STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 228
NAMS HOLDINGS, LLC, a Delaware limited liability company, Plaintiff, v. GRANT C. REECE; JAMES B. CHAPMAN; and SMART PROCESSING, LLC, a North Carolina Limited Liability Company, Defendants.	**ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

1. Plaintiff NAMS Holdings, LLC acquired the payment-processing business of Defendants Grant C. Reece and James B. Chapman in 2014. As part of the deal, Reece and Chapman agreed not to solicit NAMS Holdings' "merchant customers" and "merchant clients" for a period of five years. NAMS Holdings contends that Reece and his new company, Smart Processing, LLC, are violating the non-solicitation provisions, and it has moved for a preliminary injunction. Having considered the parties' filings and arguments, the Court **DENIES** the motion.

I.
PROCEDURAL HISTORY

2. NAMS Holdings filed its complaint on July 7, 2017. The complaint asserts one count for breach of contract against Reece and Smart Processing. (*See* Compl. ¶¶ 21–24, ECF No. 3.) It asserts a second count against Chapman for joint and several liability. (*See* Compl. ¶ 25.)

3. NAMS Holdings filed its motion for preliminary injunction and a supporting brief on July 12, 2017. (Br. in Supp. of Mot. for Prelim. Inj., ECF No. 9 ["Pl.'s Br."].) Reece and Smart Processing filed their opposition on August 1, 2017. (Mem. of Law in Opp'n to Mot. for Prelim. Inj., ECF No. 19 ["Defs.' Br."].) NAMS Holdings waived the right to file a reply.

4. At the hearing on August 7, 2017, the Court directed both sides to submit supplemental briefing on August 9, 2017. (*See* Pl.'s Supp. Br. in Supp. of Mot. for Prelim. Inj., ECF No. 22 ["Pl.'s Supp. Br."]; Defs.' Supp. Mem. in Opp'n to Mot. for Prelim. Inj., ECF No. 23 ["Defs.' Supp. Br."].) The motion is ripe for determination.

II.
FINDINGS OF FACT

5. The Court makes the following findings of fact for the sole purpose of deciding this motion. These findings are not binding at a trial on the merits. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75, 620 S.E.2d 258, 265 (2005).

6. Reece formed North American Merchant Services, Inc. ("NAMS, Inc.") in 1996 in Georgia and reincorporated the company in North Carolina in 2003. (Reece Aff. ¶ 2, ECF No. 21.) The business of NAMS, Inc. was to provide services needed to process electronic payments (that is, debit or credit card payments). (Reece Aff. ¶ 3.) In practice, NAMS, Inc. provided two services: it installed and serviced point-of-sale equipment at the merchant in addition to providing the back-end services needed to convert the payments into accessible funds. (*See* Compl. ¶ 6; Reece Aff. ¶ 3.) This required NAMS, Inc. to solicit and maintain merchant accounts and also to contract

with "merchant acquirers who in turn have relationships with banks." (Reece Aff. ¶ 3.)

7. NAMS, Inc. managed two portfolios of merchant accounts associated with two merchant acquirers: Elavon, Inc. and Priority Payment Systems, LLC ("Priority"). For its services, NAMS, Inc. received a commission, referred to as "residuals," in the form of a percentage of the fees paid by the merchants to Elavon and Priority. (Compl. ¶ 7; Reece Aff. ¶ 3.) The value of the residuals depended on "the acquisition and retention of merchant customers." (Compl. ¶ 6.)

8. In 2013, Anaraq Holdings, LLC ("Anaraq") expressed interest in acquiring NAMS, Inc. (*See* Reece Aff. ¶ 4.) They struck a deal in January 2014. (Reece Aff. ¶ 5.) As a prerequisite to the sale, NAMS, Inc. was converted into North American Merchant Services, LLC ("NAMS, LLC"). (Reece Aff. ¶ 5.) Then, on January 24, 2014, the parties executed two agreements to effectuate the sale: a Limited Liability Company Agreement ("LLC Agreement"), which created NAMS Holdings (Wu Aff. Ex. B, ECF No. 8.1 ["LLC Agreement"]); and a Securities Purchase Agreement ("SPA"), which details the terms of the sale of NAMS, LLC to NAMS Holdings (Wu Aff. Ex. A ["SPA"]). Both agreements state that they are to be governed by Delaware law. (*See* SPA § 11.7, LLC Agreement § 15.8.)

9. At the time of the sale, Reece owned 85 percent of the membership interest in NAMS, LLC. Chapman owned 5 percent, and a third individual owned the remaining 10 percent. (Reece Aff. ¶ 6.) The entire membership interest was transferred to NAMS Holdings. (SPA Schedule 2.1.) In return, the individuals

received cash payments, and Reece and Chapman also obtained Class B membership in NAMS Holdings. (SPA Schedule 2.1.)

10. Of particular relevance is section 9.3 of the SPA, which includes non-competition and non-solicitation provisions. The sellers, including Reece and Chapman, agreed not to compete against NAMS Holdings for a period of two years in North Carolina, South Carolina, Tennessee, and Mississippi. (SPA § 9.3(a).) This restriction appears to have expired on January 24, 2016.

11. The sellers also agreed to abide by several related non-solicitation provisions for a period of five years. (*See* SPA §§ 9.3(b)–(d).) Specifically, the SPA prevents Reece, Chapman, and their controlled affiliates from:

- "interfer[ing], influenc[ing], hinder[ing], hamper[ing] or imped[ing], or seek[ing] to or solicit[ing] or otherwise encourag[ing] anyone to interfere, influence, hinder, hamper or impede existing or potential business relationships between [NAMS Holdings] and any Person, entity, vendor, provider, customer, merchant, client or supplier having a relationship with [NAMS Holdings]," (SPA § 9.3(b)(iii));
- soliciting "any merchant customer or merchant client of" NAMS Holdings or NAMS, LLC to become a customer or client of anyone "in direct or indirect competition with" them (SPA § 9.3(c));
- "induc[ing] any merchant client to terminate its merchant agreement with" NAMS Holdings, (SPA § 9.3(d)); and

- "solicit[ing] any merchant client to purchase or obtain any goods or services of the type or nature offered or sold by" NAMS Holdings or "induc[ing] or attempt[ing] to induce any merchant client to cease doing business with" NAMS Holdings. (SPA § 9.3(d).)

12. These covenants are intended to remain in force "until fully performed." (SPA § 10.1.) The covenants are also assignable by NAMS Holdings, but no assignment of any party's "rights and obligations" is permitted "except with the prior written consent of the other parties" to the SPA. (SPA §§ 9.3(h), 11.4.)

13. The LLC Agreement includes substantially similar non-solicitation provisions. (*See* LLC Agreement §§ 7.2(c), (d).) One noteworthy difference is that the LLC Agreement "shall terminate automatically" upon a transfer of all or substantially all of the assets of NAMS Holdings, and the non-solicitation provisions of sections 7.2(c) and (d) do not survive termination. (LLC Agreement § 14.1.)

14. Two months after the sale of NAMS, LLC, Reece formed Smart Processing. (Reece Aff. ¶ 11.) From July 2014 until December 2014, Smart Processing served as an independent contractor for NAMS Holdings. (Reece Aff. ¶ 12.)

15. In a pair of transactions in 2016 and 2017, NAMS Holdings sold the assets of NAMS, LLC to Clarus Merchant Services Group, LLC. (*See* Compl. ¶ 14; Wu Aff. ¶ 8; Reece Aff. ¶ 23.) As part of a Residual Portfolio Purchase Agreement, Clarus "purchase[d], accept[ed], and assume[d]" all of NAMS Holdings' "rights to and interests in" the transferred assets, including any agreements with Elavon (the merchant acquirer), the associated "Merchant Portfolios," and the merchant accounts

("Designated Merchants"). (Wu Aff. Ex. C § 1.1 ["RPPA"].) Clarus further agreed to "assume[] . . . all liabilities, obligations, expenses, and commitments of" NAMS Holdings related to the transferred assets. (RPPA § 1.2.) The agreement also includes a non-solicitation provision, prohibiting NAMS Holdings and its shareholders from soliciting the merchant accounts transferred to Clarus. (RPPA § 3.1.) NAMS Holdings and Clarus executed a similar agreement as to the Priority portfolio. (*See* Reece Aff. ¶ 23.)

16. As a result, NAMS Holdings no longer has any active payment-processing business. (*See* Reece Aff. ¶ 37.) In addition to obtaining and servicing the merchant accounts of NAMS, LLC, Clarus assumed the company's website and telephone numbers, hired many of its employees, and began using its other assets (including, for example, a service vehicle). (*See* Reece Aff. ¶¶ 30, 31, 34, 36, 38.)

17. On June 27, 2017, Clarus reported to NAMS Holdings that Reece and Smart Processing were soliciting the transferred merchant accounts. (*See* Compl. ¶ 17.) Clarus provided information demonstrating that at least one merchant closed its account with Clarus and opened an account with Smart Processing. (*See* Porche Aff. ¶¶ 4–7, ECF No. 8.2.) According to Clarus, these acts constitute a breach of the non-solicitation provision in the RPP Agreement.

18. NAMS Holdings in turn brought this action against Reece and Smart Processing, alleging breach of the non-solicitation provisions in the SPA and LLC Agreement. (*See* Compl. ¶ 21.) Its motion for preliminary injunction seeks an order

"prohibiting Reece, Smart Processing, and any other 'controlled Affiliate' of either from violating" the non-solicitation provisions. (Pl.'s Br. 8.)

III.
CONCLUSIONS OF LAW

19. The SPA and LLC Agreement contain Delaware choice-of-law provisions. Thus, this Court applies North Carolina procedural law to determine whether to issue a preliminary injunction and Delaware substantive law to the interpretation and enforcement of the agreements. *See, e.g.*, *Young v. Baltimore & O. R. Co.*, 266 N.C. 458, 462, 146 S.E.2d 441, 443 (1966) (applying North Carolina procedural law and Ohio substantive law); *see also S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991) (holding that the preliminary-injunction standard is procedural) (citing *Capital Tool and Mfg. Co. v. Maschinenfabrik Herkules,* 837 F.2d 171 (4th Cir. 1988)).

20. A preliminary injunction is "an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). The plaintiff bears the burden to establish the "right to a preliminary injunction," *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975), and is entitled to relief only: "(1) if [the] plaintiff is able to show [a] *likelihood* of success on the merits of his case and (2) if [the] 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 [the] plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (internal quotation marks omitted).

21. The plaintiff may demonstrate irreparable injury by showing that "the injury is beyond the possibility of repair or possible compensation in damages" or "that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Id.* at 407, 302 S.E.2d at 763 (emphasis omitted). In addition, the trial court must weigh the potential harm a plaintiff will suffer if no injunction is entered against the potential harm to a defendant if the injunction is entered. *See Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

22. Here, the question is whether NAMS Holdings is likely to succeed on its claim that Reece and Smart Processing are violating the non-solicitation provisions in the SPA and LLC Agreement. Because the provisions are substantially similar, the Court addresses only sections 9.3(b), 9.3(c), and 9.3(d) of the SPA, unless otherwise noted.

23. Defendants argue that the restrictive covenants prohibit them only "from soliciting customers, merchants, and clients of NAMS Holdings and its subsidiaries." (Defs.' Br. 7.) In their view, they could not have breached the covenants because NAMS Holdings "has no customers, clients, or merchants" following the sale of substantially all of its assets to Clarus. (Defs.' Br. 7.)

24. NAMS Holdings disputes the effect of the assignment of its assets to Clarus, contending that "the assignment did not alter the merchants' status as 'merchant clients' of NAMS." (Pl.'s Supp. Br. 1.) NAMS Holdings points to the general principle

that "[a]ssignment does not affect the assignor's liability under the contract"—that is, NAMS Holdings did not escape its duties to the merchants by assigning those contracts to Clarus. (Pl.'s Supp. Br. 1 (citing *Schwartz v. Centennial Ins. Co.*, 1980 Del. Ch. LEXIS 501, at *6 (Del. Ch. Jan. 16, 1980)).)

25. This dispute boils down to a question of contract interpretation. "When interpreting a contract, the court's role is to effectuate the parties' intent based on the parties' words and the plain meaning of those words. Of paramount importance is what a reasonable person in the position of the parties would have thought the language of the contract meant." *Zimmerman v. Crothall*, 62 A.3d 676, 690 (Del. Ch. 2013). "Clear and unambiguous language . . . should be given its ordinary and usual meaning." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (quoting *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

26. Sections 9.3(c) and 9.3(d) of the SPA state that Reece and Smart Processing may not solicit any "merchant customer" or "merchant client" of NAMS Holdings or NAMS, LLC. Neither party has argued that these terms are ambiguous or should be given a special meaning. The Court therefore construes the terms according to their ordinary meanings: a customer is "someone who buys goods or services from a business," and a client is "a person who engages the professional advice or services of another." *Customer*, Merriam-Webster.com (Aug. 18, 2017) https://www.merriam-webster.com/dictionary/customer; *Client*, Merriam-Webster.com (Aug. 18, 2017) https://www.merriam-webster.com/dictionary/client.

27. Applying these definitions, the Court agrees with Defendants that NAMS Holdings is not likely to succeed in establishing a breach. No merchant presently "buys goods or services" from or "engages the . . . services" of NAMS Holdings or NAMS, LLC because Clarus obtained the entire payment-processing business, including the merchant accounts, the right to residuals, many employees, and even the telephone numbers and a service vehicle. The services previously provided by NAMS Holdings—such as installing and maintaining equipment—are now provided by Clarus. (*See* Wu. Aff. ¶ 8, Reece Aff. ¶ 30.) And when a merchant wishes to switch service providers, it calls Clarus, not NAMS Holdings. (*See* Porche Aff. ¶¶ 4–9; *see also* Compl. ¶ 18.) In short, NAMS Holdings has no clients or customers, as those terms are commonly understood.

28. NAMS Holdings insists that it continues to have a contractual relationship with the merchants because, as the assignor, NAMS Holdings remains secondarily liable under the merchant contracts assigned to Clarus. (*See* Pl.'s Supp. Br. 1–2.) As a proposition of law, it may be correct that NAMS Holdings and the merchants continue to have legal rights with respect to one another. But that attenuated relationship is not a *customer* or *client* relationship, which is what the SPA requires. It is simply not the case, as NAMS Holdings contends, that the merchants "remain[ed] as much 'merchant clients' of NAMS [Holdings] after the assignment as before." (Pl.'s Supp. Br. 2.)

29. Thus, on this record, NAMS Holdings has shown only that Reece and Smart Processing solicited the clients or customers of *Clarus*. Sections 9.3(c) and 9.3(d) were not drafted to bar that conduct.

30. The Court also notes that, under section 9.3(c), Reece and Smart Processing may not solicit any merchant customer "to become a customer or client of another Person which is in *direct or indirect competition* with" NAMS Holdings. (SPA § 9.3(c) (emphasis added).) Similarly, section 9.3(d) states, in part, that Reece and Smart Processing may not "solicit any merchant client to purchase or obtain any goods or services of the type or nature *offered or sold by*" NAMS Holdings. (SPA § 9.3(d) (emphasis added).) NAMS Holdings does not offer or sell any goods or services, so it has no competition—further underscoring the fact that it has no customers or clients, as those terms are ordinarily understood.

31. The Court also concludes that NAMS Holdings is not likely to succeed in establishing a breach of section 9.3(b)(iii), which prohibits Reece and Smart Processing from interfering with "existing or potential business relationships between [NAMS Holdings] and any Person, entity, vendor, provider, customer, merchant, client or supplier having a relationship with [NAMS Holdings]." (SPA § 9.3(b)(iii).) NAMS Holdings interprets this provision to prohibit Reece and Smart Processing from interfering with the Clarus relationship by soliciting merchants transferred as part of the RPP Agreement.

32. There are two problems with this interpretation. First, the Court has concluded that sections 9.3(c) and 9.3(d) do not preclude Reece and Smart Processing

from soliciting NAMS Holdings' former customers and clients. It would be exceedingly odd to interpret section 9.3(b) as an indirect prohibition on that conduct. Second, in context, the phrase "business relationships" appears to refer to the business of payment processing, as discussed in section 9.3(a). NAMS Holdings is no longer in that business.

33. Having carefully considered the record, the Court is left with the firm conviction that the parties reached a carefully crafted bargain. By their plain terms, the non-solicitation provisions were designed to protect only NAMS Holdings' ongoing payment-processing business. Enjoining Reece and Smart Processing from soliciting NAMS Holdings' former customers and clients, after an assignment of those assets to Clarus, would upset this bargain. (Indeed, it appears that the sale of the business extinguished entirely the non-solicitation provisions in the LLC Agreement. (*See* LLC Agreement § 14.1.))

34. For these reasons, the Court concludes that NAMS Holdings has not shown a likelihood of success on the merits as to its claim for breach of the non-solicitation provisions. Accordingly, NAMS Holdings has not carried its burden to establish the right to a preliminary injunction.

IV.
CONCLUSION

35. Based on the findings of fact and conclusions of law, the Court in its discretion **DENIES** the motion for preliminary injunction.

This the 18th day of August, 2017.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases