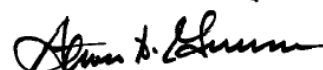


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**OPPC**

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GARY and KAREN JORDAN

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

GARY JORDAN and KAREN JORDAN,  
Plaintiffs,

v.

SAMANTHA HAMILTON, ISABEL  
VALDIVIESO-ESTRADA a/k/a Isabel  
Hamilton, GOVERNMENT EMPLOYEES  
INSURANCE COMPANY ("GEICO"),  
Defendants.

Case No.: A-10-627758-C  
Dept. No.: XIX

Hearing Date: May 25, 2012  
Hearing Time: 9:30 a.m.

**PLAINTIFFS' OPPOSITION TO DEFENDANT GEICO'S MOTION FOR  
TEMPORARY PROTECTIVE ORDER AND COUNTERMOTION TO COMPEL  
AND AWARD SANCTIONS FOR ABUSIVE LITIGATION TACTICS**

COMES NOW, Plaintiffs GARY and KAREN JORDAN (collectively referred to hereinafter as "Plaintiffs"), by and through their attorneys of record, M. Bradley Johnson, Esq., and Tyler J. Watson, Esq., of the law firm KRAVITZ, SCHNITZER, SLOANE, & JOHNSON, CHTD., and hereby submits this Opposition to Defendant GOVERNMENT EMPLOYEES INSURANCE COMPANY's ("GEICO") Motion for Temporary Protective Order as well as a Countermotion to Compel GEICO to abstain from previously employed, abusive litigation tactics and award sanctions.

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DATED this 23<sup>rd</sup> day of May, 2012.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

GEICO seeks to obtain an Order that would prevent Plaintiffs from obtaining necessary discovery relevant to the handling of this claim by GEICO from the time the suit was filed. Apparently, it is GEICO's position that Plaintiffs should not be able to depose the GEICO adjuster that handled this claims file since the time the suit was filed, and that Plaintiffs should not be able to reference GEICO's bad faith settlement attempts. Given that GEICO, as well as its attorneys, are required to handle an insurance claim in good faith from its inception all the way through any litigation, the Defense's position would produce an absurd and extremely prejudicial result; it would preclude Plaintiffs from ever pursuing a bad faith claim once litigation has started. Obviously, this position lacks merit, and for those reasons, GEICO's Motion for Protective Order should be denied.

Further, Plaintiffs in this case seek a Motion to Compel Discovery moving forward and to award sanctions to thwart future abusive discovery tactics. Defense counsel's conduct during the deposition of GEICO (pre-suit PMK) Claims Adjuster Michelle Chase-Helms constitutes clear and repeated abusive litigation tactics. Defense Counsel's conduct has been expressly prohibited in the *Olivarez v. Rebel Oil, Co., et al*, Discovery Commissioner Op. 11 (April 2003). Defense counsel's conduct was both obstructive and prejudicial to Plaintiffs in obtaining useful, discoverable testimony in this matter. As such, Plaintiffs specifically request this Honorable Court Compel Defense counsel to abstain from this conduct as well as impose any sanctions this Honorable Court deems fit.

### **II. STATEMENT OF FACTS**

Plaintiff GARY JORDAN, the owner and driver of a 2006 Honda VTX1300 Motorcycle, was seriously injured in an accident that occurred on April 7, 2010. Plaintiff KAREN JORDAN, Mr. Jordan's wife, was driving behind Mr. Jordan's motorcycle with a clear view of the accident as it occurred. Mr. Jordan was diagnosed with, among other items, a pelvic fracture that required open reduction and internal fixation surgery. The medical totals for Mr. Jordan's injury were in excess of \$300,000.00. As a result of witnessing her husband's significant injury, Mrs. Jordan suffered both emotional and physical harm. The Las Vegas Metropolitan Police Department ("Metro") Report indicated Mr. Jordan was not at fault for the subject accident.

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1 At the time of the accident, both Mr. and Mrs. Jordan were insured through GEICO. The  
2 coverage included underinsured motorist coverage in the amount of \$100,000.00/\$300,000.00.  
3 GEICO's claim log records indicate that Mrs. Jordan reported the claim on April 8, 2010, one day  
4 after the subject accident. By April 29, 2010, the adjuster working on the case made a note that Mr.  
5 Jordan's injuries were "severe" and the claim was likely worth policy limits. The at-fault driver's  
6 underlying insurance tendered policy limits in approximately June of 2010. However, these policy  
7 limits were nowhere near adequate to compensate Mr. and Mrs. Jordan for their injuries, and as a  
8 result, the Jordans made a demand for full policy limits to GEICO on July 2, 2010. Seven days later,  
9 the GEICO representative adjusting the file requested authority to accept the limit demand's  
10 \$100,000.00 for Mr. Jordan's claim. On **July 23, 2010**, GEICO's claim logs indicate that GEICO  
11 had accepted Mr. Jordan's policy limit demand of \$100,000.00. However, an actual check was never  
12 presented to Mr. Jordan until **April 8, 2011**. This was nearly nine months after GEICO determined  
13 Mr. Jordan was entitled to policy limits.

14 The policy limits check was presented to Mr. Jordan only after GEICO had twice demanded  
15 Mr. Jordan dismiss all his bad faith claims without providing any consideration for the same.  
16 Further, this also came after Defense counsel improperly attempted to condition the \$100,000.00  
17 payment upon settlement of **both** Mr. and Mrs. Jordans' claims. Specifically, in a December 6,  
18 2010, correspondence from Defense counsel, Defense counsel wrote "GEICO is willing to settle all  
19 claims for Mr. and Mrs. Jordan prior to the holidays, assuming we can agree the total value of their  
20 claims is \$100,000.00." Correspondence from Plaintiffs' counsel, Hanlon, dated December 6, 2010,  
21 attached hereto as **Exhibit 1**. Plaintiffs' Amended Complaint specifically seeks to recover damages  
22 for post-litigation bad faith. These claims have been specifically addressed in an expert report filed  
23 by Plaintiffs.

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1 On May 14, 2012, counsel for Plaintiffs deposed Michelle Chase-Helms, who was the “pre-  
2 litigation person most knowledgeable for GEICO and the GEICO Claims Adjuster that adjusted Mr.  
3 and Mrs. Jordans’ claims prior to the filing of suit in this matter. See Deposition of Michelle Chase-  
4 Helms, attached hereto as **Exhibit 2**.<sup>1</sup> During this deposition, counsel for Plaintiffs inquired as to the  
5 procedures followed by an adjuster where active litigation is ongoing. Ms. Chase-Helms  
6 acknowledged that “when we [adjusters] are assigned to a file, we are the ones that oversee [the  
7 file].” *Id.* at 18:12-19; 14. She further testified that the adjuster is “still ultimately handling the file.”  
8 She even explained it is still the GEICO employee that “recommends and requests authority to settle  
9 a case.” *Id.* **Further, she testified that GEICO has an ongoing duty to act in good faith even**  
10 **after litigation begins.** *Id.* at 42:24-43:4; 125:16-19.

11 While Plaintiffs’ counsel was able to obtain some useful deposition testimony from Ms.  
12 Chase-Helms, the deposition was nevertheless severely disrupted by the numerous string objections  
13 made by Defense counsel along with several prompts stating that Ms. Chase-Helms should only  
14 answer “if you remember.” See, generally *id.* **In fact, Defense counsel gave prompts such as “if**  
15 **you remember,” “if you know,” and “do you understand the question” on 51 separate**  
16 **occasions over the course of Ms. Chase-Helms’ deposition.** *Id.* For example:

17 **Plaintiffs’ Counsel:** Do you agree that GEICO does not issue a  
18 policy until payment has been received?

19 **Defense Counsel:** I am going to object to the form of the  
20 question, lacks foundation. She is a claims handler. To the  
21 extent you know, you can respond.

22 **Witness:** I don’t know.

23 *Id.* at 26:6-13.

24 **Plaintiffs’ Counsel:** Would it concern you to learn that [Mr. Jordan  
25 was given a check for the policy limits in this case without  
26 signing a Release]?

27 <sup>1</sup> The attached deposition transcript is only a “draft,” but due to the time constraints imposed by Defendant’s  
28 “Emergency” Motion, the actual transcript is unavailable for this Opposition.

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**Defense Counsel:** Objection to the form of the question.

...

I am trying to think of the objection. I apologize for the delay.

I am going to object to the form, it is vague. To the extent  
you understand the question, you can respond.

**Witness:** I don't know the circumstances of why.

*Id.* at 47:11-48:1.

**Plaintiffs' Counsel:** I am representing to you that he was given a  
check without signing a release and I am asking you, given  
your expertise and knowledge working for GEICO in your  
position, if that is a breach of protocol? If it would concern  
you to learn that information?

**Defense Counsel:** I will object to foundation and incomplete  
hypothetical.

To the extent you know, you can respond.

**Witness:** I would have to understand the reason why.

*Id.* at 48:3-12.

Not only did Defense counsel present numerous string objections followed by prompts to  
respond only "if you understand the question," Defense counsel also instructed Ms. Chase-Helms not  
to answer a line of questioning relating to the settlement attempts in this case without asserting any  
privilege. Specifically, the interaction is as follows:

**Plaintiffs' Counsel:** Now, at this time, are you aware that GEICO  
had already offered \$100,000.00 to settle Mr. Jordan's claim,  
is that correct?

**Witness:** Correct.

**Plaintiff's Counsel:** So there would be no consideration given for  
Mrs. Jordan based upon this figure; is that correct?

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1                   **Defense Counsel:**     I'm going to object to the form of the question  
2                                   it lacks foundation, calls for speculation, seeks a legal  
3                                   conclusion. You weren't – I am going to instruct her not to  
4                                   respond. You were not the adjuster at the time. You have no  
5                                   basis for this information except the reading of this document.

6                   **Witness:**       Correct.

7                   **Plaintiffs' Counsel:** I am asking her based upon her reading of this  
8                                   document.

9                   **Defense Counsel:**     She was not the adjuster at the time. She has  
10                                  no knowledge. You are asking her what the attorney wrote.  
11                                  She cannot respond. You are asking for opinions. There is no  
12                                  foundation for it –

13     *Id.* at 123:19-124:11. At no point did opposing counsel assert any claim of privilege to back up his  
14     instruction to Ms. Chase-Helms the she not answer the question presented. As the Court is well  
15     aware, these types of obnoxious and obstructive behavior is expressly prohibited. In fact, the *Rebel*  
16     *Oil* opinion is directly on point in this case. Sanctions are warranted to address the abuse and to  
17     discourage it from occurring in the future.

18     **III.    LAW AND ARGUMENT**

19             **A.    Opposition to Motion for Protective Order**

20             Under the attorney-client privilege, a client may “refuse to disclose, and prevent any other  
21     person from disclosing, confidential communications between themselves or his representative and his  
22     lawyer or his lawyer’s representative.” N.R.S. 49.09(5). However, the doctrine of waiver, by  
23     implication, reflects the position that the attorney-client “privilege” was intended as a shield on a  
24     sword. *GAB Business Services, Inc. v. Syndicate 627*, 809 *et seq.* at 755, 762 (11<sup>th</sup> Cir. 1987) (quoting  
25     *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D. Fla. 1980). In the first-party insurance context,  
26     courts have found an implied waiver in two primary situations. First, the privilege can be waived by an  
27     insurance company if it relies on the advice of counsel as a defense to a bad faith claim. For example,  
28     courts have found that if an insurer references the “actual advice given by attorneys or refers to or

1 attempts to put into evidence any suggestion that its adjusters sought, obtained or relied on coverage  
2 counsel's advice, that party waives the privilege." *See Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662,  
3 666 (W.D. Wash. 2007); *see also Bronsink v. Allied Prop. & Cas. Ins.*, case no. 09-751 MJP, 2010 U.S.  
4 Dist. LEXIS 29166, \*3 (W.D. Wash. 2010). **Second, an implied waiver of the privilege can be**  
5 **found when the lawyer is acting as a *de facto* adjuster, instead of a lawyer rendering legal advice.**  
6 *See e.g., Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685 (D.S.D. 2011).

7 The insurer's duty of good faith and fair dealing continues unabated during the life of an insured-  
8 insurer relationship, including through a lawsuit or arbitration between the insurer and insured. 14  
9 Couch on Ins. 3D § 198:4; *Sanderson v. American Family Mut. Ins. Co.*, 2010 WL 4492375 (Colo.  
10 App. 2010) (*citing Bucholtz v. Safeco Ins. Co. of America*, 773 P.2d 590, 592-93 (Colo. App. 1998));  
11 **Ex. 2** at 42:24-43:4, 125:16-19. To this end, the good faith requirement has been held to apply not only  
12 to the insurer, but also the attorney of the insurer. 14 Couch on Ins. 3D § 198:17 (*citing Tran v.*  
13 *Farmers Group, Inc.*, 104 Cal. App. 4th 1202, 128 Cal Rptr. 2d 728, 730 (1st Dist. 2002), as modified  
14 on denial of reh'g, (Jan 27, 2003) (attorney for insurer has a duty of good faith to insureds);  
15 *Majorowicz v. Allied Mut. Ins. Co.*, 212 Wis. 2d 513, 525, 569 N.W.2d 472, 476 (Ct. App. 1997)).

16 GEICO's Motion is premised upon the argument that the relevant post-litigation adjuster  
17 "obtained any and all knowledge and information concerning the Plaintiffs' claims from the attorneys  
18 who were retained to defend Plaintiffs claims." Motion 3:20-22. This argument suffers from two  
19 significant and fatal flaws. First, the deposition testimony of Ms. Chase-Helms establishes this  
20 assertion is not true. During her deposition, Ms. Chase-Helms indicated that once litigation is  
21 underway, the GEICO claims representative nevertheless retains control over the file, is still the  
22 adjuster of the file, and makes settlement requests and determinations. As such, it is clear that decisions  
23 regarding settlement and adjusting the file were still the responsibility of the relevant adjuster and not  
24 Defense Counsel. Moreover, by the time litigation was underway, GEICO had already made a  
25 determination to pay Mr. Jordan policy limits on this case. However, GEICO did not issue said  
26 payment until approximately eight months after the determination to issue policy limits had been made.  
27 This information would not come from Defense counsel, but rather from the adjuster's own claim  
28 notes, which indicated that policy limits for Mr. Jordan had already been approved.



1 Second, Defense counsel's argument is flawed because if all information and adjustment  
2 efforts were housed with Defense Counsel, and not GEICO, then the appropriate witness in this case  
3 would be Defense Counsel and any privilege would be waived. *See, Bertelsen, supra.* As GEICO's  
4 duty of good faith is imputed to its defense counsel, if Defense Counsel were really adjusting the file  
5 as claimed, Defense Counsel would find itself in the position of being a defendant in this litigation.  
6 If that were the case, it would be completely improper, and likely a conflict of interest, for Defense  
7 Counsel to remain as attorney of record on this case.

8 Defense Counsel claims the adjuster's notes, thoughts, and impressions are privileged based  
9 on attorney/client privilege and/or work product doctrine. If this position were correct, the result  
10 would be that once litigation has started, a plaintiff would be no possible way to pursue an ongoing  
11 bad faith claim against the insurer. From a public policy standpoint, the result would be that an  
12 insurer could refuse to issue payment, wait for suit to be initiated, then drag their feet throughout  
13 litigation to avoid paying on a meritorious claim. In essence, it would provide insurers an  
14 opportunity to act in bad faith with impunity. This is not a reasonable result as an insurer has an  
15 ongoing duty of good faith. Even once litigation has started, an insured has a right to conduct  
16 discovery on that topic in his/her attempt to prosecute the bad faith claim. This case is no different.  
17 Mr. and Mrs. Jordan are entitled to discovery as it relates to GEICO's attempts to adjust their claims  
18 after litigation started. GEICO cannot simply claim all actions that took place after the institution of  
19 this lawsuit constitute either attorney/client privilege or work product doctrine. Given the above,  
20 GEICO's Motion for Protective Order lacks merit and should be denied in its entirety.

21 **B. Motion To Compel**

22 A simple review of Ms. Chase-Helms' deposition establishes the repeated wrongful conduct  
23 by Defense Counsel. In fact, the record is replete with exact examples of abusive and forbidden  
24 deposition conduct by an officer of the Court. It is improper for defense counsel to utilized  
25 prejudicial tactics during a deposition such as "coaching of the witness and general  
26 interruptions." *Olivarez. v. Rebel Oil Company, et. al.*, Discovery Commissioner Opinion #11 at \*11  
27 (April, 2003). These actions "cannot be tolerated." *Id.* Specifically, this Honorable Court has held  
28 "constant objections" and "gratuitous remarks," such as offering prompts like "if you remember," "if

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1 you know,” or “do you understand the question,” deprive opposing counsel of the “right to a fair  
2 examination.” *Id.* This Honorable Court specifically held such conduct constitutes grounds for  
3 “significant sanctions.” *Id.* at \*10.

4 As previously acknowledged, Defense Counsel is in the tenuous position of defending not  
5 only the actions of GEICO as it failed to issue payment to Mr. Jordan for approximately nine months  
6 after the determination Mr. Jordan was entitled to policy limits, but now they must defend their own  
7 actions whereby they attempted to tie Mr. Jordan’s claim to the complete dismissal of Mrs. Jordan’s  
8 claim. Defense counsel is expressly aware that Defense Counsel’s own conduct constitutes bad faith  
9 given the testimony of Ms. Chase-Helms. Specifically, she was asked if it is improper to condition  
10 one party’s settlement upon the settling of another party’s claim. Ms. Chase-Helms affirmed this  
11 was proper and stated “we do not do that.” **Ex. 2** at 125:12-15. In light of the fact Defense Counsel  
12 tried to tie the settlement of Mr. Jordan’s claim to the settlement of Mrs. Jordan’s claim, it is  
13 understandable that Defense Counsel feels the weight of trying to defend not only its client but also  
14 itself; however, this position does not afford Defense Counsel the opportunity to engage in abusive  
15 and disruptive litigation tactics. As noted above, on 51 separate occasions during the Deposition of  
16 Ms. Chase-Helms, Defense Counsel provided a string of disjointed objections followed by prompts  
17 to Ms. Chase-Helms, ranging the bad faith gamut of stating “answer **if** you remember,” “**if** you  
18 know,” or “answer **if** you understand the question.” *See generally id.* (emphasis added). This  
19 conduct is unquestionably improper and certainly prejudicial to Plaintiffs. Defense Counsel even  
20 went so far as to instruct the deponent not to answer a question without any assertion of privilege. *Id.*  
21 at 123:19-124:11. Rhetorically speaking, can the Court think of a better example of the behavior  
22 *Rebel Oil* was supposed to stop? Moving forward, Plaintiffs specifically request this Honorable  
23 Court compel Defense Counsel to abstain from any such tactics moving forward and to impose any  
24 sanctions this Honorable Court may deem appropriate to deter Defense Counsel from engaging in  
25 these improper actions in the future.

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Based upon the above, this Honorable Court should deny GEICO's Motion and order GEICO abstain from its previously employed, abusive litigation tactics.

DATED this 23<sup>rd</sup> day of May, 2012.

KRAVITZ, SCHNITZER, SLOANE &amp; JOHNSON, CHTD.

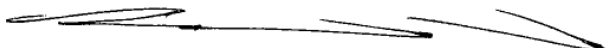
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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the 23<sup>rd</sup> day of May, 2012, I served a copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT GEICO'S MOTION FOR TEMPORARY PROTECTIVE ORDER AND COUNTERMOTION TO COMPEL** by placing said copy in a sealed envelope, postage fully prepaid, and mailing it via United States mail, first class, to the following:

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