UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

INDEPENDENT MARKETING GROUP, INC., a Florida corporation, Plaintiff, v. JERRY KEEN, an individual, BRIAN J. KEEN, an individual, WILLIAM MEGNA, an individual Defendants.	)	Civil Action File No.: 3:11-cv-447-HLA-MCR

PLAINTIFF'S BRIEF AND OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

COMES NOW, Plaintiff Independent Marketing Group, Inc. ("IMG") and files this Brief and Opposition to Defendants' Motion to Compel Production of Documents pursuant to local rule 3.04 and states as follows:

I. INTRODUCTION

1. Defendant Brian Keen is a former employee of Plaintiff. Defendant, William Megna, is an attorney who formerly represented Plaintiff. Defendant, Jerry Keen, is the father of Brian Keen and a former consultant for Plaintiff. While working with and for Plaintiff, Defendants were developing a Multiple Employer Welfare Arrangement, commonly referred to as a "MEWA". A MEWA is, at its essence, a health insurance program that operates more efficiently than other insurance programs and generates substantial savings from the purchase of insurance products by large associations in businesses through greatly reduced premiums. This,

in turn, generates substantial savings through the large associations and also generates substantial income through the volume of insurance products sold. [1]

2. More specifically, IMG was developing a MEWA for the Homebuilders Association of Georgia ("HBAG"), among others, in the fall of 2009. Defendants, in their capacities as employee, consultant, and attorney, cultivated the illusion to IMG and HBAG that they were continuing to work on IMG's behalf during the development of the HBAG MEWA. During this time, Jerry Keen (a close forward of the family for nearly 40 years) and his son, actively began working to steal HBAG business. This included the theft of confidential corporate information while at the same time the Keens were assuring IMG that everything was on track to complete the contract with the HBAG and create the MEWA.

3. However, in the eleventh hour, Defendants Jerry Keen and Brian Keen formed their own company and took the HBAG MEWA business with them. As a result, IMG fronted the monies for substantial salaries[2] and costs associated with developing the MEWA[3] and has none of the business. Defendants have fronted none of the costs, but are enjoying the fruits of the MEWA business, which was stolen from IMG.

4. This does not include the non-MEWA business of IMG which has also been taken by the Keens.

5. Plaintiff sued Defendants in State Court in Duval County, Florida, and Defendants removed the case to this Court.

---

[1] There was a presentation created by IMG for American Enterprise Bank which provided information regarding anticipated revenues from the MEWA. According to this presentation, which was given by Sheldon Bryan and Brian Keen, the MEWA was anticipated to generate hundreds of thousands of dollars per year.

[2] Between April 2010 and mid-September 2010, Jerry Keen was paid $10,000 per month. Between March 2010 and November 2010, Brian Keen was paid over $95,000. The Keens were paid significant amounts prior to this as well.

[3] Plaintiff asserts that there was an agreement to repay $600,000 in costs related to the MEWA.

6. Plaintiff has made every reasonable effort to comply with the request to produce and, in fact, has produced responsive documents to Defendants.

7. As discussed above, through their actions, Defendants allowed IMG to front the money for the costs for the MEWA development only to take the business elsewhere. As such, IMG has been decimated and the $10,000+ expense to provide documents to Defendants in the format that they desire is exceedingly burdensome to IMG.[4]

II. FACTS

IMG received the First Request for Production of Documents on September 6, 2011. The very next day, September 7, 2011, the IMG server was sent out to a third party in order to retrieve the information requested in the request for production. IMG was granted an extension and on October 27, 2011, produced a disk containing responsive documents to Defendants. Upon receiving the disk, counsel for Defendants complained to counsel for Plaintiff that the production was not in a format to their liking. Counsel for Plaintiff then contacted IKON to determine a cost for the format requested by Defendants. IKON has responded that the cost would be in excess of $10,000.

On December 20, 2011, Plaintiff produced 19 disks consisting of a forensic copy of information from Plaintiff's server with date and word search parameters. After a review of this information, Defendants' counsel determined that it was not in a format to their liking and the instant Motion was filed.

[4] Counsel for Defendants saw fit to include a footnote regarding income from the sale of the Jaguars to persons related to the owners of IMG, clearly implying that IMG has money and the issues raised herein are bogus. In the conversation between the attorneys, Campbell Ford never said "IMG is getting the money from the sale of the Jaguars." Regardless of the issues of the propriety of using an incidental comment about the intentions of this "family" to pursue this matter as discussed in an attorney-to-attorney conversation against a party in a motion, there is no factual or legal basis for attributing these monies to IMG for the purpose of determining that IMG can afford the costs required to comply with Defendants' demands.

III. LAW AND ARGUMENT

a. The motion to compel

"On a motion to compel, a responding party need not provide discovery of electronically stored information from sources that the responding party identifies as not reasonably accessible because of undue burden or cost." U & I Corporation v. Advanced Medical Design, Inc., 251 F.R.D. 667, 674 (citing Fed.R.Civ.P. 26(b)(2)(B)). "In deciding whether to permit discovery of electronically stored information, a court will consider whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the needs of the case, the amount of in (*sic*) controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of discovery in resolving the issues." Id.

Plaintiff has never asserted that Defendants were not entitled to the information[5], so the "whether to permit" part of the U & I test is not in dispute. The fact that Defendants have filed the instant Motion indicates the importance of the information to the case. However, it is the cost of accessing and formatting the information to a form acceptable to Defendants that is the stumbling block.

"The **discovering** party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party need **not** incur undue burden or expense including the cost of acquiring or creating software needed to

[5] Plaintiff's objections about attorney/client and work product privilege are as to the manner in which Defendants have asked the information to be produced, not in the actual information to be produced. For example, a request for "all documents related or relevant to Defendants' defenses to Plaintiff's claims" (assuming that Defendants' defenses were known) would require an attorney for Plaintiff to go through the documents and make professional judgment calls as to which documents were "related" or "relevant" and which ones were not "related" or "relevant." Contrast this with a request for "all emails between Mrs. X and Mr. Y" which only requires a search of the information.

retrieve responsive electronic information for production to the other side." Middle District Discovery: A Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida at p. 21 (emphasis added). Here, the burden or expense is the monies needed to pay IKON to use their software to produce material in a format desired by Defendants.

Plaintiff expended its capital in fronting the costs for developing the MEWA. Defendants allowed Plaintiff to front the costs so as to relieve Defendants of that burden. Defendants then improperly took the MEWA and the resulting income. The "parties' resources" part of the U & I test must be resolved in favor of Plaintiff.

As Defendants acknowledge, there was no stipulation between the parties as to a specific form of electronic production. Had there been an agreement of which Plaintiff was in violation, Plaintiff would not have a leg on which to stand.

Defendants' argument seems to be that "we produced it this way, so should Plaintiff." In support of this notion, Defendants assert that they "incurred in excess of $10,000 in *attorneys' fees* and other costs associated with the collection, review processing, and ultimate production" to Plaintiff. (See Motion to Compel at p.4 (emphasis added)). The clear implication of this assertion is that "Defendants' production was expensive, too" and Plaintiff should not be heard to complain about cost. While Plaintiff has no reason to doubt that extensive attorney time was expended in the production, Plaintiff's counsel has also expended a great deal of time attempting to comply with the discovery requests. However $10,000 in attorney-time does not equate to $10,000 in production costs to a third party, which is what Plaintiff faces here and cannot afford.

b. Defendants' request for attorney fees

The instant dispute presents no violation of a court order compelling production sought by Defendants. Additionally, Plaintiff has demonstrated a continuous good-faith attempt to

comply with Defendants' demands within the bounds of Plaintiff's financial abilities. Plaintiff's refusal is not so "unjustifiable as to require an order directing it to pay (Defendants') fees and costs in bringing this motion." Reckitt Benckiser, Inc. v. Watson Laboratories, Inc., 2010 U.S. Dist. LEXIS 115310 (S.D.FL. 2010). As such, there is no ground on which to sanction Plaintiff with the additional burden of paying Defendants' attorney fees.

WHEREFORE, Plaintiff, Independent Marketing Group, Inc., requests this Court to enter an order 1) denying Defendants' Motion to Compel, 2) denying Defendants' request for attorney fees for bringing the Motion, 3) allowing the discovery sought by Defendants' on the condition that Defendants agree to pay for the cost of producing the documents in a format desirable to Defendants.

Respectfully Submitted,

s/P. Campbell Ford
P. CAMPBELL FORD
Florida Bar No.: 0480495
Email: ford@fordmiller.com
Ford, Miller & Wainer, P.A.
1835 N. Third Street
Jacksonville Beach, Florida 32250
Telephone: 904-390-1970
Facsimile: 904-390-1975
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 6, 2012, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Robert H. Buckler, Esq.
Evan H. Pontz, Esq.
Troutman Sanders LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, Georgia 30308
bobby.buckler@troutmansanders.com
evan.pontz@troutmansanders.com

John A. Tucker, Esq.
1 Independent Drive
Suite 1300
P.O. Box 240
Jacksonville, Florida 32201
jtucker@foley.com

s/P. Campbell Ford
Attorney