TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

REPLY ARGUMENT

I. WHETHER THE SANCTION OF DISMISSAL IS TOO HARSH 1
WHEN A PARTY ERRONEOUSLY DOES NOT SUBMIT SWORN
ITERROGATORIES PURSUANT TO A COURT ORDER.

II. WHETHER A DISMISSAL WITHOUT PREJUDICE WOULD.....7
REQUIRE A JUDGE TO REINSTATE A CASE WHEN THERE IS NOT ANY
OTHER OPTION BY THE MARSHALL TO REINSTITUTE THE CASE;
THEREFORE, RESULTING IN A DISMISSAL WITH PREJUDICE.

CONCLUSION.....8

REASONS FOR ORAL ARGUMENT.....10

CERTIFICATE OF SERVICE.....11

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TABLE OF AUTHORITIES

CASES

Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 514 (5th Cir. 1985).....4

Chilcutt v. United States, 4 F.3d 1313, 1324 (5th Cir.1993).....6

Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1032 (5th Cir.1990).....6

Dinet v. Gavagnie, 948 So. 2d 1281, 1283 (Miss. 2007).....9

FDIC v. Conner, 20 F.3d 1376, 1381 (5th Cir. 1994) 5

Jones v. Louisiana State Bar Association, 602 F.2d 94, 96 (5th Cir. 1979).....4

Kilpatrick v. Mississippi Baptist Medical Ctr., 461 So. 2d 765, 767 (Miss.1984).....7

Marshall v. Segona, 621 F.2d 763, 768 (5th Cir. 1980).....4

McCollum v. Franklin, 608 So. 2d 692, 694 (Miss.1992).....7

National Hockey League v. Metro Hockey Club, Inc., 427 U.S. 639, 640, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976).....4

Prestridge v. City of Petal, 841 So. 2d 1048, 1061 (Miss. 2003).....7

Smith v. Smith, 145 F.3d 335, 344 (5th Cir. 1998).....4

Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002).....4

United States v. Bentley, 875 F.2d 1114, 1118 (5th Cir. 1989).....5

United States v. 49,000 Currency, 330 F.3d 371, 377 (5th Cir. 2003).....4

United States v. Katz, 178 F.3d 368, 372 (5th Cir. 1999).....5

United States v. Sarcinelli, 667 F.2d 5, 7 (5th Cir. Unit B, 1982).....5

Wallace v. Jones, 572 So.2d 371, 376, 377 (Miss. 1990).....9

REPLY ARGUMENT

I. WHETHER THE SANCTION OF DISMISSAL IS TOO HARSH WHEN A PARTY MISTAKENLY DOES NOT SUBMIT SIGNED INTERROGATORIES PURSUANT TO A COURT ORDER.

Burger King is required to be honest and straight forward with the court. Burger King argues in the record that, "...we filed our motion to dismiss as the discovery responses are void for not being sworn pursuant to Rule 33...The plaintiff did provide us with executed authorizations..." T.9. Burger King clearly stated in the record that the interrogatories were not sworn.

Burger King cannot claim facts that were not argued in district court. Burger King did not argue prejudice or bad faith on the part of Marshall in district court. Therefore, because Marshall used valid, effective and legal arguments in his Brief of the Appellant; Burger King cannot now allege inaccurate facts. The time to allege bad faith and willful disobedience of the court's orders were in the hearings held in district court.

Marshall again argues that Burger King didn't allege bad faith because Burger King knew it was an oversight that the interrogatories were not sworn. Again, why would Marshall provide an unrestricted medical release if he were acting in bad faith and had anything to hide?

Burger King is attempting to distort the facts as they existed in district court and the actions between counsel.

Marshall argued, "I did submit to the lawyer everything that we were claiming. I submitted that to him. I think his motion also said that we hadn't done any thing on discovery. They set depositions in May. They cancelled them. They asked me to – would I post pone them. I agreed to that. I said that was fine. Then we got into setting up depositions in May. They

cancelled them. I agreed to that. I said that was fine. Then we got into setting up depositions again. I was sent some dates. We verbally agreed that we could do a joint motion to continue; it would be your word on whether or not we could get it, but we would have a better chance if we jointly did that. I was sent dates that occurred during next week and after next week, which would – even though it was verbal, I was thinking we had both agreed that we would do a joint motion to continue. I don't understand how you send me deposition dates on the week of a third setting of the trial and after that and then say you're not going to sign a joint motion to continue.

...It was nothing – no intent on my part or my client's part not to give them information. My Client could sign the interrogatories. The information would not change. I think when they waited nine months, they waived any objection when they proceeded to go along with depositions. The subpoena duces tecum for the medical records, we haven't hidden anything from them and I gave them medical billing...They postponed discovery, because we could have had them done in May. And then I agreed that they didn't need to send subpoenas for the lay witnesses; I would do my best, other than going and hog-tying them, to get them to come without subpoenas; I would try and set up something in Tallulah for the depositions...I was in the process of trying to set up depositions for them...I was thinking the medical release was what needed to be signed, and I got that out in the 14 days. And, again I think they waived any objection when they proceeded over the past nine months to cooperate with discovery." T.11-14.

Burger King attempts to distort the facts by stating that it was prejudiced, but through all of the argument Burger King stated, "I'm asking the Court to dismiss the case for failure to provide us with sworn interrogatories pursuant to the order." T.16.

The Court also never stated that Marshall or Counsel for Marshall ever acted in bad faith or was willful against a Court order. The Court also never stated that the interrogatories were

deficient in the answers. The Court stated that, "I'm going to dismiss the action for failure to file the sworn interrogatories."

The exchange between the Court and Burger King is evidence that neither the Court nor Burger King believed that Marshall was acting in bad faith or was being willful in any way. "Now have the interrogatories been answered? They – we have some answers, yes, sir. Are they sworn to? No, sir. Have the requests for production been complied with? I would have to assume that – Everything I had…So what are you asking of the Court? Are you asking the Court to dismiss it, or are you asking the Court to – Yes sir. – limit them to that – what they have produced? I'm asking the Court to dismiss the case for failure to provide us with sworn interrogatories pursuant to the order." T.15-16.

Burger King cannot simply distort the truth that it knows exists because the actions are between counsel and not in the record. Counsel for Burger King clearly asked for a continuance due to Burger King requesting, cancelling and then attempting to reset depositions for the week of the third setting for a trial for which Burger King was not preparing.

Marshall had nothing to hide as is demonstrated by the unrestricted medical release. Burger King is clearly attempting to distort the facts, which is definitely in bad faith. Burger King never argued that the interrogatories were deficient or that Marshall was attempting to prejudice it at trial. Burger King never denied any facts stated by Marshall and never simply stated that Marshall's counsel was not being truthful in district court. Therefore, the argument cannot be considered and it cannot succeed on appeal.

Marshall would not have needed a continuance as Marshall never requested depositions. Marshall's witnesses were willing to attend a trial as well depositions.

"This Court reviews the granting of sanctions for abuse of discretion, including those sanction rulings which result in the entry of default judgment. Generally, in the context of Rule 37 sanctions, a district court abuses its discretion when it makes a mistake of fact or law. However, where a district court awards default judgment as a discovery sanction, two criteria must be met. (... the criteria to be used when reviewing a district court's dismissal of a claim as a Rule 37 sanction). First, the penalized party's discovery violation must be willful. Also, the drastic measure is only to be employed where a lesser sanction would not substantially achieve the desired deterrent effect. The reviewing court may also consider whether the discovery violation prejudiced the opposing party's preparation for trial, and whether the client was blameless in the violation. Here, Claimants-Appellants do not dispute the willfulness of their violation of the court's order, nor do they explicitly argue that a lesser sanction could have manufactured the appropriate level of deterrence." United States v. 49,000 Currency, 330 F.3d 371, 376 (5th Cir. 2003) citing Smith v. Smith, 145 F.3d 335, 344 (5th Cir. 1998); Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002); and Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 514 (5th Cir. 1985) (citing National Hockey League v. Metro Hockey Club, Inc., 427 U.S. 639, 640, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976); Jones v. Louisiana State Bar Association, 602 F.2d 94, 96 (5th Cir. 1979) (per curiam); and Marshall v. Segona, 621 F.2d 763, 768 (5th Cir. 1980)).

There was no prejudice to Burger King at trial as Burger King verbally agreed to a joint continuance due to its wanting to reset depositions. Niether Burger King nor the Court ever accused Marshall of willful discovery violations. The fact that the interrogatories were not sworn was obviously an oversight by Marshall's Counsel.

"We review remedies for discovery violations imposed by a district court for abuse of discretion. In exercising its discretion, the district court "should consider factors such as the reasons why disclosure was not made, the prejudice to the opposing party, the feasibility of rectifying that prejudice by granting a continuance, and other relevant circumstances." The district court "should impose the least severe sanction that will accomplish the desired result - prompt and full compliance with the court's discovery orders."" United States v. Katz, 178 F.3d 368, 372 (5th Cir. 1999) citing United States v. Bentley, 875 F.2d 1114, 1118 (5th Cir. 1989); and United States v. Sarcinelli, 667 F.2d 5, 7 (5th Cir. Unit B, 1982).

"The defendants observe that we have written that "while perhaps relevant to the type of sanction imposed, a party need not always be prejudiced by its opponent's discovery abuses prior to the imposition of sanctions." We see no inconsistency between this statement and the statement in Coane that to justify dismissal, "the misconduct must substantially prejudice the opposing party." Simply put, while lesser sanctions may be imposed without a showing of prejudice, more severe sanctions are justified only if the opposing party has suffered some palpable prejudice. Since dismissal is one of the harshest sanctions that a district court can impose, we require a showing of substantial prejudice before such a penalty is warranted. In contrast, the sanctions that we have approved without a showing of prejudice have been among the least harsh in the spectrum of available possibilities. In Chilcutt, the district court's sanction was to establish certain facts against the government. See Fed.R.Civ.P. 37(b)(2)(A). We affirmed the imposition of this penalty although there was no showing that the opposing party had been prejudiced by the government's discovery abuses because the sanction imposed was "one of the least harsh sanctions available to courts under Rule 37(b)." FDIC v. Conner, 20 F.3d 1376, 1381

(5th Cir. 1994) citing Chilcutt v. United States, 4 F.3d 1313, 1320, 1324 (5th Cir.1993); and Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1032 (5th Cir.1990).

Again, Marshall agreed that the only facts he was claiming were stated in the interrogatories. Burger King was never prejudiced at any point during the proceedings because Burger King was preparing for depositions and not a third setting for trial.

II. WHETHER A DISMISSAL WITHOUT PREJUDICE WOULD REQUIRE A JUDGE TO REINSTATE A CASE WHEN THERE IS NOT ANY OTHER OPTION BY THE APPELLANT TO REINSTITUTE THE CASE; THEREFORE, RESULTING IN A DISMISSAL WITH PREJUDICE.

The court asked during the hearing to dismiss, "So what are you asking of the Court? Are you asking the Court to dismiss it, or are you asking the Court to --...limit them to that – what they produced?" T.16.

The Court asked this because it was aware that sanctions were not warranted and definitely the facts did not warrant dismissal. As case law states the exclusion of evidence in a case should be a last resort in sanctions when there is no improper conduct, but simply a mistake was made; therefore, dismissal would definitely not be warranted.

"...exclusion of evidence is a last resort. Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion. In the imposition of sanction [s], the trial court has considerable discretion in matters pertaining to discovery and its orders will not be disturbed in the absence of abuse of discretion." Prestridge v. City of Petal, 841 So. 2d 1048, 1061 (Miss. 2003) citing McCollum v. Franklin, 608 So. 2d 692, 694 (Miss.1992); and Kilpatrick v. Mississippi Baptist Medical Ctr., 461 So. 2d 765, 767 (Miss.1984).

There were reasonable alternatives for the district court to pursue. The Court dismissed Marshall's action and refused to reinstate the case when it knew there was no other option for Marshall to pursue his action. This was clearly manifest error.

CONCLUSION

The District Court dismissed Marshall's case without prejudice as a sanction for violation of a discovery order with the following facts:

1. The lack of sworn responses to Burger King's interrogatories was an oversight;
2. Marshall was cooperating fully with discovery in agreeing to postpone depositions in May 2006 at Burger King's request;
3. Burger King was not preparing for trial as it had verbally agreed to a joint continuance with Marshall;
4. Burger King set deposition dates during and after the week of the November 13, 2006, which was the third trial setting;
5. Burger King was not substantially prejudiced for trial; and
6. The sanction was too harsh and unwarranted.

Burger King was provided Marshall's medical release, which gave Burger King unlimited access to Marshall's medical records. Upon granting unlimited access to Marshall's medical records there was nothing else to hide from Burger King as Marshall was claiming damages for injuries he sustained. Said injuries were completely disclosed in the medical records. The trial court's ruling dismissing Marshall's case and refusing to reinstate the case when there is no other option available to Marshall to reinstate his case is in effect a dismissal with prejudice which is too harsh for the facts of the case.

"Furthermore, this Court has previously reversed the ruling of a trial court, which dismissed a case with prejudice after the plaintiff failed to answer questions under oath after being instructed to do so by the trial court. The Court held that dismissals should be granted only when less drastic alternatives have been considered and such lesser sanctions would not

serve the best interest of justice. The Court also stated that dismissal with prejudice is "an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases." In light of Wallace, we find that the dismissal of Plaintiffs' case is too harsh a result." Dinet v. Gavagnie, 948 So. 2d 1281, 1285 (Miss. 2007) citing Wallace v. Jones, 572 So.2d 371, 376, 377 (Miss. 1990).

Burger King cannot argue facts such as prejudice, bad faith and willfulness when it did not even attempt these arguments in district court. Burger King also had ample opportunity to state that counsel for Marshall was being untruthful about Burger King's request for a continuance and its request to set up depositions during the week of the third trial setting. It did not make this argument in district court and it cannot be considered or allowed to prevail on appeal. **Parties either use their arguments in district court or they lose them on appeal.** Burger King is clearly acting in bad faith in their Brief of the Appellee.

The sanction of dismissal by the trial court is an abuse of its discretion. This Court must reverse the ruling of the trial court in dismissing Marshall's case and refusing to reinstate when there was no other option for Marshall to reinstate the case.

Respectfully Submitted,

BY: _____

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REASONS FOR ORAL ARGUMENT

Marshall would respectfully request this honorable Court to allow oral arguments in light of the fact that Marshall believes that the seriousness of the results of the Court's ruling and the manifest error of the trial court can be explained in oral argument in a manner that cannot be addressed simply by the written word. Marshall has suffered a severe loss in the accident that is the subject of the initial action. This can only be conveyed through oral argument.

This 24th day of January, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Joy R. Jackson, Counsel for Appellant, do hereby certify that I have caused to be mailed via United States Postal Service, First Class postage prepaid a true and correct copy of the above and foregoing **REPLY BRIEF OF THE APPELLANT** to the following:

Honorable Frank G. Vollor
Circuit Court Judge
P.O. Box 351
Vicksburg, MS 39181-0351

Brian Hyneman
Hickman, Goza & Spragins, PLLC
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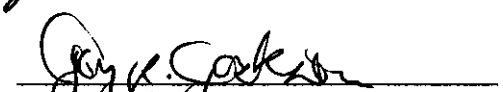
Oxford, Mississippi 38655

This 24th day of January, 20 18.



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