

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

08-CVS-011562

VELOCITY FIBER BROADBAND,)
LLC)

Plaintiff,)

v.)

LANG MANAGEMENT, INC.,)

Defendant.)

**DEFENDANT’S RESPONSE SUPPORTING
RETENTION OF ACTION IN THE
BUSINESS COURT**

Pursuant to Rule 3.3 of the North Carolina Business Court Rules, Defendant Lang Management, Inc. (“LMI”), by and through undersigned counsel, responds to Plaintiff Velocity Fiber Broadband, LLC’s (“Velocity”) opposition to the designation of this action as a mandatory complex business case (the “Opposition”). This action meets the criteria for designation as a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4 and should be adjudicated in the Business Court.

I. PLAINTIFF VELOCITY MISCHARACTERIZES THIS CASE.

In its Opposition, Velocity argues that this action is a simple “commission dispute” seeking “unpaid commissions” and that “[n]othing in this case requires any type of analysis or interpretation of the law” regarding the topics set forth in N.C. Gen. Stat. § 7A-45.4(6) – the internet, electronic commerce, and biotechnology. This argument and Velocity’s attempt to “oversimplify” the issues of this case in order to get it removed from this Court are misplaced.

According to its Complaint, it is certainly true that Plaintiff Velocity seeks to recover commissions. However, its entitlement to commissions rests on its proof of the existence of a number of exhibits to certain infrastructure agreements which are conditions precedent, many of

which concern the fiber optic infrastructure to support the provision of telecommunication and internet services, the nature of the voice, video or data (internet) services to be provided over the infrastructure, and telecommunications easements for qualifying voice, video and data services.

As discussed in LMI's previously-filed Notice of Designation, Defendant LMI is an independent contractor for Capitol Infrastructure, LLC ("Capitol"), a third-party to this litigation that is in the business of constructing state-of-the-art fiber optic infrastructure over which certain telecommunication and internet services are offered. Pursuant to contracts between Capitol and LMI, LMI was charged with securing within certain geographic areas master community infrastructure agreements between Capitol and developers for specific communities for the deployment of such infrastructure in these specific communities.

Specific to this action, LMI entered into agreements wherein Velocity agreed to consult with LMI in connection with LMI's work for Capitol in a designated geographic region. In this relationship, Velocity was to market the construction of such infrastructure by Capitol to support certain telecommunication and internet services in a designated region. These telecommunication services included: (i) **Data/Internet Services** (which are connectivity services with the internet using internet protocol wired Ethernet, wireless transmission or other transmission media); (ii) **Voice Services** (which are local voice telecommunication services provided by local exchange services provided by inter-exchange carriers or by resellers of the same); (iii) **Multi-channel Video Services** (multi-channel cable television and other video and/or sound services that are provided over Capitol's infrastructure); and (iv) **Security Services** (the installation and/or monitoring of burglar, fire and other security systems and related equipment, including wired or wireless detection and transmission equipment).

Velocity alleges that it is entitled to commissions from Defendant LMI “in excess of Two Million Dollars (\$2,000,000)” arising out of agreements allegedly entered into between third-party Capitol and third-party, Ginn Clubs & Resorts, Inc. (“Ginn”). As discussed above, for Velocity to be entitled to commissions, certain conditions precedent and other terms and obligations must be satisfied. For example, entitlement to a commission requires the execution of master telecommunication infrastructure agreements and a number of exhibits to these agreements which are conditions precedent, many of which concern the fiber optic infrastructure to support the provision of telecommunication and internet services, the nature of the voice, video or data (internet) services to be provided over the infrastructure, and telecommunications easements for qualifying voice, video and data services.

Due to Velocity’s failure to plead or provide specific details in its complaint, it is difficult at this stage of the litigation for LMI, without discovery, to identify all of the issues, factual and legal, that this Court may be called upon to address in order to resolve Velocity’s claim. However, the determination as to whether commissions are owed will most certainly require an understanding of the concepts discussed above – which are topics within the scope of “internet” and/or “electronic commerce” in N.C. Gen. Stat. § 7A-45.4(a)(6). As noted in this Court’s *Report on Activities of the North Carolina Business Court (2006-2008)* (page 2), the statutory provision on which Defendant LMI relies was intended to expand the jurisdiction of the Business Court to hear “certain cases involving technology.” The subject matter of the agreements at issue in this case – *e.g.*, infrastructure to support telecommunication and internet-based services – fall within this area. Importantly, nowhere in its Opposition does Velocity explain how an understanding of these topics would not be required in connection with the claim it asserts.

Velocity appears to be taking the position that this case should not be before the Business Court because it is a “contract dispute.” Many complex business cases arise out of or are related to some type of contractual dispute and/or disagreement. It is the subject matter of the contractual dispute, as well as its complexity, that determines if that action is proper before the Business Court. Defendant respectfully submits that Velocity’s claim alone presents such a case.

II. LMI’S COUNTERCLAIMS PROVIDE ANOTHER BASIS FOR A BUSINESS COURT DESIGNATION.

LMI has asserted counterclaims against Velocity for, *inter alia*, the misappropriation of trade secrets, a claim that falls within the scope of “unfair competition law,” as that term is used in N.C. Gen. Stat. § 7A-45.4(a)(4). In the scope of Velocity’s consulting work for LMI, LMI provided to Velocity materials and electronic information concerning the telecommunication and internet infrastructure that Velocity was obligated to market. Some of this material belonged to LMI; however, much of this material included confidential and proprietary business information that belonged to LMI’s customer, third-party Capitol – the company that constructed the infrastructure to support the provision of telecommunication and internet services. The proprietary and commercially-valuable information belonging to Capitol was provided to Velocity specifically to enable it to market the construction of such telecommunication and internet infrastructure by Capitol. This information was provided by LMI to Velocity “in strict confidence” and under the protection of appropriate confidentiality and non-disclosure obligations. However, in disregard of its contractual and legal duties to return to LMI all materials provided it during the term of their agreement, Velocity has failed and/or refused to do so.

Based on Velocity’s own allegations in its Complaint regarding the purported Ginn business that took place after Velocity terminated its agreement with LMI, LMI was put on

notice that Velocity had apparently failed to return certain confidential and proprietary information in violation of its agreements. It appears that Velocity continues to have possession of certain confidential business information previously provided to it, which included: network design and configuration including computer aided design (CAD) files; head end design including but not limited to images thereof; technical configuration and modulation of signals (voice, video, data and security) over separate wavelengths to provide multiple concurrent service offerings over a single fiber optic strand; images of actual head end designs; design of equipment for wireless internet deployment; tower design(s); utilization of optical splitters; delivery of data using Ethernet protocols by use of multiplexer; conduit design and mechanisms for reimbursement of costs related to the same; fiber riser design; strategies for deployment of network cameras and online access of the video information for construction site monitoring; use of passive optical network terminals in conjunction with optical amplifiers as deployed, and the interaction of the same with satellite systems, as deployed; regulatory design and competitive analysis and market analysis of the same, including price comparisons; copper, coaxial and fiber wiring costs; design of QAM systems (quadrature amplicaton modulation) of video signals for developers. Until discovery is conducted, LMI will not be able to identify with specificity which of the foregoing business data and methods Velocity has retained unlawfully in its possession.

CONCLUSION

Defendant LMI respectfully requests this Court to retain this action.

This the 1st of October, 2008.

/s/ Scott E. Bayzle
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANT'S RESPONSE SUPPORTING RETENTION OF ACTION IN THE BUSINESS COURT** has been served on the parties in this action (i) by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following address, and (ii) by e-mailing the same addressed to following e-mail address:

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This the 1st day of October, 2008.

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