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Order on Smart Games' Motion to Dismiss (MICHAEL MACKE)

Elizabeth E. Long
Superior Court of Fulton County

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Recommended Citation
Long, Elizabeth E., "Order on Smart Games' Motion to Dismiss (MICHAEL MACKE)" (2009). *Georgia Business Court Opinions.* Paper 144.
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MAR - 4 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL MACKE, Plaintiff, v. CADILLAC JACK INC., SMART GAMES GROUP CORP., EUGENE CHAYEVSKY, AND OLEG BOYKO, Defendants.	)))))))))))	Civil Action No. 2008CV158015

ORDER ON SMART GAMES' MOTION TO DISMISS

On March 3, 2009, counsel appeared before the Court to present oral argument on Defendant Smart Games' Motion to Dismiss. After having considered the Complaint and the Amended Complaint, the briefs submitted on the Motion, and the arguments presented by counsel, the Court finds as follows:

Pursuant to O.C.G.A. § 9-11-12(b)(6), "[t]he standard used to evaluate the grant of a motion to dismiss when the sufficiency of the complaint is questioned is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts." Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003).

Plaintiff Michael Macke, the founder and 40% shareholder of Defendant Cadillac Jack, brought two counts of breach of fiduciary duties against Defendants alleging that their actions[1]

[1] Plaintiff alleges that Defendants Boyko and Chayevsky mismanaged Smart Games through such actions as authorizing the acquisition of over $40 million in debt and approving conflict-of-interest transactions.

depressed the value of Cadillac Jack. Defendant Smart Games[2] is the 60% majority shareholder of Defendant Cadillac Jack; Smart Games also appointed Defendants Oleg Boyko and Eugene Chayevsky to serve as directors of Cadillac Jack. Defendant Smart Games petitions this Court to dismiss Plaintiff's claims against it on the grounds that Plaintiff has not alleged specific acts of wrongdoing against Smart Games, but instead attempts to hinge Smart Games' liability on its relationship with Defendants Boyko and Chayevsky. Defendant argues that without specific allegations of wrongdoing by Smart Games, the Complaint should be dismissed against it. Plaintiff opposes the motion to dismiss on the grounds that he has sufficiently alleged that Smart Games participated in wrongdoing which amounted to a breach of fiduciary duty owed to Plaintiff as the minority shareholder.

Under Georgia law, three elements are required to establish a claim for breach of fiduciary duty: (1) the existence of a duty, (2) a breach of that duty, and (3) damage proximately caused by such breach. Ansley Marine Constr. v. Swanberg, 290 Ga. App. 388,391 (2008). Smart Games, as the majority shareholder of Cadillac Jack, owed a fiduciary duty to Plaintiff Macke as the minority shareholder. See e.g., Marshall v. W.E. Marshall Co., 189 Ga. App. 510, 512 (1989). Plaintiff alleges that Smart Games breached its fiduciary duties owed to him by entering into promissory notes with Cadillac Jack which earned Smart Games an above-market interest rate of 20%. Plaintiff also alleges that Smart Games' affiliates entered into similar "sweetheart" deal transactions that allowed Smart Games, as the majority shareholder, to misappropriate the assets of Cadillac Jack. Plaintiff additionally alleges that he was harmed as a result of these actions by the depressed value of Smart Games' stock.

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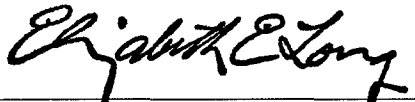
[2] Smart Games Group Corp. has since the filing of this lawsuit been acquired by Finstar Gaming Partners, L.P., but will hereinafter be referred to as Smart Games.

The Court finds that Plaintiff has successfully pled a claim for breach of fiduciary duty against Defendant Smart Games. The Court hereby **DENIES** Defendant Smart Games' Motion to Dismiss. Therefore, any specific claims of wrongdoing against Smart Games as alleged in the pleadings now or that come to light in discovery may proceed. Smart Games' liability, however, may not hinge solely upon the actions of Defendants Boyko and Chayevsky.

SO ORDERED this 4th day of March, 2009.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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