IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

AGC NETWORKS, INC.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 14-308-LPS
	)	
RELEVANTE, INC., JOSH HADFIELD, ANTHONY MILLER, SCOTT SMITH, RICHARD TARITY, JENNIFER WAGNER, and EILEEN WAINWRIGHT,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

At Wilmington this 31st day of March, 2015:

Having reviewed the motion to dismiss counterclaims filed by Plaintiff AGC Networks, Inc. ("Plaintiff"), and the papers submitted in connection therewith (D.I. 17, 18, 19, 21, 22),

IT IS HEREBY ORDERED that, for the reasons stated below, the Motion to Dismiss is **GRANTED** and the counterclaim asserted by Defendant Relevante, Inc. ("Defendant") is **DISMISSED.**

Background. Plaintiff filed this lawsuit against Defendants for allegedly "execut[ing] an elaborate scheme to steal AGC's established customers, suppliers, distributors, and vendors, in addition to AGC's top managers, engineers, and sales associates." (D.I. 18 at 1) The complaint was filed on March 6, 2014. (D.I. 1) Thereafter, on April 1, 2014, AGC sent letters to some of its former customers informing them of the complaint and requesting that they preserve electronically stored information that might be relevant to the issues in this case (the

"Preservation Letters"). (D.I. 18 at 6-7; D.I. 19 Ex. A) Defendant then asserted a counterclaim against AGC for tortious interference with prospective business activities, alleging that, by sending the Preservation Letters, Plaintiffs intentionally and wrongfully interfered with Defendant's business relationships or expectancies with those third parties. (D.I. 16 at 15-19)

AGC has filed a motion to dismiss Defendant's sole counterclaim. (D.I. 17) AGC's motion is predicated on the contention that the communications on which the tortious interference claim is based (the Preservation Letters) are subject to the absolute litigation privilege associated with communications made during the course of judicial proceedings. Therefore, according to AGC, Defendant has failed to state a claim on which relief may be granted.

Legal Standards. When presented with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), courts conduct a two-part analysis. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, courts separate the factual and legal elements of a claim, accepting "all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. This first step requires courts to draw all reasonable inferences in favor of the non-moving party. *See Maio v. Aetna, Inc.*, 221 F.3d 472, 500 (3d Cir. 2000). However, the Court is not obligated to accept as true "bald assertions," *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997), "unsupported conclusions and unwarranted inferences," *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997), or allegations that are "self-evidently false," *Nami v. Fauver*, 82 F.3d 63, 69 (3d Cir. 1996).

Second, courts determine "whether the facts alleged in the complaint are sufficient to

show that the plaintiff has a 'plausible claim for relief.'" *Fowler*, 578 F.3d at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This is a context-specific determination, requiring the court "to draw on its judicial experience and common sense." *Id.* at 679. At bottom, "[t]he complaint must state enough facts to raise a reasonable expectation that discovery will reveal evidence of [each] necessary element" of a claim. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 321 (3d Cir. 2008) (internal quotation marks omitted).

"[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted). Finally, although a non-fraud claim need not be pled with particularity or specificity, that claim must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 555.

Discussion. The parties agree that Defendant has satisfied the pleading standards of Rule 12(b)(6) so long as the Court finds that the claim for tortious interference with business prospects is not barred by the Delaware's absolute litigation privilege. That is, application of the absolute privilege doctrine is the sole issue presented by AGC's motion.

Delaware adheres to the common law rule of "absolute privilege" that "protects from actions for defamation statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the privilege shows that the statements issued as part of a judicial proceeding and were relevant to the matter at issue in the case."

Barker v. Huang, 610 A.2d 1341, 1345 (Del. 1992). Here, then, the Court must determine whether: (1) AGC's statements in the Preservation Letters were made during the course of a judicial proceeding; (2) if so, whether the content of AGC's statements was relevant to this action; and (3) whether Delaware's absolute privilege doctrine is limited to the tort of defamation. The Court has concluded it agrees with AGC on all three questions.

First, the statements in the Preservation Letters were made during the course of a judicial proceeding. Delaware's privilege is "not narrowly confined to intra-courtroom events, but extends to all communications appurtenant thereto such as conversations between witnesses and counsel, the drafting of pleadings, and the taking of depositions or affidavits *ex parte*." *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. Ct. 1983) (internal citations omitted). The allegedly tortious statements in this case were made in the form of the Preservation Letters, which was correspondence sent to potential third-party witnesses in an effort to preserve evidence. These statements, therefore, occurred in the course of a judicial proceeding. Hence, "the contacts . . . with [D]efendants' customers in this case were preliminary steps in the preparation of plaintiff's case and thus were made during the course of a judicial proceeding." *Hoover v. Van Stone*, 540 F. Supp. 1118, 1123 (D. Del. 1982).

Second, the content of AGC's statements in the Preservation Letters were relevant to this action. "This requirement of relevancy, however, has been liberally construed.[1] Strict legal relevance need not be demonstrated; instead the allegedly defamatory statements must have only

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[1]This liberal construction promotes the "purpose served by the absolute privilege," which is "to facilitate the flow of communication between persons involved in judicial proceedings and, thus, to aid in the complete and full disclosure of facts necessary to a fair adjudication." *Hoover*, 540 F. Supp. at 1122.

some connection to the subject matter of the pending action." *Id.* at 1121. As in *Hoover*,

> [t]he disclosure of the existence of the suit in the form letter sent to [Defendant's] customers and the description of the allegations of the complaint . . . were reasonably calculated to obtain responsive information concerning each customer's transactions. . . . Accordingly, the alleged defamatory statements made in this case were pertinent to the subject matter of the suit and are absolutely privileged.

Id. at 1123-24.

Finally, the Preservation Letters are within the scope of the absolute privilege even though Defendant has not asserted a defamation claim. Defendant argues that the absolute privilege only applies to defamation claims, pointing out that in *Hoover* there was an underlying defamation claim which is absent here. As the Delaware Supreme Court has explained,

> The absolute privilege would be meaningless if a simple recasting of the cause of action from 'defamation' to 'intentional infliction of emotional distress' or 'invasion of privacy' could void its effect. . . . To the extent that such statements were made in the course of judicial proceedings, they are privileged, regardless of the tort theory by which the plaintiff seeks to impose liability.

Barker, 610 A.2d at 1349. The Court is not persuaded that Delaware law protects defamatory false statements but does not protect non-defamatory truthful[2] statements that meet the other requirements for application of the absolute litigation privilege.

UNITED STATES DISTRICT JUDGE

[2]As Defendant acknowledges, it "makes no allegations in its counterclaim about the falsity of any statement or communication made by AGC to its former customers regarding this litigation." (D.I. 21 at 12)

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Defendants.	)	

JOINT ~~[PROPOSED]~~ SCHEDULING ORDER

This 31st day of March, 2015, the Court having consulted with the parties' attorneys and received a joint proposed scheduling order, and the parties having determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation, or binding arbitration;

IT IS ORDERED that:

1. Rule 26(a)(1) Initial Disclosures and E-Discovery Default Standard. Unless otherwise agreed to by the parties, the parties shall make their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) within five (5) days of the date of this Order. If they have not already done so, the parties are to review the Court's Default Standard for Discovery of Electronic Documents, which is posted at http://www.ded.uscourts.gov (see Orders, etc., Policies & Procedures, Ad Hoc Committee for Electronic Discovery), and is incorporated herein by reference.

2. Joinder of Other Parties and Amendment of Pleadings. All motions to join other parties, and to amend or supplement the pleadings, shall be filed on or before April 27, 2015.

3. Discovery. Unless otherwise ordered by the Court, the limitations on discovery set forth in Local Rule 26.1 shall be strictly observed.

a. Discovery Cut Off. All discovery in this case shall be initiated so that it will be completed on or before April 1, 2016.

b. Document Production. Document production shall be substantially complete by January 2, 2016.

c. Requests for Admission. A maximum of 100 requests for admission are permitted for each side.

d. Interrogatories.

i. A maximum of 200 interrogatories, including contention interrogatories, are permitted for each side.

ii. The Court encourages the parties to serve and respond to contention interrogatories early in the case. In the absence of agreement among the parties, contention interrogatories, if filed, shall first be addressed by the party with the burden of proof. The adequacy of all interrogatory answers shall be judged by the level of detail each party provides; i.e., the more detail a party provides, the more detail a party shall receive.

e. Depositions.

i. Each side is limited to a total of 7 hours (per deposition) of taking testimony by deposition upon oral examination. Counsel will further meet and confer on this issue.

ii. Location of Depositions. Counsel agree to conduct depositions in Allentown, PA.

f. Disclosures of Expert Testimony.

i. Expert Reports. For the party who has the initial burden of proof on the subject matter, the initial Federal Rule 26(a)(2) disclosure of expert testimony is due on or before January 2, 2016. The supplemental disclosure to contradict or rebut evidence on the same matter identified by another party is due on or before February 18, 2016. Reply expert reports from the party with the initial burden of proof are due on or before April 1, 2016. No other expert reports will be permitted without either the consent of all parties or leave of the Court. Along with the submissions of the expert reports, the parties shall advise of the dates and times of their experts' availability for deposition.

ii. Objections to Expert Testimony. To the extent any objection to expert testimony is made pursuant to the principles announced in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), as incorporated in Federal Rule of Evidence 702, it shall be made by motion no later than the deadline for dispositive motions set forth herein, unless otherwise ordered by the Court.

g. Discovery Matters and Disputes Relating to Protective Orders.

i. Any discovery motion filed without first complying with the following procedures will be denied without prejudice to renew pursuant to these procedures.

ii. Should counsel find, after good faith efforts – including ***verbal*** communication among Delaware and Lead Counsel for all parties to the dispute – that they are unable to resolve a discovery matter or a dispute relating to a protective order, the parties

involved in the discovery matter or protective order dispute shall submit a joint letter in substantially the following form:

> Dear Judge Stark:
>
> The parties in the above-referenced matter write to request the scheduling of a discovery teleconference.
>
> The following attorneys, including at least one Delaware Counsel and at least one Lead Counsel per party, participated in a verbal meet-and-confer (in person and/or by telephone) on the following date(s):
>
> _____
>
> Delaware Counsel: _____
>
> Lead Counsel: _____
>
> The disputes requiring judicial attention are listed below:
>
> [provide here a non-argumentative list of disputes requiring judicial attention]

iii. On a date to be set by separate order, generally not less than forty-eight (48) hours prior to the conference, the party seeking relief shall file with the Court a letter, not to exceed three (3) pages, outlining the issues in dispute and its position on those issues. On a date to be set by separate order, but generally not less than twenty-four (24) hours prior to the conference, any party opposing the application for relief may file a letter, not to exceed three (3) pages, outlining that party's reasons for its opposition.

iv. Each party shall submit two (2) courtesy copies of its discovery letter and any attachments.

v. Should the Court find further briefing necessary upon conclusion of the telephone conference, the Court will order it. Alternatively, the Court may choose to resolve the dispute prior to the telephone conference and will, in that event, cancel the conference.

4. Motions to Amend.

a. Any motion to amend (including a motion for leave to amend) a pleading shall ***NOT*** be accompanied by an opening brief but shall, instead, be accompanied by a letter, not to exceed three (3) pages, describing the basis for the requested relief, and shall attach the proposed amended pleading as well as a "blackline" comparison to the prior pleading.

b. Within seven (7) days after the filing of a motion in compliance with this Order, any party opposing such a motion shall file a responsive letter, not to exceed five (5) pages.

c. Within three (3) days thereafter, the moving party may file a reply letter, not to exceed two (2) pages, and, by this same date, the parties shall file a letter requesting a teleconference to address the motion to amend.

5. Motions to Strike.

a. Any motion to strike any pleading or other document shall ***NOT*** be accompanied by an opening brief but shall, instead, be accompanied by a letter, not to exceed three (3) pages, describing the basis for the requested relief, and shall attach the document to be stricken.

b. Within seven (7) days after the filing of a motion in compliance with this Order, any party opposing such a motion shall file a responsive letter, not to exceed five (5) pages.

c. Within three (3) days thereafter, the moving party may file a reply letter, not to exceed two (2) pages, and, by this same date, the parties shall file a letter requesting a teleconference to address the motion to strike.

6. Application to Court for Protective Order. Should counsel find it will be necessary to apply to the Court for a protective order specifying terms and conditions for the disclosure of confidential information, counsel should confer and attempt to reach an agreement on a proposed form of order and submit it to the Court within ten (10) days from the date of this Order. Should counsel be unable to reach an agreement on a proposed form of order, counsel must follow the provisions of Paragraph 3(g) above.

Any proposed protective order must include the following paragraph:

> Other Proceedings. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated "confidential" [the parties should list any other level of designation, such as "highly confidential," which may be provided for in the protective order] pursuant to this order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

7. Papers Filed Under Seal. When filing papers under seal, counsel shall deliver to the Clerk an original and one (1) copy of the papers. In accordance with section G of the 6 Administrative Procedures Governing Filing and Service by Electronic Means, a redacted version of any sealed document shall be filed electronically within seven (7) days of the filing of the sealed document.

8. Courtesy Copies. The parties shall provide to the Court two (2) courtesy copies of all briefs and one (1) courtesy copy of any other document filed in support of any briefs (i.e., appendices, exhibits, declarations, affidavits etc.). This provision also applies to papers filed under seal.

9. ADR Process. This matter is referred to a magistrate judge to explore the possibility of alternative dispute resolution.

10. Interim Status Report. On November 18, 2015, counsel shall submit a joint letter to the Court with an interim report on the nature of the matters in issue and the progress of discovery to date. Thereafter, if the Court deems it necessary, it will schedule a status conference.

11. Case Dispositive Motions. All case dispositive motions, an opening brief, and affidavits, if any, in support of the motion shall be served and filed on or before May 16, 2016. Briefing will be presented pursuant to the Court's Local Rules. No case dispositive motion under Rule 56 maybe filed more than ten (10) days before the above date without leave of the Court.

12. Applications by Motion. Except as otherwise specified herein, any application to the Court shall be by written motion filed with the Clerk. Any non-dispositive motion should contain the statement required by Local Rule 7.1.1.

13. Pretrial Conference. On ~~September~~ Feb. 10, 2017 ~~2016~~, the Court will hold a pretrial conference in Court with counsel beginning at 9:00 a.m. Unless otherwise ordered by the Court, the parties should assume that filing the pretrial order satisfies the pretrial disclosure requirement of Federal Rule of Civil Procedure 26(a)(3). The parties shall file with the Court the joint proposed final pretrial order with the information required by the form of Final Pretrial Order which accompanies this Scheduling Order on or before Feb. 1, 2017. ~~August 17, 2016.~~ Unless otherwise ordered by the Court, the parties shall comply with the timeframes set forth in Local Rule 16.3(d)(l)-(3) for the preparation of the joint proposed final pretrial order. The Court will advise the parties at or before the above-scheduled pretrial conference whether an additional pretrial conference will be necessary.

14. Motions *in Limine*. Motions *in limine* shall not be separately filed. All *in limine* requests and responses thereto shall be set forth in the proposed pretrial order. Each party shall

be limited to three (3) *in limine* requests, unless otherwise permitted by the Court. The *in limine* request and any response shall contain the authorities relied upon; each *in limine* request may be supported by a maximum of three (3) pages of argument and may be opposed by a maximum of three (3) pages of argument, and the party making the *in limine* request may add a maximum of one (1) additional page in reply in support of its request. If more than one party is supporting or opposing an *in limine* request, such support or opposition shall be combined in a single three (3) page submission (and, if the moving party, a single one (1) page reply), unless otherwise ordered by the Court. No separate briefing shall be submitted on *in limine* requests, unless otherwise permitted by the Court.

15. Jury Instructions, Voir Dire, and Special Verdict Forms. Where a case is to be tried to a jury, pursuant to Local Rules 47 and 51 the parties should file (i) proposed voir dire, 8 (ii) preliminary jury instructions, (iii) final jury instructions, and (iv) special verdict forms three (3) full business days before the final pretrial conference. This submission shall be accompanied by a computer diskette containing each of the foregoing four (4) documents in WordPerfect format.

16. Trial. This matter is scheduled for a ~~10~~ 9-day jury trial beginning at 9:30 a.m. on ~~October~~ Feb. 21, ~~2016~~ 2017, with the subsequent trial days beginning at 9:00 a.m. Until the case is submitted to the jury for deliberations, the jury will be excused each day at 4:30 p.m. The trial will be timed, as counsel will be allocated a total number of hours in which to present their respective cases.

Chief United States District Judge