

9-8-2008

Order (ALAN B. THOMAS, JR.)

Alice D. Bonner

Superior Court of Fulton County

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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

FIRST EMPIRE CORPORATION)
(directly and derivatively in its)
Capacity as a shareholder of)
LecStar Corporation), **ALAN B.**)
THOMAS, JR. (directly and)
derivatively in his capacity as a)
shareholder of LecStar Corporation))
and HEATHER McFARLAND (directly)
and derivatively in her capacity as a)
shareholder of LecStar Corporation),)

Plaintiffs,)

v.)

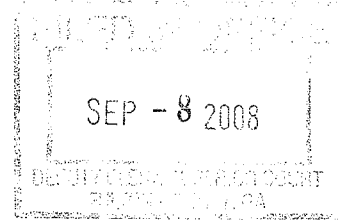
JOHN C. CANOUSE,)
STEPHEN M. HICKS, SOUTHRIDGE)
CAPITAL MANAGEMENT LLC,)
W. DALE SMITH, CACHE CAPITAL)
(USA), L.P., ATLANTIS CAPITAL)
FUND, LTD., and McCORMACK)
AVENUE, LTD.)

Defendants,)

v.)

LECSTAR CORPORATION,)

as a Nominal Defendant.)



**CIVIL ACTION FILE
NO. 2004CV88793**

ORDER

This case is before the Court on Plaintiffs' Motion to Compel, filed June 5, 2008. After reviewing the record of the case and the briefs submitted, the Court finds as follows:

This case involves alleged securities fraud. The Plaintiffs, three (3) shareholders of the LecStar Corporation ("LecStar"), filed this action individually and derivatively on behalf of LecStar in 2004 against the Defendants, who allegedly fraudulently transferred all of LecStar's stock and assets to off-shore entities for their own benefit.

This Court issued a Scheduling Order on September 13, 2007, setting a six-month discovery period.¹ Plaintiffs served initial discovery requests on October 17, 2007. After several requests by Plaintiffs that Defendants Stephen Hicks ("Hicks"), Southridge Capital Management, LLC ("Southridge"), and McCormack Avenue, Ltd. ("McCormack") (hereinafter referred to collectively as the "Southridge Defendants") supplement their discovery responses, Plaintiffs filed the instant Motion to Compel. The three (3) subjects at issue in this Motion are: (1) The Southridge Defendants' alleged failure to produce discoverable documents; (2) Defendant McCormack's alleged failure to provide a competent 30(b)(6) witness; and (3) the Southridge Defendants failure to verify interrogatory responses.

Issue 1: Defendants Failure To Produce Discoverable Documents

Plaintiffs claim that the Southridge Defendants have failed to produce certain documents Defendant Hicks acknowledged exist during his 30(b) (6) deposition as McCormack's representative as well as other documents Plaintiffs requested in several Requests to Produce. In support of their allegations,

1. The instant motion was brought after the discovery deadline has passed because the parties had agreed to conduct depositions after the discovery deadline due to scheduling issues.

Plaintiffs submitted Exhibit "A" to Plaintiffs' Motion to Compel delineating these deficiencies as follows:²

(a) Exhibit "A" Categories 1-12: relate to responses Hicks made during his 30(b)(6) deposition as McCormack's representative admitting the existence of and the Defendants' access to the documents requested, but not produced.

(b) Exhibit "A" Categories 18-2: relate to Plaintiffs' various Requests to Produce Documents to McCormack, Southridge, and/or Hicks and the respective Defendants' written objections.

In their Reply brief, filed July 8, 2008, Defendants merely claim they need more time, and they will "locate, gather, and produce" any such documents that still exist relating to Categories 1-12. Defendants do not provide any further argument for failing to provide the documents listed in Categories 18-21.

Parties may obtain discovery regarding any non-privileged matter which is relevant to the subject matter of the litigation, including documents reasonably calculated to lead to the discovery of admissible evidence. O.C.G.A. § 9-11-26(b). Under Georgia law, the responding party has a duty to give the requesting party access to such documents that are in the possession, custody, or control of the party upon which the request is made. O.C.G.A. § 9-11-34. The Court has authority to issue orders compelling a party to produce such relevant, responsive, accessible documents if not provided during the normal course of discovery.

O.C.G.A. § 9-11-37 (a).

2. Plaintiffs' Chart groups similar discovery requests topically and then numbers these groups from 1-26. This Order refers to these numbered groups as "Categories." Within each "Category," Plaintiffs enumerate the individual, discovery requests at issue.

The Court finds that Categories 1-12 of Plaintiffs' Exhibit "A" request relevant Documents,³ which Hicks admits do or should exist and are accessible by the Southridge Defendants. Furthermore, the Court finds that Categories 18-21 also request documents that are relevant and calculated to lead to the discovery of admissible evidence.⁴ The Court is not persuaded by Defendants' objections because the requests are narrowly tailored, specific, and should be accessible to the respective Defendants.

Accordingly, the Court hereby **GRANTS** Plaintiffs' Motion to Compel and **ORDERS** the respective Defendants to produce the specific documents listed in Exhibit "A" under Categories 1-12, and 18-21 within fifteen (15) days of the date of this Order.

Issue #2: Defendant McCormack's Failure To Produce An Adequate 30(b)(6) Representative

Plaintiffs timely sent McCormack a list of forty-one (41) specific areas for its corporate deposition. McCormack designated Hicks as its 30(b)(6) representative, but Hicks could not remember or did not know the answers to twenty-five (25) of the specified deposition categories. Exhibit "C" to Plaintiff's Motion to Compel delineates the specific questions Hicks claimed not to remember or know, even though he allegedly controls McCormack. In their

3. The requested documents relate to the business history of McCormack, the disposition of LecStar's assets, transactions between McCormack and Fonix, disposition of Fonix stock by ITEL shareholders, McCormack's transactions with ITEL, and the valuation of LecStar assets, all of which are relevant to the Plaintiffs' claims.

4. These requests seek documents dealing with Securities Purchase Agreement between ITEL and McCormack, consideration received from transfer of LecStar assets from McCormack to ITEL and from LTEL to Fonix, and McCormack, LTEL, and Southridge business documents.

Reply brief, Defendants have agreed to supplement Mr. Hicks' responses.

Plaintiffs, however, seek the opportunity to redepose Hicks.

To depose a corporation, the party requesting the deposition must designate with reasonable particularity the matters on which the examination is requested. O.C.G.A. § 9-11-30 (b)(6). The person/persons designated by the organization to testify on its behalf must then testify to matters known or "reasonably available" to the organization. Id.

The Court finds that the Plaintiffs designated the subject matter for the McCormack's deposition with reasonable particularity, and that the topics and questions enumerated in Exhibit "C" should be "reasonably available" to Hicks or other corporate representative/s.

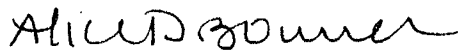
Accordingly, the Court hereby **GRANTS** Plaintiffs' Motion to Compel and **ORDERS** that Hicks or, if Hicks has insufficient information, then a more appropriate 30(b)(6) representative, be redeposed on the twenty-five (25) topics and/or the specific questions listed in Exhibit "C" to Plaintiffs' Motion. Within seven (7) days of the date of the Order, counsel for McCormack shall submit to Plaintiffs the identity and availability of the 30(b)(6) representative for the forty-five (45) days following the date of this Order. Thereafter, the parties shall agree to a deposition date within seven (7) days and provide notice to the Court of the agreed upon deposition date, which shall be set no later than forty-five (45) days from the date of this Order.

Issue #3: Southridge Defendants Failure to Verify Interrogatory Responses.

Plaintiffs claim that Defendants have failed to attach verifications to several of their interrogatory responses as required by O.C.G.A. § 9-11-33(a)(2). In particular, Hicks failed to verify his responses to Plaintiff Heather McFarland's First Interrogatories; Southridge has failed to verify its responses to Plaintiff Heather McFarland's First Interrogatories; and McCormack has failed to verify its Second Amended Responses to Plaintiffs' First Interrogatories and its Responses to Plaintiff Heather McFarland's First Interrogatories. On several occasions, Plaintiffs' counsel requested these verifications from Defendants.⁵ In their Reply brief, Defendants do not deny their failure to provide the verifications and state they will produce them.

The Court finds the Defendants have failed to provide the required verifications in a timely manner. Accordingly, the Court hereby **GRANTS** Plaintiffs' Motion to Compel and **ORDERS** Defendants Hicks, Southridge, and McCormack to provide the above verifications within five (5) days of the date of this Order.

SO ORDERED this 8 day of Sept., 2008.


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

5. See Exhibit 3,4,5 of Mark F. Dehler's Affidavit containing letters to Defendants' counsel.