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Davidson County Chancery Court

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY
PART IV, AT NASHVILLE

AMERICAN CATALOG MAILERS)
ASSOCIATION and NETCHOICE,)

Plaintiffs,)

v.)

TENNESSEE DEPARTMENT OF)
REVENUE and DAVID GERREGANO,)
in his capacity as the Commissioner of the)
Tennessee Department of Revenue,)

Defendants.)

MF
No. 17-307-IV

FILED
2017 AUG 21 AM 9:52
CLERK & MASTER
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BC&M

ORDER ON DEFENDANTS' MOTION TO COMPEL

This matter was heard on Friday, July 28, 2017, on Defendants' motion to compel. At the conclusion of the hearing, the Court announced its ruling on Defendants' motion from the bench. A transcript of the Court's ruling is attached hereto as Exhibit A and is incorporated herein by

RT reference. In this connection, the Court hereby directs that the version of Exhibit A lodged with the Court by Defendants be appended to this Order.
Plaintiffs, American Catalog Mailers Association and NetChoice, are trade associations that

have sued Defendants, the Tennessee Department of Revenue and the Tennessee Commissioner of Revenue, pursuant to Tenn. Code Ann. § 4-5-225, for a declaratory judgment that Tenn. Comp. R. & Regs. 1320-05-01-.129(2) ("Rule 129(2)"), which requires certain out-of-state dealers to collect and remit Tennessee sales tax, is unconstitutional on its face under the Commerce Clause and Due Process Clause of the U.S. Constitution. Defendants propounded written discovery to Plaintiffs seeking, among other things, detailed information and documents specific to Plaintiffs' members

who are subject to Rule 129(2). Plaintiffs objected to this discovery on the grounds that the requested discovery was not relevant to their facial challenge to Rule 129(2) and was for the most part not in Plaintiffs' custody or control. Defendants filed a motion to compel Plaintiffs to respond to Defendants' discovery requests regarding Plaintiffs' members.

The Court finds that some, limited discovery is appropriate and not inconsistent with the Tennessee Rules of Civil Procedure. In balancing the competing interests at play and in order to move the case forward, the Court hereby ORDERS as follows:

1. Within thirty (30) days of entry of this order and after examination of each association's records, Plaintiffs shall identify all of their members that Plaintiffs know to be subject to Rule 129(2). For each such member who is subject to Rule 129(2), Plaintiffs shall provide

Defendants with identifying information that is sufficient to enable Defendants to contact the member directly.

Additionally, Plaintiffs shall prepare a bare list of all members of both associations and produce this list to Defendant.


2. In the event that Plaintiffs have members who prefer to be contacted through Plaintiffs, Plaintiffs shall inform Defendants which of their members prefer to be contacted through Plaintiffs and the parties shall confer regarding the manner in which such further discovery may proceed.

3. The Court does not by this Order limit Defendants' ability to seek informal or formal third-party discovery from Plaintiffs' members who are subject to Rule 129(2), subject to applicable laws and rules of procedure governing third-party discovery. This Order is expressly entered without prejudice to any party, or any third-party, with respect to any other matter not specifically addressed herein.

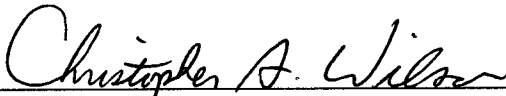
4. At this time, the Court reserves ruling on the remainder of Defendants' discovery requests concerning Plaintiffs' members and Plaintiffs' objections to those requests. The parties are not prejudiced from bringing these matters before the Court again at a later date, if necessary.

5. The Court declines to award costs, attorneys' fees, or sanctions to either party. Plaintiffs' objections were reasonable and made in good faith and no such award is warranted.

IT IS SO ORDERED.


HONORABLE RUSSELL T. PERKINS
CHANCELLOR, PART IV

SUBMITTED FOR ENTRY BY:


Charles A. Trost (Tenn. BPR No. 4079)
G. Michael Yopp (Tenn. BPR No. 2766)
Christopher A. Wilson (Tenn. BPR No. 24804)
WALLER LANSDEN DORTCH & DAVIS, LLP
Nashville City Center, Suite 2700
511 Union Street
Nashville, TN 37219-1750
Fax: (615) 244-6804



and

George S. Isaacson (admitted pro hac vice)
Matthew P. Schaefer (admitted pro hac vice)
BRANN & ISAACSON
184 Main Street; P.O. Box 3070
Lewiston, ME 04243-3070
Fax: (207) 783-9325
*Attorneys for Plaintiffs, American Catalog
Mailers Association and NetChoice*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Plaintiffs' Order on Defendants' Motion to Compel to be served by hand delivery upon the following:

Charles L. Lewis, Esq.
Mary Ellen Knack, Esq.
R. Mitchell Porcello, Esq.
Office of the Attorney General, Tax Division
UBS Tower, 20th Floor
315 Deaderick Street
Nashville, Tennessee 37202
*Attorneys for Defendants Tennessee
Department of Revenue and Commissioner
David Gerregano*

on this 16th day of August, 2017.



Attorney for Plaintiffs

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AMERICAN CATALOG MAILERS ASSOCIATION

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VS.

TENNESSEE DEPARTMENT OF REVENUE

TRANSCRIPT OF PROCEEDINGS

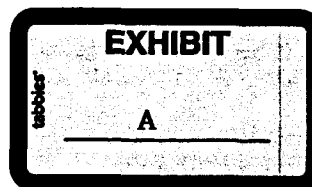
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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY
PART IV, AT NASHVILLE

AMERICAN CATALOG MAILERS
ASSOCIATION and NETCHOICE,

Plaintiffs,

vs.

Case No. 17-307-IV

TENNESSEE DEPARTMENT OF
REVENUE and DAVID GERREGANO
in his capacity as the Commissioner
of the Tennessee Department of Revenue,

Defendants.

BE IT REMEMBERED that the above-captioned
cause came on for hearing, on this, the 28th day of
July 2017, before Chancellor Russell Perkins, when
and where the following proceedings were had, to
wit:

Elite Reporting Services
www.elitereportingservices.com
D. Rochelle Koenes, Associate Reporter, RPR, LCR
Post Office Box 292382
Nashville, Tennessee
(615) 595-0073

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A P P E A R A N C E S

For the Plaintiffs:

MR. CHRISTOPHER WILSON
Attorney at Law
Waller Lansden Dortch & Davis, LLP
Nashville City Center, Suite 2700
511 Union Street
Nashville, TN 37219
(615)244-6380
chris.wilson@wallerlaw.com

MR. MATTHEW P. SCHAEFER
Brann & Isaacson
184 Main Street
P.O. Box 3070
Lewiston, ME 04243
(207)786-3566
mschaefer@brannlaw.com

For the Defendants:

MR. RYAN MITCHELL PORCELLO
MR. CHARLES L. LEWIS
MS. MARY ELLEN KNACK
Office of Attorney General
Tax Division
UBS Tower
315 Deaderick Street
Nashville, TN 37243
(615)532-2547
mitch.porcello@ag.tn.gov
larry.lewis@ag.tn.gov
mary.knack@ag.tn.gov

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P R O C E E D I N G S

(WHEREUPON, the above-captioned matter was heard in open court as follows:)

MR. PORCELLO: Good morning, Your Honor. 08:55:33
I'm Mitch Porcello from the Attorney General's 09:10:36
Office on behalf of the Department of Revenue and 09:10:36
the Commissioner of Revenue. 09:10:39

THE COURT: Good morning. 09:10:40

MR. PORCELLO: This is our motion to 09:10:40
compel the plaintiffs to fully respond to written 09:10:42
discovery and to produce responsive documents. The 09:10:45
requested discovery is relevant to the subject 09:10:47
matter of this action and is in plaintiffs custody 09:10:50
or control. 09:10:53

To get into the discovery, a little bit 09:10:55
of a background is necessary. Plaintiffs brought 09:10:58
this action pursuant to T.C.A. Section 4-5-225 to 09:11:01
challenge the Department of Revenue sales tax Rule 09:11:07
129(2). Rule 129 provides, in total, out-of-state 09:11:10
dealers -- subpart 1 provides out-of-state dealers 09:11:16
with no physical presence in Tennessee have a 09:11:20
substantial nexus with the state. These dealers 09:11:21
shall register with the Department for sales and 09:11:24

1	THE COURT: Thank you.	10:01:03
2	MR. LEWIS: Thank you, Your Honor.	10:01:05
3	THE COURT: It's always challenging to	10:01:13
4	deal with the tension between the rules of liberal	10:01:16
5	discovery and the strictures of a fact and facial	10:01:20
6	constitutional challenge. If memory serves me, the	10:01:25
7	Colonial Pipeline case, which was a facial challenge	10:01:31
8	decided by the Tennessee Supreme Court three years	10:01:34
9	ago, left open the possibility that discovery might	10:01:39
10	be necessary.	10:01:45
11	The West versus Schofield case is	10:01:53
12	different from this case in a few respects that	10:01:58
13	lead the Court to believe that some discovery	10:02:04
14	beyond which the plaintiffs have offered make	10:02:07
15	sense. West versus Schofield, which I believe is	10:02:11
16	ultimately decided on a ripeness issue, involved	10:02:16
17	inmates -- and this was a challenge to a method of	10:02:20
18	execution. It wasn't a case of associational	10:02:24
19	standing, and it was not a case that raised	10:02:27
20	commerce clause issues.	10:02:30
21	So in this case, as the State has	10:02:38
22	argued, the regulation has been posed or prepared,	10:02:43
23	at least ostensibly, to harmonize the Quill ruling	10:02:50
24	with the realities of commerce in 2016 and 2017 and	10:03:01
25	forward. It also might be a mechanism to try to	10:03:09

1 expand or challenge Quill. But some discovery 10:03:13
2 ought to be allowed. 10:03:21

3 And I'm going to -- I'm not going to go 10:03:23
4 one by one by each request because it's going to 10:03:27
5 just take a little bit too much time, but I'm going 10:03:32
6 to give some broad parameters. My ruling might 10:03:35
7 require the parties to confer a little bit more, 10:03:39
8 but it's designed to try to balance the competing 10:03:42
9 interests that we have here. 10:03:47

10 In getting to the legal issues before 10:03:51
11 the Court, not letting the discovery get too 10:03:52
12 burdensome when, in fact, we do have a facial 10:03:56
13 challenge and maybe having a fulsome record that 10:03:59
14 can go up, because this case is going up unless 10:04:04
15 it's stayed and the parties agree to be bound by 10:04:10
16 what happens in other cases. 10:04:16

17 So the plaintiffs should provide the 10:04:18
18 answer to the question "Identify your members who 10:04:23
19 are -- appear to be covered by this rule," and it 10:04:29
20 should not be limited to one because of the 10:04:37
21 associational standing issue. It should be 10:04:40
22 everyone that they do diligently inquire and know 10:04:45
23 about, which is how the rule of discovery operates. 10:04:48

24 Also, they should provide a list with 10:04:54
25 appropriate identifying information. When I say, 10:04:54

1 "appropriate identifying information," information 10:04:54
2 that would allow the State to contact these 10:05:00
3 members. The two plaintiffs in this case, the 10:05:05
4 first plaintiff is described as the leading trade 10:05:09
5 association, and the second one is described as a 10:05:15
6 leading association. And the Court can't tell, 10:05:19
7 unless I missed something in the complaint, the 10:05:21
8 volume of what we are talking about. I can't 10:05:24
9 really tell. And that is kind of a concern here. 10:05:27
10 But at minimum, the names of the members of each 10:05:30
11 association and relevant contact information, 10:05:38
12 address information that these two plaintiffs 10:05:43
13 should have. 10:05:55
14 So in addition to the one member 10:05:56
15 offered up by each plaintiff to give the 10:06:02
16 information, anyone that they have information 10:06:06
17 about that they believe will be covered by this 10:06:09
18 rule, they should provide that same type of 10:06:12
19 information that they have offered with respect to 10:06:15
20 one as to each association. 10:06:17
21 This is not the last time, probably, 10:06:22
22 that we are going to have a discovery dispute in 10:06:24
23 this case because I can envision third parties 10:06:27
24 coming in and saying, "I got a subpoena" and that 10:06:31
25 kind of thing. So we'll deal with that. I can't 10:06:34

1 resolve all of that. That's not before me anyway. 10:06:37
2 There may be a way to short-circuit some of this. 10:06:41
3 Sometimes in a situation like this in 10:06:44
4 other legal context, the parties are able to 10:06:46
5 develop something that might be a representative 10:06:50
6 sampling if we've got voluminous information. But 10:06:52
7 that may be down the road a little bit. That might 10:06:58
8 be the subject of some conversation. It might not 10:07:03
9 be practical in this case. But if it is, it's 10:07:06
10 something that the parties can discuss. 10:07:09
11 And I'm going to limit it to that for 10:07:22
12 now without prejudice to this issue coming back -- 10:07:24
13 back up. And I put no limitation on the State's 10:07:30
14 ability to do informal discovery or formal 10:07:37
15 discovery within the applicable laws and rule of 10:07:41
16 procedures as to these members. And to the extent 10:07:46
17 that, in providing this information to the 10:07:50
18 defendants, there's somebody -- there's some entity 10:07:57
19 in that list that, for whatever reason, has such a 10:08:03
20 role with the association that there's something 10:08:08
21 equivalent to a managing agent or -- I don't know 10:08:14
22 what it is. I'm just thinking -- then the 10:08:17
23 plaintiffs should identify any such association. 10:08:19
24 In other words, if they object to the 10:08:23
25 defendants contacting them directly without going 10:08:27

1 through the plaintiffs, for whatever reason, there 10:08:31
2 may be some interrelationships that the Court 10:08:34
3 doesn't know about. Then they should identify that 10:08:38
4 so that can be discussed and worked out before 10:08:41
5 somebody is alleged to have gone afoul of some sort 10:08:44
6 of protocol. 10:08:48
7 And the Court reserves ruling on the 10:08:52
8 rest that's not covered by this. And the Court 10:08:54
9 does not treat any argument that is not 10:08:57
10 specifically addressed as to these particular 10:09:04
11 discovery -- as finally adjudicated of this ruling 10:09:08
12 without prejudice to similar issues coming up in 10:09:12
13 the practicalities and the hurly-burly of 10:09:16
14 litigation. 10:09:20
15 But the reason -- one of the reasons 10:09:21
16 why I think this is appropriate is I was trying to 10:09:23
17 think ahead, which is dangerous, to what the 10:09:30
18 experts would review in trying to get this case 10:09:37
19 ready for trial or either a summary judgment 10:09:40
20 disposition, and they would probably need to know 10:09:43
21 more than what has been proposed by the plaintiffs. 10:09:46
22 So that's the Court's ruling. I will 10:09:50
23 ask counsel for the parties to confer on the order. 10:09:53
24 If one side takes the first stab, circulate it 10:09:59
25 before you submit it to the Court so that questions 10:10:02

1 as to form can be discussed before it's lodged. 10:10:06
2 But let's not wait a long time. In other words, if 10:10:10
3 somebody is being slow about getting it back, just 10:10:13
4 go ahead and file it. And then under the local 10:10:15
5 rules, a competing order or a written objection can 10:10:18
6 be filed. But in the first instance, because this 10:10:21
7 is important to the progression of the case, the 10:10:26
8 parties -- one side should do the first draft, 10:10:31
9 circulate it, and try to get some agreement as to 10:10:34
10 form of this particular order. 10:10:38

11 As to -- the Court is not going to 10:10:40
12 award any sanctions on this because there were 10:10:43
13 reasonably good-faith, well-argued positions 10:10:47
14 offered by the plaintiff. And also this whole 10:10:52
15 scenario is a unique situation, and it may very 10:10:57
16 well end up being a case of first impression. And 10:11:01
17 the plaintiffs were well within their rights to 10:11:05
18 raise the objections that they did. So that's the 10:11:07
19 Court's ruling. 10:11:10

20 (WHEREUPON, the foregoing proceedings
21 were concluded at 10:11 a.m.)

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REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF MONTGOMERY

I, D. ROCHELLE KOENES, Licensed Court Reporter, with offices in Clarksville, Tennessee, hereby certify that I reported the foregoing hearing of AMERICAN CATALOG MAILERS ASSOCIATION, ET AL. vs. TENNESSEE DEPARTMENT OF REVENUE, ET AL., by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

I further certify that in order for this document to be considered a true and correct copy, it must bear my original signature, and that any unauthorized reproduction in whole or in part and/or transfer of this document is not authorized, will not be considered authentic, and will be in violation of Tennessee Code Annotated 39-14-104, Theft of Services.

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