

QWIL PBC & Enter, Inc. v Landow
2020 NY Slip Op 30900(U)
March 30, 2020
Supreme Court, New York County
Docket Number: 653605/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

-----X
QWIL PBC & ENTER, INC.

Plaintiff,

- v -

JONATHAN LANDOW, PARAMOUNT

Defendant.

-----X

INDEX NO.	653605/2019
MOTION DATE	03/30/2020
MOTION SEQ. NO.	003 007
DECISION + ORDER ON MOTION	

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 78, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 179

were read on this motion to/for CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203

were read on this motion to/for SANCTIONS

Upon the foregoing documents and for the reasons set forth below, Qwil PBC (**Qwil**) and Enter, Inc.'s (**Enter**, and together with Qwil, the **Petitioners**) motions (i) to hold Dr. Jonathan Landow in contempt of court (Mtn. Seq. No. 003) and (ii) for sanctions (Mtn. Seq. No. 007) against Dr. Landow, Paramount Medical Services, P.C. (**Paramount**), Preferred Medical P.C. (**Preferred**), and Sovereign Medical Services, P.C. (**Sovereign**; Paramount, Preferred, and together with Sovereign, hereinafter, collectively the **Landow Entities**) are granted. The Landow Entities together with Dr. Landow are hereinafter referred to as the Respondents.

THE RELEVANT FACTS AND CIRCUMSTANCES

On June 24, 2019, the Petitioners commenced this proceeding by filing a petition (the **Petition**) for attachment in aid of arbitration pursuant to CPLR § 7502 (c) against Dr. Landow, individually and the Landow Entities (NYSCEF Doc. No. 1), and an *ex parte* order to show cause (the **OSC**) seeking, among other relief, to seal the file, a temporary restraining order in aid of attachment, and expedited discovery in aid of arbitration (NYSCEF Doc. No. 2). In support of the OSC, the Petitioners submitted the affidavit of Johnny Reinsch, Chief Executive Officer of Qwil (NYSCEF Doc. No. 5), and Andrew Olson, Vice President of Finance of Enter (NYSCEF Doc. No. 11).

According to the supporting affidavits, Dr. Landow and the Landow Entities entered into a certain Platform Services Agreement (the **PSA**), dated January 11, 2018 (NYSCEF Doc. No. 6), and a Contractor Products and Services Agreement (NYSCEF Doc. No. 7; hereinafter, the **Qwil Agreement**); the PSA together with the Qwil Agreement, hereinafter, collectively, the **Agreements**), pursuant to which the Petitioners were granted a security interest in certain medical accounts receivable (the **Unpaid Earnings**) of Dr. Landow and the Landow Entities and acquired the right to be repaid directly by the insurance companies for such Unpaid Earnings (Qwil Agreement § 6). The Petitioners perfected their security interest in the Unpaid Earnings by filing UCC-1 Financing Statements (NYSCEF Doc. No. 8-10). As part of the deal, Qwil purchased the Unpaid Earnings at an advance rate and Enter collected and serviced the payments (Qwil Agreement § 5; Reinsch Aff., ¶ 9; Olson Aff. ¶ 13). Qwil and Enter received a percentage of Unpaid Earnings and other fees for their services as set forth in certain Enter Solutions Pricing

Schedules (the **Pricing Schedules**) executed by Dr. Landow and the Landow Entities (NYSCEF Doc. No. 13-16).

The Petitioners allege that Qwil advanced over \$10 million to Dr. Landow and the Landow Entities against their Unpaid Earnings pursuant to the Agreements, but beginning in January 2019, Dr. Landow and the Landow Entities blocked their access to the proceeds from the Unpaid Earnings and misdirected the funds among various accounts to deprive the Petitioners of the payments they were owed. They allege that, to date, they have not received the fees that they are owed for their services and have received only approximately \$2.5 million of their total capital outlays of over \$10 million to Dr. Landow and the Landow Entities.

The Petitioners filed the Petition and OSC on June 24, 2019 seeking to preserve the status quo in anticipation of pending arbitration relating to the Respondents' alleged breach of the Agreements by attaching \$2,253,429.27 from certain accounts held by the Respondents.

Significantly, during the June 24, 2019 hearing (the **June 24 Hearing**), and together with Petitioner's counsel, the court contacted counsel for the Respondents, Charles H. Horn, by telephone, to (i) notify him that the court was issuing a temporary restraining order both against Dr. Landow personally and against the Landow Entities and cautioned Mr. Horn that Dr. Landow would be held in contempt of court for any violation of its terms, and (ii) to give him an opportunity to file opposition papers. The court granted Mr. Horn a brief recess to confer with Dr. Landow to both advise him of the TRO and to determine how long he would need to submit opposition papers. Following the recess, Mr. Horn requested a period of two weeks to allow him

to submit opposition papers. The court agreed to Mr. Horn's request and reminded him that the TRO was in effect.

At the June 24 Hearing, the court issued a temporary restraining order in aid of arbitration (the **June 24 TRO**) which provided that it was

ORDERED that pending the hearing of this Order to Show cause, temporary restraining order in aid of arbitration, pursuant to CPLR § 7502(c) and CPLR § 6210, is granted prohibiting Respondents *Landow*, Preferred, Paramount, and Sovereign and their agents and affiliates from disposing of, processing, routing, facilitating, selling, transferring, encumbering removing, paying over, conveying or otherwise interfering with Respondents' or their affiliates' property, debts, accounts, receivables, rights of payments, or tangible or intangible assets of any kind up tot the amount of \$2,253,429.27 – the principal amount of the debt, pending a hearing on this Order to Show Cause (NYSCEF Doc. No. 66 at 3).

And significantly, following the foregoing typed text to memorialize the conversation with Mr. Horn, the court had the following language hand written on to the OSC:

+ counsel for Δ having been advised and instructed to advise his clients accordingly

(*id.*)

The TRO also directed J.P. Morgan Chase Bank, N.A. (**Chase**) to:

hold and retain within its control and prohibit Respondents or their agents or affiliates from withdrawing . . . or otherwise disposing of any . . . funds or other property up to the amount of \$2,253,429.27, that are owned by, held in the name of, for the benefit of, or otherwise controlled by, directly or indirectly, any of the Respondents or their affiliates, in whole or in part (*id.*).

The Petitioners' papers submitted in support of the June 24 TRO specified five known accounts associated with the Respondents held at Chase (the **Chase Accounts**) with account numbers ending in *****6300, ***** 7016, ***** 3059, ***** 3211, and ***** 7982.

In response to the June 24 TRO, Chase issued a letter, dated July 2, 2019 (the **Chase Response Letter**), setting forth a list of all accounts that it deemed to be subject to the June 24 TRO (Spillane Aff., Ex. 2). Significantly, the Chase Response Letter states that Dr. Landow is listed as a “[s]ignor on all held accounts” (*id.*). Included in the list of accounts are the account of Carbon Capital Group LLC with account number ending in 7982 (the **Carbon Account**), certain accounts held by Paramount with account numbers ending in 7977 and 3059 (the **Paramount Accounts**), and accounts in the name of GTY Corp. with account numbers ending in 8906 and 3796 (the **GTY Accounts**), among other Chase Accounts (*id.*).

Pursuant to the Agreements, the Landow Entities granted Enter access to the Chase Accounts so that Enter could monitor their performance and ensure payment of the monies owed Enter and Qwil. Dr. Landow expressly authorized and consented to grant Enter access to monitor the Chase Accounts through a service called Plaid (Russell Aff., ¶¶ 5-16).

Plaid account statements (the **Plaid Statements**) submitted by the Petitioners in support of their contempt motion show that between June 26, 2019 (two days following the issuance of the June 24 TRO) and July 1, 2019 (i.e., prior to the issuance of the July 11 Order (hereinafter defined)), there were multiple transfers of funds out of at least three of the Chase Accounts with account numbers ending in 7982, 8906, and 3796 to certain accounts held at the brokerage firm Interactive Brokers LLC (**Interactive Brokers**) totaling approximately \$5 million (NYSCEF Doc. No. 62, 63, 64). For the avoidance of doubt, these accounts include the Carbon Account and the GTY Accounts identified in the Chase Response Letter as being subject to the TRO, and for which Dr. Landow is a signatory.

In other words, notwithstanding the June 24 TRO, and the court's conversation with Respondents' counsel memorialized in part on the executed OSC on June 24, 2019, two days later, on June 26, 2019, (i) \$4 million was transferred from the Carbon Account ending in 7982 to the GTY Account ending in 8906 and (ii) \$500,000.00 was transferred from the Carbon Account ending in 7982 to an Interactive Brokers account purportedly held by Gloria Landow, Dr. Landow's mother, each as evidenced by the Plaid Statement for the Carbon Account ending in 7982 (NYSCEF Doc. No. 62). As a result, the Carbon Account, which was subject to the June 24 TRO, had a balance of more than \$4.5 million as of June 11, 2019, and the two transfers on June 26, 2019 depleted virtually the entire balance (Olson Aff., ¶ 32). For the avoidance of doubt, these large transfers following the issuance of the June 24 TRO were unusual based on the account's transaction history. To wit, the Plaid Statement for the Carbon Account shows that there was very little activity for that account prior to June 26, 2019. The Plaid Statement shows a \$25 service fee charged on May 3, 2019, a payment to Alexa Landow on September 6, 2018, and no other debits since the account's creation in July 2018 (NYSCEF Doc. No. 62).

The Plaid Statement for the GTY Account ending in 8906 also reveals atypical account activity and transfers while the June 24 TRO was in effect. For example, the Plaid Statement shows: (i) a transfer of \$500,000.00 to an Interactive Brokers account in the name of Gloria Landow on June 28, 2019, (ii) a transfer of \$4 million to an Interactive Brokers account in the name of Gloria Landow on July 1, 2019, (iii) a transfer of \$475,000.00 to an account ending in 0362 (another Chase Account belonging to one of Dr. Landow's affiliates) on June 26, 2019, (iv) a transfer of \$4,477,000.00 to the GTY Account ending in 3796, also on June 26, 2019, and (v) a transfer of

\$500,000.00 to an unknown Interactive Brokers account on June 28, 2019 (NYSCEF Doc. No. 63).

The Plaid Statement for the GTY Account ending in 3796 shows similarly unusual activity during the period in which the June 24 TRO was in effect, including: (i) a transfer of \$505,000.00 to the GTY Account ending in 8906 on June 28, 2019, and (ii) a transfer of \$4 million to the GTY Account ending in 8906 on July 1, 2019 (NYSCEF Doc. No 64). The Plaid Statements trace the movement of funds among the various Chase Accounts of Dr. Landow and the Landow Entities through a total of eight large transactions and several smaller transactions and ultimately show the transfer of nearly \$5 million out of those accounts to the Interactive Brokers accounts.

At oral argument on July 11, 2019, Mr. Horn, then counsel for the Respondents, specifically requested that the court consider curtailing the order of attachment beyond that contemplated by the June 24 TRO:

MR. HORN: As far as the scope of the order of attachment, your Honor, the way this agreement worked between the parties is they had what they referred to as the push-pull accounts, and those are the accounts that were subject to this.

What the present order of attachment is, it is very broad in this language, and it encompasses far more than the push-pull accounts. What I would respectfully request is that if the court were to maintain it, that it be significantly curtailed so as to not include any account that maybe even tangentially connect to Dr. Landow who is not a part to any of these contracts.

(NYSCEF Doc. No. 186, at 43: 13-24).

Following oral argument on July 11, 2019 (the **July 11 Hearing**), the court expressly rejected the Respondents request and granted the Petitioners' application for an order of attachment in aid

of arbitration in its entirety on the record stating “[s]o I’m granting the relief that is requested. I’m granting the order of attachment in its entirety” (NYSCEF Doc. No. 186, at 50:1-3 [emphasis added]) because the allegations included that prior to the issuance of the June 24 TRO Dr. Landow had misdirected funds to accounts that were not subject to the agreement, and at the time of the July 11 Hearing, the Petitioners presented evidence that Dr. Landow had violated the June 24 TRO. The court further ordered that the funds transferred on June 26, 2019 be returned to the Carbon Account ending in 7982 within 5 days and uploaded a grey sheet short form order, dated July 11, 2019 (the **July 11 Order**) to reflect the same (NYSCEF Doc. No. 187). At that hearing, and given the allegations of Dr. Landow’s alleged violations of the June 24 TRO, the court noted for the record that Mr. Horn, Respondents’ counsel, had been notified of the pending June 24 TRO:

THE COURT: When you came in, remind me, I think we reached out to counselor for the defendants and we had a phone conference, didn’t we?

MS. SPILLANE: That’s correct, your Honor.

THE COURT: And I advised him at the time that a TRO was going to be in effect, and if they moved any money I might be willing to hold them in contempt today.

MS. SPILLANE: That’s correct, your Honor...

(NYSCEF Doc. No.186, at 3:12-20).

The court further ordered at that time that: “To the extent that any money has been transferred out of said accounts between June 24, 2019 and today, [Respondents] must return said money [within] 5 days” (NYSCEF Doc. No. 187).

On July 22, 2019, due to difficulties in entering the order, the Petitioners submitted a proposed replacement order (the **Replacement Order**) directing the Sheriff of New York County, or of any county of the State of New York, to attach the property of Dr. Landow and the Landow Entities, by levy upon any personal property, debts owed, or interests in real property, to satisfy the sum of \$2,253,429.27, including but not limited to the five accounts referenced in the July 11 Order. After the Petitioners submitted the Replacement Order to the court, the court directed the parties to appear in court to review the Replacement Order. The court reviewed the Replacement Order, *which reflected the court's ruling on the record*, and subsequently, in the presence of counsel for Qwil and the Respondents, signed the order on the afternoon of July 22, 2019 (the **July 22 Order**).

Subsequently, the Respondents moved by order to show cause on July 29, 2019 (Mtn. Seq. No. 004) seeking relief from the order of attachment. The Respondents argued, among things, that (i) the July 22 Order improperly expanded the scope of the attachment beyond the five accounts listed in the July 11 Order to include Dr. Landow's personal accounts (which request as discussed *supra* had been raised at the July 11 Hearing and rejected by the court, i.e., not to cover Dr. Landow's personal accounts), and (ii) Dr. Landow's personal accounts are not implicated because he has no contractual relationship with Enter or Qwil in his individual capacity (i.e., the very same argument that was raised at the July 11 Hearing and rejected by the court). The arguments were wholly without merit.

The court explained at the hearing on the July 29 OSC that the relief granted in the July 22 Order effectuated but did not expand the order of attachment previously granted by the court, and the

order of attachment was always intended to cover Dr. Landow, individually, as the Petition and OSC filed on June 24, 2019 were brought against him personally in addition to the Landow Entities and allege that he was personally responsible for blocking access to the Chase Accounts and improperly diverting funds in breach of the Agreements. In addition, the scope of the TRO had been explained to Respondents' counsel when the June 24 TRO was issued and memorialized in part when the court signed the June 24 TRO. By short-form decision and order, dated December 18, 2019, the court denied the Respondents' motion to modify the July 22 Order and granted the Petitioners leave to move for appropriate sanctions (NYSCEF Doc. No. 178). At that time, Dr. Landow argued that the monies in these accounts were not misdirected funds that were subject to the TRO and that he did not violate the June 24 TRO or the Agreements because he never misdirected any of the accounts receivable that were subject to the Agreements.

On August 2, 2019, the court issued an interim order (the **August 2 Order**), which granted the Petitioners' prior application for pre-arbitration discovery in its entirety (NYSCEF Doc. No. 129 at 3). The court explained that it was issuing the order, among other reasons, "to assist the court in assessing whether the order of attachment should be modified, whether Dr. Landow should be held in contempt of the court's prior order, and in aid of the arbitration to permit the [P]etitioners to explore the location of any monies allegedly wrongfully misdirected" (*id.*).

On August 8, 2019, the Respondents commenced an Article 78 proceeding challenging the July 22 Order as improper *sua sponte* conduct by the court. By decision and order, dated October 29, 2019, the First Department unanimously dismissed the Respondents' Article 78 petition in its entirety (*Landow v Borrok*, 176 AD3d 615, 615 [1st Dept 2019]).

On November 1, 2019, the Respondents filed an appeal of the July 22 Order. Pursuant to a decision and order, dated February 25, 2020, the First Department unanimously affirmed the July 11 Order, (entered on July 15, 2019), which granted the petition for an order of attachment and ordered the parties to proceed to arbitration, and unanimously affirmed the August 2 Order, which granted pre-arbitration discovery (*Qwil PBC v Landow*, 180 AD3d 593, 593 [1st Dept 2020]). The First Department dismissed the appeal of the July 22 Order without prejudice as premature as the order to show cause challenging the July 22 Order was at that time still pending (*id.*).

DISCUSSION

I. Dr. Landow is in Contempt (Mtn. Seq. No. 003)

Judiciary Law § 753 authorizes a court “to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced,” where, for example, a party to an action or special proceeding disobeys a lawful mandate of a court (Judiciary Law § 753 [A] [3]; *People v Sweat*, 24 NY3d 348, 354 [2014]).

To prevail on a motion to hold a party in civil contempt, the movant bears the burden to establish, by clear and convincing evidence, that (1) “a lawful order of the court, expressing an unequivocal mandate, was in effect,” (2) the party to be held in contempt disobeyed the order, (3) and had knowledge of the order, (4) resulting in prejudice to the rights of a party to the

litigation (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015], quoting *McCormick v Axelrod*, 59 NY2d 574, 583 [1983]).

Here, the Petitioners argue that the clear and convincing evidence establishes that Dr. Landow knew of this court's June 24 TRO prohibiting him from, among other things, transferring funds out of the Chase Accounts up to the amount of \$2,253,429.27, and that he willfully violated the June 24 TRO immediately after it was served on him. To wit, the Petitioners argue that the clear and convincing evidence submitted shows that the court advised the Respondents' counsel at the hearing on June 24, 2019 of the scope of the June 24 TRO when the court signed the June 24 TRO and reminded counsel that he had been so advised at the July 11 Hearing. The clear and convincing evidence also shows that, beginning on June 26, 2019—just two days after the June 24 TRO was issued and just one day after it was served on Dr. Landow and his counsel—Dr. Landow, or his agents or affiliates, transferred approximately \$5 million out of the Chase Accounts owned by Dr. Landow, the Landow Entities, or their affiliates, to Interactive Brokers accounts, in addition to several other large-dollar transfers between Landow-affiliated Chase Accounts, leaving a balance of just \$280,000.00 (Olson Aff., ¶¶ 7-14; Spillane Aff., ¶¶ 16-17; NYSCEF Doc. No. 67). The Chase Accounts from which the funds were diverted are all owned or controlled by Dr. Landow or the Landow Entities, or by their agents or affiliates, and they were therefore unequivocally subject to the June 24 TRO. They were identified by Chase in the Chase Response Letter as the accounts associated with Dr. Landow and the Landow Entities. The Chase Response Letter also notes that Dr. Landow is listed as a signor on all of the held Chase Accounts.

And, the Petitioners argue that the clear and convincing evidence establishes that Dr. Landow's conduct substantially prejudiced their rights by depleting the funds available in the Chase Accounts that they may ultimately be entitled to recover as damages in the forthcoming arbitration and requiring significant and costly motion practice, including necessitating the filing of the instant contempt and sanctions motions and opposing the numerous motions filed by the Respondents.

In his opposition papers, Dr. Landow argues that the motion should be denied because (a) the Carbon Account is held by an unrelated company owned solely by his mother and daughters and therefore it was not subject to the June 24 TRO, (b) he did not personally transfer the funds, (c) service of the order to show cause to seal the file and for an order of attachment in aid of arbitration was deficient, and (d) he did not receive proper notice of the instant contempt motion. Simply put, Dr. Landow's arguments are unavailing.

First, the Carbon Account was subject to the June 24 TRO. Period. Full stop. The allegations in this action are that Dr. Landow misdirected funds that were to receive the accounts receivable that were the subject of the Agreements to other entities. The Carbon Account was identified in the Petitioner's moving papers in support of the June 24 TRO (Olson Aff. in Support of Petition, ¶ 32) which the court granted in its entirety, and the order uploaded afterward broadly prohibited the Respondents, or their agents or affiliates from, among other things, "transferring . . . or otherwise interfering with Respondents' or their affiliates' property, debts, [or] accounts . . . up to the amount of \$2,253,429.27" (NYSCEF Doc. No. 66 at 3) . And, the court advised Mr. Horn, Dr. Landow's then lawyer, of the same and the court noted on the signed order to show cause

that the court advised Dr. Landow of the June 24 TRO and reminded him that he had been so advised at the July 11 Hearing.

Importantly, the argument that the July 11 Order was limited only to certain enumerated accounts of the corporate respondents is false as discussed *supra* and in some ways besides the point as the transfers at issue began on June 26, 2019, the day after the June 24 TRO was served on Dr. Landow and the Landow Entities and prior to the issuance of the July 11 Order. The June 24 TRO unequivocally restrained the Respondents and their agents or affiliates from transferring *any* of the Respondents' or their affiliates' funds. There is no language in the June 24 TRO that would limit its scope to certain corporate accounts. By the time the July 11 Order was issued, which enumerates five specific accounts belonging to the Landow Entities, the transfers had already occurred in violation of the June 24 TRO. And, also as discussed above, Mr. Horn argued at the July 11 Hearing that the attachment should be limited and the court expressly rejected the argument.

In addition, Dr. Landow's contention that the Carbon Account is owned by "Carbon Capital Management LLC" (NYSCEF Doc. No. 90, ¶ 31; 92, fn 3 and 4), a wholly unrelated company that he does not own, and that such account is held by his mother and daughters who "own and control Carbon," is also just false. To wit, the Second Department has already decided this issue in an unrelated proceeding, stating that "[t]he record demonstrates that the plaintiff, Carbon Capital Management, LLC, is owned and managed by Landow" (*Carbon Capital Mgt., LLC v Am. Express Co.*, 88 AD3d 933, 940 [2d Dept 2011]).

Putting that aside (as that determination was made in 2011), the Chase Response Letter also establishes that Dr. Landow is a signor on the Carbon Account, as he is for all of the Chase Accounts. Carbon's Articles of Organization were filed by Dr. Landow, personally, and list Dr. Landow as the organizer (NYSCEF Doc. No. 120). Certain communications between Dr. Landow and Enter refer to Carbon as one of Dr. Landow's affiliated companies. For example, Brian Swann's (Vice President of Business Development for Enter) affidavit indicates that on November 21, 2018, Dr. Landow sent him a document proposing a separate transaction involving an entity that he referred to as "CCM," which he described as his healthcare compliance company (Swann Aff. ¶¶ 6, 8; NYSCEF Doc. No. 116). Mr. Swann's affidavit further indicates that Dr. Landow referred to CCM as Carbon in several communications with Jordan Kelley, Enter's CEO, and him in relation to the proposed deal (Swann Aff., ¶¶ 6-7). And, Mr. Swann's Affidavit refers to a January 21, 2019 email (the **January 21 Email**) from Mr. Swann to Dr. Landow, in which Mr. Swann wrote "I will type-up a first draft of the Enter/Carbon MOU this weekend" (*id.*, ¶ 7; NYSCEF Doc. No. 117 at 3). And in Dr. Landow's emails in response to the January 21 Email, he never questions the reference to Carbon (*id.*, ¶ 7; NYSCEF Doc. No. 117 at 3). Ultimately, the evidence establishes that Carbon is an affiliate of Dr. Landow and is owned and managed by Dr. Landow. In other words, in short, it is simply not true that Carbon is wholly unrelated to Dr. Landow and Dr. Landow's statement to the contrary is a willful and contumacious attempt to commit a fraud on this court.¹

¹ For completeness, the court notes that the Chase Response Letter indicates that this account is Carbon Capital Group, LLC's account (i.e., as opposed to Carbon Capital Management, LLC) and Dr. Landow is a signatory and that per the Chase Response Letter, they understood it to be subject to the June 24 TRO as one of Dr. Landow's accounts. In any event, whether it is Carbon Capital Management, LLC's account which Dr. Landow owns or Carbon Capital Group, LLC's account, which is also Dr. Landow's according to Chase, it is immaterial as the account, per Chase was Dr. Landow's.

In addition, Dr. Landow's argument that he did not disobey the June 24 TRO because he did not make or direct the transfers is unpersuasive. Although Dr. Landow states in his affidavit that he did not make or direct the transfers of funds from the Chase Accounts (Landow Aff., ¶ 35), and his mother likewise testifies that Dr. Landow never directed her to transfer funds out of the Carbon Account after the issuance of the June 24 TRO and "never directed [her] to move or transfer any [Carbon] funds for any purpose *other than what my grandchildren and [Gloria Landow] felt was appropriate for our economic interests*," (Gloria Landow Aff., ¶¶ 9-10 [emphasis added]), neither Dr. Landow nor Gloria Landow deny that the transfers occurred or explain how or why they occurred. Even if Dr. Landow did not make the transfers himself, which Gloria Landow does not claim, either Gloria Landow, Dr. Landow's daughters, or another signatory from Carbon did. Therefore, regardless of who directed the transfers, they were made by Dr. Landow's agents or affiliates in direct violation of the June 24 TRO, and by Gloria Landow's own admission, at his direction.

And, to the extent that Dr. Landow argues that the motion must be denied because service of the June 24 TRO was deficient and that he did not know about it, the argument fails. As already discussed, Dr. Landow's counsel participated in the June 24, 2019 hearing by phone, (ii) the court advised Dr. Landow's counsel of that it was granting the June 24 TRO in its entirety, (iii) the court instructed Dr. Landow's counsel to advise Dr. Landow that the June 24 TRO was in effect and that he would be held in contempt of court if he violated it, and (iv) Dr. Landow's counsel communicated this information to Dr. Landow (Horn Aff., ¶¶ 5, 10-13). It is therefore entirely clear on the record before the court that Dr. Landow was on notice of the June 24 TRO.

In addition, the Petitioners have established that the June 24 TRO was properly served in accordance with the signed order to show cause on Dr. Landow and his counsel on June 25, 2019, by Federal Express (**Fed Ex**) overnight delivery and by email – the day before the transfers occurred. Specifically, Meghan K. Spillane, counsel for the petitioners, states in her affidavit in support of the petitioners’ contempt motion that the order to show cause to seal the file and for attachment in aid of arbitration and supporting papers were served on Mr. Horn, as counsel of record for the Respondents, by email to chorn@rfriedmanlaw.com on June 25, 2019 at 11:43 AM (Spillane Aff., ¶¶ 6-7; NYSCEF Doc. No. 107). Ms. Spillane also testifies that she personally served the order and supporting papers on Dr. Landow by email to jslandow@gmail.com on June 25, 2019 at 3:43 PM, and that she copied Mr. Horn on this email as well (*id.*, ¶¶ 9, 11; NYSCEF Doc. No. 108). It is undisputed that jslandow@gmail.com is the email address that Dr. Landow regularly used throughout his business dealings with the Petitioners, and he does not deny that he is able to receive email at that address (Spillane Aff., ¶ 10).

And, significantly, Ms. Spillane testifies that she served the order and supporting papers on the Respondents at the addresses established for receipt of notices as set forth in the Agreements on June 25, 2019 in accordance with the court’s directive in the June 24 TRO. Specifically, Ms. Spillane states that she worked with Kate McHugh, another employee of her law firm, Goodwin Proctor LLP, to mail the order and supporting papers by Fed Ex overnight delivery to Mr. Horn’s address on June 25, 2019, and the Fed Ex receipts submitted by the Petitioners show that the order and supporting papers were delivered on June 26, 2019 at 10:17 AM (*id.*, ¶¶ 14-19; NYSCEF Doc. No. 109, 110). Ms. Spillane further testifies that she worked with Ms. McHugh

to mail the order and supporting papers to each of the Respondents via Fed Ex overnight delivery based on the address listed in the Pricing Schedules (Spillane Aff., ¶¶ 20-24). The Fed Ex receipts show that the order and supporting papers were delivered to Dr. Landow and the Landow Entities on June 26, 2019 at 11:01 AM (NYSCEF Doc. No. 111, 112). Ms. Spillane filed an affidavit of service on June 26, 2019 (NYSCEF Doc. No. 114). The affidavit of service constitutes *prima facie* evidence of proper service and Dr. Landow's bare, conclusory denial of receipt of the order or supporting papers by email or overnight delivery is insufficient to rebut the presumption of proper service and is contradicted by the evidence (*Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012]).

Finally, Dr. Landow's argument that the motion should be denied because he was not afforded proper notice similarly fails. Pursuant to CPLR § 2214 (a), "[a] notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor." Simply put, the argument is without merit because the Notice of Motion filed by the Petitioners on July 9, 2019 (NYSCEF Doc. No. 59) clearly contains all of the requisite information. And, he filed opposition papers and had counsel appear at each and every court appearance following the June 24, 2019 appearance at which time, as previously discussed, the court telephoned his attorney and appropriately advised him. Accordingly, the Petitioner's have established by clear and convincing evidence that Dr. Landow knowingly and willfully violated the June 24 TRO and the motion (Mtn. Seq. No. 003) for an order holding Dr. Landow in civil contempt is granted.

II. Sanctions are Warranted (Mtn. No. Seq. 007)

A court in a civil action is authorized to award the reasonable attorneys' fees and expenses incurred by a party as a result of the opposing party's frivolous conduct (22 NYCRR § 130-1.1 [a]). Conduct is frivolous for the purposes of a motion for sanctions if (i) it is completely meritless, (ii) it is done to delay or prolong the litigation or to harass or injure another party, or (iii) asserts false material statements of fact (*id.* § 130-1.1 [c]). In addition,

[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal and factual basis for the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party (*id.*).

The Respondents assert that the Petitioners' motion for sanctions is based solely on the Respondent's July 29 order to show cause seeking to modify the July 22 Order. This is incorrect. As the Petitioners' supporting papers make clear, the conduct that they allege to be frivolous relates to (i) the Notice of Appeal of the July 22 Order filed on July 23, 2019, (ii) the July 29 order to show cause, (iii) the Article 78 proceeding filed on August 8, 2019, and (iv) the appeal filed in the Appellate Division, First Department on November 1, 2019.

The Respondents' primary argument in each of these proceedings was that the July 11 Order did not grant the relief sought in the June 24 TRO. The argument is knowingly false. As discussed *supra*, at the July 11 Hearing, Mr. Horn requested that the attachment be limited and the court rejected his request when it ruled on the record "[s]o I'm granting the relief that is requested. I'm granting the order of attachment in its entirety" (NYSCEF Doc. No. 186, at 50:1-3). The court was absolutely clear that the attachment reached "any assets, accounts, or other property in which Respondents *or their affiliates* have an interest, and upon such debts owing to Respondents as will secure an arbitration award to the extent of at least \$2,253,429.27,"

(NYSCEF Doc. No. 183 at 1-2 [emphasis added]). The July 22 Order merely replaced the July 11 Order by directing the Sheriff to attach the property of Dr. Landow and the Landow Entities to satisfy the sum of \$2,253,429.27 (NYSCEF Doc. No. 190).

Although the Respondent's current counsel was not counsel of record during the July 11 Hearing and may not have had the transcript of the July 11 Hearing when he filed the July 29 order to show cause, the court unequivocally stated on the record during the July 29, 2019 hearing of the Respondents' order to show cause (the **July 29 Hearing**) that the July 22 Order effectuated but did not in any way expand the scope of the order of attachment granted in the July 11 Order (NYSCEF Doc. No. 194, at 17:16-18:20; 19:24-20:2).

In other words, even if the Respondents' new counsel brought the July 29 order to show cause based upon the good faith belief that the July 22 Order broadened the scope of the order of attachment, after the July 29 Hearing, the court made it clear that the purpose of the July 11 Order was to grant the relief sought in the June 24 TRO "in its entirety" and the July 22 Order did not expand it. Despite this clarification, the Respondents proceeded to file an appeal based on this same false argument that was both directly contradicted by the record which he either did not review or chose to ignore and also explained to new counsel which appeal he never withdrew and proceeded to prosecute knowing that it was false.

Put another way, after receiving the transcript of the July 11 Hearing and the unequivocal clarification from the court, not to mention the express colloquy on the record about the scope of the attachment at the July 11 Hearing with Mr. Horn, Respondents' prior counsel, the Respondents had ample opportunity to re-evaluate the factual and legal basis for their challenges

to the July 22 Order, but nevertheless continued to proceed with this challenge without factual or legal basis. This is the definition of willful and contumacious and the tactics appear to be designed solely to delay or prolong this litigation and the resolution of the underlying arbitration. Without addressing the ethical considerations, as a result of the Respondents' frivolous conduct, the Petitioners have been forced to incur significant legal expenses. Therefore, the motion for sanctions is granted and the Respondents shall pay the Petitioners' attorneys' fees and costs associated with bringing the instant motions to hold Dr. Landow in contempt and for sanctions.

Accordingly, it is

ORDERED that the Petitioners' motion to hold Dr. Jonathan Landow in contempt of court (Mtn. Seq. No. 003) is granted; and it is further

ORDERED that the Petitioners' motion for sanctions against the Respondents is granted; and it is further

ORDERED that Dr. Jonathan Landow is hereby held in contempt of court for willfully and contumaciously disobeying the court's Temporary Restraining Order, dated June 24, 2019; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees and costs incurred in connection with the motions for contempt (Mtn. Seq. No. 003) and sanctions (Mtn. Seq. No.

007) that the Petitioners may recover is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the Petitioners shall, within 45 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon 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); and it is further

ORDERED that Dr. Landow is directed to appear for a deposition, pursuant to Article 31 of the CPLR, by counsel for Petitioners concerning any information relevant to any assets, accounts, or other property in which Respondents or their affiliates have or had an interest, including but not limited to medical accounts receivable purchased by Qwil and serviced by Enter and funds transferred out of Respondents' or their affiliates' accounts at J.P. Morgan Chase Bank, N.A. to Interactive Brokers LLC in the amounts of \$500,000, \$500,000, and \$4,000,000 on June 26, June 28, and July 1, 2019, with IMAD numbers 0626B1QGC07C011216, 0628B1QGC05C042502, and 0701B1QGC01C018285 as soon as one can be practicably scheduled; and it is further

² Copies of the Information Sheet are available in Room 119 M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "Reference" section of the "Courthouse Procedures" link.

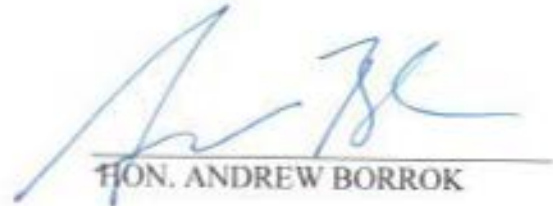
ORDERED that the Petitioners are hereby granted use of any disclosure methods provided for in Article 31 of the CPLR to discover any information relevant to any assets, accounting, or other property in which Respondents or their affiliates have or had an interest, including but not limited to an accounting of funds transferred in relation to the Interactive Brokers transactions; and it is further

ORDERED that Dr. Landow shall provide an accounting of and return any and all funds transferred in the Interactive Brokers transactions (in an amount totaling at least \$5,000,000) to the Chase Bank accounts held by the Respondents or their affiliates within five (5) business days of the date of the Court's order on this Motion; and it is further

ORDERED that, as contemplated in Petitioners' previously filed Petition for an Order of Attachment in Aid of Arbitration in aid of an arbitration proceeding to be commenced by Petitioners pursuant to CPLR § 7502(c), an order of attachment is hereby granted in the amount of \$2,253,429.27 against Respondents Landow, Paramount, Preferred, and Sovereign, and the sheriff of any county or of New York City to levy within his/her jurisdiction, at any time before final judgment herein, upon any assets, accounts, or other property in which Respondents or their affiliates have an interest, and upon such debts owing to Respondents as will secure an arbitration award to the extent of at least \$2,253,429.27, including but not limited to

Respondents' or their affiliates' accounts held at Chase Bank and/or Interactive Brokers.

March 30, 2020



HON. ANDREW BORROK