

Michigan has a strong historical commitment to a far-reaching, open and effective discovery practice.<sup>1</sup> It is a well established principle that the ultimate objective of discovery is to make available to all parties in advance of trial, all relevant facts which might be admissible during trial.<sup>2</sup> Discovery rules are to be liberally construed in order to further the ends of justice.<sup>3</sup> The purpose of discovery is to simplify and clarify issues.<sup>4</sup> The discovery process was designed to promote the discovery of facts and circumstances of dispute, not assist in their concealment.<sup>5</sup>

In this action, Defendant has refused to provide full and complete responses to interrogatories and document requests that are intended to promote the discovery of true facts and circumstances in controversy. Defendant has completely failed to provide the documents requested in the Request for Documents dated November 27, 2007.

For case in point, Interrogatory # 6 of the November 27, 2007 interrogatories asked:

“Describe, in detail, how it was determined that Doctor’s 11% Membership interest in Defendant was, as stated in ¶1. and ¶4. (a) of the LLC Membership Interest Purchase Agreement [Exhibit A], valued at \$110,000.”<sup>6</sup>

Defendants objected based on attorney-client privilege.<sup>7</sup> The Defendant erroneously attempts to invoke the attorney-privilege to almost all of the Plaintiffs’ interrogatories and request for production of documents.<sup>8</sup> These arguments are unfounded.

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<sup>1</sup> *In re Pott*, 234 Mich App 369, 375 ; 593 NW2d 685, 689 (1999)

<sup>2</sup> *Gruber Enterprises, Inc. v Kortiddis*, 201 Mich App 625; 506 NW2d 614 (1993)

<sup>3</sup> *In re Pott*, 234 Mich. App. 369, 376; 593 N.W.2d 685, 689 (Mich.App.,1999)

<sup>4</sup> *Id.*

<sup>5</sup> *In re Pott*, 234 Mich App 369, 376 ; 593 NW2d 685, 689 (1999)

<sup>6</sup> Exhibit B, p. 8

<sup>7</sup> *Id.*, p. 8-9

<sup>8</sup> Exhibit B, Interrogatories # 3, # 6-8, # 11, # 14-16.; Request to Produce # 5.

The documents requested do not fall under the attorney-client privilege as the privilege applies only to communications.<sup>9</sup> Further, because this case at instant involves a suit brought by minority shareholders, a fiduciary duty exists that affords Plaintiffs' the opportunity to establish good cause as to why the attorney-client privilege should not be invoked.<sup>10</sup> In this case, the nature of the claim indicates good cause for disclosure.<sup>11</sup>

The requested information is highly relevant to the Plaintiffs' claim of fraudulently distributing funds in violation of the Michigan Limited Liability Company Act because they refer to documents regarding sums paid out or received by the majority shareholders of Defendant.<sup>12</sup> The documents and items requested refer to the LL Membership Interest Purchase Agreement, Radiology Service Agreement and the Mutual Release and Settlement agreement. All of the aforesaid documents were not prepared in anticipation of litigation, nor are they communications protected by the attorney client privilege.

Furthermore, in regards to questions where the Defendant states that the documents are not in within her possession, she states that Co-Defendant has the documents. This response is vague and affirmatively

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<sup>9</sup> *Reed v Baxter*, 134 F.3d 351, 355-56 (6<sup>th</sup> Cir. 1998), citing *Fausek v White*, 965 F.2d 126, 129 (6<sup>th</sup> Cir 1992) (“The elements of attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”)

<sup>10</sup> *Picard Chemical Inc Profit Sharing Plan v Perrigo Co*, 951 F. Supp. 679, 686-87 (W.D. Mich 1996)

<sup>11</sup> *Id.*, stating that “indicia that contribute to a decision of good cause exists: the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons. (emphasis added)

<sup>12</sup> M.C.L.A. § 450.4515(1) - §515(1)

unresponsive. As a majority shareholder in Defendant Company, Defendant Doctor was a manager and on the “Board of Managers” and therefore would have access to the documents requested.

Failure to properly answer the interrogatories is a complete disregard for the candor demanded by the court in having an efficient trial. By such conduct, Defendants are attempting to frustrate the purpose of discovery while concealing from Plaintiffs facts, circumstances and information needed to adequately and efficiently pursue its claims against Defendants. This Court should not tolerate such conduct.

Plaintiffs’ rely upon MCR 2.313(A)(2)(c) and (d) for requesting relief in this motion. In accordance with MCR 2.309(b)(4) and MCR 2.310(C)(2), a party on whom interrogatories or a request for production is served, must serve a written response within 28 days after service of that request. The set of Discovery was served on November 27, 2007. As such, the responses to the interrogatories and request to produce were due on December 26, 2007.

When a party refuses or fails to permit discovery, the Court has authority to grant relief pursuant to MCR 2.313. In accordance with MCR 2.313(A), “the party seeking discovery may move for an order compelling an answer, a designation, or inspection in accordance with the request.” Further, an award of expenses of motion shall be granted pursuant to MCR 2.313(A)(5). This rule provides, “If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitate the motion or the party or attorney advising such conduct, or both, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially

justified or that other circumstances made an award of expenses unjust.” MCR 2.313(A)(5). (Emphasis added).

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant its Motion to Compel More Specific Responses to Discovery pursuant to MCR 2.309 and MCR 2.310. Plaintiff further requests, in accordance with MCR 2.313(A)(5), that it be granted costs and attorney fees incurred in having to bring this Motion.