

Cyberbit, Inc. v Cloud Range Cyber, LLC

2024 NY Slip Op 31833(U)

May 21, 2024

Supreme Court, New York County

Docket Number: Index No. 654488/2022

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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<p>CYBERBIT, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>CLOUD RANGE CYBER, LLC,A TENNESSEE LIMITED LIABILITY COMPANY, DEBORAH GORDON, CLOUD RANGE CYBER, LLC,A DELAWARE LIMITED LIABILITY COMPANY, LIVE CYBER, LLC,A DELAWARE LIMITED LIABILITY COMPANY, LIVE CYBER HOLDINGS, INC.,A DELAWARE CORPORATION</p> <p style="text-align: center;">Defendant.</p>	<table border="0"> <tr> <td style="width: 30%;">INDEX NO.</td> <td style="border-bottom: 1px solid black;">654488/2022</td> </tr> <tr> <td></td> <td>02/14/2024, 02/15/2024, 02/15/2024, 02/13/2024, 02/13/2024, 02/13/2024, 03/12/2024, 03/29/2024</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black;">03/29/2024</td> </tr> <tr> <td></td> <td>005 006 007 008 009 010</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black;">013 015</td> </tr> </table>	INDEX NO.	654488/2022		02/14/2024, 02/15/2024, 02/15/2024, 02/13/2024, 02/13/2024, 02/13/2024, 03/12/2024, 03/29/2024	MOTION DATE	03/29/2024		005 006 007 008 009 010	MOTION SEQ. NO.	013 015
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DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 118, 119, 120, 121, 122, 190, 191, 192, 193, 194, 195, 287, 288, 289, 290, 291, 292, 293, 294, 295
were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 148, 149, 179, 181, 182
were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 150, 180, 183, 184, 185, 277, 278, 279
were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 96, 97, 98, 99, 100, 101, 102
were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 123, 170, 171, 172, 173, 174, 175, 176, 187
were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 116, 117, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 188

were read on this motion to/for

PREL INJUNCTION/TEMP REST ORDR

The following e-filed documents, listed by NYSCEF document number (Motion 013) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 242, 243, 244, 257, 258, 259, 260

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 015) 234, 235, 236, 237, 238, 239, 240, 241, 245, 246, 247, 248, 249, 250, 251, 252, 253, 263

were read on this motion to/for

QUASH SUBPOENA, FIX CONDITIONS

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 5.21.24), the motions (Mtn. Seq. Nos. 005, 006, 007, 008, 009, 010, 013, 015) are decided as follows:

- Defendants' motion to compel (Mtn. Seq. No. 005) is granted solely to the extent set forth on the record (*tr.* 5.21.24). As discussed, the Court is reserving decision on those portions of the motion relating to Defendants' Requests Nos. 29-50 and Plaintiffs' allegedly improper redactions. The parties shall each submit a three-page letter in regard to Defendants' Requests Nos. 29-50, via email to sfc-part53@nycourts.gov and upload to NYSCEF, addressing the Defendants' potential waiver of any claims based on trademark infringement pursuant to the Purchase Order Amendment. The Defendants shall submit their letter on or before June 7, 2024. The Plaintiff shall submit its letter in response on or before June 21, 2024. The Court will consider the issue at a hearing on July 8, 2024, at 10:30am. The Court will then issue a supplemental order addressing the issue. In regard to Plaintiffs' allegedly improper redactions, the Defendants shall submit five documents with redactions which the Defendants believe are overbroad to the Court on or before June 7, 2024. The Plaintiffs shall submit the unredacted documents to the Court for *in camera* review by June 21, 2024. The Court will hear argument on this issue at the

July 8, 2024, hearing, and thereafter issue a supplemental order.

- Plaintiff's motion to compel (Mtn. Seq. No. 007) is granted in its entirety for the reasons set forth on the record (*tr.* 5.21.24). The complaint sufficiently alleges and provides very specific examples of how the Defendants allegedly stole the Plaintiff's software and other corporate proprietary information. As to the software, as discussed, the parties shall exchange their respective software codes on an Attorneys' Eyes and Experts Eyes Only basis.
- Defendants' motion to amend (Mtn. Seq. No. 009) is granted to the extent set forth on the record (*tr.* 5.21.24). As discussed, the Defendants are given leave to add the proposed additional breach of contract claims. The motion is denied, however, as to Defendants' proposed tortious interference claim, as it is palpably insufficient as a matter of law (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]) for two reasons. First, the Defendants have taken the position in this litigation that Cloud Range TN and Live Cyber are separate entities and, having done so, they cannot assert a tortious interference claim on behalf of Live Cyber based on alleged misrepresentations made to customers of Cloud Range TN. Second, tortious interference of contract requires showing (i) the existence of a valid contract between plaintiff and a third party, (ii) the defendant's knowledge of that contract, (iii) the defendant's intentional procuring of the breach, and (iv) damages (*Foster v. Churchill*, 87 NY2d 744, 750 [1996]). Tortious interference with prospective economic advantage requires interference accomplished by "wrongful means" or that the defendant acted for the sole purpose of harming the plaintiff (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). Putting aside the

speculative damages and seemingly insurmountable causation issue, the disputed issue of fact – (*i.e.*, who terminated the contract and why), the alleged misrepresentation was made in response to a question in a bidding process for a contract with a potential customer, a university in Florida, and there is no cognizable allegation that Cyberbit’s answer to this question was by wrongful means or made with the sole intent to harm Live Cyber. At most, there answer to the question was wrong (taking the Defendants position as true). This is fatal to the claim. Thus, the Defendants’ motion to amend is denied. Although the court indicated the denial of leave to amend as to this claim was without prejudice on the record (*tr.* 5.21.24), on further consideration, it is denied with prejudice.

- As set forth on the record, (*tr.* 5.21.24), the Defendants’ motion for a preliminary injunction (Mtn. Seq. No. 010) is withdrawn without prejudice.
- Plaintiff’s motion to amend its complaint (Mtn. Seq. No. 013) is granted in its entirety for the reasons set forth on the record (*tr.* 5.21.24).
- Defendants’ motion to quash (Mtn. Seq. No. 015) is denied. As set forth on the record, (*tr.* 5.21.24), the Plaintiff is entitled to explore its veil-piercing theory, and the discovery sought is relevant to that theory.
- The Plaintiff and Defendants’ sealing motions (Mtn. Seq. Nos. 006, 008) are granted as unopposed and for good cause shown pursuant to Part 216 of the Uniform Rules for the Trial Courts, as the interest in the confidentiality of these documents outweighs the public

interest in the sealed information, as they contain proprietary financial information. The proposed redactions are appropriate.

Accordingly, it is hereby

ORDERED that the Defendants' motion to compel (Mtn. Seq. No. 005) is granted solely to the extent set forth above; and it is further

ORDERED that the Defendants shall submit their three-page letter on or before June 7, 2024; and it is further

ORDERED that the Plaintiff shall submit its three-page letter in reply on or before June 21, 2024; and it is further

ORDERED that the Defendants shall submit five documents with redactions the Defendants believe are overbroad to the Court on or before June 7, 2024; and it is further

ORDERED that the Plaintiffs shall submit the unredacted documents to the Court for *in camera* review by June 21, 2024; and it is further

ORDERED that a hearing is scheduled to consider the remaining portions of Defendants' motion to compel on July 8, 2024, at 10:30am; and it is further

ORDERED that the Plaintiff's motion to compel (Mtn. Seq. No. 007) is granted; and it is further

ORDERED that the Defendants' motion to amend (Mtn. Seq. No. 009) is granted solely to the extent set forth above; and it is further

ORDERED that the Plaintiff's motion to amend its complaint (Mtn. Seq. No. 013) is granted; and it is further

ORDERED that the Defendants' motion to quash (Mtn. Seq. No. 015) is denied; and it is further

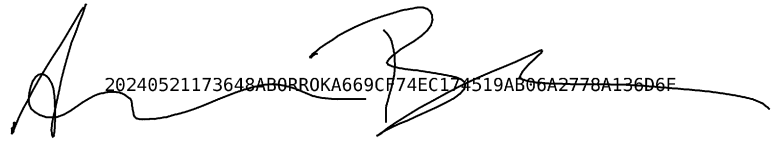
ORDERED that the Plaintiff's motion to seal (Mtn. Seq. No. 006) is granted; and it is further

ORDERED that the Defendants' motion to seal (Mtn. Seq. No. 008) is granted; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal NYSCEF Doc. Nos. 98-102, 126, 128, 138, 141-147, and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).



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5/21/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE