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| <b>Scopia Capital Mgt. LP v Quinn</b>  |
| 2020 NY Slip Op 32557(U)   |
| August 4, 2020   |
| Supreme Court, New York County   |
| Docket Number: 152069/2017   |
| Judge: Kathryn E. Freed  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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**INDEX NO.** 152069/2017

SCOPIA CAPITAL MANAGEMENT LP, HOMECARE  
MANAGEMENT CORPORATION, and COMMUNITY  
BASED CARE, LLC,

**MOTION SEQ. NO.** 001, 002

Plaintiffs,

- v -

**DECISION + ORDER ON  
MOTION**

LEWIS QUINN and AYM TECHNOLOGIES, LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 38, 51

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52

were read on this motion to/for DISCOVERY.

In this action by Scopia Capital Management LP (“SCM”), Homecare Management Corporation (“HMC”), and Community Based Care, LLC (“CBC”) (collectively “plaintiffs”) seeking injunctive relief and damages for breach of contract against Lewis Quinn (“Quinn”) and AYM Technologies, LLC (“AYM”) (collectively “defendants”), plaintiffs move (motion sequence 001), pursuant to CPLR 3124, to compel defendants, inter alia, to provide supplemental discovery responses and to specify their objections to certain discovery demands served by plaintiffs. Defendants oppose the motion and cross-move (motion sequence 001) to compel plaintiffs to supplement their response to defendants’ Interrogatory No. 8. Defendants also move (motion sequence 002) for a protective order against certain discovery demands served by plaintiffs. After

a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

In March 2013, AYM, a technology company, executed a Software License Agreement with HMC pursuant to which HMC was permitted to use AYM's software. Doc. 37. On July 25, 2015, SCM entered into a letter agreement with Quinn, Chief Executive Officer of AYM ("the letter agreement") providing, inter alia, that, in order to allow Quinn to conduct "due diligence in connection with investing in or monitoring of an investment or potential investment . . . in one or more funds or accounts managed by [SCM]", or for which SCM acts as a general partner, SCM was to provide Quinn with certain portfolio information pertaining to investments held by SCM including, but not limited to, information regarding HMC. Doc. 1 at par. 1; Doc. 41; Doc. 49. Additionally, the letter agreement provided that it would "be construed and enforced in accordance with the laws of the State of New York, USA applicable to agreements made and to be performed entirely in such State." Doc. 41 at 2. Plaintiffs allege that, since Quinn executed the signature page to the letter agreement and emailed it to SCM with a cover email he signed as CEO of AYM, the letter agreement bound both him and AYM. Doc. 1 at par. 23.

The letter agreement incorporated by reference a Confidentiality and Non-Disclosure Agreement between SCM and HMC executed in January 2015 ("the NDA"), which required SCM to maintain as confidential certain information provided to it by HMC in connection with a possible transaction between those parties. Doc. 42. By executing the letter agreement, Quinn acknowledged the existence of the NDA and agreed to adhere to the confidentiality restrictions set forth therein "as if [he] were a direct party thereto." Doc. 41 at 2. Additionally, the NDA provided

that it was to be governed by New York law and that any disputes arising therefrom were subject to the exclusive jurisdiction of the courts of New York County. Doc. 42.

Prior to the commencement of this action, AYM and Quinn filed suit against SCM, a Delaware limited partnership with its principal place of business in New York; HMC, a North Carolina corporation with its principal place of business in that state; and CBC, a limited liability company with its principal place of business in North Carolina. Doc. 1 at par. 6. In that action, commenced in the North Carolina General Court of Justice, Superior Court Division (case number 16-CVS-21788) (“the NC action”), AYM and Quinn alleged misappropriation of trade secrets, breach of contract, conversion of confidential business information, unfair competition and tortious interference with business opportunities.

Plaintiffs commenced the captioned action on March 2, 2017, alleging that they were entitled to damages because defendants breached the letter agreement with SCM, and that HMC and CBC were allegedly third-party beneficiaries to the same. Doc. 1 at pars. 45-50. In their complaint, plaintiffs alleged that, as of the time the letter agreement was executed, defendants were considering investment opportunities relating to the acquisition of certain North Carolina service providers which cared for developmentally disabled individuals. Doc. 1 at pars. 14-15, 18. By July 2015, SCM identified the first two planned acquisitions for an investment opportunity and developed a Confidential Investor Presentation (“CIP”). Doc. 1 at pars. 15-16. The CIP identified HMC as the initial target for the investment opportunity; contained terms for the acquisition of HMC, as well as a term sheet executed for the acquisition of entities known as Hughes Behavioral and Mental Health Services; and named other targets SCM had “in the pipeline”, including entities known as Lindley, TSG, and A Small Miracle. Doc. 1 at pars. 18, 25. In or about 2016, AYM, allegedly using the information in the CIP, acquired TSG and A Small Miracle. Doc. 1 at par. 32.

Although Quinn attempted to sell AYM as part of a transaction which would make him CEO of the purchasing entity, his efforts were unsuccessful. Doc. 1 at pars. 26-29. Instead of conducting a transaction with AYM, SCM completed certain other transactions in 2015 and 2016, including combining HMC, Hughes, and Lindley into CBC, a holding company whose Executive Vice President was Gene Rodgers. Doc. 1 at pars. 30-31, 33. Quinn allegedly attempted in vain to persuade SCM to enter into a transaction that would combine at least some aspects of AYM's business into CBC, with him as a leader of the company and, in the process of doing so, he allegedly disparaged Rodgers. Doc. 1 at par. 31.

As a first cause of action, plaintiffs claimed that AYM and Quinn breached the letter agreement by using confidential information covered by the same for their business interests and to exert leverage over plaintiffs in retaliation against them after Quinn's overtures to sell his business and serve as CEO of a new venture involving plaintiffs were unsuccessful. Thus, alleged plaintiffs, they were entitled to damages. Doc. 1 at pars. 48-49. As a second cause of action, plaintiffs alleged that they were entitled to injunctive relief prohibiting defendants from further use or disclosure of confidential information to which they became privy in connection with their execution of the agreements. Doc. 1 at pars. 52-55.

Quinn and Aym joined issue by their answer filed April 25, 2017 and, on or about May 16, 2017, plaintiffs served both Quinn and Aym with a First Request for Production of Documents ("FRPD"). Doc. 2; Doc. 7 at pars. 4-5; Docs. 10-11. On or about July 5, 2017, defendants responded to plaintiffs' FRPD, which response included certain objections to the same. Doc. 7 at par. 6; Doc. 12.

By notice of motion filed November 9, 2017, plaintiffs moved (motion sequence 001), pursuant to CPLR 3124, to compel defendants to:

(i) resubmit their objections to state with reasonable particularity the grounds for each objection [to the FRPD], (ii) resubmit their responses with a privilege log in compliance with applicable law, (iii) resubmit their responses to indicate the scope and manner of searches for each request for documents, (iv) resubmit their responses to indicate the non-production of any document and to otherwise comply with Instruction No. 6 (to identify and provide particular information on any document that has been destroyed or discarded) in each set of document requests, (v) search for internal, not just external, documents likely already in Plaintiffs' possession, and (vi) produce forthwith those responsive documents that are in Defendants' possession, custody, or control and are not protected by a valid and substantiated objection or privilege in their revised responses or log.

Doc. 4.<sup>1</sup>

In support of the motion, plaintiffs argue, inter alia, that defendants' boilerplate responses to the FRPD fail to specify the reasons for their objections; defendants do not advise whether they even made a search for documents responsive to the FRPD; and that defendants fail to set forth any basis for the privilege they claim in connection with certain documents. Doc. 5. Plaintiffs argue that, although defendants responded to item Nos. 1, 2, 3, 5, 11, and 14, they produced only documents shared with CBC and its affiliates and vendors but not any internal documents. Doc. 5. Indeed, assert plaintiffs, defendants did not produce a single document responsive to items 4, 6, 7, 8, 9, 10, 12, and 13 of the FRPD. Doc. 5. Plaintiffs also maintain that, although defendants objected to items 6, 7, 8, 9, 10 and 13 on relevancy grounds, the demands seek information material and necessary to the prosecution of this action. Doc. 5.

Defendants oppose the motion on the ground that the demands in the FRPD are overbroad, that their responses to the FRPD were proper in all respects, and that they had already produced approximately 200 documents in response to plaintiffs' demands. Doc. 20. They also cross-move

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<sup>1</sup> The delay in deciding the motion arises from several conferences held in an attempt to resolve the issues therein. Additionally, by so-ordered stipulation filed June 6, 2018, the parties agreed to refer this action to a special referee for the purposes of supervising discovery, including the issues raised by motion sequence Nos. 001 and 002. Docs. 51-52. However, Part 2 was later advised that there was no special referee available to supervise discovery and the case was eventually referred back to Part 2.

(motion sequence 001), pursuant to CPLR 3124, to compel plaintiffs to resubmit complete responses to defendants' Interrogatory No. 8, which seeks information regarding plaintiffs' damages. Docs. 21, 26. Additionally, they assert that, to the extent plaintiffs are granted any of the relief they seek in their motion, then they should be ordered to amend their objections to state, with reasonable particularity, the grounds for each objection and to indicate the scope of their search for responsive documents, if any, and to indicate whether any document demanded has been lost or destroyed. Doc. 26.

In reply, plaintiffs maintain that defendants failed to perform a meaningful search for electronic records and internal materials. Doc. 27. Plaintiffs further assert that, although defendants argue that plaintiffs failed to provide sufficient discovery responses, discovery demands were not even served by defendants. Doc. 27. Additionally, plaintiffs maintain that defendants' objections to their demands as overbroad are baseless. Doc. 27. Plaintiffs also argue that defendants set forth no excuse for their failure to search for internal documents. Doc. 27.

Further, plaintiffs argue that defendants' cross motion to compel must be denied since they have responded to Interrogatory No. 8 and that a request for any additional information responsive to that interrogatory is premature since they cannot respond to the same without information demanded from defendants. Doc. 27.

On April 27, 2018, defendants moved (motion sequence 002), pursuant to CPLR 3103(a), for a protective order with respect to plaintiffs' Request Nos. 6, 7, 8, 9, 10, and 13. Doc. 29. In support of the motion, defendants assert, inter alia, that item Nos. 6, 7, 8, and 9 seek defendants' proprietary and confidential information, which is not necessary for plaintiffs to prove their damages. Doc. 31.<sup>2</sup> Defendants claim that they are entitled to a protective order as to Request

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<sup>2</sup> It should be noted that the parties entered into a Confidentiality Stipulation and Protective Order filed June 6, 2018 in order to protect sensitive information exchanged during the captioned action and the NC action. Doc. 50.

No. 10 for the same reasons, as well as the fact that the request does not involve their present ownership of an existing company. Doc. 31. They further assert that they are entitled to a protective order as to Request No. 13 since the materials sought are protected by the work product and attorney-client privileges and because they seek information regarding damages sustained by AYM which, they claim, are irrelevant in the captioned action and should be pursued in the NC action. Doc. 31.

In opposition to defendants' motion for a protective order, plaintiffs argue that the information sought by item Nos. 6, 7, 8, 9, 10 and 13 seek documents that will support their claim that defendants misused confidential information in order to divert profits to which they were not entitled, thereby damaging plaintiffs.

In January of 2019, plaintiffs moved to amend the complaint to add a third cause of action alleging that AYM and Quinn willfully defrauded SCM, HMC, and CBC by engaging in "copycat financing" in violation of N.C. Gen. Stat. §75 in 2016 and 2017. Docs. 53-60. The motion was granted by order filed June 24, 2019. Doc. 71. Although AYM and Quinn then moved to dismiss the third cause of action for failure to state a claim, they withdrew the motion without prejudice after stipulating to allow plaintiff to file a second amended complaint naming Douglas Kahn as an additional defendant. Docs. 110-116; 136; 138, 142-143. Pursuant to the said stipulation, defendants reserved their right to dismiss the second amended complaint "in whole or in part." Doc. 136.

**LEGAL CONCLUSIONS:****Plaintiffs' Motion to Compel (Motion Sequence 001)**

"Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [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 test is one of usefulness and reason." (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [internal quotation marks and citations omitted]). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court . . ." (*Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843 [2d Dept 2013] [internal quotation marks and citations omitted]).

Pursuant to CPLR 3124, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), \*5 [Sup Ct, NY County 2015]). "[T]he request need only be appropriately tailored and reasonably calculated to yield relevant information. . . . [T]he purpose of discovery is to determine if material relevant to a claim or defense exists." (*Forman v Henkin*, 30 NY3d at 664). [The party opposing the motion to compel] has the burden of establishing that the "disclosure sought is improper." (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258, 608 NYS2d 647 [1st Dept 1994]).

*Jobe v Quick Coin Four, Inc.*, 2020 NY Slip Op 32071(U), \*1-2 (Sup Ct, NY County 2020).

As noted above, plaintiffs argue that defendants' responses to item Nos. 1, 2, 3, 5, 11, and 14 of the FRPD were insufficient. Doc. 5. They further assert that defendants failed to produce a single document responsive to items 4, 6, 7, 8, 9, 10, 12, and 13 of the FRPD. Doc. 5. Plaintiffs also maintain that, although defendants objected to items 6, 7, 8, 9, 10 and 13 on relevancy grounds, the demands seek information material and necessary to the prosecution of this action. Doc. 5.

Request No. 1 demanded "[a]ll documents concerning the July 25, 2015 [letter agreement] referenced in paragraph 23 of the Complaint." Docs. 10-11 at 4. Although defendants objected

to this demand as overbroad, defendants provided certain Bates stamped documents to plaintiffs in response thereto. Doc.12. Although the response states that the documents are annexed to the response, they are not filed with the response on NYSCEF as part of plaintiffs' Exhibit E to the motion. Since this Court cannot discern whether defendants' response was proper, it cannot direct defendants to supplement their response to Request No. 1.

Request No. 2 demanded "[a]ll documents concerning the [CIP] referenced in paragraph 16 of the Complaint and/or any dissemination or use of the information contained in the said [CIP]." Docs. 10-11 at 4. Defendants also objected to this demand as overbroad and provided certain Bates stamped documents to plaintiffs in response thereto. Doc.12. These documents are also not filed on NYSCEF and, thus, this Court cannot discern whether defendants' response to Request No. 2 was sufficient.

Request No. 3 sought "All communications with Gene Rodgers concerning the July 25, 2015 [letter agreement] referenced in paragraph 23 of the Complaint." Docs. 10-11 at 4. Defendants also objected to this demand as overbroad and provided certain Bates stamped documents to plaintiffs in response thereto. Doc.12. These documents are also not filed on NYSCEF and, thus, this Court cannot discern whether defendants' response to Request No. 3 was sufficient.

Request No. 4 sought "[a]ll communications concerning agreements and/or drafts of agreements and/or exhibits thereto with Gene Rodgers." Docs. 10-11 at 4. Defendants objected to this demand as "overbroad, potentially confidential and/or privileged and with no time frame and vague." Doc. 12 at 2. This demand is clearly overbroad since it fails to specify the name of the individual(s) or entity(ies) with which Rodgers contracted. Additionally, defendants correctly note that the demand is not limited in scope to a particular time period. Thus, the demand as

written seeks communications concerning any agreement, or draft of an agreement, Rodgers ever had. Additionally, it is unclear whether the demand seeks information about every draft of an agreement Rodgers eventually entered into and/or drafts of agreements which were never consummated. Thus, this Court denies that branch of plaintiffs' application seeking to compel defendants to respond to Request No. 4. *See Lerner v 300 W. 17<sup>th</sup> St. Hous. Dev. Fund Corp.*, 232 AD2d 249, 250 (1<sup>st</sup> Dept 1996) (a demand which is vague and overbroad can be deemed palpably improper).

Request No. 5 sought "[a]ll documents concerning or including communications about Gene Rodgers, including but not limited to any communications concerning reasons why Gene Rodgers should no longer be employed as an executive of CBC." Docs. 10-11 at 4. Defendants objected to this demand as overbroad, potentially privileged and/or confidential and vague and provided certain Bates stamped documents to plaintiffs in response thereto. Doc.12. These documents are also not filed on NYSCEF. Since this Court cannot discern whether defendants' response to Request No. 5 was sufficient, it cannot direct defendants to supplement their response thereto. The demand is also vague and overbroad insofar as it essentially requires the defendants to disclose only documents they believe are responsive.

Request No. 6 sought "[a]ll documents concerning the actual or potential acquisition of TSG." Docs. 10-11 at 4. Defendants objected to the demand as "overbroad, patently improper, irrelevant and not likely to lead to evidence necessary to the prosecution or defense of this matter" and that the "information [sought] is proprietary and irrelevant to the claims in this action." Doc. 12 at 2. This Court finds that the demand is improper since it does not indicate the identity(ies) of the individual(s) or entity(ies) which considered acquiring TSG or which considered acquiring it. Nor is the demand limited to any particular time period. As written, the demand seeks every

document ever written regarding the sale or potential sale of TSG. Thus, this Court finds the demand to be improper and declines to direct defendants to respond to the same. *See Lerner v 300 W. 17<sup>th</sup> St. Hous. Dev. Fund Corp.*, 232 AD2d at 250.

Request No. 7 sought “[a]ll documents concerning financial statements of TSG since the acquisition of it by [AYM] or an affiliate of [AYM].” Docs. 10-11 at 5. Defendants objected to this demand on the same ground as in item No. 6. Doc. 12 at 3. Since plaintiffs allege that AYM acquired TSG in 2016 using confidential information they obtained from the CIP (Doc. 1 at par. 32), documents related to the acquisition may lead to relevant evidence herein and defendants are thus required to reply to this request.

Request No. 8 sought “[a]ll documents concerning the actual or potential acquisition of A Small Miracle.” Docs. 10-11 at 5. Defendants objected to this demand as “overbroad, patently improper, irrelevant and not likely to lead to evidence necessary to the prosecution or defense of this matter” as well as on the ground that the materials were “proprietary and irrelevant to the claims in this action.” Doc. 12 at 3. This Court finds that the demand is improper since it does not indicate the identity(ies) of the individual(s) or entity(ies) which considered acquiring A Small Miracle or which considered acquiring it. Nor is the demand limited to any particular time period. As written, the demand seeks every document ever written regarding the sale or potential sale of A Small Miracle. Thus, this Court finds the demand to be improper and declines to direct defendants to respond to the same. *See Lerner v 300 W. 17<sup>th</sup> St. Hous. Dev. Fund Corp.*, 232 AD2d at 250.

Request No. 9 sought “[a]ll documents concerning financial statements of A Small Miracle since the acquisition of it by [AYM] or an affiliate of [AYM].” Docs. 10-11 at 5. Defendants objected on the same grounds as in item No. 8. Doc. 12 at 3. Since plaintiffs allege that AYM

acquired A Small Miracle in 2016 using confidential information improperly obtained from the CIP (Doc. 1 at par. 32), documents related to the acquisition may lead to relevant evidence herein and defendants are thus required to reply to this request.

Request No. 10 sought “[a]ll documents concerning the actual or potential acquisition of any other company in the same line of business as TSG or A Small Miracle.” Docs. 10-11 at 5. Defendants objected on the same grounds as in items No. 8 and No. 9. Doc. 12 at 3. This Court finds that the demand is improper since it does not indicate the identity(ies) of the individual(s) or entity(ies) which considered acquiring TSG or A Small Miracle or which considered acquiring either or both. Nor is the demand limited to any particular time period. As written, the demand seeks every document ever written regarding the sale or potential sale of TSG and/or A Small Miracle. Additionally, the language “actual or potential acquisition of any other company in the same line of business as TSG or A Small Miracle” is vague and overbroad. Thus, this Court finds the demand to be improper and declines to direct defendants to respond to the same. *See Lerner v 300 W. 17<sup>th</sup> St. Hous. Dev. Fund Corp.*, 232 AD2d at 250.

Request No. 11 sought “[a]ll documents concerning or including communications about termination of billing software services for CBC’s subsidiaries, including [HMC], Hughes Behavioral and Mental Health Services and/or Lindley.” Docs. 10-11 at 5. Defendants objected to this demand as overbroad and unduly burdensome but provided certain Bates stamped documents to plaintiffs in response. However, since these documents are not included as an exhibit to plaintiff’s motion, this Court cannot ascertain whether the response was sufficient.

Request No. 12 sought “[a]ll documents concerning any of the plaintiffs.” Docs. 10-11 at 5. Defendants objected to the demand as “patently improper, privileged, overbroad, vague, unduly burdensome and not likely to lead to evidence necessary to the prosecution of [sic] defense of this

matter.” Doc. 12 at 4. In this Court’s opinion, Request No. 12 is the quintessential example of a vague and overbroad demand and is thus improper. *See Lerner v 300 W. 17<sup>th</sup> St. Hous. Dev. Fund Corp.*, 232 AD2d at 250.

Request No. 13 sought “[a]ll documents concerning any work done by a forensic accountant or other outside professional that [AYM] or its counsel relied upon or referred to in correspondence with [SCM] related to purported injuries that [AYM] claims to have suffered, including all correspondence with such accountant or outside vendor.” Doc. 10-11 at 5. Defendants objected to this demand on the grounds that it sought privileged and confidential information and that it “is overbroad and demands information irrelevant to the prosecution or defense of this action.” Doc. 12 at 4. This Court finds that plaintiffs’ demand for information about damages sustained by AYM, a defendant herein, is irrelevant in this action by plaintiffs seeking injunctive relief and damages for breach of contract *against* AYM and Quinn.

Request No. 14 sought “[a]ll documents concerning a role of Clay Grubb in efforts to demand money from any of the plaintiffs.” Docs. 10-11 at 6. Defendants objected to this demand as misleading, overbroad, and patently improper but provided certain Bates stamped documents to plaintiffs in response. However, since these documents are not included as an exhibit to plaintiff’s motion, this Court cannot discern whether the response was sufficient.

### **Defendants’ Cross Motion to Compel (Motion Sequence 001)**

In support of their cross motion filed November 20, 2017, defendants assert that this Court should compel plaintiffs to supplement their response to defendants’ Interrogatory No. 8. Docs. 21-22. However, the cross motion is denied as moot since plaintiffs supplemented their response to this interrogatory on January 29, 2018. Doc. 35. In any event, the affirmation of good faith

submitted in support of the cross motion (Doc. 25) is deficient insofar as it does not indicate the time, place and/or nature of any consultation between counsel regarding outstanding discovery, as required by 22 NYCRR 202.7. *See 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 (1st Dept 2009) (citation omitted).

### **Defendants' Motion for a Protective Order (Motion Sequence 002)**

As noted previously, defendants seek a protective order against plaintiffs' Request Nos. 6-10 and 13. CPLR §3103(a) provides as follows:

Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

“Trial courts generally have broad power to regulate discovery to prevent abuse and a protective order is necessary and proper when the disclosure process is used to harass a party. The moving party bears the burden of persuasion in seeking a protective order.” *Kukla v Bamberger*, 2019 NY Slip Op 31783(U), \*1-2 (Sup Ct, NY County 2019) (citations omitted).

For the reasons stated above, defendants' motion for a protective order is granted as to plaintiffs' Request Nos. 6, 8, 10, and 13 and denied as to plaintiff's Request Nos. 7 and 9.

Finally, this Court notes that the parties have submitted correspondence to this Court regarding whether the automatic stay provision set forth in CPLR 3214(b) should prevent discovery from being exchanged at this time. Plaintiffs argue that the automatic stay invoked by defendants' motion to dismiss (motion sequence 006) should be lifted to allow discovery to proceed. Docs. 137, 145. Defendants argue that the stay should not be lifted because a motion by

them to dismiss some or all of the claims in the second amended complaint is imminent. Doc. 144. This Court finds that CPLR 3214(b) is inapplicable since there is no motion to dismiss pending. Defendants' motion to dismiss (motion sequence 006) was withdrawn without prejudice and defendants intend to move to dismiss some or all of the second amended complaint. However, 3214(b) is not triggered until that motion is made.

This Court has considered the parties' remaining contentions and finds them to be without merit or unnecessary to address given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiffs' motion to compel (motion sequence 001) is granted to the extent that, within 30 days of service of this order by plaintiffs with notice of entry, defendants must provide responses to Request Nos. 7 and 9 of Plaintiffs' First Request for Production of Documents dated May 16, 2017, and the motion is otherwise denied; and it is further

ORDERED that defendants cross motion to compel (motion sequence 001) is denied as moot; and it is further

ORDERED that defendants' motion for a protective order (motion sequence 002) is granted as to Request Nos. 6, 8, 10, and 13 of Plaintiffs' First Request for Production of Documents dated May 16, 2017 and is otherwise denied; and it is further

ORDERED that the parties are to participate in a discovery conference by telephone on September 21, 2020 at 10 am (the parties are to provide a dial-in number and access code for the call or are to have all parties on the line and then patch in the court at 646-386-5655); and it is further

ORDERED that this constitutes the decision and order of the court.

8/4/2020  
DATE



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KATHRYN E. FREED, J.S.C.

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| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |   |
|                       | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | DENIED                | <input checked="" type="checkbox"/> OTHER |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          |   |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE        |