

Ronen v Cohen

2013 NY Slip Op 31310(U)

June 14, 2013

Sup Ct, NY County

Docket Number: 650847/2013

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

NIR RONEN and MER HOLDINGS GROUP, LLC Plaintiffs,
-against-
URIEL COHEN, et al. Defendants.
INDEX NO. 650847/2013
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to were read on this motion to/for Prelim. Inj./TRO
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s).
Answering Affidavits — Exhibits No (s).
Replying Affidavits No (s).

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Plaintiffs' motion for a preliminary injunction is granted to the extent set forth in the accompanying decision/order dated June 14, 2013.

Dated: 6-14-13
MARCY S. FRIEDMAN, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT 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 – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

NIR RONEN and MER HOLDINGS GROUP,
LLC,

Plaintiffs,

- against -

URIEL COHEN, URI YERUSHALMI,
HIGHLAND ASSET MANAGEMENT, LLC,
WHITE BAY GROUP, USVI, LLLP, WHITE BAY
MANAGEMENT, LLC and WHITE BAY PT,
LLC,

Defendants.

Index No.: 650847/2013
Motion Seq. 001

DECISION/ORDER

x

This is an action for injunctive relief and damages brought by Nir Ronen (Ronen) and his company MER Holdings Group, LLC (MER) against his business partners Uriel Cohen (Cohen), Uri Yerushalmi (Yerushalmi), and White Bay Group, USVI, LLLP, White Bay Management, LLC and White Bay PT, LLC (White Bay PT) (collectively the White Bay defendants). Ronen alleges that he was ousted from the algorithmic securities trading business he co-founded with Cohen, and that defendants have misappropriated trade secrets embodied in a trading platform, known as the Bullseye Platform, that he developed. Plaintiffs move for a preliminary injunction seeking, among other things, to enjoin defendants from interfering with Ronen’s access to the Bullseye Platform and its components, including algorithms, software, hardware, and source code; ordering defendants to provide Ronen with a copy of all current versions of the algorithms and source code; enjoining defendants from “committing further breaches” of the parties’ operating agreements; and directing defendants to restore Ronen’s rights of partnership and

management in the operation of the parties' limited liability companies.

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor. (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; Grant Co. v Sroggi, 52 NY2d 496, 517 [1981].) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].)

As to likelihood of success on the merits, "the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action. While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, [a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18,23 [1st Dept 2011][internal citations and quotation marks omitted].) Where "the facts are in such sharp dispute that it cannot be said that the [movant] established a clear right to preliminary injunctive relief," the motion will be denied. (Omakaze Sushi Restaurant, Inc., v Lee, 57 AD3d 497 [2d Dept 2008].)

As alleged in the complaint, the Bullseye Platform is a securities trading platform which facilitates the high-speed analysis of securities exchange data and automatically places trades based on such information. (Compl., ¶¶ 2-3.) It is composed of trading algorithms, computer

software, computer hardware, hardware configurations, switches, infrastructure, data feed services, and the source code for the software. (Id., ¶ 4.)

Ronen attests that, in 2005, he and Cohen established a “Trading Business” which they “agreed would employ the Bullseye Platform to engage in algorithmic trading on various securities exchanges.” (Ronen Aff., ¶ 16.) While he does not define the “Trading Business,” the following evidence is undisputed as to the corporate structure under which the parties operated the Bullseye Platform: On October 30, 2006, Ronen and Cohen formed Bullseye Central, LLC (Bullseye Central) which operates the computer hardware, hardware configurations, switches, infrastructure, and data feed services. (See Affirmation of Justin J. Gunnell [plaintiffs’ attorney], Ex. A [Operating Agreement of Bullseye Central, LLC]; Transcript of Oral Argument dated April 25, 2013 [Oral Argument Tr.] at 5-6, 34.) According to the Operating Agreement of Bullseye Central, MER owns 50% of the company and Highland Asset Management, LLC (Highland or Cohen’s Company) owns the other 50%. (See Gunnell Aff., Ex. A, ex. A.) For all “Major Decisions,” the consent of both Members is required. (Id. at § 2.6.2.)

On March 10, 2008, the parties also formed Bullseye Holdings, LLC (Bullseye Holdings) to act as a holding company for Bullseye Central, Ltd. (BC Ltd.), an Israeli company which operates the software. (See Gunnell Aff., Ex. C [Amended and Restated Operating Agreement of Bullseye Holdings, LLC]; Oral Argument Tr. at 5-6, 26.) According to the Amended and Restated Operating Agreement of Bullseye Holdings, LLC, White Bay Group USVI, LLLP holds a 47.5% interest in the company, MER holds an 47.5% interest in the company, and Uri Yerushalmi holds a 5.0% interest. (Gunnell Aff., Ex. C, ex. A.) These three members are responsible for the management of the company and can take action “upon the consent of the

majority of Members by Percentage Interest.” The Bullseye Holdings Operating Agreement further provides that “[t]he Members, acting with majority consent, shall have full and complete discretion to manage and control the business and affairs of the Company” (Id. at § 2.6.1.)

Although these companies operate the hardware and software, plaintiffs and defendants sharply dispute the authorship and ownership of the Bullseye Platform, and in particular, whether the software and hardware components are owned by Ronen individually or by the Bullseye entities. Plaintiffs allege, and defendants dispute, that beginning in 2004, Ronen conceived of and authored all of the algorithms, software, and source code for the original version of the Bullseye Platform. (Compl., ¶¶ 34, 36, 233.)

In support of this contention, plaintiffs submit the affidavits of Ronen and Erez Shermer, an individual employed by BC Ltd. to translate the source code from C# to C++ (a different computer language). In his affidavit, Ronen attests that he independently conceived and developed the Bullseye Platform including the algorithms, software, and source code. (See Affidavit of Nir Ronen, ¶¶ 9, 12.) Ronen also claims that he conceived of and authored an improved version of the Bullseye Platform called Bullseye Remote (id., ¶ 11) and that he remains the largest “contributor” to the source code of the Bullseye Platform. (See Ronen Supplemental Aff., ¶¶ 17-19.) He asserts that the version of the source code that is in use today is “predominantly my work. It incorporates tens of thousands of lines of code that I alone authored, without which the Software would not function.” (Ronen Aff., ¶ 12.) In further support, Erez Shermer attests that Ronen was the sole author of original versions of Bullseye Platform and Bullseye Remote. (See Affidavit of Erez Shermer, ¶ 6.) Shermer also states that Ronen was the largest single contributor to the source code and that measuring the importance of Ronen’s

contribution in megabytes, as defendants do, is not indicative of his contribution. (Id., ¶¶ 10, 14-15.)

In opposition to Ronen's claim of authorship, defendants submit the affirmations of Cohen, Yerushalmi, and Meilech Levy, a securities trader who traded alongside Cohen and Ronen. In his affirmation, Cohen avers that the Bullseye Platform was the "product of a joint effort by numerous individuals over a period of eight years." (Affirmation of Uriel Cohen in Opp. to Prelim. Inj. Motion [Cohen PI Aff.] at 2.) Cohen further asserts that he provided the algorithms and designed a number of graphic user interface windows necessary to monitor and support trading. (Id. at 10.) Cohen also attests that during the development of the initial trading platform, Ronen was heavily, but not solely, involved and that in 2008, the parties decided to hire another programmer to encode the program into a faster computer language which was unknown to Ronen. (Id. at 11.) Cohen states that Ronen's work has been "superseded" by the addition of millions of lines of computer code. (Id. at 11-12.) In his affirmation, Meilech Levy states, although the extent of his personal knowledge is not made clear, that in 2005 Cohen developed the trading ideas and algorithms and Ronen translated these ideas into computer code. (Affirmation of Meilech Levy at 1-2.) In addition, Uri Yerushalmi attests that the original source code bears no resemblance to the source code that exists today and that the code has increased from 1.43 megabytes to 34.95 megabytes. (Affirmation of Uri Yerushalmi at 2.) Yerushalmi claims that the present code was developed over a period of seven years by programmers at Bullseye under his supervision and that Ronen did not write a single line of code as it exists today. (Id. at 2-3.)

With respect to the hardware, Ronen attests that he "led the effort . . . to design and construct the Hardware . . . to take advantage of direct access to exchange data feeds and to

perform the fastest possible analysis of those data feeds and execution of buy and sell orders.” (Ronen Aff., ¶ 13.) Ronen also attests that he “directed the design and construction of four co-location hardware systems in New York and New Jersey” which were set up in the same data centers that house the New York Stock Exchange, NASDAQ, NYSE-Arca, BATS, and Direct Edge computer servers to ensure the fastest possible access. (Id., ¶¶ 13-14.) Ronen contends that the configuration of the individual components and overall structure of the co-location hardware is proprietary. (Id., ¶ 15.)

In contrast, Cohen contends that the hardware “is a combination of off-the-shelf components put together in a logical fashion but requiring no particular design genius or imagination” and that there are no trade secrets. (Cohen PI Aff. at 13.) Cohen states that even if the court finds that the arrangement of the hardware was a trade secret, Ronen did not design such arrangement. (Id.) Rather, Cohen claims that he and an employee of Bullseye, Alon Forkosh, created the hardware system. (Id.) Cohen also asserts that the strategic idea of the design of the co-location facility was his, and that another Bullseye employee, Kevin Cruz, executed such design. (Id.)

As to the issue of ownership, plaintiffs allege that Ronen owns the source code and algorithms. (Compl., ¶ 52.) As noted above, Ronen attests that, in 2005, he and Cohen established a “Trading Business” which they “agreed would employ the Bullseye Platform to engage in algorithmic trading on various securities exchanges.” (Ronen Aff., ¶ 16.) Ronen asserts that he agreed to “permit the Trading Business to use the Bullseye Platform” and that “modifications and improvements could be made to the Bullseye Platform” so long as he “was in charge of and maintained full rights of ownership and possession in all such modifications and improvements, and so long as any traders employed by the Trading Business did not have access

to the Source Code.” (Id., ¶ 18.) Ronen claims that he “reserved the right to withdraw [his] permission to use the Bullseye Platform and the Trade Secrets.” (Id., ¶ 20.) He also claims that the Bullseye entities were formed for the purpose of “operating and developing” the hardware, software, and algorithms (Id., ¶¶ 31, 34.) He argues that the algorithms and source code are trade secrets created by him and therefore could not have been transferred absent express, volitional conduct. (Supplemental Memorandum of Law in Further Support of Plaintiffs’ Motion for a Preliminary Injunction [Ps’ Supp. Memo] at 12-15.)

In opposition, defendants assert that the Bullseye entities are the owners of the source code, algorithms, and Bullseye Platform. (Cohen PI Aff. at 2; Affirmation of Uriel Cohen in Opp. to TRO [Cohen TRO Aff.] at 2.) Specifically, Cohen claims that “at no time . . . prior to 2012 did [Ronen] ever suggest or intimate that he had any ownership interest in the software and source code developed by Bullseye.” (Cohen TRO Aff. at 5.) Cohen also affirms that he did not and never would have agreed to a provision whereby Ronen “maintained full rights of ownership and possession” in the Bullseye Platform. (Cohen PI Aff. at 12.) Cohen affirms that “the parties have operated under the premise that the Intellectual Property belonged to Bullseye” and that “ownership in it was through . . . ownership of Bullseye and not as individuals.” (Id.) With respect to the hardware, Cohen contends that even though Ronen “claims that the ‘hardware trade secrets’ belong to him. . . . there are no hardware trade secrets.” (Id. at 13.)

It is well settled that a trade secret is “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” (Ashland Mgt. v Janien, 82 NY2d 395, 407 [1993][citing section 757 of the Restatement of Torts].) The Court of Appeals has held that the following factors should be considered in determining whether a trade secret exists: “(1) the

extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” (Id. [citing Restatement of Torts §757, comment b].) As these considerations demonstrate, a trade secret must first of all be secret (id.) and will not be found where the business information is “readily ascertainable” through public sources. (Leo Silfen Inc. v Cream, 29 NY2d 387, 392 [1972][customer lists]; 1 Model Mgt., LLC v Kavoussi, 82 AD3d 502, 503 [1st Dept 2011].)

In addition, assignment of a trade secret “will not be imputed absent express, volitional conduct by the presumed assignor and assignee. Thus, one utilizing allegedly trade secret matter in an individual proprietorship will not be deemed to have sold or assigned it to the corporate entity organized by him to operate the proprietorship business absent positive evidence on the point.” (1 Milgrim, Trade Secrets § 2.02 [2], at 2-26 [citing All One Faith in One God State Universal Life Church v United States, 1976 US Dist Lexis 16229 [SD Cal 1976]; Bimba Mfg. Co. v Starz Cylinder Co., 119 Ill App 2d 251 [1st Dist 1969]]; see also Pullman Group, L.L.C. v Prudential Ins. Co. of Am., 288 AD2d 2, 3 [1st Dept 2001].)

Software, Algorithms, and Source Code

As a threshold matter, the court finds that Ronen has standing to maintain this action based on his claim to ownership of the Bullseye Platform in his individual capacity. However, as the above review of the evidence shows, the parties rely largely on the conclusory assertions of the Bullseye principals as to the authorship and ownership of the Bullseye Platform, and their

assertions are sharply conflicting. In light of the parties' factual dispute, the court holds that plaintiffs have not met their burden of showing a likelihood of success on the merits of their claim that the current versions of the software, algorithms, and source code were authored by Ronen. Even assuming that Ronen authored the original source code, Ronen's evidence does not eliminate issues of fact as to the extent to which the current version of the code is based on the original version. There is an even greater factual dispute as to the algorithms, inasmuch as Cohen claims that he was primarily responsible for developing them. These factual issues as to the authorship of the source code and algorithms must be resolved before the court can determine the further issue of whether Ronen transferred the source code and algorithms of the Bullseye Platform to Bullseye Holdings or remains their owner.

The court further holds that these factual issues as to authorship are a bar to Ronen's request for a mandatory preliminary injunction directing that defendants provide him with a copy of the current versions of the algorithms and source code, or "return" these components of the Bullseye Platform to him. (Order to Show Cause, Requests for Relief §§ [d], [i].) His request for access to the software, algorithms and source code (*id.*, §§ [a]-[c]) should be denied for two additional reasons. First, by the clear terms of the Bullseye Holdings Operating Agreement, Ronen's managerial responsibilities were terminated as permitted by the majority vote of defendants Cohen and Yerushalmi. Second, Ronen has not had personal access to the source code since March 2012 (Ronen Aff., ¶¶ 57-58); yet he did not seek injunctive relief until March 2013.

Although the court will not grant a mandatory injunction with respect to the algorithms and source code, the court reaches a different result as to plaintiffs' request for an injunction to preserve the status quo by restraining defendants from misappropriation of trade secrets to the

extent that they consist of the algorithms or source code. (Order to Show Cause, Requests for Relief § [j].) Even where factual disputes exist, a preliminary injunction should be granted where necessary to preserve the status quo provided that a showing is made that irreparable harm will result absent the injunction. (See State of New York v City of New York, 275 AD2d 740, 741 [2d Dept 2000]; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626, 628 [2d Dept 1988].)

Here, defendants have provided Avi Kohn with access to the source code. (See Affirmation of Avi Kohn at 1-2.) While Kohn claims that he is a programmer for BC Ltd. and has only been provided access to the source code “in that capacity,” he is also a trader with White Bay PT, a broker-dealer allegedly controlled by defendant Cohen and to which the trading operations were transferred in October 2012. (See Ronen Aff., ¶¶ 80-82.) Kohn’s employment with White Bay PT evidences that defendants Cohen and Yerushalmi have put the source code into the possession of a person who is in a position to disseminate it to third parties. The potential for dissemination is of particular concern, given that Cohen and Yerushalmi authorized Bullseye Central and Bullseye Holdings to enter into a Master Agreement with White Bay PT, dated August 23, 2012, under which the Bullseye entities gave that White Bay entity a license to use the “trading technology systems,” including the software. (See Cohen Aff., Ex. A [Master Agreement], § 2.) Although the Bullseye Holdings Operating Agreement permits management decisions to be made by majority vote and therefore Bullseye Holdings’ entry into the licensing agreement, if the algorithms and source code are also ultimately disseminated to the White Bay defendants, they will be in a position to compete with the Bullseye entities.

The court holds that plaintiffs have made a prima facie showing on this motion that the algorithms and source code are not publically available and are trade secrets (see MSCI Inc. v Jacob, 36 Misc3d 211, 214-15 [Sup Ct, New York County 2012]) and that the software may be a

trade secret as well. (See Falconwood Corp. v In-Touch Tech., Ltd., 227 AD2d 215 [1st Dept 1996].) Irreparable injury “may be established where there is a danger that, unless enjoined, a misappropriator of trade secrets will disseminate those secrets to a wider audience or otherwise irreparably impair the value of those secrets.” (Invesco Institutional (N.A.), Inc. v Deutsche Inv. Mgt Americas, Inc., 74 AD3d 696, 696 [1st Dept 2010][internal quotation marks and citation omitted].)

Here, plaintiffs make a prima facie showing that the algorithms, source code, and software trade secrets were disseminated to third parties. (See supra at 10.) Thus, although there is a factual dispute as to Ronen’s authorship and ownership of these trade secrets, an injunction should be granted to preserve the status quo and to prevent further dissemination pending determination of Ronen’s claim.

Hardware

As in the case of the software, algorithms, and source code, the court finds that plaintiffs make a sufficient showing on this motion that the hardware constitutes a trade secret, but that there is sharp dispute as to its authorship. Both parties rely on wholly conclusory allegations that they were responsible for the design of the arrangement of the hardware. Notwithstanding this dispute of fact, under the Bullseye Central Operating Agreement, Ronen, through his company MER, has equal management rights with Cohen, through his company Highland, over “Major Decisions.” However, the uncontested evidence shows that Bullseye Central has taken certain major steps with respect to the hardware without Ronen’s consent. Specifically, it has licensed the trading systems to White Bay PT, developed new co-location facilities in Illinois which it has leased to commodities traders, and denied Ronen access to the hardware for purposes of trading.

Based on this evidence, the court holds that plaintiffs have demonstrated a likelihood of success on the merits of their claim that defendants have misappropriated hardware trade secrets and that plaintiffs will suffer irreparable harm if further misappropriation is not enjoined. (See Order to Show Cause, Requests for Relief § [k].) The court further holds that Ronen should be provided access to the hardware for trading purposes. In this regard, the court notes that defendants have offered to make the hardware available to Ronen provided that he pays for its use. (See Oral Argument Tr. at 34-35.) Plaintiffs acknowledge that even those traders at White Bay PT who have been given access to the systems by defendants Cohen and Yerushalmi make payments for use of the hardware. (See id. at 8-9.) This court finds that mere ownership of Bullseye Central does not entitle its principals to access to the hardware without charge. Thus, Ronen's access, like the White Bay PT traders', must be conditioned on payment to Bullseye Central of his appropriate share for his personal use of the hardware.

As to the branches of the motion requesting an order enjoining defendants from committing further breaches of the Bullseye Central, LLC Operating Agreement and the Bullseye Holdings, LLC Operating Agreement (Order to Show Cause, Requests for Relief §§ [e], [g]), the court finds that these requests should be denied as overbroad.

With respect to the branch of the motion requesting restoration of Ronen's rights to participate in the management of Bullseye Central (id., § [f]), the court finds that the plaintiffs are entitled to injunctive relief. The undisputed evidence is that Ronen has a right (through MER) to participate in the management of Bullseye Central because MER is a 50% owner and the Bullseye Central Operating Agreement requires consent of both Members for Major Decisions. (See supra at 3.) Accordingly, the court holds that there is a likelihood of success on

the merits as to MER's right to participate in and manage Bullseye Central, that denial of this right would result in irreparable harm, and that the balance of the equities warrants the requested relief. In so holding, the court declines to consider defendants' contention, made for the first time at the oral argument, that plaintiffs' claims regarding the hardware must be arbitrated.

Regarding Bullseye Holdings, however, the court finds that the branch of the motion requesting restoration of MER's rights to participate in and manage Bullseye Holdings must be denied. (See Order to Show Cause, Requests for Relief § [h].) MER's management rights are limited to those set forth in the Bullseye Holdings Operating Agreement, which provides that management shall act upon the consent of the majority of Members by Percentage Interest. (See supra at 3-4.) If the other Members vote together and against MER, MER does not have the authority (or Percentage Interest) to alter such decisions.

Defendants have consented on the record to provide plaintiffs with access to the books and records of Bullseye Holdings, LLC. (See Oral Argument Tr. at 39-40; TRO Transcript dated March 28, 2013 at 21.)

Defendants have also indicated their willingness to preserve evidence. (See Order to Show Cause, Requests for Relief § [l]; Oral Argument Tr. at 40.)

With respect to the request for expedited discovery (see id., § [m]), the court has already conducted a preliminary conference and issued an order, on consent of counsel, which includes a schedule for expedited discovery.

Accordingly, it is hereby ORDERED that plaintiffs' motion is granted to the extent set forth herein; and it is further

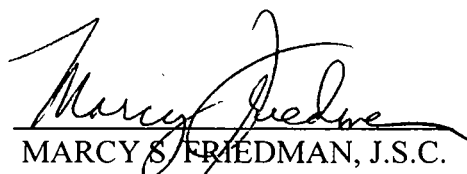
ORDERED that the parties are directed to confer on a proposed order consistent with the

terms of this decision and including provisions enjoining defendants from misappropriating trade secrets; directing defendants to provide access to the hardware to plaintiff Ronen upon payment to Bullseye Central of his appropriate share for his personal use of the hardware; restoring Ronen's rights to participate in the management of Bullseye Central; directing provision to plaintiffs of access to Bullseye Holdings and Bullseye Central's books and records, which shall not include White Bay entity records other than those to which Bullseye Holdings and/or Bullseye Central is a party; preservation by both parties of relevant evidence; and posting of an undertaking. The parties shall make good faith efforts to agree on the form of the proposed order, on the amount of payment for Ronen's use of the hardware, and on the amount of the undertaking. In the event they are unable to reach agreement, plaintiffs shall settle order and defendants shall settle a proposed counter-order. The proposed orders shall be redlined so as to indicate any provisions on which the parties have not reached agreement; and it is further

ORDERED that the parties shall telephone chambers on a conference call on June 21, 2013 at 11:00 a.m. regarding discovery as to the source code, an issue that was not resolved at the preliminary conference. Prior to the call, the parties shall confer on this issue.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2013



MARCY S. FRIEDMAN, J.S.C.

MARCY S. FRIEDMAN, J.S.C.