NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JASON ALSTON,

Petitioner,

vs.

ARIANNA W. EASTMAN; ANNETTE M. THOMAS

Respondent.

On appeal to the United States Court of Appeals for the Eleventh Circuit

Docket No. # 19-11708-E

District Court Docket No. # 1:18-cv-5343-SCJ

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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July 29, 2019

Petitioner is a Pro Se litigant

INDEX TO APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11708-E

JASON ALSTON,

Plaintiff-Appellant,

versus

ARIANNA W. EASTMAN,

Defendant-Appellee,

ANNETTE M. THOMAS,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Jason Alston's motion for leave to proceed *in forma pauperis* in his appeal from the district court's dismissal of his *pro se* personal-injury suit is DENIED because the appeal is frivolous. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON ALSTON,

Plaintiff,

v.

ARIANNA W. EASTMAN,

Defendant.

CIVIL ACTION FILE

NO. 1:18-cv-5343-SCJ

JUDGMENT

This action having come before the Court, Honorable Steve C. Jones, United States District Judge, for consideration of Defendant's Motion to Dismiss, and the Court having granted said Motion, it is

Ordered and Adjudged that judgment is in favor of Defendant and that this case is **DISMISSED**.

Dated at Atlanta, Georgia, this 16th day of April, 2019.

JAMES N. HATTEN
CLERK OF COURT

By: *s/R. Spratt*
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
April 16, 2019
James N. Hatten
Clerk of Court

By: *s/R. Spratt*
Deputy Clerk

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

JASON ALSTON,

Plaintiff,

v.

ARIANNA W. EASTMAN,

Defendant.

CIVIL ACTION FILE
No. 1:18-cv-5343-SCJ

ORDER

This matter is before the Court for consideration of multiple motions. Before the Court is Defendant's Motion to Dismiss and Plaintiff's Motion to Strike Affirmative Defenses, Motion to File a Surreply, Motion to Take Judicial Notice, and Motion for Sanctions. Doc. Nos. [12]; [18]; [19]; [26].

I. BACKGROUND

A. Facts as Alleged in Complaint

Plaintiff's complaint describes a motor vehicle accident that took place on February 17, 2016 in Norcross, Georgia.[1] See Doc. No. [2], ¶¶6–11. Plaintiff

[1] Plaintiff Alston invokes diversity jurisdiction. He is a citizen of Mississippi,

Alston alleges that Defendant Eastman was talking on her cell phone while operating a 2001 Toyota Corolla. Id. at ¶¶7, 8. In the process of making a left turn, Defendant Eastman collided with Plaintiff Alston's vehicle, resulting in personal injuries and damage to Alston's vehicle. Id. at ¶¶7, 9. Plaintiff Alston charges Eastman with negligence. Id. at ¶¶13–19.

B. Procedural History

Plaintiff filed this action along with an application to proceed *in forma pauperis* ("IFP") on November 20, 2018. Doc. Nos. [1]; [2]. Chief Magistrate Judge Walker granted Plaintiff IFP status, and the Court conducted a review of Plaintiff's complaint pursuant to 28 U.S.C. § 1915(e)(2). The Court allowed Plaintiff's claim against Defendant Eastman to proceed and ordered service be effectuated on Plaintiff's behalf. Doc. No. [4]. Defendant Eastman filed a Motion to Dismiss for Failure to State a Claim based on a statute-of-limitations affirmative defense. Doc. No. [5]. Since that time, Plaintiff has filed a Motion to Strike Defendant's First Through Seventh Affirmative Defenses, a Motion for

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and Defendants are both citizens of Georgia. Doc. No. [2], p. 1, ¶¶1–3. Although he does not include a specific amount of damages, Plaintiff Alston generally alleges that the amount in controversy exceeds $75,000. Id. at p. 2, ¶5.

Leave to File A Surreply, a Motion to Take Judicial Notice, and a Motion for Sanctions. Doc. Nos. [12]; [18]; [19]; [26]. These matters are now ripe for review.

II. LEGAL STANDARD

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court accepts the factual allegations made in the complaint as true and construes them in the light most favorable to the plaintiff. Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010). The pleadings of *pro se* parties are held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972); Tannenbaum v. U.S., 148 F.3d 1262, 1263 (11th Cir. 1998). A complaint will be dismissed for failure to state a claim if the facts as pled do not state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

"[T]he inquiry under Rule 12(b)(6) is into the adequacy of the pleadings, not the adequacy of the evidence." Solid 21, Inc. v. Breitling USA, Inc., 512 F. App'x 685, 687 (9th Cir. 2013). Therefore, the scope of review on a motion to dismiss is "limited to the four corners of the complaint." St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir. 2002). "A district court . . . may dismiss a complaint on a rule 12(b)(6) motion when its own allegations indicate the

existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint." Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993) (internal quotations omitted)).

III. DISCUSSION

A. Preliminary Matters

The Court first addresses Plaintiff's motion seeking leave to file a surreply to Defendant's reply brief for her motion to dismiss and Plaintiff's motion asking the Court to take judicial notice.

1. *Surreply*

Plaintiff filed a Motion for Leave to File a Surreply, in which he "seeks a fair opportunity to respond to the new cases cited by Defendant" in her reply brief. Doc. No. [18], p. 2. "Neither the Federal Rules of civil Procedure nor this Court's Local Rules authorize the filing of surreplies." Fedrick v. Mercedes-Benz USA, LLC, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005). "To allow such surreplies as a regular practice would put the court in the position of refereeing an endless volley of briefs." Garrison v. Ne. Ga. Med. Ctr., Inc., 66 F. Supp. 2d 1336, 1340 (N.D. Ga. 1999). Although it is within the court's discretion to allow it, a surreply is generally only necessary where a movant raises a new grounds

for its motion in the reply brief that the non-movant has no opportunity to address. See Fedrick, 366 F. Supp. 2d at 1197.

The Court finds the filing of a surreply unnecessary and inappropriate in this case. Defendant's reply brief raised no new grounds for dismissal of Plaintiff's complaint. Rather, Defendant's reply brief responds directly to the arguments raised by Plaintiff in his response brief. Plaintiff's response brief opposed dismissal by alleging various grounds for tolling, including mental incapacity. See Doc. No. [11]. Plaintiff had every opportunity to develop a legal argument for tolling on this ground and to address controlling case law. Defendant's reply brief argues that tolling is inappropriate because Plaintiff's allegations do not fit the requirements for tolling the statute of limitations due to mental disability under O.C.G.A. § 9-3-90. Doc. No. [13]. Thus, Defendant is responding to Plaintiff's tolling argument. For the foregoing reasons, Plaintiff's Motion to File a Surreply is **DENIED**. Doc. No. [18].

2. ***Judicial Notice***

Plaintiff also filed a Motion to Take Judicial Notice, in which he asks the Court to take judicial notice of his medication list and other medical information (presumably filed in support of his argument for tolling the relevant statute of limitations). Doc. No. [19]. Plaintiff's attached exhibit

includes a payment stub from a pharmacy for three prescriptions and information about each prescribed drug printed off of a website for the National Alliance of Mental Illness. Doc. No. [19-1]. Plaintiff asserts that this information "is relevant because it proves that plaintiff is being treated for mental illnesses and without plaintiff's medication plaintiff will not be able to Coping [sic] with life." Doc. No. [19], p. 2.

First, the Court notes that on a motion to dismiss, it is limited to considering the information and allegations contained in the complaint. St. George, 285 F.3d at 1337. The court may also consider documents attached to the complaint or those that are referenced in the complaint and central to the plaintiff's claim. Speaker, 623 F.3d at 1379; Horsley v. Feldt, 304 F.3d 1125, 1134–35 (11th Cir. 2002). The court may not, however, consider evidence that the plaintiff would like to submit in relation to factual issues not contained in the complaint. This is because the inquiry on a motion to dismiss simply explores whether the pleadings sufficiently state a claim, and it is not an evidentiary inquiry. Solid 21, Inc., 512 F. App'x at 687. Plaintiff's exhibits are not attached to his complaint, nor are they central to his personal injury claim.

Second, Federal Rule of Evidence 201 allows courts to take judicial notice of facts that are "not subject to reasonable dispute," because they are "generally

known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Plaintiff's pharmacy receipts and medical information printed from a website are not proper subjects for judicial notice. Plaintiff's medications, and the information about those medications, are not "generally known," nor can the Court ascertain that the source of such information is sufficiently accurate. Therefore, Plaintiff's Motion to Take Judicial Notice is **DENIED**. Doc. No. [19].

B. Motion to Dismiss

Defendant seeks dismissal of Plaintiff's complaint because Plaintiff did not file this action within the statute of limitations for personal injury claims in Georgia. Doc. No. [5-1]. Normally, an affirmative defense (such as one based on the statute of limitations) is inappropriate to raise at the motion to dismiss stage, because it requires consideration of evidence outside the pleadings. However, in this case, the existence of a statute-of-limitations defense is apparent on the face of the complaint.

The complaint alleges that the accident occurred on February 17, 2016. Doc. No. [2]. The statute of limitations for personal injury claims in Georgia is two years, making the deadline for Plaintiff to file suit February 17, 2018. See

O.C.G.A. § 9-3-33. Plaintiff filed this action on November 20, 2018.[2] See Doc. No. [1]. Therefore, Plaintiff filed his action beyond the two-year statute of limitation, and it is time-barred.

Plaintiff argues in his response that he "was unfamiliar with Georgia Laws and Statue [sic] of Limitations." Doc. No. [11], p. 2. He also reports that he was admitted to the hospital on June 24, 2016 and that he suffered from an unspecified disability as of December 1, 2015. Id. at 1–2. Additionally, Plaintiff states that he "was mentally disabled and/or to [sic] incompetent to file this lawsuit before the Statue [sic] of Limitation had expire [sic] on this claim." Id. at 3. Plaintiff attaches a Social Security Administration letter and hospital records from his June 24th visit.[3] Doc. No. [11-1]. Finally, Plaintiff asserts that

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2 Defendant says the action was filed on December 7, 2018. Doc. No. [5-1], p. 1. However, Defendant uses the date that the complaint was posted to the docket after the Court completed a frivolity review. A frivolity review may be completed within days, weeks, or months of a plaintiff filing their application to proceed *in forma pauperis*. Thus, it would be unfair to use such a date for purposes of determining when a plaintiff acted on his or her rights. Therefore, the Court considers the date that Plaintiff filed his application to proceed *in forma pauperis* and his complaint with the Clerk of Court.

3 The Court notes, as discussed above, the introduction of evidence outside the pleadings is inappropriate at the motion to dismiss stage. Plaintiff's exhibit was not included in his motion for judicial notice and seeks to introduce evidence outside the pleadings. Even if the Court were to consider the evidence submitted by Plaintiff, it does not help establish a case for tolling. To the extent that the Court would be able

a "Mr. Olesky" who is "an employee" for Defendant Eastman told him "not to get a Lawyer and that this matter can be resolved without a lawyer." Doc. No. [11], p. 3. According to Plaintiff, Mr. Olesky said he would make a settlement offer after getting the police report and hospital bills, but Plaintiff never heard from him until he filed this lawsuit. Id.

Plaintiff's arguments provide two avenues for possibly tolling the statute of limitations: mental incapacity and/or fraud on the part of the defendant.[4] The Georgia Code provides that, if an individual is legally incompetent when a cause of action accrues, the statute of limitations can be tolled until "after their disability is removed." O.C.G.A. § 9-3-90(a). Likewise, if a disability arises after a cause of action accrues, the statute of limitations is tolled during the

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to take judicial notice of the Social Security Administration letter, it could only do so to establish that Plaintiff was declared disabled under Social Security standards and is entitled to Social Security benefits. The Court cannot adopt factual findings made by the Administrative Law Judge as its own, and a disability entitling one to Social Security benefits does not automatically establish the type of mental incapacity contemplated by Georgia's statute. See O.C.G.A. § 9-3-90. Additionally, the hospital records show that Plaintiff was admitted to the hospital on June 24, 2016 and discharged on June 28, 2016. Doc. No. [11-1], p. 25. This four-day visit cannot support tolling the statute of limitations for nine months.

4 Plaintiff's argument that he was unfamiliar with Georgia law does not provide a ground for tolling. Greene v. Team Props., Inc., 247 Ga. App. 544, 546, 544 S.E.2d 726, 728 (2001), overruled on other grounds by Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68 (2005) ("[I]gnorance of the law offers no legal excuse for failing to file an action within the applicable statute of limitation.").

existence of the disability. O.C.G.A. § 9-3-91. Under Georgia law, if the claimed disability is a mental one, "[t]he test for mental incapacity is not whether one has merely mismanaged his affairs, or was merely unclear in his mind or not bright. Rather the test is one of capacity—whether the individual, being of unsound mind, could not manage the ordinary affairs of his life." Walker v. Brannan, 243 Ga. App. 235, 236-37, 533 S.E.2d 129, 130 (2000) (internal quotation omitted).

Nothing in Plaintiff's complaint indicates that he suffered the type of mental incapacity between February 17, 2016 and February 17, 2018 that would toll the personal-injury statute of limitations. Plaintiff's statements regarding incompetence in his response brief and the information contained in his accompanying exhibit do not paint the picture of an individual that could not manage the ordinary affairs of his life. Having a mental illness is not the same as being mentally incapacitated. Plaintiff did not require a guardian or other help in managing his life. He was "[a]ble to access needed resources in the community." Doc. No. [11-1], p. 28. He checked himself into the hospital. He applied for jobs. He contacted Defendant after the accident, and eventually, filed this lawsuit on his own. Therefore, tolling is not available to Plaintiff under O.C.G.A. § 9-3-90 or O.C.G.A. § 9-3-91.

The other potential ground for tolling raised by Plaintiff's response brief is fraud on the part of the Defendant. Plaintiff's brief states that Defendant's employee told him not to get a lawyer and that the matter could be resolved without one, but never followed through on these statements. Doc. No. [11], p. 3. Under Georgia law, fraud on the Defendant's part tolls the statute of limitations in two circumstances: (1) where the actual fraud is the gravamen of the cause of action, and (2) where a fraud (separate from the cause of action) "debars and deters" the plaintiff from bringing the action. Rai v. Reid, 294 Ga. 270, 271–72, 751 S.E.2d 821, 823–24 (2013); see also O.C.G.A. § 9-3-96.

Plaintiff's claim fails under the first analysis. He is suing Defendant for personal injuries arising out of a car accident; therefore, fraud is not the "gravamen" of his cause of action. Plaintiff's claim also fails under the second analysis. To establish this type of fraud, a plaintiff must prove the defendant's fraudulent actions concealed the **existence** of a cause of action, not just dissuaded the plaintiff from filing suit for a cause of action of which he was aware. Rai, 294 Ga. at 273, 751 S.E.2d at 824–25. Plaintiff was aware of his injuries following the February 17, 2016 accident. He knew he had a cause of action, evidenced by him contacting the Defendant regarding a settlement. That Plaintiff chose to rely on Defendant's employee's advice and to wait for

Defendant to reach out to him with a settlement offer does not constitute a fraud on Defendant's part as contemplated by O.C.G.A. § 9-3-96.

As it is apparent on the face of the complaint that Plaintiff's claims are barred by the two-year statute of limitations and Plaintiff has not established grounds for tolling the statute of limitations, Defendant's Motion to Dismiss is **GRANTED**. Doc. No. [5]. Due to the dismissal of Plaintiff's complaint, Defendant's answer is a nullity. Therefore, Plaintiff's Motion to Strike Affirmative Defenses is deemed **MOOT**. Doc. No. [12].

C. Motion for Sanctions

Finally, Plaintiff seeks monetary sanctions against Defendant and Defendant's counsel in the amount of $1 million dollars. Doc. No. [26], p. 2. As of March 5, 2019, Plaintiff said he "ha[d] not received one document from Defendants, nor Defendants Attorneys'," despite Defendant's Certificate of Service attached to each filing which states that the CM/ECF system will automatically send notification to Plaintiff by email. Id. at 8. Plaintiff states that he has only received documents through the mail, not by email. Id. Plaintiff appears to invoke a combination of Federal Rule of Civil Procedure 11 and the Court's inherent authority as a basis for sanctions. Id. at 4, 9.

1. *Rule 11 Sanctions*

The purpose of Rule 11 is to deter "baseless" filings in federal court by requiring attorneys to certify that the claims they raise are not for improper purposes, are warranted by law, and have evidentiary support. Fed. R. Civ. P. 11(b); see also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). The rule imposes an obligation on attorneys to conduct reasonable inquiries into the facts and claims asserted before filing a pleading or motion with the court. Rowe v. Gary, 703 F. App'x 777, 779 (11th Cir. 2017).

Rule 11 also contains procedural requirements designed to "protect the person against whom sanctions are sought and forestall unnecessary motion practice." Macort v. Prem, Inc., No. 04-15081, 2005 WL 8151794, at *5 (11thCir. Mar. 29, 2005) (quoting 5A Charles Alan Wright et al., Federal Practice and Procedure § 1337.2, at 723 (2d ed. 1995)); see also Fed. R. Civ. P. 11(c) (requiring any motion for sanctions to be served on the opposing party a minimum of twenty-one days before being filed with the court in order to provide the opposing party an opportunity to remedy the situation). A motion for Rule 11 sanctions must be served on the opposing party pursuant to Federal Rule of Civil Procedure 5. Fed. R. Civ. P. 11(c)(2).

The Court finds Rule 11 sanctions inappropriate for two reasons. First, defense counsel's filings are not frivolous, baseless, or filed for an improper reason. Plaintiff complains about improper service of those filings, but failing to properly serve Plaintiff does not turn those filings into frivolous, baseless, or harassing pleadings.

Second, Plaintiff is required to serve a motion for sanctions upon the opposing party twenty-one days in advance of filing it with the court. This allows the opposing party an opportunity to correct their conduct. Here, Plaintiff emailed the opposing party his motion, however, email is not a proper method of service under Federal Rule of Civil Procedure 5 (unless agreed to by the opposing party). Defendant has not agreed to service by email. In addition, despite the deficiency in serving the motion for sanctions, Defendant has already corrected its mistake and continues to serve Plaintiff its filings by mail.

2. *Sanctions Under Court's Inherent Power*

"A court may impose sanctions for litigation misconduct under its inherent power." Eagle Hospital Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1306 (11th Cir. 2009); see also Chambers v. NASCO, Inc., 501 U.S. 32, 46–51 (1991). "Because of their very potency, inherent powers must be exercised with restraint and discretion." Chambers, 501 U.S. at 44. The use of

the Court's inherent power is appropriate where the conduct in question does not fall neatly within any of the mechanisms for sanctions provided by statute or rule. In re Amtrak "Sunset Ltd." Train Crash, 136 F. Supp. 2d 1251. 1266 (S.D. Ala. 2001).

"The key to unlocking a court's inherent power is a finding of bad faith." Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998). "Bad faith is an objective standard that is met if the party's conduct was objectively reckless, or outside the bounds of acceptable conduct." Dial HD, Inc. v. ClearOne Commc'ns, 536 F. App'x 927, 929 (11th Cir. 2013). "Bad faith exists when the court finds that a fraud has been practiced upon it, or that the very temple of justice has been defiled, or where a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers the enforcement of a court order." Allapattah Servs., Inc. v. Exxon Corp., 372 F. Supp. 2d 1344, 1373 (S.D. Fla. 2005).

The Court finds no bad faith or other grounds on which to sanction Defendant or her counsel. It appears that defense counsel did not properly serve Plaintiff, as a *pro se* party, with each of its filings as required by the Rules of Civil Procedure and the Local Rules. See Doc. No. [15] (listing its motion to dismiss, answer, reply brief to motion to dismiss, and response brief to motion

to strike answer). Rather, defense counsel was—and is—under the impression that the CM/ECF system served Plaintiff its initial filings. See Doc. No. [27], p. 3 ("[S]ince Mr. Alston is pro se, it appears that the e-file system has provided Mr. Alston with notice via mail. Mr. Alston has certainly received the documents, as he . . . has moved within days against nearly every document Defendant has filed.").

Defense counsel rectified its mistake on January 25, 2019, when it provided "additional service" of all of its initial filings on Plaintiff. Doc. No. [15]. Thereafter, Defendant's Certificates of Service state that each document has been filed on the CM/ECF system, "which will deliver documents to" Plaintiff, and that defense counsel has also mailed a copy of the pleading to Plaintiff. See, e.g., Doc. No. [22], p. 3.

The Court clarifies for defense counsel's behalf. Pursuant to the Local Rules, *pro se* parties do not have access to the CM/ECF system. See NDGa LR App'x H, ¶5. The CM/ECF system will send a "Notice of Electronic Filing" to the filing party, but it is the filing party's responsibility to serve the pleading or document on parties that do not have access to the CM/ECF system. Id. at ¶¶12, 13; see also NDGa LR 5.1(3) ("The 'Notice of Electronic Filing' that is automatically generated by the court's Electronic Filing System constitutes

service of the filed documents on **filers**. Parties who are **not filers** must be served with a copy of any pleading or other document filed electronically in accordance with the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and these Local Rules.").

Defense counsel refers to the language in the Notice of Electronic Filing, which states that notice has been delivered "by other means" to Plaintiff as if the Court has delivered that notice. That language means that the filing party, in compliance with their obligations under the Local Rules and Federal Rules of Civil Procedure, has delivered the required notice through service of its pleading. See NDGa LR 5.1(3). The Court is not responsible for service of Defendant's pleadings. The Court only mails court orders to *pro se* parties. Despite this confusion, Plaintiff has received the documents in question and responded to each. Plaintiff, therefore has suffered no prejudice from defense counsel's misunderstanding of the rules.

As the Court finds that neither Rule 11 sanctions or sanctions under its inherent powers are appropriate , Plaintiff's Motion for Sanctions is **DENIED**. Doc. No. [26].

IV. CONCLUSION

Plaintiff's Motion to File a Surreply is **DENIED**. Doc. No. [18]. Plaintiff's Motion to Take Judicial Notice is **DENIED**. Doc. No. [19]. Defendant's Motion to Dismiss is **GRANTED** and Plaintiff's complaint is **DISMISSED**. Doc. No. [5]. Plaintiff's Motion to Strike Affirmative Defenses is deemed **MOOT**. Doc. No. [12]. Plaintiff's Motion for Sanctions is **DENIED**. Doc. No. [26]. The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 16th day of April, 2019.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE