SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

WESTPAW FILMS INC., directly and derivatively on behalf of the D&D Production,

Plaintiff,

-against-

JAMES SPRATTLEY, MICHAEL ANDREW PASCAL, and FANTASY GAME FILMS LLC,

Defendants,

and

the D&D Production,

Nominal Defendant

Index No. 505665/2014

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Westpaw is trying to achieve through this frivolous motion what it could not obtain after over seven months of negotiation –- namely a way to prevent defendants from competing with Westpaw's film. Westpaw voluntarily entered into a settlement and release with its former partner and co-producer Iconoscope in December 2013, resolving all disputes related to the prior film, which now belongs to Westpaw. During those extended negotiations, Westpaw twice requested a non-compete clause, but that request was flatly refused. Westpaw signed that agreement anyway, because it got virtually everything else. It now owns all the footage, has complete creative and managerial control over the film and received all the money the parties had raised to make it. Iconoscope did receive credits, a passive back-end interest and a contractual obligation to fulfill donor rewards, but defendants (as owners of Iconoscope) were willing to give up essentially everything else because they wanted two things: to completely sever ties with plaintiff and to make their own film – both facts that plaintiff knew prior to signing the agreement.

But that was not enough for Westpaw. In January 2014, Westpaw threatened immediate injunctive relief for alleged wrongdoing by defendants. Six months later, Westpaw now seeks "emergency" injunctive relief for the exact same conduct, all of which occurred in January 2014 and before. Not only is there no urgency to plaintiff's request for relief, there is no imminent harm either. Defendants are at least a year away from completing and releasing their film, and the status of plaintiff's film is, at best, uncertain.

Besides a complete lack of any irreparable harm, Westpaw's claims will ultimately fail, as they are conclusory and based on fictitious "Proprietary Assets," which are nothing more than publicly available information and an email account it already has access to, as well as non-existent "duties" based on the long-ago terminated (June 2013) partnership with Iconoscope, of which defendants were not partners at any relevant time. As a factual matter, defendants have used no assets, footage, money or other property belonging to Westpaw or the first film. They just want to get on with making their movie, which they should have every right to do. Whereas Westpaw will suffer no irreparable harm if an injunction is denied, the harm to defendants would be devastating, permanent and irreparable if one is granted. They will lose all their considerable personal investment (not to mention time and energy), and their film will likely never be completed, as the people and funds to finish the film will be gone. For these reasons, and the reasons set forth below, Westpaw's groundless motion for a preliminary injunction should be denied.

FACTUAL BACKGROUND

A full recitation of the facts is set forth in the Affidavit of Michael Andrew Pascal sworn to July 21, 2014 ("Pascal Aff.") and the Affirmation of Adam B. Kagan, dated July 21, 2014, ("Kagan Aff.") both submitted herewith, and so will not be repeated here. A summary follows:

The Initial Partnership. Defendant Andrew Pascal ("Pascal") originated the idea for a documentary film about the fantasy game Dungeons & Dragons ("D&D") in December 2010, and discussed his initial ideas about such film with, among others, co-defendant James Sprattley shortly thereafter. (Pascal Aff. ¶ 2). Months later, they decided to approach Anthony Savini ("Savini"), owner of Plaintiff Westpaw Films Inc. ("Westpaw"), to suggest that he direct the proposed film. (*Id.* at ¶ 3).

Pascal and Sprattley formed Iconoscope Films LLC ("Iconoscope") in February 2012, after which Pascal and Sprattley transferred their ownership in the film project to Iconoscope, which entity became partners with Westpaw with respect to the D&D film project. (Pascal Aff. ¶ 4; Complaint ¶ 24). All parties agreed that Iconoscope and Westpaw would share equally in the ownership of the project, and divide responsibilities as follows: Westpaw would have creative control over the project and Iconoscope would handle financing, marketing and distribution matters. (Pascal Aff. ¶ 4).

Though there were early warning signs of strife, in August 2012 Iconoscope and Westpaw raised about $176,000 via a Kickstarter campaign. (Pascal Aff. ¶ 7). But despite the tremendous results of that campaign, or perhaps because of it, relations between Iconoscope and Westpaw became contentious, and Iconoscope found it nearly impossible to work with Westpaw as winter turned to spring in 2013. (*Id.* at ¶ 8).

The Partnership is Terminated in June 2013. The parties turned to mediation to resolve their disputes, which took place on May 16 and 17, 2013 but was not successful. Since the parties could not agree on a framework for going forward together, Iconoscope terminated the partnership and communicated to Westpaw that fact. After mediation discussions collapsed, Westpaw/Savini immediately retained counsel, instructed Iconoscope to communicate to him only through counsel, and took the position that Westpaw alone owned 100% of the film and footage. (Pascal Aff. ¶ 10).

Iconoscope immediately retained attorney Adam Kagan who initially worked with Westpaw's lawyers to try to negotiate a different, non-partnership structure as a way get the film finished, i.e., various versions of a loan-out agreement, whereby Iconoscope would hire Westpaw as director, or conversely, as Westpaw proposed, Westpaw would hire Iconoscope to produce the film, while limiting contact and interaction between the parties as much as possible. (Pascal Aff. ¶ 11). Both Iconoscope's and Westpaw's versions of these agreements expressly provided that no partnership existed. (Kagan Aff., Ex. A and C, Section 24(c)). As part of these negotiations in early June 2013, Westpaw expressly repudiated the existence of any partnership. (Kagan Aff. ¶ 4; Ex. B). Among other things, Westpaw continued to insist that it owned 100%

of the footage, said it would consider allowing Iconoscope to participate in the project and demanded that Iconoscope quitclaim any interest it thought it might have in the film to Westpaw. *Id.* Neither Iconoscope, Sprattley or Pascal ever worked with Westpaw or Savini again, or did any work on the film after May 2013. (Pascal Aff. ¶ 12). With the partnership terminated, the attorneys spent the following months negotiating the formal wind-up and settlement of any partnership assets and negotiating the parties' separation. (*Id.*; Kagan Aff. ¶¶ 6-8).

The Final Settlement Agreement. As settlement negotiations dragged, Iconoscope realized that the only way to completely sever ties with Westpaw/Savini was for Iconoscope to agree to give up everything. (Pascal Aff. ¶ 13). The final settlement agreement stated that Westpaw would own all rights to the footage, receive all the Kickstarter money (less a reserve set aside to fulfill donor rewards) and full and complete creative and managerial control of the film. Iconoscope had obligations to fulfill certain donor rewards and a share of net proceeds, if any, but no control or rights in the film. Specifically, the Settlement Agreement states

i. "Iconoscope quitclaims to Westpaw its interest in the audio and video footage related to the project created prior to the date hereof . . . ." Section 1.

ii. "Westpaw shall . . . have full creative and business control [of the project]" Section 2; and

iii. "equity interest" means (only) a share of net proceeds, not ownership. p. 3.

(Settlement Agreement, Compl. Ex. A).

Westpaw Asked For And Was Denied A Non-Compete. During the course of negotiations between Mr. Kagan and the attorneys for Westpaw (who are its attorneys in this action), Westpaw's counsel, on at least two separate occasions asked for a non-compete to be included in the agreement between the parties. On both occasions, Mr. Kagan flatly refused

Westpaw's request. (Pascal Aff. ¶ 15; Kagan Aff. ¶¶ 6-8). There is no non-compete on the final settlement agreement. (Compl., Ex. A). Iconoscope refused to agree to a non-compete because Pascal and Sprattley were intending to make their own D&D movie, a fact of which Savini was well aware because Pascal told him prior to his attorney's requests to include a non-compete clause. (Pascal Aff. ¶ 15). Westpaw has been threatening an injunction since January 2014 based on the same set of "facts" as set forth in its complaint. (*See* Kagan Aff., Exs. E and F).

ARGUMENT

I. <u>Stringent Legal Standards Govern Plaintiff's Motion for A Preliminary Injunction</u>

To obtain a preliminary injunction, plaintiff must clearly establish the following: (1) it is likely to succeed on the merits of the action, (2) it will suffer irreparable injury absent the injunction, and (3) the balance of the equities tips in its favor. *Nobu Next Door, LLC v. Fine Art Housing, Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48 (2005); *accord Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587, 590, 802 N.Y.S.2d 221, 224 (2d Dep't 2005). As set forth below, plaintiff has failed to establish any of these requirements.

A preliminary injunction is considered "a drastic remedy" under New York law that should be granted cautiously. *Related Properties, Inc.*, 22 A.D.3d at 590, 802 N.Y.S.2d 221 at 224.

> To sustain its burden…the movant must demonstrate ***a clear right to relief which is plain from the undisputed facts***…. ***Where the facts are in sharp dispute, a temporary injunction will not be granted***.

Id. (citations omitted) (emphasis added); *accord Xerox Corp. v. Neises*, 31 A.D.2d 195, 197, 295 N.Y.S.2d 717, 719 (1st Dep't 1968) (such relief should be granted "only when required by imperative, urgent, or grave necessity, and upon the clearest evidence… [and] undisputed facts"). Moreover, mere conclusory assertions are not sufficient, but rather ***detailed competent evidence is required***. *WebMD Health Corp. v. Martin*, 12 Misc. 3d 1180(A), 824 N.Y.S.2d 767, 2006 WL

1892261 (Sup. Ct. N.Y. Co. July 11, 2006) (table); *Business Networks of New York, Inc. v. Complete Network Solutions Inc.,* 265 A.D.2d 194, 194–95, 696 N.Y.S.2d 433, 435 (1st Dep't 1999) (injunction denied where there was no evidentiary support for the assertion that defendants misappropriated a database or used it to compete against plaintiff, particularly where plaintiff's allegations that the database was confidential or a trade secret were conclusory and insufficient).

Consistent with the foregoing, the burden of proof on a preliminary injunction motion is clear and convincing evidence. *County of Suffolk v. Givens*, 106 A.D.3d 943, 967 N.Y.S.2d 387 (2d Dep't 2013) ("A movant must satisfy ***each requirement*** with clear and convincing evidence") (emphasis added). Plaintiff has not met its burden.

II. Plaintiff Has Not Demonstrated Any Irreparable Harm

A. The Standard for Irreparable Harm

Plaintiff must demonstrate by clear and convincing evidence that it will actually suffer harm, that the harm is current, and ongoing, and would be avoided or stopped through issuance of the preliminary injunction. *Joseph v. Joseph*, 108 A.D.3d 597, 598, 968 N.Y.S.2d 388, 389 (2d Dep't 2013). Thus, "the irreparable harm must be shown by the moving party to be imminent, not remote or speculative." *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442, 628 N.Y.S.2d 375, 377 (2d Dep't 1995).

This one factor can be dispositive. In *Family-Friendly Media,* the court sustained a denial of plaintiff's preliminary injunction on the irreparable harm prong alone, holding "plaintiff made only conclusory allegations and failed to point to any imminent and non-speculative harm that would befall it in the absence of a preliminary injunction." *Family-Friendly Media, Inc. v. Recorder Tel. Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 82 (2d Dep't 2010); *see also Golden,* 216 A.D.2d at 442, 628 N.Y.S.2d at 377 (denying preliminary injunction where plaintiffs pled only a future harm); *see also WebMD Health Corp.*, 2006 WL 1892261 at *6 (detailed competent evidence is required). In addition, there is no irreparable harm where plaintiff fails to demonstrate that any harm it would suffer would not be compensable by money damages. *Family-Friendly Media,* 74 A.D.3d at 739, 903 N.Y.S.2d at 82.

B. Plaintiff's Claims of Harm Are Conclusory and Unsupported

Plaintiff has failed to assert anything more than conclusory allegations with respect to purported harms, and has submitted virtually no evidence that supports ***any harm***, let alone irreparable harm. The one person who would have the personal knowledge and evidence of any harm is Westpaw's owner, Mr. Savini. Yet Mr. Savini's only claims of irreparable harm in his affidavit are startlingly vague, as if reciting categories of possible harms, rather than anything actually happening. The full extent and details of those harms are: damage to reputation, interference with ability to conduct business, unidentified persons who have refused to work with Westpaw because of defendants' film, inability to obtain funding, delays in production of his film. *See* Affidavit of Anthony Savini, sworn to July 8, 2014 ("Savini Aff.") ¶¶ 22-24. Not only are there absolutely no details provided with respect to those statements, but there is no specific connection made to anything defendants have done. *Id*.

In the affirmation of plaintiff's attorney, also submitted in support of plaintiff's motion, Mr. Dee, who presumably does not have personal knowledge of any harm to plaintiff, only cites back to ¶¶ 22-24 of Mr. Savini's affidavit discussed above and to certain paragraphs of the complaint. Affirmation of Peter Dee dated July 9, 2014 ("Dee Aff.") ¶¶ 11-15. The allegations to which he refers in the complaint and the exhibits referenced therein also do not constitute detailed competent evidence of irreparable harm. (Compl. ¶¶ 42-55, Exhibits A-G). First, as a preliminary matter, as discussed fully in Section III.A below, the so-called "Proprietary Assets," to the extent even identified by plaintiff, are neither proprietary nor confidential – e.g., all "contacts" -- donors and interviewees associated with plaintiff's film -- are publicly known and

not Westpaw trade secrets. See below, p. @. The remaining paragraphs he cites allege nothing more than "great confusion" and "many questions from the public and Kickstarter donors". (Compl. ¶ 47-55). The complaint does not state any details about how such confusion is causing irreparable harm nor does it even provide the identities of these purportedly interviewed and/or confused parties. (Compl. ¶¶43-45, 47-55).[1] Moreover, the only documentary evidence plaintiff has submitted, Exhibits A-G to the complaint, amount to nothing more than statements from people who, having heard about both D&D films, write to ask questions or seek clarification about it. The harm to plaintiff is not identified. Consequently, Plaintiff's "showing" of harm amounts to a recitation of unspecified events involving mostly unnamed parties with no details of any negative impact on plaintiff. Plaintiff's evidence cannot support a claim for irreparable harm.

C. Plaintiff's Alleged "Harm" Is Neither Urgent, Imminent or Non-Speculative

Besides failing to provide any details or evidence how it is being harmed, plaintiff has failed to demonstrate how any harm to it is imminent and why an injunction is imperative and urgent now, when the complained of conduct occurred at least six months ago. (Kagan Aff. ¶ 9; Ex. E and F; Compl. ¶¶ 47-55, Exhibits A-G). Like plaintiff's "emergency" request for a TRO, which was denied, the alleged wrongdoing forming the basis for the relief sought here has already happened -- in January 2014 and before. Plaintiff threatened defendants with an "immediate" preliminary injunction then, but never acted. (Kagan Aff.¶ 9; Ex. F). Instead, plaintiff has waited six months, but alleges no new facts supporting its request for urgent relief.[2]

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[1] The one exception is Rob Kuntz, who plaintiff alleges was under the false belief that defendants' interview of him was really for plaintiff's film. (Compl. ¶ @). That is simply not true. Mr. Kuntz knew that defendants were there in connection with a different movie. Pascal Aff. ¶ @. In any event, if Mr. Kuntz was confused -- which he was not -- exactly how this is irreparable harm to plaintiff is not specified.

[2] Paragraph 46 of the complaint states that "Defendants have sought to exploit" their alleged possession of one or more releases signed by interviewees. By plaintiff's admission, the footage containing those interviews is in

Boiled down to its essence, plaintiff simply does not want the FGF Film to be finished and compete with its film. But even if there were some underlying wrongdoing of defendants related to the FGF Film -- which there is not – any such harm from the release of the FGF Film is hardly imminent, but rather exactly the type of remote and highly speculative harm that is insufficient for preliminary injunctive relief. *Family-Friendly Media,* 74 A.D.3d at 739, 903 N.Y.S.2d at 82 (imminent and non-speculative harm required); *Golden,* 216 A.D.2d at 442, 628 N.Y.S.2d at 377 (no injunction for future harm). Defendants have only recently started raising post-production funding, and if they receive sufficient amounts, they will then need to actually commence and complete post-production and secure distribution and release of the FGF Film, a process that even in the best circumstances is likely to take at least a year. (Pascal Aff. ¶ 21). Moreover, plaintiff has made ***no allegations*** as to the status of his film (other than vague allegations of delay and lack of funding caused by defendants). There is no evidence if and when plaintiff's film will ever be finished, how and when it will be distributed or released, if ever, and, how the FGF Film's release will harm it. That is precisely the kind of speculative, theoretical harm that is not sufficient on a motion for a preliminary injunction.

D. Plaintiff Concedes the Harm it Alleges is Compensable with Monetary Damages

Where, as here, a party seeking a preliminary injunction also seeks monetary damages for the very same alleged misconduct, an injunction should not be granted. *See Mar v. Liquid Mgt. Partners, LLC*, 62 A.D.3d 762, 763, 880 N.Y.S.2d 647, 648 (2d Dep't 2009) (no irreparable harm where plaintiff "effectively acknowledged that they will be fully compensated" by money damages").

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plaintiff's sole possession (Compl. ¶ 46), thus it is difficult to envision what possible exploitation of such releases defendants could undertake, even if in their possession – which they are not. (Pascal Aff. ¶ 20). Plaintiff has complained about this since at least January 22, 2014. (Kagan Aff. ¶ 9; Ex. F).

All of plaintiff's causes of actions arise out of the same general allegations of misconduct related to "Proprietary Assets" and fiduciary duties, and plaintiff seeks monetary damages for all.[3] The claim actually denominated as "Unfair Competition" does allege that the harm "cannot be remedied merely by the payment of money damages" (Compl. ¶ 108), but this assertion is belied by the allegation on the next page of the complaint that states, "defendant's unfair competition damaged Plaintiff directly and the D&D Production in an amount to be determined at trial." (Compl. ¶ 116). Any harm that could arise from the FGF Film competing with plaintiff's film, though remote and speculative, would be compensable with monetary damages, i.e., lost profits, market harm and other business related damages. *See Fischer v Deitsch*, 168 A.D.2d 599, 601, 563 N.Y.S.2d 836, 838 (2d Dep't 1990) (holding that "[s]ince the interests . . . in the Corporation and the value thereof can be fixed at trial, damages would be sufficient to compensate [plaintiff]").

Thus, because plaintiff alleges ***both*** irreparable harm ***and*** a claim for money damages for all its claims, an injunction should not issue. *Cliff v. R.R.S. Inc.*, 207 A.D.2d 17, 20, 620 N.Y.S.2d 190, 193 (3d Dep't 1994) (injunction denied in an unfair competition case because "although plaintiff has alleged both a loss of business and customer goodwill, he has also set forth a claim for money damages.").

III. Plaintiff Has Failed to Show a Likelihood of Success on the Merits

Plaintiff has failed to demonstrate with clear and convincing evidence any basis for its claims. As demonstrated by defendants' evidentiary submissions, the few facts alleged by plaintiff are in sharp dispute, which also requires that plaintiff's motion be denied.

[3] *See, e.g.*, Breach of Fiduciary Duty (Compl. ¶ 75); Aiding and Abetting Breach of Fiduciary Duty (Compl. ¶ 81); Fraudulent Conveyance (Compl. ¶ 87); Conversion (Compl. ¶¶ 92-93); Fraudulent Inducement (Compl. ¶ 100); Unjust Enrichment (Compl. ¶¶ 115); see also Unfair Competition (¶ 116). Defendants contend that plaintiff's eighth and ninth "causes of action" for a constructive trust and alter ego are not causes of action at all. In any event, they are irrelevant to the compensatory damages analysis.

A. Plaintiff's Claims Related to Breaches of Fiduciary Duties and Alleged "Proprietary Assets" Are Likely To Fail

The complaint sets forth two causes of action premised upon the alleged existence of a fiduciary duty owed by defendants and/or Iconoscope to (i) refrain from using the so-called "Proprietary Assets" and (ii) not compete with plaintiff's film. Plaintiff fails to establish the existence of such a duty at the time of any alleged wrongdoing, nor does plaintiff demonstrate that any such "Proprietary Assets" are either proprietary or confidential. Accordingly, plaintiff's claims are not likely to succeed.

1. The "Proprietary Assets" Are Neither Proprietary or Confidential

Plaintiff defines the Proprietary Assets vaguely as "the network of contacts, trade secrets, goodwill, reputation and/or other proprietary information belonging to the D&D Production." (Compl. ¶ 42).

A careful parsing of the complaint reveals only four categories of these "assets":

1. the identities and "goodwill" of certain persons who were interviewed for the D&D Production (Compl. ¶¶ 43-45, 48, 52-54, 56) (the "Interviewees");
2. the identities and "goodwill" of certain other persons who donated to or were in some other way helpful to the D&D Production, a category which seems to include donors to the D&D Project Kickstarter campaign (Compl. ¶¶ 47-48, 50-54) (the "Contacts"); and
3. a release allegedly signed by a person interviewed for the D&D Production (Compl. ¶ 46) (the "Release");
4. an email account which Plaintiff alleges belongs to the D&D Production (Compl. ¶¶ 56-62, 66-68) (the "Email Account").

Not only do such "Proprietary Assets" not constitute trade secrets, they are not remotely confidential or proprietary. To be considered a trade secret, something must be secret. *See Ashland Mgt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912, 918 (1993). Where the identities of business contacts are "readily ascertainable outside the … business as prospective [contacts,] … trade secret protection will not attach." *Leo Silfin, Inc. v. Cream*, 29 N.Y.2d 387, 391-92, 328 N.Y.S.2d 423, 427 (1972) (no trade secret protection for a customer list that was readily available to competitors).

Here, the identities of the Interviewees and Contacts (1 and 2 above) are public information. For all Interviewees that defendants interviewed for the FGF Film, their identities and their connection with D&D were and are well known to people familiar with D&D. (Pascal Aff. ¶ 18).[4] Defendants did not use confidential information to obtain those interviews, nor did they trade off any good will from plaintiff's film. *Id*. In every interview defendants conducted for the FGF Film, they have informed the interviewees of the existence of and defendants' separation from plaintiff's film. Defendants encouraged all interviewees to continue to work with Westpaw to complete the earlier film and have never disparaged that film or Westpaw. (Pascal Aff. ¶ 17). In addition, the identities of all of the donors to the first film's Kickstarter campaign (i.e. Contacts) are also available to the general public on Westpaw's Kickstarter page and are not confidential. (Pascal Aff. ¶ 18; Ex. F).

The remaining "Proprietary Assets" -- the Release and Email Account -- are red herrings. Defendants simply do not have the Release, or any releases related to plaintiff's film, and in fact, turned over to plaintiff all releases in their possession in connection with the Settlement Agreement. (Pascal Aff. ¶ 20). This is a fact that defendants have repeatedly told plaintiff since it

[4] Of these individuals, three of them – David Ewalt, Jon Peterson, and Tim Kask – are also disclosed on plaintiff's public Kickstarter page. Three more are close relatives of the deceased co-creator of D&D, Gary Gygax; their identities are disclosed, among other places, on Mr. Gygax's Wikipedia page. And the remaining three, David Megarry, David Wesely and Rob Kuntz were early employees or shareholders of TSR, the game company founded by Gygax, and remain active in the role-playing game industry, a fact that is publicly known and not confidential. (Pascal Aff. ¶ 18).

first raised the issue in January 2014.[5] Moreover, the Email Account is not exclusively plaintiff's property as it was not subject to the Settlement Agreement. In any event, plaintiff has always had, and still has, full access to the Email Account. (Pascal Aff ¶ 19; Ex. G). Plaintiff never asked for the Email Account during settlement negotiations because it was a trivial item hardly ever used by the production. (Pascal Aff. ¶ 19). Only for purposes of litigation has it become "crucial" to plaintiff. (*See* Compl. ¶ 67).

Thus, the entire concept of plaintiff's "Proprietary Assets," on which the bulk of plaintiff's complaint is based, is nothing but a ruse -- a fiction invented by plaintiff to try to add weight to its frivolous claims. Plaintiffs' claims based on misuse of "Proprietary Assets" i.e., virtually all causes of action, are going to fail.

2. Neither Defendants Nor Iconoscope Owed A Fiduciary Duty To Plaintiff At The Time Of Any Alleged Wrongdoing

Plaintiff's claims will also fail because defendants owed no duty to plaintiff. In order to maintain a claim for breach of fiduciary duty, plaintiff must demonstrate the existence of (1) a fiduciary relationship, (2) misconduct by defendants and (3) damages that result directly from that misconduct. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 807, 921 N.Y.S.2d 260, 264 (2d Dep't 2011). Further, "a cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)." *Id*. [6] Plaintiff asserts three theories by which either defendants Sprattley and Pascal, or non-party Iconoscope, owed fiduciary duties to plaintiff:

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[5] Any such Release would be useless to defendants in connection with the FGF Film since it would only give permission to use that particular interview in connection with footage in Westpaw's possession, not for any new footage or interviews. (Pascal Aff. ¶ 20).

[6] To maintain a claim for aiding and abetting a breach of fiduciary duty, plaintiff must demonstrate "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damages as a result of the breach." *Palmetto,* 83 A.D.3d at 808-09.

i. Iconoscope owed a fiduciary duty to plaintiff as its partner, and defendants aided and abetted Iconoscope's breach of that duty. (Compl. ¶¶78-80).
ii. Sprattley and Pascal were themselves partners of plaintiff, and so owed a fiduciary duty to plaintiff. (Pl.'s Memo. of Law at 4);
iii. Sprattley and Pascal were "managers" of the Westpaw-Iconoscope partnership, and that status imposed upon them a fiduciary duty to plaintiff. (Compl. ¶¶ 73-74; Pl.'s Memo. of Law at 4).

None of these theories supports plaintiff's claims. The earliest action that plaintiff alleges constitutes a breach allegedly occurred "in or about August 2013." (Compl. ¶ 43). By this date, all of the relationships that plaintiff alleges gave rise to a fiduciary duty either had terminated or had never existed at all.

a. The Iconoscope/Westpaw Partnership Ended No Later Than June 2013.

All parties agree that a partnership existed between plaintiff and non-party Iconoscope from February 2012, when Iconoscope was formed and succeeded to Sprattley's and Pascal's interest in the partnership. (Savini Aff. ¶ 6; Compl. ¶ 24; Pascal Aff. ¶ 4). Prior to that date, but at no time after, Sprattley and Pascal individually were partners. ***However, any partnership between any of the parties was over as of June 2013***, before any of the wrongdoing alleged by plaintiff occurred.

There was never a signed agreement governing the Iconoscope/Westpaw partnership (or the Sprattley/Pascal/Savini-Westpaw partnership before that), thus it was a partnership at will. An oral partnership or partnership at will can be dissolved at any time by any partner. N.Y. Partnership Law. § 62(b); s*ee also McQullan v. Kenyon & Kenyon*, 220 A.D.2d 395, 631 N.Y.S.2d 884 (2d Dep't 1995) (at will partnership can be dissolved at any time). The dissolution need not be express, but rather may be implied from the actions of the parties. *Mishihi v. 166-25 Hillside Partners*, 51 A.D.3d 738, 738-39, 859 N.Y.S.2d 202, 203 (2d Dep't 2008) (ruling that a partnership was dissolved by partners' behavior where partners ceased all communication with each other and stopped conducting the business of the partnership). Likewise, where a partner transfers to himself the partnership's primary asset, he has "manifested an unequivocal election to dissolve the partnership." *Staines Assocs. v. Adler*, 266 A.D.2d 52, 52-53, 698 N.Y.S.2d 639, 640 (1st Dep't 1999).

Importantly for present purposes, it is well established, that upon dissolution of the partnership, a partner's partnership-based fiduciary duties cease. *Mishihi*, 51 A.D.3d at 738, 859 N.Y.S.2d at 203. This is true even during the period of the wind-up and distribution of assets. The "fiduciary relation between partners terminates upon notice of dissolution, even though the partnership affairs have not been wound up*." 6D Farm Corp. v. Carr*, 63 A.D.3d 903, 906, 882 N.Y.S.2d 198 (2d Dep't 2009) (quoting *Matter of Silverberg*, 81 A.D.2d 640, 438 N.Y.S.2d 143 (2d Dep't 1981)); *Allied Bingo Supplies of Fla., Inc. v. Hynes*, 27 A.D.3d 597, 598, 813 N.Y.S.2d 444, 446 (2d Dep't 2006) (dissolution of a partnership terminates the fiduciary relationship between partners).

Because the intentions and conduct of the parties made clear that there was no partnership after the collapse of mediation discussions in May 2013, plaintiff's claims for breach of fiduciary duty must fail. The facts constituting termination of the partnership are as follows:

- Westpaw viewed the partnership with Iconoscope as "problematic". (Pascal Aff. ¶ 8).
- Westpaw refused to share any footage with Iconoscope. (Pascal Aff. ¶ 8).
- Iconoscope viewed the partnership as terminated after mediation failed and communicated that to Westpaw (May 2013); (Pascal Aff. ¶ 10).
- Similarly, at that time Westpaw instructed Iconoscope to communicate to it only through counsel; (Pascal Aff ¶ 10).
- Westpaw took the position that Westpaw alone owned 100% of the film and footage (June 2013). (Pascal Aff ¶ 10).
- Westpaw's attorney wrote to defendants' counsel on June 3, 2014 stating that "it was the intention of all parties that…Westpaw…would own [the] footage…" but that Westpaw "is sensitive to ***allowing your clients to participate in the project***." (Kagan Aff. ¶ 4; Ex. B) (emphasis added).

- Defendants' counsel circulated a proposed new structure to the relationship, a loan-out/employment arrangement, which contained an express "no partnership" clause (May 30, 2013). (Kagan Aff ¶ @; Ex. A, Section 24 (c)).
- Plaintiff's counsel returned a heavily-marked up version of that proposed agreement that agreed to Section 24(c), and reiterated Westpaw's claim to ownership of all the footage (June 19, 2013). (Kagan Aff ¶ @; Ex. C, Section 24(c)).
- Neither Iconoscope, Sprattley or Pascal ever conducted any business with Westpaw or worked on the film again after May 2013.

Thus, by both parties' actions, words and deeds, any partnership between Westpaw and Iconoscope ended by June 2013, as did any fiduciary duties arising out of it. *See McQullan; Mishihi; Staines Assocs.; 6D Farm Corp.; Silverberg, supra*.[7]

b. Sprattley and Pascal Were No Longer Individual Partners After The Transfer of Their Partnership Interests to Iconoscope, As Plaintiff Admits.

Plaintiff asserts that at the time of the alleged misappropriation, defendants Sprattley and Pascal owed plaintiff a fiduciary duty deriving from their status as "partners" in the D&D Production. (Pl.'s Br. at 4). But plaintiff concedes that "on or about February 23, 2012, Pascal and Sprattley formed Iconoscope Films LLC … and transferred their interest in the D&D Production to Iconoscope." (Compl. ¶ 24; *see also* Savini Aff. ¶ 6). Thus, by August 2013, Pascal and Sprattley were not partners and owed no duty to plaintiff.

[7] Under no circumstances could fiduciary duties exist after the Settlement Agreement. First, Westpaw received total ownership and control. (Compl. Ex. A). Moreover, it is a *sine qua non* in any partnership or joint venture that the partners "share in the profits of the business ***and*** submit to the burden of making good the losses." *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317, 151 N.E.2d 170, 178 (1958) (emphasis added). Though it is true that under the Settlement Agreement Iconoscope retains a passive interest of any net profits (Compl, Ex. A), the ***Settlement Agreement specifically prevents Iconoscope from sharing in any net losses***: the Settlement Agreement does not allow Plaintiff to call on Iconoscope for further contributions, and plaintiff undertakes to indemnify Iconoscope from any third party claims. *Id*. This is insufficient to support a claim of partnership or joint venture. *Davella v. Nielsen*, 208 A.D.2d 494, 616 N.Y.S.2d 800 (2d Dep't 1994) (holding that "an assertion that there was an agreement to distribute the proceeds of an enterprise on a percentage basis will not suffice" to establish a joint venture").

c. Pascal and Sprattley Were Never "Managers" of the Westpaw-Iconoscope Partnership

Plaintiff's final theory is that defendants Sprattley and Pascal owed plaintiff fiduciary duties, not as partners, but as "managers" of the partnership. (Compl. ¶ 73; Pl.'s Br. at 4; Savini Aff. ¶¶ 5-6). Plaintiff has not and cannot demonstrate that Sprattley and Pascal were employed as "managers" of the partnership -- because they were not. Following their succession by Iconoscope, Sprattley and Pascal did not have any direct managerial control over the partnership as a whole. When Sprattley and Pascal undertook any activity related to the partnership after that date, it was on behalf of Iconoscope, not as "managers" of the partnership. (Pascal Aff. ¶ 4). In any event, the partnership was terminated by June 2013, prior to any alleged misconduct.

B. Plaintiff's Unfair Competition Claim Is Not Likely to Succeed

For its unfair competition claim, plaintiff must demonstrate a (1) bad faith (2) misappropriation of a commercial advantage (3) that belongs to plaintiff (4) by defendants' exploitation of plaintiff's proprietary information or trade secrets. *Out of Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578, 866 N.Y.S.2d 677, 681 (2d Dep't 2008). Plaintiff's entire claim rests on defendants' alleged misuse of "Proprietary Assets." (Compl. ¶¶ 106-07). As set forth above (Section III.A), the Proprietary Assets were neither proprietary or confidential, so plaintiff's unfair competition claim must fail.

C. Plaintiff's Causes of Action For Fraudulent Inducement and Fraudulent Conveyance Fail to State A Claim And Will Not Succeed

Plaintiff cannot succeed on its fraud claims as it has failed to make a prima facie showing of all the elements of fraud, failed to plead the elements with the requisite particularity, and has not demonstrated the existence of fraud by clear and convincing evidence.[8]

[8] Plaintiff's fifth cause of action (Compl. ¶¶ 95-104) is entitled "Fraudulent Inducement." Plaintiff's third cause of action (Compl. ¶¶ 83-88) is entitled "Accounting and Fraudulent Conveyance." Plaintiff's demand for an accounting is discussed in Section @ below.

1. <u>The Elements and Particularity Requirements</u>

The elements of fraud "are (1) a misrepresentation or a material omission of fact which (2) was false and (3) known to be false by defendant, made for the purpose of inducing the other party to rely upon it, (4) justifiable reliance of the other party on the misrepresentation or material omission, and (5) injury." *Continental Realty, LLC v. Kennelly Development Company, LLC*, 2008 NY Slip Op. 51080(U) (Demarest, J.), *citing Orlando v. Kukielka*, 40 AD3d 829, 831 (2007). In order to properly plead a cause of action for fraud, a plaintiff must allege each of these elements of fraud with particularity and support them with allegations of fact. CPLR 3016(b); *Fink v. Citizens Mtge. Banking*, 148 A.D.2d 578, 539 N.Y.S.2d 45 (2d Dep't 1989) (bare, conclusory allegations are insufficient to sustain a cause of action for fraud).

2. <u>Plaintiff's Fraud Claims Are Deficient and Unsupported By Any Facts</u>

i. <u>Plaintiff Does Not Allege a Misrepresentation or Actionable Omission</u>.

Plaintiff alleges no misrepresentation of fact by defendants. The only misrepresentation alleged in the complaint appears to be a written "whereas" clause from the Settlement Agreement, which was signed only by non-party Iconoscope, and not any of the defendants. Moreover, even if such statement could be attributed to defendants, such statement, at best is a covenant that Iconoscope negotiated the agreement in good faith. It is not a statement of fact that can serve as the basis for fraud. *See New York University v. Continental Ins. Co*., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289 (1995) (recognizing that in every contract there is an implied covenant of good faith and fair dealing and then dismissing a claim for fraudulent inducement where the complaint did not allege a separate misrepresentation from a good faith obligation, stating the allegations were nothing more than a breach of the contract claim).

The allegations sounding in omissions on the part of defendants also fail as a matter of law. In order for an omission to be cognizable as fraud, the plaintiff must allege and demonstrate that defendants had a duty to disclose material information and failed to do so. *Barrett v. Freifeld*, 77 A.D.3d 600, 601, 908 N.Y.S.2d 736, 737 (2d Dep't 2010). The only duty that plaintiff alleges is the purported fiduciary duty of Sprattley and Pascal to Westpaw, which as set forth above, was nonexistent, at the very least by the time Iconoscope and Westpaw were negotiating the Settlement Agreement. See Section III.A above. In addition, as set forth above, there are no trade secrets or confidential materials at issue here as plaintiff claims, so any failure by defendants to disclose their alleged misuse of the so-called "Proprietary Assets" would be an impossibility. See Section III.A above. As a factual matter, at no time did any defendants use any assets, footage, funds or other property of Westpaw or the first film in connection with the FGF Film, and plaintiff has submitted no evidence to the contrary. (Pascal Aff. ¶ 20).

ii. Plaintiff Has Not Demonstrated Falsity or An Intent to Defraud.

Iconoscope and defendants ***did*** negotiate the Settlement Agreement in good faith -- there were no duties to disclose and no improper use of any Westpaw property. Plaintiff's allegations of intent -- that defendants "expressly and ***intentionally*** misrepresented" (Compl. ¶ 97, emphasis added) -- is a bare conclusion, a mere recital of intention with no particularized facts concerning defendant's knowledge of the statement's falsity at the time it was made or their intention to use such statement to induce plaintiff into entering into the Settlement Agreement. Such pleading finds as a matter of law.

iii. Plaintiff Cannot Demonstrate Reasonable Reliance.

Plaintiff knew that defendants intended to make a separate film prior to the Settlement Agreement because Pascal told plaintiff about it (Pascal Aff. ¶ 15). In addition, as part of the separation negotiations, Westpaw twice asked for a covenant not to compete with his film, a concession defendants repeatedly refused to give. (Kagan Aff. ¶¶ 6-8; Pascal Aff. ¶ 15). Yet, with that state of mind, at no time did plaintiff ask defendants or Iconoscope about the status of a separate film, but rather freely entered into the Settlement Agreement. Plaintiff's current assertion that it was duped by defendants into entering the Settlement Agreement rings absolutely hollow.

iv. Plaintiff Has Alleged No Injury from Any Purported Fraud.

Plaintiff's allegations of injury for the alleged fraud are at best hard to identify. (Compl. ¶¶ 96, 102.) They are certainly not plead with the requisite particularity. Merely stating plaintiff would not have entered into the Settlement Agreement is insufficient, and the fraud claim will not succeed for this reason as well.[9]

D. Plaintiff's Claim For Conversion Is Likely to Fail

"[A] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v. New York Organ Donor Network, Inc.,* 8 N.Y.3d 43, 49-50, 827 N.Y.S.2d 96, 100 (2006). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Id.*

As set forth in detail above, defendants sharply dispute the existence of any such Proprietary Assets. See Section III.A above. The "contacts" are public information not Westpaw property; any "goodwill" is not personal property or chattel that can be converted; the

[9] Plaintiff's fraudulent conveyance claim is a non-starter. Such claim is brought "under the Common Law and Business Corporation Law §720." That statutory provision, by its terms, applies only to directors and officers of "corporations" (Bus. Corp. § 720(a)), and is therefore irrelevant here. In any event, to the extent it attempts to assert a claim for common law fraudulent conveyance, it must fail as it contains no fact allegations whatsoever, nor does it even cursorily address any of elements of fraud.

defendants simply do not have the release plaintiff complains about; and the Gmail account does not properly belong to plaintiff as it was not part of the Settlement Agreement. In any event, plaintiff has never been denied access or control over the Gmail account. (Pascal Aff. ¶ 19).

E. <u>Plaintiff's Claim For Unjust Enrichment is Likely to Fail</u>

"To establish an unjust enrichment cause of action, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Dee v. Rakower*, 112 A.D.3d 204, 213, 976 N.Y.S.2d 470, 478 (2d Dep't 2013). As set forth above, defendants have gained nothing at the expense of plaintiff. The Proprietary Assets are neither proprietary or confidential. Defendants have not improperly used any assets, funds, footage or property of plaintiff nor are they in possession of anything belonging to plaintiff. See Section III.A above.

F. <u>Plaintiff's Claim for a Constructive Trust is Likely to Fail</u>

First of all, plaintiff only asserts this claim derivatively (Compl. ¶ 119), and so it must fail. See Section III(I), below. But even as a direct claim it would fail. "The elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Canzona v. Atanasio*, 118 A.D.3d 841, --- N.Y.S.2d ---- (2d Dep't 2014) (citing *Dee v. Rakower,* 112 A.D.3d at 212, 976 N.Y.S.2d at 477). The ultimate purpose of a constructive trust is to prevent unjust enrichment. *Hall v. McDonald*, 115 A.D.3d 646, 981 N.Y.S.2d 551 (2d Dep't 2014). As set forth above, defendants have gained nothing at the expense of plaintiff. They have not improperly used any assets, funds, footage or property of plaintiff nor are they in possession of anything properly belonging to plaintiff. See Section III.A above.

G. <u>Plaintiff's Alter Ego Claim Fails on its Face and For Lack of Any Evidence.</u>

Plaintiff has not satisfied the pleading requirements for an alter ego claim, let alone supported it with clear and convincing evidence. Piercing the veil is a drastic remedy requiring that: "(1) owners exercised complete domination of corporation in respect to transaction attacked; and (2) such domination was used to commit fraud or wrong against plaintiff which resulted in plaintiff's injury." *Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810-11 (1993); *see also Fernbach, LLC v. Calleo*, 92 A.D.3d 831, 832, 939 N.Y.S.2d 501, 503 (2d Dep't 2012). Generally considered are such factors as "whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form ... such that one of the corporations is a mere instrumentality, agent and alter ego of the other." *John John, LLC v. Exit 63 Dev., LLC*, 35 A.D.3d 540, 541, 826 N.Y.S.2d 657, 659 (2d Dep't 2006).

The *John John* court dismissed plaintiff's alter ego theory because plaintiff failed to submit any evidence of the foregoing and thus failed to raise a triable issue of fact. 35 A.D.3d at 541, 826 N.Y.S.2d at 659. Similarly here, plaintiff has submitted no evidence, or even plead any specific facts of the kind required to pierce the veil. *See Goldman v. Chapman*, 44 A.D.3d 938, 939, 844 N.Y.S.2d 126, 127 (2d Dep't 2007) ("conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil."). Plaintiff's alter ego claim is therefore not likely to succeed.

H. <u>Plaintiff's Claim for An Accounting Is not Likely to Succeed</u>

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Dee v. Rakower*, 112 A.D.3d at 214, 976

N.Y.S.2d at 478 (citing *Lawrence v. Kennedy,* 95 A.D.3d 955, 958, 944 N.Y.S.2d 577, 578 (2d Dep't 2012). Those seeking an accounting must demonstrate "there is lacking complete and adequate remedy at law" *Weinstein v. Natalie Weinstein Design Assoc., Inc.*, 86 A.D.3d 641, 643, 928 N.Y.S.2d 305, 309 (2d Dep't 2011) (denying accounting where "damages appear adequate"). As set forth above, as of June 2013, at the latest, there were no longer any fiduciary duties among or between the parties related to the first D&D film. Furthermore, defendants do not possess any property in which plaintiff has a legitimate right Plaintiff has also sought monetary damages for all claims. For all these reasons, its accounting claim is very likely to fail.

I. Plaintiff's Assertion of Derivative Claims Is Misguided and Inapplicable

Finally, plaintiff's derivative claims will fail. Derivative claims cannot be brought on behalf of a general partnership. Defendants can find no authority in New York allowing for such a claim or even discussing the issue. However, other courts and authority make clear why no such claims exist. "In the general partnership context . . . no correlative derivative litigation exists because in a general partnership everyone has a right to manage the affairs of the business, including the right to sue in court." *Gotham v. Hallwood Realty Partners, L.P.*, 1998 WL 832631 n. 14 (Del. Ch. November 10, 1998); *Adams v. Land Services*, *Inc.*, 194 P.3d 429, 431 (Colo. Ct. App. 2008) ("general partnership law does not recognize derivative actions"). Plaintiff's derivative claims will not succeed.

IV. The Balance of Equities Lies in Defendants' Favor

To satisfy this requirement for a preliminary injunction, plaintiff must show by clear and convincing evidence, "that the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to defendant through imposition of the injunction." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 174, 498 N.Y.S.2d 146, 163 (2d Dep't 1986) (quoting *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.,* 70 A.D.2d

1021, 1022, 418 N.Y.S.2d 216, 218 (3d Dep't 1979)). Loss of investment in an enterprise is a factor. *See Litwin v. Maddux*, 7 Misc. 2d 750, 763, 164 N.Y.S.2d 489, 502 (Sup. Ct. Queens Co. June 28, 1957) (finding "injunction would be of little value to the plaintiff as compared to the incalculable harm to the defendants who have an investment in their book of nearly $15,000, should plaintiff's motion be granted.").

Additionally, a preliminary injunction may not issue where it would constitute a prior restraint on free speech. *See Rose v. Levine*, 37 A.D.3d 691, 693, 830 N.Y.S.2d 732, 734 (2d Dep't 2007); *Rosemont Enterprises, Inc. v. McGraw-Hill Book Co.*, 85 Misc. 2d 583, 588, 380 N.Y.S.2d 839, 842 (Sup. Ct. N.Y. Co. July 25, 1975) (greater harm to defendants "to impair their First Amendment rights by granting the injunction" than to plaintiffs to by denying the injunction).

The balance of equities clearly tips against issuing a preliminary injunction. Plaintiff’s alleged harms are at best remote: its claims amount to injuries from unfair competition in a market in which neither plaintiff nor defendants presently sell any product or service, injuries that would manifest themselves, if at all, only once one or both films is completed and distributed, if that occurs simultaneously. The harm to defendants on the issuance of a preliminary injunction, by contrast, are immediate and catastrophic: the halting of all fundraising and production and effectively, the death of their film. Here, defendant's film will likely never get made if an injunction issues. (Pascal Aff. ¶ 22). In addition, defendants would personally stand to lose at least an $80,000 investment, their film-making team, and all the funds (already raised) needed to finish the film. (*Id*.). Enjoining defendants’ current activities would cause far more harm to defendants than it would alleviate for plaintiff. Therefore, plaintiff's motion should be denied.

V. <u>Plaintiff Must Post An Undertaking</u>

CPLR § 6312(b) ***requires*** an undertaking. In light of the harm that a preliminary injunction would cause defendants, plaintiffs should be required to give an undertaking in an amount no less than $130,000, the approximate total investment in defendants' film, plus an amount which in the Court's determination constitutes reasonable costs and attorneys' fees for opposing the present motion.

CONCLUSION

For all the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied or, if not denied, subject to an undertaking of no less than $130,000.

Dated: New York, New York
July 21, 2014

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