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| **NORTH CAROLINA** | **IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION** |
| **MECKLENBURG COUNTY** | |
| HILB ROGAL & HOBBS COMPANY and THE MANAGING AGENCY GROUP, INC., Plaintiffs, | **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** |
| v. | |
| DONALD SELLARS, Defendant. | |

Defendant Donald Sellars ("Mr. Sellars") opposes Plaintiffs' motion for preliminary injunction because (1) Plaintiffs are unable to show a likelihood of success on the merits of their claim that Mr. Sellars breached restrictive covenants in the alleged employment agreement and misused confidential information, and (2) Plaintiffs have failed to make an evidentiary showing of irreparable harm if their motion is denied.

## BACKGROUND

Plaintiffs' motion for injunctive relief is based on an alleged employment agreement purporting to restrict the post-employment activities of Mr. Sellars. Mr. Sellars began working for Plaintiffs in September 1999 as Assistant Vice-President/Program Director of their lumber insurance group. Prior to joining Plaintiffs, he worked in Syracuse, New York as an underwriter specializing in lumber insurance for Great American, an insurance company. He was hired by Plaintiffs based on his experience, connections and relationships in the lumber insurance industry. Prior to his start date, Mr. Sellars did not sign an employment agreement, covenant not to compete or confidentiality agreement.

On September 28, 1999, Mr. Sellars signed a confidentiality agreement with Plaintiffs. Plaintiffs now allege that he signed and executed an Employment Agreement dated September 28, 1999, which contains a restrictive covenant including a covenant not to compete. Mr. Sellars denies signing the alleged agreement. In May 2007, he resigned because he felt as though he was being treated poorly by Plaintiffs and accepted an employment offer with a competitor. Prior to leaving Plaintiffs' employ, he notified them of his intention to continue working within the lumber insurance industry and identified his new employer, Member Insurance. Nearly five months later, on September 25, 2007, Plaintiffs filed the complaint in the above-captioned case, alleging that Mr. Sellars breached restrictive covenants contained in the September 28, 1999 Employment Agreement by soliciting Plaintiffs' clients and disclosing confidential information obtained while working for Plaintiffs. Nearly two months later, on November 14, 2007, Plaintiffs filed the instant motion for preliminary injunction.

## ARGUMENT

### I. Standard of Review.

A preliminary injunction is an extraordinary measure that will issue only upon a showing that: (1) there is a likelihood of success on the merits of the movant's case, and (2) the movant will likely suffer irreparable loss unless the injunction is issued. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Plaintiffs cannot show either necessary element and their motion should be denied.

## II. Plaintiffs Have Not Established that They are Likely to Succeed on The Merits.

### A. Plaintiffs Are Unable to Prove the Existence of an Enforceable Contract.

Plaintiffs' first and most fundamental failing is their inability to establish the existence of the employment agreement containing the restrictive covenants allegedly breached by Mr. Sellars. From the inception of this case, Mr. Sellars has denied that he signed the alleged employment agreement. Indeed, he sought a full evidentiary hearing – which Plaintiffs opposed - to finally establish that the signature on the agreement is not his own.

In lieu of the requested evidentiary hearing, Plaintiffs seek to establish the validity of the agreement through the affidavits of two of its employees. *See* Mason Affidavit ¶¶6-7; Eaton Affidavit ¶¶6-7. Richard Mason was Mr. Sellars' immediate supervisor. Bonnie Eaton has been Mr. Mason's assistant for over 20 years. Both claim that they witnessed Mr. Sellars signing the alleged employment agreement. However, as shown by Mr. Mason's and Ms. Eaton's more revealing deposition testimony, the Court should not rely on these affidavits. Interestingly, while neither witness could recall any details surrounding the execution of an employment agreement by any other employee – or even if they were present -- both claim to recall the details of Mr. Sellars' signature over eight years ago.

In Ms. Eaton's deposition, she testified to the following:

- On many occasions, she signed employment agreements as a "witness" on behalf of Plaintiffs, but was not present when they were signed. Rather, she was given already signed agreements by Mr. Mason and then added her signature as a "witness." (Eaton Dep. at 31:17-32:16).

- She 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 his or her employment agreement. For every other employee whose agreement she "witnessed," she could not recall whether she was there. (Eaton Dep. at 33:20-34:17).

- Although it was her habit to make a copy of an employee's executed employment agreement and send it to the company's in-house general counsel, she could not remember copying Mr. Sellars' alleged agreement or sending it to the company's general counsel. (Eaton Dep. at 24:8-9; 49:21-50:21).

- Typically, she typed pertinent information related to an individual on the first page of an employment agreement, but that was not done with regard to the alleged agreement. (Eaton Dep. at 19:11-20:8).

- She did not read the alleged agreement or review it prior to Mr. Sellars affixing his signature to the last page. She simply saw the last page. (Eaton Dep. at 57:8-58:2).

- She did not recall the existence of the other agreement – the "Confidentiality Agreement" -- signed on the same day. (Eaton Dep. at 47:2-4).

- She had no familiarity with Mr. Sellars' handwriting or signature. (Eaton Dep. at 37:22-40:12).

- She read Mr. Mason's affidavit prior to executing her own. (Eaton Dep. at 52:17-53:10).

In sum, Ms. Eaton's testimony that she did not recall the existence of the Confidentiality Agreement, yet she recalls witnessing Mr. Sellars (and only him over the past 10 years) signing the alleged employment agreement which she did not read or review prior to, during, or after it was allegedly executed, is far too uncertain to serve as credible testimony that Mr. Sellars signed the alleged employment agreement.

Mr. Mason's testimony is equally unpersuasive. In his deposition, he testified to the following:

- He never saw a written job offer to Mr. Sellars and doesn't recall writing such an offer, despite the fact that a job offer bearing his signature was sent to Mr. Sellars. (Mason Dep. at 66:22-68:15).

- It was his practice to have an employee sign an employment agreement contemporaneously with signing a confidentiality agreement, yet he had no recollection of Mr. Sellars signing a confidentiality agreement, and could not explain whether both were offered to Mr. Sellars in accordance with his usual practice. (Mason Dep. at 37:5-20; 81:7-12).

- He admitted that Ms. Eaton was not always present when employees signed their employment agreements and for most employees other than Mr. Sellars, either Ms. Eaton was not present or he could not recall whether she was present or not. (Mason Dep. at 52:14-55:2).

- Prior to receiving the initial draft of his affidavit from counsel for Plaintiffs, he had not given counsel *any* factual information. He presumed that "someone" at counsel's office had drafted the affidavit. (Mason Dep. at 15:16-16:22).

Thus, Plaintiffs only proof that the alleged agreement was executed by Mr. Sellars are two affidavits, both substantially undermined by subsequent deposition testimony, of company witnesses who clearly have an interest in the litigation.

In contrast, Mr. Sellars' testimony that he did not sign the alleged agreement is corroborated by the objective opinion and report of handwriting expert Diane Marsh. In fact, Mr. Sellars' counsel took every step necessary to make sure that she received the expert's unbiased opinion. In asking Ms. Marsh to undertake the engagement, counsel did not inform Ms. Marsh who she represented or of Mr. Sellars' assertion that he did not sign the employment agreement. Rather, his counsel simply requested that Ms. Marsh review several documents and ascertain if they had been signed by the same person. Marsh Affidavit at ¶¶8, 9. Counsel then sent Ms. Marsh seven documents containing

signature lines and signatures for "Donald Sellars." Marsh Affidavit at ¶11. At no time prior to the time that Ms. Marsh arrived at her conclusion did Mr. Sellars' counsel single out any of the documents as being of particular interest, nor did she inform Ms. Marsh that counsel believed that any of the documents contained a non-genuine signature or that a particular document was at issue. Marsh Affidavit at ¶13.

After Ms. Marsh reviewed the documents, she informed Ms. Sellars' counsel of her conclusion that the signature of Donald Sellars on the Employment Agreement dated September 28, 1999, was not made by the same person who executed the signatures on the other six documents that were sent to her. Only at that point, did counsel identify herself as Mr. Sellars' attorney. On October 30, 2007, counsel sent Ms. Marsh three additional exemplars of Mr. Sellars' signature from the 1999 time frame. Marsh Affidavit at ¶16. These additional signatures further confirmed Ms. Marsh's opinion that fundamental differences existed between the "Donald Sellars" signature appearing on the September 28, 1999 Employment Agreement and the additional exemplars of Mr. Sellars' signature she had reviewed. Marsh Affidavit at ¶17.

In her November 2, 2007 expert report, Ms. Marsh concluded the following:

> Based on the evidence submitted, I have concluded that there are fundamental differences between the questioned Donald Sellars signature appearing on the questioned document (Q-1) and the known signatures submitted for Donald Sellars (K-1 through K-9). It is my conclusion, within a reasonable degree of certainty, that it is highly probable that Donald Sellars did not sign the questioned documents and that the questioned document (Q-1) contains a NON-GENUINE signature.

Diane Marsh Lab Report at pp. 2-3.[1] Ms. Marsh lays out in detail several of the fundamental differences between Mr. Sellars' known signature and the signature on the purported employment agreement. Marsh Affidavit at ¶¶ 20-21.

When the facts are sharply disputed, a preliminary injunction will not be granted. *Skaggs-Walsh, Inc. v. Chmiel*, 224 A.D.2d 680, 681, 638 N.Y.S.2d 698, 699 (App. Div. 2d Dep't 1996); *see also Pearlgreen Corp. v. Yau Chi Chu*, 8 A.D.3d 460, 778 N.Y.S.2d 516 (App. Div. 2d Dep't 2004) (former employer was not entitled to preliminary injunction prohibiting former employees from soliciting the former employer's customers given the sharply disputed issues of fact between plaintiff and defendants); *Merrell Benco Agency v. Safrin*, 231 A.D.2d 614, 647 N.Y.S.2d 952, 953 (App. Div. 2d Dep't 1996) ("when there are key facts in dispute, the motion for a preliminary injunction [should be] denied") (citations omitted).[2]

Plaintiffs argue that by executing a one-page amendment in August of 2002 (the "2002 Amendment") that purported to amend an employment agreement "attached as Exhibit A," Mr. Sellars ratified the Employment Agreement dated September 28, 1999. *See* Plaintiffs' Mot. at p. 3. Yet, Plaintiffs neglect to acknowledge three key facts: (1) there was no "Exhibit A" attached to the 2002 Amendment; (2) Mr. Sellars did execute a different employment agreement – a confidentiality agreement - on September 28, 1999;

[1] As explained in her December 20 affidavit, Ms. Marsh qualified her opinion in this manner under the accepted guidelines for handwriting experts only because she has not seen the original signatures (she has seen a "first generation" copy of the original). However, her expression of a "highly probable" belief means that Ms. Marsh is "virtually certain" of her conclusion. Marsh Affidavit, at ¶19 and Ex. 4 to that affidavit.

[2] Although Mr. Sellars in no way concedes the existence of the alleged employment agreement, for the purpose of responding to Plaintiff's motion for preliminary injunction, Mr. Sellars has based this response on New York law pursuant to paragraph 16 of the alleged agreement.

and (3) the thrust of the 2002 Amendment was to provide a six month severance package in the event of Mr. Sellars' termination without cause. Sellars Affidavit at ¶¶17-19.[3] Upon signing the 2002 Amendment, Mr. Sellars believed that it referred to the confidentiality agreement signed on September 28, 1999, and rightfully so, as he had no other agreement in place with Plaintiffs at the time. Sellars Affidavit at ¶20.

Plaintiffs have yet to proffer any evidence that the Employment Agreement dated September 28, 1999 was ever attached to the 2002 Amendment. Indeed, the document produced for inspection as the original 2002 Amendment is a single-page and does not attach the "employment agreement" it purports to modify. Likewise, Mr. Mason testified that he only saw the purported amendment as a 1-page document. Mason Dep. at 99:10-100:1. Plainly, the Court should not conclude that Mr. Sellars ratified an agreement that was never attached to the 2002 Amendment. This is especially true because there was another, different agreement made in connection with his employment on the same day, an ambiguity that must be resolved against Plaintiffs. *See Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 858, 768 N.Y.S.2d 504, 506 (App. Div. 3rd Dep't 2003) ("ambiguous terms will be resolved against the contract drafter").

Accordingly, if the Court concludes that Mr. Sellars did not sign the alleged employment agreement containing the asserted restrictions or even that there is a sharp dispute whether the agreement was signed, the lack of clear proof of the existence of a valid agreement should quickly lead to a denial of Plaintiffs' motion which solely depends on the existence of the disputed agreement to support the injunctive restrictions it seeks to impose on him. (*supra* at 6-7).

[3] Offered to Mr. Sellars in response to his request for a three year contract. Sellars Affidavit at ¶¶17-19.

### B. Even If the Alleged Employment Agreement was Signed, The Restrictive Covenants Asserted Against Mr. Sellars Are Unenforceable.

Under New York law, restrictive covenants in employment agreements are disfavored. "[C]ovenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer and not unduly harsh or burdensome to the one restrained." *Post v. Merrill Lynch*, 48 N.Y.2d 84, 86-87, 397 N.E.2d 358, 359 (1979); *see also JAD Corp. of America v. Lewis*, 305 A.D.2d 545, 759 N.Y.S.2d 388 (App. Div. 2d Dep't 2003) ("restrictive covenants in the employment context are carefully scrutinized, and are disfavored since there are 'powerful considerations of public policy which militate against sanctioning the loss' of a person's livelihood") (citations omitted); *Columbia Ribbon & Carbon Mfg Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6 (1977) (same) (citations omitted); *Arc-Com Fabrics, Inc. v. Robinson*, 149 A.D.2d 311, 312, 539 N.Y.S.2d 363, 364 (App. Div. 1st Dep't 1989) (same); *Pezrow Corp. v. Seifert*, 197 A.D.2d 856, 857, 602 N.Y.S.2d 468, 469 (App. Div. 4th Dep't 1993) ("it is well established that restrictive covenants contained in employment contracts that tend to prevent an employee from pursuing a similar vocation after termination are disfavored in the law"); *Skaggs-Walsh, Inc. v. Chmiel*, 224 A.D.2d 680, 681, 638 N.Y.S.2d 698, 699 (App. Div. 2d Dep't 1996) (same); *Business Networks of New York, Inc. v. Complete Network Solutions, Inc.*, 265 A.D.2d 194, 195, 696 N.Y.S.2d 433, 435 (App. Div. 1st Dep't 1999) (noting that restrictive covenants such as a prohibition on an employee's soliciting the employer's customers or prospects for one year after leaving employment are disfavored by the law).

Thus, a restrictive covenant in an employment agreement is subject to specific enforcement only to the extent that it is:

(1) reasonable in time and area;

(2) necessary to protect the employer's legitimate interests;

(3) not harmful to the general public; and

(4) not unreasonably burdensome to the employee.

*BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389, 712 N.E.2d 1220, 1223 (1999). New York courts have strictly applied this rule to limit enforcement of broad restraints on competition. *Id.*

Plaintiffs seek to enforce the following restrictive covenants, provided in relevant part:

> Employee …… shall not…:
>
> (a) solicit a Customer or Prospective Customer, *or accept an invitation from* a Customer or Prospective Customer, for the purpose of providing Prohibited Services to such Customer or Prospective Customer;
>
> (b) solicit a Known Customer or Prospective Customer, *or accept an invitation from* a Known Customer or Prospective Customer, for the purpose of providing Prohibited Services to such Known Customer or Prospective Customer;
>
> (c) solicit a Customer or Prospective Customer located within the Restricted Area, *or accept an invitation from* a Customer or Prospective Customer located within the Restricted Area, for the purpose of providing Prohibited Services to such Customer or Prospective Customer; and
>
> (d) solicit a Known Customer located within the Restricted Area, *or accept an invitation from* a Known Customer or Prospective Customer located within the Restricted Area, for the purpose of providing Prohibited Services to such Known Customer or Prospective Customer.

*See* Complaint, Exhibit A at ¶5 (emphasis added)

Therefore, in various combinations, Plaintiffs seek to enjoin Mr. Sellars from soliciting "Customers," "Known Customers" and "Prospective Customers" for the purpose of providing "Prohibited Services" for a "Restricted Period" (Three years). Sometimes, these restrictions are unlimited in geographic scope and in other formulations limited to a "Restricted Area." (Plaintiffs' Mot. at p.1). As shown below, these restrictions, regardless of the combination, are overly restrictive, would prevent Mr. Sellars from continuing in his job and go well beyond any legitimate business interests. And, this is not, as Plaintiffs argue, only a "non-solicitation covenant." *See* Plaintiff's Mot. at p. 10. Rather, these restrictions amount to a full covenant not to compete because the restrictions prevent Mr. Sellars from working with any past, present or potential customers of Plaintiffs *even if he is sought out by the customer*.

The relevant terms are defined as follows:

> "Customers" is defined as those customers of Employer for whom there is an insurance policy or bond in force or to or for whom Employer is rendering services as of the date of termination of Employees employment.
>
> "Known Customers" shall be limited to "Customers" with whom Employee had personal contact, or for whom Employee handled insurance or bonds, or whose names become known to Employee, in the course of the performance of his/her employment duties for Employer.
>
> "Prospective Customers" shall be limited to those parties known by Employee to have been solicited for business within any Prohibited Service within the twelve (12) month period preceding the date of termination of Employee's employment, by an employee (including Employee) or agent of Employer and with or from whom, within the twelve (12) month period preceding the date of termination of Employee's employment, an employee (including Employee) or agent of Employer either had met for the purpose of offering any Prohibited Service or had received a written response to an earlier solicitation to provide a Prohibited Service.

> "Prohibited Services" shall mean (i) services in the fields of insurance or bonds or (ii) services performed by Employer, its agents or employees in any other business engaged in by Employer on the date of termination of Employee's employment, shall include but not limited to Third Party Administration, Loss Control, Trust Administration and consulting. "Field of insurance" does not include title insurance, but does include all other lines of insurance sold by Employer, including, without limitation, property and casualty, life, group, accident, health, disability, and annuities.
>
> "Restricted Area" shall mean:
>
> (i) if Employee is based in the Buffalo office, the Buffalo Area;
>
> (ii) if Employee is based in the Rochester office, the Rochester Area; and
>
> (iii) if Employee is based in the Syracuse office, the Syracuse Area.
>
> "Restricted Period" shall mean the period of three (3) years immediately following the date of termination of Employee's employment.

(Complaint, Exhibit A at ¶5).

**1. The Customer Restrictions are Overbroad**

These "customer" prohibitions – whether current, "known" or "prospective" are overly broad and unreasonable. "Customers" includes all of the Plaintiffs' customers, regardless of their location, regardless of whether Mr. Sellars had any contact with them and regardless of what kind of insurance or services they purchased. Similarly, "Known Customers" is broadly defined to include all customers whose names Mr. Sellars knew, regardless of whether he had personal contact or provided services to such customers.

In *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 712 N.E.2d 1220 (1999), the court determined that the restrictive covenant at issue was overbroad to the extent it prohibited solicitation of the employer's entire client base. The Court noted the following:

> It seems self-evident that a former employee may be capable of fairly competing for an employer's clients by refraining from use of unfair means to compete. If the employee abstains from unfair means in competing for those clients, the employer's interest in preserving its client base against the competition of the former employee is no more legitimate and worthy of contractual protection than when it vies with unrelated competitors for those clients.

*Id.* at 391, 712 N.E.2d at 1224; *see also Scott, Stackrow & Co. v. Skavina*, 9 A.D.3d 805, 780 N.Y.S.2d 675 (App. Div. 3rd Dep't 2004) (restrictive covenant in employment agreement was overly broad and unenforceable insofar as it sought to prevent defendant from soliciting or performing work for *any client* of the employer).

Additionally, Plaintiffs seek to prohibit Mr. Sellars from soliciting "Prospective Customers." These are, of course, not customers at all but instead merely potential customers who have (at any point any time within a full year prior to the end of employment) responded to some mailing or had a meeting (of any length) with anyone at the company. A list of prospective customers may not qualify for trade secret protection. *See Webcraft Technologies, Inc. v. McCaw*, 674 F.Supp. 1039, 1044 (S.D.N.Y. 1987); *see also Gaston County Digital Recorders, Inc. v. McFarland*, 2007 NCBC 23 (2007) (restrictive covenant improperly attempted to prevent [defendant] from competing with respect to [plaintiff's] future customers, which the Court concluded does not protect any legitimate interest of an employer), citing *Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141, 1148 (Ill. App. 1999) ("As a matter of law, [an employer] cannot have a protectible [sic] interest in future customers who do not yet exist."). Like the plaintiff in *BDO Seidman*, Plaintiffs here are not seeking to prevent unfair competition. They are seeking to prevent Mr. Sellars from any form of competition or work in his field – an impermissible result.

### 2. The Scope of the "Prohibited Services" is Overbroad

The definition of "Prohibited Services" is also overly broad as it extends not only to the sale of lumber insurance, the product in which Mr. Sellars has specialized for the past 12 years, to all types of insurance without regard to Mr. Sellars' involvement in that area. In addition, the scope of the restriction extends to other services such as "trust administration" and even "consulting." In effect, the broad scope of this restriction prevents him from selling insurance of any type other than title insurance. Thus, this restriction, contained in all of the injunctive restrictions sought by Plaintiffs, is plainly overbroad and makes the agreement unenforceable.

### 3. The Scope of the Geographic Area is Overbroad

Two of the four asserted restrictions, subparagraphs (a) and (b), contain no geographic restriction at all. This unlimited geographic scope prohibits Mr. Sellars from doing business with the already overly broad categories of Plaintiffs' past, present, and potential customers with no limitation as to their location. Such a restriction is clearly unreasonable under these circumstances.

### 4. The Restrictive Period is Too Long

Beyond the broad scope of the restrictions and the other faults described above, the three year length of all the asserted restrictions is unreasonable. Indeed, the broad scope of the restrictions suggests that only a very short duration might be considered reasonable. Plaintiffs have made no showing, other than the lone citation of a decades old case outside the insurance context, to establish the particular and legitimate business justification for imposing a three year covenant not to compete on Mr. Sellars. In the

absence of such a showing (which cannot be made), the Court should find that a three year restrictive covenant is unreasonable in these circumstances.

### 5. The Court Cannot "Blue Pencil" the Restrictions to Save Plaintiffs' Covenant Not to Compete

In attempting to save their overly broad restrictions, Plaintiffs suggest that the Court may "blue pencil" the alleged agreement to reduce the restrictive covenant to make it reasonable (and enforceable). "Blue Penciling" cannot, however, correct the myriad faults of the asserted restrictions. If it were to attempt to revise the restrictions, the Court would need to rewrite the overly broad definitions of "Customer," "Known Customer," "Prospective Customer," and "Prohibited Services," determine the proper geographic scope for subparagraphs (a) and (b), and set a different time period for the restrictions. The Court should not take upon itself to wholly rewrite an over 8 years old restrictive covenant between these parties. *See Leon M. Reimer & Co., P.C. v. Cipolla***,** 929 F. Supp. 154, 161 (S.D.N.Y. 1996) (although courts applying New York law have the power to modify covenants that are unreasonable as drafted and enforce them as modified, "the infirmities of [the covenant in the instant case] are simply too patent for this type of restructuring. To bring [the covenant here] into conformity with the law would require this Court essentially to rewrite the entire section, an exercise not appropriate here."). Also, a court may decline to modify the terms of a restrictive covenant where the provision evidences overreaching. *Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9 A.D.3d 805, 780 N.Y.S.2d 675, 676 (App. Div. 3d Dep't 2004) (partial enforcement denied where employer had used superior bargaining position in conditioning employment on employee's execution of overbroad noncompete provision). Such

"overreaching" - even without regard to the issue of whether the Plaintiffs put Mr. Sellars signature on the agreement - is plainly evident in the asserted restrictions.

In sum, Plaintiffs have completely failed to justify these expansive restrictions on Mr. Sellars' ability to work within his industry. They have offered no evidence of specific legitimate interests they seek to protect with these broad injunctions that would outweigh the obvious burden of the restrictions on Mr. Sellars. Accordingly, the restrictions are unenforceable and the requested injunction should be denied.

### C. Plaintiffs Have Failed to Prove That The Disputed Information is Confidential.

In support of their motion for preliminary injunction, Plaintiffs allege that Mr. Sellars has misappropriated "confidential" information gained while in their employ in order to do business with "Plaintiffs' customers" on behalf of his new employer. (Plaintiffs' Mot. at p.2). Plaintiffs have provided only weak support for this contention, making conclusory statements such as, "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." (Plaintiffs' Mot. at p.12). Further, the affidavits of Mr. Sellars and his current employer, Wayne Fell, president of Member Insurance Agency and Chairman of American Lumber Underwriters, explain why the information that he had access to at Plaintiffs was either readily available, irrelevant to his current job or has not been used in his current employment. Sellars' Affidavit at ¶¶3, 5, 28, 30, 36-42, 44-49, 66; Fell Affidavit at ¶11.

For example, information regarding rate structures was developed and created by Mr. Sellars based upon his experience in lumber insurance. *See* Sellars Affidavit at ¶45. No formulas or supporting information was supplied by Plaintiffs. *Id.* When an

insurance policy was issued, the insurance company filed the rates with the state insurance department as required by law. *Id.* These rates were then published by the state and *became publicly available*, as anyone may contact the state and obtain information regarding insurance rates. *Id.* Likewise, spreadsheets containing account information such as loss history and exposures were not confidential, as the information was provided by retail insurance agents to all wholesalers and insurers in order to obtain the best possible rate for their clients. *See* Sellars Affidavit at ¶¶ 3, 28, 46.

Plaintiffs are also mistaken in relying on their allegation that Mr. Sellars took audit reports from Plaintiffs upon his departure. When insurers performed audits, they orally communicated their findings to Mr. Sellars. Sellars Affidavit at ¶38. Months later, the insurers sent written audit reports via electronic mail, which Mr. Sellars never read because he had already been informed of the results. Sellars Affidavit at ¶39. Mr. Sellars never printed out the written audit reports, nor did he keep copies of any written reports in any files. Sellars Affidavit at ¶40. Upon leaving Plaintiffs' employ, Mr. Sellars could not have removed any files containing these reports as he did not maintain any such files. Sellars Affidavit at ¶¶39-41. Furthermore, audit reports do not contain any information that could be of any competitive value; they simply contain feedback as to the quality of underwriting. Sellars Affidavit at ¶42.

Plaintiffs' sweeping conclusions as to Mr. Sellars' alleged misappropriation and misuse must be accompanied by evidentiary support in order to obtain a preliminary injunction. *See Arc-Com Fabrics, Inc. v. Robinson*, 149 A.D.2d 311, 539 N.Y.S.2d 363, (App. Div. 1st Dep't 1989) (employer was not entitled to enjoin former employee from soliciting its customers after employee was hired by a competitor, where employer

proffered no evidentiary facts to demonstrate that its customers were not readily ascertainable, or that its services were unique, but rather relied solely on conclusory assertions in an affirmation in opposition to employee's motion for summary judgment dismissing complaint).

In *H. Meer Dental Supply Co. v. Commisso*, 269 A.D.2d 662, 702 N.Y.S.2d 463 (App. Div. 3rd Dep't 2000), the Court vacated an injunction ordered by the lower court on the basis that the plaintiff/employer failed to prove it was entitled to a preliminary injunction that would restrain the defendant/former employee's use of the employer's customer lists. In support of their motion for preliminary injunction, the plaintiff alleged that the defendant took confidential information to his new employer, which consisted of "plaintiff's confidential customer list[s] … precise discounts given … to … customers … pricing book and information … and … usage reports … detail[ing] ordering and purchase histories." *Id.* at 663-664, 702 N.Y.S.2d at 465. At the outset, the Court noted that "customer lists are generally not considered confidential information." *Id.* at 664, 702 N.Y.S.2d at 465; *see also Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 858, 768 N.Y.S.2d 504, 507 (App. Div. 3rd Dep't 2003) ("plaintiff failed to adequately demonstrate that defendant improperly appropriated its customer lists or used confidential client information … such lists are generally not considered confidential").

The *H. Meer* Court further noted that "in order to establish confidential customer information status, it [is] incumbent upon plaintiff to demonstrate that its customers are not known in the trade and are discoverable only by extraordinary efforts." *H. Meer Dental,* at 664, 702 N.Y.S.2d at 465, *citing Empire Farm Credit ACA v. Bailey*, 239 A.D.2d 855, 856, 657 N.Y.S.2d 211, 212 (App. Div. 3rd Dep't 1997) (plaintiff failed to

show that its customers are not known in the trade, and its assertions that its customer base was developed through great investment of time, effort and expense, were wholly conclusory and offered without any factual basis). Here, on behalf of MAG, Mr. Sellars discovered and signed up retail agents through one of two means: (1) by looking them up on the internet or (2) when they contacted him seeking to apply for insurance for their customers. Sellars Affidavit at ¶48. Any insureds that came to Plaintiffs were through retail agents. Sellars Affidavit at ¶¶3, 47-48. This certainly does not warrant confidential customer information status as defined by the New York courts. *Supra*.

Based on the proof offered by the plaintiff in *Commisso*, the Court concluded that a preliminary injunction should not have been issued and therefore, must be vacated. In support of its conclusion, the Court focused on the following:

> Plaintiff has failed to prove that such information is not readily discoverable through public sources. As to the remaining information, plaintiff has not put forth sufficient evidentiary proof to show what specific data the individual defendants misappropriated or used in their employ with [plaintiff]. Although plaintiff submitted computer records revealing that [defendant] downloaded some information around the time he resigned from plaintiff, the records do not disclose the nature of the information.

*H. Meer Dental,* at 664, 702 N.Y.S.2d at 465; *see also Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6 (1977) ("where the employer's past or prospective customers' names are readily ascertainable from sources outside its business, trade secret protection will not attach and their solicitation by the employee will not be enjoined"); *Pezrow Corp. v. Seifert*, 197 A.D.2d 856, 857, 602 N.Y.S.2d 468, 469 (App. Div. 4th Dep't 1993) (same).

In *Reed, Roberts Associates, Inc. v. Strauman*, 40 N.Y.2d 303, 353 N.E.2d 590 (1976), the Court refused to enforce a restrictive covenant that sought to prevent a former

employee from soliciting the employer's customers, holding that the employee engaged in no wrongful conduct and the names and addresses of potential customers were readily discoverable through public sources, thus an injunction was improper. In so holding, the Court stated:

> Apparently, the employer is more concerned about [defendant's] knowledge of the intricacies of their business operation. However, absent any wrongdoing, we cannot agree that [defendant] should be prohibited from utilizing his knowledge and talents in this area. A contrary holding would make those in charge of operations or specialists in certain aspects of an enterprise virtual hostages of their employers. Where the knowledge does not qualify for protection as a trade secret and there has been no conspiracy or breach of trust resulting in commercial piracy we see no reason to inhibit the employee's ability to realize his potential both professionally and financially by availing himself of opportunity.

*Id.* at 309, 353 N.E.2d at 594, citing Restatement, Agency 2d, §396, comment b.

The entirety of Plaintiffs' allegations of wrongful conduct are that Mr. Sellars e-mailed some information to his personal e-mail account six months before he resigned (and a year before they filed for relief), kept a list of prospects from a dead file and that they cannot locate some audit reports (that have not been alleged to have any competitive value) which they believe may have been located in his office in Syracuse. There is no evidence that the information alleged to have been taken is, in fact, confidential; rather, the evidence shows that it is not – in fact it is readily shared and often public. Sellars Affidavit at ¶¶37-42,44-48. There is no evidence that Mr. Sellars actually used or disclosed any of this claimed information; rather, Mr. Sellars and his current employer emphatically deny such use or disclosure. Sellars Affidavit at ¶¶36,63-67; Fell Affidavit at ¶11. The evidence shows, instead, that Mr. Sellars acted in an above-board manner. He e-mailed some information to his personal e-mail address for MAG business purposes to back-up information after the information on his laptop was lost with no adequate

back-up. Sellars Affidavit at ¶¶26-29. He directly informed Plaintiffs where he was going and what he was doing when he left. Sellars Affidavit at ¶¶55-59.

Plaintiffs simply have not shown that the information they claim Mr. Sellars has is confidential, that their customer information is confidential, or that Mr. Sellars has engaged in any wrongdoing. As such, their claims for preliminary injunction fail.

## III. Plaintiffs Have Failed to Prove They Would Suffer Irreparable Harm if The Injunction is Not Issued.

### A. Plaintiffs' Delay in Bringing This Action and Filing this Motion Diminishes Any Perceived Threat of Irreparable Harm Suffered if Mr. Sellars' Alleged Actions Are Not Enjoined.

Plaintiffs' belated filing of their motion belies any claim that they will suffer irreparable harm in the absence of a preliminary injunction. Mr. Sellars gave his two-week notice that he was terminating his employment with Plaintiffs on May 8, 2007. *On the same day*, he also informed Plaintiffs that he had accepted a position as president of Member Insurance. Peter Plumb, his superior at MAG knew or should have known that Member was a competitor as (1) MAG had lost Warner Robbins, one of its biggest lumber accounts, to Member and (2) when Mr. Sellars and Mr. Plumb attempted to get an insurer, Hartford, to write for MAG, Hartford told them it would be a conflict as it wrote for Member. Sellars Affidavit at ¶58. Mr. Sellars was specifically asked by two MAG employees, Anne Marie LaTocha and Robert Scott, what he would be doing at MAG, and he told them that he would be doing the "*exact same thing" that he did at MAG.* Sellars Affidavit at ¶59.

Mr. Sellars' last day of work for Plaintiffs was May 11, 2007 and his official separation date was May 22, 2007. Although Mr. Sellars denies that he solicited any customers after leaving MAG (Sellars Affidavit at ¶¶36, 63-67), Plaintiffs believed that he was "going after" accounts by no later than July 12, 2007.[4] Yet Plaintiffs did not file the above-captioned suit until September 25, 2007, nearly five months after being informed of his plans to resign and join a competitor. From the time that Mr. Sellars left Plaintiffs' employ until the day that he received Plaintiffs' complaint on September 26, 2007, no one contacted him to inform him that Plaintiffs believed he was violating any duties owed to Plaintiffs or was in violation of any obligations, whether contractual, legal or otherwise. *See* Sellars' Answer to Plaintiffs' Complaint, Second Affirmative Defense, ¶5.

The first notice Mr. Sellars had that Plaintiffs had any sort of dispute with him was upon receipt of the summons and lawsuit. In short, Plaintiffs took no action regarding their purported claims – not even an attempt to resolve them without litigation – until filing the lawsuit many months after Mr. Sellars gave notice and informed them where he was planning to work. Despite the equitable nature of the relief sought in their complaint filed on September 25, 2007, Plaintiffs chose not to file a motion for temporary restraining order or promptly seek a preliminary injunction. Instead, they waited to file their motion for preliminary injunction until November 14, 2007. This pattern of delay proves that no real emergency exists here and that Plaintiffs' current argument that there is a need for "immediate" injunctive relief is unconvincing.

[4] A copy of the July 12, 2007 e-mail from Robert Scott of HRH to Peter Plumb of HRH voicing this belief (bates labeled P000752) will be filed under seal pursuant to the parties' Stipulated Confidentiality Agreement.

### B. Plaintiffs' Conclusory Allegations Lack Evidentiary Support And Are Therefore Insufficient to Prove They Will Suffer Irreparable Harm Absent Issuance of The Injunction.

Plaintiffs offer little support and devote minimal attention to their argument that they will suffer irreparable harm absent the issuance of an injunction. According to Plaintiffs, if the Court fails to issue an injunction, the harm caused by Mr. Sellars alleged unfair advantage "is likely to continue to grow well beyond the means of Mr. Sellars to remedy it with money damages." *See* Plaintiffs' Mot. at p. 7. However, nowhere in their motion do they actually identify customers that were allegedly solicited by Mr. Sellars or the exact amount of business lost as a result of any alleged solicitation much less evidence establishing the actual solicitation. The closest Plaintiffs come to providing support for their allegations of harm is their submission of the Affidavit of Peter Plumb. Mr. Plumb testified that "the actions of Mr. Sellars have damaged the financial viability of the MAG Lumber Program previously managed by him, by soliciting as many as 20 accounts that represent over two million dollars ($2,000,000) in premiums and over three hundred thousand dollars ($300,000) in annual income to Plaintiffs, as well as caused noncompensable damages to MAG's business reputation and the goodwill MAG has developed at great effort and expense over the years." *See* Plumb Affidavit at ¶24.[5]

These general, unsupported conclusions, do not show that Plaintiffs will suffer irreparable harm absent the issuance of an injunction. *Merola v. Telonis*, 127 A.D.2d 1007, 513 N.Y.S.2d 66 (App. Div. 4th Dep't 1987) ("unless the plaintiff clearly demonstrates a necessity and urgency for relief in advance of a trial including the

[5] Plaintiffs' responses to Mr. Sellars' initial interrogatory requests seeking details of their allegations, names of customers allegedly solicited, etc. failed to provide any additional information beyond reference to the affidavits submitted in connection with this motion.

sustaining in the meantime of irreparable injury, the injunctive remedy will be withheld pending trial … the conclusory allegations of plaintiff in support of its application do not establish that irreparable harm will result in the absence of injunctive relief"); *Technology for Measurement, Inc. v. Briggs*, 291 A.D.2d 902, 903, 737 N.Y.S.2d 197, 198 (App. Div. 4th Dep't 2002) (plaintiff's conclusory allegations failed to establish that irreparable harm will result if the preliminary injunction is not granted, thereby precluding injunction); *Sutton, DeLeeuw, Clark & Darcy v. Beck*, 155 A.D.2d 962, 963, 547 N.Y.S.2d 773, 774 (App. Div. 4th Dep't 1989) (preliminary injunction should not issue where facts necessary to establish the cause of action are in sharp dispute and plaintiffs offered only conclusory allegations in support of their claim that they will suffer irreparable harm if the preliminary injunction is not granted). *See also*, *Genesis II Hair Replacement Studio v. Vallar*, 251 A.D.2d 1082, 674 N.Y.S.2d 207 (App. Div. 4th Dep't 1998); *Holdsworth v. Doherty*, 231 A.D.2d 930, 647 N.Y.S.2d 633 (App. Div. 4th Dep't 1996) *Merrell Benco Agency, Inc. v. Safrin*, 213 A.D.2d 614, 647 N.Y.S.2d 952 (App. Div. 2d Dep't 1996).

In any event, Mr. Sellars has provided the Court with a specific, detailed denial of Plaintiffs' allegations of solicitation and use of allegedly "confidential" information. Sellars' Affidavit at ¶¶ 25-36, 63-67. Mr. Sellars' professional background, reputation and experience also diminish the force of Plaintiffs' argument that they will be irreparably harmed by improper conduct absent the issuance of an injunction. As noted by Mr. Sellars, Plaintiffs recruited him to head their lumber insurance group based on his experience, connections and relationships in the lumber insurance industry. Sellars

Affidavit at ¶7. There is no reason to believe that Mr. Sellars cannot lawfully use that general experience on behalf of his new employer as he did for the Plaintiffs.

Plaintiffs' real difficulty has not been that Mr. Sellars has gone to a competitor; rather, it has been their inability to continue their lumber insurance program and support their insureds. After Mr. Sellars left MAG and Plaintiffs failed to respond to the concerns of their insurers, Markel and AmTrust, the insurers chose not to renew their insurance programs with MAG. MAG then failed to find another viable market, making it unable to write or sell lumber insurance. Sellars Affidavit at ¶¶60-62. Markel sent insureds written notices that it would not be renewing policies because it no longer did business with MAG. Sellars Affidavit at ¶61. When retail agents contacted MAG, its employees, Ms. LaTocha and Mr. Scott, told them that MAG would not renew their policies and that they would have to move their business elsewhere. *Id.* During these same conversations, the MAG employees even told the retail agents where to find Mr. Sellars. *Id*. Had Mr. Sellars simply retired rather than working for Member, the end result would have been the same – MAG would have been unable to write lumber insurance and support its customers.

Therefore, the evidence of record fails to support Plaintiffs' claim that they will suffer irreparable harm in the absence of a preliminary injunction.

## CONCLUSION

Based on the foregoing, Mr. Sellars respectfully requests that Plaintiffs' Motion for Preliminary Injunction be denied.

This the 21st day of December, 2007.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that this memorandum complies with BCR 15.8 and 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 partiers in this lawsuit. I further certify that the foregoing document was served upon the plaintiffs in this action by mailing a copy thereof to their counsel of record at the address 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 Charlotte, North Carolina, on the 21st day of December, 2007.

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