| **Kucker Marino Winiarsky & Bittens, LLP v Nuevo Modern, LLC** |
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| 2023 NY Slip Op 30281(U) |
| January 25, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 653826/2021 |
| Judge: Verna L. Saunders |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. VERNA L. SAUNDERS, JSC** **PART 36**
*Justice*

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KUCKER MARINO WINIARSKY & BITTENS, LLP,
Plaintiff,

- v -

NUEVO MODERN, LLC, and SEBASTIAN PEREZ,
Defendants.

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**INDEX NO.** 653826/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff Kucker Marino Winiarsky & Bittens, LLP ("plaintiff" or "the Firm") brings this action against defendants Nuevo Modern, LLC (Nuevo) and its sole member, Sebastian Perez ("Perez"), for unpaid legal fees. Perez now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against him. Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment in its favor against Perez.

In 2019, plaintiff represented Nuevo in a commercial landlord/tenant dispute captioned *Nuevo Modern LLC v Furniture Mix Inc.*, Civ Ct, NY County, Index No. 62519/2019 (Landlord/Tenant Action) (NYSCEF Doc. No. 25, Perez's response to plaintiff's statement of material facts, ¶ 2). A written retainer agreement dated May 17, 2019 ("Retainer") outlines the scope of its representation (*id.*, ¶ 3). The Retainer identifies the parties to the agreement as "Nuevo Modern, LLC ('Client'), and the Firm" (NYSCEF Doc. No. 16, Kucker affirmation, Ex E at 1 and 3). The payment provision in the Retainer reads, in part:

> "The Firm provides clients with timely, detailed invoices for professional services performed. Invoices are rendered on a monthly basis and are due and payable upon receipt.
> ...
> Failure to pay the bill by the (30th) day after receipt will result in the imposition of a late charge equal to nine percent (9%) per annum on the unpaid balance" (*id.* at 1-2).

The Retainer also states that Perez would be liable for payment as follows:

> "It is further understood and agreed that in matters relating to a corporation or other limited liability entity, the Firm bills the corporation or entity directly for legal services. In the event payment is not timely made, it is understood that the Firm has a

> claim against the directors and officers of the corporation or members of the entity in their individual capacities for the entire amount and the corporation or entity may reimburse the individuals for the amount paid" (*id.* at 3).

The last page of the Retainer states that "[i]f you wish to engage our firm, please sign the original retainer agreement where indicated below and return same to my office together with a check in the sum of $2,500.00" (*id.* at 4).

A paralegal at the Firm emailed the Retainer to Perez on May 17, 2019 (NYSCEF Doc. No. 17, Kucker affirmation, Ex F at 1). Perez responded the same day, writing "I want to mention that Alan and I discussed possibly a reduced rate in this case. Can you please check with him on that to determine if he can accommodate me on this matter?" (*id.* at 1). Although defendants did not return a counter-signed copy (NYSCEF Doc No. 25, ¶ 7), plaintiff was paid the initial $2,500.00 fee (NYSCEF Doc. No. 4, Perez answer ¶¶ 10 and 14; NYSCEF Doc. No. 18, Kucker affirmation, Ex G at 3).

Between June 12 and November 8, 2019, plaintiff emailed six invoices to Perez for its services (NYSCEF Doc. No. 20, Kucker affirmation, Ex 20 at 1-17). Between November 14 and December 27, 2019, plaintiff emailed Perez three separate requests to pay the outstanding amount of $24,549.40 (*id.* at 18-19). Then, on April 28, 2021, plaintiff served defendants with a Notice of Client's Right to Arbitrate the $24,549.40 due in legal fees, exclusive of late fees (NYSCEF Doc. No. 25, ¶ 12; NYSCEF Doc. No. 2, complaint, Ex A at 2). Defendants did not file a request for fee arbitration (NYSCEF Doc. No. 4, ¶ 22).

Plaintiff commenced this action on June 15, 2021 by filing a summons and complaint asserting two causes of action for (1) breach of contract against Nuevo and (2) breach of contract against Perez. It alleges that $26,758.84, inclusive of late fees charged at 9% per annum from November 8, 2019, is due. Perez has interposed an answer (NYSCEF Doc. No. 4), but Nuevo has not. Perez now moves for summary judgment dismissing the complaint. Plaintiff opposes and cross-moves for summary judgment in its favor on the second cause of action.

A party moving for summary judgment under CPLR 3212 "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this *prima facie* burden, the burden shifts to the non-moving party to furnish evidentiary proof in admissible form sufficient to raise a material issue of fact. (see *Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

At the outset, the court declines to deny Perez's motion as procedurally defective. The version of Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g (a) in effect at the time Perez made the motion required him to submit "a separate, short and concise statement, in numbered

paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried,"[1] and plaintiff argues that Perez has failed to file a statement of undisputed facts. While noncompliance with the rule may result in the denial of the movant's motion for summary judgment (*see Amos Fin. LLC v Crapanzano*, 73 Misc 3d 448, 453 [Sup Ct, Rockland County 2021]), "'[b]lind adherence'" to the rule is not mandated (*On the Water Prods., LLC v Glynos*, —AD3d —, 2022 NY Slip Op 07320, *1 [4th Dept 2022], quoting *Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022]). The court exercises its discretion to excuse Perez's failure to submit the requisite statement. Plaintiff has not alleged that it has been prejudiced, and the court observes that in support of its cross-motion, plaintiff has tendered a statement of material facts, to which defendant has responded.

Turning to the merits, Perez argues that the breach of contract claim pled against him is barred by General Obligations Law § 5-701(a)(2). He avers in an affidavit that he never received and never signed the Retainer (NYSCEF Doc No. 7, Perez aff, ¶¶ 3-5). He states that "[p]laintiff never informed me of any personal obligation on my part to act as a guarantor, or in any other manner answer [sic] for the debts of Nuevo" and that he never consented to act in such capacity, either orally or in writing (*id.*, ¶¶ 13-14). Perez further avers that he did not superadd his personal liability to that of Nuevo. He states that he acted as Nuevo's agent and that plaintiff was aware that he was only an agent (*id.*, ¶¶ 7-8).

Plaintiff counters that Perez has waived the statute of frauds defense, which, in any event, is inapplicable. On the latter point, plaintiff argues that: (1) Perez subscribed to the Retainer as evidenced in the "signature block" in his May 17, 2019 email to plaintiff; (2) Perez undertook a primary obligation to pay plaintiff; (3) plaintiff fully performed under the terms of the Retainer; and (4) Perez is estopped from asserting a statute of frauds defense.

CPLR 3018(b) provides that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as … statute of frauds." A defendant waives its right to rely on the statute of frauds by failing to move for dismissal before service of an answer is required (*see* CPLR 3211[e]; *Papell v Calogero*, 68 NY2d 705, 707 [1986]) or by failing to plead the statute of frauds as an affirmative defense in its answer (*Ryan v Kellogg Partners Inst. Servs.*, 79 AD3d 447, 448 [1st Dept 2010], *affd* 19 NY3d 1 [2012]).

General Obligations Law § 5-701(a)(2) provides that "[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith … if such agreement, promise or undertaking … [i]s a special promise to answer for the debt, default or miscarriage of another person." Perez has not pled General Obligations Law § 5-701 as an affirmative defense, nor has he moved to amend his answer to do so. Nevertheless, "[t]here is no prohibition against moving for summary judgment based on an unpleaded defense where the opposing party is not taken by surprise and does not suffer prejudice as a result" (*Matthew Adam Props., Inc. v United House of Prayer for All People*

[1] Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g (a), as amended, reads: "Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried."

*of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 600 [1st Dept 2015] [internal quotation marks and citation omitted]). In the absence of prejudice or surprise to the plaintiff, and where the plaintiff has had the opportunity to address the merits of the unpled defense, the court may consider an unpled statute of frauds defense raised on a defendant's motion for summary judgment (*Rogoff v San Juan Racing Assn.*, 77 AD2d 831, 832 [1st Dept 1980], *affd* 54 NY2d 883 [1981]). Here, Perez's counsel has submitted two emails he sent to plaintiff's counsel on September 13 and 17, 2021, in which he specifically advised counsel of the applicability of General Obligations Law § 5-701 to plaintiff's claim (NYSCEF Doc. Nos. 26-27, Perez reply affirmation, Exs A and B). Thus, plaintiff was on notice of Perez's intention to raise the statute of frauds as a defense. Furthermore, plaintiff has not alleged that it was prejudiced or surprised by the unplead defense and has fully addressed the merits of the defense in its opposition. Consequently, Perez has not waived the statute of frauds defense (*see Cohen v Holder*, 204 AD3d 973, 974 [2d Dept 2022]; *Kuhl v Piatelli*, 31 AD3d 1038, 1039 [3d Dept 2006]; *Rogoff*, 77 AD2d at 832).

It is well settled that "a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute – such as the statute of frauds (General Obligations Law § 5-701) – that imposes such a requirement" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368 [2005], *rearg denied* 5 NY3d 746 [2005]). As discussed above, a promise to answer the debt of another must be memorialized in a writing signed by the party to be charged (*Reddy v Mihos*, 160 AD3d 510, 514 [1st Dept 2018], *lv denied* 32 NY3d 902 [2018], citing General Obligations Law § 5-701 [a] [2]). If the party to be charged is primarily liable for the debt, though, the statute of frauds is inapplicable (*Lederer v King*, 214 AD2d 354, 354 [1st Dept 1995]). Applying these precepts, Perez has met his prima facie burden by showing that the unsigned Retainer is unenforceable under General Obligations Law § 5-701 (a)(2) as against him (*see Paul, Weiss, Rifkind, Wharton & Garrison v Westergaard*, 75 NY2d 755, 755 [1989]).

Plaintiff fails to raise a triable issue of fact in opposition. Contrary to plaintiff's contention, the Retainer does not impose a primary and independent obligation upon Perez to pay for plaintiff's services.

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. '*Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another*'" (*Bulkley v Shaw*, 289 NY 133, 138-139 [1942] [citation omitted] [emphasis in original]).

The Retainer plainly states that "[i]n the event" Nuevo did not timely pay, plaintiff could pursue Nuevo's members in their individual capacities for the unpaid amount, with those members left to seek reimbursement from Nuevo (NYSCEF Doc. No. 16 at 3). Such language does not suffice to create a primary duty on Perez's part to pay plaintiff (*see Paul, Weiss, Rifkind, Wharton & Garrison*, 75 NY2d at 755; *Matter of Lou Atkins Castings v Fabrikant & Sons*, 216 AD2d 111, 112 [1st Dept 1995]), particularly where plaintiff has sued Nuevo to recover on the same debt (*see Martin Roofing, Inc. v Goldstein*, 60 NY2d 262, 267-268 [1983],

*cert denied* 466 US 905 [1984] [concluding that the plaintiff had not discharged the corporation from paying its debt before pursuing the defendant on his oral promise to pay]). Nor does the Retainer contain any language creating joint and several liability (*see Chen v Yan*, 109 AD3d 727, 730 [1st Dept 2013]; *Paribas Props. v Benson*, 146 AD2d 522, 525 [1st Dept 1989]).

Plaintiff next argues that Perez subscribed to the Retainer because his May 17 email contains an electronic signature, and that Perez's May 17 email and plaintiff's May 17 email, to which the Retainer is attached, when read together, satisfy the statute of frauds. In *Scheck v Francis* (26 NY2d 466 [1970]), the Court of Appeals explained that a memorandum need not be contained in a single document to satisfy the statute of frauds (*id.* at 470-471). The memorandum "may be pieced together out of separate writings," provided that each writing is connected to the others "either expressly or by the internal evidence of subject matter and occasion and that, in case one of the writings is unsigned, they may be read together, provided that they clearly refer to the same subject matter or transaction" (*id.* [internal quotation marks and citation omitted]). "[A]n e-mail will satisfy the statute of frauds so long as its contents and subscription meet all requirements of the governing statute" (*Naldi v Grunberg*, 80 AD3d 1, 3 [1st Dept 2010], *lv denied* 16 NY3d 711 [2011]).

To create a binding contract, there must be an unambiguous and unequivocal acceptance of an offer (*Kowalchuk v Stroup*, 61 AD3d 118, 122 [1st Dept 2009]). Here, Perez's May 17 email does not demonstrate an unequivocal acceptance. Price and terms of payment are material elements of a contract (*Ansorge v Kane*, 244 NY 395, 398 [1927], *rearg denied* 245 NY 530 [1927] [granting dismissal where the parties had not agreed on the terms of payment]), and in his May 17 email, Perez inquired about lower hourly rates without definitely expressing his agreement or assent. Plaintiff submits that it did not accommodate Perez's request (NYSCEF Doc. No. 11, Kucker affirmation, ¶ 13), but it has not produced any written correspondence to Perez to support this contention or any subsequent written communication from Perez in which he confirmed the terms of the Retainer (*see Josephberg v Crede Capital Group, LLC*, 140 AD3d 629, 626 [1st Dept 2016] [finding that emails confirming the material elements of the parties' agreement satisfied the statute of frauds]). Thus, the emails fail to satisfy the statute of frauds (*see Naldi*, 80 AD3d at 6 [granting dismissal because there was "no meeting of the minds" regarding a specific contract term]), and do not establish an unambiguous and unequivocal acceptance by Perez.

General Obligations Law § 5-701 also requires that certain agreements be in writing subscribed by the party to be charged. "[S]ubscription is defined as '[t]he act of signing one's name on a document; the signature so affixed'" (*Matter of Philadelphia Ins. Indem. Co. v Kendall*, 197 AD3d 75, 78 n 2 [1st Dept 2021], quoting Black's Law Dictionary 1655 [10th ed 2014]). Relevant here is State Technology Law § 304 (2), which states that "an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." An "electronic signature" is defined as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record" (State Technology Law § 302[3]). "An e-mail sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds" (*Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st

Dept 2011]). Perez's May 17 email contains what appears to be an automatically generated signature block containing his name, the company name "NJModern," his email address "seb@njmodern.com", telephone and facsimile numbers, and the website "www.NJModern.com" (NYSCEF Doc. No. 17 at 1). A pre-printed signature block, though, is insufficient to satisfy the subscription requirement in General Obligations Law § 5-701(a)(2) (*see Bayerische Landesbank v 45 John St. LLC*, 102 AD3d 587, 587 [1st Dept 2013], *lv dismissed* 22 NY3d 926 [2013]; *but see Matter of Philadelphia Ins. Indem. Co.*, 197 AD3d at 79-80 [reasoning that emails discussing settlement exchanged between counsel which included pre-populated signature blocks sufficient to create a binding stipulation of settlement for purposes of CPLR 2104]).

Plaintiff also contends that its performance under the Retainer renders the statute of frauds inapplicable. Plaintiff asserts that Perez sought its advice about a good guy guarantee, and "[i]n this context, Plaintiff's decision to continue representation of Nuevo, hinged on Perez's objective assent that he provided some form of assurance of payment Plaintiff [sic] as manifested in writing in the very Retainer agreement that Perez ratified" (NYSCEF Doc. No. 21, plaintiff's mem of law at 14-15). This argument is unpersuasive as the doctrine of part performance is not applicable to General Obligations Law § 5-701 (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 234 n 1 [1999]; *Castellotti v Free*, 138 AD3d 198, 203 [1st Dept 2016]; *Gural v Drasner*, 114 AD3d 25, 29 [1st Dept 2013], *lv dismissed* 24 NY3d 935 [2014], *rearg dismissed* 29 NY3d 962 [2017]; *cf. Menche v CDx Diagnostics, Inc.*, 199 AD3d 678, 682 [2d Dept 2021]). In any event, plaintiff responded to Perez's query about the good guy guaranty on May 20, 2019, three days after plaintiff had emailed the Retainer (NYSCEF Doc. No. 19 at 8). Plaintiff has not established that it obtained a separate oral promise from Perez to pay for the legal services rendered to Nuevo after it answered Perez's question.

Even if the doctrine of part performance applied, plaintiff has not demonstrated that its performance was unequivocally referable to an oral agreement with Perez. To qualify as "unequivocally referable" conduct, a party's "actions alone must be 'unintelligible or at least extraordinary', explainable only with reference to the oral agreement" (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983] [citation omitted]) or the party's conduct must be "'inconsistent with any other explanation'" (*745 Nostrand Retail Ltd. v 745 Jeffco Corp.*, 50 AD3d 768, 769 [2d Dept 2008] [citation omitted]). In this case, "[plaintiff's] continued work was not unequivocally referable to [Perez's] alleged oral promise to be personally liable for the fees" (*Abyssinian Dev. Corp. v Bistricer*, 133 AD3d 435, 436 [1st Dept 2015]), as plaintiff's cross-motion contains evidence that Nuevo, not Perez, paid plaintiff the initial retainer fee by check no. 3776 dated May 20, 2019 and $1,773.11 for invoice 155834 by check no. 3777 dated November 1, 2019 from Nuevo's account (NYSCEF Doc. No. 18 at 3). Thus, it is possible that plaintiff continued to represent Nuevo because Nuevo had paid a portion of the fees that had accrued. "Since more than one potential explanation for the firm's decision to continue its representation is supported by the facts, the part performance exception to the statute of frauds does not apply" (*Carey & Assoc. v Ernst*, 27 AD3d 261, 264 [1st Dept 2006]). Plaintiff has produced no other evidence of part performance by Perez that is unequivocally referable to an oral agreement that he would pay for the services rendered to Nuevo (*see A-1 Communications v WTZA-TV Assoc.*, 245 AD2d 940, 941 [3d Dept 1997]).

Last, plaintiff argues that Perez is estopped from relying on a statute of frauds defense. A defendant may be precluded from relying on a statute of frauds defense where the plaintiff can establish promissory estoppel and where enforcement of the statute of frauds would be unconscionable (*Matter of Hennel*, 29 NY3d 487, 493-494 [2017]). Promissory estoppel requires a party to prove a clear and unambiguous promise; the party's reasonable reliance on that promise; and an unconscionable injury caused by that party's reliance (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 [1st Dept 2015]; *Ferreyr v Soros*, 116 AD3d 407, 407-408 [1st Dept 2014]). "An unconscionable injury is injury beyond that which flows naturally ... from the non-performance of the unenforceable agreement" (*Bent v St. John's Univ., N.Y.*, 189 AD3d 973, 976 [2d Dept 2020], *lv denied* 38 NY3d 904 [2022] [internal quotation marks and citation omitted]). Plaintiff has not established that it suffered an unconscionable injury since its damages consist of the money it claims is due for the legal services rendered to Nuevo under the Retainer.

Nor has plaintiff established that Perez superadded his liability to that of Nuevo. It is well-settled that "an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964] [internal quotation marks and citation omitted]). Perez has established that he was acting solely as an agent for Nuevo, a disclosed principal, and that he did not intend to be personally liable to plaintiff under the Retainer. Not only does the signature block in the Retainer contain only a single line for Perez's signature as Nuevo's member (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011] *affd* 19 NY3d 511 [2012], citing *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961] [discussing the general practice that an individual sign twice if the individual wished to be personally bound]), but plaintiff failed to produce any evidence sufficient to overcome the presumption that Perez intended to bind only his principal, Nuevo (*see Kutner v Vazquez*, 17 Misc 3d 1123[A], 2007 NY Slip Op 52127[U], *3 [Nassau Dist Ct, 1st Dist 2007]).

The court has considered plaintiff's remaining contentions and finds them unavailing. In view of the above, plaintiff's cross-motion for summary judgment on its second cause of action against Perez is denied. Accordingly, it is

**ORDERED** that the motion brought by defendant Sebastian Perez for summary judgment dismissing the complaint against him (Mot. Seq. 001) is granted, and the complaint is dismissed against said defendant; and it is further

**ORDERED** that the claims against defendant Nuevo Modern, LLC are severed and the balance of the action against the remaining defendant Nuevo Modern, LLC shall continue; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment in favor of defendant Sebastian Perez dismissing the claims made against him in this action, together with costs and

disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

**January 25, 2023**

**HON. VERNA L. SAUNDERS, JSC**

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| **CHECK ONE:** | ☐ | **CASE DISPOSED** | | ☒ | **NON-FINAL DISPOSITION** | | |
| | ☐ | **GRANTED** | ☐ **DENIED** | ☒ | **GRANTED IN PART** | ☐ | **OTHER** |
| **APPLICATION:** | ☐ | **SETTLE ORDER** | | ☐ | **SUBMIT ORDER** | | |
| **CHECK IF APPROPRIATE:** | ☐ | **INCLUDES TRANSFER/REASSIGN** | | ☐ | **FIDUCIARY APPOINTMENT** | ☐ | **REFERENCE** |