

STATE OF NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS 4285

RELATION INSURANCE, INC. and  
RELATION INSURANCE  
SERVICES OF NORTH CAROLINA,  
INC.,

Plaintiffs,

v.

PILOT RISK MANAGEMENT  
CONSULTING, LLC; PILOT  
FINANCIAL BROKERAGE, INC.  
d/b/a PILOT BENEFITS; KYLE  
SMYTHE; ROBERT CAPPS;  
LYNETTE KINNEY; EDWARD  
MILES GURLEY; SEAN KELLY;  
TYLER CROOKER; MICHELLE  
LINTHICUM; LINDA MICHELLE  
SNEED; TONI KING; and  
JOHNATHAN LANCASTER,

Defendants.

**ORDER ON PLAINTIFFS' MOTION  
TO ALLOCATE COSTS AND MOTION  
TO STRIKE**

**THIS MATTER** is before the Court on Plaintiffs' Motion to Allocate Costs (ECF No. 182) and Plaintiffs' Motion to Strike Affidavit of Amiel J. Rossabi (the "Motion to Strike," ECF No. 265) (collectively, the "Motions").

**THE COURT**, having considered the Motions, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES** that the Motion to Allocate Costs should be **GRANTED** in part and **DENIED** in part, and that the Motion to Strike should be **DENIED** as moot.

*Fox Rothschild LLP, by Kip D. Nelson and Ashley Barton Chandler for Plaintiffs Relation Insurance, Inc., and Relation Insurance Services of North Carolina, Inc.*

*Rossabi Law PLLC, by Amiel J. Rossabi for Defendants Pilot Risk Management Consulting, LLC, Pilot Financial Brokerage Inc. d/b/a*

*Pilot Benefits, Kyle Smythe, Robert Capps, Lynette Kinney, Edward Miles Gurley, Sean Kelly, Tyler Crooker, Michelle Linthicum, Linda Michelle Sneed, Toni King, and Johnathan Lancaster.*

Davis, Judge.

## FINDINGS OF FACT

1. The Court makes the following findings of fact, which are made solely for the purpose of resolving the present Motions and are not binding in any subsequent proceedings in this action.

2. The Court sets forth herein only those portions of the factual and procedural background relevant to its determination of the Motions.<sup>1</sup>

3. On 11 April 2022, Plaintiffs Relation Insurance, Inc. and Relation Insurance Services of North Carolina, Inc. (collectively, “Plaintiffs” or “Relation”) initiated this action by filing a Complaint in Guilford County Superior Court. (*See* Compl., ECF No. 3.)

4. Plaintiffs asserted the following claims in the Complaint: (a) four breach of contract claims—one against seven of its former employees (the “Former Employees”)<sup>2</sup> for breach of certain confidentiality provisions in their employment agreements; two against the Former Employees for breach of non-solicitation clauses

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<sup>1</sup> A detailed recitation of the factual and procedural background of this matter may be found in the Court’s 12 July 2024 Order and Opinion on Defendants’ Motion for Partial Summary Judgment, Plaintiffs’ Motion for Partial Summary Judgment, and Plaintiffs’ Motion for Adverse Inference at Summary Judgment and Trial Based on Spoliation of Evidence (ECF No. 284).

<sup>2</sup> The “Former Employees” are Defendants Tyler Crooker, Michelle Linthicum, Edward Miles Gurley, Sean Kelly, Toni King, Linda Michelle Sneed, and Johnathan Lancaster.

in their employment agreements; and one against a competitor and three of its employees (collectively, the “Pilot Defendants”)<sup>3</sup> for breach of a prior settlement agreement; (b) two misappropriation of trade secrets claims against all Defendants—one under the Federal Defend Trade Secrets Act, 18 U.S.C. § 1832 et seq., and one under the North Carolina Trade Secrets Protection Act, N.C.G.S. § 66-152 et seq.; (c) an unjust enrichment claim against all Defendants; (d) two computer-related claims against the Former Employees—one for computer trespass under N.C.G.S. § 14-458 and one for violation of the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030; (e) two tortious interference claims against all Defendants—one for current “business and contractual relations” and one for “prospective economic advantage”; and (f) a claim for unfair and deceptive trade practices under N.C.G.S. § 75-1.1. against all Defendants. (Compl. ¶¶ 154– 270.)

5. Two days after filing the Complaint, on 13 April 2022, Relation filed a Motion for Preliminary Injunction (the “PI Motion,” ECF No. 6). Following full briefing, the PI Motion came before the Court for a hearing on 10 May 2022. (*See* Notice of Hearing, ECF No. 11.)

6. At the 10 May hearing, the parties reached a voluntary agreement that (a) the Former Employees would return any of Relation’s alleged confidential information or trade secrets and preserve all of its computer data and emails; and (b) in return, Plaintiffs would narrow the scope of the PI Motion so that it would no

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<sup>3</sup> The “Pilot Defendants” are Pilot Risk Management Consulting, LLC, Pilot Financial Brokerage, Inc. d/b/a Pilot Benefits, Kyle Smyth, Al Capps, and Lynette Kinney. At times in this opinion, Pilot Risk Management Consulting, LLC and Pilot Financial Brokerage, Inc. d/b/a Pilot Benefits are referred to collectively as “Pilot.”

longer encompass the issues of misappropriation of alleged trade secrets or confidential information.

7. On 13 May 2022, the parties filed a “Stipulation Regarding Plaintiffs’ Motion for Preliminary Injunction” (the “Stipulation,” ECF No. 94), memorializing the terms of their agreement at the hearing.

8. The Court entered an Order on Plaintiffs’ Motion for Preliminary Injunction on 25 May 2022 (“PI Order,” ECF No. 95), which stated that the terms of the parties’ Stipulation were incorporated into the PI Order by reference.<sup>4</sup> Moreover, the Court ordered that “[t]he parties shall comply in all respects with the terms set forth in the Stipulation[.]” (PI Order, at 26.)

9. The Stipulation provided, in pertinent part, as follows:

Prior to the deletion of any information pursuant to the paragraph below, the Former Employees will make their electronic devices available for digital imaging. Plaintiffs will, at their sole expense, provide an independent third-party company to digitally image the devices. The digital images will be maintained by the third-party company and will not be available to Plaintiffs or counsel for Plaintiffs unless and until counsel agree otherwise or as ordered by the Court.

(Stipulation, at 2.)

10. Plaintiffs retained digital forensics expert David Shelton, owner of Advanced Technology Investigations, LLC, to perform the digital imaging as provided for in the Stipulation. (Shelton Aff. I ¶¶ 2–3, ECF No. 142; Nelson Aff. ¶ 53, ECF No.

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<sup>4</sup> The Court filed an Amended Order on Plaintiffs’ Motion for Preliminary Injunction (“Amended PI Order,” ECF No. 116) on 28 June 2022, which also incorporated the terms of the parties’ Stipulation therein. (Am. PI Order, at 27.) However, the Court notes that it first ordered the parties to “comply in all respects with the terms set forth in the Stipulation” on 25 May 2022. (PI Order, at 26.)

183.) Shelton testified that he has over thirty-five years of experience in the field of information technology and that he has been retained as a forensic expert in nearly one hundred civil and criminal matters. (Shelton Aff. III ¶¶ 3–4, ECF No. 217.)

11. This initial round of imaging began in May of 2022. (Shelton Aff. III ¶ 6, ECF No. 217.) On 18 May 2022, Defendants provided some of their devices—primarily personal cell phones—to Shelton for digital imaging pursuant to the Stipulation but did not provide the computers Defendants used for work at Pilot. The devices that were provided to Shelton included Linthicum’s iPhone 13 Max and Apple MacBook Pro laptop, (Shelton Aff. III, Ex. B-5, at 1, ECF No. 217.5); Sneed’s Apple iPhone 8, (Shelton Aff. III, Ex. B-6, at 1, ECF No. 217.6); Gurley’s Chromebook laptop, (Shelton Aff. III, Ex. B-7, at Ex. A, ECF No. 217.7); and Crooker’s Motorola One cellphone, (Shelton Aff. III, Ex B-10, at 1, ECF No. 217.10).

12. On 31 May 2022, the Former Employees produced 151 intangible documents that were contained on their imaged cell phones. No tangible items were produced based on the Former Employees’ representation that none existed. On that same date, in accordance with this Court’s PI Order, each of the Former Employees filed an “Acknowledgement” bearing their notarized signature stating that they had “complied with terms of the of the Stipulation.” (See Acknowledgements, ECF Nos. 98–104.)

13. On 10 June 2022, the parties jointly filed their Electronically Stored Information (“ESI”) Protocol (“ESI Protocol,” ECF No. 107). Recognizing the unique challenges of the discovery of ESI due to the potential volume and various forms or

mediums of ESI, the parties negotiated and agreed upon the ESI Protocol for the purpose of setting parameters and procedures to govern the discovery of ESI. The ESI Protocol defined ESI to include

computer generated information or data of any kind, stored in or on any storage media located on computers, file servers, disks, tape or other physical or virtualized devices or media. ESI includes but is not limited to email, word processing documents, spreadsheets, electronic slide presentations, databases, and other reasonably accessible electronically stored information relevant to the claims or defenses of any party subject to discovery pursuant to N.C. R. Civ. P. 26.

(ESI Protocol, at 1–2.)

14. With respect to searching for discoverable ESI, the ESI Protocol provided that “[d]ocuments and ESI which are neither privileged nor otherwise protected against disclosure shall be timely produced in response to a reasonable request for the production of such documents, and the Producing Party shall conduct a reasonable and good faith search for responsive ESI.” (ESI Protocol, at 3.) The ESI Protocol also provided that “[a]bsent a further order of the Court, a Producing Party shall not have an obligation to search or produce from sources of ESI that it in good faith identifies as not reasonably accessible because of undue burden or cost.” (ESI Protocol, at 3.)

15. The ESI Protocol also contemplated the potential need for cost shifting if warranted by the circumstances.

The agreements set forth herein are without prejudice to the right of a party to request additional information about, or production of, additional ESI, or object to such requests for information or production on grounds related to the particular request. The parties shall confer in good faith with regard to whether such additional efforts are reasonably

required and, if so, who should bear the cost, and may seek assistance from the Court to resolve such disputes if agreement cannot be reached.

...

If the forms of production allowed by this protocol present an undue burden or cost for a Producing Party, the parties shall meet and confer to agree on a reasonable, alternative form of production. Any party may file a motion with the Court to seek individual relief from this protocol. Each party will presumptively bear its own costs of production. However, the parties reserve the right to seek cost shifting as appropriate at a later time.

(ESI Protocol, at 2–3, 20.)

16. Beginning in July 2022, the parties served written discovery requests on each other pursuant to the Case Management Order entered by this Court on 27 June 2022 (“CMO,” ECF No. 114). (Nelson Aff. ¶¶ 5, 22.)

17. Defendants responded to Plaintiffs’ discovery requests on 13 September 2022 and produced eight documents, which amounted to 161 pages.

18. By email to the Court on 3 October 2022 (the “3 October Email”), counsel for Plaintiffs submitted a BCR 10.9 dispute summary based on asserted deficiencies in Defendants’ responses to Plaintiffs’ First Set of Interrogatories and Requests for Production of Documents, which included, among other issues, Plaintiffs’ lack of access to the previously conducted forensic imaging of Defendants’ devices (Mot. Adv. Infer., Ex A., ECF No. 213.1.) Plaintiffs also represented to the Court that Defendants had refused to search their Pilot-issued devices or provide those devices to Plaintiffs for examination.

19. On 30 September 2022, prior to emailing the Court, counsel for the parties participated in a phone call to address the dispute, which they failed to resolve

at that time. Relation's email to the Court described the nature of the dispute, in pertinent part, as follows:

On that September 30, 2022, call, Defendants would only agree to supplement their response to Global Interrogatory No. 1 and any other responses for which Defendants may deem supplementation necessary. Defendants also admitted that they did not even look for responsive information and documents. Nor did they provide any search terms or culling criteria in accordance with the ESI Protocol.

Further, many of Defendants' discovery responses referred to information contained within devices that were digitally imaged at Plaintiffs' expense pursuant to the Stipulation. Yet, on the call Defendants would only agree to allow Plaintiffs to "access" the devices to the extent they expressly mention Plaintiffs, Plaintiffs' clients, or Alleged Confidential Information. This limitation is unreasonable and inconsistent with the ESI Protocol. Defendants should search for all relevant information and ESI, including on the imaged devices, and allow Plaintiffs to obtain all responsive information on the imaged devices (excluding any privileged communications). In addition, Defendants have refused to search their Pilot-issued devices or provide those devices to Plaintiffs.

During the call, Defendants also reiterated that they would not identify or produce communications between themselves, claiming that anything from before they left Plaintiffs' employment would be captured on Plaintiffs' devices, and that anything after they left Plaintiffs' employment would be per se privileged because they "all" would have involved Defendants' counsel or been at the direction of Defendants' counsel. Again, Defendants take this position without performing any ESI search.

Given Defendants' recalcitrance, Plaintiffs are forced bring this dispute to the Court. Plaintiffs respectfully request that the Court compel Defendants to provide full and complete responses to all interrogatories, produce the requested documents and tangible things (in accordance with the ESI Protocol), and allow Plaintiffs to search the imaged devices in accordance with the discovery requests, as well as award Plaintiffs their costs and fees associated with this dispute and grant such other relief as the Court deems just and proper.

(Mot. Adv. Infer., Ex. A.)



20. At a 13 October 2022 Webex conference with the Court, Defendants agreed to produce additional tangible documents and information, as well as to provide their Pilot devices for forensic examination and digital imaging by Shelton if certain safeguards were put in place to protect confidential and personal information. In response to counsel for Plaintiffs raising the issue of allocation of ESI-related costs, the Court stated that it would decide any such issue raised by the parties at a later date. (Nelson Aff. ¶ 11; Mot. Adv. Infer., Ex. E, ECF No. 213.5.)

21. On 25 and 26 October 2022, the following electronic devices were produced to Shelton for digital imaging: Lancaster's iPhone 12 and Dell laptop, (Shelton Aff. III, Ex. B-2, at 1, ECF No. 217.2); Kinney's Apple iPhone XR, (Shelton Aff. III, Ex. B-4, at 1, ECF No. 217.4); Linthicum's Lenovo laptop, (Shelton Aff. III, Ex. B-5, at 1); Sneed's Apple iPhone 8 and HP laptop, (Shelton Aff. III, Ex. B-6, at 1, 7); Gurley's iPhone 14 Max and a Lenovo ThinkPad laptop, (Shelton Aff. III, Ex. B-7, at 1); Kelly's iPhone 14 Pro Max, HP laptop, and iPad Air, (Shelton Aff. III, Ex. B-8, at 1, 14, ECF No. 217.8); King's Dell desktop computer, (Shelton Aff. III, Ex. B-9, at 1, ECF No. 217.9); Crooker's Motorola One cellphone, (Shelton Aff. III, Ex B-10, at 1); and Crooker's HP laptop, (Shelton Aff. III, Ex B-10, at 5).

22. On 28 October 2022, Defendants produced seven additional documents and represented that the digital imaging process was complete. Plaintiffs' counsel, however, did not yet have access to the digitally imaged devices. The primary disputes at this point concerned the creation and production of a privilege log by

Defendants' attorney, along with the safeguards Defendants sought in connection with the digitally imaged devices.

23. On 3 November 2022, Capps' iPhone and MacBook laptop, as well as Smythe's iPhone 12 and HP laptop, were produced to Shelton for examination. (*See* Shelton Aff. III, Ex. B-1, at 1, ECF No. 217.1; Shelton Aff. III, Ex. B-3, at 1, ECF No. 217.3.)

24. Upon completing his analysis of the digitally imaged devices, on 30 November and 16 December 2022, Shelton "provided to counsel for Defendants external drives containing the data captured on the devices successfully imaged to that point." (Shelton Aff. III ¶ 23.) Shelton has testified that "[t]he data was provided in the form of searchable HTML reports[,] on four flash drives, which "included information about the documents and files contained on the imaged devices and their properties." (Shelton Aff. III ¶ 23; Nelson Aff. ¶ 13.) Shelton also provided Defendants' counsel with "a fifth flash drive that included potentially privileged and personal documents." (Nelson Aff. ¶ 13.)

25. On 30 December 2022, Plaintiffs' counsel were permitted to access the information contained on the digitally imaged devices. Shelton "provided copies of the HTML reports to counsel for Plaintiffs, but without items that [he] deemed potentially privileged or personal." (Shelton Aff. III ¶ 25.)

26. Following a review of that information, Plaintiffs' counsel determined that "[t]he forensic examination of the [D]efendants' electronic devices has revealed

that those devices still contain information that the Former Employees claimed to have deleted.” (Pls.’ Br. Supp. Sanctions Mot., at 5, ECF No. 138.)

27. As a result—and before the Court could conduct a BCR 10.9 conference to address the issues raised by the parties in emails sent to the Court in December of 2022<sup>5</sup>—Plaintiffs filed a Motion for Contempt and Sanctions on 10 January 2023 (the “Sanctions Motion,” ECF No. 137), in which Plaintiffs alleged that certain Defendants had willfully violated specified provisions of the Court’s PI Order. The Sanctions Motion was primarily based on Plaintiffs’ assertion that “Defendants did not permanently delete intangible information obtained from Plaintiffs.” (Sanctions Mot. ¶ 5.) Furthermore, Plaintiffs contended that the “Motion Defendants ha[d] tangible documents in their possession that they obtained from Plaintiffs while employed by Plaintiffs[,]” in violation of the PI Order. (Sanctions Mot. ¶ 6.)

28. Also on 10 January 2023, Plaintiffs emailed the Court and narrowed their BCR 10.9 Requests to four issues, some of which are relevant to the present Motion to Allocate Costs.

29. The day after Plaintiffs filed the Sanctions Motion, 11 January 2023, the Court held a Webex conference with counsel for all parties (the “January 11 Conference”). Of relevance here, the Plaintiffs asked the Court to reject Defendants’

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<sup>5</sup> Plaintiffs emailed the Court on 12 December 2022 pursuant to BCR 10.9 identifying a number of unresolved discovery disputes (“Plaintiffs’ Requests”). Defendants responded to Plaintiffs’ Requests via email to the Court on 19 December 2022. Defendants sent a second email to the Court on 19 December 2022 pursuant to BCR 10.9 also identifying a number of separate unresolved discovery disputes (“Defendants’ Requests”). Plaintiffs responded to Defendants’ Requests via email to the Court on 23 December 2022. The majority of Defendants’ Requests and the Court’s ultimate rulings thereon are not relevant to the present Motion to Allocate Costs.

position that everything contained on the imaged devices should be designated Highly Confidential. Plaintiffs also requested that to the extent Defendants withheld any information from the devices as privileged, the Court require Defendants to provide a privilege log in accordance with Rule 26(b)(5) of the Rules of Civil Procedure, the CMO, and the ESI Protocol. Both of Plaintiffs' Requests were part of the same dispute encompassed by one of the issues submitted by Defendants, which was that "Plaintiffs have refused to allow Mr. Shelton, their designated expert, to provide date ranges and other simple categorization of documents so that Defendants can complete a privilege log of the newly cloned devices[.]"

30. At the January 11 Conference, the Court ruled that any "blanket" Highly Confidential designation violates the CMO and ESI Protocol. However, the Court took the remaining issues under advisement, allowing the parties seven days to submit a list of citations to additional case law relevant to the remaining issues. The Court entered an Order (the "January 25 BCR 10.9 Order") addressing the remaining pertinent issues, stating as follows:

Plaintiffs are correct that counsel for Defendants is responsible for creating a privilege log and making designations of confidentiality with regard to Defendants' responses to Plaintiffs' document requests. But given the significant technology-related issues associated with the review of the documents at issue following the imaging of the devices and given the prior involvement of Plaintiffs' expert witness, David Shelton, in this regard, the Court, in its discretion, **ORDERS** as follows: (1) Plaintiffs shall promptly make Mr. Shelton available to assist Defendants' counsel and his IT expert with regard to the technological issues involved in allowing Defendants' counsel to expeditiously review the documents from the imaged devices in order for him to make confidentiality designations and to prepare a privilege log for up to one hour at Plaintiffs' expense; (2) To the extent that Defendants' counsel requires any additional assistance from Mr. Shelton for this purpose,

Defendants shall be required to pay for Mr. Shelton's time at his agreed-upon hourly rate in this case; (3) Defendants' counsel shall ensure that his IT expert is present when Mr. Shelton is providing assistance to Defendants' counsel; (4) Plaintiffs' counsel shall have the right to be present (at their own expense) at all times during which Mr. Shelton is assisting Defendants' counsel; and (5) Defendants shall respond to any outstanding discovery requests of Plaintiffs (including the production of a privilege log and confidentiality designations) within 30 days of the date of this Order.

(Jan. 25 BCR 10.9 Order, at 6–7, ECF No. 156.)

31. On 24 January 2023, Defendants filed a motion seeking a twenty-day extension of their deadline in which to respond to the Sanctions Motion. (Defs.' Mot. Ext. Time, ECF No. 153.) Plaintiffs consented to the extension "on the condition that Defendants arrange for Plaintiffs' forensics expert or some other independent third-party selected by Defendants to confirm that all information belonging to Relation has been permanently deleted from all Defendants' devices." (Pls.' Resp. Defs. Mot. Ext. Time, at 2, ECF No. 155.) Moreover, Plaintiffs' counsel noted that it "did not have the opportunity to address cost-shifting with Defendants' counsel [and] Plaintiffs believe that Defendants should cover the costs of any additional steps taken to effectuate permanent deletion of information that was allegedly deleted in May 2022." (Pls.' Resp. Defs. Mot. Ext. Time, at 2 n.1.)

32. The Court granted Defendants' Motion for Extension of Time, allowing Defendants an additional twenty days to respond to the Sanctions Motion and ordered as follows:

Defendants' IT specialist and Plaintiffs' forensic computer expert will work together to confirm that all documents listed in connection with Plaintiffs' Motion for Contempt and Sanctions have been deleted from the electronic devices provided by Defendants for imaging. Defendants

will thereafter certify to the Court via electronic filing that those documents are not accessible to Defendants.

(Order on Mot. Ext. Time, at 2, ECF No. 158.)

33. However, the Court deferred “ruling on the issue of which party shall be required to pay the costs associated with ensuring the permanent deletion of documents listed in connection with Plaintiffs’ Motion for Contempt[,]” and would permit the parties “to file a motion seeking the recovery of such costs following the Court’s ruling on Plaintiffs’ Motion for Contempt and Sanctions.” (Order on Mot. Ext. Time, at 2.)

34. Accordingly, Defendants’ counsel gave Shelton access to the Pilot devices for the purpose of locating and permanently deleting all relevant documents that had been identified by him from the imaging of the devices. Shelton went to the Pilot Financial Brokerage, Inc. office on 25 and 26 January 2023 for this purpose. Upon completion of this task, Shelton, William Landacre (who is Defendants’ IT specialist), and each Former Employee signed a document certifying that Shelton had deleted all identified documents that he was able to locate.

35. The Court conducted a hearing on the Sanctions Motion on 17 March 2023. On 16 April 2023, the Court issued an Order (the “April 16 Order”) denying Plaintiffs’ Sanctions Motion and concluding that Plaintiffs “failed to meet their burden of showing that Defendants’ actions were willful[.]” (April 16 Order, at 10, ECF No. 172.)

36. Plaintiffs emailed the Court on 16 May 2023, pursuant to BCR 10.9, identifying a dispute over the allocation of discovery costs in this case (the “May 16

Submission”). Defendants responded to Plaintiffs’ May 16 Submission via email to the Court on 22 May 2023.

37. Following several delays resulting from discovery disputes between the parties, discovery in this matter finally closed on 2 June 2023. (*See* 24 April 2023 Order, ECF No. 176.)

38. The Court held a Webex conference with counsel for all parties on 6 June 2023 and concluded that full briefing would be necessary to decide the costs allocation issue. Accordingly, the Court authorized the Plaintiffs to file a motion addressing the issues raised in the May 16 Submission.

39. Plaintiffs subsequently filed their Motion to Allocate Costs on 26 July 2023.

40. On 17 October 2013, counsel for Defendants submitted an affidavit in connection with the Motion to Allocate Costs. (Aff. of Amiel J. Rossabi, ECF No. 252.)

41. Plaintiffs filed a Motion to Strike on 31 October 2023 in which they requested that paragraphs 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 28, 29, 31, 32, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, and 46 and Exhibit I of the “Affidavit of Amiel J. Rossabi” be stricken.

42. After full briefing, the Court held a hearing on the Motions on 24 July 2024. The Motions are now ripe for resolution.

### **CONCLUSIONS OF LAW**

43. Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

44. Any Finding of Fact that is more appropriately deemed a Conclusion of Law and any Conclusion of Law that is more appropriately deemed a Finding of Fact, shall be so deemed and incorporated by reference as a Finding of Fact or Conclusion of Law, as appropriate.

45. In a nutshell, Plaintiffs contend that as a matter of equity, Defendants should be forced to pay some portion of the ESI costs incurred in this matter, which—up to now—have been borne solely by Plaintiffs. Defendants, conversely, argue that no such allocation would be appropriate on the ground that all (or substantially all) of the ESI costs at issue were incurred as a result of Plaintiffs' insistence that all of Defendants' devices be imaged. Defendants further point to the Stipulation in which Plaintiffs agreed to bear the expense of the imaging provided for therein.

46. The North Carolina Rules of Civil Procedure were amended in 2011 to specifically address issues unique to the discovery of ESI. *See* N.C. S.L. 2011-199 (HB 380); N.C. R. Civ. P. 26(b)(1b). Rule 26(b)(1b) of the North Carolina Rules of Civil Procedure states as follows:

(b) Discovery scope and limits. - Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

...

(1b) Specific Limitations on Electronically Stored Information. - In addition to any limitations imposed by subdivision (b)(1a) of this rule, discovery of electronically stored information is subject to the limitations set forth in Rule 34(b). The court may specify conditions for the discovery, *including allocation of discovery costs.*

N.C. R. Civ. P. 26(b)(1b) (emphasis added).



47. Accordingly, Rule 26(b)(1b) provides the Court with authority—along with accompanying discretion—to allocate costs incurred in connection with ESI discovery between the parties and therefore serves as Plaintiffs’ strongest source of legal authority for their Motion to Allocate Costs.<sup>6</sup>

48. There is not a great deal of case law in North Carolina on this subject. The parties primarily rely on this Court’s previous decisions in *Analog Devices, Inc. v. Michalski*, 2006 NCBC LEXIS 16 (N.C. Super. Ct. Nov. 1, 2006), and *SCR-Tech LLC v. Evonik Energy Servs. LLC*, 2014 NCBC LEXIS 72 (N.C. Super. Ct. Dec. 31, 2014), in support of their respective arguments.

49. The issues presented in *Analog Devices* arose in the context of a motion to compel in which the defendants requested that the plaintiff produce emails that were primarily “contained in inaccessible form.” *Analog Devices*, 2006 NCBC LEXIS 16, at \*\*1. The Court noted that the parties’ arguments required it to analyze “the extent to which inaccessible electronic data is discoverable and who should pay for its production under the North Carolina Rules of Civil Procedure.” *Analog Devices*, 2006 NCBC LEXIS 16, at \*\*1–2. In its analysis, the Court discussed some of the unique issues that arise in the context of ESI discovery:

This mix of technological problems creates a setting in which courts are increasingly called upon to make rulings on discovery issues that can either be outcome-determinative or force settlements related to the costs of discovery rather than the merits. Both the volume and storage

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<sup>6</sup> Although Rule 26(b)(1b), as worded, appears to recognize that such an allocation will often be made prior to the discovery at issue actually taking place, the Court does not believe the provision can logically be construed so as to preclude such an allocation from being made after the discovery has occurred. Indeed, at the 24 July hearing, counsel for both sides expressed their agreement that Rule 26(b)(1b) confers authority upon the Court to allocate ESI costs in this case in the event it chooses to do so.

formats of electronically produced information create other problems such as the cost associated in reviewing material for purposes of protecting the[] attorney[,] client or work product privileges. The cost of discovery is high enough without the added expenditures involved in recapturing inaccessible data. Technology issues place increasing burdens on the courts to determine when parties have acted in good faith and when they have engaged in spoliation. Management issues become more critical at the outset of complex litigation.

*Id.* at \*\*17 (internal footnote omitted).

50. This Court reasoned that “trial judges should be guided by the language of the applicable Rules of Civil Procedure, supplemented by the Guidelines adopted by the Conference of Chief Justices.” *Id.* at \*\*2. Ultimately, the Court decided to require production and “to split the cost of production between the parties subject to further revision on allocation of costs at the end of the litigation.” *Id.* In reaching this conclusion, the Court stated as follows:

North Carolina courts will look to the North Carolina Rules of Civil Procedure for guidance in deciding e-discovery issues and amend those rules as necessary. In applying the Rules, the courts will most likely use the Guidelines created by the Conference of Chief Justices. An analysis of any problem then begins with the Rules. Rule 26(b)(1) makes clear that liberal discovery is permitted. It is equally clear under the Rules that North Carolina judges have the power to limit or condition discovery under certain circumstances. After a discovery conference, “the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.” *See* N.C. R. Civ. P. 26(f).

...

The language of Rule 26 thus provides a broad framework in which to apply the concepts described by the above authorities. The overriding concern for judges applying those concepts should be whether or not they are making an outcome-determinative decision.

...

In cases where, as here, the discovery is stored in a form that is particularly difficult or costly to retrieve, a more searching inquiry into the competing interests of preventing undue burden or expense to the producing party and the importance of the discovery to the requesting party is warranted.

...

The uncertainty of the cost combined with the potential probative value of the discovery is too great to deny Defendants' motion. On the other hand, the potential cost of production combined with the great uncertainty as to the contents of the requested documents is too great to require Plaintiff to bear the full burden of production on its own.

...

Such an outcome serves to advance the long established goal of promoting liberal discovery practices, while ensuring that the burden of discovery does not in any way prove to be outcome determinative. The Court reserves the right to consider the costs of production in assessing final costs once the relative costs and benefits of discovery are more clearly known.

*Id.* at \*\*32–33, 35, 37, 45–46.

51. *SCR-Tech LLC* arose in the context of a discovery dispute based on backup tapes that had not been produced by the defendants, which the plaintiff contended “may contain relevant information for document custodians.” *SCR-Tech LLC*, 2014 NCBC LEXIS 72, at \*\*23. In response, the “[d]efendants contended that they should not be required to search the universe of tapes at issue because of the extraordinary expense in doing so . . . and [because] the expected utility in the effort, measured by relevant nonduplicative evidence that the search might produce, was limited.” *Id.*

52. In addition, the defendants asserted “that the [p]laintiff should be responsible for at least one-half of the above costs if not the entire cost.” *Id.* at \*\*25. Although the plaintiff claimed it should only pay an amount “which represents over half of the costs fairly associated with actual data restoration[,]” the defendants argued “that all the charges [we]re fairly allocable to the cost of restoration of inaccessible data.” *Id.*

53. The Court ordered as follows:

(1) if Plaintiff wishes for the effort of reviewing the tapes to go forward, it shall be required to advance one-half of the estimated costs of \$140,545; (2) the Court will review a final cost allocation upon presentation as to the utility of the search measured by the degree of non-duplicative potentially relevant information produced as a result.

*Id.* at \*\*28.

54. In reaching this decision, the Court reasoned as follows:

Appreciative of efforts to restrict the possible costs and burdens of the search, the Court nevertheless concludes that it will be better equipped to undertake a final analysis after the search, review, and production has been completed and the extent of nonduplicative information that was uncovered can be measured. It is not unfair that the requesting party should have to balance the strength of its belief that the requested search will bear fruit against their willingness to incur the costs of the effort if their belief proves to be wrong.

*Id.*

55. Although these prior decisions set out principles that are somewhat helpful, they are not completely on point given the unique facts at issue in the present case in connection with the Motion to Allocate Costs. The Court concludes that its primary goal in making an allocation ruling pursuant to Rule 26(b)(1b) must be to

exercise its discretion in a manner that is most consistent with notions of fairness and equity based on the facts and circumstances of this case.

56. In their briefs in support of the Motion to Allocate Costs, Plaintiffs have proposed two ways in which the Court could reallocate costs associated with the electronic discovery that has taken place in this case.

57. Plaintiffs' first proposal is that the Court enter an order "[a]llocating to Defendants the costs to comply with their discovery obligations[,]" which Plaintiffs calculate as amounting to \$192,104.41. (Pls.' Br. Supp. Mot., at 16.) This amount includes "[v]endor fees to cull Defendants' ESI from Defendants' devices" and the "[c]ost to review documents and identify responsiveness from Defendants' devices[,]" which totals \$90,266.50 and reflects the 198.6 hours Plaintiffs' counsel spent on this task. (Pls.' Br. Supp. Mot., at 16; Nelson Aff. ¶¶ 56–57.) Plaintiffs assert that they have "incurred at least \$203,675.82 in connection with these vendor fees[,]" (Nelson Aff. ¶ 54) but that in this first proposal they only seek to recover half of this amount.

58. Plaintiffs' second proposal is that the Court enter an order "[a]llocating to Defendants the costs to respond to [Defendants'] discovery requests[,]" which Plaintiffs contend totals \$189,780.00. (Pls.' Br. Supp. Mot., at 16.) This second amount includes \$29,210 in "[v]endor fees to preserve and cull Plaintiffs' ESI from Plaintiffs' devices" as well as the "[c]ost to review documents and identify responsiveness from Plaintiffs' devices[,]" (Pls.' Br. Supp. Mot., at 8; Nelson Aff. ¶ 49.) Plaintiffs contend "[i]n total, attorneys and staff at Fox Rothschild spent at least 387.9 hours reviewing documents pursuant to Defendants' search requests,

identifying responsiveness, assessing for privilege, and preparing responsive documents for production[.]” which resulted in “at least \$160,570 in expenses in connection with this review and production[.]” which “does not include the more than \$100,000 that Plaintiffs have incurred to host data[.]” (Nelson Aff. ¶¶ 51–52.)

59. Because a significant portion of the costs Plaintiffs seek to have allocated consist of fees incurred by their counsel, the Court, as an initial matter, will address whether any amounts allocated should include attorneys’ fees incurred by Plaintiffs’ attorneys in connection with ESI discovery.

60. It is well established that attorneys’ fees cannot be awarded in North Carolina without statutory authority. *See Stillwell Enter., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289 (1980); *Point Intrepid, LLC v. Farley*, 215 N.C. App. 82, 94–95 (2011) (“If relevant statutes do not permit reimbursement of attorneys’ fees, we may not award attorneys’ fees even on equitable grounds. . . . Unless attorneys’ fees are explicitly mentioned by statute, they are not recoverable as court costs in civil actions.”).

61. Plaintiffs attempt to avoid this rule by arguing that the costs at issue that are based on their attorneys’ review of ESI in this case should not be treated as “attorneys’ fees” in the usual sense. They further contend that—based on the facts of this case—the term “discovery costs” in Rule 26(b)(1b) should be interpreted as encompassing the fees of Plaintiffs’ counsel that were spent in connection with reviewing the ESI contained on the imaged devices of Defendants.

62. The Court is not persuaded. It is not at all clear that the General Assembly intended for the phrase “discovery costs” as used in Rule 26(b)(1b) to include attorneys’ fees. Given the longstanding rule in North Carolina against the award of attorneys’ fees absent clear statutory authority, the Court is of the view that had our legislature desired the result advocated by Plaintiffs here, it would have said so in clearer language.

63. Alternatively, even assuming *arguendo* that such fees are, in fact, subject to allocation under Rule 26(b)(1b), the Court, in its discretion, declines to include them within the universe of allocable costs in this case.

64. The Court next turns its attention to the remainder of the ESI costs at issue with regard to Plaintiffs’ Motion.

65. Based on its careful review of the record in this case, the briefs of the parties, and the arguments of counsel, the Court finds it inequitable that Plaintiffs have had sole responsibility for all ESI costs in this case.

66. Furthermore, the Court cannot ignore the fact that its rulings regarding Plaintiffs’ Motion for Adverse Inference at Summary Judgment and Trial Based on Spoliation of Evidence in its 12 July 2024 Order and Opinion supports Plaintiffs’ position during this litigation that imaging the Defendants’ devices was warranted.

67. As discussed above, Plaintiffs contend that they incurred at least \$203,675.82 in connection with Shelton’s fees. (Nelson Aff. ¶ 54; Ex. A-10.) The Court finds that portions of Shelton’s fees relating to ESI in this case should be subject to allocation among the parties.

68. However, because Plaintiffs agreed in the Stipulation to bear all of the costs associated with the initial imaging of the Former Employees' devices, those costs are not subject to allocation. Nor are any fees incurred by Shelton solely in connection with his performance of tasks as an expert witness in this case for Plaintiffs.

69. In the exercise of its discretion, the Court **CONCLUDES** that allocation of ESI-related costs on a 50%–50% basis between Plaintiffs and Defendants is fair and equitable as to the fees and costs incurred by Shelton with regard to the following tasks:

- a. purchasing external hard drives, flash drives, and other storage devices utilized in connection with both imaging Defendants' devices and downloading information from Defendants' cloud storage accounts, such as OneDrive, "sharefile" documents, and other software platforms;
- b. imaging, decrypting, and processing the Defendants' devices;
- c. downloading information from Defendants' cloud storage accounts, such as OneDrive, sharefile documents, and other software platforms;
- d. conducting or assisting Defendants' counsel with privilege reviews of the ESI contained on the devices, which includes tasks such as "redaction searches," "keyword searches," exporting the results and reports produced from those searches, and delivering such to Defendants' counsel; and



e. costs incurred in deleting documents in connection with Plaintiffs' Motion for Contempt and Sanctions.

70. Finally with regard to Plaintiffs' Motion to Strike paragraphs 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 28, 29, 31, 32, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, and 46 and Exhibit I of the Affidavit of Amiel J. Rossabi, the Motion to Strike is **DENIED** as moot because the Court has not relied on the contested exhibit or any of the contested paragraphs in any of its rulings herein.

**THEREFORE, IT IS ORDERED** as follows:

1. Plaintiffs' Motion to Allocate Costs is **GRANTED** in part and **DENIED** in part.
2. Plaintiffs shall file with the Court **by noon on 5 August 2024** an affidavit (along with any appropriate supporting materials) quantifying the total amount of Shelton's fees and costs paid by Plaintiffs solely for the tasks described above in Paragraph 69 that the Court has deemed to be allocable. None of the costs that the Court has deemed to be non-allocable in Paragraph 68 shall be included. Following its review of said affidavit, the Court will enter an Order specifying the amount that Defendants shall be required to pay Plaintiffs; and
3. Plaintiffs' Motion to Strike is **DENIED** as moot.

**SO ORDERED**, this the 31st day of July, 2024.

/s/ Mark A. Davis  
Mark A. Davis  
Special Superior Court Judge for  
Complex Business Cases