

IN THE CHANCERY COURT OF COUNTY, MISSISSIPPI

PLAINTIFF

VS.

CIVIL ACTION NO.

DEFENDANTS

**RESPONSE OF DEFENDANTS
IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL**

COMES NOW Defendants, and , by and through their attorney of record, and file this Response in Opposition to Plaintiff's Motion to Compel, and state as follows:

1.

Defendants have not acted in bad faith. Moreover, Plaintiff was not required to incur expenses in the presentation of the instant motion except to the extent that it applies to Defendants personal financial records and documents prior to the date was organized. In fact, it is Plaintiff who has acted in bad faith by failing to attempt to resolve any other discovery disputes prior to filing the Motion to Compel.

2.

Although counsel for Plaintiff and counsel for Defendants have had numerous telephone conversations and personal conferences since the filing of Plaintiff's discovery, at no time prior to filing the Motion to Compel did counsel for Plaintiff contact counsel for Defendant and request that formal responses to Plaintiff's Request for Production of Documents and Interrogatories be served. Prior to the filing of the Motion to Compel, counsel for Defendants believed that the parties were working in a cooperative informal manner to resolve the dispute and had on several occasions engaged in settlement discussions. Counsel for Defendants did not believe that counsel for Plaintiff objected to Defendants delay in filing formal discovery responses, and although counsel for Defendants can not cite a specific conversation, it is his/her belief that counsel for Plaintiff had consented to an extension of time for Defendants to provided

formal responses based on the dynamics of the situation, the subsequent demise of the corporation's business and the discussions of settlement. Counsel for Defendant did not realize that counsel for the Plaintiff was insistent on formal responses being provided by a certain time or that Plaintiff's counsel would believe that a Motion to Compel would be necessary to obtain formal responses. If, at any time, Plaintiff's counsel had requested Defendants to file formal responses, counsel for Defendants would have gladly complied. In fact, formal responses to Plaintiff's discovery have been filed and served on Plaintiff.

3.

Plaintiff's assertion that Defendants have totally failed respond to Plaintiff's discovery request is simply false. Plaintiff filed his/her Complaint and Motion for a Temporary Restraining Order herein on _____, _____. By agreement of the parties, a Temporary Restraining Order was entered by this Court on _____, _____. Pursuant to said agreed order, Defendants voluntarily agreed to produce to Plaintiff "any and all books and records, including financial documents of every kind and description pertaining to _____, its assets and business affairs to Plaintiff and/or his/her attorney on or before _____, _____ for inspection and copying at Plaintiff's expense (emphasis added). As agreed, Defendants produced approximately _____ boxes of filed documents dates from the incorporation of _____, through the current date, less and except those documents which were in the possession of the corporation's accountant for preparation of current financial statements. After the missing documents were returned from the accountant, Plaintiff's counsel was notified of their availability, but has of yet to exercise his/her right to review same. Plaintiff's counsel was provided access to all of these documents and had the opportunity to review these documents at his/her leisure. In fact, Plaintiff's counsel requested and was provided copies of _____ pages of the documents produced.

4.

The documents voluntarily produced by Defendants pursuant to the agreed Temporary Restraining Order are the same documents, which Plaintiff requested in his/her First Request for Production of Documents. While Defendants admit that while they did not file a formal response to Plaintiff's Request for Production of Documents, those documents relative to _____ were in fact provided to Plaintiff's counsel within approximately _____ weeks of the document request being filed.

5.

Moreover, on _____, _____, over _____ months prior to the suit being filed, Defendants voluntarily provided the corporation records listed in numbers _____ - _____ in the letter from Plaintiff's counsel dated _____, _____ for inspection and copying. A copy of Plaintiff's counsel's letter dated _____, _____, is attached hereto as Exhibit "A". In addition, on or about _____, _____, Defendants provided Plaintiff's counsel with additional documents, including a copy of the deposit slip showing a check from _____ in the amount of \$ _____ and other documents related to _____ compensation.

6.

The production of these voluminous documents clearly show that Defendants have not acted in bad faith or attempted to thwart Plaintiff's attempts to obtain relevant and discoverable information. While Defendants have not provided records prior to the date of the organization of the business or as to their personal financial affairs, the agreed Temporary Restraining Order applied only to the records of _____. Furthermore, Plaintiff is not entitled to any of Defendants' business records prior to the organization of _____, in the issuance of stock to _____. This occurred in _____, _____. Prior to that time, Defendant _____ operated _____ as a sole proprietorship. While it is true that Plaintiff provided Defendants \$ _____, this money was in a

form of a loan evidenced by an agreement which provided that Defendants could satisfy the note by issuing Plaintiff a percentage of the outstanding stock of _____ upon its incorporation, which was agreed to occur no later than _____, _____, or by repaying the principal amount plus _____ % interest. This agreement evidences a loan only. It did not give the Plaintiff any ownership rights whatsoever in Defendants' business and Defendants did not owe Plaintiff any duties or obligations other than the repayment of the principal amount plus interest or the issuance of stock in the corporation. Defendants satisfied their obligation by issuing shares of a total of _____ outstanding shares of _____ to the Plaintiff upon organization in _____, _____. Based upon the agreement between the parties and the Defendants' performance of its obligations, Plaintiff has no right to any of the Defendants' business records prior to the organization of _____.

7.

Moreover, the first paragraph of Plaintiff's Complaint specifically states:

This suit is filed as a shareholders derivative action pursuant to Section 79-4-7.40 of Mississippi Code of 1972, as amended, and for the benefit of the Plaintiff shareholder on the basis that the individual defendants herein have, as officers and/or directors, use their positions improperly to gain benefit for themselves as shareholders to the exclusion of Plaintiff.

This statement clearly underlies the fact that the suit involves actions occurring after the corporation was organized and _____ became a shareholder, and after the Defendants became officers and directors. Hence, by Plaintiff's own admission, the issues relative to this case arise after the formation of the corporation. To allow Plaintiff to conduct discovery relative to Defendants' personal matters and the business records of their sole proprietorship is an intrusive invasion of privacy which is not likely to lead to any admissible evidence and should not be permitted.

8.

Defendants have a legitimate dispute with Plaintiff regarding the relevancy and discoverability of documents related to time period prior to the organization of the corporation and Defendant's personal financial records. Such legitimate disputes do not constitute bad faith or justify an award of attorney fees upon the filing of a Motion to Compel.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that the Court find that Defendants have complied in good faith in responding to Plaintiff's Request for Production of Documents and Interrogatories, that Plaintiff's Motion to Compel should be denied, that Plaintiff is not entitled to any attorney's fees or other costs incurred in presenting his/her Motion to Compel and that Defendants be granted a Protective Order providing that Plaintiff is not entitled to any of Defendants' personal financial records or any records of Defendants' business prior to organization of the corporation. In the alternative, should the Court determine that Plaintiff is entitled to Defendants' personal financial records, Defendants respectfully request that a Protective Order be entered to seal such records and limit their use and availability to Plaintiff and his/her counsel solely for use in this case and that all such records be returned upon conclusion of this case.

THIS, the day of , .

Respectfully submitted,

Attorney for

Of counsel:

Telephone:
MSB #
Attorney for

CERTIFICATE OF SERVICE

This is to certify that I, _____, counsel for defendants, have mailed this day by U.S. Mail, postage prepaid, and transmitted via facsimile, a true and correct copy of the above and foregoing to _____, Attorney for Plaintiff, at _____ and facsimile number _____.

This the _____ day of _____, _____.
