IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JESSY POLSON, individually and behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC., and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. Defendants.	)	**CIVIL ACTION FILE NO. _____**

WALMART INC.'S[1] NOTICE OF REMOVAL

Defendant Walmart Inc. ("Walmart") hereby removes this action from the State Court of Fulton County, Georgia, to the Atlanta Division of the United States District Court for the Northern District of Georgia in accordance with 28 U.S.C. §§ 1332, 1441, 1446, 1453, and other applicable law. This Court has jurisdiction

[1] Plaintiff has improperly named Wal-Mart Stores, Inc. as Defendant. Effective February 2018, Wal-Mart Stores, Inc. legally changed its name to Walmart Inc.

over this action under 28 U.S.C. § 1332(d)(2). As grounds for removal, Walmart respectfully shows the following:

I. BACKGROUND

1. On June 30, 2017, Plaintiff Jessy Polson filed a Complaint against Kenny McElwaney, d/b/a Maximum Booting Co. ("McElwaney") in the State Court of Fulton County, Case No. 17EV003164 ("State Court Action"). On November 15, 2017, Plaintiff filed the First Amended Complaint ("FAC") against McElwaney in the State Court Action. On March 27, 2018, Plaintiff filed the Second Amended Complaint ("SAC") against McElwaney, Walmart, and Bright Meyers Union City Associates, L.P. in the State Court Action. In compliance with 28 U.S.C. § 1446(a), true and correct copies of all process, pleadings, and orders served upon Walmart are attached hereto as Exhibit A.

2. Plaintiff alleges that McElwaney booted his vehicle in a Walmart parking lot at 4735 Jonesboro Rd, Union City, GA 30291. He alleges the booting was unauthorized because the lot lacked the signage required under Union City Code of Ordinances, Chapter 10, Article I, § 10-28 ("Booting Ordinance").

3. This Court has original jurisdiction over Plaintiff's claims under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d).

4. Removal to this Court is proper under 28 U.S.C. §§ 1441(a) and 90(a)(2) because the United States District Court for the Northern District of Georgia, Atlanta Division, is the federal judicial district and division embracing the State Court of Fulton County, where the State Court Action was filed.

5. On May 1, 2018, Walmart was served with the summons and SAC. Walmart has filed this Notice within thirty days of service. This Notice is therefore timely. *See* 28 U.S.C. § 1446(b)(1).

6. In accordance with 28 U.S.C. § 1446(d), Walmart has filed this Notice with this Court, will serve a copy of this Notice upon all parties, and will file a copy in the State Court of Fulton County, along with a Notice of Filing of Notice of Removal. A copy of the Notice of Filing of Notice of Removal is attached hereto as Exhibit B.[2]

II. THIS COURT HAS ORIGINAL JURISDICTION UNDER CAFA.

7. CAFA grants federal courts diversity jurisdiction over putative class actions that meet certain diversity and amount in controversy requirements. *See* 28 U.S.C. § 1332(d). CAFA provides that a class action against a non-governmental

[2] By removing this action, Walmart does not waive, but expressly preserves any defenses with respect to the underlying state court action, including, but not limited to defenses related to venue and/or jurisdiction.

entity may be removed to federal court if: (1) the number of proposed class members is not less than 100; (2) any member of the proposed class is a citizen of a state different from any defendant; and (3) the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(2), d(5) & 1453(b).[3] This action satisfies all three requirements and may therefore be removed.

A. There Are At Least 100 Putative Class Members.

8. As stated in the SAC, Plaintiff seeks to represent

> a. All persons who have had a vehicle in their possession booted by or at the request of Defendants and paid fines for removal of said device within the City of Union City from June 15, 2012, through present; and
>
> b. A subclass of all persons who have had a vehicle in their possession booted by or at the request of Defendants at, or around, 4735 Jonesboro Rd, Union City, GA 30291, and have paid a fine for removal of said device from June 15, 2012, through present (the Polson subclass).

SAC ¶ 25.

9. The putative class exceeds 100 members because it includes (1) "all people" whose vehicles were booted by or at the request of Defendants, (2) in the entirety of Union City, (3) over a six year period.

[3] Class actions removed under CAFA "may be removed by any defendant without the consent of all defendants." 28 U.S.C. § 1453(b).

10. As Plaintiff has himself alleged twice since filing this action, "there are *thousands* of Class members." Compl. ¶ 22 (emphasis added); FAC ¶ 22 (emphasis added).[4]

11. In *Bankhead v. Castle Parking Solutions, LLC*, No. 1:17-cv-04085-MLB (N.D. Ga)—a related car booting case already removed to this Court—Plaintiffs similarly alleged that there "were thousands of Class members." ECF No. 1-1 at 10 (¶ 31). Based on this allegation, this Court held that CAFA jurisdiction existed. *See* ECF No. 18 at 7 (holding the "Notice of Removal sufficiently establishe[d] the first requirement under CAFA—that there are 100 or more members in the proposed class—by referencing the Complaint's allegation that 'there are thousands of Class members'").

12. For the same reason, the size of the putative class here creates CAFA jurisdiction.

[4] Plaintiff's additional recent allegation—that Defendants have immobilized "*at least* forty (40) vehicles in the City of Union City" and "*at least* forty (40) vehicles at, or around, 4735 Jonesboro Rd, Union City, GA 30291"—is mathematically consistent with his prior allegations. SAC ¶¶ 14, 15 (emphasis added). The Court may take judicial notice of these prior allegations. *See Davis v. Ocwen Loan Servicing, LLC*, No. 1:15-CV-782-TWT, 2015 WL 3988702, at *1 n.1 (N.D. Ga. June 30, 2015) ("The Court may take judicial notice of the previous complaints and court orders . . . because they are matters of public record.").

B. Minimum Diversity Exists.

13. CAFA requires minimum diversity. At least one named plaintiff must be a citizen of a different state than at least one defendant. 28 U.S.C. § 1332(d)(2)(a).

14. This case satisfies the minimum diversity requirement.

15. "Plaintiff Jessy Polson is a citizen and resident of Florida." Compl. ¶ 2.

16. Walmart is a citizen of Delaware, its state of incorporation, and Arkansas, its principal place of business. *See* 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business . . . . ").

C. The Amount in Controversy Exceeds $ 5 Million.

17. CAFA requires an amount in controversy over $5 million. The "claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6).

18. A "defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold," as 28 U.S.C. § 1446(a) tracks the general pleading requirement stated in Rule 8(a) of the Federal Rules of Civil Procedure. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

19. Thus, a notice of removal need cite only Plaintiff's allegations and requested relief to establish the amount in controversy. *See Pretka v. Kolter City Plaza II, Inc*., 608 F.3d 744, 751 (11th Cir. 2010) ("[T]he Plaintiffs' likelihood of success on the merits is largely irrelevant to the court's jurisdiction because the pertinent question is what is *in controversy* in the case, not how much the plaintiffs are ultimately likely to recover." (citation and quotation marks omitted)); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (Easterbook, J.) ("The question is not what damages the plaintiff will recover, but what amount is 'in controversy' between the parties. That the plaintiff may fail in its proof, and the judgment be less than the threshold (indeed, a good chance that the plaintiff will fail and the judgment will be zero) does not prevent removal.").

20. Simple calculation of the amount in controversy may be performed by multiplying the alleged loss by a plausible number of class members. *See, e.g.*, *Jovine v. Abbott Labs., Inc.*, No. 11-cv-80111, 2011 WL 1337204, at *4 (S.D. Fla. Apr. 7, 2011) (denying a motion to remand after calculating the amount in controversy using simple multiplication); *Senterfitt v. SunTrust Mortg., Inc.*, 385 F. Supp. 2d 1377, 1383, n.8 (S.D. Ga. 2005) (allowing simple multiplication of a possible award to determine aggregate amount in controversy under CAFA); *see also Hartis v. Chi. Title Ins. Co*., 694 F.3d 935, 945-46 (8th Cir. 2012) (concluding

that the amount in controversy exceeded CAFA's $5 million requirement by multiplying the average alleged transaction fee by the number of transactions at issue); *see also S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1317 (11th Cir. 2014) ("Estimating the amount in controversy is not nuclear science; it does not demand decimal-point precision").

21. Finally, attorneys' fees count towards the amount in controversy if "they are allowed for by [the] statute or contract" creating the cause of action. *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 808 n.4 (11th Cir. 2003).

22. The amount in controversy in this case, exclusive of interests and costs, exceeds $5 million. *See* 28 U.S.C. § 1332(d)(2).

23. Plaintiff alleges he paid a $500 fee. *See* SAC ¶ 19.

24. He seeks compensatory damages, treble damages, punitive damages, and attorneys' fees. *See Id.* ¶ 74.

25. Plaintiff's requested attorneys' fees count toward the amount in controversy because "they are allowed for by [the Georgia RICO] statute" creating that cause of action. *Federated Mut. Ins. Co.*, 329 F.3d at 808 n.4. The Georgia RICO statute provides that plaintiffs may "recover attorneys' fees in the trial and

appellate courts and costs of investigation and litigation reasonably incurred." O.C.G.A. § 16-14-6.

26. The attorneys' fees could be significant, given the scale and complexity of this putative class action.

27. These attorneys' fees plus the compensatory, treble, and punitive damages—all multiplied by the "thousands" of alleged class members—plausibly exceed the $5 million threshold.

28. For example, even assuming just treble damages of $1500 (and no punitive damages and no attorneys' fees, which Plaintiff also requests), Plaintiff would need only 3,333 class members to meet the $5 million threshold; 3,333 falls comfortably within his estimate of "thousands" of putative class members. Plaintiff satisfies the $5 million threshold, *a fortiori*, because he also seeks punitive damages and attorneys' fees.

III. CONCLUSION

29. In conclusion, CAFA applies to this action because: (i) Plaintiff alleges at least 100 putative class members; (ii) at least one member of the proposed classes is a citizen of a state different from Walmart's state of incorporation and principal place of business; and (iii) the aggregate amount in controversy exceeds $5 million.

For these reasons, Walmart respectfully requests that this Court assume full jurisdiction over this action as provided by law.

30. Walmart intends no admission of liability by this Notice and expressly reserves all defenses, motions, and pleas, including without limitation objections to the sufficiency of Plaintiff's pleadings and to the proprietary of class certification.

WHEREFORE, Walmart hereby removes this action to this Court for further proceedings according to law.

This 30th day of May, 2018.

/s/ Cari K. Dawson
Cari K. Dawson
Georgia Bar No. 213490
Lara Tumeh
Georgia Bar No. 850467
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: 404-881-7000
cari.dawson@alston.com
lara.tumeh@alston.com

Attorneys for Walmart Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system, and additionally served counsel of record by depositing copy of same in the United States Mail in an envelope with adequate postage affixed thereon, properly addressed as follows:

Matthew Wetherington
Robert N. Friedman
2860 Piedmont Rd., NE
Atlanta, GA 30305
Attorneys for Plaintiff

Brynda Rodriguez Insley
Chris Jackson
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309
Attorneys for Kenny McElwaney

On this 30th day of May, 2018.

/s/ Cari K. Dawson
CARI K. DAWSON
Attorney for Walmart Inc.

EXHIBIT A

Case Information

17EV003164 | Jessy Polson VS.Kenny McElwaney D/B/A Maximum Booting Co.,Wal-Mart Stores, Inc.

Case Number 17EV003164	Court State Court	Judicial Officer Richardson, Eric
File Date 06/30/2017	Case Type TORT	Case Status Open

Party

Plaintiff
Polson, Jessy

Address
2860 Piedmont Rd., NE
Atlanta GA 30306

Active Attorneys ▾

Attorney
WERNER, MICHAEL L
Retained

Work Phone
404-793-1690

Attorney
FRIEDMAN, ROBERT N.
Retained

Work Phone
404-881-2622

Lead Attorney
WETHERINGTON, MATTHEW Q
Retained

Work Phone
404-793-1666

Defendant
Kenny McElwaney D/B/A Maximum Booting Co.

Address
99 Bay St., Ste. J
Fairburn GA 30213

Details
Active Attorneys

Lead Attorney
INSLEY, BRYNDA RODRIGUEZ
Retained

Work Phone
404-876-9818

Attorney
JACKSON, H. CHRISTOPHER
Retained

Work Phone
404-876-9818

Defendant
Wal-Mart Stores, Inc.

Defendant
Bright-Meyers Union City Associates, L.P.

Address
C/O Neil F. Meyers
5881 Glenridge Dr., Suite 220
Atlanta GA 30328

Events and Hearings

06/30/2017 Case Initiation Form

Case Initiation Form

Comment
Case Filing Information Form w/ Complaint and Summons

06/30/2017 COMPLAINT

Class Action Complaint Details

Comment
Class Action Complaint

06/30/2017 Summons

2017-06-30 - Summons.pdf

Comment
Summons - Maximum Booting

07/18/2017 Service to Marshal/Process Server

07/18/2017 COMPLAINT

Serving Officer
Spaduzzi, P

Serving Method
Personal Service

07/26/2017 SERVICE

SERVICE

08/22/2017 EXTENSION OF TIME

Joint Stipulation of Extension of Time to Respond.pdf

Comment
Joint Stipulation of Extension of Time to Respond to Complaint

09/20/2017 EXTENSION OF TIME

Joint Stip. of Extension of Time to Respond to Complaint.pdf

Comment
Joint Stipulation of Extension of Time to Respond to Complaint

10/05/2017 EXTENSION OF TIME

Extension of Time

Comment
Joint Stipulation of Extension of Time to Respond to Complaint

10/20/2017 ANSWER

Answer

Comment
Answer to Plaintiff's Class Action Complaint on Behalf of Defendant Kenny McElwaney d/b/a Maximum Booting Co.

10/20/2017 Motion (OBTS)

Motion Details

Comment
Motion to Dismiss Plaintiff's Complaint on Behalf of Defendant Kenny McElwaney d/b/a Maximum Booting Co.

10/20/2017 BRIEF

Brief in Support.pdf

Brief - Exhibit A.pdf

Brief Exhibit B.pdf

Comment
Defendant's Brief in Support of its Motion to Dismiss Plaintiff's Complaint on Behalf of Defendant Kenny McElwaney d/b/a Maximum Booting Co.

10/20/2017 Jury Trial Demand

Jury Demand

Comment
Demand for a Twelve-Person Jury on Behalf of Defendant Kenny McElwaney d/b/a Maximum Booting Co.

10/23/2017 LEAVE OF ABSENCE

1105275.PDF

Comment
Notice of Leave of Absence - Brynda Rodriguez Insley

10/25/2017 NOTICE

Notice

Comment
Request for Oral Argument on Behalf of Defendant

11/15/2017 COMPLAINT

First Amended Complaint

Comment
First Amended Class Action Complaint

11/15/2017 Motion (OBTS)

Plaintiff's Request for Judicial Notice

Certified Ordinance

Comment
Plaintiff's Request for Judicial Notice

11/15/2017 Response

Plaintiff's Opposition to Motion to Dismiss

Exhibit A - Second Affidavit of Chief Jones

Exhibit B - Affidavit of Plaintiff

Exhibit C - Affidavit of McLochlin

Comment
Plaintiffs' Opposition to Defendant's Motion to Dismiss

11/15/2017 Motion (OBTS)

Motion

Brief in Support of Motion for Sanctions

Exhibit A - Affidavit of Wetherington

Exhibit B - Affidavit of Friedman

Exhibit C - Affidavit of Davenport

Exhibit D - Second Affidavit of Chief Jones

Comment
Plaintiffs' Motion to Strike and For Sanctions

12/14/2017 EXTENSION OF TIME

Extension of Time

Comment
Joint Stipulation Extending Time for Defendant to Respond to Plaintiff's Motion to Strike and for Sanctions

12/22/2017 EXTENSION OF TIME

1154007.PDF

Comment
Second Joint Stipulation Extending Time for Defendant to Respond to Plaintiff's Motion to Strike and for Sanctions

12/29/2017 Response

Resp to Ps MTS FINAL 122917.pdf

Comment
Response to Plaintiff's Motion to Strike and for Sanctions on Behalf of Defendant Kenny McElwaney d/b/a Maximum Booting Co.

01/11/2018 ORDER

17EV003164 Order Transferring.pdf

Comment
Order Transferring

01/12/2018 NOTE TO FILE

Comment
DOWNLOADED FOR TRANSFERRING - V. KING-HURST

01/16/2018 NOTICE

Notice

Comment
Notice of Deposition

01/16/2018 NOTICE

Notice

Comment
Notice of Deposition

01/22/2018 CERTIFICATE OF SERVICE

Certificate Of Service

Comment
Certificate of Discovery - Cross-Notice of Taking Deposition and Subpoena Duces Tecum to Cassandra Jones and Dennis Davenport

02/13/2018 Motion (OBTS)

2018-02-13 - Motion to Amend and to Add Parties.Maximum Booting.Union City.Fulton.pdf

Comment
PLAINTIFF S MOTION TO AMEND AND TO ADD WAL-MART STORES, INC. AND BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. AS PARTY DEFENDANTS

02/21/2018 MOTIONS

MOTIONS

Judicial Officer
Porter, Patsy Y

Hearing Time
03:50 PM

03/22/2018 ORDER

2018-02-13 - Motion to Amend and to Add Parties.Maximum Booting.Union City.Fulton.pdf

Comment
GRANTED - PLAINTIFF S MOTION TO AMEND AND TO ADD WAL-MART STORES, INC. AND BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. AS PARTY DEFENDANTS

03/27/2018 COMPLAINT

Complaint Details

Comment
Second Amended Class Action Complaint

04/24/2018 Summons

Summons Wal-Mart.pdf

Comment
Summons Wal-Mart Stores, Inc.

04/24/2018 Summons With Service

Summons Bright-Meyers.pdf

Fulton Marshal Entry of Service Bright-Meyers.pdf

Comment
Summons with Service Bright Meyers Union City Associates, L.P.

04/26/2018 Motion (OBTS)

11F0237.PDF

11F0239.PDF

Comment
Motion to Withdraw as Counsel of Record for Defendant and Proposed Order (Jason Bell, Esq.)

04/27/2018 ORDER

11F0237.PDF

11F0239.PDF

Comment
GRANTED - Motion to Withdraw as Counsel of Record for Defendant and Proposed Order (Jason Bell, Esq.)

05/01/2018 Service to Marshal/Process Server

05/01/2018 COMPLAINT

Serving Officer
Bradley, Stephanie

Serving Method
Corporate Service
Comment
2nd Amended Class Action Complaint

05/03/2018 CERTIFICATE OF SERVICE

Certificate Of Service

Comment
Sheriff's Entry of Service Wal-Mart Stores

05/08/2018 LEAVE OF ABSENCE

Leave Of Absence

Comment
Notice of Leave of Absence - Brynda Rodriguez Insley

05/08/2018 ORDER

Booting Cases Scheduling Order.pdf

Comment
Scheduling Order and Stay of Discovery

05/09/2018 SERVICE

SERVICE

05/22/2018 SUBSTITUTION OF COUNSEL

11H1095.PDF

Comment
Notice of Substitution of Counsel - H. Christopher Jackson

General Civil Case Filing Information Form (Non-Domestic)

Court
☐ **Superior**
☑ **State**

County FULTON **Date Filed** 06/30/2017 MM-DD-YYYY

Docket # _____

Plaintiff(s)

Polson, Jessy
Last First Middle I. Suffix Prefix Maiden

_____
Last First Middle I. Suffix Prefix Maiden

_____
Last First Middle I. Suffix Prefix Maiden

_____
Last First Middle I. Suffix Prefix Maiden

Defendant(s)

McElwaney, Kenny D/B/A Maximum Booting Co
Last First Middle I. Suffix Prefix Maiden

_____
Last First Middle I. Suffix Prefix Maiden

_____
Last First Middle I. Suffix Prefix Maiden

_____
Last First Middle I. Suffix Prefix Maiden

No. of Plaintiffs 1

No. of Defendants 1

Plaintiff/Petitioner's Attorney ☐ **Pro Se**

WETHERINGTON, MATTHEW
Last First Middle I. Suffix

Bar # 339639

Check Primary Type (Check only **ONE)**

- ☐ Contract/Account
- ☐ Wills/Estate
- ☐ Real Property
- ☐ Dispossessory/Distress
- ☐ Personal Property
- ☐ Equity
- ☐ Habeas Corpus
- ☐ Appeals, Reviews
- ☐ Post Judgment Garnishment, Attachment, or Other Relief
- ☐ Non-Domestic Contempt
- ☐ Tort (If tort, fill in right column)
- ☑ Other General Civil Specify CLASS ACTION

If Tort is Case Type:
(Check no more than **TWO**)

- ☐ Auto Accident
- ☐ Premises Liability
- ☐ Medical Malpractice
- ☐ Other Professional Negligence
- ☐ Product Liability
- ☑ Other Specify IN RE BOOTING CLASS ACTIONS

Are Punitive Damages Pleaded? ☑ **Yes** ☐ **No**

Michael L. Werner
Matthew Q. Wetherington
Robert N. Friedman
THE WERNER LAW FIRM
2860 Piedmont Rd., NE
Atlanta, GA 30305

Kevin Patrick
KEVIN PATRICK LAW
2860 Piedmont Rd., NE
Atlanta, GA 30305

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. Defendant.	)	CIVIL ACTION FILE NUMBER _____

CLASS ACTION COMPLAINT

1. Defendant Kenny McElwaney d/b/a Maximum Booting Co. ("McElwaney") has a systematic process of disabling vehicles with boots and similar devices without first complying with the City of Union City ordinances requiring certain signage at any location where vehicle immobilization occurs. As a result, McElwaney has collected thousands of dollars in booting fees in an unlawful manner. Plaintiff brings this action to recover damages and other available remedies on behalf of himself and a class of persons similarly situated.

I. PARTIES

2. Plaintiff Jessy Polson is a citizen and resident of Florida. Plaintiff brings this action in an individual capacity, and in the capacity of a class representative on behalf of others similarly situated. By bringing this action, Plaintiff avails himself of the jurisdiction of this Court.

3. Defendant McElwaney is an individual doing business as a sole proprietorship under the name "Maximum Booting Co." McElwaney may be served at 99 Bay Street, Ste. J, Fairburn, GA 30213. Jurisdiction and venue are proper as to Defendant because he is a resident of Fulton County.

II. STATEMENT OF FACTS

4. There is no provision in the Official Code of Georgia Annotated ("O.C.G.A.") which expressly authorizes vehicle immobilization on private property.

5. The City of Union City authorizes certain types of vehicle immobilization, including booting, by licensed vehicle immobilization services.

6. Booting is a method of using a mechanical device that is designed or adopted to be attached to a wheel, tire, or part of a parked motor vehicle so as to prohibit the motor vehicle's usual manner of movement or operation:

7. Once licensed, a vehicle immobilization service may only boot vehicles under the terms proscribed by City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

8. One of the conditions precedent to legally booting a vehicle within the City of Union City is to comply with certain signage requirements as detailed in Union City Code of Ordinances, Chapter 10, Article I, § 10-28. This ordinance is provided in full here:

> It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met:
>
> (1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.

b. The maximum fee for removal of the device, as provided in subsection (c).

c. The name, address, and phone number of the person or entity responsible for affixing the device.

d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.

e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

f. The name and address of the entity that hired the vehicle immobilization service or company.

g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

9. Defendant McElwaney is a licensed vehicle immobilization service operating within the City of Union City.

10. Defendant McElwaney offers booting services to parking lots within the city of Union City.

11. As described more fully below, the signs erected at every parking lot wherein McElwaney operates do not comply with Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

III. NAMED PLAINTIFF EXPERIENCES

12. On or about June 15, 2017, Plaintiff Polson parked in a private parking lot located at 4735 Jonesboro Rd., which is within the territorial limits of the City of Union City.

13. Plaintiff Polson parked in a parking lot owned by Wal-Mart Stores, Inc.

14. Defendant McElwaney was hired by the owner of the private property located at 4735 Jonesboro Rd., to install or attach vehicle immobilization devices or boots.

15. Defendant McElwaney placed a boot on Polson's vehicle and refused to remove it unless Polson paid a **$500.00** fine.

16. Plaintiff Polson paid Defendant McElwaney $500.00.

17. An exemplar of the signs erected at the parking lot located at 4735 Jonesboro Rd. is depicted below:

18. The signs do not comply with Union City Code of Ordinances, Chapter 10, Article I, § 10-28, as the signs:

a. Do not contain a statement that cash, checks, credit cards, and debit cards are accepted for payment.

b. Do not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

c. Do not contain the name and address of the entity that hired the vehicle immobilization service or company.

19. Defendant McElwaney booted Plaintiff Polson's vehicle without legal authority and caused damages to Plaintiff Polson.

IV. CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action as a class action pursuant to O.C.G.A. § 9-11-23, on behalf of themselves and the Following Class:

a. All persons who have been booted by Defendant McElwaney and paid fines for removal of said device within the City of Union City from June 15, 2013, through present; and

b. All persons who have been booted by Defendant McElwaney at 4735 Jonesboro Rd., and have paid a fine for removal of said device (the Polson subclass).

21. Excluded from the Classes are Defendant, as well as Defendant's employees, affiliates, officers, and directors, including any individuals who incurred property damage as a result of Defendant's Actions, and the Judge presiding over this case. Plaintiff reserves the right to amend the definition of the Class if discovery and/or further investigation reveal that the Class definitions should be expanded or otherwise modified.

22. **Numerosity / Luminosity / Impracticality of Joinder**: The members of the Classes are so numerous that joinder of all members would be impractical. Plaintiff reasonably estimates that there are thousands of Class members. The members of the

Classes are easily and readily identifiable from information and records in Defendant's possession, control, or custody.

23. **Commonality and Predominance**: There is a well-defined community of interest and common questions of law and fact that predominate over any questions affecting the individual members of the Classes. These common legal and factual questions, which exist without regard to the individual circumstances of any Class member, include, but are not limited to, the following:

a. Whether Defendant failed to comply with the signage requirements of Union City Code of Ordinances, Chapter 10, Article I, § 10-28 prior to engaging in booting activities at locations throughout Union City;

b. Whether Defendant engaged in fraudulent business practices with respect to booting vehicles without complying with Union City Code of Ordinances, Chapter 10, Article I, § 10-28;

c. Whether Defendant has been unjustly enriched;

d. Whether Defendant has engaged in criminal trespass;

e. Whether Defendant has engaged in false imprisonment;

f. Whether Defendant has engaged in fraud;

g. Whether Defendant converted Plaintiff's and other Class Member's property for its own use;

h. Whether Defendant unlawfully disabled Plaintiff's and other Class Member's property and refused to return the property;

i. Whether Plaintiff and the Classes are entitled to damages; and,

j. Whether Plaintiff and the Classes are entitled to equitable relief or other relief, and the nature of such relief.

24. **Typicality**: The Plaintiff's claims are typical of Classes in that Plaintiff and the Classes all have been booted as a result of Defendant's unlawful activities and sustained damages as a direct proximate result of the same wrongful practices that the Defendant has engaged in. Plaintiff's claims arise from the same practices and course of conduct that give rise to the members of the Classes' claims. Plaintiff's claims are based upon the same legal theories as the members of the Classes' claims.

25. **Adequacy**: Plaintiff will fully and adequately protect the interests of the members of the Classes and has retained class counsel who are experienced and qualified in prosecuting class actions, including consumer class actions and other forms of complex litigation. Neither the Plaintiff nor their counsel have interests which are contrary to, or conflicting with, those interests of the Classes.

26. **Superiority**: A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because, *inter alia*: it is economically impracticable for members of the Classes to prosecute individual actions; prosecution as a class action will eliminate the possibility of repetitious and redundant litigation; and, a class action will enable claims to be handled in an orderly, expeditious manner.

COUNT 1: UNJUST ENRICHMENT

27. At all times relevant to this Complaint, Defendant owed duties to Plaintiff and the other Class Members to not interfere with Plaintiff's and the other Class Member's legally protected interest in use of their vehicles.

28. No contract exists between Defendant, Plaintiff, or any other Class Members which authorize Defendant to boot their vehicle.

29. No legal authority exists for Defendant to boot Plaintiff's and other Class Member's vehicles without first complying with Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

30. Despite the lack of a contract or other legal authority, Defendant has booted Plaintiff's and other Class Member's vehicles.

31. Plaintiff and the other Class Members have paid "unlocking" fees to Defendant which were unlawfully obtained.

32. Plaintiff and the other Class Members have conferred a benefit on Defendant, which Defendant has retained and otherwise benefited from.

33. Defendant has been unjustly enriched by its unlawful booting of Plaintiff's and the Class Member's vehicles.

34. Plaintiff and other Class Members have incurred damages as a result of Defendant's criminal conduct.

35. Defendant should be required to return the benefit bestowed upon it by Plaintiff and the other Class Members.

36. Plaintiff and the other Class Members are also entitled to attorney's fees and expenses of litigation.

COUNT 2: CRIMINAL TRESPASS

37. At all times relevant to this Complaint, Defendant owed duties to Plaintiff and the other Class Members to not interfere with the possession or use of Plaintiff's and other Class Member's vehicles.

38. In violation of O.C.G.A. § 16-7-21, Defendant McElwaney knowingly and maliciously interfered with the possession or use of Plaintiff's and other Class Member's vehicles without consent.

39. Without authority, Defendant McElwaney interfered with vehicles owned by Plaintiff and the other Class Members for an unlawful purpose (to install a boot).

40. Plaintiff and other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury as a result of Defendant's criminal conduct.

COUNT 3: FALSE IMPRISONMENT

41. At all times relevant to this Complaint, Defendant owed duties to Plaintiff and the other Class Members to not interfere with the free movement of Plaintiff and the other Class Members.

42. In violation of O.C.G.A. § 51-7-20, Defendant McElwaney knowingly and unlawfully restrained the movements of Plaintiff and the other class members for varying periods of time.

43. Defendant acting without legal authority.

44. Plaintiff and other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury as a result of Defendant's criminal conduct.

COUNT 4: FRAUDULENT CONCEALMENT

45. Defendant McElwaney concealed from Plaintiff and all Class Members that Defendant lacked legal authority to a) immobilize their vehicles with a boot and b) collect a fee for removal of the boot.

46. Defendant has a duty to disclose the facts to the Plaintiff and all Class Members, but failed to do so.

47. The facts that were not disclosed were and are material.

48. Defendant knew that Plaintiff and the other Class Members were ignorant of the material facts and did not have an equal opportunity to discover the facts.

49. By failing to disclose the facts, Defendant intended to induce Plaintiff and the other Class Members into paying a fee for removal of the boot.

50. Plaintiff and the other Class Members reasonably relied on Defendant's nondisclosure.

51. Plaintiff and the other Class Members were injured as a result.

COUNT 5: CONVERSION

52. Plaintiff and the other Class Members had title (interest in) to their vehicles.

53. Defendant took possession of the property by attaching a vehicle immobilization device.

54. Plaintiff and other class members demanded possession of their property.

55. Defendant refused to surrender and/or return the property.

56. As a result, Plaintiff and other Class Members have sustained damages.

COUNT 6: TROVER, REPLEVIN, AND DETINUE

57. Plaintiff and other Class Members have title in the disputed property, or alternatively Plaintiff and other Class Members had a right to immediate possession of the property.

58. Actual possession of the property rests with Defendant.

59. Plaintiff and other Class Members made a demand to Defendant for the return of the property.

60. Defendant refused to return the property.

61. As a result of Defendant's actions, Plaintiff and other Class Members have sustained damages.

62. Plaintiff is entitled to elect (1) a verdict for the property itself, (2) the value of the property at the time of conversion with interest, (3) the highest proven value of the property from the date of the conversion.

COUNT 7: NEGLIGENCE *PER SE*

63. Defendant violated Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

64. Plaintiffs and other Class Members fall within the class of persons intended to be protected by the statute.

65. Union City Code of Ordinances, Chapter 10, Article I, § 10-28 was intended to guard against the unlawful booting of vehicles.

66. Plaintiffs and the other Class Members suffered damages as a result of Defendant's negligence.

COUNT 8: MONEY HAD AND RECEIVED

67. Defendant has received money from Plaintiff and other Class Members that in equity and good conscious Defendant should not be permitted to keep.

68. Plaintiff and other Class Members have made a demand for repayment.

69. Defendant refused the demand.

70. As a result of Defendant's actions, Plaintiff and the other class members have suffered damages.

COUNT 9: PUNITIVE DAMAGES

71. Defendant's conduct was willful, wanton, and reckless and evidences an entire want of care, which raised the presumption of a conscious indifference to the consequences of its actions.

72. As a result of Defendant's willful, wanton, and reckless conduct, Plaintiff and other Class Members are entitled to an award of punitive damages under O.C.G.A. § 51-12-5.1.

V. JURY DEMAND

73. Plaintiff demands a trial by jury for all of their claims and determination of all damages.

VI. DAMAGES AND PRAYER FOR RELIEF

74. Plaintiff prays for the following relief:

a. An order certifying this action as a class action, appointing Plaintiff as class representative and appointing Plaintiff's counsel as lead Class counsel;

b. All compensatory damages on all applicable claims in an amount to be proven at trial, and, as allowed by law, for such damages to be trebled or multiplied upon proof of claims under laws allowing for trebling or multiplying of compensatory damages based upon Defendant's violations of law;

c. An order directing disgorgement and restitution of all improperly retained monies by Defendant;

d. An order permanently enjoining Defendant from engaging in the unlawful practices, as alleged herein;

e. For an injunction to prohibit Defendant from engaging in the unconscionable commercial practices complained of herein, and for an injunction requiring to give notice to persons to whom restitution is owing of the means by which to file for restitution;

f. Punitive damages in an amount to be determined at trial;

g. Attorney fees for stubborn litigiousness pursuant to O.C.G.A. § 13-6-11; and,

h. All other and further relief, including equitable and injunctive relief, that the Court deems appropriate and just under the circumstances.

[SIGNATURES APPEAR ON FOLLOWING PAGE.]

This 30th day of June 2017.

THE WERNER LAW FIRM

/s/ Matt Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

KEVIN PATRICK LAW

/s/ Kevin Patrick
Kevin Patrick
Georgia Bar No. 225211

2860 Piedmont Rd., NE
Atlanta, GA 30305
404-566-8964

GEORGIA, FULTON COUNTY

DO NOT WRITE IN THIS SPACE

STATE COURT OF FULTON COUNTY
Civil Division

CIVIL ACTION FILE #: _____

TYPE OF SUIT	AMOUNT OF SUIT
[ ] ACCOUNT	PRINCIPAL $_____
[ ] CONTRACT	
[ ] NOTE	INTEREST $_____
[ ] TORT	
[ ] PERSONAL INJURY	ATTY. FEES $_____
[ ] FOREIGN JUDGMENT	
[ ] TROVER	COURT COST $ _____
[ ] SPECIAL LIEN	
**********	
[ ] NEW FILING	
[X] RE-FILING: PREVIOUS CASE NO. _____	

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons,
Plaintiff's Name, Address, City, State, Zip Code

VS.

KENNY McELWANEY d/b/a MAXIMUM BOOTING

99 Bay St., Ste. J
Fairburn, GA 30213
Defendant's Name, Address, City, State, Zip Code

SUMMONS

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

Name: MATTHEW Q. WETHERINGTON
Address: THE WERNER LAW FIRM, 2860 PIEDMONT RD., NE
City, State, Zip Code: ATLANTA, GA 30305 Phone No.: (404) 793-1667

An answer to this complaint, which is herewith served on you, should be filed within thirty (30) days after service, not counting the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action. **DEFENSE MAY BE MADE & JURY TRIAL DEMANDED**, via electronic filing through E-file GA or, if desired, at the e-filing public access terminal in the Self-Help Center at 185 Central Ave., S.W., Ground Floor, Room TG300, Atlanta, GA 30303.

6/30/2017 4:50:50 PM

Jakyr Reddick
LeNora Ponzo, Interim Chief Clerk (electronic signature)

If the sum claimed in the suit, or value of the property sued for, is $300.00 or more Principal, the defendant must admit or deny the paragraphs of plaintiff's petition by making written Answer. Such paragraphs undenied will be taken as true. If the plaintiff's petition is sworn to, or if suit is based on an unconditional contract in writing, then the defendant's answer must be sworn to.

If the principal sum claimed in the suit, or value of the property sued for, is less than $300.00, and is on a note, unconditional contract, account sworn to, or the petition sworn to, defense must be made by filing a sworn answer setting up the facts relied on as a defense.

SERVICE INFORMATION:

Served, this _____ day of _____, 20_____.

_____
DEPUTY MARSHAL, STATE COURT OF FULTON COUNTY

WRITE VERDICT HERE:
We, the jury, find for _____

_____

This _____ day of _____, 20_____. _____ Foreperson

(STAPLE TO FRONT OF COMPLAINT)

7/30 Walmart

7/21

STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
JUL 26 2017
DEPUTY CLERK STATE COURT
FULTON COUNTY, GA.

DO NOT WRITE IN THIS SPACE

17EV003164

The Werner Law Firm
2860 Piedmont Road, NE
Atlanta, GA 30305
(404) 793-1690

Attorney or Plaintiff Name and Address

Jessy Polson

vs.

Kenny McElwaney
99 Bay Street Ste. J
Fairburn, GA 30213

Name and Address of PLAINTIFF

Name and Address of DEFENDANT

MARSHAL'S ENTRY OF SERVICE

PERSONAL

GEORGIA, FULTON COUNTY

I have this day served the defendant(s) Kenny McElwaney personally with a copy of the within action and summons.

This 25 day of July 2017. Served at Walmart Parking lot at 4735 Jonesboro Rd Union City, Ga 30291

DEPUTY MARSHAL

NOTORIOUS

GEORGIA, FULTON COUNTY

I have this day served the defendant(s) _____

By leaving a copy of the action and summons at his/their most notorious place of abode in said County.

Delivered same in hands of _____, a _____

_____ described as follows:

Age, about _____ years; weight, about _____ lbs; height, about _____ ft. _____ in.,

Domiciled at the residence of the defendant(s).

This _____ day of _____, _____.

DEPUTY MARSHAL

CORPORATION

GEORGIA, FULTON COUNTY

Served the defendant _____, a corporation, by leaving a copy of the within action and summons with _____ in charge of the office and doing business of said corporation, in Fulton County, Georgia.

This _____ day of _____, _____.

DEPUTY MARSHAL

BETTER ADDRESS

GEORGIA, FULTON COUNTY

Diligent search made and the defendant(s):

_____

Not to be found in the jurisdiction of said Court for the following reason:

_____

NON-EST

Please furnish this office with a new service form with the correct address.

This _____ day of _____, _____.

DEPUTY MARSHAL

1 copy for court's records + 1 copy to be returned to Plaintiff after service attempted

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	Civil Action File No. 17EV003164

JOINT STIPULATION OF EXTENSION OF TIME
TO RESPOND TO COMPLAINT

Pursuant to O.C.G.A. § 9-11-6, Jessy Polson ("Plaintiff"), and Kenny McElwaney d/b/a Maximum Booting, Co. ("Defendant"), by and through their undersigned counsel, hereby agree and stipulate as follows:

The time in which the Defendant may file its response to Plaintiff's Complaint is extended through and including September 22, 2017.

SO STIPULATED, this the 22 day of August, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

Attorney for Defendant

THE WERNER LAW FIRM

Matthew Q. Wetherington
Georgia Bar No. 339639
2860 Piedmont Road., N.E.
Atlanta, Georgia 30305
Telephone: 770-837-3428
Facsimile: 855-873-2090
Matt@wernerlaw.com

Attorney for the Plaintiff

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	Civil Action File No. 17EV003164

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the within and foregoing JOINT STIPULATION OF EXTENSION OF TIME TO RESPOND TO COMPLAINT via Odyssey eFileGA, which will electronically serve a file-stamped copy to the following:

Matthew Q. Wetherington
The Werner Law Firm
2860 Piedmont Road, N.E.
Atlanta, Georgia 30305
Matt@wernerlaw.com

Kevin Patrick
Kevin Patrick Law
2860 Piedmont Road, N.E.
Suite 160
Atlanta, Georgia 30305
Kevin@patricktriallaw.com

This 22nd day of August, 2017.

Jason S. Bell
Attorney for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	Civil Action File No. 17EV003164

JOINT STIPULATION OF EXTENSION OF TIME
TO RESPOND TO COMPLAINT

Pursuant to O.C.G.A. § 9-11-6, Jessy Polson ("Plaintiff"), and Kenny McElwaney d/b/a Maximum Booting, Co. ("Defendant"), by and through their undersigned counsel, hereby agree and stipulate as follows:

The time in which the Defendant may file its response to Plaintiff's Complaint is extended through and including October 6, 2017.

SO STIPULATED, this the 20th day of September, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

Attorney for Defendant

WERNER WETHERINGTON, P.C.

Matthew Q. Wetherington by Jason S. Bell with express permission
Georgia Bar No. 339639
2860 Piedmont Road., N.E.
Atlanta, Georgia 30305
Telephone: 770-837-3428
Facsimile: 855-873-2090
Matt@wernerlaw.com

Attorney for the Plaintiff

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	)	Civil Action File No. 17EV003164

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the within and foregoing JOINT STIPULATION OF EXTENSION OF TIME TO RESPOND TO COMPLAINT via Odyssey eFileGA, which will electronically serve a file-stamped copy to the following:

Matthew Q. Wetherington
Werner Wetherington, P.C.
2860 Piedmont Road, N.E.
Atlanta, Georgia 30305
Matt@wernerlaw.com

Kevin Patrick
Kevin Patrick Law
2860 Piedmont Road, N.E.
Suite 160
Atlanta, Georgia 30305
Kevin@patricktriallaw.com

This 26th day of September, 2017.

Jason S. Bell
Attorney for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

JOINT STIPULATION OF EXTENSION OF TIME
TO RESPOND TO COMPLAINT

Pursuant to O.C.G.A. § 9-11-6, Jessy Polson ("Plaintiff"), and Kenny McElwaney d/b/a Maximum Booting, Co. ("Defendant"), by and through their undersigned counsel, hereby agree and stipulate as follows:

The time in which the Defendant may file its response to Plaintiff's Complaint is extended through and including October 20, 2017.

SO STIPULATED, this the 5th day of October, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

Attorney for Defendant

WERNER WETHERINGTON, P.C.

Matthew Q. Wetherington
Georgia Bar No. 339639
Robert N. Friedman
Georgia Bar No. 945494
2860 Piedmont Road., N.E.
Atlanta, Georgia 30305
Telephone: 770-837-3428
Facsimile: 855-873-2090
Matt@wernerlaw.com
Robert@wernerlaw.com

Attorneys for the Plaintiff

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the within and foregoing JOINT STIPULATION OF EXTENSION OF TIME TO RESPOND TO COMPLAINT via Odyssey eFileGA, which will electronically serve a file-stamped copy to the following:

Matthew Q. Wetherington
Robert N. Friedman
Werner Wetherington, P.C.
2860 Piedmont Road, N.E.
Atlanta, Georgia 30305
Matt@wernerlaw.com
Robert@wernerlaw.com

Kevin Patrick
Kevin Patrick Law
2860 Piedmont Road, N.E.
Suite 160
Atlanta, Georgia 30305
Kevin@patricktriallaw.com

This 5th day of October, 2017.

Jason S. Bell
Attorney for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	)	Civil Action File No. 17EV003164

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO

COMES NOW Kenny McElwaney d/b/a Maximum Booting Co. (hereinafter Defendant Mr. McElwaney), named as the Defendant in the above-styled action, and respectfully submits this Brief in Support of its Motion to Dismiss Plaintiff's Complaint for failure to state a claim and for lack of subject matter jurisdiction, pursuant to O.C.G.A. § 9-11-12(b)(1) and (6), showing the Court as follows:

INTRODUCTION

Despite countless signs warning that trucks were not permitted to park in a private lot for more than two hours, Plaintiff, a truck driver, parked his employer's truck in the lot for more than two hours. The truck was later booted, and the truck owner, not the Plaintiff, paid a fee to release the boot. Plaintiff filed the present lawsuit claiming the signs were not precisely in compliance with a Union City Ordinance regarding booting. Plaintiff's Complaint is hopelessly flawed, and should be dismissed.

Critically, Plaintiff's attempt to base a private cause of action on the Ordinance cannot stand – the Ordinance simply does not allow for a private right of action. Moreover, Plaintiff has no standing to bring this case as he did not own the truck, did not pay the fee, and any alleged damage was caused by his own actions not any alleged deficiency with the signage on the lot. Further, the enforcement of the Ordinance is solely for the Union City police, and it would be a violation of the separation of powers for the Plaintiff or this Court to override the judgment of the Union City police. Indeed, the Chief of Police of Union City, who was formerly the Chief of Police for Fulton County for more than thirty years, has approved of Plaintiff's signage as being in compliance with the Ordinance. Finally, while Plaintiff's claims are dependent upon a private right of action under the Ordinance, all of Plaintiff's claims also fail to state a claim for relief. Consequently, Plaintiff's Complaint lacks subject matter jurisdiction and fails to state a claim upon which relief can be granted and, thus, should be dismissed as a matter of law pursuant to O.C.G.A. § 9-11-12(b)(1) & (6).

FACTUAL BACKGROUND

A. Union City Vehicle Immobilization Ordinance.

Private property owners often choose to regulate the use of their parking lots and to exclude commercial vehicles that can damage the parking lots given their weight, and/or that are simply using the private parking lot to park their vehicles without patronizing the stores. Rather than tow vehicles that violate the rules established by the private property owners to offsite locations, many private property owners choose to use a vehicle immobilization service wherein a device, a "boot," is placed on the vehicle which immobilizes the vehicle until it is removed.

There is no state regulation preventing private property owners from booting vehicles. However, some Georgia cities, like Union City, have chosen to enact local ordinances to regulate

these vehicle immobilization services. Union City's Ordinance appears at Chapter 10, Article I § 10-28(b) and provides that it is unlawful for any person or entity to affix a vehicle immobilization device to any vehicle . . . located on private property within the city, regardless of whether a charge for parking is assessed, unless certain conditions are met regarding signage located at the entrance to the parking.[1]

The Ordinance requires companies providing immobilization services to obtain a permit from the police department and for those companies to provide the police department with copies of their contracts with the private property owners. *Id.* at § 10-28(i)(1) & (2). The Ordinance provides that a permit can be revoked by the police department "if the holder is convicted of a violation of any of the provisions . . . . ." *Id.* at § 10-28(i)(4).

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[1] The Ordinance provides as follows:

(1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.
b. The maximum fee for removal of the device, as provided in subsection (c).
c. The name, address, and phone number of the person or entity responsible for affixing the device.
d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.
e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.
f. The name and address of the entity that hired the vehicle immobilization service or company.
g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

The Union City Code also provides that a violation of any Ordinance is criminal and is punishable by a fine not to exceed $1,000 and by, among other things, imprisonment for not more than one hundred eighty (180) days, by compulsory labor on the streets or public works not to exceed thirty (30) days, by both fine and imprisonment or labor, or the fine may be imposed with an alternative. Union City's Ordinance appears at Chapter 1, § 1-17.

B. Signage at the Walmart Supercenter in Union City.

Defendant Mr. McElwaney is permitted by the Union City police department, and his company is hired by private property owners to boot commercial vehicles that violate the private property's parking rules. (Affidavit of Kenny McElwaney ("McElwaney Aff.") attached hereto as Exhibit A, ¶ 2). Among other locations, Defendant's company provides vehicle immobilization services at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter").

At the entrances to the parking lot of the Walmart Supercenter, signs were posted which contained all of the information required by the Ordinance. (McElwaney Aff. ¶ 3; Exhibit A thereto). In addition, at the request of Walmart, Defendant posted numerous additional warnings within the parking lot indicating that trucks were not permitted to park on the private property for more than two hours, and that a vehicle in violation of that rule would be booted. (*Id.*, ¶ 3). As the signs stated: "Absolutely No Truck Parking . . . Violators Will Be Booted." (*Id.*). All in all, there were more than twenty signs and warnings posted. (*Id.*).

C. Union City Police Department Inspects and Approves Defendant's Signage.

Defendant has never been cited for a violation of the Ordinance with respect to the signage at the Walmart Supercenter or otherwise. (McElwaney Aff. ¶ 2; Affidavit of Union City Police Chief Cassandra A. Jones ("Chief Jones Aff.") attached hereto as Exhibit B, ¶ 8). More

than that, the Chief of Police for Union City, Chief Cassandra A. Jones, and her Captain, Gloria Hodgson, inspected the signage at the parking lots where Plaintiff conducts vehicle immobilization in Union City, including the Walmart Supercenter, in January of 2017. (Chief Jones Aff., ¶ 5). Chief Jones has been the Chief of Police for Union City since January 2016, and prior to that, she was the Chief of Police for Fulton County from 2007 through 2015. (Chief Jones Aff., ¶ 2).

Chief Jones has confirmed that she and Captain Hodgson determined that the signage was in compliance with the Ordinance including the signage at the Walmart Supercenter.[2] (Chief Jones Aff., ¶ 5). Chief Jones also confirmed that the Union City Code Enforcement Division, housed within the Union City Police Department, has also inspected the signage and also concluded that it is compliant with the Ordinance. (Chief Jones Aff., ¶ 7).

D. Non-Party Clearwater Logistics, Not Plaintiff, Has a Truck Booted and the Non-Party Pays the Fee At Issue.

On June 15, 2017, after the inspection by the Chief of Police, a commercial truck owned and operated by Clearwater Logistics was parked at the Walmart Supercenter. Despite the clear and conspicuous signs and numerous additional warnings, the Clearwater Logistics truck was parked for more than two hours, and was booted (but not by the Defendant personally). (McElwaney Aff., ¶¶ 4-5). An invoice for the booting fee was issued to Clearwater Logistics who paid the fee via an electronic payment method. (McElwaney Aff., ¶ 6). Stated another way, Plaintiff did not own the truck that was booted, and he did not pay the fee. At best, Plaintiff was the driver who parked his employer's truck in violation of the more than twenty signs and warnings at the Walmart Supercenter.

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[2] The Ordinance was later amended to enlarge the signage requirement, but Chief Jones confirmed that Plaintiff's signage complied with that enlarged signage requirement before the amendment was passed. (Chief Jones Aff., ¶ 6).

E. The Complaint.

On June 30, 2017, Plaintiff filed the present action alleging that the signs in the parking lot were not in compliance with the Ordinance. Plaintiff's Complaint erroneously includes only pictures of warnings that are on the inside of the parking lot, and not the signs at the entrances to the parking lot,[3] which have been approved by the Union City police department, who is in charge of enforcing the Ordinance. (Chief Jones Aff., ¶¶ 4-5) (McElwaney Aff., ¶¶ 3-4). Plaintiff then makes the incredibly erroneous leap that if the signs are not in compliance with the Ordinance, that allows him to assert the following claims: (i) unjust enrichment; (ii) criminal trespass; (iii) false imprisonment; (iv) fraudulent concealment; (v) conversion; (vi) trover, replevin and detinue; (vii) negligence per se; and (viii) money had and received; and (ix) punitive damages.

ARGUMENT AND CITATION TO AUTHORITY

Plaintiff bases his Complaint on his allegation that the Ordinance was violated. However, violation of that Ordinance does not create a private right of action. Even if it did, Plaintiff would not have been the person injured thereby and, thus, does not have standing to bring suit for a violation. And, Defendant Mr. McElwaney did not even violate the Ordinance. Moreover, each Count of Plaintiff's Complaint relies on an inapplicable theory of law and is, therefore, meritless. Consequently, Plaintiff's Complaint should be dismissed. O.C.G.A. § 9-11-12(b)(1) & (6).

A. Plaintiff's Complaint Attempts to Assert a Private Right of Action Based Upon an Ordinance That Does Not Allow for One.

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[3] Plaintiff has been informed that his Complaint is inaccurate and has been provided with a true and correct photo demonstrating that the signage at the entrance of the lot contains all of the information set forth in the Ordinance. Despite that, Plaintiff has not withdrawn the Complaint.

Plaintiff's Complaint is a thinly veiled attempt to enforce a private right of action under the Ordinance. But, this Ordinance does not allow for a private right of action. Plaintiff's Complaint, therefore, must be dismissed.

"[I]t is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof." *State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, Inc.*, 312 Ga. App. 756, 761 (2011). Rather, a private cause of action is only found when the text of the regulation expressly provides for one. *Id.* For this reason, "Georgia has longstanding precedential authority rejecting the creation of implied private rights of action." *Bellsouth Telecommunications LLC v. Cobb County*, 802, S.E.2d 686, 691 (2017). Thus, in the absence of textual support, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Walker v. Oglethorpe Power Corporation*, 341 Ga. App. 647, 657 (2017).

This is particularly true for penal regulations, which create rights in favor of the general public, not for individuals damaged by a violation. *Jastram v. Williams*, 276 Ga. App. 475, 476 (2005). In fact, penal regulations, "which express prohibitions rather than personal entitlements and specify a particular remedy other than civil litigation, are accordingly poor candidates for the imputation of private rights of action." *Bridges v. Wooten*, 305 Ga. App. 682, 684 (2010). As a result, "the public policy advanced *by* a penal statute, no matter how strong, cannot support the implication of a private civil cause of action that is not based on the actual provisions *of* the relevant statute." *Anthony v. Am. Gen. Fin. Serv. Inc.*, 287 Ga. App. 448, 456 (2010) (emphasis in original). Georgia courts have repeatedly rejected private claims sounding in penal provisions, for failure to raise a justiciable issue of law amenable to resolution in a legal proceeding, despite

the gravity of the public policy considerations plaintiffs have heretofore called upon in support of their attempts to undermine this unwavering precedent. *Verdi v. Wilkinson County*, 288 Ga. App. 856, 859 (2007). For example, courts have declined to allow a private right of action to stem from statutes regarding cruelty to children, reporting of child abuse, and disturbance of human remains. *Id.* (denying a complaint based on violation of a statute governing the felony offense of wanton or malicious removal of a dead body from a grave and disturbance of human remains); *Chisolm v. Tippens*, 289 Ga. App. 757, 761, (2008) (refusing to allow a private right of action to sound from violation of a cruelty to children statute); *Anthony*, 287 Ga. App. at 456.

The Ordinance is obviously penal, as a violation may be punishable by, among other things, imprisonment for not more than one hundred eighty (180) days or by compulsory labor on the streets or public works not to exceed thirty (30) days. Chapter 1, § 1-17(a). *See Dekalb County v. Gerard*, 207 Ga. App. 43, 43 (1993)(holding that prosecution for violation of a city or county ordinance are "quasi-criminal").

The Ordinance, which appears in the same Chapter as one making it unlawful "to spit upon the sidewalks," is hardly one which promotes a public policy interest as strong as the protection of a child or the deceased. Union City Code of Ordinance§ 10-15. Consequently, it cannot logically be argued that the Ordinance could support a private right of action when those more important public policy considerations could not. *Anthony*, 287 Ga. at 456. Moreover, the outcome Plaintiff seeks–avoidance of the penalty for illegally parking in a private lot–is hardly consistent with the public policy of the Ordinance.

Moreover, if, as Plaintiff contends, the City Council also intended to expose companies to civil liability, it would have done so. *Cross v. Tokio Marine and Fire Ins. Co. Ltd*, 254 Ga. App. 739, 741 (2002) ("[T]he absence of language [] creating a private right of action strongly

indicates the legislature's intention that no such cause of action be created by said statute."); *Parris V. State Farm & C. Ins. Co.*, 229 Ga. App. 522, 524 (1997). But, the City Council used this Ordinance to create a right in favor of the general public, not for individuals claiming to have been affected by a violation. *Jastram v. Williams*, 276 Ga. App. 475, 476 (2005). Thus, despite Plaintiff's contentions that he is entitled to damages for the Defendant's alleged violation of the Ordinance, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Walker v. Oglethorpe Power Corporation*, 341 Ga. App. 647, 657 (2017).

Consequently, there is no authority that would allow the inference of a private cause of action from the public policy the Ordinance appears to promote. *State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting and Body Works Inc.*, 312 Ga. App. 756, 751 (2011). The Complaint, therefore, fails to state a claim upon which relief may be granted.

B. Plaintiff Has No Standing to Sue.

Plaintiff lacks standing to seek the relief asked for in the Complaint. The vehicle on which Maximum Booting placed an immobilization device was not owned by Plaintiff, but by Clearwater Logistics. The invoice for the fee was made to Clearwater Logistics, and Clearwater Logistics paid the booting fee. Plaintiff's Complaint, therefore, seeks to recover damages for claims which can only be asserted by Clearwater Logistics. Further, given Plaintiff's voluntary decision to illegally park in violation of the multitude of signs and warnings cautioning him not to, any alleged damages were caused by Plaintiff's voluntary act, not Defendant. Thus, Plaintiff has no standing to sue.

"[S]tanding is in essence the question of whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues, and litigants must establish their standing

to raise issues before they are entitled to have a court adjudicate those issues." *Sherman v. City of Atlanta*, 293 Ga. 169, 172(2), 744 S.E.2d 689 (2013) (punctuation, citations and emphasis omitted). "[S]tanding focuses on the party seeking relief and not on the issues the party wishes to have adjudicated, and it is the person wishing to invoke a court's jurisdiction who must have standing." *Atlantic Specialty Ins. Co. v. Lewis*, 341 Ga. App. 838, 845 (2017).

To establish standing, a plaintiff must show (1) a legally cognizable injury; (2) caused by an act of the defendant; (3) that is redressable by judicial action. *Atlanta Taxicab Co. Owners Ass'n Inc. v. City of Atlanta*, 281 Ga. 342 (2006); *Lujan v. Defendanders of Wildlife*, 504 U.S. 555, 560 (1992). Thus, "[t]he real party in interest is the person, who . . . has the right sought to be enforced." (Citation and punctuation omitted.) *Allianz Life Ins. Co., etc. v. Riedl*, 264 Ga. 395, 398(3) (1994). Standing must be determined at the time at which the complaint is filed. *Associated Credit Union v. Pinto*, 297 Ga. App. 605, 606, 677 S.E.2d 789 (2009); see O.C.G.A. § 9-11-17(a). The plaintiff has the burden of establishing that he has standing to bring the underlying suit. *Blackmon v. Tenet Healthsystem Spalding*, 284 Ga. 369, 371 (2008). Without standing, there is no subject matter jurisdiction, making dismissal appropriate. *Id.*

In *Associated Credit Union*, the Court of Appeals explained that, with regards to a suit concerning real property, the person with standing is the person who owns the property at the time the complaint is filed. *Associated Credit Union v. Pinto*, 297 Ga. App. 605, 607 (2009). There, the former owner of real property attempted to bring a suit for damages related to a deed on that property. *Id.* But, the ownership in the property had been transferred before suit was brought. *Id.* The court explained that, "[i]t is well settled that every action shall be prosecuted in the name of the real party in interest." *Id.* Because the plaintiff had already transferred ownership before filing the complaint, "he had no interest in the property and had suffered no injury" and,

therefore, lacked standing to pursue a damages claim. *Id.*; *see also Estate of Nixon v. Barber*, 340 Ga. App. 103, 103 (2017) (rejecting the plaintiffs' action for legal malpractice against an attorney who represented their son, despite the fact that they hired him, paid him, and received legal advice from him).

Here, Plaintiff similarly cannot establish any of the three requirements for standing. First, Plaintiff has no legally cognizable injury. His entire Complaint is based on the booting of a vehicle which is owned by Clearwater Logistics. Whereas the plaintiff in *Associated Credit Union* at least owned the property in question at some point in time, the Plaintiff here has never had ownership interest in the vehicle. 297 Ga. App. 607. Moreover, the invoice which resulted from Plaintiff's violation was not paid by him. Rather, it was paid by Clearwater Logistics. Consequently, it is Clearwater Logistics that would be the party in interest to the rights asserted here. *Allianz Life Ins. Co., etc*, 264 Ga. at 398. And, therefore, Clearwater Logistics who could have standing. Plaintiff, on the other hand, is not entitled to ask the Court to decide the merits of the issues raised in the Complaint.

Moreover, Plaintiff cannot demonstrate that the injury alleged was caused by Defendant Mr. McElwaney. *Atlanta Taxicab Co. Owners Ass'n Inc.*, 281 Ga. 342. Plaintiff made the decision to illegally park in the Walmart Supercenter parking lot of his own accord. He does not allege that Defendant Mr. McElwaney made him park there. Nor does he allege that he would not have parked there had the signage somehow differed. The sign posted at the entrance of the parking lot clearly put Plaintiff on notice that "This Property Owner boots unauthorized Vehicles." This signs included all of the information required by the Ordinance. And, additional warnings reiterated "Absolutely No Truck Parking . . . Violators Will Be Booted." Yet, Plaintiff still decided to illegally park in the lot. There is no reason to assume that Plaintiff would not

have parked there if more detail had been included in the signage. Consequently, even if the signage was as the Complaint alleges, that would not have been the cause of the immobilization of the vehicle. The Plaintiff was clearly on notice that he was not permitted to park in that lot and that doing so would result in him being booted. Thus, it was Plaintiff's decision to disregard that signage and violate the rights of the private property owner that caused the injury in this case.

Because Plaintiff does not have standing to bring this suit, this Court lacks subject matter jurisdiction and dismissal is warranted.

C. Mr. McElwaney Did Not Violate the Ordinance and Enforcement Is the Responsibility of the Executive Branch Not the Judiciary.

Plaintiff's allegation that Defendant Mr. McElwaney violated the Ordinance is meritless. The signage posted at the entrance of the Walmart Supercenter contains all of the information required by the Ordinance. Defendant Mr. McElwaney, at the instruction of Walmart, even provided additional warnings throughout the parking lot to ensure that full notice was provided that abandonment of vehicles for more than two hours would result in booting. The Chief of Police inspected the signage and found it to be in full compliance with the Ordinance. There was, therefore, no violation of the Ordinance.

It is up to the Police Department, not the Plaintiff, to determine when the Ordinance has been violated: determinations regarding the compliance or violation of the Ordinance are expressly declared to "be the duty of the officers of the police department." Chapter 2, Article V, § 2-136(d)(2). Accordingly, the Union City Police Department and the Union City Code Enforcement Division – which is directly responsible for the inspection and enforcement of residential and commercial properties – both perform inspections to ensure compliance with local ordinances. Towards that end, Chief of Police Cassandra A. Jones and Captain Gloria Hodgson inspected the signage at issue and determined that it was compliant with the Ordinance.

And, Union City Code Enforcement has also inspected that signage and found it to be in compliance with the Ordinance. In fact, neither Defendant Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Ordinance.

Plaintiff does not have the authority to determine when a violation of the Ordinance has taken place – that authority is expressly vested in the Police Department. And, Plaintiff certainly cannot maintain a private action against a Company which has done nothing but justifiably rely on the Police Department's representations regarding compliance of an Ordinance which it has the ultimate authority to enforce.

If Plaintiff believed that Defendant Mr. McElwaney violated the Ordinance, he could have reported that violation to the Police Department. And if Plaintiff disagreed with the Police Department's enforcement of the Ordinance, he could have sought a writ of mandamus. *Merchant Law Firm P.C. v. Emerson*, 800 S.E.2d 557 (2017). But, even when the proper remedy is asserted, courts are exceedingly hesitant to instruct public officials on their enforcement measures because doing so amounts to "undertak[ing] to oversee and control the general course of official conduct." *Dean v. Gober*, 272 Ga. 20, 23 (1999). Such an interference would constitute a violation of separation of powers of government. *Speedway Grading Corp. v. Barrow County Bd. of Com'rs*, 258 Ga. 693, 695 (1988). The Complaint does not support an inference that that level of intrusion is warranted here – there is nothing to support the conclusion that Plaintiff is better suited to interpret and enforce the Ordinance than the Police Department. And it certainly does not support an inference that Defendant Mr. McElwaney should be liable for damages for his reliance on the Police Department's authority. Instead, Plaintiff's attempt to

instruct the Police Department on how to conduct police business is the perfect example of a largely groundless claim which should not be allowed to take up the time of this Court.

D. The Individual Counts of Plaintiff's Complaint Fail as a Matter of Law.

Plaintiff attempts to hide the fact that the Complaint is nothing more than a transparent assertion of a private right of action from an ordinance which does not provide for one, behind nine Counts he alleges entitle him to damages. Each of these Counts, however, is little more than window dressing: they are inapplicable to the case at hand and, therefore, cannot be used as the Trojan horse in which Plaintiff hides his attempt to assert a private right of action under the Ordinance. Each Count fails as a matter of law and should, therefore, be dismissed.

Count I raises a claim for unjust enrichment based upon Plaintiff's assertion that Defendant Mr. McElwaney was not authorized to boot the vehicle. (Complaint, ¶¶ 27-36). But, Defendant Mr. McElwaney registered and obtained a written permit from the Police Department and had the express authority of the private property owner. Moreover, a claim for unjust enrichment must show "that the defendant induced or encouraged the plaintiff to provide something of value to the defendant[,]" that the plaintiff actually conferred that benefit with the expectation that defendant would pay the cost thereof, and that defendant knowingly accepted the benefit. *Campbell v. Ailion et al.*, 338 Ga. App. 382, 383 (2016). Here, it cannot be said that Mr. McElwaney knowingly accepted a benefit from Plaintiff: the payment for the booting fee came not from him, but from Clearwater Logistics. And, in paying that fee, the only expectation that Clearwater Logistics had was that the boot would be removed, which it was. Thus, the elements needed for unjust enrichment do not exist here.

Plaintiff's second count, criminal trespass, fails because, like the Ordinance, "[c]riminal trespass violations are not actionable for damages and cannot form the basis of a civil claim. The

statute provides that criminal trespass is a misdemeanor." *Association Services Inc. v. Smith*, 249 Ga. App. 629 (2001); (Complaint, ¶¶ 37-40).

Count three, false imprisonment, requires a showing of "the unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty." *Burrow v. K-Mart Corp.*, 166 Ga. App. 284, 287 (1983); (Complaint, ¶¶ 41-44).. Plaintiff does not allege that he was personally detained, and therefore, he cannot bring a claim for false imprisonment.

Plaintiff's fourth count, fraudulent inducement, is based on his allegation that Mr. McElwaney had a duty to inform him of the law. (Complaint, ¶¶45-51). However, "misrepresentations as to a question of law will not constitute remedial fraud, since everyone is presumed to know the law and therefore cannot in legal contemplation be deceived by erroneous statements of law. . . . *Puckett Paving Co. v. Carrier Leasing Corp.*, 236 Ga. 891, 891 (1976). Moreover, Plaintiff's assertion that Defendant Mr. McElwaney had a duty to disclose the fact that he "lacked legal authority to a) immobilize [Plaintiffs'] vehicles with a boot and b) collect a fee for removal of the boot" is patently false. (Complaint ¶ 45). As demonstrated above, Defendant McElwaney actually had legal authority to place a boot on the illegally parked cars, and collect a fee for the boot's removal, belying any claim brought by Mr. McElwaney's alleged misrepresentation.

However, even laying aside Defendant Mr. McElwaney's legal authority to boot illegally parked cars in the Walmart parking lot, Plaintiff's claim for Fraudulent concealment also requires Plaintiff to establish that Defendant Mr. McElwaney had a duty to disclose some truth to Plaintiff. "Suppression of the truth is not a fraud unless used as a means of deceiving another. No

man is compelled to break silence and speak, unless there is an obligation resting upon him to speak." *Reeves v. B. T. Williams & Co.,* 160 Ga. 15, 15 (1925).

Under O.C.G.A. § 23-2-53, that duty can only be imposed "from the confidential relations of the parties or from the particular circumstances of the case." Here there is no allegation that the parties had any kind of fiduciary, contractual, or otherwise confidential relationship, so Defendant Mr. McElwaney's alleged duty must be inferred from the "particular circumstances of the case." *Id.* Two factors must be present to infer a duty to disclose based on the particular circumstances of a case: "1) the intentional concealment of a fact 2) for the purpose of obtaining an advantage or a benefit." *Georgia Real Estate Comm'n v. Brown*, 152 Ga. App. 323, 324 (1979). Defendant Mr. McElwaney believed that he had legal authority to boot illegally parked cars in the parking lot, so there is no way that he was intentionally concealing any contrary fact from Plaintiff. Thus, this claim fails to state a claim upon which relief can be granted.

The fifth count, conversion, requires a showing of "an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights. . . ." *City of Atlanta v. Hotels.com, L.P. et al*, 332 Ga. App. 888,891 (2015); (Complaint, ¶¶52-56). Here, Plaintiff does not have title to the vehicle, and does not allege that Mr. McElwaney somehow exercised ownership of the vehicle. Indeed, Mr. McElwaney was not even present during the acts complained of in the Complaint.

As his sixth Count, Plaintiff asserts trover, replevin, and detinue. (Complaint, ¶¶57-62) But, these claims require a showing of a conversion, which as set forth above, cannot apply here. *Truscott v. Garner*, 92 Ga. App. 95, 95 (1955).

Plaintiff's seventh count, negligence per se, cannot be based on a violation of the Ordinance. (Complaint, ¶¶63-66). Laws which do not provide for private enforcement cannot be

the basis of a negligence per se claim. *Reilly v. Alvan Aluminum* Corp., 272 Ga. 280 (2000); *Govea v. City of Norcross*,271 Ga. App. 36, 41-42 (2004). It has already been established that the Ordinance provides no private right of action and, therefore, cannot be the basis of a claim for negligence per se. Moreover, Defendant Mr. McElwaney did not violate the city ordinance in question. If there was no violation, there can be no negligence per se claim. *Garnett v. Mathison*, 179 Ga. App. 242, 242 (1986). Even if Defendant Mr. McElwaney had violated a city ordinance, Plaintiff was not damaged by it, as he did not own the vehicle that was booted or pay the fee to have the boot removed. If Plaintiff was not damaged, he has no tort claim upon which relief can be granted, and his negligence per se claim must be dismissed.

Count eight is for money had and received. (Complaint, ¶¶67-70). This claim will allow a plaintiff to recover a payment only when that payment was made by mistake and the other party would not be prejudiced by refund of the payment. *McGonigal v. McGonigal*, 294 Ga.App. 427, 429-420 (2008). Here, there is no allegation the money was paid by mistake – it was paid for removal of the boot which was placed on the illegally parked vehicle. And it was not paid by Plaintiff who, therefore, cannot seek to recover it. Moreover, refunding this payment would certainly prejudice Mr. McElwaney, who should not be required to bear the burden of paying the fee for the abandoned vehicle.

Finally, Plaintiff's ninth and final count for punitive damages requires a showing of "wanton conduct . . . which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent." *Wardlaw v. Ivey*, 297 Ga. App. 240, 242 (2009); (Complaint, ¶¶71-72). Nothing in the Complaint demonstrates the required recklessness or indifference. Mr. McElwaney conducted his business in compliance with the Ordinance and instructions from the Chief of Police. Thus, this Count is again inapplicable.

Consequently each individual Count fails as a matter of law, rendering the Complaint subject to dismissal.

CONCLUSION

WHEREFORE Defendant respectfully asks this Court to dismiss Plaintiffs' Complaint.

This 20th day of October, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

/s/ Jason S. Bell
Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

INSLEY AND RACE, LLC

BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, Georgia 30309
(404) 876-9818 (telephone)
(404) 876-9817 (facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

Attorneys for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the within and foregoing DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO via Odyssey eFileGA, which will electronically serve a file-stamped copy to the following:

Michael L. Werner, Esq.
Matthew Q. Wetherington
Robert N. Friedman
Werner Wetherington, P.C.
2860 Piedmont Road, N.E.
Atlanta, Georgia 30305
Matt@wernerlaw.com
Robert@wernerlaw.com

Kevin Patrick
Kevin Patrick Law
2860 Piedmont Road, N.E.
Suite 160
Atlanta, Georgia 30305
Kevin@patricktriallaw.com

This 20th day of October, 2017.

/s/ Jason S. Bell
Jason S. Bell
Attorney for Defendant

EXHIBIT A

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	Civil Action File No. 17EV003164

AFFIDAVIT OF KENNY MCELWANEY

STATE OF: GEORGIA

COUNTY OF: FULTON

COMES NOW, Kenny McElwaney, before the undersigned officer duly authorized to administer oaths and, being sworn, does state on oath the following:

1.

My name is Kenny McElwaney. I am over the age of majority, am suffering under no legal disability, and am competent to give this Affidavit.

2.

My company, Maximum Booting Company ("Company"), performs vehicle immobilization services (commonly referred to as "booting") in Union City, Georgia, but only with respect to commercial vehicles. My Company is permitted to conduct vehicle immobilization services with the Union City Police Department. My Company has never been cited for any violation of the Union City booting ordinance.

3.

My Company has a contract to perform vehicle immobilization services at the Walmart Super Center at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Super Center"). In connection with those services, my Company posted signage at the entrances to the parking lot, which contained all of the information required by the booting Ordinance. Attached hereto as Exhibit A is an example of one of those signs. In addition, my contact at the Walmart Super Center requested that additional warnings be posted throughout the parking lot, and we posted those additional warnings. An example of one of those warnings is included in Plaintiff's Complaint. There were at least twenty signs and warnings providing notice of about booting and/or that trucks could not park in the parking lot as of June 15, 2017.

4.

On January 10, 2017, myself and John Page (who operates Buckhead Parking Enforcement) met with Chief Jones and Captain Gloria Hodgson of the Union City Police Force for them to inspect the signage at the parking lots in Union City where my company and Mr. Page's conduct vehicle immobilization services. We visited all of the lots in Union City at which my Company conducts vehicle immobilization services including the Walmart Super Center. Chief Jones indicated that the signage at the entrance of the parking lots was in compliance with the Union City Ordinance about booting.

5.

On June 15, 2017, an agent of my Company placed a vehicle immobilization device on a commercial truck owned by Clearwater Logistics ("Clearwater"). The truck indicates that it is owned by Clearwater, and that it was operated pursuant to Clearwater's US DOT# 1327977. For

purposes of this Affidavit, on October 16, 2017, I called Clearwater, and spoke to the dispatcher, who confirmed that Clearwater Logistics owned the truck in question.

6.

One of my Company's agents placed a vehicle immobilization device on the Clearwater truck because it had been improperly parked at the Walmart Super Center for more than two hours.

7.

My Company created an invoice directed to Clearwater for $500.00 for the fee to remove the immobilization device, and Clearwater paid the invoice on June 15, 2017 by a COM Check, which is an electronic payment method. The vehicle immobilization device was then removed.

[*signature on following page*]

FURTHER AFFIANT SAYETH NAUGHT.

KENNY MCELWANEY

Sworn to and subscribed before me
this 20 day of October, 2017.

NOTARY PUBLIC

My Commission Expires: 09/27/2020

EXHIBIT A

EXHIBIT B

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

Cassandra A. Jones
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this 18 day of October, 2017.

Emma Thompson
Notary Public

My Commission Expires: 8-27-18

[NOTARY SEAL]

EMMA A THOMPSON NOTARY PUBLIC FULTON COUNTY, GA EXP. Aug. 27, 2018

END OF EXHIBITS

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	)	Civil Action File No. 17EV003164

MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO

COMES NOW Defendant Kenny McElwaney d/b/a Maximum Booting Co. and files this its Motion to Dismiss Plaintiff's Complaint on Behalf of Defendant Kenny McElwaney d/b/a Maximum Booting Co. pursuant to O.C.G.A. § 9-11-12(b)(1) & (6) for failure to state a claim and for lack of subject matter jurisdiction. The reasons are more fully explained in the Brief in Support, filed herewith.

This 20th day of October, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

/s/ Jason S. Bell
Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

INSLEY AND RACE, LLC

BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, Georgia 30309
(404) 876-9818 (telephone)
(404) 876-9817 (facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

Attorneys for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the within and foregoing **MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO** via Odyssey eFileGA, which will electronically serve a file-stamped copy to the following:

Michael L. Werner, Esq.
Matthew Q. Wetherington
Robert N. Friedman
Werner Wetherington, P.C.
2860 Piedmont Road, N.E.
Atlanta, Georgia 30305
Matt@wernerlaw.com
Robert@wernerlaw.com

Kevin Patrick
Kevin Patrick Law
2860 Piedmont Road, N.E.
Suite 160
Atlanta, Georgia 30305
Kevin@patricktriallaw.com

This 20th day of October, 2017.

/s/ Jason S. Bell
Jason S. Bell
Attorney for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO

COMES NOW Kenny McElwaney d/b/a Maximum Booting Co. (hereinafter Defendant Mr. McElwaney), named as the Defendant in the above-styled action, and respectfully submits this Brief in Support of its Motion to Dismiss Plaintiff's Complaint for failure to state a claim and for lack of subject matter jurisdiction, pursuant to O.C.G.A. § 9-11-12(b)(1) and (6), showing the Court as follows:

INTRODUCTION

Despite countless signs warning that trucks were not permitted to park in a private lot for more than two hours, Plaintiff, a truck driver, parked his employer's truck in the lot for more than two hours. The truck was later booted, and the truck owner, not the Plaintiff, paid a fee to release the boot. Plaintiff filed the present lawsuit claiming the signs were not precisely in compliance with a Union City Ordinance regarding booting. Plaintiff's Complaint is hopelessly flawed, and should be dismissed.

Critically, Plaintiff's attempt to base a private cause of action on the Ordinance cannot stand – the Ordinance simply does not allow for a private right of action. Moreover, Plaintiff has no standing to bring this case as he did not own the truck, did not pay the fee, and any alleged damage was caused by his own actions not any alleged deficiency with the signage on the lot. Further, the enforcement of the Ordinance is solely for the Union City police, and it would be a violation of the separation of powers for the Plaintiff or this Court to override the judgment of the Union City police. Indeed, the Chief of Police of Union City, who was formerly the Chief of Police for Fulton County for more than thirty years, has approved of Plaintiff's signage as being in compliance with the Ordinance. Finally, while Plaintiff's claims are dependent upon a private right of action under the Ordinance, all of Plaintiff's claims also fail to state a claim for relief. Consequently, Plaintiff's Complaint lacks subject matter jurisdiction and fails to state a claim upon which relief can be granted and, thus, should be dismissed as a matter of law pursuant to O.C.G.A. § 9-11-12(b)(1) & (6).

FACTUAL BACKGROUND

A. Union City Vehicle Immobilization Ordinance.

Private property owners often choose to regulate the use of their parking lots and to exclude commercial vehicles that can damage the parking lots given their weight, and/or that are simply using the private parking lot to park their vehicles without patronizing the stores. Rather than tow vehicles that violate the rules established by the private property owners to offsite locations, many private property owners choose to use a vehicle immobilization service wherein a device, a "boot," is placed on the vehicle which immobilizes the vehicle until it is removed.

There is no state regulation preventing private property owners from booting vehicles. However, some Georgia cities, like Union City, have chosen to enact local ordinances to regulate

these vehicle immobilization services. Union City's Ordinance appears at Chapter 10, Article I § 10-28(b) and provides that it is unlawful for any person or entity to affix a vehicle immobilization device to any vehicle . . . located on private property within the city, regardless of whether a charge for parking is assessed, unless certain conditions are met regarding signage located at the entrance to the parking.[1]

The Ordinance requires companies providing immobilization services to obtain a permit from the police department and for those companies to provide the police department with copies of their contracts with the private property owners. *Id.* at § 10-28(i)(1) & (2). The Ordinance provides that a permit can be revoked by the police department "if the holder is convicted of a violation of any of the provisions . . . . ." *Id.* at § 10-28(i)(4).

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[1] The Ordinance provides as follows:

(1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.
b. The maximum fee for removal of the device, as provided in subsection (c).
c. The name, address, and phone number of the person or entity responsible for affixing the device.
d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.
e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.
f. The name and address of the entity that hired the vehicle immobilization service or company.
g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

The Union City Code also provides that a violation of any Ordinance is criminal and is punishable by a fine not to exceed $1,000 and by, among other things, imprisonment for not more than one hundred eighty (180) days, by compulsory labor on the streets or public works not to exceed thirty (30) days, by both fine and imprisonment or labor, or the fine may be imposed with an alternative. Union City's Ordinance appears at Chapter 1, § 1-17.

B. Signage at the Walmart Supercenter in Union City.

Defendant Mr. McElwaney is permitted by the Union City police department, and his company is hired by private property owners to boot commercial vehicles that violate the private property's parking rules. (Affidavit of Kenny McElwaney ("McElwaney Aff.") attached hereto as Exhibit A, ¶ 2). Among other locations, Defendant's company provides vehicle immobilization services at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter").

At the entrances to the parking lot of the Walmart Supercenter, signs were posted which contained all of the information required by the Ordinance. (McElwaney Aff. ¶ 3; Exhibit A thereto). In addition, at the request of Walmart, Defendant posted numerous additional warnings within the parking lot indicating that trucks were not permitted to park on the private property for more than two hours, and that a vehicle in violation of that rule would be booted. (*Id.*, ¶ 3). As the signs stated: "Absolutely No Truck Parking . . . Violators Will Be Booted." (*Id.*). All in all, there were more than twenty signs and warnings posted. (*Id.*).

C. Union City Police Department Inspects and Approves Defendant's Signage.

Defendant has never been cited for a violation of the Ordinance with respect to the signage at the Walmart Supercenter or otherwise. (McElwaney Aff. ¶ 2; Affidavit of Union City Police Chief Cassandra A. Jones ("Chief Jones Aff.") attached hereto as Exhibit B, ¶ 8). More

than that, the Chief of Police for Union City, Chief Cassandra A. Jones, and her Captain, Gloria Hodgson, inspected the signage at the parking lots where Plaintiff conducts vehicle immobilization in Union City, including the Walmart Supercenter, in January of 2017. (Chief Jones Aff., ¶ 5). Chief Jones has been the Chief of Police for Union City since January 2016, and prior to that, she was the Chief of Police for Fulton County from 2007 through 2015. (Chief Jones Aff., ¶ 2).

Chief Jones has confirmed that she and Captain Hodgson determined that the signage was in compliance with the Ordinance including the signage at the Walmart Supercenter.[2] (Chief Jones Aff., ¶ 5). Chief Jones also confirmed that the Union City Code Enforcement Division, housed within the Union City Police Department, has also inspected the signage and also concluded that it is compliant with the Ordinance. (Chief Jones Aff., ¶ 7).

D. Non-Party Clearwater Logistics, Not Plaintiff, Has a Truck Booted and the Non-Party Pays the Fee At Issue.

On June 15, 2017, after the inspection by the Chief of Police, a commercial truck owned and operated by Clearwater Logistics was parked at the Walmart Supercenter. Despite the clear and conspicuous signs and numerous additional warnings, the Clearwater Logistics truck was parked for more than two hours, and was booted (but not by the Defendant personally). (McElwaney Aff., ¶¶ 4-5). An invoice for the booting fee was issued to Clearwater Logistics who paid the fee via an electronic payment method. (McElwaney Aff., ¶ 6). Stated another way, Plaintiff did not own the truck that was booted, and he did not pay the fee. At best, Plaintiff was the driver who parked his employer's truck in violation of the more than twenty signs and warnings at the Walmart Supercenter.

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[2] The Ordinance was later amended to enlarge the signage requirement, but Chief Jones confirmed that Plaintiff's signage complied with that enlarged signage requirement before the amendment was passed. (Chief Jones Aff., ¶ 6).

E. The Complaint.

On June 30, 2017, Plaintiff filed the present action alleging that the signs in the parking lot were not in compliance with the Ordinance. Plaintiff's Complaint erroneously includes only pictures of warnings that are on the inside of the parking lot, and not the signs at the entrances to the parking lot,[3] which have been approved by the Union City police department, who is in charge of enforcing the Ordinance. (Chief Jones Aff., ¶¶ 4-5) (McElwaney Aff., ¶¶ 3-4). Plaintiff then makes the incredibly erroneous leap that if the signs are not in compliance with the Ordinance, that allows him to assert the following claims: (i) unjust enrichment; (ii) criminal trespass; (iii) false imprisonment; (iv) fraudulent concealment; (v) conversion; (vi) trover, replevin and detinue; (vii) negligence per se; and (viii) money had and received; and (ix) punitive damages.

ARGUMENT AND CITATION TO AUTHORITY

Plaintiff bases his Complaint on his allegation that the Ordinance was violated. However, violation of that Ordinance does not create a private right of action. Even if it did, Plaintiff would not have been the person injured thereby and, thus, does not have standing to bring suit for a violation. And, Defendant Mr. McElwaney did not even violate the Ordinance. Moreover, each Count of Plaintiff's Complaint relies on an inapplicable theory of law and is, therefore, meritless. Consequently, Plaintiff's Complaint should be dismissed. O.C.G.A. § 9-11-12(b)(1) & (6).

A. Plaintiff's Complaint Attempts to Assert a Private Right of Action Based Upon an Ordinance That Does Not Allow for One.

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[3] Plaintiff has been informed that his Complaint is inaccurate and has been provided with a true and correct photo demonstrating that the signage at the entrance of the lot contains all of the information set forth in the Ordinance. Despite that, Plaintiff has not withdrawn the Complaint.

Plaintiff's Complaint is a thinly veiled attempt to enforce a private right of action under the Ordinance. But, this Ordinance does not allow for a private right of action. Plaintiff's Complaint, therefore, must be dismissed.

"[I]t is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof." *State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, Inc.*, 312 Ga. App. 756, 761 (2011). Rather, a private cause of action is only found when the text of the regulation expressly provides for one. *Id.* For this reason, "Georgia has longstanding precedential authority rejecting the creation of implied private rights of action." *Bellsouth Telecommunications LLC v. Cobb County*, 802, S.E.2d 686, 691 (2017). Thus, in the absence of textual support, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Walker v. Oglethorpe Power Corporation*, 341 Ga. App. 647, 657 (2017).

This is particularly true for penal regulations, which create rights in favor of the general public, not for individuals damaged by a violation. *Jastram v. Williams*, 276 Ga. App. 475, 476 (2005). In fact, penal regulations, "which express prohibitions rather than personal entitlements and specify a particular remedy other than civil litigation, are accordingly poor candidates for the imputation of private rights of action." *Bridges v. Wooten*, 305 Ga. App. 682, 684 (2010). As a result, "the public policy advanced *by* a penal statute, no matter how strong, cannot support the implication of a private civil cause of action that is not based on the actual provisions *of* the relevant statute." *Anthony v. Am. Gen. Fin. Serv. Inc.*, 287 Ga. App. 448, 456 (2010) (emphasis in original). Georgia courts have repeatedly rejected private claims sounding in penal provisions, for failure to raise a justiciable issue of law amenable to resolution in a legal proceeding, despite

the gravity of the public policy considerations plaintiffs have heretofore called upon in support of their attempts to undermine this unwavering precedent. *Verdi v. Wilkinson County*, 288 Ga. App. 856, 859 (2007). For example, courts have declined to allow a private right of action to stem from statutes regarding cruelty to children, reporting of child abuse, and disturbance of human remains. *Id.* (denying a complaint based on violation of a statute governing the felony offense of wanton or malicious removal of a dead body from a grave and disturbance of human remains); *Chisolm v. Tippens*, 289 Ga. App. 757, 761, (2008) (refusing to allow a private right of action to sound from violation of a cruelty to children statute); *Anthony*, 287 Ga. App. at 456.

The Ordinance is obviously penal, as a violation may be punishable by, among other things, imprisonment for not more than one hundred eighty (180) days or by compulsory labor on the streets or public works not to exceed thirty (30) days. Chapter 1, § 1-17(a). *See Dekalb County v. Gerard*, 207 Ga. App. 43, 43 (1993)(holding that prosecution for violation of a city or county ordinance are "quasi-criminal").

The Ordinance, which appears in the same Chapter as one making it unlawful "to spit upon the sidewalks," is hardly one which promotes a public policy interest as strong as the protection of a child or the deceased. Union City Code of Ordinance§ 10-15. Consequently, it cannot logically be argued that the Ordinance could support a private right of action when those more important public policy considerations could not. *Anthony*, 287 Ga. at 456. Moreover, the outcome Plaintiff seeks–avoidance of the penalty for illegally parking in a private lot–is hardly consistent with the public policy of the Ordinance.

Moreover, if, as Plaintiff contends, the City Council also intended to expose companies to civil liability, it would have done so. *Cross v. Tokio Marine and Fire Ins. Co. Ltd*, 254 Ga. App. 739, 741 (2002) ("[T]he absence of language [] creating a private right of action strongly

indicates the legislature's intention that no such cause of action be created by said statute."); *Parris V. State Farm & C. Ins. Co.*, 229 Ga. App. 522, 524 (1997). But, the City Council used this Ordinance to create a right in favor of the general public, not for individuals claiming to have been affected by a violation. *Jastram v. Williams*, 276 Ga. App. 475, 476 (2005). Thus, despite Plaintiff's contentions that he is entitled to damages for the Defendant's alleged violation of the Ordinance, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Walker v. Oglethorpe Power Corporation*, 341 Ga. App. 647, 657 (2017).

Consequently, there is no authority that would allow the inference of a private cause of action from the public policy the Ordinance appears to promote. *State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting and Body Works Inc.*, 312 Ga. App. 756, 751 (2011). The Complaint, therefore, fails to state a claim upon which relief may be granted.

B. Plaintiff Has No Standing to Sue.

Plaintiff lacks standing to seek the relief asked for in the Complaint. The vehicle on which Maximum Booting placed an immobilization device was not owned by Plaintiff, but by Clearwater Logistics. The invoice for the fee was made to Clearwater Logistics, and Clearwater Logistics paid the booting fee. Plaintiff's Complaint, therefore, seeks to recover damages for claims which can only be asserted by Clearwater Logistics. Further, given Plaintiff's voluntary decision to illegally park in violation of the multitude of signs and warnings cautioning him not to, any alleged damages were caused by Plaintiff's voluntary act, not Defendant. Thus, Plaintiff has no standing to sue.

"[S]tanding is in essence the question of whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues, and litigants must establish their standing

to raise issues before they are entitled to have a court adjudicate those issues." *Sherman v. City of Atlanta*, 293 Ga. 169, 172(2), 744 S.E.2d 689 (2013) (punctuation, citations and emphasis omitted). "[S]tanding focuses on the party seeking relief and not on the issues the party wishes to have adjudicated, and it is the person wishing to invoke a court's jurisdiction who must have standing." *Atlantic Specialty Ins. Co. v. Lewis*, 341 Ga. App. 838, 845 (2017).

To establish standing, a plaintiff must show (1) a legally cognizable injury; (2) caused by an act of the defendant; (3) that is redressable by judicial action. *Atlanta Taxicab Co. Owners Ass'n Inc. v. City of Atlanta*, 281 Ga. 342 (2006); *Lujan v. Defendanders of Wildlife*, 504 U.S. 555, 560 (1992). Thus, "[t]he real party in interest is the person, who . . . has the right sought to be enforced." (Citation and punctuation omitted.) *Allianz Life Ins. Co., etc. v. Riedl*, 264 Ga. 395, 398(3) (1994). Standing must be determined at the time at which the complaint is filed. *Associated Credit Union v. Pinto*, 297 Ga. App. 605, 606, 677 S.E.2d 789 (2009); see O.C.G.A. § 9-11-17(a). The plaintiff has the burden of establishing that he has standing to bring the underlying suit. *Blackmon v. Tenet Healthsystem Spalding*, 284 Ga. 369, 371 (2008). Without standing, there is no subject matter jurisdiction, making dismissal appropriate. *Id.*

In *Associated Credit Union*, the Court of Appeals explained that, with regards to a suit concerning real property, the person with standing is the person who owns the property at the time the complaint is filed. *Associated Credit Union v. Pinto*, 297 Ga. App. 605, 607 (2009). There, the former owner of real property attempted to bring a suit for damages related to a deed on that property. *Id.* But, the ownership in the property had been transferred before suit was brought. *Id.* The court explained that, "[i]t is well settled that every action shall be prosecuted in the name of the real party in interest." *Id.* Because the plaintiff had already transferred ownership before filing the complaint, "he had no interest in the property and had suffered no injury" and,

therefore, lacked standing to pursue a damages claim. *Id.*; *see also Estate of Nixon v. Barber*, 340 Ga. App. 103, 103 (2017) (rejecting the plaintiffs' action for legal malpractice against an attorney who represented their son, despite the fact that they hired him, paid him, and received legal advice from him).

Here, Plaintiff similarly cannot establish any of the three requirements for standing. First, Plaintiff has no legally cognizable injury. His entire Complaint is based on the booting of a vehicle which is owned by Clearwater Logistics. Whereas the plaintiff in *Associated Credit Union* at least owned the property in question at some point in time, the Plaintiff here has never had ownership interest in the vehicle. 297 Ga. App. 607. Moreover, the invoice which resulted from Plaintiff's violation was not paid by him. Rather, it was paid by Clearwater Logistics. Consequently, it is Clearwater Logistics that would be the party in interest to the rights asserted here. *Allianz Life Ins. Co., etc*, 264 Ga. at 398. And, therefore, Clearwater Logistics who could have standing. Plaintiff, on the other hand, is not entitled to ask the Court to decide the merits of the issues raised in the Complaint.

Moreover, Plaintiff cannot demonstrate that the injury alleged was caused by Defendant Mr. McElwaney. *Atlanta Taxicab Co. Owners Ass'n Inc.*, 281 Ga. 342. Plaintiff made the decision to illegally park in the Walmart Supercenter parking lot of his own accord. He does not allege that Defendant Mr. McElwaney made him park there. Nor does he allege that he would not have parked there had the signage somehow differed. The sign posted at the entrance of the parking lot clearly put Plaintiff on notice that "This Property Owner boots unauthorized Vehicles." This signs included all of the information required by the Ordinance. And, additional warnings reiterated "Absolutely No Truck Parking . . . Violators Will Be Booted." Yet, Plaintiff still decided to illegally park in the lot. There is no reason to assume that Plaintiff would not

have parked there if more detail had been included in the signage. Consequently, even if the signage was as the Complaint alleges, that would not have been the cause of the immobilization of the vehicle. The Plaintiff was clearly on notice that he was not permitted to park in that lot and that doing so would result in him being booted. Thus, it was Plaintiff's decision to disregard that signage and violate the rights of the private property owner that caused the injury in this case.

Because Plaintiff does not have standing to bring this suit, this Court lacks subject matter jurisdiction and dismissal is warranted.

C. Mr. McElwaney Did Not Violate the Ordinance and Enforcement Is the Responsibility of the Executive Branch Not the Judiciary.

Plaintiff's allegation that Defendant Mr. McElwaney violated the Ordinance is meritless. The signage posted at the entrance of the Walmart Supercenter contains all of the information required by the Ordinance. Defendant Mr. McElwaney, at the instruction of Walmart, even provided additional warnings throughout the parking lot to ensure that full notice was provided that abandonment of vehicles for more than two hours would result in booting. The Chief of Police inspected the signage and found it to be in full compliance with the Ordinance. There was, therefore, no violation of the Ordinance.

It is up to the Police Department, not the Plaintiff, to determine when the Ordinance has been violated: determinations regarding the compliance or violation of the Ordinance are expressly declared to "be the duty of the officers of the police department." Chapter 2, Article V, § 2-136(d)(2). Accordingly, the Union City Police Department and the Union City Code Enforcement Division – which is directly responsible for the inspection and enforcement of residential and commercial properties – both perform inspections to ensure compliance with local ordinances. Towards that end, Chief of Police Cassandra A. Jones and Captain Gloria Hodgson inspected the signage at issue and determined that it was compliant with the Ordinance.

And, Union City Code Enforcement has also inspected that signage and found it to be in compliance with the Ordinance. In fact, neither Defendant Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Ordinance.

Plaintiff does not have the authority to determine when a violation of the Ordinance has taken place – that authority is expressly vested in the Police Department. And, Plaintiff certainly cannot maintain a private action against a Company which has done nothing but justifiably rely on the Police Department's representations regarding compliance of an Ordinance which it has the ultimate authority to enforce.

If Plaintiff believed that Defendant Mr. McElwaney violated the Ordinance, he could have reported that violation to the Police Department. And if Plaintiff disagreed with the Police Department's enforcement of the Ordinance, he could have sought a writ of mandamus. *Merchant Law Firm P.C. v. Emerson*, 800 S.E.2d 557 (2017). But, even when the proper remedy is asserted, courts are exceedingly hesitant to instruct public officials on their enforcement measures because doing so amounts to "undertak[ing] to oversee and control the general course of official conduct." *Dean v. Gober*, 272 Ga. 20, 23 (1999). Such an interference would constitute a violation of separation of powers of government. *Speedway Grading Corp. v. Barrow County Bd. of Com'rs*, 258 Ga. 693, 695 (1988). The Complaint does not support an inference that that level of intrusion is warranted here – there is nothing to support the conclusion that Plaintiff is better suited to interpret and enforce the Ordinance than the Police Department. And it certainly does not support an inference that Defendant Mr. McElwaney should be liable for damages for his reliance on the Police Department's authority. Instead, Plaintiff's attempt to

instruct the Police Department on how to conduct police business is the perfect example of a largely groundless claim which should not be allowed to take up the time of this Court.

D. The Individual Counts of Plaintiff's Complaint Fail as a Matter of Law.

Plaintiff attempts to hide the fact that the Complaint is nothing more than a transparent assertion of a private right of action from an ordinance which does not provide for one, behind nine Counts he alleges entitle him to damages. Each of these Counts, however, is little more than window dressing: they are inapplicable to the case at hand and, therefore, cannot be used as the Trojan horse in which Plaintiff hides his attempt to assert a private right of action under the Ordinance. Each Count fails as a matter of law and should, therefore, be dismissed.

Count I raises a claim for unjust enrichment based upon Plaintiff's assertion that Defendant Mr. McElwaney was not authorized to boot the vehicle. (Complaint, ¶¶ 27-36). But, Defendant Mr. McElwaney registered and obtained a written permit from the Police Department and had the express authority of the private property owner. Moreover, a claim for unjust enrichment must show "that the defendant induced or encouraged the plaintiff to provide something of value to the defendant[,]" that the plaintiff actually conferred that benefit with the expectation that defendant would pay the cost thereof, and that defendant knowingly accepted the benefit. *Campbell v. Ailion et al.*, 338 Ga. App. 382, 383 (2016). Here, it cannot be said that Mr. McElwaney knowingly accepted a benefit from Plaintiff: the payment for the booting fee came not from him, but from Clearwater Logistics. And, in paying that fee, the only expectation that Clearwater Logistics had was that the boot would be removed, which it was. Thus, the elements needed for unjust enrichment do not exist here.

Plaintiff's second count, criminal trespass, fails because, like the Ordinance, "[c]riminal trespass violations are not actionable for damages and cannot form the basis of a civil claim. The

statute provides that criminal trespass is a misdemeanor." *Association Services Inc. v. Smith*, 249 Ga. App. 629 (2001); (Complaint, ¶¶ 37-40).

Count three, false imprisonment, requires a showing of "the unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty." *Burrow v. K-Mart Corp.*, 166 Ga. App. 284, 287 (1983); (Complaint, ¶¶ 41-44).. Plaintiff does not allege that he was personally detained, and therefore, he cannot bring a claim for false imprisonment.

Plaintiff's fourth count, fraudulent inducement, is based on his allegation that Mr. McElwaney had a duty to inform him of the law. (Complaint, ¶¶45-51). However, "misrepresentations as to a question of law will not constitute remedial fraud, since everyone is presumed to know the law and therefore cannot in legal contemplation be deceived by erroneous statements of law. . . . *Puckett Paving Co. v. Carrier Leasing Corp.*, 236 Ga. 891, 891 (1976). Moreover, Plaintiff's assertion that Defendant Mr. McElwaney had a duty to disclose the fact that he "lacked legal authority to a) immobilize [Plaintiffs'] vehicles with a boot and b) collect a fee for removal of the boot" is patently false. (Complaint ¶ 45). As demonstrated above, Defendant McElwaney actually had legal authority to place a boot on the illegally parked cars, and collect a fee for the boot's removal, belying any claim brought by Mr. McElwaney's alleged misrepresentation.

However, even laying aside Defendant Mr. McElwaney's legal authority to boot illegally parked cars in the Walmart parking lot, Plaintiff's claim for Fraudulent concealment also requires Plaintiff to establish that Defendant Mr. McElwaney had a duty to disclose some truth to Plaintiff. "Suppression of the truth is not a fraud unless used as a means of deceiving another. No

man is compelled to break silence and speak, unless there is an obligation resting upon him to speak." *Reeves v. B. T. Williams & Co.,* 160 Ga. 15, 15 (1925).

Under O.C.G.A. § 23-2-53, that duty can only be imposed "from the confidential relations of the parties or from the particular circumstances of the case." Here there is no allegation that the parties had any kind of fiduciary, contractual, or otherwise confidential relationship, so Defendant Mr. McElwaney's alleged duty must be inferred from the "particular circumstances of the case." *Id.* Two factors must be present to infer a duty to disclose based on the particular circumstances of a case: "1) the intentional concealment of a fact 2) for the purpose of obtaining an advantage or a benefit." *Georgia Real Estate Comm'n v. Brown*, 152 Ga. App. 323, 324 (1979). Defendant Mr. McElwaney believed that he had legal authority to boot illegally parked cars in the parking lot, so there is no way that he was intentionally concealing any contrary fact from Plaintiff. Thus, this claim fails to state a claim upon which relief can be granted.

The fifth count, conversion, requires a showing of "an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights. . . ." *City of Atlanta v. Hotels.com, L.P. et al*, 332 Ga. App. 888,891 (2015); (Complaint, ¶¶52-56). Here, Plaintiff does not have title to the vehicle, and does not allege that Mr. McElwaney somehow exercised ownership of the vehicle. Indeed, Mr. McElwaney was not even present during the acts complained of in the Complaint.

As his sixth Count, Plaintiff asserts trover, replevin, and detinue. (Complaint, ¶¶57-62) But, these claims require a showing of a conversion, which as set forth above, cannot apply here. *Truscott v. Garner*, 92 Ga. App. 95, 95 (1955).

Plaintiff's seventh count, negligence per se, cannot be based on a violation of the Ordinance. (Complaint, ¶¶63-66). Laws which do not provide for private enforcement cannot be

the basis of a negligence per se claim. *Reilly v. Alvan Aluminum* Corp., 272 Ga. 280 (2000); *Govea v. City of Norcross*,271 Ga. App. 36, 41-42 (2004). It has already been established that the Ordinance provides no private right of action and, therefore, cannot be the basis of a claim for negligence per se. Moreover, Defendant Mr. McElwaney did not violate the city ordinance in question. If there was no violation, there can be no negligence per se claim. *Garnett v. Mathison*, 179 Ga. App. 242, 242 (1986). Even if Defendant Mr. McElwaney had violated a city ordinance, Plaintiff was not damaged by it, as he did not own the vehicle that was booted or pay the fee to have the boot removed. If Plaintiff was not damaged, he has no tort claim upon which relief can be granted, and his negligence per se claim must be dismissed.

Count eight is for money had and received. (Complaint, ¶¶67-70). This claim will allow a plaintiff to recover a payment only when that payment was made by mistake and the other party would not be prejudiced by refund of the payment. *McGonigal v. McGonigal*, 294 Ga.App. 427, 429-420 (2008). Here, there is no allegation the money was paid by mistake – it was paid for removal of the boot which was placed on the illegally parked vehicle. And it was not paid by Plaintiff who, therefore, cannot seek to recover it. Moreover, refunding this payment would certainly prejudice Mr. McElwaney, who should not be required to bear the burden of paying the fee for the abandoned vehicle.

Finally, Plaintiff's ninth and final count for punitive damages requires a showing of "wanton conduct . . . which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent." *Wardlaw v. Ivey*, 297 Ga. App. 240, 242 (2009); (Complaint, ¶¶71-72). Nothing in the Complaint demonstrates the required recklessness or indifference. Mr. McElwaney conducted his business in compliance with the Ordinance and instructions from the Chief of Police. Thus, this Count is again inapplicable.

Consequently each individual Count fails as a matter of law, rendering the Complaint subject to dismissal.

CONCLUSION

WHEREFORE Defendant respectfully asks this Court to dismiss Plaintiffs' Complaint.

This 20th day of October, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

/s/ Jason S. Bell
Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

INSLEY AND RACE, LLC

BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, Georgia 30309
(404) 876-9818 (telephone)
(404) 876-9817 (facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

Attorneys for Defendant

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the within and foregoing DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO via Odyssey eFileGA, which will electronically serve a file-stamped copy to the following:

Michael L. Werner, Esq.
Matthew Q. Wetherington
Robert N. Friedman
Werner Wetherington, P.C.
2860 Piedmont Road, N.E.
Atlanta, Georgia 30305
Matt@wernerlaw.com
Robert@wernerlaw.com

Kevin Patrick
Kevin Patrick Law
2860 Piedmont Road, N.E.
Suite 160
Atlanta, Georgia 30305
Kevin@patricktriallaw.com

This 20th day of October, 2017.

/s/ Jason S. Bell
Jason S. Bell
Attorney for Defendant

EXHIBIT A

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	Civil Action File No. 17EV003164

AFFIDAVIT OF KENNY MCELWANEY

STATE OF: GEORGIA

COUNTY OF: FULTON

COMES NOW, Kenny McElwaney, before the undersigned officer duly authorized to administer oaths and, being sworn, does state on oath the following:

1.

My name is Kenny McElwaney. I am over the age of majority, am suffering under no legal disability, and am competent to give this Affidavit.

2.

My company, Maximum Booting Company ("Company"), performs vehicle immobilization services (commonly referred to as "booting") in Union City, Georgia, but only with respect to commercial vehicles. My Company is permitted to conduct vehicle immobilization services with the Union City Police Department. My Company has never been cited for any violation of the Union City booting ordinance.

3.

My Company has a contract to perform vehicle immobilization services at the Walmart Super Center at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Super Center"). In connection with those services, my Company posted signage at the entrances to the parking lot, which contained all of the information required by the booting Ordinance. Attached hereto as Exhibit A is an example of one of those signs. In addition, my contact at the Walmart Super Center requested that additional warnings be posted throughout the parking lot, and we posted those additional warnings. An example of one of those warnings is included in Plaintiff's Complaint. There were at least twenty signs and warnings providing notice of about booting and/or that trucks could not park in the parking lot as of June 15, 2017.

4.

On January 10, 2017, myself and John Page (who operates Buckhead Parking Enforcement) met with Chief Jones and Captain Gloria Hodgson of the Union City Police Force for them to inspect the signage at the parking lots in Union City where my company and Mr. Page's conduct vehicle immobilization services. We visited all of the lots in Union City at which my Company conducts vehicle immobilization services including the Walmart Super Center. Chief Jones indicated that the signage at the entrance of the parking lots was in compliance with the Union City Ordinance about booting.

5.

On June 15, 2017, an agent of my Company placed a vehicle immobilization device on a commercial truck owned by Clearwater Logistics ("Clearwater"). The truck indicates that it is owned by Clearwater, and that it was operated pursuant to Clearwater's US DOT# 1327977. For

purposes of this Affidavit, on October 16, 2017, I called Clearwater, and spoke to the dispatcher, who confirmed that Clearwater Logistics owned the truck in question.

6.

One of my Company's agents placed a vehicle immobilization device on the Clearwater truck because it had been improperly parked at the Walmart Super Center for more than two hours.

7.

My Company created an invoice directed to Clearwater for $500.00 for the fee to remove the immobilization device, and Clearwater paid the invoice on June 15, 2017 by a COM Check, which is an electronic payment method. The vehicle immobilization device was then removed.

[*signature on following page*]

FURTHER AFFIANT SAYETH NAUGHT.

KENNY MCELWANEY

Sworn to and subscribed before me
this 20 day of October, 2017.

NOTARY PUBLIC

My Commission Expires: 09/27/2020

KEISHA PIERSON NOTARY PUBLIC FULTON COUNTY, GEORGIA MY COMMISSION EXPIRES SEPTEMBER 27, 2020

EXHIBIT A

EXHIBIT B

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

Cassandra A. Jones
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this 18 day of October, 2017.

Emma Thompson
Notary Public

My Commission Expires: 8-27-18

[NOTARY SEAL]

EMMA A THOMPSON NOTARY PUBLIC FULTON COUNTY, GA EXP. Aug. 27, 2018

END OF EXHIBITS

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

DEMAND FOR A TWELVE-PERSON JURY
ON BEHALF OF DEFENDANT KENNY MCELWANEY
D/B/A MAXIMUM BOOTING CO.

COMES NOW KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., named as the Defendant in the above-styled lawsuit, and, pursuant to O.C.G.A. 15-12-122(a)(2), demands a trial by a jury of twelve persons to be picked from a panel of twenty-four prospective jurors. The claim for damages in this cause is greater than $25,000.00, and this Defendant is therefore entitled to a jury of twelve as a matter of law.

Respectfully submitted, this 20th day of October, 2017.

SMITH, GAMBRELL & RUSSELL, LLP

/s/ Jason S. Bell
Jason S. Bell
Georgia Bar No. 048530
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
Email: jbell@sgrlaw.com

INSLEY AND RACE, LLC

BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, Georgia 30309
(404) 876-9818 (telephone)
(404) 876-9817 (facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing DEMAND FOR A TWELVE-PERSON JURY ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
The Werner Law Firm
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 20th day of October, 2017.

/s/ Jason S. Bell
Jason S. Bell
Attorney for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

NOTICE OF LEAVE OF ABSENCE

COMES NOW **Brynda Rodriguez Insley, Esq.**, and respectfully notifies all Judges, Clerks of Court and Counsel of Record that she will be on Leave as follows pursuant to Georgia Uniform Court Rule 16:

1. Monday, October 30, 2017 through Friday, November 3, 2017 (Personal Leave);
2. Friday, November 17, 2017 and Monday, November 20, 2017 (Personal Leave);
3. Wednesday, November 22, 2017 through Friday, November 24, 2017 (Thanksgiving Day Holiday and Personal Leave);
4. Monday, December 11, 2017 (Personal Leave);
5. Wednesday, December 20, 2017 through Wednesday, January 17, 2018 (Christmas and New Year's Eve Holiday and Personal Leave).

All affected parties shall have ten days from the date of this Notice to object to it. If no objections are filed, the Leave shall be granted.

This 23rd day of October, 2017.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing NOTICE OF LEAVE OF ABSENCE upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
The Werner Law Firm
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

Co-Counsel for Defendant
Kenny McElwaney d/b/a
Maximimum Booting Co.
Jason S. Bell, Esq.
Smith Gambrell & Russell, LLP
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, GA 30309-3592

This 23rd day of October, 2017.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
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IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

REQUEST FOR ORAL ARGUMENT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

COME NOW, KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., named as a Defendant in the above-styled civil action, by and through their counsel of record, request oral argument pursuant to Superior Court Rule 6.3 as to Defendant's Motion to Dismiss Plaintiff's Complaint filed on October 20, 2017.

This 25th day of October, 2017.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

/s/ Jason S. Bell
Jason S. Bell
Georgia Bar No. 048530
(Signed with Express Permission by Brynda Rodriguez Insley, Esq.)

Attorneys for Defendant Kenny McElwaney d/b/a Maximum Booting Co.

SMITH GAMBRELL & RUSSELL, LLP
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, GA 30309-3592
404-815-3500
jbell@sgrlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing REQUEST FOR ORAL ARGUMENT ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
The Werner Law Firm
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 25th day of October, 2017.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496
Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons,	
Plaintiff,	**CIVIL ACTION FILE NUMBER**
v.	**17EV003164**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	
Defendant.	

FIRST AMENDED CLASS ACTION COMPLAINT

1. Defendant Kenny McElwaney d/b/a Maximum Booting Co. ("McElwaney") has a systematic process of disabling vehicles with boots and similar devices without first complying with the City of Union City ordinances requiring certain signage at any location where vehicle immobilization occurs. As a result, McElwaney has collected thousands of dollars in booting fees in an unlawful manner. Plaintiff brings this action to recover damages and other available remedies on behalf of himself and a class of persons similarly situated.

I. PARTIES

2. Plaintiff Jessy Polson brings this action in his individual capacity, and in the capacity of a class representative on behalf of others similarly situated. By bringing this action, Plaintiff avails himself of the jurisdiction of this Court.

3. Defendant McElwaney is an individual doing business as a sole proprietorship under the name "Maximum Booting Co." McElwaney was lawfully served on July 25, 2017. Jurisdiction and venue are proper as to Defendant because he is a resident of Fulton County.

II. STATEMENT OF FACTS

4. There is no provision in the Official Code of Georgia Annotated ("O.C.G.A.") which expressly authorizes vehicle immobilization on private property.

5. The City of Union City authorizes certain types of vehicle immobilization, including booting, by licensed vehicle immobilization services.

6. Booting is a method of using a mechanical device that is designed or adopted to be attached to a wheel, tire, or part of a parked motor vehicle so as to prohibit the motor vehicle's usual manner of movement or operation:

7. Once licensed, a vehicle immobilization service operating in Union City may only boot vehicles under the terms proscribed by City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

8. One of the conditions precedent to legally booting a vehicle within the City of Union City is to comply with certain signage requirements as detailed in Union City

Code of Ordinances, Chapter 10, Article I, § 10-28. This ordinance is provided in full here:

> It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met:
>
> (1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.
>
> (2) The wording on such signs shall contain the following information:
>
> a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.
>
> b. The maximum fee for removal of the device, as provided in subsection (c).
>
> c. The name, address, and phone number of the person or entity responsible for affixing the device.
>
> d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.
>
> e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.
>
> f. The name and address of the entity that hired the vehicle immobilization service or company.
>
> g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

9. Defendant McElwaney is a licensed vehicle immobilization service operating within the City of Union City.

10. Defendant McElwaney offers booting services to parking lots within the city of

Union City.

11. On information and belief, the signs erected at every parking lot wherein McElwaney operates do not comply with Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

III. NAMED PLAINTIFF'S EXPERIENCE

12. On or about June 15, 2017, Plaintiff parked in a private parking lot located at 4735 Jonesboro Rd, Union City, GA 30291, which is within the territorial limits of the City of Union City.

13. Plaintiff parked in a parking lot owned by Wal-Mart Stores, Inc.

14. Defendant McElwaney was hired by the owner of the private property located at 4735 Jonesboro Rd., to install or attach vehicle immobilization devices or boots.

15. Defendant McElwaney placed a boot on Plaintiff's vehicle and refused to remove it unless Plaintiff paid a **$500.00** fine.

16. Plaintiff paid Defendant McElwaney $500.00.

17. An exemplar of the signs erected at the parking lot located at 4735 Jonesboro Rd. is depicted below:

18. The signs do not comply with Union City Code of Ordinances, Chapter 10, Article I, § 10-28, as the signs:

a. Do not contain a statement that cash, checks, credit cards, and debit cards are accepted for payment.

b. Do not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

c. Do not contain the name and address of the entity that hired the vehicle immobilization service or company.

19. Defendant McElwaney booted Plaintiff's vehicle without legal authority and caused damages to Plaintiff.

IV. CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action as a class action pursuant to O.C.G.A. § 9-11-23, on

behalf of himself and the following Classes:

a. All persons who have been booted by Defendant McElwaney and paid fines for removal of said device within the City of Union City from June 15, 2012, through present; and

b. All persons who have been booted by Defendant McElwaney at 4735 Jonesboro Rd, Union City, GA 30291, and have paid a fine for removal of said device from June 15, 2012, through present (the Polson subclass).

21. Excluded from the Classes are Defendant, as well as Defendant's employees, affiliates, officers, and directors, including any individuals who incurred property damage as a result of Defendant's actions, and the Judge presiding over this case. Plaintiff reserves the right to amend the definition of the Classes if discovery and/or further investigation reveal that the Class definitions should be expanded or otherwise modified.

22. **Numerosity / Impracticality of Joinder**: The members of the Classes are so numerous that joinder of all members would be impractical. Plaintiff reasonably estimates that there are thousands of Class members. The members of the Classes are easily and readily identifiable from information and records in Defendant's possession, control, or custody.

23. **Commonality and Predominance**: There is a well-defined community of interest and common questions of law and fact that predominate over any questions affecting the individual members of the Classes. These common legal and factual questions, which exist without regard to the individual circumstances of any Class member, include, but are not limited to, the following:

a. Whether Defendant engaged in fraudulent business practices with respect

to booting vehicles without legal authority throughout Union City;

b. Whether Defendant engaged in racketeering activity prohibited under O.C.G.A. § 16-14-1, *et seq*.

c. Whether Defendant engaged in civil theft \ conversion;

d. Whether Defendant engaged in false imprisonment;

e. Whether Defendant engaged in making false statements;

f. Whether Defendant unlawfully disabled Plaintiff and other Class Member's property and refused to return the property;

g. Whether Plaintiff and the Classes are entitled to damages; and,

h. Whether Plaintiff and the Classes are entitled to equitable relief or other relief, and the nature of such relief.

24. **Typicality**: Plaintiff's claims are typical of the Classes in that Plaintiff and the Classes have all been booted as a result of Defendant's unlawful activities, and have all sustained damages as a direct proximate result of the same wrongful practices. Plaintiff's claims arise from the same practices and course of conduct that give rise to the Classes' claims. Plaintiff's claims are based upon the same legal theories as the Classes' claims.

25. **Adequacy**: Plaintiff will fully and adequately protect the interests of the Classes and has retained class counsel who are experienced and qualified in prosecuting class actions, including consumer class actions and other forms of complex litigation. Neither the Plaintiff nor their counsel have interests which are contrary to, or conflicting with, those interests of the Classes.

26. **Superiority**: A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because, *inter alia*: it is economically

impracticable for members of the Classes to prosecute individual actions; prosecution as a class action will eliminate the possibility of repetitious and redundant litigation; and, a class action will enable claims to be handled in an orderly, expeditious manner.

COUNT 1: FALSE IMPRISONMENT

27. At all times relevant to this Complaint, Defendant owed duties to Plaintiff and other Class Members not to interfere with the free movement of Plaintiff and other Class Members.

28. In violation of O.C.G.A. § 51-7-20, Defendant knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time.

29. Defendant was acting without legal authority when Defendant restrained the movements of Plaintiff and other Class Members.

30. Plaintiff and other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury as a result of Defendant's conduct.

COUNT 2: CONVERSION / CIVIL THEFT

31. Plaintiff and other Class Members had an ownership interest in funds that were paid to Defendant.

32. Defendant took possession of Plaintiff and other Class Members' funds by demanding that Plaintiff and other Class Members pay $500.00 to have a vehicle immobilization device removed.

33. Plaintiff and other Class Members demanded that the vehicle immobilization device be removed free of charge.

34. Defendant refused to release Plaintiff and other Class Members' vehicles without

payment of $650.00.

35. Defendant had no lawful right to immobilize Plaintiff and the other Class Members' vehicles, or to demand payment to remove vehicle immobilization devices.

36. As a result, by requiring Plaintiff and other Class Members to pay $500.00 to have vehicle immobilization devices removed, Defendant has wrongfully converted Plaintiff and other Class Members' funds, and Plaintiff and other Class Members have sustained damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 3: PREMISES LIABILITY / O.C.G.A. § 51-3-2

37. As occupiers of the properties at, or around, 4735 Jonesboro Rd., Union City, GA 30291, Defendant owes a duty under O.C.G.A. § 51-3-2 not to willfully or reckless cause injury to invitees, licensees, and trespassers on the property.

38. It is considered willful or wanton not to exercise ordinary care to protect anticipated trespassers from dangerous activities or hidden perils on the premises.

39. The duties imposed by O.C.G.A. § 51-3-2 prohibit Defendant from setting up a "mantrap" to cause harm to any invitees, licensees, and trespassers on the property.

40. By illegally immobilizing vehicles at, or around, 4735 Jonesboro Rd., Defendant setup such a "mantrap," and subjected invitees, licensees, and trespassers of the property to a known harm and dangerous activity.

41. Specifically, by illegally immobilizing vehicles, Defendant willfully or recklessly subjected invitees, licensees, and trespassers of the property to false imprisonment, conversion, civil theft, and extortion in violation of the duties imposed on occupiers of property under O.C.G.A. § 51-3-2.

42. As a result of Defendant's breach, Plaintiff and other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 4: NEGLIGENCE *PER SE*

43. Defendant violated Union City Code of Ordinances, Chapter 10, Article I, § 10-28 by unlawfully booting Plaintiff and other Class Members' vehicles within Union City without proper signage.

44. Plaintiff and other Class Members fall within the class of persons intended to be protected by Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

45. Union City Code of Ordinances, Chapter 10, Article I, § 10-28 is intended to guard against the unlawful activities of Defendant.

46. Due to Defendant's negligence, Plaintiff and the other Class Members have suffered harm Union City Code of Ordinances, Chapter 10, Article I, § 10-28 was intended to prevent.

47. Due to Defendant's negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 5: MONEY HAD AND RECEIVED

48. Because Defendant collected $500.00 from Plaintiff and other Class Members to release vehicles unlawfully booted by Defendant, Defendant has received money from Plaintiff and other Class Members that in equity and good conscious Defendant should not be permitted to keep.

49. As a result of Defendant's actions, Plaintiff and the other class members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 6: VIOLATION OF GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO")

50. Defendant, as part of its parking company business, engages in an enterprise of unlawfully immobilizing vehicles for profit.

51. Defendant's conduct subjects it to liability under Georgia's Racketeer Influenced and Corrupt Organization Act ("RICO"), O.C.G.A. § 16-14-1 *et seq*., as more fully set out below.

52. Specifically, Defendant, in furtherance of its unlawful vehicle immobilization enterprise, has engaged in a pattern of racketeering activity, including, but not limited to the following:

a. By forcing Plaintiff and other Class Members to pay to have an unlawfully placed vehicle immobilization device removed, Defendant has engaged in Theft (O.C.G.A. § 16-8-1), Theft by Taking (O.C.G.A. § 16-8-2), Theft by Deception (O.C.G.A. § 16-8-3), Theft by Conversion (O.C.G.A. § 16-8-4), and Theft by Extortion (O.C.G.A. § 16-8-16);

b. By alleging through signage, notices, and other documents provided to Plaintiff and other Class Members, that Defendant was lawfully permitted to immobilize Plaintiff and other Class Members' vehicles, and lawfully permitted to charge fees for the removal of vehicle immobilization devices, Defendant has engaged in the use of false statements in violation of O.C.G.A. § 16-10-20; and

c. By unlawfully attaching vehicle immobilization devices to Plaintiff and other Class Members' vehicles, Defendant knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time in violation of O.C.G.A. § 16-5-41.

53. Defendant has also engaged in racketeering activity by extorting money from Plaintiff and other Class Members under the threat of refusing to remove an unlawfully placed vehicle immobilization device.

54. Defendant's above described racketeering activity is all done in furtherance of Defendant's enterprise of profiting off unlawfully immobilizing vehicles.

55. Defendant's above described racketeering activity all have the same or similar methods of commission in that they all involve the unlawful use of vehicle immobilization devices, and false or misleading signage and documentation, to force Plaintiff and other Class Members to pay to have unlawfully placed vehicle immobilization devices removed.

56. Defendant's racketeering activity have the same or similar objective, namely, profiting off the unlawful use of vehicle immobilization devices.

57. Defendant's racketeering activity have the same or similar victims, namely, Plaintiff and other Class Members who have been forced to pay Defendant to remove a vehicle immobilization device unlawfully placed on Plaintiff and other Class Members' vehicles by Defendant.

58. Defendant's racketeering activity are otherwise related by distinguishing characteristics including, but not limited to, the involvement and collusion of Defendant and its workers, executives, and officers.

59. Defendant's racketeering activity is part of a long-term enterprise that has existed, and continues to, exist for over five (5) years, and will continue to exist unless halted by judicial intervention.

60. As a result of Defendant's racketeering activity, Plaintiff and other Class

Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 7: ATTORNEY'S FEES

61. Defendant has acted in bad faith, have been stubbornly litigious, and has caused Plaintiff and other Class Members unnecessary trouble and expense.

62. Accordingly, Plaintiff and other Class Members are entitled to recover their expenses of litigation, including their reasonable attorney's fees, pursuant to O.C.G.A. § 13-6-11.

COUNT 8: PUNITIVE DAMAGES

63. Defendant's conduct was willful, wanton, and reckless and evidences an entire want of care, which raised the presumption of a conscious indifference to the consequences of its actions.

64. As a result of Defendant's willful, wanton, and reckless conduct, Plaintiff and other Class Members are entitled to an award of punitive damages under O.C.G.A. § 51-12-5.1.

V. JURY DEMAND

65. Plaintiff demands a trial by jury for all of his claims and for a determination of all damages.

VI. DAMAGES AND PRAYER FOR RELIEF

66. Plaintiff prays for the following relief:

a. An order certifying this action as a class action, appointing Plaintiff as class representative and appointing Plaintiff's counsel as lead Class counsel;

b. All compensatory damages on all applicable claims in an amount to be proven at trial, and, as allowed by law, for such damages to be trebled or multiplied upon proof of claims under laws allowing for trebling or multiplying of compensatory damages based upon Defendant's violations of law;

c. An order directing disgorgement and restitution of all improperly retained monies by Defendant;

d. An order permanently enjoining Defendant from engaging in the unlawful practices, as alleged herein;

e. For an injunction to prohibit Defendant from engaging in the unconscionable commercial practices complained of herein, and for an injunction requiring Defendant to give notice to persons to whom restitution is owing, and to identify the means by which to file for restitution;

f. Punitive damages in an amount to be determined at trial;

g. Attorney fees for stubborn litigiousness pursuant to O.C.G.A. § 13-6-11; and,

h. All other and further relief, including equitable and injunctive relief, that the Court deems appropriate and just under the circumstances.

{SIGNATURE ON THE FOLLOWING PAGE}

This 15th day of November 2017.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

robert@wernerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing *AMENDED CLASS ACTION COMPLAINT* to be served upon all parties in this case by United States Mail, proper postage prepaid, addressed as follows:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta. GA 30309

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON	)	
Individually,	)	
and on behalf of a class of similarly situated	)	
persons,	)	**CIVIL ACTION FILE NUMBER**
	)	
Plaintiff,	)	**17EV003164**
	)	
v.	)	
KENNY MCELWANEY D/B/A	)	
MAXIMUM BOOTING CO.	)	
	)	
Defendant.	)	

PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE OF CITY ORDINANCE

COMES NOW Plaintiff Jessy Polson, Individually, and on behalf of a class of similarly situated persons and, pursuant to O.C.G.A. § 24-2-221, herein files his Request for Judicial Notice of City Ordinance, respectfully showing the Court as follows:

1.

O.C.G.A. § 24-2-221 provides:

> When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of Code Section 24-9-902 and in the absence of contrary evidence, **judicial notice may be taken of a certified copy of any ordinance** or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 **as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented**. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body.

O.C.G.A. § 24-2-221 (emphasis added).

2.

Attached hereto as Exhibit A is a certified copy of Union City Code of Ordinances, Chapter 10, Article I, § 10-28, titled "Use of vehicle immobilization devices."

The attached certified copy of Union City Code of Ordinances, Chapter 10, Article I, § 10-28 satisfies all requirements of O.C.G.A. § 24-2-221.

4.

Accordingly, Plaintiff respectfully requests that the Court take judicial notice of the attached certified copy of Union City Code of Ordinances, Chapter 10, Article I, § 10-28 as representing an ordinance duly approved by the City of Union City.

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing *PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE OF CITY ORDINANCE* to be served upon all parties in this case by United States Mail, proper postage prepaid, addressed as follows:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

THE CITY OF UNION CITY
"The Progressive City"

CLERK'S OFFICE
5047 UNION STREET
UNION CITY, GEORGIA 30291-1497
PHONE: (770) 964-2288
FAX: (770) 306-6861

DATE: October 24, 2017

TO: Robert Friedman, Esquire

RE: Response to second Open Records Request received on August 25, 2017

Certified copies of Union City's Booting Ordinance, Section 10-28 "Use of vehicle immobilization devices."

I certify that the attached four (4) documents referenced above are true and accurate copies made by Shandrella Jewett, City Clerk for The City of Union City, on this **24th** day of **October, 2017**.

Shandrella Jewett

Shandrella Jewett, City Clerk

Sec. 10-28. - Use of vehicle immobilization devices.

(a) As used in this section, the following terms and phrases shall have the meaning set out below:

Commercial motor vehicle shall mean any vehicle or combination vehicle with a gross vehicle weight of ten thousand and one (10,001) pounds or greater.

Light passenger vehicle shall mean any vehicle with a gross vehicle weight of ten thousand (10,000) pounds or less.

Vehicle immobilization device shall mean any mechanical device, including those commonly referred to as "boots," which is designed or adopted to be attached to a wheel, tire, or other part of a parked vehicle so as to prohibit the vehicle's usual manner of movement or operation.

(b) It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met:

(1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.

b. The maximum fee for removal of the device, as provided in subsection (c).

c. The name, address, and phone number of the person or entity responsible for affixing the device.

d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.

e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

f. The name and address of the entity that hired the vehicle immobilization service or company.

g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

(c) It shall be unlawful for any person or entity affixing a vehicle immobilization device to a light passenger vehicle within the city to charge a fee for removal of the device in excess of one hundred fifty dollars ($150.00). The one-hundred-fifty-dollar fee may be paid by cash, check, credit card, or debit card at no additional charge. It shall be unlawful for any person or entity affixing a vehicle immobilization device to a commercial motor vehicle within the city to charge a fee for removal in excess of five hundred dollars ($500.00). The five-hundred-dollar fee may be paid by cash, check, credit card, or debit card at no additional charge.

(d) It shall be unlawful for any person or entity to immobilize any vehicle located on public property within the city.

(e) It shall be unlawful for any person or entity affixing a vehicle immobilization device to a vehicle to fail to arrive on the site where the vehicle was immobilized within one (1) hour of being contacted by the owner, driver or person in charge of the vehicle that has been immobilized. It shall also be unlawful for any person or entity affixing a vehicle immobilization device to a vehicle to fail to release the vehicle from immobilization within thirty (30) minutes after receipt of payment from the owner, driver or person in charge of a vehicle that has been immobilized.

(f) It shall be unlawful for any vehicle immobilization service, or the vehicle immobilization service's agent, representative, employee or operator to go to any place and immobilize a vehicle unless said service is under contract with the owner and/or the owner's agent, representative or employee of a commercial parking lot.

(g) It shall be unlawful for any person or entity affixing a vehicle immobilization device to fail to provide a receipt of payment of the booting fee to the owner, driver, or person in charge of a vehicle. The receipt shall have the following

information: the name, address, and phone number of the vehicle immobilization service or company; and the name and signature of the person who affixed/removed the vehicle immobilization device.

(h) A vehicle immobilization device cannot be affixed to a vehicle and a fee cannot be charged if the driver of the vehicle returns to the vehicle before the installation of the vehicle immobilization device is complete.

(i) (1) Any person affixing or removing a vehicle immobilization device shall register with and obtain a written permit from the police department by paying a fifty-dollar fee and filing an application, on a form to be supplied by the police department, including the following:

a. Name of applicant;

b. Permanent address and telephone number of the applicant;

c. Applicant's driver's license number or state issued identification number; and

d. Name and address of applicant's employer.

The application shall be sworn by the applicant, and it shall be unlawful for an applicant to make a false statement of fact in his or her application.

In addition, as part of the registration process, the applicant shall submit to a criminal background check and fingerprinting by the police department. No permit shall be issued to a person who has been convicted of a violation of the provisions of this section or to any person whose permit issued hereunder has previously been revoked as provided herein.

(2) Any person submitting an application to the police department for a written permit as provided by this subsection shall also provide, at the time of submitting said application, a copy of any and all contracts required by subsection (f) above. Once a written permit has been issued, the holder shall provide to the city copies of contracts for any subsequent properties for which the holder intends to provide vehicle immobilization services. Any permit issued pursuant to this section shall only allow the holder to immobilize a vehicle located on property for which the holder has submitted to the city a copy of a contract as required by subsection (f) above.

(3) Upon proper registration in accordance with this section, a written permit shall issue, to be valid for one (1) calendar year from the date of issuance. Each person affixing or removing a vehicle immobilization device shall at all times while conducting business carry upon his or her person the permit so issued and shall display such permit upon request.

(4) A permit issued hereunder shall be revoked by the police department if the holder of the permit is convicted of a violation of any of the provisions of this section. Immediately upon such revocation, written notice thereof shall be given to the holder of the permit in person or by certified United States mail addressed to his or her permanent address set forth in the application. Immediately upon the giving of such notice the permit shall become null and void and must be turned into the police department.

(Ord. No. 2013-08, § 1, 12-17-13; Ord. No. 2014-04, §§ 1—3, 4-15-14; Ord. No. 2017-03, § 2, 3-21-17)

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. Defendant.	CIVIL ACTION FILE NUMBER 17EV003164

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW Plaintiff Jessy Polson, Individually, and on behalf of a class of similarly situated persons, and files Plaintiff's Opposition to Defendant Kenny McElwaney d/b/a Maximum Booting Co.'s Motion to Dismiss, respectfully showing the Court as follows:

INTRODUCTION

In this action, Plaintiff has filed a Class Action Complaint against Defendant Kenny McElwaney d/b/a Maximum Booting Co. to recover damages caused by Defendant's systematic practice of unlawfully immobilizing vehicles within the City of Union City. (Pl.'s Amended Comp., ¶¶ 1-11). Nothing in the Official Code of Georgia ("O.C.G.A.") authorizes vehicle immobilization, otherwise known as "booting." (Pl.'s Amended Comp.,¶ 4). The only legal authorization for vehicle immobilization within the City of Union City is provided by municipal ordinance (City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28)[1]. (Pl.'s Amended Comp., ¶¶ 4-7). Union City's vehicle immobilization ordinance provides that, if

[1] A true and accurate copy of Union City's vehicle immobilization ordinance is attached to Plaintiff's Request for Judicial Notice of City Ordinance, filed contemporaneously with Plaintiff's Opposition to Defendant's Motion to Dismiss.

specific signage conditions are not met, "[i]t shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle…." (Union City Code of Ordinances, Chapter 10, Article I, § 10-28; Pl.'s Amended Comp., ¶ 8).

Plaintiff alleges that at the location where Defendant booted his truck, and at all other locations in Union City where Defendant boots vehicles, Defendant's signs fail to comply with the conditions imposed by Union City Code of Ordinances, Chapter 10, Article I, § 10-28. (Pl.'s Amended Comp., ¶¶ 11-19). Plaintiff further alleges that because Defendant failed to comply with the signage conditions of the ordinance, Defendant had no legal authority to exercise dominion and control over his property, or to demand and collect payment for the removal of any vehicle immobilization device. (Pl.'s Amended Comp., ¶¶ 18-19). As Defendant booted Plaintiff's truck without legal authority, and as Plaintiff was forced to pay Defendant to remove the vehicle immobilization device, Plaintiff suffered damages as a direct and proximate result of Defendant's unlawful conduct. (Pl.'s Amended Comp., ¶¶ 27-64).

On October 20, 2017, Defendant filed a Motion to Dismiss, alleging that "Plaintiff's Complaint is hopeless flawed," because "the Ordinance simply does not allow for a private right of action," and because "Plaintiff has no standing to bring this case…." (Defendant's Brief in Support of Motion to Dismiss, pp. 1-2). Defendant also contends that he has not violated the Union City booting ordinance because the Union City Chief of Police "has approved of Defendant's signage as being in compliance with the Ordinance." (Defendant's Brief in Support of Motion to Dismiss, p. 2). Defendant's motion is without merit as Plaintiff is not seeking any relief under the ordinance itself. Plaintiff's Amended Complaint instead seeks relief for Defendant's unlawful immobilization of Plaintiff's truck under well recognized theories of false imprisonment, conversion, money had and received, negligence, and violation of Georgia's

Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-1 *et seq*. ("RICO"). (Pl.'s Amended Comp., ¶¶ 27-64).

Defendant's remaining arguments regarding standing and compliance with the ordinance are also unfounded because Plaintiff suffered damages as a direct result of Defendant's unlawful conduct and because the Union City Police Department has never made any determination that Defendant's signs satisfy the conditions set forth in the Union City booting ordinance. (*See* Second Affidavit of Union City Police Chief Cassandra A. Jones, attached hereto as Exhibit A).[2] Moreover, Defendant's allegation that his signs comply with the ordinance is disproved by Plaintiff's own sworn testimony. (*See* Affidavit of Kenny McElwaney, Exhibit A to Defendant's Motion to Dismiss). One only has to compare the language on the sign depicted in Defendant's Affidavit with the conditions listed in the ordinance to see that Defendant's signs are missing required language. (Compare Ex. A to McElwaney Aff. with Union City Code of Ordinances, Chapter 10, Article I, § 10-28.)

LEGAL STANDARDS

When evaluating a motion to dismiss, "the trial court must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff." *Ramsey v. New Times Moving, Inc.*, 332 Ga. App. 555, 557, 774 S.E.2d 134, 136 (2015); *Wright v. Waterberg Big Game Hunting Lodge Otjahewita (PTY), Ltd.*, 330 Ga. App. 508, 509, 767 S.E.2d 513, 515 (2014). A motion to dismiss must be denied "[i]f, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant." *Ramsey*, 332 Ga. App. at 557; *Sherman v. Fulton Cty. Bd. of Assessors*, 288 Ga. 88,

[2] Police Chief Jones' recent testimony makes it apparent that Defendant's counsel has submitted a materially false and misleading Affidavit of Police Chief Jones in bad faith. The full implications of Defendant's counsel's misconduct are addressed in Plaintiff's Motion to Strike and for Sanctions, filed contemporaneously with Plaintiff's Opposition to Defendant's Motion to Dismiss.

89–90, 701 S.E.2d 472, 474 (2010). Stated differently, "[a] motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Austin v. Clark*, 294 Ga. 773, 774–75, 755 S.E.2d 796, 798–99 (2014); *Bourn v. Herring*, 225 Ga. 67, 70, 166 S.E.2d 89, 93 (1969). In addition, under O.C.G.A. § 9-11-12(b), "[i]f, on a motion to dismiss … matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56." *Garner v. U.S. Bank Nat. Ass'n*, 329 Ga. App. 86, 86–87, 763 S.E.2d 748, 749 (2014); *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 672, 686 S.E.2d 322, 323 (2009).

Here, because Plaintiff's Class Action Complaint has sufficiently pled facts that support all of Plaintiff's claims, and because Plaintiff is not seeking any relief under Union City's vehicle immobilization ordinance, Defendant's Motion to Dismiss must be denied. With respect to Defendant's standing and signage arguments, these allegations rely entirely on information not contained in the pleadings, and therefore must be treated as a motion for summary judgment. O.C.G.A. § 9-11-12(b); *Garner*, 329 Ga. App. at 86-87; *Fitzpatrick*, 300 Ga. App. at 672. Should the Court decide to rule on Defendant's standing and signage claims, Plaintiff must be "given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56." *Id.* This includes opposing Affidavits. O.C.G.A. § 9-11-56(e).

As Plaintiff has presented sworn testimony establishing that he is the owner of the truck that was booted, and that he has incurred damages as a direct and proximate result of Defendant's conduct, Plaintiff obviously has standing to pursue his claims against Defendant. (*See* Affidavit of Jessy Polson, attached hereto as Exhibit B). Further, considering that Chief Jones has completely disavowed the testimony previously given in support of Defendant's

motion, there is no evidence that Defendant's signs are in compliance with the Union City booting ordinance. (Second Jones Aff., ¶¶ 9-11). Defendant's own sworn testimony shows that his signs do not comply with the ordinance. (Ex. A to McElwaney Aff.).

ARGUMENT AND CITATION OF AUTHORITY

A. NONE OF PLAINTIFF'S CLAIMS REQUIRE A PRIVATE REMEDY UNDER THE UNION CITY BOOTING ORDINANCE

For four independent reasons, the lack of any explicit "private remedy" in Union City's vehicle immobilization ordinance is not a bar to Plaintiff's lawsuit. First, because strict compliance with Union City's vehicle immobilization ordinance is a condition precedent for lawful immobilization of vehicles in Union City, any non-compliant booting is tortious. Second, as Plaintiff is part of the class intended to be protected by Union City's vehicle immobilization ordinance, and as Defendant's actions have caused Plaintiff harm the ordinance was intended to prevent, Plaintiff may pursue claims for Defendant's negligent violation of the ordinance. Third, O.C.G.A. 51-3-2 permits Plaintiff to pursue a premises liability claim against Defendant for recklessly and willfully causing Plaintiff harm. Fourth, Georgia's RICO statute (O.C.G.A. § 16-14-1 *et seq.*) provides Plaintiff a private remedy for Defendant's unlawful conduct.

1. Plaintiff's Intentional Tort Claims were Sufficiently Pled as Any Non-Compliant Vehicle Immobilization is Tortious

Defendant's motion erroneously contends, because Union City's vehicle immobilization ordinance does contain a private right of action, Plaintiff's "Complaint, therefore, fails to state a claim upon which relief may be granted." (Defendant's motion, pp. 6-9). As explained below, the very act of vehicle immobilization for profit is an exercise of dominion and control over an individual's property that, absent legal authority, is unlawful and tortious. Because vehicle immobilization is not authorized under the O.C.G.A., the only legal way to immobilize a vehicle

in Union City is by complying with the all of the conditions set forth in Union City Code of Ordinances, Chapter 10, Article I, § 10-28. In this way, the ordinance, if properly followed, is an affirmative defense to the variety of underlying torts that would otherwise be committed by immobilizing vehicles for profit.

The ordinance itself expressly states that any non-compliant vehicle immobilization is unlawful. *Id*. at § 10-28(b) ("It shall be **unlawful** for any person or entity to affix a vehicle immobilization device to any vehicle … unless the following conditions are met….") (emphasis added). Because vehicle immobilization for profit is by itself tortious, Plaintiff does not need a private remedy to seek relief for Defendant's actions. Plaintiff's lawsuit references the ordinance primarily to show that Defendant has failed to comply with the signage conditions, and thus, cannot rely on the ordinance for legal authority.

Although Plaintiff's counsel is aware of no reported cases that specifically address vehicle immobilization, the legal framework created by Union City's ordinance is common under Georgia law. When a statute grants individuals the right to exercise dominion and control in degradation of the common law, the violation of such a statute gives rise to any underlying torts that would otherwise be committed. The prime example of this framework can be seen in dispossessory proceedings under O.C.G.A. § 44-7-50 *et seq.* Just as compliance with the ordinance is the only legal method for immobilizing vehicles in Union City, "[t]he exclusive method whereby a landlord may evict a tenant is through a properly instituted dispossessory action filed pursuant to O.C.G.A. § 44-7-50 *et seq*." *Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Sols., LLC*, 321 Ga. App. 100, 101, 741 S.E.2d 225, 227 (2013); *Roberts v. Roberts*, 205 Ga. App. 371, 372, 422 S.E.2d 253, 254 (1992). Despite there being no private remedy in O.C.G.A. § 44-7-50, it is well-established that, if a landlord evicts a tenant,

"without following the dispossessory procedures," the landlord can be held liable for the underlying torts of "wrongful eviction and trespass." *Kahn v. Britt*, 330 Ga. App. 377, 392, 765 S.E.2d 446, 460 (2014); *Swift Loan & Fin. Co. v. Duncan*, 195 Ga. App. 556, 557, 394 S.E.2d 356, 358 (1990) ("A landlord can be subject to an action for trespass because his remedy for taking repossession of the premises is codified at O.C.G.A. § 44-7-50.").

Georgia's other self-help laws provide many more examples. For instance, any detention of a suspected shoplifter that fails to comply with the procedures outlined in O.C.G.A. § 51-7-60 gives rise to a claim for false imprisonment. *Hampton v. Norred & Assocs., Inc.*, 216 Ga. App. 367, 369, 454 S.E.2d 222, 224 (1995) ("The statute makes no reference to the detention of people for reasons other than suspected shoplifting … the trial court erred in granting summary judgment to Norred on the false imprisonment claim."); *Brown v. Super Disc. Markets, Inc.*, 223 Ga. App. 174, 174-75, 477 S.E.2d 839, 840–41 (1996) ("Cub and Smith moved for summary judgment asserting that their actions were protected by statutory privilege under O.C.G.A. § 51-7-60 … [A] jury must determine the reasonableness of Smith's actions on the false imprisonment and false arrest counts."). Similarly, the retention or sale of an abandoned vehicle without complying with the provisions of O.C.G.A. § 40-11-1, *et seq.* gives rise to a claim for conversion. *Horner v. Robinson*, 299 Ga. App. 327, 329-30, 682 S.E.2d 578, 580 (2009) ("Absent strict compliance with the notice provisions, TopCat did not create a valid lien on the vehicle upon which to foreclose … consequently, Horner cannot seek refuge in the statute as a defense to Robinson's conversion action."); *Hardin v. City Wide Wrecker Serv., Inc.*, 232 Ga. App. 617, 619, 502 S.E.2d 548, 550 (1998) ("Because it exercised dominion and control over Hardin's car without authority, City Wide is liable for conversion in spite of the fact that it acted in good faith.").

In the instant case, Plaintiff alleges that because Defendant failed to comply with the signage conditions imposed by Union City's vehicle immobilization ordinance, Defendant's exercise of dominion and control over Plaintiff's truck was without legal authority. (Pl's Amended Comp., ¶¶ 12-19). Such an unlawful exercise of dominion and control over an individual's property gives rise to claims for false imprisonment and conversion. *Wallace v. Stringer*, 250 Ga. App. 850, 854, 553 S.E.2d 166, 169-70 (2001) ("The exercise of dominion over the property serves also to exercise dominion over the person owning such property."); *Burrow v. K-Mart Corp*., 166 Ga. App. 284, 288–89, 304 S.E.2d 460, 464–65 (1983); *Qenkor Const., Inc. v. Everett*, 333 Ga. App. 510, 519, 773 S.E.2d 821, 828–29 (2015) ("[B]oth cash and checks may be the subject of a conversion claim and conversion is defined as an unauthorized assumption and exercise of the right of ownership over personal property belonging to another … or an unauthorized appropriation.").

As the only legal method for immobilizing vehicles in Union City is strict compliance with the ordinance, by alleging that: 1) Defendant booted his truck without complying with the ordinance; and 2) Defendant refused to release his truck without payment, Plaintiff has pled valid claims against Defendant for false imprisonment and conversion. *Wallace*, 250 Ga. App. at 854; *Burrow*., 166 Ga. App. at 288-89; *Qenkor Const., Inc.*, 333 Ga. App. at 519; (Pl.'s Amended Comp., ¶¶ 27-36). Additionally, since Plaintiff has alleged that Defendant demanded and collected payment without legal justification, Plaintiff has also pled a valid claim for money had and received. *Haugabook v. Crisler*, 297 Ga. App. 428, 431, 677 S.E.2d 355, 358 (2009) ("An action for money had and received … is maintainable in all cases where one has received money under such circumstances that in equity and good conscience he ought not to retain it...."); (Pl.'s Amended Comp., ¶¶ 48-49).

Plaintiff's tort claims are no different from the common law claims asserted in all of the above-referenced self-help cases. *See Kahn*, 330 Ga. App. at 392; *Swift Loan & Fin. Co.*, 195 Ga. App. at 557; *Hampton*, 216 Ga. App. at 369; *Brown*, 223 Ga. App. at 174-75; *Horner*, 299 Ga. App. at 329-30; *Hardin*, 232 Ga. App. at 619. The lack of an express private remedy did not prevent any of the plaintiffs in the above-referenced cases from proceeding on their underlying tort claims. There is no reason to treat Plaintiff's claims in the present case any differently. Accordingly, because Plaintiff has alleged facts that would entitled him to relief under established Georgia tort law, and because Plaintiff's tort claims do not require a private remedy, Defendant's Motion to Dismiss should be denied.

2. Plaintiff's Negligence Claims were Sufficiently Pled as the Ordinance was Intended to Prevent Non-Compliant Booting

As with Plaintiff's intentional tort claims, Plaintiff's negligence claims do not require an express private remedy. As stated by the Georgia Court of Appeals, a plaintiff may pursue a claim for negligent violation of a "statute or ordinance" if: 1) "the injured person falls within the class of persons it was intended to protect"; and 2) "the harm complained of was the harm it was intended to guard against." *Brown v. Belinfante*, 252 Ga. App. 856, 861, 557 S.E.2d 399, 403 (2001); *Womack v. Oasis Goodtime Emporium I, Inc.*, 307 Ga. App. 323, 329, 705 S.E.2d 199, 203 (2010). Claims for negligent violation of a statute or an ordinance do not require an express private remedy. *Id.*; *see also McLain v. Mariner Health Care, Inc.*, 279 Ga. App. 410, 413, 631 S.E.2d 435, 438 (2006) ("[T]he complaint's allegations of violations of the same statutes and regulations would be competent evidence of Mariner's breach of duty under a traditional negligence action.").

Georgia Courts have repeatedly held that even if an ordinance does not contain a private right of action, the violation of a county or municipal ordinance can support a negligence claim.

See Womack, 307 Ga. App. at 330 ("Womack falls within the class of persons the law was intended to protect from exploitation and harm, and the club's county Code violations are capable of having a causal connection to Womack's injuries and damage. This is sufficient to constitute negligence per se.") (internal cits. omitted); *Holbrook v. Exec. Conference Ctr., Inc.*, 219 Ga. App. 104, 107, 464 S.E.2d 398, 401 (1995) ("Executive's undisputed noncompliance with the Fulton County ordinance … constituted negligence per se as relied on by the plaintiffs.") (internal cits. omitted); *Total Equity Mgmt. Corp. v. Demps*, 191 Ga. App. 21, 23–24, 381 S.E.2d 51, 55 (1989) ("Violation of an ordinance governing installation of gas lines and cutoff valves constitutes negligence per se."); *Montgomery Ward & Co. v. Cooper*, 177 Ga. App. 540, 542, 339 S.E.2d 755, 757 (1986) ("[T]here is a question of fact whether appellant's violation of the Columbus ordinance is negligence per se as to appellee.").

Here, Union City's vehicle immobilization ordinance requires that, among other things, all persons performing vehicle immobilization must post signage that includes: 1) a statement that cash, checks, credit cards, and debit cards are accepted for payment; 2) a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards; and 3) the name and address of the entity that hired the vehicle immobilization service or company. (Pl.'s Amended Comp. ¶ 8; Union City Code of Ordinances, Chapter 10, Article I, § 10-28(b)(2)). This information is necessary to know what form of payment is accepted, and to contact the entity responsible for hiring the booting company if a person believes their vehicle was illegally booted.

Plaintiff is an individual whose truck was immobilized by Defendant while he was parked in Union City. (Pl.'s Amended Comp., ¶¶ 12-19). As such, Plaintiff is part of the class of persons the ordinance was intended to protect by mandating signage that includes the accepted

methods for payment, and the name of the entity that hired the booting company. Because Defendant's signs failed to provide this information, Plaintiff could not determine what form of payment would be accepted, or contact the entity that hired Defendant to seek redress. Consequently, Plaintiff suffered harm the signage conditions of the ordinance were intended to guard against. (Pl.'s Amended Comp., ¶¶ 43-47).

To the extent Defendant alleges Plaintiff's damages were not caused by Defendant's violation of the ordinance, Plaintiff is not required to provide causation evidence at this time. *Estate of Nixon v. Barber*, 340 Ga. App. 103, 104, 796 S.E.2d 489, 491 (2017) ("[A] plaintiff is not required to plead in the complaint facts sufficient to set out each element of a cause of action so long as it puts the opposing party on reasonable notice of the issues that must be defended against."); *Cleveland v. MidFirst Bank*, 335 Ga. App. 465, 465, 781 S.E.2d 577, 578 (2016). Furthermore, the issue of causation in a negligence action is for a jury to decide. *Womack*, 307 Ga. App. at 330 ("Whether or not such negligence proximately caused the injury is generally a jury question.") (internal cits. omitted); *Boyer v. Brown*, 240 Ga. App. 100, 101, 522 S.E.2d 692, 694 (1999) ("Proximate cause is for the jury to decide…."); *Holbrook*, 219 Ga. App. at 107-08 ("Even though in the case sub judice there is no direct evidence … the jury would be authorized to infer that his near drowning would not have happened but for Executive's noncompliance with the applicable pool safety regulations.").

Defendant's argument that Plaintiff cannot recovery for any violation of the ordinance because "[t]he Ordinance is obviously penal," misunderstands the purpose of the Union City booting ordinance. (Defendant's Brief in Support of Motion to Dismiss, pp. 7-8). The ordinance itself does not provide any criminal penalties. (Union City Code of Ordinances, Chapter 10, Article I, § 10-28). Defendant wrongly assumes the ordinance is penal in nature based on the

following statement contained in Union City Code of Ordinances, Chapter 1, § 1-17(a):

> Whenever in this Code or in any ordinance of the city any act is prohibited or is made or declared to be unlawful … **where no specific penalty is provided therefor**, the violation of any such provision of this Code or any such ordinance shall be punished by a fine not to exceed one thousand dollars ($1,000.00) or by imprisonment for not more than one hundred eighty (180) days….

Id. (emphasis added).

Chapter 1, § 1-17(a) does not apply to the booting ordinance (Chapter 10, Article I, § 10-28) as the booting ordinance expressly provides the penalty of license revocation for any violation of the ordinance. *Id*. at § 10-28(i)(4) ("A permit issued hereunder shall be revoked by the police department if the holder of the permit is convicted of a violation of any of the provisions of this section."). The Georgia Supreme Court has held that the inclusion of such administrative enforcement provisions does not preclude a claim for negligence per se. *See* O.C.G.A. § 43-26-9(c) ("The board … may impose any disciplinary sanction provided by Code Section 43-1-19 or 43-26-11."); *Cent. Anesthesia Assocs., P.C. v. Worthy*, 254 Ga. 728, 731, 333 S.E.2d 829, 832 (1985) ("We disagree that O.C.G.A. § 43-26-9(b) is simply a licensing statute, and that it does not establish a standard of conduct….").

Because Plaintiff has pled facts sufficient to establish that he is part of the class the Union City vehicle immobilization ordinance was intended to protect, and that Plaintiff suffered harm the ordinance was intended to prevent, no private right of action is needed for Plaintiff's negligence claims, and Defendant's Motion to Dismiss should be denied.

3. Plaintiff's Premise Liability Claims were Sufficiently Pled as Plaintiff has Alleged Defendant Willfully or Recklessly Caused Plaintiff Harm

Under O.C.G.A. 51-3-2, occupiers of property owe a duty to invitees, licensees, and trespassers not to "willfully or wantonly" cause harm. *Id.*; *Gomez v. Julian LeCraw & Co.*, 269 Ga. App. 576, 578, 604 S.E.2d 532, 535 (2004) ("A landowner owes only a minimal duty to a

trespasser: to avoid wilfully or wantonly injuring him or her."); *Jones v. Barrow*, 304 Ga. App. 337, 339–40, 696 S.E.2d 363, 366–67 (2010) ("To the licensee, as to the trespasser … they must not contain pitfalls, man-traps, and things of that character.") *see also Lowery's Tavern, Inc. v. Dudukovich*, 234 Ga. App. 687, 688–89, 507 S.E.2d 851, 853-54 (1998) ("Whether Dudukovich was a licensee or a trespasser is irrelevant because the duty owed him is the same in either case."). Conduct prohibited by O.C.G.A. 51-3-2 includes anything designed to specifically harm an anticipated trespasser. *Jones*, 304 Ga. App. at 339-40 ("The doctrine of mantrap rests on the theory that the landowner was expecting the trespasser or licensee and prepared his premises to injure the visitor."); *Crosby v. Savannah Elec. & Power Co.*, 114 Ga. App. 193, 198, 150 S.E.2d 563, 569 (1966). O.C.G.A. 51-3-2 expressly permits parties injured by such actions to pursue a claim for damages. *Id.*; *Waldo v. Moore*, 241 Ga. App. 797, 798, 527 S.E.2d 887, 888 (2000).

Here, Plaintiff has alleged that Defendant, as an occupier of the property located at, or around, 4735 Jonesboro Rd., Union City, GA 30291, violated the duties imposed under O.C.G.A. § 51-3-2 by willfully or recklessly immobilizing Plaintiff's truck without legal authority, causing Plaintiff harm. (Pl.'s Amend Comp., ¶¶ 37-42). These allegations are sufficient to plead a valid claim for premises liability under O.C.G.A. 51-3-2. *See Waldo*, 241 Ga. App. at 799 (*reversing directed verdict*, "Whether the scalding water temperature in the shower constituted a hidden peril, mantrap, or pitfall is undoubtedly a question for jury determination."); *London Iron & Metal Co. v. Abney*, 245 Ga. 759, 761, 267 S.E.2d 214, 216 (1980) ("We conclude that the undisputed evidence in the present case fails to demonstrate, as a matter of law, that the defendants did not breach their duty to refrain from wantonly and recklessly exposing the present plaintiff to hidden perils.") (internal cits. omitted); *MacKenna v. Jordan*, 123 Ga. App. 801, 802, 182 S.E.2d 550, 552 (1971) (*affirming denial of summary judgment*, "[T]here are issues for jury

determination such as whether the defendant exercised the proper care in anticipating the plaintiff and whether the incompleted porch constituted a hidden peril, mantrap or pitfall.").

Because Plaintiff has pled facts sufficient to establish that Defendant, as an occupier of property, willfully or reckless caused Plaintiff harm by unlawfully immobilizing his truck, Plaintiff is permitted to pursue a claim for damages against Defendant for premises liability under O.C.G.A. 51-3-2, and Defendant's Motion to Dismiss should be denied.

4. Plaintiff's Rico Claims were Sufficiently Pled as Plaintiff has Alleged Defendant Violated Multiple Predicate Acts

With respect to Plaintiff's claims under Georgia's RICO statute (O.C.G.A. § 16-14-1 *et seq*.), Defendant's Motion to Dismiss is particularly inapplicable as O.C.G.A. § 16-14-6(c) provides Plaintiff an express private right of action for his RICO claims:

> Any person who is injured by reason of any violation of Code Section 16-14-4 **shall have a cause of action** for three times the actual damages sustained and, where appropriate, punitive damages….

O.C.G.A. § 16-14-6(c) (emphasis added); *Maddox v. S. Eng'g Co.*, 216 Ga. App. 6, 7, 453 S.E.2d 70, 72 (1994).

The core purpose of Georgia's RICO statute is to provide a civil remedy for persons harmed by unlawful conduct. *See* O.C.G.A. § 16-14-2(b) ("The General Assembly declares that the intent of this chapter is to impose sanctions against those who violate this chapter and to provide compensation to persons injured or aggrieved by such violations."); *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 429, 614 S.E.2d 758, 760 (2005) ("[T]he purpose of the RICO Act is to provide compensation to private persons injured or aggrieved by reason of any RICO violation."); *Dee v. Sweet*, 268 Ga. 346, 349, 489 S.E.2d 823, 825 (1997) ("The purpose of the Georgia RICO Act is to impose sanctions against the subversion of the economy by organized criminal elements and to provide compensation to private persons injured thereby.") (internal

cits. omitted).

To sufficiently plead a RICO violation under O.C.G.A. § 16-14-4, a party is only required to allege injury "by at least two interrelated predicate offenses" listed in O.C.G.A. § 16-14-3. *Mbigi v. Wells Fargo Home Mortg.*, 336 Ga. App. 316, 322, 785 S.E.2d 8, 16 (2016); *Maddox*, 216 Ga. App. at 7. Plaintiff's Class Action Complaint alleges that, in furtherance of Defendant's enterprise of unlawfully booting vehicles for profit, Defendant committed the following predicate offenses listed under O.C.G.A. § 16-14-3:

> a. By forcing Plaintiff and other Class Members to pay to have an unlawfully placed vehicle immobilization device removed, Defendant has engaged in Theft (O.C.G.A. § 16-8-1), Theft by Taking (O.C.G.A. § 16-8-2), Theft by Deception (O.C.G.A. § 16-8-3), Theft by Conversion (O.C.G.A. § 16-8-4), and Theft by Extortion (O.C.G.A. § 16-8-16);
>
> b. By alleging through signage, notices, and other documents provided to Plaintiff and other Class Members, that Defendant was lawfully permitted to immobilize Plaintiff and other Class Members' vehicles, and lawfully permitted to charge fees for the removal of vehicle immobilization devices, Defendant has engaged in the use of false statements in violation of O.C.G.A. § 16-10-20; and
>
> c. By unlawfully attaching vehicle immobilization devices to Plaintiff and other Class Members' vehicles, Defendant knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time in violation of O.C.G.A. § 16-5-41.

(Pl.'s Amended Comp., ¶ 52).

As a direct and proximate result of Defendant's above-described racketeering activity, Plaintiff and all other similarly situated persons suffered damages. (Pl.'s Amended Comp., ¶¶ 50-60). Because Plaintiff alleges that he suffered damages caused by Defendant's violation of more than two interrelated predicate offenses, Plaintiff has sufficiently pled a valid RICO claim, and Defendant's Motion to Dismiss should be denied. *Mbigi*, 336 Ga. App. at 324 ("[A]s Mbigi's complaint alleges that he was injured by at least two predicate acts which could

constitute a pattern of racketeering activity … the trial court erred in dismissing Mbigi's RICO claim."); *Maddox*, 216 Ga. App. at 7 ("As the averments of the complaint do not disclose with certainty that the plaintiff would not be entitled to relief under any state of facts … plaintiff's RICO claim should not have been dismissed.") (internal cits. omitted); *State v. Shearson Lehman Bros.*, 188 Ga. App. 120, 122, 372 S.E.2d 276, 278 (1988).

B. PLAINTIFF HAS STANDING TO ASSERT CLAIMS AGAINST DEFENDANT

Defendant mistakenly alleges that, "Plaintiff lacks standing to seek the relief asked for in the Complaint," because "[t]he vehicle on which Maximum Booting placed an immobilization device was not owned by Plaintiff, but by Clearwater Logistics," and because "Clearwater Logistics paid the booting fee." (Defendant's Brief in Support of Motion to Dismiss, pp. 9-12). First, contrary to Defendant's unsupported hearsay allegations, Clearwater Logistics does not own the truck Defendant booted on June 15, 2017. (Affidavit of Jessy Polson, ¶ 3, attached hereto as Exhibit B; Affidavit of Mark McLochlin, ¶ 5, attached hereto as Exhibit C). The truck is owned by J & L Transport Services, Inc., a corporation owned by Plaintiff. (Polson Aff., ¶ 3; McLochlin Aff., ¶ 5). Second, when a case involves a seizure or forfeiture of property, "[a] claimant need not own the property in order to have standing to contest its forfeiture; a lesser property interest, such as a possessory interest, is sufficient for standing." *Henry*, 621 F. App'x at 972; *Via Mat Int'l S. Am. Ltd. v. United States*, 446 F.3d 1258, 1262 (11th Cir. 2006) ("[N]on-owners, such as bailees or those with possessory interests, can also have injuries resulting from the seizure of property that are sufficient to establish standing."); *United States v. $38,000.00 Dollars in U.S. Currency*, 816 F.2d 1538, 1544 (11th Cir. 1987); *see also Metzger v. Americredit Fin. Servs., Inc.*, 273 Ga. App. 453, 454, 615 S.E.2d 120, 122 (2005) ("[T]o establish a claim for conversion, the complaining party must show (1) title to the property **or the right of**

possession….") (internal cits. omitted) (emphasis added).

Here, Plaintiff was the owner of the truck booted by Defendant through Plaintiff's corporation, J & L Transport Services, Inc., and Plaintiff had a clear possessory interest in the truck as the president and owner of J & L Transport Services, Inc. (Polson Aff., ¶ 3; McLochlin, ¶ 5). As a matter of law, Defendant's unlawful exercise of dominion and control over Plaintiff's property was also an exercise of dominion and control over Plaintiff, thereby depriving Plaintiff of his personal liberty. *Wallace*, 250 Ga. App. at 854; *Burrow*., 166 Ga. App. at 288-89. Plaintiff's ownership and possessory interest in the truck is sufficient to confer Plaintiff standing to seek damages against Defendant for the deprivation of Plaintiff's personal liberty. *Henry*, 621 F. App'x at 972; *Via Mat Int'l S. Am. Ltd.*, 446 F.3d at 1262; *Metzger*, 273 Ga. App. at 454.

As further evidence that Plaintiff suffered a concrete and particularized injury as a result of Defendant's conduct, Plaintiff was ultimately responsible for paying the $500.00 fee charged by Defendant. (Polson Aff., ¶¶ 10-12; McLochlin, ¶¶ 10-12). Clearwater Logistics paid the fine because Defendant would not accept a check provided by Plaintiff. *Id*. The $500.00 was then deducted from Plaintiff's next settlement check with Clearwater Logistics. *Id*. Plaintiff does not lose standing to recover the $500.00 he lost as a direct and proximate result Defendant's unlawful conduct simply because the bill was initially paid by his employer. *See Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 683 (S.D. Fla. 2013) ("Defendants' next contention is that Manno lacks standing because his wife paid the cell phone bills … This argument also fails … He stated in deposition that his wife paid the cell phone bill, but he also made clear that payment came out of their joint checking account."). It would be particularly perverse to deny Plaintiff standing due to Defendant's refusal to accept a check issued by Plaintiff. (Polson Aff., ¶¶ 10-12).

Lastly, any allegation that Plaintiff's injuries are not "fairly traceable" to Defendant's conduct is groundless. Strict compliance with Union City's booting ordinance is the only lawful method of immobilizing vehicles in Union City. By booting Plaintiff's truck without complying with all of the signage conditions imposed by the ordinance, Defendant unlawfully exercised dominion and control over Plaintiff's property, deprived Plaintiff of his personal liberty, and wrongfully appropriated $500.00 from Plaintiff to have the vehicle immobilization device removed. (Pl.'s Amended Comp., ¶¶ 27-64). These facts show Plaintiff's damages were directly caused by Defendant's actions, and Plaintiff easily satisfies the "fairly traceable" requirement for Article III standing. *Freeman v. JPMorgan Chase Bank N.A.*, 675 Fed. Appx. 926, 931 (11th Cir. 2017) ("The fairly traceable requirement is satisfied even if a plaintiff's injury is indirectly caused by a defendant's action."); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003).

Because Defendant unlawfully exercised dominion and control over Plaintiff's property, deprived Plaintiff of his personal liberty, and unlawfully extorted $500.00 from Plaintiff, Plaintiff suffered a concrete and particularized injury that was the direct and proximate result of Defendant's conduct, and Plaintiff has standing to seek to compensatory damages from Defendant.

C. DEFENDANT'S SIGNS DO NOT COMPLY WITH UNION CITY ORDINANCE

In order to lawfully boot vehicles in Union City, a licensed vehicle immobilization operator is required to post signage that contains **all** of the following language:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.

b. The maximum fee for removal of the device, as provided in subsection (c).

c. The name, address, and phone number of the person or entity responsible for

affixing the device.

d. A statement that cash, checks, credit cards, and debit cards are accepted or payment.

e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

f. The name and address of the entity that hired the vehicle immobilization service or company.

(Union City Code of Ordinances, Chapter 10, Article I, § 10-28; Pl.'s Amended Comp., ¶ 8).

On June 15, 2017, Plaintiff did not initially see any signs referencing vehicle immobilization or booting at the Walmart Supercenter located at 4735 Jonesboro Rd., Union City, GA 30291 (the "Walmart Supercenter"). (Polson Aff., ¶ 4). When Plaintiff found his truck booted, he did find the following sign in the parking lot:

(Polson Aff., ¶ 5; Pl's Amended Comp., ¶ 17).

On June 15, 2017, Plaintiff found no other signs that referenced booting or vehicle immobilization in the Walmart Supercenter parking lot. (Polson Aff., ¶ 6). The sign Plaintiff observed on June 15, 2017, at the Walmart Supercenter parking lot does not comply with the Union City booting ordinance as the sign: 1) does not contain a statement that cash, checks,

credit cards, and debit cards are accepted for payment; 2) does not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards; and 3) does not contain the name and address of the entity that hired the vehicle immobilization service or company. (Union City Code of Ordinances, Chapter 10, Article I, § 10-28; Pl.'s Amended Comp., ¶ 18).

Defendant contends that he also posted the following signage at the entrances to the Walmart Supercenter parking lot:

(Affidavit of Kenny McElwaney, ¶ 3, Ex. A to Defendant's Motion to Dismiss).

Defendant alleges that this sign was present at the entrance to the Walmart Supercenter parking lot on June 15, 2017. (McElwaney Aff., ¶¶ 3-4). Defendant claims these signs were inspected and approved by Police Chief Jones and Captain Hodgson of the Union City Police Department on January 10, 2017. (McElwaney Aff., ¶ 4). Defendant attaches the October 18, 2017, Affidavit of Chief Jones as evidence that Defendant's signs are in compliance with the

Union City booting ordinance. (*See* Ex. B to Defendant's Motion to Dismiss).

There are numerous problems with Defendant's claims. First, the sign attached to Defendant's Affidavit was not observed by Plaintiff on June 15, 2017. (Polson Aff., ¶¶ 6-7). This makes Defendant's signage an issue of material fact in dispute that cannot be resolved on summary judgment. *Franklin v. Eaves*, 337 Ga. App. 292, 292, 787 S.E.2d 265, 267 (2016). Second, the sign attached to Defendant's Affidavit does not comply with the ordinance as it is missing the required full statement, "no additional fee will be charged for use of cash, checks, credit cards, or debit cards." (Affidavit of Kenny McElwaney, ¶ 3); Union City Code of Ordinances, Chapter 10, Article I, § 10-28(b)(2)(e). Third, no one at the Union City Police Department has ever determined that Defendant's signs are in full compliance with the ordinance. (Second Jones Aff., ¶¶ 8-11).

When Chief Jones was questioned about her October 18, 2017, Affidavit, she clarified that she only inspected Defendant's signs on January 10, 2017, to determine if the signs were visible, provided notice that booting occurred on the property, and were of sufficient size. (Second Jones Aff., ¶¶ 3-7). There is no evidence that Chief Jones, or anyone else at the Union City Police Department, has ever inspected Defendant's signs to ensure that they contain all of the **language** required by the Union City booting ordinance. (Second Jones Aff., ¶¶ 8-11). In fact, after being presented with a certified copy of the ordinance and pictures of Defendant's signs, Chief Jones expressly withdrew any and all allegations which even suggest that any of Defendant's signs: 1) contain all of the language required by the ordinance; and 2) are in full compliance with the ordinance. *Id*. The statements contained in Chief Jones Second Affidavit strongly suggest Defendant's counsel obtained Chief Jones October 18, 2017, Affidavit by misrepresenting the nature of Plaintiff's lawsuit or by omitting materially relevant facts.

As there is no evidence that Defendant's signs at 4735 Jonesboro Rd. on June 15, 2017, were in full compliance with the Union City booting ordinance, and as Defendant's own sworn testimony establishes that the signs are missing language required by the ordinance, Defendant's motion should be denied.

CONCLUSION

WHEREFORE, based upon the above reasons, Plaintiff respectfully requests that Defendant's Motion to Dismiss be DENIED in its entirety.

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing *PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS* to be served upon all parties in this case by United States Mail, proper postage prepaid, addressed as follows:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta. GA 30309

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	CIVIL ACTION FILE NUMBER
Plaintiff,	)	17EV003164
v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

SECOND AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Cassandra A. Jones, who, after being duly sworn, stated under oath as follows:

1.

My name is Cassandra A. Jones. I am over eighteen (18) years of age. I have personal knowledge of the facts stated in this Affidavit and know them to be true and accurate.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

On October 18, 2017, I signed an Affidavit prepared by attorney Jason Bell with Smith, Gambrell & Russell, LLP, counsel for Defendant Kenny McElwancy d/b/a Maximum Booting Co. A true and accurate copy of the Affidavit I signed is attached hereto as Exhibit 1.

4.

Prior to receiving the October 18, 2017, Affidavit, I told attorney Jason Bell that, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police Department, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting Co.) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where these companies conduct vehicle immobilization in Union City. This inspection included the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 (the "Walmart Supercenter").

5.

My inspection of the signs at these parking lots on January 10, 2017, was related to a request from City Council to propose amendments to the Union City Booting Ordinance, Union City Code of Ordinances, Chapter 10, Article I, § 10-28 (the "Union City Booting Ordinance").

6.

I explained to attorney Jason Bell that my inspection of the signage on January 10, 2017, was limited to determining if the signs were visible, provided notice that booting occurred on the property, and were of sufficient size.

7.

I told attorney Jason Bell that I, and Captain Gloria Hodgson, determined that the signage we inspected on January 10, 2017, including the signage at the Walmart Supercenter, was of sufficient size according to the Union City Booting Ordinance.

8.

I never told attorney Jason Bell that I, or anyone else with the Union City Police Department, determined that the signage we inspected on January 10, 2017, including the

signage at the Walmart Supercenter, contained all of the language required by the Union City Booting Ordinance.

9.

I never intended for my October 18, 2017, Affidavit to imply that I made any determination regarding whether the specific language contained on the signage at these parking lots, including the signage at the Walmart Supercenter, complied with all of the conditions imposed by the Union City Booting Ordinance.

10.

To the extent that the October 18, 2017, Affidavit I signed claims that I, or anyone else with the Union City Police Department, determined that any signs, including the signage at the Walmart Supercenter, contained all of the language required by the Union City Booting Ordinance, I withdraw all such allegations.

11.

To the extent that the October 18, 2017, Affidavit I signed claims that I, or anyone else with the Union City Police Department, determined that any signs, including the signage at the Walmart Supercenter, were in full compliance with Union City Booting Ordinance, I withdraw all such allegations.

FURTHER AFFIANT SAYETH NAUGHT.

Cassandra A. Jones

CASSANDRA A. JONES

Sworn to and subscribed before me
this 30th day of October, 2017

Emma Thompson

Notary Public

EMMA THOMPSON NOTARY PUBLIC Exp. Aug. 27, 2018 FULTON COUNTY, GA

My Commission Expires:
August 27, 2018

EXHIBIT 1

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

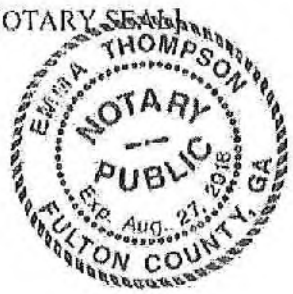
Cassandra A. Jones
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this 18 day of October, 2017.

Emma Thompson
Notary Public

My Commission Expires: 8-27-18

[NOTARY SEAL]



IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	**CIVIL ACTION FILE NUMBER**
Plaintiff,	)	**17EV003146**
v.	)	
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

STATE OF GEORGIA }
COUNTY OF FULTON }

AFFIDAVIT OF JESSY POLSON

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, JESSY POLSON, who, after being duly sworn, stated under oath as follows:

1.

My name is JESSY POLSON. I am over eighteen (18) years of age. I have personal knowledge of the facts stated in this Affidavit and know them to be true and correct.

2.

On June 15, 2017, I parked my truck at the Walmart Supercenter parking lot located at, or around, 4735 Jonesboro Rd, Union City, GA 30291 (the "Walmart Supercenter").

3.

I own the truck that I parked at the Walmart Supercenter on June 15, 2017, through my corporation, J & L Transport Services, Inc. ("J & L Transport"). (A true and accurate copy of the title to the truck I parked at the Walmart Supercenter is attached hereto as Exhibit 1). I am the owner and president of J & L Transport. J & L Transport has no other officers, shareholders,

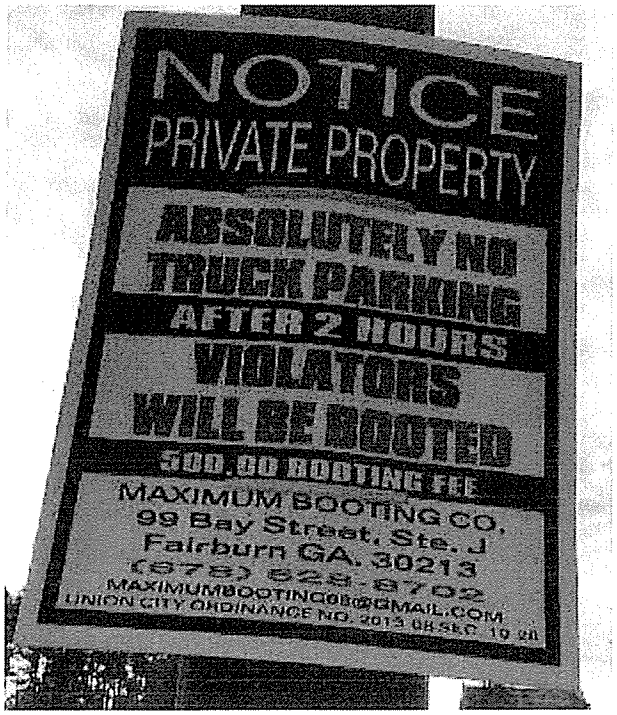
or members. (A true and accurate copy of J & L Transport's records maintained by the Florida Secretary of State is attached hereto as Exhibit 2).

4.

When I parked my truck at the Walmart Supercenter on June 15, 2017, I did not see any signs that referenced booting or vehicle immobilization.

5.

When I later found my truck booted, I did find the following sign in the parking lot:



6.

On June 15, 2017, I found no other signs that referenced booting or vehicle immobilization in the Walmart Supercenter parking lot.

7.

On June 15, 2017, I did not see any of the following signs in the Walmart Supercenter parking lot:

8.

After I found my truck booted, the man who booted my vehicle approached me and demanded I pay him $500.00 to remove the boot.

9.

I asked this person to remove the boot from my truck, but he refused to remove the boot unless I paid him $500.00.

10.

The booting company would not accept a check issued by me to remove the boot.

11.

Because the booting company would not accept a check issued by me to remove the boot, I contacted my employer, Clearwater Logistics, and requested that they pay the booting fee and

then deduct the fee from my wages.

12.

On June 29, 2017, a deduction of $500.00 was removed from my next settlement check with my employer to cover the cost of the booting fee. (A true and accurate copy of my June 29, 2017, owner operator compensation report showing the $500.00 deduction for the booting fee is attached hereto as Exhibit 3).

FURTHER AFFIANT SAYETH NAUGHT.

Jessy L. Polson

JESSY POLSON

Sworn to and subscribed before me
this 13th day of November, 2017.

Notary Public
My Commission Expires: 10/29/2020

TIFFANY SIERRA
Notary Public - State of Florida
Commission # GG 024636
My Comm. Expires Oct 29, 2020

EXHIBIT 1

Mail Lien Satisfaction to: Dept of Highway Safety and Motor Vehicles, Neil Kirkman Building, Tallahassee, FL 32399-0500

T# 724443931
B# 585849

Identification Number	Year	Make	Body	WT-L-BHP	Vessel Regis. No.	Title Number
3HTCDAMN61N092711	2001	INTL	TK	21940		109848637

Registered Owner:

J & L TRANSPORT SERVICES INC
2459 OLIVE BRANCH WAY
ORLANDO, FL 32817

Date of Issue 09/20/2012

Lien Release
Interest in the described vehicle is hereby released
By_____
Title_____
Date_____

IMPORTANT INFORMATION

1. When ownership of the vehicle described herein is transferred, the seller MUST complete in full the Transfer of Title by Seller section at the bottom of the certificate of title.
2. Upon sale of this vehicle, the seller must complete the notice of sale on the reverse side of this form.
3. Remove your license plate from the vehicle.
4. See the web address below for more information and the appropriate forms required for the purchaser to title and register the vehicle, mobile home or vessel: http://www.hsmv.state.fl.us/html/titlinf.html

Mail To:

J & L TRANSPORT SERVICES INC
2459 OLIVE BRANCH WAY
ORLANDO, FL 32817

LIEN SATISFACTION

CERTIFICATE OF TITLE

Identification Number	Year	Make	Body	WT-L-BHP	Vessel Regis. No.	Title Number
3HTCDAMN61N092711	2001	INTL	TK	21940		109848637

Lien Release
Interest in the described vehicle is hereby released
By_____
Title_____
Date_____

Prev State	Color	Primary Brand	Secondary Brand	No of Brands	Use	Prev Issue Date
OK	GRY				PRIVATE	

Odometer Status or Vessel Manufacturer or OH use	Hull Material	Prop	Date of Issue
780,687 MILES 09/20/2012 ACTUAL			09/20/2012

Registered Owner

J & L TRANSPORT SERVICES INC
2459 OLIVE BRANCH WAY
ORLANDO, FL 32817

1st Lienholder

NONE

DIVISION OF MOTORIST SERVICES TALLAHASSEE FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

Boyd Walden
Director

Julie L. Jones
Executive Director

Control Number 101806360
22 /1 101806360

TRANSFER OF TITLE BY SELLER (This section must be completed at the time of sale.)

Federal and/or state law require that the seller state the mileage, purchaser's name, selling price and date sold in connection with the transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

This title is warranted to be free from any liens except as noted on the face of the certificate and the motor vehicle or vessel described is hereby transferred to:

Seller Must Enter Purchaser's Name:_____ Address:_____

Seller Must Enter Selling Price:_____ Seller Must Enter Date Sold:_____

I/We state that the [ ] 5 or [ ] 6 digit odometer now reads [| | | | | |] (no tenths) miles, date read_____ and I hereby certify that to the best of my knowledge the odometer reading:

[ ] 1. reflects ACTUAL MILEAGE. [ ] 2. is IN EXCESS OF ITS MECHANICAL LIMITS. [ ] 3. is NOT THE ACTUAL MILEAGE.

UNDER PENALTIES OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING DOCUMENT AND THAT THE FACTS STATED IN IT ARE TRUE.

SELLER Must Sign Here:_____ CO-SELLER Must Sign Here:_____

Print Here:_____ Print Here:_____

Selling Dealer's License Number:_____ Tax No.:_____ Tax Collected:_____

Auction Name:_____ License Number:_____

PURCHASER Must Sign Here:_____ CO-PURCHASER Must Sign Here:_____

Print Here:_____ Print Here:_____

NOTICE: PENALTY IS REQUIRED BY LAW IF NOT SUBMITTED FOR TRANSFER WITHIN 30 DAYS AFTER DATE OF PURCHASE.

VOID IF ALTERED

HSMV 82250 (REV. 07/09) STATE OF FLORIDA

EXHIBIT 2

Detail by Entity Name

Florida Profit Corporation
J & L TRANSPORT SERVICES, INC.

Filing Information

Document Number	P00000007733
FEI/EIN Number	59-3621180
Date Filed	01/25/2000
State	FL
Status	INACTIVE
Last Event	ADMIN DISSOLUTION FOR ANNUAL REPORT
Event Date Filed	09/27/2013
Event Effective Date	NONE

Principal Address

2459 OLIVE BRANCH WAY
ORLANDO, FL 32817

Changed: 02/13/2006

Mailing Address

POST OFFICE BOX 678448
ORLANDO, FL 32867

Registered Agent Name & Address

SPIEGEL & UTRERA, P.A.
343 ALMERIA AVENUE
CORAL GABLES, FL 33134

Officer/Director Detail

Name & Address

Title PSTD

POLSON, JESSY L
2459 OLIVE BRANCH WAY
ORANDO, FL 32817

Annual Reports

Report Year	Filed Date
2010	04/25/2010
2011	02/04/2011

2012	04/28/2012

Document Images

04/28/2012 -- ANNUAL REPORT	View image in PDF format
02/04/2011 -- ANNUAL REPORT	View image in PDF format
04/25/2010 -- ANNUAL REPORT	View image in PDF format
04/28/2009 -- ANNUAL REPORT	View image in PDF format
04/23/2008 -- ANNUAL REPORT	View image in PDF format
04/26/2007 -- ANNUAL REPORT	View image in PDF format
02/13/2006 -- ANNUAL REPORT	View image in PDF format
04/13/2005 -- ANNUAL REPORT	View image in PDF format
02/23/2004 -- ANNUAL REPORT	View image in PDF format
04/22/2003 -- ANNUAL REPORT	View image in PDF format
04/02/2002 -- ANNUAL REPORT	View image in PDF format
07/24/2001 -- ANNUAL REPORT	View image in PDF format
01/25/2000 -- Domestic Profit	View image in PDF format

P00000007733

SPIEGEL & U[illegible]ra, P.A.
(Requestor's Name)
2[illegible] ALHAMBRA AVENUE
CORAL GABLES, FL 33134 - (305) 445-2700

-- OFFICE USE ONLY

CORPORATION NAME(S) & DOCUMENT NUMBER(S) (if known):

1. J & L TRANSPORT SERVICES, INC.
(Corporation Name) (Document #)
2. (Corporation Name) (Document #)
3. (Corporation Name) (Document #)
4. (Corporation Name) (Document #)

☐ Walk-In ☐ Pick up time _____ ☐ Certified Copy

☐ Mail out ☐ Will wait ☐ Photocopy ☐ Certificate of Status

00 JAN 25 AM 9:27
SECRETARY OF STATE
TALLAHASSEE FLORIDA

FILED

NEW FILINGS	
	Profit
	NonProfit
	Limited Liability
	Domestication
	Other

AMENDMENTS	
	Amendment
	Resignation of R.A., Officer/Director
	Change of Registered Agent
	Dissolution/Withdrawal
	Merger

REGISTRATION/ QUALIFICATION	
	Foreign
	Limited Partnership
	Reinstatement
	Trademark
	Other

OTHER FILINGS	
	Annual Report
	Fictitious Name
	Name Reservation

300003109263--5
-01/25/00--01010--003
***2660.00 *****70.00

DIVISION OF CORPORATIONS
FILING & CERT. OFC OF STATE
TALLAHASSEE, FLORIDA
00 JAN 25 AM 8:04
RECEIVED

Examiner's Initials	

ARTICLES OF INCORPORATION

OF

J & L TRANSPORT SERVICES, INC.

FILED
00 JAN 25 AM 9:21
SECRETARY OF STATE
TALLAHASSEE FLORIDA

The undersigned subscriber to these Articles of Incorporation is a natural person competent to contract and hereby form a Corporation for profit under Chapter 607 of the Florida Statutes.

ARTICLE 1 - NAME

The name of the Corporation is **J & L TRANSPORT SERVICES, INC.**, (hereinafter, "Corporation").

ARTICLE 2 - PURPOSE OF CORPORATION

The Corporation shall engage in any activity or business permitted under the laws of the United States and of the State of Florida.

ARTICLE 3 - PRINCIPAL OFFICE

The address of the principal office of this Corporation is 2459 Olide Branch Way, Orlando, Florida 32817 and the mailing address is Post Office Box 678448, Orlando, Florida 32867.

ARTICLE 4 - INCORPORATOR

The name and street address of the incorporator of this Corporation is:

Elsie Sanchez
343 Almeria Avenue
Coral Gables, Florida 33134

ARTICLE 5 - OFFICERS

The officers of the Corporation shall be:

President:	Jessy L. Polson
Secretary:	Jessy L. Polson
Treasurer:	Jessy L. Polson

whose addresses shall be the same as the principal office of the Corporation.

ARTICLE 6 - DIRECTOR(S)

The Director(s) of the Corporation shall be:

Jessy L. Polson

whose addresses shall be the same as the principal office of the Corporation.

ARTICLE 7 - CORPORATE CAPITALIZATION

7.1 The maximum number of shares that this Corporation is authorized to have outstanding at any time is **SEVEN THOUSAND FIVE HUNDRED (7,500)** shares of common stock, each share having the par value of **ONE DOLLAR ($1.00).**

7.2 All holders of shares of common stock shall be identical with each other in every respect and the holders of common shares shall be entitled to have unlimited voting rights on all shares and be entitled to one vote for each share on all matters on which Shareholders have the right to vote.

7.3 All holders of shares of common stock, upon the dissolution of the Corporation, shall be entitled to receive the net assets of the Corporation.

7.4 No holder of shares of stock of any class shall have any preemptive right to subscribe to or purchase any additional shares of any class, or any bonds or convertible securities of any nature; provided, however, that the Board of Director(s) may, in authorizing the issuance of shares of stock of any class, confer any preemptive right that the Board of Director(s) may deem advisable in connection with such issuance.

7.5 The Board of Director(s) of the Corporation may authorize the issuance from time to time of shares of its stock of any class, whether now or hereafter authorized, or securities convertible into shares of its stock of any class, whether now or hereafter authorized, for such consideration as the Board of Director(s) may deem advisable, subject to such restrictions or limitations, if any, as may be set forth in the bylaws of the Corporation.

7.6 The Board of Director(s) of the Corporation may, by Restated Articles of Incorporation, classify or reclassify any unissued stock from time to time by setting or changing the preferences, conversions or other rights, voting powers, restrictions, limitations as to dividends, qualifications, or term or conditions of redemption of the stock.

ARTICLE 8 - SUB-CHAPTER S CORPORATION

The Corporation may elect to be an S Corporation, as provided in Sub-Chapter S of the Internal Revenue Code of 1986, as amended.

8.1 The shareholders of this Corporation may elect and, if elected, shall continue such election to be an S Corporation as provided in Sub-Chapter S of the Internal Revenue Code of 1986, as amended, unless the shareholders of the Corporation unanimously agree otherwise in writing.

8.2 After this Corporation has elected to be an S Corporation, none of the shareholders of this Corporation, without the written consent of all the shareholders of this Corporation shall take any action, or make any transfer or other disposition of the shareholders' shares of stock in the Corporation, which will result in the termination or revocation of such election to be an S Corporation, as provided in Sub-chapter S of the Internal Revenue Code of 1986, as amended.

8.3 Once the Corporation has elected to be an S Corporation, each share of stock issued by this Corporation shall contain the following legend:

> "The shares of stock represented by this certificate cannot be transferred if such transfer would void the election of the Corporation to be taxed under Sub-Chapter S of the Internal Revenue Code of 1986, as amended."

ARTICLE 9 - SHAREHOLDERS' RESTRICTIVE AGREEMENT

All of the shares of stock of this Corporation may be subject to a Shareholders' Restrictive Agreement containing numerous restrictions on the rights of shareholders of the Corporation and transferability of the shares of stock of the Corporation. A copy of the Shareholders' Restrictive Agreement, if any, is on file at the principal office of the Corporation.

ARTICLE 10 - POWERS OF CORPORATION

The Corporation shall have the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, subject to any limitations or restrictions imposed by applicable law or these Articles of Incorporation.

ARTICLE 11 - TERM OF EXISTENCE

This Corporation shall have perpetual existence.

ARTICLE 12 - REGISTERED OWNER(S)

The Corporation, to the extent permitted by law, shall be entitled to treat the person in whose name any share or right is registered on the books of the Corporation as the owner thereto, for all purposes, and except as may be agreed in writing by the Corporation, the Corporation shall not be bound to recognize any equitable or other claim to, or interest in, such share or right on the part of any other person, whether or not the Corporation shall have notice thereof.

ARTICLE 13 - REGISTERED OFFICE AND REGISTERED AGENT

The initial address of registered office of this Corporation is Spiegel & Utrera, P.A., located at 343 Almeria Avenue, Coral Gables, Florida 33134. The name and address of the registered agent of this Corporation is Spiegel & Utrera, P.A., 343 Almeria Avenue, Coral Gables, Florida 33134.

ARTICLE 14 - BYLAWS

The Board of Director(s) of the Corporation shall have power, without the assent or vote of the shareholders, to make, alter, amend or repeal the Bylaws of the Corporation, but the affirmative vote of a number of Directors equal to a majority of the number who would constitute a full Board of Director(s) at the time of such action shall be necessary to take any action for the making, alteration, amendment or repeal of the Bylaws.

ARTICLE 15 - EFFECTIVE DATE

These Articles of Incorporation shall be effective immediately upon approval of the Secretary of State, State of Florida.

ARTICLE 16 - AMENDMENT

The Corporation reserves the right to amend, alter, change or repeal any provision contained in these Articles of Incorporation, or in any amendment hereto, or to add any provision to these Articles of Incorporation or to any amendment hereto, in any manner now or hereafter prescribed or permitted by the provisions of any applicable statute of the State of Florida, and all rights conferred upon shareholders in these Articles of Incorporation or any amendment hereto are granted subject to this reservation.

ARTICLE 17 - INDEMNIFICATION

The Corporation shall indemnify a director or officer of the Corporation who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director or officer was a party because the director or officer is or was a director or officer of the Corporation against reasonable attorney fees and expenses incurred by the director or officer in connection with the proceeding. The Corporation may indemnify an individual made a party to a proceeding because the individual is or was a director, officer, employee or agent of the Corporation against liability if authorized in the specific case after determination, in the manner required by the board of directors, that indemnification of the director, officer, employee or agent, as the case may be, is permissible in the circumstances because the director, officer, employee or agent has met the standard of conduct set forth by the board of directors. The indemnification and advancement of attorney fees and expenses for directors, officers, employees and agents of the Corporation shall apply when such persons are serving at the Corporation's request while a director, officer, employee or agent of the Corporation, as the case may be, as a director, officer, partner, trustee, employee or agent of another foreign or domestic Corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, whether or not for profit, as well as in their official capacity with the Corporation. The Corporation also may pay for or reimburse the reasonable attorney fees and expenses incurred by a director, officer, employee or agent of the Corporation who is a party to a proceeding in advance of final disposition of the proceeding. The Corporation also may purchase and maintain insurance on behalf of an individual arising from the individual's status as a director, officer, employee or agent of the Corporation, whether or not the Corporation would have power to indemnify the individual against the same liability under the law. All references in these Articles of Incorporation are deemed to include any amendment or successor thereto. Nothing contained in these Articles of Incorporation shall limit or preclude the exercise of any right relating to indemnification or advance of attorney fees and expenses to any person who is or was a director, officer, employee or agent of the Corporation or the ability of the Corporation otherwise to indemnify or advance expenses to any such person by contract or in any other manner. If any word, clause or sentence of the foregoing provisions regarding indemnification or advancement of the attorney fees or expenses shall be held invalid as contrary to law or public policy, it shall be severable and the provisions remaining shall not be otherwise affected. All references in these Articles of Incorporation to "director", "officer", "employee" and "agent" shall include the heirs, estates, executors, administrators and personal representatives of such persons.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, acknowledged and filed the foregoing Articles of Incorporation under the laws of the State of Florida, this JAN 25 2000.

Elsie Sanchez, Incorporator

ACCEPTANCE OF REGISTERED AGENT DESIGNATED IN ARTICLES OF INCORPORATION

Spiegel & Utrera, P.A., having a business office identical with the registered office of the Corporation name above, and having been designated as the Registered Agent in the above and foregoing Articles of Incorporation, is familiar with and accepts the obligations of the position of Registered Agent under the applicable provisions of the Florida Statutes.

Spiegel & Utrera, P.A.

By: _____
Natalia Utrera, Vice President

FILED
00 JAN 25 AM 9:27
SECRETARY OF STATE
TALLAHASSEE FLORIDA

SPIEGEL & UTRERA, P.A.
LAWYERS
www.amerilawyer®.com
343 ALMERIA AVENUE CORAL GABLES, FL 33134 - (305) 445-2700 - (800) 603-3900 - FACSIMILE (305) 447-8900
MAILING ADDRESS - POST OFFICE BOX 144479, CORAL GABLES, FL 33114-4479

EXHIBIT 3

Owner Operator Compensation Report

Partner Driver Jessy Polson CLR100

Date Paid 6/29/2017

Shipment #	Jessy #	Date picked up	Pick up Location	Delivery Location		Payment Shipment	Misc
3222/7366617	26	5/25/17	Orlando FL	Key Largo FL		$ 500.00	
3320/7366670	27	5/30/17	Tampa FL	Tallahasee FL		$ 525.00	
3247/7366719	28	6/6/17	Orlando FL	Orlando FL		$ 200.00	
3267/7366774	29	6/13/17	Orlando FL	Columbus GA		$ 569.85	
3278/7366805	30	6/16/17	Lawrenceville GA	LongBoat Key FL		$ 775.75	
3285/7366822	31	6/20/17	Orlando FL	Jacksonville FL		$ 300.00	
					Totals	$ 2,870.60	$ -
					Total Due		$ 2,870.60

Deduction Items

Pri / Phy Ins		362.66 Mo	$91.00 week		$ 273.00	6/23 6/30 7/7
Occ / Acc Ins		$164.00 Mo	$41. week		$ 123.00	
IFTA					$ 500.00	Paid parking fine
Escrow		Max Balance $500.				
Escrow Balance		$ 500.00				
				Total Dedcution	$ 896.00	
				Total Due	$ 1,974.60	

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	**CIVIL ACTION FILE NUMBER**
Plaintiff,	)	**17EV003146**
v.	)	
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

STATE OF GEORGIA }
COUNTY OF FULTON }

AFFIDAVIT OF MARK MCLOCHLIN

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, MARK MCLOCHLIN, who, after being duly sworn, stated under oath as follows:

1.

My name is MARK MCLOCHLIN. I am over eighteen (18) years of age. I have personal knowledge of the facts stated in this Affidavit and know them to be true and correct.

2.

I am the president of Clearwater Logistics.

3.

Clearwater Logistics employs Jessy Polson as an owner/operator truck driver.

4.

The truck Jessy Polson operates for Clearwater Logistics (truck CLR100) is not owned by Clearwater Logistics.

5.

The truck Jessy Polson operates for Clearwater Logistics (truck CLR100) is owned by Jessy Polson through his corporation, J & L Transport Services, Inc. (A true and accurate copy of the owner/operator agreement between Clearwater Logistics and Jessy Polson is attached hereto as Exhibit 1).

6.

I have never informed anyone that Clearwater Logistics owns the truck Jessy Polson operates for Clearwater Logistics (truck CLR100).

7.

No one at Clearwater Logistics would have ever told anyone that Clearwater Logistics owns a truck subject to an owner/operator agreement. Clearwater Logistics does not own any trucks subject to an owner/operator agreement.

8.

On June 15, 2017, I was notified by owner/operator Jessy Polson that his truck (truck CLR 100) was booted in a parking lot by a company named Maximum Booting Company.

9.

Jessy Polson informed me that Maximum Booting Company would not release his truck (truck CLR 100) unless they received $500.00.

10.

Jessy Polson informed me that he did not have $500.00 in cash, and that Maximum Booting Company would not accept a check issued by him.

11.

Jessy Polson requested that Clearwater Logistics pay the $500.00 booting fee and then

deduct this $500.00 fee from his next settlement check.

12.

Clearwater Logistics paid the $500.00 booting fee and then deducted the $500.00 fee from Jessy Polson's next settlement check. (A true and accurate copy of Jessy Polson's June 29, 2017, owner operator compensation report showing the $500.00 deduction is attached hereto as Exhibit 2).

FURTHER AFFIANT SAYETH NAUGHT.

MARK MCLOCHLIN

Sworn to and subscribed before me
this 10th day of November, 2017.

Notary Public
My Commission Expires: May 4, 2024

Karen Wise, Notary Public
Comm. Expires May 4, 2024
Resides in Elkhart Co., IN
Comm. Number 681110

EXHIBIT 1

INDEPENDENT CONTRACTOR AGREEMENT

This Independent Contractor Agreement is made between McLochlin Automotive Inc, DBA: Clearwater Logistics (hereinafter referred to as "Carrier") and J & L TRANSPORT SERVICES INC, (hereinafter referred to as "Contractor").

WHEREAS, Carrier is a for-hire motor carrier operating in interstate commerce and subject to the rules and regulations of the Federal Motor Carrier Safety Administration, the U.S. Department of Transportation, and other federal and state agencies; and

WHEREAS, Contractor is a (check where applicable): (1) A Sole Proprietorship ☐; (2) Limited Liability Corporation or Partnership ☐; or (3) A Corporation ☐ which owns or leases the equipment identified in Appendix A attached hereto; and

WHEREAS, the parties desire to enter an independent contractor relationship in accordance with applicable law;

NOW, THEREFORE, the parties agree as follows:

This Agreement shall govern the lease of equipment identified on Appendix A with driver by Contractor to Carrier for the continuing performance of a series of separate transportation contracts, the payment for which shall be determined in accordance with the agreed compensation set forth in Appendix B.

1. Compliance with Federal Statutes and Regulations. The parties acknowledge and agree that this contract is governed by Federal Regulation, to wit: 49 C.F.R. 376 and it is the intent of the parties that this Agreement fully comply with such regulations without creating indicia of control which would otherwise frustrate the intent of the parties to create an independent contractor relationship. See 49 C.F.R. '376.12(c)(4).

Accordingly, the parties agree as follows:

A. Carrier shall exercise that level of dominion and control over the leased equipment required by Federal Motor Carrier Safety Regulations including the execution of an original and 2 copies of this Lease by the parties with a copy or notice of this Lease to be kept on the equipment during its term in accordance with '376.11(a) and '376.12(l).

B. Receipts specifying the identity of the equipment and stating the date and time possession is transferred shall be issued in the form set forth in Appendix C in the time and manner as required by '376.11(b).

C. During the period of the Lease, Carrier shall identify the equipment in accordance with FMCSA requirements found at 49 U.S.C. '390.21 and Contractor warrants that it will immediately execute a receipt for return of the equipment as provided for in Appendix C, and remove or submit for removal all identification that the equipment is operated subject to the safety duties and obligations of Carrier.

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D. Records of Equipment. Carrier shall keep records covering each separate job or trip for which Contractor's services are retained in accordance with '376.11(d). Contractor warrants that it will instruct its driver to issue, obtain and carry while in transit bills of lading covering each trip which identify the lading and indicating the point of origin, the time and date of departure, the point of final destination, and confirm that the transportation is provided under the responsibility of Carrier.

E. Contractor warrants that it is the title holder or has equitable ownership of the leased equipment in accordance with '376.12(a).

F. The Lease shall commence with the time of the giving of the receipt for possession and shall continue from month to month until terminated by either party in accordance with the termination provisions herein.

G. To fulfill the exclusive possession and responsibilities of the regulations, the authorized carrier shall have exclusive possession, control and use of the equipment for the duration of the lease and the concomitant safety duties imposed by the Federal Motor Carrier Safety Administration's regulations. See 49 C.F.R. '376.12(c) and the safety regulations found at '390-399.

H. Contractor recognizes Carrier's regulatory duty to *inter alia* maintain driver qualification files, monitor driver's hours of service, conduct pre-employment and random drug and alcohol screening, verify equipment maintenance and repair, ensure proper securement, transport of freight in accordance with reasonable dispatch and highway restrictions governing the transportation of hazardous and overweight and over-dimensional loads. Contractor certifies that it is familiar with these regulatory requirements, will so instruct its driver personnel in proper compliance and will indemnify and hold Carrier harmless from any breach by it or its employees of this duty or failure to offer reasonable cooperation.

I. Calculation of Compensation. Compensation set forth in Appendix B is based upon a percentage of the line haul revenue derived from each load or trip tendered by Carrier to Contractor and accepted for transport. Line haul revenue shall be that amount reflected upon the rated freight submitted by Carrier to its customer for payment for the services rendered by Contractor and accordingly shall exclude charges paid to interline carriers, pickup and delivery fees for services not performed by Contractor, expenses for over-dimensional permits, escort service and accessorial charges not earned by line haul equipment or its drivers such as lumpers or rigging expenses. Other expenses not attributable to the services rendered by Contractor shall also be excluded from line haul revenue. In accordance with 49 C.F.R. '376.12(g), Carrier will give Contractor before or at the time of settlement a copy of the rated freight bill or computer-generated document containing the same information. Upon request, Contractor may view other documents as required by regulation. In addition to the agreed percentage of line haul revenue, Contractor shall receive 100% of any fuel surcharge, if any, collectible by Carrier as reflected on its rated freight bill.

Initial Here: JP

J. Non-Reimbursable Expenses. For the consideration specified above, Contractor agrees to be solely responsible for the following additional expenses:

(1) Identification Devices. (At its expense upon termination of lease, Contractor removing identification devices, offering suitable evidence to Carrier that such devices have been removed, or submit the equipment to Carrier for its removal.)

(2) Cost of Fuel.

(3) Fuel Taxes.

(4) Permits of all types.

(5) Tolls, ferries, accessorial services, base plate and licenses.

(6) The hiring and settling of wages for its drivers and the payment of all employment taxes, worker's compensation insurance,

(7) The maintenance of all equipment in accordance with DOT standards.

(8) The payment of all operating expenses including Federal Highway Use Taxes, personal property taxes, fines incurred by it.

(9) Furnishing all tools, including tie-downs and load securement equipment, and safety equipment required by the DOT and/or FMCSA.

(10) Cost pertaining to the proper training and instruction of Contractor and its employees.

(11) Compatible on-board computer and tracing technology to meet Shipper's requirements. Attached hereto as Appendix D is a list of tools and other devices which Contractor is required to provide pursuant to this Agreement which can be purchased or rented to Contractor by Carrier for the fees stated therein. If Contractor elects to purchase or rent these items by executing the addendum in the place provided, the cost of same will be charged back to settlements until such time as the tool or device is returned in good condition, ordinary wear and tear excepted.

(12) Property Damage to Carrier's Trailer. Contractor shall be responsible for any property damage to Carrier's trailer equipment or other equipment beyond ordinary wear and tear.

Initial Here: _____

(13) Fines for Oversize or Overweight Shipments. Unless trailers are preloaded and sealed or containerized, Contractor or its employees shall be responsible for confirming that all lading is suitable for transportation in accordance with applicable weight and dimensional limitations imposed by in-transit states or authorized by special permits obtained for transportation of the shipment. Contractor shall be responsible for all fines, penalties and claims resulting from failure to comply with this obligation.

(14) With respect to fuel purchases set forth in Subparagraph 3 above, Contractor recognizes that Carrier is required by IFTA to file taxes governing fuel taxes for its services and accordingly agrees to purchase sufficient fuel within each state in which its equipment operates to assure payment of fuel taxes. Contractor agrees to provide carrier with satisfactory proof of such purchases and to pay any applicable deficiency.

(15) With respect to base plates, if purchased in the name of Carrier, upon termination of the lease Carrier will transfer the plates to another unit if possible, crediting Contractor with any refund or credit it received. If carrier is unable to transfer the plates to another unit, then no refund or credit will be due to Contractor.

K. Payment. In accordance with 49 C.F.R. '376.12(f) Carrier agrees to pay Contractor within 15 days after submission of necessary original delivery documents to secure payment from shipper and driver log books required by the U.S. DOT. Because the parties recognize that the U.S. DOT regulations now require the carrier to maintain supporting documents including but not limited to trip reports, weight tickets, evidence of toll receipts and fees, as well as other documents, Contractor agrees to submit these additional documents with its settlement and agrees to a settlement deduction of $50 per occurrence if such documentation is not provided within 5 working days of request.

L. Chargeback Options. Carrier shall be entitled to chargeback to Contractor and deduct from settlement the following: (1) all payments paid by Carrier for authorized advances and costs incurred by Carrier on behalf of Contractor as a result of Contractor's obligations enumerated in J above. In addition, any advance specifically confirmed in writing, the purchase of any goods or services from Carrier by Contractor as specifically authorized in this Agreement or otherwise and specifically enumerated fine or penalty may be deducted for the specific amount provided for herein or at Carrier's cost without markup. Contractor will be afforded copies of documents necessary to determine the validity of any charge.

M. Products, Equipment or Services from Carrier. Contractor is not required to purchase or rent any products, equipment or services from Carrier as a condition of entering this Lease. Any product, equipment or service which Contractor elects to purchase shall be enumerated in Appendix D or by subsequent addenda.

Initial Here: _____

N. Insurance. Carrier has a legal obligation under federal statute to provide bodily injury and property damage insurance to the public for the use of the leased equipment pursuant to 49 U.S.C. ' 13906 during the term of this Lease. Contractor agrees to carry non-trucking liability (so-called "deadhead and bobtail") insurance with a combined single limit of not less than $500,000 and will provide proof of such coverage to Carrier during the term of this Agreement. Contractor further agrees that it is its sole duty to require and maintain at its expense worker's compensation insurance or other insurance required by the provision of any applicable employer's liability law on all drivers and any other employees required by Contractor or hired by Contractor to perform the services under this Agreement. A certificate of worker's compensation will be furnished upon request. If Contractor elects to obtain and if Contractor maintains that worker's compensation is not required due to statutory exemption, it will provide evidence of comparable occupational accident insurance and otherwise warrants that it will indemnify and hold harmless Carrier against any allegation of cut-through liability.

If Contractor elects to purchase any insurances from sources available through Carrier, such coverage will be set forth in Appendix D and Carrier will provide Contractor with a copy of each policy upon request, providing to Contractor a certificate of insurance naming the insurer, the policy number, the effective dates, the amount of coverage, the cost to lessor and any deductible.

O. Cargo and Accident Deductible. Notwithstanding any public liability insurance or cargo insurance maintained by Carrier, Contractor agrees to pay to Carrier as a penalty an amount equal to the first $1500 of the expense incurred by Carrier and paid to it any cargo claimant or accident victim as a result of the negligence of Contractor or its employees in the performance of this contract.

P. Notification Requirement. Contractor further agrees to immediately notify Carrier of any potential cargo claim, accident, fine, citation or out-of-service order incurred by Contractor or its employees in order to ensure Carrier's compliance with its customer and safety obligations.

Q. Escrow of Funds. The Contractor shall deposit with the Carrier a performance bond issued by a Surety Company approved by Carrier in the amount of $2,500.00 per vehicle, or at his option, may furnish in lieu thereof a $500.00 cash bond for the tractor described in Section III of this Agreement to guarantee the full, complete and competent performance of the Contractor's obligations under this contract. These obligations include, but are not limited to, the settlement of all accounts between Contractor, its employees or agents, and Carrier, and the return of all regulatory agency permits, tags and identifications issued in the name of the Carrier and the Contractor upon expiration or termination of the Contract or upon the execution of a receipt for the equipment.

The Contractor shall receive notice through the settlement process of any transaction involving the escrow funds, to include any withdrawals or any other adjustments to the escrow account. Contractor shall have the right to an accounting for transactions involving the escrow fund at any time. The Carrier shall compute interest on the escrow funds at least quarterly. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier

may deduct a sum equal to the average advance made to the Contractor during the period of time for which the interest is to be paid. The interest rate that is to be applicable to said interest payments shall be set at a rate equal to the average yield or equivalent coupon issue yield on 13-week Treasury Bills as established in the weekly auction by the Department of Treasury.

If for any reason Contractor fails to return Carrier's equipment within 48 hours of request, Contractor acknowledges that Carrier may seek a writ of replevin and agrees to pay all attendant attorney's fees and court costs as well as all costs of recovery incurred by Carrier to recover its equipment.

R. Impermissive Use of Equipment. The parties contemplate that Contractor may use trailer equipment owned by Carrier to provide the contracted services. Such equipment may be used without additional charge for the purpose of providing services for Carrier or with Carrier's express permission. During the term of this Agreement, if Contractor moves or pulls Carrier's trailer from Carrier's terminal or other location without Carrier's authorization, Contractor will be assessed 15¢ per mile for the total number of miles and all other charges incurred in securing and returning such trailer subject to a minimum charge of $50 per day.

2. Contractor Independence/Control of Operations.

A. Federal and State Laws. At all times, Independent Contractor shall remain solely responsible for payment of all federal and state taxes accruing as a result of its maintenance and use of the leased vehicle, retention and payment of driver personnel to perform services under this agreement. Contractor warrants that it is familiar with and shall comply with all applicable employment laws and applicable taxes including and not limited to federal and state income tax, state worker's compensation, unemployment compensation taxes, and overtime requirements which may be applicable. Contractor shall indemnify and hold carrier harmless from these obligations.

To the extent not inconsistent with federal, state and safety regulations, including but not limited to hours of service requirements, highway speed limits and other restrictions, Contractor shall be free to set the method and time of performance for all delivery of loads accepted by it. The parties agree and understand that federal and state laws and regulations impose duties on carriers including the maintaining of records of Contractor operations, equipment maintenance, hours of service, reporting for state tax purposes all miles run by the vehicle as well as additional obligations imposed by carrier's insurer whose federal filings are a prerequisite of operations. Contractor agrees to comply with these federal duties and statutes with respect to the equipment leased to carrier and will provide all necessary supporting documents as required by law. Contractor warrants that it will only permit driver personnel to perform service under this Contract who have been credentialed and approved by Carrier in accordance to US DOT requirements.

B. Customer-Specific Requirements. The parties agree that in the performance of this contract, carrier in its sole discretion will tender Contractor individual loads, subject to its equipment availability on a load-by-load basis. It is agreed that any load may have customer-imposed service requirements which will be conveyed to the Contractor at time of

tender. Contractor agrees to accept or reject the load tender and is not subject to forced dispatch. In accepting the load, Contractor agrees to perform in accordance with any special ground rules imposed by the customer and further warrants that the expected service can be provided in a safe and non-negligent fashion in accordance with its drivers' available hours of service.

C. Routes and Methods. The parties agree that federal regulation requires a carrier to be responsible for accounting for all miles run by the involved commercial vehicle while under lease and for the hours of service of the driver operating the leased vehicle, regardless of whether the truck is under dispatch. Notwithstanding these requirements, Contractor is free to select the routing for performing any dispatch consistent with state and federal highway speed limits, weight and other restrictions. Carrier will assist Contractor by providing practical routing information for its use. Contractor agrees to indemnify and hold harmless carrier from any claim, fine, loss or damage which arises from the "deadhead or bobtail" use by it of the equipment.

Contractor agrees to indemnify and hold harmless Contractor from any claim, fine or assessment arising out of its failure to comply with the warranties and representations contained in this paragraph.

D. Independent Contractor Status. It is the intent of the parties for Contractor to retain the status of an independent contractor in business for federal and state law purposes. Carrier's control over Contractor shall be limited to that control required by federal and state statutes and regulations governing the conduct of motor carriers. Contractor shall train all of its driver personnel in accordance with U.S. DOT requirements and shall submit all driver personnel to carrier for qualification, safety and training to the extent required by federal regulations. Neither Contractor nor its driver employees shall be required to attend other employment training meetings held by the company nor shall they be subject to the company employment manual. Contractor shall have the right to substitute other qualified drivers to perform the services subject to carrier's confirmation that Contractor's driver meets the driver qualifications established by the U.S. DOT and its insurers.

Contractor warrants that no driver will be used until the driver has been qualified by carrier in accordance with federal safety requirements. At all times, Contractor shall remain responsible for hiring and supervising his employees and for paying their salaries and all relevant taxes. Contractor warrants compliance with all federal and state employment laws and shall indemnify and hold carrier harmless from its failure to discharge such obligations.

Contractor shall at all times be free to set its hours of operations consistent with the federally imposed hours of service requirements and the scope of the work accepted and the customer's service expectations. Contractor is free to work when and where it chooses and shall accept or reject work assignments on a load by load basis. Contractor agrees to comply with any scope of work requirement imposed by the customer service conditions when accepting a job assignment but is otherwise free to schedule the order of its work.

Where shipper requires same and to facilitate efficient dispatch, Contractor agrees to provide electronic notification of its operating status including when equipment is loaded,

Initial Here: J.P.

unloaded or otherwise available to dispatch. Otherwise no oral or written report other than the supporting documents and logs required by the DOT, bills of lading and shipping documents required by the customer for payments and fuel taxes as required by IFTA shall be required.

Contractor shall be solely responsible for furnishing the power equipment used to provide service and shall keep same in good repair in accordance with federal regulation and inspection requirements. Contractor shall be solely responsible for the payments on the leased equipment on the subject equipment and shall have the right to make all crucial decisions with respect to the maintenance and operation of such equipment.

Consistent with the leasing regulations which require carrier to have exclusive possession and control of the equipment, Contractor shall be free with notice to work for other carriers or customers. Contractor shall have the right to discharge any driver it employs at any time. Contractor agrees that it shall reassign any driver which Carrier in its sole discretion determines is unqualified to comply with Carrier's federal imposed safety duties.

Contractor warrants as a condition of this contract that all equipment will be continually operated in accordance with U.S. DOT safety regulations in a non-negligent fashion.

Contractor shall accept work assignments on a job by job or load by load basis and agrees to comply with any ground rules or scope of work requirements established by the shipper as a service condition imposed on the work provided. Carrier does not guarantee Contractor a profit or limit its profit margin for contracts performed.

3. Standard Operating Procedures. Because Carrier's customers require on-board communication to track delivery times, confirm pickups and deliveries and obtain advice about in-transit conditions, Contractor agrees to obtain on-board communication devices compatible with Carrier's system. Such equipment may be obtained and installed by Contractor in leased unit at its choosing. If purchased or leased from Carrier, Contractor's decision will be reflected in Appendix D and deduction from settlement will be authorized.

Unless Contractor or its driver notifies Carrier to the contrary, for the parties' mutual benefit, Carrier will tender loads to Contractor's driver using such on-board communications in real time based upon the availability of shipments, the equipment, and notice provided electronically that the leased equipment is available for a new contract consistent with the driver's available hours of service and its location. To facilitate these standard operating procedures, Contractor agrees to afford Carrier reasonable notice if its driver or unit is otherwise unavailable to accept additional loads.

4. Contractors, Warranties, and Indemnification. As consideration for entering into this agreement, Contractor warrants as follows:

a. that it is properly licensed and authorized to conduct its independent trade or business in accordance with local and state laws.

Initial Here: J.P.

b. that it will comply with all federal, state, and local taxing authorities that are applicable to its trade or business and will pay all applicable withholding and employment taxes and insurance payments as they come due by reason of its retention of personnel to provide the contracted service.

c. that it will not accept or incur any payment obligation on behalf of Carrier without its express written approval.

d. that it will promptly notify Carrier of any acts that result in any type of loss, shortage, citation, fine, or out of service order incurred in the course of its use or maintenance of the lease equipment during the period of this lease.

5. Contractor agrees to indemnify and hold Carrier harmless from any breach of the above warranties or if other claim laws or damage arising out of the negligent or willful acts or omission of it, its officers, directors, employees, or agent

6. Integrated Claim. The Parties agree that this contact sets forth the full understanding of the Parties and shall not be modified or changed in any way except by express written addendum.

7. Termination. This Contract may be terminated by either party on fifteen (15) days written notice. If, in the sole opinion of Carrier, the driver qualified by Contractor to provide services fails to comply with the Federal Motor Carrier Safety Regulations, Carrier may terminate this Agreement at any time.

8. Claims Notification. The Parties recognize in accordance with federal statute, Carrier has 6 months from the issuance of any freight invoice to file an undercharged claim with its Shipper. Accordingly, the Parties agree that Contractor will review its settlements and notify Carrier not later than 165 days after issuance of its disputed amount or thereafter will be barred.

9. Arbitration. Parties agree that in the event of any disputes at the request of either party the issue may be submitted to binding arbitration under the rules of the American Arbitration Association sitting at Indiana. The decision of the arbiter shall be final.

10. Venue and Jurisdiction. This agreement is made pursuant to the requirements of federal law and otherwise subject to the laws of the state of Indiana. The parties agree that Venue and Jurisdiction over all disputes shall be Indiana.

Initial Here: JP

Dated this 24th day of Sept, 2012.

[CARRIER]: Clearwater Logistics

Signature

Mark McLachlin

Print Name

CEO

Title

[CONTRACTOR]: J & L Transport Services Inc

Signature

Jessy Olson

Print Name

President

Title

Initial Here: _____

APPENDIX A

IDENTIFICATION OF EQUIPMENT

	Make	Year	Serial No.
Tractor	International 921	2001	3HTCDAMN61N092711
Trailer			
Trailer			
Trailer			
Trailer			
Trailer			

Name of Contractor: J2L TRANSPORT SERVICES INC

Phone: 407.497 4798 Fax: _____

Address: 2459 OLIVE BRANCH WAY ORLANDO FL 32817

FID No. 593621180 or SSN: _____

I certify that the above named Contractor is the title holder or beneficial owner of the identified equipment authorized to receive payments for the use of this equipment pursuant to the terms of this Agreement.

Signature

9-21-2017
Date

Initial Here: _____

APPENDIX B

COMPENSATION

For use of Contractor's:

Straight Truck: Minimum of __65___% of adjusted gross revenue

100% fuel surcharge

Initial Here: _____

APPENDIX C

RECEIPT FOR EQUIPMENT

This Receipt is issued by Carrier to the beneficial owner J & L TRANSPORT SERVICES INC for VIN No. 3HTCDAMN6JN092711 this date for possession of the equipment pursuant to an Independent Contractor Agreement. This Receipt shall serve as compliance with 49 C.F.R. ' 376.11 as evidence of a continuing 30 day lease for Carrier to transport general commodities without exception. A copy of the original Lease is kept by Carrier at CLEARWATER LOGISTICS [address]. 3726 N. HOMEST MISHAWAKA IN 46545

Received this 21 day of SEPTEMBER, 2012 at 12:15 A.M. / P.M.

By: _____ (Authorized Agent of Carrier)

RELEASE OF EQUIPMENT (To be completed upon termination of agreement)

Independent Contractor hereby acknowledges receipt of Equipment described in this Agreement.

Hour 1215 A.M. (P.M.) Date 09-21-2012 Place _____

Independent Contractor Signature _____

Initial Here: _____

EXHIBIT 2

Owner Operator Compensation Report

Partner Driver Jessy Poison CLR100

Date Paid 6/29/2017

Shipment #	Jessy #	Date picked up	Pick up Location	Delivery Location		Payment Shipment	Misc
3222/7366617	26	5/25/17	Orlando FL	Key Largo FL		$ 500.00	
3320/7366670	27	5/30/17	Tampa FL	Tallahasee FL		$ 525.00	
3247/7366719	28	6/6/17	Orlando FL	Orlando FL		$ 200.00	
3257/7366774	29	6/13/17	Orlando FL	Columbus GA		$ 569.85	
3278/7366805	30	6/16/17	Lawrenceville GA	LongBoat Key FL		$ 775.75	
3285/7366822	31	6/20/17	Orlando FL	Jacksonville FL		$ 300.00	
					Totals	$ 2,870.60	$ -
					Total Due		$ 2,870.60

Deduction Items

Pri / Phy Ins		362.66 Mo	$91.00 week		$ 273.00	6/23 6/30 7/7
Occ / Acc Ins		$164.00 Mo	$41. week		$ 123.00	
IFTA					$ 500.00	Paid parking fine
Escrow		Max Balance $500.				
Escrow Balance		$ 500.00				
				Total Dedcution	$ 896.00	
				Total Due	$ 1,974.60	

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON	)	
Individually,	)	
and on behalf of a class of similarly situated	)	
persons,	)	**CIVIL ACTION FILE NUMBER**
	)	
Plaintiff,	)	**17EV003164**
	)	
v.	)	
KENNY MCELWANEY D/B/A	)	
MAXIMUM BOOTING CO.	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS

COMES NOW JESSY POLSON, Plaintiff in the above-styled civil action, and files this, his Motion to Strike and for Sanctions pursuant to O.C.G.A. § 15-1-3. Plaintiff's motion is based on Defendant's intentional and willful submission of a materially misleading or false Affidavit in support Defendant's pending Motion to Dismiss.

In support of this motion, Plaintiff relies on the following:

1) Plaintiff's Brief in Support of Motion to Strike and for Sanctions;

2) Affidavit of Matthew Q. Wetherington;

3) Affidavit of Robert N. Friedman;

4) October 18, 2017, Affidavit of Union City Police Chief Cassandra A. Jones;

5) Affidavit of Dennis Davenport;

6) Second Affidavit of Union City Police Chief Cassandra A. Jones;

7) All pleadings of record in the above-styled case; and

8) Any and all other evidence properly before the Court upon the hearing of this motion.

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing *PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS* to be served upon all parties in this case by United States Mail, proper postage prepaid, addressed as follows:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta. GA 30309

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons, **Plaintiff,** **v.** **KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,** **Defendant.**	**CIVIL ACTION FILE NUMBER** **17EV003164**

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO STRIKE AND FOR SANCTIONS

COMES NOW JESSY POLSON, Plaintiff in the above-styled civil action, and files this, his Brief in Support of Motion to Strike and for Sanctions, respectfully showing this the Court as follows:

INTRODUCTION

Defendant's Motion to Dismiss attached a materially false Affidavit for the sole purpose of attempting to convince this Court that Defendant has fully complied with the Union City booting ordinance. Defendant, through his counsel, drafted and filed an Affidavit of Union City Police Chief Cassandra A. Jones that falsely asserts Chief Jones, and other officers, determined that Defendant's signs contain all of the language required by Union City's booting ordinance. This Affidavit is false and misleading for two reasons. First, Chief Jones and her office have only inspected Defendant's signs for size and visibility. This distinction was clearly communicated to Defendant by Chief Jones and the City Attorney for Union City prior to Defendant submitting the Affidavit. Second, Defendant's signs do not contain the language required by the ordinance. Defendant and his counsel have confirmed this fact numerous times in communications with Plaintiff's counsel. Nonetheless, despite actual knowledge that: (1)

Defendant's signs do not contain the language required by the ordinance; and (2) Chief Jones' inquiry was limited to the size and visibility of Defendant's signs – not the language – Defendant drafted and filed a false Affidavit with the Court. The willful mischaracterization of material facts to gain an unfair advantage in a lawsuit should not be tolerated by this Court.

STATEMENT FACTS

A. Defendant's Signs Do Not Comply with the Union City Ordinance

This lawsuit arises out of Defendant's unlawful booting of Plaintiff's truck at the Walmart Supercenter parking located at, or around, 4735 Jonesboro Rd, Union City, GA 30291 (the "Walmart Supercenter"). (Pl's Comp, ¶¶ 12-19; Pl's Amended Comp., ¶¶ 12-19). The only legal authorization for vehicle immobilization within Union City is provided by municipal ordinance (City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28).[1] (Pl's Comp, ¶¶ 4-8; Pl's Amended Comp., ¶¶ 4-8). Thus, the most important issue in this case is whether Defendant's signs completely comply with the ordinance. Plaintiff's lawsuit alleges that, at the location where Defendant booted Plaintiff's truck, and at all other locations where Defendant immobilizes vehicles in Union City, Defendant's signs do not comply with the Union City booting ordinance. (Pl's Comp, ¶¶ 11-19; Pl's Amended Comp., ¶¶ 11-19). Specifically, Plaintiff alleges that Defendant's signs:

a. Do not contain a statement that cash, checks, credit cards, and debit cards are accepted for payment;

b. Do not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards; and

c. Do not contain the name and address of the entity that hired the vehicle immobilization service or company.

[1] A true and accurate copy of Union City's vehicle immobilization ordinance is attached to Plaintiff's Request for Judicial Notice of City Ordinance, filed contemporaneously with Plaintiff's Motion to Strike and for Sanctions.

(Pl's Comp, ¶¶ 17-19; Pl's Amended Comp., ¶¶ 17-19).

After Plaintiff served Defendant with his Complaint, Defendant's counsel requested that Plaintiff dismiss his lawsuit based on Defendant's representation that he had additional signs at the Walmart Supercenter that comply with the Union City booting ordinance. (Affidavit of Matthew Q. Wetherington, ¶ 5, attached hereto as Exhibit A). As evidence of this, Defendant's counsel provided several pictures of the following signs:

(Wetherington Aff., ¶¶ 5-6).

Upon review, Plaintiff's counsel explained that the signs in question were clearly altered with labeling tape,[2] and that, even if these exact signs were at the Walmart Supercenter when Plaintiff's truck was booted, the signs **still** do not comply with Union City's booting ordinance as they are missing mandatory payment language. (Wetherington Aff., ¶ 7; Affidavit of Robert N.

[2] On the left sign, "NO ADDITIONAL FEES APPLY FOR DEBIT OR CREDIT CARDS" was added. On the right sign, the name of the parking lot owner, address of the booting company, and payment information was added.

Friedman, ¶ 7, attached hereto as Exhibit B); Union City Code of Ordinances, Chapter 10, Article I, § 10-28(b)(2)(e) ("It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle … unless the following conditions are met … A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards."). In recognition that the signs were missing this required language, Defendant's counsel alleged that the omission was not actionable:

> For instance, if you are complaining that the debit or credit card language was missing, that's only a claim if someone was charged a fee for that. There is no claim absent harm that flows from the alleged violation….

(Wetherington Aff., ¶ 8; Friedman Aff., ¶ 8).

Again, Plaintiff's counsel stated that strict compliance with the Union City booting ordinance is a condition precedent to lawfully boot vehicles in Union City and, based on the plain language of the ordinance, the "failure to comply with **any** portion of the ordinances renders the booting unlawful." (Friedman, Aff., ¶ 9). Therefore, as of August 31, 2017, although Defendant disputed whether the violation was actionable, Defendant's counsel unquestionably knew that Defendant's signage at the Walmart Supercenter did not contain all of the **language** required by the ordinance. (Wetherington Aff., ¶ 8; Friedman Aff., ¶¶ 8-9).

B. Defendant Obtained a Materially False Affidavit from Chief Jones

On October 20, 2017, Defendant filed his Motion to Dismiss, contending, in part, that the "Chief of Police of Union City … has approved of Plaintiff s signage as being in compliance with the Ordinance." (Defendant's Brief in Support of Motion to Dismiss, p. 2). To support this claim, Defendant attached the October 18, 2017, Affidavit of Union City Police Chief Cassandra A. Jones. (Exhibit B to Defendant's Motion to Dismiss). The October 18, 2017, Affidavit of Chief Jones alleges that on January 10, 2017, Chief Jones and Captain Gloria Hodgson inspected

Defendant's signage "at the Walmart Supercenter," and "determined that the signage was in compliance with the Booting Ordinance…." (Jones Aff., ¶ 5). The October 18, 2017, Affidavit of Chief Jones also states that she "confirmed that the Union City Code Enforcement … has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance." (Jones Aff., ¶ 7).

Considering that Defendant's signs at the Walmart Supercenter are indisputably missing required language, Plaintiff's counsel contacted Chief Jones and Dennis Davenport, City Attorney for Union City, to understand why Chief Jones had signed an obviously false sworn statement. (Friedman Aff., ¶¶ 10-22; Wetherington Aff., ¶¶ 9-14). Davenport stated that, prior to October 18, 2017, Defendant's counsel had contacted him to discuss Plaintiff's lawsuit. (Affidavit of Dennis Davenport, ¶ 5, attached hereto as Exhibit C). Davenport informed Defendant's counsel that Chief Jones had inspected Defendant's signs on, or about, January 10, 2017, due to concerns from the Mayor and City Council that booting signage in Union City was "too small to be effective." (Davenport Aff., ¶ 6). Davenport provided Defendant's counsel with two memoranda that documented these concerns, and Chief Jones' findings regarding signage size. (Davenport Aff., ¶ 7). Chief Jones personally told Defendant's counsel that her "inspection of the signage on January 10, 2017, was limited to determining if the signs were visible, provided notice that booting occurred on the property, and were of sufficient size." (Second Affidavit of Chief Jones, ¶ 6, attached hereto as Exhibit D).

Defendant's counsel did not disclose to Davenport that Plaintiff's lawsuit alleged that Defendant's signs were missing required **language**. (Davenport Aff., ¶ 8). Chief Jones and Davenport never told Defendant's counsel that Chief Jones, or anyone else with the Union City Police Department, had inspected Defendant's signs to ensure they contained all of the **language**

required by the Union City booting ordinance. (Davenport Aff., ¶ 9; Second Jones Aff., ¶ 8). The October 18, 2017, Affidavit of Chief Jones, prepared by Defendant's counsel, was reviewed and approved by Davenport because he was led to believe the Affidavit was only documenting that Defendant's signs "met the minimum size requirements." (Davenport Aff., ¶ 10).

When Chief Jones was made aware of the context in which her Affidavit was presented to the Court, Chief Jones agreed to submit a second Affidavit explaining that she expressly told Defendant that her inspection was limited to whether the signs were "visible […] and were of sufficient size." (Second Jones Aff., ¶ 6). Chief Jones stated that her October 18, 2017, Affidavit was NOT intended to imply that she had made any "determination regarding whether the specific language contained on the signage … complied with all of the conditions imposed by the Union City Booting Ordinance." (Second Jones Aff., ¶ 9). Additionally, Chief Jones expressly withdrew any and all allegations which even suggest that any of Defendant's signs: (1) contain all of the language required by the ordinance; and (2) are in full compliance with the ordinance. (Second Jones Aff., ¶¶ 10-11).

C. Defendant Confirmed his Intent to Rely on a False Affidavit

To verify that there was no misunderstanding or inadvertent phrasing of Chief Jones' October 18, 2017, Affidavit, Plaintiff's counsel requested that Defendant's counsel confirm in writing that Chief Jones told him "that the **language** on *all* of the signs that they reviewed are in full compliance with the ordinance." (Wetherington Aff., ¶ 15). Defendant's counsel affirmed that Chief Jones told him that the **language** on all of Defendant's signs complied with the ordinance. (Wetherington Aff., ¶ 16). Defendant's counsel further alleged that the October 18, 2017, Affidavit of Chief Jones "defeats" Plaintiff's case, and that Plaintiff should "move on" based on "how hard" Defendant's counsel litigates. *Id*. Accordingly, despite Defendant's

knowledge that: (1) Plaintiff's lawsuit is entirely about language missing from Defendant's signs; (2) Defendant's signs are missing required language; and (3) Defendant's signs were only previously inspected for size, Defendant, through his counsel, intentionally drafted and submitted a materially false Affidavit to mislead this Court. Such misconduct cannot be condoned and must be sanctioned.

LEGAL STANDARD

The intentional submission of false or misleading statements to the Court is sanctionable conduct under O.C.G.A. § 9-15-14 . *Century Center at Braselton LLC v. Town of Braselton*, 285 Ga. 380, 381 (2009) (*upholding sanctions where counsel* "knowingly and willfully presented an inaccurate and false survey in an effort to defraud the court, subvert justice, and gain an unfair advantage…."); *see also Huffman v. Armenia*, 284 Ga. App. 822, 828–29, 645 S.E.2d 23, 28 (2007) (*affirming award of $32,000 in fees under O.C.G.A. § 9-15-14 for* "[A]ttorneys' actions in making false statements of material fact in briefs filed in this Court…."). Moreover, "the trial court may impose a harsh sanction, including the striking of … pleadings and the barring of the introduction of supporting evidence, because of the inherent power of the trial court who is charged with the efficient clearing of cases upon the court's docket." *Bayless v. Bayless*, 280 Ga. 153, 155, 625 S.E.2d 741, 743 (2006); *see also* O.C.G.A. § 15-1-3 ("Every court has power … [t]o compel obedience to its judgments, orders, and process … [and] control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto."). The Court of Appeals will not reverse a trial court's imposition of sanctions for the presentation of a false or misleading affidavit unless there has been a clear abuse of discretion. *Malloy v. Cauley*, 169 Ga. App. 623, 624, 314 S.E.2d 464, 465 (1984).

In addition to the Court's power to "control the furtherance of justice" under O.C.G.A. § 15-1-3, Georgia's summary judgment statute expressly contemplates sanctions for submitting false affidavits. By submitting the October 18, 2017, Affidavit of Chief Jones, and the Affidavit of Defendant, Defendant's Motion to Dismiss introduced facts not included in the pleadings, converting Defendant's motion into a motion for summary judgment subject to O.C.G.A. § 9-11-56. *See* O.C.G.A. § 9-11-12(b) ("If, on a motion to dismiss … matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56."). O.C.G.A. § 9-11-56(g) provides that:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court **shall** forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.

Id. (emphasis added); *Malloy* 169 Ga. App. at 624 ("Appellant contends that the trial court erred by … imposing the sanction of attorney fees and expenses … the trial court's action was fully warranted based upon appellant's presentation of an affidavit containing a statement she knew to be false.").

Here, because Defendant submitted the October 18, 2017, Affidavit of Chief Jones to this Court with full knowledge that the allegations contained therein were materially misleading or false, the Court should: (1) strike the Affidavit to prevent Defendant from profiting from his misconduct; (2) order Defendant, and Defendant's counsel, to pay Plaintiff's attorney's fees incurred in filing this motion and in responding to Defendant's Motion to Dismiss; (3) issue an evidentiary sanction precluding Defendant from contesting Plaintiff's claim that all of Defendant's signs fail to comply with the ordinance; and (4) issue a show cause order to

determine what additional sanctions should be issued, including striking Defendant's Answer. Although harsh, such sanctions are necessary to deter such flagrant unprofessional conduct. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L. Ed. 2d 747 (1976) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.").

ARGUMENT AND CITATION OF AUTHORITY

Though there are not many reported cases involving the intentional submission of false or misleading affidavits, the case of *City of Griffin v. Jackson*, 239 Ga. App. 374, 520 S.E.2d 510 (1999), is directly on point. In *Jackson*, plaintiff filed suit against the "City of Griffin for injuries she allegedly sustained when her automobile collided with a police vehicle…." *Id.* at 374-75. At issue were "photographs of the collision scene" taken by "Gail Burel Mullins, an investigator for the Griffin Police Department." *Id.* at 375. Plaintiff requested these photos in discovery, the photos were never produced, plaintiff moved to compel, and the trial court ordered the city to produce the photos. *Id.* The city then moved for a protective order, claiming it could not locate the photos. *Id.* In support of this motion, the city "submitted affidavits from Chief of Police Armand Capeau and Corporal James Landham stating that they had performed a diligent search for the photographs but could not find them." *Id.*

When it was later determined through depositions that the photos were at one time in the police department's possession, the trial court struck the city's answer and the city appealed. *Id.* at 376. On appeal, the Georgia Court Appeals upheld the trial court's ruling, in part, based on the finding that the city provided "misleading affidavits that mischaracterized the nature of the

city's investigation and that failed to disclose relevant facts known to the city, in an attempt to obtain a protective order…." *Id*. at 382. The court held that such conduct was "sufficient to demonstrate that the city acted with conscious indifference to the consequences," and that, based on these facts, "the trial court did not abuse its discretion in striking the city's pleadings." *Id*.

In the instant case, as in *Jackson,* Defendant obtained and submitted an affidavit from a police chief that mischaracterized the nature of a prior police investigation, and failed to disclose materially relevant facts known to Defendant. Defendant was informed by both Chief Jones and Davenport that the Union City Police Department's January 10, 2017, investigation was limited to the size and visibility of Defendant's signage. (Davenport Aff., ¶ 6; Second Jones Aff., ¶ 6). The October 18, 2017, Affidavit obtained and submitted by Defendant omits this key fact, and contains the substantially broader claim that Chief Jones, and other officers, "determined that the signage was in compliance with the Booting Ordinance…." (Jones Aff., ¶ 5). Just as in *Jackson*, Defendant used this misleading Affidavit to support a motion intended to give Defendant an advantage in the case, thereby undermining the integrity of the Court. This was not a mistake or a misunderstanding by Defendant or Defendant's counsel. The Affidavit was carefully worded to deceive Chief Jones, Davenport, Plaintiff, and this Court.

As stated above, Defendant knew that: (1) Plaintiff's primary allegation is that Defendant's signs are missing required language; and (2) Defendant's signs are in fact missing required payment language. (Wetherington Aff., ¶¶ 7-8; Friedman Aff., ¶¶ 7-9). That Defendant had this information, and failed to disclose it to Chief Jones and Davenport, establishes that Defendant's mischaracterization of Chief Jones' prior investigation was willful. (Davenport Aff., ¶ 8). Any allegation that this was some misunderstanding is baseless. At the time Defendant obtained the October 18, 2017, Affidavit, Defendant's counsel spoke with both the

City Attorney and Chief Jones to determine the extent of Chief Jones' prior investigation of Defendant's signs. (Davenport Aff., ¶¶ 5-9; Second Jones Aff., ¶¶ 4-8). Both Mr. Davenport and Chief Jones have provided sworn statements documenting their conversations with Defendant's counsel. *Id.* When given an opportunity to clarify his intent, Defendant's counsel reiterated the false statements contained in the October 18, 2017, Affidavit and offered grandstanding comments about "how hard" he litigates. (Wetherington Aff., ¶¶ 15-16). Consequently, because Defendant, through his counsel, has willfully and unrepentantly obtained and submitted a materially misleading affidavit for the express purpose of deceiving this Court, the Court should issue appropriate sanctions.

Such sanctions should at the very least include striking the October 18, 2017, Affidavit of Chief Jones to ensure that Defendant does not benefit from his misconduct. As an additional sanction, since Defendant attempted to defraud this Court with an Affidavit that falsely alleges Defendant's signs fully comply with the ordinance, an evidentiary sanction prohibiting Defendant from challenging Plaintiff's contention that all of Defendant's signs fail to comply with the ordinance is fitting. Because the facts and circumstances surrounding the October 18, 2017, Affidavit of Chief Jones show that it was offered in bad faith, Plaintiff also requests that the Court order Defendant, and Defendant's counsel, to pay Plaintiff's attorney's fees incurred in filing this motion, and in responding to Defendant's Motion to Dismiss pursuant to either O.C.G.A. § 9-11-56(g) or O.C.G.A. § 9-15-14. Lastly, as Defendant's actions were willful, the Court should issue a show cause order to determine what additional sanctions should be issued, including striking Defendant's Answer.

CONCLUSION

WHEREFORE, based upon the above reasons, Plaintiff respectfully requests that his

Motion to Strike and for Sanctions be GRANTED and that the Court:

1) Strike the October 18, 2017, Affidavit of Chief Jones;
2) Issue an evidentiary sanction precluding Defendant from contesting Plaintiff's claim that all of Defendant's signs fail to comply with City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28;
3) Order Defendant, and Defendant's counsel, to pay all attorney's fees incurred by Plaintiff in filing this motion, and in responding to Defendant's Motion to Dismiss under either O.C.G.A. § 9-11-56(g) or O.C.G.A. § 9-15-14; and
4) Issue a show cause order to determine what additional sanctions should be issued, including striking Defendant's Answer.

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing *PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO STRIKE AND FOR SANCTIONS* to be served upon all parties in this case by United States Mail, proper postage prepaid, addressed as follows:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta. GA 30309

This 15th day of November, 2017.

WERNER WETHERINGTON, PC

/s/ Matthew Q. Wetherington
MICHAEL L. WERNER
Georgia Bar No. 748321
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	**CIVIL ACTION FILE NUMBER**
Plaintiff,	)	**17EV003164**
v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

STATE OF GEORGIA }

COUNTY OF FULTON }

AFFIDAVIT OF MATHEW WETHERINGTON

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Mathew Wetherington who, after being duly sworn, stated under oath as follows:

1.

My name is Mathew Wetherington. I am over eighteen (18) years of age and under no legal disability.

2.

I am duly licensed to practice law in the State of Georgia. My Georgia Bar Number is 339639. I am an attorney at Werner Wetherington, P.C.

3.

I have personal knowledge of the facts stated in this Affidavit and know them to be true and correct.

4.

I am counsel of record for Plaintiff Jessy Polson in the above-referenced matter.

5.

On, or about, August 21, 2017, attorney for Defendant Kenny McElwaney, Jason Bell, contacted me regarding Plaintiff's lawsuit. Mr. Bell requested that Plaintiff dismiss his lawsuit against Defendant based on allegations that Defendant had additional signs at the Walmart Supercenter (4735 Jonesboro Rd, Union City, GA 30291) that comply with the Union City booting ordinance. (True and accurate copies of my emails to and from attorney Jason Bell on August 21, 2017, are attached hereto as Exhibit 1).

6.

As evidence of this allegation, Mr. Bell provided several pictures of the following signs:

(*See* Ex. 1).

7.

Upon review of the signs provided by Mr. Bell, I, and my associate Robert N. Friedman, each contacted Mr. Bell and explained that the signs in question were clearly altered, and that, even if these exact signs were at the Walmart Supercenter when Plaintiff's truck was booted, the signs **still** do not comply with Union City booting ordinance as they are missing required payment language.

8.

On August 31, 2017, in recognition that the signs were missing this required language, Mr. Bell alleged that the omission of this payment language was not actionable. (A true and accurate copy of attorney Jason Bell's August 31, 2017, email is attached hereto as Exhibit 2).

9.

After receiving Defendant's Motion to Dismiss, on October 30, 2017, I met with Union City Police Chief Cassandra A. Jones to discuss her October 18, 2017, Affidavit that was offered in support of Defendant's Motion to Dismiss.

10.

Chief Jones informed me that the October 18, 2017, Affidavit was prepared by attorney Jason Bell.

11.

Chief Jones stated that, before executing the October 18, 2017, Affidavit, she explained to attorney Jason Bell that her inspection of Defendant's signage on January 10, 2017, was limited to determining if the signs were visible, provided notice that booting occurred on the property, and were of sufficient size.

12.

Chief Jones stated that, she never told attorney Jason Bell that she, or anyone else with the Union City Police Department, determined that the signage she inspected on January 10, 2017, including the signage at the Walmart Supercenter, contained all of the language required by the Union City booting ordinance.

13.

Chief Jones stated that, she never intended for her October 18, 2017, Affidavit to imply that she made any determination regarding whether the specific language contained on the signage at these parking lots, including the signage at the Walmart Supercenter, complied with all of the conditions imposed by the Union City Booting Ordinance.

14.

Chief Jones agreed to sign a second Affidavit, withdrawing any allegations that she, or anyone else with the Union City Police Department, determined that any of Defendant's signs: 1) contained all of the language required by the Union City booting ordinance; and 2) were in full compliance with the Union City booting ordinance.

15.

As these representations from Chief Jones conflicted with the statements contained in Defendant's Motion to Dismiss, and the October 18, 2017, Affidavit of Chief Jones offered in support of Defendant's Motion to Dismiss, I emailed Mr. Bell on October 31, 2017, and requested that Mr. Bell confirm that he intended to represent to the Court that Chief Jones told him that the language on *all* of Defendant's signs that she reviewed are in full compliance with the ordinance. (A true and accurate copy of my October 31, 2017, email to attorney Jason Bell is attached hereto as Exhibit 3).

16.

On November 1, 2017, Mr. Bell responded to my email and affirmed that Chief Jones told him that the language on all of Defendant's signs complied with the ordinance. Mr. Bell further alleged that the October 18, 2017, Affidavit of Chief Jones "defeats" Plaintiff's case, and that Plaintiff should "move on" based on "how hard" Mr. Bell litigates. (A true and accurate copy of attorney Jason Bell's November 1, 2017, email is attached hereto as Exhibit 4).

FURTHER AFFIANT SAYETH NAUGHT.

MATHEW WETHERINGTON

Sworn to and subscribed before me

this 15th day of November, 2017.

TARISHA WIMBLEY NOTARY PUBLIC HENRY COUNTY, GA

Notary Public

My Commission Expires: 8/11/19

EXHIBIT 1

WERNER WETHERINGTON

Matt Wetherington <matt@wernerlaw.com>

FW: McElwaney Stipulation

Matt Wetherington <matt@wernerlaw.com> Mon, Aug 21, 2017 at 4:03 PM
To: "Bell, Jason" <JBELL@sgrlaw.com>
Cc: mike <mike@wernerlaw.com>, Kevin Patrick <kevin@patricktriallaw.com>, Robert Friedman <robert@wernerlaw.com>

Sounds great, and thanks. You can file with my consent.

-Matt Wetherington

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

On Mon, Aug 21, 2017 at 3:56 PM, Bell, Jason <JBELL@sgrlaw.com> wrote:

> Dear Matt:
>
> After looking at my schedule, I pushed the response date out a little further until September 22. Please let me know if that is agreeable, and whether I can sign the stipulation on your behalf.
>
> On the signage, I understand that the signs that are posted at the entrance have not been changed since the filing of the lawsuit, but some of the signs inside the lot have been removed. If you see some issue with that, please let me know.
>
> I'll e-mail you the pictures in a minute, please let me know your thoughts after you have reviewed.
>
> I am thinking your photographer just missed the entrance signs when you took them before the lawsuit. If you think differently, please let us know.
>
> I'll e-mail you the pictures in a minute, please let me know your thoughts after you have reviewed.
>
> Thank you.
>
> Jason

JASON S. BELL | **Attorney at Law**

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

From: Shorter, Greg
Sent: Monday, August 21, 2017 3:49 PM
To: Bell, Jason
Subject: McElwaney Stipulation

GREGORY L. SHORTER | **Legal Secretary**

404-815-3500, x53104 *phone*
404-815-3509 *fax*
www.sgrlaw.com
gshorter@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

WERNER WETHERINGTON

Matt Wetherington <matt@wernerlaw.com>

McElwaney Wal-Mart Signs

Bell, Jason <JBELL@sgrlaw.com> Mon, Aug 21, 2017 at 3:57 PM
To: Matt Wetherington <matt@wernerlaw.com>, mike <mike@wernerlaw.com>, Kevin Patrick <kevin@patricktriallaw.com>, Robert Friedman <robert@wernerlaw.com>
Cc: "Bell, Jason" <JBELL@sgrlaw.com>

Matt:

I understand these are the Walmart signs. Thank you.

Jason

JASON S. BELL | **Attorney at Law**

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SGR SMITH, GAMBRELL & RUSSELL, LLP

7 attachments

IMG_5114 (2).JPG
141K

IMG_5115.JPG
124K

IMG_5116 (2).JPG
102K

IMG_5118 (2).JPG
97K

IMG_5119 (2).JPG
105K

IMG_5121.JPG
101K

IMG_5124.JPG
136K

EXHIBIT 2

WERNER WETHERINGTON

Matt Wetherington <matt@wernerlaw.com>

Legal authority

Bell, Jason <JBELL@sgrlaw.com> Thu, Aug 31, 2017 at 5:33 PM
To: Robert Friedman <robert@wernerlaw.com>, Matt Wetherington <matt@wernerlaw.com>
Cc: "Bell, Jason" <JBELL@sgrlaw.com>

Dear Robert and Matt:

First, my understanding is that the signs were not altered after the lawsuit, and in fact, in the pictures I see some signs with tape and others without. The signs do fade over time, and those areas that have faded have tape applied so you can read that portion. Are you seeing something different than that? Also, my understanding is that you have no evidence to contradict that since whoever took the pictures for you originally missed all of these signs because they were focused on the inside of the lot.

Second, it sounds like we are at least in agreement that the allegations that there were no signs referencing the ordinance as stated in the complaint are incorrect. What is wrong with the signs in the pictures that I sent you?

Unless any alleged error traces directly to your client's alleged damages, then there is no case. I think I have U.S. Supreme Court authority on that issue. For instance, if you are complaining that the debit or credit card language was missing, that's only a claim if someone was charged a fee for that. There is no claim absent harm that flows from the alleged violation. So if you can clarify what is wrong, I can send you the authority.

As for standing, I understand your theory to be that some property was taken unlawfully, but your client did not own the property. I understand your theory is that your client was damaged, but he did not pay the fee. My client boots commercial vehicles, and in fact, the bill in this case was made out to Clear Water Logistics not your client. There is absolutely no standing here, and it's not a close call. Clear Water Logistics' vehicle was booted, and it paid to have the boot removed. The fact that your client was the driver who placed the vehicle there is literally irrelevant. If your client's employer charges him for the fee that it paid, that's between them. Your client was not charged a fee, and his employer did not front him the money to pay the fee. Respectfully, I would ask you dismiss on this basis alone. Have you looked at the receipt?

Based upon my last call with Matt, I understand that your position is that booting is generally illegal in the absence of a city ordinance permitting it. I have asked for that authority a couple of times, but have not received anything. Can you please send me that so I can look at it? Thank you.

Jason

From: Robert Friedman [mailto:robert@wernerlaw.com]
Sent: Thursday, August 31, 2017 4:23 PM
To: Matt Wetherington; Bell, Jason
Subject: Re: Legal authority

Jason, I will address the two incidents involving your client and give my current understanding of each situation.

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

EXHIBIT 3

WERNER WETHERINGTON

Matt Wetherington <matt@wernerlaw.com>

Maximum Booting

Matt Wetherington <matt@wernerlaw.com> Tue, Oct 31, 2017 at 11:31 AM
To: "Bell, Jason" <JBELL@sgrlaw.com>

Jason,

I hope this email finds you well. I'm writing on two issues. First, what is the status of the acknowledgement of service in the Newnan case? I need a response today, if possible. Second, I have reviewed your motion to dismiss in the Union City case. It is obviously concerning to us and we are evaluating our next steps. Can you confirm that the Chief of Police told you that the language on *all* of the signs that they reviewed are in full compliance with the ordinance?

Can you help me understand your position on the full scope and implications of that affidavit? I don't to waste time on this case if it makes sense to just pursue the Newnan case.

Respectfully yours,

-Matt Wetherington

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

EXHIBIT 4

WERNER WETHERINGTON

Matt Wetherington <matt@wernerlaw.com>

Maximum Booting

Bell, Jason <JBELL@sgrlaw.com> Wed, Nov 1, 2017 at 5:04 PM
To: Matt Wetherington <matt@wernerlaw.com>
Cc: "Bell, Jason" <JBELL@sgrlaw.com>

Matt:

Yes, she said she looked at all of the lots, and that's what the Affidavit says. I don't get the second question except to say, yes I think the Affidavit defeats your case. Yes, I think you are wasting your time with that case, and should move on.

Can you send me the Affidavit again. Sorry about the delay on that. With respect to the second case, I would also suggest you move on. I think you can see how hard I'll litigate. I have an interest in this case, and now I'm hooked. I'm telling you he has little assets, and if you win, you'll just force him into bankruptcy and you won't recover. Finally, since he boots commercial vehicles, your class would be businesses who aren't really going to care.

I think you can tell now that I'm a straight shooter at this point. Go after the other fish.

Jason

JASON S. BELL | Attorney at Law

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SGR SMITH, GAMBRELL & RUSSELL, LLP

From: Matt Wetherington [mailto:matt@wernerlaw.com]
Sent: Wednesday, November 01, 2017 4:50 PM
To: Bell, Jason
Subject: Re: Maximum Booting

CAUTION: This email is from an external source. Do not click links or attachments unless it's from a verified sender.

[Quoted text hidden]

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	**CIVIL ACTION FILE NUMBER**
Plaintiff,	)	**17EV003164**
v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

STATE OF GEORGIA }

COUNTY OF FULTON }

AFFIDAVIT OF ROBERT N. FRIEDMAN

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Robert Friedman who, after being duly sworn, stated under oath as follows:

1.

My name is Robert Friedman. I am over eighteen (18) years of age and under no legal disability.

2.

I am duly licensed to practice law in the State of Georgia. My Georgia Bar Number is 945494. I am an attorney at Werner Wetherington, P.C.

3.

I have personal knowledge of the facts stated in this Affidavit and know them to be true and correct.

4.

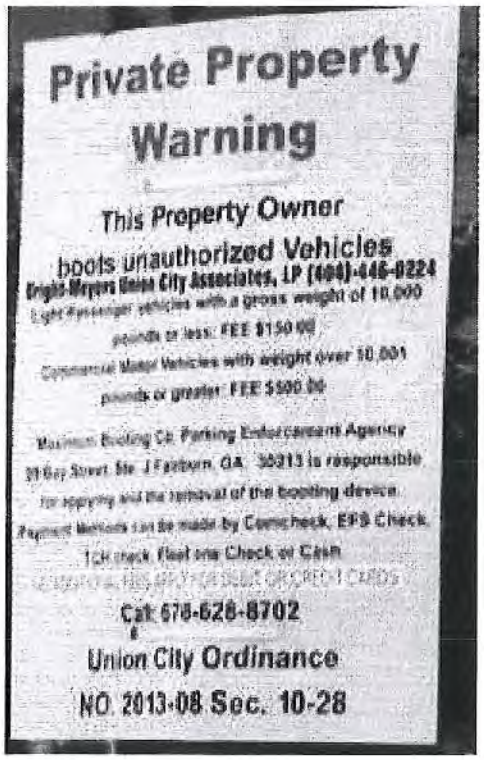
I am counsel of record for Plaintiff Jessy Polson in the above-referenced matter.

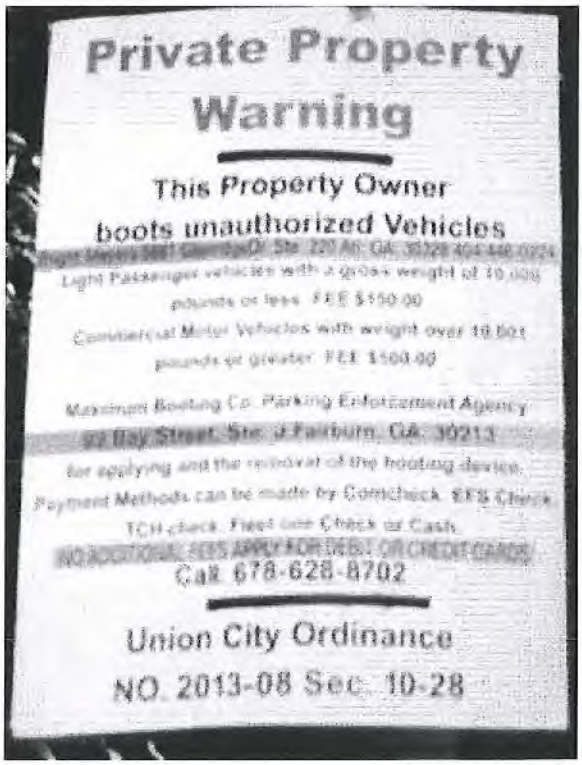
5.

On, or about, August 21, 2017, I spoke with attorney for Defendant Kenny McElwaney, Jason Bell, regarding Plaintiff's lawsuit. Mr. Bell requested that Plaintiff dismiss his lawsuit against Defendant based on allegations that Defendant had additional signs at the Walmart Supercenter (4735 Jonesboro Rd, Union City, GA 30291) that comply with the Union City booting ordinance.

6.

As evidence of this allegation, Mr. Bell provided several pictures of the following signs:





(A true and accurate copy of attorney Jason Bell's August 21, 2017, email is attached hereto Exhibit 1).

7.

Upon review of the signs provided by Mr. Bell, I contacted Mr. Bell and explained that the signs in question were clearly altered, and that, even if these exact signs were at the Walmart

Supercenter when Plaintiff's truck was booted, the signs **still** do not comply with Union City booting ordinance as they are missing required payment language. (A true and accurate copy of my August 31, 2017, email to attorney Jason Bell is attached hereto as Exhibit 2).

8.

On August 31, 2017, in recognition that the signs were missing this required language, Mr. Bell alleged that the omission of this payment language was not actionable. (A true and accurate copy of attorney Jason Bell's August 31, 2017, email is attached hereto as Exhibit 3).

9.

Again, I told Mr. Bell that strict compliance with the Union City booting ordinance is a condition precedent to lawfully boot vehicles in Union City and, based on the plain language of the ordinance, the "failure to comply with any portion of the ordinances renders the booting unlawful." (A true and accurate copy of my second August 31, 2017, email to attorney Jason Bell is attached hereto as Exhibit 4).

10.

After receiving Defendant's Motion to Dismiss, on October 25, 2017, I contacted Union City Police Chief Cassandra A. Jones and attorney for Union City, Dennis Davenport, to discuss Chief Jones' October 18, 2017, Affidavit that was offered in support of Defendant's Motion to Dismiss.

11.

I provided Mr. Davenport with a certified copy of the Union City booting ordinance and pictures of Defendant's signs at the Walmart Supercenter, and explained that I had concerns that Chief Jones' October 18, 2017, Affidavit contained what appeared to be false statements.

12.

Mr. Davenport confirmed that, prior to October 18, 2017, attorney Jason Bell had

contacted him to discuss Plaintiff's lawsuit.

13.

Mr. Davenport told me that he informed attorney Jason Bell that Chief Jones had inspected Defendant's signs on, or about, January 10, 2017, due to concerns from the Mayor and City Council that booting signage in Union City was "too small to be effective."

14.

Mr. Davenport told me that he provided attorney Jason Bell with two memoranda that documented these concerns, and Chief Jones' findings regarding signage size.

15.

Mr. Davenport told me that attorney Jason Bell never mentioned to him that Plaintiff's lawsuit alleged that Defendant's signs were missing required language.

16.

Mr. Davenport told me that he never told attorney Jason Bell that Chief Jones, or anyone else with the Union City Police Department, had inspected Defendant's signs to ensure they contained all of the language required by the Union City booting ordinance.

17.

Mr. Davenport told me that the October 18, 2017, Affidavit of Chief Jones, prepared by attorney Jason Bell, was reviewed and approved by him because he believed the Affidavit was only confirming that Defendant's signs "met the minimum size requirements."

18.

On October 30, 2017, I met with Union City Police Chief Cassandra A. Jones to discuss her October 18, 2017, Affidavit that was offered in support of Defendant's Motion to Dismiss.

19.

Chief Jones stated that, before executing the October 18, 2017, Affidavit, she explained

to attorney Jason Bell that her inspection of Defendant's signage on January 10, 2017, was limited to determining if the signs were visible, provided notice that booting occurred on the property, and were of sufficient size.

20.

Chief Jones stated that, she never told attorney Jason Bell that she, or anyone else with the Union City Police Department, determined that the signage she inspected on January 10, 2017, including the signage at the Walmart Supercenter, contained all of the language required by the Union City booting ordinance.

21.

Chief Jones stated that, she never intended for her October 18, 2017, Affidavit to imply that she made any determination regarding whether the specific language contained on the signage at these parking lots, including the signage at the Walmart Supercenter, complied with all of the conditions imposed by the Union City Booting Ordinance.

22.

Chief Jones agreed to sign a second Affidavit, withdrawing any allegations that she, or anyone else with the Union City Police Department, determined that any of Defendant's signs: 1) contained all of the language required by the Union City booting ordinance; and 2) were in full compliance with the Union City booting ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

ROBERT FRIEDMAN

Sworn to and subscribed before me

this 15th day of November, 2017.

Tisha Wimbley

Notary Public

My Commission Expires: 8/10/19

TARISHA WIMBLEY NOTARY PUBLIC HENRY COUNTY, GA

EXHIBIT 1

WERNER WETHERINGTON

Robert Friedman <robert@wernerlaw.com>

McElwaney Wal-Mart Signs

1 message

Bell, Jason <JBELL@sgrlaw.com> Mon, Aug 21, 2017 at 3:57 PM
To: Matt Wetherington <matt@wernerlaw.com>, mike <mike@wernerlaw.com>, Kevin Patrick <kevin@patricktriallaw.com>, Robert Friedman <robert@wernerlaw.com>
Cc: "Bell, Jason" <JBELL@sgrlaw.com>

Matt:

I understand these are the Walmart signs. Thank you.

Jason

JASON S. BELL | Attorney at Law

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

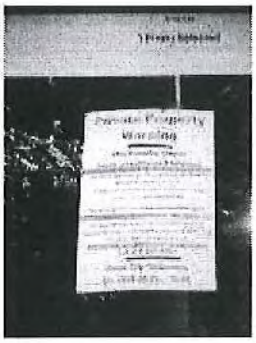
SGR SMITH, GAMBRELL & RUSSELL, LLP

7 attachments

IMG_5114 (2).JPG
141K

IMG_5115.JPG
124K

IMG_5116 (2).JPG
102K



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IMG_5119 (2).JPG
105K

IMG_5121.JPG
101K

IMG_5124.JPG
136K

EXHIBIT 2

WERNER WETHERINGTON

Robert Friedman <robert@wernerlaw.com>

Fwd: Legal authority

Robert Friedman <robert@wernerlaw.com> Thu, Aug 31, 2017 at 4:23 PM
To: Matt Wetherington <matt@wernerlaw.com>, JBELL@sgrlaw.com

Jason, I will address the two incidents involving your client and give my current understanding of each situation.

I will also address your allegations regarding standing.

Union City

For the booting that took place in Union City, on June 15, 2017, involving Jessy Polson, your client booted Mr. Polson in violation of City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

I appreciate you providing us with copies of the signs located at 4735 Jonesboro Rd., however, those signs have clearly been altered.

You can see the tape on the signs.

I have personally traveled to this parking lot and inspected these signs.

There is no mistaking the fact that after the signs were erected, they were materially altered to include additional language.

We believe that, during the discovery process, we will obtain evidence that your client made these alterations after service of our lawsuit.

Furthermore, even if the alterations to the signs were made prior to our lawsuit, your client's signs are **still** not in compliance with City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

Your client is charging $500.00 per booting.

To do so legally, your client must **strictly** comply with City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

Newnan

For the booting that took place in Newnan, on August 16, 2017, involving Andy Miller, your client booted Mr. Miller without any legal authority.

I have confirmed that neither the City of Newnan or Coweta County have a booting ordinance.

Any booting that takes place within the City of Newnan is therefore strictly unlawful in all circumstances.

Because of the egregious nature of your client's actions in Newnan, we are considering including the property owners, the business owners, and any other entities that may have provided your client material support for his operations in Newnan as party Defendants.

When I have completed my research and identified all potentially liable parties, we will file suit.

If you would like to acknowledge service of this lawsuit let me know.

Standing

With respect to your allegations on standing, I am aware of no legal authority that suggests my clients need to own the vehicles to assert their claims.

My clients were both forced to pay money due to the booting fees imposed by your client.

As such, my clients were directly harmed by your client's acitons and have standing to assert their claims.

If you have any legal authority that suggests otherwise, I am happy to review it.

If you have any other questions, please feel free to contact me.

Robert Friedman

Werner Wetherington, PC
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404-991-3692
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com
[Quoted text hidden]

EXHIBIT 3

WERNER WETHERINGTON

Robert Friedman <robert@wernerlaw.com>

Fwd: Legal authority

Bell, Jason <JBELL@sgrlaw.com> Thu, Aug 31, 2017 at 5:33 PM
To: Robert Friedman <robert@wernerlaw.com>, Matt Wetherington <matt@wernerlaw.com>
Cc: "Bell, Jason" <JBELL@sgrlaw.com>

Dear Robert and Matt:

First, my understanding is that the signs were not altered after the lawsuit, and in fact, in the pictures I see some signs with tape and others without. The signs do fade over time, and those areas that have faded have tape applied so you can read that portion. Are you seeing something different than that? Also, my understanding is that you have no evidence to contradict that since whoever took the pictures for you originally missed all of these signs because they were focused on the inside of the lot.

Second, it sounds like we are at least in agreement that the allegations that there were no signs referencing the ordinance as stated in the complaint are incorrect. What is wrong with the signs in the pictures that I sent you?

Unless any alleged error traces directly to your client's alleged damages, then there is no case. I think I have U.S. Supreme Court authority on that issue. For instance, if you are complaining that the debit or credit card language was missing, that's only a claim if someone was charged a fee for that. There is no claim absent harm that flows from the alleged violation. So if you can clarify what is wrong, I can send you the authority.

As for standing, I understand your theory to be that some property was taken unlawfully, but your client did not own the property. I understand your theory is that your client was damaged, but he did not pay the fee. My client boots commercial vehicles, and in fact, the bill in this case was made out to Clear Water Logistics not your client. There is absolutely no standing here, and it's not a close call. Clear Water Logistics' vehicle was booted, and it paid to have the boot removed. The fact that your client was the driver who placed the vehicle there is literally irrelevant. If your client's employer charges him for the fee that it paid, that's between them. Your client was not charged a fee, and his employer did not front him the money to pay the fee. Respectfully, I would ask you dismiss on this basis alone. Have you looked at the receipt?

Based upon my last call with Matt, I understand that your position is that booting is generally illegal in the absence of a city ordinance permitting it. I have asked for that authority a couple of times, but have not received anything. Can you please send me that so I can look at it? Thank you.

Jason

From: Robert Friedman [mailto:robert@wernerlaw.com]
Sent: Thursday, August 31, 2017 4:23 PM

To: Matt Wetherington; Bell, Jason
Subject: Re: Legal authority

Jason, I will address the two incidents involving your client and give my current understanding of each situation.

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

EXHIBIT 4

WERNER WETHERINGTON

Robert Friedman <robert@wernerlaw.com>

Fwd: Legal authority

Robert Friedman <robert@wernerlaw.com> Thu, Aug 31, 2017 at 5:59 PM
To: "Bell, Jason" <JBELL@sgrlaw.com>
Cc: Matt Wetherington <matt@wernerlaw.com>

Jason, it is clear that we are not going to be able to resolve our differences through discussion.

Our positions on these issues are too far apart.

With regard to the taped portions of the signs, I personally saw these signs and I can attest to the fact that the taped portions add language that was not on the signs prior to the tape being added.

Its hard to see in pictures, but if you visit the parking lot and look the signs, it is obvious.

We will explore in discovery when the signs were altered.

As to your causation argument, we do not agree.

Union City Code of Ordinances, Chapter 10, Article I, § 10-28 provides:

It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met....

In other words, failure to comply with **any** portion of the ordinances renders the booting unlawful.

The very act of involuntary vehicle immobilization itself constitutes a number of torts including, but not limited to, conversion and false imprisonment.

Strict compliance with the ordinance is the only way a person performing involuntary vehicle immobilization may avoid civil, and possibly criminal, liability for the act.

If you are interested in researching the issue, I suggest you look at cases involving unlawful self-help.

Your client has no right to take punitive action against other citizens.

To the extent you strongly believe my client has no standing to maintain his claim, you can either provide me with case law to review or file a motion with the Court.

Absent clear legal authority that suggests your client was permitted to boot my clients, we are not going dismiss any lawsuit.

If you want to help your client, I strongly suggest you determine the existence of any available insurance coverage.

Your client was operating in Union City as a sole proprietorship for years before incorporating.

Absent some insurance coverage, it appears that your client will be personally liable for what could be substantial damages.

Robert Friedman

Werner Wetherington, PC
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404-991-3692

Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

[Quoted text hidden]

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	**CIVIL ACTION FILE NUMBER**
Plaintiff,	)	**17EV003146**
v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

STATE OF GEORGIA }
COUNTY OF FULTON }

AFFIDAVIT OF DENNIS A. DAVENPORT

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, DENNIS A. DAVENPORT, who, after being duly sworn, stated under oath as follows:

1.

My name is DENNIS A. DAVENPORT. I am over eighteen (18) years of age. I have personal knowledge of the facts stated in this Affidavit and know them to be true and correct.

2.

I am an attorney with McNally, Fox, Grant & Davenport, P.C. I am the city attorney for the city of Union City.

3.

On October 25, 2017, attorney Robert Friedman, counsel for Plaintiff Jessy Polson, contacted me to discuss the October 18, 2017, Affidavit of Union City Police Chief Cassandra A.

Jones. (A true and accurate copy of Chief Jones' October 18, 2017, Affidavit is attached hereto as Exhibit 1).

4.

I told Mr. Friedman that the October 18, 2017, Affidavit of Chief Jones was prepared by attorney Jason Bell, counsel for Defendant Kenny McElwaney.

5.

Prior to October 18, 2017, Jason Bell contacted me to discuss Plaintiff's booting lawsuit against Defendant.

6.

I informed Jason Bell that Chief Jones had inspected Defendant's signs on, or about, January 10, 2017, due to concerns from the Mayor and City Council that booting signage in Union City was too small to be effective.

7.

I provided Jason Bell with two memoranda that documented these concerns, and Chief Jones' findings regarding signage size. (True and accurate copies of the memoranda that I provided to Jason Bell are attached hereto as Exhibit 2).

8.

Jason Bell never mentioned that Plaintiff's lawsuit alleged that Defendant's signs were missing language required by the Union City booting ordinance.

9.

I never told Jason Bell that Chief Jones, or anyone else with the Union City Police Department, had inspected Defendant's signs to ensure they contained all of the language required by the Union City booting ordinance.

10.

The October 18, 2017, Affidavit of Chief Jones was reviewed and approved by me based upon my understanding that the focus for compliance by Chief Jones was whether Defendant's signs met the minimum size requirements.

FURTHER AFFIANT SAYETH NAUGHT.

DENNIS A. DAVENPORT

Sworn to and subscribed before me
this 6th day of November

Notary Public
My Commission Expires:

JODY A SILVA NOTARY PUBLIC FAYETTE COUNTY GEORGIA EXPIRES SEPT. 10, 2018

EXHIBIT 1

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

Cassandra A. Jones
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this 18 day of October, 2017.

Emma Thompson
Notary Public

My Commission Expires: 8-27-18

[NOTARY SEAL]

EMMA THOMPSON NOTARY PUBLIC FULTON COUNTY, GA EXP. Aug. 27, 2018

EXHIBIT 2

MEMORANDUM

TO: PAS

FROM: DAD

RE: UNION CITY BOOTING ORDINANCE

DATE: NOVEMBER 1, 2016

The Agenda for the Mayor and Council of Union City for its October 18, 2016 meeting contained an item relating to a review of the Booting Ordinance. When the item came up, the issue that was discussed was the signage notifying the public at large that cars will be booted. The signage, although it complies with the ordinance, apparently is too small to be effective. One issue came up with respect to the signage as it relates to the city's Sign Ordinance. I stated that these type signs may be treated differently, much like the signs on a menu board at a drive-through, because they aren't aimed at the traveling public, generally. Instead they are there to inform the captive audience already on the premises. The Mayor and Council provided general direction to staff to provide proposed amendments to the Booting Ordinance, specifically as it relates to signage. You may want to reach out with whomever the staff person would be at Union City and start this process prior to the November 15 meeting. Councilmember Mealing may want an update on this process since the October meeting.

MEMORANDUM

TO: PAS

FROM: DAD

RE: AMENDMENTS TO BOOTING ORDINANCE

DATE: JANUARY 24, 2017

The Mayor and Council for Union City met on Tuesday, January 17, 2017. Chief Jones addressed the Mayor and Council on the current state of the booting ordinance. She said that the ordinance is, more or less, providing for a sound enforcement structure. She highlighted two areas where she would like to see changes made: 1. Signage; and 2. Documentation.

As to signage, she stated that there are sufficient numbers of signs up and the signs she sees are larger than are required in our ordinance. Our ordinance requires signage of 12" x 12". She said the signs she's observing are 18" x 24". She stated the 18" x 24" signs are very noticeable and she feels that is a good size for the signs. She requested that the ordinance be amended to reflect this new minimum sign size.

The second area is one of documentation. Presuming there is no current requirement in the ordinance, she requested that the booting companies be required to provide a copy of the contract between the booting company and the property owner/manager to Union City.

Please review the booting ordinance and make the requested changes consistent with Chief's requests. There will not be a substantive agenda for February so this will reappear at the March meeting. This will need to be in to the Clerk's office on or before Noon on Monday, March 13, 2017.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of a class of similarly situated persons,	)	CIVIL ACTION FILE NUMBER
Plaintiff,	)	17EV003164
v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

SECOND AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Cassandra A. Jones, who, after being duly sworn, stated under oath as follows:

1.

My name is Cassandra A. Jones. I am over eighteen (18) years of age. I have personal knowledge of the facts stated in this Affidavit and know them to be true and accurate.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

On October 18, 2017, I signed an Affidavit prepared by attorney Jason Bell with Smith, Gambrell & Russell, LLP, counsel for Defendant Kenny McElwancy d/b/a Maximum Booting Co. A true and accurate copy of the Affidavit I signed is attached hereto as Exhibit 1.

4.

Prior to receiving the October 18, 2017, Affidavit, I told attorney Jason Bell that, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police Department, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting Co.) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where these companies conduct vehicle immobilization in Union City. This inspection included the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 (the "Walmart Supercenter").

5.

My inspection of the signs at these parking lots on January 10, 2017, was related to a request from City Council to propose amendments to the Union City Booting Ordinance, Union City Code of Ordinances, Chapter 10, Article I, § 10-28 (the "Union City Booting Ordinance").

6.

I explained to attorney Jason Bell that my inspection of the signage on January 10, 2017, was limited to determining if the signs were visible, provided notice that booting occurred on the property, and were of sufficient size.

7.

I told attorney Jason Bell that I, and Captain Gloria Hodgson, determined that the signage we inspected on January 10, 2017, including the signage at the Walmart Supercenter, was of sufficient size according to the Union City Booting Ordinance.

8.

I never told attorney Jason Bell that I, or anyone else with the Union City Police Department, determined that the signage we inspected on January 10, 2017, including the

signage at the Walmart Supercenter, contained all of the language required by the Union City Booting Ordinance.

9.

I never intended for my October 18, 2017, Affidavit to imply that I made any determination regarding whether the specific language contained on the signage at these parking lots, including the signage at the Walmart Supercenter, complied with all of the conditions imposed by the Union City Booting Ordinance.

10.

To the extent that the October 18, 2017, Affidavit I signed claims that I, or anyone else with the Union City Police Department, determined that any signs, including the signage at the Walmart Supercenter, contained all of the language required by the Union City Booting Ordinance, I withdraw all such allegations.

11.

To the extent that the October 18, 2017, Affidavit I signed claims that I, or anyone else with the Union City Police Department, determined that any signs, including the signage at the Walmart Supercenter, were in full compliance with Union City Booting Ordinance, I withdraw all such allegations.

FURTHER AFFIANT SAYETH NAUGHT.

Cassandra A. Jones

CASSANDRA A. JONES

Sworn to and subscribed before me
this 30th day of October, 2017

Emma Thompson

Notary Public

EMMA THOMPSON NOTARY PUBLIC Exp. Aug. 27, 2018 FULTON COUNTY, GA

My Commission Expires:
August 27, 2018

EXHIBIT 1

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

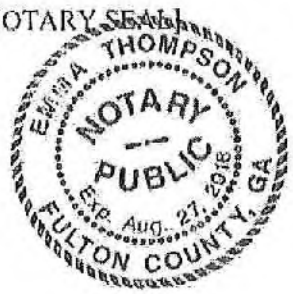
Cassandra A. Jones
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this 18 day of October, 2017.

Emma Thompson
Notary Public

My Commission Expires: 8-27-18

[NOTARY SEAL]



IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

JOINT STIPULATION EXTENDING TIME FOR DEFENDANT TO RESPOND TO PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS

COME NOW Plaintiff and Defendant, by and through their attorneys, and jointly stipulate to this Court that the time within which Defendant Kenny McElwaney d/b/a Maximum Booting Co. has to respond to Plaintiff's Motion to Strike and for Sanctions is hereby extended up, through and including, Friday, December 22, 2017.

Respectfully submitted, this 14th day of December, 2017.

PREPARED AND
STIPULATED TO BY:

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

STIPULATED TO BY:

/s/ Matthew Q. Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
(Signed with Express Permission
By Brynda Rodriguez Insley, Esq.)

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305
(404) 793-1690
Matt@WernerLaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing JOINT STIPULATION EXTENDING TIME FOR DEFENDANTS TO RESPOND TO PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

Co-Counsel for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.
Jason S. Bell, Esq.
Smith Gambrell & Russell, LLP
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, GA 30309-3592

This 14th day of December, 2017.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435
KENNETH J. BENTLEY
Georgia Bar No. 715496
Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

SECOND JOINT STIPULATION EXTENDING TIME FOR DEFENDANT TO RESPOND TO PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS

COME NOW Plaintiff and Defendant, by and through their attorneys, and jointly stipulate to this Court that the time within which Defendant Kenny McElwaney d/b/a Maximum Booting Co. has to respond to Plaintiff's Motion to Strike and for Sanctions is hereby extended up, through and including, Friday, December 29, 2017.

Respectfully submitted, this 22nd day of December, 2017.

PREPARED AND
STIPULATED TO BY:

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

STIPULATED TO BY:

/s/ Robert N. Friedman
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494
(Signed with Express Permission
By Brynda Rodriguez Insley, Esq.)

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305
(404) 793-1690
Matt@WernerLaw.com
robert@wernerlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing SECOND JOINT STIPULATION EXTENDING TIME FOR DEFENDANTS TO RESPOND TO PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

Co-Counsel for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.
Jason S. Bell, Esq.
Smith Gambrell & Russell, LLP
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, GA 30309-3592

This 22nd day of December, 2017.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435
KENNETH J. BENTLEY
Georgia Bar No. 715496
Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
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181 14th Street, Suite 200
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(404) 876-9818 (Telephone)
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kbentley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

COMES NOW, Kenny McElwaney d/b/a Maximum Booting Co. ("Defendant Mr. McElwaney") named as Defendant in the above styled civil action, by and through counsel, herein files this, his Response to Plaintiff's Motion to Strike and for Sanctions (Plaintiff's Motion), respectfully showing the Court that Plaintiff's Motion should be summarily denied as it is without any legal or factual merit and propounded in bad faith for the sole purpose of distracting the Court from the merits of the underlying Motion to Dismiss filed by the Defendant Mr. McElwaney.

I. PROCEDURAL HISTORY

1.

On June 30, 2017, Plaintiff filed the present lawsuit against Defendant Mr. McElwaney arising out of injuries allegedly sustained by him when the truck he was driving was booted in a Walmart parking lot. (Plaintiff's Complaint, generally).

2.

On October 20, 2017, Defendant Mr. McElwaney timely filed his Answer to Plaintiff's Complaint, and a Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss"). On October 25, 2017, Defendant Mr. McElwaney requested oral argument on his Motion to Dismiss.

5.

On November 15, 2017, Plaintiff filed his: a) First Amended Complaint; b) Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint; and c) Motion to Strike and for Sanctions.

6.

Defendant Mr. McElwaney timely files this his Response to Plaintiff's Motion showing the Court that the Plaintiff's Motion is baseless and should be summarily denied.

II. STATEMENT OF PERTINENT FACTS

Maximum Booting Company ("MBC") performs vehicle immobilization services (commonly referred to as "booting") in Union City, Georgia; but, only with respect to commercial vehicles. MBC is permitted to conduct vehicle immobilization services with the Union City Police Department. MBC has never been cited for any violation of the Union City booting ordinance. (See Affidavit of Defendant Mr. McElwaney, Paragraph 2, attached as Exhibit "A" in support of his Motion to Dismiss filed on October 20, 2017).

MBC has a contract to perform vehicle immobilization services at the Walmart Super Center at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Super Center"). See Affidavit of Defendant Mr. McElwaney, Paragraph 3).

On January 10, 2017, Defendant Mr. McElwaney and John Page (who operates Buckhead Parking Enforcement) met with Chief of Police for Union City, Cassandra A. Jones ("Chief Jones") and Captain Gloria Hodgson of the Union City Police Force for them to inspect the

signage at the parking lots in Union City where MBC and Mr. Page's conduct vehicle immobilization services. They visited all of the lots in Union City at which MBC conducts vehicle immobilization services including the Walmart Super Center. Chief Jones indicated that the signage at the entrance of the parking lots was in compliance with the Union City Ordinance about booting. (See Affidavit of Defendant Mr. McElwaney, Paragraph 4)

On June 30, 2017, Plaintiff filed the present lawsuit against Defendant Mr. McElwaney. Jason S. Bell, Esq. (Mr. Bell) with Smith, Gambrell & Russell, LLP was personally retained by Defendant Mr. McElwaney to defend him and MBC. In the course of Mr. Bell's investigation, he learned that Chief Jones had inspected the signage at various parking lots in Union City in January 2017 to review their compliance with the Union City Booting Ordinance; Chief Jones was with Defendant Mr. McElwaney and others when she conducted the inspection; and Mr. Bell understood that Chief Jones had determined that the signage was in compliance with the Union City Booting Ordinance. Mr. Bell, therefore, wanted to interview Chief Jones regarding her knowledge, and obtain an Affidavit, if possible. (See Affidavit of Jason S. Bell, Esq., Paragraph 3, attached hereto as Exhibit "I").

Mr. Bell first contacted the City Attorney for Union City, Mr. Dennis Davenport ("Mr. Davenport"), to see whether he could interview Chief Jones and potentially obtain an Affidavit regarding her knowledge and actions with regard to the Union City Booting Ordinance. Mr. Bell told Mr. Davenport about the lawsuit, Plaintiff's allegations that the wording on the signage was not in compliance with the Ordinance, and that the parties could not even agree on the signage that was present. Mr. Bell also told him regarding Chief Jones' January 2017 inspection of the signage with Defendant Mr. McElwaney and others, and his understanding that Chief Jones had

approved of the signage as being in compliance with the Ordinance. (See Affidavit of Mr. Bell, Paragraph 4).

Mr. Davenport was very accommodating. He told Mr. Bell that he could contact Chief Jones directly and gave him her cell phone number. Mr. Davenport also offered to send Mr. Bell some history of the Booting Ordinance, and Mr. Bell said please do as this was a class action complaint, and the fact that the law had changed would be relevant. (Affidavit of Mr. Bell, Paragraph 5).

Mr. Bell subsequently contacted Chief Jones, and told her about the lawsuit, his representation of Defendant Mr. McElwaney, his understanding of the January 2017 inspection of the signage she had performed with Defendant Mr. McElwaney and his request to meet with her. She agreed that they could meet and scheduled a meeting for October 4, 2017 at her office. Mr. Bell indicated that he was happy for Mr. Davenport to participate, but Chief Jones indicated that would not be necessary. (Affidavit of Mr. Bell, Paragraph 6).

Dani Burnette, an associate with Mr. Bell's Firm (then a law clerk), accompanied Mr. Bell to the meeting with Chief Jones on October 4, 2017. During the meeting, Mr. Bell told Chief Jones about the lawsuit, Plaintiff's claim that the subject signs were not in compliance with the Ordinance because they did not contain the required language and that the parties could not even agree on the signage that was present. Mr. Bell further told Chief Jones that it was his understanding from Defendant Mr. McElwaney that she had inspected the signage at the Walmart and other locations in January and determined that it was in compliance with the Union City Booting Ordinance. Chief Jones confirmed she knew the Ordinance and told Mr. Bell and Ms. Burnette that she had in fact inspected the signage at the Walmart and other locations with Captain Hodgson, and that it was in compliance with the Union City Booting Ordinance. Chief

Jones made no indication that her inspection was limited to certain parts of the Union City Booting Ordinance. (See Affidavit of Mr. Bell, Paragraph 7; Affidavit of Dani Burnette, Esq., Paragraphs 4-5, attached hereto as Exhibit "2").

Mr. Bell also told Chief Jones that it was his understanding from Defendant Mr. McElwaney that Code Enforcement had inspected and approved of the subject signage as being in compliance with the Union City Booting Ordinance. During the meeting, Chief Jones called who Mr. Bell understood to be the head of the Union City Code Enforcement, on the speakerphone on her cell phone in front of Mr. Bell and Ms. Burnette. He confirmed that he had inspected the subject signage and it was in compliance with the Union City Booting Ordinance. He asked whether Chief Jones needed him to check it again. She said she did not need him to. As Mr. Bell understood Chief Jones, Code Enforcement was not part of the Police Department, but it ultimately reported to Chief Jones. (See Affidavit of Mr. Bell, Paragraph 8; Affidavit of Ms. Burnette, Paragraph 6).

Although Mr. Davenport made no request to be involved in the process, Mr. Bell made sure to include Mr. Davenport during the draft affidavit review process. Mr. Bell called Mr. Davenport and told him that he would be sending him the draft Affidavit of Chief Jones. Mr. Davenport confirmed that he would review it with Chief Jones. On October 12, 2017, Mr. Bell emailed the draft Affidavit of Chief Jones to Mr. Davenport. (See Affidavit of Mr. Bell, Paragraph 9 and Exhibit A to Mr. Bell's Affidavit).

Separately, Ms. Burnette e-mailed Chief Jones thanking her for meeting, and telling her that they were sending the draft affidavit to Mr. Davenport for him to review it with her. (See Affidavit of Mr. Bell, Paragraph 10, Affidavit of Ms. Burnette, Paragraph 7)

On October 13, 2017, Mr. Davenport e-mailed Mr. Bell and stated that "Chief Jones emailed me and asked me to have you give her a call to make some corrections on the affidavit." (Affidavit of Mr. Bell, Paragraph 11 and Exhibit B to Mr. Bell's Affidavit).

Mr. Bell talked to Chief Jones on October 13, 2017, and she asked Mr. Bell to make changes to the language in paragraph four (4) of the Affidavit. (Affidavit of Mr. Bell, Paragraph 12).

Pursuant to Chief Jones' request, Mr. Bell made the changes to the draft Affidavit. Although Mr. Davenport had not asked to be kept involved, Mr. Bell made sure to copy him on his response e-mail to Chief Jones. (Affidavit of Mr. Bell, Paragraph 13).

In Mr. Bell's response e-mail, he sent Chief Jones a clean version of the Affidavit and a redline showing the changes she had requested. Mr. Bell also wrote: "If this is correct, you can execute it, and I will send someone to pick it up. If you have any other changes, please let me know." (Affidavit of Mr. Bell, Paragraph 14 and Exhibit C to Mr. Bell's Affidavit).

Chief Jones executed her Affidavit on October 18, 2017 stating the following:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10. 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter'). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also

noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be incompliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

(See Affidavit of Chief Jones, attached as Exhibit "B" in support of his Motion to Dismiss filed on October 20, 2017).

At no time, has Chief Jones or Mr. Davenport contacted Mr. Bell about any issues with respect to Chief Jones's Affidavit. (Affidavit of Mr. Bell, Paragraph 15).

On October 31, 2017, the day after Chief Jones signed the Second Affidavit, Plaintiff's Counsel, Matt Wetherington, Esq., e-mailed Mr. Bell and wrote "Second, I have reviewed your motion to dismiss in the Union City case. It is obviously concerning to us and we are evaluating our next steps." Mr. Wetherington asked Mr. Bell whether he could confirm that "the Chief of Police told you that the language on all of the signs that they received are in full compliance with

the ordinance?" Mr. Wetherington then said "I don't want [sic] waste time on this case if it make [sic] sense to just pursue the Newnan case." As the e-mail reflects, Plaintiff's Counsel did not tell Mr. Bell that Chief Jones had indicated any issues with her Affidavit even though the Second Affidavit had already been signed. In fact, just the opposite, he made it seem to Mr. Bell like he was considering dismissing the case after "reviewing] [the] motion to dismiss . . . ." (Affidavit of Mr. Bell, Paragraph 16 and Exhibit D to Mr. Bell's Affidavit).

On November 1, 2017, Mr. Wetherington sent a follow-up e-mail to Mr. Bell and stated "Following up. I've got to make decision in several of these cases." Once again, Mr. Wetherington did not indicate to Mr. Bell that Chief Jones had indicated any issues with her Affidavit even though the Second Affidavit had already been signed. Instead, he again led Mr. Bell to believe he was considering dismissing the lawsuit altogether after reading the motion to dismiss. (Affidavit of Mr. Bell, Paragraph 17 and Exhibit E to Mr. Bell's Affidavit).

On November 1, 2017, Mr. Bell responded to Mr. Wetherington's November 1, 2017 e-mail, and stated in part "Yes, she said she looked at all of the lots, and that's what the Affidavit says." (Affidavit of Mr. Bell, Paragraph 18 and Exhibit F to Mr. Bell's Affidavit).

On November 7, 2017, Plaintiff's Co-Counsel, Robert Friedman, Esq., sent Mr. Bell another e-mail about an Acknowledgement of Service in a second lawsuit they had filed against Defendant Mr. McElwaney, and again never mentioned anything about Chief Jones or the Second Affidavit. (Affidavit of Mr. Bell, Paragraph 19 and Exhibit G to Mr. Bell's Affidavit).

In fact, Plaintiff s Counsel never told Mr. Bell that Chief Jones had indicated any issues with her Affidavit even though the Second Affidavit had already been signed on October 30, 2017. (Affidavit of Mr. Bell, Paragraph 20).

Similarly, the Undersigned Counsel, who was separately retained by Nationwide Insurance Company on behalf of Defendant Mr. McElwaney, pursuant to a reservations of rights, never received any communication of any kind from Plaintiff's Counsel about any concern over Chief's Jones' Affidavit even though Plaintiff's Counsel was fully aware of the Undersigned's involvement in the case and there had been conversations with Mr. Wetherington during this very time period.

III. ARGUMENT AND CITATION OF AUTHORITY

A. There Is No Evidence of An Alleged Intentional And Willful Submission Of A Materially Misleading or False Affidavit, And Therefore, Plaintiff's Motion Should Be Summarily Denied.

It is a long held principle of Georgia law that if "[a party] can read, [she] is responsible for what [she] signs." *Cochran v. Murrah*, 235 Ga. 304, 306 (1975). Signers of contracts are presumed to have read their provisions and understood the contents. *Swyters v. Motorola Employees Credit Union*, 244 Ga. App. 356 (2000); *O'Brien Family Trust v. Glen Falls Ins. Co.*, 218 Ga. App. 379 (1995). Even if a party to a contract is unable to read, "they are negligent if they fail to have the contract read to them. If a person cannot read the instrument, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will stop him from avoiding it on the ground that he was ignorant of its contents." *Intl. Indem. Co. v. Smith*, 178 Ga.App. 4, 5 (1986), quoting *Southern Auto Co. v. Fletcher*, 66 Ga.App. 168, 170 (1941). See also *Cole v. State*, 118 Ga. App. 228, 228 (1968) (holding that failure to read an affidavit prior to signing it is sufficient evidence to uphold a criminal conviction for making a material false statement).

Chief Jones had the legal obligation to sign only an Affidavit that is true and correct, and it was/is completely appropriate for others to rely upon it in the ordinary course of business, as was done in this case. Chief Jones is a 40-year veteran police officer that has served as the Chief of Police of Fulton County from 2007 to 2015 and the Chief of Union City from 2016 to the present. (See Affidavit of Chief Jones, Paragraph 2). In her October 18, 2017 Affidavit, Chief Jones swore, under oath, in the presence of a Notary Public, that she is of the age of majority, suffers from no legal disability, was competent to testify, gave the Affidavit freely and based her Affidavit upon her personal knowledge. Accordingly, there is no evidence of an alleged intentional and willful submission of a materially misleading or false Affidavit, and therefore, Plaintiff's Motion should be summarily dismissed.

Under Georgia law, Chief Jones is presumed to have read the provisions and understood the contents of her Affidavit. *Swyters*, 244 Ga. App. at 358; and *O'Brien Family Trust*, 218 Ga. App. at 381. In fact, the evidence shows that Chief Jones not only read the draft Affidavit that was sent to her attorney, Mr. Davenport, on October 12, 2017; but, Chief Jones asked Mr. Davenport to have Mr. Bell contact her as she had revisions to the Affidavit. (See Affidavit of Mr. Bell, Paragraphs 12 - 13 and Exhibit B to Mr. Bell's Affidavit). Chief Jones and Mr. Davenport were sent Chief Jones' revised, red-lined Affidavit on October 16, 2017, and only thereafter, did Chief Jones sign her Affidavit, in the presence of a Notary Public, on October 18, 2017. (See Affidavit of Mr. Bell, Paragraphs 13 - 14 and Exhibit C to Mr. Bell's Affidavit and Affidavit of Chief Jones, Signature Page). Accordingly, there is no evidence of an alleged intentional and willful submission of a materially misleading or false Affidavit, and therefore, Plaintiff's Motion should be summarily dismissed.

Chief Jones specifically swore in her Affidavit to personal knowledge that "Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that signs **containing information specified in the Ordinance** are posted at the entrance of the lots ("Booting Ordinance")(emphasis provided). (See Affidavit of Chief Jones, Paragraph 3).

Chief Jones further attested to the Union City Police Department's responsibility to oversee the Booting Ordinance and to issue written permits to any person affixing or removing a vehicle immobilization device. Chief Jones confirmed that the Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance, and the Code Enforcement Division is under her ultimate supervision. (See Affidavit of Chief Jones, Paragraph 4).

Chief Jones fully corroborated Defendant Mr. McElwaney's Affidavit, and confirmed that she and Captain Hodgson inspected the booting signage at the Walmart Super Center, with Defendant Mr. McElwaney and John Page (Buckhead Parking Enforcement) in January 2017, and concluded that the signage was in Compliance with the Booting Ordinance. (See Affidavit of Chief Jones, Paragraph 5). Chief Jones further confirmed that the Union City Code Enforcement had also inspected the signage at the Walmart Supercenter and found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance. (See Affidavit of Chief Jones, Paragraph 7)

Importantly, Chief Jones confirmed that neither Defendant Mr. McElwaney nor MBC has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance. (See Affidavit of Chief Jones, Paragraph 8)

Each and every one of these facts were freely sworn to by Chief Jones in her Affidavit, and Chief Jones had the benefit and advice of legal counsel throughout the entire affidavit process. Accordingly, there is no evidence of an alleged intentional and willful submission of a materially misleading or false Affidavit, and therefore, Plaintiff's Motion should be summarily dismissed.

B. Chief's Jones' Second Affidavit Constitutes Nothing More Than A Partial Clarification Of Her First Affidavit, And Does Not Raise Even A Scintilla of Circumstantial, Much Less, Direct Evidence of An Alleged Intentional And Willful Submission Of A Materially Misleading or False Affidavit. Hence, Plaintiff's Motion Should Be Summarily Denied.

After meeting with Plaintiff's Counsel, Matt Wetherington, Esq. and Robert N. Friedman, Esq. on October 30, 2017, and after Mr. Friedman told Mr. Davenport that he "had concerns that Chief Jones October 18, 2017 Affidavit contained what appeared to be false statements" (See Affidavit of Robert N. Friedman, Paragraph 11, attached as Exhibit B to Plaintiff's Motion), Chief Jones executed a second Affidavit on October 30, 2017 claiming that she never intended for her October 18, 2017 Affidavit to imply that she made any determination regarding whether the specific language contained on the signage at these parking lots, including the signage at the Walmart Super Center, complied with all of the conditions imposed by the Union City Booting Ordinance. (See Second Affidavit of Chief Jones dated October 30, 2017, Paragraph 9, attached as Exhibit "2" to Plaintiff's Motion). She further attested that to the extent that the October 18, 2017 Affidavit claims that she, or anyone else with the Union City Police Department, determined that any signs, including the signage at the Walmart Super Center, contained all of the language required by the Union City Booting Ordinance or were in full compliance with Union City Booting Ordinance, she withdrew all such allegations. (See Second Affidavit of Chief Jones, Paragraphs 10 and 11).

All witnesses certainly have the right to clarify prior understandings and prior statements, sworn or otherwise, and Chief Jones' decision to do so is certainly her right; however, it is important to note that Chief Jones only clarifies a portion of her October 18, 2017 Affidavit, and that the remaining attestations otherwise stand. As an example, Chief Jones stands by the fact that she was aware of the language of the Booting Ordinance and determined that certain aspects of the signage at the Walmart Super Center met the requirements of the Booting Ordinance. Chief Jones does not modify any of her statements in Paragraphs 1, 2, 3, 4, 6 or 8. Chief Jones makes no comment regarding Defendant Mr. McElwaney's recall of Chief Jones' statements during the January 2017 inspection of the signage and that she said it met the requirements of the Booting Ordinance. In fact, Chief Jones specifies in her Second Affidavit, Paragraph 6, that her inspection of the signage on January 10, 2017 included determining if the signs were visible, provided notice that booting occurred on the property and were of sufficient size.

Simply stated, Chief Jones has merely clarified, from her perspective, only a portion of her prior Affidavit which doesn't raise even an inference of an alleged intentional and willful submission of a materially misleading or false Affidavit. Accordingly, Plaintiff's Motion should be summarily dismissed.

C. There Is No Materially Misleading or False Affidavit Per The Sworn Affidavits of Mr. Bell And Ms. Burnette, And Therefore, Plaintiff's Motion Should Be Summarily Denied.

Mr. Bell and Ms. Burnette are duly licensed attorneys, in good standing with their respective State Bars, and employed with the reputable law firm of Smith, Gambrell & Russell, LLP. (Sec Affidavit of Mr. Bell, Paragraph 2; Affidavit of Dani Burnette, Esq., Paragraph 2). Chief Jones and Captain Hodgson had previously told Defendant Mr. McElwaney and Mr. Page in January 2017 that the booting signage at the Walmart Super Center was in compliance with

the Booting Ordinance. (See Affidavit of Mr. Bell, Paragraph 3). It was, therefore, reasonable and logical for Mr. Bell to interview Chief Jones and obtain her Affidavit if she had in fact found the booting signage in compliance with the Booting Ordinance.

Mr. Bell made certain to contact and work through the City Attorney, Mr. Davenport, at all times. (See Affidavit of Mr. Bell, Paragraph 4, 5, 9, 11, 13 and 14). Mr. Bell and Ms. Burnette both attended the meeting with Chief Jones on October 4, 2017. (See Affidavit of Mr. Bell, Paragraphs 7-8; Affidavit of Dani Burnette, Esq., Paragraphs 3-6). [1] Mr. Bell and Ms. Burnette both affirm that Mr. Bell told Chief Jones about the lawsuit and Plaintiff's allegations that the wording on the signage was not in compliance with the Booting Ordinance. (See Affidavit of Mr. Bell, Paragraphs 7; Affidavit of Dani Burnette, Esq., Paragraphs 4). Mr. Bell and Ms. Burnette further affirm that Chief Jones said she knew the Booting Ordinance, she had inspected the signage at the Walmart Super Center in January 2017 and she had determined that it was in compliance with the Booting Ordinance. (See Affidavit of Mr. Bell, Paragraphs 7; Affidavit of Dani Burnette, Esq., Paragraphs 5). Mr. Bell and Ms. Burnette both witnessed and heard Chief Jones call who they understood to be the head of the Union City Code Enforcement, and confirm that he had inspected the subject signage and it was in compliance with the Union City Booting Ordinance. (See Affidavit of Mr. Bell, Paragraph 8; Affidavit of Ms. Burnette, Paragraph 6). Chief Jones made no indication that her inspection was limited to certain parts of the Union City Booting Ordinance. (See Affidavit of Mr. Bell, Paragraph 7; Affidavit of Dani Burnette, Esq., Paragraph 5).

Mr. Bell worked through Mr. Davenport in sending Chief Jones' draft Affidavit to her, and again, when Chief Jones requested revisions to her Affidavit, and then finally, when she

[1] For some reason, in Chief Jones' second Affidavit, she fails to mention that Ms. Burnette was in the meeting with her and Mr. Bell.

executed her final Affidavit. (Affidavit of Mr. Bell, Paragraphs 11, 12, 13 and Exhibit B to Mr. Bell's Affidavit). When Mr. Bell sent Chief Jones and Mr. Davenport a clean version of the Affidavit and a redline showing the changes she had requested, Mr. Bell specifically wrote: "If this is correct, you can execute it, and I will send someone to pick it up. If you have any other changes, please let me know." (Affidavit of Mr. Bell, Paragraph 14 and Exhibit C to Mr. Bell's Affidavit). At no time, has Chief Jones or Mr. Davenport contacted Mr. Bell about any issues with respect to Chief Jones Affidavit. (Affidavit of Mr. Bell, Paragraph 15).

The fact that Chief Jones has had a change of heart after meeting with Plaintiff's Counsel, and submitted a second Affidavit purportedly clarifying her perceptions and understanding, in no way remotely supports Plaintiff's allegations that Mr. Bell submitted a materially misleading or false Affidavit. Accordingly, Plaintiff's Motion should be summarily dismissed.

D. <u>The Legal Authority Cited And Relied Upon By Plaintiff Is Inapplicable And Distinguishable, and therefore, Plaintiff's Motion Should Be Summarily Denied.</u>

Plaintiff's Motion seeks monetary and legal sanctions under four separate statutes, although the Motion does not recognize the distinction between these differing theories of recovery. The four statutes are O.C.G.A. §§ 9-15-14, 9-11-56(g), 15-1-3, and 9-11-37(b). Two of these statutes, and the cases construing them, are completely inapplicable to the case at hand.

O.C.G.A. § 15-1-3 grants trial courts the power to compel obedience to its orders and to control the conduct of all persons connected with a judicial proceeding before that court. *See* O.C.G.A. § 15–1–3(3) and (4). *See also Bayless v. Bayless*, 280 Ga. 153, 155 (2006). In practice, this statute has been applied to award sanctions against parties who repeatedly violate court orders or fail to appear at mandated conferences and hearings. *See generally, Bayless*, 280 Ga. at 153. Here, no Court order has been violated, and Defendant Mr. McElwaney has not failed

to appear at any hearings or otherwise ignored any orders from the Court. *Cf. id.; Truitt v. Housing Authority of City of Augusta*, 235 Ga. App. 92, 94 (1998). Thus, O.C.G.A. § 15-1-3, and the cases cited thereunder, are wholly inapplicable and should be disregarded by the Court.

Likewise, O.C.G.A. § 9-11-37(b) is applied by courts to award sanctions against parties who willfully violate discovery rules. While Plaintiff's motion doesn't specifically state that it seeks sanctions under this rule, the one case it cites and states is "directly on point" with their motion is a case that was decided under this statute. In *City of Griffin v. Jackson*, 239 Ga.App. 374 (1999), the City of Griffin was monetarily sanctioned after the court ruled the City had willfully misled the court regarding the existence of photographs taken by a police officer that were requested in discovery. At first, the City denied that any responsive photographs existed. However, in response to a second request, the City acknowledged the existence of some photographs and promised to produce them. After the City failed to produce these photographs, the plaintiff moved to compel their production, to which the City responded saying they would be producing the photos. At a hearing on the motion to compel, the City's attorney told the Court that he did not have the photos, but would gather them and provide them to the plaintiff. After the hearing, and a full 18 months after the City initially indicated it would produce the photos, the City filed a motion for a protective order with two affidavits (one from the Chief of Police and another from a Police Corporal) indicating that after diligently searching, the City could not locate the photos.

After the motion for a protective order was filed, plaintiff requested that the court allow her to depose the individuals who signed the affidavits and other supposed custodians of these photographs. When the deposition testimony contradicted some of the testimony in the affidavits and indicated that the police department had possession of the photographs, the plaintiff filed a

motion to strike the two affidavits and for sanctions. The court awarded monetary and legal sanctions under O.C.G.A. § 9-11-37(b), finding that the City had willfully mislead the court about the existence of the photos and their efforts to produce them.

Also see, *Mateen v. Dicus,* 275 Ga. App 742 (2005) (reversed in part on other grounds) as illustrative of the type of discovery abuse which would justify sanctions under O.C.G.A. § 9-11-37(b). In that case, nearly *three years of discovery disputes had taken place*, and the trial court adjudged the defendants in contempt for failure to appear at their depositions and ordered them to pay $2,000 in sanctions. *Id.*at 743. After the defendants had failed to comply with the order for monetary sanctions for more than 17 months, the trial court found them in contempt. *Id.* The court struck the defendants' answers and counterclaims and entered default judgment against them pursuant to O.C.G.A. § 9-11-37(b).

Like O.C.G.A. § 15-1-3, O.C.G.A. § 9-11-37(b) is entirely inapplicable to the present circumstance which in no way involves failure to comply with any existing Court orders or discovery requests, or other discovery abuse. In fact, in order for a court to award sanctions under O.C.G.A. § 9-11-37(b), the Court must first have issued an order compelling the production of discovery, and the sanctioned party must have continued to refuse to produce that information. *See generally* O.C.G.A. § 9-11-37(b). No order to compel has been issued in this case, so this statute and the cases construing it are also wholly inapplicable to Plaintiff's motion.

The two remaining statutes cited in Plaintiff's Motion do not authorize the legal sanctions that Plaintiff has requested. While attorney's fees can be awarded under either O.C.G.A. §§ 9-15-14 and 9-11-56(g), neither statute provides a basis for striking a defendant's answer or defenses, which Plaintiff requests in his motion.

Under O.C.G.A. 9-15-14, a court can award monetary sanctions against a party who

"knowingly and willfully presented an inaccurate and false [evidence] in an effort to defraud the court, subvert justice, and gain an unfair advantage." *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 381 (2009) (imposing monetary sanctions against a party who knowingly relied on a falsified land survey in a zoning dispute).[2]

Similarly, O.C.G.A. 9-11-56(g) states:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.

The Undersigned found only a single reported case outlining an award of sanctions under Rule 56(g) - *Malloy v. Cauley*, 169 Ga. App. 623 (1984). In *Malloy*, the trial court initially denied a Defendant's motion for summary judgment based on an affidavit that was filed by the Plaintiff. *Id.* at 623. When a subsequent deposition of the Plaintiff revealed that he did not have personal knowledge about some of the items in the affidavit, and that he had lied to the court about other items in the affidavit, the Defendant filed a motion to strike the Plaintiff's affidavit and a motion for reconsideration of the motion for summary judgment. *Id.* The trial court found that the affidavit was presented in bad faith and for purposes of delay. *Id.* The trial court struck the affidavit, granted summary judgment in favor of the Defendant, and ordered Plaintiff to pay defendant's attorney's fees. *Id.*

The *Malloy* case is distinguishable in every way: Mr. Bell has personal knowledge of the facts set forth in his Affidavit; Mr. Bell has not lied to anyone, including the Court; Mr. Bell took

[2] Monetary sanctions can also be levied against a party who has made misleading statements in briefs and during oral argument, although the case law indicates that the level of dishonesty must be fairly egregious in order to trigger sanctions for this type of violation. *See, i.e., Huffman v. Armenia,* 284 Ga. App. 822, 824, 645 S.E.2d 23, 25 (2007)(upholding sanctions when a pro se party indicated in open court that he had an authorization from his corporate board to file a bankruptcy petition, when he in fact did not have any such authorization and then went behind the court's back to obtain an authorization afterwards).

reasonable steps to ensure that the Chief Jones' Affidavit was entirely correct. Mr. Bell made sure Chief Jones was represented by her own counsel, and communicated directly with her counsel at every step of the affidavit process. Mr. Bell also asked Chief Jones to review the draft affidavit carefully with her counsel, and let him know if they needed to make any changes. Indeed, Chief Jones did request that a change be made to the language of the affidavit, and Mr. Bell gladly accommodated her. After making the requested changes, Mr. Bell again invited Chief Jones and her counsel to let them know if any other changes needed to be made before Chief Jones executed the Affidavit. Chief Jones executed the Affidavit without requesting any other changes. At that point, it was reasonable for Mr. Bell to presume that Chief Jones was basing her Affidavit upon personal knowledge, she had thoroughly reviewed her Affidavit for accuracy, and that she was being truthful in her testimony. It is also important to note that Ms. Burnett corroborates what Mr. Bell said to Chief Jones in the October 4, 2017 meeting; Defendant Mr. McElwaney corroborates that Chief Jones determined that the signage in the Walmart Super Center complied with the Booting Ordinance back during her inspection in January 2017 (which was the reason Mr. Bell requested to meet with Chief Jones to begin with); Defendant Mr. McElwaney and MBC have never been cited for not complying with the Booting Ordinance; and Chief Jones expressly states that she gave her Affidavit freely and based upon personal knowledge.

There is no evidence of bad faith or intentional and willful wrongdoing by Mr. Bell, and Plaintiff's Motion should be summarily denied.

IV. CONCLUSION

In conclusion, the evidence before the Court shows that a 40 year, veteran police officer, who was competent, acting freely and represented by legal counsel, executed an Affidavit on

October 18, 2017 attesting to the fact that, as the person overseeing compliance with local ordinances in Union City, including the Booting Ordinance, she (and Captain Hodgson) had personally inspected and confirmed in January 2017 that Defendant Mr. McElwaney's booting signage was in compliance with the Booting Ordinance. After meeting with Plaintiff's Counsel, and apparently after being threatened with providing a false Affidavit, Chief Jones signed a second Affidavit saying that she meant to say she only inspected certain parts of the booting signage as being in compliance. It is simply absurd to suggest that Chief Jones' failure to provide an accurate Affidavit after reading and making revisions to it, with the assistance of counsel, should be the foundation upon which to sanction Defendant Mr. McElwaney.

Additionally, given the overwhelming evidence that Mr. Bell acted in the utmost professional and ethical manner in contacting Chief Jones, insuring that he worked through her counsel, at all times, and providing her with every conceivable opportunity to provide truthful and accurate information in her Affidavit, one is left to wonder how this entire Motion could have been avoided had Plaintiff's Counsel acted in good faith and simply called Mr. Bell. Instead, as shown through the email communications from Mr. Wetherington and Mr. Friedman on October 31, 2017, November 1, 2017 and November 7, 2017, Plaintiff's Counsel intentionally withheld the fact that Chief Jones' had executed a second Affidavit, and attempted to mislead Mr. Bell in some sort of "gotcha" game to leverage this distraction from Defendant Mr. McElwaney's underlying Motion to Dismiss. (Affidavit of Mr. Bell, Paragraphs 16 - 20).

Similarly, the Undersigned Counsel, who was separately retained by Nationwide Insurance Company on behalf of Defendant Mr. McElwaney pursuant to a reservations of rights, never received any communication of any kind from Plaintiff's Counsel about any concern with Mr. Bell or Chief's Jones' Affidavit even though Plaintiff's Counsel was fully aware of the

Undersigned's involvement in the case and there had been conversations with Mr. Wetherington during this very time period.

As a result of this unfortunate behavior, Mr. Bell's reputation has been unfairly impugned with these baseless allegations, and Defendant Mr. McElwaney has been unfairly forced to expend resources in responding to this frivolous Motion. Accordingly, in addition to asking this Court to DENY Plaintiff's Motion to Strike and for Sanctions, Defendant Mr. McElwaney also asks this Court for such other and further relief as this Honorable Court deems just and proper, including reasonable attorneys' fees incurred in responding to this Motion in an amount to be determined at a subsequent Hearing.

This 29th day of December, 2017.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS ON BEHALF OF DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
The Werner Law Firm
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 29th day of December, 2017.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435
KENNETH J. BENTLEY
Georgia Bar No. 715496

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
kbentley@insleyrace.com

EXHIBIT "1"

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF JASON S. BELL, ESQ.

STATE OF: GEORGIA

COUNTY OF: FULTON

COMES NOW, Jason S. Bell, before the undersigned officer duly authorized to administer oaths and, being sworn, does state on oath the following:

1.

My name is Jason Bell. I am over the age of majority, am suffering under no legal disability, am competent to give this Affidavit and base this Affidavit upon my personal knowledge which is true and accurate to the best of my knowledge.

2.

I have been licensed to practice law since 1994, and am a partner in the law firm of Smith, Gambrell & Russell, where I have practiced my entire twenty three year career. I am a member in good standing of both the Georgia and Florida Bars.

3.

I was personally retained by Defendant, Kenny McElwaney, to defend him and his company, Maximum Booting Co., in connection with the present civil lawsuit alleging improper booting of commercial vehicles in Union City. In the course of my investigation, I learned that the Chief of Police for Union City, Cassandra A. Jones ("Chief Jones"), had inspected the signage at various parking lots in Union City in January 2017 to review their compliance with the Union City Booting Ordinance. Chief Jones was with Defendant Mr. McElwaney, and others, when she conducted the inspection, and I understood that she had determined that the signage was in compliance with the Union City Booting Ordinance. I, therefore, wanted to interview Chief Jones regarding her knowledge, and obtain an Affidavit, if possible.

4.

I first contacted the City Attorney for Union City, Mr. Dennis Davenport ("Mr. Davenport"), to see whether I could interview Chief Jones and potentially obtain an Affidavit regarding her knowledge and actions with regard to the Union City Booting Ordinance. I told him about the lawsuit, Plaintiff's allegations that the wording on the signage was not in compliance with the Ordinance, and that the parties could not even agree on the signage that was present. I also told him regarding Chief Jones' January 2017 inspection of the signage with Defendant Mr. McElwaney and others, and my understanding that Chief Jones had approved of the signage as being in compliance with the Ordinance.

5.

Mr. Davenport was very accommodating. He told me that I could contact Chief Jones directly and gave me her cell phone number. He also offered to send me some history of the Booting Ordinance, and I said please do as this was a class action complaint, and the fact that the law had changed would be relevant.

6.

I subsequently contacted Chief Jones. I told her about the lawsuit, my representation of Defendant Mr. McElwaney, my understanding of the January 2017 inspection of the signage she had performed with Defendant Mr. McElwaney and my request to meet with her. She agreed we could meet and we scheduled a meeting for October 4, 2017 at her office. I indicated that I was happy for Mr. Davenport to participate, but she indicated that would not be necessary.

7.

Dani Burnette, an associate with our Firm (then a law clerk), accompanied me, and we both met with Chief Jones on October 4, 2017. During the meeting, I told Chief Jones about the lawsuit, Plaintiff's claims that the subject signs were not in compliance with the Ordinance because they did not contain the required language and that the parties could not even agree on the signage that was present. I further told Chief Jones that it was my understanding from Defendant Mr. McElwaney that she had inspected the signage at the Walmart and other locations in January and determined that it was in compliance with the Union City Booting Ordinance. Chief Jones confirmed she knew the Ordinance and told us that she had in fact inspected the signage at the Walmart and other locations with Captain Hodgson and that it was in compliance with the Union City Booting Ordinance. Chief Jones made no indication that her inspection was limited to certain parts of the Union City Booting Ordinance.

8.

I also told Chief Jones that it was my understanding from Defendant Mr. McElwaney that Code Enforcement had inspected and approved of the subject signage as being in compliance with the Union City Booting Ordinance. During the meeting, Chief Jones called who I understood to be the head of the Union City Code Enforcement, on the speakerphone on her cell phone in front of myself and Ms. Burnette. He confirmed that he had inspected the subject

signage and it was in compliance with the Union City Booting Ordinance. He asked whether Chief Jones needed him to check it again. She said she did not need him to. As I understood Chief Jones, Code Enforcement was not part of the Police Department, but it ultimately reported to her.

9.

Although he made no request to be involved in the process, I made sure to include Mr. Davenport during the draft affidavit review process. I called him and told him that I would be sending him the draft Affidavit of Chief Jones. Mr. Davenport confirmed that he would review it with Chief Jones. On October 12, 2017, I emailed the draft Affidavit of Chief Jones to Mr. Davenport. (A true and correct copy of the October 12, 2017 e-mail string with Mr. Davenport is attached hereto as Exhibit A).

10.

Separately, Ms. Burnette e-mailed Chief Jones thanking her for meeting with us, and telling her that we were sending the draft affidavit to Mr. Davenport for him to review it with her.

11.

On October 13, 2017, Mr. Davenport e-mailed me and stated that "Chief Jones emailed me and asked me to have you give her a call to make some corrections on the affidavit." (A true and correct copy of the October 13, 2017 e-mail from Mr. Davenport is attached hereto as Exhibit B.)

12.

I talked to Chief Jones on October 13, 2017, and she asked me to make changes to the language in paragraph four (4) of the Affidavit.

13.

Pursuant to her request, I made the changes to the draft Affidavit. Although Mr. Davenport had not asked to be kept involved, I made sure to copy him on my response e-mail to Chief Jones.

14.

In my response e-mail, I sent Chief Jones a clean version of the Affidavit and a redline showing the changes she had requested. I also wrote: "If this is correct, you can execute it, and I will send someone to pick it up. If you have any other changes, please let me know." (A true and correct copy of my October 16, 2017 e-mail with the attachments is attached hereto as Exhibit C.)

15.

Since that date, I have not been contacted by Chief Jones or Mr. Davenport. I certainly would have expected them to call me about any issues with respect to Chief Jones Affidavit.

16.

On October 31, 2017, the day after Chief Jones signed the Second Affidavit, Plaintiff's Counsel, Matt Wetherington, Esq., e-mailed me and wrote "Second, I have reviewed your motion to dismiss in the Union City case. It is obviously concerning to us and we are evaluating our next steps." He asked me whether I could confirm that "the Chief of Police told you that the language on all of the signs that they received are in full compliance with the ordinance?" He then said "I don't want [sic] waste time on this case if it make sense to just pursue the Newnan case." As the e-mail reflects, Plaintiff's counsel did not tell me that Chief Jones had indicated any issues with her Affidavit even though the Second Affidavit had already been signed. In fact, just the opposite, he made it seem to me like he was considering dismissing the case after

"review[ing] [the] motion to dismiss . . . ." (A true and correct copy of Mr. Wetherington's October 31, 2017 e-mail is attached hereto as Exhibit D.)

17.

On November 1, 2017, the next day, Plaintiff's counsel, Mr. Wetherington, send me a follow-up e-mail and stated "Following up. I've got to make decision in several of these cases." Once again, Mr. Wetherington did not indicate to me that Chief Jones had indicated any issues with her Affidavit even though the Seeond Affidavit had already been signed. Instead, he again led me to believe he was eonsidering dismissing the lawsuit altogether after reading the motion to dismiss. (A true and correct copy of his Novemher 1, 2017 e-mail is attached hereto as Exhibit E.)

18.

On November 1, 2017, I responded to Mr. Wetherington's November 1, 2017 e-mail, and stated in part "Yes, she said she looked at all of the lots, and that's what the Affidavit says." (A true and correct copy of my Novemher 1, 2017 response is attached hereto as Exhibit F.)

19.

On November 7, 2017, Plaintiff's Counsel, Robert Friedman, sent me another e-mail about an Aeknowledgement of Service in a second lawsuit they had filed against Mr. McElwaney, and again never mentioned anything about Chief Jones or the Second Affidavit. (A true and correct coy of that Novemher 7, 2017 e-mail is attached hereto as Exhibit G.)

20.

In fact, Plaintiff's Counsel never told me that Chief Jones had indicated any issues with her Affidavit even though the Second Affidavit had already been signed on October 30, 2017.

FURTHER AFFIANT SAYETH NAUGHT.

Jason Bell
JASON BELL

Sworn to and subscribed before me
this 28th day of December, 2017.

Shawn K. White
NOTARY PUBLIC

My Commission Expires: 4-22-19

SHAWN K. WHITE
NOTARY
EXPIRES
GEORGIA
April 22, 2019
PUBLIC
COBB COUNTY

EXHIBIT A

White, Shawn

From: Dennis A. Davenport <dadaven@bellsouth.net>
Sent: Thursday, October 12, 2017 5:01 PM
To: Bell, Jason
Subject: RE: Draft Affidavit -- Chief Jones

Got it.

Dennis A. Davenport
McNally, Fox, Grant & Davenport, P.C.
100 Habersham Drive
Fayetteville, Georgia 30214
(770) 461-2223

From: Bell, Jason [mailto:JBELL@sgrlaw.com]
Sent: Thursday, October 12, 2017 8:58 AM
To: Dennis A. Davenport (dadaven@bellsouth.net)
Cc: Bell, Jason
Subject: Draft Affidavit -- Chief Jones

Dear Dennis:

Pursuant to our discussion, attached is the Draft Affidavit for Chief Jones for her and your review.

I understand that you will coordinate with Chief Jones about this. We'll send her an e-mail letting her know we sent this to you.

Our Motion is due next Friday, so we would like to complete this by Wednesday if at all possible.

Thank you for your help and assistance.

Jason

JASON S. BELL | **Attorney at Law**

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	)	Civil Action File No. 17EV003164

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The enforcement of the Booting Ordinance is conducted by the Union City Police Department as well as the Union City Code Enforcement Division. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, took the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

_____
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this _____ day of October, 2017.

_____
Notary Public

My Commission Expires: _____

[NOTARY SEAL]

EXHIBIT B

White, Shawn

From: Dennis A. Davenport <dadaven@bellsouth.net>
Sent: Friday, October 13, 2017 3:49 PM
To: Bell, Jason
Subject: Affidavit

Jason,

Chief Jones emailed me and asked me to have you give her a call to make some corrections on the affidavit. The number I have for her is (404) 952-3142.

Dennis A. Davenport
McNally, Fox, Grant & Davenport, P.C.
100 Habersham Drive
Fayetteville, Georgia 30214
(770) 461-2223

EXHIBIT C

White, Shawn

From: Bell, Jason
Sent: Monday, October 16, 2017 2:09 PM
To: cjones@unioncityga.org
Cc: Bell, Jason; Dennis A. Davenport (dadaven@bellsouth.net); Burnette, R. Danielle
Subject: Affidavit
Attachments: #16820759v1_SGR_ - Chief Jones Affidavit.DOCX; Affidavit of Chief Cassandra A. Jones - Chief Jones Affidavit.pdf

Dear Chief Jones:

Attached is a clean and redline of the Affidavit for your review.

If this is correct, you can execute it, and I will send someone to pick it up. If you have any other changes, please let me know.

Thank you again for your help and assistance.

Jason

JASON S. BELL | Attorney at Law

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v.	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Cassandra A. Jones, who, after being duly sworn, deposed, and testifies as follows:

1.

I am of the age of majority, suffer no legal disability, and am competent to testify. This Affidavit is given freely and is based upon my personal knowledge.

2.

I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

3.

Union City Code of Ordinances § 10-28(b) provides that it shall be unlawful for a vehicle immobilization device to be attached to a vehicle unless certain conditions are met including that

signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The Union City Police Department oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

5.

As a part of my official police duties, in early January 2017, I decided to inspect the signage at various parking lots in Union City to review their compliance with the Booting Ordinance. Specifically, on January 10, 2017, I, along with Captain Gloria Hodgson of the Union City Police force, met the representatives of two booting companies, Kenny McElwaney (Maximum Booting) and John Page (Buckhead Parking Enforcement) to inspect the signage at the parking lots where their companies conduct vehicle immobilization in Union City including the signage at the Walmart Supercenter located at 4735 Jonesboro Road, Union City, GA 30291 ("Walmart Supercenter"). We (Captain Hodgson and myself) determined that the signage was in compliance with the Booting Ordinance including the signage at the Walmart Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. MeElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforeement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

_____
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this _____ day of October, 2017.

_____
Notary Public

My Commission Expires: _____

[NOTARY SEAL]

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and on, behalf of a class of similarly situated persons,	)	
Plaintiff,	)	Civil Action File No. 17EV003164
v,	)	
KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO.	)	
Defendant.	)	

AFFIDAVIT OF UNION CITY POLICE CHIEF CASSANDRA A. JONES

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1.

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I am the Chief of Police for the Union City Police Department, which position I have held since January 2016. Prior to that position, I was the Chief of Police of Fulton County from 2007-2015, and I have been a police officer for over 40 years.

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signs containing information specified in the Ordinance are posted at the entrance of the lots ("Booting Ordinance").

4.

The ~~enforcement of the Booting Ordinance is conducted by the~~ Union City Police Department ~~as well as the Union City Code Enforcement Division~~oversees the Booting Ordinance. In fact, the Booting Ordinance requires any person affixing or removing a vehicle immobilization device to register with and obtain a written permit from the Union County Police Department. The Union City Code Enforcement Division, housed within the Union City Police Department, is directly responsible for the inspection and enforcement of residential and commercial properties to ensure compliance with local ordinances, including the Booting Ordinance. The Code Enforcement Division does not directly report to me but is under my ultimate supervision.

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Supercenter. I also noted that the sign itself at the Walmart Supercenter was actually larger in size than what was required by the Booting Ordinance at that time.

6.

On March 21, 2017, the Union City Council amended the Booting Ordinance to increase the size of the signs to 18" x 24". During my previous inspection of the Walmart Supercenter, I noted that the signage was already in compliance with this increased signage requirement.

7.

I have confirmed that the Union City Code Enforcement has also inspected the signage at the Walmart Supercenter and has found the signage at the Walmart Supercenter to be in compliance with the Booting Ordinance.

8.

Neither Mr. McElwaney nor his company, Maximum Booting, has ever been cited by either the Union County Police Department or the Code Enforcement Division for any violation of the Booting Ordinance.

FURTHER AFFIANT SAYETH NAUGHT.

_____
CHIEF CASSANDRA A. JONES

Sworn to and subscribed before me
this _____ day of October, 2017.

_____
Notary Public

My Commission Expires: _____

[NOTARY SEAL]

Document comparison by Workshare 9.5 on Monday, October 16, 2017 2:03:38 PM

Input:	
Document 1 ID	interwovenSite://SGRDMS/SGR/16793146/4
Description	#16793146v4<SGR> - Affidavit of Chief Cassandra A. Jones
Document 2 ID	interwovenSite://SGRDMS/SGR/16820759/1
Description	#16820759v1<SGR> - Chief Jones Affidavit
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	3
Deletions	3
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	6

EXHIBIT D

Bell, Jason

From: Matt Wetherington <matt@wernerlaw.com>
Sent: Tuesday, October 31, 2017 11:31 AM
To: Bell, Jason
Subject: Maximum Booting

Jason,

I hope this email finds you well. I'm writing on two issues. First, what is the status of the acknowledgement of service in the Newnan case? I need a response today, if possible. Second, I have reviewed your motion to dismiss in the Union City case. It is obviously concerning to us and we are evaluating our next steps. Can you confirm that the Chief of Police told you that the language on *all* of the signs that they reviewed are in full compliance with the ordinance?

Can you help me understand your position on the full scope and implications of that affidavit? I don't to waste time on this case if it makes sense to just pursue the Newnan case.

Respectfully yours,

-Matt Wetherington

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

EXHIBIT E

Bell, Jason

From: Matt Wetherington <matt@wernerlaw.com>
Sent: Wednesday, November 01, 2017 4:50 PM
To: Bell, Jason
Subject: Re: Maximum Booting

Following up. I've got to make decisions in several of these cases.

-Matt Wetherington

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

On Tue, Oct 31, 2017 at 11:31 AM, Matt Wetherington <matt@wernerlaw.com> wrote:
Jason,

I hope this email finds you well. I'm writing on two issues. First, what is the status of the acknowledgement of service in the Newnan case? I need a response today, if possible. Second, I have reviewed your motion to dismiss in the Union City case. It is obviously concerning to us and we are evaluating our next steps. Can you confirm that the Chief of Police told you that the language on *all* of the signs that they reviewed are in full compliance with the ordinance?

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Respectfully yours,

-Matt Wetherington

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090

EXHIBIT F

Bell, Jason

From: Bell, Jason
Sent: Wednesday, November 01, 2017 5:04 PM
To: Matt Wetherington
Cc: Bell, Jason
Subject: RE: Maximum Booting

Matt:

Yes, she said she looked at all of the lots, and that's what the Affidavit says. I don't get the second question except to say, yes I think the Affidavit defeats your case. Yes, I think you are wasting your time with that case, and should move on.

Can you send me the Affidavit again. Sorry about the delay on that. With respect to the second case, I would also suggest you move on. I think you can see how hard I'll litigate. I have an interest in this case, and now I'm hooked. I'm telling you he has little assets, and if you win, you'll just force him into bankruptcy and you won't recover. Finally, since he boots commercial vehicles, your class would be businesses who aren't really going to care.

I think you can tell now that I'm a straight shooter at this point. Go after the other fish.

Jason

JASON S. BELL | Attorney at Law

404-815-3619 *phone*
404-685-6919 *fax*
www.sgrlaw.com
JBELL@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

From: Matt Wetherington [mailto:matt@wernerlaw.com]
Sent: Wednesday, November 01, 2017 4:50 PM
To: Bell, Jason
Subject: Re: Maximum Booting

Following up. I've got to make decisions in several of these cases.

-Matt Wetherington

WERNER WETHERINGTON, P.C.
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

On Tue, Oct 31, 2017 at 11:31 AM, Matt Wetherington <matt@wernerlaw.com> wrote:
Jason,

I hope this email finds you well. I'm writing on two issues. First, what is the status of the acknowledgement of service in the Newnan case? I need a response today, if possible. Second, I have reviewed your motion to dismiss in the Union City case. It is obviously concerning to us and we are evaluating our next steps. Can you confirm that the Chief of Police told you that the language on *all* of the signs that they reviewed are in full compliance with the ordinance?

Can you help me understand your position on the full scope and implications of that affidavit? I don't to waste time on this case if it makes sense to just pursue the Newnan case.

Respectfully yours,

-Matt Wetherington

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2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404.793.1693
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

EXHIBIT G

Bell, Jason

From: Robert Friedman <robert@wernerlaw.com>
Sent: Tuesday, November 07, 2017 4:11 PM
To: Bell, Jason
Subject: Acknowledgement of Service
Attachments: Acknowledgment of Service.Maximum Booting and Kenneth.docx

Matt mentioned that you wanted a second copy of the Acknowledgement of Service for the Newnan case. Please let me know if there is any issue with you acknowledging service on behalf of your client.

Robert Friedman

Werner Wetherington, PC
2860 Piedmont Rd. NE
Atlanta, Georgia 30305
DIRECT DIAL: 404-991-3692
Office: 770-VERDICT
Fax: 855-873-2090
www.WernerLaw.com

END OF EXHIBITS

EXHIBIT "2"

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually and on, behalf of a class of similarly situated persons, Plaintiff, v. KENNY McELWANEY d/b/a, MAXIMUM BOOTING CO. Defendant.	)	Civil Action File No. 17EV003164

AFFIDAVIT OF DANIELLE BURNETTE, ESQ.

STATE OF: GEORGIA

COUNTY OF: FULTON

COMES NOW, Danielle Burnette, before the undersigned officer duly authorized to administer oaths and, being sworn, does state on oath the following:

1.

My name is Danielle Burnette. I am over the age of majority, am suffering under no legal disability, and am competent to give this Affidavit upon my personal knowledge which is true and correct to the best of my knowledge.

2.

I am an associate with the law firm of Smith, Gambrell & Russell, and a member in good standing of the Georgia Bar.

3.

On October 4, 2017, I accompanied Jason Bell to meet with Chief Cassandra A. Jones ("Chief Jones") to discuss her review of the signage at the Walmart parking lot discussed in the Complaint.

4.

During the meeting, Mr. Bell told Chief Jones about the lawsuit, Plaintiff's claims that the subject signs were not in compliance with the Ordinance because they did not contain the required language, and that the parties could not even agree on the signage that was present. Mr. Bell further told Chief Jones that it was his understanding from Defendant Mr. McElwaney that Chief Jones had inspected the signage at the Walmart and other locations in January and determined that it was in compliance with the Union City Booting Ordinance.

5.

During the meeting, Chief Jones confirmed that she knew the Ordinance regarding booting, and that she had inspected the signage at the Walmart and other locations with Captain Hodgson and confirmed that they were in compliance with the Ordinance. She did not indicate that her inspection was limited to certain parts of the Ordinance.

6.

During the meeting, Mr. Bell also told Chief Jones that Mr. McElwaney had indicated that Code Enforcement had inspected and approved of the signage as being in compliance with the Ordinance and asked whether she could confirm that. During the meeting, Chief Jones called, who I understood to be the head of the Union City Code Enforcement, on the speakerphone on her cell phone in front of myself and Mr. Bell. He confirmed that he had inspected the signage and it was in compliance with the Ordinance, and asked whether Chief

Jones needed him to check it again. She said she did not need him to. As I understood Chief Jones, Code Enforcement was not part of the Police Department, but it ultimately reported to her.

7.

On October 12, 2017, I e-mailed Chief Jones thanking her for meeting with us, and told her that we would be sending the draft affidavit to the City Attorney for him to review it with her. A true and correct copy of that e-mail is attached hereto as Exhibit A.

FURTHER AFFIANT SAYETH NAUGHT.

Danielle Burnette
DANIELLE BURNETTE

Sworn to and subscribed before me
this 28th day of December, 2017.

Shawn K. White
NOTARY PUBLIC

My Commission Expires: 4-22-19

EXHIBIT A

Bell, Jason

From: Burnette, R. Danielle
Sent: Monday, October 16, 2017 2:07 PM
To: Bell, Jason
Subject: FW: Affidavit for Your Review

R. DANIELLE BURNETTE | Law Clerk

404-815-3987 *phone*
404-685-7287 *fax*
www.sgrlaw.com
dburnette@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

From: Cassandra Jones [mailto:cjones@unioncityga.org]
Sent: Thursday, October 12, 2017 12:38 PM
To: Burnette, R. Danielle
Subject: RE: Affidavit for Your Review

Ok

From: Burnette, R. Danielle [mailto:dburnette@sgrlaw.com]
Sent: Thursday, October 12, 2017 9:23 AM
To: Cassandra Jones
Subject: Affidavit for Your Review

Dear Chief Jones:

Thank you for taking the time to meet with Jason and me on October 4. As we discussed, we have drafted an affidavit and sent it to City Attorney Dennis Davenport. He will coordinate reviewing it with you.

Again, thank you for your assistance on this matter. Please let me know if you have any questions.

All the best,
Danielle

R. DANIELLE BURNETTE | Law Clerk

404-815-3987 *phone*
404-685-7287 *fax*
www.sgrlaw.com
dburnette@sgrlaw.com

Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592

SMITH, GAMBRELL & RUSSELL, LLP

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of A class of similarly situated persons, Plaintiff, vs. KENNY MCELWANEY d/b/a MAXIMUM BOOTING CO., Defendant.	Civil Action No. 17EV003164B

ORDER TRANSFERRING MATTER

The above-captioned case is presently before the Court on the Honorable Eric A. Richardson's consent to accept the transfer of the above-captioned case. Therefore, the above-captioned case is **HEREBY TRANSFERRED** to the Honorable Eric A. Richardson.[1]

SO ORDERED this 11 day of January, 2018, at Atlanta, Georgia.

Patsy Y. Porter, Judge
State Court of Fulton County

Copies to:

THE HONORABLE ERIC A. RICHARDSON, JUDGE
c/o Trinity Townsend
trinity.townsend@fultoncountyga.gov

PLAINTIFF'S COUNSEL
MICHAEL L. WERNER
MATTHEW Q. WETHERINGTON

[1] The Uniform Superior Court Rules provide, in pertinent part,

> The judge to whom any action is assigned shall have exclusive control of such action, except as provided in these rules, and no person shall change any assignment except by order of the judge affected and as provided in these rules. In this regard[,] an assigned judge may transfer an assigned action to another judge with the latter's consent in which event the latter becomes the assigned judge.

Unif. Sup. Ct. R. 3.3. As such, the parties should be advised that, if the Honorable Eric A. Richardson declines to accept assignment of the above-captioned case, this Division will retain exclusive control over this matter.

ROBERT N. FRIEDMAN
mike@wernerlaw.com
matt@wernerlaw.com
robert@wernerlaw.com

DEFENDANT'S COUNSEL
BRYNDA R. INSLEY
KENNETH J. BENTLEY
binsley@insleyrace.com
kbentley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, And on behalf of a class of similarly situated persons,	)	
Plaintiff,	)	**CIVIL ACTION FILE NO.**
v.	)	**17EV003164**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

NOTICE TO TAKE DEPOSITION OF CASSANDRA A. JONES

TO: Chief Cassandra A. Jones
Union City Police Department
5060 Union Street
Union City, GA 30291

Please take notice that pursuant to O.C.G.A. §9-11-30(b) and O.C.G.A. §9-11-34, counsel for Plaintiff will take the deposition of **Cassandra A. Jones** by oral examination for the purpose of discovery, cross examination, and all other purposes permitted by the law of the State of Georgia before an officer duly authorized to administer oaths at the office of McNally, Fox, Grant & Davenport, 100 Habersham Drive, Fayetteville, GA 30214-1381 on the 26th day of January, 2018 at 1:00 p.m. continuing from day to day until its completion.

This 16th day of January 2018.

WERNER WETHERINGTON, PC

/s Matthew Q. Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT
matt@wernerlaw.com
robert@wernerlaw.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, And on behalf of a class of similarly situated persons,	)	
Plaintiff,	)	**CIVIL ACTION FILE NO.**
v.	)	**17EV003146**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing NOTICE TO TAKE DEPOSITION OF CASSANDRA A. JONES with the Clerk of Court using the Odyssey eFileGA system which will automatically send e-mail notification of such filing to the following attorneys of record:

Jason S. Bell Esq.
SMITH GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
They Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 16th day of January 2018.

WERNER WETHERINGTON, PC

/s Matthew Q. Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT
matt@wernerlaw.com
robert@wernerlaw.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, And on behalf of a class of similarly situated persons,	)	
Plaintiff,	)	**CIVIL ACTION FILE NO.**
v.	)	**17EV003164**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

NOTICE TO TAKE DEPOSITION OF DENNIS A. DAVENPORT

TO: Dennis A. Davenport
McNally, Fox, Grant & Davenport
100 Habersham Drive
Fayetteville, GA 30214-1381

Please take notice that pursuant to O.C.G.A. §9-11-30(b) and O.C.G.A. §9-11-34, counsel for Plaintiff will take the deposition of **Dennis A. Davenport** by oral examination for the purpose of discovery, cross examination, and all other purposes permitted by the law of the State of Georgia before an officer duly authorized to administer oaths at the office of McNally, Fox, Grant & Davenport, 100 Habersham Drive, Fayetteville, GA 30214-1381 on the 26th day of January, 2018 at 11:00 a.m. continuing from day to day until its completion.

This 16th day of January 2018.

WERNER WETHERINGTON, PC

/s Matthew Q. Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

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IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, And on behalf of a class of similarly situated persons,	)	
Plaintiff,	)	**CIVIL ACTION FILE NO.**
v.	)	**17EV003146**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing NOTICE TO TAKE DEPOSITION OF DENNIS A. DAVENPORT with the Clerk of Court using the Odyssey eFileGA system which will automatically send e-mail notification of such filing to the following attorneys of record:

Jason S. Bell Esq.
SMITH GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
They Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 16th day of January 2018.

WERNER WETHERINGTON, PC

/s Matthew Q. Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
770-VERDICT
matt@wernerlaw.com
robert@wernerlaw.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

CERTIFICATE OF DISCOVERY

I HEREBY CERTIFY that I have this day served a copy of the following:

1. **Cross-Notice of Taking Deposition to Cassandra A. Jones;**
2. **Cross-Notice of Taking Deposition to Dennis A. Davenport**
3. **Subpoena for Deposition and Duces Tecum to Cassandra A. Jones;**
4. **Subpoena for Deposition and Duces Tecum to Dennis A. Davenport.**

upon all parties to this matter by email on January 20, 2018, by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

Co-Counsel for Defendant
Kenny McElwaney d/b/a
Maximimum Booting Co.
Jason S. Bell, Esq.
Smith Gambrell & Russell, LLP
Promenade II, Suite 3100
1230 Peachtree Street, NE
Atlanta, GA 30309-3592

This 22nd day of January, 2018.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435
JAMES P. MYERS
Georgia Bar No.
Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
jmyers@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. Defendant.	CIVIL ACTION FILE NUMBER 17EV003164

PLAINTIFF'S MOTION TO AMEND AND TO ADD WAL-MART STORES, INC. AND BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. AS PARTY DEFENDANTS

COMES NOW Plaintiff in the above-styled action and moves to amend to clarify Plaintiff's claims against Defendant, to assert additional claims, and to add Wal-Mart Stores, Inc. and Bright-Meyers Union City Associates, L.P. as party Defendants:

1.

Under O.C.G.A. § 9-11-21 an order from the Court is necessary to either drop or add a party. Georgia law grants the trial court discretion to permit the addition of a party defendant. *See Fontaine v. Home Depot, Inc.*, 250 Ga. App. 123, 123, 550 S.E.2d 691, 693 (2001) ("The addition of a new party defendant by an amendment to the complaint requires the exercise of discretion by the trial court.").

2.

Under O.C.G.A. § 9-11-15, "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order." *Id.* No pretrial order has been entered in the instant case.

3.

During Plaintiff's investigation of this case Plaintiff has learned that Wal-Mart Stores, Inc. and Bright-Meyers Union City Associates, L.P. own or occupy property at which they have hired, authorized, or otherwise provided material support to Defendant or other individuals / entities that unlawfully immobilize vehicles at the property where Plaintiff's vehicles was unlawfully booted.

4.

Accordingly, Plaintiff requests that the Court add Wal-Mart Stores, Inc. and Bright-Meyers Union City Associates, L.P. as party Defendants, and permit Plaintiff to amend his Complaint to assert appropriate allegations against these Defendants. A true and accurate copy of Plaintiff's proposed Second Amended Complaint is attached hereto as Exhibit A.

5.

Following the addition of Wal-Mart Stores, Inc. And Bright-Meyers Union City Associates, L.P. as party Defendants the amended caption shall be as follows:

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC. and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P., Defendants.	CIVIL ACTION FILE NUMBER 17EV003164

{Signature on the Following Page}

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

CERTIFICATE OF SERVICE

COMES NOW, Plaintiff, by and through the undersigned Counsel, and hereby file this Certificate with the Court as required by Uniform Superior Court Rule 5.2. This is to certify that on this day I have served opposing counsel herein with a copy of **PLAINTIFF'S MOTION TO AMEND AND TO ADD WAL-MART STORES, INC. AND BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. AS PARTY DEFENDANTS** by electronic transmission via Odyssey File & Serve:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

EXHIBIT A

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons,	
Plaintiff,	**CIVIL ACTION FILE NUMBER**
v.	**17EV003164**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC., and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P.	
Defendants.	

SECOND AMENDED CLASS ACTION COMPLAINT

1. Defendant Kenny McElwaney d/b/a Maximum Booting Co. ("McElwaney") has a systematic process of disabling vehicles with boots and similar devices without first complying with the City of Union City ordinances requiring certain signage at any location where vehicle immobilization occurs. As a result, McElwaney has collected an unknown amount of booting fees in an unlawful manner. All other Defendants own or occupy property at which it has hired, authorized, or otherwise provided material support to entities or individuals that unlawfully immobilize vehicles at this property. Plaintiff brings this action to recover damages and other available remedies on behalf of himself and a class of persons similarly situated.

I. PARTIES

2. Plaintiff Jessy Polson brings this action in his individual capacity, and in the capacity of a class representative on behalf of others similarly situated. By bringing this action, Plaintiff avails himself of the jurisdiction of this Court.

3. Defendant McElwaney is an individual doing business as a sole proprietorship under the name "Maximum Booting Co." McElwaney was lawfully served on July 25, 2017. Jurisdiction and venue are proper as to Defendant because he is a resident of Fulton County.

4. Defendant Wal-Mart Stores, Inc. is a corporation registered to business in Georgia. Wal-Mart Stores, Inc. can be served through its registered agent, C T Corporation System at 289 S Culver St, Lawrenceville, GA 30046. Jurisdiction and venue are proper as to Wal-Mart Stores, Inc. because it is a joint tortfeasor with one or more Defendants who reside in Fulton County.

5. Defendant Bright-Meyers Union City Associates, L.P. is a limited partnership registered to business in Georgia. Bright-Meyers Union City Associates, L.P. can be served through its registered agent, Neil F. Meyers at 5881 Glenridge Drive, Suite 220, Atlanta, GA, 30328. Jurisdiction and venue are proper as to Bright-Meyers Union City Associates, L.P. because it is a joint tortfeasor with one or more Defendants who reside in Fulton County.

II. STATEMENT OF FACTS

6. There is no provision in the Official Code of Georgia Annotated ("O.C.G.A.") which expressly authorizes vehicle immobilization on private property.

7. The City of Union City authorizes certain types of vehicle immobilization, including booting, by licensed vehicle immobilization services.

8. Booting is a method of using a mechanical device that is designed or adopted to be attached to a wheel, tire, or part of a parked motor vehicle so as to prohibit the motor vehicle's usual manner of movement or operation:

9. Once licensed, a vehicle immobilization service operating in Union City may only boot vehicles under the terms proscribed by City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

10. One of the conditions precedent to legally booting a vehicle within the City of Union City is to comply with certain signage requirements as detailed in Union City Code of Ordinances, Chapter 10, Article I, § 10-28. This ordinance is provided in full here:

> It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met:
>
> (1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.

b. The maximum fee for removal of the device, as provided in subsection (c).

c. The name, address, and phone number of the person or entity responsible for affixing the device.

d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.

e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

f. The name and address of the entity that hired the vehicle immobilization service or company.

g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

11. Defendant McElwaney is a licensed vehicle immobilization service operating within the City of Union City.

12. Defendant McElwaney offers booting services to parking lots within the city of Union City.

13. On information and belief, the signs erected at every parking lot wherein Defendants operates do not comply with Union City Code of Ordinances, Chapter 10, Article 1, § 10-28.

14. On information and belief, Defendants have immobilized at least forty (40) vehicles in the City of Union City from 2012 through present.

15. On information and belief, Defendants have immobilized at least forty (40) vehicles at, or around, 4735 Jonesboro Rd, Union City, GA 30291 from 2012 through

present.

III. NAMED PLAINTIFF'S EXPERIENCE

16. On or about June 15, 2017, Plaintiff parked in a private parking lot located at 4735 Jonesboro Rd, Union City, GA 30291, which is within the territorial limits of the City of Union City.

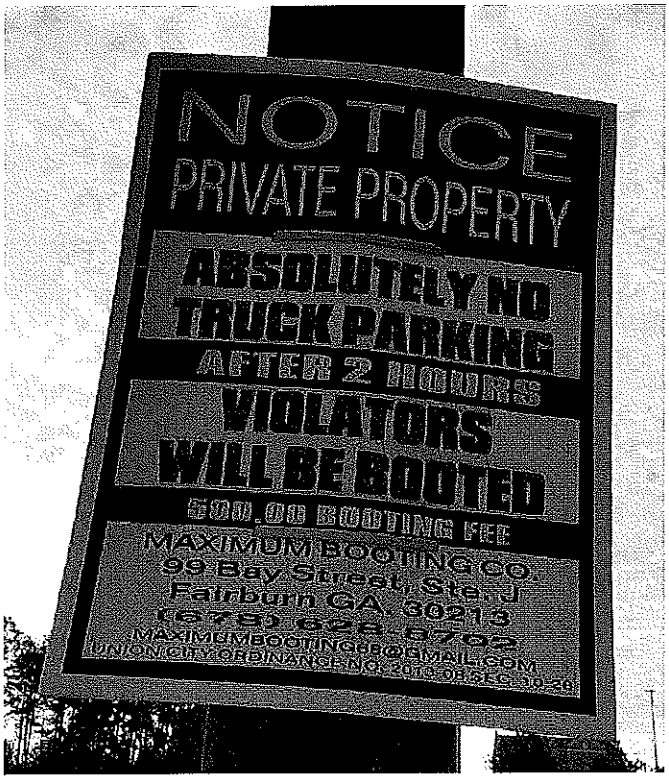
17. Plaintiff parked in a parking lot owned by Wal-Mart Stores, Inc.

18. Defendant McElwaney was hired by the owner of the private property located at 4735 Jonesboro Rd., to install or attach vehicle immobilization devices or boots.

19. Defendant McElwaney placed a boot on Plaintiff's vehicle and refused to remove it unless Plaintiff paid a **$500.00** fine.

20. Plaintiff paid Defendant McElwaney $500.00.

21. An exemplar of the signs erected at the parking lot located at 4735 Jonesboro Rd. is depicted below:



22. Defendants' violations of Union City Code of Ordinances, Chapter 10, Article I, § 10-28 include, but are not limited to:

a. The signs do not contain a statement that cash, checks, credit cards, and debit cards are accepted for payment.

b. The signs do not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

c. The sings do not contain the name and address of the entity that hired the vehicle immobilization service or company.

23. Defendants booted Plaintiff's vehicle without legal authority and caused damages to Plaintiff.

24. On information and belief, at all other locations within the City of Union City where Defendants engage in vehicle immobilization, the signs erected by Defendants do not comply with the requirements of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

IV. CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action as a class action pursuant to O.C.G.A. § 9-11-23, on behalf of himself and the following Classes:

a. All persons who have had a vehicle in their possession booted by or at the request of Defendants and paid fines for removal of said device within the City of Union City from June 15, 2012, through present; and

b. A subclass of all persons who have had a vehicle in their possession booted by or at the request of Defendants at, or around, 4735 Jonesboro

Rd, Union City, GA 30291, and have paid a fine for removal of said device from June 15, 2012, through present (the Polson subclass).

26. Excluded from the Classes are Defendants, as well as Defendants' employees, affiliates, officers, and directors, including any individuals who incurred property damage as a result of Defendants' actions, and the Judge presiding over this case. Plaintiff reserves the right to amend the definition of the Classes if discovery and/or further investigation reveal that the Class definitions should be expanded or otherwise modified.

27. **Numerosity / Impracticality of Joinder**: The members of the Classes are so numerous that joinder of all members would be impractical. The members of the Classes are easily and readily identifiable from information and records in Defendants' possession, control, or custody.

28. **Commonality and Predominance**: There is a well-defined community of interest and common questions of law and fact that predominate over any questions affecting the individual members of the Classes. These common legal and factual questions, which exist without regard to the individual circumstances of any Class member, include, but are not limited to, the following:

a. Whether Defendants engaged in fraudulent business practices with respect to booting vehicles without legal authority throughout Union City;

b. Whether Defendants engaged in racketeering activity prohibited under O.C.G.A. § 16-14-1, *et seq*.

c. Whether Defendants engaged in civil theft \ conversion;

d. Whether Defendants engaged in false imprisonment;

e. Whether Defendants engaged in making false statements;

f. Whether Defendants unlawfully disabled Plaintiff and other Class Member's property and refused to return the property; and

g. Whether Plaintiff and the Classes are entitled to damages.

29. **Typicality**: Plaintiff's claims are typical of the Classes in that Plaintiff and the Classes have all been booted as a result of Defendants' unlawful activities, and have all sustained damages as a direct proximate result of the same wrongful practices. Plaintiff's claims arise from the same practices and course of conduct that give rise to the Classes' claims. Plaintiff's claims are based upon the same legal theories as the Classes' claims.

30. **Adequacy**: Plaintiff will fully and adequately protect the interests of the Classes and has retained class counsel who are experienced and qualified in prosecuting class actions, including consumer class actions and other forms of complex litigation. Neither the Plaintiff nor their counsel have interests which are contrary to, or conflicting with, those interests of the Classes.

31. **Superiority**: A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because, *inter alia*: it is economically impracticable for members of the Classes to prosecute individual actions; prosecution as a class action will eliminate the possibility of repetitious and redundant litigation; and, a class action will enable claims to be handled in an orderly, expeditious manner.

COUNT I: NEGLIGENCE

32. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to immobilize vehicles without legal authority.

33. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to exceed the scope of their booting license in the City of Atlanta.

34. Defendants breached their duties to Plaintiff by exceeding the scope of their booting license and/or otherwise immobilizing Plaintiff's and other Class Member's vehicles without legal authority.

35. As a result of Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 2: NEGLIGENCE *PER SE*

36. Defendants violated the Union City vehicle immobilization ordinance by unlawfully booting Plaintiff and other Class Members' vehicles.

37. Plaintiff and other Class Members fall within the class of persons intended to be protected by this ordinance.

38. The Union City vehicle immobilization ordinance is intended to guard against the unlawful activities of Defendants.

39. Due to Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 3: PREMISES LIABILITY / O.C.G.A. §§ 5I-3-1, 51-3-2

40. As owners and occupiers of the property where Defendants immobilize vehicles, Defendants have a duty of ordinary care not to cause harm to individuals at this property.

41. By illegally immobilizing vehicles Defendants breached this duty and caused harm to Plaintiff and other Class Members.

42. As a result of Defendants' breach, Plaintiff and other Class Members have

suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 4: IMPUTED NEGLIGENCE / O.C.G.A. § 51-2-5

43. Defendants hired, authorized, or provided material support to individuals that unlawfully immobilized Plaintiff and other Class Members' vehicles.

44. Defendants are vicariously liable for the negligence of these individuals under O.C.G.A. § 51-2-5.

45. Due to Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 5: FALSE IMPRISONMENT

46. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to interfere with the free movement of Plaintiff and other Class Members.

47. In violation of O.C.G.A. § 51-7-20, Defendants knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time.

48. Defendants were acting without legal authority when Defendants restrained the movements of Plaintiff and other Class Members.

49. Plaintiff and other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury as a result of Dcfendants' conduct.

COUNT 6: CONVERSION / CIVIL THEFT

50. Plaintiff and other Class Members had an ownership interest in funds that were paid to Defendants.

51. Defendants took possession of Plaintiff and other Class Members' funds by

demanding that Plaintiff and other Class Members pay to have a vehicle immobilization device removed.

52. Plaintiff and other Class Members demanded that the vehicle immobilization device be removed free of charge.

53. Defendants refused to release Plaintiff and other Class Members' vehicles without payment.

54. Defendants had no lawful right to immobilize Plaintiff and the other Class Members' vehicles, or to demand payment to remove vehicle immobilization devices.

55. As a result, by requiring Plaintiff and other Class Members to pay to have vehicle immobilization devices removed, Defendants have wrongfully converted Plaintiff and other Class Members' funds, and Plaintiff and other Class Members have sustained damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 7: MONEY HAD AND RECEIVED

56. Because Defendants collected money from Plaintiff and other Class Members to release vehicles unlawfully booted by Defendants, Defendants have received money from Plaintiff and other Class Members that in equity and good conscious Defendants should not be permitted to keep.

57. As a result of Defendants' actions, Plaintiff and the other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 8: VIOLATION OF GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO")

58. Defendant McElwaney, as part of its parking company business, engages in an enterprise of unlawfully immobilizing vehicles for profit.

59. Defendant's conduct subjects him to liability under Georgia's Racketeer

Influenced and Corrupt Organization Act ("RICO"), O.C.G.A. § 16-14-1 *et seq.*, as more fully set out below.

60. Specifically, Defendant, in furtherance of its unlawful vehicle immobilization enterprise, has engaged in a pattern of racketeering activity, including, but not limited to the following:

a. By forcing Plaintiff and other Class Members to pay to have an unlawfully placed vehicle immobilization device removed, Defendant has engaged in Theft (O.C.G.A. § 16-8-1), Theft by Taking (O.C.G.A. § 16-8-2), Theft by Deception (O.C.G.A. § 16-8-3), Theft by Conversion (O.C.G.A. § 16-8-4), and Theft by Extortion (O.C.G.A. § 16-8-16);

b. By alleging through signage, notices, and other documents provided to Plaintiff and other Class Members, that Defendant was lawfully permitted to immobilize Plaintiff and other Class Members' vehicles, and lawfully permitted to charge fees for the removal of vehicle immobilization devices, Defendant has engaged in the use of false statements in violation of O.C.G.A. § 16-10-20; and

c. By unlawfully attaching vehicle immobilization devices to Plaintiff and other Class Members' vehicles, Defendant knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time in violation of O.C.G.A. § 16-5-41.

61. Defendant has also engaged in racketeering activity by extorting money from Plaintiff and other Class Members under the threat of refusing to remove an unlawfully placed vehicle immobilization device.

62. Defendant's above described racketeering activity is all done in furtherance of Defendant's enterprise of profiting off unlawfully immobilizing vehicles.

63. Defendant's above described racketeering activity all have the same or similar methods of commission in that they all involve the unlawful use of vehicle immobilization devices, and false or misleading signage and documentation, to force Plaintiff and other Class Members to pay to have unlawfully placed vehicle immobilization devices removed.

64. Defendant's racketeering activity have the same or similar objective, namely, profiting off the unlawful use of vehicle immobilization devices.

65. Defendant's racketeering activity have the same or similar victims, namely, Plaintiff and other Class Members who have been forced to pay Defendant to remove a vehicle immobilization device unlawfully placed on Plaintiff and other Class Members' vehicles by Defendant.

66. Defendant's racketeering activity are otherwise related by distinguishing characteristics including, but not limited to, the involvement and collusion of Defendant and its workers, executives, and officers.

67. Defendant's racketeering activity is part of a long-term enterprise that has existed, and continues to, exist for over five (5) years, and will continue to exist unless halted by judicial intervention.

68. As a result of Defendant's racketeering activity, Plaintiff and other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 9: ATTORNEY'S FEES

69. Defendants have acted in bad faith, have been stubbornly litigious, and have caused Plaintiff and other Class Members unnecessary trouble and expense.

70. Accordingly, Plaintiff and other Class Members are entitled to recover their expenses of litigation, including their reasonable attorney's fees, pursuant to O.C.G.A. § 13-6-11.

COUNT 10: PUNITIVE DAMAGES

71. Defendants' conduct was willful, wanton, and reckless and evidences an entire want of care, which raised the presumption of a conscious indifference to the consequences of its actions.

72. As a result of Defendants' willful, wanton, and reckless conduct, Plaintiff and other Class Members are entitled to an award of punitive damages under O.C.G.A. § 51-12-5.1.

V. JURY DEMAND

73. Plaintiff demands a trial by jury for all of his claims and for a determination of all damages.

VI. DAMAGES AND PRAYER FOR RELIEF

74. Plaintiff prays for the following relief:

a. An order certifying this action as a class action, appointing Plaintiff as class representative and appointing Plaintiff's counsel as lead Class counsel;

b. All compensatory damages on all applicable claims in an amount to be proven at trial, and, as allowed by law, for such damages to be trebled or

multiplied upon proof of claims under laws allowing for trebling or multiplying of compensatory damages based upon Defendants' violations of law;

c. Punitive damages in an amount to be determined at trial;

d. Attorney fees for stubborn litigiousness pursuant to O.C.G.A. § 13-6-11; and,

e. All other and further relief the Court deems appropriate and just under the circumstances.

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

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CERTIFICATE OF SERVICE

COMES NOW, Plaintiff, by and through the undersigned Counsel, and hereby file this Certificate with the Court as required by Uniform Superior Court Rule 5.2. This is to certify that on this day I have served opposing counsel herein with a copy of **SECOND AMENDED CLASS ACTION COMPLAINT** by electronic transmission via Odyssey File & Serve:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
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This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
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Atlanta, GA 30305
404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

State Court of Fulton County

185 Central Avenue, S.W., Suite TG400
Atlanta, Georgia 30303
Telephone: (404) 613-5040

12/21/2017

BRYNDA RODRIGUEZ INSLEY
181 14TH STREET NE
THE MAYFAIR ROYAL - SUITE 200
ATLANTA GA 30309

CIVIL ACTION NO: 17EV003164-B

IN THE CASE OF: JESSY POLSON
VS.KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

NOTICE OF CIVIL MOTIONS CALENDAR

The above civil action is set for oral argument on a pending motion. Parties are to appear before the Honorable Patsy Y Porter on **02/21/2018** at **3:50 PM**, in room number **2D**, 185 Central Avenue, SW, Justice Center Tower, Atlanta, Georgia 30303. Failure to appear will be construed as waiver of oral argument. Please refer to the attachment for further information.

Questions regarding the calendaring of this case can be directed to Mr. Booker T. "Chip" Washington, Judge Patsy Porter's Staff Attorney at **404-613-4350** or booker.washington@fultoncountyga.gov.

DeAndre C. Moore

Deputy Clerk, State Court of Fulton County

State Court of Fulton County

185 Central Avenue, S.W., Suite TG400
Atlanta, Georgia 30303
Telephone: (404) 613-5040

12/21/2017

JASON SOUTHERLAND BELL
SUITE 3100 PROMENADE II
1230 PEACHTREE ST NE
ATLANTA GA 30309-3592

CIVIL ACTION NO: 17EV003164-B

IN THE CASE OF: JESSY POLSON
VS.KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

NOTICE OF CIVIL MOTIONS CALENDAR

The above civil action is set for oral argument on a pending motion. Parties are to appear before the Honorable Patsy Y Porter on **02/21/2018** at **3:50 PM**, in room number **2D**, 185 Central Avenue, SW, Justice Center Tower, Atlanta, Georgia 30303. Failure to appear will be construed as waiver of oral argument. Please refer to the attachment for further information.

Questions regarding the calendaring of this case can be directed to Mr. Booker T. "Chip" Washington, Judge Patsy Porter's Staff Attorney at **404-613-4350** or booker.washington@fultoncountyga.gov.

DeAndre C. Moore

Deputy Clerk, State Court of Fulton County

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12/21/2017

MATTHEW Q WETHERINGTON
2860 PIEDMONT RD NE
SUITE 100
ATLANTA GA 30305

CIVIL ACTION NO: 17EV003164-B

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12/21/2017

ROBERT N. FRIEDMAN
CRUSER & MITCHELL LLP
275 SCIENTIFIC DRIVE
MERIDIAN II - SUITE 2000
NORCROSS GA 30092

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12/21/2017

MICHAEL L WERNER
THE WERNER LAW FIRM PC
2860 PIEDMONT ROAD NE
ATLANTA GA 30305

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12/21/2017

File Copy

CIVIL ACTION NO: 17EV003164-B

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DeAndre C. Moore

Deputy Clerk, State Court of Fulton County

STATE COURT OF FULTON COUNTY
ATLANTA, GEORGIA

February 21, 2018 Civil Motions
Afternoon Division B - Judge Porter

02/21/2018 at 2:30 PM

JUDGE: Porter, Patsy Y 2:30 PM

Beginning at 2:30 PM with 20 minute intervals

1 – 2:30

16EV002212 William Watson,Felicia Watson VS.David Davis,Thomas Builders, Inc. (TN) **FILE DATE: 05/10/2016** **COMMENTS**	**Plaintiff: Felicia Yvette Watson; William Watson** **Defendant: Asurety Company, Inc., d/b/a Hard Rock Concrete Services; David Davis; Hard Rock Concrete, Inc.; Heaton Erecting, Inc.; Jesse Wallace; John Doe 1; Kenneth Butcher; Richard Couch; Thomas Builders, Inc. (TN)**	**Attorney: RUDER, KIM MICHELLE** **Attorney: RUDER, KIM MICHELLE; Foster, Richard Crawford; Foster, Richard Crawford; DARNEILLE, JASON D; Foster, Richard Crawford; MOCK, T. RYAN, Jr.; DARNEILLE, JASON D; DARNEILLE, JASON D**

1 – 2:50

16EV000088 Tamara Schwartz,Marc Schwartz VS.RBM of Atlanta, Inc.,Desmond Domingo **FILE DATE: 01/08/2016** **COMMENTS**	**Plaintiff: Abigail Schwartz; Marc Schwartz; Tamara Schwartz** **Defendant: Desmond Jenna Domingo; Donna Agan Lee; RBM of Atlanta, Inc.**	**Attorney: ST. AMAND, MICHAEL D.; ST. AMAND, MICHAEL D.; ST. AMAND, MICHAEL D.** **Attorney: Goldman, Michael J.; MYERS, JR, ARTHUR L; WARREN, RANDI**

1 – 3:10

13EV018146 GAYLOR,MARK VS NORTH ATL UROLOGY & ET AL **FILE DATE: 09/06/2013** **COMMENTS**	**Plaintiff: MARK GAYLOR** **Defendant: HOWARD CRAIG GOLDBERG, M.D.; NORTH ATLANTA UROLOGY ACQUISITIONS LLC; NORTH ATLANTA UROLOGY ASSOCIATES P.C.**	**Attorney: Trask, Thomas Dixon** **Attorney: POWELL, RANDOLPH PAGE, Jr.; POWELL, RANDOLPH PAGE, Jr.; POWELL, RANDOLPH PAGE, Jr.**

STATE COURT OF FULTON COUNTY
ATLANTA, GEORGIA

February 21, 2018 Civil Motions
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02/21/2018 at 2:30 PM

JUDGE: Porter, Patsy Y 2:30 PM

Beginning at 2:30 PM with 20 minute intervals

1 – 3:30

17EV002871 Rachel St.Fleur VS.SARA, Inc.,John Does #1-S **FILE DATE: 06/14/2017** **COMMENTS**	**Plaintiff: Rachel St.Fleur** **Defendant: John Does #1-S; SARA, Inc.**	**Attorney: STODDARD, MATTHEW B** **Attorney: BASS, GLENN S**

1 – 3:50

17EV003164 Jessy Polson VS.Kenny McElwaney D/B/A Maximum Booting Co. **FILE DATE: 06/30/2017** **COMMENTS**	**Plaintiff: Jessy Polson** **Defendant: Kenny McElwaney D/B/A Maximum Booting Co.**	**Attorney: WETHERINGTON, MATTHEW Q** **Attorney: Bell, Jason Southerland**

1 – 4:10

17EV004311 VOTTA VS. JACOB GOLDBERGet al. **FILE DATE: 09/07/2017** **COMMENTS**	**Plaintiff: MICHAEL VOTTA** **Defendant: CINDY GOLDBERG; HOWARD GOLDBERG; JACOB GOLDBERG; PHUONG NGOC LUONG**	**Attorney: BIRD, WILLIAM Q.** **Attorney: STEWART, MARCIA R.; STEWART, MARCIA R.; STEWART, MARCIA R.; HARRISON, ROBERT CHRISTOPHER**

CIVIL MOTIONS CALENDAR

Judge Patsy Y. Porter
Justice Center Tower
185 Central Avenue, S.W.
Atlanta, GA 30303

Courtroom 2D

The following cases are scheduled for oral argument on February 21, 2018, in Courtroom 2-D. Please note the time your case is scheduled to appear. It will be necessary to be in Court for oral argument on all motions unless specifically excused therefrom. Each side is limited to ten (10) minutes. Movant will notify Respondent with a Notice of Motion, not less than five (5) days prior to the hearing date of the motion. If a motion is removed from this calendar other than for legal cause, the motion will have to be restipulated in writing to the ready list after ninety days. Failure to appear may result in sanctions including dismissal for want of prosecution, default judgment, and/or placing the case on inactive status, at the Judge's discretion.

Please direct all inquiries to this calendar to: Booker Washington, Staff Attorney (404) 613-4350 or booker.washington@fultoncountyga.gov. Parties must notify Booker at least 5 days before the hearing to request a court reporter. Failure to do so may result in no takedown. Further, if your matter is scheduled before 8:30am, you are required to bring your own court reporter. Parties must update the Court (preferably via email) with the Attorneys or Parties that will appear to argue the motions at least 5 days before the hearing.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. Defendant.	CIVIL ACTION FILE NUMBER 17EV003164

PLAINTIFF'S MOTION TO AMEND AND TO ADD WAL-MART STORES, INC. AND BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. AS PARTY DEFENDANTS

COMES NOW Plaintiff in the above-styled action and moves to amend to clarify Plaintiff's claims against Defendant, to assert additional claims, and to add Wal-Mart Stores, Inc. and Bright-Meyers Union City Associates, L.P. as party Defendants:

1.

Under O.C.G.A. § 9-11-21 an order from the Court is necessary to either drop or add a party. Georgia law grants the trial court discretion to permit the addition of a party defendant. *See Fontaine v. Home Depot, Inc.*, 250 Ga. App. 123, 123, 550 S.E.2d 691, 693 (2001) ("The addition of a new party defendant by an amendment to the complaint requires the exercise of discretion by the trial court.").

2.

Under O.C.G.A. § 9-11-15, "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order." *Id.* No pretrial order has been entered in the instant case.

3.

During Plaintiff's investigation of this case Plaintiff has learned that Wal-Mart Stores, Inc. and Bright-Meyers Union City Associates, L.P. own or occupy property at which they have hired, authorized, or otherwise provided material support to Defendant or other individuals / entities that unlawfully immobilize vehicles at the property where Plaintiff's vehicles was unlawfully booted.

4.

Accordingly, Plaintiff requests that the Court add Wal-Mart Stores, Inc. and Bright-Meyers Union City Associates, L.P. as party Defendants, and permit Plaintiff to amend his Complaint to assert appropriate allegations against these Defendants. A true and accurate copy of Plaintiff's proposed Second Amended Complaint is attached hereto as Exhibit A.

5.

Following the addition of Wal-Mart Stores, Inc. And Bright-Meyers Union City Associates, L.P. as party Defendants the amended caption shall be as follows:

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC. and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P., Defendants.	CIVIL ACTION FILE NUMBER 17EV003164

{Signature on the Following Page}

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

CERTIFICATE OF SERVICE

COMES NOW, Plaintiff, by and through the undersigned Counsel, and hereby file this Certificate with the Court as required by Uniform Superior Court Rule 5.2. This is to certify that on this day I have served opposing counsel herein with a copy of **PLAINTIFF'S MOTION TO AMEND AND TO ADD WAL-MART STORES, INC. AND BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. AS PARTY DEFENDANTS** by electronic transmission via Odyssey File & Serve:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

EXHIBIT A

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons,	
Plaintiff,	**CIVIL ACTION FILE NUMBER**
v.	**17EV003164**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC., and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P.	
Defendants.	

SECOND AMENDED CLASS ACTION COMPLAINT

1. Defendant Kenny McElwaney d/b/a Maximum Booting Co. ("McElwaney") has a systematic process of disabling vehicles with boots and similar devices without first complying with the City of Union City ordinances requiring certain signage at any location where vehicle immobilization occurs. As a result, McElwaney has collected an unknown amount of booting fees in an unlawful manner. All other Defendants own or occupy property at which it has hired, authorized, or otherwise provided material support to entities or individuals that unlawfully immobilize vehicles at this property. Plaintiff brings this action to recover damages and other available remedies on behalf of himself and a class of persons similarly situated.

I. PARTIES

2. Plaintiff Jessy Polson brings this action in his individual capacity, and in the capacity of a class representative on behalf of others similarly situated. By bringing this action, Plaintiff avails himself of the jurisdiction of this Court.

3. Defendant McElwaney is an individual doing business as a sole proprietorship under the name "Maximum Booting Co." McElwaney was lawfully served on July 25, 2017. Jurisdiction and venue are proper as to Defendant because he is a resident of Fulton County.

4. Defendant Wal-Mart Stores, Inc. is a corporation registered to business in Georgia. Wal-Mart Stores, Inc. can be served through its registered agent, C T Corporation System at 289 S Culver St, Lawrenceville, GA 30046. Jurisdiction and venue are proper as to Wal-Mart Stores, Inc. because it is a joint tortfeasor with one or more Defendants who reside in Fulton County.

5. Defendant Bright-Meyers Union City Associates, L.P. is a limited partnership registered to business in Georgia. Bright-Meyers Union City Associates, L.P. can be served through its registered agent, Neil F. Meyers at 5881 Glenridge Drive, Suite 220, Atlanta, GA, 30328. Jurisdiction and venue are proper as to Bright-Meyers Union City Associates, L.P. because it is a joint tortfeasor with one or more Defendants who reside in Fulton County.

II. STATEMENT OF FACTS

6. There is no provision in the Official Code of Georgia Annotated ("O.C.G.A.") which expressly authorizes vehicle immobilization on private property.

7. The City of Union City authorizes certain types of vehicle immobilization, including booting, by licensed vehicle immobilization services.

8. Booting is a method of using a mechanical device that is designed or adopted to be attached to a wheel, tire, or part of a parked motor vehicle so as to prohibit the motor vehicle's usual manner of movement or operation:

9. Once licensed, a vehicle immobilization service operating in Union City may only boot vehicles under the terms proscribed by City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

10. One of the conditions precedent to legally booting a vehicle within the City of Union City is to comply with certain signage requirements as detailed in Union City Code of Ordinances, Chapter 10, Article I, § 10-28. This ordinance is provided in full here:

> It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met:
>
> (1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.

b. The maximum fee for removal of the device, as provided in subsection (c).

c. The name, address, and phone number of the person or entity responsible for affixing the device.

d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.

e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

f. The name and address of the entity that hired the vehicle immobilization service or company.

g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

11. Defendant McElwaney is a licensed vehicle immobilization service operating within the City of Union City.

12. Defendant McElwaney offers booting services to parking lots within the city of Union City.

13. On information and belief, the signs erected at every parking lot wherein Defendants operates do not comply with Union City Code of Ordinances, Chapter 10, Article 1, § 10-28.

14. On information and belief, Defendants have immobilized at least forty (40) vehicles in the City of Union City from 2012 through present.

15. On information and belief, Defendants have immobilized at least forty (40) vehicles at, or around, 4735 Jonesboro Rd, Union City, GA 30291 from 2012 through

present.

III. NAMED PLAINTIFF'S EXPERIENCE

16. On or about June 15, 2017, Plaintiff parked in a private parking lot located at 4735 Jonesboro Rd, Union City, GA 30291, which is within the territorial limits of the City of Union City.

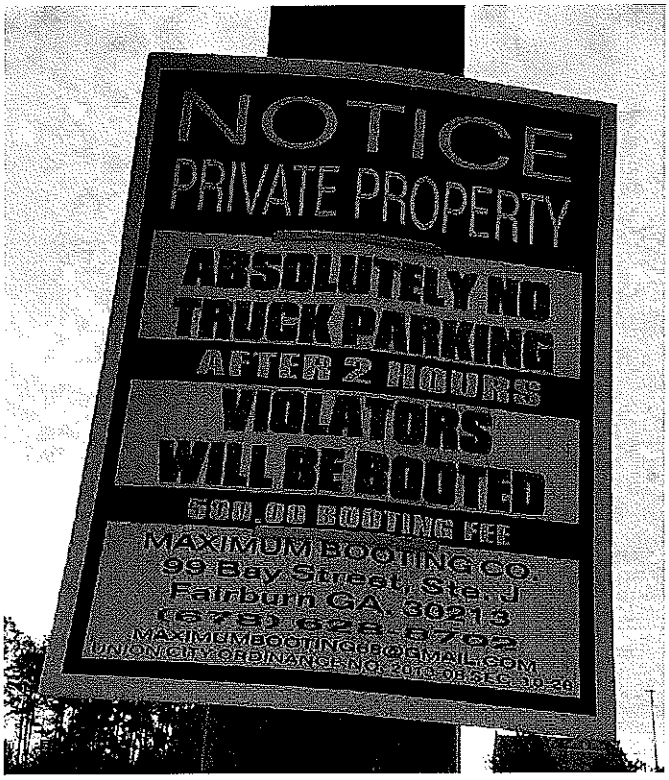
17. Plaintiff parked in a parking lot owned by Wal-Mart Stores, Inc.

18. Defendant McElwaney was hired by the owner of the private property located at 4735 Jonesboro Rd., to install or attach vehicle immobilization devices or boots.

19. Defendant McElwaney placed a boot on Plaintiff's vehicle and refused to remove it unless Plaintiff paid a **$500.00** fine.

20. Plaintiff paid Defendant McElwaney $500.00.

21. An exemplar of the signs erected at the parking lot located at 4735 Jonesboro Rd. is depicted below:



22. Defendants' violations of Union City Code of Ordinances, Chapter 10, Article I, § 10-28 include, but are not limited to:

a. The signs do not contain a statement that cash, checks, credit cards, and debit cards are accepted for payment.

b. The signs do not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

c. The sings do not contain the name and address of the entity that hired the vehicle immobilization service or company.

23. Defendants booted Plaintiff's vehicle without legal authority and caused damages to Plaintiff.

24. On information and belief, at all other locations within the City of Union City where Defendants engage in vehicle immobilization, the signs erected by Defendants do not comply with the requirements of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

IV. CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action as a class action pursuant to O.C.G.A. § 9-11-23, on behalf of himself and the following Classes:

a. All persons who have had a vehicle in their possession booted by or at the request of Defendants and paid fines for removal of said device within the City of Union City from June 15, 2012, through present; and

b. A subclass of all persons who have had a vehicle in their possession booted by or at the request of Defendants at, or around, 4735 Jonesboro

Rd, Union City, GA 30291, and have paid a fine for removal of said device from June 15, 2012, through present (the Polson subclass).

26. Excluded from the Classes are Defendants, as well as Defendants' employees, affiliates, officers, and directors, including any individuals who incurred property damage as a result of Defendants' actions, and the Judge presiding over this case. Plaintiff reserves the right to amend the definition of the Classes if discovery and/or further investigation reveal that the Class definitions should be expanded or otherwise modified.

27. **Numerosity / Impracticality of Joinder**: The members of the Classes are so numerous that joinder of all members would be impractical. The members of the Classes are easily and readily identifiable from information and records in Defendants' possession, control, or custody.

28. **Commonality and Predominance**: There is a well-defined community of interest and common questions of law and fact that predominate over any questions affecting the individual members of the Classes. These common legal and factual questions, which exist without regard to the individual circumstances of any Class member, include, but are not limited to, the following:

a. Whether Defendants engaged in fraudulent business practices with respect to booting vehicles without legal authority throughout Union City;

b. Whether Defendants engaged in racketeering activity prohibited under O.C.G.A. § 16-14-1, *et seq*.

c. Whether Defendants engaged in civil theft \ conversion;

d. Whether Defendants engaged in false imprisonment;

e. Whether Defendants engaged in making false statements;

f. Whether Defendants unlawfully disabled Plaintiff and other Class Member's property and refused to return the property; and

g. Whether Plaintiff and the Classes are entitled to damages.

29. **Typicality**: Plaintiff's claims are typical of the Classes in that Plaintiff and the Classes have all been booted as a result of Defendants' unlawful activities, and have all sustained damages as a direct proximate result of the same wrongful practices. Plaintiff's claims arise from the same practices and course of conduct that give rise to the Classes' claims. Plaintiff's claims are based upon the same legal theories as the Classes' claims.

30. **Adequacy**: Plaintiff will fully and adequately protect the interests of the Classes and has retained class counsel who are experienced and qualified in prosecuting class actions, including consumer class actions and other forms of complex litigation. Neither the Plaintiff nor their counsel have interests which are contrary to, or conflicting with, those interests of the Classes.

31. **Superiority**: A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because, *inter alia*: it is economically impracticable for members of the Classes to prosecute individual actions; prosecution as a class action will eliminate the possibility of repetitious and redundant litigation; and, a class action will enable claims to be handled in an orderly, expeditious manner.

COUNT I: NEGLIGENCE

32. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to immobilize vehicles without legal authority.

33. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to exceed the scope of their booting license in the City of Atlanta.

34. Defendants breached their duties to Plaintiff by exceeding the scope of their booting license and/or otherwise immobilizing Plaintiff's and other Class Member's vehicles without legal authority.

35. As a result of Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 2: NEGLIGENCE *PER SE*

36. Defendants violated the Union City vehicle immobilization ordinance by unlawfully booting Plaintiff and other Class Members' vehicles.

37. Plaintiff and other Class Members fall within the class of persons intended to be protected by this ordinance.

38. The Union City vehicle immobilization ordinance is intended to guard against the unlawful activities of Defendants.

39. Due to Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 3: PREMISES LIABILITY / O.C.G.A. §§ 5I-3-1, 51-3-2

40. As owners and occupiers of the property where Defendants immobilize vehicles, Defendants have a duty of ordinary care not to cause harm to individuals at this property.

41. By illegally immobilizing vehicles Defendants breached this duty and caused harm to Plaintiff and other Class Members.

42. As a result of Defendants' breach, Plaintiff and other Class Members have

suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 4: IMPUTED NEGLIGENCE / O.C.G.A. § 51-2-5

43. Defendants hired, authorized, or provided material support to individuals that unlawfully immobilized Plaintiff and other Class Members' vehicles.

44. Defendants are vicariously liable for the negligence of these individuals under O.C.G.A. § 51-2-5.

45. Due to Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 5: FALSE IMPRISONMENT

46. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to interfere with the free movement of Plaintiff and other Class Members.

47. In violation of O.C.G.A. § 51-7-20, Defendants knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time.

48. Defendants were acting without legal authority when Defendants restrained the movements of Plaintiff and other Class Members.

49. Plaintiff and other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury as a result of Dcfendants' conduct.

COUNT 6: CONVERSION / CIVIL THEFT

50. Plaintiff and other Class Members had an ownership interest in funds that were paid to Defendants.

51. Defendants took possession of Plaintiff and other Class Members' funds by

demanding that Plaintiff and other Class Members pay to have a vehicle immobilization device removed.

52. Plaintiff and other Class Members demanded that the vehicle immobilization device be removed free of charge.

53. Defendants refused to release Plaintiff and other Class Members' vehicles without payment.

54. Defendants had no lawful right to immobilize Plaintiff and the other Class Members' vehicles, or to demand payment to remove vehicle immobilization devices.

55. As a result, by requiring Plaintiff and other Class Members to pay to have vehicle immobilization devices removed, Defendants have wrongfully converted Plaintiff and other Class Members' funds, and Plaintiff and other Class Members have sustained damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 7: MONEY HAD AND RECEIVED

56. Because Defendants collected money from Plaintiff and other Class Members to release vehicles unlawfully booted by Defendants, Defendants have received money from Plaintiff and other Class Members that in equity and good conscious Defendants should not be permitted to keep.

57. As a result of Defendants' actions, Plaintiff and the other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 8: VIOLATION OF GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO")

58. Defendant McElwaney, as part of its parking company business, engages in an enterprise of unlawfully immobilizing vehicles for profit.

59. Defendant's conduct subjects him to liability under Georgia's Racketeer

Influenced and Corrupt Organization Act ("RICO"), O.C.G.A. § 16-14-1 *et seq.*, as more fully set out below.

60. Specifically, Defendant, in furtherance of its unlawful vehicle immobilization enterprise, has engaged in a pattern of racketeering activity, including, but not limited to the following:

a. By forcing Plaintiff and other Class Members to pay to have an unlawfully placed vehicle immobilization device removed, Defendant has engaged in Theft (O.C.G.A. § 16-8-1), Theft by Taking (O.C.G.A. § 16-8-2), Theft by Deception (O.C.G.A. § 16-8-3), Theft by Conversion (O.C.G.A. § 16-8-4), and Theft by Extortion (O.C.G.A. § 16-8-16);

b. By alleging through signage, notices, and other documents provided to Plaintiff and other Class Members, that Defendant was lawfully permitted to immobilize Plaintiff and other Class Members' vehicles, and lawfully permitted to charge fees for the removal of vehicle immobilization devices, Defendant has engaged in the use of false statements in violation of O.C.G.A. § 16-10-20; and

c. By unlawfully attaching vehicle immobilization devices to Plaintiff and other Class Members' vehicles, Defendant knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time in violation of O.C.G.A. § 16-5-41.

61. Defendant has also engaged in racketeering activity by extorting money from Plaintiff and other Class Members under the threat of refusing to remove an unlawfully placed vehicle immobilization device.

62. Defendant's above described racketeering activity is all done in furtherance of Defendant's enterprise of profiting off unlawfully immobilizing vehicles.

63. Defendant's above described racketeering activity all have the same or similar methods of commission in that they all involve the unlawful use of vehicle immobilization devices, and false or misleading signage and documentation, to force Plaintiff and other Class Members to pay to have unlawfully placed vehicle immobilization devices removed.

64. Defendant's racketeering activity have the same or similar objective, namely, profiting off the unlawful use of vehicle immobilization devices.

65. Defendant's racketeering activity have the same or similar victims, namely, Plaintiff and other Class Members who have been forced to pay Defendant to remove a vehicle immobilization device unlawfully placed on Plaintiff and other Class Members' vehicles by Defendant.

66. Defendant's racketeering activity are otherwise related by distinguishing characteristics including, but not limited to, the involvement and collusion of Defendant and its workers, executives, and officers.

67. Defendant's racketeering activity is part of a long-term enterprise that has existed, and continues to, exist for over five (5) years, and will continue to exist unless halted by judicial intervention.

68. As a result of Defendant's racketeering activity, Plaintiff and other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 9: ATTORNEY'S FEES

69. Defendants have acted in bad faith, have been stubbornly litigious, and have caused Plaintiff and other Class Members unnecessary trouble and expense.

70. Accordingly, Plaintiff and other Class Members are entitled to recover their expenses of litigation, including their reasonable attorney's fees, pursuant to O.C.G.A. § 13-6-11.

COUNT 10: PUNITIVE DAMAGES

71. Defendants' conduct was willful, wanton, and reckless and evidences an entire want of care, which raised the presumption of a conscious indifference to the consequences of its actions.

72. As a result of Defendants' willful, wanton, and reckless conduct, Plaintiff and other Class Members are entitled to an award of punitive damages under O.C.G.A. § 51-12-5.1.

V. JURY DEMAND

73. Plaintiff demands a trial by jury for all of his claims and for a determination of all damages.

VI. DAMAGES AND PRAYER FOR RELIEF

74. Plaintiff prays for the following relief:

a. An order certifying this action as a class action, appointing Plaintiff as class representative and appointing Plaintiff's counsel as lead Class counsel;

b. All compensatory damages on all applicable claims in an amount to be proven at trial, and, as allowed by law, for such damages to be trebled or

multiplied upon proof of claims under laws allowing for trebling or multiplying of compensatory damages based upon Defendants' violations of law;

c. Punitive damages in an amount to be determined at trial;

d. Attorney fees for stubborn litigiousness pursuant to O.C.G.A. § 13-6-11; and,

e. All other and further relief the Court deems appropriate and just under the circumstances.

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington

MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

CERTIFICATE OF SERVICE

COMES NOW, Plaintiff, by and through the undersigned Counsel, and hereby file this Certificate with the Court as required by Uniform Superior Court Rule 5.2. This is to certify that on this day I have served opposing counsel herein with a copy of **SECOND AMENDED CLASS ACTION COMPLAINT** by electronic transmission via Odyssey File & Serve:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 13th day of February 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington
MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

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404-793-1693
matt@wernerlaw.com
robert@wernerlaw.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, Individually, and on behalf of a class of similarly situated persons,	
Plaintiff,	**CIVIL ACTION FILE NUMBER**
v.	**17EV003164**
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC., and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P.	
Defendants.	

SECOND AMENDED CLASS ACTION COMPLAINT

1. Defendant Kenny McElwaney d/b/a Maximum Booting Co. ("McElwaney") has a systematic process of disabling vehicles with boots and similar devices without first complying with the City of Union City ordinances requiring certain signage at any location where vehicle immobilization occurs. As a result, McElwaney has collected an unknown amount of booting fees in an unlawful manner. All other Defendants own or occupy property at which it has hired, authorized, or otherwise provided material support to entities or individuals that unlawfully immobilize vehicles at this property. Plaintiff brings this action to recover damages and other available remedies on behalf of himself and a class of persons similarly situated.

I. PARTIES

2. Plaintiff Jessy Polson brings this action in his individual capacity, and in the capacity of a class representative on behalf of others similarly situated. By bringing this action, Plaintiff avails himself of the jurisdiction of this Court.

3. Defendant McElwaney is an individual doing business as a sole proprietorship under the name "Maximum Booting Co." McElwaney was lawfully served on July 25, 2017. Jurisdiction and venue are proper as to Defendant because he is a resident of Fulton County.

4. Defendant Wal-Mart Stores, Inc. is a corporation registered to business in Georgia. Wal-Mart Stores, Inc. can be served through its registered agent, C T Corporation System at 289 S Culver St, Lawrenceville, GA 30046. Jurisdiction and venue are proper as to Wal-Mart Stores, Inc. because it is a joint tortfeasor with one or more Defendants who reside in Fulton County.

5. Defendant Bright-Meyers Union City Associates, L.P. is a limited partnership registered to business in Georgia. Bright-Meyers Union City Associates, L.P. can be served through its registered agent, Neil F. Meyers at 5881 Glenridge Drive, Suite 220, Atlanta, GA, 30328. Jurisdiction and venue are proper as to Bright-Meyers Union City Associates, L.P. because it is a joint tortfeasor with one or more Defendants who reside in Fulton County.

II. STATEMENT OF FACTS

6. There is no provision in the Official Code of Georgia Annotated ("O.C.G.A.") which expressly authorizes vehicle immobilization on private property.

7. The City of Union City authorizes certain types of vehicle immobilization, including booting, by licensed vehicle immobilization services.

8. Booting is a method of using a mechanical device that is designed or adopted to be attached to a wheel, tire, or part of a parked motor vehicle so as to prohibit the motor vehicle's usual manner of movement or operation:

9. Once licensed, a vehicle immobilization service operating in Union City may only boot vehicles under the terms proscribed by City of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

10. One of the conditions precedent to legally booting a vehicle within the City of Union City is to comply with certain signage requirements as detailed in Union City Code of Ordinances, Chapter 10, Article I, § 10-28. This ordinance is provided in full here:

> It shall be unlawful for any person or entity to affix a vehicle immobilization device to any vehicle in any off-street parking facility, lot or area located on private property within the city, regardless of whether a charge for parking is assessed, unless the following conditions are met:
>
> (1) Signs shall be located at each designated entrance to the parking facility, lot or area where such a device is to be used indicating that parking prohibitions are in effect. Signs shall be at a minimum of eighteen (18) inches by twenty-four (24) inches and reflective in nature.

(2) The wording on such signs shall contain the following information:

a. A statement that any vehicle parked thereon which is not authorized to be parked in such area may be subject to use of a vehicle immobilization device.

b. The maximum fee for removal of the device, as provided in subsection (c).

c. The name, address, and phone number of the person or entity responsible for affixing the device.

d. A statement that cash, checks, credit cards, and debit cards are accepted for payment.

e. A statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

f. The name and address of the entity that hired the vehicle immobilization service or company.

g. The phone number referenced in subsection (b)(2)c. above must be operable and answered in person during the hours a vehicle immobilization device is affixed to a vehicle within the city.

11. Defendant McElwaney is a licensed vehicle immobilization service operating within the City of Union City.

12. Defendant McElwaney offers booting services to parking lots within the city of Union City.

13. On information and belief, the signs erected at every parking lot wherein Defendants operates do not comply with Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

14. On information and belief, Defendants have immobilized at least forty (40) vehicles in the City of Union City from 2012 through present.

15. On information and belief, Defendants have immobilized at least forty (40) vehicles at, or around, 4735 Jonesboro Rd, Union City, GA 30291 from 2012 through

present.

III. NAMED PLAINTIFF'S EXPERIENCE

16. On or about June 15, 2017, Plaintiff parked in a private parking lot located at 4735 Jonesboro Rd, Union City, GA 30291, which is within the territorial limits of the City of Union City.

17. Plaintiff parked in a parking lot owned by Wal-Mart Stores, Inc.

18. Defendant McElwaney was hired by the owner of the private property located at 4735 Jonesboro Rd., to install or attach vehicle immobilization devices or boots.

19. Defendant McElwaney placed a boot on Plaintiff's vehicle and refused to remove it unless Plaintiff paid a **$500.00** fine.

20. Plaintiff paid Defendant McElwaney $500.00.

21. An exemplar of the signs erected at the parking lot located at 4735 Jonesboro Rd. is depicted below:

22. Defendants' violations of Union City Code of Ordinances, Chapter 10, Article I, § 10-28 include, but are not limited to:

a. The signs do not contain a statement that cash, checks, credit cards, and debit cards are accepted for payment.

b. The signs do not contain a statement that no additional fee will be charged for use of cash, checks, credit cards, or debit cards.

c. The sings do not contain the name and address of the entity that hired the vehicle immobilization service or company.

23. Defendants booted Plaintiff's vehicle without legal authority and caused damages to Plaintiff.

24. On information and belief, at all other locations within the City of Union City where Defendants engage in vehicle immobilization, the signs erected by Defendants do not comply with the requirements of Union City Code of Ordinances, Chapter 10, Article I, § 10-28.

IV. CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action as a class action pursuant to O.C.G.A. § 9-11-23, on behalf of himself and the following Classes:

a. All persons who have had a vehicle in their possession booted by or at the request of Defendants and paid fines for removal of said device within the City of Union City from June 15, 2012, through present; and

b. A subclass of all persons who have had a vehicle in their possession booted by or at the request of Defendants at, or around, 4735 Jonesboro

Rd, Union City, GA 30291, and have paid a fine for removal of said device from June 15, 2012, through present (the Polson subclass).

26. Excluded from the Classes are Defendants, as well as Defendants' employees, affiliates, officers, and directors, including any individuals who incurred property damage as a result of Defendants' actions, and the Judge presiding over this case. Plaintiff reserves the right to amend the definition of the Classes if discovery and/or further investigation reveal that the Class definitions should be expanded or otherwise modified.

27. **Numerosity / Impracticality of Joinder**: The members of the Classes are so numerous that joinder of all members would be impractical. The members of the Classes are easily and readily identifiable from information and records in Defendants' possession, control, or custody.

28. **Commonality and Predominance**: There is a well-defined community of interest and common questions of law and fact that predominate over any questions affecting the individual members of the Classes. These common legal and factual questions, which exist without regard to the individual circumstances of any Class member, include, but are not limited to, the following:

a. Whether Defendants engaged in fraudulent business practices with respect to booting vehicles without legal authority throughout Union City;

b. Whether Defendants engaged in racketeering activity prohibited under O.C.G.A. § 16-14-1, *et seq*.

c. Whether Defendants engaged in civil theft \ conversion;

d. Whether Defendants engaged in false imprisonment;

e. Whether Defendants engaged in making false statements;

f. Whether Defendants unlawfully disabled Plaintiff and other Class Member's property and refused to return the property; and

g. Whether Plaintiff and the Classes are entitled to damages.

29. **Typicality**: Plaintiff's claims are typical of the Classes in that Plaintiff and the Classes have all been booted as a result of Defendants' unlawful activities, and have all sustained damages as a direct proximate result of the same wrongful practices. Plaintiff's claims arise from the same practices and course of conduct that give rise to the Classes' claims. Plaintiff's claims are based upon the same legal theories as the Classes' claims.

30. **Adequacy**: Plaintiff will fully and adequately protect the interests of the Classes and has retained class counsel who are experienced and qualified in prosecuting class actions, including consumer class actions and other forms of complex litigation. Neither the Plaintiff nor their counsel have interests which are contrary to, or conflicting with, those interests of the Classes.

31. **Superiority**: A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because, *inter alia*: it is economically impracticable for members of the Classes to prosecute individual actions; prosecution as a class action will eliminate the possibility of repetitious and redundant litigation; and, a class action will enable claims to be handled in an orderly, expeditious manner.

COUNT 1: NEGLIGENCE

32. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to immobilize vehicles without legal authority.

33. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to exceed the scope of their booting license in the City of Atlanta.

34. Defendants breached their duties to Plaintiff by exceeding the scope of their booting license and/or otherwise immobilizing Plaintiff's and other Class Member's vehicles without legal authority.

35. As a result of Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 2: NEGLIGENCE *PER SE*

36. Defendants violated the Union City vehicle immobilization ordinance by unlawfully booting Plaintiff and other Class Members' vehicles.

37. Plaintiff and other Class Members fall within the class of persons intended to be protected by this ordinance.

38. The Union City vehicle immobilization ordinance is intended to guard against the unlawful activities of Defendants.

39. Due to Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 3: PREMISES LIABILITY / O.C.G.A. §§ 51-3-1, 51-3-2

40. As owners and occupiers of the property where Defendants immobilize vehicles, Defendants have a duty of ordinary care not to cause harm to individuals at this property.

41. By illegally immobilizing vehicles Defendants breached this duty and caused harm to Plaintiff and other Class Members.

42. As a result of Defendants' breach, Plaintiff and other Class Members have

suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 4: IMPUTED NEGLIGENCE / O.C.G.A. § 51-2-5

43. Defendants hired, authorized, or provided material support to individuals that unlawfully immobilized Plaintiff and other Class Members' vehicles.

44. Defendants are vicariously liable for the negligence of these individuals under O.C.G.A. § 51-2-5.

45. Due to Defendants' negligence, Plaintiff and the other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 5: FALSE IMPRISONMENT

46. At all times relevant to this Complaint, Defendants owed duties to Plaintiff and other Class Members not to interfere with the free movement of Plaintiff and other Class Members.

47. In violation of O.C.G.A. § 51-7-20, Defendants knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time.

48. Defendants were acting without legal authority when Defendants restrained the movements of Plaintiff and other Class Members.

49. Plaintiff and other Class Members have incurred damages in an amount to be determined by the enlightened conscience of a jury as a result of Defendants' conduct.

COUNT 6: CONVERSION / CIVIL THEFT

50. Plaintiff and other Class Members had an ownership interest in funds that were paid to Defendants.

51. Defendants took possession of Plaintiff and other Class Members' funds by

demanding that Plaintiff and other Class Members pay to have a vehicle immobilization device removed.

52. Plaintiff and other Class Members demanded that the vehicle immobilization device be removed free of charge.

53. Defendants refused to release Plaintiff and other Class Members' vehicles without payment.

54. Defendants had no lawful right to immobilize Plaintiff and the other Class Members' vehicles, or to demand payment to remove vehicle immobilization devices.

55. As a result, by requiring Plaintiff and other Class Members to pay to have vehicle immobilization devices removed, Defendants have wrongfully converted Plaintiff and other Class Members' funds, and Plaintiff and other Class Members have sustained damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 7: MONEY HAD AND RECEIVED

56. Because Defendants collected money from Plaintiff and other Class Members to release vehicles unlawfully booted by Defendants, Defendants have received money from Plaintiff and other Class Members that in equity and good conscious Defendants should not be permitted to keep.

57. As a result of Defendants' actions, Plaintiff and the other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 8: VIOLATION OF GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO")

58. Defendant McElwaney, as part of its parking company business, engages in an enterprise of unlawfully immobilizing vehicles for profit.

59. Defendant's conduct subjects him to liability under Georgia's Racketeer

Influenced and Corrupt Organization Act ("RICO"), O.C.G.A. § 16-14-1 *et seq*., as more fully set out below.

60. Specifically, Defendant, in furtherance of its unlawful vehicle immobilization enterprise, has engaged in a pattern of racketeering activity, including, but not limited to the following:

a. By forcing Plaintiff and other Class Members to pay to have an unlawfully placed vehicle immobilization device removed, Defendant has engaged in Theft (O.C.G.A. § 16-8-1), Theft by Taking (O.C.G.A. § 16-8-2), Theft by Deception (O.C.G.A. § 16-8-3), Theft by Conversion (O.C.G.A. § 16-8-4), and Theft by Extortion (O.C.G.A. § 16-8-16);

b. By alleging through signage, notices, and other documents provided to Plaintiff and other Class Members, that Defendant was lawfully permitted to immobilize Plaintiff and other Class Members' vehicles, and lawfully permitted to charge fees for the removal of vehicle immobilization devices, Defendant has engaged in the use of false statements in violation of O.C.G.A. § 16-10-20; and

c. By unlawfully attaching vehicle immobilization devices to Plaintiff and other Class Members' vehicles, Defendant knowingly and unlawfully restrained the movements of Plaintiff and other Class Members for varying periods of time in violation of O.C.G.A. § 16-5-41.

61. Defendant has also engaged in racketeering activity by extorting money from Plaintiff and other Class Members under the threat of refusing to remove an unlawfully placed vehicle immobilization device.

62. Defendant's above described racketeering activity is all done in furtherance of Defendant's enterprise of profiting off unlawfully immobilizing vehicles.

63. Defendant's above described racketeering activity all have the same or similar methods of commission in that they all involve the unlawful use of vehicle immobilization devices, and false or misleading signage and documentation, to force Plaintiff and other Class Members to pay to have unlawfully placed vehicle immobilization devices removed.

64. Defendant's racketeering activity have the same or similar objective, namely, profiting off the unlawful use of vehicle immobilization devices.

65. Defendant's racketeering activity have the same or similar victims, namely, Plaintiff and other Class Members who have been forced to pay Defendant to remove a vehicle immobilization device unlawfully placed on Plaintiff and other Class Members' vehicles by Defendant.

66. Defendant's racketeering activity are otherwise related by distinguishing characteristics including, but not limited to, the involvement and collusion of Defendant and its workers, executives, and officers.

67. Defendant's racketeering activity is part of a long-term enterprise that has existed, and continues to, exist for over five (5) years, and will continue to exist unless halted by judicial intervention.

68. As a result of Defendant's racketeering activity, Plaintiff and other Class Members have suffered damages in an amount to be determined by the enlightened conscience of a jury.

COUNT 9: ATTORNEY'S FEES

69. Defendants have acted in bad faith, have been stubbornly litigious, and have caused Plaintiff and other Class Members unnecessary trouble and expense.

70. Accordingly, Plaintiff and other Class Members are entitled to recover their expenses of litigation, including their reasonable attorney's fees, pursuant to O.C.G.A. § 13-6-11.

COUNT 10: PUNITIVE DAMAGES

71. Defendants' conduct was willful, wanton, and reckless and evidences an entire want of care, which raised the presumption of a conscious indifference to the consequences of its actions.

72. As a result of Defendants' willful, wanton, and reckless conduct, Plaintiff and other Class Members are entitled to an award of punitive damages under O.C.G.A. § 51-12-5.1.

V. JURY DEMAND

73. Plaintiff demands a trial by jury for all of his claims and for a determination of all damages.

VI. DAMAGES AND PRAYER FOR RELIEF

74. Plaintiff prays for the following relief:

a. An order certifying this action as a class action, appointing Plaintiff as class representative and appointing Plaintiff's counsel as lead Class counsel;

b. All compensatory damages on all applicable claims in an amount to be proven at trial, and, as allowed by law, for such damages to be trebled or

multiplied upon proof of claims under laws allowing for trebling or multiplying of compensatory damages based upon Defendants' violations of law;

c. Punitive damages in an amount to be determined at trial;

d. Attorney fees for stubborn litigiousness pursuant to O.C.G.A. § 13-6-11; and,

e. All other and further relief the Court deems appropriate and just under the circumstances.

This 27th day of March 2018.

WERNER WETHERINGTON, P.C.

/s/ Matt Wetherington

MATTHEW Q. WETHERINGTON
Georgia Bar No. 339639
ROBERT N. FRIEDMAN
Georgia Bar No. 945494

2860 Piedmont Rd., NE
Atlanta, GA 30305
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robert@wernerlaw.com

CERTIFICATE OF SERVICE

COMES NOW, Plaintiff, by and through the undersigned Counsel, and hereby file this Certificate with the Court as required by Uniform Superior Court Rule 5.2. This is to certify that on this day I have served opposing counsel herein with a copy of **SECOND AMENDED CLASS ACTION COMPLAINT** by electronic transmission via Odyssey File & Serve:

Jason S. Bell, Esq.
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street, NE
Atlanta, GA 30309

Brynda Rodriguez Insley, Esq.
Kenneth J. Bentley, Esq.
INSLEY AND RACE, LLC
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309

This 27th day of March 2018.

WERNER WETHERINGTON, P.C.

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robert@wernerlaw.com

GEORGIA, FULTON COUNTY **DO NOT WRITE IN THIS SPACE**

STATE COURT OF FULTON COUNTY
Civil Division

CIVIL ACTION FILE #: _____

_____

_____

_____

Plaintiff's Name, Address, City, State, Zip Code

vs.

_____

_____

_____

Defendant's Name, Address, City, State, Zip Code

TYPE OF SUIT	AMOUNT OF SUIT
[ ] ACCOUNT	PRINCIPAL $_____
[ ] CONTRACT	
[ ] NOTE	INTEREST $_____
[ ] TORT	
[ ] PERSONAL INJURY	ATTY. FEES $_____
[ ] FOREIGN JUDGMENT	
[ ] TROVER	COURT COST $ _____
[ ] SPECIAL LIEN	
**********	
[ ] NEW FILING	
[ ] RE-FILING: PREVIOUS CASE NO. _____	

SUMMONS

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

Name: _____

Address: _____

City, State, Zip Code: _____ Phone No.:_____

An answer to this complaint, which is herewith served on you, should be filed within thirty (30) days after service, not counting the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action. **DEFENSE MAY BE MADE & JURY TRIAL DEMANDED**, via electronic filing through E-file GA or, if desired, at the e-filing public access terminal in the Self-Help Center at 185 Central Ave., S.W., Ground Floor, Room TG300, Atlanta, GA 30303.

LeNora Ponzo, Chief Clerk (electronic signature)

If the sum claimed in the suit, or value of the property sued for, is $300.00 or more Principal, the defendant must admit or deny the paragraphs of plaintiff's petition by making written Answer. Such paragraphs undenied will be taken as true. If the plaintiff's petition is sworn to, or if suit is based on an unconditional contract in writing, then the defendant's answer must be sworn to.

If the principal sum claimed in the suit, or value of the property sued for, is less than $300.00, and is on a note, unconditional contract, account sworn to, or the petition sworn to, defense must be made by filing a sworn answer setting up the facts relied on as a defense.

SERVICE INFORMATION:

Served, this _____ day of _____, 20_____. _____
DEPUTY MARSHAL, STATE COURT OF FULTON COUNTY

WRITE VERDICT HERE:
We, the jury, find for _____

_____

This _____ day of _____, 20_____. _____ Foreperson

(STAPLE TO FRONT OF COMPLAINT)

GEORGIA, FULTON COUNTY **DO NOT WRITE IN THIS SPACE**

STATE COURT OF FULTON COUNTY
Civil Division

CIVIL ACTION FILE #: _____

_____

_____

_____

Plaintiff's Name, Address, City, State, Zip Code

vs.

_____

_____

_____

Defendant's Name, Address, City, State, Zip Code

TYPE OF SUIT	**AMOUNT OF SUIT**
[ ] ACCOUNT	PRINCIPAL $_____
[ ] CONTRACT	
[ ] NOTE	INTEREST $_____
[ ] TORT	
[ ] PERSONAL INJURY	ATTY. FEES $_____
[ ] FOREIGN JUDGMENT	
[ ] TROVER	COURT COST $ _____
[ ] SPECIAL LIEN	
**********	
[ ] NEW FILING	
[ ] RE-FILING: PREVIOUS CASE NO. _____	

SUMMONS

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

Name: _____

Address: _____

City, State, Zip Code: _____ Phone No.:_____

An answer to this complaint, which is herewith served on you, should be filed within thirty (30) days after service, not counting the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action. **DEFENSE MAY BE MADE & JURY TRIAL DEMANDED**, via electronic filing through E-file GA or, if desired, at the e-filing public access terminal in the Self-Help Center at 185 Central Ave., S.W., Ground Floor, Room TG300, Atlanta, GA 30303.

LeNora Ponzo, Chief Clerk (electronic signature)

If the sum claimed in the suit, or value of the property sued for, is $300.00 or more Principal, the defendant must admit or deny the paragraphs of plaintiff's petition by making written Answer. Such paragraphs undenied will be taken as true. If the plaintiff's petition is sworn to, or if suit is based on an unconditional contract in writing, then the defendant's answer must be sworn to.

If the principal sum claimed in the suit, or value of the property sued for, is less than $300.00, and is on a note, unconditional contract, account sworn to, or the petition sworn to, defense must be made by filing a sworn answer setting up the facts relied on as a defense.

SERVICE INFORMATION:

Served, this _____ day of _____, 20_____. _____
DEPUTY MARSHAL, STATE COURT OF FULTON COUNTY

WRITE VERDICT HERE:
We, the jury, find for _____

_____

This _____ day of _____, 20_____. _____ Foreperson

(STAPLE TO FRONT OF COMPLAINT)

CAFN: 17EV003164

STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

DO NOT WRITE IN THIS SPACE

Matthew Wetherington, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd., NE
Atlanta, GA 30305

Attorney or Plaintiff Name and Address

Jessy Polson
c/o Matthew Wetherington, Werner Wetherington, P.C.
2860 Piedmont Rd., NE, Atlanta, GA 30305

Name and Address of PLAINTIFF

VS.

Bright-Meyers Union City Associates, L.P.
c/o Neil F. Meyers
5881 Glenridge Dr., Ste. 220, Atlanta, GA 30328

Name and Address of DEFENDANT

MARSHAL'S ENTRY OF SERVICE

PERSONAL

GEORGIA, FULTON COUNTY

I have this day served the defendant(s) _____

_____ personally with a copy of the within action and summons.

This _____ day of _____, _____. _____
DEPUTY MARSHAL

NOTORIOUS

GEORGIA, FULTON COUNTY

I have this day served the defendant(s) _____

By leaving a copy of the action and summons at his/their most notorious place of abode in said County.

Delivered same in hands of _____, a _____

_____ described as follows:

Age, about _____ years; weight, about _____lbs; height, about _____ft. _____in.,

Domiciled at the residence of the defendant(s).

This _____ day of _____, _____. _____
DEPUTY MARSHAL

CORPORATION

GEORGIA, FULTON COUNTY

Served the defendant _____, a corporation, by leaving a copy of the within action and summons with _____ in charge of the office and doing business of said corporation, in Fulton County, Georgia.

This _____ day of _____, _____. _____
DEPUTY MARSHAL

BETTER ADDRESS

GEORGIA, FULTON COUNTY

Diligent search made and the defendant(s):

_____

Not to be found in the jurisdiction of said Court for the following reason:

_____

NON-EST

Please furnish this office with a new service form with the correct address.

This _____ day of _____, _____. _____
DEPUTY MARSHAL

1 copy for court's records + 1 copy to be returned to Plaintiff after service attempted

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

MOTION TO WITHDRAW AS COUNSEL OF RECORD
FOR DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

COMES NOW Kenny McElwaney d/b/a Maximum Booting Co., by and through undersigned counsel, and hereby moves the Court for an Order withdrawing Jason Bell, Esq. and the law firm of Smith Gambrell & Russell, LLP as counsel of record. Brynda Rodriguez Insley, Esq. continues to serve as lead counsel for Defendant Kenny McElwaney d/b/a Maximum Booting Co.

A proposed Order is attached hereto.

This 26th day of April, 2018.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435

Attorney for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818
binsley@insleyrace.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed the MOTION TO WITHDRAW AS COUNSEL OF RECORD FOR DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 26th day of April, 2018.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435

Attorney for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons, Plaintiff, vs. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., Defendant.	)	CIVIL ACTION FILE NO. 17EV003164

ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL OF RECORD FOR DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

Having read and considered the Motion to Withdraw as Counsel for Defendant Kenny McElwaney d/b/a Maximum Booting Co. filed in the above-styled case, it is hereby

ORDERED that the Motion be GRANTED. The Clerk is directed to terminate Jason Bell, Esq., the law firm of Smith Gambrell & Russell, LLP, as counsel of record for Defendant Kenny McElwaney d/b/a Maximum Booting Co. Brynda Rodriguez Insley, Esq. continues to serve as lead counsel for Defendant Kenny McElwaney d/b/a Maximum Booting Co.

SO ORDERED, this _____ day of April, 2018.

HONORABLE ERIC A. RICHARDSON
JUDGE, STATE COURT OF FULTON COUNTY

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

MOTION TO WITHDRAW AS COUNSEL OF RECORD
FOR DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

COMES NOW Kenny McElwaney d/b/a Maximum Booting Co., by and through undersigned counsel, and hereby moves the Court for an Order withdrawing Jason Bell, Esq. and the law firm of Smith Gambrell & Russell, LLP as counsel of record. Brynda Rodriguez Insley, Esq. continues to serve as lead counsel for Defendant Kenny McElwaney d/b/a Maximum Booting Co.

A proposed Order is attached hereto.

This 26th day of April, 2018.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 611435

Attorney for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818
binsley@insleyrace.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed the MOTION TO WITHDRAW AS COUNSEL OF RECORD FOR DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO. upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 26th day of April, 2018.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435

Attorney for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

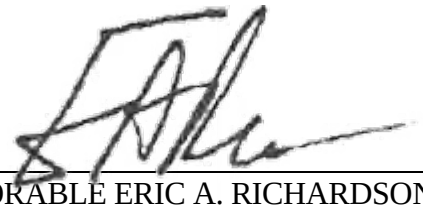
JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL OF RECORD FOR DEFENDANT KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.

Having read and considered the Motion to Withdraw as Counsel for Defendant Kenny McElwaney d/b/a Maximum Booting Co. filed in the above-styled case, it is hereby

ORDERED that the Motion be GRANTED. The Clerk is directed to terminate Jason Bell, Esq., the law firm of Smith Gambrell & Russell, LLP, as counsel of record for Defendant Kenny McElwaney d/b/a Maximum Booting Co. Brynda Rodriguez Insley, Esq. continues to serve as lead counsel for Defendant Kenny McElwaney d/b/a Maximum Booting Co.

SO ORDERED, this 27th day of April, 2018.



HONORABLE ERIC A. RICHARDSON
JUDGE, STATE COURT OF FULTON COUNTY

Record Id Stamp
8D919

Civil Action No. 17EV003164

Date Filed 3/27/18

Magistrate Court ☐
Superior Court ☐
State Court ☑
Georgia, ~~Gwinnett~~ Fulton County

Attorney's Address
Werner Wetherington, P.C.
2860 Piedmont Rd., NE
Atlanta, GA 30305

Name and Address of party to be served.
Wal-Mart Stores, Inc.
c/o CT Corporation System
289 S Culver Street
Lawrenceville, GA 30046

Jessy Polson — Plaintiff

VS.

Kenny McElwaney DBA Maximum Booting Co, et al — Defendant

Garnishee

Sheriff's Entry Of Service

Personal ☐ I have this day served the defendant _____ personally with a copy of the within action and summons.

Notorious ☐ I have this day served the defendant _____ by leaving a copy of the action and summons at his most notorious place of abode in this County.

Delivered same into hands of _____ described as follows

age, about _____ years; weight, about _____ pounds; height, about _____ feet and _____ inches; domiciled at the residence of defendant.

Corporation ☑ Served the defendant Wal Mart a corporation

by leaving a copy of the within action and summons with Linda Banks in charge of the office and place of doing business of said Corporation in this County.

Tack & Mail ☐ I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the place stated in the summons.

Non Est ☐ Diligent search made and defendant _____ not to be found in the jurisdiction of this Court.

This 1 day of May, 2018.

Jim Casey 5030
Deputy

Sheriff Docket _____ Page _____

Gwinnett County, Georgia

WHITE: Clerk CANARY: Plaintiff / Attorney PINK: Defendant

SC-2 Rev.3.13

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

NOTICE OF LEAVE OF ABSENCE

COMES NOW **Brynda Rodriguez Insley, Esq.**, and respectfully notifies all Judges, Clerks of Court and Counsel of Record that she will be on Leave as follows pursuant to Georgia Uniform Court Rule 16:

1. Tuesday, June 12, 2018 through Friday, June 15, 2018 (Professional Seminar);
2. Thursday, June 21, 2018 through Friday, June 22, 2018 (Personal Leave);
3. Thursday, July 5, 2018 through Friday, July 6, 2018 (Personal Leave);
4. Thursday, July 12, 2018 through Friday, July 13, 2018 (Personal Leave);
5. Friday, July 20, 2018 (Personal Leave);
6. Monday, August 6, 2018 (Personal Leave);
7. Thursday, August 30, 2018 through Friday, August 31, 2018 (Personal Leave);
8. Thursday, September 6, 2018 through Friday, September 7, 2018 (Personal Leave);
9. Thursday, September 27, 2018 through Friday, September 28, 2018 (Personal Leave);
10. Thursday, November 1, 2018 through Friday, November 2, 2018 (Personal Leave);

11. Friday, November 16, 2018 and Monday, November 19, 2018 (Personal Leave);

12. Wednesday, November 21, 2018 through Friday, November 23, 2018 (Thanksgiving Holiday);

13. Friday, December 7, 2018 and Monday, December 10, 2018 (Personal Leave);

14. Friday, December 21, 2018 through Friday, January 18, 2019 (Christmas and New Year's Eve Holiday and Personal Leave).

All affected parties shall have ten days from the date of this Notice to object to it. If no objections are filed, the Leave shall be granted.

This 8th day of May, 2018.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing NOTICE OF LEAVE OF ABSENCE upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 8th day of May, 2018.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: *UNLAWFUL BOOTING CLASS ACTIONS*	CIVIL ACTION FILE NUMBERS: 17EV005740 17EV004847 17EV004470 17EV004381 17EV004017 17EV004040 17EV003164 17EV002138 17EV001402 16EV005868 16EV005261 16EV005255 2017CV285526

SCHEDULING ORDER AND STAY OF DISCOVERY

CASE	PLAINTIFFS' COUNSEL	DEFENSE COUNSEL
Griffith, Leslie v. Advanced Booting Services, Inc. CAFN: 17EV001402 Tibbetts, Ryan *(fka Ledbetter, Melissa)* v. Advanced Booting Services, Inc. CAFN: 16EV005255 Smith, Luke, et. al. v. Empire Parking Services, Inc. CAFN: 16EV005261		

Alhaddad, Rim (pro se) v. Advanced Booting Services, Inc., et. al. CAFN: 2017CV285516	None	Kimberly D. Stevens Willie C. Ellis Jr.
Atlanta Movers, Two Men and a Truck and Jarvis Gissentanner v. Buckhead Parking and Enforcement, LLC, et. al. CAFN: 17EV005740	Matthew Q. Wetherington	Charles Grant
Ayalew, Mentewab, et. al. v. Castle Parking Solutions, LLC CAFN: 17EV004017	Matthew Q. Wetherington	Megan A. McCue John C. Rogers
Formisano, Nick v. Bootman, Inc., et. al. CAFN:17EV005429	Adam Webb	Thomas C. MacDiarmid
Liotta, Matt v. Secure Parking Enforcement CAFN: 17EV005868	Matthew Q. Wetherington	Frank C. Bedinger, III
Polson v. Kenny McElwaney d/b/a Maximum Booting CAFN: 17EV003164	Matthew Q. Wetherington	Brynda R. Insley H. Christopher Jackson
Roger Shelton v. Atlanta Black Loyalties CAFN: 17EV004381	Matthew Q. Wetherington	Michael N. Miller

Not present: Rim Alhaddad

On February 09, 2018, the Court held a telephonic case management conference in which the parties expressed a desire for a briefing schedule for a Motion to Dismiss and a stay of discovery until Defendant's Motion to Dismiss has been adjudicated. Plaintiffs requested an opportunity to file Amended Complaints and to add additional parties so that all applicable Motions to Dismiss can be filed and resolved at once.

Based on the agreement of the parties, the Court enters the following briefing schedule for Plaintiffs to file their Amended Complaint and add all appropriate parties, and for Defendant to file a Motion to Dismiss:

February 16, 2018	Plaintiffs will file their Amended Complaint and move to add any appropriate parties.
February 23, 2018	Defendant will file any opposition to Plaintiffs' Motion to Add Parties.
March 2, 2018	Plaintiffs will file their Reply Brief in Support of their Motion to Add Parties.
March 14, 2018	The Court will enter an Order granting or denying Plaintiffs' outstanding motions to amend and/or add parties.
June 8, 2018	Any Defendant who has been served as of the date of this Order will file a Motion to Dismiss.
July 9, 2018	Plaintiffs will file a response to Defendant's Motion to Dismiss.
July 16, 2018	Defendant will file its Reply Brief in Support of their Motion to Dismiss.

Any Defendant who is not presently a party to this case shall file its Motion to Dismiss within sixty (60) days of service of Plaintiffs' Complaint.

Discovery is hereby stayed until Defendant's Motions to Dismiss have been resolved. This stay does not affect discovery orders already entered by the Court. Plaintiffs' motion to strike in the *Polson v. Kenny McElwaney* case, and any and all briefing deadlines for all other

outstanding motions, including but not limited to any motion for class certification, are hereby stayed.

While discovery is stayed, Defendant shall preserve all evidence of: (1) the location of every property in the proposed class at which Defendant has operated at within the proposed class period; (2) the number of paid bootings at each property in the proposed class at which Defendant has operated at within the proposed class period; and (3) the language on each of Defendant's signs at each property in the proposed class at which Defendant has operated at within the proposed class period. If any signs relevant to the proposed class have been altered by Defendant since the filing of Plaintiffs' lawsuit, Defendant must preserve evidence of the language on the sign before such changes were made.

SO ORDERED this 8th day of May, 2018.

The Honorable Eric. A. Richardson
State Court of Fulton County

5-3/1311 NIC L/C

CAFN: 17EV003164

DO NOT WRITE IN THIS SPACE

FILED IN OFFICE
MAY 09 2018
DEPUTY CLERK STATE COURT
FULTON COUNTY, GA.

STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Matthew Wetherington, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd., NE
Atlanta, GA 30305
Attorney or Plaintiff Name and Address

Jessy Polson
c/o Matthew Wetherington, Werner Wetherington, P.C.
2860 Piedmont Rd., NE, Atlanta, GA 30305
Name and Address of PLAINTIFF

VS:

Bright-Meyers Union City Associates, L.P.
c/o Neil F. Meyers
5881 Glenridge Dr., Ste. 220, Atlanta, GA 30328
Name and Address of DEFENDANT

MARSHAL'S ENTRY OF SERVICE

PERSONAL

GEORGIA, FULTON COUNTY

I have this day served the defendant(s) _____

_____ personally with a copy of the within action and summons:

This _____ day of _____, _____. _____ DEPUTY MARSHAL

NOTORIOUS

GEORGIA, FULTON COUNTY

I have this day served the defendant(s) _____

By leaving a copy of the action and summons at his/their most notorious place of abode in said County.

Delivered same in hands of _____, a _____

_____ described as follows:

Age, about _____ years; weight, about _____ lbs; height, about _____ ft. _____ in.,

Domiciled at the residence of the defendant(s).

This _____ day of _____, _____. _____ DEPUTY MARSHAL

CORPORATION

GEORGIA, FULTON COUNTY

Served the defendant Bright-Meyers Union City Associates, a corporation, by leaving a copy of the within action and summons with Matt Sasser, Vice President in charge of the office and doing business of said corporation, in Fulton County, Georgia.

This 7th day of May, 2018. _____ DEPUTY MARSHAL

BETTER ADDRESS

GEORGIA, FULTON COUNTY

Diligent search made and the defendant(s):

_____

Not to be found in the jurisdiction of said Court for the following reason:

_____

NON-EST

Please furnish this office with a new service form with the correct address.

This _____ day of _____, _____. _____ DEPUTY MARSHAL

REC'D MARSHAL'S DEPT. FULTON COUNTY GA

1 copy for court's records + 1 copy to be returned to Plaintiff after service attempted

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON Individually, and on behalf of A class of similarly situated persons,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. 17EV003164
KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO.,	)	
Defendant.	)	

NOTICE OF SUBSTITUTION OF COUNSEL

COMES NOW, KENNY MCELWANEY d/b/a MAXIMUM BOOTING CO., named as Defendant in the above-styled civil action, and gives notice that H. Christopher Jackson, Esq. of the law firm of INSLEY & RACE, LLC, is substituted as counsel of record in place of Kenneth J. Bentley, who is no longer with the law firm of INSLEY AND RACE, LLC for Defendant Kenny McElwaney d/b/a Maximum Booting Co. Brynda Rodriguez Insley, Esq. will remain lead counsel and H. Christopher Jackson. Contact information for substituted counsel is as follows:

H. Christopher Jackson, Esq.
INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, NE, Suite 200
Atlanta, GA 30309
404-876-9818 (Telephone)
404-876-9817 (Facsimile)
cjackson@insleyrace.com

All further pleadings, orders and notices should be sent to substitute counsel.

This 22nd day of May, 2018.

Respectfully submitted,

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435
H. CHRISTOPHER JACKSON
Georgia Bar No. 447282

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
cjackson@insleyrace.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing NOTICE OF SUBSTITUTION OF COUNSEL upon all parties to this matter by Odyssey EFileGA and by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to counsel of record as follows:

Attorneys for Plaintiff
Michael L. Werner, Esq.
Matthew Q. Wetherington, Esq.
Robert N. Friedman, Esq.
Werner Wetherington, P.C.
2860 Piedmont Rd. NE
Atlanta, GA 30305

Kevin Patrick, Esq.
Kevin Patrick Law
2860 Piedmont Rd. NE
Atlanta, GA 30305

This 22nd day of May, 2018.

/s/ Brynda Rodriguez Insley
BRYNDA RODRIGUEZ INSLEY
Georgia Bar No. 61435
H. CHRISTOPHER JACKSON
Georgia Bar No. 447282

Attorneys for Defendant
Kenny McElwaney d/b/a
Maximum Booting Co.

INSLEY & RACE, LLC
The Mayfair Royal
181 14th Street, Suite 200
Atlanta, Georgia 30309
(404) 876-9818 (Telephone)
(404) 876-9817 (Facsimile)
binsley@insleyrace.com
cjackson@insleyrace.com

EXHIBIT B

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC., and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. Defendants.	)	**CIVIL ACTION FILE NO. 17EV003164**

WALMART INC.'S[1] NOTICE OF FILING OF NOTICE OF REMOVAL

PLEASE TAKE NOTICE that the undersigned has filed in the United States District Court for the Northern District of Georgia the attached Notice of Removal. In accordance with 28 U.S.C. §§ 1441 and 1446, the above-styled action is now removed, and all further proceedings in the State Court of Fulton County are stayed.

[Signature on following page]

[1] Plaintiff has improperly named Wal-Mart Stores, Inc. as Defendant. Effective February 2018, Wal-Mart Stores, Inc. legally changed its name to Walmart Inc.

DATED: May 30, 2018

/s/ Cari K. Dawson
Cari K. Dawson
Georgia Bar No. 213490
Lara Tumeh
Georgia Bar No. 850467
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: 404-881-7000
cari.dawson@alston.com
lara.tumeh@alston.com

Attorneys for Walmart Inc.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JESSY POLSON, individually and behalf of a class of similarly situated persons, Plaintiff, v. KENNY MCELWANEY D/B/A MAXIMUM BOOTING CO., WAL-MART STORES, INC., and BRIGHT-MEYERS UNION CITY ASSOCIATES, L.P. Defendants.	)	**CIVIL ACTION FILE NO. 17EV003164**

CERTIFICATE OF SERVICE

This is to certify that this 30th day of May, 2018, I have served this WALMART INC.'S NOTICE OF FILING NOTICE OF REMOVAL upon the following counsel of record via United States First Class Mail, at the following addresses:

Matthew Wetherington
Robert N. Friedman
2860 Piedmont Rd., NE
Atlanta, GA 30305
Attorneys for Plaintiff

Brynda Rodriguez Insley
Chris Jackson
The Mayfair Royal, Suite 200
181 14th Street, NE
Atlanta, GA 30309
Attorneys for Kenny McElwaney

/s/ Cari K. Dawson
CARI K. DAWSON

JS44 (Rev. 6/2017 NDGA)

CIVIL COVER SHEET

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

I. (a) PLAINTIFF(S)

Jessy Polson

DEFENDANT(S)

Kenny McElwaney, d/b/a Maximum Booting Co.
Wal-Mart Stores, Inc. (correct name is Walmart Inc.)
Bright-Meyers Union City Associates, L.P.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Unknown
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Unknown
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS)

Matthew Wetherington & Robert Friedman, Werner Wetherington, P.C.

ATTORNEYS (IF KNOWN)

Walmart Inc.: Cari Dawson & Lara Tumeh, Alston & Bird LLP (cari.dawson@alston.com, lara.tumeh@alston.com)
Kenny McElwaney: Brynda Rodriguez Insley & Christopher Jackson, Insley and Race, LLC

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. GOVERNMENT PLAINTIFF
- ☐ 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
- ☐ 2 U.S. GOVERNMENT DEFENDANT
- ☑ 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(FOR DIVERSITY CASES ONLY)

PLF	DEF		PLF	DEF	
☐ 1	☐ 1	CITIZEN OF THIS STATE	☐ 4	☐ 4	INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE
☑ 2	☐ 2	CITIZEN OF ANOTHER STATE	☐ 5	☑ 5	INCORPORATED AND PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE
☐ 3	☐ 3	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	☐ 6	☐ 6	FOREIGN NATION

IV. ORIGIN (PLACE AN "X "IN ONE BOX ONLY)

- ☐ 1 ORIGINAL PROCEEDING
- ☑ 2 REMOVED FROM STATE COURT
- ☐ 3 REMANDED FROM APPELLATE COURT
- ☐ 4 REINSTATED OR REOPENED
- ☐ 5 TRANSFERRED FROM ANOTHER DISTRICT (Specify District)
- ☐ 6 MULTIDISTRICT LITIGATION - TRANSFER
- ☐ 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGE JUDGMENT
- ☐ 8 MULTIDISTRICT LITIGATION - DIRECT FILE

V. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Plaintiff sued in Fulton County State Court. The Class Action Fairness Act (CAFA), 28 U.S.C. 1332(d), grants federal courts original jurisdiction over putative class actions, like this action, that meet the diversity and amount in controversy requirements.

(IF COMPLEX, CHECK REASON BELOW)

- ☐ 1. Unusually large number of parties.
- ☐ 2. Unusually large number of claims or defenses.
- ☐ 3. Factual issues are exceptionally complex
- ☐ 4. Greater than normal volume of evidence.
- ☐ 5. Extended discovery period is needed.
- ☐ 6. Problems locating or preserving evidence
- ☐ 7. Pending parallel investigations or actions by government.
- ☐ 8. Multiple use of experts.
- ☐ 9. Need for discovery outside United States boundaries.
- ☐ 10. Existence of highly technical issues and proof.

CONTINUED ON REVERSE

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT $_____ APPLYING IFP _____ MAG. JUDGE (IFP) _____

JUDGE _____ MAG. JUDGE _____ NATURE OF SUIT _____ CAUSE OF ACTION _____

(Referral)

VI. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT - "0" MONTHS DISCOVERY TRACK
- ☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- ☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (Excl. Veterans)
- ☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

CONTRACT - "4" MONTHS DISCOVERY TRACK
- ☐ 110 INSURANCE
- ☐ 120 MARINE
- ☐ 130 MILLER ACT
- ☐ 140 NEGOTIABLE INSTRUMENT
- ☐ 151 MEDICARE ACT
- ☐ 160 STOCKHOLDERS' SUITS
- ☐ 190 OTHER CONTRACT
- ☐ 195 CONTRACT PRODUCT LIABILITY
- ☐ 196 FRANCHISE

REAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 210 LAND CONDEMNATION
- ☐ 220 FORECLOSURE
- ☐ 230 RENT LEASE & EJECTMENT
- ☐ 240 TORTS TO LAND
- ☐ 245 TORT PRODUCT LIABILITY
- ☐ 290 ALL OTHER REAL PROPERTY

TORTS - PERSONAL INJURY - "4" MONTHS DISCOVERY TRACK
- ☐ 310 AIRPLANE
- ☐ 315 AIRPLANE PRODUCT LIABILITY
- ☐ 320 ASSAULT, LIBEL & SLANDER
- ☐ 330 FEDERAL EMPLOYERS' LIABILITY
- ☐ 340 MARINE
- ☐ 345 MARINE PRODUCT LIABILITY
- ☐ 350 MOTOR VEHICLE
- ☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
- ☑ 360 OTHER PERSONAL INJURY
- ☐ 362 PERSONAL INJURY - MEDICAL MALPRACTICE
- ☐ 365 PERSONAL INJURY - PRODUCT LIABILITY
- ☐ 367 PERSONAL INJURY - HEALTH CARE/ PHARMACEUTICAL PRODUCT LIABILITY
- ☐ 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

TORTS - PERSONAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 370 OTHER FRAUD
- ☐ 371 TRUTH IN LENDING
- ☑ 380 OTHER PERSONAL PROPERTY DAMAGE
- ☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

BANKRUPTCY - "0" MONTHS DISCOVERY TRACK
- ☐ 422 APPEAL 28 USC 158
- ☐ 423 WITHDRAWAL 28 USC 157

CIVIL RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 440 OTHER CIVIL RIGHTS
- ☐ 441 VOTING
- ☐ 442 EMPLOYMENT
- ☐ 443 HOUSING/ ACCOMMODATIONS
- ☐ 445 AMERICANS with DISABILITIES - Employment
- ☐ 446 AMERICANS with DISABILITIES - Other
- ☐ 448 EDUCATION

IMMIGRATION - "0" MONTHS DISCOVERY TRACK
- ☐ 462 NATURALIZATION APPLICATION
- ☐ 465 OTHER IMMIGRATION ACTIONS

PRISONER PETITIONS - "0" MONTHS DISCOVERY TRACK
- ☐ 463 HABEAS CORPUS- Alien Detainee
- ☐ 510 MOTIONS TO VACATE SENTENCE
- ☐ 530 HABEAS CORPUS
- ☐ 535 HABEAS CORPUS DEATH PENALTY
- ☐ 540 MANDAMUS & OTHER
- ☐ 550 CIVIL RIGHTS - Filed Pro se
- ☐ 555 PRISON CONDITION(S) - Filed Pro se
- ☐ 560 CIVIL DETAINEE: CONDITIONS OF CONFINEMENT

PRISONER PETITIONS - "4" MONTHS DISCOVERY TRACK
- ☐ 550 CIVIL RIGHTS - Filed by Counsel
- ☐ 555 PRISON CONDITION(S) - Filed by Counsel

FORFEITURE/PENALTY - "4" MONTHS DISCOVERY TRACK
- ☐ 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
- ☐ 690 OTHER

LABOR - "4" MONTHS DISCOVERY TRACK
- ☐ 710 FAIR LABOR STANDARDS ACT
- ☐ 720 LABOR/MGMT. RELATIONS
- ☐ 740 RAILWAY LABOR ACT
- ☐ 751 FAMILY and MEDICAL LEAVE ACT
- ☐ 790 OTHER LABOR LITIGATION
- ☐ 791 EMPL. RET. INC. SECURITY ACT

PROPERTY RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 820 COPYRIGHTS
- ☐ 840 TRADEMARK

PROPERTY RIGHTS - "8" MONTHS DISCOVERY TRACK
- ☐ 830 PATENT
- ☐ 835 PATENT-ABBREVIATED NEW DRUG APPLICATIONS (ANDA) - a/k/a Hatch-Waxman cases

SOCIAL SECURITY - "0" MONTHS DISCOVERY TRACK
- ☐ 861 HIA (1395ff)
- ☐ 862 BLACK LUNG (923)
- ☐ 863 DIWC (405(g))
- ☐ 863 DIWW (405(g))
- ☐ 864 SSID TITLE XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS - "4" MONTHS DISCOVERY TRACK
- ☐ 870 TAXES (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - THIRD PARTY 26 USC 7609

OTHER STATUTES - "4" MONTHS DISCOVERY TRACK
- ☐ 375 FALSE CLAIMS ACT
- ☐ 376 Qui Tam 31 USC 3729(a)
- ☐ 400 STATE REAPPORTIONMENT
- ☐ 430 BANKS AND BANKING
- ☐ 450 COMMERCE/ICC RATES/ETC.
- ☐ 460 DEPORTATION
- ☐ 470 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
- ☐ 480 CONSUMER CREDIT
- ☐ 490 CABLE/SATELLITE TV
- ☐ 890 OTHER STATUTORY ACTIONS
- ☐ 891 AGRICULTURAL ACTS
- ☐ 893 ENVIRONMENTAL MATTERS
- ☐ 895 FREEDOM OF INFORMATION ACT
- ☐ 899 ADMINISTRATIVE PROCEDURES ACT / REVIEW OR APPEAL OF AGENCY DECISION
- ☐ 950 CONSTITUTIONALITY OF STATE STATUTES

OTHER STATUTES - "8" MONTHS DISCOVERY TRACK
- ☐ 410 ANTITRUST
- ☐ 850 SECURITIES / COMMODITIES / EXCHANGE

OTHER STATUTES - "0" MONTHS DISCOVERY TRACK
- ☐ 896 ARBITRATION (Confirm / Vacate / Order / Modify)

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.3**

VII. REQUESTED IN COMPLAINT:

☑ **CHECK IF CLASS ACTION UNDER F.R.Civ.P. 23** **DEMAND $** over $5 million

JURY DEMAND ☑ **YES** ☐ **NO (CHECK YES ONLY IF DEMANDED IN COMPLAINT)**

VIII. RELATED/REFILED CASE(S) IF ANY

JUDGE Brown **DOCKET NO.** 17-cv-04085-MLB

CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES: (CHECK APPROPRIATE BOX)

- ☐ **1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.**
- ☑ **2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.**
- ☐ **3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.**
- ☐ **4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.**
- ☐ **5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.**
- ☐ **6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S)):**

- ☐ **7. EITHER SAME OR ALL OF THE PARTIES AND ISSUES IN THIS CASE WERE PREVIOUSLY INVOLVED IN CASE NO. , WHICH WAS DISMISSED. This case ☐ IS ☐ IS NOT (check one box) SUBSTANTIALLY THE SAME CASE.**

/s/ Cari K. Dawson 5/30/2018

SIGNATURE OF ATTORNEY OF RECORD **DATE**