

**Matter of Red Ventures, LLC v Modern Consumer,  
LLC**

2010 NY Slip Op 31185(U)

May 10, 2010

Supreme Court, New York County

Docket Number: 100589/10

Judge: Judith J. Gische

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SCANNED ON 5/18/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
HON. JUDITH J. GISCHE <sup>Justice</sup>

PART 10

RED VENTURES

- v -

MODERN CONSUMER

INDEX NO. 100589/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: MAY 10 2010

[Signature]  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of new York  
County of New York: IAS 10

-----X  
In the Matter of:

the Application of **Red Ventures, LLC** and  
**Modern Consumer RV, LLC** for an Order  
Pursuant to CPLR 3102(e) in Aid of Taking the  
Deposition of and for the Production of  
Documents from Datalot, Inc. and for the  
production of Documents from Morgan Joseph  
& Co., Inc. In a certain Action  
Red Ventures LLC and Modern  
Consumer RV, LLC,  
  
Plaintiffs,

**Decision**  
Index # 100589/10  
Mot. seq. # 002

Present:  
Hon. Judith J. Gische, JSC

-against-

Modern Consumer, LLC, Michael Fishman,  
Michael Jacobson, Steven Leavy and Josh  
Reznick,  
  
Defendants/Counterclaim  
And Third party Plaintiffs,

-against-

Ricardo Elias, Mark Brodsky and  
Dan Feldstein,  
  
Third Party Defendants.

-----X

Hon. Judith J. Gische  
PRESENT

Pursuant to CPLR 2219(a) the following papers were considered by the Court in  
connection with this motion/proceeding:

<b>PAPERS</b>	<b>NUMBERED</b>
OSC, DHC affirm., AS affd., exhibits.....	1
ACW affd., exhibits.....	2
MB affd., exhibits.....	3
DHC reply affirm., exhibits.....	4
JR affd.....	5

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*Upon the foregoing papers, the decision of the court is as follows:*

This is a proceeding brought to quash the deposition subpoena and subpoena duces tecum served on Datalot, Inc. ("Datalot"). Alternatively, Datalot seeks a protective order requiring that information provided pursuant to such subpoenas remain confidential. Finally, Datalot seeks its costs and attorney fees pursuant to 22 NYCRR Part 130. The motion is opposed by Red Ventures LLC and Modern Consumer RV, LLC (collectively "Red Ventures").

Red Ventures is a plaintiff in an action commenced in the State of North Carolina against multiple defendants, including Josh Reznick ("North Carolina action"). The North Carolina action concerns a contract for the purchase of a business which, according to the complaint, "focused on generating leads for automotive purchases and loans" ("contribution agreement"). According to the complaint, Red Ventures brought the North Carolina action "to rescind the purchase , recover their investment and collect damages based upon numerous misrepresentations by the defendants."

Datalot is not a party to the North Carolina action. Josh Reznick ("Reznick"), one of the individually named defendants in the North Carolina action, was an owner of Modern Consumer, LLC ("MC, LLC"), the business purchased by Red Ventures. Reznick also signed the contribution agreement at issue in the North Carolina action, in his individual capacity. Following the closing of the purchase, Reznick continued to work for Red Ventures. The parties had differences and in November 2008, Reznick resigned. Reznick is currently the CEO of Datalot.

The allegations in the North Carolina action against Reznick personally, include a claim that he violated the restrictive covenant and confidential information provisions of the contribution agreement by obtaining employment with Datalot. Red Ventures claims that Datalot is its competitor because both companies "utilize data to generate leads." It alleges that Reznick is using confidential and proprietary information it acquired while employed at Red Ventures to benefit Datalot. It also alleges that Reznick is inducing and continues to induce customers, distributors, suppliers and or vendors to reduce their business with Red Ventures.

Red Ventures obtained an out of state commission from the Superior Court in North Carolina to take the deposition and obtain documents from Datalot. By ex parte order, made by the Hon. Milton Tingling on January 15, 2010, Datalot was ordered to produce certain identified records and to appear for a deposition. This motion was brought in response to Judge Tingling's January 15, 2010 order.

Datalot claims that the subpoena duces tecum should be quashed because it seeks documents that are "immaterial, overbroad, burdensome, harassing, confidential and otherwise privileged." According to Datalot, the subject matter of the deposition subpoena is also improper.

Datalot's arguments are based upon its representations that Datalot is not a competitor of Red Venture's operation, because it is not in the business of generating leads in the automotive industry. Moreover, it argues that Red Venture is unable to identify at this time even one customer, distributor, supplier or vendor that was improperly solicited by Datalot.

Red Ventures' argument is, however, that as part of the contribution agreement it

acquired the rights to the proprietary lead assessment tools, techniques, processes and formulas developed by Reznick while he was at the acquired company. Those systems, as represented to them by Resnick, included LenderGate-Ping Post system Algorithms which looks at a lead's zip code, SSN and monthly income and based upon that information, calculates the expected price that dealers would be willing to pay for the lead. Red Ventures claims that Datalot's own marketing data describes their business operations as a marketing service company that uses predictive technology to deliver consumer leads and that the technology utilizes marketing software, proprietary consumer data and sophisticated predicative algorithms.

In reply, Reznick claims that Datalot's entire methodology and format for segmenting and routing online users is based upon a completely new model from both a business and technology standpoint. The Datalot software code was created by Aaron Seigler using widely known, publically available, open source software.

## **DISCUSSION**

In the seminal case of Ayliffe and Companies v. Montrose Chemical Corporation, (166 AD2d 223 [1<sup>st</sup> dept. 1990]) this department set forth the standard of review for objections to discovery orders made in this court pursuant to out of state commissions. CPLR 3102(e). The Appellate Division held that review is limited to determining [1] whether the witnesses' fundamental rights are preserved; [2] whether the scope of the inquiry falls within the issues of the pending out of state action and [3] whether the examination is fair. The court went on to say that this state courts "will not prejudice the materiality or the competency of the evidence in a cause pending in another jurisdiction and will afford the widest possible latitude in the conduct of such [discovery]."

In the more recent case of Trump v. Sulzberger (20 Misc3d 1140 [NY Co. Sup. Ct. 2008]) the Hon. Joan Madden reviewed the post Ayliffe, *supra*, decisions by the First Department applying that standard. Judge Madden's thorough and scholarly review of the law is as follows:

"Notwithstanding [Ayliffe], New York Courts retain discretionary authority under CPLR 3103(a) to issue a protective order or quash a subpoena issued pursuant to CPLR 3102(e) due to over breadth or to prevent unnecessary harassment, see Matter of Dier, 297 AD2d 577 (1<sup>st</sup> dept 2002), Law Office of Paul A. Lange v. Roman Catholic Diocese of Dallas, 245 AD2d 118, 119 (1<sup>st</sup> dept 1997), due to an independent determination that the material sought is not critical or necessary, see Brown & Williamson Tobacco Corp. V. Wigand, 228 AD2d 187 (1<sup>st</sup> dept. 1996) app withdrawn 90 NY2d 901 (1997), or due to the inclusion of material protected by the attorney-client privilege, see Bomadier Capital, Inc. v. Schoengold, Sporn, Laitman & Lometti P.C., 46 AD3d 3232 (1<sup>st</sup> dept. 2007, Kirkland & Ellis v. Chadborne & Parke, *supra*. These cases require this court to exercise its discretion and review the subpoenas under the standards enumerated above, rather, than simply 'rubber stamping' the determination of [another state's] court."

Applying these standards, the court finds that the scope of the inquiry, for the most part, pertains to the underlying North Carolina action. Certain questions are not answerable in their current format and therefore requiring answers would be unfair. In addition since most of the material sought is confidential and/or proprietary, Datalot's rights can only be preserved with an underlying mechanism for discovery that preserves their confidential nature.

Datalot may or may not be a competitor of Red Ventures. The court does not reach that argument which really must be made to the North Carolina court that issued the subpoenas in the first place. The court will not supervise discovery and disputes that otherwise rightfully belong in the North Carolina action.

On the other hand, the court finds that the requests requiring Datalot to testify and provide documentary information about any current, former or prospective customer of Red Venture without Red Ventures first identifying its own list of current former and/or prospective customers, are impossible to answer. Thus, the court quashes items 19 and 20 of the Schedule of Subjects for Deposition and items 13 and 14 of the Schedule of Documents to Be Produced.

Likewise, it is Red Ventures' ultimate burden to prove that Datalot is using Red Ventures' confidential and/or proprietary information. It is a meaningless discovery request to ask, in a blunderbuss manner, for documents and testimony "related to Datalot's use of Red Ventures' confidential and/or proprietary information." Thus the court quashes item 22 of the Schedule of Subjects for Deposition and item 25 of the Schedule of Documents to Be Produced.

Potentially all of the information requested from Datalot is confidential and/or proprietary. Datalot should not be compelled to produce any confidential and/or proprietary information without the protection of an agreement and/or order of confidentiality.

Presently there is "stipulation and order for the production and exchange of confidential information (Revised 04/09)" that is in general use in the commercial parts of the Supreme Court's this county ("form confidentiality order"). This document is available online at <http://www.nycourts.gov/courts/comdiv/newyork.shtml>. Such form confidentiality order sets out the obligations each party to an action has to keep documents and information confidential. It also sets out a mechanism for the parties to identify and either agree, or seek court determination, as to whether documents fall

within or without the confidential protection. Thus, the court adopts those obligations and disputes methodology as the procedures to be generally followed in this case.

This court's directions are without prejudice to Datalot seeking further relief in the North Carolina action. The parties are to settle an order consistent with this decision which shall include, amount other things, the applicable and relevant decretal language from the confidentiality order. References in confidentiality order to the action or litigation shall mean the North Carolina action and paragraph 12(b) shall be deleted.

A new deposition date shall be set no later than 30 days following the entry of an order in this case.

The request for sanctions is denied.

This constitutes the decision of the court. The movant is directed to settle an order on Notice.

Dated: New York, New York  
May 11, 2010

J.G. J.S.C. 