

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

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

NEXT ADVISOR CONTINUED,
INC.,

Plaintiff,

v.

LENDINGTREE, INC. and
LENDINGTREE, LLC,

Defendants.

**ORDER ON DEFENDANTS' MOTION
FOR STAY OF PRELIMINARY
INJUNCTION ORDER PENDING
APPEAL**

1. **THIS MATTER** is before the Court upon Defendants LendingTree, Inc. and LendingTree, LLC's (collectively, "Defendants") Motion for Stay of Preliminary Injunction Order Pending Appeal (the "Motion") in the above-captioned case.

2. On June 29, 2016, the Court filed its Order Granting Plaintiff's Motion for Preliminary Injunction (the "Preliminary Injunction Order").¹

3. On July 29, 2016, Defendants filed a Notice of Appeal of the Preliminary Injunction Order to the North Carolina Supreme Court. That same day, Defendants filed the Motion, seeking a stay of the Preliminary Injunction Order pursuant to N.C. R. Civ. P. 62(c) based on certain provisions contained in the Asset Purchase Agreement executed on May 5, 2006 by Bankrate, Inc., Next Advisor, Inc., and the Equity Holders of Next Advisor, Inc. ("Asset Purchase Agreement").

¹ The Preliminary Injunction Order was first filed under seal on June 29, 2016 so that the Court could determine whether the parties contended that any portion of the Order contained confidential business information that should remain under seal. After receiving no objections from counsel for the parties, the Court refiled the Preliminary Injunction Order on July 7, 2016 on the public docket in its entirety without redactions.

4. On August 22, 2016, Plaintiff Next Advisor Continued, Inc.² (“Next Advisor” or “Plaintiff”) filed its Response to the Motion, and on September 6, 2016, Defendants filed a Reply in further support of the Motion. A hearing was held on September 29, 2016, at which all parties were represented by counsel. The Motion is now ripe for resolution.

5. Rule 62 of the North Carolina Rules of Civil Procedure provides:

(a) . . . Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of section (c) govern the suspending, modifying, restoring, or granting of an injunction during the pending of an appeal. . . .

(c) When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

6. Our appellate courts have concluded that “the standard which a trial court should use when ruling on a Rule 62(c) motion [is] the two-pronged test articulated by our Supreme Court in [*Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 55 (1977)].” *N. Iredell Neighbors for Rural Life v. Iredell County*, 196 N.C. App. 68, 78, 674 S.E.2d 436, 443 (2009). In *Berry*, the Supreme Court stated that “[a] preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation” and “will be issued only (1)

² Plaintiff’s corporate name at the time this action was filed was “Next Advisor, Inc.” On June 22, 2016, Plaintiff amended its Articles of Incorporation to change its name from “Next Advisor, Inc.” to “Next Advisor Continued, Inc.” By Order dated August 8, 2016, the Court granted Plaintiff’s Motion to Amend Case Caption to reflect the change in Plaintiff’s corporate name from “Next Advisor, Inc.” to “Next Advisor Continued, Inc.”

if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.” *Berry*, 293 N.C. at 701, 239 S.E.2d at 574.

7. Having carefully reviewed the Motion, the parties' briefs and supporting exhibits and related materials advanced in support of and in opposition to the Motion, and the arguments of counsel, the Court concludes, as it did when the Court issued the Preliminary Injunction Order on June 29, 2016, that (i) Plaintiff has shown that it has a likelihood of success on the merits with respect to its claims for misappropriation of trade secrets under N.C. Gen. Stat. § 66-152, *et seq.*, and for breach of the parties' Non-Disclosure Agreement, (ii) Plaintiff is likely to sustain irreparable loss or harm absent the entry of the Preliminary Injunction Order, and (iii) issuance of the Preliminary Injunction Order is necessary to protect Plaintiff's rights during the course of this litigation, including, in particular, Plaintiff's rights under the Asset Purchase Agreement.

8. The Court further concludes, as it did when the Court issued the Preliminary Injunction Order, that entry of the Preliminary Injunction Order is appropriate and necessary based on either or both of the Court's independent conclusions that Plaintiff has shown that it has a likelihood of success on its claim for misappropriation of trade secrets under N.C. Gen. Stat. § 66-152, *et seq.*, and a likelihood of success on its claim for breach of the parties' Non-Disclosure Agreement.

9. The Court also concludes that a careful balancing of the equities here weighs in favor of Plaintiff and the issuance, and continuation during appeal, of the Preliminary Injunction Order. *See A.E.P. Indus., Inc., v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).

10. In addition, the Court has engaged in a balancing process, weighing potential harm to Plaintiff if the Preliminary Injunction Order is stayed during appeal against the potential harm to Defendants if the Preliminary Injunction Order is not stayed during the pendency of the appeal, and finds that the potential harm to Plaintiff if the Preliminary Injunction Order is stayed outweighs the harm to Defendants if the Preliminary Injunction Order is not stayed during the appeal. *See Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

11. Finally, although Defendants contend that they have suffered, and will continue to suffer, substantial harm and loss from the issuance and continuation of the Preliminary Injunction Order, Defendants have not argued or made any showing that the \$1 million (\$1,000,000.00) bond the Court required as a condition of the Preliminary Injunction Order should be increased or otherwise modified as permitted under Rule 62(c). As a result, the Court concludes, in the exercise of its discretion, that the bond of \$1 million (\$1,000,000.00), required in the Preliminary Injunction Order and posted or deposited on June 30, 2016 by Plaintiff, is a proper security based on the current record before the Court, without prejudice to either party's right to request that the amount of the bond be increased or decreased for good cause shown.

12. Accordingly, the Court concludes that the Preliminary Injunction Order was properly issued and that the Preliminary Injunction Order should not be stayed during the pendency of the appeal.

13. **WHEREFORE**, the Court hereby **DENIES** Defendants' Motion for Stay of Preliminary Injunction Order Pending Appeal.

SO ORDERED, this the 4th day of October, 2016.

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