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Phoenix Transcription, LLC
Teresa Ulrich, Melissa Ulrich,
John Ulrich, Mark Mazza and
Patricia Wtulich

FILED

JAN 23 2015

**STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION**

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: MORRIS COUNTY
DOCKET NO.: C-121-13**

KING TRANSCRIPTION SERVICES, LLC,

Plaintiff,

vs.

**PHOENIX TRANSCRIPTION, LLC, FRANK
ULRICH, TERESA ULRICH, MELISSA
ULRICH, JOHN ULRICH, MARK MAZZA
and PAT WTULICH,**

Defendants.

CIVIL ACTION

**ORDER GRANTING
MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER, having been opened to the Court upon the motion of John Fialcowitz, Esq., counsel for Defendants Phoenix Transcription, LLC (“Phoenix”), Teresa Ulrich (“Teresa”), Melissa Ulrich (“Melissa”), John Ulrich (“John”) (collectively, the “Phoenix Defendants”) and Patricia Wtulich (“Patricia”) for an Order, pursuant to *Rule 4:46-2*, granting the Phoenix Defendants and Patricia summary judgment and dismissing the Amended Verified Complaint with prejudice; and the Court having considered the parties’ submissions and for good cause shown,

IT IS on this the 23rd day of January, 2015,

ORDERED as follows:

1. The motion of the Phoenix Defendants and Patricia is GRANTED.
2. The Amended Verified Complaint is hereby dismissed with prejudice. *as to* [⊕]
3. Mr. Fialcowitz shall serve a copy of this Order on all parties within days. *(in court)*

*Reasons stated on
The record*

Stephan Hansbury
Hon. Stephan Hansbury, P.J. Ch.

This motion was: opposed.
 unopposed.

*⊕ Phoenix Transcript for, Teresa
Ulrich, Melissa Ulrich, John Ulrich, Mark
Mazza and Pat Ulrich*

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: GEN. EQUITY
MORRIS COUNTY
DOCKET NO.: C-234-13
A.D. # _____

KING TRANSCRIPTION)
SERVICES, LLC)
)
Plaintiff,)
)
vs.) TRANSCRIPT
) OF
) MOTION
PHOENIX TRANSCRIPTION,)
LLC, et al.)
)
Defendants.)

Place: Morris County Courthouse
Washington and Court Streets
Morristown, NJ 07963-0910

Date: January 23, 2015

BEFORE:

HONORABLE STEPHAN C. HANSBURY, P.J.Ch.

TRANSCRIPT ORDERED BY:

JOHN FIALCOWITZ, ESQ., (Law Offices of John
Fialcowitz, LLC)

APPEARANCES:

RONALD T. NAGLE, ESQ., (Ronald T. Nagle, Esq., PC)
Attorney for the Plaintiff

FRANK ULRICH,
Pro Se Defendant

JOHN FIALCOWITZ, ESQ., (Law Offices of John
Fialcowitz, LLC)
Attorney for Defendants Phoenix Transcription, et
al.

Transcriber: Jennifer Wtulich
PHOENIX TRANSCRIPTION
796 Macopin Road
West Milford, NJ 07480

Audio Recorded
Recording Opr: Not Indicated

I N D E X

	<u>PAGE</u>
<u>MOTIONS:</u>	
<u>SUMMARY JUDGMENT - PHOENIX:</u>	
<u>Arguments</u>	
BY: Mr. Nagle.....	11
BY: Mr. Fialcowitz.....	3
<u>THE COURT:</u>	
Decision.....	21
<u>SUMMARY JUDGMENT - CROSS-COMPLAINT-KING:</u>	
<u>Arguments</u>	
BY: Mr. Nagle.....	22
<u>THE COURT:</u>	
Decision.....	28
<u>SUMMARY JUDGMENT - CROSS-MOTION:</u>	
<u>Arguments</u>	
BY: Mr. Ulrich.....	30
<u>THE COURT:</u>	
Decision.....	36

1 (Proceeding commenced at 1:28 p.m.)

2 THE COURT: Please have a seat. Excuse me,
3 all right this is the matter of King Transcription
4 Services versus Phoenix. Docket Number C-121-13, and
5 may we have appearances, please?

6 MR. NAGLE: Good afternoon, Your Honor.
7 Ronald Nagel, on behalf of the plaintiff.

8 THE COURT: Sir.

9 MR. ULRICH: Frank Ulrich, representing
10 myself as Pro se.

11 THE COURT: Sir, how are you?

12 MR. ULRICH: Very good, thank you.

13 MR. FIALCOWITZ: Good afternoon, Your Honor.
14 John Fialcowitz, representing the rest of the caption.

15 THE COURT: Good afternoon. Who would like
16 to go first?

17 MR. FIALCOWITZ: I'd be happy to go first,
18 Your Honor. I moved for Summary Judgment on behalf of
19 the Phoenix defendants, Teresa Ulrich, John Ulrich,
20 Melissa Ulrich and Pat Wtulich.

21 This is a case about courthouse and
22 transcriber contact information. This case has been
23 pending since September 13th, 2013. The parties had
24 approximately 15 months to engage in discovery and
25 develop the record.

1 As I reviewed the Statement of Uncontested
2 Material Facts and King's response, it struck me that
3 there really isn't any uncontest -- you know, any
4 contested material facts relating to this information
5 and the basic circumstances around this industry. And
6 we feel that this matter is right for Summary Judgment
7 before the Court now. We have a trial date on March
8 2nd. It's a trial date that's been put off twice
9 before.

10 There's basically six claims that King is
11 asserting against my clients and I'll group Phoenix,
12 Teresa, John, Melissa and I'll call them the Phoenix
13 defendants today if that's all right with Your Honor,
14 just to abbreviate -- and Patricia.

15 First, they're claiming that my clients mis-
16 appropriated their trade secrets. That's in count five
17 of the Amended Verified Complaint.

18 The second claim they're asserting against my
19 clients is that they breached fiduciary duties. That's
20 in count three of the Amended Verified Complaint.
21 Tucked into count three is also a claim for aiding and
22 abetting a breach of fiduciary duty on the part of Mr.
23 Frank Ulrich, co-defendant.

24 The fourth set of claims arise out of an
25 alleged aiding and abetting, tortious interference --

1 excuse me, aiding and abetting a breach of restrictive
2 covenant and tortious interference.

3 Fifth set of claims are these conversion,
4 unfair competition claims; which are count seven and
5 eight of the Amended Verified Complaint.

6 And the last group of claims, if you will, is
7 a tortious -- what I call the un-pled tortious
8 interference claim arising out of alleged piracy of
9 transcribers.

10 It's important, even before I go into my
11 presentation to point out to the Court that it's
12 undisputed that none of my clients had any kind of non-
13 compete or non-disclosure, non-solicitation agreement
14 with the plaintiff, King Transcription. All the claims
15 are basically Tort based claims.

16 And before I proceed, Your Honor, I want to
17 do this in the way that is most useful for you. If it
18 would be most useful I could do one claim at a time and
19 allow Mr. Nagle and Mr. Ulrich -- would that be easiest
20 for you?

21 THE COURT: It doesn't matter to me, whatever
22 you find easiest.

23 MR. FIALCOWITZ: Okay.

24 THE COURT: I'll adjust, I promise.

25 MR. FIALCOWITZ: I'm sure you will.

1 I'll start with the mis-appropriation of
2 trade secret claim, which again is found in count five
3 of the Amended Verified Complaint. Our Motion for
4 Summary Judgment on that claim is based simply on the
5 fact that King cannot prove either a trade secret or
6 the necessary employment relationship. As we set forth
7 in the papers, the issue -- the information at issue
8 here is this -- the courthouse contacts within the
9 transcriber units in the Superior Court and these
10 transcriber names.

11 We put in evidence on -- Exhibit 7 of my
12 certification is the AOC list of transcriber units and
13 contact personnel and their telephone numbers. We've
14 put in the vicinage web pages which show this
15 information. There is nothing secret about this
16 information.

17 Transcriber names; the transcribers know each
18 other through family relationships. King itself had
19 basically sent emails out to the other transcribers
20 that disclosed the names of these transcribers. Again
21 nothing is secret about this information.

22 And on top of it all, as I attached in
23 Exhibit 2 to my certification, King itself broadcasts
24 that fact that it does business with the Bergen
25 Transcript Unit, the Essex Transcript Unit, the Hudson

1 -- and it was purposeful. And the stuff was out there
2 for well over a year that they did business -- and I'll
3 talk about the additional significance of that when we
4 get to the restrictive covenant section.

5 So for those reasons, Your Honor, we contend
6 that Summary Judgment is appropriate with the mis-
7 appropriation of trade secret claim.

8 Second, with regard to the breach of
9 fiduciary duty claim. We have put in not only the
10 testimony of Mr. Froonjian, King's Mr. Froonjian,
11 basically saying none of our people had fiduciary
12 duties, but the whole concept of fiduciary duty from
13 the FG Supreme Court case is that there is a
14 relationship of trust and confidence built on sort of
15 one party having a superior or dominant position in the
16 relationship.

17 My clients, to the extent they had -- John
18 had no relationship with King at all. But, Teresa and
19 Melissa and Patricia were low-paid independent
20 contractors. Again, not the relationship that gives
21 rise to a fiduciary duty. And I note in the
22 opposition, King didn't address our arguments. So for
23 that reason alone, we would ask that the breach of
24 fiduciary duty claim in count three of the complaint be
25 dismissed.

1 Turning to the aiding and abetting on Mr.
2 Ulrich's alleged breach of fiduciary duty. There's
3 several grounds to have this claim dismissed. The
4 first one, and it relates to both aiding and abetting
5 counts is, there's a knowledge requirement that is
6 imposed. Like our clients, Phoenix defendants,
7 Patricia, they have to show that our clients knew about
8 this restrictive covenant in the King Operating
9 Agreement.

10 And I went through the record on this case, I
11 can't find anything in terms of admissible evidence
12 that King submitted to show that my clients knew about
13 this restrictive covenant. In fact, they've certified,
14 and I also in my reply quoted from Teresa's deposition
15 where she again said, "I had no knowledge of this
16 restrictive covenant".

17 And then just turning to the basic fiduciary
18 duty. The point I would also emphasize with the Court
19 there is that the Court really has to look at the
20 substance of what's going on here.

21 Mr. Ulrich, at best is a member, after
22 November 2012, when all the events that are alleged
23 took place. All he is, is a 33 and a third percent
24 owner in King; doesn't have a controlling interest; no
25 role in the operations of the company. And based on --

1 looking at the act, I don't see how you can imply a
2 fiduciary duty there.

3 Again, looking back at EG and the basic
4 definition of what is a fiduciary. Someone who's in a
5 dominant or superior position. That's not Mr. Ulrich
6 after November of 2012.

7 Turning to the fourth set of claims; the
8 aiding and abetting, the breach of restrictive
9 covenant. The additional point -- I didn't do a good
10 job in my papers and I really want to emphasize with
11 the Court as I went back through things, is looking at
12 this restrictive covenant, I think it's critical that
13 the Court look at the industry we're talking about.
14 It's hard to imagine a more regulated industry than the
15 transcription industry.

16 Contrasting it with the Platinum Management
17 versus DAHMS case where it's private buyers who have
18 price preferences, toy preferences. In the
19 transcription industry, there's no product
20 differentiation. If you look at Exhibit 3 to Teresa's
21 certification, the Standards Booklet, the Standards
22 booklet says exactly how everybody has to prepare a
23 transcript. You have to conform to those guidelines.
24 It's not a situation where a transcript from KLJ
25 Transcripts is going to differ from a transcript from

1 Phoenix. It's going to -- they all have to do it the
2 exact same way so we don't have an industry with
3 product differentiation.

4 Nor do we have an industry that has price
5 differentiation because the price of transcripts are
6 set by statute. That's N.J.S.A. 2B:, I think it's 7-4,
7 it sets the price of the transcripts. So we have a
8 very unique animal in terms of the industry that we're
9 talking about here which I think sets us apart from
10 cases like Platinum Management, LaMorte Burns where
11 those cases involve private buyers with a whole range
12 of preferences where a sales agent might provide a
13 competitor with a competitive advantage. Our case is
14 completely different.

15 Turning to the conversion and unfair
16 competition claims. Again, there is nothing
17 proprietary or -- that gives King an exclusive right to
18 possess the names and contact information for
19 transcript unit personnel and these transcribers. And
20 for that reason alone, both of those claims fault.

21 And finally, the last set of claims with
22 regard to the piracy of -- of these transcribers. Not
23 only was it not pled in the Amended Verified Complaint,
24 but just looking at the substance of it. They put in,
25 the same certifications we all looked at back in

1 October of 2013 on the Order to Show Cause; the Hicks's
2 certification and the Powers's certification. In both
3 those certifications, Ms. Hicks and Ms. Powers say that
4 they allegedly were approached by Mr. Ulrich but they
5 remained with King.

6 So how can you say there's piracy? The only
7 proof they have are these two certifications and the
8 transcribers didn't jump ship. So there's a fatal lack
9 of causation to this claim.

10 Your Honor, again this case is really, in my
11 mind, the same as it was when we appeared before Your
12 Honor back on October 2013. We've given King the
13 opportunity to develop its claims exhaustively. My
14 clients were deposed for three days. But at this
15 point, Your Honor, I believe it's appropriate to grant
16 my clients Summary Judgment.

17 THE COURT: Okay, thank you.

18 MR. FIALCOWITZ: Thank you.

19 THE COURT: Yes, sir?

20 MR. NAGLE: Thank you, Your Honor.

21 Yes, with regard to the issue of the trade
22 secrets. Our position is we paid Mr. Ulrich, Frank
23 Ulrich, very well to work with us. We gave him the
24 opportunity to take clients and family members and
25 friends to Devils games and dinners and meals. And the

1 purpose of that was to establish relationships. And
2 that's what we contend our -- our confidential and
3 proprietary information is. It's the relationships
4 that Mr. Ulrich established with these individuals.
5 Their names may be known but the relation --

6 THE COURT: And that has what to do with the
7 defendant that's made that motion?

8 MR. NAGLE: Well, the first thing that Mr.
9 John Ulrich did was go out and contact these very
10 individuals who Frank Ulrich had the relationships
11 with. So it's pretty -- I think pretty obvious that
12 his brother gave him these names.

13 THE COURT: Ah, it is, and what proof do you
14 have of that?

15 MR. NAGLE: Out of all the court --

16 THE COURT: And the names that he gave,
17 aren't they the same ones that are on the AOC list and
18 the Lawyers Diary and everything else?

19 MR. NAGLE: The names are known, Your Honor

20 --

21 THE COURT: Okay, there you go --

22 THE COURT: -- but out of -- out of all of
23 the courthouses that you could go to in the State and
24 all of the people that you could contact in the various
25 courthouses, the first thing that they do is go to

1 these very two individuals in Bergen County who Frank
2 Ulrich has advised during his depositions, he had over
3 for barbeques.

4 THE COURT: But how does it get to be a trade
5 secret? How does it get to be privileged --
6 confidential information?

7 MR. NAGLE: It's the relationship. It's the
8 relationship that they're -- they're trading off of
9 between our client, Mr. Ulrich, the names are similar.
10 They're brothers. That's -- that's what's
11 confidential. That's what's proprietary --

12 THE COURT: What's confidential? There's
13 nothing confidential.

14 MR. NAGLE: The relationships that we've
15 established with these individuals to know that if you
16 use us, you --

17 THE COURT: So -- that's not confidential.
18 There's a relationship there. That's all, I get it.

19 MR. NAGLE: Right.

20 THE COURT: That's not protected. It's not a
21 confidential trademark secret, et cetera.

22 MR. NAGLE: Under the case law, Your Honor,
23 and we cited the Ingersoll-Rand case where it says if
24 you put an individual in a position where they're able
25 to create something --

1 THE COURT: We're not talking about him,
2 we're talking about the -- the group -- Phoenix group.

3 MR. NAGLE: Right. Well what -- what
4 happened was the Phoenix group ended up taking that
5 information --

6 THE COURT: Right.

7 MR. NAGLE: -- and going off to these very
8 courthouses and establishing a competing business --

9 THE COURT: And you have -- you have evidence
10 to prove that those names were given -- well, you know
11 I don't know that you need evidence because the names
12 aren't privileged. The bottom line, they aren't
13 privileged. Their relationship is nice, that's cool.
14 I get that --

15 MR. NAGLE: And -- and there's a lot of case
16 law that we've cited in our brief that says, you know,
17 an employer has an expectation of protecting
18 relationships with their clients. And that's what we
19 were trying to do here, is protect our relationship
20 with our clients and not allow this kind of trade-off
21 of one Ulrich versus the other Ulrich, to come in and
22 say, "Well you knew my brother, now you know me," and I
23 know exactly who to go to.

24 You know it -- it just -- didn't fall into
25 his lap, he knew exactly where to go when he went to

1 these courthouses. And within two months they're
2 making \$40,000 in a start-up business --

3 THE COURT: Let's assume for a minute -- and
4 I'm just -- for the sake of argument -- that this
5 Ulrich passed that information onto the defendants; so
6 what. Why can't they use it?

7 MR. NAGLE: Well then, it's in a breach of
8 his fiduciary obligation.

9 THE COURT: We're not talking about him yet,
10 we're talking about them.

11 MR. NAGLE: Right.

12 THE COURT: How did they violate anything by
13 -- assuming you're right, by taking the names -- okay,
14 I'll go contact that person.

15 MR. NAGLE: They knew that -- that --

16 THE COURT: What did they do wrong?

17 MR. NAGLE: -- they knew that Frank was a
18 former employee --

19 THE COURT: Okay, big deal. They knew he was
20 an employee.

21 MR. NAGLE: As an employee, Frank had certain
22 fiduciary obligations and obligations to maintain --

23 THE COURT: Why can that shift the burden to
24 these people? How does it get to them?

25 MR. NAGLE: Your Honor, why would they --

1 I'll ask -- I guess a rhetorical question. Why would
2 they not use an Ulrich to create the company? Why
3 would they start paying Frank in cash? Why would they
4 start paying his cable bill?

5 When you look at the telephone calls that
6 Frank made he's -- in this period of three days in
7 April --

8 THE COURT: Yeah, but what did -- assuming he
9 did all those things --

10 MR. NAGLE: Right.

11 THE COURT: -- how does that affect a claim
12 against the defendants?

13 MR. NAGLE: Because they knew it was wrong.

14 THE COURT: Why? What did -- they didn't
15 know about the restrictive covenant agreement.

16 MR. NAGLE: They didn't know about the
17 restrictive covenant but they knew he was an employee
18 of the company --

19 THE COURT: So what --

20 MR. NAGLE: -- and they -- they knew it was
21 wrong. Everything --

22 THE COURT: Why, where -- where is -- where
23 is there one scrap of evidence that shows they knew it
24 was wrong?

25 MR. NAGLE: If they didn't know it was wrong,

1 why wouldn't they just pay Frank with a check, not made
2 out to cash? Why would they -- use an Ulrich to create
3 the company --

4 THE COURT: You know, you can't throw
5 speculation out there and hope it flies and wins.
6 What's your hard evidence today? What are the material
7 facts which prove -- that permits you to make the
8 allegation you've made against these defendants?

9 MR. NAGLE: When you add them all together,
10 Your Honor --

11 THE COURT: Ah, circumstantial evidence,
12 credibility, right. Okay, all right; I'll tell you
13 what, I'll let you finish.

14 MR. NAGLE: Okay. I think that takes us
15 through the trade secret and aiding and abetting.

16 As far as the restrictive covenant; you know
17 -- it's a -- it's something as a partner in the
18 business Mr. Ulrich agreed to. He's a one-third owner
19 of the business. And whether or not -- again, as a
20 former employee he has a fiduciary obligation to the
21 company. And he can't go out and he can't just say,
22 "All right, now I'm going to give you all the secrets
23 that I used --

24 THE COURT: But you're talking about him,
25 we're not up to him, we're talking about Phoenix.

1 MR. NAGLE: Right.

2 THE COURT: So tell me what you're telling me
3 about Phoenix.

4 MR. NAGLE: Well, Phoenix is arguing the
5 restrictive covenant isn't enforceable as to Mr.
6 Ulrich, so --

7 THE COURT: No they're not.

8 MR. NAGLE: Yeah, that was part of their
9 argument.

10 THE COURT: Well, they can't make it because
11 they're not his client.

12 MR. NAGLE: Well, that's kind of what I
13 understood but anyway I'm addressing it because --

14 THE COURT: Well, except that I suppose to
15 the extent that it rubs off on them, I guess they can
16 make that argument.

17 MR. NAGLE: Right. But that's the argument
18 -- they did argue that the restrictive covenant wasn't
19 enforceable, so -- I'm addressing that because they
20 addressed it. And -- and -- there is, Your Honor,
21 under that Wear-ever case, a situation where, you know,
22 two maybe didn't go with them, transcribers but eight
23 did. Eight of our best left us and haven't come back.

24 THE COURT: What's wrong with that?

25 MR. NAGLE: It -- it -- it was specific

1 targeting of these eight individuals.

2 THE COURT: So what.

3 MR. NAGLE: The only reason they knew the
4 names of the individuals was because Mr. Ulrich gave
5 them that direction.

6 THE COURT: Well maybe the other two gave
7 them the names.

8 MR. NAGLE: Mr. Ulrich testified at his
9 deposition that he steered them to Phoenix.

10 THE COURT: Yeah, okay. But what does that
11 have to do with Phoenix?

12 MR. NAGLE: And then Phoenix focuses on those
13 individuals --

14 THE COURT: So what did they do wrong?

15 MR. NAGLE: -- and comes -- it's the same
16 thing as Wear-ever.

17 THE COURT: What did they do wrong?

18 MR. NAGLE: Taking our best transcribers away
19 from us as an effort to hurt the business.

20 THE COURT: Ah -- I'd imagine it was an
21 effort to benefit their business, not necessarily hurt
22 yours, but --

23 MR. NAGLE: It did both, and that was what
24 happened in the Wear-ever case --

25 THE COURT: What did they do wrong?

1 MR. NAGLE: Pirating our transcribers.

2 THE COURT: That's a nice word, pirating, but
3 what -- what did they do wrong?

4 MR. NAGLE: Focusing on the specific best
5 eight transcribers that we had is wrong, and they --

6 THE COURT: You don't think a lawyer who's --
7 who goes to another firm and identifies the best
8 lawyers in the firm and tries to induce them to come to
9 that firm, that that's wrong too?

10 MR. NAGLE: I -- I -- with -- with no other
11 facts, maybe not but given the facts of this case --

12 THE COURT: Which are what? That's what I'm
13 trying to get to.

14 MR. NAGLE: Again, you have cash payments
15 being made to Mr. Ulrich. You have phone calls Mr.
16 Ulrich is making on behalf of, presumably, Phoenix.
17 He's wrapped up in the business --

18 THE COURT: Presumably. Here we are at a
19 Motion for Summary Judgment and you're saying
20 presumably.

21 MR. NAGLE: I think when you add all the
22 facts together though, Your Honor --

23 THE COURT: Right. Well, I know that's your
24 hope.

25 MR. NAGLE: Well -- I -- and I -- I think

1 that's the view that -- that I have. When we add them
2 all together, it creates a situation where clearly
3 Phoenix knew what they were doing was wrong.

4 If they didn't think they were doing wrong,
5 they would have been above board and they would have
6 done things clearly out in the open. Instead they hid
7 under the radar and tried to make it look like their
8 brother wasn't involved.

9 THE COURT: And when you asked them why they
10 paid him in cash, what did they say?

11 MR. NAGLE: It was a loan.

12 THE COURT: Okay.

13 MR. NAGLE: It's not treated as a loan on the
14 tax return. There's no documents to substantiate it as
15 a loan.

16 THE COURT: So, what else?

17 MR. NAGLE: That's it, Your Honor.
18 Everything else we've addressed in our papers.

19 THE COURT: Okay. All right, well in spite
20 of your enthusiasm, I will grant the application to
21 dismiss. It comes down to really two things. One is
22 are there trade secrets; no there's no trade secrets.
23 All the information that is out there is out there,
24 period; end of story.

25 You can look on the internet and see here's

1 all the people. You can go to the courthouse and say,
2 "Who's the person I should contact?" and they'll tell
3 you. There's no trade secret involved. And the
4 evidence is clear that these defendants did not know of
5 any restrictive covenant.

6 So in terms of aiding and abetting,
7 conversion, unfair competition, tort claims; they all
8 go out the window because you don't have those two
9 specific issues.

10 Now there's other subtleties like fiduciary
11 duty. Well they're low-paid, independent contractors
12 so there's no fiduciary duty there. There's no product
13 differentiation or price, we know that. There's
14 nothing proprietary. There's nothing secret and
15 there's nothing -- no agreement.

16 This world has a -- this world fosters
17 competition. It recognizes that restrictive covenants,
18 at least in New Jersey, have merit; not all states do.
19 But there's simply nothing to suggest that there's a
20 claim against these defendants. There are no material
21 facts in dispute. If I look through the Statement of
22 Facts submitted, I can't even get a claim -- a cause of
23 action out of them; by that I mean the plaintiff.

24 So there's simply no legal or factual basis
25 to sustain the possibility that the judgment could be

1 entered against Phoenix and the individuals. So I will
2 grant the application; they're out of the case.

3 Okay, who wants to go next?

4 MR. NAGLE: Your Honor, I had filed a motion,
5 I guess earlier -- with regard -- I guess a partial
6 Summary Judgment Motion as to Mr. Ulrich. I submitted
7 a reply -- Your Honor's familiar with -- and there's a
8 lot of paperwork and I know you're familiar with it
9 all.

10 The only thing I would emphasize is that Mr.
11 Ulrich did give a deposition and he should be limited
12 to his testimony at his deposition. We tried to find
13 out through his deposition what his causes of action
14 were and what his claims were. And in his opposition
15 to the motion, he seems to have -- to try and broaden
16 that and we believe that he should be stuck to his
17 deposition testimony.

18 THE COURT: Okay. I don't know what that
19 means, but.

20 MR. NAGLE: In terms of claims. He made a
21 claim for oppression --

22 THE COURT: He stuck to the -- to the
23 counter-claim he filed, yes.

24 MR. NAGLE: Right. But when we took his
25 deposition, we asked him what provision of the

1 Operating Agreement do you claim is violated. He said
2 specifically section 6.01. In his opposition, he's now
3 broadening that. Again -- we took his deposition, we
4 asked him about --

5 THE COURT: I'm sorry, you're confusing me
6 completely. Are you asking that I dismiss part --
7 certain parts of his counter-claim?

8 MR. NAGLE: Correct.

9 THE COURT: Which ones?

10 MR. NAGLE: The entire counter-claim.

11 THE COURT: Wait -- whoa -- wait a minute.
12 He's -- he's a direct -- he's a member of your company
13 and he's not been treated as a member since this matter
14 came up. Why does that give -- it alone, give him
15 claims against your client?

16 MR. NAGLE: Well, he made a decision to walk
17 away from the company after he was terminated.

18 THE COURT: Can you show me that he's been
19 invited to all the meetings? That's he's been paid?
20 That he has all the benefits of a full partner?

21 MR. NAGLE: In -- in his deposition
22 transcript he admitted that the first time that he had
23 any contact --

24 THE COURT: That's not what I'm asking you.

25 MR. NAGLE: -- or tried -- right --

1 THE COURT: How are you going to prove that
2 he's been treated as a full member?

3 MR. NAGLE: We -- there was no historical
4 meetings, Your Honor. There was no historical -- I
5 mean it's a small company --

6 THE COURT: He's one of three people that
7 owns your company.

8 MR. NAGLE: Right.

9 THE COURT: And he's been shut out, that's
10 pretty clear.

11 MR. NAGLE: Your Honor, he made that decision
12 to be shut out. He walked away. We asked him to come
13 back and help out with the company as a co-owner and he
14 said no. He left the company and walked.

15 THE COURT: So, he has no claim against the
16 company for -- for example, he's asking that I dissolve
17 the company I guess and appoint a referee in order to
18 divide up the proceeds. He has no legitimate claims of
19 that nature?

20 MR. NAGLE: Not -- in -- under case law, Your
21 Honor.

22 THE COURT: Of course he does.

23 MR. NAGLE: I view it differently,
24 respectfully.

25 THE COURT: Well, how can you say that? He

1 owns one-third of this company. What does he do, just
2 walk away and say good-bye? No money, no transaction,
3 no resignation, no dissolution, no nothing?

4 MR. NAGLE: I'm talking specifically with
5 regard to the oppression claim.

6 THE COURT: Yeah, I am too.

7 MR. NAGLE: Right. And -- and -- the only
8 incidences of oppressions he claims is not being paid
9 dividends or distributions.

10 THE COURT: That's not what he says at all.
11 But really how can you take the position? He owns one-
12 third of your company. He's not been participated and
13 -- he has not been permitted to participate in the
14 company as an owner.

15 MR. NAGLE: Based on his own decision to do
16 that. We asked him, after he was terminated to come
17 back --

18 THE COURT: Please -- don't --

19 MR. NAGLE: -- and help out.

20 THE COURT: And have you been paying him?
21 Have you been telling him of --

22 MR. NAGLE: No.

23 THE COURT: -- board meetings.

24 MR. NAGLE: No, we haven't been paying him
25 because we've had this motion before Your Honor in July

1 or June. We haven't been paying him because of the
2 offsets that we have against him for breaching the
3 covenant and doing what he's done.

4 THE COURT: Well, good luck with that.

5 Of course, counts one and two remain in the
6 counter-claim, there is no question about it. He's an
7 owner of the company, he has a right to pursue those
8 claims. I don't know that he'll win, but of course he
9 does. I really don't understand your argument. Some
10 of the other counts I can understand. He didn't breach
11 the -- you didn't breach the contract; I think that's
12 one of them under the Operating Agreement.

13 MR. NAGLE: Correct.

14 THE COURT: I get that. The only claim is
15 that he was fired. He says the Operating Agreement
16 doesn't permit it; well it does. I get that. But his
17 -- their first -- I think it's counts one and two; of
18 course they remain; really. They're legitimate
19 judicial claims against your client. I don't know how
20 I could say it otherwise.

21 I'm not saying he's going to win, but the
22 facts are clearly in dispute as to how he was treated
23 since the day he left. There -- there's just no
24 question about that.

25 Doesn't -- as I've said, I'm not saying he's

1 going to win, but are there material facts in dispute
2 where I can conclude he has no claim against your
3 clients; no there are not. Clearly there is a
4 question, a lot of questions.

5 So I think it's -- I think one and two
6 remain. I'll go through the complaint in a minute. I
7 mean, I know it's nice to grant Summary Judgment, but
8 Summary Judgment can't be granted if there's material
9 facts in dispute. So let's look specifically at the
10 different counts.

11 Okay, oppression; seems to me there is a
12 potential claim there. It remains. That's count one.
13 Count two, abuse of authority and breach of fiduciary
14 duty; lots of facts in dispute over that one. That
15 remains. Breach of the Operating Agreement; I agree
16 with you, count three should be dismissed. There is no
17 evidence of a breach of the agreement. Accounting; I'm
18 not sure about that one, whether he's been provided --
19 I know you say he has been but let's -- I'll hear from
20 him on count four.

21 Civil conspiracy against third parties; I
22 guess that remains. It's a derivative claim out of one
23 and two. Defamation; that remains. There's evidence
24 that your guy said he's -- he's a thief. Maybe that's
25 true, maybe not. Your brief just says, "Judge you have

1 to prove damages, the law supports that." Well, what
2 law supports that? In fact the laws go the opposite
3 way and I can't remember the name of the case but the
4 Initials versus Initials case says that in certain
5 cases you don't have to prove damages. So that
6 remains.

7 Defamatory entry to reputation; I think
8 that's really the same as six, so that remains. So,
9 breach of contract I get, but -- and I don't know about
10 the accounting so, but the rest are valid claims.

11 Are they going to be found in his favor, I
12 have no idea. But when someone says you got fired
13 because he was a thief; is that defamatory. Maybe, I
14 don't know. Is he a thief? You're going to have to
15 prove he's not I guess, or he is I suppose. But those
16 are valid claims.

17 I don't know why we're not seeing eye to eye
18 -- well I do know because you've got a job to do for
19 your client but if you say -- if you tell the world or
20 tell outside people that someone's been terminated
21 because they're a thief, it has to be true; right?
22 Right.

23 Okay, so what else do I need to know?

24 MR. NAGLE: That's it, Your Honor.

25 THE COURT: Tell me about the accounting now.

1 What's your position on that?

2 MR. NAGLE: Well, in discovery in this case
3 we've produced all of the financial information that we
4 have for the company.

5 THE COURT: Okay.

6 MR. NAGLE: Which would include, you know,
7 the books and records, so --

8 THE COURT: Okay, well let's hear from him.

9 MR. NAGLE: -- I mean it's not a formal
10 accounting per say as one would call it. But it -- our
11 view is he has the information.

12 THE COURT: Okay. So, what's -- I didn't
13 give you a chance to speak, so I guess I should give
14 you a chance now.

15 MR. ULRICH: Thank you, Your Honor. With
16 regards to the accounting, the last information I
17 received pertaining to the finances of the company was
18 March of 2000 and -- we're in '15 -- 2014 and that was
19 due to a discovery request. Since that time I've
20 received nothing with regards -- I have no -- I have no
21 idea how the company is operating financially, what
22 they -- you know, whether they are succeeding. I'm
23 completely in the dark as I was prior to discovery.

24 THE COURT: All right. So I guess since
25 there's facts in dispute, I guess it remains a claim

1 unless you can rebut that. Has he gotten anything
2 since the spring of 2014?

3 MR. NAGLE: There -- there -- additional
4 information was provided over the summer but it hasn't
5 been updated to date; no.

6 THE COURT: Okay. All right, I guess you're
7 the last -- last Indian standing, last person standing
8 I suppose. You also filed a Motion.

9 MR. ULRICH: Did I file a motion?

10 MR. FIALCOWITZ: You just cross-moved with
11 regard to our claims.

12 THE COURT: I mean, if we are where we are, I
13 --

14 MR. ULRICH: I'd like your guidance on this
15 because I'm not sure that --

16 THE COURT: Well, I can't give you any
17 guidance.

18 MR. ULRICH: Well --

19 THE COURT: You've asked for an Order
20 Granting Summary Judgment in your favor and dismissing
21 the complaint entirely as to you. You've asked me to
22 throw his case against you out.

23 MR. ULRICH: Okay. So it's been -- versus
24 the -- the -- John, Teresa, you know, and Phoenix
25 that's -- that's been set aside.

1 THE COURT: You and he are in it, that's it.

2 MR. ULRICH: Okay.

3 THE COURT: Do you mind standing? I tend to
4 be --

5 MR. ULRICH: Oh, I'm sorry --

6 THE COURT: -- it's all right. I tend to be
7 kind of formal.

8 MR. ULRICH: I apologize.

9 THE COURT: Not a problem.

10 MR. ULRICH: So I guess I'll refer to my
11 brief? Let's see -- I'm just going to -- lump one --
12 one and two; enforcement of restrictive covenant and
13 breach of fiduciary duty. I believe I reference some
14 information that was provided in the -- information
15 that was provided by -- by Phoenix through John
16 Fialcowitz. With regards to my -- my fiduciary
17 responsibility, I haven't violated that in any way.

18 I haven't had any contact -- any contact or
19 -- no interest in Phoenix Transcription. But if I were
20 to have any finance -- fiduciary responsibility, I
21 would think that we would have to take into
22 consideration that fact that I've received basically no
23 -- no information; financial or distributions from the
24 day that I was released as a manager to present.

25 THE COURT: Okay, well as I see counts one

1 and two, you still remain a member of the plaintiff --

2 MR. ULRICH: Okay.

3 THE COURT: -- they're saying you conspired
4 with the now removed defendants and that the evidence
5 of that is that you've got some payments from them.
6 That suggests there's a claim here that needs to be
7 flushed out I think.

8 MR. ULRICH: Okay. Since -- since my -- my
9 release from King Transcription, I've had no source of
10 income. In my family, when -- when a member becomes on
11 hardship, family members chip-in to support and help.
12 And that's basically what the funds are that are coming
13 from --

14 THE COURT: Okay, but that's -- that's a fact
15 that needs to be decided at a trial.

16 MR. ULRICH: Okay.

17 THE COURT: You got money from them, they say
18 it's because of your participating with them --

19 MR. ULRICH: Right.

20 THE COURT: -- you say it was loans. I can't
21 make a decision --

22 MR. ULRICH: Okay.

23 THE COURT: -- based upon just submissions.
24 I have to hear testimony, evidence. I mean, I think
25 count five, mis-appropriation of trade secrets; since

1 there's no trade secrets, I don't know how you could
2 mis-appropriate them. So I suppose count five is worth
3 -- is appropriate to dismiss.

4 MR. ULRICH: Okay.

5 THE COURT: Having previously concluded that
6 there's no trade secrets.

7 MR. ULRICH: I mean, respectfully, Your
8 Honor, the information put forth by John Fialcowitz,
9 representing Phoenix --

10 THE COURT: Right.

11 MR. ULRICH: -- I believe applies to my
12 situation equally. I mean it's -- although --

13 THE COURT: Well, there's a couple
14 differences. You did sign a restrictive covenant
15 contract --

16 MR. ULRICH: Okay.

17 THE COURT: -- and you still are a member of
18 the plaintiff, so there are some legal distinctions
19 between you and them, for those two reasons at least.

20 MR. ULRICH: Okay. So what counts do we have
21 still standing then?

22 THE COURT: Well, the only one that I've --
23 that I so far ruled is five; trade secrets because I
24 ruled in his case that there were no trade secrets,
25 that all this is public information.

1 MR. ULRICH: All right.

2 THE COURT: But I'm still open to hearing
3 what you think and give Mr. Nagle a chance to talk
4 also.

5 MR. ULRICH: With regard to trade secrets --
6 well that's -- that's already been ruled.

7 THE COURT: That's done.

8 MR. ULRICH: Okay.

9 THE COURT: All the other counts. If you
10 think it's warranted that there are no material facts
11 in dispute, that they can prove any of the other
12 counts, this is the time to tell me.

13 MR. ULRICH: I'm at a loss here. Can you
14 give me a second please?

15 THE COURT: Of course.

16 MR. ULRICH: All right; thanks.

17 THE COURT: Would you like me to step down so
18 you don't feel like I'm watching you?

19 MR. ULRICH: No, that's all right.

20 THE COURT: All right, why don't we take a
21 break, I'm sure you don't need me sitting here watching
22 you --

23 MR. ULRICH: I appreciate that.

24 THE COURT: -- just let me know when you're
25 ready.

1 MR. ULRICH: All right.

2 (Off the record. Back on the record)

3 THE COURT: Okay. Yes, sir?

4 MR. ULRICH: Your Honor, I believe in my
5 brief, for these counts I've cited -- referred to the
6 Fialcowitz brief and I just rely on that.

7 THE COURT: Okay.

8 MR. ULRICH: All right.

9 THE COURT: Sounds good, sir. Mr. Nagle?

10 MR. NAGLE: Your Honor, I don't have anything
11 further.

12 THE COURT: Okay, well various counts -- let
13 me back up a minute. There is an agreement, an
14 enforceable restrictive covenant between the plaintiff
15 and Mr. Ulrich. And the plaintiff wishes to enforce
16 that and there's material facts in dispute as to
17 whether he did or did not violate that.

18 On the usurpation of corporate opportunity,
19 the same -- the same is true. There are facts in
20 dispute as to whether the defendant caused the
21 plaintiff to suffer damages.

22 In terms of breach of fiduciary duty, of good
23 faith and loyalty to King. It -- it's an interesting
24 issue because as a member -- as a -- as a -- one of the
25 three owners, that creates a duty and I don't know of

1 any case that talks about the issues when two members
2 fire the third as an employee; does that affect the
3 duty of loyalty. I don't know, interesting question
4 but that's in count three.

5 Count four, breach of covenant of good faith;
6 same thing. Mis-appropriation of trade secrets; since
7 there were no trade secrets, that is dismissed as I've
8 previously indicated.

9 Tortious interference with business
10 relations; well he's -- the plaintiff is asserting that
11 this defendant interfered with the plaintiff's ability
12 to continue doing business, I guess, and participated
13 in stealing clients improperly. Again, I think there's
14 material facts in dispute as to that one.

15 And conversion -- let me ask Mr. Nagle, what
16 is it that it's alleged he converted because I'm not
17 clear?

18 MR. NAGLE: It was some of our software, Your
19 Honor. We put in our papers that -- the first invoice
20 --

21 THE COURT: Right.

22 MR. NAGLE: -- that was generated by Phoenix
23 was the last invoice number -- next number up --

24 THE COURT: 30,000; whatever it was, yeah.

25 MR. NAGLE: -- correct. So that tracking

1 software and accounting software has -- contains
2 propriet -- we claim it contains proprietary
3 information or at least information with regard to our
4 clients, even if it's not proprietary, it is
5 information with regard to our clients.

6 THE COURT: Well, there's not much in here to
7 really deal with that issue but I guess since there's
8 an allegation and there's no material -- no rebuttal to
9 -- at this point to that. That remains.

10 And unfair competition; I guess that stays
11 too. So at least as to Mr. Ulrich, count five goes.

12 Okay, anything else gentlemen? All right, it
13 seems like we have an interesting situation here. You
14 have a defendant who is an owner of the plaintiff who
15 at least intuitively might be deserving -- let me start
16 that again. There is no plan on the table to remove --
17 to get him off as a member. That's the strange thing
18 here I -- that I don't understand and at least there's
19 nothing in this litigation, so it seems like he may
20 have claims against the plaintiff as a member.

21 It seems like you may have claims against him
22 for violating the restrictive covenant. Sounds like
23 that's a basis to talk turkey and try and get this
24 resolved to me. Hey, who am I?

25 MR. NAGLE: On the record or off the record,

1 Your Honor -- I mean -- if you want -- I think if we go
2 off the record I'll -- I can -- I'll -- I'll tell you
3 how I view practically going forward.

4 THE COURT: Well I can't do that because he's
5 pro se --

6 MR. NAGLE: Okay.

7 THE COURT: -- so.

8 MR. NAGLE: I think as a practical matter, in
9 light of what happened here today, I think the
10 opportunity to resolve those issues as Your Honor has
11 suggested is --

12 THE COURT: It's seems like it might be worth
13 while.

14 MR. NAGLE: -- is a --

15 THE COURT: You don't mind, right? Okay,
16 sounds good. Give me a couple of minutes to do the
17 orders and then we'll see you in March if you're still
18 involved.

19 MR. FIALCOWITZ: Thank you, Your Honor.

20 MR. ULRICH: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. NAGLE: Thanks, Judge.

23 (Proceeding Concluded at 2:12 p.m.)
24
25

CERTIFICATION

1
2
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