

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 MOTIONS TO COMPEL  
IN PART AND DENYING RECOVERY OF ATTORNEYS' FEES**

Lengthy oral argument was conducted in this case on motions related to electronic discovery. Counsel were ordered to bring their computers to the hearing to demonstrate their positions and for the Court to view the data and formats of production. They did so; and the demonstrations which were effective and productive.

After considering the law, the argument and demonstration of Counsel, and the record, the following rulings are issued.

**Plaintiff's Second Motion to Compel Defendant's Responses to Requests for Production of Documents, Filed March 24, 2017**

As a preliminary matter, Plaintiff's Requests for Production 1, 2, 21 and 22 are no longer in issue. Remaining to be ruled upon is Plaintiff's Second Motion to Compel Defendant's Responses to Requests for Production 11, 13, 14, 15 and 16.

As to these Requests, four of them have in common that each one of them seeks to identify each and every document in Defendant's custody and control relating to or reflecting:

1. any billed Facility Charges past due as of February 25, 2016 [Request 11];
2. any billed Facility Charges past due as of May 31, 2016 [Request 13];
3. amounts, billed or unbilled, Defendant claims were owed at any time for services preformed [Request 14]; and
4. amount paid by Plaintiff at any time for services performed under the Agreement [Request 15].<sup>1</sup>

There is no dispute that the Defendant has produced the documents responsive to Requests 11, 13, 14 and 15. Some 67,000 documents, stored electronically by the Defendant, have been produced on a disk to the Plaintiff and Bates numbered.

In addition to production of the disc of 67,000 documents, the Defendant has produced electronically a large spreadsheet which contains the following information for every invoice and payment: Contract, Pharmacy, Fac #, Facility Name, Statement #, Bill Thur Date, Inv Amt, Amt Due, Comment, Paid Amount, Last Pay Date, Last Pay Amt, and Outside Terms. These invoices can be matched up to 67,000 documents produced. Additionally the spreadsheet is provided in a format that enables the data to be filtered by specific queries.

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<sup>1</sup>Request 16 seeks recovery of damages, including lost profits, on Defendant claims for breach of contract. It is dealt with separately below.

The issue is the form of the production in response to each request for production.

Plaintiff relies upon Tennessee Civil Procedure Rule 34.02(2) which provides as follows:

Unless the parties otherwise agree, or the court otherwise orders . . .

(2) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Plaintiff's Counsel asserts under Tennessee Civil Procedure Rule 34.02(2) the Defendant is required to list by Bates number, every document responsive to each of Requests 11, 13, 14, 15 so that the Plaintiff will know which of the 67,000 documents Defendant considers fall within each Request for Production 11, 13, 14 and 15. This, the Court concludes, is not feasible and is not required by the Tennessee Rules of Civil Procedure.

As to unfeasible, for example, if the documents responsive to the Requests are evenly divided and segregated, just to demonstrate, that is  $67,000/4$ , i.e. 16,750 Bates Numbers that would have to be listed for each of Requests 11, 13, 14 and 15. In this regard, the comments to Rule 34.02 explain that:

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.

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

The Court concludes that with one exception and addition ordered below, the Defendant, through production of the large spreadsheet, had made the 67,000 invoices susceptible to filtering and to queries. The combination of production of all the 67,000 documents and the interactive spreadsheet for this data, the Court concludes, complies with Rule 34.02(3) that, “If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.” There is, however, one addition the Defendant must provide.

The Court further rules that to enable the Plaintiff to know which documents out of the 67,000 the Defendant believes are responsive to the different criterion stated in Requests 11, 13, 14 and 15, it is ORDERED that for each of these Requests, by June 9, 2017 the Defendant shall provide to the Plaintiff an explanation, step by step, the columns it goes to on the spreadsheet and the filters it uses to arrive at the criterion for each Request. This shall be done for each Request 11, 13, 14 and 15.

In issuing the above ruling the Court adopts the Defendant's analysis and in the interest of time reproduces it verbatim as follows.

There is a split among federal courts over whether ESI must (a) be *both* produced in a reasonable format *and* either be labeled by request or produced as kept in the ordinary course of business, or (b) simply be produced in a reasonable format. The Middle District of Tennessee Case cited by Plaintiff, *Quality Mfg. Sys. v. R/X Automation Solutions, Inc.*, 2016 WL 1244697 (M.D. Tenn. Mar. 30, 2016) describes the split and adopts the former view. This split is significant because PharMerica's entire production is of ESI, and because Tennessee has adopted the opposite position than taken in *R/X Automation*.

Importantly, the Tennessee Rule 34.02(2), unlike the federal rule, makes clear that the obligation to label by request or produce documents as kept in the ordinary course *only* applies to "documents produced for inspection." The advisory committee notes to Tennessee Rule 34.02 further clarify that the reasonable formatting requirements of subsection (3) are intended to provide "similar" protections as that of subsection (2)—but importantly not identical rules. Thus, Rule 34.02 of the Tennessee Rules of Civil Procedure was drafted to adopt the opposite position to that taken in *R/X Automation*, and thus the Defendant was only obligated to produce ESI in a reasonably usable format—which it did.

The remainder of the cases cited by Plaintiff either deal with the production of paper documents or deal with the production of ESI before the federal rules had specific provisions for doing so. As such, they are of marginal, if any, relevance to the present dispute.

Furthermore, the cases cited by Plaintiff typically deal with very different conduct, such as *Stiller*, involving a party that refused to allow the other side to review documents to determine which ones it would have to pay to copy, or *Specially Lines Insurance*, involving a party that produced 19,000 *boxes* of documents, many of which were unlabeled, or *Cardenas*, where a party removed 18,000 documents from their original context and produced them in newly-created folders categorized not by document request, but by criteria selected by the producing party.

Furthermore, PharMerica's production would have satisfied even the federal courts adopting the *R/X Automation* line of cases, were they applicable here. PharMerica complied with the obligation imposed by those cases—but not by the Tennessee Rules—to produce ESI in the form in which it was kept in the ordinary course of business. PharMerica did so by providing a large amount of information regarding the source and organization of these documents, including naming whether the document was maintained as in an email system, as a PDF from scanned paper, or as an electronic file; naming the custodian of each document, providing the original name of the files, and providing all fields of metadata that would ordinarily be seen by someone viewing the files in their native format. PharMerica also produced certain types of files, such as spreadsheets, in native format where review in other formats would be inconvenient. Thus, PharMerica has complied even with the more stringent requirements imposed in those federal courts that have adopted Plaintiff's position.

Accordingly, the Court concludes that, except for the additional order stated above of providing for each Request for Production 11, 13, 14 and 15 the step by step, columns to go to on the spreadsheet and filters to use to arrive at the criterion for each Request, the Defendant has complied with the Plaintiff's requests for production.

With respect to Request for Production 16, the Defendant is ORDERED to file a verified notice by June 9, 2017, stating that it will identify, and to the extent not already produced, will produce documents responsive to Request 16 in conjunction with production of its expert report. The Defendant shall further verify that at this time it does not have the documents completely identified.

**Defendant's Renewed Motion to Compel Plaintiff to Respond to Interrogatories, Filed March 24, 2017**

During oral argument, it was announced that disputes as to Plaintiff's responses to Defendant's Interrogatories 4 and 16 have been resolved. Remaining in dispute are Plaintiff's responses to Defendant's Interrogatories 6, 8, 10, 11 and 14. The dispute is that instead of producing the requests in native form, original source, "backup document," metadata, etc., the Plaintiff has produced some documents, but also produced spreadsheets developed by Counsel. These spreadsheets summarize the original sources and "convert" the original source data into a spreadsheet format. In turn, the spreadsheet has been converted into a PDF to prevent access to Counsel's work product with respect to previous versions of the metadata. The result is that the spreadsheets are not searchable and are of little utility to

the Defendant as discovery. The result is, as stated in the comment to Rule 34.02, that the producing party has “remove[d] or significantly degrade[d]” the Excel spreadsheet function “that makes it unsearchable by electronic means” and therefore provided the Defendant a discovery production without a method to “use the information efficiently in the litigation.”

The Plaintiff’s position is that such discovery complies because the Plaintiff is not proceeding under Rule 33.03, which allows a party to opt to produce business records “where the answer to an interrogatory may be derived or ascertained from the business records.” The Plaintiff asserts its spreadsheets produced by Counsel are answers to the interrogatories. Because it has chosen not to produce documents, the Plaintiff asserts Rules 34.01 and 34.02 and the comments do not apply. This argument is dismissed.

Review of the Plaintiff’s answers to the interrogatories in issue refer to and use electronic documents to answer the interrogatories. Use of electronic documents requires that the documents be produced in a way that makes them searchable by electronic means. The Court therefore concludes that Rule 33.03 is triggered as well as Rules 34.01 and 34.02, and their comments. Moreover the spreadsheets provided as “interrogatory answers” are not complete or comprehensible because they can not be filtered.

It is therefore ORDERED that Plaintiff’s Counsel shall consult with their IT consultant to create a “clean” copy of the spreadsheets Counsel created to answer the Interrogatories, that is, a copy of the spreadsheet that does not have previous versions which



would divulge work product but which would have the capability to be filtered and searched in Excel, and shall produce that to Defendant by June 9, 2017.

It is further ORDERED that Plaintiff's Counsel shall revise its serial answers to Interrogatories which provide "Objection," "Answer," "Supplemental Answer" and "Second Supplemental Answer" to combine and synthesize these, and serve by June 9, 2017 a Finalized Answer to Date for Interrogatories 6, 8, 10, 11 and 14.

With respect to Defendant's Motion to Compel Interrogatory 18, the Motion is denied.

**6/20/17 Telephone Conference; Upcoming Litigation Plan Deadlines Vacated**

It is ORDERED that on June 20, 2017 at noon, the Court shall conduct a telephone conference to dispose of any remaining disputes on written discovery and to discuss with Counsel proceeding with filing motions for summary judgment before any depositions are taken. It is ORDERED that paragraphs 4-6 of the November 10, 2016 Revised Litigation Deadlines are vacated and shall be reset during the telephone conference.

**Attorneys Fees Denied**

It is ORDERED that the pending and previous requests of Counsel for each party to recover attorneys fees related to the disputes on written discovery are denied. These are denied because the Court concludes that there are so many variations in the manner in which

electronic information is stored and produced in response to discovery, that disputes are inherent. In this case, the Court finds no malice or willful concealment or obfuscation.

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