IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

MANUEL HERNANDEZ, Plaintiff, v. STAR RESIDENTIAL, LLC, TERRACES AT BROOKHAVEN, LLC, Defendants.	Civil Action File No.: 18A68544-6

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS

COMES NOW Plaintiff Manuel Hernandez and files their Reply to Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions. In support of its motion, Plaintiff shows the Court the following:

BRIEF STATEMENT OF MATERIAL FACTS AND PROCEDURAL POSTURE

Plaintiff incorporates, by way of cross-reference, his Renewed Motion to Compel.

BRIEF INTRODUCTION

In his Renewed Motion to Compel ("Renewal Motion"), Plaintiff once again seeks to obtain Defendants' financial/annual budgets from the time Defendants purchased the Terraces at Brookhaven (circa. 2015) through the time Defendants sold the property (circa. 2018/2019). Plaintiff also seeks financial information of Defendants at their other managed property locations based on Plaintiff's punitive damages claim. Defendants have filed a response to Plaintiff's

Renewal Motion arguing that: (1) Plaintiff's discovery sought is irrelevant to the issues in the case, and (2) Plaintiff's request for financial information supportive of his punitive damages claims is premature because Plaintiff has failed to provide evidence that punitive damages are warranted in this case. Below, Plaintiff replies to each of these arguments as Defendants have provided the court with erroneous analyses of the law and material facts applicable to these questions.[1]

ARGUMENT & CITATION TO AUTHORITY

1. Any cases Defendants cited regarding an exclusionary interpretation of relevance that is not federal appellate law or that is Georgia appellate law before 2013 is no longer good law and should not be considered by this Court.

Defendants provide this Court with an exclusionary interpretation of relevance under **old** Georgia case law, which is **no longer good law** (emphasis supplied).[2] Regarding the issue of relevance, Georgia has adopted O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403, which are modeled on their Federal counterparts. It is well-established that "[i]n 2013, Georgia abandoned its antiquated, Civil War-era evidence code in favor of a new evidence code modeled after the Federal Rules of Evidence."[3] Therefore, when deciding whether some evidence is irrelevant to a

[1] Georgia Rules of Professional Conduct 3.3(a)(1)&(3) state: "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . [or] fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel…" Defendants' Response Brief fails to meet the requirements of Professional Rules 3.3(a)(1) & 3.3(a)(3) since Defendants' response utterly fails to analyze the questions of relevance under the applicable new rules of evidence (i.e., Rules 401, 402, and 403). *See generally, infra*.

[2] Justice Nahmias has specifically admonished counsel and the courts on the use of inapposite case law when analyzing relevance questions under Rules 401, 402, and 403. In particular, during oral argument in *Ballinger v. State*, Justice Nahmias stated: "We've said over and over and I'll keep going about forty times because I did a Westlaw search and found more than that number of cases. What we look to, 401, 402, and 403 were taken directly from Federal Rules 401, 402, and 403, Right? So, what we look to is Federal case law on the issues at hand. And we say we don't look to our old case law unless you can show that it was based on Federal appellate case law, even then it's not clear we look to it." Justice Nahmias, *Ballinger v. State*, Case No. S19A1087 (Oral Argument, August 20, 2019).

[3] John S. Melvin, *What are the Chances? A Response to Professor Milich's View of 404(B)*, 9 J. Marshall L.J. 40 (2015-16). *See also* Carlson & Carlson, *Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 7 J. Marshall L.J. 269, 279-80 (2014).

particular issue, only Georgia case law after 2013 and/or federal appellate law should be considered.[4] For an outline of the application of the new Evidence Code in Georgia and relevant case law, please *see* Plaintiff's Motion for Use of Proper Authority at Trial and to Restrict Improper Trial Objection filed simultaneously herewith.

Here, Defendants raise the specter of "irrelevance" in order to shield themselves from Plaintiff's discovery requests. However, Defendants do not **once** mention in their Brief the proper governing statutes on relevance – Rules 401, 402, or 403. The only appellate case cited by Defendants that even remotely comes close to supporting their position regarding the alleged irrelevance of Defendants' financial information is a case from 1991.[5] Citing to old case law, Defendants provide the following general proposition to support their view on relevance: "a landowner does not become an insurer of safety by taking some security precautions on behalf of invitees and undertaking some measures to protect patrons does not heighten the standard of care or ordinarily constitute evidence that further measures might be required." (Defendants' Response Brief at 12; *citing Lau's Corp. v. Haskins*, 261 Ga. 491 (1991)).

[4] Plaintiff's counsel notes that Plaintiff cited primarily to post-2013 cases and Federal appellate cases. However, Plaintiff did also cite to four (4) Georgia appellate cases that predate the change in the evidence Code (*Bethany Grp., LLC v. Grabman*, 315 Ga. App. 298 (2012); *Confetti Atlanta v. Gray*, 202 Ga. App. 241 (1991); *Lay v. Munford*, Inc., 235 Ga. 340 (1975); *Matt v. Days Inn of Am*., 212 Ga. App. 792 (1994). Plaintiff acknowledges that the foregoing decisions apply Georgia's prior evidence code. However, on the issue of relevance, Georgia's current standard is broader and more inclusive than former Georgia law. Accordingly, previous cases pertaining to the admissibility/relevance of evidence, as opposed to the inadmissibility/irrelevance of evidence, are still germane. *See* Carlson on Evidence: Comparing Georgia and Federal Rules, 6th Ed. "Relevant Evidence." at 91-244.

[5] Defendants' citations to more recent negligent security cases do not mention Rules 401, 402, and 403. That point aside, those cases do not address the question of a Defendant's security budget. They are silent on the issue and therefore provide us with nothing to consider. Therefore, contrary to Defendant's use of them, the more recent cases do not stand for the proposition that a Plaintiff's request for financials are not permitted by Georgia courts when analyzing negligent security issues. However, Defendants disingenuously draw an unjustified inference from these cases. Defendants assume that, because Defendant's financials are not addressed in these cases, with regard to the adequacy of Defendant's security, then such evidence was not permissible to obtain. This is a clearly fallacious leap in logic.

It is questionable whether Defendants' general proposition, taken out of context from *Lau's Corp. v. Haskins*,[6] is even applicable to the issue of the relevance of Defendants' financial information within the context of adequate security. Defendants' proposition is a generic one. Defendants' proposition simply means that a Defendant is not, generally speaking, a guarantor of an invitee's safety. In other words, absent a "recognizable risk of harm," a Defendant's actions regarding the implementation of safety measures are not necessarily negligent just because the Defendant 'may have done more.' Nonetheless, it is well-established that a Defendant has a duty to invitees to exercise reasonable care in keeping their premises and approaches safe once a Defendant becomes aware that a recognizable danger exists. Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 328 (Ga. 2017). Once a specific danger/hazard exists, such as a pattern of crime on a Defendant's property, a Defendant must implement reasonable safety measures in light of the specific danger/hazard presented. *Hill v. MM Gas & Good Mart, Inc.*, 351 Ga. App. 708, 710 *citing Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 328 (Ga. 2017).

Assuming *arguendo* that Defendants' general proposition somehow supports a more exclusive interpretation of the type of evidence that is relevant in a negligent security case, which is doubtful, Defendants' general proposition nonetheless stems from a 1991 case that pre-dates the 2013 change in the evidence code. Importantly, Defendants' general proposition is not analyzed

[6] The complete context of the *Lau's Corp*. citation is as follows: "A proprietor's duty to invitees is to 'exercise ordinary care in keeping the premises and approaches safe.' OCGA § 51-3-1. The proprietor is not the insurer of the invitee's safety, *Pound v. Augusta National, Inc.,* 158 Ga.App. 166 (1981), but is bound to exercise ordinary care to protect the invitee from unreasonable risks of which he or she has superior knowledge. *Atlanta Gas Light Co. v. Gresham,* 260 Ga. 391, (1990). **If** the proprietor has reason to anticipate a criminal act, he or she **then** has a 'duty to exercise ordinary care to guard against injury from dangerous characters.' *Atlantic C.L.R. Co. v. Godard,* 211 Ga. 373, 377 (1955)." Moreover, "[e]xactly what constitutes 'ordinary care' varies with the circumstances and the magnitude of the danger to be guarded against. Prosser, Law of Torts, 4th ed., §§ 31 and 33 (1971). 'Since it is impossible to prescribe definite rules in advance for every combination of circumstances which may arise, the details of the standard must be filled in each particular case.' *Id.* at § 37, p. 207. *Lowe v. Atlanta Masonic Temple Co.,* 79 Ga.App. 575 (1949). But, to be negligent, the conduct must be unreasonable in light of the recognizable risk of harm. *Pound, supra,* 158 Ga.App. at 168; *see also* Prosser, *Law of Torts* 4th ed., § 31, p. 147. West Publishing Company (January 1, 1978).

under Rules 401, 402, and 403 – a fatal flaw in Defendants' argument. Therefore, this Court should look at Defendants' generic proposition, as well as Defendants' overall approach to the question of relevance, with a jaundiced eye.

Regarding the question of whether Defendants' financial/budgetary information constitutes relevant evidence within the context of a negligent security case, Defendants' citation to *Lau's Corp. v. Haskins*, is misplaced. *Lau's Corp.* is a Georgia appellate case that pre-dates the 2013 change in Georgia's evidence code by more than twenty (20) years. Therefore, *Lau's Corp*. cannot be marshalled to support an exclusionary interpretation of relevant evidence within the context of a negligent/inadequate security case. As shown below, the "new" evidence code's rules on relevance are **broader** and more **inclusive**, than Georgia's previous relevancy rules (emphasis added). Therefore, any Georgia appellate cases cited to the prior code to support an exclusionary interpretation of relevance are inapposite. *See*, Carlson on Evidence: Comparing Georgia and Federal Rules, 6th Ed. "Relevant Evidence." at 91-244. (Need proper citation form)

2. Defendant's budget is relevant under Georgia's Evidence Code to establish whether or not Defendant's exercised ordinary care.

O.C.G.A. §§ 24-4-401, 402, and 403 and their supporting post-2013 Georgia appellate case law and Federal appellate case law, constitute the proper framework for analyzing the issue of relevance of Defendants' financial information/annual budget. In the instant case, Defendants' budget information is relevant to establishing whether or not Defendant exercised ordinary care in the protection of its tenants against foreseeable violent crime.

a. Relevance of budget in federal court decisions.

Federal courts have routinely considered the information of a landowner's budget when determining whether or not the landowner met its duty of ordinary care. In *James v. Duquesne Univ.*, Defendant argued that, based on its policies, its "goal [was] to anticipate and prevent unsafe

conditions on campus and protect individuals from 'the imprudent or illegal acts others.'" *James v. Duquesne Univ.*, 936 F.Supp.2d 618, 625 (W.D. Pa. 2013). In order to support its claims that it met its goals, and provided adequate security, Defendant presented evidence that "[Defendant] had **annually increased its budget** for campus security/safety from $1,524,493.53 in 2003 to $1,762,164.06 in 2006." Id. In *Ortiz v. New York City Housing Authority* (22 F. Supp.2d 15), the District Court for the Eastern District of New York addressed a case in which the plaintiff was raped in a housing project owned and operated by New York City Housing Authority. Similar to the circumstances in the instant case, the housing project where defendant lived was known by Defendant to be crime-infested, yet Defendant decided to take no additional security measures other than provide locks on the outside doors, which were perpetually broken. *Ortiz v. New York City Housing Authority*, 22 F.Supp.2d 15, 24-30 (E.D. N.Y. 1998). When asked why they had not placed an intercom system in the housing project when the locks proved ineffective, or why they had never stationed security guards inside the buildings despite repeated requests from tenants, Defendant simply stated that it **wasn't in the budget**. *Id.* (emphasis added). In *Therrien v. Target Corp.*, plaintiff sued defendant for inadequate security when plaintiff attempted to assist defendant's sole security guard in dealing with a shoplifter. *See* Therrien v. Target Corp., 617 F.3d 1242. Plaintiff was ultimately stabbed by the shoplifter. *Id.* at 1247. Plaintiff brought claims of inadequate/negligent security against Target. *Id.* Testimonial evidence established that **although the store budgeted security guards for 120 hours a week, it was staffed for only 80 hours a week**. *Id.* at 1247. The trial court found that there was sufficient evidence to support a verdict against Defendant. *Id.* at 1251. The 10th Circuit affirmed. *Id.*

b. Relevance of budget in Georgia post-2013 decisions.

In *In re Equifax, Inc.*, the district court for the northern district of Georgia addressed a case

in which the Defendant, Equifax, was the subject of one of the largest data breaches in history. Applying Georgia law, the court noted that, as has been held in similar cases, criminal data breaches are "peculiarly similar" to premises liability cases "where the Georgia Supreme Court has held that if a proprietor has reason to anticipate a criminal act, then he or she has a duty to exercise ordinary care to guard against injury from dangerous characters." In re Equifax, Inc., 362 F.Supp. 3d 1295, 1320 (N.D. Ga. 2019). Finding that Equifax had failed to meet their duty of ordinary care, the court cited to the fact that, despite evidence that Equifax was becoming increasingly vulnerable to more dangerous cyber-attacks, "Equifax's leaders afforded low priority to cybersecurity, **spending a small fraction of the company's budget on cybersecurity**." Id. at 1310 (emphasis added).

c. Relevance of Defendants' budget to the instant controversy.

"In Georgia, owners or occupiers of land have a statutory duty to exercise ordinary care in keeping the premises and approaches safe." *Stelly v. Wse Prop. Mgmt.*, LLC., 829 S.E.2d 871, 874 (Ga. App. 2019). "If there is reason to anticipate some criminal conduct, the landowner must exercise ordinary care to protect its invitees from injuries caused by such conduct […]." *Martin v. Six Flags Over Ga. II, L.P.*, 801 S.E.2d 24, 30 (Ga. 2017). Defendants' repeated argument that because they **never** took safety precautions in the face of rising criminal activity on their property that they are somehow shielded from their duty of ordinary care is ***outrageous***. **Defendants cannot opt-out of their duty of ordinary care.**[7] The cases cited in Plaintiff's original motion to compel

[7] Plaintiff highlights Defendants' lease agreement informing residents that they take no security precautions and attempting to shift their duty of responsibility onto the residents. Specifically, the following two clauses, should be considered in tandem:

- "The lessor or owner does not offer or provide security services or devices of any kind which are intended to protect resident or resident's family, occupants, guests, and property against crimes committed in resident's apartment or in the apartment community"
- "Resident has a responsibility to exercise due care for his or her own safety and take affirmative steps to protect himself or herself against injury and damages which may be cause by third parties or other residents.")

which detail various property owners' failures to meet their standard of ordinary care by their either lack of or decrease in safety precautions in the face of a rise in criminal activity **are applicable** to the instant controversy. In all of those cases, the courts' holdings fell on the question of **whether or not the precautions that the property owner took were adequate and sufficient to meet their duty of ordinary care.** That is precisely the question at the heart of the instant controversy. A complete failure to take **any security measures** in the face of incessant dangerous criminal activity is functionally equivalent to a failure to increase security measures in the face of rising criminal activity. Defendants' reliance on the argument that the cases cited by Plaintiff did not focus on budget is purely semantic – **obviously, an increase or decrease in security measures are guided by budgetary concerns, and these concerns will be reflected in the property owner's financial documents and budgetary information**.

In the instant case, Defendants attempt to evade their duty by stating that they never hired a security firm, but instead relied on "outdoor lighting, telephones, and locks on apartments." Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions at 4. They go on to say that during a discovery conference, they "discussed in good faith the potential of producing certain line items from Defendants' operating budget for the subject property that detailed topics like lighting, locks and phones […]." Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions at 5. Unfortunately for Defendants, this information, taken out of context, is unhelpful for the appropriate resolution of this controversy, as is their argument that these documents are irrelevant

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Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions at 4. Defendants attempt to use these clauses to shield themselves against performing the affirmative actions necessary to meet their duty of ordinary care. **This is illegal**. "OCGA § 51-3-1 imposes **a nondelegable duty** upon a landowner to keep his premises in a reasonably safe condition, and a landowner must use ordinary care to do so." Mason v. Chateau Communities, Inc., 280 Ga. App. 106, 112 (Ga. App. 2006). (emphasis added).

because "there was no line item in Defendants' budget for 'security.'" Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions at 4.

In the instant case, *at the very least*, Defendants' production of these financial documents will prove relevant for analyzing Defendants' monetary expenditures on their security measures **within the context of their overall budget** and in light of the high rate of criminal activity in the area. Despite Defendants' attempt to minimize the relevance of this information, these financial sums are absolutely necessary to provide the proper context for a fact-finder to determine whether or not Defendants' **acted reasonably** in terms of **how they chose to allocate their resources** in the face of relentless criminal activity on their property. For these reasons, evidence of Defendants' annual budgets at the Terraces of Brookhaven from the time that Defendant purchased the property (circa. 2015) through the subject-incident (May 29, 2017) and to the sale of the property (sometime in 2017/2018) are relevant.[8]

3. A factual basis clearly exists for Plaintiff's punitive damages claim.

In their brief, Defendants argue that Plaintiff must make a prima facie showing of its entitlement to recover punitive damages before he can demand financial records. Georgia courts have established that, in order to make such a showing, a plaintiff must be able to show a causal connection between the defendant's actions and the plaintiff's injury and make an evidentiary showing that there is a factual basis for the punitive damages claim. *Ledee v. Devoe,* 255 Ga. App. 620, 624 (Ga. App. 2002). Plaintiff has already met its burden regarding these elements, and Defendants' argument otherwise is just an attempt to delay the surrender of documents that are highly relevant to proving this claim.

[8] Defendants attempt to characterize Plaintiff's request as overly broad because of timeframe and scope. However, Plaintiff only seeks Terraces' annual operating and maintenance budgets from the time of purchase through the selling of the property, which appears to be three (3) to four (4) years of annual budgets.

a. *Defendants failure to take steps to protect their tenants in the face of high foreseeability violent crime created a causal connection between Plaintiff's injuries and Defendants' actions.*

Plaintiff's injuries occurred on premises owned and operated by Defendants. Defendants' property had been the site of numerous dangerous and illegal activities in the months and years leading up to this incident. It is well-established law that when a landowner has reasonable grounds to apprehend that criminal activity could occur on their property, they are under a duty to take reasonable steps to guard against injury from such criminal activity. *Securealert, Inc. v. Boggs,* 345 Ga. App. 812, 817, 815 S.E.2d 156, 161 (Ga. App. 2003).

> In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question

Rautenberg v. Pope, 351 Ga. App. 503, 505 (Ga. App. 2009). Between 2016 and the date on which Mr. Hernandez was shot in the breezeway outside of his apartment (less than one and a half years), police had received reports involving four aggravated assaults with a gun on the 3500 block of Buford Highway. (Criminal Assessment Report of Timothy L. Zehring, hereinafter referred to as "Criminal Assessment" at 22, attached hereto as Exhibit "A"). An aggravated assault with a gun had occurred on March 27, 2017, **two months before** Mr. Hernandez was shot. (Criminal Assessment at 22).

> In [*Sturbridge Partners v. Walker*, (482 S.E.2d 339)] the Supreme Court held that the owner's knowledge of **two or three** unforced, daytime burglaries at an apartment complex was sufficient to create a jury issue about whether it was reasonable to anticipate that an unauthorized entry of an occupied apartment might lead to personal harm to a tenant."

TGM Ashley Lakes, Inc. v. Jennings, 260 Ga. App. 456, 463 (Ga .App. 2003) (emphasis added).

In addition to the aggravated assault reports, between January of 2015 and the day on which Plaintiff was assaulted, police had been called to the 3500 block on one hundred and

twenty-five (125) different occasions. (Criminal Assessment at 22-28). Rarely did more than two or three days pass without the police responding to a report of criminal activity at the location. Based on the high level of reported criminal activity, the high level of robberies, and the high level of violent crimes, it was **highly foreseeable** that one of Defendants' tenants would be a victim of violent crime, specifically the kind of violent crime of which Plaintiff was a victim.

Landowners have a nondelegable duty to protect their tenants from the injurious effects of reasonably foreseeable criminal activity. *Mason v. Chateau Communities, Inc.*, 280 Ga. App. 106, 112 (Ga. App. 2006). A landowner can be liable for third-party criminal attacks if it had reasonable grounds to anticipate that such a criminal act would be committed and failed to exercise ordinary care to guard against injury. *Bolton v. Golden Bus., Inc.*, 823 S.E.2d 371, 372 (Ga. App. 2019). The record clearly shows – and Defendants **repeatedly insist**– that despite their knowledge that their property was a breeding ground for criminal activity, they took **no security measures to mitigate the risk of danger to their tenants** in the face of this foreseeable criminal activity. Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions at 4. Based on the ongoing and unrelenting theft and violence on their property, it was clear that the measures that Defendant now highlights, "outdoor lighting, telephones, and locks on apartments," were absolutely inadequate for deterring criminal activity and protecting their residents. Despite the obvious need for **any sort of** security measures, Defendant repeatedly refused to make the necessary changes and upgrades that would have provided their tenants with a reasonable level of safety and security. There is evidence to support the proposition that Defendants' breached their duty of ordinary care by failing to take reasonable measures to secure their property despite knowing about the prevalence of criminal

activity on their property and that this breach was the proximate cause of Plaintiffs' injuries. The causal connection prong of this test is clearly met.

b. Defendants' complete lack of security measures illustrate an entire want of care that raises the presumption that they were consciously indifferent to their tenants being victims of violent crime.

Punitive damages are appropriate when the evidence shows "that entire want of care which would raise the presumption of conscious indifference to consequences." OCGA § 51-12-5.1(b). Here there is extensive evidence on the record to show that, in light of relentless criminal activity, Defendants displayed conscious indifference to the high probability that someone would be seriously injured on their property.

The Terraces at Brookhaven Apartments is located on a stretch of highway called the Buford Highway Corridor. There are around twenty apartment complexes in the corridor. The majority of the residents are immigrants, many of whom are of Latin American origin and speak English as a second language. As in many immigrant communities in the United States, the area is poor. As in many poor areas in the country, the crime rate is high. Over the two plus years that Defendants owned and operated the Terraces at Brookhaven, the 3500 block, on which the complex is located, was the site of hundreds of cases of criminal activity reported to the police. Allegations ranged from burglary by forced entry, to robbery with a gun, to aggravated assault with a gun. Theft, enforced by violence, was rampant.

In a community as vulnerable as this one, Defendants chose not to take **any measures** to mitigate their tenants' high risk of being the victim of violent crime. They did not install gates at the front entrance to guard against trespassers. They didn't install cameras in the breezeways to deter criminal activity. They didn't employ security guards to protect the tenants while they were on the complex grounds. The measures that Defendants' have identified – lights, locks and

phones – **are not even security measures at all**, as discussed in more detail *infra*. Defendant simply identifies these things in their brief to avoid plainly stating the ugly truth – that, in the face of constant violent crime, they took **no security measures at all** to protect the lives and safety of their tenants. Defendants' argument that having never taken security measures excuses them from implementing security measures is just as outrageous as their decision to let their tenants live in a crime-infested property with **zero** security measures.

Not only did Defendants refuse to take the measures that the law requires to keep their tenants safe, they also attempted to shift this burden onto their tenants with cumbersome, onerous, and unconscionable contract terms. In their Response to Plaintiff's renewed Motion to Compel, Defendants shamelessly recount these terms, citing that their tenants signed a lease acknowledging that Defendants did "**not offer or provide security services or devices *of any kind***" and that the "[r]esident has a responsibility to exercise due care for his or her own safety and to ***take affirmative steps*** **to protect himself or herself against injury and damages which may be caused by third parties or other residents.**" Defendants' Response in Opposition to Plaintiff's Renewed Motion to Compel Discovery and for Sanctions at 4 (emphasis added). Defendants' included these clauses with full knowledge that they are an illegal attempt to shift their burden of ordinary care onto their tenants. "O.C.G.A. § 51-3-1 imposes ***a nondelegable duty*** upon a landowner to keep his premises in a reasonably safe condition, and a landowner must use ordinary care to do so." *Mason v. Chateau Communities, Inc.*, 280 Ga. App. 106, 112 (Ga. App. 2006) (emphasis added). Plaintiff cannot pretend that Defendants, owners of multiple properties, did not know that this is the law. Plaintiff cannot pretend that Defendants did not know that their contract terms were illegal. Finally, Plaintiff cannot ignore that these contract terms were imposed upon a vulnerable community who likely did not understand that, in

exchange for renting an apartment, they were putting the safety of themselves and their families at risk, with no opportunity for legal redress. These contract terms are not only unconscionable, they are predatory. Georgia law demands that Defendants' actions illustrate "that entire want of care which would raise the presumption of conscious indifference to consequences." Defendants' actions exceed the law's demand.

c. Based on Plaintiff's evidentiary showing, discovery of Defendants' financial information is permissible.

There is an undeniable causal connection between Defendants' inaction and Plaintiff's injury, and Plaintiff has made an evidentiary showing to support its claim to punitive damages. Defendants' actions are already egregious, but if Defendants had the financial means to put in place measures that could protect their tenants' health and safety but refused to do so in order to protect their bottom line, then their actions are also morally reprehensible and undoubtedly warrant to the reward of punitive damages in this case to ensure that Defendant does not continue to manage property in this way in the future.

4. The scope of documents sought to support Plaintiff's punitive damage claim is not overly broad.

Once a plaintiff makes an evidentiary showing that a defendant would be liable for punitive damages, "it is the trial court's obligation to assure that the scope of the discovery is restricted to the extent necessary to prevent an unreasonable intrusion into the defendant's privacy." *Ledee v. Devoe*, 255 Ga. App. at 625. Defendants' argument that Plaintiff seeks an unreasonable scope of discovery is illogical. In order to make Plaintiff has argued repeatedly throughout this brief, it only seeks Defendants' annual budgets from the time that Defendant purchased the Terraces of Brookhaven (circa. 2015) through the subject-incident (May 29, 2017) and to the sale of the property (sometime in 2017/2018). Financial records from this time period

– the time period during which Defendants owned and operated the subject property – are necessary to determine whether or not Defendants' acted reasonably in regard to implementing security measures in light of their overall budget. *See* In re Equifax, Inc., 362 F.Supp. 3d at 1310. In addition to financial records from the Terraces of Brookhaven, Plaintiff also seeks financial records from the same time period from three other properties managed by Defendant Star Residential, LLC. Plaintiff seeks these records to determine if Defendants took security measures in other apartment complexes that they didn't take for the Terraces at Brookhaven. Plaintiff also requests these documents because, as has been previously argued, evidence of a defendant's wealth is always relevant in the context of punitive damages. *Mathias v. Accor Economy Lodging, Inc*., 347 F.3d 672, 677 (7th Cir. 2003) (finding that "[a]lthough a defendant's wealth is not a sufficient basis for awarding punitive damages[,]" it is "relevant" to assessing the amount of punitive damages).[9] Because these records area already "restricted to the

[9] *See also, DiSorbo v. Hoy*, 343 F.3d 172, 189 n.9 (2d Cir. 2003) (in punitive damages trial, "District Court should admit evidence of Pedersen's financial situation. One purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay.") (*citing State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (*2003*) (*"State Farm"*); *Freund v. Nycomed Amersham,* 347 F.3d 752 (9th Cir. 2003) (post-*State Farm* case affirming consideration of defendants' financial condition in punitive damages analysis) (*citing State Farm*); *Horney v. Westfield Gage Co.,* 77 F. App'x 24 (1st Cir. 2003) (defendant's net worth may be (but is not required to be) before the jury in assessing punitive damages (*citing State Farm*)); *TVT Records v. Island Def Jam Music Group,* 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (after *State Farm*, jury may consider, but may not give "undue weight" to defendant's wealth) (*citing State Farm*). *See also Liggett Group, Inc. v. Engle,* 853 So. 2d 434, 458 (Fla. App. 2003) (after *State Farm*, punitive damages award "cannot be justified **solely** upon the wealth of the defendant.") (emphasis added) (*citing State Farm*); *Honzawa v. Honzawa*, 766 N.Y.S.2d 29, 30-31 (N.Y. App. Div. 2003) (given "the immense value of the family businesses ... [and] [s]ince the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others, a more substantial penalty than $10 million is appropriate.") (*citing State Farm*); *Trinity Evangelical Lutheran Church v. Tower Ins. Co*., 661 N.W.2d 789, 804 (Wis. 2003) ("Defendant's wealth is oftentimes a significant factor. In this case, the evidence presented to the jury ... appears sufficient to justify the size of the punitive damages award.") (*citing State Farm*); *Gibson v. Overnite Transp. Co*., 671 N.W.2d 388, 395 (Wis. Ct. App. 2003) ("As a final factor, we consider Overnite's wealth. Wealth of the wrongdoer is an appropriate factor in determining the amount of punitive damages to award.") (*citing State Farm*); *Fritzmeier v. Krause Gentle Corp.,* 669 N.W.2d 699, 710 (S.D. 2003) ("The fourth factor is consideration of the wrongdoer's financial condition. We look at

extent necessary to prevent an unreasonable intrusion into the defendant's privacy," Plaintiff requests that this Court grant its motion to compel these documents. Holman v. Burgess, 190 Ga.App. 61, 62 (Ga. App. 1991).

I. CONCLUSION

Plaintiff respectfully submits this motion and its memorandum in support and asks this Court to enter an order compelling Defendants to produce their annual budgets for the Terraces of Brookhaven from the time that Defendant purchased the property (circa. 2015) through the subject-incident (May 29, 2017) and to the sale of the property (sometime in 2017/2018).

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both net income and net worth.") (*citing State Farm*); *Brandstetter v. Holiday Retreats, Inc*., No. E032364, 2003 Cal. App. Unpub. LEXIS 9863, at *21 (Cal. App. Oct. 21, 2003) ("The record also provided sufficient indicia of defendants' wealth to permit appropriate assessment of punitive damages.") (*citing State Farm*); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos*., G029532, 2003 Cal. App. Unpub. LEXIS 5208, at *12 (Cal. App. May 28, 2003) ("punitive damages cannot be so low as to allow the defendant to absorb the award with little or no discomfort. Nor should an award be so small that it can be simply written off as part of doing business.") (*citing State Farm*).