SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

EVO MERCHANT SERVICES, LLC and EVO PAYMENTS INTERNATIONAL, LLC,	Index No. 608446/2020
	Hon. Elizabeth H. Emerson
Plaintiffs,	
	Motion Seq. No. -004
-against-	
R.B.C.K. ENTERPRISES, INC. a/k/a RBCK ENT, INC. d/b/a RB CONTROLS n/k/a SPA TECHNOLOGIES, INC., RB RETAIL & SERVICES SOFTWARE LLC d/b/a RB RETAIL & SERVICES SOLUTIONS, and FULLSTEAM OPERATIONS, LLC,	
Defendants.	

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO MODIFY INJUNCTION

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Dated: March 31, 2021
Hampton Bays, New York

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Defendants RB Retail and Fullsteam, by and through their counsel, Kirsch & Niehaus, PLLC, respectfully submit this Reply Memorandum of Law in Further Support of their motion pursuant to CPLR 6314 to modify the Order to the extent of releasing RB Retail and Fullsteam from the injunction in favor of plaintiffs EVO.[1]

PRELIMINARY STATEMENT

EVO's opposition papers merely serve to underscore the complete lack of evidence to support the injunction currently imposed against RB Retail and Fullsteam. While allegations may be sufficient to sustain a complaint against a motion to dismiss, a preliminary injunction must be supported by clear and convincing evidence. Recent events have shown that not only *has* EVO failed to provide appropriate supporting evidence, EVO *cannot* do so.

The primary argument advanced by EVO's brief is that RB Retail and Fullsteam are bound by the Referral Agreement as successors of R.B.C.K. However, EVO has never presented any evidence – much less clear and convincing evidence – that either RB Retail or Fullsteam is bound under any successor liability theory, be it de facto merger, mere continuation, or fraud. Nor has EVO presented any evidence that: (i) the Referred Customer List is in any way confidential, that (ii) R.B.C.K. either possessed or forwarded to RB Retail or Fullsteam any such customer list, or that (iii) RB Retail or Fullsteam used any such list or confidential information. Indeed, EVO now essentially argues that it need not show either that the Referred Customer List contained confidential information or that RB Retail or

[1] Capitalized terms not defined herein shall have the same meaning ascribed to them in RB Retail and Fullsteam's opening memorandum of law.

Fullsteam used that list, and that it need only show that RB Retail or Fullsteam competed for EVO's customers. In other words, EVO is seeking to enforce a bare non-competition provision without the required showing that such a provision is necessary to protect a legitimate business interest of EVO – as opposed to simply seeking to avoid competition. EVO's claim not only rests on the unsupported allegation that RB Retail and Fullsteam are bound by the Referral Agreement, it turns New York non-competition law on its head.

Because the recently-provided Referred Customer List confirms that there is no clear and convincing evidence necessitating the preliminary injunction against RB Retail and Fullsteam, the current injunction should be dissolved as to those parties.

RESTATEMENT OF FACTS

EVO's statement of facts implicitly acknowledges that the Referred Customer List contains no confidential information, and expressly acknowledges that it had to be created by EVO in response to a request by RB Retail and Fullsteam. (EVO Br. pp. 4-5.) EVO presents no evidence that either RB Retail or Fullsteam knew what customers had been referred to EVO by R.B.C.K. prior to the creation of the Referred Customer List, and presents no evidence that either RB Retail or Fullsteam competed unfairly with EVO in any way.[2]

[2] Counsel's conjecture that RB Retail and Fullsteam were merely "feigning ignorance" as to the composition of the Referred Customer List and their unfounded allegations of spoliation are both unsupported by any evidence, and insulting. (EVO Br. p. 5, fn. 3.)

Instead, in an attempt to bolster its argument, EVO misstates the text of the Referral Agreement, claiming that "the parties explicitly agreed information and data belonging to or relating to EVO, *including the "persons constituting Referred Merchants hereunder [i.e., EVO's Pool Merchants]",* are *EVO's property and confidential information*. (EVO Br. p. 3, emphasis and additions in original.) By selectively omitting key words and phrases, EVO seeks to convey the impression that *the customers themselves* became property of EVO. But even if such a provision could be enforced, that is not what the Referral Agreement says. Instead, it states:

> *Each Party* acknowledges that all information and data belonging to or *relating to the business of the other Party* is confidential ("Confidential Information"). This Agreement, *the list of* persons constituting Referred Merchants hereunder, and all payments and reports delivered hereunder constitute the Confidential Information of EVO.

(Dkt. 9; Referral Agreement ¶ 7, words and concepts omitted by EVO italicized.) The complete language of the Referral Agreement makes clear first that the obligations of the parties are reciprocal, and that information relating to "the business of the other Party" remains the confidential information of that party. Thus, information relating to R.B.C.K.'s business *including its complete customer list* remained R.B.C.K.'s information and property. Second, the language omitted by EVO makes clear that EVO can only claim that "the list of persons" referred to EVO by R.B.C.K. constitutes its confidential information, and not the customers themselves. And, again, there is no evidence that this "list of persons" was provided

to RB Retail or Fullsteam, or even that it existed as a separate list prior to its creation by EVO in the past few weeks.

EVO also cites the non-solicitation language contained in paragraph 10 of the Referral Agreement as barring R.B.C.K. (and purportedly RB Retail and Fullsteam) from competing for referred customers for three years. (EVO Br. p. 3.) However, EVO presents no evidence of a legitimate, protectible business interest that would justify this anti-competitive provision. (EVO Br. p. 3.)

EVO further argues that RB Retail and Fullsteam are bound as successors in liability to R.B.C.K., but as "evidence" cites only its own memoranda of law. (EVO Br. p. 4.) Notwithstanding the Complaint's allegations, EVO has never presented any evidence of any continuity of ownership between R.B.C.K. and RB Retail (or Fullsteam for that matter), as required to sustain a preliminary injunction. (Dkt. 27; Memorandum of Law, pp. 7-11.) And despite labelling the sale of assets by R.B.C.K. to RB Retail a "sham" and a "fraudulent" transaction, EVO can present no evidence that the transaction was a sham, or that it was designed in any way to defraud EVO. (EVO Br. p. 3.) Again, to the contrary, the only evidence on this issue is that the transaction was extensively negotiated at arm's length between the parties and counsel, and resulted in a fair market purchase of R.B.C.K.'s assets by RB Retail for of millions of dollars. (Dkt. 28; Lawler Aff. ¶¶ 9-17.)

Lastly, EVO does not dispute that any customers set forth on the Referred Customer List are also reflected on R.B.C.K.'s general customer list which it sold to

RB Retail. Nor does EVO dispute that it has overstated the number of "customers" referred under the Referral Agreement by counting all accounts held by a single merchant as separate "customers." EVO certainly presents no evidence that RB Retail or Fullsteam learned of any EVO customer by means other than R.B.C.K.'s general customer list.

ARGUMENT

I. CPLR 6314 DOES NOT REQUIRE CHANGED CIRCUMSTANCES TO MODIFY AN INJUNCTION

EVO's primary argument is not that the preliminary injunction is justified, but that the Court should not even consider modifying the injunction. EVO argues that because RB Retail and Fullsteam have "failed to satisfy their burden of establishing any subsequent events between January 29, 2021 and now which would change the facts under which the preliminary injunction was granted," the motion should be denied. (EVO Br. p. 7.) As an initial matter, this is a rather ironic argument coming from EVO, which moved to renew its request for a preliminary injunction on the basis of a single letter. (Dkt. 60.) More importantly, there is no requirement in CPLR 6314 of "changed circumstances" – the section states that such a motion may be made "at any time" – and EVO admits that a motion to modify should be granted under "compelling" circumstances. In any event, the circumstances have changed.

As an equitable pre-judgment remedy, a preliminary injunction remains subject to the continuing discretion of the court, and a motion to modify or vacate will be granted where the "injunctive relief would not serve the objective the remedy

is designed to achieve and where the elements required for imposing a preliminary injunction are not met." *Best v. Adler*, 60 Misc. 3d 1210(A), 2018 WL 3298021 (Sup. Ct. N.Y. Co. 2018), *citing CanWest Global Comm. Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 866 (Sup. Ct., N.Y. Co. 2005). The two cases cited by EVO each characterize the standard for granting a motion under CPLR 6314 as a showing of "compelling or changed circumstances *that would render continuation of the injunction inequitable*." *Ehrenkranz v. 58 MHR LLC*, 2016 WL 6248226, at *3 (Sup. Ct. Suffolk Co. July 12, 2016), *Arcamone-Makinano v. Britton Property, Inc.*, 2010 WL 10817561, at *1 (Sup. Ct. Queens Co. Oct. 19, 2010) (emphasis added).[3]

As detailed below, RB Retail and Fullsteam have presented compelling evidence that continuation of the injunction against them would be inequitable, and have identified changed circumstances – i.e., that the Referred Customer List did not exist prior to a few weeks ago – that renders the continuation of the injunction against them inequitable.

II. THE INJUNCTION SHOULD BE DISSOLVED AS TO RB RETAIL AND FULLSTEAM

EVO's papers are long on argument as to why the Court should not consider the instant motion, but short on why continuing the injunction is necessary or equitable. This is because events have shown that EVO has no evidence to support any aspect of the current injunction against RB Retail or Fullsteam.

[3] The rulings in *Ehrenkranz* (expressly) and *Arcamone-Makinano* (impliedly) were premised largely on the fact that neither moving party presented additional evidence, not that changed circumstances were an absolute requirement. Indeed, in *Ehrenkranz*, the Second Department had recently denied the moving party's appeal of an injunction, and the court viewed the motion as an attempt to re-argue the appeal.

Abandoning any claim that the Referred Customer List contains objectively confidential information, and unable to point to any evidence that RB Retail or Fullsteam used confidential information to solicit customers, EVO simply assumes that: (i) RB Retail and Fullsteam are bound by the Referral Agreement as successors-in-interest to R.B.C.K; and (ii) the confidentiality and non-compete provisions of the Referral Agreement are enforceable as written. While the precipitating cause of this motion was EVO's inability to promptly provide a Referred Customer List that contained actual, protectible, confidential information, it is worth noting that EVO has never presented any other evidence in support of these theories.

A. The Referred Customer List Cannot Independently Justify the Injunction

First, EVO acknowledges that in the absence of an agreement, mere lists of customers are not considered confidential information.[4] (EVO Br. p. 10.) The only list of customers in evidence in this case contains only names and addresses – exactly the type of list considered not confidential under New York law. (Opening Br. pp. 8-9.) In creating the Referred Customer List, EVO confirmed for the first time that it had no evidence that *any* defendant, including RB Retail or Fullsteam, possessed either the customer list itself, or any confidential customer information. And given the lack of confidential information, the newly-created Referred Customer List cannot, by itself, justify any injunction.

[4] As discussed below, even where an agreement purports to classify information as confidential, such a provision will only be enforced where the information is actually confidential. (Section II.C *infra*.)

B. The Referral Agreement Does Not Prohibit R.B.C.K. From Selling Its Own Customer List

Second, EVO argues that the injunction is justified because R.B.C.K. purportedly breached the Referral Agreement by providing RB Retail with the names of customers it referred to EVO as part of R.B.C.K.'s overall customer list. (EVO Br. p. 11.) But as noted in the Restatement of Facts, the Referral Agreement says otherwise. Contrary to EVO's misrepresentations, that agreement expressly refers to confidential information as "*the list of* persons constituting Referred Merchants" hereunder, not the customers themselves. (Dkt 9; Referral Agreement, ¶ 7.) And again, there is no evidence that "the list of persons" referred to EVO by R.B.C.K. was provided to RB Retail or Fullsteam, or that such a list ever previously existed, given EVO's difficulty in creating it. Moreover, the Referral Agreement expressly claims that all information "relating to the business of the other Party" is confidential. Thus, R.B.C.K.'s overall customer list remained *its* confidential information and property, and it was free to share or sell that information to a third party. EVO's argument implies that R.B.C.K. was free to sell its customer list to a third party so long as it redacted the identities of its customers who R.B.C.K. had referred to EVO for credit card processing. Fortunately, this untenable argument is belied not only by logic and the law, but by the parties' own Referral Agreement. Thus, the provision of R.B.C.K.'s general customer list to RB Retail cannot justify continuing the injunction.

C. The Referred Customer List is Not Confidential Information

EVO's next two arguments rest on the unwarranted assumption that courts will automatically enforce restrictive covenants contained in parties' contracts. Obviously, this is not the case. Restrictive covenants, including confidentiality provisions, are disfavored under New York law, and will only be enforced to the extent that they are necessary to protect the legitimate interests of the party seeking enforcement. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388 (1999). The same standard applies to restrictive covenants ancillary to employment agreements, and to contracts between companies. *See Elite Promotional Marketing, Inc. v. Schumacher*, 8 A.D.3d 525 (2d Dep't 2004). Legitimate interests are limited to "the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." *Id.*, 93 N.Y.2d at 389.

Thus, EVO is incorrect when it argues that the Referred Customer List necessarily constitutes confidential information because the Referral Agreement defines it as confidential, and because other cases construing the confidentiality of customer lists did so only in the absence of a written agreement. (EVO Br. pp. 9-10.) As pithily noted in the context of purportedly confidential customer lists:

> information that is otherwise readily ascertainable does not become a protected trade secret merely because the parties have entered into a confidentiality agreement.

Robert Half International, Inc. v. Dunn, 2013 WL 10829925, at *6 (N.D.N.Y. October 29, 2013). New York state courts have addressed the issue as well, with the Court of Appeals affirming the approach. In *Ashland Management Inc. v. Altair*

Investments NA, LLC, 59 A.D.3d 97, 99, 102 (1st Dep't 2008), *aff'd as modified*, 14 N.Y.3d 774 (2010), the court considered the enforceability of a confidentiality agreement which purported to bar an employee from using this employer's customer list. The court held:

> Restrictive covenants, *such as the confidentiality agreements herein*, are subject to specific enforcement to the extent that they are "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." With respect to covenants aimed at protecting against misappropriation of an employer's trade secrets or confidential customer lists, ". . . restrictive covenants will be enforceable to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information." Whether a plaintiff's customer list and/or other proprietary information constitutes a trade secret or is readily ascertainable from public sources is ordinarily a triable issue of fact.

Id. at 102 (internal citations omitted). In other words, any purportedly confidential customer list must be judged on its own merits, not by merely defining it as confidential information in a contract. *See also, H&R Recruiters, Inc. v. Kirkpatrick*, 243 A.D.2d 680, 681 (2d Dep't 1997) (restrictive covenant in employment agreement not enforceable because customer list readily discoverable through nonconfidential sources); *Ken J. Pezrow Corp. v. Seifert*, 197 A.D.2d 856 (4th Dep't 1993) (same).

As noted in the moving parties' opening brief (pp. 8-11), there is no evidence that the Referred Customer List was not known in the trade and was discoverable only through extraordinary efforts. Nor does the Referred Customer List contain any other confidential or proprietary information. An injunction is not warranted on this ground, either.

D. The Referred Customer List Cannot Justify a Non-Competition Provision

Similarly, the Referred Customer List demonstrates that it is insufficient to justify the three-year non-solicit provision of the Referral Agreement. As noted above, non-compete and non-solicit agreements will only be enforced to the extent that they are necessary to protect the legitimate interests of the party seeking enforcement – simply including the provision in a contract does not render it enforceable. *BDO Seidman*, 93 N.Y.2d at 388. And, like restrictive covenants regarding confidential information, enforceable non-compete and non-solicit provisions are limited to "the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." *Id.* at 389.

As detailed above and in the moving parties' initial brief, provision by EVO of the Referred Customer List confirms that there is nothing confidential about it, and there is no evidence or indication that any actual confidential information belonging to EVO has been used by RB Retail or Fullsteam to solicit EVO customers. Thus, the injunction is not justified on the ground that it is necessary to enforce the non-solicit provision of the Referral Agreement.[5]

[5] EVO also implicitly concedes that the Referred Customer List contains no names that were not already included in R.B.C.K.'s overall customer list. Because parties are always free to solicit customers with whom they have a pre-existing relationship, even if RB Retail or Fullsteam were considered R.B.C.K.'s successor-in-interest (and neither is), they would be free to compete for R.B.C.K.'s own customers, including every customer on the Referred Customer List. *See Elite Promotional Marketing,* 8 A.D.3d at 526; *BDO Seidman*, 93 N.Y.2d at 392 (employer's legitimate business interest limited to protecting customers with whom departing employee developed relationship as a result of employer's efforts).

E. There is No Evidence that RB Retail or Fullsteam is a Successor-In-Interest Bound to the Referral Agreement

Throughout its brief, EVO simply assumes that RB Retail and Fullsteam are bound by the provisions of the Referral Agreement as R.B.C.K.'s successors-in-interest. As set forth above, the relevant provisions of the Referral Agreement are not enforceable, because there is no legitimate business justification for either the confidentiality provision or the non-compete. But regardless of the enforceability of those provisions, there is absolutely no evidence to support EVO's allegations that RB Retail and/or Fullsteam are bound to the Referral Agreement under some theory of successor liability. For this additional reason, continuing the injunction as against RB Retail and Fullsteam would be inequitable.

F. EVO's "Contract Construction" Argument is Ill-Founded and Contrary to Public Policy

Finally, EVO makes the unfounded, but revealing, argument that it never would have entered into the Referral Agreement if R.B.C.K. were "permitted to steal those very customers." (EVO Br. pp. 10-11.) First, of course, this argument ignores the facts that EVO made hundreds of thousands, of not millions of dollars, from the customers referred by R.B.C.K., and that R.B.C.K. is not a competitor of EVO's credit card processing business. But this argument – as well as others throughout EVO's brief – is premised more tellingly on the incorrect assumption that EVO should not have to compete for customers. The bedrock principle of *BDO Seidman*, and before that, *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303 (N.Y. 1976) is that New York law encourages competition, and discourages restrictive covenants that have the effect of lessening competition. Indeed, under these cases

and their progeny, New York courts simply will not enforce anti-competitive provisions absent a narrowly-defined set of legitimate business reasons to enforce them. For this additional, but overarching reason, the current injunction against RB Retail and Fullsteam is inequitable and should be dissolved.

G. The Referred Customer List Shows There is No Irreparable Injury

RB Retail and Fullsteam stand on their initial papers with respect to the lack of irreparable injury. (Opening Br. pp. 11-12.) The Referred Customer List demonstrates that any harm suffered by EVO can be compensated by identifying the lost customers and awarding money damages, and thus EVO will suffer no irreparable harm. EVO's argument that the irreparable harm argument was waived must fail first because the creation and delivery of the Referred Customer List demonstrates that any "lost" customers are knowable, identifiable, and that their loss can be monetarily compensated. In addition, no injunction can stand absent irreparable harm, and if the circumstances justifying the injunction are proven false or change, the injunction should be modified. *Best v. Adler; CanWest Global Comm. Corp. v. Mirkaei Tikshoret Ltd.*, *supra* p. 5.

CONCLUSION

For all of the reasons set forth above, and in the moving parties' initial papers, the injunction issued by the Court's Order of January 29, 2021 should be modified to the extent of lifting the injunction as against RB Retail and Fullsteam.

Dated: March 31, 2021
Hampton Bays, New York

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CERTIFICATE OF WORD COUNT

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Dated: March 31, 2021

s/ Paul R. Niehaus
Paul R. Niehaus