IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

Yuling Zhan,	)	
Plaintiff	)	
V.	)	No: 04 M1 23226
Napleton Buick Inc;	)	
Defendant	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF THE MOTION

TO DISQUALIFY AND/OR SANCTION

On December 21, 2004, plaintiff filed the instant lawsuit, and raised a variety of claims against a car dealership, Napleton Buick Inc. ("Buick). Ms. Elaine S. Vorberg ("Vorberg"), Mr. Ryan Haas ("Haas") and others from Childress Duffy Goldblatt, Ltd. (the "Firm") represented defendant Buick as its present counsel.

After nine-month court proceedings, discovery could not start, because Buick failed to file an Answer, and its counsel interrupted and delayed the process again and again. Plaintiff will show below that it is warranted to disqualify and/or sanction Vorberg, Haas and their Firm, under Illinois Supreme Court Rules, Rules of the Circuit Court of Cook County, Illinois Code of Civil Procedure, and Illinois Rules of Professional Conduct (IRPC).

A. Vorberg And Haas Should Be Disqualified Because They Identified Themselves Or Acted As Necessary Witnesses In The Instant Suit

1. On September 4, 2003, Plaintiff bought a 1999 Ford Taurus from Buick; the car stalled at highway speed on the first day plaintiff drove it to and

from work. Plaintiff was extremely lucky there was no fatal accident occurred, Buick towed back the car, kept the money ever since. On September 9, 2003, Plaintiff sent a letter and fax to Buick as a notice of revocation, asking the dealer to respond in three days by fax, so the problem could be solved in one week. On September 14 and November 2, 2003, plaintiff wrote letters to the Illinois Attorney General's Office, asking for help. In an undated response to the same government office, Buick enclosed a letter addressed to plaintiff. In response, plaintiff promptly pointed out the September 10, 2003 letter Buick submitted was falsified. For the next fifteen months, Buick showed no intention to solve the problem in any reasonable way, and plaintiff was forced to file the instant suit.

2. On February 28, 2005 and March 9, 2005, Vorberg wrote two letters to plaintiff, asked for the car keys and, most importantly, twisted facts about what Buick had and had not done. See Exhibit 1 and 2. On March 2 and March 14, 2005, plaintiff politely but explicitly persuaded Vorberg not to provide false statement. See Exhibit 3. On March 16, 2005, at plaintiff's surprise, Haas demanded car keys in the open court. Such conduct clearly violated Illinois Supreme Court Rule 201(k) and Rule 2.1 of this Court.
3. After the instant lawsuit was filed, beyond any reasonable doubt, Buick and its counsel did not need car keys to take part in a joint inspection or settlement negotiation. Plaintiff had a good reason to believe it was a collusion and fraud from the start. A series of events convinced plaintiff it was part of a calculated scheme to deceive. Buick and its counsel dared not file a written motion to demand the car keys. As necessary witnesses and actors in the process, Vorberg and Haas, have never been honest in and out of the Court regarding their real intention.
4. On April 15, 2005, Vorberg filed an Affidavit to the Court. Failing to show how such a filing was permitted; she volunteered to be a possible witness at trial for herself and Buick. See Exhibit 4. The Affidavit means nothing but an admission that Buick and its counsel all had an interest and

opportunity to alter the car's condition. Under IRPC 3.7(a), a lawyer is prevented from continuing representation of a client if the lawyer knows or reasonably should know she or he may be called as a witness on behalf the client, unless certain exceptions apply. Disqualification will be proper when from the outset the attorney knew that she or he was likely to be called as a witness. See *National Wrecking Co. v. Midwest Terminal Corp*. 601 N. E. 2d 999 (Ill. App. 1st Dist. 1992)

5. On August 3, 2005, although acting as an advocate, Haas spent most of his rime as "witness", providing devoid and false statement during an arbitration hearing. The Arbitration Panel should be considered as a tribunal. See *Skoinick v. Altbeimer & Gray* 730 N. E. 2d 4, 25 (2000) (tribunal is defined as "a trial type proceeding in which evidence is presented to a fact-finder to the parties, witnesses are examined, and a decision by a decision-maker is reached on the basis of evidence and arguments developed in the proceeding.")
6. Haas had never followed Illinois Supreme Court Rules and IRPC during the arbitration. At best, all his testimony as a witness constituted a violation of the basic requirement that all factual allegations in the Amended Complaint must be taken as true, since Buick failed to file an Answer. At worst, his testimony was nothing but false statements presented to a tribunal. For instance, he vigorously argued " We don't know plaintiff rented cars for three months." Such a contention is flagrantly fraudulent because he knew that plaintiff had incorporated all the car rental receipts in her Complaint and Amended Complaint.
7. During the arbitration, Haas presented three pieces of "evidence" in total to the Panel, two above-mentioned letters written by Vorberg, another was the undated letter written by Buick, attached with a falsified letter, which was addressed to plaintiff. (Exhibits E1 and E2 in plaintiff's Amended Complaint) By doing so, Haas violated Illinois Supreme Court Rule 90 (c), because he failed to inform plaintiff about his intention to submit such documents to the Arbitration Panel. At the same time, Haas put Vorberg in

a position to play multiple roles, such as lead counsel and necessary witness for both Buick and Haas. Further, in concert with Vorberg, Haas was fabricating evidence, false and inadmissible as hearsay. The realty is no matter how skillful in twisting words and facts, neither Haas nor Vorberg could change what Buick had or had not done.

8. There would be no doubt that testimony from Vorberg and Haas will create confusion during a trial. Jury might wonder what roles they are playing: counsel or actors, witnesses for plaintiff or defendant etc. It is well known that IRPC 3.7 and case law prohibit a lawyer from testifying in a matter in which he or she represents one of the parties. This is designed to serve a number of purposes, such as to benefit all parties including their attorneys, and at the same time, to preserve public confidence in the administration of justice. See *Jones v. City of Chicago,* 610 F. Supp. 350 (N.D. Ill. 1984); *Greater Rockford Energy & Technology Corp. v. Shell Oil Co*., 777 F. Supp. 690 (C. D. Ill. 1991). Accordingly, Vorberg and Haas should be disqualified in the instant suit as a matter of law.

B. Buick And Its Counsel Should Be Sanctioned For Frivolous Filing, Groundless Contentions And Total Lack Of Respect To The Rules

1. On January 27, 2005 while filing a motion to dismiss and strike, Buick's counsel provided false statement on oath, served a single piece of paper - the notice of motion only - upon plaintiff, without mailing a copy of the motion and required attachment. See Exhibit 5. Buick failed to serve papers on time and such conduct was clearly in violation of Illinois Supreme Court Rule and the Rule of this Court.
2. Plaintiff had to file an opposition to object such practice from Buick, and attended a hearing otherwise she did not have to. On February 3, 2005, the Honorable Judge directed Buick to "do it all over again." But Buick's counsel still pretended to be a prevailing party, drafting a Court Order to deny plaintiff's filing as moot.

3. On February 4, 2005, after the Court ruling, Vorberg wrote plaintiff a letter, further quibbled over and covered up their failure in serving papers. See Exhibit 6. It is plain wrong for Vorberg to use the word “Another” in the letter. Vorberg certainly knew that not a single copy of the motion had been sent to plaintiff before. By denying an obvious failure and covering it up, Vorberg put her credibility in doubt from the very beginning.
4. After a joint inspection of the car in dispute on March 31, 2005, during a hearing on April 4, 2005, plaintiff stated in open court that she did not misuse the car. Vorberg concurred immediately: “that is right.” On April 11, 2005, at Vorberg’s presence, Buick tried to “start the car and take a ride.” Using two chargers in a row, Buick struggled with the car for about half an hour, but completely failed.
5. On April 15, 2005, Vorberg filed her Affidavit to the Court, volunteered to testify at trial as a witness, and on May 17, 2005, contrary to her previous position, she contended in a letter sent to plaintiff: “ any stalling of the vehicle may have been due to an insufficient amount of fuel in the vehicle.” This is a clear indication that Buick and its counsel already went down the road of spoliation. Playing words to insult human intelligence, Vorberg finally revealed why Buick and its counsel sought unilateral access to the subject car and demanded the car keys after the lawsuit was filed.
6. On May 5, 2005, Plaintiff filed an Amended Complaint. One month later on June 21, 2005, Buick submitted its motion to dismiss and strike, which was a complete failure. In its thirteen-page motion, at pages 2, 3, 4, 5, 6, 9, 10, Buick provided incorrect assertion and argument based on its misinterpretation of the law. There were false statements at pages 4, 6 and 11. Buick’s contention at pages 7 and 8 clearly had no merit. Worst of all, Buick devoted half of the page 5 to argue: “§2310(d) does not provide a basis for any action, regardless of what facts the Plaintiff has plead.” Here, Buick was basically suggesting there was no private cause of action

under the Magnuson-Moss Act. Such incredible argument is not only frivolous, but also scandalous.

7. On June 23, 2005, Buick failed to file papers on time as the Honorable Judge ordered. In violation of 735 ILCS 5/2-602, 735 ILCS 5/2-608 and IRPC 3.1, Buick and its counsel cooked up a "counterclaim" to insult and harass plaintiff, in which Buick pretended to be, or described itself as a storage facility, and Vorberg acted like Buick's accounting officer, collection agent and counsel at the same time. As absurd and outrageous as it could be in several ways, as a lawyer, Vorberg was demanding a Court Order in a "counterclaim", not in a motion, for permission to destroy evidence before discovery. See Exhibit 7.
8. In the "counterclaim", Buick requested to dispose the subject car, and demanded $19,600 and more from plaintiff. Even after a cursory reading, conclusion can be made, the "counterclaim" has no legal ground; there is no single set of facts to support the frivolous filing. On July 12, 2005, plaintiff filed a motion to strike, and Buick did not rebut, much less respond to plaintiff's motion as the Rules of Civil Procedure required.
9. Because Buick and its counsel interrupt and delay the court proceedings and failed to file an Answer, discovery for the instant suit cannot start. But on July 12, 2005, Buick filed a Notice To Produce in an attempt to intentionally inflict emotional distress upon plaintiff. Such conduct further violates Illinois Supreme Court Rules, Illinois Rules of Civic Procedure, the Rules of this Court, and the Illinois Rules of Professional Conduct.
10. On August 3, 2005, during anarbitration, Haas vigorously contended: "Plaintiff has the burden to prove what is defective with the car." As the Court can see, such assertion is completely wrong as a matter of law. Courts of different jurisdiction have a consistent and uniform holding on this issue. See e.g. *Ford Motor Company. V. Phillips*, 551 So. 2d 992 (Ala. 1989); *Universal Motors Inc. v. Waldock,* 719 P. 2d 254 (Alaska 1986); *Soto v. Danelson Suzuki*, 1994 Conn. Sup. LEXIS 2439; *Stewart v. Ford Motor Co*., 553 F. 2d 130, 136 (D. C. Cir. 1977); *Burrus v. Itek Corp*., 360

N. E. 2d 1168, 1171 (Ill. App. 1977); *Alvarez v. American Isuzu Motors,* 321 Ill. 3d 696, 702, 749 N. E. 2d, 22 (2001); *Rose v. Epley Motor Sales*, 215 S. E. 2d 573, 577-578 (N. C. 1975).

11. Under Illinois Supreme Court Rule 92 (b), for a court-annexed arbitration, "[T]he award shall dispose of all claims for relief." During the arbitration, Haas knowingly and willingly concealed the "counterclaim", although its face value was much greater than a dangerously defective car. Such concealment should be considered as fraud upon a tribunal. Further, Buick and its counsel have never been honest with the Court, since they did not withdraw the frivolous filing before and after the arbitration.
12. Illinois Supreme Court Rule 137 ("Rule 137") requires that every pleading, motion and other paper of a party shall not "interpose for any improper purpose, such as to harass or cause unnecessary delay or needless increase the cost of litigation". Buick and its counsel have never been honest with the Court about what is the purpose of their "counterclaim". For more than 15 months Buick fails to respond plaintiff's request directly. As the Court can see, even if Buick were competent to fix the car in 2005 after the lawsuit started, filing a groundless counterclaim is still an outrageous conduct. It is a matter of law that Buick has no right to cure any of the dangerous defects after plaintiff revoked the acceptance or rescinded the contract. Evidence has to be preserved under 810 ILCS 5/2-515.
13. On August 24, 2005, another Buick's counsel admitted in the open court that Buick did not present the "counterclaim" to the Arbitration Penal. Courts uniformly hold that when a lawsuit is suspected of being brought for a reason other than for the resolution of the claims, the trial judge must take an inquiry as to whether the suit has been brought to harass or for some other improper purpose, regardless if the suit has some plausibility. See e.g. *Szabo Food Services, Inc. v. Canteen Corp*, 823 F. 2d 1072, 1082-1083 (7th Cir. 1987). Further, frivolous filings, which have been voluntarily dismissed, are still subject to sanctions. See *Cooter & Gell v*

Hartmarx Corp., 496 U. S. 384 (1990); *Edward Yavitz Eye Center, Ltd. V. Allen*, 608 N. E. 2d 1242 (Ill. App. 2nd Dist. 1993); *Pines v. Pines* 635 N. E. 2d 1301 (Ill. App. 1st Dist. 1994).

14. On July 20, 2005, the Honorable Judge ruled that the case had to proceed and Buick' Motion to Dismiss was denied, Haas simply argued "No. We want to dismiss the case, " then, he requested another hearing. The Honorable Judge explicitly directed Buick to set a date for a 10:30 am hearing. On July 21, 2005, Haas filed the same old motion to dismiss one more time, discarded the "counterclaim", and chose a date for a 10:00 am hearing instead, for which some other Judge would preside. Such conduct definitely should be sanctioned under Rule 137. No lawyer shall play tricks in the Court, file the same old motion again to seek a ruling in his favor from a different Judge, or simply intend to harass adverse party, delay the process, and increase litigation costs.

C. Actual And Substantial Conflict Of Interest Exists, Under IRPC 1.10, The Firm Childress Duffy Goldblatt, Ltd. Should Be Disqualified As Well

1. Six months after the lawsuit was filed, and more than nineteen months had passed since plaintiff wrote two letters to the Illinois Attorney General's Office, Buick's counsel started trying to argue that their client sent a letter to plaintiff on September 10, 2003. On all occasions, plaintiff pointed out this is a deceptive statement, and she has provided detailed analysis on this issue in the Complaint. At trial it would be odd for Vorberg and other counsel to repeat the same argument, because they have credibility problem of their own in serving papers, on oath and in court proceedings. There is no way for Vorberg and others to convince a Jury that Buick was honest all the time, but its counsel did provide fraudulent statement to cover up a proven failure. Under IRPC 1.2 (d)(f)(g) and IRPC 3.3 Vorberg and others have to admit their own fatal mistakes; they have to correct all their false statement of material fact; and disclosure of Buick's conduct and wrong-doings would be inevitable. A conflict of

interest arises when an attorney's testimony would prejudicially contradict or undermine her/his client's factual assertions. See *Lamborn v. Dittmer* 873 F. 2d 522, 531 (2nd Cir. 1989).

2. When Buick's counsel started arguing that Buick sent the above-mentioned letter directly to plaintiff on September 10, 2003, they were denying plaintiff's allegation that the letter was falsified at a later date for the purpose of fraud and deception. At trial Vorberg and Haas would be in an awkward position to argue, in vain, that Buick did not falsified document about two years ago, but its counsel did fabricate evidence during arbitration. Under IRPC 1.2 (d)(f)(g) and IRPC 3.3 Vorberg and Haas have to admit they submitted inadmissible evidence and provided fraudulent statement to a tribunal; also they have to correct all their false statement of material fact; and disclosure of Buick's conduct and wrong-doings would be inevitable. It would be inappropriate for Vorberg and Haas to serve as Buick's trial counsel because of conflict of interest.
3. After the lawsuit was filed, there is no legitimate reason for Buick and its counsel to demand the car keys, Vorberg was the only person who wrote plaintiff making the request, and Haas was the only one to demand the same in the Court. This raises many important questions: who initiated the process; for what purpose; whether the car condition was altered; and when it happened, who should take the responsibility. A court states that the duty for candor before the court "trumps" or "supercedes" the duty of confidentiality when a client insists perpetuating perjury. See *Romano Bros. Beverage Co. v. D'Agostino-Yerow Assoc., Inc.*, 1996 U. S. LEXIS 10730 (N. D. Ill. 1996) at 47-49. Testimony from Vorberg and Haas would contradict with that from Buick as to whether Buick's counsel initiated the whole process. When fraud-upon-the-court is at issue, there would be substantial conflict of interest between Buick and its counsel. Under IRPC 3.7 and IRPC 1.7(b) Vorberg and Haas should be disqualified for the instant suit.

4. Six months after the lawsuit started, failing to follow the Court Order, violating Illinois Rule of Civil Procedure, Buick filed the "counterclaim", which was patently without any merit. A lot of important questions have to be answered such as who proposed such a filing, for what improper purpose; why there was no response to plaintiff's motion to strike; why Haas did not present the "counterclaim" to an Arbitration Panel; whether or not Buick had authorized Haas to abandon or conceal it; why Buick counsel did not withdraw the filing in the Court. During the arbitration, Haas was the only person acting as advocate and witness for Buick and Vorberg. When fraud upon a tribunal is at issue, necessary testimony from Vorberg and Haas would contradict with that from Buick. The Jury might ask the "counterclaim" belongs to whom, Buick or its counsel. There is substantial conflict of interest between Buick and its counsel. Under IRPC 3.7 and IRPC 1.7(b) Vorberg and Haas should be disqualified.
5. When testifying at trial, Vorberg and Haas have to argue their own credibility, and the Jury would be confused what roles they are playing. Under IRPC 1.10(a) and IRPC 1.7(b), when the rules on conflict would preclude them acting as advocates, actors or witnesses; it would likewise be improper for any member of the Firm to serve as Buick's trial counsel. See Geisler by Geisler v. Wyeth Laboratories, 716 F Supp. 520, 525 (D. Kan. 1989)
6. Disqualification is regarded as a drastic measure, which courts should grant only when necessary. See *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 721 (7th Cir.). On the other hand, the rules of legal ethics are aimed at protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of the judicial proceedings. Any doubts as to the existence of a conflict should be resolved in favor of disqualification. See *Skokie Gold Standard Liquors v. Joseph E. Seagram & Sons, Inc.*, (1st Dist. 1983) 116 Ill. App. 1057, 72 Ill. Dec. 561, 452 N. E. 2d 814. Accordingly Childress Duffy Goldblatt, Ltd should be disqualified in the instant lawsuit as well.

D. Conclusion

For the foregoing reasons, Vorberg and/or Haas as advocates/actors or witnesses should be disqualified. Sanction is warranted for each time Buick and its counsel show total lack of respect to the Court Orders, Illinois Supreme Court Rules, Rules of this Court, Illinois Rules of Professional Conduct. And sanction should be imposed upon Buick and its counsel for each frivolous filing and groundless contention they presented. Further, based on the foregoing, Childress Duffy Goldblatt, Ltd should be disqualified as well from the instant suit under IRPC 1.10(a) and IRPC 1.7(b).

Respectfully submitted

_____ _____

(Plaintiff's Signature) (Date)

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