

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

FALCON PICTURES GROUP, LLP,)
)
Plaintiff/Counter-Defendant,)
)
v.)
)
HARPERCOLLINS CHRISTIAN)
PUBLISHING, INC. d/f/a THOMAS)
NELSON, INC.)
)
Defendant/Counter-Plaintiff.)

Case No. 20-282-BC

JURY DEMAND

ORDER APPOINTING SPECIAL MASTER

The Court heard Plaintiff's Motion to Compel on July 10, 2020. Specifically, Plaintiff seeks interrogatory and production request responses from Defendant that encompass the entirety of the parties' relationship, and relate to all aspects of that relationship. The motion is specific to five interrogatories and sixteen production requests. Plaintiff classifies the disputed discovery as fitting into four categories, each related to the products that are the subject of this litigation, as follows:

1. Defendant's manufacturing records and related information (Interrogatory Nos. 4-5; Production Request Nos. 3-4);
2. Defendant's sales records dating back to 2007 (Interrogatory Nos. 6-7; Production Request Nos. 9-13, 15);
3. Defendant's inventory records (Production Request Nos. 14, 16-22); and
4. Miscellaneous requests (Interrogatory Nos. 11-12, 17; Production Request 24-26).

In support of its motion, and the need for these materials, Plaintiff submits the affidavit of Tracy L. Thomas, CPA, CGMA, with KraftCPAs, PLLC. Mr. Thomas performs external audits for clients and has been engaged by Plaintiff to assist it in this litigation. He asserts that “In order to audit the completeness of inventory based sales, auditors typically perform inventory warehouse counts at the beginning and end of reporting periods and perform audit procedures on the period between those two inventory dates by auditing the additions to inventory (purchases from third parties or self-manufacture of the products) and the decrease in inventory due to recorded sales or, in some cases, non-sales decreases such as damaged products or those removed for promotional purposes. . . In situations where the auditor is not able to physically observe the inventory, which is the situation with the Thomas Nelson-controlled merchandise, auditors must rely on the mathematical formula of determining how many units have been produced or purchased from 3rd parties less how many are still in inventory. . .”

Defendant asserts that some of the requested materials are irrelevant because they cover a time period barred by the applicable statute of limitations in anticipation of the Court ruling on its dispositive motion to dismiss those claims. The Court is entering a Memorandum and Order contemporaneously with this order denying that motion specifically because the statute of limitations issues require fact finding it cannot do at this early stage in the litigation. Thus, that is not a basis to object to the requested discovery.

Additionally, however, Defendant argues that some of the documents requested require extraordinary effort and expense when the same information is available otherwise, or it is not relevant to the parties’ dispute. Specifically, that the volume of the material requested, as well as the difficulty obtaining it and its relevance to the dispute is reasonably objectionable. In support of this position, it has submitted the declaration of Christine Jones, its Senior Director of Finance.

She explains how Defendant calculates royalties, and the lack of relevance of material requested regarding manufacturing and inventory. At oral argument, counsel for Defendant stressed the expense associated with items on backup tapes and other materials stored in various electronic formats.

On May 14, 2020, Plaintiff/Counter-Defendant filed an Answer to the Second Amended Counterclaim. The Court was waiting to set a Rule 16 Scheduling Conference until the pleadings were complete. In the meantime, on May 7, 2020, Defendant filed its dispositive motion heard on the same day as Plaintiff's motion to compel. The Court is therefore faced with these complex and technology driven discovery disputes very early in this case, without having had the chance to do a discovery plan with the parties. Moreover, the Court needed to rule on the dispositive motion first in order to define the relevant period of inquiry. With its Memorandum and Order on that motion, the Court is leaving open the statute of limitations issues until there is further development of the facts relevant to that inquiry. Thus, discovery regarding the three subject products *could* relate back to 2007. The issues involving cost, access and relevance must be assessed in the context of Tenn. R. Civ. Pro. 26.02(1), which states as follows, in relevant part:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden and cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, e.g., where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

The particulars regarding the type of storage technology and the expense of obtaining it is highly relevant to this inquiry. The Court is therefore appointing WILLIAM T. RAMSEY of Neal & Harwell, PLLC, as a Special Master in this case pursuant to Tenn. R. Civ. Pro. 53. As such, the

Special Master is ordered to meet with counsel regarding the outstanding discovery issues; identify their specific objections associated with the burden, expense and accessibility of the requested information; and file a report with the Court regarding his recommendations. The Court requests the Special Master complete this task within forty-five (45) days, or notify the Court if he requires additional time. The Special Master is entitled to compensation at \$500 an hour, which is his standard rate for such work, plus reasonable and necessary out-of-pocket costs and expenses. The expense of the Special Master shall be borne equally by the parties, and each is ordered to deposit with the Clerk & Master the sum of \$2,500, on or before August 1, 2020 for this purpose. The Special Master will be required to submit a fee application to the Court upon the filing of his report, and is requested to limit his work on this matter to ten (10) hours or, if that is not feasible, to notify the Court the work may exceed that amount. The parties shall have the opportunity to object to any compensation or expense reimbursements paid to the Special Mater after reported to the Court. The Special Master will be compensated from the funds being held by the Clerk & Master in this matter, unless otherwise directed by the Court.

The parties are ordered to fully cooperate with the Special Master in fulfilling his duties pursuant to this Order.

IT IS THEREFORE ORDERED that the Special Master is appointed for the purpose set out herein.

IT IS FURTHER ORDERED that the Special Master shall otherwise have and enjoy the powers and prerogatives ordinarily provided to special masters by law.

IT IS FURTHER ORDERED that nothing in this Order shall subject the Special Master to personal liability for acting as the Special Master herein. Unless based upon the gross negligence or the willful and malicious conduct of Special Master and his consultants, agents, and

employees, all obligations and risks incurred by Special Master and his consultants, agents, and employees in the discharge of his duties shall be obligations and risks solely to the parties. The Special Master shall be and hereby is excused and exculpated by the Court from any such personal liability, unless based upon the gross negligence or the willful and malicious conduct of the Special Master.

IT IS FURTHER ORDERED that the Special Master may at any time apply to this Court for further or other instructions and powers necessary to enable the Special Master to properly perform the Special Master's duties.

IT IS FURTHER ORDERED that the Special Master's duties and powers shall be assumed forthwith.

Anne C. Martin

ANNE C. MARTIN
CHANCELLOR, PART II
TENNESSEE BUSINESS COURT
PILOT PROJECT

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