IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TLS MANAGEMENT & MARKETING SERVICES, LLC
d/b/a TAX LAW SOLUTIONS, LLC **PLAINTIFF**

VS. **CAUSE NO. 14-881-CWR-LRA**

MARDIS FINANCIAL SERVICES, INC.,
CAPITAL PRESERVATION SERVICES, LLC
AND J. TODD MARDIS **DEFENDANTS**

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION

Defendants, Mardis Financial Services, Inc., Capital Preservation Services, LLC and J. Todd Mardis, hereby file this Brief in Support of their Motion for Reconsideration, as follows:

I. INTRODUCTION

Plaintiff TLS Management & Marketing Services, LLC d/b/a Tax Law Solutions, LLC ("TLS") is a Puerto Rico company that markets and sells tax planning services to businesses and individuals. Dkt. 1 at ¶10. Defendants were associated with TLS as independent contractors from 2010 to 2014, when the business relationship ended. TLS filed this lawsuit on November 13, 2014, alleging the following claims: (1) Breach of Contract Against CPS; (2) Breach of Contract Against MFS; (3) Breach of Contract Against Mardis; (4) Violation of Mississippi Uniform Trade Secrets Act, Miss. Code Ann. § 75-26-1, *et. seq.*; (5) Violation of the Lanham Act; (6) Tortious Interference with Business Relations and (7) Unfair Competition.

In its Order entered on January 29, 2018 [Dkt. 187], the Court granted TLS' Motion for Default Judgment [Dkt. 129] as a discovery sanction against Defendants. The Court has

not yet entered a separate default judgment.[1] However, the implication of the Court's Order is that the validity of TLS' claims has been conclusively established by default and the only remaining issue for trial is TLS's alleged damages. If this is the intended impact of the Court's ruling, Defendants respectfully request reconsideration because such an extreme sanction deprives Defendants of their ability to defend against TLS' claims and violates due process.[2]

In its Order, the Court also denied certain motions "with prejudice," including: (1) TLS' Motion to Quash Subpoenas [Dkt. 157] and (2) Defendants' Third Motion to Compel [Dkt. 170]. Because the Court did not explain its reasoning, these rulings are confusing and inconsistent. It is also unclear whether the Court denied certain motions as an additional sanction or whether it considered the merits. Regardless of whether the Court reconsiders its default judgment ruling, Defendants respectfully request that it reconsider and/or clarify its rulings on these motions which impact Defendants' ability to contest TLS' alleged damages.

II. PROCEDURAL BACKGROUND

To frame the issues and place the impact of the Court's Order in its proper context, it is necessary to review the procedural history of this case. Since the outset of the case, Defendants have steadfastly contended TLS' claims are invalid and its discovery demands were unreasonable. Despite Defendants' legitimate requests for relief, the Court deferred consideration of their challenges and declined to impose reasonable limits on discovery.

[1] *See* Fed.R.Civ.P. 55(b); Fed.R.Civ.P. 58(a).

[2] This motion is properly considered as a motion for relief from judgment under Fed.R.Civ.P. 59. This motion is timely filed within 28 days of the Court's Order.

Now, as a consequence of a discovery sanction, the Defendants will be prevented from finally having their challenges to TLS' claims adjudicated on the merits. This is unjust.

A. The Court Enters a Stay Pending a Ruling on Defendants' Initial Motion to Dismiss

On December 8, 2014, Defendants filed their Answer and Affirmative Defenses [Dkt 9] to TLS' Complaint along with a Motion to Dismiss [Dkt 10] pursuant to Mississippi's "door closing" statute, Miss. Code Ann. § 79-4-15.02. The Court entered an Order [Dkt 27] staying this case pending a ruling on this motion.

In response to Defendants' Motion [Dkt. 13; Dkt 20], TLS conceded that it is a foreign corporation and lacks a certificate of authority from the Secretary of State to conduct business in Mississippi. However, TLS argued that its local business activities did not require registration. On December 17, 2015, the Court entered a text-only order lifting the stay and denying Defendants' motion without making any ruling on the merits.

B. After the Stay is Lifted, Defendants file Dispositive Motions and Request Limits on Discovery

The initial Case Management Order [Dkt 32] was entered on March 9, 2016. Shortly thereafter, on June 6, 2016, Defendants filed a Motion for Summary Judgment [Dkt 36]. As to TLS' breach of contract claims,[3] Defendants argued: (1) TLS lacks standing to enforce the CPS Agreement and/or the MFS Agreement because it is a non-party[4] and Defendants never

[3] TLS' breach of contract claims concern two agreements: (1) a Confidentiality and Non-Competition Agreement dated June 9, 2010, between Tax Law Solutions, LLC, a Delaware limited liability company, and CPS (the "CPS Agreement"); and (2) a Subcontractor Agreement dated February 28, 2011, between Tax Law Solutions, LLC, a Puerto Rico limited liability company, and MFS (the "MFS Agreement"). *See* Doc. No. 1-2; Doc. No. 1-3.

[4] The caption of TLS' Complaint is cryptically styled in the name of "TLS Management and Marketing, LLC **d/b/a** Tax Law Solutions, LLC." This entity is not a party to either agreement. *See* Doc 43-1 at pg. 2. Tax Law Solutions, LLC was a Delaware company formed in or around 2005. After reincorporating in Puerto Rico in 2010, Tax Law Solutions, LLC changed its name in 2012 to TLS Management and Marketing Services, LLC. *Id.* After Defendants resigned in 2014, a sham merger was effectuated between TLS Management & Marketing, LLC and Tax Law Solutions, LLC, the Delaware company which had ceased to exist in 2010.

consented to any assignment to TLS;[5] (2) the MFS Agreement superseded and cancelled the CPS Agreement;[6] (3) the Confidentiality and Non-Competition provisions of the CPS Agreement are unenforceable under Illinois law;[7] and (4) the Confidentiality and Non-Competition provisions of the MFS Agreement are unenforceable under Puerto Rico law.[8]

As to TLS' claim under the Mississippi Uniform Trade Secrets Act ("MUTSA"), Miss. Code Ann. §§ 75–26–1, *et seq.,* Defendants disputed that TLS had any "trade secrets." The MUTSA defines a "trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Miss. Code Ann. § 75–26–3(d); *see also Marshall v. Gipson Steel, Inc.,* 806 So.2d 266, 271 (Miss.2002)(discussing the "two prongs" which a plaintiff must establish).

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[5] Both agreements contain a provision which prohibits assignments without the prior written consent of the other party. *See* Section 4.3 of CPS Agreement and Section 9.5 of MFS Agreement.

[6] The CPS Agreement was the initial "working arrangement" between the parties when the relationship began in 2010. The MFS Agreement, which was entered into in 2011, updated and revised the parties' "working arrangement" going forward. *See* Doc. 36-2 at ¶6. The MFS Agreement was subsequently amended in 2013 as the operative agreement between the parties. *See* Doc. No. 1-4. Accordingly, Defendants contend that TLS' claims based on the CPS Agreement should be dismissed. A related issue is whether the CPS Agreement was ever supported by adequate consideration. *See, e.g., Fifield v. Premier Dealer Svc., Inc*., 993 N.2d 938, 943 (Ill. App. Ct. 2013)(a substantial period of engagement of at least 2 years is required as consideration).

[7]Section 4.11 of the CPS Agreement provides that it is governed by Illinois law.

[8]Section 9.9 of the MFS Agreement provides that it is governed by the "laws of the jurisdiction in which TLS is domiciled." TLS is domesticated in Puerto Rico, and its managing members also reside in Puerto Rico.

Defendants contend that TLS cannot establish either prong as part of its *prima facie* case under the MUTSA. That is, TLS cannot show that its tax planning methods are any different than the methods utilized by its competitors. *See ACI Chemiclas, Inc. v. Metoplex,* 615 So.2d 1193, 1195 (Miss. 1993)(a process of "general knowledge in an industry cannot be appropriated by one as his own secret"). Likewise, TLS cannot show its methods are secret and cannot be ascertained by other means, for example, by reading the tax code, IRS guidelines and trade publications.

As to TLS' claim under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), Defendants presented evidence refuting TLS' allegation that they made a false or misleading statement in connection with two (2) endorsements from customers, who are referred to as "C.H." and "D.H." in TLS' Complaint. The crux of TLS' claim is that neither C.H. nor D.H. "ha[ve] ever utilized CPS' services," but that Defendants falsely publicized otherwise. *See* Dkt. 1 at ¶¶ 128-29. Through his affidavit (which TLS has never rebutted), Mardis established both D.H. and C.H. were already clients who had utilized CPS' services prior to his affiliation with TLS.[9]

As to TLS' claims for tortious interference with business relations and unfair competition, Defendants cited authority that, in the absence of a valid non-competition agreement, an employee if free to terminate his employment and compete against his former employer for business. *See Metaplex*, 615 So. 2d at 1195 (noting that in competing for business, a former employee is free to draw upon general knowledge, experience, memory and skill, provided he does not misuse any trade secrets of his former employer).

[9] *See* Doc. 36-2 at ¶ 8. Defendants also argued that TLS cannot prove that any customer was actually confused by these endorsements or that it has suffered any actual damages as a result thereof. *See Synygy, Inc. v. Scott-Levin, Inc.,* 51 F.Supp.2d 570, 576 (E.D. PA 1999)(even if the statements at issue were actionable under the Lanham Act, plaintiff could not show any actual damages).

Accordingly, these claims are not viable as stand-alone theories of recovery against Defendants.

Meanwhile, in addition to seeking onerous discovery from Defendants (including access to their computers), TLS served over 70 subpoenas on non-parties. The subpoenas commanded individuals and businesses located all over the country to produce documents related to any business dealings or communications with Defendants.[10]

Because Defendants' Motion for Summary Judgment involved predominantly legal issues, Defendants requested a stay of discovery pending the Court's decision as to whether TLS had valid claims. Defendants also moved for a protective order limiting the scope of discovery. *See* Dkt. 38, 40 and 41.

On June 17, 2016, the Court entered a text-only order "dismissing" Defendants' Motion for Summary Judgment "without prejudice." The Court also denied Defendants' request for a stay and referred the parties' disputes concerning the scope of discovery to the Magistrate Judge. *Id.*

Defendants requested the Court to limit the scope of discovery to specific factual issues, if any, which TLS' identified in connection with Defendants' motion for summary judgment. Defendants contended it was improper and premature to allow TLS to conduct wide-open discovery as to Defendants' customers and finances. *See* Dkt. 46. Accordingly, Defendants interposed legitimate objections to the breadth of TLS' written discovery requests. Contending discovery should have no limits, TLS filed motions to compel. *See* Dkt. 57 and 82.

[10] *See* Dkt. 41. TLS ultimately issued over 140 subpoenas to third parties in this case.

On July 1, 2016, Defendants filed a Motion for Judgment on the Pleadings [Dkt. 48], urging the Court to consider their legal challenges to the agreements at issue and to place reasonable limits on the scope of discovery. Defendants reasserted their summary judgment arguments that the Confidentiality and Non-Competition Provisions contained in the CPS Agreement and in the MFS Agreement are unenforceable as a matter law.

Defendants reasserted that if the CPS Agreement still existed when they separated from TLS in 2014, the Non-Competition provision is invalid under Illinois law because it does not define or limit the geographic scope; nor does it contain any qualifying language as to the specific activities or customers to which it applies.[11] The Confidentiality provision of the CPS Agreement is likewise invalid because it purports to prohibit the use or disclosure of any information obtained by Defendants during the course of their affiliation with TLS.[12]

Defendants reasserted that the MFS Agreement is invalid under Puerto Rico law because it does not include a geographic or existing customer limitation. *See PACIV, Inc. v. Perez Rivera*, 159 D.P.R. 523 (2003)(under Puerto Rico law, restrictive covenants must be narrowly circumscribed to activities similar to those in which the employee was engaged, must specify a geographic area and must be limited to a duration of twelve (12) months).

[11] *See Arcor, Inc. v. Haas*, 842 N.E.2d 265 (Ill. Ct. App. 2005) *AssuredPartners, LLC v. Schmitt*, 44 N.E.3d 463 (Ill. Ct. App. 2015). *See Eichmann v. Nat'l Hosp. and Health Care Svc., Inc.,* 719 N.E.2d 1141, 1146 (Ill. Ct. App. 1999) (noting a restrictive covenant which lacks both a geographic limitation and any qualifying language concerning particular customers to which it applies is unreasonable as a matter of law).

[12] *See Rubloff Development Group, Inc. v. SuperValu, Inc.,* 863 F.Supp.2d 732, 749 (N.D.Ill.2012) (noting "Illinois views post-employment restrictive covenants that insist on absolute secrecy of any and all information as unreasonable and unenforceable because a person is allowed to make a living, and cannot possibly not utilize *any* information from his past job.").

The Confidentiality provision in the MFS Agreement is likewise void because it effectively operates as a post-termination restraint for an unlimited duration.[13]

In response to this motion, TLS argued that Illinois law, not Puerto Rico law, governs the MFS Agreement. TLS claimed that, even though its business is in Puerto Rico, it is actually "domiciled" in Illinois where one of its founding members, Richard Columbik, supposedly resided at the time the MFS Agreement was signed in 2011. *See* Dkt. 53 at pgs. 5-6. Rather than delving into a factual dispute over TLS's "domicile," Defendants simply assumed *arguendo* in their Reply that Illinois law governed both agreements. Defendants argued the restrictive covenants in the MFS Agreement are unenforceable even if Illinois law applies.[14]

Meanwhile, Defendants served discovery on TLS requesting that it identify and describe any "trade secrets" which Defendants supposedly misappropriated. TLS' vague and unresponsive answers forced Defendants to file a Motion to Compel and for Protective Order Limiting Timing and Scope of Discovery [Dkt. 84]. Defendants again urged the Court to place reasonable limitations on the scope of discovery in light of the pending dispositive motion

[13] As they may pertain to Mardis, the agreements impose inconsistent obligations. The CPS Agreement prohibits post-termination competition for a period of two (2) years; whereas this period is limited to one (1) year in the MFS Agreement. The CPS Agreement prohibits the post-termination "use and disclosure" of "Confidential Information" for a two (2) year period; whereas the MFS Agreement contains no duration. *See* Doc No. 1-2; Doc. No. 1-3.

[14] *See* Dkt. 55, pg. 2 n. 2. Defendants maintain and intend to prove that the MFS Agreement is governed by Puerto Rico law and that TLS' argument regarding its Illinois "domicile" is misleading and incorrect. For example, the proof will show that the MFS Agreement was amended in 2013 after Mr. Columbik relocated his personal residence to Puerto Rico. *See* Doc. 1-4. Moreover, upon information and belief, TLS has conceded Puerto Rico law applies to an identical agreement in a similar case it is pursuing against its former CFO, Ricky Rodriquez, in the District of Puerto Rico, Cause No. 15-21-21, of which this Court is aware. *See* Dkt. 187 at n. 22; *See* Exhibit 4 to Defs' Motion (Excerpts from R. Rodriquez deposition). In that case, there is a motion for summary judgment pending (under seal) which challenges the enforceability of TLS' subcontractor agreement under Puerto Rico law. *See* Dkt. No. 300 in Cause No. 15-21-21 (D.P.R.).

on TLS' breach of contract claims and TLS' failure to identify and describe its alleged trade secrets with "reasonable particularity."[15]

The Magistrate Judge requested additional briefing on this issue and the scope of permissible discovery (which also involved TLS' request for access to Defendants' computers). *See* Order at Dkt. 75. In its supplemental brief, TLS revealed its main objective in seeking discovery, including ESI, as to Defendants "new" customers was to establish its alleged damages. *See* Dkt. 76. at pg. 5 (arguing that Defendants' sales information is relevant to "measure of damages to be determined"). In their supplemental briefing, Defendants argued that TLS was "putting the cart before the horse" because unless TLS could establish a valid cause of action, it had no basis to recover damages.[16]

C. The Court Declines Defendants' Request to Limit Discovery

On November 30, 2016, the Magistrate Judge held a hearing and announced rulings on the pending discovery motions. The rulings were memorialized in an Order [Dkt. 106] entered on December 6, 2016. While the Court ordered TLS to "confirm or supplement" its discovery responses regarding its alleged trade secrets, it declined to address the applicability of the "reasonable particularity" standard or limit discovery on this basis. *Id.* at

[15] *See DeRubeis v. Witten Technologies, Inc*., 244 F.R.D. 676 (N.D. Ga. 2007)(holding that a trade secret plaintiff should not be permitted to take general discovery prior to identifying its claimed trade secrets with "reasonable particularity"); *StoneEagle Svs., Inc. v. Valentine*, 2013 WL 9554563, (N.D. Tex. June 5, 2013)(following *DuRubeis*).

[16] *See* Dkt. 81 at pg. 10, n.2. Defendants urged the Court to limit discovery to clients Defendants actually serviced and/or had become aware of during the time period (2010-2014) when they had a business relationship with TLS.

pg. 3. The Court also granted TLS' request to inspect the work computers of seven (7) individuals pursuant to an "imaging protocol."[17]

The imaging protocol established a process for TLS to copy the internal hard drives and then search for specific terms that might yield relevant information. TLS proposed 494 search terms, "consisting predominantly of the names of [its] tax consulting clients" as well as generic phrases such as: "Tax Report"; "Closely Held Insurance Company (or CHIC)"; and "Non-Qualified Deferred Compensation Plan (or NQDC)." Dkt. 76 at pg. 11. The purpose of having search terms was to cull-out irrelevant information archived on the computers. *See* Ex. 5 at pg. 1.

Also, on November 30, 2016, the Court issued an Order [Dkt. 104], denying Defendants' Motion for Judgment on the Pleadings as to TLS' breach of contract claims. Applying Illinois law to both agreements, the Court reasoned it would be more prudent "to wait until the factual context surrounding such covenants is fully developed before assessing reasonableness." Dkt. 104 at pg. 13.

D. Defendants Comply with the Court's Discovery Rulings

After the Court's discovery rulings, Defendants timely supplemented their discovery responses and document production. Defendants produced over 50,000 pages of documents, including ESI, email communications, customer files, marketing materials, tax returns and financial statements. *See* Dkt. 108-112; *see also* Exhibit 1 to Defs' Motion.

[17] *See* Dkt. 106 at pgs. 1-2; *see also* Doc. 68-5, which is a copy of the draft imaging protocol. A copy of the executed protocol along with the final search terms is attached as Exhibit 5 to Defs' Motion. The individuals referenced in the Order are: Todd Mardis, Angela Dallas, Donna Carter, Blythe Byrd, David Byrd, Kim Mardis and Diana Walton. Dkt. 106 at pgs. 1-2. The Court also resolved a dispute as to the scope of the search terms and the number of computers to be searched. *Id.*

Per the Court's ruling on Defendants' Motion to Compel, TLS "confirmed" it had nothing further to add regarding its alleged "trade secrets."[18] Based on its pleadings and discovery responses, the only "trade secret" identified by TLS is its so-called "Tax Report." Although TLS describes this document as a "winning playbook," it is nothing more than a compilation of publicly available tax information (code sections, regulations and trade articles) and generic tax strategies which are commonplace in the industry.[19]

In early 2017, counsel for the parties began to discuss arrangements for TLS' vendor to image the CPS email system and computer hard drives at Defendants' office. During this process, the undersigned learned for the first time that Defendants did not have custody, control or possession of the computers utilized by David Byrd, his son, Blythe Byrd, and Diana Walton. Through emails, the undersigned explained to TLS' counsel that the Byrds are independent consultants of CPS. The Byrds are not employees of CPS, and thus, CPS did not provide, own, have access to or maintain their computers. The undersigned also explained that Diana Walton is employed by a third-party consultant in Florida. Ms. Walton is not an employee of CPS, and thus, CPS did not provide, own, have access to or maintain her computer.[20]

TLS filed a motion to compel [Dkt. 113], demanding access to the email accounts and computers of the Byrds and Ms. Walton. In their response [Dkt. 114], Defendants explained the situation described above and suggested TLS serve subpoenas on these individuals. *Id*.

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[18] *See* Exhibit 2 to Defs' Motion (Email from TLS' counsel dated December 19, 2016).

[19] *See* Dkt. 89, at pg.15. *See* Exhibit 3 to Defs' Motion (Expert Report of Dominique Molina).

[20] *See* Doc. 113-6 (emails). CPS provides its independent consultants with an email address, and Defendants agreed to provide TLS' vendor with access to the Byrds' and Walton's CPS email accounts which were stored in the shared cloud.

at pgs. 2-3. During a telephonic hearing held on February 1, 2017, the Magistrate Judge resolved this dispute by asking the undersigned to contact these individuals and inquire whether they would voluntarily participate in the computer imaging process. The undersigned was able to contact the Byrds, and they consented. However, the undersigned was unable to reach Ms. Walton.[21] The Court's Order [Dkt. 115] confirmed this resolution, and the imaging process occurred on February 2, 2017. During this process, TLS' vendor, Sean McDermott, imaged the emails archived on Defendants' cloud-based system (Microsoft 365) as well as the hard drives of the computers utilized by the following persons: Todd Mardis, Kim Mardis, Kim Smith, Donna Carter, David Byrd, Blythe Byrd, and Angela Dallas.[22]

Shortly thereafter, the parties began to schedule and take depositions. TLS' principals, Mr. Columbik and Mr. Runge, were deposed by Defendants on March 22-23, 2017. Mr. McDermott furnished his report to TLS' counsel on or about April 18, 2017. *See* Doc. 129-1. A few days later, TLS deposed Todd Mardis, Kim Mardis, Angela Dallas, Donna Carter and David Byrd. *See* Dkt. Nos. 119-125.

E. TLS' Motion for Default Judgment

On the basis of Mr. McDermott's report, TLS filed its Motion for Default Judgment [Dkt. 129] on June 2, 2017. Due to the technical nature of TLS' motion and the extreme relief being sought, Defendants moved the Court for an extension of time through August 11, 2017, in order to conduct additional discovery, obtain their own expert analysis and prepare a response. *See* Dkt. No. 131. On June 15, 2017, the parties deposed Defendants' outside

[21] The undersigned later followed-up with Ms. Walton about her computer and informed TLS' counsel that she did not have a computer assigned to her by the consultant she worked for in Florida. *See* Exhibit 6 to Defs.' Motion (emails re: computer imaging).

[22] Although Kim Smith was not identified in the Court's Order [Dkt. No. 106], Defendants voluntarily included her computer in the imaging process.

computer technicians, Mike Lenoir of Matrix Solutions and Luke Lundemo of Computer Co-Op. *See* Doc. 145-1; Doc. 145-2. On June 30, 2017, Defendants took Mr. McDermott's deposition. *See* Doc. 145-3. Meanwhile, Mr. McDermott's images and report were sent for analysis to Defendants' computer forensic expert, Andy Mozingo. Mr. Mozingo furnished his written report on August 8, 2017. *See* Doc. 145-4. TLS deposed Mr. Mozingo on August 17, 2017. *See* Doc. 162-5.

Defendants filed their Response [Dkt. 145] to TLS' Motion for Default Judgment on August 11, 2017. Defendants argued there was no cause to enter a default judgment because TLS failed to show any ESI had been permanently "lost" as required by Fed.R.Civ.P. 37(e). TLS likewise failed to show that it had been prejudiced by the absence of any missing data or that Defendants intended to deprive TLS of such information.

TLS filed a Reply in Further Support of its Motion for Default Judgment on September 15, 2017. Dkt. 162. Because TLS' reply raised new and expanded issues, Defendants filed a Motion to Strike, or in the Alternative, for Leave to File Surreply. Dkt. 169. For example, TLS made an erroneous claim that Defendants' were responsible for preserving an old computer which David Byrd had replaced and discarded in or around December, 2016. TLS also submitted a new 16-page post-deposition declaration from Mr. McDermott which was replete with new opinions, exhibits and argumentative commentary. *See* Doc. 162-4. Defendants suggested the Court consider TLS' Motion in an evidentiary hearing or as part of the bench trial of this matter. However, if the Court was inclined to consider TLS' Motion solely on briefs, Defendants requested an opportunity to address the new issues raised by TLS' reply. *See* Dkt. 169 at pgs. 2-3.

F. Defendants' Additional Efforts to Obtain Discovery From TLS

Meanwhile, Defendants were seeking additional discovery regarding the allegation that they had damaged TLS' business and diverted away customers. *See* Dkt. 1 at ¶¶ 123 & 139. In September, 2017, Defendants served subpoenas on Cahill & Associates, PC and O'Kelly & Associates, Inc. Dkt. 152; Dkt. 156. These are accounting firms located in Colorado which were previously affiliated and did business as Cahill, O'Kelly & Associates, PC ("COA"). On February 13, 2014, a few months before this lawsuit was filed, COA prepared a "Valuation Report" for TLS' tax planning business (*i.e.* the "Consulting Division"). *See* Doc. 163-1. Because the Valuation Report contains highly relevant information, Defendants served the subject subpoenas to obtain any documents reviewed and/or relied upon by COA in valuing TLS' business and its "Tax Report," including TLS' tax returns and financial records. TLS filed a Motion to Quash [Dkt. 157], arguing that Defendants' subpoenas seek privileged and irrelevant information.

Also, on September 29, 2017, Defendants filed a Third Motion to Compel [Dkt. 170] as to TLS' deficient response to Document Request No. 22 contained in Defendants' First Request for Production of Documents.

> **REQUEST NO. 22:** Produce all records, including financial statements and tax returns, that reflect the amount of revenue you have generated, received and/or earned from selling what you contend to be "TLS Services" during each year from 2005 to present.
>
> **TLS' RESPONSE:** Plaintiff objects to this request as overbroad and not reasonably tailored to lead to the discovery of admissible evidence.

Defendants' subpoenas and Request No. 22 overlap in that they both seek discovery of information concerning any harm allegedly done to TLS' business as well as the "value" of its alleged trade secret.

G. The Court Grants TLS' Motion for Default Judgment and Denies Other Pending Motions

The trial of this matter was scheduled to begin on February 26, 2018. In light of the pending motions, which had not been ruled upon, Defendants moved for a continuance on January 8, 2018. Dkt. 180.

On January 29, 2018, the Court entered its Order [Dkt. 187], granting TLS' Motion for Default Judgment. In its Order, the Court also denied without explanation TLS' Motion to Quash [Dkt 157]; Defendants' Motion to Strike or in the Alternative for Leave to file a Surreply [Dkt 169]; Defendants' Third Motion to Compel [Dkt 170] and Defendants' Motion to Continue Trial [Dkt No. 179]. The Court has reset this matter for a bench trial to begin on March 27, 2018, on the issue of TLS' alleged damages.

III. ARGUMENT

A. The Court Should Reconsider its Decision to Grant a Default Judgment because this Extreme Sanction Violates Due Process

The Court's Order [Dkt. 187] does not explain the effect of its decision to grant a default judgment in TLS' favor. However, it appears the Court has decided to impose the extreme sanction of striking Defendants' Answer and Affirmative Defenses and accepting as established all claims and allegations asserted in TLS' Complaint (except as to the amount of TLS' alleged damages). As explained below, the Court's ruling violates the Fifth Amendment and should be vacated.

Without question, this Court possesses broad discretion to impose discovery sanctions. However, the Court's discretion is constrained "by the most fundamental safeguard of fairness: the Due Process Clause of the Fifth Amendment." *Serra Chevrolet, Inc. v. General Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir. 2006)(*citing Insurance Corp. of Ireland, LTD., v. Compagnie des Bauxistes de Guinee*, 456 U.S. 694, 707 (1982)).

The Due Process Clause imposes two (2) limitations on a district court's discretion to impose discovery sanctions: the sanction must be "just," and the sanction must be specifically related to the particular "claim" for which discovery was being sought. *Ireland*, 456 U.S. at 707. Discovery sanctions which deprive a litigant from asserting a claim or defense "violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Wyle v. R.J. Reynolds Indus., Inc.,* 709 F.2d 585, 591 (9th Cir. 1985). Moreover, in the spoliation context, due process requires a "nexus" (*i.e*. a specific relationship) between the discovery abuse and the particular claim or defense that the Court is striking as a sanction. *See Serra*, 446 F.3d at 1151-152.

In *Serra*, the district court struck General Motor's affirmative defenses and also imposed monetary sanctions based on its failure to preserve certain documents relevant to the litigation. *Id.* at 1152. Although the Eleventh Circuit affirmed the civil contempt finding based on GM's discovery abuses, it reversed the spoliation remedies on due process grounds. The discovery order at issue compelled the production of documents regarding satellite agreements between GM and Chevrolet dealers nationwide as well as allocation data for dealers in the Birmingham area. *Id.* When GM failed to comply, the district court struck three (3) affirmative defenses which pertained to the preclusive effect of prior litigation. Because

these defenses had "no apparent relationship with the discovery abuse," the district court's sanction "violated the due process rights of GM." *Id*. at 1152-53.

In *Serra,* the Eleventh Circuit discussed and distinguished the Supreme Court's decision in *Ireland. Id.* In that case, the Supreme Court addressed whether the district court violated due process when it overruled an objection to personal jurisdiction as a sanction for the failure of the defendants to provide documents regarding personal jurisdiction as required by a discovery order. 456 U.S. at 707. The Supreme Court upheld the sanction because defendants' failure to provide this discovery impaired the plaintiff's ability to prove the extent of contacts between the defendants and the forum state. *Id.* at 709. The Court concluded that the sanction was "specifically related" to the discovery abuse, because the imposition of the sanction "took as established the facts [*i.e*. jurisdictional contacts] that [the plaintiff] was seeking to establish through discovery." *Id.* at 709.

The Fifth Circuit addressed and followed *Ireland* in *Chilcutt v. U.S*., 4 F.3d 1313 (5th Cir. 1993). *Chilcutt* involved a personal injury/slip and fall claim against the U.S. Post Office. During discovery, the plaintiff sought to discover any logs or reports concerning similar accidents at the location where the accident occurred. Initially, the government did not respond at all to the plaintiff's discovery requests. After the plaintiff filed a motion to compel, the government affirmatively represented no such documents existed. Ultimately, the plaintiff was able to prove the falsity of this representation and that the government did, in fact, possess an accident log as well as a written report for this particular incident. The plaintiff moved the district court to enter a default judgment under Rule 37 as a sanction for the government's "flagrant disregard of its discovery obligations." *Id.* at 1318-19.

Although the district court believed a default judgment as to liability and damages was justified, it decided instead to deem the *prima facie* elements of plaintiff's liability claim established (*i.e.* the government was negligent in maintaining the premises). However, the court allowed the government to present evidence of its affirmative defenses (including contributory negligence) and required the plaintiff to prove damages. After a bench trial on damages, the government appealed the adverse ruling to the Fifth Circuit. The primary issue on appeal was whether the district court abused its discretion by deeming liability to have been established as a discovery sanction. *Id.* at 1319.

The Fifth Circuit began its analysis with a discussion of *Ireland*. The Court noted that, while harsh sanctions may be imposed under Rule 37 to punish and deter discovery abuses, such decisions must be guided by the two standards recognized in *Ireland:* "fairness and a substantial relationship between the sanction and the claim." *Id.* (citing *Insurance Corp. of Ireland*, 456 U.S. at 707).

Like the personal jurisdiction issue in *Ireland*, the discovery requests in *Chilcutt* were targeted to a specific issue in the case---whether the government knew or should have known of a dangerous condition on the premises based on other accidents. Because the government failed to produce specific information sought by the plaintiff (and covered up its existence), the Fifth Circuit upheld the sanction establishing liability because it was directly related to the discovery abuse. *Chilcutt*, 4 F.3d at 1319.

Thus, in determining whether certain "claims" should be conclusively established as a spoliation sanction, due process requires the Court to consider what specific information the plaintiff was targeting in discovery and whether a substantial nexus exits between the failure to produce such information and the particular claim at issue. Where there is no such

nexus, a sanction establishing legal consequences from a failure to produce information is purely punitive in nature and violates the Due Process Clause. *See Insurance Corp. of Ireland.,* 456 U.S. at 709 (holding the legal consequence of a discovery sanction must follow from the discovery abuse).

Here, the specific discovery abuse at issue is Defendants' failure to preserve potentially relevant ESI on certain computer hard drives. In assessing whether a default judgment comports with due process, the first question is--what was TLS seeking to establish through ESI discovery from Defendants? According to TLS, it was primarily seeking to establish damages by discovering the extent to which Defendants were soliciting its existing clients and utilizing its allegedly "confidential" information. As the Court observed in its Order, TLS was seeking "data about Defendants' business strategies, clients and products" in order to prove its claims. Dkt. 187 at pg. 2.

Assuming *arguendo* that some of this "data" was actually "lost" as a result of Defendants' failure to preserve "all of the containers,"[23] the critical question is whether a substantial nexus exits between this information and the particular claim to be conclusively established as a legal consequence of the default judgment sanction. As discussed below, there are numerous "claims" at issue in this case which have no relationship with "data about Defendants' business strategies, clients and products." Because it is unclear from the Court's Order, due process requires this Court reconsider whether the Defendants' discovery abuse (*i.e*. the failure to preserve ESI) actually relates to the specific claims at issue.

Since the outset of this litigation, Defendants have steadfastly maintained two fundamental positions: (1) the restrictive covenants in TLS' contracts are unenforceable; and

[23] *See* Dkt. 187 at pg. 2.

(2) TLS does not possess any "trade secrets." Although Defendants requested early resolution of these issues, the Court repeatedly deferred for later determination. Accordingly, Defendants fully intend to reassert these issues at the directed verdict stage and in its Proposed Findings of Fact and Conclusions of Law.

TLS' breach of contract claims implicate numerous issues necessary for judicial determination. Some of these issues are purely legal, whereas others present mixed questions of law and fact. For example, the Court must initially determine which law applies to the MFS Agreement, Puerto Rico or Illinois. This issue turns on where TLS is or was domiciled. This is a critical issue because Puerto Rico imposes specific requirements on restrictive covenants which the MFS Agreement clearly does not satisfy. Then, there is the question of whether the CPS Agreement was superseded and cancelled by the MFS Agreement. Even if the CPS Agreement still existed when Defendants separated from TLS in 2014, the Court must decide whether the CPS Agreement (and also perhaps the MFS Agreement) is enforceable under Illinois law. This will entail an assessment of whether the restrictive covenants at issue are supported by adequate consideration and constitute "reasonable" restrains on trade based on TLS' legitimate business interests.

These threshold contractual issues do not have a substantial nexus to "data about Defendants' business strategies, clients and products" that may have been deleted from the Defendants' computer hard drives. Therefore, it would violate the Defendants' due process rights for the Court to establish by default that the agreements at issue are enforceable as a punishment for spoliation.

The same problem exists with respect to TLS' claim that Defendants misappropriated its "trade secrets." To prevail on its claim under the MUTSA, TLS bears the burden of proving

it possesses a "trade secret" within the meaning of Miss. Code Ann. § 75-26-3(d). That is, TLS must prove it has a particular method or technique (or compilation thereof) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use. TLS must also prove it took reasonable efforts to maintain the secrecy of any such trade secret.

Again, these threshold issues do not have a substantial nexus to "data about Defendants' business strategies, clients and products" that may have been deleted from Defendants' computer hard drives. Therefore, it would violate the Defendants' due process rights for the Court to establish by default that TLS possesses trade secrets as a punishment for spoliation.[24]

B. The Court Should Reconsider its Decision to Grant a Default Judgment as to all Issues of Liability because this Extreme Sanction is Unjust

Due process requires that a discovery sanction be "just." In *Ireland* and *Chilcutt*, the courts found aggravating circumstances justified a sanction establishing claims in favor of the non-offending party. In both cases, however, there were specific warnings from the court

[24] There are additional unresolved "claims" in this case which likewise lack a substantial nexus to "data about Defendants' business strategies, clients and products," including: (1) whether Mississippi's door closing statute, Miss. Code Ann. § 79-4-15.02, bars this action based upon the nature and extent of TLS's business activities in Mississippi when it filed this lawsuit in 2014; (2) whether TLS, as a non-party, has standing to seek enforcement of the CPS Agreement or the MFS Agreement under the applicable law; (3) whether the non-competition provision of the MFS Agreement is null and void by operation of Sections 8.3 and 8.4.3 because TLS engaged in illegal or unethical conduct; (4) whether Defendants violated the Lanham Act by making a false statement in connection with the endorsements made by D.H. and C.H. as alleged in TLS' Complaint; (5) whether, in the absence of valid restrictive covenants and trade secrets, TLS can pursue claims under Mississippi law for unfair competition and tortious interference with business relations; and (6) does TLS owns the rights to the "Tax Report."

followed by intentional discovery abuses.[25] Here, the severity of the sanction far exceeds the severity of the discovery abuse.

As a preliminary matter, the Court's decision to make factual findings and credibility determinations adverse to the Defendants without conducting an evidentiary hearing on TLS' motion raises due process concerns. *See Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 898-99 (5th Cir. 1997)(approving district's court use of an evidentiary hearing in conjunction with a claim that a party has willfully abused the judicial process); *Wyle*, 709 F.2d at 592 (noting fundamental fairness may require an evidentiary hearing to determine appropriate discovery sanctions and also protect a party's right to due process). These concerns are heightened in this case because the Court apparently had questions about Defendants' back-up files and processes which could have been addressed in an evidentiary hearing.[26] Moreover, as discussed below, several of the Court's factual pronouncements are objectively wrong.

1. The Court's Findings that Defendants "refused to open their books" and "spent years resisting discovery" are Clearly Erroneous

In its Order, the Court justified its extreme sanction on factual findings relating to Defendants' overall discovery conduct. Specifically, the Court made a finding that Defendants "refused to open their books" for the first two (2) years of this litigation "despite many reasonable requests from TLS." Dkt. at pg. 6. The Court also found that Defendants' "[spent]

[25] *See Ireland*, 456 U.S. at 707-08 (in holding the sanction was "just," the court relied on the fact the district court had specifically ordered the defendants to provide the requested information about their contacts with the forum state); *Chilcutt*, 4 F.3d at 1321 (in determining whether the sanction was "just and fair," the court noted the government had been previously warned a default judgment would be entered if the requested information was not produced).

[26] *See* Dkt. 187 at pg. 5.

years resisting discovery." *Id*. at 10. With all due respects, these findings are not supported by the record.

The Court's Order erroneously suggests that, during the first two (2) years of this litigation, Defendants simply ignored TLS' "reasonable requests" and unjustifiably "refused to open their books." To be clear, this case was **stayed** during the first year by Order of the Court, pending a ruling on Defendants' initial Motion to Dismiss. Dkt. 10; Dkt. 27; Dkt. 29. After the stay was lifted on December 17, 2015, [Dkt. 32], Defendants filed a Motion for Summary Judgment, a Motion to Stay Discovery and a Motion for Protective Order as to TLS' discovery requests. *See* Dkt. 36; Dkt. 38; Dkt. 40. The Court did not rule on the parties' significant disputes concerning the scope of permissible discovery until November 30, 2016. Dkt. 104.

One of the aggravating factors that the Court found in *Chilcutt* was that the government "never contended that the plaintiff's use of discovery was an abuse of judicial process," nor did it contend that discovery was being pursued for meritless claims. *Chilcutt*, 4 F.3d at 1322. Here, however, Defendants contended from the outset that TLS was engaging in "scorched earth" discovery tactics which included unreasonable demands for information. Defendants had every right to zealously defend themselves against TLS' claims, to file dispositive motions and to "resist" TLS' unreasonable discovery demands by requesting relief from the Court. Although the Court ultimately disagreed with Defendants' positions as to the scope of discovery, it never imposed sanctions on or issued warnings to Defendants for any discovery abuse prior to this default judgment ruling. Therefore, it is unjust for this Court to use Defendants' legitimate motion practice as a basis for imposing this extreme sanction.

2. The Court's Finding that Defendants "Systematically Destroyed" Data is Clearly Erroneous

After the Court resolved the parties' significant disputes regarding the scope of permissible discovery, Defendants timely supplemented their discovery responses in compliance with the Court's directives and ultimately produced over 50,000 pages of documents in electronic and paper format. Defendants also complied with the Court's directives to provide TLS with access to the CPS email system and certain computer hard drives. Despite these significant efforts to provide information to TLS, the Court found Defendants were at the same time systematically destroying data.

As the Court noted in its Order, the "vast majority" of the deleted data consisted of irrelevant system files which Defendants had no duty to preserve. Dkt. 187 at pg. 3 n. 13. It is true that some user created files on certain hard drives were deleted manually or through the use of a clean-up program. However, Defendants utilized multiple systems to back-up their hard drives, and back up files were available for TLS to inspect.[27] These facts mitigate against a finding that Defendants intended in bad faith to permanently destroy data.

In its Order, the Court rejected the existence of back-up files as a mitigating factor. The Court reasoned Defendants had failed to show by clear and convincing evidence which deleted files were relevant to the case and that *all* of them were backed-up elsewhere. *Id.* at pgs. 4-6. It was unjust for the Court to place this "relevancy" burden on Defendants when TLS had failed to make any initial showing whatsoever that specific documents or categories of documents seemed to be missing based on its review of the voluminous information produced by Defendants. Moreover, the Court apparently overlooked the fact that the search

[27] Indeed, as Donna Carter testified, Defendants have utilized Dropbox since 2013 "to store all of our information." *See* Exhibit 8 (Excerpts from Donna Carter's deposition) at pgs. 20-1.

terms of the imaging protocol defined the scope of relevant ESI. TLS never suggested its case was somehow compromised due to missing information pertaining to those specific search terms.

In support of its finding that the Defendants "systematically destroyed data," the Court heavily relied on the fact that David Byrd did not preserve his old computer for imaging. The Court did not make any specific findings in its Order that Defendants were responsible for preserving Mr. Byrd's personal computer or that they were even aware he had replaced and discarded a computer. However, without conducting an evidentiary hearing, the Court unfairly inferred such facts against Defendants.

As set forth above, a dispute arose in January, 2017, as to whether Mr. Byrd's computer should be included in the imaging protocol because he was neither a party nor an employee of a party. *See* Doc. 113-6. Mr. Byrd is an independent advisor affiliated with CPS. *See* Ex. 7 at pg. 23. Mr. Byrd is not an employee of CPS. There is no evidence whatsoever that CPS provided him with a computer; nor is there evidence that Defendants ever had custody, control or possession of his computer. At the Magistrate Judge's request, and to resolve this discovery dispute among the parties, Mr. Byrd voluntarily agreed to allow TLS to image his computer. *See* Dkt. 115. It is unclear from Mr. Byrd's deposition testimony whether he was even aware of TLS' request to include his computer in the imaging protocol when he replaced his computer. *See* Ex. 7 at pg. 84.

In any event, Mr. Byrd testified during his deposition that he did not inform Defendants or their counsel that his old computer had "crashed" or that he was purchasing a new model after he voluntarily agreed to participate in the imaging process. *See* Ex. 7 at pgs. 88-9. Mr. Byrd described himself as a novice with computers and believed "everything

that was on [his old computer] would still be on [his new computer]" after the IT professional set it up for him. *Id.* at 87. Based on this testimony, the Court clearly erred in finding that Mr. Byrd acted in bad faith by failing to preserve his computer, and more importantly, by imputing this to Defendants.

The Court also erred in inferring that Defendants "systemically destroyed data" in bad faith simply because "some" relevant information may have been deleted. The fact that a data loss has occurred does not establish a party's intent to deprive its opponent of useful information. As Judge Lee recently recognized, a party's failure to preserve information may be the result of carelessness or even gross negligence in the handling or safeguarding of ESI. However, unless the record clearly suggests bad faith, the Court should exercise restraint in punishing a litigant for discovery infractions. *See* Dkt. 393 in *Itron, Inc. v. Johnston, et. al.*, Civil Action No. 3:15CV330 (S.D. Miss. Oct. 26, 2017)(denying request for adverse inference instruction based on party's failure to preserve a laptop computer and back-up files because the record did not suggest intent). The record in this case likewise does not support a finding that Defendants acted in bad faith.[28] At most, the record suggests Defendants were careless in preserving ESI.

3. The Court's Finding that Witnesses Lied about Destroying Data is Clearly Erroneous

In its Order, the Court made a remarkable adverse credibility determination against three of Defendants primary witnesses. Specifically, the Court found that CPS representatives, Todd Mardis, Kim Mardis and Donna Carter, committed perjury. These are

[28] Without conducting an evidentiary hearing, the Court drew adverse inferences that the witnesses had actual knowledge of specific events in this litigation in real time and then engaged in deletion activity in response thereto. With all due respect, the record does not support such findings.

shocking, significant findings which disparage the reputations of these people. With all due respect, Defendants implore the Court to revisit the basis for its findings and to vacate this aspect of its Order.

According to the Court, these witnesses "lied" by denying that: (1) In early 2017, Todd Mardis deleted hundreds of business documents on his computer; (2) In August, 2016, Kim Mardis deleted the user profile on her corporate computer; and (3) In September, 2016, Donna Carter deleted the user profile on her corporate computer and later deleted files from her computer.[29] The only cited support for these findings are the McDermott report, which mentions this deletion activity, and excerpts from these witnesses' depositions taken by TLS' counsel. *Id.* at pg. 4 n. 19. For the record, the complete cited excerpts are set forth below:

Todd Mardis:

Q: Can you explain how and when CPS and MFS preserved documents and information relating to this litigation?

Mr. McCraney: Object to the form

A: I don't understand the question.

Q: Well, when you receive notice—you, CPS and MFS, receive notice of the lawsuit, what steps did you take to preserve information which might be relevant or responsive to the case?

A: I didn't preserve or destroy documents. Nothing changed. I mean, the documents were where they were.[30]

[29] *Id.* at pg. 3. This deletion activity can hardly be described as "systematic." If anything, these occurrences are random, disconnected and unexplained.

[30] Dkt. 129-49.

Kim Mardis:

Q: Are you aware of any reason why information or documents would no longer be available *that would be responsive to the discovery served by TLS in this case*?

A: No

Mr. McCraney: Let me just object to the form.

A: Sorry, No, I don't . . ..[31]

Donna Carter:

Q: Are you aware of any reason why information which would be responsive *to the discovery request that TLS has served in this case* would no longer be available?

A: No[32]

With all due respect, nothing in the witnesses' testimony supports the Court's findings that they "lied" about anything.

Without asking about any particular file or document, TLS' counsel asked Mr. Mardis a vague question about what steps CPS and MFS took to preserve information "which might be relevant or responsive." Mr. Mardis testified that he did not do anything out of the ordinary, and his testimony suggests his belief that whatever information was "relevant and responsive" would still be available. He didn't lie about deleting files on his computer because he wasn't even asked about files on his computer. Mr. Mardis' largely gratuitous statement that "I didn't preserve or destroy documents" is also uncontradicted by any evidence. There has been no showing that Mr. Mardis "destroyed documents." Even if Mr. Mardis deleted files from his hard drive, this does not support the Court's *ipso facto*

[31] Dkt. 129-50.

[32] Dkt. 129-51.

conclusion that he "destroyed documents" because of the many back-up systems utilized by Defendants.

Yet, on the basis of this clumsy exchange,[33] TLS accused Mr. Mardis of "providing false testimony." Inexplicably, the Court adopted this narrative without conducting any evidentiary hearing and amplified it in dramatic fashion.

Arguably, the treatment of Mrs. Mardis and Ms. Carter is even worse. Without laying any foundation, TLS' counsel posed a confusing and objectionable question to Mrs. Mardis about whether she was "aware of any reason" why some information which might be "relevant or responsive" to "the discovery served by TLS" might no longer be available. TLS asked essentially the same question of Ms. Carter. The question is absurdly vague and speculative on its face, and as such, cannot form the basis of any proper credibility analysis.

The question assumes that these witnesses were made aware of the actual discovery served by TLS and that these witnesses were capable of determining what would be responsive thereto. During the depositions, TLS' counsel did not bother to show these witnesses a copy of any set of discovery to which they were referring, much less any particular request. More importantly, TLS' counsel did not specifically ask these witnesses whether or why they had deleted any information from their computers or whether they were aware that any such deletions would result in the actual destruction of those records. These are clerical employees who cannot be expected to determine what is "relevant or

[33] Unbeknownst to these witnesses or the undersigned, TLS' counsel had already obtained the McDermott report before taking these depositions. TLS had the opportunity to share with Mr. Mardis the findings of that report before or during the deposition, including the findings that certain information had been deleted from CPS' computers on specified dates. TLS elected instead to sandbag with this information and use it as the basis for its charges of "false testimony." Putting aside for now the ethics of the dubious tactic, it should be clear that the execution was sloppy at best. If TLS wanted to establish a perjury trap, it should have at least asked specific questions that would have demonstrated the inconsistency with the specific findings of the McDermott report.

responsive," particularly to unknown discovery requests. Yet, without conducting an evidentiary hearing, the Court found not only that these witnesses provided false testimony on questions that were not even asked of them, but that these "misrepresentations" were intentional and perjurious.

The record does not support a finding that any of these witnesses "lied" about anything. The Court's findings in this regard are inherently unfair, objectively unsupported, disparaging to reputations, and are otherwise unjust. The findings that these witnesses "lied" should be vacated, and since this appears to have been a primary motivation for the Court's default judgment, so should the entire Order.

4. The Court Clearly Erred in Failing to Consider the Effectiveness of Lesser Sanctions

The Fifth Circuit requires district courts to use "the least onerous sanction which will address the offensive conduct."[34] Because the Court's primary focus was on severely punishing Defendants, it gave no consideration in its Order to whether lesser sanctions (such as a monetary fine, additional discovery at Defendants' expense and/or an adverse inference) would serve the purposes of Rule 37.

C. The Court Should Reconsider and/or Clarify Its Denial of Other Motions "With Prejudice"

As part of its Order, the Court denied TLS' Motion to Quash [Dkt 157] and Defendants' Third Motion to Compel [Dkt 170]. These related motions concern Defendants' efforts to obtain information about TLS' business operations and finances. As set forth in the briefing,

[34] *Gonzalez v. Trinity Marine Grp., Inc.,* 117 F.3d 894, 899 (5th Cir.1997); *see also Topalian v. Ehrman,* 3 F.3d 931, 937 (5th Cir. 1993) (holding that district courts must show that "sanctions are not vindictive or overly harsh reactions to objectionable conduct, and that the amount and type of sanction was necessary to carry out the purpose of the sanctioning provision"). Further, a district court's sanction is "appropriate only if its deterrent value cannot be substantially achieved by use of less drastic sanctions." *Brinkman Dallas County,* 813 F.2d 744, 749 (5th Cir. 1987).

Defendants contend that the requested information is relevant and discoverable as to TLS' alleged damages and other issues in this case.

Because the Court did not explain its ruling regarding these motions, it is unclear what Defendants are permitted to do in order to prepare for trial (whether it will be limited to damages only or will involve other issues as well). The subpoenas and Defendants' Request for Production No. 22 seek overlapping information. Thus, the Court's rulings are confusing and inconsistent. Because it denied TLS' Motion to Quash, Defendants can presumably seek discovery of this information from the accounting firms.[35] However, since the Court has denied Defendants Third Motion to Compel, Defendants apparently cannot seek the same information from TLS. Because of this inconsistency, it is also unclear whether the Court may have denied this motion and possibly others as additional sanctions. Defendants request reconsideration and/or clarification on that point as well.

IV. CONCLUSION

For these reasons, Defendants' respectfully request that the Court reconsider its Order granting TLS' Motion for Default Judgment and denying other pending motions "with prejudice."

[35] Although the Court has denied TLS' Motion to Quash, the accounting firms have not compiled with or responded to the subpoenas. Thus, depending on the resolution of this motion, Defendants may be required to file a motion to enforce compliance with the subpoenas.

RESPECTFULLY SUBMITTED this the 23rd day of February, 2018.

MARDIS FINANCIAL SERVICES, INC., CAPITAL PRESERVATION SERVICES, LLC AND J. TODD MARDIS

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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing pleading was filed electronically through the Court's CM/ECF system and served electronically on all parties enlisted to receive service electronically.

This the 23rd day of February, 2018.

/s/ W. Thomas McCraney, III
W. Thomas McCraney, III