Dantzig v ORIX AM Holdings, LLC
2019 NY Slip Op 33030(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 653368/2016
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** IAS MOTION 48EFM

Justice

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ARON DANTZIG,

Plaintiff,

- v -

ORIX AM HOLDINGS, LLC, ORIX ASSET MANAGEMENT, LLC, ORIX AM INVESTMENTS, LLC, ORIX USA ASSET MANAGEMENT, ORIX CORPORATION, and ORIX USA CORPORATION,

Defendants.

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INDEX NO. 653368/2016

MOTION DATE

MOTION SEQ. NO. 002 003 004 005

DECISION + ORDER ON MOTION

MASLEY, J:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 109, 110, 111, 112, 113, 114, 115, 140, 145, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 201

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 141, 146, 170, 171, 172, 173, 213, 214, 215, 216

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 142, 147, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 143, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 174, 199, 200, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212

were read on this motion to/for SANCTIONS.

Background

Plaintiff Aron Dantzig allegedly entered into various written agreements, in September 2011, with non-party Richard Baxter, and defendants ORIX AM Holdings LLC, ORIX Asset Management LLC, ORIX AM Investments LLC, ORIX USA Asset

Management, ORIX Corporation, and ORIX USA Corporation (collectively, ORIX defendants). (NYSCEF Doc. No. 36, First Amended Complaint at ¶¶ 2, 31.) Pursuant to these written agreements, the ORIX defendants promised to invest in Fund I and later Fund II, in exchange for Dantzig and Baxter's services as managers and co-investors of these investments. (*Id.* at ¶¶ 31, 35.) Dantzig and Baxter managed these investments through nominal defendants New Health Capital Partners GP LLC, New Health Capital Partners Management LP, New Health Capital Partners Management GP LLC, and New Health Capital Partners Fund I, LLC (collectively NHCP). (*Id.* at ¶¶ 23, 31; *see also* NYSCEF Doc. No. 110.)

Fund I was successful, and by May 2013, NHCP had allegedly met the preconditions in the agreements that would have triggered a $50,000,000 investment by the ORIX defendants in Fund II. (*Id.* at ¶¶ 38, 44.) Nevertheless, Baxter informed Dantzig and the ORIX defendants of his intention to resign from NHCP and work for a competitor. (*Id.* at ¶¶ 47, 49.) This resignation was set to trigger a host of provisions in the written agreements ranging from anti-competitive restrictive covenants that the ORIX defendants and Dantzig could enforce, to forfeitures of Baxter's compensation and equity interests. (*Id.* at ¶¶ 51, 52, 55.) Allegedly, these circumstances caused Baxter and the ORIX defendants to enter into a secret agreement by which the ORIX defendants promised to release Baxter from his obligations in exchange for his cooperation in terminating Dantzig and assisting the ORIX defendants take control of Fund I. (*Id.* at 59, 60.)

The ORIX defendants and Baxter allegedly performed under this secret agreement, and on July 11, 2013, they provided a notice of termination without cause to Dantzig, effective January 11, 2014. (*Id.* at ¶ 74.) The ORIX defendants allegedly

disseminated false information that Dantzig's employment was effective immediately. (*Id.* at ¶ 79.) Accordingly, this information cast Dantzig in a negative light insofar as investors believed that he was terminated for cause as the result of wrongdoing. (*Id.*) The ORIX defendants also began implementing the dissolution of Fund I, and NHCP. (*Id.* at ¶ 77.) During this time, the ORIX defendants allegedly denied Dantzig compensation that he previously had earned pursuant to the written agreements, as well as compensation that he allegedly should have earned throughout the dissolution process. (*Id.*) Nevertheless, Dantzig offered to purchase the assets of Fund I, but the ORIX defendants sold the assets to other parties for a price lower than that offered by Dantzig. (*Id.* at ¶ 85.)

On June 24, 2016, Dantzig commenced this action by summons with notice (NYSCEF Doc. No. 1.) This action was removed to the United States District Court for the Southern District of New York. (NYSCEF Doc. No. 2.) On March 22, 2017, Dantzig filed the First Amended Verified Complaint alleging causes of action for breach of the written agreements, inducing breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, tortious interference with prospective economic advantage, breach of fiduciary duty, quantum meruit, unjust enrichment, constructive trust. Alternatively, Dantzig alleged derivative causes of action for breach of contract, inducing breach of contract, and tortious interference with contract. The ORIX defendants, and NHCP moved to dismiss. Hon. Louis L. Stanton (SDNY) granted the motions with respect to Dantzig's claims for tortious interference with contract, tortious interference with prospective economic advantage, quantum meruit, unjust enrichment and for constructive trust. (NYSCEF Doc. No. 39 at 26.) The

balance of the action was remanded back to the Commercial Division on February 2, 2018. (NYSCEF Doc. No. 6 at 4; NYSCEF Doc. No. 35.)

Dantzig has since become an owner and Managing Partner of a business known as Capital IP Investment Partners LLC (Capital IP). (NYSCEF Doc. No. 76 at ¶ 6; NYSCEF Doc. No. 171 at ¶¶ 3, 5.)

Motion Sequence Number 003[1]

In motion sequence number 003, the ORIX defendants move pursuant to CPLR 3124 and 3126 to compel Dantzig to produce certain documents or preclude him from offering evidence at trial concerning future compensation he allegedly would have received from NHCP. Dantzig opposes, arguing that the information sought is irrelevant, not in his possession, or duplicative of disclosure previously provided.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words, 'material and necessary', are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, [1968].) "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"–i.e., relevant–regardless of whether discovery is sought from another party or a nonparty." (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [citations omitted].)

[1] The motions are considered out of turn for the purpose of brevity and organization.

ORIX Defendants' Supplemental Requests 1-10

The ORIX defendants' supplemental requests 1-10 are relevant to show Dantzig's mitigation of damages and loss of future profits. Plaintiffs are "required to mitigate damages upon breach," and therefore, a lack of diligent effort to mitigate damages is a defense available to defendants. (*Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74 [1966].) "It [is] defendants' burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages." (*LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107 [1st Dept 2007].) Should the plaintiff mitigate its damages through adequate cover, lost profits may not be recovered. (*Jay N Jen, Inc. v Polge Seafood Distrib., Inc.*, 70 AD3d 1447, 1449 [4th Dept 2010]; NY PJI 4:20, Comment, Lost Future Profits [Note: online treatise].)

Indeed, a plaintiff "may only recover damages for loss of future profits if it 'demonstrate[s] with certainty that such damages have been caused by the breach ..., the alleged loss must be capable of proof with reasonably certainty ... not [] merely speculative, possible or imaginary ... and the particular damages [must have been] fairly within the contemplation of the parties.'" (*Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 87 [1st Dept 2012][internal citation omitted].) "'When the existence of damage is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied recovery of substantial damages,' although, of course, the plaintiff must show 'a stable foundation for a reasonable estimate' of damages." (*Id.* at 89 [internal citations omitted].) "New York law does not countenance damage awards based on [s]peculation or conjecture." (*Id.* citing *Wolff & Munier, Inc. v Whiting-Turner Contr. Co.*, 946 F2d 1003, 1010 [2d Cir 1991][internal quotation marks omitted].)

Request No. 1 for Capital IP's formation and governing agreements is relevant for loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 5.)

Request No. 2 for any employment or services agreements between Dantzig and Capital IP goes to Dantzig's loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 6.)

Request No. 3 for Capital IP's corporate organization charts for the period of January 16, 2014, to the present is relevant for loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 6.)

Request No. 4 for Capital IP's capital structure, including the sources of capital and the terms on which funds are invested in Capital IP, is also relevant to establish loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 7.)

Request No. 5 for Capital IP's financial statements for the period of January 16, 2014 to the present is relevant to establish loss of future profits and mitigation of damages.

Request No. 6 for all management projections of Capital IP's financial performance between the date of the request and January 1, 2024 goes to loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 8.)

Request No. 7 for all management projections of the financial performance of Capital IP's investments between the date of this request and January 1, 2024 goes to loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 9.)

Request No. 8 for documents sufficiently showing Dantzig's business relationship to Capital IP, including the services that Dantzig provides to Capital IP, the terms on which Dantzig was compensated, and his actual compensation since January 16, 2014 goes to loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 9.)

Request No. 9 for Capital IP's list of, or other documents sufficient to show, its investments for the period of January 16, 2014 to the present goes to loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 10.)

Request No. 10 for documents sufficient to show Dantzig's shares of any carried interest, incentive income, investment income or management fees of Capital IP and the actual and projected values of such shares goes to loss of future profits and mitigation of damages. (NYSCEF Doc. No. 102 at 10.)

Accordingly, Dantzig is directed to comply with these requests. To the extent he contends that the documents sought do not exist, Dantzig is directed to provide an affidavit to that effect and explain how Capital IP has been operating without such documents.

ORIX Defendants' Supplemental Interrogatory Nos. 9 & 12-17

Supplemental Interrogatory Nos. 9 & 12-17 are relevant, but to the extent they are overly broad, the court declines to compel Dantzig's compliance. CPLR 3131 provides that "[i]nterrogatories may relate to any matters embraced in the disclosure requirement of section 3101" and they "may require copies of such papers, documents or photographs as are relevant to the answers required ..." (CPLR 3131.) Although "CPLR 3131 provides that copies of documents relevant to the answers required may be requested ... [i]t does not authorize an all-inclusive demand for the production of documents of any kind." (*Midland Glass Co. v American Can Co.*, 38 AD2d 820, 820-821 [1st Dept 1972].) Interrogatories that are irrelevant, overly broad and burdensome are improper. (*Alba v Ford Motor Co.*, 111 AD3d 68, [1st Dept 1985].) Similarly, interrogatories that "call for an opinion as to a conclusion of law" are improper. (*Pineda v Roerig & Co.*, 43 AD2d 827, 827 [1st Dept 1974].)

"Contention interrogatories request the support for a party's allegations and claims asserted in pleadings." (3 N.Y.Prac., Com. Litig. in New York State Courts § 28:10 [4th ed 2019][Note: online treatise].) The typical form of a contention interrogatory is as follows: "[s]tate in detail all facts supporting the allegation that Defendant breached the agreement between the parties." (*Id.*)

Interrogatory Request No. 9 for all statements by any of the ORIX defendants that Dantzig alleges to have been disparaging or defamatory for purposes of his claim at ¶¶ 78-79 in the Amended Complaint including the individual's identity, the recipients of the statement, the statement's content and date, whether the statement was in writing, the document in which the statement was made, and "all evidence of the statement" is overly broad. (*Alba*, 111 AD3d at 69; NYSCEF Doc. No. 102 at 23.) To the extent Dantzig is asked for "all evidence of the statement," Dantzig need not comply. However, the balance of the contention interrogatory is proper.

Interrogatory Request No. 12, to state all facts supporting Dantzig's claim that he is entitled to at least $5,000,000 for management fees owed between the expiration of the Investment Period and the remainder of Fund I, is a proper contention interrogatory. (NYSCEF Doc. No. 102 at 26.)

Interrogatory Request No. 13 to state all facts supporting Dantzig's claim that the projected gross national profit of NHCP is $44,000,000 is a proper contention interrogatory. (NYSCEF Doc. No. 102 at 26.)

Interrogatory Request No. 14 to state all facts supporting Dantzig's claim that he suffered damages for the alleged improper enforcement of his non-compete provision is an appropriate contention interrogatory. (NYSCEF Doc. No. 102 at 27.)

Interrogatory Request No. 15 to state all facts supporting Dantzig's claim that the value of his interest in management fees for Fund II is at least $10,000,000 is an appropriate contention interrogatory. (NYSCEF Doc. No. 102 at 27.)

Interrogatory Request No. 16 to state all facts supporting Dantzig's claim that the value of his interest in investment income for Fund II is at least $14,000,000 is a proper contention interrogatory. (NYSCEF Doc. No. 102 at 28.)

Interrogatory Request No. 17, which states, "[i]identify everything that you have done to mitigate the damages that you have alleged in this Action," is overly broad. (*Id.* at 29.) Nevertheless, it "improperly calls for an opinion as to a conclusion of law." (*Pineda*, 43 AD2d at 827.) Dantzig need not comply with this request.

Dantzig is directed to comply with these supplemental interrogatory requests as set forth above.[2]

ORIX Defendants' Interrogatory 4

Interrogatory 4 requests "[a]ll documents concerning the financial performance of each of the NHCP entities, including but not limited to financial statements, valuations, and management projections." (NYSCEF Doc. No. 78 at 7.) This is not an interrogatory, but rather an all-inclusive demand for the production of documents. (*Midland Glass Co. v American Can Co.*, 38 AD2d 820, 820-821 [1st Dept 1972].) Dantzig need not comply.

[2] At the Preliminary Conference, this court directed that "Contention interrogatories pursuant to Commercial Division Rule 11-a(d) shall be served by all parties within thirty (30) days after the deadline for the disclosure of expert witnesses." (NYSCEF Doc. No. 32 at ¶ 5[c].) This directive remains operative.

Possession, Custody and Control of Information

The balance of Dantzig's arguments are without merit especially those premised on his inability to produce the information sought because he lacks custody and control or is otherwise bound by confidentiality agreements. CPLR 3120 (1) (i) provides that "any party may serve on any other party a notice ... to produce and permit the party seeking discovery ... to inspect, copy ... or photograph any designated documents or any things which are in the possession, custody or control of the party ... served." The phrase "possession, custody or control" allows for discovery "from parties that ha[ve] practical ability to request from, or influence, another party with the desired discovery documents." It is construed to encompass constructive possession. (*Id.* [Practice Commentary]) Indeed, "[c]ontrol does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." (*Id.* citing *Bank of New York v Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135, 146 [SD NY 1997.)

Here, Dantzig swears in his affidavit that he and a partner "jointly formed Capital IP in 2014" and that they serve as "Managing Members." (NYSCEF Doc. No. 171 at ¶¶ 3, 5.) Accordingly, Dantzig has the practical ability to obtain the requested documents from Capital IP. Although Dantzig further contends that he may not produce the documents sought because "Capital IP, the investors and the investments all value confidentiality," it is settled that "even private materials may be subject to discovery if they are relevant." (*Forman v Henkin*, 30 NY3d 656, 666, [2018].) To the extent such

documents contain "proprietary" and "competitively damaging" information, the parties may designate them accordingly.

The motion is granted as set forth above.

Motion Sequence Number 002

In motion sequence number 002, nominal defendants NHCP move pursuant to CPLR 3124 to compel Dantzig to produce all communications between or among personnel of NHCP and NHCP's counsel. Dantzig opposes, arguing that NHCP has failed to show that it is the true client of the communications at issue.

The proponent of the attorney client privilege bears the burden of establishing that the information sought is immune from disclosure. (*People v Greenberg*, 50 AD3d 195, 200 [1st Dept 2008].) The attorney client privilege belongs to the client. (*People v Osorio*, 75 NY2d 80, 84 [1984].) For instance, in the corporate context, "the corporation and its current board of directors control the attorney-client privilege with regards to confidential communications arising out of general business matters." (*People v Greenberg,* 50 AD3d at 201.)

The attorney-client privilege attaches if information is disclosed in confidence to the attorney for the purposes of obtaining legal advice or service. (*People v Osorio*, 75 at 84.) The privilege extends to communications from attorney to client. (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991].) "[T]he communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." (*Id.* at 377-378 [internal quotations and citation omitted].) "The communication itself must be primarily or predominantly of a legal character. (*Id.* at 378 [citation omitted]).

"[A]ttorney work product only applies to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." (*Brooklyn Union Gas Co. v American Home Assur. Co.,* 23 AD3d 190, 190-191 [1st Dept 2005][citation omitted]). "The prospect of litigation may be relevant to the subject of work product and trial preparation materials." (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 at 380 [citation omitted].) The burden of satisfying each element of the work product privilege rests on the party asserting it. (*John Blair Communications v Reliance Capital Group,* 182 AD2d 578, 579 [1st Dept 1992].) "The workproduct privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation." (*Coastal Oil N.Y., Inc. v Peck*, 184 AD2d 241, 241 [1st Dept 1992][citation omitted].)

Communications Involving NHCP's Personnel and Counsel

Dantzig has failed to meet his burden of establishing that communications between or among personnel of NHCP and NHCP's counsel are immune from disclosure. Any attorney client privilege that protects these communications belongs to NHCP, the nominal defendants who are requesting them. The nominal defendants control the attorney-client privilege concerning communications between or among their personnel and counsel, not Dantzig. Additionally, Dantzig fails to submit an attorney affidavit showing that any of these communications were generated by any attorney for the purpose of litigation, and again, its NHCP's privilege to assert. Accordingly, the motion is granted insofar as Dantzig is directed to produce all communications between or among personnel of NHCP and NHCP's counsel.

Motion Sequence Number 004

In motion sequence number 004, the ORIX defendants move pursuant to CPLR 3124 to compel Dantzig to (1) produce all communications with NHCP's legal counsel, (2) produce all responsive communications with nonparty Lawrence Bain and (3) correct the deficiencies in Dantzig's privilege log. Dantzig opposes, again arguing that the attorney-client and attorney work product privileges shield these documents from disclosure.

Communications with NHCP's Legal Counsel

As previously noted, Dantzig is directed to produce all communications between or among personnel of NHCP and NHCP's counsel to NHCP. Insofar as the ORIX defendants also seek a portion of these communications, NHCP, to whom the privilege belongs, has not asserted it, nor opposed the motion. Accordingly, Dantzig is directed to produce all communications with NHCP's legal counsel to the ORIX defendants.

Category No. 28 Communications Involving Lawrence Bain

With respect to the documents involving Lawrence Bain (NYSCEF Doc. No. 111 at 5, Category 28), Dantzig fails to meet his burden of establishing that the information sought is immune from disclosure. (*People v Greenberg*, 50 AD3d at 200.) Generally, communications made between a client and counsel in the known presence of a third party are not privileged. (*People v Osorio*, 75 NY2d 80, 84 [1989].) Nevertheless, "statements made to the agents or employees of the attorney or client ... retain their confidential (and therefore, privileged) character, where the presence of such third parties is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality." (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616,624-625 [2016].)

In his affidavit, Dantzig fails to state or show that he had a reasonable expectation of confidentiality concerning Bain's participation in the communications.[3] Moreover, Dantzig fails to state or show that Bain's participation was "necessary to enable the attorney-client communication." (*Ambac Assur. Corp.*, 27 NY3d at 625.) Indeed, the attorney affirmations submitted by Dantzig merely state that "Bain had the relevant experience to help provide legal advice to ... Dantzig" (NYSCEF Doc. No. 177 at ¶ 8) and that "Bain had the knowledge and experience to help us provide legal advice to Mr. Dantzig." (NYSCEF Doc. No. 176 at ¶ 8; NYSCEF Doc. No. 177 at ¶ 8.) Both affirmations are insufficient and conclusory especially because Dantzig has not articulated or shown that Bain is an attorney, let alone Dantzig's attorney.

Additionally, Dantzig fails to meet his burden of establishing that the communications involving Bain are attorney-work product. (*John Blair Communications,* 182 AD2d at 579.) None of the attorney affirmations submitted by Dantzig show "that the information was generated by an attorney for the purpose of litigation." (*Coastal Oil N.Y., Inc.,* 184 AD2d at 241[citation omitted].) Indeed, none of the affidavits submitted state that the documents concerning Bain are materials uniquely the product of a lawyer's learning and professional skills. (*Brooklyn Union Gas Co.,* 23 AD3d at 190-191 [citation omitted].) Therefore, Dantzig is directed to produce the communications under Category No. 28 on the privilege log. (NYSCEF Doc. No. 111 at 5.)

[3] Despite swearing under oath that he and Bain "have a father-son relationship," Dantzig produces no affidavit or sworn testimony from Bain. (NYSCEF Doc. No. 178 ¶ 7.)

Privilege Log Format

With respect to the alleged deficiencies in Dantzig's privilege log, Dantzig is directed to conform the privilege log to Rule 11-b of the Rules of the Commercial Division of the Supreme Court. This rule provides:

> "The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative."

(Uniform Rules for Trial Cts [22 NYCRR] § 202.70 Rule 11-b[b][1].) Here, Dantzig failed to provide a certification for each category. (NYSCEF Doc. No. 111.) Remedying this deficiency will ultimately resolve any specificity concerns raised by defendants in connection with the categories used by Dantzig. Accordingly, this prong of relief requested in defendants' motion is granted to the extent set forth above.

The motion is granted.

Motion Sequence Number 005

In motion sequence number 005, Dantzig moves pursuant to CPLR 3126(3) for spoliation sanctions. These sanctions are (1) for a finding that Dantzig's damages include those that would have flowed from Fund II, (2) that the ORIX defendants breached their agreements by disparaging Dantzig, (3) precluding the ORIX defendants

from offering proof contrary to Dantzig's evidence concerning the closing and performance of Fund II, and the value of Fund I, (4) for an adverse inference that the allegedly destroyed documents would not support the ORIX defendants' position or contradict Dantzig's evidence and (5) attorneys' fees and costs associated with this application.

Dantzig contends that the ORIX defendants took control of NHCP and disposed of all of NHCP's emails and electronic documents (ESI) held on a server, Rackspace. Dantzig maintains that the ORIX defendants destroyed this ESI in spite of two letters from Dantzig, requesting that the ORIX defendants preserve the ESI (September 30, 2013 Letter [NYSCEF Doc. No 134] and November 5, 2013 Letter [NYSCEF Doc. No. 136]). Without this ESI, inclusive of all NHCP employee emails such as those involving Baxter, Dantzig argues that he cannot show that the ORIX defendants failed to maximize the value of NHCP in winding down Fund I. Without all emails sent to NHCP email addresses used by Dantzig or Baxter, Dantzig contends that he cannot prove disparagement related damages insofar as he cannot show that clients were inquiring about his termination. Additionally, Dantzig asserts that without NCHP emails including Baxter's, Dantzig cannot show the expected compensation of Fund II insofar as he cannot produce emails about potential investors and investments. The ORIX defendants oppose. They argue that they had no duty to preserve the ESI and that Dantzig failed to establish a culpable state of mind, or the ESI's relevance.

"A party that seeks sanctions for spoliation of evidence must show [1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a 'culpable state of mind,' and [3] 'that the destroyed evidence was relevant to the party's claim or defense such

that the trier of fact could find that the evidence would support the claim or defense.'" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015][citations omitted]). As to the first prong, an obligation to preserve relevant evidence arises when a party reasonably anticipates litigation. (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012]). Generally, "[a] reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." (*Id.*) With respect to the second prong, "[a] culpable state of mind ... includes ordinary negligence." (*Id.* at 45 [internal quotation marks and citations omitted].) As to third prong, "[t]he intentional or willful destruction of evidence is sufficient to presume relevance." (*Id.* [internal quotation marks and citations omitted].) Additionally, gross negligence raises the presumption of relevance. (*Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 171 AD3d 680, 680 [1st Dept 2019].)

A spoliation sanction must "reflect an appropriate balancing under the circumstances." (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016][internal quotation marks and citation omitted].) For instance, "[w]here spoliation of evidence deprives a plaintiff of any means of establishing a prima facie case, striking the answer is an appropriate remedy." (*Melcher v Apollo Med. Fund Mgt. LLC*, 105 AD3d 15, 24 [1st Dept 2013].) Alternatively, a court may impose an adverse inference charge. (*Arbor Realty Funding, LLC,* 140 AD3d at *610.*)

Control of The ESI and The Obligation to Preserve It

Here, the ORIX defendants had control over the ESI and an obligation to preserve it at the time of its destruction. It is undisputed that Dantzig transferred control

of the ESI to the ORIX defendants, who maintained that control when they requested to cancel services from Rackspace on June 28, 2014. (*see e.g.* NYSCEF Doc. Nos. 156, 165.) The ORIX defendants also had an obligation to preserve the ESI because a reasonable anticipation of litigation arose when Dantzig sent the September 30, 2013 Letter and November 5, 2013 Letter. (NYSCEF Doc. Nos. 134, 136.) Specifically, in the September 30, 2013 Letter, Dantzig stated,

> "these Documents (*including any and all emails*) are particularly important to an understanding of NHCP, including ... *to understand any potential wrong-doing by the Board of NHCP in each Board member's individual and collective capacity*. The failure of NHCP and ORIX ... to retain full and complete copies ... directly or indirectly related to NHCP and its Members ... would be substantially and broadly prejudicial to me as a Member of NHCP."

(NYSCEF Doc. No. 134[emphasis added].) Additionally, the November 4, 2013 Letter, restated the above, but this time, bolded and underlined the phrase, "to understand any potential wrong-doing by the Board of NHCP." (NYSCEF Doc. No. 136.) Dantzig then added,

> "there is an absolute legal duty to retain, protect, and preserve all material pertaining to *potential claims* ... which may arise as a result of ORIX's participation and involvement with NHCP, and the substantial control ORIX and Mr. Baxter continues to exert on NHCP ... *ORIX and Mr. Baxter ... have an obligation to ensure the preservations of these materials occur both at NHCP and ORIX*."

(NYSCEF Doc. No. 136[emphasis added].) Accordingly, the ORIX defendants were on notice of a credible probability that they would become involved in litigation. The first prong is established.

Culpable State of Mind

The ORIX defendants intentionally destroyed the ESI. It is undisputed that the ORIX defendants requested cancellation of services from Rackspace less than a year after receiving the September 30, 2013 Letter and November 5, 2013 Letter. (NYSCEF Doc. No. 165.) Upon receipt of this request, Rackspace sent an email explicitly stating, "Please contact us immediately if this cancellation was requested in error." (*Id.*) The ORIX defendants, however, made no such contact, and the ESI was destroyed. Accordingly, the second prong is established.

Relevance

Because the ESI was intentionally destroyed, the court presumes the relevance of ESI stored on Rackspace. Therefore, the third prong is established.

Sanctions

In fashioning a spoliation sanction, Danzig has not articulated or shown that the destruction of the ESI has deprived him of any means of establishing a prima facie case. Although Dantzig asserts that without the ESI, he cannot prove the expected compensation of Fund II, disparagement damages, or the failure of the ORIX to maximize the value of NHCP, these assertions are conclusory, and unpersuasive in light of the other disclosure devices available. Accordingly, the proposed sanction that is tantamount to striking the answer - finding that the ORIX Defendants breached their agreements by disparaging Dantzig - is denied. Finding that Danzig's damages include those that would have flowed from Fund II, or precluding the ORIX defendants from offering proof contrary to Dantzig's evidence concerning the funds also do not reflect an appropriate balancing under these circumstances. Accordingly, the most appropriate sanction here, as proposed by Dantzig, is an adverse inference that the destroyed ESI

would not contradict Dantzig's evidence at trial. The motion is granted to the extent set forth above.

It is,

ORDERED that Motion Sequence Number 002 is granted to the extent set forth in this decision; and it is further

ORDERED that Motion Sequence Number 003 is granted to the extent set forth in this decision; and it is further

ORDERED that Motion Sequence Number 004 is granted to the extent set forth in this decision; and it is further

ORDERED that Motion Sequence Number 005 is granted to the extent set forth in this decision.

Motion Seq. No. 002

10/10/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

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

Motion Seq. No. 003

10/9/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

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

Motion Seq. No. 004

10/9/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

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

Motion Seq. No. 005

10/9/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

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