

STATE OF NORTH CAROLINA
HAYWOOD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 1224

MARY ANNETTE, LLC; JORGE
CURE; DANA CURE; TWILIGHT
DEVELOPMENTS, INC.; OZZIE 1,
LLC; MICHAEL WASHBURN; and
CHRISTINE SHEFFIELD,

Plaintiffs,

v.

TERRI LYNN CRIDER; and
MOUNTAIN GIRL VENTURES,
LLC,

Defendants.

**ORDER ON DEFENDANTS'
MOTION TO COMPEL**

1. This Order addresses Defendants' motion to compel. (*See* ECF No. 85.)

Background

2. Defendants submitted a Business Court Rule ("BCR") 10.9 dispute summary via e-mail to the Court's law clerks on 19 April 2023. The summary represented that Plaintiffs had not provided written responses to Defendants' First Request for Production of Documents (the "Request") and that Plaintiffs' limited production to that point consisted of a link to an incomplete and disorganized batch of documents in a cloud-based Google Drive account. Plaintiffs did not respond to the BCR 10.9 summary. Instead, they served overdue written responses along with a USB drive that supposedly contains most of the same documents as the Google Drive account. Their complete response to each request for production states "See #1 USB"; there are no objections or other details. (*See* ECF No. 100.1.) Following a conference and with the agreement of the parties, the Court directed counsel to meet and confer to

determine whether the documents in the USB drive satisfied Defendants' Request and to report the results of that meeting. (*See* ECF No. 77.)

3. The parties submitted their report on 16 June 2023. In that report, they jointly represent that counsel reviewed the USB drive together, that the documents on the USB drive “may or may not be the same” as those in the Google Drive account, that “no documents were submitted for Plaintiffs Twilight Developments, INC [sic] or Ozzie 1, LLC,” and “that documents submitted [by Plaintiffs] were incomplete, unorganized, and not understandable primarily in regards to financial documents requested and documents verifying income and expenses of Plaintiff[] Mary Annette, LLC” As a result, “there was no resolution of the pending issues.” (ECF No. 78 at ¶¶ 3, 5–8.)

4. Based on a review of the joint report and the reasons for the impasse, the Court permitted Defendants to file a motion to compel. *See* BCR 10.9(c). After full briefing and a hearing on 14 August 2023, the motion is ripe for determination.

Discussion

5. This is not a typical discovery dispute. Plaintiffs do not object to any of Defendants' requests for production—not for privilege, undue burden, lack of relevance, or any other ground. Thus, Defendants' right to receive responsive documents is a given. All that is at issue is whether Plaintiffs' production of documents to date is complete and properly formatted.

6. Regrettably, the briefing is unhelpful. The Court advised Defendants to “set forth the discovery materials requested and their corresponding categories with

particularity.” (ECF No. 80.) Instead, they spend the bulk of their supporting brief rehashing the history of the dispute and then make a general request for an order compelling Plaintiffs to “respond in a clear, organized, and professional manner” (See ECF No. 86 at 2.) Plaintiffs’ response brief is even more puzzling. They insist that their production is “organized, usable, and as kept in [the] course of business,” (ECF No. 100 at 4), but inexplicably say nothing about their previous admission to the contrary, (ECF No. 78 at ¶ 7).

7. The Court has carefully considered these arguments in light of the whole record and the clarifications offered by counsel at the hearing. Having done so, the Court concludes that Defendants are entitled to relief.

8. The parties’ joint report, which Plaintiffs’ counsel signed, is the best evidence of the state of affairs and strongly supports Defendants’ position. In the parties’ own words, “no documents were provided for” Ozzie 1 and Twilight Developments, and the documents for Mary Annette are “incomplete, unorganized, and not understandable.” (ECF No. 78 at ¶ 7.) There’s no way around those unequivocal statements.

9. Furthermore, Plaintiffs’ responses are deficient even assuming that they produced records as kept in the course of business, as they contend. Because the parties have not agreed to a protocol for how to produce electronically stored information, the default rules apply. This means that Plaintiffs were required to “state the form or forms [they] intend[ed] to use” before producing information “in a reasonably usable form or forms.” N.C. R. Civ. P. 34(b), (b)(2). The point of requiring

a responding party to state the intended form *before* producing information is to head off disputes over format as early as possible and to keep the parties from incurring unnecessary expenses. *See, e.g., German v. Micro Elecs., Inc.*, 2013 U.S. Dist. LEXIS 4594, at *21–22 (S.D. Ohio Jan. 11, 2013) (applying analogous federal rule); *Cenveo Corp. v. So. Graphic Sys.*, 2009 U.S. Dist. LEXIS 108623, at *6–7 (D. Minn. Nov. 18, 2009) (same). Here, Plaintiffs did not state the form that they intended to use. They simply gave Defendants access to a cloud-based folder¹ and then followed up with a physical USB drive that “may or may not” contain the same files. (ECF No. 78 at ¶ 6.) By producing and reproducing documents in different formats without first stating what form they intended to use, Plaintiffs have violated Rule 34, invited this dispute, and muddled the record.

10. Accordingly, the Court concludes that Plaintiffs’ production is incomplete and not in compliance with Rule 34. Next, the Court will address appropriate relief in connection with the specific categories of documents at issue.

11. **Production by Ozzie 1.** At the hearing, the parties reported that Plaintiffs had produced some documents from Ozzie 1 after the motion to compel was filed, and counsel for Plaintiffs represented that no other responsive documents for Ozzie 1 exist. There appears to be no reasonable justification for the late production, and the Court has no way to verify that all responsive documents have now been produced. Accordingly, the Court orders Plaintiffs either to produce any additional responsive

¹ Giving a party access to a cloud account in lieu of producing the information in the account is itself potentially problematic. *See German*, 2013 U.S. Dist. LEXIS 4594, at *28 (noting party’s “valid concerns that such access could give rise to risks of altering or affecting the data and websites”).

documents from Ozzie 1 or to certify that no other responsive documents exist in compliance with Rule 26.

12. **Production by Twilight Developments.** As this dispute has played out, the ground has shifted most with respect to Twilight Developments. According to the parties' joint report, Twilight Developments produced no documents at all—which Plaintiffs now say is incorrect. In addition, when pressed by the Court, counsel for Defendants stated that they seek just three categories of documents from Twilight Developments: (i) its tax returns, (ii) records of capital contributions it made to Mary Annette, and (iii) records of any payments between it and Mary Annette.

13. Resolving the tax return issue is straightforward. Plaintiffs' counsel represented that Twilight Developments has lost its tax returns and requested copies from the IRS. Plaintiffs acknowledge that they must produce the returns, and the Court orders them to do so as soon as copies are available.

14. Confusion surrounds the other categories of documents. After initially conceding that they had not produced any documents, Plaintiffs now say that Defendants have already received everything they seek. This confusion is a consequence of Plaintiffs' decision to produce information in two different forms without first telling Defendants what form they intended to use, as required by Rule 34. Moreover, because the parties are unsure whether the contents of the Google Drive account and the USB drive are the same, it is unclear whether Plaintiffs contend that the documents can be found on one or the other or both. Accordingly, Plaintiffs must produce—or reproduce, as the case may be—records of any capital

contributions from Twilight Developments to Mary Annette and records of any payments between the two entities in a form that is agreeable to both sides. This may pose a burden to Plaintiffs, but it is a burden of their own making.

15. **Production by Mary Annette.** Echoing the dispute about Twilight Developments' production, one issue concerning Mary Annette's production involves its tax return(s). Plaintiffs' counsel represented that the company has prepared one or more tax returns but could not say whether it had completed and filed the return(s) yet. Plaintiffs acknowledge that they must produce the return(s), and the Court orders them to do so once completed and filed.

16. The five other categories of documents that Defendants seek are (i) receipts for rental income, (ii) receipts for rental reservations, (iii) expenses, (iv) utility payments, and (v) purchases of equipment. Plaintiffs say that they have produced all these documents—possibly on the Google Drive account, possibly on the USB drive, or possibly both. Again, the confusion stems from Plaintiffs' noncompliance with Rule 34. Accordingly, Plaintiffs must produce all responsive documents in a form agreeable to both sides.

17. Defendants also ask the Court to require Mary Annette to engage an outside accountant to create and produce an income and expense ledger. The Court denies that request. Plaintiffs must produce responsive documents in their possession but need not create new documents that do not exist.

18. **Deposition of Dana Cure.** These disputes over documentary discovery have delayed the deposition of Dana Cure. As far as the Court can tell, counsel have

agreed to move forward with her deposition once the pending motion to compel has been resolved. The Court therefore directs the parties to meet and confer in four weeks' time to settle on a mutually acceptable date.

19. **Costs and Attorneys' Fees.** In their motion to compel, Defendants include a request for an award of reasonable expenses, including attorneys' fees, under Rule 37. When a motion to compel is granted,

the court *shall*, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

N.C. R. Civ. P. 37(a)(4) (emphasis added).

20. The Court determines, in its discretion, that Defendants are entitled to the reasonable expenses, including attorneys' fees, incurred in pursuing their motion to compel. It is undisputed that Plaintiffs failed to respond to Defendants' Request within the period prescribed by the Rules of Civil Procedure. As discussed, Plaintiffs' untimely responses also failed to comply with Rule 34. Moreover, Plaintiffs have repeatedly contradicted themselves—conceding that their production was incomplete and unorganized before backtracking and arguing that it was complete and well organized. Nor have Plaintiffs provided any justification, much less a substantial justification, for their noncompliance. Because the Court granted most of the relief sought by Defendants, and in the absence of “circumstances [that] make an award of

expenses unjust,” N.C. R. Civ. P. 37(a)(4), Defendants are entitled to an award of costs and attorneys’ fees.²

Conclusion

21. For all these reasons, the Court **GRANTS in part** Defendants’ motion to compel and **ORDERS** as follows:

- a. Ozzie 1 shall have through and including 14 September 2023 to produce all documents that are responsive to Defendants’ Request or certify to Defendants that all responsive documents have been produced.
- b. Twilight Developments shall have through and including 14 September 2023 to produce (i) its tax returns, (ii) records of its capital contributions to Mary Annette, and (iii) records of payments between it and Mary Annette. The format of the production must be agreeable to both sides. If Twilight Developments has not received copies of its tax returns from the IRS by that date, Plaintiffs may move for additional time to produce the tax returns; however, any such motion must include documentation to show when Twilight Developments requested copies from the IRS and when it expects to receive them.
- c. Mary Annette shall have through and including 14 September 2023 to produce (i) its tax return(s), (ii) receipts for rental income, (iii) receipts for rental reservations, (iv) documents reflecting expenses, (v) utility payments, and (vi) documents reflecting purchases of equipment. The

² Plaintiffs contend, unnecessarily, that they should not be sanctioned under Rule 37(b). Defendants have not sought, and the Court has not imposed, sanctions under that rule.

format of the production must be agreeable to both sides. If Mary Annette has not completed and filed its tax return(s) by that date, Plaintiffs may move for additional time to produce the tax return(s); however, any such motion must specify when Mary Annette intends to file such return(s).

- d. Counsel shall meet and confer on or before 21 September 2023 to select a mutually acceptable date for the deposition of Dana Cure.
- e. Defendants shall recover from Plaintiffs their reasonable expenses, including attorneys' fees, incurred in preparing and prosecuting this motion to compel. The Court encourages the parties to stipulate to the total amount of fees and expenses to be awarded and they shall have through and including 14 September 2023 to file a joint stipulation. If the parties are unable to come to an agreement, the following briefing schedule shall apply instead:
 - i. Defendants shall have through and including 21 September 2023 to file their fee application and any supporting materials;
 - ii. Plaintiffs shall have through and including 5 October 2023 to file any response to Defendants' fee application;
 - iii. Defendants shall have through and including 12 October 2023 to file a reply brief in support of their fee application; and
 - iv. The Court will determine at a later date whether to convene a hearing on Defendants' anticipated application for costs and fees.

22. The Court **DENIES** Defendants' request that Plaintiffs produce an income and expense ledger for Mary Annette prepared by an outside accountant.

23. A final observation is needed. Although the original complaint was filed almost two years ago, the parties have yet to complete written discovery. A host of procedural irregularities and discovery disputes have stymied the progress of this action. The Court reminds both sides to "cooperate to ensure that discovery is conducted efficiently. Courtesy and cooperation among counsel advances, rather than hinders, zealous representation." BCR 10.1.

SO ORDERED, this the 24th day of August, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases