

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Bruce Schultze,)
)
 Plaintiff,)
)
 vs.)
)
 Stephen A. Brown, Individually and)
 as manager of Pure Market)
 Solutions, LLC, Pure Market)
 Solutions, LLC, SLK, LLC, and)
 John Doe,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2016-CP-40-2760

**ORDER AND SANCTIONS
 ON PLAINTIFF'S MOTION TO COMPEL**

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SC Court of Appeals

RICHLAND COUNTY
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This matter comes before me on the Plaintiff's September 16, 2016 Motion to Compel Discovery and February 1, 2017 Amended Motion to Compel Discovery. Plaintiff's counsel was represented by Joseph M. McCulloch, Jr. and Kathy R. Schillaci and defendants were represented by Karen Simmons. After hearing arguments of counsel for all parties who have appeared in this matter and after review of the motions and other filings, I GRANT the Plaintiff's Motion to Compel discovery as set forth below as no justifiable excuse exists for the delay in providing discovery. Further, the Court finds an award of reasonable attorney fees and costs, to be submitted to the court, is appropriate.

FACTUAL BACKGROUND

This court has reviewed the entire record, including all pleadings and related filings, supplemental materials submitted, the October 11, 2016 and November 14, 2016 deposition transcripts, and the limited discovery produced by defendant Brown on February 7, 2017.

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Based on this court's review of the pleadings and filed documents, it appears the following is alleged. The Plaintiff is a small business owner with a store located in Columbia, South Carolina. Sometime in 2011, Defendant Brown approached the Plaintiff at the Plaintiff's store about investing and becoming a 50/50 partner in defendant Pure Market Solutions, LLC with Defendant Brown serving as the other partner and manager. It is alleged that Defendant Brown represented to Plaintiff that the investment monies would be used to secure exclusive marketing rights to certain energy drinks in the United States and would also be used to buy out the interests of another partner. Defendant Brown in his Answer and deposition admits that the Plaintiff paid monies into Pure Market Solutions, LLC. Plaintiff continued to make large financial contributions into Pure Market Solutions, LLC, and additionally provided furniture and funds for the purchase of an RV to be used for marketing purposes. The Complaint also alleges the Plaintiff persistently requested information regarding finances of the business venture and received continuing promises they would be produced.

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JMT
In late 2014, the Plaintiff learned from the new franchise holder that Pure Market Solutions was no longer the owner of the energy drink distributorship, a fact never made known to the Plaintiff by the manager, Defendant Brown. Defendant Brown prior to the lawsuit provided 2011 and 2012 partnership tax returns to Plaintiff which showed the tax preparer/accountant, Todd Stone, on the returns as a partner in Pure Market Solutions, LLC, a change never made known to or approved by Plaintiff. The court notes that Defendant Brown in his Answer and deposition denies that Todd Stone was a partner in Defendant Pure Market Solutions, LLC, which is in direct conflict with the filed tax returns. See Answer paragraph 11; Brown Depo. T. p. 89, lines 18-21. Further, the tax returns show a decrease in the Plaintiff's ownership shares by reason of the new but undisclosed interest. Following repeated demands for

information including accounting records, tax returns, and an explanation for the new partner, Defendant Brown in October 2015 sent to the Plaintiff an incomplete 2013 tax return. This return showed a loss and a further unexplained decrease in the Plaintiff's partnership shares. After continued requests for business records and information, the Plaintiff filed this lawsuit on April 29, 2016. The Complaint alleges causes of action for fraud, misrepresentation, breach of contract, breach of contract accompanied by a fraudulent act, conversion, civil conspiracy, unjust enrichment, breach of fiduciary duty, and negligence alleging statutory violations, including the failure and/or refusal to produce business records.

The refusal of Defendant Brown on behalf of himself and the companies he manages to provide essential business records and business information to his business partner, both before and after the filing of this lawsuit, is critical to the Plaintiff's ability to pursue relief in this litigation. This information is made all the more urgent given the inclusion of an alleged third party as an unauthorized partner, the failure of the business to retain the energy drink franchise, and the use of the only currently known business asset, an RV.

FINDINGS

#3
OST

Based on the Court's review of the record, it finds as follows. On June 16, 2016, the Plaintiff served the Defendants through their attorney with Plaintiff's First Set of Interrogatories to Defendants and First Set of Requests for Production to Defendants. It appears service was proper and is not in dispute. The undisputed record shows that the Plaintiff's counsel sent emails to defense counsel on August 17, 2016 and again on August 31, 2016, checking on the status of discovery. The e-mails were not answered. Counsel certifies, which is not in dispute, that she additionally left voicemails at defense counsel's office but received no

call back. On September 16, 2016, the Plaintiff filed a Motion to Compel which was served on defense counsel.

On September 20, 2016, the Plaintiff served defense counsel via e-mail and U.S. mail with Notice of Defendant Brown's deposition. Neither defendant Brown nor his counsel appeared for the October 11, 2016 deposition. Thereafter, on November 4, 2016, the Plaintiff's counsel sent an e-mail to defense counsel stating: "If you will forward your overdue discovery responses by Thursday (11/10), we can complete the deposition and resolve the motion to compel without additional costs." In response, defense counsel on November 10, 2016 indicated she anticipated having discovery "by the end of next week." This e-mail is attached as an exhibit to the Amended Motion. At Defendant Brown's rescheduled deposition on November 14, 2016, he denied having ever seen the discovery requests and claimed he was not aware a motion to compel had been filed. The discovery requests and motion are attached as an exhibit to the deposition which is on file with this court.

Having fully read the deposition transcript along with the other filings, the court finds Defendant Brown's conduct consistent with a pattern of evasiveness when it comes to providing information and documents related to the businesses he manages and in the discovery of this case. (See Brown Depo T. p. 8, line 23 - p.9, line 6; p. 9. Line 24 - p.12, line 6; p. 32, line 13 - p. 34, line 4; p. 35, lines 3-15; p. 51, lines 5-11; p. 53, lines 19-21; p. 55, lines 10-12; p. 85; p. 91, lines 8 - 14; p. 93, lines 11-14).

On November 16, 2016, following the deposition, the Plaintiff's counsel served additional discovery in the nature of supplemental interrogatories and requests for production.

On January 11, 2017, this court noticed the hearing on the motion to compel and required proposed orders be submitted by February 1, 2017. On February 1, 2017, having still

received no discovery responses, the Plaintiff filed an Amended Motion to Compel setting forth an updated timeline and seeking to strike the Defendants' Answer as an additional sanction. On February 6, 2017, defense counsel contacted the Plaintiff's counsel by e-mail seeking to enter into a consent order "requiring that we provide responses to you within a certain time or pay your costs in connection with the motion." Plaintiff's denied the request. See Supplemental Materials in Support of Plaintiff's Motion to Compel. On the afternoon of February 7, 2017 (the day before this hearing), the Defendants provided the Plaintiff with incomplete discovery responses.

After reviewing the record and hearing the arguments of counsel, this court FINDS that Defendant Brown on behalf of himself and as manager of Pure Market Solutions, LLC and SLK, LLC, has not made reasonable efforts to comply with discovery. Given Defendant Brown is acting as manager for these companies, he should have the records either in his possession or otherwise accessible. This court further FINDS the discovery he has refused to provide are details at the core of the Plaintiff's claims for fraud and breach of fiduciary duty.

This court further FINDS that the discovery failure is in no part the fault of defense counsel.

#5
JBT
This court FINDS that even if it is true, as Defendant Brown alleges, that his laptop containing business information was stolen in 2014, there is no evidence that Defendant Brown has made any effort to recover documents, e-mails, and materials in the possession of attorneys, tax professionals, third-party providers (e.g. Google, QuickBooks), purchasers of the energy drink (Amazon, eBay, T. p. 72) or others who likely have business documents. Further, there is no evidence of his producing business documents and communications, other than a few scant documents, that would have been received *after* the computer was stolen in 2014, and no production of bank records (statements, copies of checks) for the various entities that would

assist with providing the Plaintiff with an accounting. Furthermore, in his deposition, Defendant Brown specifically mentions a flash-drive of corporate materials that may have been provided to his accountant (T. p. 67, lines 22-25) so it appears business records were stored on other devices.

This court **GRANTS** Plaintiff's Motion to Compel and finds and **ORDERS** that within ten (10) days of the court signing this order, Defendant Stephen Brown on behalf of himself and as manager of Pure Market Solutions, LLC and SLK, LLC shall make reasonable efforts to recover, reconstruct, and/or provide the following documents and information:

- All banking records since August 1, 2011 for Pure Market Solutions, LLC, SLK, LLC, and Custom RV Rentals, LLC including but not limited to bank statements, copies of checks, deposits and withdrawals;
- All credit card statements for Defendant Brown, Pure Market Solutions, LLC, SLK, LLC, and Custom RV Rentals, LLC since August 1, 2011;
- Records of all sales and monies received from buyers, including but not limited to eBay and Amazon;
- Copies of any other business records for Pure Market Solutions, LLC, SLK, LLC and Custom RV Rentals, LLC regardless of whether those documents are in the possession of Defendant Brown or someone hired by him such as attorneys and accountants, including but not limited to such records in the possession of attorney Gary Pennington, Frank Barton, and CPA Todd Stone. This includes but is not limited to all invoices, balance sheets, profit and loss, tax information, communications, legal pleadings, operating agreements, corporate record books corporate minutes, partnership buy-out agreements, notices, offer letter to TD Bank (T. p. 84, lines 10-17) and resolutions since 2011;
- Fully executed copy of the Distribution Agreement;
- 2014 SLK, LLC tax returns and related documents;
- 2015 tax returns for Pure Market Solutions, LLC, and SLK, LLC, extension requests, and accompanying documents required for the preparation of such returns;
- Any and all emails, documents and accounting records (including any reconstructed records) from Stephen Brown's desk top computer, cloud account and/or any other defendant computer or server relating in any way

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to Pure Market Solutions, LLC, SLK, LLC, Custom RV Rentals, LLC or the RV at issue for the last five (5) years. While Defendant Brown responds, "The Defendants are not in possession of such documents," he testified in his deposition to reconstructing some of those records." (Brown T. p. 92, lines 2 – 6);

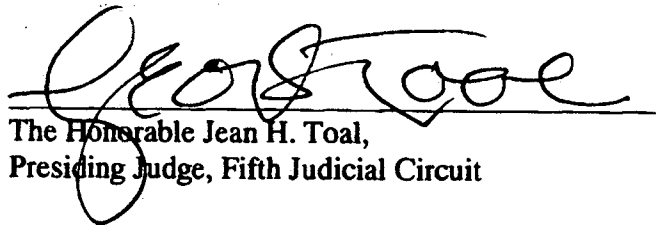
- Articles of Incorporation for Custom RV Rentals;
- Set forth the applicable dates Stephen Brown, Todd Stone, and/or Bruce Schultze became members of Pure Market Solutions, LLC;
- A list of individuals/entities renting the RV in relation to dates and rents received;
- Proof of insurance for the RV;
- A listing of any and all computer back-ups used by Defendant Brown since 2012 including but not limited to the Cloud, external hard drives, thumb drives, CDs, printed copies, and Carbonite back-up;
- If other partners or shareholders are involved in SLK, LLC, they need to be listed;
- Any and all documents recorded with the Secretary of State's office regarding PMS not included above.

This court further **GRANTS** the Plaintiff's request for reasonable attorney fees and costs to be provided to this Court separately for review and determination in the way of attorney affidavits. Specifically, pursuant to Rule 37(a)(4) of the South Carolina Rules of Civil Procedure, this court finds it appropriate under the facts herein for Defendant Stephen Brown to pay the reasonable attorney fees and costs related to obtaining discovery from the time of the filing of the motion to compel, including but not limited to the costs and reasonable attorney fees related to the taking and preparation for Defendant Brown's depositions, preparation of the discovery motions and related filings, hearing preparation and attendance, and other discovery related fees and costs.

This court **DENIES** the Plaintiff's Amended Motion to Compel Discovery only to the extent it seeks to have this court immediately strike the Defendants' Answer. However, this court **FINDS** and **ORDERS** that if Defendant Stephen Brown, on behalf of himself and as manager of Pure Market Solutions, LLC and SLK, LLC, fails to produce the information above to the Plaintiff within ten (10) days hereof, then upon the Plaintiff's application to this court, this court will order the striking of Defendants' Answer, will enter default, render a judgment on the issue of liability, and proceed with a hearing on damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's motion to compel discovery is **GRANTED**, that reasonable attorney fees and costs in an amount to be determined shall be **GRANTED** to the Plaintiff, that the Plaintiff's request for immediate striking of the Answer be **DENIED** but that should this Order not be fully complied with by Defendants within ten (10) days hereof, the court will strike the Defendants' Answer, enter default, render judgment on liability, and proceed with a hearing on damages.

AND IT IS SO ORDERED.


The Honorable Jean H. Toal,
Presiding Judge, Fifth Judicial Circuit

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Columbia, South Carolina

this 13th day of February, 2017