

**NORTH CAROLINA**

**IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION**

**MECKLENBURG COUNTY**

HILB ROGAL & HOBBS COMPANY and )  
THE MANAGING AGENCY GROUP, INC., )

Plaintiffs, )

v. )

DONALD SELLARS, )

Defendant. )

**DEFENDANT’S MEMORANDUM  
IN OPPOSITION TO PLAINTIFFS’  
MOTION FOR EXPEDITED  
DISCOVERY**

On September 25, 2007, almost five (5) months after Donald Sellars informed Plaintiff, Managing Agency Group (“MAG”), that he was leaving his employment with them in order to work for a division of Member Insurance Agency (“Member”), Plaintiffs filed suit against Mr. Sellars for alleged violations of a purported employment agreement and other alleged related breaches of duty. Plaintiffs followed with a motion for expedited discovery (which did not attach any discovery requests) on October 3, 2007. Nothing in either the unverified Complaint or plaintiffs’ motion explains their great delay in seeking relief or why there is now a sudden pressing need to expedite discovery in this matter. Plaintiffs have not sought either a temporary restraining order or moved for preliminary injunction. Nothing is alleged to be currently pending before the Court or occurring in Plaintiffs’ day to day business that would warrant a suspension of the ordinary rules and timelines governing discovery. Further, the discovery sought is not narrowly tailored to achieve a specific need; rather it is a broad based “fishing expedition” that Plaintiffs candidly admit seeks to discover facts to support a speculative, future motion.

Further, the Court should be aware that not only have the Plaintiffs not filed any motion that requires immediate attention, but that the case rests upon a purported employment agreement in which Mr. Sellars’ signature has been inserted by someone other than Mr. Sellars. Although

his name appears on the document, Mr. Sellars never signed the employment agreement attached to the Complaint. In sum, the Court has before it a request for expedited discovery where there is neither a motion for temporary restraining order or a motion for preliminary injunction, and where the entire basis for the lawsuit will soon be called into question. Therefore, Plaintiffs' motion to expedite discovery should be denied.

### **FACTUAL BACKGROUND<sup>1</sup>**

Mr. Sellars was employed by a subsidiary of plaintiff HILB Rogal & Hobbs Company ("HRH") beginning in September, 1999. He was later transferred to MAG, another HRH subsidiary, and ultimately promoted to Vice President Managing Agency Group. *See* Plaintiffs' Complaint, at ¶8. Both HRS subsidiaries are primarily engaged in the business of providing risk management, insurance brokerage and consulting services in property, casualty, employee benefits and executive benefits. *Id.*, at ¶6. In Mr. Sellars' position with MAG, he oversaw the underwriting of retail agents' accounts for MAG's Lumber Program. *Id.*, at ¶8.

On May 8, 2007, Mr. Sellars gave his two week notice, informing MAG of his voluntary decision to resign from his position as a Vice President of MAG. *Id.*, at ¶14. At the time that he gave his notice, Mr. Sellars specifically informed Roger Teese, the president of MAG, that he was going to work for Member Insurance and was being made a president. *Id.* Mr. Sellars' last day of work for MAG was May 11, 2007 and his official separation date was May 22, 2007. *Id.*, at ¶19. Almost immediately upon leaving MAG, Mr. Sellars began working for Member, exactly as he had informed MAG he would be doing.

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<sup>1</sup> For purposes only of this motion, the factual background is taken, except where noted, from the allegations of Plaintiffs' Complaint. Mr. Sellars recognizes that this motion is not the forum to dispute the alleged facts and he will provide his answer to these allegations at the appropriate time.

From the time that Mr. Sellars left MAG until he learned of the lawsuit in late September, 2007,<sup>2</sup> Plaintiffs never contacted Mr. Sellars in any way to inform him that they believed he was violating any alleged contractual obligation or other legal duty. The first notice he had that Plaintiffs had any sort of dispute with him was when he received the summons and lawsuit. In short, Plaintiffs took no action regarding its purported claims – not even in an attempt to resolve them without litigation – until filing this suit almost five months after Mr. Sellars gave notice and specifically informed them where he was planning to work.

On October 3, 2007, Plaintiffs filed their Motion for Expedited Discovery, seeking to obtain the following broad categories of documents within five (5) days:

- (a) Documents regarding Mr. Sellars' direct solicitation or indirect solicitation through brokers under his management of Plaintiffs' Customers, Known Customers, and Prospective Customers (as each group is defined in the Employment Agreement) for their insurance-related business;
- (b) A copy of Mr. Sellars' job description, his work assignments (including calendar, day timer, timesheets, diaries and expense reports) and employment agreement(s) with his new employer, Member Insurance Agency, Inc. ("Member Insurance");
- (c) Documents regarding the plans of Member Insurance to solicit Plaintiffs' Customers, Known Customers, and Prospective Customers (as each group is defined in the Employment Agreement) for their insurance-related business;
- (d) Documents regarding the circumstances of how Member Insurance recruited Mr. Sellars (or how he sought employment with Member Insurance); and
- (e) Documents taken by Mr. Sellars that belong to Plaintiffs.

*See* Plaintiffs' Motion for Expedited Discovery (the "Motion") at ¶3. Plaintiffs did not file written requests for production of documents before filing this motion, and none are attached to the motion. They have since filed requests for production of documents – to be responded to in the normal course of discovery -- that include the categories of documents named in their motion

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<sup>2</sup> There is a question as to whether Mr. Sellars was properly served in this action, but the Court need not address that issue at this time.

and encompass an even broader range of areas. Those requests were served on October 11, 2007, making a response due no earlier than November 12, 2007.<sup>3</sup>

While the complaint appears to contemplate some sort of injunctive relief, no motion for temporary restraining order or preliminary injunction has yet been filed. Rather, Plaintiffs contend generally that they need expedited discovery in order to prepare to file for preliminary injunctive relief.

## **ARGUMENT**

### **I. THE RELEVANT STANDARD UNDER NORTH CAROLINA LAW**

North Carolina Rule of Civil Procedure 26(d) sets the sequence and timing of discovery. N.C.R.Civ.P. 26(d). While the Business Court Rule 18.2 expressly permits discovery before the issuance of the case management order, the rules of civil procedure also give responding parties either 30 days after service of the discovery or 45 days after the service of the summons and complaint to respond to initial discovery. N.C.R.Civ.P. 34(b). This time may only be shortened by order of the Court. *Id.*

The decision to grant a motion to shorten the response time is discretionary with the Court upon good cause shown. *Blakenship v. Town & Country Ford, Inc.*, 174 N.C.App. 764, 768, 622 S.E.2d 638, 641 (N.C.App. 2005). There is no specific North Carolina state authority on point, but North Carolina Federal Courts, specifically, the Eastern District of North Carolina, employ a “reasonableness test,” “taking into account the totality of the circumstances,” when evaluating a motion for expedited discovery. *Dimension Data N. Am. Inc. v. Netstar-1, Inc.*, 226 F.R.D. 528, 531 (E.D.N.C. 2005)(rejecting plaintiff’s request for expedited discovery where there was neither a pending motion nor

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<sup>3</sup> As discussed below, the timing and course of discovery in this matter should be determined as part of the initial case management process that takes into account the necessity of resolving the threshold issue of whether Mr. Sellars signed the purported employment agreement between the parties.

irreparable harm shown). Here, similar to the circumstances in *Dimension Data*, “expedited discovery is not reasonable at this stage of the proceedings.” *Id.*

## **II. PLAINTIFFS’ MOTION FOR EXPEDITED DISCOVERY IS NOT REASONABLY TIMED AND SHOULD THEREFORE BE DENIED.**

### **A. There are no pending motions for temporary restraining order or preliminary injunction**

Plaintiffs have not established good cause for their motion, which should be denied because it is not reasonable at this stage of the proceedings. Although Plaintiffs argue that expedited discovery is necessary to ascertain the extent of alleged damage before a preliminary injunction hearing, Plaintiffs have not yet filed a motion for preliminary injunction or temporary restraining order. While in some circumstances parties may be allowed to engage in expedited discovery in preparation for a *hearing* on preliminary injunction, where no such hearing or determination is pending, expedited discovery is premature. *Dimension Data*, 226 F.R.D. at 532, *citing KBG Holding Corp. v. Union Bank*, 56 Fed.Appx. 111, 114 (4<sup>th</sup> Cir. 2003) (“the parties engaged in expedited discovery in preparation for the ... hearings on the competing motions for preliminary injunction”).

*Dimension Data* is directly on point. In that case, an employer brought an action against former employees and their new company based on alleged breach of confidentiality agreements and unauthorized disclosure of trade secrets. In its motion for expedited discovery, the plaintiff sought documents related to the defendants’ interaction with its current and prospective clients, as well as information related to the new company’s clients, revenues, practices and policies regarding the solicitation of new employees and customers. *Dimension Data*, 226 F.R.D. at 529. The Court rejected the plaintiff’s motion for expedited discovery as not reasonably timed because the plaintiff had “not yet filed a motion for temporary restraining order or a motion for preliminary injunction, setting out in detail the areas in which discovery is necessary in advance

of a determination of preliminary injunctive relief.” *Id.* at 531-32. In the instant motion, Plaintiffs seek broad categories of information that are substantively similar to the requested information in *Dimension Data*. As in *Dimension Data*, Plaintiffs have not filed a motion for temporary restraining order or preliminary injunction, and, as in *Dimension Data*, Plaintiffs seek production of broad categories of documents including Member Insurance’s clients, practices and policies regarding the solicitation of new employees and customers. Therefore, as in *Dimension Data*, expedited discovery is not appropriate and Plaintiffs’ motion should be denied.

**B. There are serious questions regarding the authenticity of the employment agreement**

The questions surrounding the authenticity of the employment agreement that forms the basis of Plaintiffs’ lawsuit (attached to Plaintiffs’ Complaint as Exhibit A) also make it clear that this is not a matter for expedited discovery. On Tuesday, October 16, 2007, counsel for Mr. Sellars informed counsel for Plaintiffs that (1) the signature on the employment agreement attached to the Complaint as Exhibit A is not Mr. Sellars’ and (2) it appears that the signature was inserted by an unknown person. Counsel for Mr. Sellars informed counsel for Plaintiffs’ that they wanted to give Plaintiffs an opportunity to investigate and rectify the matter, and all counsel agreed to follow up with a conversation on October 19, 2007. On October 18, 2007, counsel for Mr. Sellars sent to Plaintiffs’ counsel Mr. Sellars’ affidavit attesting to the fact that the signature on Exhibit A is not his. A copy of that affidavit is attached to this memorandum as Exhibit 1.

In the follow up conversation with Defendant’s counsel, Plaintiffs’ counsel said that their clients intend to claim that the signature is authentic and would supply affidavits supporting that contention during the week of October 22, 2007. Therefore, it appears that a fundamental threshold question is whether there is an authentic employment agreement between the parties.

Defendant respectfully suggests that before the parties and the Court become engaged in extensive and expensive discovery in this matter, a more prudent course of action would be for the parties and the Court first to address and determine the authenticity of the employment agreement. Then, the need for broad discovery and further litigation, if any, can be assessed. Accordingly, broad based discovery would be inappropriate at this point in the litigation, particularly on the expedited basis sought by Plaintiffs.

### **III. PLAINTIFFS HAVE NOT SHOWN THAT THEY WILL BE IRREPARABLY HARMED WITHOUT EXPEDITED DISCOVERY.**

While Plaintiffs argue that the Court should order expedited discovery based on application of the “good cause” standard applied by the federal courts (*See* Plaintiffs’ Motion at ¶4), they have not shown, nor have they even tried to show, that they will be irreparably harmed by obtaining responses to the broad discovery they allude to in their motion until the time set by a case management order or Rule 34(b) of the North Carolina Rules of Civil Procedure. *Dimension Data*, 226 F.R.D. at 532 (in requesting expedited discovery, plaintiff must show that it will be irreparably harmed by delaying discovery until a preliminary injunction hearing is pending before the Court). Specifically, Plaintiffs argue that good cause exists to allow expedited discovery based on Mr. Sellars’ supposed “surreptitious behavior” and the need to preserve evidence under Mr. Sellars’ control that may be altered, removed and/or disposed. *Id.* at ¶6, 10. This reasoning is belied by the allegations of Plaintiffs’ own complaint and the facts surrounding the parties discussions.<sup>4</sup>

While Plaintiffs’ may, in a conclusory fashion, call Mr. Sellars’ behavior “surreptitious,” they allege no facts to support that conclusion. In fact, their own allegations show that Mr.

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<sup>4</sup> With respect to Plaintiffs’ argument regarding preservation of evidence, Mr. Sellars’ counsel has informed Plaintiffs’ counsel that Mr. Sellars will take appropriate steps to preserve the requested documents within his custody and control to the extent they exist.

Sellars' actions have been open. For example, Mr. Sellars directly informed Plaintiffs that he was leaving their employ to become a president with Member.

Further, all of Mr. Sellars' supposed secretive activities are alleged to have occurred between 5 and 11 months ago. *See* Plaintiffs' Complaint, at ¶¶14-17. Thus any information Mr. Sellars allegedly took from Plaintiffs would have been missing since at least May 2007, and any need to take action would have existed since that time. Yet, Plaintiffs waited *five months* before filing the Complaint and then bringing a motion for expedited discovery seeking information. Plaintiffs demonstrated no urgency in raising these issues or in the filing of the instant motion, and they should not be allowed to fabricate an emergency out of circumstances that amount to nothing more than a fishing expedition for information that may be helpful to their case. Without a showing that they will be irreparably harmed, their request for expedited discovery ought to be rejected. *Dimension Data*, 226 F.R.D. at 532.

#### **IV. PLAINTIFFS' REQUEST IS NOT NARROWLY TAILORED TO OBTAIN INFORMATION RELEVANT TO A PRELIMINARY INJUNCTION DETERMINATION.**

Plaintiffs claim that they seek the various categories of information requested on an expedited basis in order to prepare for a hearing on their "expected" motion for preliminary injunction. Motion at ¶2. The documents and information sought relate to (1) Mr. Sellars' alleged solicitation of Plaintiffs' customers; (2) Mr. Sellars' employment with Member Insurance; (3) Member Insurance's alleged plans to solicit Plaintiffs' customers; (4) Member Insurance's recruitment of Mr. Sellars; and (5) Plaintiffs' documents in Mr. Sellars' possession. Motion at ¶3. On its face, the requests are overbroad and unrestrained as to time and scope. Although Plaintiffs allege that the discovery sought is narrowly tailored to "critical" documents



that are “readily available” to Mr. Sellars, the requested information is not tailored to specific issues that would be determined in a preliminary injunction hearing. Motion at ¶7.

An expedited discovery request should be narrowly tailored to focus on information believed to be probative to the preliminary injunction analysis. *See Dimension Data*, 226 F.R.D. at 532 (plaintiff requested expedited discovery covering a broad range of the defendant’s business practices; court found that the requests were not narrowly tailored to obtain information relevant to a preliminary injunction determination, and thus expedited discovery was not reasonable at that stage of the proceedings). Here, Plaintiffs seek overly broad, general categories of documents. Such documents are not properly the subject of an expedited discovery motion. *Id.* The information sought is more appropriately the subject of traditional discovery (which Plaintiffs have now served) or mutual agreement between the parties regarding document preservation and production, rather than the five day expedited discovery sought by Plaintiffs.

**V. PLAINTIFFS’ REQUEST THAT MR. SELLARS RESPOND IN FIVE DAYS IS UNREASONABLE**

Plaintiffs’ request for expedited production of broad categories of information within five days is unreasonable based on the transparent nature of Mr. Sellars’ departure and Plaintiffs’ extraordinary delay in initiating proceedings against Mr. Sellars. Whereas the normal amount of time given a party to respond to discovery in North Carolina is at least 45 days following service of the Summons and Complaint, Plaintiffs have not provided any reasonable basis upon which to shorten that period. N.C. Gen. Stat. Ann. § 1A-1, Rule 34(b). *See, e.g. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O’Connor*, 194 F.R.D. 618, 623 (N.D.Ill. 2000)(“Expedited discovery is not the norm ... Plaintiff must make some *prima facie* showing of the *need* for the expedited discovery”). Here, Plaintiffs’ delay in filing this lawsuit contradicts any suggestion that the

requested information is critical to Plaintiffs' business operations, or that disclosure of certain information would be harmful to their interests.

### CONCLUSION

Plaintiffs' delay in making and filing the asserted claims against Mr. Sellars proves that there is no emergency, and Plaintiffs have failed to offer other evidence that good cause exists to grant their motion. Moreover, Plaintiffs' delay demonstrates that they will suffer no prejudice if their motion is denied and the information is produced according to a case management order or other traditional discovery schedule. Additionally, there are serious questions regarding the threshold issue of the authenticity of the agreement that forms the basis for Plaintiffs' Complaint. Those critical issues should be resolved before the parties engage in general discovery. Based on these circumstances, and as further stated above, the Court should deny Plaintiffs' motion for expedited discovery.

This the 22nd day of October, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8 AND CERTIFICATE OF SERVICE

I hereby certify that this memorandum complies with BCR 15.8 and that I have electronically filed the foregoing Defendant's Memorandum in Opposition to Plaintiffs' Motion for Expedited Discovery 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 I have served upon each of the parties in this lawsuit by depositing a copy of it in the United States mail, first class, postage prepaid, in envelope(s) addressed to the following individuals:

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This the 22<sup>nd</sup> day of October, 2007.

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