STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 5801
TOTAL MERCHANT SERVICES, LLC, Plaintiff, v. TMS NC, INC. AND CHRISTOPHER COLLINS, Defendants.	**ORDER DENYING DEFENDANTS' MOTION TO STAY DISCOVERY AND DEFENDANTS' AMENDED MOTION FOR TEMPORARY STAY OF CASE AND ENFORCEMENT OF ALL ORDERS PENDING APPEAL**

1. **THIS MATTER** is before the Court on Defendants TMS NC, Inc. ("TMS NC") and Christopher Collins' ("Collins," together "Defendants") Motion to Stay Discovery (the "Motion to Stay Discovery") and Defendants' Amended Motion for Temporary Stay of Case and Enforcement of All Orders Pending Appeal (the "Motion to Stay Pending Appeal," together the "Motions") in the above-captioned case.[1] Having considered the Motions, the briefs, exhibits, and the arguments of counsel at hearings held on the Motions, and other relevant documents of record, the Court hereby **DENIES** the Motions for the reasons set forth below.

I.

PROCEDURAL AND FACTUAL BACKGROUND

2. Plaintiff TMS ("TMS") initiated this action in Wake County Superior Court on 28 April 2021, asserting claims against TMS NC and TMS NC's owner

[1] (Defs.' Mot. Stay Disc. [hereinafter "Mot. Stay Disc."], ECF No. 76; Def. TMS NC, Inc.'s and Christopher Collins's Am. Mot. for Temp. Stay of Case and Enf't of All Orders Pending Appeal [hereinafter "Mot. Stay Pending Appeal"], ECF No. 129.)

Collins for breach of contract, indemnification, specific performance, preliminary and injunctive relief, and declaratory judgment arising out of Defendants' alleged breach of an exclusive sales agreement[2] and alleged refusal to permit TMS to enforce its inspection rights pursuant to the Agreement.[3] Contemporaneously with the Complaint, TMS filed a Motion for Preliminary Injunction,[4] and served discovery requests on Defendants (the "Discovery Requests").[5]

3. Before the Motion for Preliminary Injunction was heard, Defendants removed the case to the United States District Court for the Eastern District of North Carolina, Western Division, on 8 June 2021.[6] The case was later remanded to the Superior Court of North Carolina on 16 December 2021 upon the federal court's

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[2] In brief, the parties' predecessors-in-interest entered a Sales Representation Agreement (the "Agreement") in 2008 by which TMS NC, in exchange for selling and marketing TMS's products and services, is paid a "residual share," the difference between certain rates and fees charged to each business-customer that TMS NC solicits on behalf of TMS and certain rates and fees that TMS pays to third party credit card associations and other related vendors for those services. (Verified Compl. ¶ 14 [hereinafter "Compl."], ECF No. 2; Compl. Ex. A [hereinafter "Agreement"], ECF No. 2; TMS NC's Answer with Countercl. and Third-Party Claims ¶ 13 [hereinafter "TMS NC's Ans."], ECF No. 34.) In 2018, the parties entered into an addendum to the Agreement (the "Exclusivity Addendum"), which increased TMS NC's residual share percentage in exchange for TMS NC's promise to exclusively market and sell TMS's products. (Compl. Ex. B [hereinafter "Exclusivity Addendum"], ECF No. 2.)

[3] (*See generally* Compl.)

[4] (Mot. Prelim. Inj., ECF No. 4.)

[5] (*See* Mot. Compel Disc. Resp. and for Award of Expenses Exs. A–C at 9–34 [hereinafter "Discovery Requests"], ECF No. 19.)

[6] (Notice of Removal, ECF No. 29.)

conclusion that the case had been improperly removed and the federal court's resulting imposition of sanctions against Defendants.[7]

4. After remand, on 18 January 2022, TMS filed an Amended Motion for Preliminary Injunction.[8] The Amended Motion for Preliminary Injunction was heard by the Honorable John W. Smith on 17 March 2022.[9] Judge Smith did not resolve the Amended Motion for Preliminary Injunction, however, and, at Judge Smith's recommendation, on 21 March 2022, the Chief Justice of the Supreme Court of North Carolina designated this action as a complex business case under Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts and assigned the case to the undersigned.[10]

5. On 4 April 2022, TMS filed a Second Amended Motion for Preliminary Injunction (the "PI Motion"), which was fully briefed and argued at a hearing held on 22 April 2022.[11]

6. On 5 April 2022, Defendants filed the Motion to Stay Discovery, seeking to stay discovery until the Court ruled on Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment (the "Motion to Dismiss or for Summary

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[7] (Order, ECF No. 56.)

[8] (Am. Mot. Prelim. Inj., ECF No. 17.)

[9] (*See* Notice of Hr'g, ECF No. 20.)

[10] (Designation Order, ECF No. 1; Order Staying Case Until Bus. Ct. Accepts or Rejects, ECF No. 24.)

[11] (Second Am. Mot. for Prelim. Inj., ECF No. 72; *see also* Scheduling Order and Notice of Hr'g, ECF No. 65.)

Judgment").[12] The Motion to Stay Discovery, along with other motions, was heard at a hearing on 18 May 2022.

7. The Court granted the PI Motion in part in an Order dated 6 May 2022 (the "PI Order").[13] Among other things, the PI Order (i) enjoined Defendants from offering services that compete with TMS's services to customers and (ii) required TMS NC to allow TMS to exercise certain inspection rights within seven days from entry of the PI Order, 13 May 2022.[14]

8. On 12 May 2022, the day before compliance with the PI Order was due, Defendants filed a Notice of Appeal that purported to appeal the PI Order.[15] The interlocutory appeal was made to the North Carolina Court of Appeals, however, rather than the Supreme Court of North Carolina and was therefore made to the wrong appellate court and thus without legal effect.

9. On 13 May 2022, Defendants filed a Motion for Temporary Stay Pending Appeal,[16] which Defendants subsequently amended that same day.[17] The Court

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[12] (Defs.' Mot. Dismiss or in the Alt. Mot. for Summ. J., ECF No. 68.)

[13] (Order on Pl. Total Merchant Services' Second Am. Mot. for Prelim. Inj. [hereinafter "PI Order"], ECF No. 98.)

[14] (PI Order ¶ 70.)

[15] (Aff. of Joshua P. Gunnemann ¶ 5, ECF No. 122; Notice of Appeal, ECF No. 101.)

[16] (Defs. TMS NC's and Collins' Mot. for Temp. Stay Pending Appeal, ECF No. 102.)

[17] (Defs. TMS NC's and Collins' Am. Mot. for Temp. Stay Pending Appeal, ECF No. 105.)

summarily denied the motion without prejudice on 16 May 2022 because Defendants failed to comply with the Business Court Rules in presenting the motion.[18]

10. The Court subsequently amended the PI Order ("Order Amending PI Order") on 19 May 2022 to more accurately reflect Plaintiff's interpretation of the Agreement and to indicate that Plaintiff had paid the required bond.[19] The Court did not otherwise modify the PI Order at that time. Later that same day, Defendants filed an Amended Notice of Appeal, this time properly addressed to the Supreme Court of North Carolina,[20] and the Court issued an order clarifying (the "Clarifying Order") that its Order Amending PI Order did not change the dates for compliance with paragraph 70 of the PI Order and that the deadline for Defendants to comply with the PI Order remained 13 May 2022.[21]

11. On 23 May 2022, Defendants filed the Motion to Stay Pending Appeal, which was heard, with other motions, at a hearing on 15 June 2022 (the "June 15 Hearing"), at which all represented parties were represented by counsel.[22]

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[18] (Order Summarily Denying Without Prejudice Defs. TMS NC, Inc.'s and Christopher Collins' Am. Mot. for Temp. Stay Pending Appeal, ECF No. 108.)

[19] (Compl. Ex. A, ECF No. 2; Order Amending Order on Pl. Total Merchant Services' Second Am. Mot. for Prelim. Inj., ECF No. 115; *see also* ECF Nos. 115.1, 116.)

[20] (Am. Notice of Appeal, ECF No. 117)

[21] (Order Clarifying Order Amending Order on Pl. Total Merchant Services' Second Am. Mot. for Prelim. Inj. [hereinafter "Clarifying Order"], ECF No. 118; *see also* Second Am. Order on Pl.'s Second Am. Mot for Prelim. Inj., ECF No. 118.1; Second Am. Order on Pl.'s Second Am. Mot for Prelim. Inj., ECF No. 119.)

[22] (*See* Am. Scheduling Order and Notice of Hr'g and Case Mgmt. Conf., ECF 132.)

12. Even though the Court issued the PI Order on 6 May 2022, Defendants have refused to this date to comply with the PI Order in any respect.

13. The Motions are now ripe for resolution.

II.

LEGAL STANDARD

14. Under N.C.G.S. § 1-294, an appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]" "[A]n interlocutory order, one that 'does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy,' is generally not appealable" and thus generally not a candidate for immediate review. *SED Holdings, LLC v. 3 Star Props., LLC*, 250 N.C. App. 215, 220 (2016) (quoting *Veazey v. Durham*, 231 N.C. 357, 362 (1950)). Nevertheless, an interlocutory order will be deemed immediately appealable when it "affects a substantial right that will clearly be lost or irremediably adversely affected if the order is not reviewed before final judgment." *Id.* at 221 (cleaned up).

15. A "two-part test has developed" to determine whether an interlocutory order affects a substantial right: "the right itself must be substantial and the deprivation of that substantial right must potentially work injury to the appellant if not corrected before appeal from final judgment." *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484 (2017) (cleaned up). "The trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable." *RPR & Assocs. v. Univ. of N.C.-Chapel Hill*, 153

N.C. App. 342, 348 (2002). The trial court makes this determination on a case-by-case basis, *see SED Holdings, LLC*, 250 N.C. App. at 221, and the appellant bears the burden of showing that the interlocutory order affects a substantial right, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994).

16. North Carolina Rule of Civil Procedure ("Rule(s)") 62(c) provides that:

> **Injunction pending appeal.** — 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.

17. The Court of Appeals has held that, "when ruling on a Rule 62(c) motion, . . . the two-pronged test articulated by our Supreme Court in [*Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977) is] applicable." *N. Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 79 (2009). In *Berry*, the Supreme Court provided the following test:

> A preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) 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.

293 N.C. at 701 (emphasis omitted).

18. Rule 62(d) provides in relevant part that "[w]hen an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295."

19. Rule 26(c) permits "our state trial courts . . . to limit discovery where 'justice requires it' to protect a party or person, including a corporate executive, 'from unreasonable annoyance, embarrassment, oppression, or undue burden or expense.' " *Next Advisor Continued, Inc. v. LendingTree, Inc.*, 2016 NCBC LEXIS 72, at *9–10 (N.C. Super. Ct. Sept. 16, 2016) (quoting N.C. R. Civ. P. 26(c)).

20. Our Court of Appeals has summarized the relevant standard of review as follows:

> When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion. A trial court may be reversed for abuse of discretion only if the trial court made a patently arbitrary decision, manifestly unsupported by reason. Rather, appellate review is limited to [e]nsuring that the decision could, in light of the factual context in which it was made, be the product of reason.

Southeastern Surs. Grp., Inc. v. Int'l Fid. Ins. Co., 244 N.C. App. 439, 457–58 (2015) (alteration in original) (citation omitted).

III.

ANALYSIS

A. The Motion to Stay Pending Appeal[23]

1. Whether an Automatic Stay is in Effect

21. The PI Order is still in effect and remains in force. It was entered pending final resolution or other order of the Court, and the Court has not entered any orders dissolving the PI Order. In pertinent part, the PI Order directed

[23] The parties' arguments on the Motion to Stay Pending Appeal overlap significantly with their arguments on Plaintiff's Motion for Civil Contempt, for an Award of Attorneys' Fees, and for Expedited Briefing (the "Motion to Compel"), ([hereinafter "Contempt Mot."], ECF No. 120), so the Court cites from briefing on both motions.

Defendants to (i) honor the Exclusivity Addendum, (ii) "allow TMS access to the premises of TMS NC and provide TMS with full and unfettered access to the books, records, accounts, and files of TMS NC pertaining to TMS NC's performance of the Services for the purpose of TMS inspecting and copying those items" and (iii) "provide TMS current and updated financial and other information on TMS NC and its directors, officers, shareholders, partners, or principals."[24]

22. Our appellate courts have recognized that "a preliminary injunction is interlocutory in nature, and, as a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment." *Onslow Cnty. v. Moore*, 129 N.C. App. 376, 387 (1998) (cleaned up) (citing *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23 (1990)); *see also Sia Grp., Inc. v. Patterson*, 254 N.C. App. 85, 87 (2017) ("A trial court's ruling on a motion for preliminary injunction is interlocutory." (quoting *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639 (2002))).

23. Defendants contend that the action is automatically stayed under section 1-294 because they appealed the PI Order, which Defendants contend impacts their substantial rights. As expressed in the Clarifying Order and again in the Second Amended Order on Plaintiff's Second Amended Motion for Preliminary Injunction, the Court disagrees and considers Defendants' appeal to be an

[24] (PI Order ¶ 70(a)–(d).)

interlocutory appeal that does not affect a substantial right.[25] The Court will address each substantial right that Defendants propose in turn.

a. Whether the PI Order Affected Defendants' Substantial Right to Make a Living

24. Defendants primarily argue that the PI Order affects their substantial right "to earn a living and practice their livelihood."[26] Defendants liken enforcement of the Exclusivity Addendum, which prohibits Defendants from "directly or indirectly . . . market[ing], promot[ing] or sell[ing] any processing program that competes (or would reasonably be expected to compete) with TMS'[s] Processing Program . . . or solicit[ing] or encourag[ing] any businesses or financial institutions to join or apply for admission into any such Competing Program," to the enforcement of a noncompete agreement, a type of restrictive covenant that North Carolina courts have sometimes found to affect a party's substantial right to earn a living.[27] *See, e.g.*, *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866 (1993); *Masterclean of N.C., Inc. v. Guy*, 82 N.C. App. 45 (1986); *QSP, Inc. v. Hair*, 152 N.C. App. 174 (2002).

25. Plaintiff denies that the PI Order affects Defendants' substantial right to make a living because Plaintiff contends that the Exclusivity Addendum is

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[25] (Clarifying Order n.1; Second Am. Order on Pl.'s Second Am. Mot for Prelim. Inj. n.1, ECF No. 119.)

[26] (Defs.' Opp'n to Pl.'s Mot. for Civ. Contempt 8 [hereinafter "Def.s' Opp'n Mot. Contempt"], ECF No. 135 (quoting *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635 (2002)).)

[27] (Exclusivity Addendum ¶ 4(a); Defs.' Mem. Supp. Mot. for Temp. Stay of Case and Enf't of All Orders Pending Appeal 7–9 [hereinafter "Defs.' Supp. Mot. Stay Pending Appeal"], ECF No. 130.)

narrower in scope than the restrictions in the cases cited by Defendants.[28] Plaintiff also relies on evidence showing that Defendants are still doing business with Plaintiff and earning substantial compensation—between $285,000 and $327,000 per month—pursuant to the Agreement, facts Plaintiff argues belie the suggestion that Defendants would be prevented from making a living by remaining an exclusive seller and marketer of Plaintiff's products.[29]

26. The Court agrees with Plaintiff. Our courts have long distinguished between interlocutory orders that merely "affect" a defendant's ability to do business (which do not affect a substantial right and are not immediately appealable)[30] and orders that "prevent" or "halt" a defendant from doing business (which can affect a substantial right and may be immediately appealable).[31]

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[28] (Pl.'s Resp. Opp'n Defs.' Am. Mot. for Stay (ECF No. 129) 2–6 [hereinafter "Pl.'s Opp'n Mot. Stay Pending Appeal"], ECF No. 134.)

[29] (Mem. Supp. Pl.'s Mot. for Civ. Contempt, for an Award of Att'ys' Fees, and for Expedited Br. 8–10, ECF No. 123; Reply Br. Supp. Pl.'s Mot. for Civ. Contempt, for an Award of Att'ys' Fees, and for Expedited Br. 2, ECF No. 137 (citing Compl. ¶ 15; Aff. of Meredith Taunt ¶ 16 [hereinafter "Taunt Aff."], ECF No. 73); TMS NC's Ans. ¶ 15.)

[30] Representative decisions in which our courts have found that a substantial right did not exist because the enjoined party was not prevented from earning a living include: *A & D Env't Servs., Inc. v. Miller*, 243 N.C. App. 1, 4 (2015) ("[A]n injunction which merely *limits* a person's ability to earn a living may not affect a substantial right."); *Consol. Textiles, Inc. v. Sprague*, 117 N.C. App. 132, 134 (1994) ("Here, defendant is not *prevented* from earning a living or practicing his livelihood." (emphasis added)); *Live, Inc. v. Domino's Pizza, LLC*, 225 N.C. App. 265 (2013) (injunction that only "*partially* affected" without "complete[ly] halt[ing]" defendants' business does not affect a substantial right (emphasis added)); *Barnes v. St. Rose Church of Christ, Disciples of Christ*, 160 N.C. App. 590, 592 (2003) (where day-to-day operation of defendant "is not halted" by the trial court's injunction, the injunction does not affect a substantial right); *Batesville Casket Co. v. Wings Aviation, Inc.*, 214 N.C. App. 447, 457 (2011) (same).

[31] Representative decisions in which our courts have found that a substantial right did exist because the enjoined party was prevented from earning a living include: *Milner*, 111 N.C. App. at 869 (finding that a substantial right was affected where employees resigned and were

27. The undisputed evidence here shows that Defendants received over $3,000,000 in annual compensation from Plaintiff between February 2021 and April 2022, and TMS NC admitted in its Answer that, from its entry into the Exclusivity Addendum on 1 October 2018 through February 2021, it "was paid more than $9.4 million [or more than $327,000 per month on average] as its residual share," by Plaintiff.[32] No evidence has been offered suggesting that Defendants will not be able to continue earning substantial compensation from Plaintiff under the terms of the PI Order during the pendency of this litigation or even that the PI Order has caused Defendants to lose revenue from any other source.

28. Moreover, Defendants have not offered argument, much less evidence, that their monthly compensation has not actually been received or is otherwise less than the undisputed evidence shows that it is. To the contrary, all the evidence in the record indicates that Defendants' exclusive relationship with Plaintiff is extremely profitable for Defendants and consistent with TMS NC's usual line of work.[33] In fact, Collins testified that TMS NC has added over five hundred merchants since June 2020.[34] As such, Defendants' contention the PI Order has denied them

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rendered "[un]ab[le] to do business" by the enforcement of a noncompete); *Precision Walls, Inc.*, 152 N.C. App. at 635 (same); *Masterclean*, 82 N.C. App. at 52 (stating that a preliminary injunction forbidding the defendant from practicing his line of work anywhere in the United States "deprived [him] of a realistic opportunity to use his own skill and talents" and rises to the level of a substantial right); *QSP, Inc.*, 152 N.C. App. at 177 (finding same where an employee subject to restrictive covenant resigned and competed with former employer).

[32] (Taunt Aff. ¶ 16; TMS NC's Ans. ¶ 15; Compl. ¶ 15.)

[33] (Taunt Aff. ¶¶ 14–16; Compl. ¶ 15; TMS NC's Ans. ¶ 15.)

[34] (Collins Aff. ¶ 18, ECF No. 87.)

the right "to earn a living and practice their livelihood" is wholly refuted by the undisputed factual record.[35]

29. Further, by its plain terms, the Exclusivity Addendum preserves the parties' business relationship and only restricts Defendants from "market[ing], promot[ing], or sell[ing] any processing program that competes (or would reasonably be expected to compete) with TMS'[s] Processing Program."[36] The PI Order maintains the status quo reflected in the Exclusivity Addendum—which the Court found in the PI Order that Plaintiff has shown is likely enforceable—by simply requiring Defendants to do that which they agreed to do, for the substantial compensation that Plaintiff agreed to pay and Defendants agreed to receive. As a result, Defendants cannot show that the PI Order affects a substantial right in these circumstances. Like the federal court that found Defendants' earlier removal of this action to be improper, the Court does not find the rejection of Defendants' substantial right

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[35] At most, Defendants' ability to earn a livelihood is affected by the PI Order in the same way that a zoning ordinance sometimes affects a portion of an impacted party's ongoing business operations. In those situations, our courts have routinely concluded that the ordinance does not affect a substantial right. *See, e.g.*, *Bessemer City Express*, 155 N.C. App. at 638, 640 (finding an ordinance prohibiting a food store from having video game machines on its premises did not affect the substantial right to practice one's livelihood because "the ordinance d[id] not restrict plaintiffs from operating their businesses' other functions such as selling food and supplies. . . . Plaintiffs simply [we]re limited in their use of video machines"); *City of Fayetteville v. E & J Invs.*, 90 N.C. App. 268, 270 (1988) (finding that a substantial right was not affected because an ordinance prohibiting topless dancing "merely enjoin[ed] defendants from violating . . . the Fayetteville City Code" and did not impact the lounge's ability to operate as a lounge); *Rollins v. Town of Cleveland*, No. COA04-997, 2005 N.C. App. LEXIS 932, at *7 (Ct. App. May 3, 2005) (concluding that a zoning ordinance limiting appellant's truck delivery business did not affect appellant's right to make a living, in part because it "appears that petitioner is still operating his business").

[36] (Exclusivity Addendum ¶ 4(a).)

analysis on this basis to be a "close call." Defendants' effort to stay this action pending appeal on this ground is wholly without merit.

b. Whether the PI Order Affected Defendants' Substantial Right to Keep Financial Information Private

30. Defendants next argue that allowing Plaintiff to access the information and documents the PI Order orders Defendants to produce affects a substantial right because preparing the contemplated documents would be expensive and, if the Supreme Court decides that the Exclusivity Addendum was in fact terminated, Defendants would be incurably prejudiced if Plaintiff gains access to books and records that it has no right to examine.[37]

31. Defendants advance no evidence to substantiate their forecast that complying with the PI Order will be unduly expensive. The rest of Defendants' argument on this point amounts to a disagreement with the Court's finding that Plaintiff has a present contractual right to access the information identified in the PI Order. Defendants broadly contend that confidential information is lurking in the books and records, but "[b]lanket assertions that production is not required due to a privilege or immunity are insufficient to demonstrate the existence of a substantial right." *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 433 (2019). Accordingly, Defendants fail to establish their entitlement to an automatic stay on this basis as well.

[37] (Defs.' Mem. Supp. Mot. for Temp. Stay of Case and Enf't of All Orders Pending Appeal 7–9 [hereinafter "Defs.' Supp. Mot. Stay Pending Appeal"], ECF No. 130.)

c. Whether the PI Order Otherwise Changed the Status Quo

32. Defendants also argue that the PI Order is immediately appealable because it changed the status quo by (i) enforcing the Exclusivity Addendum, which Defendants contend has been terminated for over two years, and (ii) allowing Plaintiff to inspect documents that Defendants were never required to maintain or produce.[38] In making this argument, Defendants again blind themselves to the Court's conclusions of law in the PI Order that "Plaintiff has shown a likelihood of success in establishing the existence of a valid contract [the Agreement as modified by the Exclusivity Addendum]" and that "Plaintiff timely sought to exercise its inspection rights[,]" including its right to inspect the very documents that Defendants contend they are not required to produce.[39]

2. Whether a Discretionary Stay is Warranted

33. In addition to asserting that the case is automatically stayed, Defendants request the Court to either suspend enforcement of the PI Order pending appeal pursuant to Rule 62(c) or enter a discretionary stay pursuant to Rule 62(d).[40]

34. Plaintiff contends that Defendants' request for a discretionary stay is nothing more than a request for the Court to reconsider its PI Order, a request the

[38] (Defs.' Opp'n Mot. Contempt 8–9.)

[39] (PI Order ¶¶ 48, 63.)

[40] (Defs.' Supp. Mot. Stay Pending Appeal 2–3, 9–10.)

Court should decline considering its findings that Plaintiff is entitled to an injunction, that Plaintiff will be irreparably harmed without one, and that the matter is urgent.[41]

35. The Court agrees with Plaintiff.

36. As mentioned above, the standard that North Carolina trial courts use when reviewing motions made under Rule 62(c) is identical to the standard used when reviewing preliminary injunction motions. *N. Iredell Neighbors for Rural Life*, 196 N.C. App. at 79 (citing *Berry* 293 N.C. at 701). Of course, the Court already applied this exact two-pronged analysis in its PI Order when it concluded that Plaintiff was entitled to an injunction.[42] In requesting a discretionary stay under Rules 62(c) and (d), Defendants rely on grounds that the Court has already rejected in this Order and the PI Order. Nothing Defendants presented at the June 15 Hearing or in its supporting brief upsets the Court's conclusion that the PI Order does not threaten Defendants' substantial rights. Staying this action would only serve to delay the resolution of an action that has been pending for over a year. The Court denies Defendants' Motion to Stay Pending Appeal accordingly.[43]

B. The Motion to Stay Discovery

37. Defendants move pursuant to Rule 26(c) to stay discovery until the Court resolves Defendants' Motion to Dismiss or for Summary Judgment, contending

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[41] (Pl.'s Resp. Opp'n Defs.' Am. Mot. for Stay (ECF No. 129) 6 [hereinafter "Pl.'s Opp'n Mot. Stay Pending Appeal"], ECF No. 134 (citing PI Order).)

[42] (*See generally* PI Order.)

[43] For these same reasons, the Court declines to exercise its inherent authority to enter a discretionary stay of proceedings pending appeal.

that enduring the hassle and expense of discovery would be unnecessary if the Court grants Defendants' dispositive motion.[44]

38. Plaintiff contends that staying discovery is inappropriate because Defendants provide no evidence of their discovery costs, Defendants have waived their right to protect themselves from discovery in the first place, and, to the extent that Defendants seek summary judgment, Plaintiff requires discovery to challenge that motion adequately and fairly under Rule 56(f).[45]

39. The Court again agrees with Plaintiff.

40. First, as the "party seeking a protective order on the basis that electronically stored information sought is from a source identified as not reasonably accessible because of undue burden or cost," Defendants have "the burden of showing that the basis exists." N.C. R. Civ. P. 26(c). Defendants fail to meet this burden because, despite their insistence that discovery will be costly, they admit in their briefing that they "are unable to ascertain at this time the number of documents at issue in this case[.]"[46] Defendants cite to *Cleveland Construction, Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407-RJC-DCK, 2009 U.S. Dist. LEXIS 33876 (W.D.N.C. Mar. 31, 2009), in which a movant obtained a Rule 26(c) stay on discovery without stating an exact dollar amount in expected costs. However, the movant in

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[44] (Mem. Supp. Defs.' Mot. Stay Disc. [hereinafter "Defs.' Supp. Mot Stay Disc."], ECF No. 77.)

[45] (Pl.'s Resp. Opp'n Defs.' Mot. Stay Disc. 1–6 [hereinafter "Pl.'s Opp'n Mot. Stay Disc."], ECF No. 91.)

[46] (Defs.' Supp. Mot. Stay Disc. 5.)

Cleveland Construction faced a production request "of over five hundred boxes of documents and potentially one million pages or more, including requests for documents from out-of-state locations." *Id.* at *3. Defendants have put forth no evidence of that sort.

41. Next, Plaintiff contends that Defendants' Motion to Stay Discovery is a disguised objection to discovery that Defendants have waived by failing to provide discovery responses to Plaintiff's Discovery Requests within forty-five days as required by Rules 33(a) and 34(b). The Court agrees with Plaintiff's calculations that this deadline expired, at the latest, on 5 January 2022,[47] a date that passed without any response or objection from Defendants. Instead, Defendants filed their first discovery responses on 16 March 2022, and even then, Plaintiff has shown that these responses were deficient.[48] Because Defendants failed to answer the discovery responses by the allotted deadline, Defendants have waived their basis for objecting to the outstanding Discovery Requests. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 415 (1975) (finding that failure to answer interrogatories until twenty-six days after they were due and to object until forty-six days after the objection

[47] Plaintiff served its discovery requests with the Complaint on 28 April 2021. Under Rule 33(a), Defendants had forty-five days to respond. After thirty of the forty-five days had passed, Defendants removed the case to federal court on 8 June 2021. The case was remanded to this Court on 21 December 2021. Excluding the dates between Defendants' improper removal and the resulting remand, the remaining fifteen days available for Defendants' response expired on 5 January 2022. (*See* Pl.'s. Opp'n Mot. Stay Disc. 2; Br. Supp. Am. Mot. Compel Disc. Resp. and for Award of Expenses 1–4, ECF No. 67.)

[48] (Pl.'s Opp'n Mot. Stay Disc. 2–3.) Plaintiff has raised the adequacy of Defendants' responses through its Motion to Compel, which was heard at the June 15 Hearing. The Court announced its intention to grant the Motion to Compel at the June 15 Hearing but has not yet entered its written order on the motion.

deadline passed resulted in waiver of the right to objection); *see also Kean v. Kean*, 2022 N.C. App LEXIS 277, **3–4, **10–12 (Apr. 19, 2022) (unpublished) (affirming trial court's waiver of objections when interrogatories were served thirty-one days after they were due).

42. Finally, as Plaintiff points out, staying discovery to allow the parties to resolve the Motion to Dismiss or for Summary Judgment would be highly prejudicial and grossly unfair because Defendants have appended documents to their Motion to Dismiss or for Summary Judgment that have never been produced to Plaintiff while at the same time requesting to stay discovery on those very same issues.

43. In sum, Defendants have failed to show good cause for staying discovery, and the Court, in the exercise of its discretion, refuses to indulge Defendants' further delay in answering discovery requests that have been pending for over a year without Defendants producing a single document in response.

44. **WHEREFORE**, for the reasons set forth above and in the exercise of its discretion, the Court hereby **DENIES** the Motions.

It is **SO ORDERED**, this the 27th day of June, 2022.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III
Chief Business Court Judge