



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

September 5, 2014

Thomas E. Hanson, Jr., Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801

David E. Wilks, Esquire
Laina M. Herbert, Esquire
Wilks, Lukoff & Bracegirdle, LLC
1300 N. Grant Avenue, Suite 100
Wilmington, DE 19806

Re: *Mitchell Lane Publishers, Inc. v. Rasemas*
C.A. No. 9144-VCN
Date Submitted: September 3, 2014

Dear Counsel:

Defendants Joseph Rasemas, Cynthia Rasemas, and Purple Toad, Inc. (collectively, the "Defendants") have moved to compel Plaintiff Mitchell Lane Publishers, Inc. and Counterclaim-Defendant Barbara Mitchell (collectively, the "Plaintiff" or "Mitchell Lane") to produce (i) comprehensive financial information relating to Mitchell Lane's claims of lost profits, including balance sheets, income statements, statements of operations and financial statements, whether audited or

unaudited from January 1, 2004 through the most recent quarter, and (ii) documents constituting templates that Mitchell Lane uses to produce its books.

The financial information sought by Defendants is generally relevant and subject to discovery. Plaintiff has had difficulty retrieving the data; blame is placed on the accounting software which, according to Plaintiff, only preserves data for one year. It argues that it cannot produce what it does not have. While that premise may be appropriate in some circumstances, a certain skepticism is warranted as to the unavailability of recent and basic financial information.¹ The Defendants attribute Plaintiff's inability to produce (or its loss of) financial information to despoliation, but that claim, at best, is premature.² Alternatively, Defendants request access to Plaintiff's computer to allow their expert the opportunity to retrieve the data. That request, too, is premature.

¹ Mitchell Lane contends that it "performed a comprehensive search of [its] files." Pl. and Countercl. Defs.' Opp'n to Defs.' Mot. to Compel at ¶ 20. A comprehensive search of paper files is not necessarily an appropriate substitute for more diligence regarding computer records.

² "Spoliation of evidence is a serious charge [that cannot be proved by] a vague and general complaint that evidence has been destroyed." *Seibold v. Camulos P'rs L.P.*, 2012 WL 4076182, at *23 (Del. Ch. Sept. 17, 2012).

Plaintiff will be given yet another opportunity to provide the requested information. That may require the retention by Plaintiff of a computer forensic expert, at Plaintiff's expense, to confirm the availability (or provide an explanation for the absence of) financial data from Plaintiff's computer system. Plaintiff will report to the Defendants on the status of this effort within seven calendar days. The report, if the data cannot be produced, should reflect the expert's best understanding of why the data could not be produced, and whether it may be attributed to the software or other factors. If the expert assessment cannot be performed within seven calendar days, Plaintiff shall report to the Court promptly.

Regarding the design templates, Mitchell Lane asserts that it has produced to Defendants all templates that Mitchell Lane considers to be proprietary and confidential.³ Mitchell Lane has repeatedly assured Defendants that Defendants are presently aware of any and all templates used by Mitchell Lane. The Court will not order the production of documents that do not exist.⁴

³ See Pl. and Countercl. Def.'s Opp'n to Defs.' Mot. to Compel at ¶ 19.

⁴ See *NRG Barriers, Inc. v. Jelin*, 1996 WL 377014, at *1 (Del. Ch. July 1, 1996). Conversely, Plaintiff's failure to produce other templates, specifications, criteria,

Mitchell Lane Publishers, Inc. v. Rasemas
C.A. No. 9144-VCN
September 5, 2014
Page 4

For the foregoing reasons, Defendants' Motion to Compel is denied in part and granted in part.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

or the like now will probably preclude Plaintiff from attempting to use any such evidence at either the preliminary injunction hearing or the trial of this matter.