

**IDX Capital LLC v Phoenix Partners Group LLC**

2009 NY Slip Op 31932(U)

August 27, 2009

Supreme Court, New York County

Docket Number: 102806/07

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56

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IDX CAPITAL LLC, JAMES CAWLEY,  
HELEN CAWLEY, JAMES CAWLEY, SR.,  
BRADY HALPER, RON NEAL, BHANU PATEL  
and STARLIGHT INVESTMENTS, LTD.,

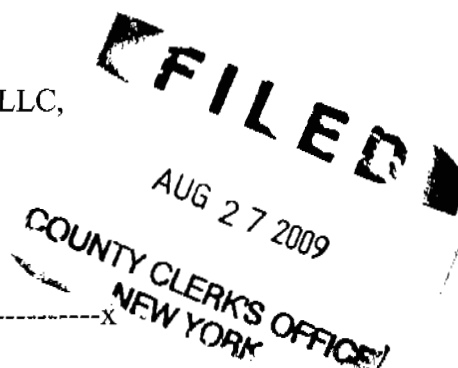
Index No.  
102806/07

Plaintiffs,

- against -

PHOENIX PARTNERS GROUP LLC,  
PHOENIX PARTNERS GROUP LP,  
INTERDEALER INFORMATION TECHNOLOGIES, LLC,  
WESLEY WANG, NICHOLAS STEPHAN,  
MARCOS BRODSKY, JASON HOROWITZ,  
PATRICK NIHAN and TERENCE SOLOMONE,

Defendants.  
-----x



**RICHARD B. LOWE III, J.:**

Motions designated Sequence Numbers 008, 009, and 010, seeking to dismiss certain causes of action or strike certain allegations in the second amended Complaint, are consolidated for disposition.

In Motion Sequence Number 008, defendants Phoenix Partners Group LLC (“Phoenix”), Phoenix Partners Group LP (“Phoenix LP”), Nicholas Stephan (“Stephan”), Marcos Brodsky (“Brodsky”), and Patrick Nihan (“Nihan”) move, pursuant to CPLR 3211(a)(7), to dismiss the causes of action against them or, pursuant to CPLR 3024(b), to strike certain allegations.

In Motion Sequence Number 009, defendant Interdealer Information Technologies, LLC (“Interdealer IT”) moves, pursuant to CPLR 3211(a)(7), to dismiss the causes of action against it.

In Motion Sequence Number 010, defendant Wesley Wang (“Wang”) moves, pursuant to CPLR 3024, to strike certain allegations.

## BACKGROUND

Plaintiffs commenced this action to recover damages from defendants based on their alleged actions in undermining negotiations for an agreement between plaintiff IDX Capital LLC (“IDX”) and non-party Knight Capital Group, Inc. (“Knight”) for the purchase of IDX’s assets, as well as causing Knight to withdraw employment agreements with plaintiffs James Cawley (“Cawley”) and Brady Halper (“Halper”) and disseminating false and defamatory information about them. Plaintiffs claim that defendants successfully participated in a campaign of harassment, defamation, and disparagement, aimed at blocking the IDX-Knight transaction and related employment agreements, by marshaling false information about them, which was shared with Knight in a series of emails and other media.

### **The Parties**

IDX is a Delaware limited liability credit derivative inter-dealer broker with its principal place of business in New York, New York. Cawley is the chief executive officer and chief financial officer of IDX, and Halper is IDX’s former chief operating officer. Plaintiffs Helen Cawley, James Cawley, Sr., Ron Neal, Bhanu Patel, and Starlight Investments, Ltd., an Anguilla-based investment company, are investors in IDX.

Phoenix LP is the successor-in-interest to Phoenix, another Delaware credit derivative inter-dealer broker. Wang, Stephan, and Brodsky are managing partners of Phoenix LP.

Interdealer IT, another Delaware inter-dealer broker, shared offices and operational resources with Phoenix LP. Wang, Stephan, Brodsky, and defendant Jason Horowitz (“Horowitz”) are also shareholders of Interdealer IT. Horowitz, a managing director at Interdealer IT, served as the chief technology officer of IDX until his termination in August

[\* 4 ]

2006. Nihan, a former employee of IDX, is an employee of Phoenix LP. Defendant Terence Solomone is a former employee of IDX.

### **Factual Allegations**

The Second Amended Complaint includes the following allegations. Cawley, Wang, and Stephan founded Axiom in November 2002. However, disagreements among them and other Axiom employees, including Brodsky, led to a dissolution proceeding, entitled *Stephan v Cawley* (Sup Ct, NY County, Index No.108226/05) and a Settlement Agreement, dated June 20, 2005, *inter alia*, dissolving Axiom. As part of the Settlement Agreement, Wang and Stephan agreed to resign as managers and employees of Axiom, Axiom agreed to buy back the shares held by Wang and Stephan, all parties agreed to make a joint statement withdrawing all allegations against Cawley, and all parties agreed not to disparage one another (*see* Transcript of Axiom Dissolution, Not of Mot [008], Exh Z, pp42-43).

In June 2005, Wang, Stephan, and Brodsky formed Phoenix and hired many of Axiom's former employees. Cawley and the remaining Axiom employees, members, and investors formed IDX in September 2005.

In November 2006, Knight entered into negotiations to purchase the assets of IDX and its subsidiary, IDX Derivatives. Knight also presented Cawley and Halper with written employment agreements and an offer of shares of Knight stock as part of the transaction.

Plaintiffs maintain that defendants learned of the IDX-Knight transaction and set out to undermine it using various means. Specifically, plaintiffs allege that Horowitz, while serving as a managing director at Interdealer IT, (1) used information obtained while he was employed by IDX to gain access to IDX's computer system on several occasions, without permission, on several occasions, for the purpose of obtaining information relating to the IDX-Knight

5 ]  
transaction; (2) exchanged emails with Wang and Stephan concerning information he obtained from IDX's computer system; (3) assisted Wang and Stephan in recruiting and hiring Nihan, another former IDX employee; and (4) altered an IDX website to display disparaging or defamatory material concerning Cawley.

Plaintiffs also claim that Nihan surreptitiously accepted a position at Phoenix, while continuing to work for IDX, so that he could pass on IDX confidential and proprietary information to Phoenix. Plaintiffs further allege that Wang paid Nihan or arranged for payment to be made to him in exchange for providing the information concerning IDX.

In addition, plaintiffs claim that Wang used pseudonyms to send Knight numerous emails containing false, defamatory, and disparaging messages concerning IDX, as well as documents from the Axiom dissolution proceeding that were disparaging to Cawley and Halper. The pleadings include copies of the actual emails sent to Knight.

Plaintiffs claim that as a result of defendants' actions, Knight backed out of the IDX-Knight transaction, including the Cawley and Halper employment agreements. Plaintiffs further claim that even after Knight decided not to close on the transactions, defendants continued their campaign of harassment, defamation, and disparagement by, *inter alia*, sending Knight additional email and posting comments about Cawley on a publicly accessible message board. In addition, plaintiffs claim that Wang continued to solicit damaging information concerning Cawley and sent harassing emails to Cawley's family.

Plaintiffs claim that the individual defendants knowingly and collectively participated in the campaign to block the IDX-Knight transaction and related employment agreements, and to destroy the personal and professional reputations of Cawley and Halper. Plaintiffs further allege that the corporate defendants, through the actions of its officers and managing partners,

including Wang, Stephan, Brodsky, and Horowitz, and its offices, computers, employees, and funds, participated in the campaign to block the IDX-Knight transaction and related employment agreements.

The first amended Complaint named as defendants Phoenix and Wang, and asserted causes of action for tortious interference, libel, injurious falsehood, and breach of a settlement agreement. Plaintiffs essentially claimed that Wang, as owner, officer, and control person of Phoenix, sent a series of defamatory emails concerning Cawley and Halper, and that Wang used Phoenix's offices and computers in furtherance of his campaign.

This Court denied Phoenix's motion to dismiss the tortious interference, libel, and injurious falsehood claims against it in the first amended Complaint (*see* Phoenix Mem in Support, p. 7, n. 3). Thereafter, plaintiffs sought leave to file an amended complaint adding five defendants and four causes of action. After reviewing the proposed second amended Complaint, defendants moved for an order directing that all papers filed in connection with any motion or cross motion concerning the proposed pleading be filed under seal and confidential, pending the Court's determination on the motions. The Court denied defendants' motion, by order entered August 5, 2008 (*see* Meyer Affid, Exh B). In addition, by order, entered December 2, 2008, this Court granted plaintiffs' motion to file a second amended Complaint (*see* Meyer Affid, Exh C).

Plaintiffs filed the second amended Complaint seeking to recover damages from defendants for their tortious interference with the IDX-Knight transaction and related employment agreements. In the first cause of action, plaintiffs allege a claim for tortious interference with business relations against all defendants. In the second and third causes of action, Cawley and Halper, respectively, allege claims against all defendants for tortious interference with the employment agreement with Knight.

[\* 7 ]

In the fourth and fifth causes of action, Cawley and Halper, respectively, allege libel claims against Wang and Phoenix. In the sixth and seventh causes of action Cawley and Halper, respectively, allege claims for injurious falsehood against Wang and Phoenix. In the eighth cause of action, IDX alleges a claim for injurious falsehood against Wang and Phoenix.

IDX alleges claims for breach of fiduciary duty against Horowitz in the ninth cause of action, and against Nihan in the tenth cause of action. In addition, IDX alleges claims for aiding and abetting breach of fiduciary duty against Wang, Stephan, Brodsky and Phoenix in the eleventh cause of action, and against Interdealer IT in the twelfth cause of action.

In the thirteenth cause of action, Cawley, Helen Cawley, James Cawley, Sr., Ron Neal, Dhanu Patel, and Starlight seek injunctive relief against Wang and Stephan for violation the Settlement Agreement in Axiom dissolution proceeding.

Defendants seek to dismiss the Second Amended Complaint or to strike certain allegations therein.

## DISCUSSION

### Motion to Dismiss

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

The first cause of action essentially alleges that Phoenix, through the actions of its high level managers, including Wang, Stephan, and Brodsky, and its other employees, including Horowitz and Nihan, improperly accessed an IDX computer, used anonymous emails and other wrongful means to block the IDX-Knight asset purchase transaction, and that Knight would have entered into an asset purchase agreement with IDX but for the intentional and wrongful acts of defendants. Thus, given the most favorable intendment, the first cause of action states a valid claim for tortious interference with business relations against said defendants (*see WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257 [1<sup>st</sup> Dept 1992]). The pleadings also sufficiently allege that Interdealer IT, acting through Horowitz, participated in the campaign to block the IDX-Knight transaction, so as to survive a motion to dismiss (*see Keen v Keen*, 113 AD2d 964, 966 [3d Dept 1985]).

Similarly, the pleadings sufficiently allege that Knight entered into valid employment agreements with Cawley and Halper; that defendants knew of the existence of said agreements; and that defendants' deliberate interference resulted in the breach of the agreements, so as to state a cause of action for tortious interference with contractual relations (*see NBT Bancorp, Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621 [1996]).

The causes of action for libel arising out of the alleged actions of Wang and others in sending Knight a series of emails containing specific false statements concerning Cawley, Halper, and the Axiom Dissolution proceeding, out of personal spite or ill will, and with reckless disregard for the statements' truth or falsity, are also actionable (*see Foster v Churchill*, 87 NY2d 744, 752 [1996]). Furthermore, contrary to defendants' position, as stated, Phoenix may be held liable for the conduct of Wang and its other principals, who participated in and used

\* 9 ]  
Phoenix's resources to facilitate their campaign to block the IDX-Knight transaction and related employment agreements (*see Keen v Keen, supra*).

However, the causes of action for injurious falsehood by Cawley and Halper are duplicative of the causes of action for libel and, in any event plaintiffs fail to plead injury to any legally protected property interest or special damages (*see Rosenberg v Home Box Office, Inc.*, 33 AD3d 550 [1<sup>st</sup> Dept 2006]). The absence of any facts alleging injury to a legally protected interest or special damages is also fatal to IDX's claim for injurious falsehood (*see id.*). Plaintiffs' assertion that such factual allegations are not necessary lacks merit. Thus, the sixth, seventh, and eighth causes of action alleging injurious falsehood are dismissed.

In the ninth and tenth causes of action, IDX alleges that Horowitz and Nihan, respectively, breached a fiduciary duty while they were still employed by it. "An employee owes a fiduciary duty to his employer as a matter of law and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost faith and loyalty in the performance of his duties'" (*Louis Capital Markets, L.P. v REFCO Group, Ltd.*, 9 Misc 3d 283, 289 [Sup Ct, NY County 2005] quoting *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 132, 138 [1936]). Furthermore, while an employee may secretly incorporate a competitive business prior to his departure, he must not "use his principal's time, facilities or proprietary secrets to build his competing business" (*Maritime Fish Prods., Inc. v World-Wide Fish Prods., Inc.*, 100 AD2d 81, 88 [1<sup>st</sup> Dept 1988]).

Here, the pleadings sufficiently detail how Horowitz allegedly breached a duty to IDX by, *inter alia*, using information obtained while employed by IDX to later gain access to IDX's computer system on several occasions, without permission, for disloyal purposes, so as to survive a motion to dismiss. In addition, the factual allegations that Nihan disclosed to several

defendants confidential information concerning the terms of IDX-Knight transaction, while still employed by IDX and in exchange for payments and the promise of employment, are sufficient to state a claim for breach of fiduciary duty. The allegations here also satisfy the heightened pleading standard required by CPLR 3016[b] since they sufficiently inform defendants of the substance of the claims against them (*see Louis Capital Markets, L.P. v REFCO Group, Ltd., supra*).

In addition to satisfactorily alleging breach of fiduciary duty, the pleadings sufficiently allege that Wang, Stephan, Brodsky and Phoenix knowingly induced or participated in the breach, and that IDX suffered damage as a result of the breach, so as to state a valid claim for aiding and abetting breach of fiduciary duty (*see Kaufman v Cohen, 307 AD2d 113, 125 [1<sup>st</sup> Dept 2003]*). As stated, the pleadings also satisfactorily allege that Interdealer IT, acting through Horowitz, participated in the campaign to block the IDX-Knight transaction, so as to survive a motion to dismiss the claim for aiding and abetting breach of fiduciary duty.

The thirteenth cause of action states a viable claim to enjoin the parties to the Settlement Agreement from violating the terms therein by continuing to disparage one another, sufficiently alleging a likelihood of success, irreparable injury absent such relief, and a balancing of the equities in favor of the relief sought (*see Amarant v D'Antonio, 197 AD2d 432, 433-434 [1<sup>st</sup> Dept 1993]*).

In sum, the motion to dismiss is granted to extent of dismissing the sixth, seventh, and eighth causes of action for injurious falsehood, and it is otherwise denied. The Court need not address plaintiffs' request in their memorandum of law to replead any deficiency in the Complaint, as no such motion is before the Court (*see Mihlovan v Grozavu, 72 NY2d 506, 508 [1988]*). In any event, the dismissed claims were duplicative of other adequately pleaded claims.

**Motion to Strike**

CPLR 3024(b) directs that “[a] party may move to strike any scandalous or prejudicial material unnecessarily inserted in a pleading.” In reviewing a motion pursuant to CPLR 3024(b), the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1<sup>st</sup> Dept 2007]).

The information which defendants seek to strike are based on documentary evidence in the form of their own emails and instant messages, which form the basis of plaintiffs claims against them. Thus, the requests to strike certain materials from the pleadings is denied.

Accordingly, it is

ORDERED that the motion by defendants Phoenix, Phoenix LP, Stephan, Brodsky, and Nihan is granted to the extent of dismissing the sixth, seventh, and eighth causes of action in the second amended Complaint, and it is otherwise denied; and it is further

ORDERED the motion to dismiss by defendant Interdealer IT and motion to strike by defendant Wang are denied; and it is further

ORDERED that the sixth, seventh, and eighth causes of action in the second amended Complaint are severed and dismissed, and the remainder of the action shall continue; and it is further

ORDERED that defendants are directed to serve answers to the Second Amended Complaint within 10 days after service of a copy of this order with notice of entry.

**Dated:** August 27, 2009

**FILED** ENTER:  
 AUG 27 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK  
 HON. RICHARD B. LOWE, III  
 J. S. C.