NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
MECKLENBURG COUNTY	**07 CVS 19339**

HILB ROGAL & HOBBS COMPANY and THE MANAGING AGENCY GROUP, INC.,	)	**REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
Plaintiffs,	)	
v.	)	**BCR 15.8**
DONALD SELLARS,	)	
Defendant.	)	

In 1999, Mr. Sellars agreed to reasonably limit his competitive activities in exchange for becoming a senior leader of plaintiffs' lumber insurance program. Specifically, he promised never to misappropriate their confidential business information and not to solicit their customers for three years following his separation. In 2002, Mr. Sellars specifically reaffirmed his undertakings as result of re-negotiating his Employment Agreement (the "Agreement"). He – and his new employer – now find keeping these promises to be both inconvenient and detrimental to achieving their common business interests, which include competing (unfairly) against the plaintiffs in the lumber insurance market.

Mr. Sellars has raised all sorts of baseless objections as to why the Court should not hold him to his word. The time has come for the Court to enjoin Mr. Sellars from the unabated breach of his covenants and to stem the irreparable loss occasioned by his misconduct.

ARGUMENT

I. Plaintiffs Have Met Their Burden of Showing that Mr. Sellars Executed the Employment Agreement in 1999.

For purposes of the pending motion, plaintiffs need only show a likelihood that Mr. Sellars signed the Agreement in 1999, not the absence of any dispute. *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 470-71, 556 S.E.2d 331, 336 (2001) (entry of preliminary injunction affirmed despite insurance executive's claim that he was unaware of a noncompete covenant and that the employment agreement contained certain enforcement deficiencies). They have discharged that burden. First, two eyewitnesses testified in their affidavits that Mr. Sellars completed and signed the agreement in their presence. Mason Aff. ¶¶ 6-7; Eaton Aff. ¶¶ 6-7. The eyewitnesses later reiterated their affidavit testimony during their depositions and described in detail the execution of the contract. Mason Dep. 50, 74; Eaton Dep. 46. Despite a full and fair opportunity to examine the eyewitnesses, Mr. Sellars did not succeed in eliciting any recantation of their sworn testimony that he had appeared before them in their offices located in Buffalo, New York on September 28, 1999, completed the blanks in the Agreement, and then signed the contract above the signature block reserved for him. Mason Aff. ¶ 8; Mason Dep. 50, 74; Eaton Dep. 46. Indeed, Mr. Sellars does not offer the Court any sworn testimony refuting the day's events described by Mr. Mason and Ms. Eaton. Mr. Sellars only repeats his conclusory statement that "[t]he signature on the last page of the Employment Agreement that says 'Donald Sellars' is not my signature." Sellars 12/21/07 Aff. ¶ 12.

Unable to attack the core testimony of Mr. Mason and Ms. Eaton, Mr. Sellars still quibbles with non-material aspects of their testimony. Whether, for example, Mr. Mason or Ms.

Eaton witnessed other employees sign other contracts on other occasions is of no significance for purposes of the pending motion. What is more disappointing is that Mr. Sellars has not abandoned his wildly inaccurate attacks on the credibility of these witnesses when the transcripts of their actual testimony contradict the attacks. *See* Pls.' Opp'n to Def.'s Mot. to Stay Pls.' Mot. for Prelim. Inj., pp. 6-9.

Below, plaintiffs will address the false impressions Mr. Sellars attempted to create with the bulleted points at page four of his brief about Ms. Eaton's deposition testimony:

- Mr. Sellars' assertion that Ms. Eaton "could not remember a single instance – other than Mr. Sellars – over the past ten (10) years in which she was a witness in the room to an employee signing their employment agreement" is directly contradicted by her actual testimony that she was in the room when Diane Ambrose signed her agreement in 1997. Eaton Dep. 30.
- Mr. Sellars' impressive height made a memorable first impression on Ms. Eaton during their encounter on September 28, 1999. Eaton Dep. 41.[1] Ms. Eaton recalls asking Mr. Sellars where he had relocated because she did not have his address to complete the first page of his Agreement. She remembers speaking with Mr. Sellars about his moving to Hamburg, New York, where Ms. Eaton herself resided. Eaton Dep. 43-44. These facts, notably absent from Mr. Sellars' brief, explain why Ms. Eaton distinctly recalls him signing the Agreement on that date.

[1] Pages from Ms. Eaton's transcript that have not been previously submitted with plaintiffs' response to defendant's motion to stay the preliminary injunction motion are attached as Exhibit A.

- Ms. Eaton must have followed her habit of forwarding the original executed agreement onto corporate. Plaintiffs have tracked the chain of custody of the Agreement since its execution in 1999 to the corporate repository for these types of contracts. *See* Mason Aff. ¶ 9; Eaton Aff. ¶ 9; Freeze Aff. ¶¶ 2-3; Woolfolk Aff. ¶ 4, 7. Mr. Sellars is left to argue the ridiculous proposition that, in 1999, Mr. Mason and Ms. Eaton conspired to forge Mr. Sellars' signature to the Agreement and then sent the original work of forgery to corporate records where it would be found in 2007 to prosecute plaintiffs' claims against Mr. Sellars because he had joined a competitor.
- Ms. Eaton testified that she did not type (Mr. Sellars' emphasis) in the information to complete the blanks in the Agreement because she did not know Mr. Sellars' new home address. Eaton Dep. 43. Mr. Sellars completed the blanks in his own handwriting on a copy of the agreement that she had previously mailed to him. Eaton Dep. 44; Mason Dep. 65-66.
- Ms. Eaton did not recall the Confidentiality Agreement because Mr. Sellars signed it in HRH's Jamestown office and Richard W. Brostrom signed it on behalf of the plaintiffs.
- Ms. Eaton gained familiarity with Mr. Sellars' signature because she saw it on expense reports. Eaton Dep. 40. Her affidavit testimony that the signature on the 2002 amendment was Mr. Sellars' proved accurate.
- Ms. Eaton did read Mr. Mason's affidavit prior to executing her own. What Mr. Sellars fails to bring to the Court's attention is Ms. Eaton's testimony that she did ***not*** make any changes in her affidavit based on what she had read in his affidavit. *See* Eaton Dep. 52-

53.

There is no reason to belabor the point by addressing the similarly selective manner in which Mr. Sellars attempts to impugn Mr. Mason's credibility.

Moreover, plaintiffs have discredited the other red herring dangled by Mr. Sellars.[2] Herbert Brantlinger, a disinterested witness, swore in his affidavit that the agreement referenced in his January 27, 2003 memo was ***not*** the type of contract like the 1999 Employment Agreement. Brantlinger Aff. ¶¶ 8, 9. Yet, Mr. Sellars is not dissuaded from continuing to rely on the Brantlinger memo. Perhaps he is wed to the "Big Lie" technique whereby if he continues to spin the same story, regardless of its merit, it will be accepted as fact by the Court.

In summary, Mr. Sellars has devoted the bulk of his defense to the "authentication" issue, trying to convince the Court that he did not sign the Agreement in 1999. His position, though meritless, is understandable. He, in part, secured his new position with Member Insurance as the President of American Lumber Underwriters ("ALU") by representing to ALU that he [Sellars] was not bound by a noncompete with plaintiffs. Fell Aff. ¶ 10.[3] While it is too late for Mr. Sellars to abandon his untenable position,[4] it is not binding on this Court.

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[2] Plaintiffs will address during the preliminary injunction hearing the fatal deficiencies of the testimony of Mr. Sellars' expert witness. *See Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) ("expert testimony is not binding on the trier of fact. Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts.").

[3] Pursuant to the Parties' Stipulated Confidentiality Agreement, a copy of Mr. Sellars' signed offer letter from Member Insurance (MEMBER10-13) will be filed under seal, along with other relevant documents.

[4] Mr. Sellars should have heeded the advice attributed to Will Rogers, "When you find yourself in a hole, stop digging."

II. In Any Event, Mr. Sellars is Bound by His 2002 Amendment.

The Court may avoid the controversy manufactured by Mr. Sellars about the execution of the Agreement in 1999 by holding him to the 2002 amendment to the Agreement. Mr. Sellars does not deny that he signed that contract. However, he does ask the Court to relieve him of its terms. Despite his demonstrated business acumen and expertise in negotiating contracts, *see, e.g.*, Sellars 12/21/2007 Aff. ¶¶ 2, 5 & 7, Mr. Sellars would have the Court believe that he did not know what he was signing in 2002. Sellars 12/21/2007 Aff. ¶ 20.

The entire substance of the amendment presented to Mr. Sellars at his request reads:

> WHEREAS, Donald Sellars ("Employee") and HILB, ROGAL AND HAMILTON COMPANY OF UPSTATE NEW YORK, LLC ("Employer," formerly known as S.H. Gow and Company, Inc.) entered on September 28, 1999, into the ***Employment Agreement*** attached hereto as Exhibit A ("Employment Agreement");
>
> WHEREAS, the ***Employment Agreement*** provides that Employee may be terminated at any time, without cause, on thirty (30) days notice;
>
> WHEREAS, Employer desires to afford Employee some comfort with respect to any termination without cause in exchange for affirmation of the ***Employment Agreement*** (including most specifically, without limitation, the restrictive covenants therein);
>
> Now, therefore it is hereby AGREED:
>
> 1. A new section is added as follows:
>
> 17.G Severance and Release. If Employer terminates Employee's employment without cause (as defined in Paragraph 10), then Employee shall be entitled to a total of six months of base pay (one month notice and an additional five months) in exchange for Employee's execution of HRH's customary release.
>
> 2. In all other respects except as modified above, the ***Employee*** [sic] ***Agreement*** remains in full force and effect.

See Ex. B to Brantlinger Aff. (emphasis added). There is nothing in the plain language of the five-paragraph amendment that would confuse a reasonable person of Mr. Sellars' experience. The 1999 Agreement is specifically referenced ***four*** separate times. In contrast, the Confidentiality Agreement is never mentioned. Likewise, the Confidentiality Agreement has ***no*** termination notice provision which could be amended; only the Employment Agreement had such a notice provision. Not coincidently, new Paragraph 17.G fits neatly as the last section of the "forged" Employment Agreement while the enumerated sections of the Confidentiality Agreement end at paragraph 8. Mr. Sellars again has taken an untenable position. However, the Court should not entertain his "ignorance" defense because it is not cognizable under the law. *See Bishop v. Maurer*, 33 A.D.3d 497, 500, 823 N.Y.S.2d 366, 368 (1st Dep't 2006) ("a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it"); *Martin v. Vance*, 133 N.C. App. 116, 121, 514 S.E.2d 306, 310 (1999) ("one who signs a paper writing is under a duty to ascertain its contents").

III. The Non-solicitation Provisions are Reasonable and Necessary.

Mr. Sellars broadly attacks every aspect of the non-solicitation provisions so that he may continue to unfairly compete against plaintiffs. It is a wholly different approach than the one Mr. Sellars had adopted in 1999 when he accepted the opportunity offered by plaintiffs. In 1999, Mr. Sellars acknowledged the value of plaintiffs' investment in securing and maintaining its customer relationships, Agreement, ¶ 5, p. 5; that the terms of the non-solicitation covenant are "fair, necessary for the protection of [plaintiffs] and relatively standard to the insurance agency industry," Agreement, ¶ 15; that he "was offered the opportunity to negotiate, alter, and amend

any and all provisions of [the] Agreement before executing [it] and legally binding himself," Agreement, ¶ 15; that his non-solicitation covenant was a material condition of his employment, Agreement, ¶ 13; and that his breach of that promise would entitle plaintiffs to injunctive relief, Agreement, ¶ 8, p. 7. The Court should not hear his contrary assertions at this time.

The client-based non-solicitation provisions in the Agreement are reasonably limited temporally and geographically, necessary to protect plaintiffs' legitimate interests, not harmful to the general public and not unreasonably burdensome to Mr. Sellars. *See, e.g., Estee Lauder Companies Inc. v. Batra*, 430 F. Supp. 2d 158, 181 (S.D.N.Y. 2006). At the time of his resignation, Mr. Sellars held the title of Vice President of MAG, managed its Lumber Program and oversaw underwriting for plaintiffs' Lumber Program accounts. He personified plaintiffs in the market and had established intimate working relationships with plaintiffs' customers and potential clients. Plumb Aff. ¶¶ 7-10; Sellars 12/21/2007 Aff.¶ 48. Plaintiffs have every reason to protect their investment in Mr. Sellars over the seven plus years of his tenure.

Contrary to Mr. Sellars' unsupported assertions, the Agreement does not prevent him from having any association whatsoever with any business that provides insurance services. Instead, the non-solicitation clauses in the Agreement merely limit Mr. Sellars' ability to contact a subset of potential customers in the lumber insurance market. The limited restrictions in the Agreement will not prevent Mr. Sellars from earning a living. *See McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 174, 498 N.Y.S.2d 146, 153 (N.Y.A.D. 2 Dep't 1986) (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").

IV. The Non-disclosure Provisions are Reasonable and Necessary.

Mr. Sellars' outright denial that the information he has misappropriated from plaintiffs is confidential and entitled to protection under the Agreement (and the Confidentiality Agreement) is similarly unavailing. In his Employment Agreement, Mr. Sellars specifically acknowledged the "actual and potential economic value" plaintiffs derive from their "Confidential Information not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." Agreement, ¶ 4. He recognized that this "Confidential Information" includes:

> information about the HRH Customers such as 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 information about HRH Companies such as methods of soliciting business, documents, [and] financial data.

Agreement, ¶ 4. He entered into a similar agreement with ALU to respect its confidential information. *See* MEMBER 5-7 (filed under seal).

The Court should ignore Mr. Sellars' arguments that the information he worked so hard to develop while he was in plaintiffs' employ is now unworthy of protection. Kennedy Aff. ¶¶ 6-7, 11. This information is not readily available from a single public source (*see, e.g.,* Plumb Aff. ¶ 18) and is entitled to protection. *Greystone Staffing, Inc. v. Goehringer*, 2006 WL 3802202, at *4, 14 Misc.3d 1209(A), 836 N.Y.S.2d 485 (N.Y. Sup. Nov. 27, 2006) (recognizing employer's legitimate need to protect confidential information in the form of customer lists, and other information concerning the employer's business and prices that would be of significant value to a competitor who does not possess such information); *McLaughlin*, 114 A.D.2d at 173,

498 N.Y.S.2d at 152 (finding customer lists of brokerage firm, compiled as result of effort and expense on brokerage firm, deserving of protection by means of injunctive relief); *compare H. Meer Dental Supply Co. v. Francesco Commisso*, 269 A.D.2d 662, 664, 702 N.Y.S.2d 463 (App. Div. 3d Dep't 2000) (customer lists not considered confidential information where information is not readily discoverable through public sources). Mr. Sellars cannot trade on the confidential information he had gained by virtue of his executive position with plaintiffs on behalf of ALU.

V. Plaintiffs Have Shown Well Beyond a Likelihood that They will Suffer Irreparable Harm.

A. Plaintiffs did not unduly delay in either bringing this action or seeking injunctive relief.

Mr. Sellars is being modest. Rather than being proud about the unilateral delay he engineered, he credits the plaintiffs. Mr. Sellars first concealed from plaintiffs his actual plans to work for a direct competitor upon his departure in May 2007. Mr. Sellars' representation to plaintiffs that he was going to work at Member Insurance (a captive insurance company) as its President did not raise suspicions that he would be competing against plaintiffs. (Plumb Aff. ¶ 11; Teese Aff. ¶ 6). However, when plaintiffs learned that Mr. Sellars was working for ALU and that he was soliciting business from plaintiffs' Lumber Program accounts by using information that he had misappropriated from plaintiffs, they moved promptly by filing the instant action on September 25, 2007. (Plumb Aff. ¶ 12).

Likewise plaintiffs were delayed in filing their preliminary injunction motion because they first had to clear the "authenticity" roadblock that Mr. Sellars threw in their path. Next, both Mr. Sellars and his new employer resisted plaintiffs' discovery requests because they would

yield evidence to support the motion. They relented only after the Court's intervention and after plaintiffs would not have a meaningful opportunity to review the information disgorged.

Mr. Sellars can point to no evidence that any delay by plaintiffs in filing their complaint or preliminary injunction motion was either unreasonable or has prejudiced him in any way. *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 182, 581 S.E.2d 415, 424-25 (2003) (finding lapse of time insufficient to support laches defense where the record showed that party moved expeditiously once it had knowledge of facts to support its claim); *Battleground Veterinary Hosp. v. McGeough*, 2007 WL 3071618, at *13, 2007 NCBC 33 (N.C. Super. Oct. 19, 2007) (denying defendant's summary judgment motion on plaintiff's breach of contract claim based on laches defense) (internal citations and quotations omitted). The reality is that Mr. Sellars has accomplished by fiat what he is not entitled to under his Agreement with plaintiffs. He was able to solicit their customers with the advantage of their Confidential Information on behalf of ALU through the peak December season. Sellars 12/21/07 Aff. ¶ 33. The Court should not reward this gamesmanship. Mr. Sellars is disqualified from availing himself of the equity defense of laches because he has come before this Court with unclean hands. *Barber*, 147 N.C. App. at 470-71, 556 S.E.2d at 336.

B. Plaintiffs have come forward with plenary evidentiary support of harm.

Despite Mr. Sellars' attempts to stonewall their prosecution of this case, plaintiffs have more than met their burden of demonstrating that they will sustain irreparable loss should Mr. Sellars be permitted to continue unfairly stealing their customers away. *See A.E.P. Indus. v. McClure*, 308 N.C. 393, 401, 405-10, 302 S.E.2d 754, 760-64 (1983) (injunctive relief is also

appropriate for the protection of plaintiffs' rights during the pendency of litigation). Through Mr. Plumb's affidavit, detailing the losses plaintiffs have incurred as a result of Mr. Sellars' misconduct, along with documents plaintiffs have produced revealing Mr. Sellars' continued attempts to solicit business from plaintiffs' customers in violation of his restrictive covenants and other documents to be submitted under seal, plaintiffs have set forth evidentiary support sufficient to satisfy their request for injunctive relief. Despite Mr. Sellars' allegations to the contrary, to succeed in obtaining preliminary relief, plaintiffs are not required to identify an exact amount of business or actual list of customers lost as a result of his misconduct. *See Id.* at 406, 302 S.E.2d at 762 ("it is not necessary to show actual damage by instances of successful competition, but it is sufficient if such competition, in violation of the covenant, may result in injury"). Instead, injunctive relief is appropriate in circumstances like these where it is difficult to quantify the amount of harm done in the past or potential harm in the future to plaintiffs' customer relationships. *See Shred-IT USA, Inc. v. Mobile Data Shred, Inc.*, 202 F. Supp. 2d 228, 234 (S.D.N.Y. 2002); *QSP, Inc. v. Hair*, 152 N.C. App. 174, 179, 566 S.E.2d 851, 854 (2002) (finding irreparable harm sufficient to support a preliminary injunction where former employee engaged in the solicitation of the plaintiff's customers in violation of restrictive covenant and misappropriated confidential material while working for the plaintiff).

Mr. Sellars would have the Court trust him. However, he has repeatedly put his own interests before those of plaintiffs. Mr. Sellars denies signing the Agreement in 1999 to secure new employment. Mr. Sellars denies any appreciation of the amendment to the Agreement he had negotiated. By his own admission, Mr. Sellars has not demonstrated the moral fortitude to

say "no." Under his version of events, he succumbed to pressure and signed the amendment. Sellars 12/21/07 Aff. ¶ 18. Mr. Sellars did not tell the whole truth about his future plans to Messrs. Teese and Plumb when he announced his resignation. He has retained and used plaintiffs' Confidential Information despite his promises made in the Agreement, reaffirmed in the amendment to the Agreement, and repeated in the Confidentiality Agreement.[5] Mr. Sellars goes so far as to swear that he "was never instructed that any information [of plaintiffs] was confidential"! Sellars 12/21/07 Aff. ¶ 44. In addition, Mr. Sellars has deliberately breached three stock option agreements with HRH by going to work for a competitor because, in his calculus, the opportunity at ALU outweighed the forfeiture provisions in the contracts.

In sum, Mr. Sellars is not due any more opportunities to voluntarily act in an appropriate manner vis-à-vis plaintiffs. He will conform to his contractual, common law and statutory duties only when ordered to do so by the Court.

[5] In an effort to downplay his misconduct, Mr. Sellars labels the confidential account information that he demanded Ms. Kennedy spend several months compiling prior to his departure as "a list of prospects from a dead file," and blithely characterizes his emailing of plaintiffs' business information to his personal email account was an "above-board" act to protect them. *See* Def.'s Resp. at 20-21; *compare* Plumb Aff. ¶ 19; Teese Aff. ¶ 8; Brantlinger Aff. ¶ 10 (explaining that Sellars was never authorized to back up electronic files by emailing documents to his personal address).

CONCLUSION

For the reasons set forth herein and in their opening memorandum, plaintiffs pray that the Court grant their motion for a preliminary injunction.

Respectfully submitted, this the 31st day of December, 2007.

WILLIAMS MULLEN MAUPIN TAYLOR

/s/ Kimberly D. Bartman
Michael C. Lord
N.C. State Bar No. 15966
Kimberly D. Bartman
N.C. State Bar No. 34923
3200 Beechleaf Court, Suite 500
P.O. Drawer 19764
Raleigh, NC 27619-9764
Telephone: (919) 981-4000
Fax: (919) 981-4300

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court, I certify that the foregoing brief, which is prepared using a proportional font, is double-spaced and is less than 3750 words as reported by the word-processing software. I further certify that I have electronically filed the foregoing document using the North Carolina Business Court Electronic Filing System, which will send notification of such a filing to each of the parties in this lawsuit. I further certify that the foregoing document was served upon the defendant in this action by mailing a copy thereof to his counsel of record at the addresses indicated below with the proper postage attached and deposited in an official depository under the exclusive care and custody of the United States Postal Service in Raleigh, North Carolina, on the 31st day of December, 2007.

WILLIAMS MULLEN MAUPIN TAYLOR

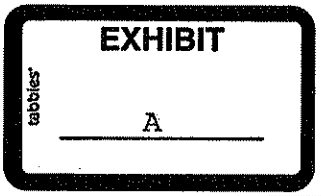
/s/ Kimberly D. Bartman
Kimberly D. Bartman
Attorneys for the Plaintiffs
Post Office Drawer 19746
Raleigh, NC 27619-9764
Telephone: (919) 981-4000
Facsimile: (919) 981-4300

SERVED:

Andrea Okun, Esq.
Richard B. Lapp, Esq.
Dana Orr, Esq.
Seyfarth Shaw LLP
131 S. Dearborn Street
Suite 2400
Chicago, IL 60603

Irving Brenner, Esq.
Helms Mullis & Wicker
P.O. Box 31247
Charlotte, NC 28231

of work?
A. Yes, I was.
Q. Do you remember what day of the week his first day of work was?
A. No, I don't.
Q. How do you recall you were there on his first day?
A. I was in the reception area of our office on the second floor when Rick Mason brought in Don Sellars for the first time.
Q. And that wasn't when you brought him in for an interview, that was for his first day of work?
A. That was for his first day of work.
Q. And how do you know it was his first day of work?
A. Because I'd never met him before and I was extremely impressed by his height.
Q. I think you said you don't recall what day of the week that was?
A. No, I do not.
Q. Other than -- I presume Mr. Mason introduced you to Mr. Sellars at that point in time?
A. Yes, he did.
Q. Do you recall what, if anything, you and he discussed, you and Mr. Sellars?



Q. Did you see anything other than the last page when he signed it?
A. No. I take -- I take that back because he had filled in the -- his name and address, that's when we had the conversation about living in Hamburg and then there was the last page.
Q. Did he fill that in, the name and address while you were standing there or was it already filled in when you walked in?
A. It was already filled in.
Q. Do you know whether Mr. Sellars signed any other -- filled out any other paperwork at the time?
A. Not --
Q. When I say at the time, I mean, in the conference room during that time period?
A. Not to my knowledge.
Q. Do you know whether Mr. Sellars used his own pen?
A. There's pens in the conference room. I don't know if it was his or not.
Q. Do you recall what the color of ink was of the pen he used to sign?
A. No.
Q. What was Mr. Sellars wearing?