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Order on Discovery Matters (AMANA I SA)

Alice D. Bonner
Superior Court of Fulton County

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Recommended Citation
Bonner, Alice D., "Order on Discovery Matters (AMANA I SA)" (2008). *Georgia Business Court Opinions.* Paper 32.
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMANA I SA and SHEIK MOHAMMED AL-AMOUDI Plaintiff, v. CAIRNWOOD GROUP, LLC, CAIRNWOOD CAPITAL MANAGEMENT, LLC, LANE P. PENDLETON, LAIRD P. PENDLETON, KIRK P. PENDLETON, and THAYER B. PENDLETON. Defendants,	*	Civil Action File No. 2006-CV-114931 (Business One—ADB)

FILED IN OFFICE
APR 29 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON DISCOVERY MATTERS

Counsel appeared before the Court on March 3, 2008 to present oral argument on several discovery issues, including Plaintiffs' Motion to Compel, filed February 27, 2008. The parties were allowed time to fully brief that motion. After reviewing the record of the case, the oral argument of counsel, and the briefs on the motion, the Court finds as follows:

This case involves a dispute arising out of an investment by Plaintiffs Amana I SA ("Amana"), a Luxembourg company, and Sheik Mohammad Al-Amoudi ("Al-Amoudi"), in Cairnwood Global Technology Fund ("CGTF"), a Cayman Islands company, which was managed and/or invested in by the remaining Defendants.

Lane Pendleton's Orient Network Laptop Hard Drive Disk

Plaintiffs seek an Order from this Court compelling Lane Pendleton ("Pendleton") to produce the original hard drive disk of his laptop computer for copying. From 2001 to 2005, Pendleton had possession of a laptop purchased by Orient Network, an entity involved in the complicated investment structure underlying this case. He used this laptop to conduct business and send emails on behalf of Orient Network and CGTF.

In 2005, Orient Networks entered the Singapore equivalent of bankruptcy (i.e.,

liquidation) and Pendleton turned over the laptop to the judicial manager. Later, Pendleton requested to make a copy of the laptop's hard drive disk. With permission, Pendleton had Ms. Joseph, his former secretary who was then working for the judicial manager, take the laptop to a computer store to have the copy made. Thereafter the laptop was returned to the judicial manager and a copy of the hard drive delivered to Pendleton.

The hard disk returned with the laptop was not the original hard disk and is a source of great controversy in this and other actions. The hard disk in the returned laptop was a different model made by a different manufacturer that had belonged to a piano teacher. To compound the controversy, in a June 2006 deposition, Pendleton testified in the Orient Network liquidation matter that he had the original hard drive disk at home. In a separate Singapore action, involving similar parties and/or their related business ventures, Pendleton submitted an affidavit and provided the Singapore Court with Ms. Joseph's affidavit to explain that he did <u>not</u> have the original hard drive disk. After the Singapore Court's finding that the affidavits were contradictory to his prior testimony and providing an opportunity for cross examination, the parties entered into a consent agreement. Pursuant to the consent agreement, the parties agreed that the affidavits would not be relied upon and avoided cross examination. Thereafter, the Singapore Court found, and was affirmed, that the facts of that case led to the conclusion that Pendleton had possession of the original hard drive disk.[1]

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1. Pendleton dismisses the Singapore Court's finding on the grounds that it was in the absence of "facts" and that his counsel was "tricked" into agreeing to a consent order without an agreement that revised affidavits could be submitted in the future. After reading the Singapore Court's order and the transcript portions provided to this Court, this Court finds those arguments to be without foundation.

In this action Pendleton asserts that he has only the copy of the hard drive disk in his possession. The copy retained by him, however, is on a disk that was manufactured and sold after the copy was made in October 2005. Plaintiffs also point out that Pendleton's testimony and affidavits in the Singapore action indicate that the copy of the hard disk was made and delivered to him in early October 2005. In his responsive briefs in this action, however, Pendleton states that the copy was made in "late" 2005. Additionally, Pendleton filed unverified answers to an Al-Amoudi interrogatory and an unverified amended answer to an Amana interrogatory, both of which sought information regarding the original hard drive disk. See Williamson v. Lunsford, 119 Ga. App. 240 (1969).

The location of the original hard drive disk raises serious factual and credibility questions in this case. In addressing these questions, Defendants ask this Court to ignore the Singapore record on this matter, while Plaintiffs ask this Court to substitute the Singapore Court's reasoning for its own. In addition, the remedy that Plaintiffs seek has potentially harsh consequences. As Defendants point out, an order requiring Pendleton to produce the original disk, which he claims he does not have, could result in sanctions including striking his answer and defenses.

Because of the potential impact of the Court's ruling, the absence of a full record on this issue in this proceeding, and the credibility questions raised, the Court concludes that direct evidence is necessary to make a determination on this issue. Within forty-five (45) days of the date of this Order, the parties are hereby **ORDERED** appear to present direct evidence on the issue of the original hard drive disk. Counsel for Pendleton shall contact the Court within ten (10) days of the date of this Order, after consultation with all counsel

in the case, to set a date for the hearing that is convenient for Pendleton and all counsel.

Notwithstanding this Court's Order regarding the laptop hard drive disk, Pendleton is under an obligation to provide complete discovery responses to Plaintiffs' requests. Within thirty (30) days of this Order, Lane Pendleton is hereby **ORDERED** to produce any responsive documents from 2001-2005, including emails, not already produced by him and to provide a verified statement to this Court that all responsive documents in his possession, custody or control sought by Plaintiffs have been produced. In addition, Pendleton shall provide verified interrogatory responses to all pending interrogatories within thirty (30) days of this Order and shall hereafter submit only verified interrogatory responses.

1999-2000 Documents

In addition to the discovery from Defendant Lane Pendleton discussed above, Plaintiffs seek an Order from this Court compelling the remaining Defendants to produce documents from 1999-2000. These Defendants claim that all responsive documents have been produced. However, since the Motion to Compel was filed, these Defendants have produced additional documents, listed as Exhibit 1 to their response, as well as re-searched Ms. Aouad's computer for responsive documents.

Within thirty (30) days of this Order, Individual Defendants are hereby **ORDERED** to produce all additional documents, including 1999-2000 emails in the possession of any individual Defendant (Defendants may not simply rely upon the copies created by Tim Lundberg) not already produced in this action, and file with this Court a verified statement that all responsive documents in their possession, custody, or control have been produced. The verified statement shall include a detailed statement of the discovery steps

taken, and provide an explanation for all "missing" documents. Within fifteen (15) days after receipt of this statement, Plaintiffs may submit to the Court a written request that additional discovery searches for responsive documents be performed specifying the steps desired and listing the documents believed to be discovered by such additional steps.

Law Firm Documents

Plaintiffs seek documents held by Defendants' former French law firm UGGC & Associés ("UGGC"). Defendants state that UGGC is holding documents due to a billing dispute with Defendants despite the efforts of Kirk Pendleton and a mutual friend to persuade the lead attorney to release the files or provide them with an invoice.

Plaintiffs argue that the documents held by UGGC are within Defendants' control for purposes of compelling discovery. O.C.G.A. § 9-11-34(a) ("To produce....any tangible things...which are in the possession, custody, or control of the party upon whom the request is served..."). Control encompasses not only possession of a document, but the "right, authority, or ability to obtain the documents" and can extend to documents held by a third party. Lone Star Steakhouse and Saloon, Inc. v. Liberty Mut. Ins. Group, 2003 WL 21659662 *2 (D. Kan. 2003) (holding that plaintiff had control over documents held by its attorneys) citing *Comeau v. Rupp,* 810 F. Supp 1127, 1166 (D. Kan.1992); cf Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 138 -139 (2nd Cir. 2007) (finding that a party did not "control" documents held by a Russian Company despite the party's ownership and management interests in the company because of barriers created by international law); see also Ambler v. Archer, 230 Ga. 281, 287 (1973) (holding that federal decisions construing Federal Civil Procedure rules similar to Georgia' Civil Practice

Act are persuasive).

Defendants' documents held by UGGC are found to be within Defendants' control because they have a legal right to those documents. The outstanding billing dispute, which is the barrier to obtaining the documents, is a matter solely between Defendants and UGGC and should not interfere with Plaintiffs' right to discover those documents. Defendants are hereby **ORDERED** to produce the documents held by UGGC within thirty (30) days of the date of this Order.

Format of Documents

Plaintiffs request that certain documents already produced by Defendants be re-produced in native format. Native format means the format in which the document was originally created.[2] Plaintiffs have identified several documents that they seek in native format. Plaintiffs note that the original discovery requests sought the documents in native format and that they objected to the format in which the documents were produced.

Plaintiffs seek the native format of documents, in part, to obtain access to the metadata of the documents, which can reveal information about when, how, and by whom the document was created and authenticate different versions of the document. See Williams v. Sprint/United Management Co., 230 F.R.D. 640, 647 (D. Kan. 2005). According to Plaintiffs, the documents requested in native format include the annual

2. **Native Format**: Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the "native format" of the document. Because viewing or searching documents in the native format may require the original application (for example, viewing a Microsoft Word document may require the Microsoft Word application), documents are often converted to a vendor-neutral format as part of the record acquisition or archive process. "Static" formats (often called "imaged formats"), such as TIFF or PDF, are designed to retain an image of the document as it would look viewed in the original creating application but do not allow metadata to be viewed or the document information to be manipulated. See THE SEDONA CONFERENCE GLOSSARY FOR E-DISCOVERY AND DIGITAL INFORMATION MANAGEMENT (2005) *available at*: http://www.relevantevidence.com/downloads/TSGlossaryMay05Version.pdf .

reports, share certificates, letters, and certain emails of Tim Lundberg form the central issue in this case: whether certain statement were or were not made in the course of soliciting Plaintiffs' investment in CGTF.

Defendants object to the production of the documents in native format because of the burden imposed upon them to reproduce documents. Defendants also object to the production of Microsoft Word documents created by Tim Lundberg into which he copied and pasted now deleted email texts. Defendants redacted certain portions of these email documents that they claim were unresponsive or privileged, and argue that being required to produce the documents in native format would prevent appropriate redaction. CGTF, however, is now run by a liquidator who "has control over the corporation's attorney-client privilege with respect to pre-bankruptcy communications." See In re Maxim Group, Inc. Securities Litigation, 2002 WL 987660, *1 (N.D.Ga. 2002) (holding that a corporation's trustee is the only entity who has standing to assert privilege on behalf of the corporation). Thus, the scope of privilege able to be asserted by Mr. Lundberg is restricted to privilege he held at the time of the email communication and which he has not since waived.

The Court finds that Plaintiffs demonstrated their special need for and the relevance of the native format of these specific documents. See Williams v. Sprint/United Management Co., 230 F.R.D. 640. In addition, the Court finds that Plaintiffs have sufficiently limited their request of native document formats to those documents listed on Exhibit A to the Amendment to their Motion to Compel (approximately 2200 pages of documents) to reduce the burden imposed upon Defendants. Therefore, within thirty (30) days of the date of this Order, Defendants are hereby **ORDERED** to produce the documents listed on Exhibit A of Plaintiff's Amendment to their Motion to Compel in native

format, with metadata intact. The documents may be produced on a CD without Bates numbering, or by any other means agreed to by the parties. Any remaining privilege questions with regard to the Tim Lundberg email documents shall be raised with the Court within fifteen (15) days of the date of this Order.

Communications with Fund Investors

Finally, Plaintiffs request this Court to compel Defendants to produce communications with other CGTF investors reflecting representations/communications and evidence of transmittal of the CGTF reports to these investors. Defendants oppose the Motion on the grounds that they have produced all such relevant documents in their possession, control or custody.

Within thirty (30) days of this Order, Defendants are hereby **ORDERED** to produce all communications with other CGTF investors and evidence of report transmittals within Defendants' possession, control, or custody not already produced and to file a verified statement with this Court certifying that all such documents have been produced.

Sheik Mohammed Al-Amoudi

During the March 3, 2008 hearing, the parties discussed Al-Amoudi's deposition, which has been postponed due to visa complications. During the hearing, the Court ruled that Defendants were entitled to take Al-Amoudi's deposition during fact discovery, which is set to close on June 30, 2008. The Court ordered Al-Amoudi's counsel to provide the Court with weekly updates on his visa application process, including the date, once scheduled, of Al-Amoudi's visa application interview. In addition, the Court ordered that if Al-Amoudi was unable to obtain his visa due to a delay caused by or a decision of the State Department, then his deposition should be taken in London and Al-Amoudi would be

responsible for paying Defendants' travel costs.

To date, Al-Amoudi has not obtained his visa, nor has he scheduled an interview with the State Department, which is a necessary step in obtaining the visa. Consistent with the Court's bench ruling on March 3, 2008, upon proper notice by Defendants, Al-Amoudi is hereby **ORDERED** to sit for a deposition, as discussed above, before the close of discovery or face the possibility of sanctions.

SO ORDERED this 29th day of April, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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