

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MARTIN RAPAPORT, RAPAPORT USA and INTERNET DIAMOND EXCHANGE, L.L.C.,	CIVIL ACTION NO. 04 06626 (RJH)
Plaintiffs,	
- vs. -	
IDEX ONLINE, LTD., IDEX ONLINE S.A., IDEX ONLINE ISRAEL, LTD., JOHN DOES I-XX, and ROE CORPORATIONS I-XX,	
Defendants.	

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE  
PLAINTIFFS' FIFTH AMENDED AND SUPPLEMENTED COMPLAINT

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**COLEMAN LAW FIRM**

A Professional Corporation  
Ronald D. Coleman (RC 3875)  
David Stein (DS 2119)  
1350 Broadway, Suite 1212  
New York, New York 10018  
(212) 752-9500  
Attorneys for Plaintiffs

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**PRELIMINARY STATEMENT AND FACTUAL BACKGROUND**

Plaintiffs Martin Rapaport, Rapaport USA, Inc., Internet Diamond Exchange LLC, and Diamonds.net LLC (collectively "plaintiffs"), served their Amended and Supplemented Complaint in or about November 2004 after this matter was transferred to the Southern District from the District Court in Nevada. Then-defendant IDEX Online, Ltd., filed its Answer in or about December 2004. A delay of several months followed due to requests by defendants' previous counsel for various reasons and eventually a change in counsel. In May 2005, plaintiffs filed their Second Amended and Supplemented Complaint which was identical in all respects to their Amended and Supplemented Complaint, but which included exhibits which inadvertently had been omitted from the earlier Complaint. In April 2005, plaintiffs filed their Third Amended and Supplemented Complaint adding IDEX USA, Inc., as a defendant to the action after that entity was first identified in defendants' Rule 26(a)(1) Initial Disclosures. (Due to a transfer of defendants' corporate assets, IDEX USA, Inc., is no longer a party to this action.) There was no substantive change in the complaint, which differed little from the one originally filed in Nevada.

At the end of July 2005, plaintiffs filed their Fourth Amended and Supplemented Complaint which remained essentially the original document, but added the appropriate corporate entities as defendants' following defendants' disclosure of

their identities. At this stage, however, plaintiffs added a claim for patent infringement as a result of defendants' infringing activities which began some time in the spring of 2005.

Plaintiffs now seek leave to file the amended complaint which is the subject of this motion. The proposed amended complaint contains few new factual allegations, but recasts a now-deleted copyright infringement claim as a misappropriation claim under New York law and adds a new claim for breach of contract and a claim, based on the contract claim, for tortious interference with contract based on apparent violations of the terms of service of plaintiffs' website by defendant or those working in concert with them. A copy of plaintiffs' proposed Fifth Amended and Supplemented Complaint, which previously has been sent to the Court and to defense counsel, is attached hereto as Exhibit A.

No discovery, besides the initial disclosures, has taken place in this case. Defendants have informed the Court and counsel for plaintiff that they object to the filing of this amended pleading on the grounds of futility.

**I. LEGAL ARGUMENT**

**a. Amendments to amend the pleadings are to be freely granted.**

Under Fed. R. Civ. P. 15(a), a plaintiff may file an amended complaint after an answer has been filed with leave of

court. The Rule does not prescribe a time limit for the filing of amendments. Consequently, motions for leave to amend have been granted at various stages of litigation, including after the entry of judgment. See, e.g., Newark Branch, NAACP v. Harrison, 907 F.2d 1408, 1417 (3<sup>rd</sup> Cir. 1990). The United States Supreme Court has enumerated several factors that are given weight by the courts in the exercise of their discretion on a motion for leave to amend: (1) undue delay; (2) bad faith; (3) dilatory motive; (4) repeated failure to remedy problems in the complaint; (5) undue prejudice; and (6) futility. Foman v. Davis, 371 U.S. 178, 182 (1962). Courts also consider the effect denial of leave to amend would have on plaintiff, the reasons for plaintiff's failure to include or delete information earlier, and possible injustice to third parties. There is a strong bias toward granting motions for leave to amend. Id. Rule 15(a) itself directs that leave to amend "shall be freely given when justice so requires."

**b. The claims added to the complaint are not futile.**

Defendants have represented that the basis for their opposition to the instant motion is that plaintiffs' claims are futile. An amendment to a pleading will be deemed futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dougherty v. North Hempstead Zoning Bd. of Zoning Appeals, 282 F.3d 83, 88 (2<sup>nd</sup> Cir. 2002).

If, however, there are at least colorable grounds for relief, justice requires that the motion to amend be granted. Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 783 (2<sup>nd</sup> Cir. 1984) (quoting S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Bldg. 1 Housing Dev. Fund Co., 608 F.2d 28, 42 (2<sup>nd</sup> Cir. 1979); Schwimmer v. Guardian Life Ins. Co., No. 93 Civ. 0428, 1996 WL 146004, at \*3 (S.D.N.Y. Apr. 1, 1996) (allowing amendment where "it is not so frivolous or outlandish to render it futile"), *aff'd*, 104 F.3d 354 (2<sup>nd</sup> Cir. 1996); Weg v. Macciarola, 729 F.Supp. 328, 341 (S.D.N.Y. 1990) (motion should be granted unless amendment is frivolous or facially insufficient).

The liberal standard embodied in Rule 15, coupled with the fact that plaintiffs' amended claims here are not obviously vulnerable to a motion to dismiss, should lead the Court to reject defendants' futility argument. Though the Court need not delve into the merits of plaintiffs' claims, there is no basis for defendants to argue that plaintiffs cannot establish *prima facie* claims for misappropriation, breach of contract and tortious interference with contract.

**c. There are no other grounds to deny leave to amend.**

Even if defendants were to oppose this motion on the basis of other Foman v. Davis factors, their arguments would be unpersuasive. Allowing plaintiffs to file their Fifth Amended

and Supplemented Complaint will not delay the present proceedings, which have been pending for almost a year; and plaintiffs' purpose in filing this latest complaint is not to delay the litigation but, rather, to plead the facts and causes of action as accurately as possible.

As detailed above, the first substantive amendments to plaintiffs' original complaint did not occur until the filing of the Fourth Amended and Supplemented Complaint in July 2005 which added a patent infringement claim as a result of defendants' recent offending activities, as alleged. The instant new complaint essentially presents a new legal theory based on the facts of plaintiffs' now-removed copyright claim as a claim for misappropriation.

The new pleading does add a new contract claim based on facts uncovered by plaintiffs' recent investigations, which arose out of their due diligence in connection with the patent claim, indicating that defendants may have reverse-engineered plaintiffs' website by gaining access to it as members. If indeed this is so, they did so in violation of the terms of service all members agree to; hence the contract claim. If they did not do so, but utilized others to gain access to plaintiffs' site in order to violate the terms of service, this constitutes an inducement by defendants to those others to violate the terms of service; hence the tortious interference claim.



Defendants have been aware of the underlying facts of this case since its inception nearly a year ago, and nothing in this amended complaint alters defendants' familiarity therewith nor causes undue delay to the proceedings.

Plaintiffs also have not sought to amend their complaint in bad faith. Their sound, logical reasons for requesting to file an amended complaint are explained above and there are no grounds to allege bad faith. Additionally, there is no indication that plaintiffs' request to amend is motivated by a desire to delay the proceedings. To the contrary, plaintiffs at all times have demonstrated nothing other than a strong desire to bring this case to trial as soon as possible. Contrary to suggestions made on and off the record, the instant motion is not the result of plaintiffs' supposed "repeated failures" to remedy problems in the complaint but, rather, to reclassify and amplify allegations contained in the Fourth Amended and Supplemented Complaint. Lastly, plaintiffs' proposed amended complaint would cause no undue prejudice, as defendants have had first-hand familiarity with the facts of this case for nearly a year and have been in possession of a detailed complaint for just as long.

Denial of leave to amend would prejudice plaintiffs' case in that plaintiffs would be unable to pursue litigation on viable theories of recovery against culpable defendants.

Plaintiffs respectfully urge this Honorable Court to follow the strong bias toward granting motions for leave to amend (see Foman, supra) as well as the mandate of Rule 15(a) that leave to amend "shall be freely given when justice so requires."

**CONCLUSION**

For the foregoing reasons, plaintiffs respectfully request that this Court grant their motion seeking leave to amend.

**COLEMAN LAW FIRM**

A Professional Corporation

By: \_\_\_\_\_



Ronald D. Coleman (RC 3875)  
David Stein (DS 2119)  
1350 Broadway, Suite 1212  
New York, New York 10018  
(212) 752-9500  
Attorneys for Plaintiffs

Dated: September 15, 2005

**CERTIFICATION OF SERVICE**

I hereby certify that true and correct copies of the Motion for Leave to Amend the Complaint, Proposed Order and Memorandum of Law were furnished to counsel for defendant by ECF and email on this 15<sup>th</sup> day of September, 2005:

A handwritten signature in blue ink, appearing to read "Ronald Coleman", is written above a horizontal line.

Ronald Coleman