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David J. Smith Clerk of Court
c/o Sandra Brasselmon
United States Court of Appeals
Eleventh Circuit
Elbert P. Tuttle Courthouse
56 Forsyth Street, N.W.
Atlanta, GA 30303

RE: CONSOLIDATED RESPONSE OF APPELLANTS TO AUGUST 16 REQUEST FOR LETTER BRIEF RESPONDING TO QUESTIONS

Appeal Number: 16-15467-DD
Case Style: Alpine Straightening Systems, et al v. State Farm Mutual Auto., et al District Court Docket No: 6:14-md-02557-GAP-TBS
Secondary Case Number: 6:14-cv-06003-GAP-TBS

Appeal Number: 16-13601-AA
Case Style: Indiana Autobody Association,, et al v. State Farm Mutual Auto., et al District Court Docket No: 6:14-md-02557-GAP-TBS
Secondary Case Number: 6:14-cv-06001-GAP-TBS

Dear Ms. Brasselmon and Mr. Smith:

This Consolidated Letter Brief of Appellants in Appeal Numbers 16-15467 (hereafter "Utah Case") and 16-13601 (hereafter "Indiana Case") is in response to the August 16, 2017 request from Mr. Smith, on behalf of the Court, for letter briefs answering its questions relating to the apparent "late" filing of Second Amended Complaints by the Plaintiffs/Appellants in the above identified appeals. A brief summary of the relevant history of the underlying action is provided is provided to assist in applying Appellants' legal arguments to the facts.

BACKGROUND

On April 27, 2015, the District Court dismissed the First Amended Complaint in the Utah Case and allowed 21 days for the filing of an amended

complaint (Doc. 101). Without seeking prior leave to extend the time of filing, Utah Plaintiffs filed their Second Amended Complaint (Doc. 102) 23 days later on May 20, 2015. On June 18th, some of the Defendants filed a Motion to Strike the Second Amended Complaint (Doc. 105) arguing the dismissal without prejudice converted to a dismissal with prejudice when an amended complaint was not filed on May 18th. Reasonably assuming that the case was alive and in still subject to Judge Presnell's jurisdictional authority, the other Defendants filed Rule 12(b)(6) Motions to Dismiss, and briefs in Opposition and Reply were filed. On November 20, 2015, the Court denied the Motion to Strike, construing Plaintiffs' Opposition (Doc. 112) as a Rule 6(1)(B) motion for a two-day extension of time, and granted that motion based upon its finding of excusable neglect (Doc. 123.)

On March 30, 2015, the District Court dismissed the First Amended Complaint in the Indiana Case and gave Plaintiffs the opportunity to "file an amended pleading on or before April 13, 2015." (Doc. 150). Without seeking prior leave to extend the time of filing, Indiana Plaintiffs filed their The Second Amended Complaint (Doc. 151) on April 14, 2015. On May 15th, some of the Defendants filed a Motion to Strike the Second Amended Complaint (Doc. 153) arguing the dismissal without prejudice converted to a dismissal with prejudice when an amended complaint was not filed on April 18th. Reasonably assuming that the case was alive and in still subject to Judge Presnell's jurisdictional authority, the other Defendants filed Rule 12(b)(6) Motions to Dismiss, and briefs in Opposition and Reply were filed. On November 20, 2015, the Court denied the Motion to Strike, construing Plaintiffs' Opposition (Doc. 158) as a motion to extend the time pursuant to a Rule 6(1)(B) motion for a two-day extension of time, and granted that motion based upon its finding of excusable neglect (Doc. 173.)

Defendants/Appellants did not seek an appeal of the Utah or Indiana Orders denying the motions to strike. All parties continued to rely upon the District Court's ruling and ongoing exercise of jurisdiction, expending considerable time and funds reasonably believing that there was no final, appealable Judgment and there was no clock ticking for filing Notices of Appeal.

RESPONSES TO QUESTIONS

1. Whether the dismissal without prejudice became a final judgment at

the expiration of the allotted time for filing, see, e.g., *Hertz Corp. v. Alamo Rent-A- Car, Inc.*, 16 F.3d 1126, 1132 (11th Cir. 1994) ("[A]n order dismissing a complaint with leave to amend within a specified time period becomes final . . . when the time period allowed for amendment expires.");

Appellants are unable to identify any Eleventh Circuit or Supreme Court case law contrary to the holding in Hertz Corp. that an order dismissing a complaint with leave to amend within a specified time period becomes final when that time period expires. However, as more fully set forth below there are significant reasons for this Court to elect to forego the analysis laid out in its request for letter briefs based upon the Rule 6 Harmless Error standard of Federal Rules of Civil Procedure 61. Appellants respectfully request that in the interest of justice, the Court do so, and allow these two cases to proceed to oral argument and full consideration on the substantive merits of the appeals. To dismiss these appeals based on procedural gymnastics would work a substantial injustice to the Appellants. On the contrary, allowing the appeals to go forward based upon a finding that the District Court's ultimate decision to construe Appellants' Second Amended Complaints as having been timely filed would not result in substantial prejudice or harm.

A. If the Dismissal of the First Amended Complaints became a final judgment, the District Court continued to act as if it retained jurisdiction, and, with only a couple of exceptions, the Defendants failed to challenge in any way the timeliness of the filing and proceeded with further litigation, pleading and briefing. These actions led the Appellants to believe that there was no final, appealable Judgment.

B. If the Court had granted the Motions to Strike brought by a couple of Defendants, it would have been a final appealable judgment. Therefore it stands to reason that the denial of a Motion to Strike is also a final appealable judgment. Appellants are unable to locate any precedent that holds that a granting or denial of a Motion to Strike a Complaint is not appealable. The Appellees' whose Motions to Strike were denied did not timely file an appeal or at the very least request and interlocutory appeal. When Plaintiffs/Appellants filed their Notices of Appeal after their Second Amended Complaints were dismissed. No Defendant/Appellee filed its own appeal challenging the District Court's granting

of leave to amend after the original time had passed.

C. The law allows the Court of Appeals to give significant deference to a procedural action by the District Court, even if it is in error and excuse that error under Rule 61.

2. Whether—assuming the judgment in this case did become final—the district court thereafter had jurisdiction to grant a motion to extend the time for filing the Second Amended Complaint, see id. at 1132–33 (finding that when a "dismissal order became final . . . the [district] court lost all its prejudgment powers to grant any more extensions");

See response to Question 1 above. Nevertheless, Congress established Rule 61 pursuant to 28 United States Code 2111 for just such a fact situation as presented to this Court.

> Rule 61. Harmless Error
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943), the Supreme Court established where the burden lies in challenging a judgment or order as erroneous, stating "he who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." Here no party timely challenged that District Court's ruling to allow a late filed Amended Complaint, exercising its considerable discretion to find that the late filing was based upon excusable neglect. Furthermore, Appellants urge the Court to conclude that Judge Presnell's arguably extra-jurisdictional action in allowing the pleading stage to continue was also harmless error. There is no evidence

before this Court that any such prejudice has occurred, or will occur, to any of the Appellees if the appeals are allowed to proceed on the merits.

3. Whether—assuming that the district court was without power to grant the motion to amend—the plaintiff body shops were required to seek relief from a final judgment under Fed. R. Civ. P. 59 or 60(b) before seeking leave to amend, see *Jacobs v. Tempu-Pedic Intern., Inc*., 626 F.3d 1327, 1344–45 (11th Cir. 2010);

A Rule 59 Motion would have been available to the Defendants/Appellees based upon the statement of this Court in Jacobs that its purpose is to challenge a "manifest error of law or fact." The Court went on to declare that "Jacobs's remedy, if he thought the district court ruling was wrong, was to appeal." Defendants/Appellees did not appeal. The District Court did not state or even suggest that a final judgment had been entered. In fact, Plaintiffs/Appellants were led by the Court ot believe that it had authority to accept the Second Amended Complaint notwithstanding the late filing Plaintiffs benefited from the ruling and had no reason to challenge the court.

4. Whether—assuming that the body shops were required to seek relief from the final judgment—the district court could have construed the motion to amend as a motion arising under Rule 59 or 60(b) and, given that it did not do so, whether this Court may construe the district court as having done so, see *Pippen v. Georgia-Pacific Gypsum*, LLC, 408 F. App'x 299, 302 (11th Cir. 2011) (collecting cases);

See responses above. Appellants assert that this question is irrelevant to a decision whether to allow these cases to proceed on appeal because this Court has the authority to apply the Rule 61 analysis and find that what happened below was harmless error. It would be unjust and highly prejudicial to the Appellants, years after the fact, and after having expended considerable time and money in ongoing litigation and all the costs of appeal to be held accountable for the District Court's error – and error that the vast majority of Appellees failed to acknowledge, challenge or even question.

In *E.E.O.C. v. Alton Packaging Corp*., 901 F.2d 920, 922 (11th Cir. 1990), this court held that under Rule 61, a "reviewing court must disregard as harmless

error any error which does not affect the substantial rights of the parties."

5. Whether—assuming that this Court has the power to so construe the district court's treatment of the motion to amend—we should do so here and, if we should, whether we should proceed under Rule 59 or Rule 60(b), specifically considering, in addition to any other relevant concerns, this Court's "demonstrated [] wariness of grants of Rule 60(b)(1) relief for excusable neglect based on claims of attorney error," see Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993).

This Court should not proceed under Rules 59 or 60(b). It should proceed under Rule 61 and allow oral argument and consideration by a panel of judges on the merits of the only questions appropriately before the court as set forth in the Appeals Briefs. As stated in *Miccosukee Tribe of Indians of Florida v. Billy Cyress, et al.*, United States Court of Appeals for the Eleventh Circuit, No. 15-11223, 03/08/2017, under Rule 61, "unless justice requires otherwise, no error . . . by the [district] court . . . is [a] ground . . . for vacating, modifying, or otherwise disturbing a judgment or order.".

The Fifth Circuit was cited by Judge in his dissent in *Rosenfield v. Oceania Cruises, Eleventh Circuit*, No. 10-12651in support of his opinion that

> because the appellant must affirmatively show prejudice, it is incumbent on the appellant [or in this case the Appellee] to present this court with a record on appeal adequate to determine whether the District Court erred and, if so, whether the error was prejudicial. See, e.g., id. ("The appellants have brought up only a partial record and there is no way to determine that the argument of counsel was not supported by or responsive to the entire record."). This court cannot analyze error for prejudice in a vacuum because what constitutes error in the abstract may be inconsequential in light of the totality of evidence before the finder of fact. See, e.g., United States v. Borden Co., 347 U.S. 514, 516, 74 S. Ct. 703, 705, 98 L. Ed. 903 (1954) "[A]bsent a showing of prejudice,"however, this court "shall not reverse the judgment of the district court." Flores v.Cabot Corp., 604 F.2d 385, 386 (5th Cir. 1979) (per curiam). In other words, this court does not "presume[ ]" that prejudicial error occurred at trial. Morgan v. Sun Oil Co., 109 F.2d 178, 181 (5th Cir. 1940).

6. Whether, based on the foregoing, this Court has jurisdiction over an appeal of the dismissal of the Second Amended Complaint?

For all of the forgoing reasons, Appellants respectfully request that this Court allow the Appeals to go forward.

Respectfully submitted,

/s/ *Mark L. Shurtleff*
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Plaintiff/Appellant Liaison Counsel

Electronically filed with the Clerk of the Court on the 6th day of September, 2017, via the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record that are registered with the Court's CM/ECF system.

/s/Mark L. Shurtleff