

**IN THE GEORGIA STATE-WIDE BUSINESS COURT**

**ELAVON, INC.,**

**Plaintiff,**

**v.**

**PEOPLE’S UNITED BANK, National  
 Association, individually and as successor  
 in interest to UNITED BANK, N.A.;**

**Defendant.**

**Civil Action File No.**

**COMPLAINT**

Through this civil action Plaintiff Elavon, Inc. (“Elavon”) seeks to hold People’s United Bank, National Association (“PUB”), individually and as successor in interest to United Bank, N.A. (“United”),<sup>1</sup> accountable to express promises to refer all credit card merchant processing business to Elavon.

**PARTIES**

1. Plaintiff Elavon, Inc. is a corporation organized and existing under the laws of the State of Georgia with its principal place of business located at 2 Concourse Parkway NE, Suite 800, Atlanta, Georgia 30328.

2. As one of its core businesses, Elavon processes credit card, debit card,

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<sup>1</sup> PUB in its individual capacity and as successor to United Bank will hereinafter be referred to as “PUB” or “Defendant.”

and other transactions for merchants. Elavon is one of the largest merchant processors in the country.

3. Defendant People's United Bank, National Association is a national banking association with its headquarters and principal place of business located at 850 Main Street, Bridgeport, Connecticut 06604.

4. PUB has over 400 retail locations across the Northeast United States and manages over \$60 billion in assets. PUB has branch locations in Connecticut, New York, Massachusetts, Vermont, New Hampshire, and Maine.

5. People's United Financial, Inc., a financial services company headquartered in Bridgeport, Connecticut, holds the stock and owns the assets of PUB. People's United Financial, Inc. is publicly traded on NASDAQ under the ticker symbol PBCT.

6. PUB became the successor-by-merger to United effective November 1, 2019. PUB stands in the shoes of United for purposes of United's pre-November 1, 2019 conduct and is directly responsible for PUB's pre-November 1, 2019 conduct and all post-November 1, 2019 conduct. Prior to merging with PUB, United operated with its headquarters in Hartford, Connecticut with a footprint in Connecticut and Massachusetts.

## **NATURE OF THE ACTION**

7. Elavon's merchant processing business is developed in large part through exclusive referral agreements with partner banks and other financial institutions.

8. Those referral agreements contain certain terms and conditions that spell out the exclusivity of the relationship.

9. The referral relationship is structured to allow both the partner bank and Elavon to reap increased benefits of their bargain as the partner bank increases its footprint and thereby enhances its referral base.

10. Elavon and United entered into a referral agreement on or about May 7, 2018 (the "Referral Agreement").<sup>2</sup>

11. Under that Referral Agreement, United promised that it and its affiliates and successors would refer all potential merchant processing customers to Elavon for an initial five-year term ending no earlier than May 7, 2023.

12. United also promised that neither it nor its affiliates and successors would offer merchant processing services.

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<sup>2</sup> Due to the confidentiality provisions contained in the Referral Agreement, Elavon has not attached the Referral Agreement itself hereto. Instead, Elavon has described or quoted herein portions of the Referral Agreement that are necessary to enforce the provisions of the Referral Agreement. Both parties to this dispute are bound by the confidentiality provisions in the Referral Agreement.

13. Through a stock transaction between the holding companies for PUB and United announced on July 15, 2019 and completed on November 1, 2019, PUB became the successor-by-merger to United.

14. On that same day, and with full knowledge of United's contractual promises to which it succeeded, PUB attempted to terminate the Referral Agreement and declared its intent to immediately break the promises to which it was now bound.

15. Thereafter PUB did in fact break many of the promises to which it was bound, including, but not limited to, promises to refer merchant servicing business to Elavon and to not operate a competing merchant services processing business.

16. PUB, in fact, operated a joint merchant processing services venture with one of Elavon's largest competitors and diverted to this venture the same merchants that PUB was obligated to refer to Elavon.

17. Elavon has been denied the benefits of its bargain and PUB has been unjustly enriched through its efforts to compete against, rather than partner with, Elavon.

18. Through this civil action Elavon seeks to recover benefits due it under the Referral Agreement, additional damages to punish PUB's tortious conduct, and an injunction to shut down the competing business wrongfully being operated in competition to Elavon.

## **JURISDICTION AND VENUE**

19. Jurisdiction and venue are proper in this Court.

20. This Court has jurisdiction over this matter pursuant to O.C.G.A. §§ 15–5A–3(a)(1)(A)(xiv)-(xv) as this dispute involves a breach of contract and tort claims between businesses arising out of business transactions and relationships. In addition, and consistent with jurisdiction pursuant to O.C.G.A. § 15–5A–3(a)(1)(B)(ii), the damages requested well exceed the \$500,000.00 amount-in-controversy threshold.

21. Moreover, Elavon and United contractually agreed to the jurisdiction and venue of this dispute in this Court. In Section 22 of the Terms and Conditions of the Referral Agreement, the parties agreed that any action or proceeding “arising under this Agreement shall be exclusively in the state courts located in Fulton County, State of Georgia.” (Referral Agreement at p. 4, § 22.)

22. The Business Court is a state court located in Fulton County, State of Georgia.

23. Each party expressly waived any objection to jurisdiction and venue in this forum. (*Id.*)

## **FACTS**

### ***Elavon operates a successful merchant processing business.***

24. Businesses across the country and around the world require the ability to accept and process electronic payments, including, but not limited to, debit and credit card transactions. Merchant processors provide services that allow merchants to do just that.

25. Elavon provides full-service merchant processing services to over 1.3 million customers in over 30 countries.

26. Merchant processing is a high volume, low-profit margin business. Large transaction volume is necessary to successfully conduct this business.

27. Elavon maintains and grows its merchant processing business in large part through merchant referrals from various entities, including banks with whom it has entered into contractual referral agreements.

28. Elavon's referral arrangement allows banks to avoid the infrastructure costs and credit risks involved in processing merchant transactions, to profit from the steady revenue stream offered from referral royalties, and to benefit from Elavon's high customer service standards, global footprint, and ability to fulfill all of a customer's merchant processing needs.

29. Merchants referred to Elavon typically develop long term relationships that provide significant ongoing future revenues to Elavon.

***Elavon and United entered into the Referral Agreement.***

30. The Referral Agreement between Elavon and United (now PUB) is a valid contract imposing obligations and providing benefits to all parties. (Referral Agreement.)

31. The effective date of the Referral Agreement was May 7, 2018 and the initial term of the Referral Agreement is five years. (*Id.* at p. 1, ¶ G.) Consequently, as of the time of this civil action filing, nearly 40% of the initial contract term remains.

32. The Referral Agreement is governed by and construed in accordance with the laws of the State of Georgia. (*Id.* at p. 4, § 22.)

33. The Referral Agreement is “binding upon the Parties and their **respective successors.**” (*Id.* at p. 4, § 15 (emphasis added)).

34. Accordingly, as United’s successor, beginning no later than November 1, 2019, PUB became bound by the Referral Agreement’s referral and exclusivity provisions.

***United (now PUB) owes exclusive obligations to Elavon.***

35. Section 1.1 of the Referral Agreement sets forth several obligations of United (now PUB) to protect and enforce the exclusivity of the relationship with Elavon. (*Id.* at p. 2, § 1.1.)

36. Importantly, Section 1.1 binds United (now PUB) “and any Affiliated Entities that now or in the future provide banking or financial services.” (*Id.*) An “Affiliated Entity” is defined to include “an entity that controls [United], and each of their respective affiliates and subsidiaries.” (*Id.* at p. 10, Glossary.)

37. United (now PUB) is required “to refer customers inquiring about transaction processing services, or the Merchant Program in particular, to Elavon on an exclusive basis.” (*Id.* at p. 2, § 1.1.)

38. United (now PUB) is required to “not refer any prospective merchant customer to any other provider of transaction processing services as described in the Merchant Program unless Elavon has refused in writing to provide transaction processing services for such merchant.” (*Id.*)

39. Similar to Section 1.1, Section 7 of the Referral Agreement contains additional exclusivity obligations that bind United (now PUB) and any “Affiliated Entities.” (*Id.* at p. 4, § 7.)

40. United (now PUB) is prohibited from providing merchant processing services “similar to those provided by Elavon” to any merchant. (*Id.*)

41. United (now PUB) is prohibited, during the term of the Referral Agreement and for two years following a valid termination of the Referral Agreement, from directly or indirectly soliciting merchant processing business from any Referred Merchant participating in the Merchant Program. (*Id.*)



***Elavon invested in the United relationship.***

42. In accordance with the Referral Agreement, Elavon established a team of professionals and enacted processes sufficient to manage United's needs. ((*Id.* at p. 2, § 2.4.)

43. Elavon devoted time, effort and infrastructure to service and grow the United portfolio.

44. Elavon also shared confidential information and trade secrets with United, including its business models and marketing strategies, customer lists, and monthly revenue, expense, and other financial data.

45. And, Elavon provided United a signing bonus, referral fees and royalties.

46. Elavon provided processing services to the merchants referred to it by United prior to its merger with PUB.

47. In short, Elavon invested greatly in the relationship with United (now PUB) and performed all of its obligations under the Referral Agreement, and Elavon is able and willing to provide these same resources and services to PUB and otherwise perform all of its obligations under the Referral Agreement for PUB.

***PUB deliberately broke the promises to which it was bound.***

48. United (now PUB) may terminate the Referral Agreement before its expiration in only two circumstances: if (i) Elavon suffers a bankruptcy event, as

defined, or (ii) a bank regulator formally directs United (now PUB) to terminate the Agreement. (*Id.* at p. 4, § 8.)

49. Neither early termination condition has been met.

50. Nevertheless, on the day that it formerly succeeded to United's obligations, PUB attempted to terminate the Referral Agreement. A true and correct copy of PUB's wrongful attempted termination letter dated November 1, 2019, is attached hereto as Exhibit 1 and incorporated herein. By sending this letter, PUB expressly acknowledged that it had succeeded to United's obligations under the Referral Agreement.

51. By written letter on the same day, Elavon confirmed the ongoing contractual relationship, now with PUB as successor to Elavon. A true and correct copy of Elavon's November 1, 2019 letter to PUB is attached hereto as Exhibit 2 and incorporated herein.

52. Beginning no later than November 1, 2019, PUB (formerly United) deliberately violated the terms of the Referral Agreement by withholding merchant referrals from Elavon and diverting them instead to a joint merchant processing venture between PUB and one of Elavon's primary market competitors.

***Elavon has suffered significant financial harm.***

53. PUB (formerly United)'s conduct has caused and continues to cause substantial injury to Elavon.

54. PUB (formerly United) violated and continues to violate, among other provisions, its obligations to refer merchants and other entities exclusively to Elavon.

55. Further, as a result of the PUB's unlawful purported termination, the attrition rate on Elavon's existing customers attributable to the Referral Agreement is and will be significantly higher during the term of the Referral Agreement than it would otherwise be.

56. PUB's joint venture takes business directly from Elavon in order to enrich PUB while depriving Elavon of the benefit of the bargain contained in the Referral Agreement.

57. Similarly, PUB is violating the exclusivity covenants contained in the Referral Agreement both by operating the joint venture and by referring merchants to it. But for the deliberate breach of the exclusivity covenants, PUB would refer all such merchants to Elavon.

58. As a result of PUB's wrongful attempted termination and numerous breaches, Elavon has suffered significant harm.

**COUNT I—*Breach of Contract, Wrongful Attempted Termination and  
Anticipatory Repudiation***

59. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

60. The Referral Agreement is a valid contract between Elavon and United.

61. The initial term of the Referral Agreement runs through May 7, 2023.

62. Section 15 of the Referral Agreement provides that it “will inure to the benefit of and will be binding upon the Parties **and their respective successors**[.]”  
(*Id.* at p. 4, § 15.)

63. As United’s successor, PUB is bound by the Referral Agreement.

64. The Referral Agreement is not terminable at will.

65. The Referral Agreement provides United (now PUB) termination rights only in the event of a “Bankruptcy Event,” a defined term not implicated by the instant dispute, or in the event a regulator ordered termination, also an event not implicated by the instant dispute.

66. The Referral Agreement does not provide PUB any termination rights greater than those belonging to United and does not allow for a termination for convenience, or because of potential or effectuated acquisition, or for change in control.

67. Absent a valid termination due to a Bankruptcy Event or regulator direction, PUB was and is obligated to honor its obligations to Elavon.

68. Neither condition for termination has occurred.

69. PUB wrongfully and unilaterally attempted to terminate the Referral Agreement as of November 1, 2019. This attempted termination constitutes an anticipatory repudiation of the Referral Agreement.

70. PUB did not have the right to terminate the Referral Agreement on November 1, 2019.

71. PUB's attempted termination constitutes a breach of contract in and of itself.

72. Elavon provided notice of the breach to PUB, yet PUB refused to cure the wrongful purported termination notwithstanding Elavon's full performance.

73. Elavon has been damaged and harmed as a result of PUB's wrongful attempted termination of the Referral Agreement in an amount to be proven at trial.

**COUNT II—*Breach of Contract, Failure to Perform and Breach of Implied***

***Covenant of Good Faith and Fair Dealing***

74. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

75. The Referral Agreement obligates United and PUB to, among other things, use "best efforts to exclusively market the Merchant Program to its customers," "refer customers inquiring about transaction processing services, or the Merchant Program, in particular, to Elavon on an exclusive basis," to "maintain promotional material . . . to be distributed to prospective merchant customers," and

to “sponsor a minimum of two (2) 60-day merchant processing sales campaigns per calendar year in all of [United and PUB’s] branches.” (*Id.* at p. 2, § 1.)

76. The Referral Agreement also precludes United (now PUB) from referring “any prospective merchant customer to any other provider of transaction processing services as described in the Merchant Program unless Elavon has refused in writing to provide transaction processing services for such merchant.” (*Id.*)

77. PUB (formerly United) breached the provisions outlined in Paragraphs 75 and 76 beginning on November 1, 2019, if not earlier, and continues to breach those provisions on an ongoing basis.

78. Defendant breached Paragraph 1 of the Terms and Conditions of the Referral Agreement by:

- a. failing to use best efforts to exclusively market the Elavon Merchant Program to Defendant’s customers;
  - b. failing to refer customers inquiring about transaction processing services, or the Merchant Program, in particular, to Elavon on an exclusive basis;
  - c. failing to maintain Elavon promotional material in all PUB branches;
- and

- d. failing to sponsor any merchant processing sales campaigns, let alone two 60-day campaigns per branch per year, as the Referral Agreement required.

79. In addition, PUB (formerly United) breached the exclusivity and non-solicitation provisions of Section 7 of the Referral Agreement. Among other breaches, PUB has:

- a. provided services similar to those provided by Elavon;
- b. referred prospective merchant customers to another provider of services similar to those provided by Elavon; and
- c. assisted others in providing or offering to provide transaction processing services.

80. PUB also breached and continues to breach the covenant of good faith and fair dealing by purporting to terminate the Referral Agreement without the legal right to do so and by refusing to perform thereunder.

81. Elavon has been damaged as a result of United's pre-merger breaches of the Referral Agreement in an amount to be proven at trial.

82. Elavon has been damaged as a result of PUB's breaches of the Referral Agreement in an amount to be proven at trial.

### COUNT III—*Injunctive Relief*

83. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

84. The Referral Agreement includes an important provision regarding the exclusivity of the relationship between Elavon and United (now PUB). Specifically, the Referral agreement states:

For the period beginning as of [May 7, 2018] and continuing until the effective date of the expiration or termination of this Agreement, [Defendant] shall not provide services similar to those provided by Elavon under the Merchant Program to any merchant or Referred Merchant, and [Defendant] will not refer any prospective merchant customer or Referred Merchant to any other provider of services similar to those provided by Elavon under the Merchant Program unless Elavon declines a prospective merchant's application as set forth in Section 23[.]

and:

during the term of this Agreement and for a period of two (2) years following the termination of this Agreement, [Defendant] agrees that it will not, directly or indirectly, solicit for itself or others, offer to provide or assist others in providing or offering to provide, transaction processing services to any Referred Merchant participating in the Merchant Program.

(*Id.* at p. 4, § 7.)

85. The exclusivity and non-solicitation provisions contained in the Referral Agreement apply to PUB. (*See id.* at § 15.)

86. In direct contravention of these clear contractual obligations, PUB has steered merchant processing customers to its joint venture.



87. United (now PUB) agreed that “Elavon shall be entitled to specific performance of [Defendant’s] obligations under” the Referral Agreement exclusivity and non-solicitation provisions. (*Id.* at § 7.)

88. Elavon respectfully requests an injunction: (i) through May 7, 2023 preventing PUB and its successors from operating or engaging in a merchant processing business competing with Elavon; and (ii) through May 7, 2025, preventing PUB from providing, or assisting others in providing, or offering to provide transaction processing services to any Referred Merchant or merchant who should have been referred to Elavon under the Referral Agreement.

**COUNT IV—*Tortious Interference with Contractual Relations, Business Relations and Prospective Business Relations***

89. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

90. By no later than November 1, 2019, PUB had full knowledge of the Referral Agreement.

91. On information and belief, prior to November 1, 2019, PUB acted improperly and wrongfully without privilege in order to induce United to breach the Referral Agreement.

92. On information and belief, PUB also acted improperly and wrongfully without privilege in interfering with Elavon's business relationships and potential business relationships with third-party merchants.

93. Prior to its merger with United, PUB was a stranger to the contractual relationship between Elavon and United. PUB was also a stranger to the business relations between Elavon and the third-party merchants that were referred to it by United prior to its merger with PUB.

94. In knowingly and intentionally inducing United to breach the Referral Agreement and violating the exclusivity and non-solicitation provisions of the Referral Agreement, PUB acted solely in furtherance of its own interest in order to enrich itself at the expense of Elavon.

95. In inducing United to breach the Referral Agreement, PUB acted purposely and with malice and the intent to injure Elavon. It did so knowing that it would reap the financial benefits from its own joint venture and knowing that doing so would harm Elavon.

96. Pursuant to Section 3 of the Referral Agreement, United acknowledged and agreed "that any merchant that is a party to a Merchant Agreement does and shall have a direct business relationship with Elavon." (Referral Agreement, p. 2, § 3.) Further, Elavon retained "all right, title and interest in and to all Merchant

Agreements” that were entered into based upon referrals provided under the Referral Agreement. (*Id.*)

97. PUB was aware of Elavon’s business relations with third-party merchants and the rights associated therewith, but nevertheless tortiously interfered with Elavon’s direct business relationships by steering business away from Elavon and, instead, steering those relationships to its own joint venture.

98. In interfering with Elavon’s Merchant Agreements and by steering prospective business away from Elavon, PUB acted purposely and with malice and the intent to injure Elavon. It did so knowing that it would reap the financial benefits from its own joint venture and knowing that doing so would harm Elavon.

99. PUB’s tortious conduct proximately caused damage to Elavon in an amount to be proven at trial.

#### **COUNT V—*Unjust Enrichment***

100. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

101. As set forth above, Elavon conferred multiple benefits on United (now PUB).

102. In return, Elavon was to receive the immediate and future benefits from entering into contractual relationships with merchants referred to it by United (now PUB) during the entire term of the Referral Agreement.

103. The benefits from merchant referrals include, but are not limited to, a long term revenue flow from the servicing fees to be paid by referred merchants over several years.

104. Instead of conferring the benefits of merchant referrals to Elavon, United (now PUB) enriched itself by entering into merchant servicing contracts with merchants who otherwise would have contracted with Elavon for the same services.

105. In other words, PUB was unjustly enriched at the expense of Elavon in an amount not less than the received and expected profits from the servicing contracts entered into with merchants from referrals that otherwise were contractually owed to Elavon.

106. There was no valid justification for PUB's unjust enrichment.

107. Equity requires that PUB compensate Elavon for the financial benefits PUB received from the referrals made to the PUB joint venture.

#### **COUNT VI—*Contractual Attorneys' Fees and Expenses of Litigation***

108. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

109. The Referral Agreement is a valid contract between Elavon and Defendant.

110. The provisions of the Referral Agreement apply to PUB, as the Referral Agreement applies to United's successors.

111. As described above, United and PUB breached the contract and defaulted under thereunder.

112. Pursuant to Section 20 of the Terms and Conditions of Referral Agreement, Elavon, as the non-defaulting party, is “entitled to recover from” United and PUB “expenses incurred in enforcing the provisions of this Agreement, including reasonable legal fees and costs.” (Referral Agreement, p. 4, § 20.)

113. Elavon has incurred fees and costs in enforcing the provisions of the Referral Agreement against PUB.

114. Elavon is entitled to recover its attorneys’ fees and expenses of litigation from PUB, in an amount to be determined at trial, pursuant to the Referral Agreement.

**COUNT VII—*Statutory Attorneys’ Fees and Expenses of Litigation***

115. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

116. Although Elavon engaged in many attempts to avoid the instant action, PUB has refused to abide by the terms of the Referral Agreement.

117. PUB has acted in bad faith in connection with the events described herein, has been stubbornly litigious, and has caused Elavon unnecessary trouble and expense.

118. Elavon is entitled to recover its expenses of litigation, including reasonable attorneys' fees, from PUB pursuant to O.C.G.A. §13-6-11.

### **COUNT VIII—*Punitive Damages***

119. Plaintiff Elavon realleges and incorporates by reference the previous allegations as if fully set forth herein.

120. PUB's actions in inducing United to breach the Referral Agreement in order to support a joint venture with Elavon's direct competitor demonstrate willful misconduct, fraud, wantonness, and/or the entire want of care that gives rise to a presumption of conscious indifference to the consequences.

121. PUB's actions in interfering with Elavon's relationships with third-party merchants in order to enrich itself and support a joint venture with Elavon's direct competitor demonstrate willful misconduct, fraud, wantonness, and/or the entire want of care that gives rise to a presumption of conscious indifference to the consequences.

122. Because PUB acted with the specific intent to cause harm to Elavon, there is no limit to the amount of punitive damages for which PUB is liable.

123. Pursuant to O.C.G.A. § 51-12-5.1, Elavon prays for an award of punitive damages to punish PUB and to deter it from engaging in similar misconduct in the future.

## **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff Elavon, Inc. prays for the following relief:

1. That judgment be entered in favor of Elavon and against PUB in an amount to be determined by the Court;
2. That the Court enter an injunction: (i) through May 7, 2023 preventing PUB, its Affiliated Entities, and its successors from operating or engaging in a merchant processing business competing with Elavon; (ii) through May 7, 2025, preventing PUB, its Affiliated Entities, and its successors, from providing, or assisting others in providing, or offering to provide transaction processing services to any Referred Merchant or merchant who should have been referred to Elavon under the Referral Agreement; and (iii) preventing PUB, its Affiliated Entities, and its successors, from continued servicing of merchants that should have been referred to Elavon but for breach of the Referral Agreement;
3. That Elavon be awarded compensatory damages arising from United's and PUB's breaches of the Referral Agreement, including, but not limited to, damages for PUB's anticipatory repudiation through the five-year term of the Referral Agreement, in an amount to be determined by the Court;
4. That Elavon be awarded punitive damages;
5. That Elavon be awarded prejudgment and post-judgment interest consistent with the Referral Agreement and Georgia law;

6. That Elavon be awarded its expenses of litigation, including reasonable attorneys' fees, costs, and costs and expenses of Elavon's investigation and this litigation; and

7. That the Court award to Elavon such other and further relief as the Court deems just and proper.

Respectfully submitted this 29th day of June, 2021.

**PARKER HUDSON RAINER & DOBBS LLP**

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