IN THE CIRCUIT COURT IN AND FOR THE SIXTH JUDICIAL CIRCUIT
OF PINELLAS COUNTY, FLORIDA

Case No. 05 007822 CI 11
UCN: 522005CA007822XXCICI

ALFRED L. WILLIAMS II, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

HERITAGE OPERATING, L.P. d/b/a HERITAGE PROPANE, a Delaware Limited Partnership, as successor in interest to **PEOPLES GAS,**

Defendant.

ORDER GRANTING CLASS PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT

THIS CAUSE came before the Court on February 24, 2014 on Plaintiff's Motion for Sanctions and to Show Cause as to Why Defendant, Heritage Operating, LP., Should Not be Held in Contempt ("Motion for Sanctions"). The Court having reviewed the briefs, heard the argument of counsel and being fully advised in the premises, hereby finds and orders as follows:

ORDERED AND ADJUDGED that Plaintiff's Motion for Sanctions is granted in part and denied in part for the following reasons:

I. Legal Standard

1. In Bitterman v. Bitterman, 714 So.2d 356, 365 (Fla. 1998), the Florida Supreme Court discussed the inequitable conduct doctrine, stating:

> The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith. Attorney's fees based on a party's inequitable conduct have been recognized by other courts in this country. *See Vaughan v. Atkinson,* 369 U.S. 527, 530-31,

82 S.Ct. 997, 8 LEd.2d 88 (1962) (awarding attorney's fees based on respondent's "recalcitrance" and "callous" attitude); *Ro/ax v. Atlantic Coast Line R.R.* Co., 186 F.2d 473, 481 (4th Cir.1951) (holding that attorney's fees were justified because "plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization"). We note that this doctrine is rarely applicable. It is reserved for those extreme cases where a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Foster v. Tourtellotte,* 704 F.2d 1109, 1111 (9th Cir.1983) (quoting *F.D. Rich* Co. *v. United States ex rel. Industrial Lumber* Co., 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)). "Bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Dogherra v. Safeway Stores, Inc.,* 679 F.2d 1293, 1298 (9th Cir.1982) (quoting *Hall v. Cole,* 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702 (1973)). This Court and other courts in this state have recognized that attorney's fees can be awarded in situations where one party has acted vexatiously or in bad faith. *See Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145, 1148 (Fla.1985) ("This state has recognized a limited exception to this general American Rule in situations involving inequitable conduct."); *Hilton Oil Transport v. Oil Transport* Co., 659 So.2d 1141, 1153 (Fla. 3d DCA 1995); *In re Estate of DuVal,* 174 So.2d 580, 587 (Fla. 2d DCA 1965).

2. In Boca Burger, Inc. v. Forum, 912 So.2d 561, 571 (Fla. 2005), the Florida Supreme Court further discussed the notion that although counsel "does have an obligation to be faithful to [his client's] lawful objectives, that obligation cannot be used to justify unprofessional conduct by elevating the perceived duty to zealously represent over all other duties." (citing Lingle v. Dion, 776 So.2d 1073, 1078 (Fla. 4th DCA 2001) (alterations

in original) (quoting Visoly v. Sec. Pac. Credit Corp., 768 So.2d 482, 492 (Fla. 3d DCA 2000)). The Florida Supreme Court continued, stating that:

> Section 57.105, as well as the Florida Bar rules of professional conduct and even the oath of admission to the Florida Bar, all warn-if any warning were needed-that counsel must be governed by considerations other than mere zealous advocacy for the client. See § 57.105, Fla. Stat. (2002) (allowing a court to sanction the losing party and the losing party's attorney if the court finds the losing party's attorney knew or should have known that a claim or defense was not supported by the application of then-existing law); R. Regulating Fla. Bar 4-3.3(a)(1) ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."); Oath of Admission, Fla. Bar J., Sept. 2004, at 2 ("I will employ for the purposes of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law."). Rule 4-3.3(a)(3) of the Rules Regulating the Florida Bar specifically prohibits an attorney from knowingly "fail[ing] 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." Id.

3. The justification for attorney's fees for bad faith litigation conduct, is found in Moakley v. Smallwood, 826 So.2d 221 (Fla. 2002), where the Florida Supreme Court declared that a trial judge has the inherent authority to award attorney's fees against a party for bad faith or egregious conduct in litigation, even though no statute authorizes the award. See also, Bitterman, 714 So.2d 356; Aoude v. Mobile Oil Corp., 892 F.2d 1115 (1st Cir. 1989)) (discussing the court's inherent power to do "whatever is reasonably necessary to deter abuse of the judicial process . . .").

II. Background

4. Here, the Class Plaintiff, WILLIAMS, alleges that the Defendant, HERITAGE, has engaged in misconduct by creating a Class Notice List that the Defendant knew included customers that were either not Peoples Gas customers and/or would not be entitled to damages. WILLIAMS asserts that this alleged scheme was calculated to: 1) force the Class Plaintiff and/or his counsel into spending thousands of dollars on all of the costs associated with mailing Class Notices to thousands of customers that HERITAGE knew or should have known were either not Peoples Gas customers and/or would not be entitled to damages; 2) force Class Plaintiff's counsel into spending hundreds of hours working on issues related to customers named on the Class Notice List that HERITAGE knew were either not Peoples Gas customers and/or would not be entitled to damages; and, 3) convince this Court that the only way to determine damages is by conducting a file-by-file review of each customer's hard customer file – as opposed to relying on only HERITAGE'S electronic records – so HERITAGE could argue that the subject Class must be decertified because the file-by-file review creates thousands of mini-trials.

5. WILLIAMS also argues that HERITAGE has made knowingly false arguments in its papers and at hearings to force Plaintiff and this Court into spending additional resources and time. To wit, WILLIAMS contends that

contrary to HERITAGE'S admission that it assumed all the liabilities from Peoples Gas in its Answer to Plaintiff's Second Amended Complaint, HERITAGE'S counsel has represented to the Court at multiple stages that HERITAGE'S acquisition of Peoples Gas was only an "asset" purchase and intentionally misquoted in its papers and during the hearing on Plaintiff's Valcin Presumption Motion that its own client's 2002 10-K report proved the acquisition was only an "asset" purchase. In addition to the actual verbiage within HERITAGE'S 2002 10-K report, WILLIAMS also relies on page fifteen (15) – or Bates Number "Heritage 333" – of Heritage's produced Propane Acquisition Log, which states that the August 10, 2000 "Contribution Agreement" between Peoples Gas and HERITAGE was: "Not Heritage's standard Contribution Agreement. This is closer to a stock purchase for $, *assumption of liabilities* and issuance of Common Units, however, no ownership of U.S. Propane, L.P. was acquired, only the ownership interests of the four LLCs [one of which was Peoples Gas]." *(Emphasis added.)*

6. Finally, WILLIAMS states that HERITAGE has filed and relied on false affidavits, invalidly notarized affidavits and false answers to interrogatories during the course of this litigation.

7. Specifically, the Plaintiff argues that in response to Plaintiff's Motion to Order that Damages will be Determined Using a Damage Study Based on Defendant's Records ("Plaintiff's Damages Study Motion"), HERITAGE filed and relied upon the Affidavit of Dr. Chris P. Tsokos, which stated, *inter alia,*

that Dr. Tsokos had "reviewed numerous documents, including the . . . Court's Order Finding Liability of Heritage Operating, LP on Breach of Contract claim of the plaintiff Class"; however, at his deposition, Dr. Tsokos unequivocally testified that he has not reviewed any Orders entered by this Court in this case. Further, Plaintiff notes that, during his deposition, Dr. Tsokos testified that he brought nothing in response to Plaintiff's subpoena duces tecum, had no useful materials or notes anyway, and had destroyed most everything relevant that may have existed at one time. Plaintiff also points out that Dr. Tsokos testified that, despite his filed affidavit criticizing Plaintiff's expert and Plaintiff's Damages Study Motion, he had no opinion or conclusions as of the time of his deposition because, according to Tsokos, counsel for HERITAGE has a "belief" that there is a statistical, electronic method to exclude customers from the Class Notice List, but because he had not yet been asked to do anything, he had no opinion or conclusion on counsel for HERITAGE'S "belief".

8. Dr. Tsokos also testified that he had never heard of Messer's Hill, Hughes, Tate, Hamilton, Ms. Harrison or Ms. Yip – much less reviewed their deposition testimony and/or communications with counsel for HERITAGE, despite HERITAGE'S Response to Plaintiff's Notice of Serving Expert Interrogatories to Defendant which stated:

> Dr. Tsokos will base his factual statements of Mr. Hill, Mr. Hughes, Mr. Tate, Ms. Harrison, Ms. Yip, Mr. Hamilton, and Mr. Hughes [sic] as contained in their depositions and communications with counsel, as well as are to be depicted in a summary and demonstrative aid depicting the acquisition history of Heritage Propane through the merger with AmeriGas.

9. Finally, WILLIAMS argues that HERITAGE has filed and relied on multiple affidavits submitted by its employee and witness John Hughes which state, among other things, that Mr. Hughes' opinion and testimony are "based upon [his] review of the Court's January 3, 2013 Order Finding Liability of Heritage Operating, LP on Breach of Contract Claim of the Plaintiff Class"; however, like Dr. Tsokos, in his February 10, 2014 deposition, Hughes unequivocally testified that he had not reviewed any Orders of this Court during the entirety of this case. Furthermore, Plaintiff contends that Hughes' January 30, 2014 affidavit was invalidly and improperly notarized in Oklahoma because Hughes lives in Jacksonville, FL and, therefore, did not personally appear before the notary (who works in HERITAGE'S counsel's office) as required and attested to.

10. Conversely, HERITAGE argues that it has complied with this Court's Class Notice List Order and that Plaintiff's counsel and Plaintiff's expert were the ones that created the search queries for the Class Notice List. To wit, HERITAGE states that Plaintiff's expert, Frank Cohen, analyzed, suggested, confirmed and allowed HERITAGE to create the Class Notice List based on the fields and values Plaintiff and/or his expert identified; thus, HERITAGE argues that if the Class Notice List is overbroad, it is Plaintiff's fault, not HERITAGE'S or its employees', John Hughes and/or Linda Yip.

11. Further, HERITAGE asserts that it complied with this Court's Class Notice List Order by producing the Propane 2000 data to Plaintiff's counsel prior to the May 28, 2012 deadline, and further notes that it was unaware of the RIS computer system and data (which Linda Yip was responsible for) until after the May 28, 2012 deadline, but it produced the RIS data to Plaintiff's counsel as soon as that information was learned and obtained.

12. As for all of the data produced in regards to the Class Notice List, HERITAGE avers that, at the time the Class Notice List was produced, it did not know of any method to electronically exclude customers beyond the methods taken.

13. Next, HERITAGE states that after the Court entered its Order on Liability on January 3, 2013, counsel for HERITAGE conferred with Hughes and Yip to determine ways to potentially exclude customers from the Class Notice List and as a result of some of those discussions, HERITAGE filed a Motion for Partial Summary Judgment in April, 2013, attaching affidavits of Hughes and Yip, arguing that certain customers were "barred" from recovering damages due to the statute of limitations. [1]

14. HERITAGE also argues that on August 28, 2013, it filed another Motion for Partial Summary Judgment – attaching a new affidavit of Linda Yip, dated August 27, 2013 – that, *inter alia,* sought to electronically

[1] On May 28, 2013, HERITAGE filed a Notice of Cancelation of Hearing regarding this Motion for Partial Summary Judgment so that Motion was never heard.

exclude certain customers from recovering damages because, by identifying a unique numerical digit, the RIS system could allegedly confirm that certain customers could not have been Peoples Gas customers. Thus, HERITAGE maintains that Plaintiff first became aware of HERITAGE'S electronic exclusion method for, at least, the RIS data on August 28, 2013, not January 30, 2014.

15. Although HERITAGE'S counsel did state that because he was at trial an associate in his office worked with Hughes on his January 30, 2014 affidavit and that the associate and notary (which both work for counsel for HERITAGE'S firm) should have known better than to notarize Hughes' affidavit in the State of Oklahoma if Hughes was not personally there, HERITAGE did not offer any response or rebuttal, in its papers or at the hearing on Plaintiff's Motion for Sanctions, as to Plaintiff's allegations that: 1) HERITAGE'S counsel made knowingly false arguments in its papers and at hearings regarding its position that it only purchased the "assets" of Peoples Gas and did not assume Peoples Gas' liabilities; 2) HERITAGE filed and relied on false affidavits of Dr. Tsokos and Hughes; 3) HERITAGE filed and relied on false interrogatory answers; 4) HERITAGE'S expert, Dr. Tsokos, showed up for his deposition without bringing any responsive papers because he either destroyed them or they were not helpful to anyone but himself; and, 5) despite submitting an affidavit in opposition to Plaintiff's Damages Study Motion, Dr. Tsokos had not yet been asked to form an opinion – only that he was aware of counsel for HERITAGE'S "belief" that there was a statistical, electronic method that could be used to exclude customers from the Class Notice List.

III. Findings

16. The Court having reviewed the briefs, heard the argument of counsel and being fully advised in the premises, hereby finds as follows.

a. First, the Court finds that HERITAGE caused the creation of an overbroad Class Notice List that could have been further reduced electronically as far back as March of 2012.

i. In reaching this determination, the Court relies on the dialogue in a hearing on March 29, 2012, where the mergers and acquisitions of the Defendant was discussed in relation to the potential class members database and ways to limit the class notice based on corporate structure since the class was to only include customers from Peoples Gas during a certain time frame. While Plaintiff agreed to send notices to an "overbroad" class to include customers that had no prior relationship with Peoples Gas was never the intent. Plaintiff has promoted all along an electronic method to exclude potential class members; however, the Plaintiff lacked the knowledge of Defendant's electronic capabilities and relied on the logical conclusion that Defendant's would not promote an overbroad class unnecessarily.

ii. Similarly, from May 2012 during the Phase 1 – Damages Trial testimony of Linda Yip. Specifically, Yip testified that, at the time she created and produced the RIS customer names for the Class Notice List, she was aware that the RIS database had a unique numerical digit that could

identify a significant number of customers that could ***not*** be Peoples Gas customers; however, she was instructed to produce the entire list anyway. Therefore, despite HERITAGE'S position that it advised Plaintiff on August 28, 2013 in its Motion for Partial Summary Judgment (which attached Yip's August 27, 2013 affidavit) that it could electronically exclude RIS customers from the Class Notice List, that Motion and affidavit were filed more than fourteen (14) months after HERITAGE produced the Class Notice List to Plaintiff and after Plaintiff had already paid for all the costs associated with mailing the Class Notice to every customer identified on the Class Notice List.

iii. Similarly, the Court finds that Hughes knew of other methods to electronically exclude customers from the Class Notice List at the time he ran his initial query, but HERITAGE did not utilize those methods nor inform the Plaintiff until after it filed its Motion for Partial Summary Judgment Regarding Class Members on January 30, 2014. Regarding HERITAGE'S position that Plaintiff's counsel and Plaintiff's expert created the query and/or determined which values and/or fields were to be used to create the Class Notice List, the Court notes that the electronic data at issue is data that has been in the custody and control of HERITAGE throughout the duration of this case; thus, neither Plaintiff's counsel nor Plaintiff's expert can be expected to know everything that is in HERITAGE'S databases and/or what fields and/or queries would have yielded the best electronic results for creating the Class Notice List. Instead, HERITAGE was the best

suited party to explore all potential methods of electronic exclusion prior to producing the Class Notice List, and its failure to do so in good faith and a reasonable manner amounts to sanctionable conduct.

iv. Furthermore, this Court does not find it credible that Plaintiff's counsel stipulated (as HERITAGE'S counsel alleged and Plaintiff's counsel disputed during the Motion for Sanctions hearing) to exclude the customers Yip identified in her August, 2013 affidavit. If Plaintiff had entered into a valid stipulation, HERITAGE would not have filed, noticed for hearing and argued its January 30, 2014 Motion for Partial Summary Judgment Regarding Class Members if the Plaintiff already stipulated to HERITAGE'S August 28, 2013 Motion for Partial Summary Judgment, which sought the same type of relief. Indeed, beyond counsel for HERITAGE'S comments during the Motion for Sanctions hearing, no evidence has been provided to this Court to support such "stipulation", despite the clear language of Rule 2.505(d), Florida Rules of Judicial Administration – Stipulations, which states:

> No private agreement or consent between parties or their attorneys concerning the practice or procedure in an action shall be of any force unless the evidence of it is in writing, subscribed by the party or the party's attorney against whom it is alleged. Parol agreements may be made before the court if promptly made a part of the record or incorporated in the stenographic notes of the proceedings, and agreements made at depositions that are incorporated in the transcript need not be signed when signing of the deposition is waived. This rule shall not apply to settlements or other substantive agreements.

b. Second, HERITAGE'S conduct which led to the entry of the Valcin Presumption Order and its misconduct described herein as it relates to creation of the overbroad Class Notice List unnecessarily burdened the Court and Plaintiff with the discovery issues related to a file-by-file review. As a result, the Court finds that despite insisting for years – over Plaintiff's objections – that a file-by-file review of every customer's hard paper file was the only way to determine damages, during the Phase 1 – Damages Trial, HERITAGE did not attempt to use a single hard customer file to limit the number of customers from the Class Notice List that were potentially entitled to damages; therefore, this Court's requirement – based on HERITAGE'S statements – that Plaintiff engage in a file- by-file review of every customer's hard paper file for the districts at issue in the Phase 1 – Damages Trial resulted in a significant waste of the Court's time and effort as well as the Plaintiff's time, costs and other resources.

c. Third, the Court finds that HERITAGE has made knowingly false statements in its papers and at hearings in regards to counsel for HERITAGE'S repeated insistence that HERITAGE only purchased the "assets" of Peoples Gas and did not assume Peoples Gas' liabilities. In reaching this conclusion, the Court relies on the 2002 10-K report that HERITAGE filed with the Securities and Exchange Commission and which HERITAGE attached to its Response to Plaintiff's Valcin Presumption Motion.

Additionally, the Court notes that HERITAGE'S produced Propane Acquisition Log confirms that HERITAGE assumed Peoples Gas' liabilities as a result of the August 10, 2000 "Contribution Agreement" between Peoples Gas and HERITAGE, thus, counsel for HERITAGE'S statements to the contrary are false.

d. Fourth, the Court acknowledges that HERITAGE offered no rebuttal to Plaintiff's charge that HERITAGE relied on and filed with the Court false affidavits and false answers to interrogatories during the course of this litigation.

i. Specifically, the Court finds that the Affidavit of Dr. Chris P. Tsokos was a false affidavit because Dr. Tsokos testified at his deposition that he had not reviewed any Court Orders from this case; thus, there could be no truth to his affidavit testimony that he had "reviewed numerous documents, including the . . . Court's Order Finding Liability of Heritage Operating, LP on Breach of Contract claim of the plaintiff Class". Similarly, during his depositions, Dr. Tsokos testified that he had never heard of Messer's Hill, Hughes, Tate, Hamilton, Ms. Harrison or Ms. Yip, much less reviewed their deposition testimony and/or communications with counsel; thus, HERITAGE'S above noted Response to Plaintiff's Notice of Serving Expert Interrogatories to Defendant cannot be considered truthful.

ii. In the same respect, the Court has reviewed Mr. Hughes' February 10, 2014 deposition testimony and finds that John Hughes testified

that he had not reviewed any Court Orders from this case; therefore, HERITAGE also filed with the Court and relied on at least two (2) false affidavits of its employee and witness, John Hughes (one in March of 2013 and the other in January of 2014).

e. Fifth, the Court finds that Mr. Hughes' January 30, 2014 affidavit was invalidly and improperly notarized in Oklahoma because Mr. Hughes testified at the Phase 1 – Damages Trial that he had not traveled to the State of Oklahoma during the relevant time period; therefore, he could not have personally appeared before the notary (who works for HERITAGE'S counsel's firm) as required and attested to. Additionally, counsel for HERITAGE conceded this fact – although he stated that an associate from his office worked on the affidavit with Hughes, not him.[2]

f. Finally, the Court finds it unfathomable that on the eve of the Phase 1 - Damages Trial, the Defendant's determine a new method to reduce the number of class members electronically by roughly 40% after more than two years of active discovery and litigation as to the actual class members by reviewing corporate structure and time frame established in prior Court Orders as acknowledged in Defendant's Motion for Partial Summary Judgment Regarding Class Members filed January 30, 2014 and in Defendant's Response and Cross-Motion to Class Plaintiff's Motion for Sanctions filed

[2] Although counsel for Plaintiff argued in his Reply at the Motion for Sanctions hearing that the "associate" discussed by counsel for HERITAGE is not admitted pro hac vice for this case, the Court is not addressing that issue here.

February 17, 2014. This very concept was dicussed in the hearing on March 29, 2012.

IV. Awarded Relief

17. As a result of these findings, the Court imposes the following sanctions:

a. Plaintiff's Motion for Damages Study is hereby **GRANTED** as to future damages trials.

i. The Court acknowledges that prior to commencing the Phase 1 – Damages Trial, counsel for both parties conferred and stipulated to electronic exclusions of customers from the Class Notice List; therefore, by agreement, those customers are not entitled to damages.

ii. Further, during the Phase 1 – Damages Trial, the Court determined that the evidence related to HERITAGE'S electronic records was sufficient to demonstrate damages, thus, the Court concludes that damages can be determined by the methodology discussed in Plaintiff's Damages Study Motion.

iii. Also, the Court notes that counsel for both parties have advised that they will work together to stipulate which other customers that were mailed a Class Notice from the remaining Florida districts (which have not yet been tried) can be electronically excluded from recovering damages; therefore, once those exclusions, by stipulation, are confirmed, the methodology discussed in Plaintiff's Damages Study can be used to determine damages to the customers remaining on the Class Notice List.

iv. Finally, the Court notes that the affidavit of HERITAGE's expert, Dr. Chris P. Tsokos, which was incorporated into HERITAGE's Response to Plaintiff's Damages Study Motion, was a false affidavit; therefore, the Court's reliance on Tsokos' affidavit and HERITAGE's arguments related to Tsokos' affidavit were misguided and the Court should not have considered Tsokos' affidavit or arguments related thereto as part of the Court's prior ruling on Plaintiff's Damages Study Motion.

b. In addition to granting Plaintiff's Motion for Damages Study, the Court also notes that Plaintiff's counsel successfully demonstrated that, despite their best efforts, in respect to any given hard customer file and/or produced General Sales Agreement ("GSA"), Plaintiff is incapable of definitively determining in any individual case what category the respective file and/or GSA falls under (i.e. No Peoples Gas GSA, Altered Peoples Gas GSA, Peoples Gas GSA with Tank Rent Specified, Peoples Gas GSA with no mention of Tank Rent). Additionally, HERITAGE'S failure to make any attempt to limit the number of customers from the Class Notice List that were potentially entitled to damages during the Phase 1 – Damages Trial caused a significant waste of Plaintiff's time, costs and other resources because, during the Phase 1 – Damages Trial, Plaintiff through the testimony of HERITAGE'S own witnesses and his expert relied on HERITAGE'S electronic records to fulfill his burden of proof; thus,

this Court's instruction – upon HERITAGE'S urging – that Plaintiff conduct a file-by-file review of every hard customer file at issue was futile. As a result, the Court hereby imposes the following guidelines upon HERITAGE if it intends to proffer any of its customer's hard paper files as evidence at any future trial on damages.

i. Forty-five (45) days prior to the respective Damages Trial, HERITAGE shall: 1) identify the specific customer(s), customer account number(s) and particular district for the respective file(s) that it intends to rely upon and 2) shall specifically note what category HERITAGE believes the file and/or GSA falls under.

ii. Thirty (30) days prior to the respective Damages Trial, HERITAGE shall lay the factual predicate by affidavit or other sworn testimony for the admissibility of the documents it intends to proffer at the respective Damages Trial, including the requisite proof of authenticity and satisfaction of all the elements within Fla. Stat. § 90.803(6) (or the hearsay exception rule) under which the documents are to be offered.

iii. Thirty (30) days prior to the respective Damages Trial, HERITAGE shall lay the factual predicate for the trustworthiness of the documents it intends to proffer at the respective Damages Trial.

iv. Within the 30 day period prior to the respective Damages Trial noted above in paragraph 17(b)(ii-iii), Plaintiff may conduct appropriate

discovery regarding the identified hard files discussed in paragraph 17(b)(i), including depositions of any witnesses identified by HERITAGE for purposes of establishing its proffer of complying with Fla. Stat. §90.803(6) and/or the trustworthiness of such hard paper files.

c. Although the Court and counsel for both parties discussed Fla. Stat. § 57.105(2) during the Motion for Sanctions hearing, the Court recognizes that Plaintiff filed his Motion for Sanctions within only a few days of receiving Defendant's Motion for Partial Summary Judgment Regarding Class Members, deposing John Hughes and deposing Chris P. Tsokos; thus, at this point, there is no way to avoid any potential issues that may relate to the 21 day safe-harbor provisions discussed in § 57.105(4). Nevertheless, this Court has inherent authority to issue sanctions. See Moakley v. Smallwood, 826 So.2d 221 (Fla. 2002); Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998); Aoude v. Mobile Oil Corp., 892 F.2d 1115 (1st Cir. 1989)); Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998); Boca Burger. Inc.. v Forum, 912 So.2d 561, 571 (Fla. 2005); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 486 (S.D. Fla. 1984). Accordingly, the Court hereby sanctions HERITAGE and awards Plaintiff the following:

i. All reimbursement costs associated with mailing Class Notices to customers that both parties will/have electronically exclude(ed) as a result of the electronic methods discussed by John Hughes and Linda Yip.

ii. Plaintiff's attorneys' fees and costs associated with the time and expense that Plaintiff's counsel incurred filing and/or appearing for hearings related to HERITAGE'S position that it only purchased the "assets" of Peoples Gas and did not "assume the liabilities".

iii. Plaintiff's attorneys' fees and costs associated with conducting a file-by- file review of the customer's hard paper files that were at issue for the Phase 1 – Damages Trial because, at the time HERITAGE produced the Class Notice List, it knew of ways to electronically identify and/or exclude from the Class Notice List customers that were ***not*** Peoples Gas customers; however, HERITAGE failed to utilize those electronic means at that time, causing the Court to require Plaintiff to conduct a file-by-file review. Also and as noted above, HERITAGE'S failure to make any attempt to limit the number of customers from the Class Notice List that were potentially entitled to damages during the Phase 1 – Damages Trial caused a significant waste of the Court's time and effort as well as the Plaintiff's time, costs and other resources because, during the Phase 1 – Damages Trial, Plaintiff through the testimony of HERITAGE'S own witnesses and his expert relied on HERITAGE'S electronic records to fulfill his burden of proof; thus, this Court's instruction – upon HERITAGE'S urging – that Plaintiff conduct a file-by-file review of every hard customer file at issue was futile.

d. The Court, however, **DENIES** Plaintiff's prayer that this Court Strike HERITAGE'S affirmative defenses, but warns HERITAGE that if the Courts

determine that there is any further bad faith and/or sanctionable conduct, it may strike HERITAGE'S pleadings *in toto.*

18. To the extent that any of the above sanctions require future fee hearings and/or hearings to determine whether HERITAGE or its counsel is responsible for paying the sanction(s) discussed herein, those issues will be addressed and resolved separately.

DONE AND ORDERED in Chambers in St. Petersburg, Pinellas County Florida on August 22, 2014.

ORIGINAL SIGNED
Circuit Court
Pinellas County, Florida

AUGUST 22, 2014

Pamela A.M. Campbell
Circuit Judge

Pamela A.M. Campbell
Circuit Judge

Copies to:
Hala Sandridge, Esquire hala.sandridge@bipc.com
Carl Nelson, Esquire carl.nelson@bipc.com
Edward Waller, Esquire Edward.waller@bipc.com
Thomas Seider, Esquire Thomas.seider@bipc.com joanne.volpe@bipc.com valeria.terry@bipc.com
R. Charles Wilkin Esquire cwilkin@wilkinmcmurray.com
Eddie G. Godwin, Esquire egodwin@laulane.com mdallago@laulane.com
Kent G. Whittemore, Esquire kwhittemore@wherejusticematters.com eservice@wherejusticematters.com
Jeffrey M. Liggio, Esquire emailservice@liggiolaw.com
Geoff S. Stahl, Esquire emailservice@liggiolaw.com
Scott T. Johni, Esquire service@johnilaw.com scott@johnilaw.com