

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV020659-910

IMPLUS FOOTCARE, LLC and IM
GROUP HOLDINGS
CORPORATION,

Plaintiffs,

v.

TODD VORE, BLUE SAN, LLC, H.B.
SHOES CO., and THE MIKE HALE
COMPANY,

Defendants.

**ORDER ON
MOTION FOR COMMISSION**

THIS MATTER is before the Court on Defendants Todd Vore and Blue San, LLC's ("Blue San," and together with Vore, "Defendants") Motion for Commission ("Motion," ECF No. 60).

FACTUAL AND PROCEDURAL BACKGROUND

1. On 2 July 2024, Plaintiffs Implus Footcare, LLC ("Implus") and IM Group Holdings Corporation (together with Implus, "Plaintiffs") filed a Complaint (ECF No. 3) against Vore, asserting various claims for monetary relief.
2. Plaintiffs filed an Amended Complaint (ECF No. 30) on 21 October 2024, adding claims against Blue San.
3. On 20 November 2024, Blue San filed an Answer (ECF No. 34) in which it asserted counterclaims against Plaintiffs.

4. Blue San subsequently filed Amended Counterclaims (ECF No. 54) on 30 January 2025. At the same time, Plaintiffs filed a Motion for Leave to File Second Amended Complaint (ECF No. 55).

5. The Court entered an Order (ECF No. 58) on 11 February 2025, granting Plaintiffs leave to file the Second Amended Complaint (ECF No. 59), which Plaintiffs filed later that day.

6. On 13 February 2025, Defendants filed the present Motion seeking this Court's issuance of a commission in connection with a subpoena to a non-party entity, Berkshire Partners ("Berkshire"), compelling Berkshire to produce documents and designate a corporate representative to appear for a deposition.

7. In the Motion, Defendants assert that Berkshire is a Massachusetts private equity firm that has been the majority interest shareholder in Implus since on or about 30 April 2025.

8. Defendants allege that Berkshire negotiated and drafted two of the primary documents central to this action—the 2015 IM Group Holdings Stockholders Agreement and the 2020 Vore Separation Agreement.

9. Defendants contend that Berkshire is in possession of drafts and final versions of key documents that were executed between Vore and Implus and that—as the majority stockholder of Implus—Berkshire possesses relevant (or potentially relevant) information, including the identities of other individuals who have received Plaintiffs' purported trade secret information.

10. On 23 February 2025, Plaintiffs filed Objections to Defendants' Motion for Commission ("Objections," ECF No. 64). In their Objections, Plaintiffs oppose the Motion on various grounds, arguing that the subpoena to Berkshire (1) seeks privileged and confidential information; (2) calls for the disclosure of information that is irrelevant to any of the parties' claims or defenses; (3) seeks information that should have first been requested from Plaintiffs; and (4) was filed without Defendant making a good faith effort to confer with Plaintiff regarding the scope of the subpoena.

ANALYSIS

11. North Carolina Rule of Civil Procedure 45 governs the issuance of subpoenas in civil actions. Specifically, Rule 45(f) provides that

Any party may obtain discovery from a person residing in another state of the United States . . . in any one or more of the following forms: (i) oral depositions, (ii) depositions upon written questions, or (iii) requests for production of documents and tangible things. In doing so, the party shall use and follow any applicable process and procedures required and available under the laws of the state . . . where the discovery is to be obtained. If required by the process or procedure of that state . . . where the discovery is to be obtained, a commission may issue from the court in which the action is pending in accordance with the procedures set forth in subdivision (2) of this subsection.

N.C. R. Civ. Pro. 45(f)(1); *see also Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 73, at *2 (N.C. Super. Ct. June 10, 2020) (noting that entities "based in Massachusetts, could not [be] serve[d] subpoenas without first obtaining commissions, also called letters rogatory[]" (cleaned up)).

12. Because Berkshire is a resident of Massachusetts, Defendants now seek a commission allowing for the issuance of a subpoena to Berkshire pursuant to Rule 45(f). As noted above, Plaintiffs oppose the Motion.

13. The Court finds that Defendants' Motion must be dismissed without prejudice because it is premature. Pursuant to the North Carolina Business Court Rules ("BCR"), a party seeking court intervention on a discovery-related dispute must first avail itself of the process set out in BCR 10.9.

14. BCR 10.9 states in relevant part as follows:

(a) **Application.** This rule applies to motions under Rules 26 through 37 and Rule 45 of the Rules of Civil Procedure. References to "party" or "parties" in this rule include non-parties subject to subpoena under Rule 45 of the Rules of Civil Procedure.

(b) **Pre-filing requirements.**

(1) **Summary of dispute.** Before filing a motion related to discovery, a party must engage in a thorough, good-faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party seeking relief must e-mail a summary of the dispute to the judicial assistant and law clerk for the presiding Business Court judge and to opposing counsel. The summary may not exceed 700 words; the certificate described in BCR 10.9(b)(2) does not count against this limit. Any other party may submit a response to the summary; the response may not exceed 700 words (excluding the response to the certificate) and must be e-mailed to the judicial assistant and law clerk for the presiding Business Court judge and to opposing counsel within seven calendar days of when the initial summary was e-mailed. Word limits are to be calculated in accordance with BCR 7.8. No replies are allowed.

(2) **Certification of good-faith effort to resolve the dispute.** A dispute summary under BCR 10.9(b)(1) must include a certification that, after personal consultation and diligent attempts to resolve differences, the parties could not resolve the dispute. The certificate must state the date(s) of the conference, which attorneys participated, and the specific results achieved. The certificate must say, if applicable, whether the parties discussed cost-shifting, proportionality, or alternative discovery methods that might resolve the dispute. This certificate may not exceed 300 words. The response by any other party under BCR

10.9(b)(1) may include a response, not to exceed 200 words, to the substance of the certificate.

- (3) **Telephone conference among counsel and the presiding Business Court judge.** After the summary, certificate, and any response(s) are submitted, the Court may schedule a telephone conference with counsel to discuss the dispute, order the parties to file a motion and brief regarding the dispute or provide additional materials, or issue an order that decides the issues raised or that provides the parties with further instructions. If the Court elects to conduct a telephone conference, the Court may decide the parties' dispute during the conference.

BCR 10.9(a), (b)(1)–(3).

15. Thus, as the plain text of BCR 10.9(a) makes clear, disputes involving Rule 45 are encompassed by BCR 10.9. Here, however, despite being informed that Plaintiffs opposed Defendants' request for the issuance of a commission regarding the subpoena to Berkshire, Defendants did not initiate the BCR 10.9 process.

16. Accordingly, the Motion is **DENIED** without prejudice

17. The Court wishes to emphasize the importance of the requirement in subpart (b)(2) of the BCR 10.9 process that the parties diligently seek to resolve the dispute among themselves before seeking assistance from the Court. Based on the parties' filings, it does not appear that any meaningful attempt to do so has taken place as of the present date.

18. Accordingly, before any submission is made under BCR 10.9 on this issue, the Court **DIRECTS** the parties to meet (either in-person or virtually) and

exercise their best good-faith efforts to resolve their dispute or, at a minimum, narrow its scope.¹

19. In the event that a dispute nevertheless remains despite the attorneys' best efforts to reach a resolution among themselves, Defendants shall be permitted to initiate the BCR 10.9 process.

CONCLUSION

Accordingly, in the exercise of its discretion, the Court **DENIES** the Motion for Commission without prejudice.

SO ORDERED, this the 25th day of February 2025.

/s/ Mark A. Davis

Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

¹ During this process, the parties may deem it advisable to include counsel for Berkshire.