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2-14-2012

Order on Motion to Compel (SOUTHERN  
TELECOM)

Melvin K. Westmoreland  
*Superior Court of Fullton County*

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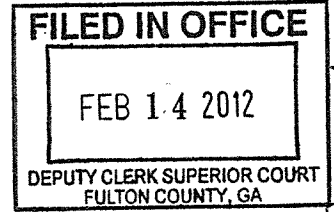
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**COPY**

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



*Candy Thomas*

SOUTHERN TELECOM, INC., )  
)  
Plaintiff, )  
)  
v. )  
)  
TW TELECOM INC. OF GEORGIA )  
L.P., F/K/A TIME WARNER )  
TELECOM OF GEORGIA, L.P. AND )  
TW TELECOM OF ALABAMA LLC, )  
F/K/A TIME WARNER TELECOM OF )  
ALABAMA LLC, )  
)  
Defendants. )  
)

Civil Action File No.  
2011-CV-198651

**BUS 3**

**ORDER**

This matter is before the Court on Defendants' Motion to Compel Discovery Responses and Request for Involuntary Dismissal of Plaintiff's Complaint for Damages and Injunctive Relief, or (Alternatively) Motion for Evidentiary Presumption. Upon consideration of the parties' briefs, and the record of the case, the Court finds as follows:

This case involves the scope and interpretation of two revenue sharing provisions found in two contracts between Plaintiff's predecessors-in-interest and Defendants' predecessors-in-interest. On September 19, 2011 the Court entered a First Amended Case Management Order, which bifurcated discovery into two phases. Phase I discovery is limited to "those issues concerning the proper scope and interpretation of the two contracts addressed in Plaintiff's complaint." Phase II discovery is intended to address all other issues not resolved by dispositive motions filed following the expiration of Phase I discovery.

On November 28, 2011, Defendants filed the instant motion taking issue with five categories of discovery topics. In their reply, which was filed following two depositions,

Defendants withdrew their request for Court intervention with respect to Interrogatory Nos. 6 and 11 and their request for a discovery extension. The Court will address the remaining issues raised in Defendants' motions.

### **Interrogatory No. 3**

Defendants contend Plaintiff provided implausible and deficient responses to Interrogatory No. 3. Interrogatory No. 3 requests that Plaintiff identify all persons involved with the negotiation of the agreements at issue. The Court has reviewed Plaintiff's responses to this Interrogatory. In those responses, Plaintiff identified a number of individuals and provided brief descriptions of their possible involvement with the negotiation of contracts that were drafted fifteen years ago. The Court finds Plaintiff's effort to comply with their responsibilities under the Civil Practice Act satisfactory. Defendants' request is **DENIED**.

### **Request for Production Nos. 85-88**

Defendants contend Plaintiff failed to produce items to support its interpretation and construction of the contracts in response to the Request for Production Nos. 85-88. Plaintiff contends that it has provided to Defendants all the documents related to the interpretation of the contract, including, drafts, correspondence and internal memoranda relating to the contracts, and documents relating to the implementation and administration of the contracts. Moreover, Plaintiff contends that they have nothing responsive to this request because they contend that the agreements are unambiguous and speak for themselves. The Court finds Plaintiff's position reasonable and their efforts to comply adequate for purposes of O.C.G.A. § 9-11-34. Defendants' motion to compel Request for Production Nos. 85-88 is **DENIED**.

#### **Interrogatory No. 46**

Interrogatory No. 46 seeks information related to any demands that Plaintiff made on Defendants for amounts allegedly owed under the agreements. Plaintiff objects to this request on the grounds that it contends that it falls outside the scope of Phase I discovery, which is limited to “the scope and interpretation of the two contracts addressed in Plaintiff’s complaint.” Because the Court agrees that, in the event of an ambiguity, the conduct of the parties could be probative of their interpretation of the provisions at issue, the Court **GRANTS** Defendants’ request for information concerning demands for payment specified in Interrogatory No. 46 and compels Plaintiff to provide a response on or before February 20, 2012.

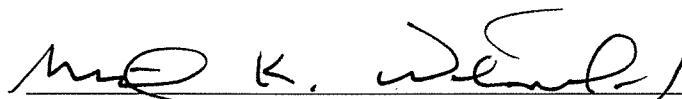
#### **Interrogatory No. 40 and Requests for Production Nos. 91-100**

Defendants seek information concerning contracts to which Plaintiff is a party that contain provisions similar to the one at issue in this case. Plaintiff produced one contract that they found had a similar provision to the revenue sharing provisions of the contract at issue. Nevertheless, Defendants insist that there are other responsive documents following the deposition of Plaintiff’s representative, who described the review undertaken to identify documents responsive to this request. In his testimony, Plaintiff’s representative mentioned that his staff identified several documents that were potentially responsive, but Plaintiff’s representative and Plaintiff’s counsel determined that the document produced was the only one that contained similar provisions to the one at issue here. Plaintiff has satisfied its responsibilities under the Georgia Code. Defendants’ request for relief concerning Interrogatory No. 40 and Requests for Production Nos. 91-100 is **DENIED**.

**Defendants' Request for Sanctions or Alternatively an Adverse Inference Against Plaintiff**

Defendants argue that Plaintiff's complaint should be dismissed, or alternatively, that the Court should shift the presumption against Plaintiff, due to Plaintiff's alleged failure to present evidence to support its interpretation of the agreements at issue in this case. During the deposition of Wayne Ellis, General Manager for Plaintiff, Defendants asked Mr. Ellis to provide support for Plaintiff's position as to why it believes it is entitled to further revenues from Defendants. Mr. Ellis responded that he relied on the terms of the agreements, without pointing to any specific term. Upon further questioning by Defendants, Plaintiff's counsel objected that the question required contract interpretation, which calls for a legal conclusion. Under Georgia law, the interpretation of a contract is a legal question. O.C.G.A. § 13-2-1. Thus, Plaintiff's objections were reasonable and did not violate the Georgia Civil Practice Act. Further, in light of the Court's ruling above, the other grounds cited by Defendants in support of their request for sanctions or alternatively, an adverse inference against Plaintiff, are without merit. Defendants' request for sanctions or an adverse inference against Plaintiff is **DENIED**.

**SO ORDERED** this 14<sup>th</sup> day of February, 2012.

  
MELVIN K. WESTMORELAND, SENIOR JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

Copies via email to:

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