

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 3612

ENNIS-FLINT, INC.,

Plaintiff,

v.

ROBERT WILLIAM GREER and GP
INNOVATIONS, LLC,

Defendants.

**SUPPLEMENTAL ORDER #9
REGARDING FORENSIC
EXAMINATION**

1. For reasons documented in prior orders, it became necessary to conduct a forensic examination of multiple devices owned by Defendants, and because of the possible implication of privileged information, to have such examination conducted by a mutually-retained expert not under the sole and direct authority of the party opposing the privilege and without authority to release information for which a claim of privilege was made without court authority. The parties jointly retained Envista Forensics (“Envista”) to conduct the forensic examination, and the Court has supervised the examination and any release of information resulting from that examination. Ultimately, Envista provided to the Court a listing of 5,436 files that Envista identified utilizing the approved search terms. (See Supplemental Order #3 Regarding Forensic Examination ¶ 2, ECF No. 194). Defendants do not oppose release of a large portion of those files to Plaintiff, but as to others contend either that they are not responsive to any issue in this litigation or should be shielded from production because they contain privileged or protected confidential information.

2. The Court held a status conference on October 21, 2019 to finalize the process for determining which of these files should be produced to Plaintiff and if and how the various devices should be returned to Defendants. The 5,436 files identified by Envista fall within five separate categories:

- a. **Responsive Documents.** Defendants have identified 2,159 files as “responsive” documents for which Defendants have no objection to their production to Plaintiff. A separate question arises as to whether Defendants are entitled to continued possession of these files because of concerns that they contain Plaintiff’s trade secrets and/or confidential information. The parties held a conference call with Envista October 24, 2019, as a result of which Plaintiff confirms that it does not agree that Envista be allowed to return these files to Defendants. The Court directs that within ten (10) calendar days of the entry of this Order, Envista shall produce these 2,159 files files to Plaintiff and the Court (not Defendants) via an electronic secure file share by sending a secure link via email. This production should be entirely separate from all other productions.
- b. **Potentially Privileged Documents.** Defendants identified 345 files as protected (or possibly protected) by the attorney-client privilege, including 94 files for which even the filenames or file paths have not been shared with Plaintiff due to Defendants’

contention that these names and paths themselves are privileged and/or reveal the nature of the privileged information. (See Supplemental Order #6 Regarding Forensic Examination ¶ 5, ECF No. 199). Plaintiff contends that it cannot, based on information provided to it to date, determine whether to challenge Defendants' assertion of privilege. The Court directs as follows:

- i. Within ten (10) calendar days of the entry of this Order, Envista shall produce these 345 files to the Court and to Defendants (not Plaintiff) via electronic secure file share by sending a secure link via email. This production should be entirely separate from all other productions. Defendants shall promptly confirm to Plaintiff and the Court their receipt of this document production.
- ii. Within fourteen (14) calendar days of Defendants' receipt of the foregoing document production:
 1. With regards to the 94 files mentioned above, Defendants shall provide in writing, on a document by document basis, to both the Court and Plaintiff information adequate to demonstrate: Defendants' justification for asserting the attorney-client privilege. The Court will then review each of the 94 documents *in camera* to determine whether the

documents should be withheld from production to Plaintiff.

2. With regards to the remaining 251 files subject to a claim of privilege, Defendants shall provide in writing, on a document by document basis, to both the Court and Plaintiff the following information: (a) the name of the sender and/or creator(s) of the document, identifying all attorneys with the designation “Esq.” (for example, “John Smith, Esq.”); (b) the name of all recipients of the document (whether on the “to,” “cc,” or “bcc” line or otherwise), identifying all attorneys with the designation “Esq.” (for example, “John Smith, Esq.”); and (c) Defendants’ justification for asserting the attorney-client privilege.
 - a. Plaintiff shall provide this information within ten (10) calendar days from receipt of the files from Envista;
 - b. Plaintiff shall have ten (10) calendar days of its receipt of Defendants’ statement in order to challenge Defendants’ assertion of privilege.

c. **Documents Potentially Containing Confidential Information of Defendants.** Defendants have identified 847 files that may contain their trade secrets or other confidential business information, including 277 files for which Defendants redacted the filenames or file paths from the Envista index provided to Plaintiff. Following the parties further communications including emails on October 23, 2019 and a October 24, 2019 conference call with Envista, the Court orders:

- i. Within ten (10) calendar days of the entry of this Order, Envista shall produce these 847 files to the Court and to Defendants (not Plaintiff) via electronic secure file share by sending a secure link via email. This production shall be entirely separate from all other productions. Defendants shall promptly confirm to Plaintiff and the Court their receipt of this document production.
- ii. Within fourteen (14) calendar days of Defendants' receipt of the foregoing document production, Defendants shall provide in writing to both the Court and Ennis-Flint the following information: (a) identification of all documents that Defendants agree can be produced to Plaintiff on a "Prosecution Bar" basis per the terms of the Protective Order in this matter; and (b) for any remaining document,

Defendants' justification for asserting that these documents are confidential and should not be shared with Plaintiff even on a "Prosecution Bar" basis per the terms of the Protective Order.

iii. The Court shall then consider how to resolve any remaining disagreement.

d. **"Unknown" documents.** Defendants have identified 289 files as "unknown," meaning that without a review of the documents themselves, Defendants cannot from Envista's index alone determine if they have any objection to these files being produced to Plaintiff.

i. With regards to these 289 files, Plaintiff has identified the following files—by item number listed in the 3rd column on Exhibit D to the Court's Supplemental Order #6—which should be produced to Defendants and the Court (not Plaintiff) via electronic secure file share by sending a secure link via email:

1. 191300
2. 182206
3. 157071
4. 441181
5. 437718

6. 437698
7. 437702
8. 437703
9. 437704
10. 437706
11. 451096
12. 448746
13. 448699
14. 448702
15. 448705
16. 448779
17. 448710
18. 448693
19. 448694
20. 448709
21. 448697
22. 448877
23. 448878
24. 448879
25. 448880
26. 407361
27. 409336

28. 409338

29. 409340

ii. This production shall be entirely separate from all other productions. Defendants shall promptly confirm to Plaintiff and the Court their receipt of this document production.

iii. Within seven (7) calendar days of Defendants' receipt of the foregoing document production, Defendants shall provide the Court with any written objections to Envista producing these files to Plaintiff. For any requested files to which a timely objection is provided by Defendants, the Court shall review such files *in camera*. The Court will then enter an order as to which of these documents Envista should produce to Plaintiff.

e. **Personal/Unrelated documents.** Defendants have identified 1,796 files they contend are personal and unrelated to the litigation. A listing of those files was made available for review by Plaintiff's outside counsel only, who identified two sub-categories of these documents for further review via letter dated August 23, 2019:

i. One category consists of 29 files that the Court has now reviewed *in camera*. As stated at the October 21, 2019

status conference, the Court determined eleven (11) are personal and unrelated to the litigation. Defendants do not object to the remaining eighteen (18) documents being provided to Plaintiff, with the understanding that they shall not be used except for purposes of this litigation. Envista shall then produce the following documents to Plaintiff via electronic secure file share by sending a secure link via e-mail:

1. 83
2. 136
3. 275
4. 963
5. 993
6. 1070
7. 1075
8. 1076
9. 1195
10. 1318
11. 1319
12. 1344
13. 1347
14. 1364

15. 1400

16. 1401

17. 1402

18. 1692

ii. This production shall be entirely separate from all other productions.

iii. The second category includes 154 files which represent contact information for various entities and individuals, including current employees of Plaintiff. Defendants had no objection to the production of these files to Plaintiff, and the Court produced paper copies of these files to Plaintiff at the October 21, 2019 status conference. Plaintiff agreed not to communicate about this litigation with any of the third parties listed in these files without first notifying the Court and the Defendants, but this agreement does not in any way impact Ennis-Flint's ability to (a) communicate about this litigation with its current employees (to the extent permitted by the Protective Order in this matter), or (b) communicate about and conduct its business dealings in the ordinary course of business.

3. As agreed by the parties, within ten (10) calendar days of this Order, Envista shall forensically wipe and return to Defendants the iPhone 7+ and the portable USB hard drive that are currently in Envista's possession.

4. As for Defendants' laptop that is currently in Envista's possession, within five (5) calendar days of this Order, Envista shall provide to Plaintiff and Defendants a listing of the names of folders on the laptop.

a. Within seven (7) calendar days of Defendants' receipt of the foregoing list, Defendants shall identify in writing to Plaintiff the specific folders that Defendants suggest Envista should either (a) preserve or (b) permanently delete, by Envista prior to the laptop being returned to Defendants.

b. Within seven (7) calendar days of Plaintiff's receipt of Defendants' foregoing written identification of laptop folders to be preserved or permanently deleted, Plaintiff shall confer with Defendant as to any further procedure prior to Envista's return of the laptop to Defendants.

5. A copy of this Order shall be provided to Envista so that it can prepare the identified files.

IT IS SO ORDERED this the 30th day of October, 2019.

/s/ James L. Gale

James L. Gale
Senior Business Court Judge