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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-020243 08/23/2012

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
A. Melchert
Deputy

C B I GROUP L L C

DENNIS I WILENCHIK

v.

GUIDANCE INVESTORS LIMITED PARTNERSHIP, et al.

CHARLES T CARSON

GEOFFREY S KERCSMAR

UNDER ADVISEMENT RULING

Plaintiff CBI filed a Motion for Sanctions against Defendant Guidance Investors Limited Partnership (Guidance), Guidance's related LLCs, and their counsel. The Court has reviewed all pleadings and exhibits filed in connection with the Motion; the depositions of Mr. Steven Broe, Guidance's principal; discovery motions, responses, and Court orders; transcripts of several hearings, including the June 18-19, 2012 evidentiary hearing; and the applicable law.

DISCLOSURE/DISCOVERY VIOLATIONS BY GUIDANCE ENTITIES

At issue are actions which, when viewed together, represent Guidance's attempts to mislead CBI, the Court, and the jury and to prevent a resolution of this case on the merits. It is clear that Guidance intended to conceal information about its assets. This information is relevant to CBI's RICO claim in the present case. It was also relevant to claims in two prior lawsuits, namely CBI's collection efforts in CV 1999-001302 (Case #1) and CBI's fraudulent transfer claim in CV 2005-002064 (Case #2). The information was subject to Rule 26.1 disclosure requirements in all three actions.

In a nutshell, approximately $7 million derived from the sale of original Guidance real estate assets was deposited into foreign bank accounts during the time that Guidance owed a $2 million judgment to CBI. Guidance did not disclose the existence of these accounts nor the fact that the funds deposited in these accounts came from the sale of original Guidance assets until June 6 and 7, 2012, a week before trial. Plaintiff CBI initially requested this information in 2006.

The conduct that most concerns the Court is the 1) testimony of Mr. Broe who manages and controls all of the Guidance entities denying the existence of documents regarding these accounts that, as it turns out, he knew about and kept in his office, and 2) the failure of Guidance and its LLCs (including AEM) to produce information about these accounts in violation of Rule 26.1 and the Court's rulings. Information that should have been disclosed in 2006 was not disclosed until June, 2012. It took six years, seven depositions of Mr. Broe, at least six motions to compel, and several Court orders.

On June 18-19, 2012, the Court conducted an evidentiary hearing on Guidance's/Mr. Broe's knowledge and participation in Guidance's and the LLCs' failure to disclose the information about the overseas accounts that was finally produced on June 6 and 7, 2012. Based on the evidence presented at the hearing and an exhaustive review of the record, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

GUIDANCE ENTITIES

1. Guidance and its LLCs are a closely-held family business, owned by the Broe family. The businesses include storage facilities, child care centers, apartment buildings, and other commercial businesses and real estate holdings in several states.

2. Starting In 2000, John Broe (Steven Broe's father) set up four LLC's (J&F Associates, Safeguard SS, Three Minis, and SK Holdings (referred to as the "LLCs")) and transferred Guidance's assets to the LLCs. Guidance controls the LLCs through a 98% to 99% membership interest. Other Broe family individuals or entities own the other 1% to 2%. A fifth Broe-family LLC, Advanced Educational Management (AEM), is the managing member of the LLCs. The LLCs and AEM exist to administer Guidance's real estate assets and businesses conveyed to the LLCs by Guidance. They do not appear to have any other function. Between 2000 and 2006, real estate assets were sold and the proceeds deposited in bank accounts through AEM and a Caribbean investment company, Oxy Education Investments.

3. The Broe family *is* Guidance, and Guidance *is* the LLCs and AEM. Guidance's business is conducted by, through, and between the LLCs and AEM. Mr. Broe oversees and

controls the business. He has appeared and testified as the custodian of records and/or Rule 30b6 witness for Guidance, the LLCs, and AEM.

PROCEDURAL HISTORY – THE CASES

4. The present case is the third lawsuit of three involving these parties:
   A. Case #1 - CV 1999-001302 (breach of contract/consumer fraud)(June 1999 to approx. June 2007)

   B. Case #2 - CV 2005-002064 (declaratory judgment/fraudulent transfer)(February 2005 to approx. June 2007)

   C. Case #3 - CV 2007-020243 (abuse of process/RICO)(October 2007 – present)

A. Case #1: CV 1999-001302 (breach of contract/consumer fraud)(June 1999 to approx. June 2007)

5. In June 1999, CBI sued Guidance, Guidance Investors, Inc., and John Broe, then Manager of the Guidance entities. The suit alleged breach of contract and consumer fraud and sought damages of $4 million. The suit arose after Guidance contracted to sell property to CBI but secretly sold it to someone else. In November 2003, a jury found for CBI and awarded $750,000 compensatory damages and $3.25 million punitive damages. The Court remitted the punitive damages and, on October 6, 2004, signed Amended Final Judgment awarding CBI $750,000 compensatory damages, $1 million punitives, attorneys fees of $265,000, costs of $14,090.80, plus interest at 10% from August 4, 2004 (date of original Judgment).

6. Guidance appealed. The Court of Appeals affirmed the verdict (January 2006), and the Supreme Court denied review (September 2006). Guidance did not pay the judgment or post a supersedeas bond. CBI pursued collection.

7. CBI conducted a public records search in December 2004, two months after the Court entered the Amended Final Judgment. The search revealed the existence of the LLCs and that Guidance had transferred its real estate holdings to them between 2000 and 2004. Initially, Guidance, through its counsel, Charles Carson, and principal, Mr. Broe, denied that Guidance had any interest in the LLCs. CBI eventually learned that Guidance owns virtually 100% of the LLCs and, as a result, has a net worth of several million dollars.

8. Over Guidance's objections, CBI obtained a charging lien against Guidance's distributions from the LLCs. If any of these real estate assets were sold or otherwise generated income, the lien precluded doing anything with the funds unless and until CBI collected its

judgment from those cash proceeds. (Unbeknownst to CBI and the Court, assets *were* sold for several million dollars before and while the lien was pending. The funds were routed through AEM and into the overseas bank accounts.)

9. Again over Guidance's objections, the Court appointed a receiver to look at the books of Guidance and its LLCs. The day before the receiver was scheduled to review the books, Guidance agreed to pay the judgment in full, with interest. Payments were made in May and June 2007.

B. Case #2: CV 2005-002064 (Declaratory judgment/Fraudulent transfer)(February 2005 to approx. June 2007)

10. After CBI learned of the transfers to the LLCs, it filed Case #2 against Guidance for fraudulent transfer and a declaratory judgment that the asset transfers were voidable and subject to attachment. The Court consolidated Case #2 with Case #1 in January 2007.

11. The Complaint in Case #2 alleged in part that Guidance had moved "substantially all of [its] assets" (Complaint, para. 17) and that Guidance did not "receive reasonably equivalent value in exchange for these transfers." (Complaint, para. 13).[1] In fact, while Guidance transferred its assets, it *did* receive equivalent value (the near-100% interest in the LLCs). However, Guidance filed an Answer in October 2005 *admitting* paragraphs 13 and 17. The admissions made it appear as though Guidance was completely worthless.

12. At the time Guidance filed its Answer, the Guidance entities had established the offshore company, Oxy; sold some of Guidance's original real estate holdings; and deposited the proceeds -- approximately $6 million of them – in overseas accounts.

13. In January and February 2006, Guidance filed disclosure statements. No information was disclosed regarding Guidance's ownership of the LLCs, the sale of assets, the accounts, or the deposits.

[1] A transfer is fraudulent as to an existing creditor if it is made "[w]ith actual intent to hinder, delay or defraud" the creditor; if it is made [w]ithout receiving a reasonably equivalent value in exchange" and leaves the debtor with too few assets; or "if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." A.R.S. §§ 44-1—5, 44-1005.

14. In March 2006, CBI deposed Mr. Broe as the 30b6 witness for Guidance. He testified that the transfers depleted Guidance of its assets.[2]

15. In May 2006, pursuant to a Court order, Mr. Broe gave a debtor's examination. Prior to the examination, he produced documents, including tax records, for Guidance that showed its ownership of the LLCs and a net worth in the millions of dollars. Contrary to CBI's Complaint and Guidance's Answer, Guidance had considerable value.

16. As stated above, CBI obtained a charging lien against Guidance's distributions from the LLCs and moved for the receiver in Case #1. Guidance paid the judgment. Since Guidance had transferred its assets in exchange for reasonably equivalent value, the Court dismissed CBI's fraudulent transfer claim. Guidance had allowed CBI to pursue a lawsuit for two years by failing to disclose up front Guidance's interest in the LLCs and assests.

C. Case #3: CV 2007-020243 (Abuse of process/RICO)(Oct. 2007 – present)

17. In October 2007, CBI filed the present case against Guidance for abuse of process (in the fraudulent case, Case #2) and RICO. In April 2010, Judge Kenneth Mangum granted CBI's Motion for Summary Judgment on the abuse of process claim. As discussed further below, discovery focused on the RICO claim and CBI's efforts to obtain information tracing Guidance's original assets.

18. The case was set for trial on June 11, 2012 on compensatory and punitive damages for abuse of process and RICO (liability and damages). On June 6-7, 2012, Guidance disclosed relevant information about Guidance's liquid assets for the first time. This information related to the RICO claim and punitive damages for abuse of process. The last-minute disclosure severely prejudiced CBI. The Court granted CBI's Motion to Vacate the trial and reset trial to October 14, 2012.

BROE TESTIMONY

19. CBI deposed Mr. Broe seven times between 2006 and 2012. Pertinent to the issue of non-disclosure, Mr. Broe gave the following testimony on March 6, 2006; May 15, 2006; February 15, 2012; and June 7, 2012.

[2] Mr. Broe corrected his deposition after Guidance disclosed documents showing its net worth through the LLCs. The correction indicated that Guidance did not admit the no-assets allegation in the Complaint. This "correction" was also false. The Answer states a clear "admit" to this allegation, and Guidance never filed an amended Answer.

A. March 3, 2006

20. On March 3, 2006, he was deposed as the Rule 30b6 representative of Guidance. Case #2 (fraudulent transfer) had been served and answered. The Complaint alleged that the transfers to the LLC's from Guidance were *not* made for equivalent value and that the transfers left Guidance with no assets. (Complaint, para. 13, 17.) In its Answer, Guidance *admitted* both of these allegations. In his deposition, Mr. Broe affirmed the Answer:

> Q. Do you remember a portion of the answer to the complaint essentially admitting that the transfers that are the subject of this case resulted in Guidance Investors Limited Partnership having substantially no assets?
>
> A. No, I don't remember.
>
> **Q. But do you remember from your own memory, without reference to those documents, that the subject transfers in this case resulted in Guidance Investors Limited Partnership having substantially no assets?**
>
> **A. Yes.**
>
> Q. Since the subject transfers that are the issue in this case, has Guidance Investors Limited Partnership ever had new assets?
>
> A. No.
> (Deposition, March 3, 2006, p. 57, l. 24 to p. 58, l. 21.) (Emphasis added.)

21. Mr. Broe's testimony confirming that Guidance had no assets was false. At the time of this deposition, over $6 million derived from original Guidance assets had been deposited into bank accounts that Mr. Broe controlled.

22. During this deposition, attorney Carson instructed Mr. Broe not to answer any questions about Guidance's assets. (Deposition, March 3, 2006, p. 48, l. 1 to 3.)

B. May 15, 2006

23. On May 15, 2006, Mr. Broe testified in a debtor's examination/deposition in Case #1. Per the Order for Supplemental Proceedings (Judgment Debtor's Examination), the Court ordered Guidance to produce the following at the examination: For the period April 2000 to 2006 (the "Period"), documents, including, but not limited to:

> 11. All documents **pertaining to any bank accounts, checking accounts, savings accounts, savings and loan accounts, credit union accounts, or other depository accounts in which** the judgment debtor Guidance Investors, L.P. has **an interest**, or in which the judgment debtor Guidance Investors, L.P. had **an interest at any time during the Period**, including, without limitation, all monthly statements, passbooks, stubs, cancelled checks, and any other documents evidencing any deposits or withdrawals made by the judgment debtor Guidance Investors, L.P. at any time during the Period.

(Exhibit 34 to June 18-19, 2012 Evidentiary Hearing ("Hearing").) (Emphasis added.)

24. In the debtor's exam, CBI's counsel asked Mr. Broe whether there were any other records responsive to the Judgment Debtor's Examination Order that had not been produced. He testified that all bank account records had been produced.

> Q. We talked about the Bank of America commercial account records and where they may or may not be and whether they exist or not today. Those records aside, and also putting aside the records you brought today, **do you know if there are any other records of Guidance Investors Limited Partnership that are responsive to the Court Order that you have not brought today?**
>
> **A. I know of no other records.**
> (Deposition, May 15, 2006, p. 16, l. 4-13.) (Emphasis added.)

25. The statement that he knew of no other records was false. At his June 7, 2012 deposition, he testified regarding his knowledge about the Vanguard Group and London & Capital account records dating back to 2004 that he produced on June 6, 2012. He further testified that the accounts reflected deposits made from the sale of Guidance's assets and that he maintained these accounts records in his office.

C. February 15, 2012

26. On February 15, 2012, CBI deposed Mr. Broe as the representative of AEM in connection with AEM's response to CBI's subpoena for documents. He testified that all bank statements containing any data traceable to the original Guidance assets had been produced.

> Q. You said that you produced the bank records that showed any transactions or any receipts by AEM of $100,000 or more?

A. Yes.

Q. Okay. And I think you told us that any real estate proceeds from the sale of those same original guidance real estate assets would have resulted in proceeds to the five LLC's in excess of a hundred thousand dollars?

A. Yes, that's right.

Q. So can we also deduce that included in these bank records that AEM produced would be the proceeds from any of those real estate assets that would have been traceable back to Guidance?

A. Yes.
(Deposition, February 15, 2012, p. 110, l. 21 to p. 111, l. 10.) (Emphasis added.)

27. As to Oxy, Mr. Broe testified that there were no records in addition to those produced by AEM:

Q. Do you remember or could you direct our attention to any of [the documents produced by AEM] that pertain to Oxy Educational?

A. I believe we're looking at page 33 and your Bates index.

Q. Okay. Thank you. Let me get there, please. Okay 33, 34, 35, and 36. Are those --

A. Yes. Pages subsequent, I was going to add but you got there.

Q. Okay. **Are there any others regarding or related to Oxy Educational that would be responsive to the subpoena as you understand it, the parameters as we've discussed multiple times today that have not been produced?**

A. No.
(Id., p. 93 l. 4-18.) (Emphasis added.)

28. Regarding the Vanguard Group account statement, he testified:

Q. It bears a date of October 2005. It's from the Vanguard Group, and so we're looking at the same page, correct, sir?

A. I think so.

Q. And in the middle of the page there's an entry under transactions for October 31 for $953,500. Do you see that one?

A. I see that.

Q. And other than what's been produced so far in Exhibit 2, **are there any documents anywhere that can help us understand or explain any additional detail surrounding that transaction?**

A. No. I've produced all of the relevant documents.

Q. Are there any other Vanguard statements other than the October '05 one that's been produced? Because I think this is the only page from that account that we received.

A. Again, to be clear, I'm looking at just those documents that relate to transfers from entities in the time period and I think this is complete.
(Id., p. 57, l. 3-16, and p. 57, l. 23 to p. 58, l. 4.) (Emphasis added.)

29. His testimony that no other records existed was false. As stated, the documents produced on June 6, 2012, the night before Mr. Broe's June 7, 2012 deposition, included account statements showing:

- On April 8, 2004, Oxy deposited $4.4 million in funds from AEM into a London & Capital account in London, England. Between April 2004 and January 2005, additional deposits were made to this account for total of over $6 million.
- In October 2005, AEM opened an account with Vanguard Group and deposited over $1.7 million.
- In March 2006, AEM and Oxy opened a second account with London & Capital and deposited $1,656,004 into this account.
- In December 2006, AEM deposited $2.225 million into the Vanguard Group account.

D. June 7, 2012

30. On June 7, 2012, Mr. Broe testified regarding the above accounts and deposits and confirmed that these funds were derived from the sale of original Guidance assets. He testified that the April 8, 2004 opening deposit of $4,473,206.00 was exclusively the proceeds of the original Guidance assets. He also testified that the "majority" of the subsequent deposits to the London & Capital accounts (over $6 million by January 2005) were also traceable to the original Guidance assets.

31. Regarding the London & Capital accounts:

> Q. Do you remember what individual or what entity made any or all of these contributions?
>
> A. As best as I can recall, these were transfers from Advanced Educational Management.
>
> Q. **Do any of those dollar figures reflect any funds traceable to the original guidance Investors Limited Partnership assets?**
>
> **A. Yes.**
> (6/7/12 Depo, p. 83, l. 6-13.) (Emphasis added.)
>
> ****
> Q. **Can you help tell us what proportion, if any, by any measure you would like to use, any approximation you would like to use, if you can, as to how much of that 6 million –plus is not attributable or traceable to the original Guidance assets? Can you answer the question?**
>
> Mr. Carson: Object to the form.
>
> A. Well, first I'd say that funds from Advanced Educational Management included sources from multiple case streams, including the business operations and child care center operations. However, **I think it's fair to say that the majority of these account values have come from sale of property.**
>
> By Mr. Felder:
> Q. **Sale of properties that were originally in the hands of Guidance Limited Partnership?**

A. **Yes.**
(Deposition, June 7, 2012, p. 83, l. 6 to p. 89, l. 7.) (Emphasis added.)

32. At this point, Mr. Broe requested a break and left the room with his attorneys, Mr. Carson and Mr. Threet who represented AEM. When they returned, he made a statement for the record as follows:

> I need to further clarify that transfers from Advanced Educational Management were made to another entity called Oxy Educational Investments, and from there, London & Capital managed accounts. The reports that you've been reviewing and discussing with me recently, 3610 and 3611, are accounts for Oxy Educational Investments and in -- I had **not produced those earlier because they were not part of our disclosure list**. **However, I understand Judge Cooper has expanded the scope of discussion and disclosure**, and I -- this week I wanted to make sure you had that information prior to this deposition so that you could have that information. The list of **transfers on that are fairly small**, but I wanted you to have that information **so you wouldn't feel like I've been withholding information from you**.
> (June 7, 2012 Depo, p. 86, l. 20 to p. 87, l. 10.) (Emphasis added.)

33. He further testified that proceeds of sales of original Guidance assets funded the Vanguard Group account. He described a specific sale of a property initially transferred from Guidance one of the LLCs, SK Holdings. (Id. at p. 99, l. 24 to p. 100, l. 23.)

34. Perhaps most importantly, in response to Mr. Carson's question, Mr. Broe testified that, at all times, Guidance had control over the LLCs and the cash to pay the judgment.

> Q. And tell us, at all times did Guidance Investors have sufficient assets to cover the full payment of the judgment in full, plus full legal interest? [objection]
>
> A. **Yes, We -- Guidance Investors was an owner of the LLCs. It received ownership interests and could have pulled funds from any of the LLCs that were formed under it, so yes.**
> (Id. at p. 133, l. 6 – 23.) (Emphasis added.)

DOCUMENT REQUESTS

A. 2006 – Order re Debtor's Examination

35. In March 2006, CBI served Mr. Broe with the Court's Order for Supplemental Proceedings (Judgment Debtor's Examination). The order included a directive that Guidance's representative produce at the examination all documents identified in the Order as Exhibit A. Exhibit A consisted of several categories of documents, including all documents 1) pertaining to any assets or property in which Guidance had or has "any interest at any time" between 2000 and 2006, 2) "reflecting any assets and liabilities of the judgment debtor" for that time period, and 3) "pertaining to any bank accounts" in which Guidance has or had an interest between 2000 and 2006. (Exh.34 to June 18-19, 2012 Hearing.)

36. The documents produced on June 6, 2012, clearly fell within the categories included on Exhibit A to the Judgment Debtor's Examination Order. These bank records reflect funds derived from the sale of original Guidance assets.

B. 2008 – Request for Production

37. In May 2008, CBI sent written discovery requests to Guidance requesting information and documents regarding financial accounts and proceeds regarding the original Guidance assets. CBI's First Request for Production of Documents dated May 23, 2008, specifically requested seven categories of documents, including those "documents constituting, referring to, and/or related to the disposition of the proceeds from the sale(s) of all real estate owned by Defendant Guidance Investors, LP. as of May 1999." CBI's First Set of Non-Uniform Interrogatories also dated May 23, 2008, posed seven questions, such as asking Guidance to describe "[f]or all real estate owned by Defendant Guidance Investors, L.P. as of May 1999…whether and to whom said property has since been conveyed, and, if sold, identify and describe the disposition of the proceeds from said sale(s)." (Hearing Exhibits. 46, 48.)

38. Guidance's Answers to the NUI's and Response to RFP, both dated June 30, 2008 and verified by Mr. Broe, objected to all of the NUI's and RFP's as "irrelevant." Guidance refused to provide any information about the sale of any asset prior to 2005 (which would have included the majority of the deposits that Guidance disclosed on June 6, 2012). Guidance did not produce any documents in response to the RFP. (Hearing Exhibits 47, 49.)

39. CBI filed a Motion to Compel, and Guidance filed a Response. It does not appear that the Court ruled, but, instead, extended the deadline for discovery. The Court's minute entries of October 14, 2009 and November 10, 2009 noted "difficulties in obtaining discovery" and "ongoing discovery dispute." CBI moved for, and Guidance opposed, the appointment of a

discovery master. Guidance moved for an order limiting the scope of discovery. The Court denied the motion. (See Hearing Exhibits 51 to 57.)

C. 2010 - 2011 – Subpoenas to LLCs and AEM

40. In November 2010, CBI issued and served subpoenas on the LLCs. The subpoenas were substantially similar to the 2006 Order re Debtor's Examination and the May 23, 2008, discovery requests propounded on Guidance. The subpoenas demanded production of all documents regarding "the sale of purchase of any assets, and/or in connection with any distribution to any individual or entities," "any asset previously owned by Guidance," and "all proceeds from sales of any assets conveyed..by Guidance." (Hearing Exhibit 60.)

41. No objection or motion to quash the subpoenas was filed. The LLCs produced limited information. They did not produce any bank statements or records of the Vanguard Group or London and Capital accounts.

42. On March 2, 2012, CBI deposed Mr. Broe who appeared in response CBI's notice for the deposition of a 30b6 representative for the LLCs. Mr. Broe acknowledged that bank records for the LLCs existed but stated that his accountant had them. CBI requested that the accountant be contacted and the documents retrieved. Mr. Carson, appearing as counsel for the LLCs as well as Guidance, refused. He argued that Guidance had no obligation to produce documents not in its possession.

43. On April 25, 2011, CBI filed a Motion to Compel and/or For an Order to Show Cause why the LLCs should not be held in contempt for failing to comply with the subpoenas. The Court set a hearing for September 18, 2011. After the hearing was set, Mr. Carson produced bank records reflecting transfers of funds between the LLCs and AEM. The Court vacated the hearing but awarded CBI its attorneys fees relating to the LLC subpoenas.

44. While the Vanguard Group and London & Capital account records were within the scope of the subpoeanas to the LLCs, these documents were not produced.

45. On September 29, 2011, CBI served on AEM a subpoena for the same type of information – documents, including bank account records, regarding the disposition of any original Guidance assets. (Hearing Exhibit 62.) AEM refused to produce <u>any</u> documents. Guidance filed a Motion for Protective Order; AEM filed a Motion to Quash; and CBI filed a Motion to Compel.

46. On December 13, 2011, the Court granted CBI's Motion to Compel, denied AEM's Request to Quash, and denied Guidance's Motion for Protective Order. The Court:

- ordered AEM to produce, by January 16, 2012, all documents relating to "any asset ultimately traceable to or from Guidance's original real estate assets;"
- stated specifically stated that the documents include any relating to the "creation, management, handling, transfer, or sale of these assets between January 1, 2000 and June 21, 2007" and information "regarding income or interest generated by these assets after that time period but only as a result of their activity between January 1, 2000 and June 21, 2007; and
- ruled that CBI could depose Mr. Broe on the AEM and LLC records.

47. Throughout this painful process, CBI's counsel sent letters to Mr. Broe's attorneys in an effort to resolve the discovery issues. A letter dated October 2011 to counsel for AEM, Mr. Threet, clearly stated CBI's request for information relating to the bank records that was not produced until a week before trial. The letter directed Mr. Threet's attention to deposits made in 2005 to 2007 into offshore accounts, Irish Permanent International and Scottish Equitable International, and transfers to entity described as "Oxy." The letter advised that CBI would question Mr. Broe in deposition about these accounts. (Hearing Exhibit 63.)

48. Despite the Court's express ruling on 12/13/11 that CBI could depose Mr. Broe on the AEM and LLC records, Guidance filed a Motion to Quash the 30b6 subpoena to AEM. AEM joined. Plaintiff filed responses and a Cross-Motion to Compel and/or for Order to Show Cause.

49. On February 7, 2012, the Court denied the Motion to Quash. The Court:

- again ruled that AEM comply with the subpoena served by CBI by providing "all documents relating to any asset ultimately traceable to or from guidance's original real estate assets;" and
- ordered AEM to produce a 30b6 deponent to testify regarding AEM's bank statements, the source of the assets reflected in the statements not produced, interest income, and any life insurance purchased by the Broes prior to payment of the judgment.

50. On February 15 and March 2, 2012, CBI deposed Mr. Broe regarding documents produced by AEM and the LLCs in response to CBI's subpoena -- *records produced in response to CBI's subpoena for documents relating to Guidance's assets.* At both depositions, Mr. Broe was asked about individual transactions. He denied the existence of any documents that could provide detail about the transactions. Further, counsel (Mr. Threet and Mr. Carson) repeatedly instructed Mr. Broe not to answer questions about the transactions. Despite the Court's orders that AEM and the LLCs produce a witness to answer questions about the documents, counsel objected on the grounds that the transactions were beyond the scope of the deposition and that discovery had closed.

51. On April 10, 2012, CBI filed yet another Motion to Compel Mr. Broe to answer questions about the transactions and for AEM to produce additional financial records that Mr. Broe had acknowledged in the February 15, 2012 deposition was not produced.

52. On April 26, 2012, AEM filed its opposition. In its Response (p. 5, l. 8), AEM's counsel stated that:

> Advanced produced **all** bank statements for **every** account during the relevant period which contained **every transaction** which might **possibly** be **traceable to the Guidance real estate assets**.

And, at p. 7, l. 19:

> [Mr. Broe] further testified [at his February 15, 2012 deposition in his capacity as representative of AEM] that he had **produced everything** that could be in response to the subpoena and the court order regarding documentation of the management or holding of the assets.

AEM concluded its brief by faulting CBI for "ignor[ing] the uncontroverted testimony and continu[ing] to harass Mr. Broe and Advanced." (Id., p. 11, l. 12.)

53. On April 27, 2012, the LLCs filed their Response, asserting similar criticisms of CBI. The Response also stated, at p. 3, l. 15, in reference to the AEM February 15, 2012 records deposition and corrections thereto, that:

> In those corrections AEM custodian of records Steve Broe clarified his February 15, 2012 deposition answers leaving **no doubt** that AEM produced **all** the AEM records that **pertained to the original Guidance real estate assets** as ordered by the Court in its December 13, 2012 order.

54. On May 24, 2012, the Court ordered for **the third time** that Guidance, the LLCs, and AEM produce the documents that CBI had been requesting and as ordered by the Court in its December 13, 2011 and February 7, 2012 orders. The Court ordered:

- the immediate production of all documents regarding the administration of proceeds of original Guidance assets between 2000 and 2007; and
- that Mr. Broe be deposed before the start of trial on June 11, 2012 and answer substantive questions about the transactions "which either involves, appears to involve, or may involve any asset, in whatever form, that is traceable back to

> Guidance including the transaction when the res estate was transferred from Guidance to one of the LLCs or a subsequent transaction involving that asset of funds from that asset."

55. The deposition took place June 7, 2012. After business hours the night before, on June 6, 2012, Mr. Carson provided CBI with 60 pages of records from the Vanguard Group account. CBI also received for the first time the records of London & Capital. (Exhibits 4 and 5 to Plaintiff's Emergency Motion to Vacate or Continue Trial and Motion for Sanctions.)

56. On June 7, 2012, Mr. Broe testified that AEM set up London & Capital accounts through Oxy, a company formed in Nevis in the Caribbean. AEM deposited substantial funds with Oxy which in turn, deposited them with London & Capital. That account included various funds, including Irish Permanente and Scottish Equitable. Mr. Broe testified that the 4/8/04 opening deposit of $4,473,206 was exclusively the proceeds of the original Guidance assets. He further testified that the "majority" of the subsequent deposits to the London and Capital accounts were also traceable to the original Guidance assets. He also testified that the Vanguard account was funded by proceeds of sales of original Guidance assets, including purchases by a Walter Solem of property from one of the LLCs, SK Holdings, which properties were originally transferred by Guidance. (Deposition, June 7, 2012, p. 99-100, 121, 83-89.)

57. The Court continued the trial, finding that the last-minute disclosure of the Vanguard Group and London and Capital accounts and Mr. Broe's June 7, 2012 testimony prejudiced CBI and for the reasons stated in Plaintiff's Emergency Motion to Vacate or Continue Trial and Motion for Sanctions.

LAW

1. Rule 26.1 requirements. Parties are required to voluntarily disclose the factual basis of the claims or defenses; the names, contact information, and an anticipated testimony of witnesses they intend to call; the names and contact information of anyone who may have knowledge relevant to the facts or issues; the names and opinions of expert witnesses; and a list of all documents "known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action and those which appear reasonably calculated to lead to the discovery of admissible evidence. See *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 896 P.2d 254 (1995); and *Link v. Pima County*, 193 Ariz. 336, 972 P.2d 669 (1998).

Rule 26.1(b)(3) expressly states that "all disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation."

2. Failure to disclose and/or to make a false/misleading disclosure. Rules 37(c)(1) provides sanctions against a "party or attorney who makes a disclosure pursuant to Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete," causing the other side to incur unnecessary expense. The party or attorney **"shall be ordered by the court" to reimburse the opposing party, including attorneys fees.** "In addition or in lieu of these sanctions," after affording the opportunity to be heard, the court may impose any of the sanctions listed in Rule 37(b)(2) (A) – (C) and "may include informing the jury of the failure to make the disclosure."

Sanctions available under Rule 37(b)(2) are: (A) an order designating certain facts are to be established, (B) an order precluding the disobedient party to assert claims or defenses or prohibiting that party from introducing designated matter in evidence; and (C) an order striking out pleadings or parts thereof, staying proceedings, dismissing all or part of the action, or rendering a judgment by default against the disobedient party. Instead of or in addition to the above, "the court **shall require** the party failing to obey the order or the attorney advising that party or both to **pay the reasonable expenses, including attorney's fees,** caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Rule 37(d) specifically addresses a party's or attorney's "knowing failure to timely disclose damaging or unfavorable information." Such conduct "shall be grounds for imposition of serious sanctions in the court's discretion up to an including dismissal of the claim or defense."

Rule 37(a)(3) makes clear that **"an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond."**

3. Failure to obey court order. Sanctions are available under Rules 37(b) for a party's failure to comply with a court order. "If a deponent fails to be sworn or to answer a question after being directed to do so by the court…the failure may be considered a contempt of that court."

4. Rule 11 -- signing of pleadings. Sanctions are also available under Rule 11. These sanctions may be imposed on the party or that party's attorney. Under Rule 11, a signed "pleading, motion, or other paper" certifies that the information is factually accurate, is supported by law, and is not made for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." A violation of Rule 11 warrants an "appropriate sanction" against the attorney and/or party, including an order to pay the opposing party's fees.

5. Sanctions. The Court may strike an answer and/or enter default against a party if the court is satisfied that the party personally is complicit in the abusive behavior. *Groat v. Equity American Ins. Co.*, 180 Ariz. 342, 884 P.2d 228 (App. 1994). The sanction of dismissal is warranted only when the court makes an express finding that a party, as opposed to his counsel, has obstructed discovery and that the court has considered and rejected lesser sanctions as a penalty. *Rivers v. Solley,* 217 Ariz. App. 528, 177 P.3d 270 (2008).

CONCLUSIONS OF LAW

1. Guidance failed to comply with Rule 26.1 in this case, as well as Cases #1 and #2. Rule 26.1 required Guidance to disclose all information and documents regarding the location and disposition of Guidance's original assets. Rule 26.1 mandates the disclosure of any information that might lead to the discovery of admissible evidence, regardless whether that information helps or hurts the disclosing party's position. A specific discovery request is not required.

A. Throughout its various phases, this litigation has always been about Guidance's original assets. Guidance set up the LLCs and transferred its assets to the LLCs while Case #1 was in litigation. Between 2004 and 2006, while CBI was trying to collect the underlying $2 million judgment, over $6 million derived from the sale of Guidance's assets was deposited into overseas bank accounts.

B. While Guidance eventually paid the judgment, the circumstances of the payment, coupled with the transfers and Guidance's unwillingness to disclose information about where the assets went, gave rise to the claims in Cases #2 and #3. In each case, CBI was entitled to full disclosure from Guidance regarding those original assets – where they went, what accounts they were deposited in, etc. What CBI got was delay, incomplete discovery responses and never a Rule 26.1 disclosure of information. Guidance not only refused to produce meaningful information pursuant to a specific discovery request, it took a court order each time before Guidance would disclose information that it had an affirmative duty to produce.

C. The Court specifically finds that the information that Guidance did not disclose until June 6-7, 2012 was potentially relevant to CBI's claims and, therefore, discoverable. The Court further finds that the information was/is damaging and unfavorable to Guidance. The Court finds that Guidance intentionally withheld this damaging evidence in violation of Rule 37(d). Guidance attempts to argue that, because Oxy is mentioned on one of the LLCs' tax returns produced in 2010 or 2011, it produced information about the offshore accounts before June 6, 2012. The Court finds that this partial "production" to be woefully incomplete, provides no

information about offshore bank accounts or the sale of Guidance's assets and, as such, constitutes "no disclosure" pursuant to Rule 37(a)(3).

D. Additionally, the Court concludes that the documents and information disclosed on June 6 and 7, 2012 should have been disclosed no later than at the time of Mr. Broe's debtor's examination on April 24, 2006. The violation of Rule 26.1 was intentional and continuous. As the Findings of Fact demonstrate, hundreds of hours were spent after April 24, 2006 that should have been avoided. Guidance's conduct demonstrates a blatant disregard of the taxpayer dollars that fund our courts and a gross manipulation of the judicial system.

2. The Guidance entities violated Court orders. The Court finds that Guidance violated the 2006 Order for Supplemental Proceedings (Judgment Debtor's Examination). The documents provided June 6, 2012, fell within the scope of the Order that directed Guidance produce all documents 1) pertaining to any assets or property in which Guidance had or has "any interest at any time" between 2000 and 2006, 2) "reflecting any assets and liabilities of the judgment debtor" for that time period, and 3) "pertaining to any bank accounts" in which Guidance has or had an interest between 2000 and 2006. (Hearing Exhibit 34.)

A. The Court further finds that the LLCs and AEM violated the Court's orders of December 13, 2011 and February 7, 2012 regarding the production of documents in response to CBI's subpoenas. These orders specifically stated that AEM produce all documents regarding any income or proceeds generated between 2000 and 2007 by or relating to Guidance's original real estate assets. This was not done, and, in addition, counsel instructed Mr. Broe not to answer questions about transactions reflected on bank statements related to Guidance's original assets. It was not until the Court's third order of May 24, 2012 that Mr. Broe finally retrieved the Vanguard Group and London & Capital account records from his office and responded to questions about the transactions involving Guidance's assets.

B. Pursuant to Rule 37(b)(2), the Court specifically finds the LLCs, AEM, and Mr. Broe in contempt for their failure to comply with the Court's December 13, 2011 and February 7, 2012 orders.

3. Mr. Broe actively participated in Guidance's, the LLCs', and AEM's misconduct. The Court finds that Mr. Broe was an active participant in the discovery misconduct in this case. In addition to his deposition testimony cited above, his testimony at the June 18-19, 2012 Hearing supports this conclusion.

A. **Mr. Broe acknowledged that he reviewed and prepared the responses to CBI's discovery requests:**

Q. They were available to you at all times and you knew at all times that the actual language that you were requested on numerous occasions, numerous occasions, to respond to, from '05 on, was whether Guidance had an interest in any assets; did you understand that?

A. Yes, I understood that.
(6/18/12 hearing, p. 91, l. 23 to p. 93, l. 3.)

And,

Q. Did you read the various requests, without going through each and every one of the, did you read them?

A. Yes, I did.
(6/18-19/12 hearing, p. 109, l. 16 – 18).

B. **He understood that CBI was looking for information about Guidance's interest in assets anywhere, not just in Guidance's personal accounts:**

Q. It wasn't an ownership interest in whether Guidance actually owned the Nevus company and owned the London and Capital company or account, the issue you understood, and you were asked repeatedly, and if you want I'll show it to you and take the time, was whether or not Guidance had any interest in assets anywhere and you repeatedly reaffirmed that it didn't, isn't that true?

A. That is true.
(6/19/12 hearing, p. 92, l. 10-17.)

C. **He knew the information being withheld was potentially relevant to CBI's claims.**

Q. Well, in fact you knew exactly what they were looking for because they went into court in fact, in front of Judge Katz in fact, seeking receiver to find out where all this money went that you still weren't producing records on. And Judge Katz agreed to appoint a receiver. You were aware of that, isn't that true?

A. That's true.
(6/19/12 hearing, p. 96, l. 20 – p. 97, l. 1.)

D. **While he knew the information in accounts, such as AEM's accounts with Oxy, was potentially relevant to CBI's claims, he considered it to be "irrelevant."**

> Q….So is the answer simply that you didn't think you were providing the information to us by production of those documents because you didn't think it was relevant?
> (Objections and discussion on the record)
>
> The Witness: Okay. When I produced documents for Guidance Investors Limited Partnership I didn't feel it was relevant to produce documents related to Advanced [Educational Management].
> Q. Right. That's the – that's the truth of the matter, isn't it? You didn't feel it was relevant, right?
>
> A. That's right.
>
> Q. And you didn't feel it was calculated to lead to relevant evidence even in the beginning of '05 because you felt we had no right to that information, isn't that right?
>
> A. That's right.
> (6/19/12 hearing, p.89, l. 10-12, 24 to p. 90, l. 11.)

E. **Significantly, neither the Court's orders nor CBI's Motion for Sanctions has altered Mr. Broe's view.** In response to the Court's question, he stated:

> The Court: Mr. Broe, in your mind do you still believe that the Oxy and Vanguard accounts that we've been talking about are still not related to Guidance?
>
> The Witness: I—that's correct.
> (6/19/12 hearing, p. 84, l. 6-9.)

F. **Broe acknowledged that he knew that partial disclosure of information could be a violation of his disclosure obligations:**

> Q. ..So do you understand that telling someone part of the story without telling the rest of the story could be deceptive and misleading and fraudulent?

A. Yes.

Q Do you also understand it could be a violation of basic disclosure requirements in a case where we're dealing with creditors seeking money to collect on?
[objection]

Q. Do you understand that?

A. Yes.
(6/19/12 hearing, p. 106, l. 14 – 24.)

Mr. Broe acknowledged his part in the decisions not to produce information regarding Guidance's liquid assets. The Court finds that Mr. Broe's conduct on behalf of Guidance and its related entities warrants sanctions pursuant to Rule 37(b)(2) in the form of an order designating certain facts to be taken by the jury as established. The Court will determine what those facts are and provide further direction to the parties on this matter.

4. The Guidance entities made material misrepresentations to the Court. The Court finds that Guidance, the LLCs, AEM, and Mr. Broe made the following material misrepresentations to the Court:

A. Guidance's Answer in Case #2 intentionally and falsely denied having any assets or receiving a reasonably equivalent value in exchange for the transfer of its substantial assets to the LLCs. Mr. Broe verified the Answer and confirmed its content in his March 3, 2006 deposition. The Answer was never amended.

B. Mr. Broe's testimony on May 15, 2006; February 15, 2012; and March 2, 2012 denied the existence of documents including those produced on June 6, 2012.

C. Counsel for AEM and the LLCs erroneously avowed to the Court that all documents had been produced in response to the Court's 12/13/11 ad 2/7/12 orders. See AEM's April 26, 2012 Response to CBI's Motion to Compel and the LLCs' April 27, 2012 Response. Particularly given the number of years that CBI sought this information, counsel had a duty to ensure that the documents did not exist before signing pleadings to that effect a mere two months before the documents were finally produced.

5. The Court finds that Guidance's attempts to defend its failure to disclose are not supported by the facts or law. Guidance argues that Rule 26.1 does not apply in the collection

setting and that it was under no obligation to disclose asset information in Case #1. Guidance does not provide a shred of legal support for that argument, and the Court sees no conflict between Rule 26.1 and discovery conducted pursuant to Rule 69 in a process to enforce a judgment. Even if this was true, Guidance was under a specific court order – the March 2006 Supplemental Order re Debtor's Examination – in Case #1 to produce all information relating to Guidance's original assets.

A. Guidance further argues that it had no duty to disclose information relating to the LLCs and AEM because these are legally separate entities from Guidance LP, the parent. According to Guidance, CBI's only remedy was a claim against Guidance's membership interest in the LLCs. Therefore, any documents or information about the administration of original Guidance assets "does not make any such items relevant to the issues in this lawsuit." (Guidance's Response to Plaintiff's Motion to Vacate and Motion for Sanctions, p. 4, l. 18-19.)

This argument is fundamentally flawed for three reasons. First, the case was in discovery, not trial. Rule 26.1 requires the disclosure of any information that "appear[s] reasonably calculated to lead to the discovery of admissible evidence." In Case #1, Guidance moved its substantial assets, refused to pay the judgment, and failed to post a bond. CBI was entitled to investigate Guidance's assets – wherever they were. Even if CBI could not attach the funds in the LLCs and AEM accounts, the fact that that these accounts exist and where the funds came from (ie from the sale of original Guidance assets) was potentially very relevant to CBI's collection efforts in Case #1.

Second, this argument ignores the fact that the fraudulent transfer of assets to avoid paying a judgment is voidable. Therefore, CBI may not be limited to a charging lien against Guidance as a sole remedy. The administration of Guidance's original assets was relevant to the fraudulent transfer claims in Case #2 and the RICO and punitive claims in Case #3. Guidance lost motions to dismiss in both cases. CBI had colorable claims on which the Court ruled it could proceed. Guidance's own conduct gave rise to those claims. Had Guidance done the right thing and paid the judgment timely, CBI would have had no reason to pursue Guidance's original assets.

Third, the obligation to disclose was on Guidance, regardless of what entity technically made or received a deposit. The duty arises from a party's knowledge of information pertinent to the claims, defenses, witnesses, and documents in a case. It does not matter where the documents are kept or whose documents they are. A party must disclose and timely supplement a list of those documents "known by a party to exist whether or not in the party's possession, custody or control." Rule 26.1(a) (3). And, it must produce them if the documents are within that party's control.

Mr. Broe knew about the sale of Guidance's original assets and where the money was. As such, he had a duty to disclose that information. Guidance further had a duty to produce any documents within its control. Since Mr. Broe controls all of the Guidance entities, Guidance, through Broe, had a duty to produce the LLC and AEM account records. The notion that separate corporate entities meant that Guidance had no duty to make a full disclosure of information completely contradicts our disclosure rules.

6. The Court finds that Guidance's conduct prejudiced CBI. First, CBI incurred substantial attorneys fees and costs as a result of Guidance's withholding of information for six years. Second, CBI was deprived of the opportunity to investigate fully the information about the offshore bank accounts, to evaluate whether to retain an expert (if necessary), and to discover whether there are more bank accounts out there that have yet to be disclosed.

SANCTIONS

1. Guidance is ordered to pay, for the period of April 24, 2006 through June 18, 2012, CBI's attorney's fees and costs related to discovery, including but not limited to all motion work and depositions and the Hearing on June 18-19, 2012, but excluding any prior awards to CBI for fees and costs relating to discovery motions. Rule 37(b)(2). It is further ordered that Guidance shall make payment within seven (7) business days of the Court's entry of a judgment for these fees and costs. Mr. Broe has testified that Guidance controls the accounts of its related LLC entities and shall pay this sanction with funds from these accounts, if necessary.

2. The following evidence shall be precluded at trial:

A. All testimony/opinions of Guidance's expert witness. His opinions criticizing CBI's expert and damages claims are based on false and misleading information. Had the case proceeded on June 11 without the information CBI got on June 6-7, Guidance's expert would have testified that CBI did not have sufficient information regarding Guidance's financial health to prove damages caused by Guidance's delay in paying the $2 million judgment. We now know that Guidance had over $6 million at its fingertips at the time the Court entered the final Amended Judgment in 2004. The expert's testimony is based on false information. Not only would the testimony not aid the jury, it would be extremely misleading. The expert and any evidence derived from the expert's opinions is precluded.

B. All evidence or argument in defense of the RICO claim. Guidance's defense to this claim has been a fraud. It has been premised on the deliberate withholding of facts related to the claim. Any evidence or argument that Guidance intended to offer is fundamentally flawed by the failure to disclose facts and documents relevant to this claim.

3. The Court will designate facts to be taken as established by a jury in this case. Rule 37(b)(2). These facts will relate to Guidance's failure to comply with Rule 26.1 and will be based on the facts and findings set forth in this Order.

4. The Court has considered and rejected lesser sanctions. Having found a six-year failure to comply with Rule 26.1, Rule 37(b)(2) mandates the Court order Guidance to reimburse CBI its attorneys fees and costs incurred as a result to Guidance's conduct in discovery. In addition, the Court feels strongly that the additional sanctions of precluding evidence and designating certain facts for the jury at trial are warranted, based on the nature and extent of Guidance's conduct in this case. Finally, the Court is concerned that, if Guidance still has not disclosed all information about its assets, absent serious sanctions being imposed, nothing will change as discovery proceeds.

OTHER

1. CBI has requested sanctions be imposed against attorneys Carson and Threet. Consideration of such an action would require further evidentiary hearings. While the Court has concerns about counsels' conduct, particularly as it pertains to their duty to ensure their clients' compliance with Rule 26.1 and the Court's orders, the Court declines to consider sanctions at this time.

2. Any further violation of Rule 26.1 and/or the Court's orders will result in additional sanctions, including and up to striking CBI's Answer.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.