STATE OF NORTH CAROLINA

DAVIE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 367

BRAKEBUSH BROTHERS, INC. AND HOUSE OF RAEFORD FARMS,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON - NOVAE 2007 SYNDICATE SUBSCRIBING TO POLICY WITH NUMBER 93PRX17F157, HALLMARK SPECIALTY INSURANCE CO., EVANSTON INSURANCE CO., MAXUM INDEMNITY CO., HUDSON SPECIALTY INSURANCE CO., LIBERTY SURPLUS INSURANCE CORPORATION, IRONSHORE SPECIALTY INSURANCE CO., AND CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON -BRIT SYNDICATE 2987 SUBSCRIBING TO POLICY WITH NUMBER PD-l0972-00,

Defendants.

ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

1. **THIS MATTER** is before the Court on Defendants' Motion for Sanctions ("Motion," ECF No. 243). Defendants Certain Underwriters at Lloyd's of London-Novae 2007 Syndicate Subscribing to Policy with Number 93PRX17F157, Hallmark Specialty Insurance Co., Evanston Insurance Co., Maxum Indemnity Co., Hudson Specialty Insurance Co., Liberty Surplus Insurance Corporation, Ironshore Specialty Insurance Co., and Certain Underwriters at Lloyd's of London-Brit Syndicate 2987 Subscribing to Policy with Number PD-10972-00 (collectively, "Defendants") request that this Court impose various sanctions on Plaintiffs

Brakebush Brothers, Inc. ("Brakebush") and House of Raeford Farms ("Raeford") for discovery violations—namely, Plaintiffs' failure to produce certain notes, photographs, and videos in their responses to Defendants' discovery requests until the day before the parties' deadline in which to exchange trial exhibit lists.

2. The Court, having considered the Motion, the briefs and submissions of the parties, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES**, in the exercise of its discretion, that the Motion should be **GRANTED**, in part, and **DENIED**, in part.

3. The Court makes the following Findings of Fact and Conclusions of Law and **ORDERS** the relief set forth below.

FINDINGS OF FACT

4. In the event that any finding of fact set out herein has been misidentified as a conclusion of law or a conclusion of law has been misidentified as a finding of fact, that item shall be deemed to be its appropriate designation.

5. A complete summary of the factual background and legal issues presented in this case can be found in prior opinions of the Court. (*See e.g.*, ECF Nos. 93, 184, 215.) Nevertheless, the Court will briefly summarize those facts that are most directly relevant to the present Motion.

6. In this lawsuit, Plaintiffs Brakebush and Raeford have sued a number of insurance companies in a dispute over the amount of insurance proceeds payable under excess insurance policies issued by Defendants following a fire that occurred on 14 December 2017 at a chicken plant in Mocksville, North Carolina. The plant is

currently owned by Brakebush and was formerly owned by Raeford. Raeford was in the process of selling the plant to Brakebush at the time of the fire. At that time, the plant was insured for fire damage under a primary insurance policy with limits of $20 million (all proceeds of which have been paid to Brakebush) as well as under excess policies issued by each of the Defendants—eight insurance companies. (*See* ECF Nos. 44.8–44.15, 194.8.) Plaintiffs' claims against Defendants in this action are based on their contention that the amount of insurance proceeds paid out thus far by Defendants is insufficient to reimburse Plaintiffs for the full amount of the fire damage.

7. In response, Defendants filed counterclaims alleging that the fire insurance claim submitted by Brakebush fraudulently sought the recovery of insurance proceeds in an amount that grossly exceeded the value of—and in some instances were wholly unrelated to—the actual fire damage to the plant.

8. The present Motion does not relate to any substantive issues in this case. Rather, it concerns the late production of (1) numerous handwritten notes (the "C.B. Notes") made by Carey Brakebush,[1] a Brakebush executive who played a central role in the preparation and submission of the insurance claim; and (2) an assortment of photographs and videos of the fire damage (the "Mixon Materials") taken by Steve Mixon, the former Mocksville Plant Manager who has since died.[2]

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[1] To avoid any confusion, this Order refers to Carey Brakebush by name and refers to Brakebush Brothers, Inc. as "Brakebush."

[2] The Court refers to the C.B. Notes and Mixon Materials collectively as the "Withheld Materials."

Despite the extensive discovery process that occurred in this case, Plaintiffs failed to produce the Withheld Materials until they were preparing their exhibit list for the jury trial in this matter that was previously scheduled to begin on 29 January 2024.

9. Brakebush initiated this lawsuit against Defendants by filing a Complaint in Davie County Superior Court on 8 October 2020. (Compl., ECF No. 3.)

10. On 8 March 2021, the Court held a Case Management Conference with counsel for the parties and subsequently entered a Case Management Order ("CMO") "to address scheduling and case management issues and in order to facilitate the fair and efficient disposition of this action." (CMO, at 1, ECF No. 59.) One of the primary purposes of the CMO is to memorialize certain discovery procedures and deadlines. The CMO stated, in part, that "[t]he North Carolina Rules of Civil Procedure ('Rules'), the General Rules of Practice for the Superior and District Courts and the [Business Court Rules] shall govern all matters not expressly covered by this Order." (CMO, at 1.)

11. With respect to document production and the establishment of an ESI protocol, the Court ordered that "[t]he parties shall work together cooperatively to produce documents and electronically stored information" and noted that "[t]he parties are not presently aware of any devices for which a forensic examination is required." (CMO, at 7.)

12. As set out in the CMO, the parties' original deadline in which to complete both fact and expert discovery was 28 January 2022. (CMO, at 4.) However, for various reasons, the parties' deadlines in which to complete discovery were

extended multiple times. (*See* ECF Nos. 82, 116, 150, 178, 190.) Ultimately, apart from two specific depositions that the Court permitted to be taken outside the applicable deadline, the fact discovery period closed on 4 November 2022 and expert discovery concluded on 13 January 2023. (*See* ECF Nos. 158, 178, 190, 192.)

13. In accordance with the deadlines and procedures contained in the CMO, Brakebush served its responses to Defendants' First Requests for Production on 6 July 2021, in which Brakebush, subject to general objections, "agree[d] to produce non-privileged documents, if any, in its possession, custody or control, that relate to the repair and reconstruction of the Mocksville Plant as a result of the Loss." (Defs.' Br. Supp. Mot. Ex. 1, at 10, ECF No. 246.1.)

14. Brakebush filed an Amended Complaint on 10 December 2021, adding Raeford as a co-Plaintiff in this action, necessitating a modification of the CMO and extensions of the discovery deadlines contained therein. (Am. Compl., ECF No. 100; Order Joint Mot. Ext. Deadlines, ECF No. 116.)

15. In July of 2022, Defendants emailed counsel for Brakebush requesting that Defendants be permitted to take the deposition of Mixon, who, as mentioned above, was the former Mocksville Plant Manager. (ECF No. 177.2.) Defendants represent that they subsequently "received a call from Plaintiffs' counsel requesting that Defendants relent in taking Mr. Mixon's deposition due to him suffering from pancreatic cancer." (Defs.' Br. Supp. Mot., at 4, ECF No. 247.) After this call, counsel for Defendants sent Plaintiffs' counsel an email in which Defendants "agree[d] to hold Mr. Mixon in abeyance as a witness while [Defendants] depose others," based on

Brakebush's agreement that Mixon "would not be proffered as a witness in any form by plaintiffs at a later date." (ECF No. 177.3.)

16. On 4 November 2022—the day fact discovery was set to close—Defendants filed a motion requesting a fourteen-day extension of the fact discovery deadline to take three additional discovery depositions, including Mixon's, stating that due to Mixon's illness, "his deposition is needed promptly for the further purpose of preserving his testimony for trial." (ECF No. 173, at 2.) Plaintiffs again opposed Defendants' request to depose Mixon. (ECF No. 177, at 4–5.) The Court denied Defendants' 4 November 2022 motion, as well as Defendants' subsequent motion for reconsideration. (*See* ECF Nos. 178, 183.)

17. On 30 November 2022, counsel for Defendants informed Plaintiffs' counsel that they were "planning to file a motion for leave to take a deposition *de bene esse* of Mixon." (ECF No. 246.4, at 2.) That same day, Plaintiffs responded that they would oppose the motion. (ECF No. 246.4, at 2.) On 1 December 2022, Plaintiffs' counsel emailed counsel for Defendants providing "certain information regarding Mr. Mixon's medical condition" and proffering the following compromise:

> To the extent that it would allow us to avoid further motion practice on this issue at this time, if [Defendants] forgo bringing a motion at this time, should [Defendants] wish to revisit this issue down the road if Mr. Mixon's health condition allows, [Plaintiffs] would agree to not raise this additional delay in bringing the motion as grounds to deny the motion.

(ECF No. 246.4, at 1.) Defendants represent that they "agreed to forbear on the continued understanding that Plaintiffs would not proffer Mr. Nixon in any form at trial and that 'if Mr. Mixon's health condition allows,' Defendants could renew their

request." (Defs.' Br. Supp. Mot., at 6.) However, Mixon died on 7 October 2023. (Defs.' Br. Supp. Mot., at 6.)

18. A jury trial in this matter was scheduled to begin on 29 January 2024. (Notice of Jury Trial, ECF No. 216.)

19. On 8 November 2023, the Court entered a Pretrial Scheduling Order, which addressed deadlines for final pre-trial preparation. (Pretrial Sched. Order, ECF No. 230.) Among other things, the parties were ordered to exchange trial exhibits and witness lists no later than 29 November 2023. (Pretrial Sched. Order, at 1.)

20. On 21 and 22 November 2023, counsel for Plaintiffs met with Carey Brakebush regarding the creation of Plaintiffs' exhibit list for trial. (Pls.' Br. Opp. Mot., at 3, ECF No. 248.) According to Plaintiffs, at some point during these meetings, "Mr. Brakebush made a passing comment seeming to imply some question about whether Plaintiffs' counsel had all of his notes." (Pls.' Br. Opp. Mot., at 3.)

21. Defendants have represented to the Court that a week after learning that all of Carey Brakebush's notes may not have been produced, on 28 November 2023 and 1 December 2023, Plaintiffs disclosed and produced—for the first time in this case—the C.B. Notes, "a .pdf document consisting of 112 pages of [Carey] Brakebush's handwritten, chronological, and extensive personal notes regarding the fire loss and rebuild[,]" concerning the fire damage to the plant that lies at the heart of this lawsuit. Defendants contend that the C.B. Notes are of critical importance because Carey Brakebush was "the principal architect of the rebuild of the Mocksville

plant and the individual who was at the center of preparing the insurance claim at issue here." (Defs.' Br. Supp. Mot., at 3, 8.) Defendants describe the C.B. Notes as a "workbook detailing meetings, discussions, calls, etc. related to the rebuild and insurance discussions." (Defs.' Br. Supp. Mot., at 3.)

22. Plaintiffs characterize the series of events leading up to their discovery that the C.B. Notes had been erroneously withheld as follows:

> On November 21 and 22, 2023, Plaintiffs' counsel met with Carey Brakebush in Chicago to develop Plaintiffs' Exhibit List, which was due on November 29. Mr. Brakebush made a passing comment seeming to imply some question about whether Plaintiffs' counsel had all of his notes. Based on Mr. Brakebush's comment, following the meetings, and immediately upon returning to Minneapolis, counsel investigated the database of collected and produced documents. While some notes from Mr. Brakebush were in the produced database, it was not clear whether they included the notes Mr. Brakebush referenced. Accordingly, straddling the Thanksgiving holiday, counsel arranged to meet again with Mr. Brakebush Monday morning, November 27. Thereafter, Mr. Brakebush delivered a PDF of 112 pages of handwritten notes exported from an application titled GoodNotes. Plaintiffs' counsel was unable to locate those 112 pages of notes, through targeted searches, in their productions. Comparing the 112 pages against the production database could not confirm that the notes existed in the database. Accordingly, Plaintiffs produced them to Defendants on November 28. Plaintiffs then identified just three pages of those notes (BB00213228, BB00213241, and BB00213316) on their exhibit list served on November 29.

(Pls.' Br. Opp. Mot., at 3–4.)

23. In addition to the C.B. Notes, Defendants contend that Plaintiffs contemporaneously disclosed and produced, for the first time in this case, the Mixon Materials—"a cache of pictures [and videos] of the Mocksville plant taken by Mixon, which also were not produced in discovery." (Defs.' Br. Supp. Mot., at 7–8, ECF No. 247.) Plaintiffs have offered the following explanation for the untimely production of the Mixon Materials:

> During the same [November 2023] meetings with Mr. Brakebush, Plaintiffs reviewed multiple photographs, including a few videos. In the process of attempting to list those photos on the exhibit list by bates number, counsel was unable to locate certain photos and videos in the production database. On Monday, November 27, Plaintiffs arranged to transmit a flash drive of the photos still maintained by Brakebush from Mr. Mixon to load, process, and produce as quickly as possible.
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> . . .
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> Metadata reflects that at least 200 of Mr. Mixon's photographs were produced long ago to all parties, and Plaintiffs reasonably and in good faith believed that all of Mr. Mixon's photos were produced. Unfortunately, however, and despite haven taken efforts to secure the photos from Mr. Mixon's device, the photos did not load into the production database. Given his condition, however, deposition preparation or similar activities from which it might have sooner become apparent that further Mixon photos had not been produced did not occur. It was not until Plaintiffs' counsel was looking for file names and corresponding bates numbers in preparing the exhibit list that Plaintiffs' counsel discovered that the 200 photos produced did not include all of the Mixon-sourced photos and few videos.

(Pls.' Br. Opp. Mot., at 4, 6.)

24. The parties engaged in a "meet-and-confer" to address the eleventh-hour production of the C.B. Notes and Mixon Materials on 30 November 2023. The parties failed to reach a resolution of the issue at that time.

25. Defendants filed a Motion for Status Conference on 1 December 2023. (ECF No. 237.) The Court subsequently conducted a status conference on 5 December 2023 (the "5 December Status Conference") to address the newly-produced evidence.

26. At the 5 December Status Conference, counsel for Defendants informed the Court of their intention to seek sanctions in connection with the untimely production of the Withheld Materials. On 6 December 2023, the Court entered an

Order staying all deadlines contained within the Pretrial Scheduling Order pending the Court's ruling on Defendants' forthcoming motion for sanctions. (ECF No. 242.)

27. On 8 December 2023, Defendants filed the present Motion along with a supporting memorandum and accompanying exhibits.[3] (*See* ECF Nos. 243, 246, 247.) In the Motion, Defendants requested that the Court bar Plaintiffs from using the newly produced C.B. Notes and Mixon Materials at trial and that an "adverse inference" instruction be given to the jury at trial to the effect that the Withheld Materials were within the custody and control of Plaintiffs throughout this litigation and that their tardy production of these items creates the inference that, if admitted into evidence, the Withheld Materials would be unfavorable to Plaintiffs' case. (Defs.' Br.. Supp. Mot., at 1–2.) Alternatively, Defendants requested that the Court (1) grant a continuance of the existing 29 January 2024 trial date so that additional discovery could be undertaken with respect to the newly produced evidence; and (2) impose monetary and certain other types of sanctions against Plaintiffs. (Defs.' Br. Supp. Mot., at 2.)

28. Plaintiffs filed a response to the Motion on 11 December 2023. (Pls.' Br. Opp. Mot., ECF No. 248).

29. On 12 December 2023, the Court entered an Order cancelling the scheduled jury trial in this matter set to begin on 29 January 2024 and stating that

[3] Amended versions of Defendants' supporting memorandum, index of exhibits, and accompanying exhibits were also filed on 8 December 2023 to fix clerical mistakes. The amended versions of these documents located at ECF Nos. 246 and 247 are the operative documents for purposes of considering the present Motion.

the trial would be rescheduled at a later date.[4] (ECF No. 249.) Furthermore, the Court directed Defendants to file a reply brief in support of their Motion on or before 21 December 2023.

30. Defendants timely filed a reply brief in support of the Motion on 21 December 2023. (Defs.' Reply Br. Supp. Mot., ECF No. 251.)

31. On 10 January 2024, the Court held a hearing via Webex on the Motion, which is now ripe for resolution.

CONCLUSIONS OF LAW

32. Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

33. Pursuant to Rule 37 of the North Carolina Rules of Civil Procedure and the Court's inherent authority, Defendants requested in the Motion that the Court impose the following sanctions against Plaintiffs: (i) "bar Plaintiffs from using, relying on, or referring to, in any way, any of the recently produced documents, photos, and videos"; and (ii) at trial provide the jury with an adverse inference "instructing that the withheld documents, photos, and videos, that were in Plaintiffs custody and control during the course of the instant litigation and discovered and produced long after the close of discovery in this case, if submitted into evidence, would not be favorable to Plaintiffs' case." (Defs.' Br. Supp. Mot., at 1–2.) Alternatively, Defendants requested the imposition of lesser sanctions, including "a continuance of the January 29, 2024 Trial date and pre-trial order schedule, so that

[4] The Court also cancelled the Final Pretrial Conference in this matter previously scheduled for 12 January 2024.

up to 90 days of additional discovery may be undertaken as to withheld materials with Plaintiffs bearing the costs and expenses, including Defendants' attorneys' fees, of these renewed discovery efforts." (Defs.' Br. Supp. Mot., at 2.) Finally, Defendants also "request[ed] the Court enter an order awarding them their reasonable expenses incurred in conjunction with" the Motion. (Defs.' Br. Supp. Mot., at 2.)

34. As noted above, the Court previously entered orders staying the deadlines contained within the Pretrial Scheduling Order and cancelling the trial in this matter previously scheduled to begin on 29 January 2024. (*See* ECF Nos. 242, 249.) Therefore, to the extent the Motion seeks a continuance of the trial and pretrial deadlines, the Motion is **DENIED** as **MOOT**.

35. At the outset, the Court notes that Defendants conceded at the 10 January 2024 hearing that there is no evidence in the record that the untimely disclosure of the Withheld Materials was the fault of any employee or agent of Raeford. Instead, the record shows that the fault lies with Carey Brakebush, an officer of Brakebush. Therefore, the Court finds it inappropriate to impose sanctions against Raeford. Accordingly, the remainder of this Order concerns the propriety of issuing sanctions against Brakebush.

36. "The Court has multiple sources of authority to impose a variety of sanctions for violations of" its orders pertaining to discovery. *Out of the Box Developers, LLC v. LogicBit Corp.*, 2014 NCBC LEXIS 7, at **2 (N.C. Super. Ct. Mar. 20, 2014) (concluding "that both Rule 37(b)(2) and the inherent authority of a trial

court to manage its docket and compel compliance with its orders permit imposing sanctions for violations of Rule 26(c) protective orders").

37. First, "Rule 37 gives the trial court express authority to compel discovery and to sanction a party for abuse of the discovery process." *Cloer v. Smith*, 132 N.C. App. 569, 573 (1999); *see also Pugh v. Pugh*, 113 N.C. App. 375, 378 (1994) ("The substantive law governing discovery is contained in N.C.G.S. § 1A-1, Rules 26-36. However, it is Rule 37 which governs discovery sanctions and which puts teeth in the other rules.").

38. This Court has explained the sweeping nature of Rule 37 as follows:

> Rule 37 permits sanctions "for failure . . . to comply with discovery processes." *Bumgarner v. Reneau*, 332 N.C. 624, 630, 422 S.E.2d 686, 690 (1992); *see also Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 781 (1999) ("Rule 37 gives the trial court express authority . . . to sanction a party for abuse of the discovery process."). Rule 37 should be construed liberally to provide trial courts with flexibility to impose sanctions. *Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 (1979). The Comment to Rule 37 notes that subsection (b)(2) provides for comprehensive enforcement of all "orders for discovery[,]" including orders entered pursuant to Rule 26(c). N.C. Gen. Stat. 1A-1, Rule 37, Comment to the 1975 Amendment.

Out of the Box Developers, LLC, 2014 NCBC LEXIS 7, at **3–4.

39. "The imposition of sanctions under Rule 37 'is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion.' " *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 246 (2005). "The court need not find 'willful' conduct in order to impose any of the sanctions allowed by Rule 37 [and] the party seeking Rule 37 sanctions need not show prejudice

resulting from the sanctionable conduct." *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at **8 (internal citations omitted).

40. "Rule 37 supplies the court with a broad spectrum of sanctions, including striking pleadings in whole or part, dismissing the action, entering default, and treating further violations of court orders as contempt of court." *Id.* at **7–8.

41. Subsection (b)(2) of Rule 37 provides as follows:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> > a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> > b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;
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> > c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> >
> > d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
> >
> > e. Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in subdivisions a, b, and c of this subsection, unless the party failing to comply shows that the party is unable to produce such person for examination.

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

N.C. R. Civ. P. 37(b)(2).

42. "When issuing sanctions pursuant to Rule 37(b), the Court must consider lesser sanctions available and determine what is appropriate based on the facts and circumstances of this case." *Tumlin v. Tuggle Duggins P.A.*, 2018 NCBC LEXIS 51, at *41–42 (N.C. Super. Ct. May 22, 2018); *see also Ray v. Greer*, 212 N.C. App. 358, 363 (2011) ("[T]he trial court may determine the appropriate sanction in its discretion," but "must consider lesser sanctions before imposing the most severe sanction available[.]"). In making this inquiry, "[t]he Court must determine, in its discretion, 'whether the lost information is both unique and important to the litigation.' " *Tumlin*, 2018 NCBC LEXIS 51, at *42.

43. Second, in addition to the authority provided by Rule 37, "[t]rial courts retain inherent authority 'to do all things that are reasonably necessary for the proper administration of justice.' " *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at **9 (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987)). This includes the "inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37." *Cloer*, 132 N.C. App., at 573 (citing *Green v. Maness*, 69 N.C. App. 292, 299, *disc. rev. denied*, 312 N.C. 622 (1984)); *see also Few v. Hammack Enters., Inc.*, 132 N.C. App. 291, 298 (1999) ("Even absent an express grant of authority, however, trial courts have inherent authority to impose sanctions for willful failure to comply with the rules of court."); *Tumlin*, 2018 NCBC LEXIS 51, at

*38 ("The Court agrees that it can address general violations of discovery obligations because it 'retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37.' "); *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at **9 ("This inherent authority includes 'the power . . . to sanction parties for failure to comply with court orders[.]' " (quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674 (1987))).

44. The Court's inherent authority to impose sanctions for discovery violations beyond those enumerated in Rule 37 flows in part from the Court's "duty to protect the integrity of the legal process." *Kixsports, LLC v. Munn*, 2019 NCBC LEXIS 62, at *26 (N.C. Super. Ct. Sept. 30, 2019).

45. Pursuant to its inherent authority, "[t]he court may order a party to pay 'the reasonable costs, including attorneys' fees[,] incurred . . . in a proceeding in which [a party] has failed to comply with a court order.' " *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at **9 (quoting *Daniels*, 320 N.C. at 674). Moreover, "the Court may impose lesser sanctions under that [inherent] authority for violations of its orders." *Id.* at **10.

46. "When sanctioning a party under its inherent authority, the court must weigh the circumstances of each case and choose a sanction that, in the court's judgment, 'properly takes into account the severity of the party's disobedience.' " *Out of the Box Developers, LLC*, 2014 NCBC LEXIS 7, at **10 (quoting *Patterson v. Sweatt*, 146 N.C. App. 351, 357 (2001)). "The sanction imposed should be

proportionate to the gravity of the offense." *Kixsports, LLC*, 2019 NCBC LEXIS 62, at *26 (quoting *Montaño v. City of Chicago*, 535 F.3d 558, 563 (7th Cir. 2008)).

47. The "preferred" sanctions requested by Defendants are interrelated in nature. First, Defendants ask that this Court enter an order "barring Plaintiffs from referring to, using or relying on any of the recently disclosed documents, photos, and videos in any way at all, including but not limited to supporting any opinion or testimony at trial[.]" (Defs.' Br. Supp. Mot., at 14.) Next—assuming the Court grants Defendants' request that the Withheld Materials be excluded at trial—Defendants seek the imposition of "an adverse inference in the form of an instruction to the jury that Plaintiffs' withheld evidence was in Plaintiffs' possession, custody and control during the course of the lawsuit, and if the same were entered into evidence, the evidence would be prejudicial to the presentation of Plaintiffs' case and defenses[.]" (Defs.' Br. Supp. Mot., at 14.)

48. The Court cannot find any support in North Carolina law for such an "adverse inference" jury instruction under these circumstances. A review of the pertinent case law reveals that this type of instruction has only been authorized when spoliation of evidence has occurred. Accordingly, "North Carolina courts require a party seeking an adverse inference instruction to show that pertinent or 'potentially supportive' documents existed and were destroyed." *Tumlin*, 2018 NCBC LEXIS 51, at *38. Although there is no doubt that the C.B. Notes and Mixon Materials are "pertinent or potentially supportive," they were not destroyed. Therefore, the Motion

is **DENIED** as to Defendants' request that the jury be given an "adverse inference" instruction at trial.

49. With respect to Defendants' accompanying request that the Court "bar Plaintiffs from using, relying on, or referring to, in any way, any of the recently produced documents, photos, and videos[,]" the Court has carefully considered this request but ultimately declines to impose this sanction. Although the Court remains troubled by the untimely disclosure of the Withheld Materials, the Court is reluctant to prevent these materials from being offered into evidence at the trial of this matter. The key issue in this case is the value of the damage actually incurred to the plant as a result of the subject fire. The Withheld Materials are highly relevant to this issue, and the Court believes that the parties should be permitted to offer some or all of these items into evidence at trial. Therefore, the Motion is **DENIED** as to Defendants' request that the Court bar Plaintiffs from using at trial the Withheld Materials.

50. Nevertheless, the Court, in the exercise of its discretion and having considered the imposition of lesser sanctions, agrees that Defendants are entitled to the alternative sanctions requested in the Motion pursuant to Rule 37 and the Court's inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37.

51. The Court finds that "some additional discovery is needed to ameliorate" any prejudice caused to Defendants by the late production of the C.B. Notes and Mixon Materials. *Kixsports, LLC*, 2019 NCBC LEXIS 62, at *8. As a part of such

limited discovery, the Court, in the exercise of its discretion, **ORDERS** that Defendants shall be permitted to reopen the deposition of Carey Brakebush for the limited purpose of examining him regarding the Withheld Materials, including the reason for their untimely production, the circumstances of their discovery, and his production of the Withheld Materials to counsel (subject to the restrictions imposed by the attorney-client privilege). If, after reopening Carey Brakebush's deposition, Defendants believe that further discovery on the subject of the Withheld Materials is required, then Defendants may file a motion with the Court at the appropriate time seeking leave to conduct any additional depositions that it deems necessary.[5] Furthermore, in the event that any party believes that the disclosure of the Withheld Materials necessitates amending their existing expert reports, the party shall be permitted to file a motion with the Court seeking leave to do so.[6]

52. In addition, the Court, in the exercise of its discretion, **ORDERS** that Brakebush shall produce Carey Brakebush's iPad device for a third-party forensic examination and that Brakebush shall bear the cost of the examination. This forensic examination shall include the retrieval of content and metadata associated with the GoodNotes application utilized by Carey Brakebush for notetaking.

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[5] The Court wishes to emphasize, however, that all new discovery authorized herein shall relate solely to the Withheld Materials. The parties shall *not* be permitted to conduct discovery on any topic unrelated to the C.B. Notes and the Mixon Materials.

[6] Plaintiffs shall not be permitted to reopen any depositions of fact witnesses. However, the Court will allow both Plaintiffs and Defendants the opportunity to seek leave from the Court to amend their expert reports and, assuming the Court allows such amendments in whole or in part, to seek leave to reopen the depositions of the opposing side's expert witnesses.

53. The Court is aware that "courts approach forensic imaging with a measure of caution because of its intrusive nature." *Kixsports, LLC*, 2019 NCBC LEXIS 62, at *10. Nevertheless, "[f]orensic examinations . . . may be warranted when there exists some factual basis to conclude that the responding party has not met its duties in the production of discoverable information." *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 436 (2019). Here, such a factual basis exists because of Brakebush's gross tardiness in producing the Withheld Materials as set out above in violation of the rules of discovery.

54. Within ten days of the date of this Order, and after consultation with Plaintiffs, Defendants shall file a proposed Scheduling Order containing deadlines for the additional discovery set out above.

55. Additionally, the Court, in the exercise of its discretion, **CONCLUDES** that monetary sanctions are appropriate. Rule 37 expressly states that "the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. R. Civ. P. 37(b)(2). Brakebush's untimely production was not substantially justified, and there are no other circumstances making an award of expenses unjust.

56. There is no evidence in the record suggesting that Brakebush's failure to produce the Withheld Materials in a timely fashion was deliberate on the part of either Brakebush or its attorneys. But that does not render the imposition of

monetary sanctions in this case inappropriate or improper. The failure to produce highly relevant documents responsive to the opposing party's discovery requests in a timely fashion is sanctionable even where the discovery violation was unintentional. Here, the production was not merely untimely but did not occur until the eve of trial. The Court finds that, at a minimum, Brakebush's discovery violation was the result of extreme negligence. Carey Brakebush is perhaps the primary witness for Brakebush in this case, and it is inexcusable that at no time during the discovery process were the electronic devices used by him searched with sufficient thoroughness to obtain the C.B. Notes. It is similarly unacceptable that during the lengthy discovery process in this case, Brakebush did not obtain, and produce, the Mixon Materials.

57. As a result of this negligence, Defendants have been prejudiced in their ability to fully prepare for trial and have incurred (and will continue to incur) additional attorneys' fees in connection both with the filing of the present Motion and with the additional discovery that will need to take place.[7] *See Kixsports, LLC*, 2019 NCBC LEXIS 62, at *29 ("Monetary sanctions are needed to compensate Defendants for their costs, including reasonable attorneys' fees, incurred in connection with filing this motion.").

58. Finally, Brakebush shall provide Defendants' counsel with a certification within twenty days of the date of this Order that all relevant

[7] Although not a basis for the imposition of sanctions, the Court notes that Brakebush's conduct has inconvenienced not only this Court but also the staff of the Davie County Trial Court Administrator's Office and Clerk's Office.

discoverable materials in their possession, custody, or control have been produced to Defendants, including a search for and production of all notes, photographs, videos, or any other documents relating to the fire damage to the Mocksville plant, the rebuilding of the plant, and the insurance claim submitted by Brakebush in connection with the fire damage.

59. After careful consideration of all the facts relevant to Defendants' Motion, the Court concludes that the sanctions imposed on Brakebush are reasonable, necessary, and justified under the circumstances. Moreover, Brakebush was fully notified of the factual basis for the sanctions sought and given a full and fair opportunity to be heard before the Court's final decision on this issue. Therefore, the Court's determination that sanctions are appropriate does not violate Brakebush's due process rights.

ACCORDINGLY, THE COURT CONCLUDES, in its discretion, that the Motion should be **GRANTED**, in part, and **DENIED**, in part. **IT IS ORDERED** as follows:

1. To the extent the Motion seeks a continuance of the trial and pretrial deadlines, the Motion is **DENIED** as moot.
2. To the extent Defendants request that the Court give an "adverse inference" jury instruction at trial, the Motion is **DENIED.**
3. To the extent Defendants request that the Court bar Plaintiffs from introducing any portion of the Withheld Materials at trial, the Motion is **DENIED.**

4. To the extent the Motion seeks the imposition of monetary sanctions against Raeford, the Motion is **DENIED**.
5. Defendants shall be permitted to reopen the deposition of Carey Brakebush for the limited purpose of questioning him about the Withheld Materials. Defendants shall be permitted to seek leave from the Court to reopen any other fact witness depositions necessitated by the new testimony of Carey Brakebush, and the parties shall be allowed to seek permission from the Court to amend their expert reports accordingly.
6. Brakebush shall produce Carey Brakebush's iPad device for a third-party forensic examination with the costs of the examination to be borne by Brakebush. This examination shall include the retrieval of content and metadata associated with the GoodNotes application.
7. Defendants are **DIRECTED** to file a proposed Scheduling Order within **ten days** of entry of this Order that contains proposed deadlines for the new discovery authorized herein.
8. Defendants shall recover from Brakebush their expenses, including reasonable attorney's fees, incurred in connection with prosecuting the present Motion and in conducting the new discovery necessitated by Brakebush's late production of the Withheld Materials. Defendants shall be permitted to file a fee petition accompanied by supporting materials following the completion of the new discovery.

9. Brakebush shall provide Defendants' counsel with a certification within **twenty days** of the date of this Order that all relevant discoverable documents in their possession, custody, or control have been provided to Defendants, including a search for and production of all notes, photographs, videos, or other documents relating to the fire damage to the Mocksville plant, the rebuilding of the plant, and the insurance claim submitted by Brakebush in connection with the fire damage.

SO ORDERED, this the 22nd day of January, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases