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May 14, 2021

VIA Electronic Filing
Administrative Law Judge Elizabeth Barnes
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Fl.
Harrisburg, PA 17120

Re: Application of All Choice Energy MidAmerica LLC
Electric: A-2021-3024563
Natural Gas: A: 2021-3024607

Dear Judge Barnes:

This firm represents Choice Energy, LLC, d/b/a 4 Choice Energy in the above matters, scheduled for a hearing on May 20, 2021. Enclosed -please find the following exhibits that 4 Choice Energy seeks to submit into evidence at the hearing:

Exhibit 1 Stipulation and Order of Dismissal, *Soriano v. Choice Energy*, MON-DC-4663-20

Exhibit 2. Order dismissing case and denying sanctions, *Zelma v. Choice Energy*, 2:19-cv-17535.

Also enclosed is a copy of a verified letter in response to the motion to dismiss filed by All Choice Energy MidAmerica LLC.

Respectfully submitted,

John D. Coyle
Admitted pro hac vice

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EXHIBIT 1

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Attorneys for Defendant Choice Energy LLC

DAIENE BAREIRA SORIANO, Plaintiff, v. CHOICE ENERGY LLC, John Does 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SPECIAL CIVIL PART MONMOUTH COUNTY DOCKET NO: MON-DC-4663-20 **STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE**

WHEREAS: Plaintiff asserted claims against Choice Energy LLC regarding telephone calls allegedly made in violation of the Do-Not-Call List;

WHEREAS: Choice Energy LLC provided call logs establishing that the calls at issue were not made to Plaintiff by Choice Energy LLC and served Plaintiff with a frivolous litigation demand to withdraw the Complaint;

WHEREAS: Plaintiff wishes to dismiss her claims against Choice Energy LLC, **without receiving any compensation** from Choice Energy LLC;

WHEREAS: In exchange for this dismissal with prejudice without compensation, Choice Energy LLC waives and releases any claims it could have asserted regarding frivolous litigation pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-15-1.

THEREFORE: it is hereby stipulated and ordered that all claims against Choice Energy, LLC in this matter are hereby dismissed with prejudice and without an award of attorney's fees or costs against any party.

LAW OFFICE OF HOWARD GUTTMAN Attorneys for Plaintiff *Howard Gutman* By: HOWARD GUTTMAN, ESQ. Dated: October 9, 2020	BEVAN, MOSCA & GIUDITTA, P.C. Attorneys for Choice Energy LLC By: *s/ John D. Coyle, Esq.* JOHN D. COYLE, ESQ. Dated: October 9, 2020

Date: October 14, 2020

/s/Daniel L. Weiss
HON. DANIEL L. WEISS, J.S.C.

EXHIBIT 2

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RICHARD M. ZELMA, Plaintiff, v. CHOICE ENERGY LLC, et al, Defendant.	Civil Action No.: 19-17535 **ORDER**

CECCHI, District Judge.

This matter comes before the Court on Plaintiff Richard M. Zelma's ("Plaintiff") motion (ECF No. 30) to voluntarily dismiss his amended complaint (ECF No. 29 (the "Amended Complaint")), and Defendant Choice Energy LLC, Michael Joseph Needham, and Moses K. Cheung's (the "Choice Energy Defendants") cross-motion for sanctions pursuant to Federal Rule of Civil Procedure 11 (ECF No. 32). Plaintiff opposed the Choice Energy Defendants' motion for sanctions (ECF No. 33); and

WHEREAS Plaintiff brings this action against Defendants for allegedly making numerous telemarketing calls to Plaintiff's cellular phone (the "Calls") without Plaintiff's consent in violation of federal and state law.[1] ECF No. 29; and

WHEREAS on September 8, 2020, Plaintiff moved before this Court to voluntarily dismiss the Amended Complaint without prejudice, pursuant to Federal Rule Civil Procedure 41(a)(2). ECF No. 30; and

[1] In addition to the Choice Energy Defendants, Plaintiff also brings this action against "Telemarketer(s)," "ABC Corporations' (1-10)," Brent Hood, and Mike Sobieski (collectively, "Defendants").

WHEREAS on September 21, 2020, the Choice Energy Defendants advised the Court that they "do[] not object to dismissal"[2] of the Amended Complaint without prejudice.[3] ECF No. 31 at 6; and

WHEREAS the Court thus grants Plaintiff's request to dismiss the Amended Complaint without prejudice given Defendants' consent and pursuant to the interests of justice in the discretion of the Court. *Silvertop Associates, Inc., v. Kangaroo Manufacturing, Inc.*, No. 11707919, 2021 WL 1138135, at *2 (D.N.J. Mar. 24, 2021) (finding that "the decision to dismiss . . . without [prejudice] is left to the discretion of the court" pursuant to Rule 41(a)(2) and that "courts in this district have long held that without substantial prejudice to the defendant, a motion for voluntary dismissal . . . generally should not be denied") (citations omitted); and

WHEREAS the Choice Energy Defendants also move for "an award of attorneys' fees and costs as sanctions against Plaintiff" pursuant to Federal Rule of Civil Procedure 11 because Plaintiff allegedly (1) filed this lawsuit with the knowledge that his claims were meritless, (2) failed to cooperate with Defendants' discovery requests and acted in a disruptive manner, and (3) "buri[ed]" Defendants with unnecessary and superfluous discovery requests in an attempt to coerce a settlement agreement. *See generally* ECF No. 32; and

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[2] The other Defendants have not responded to Plaintiff's motion to voluntarily dismiss the Amended Complaint without prejudice. Therefore, the Court considers those parties' silence as consent to Plaintiff's request.

[3] The Choice Energy Defendants articulated that they do not oppose Plaintiff's motion "so long as Defendants do not waive their right to fees and costs." ECF No. 31 at 6. However, there exists a "general rule in American jurisprudence that litigants must bear their own expenses [and costs] regardless of whether they win or lose . . . [absent] an exception." *Morning Sun Books, Inc. v. Div. Point Models, Inc.*, 826 F. App'x 167, 169 (3d Cir. 2020). While the Court's authority to issue sanctions in the form of fees and costs pursuant to Federal Rule of Civil Procedure 11 confers such an exception to this "general rule," Defendants nevertheless have no "right" to any such fees and costs. Put differently, Defendants have no right to waive.

WHEREAS in support of the supposedly baseless nature of Plaintiff's claims, the Choice Energy Defendants point out that Plaintiff is a serial filer of telemarketer lawsuits, including at least 16 suits before this Court and hundreds of actions before other courts. *Id.* at 20. As for Plaintiff's allegedly insubordinate behavior with respect to discovery, Defendants note that Plaintiff "refused to provide" recordings of each of the Calls that were supposedly made, as well as "unredacted logs of the Calls." *Id.* at 6. With respect to Plaintiff's alleged attempt to pressure a settlement agreement with Defendants, the Choice Energy Defendants highlight the suspicious timing in which Plaintiff decided to request dismissal of his claims without prejudice—immediately after Magistrate Judge Falk ordered Plaintiff to produce this potentially outcome determinative discovery. *Id.* at 9; and

WHEREAS Federal Rule of Civil Procedure 11(c) allows courts to impose an "appropriate sanction," including an award of attorneys' fees, for violations of Federal Rule of Civil Procedure 11(b). *Bradford v. Bolles*, No. 13-1910, 2015 WL 10936052, at *2 (D.N.J. Mar. 10, 2015), *aff'd*, 645 F. App'x 157 (3d Cir. 2016). "Rule 11(b) requires parties," including *pro se* parties "to certify that their filings have evidentiary support and are based on a reasonable inquiry." *Id.* In assessing a party's conduct under Rule 11(b), "courts should apply an objective standard of reasonableness under the circumstances at the time of filing." *Id.* (citations omitted). "However, such sanctions, including an award of fees, should only be imposed in the 'exceptional circumstance' and 'must be limited to what suffices to deter repetition of the conduct.'" *Id.* (citations omitted). While, as noted above, the obligations of Rule 11 apply to *pro se* parties, "the analysis of reasonableness takes into account the party's *pro se* status." *Huertas v. Transunion, LLC*, No. 08-244, 2010 WL 1838410, at *3 (D.N.J. May 6, 2010). Ultimately, "'[t]he award of costs and attorneys' fees under Rule 11 . . . is a matter committed to the district court's discretion.'" *Huzinec v. Six Flags Great*

Adventure, LLC, No. 162754, 2018 WL 1919956, at *9 (D.N.J. Apr. 24, 2018) (quoting *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986)); and

WHEREAS here, Plaintiff's behavior does not constitute an "exceptional circumstance" and, thus, the issuance of sanctions under Rule 11 would not be appropriate. The Court takes into account Plaintiff's *pro se* status in this decision, as well as Plaintiff's apparent belief that he received the Calls from a telemarketer named "Choice" without his consent (ECF No. 22-2 at ¶ 13 (citing audio recording of one of the Calls)). Therefore, the Court denies the Choice Energy Defendants' motion for sanctions.[4]

Accordingly, **IT IS** on this 23 day of April, 2021,

ORDERED that Plaintiff's motion to voluntarily dismiss his amended complaint without prejudice (ECF No. 30) is **GRANTED**; and it is further

ORDERED that the Choice Energy Defendants' motion for sanctions pursuant to Federal Rule of Civil Procedure 11 (ECF No. 32) is **DENIED**; and it is finally

ORDERED that the Clerk of the Court shall mark this matter closed.

SO ORDERED.

CLAIRE C. CECCHI, U.S.D.J.

[4] Despite the denial of the Choice Energy Defendants' motion for sanctions, the Court acknowledges Defendants' frustrations and allegations regarding Plaintiff's means of proceeding in this action. Accordingly, Plaintiff is reminded that Federal Rule of Civil Procedure 11 provides that a party may not advance frivolous arguments without evidentiary support and must maintain a duty of candor. *See Doe v. Quinones*, No. 17-719, 2019 WL 8989852, at *2, n. 2 (W.D. Pa. Dec. 3, 2019), *report and recommendation adopted as modified*, 2020 WL 1150970 (W.D. Pa. Mar. 10, 2020).