

STATE OF NORTH CAROLINA
BRUNSWICK COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 746

JCG & ASSOCIATES, LLC; MIP 1,
LLC; JAMES BONICA; and
PATRICIA BONICA,

Plaintiffs and
Counterclaim
Defendants,

v.

DISASTER AMERICA USA, LLC;
DA ROOFING SYSTEMS; DONALD
HUSK; and JASON HUSK,

Defendants,

and

DISASTER AMERICA OF NORTH
CAROLINA, LLC,

Defendant and
Counterclaim
Plaintiff.

**ORDER ON BCR 10.9
DISCOVERY DISPUTE**

1. On February 12, 2020, counsel for Plaintiffs submitted an informal discovery-dispute summary under Business Court Rule (“BCR”) 10.9. After Defendants timely responded, the Court held a teleconference and invited further e-mail submissions from each side. Having concluded that formal briefing would be inefficient, costly to the parties, and of little additional value, the Court elects to decide the dispute based on the parties’ informal submissions and oral arguments, as permitted by BCR 10.9(b)(3).

2. This case arises from an alleged scheme by Defendants to defraud property owners damaged by Hurricane Florence when it struck North Carolina in 2018. Defendants provide catastrophic remediation and restoration services; it is alleged

that they overcharged Plaintiffs or charged for services that were never performed, all while fraudulently using the name and general contractor's license of JCG & Associates, LLC ("JCG"). An earlier order describes these allegations in more detail. *See JCG & Assocs., LLC v. Disaster Am. USA, LLC*, 2019 NCBC LEXIS 112, at *1–6 (N.C. Super. Ct. Dec. 19, 2019). The asserted claims include fraud, common-law trademark infringement, racketeering, and unjust enrichment, among others. (*See* Compl. ¶¶ 85, 106, 126, 127, 130, 142, 143, 153, ECF No. 2.)

3. This discovery dispute relates to financial information. JCG served interrogatories and requests for documents in which it sought the total revenue and net profit earned by Defendants in North Carolina during a defined period after September 1, 2018. JCG also requested the total revenue that Defendants received for each property they agreed to repair as well as the compensation received from each property owner or insurance carrier.* When Defendants refused to produce relevant ledgers (such as financial data maintained in QuickBooks software), JCG submitted the dispute under BCR 10.9.

4. “[O]rders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion.” *Wachovia Bank, N.A. v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) (quoting *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff'd*, 360 N.C. 356 (2006) (per curiam)). In general,

* With the discovery-dispute summary, JCG provided excerpts of the relevant discovery requests. They include Interrogatory Nos. 15, 16, 24, and 25 and Requests for Production Nos. 1 and 16 to Disaster America USA, LLC and Interrogatory Nos. 14 and 15 and Requests for Production Nos. 1 and 16 to Disaster America of North Carolina, LLC.

“[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” N.C. R. Civ. P. 26(b)(1). “The test of relevancy under Rule 26 is not, of course, the stringent test required at trial. The rule is designed to allow discovery of any information ‘*reasonably calculated* to lead to the discovery of admissible evidence’” *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976) (quoting N.C. R. Civ. P. 26(b)) (emphasis in original).

5. The relevance of the disputed requests does not appear to be in dispute. Disgorgement of the infringer’s profits is one potential remedy in a case of trademark infringement. *See* 15 U.S.C. § 1117(a); *Johnson & Morris, PLLC v. Abdelbaky & Boes, PLLC*, 2017 NCBC LEXIS 89, at *13 (N.C. Super. Ct. Sept. 28, 2017) (“Under North Carolina law, a common law claim for trademark infringement of an unregistered mark is analyzed under federal law”). The alleged infringer’s revenue and profit information are relevant at least to that issue.

6. Defendants instead object to the requests on three other grounds. None is persuasive.

7. First, Defendants contend that the requests are overbroad. Not so. Even the broadest requests are limited to the place (North Carolina) and time (immediately after Hurricane Florence) of the alleged misconduct. Indeed, many of the requests are limited to specific properties and contracts. These are narrow, targeted requests for discovery. And the burden on Defendants appears to be minimal given that most,

if not all, of the data is maintained in QuickBooks, making it relatively easy to gather and produce.

8. Second, Defendants object to the timing of the discovery. According to Defendants, a plaintiff in a trademark-infringement case is entitled to disgorgement and an accounting of profits only upon a showing of fraud or bad faith. That showing has not yet been made, they contend, and discovery on these topics must therefore wait until after a finding of liability.

9. The Court disagrees. The Rules of Civil Procedure allow for liberal pretrial discovery of relevant matters, including matters related to issues of damages and other remedies. Defendants have not cited a single case requiring phased discovery in this situation. From the Court's own research, at least one federal district court has rejected it outright, *see Saltair, Inc. v. I.S.T. Global*, 2010 U.S. Dist. LEXIS 157408, at *5–8 (D. Wyo. Dec. 20, 2010), and many others have allowed routine discovery of a defendant's financial information in cases of trademark infringement, *see Samsung Elecs. Am., Inc. v. Chung*, 321 F.R.D. 250, 298–99 (N.D. Tex. 2017); *Emerald City Mgmt., LLC v. Kahn*, 2015 U.S. Dist. LEXIS 193464, at *9–12, 15–17 (E.D. Tex. Sept. 2, 2015); *Payless Shoesource Worldwide v. Target Corp.*, 2006 U.S. Dist. LEXIS 84072, at *15–22 (D. Kan. Nov. 17, 2006); *Ass'n of the U.S. Army v. Aegis Consulting Grp., Inc.*, 2005 U.S. Dist. LEXIS 29333, at *13–14 (W.D. Pa. Nov. 22, 2005); *Analytics, Inc. v. Analytix, Inc.*, 1987 U.S. Dist. LEXIS 4170, at *6–7 (E.D. Pa. May 13, 1987). It may be appropriate to *reopen* discovery related to remedies after a finding of liability, *see Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d

1059, 1076–77 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 410 (2015), but not to delay discovery of financial information altogether.

10. Even if Defendants were correct, the requested discovery would likely be relevant to other claims, which rest on allegations that Defendants fraudulently charged or overcharged Plaintiffs as part of a broader fraudulent scheme within the State. (See Compl. ¶¶ 26, 30, 46, 47, 50, 51, 56, 59, 60, 68, 70, 85.) The requests for targeted financial information relating to specific contracts and properties in North Carolina may have bearing on those claims. See *Young v. Kimberly-Clark Corp.*, 219 N.C. App. 172, 182, 724 S.E.2d 552, 559 (2012); *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2018 NCBC LEXIS 100, at *31–33 (N.C. Super. Ct. Sept. 26, 2018).

11. Third, Defendants argue that JCG is unlikely to prevail on the merits of its trademark claim. It goes without saying that Defendants “cannot refuse to produce these requested documents or information simply because they are relevant to a claim on which Defendant[s] feel confident under the law that they will prevail.” *Firebirds Int’l, LLC v. Firebird Rest. Grp., LLC*, 2018 U.S. Dist. LEXIS 131113, at *48 (N.D. Tex. July 16, 2018). No motions to dismiss or motions for summary judgment have been filed. The claim is thus part of the case, and JCG is entitled to discovery.

12. Accordingly, the Court **ORDERS** as follows:

- (a) Disaster America USA shall provide full and complete responses to JCG’s Interrogatory Nos. 15, 16, 24, and 25 and Requests for Production Nos. 1 and 16 no later than June 12, 2020.

(b) Disaster America of North Carolina shall provide full and complete responses to JCG's Interrogatory Nos. 14 and 15 and Requests for Production Nos. 1 and 16 no later than June 12, 2020.

SO ORDERED, this the 5th day of May, 2020.

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