

Next Advisor, Inc. v. LendingTree, Inc., 2016 NCBC Order 12.

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

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

NEXT ADVISOR, INC.,
Plaintiff,

v.

LENDINGTREE, INC. and
LENDINGTREE, LLC,
Defendants.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

1. **THIS MATTER** is before the Court on Plaintiff Next Advisor, Inc.'s ("Next Advisor") Motion for Preliminary Injunction (the "Motion") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure in the above-captioned case. Having considered the Motion, all briefs and materials filed in support of and in opposition to the Motion, live witness testimony and the arguments of counsel at a hearing held on June 21, 2016, and the entire file in this matter, the Court hereby **GRANTS** the Motion.

I.

PROCEDURAL HISTORY

2. On November 9, 2015, Next Advisor initiated this action in Mecklenburg County Superior Court by filing a Complaint against Defendants LendingTree, Inc. and LendingTree, LLC (collectively, "Defendants" or "LendingTree") alleging breach of a non-disclosure agreement, misappropriation of trade secrets, and unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1. On that same date, Next Advisor filed a Motion for Expedited Discovery. The matter was designated a mandatory complex business case by order of the Chief Justice of the North Carolina Supreme Court on November 13, 2015, and assigned to the undersigned Special Superior Court

Judge for Complex Business Cases by order of the Chief Special Superior Court Judge for Complex Business Cases on November 16, 2015.

3. On November 20, 2015, the Court noticed a hearing on Next Advisor's Motion for Expedited Discovery to be held on December 1, 2015. On November 24, 2015, LendingTree filed a Motion for Additional Time for Briefing. That Motion was granted by a November 24, 2015 Order allowing time for LendingTree to submit a brief in opposition to Next Advisor's Motion for Expedited Discovery and scheduling the hearing on the Motion for Expedited Discovery for December 9, 2015.

4. On December 11, 2015, the Court issued an Order denying Next Advisor's Motion for Expedited Discovery because Next Advisor had not demonstrated it would suffer irreparable harm as a result of what, at that point, would have been an eleven-day delay in receiving responses to Next Advisor's First Requests for Production of Documents. The Order also deemed LendingTree's opposition to Next Advisor's Motion for Expedited Discovery to be a Motion for Protective Order and set a hearing on that Motion for Protective Order for January 13, 2016. The Court heard the arguments of counsel and received submissions from the parties on January 13, 2016.

5. On January 19, 2016, the Court issued an Order deferring its ruling on the Motion for Protective Order and requesting that Next Advisor file exemplar documents for each of nine categories of trade secrets identified by Next Advisor in its response to LendingTree's Interrogatory No. 3. Next Advisor complied by making a filing under seal of exemplar documents on January 22, 2016.

6. On February 4, 2016, the Court denied LendingTree's Motion for Protective Order, holding that Next Advisor had provided descriptions of its alleged trade secrets with exemplar

documents that suggested Next Advisor had asserted a well-investigated claim and had satisfied its burden of sufficiently identifying its alleged trade secrets in order to proceed with discovery.

7. On April 11, 2016, Next Advisor filed its Motion for Preliminary Injunction. The Court heard that Motion, including live testimony¹ and the receipt of other evidence, on June 21, 2016.

II.

FINDINGS OF FACT²

The Court makes the following FINDINGS OF FACT for the purpose of determining the instant Motion:

8. At the time of the filing of this action, Plaintiff Next Advisor, Inc. was a California corporation with its principal place of business in San Mateo County, California.

9. Defendant LendingTree, Inc. is a Delaware corporation that has its principal place of business in Mecklenburg County, North Carolina. Defendant LendingTree, LLC is a Delaware limited liability company that has its principal place of business in Mecklenburg County, North Carolina.

10. Next Advisor was founded in 2006 and its business is providing a web-based vehicle for driving consumers to various internet vendors. For the past several years, Next Advisor's primary business has involved using its web-based vehicle to drive consumers to apply for credit cards. Next Advisor uses editorial content hosted on its own website as a means to

¹ The Court permitted each party seventy-five minutes to present live testimony at the hearing. Next Advisor offered the testimony of Next Advisor's President and CEO, Erik Larson. LendingTree offered the testimony of two LendingTree employees, Ryan Alex, LendingTree's Director of National Sales, and Jarret DiToro, LendingTree's Director of Content Marketing.

² "It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits." *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75, 620 S.E.2d 258, 265 (2005) (citing *Huggins v. Wake Cnty. Bd. of Educ.*, 272 N.C. 33, 40-41, 157 S.E.2d 703, 708 (1967)).

inform consumers and encourage them to apply for credit cards. Next Advisor is compensated at an agreed-upon rate by a credit card issuer when a consumer applies and is approved for that issuer's card as a result of Next Advisor's marketing efforts.

11. There are multiple paths for internet marketing companies to obtain the attention of consumers to drive those consumers to purchase a product (or in this case, to apply for a credit card). These include: (i) search engine optimization, which involves creating online content designed to drive high placement on search engine results; (ii) search engine marketing, which involves paying a search engine company for prominent advertisement placements accompanying the results of consumer searches containing certain search terms; and (iii) display advertising, which involves the purchase of a banner advertising space on websites. Internet marketing can also be done through business development deals in which a marketing company contracts directly with a website to place its advertisements on that website.

12. There are also different types of web pages to which internet credit card marketing companies direct consumers who click on a search engine result or advertisement. These include comparison pages (listing attributes of multiple products) and editorial content that provides assessments and recommendations in a blog or article-style format.

13. Internet marketing companies can also drive consumers to purchase a product through paid content marketing (also known as native advertising). This involves developing campaigns that pair editorial content with one or more advertisements intended to drive consumers to that editorial content. Paid credit card content marketing is unique in that these campaigns are submitted to a third-party content marketing company along with the bid that the internet marketing company agrees to pay each time a consumer clicks on the advertisement that drives the consumer to the editorial content. The content marketing company has the option to accept the

bid and to place one or more of the advertisements for that campaign onto third-party websites. Whether a content marketing company will choose to place an ad or ads, what price is required to obtain favorable placements, and the number of consumer clicks (and therefore cost) that the ads will generate is unknown.

14. Beginning in 2013, Next Advisor began to focus its credit card marketing efforts on paid content marketing. It expended significant time and effort developing its paid credit card content marketing business. Until June of 2015, Next Advisor was the only company with a significant presence in paid credit card content marketing, and the company enjoyed financial success in that space.

15. In November 2014, Next Advisor and LendingTree entered into a Mutual Non-Disclosure Agreement dated November 20, 2014 (the “NDA”) to facilitate the exchange of confidential information in connection with a possible acquisition of Next Advisor by LendingTree. The NDA defines “Confidential Information” as all nonpublic information that the parties disclosed to each other while pursuing a possible transaction. The NDA mandates that Confidential Information be used solely for the purpose of evaluating the potential transaction, and be disclosed only to persons who need to know such information for the purpose of evaluating the transaction and who agree to treat such information in accordance with the terms of the NDA.

16. During due diligence, Next Advisor determined that it was not able to locate confidentiality agreements for four of its employees. Three of these employees were among Next Advisor’s first hires, and two had previously worked for Next Advisor’s President and CEO, Erik Larson. It is not clear whether these employees had signed agreements that were later misplaced or had not signed such agreements to that point. When the issue came to light, all four employees (who were each still employed by Next Advisor) promptly executed retroactive confidentiality

agreements covering their entire respective employment periods. Since that date, all Next Advisor employees have been subject to confidentiality agreements covering the entire tenure of their employment.

17. Never at any time has Next Advisor shared any confidential or trade secret information with a potential purchaser without the protection of a nondisclosure agreement.

18. On May 11, 2015, Next Advisor and LendingTree entered into a non-binding indication of interest for the purchase of Next Advisor by LendingTree (the “IOI”).

19. Pursuant to the NDA, Next Advisor provided confidential information to LendingTree regarding its business. On May 18, 2015, Next Advisor opened a secure electronic data room for the purpose of sharing Confidential Information pursuant to the NDA. The confidential information provided included multiple compilations of data that revealed Next Advisor’s detailed pricing and profitability information, including information specific to paid credit card content marketing that was broken down month by month for a period of twenty-two months. That information was broken down into multiple financial and marketing metrics including: by issuer, by individual credit card, by paid marketing channel, and by type of device. All of the data provided was explicitly requested by LendingTree. That data was the result of years of trial and error and many millions of dollars expended by Next Advisor. The scope of data requested by LendingTree was significantly broader and more detailed than the scope of data required in a subsequent transaction which resulted in the execution by Next Advisor and Bankrate, Inc. (“Bankrate”) of an agreement for Bankrate to purchase the assets of Next Advisor (the “Bankrate Transaction”).

20. LendingTree employees, including Gabe Dalporto, Jarret DiToro, and Alex Braman, among others, had full access to the documents in the electronic data room.

21. Next Advisor also provided trade secret and confidential information to LendingTree during a meeting on May 19, 2015. The meeting was held because LendingTree requested the opportunity to conduct diligence concerning some of Next Advisor's key personnel. Significantly, Next Advisor had understood the purpose of this meeting to be for LendingTree to discuss retention issues with various Next Advisor employees on an individual basis. The meeting format changed to a group meeting in which LendingTree conducted operational due diligence on the key operational members of Next Advisor's team. In addition to Mr. Larson, the meeting was attended by Next Advisor employees Colin McIntyre and Angelo Formosa. During the lengthy meeting, in response to questions from LendingTree, Next Advisor disclosed to LendingTree employees Gabe Dalporto, Jarret DiToro, and Alex Braman a variety of confidential information concerning Next Advisor's process for operating its paid credit card content marketing business, its historical bidding ranges in paid content marketing, and its profit margins. Mr. Braman took nineteen pages of detailed typewritten notes during the meeting and Mr. Dalporto took handwritten notes on the information provided at the meeting.

22. Shortly after leaving the meeting, Mr. DiToro told Mr. Dalporto that it was "crazy" for LendingTree to purchase Next Advisor because he, Mr. DiToro, could do what Next Advisor was doing. Prior to obtaining access to the information provided by Next Advisor to LendingTree in due diligence and attending the May 19 meeting, Mr. DiToro never represented that he was able to do what Next Advisor was doing. Prior to obtaining access to the information provided by Next Advisor to LendingTree during due diligence and attending the May 19 meeting, Mr. DiToro was aware of the publicly-available component of Next Advisor's business and had expressed that Next Advisor was the class leader in the field.

23. Next Advisor was at all times cautious about sharing its confidential and trade secret information. There is no evidence that any of the confidential or trade secret information shared by Next Advisor with LendingTree during due diligence was ever shared publicly.

24. The accumulated compilation of business information provided by Next Advisor to LendingTree pursuant to the NDA derived commercial value by not being generally known or readily ascertainable through independent development or reverse engineering.

25. LendingTree is an internet marketing company. Its initial focus was on the marketing of mortgage products, but it has extended its business to other products including auto loans, business loans, and credit cards.

26. Prior to obtaining Next Advisor's confidential information during due diligence, LendingTree's spending on credit card marketing was limited, and its credit card marketing efforts were focused on search engine optimization, search engine marketing, and display. It had made some effort to engage in content marketing through business development and believed that further efforts on content marketing should be focused on business development. Prior to obtaining Next Advisor's confidential information, LendingTree did not do any paid credit card content marketing. Prior to obtaining Next Advisor's confidential information, LendingTree did not have any present intention to begin to commit resources to engage in paid credit card content marketing.

27. Two to three weeks prior to obtaining Next Advisor's confidential information, LendingTree prepared presentations to several credit card issuers seeking to encourage the issuers to raise the payouts they were providing to LendingTree for approved applications. Those presentations did not commit LendingTree to spend any specific amount to promote the cards of the targeted issuers. Those presentations did not forecast any shift in LendingTree's marketing plan to include paid content marketing, much less to focus on paid content marketing.

28. Within days of obtaining Next Advisor's confidential information, LendingTree formulated and began implementing a plan to engage in paid credit card content marketing on a large scale. LendingTree used the confidential information it had obtained from Next Advisor on Next Advisor's average issuer payout and profit margin to develop LendingTree's content marketing plan. According to a May 26 e-mail communication from Mr. DiToro to Mr. Dalporto and Mr. Braman, the purpose of using Next Advisor's confidential information was "get something similar to NA [Next Advisor] without paying for it." Mr. DiToro concluded his e-mail communication by stating "Remember, a \$100 million saved is a \$100 million earned." In response, Mr. Dalporto urged Mr. DiToro to "get something launched FAST."

29. In late May 2015, LendingTree prepared new presentations to credit card issuers that included promised spending on credit card marketing that was more than seven times the monthly amount LendingTree had been spending on credit card marketing prior to obtaining Next Advisor's confidential information. These new presentations also forecasted a shift in marketing focus, stating that LendingTree's "main initiative" was content marketing and that 77% of LendingTree's credit card marketing efforts going forward would involve content marketing.

30. On June 4, 2015, LendingTree initiated efforts to begin doing credit card content marketing using the paid content marketing channels that Next Advisor's confidential information revealed were most profitable to Next Advisor. The prime architect of LendingTree's paid credit card content marketing plan was Jarret DiToro. Mr. DiToro's stated intention in initiating a credit card content marketing plan for LendingTree was to "replicate what Next Advisor is doing as closely as possible." In a May 29, 2015 e-mail Mr. DiToro shared with colleagues that it was LendingTree's intention to "spend [itself] into significance" in paid credit card content marketing.

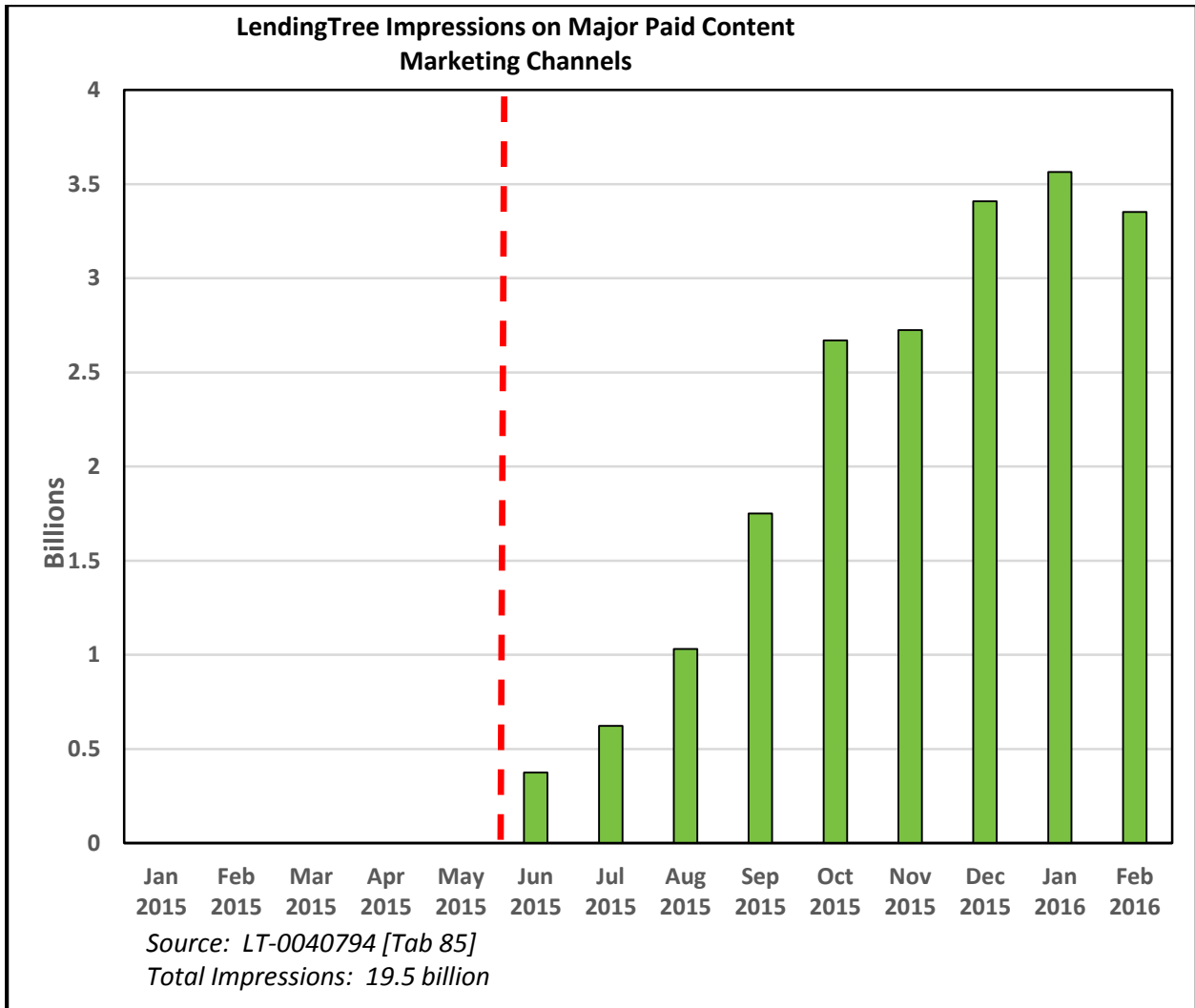
31. Prior to obtaining Next Advisor's confidential information, LendingTree was aware of Next Advisor and observed publicly-available information regarding Next Advisor's paid credit card content marketing, but, until it obtained Next Advisor's confidential information, LendingTree made no effort to replicate Next Advisor.

32. Prior to initiating LendingTree's paid credit card content marketing plan in late May 2015, Mr. DiToro had no experience with paid credit card content marketing.

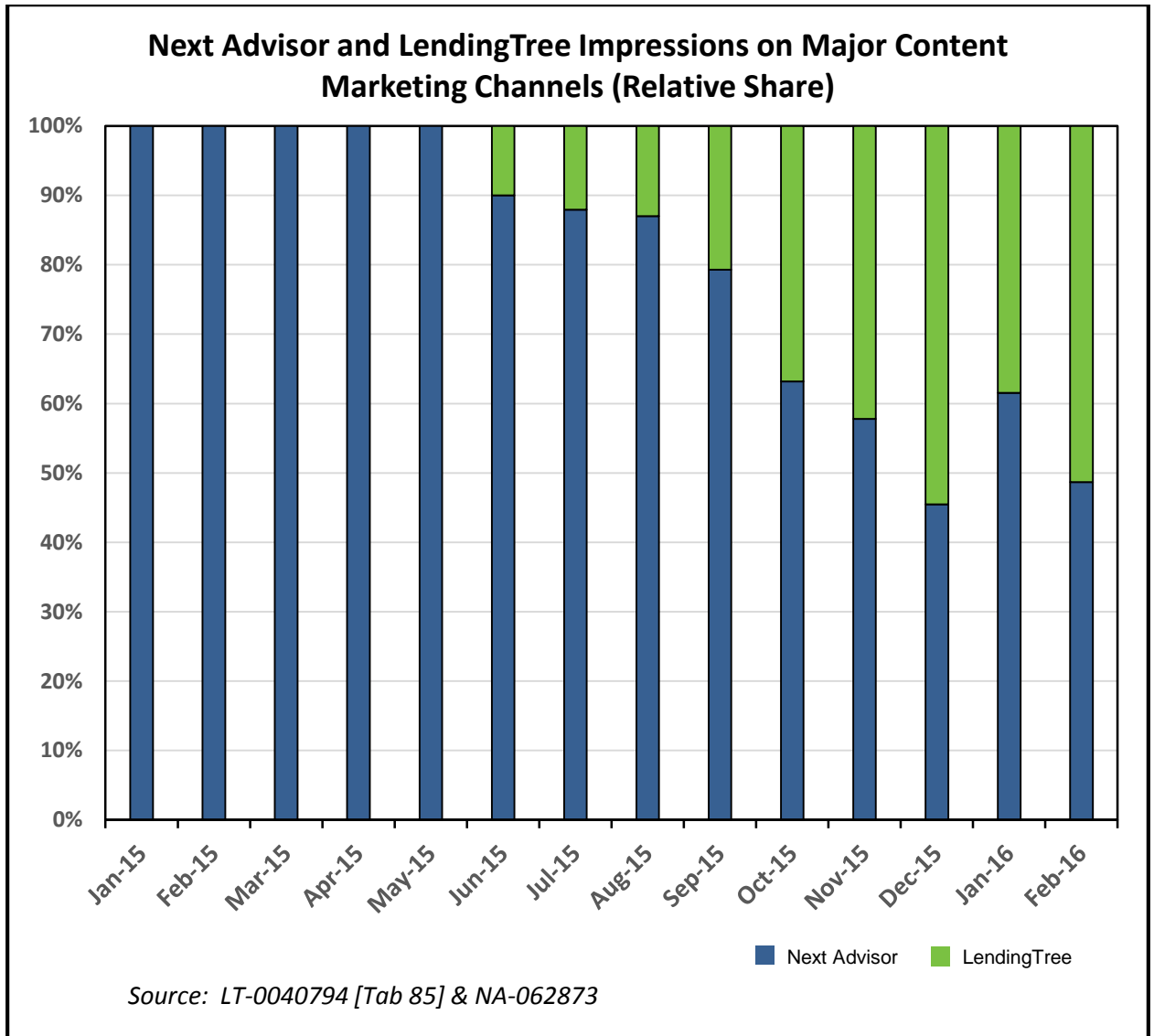
33. LendingTree spent no money on paid credit card content marketing prior to June 1, 2015. Between June 1, 2015 and February 28, 2016, LendingTree spent more than \$9,410,000.00 on paid credit card content marketing. LendingTree placed no credit card marketing ads through paid credit card content marketing prior to June 1, 2015. Since June 1, 2015, LendingTree paid credit card marketing ads have been placed more than 19,500,000,000 times. Those ads have generated more than 9,600,000 clicks.

34. LendingTree essentially opened up a new business, replicating the business of Next Advisor, almost immediately after obtaining trade secret and confidential information from Next Advisor.

35. At the hearing on this matter, Next Advisor submitted an illustrative graph based on data obtained from LendingTree in discovery that demonstrates LendingTree's sudden transition into two major content marketing channels:



36. An additional exhibit submitted by Next Advisor for illustrative purposes illustrates LendingTree’s rapid entry into a market that had been solely occupied by Next Advisor; this entry began almost immediately after LendingTree obtained access to Next Advisor’s trade secret and confidential information:



37. Messrs. Dalporto, DiToro, and Braman never saw the NDA. Messers. Braman and DiToro were never informed that they were prohibited from using Next Advisor’s information for any purpose other than the evaluation of the transaction. Mr. DiToro has no recollection of being informed that Next Advisor’s information was covered by a non-disclosure agreement.

38. In his deposition, Mr. DiToro acknowledged that he used portions of what he learned in due diligence to prepare a plan to compete with Next Advisor and that he believed it was “logical” to use information obtained in diligence to determine if one could copy the business of the target company without having to buy it.

39. As soon as LendingTree launched its first paid credit card content marketing campaigns (in June 2015), Erik Larson, the founder, President, and Chief Executive Officer of Next Advisor, observed that LendingTree had begun doing paid credit card content marketing for the first time, using one of the channels that had been revealed in due diligence as being the most profitable, and that the actual content used by LendingTree in its paid content ads looked extremely similar to content that had been used by Next Advisor and revealed to be effective. Mr. Larson complained immediately about LendingTree's conduct, asserting that it was wrongful and a violation of the NDA. Mr. Dalporto responded that if the contemplated acquisition of Next Advisor by LendingTree were to be completed, the problem would be resolved.

40. After the date of the IOI, Next Advisor's growth significantly exceeded the projections on which the terms of the potential acquisition were predicated. Although LendingTree indicated some limited willingness to revise the deal terms, Mr. Larson believed it was no longer in the best interest of Next Advisor to complete the transaction. For this reason, among others, Mr. Larson determined that he would prefer not to sell the assets of Next Advisor to LendingTree and the deal was not consummated.

41. Upon learning that Next Advisor had decided not to complete the transaction, Doug Lebda, the Chief Executive Officer of LendingTree, told the investment bankers facilitating the deal in an e-mail that LendingTree would "go to every card provider, get our payouts up (as they've already been willing to do) put a bunch of people on this and we bash each other in the market. . . . But we've got a brand. His margins shrink and we still win, it just takes us an extra year."

42. Adbeat is a third-party source through which internet marketing companies can purchase certain information regarding competitors in the market. Adbeat provides reliable information about who is in the market and the general volume of market participation. As of

March 25, 2016, Adbeat data showed that the only two internet marketing companies doing paid credit card content marketing in anything more than a *de minimis* volume since June 2015 were Next Advisor and LendingTree.

43. There is no third-party source that can provide information regarding the profitability of any credit card marketing company's business. Although Adbeat purports to provide an estimate of the "spend" of a credit card marketing company, that estimate is not accurate. Adbeat does not attempt to estimate revenue. Adbeat's comparison of relative market presence is generally accurate.

44. On May 5, 2016, Next Advisor entered into the Bankrate Transaction. The asset purchase agreement provides that Next Advisor may earn additional compensation of up to \$145.7 million for the sale of its assets if certain profitability targets are achieved during the eighteen-month period following the date of the closing of the Transaction. The Transaction closed on June 17, 2016. The continued presence of LendingTree in the paid credit card content marketing arena impairs Next Advisor's opportunity to reach its earnout targets in ways that are difficult to calculate.

45. Prior to LendingTree's entry into paid credit card content marketing, Next Advisor was the only company with any significant presence in the paid credit card content marketing arena and it experienced significant, consistent growth in its credit card marketing business. Since LendingTree has entered the paid credit card content market, Next Advisor's growth has slowed. Next Advisor's cost per click has increased on two primary marketing channels where it now competes with LendingTree, and Next Advisor's profit margins have declined.

46. Although LendingTree is not consistently generating a profit in its paid credit card marketing business, its average monthly spend on two primary marketing channels for paid credit

card marketing since it has obtained Next Advisor's confidential information is twelve times what its average monthly spend on all credit card marketing was in the five months preceding the acquisition of Next Advisor's confidential information. In any case, it is LendingTree's spend in the paid credit card content market that has a direct impact on Next Advisor's business, not LendingTree's profitability.

47. The growth trajectory that Next Advisor would have continued to enjoy if LendingTree had not begun direct competition against Next Advisor in paid credit card content marketing is difficult to determine.

48. The level of profitability that Next Advisor would have continued to enjoy if LendingTree had not begun direct competition with Next Advisor in paid credit card content marketing is difficult to determine.

49. The impact that LendingTree's entry into the paid credit card content market is having upon Next Advisor is significant but difficult to determine with precision. The exact number of LendingTree ads that are placed by credit card marketing companies in lieu of Next Advisor ads is unknowable. The number of clicks that are generated by LendingTree ads that would have been clicks generated by Next Advisor ads but for the presence of LendingTree in the market is unknowable. LendingTree's sudden and well-funded entry into the paid credit card content marketing arena has deprived Next Advisor of the unique position and competitive advantage that it enjoyed by being the first company to develop any significant market presence in paid credit card content marketing.

50. While it is likely that LendingTree's brand and consumer name recognition, which were developed in other contexts, enhance its capacity to compete with Next Advisor and damage Next Advisor in the marketplace, the precise effect that LendingTree's brand recognition may be

having on its ability to compete directly against Next Advisor in the paid credit card marketing space is difficult to determine.

51. At the time of the closing of the Bankrate Transaction on June 17, 2016, Next Advisor had considerable assets sufficient to respond in damages if LendingTree were to suffer damages by a wrongful injunction, although it is unclear to the Court whether some or all of those assets have been distributed since the closing or will be distributed at some later date.

III.

CONCLUSIONS OF LAW

52. The Court has jurisdiction over the parties and subject matter of this action.

53. Pursuant to N.C. Gen. Stat. § 7A-45.4, this case has been properly designated as a complex business case.

54. A plaintiff seeking an injunction must show (i) likelihood of success on the merits and (ii) that the plaintiff is likely to sustain irreparable loss absent an injunction, or that an injunction is necessary to protect the plaintiff's rights during the litigation. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983); *see also* N.C. R. Civ. P. 65; N.C. Gen. Stat. § 1-485. The North Carolina Trade Secrets Protection Act (“TSPA”) expressly authorizes a court to preliminarily enjoin “actual or threatened misappropriation of a trade secret.” N.C. Gen. Stat. § 66-154(a). Under North Carolina law, “[i]t is well settled that an injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential information.” *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 594, 424 S.E.2d 226, 229 (1993) (quotation omitted). The burden is on Next Advisor to establish its right to a preliminary injunction. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975). “A court considering whether to grant a preliminary injunction may assess the credibility of witnesses testifying before it at a

preliminary injunction hearing, and base its decisions on credibility determinations.” *Hudson Glob. Res. Holdings, Inc. v. Hill*, No. 02:07cv0132, 2007 U.S. Dist. LEXIS 38326, at *22 (W.D. Pa. May 25, 2007).³

55. LendingTree’s decision to revise its credit card marketing model in May 2015 was not the product of independent development.

56. The use by LendingTree of Next Advisor’s confidential information to make a decision to revise its credit card marketing model and conceive and build a paid credit card content marketing business to compete with Next Advisor did not involve simply the development by LendingTree employees of general skills, knowledge, and experience as it relates to the business of Next Advisor, but rather demonstrated reliance upon explicit, non-public data specific to Next Advisor that Next Advisor had developed over a period of years and which involved the investment of millions of dollars.

57. The use by LendingTree of Next Advisor’s confidential information to make a decision to revise its credit card marketing model and conceive and build a paid credit card content marketing business to compete with Next Advisor, as well as the disclosure of Next Advisor’s confidential information to persons who had not agreed to treat such information in accordance with the terms of the NDA, demonstrate that Next Advisor is likely to prevail on the merits of its breach of contract claim with respect to the NDA.

58. The TSPA defines a trade secret as “business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process” that (i) “[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse

³ North Carolina courts often look to federal decisions for guidance on Rule 65 issues. *See, e.g., Keith v. Day*, 60 N.C. App. 559, 560–61, 299 S.E.2d 296, 297 (1983).

engineering by persons who can obtain economic value from its disclosure or use” and (ii) “[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” N.C. Gen. Stat. § 66-152(3). Misappropriation is defined to include the “use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.” N.C. Gen. Stat. § 66-152(1). A prima facie case of misappropriation is established when a party introduces substantial evidence showing that the person against whom relief is sought both (i) knows of or should have known of the trade secret and (ii) has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent of the owner. *TSG Finishing, LLC v. Bollinger*, 767 S.E.2d 870, 876 (N.C. Ct. App. 2014) (citing N.C. Gen. Stat. § 66-155).

59. The information that Next Advisor disclosed to LendingTree about its costs, revenues, payouts (which are equivalent to pricing information), historical bid range, and methodology for content marketing falls squarely within the categories of information that North Carolina courts have recognized as trade secrets. *E.g.*, *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 233–34, 752 S.E.2d 634, 649 (2013) (pricing information, historical costs, and sales data were trade secrets); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 53–56, 620 S.E.2d 222, 226–28 (2005) (compilation of information including special pricing information, customer information, personnel and salary information, organizational structure, financial projections, utilization rates, fleet mix by market, budget information, and cost information constituted trade secrets); *Byrd’s Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 375–76, 542 S.E.2d 689, 692 (2001) (historical cost information was a trade secret); *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992) (pricing

and bidding formulas were trade secrets). *See also, e.g., PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1270 (7th Cir. 1995) (“particularized plans or processes developed by [the plaintiff] and disclosed to [the defendant] . . . which are unknown to others in the industry and which give the [defendant] an advantage over [its] competitors” were trade secrets under Illinois’ similar trade secrets protection statute).

60. Next Advisor’s trade secret information was the subject of efforts reasonable under the circumstances to maintain its secrecy.

61. The use by LendingTree of Next Advisor’s trade secret information to make a decision to revise its credit card marketing plan and to conceive and build a paid credit card content marketing business to compete with Next Advisor demonstrates the commercial value of the information, constitutes misappropriation pursuant to N.C. Gen. Stat. § 66-152(1), and demonstrates that Next Advisor is likely to prevail on the merits of its claim for misappropriation of trade secrets.

62. North Carolina courts have long recognized that preliminary injunctive relief is especially appropriate where a company’s trade secrets are at stake:

[M]isappropriation of a trade secret is an injury of “such continuous and frequent occurrence that no reasonable redress can be had in a court of law.” The very nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects. The party wronged may forever lose its competitive business advantage or, at the least, a significant portion of its market share.

Barr-Mullin, 108 N.C. App. at 597, 424 S.E.2d at 230. Accordingly, “in most instances, courts presume irreparable harm where a trade secret has been misappropriated.” *Merck & Co. Inc. v. Lyon*, 941 F. Supp. 1443, 1455 (M.D.N.C. 1996). A preliminary injunction is especially warranted where misappropriation threatens to deprive a business of its competitive advantage. *Barr-Mullin*, 108 N.C. App. at 597, 424 S.E.2d at 230; *see also TSG Finishing*, 767 S.E.2d at 882 (irreparable

injury shown where the plaintiff was at risk of losing “whatever competitive advantage it may have had” in its industry).

63. To prove irreparable injury,

it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

Barr-Mullin, 108 N.C. App. at 597, 424 S.E.2d at 230 (quoting *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949)). Additionally, the North Carolina Supreme Court has “consistently adhered to the proposition that where the principal relief sought is a permanent injunction, it is particularly necessary that the preliminary injunction issue.” *A.E.P. Indus.*, 308 N.C. at 408, 302 S.E.2d at 763.

64. Next Advisor has suffered financial harm as a consequence of LendingTree’s sudden entry into paid credit card content marketing and continued efforts to “spend [itself] into significance” in paid credit card content marketing, as is demonstrated by the increased costs and declining profit margins that Next Advisor has experienced. However, the damages Next Advisor has suffered are difficult to ascertain with certainty because it is difficult to quantify the growth and profitability that Next Advisor would have continued to enjoy in the absence of LendingTree’s conduct.

65. Nevertheless, it is clear that LendingTree’s misappropriation of Next Advisor’s trade secrets have damaged Next Advisor’s business, deprived it of its market position, stripped it of market share, and dulled its competitive advantage. That injury is “not one to which [Next Advisor] should be required to submit.” *Barr-Mullin*, 108 N.C. App. at 597, 424 S.E.2d at 230. Its recurrence is “continuous and frequent” as LendingTree continues its active credit card content

marketing efforts. *Id.* Additionally, Next Advisor seeks a permanent injunction in this case, which also weighs in favor of its request for a preliminary injunction to preserve what remains of its market share and competitive advantage. *A.E.P. Indus.*, 308 N.C. at 408, 302 S.E.2d at 763.

66. The issuance of a preliminary injunction “is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *Id.* at 400, 302 S.E.2d at 759 (quoting *State v. School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980)). The Court, in exercising its discretion, “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). “In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.” *Id.*

67. Here, the Court has engaged in a balancing process, weighing potential harm to Next Advisor if the preliminary injunction is not issued against the potential harm to LendingTree if injunctive relief is granted, and finds that the potential harm to Next Advisor if the preliminary injunction is not issued substantially outweighs the potential harm to LendingTree in the event the Court grants Next Advisor’s requested injunctive relief.

68. The Court concludes that Next Advisor has suffered and continues to suffer irreparable harm as a result of LendingTree’s conduct and that the harm to Next Advisor is immediate and ongoing and cannot later be redressed by the Court if allowed to continue during the course of litigation. Moreover, under the terms of the May 5, 2016 asset purchase agreement between Next Advisor and Bankrate, Next Advisor has the opportunity to earn a potential earnout payment of up to \$145.7 million upon achieving certain growth targets over the eighteen-month period commencing July 1, 2016. Thus, if the preliminary injunction is not issued, Next Advisor

could potentially lose the right to some or all of a significant earnout payment as a result of LendingTree's entry into the paid credit card content marketing business through the use of Next Advisor's confidential information and trade secrets.

69. On the other hand, although LendingTree has made substantial investments in its paid credit card content marketing business to date, the Court finds that the entry of a preliminary injunction, if later adjudged to have been improper, would not work to squander or dissipate LendingTree's investment, but would, at most, defer LendingTree's further development of its paid credit card content marketing channel to some later date. In addition, although LendingTree contends that its relationships with credit card issuers will be unfairly harmed by the entry of a preliminary injunction, the Court finds that the relief Next Advisor seeks is narrowly restricted to LendingTree's paid credit card content marketing business and does not impact LendingTree's ability to market credit cards through other marketing channels or to place advertisements with content marketing companies for products other than credit cards. Therefore, the Court finds that a careful balancing of the equities weighs in favor of the entry of a preliminary injunction.

70. “[T]he trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant no material damage, and where the applicant for equitable relief has considerable assets and is able to respond in damages if the defendant does suffer damages by reason of a wrongful injunction.” *Stevens v. Henry*, 121 N.C. App. 150, 154, 464 S.E.2d 704, 707 (1995) (quoting *Keith*, 60 N.C. App. at 562, 299 S.E.2d at 298) (alterations and quotations omitted); *see also Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, 2015 NCBC LEXIS 66, at *32 (N.C. Super. Ct. May 26, 2015).

71. Next Advisor argues that because LendingTree acknowledges that it is not operating at a profit in its paid credit card marketing business, and because Next Advisor has

considerable assets such that it will be able to respond in damages if LendingTree were to suffer by a wrongful injunction, the Court should determine that a bond will not be required. The fact that LendingTree is not now operating at a profit, however, does not compel the conclusion that LendingTree will not have incurred any damages if it is later found that LendingTree has been wrongfully enjoined. Further, although it appears that Next Advisor received considerable assets upon the closing of the Bankrate Transaction on June 17, it is unclear to what extent those assets were, or will be, distributed to Mr. Larson or others during the course of this litigation.

72. Accordingly, pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure, and as a condition of this Order, the Court concludes, in the exercise of its discretion, that a bond of \$1 million (\$1,000,000.00) is a proper security, without prejudice to either party's right to request that the amount of the bond be increased or decreased for good cause shown.

73. **NOW THEREFORE**, based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that, through and until the conclusion of this civil action, and unless and until otherwise ordered by this Court:

- a) Defendants and anyone acting in concert with them are prohibited from using or disclosing the confidential and trade secret information that Defendants obtained from Next Advisor pursuant to the Mutual Non-Disclosure Agreement dated November 20, 2014;
- b) Defendants and anyone acting in concert with them are prohibited from engaging in paid credit card content marketing by placing credit card advertisements through any content marketing company;
- c) Pursuant to the provisions of North Carolina Rule of Civil Procedure 65(c), and as a condition of this Order, Next Advisor shall post security in the

amount of \$1 million (\$1,000,000.00) in the form of cash, check, surety bond, or other undertaking satisfactory to the Mecklenburg County Clerk of Superior Court; and

- d) The terms and conditions of this Order shall be in force and take effect immediately upon Next Advisor's posting of security as provided herein.

SO ORDERED, this the 29th day of June, 2016.

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