United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

REALPAGE, INC.; REALPAGE VENDOR COMPLIANCE LLC	§ § § § § § § §	Civil Action No. 4:16-CV-00737 Judge Mazzant
v.		
ENTERPRISE RISK CONTROL, LLC; LONNIE DERDEN		

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiffs' Application for Preliminary Injunction (Dkt. #10). After considering the relevant pleadings, exhibits, and argument at the preliminary injunction hearing, the Court finds Plaintiffs' motion should be granted in part.

BACKGROUND

Lonnie Derden ("Derden") has been in the vendor compliance and tenant screening industry for sixteen years. In 1999, Derden created his own company, Resident Data. Derden sold Resident Data to Choice Point and became Vice President of the department at Choice Point. In 2005, Derden created Compliance Depot. Derden created Compliance Depot by using rules and code he found on the internet, six months of labor, and a $250,000 investment. By 2011, Compliance Depot had annual revenues of $6 million.

In 2011, RealPage Vendor Compliance LLC, a wholly owned subsidiary of RealPage, Inc. (collectively "RealPage") purchased Compliance Depot for nearly $24 million. As part of the Compliance Depot purchase, Derden and RealPage entered into three agreements: (1) the Asset Purchase Agreement ("APA"); (2) the Significant Owners' Agreement ("SOA"); and (3) the Employment Agreement. Each agreement contained non-competition, non-solicitation, and confidentiality agreements.

Tom Bean ("Bean") was one of Derden's long-time friends and colleagues. In early 2012, Bean left RealPage. Around May 2012, Bean decided to create a software consulting firm, IDC Software. In April 2012, Bean emailed another former RealPage employee, David Boyle ("Boyle") a "wish list" of equipment to support IDC Software's projects. Also in April 2012, Bean worked with a third former RealPage employee James Beavers ("Beavers") to obtain a quote for Dell computers, using Compliance Depot's account number. Derden provided the funding for IDC Software to purchase this equipment and software. On May 17, 2012, Bean received an employer identification number from the IRS. At this time, IDC Software had two projects, but focused primarily—if not exclusively—on getting "[Derden's] core software business developed." On May 19, 2012, Bean emailed Richard Wolff ("Wolff") and copied Boyle. Bean's email to Wolff contained several ".sql" files and instructed Wolff to "change table and column names and layouts so we aren't just copying what we did the first time." Derden agreed to pay Wolff $115,000 for this task. Over the next year, Derden was the sole source of funds for operating expenses, ultimately investing $160,000 in IDC Software.

In December 2012, Derden created Enterprise Risk Control, LLC ("Enterprise"). In July 2013, Derden purchased IDC Software's vendor compliance code and hired Bean as an employee of Enterprise. At that time, Bean uploaded his code onto Enterprise's servers. Bean continued to develop Enterprise's code until April 2017. Enterprise began marketing its product to potential customers in February 2014, and to its first multi-family customer in August 2015.

In February 2014, RealPage caught wind of Enterprise's new application and potential misappropriation of trade secrets. RealPage sent Defendants a cease and desist letter demanding assurances that Defendants were not soliciting RealPage clients and were not using RealPage secrets. Defendants responded with assurances that they did mistakenly approach a RealPage

client, but immediately backed off when they learned of the mistake. Defendants also assured RealPage that they did not have any trade secret information.

In April 2016, RealPage received more information that Defendants might be using trade secrets when a disgruntled ex-Enterprise employee, Cheryl Freudiger ("Freudiger") approached RealPage claiming that Enterprise gave her various trade secret materials. However, Freudiger did not produce corroborating evidence to RealPage until August 5, 2016. In early September, RealPage also received an email from one of its clients, explaining how Enterprise approached with a new vendor compliance application.

On September 23, 2016, RealPage filed suit against Derden and Enterprise asserting claims for misappropriation of trade secrets, breach of contract, and breach of fiduciary duty (Dkt. #1). On December 2, 2016, RealPage served Enterprise and Derden with its first set of requests for production. In its requests for production, RealPage requested, among other things, all of Enterprise's source code. Defendants produced all source code after early July 2013, but denied having access to any source code from before July 2013. Defendants based their position on Bean's declaration because he was the primary developer of code before July 2013. Bean swore under oath that when he left RealPage, he "did not take any of RealPage's confidential information" (Dkt. #21, Exhibit 3 at ¶ 4). On February 17, 2017, RealPage filed a motion to compel production of documents (Dkt. #40) followed two weeks later by a motion to compel computer images (Dkt. #49).

RealPage argued that there was an unexplained gap in the development of Enterprise's code. RealPage based this argument on several comments, visible in post-July 2013 code, that were made as early as July 2012. However, despite being able to see these comments, the code was not accessible. In response to RealPage's motions to compel, Defendants relied again on

Bean's sworn testimony that he did not take any confidential information with him and did not use any of RealPage's confidential information during his employment with Enterprise (Dkt. #44, Exhibit 2 at ¶¶ 6, 9, 11). Further, Bean swore that "[a]fter I transferred the earlier IDC code onto [Enterprise's] TFS server, I removed the previous work from the IDC computer I had been using because it was no longer 'my' code or 'IDC's' code – it was [Enterprise's] code" (Dkt. #44, Exhibit 2 at ¶ 8). Finally, Bean swore that he looked for remnants of Enterprise's source code from the IDC Software computer that he used before July 2013, but did not locate any (Dkt. #44, Exhibit 2 at ¶ 10).

Seemingly at a stalemate, the Court held that it could not order Defendants to compel what they did not have. However, finding that RealPage was entitled to verify Bean's allegations regarding the code's destruction, the Court ordered Defendants to produce mirror images of computers and storage devices used by Tom Bean in July 2013 (Dkt. #62 at p. 5). The Court limited the examination to determine if the source code was recoverable. If the code was not recoverable, the Court permitted the neutral forensic examiner to determine the details of any deletions so that RealPage could adequately cross-examine at trial.

The forensic examination conducted on April 6, 2017, showed that Bean did not delete the IDC Software code in July 2013 as he previously swore to. Instead, Bean destroyed thousands of files in September 2016, after RealPage filed this suit. The forensic examination also showed nearly 1,000 files deleted on April 3, 2017, after the Court ordered a forensic examination. In all, nearly 100,000 files were deleted from Enterprise's code since RealPage filed suit. Although the forensic exam shows which files were deleted, it cannot show any information about what the deleted code contained.

After the forensic examination, Defendants withdrew Bean's two declarations, which claimed that he did not take any RealPage information and that the Enterprise code was created without leveraging anything from RealPage. Bean has now admitted that he took a thumb drive with "everything" from RealPage and took the thumb drive home in April 2012.

In addition to Derden, Enterprise had six former RealPage employees: Bean, Beavers, Boyle, Linda Jones ("Jones"), Shawn Davis ("Davis"), and Michele Head ("Head"). Shortly after the forensic examination revealed Bean's misrepresentations to the Court, Enterprise terminated his employment. Enterprise spent approximately 9,500 development hours and $3.3 million creating its current product. Today, Enterprise provides vendor risk-management and credentialing services to school districts, restaurant chains, construction companies, homeowners' association management companies, commercial real estate, and multi-family properties.

On September 23, 2016, Plaintiffs filed suit against Derden and Enterprise asserting claims for misappropriation of trade secrets, breach of contract, and breach of fiduciary duty (Dkt. #1). On October 4, 2016, Plaintiffs filed their Application for Preliminary Injunction (Dkt. #10). On November 7, 2016, Defendants filed their response (Dkt. #21). On June 23, 2017, Plaintiffs filed a supplemental brief and exhibits (Dkts. #78–82). On July 3, 2017, Defendants filed their supplemental brief and exhibits (Dkts. #86–88). On July 12, 2017, Plaintiffs filed a supplemental reply (Dkt. #90). On July 13, 2017, the parties submitted joint deposition submissions in lieu of several witnesses' live testimony (Dkt. #92). On July 16, 2017, Defendants filed a supplemental surreply (Dkt. #93). On July 17, 2017, the Court held an evidentiary hearing. After the hearing, the parties submitted an admitted exhibit list (Dkt. #95).[1]

---

[1] The admitted exhibit list follows the same numbering as used throughout the depositions in this case. For ease, the Court's references to exhibits refer to those reflected on the admitted exhibit list (Dkt. #95).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.