**IN THE STATE COURT OF DEKALB COUNTY**
**STATE OF GEORGIA**

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| **SARITA WILCOXSON,**<br><br>**PLAINTIFF,**<br><br>**V.**<br><br>**HIGHLANDS AT EAST ATLANTA LP; NUROCK MANAGEMENT GROUP LLC; JOHN/JANE DOES 1-5; JOHN DOES ENTITIES 1-2; COUNTER MEASURE OPERATIONS INC,**<br><br>**DEFENDANTS.** | **CIVIL ACTION**<br>**FILE NO. 16A62169-4** |

**ORDER**

This matter is before the Court on *Plaintiff's Second Motion for Discovery Sanctions*, filed May 14, 2018; Defendants Highlands at East Atlanta, LP (Highlands LP) and NuRock Management Group LLC (NuRock)'s *Motion for Summary Judgment* and *Motion to Exclude Plaintiff's Designated Expert Witness Vincent Velazquez*, filed May 28, 2018; *Plaintiff's Motion to Compel Production of Emails, to Permit Forensic Examination of Defendants' Computer Systems, and for Sanctions*, filed July 8, 2018; and *Defendants' Renewed Motion to Exclude Expert Witnesses*, filed July 20, 2018. The Court has reviewed the law and evidence presented by the Parties in their briefs and at oral argument on August 8, 2018.

## I. Defendants' Motions to Exclude Expert Witnesses

A. *Vincent Velazquez*

O.C.G.A. § 24-7-702 governs the admissibility of expert testimony in Georgia. It is similar to Federal Rule of Evidence 702, and provides:

> (b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

O.C.G.A. § 24-7-702(b).

Mr. Velazquez is expected to testify that security measures taken at the subject property were inadequate, considering an unusually high risk of violent crime at the property. Mr. Velazquez's expert testimony describes an overall program of crime suppression that should have been in place at the Highlands months before the incident, given the high levels of violent crime there. The focus he described would have been "to take this property over and basically get it under some sort of control based on this amount of crime, this pattern of crime that I see going back two years prior to the murder."

Mr. Velazquez bases his opinions on "his training and experience as a law enforcement officer and detective, his review of discovery materials and crime records concerning security measures and crime at the property, and his knowledge of property and apartment security as a consultant for property management companies." He has experience as a police officer and spent time serving as a part-time security consultant for the Atlanta Housing Authority. In that role, he and Mr. Tripp managed the security officers for the property management companies that ran the complexes; provided strategies to improve security and reduce crime at these low-income, multi-family properties; and advised the management companies on multiple aspects of security such as access control, lighting, cameras, scheduling and staffing of security guards, and whether or not to employ off-duty police officers at a property. Since the Atlanta public housing projects were shut down in 2010, his security work has been focused on corporate trainings, including "active shooter training, report writing,... chain of custody, incident reporting, emergency

evacuation... fire drill training ...", scheduling private security for events, and providing security detail for professional sports players and company executives.

Mr. Velazquez did not consult publications, articles or other resources in reaching his opinions. He reviewed witness depositions; the DeKalb Police Department criminal investigation file, including crime scene photos and video; testimony from the criminal trial of Deandre Seabrooks; and the crime statistics for the Highlands property. Mr. Velazquez also reviewed reports of calls for service (related to 911 calls) from several apartment communities in the area, but not police reports. Mr. Velazquez conceded that his proposed additional security measures would not have deterred this incident from happening, but might have changed where it occurred.

The Court finds that Mr. Velazquez is a qualified expert whose testimony is based upon his relevant experience, which provides a sufficient and reliable basis for his opinions, which are reliably applied to the facts of this matter and helpful to the fact-finder. Accordingly,

IT IS HEREBY ORDERED that Defendants' *Motion to Exclude Plaintiff's Designated Expert Witness Vincent Velazquez* is **DENIED**.

B. *Woodrow Tripp and Jeff McClung*

In the Court's discretion,

IT IS FURTHER ORDERED that *Defendants' Renewed Motion to Exclude Expert Witnesses* is **DENIED**.

## II. Defendants' *Motion for Summary Judgment*

A party moving for summary judgment must show that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law . . . ." O.C.G.A. § 9-11-56(c). The moving party has the burden to establish that there is no genuine issue as to any material fact, even as to those issues upon which the opposing party would have the burden of proof at trial. *Meade v. Heimanson*, 239 Ga. 177 (1978); *Ham v. Ham*, 230 Ga. 43 (1973); *Massey v. National Homeowners*, 225 Ga. 93 (1969).

The facts, in a light construed most favorably to the party opposing summary judgment, are as follows: Defendants own and operate the Highlands at East Atlanta apartment complex (the Highlands), located at 2051 Flat Shoals Road in DeKalb County. A company called Counter Measure Operations, Inc. (CMO) was contracted to provide security at the Highlands and at other NuRock properties in the Atlanta area from 2011 through approximately May 2017.

There is evidence of chronic crime and gang activity at the Highlands. Major K.D. Johnson, the South Precinct Commander for DeKalb County Police Department, testified that the Highlands was one of his top priorities in the entire precinct and that DeKalb County assigned a special anti-gang task force to the Highlands in August 2015. A high number of violent incidents were reported, including drive-by shootings, armed robberies, witness intimidation, and murders. From 2012 through the end of 2015, there were numerous incidents that involved multiple gunfire and/or bullet damage to buildings at the Highlands.

Former employees testified about gang activity on the property: Maintenance man Marcellus Simpson testified that he had to clean up gang signs from the buildings about once a month. Defendants' former property manager, Princess Cato, testified that she saw gang graffiti and that both she and Debbie Davis used to see groups of young men standing about in the breezeways carrying AK-47s and AR-15s. Ms. Cato further testified that she and Ms. Davis knew about gang shootouts on the property.

In December 2015 Major Johnson told Defendants that their security was not getting the

job done and that they needed approximately 10 armed, off-duty police officers providing security full time at the complex. Defendants did not follow this recommendation. Defendants' 2011 contract with CMO called for a total of only four guards to cover all ten of NuRock's apartment complexes in the Atlanta area. Despite the history of crime at the property, and despite Major Johnson's December 2015 recommendation of ten off-duty police officers, Defendants' Asset Manager testified that there was no regularly scheduled security provided at the Highlands until after the incident in suit.

In January 2016, Deandre Seabrooks murdered Plaintiff's decedent Sariah Wilcoxson in front of the Highlands complex. Sariah was a resident of the Highlands and therefore was an invitee on the property. Mr. Seabrooks got out of a car in the middle of Flat Shoals Road and walked towards the complex, shooting an AK-47. Crime scene photos show Sariah's body lying next to a post of the fence in front of the complex, just by a MARTA stop near the complex's entrance. The fencepost where Sariah fell was almost seven feet inside Defendants' property line.

Defendants contend that they did not owe any applicable duty to Sariah Wilcoxson because Mr. Seabrooks shot her while standing in the public street. They further contend that a jury could not find causation, because even if they had provided adequate security measures on the property, such measures would not have deterred a shooter who was not standing on the property. The Court disagrees. As the owner and manager of the Highlands complex, Defendants owed Sariah Wilcoxson, and the other residents of the Highlands, a duty to exercise ordinary care to reduce the foreseeable risk of violent crime. A reasonable jury could find that their breach of that duty proximately caused Sariah's death.

An owner or occupier of land is liable in damages to an invitee for injuries caused by the

owner or occupier's failure to exercise ordinary care in keeping the premises safe. O.C.G.A. § 51-3-1; *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785 (1997). The question of liability depends on whether the owner or occupier permits a condition to exist on the property that "expose[s] an invitee to a foreseeable unreasonable risk of harm under the totality of the circumstances in each particular case." *Shackelford v. Dekalb Farmer's Mkt.*, 180 Ga. App. 348, 349-350 (1986), *citing Hollis v. First Nat. Bank*, 117 Ga. App. 145, 147 (1968). A reasonable jury could find that Defendants failed to provide adequate security at the Highlands and that this breach of duty contributed to the causation of the Sariah Wilcoxson shooting.

Defendants point to the fact that Seabrooks was not standing on their property when he fired the fatal shots. It has long been settled that "[t]he crime does not have to originate on the landowner's property in order to hold the owner liable." *Camelot Club Condo. Ass'n v. Afari-Opoku*, 340 Ga. App. 618, 623 (2017); *see also McNeal v. Days Inn of America, Inc.*, 230 Ga. App. 786, 789 (1998) (denying summary judgment to premises owner on claims by plaintiffs who were attacked in hotel's parking lot by four men who followed them there from a nearby restaurant). Likewise, a landowner may be liable for a criminal attack that arises from a dangerous condition on the landowner's premises, even if the attack itself does not occur on the premises. *Wilks v. Piggly Wiggly S.*, 207 Ga. App. 842, 843 (1993) (denying summary judgment to store owner on premises claim arising from off-premises criminal attack where loiterers outside store followed an invitee from the store on foot and robbed her).

In *Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323 (2017), the Supreme Court of Georgia made clear that a property owner that fails to address criminal street gang activity on its property is liable when that activity foreseeably causes an attack off the property. Although there are some differences between this case and the facts in *Six Flags*, the same legal principles

apply here. A jury could find that Defendants had notice of a significant gang problem on their property, which had already resulted in an untold number of drive-by shootings, mass shootouts, murders, and injuries to innocent bystanders, including children.

The Georgia Legislature adopted the basic framework of nuisance law in the Street Gang Terrorism and Prevention Act, O.C.G.A. §§ 16-15-1, *et seq.* (the "SGTPA"). The statement of legislative intent contained in the SGTPA states that the legislation responds to "a state of crisis which has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety . . . ." O.C.G.A. § 16-15-2 (emphasis added). The fact that people in the immediate vicinity of a gang-infested property are unable to avoid such violence is precisely what makes the property a public nuisance. *See Dean v. State*, 151 Ga. 371, 374 (1921) ("a public nuisance is one which causes hurt, inconvenience, or damage to the public generally, or such part of the public as necessarily come in contact with it"). The Court is mindful of the Supreme Court's statement in *Six Flags*, that there must be a sufficient connection to the property for a property owner to have liability for criminal activity. The Court is satisfied that a jury could find a sufficient connection here.

Defendants argue that there is no evidence that Sariah Wilcoxson was "injured by reason of criminal gang activity" so as to have a cause of action for treble damages under O.C.G.A. § 16-15-7(c). The Court disagrees. The term "criminal gang activity" is a defined term in the SGTPA that encompasses a list of predicate offenses, including but not limited to "[a]ny criminal offense in the State of Georgia, any other state, or the United States that involves violence, possession of a weapon, or use of a weapon, whether designated as a felony or not, and regardless of the

maximum sentence that could be imposed or actually was imposed." O.C.G.A. § 16-15-3(1)(J). Because Sariah Wilcoxson was killed as a result of a criminal offense that involved violence, possession of a weapon, and the use of a weapon, she satisfies the statutory definition of a "person who is injured by reason of criminal gang activity" within the meaning of the SGTPA. In addition, a reasonable jury could conclude that a gang satisfying the statutory definition of a "criminal street gang" used the Highlands property for gang activity over a long period of time and that Sariah's death was the result of gang activity.

Defendants next contend that punitive and treble damages are not available. The Court disagrees. It is plain that the Legislature intended treble damages and punitive damages to be available under the SGTPA in cases of homicide. A jury could find that the record of this case contains circumstances of "aggravation and outrage" sufficient to support an award of punitive damages. There is evidence that Defendants received notice of the risk of violent crime at the Highlands from government agencies, numerous residents, and their own employees. Yet they admit that they took no steps to abate gang activity. A jury could find that this testimony "shows a 'conscious indifference to consequences,' and therefore meets the 'clear and convincing' standard of O.C.G.A. § 51-12-5.1 (b)." *Mack Trucks v. Conkle*, 263 Ga. 539, 544-45 (1993).

Defendants argue that they are entitled to summary judgment as to Plaintiff's claims for attorneys' fees and expenses of litigation under O.C.G.A. § 13-6-11, because Plaintiff's claims sound in negligence and, according to Defendants, there is a "bona fide controversy" as to liability." As the Court of Appeals has held, "the existence of a bona fide controversy negates the possibility of a statutory award only '[w]here bad faith is not at issue.'" *Oglethorpe Power Corp. v. Estate of Forrister*, 332 Ga. App. 693, 705 (2015) (quoting *Lamb v. State Farm Mut. Auto Ins.*

*Co.*, 240 Ga. App. 363, 365 (1999)). Genuine issues of material facts exist regarding Defendants' bad faith in this matter.

Accordingly,

IT IS FURTHER ORDERED that Defendants' *Motion for Summary Judgment* is **DENIED**.

**III.** ***Plaintiff's Second Motion for Discovery Sanctions*** and ***Plaintiff's Motion to Compel Production of Emails, to Permit Forensic Examination of Defendants' Computer Systems, and for Sanctions***

Some of the central issues in the case are the levels of crime and gang activity on the property, the Defendants' knowledge of these problems, and the steps Defendants took to address them. Defendants have stated that they provided security by hiring a company called Counter Measure Operations, Inc. ("CMO"). CMO's contract provided for four security guards that would rove among approximately ten apartment properties in the Atlanta area. This contract began in 2011 and ended in approximately May, 2017. The contract was signed by Defendants' Asset Manager, Rebecca Lively, and CMO's owner, Gabriel Smith.

On January 16, 2018, this Court entered an Order compelling Defendants to produce a range of documents, including all daily security logs and criminal trespass warnings for the Highlands property. On February 14, 2018, Defendants filed a certification with this Court in which they stated that no criminal trespass warnings were issued at the property for the relevant time period before the incident in this case. Defendants also represented in their certification that they had produced daily security logs from CMO. However, the Court finds that this was not true. Only one document in the referenced Bates range appears to be a CMO document, and

Rebecca Lively testified in her deposition that this document was an incident report, not a daily security log.

Defendants have provided conflicting testimony as to whether the daily security logs ever existed, and as to what became of the logs if they did exist. Defendants' Regional Manager, Debbie Davis, testified in her deposition in this action that CMO's security guards submitted written logs every day. Later, both Ms. Davis and Ms. Lively filed affidavits in which they stated that Defendants did not "regularly request" daily logs from CMO during the period before the incident in suit, but they did not go so far as to state that such logs never existed for that period. Nor did they explain what became of such logs, if they did exist.

In addition, Plaintiff has filed with the Court the transcript of a deposition given by Defendants' Asset Manager, Rebecca Lively, in another action pending against NuRock Management Group, LLC, *Randy Harris and Myliaka West v. Eagles Creste Housing Partners, L.P and Nurock Management Group, LLC* (Case No. 17EV003176, St. Ct. of Fulton County) (the "*Harris*" case) (deposition dated July 11, 2018). Defendant has not disputed the authenticity of this transcript. In the *Harris* case, Ms. Lively testified that NuRock did not enforce the provision of the contract that called for daily written logs, and that CMO did not create written reports unless there was an incident. This suggests that daily logs may never have existed at all, but Defendants have not taken that position in this case.

Plaintiff's Interrogatories Nos. 23, 24, and 25 in Plaintiff's First Set of Interrogatories required Defendants (1) to identify the names and addresses of all security guards that were employed or contracted by Defendants to work at the Highlands at the time of the incident; (2) to provide a detailed description of the manner in which such guards were used; and (3) to set forth any protocols, directives, rules or regulations that were given to such guards. In Defendants'

initial responses to Plaintiff's First Set of Interrogatories, Defendants stated that they "do[] not have any information regarding individual employees of Counter Measure Operations." NuRock's Responses to Plaintiff's First Set of Interrogatories, dated February 6, 2017, Response No. 23; *see also id.*, Responses Nos. 24, 25. On March 28, 2017, after Plaintiff requested supplementation, each Defendant served supplemental responses in which each Defendant again stated categorically that it "does not have information regarding security guards." Defs' Suppl. Resp. to Plff's 1st Interrogs., p. 7.

It is undisputed, however, that CMO still worked for Defendants during the entire period of time encompassing Defendants' original responses, conferral with counsel for Plaintiff, and Defendants' first supplemental responses. In fact, Defendants' Asset Manager, Rebecca Lively, filed an Affidavit with this Court stating that CMO still worked for Defendants until approximately May 2017, which was several months after the service of these responses. In their responses to Plaintiff's written discovery requests, Defendants did not disclose to Plaintiff that their relationship with CMO was ongoing.

The Court finds that Defendants' statements that they did not have any information about CMO's guards or their activities at the Highlands are not credible. It defies belief that Ms. Lively could manage CMO's activities on multiple properties, solely by telephone, without knowing any of the guards' names or contact information, and without knowing anything about what the guards were instructed to do at the Highlands.

In addition, the Court finds that Defendants gave deliberately misleading responses when they stated that they did not have information about CMO's guards or their activities. When they made those responses, Defendants did not disclose to Plaintiffs that CMO was still providing security at the Highlands property or that Ms. Lively was still talking with CMO's President

multiple times per week about security issues. In fact, Ms. Lively testified in her deposition that she even spoke with him about Plaintiff's discovery requests, and that he was cooperative, but that she did not ask him for the identities of the guards who were working at the Highlands. Taken as a whole, Defendants' discovery responses misleadingly implied that information about CMO's guards and their activities was not available to Defendants. That was not true.

In addition, at the time they made these responses, Defendants had in their possession information about CMO and its activities that Defendants did not produce. About a year-and-a-half later, on July 31, 2018, Defendants produced emails from at least three CMO employees: Gabriel Smith, Geoffrey Dixon, and Kiyana Pittman. The emails from Pittman included an entire block of contact information, including a work address, phone number, and fax number, and a document purporting to describe the services provided to Defendants by CMO. All of this information was responsive to Plaintiff's document requests and interrogatories, and was in Defendants' possession in February 2017 and March 2017; yet in their discovery responses served at that time, Defendants falsely denied having it. Defendants also later produced invoices from CMO, but they were very heavily redacted, removing the context of the information that remained visible. These invoices also were in Defendants' possession in February 2017 and March 2017. As documents relating to security at the Highlands, they also were responsive.

All of Defendants' highest-ranking managerial employees testified in their depositions that they knew nothing of any gang activity at the Highlands. Both Debbie Davis and Rebecca Lively testified that they had not seen any gang activity at the Highlands and that no one had told them about gang activity at the Highlands. In her Rule 30(b)(6) deposition as the corporate representative, Ms. Lively testified that Defendants had never been informed by anyone, including the DeKalb Police Department, that there was gang activity at the Highlands. Rob

Hoskins likewise testified that no one had ever told him about any gang activity at the Highlands, and Sandy Hoskins testified that she was "aware of no gang issues at the Highlands."

The emails that Defendants produced on July 31, 2018, demonstrate that these corporate-level managerial witnesses testified falsely when they denied having received information about gang activity at the Highlands. For example, on February 6, 2015, Debbie Davis sent an email stating that she called DeKalb County Police Department to break up a "gang party" involving twenty to thirty men, resulting in arrests for drugs and weapons offenses. On December 17, 2015, Rob Hoskins, Sandy Hoskins, Rebecca Lively, and Debbie Davis all participated in an email chain discussing a YouTube video of a gang, which the DeKalb County Police precinct commander had mentioned to Defendants. Another email, from a HUD compliance officer, reported a resident complaint about a gang shootout and asked, "Are there any efforts made by management to partner with the police in order to curb gang activities on the site?" The production also contained an email thread among Sandy Hoskins, Rebecca Lively, and Debbie Davis concerning an upcoming visit to the property by Commissioner Larry Johnson in response to a gang shootout at the property. In one email, Sandy Hoskins asked Debbie Davis, "did Gabriel get the police report on Q18? Is that the right unit with guns and gangs?" and Rebecca Lively responded, "Yes that is the right unit."

"'A trial court has broad discretion to control discovery, including the imposition of sanctions.'" *Resurgens, P.C. v. Elliott*, 301 Ga. 589, 597 (2017) (quoting *Smith v. Glass*, 273 Ga. App. 327, 328 (2005). O.C.G.A. § 9-11-37 provides that, "[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just . . .." O.C.G.A. § 9-11-37(b)(2). Appropriate orders may include (1) an order deeming certain facts established, O.C.G.A. § 9-11-37(b)(2)(a); (2) an order

precluding claims, defenses, or evidence, O.C.G.A. § 9-11-37(b)(2)(b); or (3) an order striking pleadings, O.C.G.A. § 9-11-37(b)(2)(c).

In addition, O.C.G.A. § 9-11-37(d) authorizes all of the above sanctions, up to and including the striking of pleadings, if a party; the officer, director, or managing agent of a party; or a corporate representative designated under Rule 30(b)(6), fails to appear for a deposition or fails to respond to discovery. "[F]or purposes of OCGA § 9-11-37(d) sanctions, a defendant's intentional false response to a discovery request equates to a total failure to respond and therefore authorizes a trial court in its discretion to strike the defendant's answer." *MARTA v. Doe*, 292 Ga. App. 532, 532 (2008); *see also Resurgens, P.C. v. Elliott*, 301 Ga. 589, 597 (2017) ("a trial court clearly has the discretion to impose Rule 37(d) sanctions if it finds that the offending party has provided discovery responses which were false or deliberately misleading"); *Howard v. Alegria*, 321 Ga. App. 178, 189-90 (2013) ("a trial court is authorized to strike a party's pleadings or impose other sanctions for discovery abuse," including false statements).

Federal courts also have held that deliberate false testimony warrants dismissal of pleadings. *Chamberlain v. Les Schwab Tire Ctr. of Cal., Inc.*, 2012 U.S. Dist. LEXIS 171325, *8 (E.D. Cal. Nov. 30, 2012) ("Dismissal is an appropriate sanction for perjury because committing perjury is tantamount to acting in bad faith."); *Arnold v. County of El Dorado*, 2012 U.S. Dist. LEXIS 112398, *12-14 (E.D. Cal. Aug. 8, 2012) ("Clearly, committing perjury is acting in 'bad faith.'").

> Litigation is not a game in which perjury warrants a five yard penalty for a minor untruth, fifteen yards if the perjury was really serious. Rather, **perjury on any material fact strikes at the core of the judicial function and warrants a dismissal of one's right to participate at all in the truth seeking process.** If one can be punished for perjury with up to five years imprisonment, 18 U.S.C. § 1621, it should not seem out of place that a civil action might be dismissed for the same conduct.

*Arnold v. County of El Dorado*, 2012 U.S. Dist. LEXIS 112398, *12-14 (E.D. Cal. Aug. 8, 2012) (emphasis added). As a District Court in New York put it: "If refusal to answer questions can justify dismissal of a complaint, then surely deliberately answering questions falsely should suffice." *Miller v. Time-Warner Communs., Inc.*, 1999 U.S. Dist. LEXIS 14512, *9 (S.D.N.Y. Sept. 22, 1999) (imposing sanction of dismissal for falsifying documents and lying about it).

The Civil Practice Act requires a party to "furnish such information as is available to the party" in responding to interrogatories. O.C.G.A. § 9-11-33(a)(1). And it is well established that a party must produce documents and information not just in its direct possession, but also in its control, including documents that can be obtained from the party's agents or close business associates. *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 735 (2010) ("Because the requested data is in the custody, possession, or control of Resource Life or its agents, they were obligated to produce the same."); *Lion Antique Cars & Invs., Inc. v. Tafel*, 332 Ga. App. 824 (2015) (sanctions imposed on party who failed to obtain documents from a third party with whom the party had a longstanding business relationship). In view of that underlying legal obligation, Defendants gave, at best, a deliberately misleading discovery response when they categorically stated that they had no information about CMO's guards or their activities, without also disclosing to Plaintiff that CMO was still employed by Defendants and that Ms. Lively was talking to CMO's President several times per week.

Even more egregious is the false testimony of Defendants' corporate witnesses regarding their knowledge of gang activity on the Highlands property. All four of these witnesses flatly denied any such knowledge, and several of them unequivocally denied that they had ever heard any reports of gang activity at the Highlands. Yet these witnesses' emails, which were not produced until well over a year into the litigation, make it clear beyond question that all four of

them received notice of gang activity at the property and emailed with each other about gang activity on multiple occasions. It is not credible that all four of them simply forgot about these communications. In addition, the Court also observed the video deposition testimony of all of these witnesses and finds that they were not credible in denying awareness of gang activity.

The Court finds that Defendants' pattern of deliberate misconduct justifies the striking of their liability defenses in this case. In both their initial and supplemental discovery responses, Defendants falsely denied having information regarding CMO's guards and their activities at the Highlands. In fact, Rebecca Lively was talking with Gabriel Smith on a regular basis throughout the relevant period about exactly that topic. Defendants did not disclose this fact until much later, after CMO not only had ceased providing security at the property but also had gone out of business and had gone into default in this litigation. Defendants also failed to comply with this Court's Order to produce the daily security logs from CMO, and have never explained what happened to the logs. Worse, Defendants misrepresented to this Court in their Certification that the logs had been produced. And finally, Defendants' belated production of emails contains numerous emails that prove their corporate witnesses testified falsely in their depositions.

Each of these offenses is legally sufficient, standing alone, to support striking of pleadings. But the fact that Defendants did all of these things, and provided false deposition testimony through no less than four representatives of corporate management, demonstrates that nothing less than the striking of Defendants' liability defenses will suffice to punish and deter their misconduct and uphold the authority of this Court.

In addition, the Court finds that Defendants' misconduct has caused substantial prejudice to Plaintiff's ability to try her liability case. Plaintiff has submitted an affidavit from the South Precinct Commander of the DeKalb County Police Department, Major K.D. Johnson, stating that

police identified the Highlands as a "hot spot" for crime and gang activity. Given that level of crime, it stands to reason that the missing daily logs, and the testimony of the undisclosed CMO witnesses, likely would have shown that CMO's guards knew about crime and gang activity on Defendants' property during the six-year period that CMO provided security at the Highlands, and that they reported such incidents to Defendants. This is also confirmed by Defendants' emails, which indicate that Defendants asked CMO's President, Gabriel Smith, to obtain a police report for a gang-related incident at the property. This suggests that the missing evidence from CMO would have helped Plaintiff prove facts relating to gang activity, which is a central issue in the case. Defendants' misconduct has deprived Plaintiff of the ability to prove these facts by showing the jury these key documents and deposing the relevant CMO personnel.

The Court has considered alternative sanctions. The sanctions that Plaintiff originally requested were (1) an Order directing that Defendants' constructive knowledge of crime and gang activity shall be taken to be established for purposes of this action; (2) an Order precluding Defendants from calling any CMO witnesses at trial or testifying as to the contents of the unproduced CMO documents; and (3) an instruction to the jury that it may infer the missing CMO witnesses and documents would have shown facts adverse to Defendants. These sanctions would all be justified under O.C.G.A. §§ 9-11-37(b) and (d), based on Defendants' deliberately misleading discovery responses and their failure to comply with the Court's January 16, 2018 Order requiring production of the security logs. *See Buckner*, 304 Ga. App. at 734-739 (affirming the trial court's imposition of an evidentiary presumption against the defendant under O.C.G.A. § 9-11-37(d) "because of its patently false discovery responses and its misrepresentations to the trial court"); *Ford Motor Co. v. Gibson*, 283 Ga. 398, 402 (2008) ("The trial court did not abuse its discretion where, in light of its conclusion that Ford had wilfully disobeyed its prior discovery

order, the court could have imposed the ultimate sanction of default but instead opted for the lesser sanction of issue preclusion.").

The Court finds, however, that these sanctions are not adequate to address the seriousness of Defendants' added misconduct in providing false testimony from not one but all four of their corporate-level witnesses, including Defendants' two managing agents and their Rule 30(b)(6) representative. Added to Defendants' suppression of responsive documents and information on central issues, these witnesses' false testimony strikes at the heart of the Court's truth-finding function and undermines the reliability of the trial, warranting the severest sanction available to the Court. Accordingly, the Court, in exercising its discretion,

HEREBY FURTHER ORDERS that *Plaintiff's Second Motion for Discovery Sanctions* is **GRANTED**. Defendants' liability defenses are **STRICKEN** as a sanction for their discovery misconduct in this case. The case will proceed to trial on damages only. Defendants may still dispute whether the statutory standards for treble damages and punitive damages are met, and the amounts of any damages. As further sanction, Defendants shall bear the reasonable costs of a forensic examination, which shall proceed as follows:

1. Within 14 days of entry of this Order, Defendants shall produce for deposition the person or persons most knowledgeable as to (1) the identifying information and locations of the applications and/or devices where emails and other electronically stored information ("ESI") relating to the incident in suit, the Highlands at East Atlanta, and/or Counter Measure Operations have been stored in the regular course of Defendants' business from January 1, 2012 through the present; (2) the preservation and/or destruction of such ESI; and (3) Defendants' efforts to identify and produce ESI in this litigation.

2. Within 14 days of that deposition, Defendants shall permit a forensic computer

examiner chosen by Plaintiff to examine and image the applications and/or devices where ESI relating to the incident in suit, the Highlands at East Atlanta, and/or Counter Measure Operations have been stored in the regular course of Defendants' business from January 1, 2012 through the present. The examiner shall have access to the content stored in these applications and/or devices, as well as any metadata and/or source data that may be necessary to recover information that has been deleted or altered. The examiner shall use data-collection and imaging methods that reliably preserve the integrity of the original data.

3. Plaintiff's forensic computer examiner shall be permitted to analyze the collected data and provide reports to Plaintiff's counsel regarding such data, provided, that reasonable steps shall be taken to prevent the disclosure of materials protected by the attorney-client privilege and/or work product protection. Any inadvertent disclosure of such materials that may occur in the course of the examination shall not result in waiver of the applicable privilege or protection.

4. A review set of potentially responsive emails or other ESI identified through the above forensic examination shall be provided, in the first instance, to Defendants' counsel. Defendants' counsel shall produce all responsive and non-privileged materials to Plaintiff within 30 days of receiving the review set, unless the Court upon motion extends that deadline. Any materials withheld on grounds of any claim of privilege or other protection from disclosure shall be listed on a privilege log pursuant to Unif. Super. Ct. R. 5.5, with sufficient information to enable Plaintiff and the Court to evaluate the claim of privilege or protection.

6. Further, within five business days of entry of this Order, Defendants shall produce unredacted copies of all invoices provided by Counter Measure Operations that relate in any way to the Highlands at East Atlanta property.

IT IS FURTHER ORDERED that *Plaintiff's Motion to Compel Production of Emails, to Permit Forensic Examination of Defendants' Computer Systems, and for Sanctions* is **DENIED AS MOOT.**

**SO ORDERED**, this 28th day of September, 2018.

JOHNNY N. PANOS, JUDGE
STATE COURT OF DEKALB COUNTY

CC: Leighton Moore, Esq.
Deborah Shelles Cameron, Esq.

STATE COURT OF
DEKALB COUNTY, GA.
9/28/2018 10:18 AM
E-FILED
BY: Brittany Banks