

to follow this Court's August 1, 2019 Order. For these reasons, as set out in detail below, the Court grants Plaintiff's Motion for Sanctions pursuant to Rule 37 of the South Carolina Rules of Civil Procedure and hereby strikes all pleadings of the Wuertz Defendants.

FACTUAL HISTORY

The Court makes the following findings of fact in the issuance of its order. This case was filed in South Carolina Circuit Court on May 11, 2012. Plaintiff alleges that the Defendants failed to pay certain invoices for the purchase of petroleum products and interfered with and wrongfully acquired certain business accounts held by Plaintiff. Plaintiff has alleged that such actions were accomplished through fraud and misrepresentation and that such actions resulted in the loss of Plaintiff's future profits.

Prior Discovery Orders Regarding Defendants' Financial Information

Plaintiff issued its first set of Interrogatories and Requests for Production, including requests for Defendants' past and current financial information on October 2, 2012. The Defendants failed to respond to Plaintiff's discovery requests and on January 31, 2013 Plaintiff filed its first Motion to Compel. The parties entered into a Consent Order on March 15, 2013 in which the Defendants promised to provide discovery requests, including the financial information sought by Plaintiff and to pay Plaintiff's attorney's fees as a sanction for its discovery abuse. The Defendants failed to comply with the Consent Order and Plaintiff filed an Amended Motion to Compel. The Court granted that motion on August 22, 2013 and ordered Defendants to produced discovery including sworn, certified financial statements.

Plaintiff was forced to file a second Motion to Compel on August 27, 2013 when Defendants again failed to comply with the Court's Order. On October 3, 2013 the Court ordered Defendants to provide their financial information and sanctioned the Defendants \$2,000.00 for

their failure to comply the Court's August 22, 2013 Order. In her Order Judge Goodstein included the following language:

“...(b) In lieu of producing the documents requested in Plaintiff's First Supplemental Request for Production nos. 3 and 5, Defendants shall produce the working papers such as W-2's, 1099s, K-1's, ect., used in preparation of Defendants' state and federal tax returns for the period of 2008 – 2012. (c) Nothing set out in this paragraph shall be construed as any limitation upon Plaintiff's right to seek additional discovery on these issues in the future.”

In March 2015 the Plaintiff issued subpoenas to Defendants' bank (Wells Fargo) and accountant (Margavio and Schmidt) requiring the production of Defendants' bank and accountant records from 2009 to the present date. Defendants filed a Motion to Quash. At the hearing on Defendants' Motion to Quash, Defendants argued that the scope of Plaintiff's subpoenas was overbroad and the information sought was not relevant. The Plaintiff argued that the subpoenas were necessary due to Defendants continuing failure to respond to discovery requests, failure to follow the Court's prior orders, and were directly relevant to Plaintiff's claims that Defendants had taken millions of dollars in business from Plaintiff. The Court denied Defendants' Motion to quash and found that bank and accountant records from 2009 through the present were relevant and should be disclosed.

On April 8, 2015 the parties were ordered to mediate this case. At mediation a settlement was reached in which Defendants agreed to pay a settlement amount within 30 days. The Defendants failed to pay the agreed upon settlement amount and breached the settlement agreement. Issues resulting from the failed settlement were appealed and the case was stayed pending and order of the Court of Appeals for three years.

Defendants' Refusal to Comply with this Court's August 1, 2019 Ruling

The case was remanded back to this Court in March 2019 and an order for a date certain trial to begin on November 19, 2019 was issued. The Plaintiff demanded that Defendants provide updated financial statements and re-issued a subpoena in Louisiana for Margavio & Schmidt (Defendants' CPA) as previously ordered in the Court's April 6, 2015 Order.

Defense Counsel advised that he would get back to Plaintiff's Counsel regarding those issues prior to an April 22, 2019 teleconference scheduled with the Court. Defendants' Counsel did not provide any response on those issues prior to the April 22nd teleconference. During the April 22nd teleconference with this Court, Plaintiff's Counsel informed the Court of various issues preventing the Plaintiff from obtaining the previously ordered financial records including Defendants refusal to sign a Consent Order for the domestication of an out of state subpoena and third party efforts to quash the Plaintiff's Louisiana subpoena served upon the CPA (despite the Court's earlier ruling). For these reasons, the Plaintiff requested that the Court order Defendants to provide executed authorizations for the production of its CPA/financial records. In response, Defense Counsel advised the Court that he required until May 6, 2019 to provide the discovery Plaintiff sought. Defense Counsel did not provide the discovery by May 6, 2019 and on May 15, 2019 Plaintiff filed its Third Motion to Compel seeking the production of Defendants' financial information and requesting monetary sanctions.

In an order dated June 18, 2019 this Court granted Plaintiff's requested relief ordering Defendants to sign authorizations for the release of their financial and CPA information within 7 days of the order and to produce sworn certified financial statements within 21 days of the Order. The Court also sanctioned Defendants for their noncompliance and discovery abuse in the amount of One Thousand Nine Hundred and Fifty Dollars (\$1,950.00). On June 25, 2019, the due date for

the signed authorizations, Counsel for the Wuertz Defendants filed a motion to amend the Court's order pursuant to S.C.R.C.P. 59. The Court reviewed briefings from the parties and on August 1, 2019 issued an order amending its June 18th Order still granting the relief requested by Plaintiffs but altering its original Order allowing different classes of individuals to sign the requested authorizations. The authorizations were to be signed within seven days and financial statements were to be produced within 21 days.

The record shows that on August 9, 2019, after the Court's deadline had passed for the Defendants' production of authorizations and payment of sanctions, Defense Counsel for the Wuertz Defendants sent an e-mail to Plaintiff's counsel representing that he had not seen the Order and would obtain a copy of it. Plaintiff's Counsel sent a communication sixteen minutes later stating the deadline had already passed and requesting information on when Counsel for the Wuertz Defendants would provide the authorizations.

On Monday August 12, 2019 Defense Counsel requested copies of the authorizations that were to be signed. Plaintiff had previously provided Defense Counsel with copies of these authorizations. Counsel for the Wuertz Defendants responded nine hours later stating that he did not believe there would be any issue getting all the signed authorizations to Plaintiff's counsel by August 16, 2019. On August 19, 2019 Defense Counsel stated that Mr. Wuertz was "meeting with the accountant later today" and he expected to have "something by tomorrow morning." Plaintiff's Counsel responded via e-mail later that day again asking for Counsel to provide the signed authorizations for Mr. Wuertz's tax returns within two days of the e-mail. No response was received. On August 23, 2019, Plaintiff's counsel sent Defense Counsel a letter, pursuant to S.C.R.C.P. 11, stating that they had failed to comply with the Court's order and requesting Compliance before Noon on August 28, 2019. Counsel for the Wuertz Defendants e-mailed

Plaintiff's Counsel at 11:00am on August 28, 2019 requesting until the end of the day to comply with the Court's August 1, 2019 Order. Defendants provided nothing further on August 28, 2019.

On August 29, 2019 Counsel for Defendant Girardeau sent a sworn financial statement which also included language seeking to reserve his right to supplement the information contained in the financial statement at a later time. On August 29, 2019 Counsel for the Wuertz Defendants produced certain tax documents for 2016 and 2017 tax years of Crest Energy Partners LP, and a financial statement for Henry Wuertz. Defense Counsel's e-mail closes by stating "Stand by, more to come." No additional productions or communications were provided by Counsel for the Crest Defendants, Dunhill Defendants, and Wuertz that day.

On August 30, 2019 counsel for the Wuertz Defendants attached a letter from Sean K. Butler, an accountant who represented in the letter to have previously prepared tax returns for Crest Energy Partners, L.P. and is "familiar with that entity's corporate structure and financial condition." This document claimed that none of the Crest Defendants nor Dunhill Defendants have any real income reflected on the 2016 nor 2017 tax years and have not filed tax returns for 2018. It was not a financial statement for any entity and the Court finds it was not be responsive to the Court's Order. The e-mail transmitting that letter from Counsel for the Wuertz Defendants again stated "More to come..."

No further discovery materials were produced. The Wuertz Defendants never produced the signed Court-ordered authorizations for the CPA records nor paid the \$1,950.00 in monetary sanctions. On August 30, 2019 Counsel for the Wuertz Defendants sent a letter to the Court stating he had complied as much as he would with the August 1st Order of the Court and believed his actions to be substantially compliant with that Order. Defense Counsel further requested that this

Court hold him in Contempt for his and his client's refusal to comply with the Court's order so that he could appeal the August 1, 2019 Order.

Plaintiff offered unchallenged evidence that on September 3, 2019 they received by courier what purported to be a Notice of Appeal. Counsel for the Wuertz Defendants admitted that the Notice of Appeal served on Plaintiff was not filed with this Court or the Court of Appeals. The certificate of service contained in the document delivered to Plaintiff swore that the NOA had been served upon Plaintiff's Counsel four days earlier, on August 30, 2019. Plaintiff also offered unchallenged evidence that Counsel for the Wuertz defendants had previously threatened an appeal of the Court's August 1, 2018 order and at that time Plaintiff's Counsel had advised Mr. Marvel that an appeal of the discovery order would be interlocutory. The Court finds that the Notice of Appeal served upon Plaintiff and the threat of Appeal was intended to cause delay.

At oral argument on September 23, 2019, Defense Counsel argued that he had substantially complied with the Court's order, that his clients were unable to pay the monetary sanctions ordered by the Court, and requested the Court to issue an order finding the Wuertz Defendants in Contempt so they could appeal the August 1, 2019 discovery order. Defense Counsel further stated that he was aware he could not file the threatened appeal regarding the August 1, 2019 Order without being held in contempt because the appeal would be interlocutory. Defendants did not advise Plaintiff or the Court of its inability to pay the award of attorney's fees at any point prior to the September 23, 2019 hearing and failed to offer any proof of that assertion. No memorandum or motion seeking relief from the monetary sanctions due to an inability to pay was filed. Defense Counsel also stated that he had been ordered by his client to appeal any order issued by the Court.

ANAYLSIS

Pursuant to Rule 37, SCRCP, when a party fails to respond to discovery requests or obey an order to provide or permit discovery, the court may “make such orders in regard to the failure as are just.” Rule 37(b)(2), SCRCP. “Rule 37 expressly grants the trial court power to order judgment by default for either violation of a court order, or upon motion, for a party’s failure to respond to certain discovery requests.” *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E. 2d 679, 682 (Ct. App. 1997) (citing Rule 37(b)(2)(C) & (d)). “Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Creighton v. Coligny Plaza Ltd.Pshp.*, 334 S.C. 96, 122-23, 512 S.E.2d 510 (Ct.App.1998) citing *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 545, 489 S.E.2d 679, 683 (Ct.App. 1997) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976)). It is in the discretion of this Court to award sanctions for Plaintiff’s failure to respond fully to discovery requests and refuses to obey court orders. *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct.App. 1987).

When discovery violations show bad faith, willful disobedience, or gross indifference to another litigants’ rights, it is justified to strike that party’s pleadings. *QZO, Inc. v. Moyer*, 358 S.C. 246, 255, 594 S.E.2d 541, 546 (2004). When determining the proper sanction, the Court should consider the precise nature of the discovery sought, the discovery posture of the case, willfulness, and the degree of the prejudice. *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (1997). Where a party’s right to discovery is abused, prejudice must be presumed unless the party failing to submit the discovery can show a lack of prejudice. *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987).

Prior to Plaintiff bringing its Motion for Sanctions, the Defendants had entered into a Consent Order and the Court granted three separate Motions to Compel – all regarding the Defendants failure to provide discovery responses relating to the financial information sought by Plaintiff. Two of those orders included monetary sanctions against the Defendants for the failure to comply with Rule 37. Plaintiff's motions continued to seek the enforcement of previous Court ordered discovery and were necessary as a result of Defendants' noncompliance with prior orders and its failure to follow the Rules of Civil Procedure. The Court had denied the Defendant's Motion to Quash certain financial discovery, holding that the discovery requested was necessary for the Plaintiff's case and not overbroad. All parties were aware that the character of the discovery sought had been found to be relevant and discoverable by the Trial Court in multiple orders and should be produced.

Defendants representations to Plaintiff and the Court during the April 22, 2019 conference that they would produce the sought discovery, failing to and forcing a Motion to Compel, and the subsequent willful noncompliance with the Court's August 1, 2019 Order is a continuation of its dilatory tactics throughout this case which has prejudiced Plaintiff's ability to support their claims with discoverable information and prepare for trial. Counsel for the Wuertz Defendants was aware that a trial was imminent. Defendants made numerous representations that they would produce the discovery both prior to and subsequent to this Court's Order, all along breaching the deadlines and extensions to deadlines granted by Plaintiff. In the wake of those representations, Defendants failure to comply with the August 1st Order of the Court and request for contempt demonstrates a clear willful disobedience towards Court orders and disregard for the Plaintiff's rights.

The Wuertz Defendant's counsel's letter to the Court dated August 30, 2019 announcing their failure to comply with and intent to appeal the order cites to *Metts v. Mims*, 384 S.C. 491,

682 S.E.2d 813 (2009) and to *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014). These cases outline the proper procedure for requesting contempt to Appeal a discovery order and document a case where a party had its pleadings struck for feigning compliance multiple times before eventually requesting contempt.

As set out in *Davis* and *Metts*, if the Wuertz Defendants believed the discovery requested was inappropriate, privileged, or they were not obligated to produce it according to the rules, they should have stated that clearly and affirmatively prior to or at least during the April 22, 2019 teleconference, or at latest, immediately after the Court's ruling. In choosing to make false representations to opposing counsel and then further feign compliance with the order of the Court, the Wuertz Defendants wasted months of time before requesting Contempt for the purpose of manufacturing an appealable issue. These actions alone are sufficient to grant an order of sanctions striking the pleadings of these Defendants pursuant to *Davis v. Parkview*. When taken as a whole in context with the Defendants prior discovery abuse, repeated monetary sanctions and continuing noncompliance with orders and the Rules of Civil Procedure, it is apparent to this Court that no other sanction is likely to have an effect on the behavior of these Defendants.

The Court finds from a review of the totality of the record that the Wuertz Defendant's conduct is in bad faith, is willfully disobedient to the orders of the Court, and demonstrates a gross indifference to the Plaintiff's rights seeking to delay a case on the eve of trial. Having considered the nature of the discovery sought, the discovery posture of the case, the Wuertz Defendant's willfulness, and the degree of prejudice the noncompliance has caused to the Plaintiff, it is the holding of this Court that the Pleadings of Crest Energy Partners GP, LLC, Crest Energy Partners L.P., Dunhill Products GP, LLC, Dunhill Products, L.P., and Henry Wuertz shall be struck in accordance with Rule 37 of the South Carolina Rules of Civil Procedure.

IT IS SO ORDERED

The Honorable Maité Murphy

Date: _____ 2019

_____, South Carolina



Dorchester Common Pleas

Case Caption: Innovative Waste Management Inc , plaintiff, et al VS Crest Energy Partners Gp, LLC , defendant, et al
Case Number: 2012CP1801227
Type: Order/Sanctions

So Ordered

s/ Maite Murphy 2166