FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

YOUNG LIVING ESSENTIAL OILS, LC, a Utah limited liability company,	**RULING ON DEFENDANTS' JOINT MOTION FOR FEES AND COSTS**
Plaintiff,	Civil No. 120400973
vs.	Date: July 9, 2018
DOTERRA, INC., a Utah corporation, et al.,	Judge Christine S. Johnson
Defendants.	

This matter is before the Court on Defendants' Motion for Attorneys' Fees and Costs, received by the Court on August 9, 2017. Plaintiff's Opposition was filed on September 15, 2017, followed by Defendants' Reply on December 15, 2017. Oral arguments were conducted on May 30, 2018. Plaintiff was present through counsel: Mr. Arthur B. Berger and Mr. Samuel C. Straight. Defendants were present through counsel: Mr. Mark R. Gaylord, Mr. Aaron R. Harris, Mr. Tyler M. Hawkins, Mr. Kip Muir, and Mr. Steven C. Smith. Having considered the arguments presented, the submissions of the parties, and being advised in the applicable rules and governing law, the Court now grants the motion in part and denies in part, based upon the following.

INTRODUCTION

The issue presented to the Court is whether the Plaintiff is obligated to pay attorneys' fees and costs pursuant to statutory provisions which allow such awards when claims or actions are filed in bad faith. As Plaintiff's trade-secret claim was filed in bad faith, and because the attorneys' fees requested are reasonable in light of the complexity of the case and the interwoven nature of the claims, Defendants' request is granted in part. Defendants' accompanying request for costs is also granted in part, making reductions as required by existing law.

FACTUAL BACKGROUND

The parties have not requested an evidentiary hearing but have submitted evidence via numerous exhibits. Based upon that evidence, as well as a review of the record, the Court finds that the following facts are either undisputed, uncontested, or properly inferred from the evidence presented.

The present controversy arises from a business dispute. David Stirling, Emily Wright, David Hill, Justin Harrison, Lillian Shepherd, Gregory Cook, and Tomas Severo (collectively, "Individual Defendants"), were formerly highly-placed executives and employees for Young Living Essential Oils, the Plaintiff. Young Living was founded by Mr. D. Gary Young and is owned by his surviving wife, Mrs. Mary Young .[1] The Individual Defendants all left Young Living between late 2007 and early 2008 and created a competing company, Doterra, Inc., the corporate Defendant.

Formation of Doterra and Young Living's Investigation

Stirling was the first to leave Young Living, having been told not to return on or about August 7, 2007. His termination was finalized on September 7, 2007. Cook and Wright followed shortly thereafter, with Cook's termination on September 30, 2007, and Wright's on October 1, 2007. Hill left Young Living on or about October 8, 2007, although he continued to provide consulting services through the end of the calendar year. Harrison terminated his

[1]Mr. Young testified at trial and submitted a declaration for consideration as part of this motion, but has since died.

employment on or about February 11, 2008.[2] Severo left to work for Doterra around May 2012.[3]

Hill had been assigned a single laptop computer.[4] He returned that computer to Young Living in October 2007.[5] Internal records confirm that Young Living was in possession of the computer and contemplated having a forensic examination completed. The computer was intact, with Young Living's IT department noting that it was unique only in that it was the only one of the Individual Defendants' computers which had not been re-circulated to a new employee for reuse.[6] Young Living also placed the computer on a litigation hold.[7]

Approximately one month before her leaving, Wright was issued a new laptop computer for home use. Young Living's internal records reveal that, at the time, Wright reported the laptop she had previously been using had been damaged ("Old Laptop").[8] While the new computer was surrendered to Young Living when Wright left the following month, the Old Laptop was never recovered. Later, Wright recalled throwing away a computer on Young Living's direction because it was nonfunctional; this was determined to be the Old Laptop. Wright also kept a third computer issued by Young Living at her home ("Tower Computer") which was not immediately returned.[9] Young

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[2]*Complaint*, ¶¶78-82.

[3]*Complaint*, ¶119.

[4]*Defendants' Joint Motion for Attorneys' Fees*, August 9, 2017, Ex. 5, Kevin Pace (30(b)(6)) deposition, p. 390, lines 6-12.

[5]*Defendants' Motion for Sanctions Due to Spoliation*, May 13, 2015, Ex. 24, Kevin Pace (30(b)(6)) deposition, p. 369, lines 5-8. *See also* Declaration of David K. Hill, May 13, 2015.

[6]*Id.* at Ex. 14, internal emails.

[7]*Defendants' Joint Motion for Attorneys' Fees*, August 9, 2017, Ex. 5, Kevin Pace (30(b)(6)) deposition, p. 381, lines 16-19.

[8]*Defendants' Motion for Sanctions Due to Spoliation*, May 13, 2015, Ex. 15, Young Living internal emails.

[9]Wright's testimony on this point was confusing. She testified that the computer she threw away was the Tower Computer. However, in sorting through this issue previously, this Court

Living's suspicions regarding the disposal of the Old Laptop were raised once Wright began working for Doterra.

Young Living learned that the Individual Defendants intended to launch a competing business in early 2008, and suspicions mounted that they had retained and used confidential information in order to do so. An investigation into these suspicions commenced. In February 2008, warning letters were sent to Stirling, Wright, and Cook, advising them of potential legal action. These were followed by letters demanding the return of all computers and confidential information. In particular, Young Living was concerned that trade secret or otherwise confidential information was being used. Young Living had also received complaints that the Individual Defendants might be soliciting Young Living distributors in violation of their respective contracts. A thorough investigation was undertaken to evaluate these concerns.[10]

The demand letters issued by Young Living resulted in the return of numerous documents, including some which Young Living believed to be trade secrets. The Individual Defendants also returned two computers.[11] The first of these was Wright's Tower Computer. The second was a laptop which had been issued to Stirling. These computers later disappeared ("Lost Computers").

Ultimately, Young Living's previous outside counsel issued an opinion letter on May 9, 2008, advising that Young Living had "viable claims" but that the strength of these claims would be dependent upon how well Young Living developed the supporting facts. The letter concluded that there was supporting evidence "of solicitation in violation of non-solicitation agreements and possibly some use of Young Living's formulas in the DoTerra products."[12]

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has determined that Wright's Old Laptop was the discarded computer, and the Tower Computer was later returned to Young Living. *See Ruling and Order on Defendants' Motion for Sanctions due to Spoliation,* September 23, 2015.

[10]*See Defendants' Motion for Sanctions due to Spoliation,* May 13, 2015, Ex. 2-3, letters from Robert L. Janicki.

[11]*See Id.*, Ex. 5-7, Young Living internal emails and letters from Darren K. Nelson.

[12]*Defendants' Motion for Partial Summary Judgment re: Plaintiffs 2nd Amended Complaint on all Tort, Statutory, and Verbal Contract Claims,* June 10, 2014, Ex. S. Robert Janicki Deposition, Ex. 15.

Notwithstanding, Young Living filed no claims against Doterra or any of the Individual Defendants at that time.

This posture changed in 2012 after Young Living reported finding a document on Hill's computer. The document, dated November 1, 2007, was a business plan ("Business Plan") for a company called Thrive—the predecessor of Doterra. The original Complaint described that the Business Plan was "recently discovered on Defendant Hill's Young Living Computer Hard Drive[.]"[13] No further information was offered regarding the discovery of the Business Plan at that time.

Procedural History

Young Living filed its initial Complaint on June 21, 2012, alleging: breach of contract, violations of Utah's Trade Secret Act ("UTSA"), unfair competition (under UTAH CODE ANN. §13–15–101), and multiple tort claims.[14] Underpinning each of these claims were the allegations that the Defendants had used trade secrets. For example, in stating the grounds for its first and second claims (breach of the duty of loyalty and fiduciary duty, and inducing and aiding and abetting breach of duty of loyalty and fiduciary duty) Young Living alleged that the Individual Defendants had been "entrusted with proprietary, confidential and trade secret information of Young Living" and that they "knew and acknowledged, as a condition of their employment, that they were not to reveal such information to anyone outside of Young Living." Young Living continued: "All Defendants [had] intentionally induced and/or aided and abetted the breaches of the duty of loyalty and fiduciary duty . . . by providing substantial assistance and/or encouragement for those breaches."[15] Similarly, Young Living's contract-based claims were based in part upon the allegations that the Individual Defendants had breached the provisions of their contracts that prohibited the unauthorized use or disclosure of confidential information

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[13] *Complaint*, ¶108.

[14] This was later followed by Living's Second Amended Complaint on December 2, 2013.

[15] *Complaint*, ¶¶131-132, 141.

and trade secrets. The Complaint repeats these allegations in supporting its remaining claims.[16]

Doterra and the Individual Defendants responded to the Complaint with two motions: a motion to dismiss (filed by Doterra, Stirling, Wright, Cook, and Hill); and a motion for judgment on the pleadings (filed by Harrison, Shepherd, and Severo). Among other things, both motions argued that Young Living's UTSA claim should be dismissed as untimely. All Defendants asserted that Doterra's presence in the marketplace, beginning in early 2008, had provided Young Living sufficient notice to investigate and file any claims it might have. Because the Complaint was not filed until June 2012, all Defendants maintained that the three year statute of limitations applicable to the UTSA claim had run. Harrison, Shepherd, and Severo's motion also moved for dismissal of non-contract claims, arguing that they had been statutorily superceded by UTSA.

Young Living's opposition to these motions asserted that the limitations period had been tolled until discovery of its claims. Specifically, with respect to the UTSA claim, Young Living requested that the Court apply the discovery rule. Young Living argued that the Individual Defendants had successfully concealed their wrongful activities—through both their consistent denials of wrongdoing as well as Wright's destruction of her computer—and that as a result of that concealment: "Young Living did not discover Defendants' misappropriation [of trade secrets] until recently. Indeed, Young Living only recently discovered on Defendant Hill's computer hard drive a business plan for doTERRA[.]"[17] In response to the UTSA preemption issue, Young Living agreed that UTSA required dismissal of its tort claims unless they relied on facts that did not simultaneously establish a claim for misappropriation of trade secrets.

In ruling on the motions, the Court reviewed the Complaint, in particular, each paragraph which made allegations regarding Young Living's delay in bringing suit. One such allegation, which was raised in the Complaint but not briefed by Young Living, was that Young Living's in-house counsel,

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[16] *Id.* ¶¶157-165 (UTSA), ¶¶167-168 (unfair competition), ¶173 (unjust enrichment), ¶179 (intentional interference with existing/prospective economic relations), ¶186 (civil conspiracy).

[17] *Young Living's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings*, August 22, 2012, p. 9.

Wade Winegar, had wrongly discouraged the filing of a lawsuit ("Winegar Conspiracy").[18] The Court dismissed this idea, concluding that a misleading claim by a third party did not amount to concealment by the Individual Defendants. The Court also rejected the argument that the Individual Defendants' denials of liability implicated tolling of the limitations period. Finally, the Court observed that the belated discovery of the Business Plan could not be considered as evidence of concealment by the Individual Defendants because the Complaint had made no claim that the Business Plan was concealed. Notwithstanding, the Court concluded that the Complaint had sufficiently alleged concealment through the allegations regarding the destruction of Wright's computer. Finding that this constituted prima facie evidence of concealment, the Court denied both the motion to dismiss and the motion for judgment on the pleadings.

With respect to the UTSA preemption issue raised by Harrison, Shepherd, and Severo, the Court determined that Young Living's tort claims, to the extent they relied upon the unauthorized use of trade secrets and other proprietary information, were preempted. The end result was the dismissal of the tort and unfair competition claims as to Harrison, Shepherd, and Severo; excepting the aiding and abetting claim, which remained as to Harrison and Shepherd only.

Following significant discovery, the statute-of-limitations issue was again raised. On June 6, 2014, Doterra, Wright, and Stirling brought a motion for partial summary judgment on all of Young Living's tort, verbal contract, and UTSA claims ("Statute of Limitations Motion"). They also requested summary judgment on non-contract claims preempted under UTSA.

Opposing this motion, Young Living argued that facts outside of UTSA supported its unfair competition and tort claims. With respect to the statute-of-limitations issue, Young Living again emphasized that, "[p]rior to locating the . . . Business Plan . . . Young Living was unable to identify sufficient evidence to

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[18]Paragraphs 106-107 of the Complaint suggest that Winegar may have conspired with the Defendants, stating that he "had close relationships with many of the Defendants, [and] told Young Living's senior management that Young Living 'had no claims' against the Defendants and doTERRA, which was false. Young Living's investigation of Mr. Winegar's activities is ongoing to determine whether he also participated in the Defendants' conspiracy." Young Living repeated these allegations in paragraphs 113-114 of its Second Amended Complaint.

bring the claims against Defendants that are the subject of Defendants' Motion."[19]

In a lengthy and detailed statement of facts, Young Living outlined the discovery of the Business Plan. Though the Complaint made no mention of its concealment, Young Living now claimed that it had been concealed after all. It was acknowledged that both Winegar and the IT department had reported receiving Hill's computer after his resignation; Young Living claimed that it was then quickly recirculated before being examined. Hinting at a conspiracy, Young Living noted that the IT director responsible was a friend of Stirling's who thereafter left to take a position with Doterra. A hard drive belonging to Hill ("Hard Drive") later surfaced. Young Living suggested that Hill may have had a second computer, or perhaps an external hard drive, though no logs or records confirmed that this was the case.[20]

Young Living reported that the Hard Drive had been stored "at Young Living's offices along with hard drives of various employees" until 2009; thereafter it was acquired by an independent contractor for Young Living, Vallorie Judd. Judd claimed that she had received it from a Young Living employee—Kelly Case. According to Judd, she and Case had attempted to access the contents of the Hard Drive but were unable to do so. In early 2012, Judd sought the assistance of another Young Living employee—Cory Weaver. Weaver was able to access the files on the Hard Drive, including the Business Plan.[21] Weaver elaborated that Judd had given him the Hard Drive in Young Living's Ecuador office, where it had been stored in a grey bag and tucked in a white cardboard box. He disagreed with Judd about any bar to accessing the Hard Drive, describing that he'd been able to view its contents without the need to disable any password or similar security device. Once he found the Business

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[19] *Young Living Opposition to Defendants' Motion for Partial Summary Judgment,* July 8, 2014, p. xiv, ¶9.

[20] *id. at pp.* xx-xxiv.

[21] *id.* at Ex. QQ, Plaintiff's Objections and Responses to Defendants' First Set of Discovery Requests, p. 9.

Plan, he recognized its importance and passed it along to Mary Young upon his return to Utah.[22] [23]

The Defendants disputed many of these alleged facts. For example, they produced a declaration from Case, who denied she had played any part in discovering the Hard Drive. Additionally, they emphasized the inconsistencies in the story, including the dispute about whether or not there had been a security device on the Hard Drive preventing its examination. Defendants further challenged the suggestion that Hill had more than one computer to begin with.

The Court resolved these factual disputes in favor of Young Living for the purposes of summary judgment, instead focusing on whether the Business Plan provided the final information necessary to file its Complaint, as Young Living claimed. Ultimately, because the Business Plan only served to confirm what Young Living's extensive investigation had already uncovered about the Individual Defendants and their formation of Doterra, the Court concluded that Young Living had sufficient information to proceed with its claims in 2008. Consequently, the statute of limitations was triggered at that time. Summary judgment on the expired claims was granted in the Court's October 15, 2014 ruling. This also put the UTSA preemption issue to rest, as any portions of the tort and unfair competition claims which had not been preempted were time-barred.[24]

Months later, on May 13, 2015, Defendants filed a motion seeking sanctions due to spoliation of evidence. In this motion, Defendants detailed

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[22]*Defendants' Motion for Partial Summary Judgment Re: Plaintiff's Second Amended Complaint,* June 10, 2014, Ex. T, Declaration of Cory Weaver

[23]Young Living notes that it was not the original proponent of Weaver's declaration. This is true. However, Young Living was quick to embrace the parts of Weaver's story that suited its own narrative. Young Living referred to numerous aspects of Weaver's description in its statement of facts and attached his declaration as Exhibit AA to its memorandum in opposition.

[24]Harrison and Shepherd (Severo being dismissed entirely) brought their own statute of limitations motion on May 21, 2015. They had verbally joined in the Statute of Limitations Motion at oral arguments, but the Court's written ruling failed to address that. Thus, a second statute of limitations motion was necessary. The Court granted this motion on September 23, 2015.

additional information which came to light after the Court ruled on the Statute of Limitations Motion. Particularly noteworthy was the Expert Report of Jon Berryhill ("Berryhill Report").[25] The Berryhill Report detailed the forensic examination of the Hard Drive. It has never been refuted by Young Living. It concluded that the username "dhill" was indeed assigned to the Hard Drive, and that the drive was an internal drive which had been removed from a Dell laptop computer.[26] It identified that the Business Plan was first downloaded from an email attachment and saved in dhill's "my documents" folder on December 29, 2007.[27] On that same date, a "link file" was created, making a shortcut to access the Business Plan.[28] There were no passwords or other security devices which prevented access to the Business Plan. Neither was it hidden in large numbers of other files. In addition to the Business Plan, the "my documents" folder contained only four pictures, eight Word documents, six PowerPoint files, and one PDF file.[29] In short, the most rudimentary of searches would have uncovered the Business Plan.

In fact, it appeared that such searches had occurred. The Hard Drive was accessed on multiple occasions, including once on April 8, 2009, when the link file to access the Business Plan was used.[30] The Hard Drive was also accessed at least six times in 2008, at least once in March 2009, and three times in 2012.[31] Berryhill characterized that the Hard Drive had last been "used" in March of 2008, and the other activity appeared to be "someone looking

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[25] *Defendants' Motion for Sanctions due to Spoliation,* May 13, 2015, Ex. 26, Expert Report of Jon Berryhill.

[26] *Id.* at p. 7.

[27] *Id.* at pp. 5, 7.

[28] *Id.* at p. 6.

[29] *Id.* at p. 6

[30] *Id.*

[31] *Id.* at p. 8.

around."[32] Notably, all of these dates are *after* Hill returned his computer to Young Living in October 2007.[33]

Defendants' spoliation motion also pieced together Young Living's involvement with the Lost Computers. Defendants identified that, in April 2008, these computers had been secured on a litigation hold with Young Living's previous outside counsel so that the hard drives could be copied and examined. Although the drives were imaged, that data, as well as the computers themselves, vanished after being released to Young Living in January 2009. In ruling on this motion, the Court concluded that spoliation sanctions against Young Living were warranted.

Present Procedural Posture

Following a lengthy series of Defendants' motions which served to defeat many of Young Living's claims (including all claims filed against Doterra and Severo), the parties tried the remaining breach of contract claims to a jury in May and June 2017. The jury returned a verdict in favor of the remaining Individual Defendants. As the prevailing party at trial, the Defendants now seek an award of costs under Rule 54(d). All Defendants also request recovery of attorneys' fees and costs for prevailing on Young Living's UTSA claim. Young Living opposes such an award, asserting that Defendants are not entitled to fees because the UTSA claim was not brought in bad faith.

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[32] *Id.* at 7.

[33] Young Living maintains that it may have recovered Hill's computer several months later. In support, it points to the February 29, 2008, email from its in-house counsel, Wade Winegar, which indicates that "Justin brought in Dave Hill's computer . . . last night." *See Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment*, July 8, 2014, Ex. BB. However, this email does not contradict the other evidence supporting Hill's earlier return of the computer. The deposition testimony offered by Young Living's 30(b)(6) witness, Kevin Pace, together with Hill's Declaration, support that Hill surrendered the computer to another Young Living employee, possibly Justin Harrison, who was then still employed with Young Living, so that it would be returned to Young Living's computer help desk. While Young Living has been unable to produce any log which can confirm the exact date in which the IT department received Hill's computer, there can be no doubt that Young Living executives knew they had possession of it in early 2008. Winegar acknowledged as much when he testified regarding the above-cited email. *See Defendants' Joint Motion for Attorneys Fees*, August 9, 2017, Ex. B, Deposition of Wade Winegar, p. 190, lines 19-20 ("we obviously were aware at some point that Dave Hill's computer was returned").

Alternatively, Young Living asserts that even if there is bad faith, ample basis exists to deny Defendants' request because: (1) fee awards under UTSA are discretionary, (2) Defendants have failed to properly disaggregate their fees, and (3) the requested costs are not recoverable under the statute. The Court will address each issue in turn.

ANALYSIS

I. BAD FAITH FEE AWARDS UNDER UTSA

Under UTSA, a prevailing party may seek an award of attorneys' fees under defined circumstances, including the following: "If a claim of misappropriation is made in bad faith . . . the court may award reasonable attorneys' fees to the prevailing party." UTAH CODE ANN. §13–24–5. Here, Defendants assert that they are entitled to a fee award for those fees incurred in defending against the UTSA claim because Young Living asserted it in bad faith. Young Living resists this claim, arguing that it had a good-faith belief in the viability of its claim at the time the Complaint was filed. The Court agrees with Defendants.

"Bad faith" is not defined within UTSA, and there is no existing case law in Utah's state courts interpreting UTSA's fee award section. Notwithstanding, "bad faith" in the context of attorney-fee awards generally has been interpreted under the Judicial Code; the Court adopts Young Living's argument that the same definition is applicable here:

> A finding of bad faith requires a factual determination of a party's subjective intent. To find that a party acted in bad faith, the court must conclude that at least one of the following factors existed:
> (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others.

Migliore v. Livingston Fin., LLC, 2015 UT 9, ¶ 32, 347 P.3d 394 (internal citations omitted).

Under this test, a fee award is supportable by just one of the listed factors. The Court begins with the first.

A. Young Living Lacked an Honest Belief in the Propriety of its UTSA Claim

Defendants put forward several examples of alleged bad faith on the part of Young Living: (1) reliance upon the Business Plan, (2) the alleged Winegar Conspiracy,[34] and (3) the destruction of the Lost Computers.[35] Because the first candidate (one which the Court has expressed significant concern over previously) is dispositive, the inquiry need not go beyond it.

In initially bringing its claims, Young Living clearly recognized that it needed to justify the delay in filing the Complaint. In 2012, Young Living was bringing an UTSA claim alleging that Defendants had used trade secrets in creating Doterra—and Doterra was launched in 2008. The math was not complex. Applying UTSA's three-year statute of limitations, the UTSA claim was time-barred *unless* Young Living could establish that it had not immediately discovered evidence to support it. Young Living covered that base in the Complaint by pleading that Defendants had concealed their wrongful conduct, and that only the recent discovery of the Business Plan had provided the evidence needed in order to proceed.

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[34]The Winegar Conspiracy was suggested by the Complaint and the Second Amended Complaint, but never truly relied upon by Young Living as a basis for tolling the statute of limitations. It was not raised as an argument in opposing Defendants' motion to dismiss/ motion for judgment on the pleadings. By the time the Statute of Limitations Motion was filed, Young Living changed its position entirely and asserted that it "relied on . . . the thorough investigation and advice of its General Counsel, Wade Winegar . . . in determining that insufficient evidence existed at that time to bring suit." *Plaintiff's Opposition to Motion for Partial Summary Judgment*, p. 22. The hint that Winegar had made this recommendation due to any alliance with the Defendants was dropped. Thus, the Court rejects the notion that the Winegar Conspiracy supports a finding of bad faith.

[35]While the Lost Computers served as a basis for spoliation sanctions, the Court cannot conclude that it was bad faith for Young Living to argue that the destruction of Wright's computer was a basis for tolling of the statute of limitations. Wright acknowledged that she discarded the Old Laptop. At the time Young Living filed its Complaint, it was not unreasonable to infer that she had done so in an attempt to conceal wrongdoing.

Young Living doubled down on this argument in responding to Defendants' motion to dismiss and motion for judgment on the pleadings. There, Young Living agreed that the three-year-limitations period applied to the UTSA claim, but argued that the statute did not begin to run until the claim was discovered. That discovery, Young Living claimed, happened only with the recent discovery of the Business Plan. Young Living again drove this point home in opposing summary judgment on the Statute of Limitations Motion. There, Young Living repeatedly emphasized that it "did not discover evidence of misappropriation until it discovered the Thrive Business Plan in 2012."[36] In short, the idea that the Business Plan was the final piece of the puzzle was the ever-present drum beat in Young Living's case.

However, after a long procedural history, the Court knows this to be false. The Business Plan could not have been the catalyst for filing the Complaint in 2012 because Young Living discovered it years before. Young Living was already in possession of Hill's computer (and its internal Hard Drive) at the time the Business Plan was downloaded. According to the Berryhill Report, that download happened on December 29, 2007, at 7:13 am. Minutes later, at 7:19 am, a "link file" (titled "business plan.lnk") creating a shortcut to access the Business Plan was saved onto the computer's Hard Drive. Berryhill described: "[e]xternal metadata for the link file show . . . a last accessed date of April 08, 2009 10:10:45 am. The last accessed date of April 08, 2009 means that the file was accessed from within the Dell laptop's operating system at that time."[37]

This April 8, 2009 date is significant, because it demonstrates that the Business Plan was accessed approximately eighteen months after both Hill and Young Living's 30(b)(6) witness agreed the computer was surrendered to Young Living. And it is over thirteen months after Young Living's in-house counsel sent his February 2008 email to Young Living executives informing them that "Justin brought in Dave Hill's computer[.]" Someone from Young Living plainly searched through the files on Hill's computer and accessed the Business Plan. That knowledge is imputed to Young Living for the purposes of

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[36]Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, July 8, 2014, p. 7.

[37]*Defendants' Motion for Sanctions due to Spoliation*, May 13, 2015, Ex. 26, Expert Report of Jon Berryhill, p. 6.

a fee award. *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 23, 61 P.3d 1009. For Young Living to then submit to this Court in 2012—three years later—that the Business Plan was a "recent discovery" that had only just given Young Living notice of its claims is not just a casual misstatement. It is a knowing falsification of the evidence.

Moreover, this falsification was offered to the Court in a calculated way. It was not enough to simply state that the Business Plan was a recent discovery. Because the Hard Drive had been in Young Living's possession for years, Young Living had to explain *why* it was a recent discovery. In order to do this, Young Living tampered with Hill's computer. It was returned to Young Living in one piece and placed on a litigation hold. Yet, by the time it was examined by Berryhill, all that remained was the Hard Drive. The story of how this occurred is full of gaps and eyebrow-raising inconsistencies.

Young Living's initial explanation, offered in its December 2012 response to Defendants' discovery requests, simply states that the Hard Drive had been stored at "Young Living's offices along with hard drives of various employees who had left their employment[.]" Somehow, Young Living claimed the Hard Drive came into Kelly Case's possession, who then gave it to Vallorie Judd in 2009. Case denies this entirely, and Young Living has provided no alternative explanation for how Judd acquired the Hard Drive. Judd claims that she was unable to access the Hard Drive's contents until she gave it to Cory Weaver in 2012. This, too, is untrue. Weaver reported (and Berryhill later confirmed) that there was no password or security device that barred access. Stranger still is Weaver's extraordinary account that Judd produced the Hard Drive from a cardboard box at Young Living's Ecuador farm. How Hill's computer—which was on a litigation hold in Young Living's office in Utah—could possibly have ended up as a discarded Hard Drive a continent away remains shrouded in mystery.[38]

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[38]Young Living now scoffs at this detail, dismissing Weaver as a liar and a thief. However, the Ecuador detail was readily embraced by Young Living at the time the Statute of Limitations Motion was briefed. In its opposition, it parroted back Weaver's story, and even corroborated it with deposition testimony from a Young Living employee (Joe Walker), who agreed that Judd was in Ecuador when she found the Hard Drive. *Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment*, July 8, 2014, p. xxiii.

Young Living attempted to explain away that mystery with a convenient bit of misdirection. Recognizing that its internal emails documented the receipt of Hill's computer years before, Young Living had to create a fiction that Hill had more than one computer—perhaps even an external drive that no one had known about. There were never any IT records to confirm this theory (indeed, Young Living has claimed all such records are "gone"), and once the Berryhill Report was completed, the external-drive argument was proven false. The Hard Drive was an *internal* hard drive. There are physical differences between an internal hard drive and an external hard drive that are obvious, even for someone who is not well-studied in computer science. Anyone who had seen the Hard Drive would have known that it was not an external hard drive. Young Living *had* seen the Hard Drive. It had been in constant possession of it for years. Yet it still offered up the red herring that the Hard Drive was an external drive which had been recently discovered.

Young Living's slight of hand was enough for its UTSA claim to survive Defendants' motion to dismiss and motion for judgment on the pleadings. Young Living's Complaint alleged that the Business Plan was a recent discovery, and the Court accepted that allegation as true. Thus, the Defendants were required to undertake a significant discovery burden to prevail on their statute-of-limitations defense. This all would have been avoided if Young Living had owned up to its knowledge of the Business Plan from the beginning.[39]

In summary, Young Living's assertion that the Business Plan was a recent discovery was a specious claim made in an intentional and transparent attempt to advance an UTSA claim which it knew to be untimely.[40] Young

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[39]While the Court has spared little criticism from Young Living, it should be emphasized that this judgment is not directed at Young Living's present counsel, a skilled team of lawyers from Ray Quinney & Nebeker PC. There has been nothing to suggest that these attorneys had any knowledge of Young Living's prior conduct.

[40]On first blush, the motive for doing so may not be immediately clear. Even removing the UTSA claim, Young Living had breach of written contract claims that were not time-barred, and those claims were taken to trial. Why was the UTSA claim needed? The answer to this question may lie in the Complaint. In bringing its UTSA claim, Young Living requested disgorgement damages, as well as recovery of its own attorney fees should it be the prevailing party. These are statutory remedies they would not have been able to seek absent the UTSA claim.

Living lacked an honest belief in the propriety of its UTSA claim; therefore, bad-faith attorneys' fees are properly considered. The Court need not consider the alternative grounds for fees advanced by Defendants.

B. Declining a Fee Award would Produce an Inequitable Result

Young Living asserts that, even should the Court find bad faith, the discretionary nature of fee awards under UTSA allows the Court to deny Defendants' request. Young Living contends that a fee award is not necessary because it received sufficient punishment through the Court's spoliation ruling. Defendants respond that UTSA's attorney-fee provision is intended to shift the expense of bad-faith litigation to the wrongdoer and that it would be inequitable not to make a fee award in this case. The Court agrees with Defendants.

The parties have cited authority which disagrees on whether bad-faith attorney fees are intended to be compensatory or punitive. Utah's federal district court has held that such an award "shifts the burden and expense of the litigation when willful and malicious misappropriation is found . . . . Thus, an award of attorneys' fees under the UTSA is compensatory, not punitive." *Storagecraft Tech. Corp. v. Kirby,* 2012 WL 4467520, *1. Conversely, Utah's Supreme Court has generally noted that "the reason for awarding attorney fees [based on bad faith] is to punish the wrongdoer, and not compensate the victim[.]" *Still Standing Stable, LLC, v. Allen,* 2005 UT 46, ¶16, 122 P.3d 556 (bracketed language in original) (quoting Jay Rosenblum, *Standard of Review: The Appropriate Standard of Review for a Finding of Bad Faith,* 60 GEO. WASH.L.REV. 1546, 1551 (1992).

While these purposes are different, the Court concludes that these are not mutually exclusive ideas. A party who has been required to expend significant resources in order to defend against a specious claim should be compensated for that expense. And a party who brings such a claim should be penalized. In short, "[w]here a party has acted on a meritless claim and in bad faith, in most cases it would be inequitable *not* to award attorney fees." *Wardley,* 2002 UT 99, ¶31 (emphasis in original). Moreover, Young Living's claim that it has already suffered punishment for its actions conflates its bad behavior. Spoliation sanctions were ordered against Young Living because it

destroyed the Lost Computers, not because it brought the UTSA claim in bad faith.

Based upon the foregoing, the equities weigh in favor of a fee award.

C. The Attorneys' Fees Requested by Defendants are Reasonable

Young Living next argues that attorneys' fees in this case should not be awarded because they are not reasonable. To this end, Young Living raises two primary objections: (1) Defendants' proposed fee award does not properly segregate work done on UTSA from other billable hours, and (2) the amount of hours billed and the billable rates do not comply with the "lodestar" method. The Court will address each objection in turn.

1. Defendants have properly allocated their requested attorneys' fees

Young Living objects that Defendants' fee affidavit does not properly allocate between hours billed for the UTSA claim and hours billed where there is no fee entitlement. Defendants respond that they have properly allocated their proposed fee award because all work detailed was either specific to the UTSA claim or substantially related to it. The Court agrees with Defendants.

The parties agree that Utah law requires that "a party seeking fees must allocate its fee request according to its underlying claims." *Crane-Jenkins v. Mikarose, LLC*, 2016 UT App 71, ¶ 21, 371 P.3d 49 (internal quotation omitted). This allocation falls into three categories: "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." *Id.* For some litigants, separating an attorney's billing statement into these discrete categories can be simple. However, in complex cases such as this one, teasing apart work done on one claim or issue from work done on another is an impossible task. When this problem arises, "a prevailing party may collect on noncompensable claims only if those claims substantially overlap with compensable claims." *Jensen v. Sawyers*, 2005 UT 81, ¶ 128, 130 P.3d 325.

Defendants claim that substantial overlap exists here; therefore, they request recovery of attorneys' fees for all billings related to their UTSA defense, as well as those fees billed for overlapping claims. Their itemized billing statements have been filed as Appendix 1 to the present motion. It includes a fee request for $875,470.00 as to the fee affidavit from Smith LC, $553,206.60 as to the affidavit from Durham Jones & Pinegar, and $701,143.60 as to the affidavit from Ballard Spahr LLP, for a total of $2,129,820.20 in attorneys' fees. The fee requests are "bookended," beginning with the date each firm commenced work on this case and ending with the date when the UTSA claim was eliminated through application of the statute-of-limitations defense.

Young Living correctly notes that Appendix 1 is not separated into categories of successful claims and unsuccessful claims. This is owing to Defendants' position that there are no unsuccessful claims. Defendants have framed this request as one in which essentially all of their attorneys' fees within the bookended period are recoverable because they are all fees billed for work on the UTSA claim, or for work that was substantially related to it.[41] If this claim is true, there would be no unsuccessful claims to include in the itemization. In that event, the point of Young Living's objection is that Appendix 1 casts too wide a net in claiming fees for "substantially related" work.

Defendants' claim for fees therefore rests upon the degree of relation between the UTSA claim and the other claims alleged in the Complaint. These claims include: statutory claims, including UTSA and unfair competition; contract-based claims, including breach of contract, and breach of the covenant of good faith and fair dealing; and tort claims, including breach of the duty of loyalty and fiduciary duty, inducing and aiding and abetting breach of the duty of loyalty and fiduciary duty, unjust enrichment, intentional interference, and civil conspiracy.

Young Living recognizes that a certain level of overlap exists within these claims. For example, all of the tort claims occupied the same space as the UTSA claim because all primarily relied upon the theory that Defendants had wrongfully competed with Young Living by appropriating Young Living's

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[41]Defendants note that Appendix 1 does not include isolated entries for billings which could be separated from the trade secrets claims.

confidential and trade-secret information. This type of overlap was anticipated under UTSA, and the legislature unambiguously declares its intent for UTSA to "displace[] conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." UTAH CODE ANN. §13–4–8(1). Early in the litigation, Harrison, Shepherd, and Severo included this issue as one basis for dismissing the non-contract claims. The Court granted this motion, finding that "Young Living's competing tort claims are preempted, to the extent that they rely upon the unauthorized use of trade secrets and other confidential or proprietary information." *Ruling and Order,* Dec. 3, 2012, p. 17. Once the trade secret allegations were removed from the tort claims, all that remained was the aiding and abetting claim against Harrison and Shepherd. The remaining Defendants (Doterra, Stirling, Wright, Cook, and Hill) prevailed in their subsequent motion raising the same issue. *See Ruling and Order on Defendants' Multiple Motions for Summary Judgment,* Oct. 15, 2014, p. 21–26.

In addition to the intersection between the UTSA and tort claims, substantial overlap existed with Young Living's contract-based claims. These claims survived the earlier preemption motions because UTSA does not displace contractual remedies (*See* UTAH CODE ANN. §13–24–8(2)(a)). The contract claims were based, in part, upon the theory that the Individual Defendants had breached the confidentiality clause included within their written contracts. The confidential information at issue was the same trade secret and proprietary information that formed the basis of the UTSA claim. Young Living also proceeded on the theory that the Individual Defendants had breached a separate contractual provision by soliciting Young Living distributors within a proscribed solicitation period. However, this too created overlap because Young Living's distributor lists were considered trade secrets. Thus, the alleged solicitation of distributors created a potential violation of two contractual provisions: the non-solicitation provision for any recruiting that occurred during the non-solicitation period, and the confidential information provision for any use of Young Living distributor lists in order to make those solicitations. In this way, the trade-secret issues bled throughout Young Living's contract claims as well.

Young Living first contends that the overlap between the UTSA and tort claims was resolved by the UTSA preemption motions. In essence, Young Living argues that those motions filtered the trade secrets out of the tort claims, leaving claims which *could* be disaggregated from the claim to attorneys' fees,

thereby making Defendants' current request for *all* fees improper. The preemption motion was granted with respect to Harrison, Shepherd, and Severo on December 3, 2012; Young Living asserts that there should be no attorneys' fee award after that date.[42]

However, this argument ignores the overlap between UTSA and the contract claims, which survived the preemption motion. Young Living's argument on this point is a double-edged sword. Young Living asserts that attorneys' fees should not be awarded because, even if the UTSA claim had never been brought, the same attorneys' fees would nevertheless have been incurred on the breach-of-contract claims. In support of this point, Young Living notes that its theory that the Individual Defendants breached the confidential-information provision in their contracts failed only because Young Living was unable to show damages. Thus, it claims there was no wasted legal expense in defending against the specious UTSA claim, since the same work would have been done to defend on the overlapping contract theory. Of course, this argument only serves to highlight how much common ground is shared between the UTSA and breach-of-contract claims. Defendants are entitled to an award for fees incurred as to the UTSA claim, and if those fees cannot be separated from the breach-of-contract fees, Defendants are entitled to those fees as well.

Ultimately, the Court concludes that there truly is substantial overlap between the UTSA claim and all other claims raised by the Complaint. The overlap is such that, aside from the contract-based claims and UTSA, only a portion of one tort claim survived Harrison, Shepherd, and Severo's motion for judgment on the pleadings. There simply were not facts alleged outside of UTSA to support those claims. The contract claims converged with UTSA as well. The confidential-information theory was entirely premised on the same facts as the time-barred UTSA claim, and the solicitation theory crossed over into the trade secret-territory because of the potential that those solicitations had been made using confidential information. In summary, if Young Living's claims were depicted as a Venn diagram, the UTSA claim would nearly eclipse all others. This, the Court concludes, constitutes substantial overlap and

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[42]The remaining Defendants combined the UTSA preemption issue with the statute of limitations issue. The Court ruled on those issues together, granting them in the same October 15, 2014 ruling. Thus, Young Living's argument that the UTSA preemption ruling provides an earlier cut-off date for attorneys' fees only goes so far.

entitles Defendants to all of the attorneys' fees requested during the bookended period.[43]

2. Defendants' fee request complies with the lodestar method

In addition to arguing that Defendants have failed to sufficiently allocate fees, Young Living also responds that the billable rates used by Defendants are excessive, and that Defendants have submitted duplicate entries. Both of these objections arise from the lodestar method of evaluating fee awards. Defendants assert that both the hourly rate and the amount of hours billed are reasonable. The Court agrees with Defendants.

"The lodestar method requires a determination of the hours reasonably expended on the case as well as a reasonable hourly rate for the services." *Barker v. Utah Pub. Serv. Com'n*, 970 P.2d 702, 708 (Utah 1998). The fee award may then be adjusted upwards or downwards based on other factors, such as the level of the risk involved in the case and the quality of the work. *Id.* Other factors may include: "the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved." *Dixie State Bank v. Bracken*, 764 P.2d 985, 989 (Utah 1988). The parties agree that the lodestar method is the traditional approach in considering fee awards under UTSA. *USA Power, LLC v. PacificCorp*, 2016 UT 20, ¶ 92, 372 P.3d 629.

Young Living first challenges the reasonableness of the hourly rates billed by some attorneys, specifically lead counsel at Smith LC ($400) and lead counsel at Ballard Spahr ($525). Young Living asserts that the hourly rates permitted should be the rates billed by Durham Jones & Pinegar's Lehi office ($250–290) because those rates are more representative of rates billed in Utah County, as opposed to Ballard Spahr's "national rate," or the rates in Irvine,

[43]For all Defendants, that period begins with June 21, 2012–the date in which the Complaint was filed. It ends with the date when the UTSA claim was defeated (October 15, 2014 for Doterra, Wright, Stirling, Hill, and Cook, and September 23, 2015, for Harrison, Shepherd, and Severo). Young Living argues that the earlier date should be used for all Defendants. However, adopting that date would place the financial burden of defending against Young Living's specious claim on the wronged party. The Court declines to do this.

California (the location of Smith LC). However, the choice of Utah County as the standard for which billable hours should be judged is an odd one. It is true that this lawsuit was filed in Utah County. However, only one lawyer appearing on this case is located in Utah County. Nearly all come from Salt Lake City—including the attorneys hired by Young Living. If it is unreasonable to pay out-of-county lawyers to appear on Utah County cases, then Young Living's decision to hire its own team of lawyers from a prestigious Salt Lake City firm was equally unreasonable.

Rather than judging reasonableness based on the geographic boundaries of Utah County, the Court makes the following observations. This was a highly- complex case involving international companies, trade secrets, and massive amounts of discovery which was gathered from various locations around the world. The task of defending against Young Living's claims was made even more daunting by the fact that Young Living sought damages in excess of $300 million dollars. Much was at stake, perhaps the viability of Doterra itself, and highly-skilled attorneys were needed to analyze the issues presented and prepare an appropriate strategy. Defendants can be forgiven for not shopping for a bargain. Ultimately, the legal strategy adopted by Defendants' counsel proved to be successful, with the Court finding in favor of Defendants on multiple pre-trial motions, and the jury finding in Defendants' favor at trial. In all fairness, given the difficulty of the litigation, the potential damage exposure, the expertise involved, and the result obtained, the Court cannot conclude that the rates billed are unreasonable.

Young Living also challenges the reasonableness of some of the hours claimed on the grounds that they are duplicative. It is true that Defendants retained a team of attorneys from three different firms, and those attorneys billed for time spent coordinating with one another, as well as for work which was similar. For example, some motions filed by one set of defendants dovetailed with motions filed by another, and some preparations required multiple attorneys to review the same discovery and communicate with one another about their analysis. However, as noted above, this was a highly-complex case which involved numerous defendants. Not all defendants had the same defenses and legal interests. The contractual provisions in each contract were not identical. Different breaches of contract, and varying uses of confidential information, were alleged. It is to be expected that different attorneys would need to be represent those varying defenses, and that those

attorneys would need to file separate motions which, though similar, applied uniquely to the allegations made against each Defendant. Even Young Living hired a legal team, rather than a single lawyer, to advocate for its interests; thereby, making its complaint about the number of attorneys involved ring a bit hollow.

Moreover, the Court notes that Defendants' attorneys appeared to make reasonable efforts to minimize duplicate work. When appropriate, Ballard Spahr joined in motions filed by Smith LC, so as to avoid unnecessary duplication of their efforts. Time spent conferring between various firms in order to coordinate those efforts is appropriate. All told, the use of multiple attorneys, given the complex issues presented, the number of defendants involved, and the amount of damages sought, cannot truly be viewed as inefficient.

Based upon the foregoing, denying Defendants' proposed fee award is not proper. Notwithstanding, the Court concludes that, when considering the totality of the circumstances, there are proper grounds to grant a reduction in fees. As noted above, the lodestar method contemplates making an upward or downward adjustment based on various considerations. Young Living's objections, while insufficient to deny a fee award, are enough, when taken together, to grant a discount. No attorneys are 100% efficient 100% of the time. Though trade-secret allegations were intertwined with all of Young Living's claims, certainly there is work represented on the fee affidavit which fell outside of UTSA's shadow. In order to account for these factors, the Court discounts Defendants' fee award by 15%. In the judgment of this Court, such a discount fairly considers the concerns raised by Young Living.

In conclusion, Defendants' fee request is reasonable, though discounted by 15%.

D. Recovery of Costs is Limited to the Categories Permitted under Rule 54(d)

1. UTSA does not Permit Recovery of Costs

Defendants' final argument for a fee award under UTSA is a request for out-of-pocket costs, including costs incurred for travel, legal research, expert

fees, deposition expenses, etc. In total, Defendants request $219,618.37 in costs. Defendants assert that such costs are recoverable as legal fees that are normally billed as part of an attorney's fee. Young Living responds that these costs are not recoverable under UTSA, arguing that costs should be specifically limited to that which is permitted by Rule 54(d). The Court agrees with Young Living.

As noted above, in cases of bad faith, UTSA directs that "the court may award reasonable attorneys' fees to the prevailing party." UTAH CODE ANN. §13–24–5. The plain language of this section makes no reference to costs; either to explicitly permit them or to rule them out. Defendants view this silence as an open door and argue that the Court should, in exercise of its discretion, allow recovery of any costs which were billed as part of their attorneys' fees. This would include costs incurred for expert witnesses, travel, and so forth. In support of this argument, Defendants summarize the legislative history of California's version of UTSA, which, like Utah's, was adopted from the Uniform Trade Secret Act. Defendants acknowledge that California's statute was amended to specifically allow for recovery of out-of-pocket costs, and they detail the policy behind that amendment.

Whether or not a similar amendment should be adopted here is a question for the legislature, not for this Court. Certainly Utah's lawmakers could have expressly provided for a recovery of fees had they chosen to do so. They have not. The Court views that silence as intentional and declines to order compensation for the scope of fees requested. Accordingly, Defendants are permitted only those fees which are allowed under Rule 54(d).

2. Rule 54(d) Allows for Recovery of Taxable Costs

Defendants have submitted separate affidavits which request costs based on the categories allowed under Rule 54(d), as well as some categories which they assert are discretionary. Combined, these affidavits request costs in the amount of $241,514.78. Young Living objects to this figure, asserting that it goes beyond what is allowed as a taxable cost to include many of the litigation expenses that are not permitted under the rule. The Court agrees with Young Living in part.

Rule 54(d)(1) directs that "costs should be allowed to the prevailing party." Those costs are limited, however, to that which is considered a

"taxable" cost. These "[c]osts are defined as those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment." *Long v. Stutesman*, 2011 UT App 438, ¶ 32, 269 P.3d 178, 185–86 (internal quotation omitted). Taxable costs do not include litigation expenses, "which may be ever so necessary, but are not properly taxable as costs." *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980).

Based upon this precedent, witness fees, travel expenses, and service of process costs are allowed in accordance with the statutory fee schedule. *See Morgan v. Morgan*, 795 P.2d 684, 686–687 (Utah Ct. App. 1990). Taxable costs may also include depositions "as long as the trial court is persuaded that [the depositions] were taken in good faith and, in light of the circumstances, appeared to be essential for the development and presentation of the case." *Stevensen 3rd East LC v. Watts*, 2009 UT App 137, ¶ 65, 210 P.3d 977, 993.

However, certain categories of expenses have historically been excluded from a cost award under Rule 54(d). This includes: "(1) land surveys, accounting fees, and appraisal fees, (2) trial exhibits, (3) contour models, photographs, and certified copies of documents, (4) photocopying costs, and (5) '[a]ny amount paid over [a] statutory allowance' for witnesses, travel, or service of process fees[.]" *Stevensen 3rd East*, 2009 UT App 137, ¶ 63.

Within this framework, Young Living has recommended that costs in the amount of $9,360.54 should be awarded to Durham Jones & Pinegar and $2,736.15 to Ballard Spahr. The Court adopts this recommendation. Beyond these fees, Young Living has submitted detailed objections to the costs requested by Defendants. Those objections can be grouped into the following categories: (A) mediation costs, (B) trial exhibits, (C) subpoena costs, (D) deposition costs, (E) trial and hearing transcript costs, (F) courier services, (G) database services, (H) miscellaneous attorney travel expenses, (I) copy and binder costs, and (J) trial technology. The Court will address each category in turn.

(A) MEDIATION COSTS

Young Living objects to Defendants' $1,750.00 line item for mediation costs (incurred by Ballard Spahr). The Court concurs with Young Living's analysis concluding that voluntary mediation costs are a litigation expense and

not a taxable cost. *Cf. Stevenett v. Wal-Mart Stores*, 1999 UT App 80, ¶ 37–38 (mediation costs permitted where such costs were court ordered, as opposed to voluntary).

(B) TRIAL EXHIBITS

Young Living objects to $2,012.24 in costs incurred for trial exhibits requested by Defendants ($986.74 to Ballard Spahr, and $1,025.50 to Smith LC). The Court concurs with Young Living's analysis concluding that trial exhibits are an expense category that has traditionally been disallowed as a taxable cost.

(C) SUBPOENA COSTS

Defendants have requested $438.50 in subpoena costs ($154 to Ballard Spahr, $264.50 to Durham Jones & Pinegar, and $20.00 to Smith LC). This is calculated using the allowable witness fee of $18.50 per witness pursuant to §78B–1–119, as well as the statutory $20 service fee under §17–22–2.5(2)(a). The Court awards these statutory costs.

(D) DEPOSITION COSTS

Ballard Spahr has requested $15,694.47 in transcript costs for multiple depositions, as well as $25,247.93 for attorney-travel costs incurred in attending those depositions. Durham Jones & Pinegar has requested $25,713.59 for deposition transcripts and video costs, as well as $29,437.68 for the service of court reporters during the depositions. $29,981.00 in attorney-travel expenses is also included in their request. Smith LC has requested $11,942.53 for deposition transcripts, and $5,443.99 for attorney-travel and meal expenses incident to attending depositions. Young Living has opposed all of the travel expenses and all but $2,412.15 of Ballard Spahr's transcript costs, as well as all but $5,378.10 of Durham Jones & Pinegar's transcript costs.

The Court concurs that incidental costs incurred for counsel to attend a deposition are not contemplated by the definition of taxable costs. There is simply no statute or rule that directs their payment. Accordingly, the Court declines to award these litigation expenses.

With respect to the remaining deposition costs, Young Living's repeated objections are that the depositions were either: not essential to the case, were obtainable by a less expensive means of discovery, or were not used at trial. As noted *supra*, deposition expenses may be awarded under certain circumstances. Over time, different standards have been offered in considering those circumstances. The approach advanced by Young Living was given in *Young v. State*, 2000 UT 91, 16 P.3d 549. There, the Utah Supreme Court articulated multiple factors which could support a finding that a deposition was essential. An alternative approach, offered in *Guisti v. Wentworth Corp.*, gave a more concise rule, stating that deposition costs were recoverable "subject to the limitation that they were taken in good faith and appear to be essential for the development and presentation of the case." 2009 UT 2, ¶ 80, 201 P.3d 549. Recently, the Supreme Court has clarified that *Giusti* is the correct rule. *Penunuri v. Sundance Partners, Ltd.*, 2017 UT 54, ¶ 43, —P.3d—.

In the present case, Young Living raises no bad-faith objection, and the Court will thereby conclude that the first condition has been satisfied. As to the remaining condition, the Court finds that the following depositions were essential for the development of the case; and costs for transcription, video, or court reporter fees are proper:

(1) Peggy Langenwalter: The deposition testimony of Peggy Langenwalter was used as an exhibit on two motions for partial summary judgment. That testimony was relied upon in the Court's analysis, and partial summary judgment was granted as to the alleged Langenwalter solicitation. *See Ruling and Order on Justin Harrison's Motion for Summary Judgment on Remaining Solicitees,* Feb. 24, 2015, p. 13; and *Ruling and Order on Defendants' Motion for Summary Judgment on Remaining Solicitees,* Sept. 23, 2015, p. 28–30. Based upon the foregoing, Langenwalter's deposition testimony was essential to the development of Defendants' defense on those issues and therefore the costs of that deposition are properly awarded.

(2) Susie Bagwell: The deposition testimony of Susie Bagwell was submitted as an exhibit in a defense motion for partial summary judgment. That testimony was relied upon in the Court's analysis and summary judgment was granted as to the Bagwell

solicitation. *See Ruling and Order on Defendants' Motion for Summary Judgment on Remaining Solicitees,* Sept. 23, 2015, p. 22. Based upon the foregoing, Bagwell's testimony was essential to the development of Defendants' defense on this issue and therefore the costs of her deposition are properly awarded.

(3) Justin Harrison. Harrison's deposition testimony was submitted as an exhibit in his motion for partial summary judgment. His testimony was relied upon in the Court's analysis as to the alleged Molinar and Johnson solicitations, and partial summary judgment was granted. *See Ruling and Order on Justin Harrison's Motion for Summary Judgment on Remaining Solicitees,* Feb. 24, 2015, p. 17–19. Moreover, Harrison's deposition was used by both parties at trial to refresh recollection and impeach. Given the length of time which had transpired between filing the Complaint and trial, the earlier record of his testimony was critical. Based upon the foregoing, Harrison's testimony was essential to the development of his defense and therefore the costs of his deposition are properly awarded.

(4) Lillian Shepherd, David Stirling, and Emily Wright. The deposition testimony of these Defendants was used by both parties at trial to refresh recollection and impeach. The earlier record of their testimony was crucial on many points—particularly given the length of time which had elapsed before the trial took place. Accordingly, this testimony was essential to the development of the defense and therefore the costs of these depositions are properly awarded.

As to the remaining depositions: Defendants have not offered a specific explanation for *how* the testimony of any particular witness was essential to their case. In many pretrial motions, Defendants submitted declarations from witnesses in lieu of deposition testimony, leaving it unclear (absent guessing or re-listening to weeks of trial testimony) how the deposition was used. Indeed, in some cases Appendix 1 fails to even provide the name of the witness who was deposed. Absent such an argument, and absent any clear use of the deposition in the record, the Court is confident that any award for these

deposition costs would be reversed. Accordingly, costs for the remaining depositions are not awarded.

(E) TRIAL AND HEARING TRANSCRIPT COSTS

Young Living objects to $45,016.83 in costs for daily trial transcripts, as well as the transcripts of various hearings ($24,833.35 requested by Durham Jones & Pinegar, $16,757.85 by Ballard Spahr, and $3,425.63 by Smith LC). The Court concurs with Young Living's analysis concluding that these transcripts are not required by any statute or rule, and are not a taxable cost.

(F) COURIER SERVICES

Young Living objects to $641.32 in courier costs requested by Defendants (and billed by Durham Jones & Pinegar). The Court concurs with Young Living's analysis and concludes that such costs do not come within the definition of a taxable cost.

(G) DATABASE SERVICES

Defendants request of $29,937.50 to recover costs incurred by Durham Jones & Pinegar in hiring a neutral, third party to review proprietary business information that was subject to a protective order. These fees were not incurred out of an exercise of discretion on the part of counsel. They were ordered by this Court after both parties expressed concern regarding the highly-confidential nature of the type material at issue. Because they were court-ordered, they are comparable to the court-ordered mediation costs that were awarded in *Stevenette.* Accordingly, these costs were incurred by order of the Court and they are properly considered as a taxable cost as opposed to a litigation expense. The Court awards costs for database services.

(H) MISCELLANEOUS ATTORNEY TRAVEL EXPENSES

Young Living objects to $4,042.12 in travel costs requested by Defendants ($2,847.22 to Durham Jones & Pinegar and $1,194.90 to Smith LC). This would include travel incident to trial, other "local" travel, and meals. The Court concurs with Young Living's analysis concluding that travel expenses are not a taxable cost. While necessary, such costs are not mandated by statute or rule

and are properly characterized as a litigation expense as opposed to a cost recoverable under 54(b).

(I) COPY AND BINDER COSTS

Young Living objects to $12,158.70 in copy costs requested by Defendants ($7,086.90 to Durham Jones & Pinegar and $5,071.80 to Smith LC). This would include costs for assembling various binders, as well as the authentication of copies. The Court concurs with Young Living's analysis and concludes that photocopy costs are specifically listed as the type of expense that is not recoverable under Rule 54(d). The same logic would apply to the costs of preparing binders with copies of exhibits and other materials.

(J) TRIAL TECHNOLOGY

Young Living objects to $1,020.00 in trial technology costs requested by Defendants (and billed by Durham Jones & Pinegar). The Court concurs with Young Living's analysis and concludes that expenses for trial technology are not covered by statute or rule and are therefore not recoverable as a taxable cost under 54(b).

In conclusion, the Court awards those costs which Young Living has conceded it should pay under the rule, including subpoena costs. The Court also orders costs incurred for database services and depositions as outlined above.

II. BAD-FAITH ATTORNEY FEE AWARDS UNDER THE JUDICIAL CODE

In the event attorney fees are not awarded under UTSA, Defendants offer that the Judicial Code provides an alternative basis under which to award fees. Young Living responds that the Court should deny this request because the statute is not intended to apply to partial-fee requests. The Court agrees with Young Living.

Section 78B–5–825(1) ("Section 825") of the Judicial Code provides: "In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the *action* or defense to the action was without merit

and not brought or asserted in good faith[.]" (emphasis added). Young Living emphasizes that Section 825 permits fee awards for *actions* brought in bad faith, not for portions of an action, such as a claim or a motion. Here, Defendants claim that the UTSA claim was brought in bad faith and request a partial -fee award for the fees incurred with respect to that claim. Defendants have presented no argument that Young Living's entire lawsuit was brought in bad faith.

Precedent supports Young Living's position that such partial-fee requests are not permitted under Section 825. In considering this issue, Utah's Court of Appeals noted that "[t]he plain language of section 78B–5–825 expressly limits the award of attorney fees to situations where a party prevails with regard to an 'action' . . . . '[A]ction' is a term of art, basically meaning a lawsuit, and a motion—an optional part of a lawsuit—clearly does not equate to an 'action.'" *Martin v. Rasmussen*, 2014 UT App 200, ¶ 23, n.3, 334 P.3d 507, (quoting *Dahl v. Harrison*, 2011 UT App 389, ¶42, 265 P.3d 139).

The same analysis applies here. Young Living filed a civil action against Defendants. That action included multiple claims—one of which being the UTSA claim at issue here. Section 825 permits a fee award if Young Living's lawsuit was brought in bad faith, but not if one claim within that lawsuit was so filed. Based upon the foregoing, attorneys fees under Section 825 are properly denied.

III. CONCLUSION

Based upon the foregoing, Defendants' Joint Motion for Fees and Costs is granted in part and denied in part.

Pursuant to Rule 7, counsel for Defendants is directed to prepare an order consistent with this Ruling.

DATED this 9 day of July, 2018.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DISTRICT COURT • UTAH COUNTY

Christine S. Johnson
DISTRICT COURT JUDGE

certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120400973 by the method and on the date specified.

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Date: 7/10/18

Deputy Court Clerk