

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

COVENANT DOVE, LLC,)	
)	
Plaintiff,)	
)	
VS.)	NO. 16-541-BC
)	
PHARMERICA CORPORATION,)	
)	
Defendant.)	

**MEMORANDUM AND ORDER GRANTING DEFENDANT’S MOTION
TO COMPEL RESPONSES TO ITS FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

This case is before the Court on a discovery dispute: the Defendant has filed a motion to compel responses to its first request for production of documents.

After considering the law, the record and arguments of Counsel, the Court is persuaded by Defendant’s showing and analysis, and finds that the absence of internal communications and internal financial information of Plaintiff’s production of documents to date is counter-intuitive, Plaintiff’s assertions of privilege are not well founded, and the format of Plaintiff’s production is not reasonably useable as required by the Tennessee Rules of Civil Procedure.

It is therefore ORDERED that the Defendant’s motion to compel is granted, and by July 18, 2017, Plaintiff shall complete the following.

1. Concerning requests for production 9, 17, 23-32 and 34-37, a representative of Plaintiff, knowledgeable of the production being provided by the Plaintiff, shall file, under oath, a declaration or affidavit stating that:

- All information responsive to these requests has been produced; and
- Stating separately, with respect to each request, the custodians from whom the documents were obtained, the location of each custodian's documents (e.g., email server, laptop, etc.), any searches used to extract the documents, including date ranges and other identifying limitations, and any categories of documents responsive to the requests Plaintiff determined not to produce.

Rationale: Calculated to lead to the discovery of admissible evidence are documents of internal communications of Plaintiff on their impressions, belief and conduct with respect to the parties' transactions, and internal financial information. To date, Plaintiff's production does not include such documents even though they come within the scope of the requests for production. The absence of such information in the materials which have been produced, therefore, has an unusual appearance and is the reason for this ruling.

2. With respect to requests for production 6, 12-14, 19-21, Plaintiff shall produce this information by the July 18, 2017 deadline set above.

Rationale: The Plaintiff's objection that these are not calculated to lead to the discovery of admissible evidence is overruled. The scope of discovery in this case is broader than the Plaintiff's assertion that it is limited to the discreet issues of the amount that was owed as of May 31, 2016, and the subissues of the interpretation of the Settlement Agreement and

course of dealings concerning amounts due under the Facility Agreements. The scope also encompasses information pertaining to waiver and estoppel, asserted by the Plaintiff as affirmative defenses to the Counterclaim, and the amount owed to the Defendant, who, as the case has moved beyond unsuccessful mediation, seeks to have a ruling on summary judgment as to the amounts that are owed to the Defendant.

With respect to Plaintiff's assertion of an agreement between Counsel that limited the dates or categories of these documents, the agreement was not filed with the Court nor stipulated to and, therefore, it is not sufficiently certain to be cognizable by the Court.

Further, the Court dismisses the Plaintiff's claim of the accountant privilege to the extent it is being asserted as to requests 19-21. The privilege does not apply because these are Plaintiff's internal documents being sought from Plaintiff under the terms of a protective order. The information is not being sought from the Plaintiff's accountant from whom the privilege must be asserted. TENN. CODE ANN. § 62-1-116. Also, the privilege was not listed on the Plaintiff's privilege log and, therefore, has been waived. *See First Horizon Nat'l Corp. v. Houston Cas. Co.*, 2016 WL 5867268, at *8 (W.D. Tenn. Oct. 5, 2016).

3. As to request for production 33, the documents are relevant and shall be produced.

Rationale: The Plaintiff's recently asserted objection on grounds of relevancy is overruled. The Court concludes that the requested "documents memorializing or reflecting your

deliberations, discussions, or decision-making process regarding whether to enter into a contract with a different pharmacy services provider for sites previously serviced by PharMerica pursuant to the Agreement” are calculated to lead to the discovery of admissible evidence. In so ruling, the Court adopts the Defendant’s analysis that if this discovery shows that the Plaintiff was leading PharMerica to believe that it intended to enter into a new agreement with PharMerica in order to get out of the current one, it could not assert the equitable defense of estoppel since Plaintiff had unclean hands.

4. With respect to request for production 38, the Plaintiff shall file a verified notice stating that it “will identify, and to the extent not already produced, will produce documents responsive to request 38 in conjunction with production of its expert report” and it shall further verify at this time that it does not have the documents completely identified.

5. As to format, the Court adopts the protocol asserted by the Defendant. With respect to the documents ordered to be produced herein, and past documents, and all future documents, they shall be furnished in the following format:

1. All spreadsheets (e.g., Excel documents), presentations (e.g., PowerPoint documents) and multimedia files (e.g., video or sound recordings) should be produced in native format, unaltered and with the filename unchanged. If native files are saved within an electronic folder or filing system, the foldering or filing organization should be preserved and the filepath identified;

2. All other documents should be produced as individual PDFs (each email, attachment, or other document produced as a single pdf, and not combined with other documents);
3. Each page of a produced document shall have a legible, unique page identifier (“Bates Number”) on the face of the image at a location that does not obliterate, conceal, or interfere with any information from the source document. Redactions should be clearly marked or stamped on the page in such a way that it is clear from review that a portion of the image has been redacted and the purpose for the redaction (e.g., “Redacted – Privileged”). Native files should be produced with a placeholder image or other clear means of linking the file to a specific Bates Number;
4. So as to preserve original metadata, all emails should be produced as maintained by the original custodian (not forwarded to counsel with the forwarding email redacted at the top, as PharMerica believes was the previous method of production);
5. Documents which are attached or otherwise linked to one another should be identified and described in a manner which clearly identifies the relationship between the files (for example, if an email contains an attachment, that attachment should be indicated to be attached to the parent email, for example by producing a spreadsheet identifying parent and child documents by bates number and relationship); and
6. All documents should be produced with the following metadata for each document, identified by Bates number, via spreadsheet:
 - a. Date sent;
 - b. Date received;
 - c. Data source;
 - d. Author and/or “From”;
 - e. Recipient and/or “To”;
 - f. CC;
 - g. BCC;
 - h. Subject and/or Re: Line;
 - i. Filename; and
 - j. File Path.

Rationale: In so ruling the Court reiterates herein, from pages 3-4 of its May 8, 2017 Memorandum and Order on a previous discovery dispute, the explanation in the comments to Rule 34.02 that electronic documents shall be produced in a way that makes them searchable by electronic means in order to satisfy the useable format requirement of the Tennessee Rules of Civil Procedure.

Rule 34.01 requires that, if necessary, a responding party “translate” information it produces into a “reasonably usable” form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature [emphasis added].

TENN. R. CIV. P. 34.02, *2009 Advisory Commission Comment* (West 2017).

The Second Declaration of Lucas R. Smith, filed on behalf of Defendant, is unrefuted that the Plaintiff has removed material from the documents it has produced. The Declaration explains that the removal has degraded the functionality of the documents. The facts established by the Declaration are that the Plaintiff has converted multiple documents into overall PDFs and the Plaintiff has removed metadata from the documents. The result is that the Defendant is unable to determine “where one document ends and another starts, if any

documents were originally attached to a given document, who created the document, who received the document, when the document was created, who was the custodian of the document, or whether the document is incomplete or has been altered from the original. By removing the metadata the Plaintiff has eliminated the ability, innate in electronic systems such as email, to quickly sort and filter the documents by criteria such as subject, date or author.” May 30, 2017 *Defendant’s Memorandum*, at 1-2.

Lastly, it is ORDERED that any documents not produced in discovery by the Plaintiff shall not be admitted as evidence for dispositive motions or at trial.

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

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

J. Cole Dowsley, Jr.
Alex S. Fisher
Karen A. Doner
Natalie Rainforth
Lucas R. Smith
Michael Hess
Sarah B. Miller
Benjamin Fultz
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