

**Ferolito v Vultaggio**

2012 NY Slip Op 30756(U)

March 26, 2012

Sup Ct, New York County

Docket Number: 600396/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
J.S.C. Justice

PART 1

Index Number : 600396/2008  
FEROLITO, JOHN M.  
VS.  
VULTAGGIO, DOMENICK J.  
SEQUENCE NUMBER : 030  
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 600396/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 030  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to quash subpoenas

	PAPERS NUMBERED
Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>A-F; A</u>	<u>1</u>
<del>Notice of Cross-Motion +</del> Answering Affidavits — Exhibits <u>1-37</u>	<u>2</u>
Replying Affidavits _____	<u>3</u>

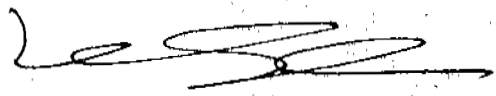
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion  
are decided in accordance with the  
attached decision and order.

**FILED**

MAR 27 2012

NEW YORK  
COUNTY CLERK'S OFFICE



Dated: March 26, 2012

**MARTIN SHULMAN**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X

JOHN M. FEROLITO, et al.,

Plaintiffs,

-against-

Index Nos. 600396/08,  
590967/08 and 100568/11

DOMENICK J. VULTAGGIO, et al.,

**Motion Seq. 030**

Defendants.

-----X

DOMENICK J. VULTAGGIO, et al.,

Counterclaim and Third-Party Plaintiffs,

-against-

JOHN M. FEROLITO, et al.,

Counterclaim and Third-Party Defendants.

-----X

In the Matter of the Application of John M. Ferolito,

Petitioner,

For the Dissolution of Beverage Marketing USA, Inc.,  
a Domestic Corporation.

-----X

**SHULMAN, J.:**

Non-parties Emmanuel Durand and Rita Keskinyan (collectively "movants") move to quash the Vultaggio defendants' (hereinafter "Vultaggio") subpoenas ad testificandum seeking their depositions in these consolidated actions. Alternatively, movants ask that their depositions be held in abeyance pending the completion of the parties' depositions. Vultaggio opposes the motion and cross-moves to compel movants to comply with the subpoenas within two weeks of this court's determination of this motion and cross-motion.

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Presently, all proceedings other than those bearing on the valuation of plaintiff Ferolito's shares of stock in Beverage Marketing USA, Inc. ("BMU") have been stayed. In preparation for the valuation hearing, Vultaggio served the subject subpoenas to depose movants, who are investment bankers employed by Rabo Securities USA, Inc. ("Rabo"). Ferolito engaged Rabo in connection with his efforts to sell his interest in the AriZona entities, including BMU. Movants are the Rabo employees who negotiated with various entities on Ferolito's behalf. Ferolito intends to use evidence of various purchase offers Rabo obtained to establish the value of his interests.

In support of their motion to quash, movants contend that Vultaggio cannot show that the discovery sought is not available from other sources. They also maintain that there is no urgency for Vultaggio to proceed with their depositions when the parties themselves have yet to be deposed. Movants further note that Rabo responded to Vultaggio's prior subpoena duces tecum by producing approximately 15,000 pages of responsive documents.

In opposition to the motion and in support of his cross-motion Vultaggio argues that movants "should be able to provide testimony concerning negotiations, offers, documents reviewed, and other issues that relate to Ferolito's claimed basis for valuation." Lazaroff Aff. at ¶17. Defendants also contend that movants are likely to identify other entities and individuals from whom they should seek further relevant discovery. *Id.*

## DISCUSSION

With respect to obtaining discovery from non-parties, CPLR §3101(a)(4) provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action . . . upon notice stating the circumstances or reasons such disclosure is sought or required.” The party seeking disclosure from a non-party must “show special circumstances or that the information sought was relevant and could not be obtained from other sources (citations omitted).” *Tannenbaum v City of New York*, 30 AD3d 357, 358-359 (1<sup>st</sup> Dept 2006).

Here, relevancy is undisputed and movants' claim that the discovery sought can be obtained from other unidentified sources<sup>1</sup> rings hollow, particularly in light of the fact that Rabo's counsel originally agreed to the depositions without any substantive objections.<sup>2</sup> Further, counsel for Rabo and Vultaggio specifically discussed the need for Vultaggio to explore questions regarding alleged insufficiencies in Rabo's document production at the movants' depositions. Clearly, only a Rabo employee would be in a position to answer questions pertaining to documents Rabo maintains. This is true regardless of whether or not the parties' depositions have been completed.

This court has considered the remaining arguments and finds them lacking in merit. Accordingly, for the foregoing reasons, it is

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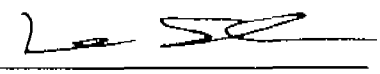
<sup>1</sup> Movants only identify possible other sources in their reply papers, urging that Vultaggio seek discovery directly from the entities which made offers to Ferolito through Rabo to purchase his interests.

<sup>2</sup> Movants' counsel accepted service of the subject subpoenas, initially objecting only to the noticed dates for the depositions, which ultimately were adjourned on consent to December 19 and 21, 2011 to accommodate movants' schedules.

ORDERED that the motion is denied and the cross-motion is granted to the extent that movants are directed to appear for depositions on a mutually convenient date not to exceed April 30, 2012.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for movants and Vultaggio.

Dated: New York, New York  
March 26, 2012

  
\_\_\_\_\_  
Hon. Martin Shulman, J.S.C.

**FILED**

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