

Next Advisor, Inc. v. Lendingtree, Inc., 2015 NCBC Order 8.

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 20775

NEXT ADVISOR, INC.,

Plaintiffs,

v.

LENDINGTREE, INC. and
LENDINGTREE, LLC,

Defendants.

**ORDER ON MOTION FOR
EXPEDITED DISCOVERY AND
NOTICE OF HEARING**

1. **THIS MATTER** is before the Court upon Plaintiff Next Advisor, Inc.’s (“Plaintiff”) Motion for Expedited Discovery (the “Motion”) in the above-captioned case. For the reasons stated below, the Motion is **DENIED**.

2. Plaintiff filed its Complaint, along with the Motion, brief in support of the Motion, and supporting affidavit on November 6, 2015. The case was designated as a complex business case on November 13, 2015, and was assigned to the undersigned on November 16, 2015.

3. Plaintiff attached to the Motion its First Request for Production of Documents to Defendant LendingTree, Inc. and LendingTree, LLC (collectively, “Defendants”) (“Request for Production”). The Complaint, Motion, and Request for Production were served on Defendants on November 16, 2015.¹

4. The Motion seeks an order requiring Defendants to respond to the Request for Production within ten days of the entry of the order. Additionally, the Motion seeks an order

¹ The Affidavit of Service originally filed with the Court by Plaintiff did not indicate that the Request for Production was served on Defendants on November 16, 2015, and counsel for Defendants was not aware that the Request for Production had been served. Plaintiff, however, represented at the December 9, 2015 telephone hearing in this matter that the Request for Production was served on Defendants along with the Complaint. Plaintiff filed an Amended Affidavit of Service on December 10, 2015, indicating that the Request for Production was in fact served with the Complaint on November 16.

allowing the depositions of four individuals within ten days of the production of documents in response to the Request for Production.

5. After permitting Defendants an opportunity to file a brief in opposition to the Motion, the Court held a telephone hearing on the Motion on December 9, 2015, at which all parties were represented by counsel. At that hearing, the Court orally ruled that it would deny the Motion. The Court convened an additional telephone conference on December 10, 2015, during which the Court made additional oral rulings. The Court memorializes its oral rulings as follows.

6. “Discovery sought on an expedited basis is subject to a heightened standard, which requires a demonstration of good cause. Where the movant seeks expedited discovery to prepare for a preliminary injunction hearing, the Court does not employ the preliminary injunction factors to determine the motion’s propriety, but reviews ‘the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances.’” *Corwin v. British Am. Tobacco PLC*, 2015 NCBC LEXIS 2, at *10 (N.C. Super. Ct. Jan. 8, 2015) (quoting *Dimension Data N. Am., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 531 (E.D.N.C. 2005)). “To show good cause, a plaintiff ‘must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited . . . proceeding.’” *Id.* (quoting *Ehrenhaus v. Baker*, 2008 NCBC LEXIS 20, at *13 (N.C. Super. Ct. Nov. 3, 2008)).

7. Essentially, “the Court must undertake a balancing test in which it must determine both whether Plaintiff has demonstrated a substantial, colorable claim and the magnitude of the possible burden or harm to Defendants that may result from imposing the expense and potential business delay attendant to expedition of discovery, including in that determination the possibility of motion

practice following initial discovery.” *Raul v. Burke*, 2015 NCBC LEXIS 93, at *3–4 (N.C. Super. Ct. Oct. 8, 2015).

8. Applying this balancing test here, the Court concludes that Plaintiff’s Motion should be denied, in particular because Plaintiff has failed to show “a sufficient possibility of a threatened irreparable injury” if not for expedited discovery. Plaintiff served the Request for Production with the Complaint on November 16, 2015. Defendants’ responses to the Request for Production are due under Rule 34(b) on December 31, 2015.² Plaintiff’s Motion sought expedited discovery requiring Defendants’ responses to be served ten days from the date of an order granting the Motion. Ten days from the date of the December 9, 2015 hearing is December 19, 2015. Because Plaintiff has not shown that it would be irreparably harmed if it receives Defendants’ discovery responses by December 31, rather than on December 19, the Court denies the Motion. *See, e.g., Dimension Data N. Am., Inc.*, 226 F.R.D. at 532 (denying motion for expedited discovery, in part, because plaintiff failed to show that it would be irreparably harmed by delaying in initiating discovery).

9. Moving beyond the immediate issue of expedited discovery, Defendants contend in their brief in opposition to Plaintiff’s Motion that Defendants should not be required to respond to Plaintiff’s Request for Production (or Plaintiff’s discovery requests concerning Defendants’ trade secrets generally) on the ground that Plaintiff has failed to identify its trade secrets with particularity.³ Plaintiff vigorously disagreed with Defendants’ contention at the December 9 hearing but has not had the opportunity to brief its position.

² N.C. R. Civ. P. 34(b) provides that if a request for production of documents is served with the summons and complaint, that “[t]he party upon whom the request is served shall serve a written response . . . within 45 days after service of the summons and complaint”

³ Defendants’ opposition to the Motion also argues that Plaintiff’s requests are overbroad in that they are not narrowly tailored to the issues relevant to Plaintiff’s anticipated motion for preliminary injunction. The Court reads this aspect

10. The Court concludes, in the exercise of its discretion, that a determination concerning whether Plaintiff has identified its trade secrets with sufficient particularity to obtain discovery of Defendants' trade secret information has been placed at issue by Defendants' opposition to the Motion, is ripe for decision, does not need to await Defendants' formal discovery responses and subsequent motion practice in light of the nature of Plaintiff's claims and alleged ongoing injury, and is properly considered on an expedited basis. *See generally DSM Dyneema, LLC v. Thagard*, 2014 NCBC LEXIS 51, *14–25 (N.C. Super. Ct. Oct. 17, 2014) (addressing necessary trade secret specification to permit discovery).

11. For the foregoing reasons therefore, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

- a. For purposes of this litigation, the Court hereby deems Defendants' opposition to Plaintiff's Motion to be a Motion for Protective Order.
- b. Plaintiff shall have through and including December 22, 2015 to file a response to Defendants' Motion for Protective Order.
- c. Defendants shall have through and including January 5, 2016 to file a reply.
- d. Plaintiff's response and Defendants' reply shall be subject to the word limitations for non-dispositive motions set forth in the General Rules of Practice and Procedure for the North Carolina Business Court.
- e. **TAKE NOTICE** that a hearing on Defendants' Motion for Protective Order will be held on Wednesday, January 13, 2016 at 2:00 PM in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina.

of Defendants' opposition as specific to Plaintiff's motion for expedited discovery, and thus resolved by the Court's denial of the Motion.

f. Notwithstanding the foregoing, Defendants shall be required to provide responses and objections to Plaintiff's Request for Production no later than December 31, 2015, such response and objection deadline to be extended only upon a showing of good cause. The parties are instructed to meet and confer in an effort to resolve any dispute concerning Defendants' responses and objections to Plaintiff's Request for Production and otherwise take all reasonable measures to narrow any issues requiring judicial resolution. In the event issues arising out of Defendants' responses and objections to Plaintiff's Motion require judicial resolution, each party shall file a brief statement of no longer than 400 words on or before January 11, 2016 identifying the nature of the dispute and the party's contentions. The Court will consider any such disputes at the January 13 hearing noticed in subparagraph (e) above.

SO ORDERED, this the 11th day of December, 2015.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases