COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION 4
CIVIL ACTION NO. 19-CI-00462

TOM SWEARINGEN,
individually and on behalf of all
similarly situated

PLAINTIFF

v.

HAGYARD-DAVIDSON-MCGEE
ASSOCIATES, PLLC, et al.

DEFENDANTS

OPINION AND ORDER

This matter comes before the Court on the motions of Defendants Drs. Michael Hore, Michael Spirito, Dwayne Rodgerson, and Robert J. Hunt; Hagyard-Davidson-McGee Associates, PLLC ("HDM"); and Dean Dorton Allen Ford, PLLC ("DDAF"), for CR 11 sanctions against Mason Miller and William Rambicure as counsel for Plaintiff Tom Swearingen. Having held an evidentiary hearing, watched the Plaintiff's deposition in its entirety at the request of the parties, reviewed the record in full, and being otherwise sufficiently advised, the Court, as discussed more fully below, finds that both Miller and Rambicure violated CR 11 by prosecuting this case despite clear evidence that there was no reasonable basis to believe the allegations contained in the Complaint were grounded in fact and law. The Court imposes sanctions against Plaintiff's counsel as mandated by CR 11.

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Procedural History and Findings of Fact

Defendants' motions result from the unverified Complaint, signed by Mr. Miller, asserting claims for (1) fraudulent inducement and/or fraudulent misrepresentation; (2) breach of express warranty; (3) civil conspiracy; (4) aiding and abetting a civil conspiracy; (5) aiding and abetting fraud; (6) negligence; and (7) negligence *per se*.

Although Rambicure did not sign the Complaint, he did sign Plaintiff's Response to Defendant's Motion to Stay Discovery filed April 25, 2019, and his name appears in the signature block underneath Miller's as Plaintiff's counsel of record on all filings. His responsive pleading, in which he argued that discovery should proceed, significantly increased the costs to the Defendants in defending this action. Furthermore, records provided to the Court indicate that Rambicure was substantially involved in the case from nearly the beginning. In particular, the billing records that were voluntarily provided to the Court show that Rambicure worked on a wide variety of issues in the case, logging more than 186 billable hours as early as February 7, 2019, the day the original complaint was filed. That first entry stated that he had reviewed the class Complaint and Herald Leader article regarding the Defendant veterinarians' misdating the x-rays and sent an email to Miller regarding the same. Subsequent entries show that Rambicure was involved in every stage of the case from then on. Due to his involvement in the case from nearly its inception, the Court finds that many of its findings regarding Miller's misconduct in this case must also be attributed to Rambicure.

The Court notes that, though both Miller and Rambicure were represented by the same counsel for this Motion for Sanctions, the two attorneys were differently situated, as can be seen by the testimony of Mr. Rambicure, who attempted to obfuscate his involvement in this matter. This was in large part assisted by the fact that Rambicure only signed the Response to Defendant's Motion to Stay Discovery and Swearingen's Responses and Objections to the First Set of Interrogatories. Despite this, the time records for this matter, provided by counsel for Miller and Rambicure, clearly indicate that Rambicure was just as involved prosecuting this matter as Miller.

Styled as a "Class Action Complaint," Swearingen stated claims individually "and on behalf of a class of similarly situated individuals." The Complaint listed 24 horses Swearingen had purchased at the Keeneland sales between 2007 and 2016. Central to Swearingen's individual and putative class claims were the Defendant's self-reports to the Kentucky Board of Veterinary Examiners advising they had, in the past, altered dates on digital x-rays taken of horses so that the x-rays appeared as if they had been taken within the time mandated by Keeneland's Conditions of Sale, and those x-rays were placed in the Keeneland repository. The unverified complaint further alleged that the misdated x-rays caused buyers to buy horses they would not have otherwise purchased, and that if Swearingen and other buyers had known of the misdating practice, they "would not have participated in the Keeneland sale in the first place and never would have bought the aforementioned horses."

Swearingen's Complaint specifically alleged he "would review or have his agents review the radiographs of such horse" prior to making a purchase at Keeneland and "did in fact review the x-rays in the Repository." The Complaint defined the putative class that Swearingen sought to represent as:

> those individuals who purchased one or more horses at Keeneland horse sales since the implementation of the digital Repository (as defined below), who reviewed digital x-rays in the Repository (either individually or by one of their agents) prior to bidding on such horses and who, if it had been disclosed in advance to them that some portion of the x-rays in the Repository had fraudulently altered dates, the number of which and the identity of which could not be determined, would not have purchased such horses at the sale(s) in the first instance.

Miller, with Rambicure's involvement and review, began drafting the case caption in the Complaint just a few days after his initial meeting with Swearingen—before Swearingen had signed an engagement letter with Miller Edwards Rambicure PLLC and before either Plaintiff's counsel had reviewed any of the documents that Swearingen later provided. Miller admitted that he decided at that time to "use" Swearingen as the putative class representative. The firm's billing statements further establish that Miller had actually begun drafting a class action complaint prior to being contacted by Swearingen or any other potential claimant.

Miller testified that in meetings with Swearingen prior to filing the Complaint, Swearingen told him repeatedly that he "either had veterinarians look at x-rays or veterinarians had looked at x-rays, and in all of those cases he ultimately looked at the radiological report that summarized those x-rays." In spite of this testimony, Miller and

Rambicure have subsequently argued that the Complaint's allegations that either Swearingen reviewed—or a veterinarian on his behalf reviewed—x-rays in the repository really meant that Swearingen relied on x-rays in the repository by reviewing radiograph reports of those x-rays. The Court notes that Swearingen testified he provided accurate and honest information in his discovery responses and deposition testimony wherein he admitted he never retained a veterinarian to review x-rays in the repository.

It is undisputed that Swearingen's written discovery responses and deposition testimony directly contradict the Complaint where Swearingen alleged that he had reviewed x-rays in the repository or had a veterinarian do so for him. Swearingen was represented by Rambicure at his deposition on February 11, 2020. At the deposition, Swearingen testified under oath that he never used the repository and never relied on any information in the repository. During the course of the deposition, he admitted he never went to the repository or had a veterinarian go to the repository on his behalf to look at x-rays; did not look at the dates of when the x-rays were taken; did not know whether the reports reflected when x-rays were taken or whether any x-ray actually misrepresented any horse as of the date of its sale; and even purchased a horse at Keeneland in 2019—during the course of this litigation—despite already knowing that x-rays in the repository could be misdated. While consistent with his discovery responses, such testimony is totally contradictory to the Complaint.

Counsel for Miller and Rambicure argue in their Response that Swearingen's deposition testimony revealed "for the first time" that Swearingen did not hire a veterinarian to review x-rays in the repository. The Court notes, however, that Miller Edwards Rambicure's time sheets show that Rambicure was significantly involved in drafting and reviewing Swearingen's discovery responses, including sending opposing counsel a verified copy of those responses. It is therefore not credible that Rambicure, who was well-acquainted with Swearingen's discovery answers, "was surprised" by his client's testimony in the deposition that mirrored those same discovery responses that Rambicure helped draft, finalized, and forwarded to opposing counsel.

The Record proves that his deposition testimony could not have been a surprise, as Swearingen's deposition testimony was not the first time that Swearingen admitted he did not hire a veterinarian to review x-rays in the repository. In Swearingen's discovery responses, which the firm's legal team spent "96 hours of time drafting and revising" and which Miller testified he reviewed, Swearingen "state[d] that since the digital repository was instituted at Keeneland Repository, Swearingen does not retain a veterinarian to review radiographs at the Keeneland September Yearling Sale or Keeneland November Breeding Stock Sale; instead, he relies on the radiographs placed in the repository and in turn, the report summarizing such radiographs[.]" Swearingen further answered, "[T]hat since the digital repository was instituted at Keeneland, Swearingen has not retained a veterinarian to review Repository radiographs for the purchase of horses at a Keeneland

auction." These statements invalidated the key allegations of Swearingen's individual and class claims. Nonetheless, Miller and Rambicure continued prosecuting the Complaint.

Plaintiff's counsel's original argument that the Complaint's allegations that Swearingen reviewed x-rays in the repository meant that Swearingen reviewed and relied on radiograph reports is not compelling. First, the argument is immediately defeated by the explicit wording of the allegations. The Complaint alleged, in multiple paragraphs, that Swearingen "did in fact review x-rays in the Repository," "reviewed digital x-rays in the Repository (either [himself] or by one of [his] agents) prior to bidding on such horses," and "[p]rior to purchasing any horse at Keeneland . . . would review or have his agents review the radiographs of such horse". The Complaint never mentions "reports"—not even in the lengthy section on the history and use of the repository or in connection with the 100 "John Doe" consignors named as defendants. Furthermore, as Miller testified, he knew radiograph reports are not maintained in the repository. Even if Miller and Rambicure intended the Complaint's allegations to mean that Swearingen reviewed or relied on reports (instead of the radiographs themselves), neither Swearingen nor his veterinarian could have reviewed reports in the repository. Finally, Miller admitted that Swearingen did not provide any documentary evidence that he relied on a report of an x-ray taken by any of the veterinarian Defendants—again causing

the problem that Miller and Rambicure would have had to base the allegations concerning Swearingen's statements exclusively on those statements.

Furthermore, Miller and Rambicure did not investigate the existence of a causal connection between the veterinarian Defendants' alleged conduct and Swearingen's alleged injuries. Specifically, they did not investigate whether Swearingen reviewed or relied on an x-ray in the repository taken by any of the veterinarian Defendants of any of the 24 horses that were the subject of Swearingen's individual claims. Rambicure, in testifying against his partner stated that Miller could have sought radiograph reports from the consignors of the horses that Swearingen bought and that the reports would have confirmed whether a veterinarian at HDM took the subject x-rays. Miller testified he did not ask any consignors for the reports and admitted he did not see any report that Swearingen claimed to have reviewed. The Court is fully cognizant of the fact that while Rambicure testified as to what his partner could have done, Rambicure was just as capable of doing the same.

Miller's handwritten notes showed that Swearingen advised Miller that he suffered no damages, which Swearingen confirmed in his deposition testimony. Miller testified he believed the fraud on the market theory supported Swearingen's claims against the veterinarian Defendants and that, under such theory, Swearingen did not need to prove individualized reliance or a causal connection. While the cases that Miller researched involved misrepresentations about a particular item, Miller had no evidence

that Swearingen relied on any x-ray taken by any of the veterinarian Defendants for any of the horses he purchased. Moreover, Miller's testimony is at odds with Swearingen's combined response to Defendants' motions for summary judgment, in which Swearingen clarified that his "theory – both of liability/damages and standing – is what Defendants incorrectly refer to as a 'fraud on the market' theory. Instead, Plaintiff's standing is based on the 'price differential' theory which has been upheld by numerous courts in the class action context." Regardless of his theory for damages, Plaintiff's counsel had no caselaw supporting his claim that Kentucky courts would embrace a claim for fraud without proof of individualized reliance or damages.

Miller and Rambicure further failed to investigate whether Swearingen had a factual or legal basis for the rescission remedy sought in the Complaint. Miller and Rambicure's response does not address the extent to which they investigated rescission. At the evidentiary hearing, Miller testified he and Swearingen reviewed the horses that Swearingen bought, but Miller admitted he did not confirm Swearingen still owned the horses and definitely did not know at the time he filed the Complaint that Swearingen had sold the horses identified in the Complaint. Miller does not claim to have asked whether Swearingen had sold any of the horses. Additionally, public information available at the time the Complaint was filed established that Swearingen had already sold all but one of the horses identified in the Complaint.

Based on Swearingen's discovery and deposition admissions, Defendants filed motions for summary judgment on all causes of action. In response, Miller and Rambicure drafted a post-deposition affidavit for Swearingen's signature, attempting to rehabilitate their client's deposition testimony to conform with the allegations of the original complaint, and filed a Motion for Leave to Amend the Complaint. The affidavit had Swearingen claiming that he had simply been confused in the deposition and had been unable to properly explain that he had reviewed reports created by vets who had actually reviewed the x-rays. At that time, thirteen months after filing the initial Complaint—and nearly a month after submitting the contradictory discovery responses—Plaintiff's counsel also moved for leave to file an amended complaint that would have reframed Swearingen's individual and class claims to allege reliance on radiograph reports (as opposed to the x-rays themselves) and introduce a new damages model.

Miller and Rambicure were then making two contradictory arguments. First, through the introduction of the affidavit "rehabilitating" Swearingen's testimony, that Swearingen's deposition testimony did, in fact, conform with the original Complaint. Second, by attempting to amend the Complaint so as to conform with Swearingen's testimony, that Swearingen's testimony did not match their original allegations. These conflicting arguments are reflected by the motion to amend the complaint, filed on March 2, 2020, which stated that "the graveman [sic] of Swearingen's claim is and always has

been that if he had known the repository contained some unidentified number of altered x-rays . . . he simply would not have participated in the sale in the first place . . ." and, in turn, Miller and Rambicure's response to the motion for sanctions, filed on May 25, 2022, which stated that:

> Until Mr. Swearingen's deposition, Mr. Swearingen had consistently confirmed that he had a veterinarian review the radiographs or the reports, fitting himself squarely into the definition of the class set forth in paragraph 17 of the Complaint. After Mr. Swearingen's deposition, they made attempts to understand the change in testimony and employed appropriate legal strategies to correct the error. Although the error excluded him from class as then-defined, the amended definition would have cured the defect and his claims would remain intact, as would his status as a class representative.

What is clear to the Court is that the Plaintiff's counsel have tried their best to obfuscate where this inconsistency came from—whether from Swearingen himself, or from Miller and Rambicure's own lack of investigation and research as mandated by law.

On March 5, 2020, the Court heard both the Defendants' motion for summary judgment and the Plaintiff's motion to amend the Complaint. At that time, Miller conceded that Swearingen did not meet the putative class definition and that the Complaint must be dismissed. In addition, the Hon. Guy Colson—the attorney who appeared on behalf of Swearingen at the Court's instruction—admitted that Swearingen "never had a relationship with the repository." On March 24, 2020, the Court entered an order denying Swearingen's motion for leave as untimely and dismissing Swearingen's individual and class claims with prejudice. Defendants then sought to amend the Court's order to include CR 11 sanctions against Miller and Rambicure.

Swearingen appealed.[1] Due to the pendency of the appeal, the Court denied Defendants' motions to seek sanctions pursuant to CR 11 but reserved the right to consider Defendants' motions after the conclusion of the appeal. The Court of Appeals affirmed the Court's order in favor of Defendants and characterized Swearingen's action as "a plaintiff-less lawsuit." *Id.* at 196.

Following the Court of Appeals' ruling, Defendants renewed their motions for CR 11 sanctions. In their respective motions and subsequent briefing, Defendants asserted that Plaintiff's counsel failed to reasonably investigate the allegations ultimately asserted in the Complaint, the Complaint was neither well-grounded in fact nor warranted by existing law, Plaintiff's counsel failed to reasonably investigate the CR 23 elements required to state Swearingen's class claims, and Plaintiff's counsel improperly continued to prosecute the Complaint even after the record revealed that Swearingen's causes of action were factually false and legally unsupported. Upon submission of Defendants' motions, the Court held an evidentiary hearing, at which Miller and Rambicure testified and introduced their billing entries and Miller's handwritten notes of his pre-suit meetings with Swearingen. The parties then submitted post-hearing briefs.

Conclusions of Law

Based on the foregoing findings of fact, the Court now makes the following conclusions of law regarding whether Miller and/or Rambicure violated CR 11.

[1] *Swearingen v. Hagyard Davidson McGee Assocs., PLLC*, 641 S.W.3d 186 (Ky. App. 2022).

In relevant part, CR 11 provides:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Under CR 11, the question is not "whether an attorney acted in good faith." *Louisville Rent-A-Space v. Akai*, 746 S.W.2d 85 (Ky. App. 1988). Rather, the standard for the Court to apply is one of reasonableness in the circumstances. *Id.*; *Clark Equip. Co. v. Bowman*, 762 S.W.2d 417 (Ky. App. 1988). As guided by the Federal Rules Advisory Committee with respect to Fed. R. Civ. P. 11, which is CR 11's federal counterpart, Kentucky courts have held that:

> factors to be considered by the trial court in its analysis are: (1) the amount of time available for investigation; (2) whether the signer had to rely on a client for information about the facts; (3) whether the pleading was based upon a plausible view of the law; and (4) whether the signer depended on forwarding counsel or another member of the bar.

Clark Equip. Co., 762 S.W.2d at 420.

Where a pleading, motion, or other paper is signed by an attorney in violation of CR 11, the Court, "upon motion or upon its own initiative, ***shall*** impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses

incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." (emphasis added).

Under CR 11, sanctions may not be imposed "until after entry of a final judgment." Since the Court's order in favor of Defendants has been affirmed by the Court of Appeals and is now final this Court must now rule.

With regard to Defendants' argument concerning Swearingen's individual claims, the Court concludes that Miller and Rambicure did not conduct a reasonable inquiry into the claims. Furthermore, the inquiry Miller and Rambicure did conduct did not yield the factual and legal basis certified by Miller's signature on the Complaint. By signing and filing the Complaint, as well as successive motions and other Court filings thereafter, Miller violated CR 11, and his doing so needlessly caused Defendants to incur costs of litigation that they should not have incurred.

The Court further concludes that Miller and Rambicure's inquiry into the allegation that Swearingen had a veterinarian review x-rays in the repository was insufficient under CR 11, as that inquiry rested exclusively on his client's statements. *See Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D. Ky. 1987) ("[A]n attorney has not made a 'reasonable inquiry' concerning the facts, if he has not made any inquiry, or if he has relied only on his client . . ."); *see also Large v. Oberson*, 537 S.W.3d 336, 340 (Ky. App. 2017) ("Kentucky courts have turned to federal analysis of Rule 11 for guidance on CR 11 issues."). Miller deemed other potential claimants unsuitable because "they did not have

sufficient documentation to support their claims," but, inexplicably, he determined the documents that Swearingen provided to be sufficient, even though none of those documents substantiated Swearingen's claim that Swearingen reviewed, or had a veterinarian review, x-rays in the repository.

Plaintiff's counsel did not attempt to obtain consignor reports that would have revealed whether Swearingen retained veterinarians to review x-rays for horses he purchased. Miller and Rambicure violated their duty of reasonable investigation by failing to try to obtain these readily available documents.

Plaintiff's counsel also failed to investigate the existence of a causal connection between the Defendants' alleged conduct and Swearingen's alleged injuries. For example, they did not investigate whether Swearingen reviewed or relied on an x-ray in the repository taken by any of the veterinarian Defendants for any of the 24 horses that were the subject of Swearingen's individual claims. They did not investigate the extent to which DDAF, the accountants, were involved with any such x-ray. "Before a defendant is named or a claim . . . asserted against a defendant, the attorney's file should contain facts admissible in evidence, or at least facts indicating the probable existence of evidence, implicating that defendant or supporting that claim." *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 207 (E.D. Ky. 1987). Neither Miller nor Rambicure had any factual or legal basis for the Complaint's allegations that Defendants were the "direct and proximate cause" of Swearingen's alleged damages.

Counsel failed to investigate whether Swearingen had a factual or legal basis for the recission remedy sought in the Complaint. Public information available at the time the Complaint was filed showed that Swearingen had already sold all but one of the horses identified in the Complaint. *See Swearingen v. Hagyard Davidson McGee Assocs., PLLC*, 641 S.W.3d 186, 196 (Ky. App. 2022) ("[Swearingen] always had access to Keeneland's online "Sales Summaries" database."). Swearingen was therefore not legally entitled to seek recission for those horses. *See Church v. Wright Mach. Co.*, 190 Ky. 561, 227 S.W. 1003, 1004 (Ky. 1920) (discussing privity and return of property as requirements for maintaining an action for recission).

With regard to Defendants' argument concerning Swearingen's alleged representation of the putative class and putative class claims, the Court concludes that Miller and Rambicure violated CR 11 by failing to conduct a reasonable inquiry into whether the putative class claims satisfied CR 23's requirements and whether Swearingen met the class definition and could represent the class. The limited inquiry that counsel did conduct did not yield the factual and legal basis that Miller's signature on the Complaint certified. By signing and filing the Complaint, Miller therefore violated CR 11. His doing so needlessly caused Defendants to incur costs of litigation that they should not have incurred, which constituted a violation of CR 11.

CR 23.01 enumerates four prerequisites for a class action. Specifically, CR 23.01(a) requires a class "so numerous that joinder of all members is impracticable." Although

"no strict numerical test exists to define numerosity," the number of affected persons must be "substantial." *Wilson v. Anthem Health Plans of Kentucky, Inc.*, No. 3:14-CV-743-TBR, 2017 WL 56064, at *4 (W.D. Ky. Jan. 4, 2017) (citing *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012). "Additionally, [l]eading treatises have collected cases and recognized the general rule that [a] class of 20 or fewer is usually insufficiently numerous." *Id.* Even if Miller and Rambicure assumed that the "four to eight" people Miller claimed spoke to him all could have been members of the putative class, they should have known that such a class did not achieve numerosity. They did not have a proper class member in Swearingen, much less a class so numerous that joinder was not practicable. Their inquiry into numerosity did not provide a factual or legal basis for the Complaint's allegations that "[t]he Class is so numerous that joinder of all members is impracticable, as the aforementioned sales involve thousands of buyers since 2006 who are eligible for inclusion in the Class."

CR 23.01(b) requires that "there are questions of law or fact common to the class[.]" To meet this requirement, questions common to the class members must predominate over the questions that affect individual members. *Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky. 2001). Even knowing that review of and reliance on x-rays in the repository were criteria of the putative class, neither attorney investigated how many of the "thousands of buyers" who participated in the Keeneland sales since 2006 actually reviewed or relied on x-rays in the repository or hired a veterinarian to review x-rays in the repository.

Likewise, neither investigated whether any of those buyers "would not have purchased such horses at the sale(s) in the first instance" had they known about the misdating issue—another criterion of the putative class as laid out in the Complaint. Because counsel failed to conduct a sufficient inquiry into whether Swearingen's claims were common to the putative class, there was no basis to allege that the Complaint presented "questions of both law and fact common to all Class members."

CR 23.01(c) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" The "analysis focuses on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Nebraska All. Realty Co. v. Brewer*, 529 S.W.3d 307, 312 (Ky. App. 2017) (citation and quotation marks omitted). "While commonality examines the group characteristics of the class as a whole, typicality examines the individual characteristics of the named parties in relation to the class." *Id.* at 312-13. A reasonable investigation would have revealed that there was no nexus between Swearingen and the putative class because Swearingen had no relationship with the repository. Accordingly, there was no factual or legal basis for the Complaint's allegation that Swearingen's claims were "representative and typical of the claims asserted on behalf of all Class members."

Finally, CR 23.01(d) requires that "the representative parties will fairly and adequately protect the interests of the class." Counsel was required, at minimum, to

investigate whether Swearingen was part of the putative class, possessed the same interest as other class members, and suffered the same injury as other class members. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Had there been a sufficient inquiry into Swearingen's individual claims, it would have been obvious that Swearingen could not represent a putative class constructed on the same allegations. Swearingen did not meet the putative class definition, which was clearly acknowledged when counsel admitted the Complaint they prosecuted for thirteen months must be dismissed.

Far from meeting the class action requirements, by all appearances Miller and Rambicure were trying to find a plaintiff who could carry a class action. It is clear to the Court that, as in the case *Bodner v. Oreck Direct, LLC*, "plaintiff's counsel, and not plaintiff, is the driving force behind this action." No. C 06-4756 MHP, 2007 WL 1223777 at *2 (N.D.Cal. April 25, 2007). In the *Bodner* case, "counsel himself admitted at the hearing that he or his firm had the research performed on the product at issue and had a theory about the product's deficiencies. Then, armed with that information they went in search of a plaintiff, never mind the lack of a fitting plaintiff or the lack of ethical scruples." *Id.* at *3. This Court cannot help but see the similarity between the actions complained of in *Bodner*, and the actions of Miller and Rambicure in the present action. Much like in *Bodner*, the Kentucky Court of Appeals found this matter to be "a plaintiff-less lawsuit." *Swearingen v. Hagyard Davidson McGee Assocs., PLLC*, 641 S.W.3d 186, 196 (Ky. App. 2022). Once

becoming aware of the x-ray dating issues, Miller and Rambicure set out to find a plaintiff to support the legal theory they had already devised. Clearly, their attempts to find a suitable plaintiff fell short. And yet, they filed this suit anyway.

With regard to Defendants' argument concerning Plaintiff's counsel's continued prosecution of the Complaint, the Court concludes that Miller and Rambicure's continued prosecution violated CR 11 and unnecessarily continued proceedings in the case. Any attorney acting reasonably in the circumstances would or should have realized from Swearingen's discovery responses and deposition testimony that allegations in the Complaint were untrue, that Swearingen could not prove actual reliance or injury, and that Swearingen did not meet the putative class definition and could not serve as class representative. Neither Miller nor Rambicure sought to dismiss the Complaint immediately after Swearingen's discovery responses or deposition. This delay in attempting to do anything they believed to be ameliorative—seeking leave to file a futile amendment—was not reasonable in the circumstances, multiplied proceedings unnecessarily, and caused Defendants to incur additional litigation costs, which constituted an improper purpose under CR 11.

Rambicure's signature on the Plaintiff's Response to Defendants' Motion to Stay Discovery clearly contributed to the Defendant's costs in defending this action. As this Court found earlier, Rambicure was significantly involved in the case from its earliest stages. By signing Plaintiff's Response to Defendants' Motion to Stay Discovery,

Rambicure subjected himself to possible sanctions under CR 11. As a partner in the law firm representing Swearingen and as one of the attorneys actively involved in prosecuting this case, Rambicure also had a duty to ensure the case was prosecuted ethically, including whether it should have been filed at all, and in a way that would not cause a needless increase in the cost of litigation. If adequate investigation had been done he would have known it was futile to oppose a stay of discovery. Likewise, such opposition was actually done in hopes of locating a viable plaintiff. At the very least, Rambicure should have realized from Swearingen's discovery responses and deposition testimony that the Complaint had no merit and that amending the complaint would be futile. In the Court's eyes, Miller and Rambicure's choice to continue prosecuting the case past this point was particularly egregious and therefore worthy of sanctions under CR 11.

Sanctions award

Based on these findings of fact and conclusions of law, the Court must now award sanctions. CR 11 leaves the Court no choice but to impose "appropriate sanctions."

While it is certainly questionable whether the Complaint should ever have been filed, it should have become clear to Miller and Rambicure that their Plaintiff's case was completely groundless when Swearingen's discovery responses and deposition testimony indicated that he had never accessed Keeneland's x-ray depository and therefore could never have made purchasing decisions based on the misdated x-rays.

Both Miller and Rambicure could have, and should have, dismissed the case at this point, and their decision to continue prosecuting the case anyway was egregious enough to merit an award of sanctions. The Court, therefore, in its discretion, finds it appropriate to compensate the Defendants for attorney's fees and other costs incurred past this point in the litigation, beginning the day following the tendering of Swearingen's discovery responses.

Conclusion

The Court therefore finds that Miller and Rambicure violated CR 11. With his signature on the Complaint and nearly all other subsequent documents submitted to the Court, Miller certified he had conducted a reasonable inquiry into Swearingen's claims, and that the Complaint was well grounded in fact and warranted by existing law when, in fact, it was not. Similarly, Rambicure violated CR 11 by certifying, through his signature on Plaintiff's Response to Defendants' Motion to Stay Discovery, that the case was well-grounded in fact and law, and therefore further discovery was merited. Miller and Rambicure's conduct in the case became particularly egregious when they continued to prosecute the Complaint after Swearingen's written discovery responses confirmed that the Complaint's allegations regarding Swearingen's review of x-rays in the repository were untrue, that Swearingen could not prove requisite elements of his individual or class claims, and that he never qualified as the putative class representative.

In its analysis of Miller and Rambicure's actions, it is only after great consideration that this Court comes to the decision to assess such sanctions against Miller and Rambicure.

Accordingly, Defendants' CR 11 motions are **GRANTED** as to Miller and Rambicure individually. Pursuant to CR 11 and relevant case law, Miller Edwards Rambicure may not be sanctioned as a separate entity. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989).

To be paid jointly or severally by Miller and Rambicure, the Court imposes sanctions equal to Defendants' reasonable attorney fees and costs from the day following the tendering of discovery responses until the date of this order, excluding costs and fees resulting from Plaintiff's appeal of the Court's order dismissing the Plaintiff's original Complaint. As only an appellate court may sanction at attorney for filing a meritless appeal, this Court lacks jurisdiction over filings in matters before the Court of Appeals. *Raley v. Raley*, 730 S.W.2d 531 (Ky. App. 1987). Defendants shall submit proof of their attorney fees and costs for the Court's review. Because there has been no evidence of the ability to pay a sanctions award, Miller and Rambicure may submit such evidence, in camera, for the Court's review.

This is a final and appealable order and there is no just cause for delay.

Given under my hand, this 28th day of November, 2022.

Julie Muth Goodman

HON. JULIE MUTH GOODMAN
JUDGE, FAYETTE CIRCUIT COURT

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