IN THE UNITED STATES DISTRICT COURT
THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HAURY'S AUTO BODY, INC., ET AL. **PLAINTIFFS**

VS. **CAUSE NO. 6:14-CV-6015**

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL. **DEFENDANTS**

MOTION FOR SANCTIONS

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1. Come now, Plaintiffs in the above-captioned litigation and file this, their Motion for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, against counsel for the GEICO Defendants and states to the Court the following:

2. With the Motion for Attorney's Fees, counsel for GEICO has continued its pattern and practice of knowingly and intentionally filing pleadings which violate the basic tenets of Rule 11 of the Federal Rules of Civil Procedure. The current motion, as well as prior pleadings, contains misrepresentations of fact and authority which constitute outright falsehoods.

3. GEICO counsel has intentionally attempted to perpetrate a fraud upon the Court. Sanctions under Rule 11 are not merely advisable, but, necessary to stem the conduct which has, to date, gone unchecked.

THE CURRENT MOTION

4. On September 30, 2015, GEICO, through their counsel Dan Goldfine, filed a motion for attorney's fees following dismissal without prejudice of the above-captioned action. This motion was predicated upon the purported bad faith of plaintiffs' counsel in filing the complaint in the first place. This alleged bad faith is set forth in a series of things and acts that Plaintiffs' counsel

purportedly "knew" before the complaint was filed.

5. Each and every single one of the factual statements made by GEICO counsel is false.

6. To support the claim for its purported right to fees, GEICO counsel cites a number of case authority which GEICO counsel asserts to the Court supports its motion.

7. Each and every single citation and basis for citation made by GEICO counsel is false, misrepresented, presented in a false light or intentionally misconstrued.

8. In compliance with Rule 11(c)(2), Plaintiffs electronically served GEICO counsel with the Motion for Sanctions on October 5, 2015. By correspondence forwarded electronically on October 16, 2015, GEICO counsel notified Plaintiffs it was refusing to withdraw the offending motion and was waiving the remaining time in the twenty-one-day window. Plaintiffs therefore complied with the safe harbor provision of Rule 11 prior to filing the current Motion for Sanctions.

The Timing of Pleadings

9. GEICO first argues the Washington complaint was filed in bad faith because at the time it was filed, counsel and plaintiffs knew an identical complaint had already been twice dismissed as deficient (Florida complaint *A&E Auto Body, Inc. v. 21st Century Centennial Ins. Co*., Cause No. 6:14-cv-310)[1] but instead of dismissing the Washington complaint or amending it, GEICO was "forced" to file a motion to dismiss. See GEICO motion, Doc. No. 37, pg. 2.

10. The falsehood of these statements is easily established by the chronology of relevant pleadings attached hereto as Exhibit "1."

[1]For purposes of conciseness, Plaintiffs here refer to individual actions by the state in which they were initiated, e.g., the Washington complaint, after the first identification in full. Additionally, for ease of reference and consistency, Plaintiffs refer to the cause number assigned by this Court after transfer into MDL 2557.

11. GEICO's assertion that an identical complaint had already been twice dismissed when the Washington complaint was filed is false. No complaint had been twice dismissed at the time the Washington complaint was filed.

12. In fact, no dismissal at all addressing the merits of any claim was entered by the Court at the time the Washington complaint was filed. The only order of dismissal, entered in June, 2014, which existed in any case was specific to the contents of a single complaint, Florida, and had nothing to do with the merits of the claims asserted. That order dealt with specific issues the Court directed the Florida plaintiffs to amend, none of which, again, had any bearing on the substance of the complaints or the facts there asserted. A copy of this order is attached hereto as Exhibit "2," for the Court's ease of reference.

13. This order could not apply to the Washington complaint as the Washington complaint did not even exist in June, 2014.

14. The Court took no additional action whatsoever on any motion to dismiss until January, 2015, more than two months after the Washington complaint was filed. That order was limited to the identified cases and did not in any manner address the allegations of the Washington complaint.

15. Thus, GEICO's assertions that Plaintiffs' had twice been dismissed on identical complaints is false.

16. GEICO's argument that Plaintiffs acted in bad faith by not dismissing the Washington complaint or amending it because Plaintiffs had notice from the Court of insufficiencies is factually insupportable. It is not possible to amend a complaint before an order directing such amendment exists. By the time such did exist, an intervening order had been issued which applied, an order

discussed below (which GEICO does not mention anywhere in its motion).

17. GEICO's assertion that it was "forced" to file a motion to dismiss because of the foregoing is false as it had already filed its motion long before the Court ever addressed the substance of the Washington complaint.

18. The actual facts relating to this assertion categorically show GEICO's assertions of bad faith as to this contention are demonstrably false.

GEICO's Representation of Statements of Counsel are Presented in a False Light and Falsely Asserts Admissions of Wrongdoing

19. GEICO's counsel repeatedly and falsely states Plaintiffs' national counsel "admitted to knowingly fil[ing] deficient complaints" and "forced" GEICO to needless prepare and file motions to dismiss. No such admission exists in any form as such is a blatant false statement by GEICO.

20. GEICO first relies upon an excerpt from the March 6, 2015, status conference for this proposition. See GEICO motion exhibit "C." The entire colloquy was not attached by GEICO, however the one and a half pages attached make clear the discussion was relevant only to the speed with which litigation was progressing. There was no discussion as to the merits or sufficiency of the complaints filed and there was no admission of any deficiency by any counsel for Plaintiffs.

21. A cursory review of the transcript excerpt shows that the Court had neither ruled on the sufficiency of the Washington complaint nor had the Court granted leave for Plaintiffs to amend the Washington complaint. This is, in fact, the first statements included in the transcript–that no permission had yet been given to amend complaints. See GEICO motion Exhibit "C."

22. What the transcript shows cannot reasonably or objectively be characterized as an admission of wrongdoing, but expression of an anticipated outcome and assurance counsel would comply with any order issued.

23. The same is true for the purported "admissions" in the media. Plaintiffs' counsel has never admitted to any wrongdoing, no such wrongdoing has occurred and GEICO is well aware of this. Taking a statement out of context and recasting its meaning for purposes of a motion does not alter this.

MISREPRESENTATION OF LAW

24. GEICO's misrepresentations and unadorned false statements are not limited to matters of fact, but also law.

25. GEICO asserts the Plaintiffs claims have "all been dismissed with prejudice" because Washington did not file an amended complaint. In other words, GEICO asserts a dismissal without prejudice was automatically converted to a dismissal with prejudice because no amended complaint was filed.

26. For this proposition, GEICO cites *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F. 3d 1126 (11th Cir. 1994). *Hertz* makes the completely opposite holding. It specifically held that a dismissal without prejudice is not transformed into a dismissal with prejudice because the opportunity to amend was not exercised; such could only be accomplished by "overhauling the substance of the judgment." *Id*. at 1130. That "overhaul" required a properly filed motion pursuant to applicable Rule of Procedure. For the Court's convenience, a copy of that ruling is attached hereto as Exhibit "3."

27. GEICO similarly misrepresents the holdings of other authority it pleads support this contention. The transformation of a dismissal without prejudice into one with prejudice is not

addressed at all in *Schuurman v. Motor Vessel "Betty K V,"* 798 F.2d 442 (11th Cir. 1986). As the Court explicitly stated, "Our concern is whether and under what circumstances a plaintiff may properly and timely take an appeal without requiring that the district court enter a final order of dismissal." *Id.* at 444. For the Court's convenience, a copy of that ruling is attached hereto as Exhibit "4."

28. Likewise, the final case cited by GEICO also deals exclusively with when an order of dismissal becomes final. *Sibson v. Midland Mortgage Co.*, (In re Sibson), 235 B.R. 672, 674-675 (Bankr. M.D. Fla. 1999). This is stated in the first sentence of the bankruptcy court's conclusions of law: "It is well settled in the Eleventh Circuit that an order dismissing a complaint with leave to amend within a specified time period becomes final when the time period allowed for amendment expires." *Id*. at 674-75.[2] For the Court's convenience, a copy of that ruling is attached hereto as Exhibit "5."

29. Absolutely nothing in any authority proffered by GEICO supports its contention, nor does there exist in any of those cases any equivocal language that would permit GEICO to make a good faith argument for such. Two of the three cases cited by GEICO to support its contention that a dismissal without prejudice automatically transforms into a dismissal with prejudice at some point do not even address the issue, much less hold as GEICO has reported to the Court in its motion. The only case which does address the issue categorically states no such automatic transformation occurs.

30. GEICO completely fabricated its argument and fabricated content attributed to the cited authorities.

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[2]As this is the pinpoint citation offered by GEICO, it cannot be reasonably presumed the misrepresentation was innocent.

31. In addition to simply fabricating authority, GEICO's motion is replete with misleading citations, either because the authority is presented out of context or is incomplete. Most often, GEICO strings together a number of isolated sentences from disparate cases into a single paragraph, or even a single sentence, with the result that it appears the statements are harmonious when, in fact, they are not.

32. GEICO cites *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) for the proposition that "Federal courts have inherent power to 'assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." See GEICO motion, pg. 5.

33. While the exact quote provided is transcribed from *Chambers* accurately, GEICO fails to bring to the Court's attention the immediately following sentence: "In this regard, if a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled,' it may assess attorney's fees against the responsible party."

34. As presented by GEICO, the citation is, at best misleading. The Court does not have unlimited authority to sanction as GEICO states. On the contrary, the Supreme Court went to some lengths to explain the inherent authority continues to exist to fill the interstices of abuses unaddressed by statute or Rule. *Id.* at 46.[3]

35. GEICO has not alleged Plaintiffs or their counsel have perpetrated a fraud, nor defiled the temple of justice. As such, citation to this authority is inaccurately represented to the Court.

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[3]"We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices."

36. GEICO cites *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) for its statement that the Court may sanction either parties or counsel in exercise of its inherent power. GEICO provides no context for this statement, merely asserts the Court can sanction anyone it pleases. The language to which GEICO cites relates solely to violations of F.R.C.P. 11, and upon whom the Court may impose sanctions if a violation of Rule 11 has been determined.[4]

37. GEICO's motion does not seek sanctions pursuant to Rule 11, only 28 U.S.C. § 1927. Thus, whether or not a party may be sanctioned under that Rule is irrelevant and its inclusion, particularly the language set forth by GEICO, is intended to mislead the Court.

38. *Byrne* does reference 28 U.S.C. § 1927 but GEICO omits bringing to the Court's attention that this statute is limited to a very specific set of circumstances:

> 28 U.S.C. § 1927, which states:
>
> > 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.
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> As the express language of section 1927 indicates, this sanctioning mechanism is aimed at the unreasonable and vexatious multiplication of proceedings. Unlike Rule 11, which is aimed primarily at pleadings, under section 1927 attorneys are obligated to avoid dilatory tactics throughout the entire litigation.

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[4] "In considering a motion for sanctions pursuant to Fed.R.Civ.P. 11, a court conducts a two-step inquiry: "(1) whether the party's claims are objectively frivolous; and (2) whether the person who signed the pleadings should have been aware that they were frivolous." . . . When filing a pleading in federal court, an attorney "certifies that he or she has conducted a reasonable inquiry and that the pleading is well-grounded in fact, legally tenable, and 'is not presented for any improper purpose.'" Id. . . .Thus, if, after dismissing a party's claim as baseless, the court finds that the party's attorney failed to conduct a reasonable inquiry into the matter, then the court is obligated to impose sanctions even if the attorney had a good faith belief that the claim was sound. . . .Although typically levied against an attorney, a court is authorized to issue Rule 11 sanctions against a party even though the party is neither an attorney nor the signor of the pleadings." *Byrne v. Nezhat*, 261 F.3d 1075, 1105-1106 (11th Cir. Ga. 2001)(internal citations omitted).

Id. at 1106.

39. The statute, by its own express terms, is limited to sanctions for unreasonable and vexatious multiplication of the litigation, which GEICO does not even allege occurred in the Washington case.[5] GEICO asserts, based upon false facts, that it is owed attorney's fees because the complaint was filed at all. GEICO's citation and the context in which it places the authority in its motion is substantially misleading.

40. GEICO cites *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1252 (11th Cir. 2006) for the proposition that the Court's inherent sanctioning power is co-extensive with 28 U.S.C. § 1927. *Amlong* does not hold this. *Amlong* holds that sanctions which are impermissible under § 1927 are also impermissible pursuant to inherent authority of a court. As that court stated, "As we also explained, the threshold of bad faith conduct for purposes of sanctions under the court's inherent powers is at least as high as the threshold of bad faith conduct for sanctions under § 1927. . . So sanctions that are impermissible under § 1927 are also impermissible under a district court's inherent powers." *Id.*(internal citations omitted).[6]

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[5]However, even if GEICO had argued the Washington Plaintiffs or their counsel unnecessarily and vexatiously multiplied the proceedings, the claim would utterly fail as shown by the docket. After filing the complaint, Plaintiffs' actions have been limited to responding to various motions filed by the Defendants, including GEICO, and filing an objection to the report and recommendation. A copy of the Washington docket is attached hereto as Exhibit "6."

Having initiated no actions but merely responded to the Defendants' actions, it cannot be stated the Plaintiffs have multiplied the proceedings of this lawsuit at all, much less unnecessarily or vexatiously.

[6]GEICO's assertion as to extension of authority is also logically untenable. As § 1927 is limited by its explicit terms to certain types of identified conduct and the Supreme Court has explained in the very case GEICO cites that inherent authority remains to fills the gaps of other conduct not specifically contemplated by that statute (or other Rule), it is not possible for the various sources of authority to be co-extensive.

41. GEICO cites *Murray v. Playmaker Services, LLC,* 548 F.Supp. 2d 1378, 1382 (S.D. Fla. 2008) for the theory that bad faith or vexatious conduct may be determined using either a subjective or objective standard. Again, the quote is accurately reported by GEICO, but GEICO failed to advise the Court of additional information. *Murray* cites *Amlong*, supra, for this proposition. However, *Murray* inaccurately reported the *Amlong* court's actual ruling. *Amlong* did not hold bad faith conduct may be determined either subjectively or objectively. It surveyed other circuits which variously apply either a subjective or objective standard, then clearly concluded that in the Eleventh Circuit, objective analysis is the rule though analysis of counsel's subjective state of mind may inform the objective analysis:

> But it is clear from the statutory language and the case law that for purposes of § 1927, bad faith turns not on the attorney's subjective intent, but on the attorney's objective conduct. The term "unreasonably" necessarily connotes that the district court must compare the attorney's conduct against the conduct of a "reasonable" attorney and make a judgment about whether the conduct was acceptable according to some objective standard. The term "vexatiously" similarly requires an evaluation of the attorney's objective conduct.

Amlong, 500 F.3d at 1239-40.

The Court went on to say:

> The terminology and explanation that we have employed in the past is wholly consistent with the idea that sanctions under § 1927 are measured against objective standards of conduct. In *Schwartz v. Millon Air, Inc*., we stated that sanctions are permissible "where an attorney knowingly or recklessly pursues a frivolous claim." . . . Thus, objectively reckless conduct is enough to warrant sanctions even if the attorney does not act knowingly and malevolently. In *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir. 1993), we found that an attorney's conduct was "tantamount to bad faith" when he "either carelessly or deliberately" covered up evidence. . . .
>
> In short, a district court may impose sanctions for egregious conduct by an attorney even if the attorney acted without the specific purpose or intent to multiply the proceedings. That is not to say the attorney's purpose or intent is irrelevant. Although the attorney's objective conduct is the focus of the analysis, the attorney's subjective

> state of mind is frequently an important piece of the calculus, because a given act is more likely to fall outside the bounds of acceptable conduct and therefore be "unreasonabl[e] and vexatious[]" if it is done with a malicious purpose or intent.

Id. at 1241 (internal citations omitted). Thus, GEICO's assertion that conduct may be analyzed using either standard is inaccurately reported to the Court–subjective intent may be considered but may not substitute for objective analysis.

42. Additionally, GEICO had an affirmative obligation to advise the Court of the inaccurately reported holding of *Amlong*, particularly since it must have been fully aware of the same, as GEICO cited both *Amlong* and the case which inaccurately reported it, *Murray*. GEICO did not so advise the Court of this conflict of authority.

43. GEICO cites *Amlong* again for the statement that "conduct which is reckless will satisfy this standard." See GEICO motion, pg. 6. This is a false statement, as GEICO presents it. Placed immediately following the inaccurate statement the Court can apply either a subjective standard or an objective one, GEICO implies the Court may impose sanctions if it determines Plaintiffs or their counsel acted in a subjectively reckless manner. This is simply a false inference. This is made clear by the full quote provided above. The objective standard is applicable under all circumstances.

44. GEICO materially misrepresents both the facts and the posture of the case cited for its proposition that "Courts have sanctioned attorneys for pursuing claims when they knew from rulings in other cases in an MDL that there was no reasonable basis for pursing the claims." See GEICO motion, pg. 6. GEICO cites *In re Silica Products Liability Litigation*, 398 F.Supp. 2d 563, 676 (S.D. Tex. 2005) for this assertion.

45. The *In re Silica* opinion is in excess of 200 pages long. It is not possible to adequately summarize the entirety of the contents but the opening paragraph of the opinion gives the overview: "Twenty months of pre-trial proceedings and coordinated discovery in the above-styled multidistrict litigation ("MDL") have culminated in three issues becoming ripe for decision: (1) whether federal subject-matter jurisdiction exists in this MDL's 111 cases (totaling over 10,000 individual Plaintiffs); (2) whether the doctors who diagnosed Plaintiffs with silicosis employed a sufficiently reliable methodology for their testimony to be admissible; and, (3) whether Plaintiffs' counsel should be sanctioned for submitting unreliable diagnoses and failing to fully comply with discovery orders." *Id.* at 566-67.

46. Nothing in *In re Silica* is even remotely similar to the present cause. No challenge to subject matter jurisdiction exists, no discovery has been conducted, no experts designated much less deposed and subject to a *Daubert* challenge and there is no suggestion Plaintiffs' counsel has manufactured evidence.[7] No claims were previously dismissed and re-urged. It does not even appear from the opinion that any such rulings had ever been made. Rather, the court permitted discovery to go forward. The entirety of GEICO's citation is utterly without foundation.

47. The same is true for the two other cases GEICO asserts support this mythical rule of law: *Sharrow v. Fish*, 501 F.Supp. 202, 205 (S.D.N.Y. 1980) dealt with a single plaintiff suing a single defendant for the same claim repeatedly in four separate, serial suits regarding apportionment of congressional districts all of which were previously dismissed. There was no multidistrict litigation.

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[7]Should Defense counsel decide to pursue or insinuate anyone has manufactured evidence, Plaintiffs demand strict proof of such.

48. The Washington Plaintiffs claims have never been dismissed in a previous suit. GEICO's use of this authority is misleading, particularly as it immediately follows in the same sentence the contention that dismissal of claim in one MDL case permits sanctions in another.

49. Also in that same sentence, implying MDL orders in one suit can be inferred to a separate cause and sanctionable conduct, GEICO cites *Hicks v. Arthur*, 891 F. Supp. 213, 215 (E.D. Pa. 1995). As with *Sharrow*, there was no MDL in *Hicks.* As with both *Hicks* and *In re Silica*, the matter had progressed through discovery to the summary judgment stage and counsel was sanctioned for unnecessarily multiplying the litigation after discovery established a lack of factual basis for some claims but counsel continued to press those claims. That is clearly not the case for the Washington complaint. There has been no discovery and Plaintiffs have done nothing to multiply the proceedings in this cause. See Exhibit "1" and "Exhibit 6."

OMISSION OF MATERIAL FACTS AND FINDINGS OF THE COURT

50. In March, 2015, just two weeks after the status conference, Plaintiffs filed a motion to stay all amendments until the Court had ruled on those motions then ripe so as to prevent unnecessary and duplicative filings and streamline the litigation. See Exhibit "1."

51. GEICO, who asserts it was "forced" to file a proliferation of pleadings, objected to this motion. See Exhibit "1."

52. The Court denied the motion. In doing so, however, the Court made clear the complaints were sufficiently dissimilar, particularly with respect to matters of state law, that a ruling on one case did not signify an identical ruling on the others would be forthcoming and therefore the cases should progress independently. See copy of Doc. No. 175, Order dated April 3, 2015, attached hereto as Exhibit "7."

53. Plaintiffs took the Court at its word. The Plaintiffs awaited the individual resolutions to the pending motions as the Court directed.

54. The GEICO Defendants, as did all others, received this Order. GEICO was told by the Court the cases were individual, and were being treated as individual by the Court.

55. GEICO makes no mention of this in its motion for fees. Instead, it consistently argues the Plaintiffs were under some duty to amend a complaint for which no finding of insufficiency had been made and the clear and direct order of the Court finding the cases sufficiently unique that a resolution of one set of motions did not mean an identical finding would be made in another.

56. In filing its Motion for fees, GEICO was under an affirmative duty to disclose this to the Court as it is plainly relevant to the core of its argument for fees and expenses. Certainly the Court is aware of its own prior rulings; that is not the relevant inquiry and any suggestion that GEICO may interpose later that its failure to include this information for this reason is materially misleading. This motion goes to GEICO's actions, not the Court's.

57. GEICO was fully aware at the time it argued sanctions should be imposed that the Court had previously ruled the cases were being analyzed individually. Nevertheless, GEICO repeatedly urges throughout its motion that sanctions should be imposed because Plaintiffs and their counsel "failed" to act in the Washington case based upon rulings issued in separate cases.

58. In other words, GEICO premises its motion for sanctions upon the core fact that Washington Plaintiffs followed an order of this Court. GEICO cites no authority whatsoever for this premise and, as detailed above, every single case cited by GEICO as its bases for why sanctions should be imposed is fabricated, misrepresented or otherwise wholly inapplicable.

GEICO COUNSEL'S FILING IS PART OF A CONSISTENT AND ONGOING PATTERN AND PRACTICE OF FILING PLEADINGS CONTAINING DEMONSTRABLY FALSE ASSERTIONS OF LAW AND FACT

59. The current motion is not the only instance of GEICO counsel filing pleadings containing demonstrably false and substantially misleading authority as well as arguments substantially misrepresenting the authority upon which they purportedly rest.

60. From the commencement of this litigation, GEICO counsel has sought to pervert the outcome by engaging in such behavior. In fact, this behavior began with GEICO's very first round of motions to dismiss beginning in the spring of 2014.

61. In the Mississippi motion to dismiss, GEICO counsel affirmatively misrepresented a statement of Texas law as a statement of Mississippi state law in its Mississippi motion. In its copycat motions, GEICO quoted from a Fifth Circuit case, *Daniels v. Equitable Life Assurance Society of U.S.* 35 F.3d 210 (5th Cir. 1994) to support an assertion that a particular cause of action was not maintainable under the law of the state. See copy of GEICO motion excerpt, motion to dismiss filed in Mississippi, attached hereto as Exhibit "8."

62. As it was a Fifth Circuit decision rather than a state court decision, it could be argued innocent mistake, simply careless research. However, in order to provide the quote, GEICO had to remove the words "Texas law" from two different points in the same sentence it quoted. And it could hardly have been an innocent mistake to submit the same Texas law finding as the affirmative law of a different state, not when the words "Texas law" had to be twice removed in order to offer the "quote" to the Court. This was clearly not error but intentional misrepresentation.

63. This has continued to be the GEICO counsel practice. In its motions filed in every case, GEICO has continued to assert various legal authority stands for a particular proposition which

does not appear anywhere in the authority cited. For example, in its multiple motions, GEICO has cited the same cases as standing for the proposition that eight "substantive elements" are required for a Sherman Act price fixing claim. See copy of GEICO motion to dismiss excerpt attached hereto as Exhibit "9."[8]

64. However, none of the cases cited identify any list of eight "substantive elements." Either these "substantive elements" simply do not exist, or they do not apply, such as "elements" which are only relevant to a monopoly claim, which none of the Plaintiffs have asserted. That no such eight "substantive elements" have ever been articulated as necessary predicates to a price fixing claim or that one or more "elements" are not applicable has been repeatedly pointed out to GEICO, both in writing in numerous pleading responses and by telephone discussion with GEICO counsel's former associate, Jamie Halavais.

65. Also pointed out in prior pleadings and in conversation with Ms. Halavais were the repeated false assertions of fact and authority including but not limited to falsely representing to the Court and Plaintiffs that Texas law was actually the law of another state. Nothing has dissuaded GEICO from continuing its pattern and practice of filing pleadings which violate Rule 11.

66. Other examples of ongoing violations of Rule 11 include, but are not limited to, presenting non-binding authority as binding state law, failing to advise the Court of conflicting or subsequent authority which alters or undermines its arguments, and failing to follow rules of citation and publication on unpublished opinions in violation of state supreme court and federal appellate

[8]As this same representation has been included in very nearly every single motion to dismiss filed by GEICO counsel, only a single example is being provided as an exhibit hereto rather than duplicating the identical language from every single motion GEICO has filed.

rules. These actions have been noted in responses to GEICO's pleadings and are on file with the Court.

RULE 11

67. By signing the pleadings filed, GEICO counsel is certifying the contents contain legitimate legal arguments and contentions, that facts asserted in the pleading have evidentiary support and is not forwarded for an improper purpose such has harassment, delay or needlessly increasing costs of litigation. F.R.C.P. 11(b)(1), (2) and (3).

68. In fulfilling the obligations of Rule 11, counsel has a duty of candor to the Court. *Bank of Ozarks v. Kingsland Hospitality*, LLC, 2012 U.S. Dist. LEXIS 144666, *7 (S.D. Ga. Oct. 5, 2012); *Mirabilis Ventures, Inc. v. Palaxar Group, LLC*, 2010 U.S. Dist. LEXIS 139788, 27-28 (M.D. Fla. Dec. 15, 2010) ("Rule 11 requires litigants to reasonably inquire into the law and facts before making legal and factual contentions in a pleading or motion;").

69. This duty is further codified in the Model Rules of Professional Conduct. Rule 3.3 holds:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

70. Conduct involving dishonesty, fraud, deceit or misrepresentation is officially deemed misconduct under Rule 8.4 of the ABA Model Rules of Professional Conduct.

Standard for Review of Rule 11 Motions

71. When analyzing a motion for sanctions pursuant to Rule 11, the Court applies an objective standard--whether a reasonable attorney in like circumstances could believe his actions were factually and legally justified. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002). *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. Fla. 2003).

72. A court has discretion to award Rule 11 sanctions when, among other independent reasons, a party files a pleading that has no reasonable factual basis. *Mirabilis Ventures, Inc. v. Palaxar Group, LLC*, 2010 U.S. Dist. LEXIS 139788 (M.D. Fla. Dec. 15, 2010).

73. A ". . . blatant disregard of the facts amply warrant[s] the imposition of sanctions." *Levine v. FDIC*, 2 F.3d 476, 479 (2d Cir. 1993).

ANALYSIS

74. It may be argued that each of GEICO's violations are individually of such a minor character that sanctions are not actually warranted. If there were only one or two such instances, the current motion would not be filed. GEICO counsel's repeated and blatant violations of ethical requirements are not isolated. Even after personally discussing the matter with GEICO counsel (Ms. Halavais), particularly the misrepresentations of authority, they are continuous and ongoing and can only be defined as intentional breaches of the Federal Rules and rules of professional conduct.

75. The culmination of these actions is the filing of a motion, the current motion for fees and expenses, which does not contain a single truthful, valid citation to authority or a single truthful, valid assertion of fact supporting the basis of the claim asserted.

76. As a result of GEICO's continued, willful and intentional violations of Rule 11, Plaintiffs' counsel has been required to expend hundreds of hours collectively to respond to said motions, far in excess of what would have been required had GEICO simply adhered to the ethical

requirements of the legal profession. As the actions are clearly intentional, repeated and ongoing, it may only be concluded GEICO's purpose was to harass Plaintiffs, waste time and require Plaintiffs to incur substantial financial cost in responding to the motions as filed.

77. GEICO counsel's pattern and practice of filing such motions as described above has also substantially abused the Court, requiring the waste of substantial time to sort through and identify applicable authority and argument to distinguish from the chaff.

78. The purpose of Rule 11 sanctions is to reduce frivolous claims, defenses, or motions, and to deter costly meritless maneuvers. *Cook-Benjamin v. MHM Corr. Servs.*, 571 Fed. Appx. 944, 948 (11th Cir. 2014). GEICO counsel has wasted nearly countless hours of Plaintiffs' counsel and the Court in filing the current motion and previous motions containing false assertions of law and fact.

79. Even if GEICO argues the results would be the same, counsel is not excused from conducting litigation in a manner both professional and ethical. Knowing those boundaries is simple–they are incorporated within written rules that counsel may consult at any time.

80. GEICO counsel has repeatedly and knowingly misrepresented, misquoted, mischaracterized and miscited legal authority and facts. GEICO counsel has done so repeatedly and knowingly after having these violations drawn to their attention and has made no effort whatsoever to alter their conduct. In the absence of action by this Court, that conduct will undoubtedly continue as GEICO counsel has, to date, suffered no consequences as a result of this conduct.

CONCLUSION

81. The conduct displayed by GEICO counsel violates Rule 11 of the Federal Rules of Civil Procedure, state and national codes of professional conduct, cost Plaintiffs' counsel substantial time, resources and effort to respond and wasted unknown hours of the Court's time and resources.

82. Plaintiffs therefore request an appropriate imposition of sanctions, to include attorney's fees required for the preparation of this motion. Plaintiffs also request any additional sanction the Court deems appropriate to deter such conduct in the future.

Respectfully submitted, this the 21st day of October, 2015.

HAURY'S AUTO BODY, INC., ET AL.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Plaintiffs' Motion for Sanctions* was filed electronically on the 21st day of October, 2015, and will be served upon all ECF-registered counsel by operation of the Court's electronic filing system. Parties and counsel may access this filing through the Court's system.

This the 21st day of October, 2015.

BY: /s/ Allison P. Fry
Allison P. Fry, Esq.