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DRAFT

XXX XX, XXXX

State Bar of California
Office of the Chief Trial Counsel / Intake
1149 South Hill Street
Los Angeles, CA 90015-2299

Re: Christopher P. "Hawk" Barry

Ladies and Gentlemen:

I represent Raceway Ford, an auto dealership that has become the victim of attorney misconduct that violates the Rules of Professional Conduct. My client has requested me to file on its behalf a complaint with the State Bar against Christopher "Hawk" Barry and his firm, Rosner, Law & Mansfield.

Mr. Barry has filled multiple sham lawsuits against Raceway Ford and sham motions in those lawsuits. The cases include: *Tom Quatman v. Raceway Ford*, Riverside County Superior Court case no. 366743, filed on November 8, 2001; Frederick *Gains v. Raceway Ford*, San Bernardino County Superior Court case no.

SCVSS120196, filed on October 29, 2004; Loverso *v. Raceway Ford*, Riverside County Superior Court case no. RIC 424052, filed on January 12, 2005, *Stone v. Raceway Ford,* U.S. District Court – Central District of California case no. CV 06-01802 GHK, and *Nelson v. Pearson Ford.* San Diego Superior Court case no. GIC 881178, filed on March 21, 2007. *Gains* and *Loverso* have been consolidated as Riverside case no. RICJCCP 4476 and is coordinated with *Stone.*

His most recent sham motions are a motion to disqualify three different attorneys in three different law firms representing Raceway Ford in these cases, and a motion to preclude the General Manager of Raceway Ford, Tom Owings, from attending depositions. A copy of the latter motion and Raceway Ford's opposition is submitted herewith as Exhibit A. The motions are calculated to prejudice the court against Raceway's General Manager, Tom Owings, and its counsel and to cripple Raceway's ability to defend itself in these actions, which are the second and third in a series of five class actions filed by Mr. Barry and his firm against Raceway Ford and its sister store, Pearson Ford, in the last six years.

Mr. Barry has cross-examined Mr. Owings at trial and deposed him on numerous occasions. They have spent well over a hundred hours together in depositions of other parties and witnesses. Mr. Barry unprofessionally refers to Mr. Owings as "Tom", both on and off the record.

The motion to preclude Mr. Owings from attending depositions appears to be filed in retaliation for Mr. Owings' retention of the undersigned as an expert consultant on behalf of two of Mr. Barry's former clients, Robert Loverso and Carol Sisneros, in their complaints to the State Bar against Mr. Barry and his firm. On November 1, 2006, I wrote to Mr. Owings a preliminary opinion that Mr. Barry breached his fiduciary duties to Ms. Sisneros. January 23, 2007, I wrote to Mr. Owings a preliminary opinion that Mr. Barry had committed legal malpractice by breaching his fiduciary duties to Robert Loverso in eight particulars. True and correct copies of those e-mails are submitted collectively as Exhibit B.

<u>Tom Quatman v. Raceway Ford</u>

It appears that Mr. Barry has let a feud between him and Raceway Ford and its General Manager, Tom Owings, abrogate professional conduct. The feud between Mr. Barry and Raceway Ford started with the *Quatman* case in 2005-2006. At the time, Raceway's billboards advertised, "lowest price guaranteed", so Mr. Quatman came to Raceway with an ad from Villa Ford on a Mustang GT convertible, and asked Raceway to beat the advertised price. Ultimately, Raceway did sell him a Mustang, but the final contract charged 79 cents more than what was stated in the Villa Ford ad. (However, the Raceway Mustang came with a set of $600 custom chrome wheels, and the Villa Ford Mustang did not.) Later, Mr. Barry filed a class-action lawsuit on behalf of Mr. Quatman against Raceway for (among other things) false advertising on the "lowest price guaranteed".

At trial Quatman was the only plaintiff as the class had never been certified. Judge Tranbarger (Riverside Superior Court) decided that Mr. Quatman would recover nothing, because he suffered no damages.

However, this trial took place before California's Unfair Competition Laws were amended through Proposition 64 to require that the named plaintiff suffer damages. So Judge Tranbarger also ruled that the phrase "lowest price guaranteed" might be misunderstood by consumers, and he imposed an injunction requiring Raceway to remove the phrase from its ads. On the basis of this injunction Mr. Barry's firm claimed to have vindicated an important public right and asked the court to order Raceway to pay him attorneys' fees of approximately $145,000.

Judge Tranbarger decided that Mr. Barry's firm over-worked the case and found that a reasonable attorney could have obtained the same result in 50 hours of time or less, so he only awarded approximately $18,000 in attorneys' fees, The Court of appeals called the case "a shake down lawsuit." See transcript of oral argument, page 18, line 22 through page 19, line 3, submitted as Exhibit C. Mr. Barry appealed the fee award, which was affirmed.

Gains v. Raceway Ford

Mr. Barry next filed another putative "class action" lawsuit against Raceway Ford on behalf of Frederick Gains in San Bernardino County. The *Gains v. Raceway* lawsuit alleged that Raceway violated federal truth-in-lending disclosures by "backdating" Mr. Gains' rewritten sales contract, thereby charging him interest on his purchase before it was consummated.

In reality, Mr. Gains re-financed his purchase with his credit union (due to a lower interest rate) the day after he signed his Raceway contract. He simply brought in his credit union's check for the entire purchase price of the vehicle, and at that point, Raceway disregarded all of his financing agreements and did not bother to send them to any lenders for processing. Consequently, Mr. Gains never made any payments under any financing arranged with Raceway. Once again, Mr. Barry was prosecuting a lawsuit against Raceway Ford in which his client suffered no damage.

Raceway responded to Mr. Gains' complaint with a petition to compel arbitration, which was granted, and Mr. Barry spent about a year challenging it through the appellate courts, all the way up to the California Supreme Court. The arbitration agreement was upheld, and the case should be concluded before the end of the year. The Judge has since ruled that Mr. Gains suffered no damages and therefore is not a suitable class representative. Judge Pate granted Mr. Barry time to find another class representative; the time has elapsed and Mr. Barry put no new putative class representative forth. In anticipation of an adverse ruling in the remaining individual causes of action which might subject his client to pay some of Raceway Ford's attorney fees Mr. Barry has asked the Judge to stay the proceedings until the conclusion of the Loverso case in Riverside.

Loverso v. Raceway

Next, Mr. Barry filed *Loverso v. Raceway Ford*, a case under the Consumer Legal Remedies Act ("CLRA" – which allows for awards of attorneys fees). He repeated the Gains' allegations about "backdating" Mr. Loverso's contract, and added claims that Raceway allegedly charged improper fees for tire disposal and smog checks.
However, the CLRA provides a 30-day "safe-harbor" period where the customer has to send the merchant written notice of his complaints and allow the merchant 30 days to resolve the complaint before a lawsuit for damages can be filed. When Mr. Owings received the 30-day letter, he immediately contacted Mr. Loverso and invited him to negotiate. The two men met at Raceway Ford and not only settled Mr. Loverso's problem, but found that Mr. Barry had been acting far beyond the scope of what Mr. Loverso had authorized. Furthermore, when Mr. Loverso notified Mr. Barry that he settled his case directly with Mr. Owings, Mr. Barry became furious and insisted that Mr. Loverso continue to prosecute the action on behalf of the alleged "class" of similarly situated people. Mr. Loverso refused, and Mr. Barry threatened Mr. Loverso that he could become liable for attorneys fees to the other "class members" if he dropped out of the case. For further details of what transpired between Mr. Loverso and Mr. Barry, enclosed is a true and correct copy of Robert Loverso's May 16, 2005 verified malpractice complaint against Mr. Barry and his firm, and Mr. Loverso's October 6, 2005 declaration in support of Raceway Ford's motion for a protective order in the Loverso/Stone v. Raceway Ford case, submitted as Exhibits D and E respectively.

Rosner Files Frivolous State Bar Complaint Against Raceway's Attorney

Plaintiff's motion for a protective order to preclude Mr. Owings from attending depositions refers to Mr. Barry filing a criminal complaint against Mr. Owings with the Riverside Police Department. In April, 2005, Mr. Barry's partner, Hal Rosner, filed a State Bar complaint against Raceway's attorney, Kellie Christianson, alleging that she had "improperly communicated with Mr. Rosner's client, Mr. Loverso, without Mr. Rosner's consent, in an attempt to settle the lawsuit against [her] client, Raceway Ford." See State Bar correspondence of April 20, 2005, to Ms. Christianson, submitted herewith as Exhibit F.

Mr. Barry thereafter filed papers with the Loverso court, citing to his bar complaint against Ms. Christianson as support for his motion to compel Mr. Owings' deposition, filed in the Loverso v. Raceway case on or about March 7 2005.

On May 19, 2005, the State Bar advised Raceway's counsel that it was closing the complaint against her, upon determination that "there are insufficient grounds for disciplinary action." (Exhibit G)

The allegations Mr. Barry's firm made against Ms. Christianson were completely false; Mr. Owings settled Mr. Loverso's claims without her involvement or participation, but the incident shows Mr. Barry's history of filing administrative (and now criminal) complaints in order to gain an advantage in their civil suits against Raceway.

Mr. Barry Requests Frivolous Contempt Order Against Tom Owings Personally

The fact that he lost Mr. Loverso as a client appeared to spur Mr. Barry on to re-double his efforts against Raceway Ford. Over the next year he obtained various court orders to search Raceway's records to obtain another customer to act as plaintiff in place of Robert Loverso. The litigation also became more personal. In one instance, Raceway was late in complying with one of the court orders on its customer records. Mr. Barry filed a request to have not only Raceway cited for civil contempt, but also to have Mr. Owings personally cited with contempt, even though the court's original order was imposed against Raceway only, and not Mr. Owings. Submitted herewith as Exhibit H are the original court order and Mr. Barry's pleading seeking a contempt citation against Mr. Owings personally. Mr. Owings had to hire another attorney to appear and defend him personally against this frivolous contempt charge.

Mr. Barry Uses Files from the Loverso Case as Basis for Frivolous Federal Court Case

Eventually, through massive amounts of document production imposed against Raceway, Mr. Barry located 21 other customers to serve as plaintiffs in place of Mr. Loverso. He then demanded that Raceway provide him with those 21 customers' sales transaction files, and Raceway complied. As soon as he received them, Mr. Barry filed another lawsuit against Raceway Ford! This time, he filed in federal court and alleged that Raceway's files had evidence of violations of the Drivers' Privacy Protection Act ("DPPA").

According to the legislative history, the DPPA was enacted shortly after actress Rebecca Schaeffer was murdered by a stalker who used DMV records to obtain her address. The act therefore prohibited dissemination of private information from drivers' licenses and/or DMV records.

The case Mr. Barry filed in federal court alleged that when Raceway accessed DMV records to find out whether the *Loverso* plaintiffs still owned their cars, it violated the DPPA because it obtained protected address and telephone information. The federal case was a complete sham. Raceway already had the customers' names and addresses from when they voluntarily provided them on numerous documents at the time of purchase, including documents to register their vehicle purchases with the DMV. Furthermore, Raceway never disclosed any information to third parties, which is a necessary element for a DPPA violation to occur. Finally, the DPPA has a "litigation exception", which allows for disclosure of the otherwise private information when it is done in connection with litigation.

Mr. Barry dismissed the entire case before the court had a chance to hear any of Raceway's motions to dismiss it and/or sanction Mr. Barry for filing it, but not until Raceway spent upwards of $10,000 defending against it.

State Bar Complaints against Mr. Barry by Robert Loverso, and his ex-mother-in-law, Carol Sisneros.

Ironically, Mr. Loverso and Mr. Owings became friendly, and Mr. Loverso introduced Mr. Owings to his former mother-in-law, Carol Sisneros. Ms. Sisneros is also a former client of Hawk Barry's who is also dissatisfied with Mr. Barry's representation of her. [1]

In fact, both Mr. Loverso and Ms. Sisneros have filed state bar complaints against Mr. Barry and his firm. As mentioned above, Mr. Owings has provided them both with my assistance. I examined their files and provided my opinion of Mr. Barry's conduct. When Mr. Owings told Mr. Barry that he had done so, Mr. Barry filed the motion to preclude Mr. Owings from attending depositions. It is my understanding that the State Bar sent Mr. Barry a "warning letter" regarding his conduct in representing Ms. Sisneros.

Personal Interactions between Mr. Barry and Mr. Owings

While all of these lawsuits have been pending, Mr. Barry has taken every opportunity to demand that Mr. Owings be deposed, either in his own name, or in his capacity as the "person most knowledgeable" from Raceway Ford. There have been at least five occasions when Mr. Barry has deposed Mr. Owings, prior to the January 5 deposition, which forms the alleged basis for his pending motion for protective order.

In each deposition, Mr. Barry wasted as much of Mr. Owings' time as possible (thereby running up his potentially awardable attorneys fees) and baited him with snide comments and threats, etc. In fairness, Mr. Owings "gives as good as he gets," and this banter between them has been going on for years.

Additionally, Mr. Owings attended approximately 18 depositions of Raceway customers in the *Loverso* case, and Frederick Gains' deposition in the *Gains* case, and Mr. Barry was likewise present for all of them. The banter between them has become more hostile over the years. It has gotten to the point where Mr. Barry has abandoned all pretense of professionalism, referring to Mr. Owings, both on and off the record as "Tom," and showing up for depositions dressed in short pants, sandals and tee- shirts.

At the January 5 deposition of Mr. Owings, Mr. Barry made it a point to put on the record that the January 5 2007 deposition was for arbitration only, and he was reserving his right to demand yet another deposition of Mr. Owings. In the past, he has also filed at least two motions with the courts to demand more depositions of Mr. Owings.

This motion for a protective order is ostensibly pursuant to C.C.P. §2025.420, which provides for an assortment of remedies for depositions which generate "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." However, plaintiff cites no authority for the requested remedy of barring Mr. Owings from any and all future depositions. Such action would obliterate Raceway's ability to defend itself and constitute an unconstitutional abridgment of Raceway's due process rights. Most of the employees involved in the subject transactions have left Raceway Ford by now, and as General Manager, Mr. Owings is the only Raceway representative who can effectively assist counsel in the depositions.

The case of *Lowy Development Corp. v. Superior Court* (1987) 190 Cal.App.3d 317, 321-322, cited by Mr. Barry, actually supports Raceway's position; not plaintiffs'. In *Lowy,* the court stated: "Accordingly, we hold that Lowy may designate one officer, or an employee authorized to act for the corporation, in addition to the deponent, to be present at each deposition. " (*Id* at 321.) That is what Raceway has done. Tom Owings is that corporate representative, and he has been the only corporate representative to attend in this case.

In my opinion Mr. Barry by his conduct discussed above has violated the following Rules of Professional Conduct and sections of the Business & Professions Code applicable to California attorneys: 3-110, 3-200, 3-310, 3-500, 4-200; Business & Professions Code Sections 6068 (c), (d), (g) and (m).

It is also my opinion that Mr. Barry's contract with Ms. Sisneros provided for an unconscionable fee, that is, his customary hourly rate, plus 50% of certain damages awarded to the client, including damages for emotional distress, and 10% of all out-of-pocket damages. The contract is submitted herewith as Exhibit I.

In addition, Mr. Barry had a conflict of interest in representing Ms. Sisneros, which is clearly show by his own letter to her of May 26, 2005, a copy of which is submitted as Exhibit J.

Please investigate this matter at your earliest convenience.

Very truly yours,

Boyd S. Lemon