NORTH CAROLINA **MECKLENBURG COUNTY**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION** **07 CVS 19339**
HILB ROGAL & HOBBS COMPANY and THE MANAGING AGENCY GROUP, INC., **Plaintiffs,** **v.** **DONALD SELLARS,** **Defendant.**	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Hilb Rogal & Hobbs Company ("HRH") and The Managing Agency Group, Inc. ("MAG"), seek to enjoin their former executive, defendant Donald Sellars, from continuing to breach his enforceable promises not to solicit their customers and not to misappropriate their confidential business information, all on behalf of his new employer. For the reasons that follow, the Court should enter a preliminary injunction to stem the irreparable loss occasioned by Mr. Sellars' misconduct.

BACKGROUND[1]

Mr. Sellars voluntarily resigned as Vice President and Lumber Program Manager of MAG, a subsidiary of HRH. Mr. Sellars acted once he had secured another executive position with Member Insurance. Contrary to what he had represented when giving notice of his

resignation to MAG, Mr. Sellars had accepted the presidency of a Member Insurance division named, American Lumber Underwriters ("ALU"). (Teese Aff. ¶ 4 & Ex. A; Answer ¶ 21). After recruiting Mr. Sellars, ALU became a direct competitor of HRH and MAG's Lumber Program in the specialty insurance program market. (Plumb Aff. ¶ 12; Answer ¶ 21).

Before and since his resignation, Mr. Sellars has leveraged the good will he had established as the head of MAG's Lumber Program and has misappropriated the confidential information to which he was privy to convert MAG's customers on behalf of ALU. (Plumb Aff. ¶ 17-24). Mr. Sellars successfully targeted MAG customers whose combined annual income to plaintiffs exceeded ***$300,000***. (Plumb Aff. ¶ 24). By his conduct, Mr. Sellars has not only breached the express terms of his Employment Agreement and stock option agreements with HRH, but he also has committed various torts.

Plaintiffs are not trying to prevent Mr. Sellars from earning a living in the insurance industry, even though he will be doing so with a rival in the same market. For purposes of their motion, plaintiffs only seek to enjoin Mr. Sellars from soliciting specific subsets of their customers, a condition to which he accepted when he entered into an Employment Agreement with an HRH entity on September 28, 1999 (hereinafter, the "Agreement"), and later amended.[2] Plaintiffs further seek the return of their property taken by Mr. Sellars and an order forcing him to honor his promise not to trade on the confidential business information he had acquired by virtue of his employment with them.

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[1] The complete recitation of relevant facts is set forth in the affidavits filed with the Court and incorporated by reference.

[2] A true and accurate copy of the Agreement, as amended, is attached to the Affidavit of Peter Plumb as Exhibit A.

ARGUMENT

I. Mr. Sellars Signed the Agreement and then Ratified It – At Least for Purposes of the Pending Motion.

Mr. Sellars has acted as if he is not bound by the restrictive covenants contained in the Agreement (or by his common law and statutory duties). In fact, as a threshold defense, Mr. Sellars swears that he did ***not*** sign the Agreement in September 1999. (Sellars Aff. ¶ 2). It is unclear whether Mr. Sellars claims the amendment to the Agreement is a forgery, too. *Compare* Sellars Aff. ¶ 2 ("signature" versus signature**s**) *with* Answer ¶ 11 (denies signing blank on page 11). In the amendment, he re-affirmed the Agreement "including most specifically, without limitation, the restrictive covenants therein." (Final page of Ex. A to Plumb Aff.).

In addition to his conclusory affidavit, Mr. Sellars recalls a statement he purportedly made to Vin Looney, an HRH employee, that he [Sellars] had not signed an employment agreement containing a covenant not to compete. (Answer, Affirmative Defense ¶ 2). The self-serving statement does not establish that "someone employed by HRH or MAG signed Mr. Sellars' name to the employment agreement" as he would have the Court believe. (Answer, Affirmative Defense ¶ 5). Indeed, the statement – even if made – is true: the Agreement does ***not*** contain a non-compete covenant, only non-solicitation and non-disclosure covenants.

Finally, Mr. Sellars relies on a memorandum prepared by Herb Brantlinger, then President of MAG, for the proposition that "Mr. Sellars did not execute the employment agreement with HRH or MAG." (Answer, Affirmative Defense ¶ 3). Nothing could be further from the truth. As Mr. Brantlinger explains in his affidavit, he was referring to another type of employment agreement used by MAG and not the HRH employment agreement which is the

subject of this litigation. (Brantlinger Aff. ¶¶ 8, 9).

Mr. Brantlinger continues in his affidavit to recount why the parties modified the Agreement. In a series of discussions, Mr. Sellars expressed to Mr. Brantlinger his [Sellars'] dissatisfaction with the Agreement's termination provision. Mr. Brantlinger, in turn, initiated a conversation with Robert Lockhart, a Vice President and Northeast Regional Director of an HRH entity, in an attempt to amend the Agreement. (Brantlinger Aff ¶ 6). As a result of Mr. Brantlinger's conversations with Mr. Sellars and Mr. Lockhart, Mr. Sellars executed an amendment to the very Agreement he now denies ever signing. (Brantlinger Aff. ¶ 7 & Ex. B).

This case is not the first one in which a former employee swears that he never received an employment agreement. *See, e.g., Greystone Staffing, Inc. v. Goehringer*, 2006 WL 3802202, at *2, 14 Misc.3d 1209(A), 836 N.Y.S.2d 485 (N.Y. Sup. Nov. 27, 2006). By filing the action, plaintiffs certainly believe otherwise by attaching a copy of the fully executed agreement, as amended, found in a personnel file maintained on Mr. Sellars. (Plumb Aff. ¶ 13). After Mr. Sellars raised the issue, plaintiffs have investigated his claim and, yet, have not amended their complaint. Instead, plaintiffs have filed with the Court the affidavits of the other two people whose signatures appear on the Agreement.

Richard Mason swears that he witnessed the person whom he had recruited and hired, Mr. Sellars, complete the blanks in the Agreement and witnessed both Mr. Sellars and Bonnie Eaton sign the Agreement. (Mason Aff. ¶¶ 6-7). Having Mr. Sellars sign the Agreement was consistent with the new practice implemented by HRH when it acquired S.W. Gow. and Company, Inc. (Mason Aff. ¶ 4). Ms. Eaton corroborates Mr. Mason's account. (Eaton Aff.

¶¶ 6, 7). Both Mr. Mason and Ms. Eaton further aver that Mr. Sellars' signature appears on the amendment to the Agreement. (Mason Aff. ¶ 12; Eaton Aff. ¶ 10). In addition, Mr. Mason tells the Court that he would never have offered Mr. Sellars an incentive plan had he not signed the Agreement. (Mason Aff. ¶ 10).

Against the backdrop of conflicting affidavit testimony, the Court must make its own assessment of whether the signatures appearing in the Agreement, as amended, are consistent with the other signatures Mr. Sellars does not currently dispute. At best, Mr. Sellars has created a dispute about the authenticity of his signature, but doing so does not foreclose the entry of a preliminary injunction. *See, e.g., Greystone Staffing,* 2006 WL 3802202, at *3; *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 637, 568 S.E.2d 267, 272 (2002) (sufficient evidence of consideration existed and dispute to be finally determined later); *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 468, 556 S.E.2d 331, 335 (2001) (same). If the rule were otherwise, no injunction would ever issue because experience teaches us that former employees uniformly assert some defense to the enforcement of a restrictive covenant that they have breached. The nature and kind of the evidence submitted by plaintiffs is more than sufficient to support a conclusion that plaintiffs are "likely" to prevail on their allegation that Mr. Sellars signed both the Agreement and its amendment.

II. Plaintiffs Satisfy the Standard for Granting Injunctive Relief.

Plaintiffs are entitled to injunctive relief because they have shown the Court the likelihood of two occurrences. First, plaintiffs are likely to sustain irreparable loss unless the injunction is issued. *A.E.P. Indus. v. McClure*, 308 N.C. 393, 401, 405-10, 302 S.E.2d 754, 761-

64 (1983) (alternatively, issuance is necessary for the protection of the plaintiffs' rights during the course of the litigation).[3] Second, plaintiffs are likely to prevail on the merits of their contract claim. *Id.* at 401, 302 S.E.2d at 760. Whether the non-solicitation and non-disclosure provisions of the Agreement are in fact enforceable will be determined later in the proceedings. *Barber*, 147 N.C. App. at 468, 556 S.E.2d at 335.

A. A Preliminary Injunction is Necessary to Prevent Irreparable Harm and, Alternatively, to Protect Plaintiffs' Rights During the Litigation.

The North Carolina Supreme Court has made clear that the trial court should issue a preliminary injunction "as a matter of course" in a case involving a breach of an enforceable restrictive covenant. *A.E.P. Indus.*, 308 N.C. at 406, 302 S.E.2d at 762. Absent a preliminary injunction, Mr. Sellars will continue to press his unfair advantage of trading on the confidential information he had gained while at MAG to call on MAG's customers and solicit them to buy competitive products from ALU. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (holding that the employer "faced irreparable non-compensable harm in the loss of its customers" when the former employee breached his non-solicitation covenant). This scenario is precisely the harm that HRH intended to prevent by asking Mr. Sellars to enter into the Agreement, and precisely the interim relief that he expressly consented to in the Agreement. *Xerium Tech., Inc. v. Frank*, 2007 NCBC __, pp. 18-19 at ¶¶ 8-10 (N.C. Super. June 22, 2007) (giving effect to bargained-for provision which acknowledges that breach of restrictive covenant would cause irreparable injury). Further, if the Court fails to issue an

[3]North Carolina law sets the standard for determining whether injunctive relief is appropriate as an equitable remedy. *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 426-27, 571 S.E.2d 8, 13 (2002). In any event, New York

injunction, this harm is likely to continue to grow well beyond the means of Mr. Sellars to remedy it with money damages. Plaintiffs should not be required to submit to continuing violations of the non-solicitation and non-disclosure covenants during the pendency of this litigation.

B. Plaintiffs Will Succeed on the Merits of their Contract Claim under New York Law.

The Agreement contains valid restrictive covenants under the controlling law of the State of New York. The parties agreed that the Agreement would be construed under New York law given the facts that HRH operated full-line insurance agencies from offices in Buffalo, Rochester and Syracuse, New York, and that Mr. Sellars was then a resident of Hamburg, New York. *See* Ex. A, p.1, to Plumb Aff. The choice-of-law clause is enforceable under North Carolina law.

The North Carolina Supreme Court has routinely applied the law chosen by the parties to govern their employment contract which contains restrictive covenants. *See, e.g., United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 654, 370 S.E.2d 325, 382 (1988) (applying IL law); *A.E.P. Indus.*, 302 S.E.2d at 760 (applying NJ law). The Court of Appeals has followed suit. *See, e.g., Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 518 S.E.2d 205, 208, *disc. rev. denied*, 351 N.C. 186, 541 S.E.2d 709 (1999) (applying MA law); *Redlee/SCS*, 153 N.C. App. at 423-24, 571 S.E.2d at 11(applying TX law); *Seaboard Indus. v. Blair*, 10 N.C. App. 323, 178 S.E.2d 781, 786 (1971) (applying GA law); *see also UBS PaineWebber, Inc. v. Aiken*, 197 F. Supp. 2d 436, 444 (W.D.N.C. 2002) (applying NY law; declining to follow *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353 (1998)). The courts have enforced the provision over objections

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law is not materially different. *See, e.g., Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999) (applying

lodged by the former employee that the law of the foreign state violated the public policy of the State of North Carolina. *See, e.g., Bueltel, supra* (discretionary review on this issue denied); *Redlee, supra*; *Xerium Tech.*, 2007 NCBC ___, pp. 7-11 at ¶¶ 1-8. Thus, the Court should evaluate the Agreement under New York law.[4]

Under New York law, a non-solicitation covenant is enforceable if it is reasonably limited temporally and geographically, "necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." *Reed Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 307, 386 N.Y.S.2d 677, 679, 353 N.E.2d 590, 593 (1976). Plaintiffs anticipate that Mr. Sellars will carry his broad attack against the Agreement to every element of enforceability.[5] Because the non-solicitation provision is reasonable in scope, protects plaintiffs' confidential business information and relationships with their customers, promotes public policy and does not unduly burden Mr. Sellars, plaintiffs will succeed on the merits of their contract claim.

1. The Non-Solicitation Covenant Mr. Sellars Accepted is Reasonable as to Territory and Time.

Mr. Sellars' non-solicitation promise is reasonably limited and in scope to only plaintiffs'

New York law which requires a showing of irreparable harm before an injunction may be issued).

[4] The Agreement is enforceable under North Carolina law in any event. For example, in *Precision Walls*, 152 N.C. App. at 638, 568 S.E.2d at 273, the Court of Appeals found no error in the trial judge's entry of a preliminary injunction prohibiting a former dry wall estimator from soliciting any customer of Precision Walls, wherever located, and from disclosing its confidential business information.

[5] Plaintiffs do not anticipate that, other than the authenticity of his signature, Mr. Sellars will contest the enforceability of the non-disclosure covenant which is limited to plaintiffs' confidential business information and lasts only for three years. *See, e.g., Greystone Staffing*,2006 WL 3802202, at *4 (recognizing employer's legitimate need to protect confidential information in the form of customer lists, personnel lists, and other information concerning the employer's business and prices that was not known to persons outside the employer's company and would be of significant value to a competitor who does not possess such information); *Stanley Tulchin Assoc. v. Vignola*, 186 A.D.2d 183, 186, 587 N.Y.S.2d 761, 763 (2d Dep't 1992) (finding employment agreement that barred

Customers[6], Known Customers[7] or Prospective Customers[8], and in duration to the term of three years. New York courts have repeatedly found that non-solicitation covenants using customer-based restrictions instead of territorial restrictions are reasonable. *See, e.g., Estee Lauder Companies Inc. v. Batra*, 430 F. Supp. 2d 158, 181-82 (S.D.N.Y. 2006) (finding worldwide scope of non-solicitation clause reasonable where the plaintiff's business was international in scope); *UnisourceWorldwide, Inc. v. Valenti,* 196 F. Supp. 2d 269, 273 (E.D.N.Y. 2002) (upholding restrictive covenant that prohibited the former employee from soliciting or serving *any* of the customers served by the plaintiff company without regard to the customers' geographic location); *Uniform Rental Div., Inc. v. Virgilio Moreno*, 83 A.D.2d 629, 441 N.Y.S.2d 538 (2nd Dep't 1981) (same). Likewise, New York courts have routinely enforced non-solicitation covenants of three years in duration. *See, e.g., Serv. Sys. Corp. v. Harris*, 41 A.D.2d 20, 341 N.Y.S.2d 702 (N.Y. A.D. 1973) (finding three-year non-solicitation clause reasonable in prohibiting former maintenance supervisor from soliciting accounts which he developed or which he may have serviced during a reasonable time prior to the termination of his employment).

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disclosure of client lists for a three-year period was valid to protect the plaintiff's legitimate interest in retaining its clients without unfairly burdening the defendant).

[6] This subset of plaintiffs' customer base embraces those entities with an insurance policy or bond in force, or with whom plaintiffs are rendering services, each as of the date of termination of Mr. Sellars' employment. Ex. A, ¶ 5, to Plumb Aff.

[7] This subset of plaintiffs' customers includes those entities with whom Mr. Sellars had personal contact, serviced or became aware of in the course of the performance of his duties. Ex. A, ¶ 5, to Plumb Aff.

[8] This group consists of those parties known by Mr. Sellars (1) to have been solicited for insurance-related business within the twelve-month period preceding the date of his resignation, and, within the same timeframe, (2) either had met to discuss services offered by plaintiffs or had responded in writing to an earlier solicitation. Ex. A, ¶ 5, to Plumb Aff.

Ultimately, the determination of the proper scope of the restriction covenant is within this Court's discretion. In the unlikely event that this Court finds the non-solicitation covenant too restrictive, it is empowered to revise the provision so as to make it reasonable. *See, e.g., Valenti,* 196 F. Supp. 2d at 277 (territory covered by non-compete blue penciled). A court sitting in North Carolina may blue pencil the Agreement in conformity with New York law. *See, e.g., Redlee/SCS*, 153 N.C. App. at 423-24, 571 S.E.2d at 11 (enforcing TX covenant as blue penciled); *Xerium Tech.*, 2007 NCBC __, pp. 14-15 (enforcing MA covenant as blue penciled); *UBS PaineWebber*, 197 F. Supp. 2d at 445-46 (enforcing NY covenant as blue penciled).

2. The Non-Solicitation Covenant Protects Plaintiffs' Customer Relationships and Their Confidential Business Information.

The Court should begin its analysis with a recognition of what type of restrictive covenant plaintiffs are seeking to enforce. A non-solicitation covenant is far less restrictive than a traditional non-compete provision. *Ticor*, 173 F.3d at 68-69 (distinguishing between non-compete and non-solicitation covenants). A non-solicitation covenant is narrowly tailored to protect an employer's customer relationships and good will against misappropriation by departing employees. *Ecolab, Inc. v. K.P. Laundry Mach., Inc.*, 656 F. Supp. 894, 898-99 (S.D.N.Y. 1987). These are well-recognized and legitimately protectable interests of the employer. *Id.* at 899. An employer's good will is jeopardized when a former employee would be calling upon his former employer's customers[9] to solicit business on his new employer's behalf. *Ticor*, 173 F.3d at 68-69. Moreover, as a practical matter, the non-solicitation covenant

[9] In addition, New York law recognizes that plaintiffs have a legitimate interest in protecting good will with respect to their prospective customers. *See Globaldata Mgmt. Corp. v. Pfizer*, 10 Misc. 3d 1062A, 814 N.Y.S.2d 561 (Sup.

removes any incentive for Mr. Sellars to misappropriate his extensive knowledge of the plaintiffs' confidential business information.

At the time of his departure from HRH and MAG, Mr. Sellars managed MAG's Lumber Program. (Plumb Aff. ¶ 7; Answer to Compl. ¶ 8). As the Lumber Program Manager, he oversaw the day-to-day operations, including the underwriting of insurance plans for MAG's Lumber Program accounts. (Plumb Aff. ¶ 7; Answer to Compl. ¶ 9). Mr. Sellars, through MAG's brokers, maintained his relationships with existing Lumber Program customers and remained attentive to their changing needs, thus ensuring that these customers renewed their insurance contracts with plaintiffs. (Plumb Aff. ¶ 7; Answer to Compl. ¶ 7). In addition, through plaintiffs' brokers, who submitted applications for new accounts, Mr. Sellars gained knowledge of plaintiffs' brokers' existing and prospective accounts. (Plumb Aff. ¶ 7).

Mr. Sellars' entire career at MAG had been focused on building relationships with MAG's Lumber Program customers. (Plumb Aff. ¶ 7). Plaintiffs provided Mr. Sellars with the tools necessary to develop and maintain Lumber Program accounts including a generous travel and expense budget, Confidential Information regarding MAG's products and rate structures, support staff, computer services and equipment, promotional materials, and memberships to trade associations. (Plumb Aff. ¶ 9). Mr. Sellars' post-employment contact with customers who have solely associated him with MAG would seriously damage MAG's good will.

As the president of ALU, Mr. Sellars is now in a position to appropriate MAG's good will. *See Ticor*, 173 F.3d at 68-69. Significantly, as the chief executive over the Lumber

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Ct. N.Y. Cty. 2005) ("the fact that plaintiff lost the [client] contract does not preclude its legitimate need for protection of its client good will with [its now former client]").

Program for the last seven years for MAG, Mr. Sellars would be uniquely qualified to turn customers from MAG to ALU. *See id.* Notably, ALU did not have the ability to steal away plaintiffs' major accounts ***until*** ALU hired Mr. Sellars and exploited his inside knowledge of MAG's procedures for renewing the Lumber Program accounts. (Plumb Aff. ¶¶ 11, 12, 17, 18, 21, 22; Teese Aff. ¶ 6).

The need for plaintiffs to protect their confidential business information provides an independent grounding for enforcing the non-solicitation covenant. In *Greystone Staffing*, the court granted a preliminary injunction to enforce restrictive covenants preventing a former account manager at a staffing agency from soliciting business from the staffing agency's customers which were customers at or before the time of the former employee's separation. 2006 WL 3802202, at *6. Although the former employee denied that he had misappropriated any confidential information from the staffing agency, the evidence established that the former account manager "became intimately familiar with [the staffing agency's] business and developed significant relationships with [the staffing agency's] clients and customers. ... [H]e was entrusted with customer lists, personnel lists, and other highly sensitive and confidential information concerning [the staffing agency's] business, employees, and prices." *Id.* at *3. The court found that "[t]his confidential business information is subject to the protection of the covenants in his employment agreements with" the staffing agency. *Id.*

Here, as in *Greystone Staffing*, there is "no doubt that [Mr. Sellars] had access to highly sensitive information not known to persons outside [MAG] which would be of significant value to a competitor who does not possess such information. *Id.* at *4. Moreover, plaintiffs have a

substantial interest in retaining their Lumber Account customers, "an interest which may be seriously eroded through a competitor's use of this information." *Id.*; *see also Briskin v. All Seasons Servs., Inc.*, 615 N.Y.S.2d 166, 167 (App. Div. 4th Dep't 1994) (confidential customer lists qualify as protectable interests); *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 173, 498 N.Y.S.2d 146, 152 (N.Y.A.D. 2 Dept. 1986) (customer lists of brokerage firm, compiled as result of effort and expense on brokerage firm's part and containing information which former employees of brokerage firm would not have obtained absent their former employment with brokerage firm, were deserving of protection by means of injunctive relief). The confidential account information that Mr. Sellars took with him upon his departure from MAG contains vital MAG Lumber Program account contacts, as well as data that includes rate structures, formulas for pricing for MAG's accounts, historical information on MAG's accounts, and audit reports from carriers rating the success of MAG's Lumber Program. (Plumb Aff. ¶ 18, 20; Brantlinger Aff. ¶ 11). Importantly, there is no published directory for the collection of MAG Lumber Program account contacts containing the names, addresses, or any other vital data of those companies. (Plumb Aff. ¶ 18).

It should be beyond any serious dispute that the confidential account information Mr. Sellars has wrongfully retained is not readily known in the industry and is discoverable only through extraordinary effort. (Kennedy Aff. ¶¶ 7, 11). In fact, in the Agreement, Mr. Sellars expressly acknowledged the confidential nature of plaintiffs' "customer identities and lists, revenues from customers' accounts, customer risk characteristics and requirements, key contact personnel, … policy expiration dates, policy terms, conditions, and rates, information about

prospective customers," and other business information. (Ex. A, ¶ 4, to Plumb Aff.). There is no reason to ignore such representations when made by a well-educated, sophisticated individual which would be binding if made in court. *Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 633-34 (7th Cir. 2005). The Court should not allow Mr. Sellars at this time to change his assessment simply as a means to shirk his responsibilities.

3. Granting Injunctive Relief Serves the Public Interest and Does Not Unduly Burden Mr. Sellars.

The benefit of injunctive relief to plaintiffs far outweighs any detriment to Mr. Sellars. On the one hand, an injunction would protect plaintiffs' confidential business information, good will with clients and prospective customers, methods of business operation, and contract rights. Plaintiffs seek only to enjoin Mr. Sellars' "piracy" of their most precious business asset -- their Lumber Program clients. On the other hand, Mr. Sellars would be restricted for a limited period from soliciting these customers. Mr. Sellars' ability to earn a livelihood with a competitor in his chosen profession, therefore, would not be jeopardized by the entry of a preliminary injunction. *Greystone Staffing*, 2006 WL 3802202, at *5; *McLaughlin*, 114 A.D.2d at 174, 498 N.Y.S.2d at 153 (finding defendants "will be able to earn a living if the preliminary injunction is continued; the restraint is only that they may not solicit the plaintiff's customers in order to do so"); *Ecolab*, 656 F. Supp. at 898-99 (same). ALU and MAG would compete fairly for the patronage of the lumber industry. The balance of equities is struck decidedly in favor of the plaintiffs. *See, e.g., Este Lauder*, 430 F. Supp. 2d at 182 (finding balance of hardships decidedly tips in favor of the plaintiff where it has shown that in the absence of a preliminary injunction, it is likely to suffer irreparable harm if former employee were to use and/or disclose its confidential information).

Public policy actually favors the enforcement of contracts like the one between Mr. Sellars and HRH that operate to protect legitimate business interests. *A.E.P. Indus.*, 308 N.C. at 410, 302 S.E.2d at 763; *Beam v. Rutledge*, 217 N.C. 670, 670, 9 S.E. 476, 478 (1940) ("Public policy ... favors the enforcement of contracts intended to protect legitimate interests . . .. It is as much a matter of public concern to see that valid contracts are observed as it is to frustrate oppressive ones."). "Essentially, by enforcing the restrictions, a court is only requiring the defendant[] to do what [he] agreed to do." *Kuykendall*, 322 N.C. at 649, 370 S.E.2d at 380; *see also RGI, Inc. v. Tucker & Assocs.*, 858 F.2d 227, 230 (5th Cir. 1991) (specific performance given to "bargained for provision" in agreement for injunctive relief pending arbitration), *rehearing denied*, 856 F.2d 1266 (5th Cir. 1989). Further, "[t]he law 'implies in every contract a covenant that neither party will do anything that will deprive the other of the fruits of his bargain.'" *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 229, 333 S.E.2d 299, 305 (1985) (citation omitted).

The parties regarded the Agreement as reasonable and desirable in September 1999. Mr. Sellars laid the foundation for his success in the specialty insurance program industry by virtue of his employment with plaintiffs and reaped financial reward. "Freedom to contract imports risks as well as rights." *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 390, 42 S.E.2d 352, 354 (1947). As the North Carolina Supreme Court recognized sixty years ago:

> In undertaking to change horses for what the defendant regards a better mount, he is reminded of his obligations to the steed which brought him safely to midstream and readied him for the shift. The purpose here is to call his attention to the matter.

Id. at 391, 42 S.E.2d at 354.

Mr. Sellars is simply trying to get out of an obligation that he now finds inconvenient. The decisions by the North Carolina Supreme Court, however, foreclose this so-called "defense." *See Weyerhaeuser Co. v. Carolina Power & Light*, 257 N.C. 717, 722, 127 S.E.2d 539, 543 (1962) (refusing to "relieve [a party to a contract] because the contract has proven to be a hard one"). Mr. Sellars must keep his promise.

CONCLUSION

For the foregoing reasons, plaintiffs pray that the Court grant their motion for a preliminary injunction.

Respectfully submitted, this the 14th day of November, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court, counsel for Plaintiffs certifies that the foregoing brief, which is prepared using a proportional font, is double-spaced and is less than 7500 words as reported by the word-processing software.

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CERTIFICATE OF SERVICE

On this 14th day of November 2007, I, Kimberly D. Bartman, do hereby certify that I electronically filed the foregoing document with the Business Court using the CM/ECF system, which will send notification of such filing to the Defendant.

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