

COPY

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

BOARD OF TRUMBULL TOWNSHIP)
 TRUSTEES, *et al.*,)
)
 Plaintiffs,)
)
 -vs-)
)
 LAWRENCE RICKARD, *et al.*,)
)
 Defendants.)
)
 and)
)
 MIKE DeWINE ATTORNEY)
 GENERAL OF OHIO,)
)
 Defendant-Cross-Claimant,)
)
 -vs-)
)
 LAWRENCE RICKARD, *et al.*)
)
 Cross-claim Defendants.)

CASE NO. 2008 CV 925

JUDGE RONALD W. VETTEL

JUDGMENT ENTRY

FILED
 2014 APR 29 P 4: 19
 TAMM PERITFK
 CLERK OF COURTS
 COMMON PLEAS COURT
 ASHTABULA COUNTY, OHIO

This matter came on for consideration of the Court upon Joint Motion of the Board of Trumbull Township Trustees and Ohio Attorney General for Sanctions and Other Relief originally July 12, 2011; the memorandum in support thereof; the supplemental legal authority filed November 11, 2011; the amended documentation supporting request for attorney's fees filed August 20, 2012; Lawrence Rickard's Motion for Judgment on the Pleadings filed October 24, 2012; the Board of Trumbull Township Trustee's memorandum in opposition to same filed November 2, 2012; the Board of Trumbull Township Trustee's Supplemental Documentation Supporting Request for Attorney's Fees filed November 5, 2012; the hearings on these matters held March 16,

2012, June 4, 2012, June 14, 2012, August 20, 2012, and November 5, 2012; and the Findings of Fact and Conclusions of Law filed by the Board of Trumbull Township Trustee on November 26, 2012. The Court considered the briefs, supporting memoranda, evidence, and all attached exhibits and affidavits.

I. PROCEDURAL HISTORY

Plaintiff Board of Trumbull Township Trustees ("Board") filed its complaint against Lawrence Rickard ("Rickard") and various John Does and ABC companies on July 3, 2008. Rickard runs the Great Lakes Medieval ("GLMF"). Pursuant to R.C. 4303.20 and R.C. 4303.202, Rickard obtained a temporary permit to sell alcoholic beverages at the fair for the benefit of a number of charitable purposes. In part, the complaint alleged claims concerning these charitable trust assets, so Plaintiff Board named as a necessary and indispensable party defendant the Attorney General.

The Board also named as nominal plaintiffs Trumbull Township Volunteer Fire Department, Inc. ("TTVFDI") and Trumbull Township Fire and Rescue Auxiliary, Inc. ("TTFRAI"). TTVFDI is a public charitable trust formed nearly 60 years ago as an Ohio nonprofit corporation for the purpose of funding and providing protection against fires in Trumbull Township and the surrounding communities. The Board is TTVFDI's exclusive charitable beneficiary. TTFRAI is a public charitable trust formed for the purpose of raising supplemental funds to assist the Board in providing fire protection. TTVFDI and TTFRAI are third party beneficiaries of a 2006 settlement agreement that resolved disputes between Plaintiff Board and TTVFDI regarding title to real property, firefighting equipment, and related assets.

The Attorney General filed a cross claim against Defendant Rickard on behalf of

other various charitable beneficiaries, and later amended its cross claim to include additional claims. The Board amended its complaint to include an unjust enrichment claim. Both parties further amended their pleadings to substitute Phoenix Productions LLC ("Phoenix") for the unnamed ABC companies.

In its second amended cross claim, the Attorney General asserted claims against Rickard and Phoenix (collectively "Defendants") for equitable relief and claims giving rise to general and special damages for breach of statutory fiduciary duties, conversion, and fraudulent concealment. The Attorney General also sought prejudgment attachment of trust assets. In its second amended complaint, the Board asserted against Defendants claims for declaratory relief respecting a contract between TTVFDI and Rickard. The Board also alleged a claim for damages for breach of contract and other claims for equitable relief.

Defendants filed answers and affirmative defenses to claims asserted against them. Rickard also asserted a counter claim for declaratory relief respecting the aforementioned contract.

Defendants next filed a motion for summary judgment on the Board's claims, and the Board filed a response. The Attorney General also filed a motion for summary judgment on all its claims against Defendants. After requesting and obtaining several extensions of time, Defendants failed to file a reply brief in support of their motion for summary judgment or a brief in reply to the Attorney General's motion. The Court has not ruled on these motions.

During the discovery phase of these proceedings, the Board and the Attorney General jointly issued formal discovery requests to obtain responses to interrogatories,

requests for production of documents, and to inspect Defendant's real property. They also obtained documents from third parties through the issuance of formal subpoenas and from the Ohio Tax Commissioner by order of the Court. Defendant Rickard was deposed three times, and the Board and the Attorney General interviewed and deposed numerous third party witnesses.

Defendants issued formal discovery requests to obtain the Board's responses to written interrogatories, requests for production of documents, and deposed Plaintiffs' principals and third party witnesses.

After the close of discovery and the onset of delays incident to Defendants' retention of new counsel three times between 2010 and 2011, the Board and the Attorney General jointly sought a preliminary injunction and order of prejudgment attachment of charitable trust assets, alleging they had uncovered evidence demonstrating Rickard's intent to transfer or otherwise impair the value of the assets prior to trial. These motions are also pending before the Court.

During the discovery process, frequent disputes arose concerning Rickard's responses to formal discovery and requests for production of documents, the veracity of his deposition testimony and answers to interrogatories, his failure to timely identify material witnesses, and his alleged interference with the inspection of his real property. These discovery disputes were addressed by the Court and the parties during pre-trial status conferences, on Defendants' motion for protective order, Defendants' blanket objections to the Board's written discovery requests, the Board's motion to compel discovery, and the Attorney General's motion seeking an order compelling the Ohio Tax Commissioner to disclose information regarding Rickard's tax returns.

The Board and the Attorney General prevailed on their motions to compel discovery and to compel the State Tax Commissioner to disclose information respecting defendants' tax returns. Defendants failed to prevail on their motion for protective order. The Court filed an order directing the parties to complete full discovery prior to a rescheduled mediation.

Ultimately, the Board and the Attorney General filed the instant joint motion for sanctions, alleging that Rickard engaged in a systematic pattern of discovery abuses, contumacious conduct, and fraud on the court that resulted in substantial delays in these proceedings and otherwise prejudiced them. They jointly seek an order striking Defendants' answers and affirmative defenses, dismissing his counterclaim for declaratory relief, entering default judgments on all their claims, and affording related relief.

II. CONSTRUCTIVE TRUST AND DISCOVERY

When a fiduciary commingles trust assets in the form of cash with his personal assets, the whole of all the fiduciary's personal assets is considered trust property, and any remedy afforded for breach of trust must afford the trust beneficiary the greatest return on any investment the fiduciary made with the cash. To the extent the cash can be traced to the acquisition of particular assets in the fiduciary's hands, the fiduciary owes the beneficiaries an equitable duty to convey for their exclusive benefit legal title to such assets immediately upon assuming possession, equitable title, or legal title thereto.

The Ohio Supreme Court has defined a constructive trust:

[A] trust by operation of law which arises contrary to intention and invitum, against one who, by fraud, actual or constructive, by duress or abuse of

confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

Ferguson v. Owens (1984), 9 Ohio St. 3d 223, 459 N.E.2d 1293.

A constructive trust is imposed "not because of the intention of the parties but because the person holding the title to property would profit by a wrong, or would be unjustly enriched if he were permitted to keep the property."

Univ. Hosps. Of Cleveland, Inc. v. Lynch (2002), 96 Ohio St. 3d 118, 129-130, 2002-Ohio-3748, at ¶59.

A party seeking the judicial recognition of either a constructive or resulting trust bears the burden of producing clear and convincing evidence justifying it. *Univ. Hosps. Of Cleveland, Inc. v. Lynch*, supra. The standard of "clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus; *State v. Schiebel* (1990), 55 Ohio St. 3d 71; *In re Adoption of Holcomb* (1985) 18 Ohio St. 3d, 361, 368.

Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof. However, it is also firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by a trial court judge.

Under General Trust law, when trust property is transferred to a third party in breach of a trustee's fiduciary duty, the third party takes such property

subject to the trust, unless it is a "bona fide purchaser for value." A bona fide purchaser for value is a transferee who takes trust property without notice of the breach of a trust, and it takes the property free of the trust's interest. If the transferee is not a bona fide purchaser for value or if the transferee had notice of the breach of a trust, the original trustee or the trust's beneficiaries may bring an action against the transferee for restitution of the trust property.

First Merit Mortgage Co. v. Beers, 2007-Ohio-4253, at 12-15 (internal citations omitted).

The Ohio legislature has adopted the notion that a trust beneficiary is always entitled to an accounting of trust assets, and, where trust assets have been misappropriated, the trust beneficiary may pursue trust assets through any form in order to be made whole. R.C. 5810.01(B)(2) provides:

(B) To remedy a breach of trust that has occurred or may occur, the court may do any of the following:

(9) Subject to section 5810.12 of the Revised Code, void an act of the trustee, impose a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;

R.C. 109.23 and R.C. 1716.01 *et seq.*, govern the contract between Rickard and TTVFDI respecting the management and operation of the GLMF beer concession, and as a result of the nature of their business relationship, Rickard owed TTVFDI statutory fiduciary obligations and common law fiduciary obligations to act in good faith at all times in their dealings, and to protect the account for charitable assets that came into his possession by any means or over which he exercised control.

R.C. 4303.20 and R.C. 4303.202, and the Ohio Department of Liquor Control's attendant regulations authorize issuance to charities of temporary permits to sell alcoholic beverages at special functions held only for charitable purposes, but not for "any function the proceeds of which are for the profit or gain of any individual." To the

extent Rickard collected in any manner any proceeds from the GLMF beer concession or otherwise gained anything else of value to himself from operating beer concessions at the GLMF, he unlawfully profited or gained from the function for which the permit was issued. As such, charitable proceeds that came into his possession were held in trust.

Mark Graves, an accountant with the Attorney General's Office and Bernard Agin, joint expert of the Attorney General and the Board, testified based on evidence admitted in the record at the hearing on the instant motions that Rickard misappropriated more than \$100,000 from the Board and more than \$300,000 from other charities from 1994 to present, and that he applied these proceeds for his own profit or gain. The Board and the Attorney General contend the fruits of these misappropriated assets are held in trust for the benefit of charitable beneficiaries for whose benefit they were collected.

Since Rickard is a fiduciary of charitable proceeds that came into his possession, R.C. 109.23 and R.C. 1716.01 *et seq.* obligate him to account for the charitable proceeds. As such, to the extent Rickard's income tax returns, sales tax returns, or related business records typically used to create or substantiate tax returns reflect any financial information (income or expenses), or otherwise would assist in tracing misappropriated charitable assets, same were discoverable in this action by the Board and the Attorney General. Civ.R. 26.

Since the Board and the Attorney General alleged Rickard misappropriated charitable assets in the form of cash while acting in a fiduciary capacity, they were entitled to broad discovery under Civ.R. 26, as outlined above. A right to attempt to trace misappropriated trust assets in the form of cash commingled with the fiduciary's

assets affords the beneficiary a related right to broad discovery of all the fiduciary's assets in any form. *National Bank v. Insurance Company* (1881), 104 U.S. 54, at 24-26, 28. Equity forbids the fiduciary from concealing investments made with the commingled cash.

III. PRINCIPALS OF APPLICABLE LAW

Ohio Courts have inherent authority to control all matters related to discovery, including authority to enter sanctions for discovery misconduct. *State ex rel. Grandview Hosp. and Medical Center v. Gorman* (1990), 51 Ohio St.3d 94, 95, 554 N.E.2d 1297, 1298–1299. Civ.R. 37 governs the failure to comply with Civ.R. 26 and related discovery rules, and it also authorizes trial courts to enter sanctions for discovery misconduct. Civ.R. 37(B)(2)(c) authorizes a court to strike pleadings, dismiss an action or parts thereof, and/or enter default judgment to sanction a party for disregarding court orders arising out of discovery disputes. Civ.R. 37(B)(2)(c) provides:

(2) If any party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just, 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;

Although law favors disposition on the merits, dismissal for failure to comply with a discovery order is valid where the actions of the party at fault create a presumption of willfulness or bad faith. *Huntington Natl. Bank v. Zeune* (Jul. 6, 2009), 10th Dist. No. 08AP-1020, *slip copy*, 2009-Ohio-3482.

The Eleventh District Court of Appeals held that courts should consider several factors when imposing discovery sanctions for violations of court orders, including,

all the facts and circumstances surrounding the noncompliance, including the number of opportunities and the length of time within which the faulting party had to comply with the discovery or the order to comply; what efforts, if any, were made to comply; the ability or inability of the faulting party to comply; and such other factors as may be appropriate.

Maggard v. Zervos (Dec. 12, 2003), 11th Dist. No. 2001-L-072, not reported, 2003-Ohio-6688.

Moreover, the Eleventh Appellate district has noted that the entry of an order *sua sponte* for sanctions against a party that includes dismissal of a defense, action, or claim is appropriate when "the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order." *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 632, 605 N.E.2d 936, 944.

Pursuant to Civ.R. 41(B), before a court may dismiss an action as a sanction for violation of a discovery order, the non-compliant party must be afforded ample opportunity to comply with the order and be provided with notice of the intent to dismiss the action. *Levorchick v. DeHart* (1997), 119 Ohio App.3d 339, 343-344, 695 N.E.2d 303, 306. However, a trial court need not expressly and unambiguously give actual notice of its intention to dismiss. *Sazima v. Chalko* (1999), 86 Ohio St.3d 151, 156, 712 N.E.2d 729, 733. A decision to dismiss a case pursuant to Civ.R. 41(B) is within the discretion of the trial court, subject to review only for an abuse of discretion. *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47, 684 N.E.2d 319, 321.

Further, trial courts have discretionary authority to sanction a party who perpetrates a fraud upon the court. It is generally agreed that "[a]ny fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense."

Coulson v. Coulson (1983), 5 Ohio St.3d 12, 15, 448 N.E.2d 809, 812. "[F]raud on the court...can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense." *Nichols v. Klein Tools, Inc.* (C.A.8 (Mo.), 949 F.2d 1047, 1048. Repeated and pointed lies under oath regarding a pivotal issue in the case properly gives rise to dismissal of claims. *Id.*, at 1049. No suitable penalty other than dismissal is available where the party guilty of fraud on the court has limited resources to pay an award of costs taxed against him. *Id.*, at 1049.

A sanction that includes striking a party's pleadings for failure to produce income tax returns after ordered to do so by the trial court, and related award of attorney's fees, is appropriate. *Shikner v. S&P Solutions* (Jan. 11, 2007), 8th Dist., No. 87877, unreported, 2007-Ohio-86. A stated interest in protecting the confidentiality of income tax returns is not ground for disregarding a court order compelling their production because there are various procedural mechanisms available to protect the confidentiality of its information during litigation. *Id.*, at 6.

IV. DISCOVERY TIMELINE

The discovery timeline unfolds as follows:

1. On August 7, 2008, the Board served Rickard with its first set of interrogatories and requests for production of documents. The request identified a broad range of documents, including but not limited to federal income tax returns, state income tax returns, and state sales tax returns for all the years the GLMF beer concession was operated. The Board also requested the production of all related financial records used to prepare and support said tax returns.

2. On August 29, 2008, the Board served Rickard with their second set of interrogatories and request for production of documents seeking various additional documents, including all GLMF vendor contracts for the years the beer concession operated.
3. After being deposed in September 2008, Rickard served blanket objections to the Boards discovery requests. He objected to producing the requested tax returns and supporting financial records, GLMF vendor contracts, and most of the other documents requested. In his answers to interrogatories, Rickard did not disclose the identity of Phoenix as a party having an interest in the GLMF. In his objections to the Board's first and second requests for production of documents, Rickard also failed to disclose that he had not prepared or filed tax returns for any year he operated the GLMF.
4. On October 20, 2008, the Attorney General filed a motion seeking an order compelling the Ohio Tax Commissioner to produce copies of Rickard's income tax and sales tax returns.
5. On November 7, 2008, Rickard filed a motion for protective order seeking protection from any obligation to produce his tax returns and other documents responsive to the Boards first and second requests.
6. On December 8, 2008, the Court held a hearing on the Attorney General's motion seeking an order authorizing the Ohio Tax Commissioner to produce copies of Rickard's tax returns. Although present at said hearing, Rickard at no time disclosed that the tax returns did not exist. Rickard's counsel at the time of this hearing, Jaredd Flynn, later testified that Rickard concealed this fact from

him.

7. On December 30, 2008, the Court referred this matter to mediation. The order instructed the parties to conclude discovery in advance of the mediation which was set for April 14, 2009.
8. On January 2, 2009, the Court issued an order directing the Ohio Tax Commissioner to produce copies of the tax returns. In response, the Tax Commissioner's certified that none of the requested tax returns had been filed by either Rickard or Phoenix.
9. On February 3, 2009, the Board served Rickard with notice of inspection of real property regarding the GLMF property located at 3033 State Route 534, Rock Creek, Ohio.
10. On February 10, 2009, the Board served Rickard with its third request for production of documents, seeking documents comprising or relating to insurance policies regarding the GLMF. The Board also requested production of any documents associated with marketing and advertising service providers, attendance records, ticket sales, and various electronic documents related to GLMF beer concession operations.
11. On March 4, 2009, counsel for Defendants sent a letter to counsel for Plaintiffs indicating that Rickard would search for documents responsive to the outstanding requests for production, and that they would be provided by March 16, 2009.
12. When counsel for Plaintiffs appeared at the GLMF property for inspection on March 13, 2009, Rickard failed to appear. Although Rickard's counsel appeared, the parties were unable to complete a meaningful property inspection because

most portions of the property with inaccessible due to Rickard's absence.

13. On April 6, 2009, counsel for Plaintiffs sent a letter to counsel for Defendants inquiring why certain documents had been withheld for more than six months after Rickard had delivered them to his attorney.
14. On April 8, 2009, counsel for Defendants sent an e-mail to Plaintiffs indicating that Rickard would no longer make available for inspection original documents.
15. On May 13, 2009, the Court entered an order on Rickard's motion for protective order. The Court overruled Rickard's motion to protect the returns and requested financial documents as confidential and proprietary. The Court also overruled Rickard's objections to outstanding discovery requests seeking GLMF financial information, vendor contracts, and portions of tax returns related to the beer concessions. The Court adopted the consent of Plaintiffs that the tax returns produced should be protected from disclosure to third parties.
16. On July 31, 2009, the Board filed a motion to compel respecting documents the Court previously ordered were discoverable and which Rickard had failed and refused to produce, including but not limited to (a) tax returns, (b) financial information presented to Rickard's accountant, (c) documents reflecting the general expenses of the GMLF, (d) documents evidencing vendor contracts, (e) insurance policies and other insurance related documents, (f) documents related to operating loans, (g) vendor contracts, (h) documents reflecting GLMF annual attendance, (i) documents reflecting proceeds collected from the beer concession, (j) documents Rickard delivered to his accountant, (k) the identity of Rickard's accountant, (l) documents regarding GLMF ticket revenues, and (m)

electronic documents.

17. On August 3, 2009, Defendants filed a joint motion for summary judgment.
18. On August 14, 2009, Rickard served a pleading in opposition to Plaintiffs' motion to compel discovery. In the pleading, Rickard:
 - i) stated that he, "provided all documents in his possession with respect to portions of any tax returns...and general expenses...as deemed discoverable by this Court in it's May 13, 2009 [sic]"
 - ii) stated he failed to comply with this Court's May 13, 2009 order respecting vendor contracts because his counsel "misinterpreted" the order;
 - iii) failed and refused to identify his accountant;
 - iv) agreed to produce insurance policies and related insurance documents;
 - v) maintained his denial that he maintained or possessed any electronic data requested.

V. FINDINGS

A. Tax Returns

Inconsistent with Rickard's representation in the foregoing pleadings that he had produced or would produce copies of requested tax returns, he testified at the hearing on the instant motions that he did not prepare or file returns for the years 1994 through 2005. His accountant, Paul Demshar, prepared and filed tax returns for the years 2005 through 2010 as required for Rickard's 2011 bankruptcy case. The State Tax Commissioner's records also demonstrate that no tax returns were prepared and filed thereto.

At the hearing on the instant motions, Rickard's former attorney, Jared Flynn, testified that Rickard had never advised him that the tax returns at issue had never been prepared or filed. Flynn did not, however, explain why he signed a pleading

indicating that documents had been produced when his review of the produced documents would have demonstrated that the tax returns did not exist.

The Court finds that Rickard's representations to the Court and the other parties in the foregoing instances that nonexistent documents had been prepared and produced was false and misleading. These pleadings and representations caused numerous delays and interfered with the efficient administration of justice.

B. Insurance Documents

Inconsistent with Rickard's representation in the foregoing pleadings and statements that he would produce requested insurance documents, he never produced any insurance policies, information regarding expenses for insurance that were allocated and charged to GLMF vendors, including beer concession vendors, communications with insurers regarding insurance coverage for any claims asserted in this case, or insurance related documents. The Court finds that Rickard failed to comply with Civ.R. 26(B) and 34 by failing to produce the requested insurance documents during discovery.

The Court finds that Rickard maintained insurance for the GLMF and discoverable business records related to insurance that he should have produced. He admitted during his deposition that he maintained insurance for the GLMF and business records that included insurance documents. The records of Geauga Savings Bank's records subpoenaed and introduced into evidence at the hearing on these motions demonstrate that Rickard maintained insurance for the GLMF, and provide some information regarding the nature of the insurance coverage and the identity of an insurance broker from which Plaintiffs could have sought additional discoverable

information.

The Court further finds that Rickard presented no evidence at the hearing on the instant motions to meet his burden to demonstrate why he failed to produce the requested insurance documents or why he failed to timely contact the bank during discovery to obtain and produce said documents. Under Civ.R. 34, he had a duty to retrieve and produce these documents, since documents in the hands of a party's agent are in the party's custody or control such that the party must retrieve and produce them during discovery, or at minimum, identify the custodian.

The Court finds that Rickard's failure to produce discoverable insurance documents after representing that he would produce them was egregious. The misrepresentation of his intent to comply with discovery obligations was an attempt to persuade the Court to avoid an order requiring him to produce documents sought by Plaintiffs. The foregoing caused delays and interfered with the efficient administration of justice. Plaintiffs were denied an opportunity to timely explore whether there existed insurance coverage for any of their claims, and were thereby prejudiced.

C. Electronic Records

Inconsistent with Rickard's representations that he maintained no electronic data or documents, the record reflects that he created and maintained said electronic data and documents related to the GLMF. Rickard testified at deposition that the GLMF had a website, that the GLMF staff used computers, and that they used these computers for e-mails and to generate other electronic data. Further, the record in this case is replete with other references to the GLMF website.

Ms. Burris testified that she created electronic documents for the GLMF,

including but not limited to, accounting records from 1994 through 1999. She further testified that she left these records with Rickard when she left Ashtabula County in 1999.

Geauga Savings Bank's records reflect e-mail communications between the bank and Rickard through an e-mail account identified with a derivation of the name of his girlfriend, Cindy Hotchkiss.

Mr. Novakovich testified at the hearing on the instant motions that he created and maintained in his records electronic data on Quick Books software reflecting the financial condition and operations of Unionville Tavern LLC, a restaurant business Rickard operated at a loss for several years, and that those records reflected that the restaurant business was propped up by a continuous transfer of cash from Rickard during the period he operated the GLMF.

The Court finds that Rickard presented no evidence at the hearing on the instant motions to meet his burden to demonstrate why any of the foregoing electronic data or documents could not be produced, or why to do so would have created an unreasonable burden.

The Court finds that Rickard failed to comply with Civ.R. 26(B) and 34 by failing to timely produce requested electronic data and documents which clearly existed. Rickard's representations in the foregoing pleadings that he had no electronic data or documents were false and misleading. The Court finds that Rickard's conduct regarding the discovery of electronic data and documents was egregious. This conduct caused delays and interfered with the efficient administration of justice.

C. Accountant

Inconsistent with Rickard's failure and refusal to identify his accountant, Rickard maintained an ongoing relationship with said accountant, Mr. Novakovich, during these proceedings.

Mr. Novakovich testified that he was Rickard's accountant from 2002 through 2010, when he last prepared and filed requests with taxing authorities for extensions of time to file Rickard's 2009 tax returns. Mr. Novakovich further testified that, although he was contacted for that purpose in April 2010, he never received after August 2008 a request from Rickard to produce or preserve electronic data or hard documents maintained in his records. Mr. Novakovich testified he saw GLMF financial records, and advised Rickard what business records should be maintained for tax purposes. Mr. Novakovich testified he maintained notes he took when meeting with Rickard, as well as a pro forma for his businesses and other accounting records, but these records were destroyed in 2010 or 2011 when he determined his services were no longer needed. Mr. Novakovich testified he learned from reviewing Rickard's business records that he had borrowed between \$600,000 and \$700,000 in unsecured debt to purchase the restaurant business, and that the debts of that business were paid in part by a continuous transfer of cash from Rickard during the period of time he operated the GLMF.

The Court finds all the foregoing documents and information were discoverable under the Civil Rules and the Court's May 13, 2009 order. Rickard received the Board's first and second requests for production of documents in August 2008, but made no attempt to comply with his obligations under Civ.R. 26 and 34 to retrieve and produce documents maintained by Mr. Novakovich.

Mr. Novakovich further testified he destroyed Rickard's documents and data in his possession in 2010. The Court finds this spoliation of evidence is attributable to Rickard.

The Court finds that Rickard presented no evidence at the hearing on the instant motions to meet his burden to demonstrate why he failed to obtain and produce his business records maintained in Mr. Novakovich's files, why he did not timely advise Mr. Novakovich in 2010 when he was contacted to perform tax services to preserve or make available for production in this case all of his records, why he was unable at his July 7, 2009 deposition to identify Mr. Novakovich only three months after Mr. Novakovich was contacted to perform services on his behalf, or why he did not identify Mr. Novakovich in the pleading filed August 2010.

The Court finds that Mr. Novakovich destroyed Rickard's records that were discoverable in this case before the Board and the Attorney General learned his identity. Rickard's failure to timely identify Mr. Novakovich during a period he maintained an ongoing business relationship with him was egregious. His failure to identify Mr. Novakovich was designed to limit the effectiveness of the Board's motion to compel discovery, contributed to delays in these proceedings, resulted in spoliation of evidence, and otherwise interfered with the administration of justice.

D. Vendor Contracts

On October 19, 2009, Mr. Flynn, Rickard's counsel at the time, sent an e-mail to counsel for the Board and Attorney General advising them his client had located three boxes of previously unproduced documents comprise of agreements with GLMF vendors "from 2005 or 2006" and electric bills from 2009.

Despite the fact that the GLMF boasts it has as many as 125 vendors each year, Rickard testified that it only has 40 vendors annually. Counsel for the Board testified at the hearing on the instant motions that Rickard failed to produce all of his vendor contracts. The Court finds that Rickard's failure to produce all of the GLMF vendor contracts prevented the Board and the Attorney General from discovering evidence regarding GLMF revenues and the allocation of GLMF expenses to all vendors, including the GLMF beer concession, resulting in prejudice and contributing to delays in these proceedings.

E. Delays

The Court and counsel for the parties discussed the Board's Civ.R. 56(F) motion and its related motion to compel discovery at the November 2, 2009 pretrial conference. On November 4, 2009, the Court filed an entry directing Rickard to engage in full discovery. The Court ordered that Rickard's "motion for summary judgment should not be scheduled until all parties have had an opportunity for full discovery." The Court also directed the parties to complete additional discovery, including expert discovery, by January 25, 2010. The Court finds this entry adequately apprised Rickard that he was obligated to respond to outstanding discovery requests and to otherwise comply with the discovery rules.

On January 12, 2010, Rickard's counsel Mr. Flynn and his law firm filed a motion seeking leave to withdraw as counsel for Rickard, citing their client's failure to cooperate in defense of the case and failure to pay outstanding invoices. They also filed a motion on behalf of Rickard seeking an extension of the above discovery deadlines. On February 9, 2010, Mr. Flynn again filed a motion to extend the deadlines.

On April 21, 2010, the Court granted the application of Mr. Flynn to withdraw as counsel for Rickard. In that entry, the Court noted that Rickard had failed to appear at status conferences and was failing to cooperate in the prosecution of the case. The Court also set May 21, 2010 for a hearing on pending motions to afford Rickard time to retain new counsel.

On May 19, 2010, Dean Rooney faxed a letter to the Court indicating he would be appearing as Rickard's counsel. On the May 21, 2010 hearing, the Court granted Rickard's oral motion for continuance due to the recent retention of Mr. Rooney. On May 27, 2010, the Court continued the May 28 hearing to afford Rickard opportunity to retain yet another attorney.

On June 15, 2010, on the eve of the continued hearing, Rickard hired Malcolm Douglas. Rickard again moved to continue the hearing.

The Court finds that, on multiple occasions, Rickard delayed retaining new counsel until the eve of continued hearings in order to obtain further continuances and delay the proceedings in this matter.

F. Bankruptcy

On April 12, 2011, on the eve of the April 13, 2011 hearing on the instant motion for prejudgment attachment of Rickard's assets and less than one month before the scheduled trial date of May 10, 2011, Rickard filed for bankruptcy in the U.S. Bankruptcy Court for the Middle District of Florida.

On May 23, 2011, at Rickard's first Section 341 meeting of creditors in the bankruptcy case, the Internal Revenue Service's representative reported that Rickard had not yet filed federal income tax returns for the period of 2004 through 2010 as

required for his bankruptcy petition to survive dismissal. She asked why he had not filed them, and he testified:

“There’s a multitude of reasons. One, at first I thought I wasn’t making enough to even show that I should.”

“And then there was the other part – that I’m going through a lot of legal issues back home and it’s been continuous – it was a choice that I made continuously. They were requesting to find out what is my income. I knew my income was small. I figured that if they knew my income was small, they were going to pressure me in my business. That was a choice I made.”

The Court finds Rickard’s bankruptcy testimony that he did not file income tax returns because he thought he was not making enough money wholly lacks credibility. Rickard represented in his sworn bankruptcy pleadings that he earned \$780,000 annually. Bank documents including but not limited to a mortgage loan application signed by Rickard were obtained pursuant to a subpoena issued by the Attorney General. On the application, Rickard stated that his income exceeded \$900,000 in 2004.

The Court finds that concealing discoverable GLMF financial information from the Court, Attorney General, and the Board was the driving force behind Rickard’s decision not to prepare or file tax returns at any time after this case was filed.

On May 17, 2011, the Board filed a motion to dismiss the bankruptcy case, alleging Rickard filed the case in bad faith to delay these proceedings and that he could not substantiate his financial condition.

The bankruptcy court held an evidentiary hearing on the Board’s motion on August 12, 2011. The bankruptcy court dismissed the bankruptcy case for the reasons set forth in Chief Judge Glenn’s August 12, 2011 decision. The Court takes judicial

notice of said decision, Rickard's bankruptcy petition, related schedules, and amendments thereto as referenced in Chief Judge Glenn's decision. Chief Judge Glenn found that Rickard lacked good faith when he filed his petition, because it was filed on the even of a hearing on the instant motions for preliminary injunction and prejudgment attachment. He found the bankruptcy filing served only to delay this Court from proceeding and not to further a legitimate purpose under the bankruptcy code. The Court finds that Rickard presented no evidence in this Court at the hearing on these motions to overcome that finding.

This Court further finds, as Chief Judge Glenn found, that the financial information on Rickard's tax returns for the years 2005 through 2010 is not credible. Expenses attributable to the GLMF on the tax returns are inconsistent with expenses summarized by the Board's Assistant Fiscal Officer Amy Toth. Ms. Toth testified that she calculated annual expenses for the limited number of years for which Rickard produced some documents by adding amounts from documents presented by Rickard to amounts from documents subpoenaed from entities providing services to the GLMF.

The Court also finds that the fraudulent bankruptcy filing delayed hearings in this case and interfered with the efficient administration of justice.

VI. Conclusion

Based on the history of this case, the substantial number of opportunities afforded Rickard to comply with his discovery obligations under the Civil Rules and directives in this Court's previous entries, the limited efforts Rickard exerted to comply, the lack of evidence demonstrating that he was without the ability to comply with his discovery obligations, his perpetration of fraud on the court and other parties, his false

testimony regarding the profitability of the GLMF, other contumacious conduct, and all other facts and circumstances surrounding his noncompliance with discovery obligations, the Court finds the joint motion for sanctions should be granted.

The Court finds that Rickard's misconduct engaged in for his own benefit and for the benefit of Phoenix was willful and constitutes bad faith.

The Court further finds that Rickard and Phoenix had timely notice through the filing of the motion and memorandum in support or otherwise that the sanctions requested included striking their answers, defenses, and counterclaim, and granting default judgment against them.

The Court finds the sanctions requested in the instant motion are warranted under all the facts and circumstances and hereby grants the joint motion for sanctions. Rickard and Phoenix's answers and affirmative defenses to the Board's second amended complaint and the Attorney General's second amended cross claim are hereby stricken. Rickard's counterclaim is hereby stricken. Default judgment is hereby entered against Rickard and Phoenix, jointly and severally, in favor of the Board on its second amended complaint and in favor of the Attorney General on his second amended cross claim.

The Court finds this remedy is the only effective remedy to adequately cure the prejudice to the parties and the interference with the efficient administration of justice caused by Rickard's violation of the Civil Rules through repeated instances of discovery misconduct, his contumacious conduct, and his commission of fraud upon the Court. Further, any lesser sanction would be futile because equity would require that Rickard pay as a condition of the sanctions, in advance of continued proceedings, substantial

attorney's fees and expenses incurred by the Board and Attorney General in bringing the joint motion for sanctions, and Rickard contends he is financially destitute and unable to meet his monthly financial obligations. The Court finds he could not pay a monetary sanction that would allow the case to proceed.

The Court further finds that third parties in other proceedings pending in the Court of Common Pleas of Ashtabula County, of which the Court takes judicial notice, have sued Rickard in an attempt to recover judgments that could result in the dilution of Rickard's assets that may otherwise become subject to attachment proceedings respecting any judgment entered after a delayed trial in this matter, to the prejudice of the Board and Attorney General. Any sanction that would further delay resolution of this case is therefore unwarranted.

The Court further finds no lesser sanction will otherwise adequately address Rickard's foregoing misconduct or deter others from engaging in similar misconduct. Less severe sanctions would reward contumacious conduct and bad faith, and would otherwise fail to deter others from engaging in similar discovery abuses.

IT IS, THEREFORE, ORDERED that the joint motion for sanctions is granted. The issue of damages shall be taken up at a later date.

Pursuant to Civil Rule 58(B), the Clerk of this Court is directed to serve notice of this judgment and its date of entry in the journal upon all parties and counsel of record.



RONALD W. VETTEL, JUDGE