso (Mr. Corso or the Respondent), the issues involved in this case began when Secretary Mollis was "interrogated by a television news reporter" with respect to why he, as Secretary of State, had taken no action concerning potential unauthorized lobbying that may have taken place with respect to the now-infamous 38 Studios matter.[4] Soon thereafter, on May 14, 2014, the Secretary of State's office sent a letter to Mr. Corso stating that "[t]hrough various media sources, it has come to the attention of our office that you may have failed to both register as a lobbyist and file several required lobbyist reporting forms" in connection with Mr. Corso's role in the

[4] See Respondent's Opposition to Miscellaneous Petition for Perpetuation of Testimony & Preservation of Documents and/or Items 2.

38 Studios matter. (Ex. 2—May 14, 2014 Letter to Mr. Corso.)[5] The letter further stated that Mr. Corso had engaged in lobbying in violation of state law and that if his actions were found to be intentional after an administrative hearing he could be fined or the matter could be referred to the Attorney General for criminal prosecution. Id. On June 2, 2014, Mr. Corso's counsel responded to the letter, questioning its contentions and the evidence on which they were based. (Ex. 10—June 2, 2014 Letter to Attorney Welch.) Subsequently, on June 16, 2014, the Secretary of State's office issued a Notice of Hearing and Appointment of Hearing Officer, ostensibly without conducting any further investigation. (Ex. 3—Notice of Hr'g) A hearing was commenced on July 11, 2014, which Mr. Corso was not required to and did not attend—Mr. Corso's attorney did attend the hearing. Secretary Mollis' counsel offered into evidence a series of documents. Some were admitted by the Hearing Officer but, according to Mr. Corso, others were marked for identification only because they could not be authenticated.[6] The Hearing Officer scheduled the next hearing for July 29, 2014, at which time, Mr. Corso states, the Hearing Officer advised Secretary Mollis' counsel that he should be prepared to authenticate the exhibits which had been marked for identification only. Id. at 8. On July 25, 2014, four days before the scheduled administrative hearing, the instant action was commenced with the filing of the Petition. Thereafter, the Hearing Officer continued the hearing date until August 26, 2014 to allow this Court to hear the Petition.

In the Petition, Secretary Mollis, pursuant to Rule 27(a) and § 9-18-12, sought an order from the Court authorizing him to take the deposition of the "person(s) most

[5] The parties have submitted a Briefing Record, which contains the exhibits referenced herein.

[6] See Respondent's Opposition to Miscellaneous Petition for Perpetuation of Testimony & Preservation of Documents and/or Items 7.

knowledgeable at The Providence Journal . . . , the Keeper of the Records for The Providence Journal Company, Keith D. Stokes, Thomas Zaccagnino, Curtis D. Schilling a/k/a Curt Schilling and Bill Thomas . . . for the purpose of perpetuating" their testimony. (Pet. ¶ 15.) After stating the powers the Secretary of State is granted with regard to overseeing the registration of lobbyists and filing of reports, the Petition then states that the enabling legislation that allows the Secretary of State to conduct investigations "does not provide for a specific procedure for the Secretary of State to acquire testimony from individuals related to the subject matter of the investigative/hearing procedure." Id. at ¶¶ 3-6, 14. It is contended in the Petition that, consequently, the Petitioners came before this Court in order to conduct depositions they deemed "necessary and indispensable" to the administrative hearing regarding the possible unauthorized lobbying of Mr. Corso. Id. at ¶ 13.

On August 13, 2014, Mr. Corso filed Respondent's Opposition to Miscellaneous Petition for Perpetuation of Testimony & Preservation of Documents and/or Items, (the Initial Opposition) in which he argued that the Petition was without merit and not in conformity with Rule 27(a); consequently, he sought its dismissal with prejudice, and attorney's fees and costs. It was at this time that the Petitioners became aware that there was some possibility of sanctions being sought in the case.[7] This Court scheduled a

[7] Mr. Corso's Initial Opposition did not specifically mention sanctions under Rule 11; he did not specifically request Rule 11 sanctions until he filed his Memorandum in Opposition to Petitioner's Proposed Voluntary Dismissal of Petition on August 29, 2014. However, on August 13, 2014, in his Initial Opposition, he did request attorney's fees and strongly suggested that the Petitioners' actions were extremely inappropriate. Moreover, in his Objection to Motion on Behalf of the Secretary of State for a Continuance of the July 29, 2[01]4 Hearing Date filed with the Hearing Officer on July 28, 2014, the Respondent stated that he considered the Petition to be frivolous and a violation of the rules of professional conduct. (Ex. 13 ¶ 11.) In an email to this Court on August 25,

hearing for September 3, 2014 and instructed Petitioners to respond to the Respondent's Initial Opposition by August 25, 2014. However, on August 25, 2014, the Petitioners voluntarily dismissed the suit pursuant to Super. R. Civ. P. 41(a)(1) (Rule 41(a)(1)).[8] The Respondent opposed the voluntary dismissal and contended that the Petition was filed deliberately, with bad faith and for an improper purpose, and therefore, was a violation of Rule 11.

On the next day, the scheduled administrative hearing took place. At the August 26, 2014 hearing, the Hearing Officer admitted the previously challenged documents entered for identification only into evidence as full exhibits without authentication, closed the hearing, and eventually found in favor of Secretary Mollis on September 18, 2014. (Ex. 15—Submission by Resp't at the Close of Evidence and Req. for Adjudication of No Violation ¶ 17; Ex. 42—Decision and Recommendation of Hearing Officer.) It is worth noting that the resolution of the administrative matter was effectuated without the

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2014, on which the Petitioners were also included, the Respondent stated that he was alleging a violation of Rule 11 when he filed his Initial Opposition to the Petition. (Ex. 37—Email Correspondence.)

The Petitioners themselves recognized in an email to this Court on August 26, 2014 that the Respondent's Initial Opposition to the Petition made "passing reference" to a Rule 11 violation. (Ex. 38—Email Correspondence.) They reiterated that fact at a September 3, 2014 hearing before this Court; the attorney for Petitioners stated that Mr. Corso's Initial Opposition to the Petition "references…alleged violations of Rule 11." (Ex. 41—Hr'g Tr. 10, Sept. 3, 2014.) Therefore, it is clear to this Court that the Petitioners were well aware that sanctions were a possibility before they dismissed the Petition.

[8] Though there has been debate between the parties regarding whether a Rule 41(a)(1) dismissal was appropriate, both parties agree the Petition should be dismissed and this Court continues to have jurisdiction with regard to the imposition of sanctions even after the action has been dismissed. See footnote 3, supra. Therefore, the Court need not get into the issue of whether the Petition was properly dismissed. The fact is that the Petition is dismissed and the only issue before the Court involves whether or not to impose sanctions.

depositions of the individuals sought in this action, despite those depositions being deemed "necessary and indispensable." (Pet. ¶ 13.)

On September 19, 2014, after the voluntary dismissal of this action and the administrative hearing, the parties entered into a Stipulation in order to address Mr. Corso's argument for Rule 11 sanctions; the Court endorsed that Stipulation on the record on December 2, 2014. In the Stipulation, it states that the "proceedings are in the nature of a show cause hearing, at which the Petitioners have the burden to convince the Court that they should not be sanctioned." (Ex. 43—Stipulation ¶ 2a.) The Court deems it important to note that, as the Stipulation recognizes, the Court has made every attempt to give the Petitioners the opportunity not just to file briefs, but to testify, offer any other testimonial evidence or engage in oral argument. Id. at 2b. However, the Petitioners have chosen to rest on their memoranda submitted to the Court and, as such, the Court will make its determination based on those filings. Id. at 2b, 3.

II

Standard of Review

The issue in the instant case is whether or not the Petitioners violated Rule 11 and, if they are found to have violated Rule 11, what sanctions should be imposed. Rule 11 provides, in pertinent part, as follows:

> "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's 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 signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, any 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."

This Court, when faced with a Rule 11 violation, "has the discretionary authority to fashion what it deems to be an 'appropriate' sanction, one that is responsive to the seriousness of the violation under the circumstances and sufficient to deter repetition of the misconduct in question." Lett v. Providence Journal Co., 798 A.2d 355, 368 (R.I. 2002); see also Pleasant Mgmt., LLC v. Carrasco, 918 A.2d 213, 217 (R.I. 2007). The "central purpose of Rule 11 is to deter baseless filings . . . [and] streamline the administration and procedure of the . . . courts." Cooter & Gell, 496 U.S. at 393; see also Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 13(b)(1) at 2-187 (4th ed. 2008). Therefore, any interpretation of Rule 11 "must give effect to the Rule's central goal of deterrence;" it must also remedy the harm caused by the violation. Cooter & Gell, 496 U.S. at 393; Michalopoulos v. C & D Rest., Inc., 847 A.2d 294, 300 (R.I. 2004); see also 61A Am. Jur. 2d Pleadings § 595 at 598 (2010).

A court imposing a sanction under Rule 11 must "describe the conduct determined to constitute a violation of [the] rule and explain the basis for the sanction imposed." Joseph, supra § 17(E)(1)(a),(b) at 2-364 to 2-368 (internal quotation marks omitted). In the instant case, the Stipulation states that the burden is on the Petitioners to

convince the Court why they did not act in violation of Rule 11 and should, consequently, not be subject to sanctions.[9] (Ex. 43—Stipulation ¶ 2a.)

III

Analysis

A

Parties' Arguments

The Petitioners contend that the voluntary dismissal of the Petition comported with Rule 41(a)(1), was consequently filed in good faith, and concluded the proceedings on the merits in this case. They claim in their memorandum that the Petition itself was not filed in bad faith or for an improper purpose and that Mr. Corso's arguments fall "woefully short of what he otherwise must demonstrate to the Court in order to satisfy the unusually high standard established with regard to the imposition of sanctions."

The Petitioners recognize that the Petition was not requesting a conventional use of Rule 27(a) but claim that they were attempting to argue for an extension or modification of the law because of Mr. Corso's failure to participate in the administrative hearing—according to the Petitioners, filing the Petition was also necessary because the Rhode Island General Laws do not give the Secretary of State the power to subpoena witnesses in an administrative hearing. They further aver that even if their Petition would not have prevailed, they did not intentionally or recklessly disregard their obligations to the Court, nor did they intend to harass Mr. Corso or create delay—it is their further

[9] An issue arises in this case regarding who has the burden of proof. The Stipulation provides that the Petitioners have the burden, but there is case law which suggests that the burden rests with the party requesting sanctions, in this case the Respondent. See Georgene M. Vairo, Rule 11 Sanctions § 4.02(a)(2) at 223 (3d ed. 2004). This Court need not decide this issue at this time because it would have reached the same conclusion regardless of where the burden of proof was placed.

contention that the Petition was not filed for an improper purpose or in bad faith. The Petitioners state in their memorandum that "at worst the Petition is a novel and creative approach to unusual or special circumstances that warrants the extension or modification of existing law." Id. at 14.

Finally, the Petitioners claim that the requirement in Rule 27(a) that the perpetuation of testimony must relate to "any matter which may be cognizable in this court" is satisfied by the fact that this Court has jurisdiction over any appeal from the administrative decision of the Hearing Officer. See § 22-10-10(7).

On the other hand, the Respondent posits that Secretary Mollis and Attorney Welch perpetrated a fraud upon the Court. In his memorandum, he states that "[t]he Petition was filed for the improper purpose of securing evidence for a prosecution in an administrative hearing, in a proceeding in which the government officer had performed no investigation, had what he admittedly believed was insufficient evidence, and had begun the proceeding in response to public criticism, during a campaign for election to public office." It is Mr. Corso's contention that the Petition was objectively unreasonable because it had no legal support and was an improper use of Rule 27(a).

He points out that the Petition lacks any information regarding why the testimony was imminently unavailable or in danger of being lost and how that testimony relates to a matter cognizable by the Superior Court. He further rejects the Petitioners' contention that the possibility of a Superior Court appeal from the administrative hearing satisfies Rule 27(a) because that appeal is not an action which the Petitioners have the sole authority to bring. According to Mr. Corso in his memorandum: "This was a calculated and nefarious attempt to subvert and abuse the process of the Superior Court, to interfere

with and obstruct the operation of the judicial system, for the purpose of political gain, carried out by a politically experienced public official, who controlled his own prosecutorial apparatus, in league with a member of the bar who had served as his acolyte for years." Id. at 28-29.

B

Discussion

In Rhode Island, "[t]o comply with the requirements of Rule 11, counsel must make a reasonable inquiry to assure that all pleadings, motions and papers filed with the court are factually well-grounded, legally tenable and not interposed for any improper purpose." Pleasant Mgmt., LLC, 918 A.2d at 218 (internal quotation marks omitted); see also Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). Such improper purposes include harassment, unnecessary delay or driving up the costs of the litigation. Burns v. Moorland Farm Condo. Ass'n, 86 A.3d 354, 361 (R.I. 2014); see also Joseph, supra § 13(b)(2) at 2-189 ("An improper purpose is any purpose other than one to vindicate rights (substantive or procedural) or to put claims of right to a proper test.").

The language of Rhode Island's Rule 11, while not identical, "closely follows" that of the Federal Rules of Civil Procedure Rule 11. Pleasant Mgmt., LLC, 918 A.2d at 218. As our Supreme Court has recognized, the federal courts rejected a requirement of subjective good faith and instead adopted a standard calling for objective "reasonableness under the circumstances." Id. (internal quotation marks omitted); see Cruz v. Savage, 896 F.2d 626, 631 (1st Cir. 1990) ("The appropriate standard for measuring whether a party and his or her attorney has responsibly initiated and/or litigated a cause of action in compliance with Rule 11 . . . is an objective standard of reasonableness under the

circumstances."); see also Lichtenstein v. Consol. Servs. Grp., Inc., 173 F.3d 17, 23 (1st Cir. 1999) ("Whether a litigant breaches his or her duty to conduct a reasonable inquiry into the facts and the law depends on the objective reasonableness of the litigant's conduct under the totality of the circumstances.") (internal quotation marks omitted).[10] Thus, this Court must determine whether Attorney Welch and Secretary Mollis were acting in an objectively reasonable fashion under the totality of the circumstances at the time they filed the Petition in order to determine whether the Petition was filed in good faith and for a proper purpose.

However, courts are advised to "exercise caution" and avoid using the "wisdom of hindsight" when evaluating an attorney's actions; Rule 11 should not be used to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Cruz, 896 F.2d at 631 (internal quotation marks omitted); see also Bermudez v. 1 World Prods., Inc., 209 F.R.D. 287, 290 (D.P.R. 2002) (stating that "[d]istinguishing zeal from frivolity is not an easy task") (internal quotation marks omitted). The First Circuit has helpfully stated, with regard to Rule 11 sanctions, that "[w]hile we eschew the imposition of rigid guidelines for the trial courts in this circumstance-specific area of the law, the judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms." Anderson v. Beatrice Foods, Co., 900 F.2d 388, 395 (1st Cir. 1990). The Court has been mindful of this instruction as it has considered whether or not it is appropriate to issue sanctions in the instant case.

[10] See Crowe Countryside Realty Assocs. v. Novare Eng'rs, Inc., 891 A.2d 838, 840 (R.I. 2006) ("This [C]ourt has stated previously that where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule.") (internal quotation marks omitted).

The inquiry must begin with whether or not the Petition, if it had been decided on the merits, would likely have been deemed appropriate under Rule 27(a) and § 9-18-12. Rule 27 is entitled "Depositions before action or pending appeal;" Rule 27(a) states as follows: "Before Action. The perpetuation of testimony regarding any matter which may be cognizable in this court shall be in accordance with the statutes of this state." Rule 27 "was intended to apply to situations in which testimony might be lost to a prospective litigant unless taken immediately, without having to wait for a lawsuit or other legal proceeding to commence." 23 Am. Jur. 2d Depositions and Discovery § 4 at 309 (2013); see also Robert B. Kent et al., Rhode Island Civil and Appellate Procedure § 27:2 at V-28 (2006) (stating that Rule 27(a) applies to anyone "desirous of perpetuating the testimony of any person concerning any matter that is potentially the subject of litigation"). Section 9-18-12 provides:

> "Any person, desirous of perpetuating the testimony of any witness concerning any matter which is or may be the subject of litigation, as well before as after litigation is commenced, may present a petition in writing to any justice of the supreme or superior or family court, or to any justice of a district court, setting forth the reasons of his or her application, the name of the witness or witnesses, the subject matter of the controversy, and the names of all persons known to be interested therein, and praying that the deposition of the witness or witnesses may be taken; and thereupon if the justice be satisfied of the reasonableness of the petition, he or she shall designate some notary public or standing master in chancery to take the deposition, to whom the petition, with the order of designation thereon, shall be sent."

There is very limited case law in Rhode Island dealing with the provisions of Rule 27(a) and § 9-18-12. In Travelers Ins. Co. v. Hindle, 748 A.2d 256, 261 (R.I. 2000), the Rhode Island Supreme Court stated, with respect to § 9-18-12, that "the plain language of [the

statute] allows for the perpetuation of testimony of witnesses concerning any matter which is or may be the subject of litigation, upon a trial justice's determination concerning the reasonableness of such a petition. We discern nothing in the statute that permits discovery in any way beyond such testimonial parameters or operates as a substitute for discovery." (Internal quotation marks omitted.) Thus, Rule 27(a) and § 9-18-12 were not intended to be used to obtain what would be ascertainable during the traditional discovery process, nor were they intended to obtain facts in order to determine if a claim is viable; rather, they are designed for the situation where testimony, if not preserved, may not be available at a later date. Travelers Ins. Co, 748 A.2d at 261; see In re Zak, No. PM 2003-3992, 2004 WL 144110, at * 3 (R.I. Super. Jan. 8, 2004); see also 23 Am. Jur. 2d Depositions and Discovery § 4 at 310 (2013).

Under the Federal Rules of Civil Procedure, Rule 27(b)(3), the petitioner must show that "the perpetuating of testimony may prevent a failure or delay of justice." The testimony to be perpetuated must be relevant, but, more importantly, it must also be at a "risk of permanent loss." Penn Mut. Life Ins. Co. v. U.S., 68 F.3d 1371, 1374-75 (D.C. Cir. 1995). Similarly to Rhode Island Rule 27(a), Petitioners in federal court, in order to avail themselves of Rule 27, must establish that they expect to bring an action which is cognizable in federal court; as just discussed, they must also show that the testimony would be lost, destroyed or concealed. Ash v. Cort, 512 F.2d 909, 912 (3d Cir. 1975); see Hunt v. Aurora Loan Servs., LLC, No. 11-MC-9085-ST, 2011 WL 2200811, at * 1 (D. Or. June 7, 2011). Courts are most likely to grant petitions under Rule 27 when there are special circumstances which make the preservation of testimony urgent. Tennison v. Henry, 203 F.R.D. 435, 440-41 (N.D. Cal. 2001). Some of those circumstances might

include a witness of advanced age or who is very ill, a witness' imminent departure from the country, or "the possibility the witness will not be willing to testify if discovery is delayed." In re A Certain Investor in EFT Holdings Inc., No. CV 13-0218 UA (SS), 2013 WL 3811807, at *3 (C.D. Cal. July 22, 2013).

It is clear to this Court, as it reasonably would have been to any attorney, that the Petition was not a proper use of Rule 27(a) and § 9-18-12. To begin with, there are no allegations of any kind in the Petition which indicate that the testimony the Petitioners seek to perpetuate was likely to be lost or concealed or for any reason would not be available in a later Superior Court action, if such an action was filed. In Penn Mut. Life Ins. Co., 68 F.3d at 1374-75, the United States Court of Appeals for the District of Columbia Circuit held that allegations that a witness was retired and "with the passage of time, [his] ability . . . to recall relevant facts and testify completely as to these matters may be impaired" was too general and not sufficient to satisfy Rule 27's "requirement that a petitioner demonstrate an immediate need to perpetuate testimony." (Internal quotation marks omitted.) Therefore, it is obvious that, by comparison, the complete lack of any suggestion that the testimony might be lost in the instant case certainly fails to satisfy Rule 27(a) and does so in dramatic style.[11]

[11] The Respondent also points out that the administrative hearing, for which the testimony at issue was sought, was in the form of a "show cause" hearing requiring the Respondent to show cause why he was not in violation of the rules with respect to registered lobbying. (Ex. 42—Decision and Recommendation of Hearing Officer 3.) Therefore, there was in fact no need for Secretary Mollis to present any evidence, authenticated or otherwise. The truth of this observation is found in the Hearing Officer's decision, in which he states that the General Laws "shift[] the burden of proof of the violation to the respondent [(Mr. Corso)] after the initial determination is made by the Secretary of State" that he or she has "reason to believe" a violation has occurred. Id. at 3-4. Thus, the testimony sought in the Petition was not even required for the administrative hearing.

Moreover, Rule 27(a) requires that the testimony be cognizable to an action which may be brought in Superior Court. In the instant case, no such action was even a possibility. Secretary Mollis and Attorney Welch admittedly brought this action for the purpose of obtaining deposition testimony to aid in their administrative hearing against Mr. Corso. If Rule 27(a) and § 9-18-12 cannot be used to obtain facts to determine if a cause of action exists or to conduct normal discovery, it strains credulity to suggest that there is even a valid argument to support the contention that they should have applied in the instant case. See State of Nev. v. O'Leary, 63 F.3d 932, 935 (9th Cir. 1995) (holding that the district court did not err in finding that Nevada could not file an action under Rule 27 "if it merely intended to make the material part of an administrative record").[12] The Court recognizes that the simple fact that the Petitioners were not likely to prevail does not mean that the Petition was filed for an improper purpose. See Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, L.P., 171 F.3d 52, 58 (1st Cir. 1999) ("The mere fact that a claim ultimately proves unavailing, without more, cannot support the imposition of Rule 11 sanctions."). However, the Court must take into account the fact that the Petition was not just likely to fail, it was a far cry from even being appropriate under Rule 27(a) and § 9-18-12.

This point serves to even more vividly illustrate that the Petition was not a good faith attempt to utilize Rule 27(a) and § 9-18-12.

[12] The Petitioners' argument that there is the potential that the administrative decision could be appealed to the Superior Court and that that satisfies the requirements of Rule 27(a) is completely unavailing. As Mr. Corso points out, that appeal is not an action over which the Petitioners have control; thus, there is no distinct action which the Petitioners could potentially have filed in the Superior Court. Cf. State of Nev. v. O'Leary, 151 F.R.D. 655, 658 (D. Nev. 1993) ("Nor is [Rule 27] appropriately applied to administrative rulemaking proceedings or appellate review of such proceedings which are limited to the administrative record.").

While not wanting to stifle Attorney Welch's creativity or his attempt to extend or alter the existing law, the argument that the Petition was a creative vehicle used by the Petitioners, when considered under the totality of the circumstances, is decidedly unconvincing to this Court.

Initially, the Petitioners contend that their attempted use of Rule 27(a) and § 9-18-12 was necessary because the Secretary of State is not granted subpoena powers by the General Laws with respect to administrative hearings. However, if the Secretary of State was not granted subpoena powers, that would seem to indicate to this Court that the General Assembly chose not to grant the Secretary of State that power. It is not, nor has it ever been, the function of this Court to expand the authority of a public figure; that decision lies strictly with the General Assembly. See, e.g., State v. Diamante, 83 A.3d 546, 552 (R.I. 2014) ("We are not the branch of Rhode Island government responsible for policy-making; accordingly, any remedy to [a] hardship [created by a statute] would fall within the competence of the General Assembly.").

The Petitioners also make much of the fact that Mr. Corso did not attend the administrative hearing and they use that fact as a basis for their argument that the Petition was not a sanctionable offense but rather was an attempt to do justice. Specifically, they state in their memorandum that "the instant proceeding, and the issues attended thereto are a problem of Corso's own making insofar as he willfully ignored the Secretary of State's Notice of Hearing and Appointment of Hearing Officer." They further argue to this Court, in their memorandum, that, "[i]f left to Corso, the State of Rhode Island would remain in the dark, with no answers . . . provided to the many questions that have been raised concerning 38 Studios, and the administrative process [would] degenerate into a

complete failure resulting in the waste of already expended precious time, effort and resources." However, the Petitioners themselves, in the same set of memoranda in which they made the previous two statements, recognize that "it was Corso's constitutional right to avoid meaningful participation in the subject proceeding." See also § 22-10-10(7) (devoid of any requirement that the person alleged to have committed a violation of the lobbying rules attend the violation hearing). Due to the fact that Mr. Corso was not required to attend the administrative hearing, the fact that he did not so attend in no way adds legitimacy to the Petition; it is, in other words, irrelevant. Moreover, it certainly does not suggest to the Court that the Petition was a use of creative lawyering rather than a move made purely for political gain.[13]

If the Petitioners believed so strongly in their supposed attempt to extend the law and exercise their legal creativity, then the Court cannot understand why they would voluntarily dismiss the Petition before it could be heard on the merits; the Court's confusion is exacerbated by the fact that there is no reasonable explanation as to why the Petitioners suddenly did not need the deposition testimony they claim was so important that it warranted this allegedly creative use of Rule 27(a) and § 9-18-12. The Petitioners' response to that argument is to contend that they dismissed the Petition to avoid the publicity that pursuing it would have caused and they rebuke Mr. Corso for supposedly using the judiciary to continue to publicize the matter. The problem with that argument is obvious—Mr. Corso did not file the Petition in the first place; it was the Petitioners that used the Court to publicize the matter.

[13] The Petitioners also rely heavily on the fact that the Hearing Officer ultimately found against Mr. Corso. However, as this eventuality was not known at the time the Petition was filed, it too is irrelevant.

Finding no merit in Petitioners' arguments and no legal basis for the filing of the Petition, the Court is led to the inescapable conclusion that the Petition was filed for an improper purpose. See Cruz, 896 F.2d at 632 (stating that the district court judge is given deference in issuing Rule 11 sanctions because he or she is the judicial actor "who is in the best position to evaluate the circumstances surrounding an alleged violation and render an informed judgment"). In this case, Secretary Mollis did not begin any type of proceeding against Mr. Corso until confronted by a member of the media about his failure to look into whether or not Mr. Corso had properly registered as a lobbyist. Then Secretary Mollis, without further investigation, commenced an administrative hearing in which pieces of evidence that he intended to rely on were admitted for identification only. When he was instructed to provide evidence authenticating those documents, he brought the instant Petition, presumably because he lacked evidence with which to authenticate the documents. Thus, Secretary Mollis was attempting to utilize this Court to obtain the evidence he should have found if he had conducted a proper investigation before initiating the administrative hearing.

Then, one month after filing the Petition and, notably, after the Respondent raised the possibility of sanctions, Secretary Mollis and Attorney Welch dismissed the Petition. They proceeded with the administrative hearing the next day and, curiously, at the administrative hearing, the information that had previously been entered for identification only was entered as a full exhibit, without any further authentication. This timeline would leave the Court very concerned under normal circumstances. However, given that during these events Secretary Mollis was a candidate in the democratic primary for Lieutenant Governor, the Court is several large steps past concerned—it is convinced by

these circumstances that the Petition was improperly filed in an effort to make it appear to the public that Secretary Mollis was aggressively addressing Mr. Corso's involvement in 38 Studios only to abandon and dismiss it as soon as the possibility of sanctions for such an utterly inappropriate filing were suggested.

Nothing could be as objectively unreasonable as filing a groundless Petition in Superior Court seeking court intervention, inviting a voluminous response from opposing counsel, having the Court set an expedited hearing date and prepare for that hearing only to have the Petition unilaterally dismissed on the eve of the hearing date. The Court is not designed to be a pawn in the litigation process, and it must protect itself against such abuses. The Rhode Island Supreme Court has plainly stated that "[t]rial justices must have the authority to protect the integrity of the judicial system from manipulation by unscrupulous, dishonest, or overreaching parties" and that such authority is found in Rule 11. Lett, 798 A.2d at 365. Consequently, the Court finds that this case requires the imposition of Rule 11 sanctions.

Determining what sanctions are appropriate is a matter left to the discretion of this Court. See Cabell, 810 F.2d at 466. However "[i]n choosing a sanction the basic principle . . . is that the least severe sanction adequate to serve the purpose should be imposed." Id. (internal quotation marks omitted). Moreover, the Court must "assess the relative responsibility" of each of the Petitioners and "the harm caused." Melissa L. Nelken, ed., Sanctions Rule 11 & Other Powers, 28 (3d ed. 1992) (internal quotation marks omitted); see also Lancellotti v. Fay, 909 F.2d 15, 19 (1st Cir. 1990) ("[T]he decision as to whether [the party] or his counsel or both should be sanctioned calls for an exercise of the trial court's sound discretion.").

Keeping those principles in mind, the Court offers its strongest possible rebuke to Secretary Mollis for the part he played in the misuse of this Court. However, the Court is further constrained to find, on the scant record before it, that there is no direct evidence to illustrate that Secretary Mollis knew how untenable the Petition was from a legal standpoint. Secretary Mollis is not himself a member of the bar, and the ultimate responsibility for filing the Petition rests with his legal counsel. See 61A Am. Jur. 2d Pleadings § 586 at 588 (2010) (stating that one of the factors to be considered when imposing sanctions is "whether the person committing the violation is trained in the law"). For those reasons, the Court does not impose monetary sanctions on Secretary Mollis.

However, the Court has no choice but to require Attorney Welch to pay Mr. Corso's attorney's fees and costs as a sanction for Attorney Welch's conduct. The exact amount of those fees and costs will be determined at a later date. It is the Court's belief that these sanctions comport with the intent of Rule 11 in two important ways—they deter future improper filings and they remedy the financial harm that the Petitioners' actions caused Mr. Corso by requiring him to incur attorney's fees and costs to defend Attorney Welch's Petition. See Rule 11 (suggesting the imposition of attorney's fees); see also Michalopoulos, 847 A.2d at 300; Lett, 798 A.2d at 368. In crafting these sanctions, the Court has taken great pains to be sure it was not using a cardboard sword to fight a dragon nor an elephant gun to slay a mouse. See Anderson, 900 F.2d at 395.

IV

Conclusion

It is this Court's conclusion that, under the totality of the circumstances, Secretary Mollis and Attorney Welch violated Rule 11 when they filed a Petition that was improper and legally deficient in a poorly orchestrated attempt to involve this Court in their effort to zealously pursue Mr. Corso's possible unauthorized lobbying. The Court imposes monetary sanctions on Attorney Welch in the amount of the reasonable attorney's fees and costs incurred by Mr. Corso with respect to the Petition. That amount is yet to be determined. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**A. Ralph Mollis v. Michael D. Corso**
CASE NO:	**PM 14-3703**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 17, 2014**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
For Plaintiff:	**Mark P. Welch, Esq.** **Christopher M. Mulhearn, Esq.**
For Defendant:	**Anthony M. Traini, Esq.** **Michael J. Lepizzera, Jr., Esq.**