

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 21788

AYM TECHNOLOGIES, LLC,

Plaintiff and
Counterclaim-
Defendant,

v.

GENE RODGERS,

Defendant, and

SCOPIA CAPITAL MANAGEMENT,
LP; and COMMUNITY BASED
CARE, LLC,

Defendants and
Counterclaim-
Plaintiffs.

**ORDER ON THE SCOPIA PARTIES'
MOTION TO REOPEN DISCOVERY**

1. **THIS MATTER** is before the Court on Defendants and Counterclaim Plaintiffs Scopia Capital Management LP (“Scopia”) and Community Based Care, LLC’s (“CBC,” together with Scopia, the “Scopia Parties”) Motion to Reopen Discovery Concerning Certain Materials Withheld or Destroyed by Aym Technologies, LLC (“Aym” or “Plaintiff”) (the “Motion”). (ECF No. 195.)

2. After considering the Motion, the related briefs, appropriate matters of record, and the arguments of counsel, the Court hereby **GRANTS IN PART** and **DENIES IN PART** the Motion for the reasons stated below.

A. Factual and Procedural Background

3. Plaintiff initiated this action against Defendants Gene Rodgers (“Rodgers”), CBC, Scopia, and Scopia HCM Partners, LLC (“Scopia HCM,” collectively with Rodgers, CBC, and Scopia, the “Defendants”) on December 5, 2016, alleging against Rodgers a claim for breach of contract, and against all Defendants claims for misappropriation of trade secrets in violation of N.C.G.S. § 66-152 et seq., conversion, violation of the North Carolina Unfair and Deceptive Trade Practices Act under N.C.G.S. § 75-1.1, and tortious interference.

4. On February 9, 2018, following a hearing on motions brought under Rule 12 of the North Carolina Rules of Civil Procedures (“Rule(s)”), this Court dismissed Plaintiff’s claims for misappropriation of trade secrets, conversion, and tortious interference, leaving Plaintiff’s claims for breach of contract and unfair or deceptive trade practices for further proceedings. *Aym Techs., LLC v. Rodgers*, 2018 NCBC LEXIS 14, at *54 (N.C. Super. Ct. Feb. 9, 2018).

5. The Scopia Parties answered the Complaint on March 14, 2018 and averred counterclaims against Aym for fraudulent misrepresentation and unfair or deceptive trade practices under section 75-1.1 (“Counterclaims”). (Defs. Scopia Capital Management LP’s & Community Based Care, LLC’s Answer Compl. & Countercl. [hereinafter “Countercls.”], ECF No. 69.) In these Counterclaims, the Scopia Parties alleged that Aym’s principal, Lewis Quinn (“Quinn”), misled them into believing that he wanted to invest in their business ventures when he in fact sought to sell Aym to a Scopia entity. (Countercls. ¶ 1.) As a result of Quinn’s alleged misrepresentations

and in reliance thereon, the Scopia Parties averred they incurred significant expenses that they would not have incurred but for Quinn's alleged misconduct. (Countercls. ¶ 34.)

6. In early 2019, Rodgers and the Scopia Parties filed separate motions for summary judgment on all claims remaining against them. (Def. Gene Rodgers' Mot. Summ. J., ECF No. 97; Mot. Defs. Scopia Capital Management LP & Community Based Care, LLC Summ. J., ECF No. 119.) The Court dismissed all of Plaintiff's claims, leaving only the Scopia Parties' Counterclaims for trial. *See Aym Techs., LLC v. Rodgers*, 2019 NCBC LEXIS 64, at *2 (N.C. Super. Ct. Oct. 16, 2019).

7. On December 6, 2019, the Scopia Parties moved to stay the Counterclaim proceedings in this action (the "Motion to Stay") pending the resolution of a related case in the United States District Court for the Southern District of New York (the "New York Action"). (Mot. Defs. Scopia Capital Management LP & Community Based Care, LLC Stay Countercl. Proceedings Pending Resolution Related New York Action, ECF No. 177.) The Court denied the Motion to Stay, reasoning that the Counterclaims and the New York Action involved "very different conduct." *Aym Techs., LLC v. Rodgers*, 2020 NCBC LEXIS 33, at *6 (N.C. Super. Ct. Mar. 19, 2020).

8. The Scopia Parties thereafter moved to reopen discovery on the Counterclaims, contending that e-mails recently produced in the New York Action revealed that Plaintiff withheld discovery related to the Counterclaims that Aym should have produced during discovery in this action. (Mem. Supp. Mot. Scopia

Capital Management LP & Community Based Care, LLC Reopen Disc. Concerning Certain Materials Withheld Destroyed Aym Technologies, LLC, ECF No. 197.)

9. After full briefing by the parties, the Court held a hearing on the Motion via videoconference on June 23, 2020 (the “Hearing”), at which all parties were represented by counsel. The Motion is now ripe for resolution.

B. Legal Standard

10. In North Carolina, “it is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion.” *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480 (1977); see *Myers v. Myers*, 837 S.E.2d 443, 448 (N.C. Ct. App. 2020) (stating that a decision is considered an abuse of discretion if it is “so arbitrary that it could not have been the result of a reasoned decision” (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998))). The trial court “has broad discretion to control discovery[.]” *Capital Resources, LLC v. Chelda, Inc.*, 223 N.C. App. 227, 234, 735 S.E.2d 203, 209 (2012), “because the primary duty of the trial judge is to control the course of the trial so as to prevent injustice to any party,” *id.*

C. Analysis

11. The Scopia Parties argue that their review of the e-mails produced in the New York Action shows that Aym did not fully respond to interrogatories and requests for production of documents served by the Scopia Parties during the discovery period because Aym failed to identify third-party Douglas Kahn (“Kahn”)

as a witness in this case and produce e-mails between Kahn and Quinn that are relevant to the Counterclaims.

12. Specifically, the Scopia Parties requested in their Interrogatory No. 14 that Aym identify “all individuals and/or entities with which anyone at Aym communicated, internally or externally, about any of the interaction with Scopia . . . in July 2015 through September 2015.” (Decl. Carl M. Short, III, Ex. B, at Interrog. ¶ 14, ECF No. 195.2.)¹ Defendants limited the inquiry to these months (the “Relevant Time Period”) because the Scopia Parties allege it was during this time that Quinn falsely represented that he was interested in “making a substantial investment” in Scopia and CBC, giving rise to the Counterclaims. Aym identified several persons in its response to Interrogatory No. 14 but omitted Kahn.

13. The Scopia Parties also requested that Aym produce all communications between Kahn and Aym or any of its principals “about any of the events related to this action.” (Decl. Carl M. Short, III, Ex. B, at Doc. Reqs. ¶ 13, ECF No. 195.2.)² In response, Aym produced only a few e-mails between Kahn and Quinn. After the discovery period closed in this action on January 28, 2019, however, several e-mail strings generated from July 2015 to November 2016 between Quinn and Kahn were

¹ Interrogatory No. 14 states in full: “Identify all individuals and/or entities with which anyone at Aym communicated, internally or externally, about any of the interaction with Scopia, David Wittles or Gene Rodgers in July 2015 through September 2015 or as otherwise referred to in Paragraph 8 through 28 of the Counterclaim.”

² Document Request No. 13 states in full: “Produce all communication between Doug Kahn and Aym, any of its principals, and/or any of its attorneys about any of the events related to this action.”

produced in the New York Action pursuant to a third-party subpoena to Google that the Scopia Parties contend should have been produced in this action.

14. In particular, e-mails from July 2015 suggested that Quinn and Kahn agreed to discuss “potential roll up of [I]DD behavioral health providers,” (*see* Decl. Carl M. Short, III, Ex. F, ECF No. 195.2), and met on July 23, 2015, (*see* Decl. Carl M. Short, III, Ex. G, ECF No. 195.2). E-mails from August 2015 discussed a “trade” that Quinn was considering and a follow-up meeting between Kahn and him. (*See* Decl. Carl M. Short, III, Ex. I, ECF No. 195.2.) The Scopia Parties argue that these e-mails reveal that Kahn was more heavily involved in Quinn’s investment strategy than Quinn initially led the Scopia Parties to believe, and that Aym’s failure to produce the e-mails denied them the opportunity to depose Quinn and Kahn about these highly relevant exchanges. (Reply Further Supp. Mot. Defs. Scopia Capital Management LP & Community Based Care, LLC Reopen Discovery Concerning Certain Materials Withheld Destroyed Aym Technologies, LLC, ECF No. 209.)

15. Aym makes several arguments in opposition: (i) that the Scopia Parties are on a fishing expedition for information that is useful in the New York Action (in which Kahn is a party) but has no bearing on the Counterclaims in this action (in which Kahn is not a party), (Resp. Br. Opp’n Defs. Scopia Capital Management LP’s & Community Based Care, LLC’s Mot. Reopen Disc. 2 [hereinafter “Pl.’s Resp. Br.”], ECF No. 208); (ii) that the e-mails are not relevant to the Counterclaims because the Counterclaims are against Aym, not Quinn, and it was Quinn, not Aym, that was considering investing with Scopia, (Pl.’s Resp. Br. 3); and (iii) that the e-mails are not

relevant to the Counterclaims based on their subject matter or because they were generated far outside the Relevant Time Period, between October 2015 and January 2016. (Pl.'s Resp. Br. 3; *see* Decl. Carl M. Short, III, Ex. B, at Interrog. ¶ 14, ECF No. 195.2.)

16. For the purposes of discovery, North Carolina considers any matter relevant if it “relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” N.C. R. Civ. P. 26. The Counterclaims focus on Quinn’s alleged fraudulent motive for involving himself with the Scopia Parties’ efforts to acquire IDD providers and Quinn’s allegedly false representations that he intended to invest with the Scopia Parties when in fact he sought to sell Aym to a Scopia entity all along.

17. The Court has reviewed the e-mails Defendants attached in support of the Motion and agrees that the e-mails generated between July 6, 2015 and August 20, 2015 are relevant to the Counterclaims and are the proper subject of further inquiry. The Court reaches this conclusion in part because these e-mails were exchanged between key witnesses during the Relevant Time Period and because they reference two private meetings between Quinn and Kahn at which Quinn’s intentions toward the Scopia Parties during the Relevant Time Period may have been discussed. (*See* Decl. Carl M. Short, III, Exs. F, G, I, ECF No. 195.2.)

18. The Court’s review leads it to further conclude, however, that the remaining e-mails exchanged between September 29, 2015 and January 5, 2016 were not only generated outside the Relevant Time Period but also contain content that is

irrelevant to the Counterclaims. (*See* Decl. Carl M. Short, III, Ex. H, ECF No. 195.2 (planning a golf outing); Decl. Carl M. Short, III, Ex. J, ECF No. 195.2 (forwarding a blog post about compliance); Decl. Carl M. Short, III, Ex. K, ECF No. 195.2 (discussing a potential unrelated “new venture”); Decl. Carl M. Short, III, Ex. L, ECF No. 195.2 (discussing the cost of unrelated family health insurance plans); Decl. Carl M. Short, III, Ex. M, ECF No. 195.2 (discussing the possibility of sending a cease and desist letter to Rodgers, a party not involved in the Counterclaims).)

19. As a result, the Court shall, in the exercise of its discretion, permit the Scopia Parties to depose Kahn and Quinn with respect to Exhibits F, G, and I attached to the Declaration of Carl M. Short in support of the Motion but not Exhibits H, J, K, L, and M.

20. The Scopia Parties also request that they be allowed to depose Quinn concerning Aym’s failure to: (i) identify Kahn in response to Defendants’ Interrogatory No. 14 requesting the identity of all persons with whom Aym communicated concerning the Scopia Parties, (Decl. Carl M. Short, III, Ex. B, ECF No. 195.2), and (ii) produce e-mails sent by Kahn in response to Defendants’ Document Request No. 13 seeking all communications between Kahn and Aym or any of its principals, (Decl. Carl M. Short, III, Ex. B, ECF No. 195.2).

21. Aym opposes this request, contending that it did not possess some of the e-mails Kahn produced in the New York Action and, relying on the general objections in its responses, that the e-mails are irrelevant. The Court finds Aym’s arguments to be without merit. First, Aym acknowledged at the Hearing that it possessed forty-

eight of the fifty e-mails at issue, undermining its first contention that it did not possess the e-mails. Second, Aym's reliance on its general relevance objections rings hollow considering that Plaintiff made specific relevance objections in its responses to other requests it contended sought irrelevant information. Moreover, the information sought by these requests is relevant to the Counterclaims, and Aym has not advanced a persuasive reason for its failure to produce this information during discovery.

22. The Court thus concludes that the Scopia Parties should be permitted to depose Quinn concerning the procedures Aym employed in responding to the Scopia Parties' discovery requests. Accordingly, the Court will permit the Scopia Parties to depose Quinn concerning such matters, including, in particular, Aym's actions in responding to Interrogatory No. 14 and Document Request No. 13.

23. Finally, the Scopia Parties request that they be permitted to depose Kahn for ninety minutes and Quinn for three hours on the permitted subjects. In light of the limited areas of inquiry, the Court concludes that shorter time periods—forty-five minutes for Kahn and ninety minutes for Quinn—are appropriate.

24. **WHEREFORE**, for the reasons set forth above, the Court, in the exercise of its discretion, hereby **GRANTS IN PART** and **DENIES IN PART** the Motion and **ORDERS** as follows:

- a. The Scopia Parties may depose Kahn, subject to his permitted objections under Rule 45, for no more than forty-five (45) minutes within forty-five (45) days of the entry of this Order at a date and time

selected by the Scopia Parties. The deposition shall be strictly limited to the information contained in Exhibits F, G, and I to the Declaration of Carl M. Short.³

- b. The Scopia Parties may depose Quinn for no more than ninety (90) minutes within forty-five (45) days of the entry of this Order at a date and time selected by the Scopia Parties. The deposition shall be strictly limited to (i) the information contained in Exhibits F, G, and I to the Declaration of Carl M. Short and (ii) Aym's conduct in responding to the Scopia Parties' discovery requests, including, in particular, Interrogatory No. 14 and Document Request No. 13.⁴

SO ORDERED, this the 24th day of July, 2020.

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

³ By this Order, the Court does not compel Kahn to appear for a deposition but rather permits the Scopia Parties to seek Kahn's deposition outside the discovery period through consent or as may be compelled under Rule 45. Kahn's rights under Rule 45 are not affected by this Order.

⁴ The Scopia Parties have made clear, both in their briefing and at the Hearing, that the Motion is neither a motion for sanctions nor a motion to compel discovery under Rule 37. Therefore, the Court does not consider sanctions or the shifting of costs and attorneys' fees under Rule 37 on the Motion.