

Khan v Garg
2019 NY Slip Op 32927(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 652334/2013
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X

Raza Khan, individually and derivatively on behalf
of Education Investment Finance Corp.,

Plaintiff,

- v -

Vishal Garg, et al.,

Defendants.

INDEX NO. 652334/2013

03/15, 03/18,
03/18, 03/22,
04/08, 04/15,
04/16/2019

MOTION DATES

MOTION SEQ. 014, 015, 016,
NOS. 017, 018, 019, 020

DECISION + ORDER ON
MOTIONS

-----X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 380, 381, 382, 383, 384, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 470, 472, 474, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 570, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 810

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 015) 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 455, 456, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 571, 572, 573, 574, 575, 576, 577, 630, 631, 632, 633, 634, 635, 636, 637, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 811

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 016) 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 471, 473, 501, 502, 503, 568, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 812

were read on this motion to/for SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 017) 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 504, 505, 506, 569, 709, 710, 711, 712, 713, 714, 715, 716, 813

were read on this motion to/for

SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 018) 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 766, 802, 814

were read on this motion to/for

SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 019) 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 626, 627, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 767, 803, 815

were read on this motion to/for

SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 020) 619, 620, 621, 622, 623, 624, 625, 628, 629, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 804, 805, 806, 807, 808, 816

were read on this motion to/for

DISQUALIFY COUNSEL

In this 2013 direct and derivative action with counterclaims, both plaintiff/counterclaim defendant and defendants/counterclaim plaintiffs move, by orders to show cause, for various forms of relief including quashing subpoenaed documents and depositions, compelling various discovery, sealing various documents, and to disqualify plaintiffs counsel. Specifically:

- In motion sequence number (Motion) 014, defendants Vishal Garg, Education Investment Finance Corp. (EIFC), 1/0 Capital, LLC (Capital), and Embark Holdco I, LLC (Embark Holdco) move, pursuant to CPLR 2304 and 3103, to quash subpoenas served by plaintiff on certain nonparties or, alternatively, for entry of a protective order as to the information and depositions sought in the subpoenas (NYSCEF 470).
- In Motion 015, plaintiff moves to compel documents responsive to certain requests in "Plaintiff's First Request for Documents" (NYSCEF 455).
- In Motions 016, 017, 018, and 019, defendants move, pursuant to 22 NYCRR 216.1, to file and/or require plaintiff to file numerous documents under seal and to redact all references to the contents of those documents in the publicly-filed submissions in connection with these motions (NYSCEF 468, 567, 626).

- In Motion 020, defendants move to disqualify plaintiff's counsel, Rachel Kierych, Esq. of Anderson Kill P.C. both in plaintiff's individual and derivative capacity (NYSCEF 628).

The court incorporates its May 30, 2018 decision and order resolving Motion 012 (May 2018 Decision), defendants' motion to dismiss portions of plaintiff's February 3, 2017 amended complaint (NYSCEF 360 [dismissing the fraud claim against all defendants and several other claims against Embark Holdco]). The May 2018 Decision includes a concise recitation of lengthy procedural history and general factual background of this action, as alleged in the operative pleadings, with which the court presumes familiarity.

Following this court's 2018 Decision, numerous conferences have been conducted to complete all outstanding discovery, get the case trial-ready or resolve it. Limited supplemental demands were authorized given the extraordinary amount of time that this action has remained active on this court's docket, and the parties were issued final deadlines to complete all fact and expert discovery.

Briefly, the plaintiff's amended complaint contains the following claims: (1) deadlock as to EIFC (owned by Khan and Garg in equal 50% shares); (2) breach of fiduciary duty by Garg against Khan and EIFC¹; (3) conversion of EIFC assets by Garg; [(4) dismissed fraud claim]; (5) tortious interference with an EIFC subsidiary's contract by Garg and Capital; (6) Garg's failure to execute corporate documents on

¹ The fiduciary duty breaches alleged are as follows: (i) converting EIFC funds by wire into Garg's personal accounts; (ii) falsifying EIFC financial records; (iii) failing to file EIFC tax returns since 2009; (iv) unilaterally terminating the contract between Activist Special Advisory Services, LLC (Activist), EIFC's wholly-owned subsidiary, and Phoenix Real Estate Solutions Ltd. (Phoenix), an entity in which Garg has an alleged ownership interest (Phoenix Contract); (v) diverting the Phoenix Contract to Capital and inducing former EIFC employees' Mingsung Tang and Sigurgeir "Ziggy" Jonsson to violate their non-compete agreements and join Capital; (vi) failing to assign a an Embark Corp. Note to EIFC; (vii) causing Phoenix's nonpayment of sums owed to Activist/EIFC; (viii) improperly using EIFC funds for an unrelated transaction involving MRU Lending; (ix) improperly seizing EIFC equipment; (x) improperly settling EIFC's claims against Garg-owned entities to EIFC's detriment; (xi) "subverting" the arbitration proceeding between Phoenix and Activist (Arbitration); (xii) falsifying EIFC tax return amendments; (xiv) not enforcing EIFC rights regarding Tang and Jonsson; and (xv) "conspiring with Tang and Jonsson and others to misappropriate EIFC's intellectual and other property and assets" (NYSCEF 335, ¶¶ 155-159).

behalf of a nonparty EIFC subsidiary; (7) conversion of EIFC funds by Garg through nonparty MRU Lending (MRU), a company owned solely by Garg; (8) unjust enrichment against Garg resulting from the MRU claim; and (9) an accounting for EIFC (NYSCEF 335).

Defendants' counterclaims include the following claims: (1) breach of fiduciary duty against Khan²; (2) conversion of assets belonging to EIFC and to Garg, individually; and (3) corporate waste and mismanagement of EIFC (NYSCEF 335, ¶¶ 67-69).

The court notes that, as alleged, EIFC was owned at the relevant time in equal parts by Garg and Khan, EIFC wholly owned Activist, and EIFC purchased a significant interest in Embark Corp.

Motion 014: Defendants' Motion to Quash Subpoenas/Enter a Protective Order

In Motion 014, defendants move to quash 17 subpoenas plaintiff served on the following nonparties:

- "Investor" Entities (Investors): American Express Ventures (AmEx), American International Group (AIG), Blackstone Alternative Asset Management Associates, LLC (Blackstone), Conversion Capital, LLC (Conversion), Goldman Sachs & Co. (Goldman), KCK Group, LLC (KCK); Longview Marquis Fund LP c/o Viking Asset Management, LLC (Viking), Pine Brook Capital Partners, LLC (Pine Brook), Rosenblatt Securities, LLC (Rosenblatt), Sparring Partners Capital LLC (Sparring), and Upstart Network, Inc. (Upstart);
- Other Entities: JP Morgan Chase Bank, N.A. (Chase), Kalantry LLP (Kalantry), and Kramer Levin Naftalis & Frankel LLP (Kramer Levin); and
- Individuals: Sarita James (Garg's wife and an officer of Embark Corp.), as well as former EIFC employees Tang and Jonsson.

² Alleging that Khan allegedly breached his fiduciary duties to EIFC and Garg in: (i) improperly removing Garg's access to EIFC prior to this action; (ii) filing false/misleading EIFC tax returns; (iii) commencing frivolous suits on behalf of EIFC as a "personal vendetta against Garg"; (iv) delaying EIFC tax returns and asset transfers by refusing to sign EIFC documents; (v) refusing to return EIFC funds borrowed for Khan's personal business, and (vi) failing to pay EIFC vendors (NYSCEF 335, ¶ 69).

Defendants contend that the subpoena requests are irrelevant to the allegations in the pleadings, overbroad, concern matters that have already been resolved by the court, seek privileged and/or proprietary information to which Khan is not entitled, requests for documents sought from defendants but for which Khan did not contest defendants' responsive objection (and, thus, waived the request), and were intended to harm Garg's ongoing or prospective business relationships.

Plaintiff insists that the requested information is material. Specifically, in the Investor subpoenas, plaintiff requests information relevant to plaintiff's breach of fiduciary duty, conversion, and tortious interference claims. More specifically, plaintiff seeks to determine whether and how Garg and his related entities were misusing EIFC intellectual property (IP) in its business pitches to prospective investors and services to the detriment of EIFC, from which those business opportunities were diverted. Likewise, the value that Garg or Garg-related entities may have assigned to EIFC IP is probative of the issue of damages/lost profits and motive because plaintiff alleges that EIFC's IP was misappropriated when Garg, Tang, and Jonsson departed.

Plaintiff further contends that the Other Entity subpoenas are probative of Garg's liability and damages as the amended complaint alleges conversion of EIFC funds by Garg, who had linked his personal bank account and Capital's business account to EIFC's business account, and that records and other information will demonstrate the alleged misappropriation of EIFC assets, falsification of EIFC's amended tax returns, and information regarding the valuation of EIFC's IP.

1. The Investors

Defendants could have circumvented these subpoena disputes by producing the requested information after, for instance, negotiating narrower or clearer requests, but have not done so. None of the subpoenas have previously been ordered by the court and none of the subpoenaed parties have

directly submitted any formal objection to the subpoenas. The objections to these subpoena requests are only those comprised in defendants' submissions for Motion 014.

Upon review of all subpoenas served upon the Investors, the court deems the requests overbroad and each subpoena is narrowed in its scope to documents/information identified in the clear and concise summary of the relevant documents/information sought in each subpoena outlined in plaintiff's chart (NYSCEF 510), submitted in opposition to this motion (NYSCEF 510). The requests are further limited in time to the period beginning on the date on which each Investor was contacted by any defendant or entity controlled by a defendant (Controlled Entity) to initiate or offer a business opportunity and ending six months after that business opportunity was pitched (if no agreement for services or otherwise was reached) or one year after an agreement or series of agreements, if any, was executed between a defendant or a Controlled Entity and the Investor.

The motion to quash, however, is denied as to the Investors. The requests, as narrowed, are targeted to produce material information relevant to plaintiff's claims, defendants' counterclaims, and the parties' defenses. Defendants may, alternatively, voluntarily agree with plaintiff to produce documents responsive to the narrowed subpoena requests to avoid involving the nonparty Investors or any/all of the subpoenaed individuals and entities.

2. The Other Entities

As with the Investors, the only formal objections to these subpoena requests are those comprised in defendants' submissions for Motion 014. As above, the court limits the subpoenas served on the Other Entities to the relevant issues/documents identified in plaintiff's chart (NYSCEF 510) and as further outlined below.

Plaintiff is entitled to seek all records for EIFC's corporate account at Chase and any accounts belonging to EIFC's subsidiaries (i.e., Activist). As to Garg's personal accounts, and Capital's account, the

records are relevant to plaintiff's claims and defendants' counterclaims and defenses as there are allegations relating to Garg's misappropriation of EIFC assets, Garg's linking his own personal Chase account and Capital's business account to EIFC's account and transferring funds between those and potentially other Garg-related accounts. Records for the appropriate period of time are probative as to liability and damages for the fiduciary duty and conversion claims. The scope of the Chase subpoena with respect to the Garg personal account and Capital account is limited to the period of time set forth in the operative pleadings, beginning from the date on which Garg managed EIFC's finances and/or had access to and exercised authority over EIFC's accounts and ending on the date six months after Garg relinquished control of or his access to EIFC's business accounts. The requests are further limited to documents and records pertaining to transfers to or from EIFC's account, to or from Garg's personal account, and to or from Capital's business account during the specified period of time.

As to Kramer Levin, plaintiff is entitled to seek all documents and communications relating to its representation of EIFC, its subsidiaries (including Activist and the Arbitration). As to the other matters, including Kramer Levin's representation of defendants separately from EIFC, there is no need to quash this subpoena. Kramer Levin has a legal obligation to protect its clients' privileged information and materials. This is a motion to quash a subpoena/enter a protective order. Neither is necessary or warranted here.

Likewise, plaintiff is entitled to seek all documents and communications relating to Kalantry's accountancy representation of EIFC and its subsidiaries, including any documents or records relating to EIFC's IP and EIFC's tax liabilities.

Accordingly, the motion to quash/enter a protective order is denied as to the Other Entities, and the subpoenas against those nonparties are limited as set forth above.

3. The Individuals

As above, none of the Individuals have formally objected to the subpoenas. The Individuals are James (Garg's wife and an officer of Embark Corp., an EIFC affiliate), as well as Tang and Jonsson (former EIFC employees who plaintiff alleges were induced by Garg to leave EIFC, taking EIFC's IP, and to work, instead, for Capital). The subpoenas are not quashed; however, they are limited in scope to the relevant information contained in plaintiff's chart (NYSCEF 510).

4. All Subpoenas

There being no basis requiring that these subpoenas be quashed or demanding a protective order as to the requested documents/information, Motion 014 is denied. The court has considered all of defendants' arguments in connection with Motion 014 and finds that, to the extent they are properly before the court, they do not compel an alternative result. The 17 subpoenas are, however, limited in scope as set forth in this decision.

Motion 015: Plaintiff's Motion to Compel Discovery from Defendants

In Motion 015, plaintiff seeks to compel production of responsive documents to the following document requests, served July 27, 2018:

- Request 6: All correspondence from or to Garg relating to the Phoenix Contract;
- Request 7: Any and all documents and communications relating to nonparty Phoenix's decision to terminate its contract with Activist (including five custodians other than Khan and Garg);
- Request 8: Any and all documents and communications between or among Garg and (1) Jonsson and/or (2) Mingsung Tang;
- Request 30: Any and all communications to or from Garg relating to Jonsson's compensation or employment by any person or entity, including but not limited to Garg's communications with Jonsson;
- Request 31: Any and all documents and communications relating to Capital, nonparty Phoenix, and EIFC's nonparty clients Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., Triaxx Prime

CDO 2007-1 Ltd. (collectively, Triaxx); or "any other Garg Entity," including any agreements, payments, invoices, and correspondence;

- Request 55: All documents and communications relating to contract(s) between Capital and Phoenix;
- Request 58: All documents and communications that relate to or evidence Capital's acquisition or use of EIFC's IP, including financial statements reflecting payments to Capital or Garg from nonparty Asian Castle Ltd.;
- Request 62: All documents and communications that relate to EIFC's settlement with Phoenix in the Arbitration;
- Request 63: All documents and communications that relate to EIFC's settlement of actions involving Embark Corp. and Embark Holdco;
- Request 64: All documents and communications produced by EIFC and/or Activist in the action between Activist and Phoenix that preceded the Arbitration;
- Request 65: All documents and communications that relate to the spoliation or destruction of any documents related to the Arbitration;
- Request 66: All documents and communications produced by Garg and/or his entities in the Arbitration, including exhibits and transcripts;
- Request 70: All Capital agreements with, and employment records for, Jonsson and Tang; and
- Request 74: All documents and communications that relate to payments from nonparties Phoenix, Phoenix Holdco, LP, Phoenix Structured Credit Investments Ltd., and/or Asian Castle Ltd. to Garg or any Garg-related entity.

As an initial matter, plaintiff states that the parties were close to resolving Requests 6-8, 30-31, 55, 70, and 74, with defendants' proposed modifications, but could not reach an agreement as to the time period for those requests. Defendants respond that Requests 6-8, 30-31, 55, 70, and 74 were satisfied, using the parties' agreed-upon search terms and custodians, with respect to the Phoenix Contract. The time period searched, according to defendants, was an eight-month period spanning five months prior to and three months after Phoenix's notice of termination of the Phoenix Contract. Plaintiff seeks in this motion to expand that timespan to a period of approximately five years.

While Requests 6-8, 30-31, 55, 70, and 74 are targeted to discover responsive, material information, they are overbroad in scope. To the extent not completed or otherwise formally agreed-upon in writing by the parties, defendants shall produce responsive, nonprivileged documents within their possession or reasonable control for those requests. Defendants complain that the cost of conducting further searches and reviewing documents is burdensome, but they do not indicate the costs associated with further searches or seek, for instance, to shift costs. The responses and production with privilege logs shall be conducted, to the extent not already done, pursuant to the current Part Rules for the following periods of time: January 1, 2012 through one year after termination of the Phoenix Contract (Requests 6-7); from the date on which EIFC commenced the Activist-Phoenix action (Phoenix Action) through one year after settlement of the Activist Arbitration (Request 8, 30); from January 1, 2012 through December 31, 2015 (Requests 70, 74); and from January 1, 2012 to February 3, 2017 (Request 31).

While Justice Oing denied plaintiff's motion to reject EIFC's settlement of its actions against Embark Corp. and Embark Holdco, and the Activist Arbitration, that does not preclude plaintiff from pursuing certain discovery as to those matters in connection with, at least, plaintiff's direct breach of fiduciary duty claims (even if the settlement agreements release EIFC from any related claims and precludes, for instance, the derivative fiduciary duty claim) against Garg. Accordingly, defendants shall produce responsive, nonprivileged documents for a period beginning on January 1, 2012 and ending six months after the formal execution of each confidential settlement agreement for Requests 62-66. The court notes that plaintiff was the 50% shareholder of EIFC during that time and is plainly entitled to EIFC's corporate records, generally.

Accordingly, Motion 015 is granted in part as set forth above. The court has considered defendants' remaining arguments not discussed in this decision and finds them unpersuasive, inadequately supported, or otherwise not requiring an alternative result.

Motions 016, 017, 018, and 019: Defendants' Motions to Seal

The Part 48 Practice Rules in effect as of March 1, 2019, prior to the filing of these motions, provided that "[a]pplications to seal or redact documents shall include a summary of the nature of each document, the reason(s) that each document should be sealed or redacted, and the particular 'good cause' to seal or redact each document" (Part Rules, updated 03/01/19 at 10 [emphasis omitted], citing 22 NYCRR § 216.1).

1. Motion 016:

Defendants move, pursuant to 22 NYCRR § 216.1, to file the following documents under seal: documents Bates stamped EIFC_0007882, EIFC_0010506, EIFC_0010575, EIFC_0010620, EIFC_0019729, EIFC_0019736, EIFC_0032905, and EIFC_0034526; the Affidavit of Jonsson; the Confidential Settlement Agreement & Release of the Activist-Phoenix litigation (NYSCEF 277); the Confidential Settlement Agreement & Release of the Embark Corp. and Embark Holdco litigations; and Khan's Memorandum of Law in Support of his Motion to Reject Settlements (NYSCEF 275). Defendants also seek to permanently redact all references to the contents of those documents in their papers filed in connection with Motion 014.

As to the confidential settlement agreements and plaintiff's memorandum of law in support of his motion to reject the settlement agreements, the motion is granted. Defendants have set forth the nature of those documents and, albeit minimally, have identified good cause to seal those submissions (*see IDW Group, LLC v Levine Ins. Risk Mgt. Services, Inc.*, 40 Misc 3d 368, 382 [Sup Ct, NY County 2013] [finding good cause to seal confidential settlement agreements but noting they would not remain sealed at trial]). Defendants may also redact the portions identified that discuss the contents of those documents.

As to the remaining documents sought to be sealed, the motion is denied. The summary of each document sought to be sealed and good cause to seal these documents provided by defendants consists of only brief, conclusory statements and labels (*see* NYSCEF 441 at 3, ¶¶ 1-2). These explanations are insufficient to warrant sealing entire documents for good cause shown and the court declines to search defendants' own submissions, which do not adequately comport with the Part Rules, to determine whether or not good cause can be demonstrated; that is defendants' job. Defendants may move, again, pursuant the current Part Rules, to seal or redact the documents for which the requested relief here is denied within 10 days or else waived.

2. Motion 017:

Defendants move, pursuant to 22 NYCRR 216.1, to seal the following documents filed by plaintiff in connection with Motion 015: Exhibits A, D, E, F, and G to plaintiff's Affidavit (filed in redacted form as NYSCEF 390, 393, 394, 395 and 396, respectively). Defendants further seek to permanently redact all references to those documents in paragraphs 19, 26 n 3, 32, 35, 39, 41, 42, 43, 44, and 45 in plaintiff's affidavit, as well as paragraphs 19, 26, 43, and 44 Exhibit 8 to the affidavit of defendants' counsel, Taleah E. Jennings.

As above with Motion 016, defendants fail to set forth sufficiently specific reasons showing good cause to seal the documents annexed as exhibits to plaintiff's affidavit. Although there may be sensitive information in some of these filings, defendnats have not met their burden of identifying that particular information and explaining why good cause exists to seal the documents in their entirety. Absent more information than respondents' short, conclusory assertions, the court declines to review each of these documents and speculate as to what information may or may not be adequately sensitive to warrant sealing these whole documents. Accordingly, the motion to seal plaintiff's exhibits A, D, E, F, and G in their entirety is denied without prejudice to a new motion to seal that comports with the current Part Rules.

However, exhibit D may be redacted to the extent that it contains personal information regarding Garg's children.

As to paragraphs 19, 26, 43, and 44 Exhibit 8 to the affidavit of defendants' counsel, Taleah E. Jennings., defendants make no argument in support of permanently redacting those portions of that document. Accordingly, that portion of the motion is deemed abandoned and the motion is denied as it seeks to redact the specified paragraphs. However, references to Garg's children shall be redacted consistent with 22 NYCRR 214.12. This denial is without prejudice to a new motion, to be filed within 10 days or else waived.

3. Motion 018:

In Motion 018, defendants move, pursuant to 22 NYCRR 216.1, to seal exhibits 1-2, 10-14, and 17 to defendants' counsel's affidavit in opposition to Motion 015, as well as Jonsson's and Garg's affidavit in opposition to Motion 015, and defendants' memorandum of law in opposition to Motion 015 (NYSCEF 479, 480, 488-492, 495, 477, 476, and 475, respectively). Defendants further seek to seal exhibits 1-11 of its counsel's affirmation in support of Motion 018 (identical to exhibits 1-2, 10-14, and 17 attached to counsel's affidavit in opposition to Motion 015), as well as Jonsson's and Garg's affidavits submitted with Motion 018. Defendants also seek to permanently redact all discussion of these documents on pages 4-9, 11, and 13-17 of defendants' memorandum in opposition to Motion 015.

As above, the confidential settlement agreements may be filed under seal and references to those documents' contents may be redacted. Likewise, plaintiff's memorandum of law in support of rejecting the settlement agreements, Garg's affidavit in opposition to that motion to reject the settlement, the expert's report filed in connection with the Arbitration, and the witness statement of Raja Visweswaran in support of the settlements may be sealed. References to facts relating to the *settlement* of the Arbitration contained in Garg's affidavit in opposition to Motion 015 and/or Motion 018 may be redacted; however,

defendants have not demonstrated good cause to seal or identified what particular information, if any, should be redacted from the remaining documents. Accordingly, the motion is granted in part. The portions of the motion that are denied are denied without prejudice to a new motion, to be filed within 10 days or else waived.

4. Motion 019:

Defendants move, pursuant to 22 NYCRR 216.1, to seal exhibits A-B, E-H, and J-O to plaintiff's counsel's affirmation in opposition to Motion 014 (filed in redacted form as NYSCEF 510-511, 514-517, and 519-524), and the corresponding exhibits 2-13 to defendants' counsel's affirmation in support of Motion 019 (NYSCEF 582-593). Defendant further seeks to seal exhibits A-I, L, M, P-Y, and AA attached to plaintiff's affidavit in opposition to Motion 014 (filed unredacted as NYSCEF 526, 529-535, 538, 539, 542, 544, 546-551, 527 and in redacted form as NYSCEF 528, 543, and 545), as well as the corresponding exhibits 15-36 attached to defendant's counsel's affirmation in support of Motion 019 (NYSCEF 595-616). Additionally, defendants seek to seal exhibit A to plaintiff's counsel's reply affirmation in Motion 015 (NYSCEF 572), defendants' corresponding exhibit 38 in support of Motion 019 (NYSCEF 618), and to permanently redact all reference to the contents of those documents: temporarily redacted on pages 3, 8, 9, 14, 15, 18-22, and 24 of plaintiff's memorandum in opposition to Motion 014; paragraphs 10, 15, 16, 20, 21, 26, 41, 42, 46, 50, 52-55, 57, and note 2 in plaintiff's affidavit in opposition to Motion 014; pages 2-4, 6-7, and 9 in plaintiff's reply memorandum in Motion 015; and the corresponding documents attached as exhibits 1, 14, and 37 to defendants' counsel's affirmation in support of Motion 019 (NYSCEF 581, 594, and 617).

For the same reasons stated above, Motion 019 is denied except to the extent that defendants may seal the confidential settlement agreements and may redact references to the content of the

confidential settlement agreements and references to Garg's children. The portions of this motion that are denied are without prejudice to a new motion to be filed within 10 days or else waived.

5. All Motions to Seal

Notably, defendants have not asked the court to redact specific categories of information as alternative relief if their requests to seal are denied. Accordingly, the court declines to speculate as to what categories of information, if any, may be redacted for good cause in their numerous submissions for Motions 01, 018, 018, and 019. Defendants have also not indicated with adequate specificity why there is good cause to seal these multitudinous documents in their entirety. Though there may be sensitive information in these documents, defendants have not shown how the documents, as a whole, or particular information contained in these documents, could threaten its competitive advantage or harm the business interests of any entity.

To the extent that the motions to seal are denied, they are denied (in whole or in part) without prejudice to a new motion to seal or redact, to be filed within 10 days of the court's entry of this decision and order on NYSCEF or else waived. If no motion is made within that 10-day period, the parties shall comport with the Part 48 Rules and Procedures, last updated July 29, 2019, to correct the digital record and replace the documents filed in connection with Motions 014-019 on NYSCEF as set forth in this decision.

If they elect to move to seal and/or redact within the specified time, defendants are urged to consult the current Part Rules and to identify specific categories of information and particular reasons that show why there is good cause to seal or redact the identified information or material, rather than applying mere conclusory labels ("proprietary" or "confidential business" information; "competitive advantage") and vague assertions lacking factual support that the business of a party or nonparty "could

be" harmed if the documents become or remain public. Conclusory labels and conjecture are insufficient to warrant redacting categories of sensitive information, let alone wholesale sealing of entire documents.

Motion 020: Defendants' Motion to Disqualify Plaintiff's Counsel

Defendants move, pursuant to Rules 1.9 and 3.7 (a) of the Rules of Professional Conduct, to disqualify Rachel Kierych, Esq. from representing plaintiff in his individual or derivative capacity (NYSCEF 628). Kierych filed a notice of appearance to serve as co-counsel to plaintiff in April 2019 in this 2013 action.

Defendants contend that Kierych represented defendant Embark Holdco in *Embark Holdco I LLC v. Embark Corp., et al.*, Index No. 652552/2014 (Holdco Action). Garg asserts that Kierych, in that capacity, obtained confidential records from EIFC's counsel by falsely representing that EIFC was a member of Embark Holdco (NYSCEF 621, ¶¶ 3-5 [stating, however, that the CPLR 3213 pleading was summarily dismissed "because it was based on a false affidavit submitted by [plaintiff] Raza Kahn" indicating that "Embark Holdco was . . . a wholly-owned subsidiary of EIFC"). Defendants contend that Kierych's representation of Embark Holdco is substantially related to issues in this action, such as the purported debt owed under the Embark Corp. Note that was the subject of the Holdco Action. Further, Embark Holdco is a defendant in this action, making Kierych's representation of plaintiff here directly adverse to her prior representation of Embark Holdco.

Defendants also contend that Kierych should be disqualified because she represented EIFC in connection with its loan servicing activities when plaintiff and Garg were equal shareholders of EIFC, and she cannot now represent one shareholder (plaintiff) against another (Garg). Garg states that Kierych represented EIFC for more than one year, prior to commencement of this action in 2013, when she was employed by the law firm Windells Marx Lane & Mittendorf, LLP (Windells), and that she continued to represent EIFC when she moved to her current law firm, Anderson Kill P.C. (*id.* ¶¶ 6-9).

Defendants also assert that Kierych was "highly involved" in the Arbitration, for which she appeared on behalf of EIFC and Activist, and later represented plaintiff in connection with his motion to reject the Arbitration settlement (*id.* ¶¶ 12-13). Defendants argue that, if the "propriety of the [Arbitration] settlement" is "permit[ted] to be relitigate[d]," Kierych will also become a necessary witness, precluding her representation of plaintiff under the advocate-witness rule.

Plaintiff responds that defendants' motion to disqualify Kierych is a gamesmanship tactic intended to harass plaintiff and cause plaintiff to incur undue costs and strip plaintiff of the financial means to proceed with this action. Plaintiff further responds that Kierych's prior representation of either EIFC, Embark Holdco, or plaintiff/defendant individually does not create an irrebuttable presumption of a conflict of interest and disqualification is not mandated here.

Specifically, plaintiff responds that there is no conflict of interest as to Embark Holdco as Garg has repeatedly admitted that there was never an attorney-client relationship between Kierych and Embark Holdco as "neither Khan nor EIFC has authority to act for Embark Holdco or" commence the Embark Holdco litigation (Holdco Action) (NYSCEF 780, ¶ 7 [Garg's 9/9/14 aff] [submitted in support of dismissal of the Holdco Action]); *see also id.* ¶¶ 6, 8 [asserting that Garg individually was the sole owner of Embark Holdco at that time and EIFC neither owned or managed Embark Holdco]; NYSCEF 781 [Garg's 9/24/14 email stating that he is "100% owner" of Embark Holdco]). The Holdco Action was dismissed by this court in September 2014 as EIFC lacked authority to commence the action (*see* Holdco Action, NYSCEF 104-105 [Index No.: 652552/2014]).

Plaintiff's submissions demonstrate that plaintiff, on behalf of EIFC, retained Kierych in relation to that failed Embark Holdco matter, not Garg individually or any defendant, and that there was no actual representation of Embark Holdco given EIFC's lack of authority to so act.

Plaintiff further responds that there is no appearance of impropriety as there was no violation any ethical rule or any attorney-client relationship between Kierych and defendants. Additionally, plaintiff responds that defendants' "conclusory allegation" that Kierych obtained confidential records is wholly unsupported in that defendants identify no "confidential" document whatsoever that was obtained by Kierych or her law firm in connection with the Holdco Action, that counsel does not have any information that would prejudice defendants, and any documents Kierych did obtain are the same as those in presently in the possession of defendants, none of which are unduly prejudicial in any manner.

As to defendants' contention that Kierych represented EIFC in loan servicing business operations, plaintiff responds that defendants mischaracterize the nature of EIFC's retaining Windells "to assist with the collection of defaulted student loans for the benefit of EIFC's client" (NYSCEF 769, ¶¶ 3-5 [plaintiff's aff in opposition to Motion 020]). Specifically, plaintiff asserts that EIFC acted as an intermediary by retaining counsel for its clients, for which Kierych litigated and appeared in connection with student-loan holders (and nonparties) Younomics Private Student Loan Trust and MRU 2007-A Trust, not on behalf of EIFC, which was represented by Kramer Levin and Schulte Roth & Zabel at that time (notably, Schulte Roth & Zabel, is defendants' present counsel in this action) (*id.*). In any event, plaintiff responds that there is no substantial relationship between that representation and the instant action, and the motion should be denied.

Finally, plaintiff responds that Kierych is not a necessary witness regarding the Arbitration and that defendants have failed to meet their burden of demonstrated facts that would support the allegation of a conflict or an appearance of impropriety, or any facts supporting their allegation that Kierych must be disqualified under the advocate-witness rule (*Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 32 AD3d 793, 794 [1st Dept 2006]). In any event, plaintiff argues that Kierych's testimony regarding the Arbitration would be minimal and cumulative/unnecessary given the ample record of the Arbitration proceeding,

which was settled by EIFC/Activist under the control of Garg, not plaintiff, and did not involve Kierych as a negotiator or drafter. With regard to negotiations with the Special Master, plaintiff asserts that five law firms participated in those discussions, including Anderson Kill P.C. and defendants' current and former counsel, and if Kierych must be disqualified for that reason, so must be defendants' counsel.

"The New York Code of Professional Responsibility precludes an attorney from representing any client with interests adverse to a former client on matters substantially related to the prior representation" (*Reem Contr. Corp. v Resnick Murray St. Assoc.*, 43 AD3d 369, 370-371 [1st Dept 2007]), citing DR 5-108 [a] [1], 22 NYCRR 1200.27 [a] [1]). "A party seeking disqualification of an adversary's lawyer must show: (1) the existence of a prior attorney-client relationship between the movant and opposing counsel; (2) that the matters involved in the prior and the present representations are 'substantially related'; and (3) that the interests of the present client and former client are materially adverse (*id.*).

Here, defendants have not met their burden of demonstrating each of those necessary elements. Kierych's attempted representation of Embark Holdco, on behalf of EIFC, does not suffice to establish materially adverse interests of her present client, plaintiff, and "former client," EIFC, since EIFC did not have the ability to commence litigation on behalf of Embark Holdco and the Holdco Action was promptly dismissed on that basis. To the extent that Windells represented EIFC in connection with EIFC's student loan clients, there is no indication of any actual attorney-client privilege between EIFC and Kierych based on defendants' conclusory submissions, and there is no substantial relation between that defaulted loan representation and this action.

Additionally, defendants have not demonstrated that there is an appearance of impropriety sufficient to mandate disqualification of Kierych as counsel to plaintiff. The Appellate Division, First Department has found that, if

"the representation does not violate another ethical or disciplinary rule, there can be no appearance of impropriety; that the mere appearance of impropriety alone is insufficient to warrant disqualification; and that the appearance of impropriety must be balanced against a party's right to the counsel of its choice as well as the possibility that the motion for disqualification may be motivated purely by tactical considerations"

(*Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 153 [1st Dept 2006] [internal citations omitted]).

On this record, defendants have neither demonstrated that disqualification is necessitated nor persuaded the court that disqualification is warranted or appropriate. Thus, defendants' motion to disqualify Kierych/Anderson Kill P.C. as co-counsel to plaintiff is denied.

The court has considered defendants' remaining arguments and, to the extent that they are properly before the court on Motions 014, 016, 017, 018, 019, and 020, finds them unavailing, without merit, or otherwise unpersuasive.

Accordingly, it is

As to Motion Sequence Number 014:

ORDERED that the motion is denied; and it is further

ORDERED that the subpoenas, however, are limited as set forth in the decision above; and it is further

As to Motion Sequence Number 015:

ORDERED that the motion is granted in part as set forth above and defendants shall produce documents within 10 days of this decision; and it is further

As to Motion Sequence Number 016:

ORDERED that the motion is granted in part to the extent that only the confidential settlement agreements may be filed under seal; and it is further

ORDERED that the portion of defendants' motion that is denied is without prejudice to a new motion, to be filed within 10 days in compliance with the current Part Rules or else waived; and it is further

ORDERED that, if there is no new motion to seal and/or redact filed within 10 days of entry of this decision and order on NYSCEF by the court, the parties shall, three-days after the 10-day period expires, replace the temporarily sealed and/or redacted documents submitted for this motion with unredacted copies in compliance with the Part 48 Rules and Procedures, last updated July 29, 2019; and it is further As to Motion Sequence Number 017:

ORDERED that the motion is denied without prejudice to a new motion, to be filed within 10 days in compliance with the current Part Rules or else waived; and it is further

ORDERED that, if there is no new motion to seal and/or redact filed within 10 days of entry of this decision and order on NYSCEF by the court, the parties shall, within three days of expiration of the 10-day period, replace the temporarily sealed and/or redacted documents submitted for this motion with unredacted copies in compliance with the Part 48 Rules and Procedures, last updated July 29, 2019, except that references to defendant Vishal Garg's children may remain redacted as set forth above; and it is further

As to Motion Sequence Number 018:

ORDERED that the motion is granted in part and the confidential settlement agreements, Garg's affidavit in opposition to that motion to reject the settlement, the expert's report filed in connection with the Arbitration, and the witness statement of Raja Visweswaran in support of the settlements may be filed under seal, as outlined in the above decision; and it is further

ORDERED that references to confidential settlement agreements may remain redacted as set forth above; and it is further

ORDERED that the portion of defendants' motion that is denied is without prejudice to a new motion, to be filed within 10 days in compliance with the current Part Rules or else waived; and it is further

ORDERED that, if there is no new motion to seal and/or redact filed within 10 days of entry of this decision and order on NYSCEF by the court, the parties shall, within three days of expiration of the 10-day period, replace all other temporarily sealed and/or redacted documents submitted for this motion with unredacted copies in compliance with the Part 48 Rules and Procedures, last updated July 29, 2019; and it is further

As to Motion Sequence Number 019:

ORDERED that the motion is granted in part to the extent that only the confidential settlement agreements may be filed under seal; and it is further

ORDERED that the portion of defendants' motion that is denied is without prejudice to a new motion, to be filed within 10 days in compliance with the current Part Rules or else waived; and it is further

ORDERED that, if there is no new motion to seal and/or redact filed within 10 days of entry of this decision and order on NYSCEF by the court, the parties shall, three-days after the 10-day period expires, replace the temporarily sealed/redacted documents submitted for this motion with unredacted copies in compliance with the current Part Rules, except for references to Garg's children; and it is further;

As to Motion Sequence Number 020:

ORDERED that the motion is denied.

Motion Seq. No. 014

_____/_____/_____
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

Motion Seq. No. 015

10/4/19
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

ANDREA MASLEY, J.S.C.

Motion Seq. No. 016

10/4/19
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

ANDREA MASLEY, J.S.C.

Motion Seq. No. 017

10/4/19
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

ANDREA MASLEY, J.S.C.

Motion Seq. No. 018

10/4/19
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

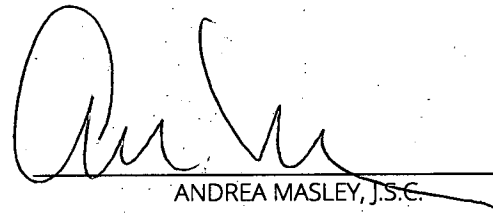
APPLICATION:

CHECK IF APPROPRIATE:

ANDREA MASLEY, J.S.C.

Motion Seq. No. 019

10.4.19
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

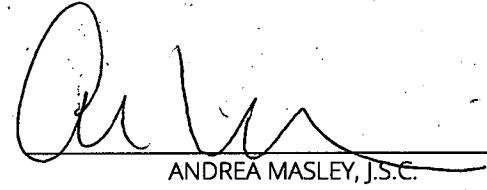
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

Motion Seq. No. 020

10.4.19
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: