

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Retail Service Systems, Inc.,	:	
Plaintiff	:	Civil Action 2:13-cv-00994
v.	:	Judge Smith
Carolina Bedding Direct, LLC, <i>et al.</i> ,	:	Magistrate Judge Abel
Defendants	:	

Scheduling Conference Order

On February 19, 2014, counsel for the parties participated in a scheduling conference with the Magistrate Judge. During the conference, counsel presented arguments relating to the February 16, 2014 motion for expedited discovery (doc. 26) filed by plaintiff Retail Service Systems, Inc. (“RSS”) and the February 17, 2014 motions to set aside entry of default, to vacate the motion for default judgment hearing date, and for leave to move or plead to the complaint (doc. 27) and to continue the February 20, 2014 hearing on plaintiff’s motion for default judgment and for expedited briefing of that motion (doc. 28) filed by defendant Carolina Bedding Direct, LLC, a dissolved North Carolina limited liability company (“Carolina Bedding Direct, LLC [NC]”).¹

Allegations in the complaint. RSS brings this action asserting defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC, and Doe Defendants 1

¹As explained below, there are two entities with the name “Carolina Bedding Direct, LLC”. One was formed in North Carolina and the other in Florida. The complaint discusses both entities.

through 50 violated Ohio's Uniform Trade Secrets Act, Ohio Revised Code §§ 1333.61 *et seq.*, and engaged in a civil conspiracy. Jurisdiction is alleged under 28 U.S.C. § 1332.

Background facts pleaded in the complaint. PMD and PMD Furniture Direct, Inc. (collectively “PMD”) developed a unique, comprehensive marketing program for the sale of bedding and furniture through small warehouses, using classified advertising, detailed telephone and sales scripts, and specific marketing techniques and sales approaches. Complaint, ¶ 11. In June 2013, PMD sold all its licenses, accounts receivable, judgments, and intellectual property (including trade secrets) to RSS. *Id.*, ¶ 3

From early 2000 to April 2003, Darren Conrad was first an assistant to PMD’s president and, later, a PMD dealer, manager, and dealer trainer. *Id.*, ¶ 13. When he left PMD in April 2003, Conrad signed a 3-year non-compete. *Id.*, ¶ 15. Nonetheless, he went into business in competition with PMD, using PMD’s confidential materials to train his dealers. *Id.*, ¶¶ 18-20.

In February 2004, PMD sued Conrad in the Franklin County Common Pleas Court for breach of a license agreement and separation agreement. *Id.*, ¶ 22. The Common Pleas Court issued a preliminary injunction and, later, a permanent injunction *Id.*, ¶¶ 23 and 32-34. The judge found that Conrad violated the non-compete and the Uniform Trade Secrets Act. *Id.*, ¶¶ 32-23. The non-compete was extended an additional 15 months from the date of the January 2009 judgment. *Id.*, ¶ 35. During the course of that litigation and after, Conrad continued to operate his businesses in violation of the injunctions and final judgment. *Id.*, ¶¶ 27 and 37.

Facts pleaded in the complaint about “Carolina Bedding Direct, LLC”. The

caption of the complaint names as a party defendant:

Carolina Bedding Direct, LLC
c/o Statutory Agent Nicholas Lyle
5275 Cleves Warsaw Pike
Cincinnati, Ohio 45238

The introduction section of the complaint states that Carolina Bedding Direct, LLC will be referred to as “Carolina Bedding”. Complaint, ¶ 1. The second named defendant, Mattress By Appointment, LLC, is referred to as “MBA”. *Id.* Carolina Bedding Direct, LLC is alleged to be a limited liability company located in North Carolina that was dissolved in October 2011.² Complaint, ¶ 6. The complaint further alleges that “. . . Carolina Bedding has filed as a Florida limited liability company Under all scenarios, Carolina Bedding is a foreign corporation doing business in Ohio.” *Id.*

When alleging Carolina Bedding’s actionable conduct, the complaint uses the present tense:

- “defendants Carolina Bedding and MBA—the Conrad Entities—operated by and through Darren Conrad **are using** the trade secrets and materials derived from proprietary information first obtained from PMD and now owned by RSS.” Complaint, ¶ 4;
- “. . . Carolina Bedding Direct, LLC and Mattress By Appointment, LLC **are** successors-in-interest and pass-through, wholly-owned entities of Darren

²During the February 19 conference, defendants’ counsel stated that Carolina Bedding Direct, LLC [NC] was created in October 2011 and dissolved in April 2012.

Conrad **that continue in operation to this day** in violation of the Franklin County Common Pleas Court’s permanent injunction” Complaint, ¶ 36; and

- “. . . defendant Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, have obtained **and continue to use** PMD’s trade secrets” Complaint, ¶ 37.

The complaint does also allege that Carolina Bedding Direct, LLC engaged in actionable conduct in the past. Complaint, ¶¶ 36 (“operated in violation of the Court’s fifteen month injunction from August 26, 2009 to November 26, 2010”) and 37 (“have obtained and continue to use PMD’s trade secrets”).

Default. Defendants argue that Carolina Bedding Direct, LLC [NC] had no obligation to respond to the complaint because the complaint did not give it fair notice that it was a named defendant. Given the references in the body of the complaint to both a North Carolina and a Florida “Carolina Bedding Direct, LLC,” I recognize that it is not wholly unambiguous which entity is a named defendant, or, indeed, whether the complaint may intend to name both entities as one defendant. Be that as it may, that is not a reason for Carolina Bedding Direct, LLC [NC] to fail to respond to the complaint. Its agent for service of process in Ohio is named in the caption of the complaint; and the complaint does allege that Carolina Bedding Direct, LLC [NC] engaged in actionable conduct. Once served with process, Carolina Bedding Direct, LLC [NC] had a legal obligation to respond to the complaint.

Doc. 26 (motion for expedited discovery). Plaintiff's February 14, 2014 motion for expedited discovery (doc. 26) is GRANTED to the following extent. Judge Smith has noticed plaintiff's November 21, 2013 motion for default judgment against defendant Carolina Bedding Direct, LLC (doc. 10) for a hearing before me for proof of a *prima facie* case of liability and to determine damages. Counsel did not enter an appearance for Carolina Bedding Direct, LLC [NC] until February 14. Plaintiff is entitled to an expeditious disposition of its motion for default judgment. Judge Smith may or may not choose to rule on defendants' just filed motions to vacate entry of default before the hearing on the motion for default judgment. Further, plaintiff is entitled to expedited discovery on the issues of whether defendants have been properly served with summons and complaint and whether this Court has personal jurisdiction over them.

I have ordered that the parties may proceed with merits discovery. Because defendants contest personal jurisdiction, merits discovery as to them must proceed under Rule 45, Fed. R. Civ. P. Defendants' counsel expressed concern that my permitting merits discovery may result in their clients exposing themselves to personal jurisdiction in the Southern District of Ohio. I recognize that if defendants serve merits discovery, they may be deemed to have waived their absence of personal jurisdiction defense.

The merits discovery I envision is relatively limited. Plaintiff has the right to take such discovery necessary to prove its damages by the greater weight of the evidence. Since much, if not all, of that information is in the hands of defendants or Darren Con-

rad, defendants are unlikely to need discovery from plaintiff. If they do, then taking discovery because of my order that merits discovery may proceed should not undermine their personal jurisdiction defense since they are not initiating contact with this jurisdiction and are participating in the discovery only because ordered to do so by the court. I understand defendants' position that they do not have minimum due process contacts with Ohio and that they are presently before the court because default has been entered against them and plaintiff has moved for default judgment. It is not my intent that their participation in the discovery I have permitted should in any way subject them to personal jurisdiction in Ohio.

Plaintiff's counsel has served a Rule 45 subpoena on defendants, but defendants have responded that the subpoenas did not comply with the procedural requirements of the rule, are over broad, and seek irrelevant information. If plaintiff believes the subpoena is enforceable, it should promptly file a motion to compel. Any memorandum in opposition must be filed within 14 days and any reply brief within 7 days. Once briefing is underway, counsel should call my office (614.719.3370) to obtain a date and time for oral argument on the motion.

If plaintiff determines that it is necessary to re-serve the subpoenas, counsel should do so promptly. To expedite discovery, the parties are ORDERED to respond to written discovery requests within 12 business days. Counsel should confer with an eye to resolving any disputes. An objection to a particular discovery request or subset of a request should not delay a response to the remaining discovery requests. So, for ex-

ample, if a party objects to a discovery request as over broad, that party must nonetheless promptly produce documents that fall within the scope of the request that are undeniably relevant.

Motions to vacate hearing date (docs. 27 and 28). Defendant Carolina Bedding Direct, LLC [NC]'s February 17, 2014 motions to vacate the February 20 hearing on plaintiff's November 21, 2013 motion for default judgment is GRANTED to the following extent. Plaintiff's counsel asked that the hearing on the January 27, 2014 motion for default judgment against defendant Mattress By Appointment, LLC (doc. 17) be combined with that as to the motion for default judgment against Carolina Bedding Direct, LLC [NC]. Accordingly, the hearing noticed for February 20 is CONTINUED. I am committed to promptly holding the hearing once expedited discovery related to the hearing and the Rule 55 motions is completed. Further delay is not in the interests of the parties or the public.

Counsel should confer and discuss what discovery each side believes it needs to complete briefing on the Rule 55 motions to set aside entry of default and the hearing on the motions for default judgment. Counsel should then submit a proposed schedule for conducting that discovery, filing their briefs, and hold the hearing. If they have not already done so, counsel should email me (abel_chambers@ohsd.uscourts.gov) their proposed scheduling order on or before **February 28, 2014**.

Counsel would like to meet with Judge Smith to discuss the schedule for disposition of the outstanding motions and the timing of the hearing on the motions for default judgment. I have communicated that request to Judge Smith's chambers.

s/Mark R. Abel
United States Magistrate Judge