IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

TERRY HODGES, an Individual, Plaintiff, v. GORDON REES SCULLY MANSUKHANI LLP, D/B/A GORDON & REES LLP, a Limited Liability Partnership; ROGER M. MANSUKHANI, an Individual; CHARLES ANTHONY MULRAIN, an Individual; RICHARD P. SYBERT, an Individual; and JONI B. FLAHERTY, an Individual, Defendants.	)	CIVIL ACTION FILE NO. 16EV004768

DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION TO STRIKE ANSWER AND ENTER DEFAULT

Defendants Gordon Rees Scully Mansukhani, LLP d/b/a Gordon & Rees, LLP ("Gordon & Rees"), Roger M. Mansukhani, Charles Anthony Mulrain, Richard P. Sybert, and Joni B. Flaherty ("Defendants"), respond as follows to Plaintiff's Motion to Strike Answer and Enter Default:

INTRODUCTION

Defendants did not delete text messages relating to Plaintiff or his case because they do not have any and they did not have any text messages concerning Plaintiff or his case. [Defendants' Affidavits, Exs. 1-3.]

Plaintiff's selectively cobbled together testimony does not establish that Defendants destroyed or failed to preserve evidence, nor does it establish that Defendants violated any Court orders. To the contrary, Defendants complied with the Court's rulings.

Plaintiff assumes, because it suits his purpose to avoid a determination on the merits in this case, that relevant text messages exist or did exist, and that Defendants either did not look

for them or destroyed them. These assumptions are untrue and unfounded. Defendants searched available devices. Where devices from 2015 were not available, Defendants employed alternate means to confirm no text messages exist and no text messages did exist, including through habit and practice evidence, search of telephone contacts backed up to the cloud, and confirmation that deleted texts were not saved to the cloud. (Affidavits, Ex. 1-3.)

It should be noted that all the testimony Plaintiff cites comes from individual Defendants' depositions. Plaintiff cites no testimony of what the firm did to search for relevant documents, yet seeks to strike its Answer. Likewise, as to Tony Mulrain, Plaintiff cites no testimony or evidence, yet he seeks to strike his Answer and enter default against him. This further demonstrates that Plaintiff's Motion is a transparent attempt to avoid a ruling on the merits of an upcoming summary judgment motion.

There was no willful disregard of the Court's orders (or any disregard at all) and Plaintiff's motion for sanctions under OCGA § 9-11-37(b)(2) is without merit.

STATEMENT OF FACTS

1. Background.

This is an action brought by Plaintiff for alleged legal malpractice, breach of fiduciary duties, and fraud. (Complaint.) The case arises out of the handling of a lawsuit Gordon & Rees lawyers Richard Sybert and Joni Flaherty filed for Plaintiff in California on July 2, 2015, against Christopher Tucker and Netflix. Although the claim against Netflix was weak, Netflix was included in the original complaint in an effort to exert additional pressure on Tucker to enter an early resolution of the case.

On July 8, 2015, the lawyers handling the case discovered that other Gordon & Rees lawyers represented Netflix in other matters. The Firm gave Plaintiff the choice of continuing

the claim against Netflix *pro se* or with other counsel or continuing with Gordon & Rees and dropping the claim against Netflix. Plaintiff opted for the latter. Ultimately the firm withdrew from representing Plaintiff after Tucker presented a contract signed by Plaintiff that would have defeated Plaintiff's claims and that Plaintiff had not disclosed to his own lawyers. When presented with the contract, Plaintiff initially denied his own signature was genuine, then later claimed his memory was hazy. Plaintiff went on to settle all claims against Tucker and Netflix on his own. (Support for these background facts is found at Exs. 7-16, and 37 to Defendant's October 6, 2017 Motion to Compel and for Protective Order.)

2. The Court's Ruling on November 3, 2017 Held that Only Text Messages from April 2015 to September 2015 Are Discoverable in This Case.

Plaintiff cites to one portion of the Court's ruling from the bench on November 3, 2017, in which the Court found that text messages and other documents from a limited period – April 2015 to shortly after September 2015 - are discoverable:

> THE COURT: I think what we're talking about is we're talking about the conflict, not just about Netflix generally or about Hodges generally, but about the conflict issue that came up and how the conflict issue was resolved. And I think a litigation partner is reasonable. And, again, I think we're in limited time frame. We're not asking you to search for years, but we got April to sometime shortly after September of 2015. And I agree that other electronic communications, e-mail, Facebook, text, those are discoverable.

As set forth below, Defendants employed reasonable means to confirm that no responsive text messages exist.

3. Defendants Did Not Delete Or Fail to Preserve Text Messages Relating to Hodges Or His Case.

a. Joni Flaherty.

Plaintiff selectively cites three lines from Ms. Flaherty's deposition, but omits most of the relevant testimony. In context, Ms. Flaherty was asked if she searched her phone for text

messages relating to Hodges in 2017, after the Court's ruling. Had Plaintiff's counsel asked her, Ms. Flaherty would have confirmed that she did not have the same phone in 2017 that she had back in 2015. (Flaherty Affidavit, ¶¶ 3-4.) Therefore, a text message search of her then-current phone would have been useless.

Ms. Flaherty was, however, able to confirm that she has no text messages and has not had any text messages relating to the representation of Plaintiff by: (1) her habit and practice to not use text messages for work, (2) the fact that no text messages from 2015 were backed up to the cloud, and (3) a search of her contacts in her phone confirming that she does not have cellular telephone numbers for the persons with whom she may have communicated regarding the Hodges matter, including Plaintiff, Tony Mulrain, Richard Sybert, and Roger Mansukhani. (Flaherty Affidavit, ¶¶ 3-4.)

Ms. Flaherty's testimony at her deposition does not support the Plaintiff's theory that Ms. Flaherty destroyed or failed to preserve text messages:

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Q Did anyone come to you and ask you for documents related to Mr. Hodges to -- for the purpose of compiling his client file?

A I don't know whether it was for the purpose of gathering his client file or the purposes of this litigation. But I have been asked for specific documents.

Q What were you asked for?

A Specifically I was asked for any written notes related to my representation of Mr. Hodges, and I was also asked about text messages related to this case.

Q When were you asked about text messages?

A I don't know, but it was former counsel for -- for the firm and for me.

Q Was it Kyle Kveton?

A No.

Q Was it Kate Whitlock?

A Yes.

Q What did she ask you to do?

MR. KINGMA: I'll object to the form. I think that's calling for attorney-client privileged information.
////

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BY MR. NEEL:

Q Did you search your personal devices for text messages?

A No.

Q Did you search any devices for text messages?

A No. I know that none exist related to this case.

Q How do you know that?

A Because I don't text with relationship to my work.

Q You did not look?

A Correct. I know that none exist. I'm certain.

Q Do you use Gmail?

A Yes. On a personal basis, not -- not in relationship to work.

Q Did you search your Gmail account with respect to any requests made by any of your attorneys for you to gather documents?

A Yes.

Q Did you search by search term? How did you search?

A Search term.

Q What terms did you use?

A Hodges, Tucker.

Q Any others?

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A I don't remember.

(Flaherty, Esq., Joni, (Pages 11:3 to 13:1), Ex. 4.)

b. Roger Mansukhani.

Mr. Mansukhani testified in his March 2019 deposition, close to a year and a half after the Court's ruling, that he did not recall if he searched for text messages. After reviewing his records, he now recalls that he did, in fact, search his text messages and there are none relating to Plaintiff. (Mansukhani Affid., ¶¶ 3-4.) He has no texts to search from 2015, as his habit and practice in 2015 was to delete emails daily. (Mansukhani Affid., ¶ 3.) He did not delete text

messages concerning Plaintiff or his case and has no text messages concerning Plaintiff or his case. (Mansukhani Affid., ¶ 4.)

c. Richard Sybert.

Plaintiff cites only four lines from Mr. Sybert's testimony. What Plaintiff omits is more telling than what he included, as Mr. Sybert confirmed he has no text messages from the time period that is the subject of the Court's ruling:

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Q Other than your firm-issued phone, did you in 2015 have a personal phone?
A No.
Q You just had one phone?
A Right. And I used that -- I used the firm-issued phone, I always have, as my personal phone as well.
Q Did you search your phone for records in response to the request for you to gather documents?
A No.
Q Do you recall deleting any text messages off your phone?
A I always delete all my text messages after I read them.
Q Was that the case in 2015?
A It's always been the case. But I don't think I was texting in 2015. I don't think I knew how. It's

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only recently I found out how to do it, and my kids taught me.

(Sybert, Richard P., (Pages 16:9 to 17:2), Ex. 5.)

Simply put, there are no text messages within the range that the Court identified as being relevant to this case for Mr. Sybert to search. Nonetheless, Mr. Sybert confirms that he did not delete any texts relating to the representation of Mr. Hodges and there were no text messages from the relevant time period to search. (Sybert Affidavit, ¶¶ 3, 4.) Moreover, like Ms. Flaherty, had Plaintiff asked him Mr. Sybert would have confirmed that he did not have the same phone

that he had back in 2015. (Sybert Affidavit, ¶ 5.) Therefore, a text message search of his then-current phone would have been useless.

d. The Statement by Kathryn Whitlock, Counsel for Defendants, in Her January 4, 2018 Letter.

Ms. Whitlock's statement in her letter that she requested that Defendants search their text messages and there are none is entirely consistent with the foregoing. (January 4, 2018 Letter, Ex. 6 ("Defendants adhered to the Court's directive and asked every law firm partner and every named defendant to check personal devices for messages that were about Terry Hodges. There simply were no personal e-mails, chats, text messages, Facebook Messenger messages, WhatsApp messages, Google IM messages, WeChat messages, other form of short messages system, or 'chat' documents about him.").)

ARGUMENT AND CITATION OF AUTHORITY

A. RELIEF UNDER OCGA § 9-11-37(B)(2) IS NOT AUTHORIZED.

Defendants complied with the Court's ruling that text messages between April and September 2015 could be relevant. There are none. In response to the Court's ruling, Defendants have repeatedly confirmed that there are no such text messages. Plaintiff's refusal to accept this answer is part of his repeated attempts to have the Court decide this case on anything other than the merits. The law is clear that relief under OCGA § 9-11-37(b)(2) is not authorized under these circumstances.

OCGA § 9-11-37(b)(2) provides for relief only if a party or an officer, director or managing agent of a party willfully fails to comply with a Court discovery order:

(b) Failure to comply with order.

> (2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under paragraph (6) of subsection (b) of Code

> Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this Code section or Code Section 9-11-35, the court in which the action is pending may make such orders in regard to the failure as are just and, among others, the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; or
>
> (E) Where a party has failed to comply with an order under subsection (a) of Code Section 9-11-35 requiring him to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders, or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

OCGA § 9-11-37(b)(2) (underline added).

"As a general rule, the trial court should attempt to compel compliance with its orders through the imposition of lesser sanctions than dismissal [or default]. The drastic sanctions of dismissal and default cannot be invoked under OCGA § 9–11–37 except in the most flagrant cases...." *Gen. Motors Corp. v. Conkle*, 226 Ga. App. 34, 43–44 (1997) (internal quotations and citations omitted). In *General Motors*, the court held that the sanction of default was "too severe a sanction" even where the defendant did not fully comply with the court's discovery order. *Id.* at 46.

At best, Plaintiff's motion relies on unfounded conclusions borne of speculation as to the answers to questions Plaintiff's counsel left open through superficial, inconsistent deposition questioning. The lawyers in this case did not text concerning business and those who did deleted texts immediately. Despite being asked repeatedly to search, their response has always been the same: that they can confirm there are no text messages concerning Plaintiff or his case. Some of the devices they had in 2015 simply no longer exist.

Defendants' response to this discovery request has been consistent, truthful, and compliant; they have repeatedly confirmed that there are no text messages concerning Plaintiff or his case. Plaintiff is searching for something that does not exist. Plaintiff has been told repeatedly that relevant text messages do not exist, yet he continues to request that the Court unfairly prejudice Defendants and their defenses.

Defendants confirmed that there are no responsive text messages through multiple methods reasonably calculated to discover whether such messages exist. This included, where appropriate, physical device searches; where a physical device search was not possible, they used alternate methods and found no messages.

Plaintiff refuses to accept the answer he has repeatedly been given that there are no such messages. Plaintiff's obstinance does not establish that Defendants violated a Court order or refused to search devices which may have relevant data.

Plaintiff's isolated, incomplete citations to deposition testimony do not demonstrate willful disregard of the Court's orders. Therefore, the Court should deny Plaintiff's Motion to Strike and Enter Default.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants respectfully request that Plaintiff's Motion be denied, that the Court enter an award of attorneys' fees pursuant to OCGA §§ 9-11-37(a)(4) and 9-15-14for Defendants having to respond to this Motion (for Defendants to submit a supplemental applications showing the amount of fees), and for such other and further relief as the Court deems just and proper.

Respectfully submitted, this, the 17th day of June 2019.

CARLOCK, COPELAND & STAIR, LLP

/s/Johannes S. Kingma
JOHANNES S. KINGMA
Georgia Bar No. 421650

/s/Mark D. Lefkow
MARK D. LEFKOW
Georgia Bar No. 004289

Attorneys for Defendants Gordon Rees Scully Mansukhani, LLP d/b/a Gordon & Rees, LLP, Roger M. Mansukhani, Charles Anthony Mulrain, Richard P. Sybert, and Joni B. Flaherty

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CERTIFICATE OF SERVICE

This is to certify that on this date I served a copy of the foregoing document via the Odyssey E-File Georgia system, which sends notice to the following counsel of record:

Warren R. Hinds, Esq.
Warren R. Hinds, P.C.
Crossville Village Office Park
1303 Macy Drive
Roswell, GA 30076

Wallace Neel, Esq.
Law Office of Wallace Neel, P.C.
43 West 43rd Street, Ste. 65
New York, NY 10036-7424

This, the 17th day of June 2019.

CARLOCK, COPELAND & STAIR, LLP

/s/Mark D. Lefkow
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AFFIDAVIT OF JONI FLAHERTY

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PERSONALLY APPEARED before me, the undersigned officer duly authorized by law to administer oaths appeared, Joni Flaherty, who, after being sworn, states and deposes as follows:

1.

I am over the age of 18, and competent to give this Affidavit and do so based upon my own personal knowledge.

2.

I am a Defendant in the case of Terry Hodges v. Gordon Rees Scully Mansukhani, LLP, et al., pending in the State Court of Fulton County, Georgia, Civil Action No. 16EV004768 (the "Lawsuit").

3.

I testified in my deposition on March 14, 2019, that I did not search personal devices for text messages relating to Mr. Hodges in response to my prior counsel asking me about text messages relating to this case. I did confirm that I did not have text messages relating to the Hodges matter. At that time, I did not have the same device as I had in 2015 and my text messages were not backed up to the cloud. I do not text relating to work. I also confirmed in February 2019 that no text messages from my personal devices in 2015 were backed up to the cloud. Therefore, I have and had no text messages relating to the Hodges matter. I searched my contacts in my phone and confirmed that I do not have the cellular telephone numbers stored in

EXHIBIT 1 to RESPONSE TO MOTION TO STRIKE ANSWER

my phone for the persons with whom I communicated regarding the Hodges matter: Mr. Hodges, Mr. Mulrain, Mr. Mansukhani, and Mr. Sybert. Other than additions to my contacts, I have not removed contacts from my cellular telephone since 2015.

4.

I did not delete any text messages concerning Mr. Hodges or his case and I do not have any text messages relating to Mr. Hodges or his case.

Further affiant sayeth not.

Joni Flaherty
Affiant

SWORN to and subscribed
before me, this 10th day
of June 2019.

NOTARY PUBLIC

SUSAN P. KAYE
COMM. #2224703
Notary Public - California
San Diego County
My Comm. Expires Dec. 9, 2021

AFFIDAVIT OF ROGER MANSUKHANI

STATE OF CALIFORNIA

COUNTY OF San Diego

PERSONALLY APPEARED before me, the undersigned officer duly authorized by law to administer oaths appeared, Roger Mansukhani, who, after being sworn, states and deposes as follows:

1.

I am over the age of 18, and competent to give this Affidavit and do so based upon my own personal knowledge.

2.

I am a Defendant in the case of Terry Hodges v. Gordon Rees Scully Mansukhani, LLP, et al., pending in the State Court of Fulton County, Georgia, Civil Action No. 16EV004768 (the "Lawsuit").

3.

I testified in my deposition on March 13, 2019, that I could not recall if I searched my personal devices for text messages. At that time, I could not recall. I have since searched my emails with counsel in this case concerning this case. Without revealing the privileged substance of these emails, I have confirmed that I did, in fact, search text messages in 2017 and 2019 and found no personal text messages concerning Mr. Hodges. Additionally, my habit and practice is to delete my text messages daily. Therefore, any text messages that I sent or received during the years 2015 and 2016 would have been deleted pursuant to this habit and practice.

EXHIBIT 2 to RESPONSE TO MOTION TO STRIKE ANSWER

I did not delete any text messages concerning Mr. Hodges or his case and I do not have any text messages relating to Mr. Hodges or his case.

Further affiant sayeth not.

Roger Mansukhani
Affiant

SWORN to and subscribed
before me, this 13th day
of June 2019.

JANEY SWANSON
COMM. #2221997
Notary Public · California
San Diego County
My Comm. Expires Nov. 16, 2021

NOTARY PUBLIC Janey Swanson

AFFIDAVIT OF RICHARD P. SYBERT

STATE OF WASHINGTON

COUNTY OF KING

PERSONALLY APPEARED before me, the undersigned officer duly authorized by law to administer oaths appeared, Richard Sybert, who, after being sworn, states and deposes as follows:

1.

I am over the age of 18, and competent to give this Affidavit and do so based upon my own personal knowledge.

2.

I am a Defendant in the case of Terry Hodges v. Gordon Rees Scully Mansukhani, LLP, et al., pending in the State Court of Fulton County, Georgia, Civil Action No. 16EV004768 (the "Lawsuit").

3.

My habit and practice, since I started using text messages, is to delete my text messages right after reading or responding to them. I do not recall if I had started using text messages in the year 2015, when I served as counsel for Mr. Hodges; I have learned to do so fairly recently from my children. Nonetheless, if I were texting at that time, I would have deleted any text messages immediately after reading or responding to them. I do not use texts for work, have never done so, and did not at the time of the Hodges representation. I

EXHIBIT 3 to RESPONSE TO MOTION TO STRIKE ANSWER

use texts only for personal matters unrelated to work. I have never received or sent any texts related to the Hodges representation.

4.

I did not delete any text messages concerning Mr. Hodges or his case, and I do not have, nor have I ever had, any text messages relating to Mr. Hodges or his case.

5.

I do not have the personal cell phone I had in 2015, nor was any of its data backed up.

Further affiant sayeth not.

Richard P. Sybert
Affiant

SWORN to and subscribed before me, this 7TH day of JUNE 2019.

NOTARY PUBLIC

LOIDA C GALLEGOS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-13-20

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

TERRY HODGES, an Individual,

Plaintiff,

vs. Civil Action No. 16EV004768

GORDON REES SCULLY MANSUKHANI LLP,

et al.

Defendants.

_____/

VIDEOTAPED DEPOSITION OF JONI FLAHERTY, ESQ.

Taken at San Diego, California

March 14, 2019

Reported by Dana E. Simon - CSR

Certificate No. 12683

EXHIBIT 4 to RESPONSE TO MOTION TO STRIKE ANSWER

client file had been requested?

A No.

Q Did anyone come to you and ask you for documents related to Mr. Hodges to -- for the purpose of compiling his client file?

A I don't know whether it was for the purpose of gathering his client file or the purposes of this litigation. But I have been asked for specific documents.

Q What were you asked for?

A Specifically I was asked for any written notes related to my representation of Mr. Hodges, and I was also asked about text messages related to this case.

Q When were you asked about text messages?

A I don't know, but it was former counsel for -- for the firm and for me.

Q Was it Kyle Kveton?

A No.

Q Was it Kate Whitlock?

A Yes.

Q What did she ask you to do?

MR. KINGMA: I'll object to the form. I think that's calling for attorney-client privileged information.

////

BY MR. NEEL:

Q Did you search your personal devices for text messages?

A No.

Q Did you search any devices for text messages?

A No. I know that none exist related to this case.

Q How do you know that?

A Because I don't text with relationship to my work.

Q You did not look?

A Correct. I know that none exist. I'm certain.

Q Do you use Gmail?

A Yes. On a personal basis, not -- not in relationship to work.

Q Did you search your Gmail account with respect to any requests made by any of your attorneys for you to gather documents?

A Yes.

Q Did you search by search term? How did you search?

A Search term.

Q What terms did you use?

A Hodges, Tucker.

Q Any others?

10:08:29 A I don't remember.
Q Were you given a list of terms to search?
A No.
Q Where else did you look for documents? I'm
10:09:06 sorry --
A Sorry. Where else did I look for documents....
Q In response to requests from any attorney
working on your behalf.
A I looked in my office for any written notes
10:09:21 that I had taken in connection with the case.
Q Did you find any?
A Yes.
Q Since that search, have you found any others?
A No.
10:09:37 Q Do you have offsite storage at Gordon & Rees?
A Not that I use.
Q When you say you searched in your office, do
you mean literally in the room in which you call an
office or --
10:09:48 A That's correct. I keep a number of written
notebooks from various time periods in my office, and I
searched through those notebooks to find any notes
related to my representation of Mr. Hodges.
Q How much did you find? How much material?
10:10:08 A It was probably somewhere between eight and

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

TERRY HODGES, an Individual,

Plaintiff,

vs. Civil Action No. 16EV004768

GORDON REES SCULLY MANSUKHANI LLP,

et al.

Defendants.

_____/

VIDEOTAPED DEPOSITION OF RICHARD P. SYBERT, ESQ.

Taken at San Diego, California

March 15, 2019

Reported by Dana E. Simon - CSR

Certificate No. 12683

EXHIBIT 5 to RESPONSE TO
MOTION TO STRIKE ANSWER

10:27:22 A I had a firm-issued phone. I don't know if it was an iPhone or a Samsung Galaxy. At some point in the past I had a Samsung Galaxy, and then I transitioned over. I think it was earlier than that. So I think the
10:27:39 answer to your question is probably yes.

Q Regardless of the make and model, you had a firm-issued phone?

A Yes.

Q Other than your firm-issued phone, did you in
10:27:48 2015 have a personal phone?

A No.

Q You just had one phone?

A Right. And I used that -- I used the firm-issued phone, I always have, as my personal phone
10:27:59 as well.

Q Did you search your phone for records in response to the request for you to gather documents?

A No.

Q Do you recall deleting any text messages off
10:28:24 your phone?

A I always delete all my text messages after I read them.

Q Was that the case in 2015?

A It's always been the case. But I don't think I
10:28:37 was texting in 2015. I don't think I knew how. It's

only recently I found out how to do it, and my kids taught me.

Q When did you first become involved with the case involving Terry Hodges?

A I believe it's when my partner, Tony Mulrain, called me earlier in the first part of 2015.

Q What did he say when he called you?

A I've -- I've got this client. It's an entertainment IP lawyer. Can you help me?

Q What is your practice area, sir?

A Intellectual property and commercial litigation.

Q Do you do copyright work?

A I do.

Q What's your copyright experience?

A Well, I've been practicing law for 41 years, and I've handled a lot of copyright cases. I know about copyright prosecution, which is a fancy-pants word for registrations and applications. I don't do much of that myself because that's pretty much mechanical administrative work, although I know the law. It's basically copyright litigation and a fair amount of counseling. You know, giving advice to clients.

Q Did you consider bringing any copyrights claims on behalf of Mr. Hodges in this case?

HAWKINS PARNELL THACKSTON & YOUNG LLP

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January 4, 2018

VIA E-MAIL (Trinity.Townsend@fultoncountyga.gov)

Honorable Eric A. Richardson
State Court of Fulton County
185 Central Avenue SW
Suite T3755
Atlanta, GA 30303

Re: *Terry Hodges v. Gordon Rees et al*
CAF# 16EV004768

Dear Judge Richardson:

Apparently to circumvent this Court's 15-page limit for briefs, Plaintiff submitted a 23-page, single spaced letter which complains strenuously about Defendants' privilege log[1]. From the skeletal information contained in the log (as is appropriate for such a document), Plaintiff weaves a tale worthy of J.K. Rowling: he's created fantastic beasts and conspiracies out of thin air. Indeed, from an entry such as "From Mansukhani to Bitter regarding weather", Plaintiff has created "Mansukhani said to Bitter that the weather tomorrow will be perfect for robbing the bank". Quite plainly, neither Plaintiff's conjectures nor his conclusions are appropriate nor accurate. Defendants submit that the Court should reject them all.

Plaintiff, in his letter, as he has since inception of the case, repeatedly laments that Defendants "covered up", "concealed", and "failed to disclose", but never identifies what it is that was allegedly withheld from him. As Plaintiff admits in his Complaint, Richard Sybert advised Plaintiff that GRSM had a conflict on the day they discovered it. (Comp., ¶31). And this conversation was followed by an e-mail which stated, "[W]e discovered a conflict in that we represent Netflix in other cases. We cannot ethically proceed unless we dismiss them as a defendant." (Comp., Ex. C). Clearly, nothing was withheld or not disclosed to Mr. Hodges and his accusations to the contrary do not convert privileged documents into discoverable information.

[1] Conspicuously absent from Plaintiff's letter—and any other writing from Plaintiff in this case—is any supplemental response to the discovery Defendants served on Plaintiff that Plaintiff has failed adequately to answer. That, also, is a matter which needs the Court's attention.

EXHIBIT 6 to RESPONSE TO
MOTION TO STRIKE ANSWER

Plaintiff also complains that Defendants "tricked him" into dropping his case against Netflix, thus "giving up" his rights against Netflix. This point, like the first, is neither true nor pertinent to the decision the Court is to make at this time. Plaintiff, assuming he has not permitted the statute of limitations to run, still has today whatever rights he had against Netflix when the Amended Complaint was filed in the Chris Tucker case. In tacit admission that the "rights" were either non-existent or of no value, Plaintiff has chosen not to pursue them.

Plaintiff repeatedly argues that Defendants were required to withdraw upon discovery of the conflict, but that is neither the law nor the decision for the Court to make at this juncture. Defendants' conduct, upon learning of the conflict, was appropriate, legal, and ethical. And Plaintiff's self-contradictory, circular arguments on this matter are evidence of that. Plaintiff contends, on the one hand, that Defendants were required to withdraw and, on the other, that they were not permitted to "threaten to withdraw"[2]. The internal inconsistency in Plaintiff's argument alone is evidence of its falsity. However, none of that is pertinent to the question at bar: whether the documents submitted by Defendants *in camera* are privileged and also otherwise discoverable. The answers to those questions are yes and no, respectively.

Trying to avoid this conclusion, Plaintiff in his letter makes a number of arguments about the attorney-client, work product, and marital privileges, as well as the standards for discovery. He fails, however, to direct the Court to a single instructive Georgia case on these issues. As the Court recognized, Georgia law is the governing authority for its decision on discoverability and admissibility. ("I'm ready to be guided on that point [regarding privilege] by what Georgia law says…" 11/03/17 transcript at 27-28). Under that law, as set forth in Defendants cover letter to the Court of December 6, 2017, the few Flaherty e-mails, and their oral conversations, are protected by the marital privilege and the remaining documents are protected by the attorney-client or anticipation of litigation/work product privileges or are entirely immaterial and, thus, not discoverable.

Even in the non-Georgia law arguments that he makes, Plaintiff mixes and matches statements about the various privileges, how they arise, and how they work. With respect to the marital privilege, he ignores Georgia law entirely. And with respect to all the privileges, he fails to distinguish between the firm file for Plaintiff's case (every page of which—without exception--was produced to Plaintiff) and other documents that might concern or mention or be about Plaintiff, the conflict, and/or Netflix, but were not the "fruits of labor" created by GRSM in their representation of Plaintiff. *See, In the Matter of Kaleidoscope, Inc*., 15 B.R. 232 (B.R. N.D. GA. 1981), *modified on other grounds*, 25 B.R. 729 (N. D. Ga. 1982). Plaintiff is not entitled to privileged or irrelevant documents that are not the fruits of GRSM's labor on Plaintiff's behalf.

[2] The case Plaintiff cites for this proposition does not remotely say what Plaintiff claims that it does. *See Unified Sewerage Agency v. Jelco, Inc*., 646 F.2d 1339, 1345 n. 4 (9th Cir. 1981).

In arguing that he is entitled to something more than has already been produced, Plaintiff's letter disregards completely Defendants' supplemental responses to Requests for Production. In that pleading, served on December 6 with the privilege log, Defendants stated that, "No named Defendant and no partner of the Law Firm Defendant has any texts or social media post which relates in any manner to Plaintiff." Defendants adhered to the Court's directive and asked every law firm partner and every named defendant to check personal devices for messages that were about Terry Hodges. There simply were no personal e-mails, chats, text messages, Facebook Messenger messages, WhatsApp messages, Google IM messages, WeChat messages, other form of short message system, or "chat" documents about him.

Plaintiff concedes that the documents produced to him by Defendants—which include much more than the file—do not at all support his claims. Rather than then concede that his fishing expedition was unsuccessful, Plaintiff boldly urges the Court to permit him to depose all the people whose name appears on the privilege log. Besides expanding the scope of discovery far beyond anything that is reasonable and permitted by the Civil Practice Act, this argument wholly flouts the purpose of the log and the submission *in camera*: the documents and information are privileged and therefore **not discoverable** in written or oral form regardless of whether the information might otherwise be considered relevant or reasonably calculated to lead to the discovery of admissible evidence.

Defendants have produced to Plaintiff all that to which he is entitled under Georgia law, as the Court can tell from the documents submitted *in camera*. If the Court has any question or concern about any particular document, Defendants would be happy to address them in a manner which will not reveal the privileged content to Plaintiff.

Despite Defendants good faith compliance with the discovery rules, Plaintiff has failed and refused to fulfill his own obligations. He has failed to provide any of the information Defendants asked for in their good faith letter seeking Plaintiff's cooperation and the Court has not yet addressed Defendants' Motion to Compel.

For this reason, Defendants respectfully request that the Court schedule another in-person discovery conference with the parties.

Once the written discovery issues are resolved, Defendants will be in a position to work with Plaintiff to schedule depositions to take place at mutually convenient time and place.

We look forward to the Court's further direction.

Very truly yours,

HAWKINS PARNELL
THACKSTON & YOUNG LLP

Kathryn S. Whitlock

KSW/mlb

cc: H. Lane Young
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Warren Hinds