

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

UNIVERSAL STRATEGY GROUP,)
INC.,)
Plaintiff,)
)
VS.) NO. 16-15-BC
)
BRIAN DAVID HALSTEAD,)
Defendant.)
_____)
)
BRIAN DAVID HALSTEAD, in his)
individual capacity and derivatively for)
UNIVERSAL STRATEGY GROUP,)
INC.,)
Counter-Plaintiff,)
)
VS.)
)
UNIVERSAL STRATEGY GROUP,)
INC., and TIMOTHY SLEMP,)
Counter-Defendants.)
CONSOLIDATED WITH
UNIVERSAL STRATEGY GROUP,)
INC.,)
Plaintiff,)
)
VS.) NO. 17-136-BC
)
BRIAN DAVID HALSTEAD,)
Defendant.)

**MEMORANDUM AND ORDER: (1) ENTERING ESI PROTOCOL
PROPORTIONATE TO CLAIMS, DAMAGES AND RELIEF
IN ISSUE AND (2) REQUIRING ADDITIONAL \$30,000.00
TO BE POSTED AS SECURITY FOR INTERLOCUTORY APPEAL**

ESI Protocol

Tennessee Civil Procedure Rule 26.06(3) provides “In any case in which an issue regarding the discovery of electronically stored information is raised or is likely to be raised, and in which counsel have not reached agreement, a judge upon its own initiative or upon a motion by the attorney for any party may order the attorneys for the parties to appear before it for a conference and, after reasonable notice to and an opportunity to be heard from the parties, may issue an order governing the discovery of electronically stored information.” Subparts (4), (5), (6) and (7) of this Rule contain additional such provisions.

Using these measures, on January 31, 2018, the Court convened a hearing on issues concerning discovery of electronically stored information (“ESI”) in this case. Grounds for convening the hearing are the delay in litigation of this case and the cost entailed by previous numerous filings and hearings which have not resolved identifying the devices to be searched and search terms to be run.

After conducting the January 31, 2018 hearing and pursuant to the authority invested in the Court by Tennessee Civil Procedure Rule 26.06, the following is issued with respect to ESI discovery in this case.

It is ORDERED that Plaintiff, Universal Strategy Group, Inc., shall consult with its ESI vendor and shall prepare search terms to be served no later than February 23, 2018, on Defendant Halstead for production of ESI discovery whose search cost will not exceed \$10,000. By February 27, 2018, Defendant Halstead shall have consulted with its ESI vendor and shall confirm to Counsel for the Plaintiff that the search cost for the

Plaintiff's terms will not exceed \$10,000.00. This same procedure and deadlines shall be implemented by Defendant Halstead of consulting with his ESI vendor to prepare and serve on Plaintiff USGI by February 23, 2018, search terms for production of ESI discovery whose search cost will not exceed \$10,000.00, and confirmation communicated by Plaintiff's Counsel by February 27, 2018, that the search cost by Plaintiff's ESI vendor will not exceed \$10,000.00. Thereafter, it is ORDERED that the ESI vendors shall complete the searches, Counsel shall review the search yields for privilege, and shall produce to the other side the ESI discovery by March 23, 2018.

In addition, from the January 31, 2018 hearing and filings for that hearing, the Court finds and concludes that the total cost for **each** side, Plaintiff and Defendant, for: running the other side's ESI search terms and obtaining the results (capped above at \$10,000.00), attorney review of the results for privilege, and production of the ESI, which total cost for all these tasks is proportionate to the case, is \$25,000.00 for each side. This \$25,000.00 finding shall be used by the Court going forward as a gauge and touchstone on any future ESI disputes and in deciding at the conclusion of the case motions for shifting discovery costs to the other side.

It is further ORDERED that a stay is issued with respect to the CounterDefendant Slemph having to run search terms and produce ESI discovery without prejudice to CounterPlaintiff to move to lift the stay after the ESI discovery outlined above has been completed showing that such ESI discovery is not duplicative.

It is additionally ORDERED that any motions for cost shifting on ESI discovery shall be filed at the conclusion of the lawsuit after liability, damages and remedies have

been decided. This includes holding in abeyance until the conclusion of the lawsuit any motions of USGI concerning the fear of excessive costs to prepare a mirror image of USGI's server. In response to that fear, at this time the measure the Court is taking is the dollar limitation on search terms.

Lastly, it is ORDERED that for clarity and certainty, by February 14, 2018, Counsel for the Plaintiff and Defendant shall file the lists, they compiled and exchanged in emails, of the devices to be searched. It is ORDERED that Plaintiff's motion filed January 12, 2018, regarding production of SIM cards is denied.

The above orders constitute the rulings and decide these pending motions:

1. January 8, 2018 – *Universal Strategy Group, Inc.'s Motion To Modify Rule 16 Case Management Order Regarding ESI Procedure And Deadlines*;
2. January 12, 2018 – *Halstead's Motion To Confirm USGI's And Slep's Obligation To Search Mobile Devices & For Special Setting & Supporting Memorandum*; and
3. January 19, 2018 – *Halstead's Motion And Supporting Memorandum To Refine Or Limit USGI's Proposed Search Terms & For Special Setting*.
4. January 22, 2018 – *USGI's Motion To Confirm Halstead's Obligations To Identify, Search And Produce Information From Undisclosed Mobile Devices*;

Plaintiff's 1/23/18 Motion to Stay; Halstead's 1/25/18 Motion to Disburse

With respect to (1) *Universal Strategy Group, Inc.'s Motion to Stay Execution or Enforcement of a Final Judgement Entered in Favor of Defendant/CounterPlaintiff, Brian David Halstead, Regarding His Motion for Partial Summary Judgement as to*

Amended Counterclaim for Breach of Promissory Notes and for Disbursement of Funds Voluntarily Deposited with the Court and for Expedited Hearing on This Motion; and (2) *Halstead's Motion to Disburse Funds and for Expedited Hearing*, it is ORDERED that the Plaintiff's motion to stay is granted contingent upon posting by February 15, 2018, an additional \$30,000.00 bond. The reason for this Order is that the funds presently deposited into the registry of the Court of \$134,940.51 do not cover the additional costs of appeal to the Defendant of interest, delay damages and costs on appeal incurred by the Defendant in defending against the appeal. This determination is based upon the following legal analysis.

(1) Recent Amendments Do Not Alter Requirement For Sufficient Security

During oral argument on the *Motion To Stay*, the Plaintiff argued that no additional bond or security should be required to secure the \$134,940.51 judgment other than the cost bond for appeal previously paid by the Plaintiff when he filed his Notice of Appeal with the Tennessee Court of Appeals. The Plaintiff's rationale for not requiring additional security is its understanding of recent amendments to the Tennessee Rules of Appellate Procedure addressing cost bonds for an appeal. According to the Plaintiff the recent amendments to the Rules of Appellate Procedure only require a minimal cost bond for appeal that secures the judgment below and no separate security is to be required by the trial judge. In making this argument, the Plaintiff did not provide any citation to legal authority.

The Court took the matter under advisement to conduct research on the recent amendments to the Tennessee Rules of Appellate Procedure which took effect July 1, 2017. After conducting a detailed review of the amendments, the Court could not find any reference in any of the amended rules or comments to the rules that would alter the requirements that sufficient security must be posted in order to secure a money judgment.

The applicable rule regarding costs on appeal is Rule 6 of the Tennessee Rules of Appellate Procedure. This rule was amended on July 1, 2017 and required notice of appeal to be filed in the Court of Appeals instead of the previous rule which required them to be filed in the trial court. In conjunction with this change, it also removed any reference “to a bond for costs on appeal” and instead refers to an appellant’s responsibility “to pay all applicable litigation taxes and all applicable fees required by the clerk of the appellate court.”

(a) Unless an appellant is exempted by statute or these rules or the Tennessee Rules of Civil Procedure, or has established indigency in accordance with Rule 18 and been permitted to proceed on appeal as an indigent person, the appellant shall pay to the clerk of the appellate court all applicable fees established by order or rule of the Supreme Court. Contemporaneous with the filing of appellant's notice of appeal or other initiating document, appellant shall (1) pay all applicable litigation taxes and all applicable fees required by the clerk of the appellate court, (2) establish to the satisfaction of the clerk of the appellate court the basis for an exemption, or (3) apply for, or establish proof of, indigency in accordance with Rule 18. If the appellant fails to pay the applicable litigation taxes or fees or to establish indigency or an appropriate exemption, the appellate court may issue an order requiring the appellant to show cause why the appeal should not be dismissed for failure to pay the applicable litigation taxes or fees.

(b) [Reserved.]

(c) Any party wanting to litigate appellate issues despite dismissal of the original appellant's appeal shall comply with the requirements of this rule for payment of applicable fees and/or taxes as required by the clerk of the appellate court.

TENN. R. APP. P. 6 (West 2018).

According to the Advisory Commission Comment, this change in Rule 6 was made primarily because the Appellate Court Clerk's office is implementing electronic filing in 2017.

ADVISORY COMMISSION COMMENT [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivisions (a) and (c) of this rule are amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (b) is deleted due to subdivision (a) being amended to address the payment of litigation taxes, which was previously addressed in subdivision (b). The amendment to Rule 6 requiring the payment of all applicable appellate fees to the clerk of the appellate court is not meant to address any additional statutory fees that might be due to the trial court clerk for preparation of the record on appeal or that are otherwise due to the trial court clerk.

TENN. R. APP. P. 6 (West 2018).

Nothing in the Advisory Commission Comment or the amended rule references or does away with the trial court's authority under Rule 62.05¹ of the Tennessee Rules of

¹ Rule 62.05 states in part:

A bond for stay shall have sufficient surety and:

(1) if an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal; in cases involving judgments payable in periodic installments, bond shall be fixed in such a manner as the court shall deem sufficient;

TENN. R. CIV. P. 62.05(1) (West 2018).

Civil Procedure to require a bond for a stay to have sufficient security. Rather, the Advisory Commission Comment addresses the payment of litigation fees and taxes – not security bonds for an appeal. For this reason, the Court rejects the Plaintiff’s argument that the only security required to stay the judgment below is the cost bond securing the payment of fees on appeal.

(2) Sufficient Security Includes More Than Present Deposit With Court

In order to stay the execution of the judgment below, sufficient security must be posted pursuant to Rule 62.05 of the Tennessee Rules of Civil Procedure. The Court determines that “sufficient security” in this case consists not only of payment of the judgment in full, which funds are already on deposit with the Court and accounted for, but as provided in Tennessee Civil Procedure Rule 62.05 interest, damages for delay and costs on appeal. These last three items, the Court concludes, total \$30,000.00 taking into account interest and contractual attorneys fees to defend against the appeal which fees are recoverable under the shareholder loans.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc by U.S. Mail, email, or efilings as applicable to:

Bryan K. Williams
J. Alex Little
W. Justin Adams
John R. Jacobson
D. Andrew Curtis