

STATE OF NORTH CAROLINA
CALDWELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 945

TREE SPROUT, LLC f/k/a
COMMERCIAL LIGHTING
SERVICES, LLC; AMP SERVICES,
LLC; and AUSTIN POWELL,

Plaintiffs,

v.

BRILLIANCE LED, LLC,

Defendant,

and

BRILLIANCE LED, LLC and
BRILLIANCE HOLDCO, LLC,

Counterclaim
Plaintiffs/Third-
Party Plaintiffs,

v.

TREE SPROUT LLC f/k/a
COMMERCIAL LIGHTING
SERVICES, LLC; AMP SERVICES,
LLC; AUSTIN MCCOY POWELL
f/k/a CLYDE BURL POWELL,

Counterclaim
Defendants.

**ORDER ON BRILLIANCE'S
MOTION TO MODIFY THE CASE
MANAGEMENT ORDER AND 12
AUGUST 2024 BCR 10.9 DISPUTE
SUMMARY**

1. **THIS MATTER** is before the Court on Defendant/Counterclaim Plaintiff/Third-Party Plaintiff Brilliance LED, LLC and Counterclaim

Plaintiff/Third-Party Plaintiff Brilliance Holdco, LLC's (collectively "Brilliance") Motion to Modify the Case Management Order (the "Motion"), (ECF No. 60), and Brilliance's Business Court Rule ("BCR") 10.9 dispute summary submitted to the Court's law clerks via e-mail and copying all counsel of record on 12 August 2024 (the "Dispute Summary"). Plaintiffs/Counterclaim Defendants Tree Sprout, LLC (f/k/a Commercial Lighting Services, LLC ("CLS")), AMP Services, LLC ("AMP"), and Austin Powell ("Powell"; collectively, "Plaintiffs") submitted their response to the Dispute Summary on 16 August 2024.

2. The Court held a Webex video conference (the "Hearing") to consider the Motion and Dispute Summary on 28 August 2024 at which all parties were represented by counsel. This Order memorializes the Court's oral rulings at the Hearing.

3. The Case Management Order (the "CMO"), as amended 3 June 2024, (ECF No. 54), set the following case management deadlines: (i) 27 August 2024 to complete fact discovery and for the party bearing the burden of proof to make expert disclosures and provide expert reports; (ii) 30 September 2024 for the opposing party to make expert disclosures and provide expert reports; (iii) 29 October 2024 to complete expert discovery; and (iv) 2 December 2024 for post-discovery dispositive motions.¹

4. Brilliance seeks through the Motion a ninety-day extension of the above deadlines for the following reasons:

¹ (ECF No. 54 ¶ 3).

- a. Brilliance's lead counsel, Bryan P. Stevens, is also lead counsel in a four-week final hearing that is scheduled to commence on 4 September 2024;
- b. Brilliance's counsel, Clayton S. Carter, is expecting a child in early September and will be taking protected leave through the end of the current discovery period;
- c. Brilliance alleges that Plaintiffs' responses to various discovery requests for production ("RFPs") are deficient and must be remedied before deposition discovery is properly initiated; and
- d. On 5 June 2024, Powell filed a second lawsuit against Brilliance LED, LLC, *Austin Powell v. Brilliance LED, LLC*, 24-CVD-728, in Caldwell County District Court alleging that Brilliance LED, LLC breached a lease agreement which relates to the underlying causes of action in this case, and which Brilliance seeks to transfer to this Court and consolidate with this action.

5. Plaintiffs oppose the Motion, and contend in their Response, (ECF No. 64), that, despite ample opportunity, Brilliance has failed to exercise reasonable diligence to conduct written and deposition discovery since the CMO was first entered on 16 January 2024, (ECF No. 29). Plaintiffs acknowledge, however, that they cancelled Powell's deposition scheduled for 10 June 2024 despite Brilliance's readiness to proceed.

6. Based on the Court's careful review of the parties' submissions, it appears to the Court that the parties, while grossly underestimating the time necessary for

the completion of discovery twice in this action, have nonetheless diligently pursued written and deposition discovery for the past several months and that scheduling difficulties and the current discovery dispute have prevented the parties from completing all remaining discovery. Accordingly, the Court, in the exercise of its discretion, finds good cause to grant Brilliance's Motion, but because the discovery period shall now extend to twice the period the parties originally proposed, the parties should take notice that the Court does not intend to further extend the case management deadlines absent exceptional good cause.

7. As to Brilliance's Dispute Summary, Brilliance argues that Plaintiffs have willfully failed to comply with their obligations under the discovery rules to produce all relevant, responsive, non-privileged documents in their possession, custody, and control. Plaintiffs variously contend in response that (i) the requested documents have already been produced in discovery, (ii) the requested documents do not exist, (iii) Plaintiffs do not have control over certain personal email accounts used to conduct business on their behalf, and (iv) certain issues are not discoverable. The Court will address Plaintiffs' response to each RFP in turn.

8. RFP 34 requests "all documents and communications identifying the current location of any funds Powell received in connection with the Transaction, including the location of the \$7,125,000 in cash consideration Powell received in connection with the transaction." Brilliance contends that it should be permitted to inquire of the location of the transaction proceeds to assist its collection efforts as against other potential claimants to the funds. Brilliance thus seeks this information not to

establish liability or damages or to rebut defenses but instead to assist in the execution and satisfaction of any judgment they may obtain in this action. Such discovery is improper at this stage of the litigation and in the current procedural context. The Court, therefore, will not require Plaintiffs to provide a further response or to produce documents in connection with RFP 34 at this time.

9. RFP 35 requests production of Powell's bank statements, credit card statements, retirement account statements, tax returns, and net wealth for purposes of computing punitive damages. While Brilliance has alleged it is entitled to punitive damages, whether the information Brilliance seeks is discoverable at this stage and on what showing has not yet been determined by our appellate courts. The Court will therefore exercise its discretion to defer its ruling at this time and order supplemental briefing on this issue.

10. RFP 53 requests login credentials for any bookkeeping, accounting, or other electronic software used by Plaintiffs to maintain their books and records prior to the 7 September 2022 closing date. Plaintiffs agree with Brilliance that the Asset Purchase Agreement ("APA") entitles Brilliance to possession of accounting software related to the operation of the CLS and AMP business entities. The parties also appear to agree that any information concerning business entities unrelated to this litigation which may be contained in Powell's QuickBooks accounts is not discoverable and should be excluded from Brilliance's access. Since Brilliance contends that QuickBooks permits accounts to be severed, the Court shall order the parties to meet and confer to determine if the accounting records of these entities are

severable and, if so, to provide access to Brilliance in accordance with the terms of the APA and this Order.

11. RFPs 42, 44–48, 55, 57, 58, 60, 107, and 108 request various financial statements, documents related to employees of CLS, AMP, and Powell, projects on which Plaintiffs placed bids, and documents related to Plaintiffs’ business relationships with various third parties. While Plaintiffs have agreed to utilize third-party software to conduct additional searches of their document repository to identify responsive documents, they maintain that they cannot access emails sent by their employees from personal email accounts and that they need not produce responsive documents that are already in Brilliance’s possession. Neither argument has merit.

12. First, Rule 34(a) of the North Carolina Rules of Civil Procedure expressly authorizes requests for matters “in the possession, custody or control of the party upon whom the request is served.” N.C.G.S. § 1A-1, Rule 34(a). Such documents and data “are deemed to be within the possession, custody or control of a party for purposes of Rule 34 if the party has actual possession, custody or control of the materials or has the legal right to obtain the documents on demand.” *Lowd v. Reynolds*, 205 N.C. App. 208, 214–15 (quoting *Pugh v. Pugh*, 113 N.C. App. 375, 380–81 (1994)). As the Court of Appeals has recently made clear, an employer “clearly [has] possession, custody, or control over the email accounts of its own employees.” *Dunhill Holdings, LLC. v. Lindberg*, 282 N.C. App. 36, 63 (2022). See also, e.g., *Bulldog Erectors, Inc. v. Flatiron Constructors Inc.*, No. 2:22-CV-0008-M, 2023 U.S. Dist. LEXIS 236982, at *10 (E.D.N.C. Sept. 13, 2023) (noting that “[t]he use by parties

of private email accounts for business purposes does not lower the threshold for reasonable inquiries, and, if anything, increases it.”); *Int’l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, No. 3:12-CV-1058-SI, 2018 U.S. Dist. LEXIS 204118, at *11 (D. Or. Dec. 3, 2018) (“The Court acknowledges, however, that a company’s officer or agent should not be able to avoid the rules of discovery by using personal email, which is in the custody and control of that officer or agent, for work purposes.”). Accordingly, Plaintiffs are ordered to produce all relevant, responsive, non-privileged documents from their current employees’ personal email accounts and from any other person or agent over whom Plaintiffs have control.

13. Second, Rule 26 makes plain that it is not “grounds for objection that the examining party has knowledge of the information as to which discovery is sought.”² Accordingly, Plaintiffs may not withhold production of relevant, responsive, non-privileged documents on grounds that Brilliance already has those documents in its possession, custody, or control. *See, e.g., Westchester Surplus Lines Ins. Co. v. Clancy & Theys Constr. Co.*, 2013 WL 6058203, at *7 (E.D.N.C. 2013) (“[T]he fact that [a party’s counsel] may already possess . . . some of the documents and information included in [his] discovery requests . . . does not excuse the [responding party’s] failure to fully respond to the discovery requests”) (quoting *Rivers v. Asplundh Tree Expert Co.*, No. 5:08cv61/RS/EMT, 2008 WL 5111300, at *4 (N.D. Fla. Dec. 3, 2008); *Beach Mart, Inc., v. L & L Wings, Inc.*, 302 F.R.D. 396, 410 (E.D.N.C. 2014) (holding that even where a party already has or could otherwise acquire documents, the

² N.C.G.S § 1A-26(b)(1).

responding party must still provide them). Accordingly, the Court shall order Plaintiffs to produce all relevant, responsive, non-privileged documents that are within their possession, custody, or control in connection with these requests for production.

14. Shortly after the Conference, on 30 August 2024, Shell R. Pearce, moved to withdraw as attorney of record for Plaintiffs. (ECF No. 66.) On 3 September 2024, David Redding, Tyler Rhoades, Alec Jalovec, and TLG Law also moved to withdraw as counsel of record for Plaintiffs. (ECF No. 67.) On 5 September 2024, the Court granted both motions to withdraw, (ECF No. 68), leaving Plaintiffs without counsel in this matter at this time. Plaintiffs' withdrawing counsel has requested, with Brilliance's counsel's consent, that the compliance and briefing deadlines the Court determined at the Conference be extended by thirty days so that Plaintiffs may have sufficient time to retain new counsel before they are required to comply. In light of the parties' consent, and for good cause shown, the Court shall exercise its discretion to extend the deadlines determined at the Conference by thirty days as provided in this Order.

15. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

- a. The parties shall file supplemental briefs on the discoverability of the information sought in RFP 35 in accordance with BCR 10.9(c). The parties' opening briefs shall be due on or before 7 October 2024, and the parties' response briefs shall be due on or before 11 October 2024.

- b. The parties shall meet, confer, and attempt to reach agreement on when and how they will transfer Plaintiff's accounting software access to Brilliance in accordance with the terms of the APA and this Order and submit a status report on their efforts by email to the Court's law clerks no later than 7 October 2024.
- c. The parties shall have through and including 28 October 2024 to produce all documents ordered to be produced pursuant to this Order.
- d. The parties shall have through and including 5 February 2025 to complete fact discovery.
- e. The parties shall have through and including 7 April 2025 to conduct expert discovery.
- f. The party bearing the burden of proof on an issue shall make expert disclosures on or before 5 February 2025, and the opposing party shall make any expert disclosures on or before 7 March 2025.
- g. If the parties elect to exchange expert reports as allowed by Rule of Civil Procedure 26(b)(4), the party bearing the burden of proof on an issue shall provide its expert report(s) on or before 5 February 2025, and the opposing party shall provide its expert report(s) on or before 7 March 2025.
- h. The parties shall file all post-discovery dispositive motions on or before 7 May 2025.

- i. Except as provided above, the Case Management Order entered on 16 January 2024 (ECF No. 29), and as subsequently amended on 3 June 2024, (ECF No. 54), shall not be affected by the entry of this Order.

SO ORDERED, this the 5th day of September, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge