STATE OF NORTH CAROLINA CABARRUS COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 3626
CALIBER PACKAGING AND EQUIPMENT, LLC and CALIBER PACKAGING GROUP, LLC, Plaintiffs, v. CHERNELL SWARINGEN, Defendant.	**ORDER ON NONPARTY PRISM PACKAGING CONSULTANTS, LLC'S SECOND OBJECTION TO DISCOVERY, MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER**

1. **THIS MATTER** is before the Court on nonparty Prism Packaging Consultants, LLC's ("Prism") Second Objection to Discovery, Motion to Quash and Motion for Protective Order (the "Motion") (ECF No. 35). For the following reasons, Prism's Motion is **GRANTED in part and DENIED in part**.

I. FACTUAL AND PROCEDURAL BACKGROUND

2. The Court does not make findings of fact but rather sets forth this background, taken from the allegations, affidavits and exhibits provided, to provide context for its ruling.

3. Prism Packaging Consultants, LLC ("Prism") is located in Chicago, Illinois. Prism and Plaintiffs in this action, Caliber Packaging and Equipment, LLC ("Caliber Packaging") and Caliber Packaging Group, LLC ("Caliber Group," together "Caliber"), are competitors in the business of distributing industrial packaging products and solutions; installing, maintaining, and repairing packaging equipment;

and providing inventory management optimization services. (Compl. ¶¶ 8, 43, ECF No. 3; Motion, Ex. B ["Haddon Aff."] ¶ 5, ECF No. 35.2.)

4. Individually and through a family partnership, Michael C. Smith ("Smith") is the majority member of both Caliber Packaging and Caliber Group. (Second Declaration of Kira Parsons ["Second Parsons Decl."] ¶ 8, ECF No. 38; Reply Br. Supp. Motion, Ex. A ["Haddon Suppl. Aff."] ¶ 3, ECF No. 39.1.) Kira Parsons ("Parsons") is a member and the Manager of both LLCs. (Second Parsons Decl. ¶ 2.) According to Thomas Haddon, a member and Manager of Prism, Parsons is Smith's business partner. (Haddon Suppl. Aff. ¶ 3.)

5. Until early 2022, Prism's predecessor, Caliber Packaging, LLC ("Caliber ORD"), was affiliated with Plaintiff. (Second Parsons Decl. ¶ 3; Haddon Aff. ¶ 1.) Smith, along with Haddon, Francis Wajda, and Matthew Wajda owned Caliber ORD in equal 25% interests. (Second Parsons Decl. Ex. A., Loan Consent and Name Change Agreement ["Loan Agreement"] ECF No. 38.1.)

6. A dispute between Smith and the other owners of Caliber ORD led to an acrimonious parting of the ways between Caliber ORD and Caliber in March 2022, and ultimately spawned litigation in Illinois. (Second Parsons Decl. ¶¶ 3, 8–10; Haddon Aff. ¶¶ 1, 3.)

7. After the separation, Caliber ORD changed its name to Prism. (Loan Agreement, at 1.) Presently, Smith, Haddon and the Wajdas own Prism.[1] (Second Parsons Decl., Ex. E. ECF No. 38.5.)

[1] To avoid confusion, the Court refers to the former Caliber ORD as "Prism" for the balance of the Order.

8. It is undisputed that Prism became Plaintiffs' competitor after it separated from Caliber and that it continues to compete with Plaintiffs. (Compl. ¶ 43; Haddon Aff. ¶ 5.)

9. Separately, here in North Carolina, Caliber has sued its former Assistant Operations Manager, Chernelle Swaringen, for allegedly transferring its trade secrets and other business information to Prism after the two companies parted ways.

10. Caliber alleges that while Swaringen was employed, her duties included supporting Prism. According to Parsons, Swaringen:

> regularly served in a support role for Prism and the other Affiliates, which included regular communications with the Prism owners regarding business matters of common interest for the Group. Specifically, [Swaringen] managed the customer service team, the customer service box (an email inbox to which Prism's customers would email orders and their vendors would send information to [sic]), she completed sales order entry, purchase order entry, responded to Prism's customer emails and assisted with freight and transportation for Prism through the date when Prism was removed from the Group.

(Second Parsons Decl. ¶ 6.) Those duties ended when Prism and Caliber Group separated.

11. Swaringen remained employed for at least five months (and perhaps longer) after the affiliation between the two companies ended. On 30 August 2022, Caliber terminated Swaringen's employment as part of a corporate restructuring. (Compl. ¶ 54.) Prism believes, however, that Swaringen continued to work for Caliber in a consulting capacity until late 1 October 2022. (Haddon Aff. ¶¶ 1-2.) Caliber

denies that Swaringen continued to work for it in any capacity after 30 August 2022. (Compl. ¶¶ 22, 54.)

12. Caliber defines Trade Secret Information in its Complaint as "confidential, proprietary and trade secret information . . . that is not generally known to the public or its competitors." (Compl. ¶ 13.) It includes:

> (1) Customer lists which include Customers' names, contact persons, purchase histories, special pricing developed for each customer, Plaintiffs' recommendations of products or packaging solutions to customers, consulting provided to customers, and other information tailored to the individual needs and requirements of the Customer; (2) information regarding prospective Customers revealing the types and frequency of Plaintiffs' interaction with the prospective customer, contact person, matters discussed, and notes regarding strategy for transforming the prospect into an active customer; (3) the Plaintiffs' cost and pricing information; (4) detailed lists of vendors describing the products purchased from the vendors and special pricing that has been negotiated, order frequency, contact persons at the vendors, and other sensitive information regarding those vendor relationships; (5) information regarding Plaintiffs' Private Label Vendor program pursuant to which Plaintiffs maintain the secrecy of the identities of those vendors who manufacture unique packaging products for Plaintiffs under the "Caliber Packaging" label to prevent competitors from knowing who made the product, interfering with those relationships, or attempting to obtain a similarly advantageous competitive relationship with Plaintiffs' Private Label Vendors; (5) [sic] information regarding Plaintiffs' importing of products from Europe and other overseas locations which includes the name of the vendors, pricing and other information that is not made public; (6) business strategy information regarding sales, marketing and product development; (7) research and development; and (8) other sensitive business information maintained by Plaintiffs.

(Compl. ¶ 13.)

13. Caliber stores business information, including Trade Secret Information, on a computer system called Sage. (Compl. ¶¶ 14–18.) As an employee, Swaringen had access to all of Sage's modules except for the banking module. (Compl.

¶ 19.) However, Prism's access to Sage was limited to its own information. Prism could not access Caliber's Trade Secret Information. (Compl. ¶ 18.)

14. After early April 2022, Swaringen was no longer authorized to support Prism. (Second Parsons Decl. ¶ 6.) Parsons testified that she orally communicated to Caliber's staff, including Swaringen, that they were not to assist Prism. (Second Parsons Decl. ¶ 4.) In addition, on 14 April 2022, Parsons emailed several of Caliber's employees, including Swaringen, to tell them that Prism had "moved to their own server so we are no longer able to assist them with order entry or invoicing as we have no access to their new system." She explained that Caliber no longer had access to Prism's information in Sage, and she directed Swaringen to "make sure you[r] customer service team knows if they [Prism] request help with order entry or invoicing they need to ask their provider as we are not responsible." (Second Parsons Decl. Ex. C, ECF No. 38.3.)

15. Nevertheless, Parsons testified that over the course of the next five months, Swaringen continued to communicate and exchange information with Prism, Haddon, and the Wajdas. (Second Parsons Decl. ¶ 7.) Specifically, Parsons stated that in the months prior to being laid off, Swaringen was frequently seen in her office with the door closed talking on her cell phone. (Pls.' Mot. Expedite Disc. Ex. B, Decl. of Kira Parsons ["Parsons Decl."] ¶ 3, ECF No. 5.2.) Caliber believes Swaringen was given specific instructions during these calls to misappropriate Caliber's Trade Secret Information and share it with Prism. (Compl. ¶ 44.) Caliber further alleges that

Swaringen misappropriated Trade Secret Information by taking photographs of the information using her cell phone. (Compl. ¶ 48.)

16. Caliber also believes that Swaringen stole hard copies of Caliber's documents containing Trade Secret information. Parsons testified that Caliber received reports that Swaringen spoke with other Caliber employees about shredding Caliber documents and putting others in her car shortly before her departure. (Second Parsons Decl. ¶ 7.) Moreover, Caliber alleges that in the weeks prior to her last day of employment, Swaringen repeatedly accessed "pick tickets, pricing, sales confirmations, and sales orders of customers with a frequency that was well beyond what she would normally need to do in a work day." (Compl. ¶ 50.) Her activity allegedly included accessing a master customer list containing all sales orders from all of Caliber's customers. (Compl. ¶ 51.)

17. Additionally, before she left, Caliber alleges that Swaringen permanently deleted important emails and email folders containing its confidential business information. (Compl. ¶ 48.) The deletions included monthly reconciliation reports of invoices issued to an important customer, employee time sheets and review forms, a bill of lading on a delivery to a customer, and vendor contact information. (Parsons Decl. ¶ 5.)

18. Two Caliber email folders of particular importance that Swaringen allegedly deleted were the Customer Service Inbox and the Sales Rep folder. According to Parsons, the Customer Service Inbox contained all sent and received customer emails from 2018 to 1 March 2022, and the Sales Rep folder contained

similar customer information. (Parsons Decl. ¶ 6.) Specifically, Parsons testified that the Customer Service Inbox contained emailed customer orders and "customer contact information and preferences, special pricing, products ordered, quantities ordered and other information that has been developed through years of selling to these customers." (Parsons Decl. ¶ 6.)

19. Parsons further testified that on 18 November 2022, she discovered that Swaringen had permanently deleted all email messages that were dated prior to 1 March 2022 and that were maintained in a second email account used by Caliber to receive orders directly from customers and sales representatives. As with the other deleted emails, the emails in this account contained "a far ranging compilation of confidential information regarding customer orders, preferences, quantities ordered, special pricing offered to [ ] customers, and other similar information" that would be damaging if it were accessed by a competitor. (Second Parsons Decl. ¶ 7.)

20. Micah Sturgis ("Sturgis"), a digital forensics expert retained by Caliber, testified that in course of his forensic review of Swaringen's activity on her computer in the weeks leading up to her termination, he discovered that numerous email deletions took place on 19 August 2022, and numerous permanent deletions of all items in the Deleted Folder occurred in late August 2022. According to Sturgis, "[t]hese double deletions were performed by the user and were not systematic deletions." (Mot. Expedited Disc. Ex. A, Aff. of Micah Sturgis ["Sturgis Aff."] ¶¶ 7–9, ECF No. 5.1.)

21. In November 2022, Prism sued Smith in Illinois (the "Illinois Action"). (Second Parsons Decl. ¶ 8.) At about the same time, Caliber filed this action against Swaringen. The gravamen of Caliber's action against Swaringen is that for at least some period of time leading up to the falling out between Prism and Caliber, and continuing until Swaringen's employment with Caliber ended, Swaringen's loyalties to Caliber were at best divided, and at worst were completely subverted by its former affiliate. Among other alleged untoward behavior, Caliber claims that Swaringen "used her possession of Plaintiffs' Trade Secret Information to entice potential prospective employers [including Prism] by promising to transfer this information to them if she were offered employment." (Compl. ¶ 47.)[2] Caliber also asserts claims for misappropriation of trade secrets, breach of contract, civil liability for theft by an employee, computer trespass, conversion, unfair and deceptive trade practices ("UDTP"), and civil conspiracy.[3] (*See generally*, Compl. ¶¶ 59–94, 100–103.)

22. The Illinois Action against Smith was dismissed without prejudice on 11 April 2023. (Second Parsons Decl. ¶ 9.) However, Prism filed a First Amended Complaint in the Illinois Action on 31 May 2023. (Second Parsons Decl. ¶ 10.)

23. In the meantime, in this case, on 6 April 2023, Prism was served with Caliber's first subpoena *duces tecum*. (Pls.' Subpoena Prism, ECF No. 28.1.) On 17

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[2] Additional background can be found in the Court's Order and Opinion on Defendant's Motion to Dismiss Plaintiffs' Claims of Theft by Employee and Unjust Enrichment. *See Caliber Packaging & Equip. LLC v. Swaringen*, 2023 NCBC LEXIS 74, at **2–6 (N.C. Super. Ct. May 31, 2023).

[3] Plaintiffs' claim for unjust enrichment was dismissed with prejudice on 31 May 2023. *Caliber Packaging & Equip.*, 2023 NCBC LEXIS 74, at **14–16.

April 2023, Prism filed its initial Objection to Discovery, Motion to Quash, and Motion for Protective Order. (ECF No. 28.) Caliber subsequently withdrew its first subpoena on 22 May 2023. (ECF No. 33.)

24. Also on 22 May 2023, Caliber served an amended subpoena *duces tecum* on Prism. (Am. Subpoena Prism, Motion, ["Amended Subpoena"] ECF No. 35.1.) Prism responded with its Motion on 5 June 2023. (ECF No. 35.)

25. On 22 August 2023, the Court held a hearing on the Motion. All parties appeared and were heard through counsel. At the conclusion of the hearing, the Court ordered Prism and the parties, with the benefit of having heard the Court's observations, to confer regarding the Amended Subpoena and to report the outcome of their conference to the Court by 24 August 2023.

26. On 24 August 2023, Caliber notified the Court through an email to its clerk that it had revised its document requests (the "Revised Subpoena") (ECF No. 45). Prism responded via email that it maintained its objections. Accordingly, the Motion is ripe for disposition.

II. LEGAL STANDARD

27. Under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure (the "Rule[s]"), "a party may obtain discovery concerning any unprivileged matter as long as relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence." *Wagoner v. Elkin City Sch.' Bd. of Educ.*, 113 N.C. App. 579, 585 (1994). Rule 26(c) provides for the issuance of a protective order for good cause

shown "to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense[.]" N.C. R. Civ. P. 26(c).

28. Likewise, Rule 45 permits a litigant to serve a subpoena commanding a nonparty to "produce and permit inspection and copying of designated records, books, papers, documents, electronically stored information, or tangible things" in its possession or control. N.C. R. Civ. P. 45(a)(1)(b). Rule 45(c) permits the recipient to object and authorizes the court to quash a subpoena if it (1) fails to allow reasonable time for compliance, (2) requires disclosure of privileged or other protected matter, (3) subjects a person to undue burden or expense, (4) is otherwise unreasonable or oppressive, or (5) is procedurally defective. N.C. R. Civ. P. 45(c)(3).

29. As this Court has observed, Rule 45 of the North Carolina Rules of Civil Procedure governing subpoenas "affords greater protection to nonparties than Rule 26 provides to parties." *Bank of Am. Corp. v. SR Int'l Bus. Ins. Co.*, 2006 NCBC LEXIS 17, at **16 (N.C. Super. Ct. Nov. 1, 2006); *SciGrip, Inc v. Osae*, 2015 NCBC LEXIS 89, at *13 (N.C. Super. Ct. Sept. 28, 2015). This is because "[a] subpoena to a nonparty . . . poses a concrete, one-sided burden with no corresponding benefit . . . [because] [n]onparties, by definition, have no direct stake in litigation." *Arris Grp., Inc. v. Cyberpower Sys. (USA)*, 2017 NCBC LEXIS 58, at *6 (N.C. Super. Ct. July 11, 2017). Consequently, it is particularly appropriate to protect nonparties from any undue burden litigation may impose without sufficient justification. *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at **16.

30. Accordingly, Rule 45 requires the Court to quash or modify a subpoena if the recipient demonstrates any of the specified grounds for objection, including privilege, unreasonableness, and undue burden. N.C. R. Civ. P. 45(c)(3), (5); *see also Arris Grp., Inc.*, 2017 NCBC LEXIS 58, at *7. If trade secrets or other confidential information is subpoenaed, the Court may quash or modify the subpoena unless the issuing party "shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship[.]" N.C. R. Civ. P. 45(c)(7).

31. Ultimately, whether to grant or deny a motion to quash or a motion for protective order with respect to a subpoena are decisions within the discretion of the Court. *Fallis v. Watauga Med. Ctr., Inc.*, 132 N.C. App. 43, 60 (1999) ("[D]iscovery orders are generally within the discretion of the court and will not be upset on appeal absent a showing of abuse of discretion"); *Transatl. Healthcare, LLC v. Alpha Constr. of the Triad, Inc.*, 2017 NCBC LEXIS 21, at *41 (N.C. Super. Ct. Mar. 9, 2017) ("Whether to grant or deny a motion to quash is within the sound discretion of the trial court.").

III. ANALYSIS

32. Prism objects to the Revised Subpoena on multiple grounds. It argues (1) the requests are unduly burdensome on Prism, a nonparty, because Caliber has not exhausted other means of obtaining them; (2) requiring it to gather and review the requested documents for production would be unduly burdensome; (3) the documents are not being sought for a proper purpose but rather are being sought to harass or for use in the Illinois Action; and (4) some of the documents are not

discoverable because the parties have a joint defense agreement that protects them as privileged. The Court addresses each objection below.

A. Undue Burden

33. Prism argues that the documents sought can be obtained from Swaringen, the defendant in this action, or from Smith, who is a member of both Caliber and Prism. It contends that, as a nonparty, it should not be required to produce the subpoenaed information until Caliber proves that it has exhausted these other avenues of obtaining it. Caliber responds that Prism misses the point. It seeks the information from Prism, not because it is unavailable elsewhere,[4] but because it seeks to prove that Prism is in possession of the information as a result of Swaringen's alleged misappropriation. Furthermore, Caliber argues, Smith is adverse to Prism in the Illinois litigation and, under the circumstances, there is reason to believe that the information at issue would not be readily available to him.

34. Assuming for these purposes the truth of Caliber's allegations regarding Swaringen's cell phone calls behind closed doors in her former office, her alleged comments to others prior to her departure, and testimony that she permanently deleted Caliber's important business information, the Court determines that it is reasonable for Caliber to question whether discovery directed to Swaringen would net the information it seeks. Indeed, any response may be viewed as unreliable, necessitating discovery directed to Prism regardless of what Swaringen says. As for requiring Smith to retrieve the information from Prism, even if it is available to him,

[4] With respect to deleted email information, Caliber observes that the documents might not be available elsewhere. (Pls.' Br. Opp. p. 9, ECF No. 37.)

his effort would not constitute *Prism's* response, and it is Prism's response that Caliber seeks. Under the circumstances presented here, Caliber should not be required to exhaust all other potential sources of the information before pursuing it directly from Prism.

35. As for the effort required to respond, the Court recognizes that Rule 45 provides a nonparty protection against undue burden. But Prism fails to convince the Court that responding to the majority of the requests in the Revised Subpoena would unduly burden it. To the contrary, Prism's counsel concedes that many of the requests are likely to net little in response, (*See, e.g.*, 22 August 2023 Hearing Transcript, pp. 7-8), and Haddon's conclusory testimony gives the Court no information regarding the time, effort or expense that would be involved in responding. (*See, e.g.*, Haddon Aff. ¶ 4 (stating only that "[i]t would pose a substantial financial and clerical burden on Prism to comply with the requests set forth in the subpoena, even if the discovery sought was warranted.").) On this record the Court does not find that requiring Prism to respond to the majority of the subpoena requests would unduly burden it.

36. However, a few requests are unduly burdensome. Prism argues that some of the requests (numbers 16, 17 and 18) seek its confidential business information and that Caliber, its competitor, has not demonstrated that it has a substantial need for this information that cannot be met without undue hardship. *See* Rule 45(c)(7). (Prism Br. Supp. pp. 5-6, ECF No. 36). Caliber responds that it

seeks the information to determine what use Prism may have made of Caliber's Trade Secret information once Swaringen provided it. (Pls.' Br. Opp. p. 10.)

37. The Court determines that requiring Prism to respond to subpoena requests 16, 17 and 18 is premature. Caliber has not yet shown a substantial need for this confidential business information. If it turns out that there is no evidence that Prism is in possession of Caliber's Trade Secret information, then Caliber has no reason to discover confidential information regarding Prism's business practices. The Court is mindful that it "should be careful in the interests of justice to prevent disclosure of confidential commercial information to avoid annoyance, embarrassment or oppression, particularly where the action is between competitors." *Harrington Mfg. Co., Inc. v. Powell Mfg. Co., Inc.*, 26 N.C. App. 414, 417 (1975).

38. In sum, the Court concludes that Caliber is not required to exhaust other avenues of discovery before seeking the information at issue from Prism, and, for the majority of the requests, Prism's protestations regarding undue burden do not carry the day. With respect to subpoena requests 16, 17 and 18, however, the Court determines that, based on the current record, the undue burden those requests impose on Prism outweighs Caliber's need for the information sought. Therefore, in the exercise of its discretion, the Court concludes that Prism is not required to respond to subpoena requests numbered 16, 17 and 18. This ruling is without prejudice to Caliber's ability to revisit the issue on a more robust record, should one develop.

B. Improper Purpose and Relevance

39. Prism argues that the requested documents are irrelevant to the case before this Court and are being sought for an improper purpose—namely, to harass or to be introduced as evidence in the Illinois Action. (Prism Br. Supp. pp. 6-7.) Caliber responds that the documents are relevant to this case and are neither related to the Illinois Action nor sought to harass. (Pls.' Br. Opp. pp. 10-11.)

40. "The burden of showing that the requested discovery is not relevant to the issues in litigation rests on the party resisting discovery." *See Hy-Ko Prods. Co. v. Hillman Grp., Inc.*, 2009 U.S. Dist. LEXIS 94713, at *4 (E.D.N.C. Oct. 8, 2009). As this Court has observed, "[t]he information sought simply needs to be 'reasonably calculated to lead to the discovery of admissible evidence.'" *Arris Grp., Inc*, 2017 NCBC LEXIS 58, at *8 (quoting N.C. R. Civ. P. 26(b)(1)); *see also Hy-Ko Prods. Co.*, 2009 U.S. Dist. LEXIS 94713, at *3 (relevance in discovery differs from trial phase).

41. After consideration of the arguments, the Court agrees with Caliber. The requests at issue target the communications and activity between Prism and Swaringen from shortly before Prism and Caliber separated to the present—a period of approximately 18 months. Given the factual allegations, the scope of the requests is reasonable. Furthermore, the claims and parties in this case differ significantly from the claims and parties in the Illinois Action. There is no overlap, and the Court finds no apparent support for Prism's protestation that Caliber is using the subpoena process to harass it.

C. Joint Defense Privilege / Common Interest Doctrine

42. Prism argues that, because it has entered into a joint defense agreement with Swaringen, certain documents requested by Caliber are protected from discovery by the attorney-client privilege or the work product doctrine. Specifically, Prism complains that plaintiffs seek documents regarding the payment of Swaringen's legal fees and any indemnity agreements (document request number 6), as well as all documents related to this lawsuit (document request number 21). It contends that these materials are not subject to discovery. (Prism Br. Supp., p. 4.)

43. Citing *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 186-87 (1993), Caliber counters that, to the extent Prism has agreed to pay Ms. Swaringen's legal fees, such an agreement is relevant to determine whether Swaringen was induced to act with impunity on Prism's behalf. Caliber stresses that it is not seeking privileged communications and argues that fee arrangements are generally not protected from discovery because they do not involve the communication of legal advice. (Pls.' Br. Opp., p. 9.)

44. As this Court has explained, "[t]he common–interest or joint–defense privilege extends the protection of the attorney–client privilege to communications between parties who share a common litigation interest." *Morris v. Scenera Research, LLC*, 2011 NCBC LEXIS 34, at *19 (N.C. Super. Ct. Aug. 26, 2011) (cleaned up). However, even where the common interest or joint defense privilege exists,[5] its effect

[5] The Court observes that Prism has not identified the common legal interest that would permit application of the common-interest doctrine. "[A] party relying on the common–interest doctrine must demonstrate that the specific communications at issue were

is only to *extend* attorney-client and work product protections, not to create those protections in the first instance.

45. The Court agrees with Caliber that a fee agreement is not *ipso facto* protected by the attorney-client privilege. *See United States v. $74,820 in U.S. Currency*, 2020 U.S. Dist. LEXIS 270028, at *20-21 (M.D.N.C. Sep. 16, 2020) (citing *In re Grand Jury Matter*, 926 F.2d 348, 351 (4th Cir. 1991) ("The attorney-client privilege normally does not extend to the payment of attorney's fees and expenses. And, the burden to demonstrate the applicability of the privilege rests with its proponent." (internal quotation marks and citations omitted)); and *United States v. Ricks*, 776 F.2d 455, 465 (4th Cir. 1985) ("[T]he privilege protects only confidential client communications; that is, communications not intended to be disclosed to third persons other than in the course of rendering legal services to the client or transmitting the communications by reasonably necessary means . . . Fees are not such confidential communications and evidence of their payment is therefore properly admissible." (internal quotation marks and citations omitted)).[6]

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designed to facilitate the common legal interest, and proving a common business or commercial interest will not suffice." *Morris,* 2011 NCBC LEXIS 34, at *20.

[6] North Carolina courts routinely look to federal decisions for guidance on procedural matters. *Forsythe v. N.C. Dep't of Revenue*, 2022 NCBC LEXIS 106, *10 (N.C. Super. Ct. Sept. 9, 2022) (citing *Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989) ("The North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules[,]" so "[d]ecisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules"); *Harper v. Vohra Wound Physicians of NY*, 270 N.C. App. 396, 403 (2020) (noting that the court "looked to federal decisions for guidance" when interpreting North Carolina's rules of civil procedure)).

46. Nevertheless, should Prism take the position that content within a joint defense agreement—or any other responsive document, in whole or in part—is privileged, it is directed to produce and serve a privilege log. (*See* CMO at 7, ECF No. 27.) Caliber is then free to determine whether, in its view, further motion practice is necessary.

D. Revised Subpoena

47. The Court observes that Caliber has adjusted the date ranges and subject parameters in its Revised Subpoena to eliminate much of the overbreadth that previously existed, and about which Prism complained. However, additional clarity is required with respect to Caliber's requests. Therefore, the Court exercises its authority to make the following additional modifications to the Revised Subpoena.

48. In the Definitions section, "Caliber ORD" shall be defined to mean:

> Prism Packaging Consultants, LLC and its predecessor, Caliber Packaging, LLC, and any parent, subsidiary, affiliated, and related company **(other than Plaintiffs),** and all its respective officers, agents, employees, directors, management, insurers, and/or attorneys, including without limitation Frank Wajda, Matt Wajda, Tom Haddon, Clay Baggett, Jeremy Emling and Warren Hillman. "Caliber ORD" shall also be deemed to include Frank Wajda, Matt Wajda, Tom Haddon, Clay Baggett, Jeremy Emling and Warren Hillman. individually.

49. The Amended Subpoena requests production of 21 categories of documents. The first request shall be modified as follows:

> 1. All text messages, instant messages, social media posts or other Communications, in any form, including attachments, concerning, discussing or relating to Caliber or the Action sent by **Caliber** ORD to Swaringen or received by **Caliber** ORD from Swaringen from March 1, 2022 to the present.

50. Except as herein provided, the requests shall be as stated in the Revised Subpoena.

IV. CONCLUSION

51. For the reasons stated above, the Court **GRANTS in part** and **DENIES in part** the Motion as follows:

a. Prism shall not be required to respond to subpoena requests 16, 17 and 18 at this time. This ruling is without prejudice to Caliber's ability to revisit these requests on a more robust record, should one develop.

b. Prism shall be required to respond to the balance of the subpoena requests, as modified herein, on or before 30 September 2023. Should Prism assert an objection on privilege or work product grounds, it shall produce a privilege log in accordance with the Case Management Order entered on the public record in this case, (ECF No. 27).

IT IS SO ORDERED, this 8th day of September, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases