

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 DENYING PLAINTIFF'S AMENDED
MOTION TO QUASH SUBPOENA DUCES TECUM AND SETTING
ADDITIONAL LITIGATION DEADLINES**

On June 20, 2017, oral argument was conducted on Plaintiff's *Amended Motion to Quash Subpoena Duces Tecum*. The *Motion* sought to quash 3 Subpoenas *Duces Tecum* issued by the Defendant to Plaintiff's accounting and tax consultants, Crowe Horwath LLP, KPMG LLP, and Ernst & Young LLP. The document requests propounded by the Defendant were identical for each of the three corporate witnesses and sought the following production:

1. All tax returns (including schedules and attachments), tax work papers, post-closing trial balances, Schedule K-1's, detailed profit and loss statements, including by vendor and expense account, and other documents provided to you by Covenant Dove or prepared by you on behalf of Covenant Dove from March 1, 2012 until the present.
2. All detailed financial statement [sic] prepared by you or on behalf of Covenant Dove from March 1, 2012 until the present.
3. All financial statements prepared by Covenant Dove and/or its management from March 1, 2012 until the present.

4. All detailed accounts payable journals (including year ending and interim accounts payable journals for Covenant Dove provided to you by Covenant Dove from March 1, 2012 until the present).
5. All auditing work papers concerning accounts payable or Covenant Dove's liability to PharMerica from March 1, 2012 until the present.

In many respects, the information in the subpoena *duces tecum* overlap with Requests for Production 19-21 served on the Plaintiff.

After taking the matter under advisement, the Court denies the *Motion* based upon the following.

The Court finds that the information for production under the subpoena *duces tecum* is relevant for the same reasons stated in the first paragraph of the "Rationale" of section 2 on pages 2-3 of the June 16, 2017 *Memorandum and Order Granting Defendant's Motion to Compel Responses to Its First Set of Requests for Production of Documents* and for the reasons stated at pages 8-10 of the Defendant's June 16, 2017 *Response to Plaintiff's Amended Motion to Quash Subpoenas Duces Tecum*—both are incorporated herein by reference.

With respect to the assertion by the Plaintiff that production of the information sought in the subpoena *duces tecum* is barred by the accountant privilege, the Court adopts the reasoning and authorities cited by the Defendant that, as the record exists, the privilege does not apply in this instance:

TCA § 62-1-116 provides that it applies only to "information that is communicated to [the accountant] or obtained by [the accountant] by the reason of the confidential nature of their employment." Thus, "Tennessee's

accountant-client privilege ‘applies only to confidential information ... [and] to come within the terms of the statute the information must have been communicated to the accountant in a confidential setting arising from the employment.’ *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235-SHL-DKV, 2016 WL 5867268, at *8 (W.D. Tenn. Oct. 5, 2016) The statutory accountant’s privilege does not extend to “the disclosure of information required to be disclosed by the standards of the public accounting profession in reporting on the examination of financial statements.” *Id.*, at *8–9. Furthermore, information disclosed to the accountant for the purpose of preparation of documents to be disclosed publicly is outside the scope of the privilege. *Id.* Covenant Dove bears the burden of demonstrating that the privilege applies, but has made no effort to demonstrate that the documents sought by the subpoena were “communicated to the accountant in a confidential setting arising from the employment” rather than documents communicated for the purpose of preparing information designed to be disclosed. Because Covenant Dove has failed to provide evidence that the privilege applies, its argument to the contrary should be dismissed out of hand.

Furthermore, the majority of the documents requested from the Accountants are, or are used to support, publically filed documents with the IRS. The fact that they are provided to a third party at all obviates the confidential nature required by the statute.⁸ And as stated above, tax returns and financial documents are entitled to no special privilege and are discoverable to the extent they are likely to lead to the discovery of admissible evidence.

⁸ As an aside, although privilege belongs to Covenant Dove, it applies to only documents that fall within the statute and it does not cover the exact same documents in its own possession that they are also refusing to produce. So the fact, for instance, that Covenant Dove communicated with its accountant about its P&L statement, which the accountant then used to create the P&L on behalf of Covenant Dove, does not render the P&L itself protected by this privilege.

Defendant’s Response to Plaintiff’s Amended Motion to Quash Subpoenas Duces Tecum, June 16, 2017, at pp. 12-13. The Court finds that the privilege does not apply because, based upon the present record, the Plaintiff has failed to demonstrate that the information sought in the subpoena *duces tecum* was communicated to the accountants for a purpose other

than: preparing information designed to be disclosed, and/or the information is in the possession of the Plaintiff, and/or the information was or was used to support publicly filed documents with the IRS.

With respect to the Defendant's opposition that the accountant privilege was waived in response to the subpoenas *duces tecum*, that objection is denied. The record establishes that the accountants asserted the privilege when they were served with the motion to quash.

Having found that the privilege does not apply and that the matters subpoenaed are relevant, it is ORDERED that the items stated in the subpoenas shall be produced by August 21, 2017, and shall be produced under the terms of the parties' protective order under the provision of "attorney's eyes only."

With respect to other litigation deadlines, it is ORDERED that the July 18, 2017 deadline for the Plaintiff to produce discovery, stated in the Order of June 16, 2017, is altered and extended to August 21, 2017.

It is further ORDERED that no more written discovery shall be served, and depositions are stayed until further order of the Court.

It is additionally ORDERED that the deadline for any and all motions to compel outstanding discovery or incomplete, insufficient discovery shall be filed by September 15, 2017; oppositions to the motions to compel shall be filed by September 25, 2017; any replies shall be filed by September 27, 2017. The Docket Clerk will notify Counsel if the Court will

decide the motions on the papers or by oral argument. The Court had considered having Counsel file reports of outstanding discovery, but has determined not to take up their time with such reports because the motions to compel shall serve that function.

It is further ORDERED that paragraphs 4-6 of the November 10, 2016 *Order Revising Litigation Deadlines* are vacated.

It is also ORDERED that motions for summary judgment, which either side is able to file based on the written discovery (as of September 27, 2017, after the Court rules upon any remaining motions to compel), shall be filed by November 3, 2017. Opposition shall be filed by December 4, 2017. Replies shall be filed by December 11, 2017. Oral argument shall be conducted on the motions on December 15, 2017, at 11:00 a.m. That argument shall be conducted in court and not by telephone.

/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
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Lucas R. Smith
Michael Hess
Sarah B. Miller
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