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Drummond Financial Services, LLC, ORDER ON MOTIONS FOR PROTECTIVE ORDERS AND TO QUASH PROPOSED DEPOSITIONS AND TO AMEND THE CASE MANAGEMENT ORDER

John J. Goger

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

DRUMMOND FINANCIAL SERVICES, LLC; et al., Plaintiffs, v. TMX FINANCE HOLDINGS, INC.; et al., Defendants.	CIVIL ACTION FILE NO. 2014CV253677 Business Case Div. 4

ORDER ON MOTIONS FOR PROTECTIVE ORDERS AND TO QUASH PROPOSED DEPOSITIONS AND TO AMEND THE CASE MANAGEMENT ORDER

The above styled action is before the Court on: Plaintiffs' letter brief requesting a protective order quashing the proposed deposition of Rod Aycox[1]; Plaintiffs' letter brief requesting a protective order quashing the proposed deposition of Jesse Anderson[2]; Defendants' request for a protective order to quash the deposition of Tracy Young[3]; and Plaintiffs' request to amend the Case Management Order[4]. Having considered the record, the Court finds and orders as follows:[5]

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1 Plaintiffs' letter regarding Rod Aycox, dated Jan. 4, 2019.
2 Plaintiffs' letter regarding Jesse Anderson, dated Jan. 4, 2019.
3 Defendants' letter regarding Tracy Young, dated Jan. 10, 2019.
4 Plaintiffs' letter regarding amending the Case Management Order, dated Feb. 15, 2019.
5 For ease of reference the Drummond Financial Services, LLC related entities (including those related to "LoanMax" companies) are referred to collectively herein as "Plaintiffs" or "LoanMax" and the TMX Financial Holdings, Inc. related entities (including those related to "TitleMax" companies) are referred to collectively herein as "Defendants" or "TitleMax".

I. Applicable standards

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…**

(Emphasis added).

"[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. The Med. Ctr., Inc., 297 Ga. 285, 291, 773 S.E.2d 692, 696 (2015) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)) (internal punctuation omitted). *See* DeLoitte Haskins & Sells v. Green, 187 Ga. App. 376, 376, 370 S.E.2d 194, 195 (1988) ("The courts of this State have long recognized the overriding policy of liberally construing the application of the discovery law. To hold otherwise would be to give every litigant an effective veto of his adversaries' attempts at discovery") (citation and internal punctuation omitted).

However, the Court must "balance[] the right of a party to obtain discovery and the right of individuals to be protected from unduly burdensome or oppressive inquiries." In re Callaway, 212 Ga. App. 500, 501, 442 S.E.2d 309, 310 (1994). In this regard O.C.G.A. §9-11-26(c) generally governs the entry of protective orders and authorizes courts to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

undue burden or expense." O.C.G.A. §9-11-26(c). "The issuance of a protective order is a recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting a party." Bd. of Regents of Univ. Sys. of Georgia v. Ambati, 299 Ga. App. 804, 811, 685 S.E.2d 719, 726 (2009) (citation omitted).

Nevertheless, protective orders should not be used as a means to hinder legitimate discovery and the burden is on the movant to show "good cause" for its entry. O.C.G.A. §9-11-26(c). As summarized by the Court of Appeals of Georgia in Caldwell v. Church, 341 Ga. App. 852, 802 S.E.2d 835 (2017):

> "O.C.G.A. § 9-11-26(c) does establish a general statutory basis for the entry of protective orders limiting or curtailing discovery under appropriate circumstances, provided such limitations do not have the effect of frustrating and preventing legitimate discovery." Christopher v. State of Ga., 185 Ga. App. 532, 533, 364 S.E.2d 905 (1988) (citation and punctuation omitted). Such protective orders, which are within the discretion of the trial judge, "are intended to be protective—not prohibitive—and, **until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoveror's** [sic] **action, the court should not intervene to limit or prohibit the scope of pretrial discovery**." Bullard v. Ewing, 158 Ga. App. 287, 291, 279 S.E.2d 737 (1981)

Caldwell, 341 Ga. App. at 861 (no error in denying protective orders where movants failed to show that bad faith or harassment motivated the party seeking the depositions or what specific prejudice might result from the depositions) (emphasis added). *See* Galbreath v. Braley, 318 Ga. App. 111, 113, 733 S.E.2d 412, 414 (2012) ("[P]rotective orders should not be awarded 'when the effect is to frustrate and prevent legitimate discovery'") (citing Intl. Svc. Ins. Co. v. Bowen, 130 Ga. App. 140, 144, 202 S.E.2d 540 (1973)); Young v. Jones, 149 Ga. App. 819, 824, 256 S.E.2d 58, 62 (1979) ("Good cause for the issuance of a protective order designed to frustrate discovery must be clearly demonstrated").[6]

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[6] As noted previously by this Court, it does not appear that the "apex doctrine" has ever been adopted by

II. Plaintiffs' Motion for Protective Order Regarding Rod Aycox

Plaintiffs ask the Court to enter a protective order quashing the proposed deposition of Rod Aycox, the Chief Executive Officer ("CEO") and a managing member of certain Plaintiffs and of an "affiliated company" called Select Management Resources, Inc. ("SMR"). Mr. Aycox avers he: does not have any "first-hand personal knowledge of relevant facts concerning the subject matter of [this litigation]"; has never directed or been involved with taking pictures of TitleMax's "goal boards"; has not seen any pictures of TitleMax's "goal boards" or used information from them to make decisions on behalf of LoanStar; and any knowledge of facts related to this action were relayed to him in the course of privileged communications by Plaintiffs' counsel.[7] Plaintiffs contend that insofar as Mr. Aycox has no personal knowledge of facts relevant to this case, the deposition is intended only to harass and "distract him from running the business of Defendants' main competition."[8]

Further, Plaintiffs note that in related litigation pending in Texas[9] Defendants sought to compel Mr. Aycox's deposition, alleging Mr. Aycox was "obsessed" with Defendants and their CEO (Tracy Young) and that Mr. Aycox's potential involvement in the geographic placement of stores was relevant to their claim that Plaintiffs used photographs of Defendants' "goal boards" to inform their decision-making regarding store placement. Plaintiffs opposed the motion in Texas, arguing Mr. Aycox's "natural interest in his competitor's business" does not have any

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Georgia state courts. *See* Cuyler v. Kroger Co., No. 1:14-CV-1287-WBH-AJB, 2014 WL 12547267, at *6 (N.D. Ga. Oct. 3, 2014), report and recommendation approved, No. 1:14-CV-1287-RWS, 2015 WL 12621041 (N.D. Ga. Jan. 8, 2015) ("[T]he apex doctrine requires that [the deposing party] show that each executive has 'unique or superior knowledge of discoverable information' that cannot be obtained by other means") (citing Chick-Fil-A, Inc. v. CFT Dev., LLC, No. 5:07-cv-501-Oc-10GRJ, 2009 WL 928226 (M.D. Fla. Apr. 3, 2009)). Thus, in considering the parties' respective motions and requests the Court shall apply Georgia law governing the general scope of discovery and the entry of protective orders as set forth above.

7 Rod Aycox Aff., ¶ 3.

8 Plaintiffs' letter regarding Rod Aycox, dated Jan. 4, 2019, p. 2.

9 Originally styled Wellshire Fin. Servs., LLC et al. v. TMX Finance Holdings, Inc. et al., District Court of Harris County, Texas, Case No. 2013-33584, later removed to federal court and styled Wellshire Fin. Servs., LLC et al. v. TMX Finance Holdings, Inc. et al., U.S. District Court for the Southern District of Texas, Case No. 4:17-cv-02786 ("Texas Litigation").

relevance and his involvement in the placement of stores is immaterial given undisputed evidence that he has never seen any goal board photographs nor received information from any such photographs. The Texas Court ultimately denied Defendants' motion to compel Mr. Aycox's deposition, and Plaintiff urge, similarly, this Court should quash his proposed deposition in this action.

However, Defendants allege Mr. Aycox is not a peripheral "part owner" but rather is "the founder, CEO, and strategic director of numerous parentless companies whose only common tie is [Mr.] Aycox."[10] Defendants contend Mr. Aycox is uniquely positioned to testify about: Plaintiffs' organizational structure; its marketing strategy and decision to use the term "loan" instead of "pawn" in Georgia advertisements; and the transfer of assets or licenses among his companies to avoid liability in this action under the Georgia Pawnshop Act. Additionally, Defendants point to evidence indicating two regional Vice Presidents somehow obtained TitleMax contracts that were then forwarded to Mr. Aycox. Insofar as the deposed witnesses had no memory of why this occurred, Defendants assert Mr. Aycox is the only remaining witness who may provide answers. Further, Defendants contend Mr. Aycox's testimony regarding his companies' "culture of covert intelligence gathering" against Defendants is relevant and discoverable and that Mr. Aycox is well positioned to testify about how Plaintiffs could use "intelligence" on competitors generally given his involvement in developing Plaintiffs' fees and interest rates.

The Court finds Mr. Aycox is likely to have discoverable information relevant to the claims and defenses in this action such that he may be deposed. Notably, the parties in this litigation are fierce competitors in the automobile title lending business, with each side alleging the other has engaged in widespread, coordinated, illegal schemes targeting them in each of the

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[10] Defendants' response letter regarding Rod Aycox, dated Feb. 1, 2019, p. 2.

states in which they operate. However, as acknowledged by Plaintiffs, they have no parent company but rather are 26 companies "affiliated by common ownership and control" and Mr. Aycox is a key figure in that common ownership and control.[11]

He holds "management roles" in a number of the entities[12] and appears to have been involved in various operational aspects of the companies, including marketing, sales and real estate strategies and decisions relevant to the parties' allegations (*e.g.*, use of the word "loan" instead of "pawn" in advertising, decisions to transfer assets/ownership/licenses from one Plaintiff entity to another, etc.)[13]. Further, it appears that in 2014, Mr. Aycox personally received TitleMax contracts in emails that were forwarded to him without explanation by regional Vice Presidents within minutes of those executives receiving them from lower level managers. These contracts were obtained and/or forwarded by individuals who, when deposed, did not know or could not "recall" why they were obtained and forwarded or if/how they were used.[14] Particularly in light of the allegations made in this litigation, Defendants are entitled to question Mr. Aycox as to what knowledge he has, if any, regarding how/why those contracts were obtained and forwarded and if/how they were used.

Given all of the above, Plaintiffs' request for a protective order quashing Mr. Aycox's deposition is hereby DENIED.

III. Plaintiffs' Motion for Protective Order Regarding Jesse Anderson

Plaintiffs also ask the Court to enter a protective order quashing the proposed deposition of Jesse Anderson, a Vice President of Operations of Plaintiffs in Texas. According to Plaintiffs,

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[11] Second Amended Complaint, ¶57.

[12] Rod Aycox Aff., ¶ 2.

[13] Kenneth Wayco Depo., pp. 47-49, 103, 166-167; Catherine Leonard Depo., pp. 102-103, 154-157; Donald Brent Matthews Depo., pp. 54-59.

[14] Defendants' response letter regarding Rod Aycox, dated Feb. 1, 2019, Exs. 12, 13; Andre Walker Depo., p. 162-164; Donald Brent Matthews Depo., pp. 146-149, 157-160.

Mr. Anderson came to learn of Defendants' employees' conduct in Texas to unlawfully search state department of motor vehicle ("DMV") records to identify and solicit Plaintiffs' customers. Mr. Anderson was also a supervisor of Zachary Farmer, a former manager for Plaintiffs in Texas who is alleged to have photographed Defendants' "goal boards", an allegation at the crux of Defendants' Second Counterclaim.

Mr. Anderson was deposed twice in the related Texas Litigation. Specifically, he was deposed on June 27, 2013 and a limited deposition regarding only "goal board secret shopping" was taken on September 22, 2016. Plaintiffs contend that insofar as Mr. Anderson was only involved with Plaintiffs' Texas operations and those matters were covered in the prior depositions, "the sum of Mr. Anderson's knowledge regarding the facts at issue between Plaintiffs and Defendants has already been exhausted in his two prior Texas depositions" such that there is no new information to be garnered from a third deposition in this action.[15]

However, as Defendants note, Mr. Anderson has never been deposed in this action. Indeed, his 2013 deposition was taken nearly a year and a half before Plaintiffs initiated this litigation and Defendants asserted their counterclaims. As such, there are claims, counterclaims, and defenses in this action that could not have been addressed during the 2013 deposition, including Plaintiffs' claims that Defendants' employees trespassed on Plaintiffs' property to improperly solicit customers and that Defendants' employees improperly offered to pay or have paid Plaintiffs' employees a referral fee.[16] It appears these matters were not addressed during the 2016 deposition (which Defendants assert lasted only approximately 70 minutes) as that deposition was limited by the Texas court to "goal board secret shopping" and Mr. Anderson was instructed by Plaintiffs' Texas counsel not to answer questions related to other issues.

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15 Plaintiffs' letter regarding Jesse Anderson, dated Jan. 4, 2019, pp. 1-2.

16 *See, e.g.,* Second Amended Complaint, ¶¶ 107-112, 132-146.

As noted above, protective orders should not be granted when the effect is to frustrate or prevent legitimate discovery. *See* Caldwell, 341 Ga. App. at 861; Christopher, 185 Ga. App. at 533; Galbreath, 318 Ga. App. at 113; Intl. Svc. Ins. Co., 130 Ga. App. at 144. Given Mr. Anderson's various roles in Plaintiffs' business, including as Vice President of Operations in Texas from 2008 through at least 2016,[17] and in light of the claims, counterclaims and defenses at issue in this action which have not been addressed at Mr. Anderson's previous depositions in other litigation, Plaintiffs' request for a protective order quashing Mr. Anderson's deposition in this action is hereby DENIED.

IV. Defendants' Motion for Protective Order Regarding Tracy Young

Defendants ask the Court to issue a protective order prohibiting Plaintiffs from taking the deposition of Tracy Young, "the primary stakeholder in TMX Finance LLC, and the Chief Executive Officer of TitleMax of Georgia, Inc. and its affiliates."[18] Defendants allege Plaintiffs have noticed Mr. Young's deposition for improper purposes—in retaliation for Defendants' attempts to depose Plaintiffs' owner (Rod Aycox) and to harass Mr. Young personally. Defendants assert Mr. Young has no first-hand personal knowledge of the conduct at issue in this action and his limited knowledge regarding Plaintiffs' allegations of unlawful conduct is privileged because it was obtained through communications with counsel. Further, Defendants note that in the related Texas Litigation the Court of Appeals for the First District of Texas vacated the trial court's order denying a motion to quash and to protect Mr. Young from being deposed. *See* In re TMX Fin. of Texas, Inc., 472 S.W.3d 864 (Tex. App. 2015).

In the Texas Litigation, Plaintiffs sought to depose Mr. Young arguing, *inter alia*, that he is the sole employee, member, and manager of TMX Finance, LLC (the parent company of

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17 Jesse Anderson Depo., p. 7.

18 Defendants' letter regarding Tracy Young, dated Jan. 10, 2019, p. 1.

various Defendant entities) such that only he can testify regarding TMX Finance's involvement in the allegedly illegal conduct forming the basis of Plaintiffs' claims in Texas. Id. at 868, 870. Plaintiffs also argued that in November of 2012 Plaintiffs' general counsel (John McCloskey) contacted Defendants' general counsel (Vin Thomas) accusing Defendants of engaging in unlawful DMV database searching to solicit Plaintiffs' customers and demanded Defendants cease and desist from such conduct. Id. at 869. Mr. Thomas then discussed the matter internally with the legal department as well as with Otto Bielss and Mr. Young and thereafter drafted a response letter denying that Defendants were engaged in such conduct and stating that Defendants "did not consider the [] allegations to be a proper business practice and ha[d] reminded all Texas managers of [Defendants'] position on this practice." Id. at 869-70. Plaintiffs urged that, as the only employee of TMX Finance, Mr. Young was the only person who could have communicated its denial of Plaintiff's allegation and directed the response to Plaintiffs' counsel. Id.

The trial court denied Defendants' motion to quash. However, applying the apex deposition doctrine (a doctrine widely recognized by Texas courts),[19] the Texas Court of Appeals held that "[m]erely having some knowledge of the subject matter of a dispute is not enough to compel an apex deposition" and that Plaintiffs "ha[d] not shown that [Mr.] Young possesses unique or superior knowledge of discoverable information." Id. at 877. Importantly, however, in so holding the Texas Court of Appeals acknowledged and rejected Plaintiffs' argument that they had attempted to pursue less intrusive means of discovery. Id. at 877 n. 4. Specifically, given that in that same opinion the appellate court found Plaintiffs could permissibly depose Mr. Bielss (TMX Finance's Chief Operating Officer) the appellate court reasoned Plaintiffs had "a less intrusive means of obtaining the sought after discovery" allegedly held by Mr. Young. Id.

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[19] *But see* note 5, *supra*.

Turning to this action, Plaintiffs oppose Defendants' motion for a protective order, citing the interactions and meetings between Mr. Thomas, Mr. Bielss, and Mr. Young and the response to Plaintiffs' counsel's November 2012 cease and desist letter. Specifically, Plaintiffs assert they have now deposed all other participants to those discussions other than Mr. Young and the deponents have testified that they cannot recall and/or would not discuss what, if any, actions Defendants took at a corporate level regarding the alleged DMV search misconduct following notice from Plaintiffs that such conduct was occurring. Because Defendants' corporate representative was similarly "unable to shed any light on the issue," Plaintiffs contend "Mr. Young's testimony is the only thing that can establish the same."[20] Plaintiffs further assert such information is "crucial to confirm the willful nature of Defendants' actions", particularly given that evidence suggests that Defendants' employees were engaging in DMV searches months after the November 2012 correspondence between the parties' general counsel.

The Court is compelled to note it previously denied the application for protective order of John W. Robinson, III, TitleMax's former CEO, regarding the Texas Litigation, finding that "[t]he extent to which TitleMax's upper management knew of [certain] alleged marketing misconduct, their position on these types of marketing strategies, and the actions they took on behalf of TitleMax as a result of their knowledge are relevant to the case."[21] The same reasoning applies, here, with respect to Mr. Young given Defendants' November 2012 denial that improper DMV searching was taking place, Mr. Young's involvement in discussions leading up to that response, and Plaintiffs' allegation the improper DMV searching continued thereafter and occurred in other states. Plaintiffs are entitled to question Mr. Young regarding any non-privilege information he may have regarding these issues, if any.

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[20] Plaintiffs' response letter regarding Tracy Young, dated Feb. 1, 2019, p. 1.

[21] John W. Robinson, III v. Wellshire Financial Services, LLC et al., Case No. 2015CV259408, Order (dated Oct. 20, 2015).

As Defendants note, communications between Mr. Young and counsel may be protected from disclosure under the attorney-client privilege. *See* O.C.G.A. §24-5-501(a)(2) ("There are certain admissions and communications excluded from evidence on grounds of public policy, including,...[c]ommunications between attorney and client"); "St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 421–22, 746 S.E.2d 98, 103 (2013) ("The privilege generally attaches when legal advice is sought from an attorney, and operates to protect from compelled disclosure any communications, made in confidence, relating to the matter on which the client seeks [legal] advice....It is well settled law in Georgia that the attorney-client privilege generally applies in the context of communications between in-house corporate counsel and the corporation's management and employees"). However, that does not entirely preclude inquiry into Defendants' corporate response and any corporate actions Defendants took after Plaintiffs placed them on notice of the alleged misconduct in November 2012. Given all of the above, Defendants' motion to quash the deposition of Mr. Young and for entry of a protective order is hereby DENIED.

V. Plaintiffs' Motion to Amend the Case Management Order

Plaintiffs ask the Court to amend the Second Amended Case Management Order to extend certain deadlines for expert discovery. Having considered the extensive record and in light of the Court's rulings herein as well as the Court's rulings issued on Jan. 22, 2019 on various discovery disputes, the Court orders that the following amended deadlines shall govern the final adjudication of this action:

(1) The depositions of Mr. Aycox, Mr. Anderson and Mr. Young shall take place no later than **March 29, 2019**.

(2) In the Jan. 22, 2019 Order on Pending Motions and Discovery Disputes, the Court granted in part Plaintiffs' motion to compel related to information regarding referral fee payments (Interrogatory No. 7) and granted Defendants' related motion to compel regarding the production of employee contracts relevant to Plaintiffs' tortious interference claim. *See* Order on Pending Motions and Discovery Disputes, pp. 14-19. The parties shall supplement their discovery responses in accordance with the foregoing rulings by **March 29, 2019**.

(3) All affirmative expert reports or any supplement thereto shall be submitted no later than **April 29, 2019**.

(4) All rebuttal expert reports or any supplement thereto shall be submitted no later than **May 29, 2019**.

(5) The parties shall file any motions for summary judgment and any motions in limine no later than **June 29, 2019**. Responses to any such motions shall be filed no later than **July 29, 2019**.

(6) The parties shall submit a consolidated pretrial order within **45 days** of the receipt of the Court's ruling on any motions for summary judgment or motions in limine. The case will be set down for a pretrial conference and trial as soon as practicable after the entry of a pretrial order. No further extensions shall be granted.

SO ORDERED this 4 day of March, 2019.

JOHN J. GOGER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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