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**Johnson ORDER DENYING DEFENDANTS' MOTION FOR
PROTECTIVE ORDER**

Kelly Lee Ellerbee
Fulton County Superior Court Judge

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

NANCY JOHNSON, Individually, and
as Executor of the Estate of Dennis L.
Johnson, and as Beneficiary of the
Nancy Johnson Family Trust,
SHANNON JOHNSON, as Beneficiary
of the Dennis Johnson Family Trust,
THE DENNIS AND NANCY
JOHNSON CHARITABLE
REMAINDER UNITRUST, THE
DENNIS L. AND NANCY JOHNSON
FAMILY FOUNDATION, INC., and
DNJ INVESTMENTS, LLC,

Plaintiffs,

v.

KEVIN TAYLOR, Individually, and as
Trustee of the Nancy Johnson Family
Trust, and Trustee of the Dennis
Johnson Family Trust, and NICOLE
TAYLOR, Individually, and as Trustee
of the Nancy Johnson Family Trust,
and Trustee of the Dennis Johnson
Family Trust,

Defendants.

CIVIL ACTION NO.
2017CV296139

Business Case Div. 3

**ORDER DENYING DEFENDANTS'
MOTION FOR PROTECTIVE ORDER**

This matter is before this Court on: Defendants' Motion for Protective Order, filed September 30, 2019 (the "Motion"); and Plaintiffs' Response in Opposition to Defendants' Motion for Protective Order, filed November 4, 2019 (the "Response"). Having considered the entire record, the Court finds as follows.

I. BACKGROUND AND PROCEDURAL HISTORY

This case involves a dispute over the administration of various trusts and related entities and the management of a key trust asset—Welcome to Paradise, LLC ("WTP") which during the relevant period owned two pizza restaurants, the Fire Stone Wood Fired Pizza and Grill in Dothan, Alabama and Woodstock, Georgia. (*See* First Amended Verified Complaint ("Complaint"), ¶21.) Nancy Johnson is the widow of Dennis Johnson and is the Executor of his Estate. (*Id.*, ¶¶ 5, 7.) They have three children: non-party David Johnson; Plaintiff Shannon Johnson; and Defendant Nicole Taylor who is married to Defendant Kevin Taylor. (*Id.*, ¶¶ 1, 6.)

The Nancy Johnson Family Trust ("NJ Trust") and the Dennis Johnson Family Trust ("DJ Trust") (collectively the "Trusts") own WTP, with each Trust holding a 50% ownership interest. (*Id.*, ¶30.) Plaintiff Nancy Johnson is the lifetime beneficiary of the NJ Trust while Plaintiff Shannon Johnson is a remainder beneficiary of both Trusts along with her siblings, Nicole and David. (*Id.*, ¶¶ 31, 38.) Defendants Kevin and Nicole Taylor are former co-managers of WTP and

former co-trustees of the Trusts. (*Id.*, ¶¶ 28-29, 31, 38.) Kevin and Nicole also previously served as officers and managers of various related entities created as part of Dennis and Nancy’s estate planning, including the Dennis and Nancy Johnson Charitable Remainder Unitrust (“CRUT”), the Dennis L. and Nancy S. Johnson Family Foundation, Inc. (“Family Foundation”), and DNJ Investments, LLC (“DNJ”). (*Id.*, ¶¶ 12-19.)

Plaintiffs allege Defendants: refused to return documents and property belonging to the CRUT, DNJ, and the Family Foundation despite having been removed as officers/managers in April 2017 (*Id.*, ¶¶ 16-19), failed and refused to provide annual accountings of the Trusts and financial information about WTP (*Id.*, ¶¶ 35-37, 45-46, 77-78, 97-98, 106-107, 112), misrepresented the financial status of WTP to fraudulently induce Nancy Johnson to invest further in the business (*Id.*, ¶¶ 47-50), and unlawfully converted funds from WTP and the Trusts (*Id.*, ¶¶ 51-52, 56, 59-60, 66-71, 75-80, 83-84, 88), among other allegations of misconduct.

Plaintiffs assert the following claims and requests for relief: (I) violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (“RICO”); (II) equitable accounting and legal accounting of the NJ Trust and WTP; (III) equitable accounting and legal accounting of the DJ Trust and WTP; (IV) breach of trust and removal of trustees; (V) breach of fiduciary duty; (VI) conversion/theft of WTP

profits and trust principal; (VII) conversion/theft of CRUT, DNJ and Family Foundation's corporate and trust property; (VIII) injunctive and other equitable relief related to the CRUT, DNJ, and Family Foundation; (IX) injunctive and other equitable relief related to the NJ Trust, DJ Trust, and WTP; (X) attorneys' fees and expenses of litigation; and (XI) punitive damages.

Between 2018 and 2019, the Court issued a number of discovery related orders, ordering Defendants to respond to Plaintiffs' discovery requests. *See generally* Order Granting Defendants' Motion to Extend Time to Respond to Plaintiffs' Discovery Requests, issued June 29, 2018; Order on Certain Discovery Related Motions, Objections and Requests, issued December 21, 2018; and Order on Discovery Dispute, issued February 21, 2019. Upon Defendants' failure to comply with the foregoing Orders, on April 2, 2019, the Court issued an Order Granting Plaintiffs' Motion for Sanctions. Therein the Court expressly found that Defendants "ha[d] not engaged in discovery in good faith and ha[d] not complied with the Court's June 29, 2018, December 17 [sic], 2018, or February 21, 2019 Orders." (April 2, 2019 Order, p. 16.) As a discovery sanction and pursuant to O.C.G.A. §9-11-37(b)(2), the Court struck Defendants' Verified Answer and Counterclaims and found Defendants to be in default. (*Id.*)

Consequently, on September 12, 2019, the Court granted Plaintiffs' Motion for Entry of Default Judgment as to Liability Against Defendants. (September 12,

2019 Order.) The Court ordered “the entry of a default judgment as to liability only against Defendants on all claims asserted in Plaintiffs’ Complaint” but “[b]ecause those claims involve unliquidated damages,” the Court directed that the case proceed pursuant to the Court’s previous case management and scheduling orders.

(Id., p. 2.)

On September 30, 2019, Defendants filed the instant Motion, objecting to discovery requests propounded by Plaintiffs on August 30, 2019 as improperly seeking financial information that is irrelevant to the currently pending issue of damages. Defendants contend the requested discovery would only be proper in the context of post-judgment discovery. Also on September 30, 2019, Plaintiffs filed a Motion to Stay the Case Management Order’s Deadlines (the “Motion to Stay”). In the Motion to Stay, Plaintiffs indicated they would be filing a Motion to Compel given that Defendants stated at recent depositions they did not intend to fully respond to Plaintiffs’ pending discovery requests and “refused to answer any questions related to their personal finances either while managing [WTP], or thereafter.” (Motion to Stay, p. 2.) Plaintiffs requested that the “Court stay the deadlines in the Case Management Order until the Court has an opportunity to rule on the Defendants’ Motion for Protective Order, and the Plaintiffs’ Motion to Compel.” (*Id.*, pp. 2-3.) After expedited briefing, on October 4, 2019, the Court granted Plaintiffs’ request to stay the case deadlines pending a ruling on

Defendants' Motion for Protective Order and Plaintiffs' anticipated Motion to Compel. (October 4, 2019 Order, p. 2.)

In the Response, Plaintiffs request the Court deny Defendant's Motion and order Defendants to fully respond to the discovery requests or, alternatively, order Defendants to respond to 31 requests "to which no objections apply." (Response, p. 2.) Defendants did not reply to Plaintiffs' Response. To date Plaintiffs have not filed a Motion to Compel.

II. 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). *See also* Bowden v. The Med. Ctr., Inc., 297 Ga. 285, 291 (2015) ("[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”) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)) (internal quotations omitted); Sechler Family P’ship v. Prime Grp., Inc., 255 Ga. App. 854, 859 (2002) (“The discovery procedure is to be given a liberal construction in favor of supplying a party with the facts without reference to whether the facts sought are admissible upon the trial of the action”) (quoting Clayton Cty. Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 695 (1993)).

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.” Board of Regents of Univ. Sys. of Georgia v. Ambati, 299 Ga. App. 804, 811 (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 (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 (2012) (“[P]rotective orders should not be awarded ‘when the effect is to frustrate and prevent legitimate discovery’”) (citing International Svc. Ins. Co. v. Bowen, 130 Ga. App. 140, 144 (1973)). Good cause which needs to be shown for a protective order must be clearly demonstrated in the factual record and “is not established by stereotyped or conclusional statements, bereft of facts.” Young v. Jones, 149 Ga. App. 819, 824 (1979).

III. DEFENDANTS’ MOTION FOR PROTECTIVE ORDER

In the Motion, Defendants ask the Court to issue a protective order finding Defendants are not obligated to “offer further responses” to Plaintiffs’ discovery requests propounded on August 30, 2019. (Motion, p. 8.) Specifically, Plaintiffs’ discovery requests propounded August 30, 2019 include: Plaintiff Shannon

Johnson's First Continuing Interrogatories propounded separately upon Defendant Kevin Taylor and Defendant Nicole Taylor (collectively "Plaintiffs' Interrogatories") and Plaintiffs Nancy Johnson and Shannon Johnson's Second Continuing Request for Production of Documents propounded separately upon Defendant Kevin Taylor and Defendant Nicole Taylor (collectively "Plaintiffs' RPDs"). (Motion, p. 1.)

Relevant to the current dispute, on March 29, 2019, Plaintiffs propounded discovery requests upon Defendants expressly titled "First Post Judgment Continuing Request for Production of Documents" and "First Post Judgment Continuing Interrogatories" (collectively "Post Judgment Discovery").¹ On May 1, 2019, Defendants moved for a protective order, challenging the "Post Judgment" discovery requests as improper in light of the posture of the case and given that Plaintiffs do not possess a judgment for actual damages. However, on May 10, 2019, Defendants filed a notice of withdrawal of that motion, stating *inter alia* that counsel had "consulted and clarified this issue" and that the motion was "moot." (May 10, 2019 Defendants' Notice of Withdrawal of Motion for Protective Order, ¶¶ 2-3.)

¹ Thus, Plaintiffs propounded this Post Judgment Discovery after the Court orally granted Plaintiffs' Motion for Sanctions from the bench at a March 21, 2019 hearing on the motion but before the Court issued its April 2, 2019 written order striking Defendants' Verified Answer and Counterclaim and before it issued its September 12, 2019 Order Granting Plaintiffs' Motion for Entry of Default Judgment as to Liability.

In their current Motion, Defendants assert that, although titled differently, Plaintiffs' current discovery requests are substantially similar to the previously withdrawn Post Judgment Discovery and are likewise improper given that Plaintiffs have a default judgment as to liability only and do not yet possess a judgment for actual damages. (Motion, p. 2.) According to Defendants, Plaintiffs' discovery requests seek financial information from Defendants "as a way of ascertaining how they can satisfy any future monetary damages they may be awarded" after a damages and equitable relief trial is held. (*Id.*, p. 3.)

Notably, Defendants generally assert all of Plaintiffs' August 30, 2019 discovery requests are "wholly outside the proper scope of discovery for this action." (*Id.*, p. 6.) Defendants ask that the Court issue a protective order stating, *inter alia*, that all such requests "are inappropriate at this time" and that "Defendants are not obligated to offer *further responses* to Plaintiff's [sic] August 30, 2019 Discovery requests." (*Id.*, p. 8 (emphasis added).) However, it is unclear from the record what, if any, response Defendants made to Plaintiffs' Interrogatories and Plaintiffs' RPDs. Thus, the Court's review is limited to Plaintiffs' discovery requests as propounded on August 30, 2019 and referenced in the Motion.

Defendants' Motion specifically references only four RPDs and three interrogatories:

Plaintiffs' RPD No. 1: [Produce] [a]ny and all monthly bank statements for all accounts including checking and savings accounts with any banks, savings and loans, credit unions, money markets, brokerage firms or other financial institutions maintained by the Defendant, either individually and/or jointly with any other person or entity for the period of October 21, 2011 to the present.

Plaintiffs' RPD No. 4: [Produce] [a]ny and all records, documents, memoranda and correspondence, which evidence or relate to the ownership of any motor vehicles by the Defendant, including but not limited to, automobile tag registrations, certificates, automobile title certificates, and/or recreational vehicle tag registrations, titles or certificates, naming Judgment Debtor, individually or jointly with any other person or entity, for the period of October 21, 2011 to the present.

Plaintiffs' RPD No. 8: [Produce] [a]ny and all records, documents, memoranda and correspondence relating to any financial statements or net worth statements for the period of October 21, 2011 to the present, including but not limited to those submitted by the Defendant to any bank, lending institution or any other entity.

Plaintiffs' RPD No. 10: [Produce] [a]ny and all statements, documents, analysis, invoices, bills or summaries given to Judgment Debtor by any stockbroker or association of stockbrokers, from whom the Defendant has bought stock, or to whom Judgment Debtor has sold stock, or with whom the Defendant has an account for the period of October 21, 2011 to the present.

Plaintiff's Interrogatory No. 1: If anyone owes you any money, state the name and address of each such debtor; the amount owed; the form of the obligation; the date the obligation was incurred; the date the obligation becomes or became, due and owing; the condition for payment of the obligation, if any, and the consideration given for the obligation.

Plaintiff's Interrogatory No. 3: If you own any other personal

property not referred to above, give a complete description of same; the present location of the property; the estimated present value of the property; and the name and address of each other person with an ownership interest in the property.

Plaintiff's Interrogatory No. 10: If you own any securities, including stocks, bonds, debentures, or mortgages, for each purchase state the type and number of the securities owned; the name of the issuing entity; the date of purchase; the total purchase price; the name and address of the broker through whom you made the purchase; and the name and address of each person with an ownership interest in such security as a result of the purchase.

(Motion, Ex. 2.) Although the Motion only specifically addresses the foregoing requests, in a footnote Defendants assert these discovery requests “were highlighted as a way to demonstrate that all of the requests are outside of the proper scope of discovery for this action as they [sic] irrelevant and impertinent.” (*Id.*, p. 8 n. 1.)

Having considered the entire record, the Court finds Plaintiffs' RPDs and Plaintiffs' Interrogatories generally seek discoverable information. Importantly, the striking of Defendants' Verified Answer and Counterclaim and subsequent entry of default judgment against Defendants serves as an admission of all well-pled allegations in Plaintiffs' Complaint.

[A] defendant in default is in the position of having admitted each and every material allegation of the plaintiff's petition except as to the amount of damages alleged. The default concludes the defendant's liability, and estops him from offering any defenses which would defeat the right of recovery.

Fink v. Dodd, 286 Ga. App. 363, 364 (2007) (quoting Cohran v. Carlin, 254 Ga. 580, 585 (1985)). *See also* Azarat Mktg. Grp., Inc. v. Department of Admin. Affairs, 245 Ga. App. 256, 257 (2000) (“[T]he default operates to admit only the well-pleaded allegations of the complaint and the fair inferences and conclusions of fact to be drawn therefrom”) (quoting Weldon v. Williams, 170 Ga. App. 589, 591 (1984)).

Here, Defendants have been held liable as to all claims asserted in the Complaint (counts I-XI), and they are deemed to have admitted numerous factual allegations that inform the scope of relevant discovery during the current damages phase of this litigation. For example, Defendants have admitted:

- “[F]rom approximately 2015 until 2016, the Defendants fraudulently induced Nancy Johnson to use the money that she received from the sale of the Glen Eagles Home, and from her monthly social security payments, to pay for the Taylors’ child care expenses on a monthly basis in the amount of approximately \$1,600 per month by the Taylors claiming that they spent a significant amount of time running WTP, sacrificed their own careers for WTP, and were not making any money running WTP.” (Complaint, ¶50.)
- “Over the course of 2016 and 2017, Nancy and Shannon Johnson have discovered that the Taylors’ infusion of cash into Welcome to Paradise from the NJ and DJ Trusts, and from Nancy Johnson, were for the sole purpose of converting those funds to the Taylors.” (*Id.*, ¶51.)
- “[T]he Plaintiffs learned in 2016 that since 2012, Kevin and Nicole Taylor have been paying themselves increasing salaries over the years while at the same time advising the Plaintiffs that the restaurants were about to go out of business.” (*Id.*, ¶56.)
- “Despite the fact that Kevin and Nicole Taylor were paid ever increasing salaries to manage WTP, from in or about 2012 to present, Kevin and Nicole

Taylor have hired third party managers to manage WTP and perform their same functions, resulting in WTP paying double management fees to both the Taylors and to third party managers. Second, upon information and belief, Kevin and Nicole Taylor are paying themselves through third party entities which have entered into contractual relationships with WTP. These entities include, but are not limited to: Dothan Guest Management Holdings, LLC (“DGMH”), Eastbeck Wealth Management, LLC (“Eastbeck”), Taylor & Company Realty, LLC, and Golden Grain Media, LLC.” (*Id.*, ¶¶ 59-60.)

- “In March 2016, the Plaintiffs discovered that in February 2016 the Taylors wrote themselves checks from a WTP bank account in the amount of approximately \$1,700 made out to ‘cash’, and with subject lines that read ‘petty cash’ during the month, and then at the end of the month ‘negative deposit’, clearly draining any net profits from WTP in cash at the end of the month.” (*Id.*, ¶68.)
- “[T]he Taylors use the WTP bank card for their personal expenses. In March 2016, the Plaintiffs discovered that in February 2016 the Taylors’ used WTP bank cards for purchases at stores such as Tommy Bahamas, Ruth’s Chris Steakhouse, and Massage Envy, to name a few, in the total amount for the month of February 2016 of approximately \$9,000 in personal expenditures for dining out, clothes, shoes, and massages.” (*Id.*, ¶¶ 69-70.)
- “Based on this discovery in March 2016, Nancy and Shannon Johnson believe that the Defendants’ theft has occurred in all months that they have operated WTP since 2012, however, the Defendants have prevented them from obtaining bank statements, which refusal has necessitated this filing.” (*Id.*, ¶71.)
- “Continuing since 2012, Kevin and Nicole Taylor have told Nancy Johnson that WTP is a failing business and could go out of business at any moment, thus subjecting her to the approximately \$1,000,000 lease liability on the Woodstock location...However, after Nancy Johnson discovered the WTP bank statements for February 2016 showing the theft outlined above, she retained counsel and began asking the Taylors for more information, and it was at that point that the Taylors began a barrage of tactics aimed at keeping Nancy and Shannon Johnson from discovering the true amount of the theft. When Nancy Johnson asked for the keys to the Dothan restaurant that she owns through South Oates, the Taylors refused. When Nancy Johnson asked for Quickbooks and other backup to the WTP financials, the Taylors refused.

Instead, Kevin and Nicole Taylor threatened Nancy Johnson by stating that if Nancy Johnson filed a lawsuit to attempt to obtain the backup documents, they would close the business and she would be subject to the \$1,000,000 liability because WTP could not afford to pay attorney's fees." (*Id.*, ¶¶ 72, 75-78.)

- "Through the above-referenced activities, the Defendants formed an association-in-fact whereby they acted individually and in concert with one another through the Enterprise known as [WTP], to steal money on a continuing, monthly basis and to prevent the Defendants from discovering the theft in order to retain the profits and benefits that flowed from [WTP] and the NJ and the DJ Trust for themselves to the exclusion of their intended beneficiaries." (*Id.*, ¶84.)
- "The Defendants fraudulently induced Nancy Johnson to sell her home by fraudulently stating to her that selling the home and investing the funds into WTP was the only way to keep the WTP restaurants open and avoid the \$1 Million lease liability when in fact, Nancy Johnson learned in 2016 that the restaurants were not insolvent and the funds were not needed to the keep the restaurants open." (*Id.*, ¶88.)
- "...Kevin and Nicole Taylor as the Board of Managers of WTP, the Trustees of the NJ Trust, and the individuals who have exerted complete control over WTP, have failed and refused to provide Nancy Johnson with any back up information or financial information related to WTP beyond tax returns and financials. Moreover, Kevin and Nicole Taylor, as Trustees of the NJ Trust, have failed and refused to provide Nancy Johnson with an accounting of either the NJ Trust or WTP." (*Id.*, ¶¶ 97-98.)
- "Kevin and Nicole Taylor as the Board of Managers of WTP, the Trustees of the DJ Trust, and the individuals who have exerted complete control over WTP, have failed and refused to provide Shannon Johnson with any back up information or financial information related to WTP beyond tax returns and financials. Kevin and Nicole Taylor have also failed and refused to provide Shannon Johnson with specific information requested related to the DJ Trust...Kevin and Nicole Taylor have failed and refused to provide complete accountings to Shannon Johnson either at her request or on an annual basis." (*Id.*, ¶¶ 106-107, 112.)

- “Upon information and belief, Kevin and Nicole Taylor have converted and misappropriated the money in the DJ and NJ Trusts for their own use and enjoyment by first distributing it to WTP to pay for purported losses, and then paying themselves exorbitant expenses, salaries, and fees through third party entities owned by Kevin and Nicole Taylor...Upon information and belief, Kevin and Nicole Taylor have converted and misappropriated the WTP profits belonging to the NJ and DJ Trusts, and thus, the Trusts’ beneficiaries, to themselves...Nancy and Shannon Johnson have demanded that Kevin and Nicole Taylor return the money and property converted/stolen, and Kevin and Nicole Taylor have refused.” (*Id.*, ¶¶ 128-129, 131.)
- “Kevin and Nicole Taylor have converted and are refusing to turn over property in their possession related to the CRUT, DNJ, and the Family Foundation...The CRUT, DNJ, and the Family Foundation have demanded that Kevin and Nicole Taylor return the property converted/stolen, and Kevin and Nicole Taylor have refused.” (*Id.*, ¶¶ 136, 139.)

Thus, Defendants have admitted that during the time they acted as managers of WTP and as trustees of the Trusts, they fraudulently induced Nancy Johnson to invest further in the business and then improperly took salaries, expenses, cash and wire transfers to which they were not entitled. They also refused to provide Plaintiffs with complete financial information related to WTP and the Trusts in an effort to actively conceal the theft. In order to establish the proper measure of damages flowing from Defendants’ admitted conduct, Plaintiffs must identify and quantify the improper transfers made to Defendants and their affiliated entities.

Further, Defendants have been found liable for breach of trust (count IV). O.C.G.A. §53-12-301, which governs such claims, provides that “[i]f a trustee commits a breach of trust...a beneficiary shall have a cause of action to seek:...[t]o

recover damages; [and] [t]o compel the trustee to redress a breach of trust by payment of money or otherwise...” O.C.G.A. §53-12-301(a)(1),(5). Further, “[w]hen trust assets are misapplied and can be traced in the hands of persons affected with notice of the misapplication, the trust shall attach to such assets. A creditor of a trust may follow assets in the hands of beneficiaries even if they were received without notice.” O.C.G.A. §53-12-301(b). Given the remedies available on the breach of trust claim, Plaintiffs are entitled to discovery regarding not only how much money was improperly taken but also what Defendants did with those funds.

Moreover, Plaintiffs seek an award of punitive damages. (Complaint, ¶¶ 92, 154.)

Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences...Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant...If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.

O.C.G.A. §51-12-5.1(b), (c), (d)(2).

“If a plaintiff seeks punitive damages, evidence of the defendant's financial circumstances may be admissible.” Dagne v. Schroeder, 336 Ga. App. 36, 41

(2016) (citing Holland v. Caviness, 292 Ga. 332, 335 (2013)). However, in order to discover information pre-trial concerning the defendant's personal financial resources, a plaintiff must make an "evidentiary showing (by affidavit, discovery responses, or otherwise) that a factual basis exist[s] for [the] punitive damage claim." Smith v. Morris, Manning & Martin, LLP, 293 Ga. App. 153, 168 (2008); Neal Pope, Inc. v. Garlington, 245 Ga. App. 49, 54 (2000); Holman v. Burgess, 199 Ga. App. 61, 63 (1991). Here, in light of the default judgment entered against Defendants on counts I through XI as well as Defendants' factual admissions as discussed above, the Court finds the requisite evidentiary showing has been made and inquiry into Defendants' "financial circumstances" at this juncture is appropriate.

It follows that inquiry into Defendants' personal finances, including their assets and liabilities, is relevant to the issue of damages (direct, consequential and punitive), and is within the scope of permissible discovery during this phase of the litigation. Although Plaintiffs and/or the newly appointed trustee of the Trusts may be in possession of certain records responsive to the requested discovery, such does not relieve Defendants of their obligation to produce responsive records and information in their custody, possession, or control. This is particularly true in light of the numerous discovery issues in this case and the general obfuscation of discovery by Defendants, chronicled in numerous orders of this Court, which call

into question the accuracy and completeness of the financial records of WTP and the Trusts. Defendants also do not specify any particular documents in Plaintiffs' possession or control that are fully responsive to Plaintiffs' discovery requests such that requiring Defendants to respond to the discovery would be unnecessarily duplicative and burdensome. Ultimately Defendants have not made the requisite showing by "substantial evidence that bad faith or harassment motivates [Plaintiffs' discovery requests]" such as is necessary for issuance of the requested protective order. Caldwell, 341 Ga. App. at 861.

"Nevertheless, even 'where pre-trial discovery of the defendant's financial resources is authorized, the scope of such should be restricted to the extent necessary to prevent an unreasonable intrusion into the defendant's privacy.'" Smith, 293 Ga. App. at 169 (quoting Holman, 199 Ga. App. at 63–64). Having reviewed Plaintiffs' discovery requests, the Court finds Interrogatory No. 3 is overbroad. Accordingly, the Court narrows this interrogatory as set forth below:

- **Interrogatory No. 3:** If you own any other personal property not referred to above with an individual present value of \$500.00 or more, give a complete description of same; the present location of the property; the estimated present value of the property; and the name and address of each other person with an ownership interest in the property.

IV. CONCLUSION

Having considered the entire record and given all of the above, Defendants' Motion for Protective Order is **DENIED**. Defendants are **ORDERED** to respond

to Interrogatory No. 3 as narrowed above and otherwise shall respond fully to Plaintiffs' RPDs and Plaintiffs' Interrogatories, all within **ten (10) days** of this order. *See* O.C.G.A. §9-11-26(c) ("If [a] motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery"). The Court will defer consideration of Plaintiffs' request for attorney's fees and expenses incurred in responding to Defendants' Motion until the damages hearing/trial at which time the parties may present argument and/or evidence regarding same.

SO ORDERED this, the 28th day of January, 2020.



HONORABLE KELLY LEE ELLERBE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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