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4-9-2018

### **Bernard H. Bronner, derivatively on behalf of Rainforest Production Holdings, inc. and directly on behalf of himself, Order on Certain Pending Motions**

Melvin K. Westmoreland  
*Fulton County Superior Court Judge*

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**IN THE SUPERIOR COURT OF FULTON COUNTY  
BUSINESS CASE DIVISION  
STATE OF GEORGIA**

BERNARD H. BRONNER, derivatively )  
on behalf of Rainforest Production )  
Holdings, Inc. and directly on behalf of )  
himself, )

Plaintiff, )

v. )

Civil Action File No. 2014CV248023

ROBERT E. HARDY, II, WILLIAM E. )  
PACKER, JR., and TRF )  
PRODUCTIONS, LLC, )

Bus. Case Div. 1

Individual Defendants. )

and )

RAINFOREST PRODUCTION )  
HOLDINGS, INC. )

Nominal Defendants )

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**ORDER ON CERTAIN PENDING MOTIONS**

This matter is before the Court on various pending pleadings: (1) Defendants' Motion for Summary Judgment; (2) Defendants' Motion for Leave to File Memorandum of Law in Excess of Page Limit; (3) Plaintiff's Motion to Compel Deposition Testimony, For Sanctions and Attorney's Fees, and Motion to Extend Deadline for Dispositive Motions ("Motion to Compel"); (4) Counterclaimants' Motion for Summary Partial Judgment – Counterclaims; and (5) Plaintiff's Response in Opposition to Defendants' Motion for Leave to File Memorandum of Law in Excess of Page Limit and incorporated request to strike Defendants' Motion for Summary Judgment and Memorandum of Law. Having considered the record, the Court finds as follows:

### **A. Defendants and Counterclaimants' Motions for Summary Judgment**

Although Defendants' Motion for Summary Judgment and Counterclaimants' Motion for Summary Partial Judgment – Counterclaims are pending, the Court will address the parties' discovery dispute before considering those motions. *See Parks v. Hyundai Motor Am., Inc.*, 258 Ga. App. 876, 877, 575 S.E.2d 673, 675 (2002) (quoting *McCall v. Henry Med. Center*, 250 Ga. App. 679, 685(2), 551 S.E.2d 739 (2001)) (“As a general rule, this Court does not condone the grant of summary judgment while a motion to compel discovery is pending, unless it can be determined that ‘the disallowed discovery would add nothing of substance to the party's claim’”).

### **B. Defendants' Motion for Leave to File Memorandum of Law in Excess of Page Limit**

In their motion, Defendants request leave of Court to file their 143-page memorandum in support of their Motion for Summary Judgment. Prior to being transferred to the Business Court, the Hon. Judge Adams entered a case management order that did not include any limitation on the length of legal briefs. Upon being transferred, this Court's standard case management order (which imposes a 30-page limit on briefs without prior leave of Court) was not entered. Rather, the Court has entered various scheduling orders amending deadlines, but which did not address the length of briefs.

Given the foregoing, the Court GRANTS Defendants' motion and will accept the briefing submitted to date. The Court, thus, DENIES Plaintiff's request that the Court strike Defendants' Motion for Summary Judgment and related memorandum. However, moving forward and absent prior permission from the Court, all briefs filed in support of or in response to a motion are limited in length to thirty pages at 12-point font.

### C. Plaintiff's Motion to Compel

The powers of the trial court to control the time, place, scope and financing of discovery are construed broadly. *See Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 589, 452 S.E.2d 159, 162 (1994), *disapproved of on other grounds by Chrysler Grp. LLC v. Walden*, No. S17G0832, 2018 WL 1323992 (Ga. Mar. 15, 2018); *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 899, 321 S.E.2d 383, 385 (1984).

With respect to the general scope of discovery, O.C.G.A. §9-11-26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence...

Relevancy is liberally construed: “[I]n the discovery context, courts should and ordinarily do interpret ‘relevant’ very broadly to mean any matter that is relevant to anything that is or may become an issue in litigation.” *Bowden v. Medical Center, Inc.*, 297 Ga. 285, 291 (2015) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)) (internal quotations omitted).

Here, Bernard H. Bronner (“Bronner”) shareholder of Rainforest Production Holdings, Inc. (“Rainforest”), brought a direct and derivative action against William E. Packer (“Packer”), Robert E. Hardy (“Hardy”), TRF Productions (“TRF”) and Rainforest (collectively “Defendants”). Bronner alleges that Packer and Hardy abused their fiduciary duties as officers and board members of Rainforest by creating companies that directly competed with Rainforest.

In the instant Motion, Bronner seeks to compel Packer to appear to complete his deposition. Packer was noticed to sit for a deposition in his individual capacity and as the 30(b)(6) designee for four separate companies relevant to this action. On January 31, 2018, prior to the close of discovery, Plaintiff deposed Packer for just short of seven hours. At the conclusion of that day, Mr. Parker had to leave due to another obligation and Plaintiff “[le]ft open the deposition for that purpose” so that it could be continued on another date.<sup>1</sup> Defendants’ counsel responded that counsel would confer to “come to some agreement as to what there remains to be explored with Mr. Packer.”<sup>2</sup> However, the parties were not able to reach a resolution and Mr. Packer ultimately refused to sit for a second deposition. Plaintiff argues Packer’s testimony—both in his individual capacity and as the 30(b)(6) representative of various entities—is relevant to Plaintiff’s allegations that Packer and Hardy established, maintained, and grew certain companies by “diverting monies and business opportunities from Rainforest.”

Having considered the record and the parties’ arguments, the Court finds Packer’s testimony is reasonably calculated to lead to the discovery of relevant, admissible evidence and a continued deposition is warranted. Although the Motion to Compel was filed after Defendants’ Motion for Summary Judgment was submitted, it relates to a discovery dispute that predates the dispositive motion and the close of discovery. *See Govindasamy v. Wells Fargo Bank, N.A.*, 311 Ga. App. 452, 454, 715 S.E.2d 737, 740 (2011) (“If a respondent requires further discovery to properly respond to a motion, possible responses may include filing a motion to extend time to respond to the motion, a motion to compel, if the responses are overdue, or an affidavit pursuant to O.C.G.A. § 9–11–56(f) setting forth why the respondent is unable to proceed without further discovery”) (citation omitted). Notably, the exhibits attached to Plaintiff’s Motion to Compel

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<sup>1</sup> Motion to Compel, Exhibit A—William E. Packer, Jr. Depo., p. 3.

<sup>2</sup> *Id.*

indicate it was not until Feb. 22, 2018 (one day after Defendants' Motion for Summary Judgment was filed) that Mr. Parker affirmatively stated, through counsel, that he would not agree to sit for a second deposition because he had already been deposed for seven hours. Less than a week thereafter Plaintiff filed the instant Motion to Compel.

Further, although under our Uniform Superior Court Rules a deposition is generally limited to one day of seven hours, the Rules also provide “[t]he court must allow additional time if needed for a fair examination of the deponent or if the deponent or another person or other circumstance impedes or delays the examination.” Ga. Unif. Super. Ct. R. 5.3. Insofar as Mr. Packer is being deposed in his individual capacity and as the 30(b)(6) designee for four separate companies relevant to the parties' dispute, the Court finds additional time is needed for a fair examination of Mr. Packer.<sup>3</sup>

Accordingly, Plaintiff's Motion is GRANTED, IN PART. Mr. Packer is instructed to appear for a continued deposition within thirty days of the entry of this Order. Counsel are asked to confer and agree on a time and place for the continued deposition which shall be limited to one day of seven hours.

With respect to Plaintiff's request to extend the deadline for filing dispositive motions, the request is GRANTED, IN PART. Within sixty days of the entry of this Order, Defendants may supplement their pending dispositive motions as they deem appropriate but any such supplement(s) shall be limited to addressing any relevant testimony provided by Mr. Packer during his continued deposition. Any response(s) to the summary judgment motions, as supplemented, shall be submitted within thirty days of the supplement or, if no supplement is filed,

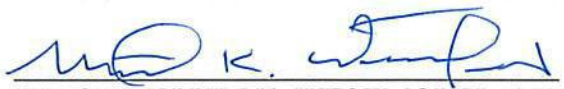
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<sup>3</sup> See D. Tennell Lockett Aff., ¶¶ 19-22.



within ninety days of this Order. Finally, within sixty days of the entry of this Order, Plaintiff may file a dispositive motion and Defendants shall submit any response within thirty days of the filing of that motion.

**SO ORDERED, this 6<sup>th</sup> day of April, 2018.**

  
JUDGE MELVIN K. WESTMORELAND  
Superior Court of Fulton County  
Business Case Division  
Atlanta Judicial Circuit

**Served upon registered service contacts through eFileGA:**

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