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

PART 56

Index Number : 115092/2008
SULLIVAN, JOSEPH W.
vs.
HARNISCH, WILLIAM F.
SEQUENCE NUMBER : 002
CONSOLIDATION/JOINT TRIAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/26/10

RICHARD B. LOWE III
J.S.C.

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Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

----------x

JOSEPH SULLIVAN,

Plaintiff,

Index No: 115092/2008

-against-

DECISION AND ORDER

WILLIAM F. HARNISCH,
PECONIC PARTNERS LLC,
PECONIC ASSET MANAGERS LLC,

Defendants.

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RICHARD B. LOWE III, J:

In motion sequence 002, plaintiff Joseph W. Sullivan ("Sullivan") moves, pursuant to CPLR § 3211(a)(7), to dismiss the first, second, eighth and tenth counterclaims asserted by defendants William F. Harnisch ("Harnisch") and Peconic Partners LLC and Peconic Asset Managers LLC (the "Peconic Companies", and collectively with Harnisch, "Defendants"). In motion sequence 003, Defendants move for pre-discovery summary judgment dismissing the second, third, fourth, fifth, eighth and ninth causes of action in Sullivan's First Amended Verified Complaint ("Amended Complaint").[1]

BACKGROUND

In his Amended Complaint, Sullivan alleges that between September 28, 2008 and October 13, 2008, he was the Peconic Companies' Chief Compliance Officer, and that between September 28, 2008 and October 13, 2008, non-party Daniel Otmar was the Peconic Companies'

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[1] Sullivan's motion also sought to transfer Defendants' previously filed Suffolk County action. That part of the motion was rendered moot by an Order dated May 21, 2009, in which the Suffolk County Court transferred venue of the action to New York County.

Deputy Compliance Officer.

Peconic Partners and Peconic Managers are institutional investment managers and registered investment advisors. Harnisch is the majority owner, CEO and president of the Peconic Companies, and maintains full management control over the Peconic Companies. On September 29 and 30, 2008, Harnisch sold two-thirds (784,085 shares) of his personal shares in Potash Corporation of Saskatchewan, Inc. ("Potash"), a non-party, publicly traded corporation, at $132 per share without: (1) pre-clearing the trades with the Peconic Companies' Compliance Officer; or (2) notifying Peconic Companies' clients who owned holdings in Potash. Allegedly in violation to the Peconic Companies' Form ADV and Code of Ethics (11/04/2008 Affidavit of Glen Banks ["Banks Aff"] Ex 17, the "Code"), Harnisch sold his personal Potash shares without making similar trades for the Peconic Companies' clients.

On October 2, 2008, the Peconic Companies sold half of the shares of Potash stock held in client accounts (230,000 shares) at an average price of $103 per share. Sullivan alleges that the Peconic Companies' clients lost $6,670,000 by not having their Potash stock sold at the same time that Harnisch sold his personal Potash shares. Harnisch thereafter sold the remaining shares of Potash held in his personal accounts (243,900 shares) on October 6, 2008 without selling any of the remaining 229,965 shares of the Peconic Companies clients' Potash stock.

According to Sullivan, Harnisch maintained the ultimate decision making authority as to what securities would be purchased or sold with clients' funds. Sullivan further alleges that, at the time Harnisch's personal Potash trades were made, only Harnisch knew whether Potash shares in clients accounts would, then or subsequently, also be sold. Furthermore, Harnisch sold his own personal holdings ahead of his clients' Potash holdings because of the conflict of interest

he created by simultaneously having his personal shares of Potash in segregated accounts apart from his clients' accounts. Sullivan explains that, in his professional judgment, Harnisch's Potash trades on September 29 and 30 and October 2 and 6, 2008 constituted "front-running".

According to Harnisch, his sales of Potash stock on September 29 and 30, 2008 and October 6, 2008, prior to the sale of such stock by the Peconic Companies on October 2, 2008, do not constitute front-running because at the time he made the sales in the Personal Accounts, there was no impending sale of Potash securities for Client Accounts and such a sale was not intended, considered, or contemplated. Harnisch explains that he sold Potash stock in his Personal Accounts on September 30, 2008 for reasons that were not applicable to the Client Accounts.

On October 6, 7 and 8, 2008, Sullivan questioned Harnisch about the apparent front-running in connection with the Potash trades and Harnisch refused to provide Sullivan with any explanation. On October 10, 2008, Harnisch summarily terminated Sullivan and Otmar's employment with the Peconic Companies, and expelled Sullivan from the Peconic Companies' partnership. Otmar had been working closely with Sullivan. Sullivan alleges that Harnisch issued public announcements that Otmar and Sullivan resigned for their own business reasons. Harnisch then replaced Sullivan and Otmar with a new compliance officer who, according to Sullivan, had no prior compliance experience, training or education.

Thereafter, on November 10, 2008, Sullivan filed his complaint in New York County alleging, *inter alia*, that the Peconic Companies terminated his employment on October 10, 2008 "in retaliation for [his] compliance efforts" concerning the allegedly improper Potash trades by Harnisch. The original complaint included the identity of certain Peconic Companies' clients.

On March 10, 2009, Sullivan filed the Amended Complaint deleting the identities of the Peconic Companies' clients. The Amended Complaint includes nine causes of action relating to retaliatory discharge, loss of his ownership interests in the Peconic Companies, defamation, and breach of duty.

Before Sullivan filed his original complaint, the Peconic Companies filed a complaint against Sullivan in Suffolk County on October 14, 2008. On November 21, 2008, the Peconic Companies amended the Suffolk complaint to add three additional causes of action which derive from the allegations in Sullivan's New York Complaint and to add Harnisch as a party. Defendants thereafter filed a Verified Answer and Counterclaims ("Answer and Counterclaims") in this action that alleges the same claims found in the Suffolk County amended complaint.

In the Answer and Counterclaims, Defendants raise numerous allegations concerning Sullivan's job performance and misappropriation of funds. Specifically, it alleges that Harnisch, as the 85% owner, had problems with Sullivan's job performance and fired Sullivan due to disagreements about Sullivan's compensation.

Defendants further allege that Sullivan maliciously made false statements concerning Harnisch's alleged front-running and maliciously disseminated the false information to the media, causing significant harm to the Defendants. Specifically, Defendants allege that Sullivan's Complaint identified certain of Peconic Companies' clients, in violation of Sullivan's continuing obligation of confidentiality. Shortly thereafter, certain of those clients withdrew their funds from Defendants' accounts. Furthermore, Sullivan's statements that the Defendants' committed securities fraud, and violated Peconic Partners' Code of Ethics are false and were disseminated with malice and meant to cause harm to Defendants. Sullivan orchestrated a

campaign of disseminating the complaint to the media, even before it was served on Defendants. Defendants allege that Sullivan delivered the complaint to at least three media outlets, the NY Post, the Globe and Mail, and the Evening Standard before Sullivan served it on Defendants. The Post article, dated November 11, 2008, referred to front running supposedly effected by Harnisch. Bloomberg.com reported on or about November 11, 2008, that:

> The former compliance officer of Peconic Companies accused the hedge-fund's owner of trading his own shares in a company ahead of clients' holdings in violation of securities laws.
>
> [Sullivan], who said he was fired October 10 for objecting to the trades, made the claims in a lawsuit filed yesterday in New York state court in Manhattan against the principal, [Harnisch], as well as [the Peconic Companies].
>
> "This is a real textbook case of what can happen to a compliance officer who says, 'That's wrong,'" Sullivan's lawyer, Alan Sklover of Sklover & Donath in New York, said in an interview.

(Counterclaims ¶ 124).

Sullivan now seeks to dismiss the first, second, eighth and tenth counterclaims based on the doctrines of absolute privilege, qualified privilege, and opinion because, he argues, they are exclusively grounded upon the statements contained in the New York Complaint. Defendants also move, seeking summary judgment on certain of Sullivan's causes of action in the Amended Complaint on the basis that Sullivan, as an at-will employee, does not have standing to bring a retaliatory discharge claim.

DISCUSSION

Motion Sequence 003

In motion sequence 003, Defendants move for pre-discovery partial summary judgment dismissing the second, third, fourth, fifth, eighth and ninth causes of action alleged in Sullivan's

Amended Complaint.[2] Defendants' argument focuses predominantly on whether Sullivan, as an at-will employee, "can assert contract and/or tort claims against his former employer based on a theory of retaliatory discharge" (Defendants' April 30, 2009 Memorandum of Law in Support ["Def's 4/30/09 Memo"] at 18).

Plaintiff's fourth cause of action concerns allegations of fraud relating to Defendants' actions depriving Sullivan of his ownership interest in the Peconic Companies, and his eighth cause of action concerns Harnisch's breach of fiduciary duties owed to Sullivan as co-members of the Peconic Companies. These claims do not concern retaliatory discharge and Defendants do not separately discuss the merits of these claims. Specifically, Defendants' arguments do not concern Sullivan's alleged membership or ownership interests in the Peconic Companies. For these reasons, Defendants' motion to dismiss Sullivan's fourth and eighth causes of action is denied.

Concerning the legal issue of whether Sullivan maintains a legal basis for his retaliatory discharge claims, courts examine whether there is an express or implied-in-law obligation limiting the employers right to terminate its at-will employee.

Express Limitation

According to the employment at-will doctrine "where an employment is for an indefinite

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[2] Defendants spend a significant portion of their brief highlighting evidence suggesting that Harnisch did not engage in front-running, and argue that summary judgment should be granted unless Sullivan can come forward with evidence supporting his claims of front-running. This argument is replete with factual issues that are not appropriately resolved on this motion before discovery has taken place, and is irrelevant to the legal issue of whether Sullivan maintains a legal basis for his retaliatory discharge claims. Plaintiff has verified his complaint and, at this stage, Sullivan is not required to come forward with additional evidence concerning Harnisch's decision when to sell Clients' Potash shares (*see* CPLR § 3212).

term it is presumed to be a hiring at-will which may be freely terminated by either party at any time for any reason or even for no reason" (*Wieder v Skala*, 80 NY2d 628, 633 [1992], *citing Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300 [1983]).

"[A]bsent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual's contract of employment, an employer's right at any time to terminate an employment at-will remains unimpaired" (*Murphy*, 58 NY2d at 305). "[I]f there [is] an express limitation on the employer's right of discharge it would be given effect even though the employment contract [is] of indefinite duration" (*id.*). "[O]n an appropriate evidentiary showing, a limitation on the employer's right to terminate an employment of indefinite duration might be imported from an express provision therefor found in the employer's handbook on personnel policies and procedures" (*id.*, *citing Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 [1982]).

This "'express limitation' exception to the at-will discharge rule . . . is a context-sensitive exception the validity of which must be determined by a trier of fact from the actions of both employer and employee in relation to a writing that is alleged to constitute an express limitation on an employer's right of discharge" (*Gorrill v Icelandair/Flugleidir*, 761 F2d 847, 852 [2d Cir 1985] [citations omitted]). "In determining the applicability of the 'express limitation' exception the court is to consider the totality of the circumstances attendant upon the employment relationship" (*Starishevsky v Hofstra Univ.*, 612 NYS2d 794, 803 [Suffolk County, Sup Ct 1994] [citations omitted]). "To establish that such policies are a part of the employment contract, an employee alleging a breach of implied contract must prove that (1) an express written policy limiting the employer's right of discharge exists, (2) the employer (or one of its authorized

representatives) made the employee aware of this policy, and (3) the employee detrimentally relied on the policy in accepting or continuing employment" (*Baron v Port Auth. of N.Y. and N.J.*, 271 F3d 81, 85 [2d Cir 2001] [citation omitted]).

During oral argument, the Court ordered Defendants to provide Sullivan with a copy of the Peconic Partners LLC Employee Handbook ("Handbook"). The parties provided limited briefing on the substance of the Handbook (*see* Doc Nos 44-45). The Handbook clearly states a policy against workplace harassment, and specifically prohibits retaliation in the case of "complaint[s] . . . of harassment or discriminatory conduct" (Daniel Felber's Aug 28, 2009 Letter Ex 1, at D007269). Defendants point to page D007230 of the Handbook which states that the Handbook "does not constitute an express or implied contract" and the "employment relationship is 'at-will'". Because the Handbook contained express language preserving the Peconic Companies' right to terminate employees at-will, the Companies' motion for summary judgment on Sullivan's breach of employment contract claim based on the Handbook must be granted (*Lobosco v N.Y. Tel. Company/NYNEX* (96 NY2d 312, 316 [2001]).

Sullivan also submits the Peconic Companies' Code of Ethics (11/04/2008 Affidavit of Glen Banks ["Banks Aff"] Ex 17, the "Code"), which by its terms "applies to all personnel" of the Peconic Companies (at 1 § A). In relevant part, it states:

> Compliance with this Code of Ethics shall be condition of employment or continued affiliation with the Adviser, and conduct not in accordance with this Code of Ethics shall constitute grounds for actions including termination of employment or removal from office. All persons shall certify annually that they have read and agree to comply in all respects with this Code of Ethics.

(*Id.* at 9 § M).

The Code dictates that each person shall report to the Compliance Officer "all purchases

and sales in any security in which such person . . . has any beneficial interest" (*id.* at 8 § J[3][a]); "[e]ach employee shall pre-clear trades in [securities]" (*id.* at 8 § J[2][a]); and "[e]ach employee who wishes to purchase or sell a security must obtain written pre-clearance from the Trading Desk or the [Compliance Officer]" (*id.* at 8 § J[2][b]).

The Code requires the "[Compliance Officer to] report to the Chief Operating Officer and the President . . ., following the receipt of any employee trading information, any apparent violation of the reporting requirements of this Code" (*id.* at 7 § I[2]).

Among its various trading and reporting violations, the Code prohibits front running or scalping (*id.* at 3 § C[2]). Examples of such prohibited conduct include:

> an Employee uses knowledge of a future purchase of a Security by a Client Account and buys the Security or acquires direct or indirect Beneficial Ownership of a Security before the Client Account buys the Security; or
>
> or an Employee uses knowledge of a future sale of a Security by a Client Account and sells (short or long) the Security for any account with respect to which the Employee has a direct or indirect Beneficial Ownership interest before the Client Account sells the Security;

(*id.*). The Code further prohibits Peconic Companies' personnel from taking "advantage of investment opportunities belonging to a Client" (*id.* at 3§C[4]). "An example of this type of prohibited conduct is to effect a personal transaction in a Security and to intentionally fail to recommend, or to fail to effect, a suitable Client Account transaction in such security in order to avoid the appearance of a conflict of interest" (*id.*).

Other than the provision at 9 § M which states that compliance with the Code is a condition of employment, the Code does not provide for any limits to the Peconic Companies' right to terminate its employees, nor does it reassert that employment is at-will regardless of the reporting requirements.

As Defendants conceded during oral argument, the Code authorizes Sullivan to make his complaint to the Securities and Exchange Commission, which he did (*see* 07/15/09 Tr at 11:3-5). Courts have been advised not to "infer a contractual limitation on the employer's right to terminate an at-will employment absent an express agreement to that effect which is relied upon by the employee" (*Chazen v Person/Wolisky, Inc.*, 309 AD2d 889, 890 [2nd Dept 2003], *quoting Doynow v Nynex Publ. Co.*, 202 AD2d 388 [2nd Dept 1994]). While the Code does not explicitly protect against retaliatory discharge for complaints about improper trading practices, the Code explicitly states affirmative obligations on the part of the Chief Compliance Officer or risk termination. The Code does not reaffirm the at-will employment relationship and specifically requires the Chief Compliance Officer to report complaints. As such, upon consideration of the "totality of the circumstances attendant upon the employment relationship" (*Starishevsky*, 612 NYS2d at 803), a trier-of-fact could read in a protection for the Chief Compliance Officer against retaliatory discharge for making such complaints (*Ehrlich v Abrams Instrument Corp.*, 53 AD2d 825, 826 [1st Dept 1976]). Based on the pleadings and the limited evidence submitted on the pre-discovery motion for summary judgment, dismissal of Sullivan's claim for breach of contract for retaliatory discharge based on the Code is denied at this stage.

Implied-in-Law Obligation

In lieu of a stated policy limiting retaliatory firings, courts have been reluctant to limit the at-will employment doctrine. The one significant exception is a "claim for breach of contract based on an implied-in-law obligation" (*Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 306 [1st Dept 1995]).

In *Wieder v Skala* (80 NY2d 628, 633 [1992]), the Court of Appeals addressed a claim by

an associate at a large law firm that he had been discharged for insisting that the law firm report unethical conduct of another associate at the same firm. The unethical conduct included numerous misrepresentations and acts of malpractice against clients of the firm and acts of forgery of checks drawn on the firm's account. The Court held that Weider stated a valid claim for breach of contract based upon an implied-in-law obligation in his relationship with the law firm. The Court reasoned that intrinsic to the relationship between Weider and the law firm was an unstated but essential compact that in conducting the firm's legal practice, both Weider and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that Weider, as an associate in their employ, act unethically and in violation of Code of Professional Responsibility DR 1-103(A), one of the primary professional rules, amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship. As the Court of Appeals stated in *Wieder*:

> in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm--the lawful and ethical practice of law.

(80 NY2d at 636).

The Court cautioned that in the absence of a written agreement or written policy guaranteeing freedom from retaliatory firing, an exception to that at-will presumption may exist only in a limited, specified circumstance (*id.* at 465-466). In *Horn v. N.Y. Times* (100 NY2d 85, 95 [2003]), the Court of Appeals further explained that this circumstance exists when certain related factors are found, specifically when there is a centrality of purpose between the employee

and employer's enterprise; when self-regulation to the employer's industry is critical; and the employee and employer have a mutual obligation to abide by the particular statute or policy rule (100 NY2d at 95-97).

Defendants' acknowledge that as the Chief Compliance Officer, Sullivan was responsible for ensuring compliance with state and federal securities rules, regulations and statutes concerning the companies' trading practices. Furthermore, Defendants acknowledge that Sullivan has an "expertise concerning federal and state securities laws" (Defendants Feb 6, 2009 Memorandum of Law at 25). Defendants concede that the Amended Complaint alleges specific facts that Harnisch engaged in front-running and related violations of state and federal securities laws. Sullivan states that he subsequently complied with his responsibilities under the Code and state and federal securities laws in "speaking-out"; following which, he was terminated, allegedly for speaking out against violations of state and federal law. Defendants's argument is that even if the Amended Complaint is taken as true, the Peconic Companies were within its rights to fire its Chief Compliance Officer for speaking out against improper trading practices.

On this pre-discovery motion for summary judgment, Sullivan's Amended Complaint alleges sufficient facts that may form the basis of "a valid claim for breach of contract based on an implied-in-law obligation in his relationship with" the Peconic Companies (*Wieder*, 80 NY2d at 638; *see also Lawrence v Miller*, 11 NY3d 588, 595 [2008]). The Court acknowledges that the First Department has cautioned against extending the *Wieder* decision to the securities industry in general (*Mulder*, 208 AD2d at 305). However, *Mulder* leaves open a case-by-case inquiry as to whether an employee's particular position falls within the general contours of *Wieder*, even if the employee works in the securities industry.

As the parties' explain, the Peconic Companies' primary responsibility to its clients is to manage their funds in a responsible and ethical manner, and the Chief Compliance Officer's role and function is to ensure compliance with state and federal securities rules and regulation, and to maintain the integrity of the Peconic Companies. In *Wieder*, the Court of Appeals remarked that the attorney's legal services to the firm's clients as a member of the bar "as at the very core and, indeed, the only purpose of his association with [the law firm] . . . [His] duties and responsibilities as a lawyer and as an associate of the firm [are] so closely linked as to be incapable of separation" (*id.* at 635). This same centrality of purpose exists here, where the Peconic Companies' Code of Ethics, and state and federal securities' laws, require the Chief Compliance Officer to act in a certain way -- meaning that according to the allegations, the Chief Compliance Officer's "only purpose", vis-a-vis the firm and its clients, was to act in the way Sullivan alleges he did.

As demonstrated by the notable financial scandals over the past few years, self-regulation is critical to the proper functioning of the financial services industry, and hedge funds in particular. Sullivan alleges that his oversight role is prescribed by securities laws and that if he failed to act in the manner he did, he could have been subject to either civil or criminal charges. As in *Wieder*, the Court considered how the particular ethical rule was indispensable to the unique function of attorney self-regulation and that Wieder's failure to comply with the ethical rule put him at risk of suspension or disbarment (*id.*). Finally, Sullivan and the Peconic Companies were engaged in a "common professional enterprise" and "were mutually bound to follow" both the Code and any federal or state securities laws at issue (*Horn*, 100 NY2d at 94). At this preliminary stage, before any discovery has taken place, the facts alleged in Sullivan's

complaint are sufficient to form a basis for a claim of breach of contract based on an implied-in-law obligation (*Finkelstein v Cornell Univ. Med. College*, 269 AD2d 114, 117 [1st Dept 2000]; *McGlynn v Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]).

Conversion

Defendants' argue that Sullivan's conversion claim, the ninth cause of action, should be dismissed because it seeks the same damages as Sullivan's breach of contract claim. They offer no support for their argument. Neither Sullivan in his opposition papers, nor Defendants in its reply papers, further refer to this argument.

Sullivan alleges that he had the rightful and legal title to his 15% ownership share of Peconic Companies, and his 33-1/3% of profits for the 2007 and 2008 fiscal years (the "Interests"), the right to possess, use, enjoy, invest and exploit the interests. Sullivan further alleges that Harnisch and the Peconic Companies intentionally exercised dominion over the Interests and denied Sullivan his right to use, enjoy and take advantage of the Interests.

In his breach of contract claim related to his membership interests (the first cause of action), Sullivan alleges that he and Harnisch entered into an agreement for the purpose of operating the Peconic Companies in which Sullivan was to be an owner of no less than 15% of the entities, and was to receive 33-1/3% of such profits. Sullivan alleges that he and Harnisch ratified, confirmed and acknowledged their agreement in official filings with governmental agencies, in official tax returns, and in statements to active and prospective investors. After his expulsion, Sullivan made a demand for his 2007 and 2008 profits. Harnisch and the Peconic Companies failed to respond to Sullivan's demands.

In *Peters Griffin Woodward, Inc. v WCSC, Inc.* (88 AD2d 883 [1st Dept 1982]), the First

Department explained:

> Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Money, if specifically identifiable, may be the subject of a conversion action. However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract.

(*Id.* 88 at 883-884 [1st Dept 1982] [citations omitted]; *see also Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 [1st Dept 2008] ["The conversion claim also fails because such a cause of action cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability."] [citation omitted]).

Sullivan never had ownership, possession or control of the Interests owed to him. Sullivan's only alleged possessory interest of such monies is based on his agreement with Harnisch. Such amounts are the subject of his first cause of action for breach of contract, and therefore the conversion claim is duplicative. Therefore, Sullivan's ninth cause of action is hereby dismissed.

Motion Sequence 002

In Motion Sequence 002, Sullivan moves to dismiss Defendants' counterclaims for Sullivan's breach of his obligation to maintain and preserve the confidentiality of client information, defamation, tortious interference with economic relations concerning Sullivan's false statements, and prima facie tort.

Defendants' first counterclaim alleges that Sullivan, as an officer of the Peconic Companies, had an obligation to maintain the confidence of the Peconic Companies' clients. Defendants' allege that Sullivan breached his obligation to maintain and preserve confidentiality of client information when he filed the complaint in this action which included the identity of the

Peconic Companies' clients and publicly disseminated the complaint. Sullivan argues that the defendants have failed to allege the basis for the duty of confidentiality. Citing to *Sullivan & Cromwell LLP v Charney* (841 NYS2d 222, 2007 NY Slip Op 50889U, at * 7 [NY Cty Sup Ct 2007]), Sullivan argues that this cause of action should be dismissed. In their voluminous submissions, Defendants do not address Sullivan's arguments concerning dismissal of this counterclaim and plainly concede Sullivan's former status as at-will employee. As the law is clear that "no fiduciary duties exist between an employer and an at-will employee" (*Sullivan & Cromwell*, 841 NYS2d 222, 2007 NY Slip Op 50889U, at * 7 [citations omitted]), and Defendants have failed to allege a binding confidentiality agreement, Defendants' first counterclaim for breach of his confidentiality obligations is dismissed for failure to state a cause of action.

Defendants' counterclaim for defamation per se is also dismissed. All of the alleged defamatory statements, except for a single published comment made to Bloomberg.com, appear in Sullivan's complaint filed in New York County approximately a month after the Peconic Companies filed their complaint against Sullivan in Suffolk County (Counterclaim 121-154). These statements fall within the protection of Civil Rights Law § 74 (*Cordell-Reeh v Nannies of St. James, Inc.*, 13 AD3d 140, 140-141 [1st Dept 2004] ["defendant's allegations fail to show that plaintiff instituted the action solely to avoid liability for defamation"]; *see also Aequitron Med. v Dyro*, 999 F Supp 294, 297-298 [ED NY 1998]). Defendants fail "to raise a triable issue as to whether the content of [Sullivan's complaint] was disseminated to the media in bad faith and with malice to avail [himself] of the exception to the absolute privilege created by Civil Rights Law § 74" (*Coyle v 203 W. 102nd St. Apt. Corp.*, 293 AD2d 377, 377-378 [1st Dept

2002], *citing Williams v Williams*, 23 NY2d 592 [1969]). The Defendants initiated litigation with their complaint in Suffolk County, so they "can hardly argue that an exception, regarding the declarant's malicious initiation of litigation solely to disseminate false statements, would apply to these facts" (*Coyle*, 293 AD2d at 377-378; *see also Mulder v. Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 310 [1st Dept 1995] [dismissing a cause of action for slander based on privilege under Civil Rights Law § 74]). The timing of service of the complaint, which was served within days of filing but not before Sullivan is alleged to have disseminated it to three media outlets, is in "itself insufficient to create a triable issue in this regard" and Defendants make no other factual allegation in support of their conclusory description of malice (*Coyle*, 293 AD2d at 377-378, *citing Fishof v Abady*, 280 AD2d 417 [2001]). Additionally, Defendants' acknowledge that a substantial number of the facts alleged are true. Sullivan's counsel's statement: "This is a real textbook case of what can happen to a compliance officer who says, 'That's wrong,'" as published by Bloomberg.com, is "a statement of opinion and, thus, non-actionable" (*Coyle*, 293 AD2d at 377-378, *citing Corporate Training Unlimited v National Broadcasting Co.*, 868 F Supp 501, 510-511 [ED NY 1994]).

Tortious Interference with Business Relations and Prima Facie Tort

Both Defendants' counterclaims for tortious interference with business relations and prima facie tort depend upon the allegations that Sullivan's actions in disseminating the complaint to third party media outlets is wrongful, or otherwise not excused. (*see Stapleton Studios LLC v City of New York*, 26 AD3d 236 [1st Dept 2006]); *Twin Laboratories, Inc. v Weider Health & Fitness*, 900 F2d 566, 571 [2d Cir 1990]).

Based on the above finding that Sullivan's dissemination of the complaint to three media

outlets are privileged pursuant to Civil Rights Law § 74 and Sullivan's attorney's comments as published on Bloomberg.com are non-actionable statement of opinion, Defendants' counterclaims for tortious interference and prima facie tort are not sufficiently pled -- the counterclaim for tortious interference cannot plead a wrongful act, and the counterclaim for prima facie tort cannot plead lack of excuse or justification.

CONCLUSION

Accordingly, it is hereby:

ORDERED that plaintiff's motion to dismiss defendants' first, second, eight and tenth counterclaims is granted; and it is further

ORDERED that defendants' motion to dismiss plaintiff's second, third, fourth, fifth, and eighth causes of action is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's ninth cause of action is granted. This constitutes the decision and order of the Court.

Dated: February 26, 2010

ENTER:

RICHARD B. LOWE III

J.S.C.