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Order on Plaintiff's Motion to Compel (MICHAEL MACKE)

Elizabeth E. Long
Superior Court of Fulton County

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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

ORDER ON PLAINTIFF'S MOTION TO COMPEL

This case is before the Court on Plaintiff's motion to compel discovery responses. Plaintiff argues that discovery responses from Defendants Cadillac Jack Inc. ("Cadillac Jack"), Smart Games Group Corp. ("Smart Games"), and Eugene Chayevsky ("Chayevsky") are deficient to varying degrees. The Court will address deficiencies in the discovery responses of each of these defendants in turn.

Cadillac Jack

Plaintiff argues that even after supplementation, Cadillac Jack's responses to interrogatory nos. 3, 4, 5, 9, 10-11 and 15 remain deficient. Attached to its response to Plaintiff's motion to compel, Cadillac Jack provided second supplemental responses to Plaintiff's interrogatories. Cadillac Jack argues that this second supplementation addresses any deficiencies raised by Plaintiff as to all of the contested interrogatories except number 9. Cadillac Jack maintains its objection to interrogatory 9. As to interrogatory nos. 3, 4, 5, 10-11, and 15, the Court GRANTS Plaintiff's motion to compel and, to the extent it has not already done so in the second supplementation, Cadillac Jack is ordered to respond fully to those interrogatories.

As to interrogatory 9, the Court DENIES Plaintiff's motion to compel. Information sought in discovery must be "relevant to the subject matter involved in the pending action" and "reasonably calculated to lead to the discovery of admissible evidence." O.C.G.A. § 9-11-26 (b)(1). In his Complaint, Plaintiff asserts claims for damages alleging breach of fiduciary duty, breach of an employment contract and breach of a stockholder's agreement. Plaintiff asserts these causes of action based on allegations that Defendants Chayevsky and Boyko caused Defendant Cadillac Jack, Inc. to enter into a series of transactions to suppress artificially the price of Cadillac Jack, Inc.'s share price. Interrogatory 9 seeks information regarding gaming applications submitted to authorities in Mississippi and Pennsylvania. The Court finds that this interrogatory is irrelevant to the subject matter of this case and, therefore, Cadillac Jack shall not be compelled to answer interrogatory 9.

Next Plaintiff argues that Cadillac Jack has failed to respond to requests for the production of documents nos. 7, 8, 37, 13, 15, 16, 48, 23, 28, 33-36, 38, 40, and 46-47. Attached to its response to Plaintiff's motion to compel, Cadillac Jack provided amended responses to Plaintiff's first request for production of documents. Cadillac Jack argues that it has already adequately responded to request nos. 13, 16, 48, 23, 28, 33, 34, 35, 36, 46-47. Cadillac Jack maintains its objections to request nos. 7, 8, 37, 15, 38, and 40.

As to request nos. 13, 16, 48, 23, 28, 33, 34, 35, 36, 46-47 the Court GRANTS Plaintiffs motion to compel and, to the extent it has not already done so by the amended responses, Cadillac Jack is ordered to respond fully to those requests.

As to the requests to which Cadillac Jack maintains its objections, the Court finds that requests 8, 37, and 40 seek documents regarding gaming applications submitted to authorities in Mississippi and Pennsylvania. As discussed above, the Court finds these requests are irrelevant

to the subject matter of this case and DENIES Plaintiff's motion to compel as to those requests. Accordingly, Cadillac Jack shall not be compelled to respond to those requests.

Requests 7 and 38 pertain in part to out-of-state gaming applications. To the extent the request calls for documents regarding such applications, Plaintiff's motion to compel is DENIED. Cadillac Jack shall not be compelled to respond to requests 7 and 38 to the extent they call for documents regarding gaming applications.

Request 15 pertains to check registers for Cadillac Jack's bank accounts since October 2004. The Court finds that this request is relevant to this case. Plaintiff's motion to compel a response to Request 15 is GRANTED and Cadillac Jack is ordered to respond fully to that Request.

Finally, Plaintiff argues that Cadillac Jack has failed to produce any documents responsive to his second request for the production of documents. Cadillac Jack argues that it has either already produced the requested documents or that it does not have documents responsive to certain requests. However, Cadillac Jack maintains objections to requests no. 5, 6, 8 and 16. As to the requests for which Cadillac Jack does not maintain its objections, Plaintiff's motion to compel is GRANTED and, to the extent it has not already done so, Cadillac Jack is ordered to respond fully to those requests.

Requests 5 and 8 involve reimbursements by Cadillac Jack to Timothy Minard. Mr. Minard is the founder of XBowling, LLC. In its amended counterclaim, Cadillac Jack alleges that Plaintiff used Cadillac Jack's funds to pay the expenses of XBowling. Thus, the Court finds that requests 5 and 8 are relevant to this case and Plaintiff's motion to compel responses to those requests is GRANTED. Request 6 pertains to any "severance agreements, release, termination agreement or similar document between Timothy Minard and Cadillac Jack." The Court finds

such documents to be irrelevant to this case and, Plaintiff's motion to compel a response to request 6 is DENIED. Request 16 pertains to communications between Plaintiff and other parties regarding Tangent Acquisition, Rio Grande or Tangent Service. In his amended counterclaim, Cadillac Jack alleges that Plaintiff committed fraud in transactions between Cadillac Jack and Tangent Acquisition, Rio Grande or Tangent Service. Accordingly, the Court finds that request 16 is relevant to this case and Plaintiff's motion to compel response to that request is GRANTED.

Chayevsky

Plaintiff argues that even after supplementation, Chayevsky's responses to interrogatory nos. 2- 4, 6, 7, and 11-14 remain deficient. Chayevsky maintains objections to all of these interrogatories except 6. Interrogatory 7 is duplicative of requests already responded to by Cadillac Jack on this issue. Interrogatory 11 seeks information regarding promissory notes between non-parties and other third parties. The Court finds Interrogatory 11 irrelevant. Interrogatory 14 asks Mr. Chayevsky to identify "any third party to who you have supplied a financial statement since January 1, 2006." The Court finds Interrogatory 14 over broad and irrelevant. Interrogatories 12 and 13 pertain to gaming applications which the Court has discussed above and found to be irrelevant. Interrogatories 2-4 pertain to payments made to Chayevsky by entities closely related to Cadillac Jack and could lead to the discovery of admissible evidence regarding Plaintiff's breach of fiduciary duty claims. Accordingly, the court DENIES Plaintiff's motion to compel responses to interrogatories 7 and 11-14, but GRANTS Plaintiff's motion to compel responses to interrogatories 2-4 and 6.

Plaintiff also argues that Chayevsky has failed to produce any documents responsive to his request for the production of documents. Chayevsky argues that for requests 1, 4, and 11-15,

he does not possess responsive documents in his personal capacity and that the requested documents have already been produced by the parties who have them. To the extent Chayevsky possesses any documents responsive to the requests above that have not already been produced by Cadillac Jack or another party, Chayevsky is ordered to produce such documents. Chayevsky shall not be compelled to produce documents that are duplicative of those already produced by Cadillac Jack for which he is the CEO.

Chayevsky maintains his objections to requests 6-9 and 16. Request 6 pertains to gaming applications and is found to be irrelevant as discussed above. Request 7 seeks financial statements provided by Chayevsky to any third party since October, 2004 and the court finds this over broad and irrelevant to this case. Accordingly Plaintiff's motion to compel responses to Requests 6 and 7 are DENIED. Request 8 pertains to Chayevsky's notes from his meetings with the Puyallups tribe. The Court finds that Chayevsky did not specifically address Request 8 in his brief and the Court has allowed other discovery on this subject and, thus, DENIES Plaintiff's motion to compel a response to Request 8. Requests 9 and 16 pertain to payments or loans from parties or related entities to Chayevsky and could lead to the discovery of admissible evidence. Accordingly, the Court GRANTS Plaintiff's motion to compel responses to Requests 9 and 16. Plaintiff's motion to compel responses to the remaining requests to which Chayevsky does not object is hereby GRANTED.

Smart Games

Plaintiff argues that Smart Games has failed to respond to any of his interrogatories. Smart Games maintains it objections to interrogatories 3-5 and 7-9. Interrogatory 8 pertains to gaming applications and is found to be irrelevant as discussed above. Interrogatory 9 seeks information regarding financial statements provided to third parties since January 1, 2006. The

Court finds this over broad and irrelevant to this case. Interrogatories 3-5 and 7 are found to be relevant to this litigation as they involve payments or loan by Smart Games and could lead to the discovery of admissible evidence regarding Plaintiff's claims of breach of fiduciary duty. Accordingly, Plaintiff's motion to compel as to interrogatories 8 and 9 is DENID, but is GRANTED as to all remaining interrogatories.

Plaintiff also argues that Smart Games' responses to his requests for production of documents nos. 5, 9-15, and 17 are deficient. For several of these Requests, Smart Games argues that it has already responded to Plaintiff or does not possess responsive documents. Smart Games maintains it objections to requests 9, 15 and 17. Request 9 pertains to payments to Smart Games by entities related to this case. Request 15 pertains to loans made to Smart Games by such entities and request 17 pertains to promissory notes entered into by Smart Games since October 2004. The Court finds these requests relevant to this case. Accordingly, Plaintiff's motion to compel responses to his request for production of documents is GRANTED.

Plaintiff's Request for Attorneys' Fees

Plaintiff argues that he should be awarded attorneys' fees associated with his motion to compel pursuant to O.C.G.A. 9-11-37(a)(4). This code section provides:

> (A) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> (B) If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Plaintiff's motion to compel has been granted in part and denied in part. Although Defendants have finally responded to most of Plaintiff's discovery requests, the responses did not come until after Plaintiff's motion to compel was filed. The Court finds that much of Defendants' initial objection was not justified. Attorney's fees should be awarded. A hearing date for such an award shall be set at a later date.

SO ORDERED this 28th day of October, 2009.

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

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