

Window World of Baton Rouge, LLC v. Window World, Inc.; Window World of St. Louis, Inc. v. Window World, Inc., 2020 NCBC Order 2.

STATE OF NORTH CAROLINA  
WILKES COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
15 CVS 1

WINDOW WORLD OF BATON  
ROUGE, LLC; WINDOW WORLD OF  
DALLAS, LLC; WINDOW WORLD  
OF TRI STATE AREA, LLC; and  
JAMES W. ROLAND,

Plaintiffs,

v.

WINDOW WORLD, INC.; WINDOW  
WORLD INTERNATIONAL, LLC;  
and TAMMY WHITWORTH,

Defendants.

**ORDER ON THE WINDOW WORLD  
DEFENDANTS' MOTION TO STAY  
AND PLAINTIFFS' MOTION TO  
COMPEL**

WILKES COUNTY

15 CVS 2

WINDOW WORLD OF ST. LOUIS,  
INC.; WINDOW WORLD OF  
KANSAS CITY, INC.; WINDOW  
WORLD OF SPRINGFIELD/PEORIA,  
INC.; JAMES T. LOMAX III;  
JONATHAN GILLETTE; B&E  
INVESTORS, INC.; WINDOW  
WORLD OF NORTH ATLANTA,  
INC.; WINDOW WORLD OF  
CENTRAL ALABAMA, INC.;  
MICHAEL EDWARDS; MELISSA  
EDWARDS; WINDOW WORLD OF  
CENTRAL PA, LLC; ANGELL P.  
WESNERFORD; KENNETH R.  
FORD, JR.; WORLD OF WINDOWS  
OF DENVER, LLC; RICK D. ROSE;  
CHRISTINA M. ROSE; WINDOW  
WORLD OF ROCKFORD, INC.;  
WINDOW WORLD OF JOLIET, INC.;  
SCOTT A. WILLIAMSON;  
JENNIFER L. WILLIAMSON; BRIAN  
C. HOPKINS; WINDOW WORLD OF  
LEXINGTON, INC.; TOMMY R.  
JONES; JEREMY T. SHUMATE;

WINDOW WORLD OF PHOENIX  
LLC; JAMES BALLARD; and TONI  
BALLARD,

Plaintiffs,

v.

WINDOW WORLD, INC.; WINDOW  
WORLD INTERNATIONAL, LLC;  
and TAMMY WHITWORTH,  
individually and as trustee of the  
Tammy E. Whitworth Revocable  
Trust,

Defendants.

1. **THIS MATTER** is before the Court on (i) Plaintiffs’ Motion to Compel Defendants Window World, Inc. and Window World International, LLC (the “WW Defendants”) to comply with Plaintiffs’ request for inspection under Rule 34 of the North Carolina Rules of Civil Procedure (“Rule(s)”) (“Motion to Compel”) filed on October 15, 2019, (ECF No. 739),<sup>1</sup> and (ii) the WW Defendants’ Motion to Stay Plaintiffs’ Motion to Compel Rule 34 Request for Inspection (“Motion to Stay”) (together with the Motion to Compel, the “Motions”) filed on November 7, 2019, (ECF No. 749).

## I.

### FACTUAL AND PROCEDURAL HISTORY

2. On May 4, 2018, Plaintiffs served on the WW Defendants a Rule 34 request for inspection of “any server” on the WW Defendants’ property or otherwise

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<sup>1</sup> For ease of reference, unless indicated otherwise, all ECF citations in this Order are to the Court’s electronic docket in 15 CVS 1. In addition, because Plaintiffs have not yet filed a redacted, public version of their sealed Motion to Compel, for purposes of this Order, the Court will refer to the redacted, public version of Plaintiffs’ supporting brief. (ECF No. 747.)

in their possession or control that has, or may have, currently or in the past, “housed, stored and/or contained emails sent or received by Leon Whitworth, Marie Whitworth, Todd Whitworth, Blair Ingle, Sean Gallagher and/or Rick Collins, including the email accounts of the same” for the purpose of “determin[ing] if any of those emails are recoverable and to recover information that will illuminate the circumstances under which such emails and email accounts apparently were deleted or lost” (the “Inspection Request” or “Request”). (Index to Pls.’ Br. Supp. Mot. to Compel WW’s Compliance with Rule 34 Request for Inspection Ex. J, ECF No. 747.1.)<sup>2</sup>

3. The WW Defendants objected to Plaintiffs’ Request on June 6, 2018, and the parties had no further communication concerning the Inspection Request for over a year. (Defs. Window World, Inc. & Window World Int’l, LLC’s Br. Supp. Mot. to Stay Pls.’ Mot. to Compel Rule 34 Request for Inspection 3 [hereinafter “Defs.’ Br. Supp. Mot. to Stay”], ECF No. 750.)

4. On August 16, 2019, the Court entered its Order and Opinion on Plaintiffs’ Privilege Motions, Window World Defendants’ Motion to Strike, and Parties’ Rule 53(g) Exceptions to Special Master’s Report (“August 16, 2019 Order”) in which the Court found that the WW Defendants had waived privilege and/or work-product immunity as to certain “Challenged Claw-back Documents” and “Sample Log Documents,” as each is defined in the August 16, 2019 Order, inappropriately claimed privilege or work-product immunity over numerous documents, and failed

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<sup>2</sup> Plaintiffs filed the index to their brief in support of the Motion to Compel under seal. (ECF No. 741.) For purposes of this Order, the Court refers to the public, redacted version. (ECF No. 747.1.)

to prepare privilege logs consistent with the North Carolina Rules of Civil Procedure. The Court entered sanctions against the WW Defendants for their discovery misconduct. (ECF Nos. 724, 725.)<sup>3</sup>

5. On September 12, 2019, Plaintiffs' counsel sent a letter to counsel for the WW Defendants raising, among other things and for the first time since June 2018, the Inspection Request.

6. On September 13, 2019, the WW Defendants filed a Notice of Appeal to the Supreme Court of North Carolina (the "Appeal"), (ECF No. 728), appealing, among other things, the sealed and public versions of the Court's August 16, 2019 Order.<sup>4</sup>

7. In light of the Appeal, the parties filed a Joint Consent Motion to Stay Deadlines and Directives Within and Compliance With the Court's August 16, 2019 Order and Opinion seeking a stay of various deadlines related to the review and production of certain documents the WW Defendants had withheld as privileged, the preparation and service of revised privilege logs, and the submission of Plaintiffs' fee petition and supporting materials. (ECF No. 729.) On September 16, 2019, the Court entered the requested stay. (ECF No. 731.)

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<sup>3</sup> The August 16, 2019 Order was filed under seal on August 16, 2019, (ECF No. 724), and publicly on August 23, 2019, (ECF No. 725). For purposes of this Order, the Court refers to the public version.

<sup>4</sup> The Appeal also included (i) the sealed and public versions of the Special Master's Discovery Report signed on December 31, 2018 and filed on the docket on January 3, 2019 and January 11, 2019, respectively, (ECF Nos. 681, 684); (ii) the Court's September 26, 2018 Order and Opinion on Window World Defendants' Motion to Compel Plaintiffs to Produce Documents Supporting Their Alleged Damages, Motion to Compel Plaintiffs and/or Metriwise, Inc. to Produce Documents or Provide Testimony, and Motion to Strike Plaintiffs' Objections to Third-Party Subpoenas, (ECF No. 589); (iii) the Court's December 19, 2018 Order and Opinion on Window World, Inc.'s Motion to Compel Net Worth Information, (ECF No. 676); and (iv) the Court's January 25, 2019 Order and Opinion on Window World Defendants' Motion for Reconsideration, (ECF No. 688).

8. At the Court's request, the parties met and conferred regarding the impact of the Appeal on all pending matters and submitted a joint status report ("Joint Status Report") on September 20, 2019. (ECF No. 732.) In their Joint Status Report, the parties identified a dispute concerning Plaintiffs' Inspection Request. (Joint Status Report 4.)

9. After obtaining the Court's permission, Plaintiffs filed their Motion to Compel on October 15, 2019 through which Plaintiffs seek a forensic examination of the WW Defendants' "servers and other relevant digital assets" by a "third-party digital forensics examiner" to determine whether any data is recoverable from six e-mail accounts that the WW Defendants claim have been irretrievably lost and, if not, when and how that data was lost. (Pls.' Br. Supp. Mot. to Compel WW's Compliance with Rule 34 Request for Inspection 2, 9 [hereinafter "Pls.' Br. Supp. Mot. to Compel"], ECF No. 747.) The WW Defendants filed their Motion to Stay Plaintiffs' Motion to Compel on November 7, 2019. After full briefing, the Court held a hearing on the Motions on December 6, 2019. The Motions are now ripe for resolution.

10. The Court will first address the Motion to Stay to determine whether this Court has the authority to rule on the Motion to Compel pending the Appeal.

## II.

### MOTION TO STAY

11. Under N.C.G.S. § 1-294, "[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon

the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure[.]” The same holds true for an appeal of “an appealable interlocutory order[.]” thus staying all further proceedings in connection with that order. *Veazey v. Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

12. However, “the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” N.C.G.S. § 1-294; see *Rutherford Elec. Mbrshp. Corp. v. Time Warner Entm’t/Advance-Newhouse P’ship*, 2014 NCBC LEXIS 34, at \*5–6 (N.C. Super. Ct. July 25, 2014) (“[A] trial court retains authority . . . to handle matters that do not raise a ‘question involved in the then-pending appeal,’ . . . or to otherwise decide issues that will not be before the appellate court for review and decision on the appeal.”); *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 219 N.C. App. 213, 723 S.E.2d 569, 572 (2012) (“the lower court . . . retains jurisdiction . . . to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from”) (citation omitted).

13. The parties agree that the August 16, 2019 Order is immediately appealable. Their dispute centers on whether Plaintiffs’ Motion to Compel is precluded by section 1-294 as a further proceeding “upon the judgment appealed from, or upon the matter embraced therein.” N.C.G.S. § 1-294. The WW Defendants primarily contend that consideration of the Motion to Compel is automatically stayed under section 1-294 because the Motion involves the same privilege and waiver issues that are presented by the Appeal of the August 16, 2019

Order.<sup>5</sup> Alternatively, the WW Defendants contend that the Court should exercise its discretion to enter a stay pending the Appeal. (Defs. Window World, Inc. & Window World Int'l, LLC's Mot. to Stay Pls.' Mot. to Compel Rule 34 Request for Inspection 2–4 [hereinafter "Defs.' Mot. to Stay"], ECF No. 749.)

14. The Court finds neither argument persuasive. First, the WW Defendants' contention that "proper procedures for resolving claims of privilege and rectifying inadvertent disclosure" are present in both the Appeal and the Motion to Compel assumes too much. (Defs.' Br. Supp. Mot. to Stay 7.) To the contrary, should the Court grant the Motion to Compel and order a forensic examination of the WW Defendants' servers, the examination and resulting production would neither require the WW Defendants to waive privilege or produce privileged documents nor require the Court to resolve issues relating to privilege or inadvertent disclosure. Plaintiffs seek only to have an independent expert perform a forensic examination to determine whether "any of the purportedly lost emails are in fact recoverable" and, consistent with *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 832 S.E.2d 223 (N.C. Ct. App. 2019), to have the Court enter a protocol that would, among other things, permit the WW Defendants to review all documents identified in the forensic examination and withhold from disclosure any documents they consider to

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<sup>5</sup> The WW Defendants also contend that (i) under Rule 37(a), Plaintiffs' Motion to Compel improperly expands the scope of the Inspection Request and seeks to re-open the fact discovery period fifteen months after its close on July 15, 2018; (ii) Plaintiffs' forensic examination request effectively seeks sanctions in addition to those in the August 16, 2019 Order now currently on appeal for the same conduct; and (iii) certain issues in the August 16, 2019 Order now on appeal relating to Sean Gallagher's alleged unauthorized disclosure of privileged information to Plaintiffs must be determined prior to the Motion to Compel. The Court has considered and, in the exercise of its discretion, rejects each of these arguments as a basis to grant the Motion to Stay.

be privileged. (Pls.' Resp. Br. in Opp'n to WW's Mot. to Stay 4, 6, ECF No. 773.)<sup>6</sup> In short, nothing in Plaintiffs' requested relief invites the Court to compel the WW Defendants to disclose privileged material to Plaintiffs or otherwise interpret, apply, or modify the August 16, 2019 Order. Because resolution of Plaintiffs' Motion to Compel does not in any way impact the August 16, 2019 Order or the matters embraced therein, the Court concludes that section 1-294 does not stay the Court's consideration of the Motion.

15. The same considerations militate against a discretionary stay. Moreover, because Plaintiffs are willing to pay the initial cost of the forensic examination, the WW Defendants have failed to show prejudice, an important consideration in evaluating any request for a discretionary stay pending appeal. *See, e.g., Red Valve, Inc. v. Titan Valve, LLC*, 2019 NCBC LEXIS 108, at \*18 (N.C. Super. Ct. Dec. 17, 2019) (noting that a trial court should consider "potential prejudice to the appellant" in evaluating a discretionary stay). As a result, the Court declines to enter a discretionary stay pending Appeal on this record.

16. The Court now turns to Plaintiffs' Motion to Compel.

### III.

#### MOTION TO COMPEL

##### A. Legal Standard

17. Under Rule 34(a):

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<sup>6</sup> Plaintiffs filed their response brief in opposition to the WW Defendants' Motion to Stay under seal. (ECF No. 766.) For purposes of this Order, the Court refers to the public, redacted version. (ECF No. 773.)



Any party may serve on any other party a request . . . to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

N.C. R. Civ. P. 34(a).

18. “Under North Carolina’s liberal discovery rules, parties are permitted to obtain discovery on any relevant, nonprivileged matter that ‘appears reasonably calculated to lead to the discovery of admissible evidence.’ ” *Transatlantic Healthcare, LLC v. Alpha Constr. of the Triad, Inc.*, 2017 NCBC LEXIS 21, at \*37 (N.C. Super. Ct. Mar. 9, 2017) (quoting N.C. R. Civ. P. 26(b)(1)).

19. “[I]f a party, in response to a request for inspection submitted under Rule 34, . . . fails to permit inspection as requested, the discovering party may move for . . . an order compelling inspection *in accordance with the request.*” N.C. R. Civ. P. 37(a)(2) (emphasis added). “The party resisting discovery bears the burden of showing why the motion to compel should not be granted[]” and must make a “particularized showing” rather than “conclusory or generalized statements.” *Nat’l Fin. Partners Corp. v. Ray*, 2014 NCBC LEXIS 50, at \*26 (N.C. Super. Ct. Oct. 13, 2014) (citation omitted). Whether to grant or deny a motion to compel discovery “is within the trial court’s sound discretion and will not be reversed absent an abuse of discretion.” *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 433, 617 S.E.2d 664, 668 (2005) (citation omitted).

B. Analysis

20. Plaintiffs ask the Court to order a forensic examination by a third-party digital forensic examiner of the WW Defendants' servers and other relevant digital assets to determine whether any data is recoverable from six e-mail accounts that the WW Defendants claim are irretrievably lost and, if not, to ascertain when and how that data was lost. (Pls.' Br. Supp. Mot. to Compel 2, 9.) If such data is recoverable, Plaintiffs ask that the WW Defendants produce responsive, non-privileged documents. (Pls.' Br. Supp. Mot. to Compel 23–24.)

21. After careful consideration, the Court concludes, in the exercise of its discretion, that Plaintiffs have failed to carry their burden on their Motion to Compel.

22. First, Plaintiffs served the Inspection Request on May 4, 2018 and received objections on June 6, 2018 yet failed to take any action to press the Request until they raised the issue to the WW Defendants and ultimately to the Court in September 2019, long after the close of fact discovery on July 15, 2018. Plaintiffs' failure is all the more troubling considering that Plaintiffs (i) knew of the loss of the six e-mail accounts in 2015 and early 2016, (ii) became fully aware of the WW Defendants' objections six weeks before the close of fact discovery but did not seek to advance a timely Business Court Rule 10.9 request, (iii) did not include the Request in the parties' Joint Motion for Leave to Complete Fact Discovery Outside of Deadline filed on July 16, 2018, (ECF No. 506), (iv) did not raise the issue to the Court at the all-day August 22, 2018 hearing on numerous discovery motions, and

(v) at no time have sought to extend the discovery period to permit the requested inspection. Plaintiffs' contention that its delay should be excused because of the then-pending privilege motions that are now on appeal assumes a connection between the Inspection Request and the appealed privilege issues that simply does not exist.

23. Moreover, Plaintiffs' Motion to Compel seeks to require a forensic examination of the WW Defendants' servers and digital assets and thus exceeds the scope of Plaintiffs' Inspection Request, which was limited to "any server." (Defs. Window World, Inc. & Window World Int'l, LLC's Corrected Br. in Opp'n to Pls.' Mot. to Compel Window World's Compliance with Rule 34 Request for Inspection 12–13, ECF No. 761.)<sup>7</sup> Because Rule 37(a)(2) permits the Court to compel inspection only "in accordance with the [Rule 34] request," Plaintiffs' Motion to Compel is overbroad and will not be enforced for this separate reason.

24. For each of these reasons, therefore, the Court concludes, in the exercise of its discretion, that Plaintiffs' Motion to Compel should be denied.

#### IV.

#### CONCLUSION

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

- a. The WW Defendants' Motion to Stay is hereby **DENIED**; and
- b. Plaintiffs' Motion to Compel is hereby **DENIED**.

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<sup>7</sup> The WW Defendants filed their corrected brief in opposition to Plaintiffs' Motion to Compel under seal. (ECF No. 755.) For purposes of this Order, the Court refers to the redacted, public version. (ECF No. 761.)

**SO ORDERED**, this the 15th day of January, 2020.

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