

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO. 3:20-CV-021-MOC-DCK**

**PHILIPS MEDICAL SYSTEMS)
NEDERLAND B.V., PHILIPS NORTH)
AMERICA LLC, and PHILIPS INDIA LTD.,)**

Plaintiffs,

v.

**TEC HOLDINGS, INC., TRANSTATE)
EQUIPMENT COMPANY, INC., and)
ROBERT A. WHEELER,)**

Defendants.

ORDER

THIS MATTER IS BEFORE THE COURT on “The Wheeler Defendants’ Motion To Compel Plaintiffs’ Identification Of Misappropriated Trade Secrets And Related Contentions” (Document No. 285); “Philips’ Motion To Compel Deposition Testimony And Expedite Briefing” (Document No. 310); “Philips’ Motion For Protective Order” (Document No. 317); “Defendants’ Motion To Compel Production Responsive To Defendants’ FDA Requests” (Document No. 319); and “Defendants’ Motion To Compel Production Of Electronically Stored Information And Source Code And To Modify Protective Order” (Document No. 333).

These motions have been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b), and are ripe for disposition. Having carefully considered the motions and the record, the undersigned will grant the motions in part and deny the motions in part.

BACKGROUND

Plaintiffs Philips Medical Systems Nederland B.V., Philips North America LLC, and Philips Electronics India Ltd. (together, “Philips” or “Plaintiffs”), initiated this action on July 28,

2017, with the filing of a “Complaint” (Document No. 1) in the United States District Court for the Northern District of Georgia (“N.D.Ga.” or “Georgia Court”) against TEC Holdings, Inc (“TEC”).

On September 29, 2017, Defendant TEC “filed a “...Motion to Dismiss” (Document No. 13) and a “...Motion To Transfer Venue” (Document No. 14) supported by the “Declaration Of Daniel R. Wheeler” (Document No. 14-1). The motion to transfer sought transfer to this Court. (Document No. 14). Plaintiffs filed a “First Amended Complaint” (Document No. 20) on October 20, 2017. Defendant TEC and Defendant Transtate Equipment Company, Inc. (“Transtate”) subsequently filed motions to dismiss the Amended Complaint. (Document Nos. 27 and 34).

The Georgia Court denied the motion to transfer on January 2, 2018; and granted in part and denied in part the motions to dismiss on March 14, 2018. (Document Nos. 39 and 42).

Plaintiffs’ “Second Amended Complaint” (Document No. 139) (the “Complaint”) was filed on May 23, 2019. Plaintiffs name the following as Defendants in the Second Amended Complaint: TEC Holdings, Inc. (“TEC”), formerly known as Transtate Equipment Company, Inc. (“Transtate I”), Transtate Equipment Company, Inc., formerly known as Transtate Holdings, Inc. (“Transtate II”) (collectively, “Transtate”), and Robert A. (“Andy”) Wheeler, individually and in his capacity as executor and personal representative of the Estate of Daniel Wheeler (“the Estate”) (Andy Wheeler and the Estate are referred to collectively as “the Wheelers” or “Wheeler Defendants”). (Document No. 139).

According to the Complaint, Philips “develops, sells, supports, maintains, and services medical imaging systems, such as X-ray systems used at hospitals and medical centers, including the proprietary hardware and software used to operate, service, and repair such systems.” (Document No. 139, p. 2). “Transtate I provided and Transtate II provides maintenance and

support services for certain of such medical systems.” (Document No. 139, p. 2). “Several prior employees of Philips North America LLC were previously employed by Transtate I and are currently employed by Transtate II as service specialists, service technicians, or similar positions.” Id. Plaintiff’s “medical imaging systems include Philips’ copyrighted and proprietary intellectual property, and proprietary trade secrets, in the form of, among other things, proprietary software that Philips’s technicians can use to service the medical imaging systems.” Id. Plaintiff “includes proprietary access controls on the medical imaging systems to restrict access to its proprietary software to authorized individuals.” Id.

Plaintiff alleges that: “Transtate I has used, and Transtate II continues to use, misappropriated trade secret information from Philips to circumvent the access controls on Philips’ medical imaging systems to gain unauthorized access to proprietary and copyrighted software.” (Document No. 139, pp. 2-3). “Transtate I and II have also made unauthorized copies of Philips’ standalone service software, circumvented access controls on the standalone software, and made unauthorized use of such software.” (Document No. 139, p. 3). “Transtate I and II have also decrypted and made unauthorized copies of Philips’ copyrighted service documentation.” Id. “Transtate uses its unauthorized access to and copies of Philips’ proprietary software and copyrighted documents to unfairly compete against Philips.” Id.

Plaintiffs assert claims in the Second Amended Complaint for: (1) violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; (2) violations of the Digital Millennium Copyright Act, 17 U.S.C. § 1201; (3) violations of the Defend Trade Secrets Act, 18 U.S.C. § 1836; (4) misappropriation of trade secrets; (5) violations of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760, *et seq.*; and (6) copyright infringement, 17 U.S.C. § 101, *et seq.* (Document No. 139, pp. 3, 39-89).

Defendants filed motions to dismiss the Second Amended Complaint on June 27, 2019, and July 19, 2019. See (Document Nos. 164 and 167). “Defendant Robert A. (“Andy”) Wheeler’s Motion To Transfer Venue” (Document No. 208) was filed on October 23, 2019, with Defendant(s) again seeking transfer to this Court. Plaintiffs opposed transfer. See (Document No. 220).

On January 10, 2020, the Georgia Court, with a different presiding judge, issued a decision transferring this case to the Western District of North Carolina. (Document No. 241); see also (Document No. 244). The Georgia Court noted, *inter alia*, that Philips had filed three (3) actions¹ with this Court since Defendant Transtate I’s original motion to transfer (Document No. 39). (Document No. 241, p. 4).

This Court held a Status Conference on January 29, 2020, with the Honorable Max O. Cogburn, Jr. presiding. See (Document No. 269). Pursuant to Judge Cogburn’s instructions, the parties filed their “Certification And Report Of F.R.C.P. 26(F) Conference And Discovery Plan” (Document No. 268) on February 12, 2020.

In March 2020, Judge Cogburn denied the motions of TEC Holdings, Inc., Transtate Equipment Co. Inc., and the Wheeler Defendants for partial dismissal. (Document Nos. 270 and 271); see also (Document Nos. 164 and 167). The Court then denied multiple discovery-related motions on June 1, 2020. See (Document Nos. 140, 170, 213, and 216). Judge Cogburn also denied “Plaintiffs’ Omnibus Motion To Dismiss Defendants’ Counterclaims And Strike Affirmative Defenses” (Document No. 280). See (Document No. 305).

¹ Philips N. Am. LLC v. Dorow, 3:19-CV-272-MOC-DSC (W.D.N.C. June 11, 2019); Philips Med. Sys. Netherlands B.V. v. TEC Holdings, Inc., 3:19-CV-373-MOC-DCK (W.D.N.C. July 30, 2019); and Philips N. Am. LLC v. Zimmerman, No. 3:19-CV-444-MOC-DSC (W.D.N.C. Sept. 10, 2019). See also Zimmerman v. Philips N. Am. LLC, 3:20-MC-141-MOC-DCK (W.D.N.C. Sept. 8, 2020).

The Court entered its “Pretrial Order And Case Management Plan” (Document No. 279) on June 4, 2020. The case deadlines have since been revised and are currently scheduled as follows: fact discovery completion – May 14, 2021; expert discovery completion – July 16, 2021; mediation report – July 23, 2021; ready date for trial – October 18, 2021. See (Document No. 339).

Now pending are renewed motions for orders compelling (or seeking protection from) certain discovery requests: “The Wheeler Defendants’ Motion To Compel Plaintiffs’ Identification Of Misappropriated Trade Secrets And Related Contentions” (Document No. 285); “Philips’ Motion To Compel Deposition Testimony And Expedite Briefing” (Document No. 310); “Philips’ Motion For Protective Order” (Document No. 317); “Defendants’ Motion To Compel Production Responsive To Defendants’ FDA Requests” (Document No. 319); and “Defendants’ Motion To Compel Production Of Electronically Stored Information And Source Code And To Modify Protective Order” (Document No. 333).

The undersigned initially attempted to resolve discovery issues between the parties through an informal telephone conference on July 1, 2020. After that effort failed, the parties were directed to file appropriate motions. The undersigned observes that over the two and a half (2 ½) years this matter was pending before the Georgia Court it was presided over by three (3) different judges who dealt with the parties’ multiple discovery disputes, including by conducting telephone conferences to address such disputes. See (Document Nos. 93, 129, 206).

The pending motions are now ripe for review and disposition.

STANDARD OF REVIEW

Rule 26 of the Federal Rules of Civil Procedure provides that:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and

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