IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

TERRY HODGES, an Individual,	)	
	)	
Plaintiff,	)	Civil Action No. 16EV004768
	)	
vs.	)	
	)	
GORDON REES SCULLY MANSUKHANI LLP, et al.	)	

MOTION TO STRIKE ANSWER AND ENTER DEFAULT

COMES NOW, Plaintiff to the above-styled civil action, and files this motion to strike Defendants' Answer and enter default judgment pursuant to O.C.G.A. § 9-11-37(2)(C). This sanction is appropriate for the Defendants ongoing, defiance of the Court's discovery Orders and spoliation of evidence in a manner that has been clearly proved during the nearly three (3) years of this case to be wilful, in bad faith, and in conscious disregard of the discovery process and this Court's Orders.

For years, Plaintiff has demanded the text messages that the individual Defendants and their law partners exchanged in 2015 concerning, *inter alia*, (1) their now-admitted failure to detect an actual, non-consentable conflict of interest between the Plaintiff and Netflix, and (2) Gordon & Rees indefensible failure to withdraw from the representation mandatorily required by both the California (3-700(B)(2) & 3-310) and Georgia (1.7) Rules of Professional Conduct.

In 2017, the Court ordered all text messages from parties and partners produced. In response, Defendants' prior counsel wrote to the Court and declared that all parties and partners had searched their personal devices, with no results.

However, when placed under oath during depositions in San Diego in March 2019, three (3) Defendants denied having made any such search—more than a year after telling the Court the opposite. Two of the Defendants stated openly that they had deleted all text messages from their personal devices.

The Court will recall that for more than a year between 2017 and 2018, these same Defendants hid responsive emails under a farcical claim of "privilege" that the Court found (in two Orders dated September 11 & 12, 2018) to be entirely unfounded: the emails sought only to protect the business relationship with Netflix and did not even purport to seek nor render legal advice. Indeed, Defendant Mansukhani blithely conceded at deposition that none of the claims of "privilege" ever had a basis.

With the latest revelations concerning the fact that it never even looked for the destroyed text messages, it is clear that Gordon & Rees has never taken its discovery obligations seriously.

For the reasons set forth herein, Plaintiff respectfully moves to strike Defendants' answer as an appropriate sanction for Defendants' ongoing and willful refusals to comply with discovery Orders, and for their sworn-to spoliation of evidence through the deletion of text messages.

Factual Background

A. In Response to Extended Briefing of all Discovery Disputes, The Court Ordered All Text Messages from Named Parties and Litigation Partners to be Produced

From September to November of 2017, Plaintiff engaged in a protracted back-and-forth with Defendants' predecessor counsel, in which both sides briefed their contentions concerning the inadequacy of the other's document production. At one point, both

Plaintiff's and Defendant Mulrain's depositions were scheduled, only to have Gordon & Rees' predecessor counsel "cancel" both the day before, after both Hodges and his counsel had traveled to Atlanta. During that briefing, for example, Plaintiff briefed the topic of "Defendants Should be Compelled to Produce Documents Concerning The Reaction Within the Firm to the Conflict's Discovery," and observed that "not a single text message or other form of SMS message or non-email electronic message has been produced, despite being expressly called for." (Ex. A at 4, 5 n.8)

The Court wisely convened a Rule Nisi conference on November 3, 2017 to address all of the back-and-forth discovery complaints. There, the Court led the following discussion concerning the Defendants' obligations to produce text messages:

> THE COURT: All right. So let me ask you, Mr. Neel, what do you think the appropriate scope should be? Because I don't know that we're even remotely relevant if we got first year associates who never had any other involvement in any of these matters, hearing something or sending an e-mail about did you hear what's happened with the conflict and with Netflix? I don't know that means anything in the case. So, what's the boundary?
>
> MR. NEEL: Well, I think first year associates -- I respectfully disagree to the extent that any of the associates knew that withdrawal was the only permissible response. Secondly, **if you're going to limit it to the partners, that seems permissible because the partners are going to bear the liability for Mr. Sybert's actions and the other defendant's actions, so they're the ones we would have an interest in talking about**, but they did not object under overbroad. They objected on relevance. So they're not saying it's too hard to do or it's too cumbersome. They're just saying it's not relevant.

Ex. B (at 39:13-40:7 (emphasis added)).

The Court then issued its Order from the bench:

> 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.)**

(*Id.* at 40:15-24 (emphasis added)).

B. Defendants' Prior Counsel Declares to the Court and that All Gordon & Rees Partners Searched Personal for Text Messages and <u>None Were Found</u>

Two months later, in a January 4, 2018 letter to the Court, Defendants' former lawyer wrote as follows:

> "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.

Ex. C (Letter from Kathryn Whitlock, Esq. to Court dated Jan. 4, 2018, at p. 3 (emphasis added)).

C. At Deposition, Defendants Deny Ever Searching their Devices, and <u>Two Defendants Reveal that they Deleted All Texts from their Devices</u>

Sixty days ago, Defendants Sybert, Mansukhani, and Flaherty were deposed in San Diego. None of them had searched their devices for any text messages.

Sybert testified (Ex. D):

> Q Did you search your phone for records in response to the request for you to gather documents?
> A No.

Flaherty testified (Ex. E):

> Q Did you search your personal devices for text messages?
> A No.

Mansukhani testified (Ex. F):

> Q Did you search your personal devices for text messages?
> A I can't recall.

Mansukhani and Sybert went on to state that they have deleted any text messages from their devices.

Mansukhani:

> Q: …. well, let me ask you this: Did you search your text messages for anything responsive to the doc requests in this action?
> A: I don't recall, but there's zero chance I would have any text message, that I delete mine always.

(Ex. F at 117:21 – 118:1)

Sybert:

> Q Do you recall deleting any text messages off your phone?
> A I always delete all my text messages after I read them.

(Ex. D at 16:19 – 22).

Argument

A. The Answer should be Stricken under O.C.G.A. 9-11-37

Section 9-11-37(2) of the O.C.G.A. provides in pertinent part:

> (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:**
>
> ***
>
> **(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…

In *Didio v. Chess,* 218 Ga.App. 550, 551, 462 S.E.2d 450 (1995), the Court of Appeals set forth the standard for striking an Answer:

> The drastic sanctions [found in OCGA § 9-11-37(b)(2)(C)] cannot be invoked except in the most flagrant cases--where the failure is wilful, in bad faith or in conscious disregard of an order. There must be a conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance." (Citation and punctuation omitted.)

The *Didio* trial court's ruling was affirmed based not only on the "failure to comply with a discovery order the trial court had issued," but also based on the

> existence or nonexistence of wilfulness … not only in the context of the time period prescribed in the order compelling answers, but in the context of the entire period beginning with service of interrogatories and ending with service of answers. Events transpiring during this entire time period are probative of whether appellant acted with 'conscious indifference to the consequences of failure to comply' with the order compelling answers. *Swindell v. Swindell,* [233 Ga. 854, 857(3) (213 S.E.2d 697) (1975)].

Id. at 46; *see also Rucker v. Blakey*, 157 Ga. App. 615, 278 S.E.2d 158 (Ga. Ct. App. 1981) (affirming striking of Answer for a willful and bad-faith failure to respond "because it was inconvenient.")

Gordon & Rees' demonstrable willfulness is evident from its long-running pattern of hiding, obstructing, and now destroying evidence. That is more than sufficient to support the sanction of striking the Answer and entering default, because Georgia courts uniformly agree that such a sanction for discovery non-compliance is right and appropriate *even without* demonstrable willfulness. *Howard v. City of Columbus,* 239 Ga.App. 399, 416, 521 S.E.2d 51 (Ga. Act. App. 1999) ("A finding of actual wilfulness is not required for the imposition of sanctions pursuant to § 9-11-37(b)(2)(C); "only a conscious or intentional act in disregarding the duty to make discovery is necessary for imposing the sanction of default.")

In *Potter v. Am. Medcare Corp.,* 225 Ga.App. 343, 346-47, 484 S.E.2d 43 (Ga. Ct. App. 1997), the Court of Appeals upheld the striking of a pleading because

> ….there was evidence to support the trial court's finding that appellant wilfully and consciously disregarded the discovery order. At the time of the July 1, 1996 hearing on appellees' motion to dismiss, appellant still had not fully complied with the trial court's order requiring a response to discovery requests. By that time, more than 13 months had elapsed from the time appellant's responses were originally due, the last extension of time had expired May 31, 1995, and almost two months had elapsed since full and complete supplemental responses were due under the trial court's order. Appellant had been on notice of the deficiencies in his supplemental responses, if not from the inception of his supplemental answers, at least from June 14, 1996, when the appellees filed a second supplement to their motion to dismiss setting forth such deficiencies, which was served on appellant along with a letter requesting full and complete responses. During the 17 days between the time appellees filed their second supplement to their motion to dismiss and the date of the hearing, appellant made no effort to correct any of the deficiencies. As the trial court noted, it was only at the hearing, after it was apparent that the trial court was extremely displeased with appellant's lack of response to her order that appellant's counsel offered to try and contact her client and once again attempt to fully respond to the ordered discovery. Appellant's failure to sufficiently and expediently respond was a "conscious or intentional failure to act,

> as distinguished from an accidental or involuntary non-compliance." (Citation and punctuation omitted.) *Didio v. Chess,* supra at 551, 462 S.E.2d 450.

By comparison to *Potter*, Gordon & Rees has proven over several *years* that it does not take its discovery obligations seriously.

Ms. Whitlock's letter above is categorical: all partners and parties searched their personal devices. But equally categorical is the San Diego deposition testimony: *none of them searched*—save that named partner Mansukhani "can't recall," and in any event he long ago deleted whatever he had (as did Sybert).

That duplicitousness is un-surprising, considering Gordon & Rees' years-long refusal to hand-over so-called "privileged" emails that the Court found lacked even the slightest indicia of privilege: no legal advice was sought, and none rendered. Astonishingly, after all of that resistance and forced-delay, named partner Mansukhani blithely admitted at deposition that *there had never been* any predicate basis for the "privilege" claims on those emails:

> Q Right. **Are you aware that you claim privilege over this document?**
> A I don't know.
> Q Okay. **Who in this exchange is the lawyer and who's the client?**
> **A** I mean, Dion's our managing partner and I'm a named partner. But **there's no attorney/client relationship between us two.**
> Q Okay. And you're not seeking any -- is there anything in here that states to you that you're seeking legal advice --
> A Not on --
> Q -- that legal advice was sought or rendered?
> A Not on this document that I'm seeing.

Ex. F (60:4-17; emphasis added).

Q Looking at that exhibit, this is again a document that you've asserted privilege over in this matter.
A Exhibit 9?
Q Yes. Can you identify for me on that document **who's serving as attorney and who's serving as the client?**
A No.
Q Can you **identify any legal advice** being sought or rendered?
A Not on the document, **no.**

(*Id.* 64:17 -65:2; emphasis added)

Q In that document who -- **who is the attorney and who is the client** in that document for purposes of your privilege assertion?
A **There's no attorney-client privilege.**
Q **What is the legal advice** being sought or rendered in that document?
A **There's no legal advice** being sought or rendered, in my opinion.

(*Id. at* 71:11-18; emphasis added).

Q Similar question to the other exhibits. **Who's the -- who's the attorney and who's the client** in these exchanges with respect to your assertion of attorney-client privilege?
A **None. There's no one.**
Q **And is there any legal advice** being rendered or sought in this exhibit?
A **No.**

(*Id. at* 89:24-90:4; emphasis added).

Q … In 14, this is a document over which you asserted privilege. **Who is the attorney and who is the client** in that e-mail?
A **There's no privilege in that e-mail.**
Q Okay. And do you see any effort to seek and/or render **legal advice**?
A **No.**

Q **Same questions, just for brevity,** with regard to 15: Basically the same answers? **No attorney, no client and no privilege?**
A **Correct.**

(*Id. at* 100:21-101:6; emphasis added).

Q …. this was held back as privileged. Same questions: **Who's the attorney and who's the client?**
A **No. There's no privilege here.**
Q And how about **any attempt to render or receive legal advice?**
A **No.**

(*Id. at* 103: 4-10; emphasis added). At every step in this October 2016 case, Gordon & Rees has made a mockery of the discovery process. Now, at last, Mansukhani was forced to testify under oath, and did not even attempt to justify the claim of privilege that Gordon & Rees used to delay the matter for more than a year—and continued to cling to even after the Court Ordered rejected the claim and compelled production.

Those same examinations under oath in San Diego revealed that Gordon & Rees *never* even looked for the text messages—despite telling the Court in writing that every partner had looked at his or her personal device and found none.

Gordon & Rees is insufficiently mindful of this Court and its obligations here. An on-the-record Order did not scare it. Two Orders compelling production of the withheld "privileged" emails did not move it to act.

Gordon & Rees has proven over several years that it does not take its discovery obligations seriously. Attorney Whitlock's statement in her January 4, 2018 Letter is

categorical: all Gordon & Rees partners and parties searched their personal devices and came up with nothing.

Categorical, too, is the deposition testimony of all three San Diego Defendants: *no one searched*, save that named partner Mansukhani "can't recall" if he did—and in any event he long ago deleted whatever he had (as did Sybert).

That duplicitousness is un-surprising, considering Gordon & Rees' years-long refusal to hand-over so-called "privileged" emails that the Court found lacked even the slightest indicia of privilege: no legal advice was sought, and none rendered. Even after the Court ordered Gordon & Rees to produce them, Gordon & Rees refused for weeks on end, until finally a Contempt motion had to be threatened.

The Court has ample reason to strike the Answer under O.C.G.A. § 9-11-37. Respectfully, it should do so, and bring this long-running pattern of gamesmanship to a just end.

B. <u>The Answer Should Be Stricken as Sanction for Spoliation</u>

A trial court may strike an answer or enter judgment for the defendant where a party failed to preserve important evidence after contemplating litigation. *See, e.g.*, *Delphi Communications Inc. v. Advanced Computing Technologies Inc.*, 336 Ga. App. 435 (2016), 336 Ga. App. 435 (trial court properly struck defendant's answer for failing to preserve computer hard drives); *Howard v. Alegria*, 321 Ga. App. 178 (2013) (trial court properly struck defendant's answer for failing to preserve a vehicle's black-box); *Flury v. Daimler Chrysler*, 427 F.3d 939 (11th Cir. 2005) (applying Georgia law and holding district court properly dismissed case because plaintiff failed to preserve his vehicle).

"Spoliation refers to the destruction, failure to preserve, or significant alteration of evidence that is necessary to pending or contemplated litigation." *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am.*, 258 Ga. App. 767, 769 (2002). Georgia law allows a finding of spoliation if the loss of the evidence occurs at a time when there is "contemplated or pending litigation." *Bouve & Mohr*, 274 Ga. App. 758, 762 (2005).

The party bringing forth a spoliation allegation has the initial burden to produce evidence of spoliation. *See Flores v. Exprezit! Stores 98-Georgia LLC*, 314 Ga. App. 570, 574 (2012). Proof of spoliation raises a rebuttable presumption against the spoliator that the evidence favored the spoliator's opponent. *R & R Insulation Servs., Inc. v. Royal Indemnity Co.*, 307 Ga. App. 419, 436 (2010).

Factors that Georgia courts consider when fashioning an appropriate spoliation remedy, include, but are not limited to the following:

> (1) whether the [party seeking sanctions] was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [party who destroyed the evidence] acted in good or bad faith; and (5) potential for abuse.

R.A. Siegel Co., 246 Ga. App. at 180 (*quoting Chapman*, 220 Ga. App. at 542) (brackets in original) (internal citations omitted). An analysis of each of these factors leads to the natural conclusion that Defendants' Answer should be struck.

Courts find spoliation where a party is instructed to preserve evidence when a party fails to preserve evidence after contemplating litigation. *See, e.g., Delphi* (spoliation where former employees failed to preserve hard drives after lawsuit was filed); *Kitchens v. Brusman*, 303 Ga.

App. 703 (2010) (trial court abused its discretion in *not* finding spoliation where defendants failed to preserve evidence after contemplating litigation); *Wal-Mart Store, Inc. v. Lee*, 290 Ga. App. 541 (2008) (trial court properly found Wal-Mart failed to preserve videotape evidence after contemplating litigation); *AMLI Residential Properties, Inc. v. Georgia Power Co.*, 293 Ga. App. 358 (2008) (trial court properly found defendant apartment complex spoliated evidence); *Bouve*, 274 Ga. Ap. 758 (same).

In *Howard*, a plaintiff sued a truck driver and its owner after a crash. Despite anticipating litigation, the defendants destroyed the truck's black-boxes and made repairs to the vehicle after the crash. *Id.* at 184. The trial court found the destroyed information was "the highest and best evidence of vehicle defects, system malfunctions, and brake problems and of what actually occurred immediately prior to and during the [collision]," and accordingly, plaintiff had been prejudiced. *Id.* at 184-85. The court struck defendant's answer. *Id.* at 178. The appeals court affirmed. *Id.* at 185.

In *Delphi*, the plaintiff accused Delphi of improperly soliciting customers and copying software products without consent. *Delphi*, 336 Ga. App. at 435. Delphi presumably received notice of the lawsuit upon service of the complaint, but then did not save "mirror images" of the computer hard drives in the state they were in as of the date Delphi was served. *Id.* The trial court found Delphi had a duty to preserve the hard drives and its failure to do so harmed the plaintiff. *Id.* Specifically, the trial court found "a meaningful link between [plaintiff's claims] and the spoliation existed, as a mirror image of [Delphi's] hard drives from the time frame of the filing of the complaint *could have* revealed evidence relevant to the critical issue of whether the software on [Delphi's] computers was copied from [Plaintiff's] computers." *Id.* at 438-39. As a

result, the trial court struck Delphi's answer. *Id.* at 439. The appeals court agreed with the trial court's analysis and decision to strike Delphi's answer. *Id.*

Striking Gordon & Rees' answer is appropriate here because named partner Mansukhani and partner Sybert admit to destroying evidence at a time post-discovery of the conflict, when they indubitably had to anticipate litigation. It is particularly egregious because the texts they deleted constituted part of Hodges' Client File. Those texts—which are indubitably both "communications" and items "reasonably necessary to the client's representation." Hodges actually owns (or *owned*) them as "personal papers and property" under Formal California Bar Opinions. *See, e.g.,* Rule 3-700(D) of the Rules of Professional Conduct of the State Bar of California; State Bar of California Formal Op. No. 2007-174; State Bar of California Formal Op. No. 1992-127.

Hodges is extremely prejudiced by the destruction because the texts are the crown jewels of evidence of intent and willfulness in Gordon & Rees' treatment of their client. If the last few years in American politics have taught us anything, it is that in mid-2015, otherwise highly intelligent people would say things in text messages—even on company devices—that they would never say in email. Sybert and Mansukhani (and by proxy Gordon & Rees) have deprived Hodges of the best evidence of what they and their partners were thinking.

Furthermore, Gordon& Rees' bad faith is palpable and, at this point, beyond dispute. From the moment they discovered the conflict, Hodges went from the beneficiary of Defendants' fiduciary duties to a problem to be avoided. Even before the "privilege" nonsense outlined above, Gordon & Rees had withheld those emails and their text messages from Hodges when producing his Client File in summer 2016, al in rank violation of the California Bar Rules.

There is no jury instruction or other sanction that can provide Plaintiff fair redress. Under this reasoning, the Court should strike Defendants' Answer. Indeed, if this Court does not strike Defendants' answer, then Gordon & Rees will be rewarded for all of the misconduct it has openly engaged in. Respectfully, the Court should not countenance such an absurd result. Gordon & Rees has sought to thwart discovery at every turn. If there is no penalty, it will succeed.

WHEREFORE, Plaintiff requests this Court enter an Order striking Defendants' Answer.

RESPECTFULLY SUBMITTED THIS 22d DAY OF MAY, 2019.

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IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

TERRY HODGES, an Individual,	)	
	)	
Plaintiff,	)	Civil Action No. 16EV004768
	)	
vs.	)	
	)	
GORDON REES SCULLY MANSUKHANI LLP, et al.	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, a true and complete copy of **PLAINITFF'S MOTION TO STRIKE ANSWER AND ENTER DEFAULT** was served Defendants upon all counsel in this action by electronic filing and by electronic mail to:

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Dated: May 22, 2019,

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IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

TERRY HODGES, PLAINTIFF,	)
VS.	) CIVIL ACTION FILE NO. 16EV004768
GORDON REES SCULLY MANSUKHANI, LLP, ET.AL DEFENDANTS.	)

EXPEDITE MOTION HEARING

— — —

BEFORE THE HONORABLE ERIC RICHARDSON, JUDGE
FULTON COUNTY JUSTICE CENTER TOWER - COURTROOM 3C
FULTON COUNTY STATE COURT, ATLANTA, GEORGIA
NOVEMBER 3, 2017

APPEARANCES OF COUNSEL:

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ATTORNEY AT LAW

FOR THE DEFENDANT: KATHRYN S. WHITLOCK
ATTORNEYS AT LAW

OCTAVIA L. WINFREY
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ATLANTA, GEORGIA 30303
770-873-5548

THE PEOPLE -- AND THE PEOPLE WHO ACTUALLY WERE DOING WORK FOR MR. HODGES.

MS. WHITLOCK: THE ONLY PEOPLE WHO DID WORK FOR MR. HODGES WERE MR. SYBERT, MRS. FLAHERTY AND, ARGUABLY, MR. MULRAIN. NOBODY ELSE DID WORK FOR MR. HODGES. AND MR. SYBERT IS THE DECISION-MAKER. SO, AGAIN, HE'S THE ONE THAT WHEN SOMEBODY SAID, YOU HAVE A CONFLICT, HE DECIDED THESE ARE MY OPTIONS. AND AS I SAID AT THE BEGINNING, MR. NEEL KEEP SAYING, YOU DIDN'T HAVE IT. YOU DIDN'T HAVE IT. YOU DIDN'T HAVE IT. THAT'S THE DECISION THAT HAS TO BE MADE LATER. THAT'S NOT MY CALL OR HIS CALL. WE READ THE LAW DIFFERENTLY.

THE COURT: ALL RIGHT. SO LET ME ASK YOU, MR. NEEL, WHAT DO YOU THINK THE APPROPRIATE SCOPE SHOULD BE? BECAUSE I DON'T KNOW THAT WE'RE EVEN REMOTELY RELEVANT IF WE GOT FIRST YEAR ASSOCIATES WHO NEVER HAD ANY OTHER INVOLVEMENT IN ANY OF THESE MATTERS, HEARING SOMETHING OR SENDING AN E-MAIL ABOUT DID YOU HEAR WHAT'S HAPPENED WITH THE CONFLICT AND WITH NETFLIX? I DON'T KNOW THAT MEANS ANYTHING IN THE CASE. SO, WHAT'S THE BOUNDARY?

MR. NEEL: WELL, I THINK FIRST YEAR ASSOCIATES -- I RESPECTFULLY DISAGREE TO THE EXTENT THAT ANY OF THE ASSOCIATES KNEW THAT WITHDRAWAL WAS THE ONLY PERMISSIBLE RESPONSE.

SECONDLY, IF YOU'RE GOING TO LIMIT IT TO THE

PARTNERS, THAT SEEMS PERMISSIBLE BECAUSE THE PARTNERS ARE GOING TO BEAR THE LIABILITY FOR MR. SYBERT'S ACTIONS AND THE OTHER DEFENDANT'S ACTIONS, SO THEY'RE THE ONES WE WOULD HAVE AN INTEREST IN TALKING ABOUT, BUT THEY DID NOT OBJECT UNDER OVERBROAD. THEY OBJECTED ON RELEVANCE. SO THEY'RE NOT SAYING IT'S TOO HARD TO DO OR IT'S TOO CUMBERSOME. THEY'RE JUST SAYING IT'S NOT RELEVANT.

MS. WHITLOCK: AND, YOUR HONOR, AGAIN, WHAT'S THE QUESTION HE'S TALKING ABOUT BECAUSE WHEN HE SAYS WE DIDN'T OBJECT TO HIS OVERBROAD, WE DIDN'T DO IT. IF HE'S TELLING ME HE WANTS EVERY E-MAIL OR EVERY TEXT MESSAGE OR EVERY CONVERSATION THAT ANY PARTNER AT GORDON AND REES HAD ABOUT NETFLIX, I CAN'T DO THAT. I MEAN, THAT IS WAY OVERBROAD. I MEAN, IT'S A 600 LAWYER FIRM.

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.

MR. NEEL: ON THAT TOPIC, THE LAST POINT I HAVE,

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

TERRY HODGES, an Individual,	)	
	)	
Plaintiff,	)	Civil Action No. 16EV004768
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	)	
GORDON REES SCULLY MANSUKHANI LLP, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO SECOND MOTION FOR PROTECTIVE ORDER

Plaintiff respectfully requests that the Court deny the Defendants' October 6, 2017 Motion for Protective Order ("Second Motion"). Plaintiff submits this brief earlier than required to permit the Court to review it before Friday's Rule Nisi appearance on the Second Motion.

This Second Motion is purely a diversionary tactic to deflect attention from Defendants' inexplicable discovery conduct, and try to salvage some credibility. Respectfully, the Court should not be fooled. Defendants have thwarted discovery at every turn. As further proof, consider that just 24 hours before the Rule Nisi hearing, they have yet to provide a privilege log, despite repeated demand. Indeed, this week Defendants asserted another new privilege—the "marital privilege"—to suddenly demand the claw-back of several emails that were annexed to the publicly-filed Complaint over a year ago. Undoubtedly the spouses involved have exchanged ample correspondence about Hodges, but GRSM has not produced it. Defendants have also refused to provide the date on which the spouses were married, a threshold fact.

FACTUAL SUMMARY

The Court is familiar with the case, so Plaintiff will dispense with any discussion separate from his Opposition to First Motion for Protective Order ("Opposition to First Motion").

One claim in the Second Motion merits specific response, though. Contrary to

Defendants' newfound position, Mr. Hodges did not ever sign a "work for hire" agreement with Chris Tucker, nor did he "equivocate" about it. When Mr. Tucker was in negotiations to sell CHRIS TUCKER LIVE to Netflix in early 2015, Mr. Tucker appeared in Mr. Hodges' hotel room to demand he sign a "Consultant Agreement" including a work-for-hire clause and a stand-alone payment of "an additional $5,000 for services Consultant renders during the development, production, and post-production of the Comedy Concert Film." (Def. Ex. 13 at 000048 ¶ 2). That 2015 document was dated, "August 1, 2012." (*Id.*) Mr. Hodges refused to sign it. (Def. Ex. 14 at 000604.) When GRSM sued Tucker and Netflix, they knew this, and alleged:

> In or about May 9, 2015, at a show in St. Louis Missouri, Tucker presented Plaintiff with an unsigned "Consultant Agreement" (hereinafter the "Sham Agreement"), backdated to August 2012, in an effort to alter and renege on his prior contractual agreements with and promises to Plaintiff *** Plaintiff refused to sign the Sham Agreement, and still has not been compensated for his work on the Film…

(Def. Ex. 7, at p 5, ¶ 24).[1] It was only after suit was filed that Mr. Tucker's lawyer sent GRSM a copy of the "Consultant Agreement"—with Mr. Hodges' signature *forged* on it. (Def. Ex. 14 at 001417-1423; 001488).

The most interesting part of that forgery is that the reference to the $5,000 payment was *removed*. (*Cf.* Def. Ex. 13 000048, ¶ 2 *with id.* 000071, ¶ 2). The reason is obvious: anyone can back-date a 2015 "contract" to 2012 and forge a signature, but no one can cause Mr. Hodges' bank records from 2012 to show a $5,000 payment that was never made. Hence, a forgery was created that omitted any reference to the $5,000, because the even if the forgery was believed, the "contract" would be unenforceable unless Mr. Tucker had performed by paying the $5,000. The 2012 bank records would have revealed that he did not, and thus would have revealed the

[1] Def. Ex. 7 at 4, ¶¶ 24-25:

forgery. Hence, that $5,000 payment provision disappeared in the forged version.

Those facts were all well-known to Defendants when they represented Mr. Hodges. Had they zealously represented Mr. Hodges against Mr. Tucker instead of sabotaging and then abandoning him, they would have won and proved a jaw-dropping forgery.

I. No Privilege Has Been Demonstrated and the Crime-Fraud Exception Would Vitiate It

In the Opposition to First Motion, Plaintiff set forth the timeline of underlying events, and noted both (1) the Defendants' failure to even attempt to justify their assertions of attorney-client privilege or work product immunity; and (2) the fact that the Crime-Fraud Exception would undercut any claim of privilege or immunity due to the multiple crimes and frauds that were committed in a months-long scheme overseen by named-partner, Defendant Mansukhani.

Defendants have not even taken the initial step of providing a privilege log as required under Georgia Uniform Superior Court Rule 5.5(1), and have denied any responsibility to do so.[2] Defendants also rely upon *St. Simons Waterfront LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013) ("*St. Simons*"), but make no effort to carry their burden to establish that intra-firm privilege. They have no answer to the fact that the claimed privileged communications were in furtherance of multiple months-long frauds against Hodges; at least three frauds upon the United States District Court for the Central District of California, because Defendants did not make mandatory[3] disclosures of the non-consentable conflict of interests; and up to three crimes under Cal.Bus. & Prof. Code § 6128 (criminalizing deceptive acts in Court).

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[2] Second Motion, at 9.

[3] *United States v. Shetty*, No. CIV.SACV07-0427DOC, 2009 WL 841566, at *10 (C.D. Cal. Mar. 27, 2009) ("To have a conflict of interest *sufficient to require disclosure to the Court*, Petitioner's attorney would have had to have a personal interest in the underlying proceedings *or a conflict resulting from representation of other involved parties*.") (emphasis added).

II. Defendants Should be Compelled to Produce Documents Concerning The Reaction Within the Firm to the Conflict's Discovery

Plaintiff's Document Request No. 15 (Ex. 23) seeks "[a]ny and all documents which reflect or constitute communications between and among Gordon and Rees personnel in response to the realization" of the failed conflict check that Defendants have admitted. Defendants objected based on privilege, which cannot be asserted both for the reasons discussed above,[4] *and* because this demand is not limited to GRSM attorneys. Rather, it seeks documents from GRSM all personnel, including non-attorneys such as paralegals and staff.

Defendants' other objection is to relevance, which is a non-starter under Georgia's "very broad[]" interpretation of relevance.[5] These responsive documents would be probative of Defendants' states of mind, the workplace pressures on them to cover-up their errors, and the degree to which the mandatory ethical response—withdrawal[6]—was known to Defendants or others at GRSM. The documents may also inform the quantum of punitive damages awarded in this case due to Defendants' bad faith, wantonness, oppression and conscious indifference to the consequences of their conduct.[7]

Defendants claim that the demanded documents are not relevant because they do not touch upon the "standard of care." But that is (1) meritless, because the "standard of care" is not

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[4] Plaintiff should also be compelled to drop the assertion of privilege and respond in full to Document Request No. 24 (documents concerning legal research by any Defendant concerning ethical requirements of the situation) and No. 23[a] (correspondence seeking legal advice concerning the conflict). Please note that "23[a]" is used because the number 23 was regrettably duplicated on two requests. Plaintiff will refer to his second request as "23[a]."

[5] *Bowden v. Medical Center, Inc.,* 297 Ga. 285, 291, 773 S.E.2d 692 (2015) (interpreting relevance "very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.")(citations omitted).

[6] "[W]here an attorney jointly represents multiple parties and a conflict of interest arises between the two, the attorney *is ethically obligated to withdraw and not represent either party*." *Montgomery Academy* 50 F.Supp.2d 344, 352 (D.N.J. 1999) (*citing Worldspan, L.P. v. Sabre Group Holdings, Inc.,* 5 F.Supp.2d 1356, 1357 (N.D.Ga. 1998) (emphasis added); *accord* Georgia Rule of Processional Responsibility 1.7, cmt. 3 ("If an impermissible conflict arises after representation has been undertaken, the lawyer should *withdraw* from the representation.") (emphasis added).

[7] Plaintiff respectfully requests that the Court rule that punitive damages discovery is available in this case, or in the alternative requests permission to include that request in his forthcoming Motion to Compel and for Sanctions. *See* Section V, *infra.* Plaintiff requests permission to exceed the 15-page limit on that forthcoming motion.

the gauge for relevance in a case alleging fraud, breach of fiduciary duty, conspiracy, and appurtenant punitive damages; and (2) false, because of the potential existence of, *e.g.,* documents or communications from Defendants or other GRSM personnel indicating that they knew the only ethical response to a non-consentable conflict was immediate withdrawal.

Defendants have referred Plaintiff to the "legal file" produced in 2016. But even if the legal file were complete—and Plaintiff strongly believes it is not[8]—this Request seeks a different compilation of documents than the "legal file." Defendants should be compelled to respond.

III. Defendants Should Be Compelled to Produce Documents Concerning The ABOVETHELAW.COM Articles on Sybert's Twitter Feed

Plaintiff has propounded document demands concerning the response at GRSM to the July 7 and July 10 articles on ABOVETHELAW.COM[9] about Sybert's Twitter feed. The relevance is obvious given that the conflict was discovered—and the scheme enacted—on July 8. Was Sybert reprimanded on July 7, or early in the day on July 8? How? By whom? Was Defendant Mansukhani involved? Did any GRSM personnel report Sybert to HR? Were Sybert's partnership and/or income already in danger when he learned on July 8 that he had sued a $41 billion cash-cow client in a case that was already making national headlines?

Had Defendants acted in accordance with the law and ethical rules, they would have had to voluntarily announce a massive embarrassment, which would have spread into national news

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[8] Among other issues, the assertion of various unsupported privileges (with no privilege log) and the failure to produce any emails which note "bcc's" give Plaintiff strong suspicion that portions of his legal file were withheld. For example, when Sybert emailed Netflix's lawyer early in the morning of July 9 to tell her that he was filing an Amended Complaint, he immediately forwarded her response to Mansukhani. But did he bcc Mansukhani on the initial email? On what other emails did he bcc Mansukhani, Mr. Packer (GRSM General Counsel), or others?

Also, not a single text message or other form of SMS message or non-email electronic message has been produced, despite being expressly called for. The lack of text messages is particularly glaring as between the husband-and-wife who have now suddenly prompted claims of "marital privilege."

[9] Exhibits 2 & 3 to the Opp. to First Motion.

through both the entertainment media covering the case, and through ABOVETHELAW.

But by *not* doing what the ethics rule mandated, Defendants swept their Netflix debacle under the rug. The ABOVETHELAW issue blew over, days became weeks and months, and no one was the wiser—until Mr. Hodges figured it out.

The personal and career stakes that led the Defendants to the cover-up are badges of fraud; proof of motive to betray Hodges; and proof of intentionality, willfulness, and bad faith for the punitive damages analysis. These highly probative documents should be produced.

IV. The California Defendants Should Be Compelled to Produce Redacted Tax Returns Demonstrating Any Declaration of Georgia Income

Last winter, the three California-based Defendants moved to dismiss on personal jurisdiction grounds. Plaintiff countered by noting that Defendants likely declared Georgia-specific income on their taxes, in order to take advantage of Georgia's state income tax rate that is half of California's eye-watering 13.3%. The Court denied the motion based upon the existence of conspiracy jurisdiction, but noted in passing that the Plaintiff had shown no evidence of income from Georgia. The Court declined to grant those Defendants' request for a Certificate of Immediate Review.

Plaintiff demanded redacted versions of the tax returns showing Georgia income.[10] The California Defendants refused to provide this information, asserting that because "the Motion to Dismiss has been decided … this issue is *moot*." (Def. Ex. 3 at p. 9 (emphasis added).)

The issue is not moot, because Defendants can mount a post-judgment appeal. Plaintiff offered to withdraw this document demand if the California Defendants agree to truly "moot" the

[10] "Request No. 20: All tax returns for calendar year 2015 which indicate that any income was generated by operations within the State of Georgia." Plaintiff offered to compromise by having the California Defendants redact the entire returns except any line noting Georgia income. These Defendants refused.

issue by waiving any objections to personal jurisdiction. They refused. Defendants cannot refuse to produce conclusive evidence that they availed themselves of the privilege of doing business in Georgia, while reserving the right to argue that Plaintiff failed to adduce evidence that they availed themselves of the privilege of doing business in Georgia.

V. Defendants Should Be Compelled to Produce Documents Concerning their Earnings and Promotions Before and After July 8, 2015

Three Document Requests seek information from January 1, 2013 through the present about the change in earnings (No. 27) and job titles (No. 28) of the individual Defendants, and about the earnings of the GRSM firm (No. 29). (Def. Ex. 23 at 11-12.) Defendants objected to all three on the basis that punitive damages discovery is improper.

The compensation of the Defendants—and the possible *quid pro quo* involved in keeping every Defendant in the conspiracy through money, promotion, or other incentive—are evidence of badges of fraud, motives to breach fiduciary duty, and incentives to "go along" with the cover-up. Under *Holland v. Caviness*, 292 Ga. 332, 335, 737 S.E.2d 669 (2013) "if a cause of action is within the ambit of OCGA § 51-12-5.1, evidence of the defendant's financial circumstances may be admissible." Mr. Hodges has already made an ample showing that this case is within the ambit of sections 51-12-5.1 (b) ("willful misconduct, malice, fraud, wantonness, oppression") and (f) ("acted, or failed to act, with the specific intent to cause harm").

VI. Defendants Should Be Compelled to State the Ethical Basis for an Attorney with a Non-Consentable Conflict to Threaten to Drop One Conflicted Client Unless He Dismisses the Other Conflicted Client

Four Interrogatories[11] called for Defendants to identify the basis under the Rules of Professional Conduct of Georgia and California for their claim that it was not improper to continue to communicate with Hodges and to continue to advise him after learning of the conflict. (Exs. 22, 28-31 at 8-9.) Defendants objected on the basis that these Interrogatories are irrelevant, vague, ambiguous, argumentative, assume facts that will not be in evidence in this case, and call for a legal opinion/conclusion. (*Id.*)

Those objections are non-starters: The Defendants' defense for failing in their ethical obligations are highly probative of their conduct in this case of malpractice, fraud against their own client, and breach of fiduciary duty. And O.C.G.A. 9-11-33(b)(2) makes plain that "legal conclusions" are fair game for Interrogatories: "An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or to the application of law to fact…"

Defendants claim (without citing any authority) that the ethical rules permitted them to advise Hodges to dismiss his claims against Netflix, and thereby make the non-consentable conflict disappear. (Second Mot. at 9.) That claim could not be more wrong: the ethical rules require immediate withdrawal to prevent that kind of misconduct. If Defendants disagree, these Interrogatories provide them the opportunity to explain.

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[11] Interrogatory Nos. 20 [and 22] read: Identify the ethical rule or rules under the California [and Georgia] Rules of Professional Conduct that permit an attorney with an actual, unwaived conflict of interests to continue to advise either client concerning the matter as to which the conflict exists.
Interrogatory Nos. 21 [and 23] read: Identify the ethical rule or rules under the California [and Georgia] Rules of Professional Conduct that permit an attorney with an actual, unwaived conflict of interests to continue to communicate with either client concerning the matter as to which the conflict exists.

Respectfully, this line of inquiry should be put to Defendants at Friday's Rule Nisi hearing. What *is* their justification for their failure to withdraw immediately when they realized the non-consentable conflict? A year into this action, they have none. None exists.

VII. Defendants Should Be Compelled Produce Communications With Certain Non-Parties Concerning Plaintiff

Document Request No. 19 seeks:

> **All communications with or concerning Chris Tucker, Norris Tucker, Tammye Stocks, Chris Tucker Enterprises LLC, Netflix, Inc. ("Netflix"), Martin Singer, Esq., Lavely & Singer, P.C., Allison S. Hart, Esq., Susan Anderson, Esq., Caldwell Leslie & Proctor, P.C., and/or Linda Burrow, Esq. with respect to Plaintiff.**

Defendants objected on the basis of both attorney-client privilege and attorney work-product, as well as relevance, and referred Plaintiff again to the "legal file."

The relevance objections fail: of course communications "with respect to Plaintiff" with the listed persons and entities that were involved in the *Hodges v. Tucker & Netflix* case are relevant. The privilege objections also fail (Section I, *supra*), unless Defendants are claiming the existence of an attorney-client relationship with the listed persons and entities. When asked to confirm the non-existence of such an attorney-client relationship (setting aside Netflix), Defendants refused (Def. Ex. 3 at 8.) Unless they can prove the existence of such an attorney-client relationship, Defendants should be compelled to respond in full to this demand.

VIII. Defendants Should Be Compelled to Produce Non-Privileged Documents and Answer Limited-Scope Interrogatories Concerning Netflix

Plaintiff asked limited questions about Netflix, to which Defendants have raised privilege and other objections. Defendants should be compelled to respond to the items below.

> **<u>Interrogatory No. 11</u>: Identify all matters in which you have provided legal representation to Netflix, Inc. and/or Netflix, LLC.**

Request No. 21: All engagement letters with Netflix, Inc. [which was limited by compromise to redacted engagement letters showing the dates of the representations and any advance-waiver clauses.]

Request No. 22: All communications with Netflix, Inc. concerning Plaintiff.

Request No. 23: All communications with Netflix, Inc. concerning the conflict of interests involving GRSM's representation of both Plaintiff and Netflix.

Defendants Mansukhani and GRSM have objected to all four on the basis of relevance and privilege, and have objected to Interrogatory 11 and Document Requests 21-23 on the basis that they seek to "harass, annoy, and embarrass… and not for any legitimate discovery purpose."

Defendants' relevance objection is inapposite. Their assertion that the testimony of Netflix personnel became irrelevant after they maneuvered Netflix out of the case in July (Ex. 3 at 9-11) is disproven by their own legal work: GRSM listed Netflix personnel on the draft Witness List for the federal court in September—until Sybert ordered, *"take them off."* Netflix's personnel still had, and have, information probative of, *e.g.,* Mr. Tucker's representations to Netflix during the negotiations for the purchase and sale of CHRIS TUCKER LIVE; their requests for work-for-hire and right of publicity agreements with Mr. Hodges; the terms and price paid by Netflix for CHRIS TUCKER LIVE; and other facts probative of Hodges' claims.

The legal work that GRSM performed for Netflix is probative of the Defendants' motivations, willfulness and bad faith. Defendants have already produced a document proving that Netflix retained GRSM (and Mulrain personally) on a new matter before the end of July 2015. (Defendants have asked to claw-back that document on "privilege" grounds.)

"Privilege" is also inapposite. Document Requests 22 and 23 are expressly limited to communications concerning the Plaintiff. To the extent any Defendant discussed GRSM client Mr. Hodges or the conflict with any person at Netflix, there could be no expectation of

confidentiality by either communicant: both knew that Mr. Hodges was a current GRSM client and thus that the GRSM communicant had duties to report the conversation to Hodges.

Document Request No. 21 (redacted engagement letters) and Interrogatory 11 (other Netflix representations) are also fair game. If those engagement letters contained advanced waivers, that is a probative fact. The representations themselves are not privileged, either: Defendants have already produced a list of all Netflix representations, which has been public for a year as Exhibit F to the Complaint.

> **Interrogatory No. 17: State the names, addresses, and telephone numbers of the person(s) at Netflix, Inc. and/or Netflix LLC with whom you interact in the course of your representation of either or both of those entities.**

Defendants have refused to answer Interrogatory No. 17, and have objected on the basis of relevance; on the basis that it seeks to "harass, annoy, and embarrass… and not for any legitimate discovery purpose;" and on the basis of attorney-client privilege and attorney work product. These objections are without basis: Interrogatories are available to discover "the identity and location of persons having knowledge of any discoverable matter." O.C.G.A. §§ 9-11-33(b)(1), 9-11-26(b)(1). This Interrogatory seeks only to identify relevant fact witnesses. What GRSM said to its client contacts at Netflix during and after the revelation of the impermissible conflict, the "damage control" conducted by Defendants after July 8, 2015, their discussions of Mr. Hodges, and other germane issues are all fair game in disclosure. Any privilege objections can be asserted at later depositions of those individuals, but their identities and contact information are not privileged.

> **Request No. 30: All documents concerning efforts to bring in Netflix Inc. as a client and/or to retain Netflix Inc. as a client.**

GRSM objected to Request No. 30 on the basis of relevance; attorney-client privilege and attorney work-product; and on the basis that it seeks to "harass, annoy, and embarrass… and not for any legitimate discovery purpose."

GRSM's courtship of Netflix is patently relevant and not harassing in a case alleging that Defendants' committed fraud and breach of fiduciary duty to assuage and protect Netflix. To the extent that Defendants marketed their services to Netflix *after* they maneuvered Netflix out of *Hodges v. Tucker & Netflix*, those communications are probative of their motive and willfulness.

Nor is the claim of privilege valid. There is no attorney-client privilege attached to documents that have never been shared with Netflix and do not contain communications from Netflix.

IX. GRSM Should Be Compelled to Disclose Other Civil Suits and Bar Grievances

Interrogatories 9 and 10 (which ask for a list of civil suits and bar grievances, respectively, in the past 10 years, Exs. 22, 28-31) are proper. Based on the conspiracy of misconduct against Plaintiff at GRSM's highest levels, Plaintiff has a basis for this demand.

X. Defendants Should Be Compelled to Answer Their Own Form of Document Request for Social Media Posts, Particularly In View of Sybert's Twitter Feed

Defendants have objected to Request No. 25 (Ex. 23 at 10) which seeks Defendants' social media posts, on the bases of overbreadth, undue burden, relevance, and that it seeks to "harass, annoy, and embarrass… and not for any legitimate discovery purpose."

That is an odd objection: Request No. 25 is a *verbatim reprinting* of Defendants' Request No. 14 to Mr. Hodges, with the only change being the year "2012" to "2013." Mr. Hodges produced documents responsive to Defendants' Request No. 14. Yet in response to *their own form of demand*—which is inarguably relevant given Sybert's Twitter history—Defendants deem

their own question "not legitimate" and a ploy to "harass, annoy, and embarrass." Defendants should be required to answer their own document demand in full.

XI. The Second Motion Contains No Factual Argument Concerning Either Defendants' Claims of Compliance or of Plaintiff's Non-Compliance

The Second Motion lays out Defendants' spin on the entire affair), but does not purport to delve into the facts of the "disputes" that they claim exist. Nor does the Second Motion take the step of citing statutes or case law to explain why their position should prevail. It's essentially 15 pages of prose.

Plaintiff is in the unusual position of being forced to make Defendants' arguments in order to counter them. He declines, except to state that he has complied in full, as the weeks of lawyer-to-lawyer letters annexed to the Second Motion make clear.

Notably absent from the Second Motion are any efforts by Defendants to explain their own misconduct. Defendants do not:

- Justify their claim that their admittedly-impermissible conflict existed only during the 48 hours between the filing of the California state court Complaint (Second Mot. at 8) and the federal Amended Complaint. The conflict existed at all times during representation.
- Offer any factual basis to support their claim of intra-firm privilege.
- Explain why they have refused to produce a privilege log nor explain their claim that "GRSM is not required to itemize for Plaintiff each of the [allegedly privileged] communications had within that relationship" is credible in view of Rule 5.5(1), which requires a withholding party to produce a privilege log.
- Offer any defense to the Crime-Fraud Exception except a conclusory statement that, "There simply is no such applicable exception." (Second Mot. at 9.)

- Explain why they subpoenaed 3 non-parties—including a subpoena upon Mr. Tucker that sought financial information about the Plaintiff—without noticing Plaintiff.

XII. Plaintiff Should Be Awarded His Attorneys Fees and Costs

"Consequences flow from an attorney's unilateral decision not to appear for a deposition." *Edmonds v. Seavey*, No. 08 Civ. 5646(HB), 2009 WL 1285526, at * 1 (S.D.N.Y. May 5, 2009), *aff'd*, 2009 WL 2150971 (S.D.N.Y. July 20, 2009), *aff'd*, 379 Fed. Appx. 62 (2d Cir. 2010). Under O.C.G.A. § 9-15-14(b), this Court may "assess reasonable and necessary attorney's fees and expenses of litigation...if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures." (emphasis added). Section 9-11-30(g) expressly states:

> If the party giving the notice of the taking a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

The federal rule on which this Section is modeled "does not require that the noticing party acted in 'bad faith,' although bad faith may play a part in the exercise of the court's discretion in making an award." *Prism Techs., LLC v. Adobe Sys., Inc.*, No. 8:10CV220, 2011 WL 6887121, at *3 (D. Neb. Dec. 29, 2011). Reasonable attorneys' fees and costs should be awarded where the noticing party did not appear. *See, e.g., Pine Lakes Int'l Country Club v. Polo Ralph Lauren Corp.*, 127 F.R.D. 471, 472 (D.S.C. 1989) (awarding attorneys' fees against cancelling party).

Moreover, under no circumstances did Defendants have the right to unilaterally "cancel" Mr. Mulrain's September 20 deposition. As Plaintiff's counsel emailed them at the time, "[m]erely filing motions for a protective order d[oes] not relieve [a noticed party] from the duty to

appear at [his] deposition." *Rice v. Cannon*, 283 Ga. App. 438, 440 (Ga. Ct. App. 2007). Defendants made no attempt for an expedited ruling, and simply refused to attend either day.

Defendants' counsel's decision not to take the deposition of Mr. Hodges, nor to produce Mr. Mulrain for his deposition, was deliberate and imposed substantial costs and lost opportunity to earn other money. This result should not be tolerated. Additionally, Mr. Hodges has incurred more fees and costs associated with opposing these two meritless Motions and attending the Rule Nisi hearing. All such costs are recoverable. *See Jones v. Lehigh S.W. Cement Co.*, No. 1:12-cv-00633-AWI-JLT, 2014 WL 346619, at *6 (E.D. Cal. Jan. 30, 2014) ("Travel costs, travel time, and lodging are compensable in the form of sanctions where a party fails to appear at a deposition he has noticed. . . . In addition, the time expended by Defendant's counsel in bringing this motion is compensable pursuant to Rule 30.").[12]

Based on the foregoing, Mr. Hodges respectfully requests that the Court order Defendants and/or their counsel to reimburse Mr. Hodges his costs (including travel) and a reasonable award of attorney's fees for the cancelled depositions, these two Motions, and the Rule Nisi hearing.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that this Motion be denied.

RESPECTFULLY SUBMITTED, this 2nd day of November, 2017.

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[12] *See also Prism Techs.*, 2011 WL 6887121, at *7 (awarding attorney's fees for deposition preparation time); *Carlson*, 2011 WL 3957524, at *4 (awarding attorney's fees and expenses incurred in making motion); *Miller*, 2008 WL 2116590, at *2 (same); *Roger Dubuis N. Am.*, 2006 WL 3199141, at *4 (same).

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IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

TERRY HODGES, an Individual, Plaintiff, vs. GORDON REES SCULLY MANSUKHANI LLP, et al.	)	Civil Action No. 16EV004768

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2017, a true and complete copy of PLAINTIFF'S OPPOSITION TO SECOND MOTION FOR PROTECTIVE ORDER was served Defendants upon all counsel in this action by electronic mail to:

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Dated: November 2, 2017

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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.

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
Wallace Neel
Warren Hinds

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

MOTION TO STRIKE ANSWER
EXHIBIT D

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

IN THE STATE COURT OF FULTON COUNTY

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Plaintiff,

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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

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?

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

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Plaintiff,

vs. Civil Action No. 16EV004768

GORDON REES SCULLY MANSUKHANI LLP,

et al.

Defendants.

_____/

VIDEOTAPED DEPOSITION OF ROGER MANSUKHANI, ESQ.

Taken at San Diego, California

March 13, 2019

Reported by Dana E. Simon - CSR

Certificate No. 12683

Q And then he later respond -- there's an exchange between you and Mr. Cominos, right?
A Correct.
Q Right. Are you aware that you claim privilege over this document?
A I don't know.
Q Okay. Who in this exchange is the lawyer and who's the client?
A I mean, Dion's our managing partner and I'm a named partner. But there's no attorney/client relationship between us two.
Q Okay. And you're not seeking any -- is there anything in here that states to you that you're seeking legal advice --
A Not on --
Q -- that legal advice was sought or rendered?
A Not on this document that I'm seeing.
Q At the topmost e-mail --
A Correct.
Q -- at 12:38 a.m. on July 9th, which I gather is really just after midnight going through the day of July 8th into the 9th, right?
A Probably.
[redacted]

11:46:38 When Mr. Schwartz writes you back and says: [redacted]

11:46:50 A Right. Correct.

Q This is -- you're referring to the fact that you're the originating attorney on the Netflix account?

A That I'm handling a case for them, yeah. And originating. But I'm handling a case.

11:47:02 Q The case was active at that point?

A It was.

Q Employment matter?

A Mh-hmm. Correct.

Q What court was that in?

11:47:12 A Probably L.A. Superior Court because they're based up there.

Q Looking at that exhibit, this is again a document that you've asserted privilege over in this matter.

11:47:50 A Exhibit 9?

Q Yes. Can you identify for me on that document who's serving as attorney and who's serving as the client?

A No.

11:47:59 Q Can you identify any legal advice being sought

or rendered?

A Not on the document, no.

(Plaintiff's Exhibit No. 10 was marked.)

BY MR. NEEL:

Q I'm marking Plaintiff's 10.

A Okay.

Q For the record, this is PRIV 30, 3-0. This one we've not seen yet. It's a four e-mail exchange. The earliest of which states on July 8th at 9:05 p.m., which I assume is an East Coast time designation. This is Mr. Sybert writing you. He says, quote: "Just left you

[redacted]

And at 6:08 p.m., above that -- again, I assume that's the West Coast time designation -- you write to Mr. Sybert: [redacted]

Why did you write that?

A I was upset. We were in a conflict position.

11:56:31 A I don't have a position one way or the other. I -- I don't know.

Q Were you involved at all in the compiling of his client file?

11:56:44 A I can't recall. But presumably my staff would have been.

Q Who's on your staff?

A Probably my secretary and my -- maybe our IT person, who would have made sure that the file was

11:57:05 provided.

Q In that document who -- who is the attorney and who is the client in that document for purposes of your privilege assertion?

A There's no attorney-client privilege.

11:57:25 Q What is the legal advice being sought or rendered in that document?

A There's no legal advice being sought or rendered, in my opinion.

(Plaintiff's Exhibit No. 11 was marked.)

11:57:37 BY MR. NEEL:

Q I'd like for you to look at Plaintiff's 11.

A Okay.

Q It's a one-page document Bates No. PRIV 59. Take a minute and have a look. And I'll represent for

11:57:46 the record the only change to this from the chain we

12:19:40 Q You don't have anything -- any entry in your conflict check sheet that's for interested parties?
A Not for interested parties. Other -- I don't think so. Other parties, other defendants. But not
12:19:49 interested parties. Like that would -- you'd have to be prescient to think about all the potentially interested parties in a case.
Q Not hard to be prescient here. You've got a con- -- you've got Tucker sells a movie to Netflix -- or
12:20:02 licenses a movie to Netflix, right?
A I don't even know if I know that.
Q You didn't check. That's the point.
A He made a documented movie, stand-up, and sold it to Netflix, yeah. I mean, I think we -- I mean, you
12:20:18 know what I'm thinking on this.
Q I've got about another hour on this.
A I'm good. Yeah, let's....
(Plaintiff's Exhibit No. 13 was marked.)
BY MR. NEEL:
12:20:52 Q This will be 13. The Bates numbers are PRIV -- actually, strike that. Let's go back -- go back to 12 for one second.
A Okay.
Q Similar question to the other exhibits. Who's
12:22:23 the -- who's the attorney and who's the client in these

exchanges with respect to your assertion of attorney-client privilege?

A None. There's no one.

Q And is there any legal advice being rendered or sought in this exhibit?

A No.

Q All right. Now, 13. Bates PRIV 37 to 39, three-page exhibit. This is a new e-mail chain, I believe.

A Okay.

Q If you look at page 38, there's an e-mail from Allison Hart from the Lavely Singer firm, dated July 8th at 6:50 p.m. Pacific. And it is to Mr. Sybert and Ms. Flaherty, copying Linda M. Burrow of the Caldwell Leslie firm and Marty Singer.

Do you know who Mr. Singer is?

A No.

Q Do you know who Ms. Burrow is?

A No.

Q Did you know at the time who Ms. Burrow was?

A No.

Q The e-mail from Ms. Hart essentially -- and I will paraphrase. And this is not for attribution. It will speak for itself. It says that the case has been removed, and despite the removal, Ms. Hart is of the

because the third one down is 7:41, which would make it Pacific.

A Correct.

Q Your instruction to Sybert in response to his e-mail is: [redacted]

A Yeah.

Q What was your concern about him sending anything to [redacted]

A I just wanted to review it. And if he was going to send something, I wanted to review it. And I was traveling, so that tells me I didn't want to review -- I couldn't review at this particular time.

Q Okay. What were you going to review it for?

A Tone.

THE REPORTER: I'm sorry?

THE WITNESS: Tone.

BY MR. NEEL:

Q This will be -- and just take a quick look. And these will be the standard questions about 14 and 15. In 14, this is a document over which you asserted privilege. Who is the attorney and who is the client in that e-mail?

A There's no privilege in that e-mail.

Q Okay. And do you see any effort to seek and/or

Motion to Strike Answer
Exhibit F

render legal advice?

A No.

Q Same questions, just for brevity, with regard to 15: Basically the same answers? No attorney, no client and no privilege?

A Correct.

(Plaintiff's Exhibit No. 16 was marked.)

BY MR. NEEL:

Q Okay. 16, please. Oh, I'm sorry. I mis-stapled something. Sorry. Let me pull those back. That's for you, Joe. Sorry to toss it.

Mr. Mansukhani, this is for you.

A Thank you.

MR. KINGMA: So two pages?

MR. NEEL: It should be 53 and 54, sequential, unless I've messed it up again.

MR. KINGMA: Got it.

BY MR. NEEL:

Q This is, as I just mentioned, PRIV 53 and PRIV 54. The first -- it appears to me -- and I'll ask you about this -- that it is a -- it's Mr. Sybert sending you a draft e-mail to Ms. Burrow in response to one of Ms. Burrow's earlier e-mails, which we'll go through it piece by piece. The first page 53.

A 53?

think necessarily this should be part of a client file.
BY MR. NEEL:
Q How about the first e-mail in the chain? Should that be part of the client file?
A Not necessarily. If Hodges already knew about the amended complaint and knew it didn't mention Netflix, I don't -- I don't think this necessarily should be part of it at all.
Q We spoke earlier about your text messages. You had stated -- correct me if I'm wrong -- you use an iPhone for messaging. You use the native app?
A Correct.
Q The native app --
A Correct. The native app, yeah. Correct.
Q You don't use any other apps for text messaging?
A I don't.
Q And whatever backup is done is done at the firm?
A Correct.
Q All right. Your predecessor counsel before Mr. Kingma took the position that -- well, let me ask you this: Did you search your text messages for anything responsive to the doc requests in this action?
A I don't recall, but there's zero chance I would

13:51:05 have any test message, that I delete mine always. I just hate having a lot of text messages, even from my wife or my kids or buddies.

Q How do you delete them? On the phone screen?

13:51:16 A Yeah, on the phone.

Q Does every partner at your firm delete in that manner?

A I have no idea.

Q Okay. Well, we've been doing our call for text

13:51:28 messages. We've received none. We've had quite a few discussions about this in and out of court. And with that said and reserving the right to call you back if we find anything in there, I'm done for the day.

THE WITNESS: Okay. Thank you.

13:51:42 MR. KINGMA: And I will say on the record, I'll check again. I don't think there are any, but I won't -- a lot of this was done before I got involved, so we'll check again.

Off the record?

13:51:52 MR. NEEL: We're done.

THE VIDEOGRAPHER: This concludes today's deposition of Roger Mansukhani. Today's date is March 13th, 2019. The time is now 1:52 p.m.

Off the record.

13:52:06 (The deposition was concluded at 1:52 p.m.)

Motion to Strike Answer
Exhibit F