Silva v Giorgio Armani Corp.
2020 NY Slip Op 33821(U)
November 17, 2020
Supreme Court, New York County
Docket Number: 159449/2015
Judge: Kathryn E. Freed

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. 159449/2015

FABIO SILVA,

Plaintiff,

- v -

MOTION SEQ. NO. 005, 006, 007, and 008

GIORGIO ARMANI CORPORATION, PRESIDIO INTERNATIONAL, INC., GIORGIO ARMANI, GIORGIO FORNARI, and LUCINDA ROSSO,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 161, 164, 192

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 152, 153, 154, 155, 156, 157, 158, 159, 160, 163, 165, 194

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 182, 184, 185, 186, 187, 188, 189, 190, 191, 193

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 196, 197, 198, 199, 200, 201, 202, 203, 204

were read on this motion to/for EXTEND - TIME.

Motion sequence nos. 005, 006, 007 and 008 are consolidated for disposition.

In motion sequence 005, plaintiff Fabio Silva moves, pursuant to CPLR 3124, to compel defendants Giorgio Armani Corporation (GAC), Presidio International, Inc. (Presidio), Giorgio Fornari (Fornari) and Lucinda Rosso (collectively, defendants) to produce unredacted documents related to the hiring of nonparty Henry Rouda (Rouda) and to produce email correspondence that had been discussed at plaintiff's deposition.

In motion sequence 006, plaintiff moves for an order directing defendants to produce Rouda for a continued deposition without any limitation on the issues about which he may be questioned, and for an order directing defendants to comply with Part 221 of the Uniform Rules for Trial Courts, more commonly known as the Uniform Rules for the Conduct of Depositions.

In motion sequence 007, plaintiff moves, pursuant to CPLR 3124, to compel defendants to conduct a search for electronically stored information (ESI) using the terms propounded by plaintiff; to compel Fornari to provide supplemental responses with regard to unscheduled salary raises; and to compel defendants to produce nonparty Luca Pastorelli (Pastorelli) for a deposition.

In motion sequence 008, plaintiff moves under CPLR 2004 and Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (d) for an order extending all pretrial deadlines to complete discovery and to extend the time to file a note of issue.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who is Mexican, is the former General Counsel and Vice President for Legal Affairs for GAC and the former General Counsel for Presidio, a GAC subsidiary. He brings this action against defendants under the New York City Human Rights Law (Administrative Code of City of NY § 8-101 *et seq*.) claiming a hostile work environment, retaliation, and unlawful discharge based on national origin and disability. Plaintiff has discontinued his claims against defendant Giorgio Armani (NY St Cts Elec Filing [NYSCEF] Doc No. 32).

Since this action was commenced, the parties have been engaged in protracted disputes over discovery, resulting in multiple court conferences, two discovery-related motions, and the appointment of a Referee to supervise and direct disclosure (NYSCEF Doc Nos. 56 and 91). The two motions were resolved by court order dated May 8, 2017 (NYSCEF Doc Nos. 114 and 129),

a so-ordered stipulation dated January 3, 2018 (the January Stipulation) and a court order signed February 7, 2018 (the February Order) (NYSCEF Doc No. 131). As is relevant here, paragraph 2 of the January Stipulation reads, in part, that defendants shall produce the following documents:

> "a) the Job posting for the position Plaintiff applied to; the job application for Plaintiff; records/notes of the interviews of Plaintiff; and communications discussing Plaintiff's qualifications and candidacy.
>
> ...
>
> h) Any job posting for Plaintiff's replacement and documents reflecting the timing of the hiring of Hank Rouda and the decision to hire Mr. Rouda. Information reflecting Mr. Rouda's compensation or benefits will be redacted to the extent otherwise required by the Court pursuant to Paragraph 3 of this Stipulation"

(*id.* at 5-6). Paragraph 4 of the January Stipulation states in part that "[i]f any documents to be produced pursuant to this Stipulation include electronically stored information (such as emails), Defendants shall apply the searches set forth in Plaintiff's Third Request for Production of Documents" without prejudice to plaintiff's right to request additional searches or defendants' right to object (*id.* at 8). The February Order provides, in relevant part, that defendants shall produce "[i]internal communications about Plaintiff's replacement's initial compensation; and, to the extent they exist, policies or other written directives/guidelines governing how Plaintiff's replacement's compensation was set and how and when it might be adjusted" (NYSCEF Doc No. 131 at 3).

The parties appeared for a court conference on April 10, 2019 (the April 10 Conference), at which time additional rulings regarding discovery were made. The parties agree that these rulings were not reduced to writing.

The present disputes involve defendants' purported noncompliance with the January Stipulation and the February Order and the parties' differing interpretations of rulings made at the

April 10 Conference. In three separate motions, plaintiff moves to compel defendants to furnish discovery. In a fourth motion, plaintiff moves for an order extending pretrial deadlines.

LEGAL STANDARDS

CPLR 3101 calls for the full disclosure of all evidence material and necessary in the prosecution or defense of an action (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). As such, "[l]iberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176 [1st Dept 1996]). Pursuant to CPLR 3124, a party may "move to compel compliance or a response" to a "request, notice, interrogatory, demand, question or order" for discovery. Nevertheless, discovery may not be used as a "fishing expedition" (*New York Community Bank v Parade Place, LLC*, 96 AD3d 542, 543 [1st Dept 2012], quoting *Orix Credit Alliance v Hable Co.*, 256 ADd 114, 116 [1st Dept 1998]). "The test of whether matter should be disclosed is 'one of usefulness and reason'" (*City of New York v Maul*, 118 AD3d 401, 402 [1st Dept 2014], quoting *Allen*, 21 NY2d at 406). Thus, it is within the court's discretion to grant a motion brought under CPLR 3124 (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009), by weighing "the need for discovery … against any special burden borne by the opposing party" (*Kavanagh v Ogden Allied Maint. Corp.*, 92 NY2d 952, 954 [1998][internal quotation marks and citation omitted]).

Motion Sequence 005

This motion concerns two categories of documents. The first category pertains to Rouda's hiring and compensation and the second pertains to documents discussed at plaintiff's deposition.

As an initial matter, this Court rejects plaintiff's contention that defendants' opposition should not be considered because they have submitted a memorandum of law instead of an affirmation or affidavit from one with knowledge of the purported facts. The Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1a (b), discussing the certification of papers, state, in pertinent part, that "[b]y signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1 (c) of this Subpart." Defendants' counsel signed the memorandum of law in accordance with the rule above (NYSCEF Doc No. 161, defendants' mem of law at 11). Incidentally, it appears that defendants' counsel has specific knowledge of the facts surrounding the present disputes, as her name appears on several of the exhibits plaintiff has submitted in connection with the motion (NYSCEF Doc No. 148, Harwin affirmation, exhibit at I at 22; NYSCEF Doc No. 149, Harwin affirmation, exhibit J at 9). Therefore, this Court will consider defendants' opposition.

A. Rouda's Hiring and Compensation

Plaintiff moves to compel defendants to produce complete, unredacted copies of documents discussing Rouda's hiring and compensation. He argues that the January Stipulation and the February Order do not allow for any redactions on these subjects. However, defendants exchanged documents with partial redactions (NYSCEF Doc No. 139, Alexandra Harwin [Harwin] affirmation, exhibit A at 1). The nature of the redacted information is identified as "Irrelevant Information Concerning Other Candidates" (*id.*).

In opposition, defendants maintain that they have complied with all prior discovery orders. They argue that issues pertaining to Rouda's hiring and compensation were previously decided in the January Stipulation and the February Order. They submit that information regarding other candidates considered for plaintiff's position prior to his hiring are not material, necessary or relevant to his claims in this action.

In response, plaintiff rejects defendants' assertion that they have complied with earlier court orders because they redacted information about Rouda, who replaced plaintiff at GAC, on the documents.

An examination of the defendants' documents shows that the partial redactions are proper and comport with the parameters of the discovery to be exchanged as set forth in the January Stipulation and the February Order. For instance, one document entitled "VP/Director Legal Affairs Candidate List" details each candidate's background and qualifications (NYSCEF Doc No. 140 at 2, 25 and 27). The only candidate information appearing on the document concerns plaintiff. On July 16, 2019, defendants exchanged a different redacted version of that same VP/Director Legal Affairs Candidate List, but the new version omitted the redactions pertaining to Rouda (NYSCEF Doc No. 145, Harwin affirmation, exhibit F at 7). Plaintiff points to another document, an email to Pastorelli written by Rosso dated July 28, 2014, to show that defendants have also removed redactions concerning Rouda's qualifications (*id.* at 5). Plaintiff argues that all other redactions must be removed.

Paragraph 2 (a) of the January Stipulation, however, does not require defendants to produce information for any candidate other than plaintiff, at least at the time of his initial hiring in September 2014. Therefore, it was appropriate for defendants to redact information pertaining to these other candidates, even though the pool of candidates included Rouda. Plaintiff has not shown

how information discussing these other candidates at the time of plaintiff's hiring bears on the discrimination, retaliation or termination claims. Importantly, plaintiff has not raised whether defendant engaged in unlawful practices related to his hiring. Furthermore, in accordance with paragraph 2 (h) of the January Stipulation, defendants properly removed the redactions on information pertaining to Rouda, and have produced a copy of Rouda's resume.

Indeed, an email thread beginning November 13, 2014 shows that defendants, notably Rosso, reached out to Rouda to give him an "update" (NYSCEF Doc No. 144, Harwin affirmation, exhibit E at 8-9). While the email thread does not reflect any further written communications on or around that date, the thread picks up with another email message from Rouda to Rosso dated April 10, 2015, which references a proposed future conversation between them (*id.* at 8). Thus, it is possible that no additional written communications exist. Notwithstanding this observation, defendants, in their opposition, do not expressly address whether additional written communications exist between Rouda and GAC for the period between November 13, 2014 and April 10, 2015. Thus, to the extent that written communications which "reflect[ ] the time of the hiring of Hank Rouda and the decision to hire Mr. Rouda" exist for the period between November 13, 2014 and April 10, 2015 and have not already been exchanged, they should be produced in accordance with paragraph 2 (h) of the January Stipulation (NYSCEF Doc No. 131 at 6).

B. Email Correspondence Discussed at Plaintiff's Deposition

Next, plaintiff seeks documents about which defendants questioned him at his deposition but have since refused to exchange. He submits that, at the April 10 Conference, defendants claimed the documents are prohibited from disclosure as attorney work product. Plaintiff has identified 11 instances from his deposition when defendants' counsel questioned him about emails

that he either sent or received and defendants object to producing them on the ground that the documents are immune from disclosure as attorney work product.

CPLR 3101 (c) provides that "[t]he work product of an attorney shall not be obtainable," and, therefore, an attorney's work product is immune from disclosure (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-377 [1991], *mot to amend remittitur denied* 79 NY2d 850 [1992]). "In the course of litigation, much of an attorney's effort is directed at preparing various documents" (*Corcoran v Peat, Marwick, Mitchell & Co.*, 151 AD2d 443, 445 [1st Dept 1989]). However, the attorney work product protection does not automatically extend to a document just because an attorney had prepared it. Rather, "attorney work product applies only 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]). An attorney's "interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product" (*Corcoran*, 151 AD2d at 445). The burden rests with the party pursuing the attorney work product exemption to demonstrate that the claimed exemption applies (*see Spectrum Sys. Intl. Corp.*, 78 NY2d at 377).

As applied here, defendants have not met their burden of demonstrating that the documents referenced at plaintiff's deposition constitute attorney work product. A review of the excerpts of the transcript reveals seven instances in which defendants' question contained exact quotations from email correspondence either written or received by plaintiff (NYSCEF Doc No. 141, Harwin affirmation, exhibit B at 397, 437-439, 444-445, 446-448, 492, 551, and 552). The other four instances involved whether plaintiff recalled writing or receiving an email about the topic in

discussion at that time (*id*. at 242, 550, and 614). Plainly, these documents were not drafted or created by defendants' counsel, since the majority of the questions centered on what plaintiff had written to, or received from, others. While the sequencing of an attorney's questions may reveal that attorney's thought process or strategy, merely quoting portions of a document written or received by plaintiff does not constitute work product. Indeed, "[n]ot every selection and compilation of third-party documents by counsel transforms that material into attorney work product" (*In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002*, 318 F3d 379, 386 [2d Cir 2002]). The attorney claiming the work product exemption "must show 'a real, rather than speculative, concern' that counsel's thought processes 'in relation to pending or anticipated litigation' will be exposed through disclosure of the compiled documents" (*id*. [internal citation omitted]). Defendants have failed to meet this burden. Thus, the documents referenced on the 11 occasions identified in plaintiff's motion shall be produced.

Motion Sequence 006

On this motion, plaintiff moves to compel defendants to produce Rouda for a further deposition. Plaintiff also moves for an order directing defendants' counsel to abide by Part 221 of the Uniform Rules for Trial Courts and for an award of sanctions under Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1.

As an initial matter, plaintiff correctly observes that defendants' 40-page affirmation in opposition clearly exceeds the 25-page limit set forth in Uniform Rule 14 (b) (1) of the Rules of the Justices, New York County, Supreme Court, Civil Branch and in Section II (E) (v) of this Court's Individual Part Rules. There has been no indication that defendants sought leave to file a lengthier submission, nor have defendants demonstrated good cause for doing so. While counsel

should have been aware of all local and individual part rules (*see e.g. Franklin v McHugh*, 804 F3d 627, 632 [2d Cir 2015] [stating that "counsel have long been charged with becoming familiar and complying with the various local rules of our courts"]), this Court declines to reject defendants' submission outright and will consider the same (*see Matter of East 91st St. Crane Collapse Litig.*, 119 AD3d 437, 438 [1st Dept 2014] [concluding that the court's refusal to consider moving papers in excess of the court's page limitation rules was an abuse of discretion]; *cf. Hornsby v Cathedral Parkway Apts. Corp.*, 179 AD3d 584, 584 [1st Dept 2020] [denying the defendants' motion where its moving papers exceeded the motion court's page limitation rules]). Plaintiff has not demonstrated having suffered any prejudice from counsel's actions. Furthermore, the excerpts from Rouda's deposition transcript quoted in counsel's affirmation contain both page and line numbers.

A. Rouda's Continued Deposition

Plaintiff submits that, at the April 10 Conference, this Court directed defendants to produce Rouda for a deposition, but "declined to limit the topics of questioning"; did not "authorize [d]efendants to instruct Mr. Rouda not to answer any non-privileged question"; and indicated that "it was appropriate to question Mr. Rouda about the terms and conditions of his employment, his qualifications, his hiring, and conversations during his hiring and interview process" (NYSCEF Doc No. 157, plaintiff's mem of law at 2) (emphasis in original). Plaintiff alleges that defendants obstructed Rouda's deposition by failing to abide by these rulings and refused to permit Rouda to answer questions about his background, prior work history, compensation, responsibilities, as well as questions regarding whether he is a member of plaintiff's protected class.

Defendants oppose the motion on two grounds. First, they argue that Rouda responded to every question posed by plaintiff within the boundaries set forth in this Court's oral order. Second, defendants contend that a disagreement regarding the parameters of the topics to be discussed arose within the first few minutes of the deposition. Defendants claim that, despite their suggestion that the parties contact this Court for clarification, plaintiff waited until the end of the deposition to do so.

It is well settled that "the scope of examination permissible at deposition is broader than the scope of examination permissible at trial" (*Horowitz v Upjohn Co.*, 149 AD2d 467, 468 [2d Dept 1989]). "In conducting depositions, questions should be freely permitted unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant" (*Kaye v Tee Bar Corp.*, 151 AD3d 1530, 1531 [3d Dept 2017] [internal quotation marks and citation omitted]).

Here, the parties agree that the permissible topics to be discussed at Rouda's deposition included the process of his hiring, his acceptance of the position, his qualifications and his past work experience (NYSCEF Doc No. 157 at 2; NYSCEF Doc No. 159, Traycee Ellen Klein [Klein] affirmation at 5), although their understanding of what questions were permissible under these categories varies significantly. The deposition transcript reflects that disagreements arose almost immediately after Rouda was sworn in. While defendants complain that the better practice would have been to seek immediate clarification from this Court on whether the deposition was limited to "Mr. Rouda's hiring, his interviews and his salary" (NYSCEF Doc No. 159 at 7), this Court finds that it would have been impractical to prospectively seek intervention before plaintiff's counsel could even pose a question. Indeed, it is "improper to direct prospectively that all

questions to be asked in the future be answered, reserving objections for the trial court, without knowing what those questions may be" (*White v Martins*, 100 AD2d 805, 805 [1st Dept 1984]).

"[T]he proper procedure to be followed in order to compel a further deposition of a witness is to indicate to the court precisely which questions were not answered, that the witness's refusal to answer was improper, and that a further deposition is the appropriate remedy" (*American Reliance Ins. Co. v National Gen. Ins. Co.*, 174 AD2d 591, 593 [2d Dept 1991]). Plaintiff submits a list of 28 instances, accompanied by excerpts from the deposition transcript, in which defendants' counsel directed Rouda not to answer. The questions concern the following:

1. Rouda's performance at GAC;
2. The performance evaluations he has received at GAC;
3. The ratings on his performance evaluation at GAC;
4. Rouda's bonus at GAC;
5. Rouda's home address;
6. Whether Rouda had cancer when GAC hired him;
7. Whether he ever brought a formal or informal complaint of discrimination against anyone at GAC;
8. Whether he ever brought a formal or informal complaint of retaliation against anyone at GAC;
9. Whether anyone has alleged that Rouda had discriminated or retaliated against that person;
10. The circumstances for his departure from Equity Properties & Development, LP;
11. The circumstances for his departure from DLC;
12. Whether H&M was the first fashion company Rouda had worked for;
13. Whether Rouda was "passionate" about fashion;
14. Rouda's overall performance score for 2015;
15. The number of times Rouda met with Pastorelli in person;
16. Whether Rouda ever asked for a base salary increase at GAC;
17. Whether Rouda received a bonus in 2015;
18. Whether Rouda's number of paid days at GAC ever increased;
19. Whether Rouda's garment allowance remained fixed after his first year at GAC;
20. The amount of Rouda's annual bonus at H&M;
21. What other employment offers Rouda received in 2015 apart from GAC's offer;
22. Whether he had discussed other employment opportunities with Rosso in 2015;
23. If any of Rouda's previous employees had asked him to work confidentially at an offsite location at the start of his employment;
24. If he was aware of other employees who began their time at GAC by working confidentially in an offsite location;

25. Whether Rouda had ever been laid off from a legal position;
26. Whether Rouda has sought other employment while at GAC;
27. Whether Boston College Law Magazine had written an article discussing Rouda's employment at GAC;
28. The amount of Rouda's annual bonus in 2016

(NYSCEF Doc No. 155, exhibit at 1-2).

Examination of this list reveals that several questions bear directly on plaintiff's claims. For instance, plaintiff alleges in the complaint that he was discriminated or retaliated against despite his strong work performance (NYSCEF Doc No. 1, ¶¶ 26 and 36). He further alleges that defendants refused to approve a salary adjustment because he had complained of discrimination (*id.*, ¶ 39). Inquiries into Rouda's compensation and benefits he received at GAC (question nos. 4, 17, 18, 19, 20 and 28); whether Rouda ever requested a salary increase (question no. 16); and the performance evaluations and ratings he received at GAC (question nos. 1, 2, 3 and 14) are all permissible, as they are designed to elicit information regarding whether plaintiff had been treated differently, and whether that treatment was unlawful. Questions pertaining to Rouda's in-person interactions with Pastorelli (question no. 15) and whether he or others at GAC were directed to work confidentially at an offsite location (question nos. 23 and 24) are also relevant.

Likewise, questions intended to ascertain whether Rouda is a member of the same protected class (question no. 6) and whether Rouda had ever complained about discrimination or retaliation at GAC (question nos. 7 and 8) are germane. Queries into Rouda's prior experience as legal counsel for another fashion company (question nos. 12 and 13); the Boston College Law Magazine article (question no. 27); and Rouda's home address (question no. 5) are also permissible for background purposes.

Additionally, the circumstances of Rouda's departure from Equity Properties & Development, LP and DLC (questions no. 10 and 11); the amount of Rouda's bonus at H&M

(question no. 20); whether he received other employment offers in 2015 (question no. 22); whether Rouda has sought out other employment opportunities while working at GAC(question no. 26); and whether anyone at GAC had alleged that Rouda had engaged in discriminatory or retaliatory conduct (question no. 9) are designed to elicit material that is relevant to plaintiff's claims.

Thus, plaintiff has shown he is entitled to a continued deposition of Rouda, and defendants shall produce Rouda for a continued deposition at a date, time and place amenable to all sides. Rouda's continued deposition, however, should not be considered an invitation for plaintiff to conduct a wholesale "do over", and the questions shall be limited to those topics described above. To the extent they have not already been answered, plaintiff may also inquire about Rouda's legal qualifications, his prior legal experience, the hiring and the interview process at GAC in 2015, which shall include communications, either written or verbal, with anyone at GAC. Given the current Coronavirus pandemic, the parties are urged to come to a mutually agreeable procedure for conducting the deposition in a manner safe for all those attending.

B. Uniform Rules for the Conduct at Depositions and Sanctions

Plaintiff also moves for an order directing defendants' counsel to comply with the Uniform Rules for the Conduct of Depositions and for an award of sanctions based on opposing counsel's improper objections made at Rouda's deposition.

Rule of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (a) permits this Court, in its discretion, to impose monetary sanctions on a party as the result of that party's frivolous conduct. Conduct is considered "frivolous" where:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In 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 or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

(Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1 [c]). An award of monetary sanctions is proper if a party manifests "extreme behavior" (*Ray v Ray*, 180 AD3d 472, 474 [1st Dept 2020], *lv dismissed* 35 NY3d 1007 [2020] [internal quotation marks and citation omitted]). Thic Court must look at the offending party's "broad pattern" of conduct (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]). For instance, an award of sanctions is appropriate where a party's conduct at a deposition is found to have been "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*Freidman v Yakov*, 138 AD3d 554, 555 [1st Dept 2016] [internal question marks and citation omitted]).

This Court declines to award monetary sanctions to plaintiff. Uniform Rules for Trial Courts (22 NYCRR) § 221.1, entitled "Objections at depositions," states as follows:

> "(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
>
> (b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest

> an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning."

Additionally, Uniform Rules for Trial Courts (22 NYCRR) § 221.2, entitled "Refusal to answer when objection is made," reads:

> "A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition."

Thus, while the rules limit the categories of objections available to a deponent at a deposition, they plainly state that a deponent may decline to answer a question if it is in contravention of a limitation set forth in a court order. A review of the transcript excerpts submitted by plaintiff reflects that defendants' counsel raised objections based on a good faith belief that this Court had limited the scope of Rouda's deposition, and plaintiff's counsel elected to move forward with the deposition. Hence, it cannot be said that defense counsel's conduct was frivolous.

Finally, this Court denies that part of plaintiff's motion for an order directing defendants' counsel and Rouda to comply with the Uniform Rules for the Conduct of Depositions at the continued deposition, since it expects the parties to be fully familiar with what is permissible under Uniform Rules for Trial Courts (22 NYCRR) §§ 221.1, 221.2 and 221.3.

Motion Sequence 007

Plaintiff moves to compel defendants to conduct additional searches for ESI, to produce information concerning requests for salary increases, and to produce Pastorelli for a deposition.

As an initial matter, this Court will consider defendants' opposing papers (*see Narvaez v Wadsworth*, 165 AD3d 407, 408 [1st Dept 2018]; *JPMorgan Chase Bank, N.A. v Hayes*, 138 AD3d 617, [1st Dept 2016]). Plaintiff filed his motion on October 31, 2019, with the return date set for December 19, 2019 (NYSCEF Doc No. 166 at 1). The notice contained a demand, under CPLR 2214 (b), that answering papers be served on or before December 4, 2019 (*id.* at 2), as had been previously agreed between the parties (NYSCEF Doc No. 186, Harwin reply affirmation, ¶ 3). However, defendants filed their opposition on December 17, 2019 (NYSCEF Doc No. 184, Klein affirmation).

"The failure to comply with CPLR 2215 or 2214 may be excused in the absence of prejudice" (*Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340 [1st Dept 2004]). Regardless of whether the parties had agreed to a briefing schedule, a point which defendants refute (NYSCEF Doc No. 193, Klein sur reply affirmation, ¶ 3), plaintiff has failed to demonstrate that he was prejudiced in any way from the delay since he has submitted a reply.

A. Additional Searches for ESI

Plaintiff moves to compel defendants to conduct additional searches for ESI based on terms propounded by him related to the following six subjects: plaintiff's termination and retaliation; discrimination or retaliation; discrimination based on national origin; discrimination based on disability; his request for a salary adjustment; and defendants' search for his replacement (NYSCEF Doc No. 170, Harwin affirmation, exhibit C). He argues that defendants have refused

to run any of his proposed searches, have refused to produce any emails for various custodians, and have run only limited searches for others.

Plaintiff maintains that, at the April 10 Conference, this Court directed defendants to produce "hit" counts for certain custodians, but the results exchanged by defendants were both "under-inclusive and over-inclusive" (NYSCEF Doc No. 179, plaintiff's mem of law at 8). He alleges that defendants produced hit counts for custodians who were not requested, produced aggregated hit counts, and refused to disclose where duplicate results had been removed (*id.*).

In opposition, defendants contend that plaintiff improperly seeks reargument of issues previously raised, and rejected by, this Court at prior conferences. Pursuant to the January Stipulation, defendants searched for all ESI and hard copies of documents responsive to the search terms propounded by plaintiff in his third request for documents, and produced all documents responsive to these searches on April 9, 2018.

Defendants further contend that, at the April 10 Conference, plaintiff presented this Court with the same list of proposed ESI searches as the list submitted in his motion. Defendants assert that, after hearing argument, this Court narrowed the search terms and the number of custodians' boxes for the search. This Court then directed defendants to produce two "hit" reports for searches of the custodial boxes for Human Resources (HR) personnel at GAC's corporate office, Giuseppe Marsocci, GAC's former Chief Executive Officer, and Fornari, limited to the period between January 1, 2012 and July 2, 2015, and a hit report for a search of plaintiff's custodial box at GAC (NYSCEF Doc No. 184, Klein affirmation, ¶ 9). Defendants provided a response on May 10, 2019, which was within the 30-day deadline imposed by this Court at the April 10 Conference (NYSCEF Doc No. 184, Klein affirmation, exhibit A at 1 [items 3 [a] and [b]). In their response, defendants' counsel estimated that the searches yielded 100,099 pages of emails per gigabyte and

that, at a minimum, two of the searches yielded 578,572.22 pages of emails (*id.* at 2-3). Defendants now argue that, since they have complied with the order of this Court issued at the April 10 Conference, plaintiff's four month delay in moving for relief is indicative of frivolous conduct and bad faith. Defendants, who characterize plaintiff's discovery tactics as a "proverbial fishing expedition" (NYSCEF Doc No. 184, ¶ 8), ask this Court to award them their attorneys' fees and expenses under Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1.

In reply, plaintiff repeats the argument that defendants' hit reports are deficient. First, the report omitted the results of a search of Tom Chan's (Chan) emails, even though Chan is alleged to have discriminated against plaintiff. Plaintiff also contends that defendants did not object to the relevance of the proposed ESI search terms, since their objections centered on the theory that they bore no liability to plaintiff.

The motion is denied insofar as plaintiff seeks to revisit issues previously raised at the April 10 Conference. The proper procedure to revisit a prior court ruling would be to bring a motion to reargue under CPLR 2221, not a motion to compel under CPLR 3124. Importantly, although the January Stipulation and February Order do not preclude plaintiff from seeking additional ESI, plaintiff does not contest defendants' assertion that the list of proposed ESI searches was already discussed at the April 10 Conference. Although plaintiff argues that the proposed search terms are narrowly tailored to suit the facts, the proposed search repeats multiple words or phrases from the earlier ESI search terms propounded in his third request for production of documents and from the more recent ESI searches defendants had been directed to conduct at the April 10 Conference. Given the breadth of the prior searches for ESI, plaintiff has not adequately demonstrated that further searches, however narrow, would likely yield results that have not already been produced. Further, contrary to plaintiff's contention, defendants' response dated May 10, 2019 expressly

states that Marsocci's and Silva's inboxes were searched, and that Chan's inbox was part of an earlier search.

Despite the significant number of "hits," however, defendants are directed to supplement their two hit reports to reflect whether their search protocol involved a deduplication procedure. If the search protocol did not involve a deduplication procedure, then defendants should provide a revised hit count to indicate the presence of any duplicate documents.

Plaintiff also objects to the "over-inclusive" nature of the searches defendants performed, which yielded results for all of defendants' Human Resources staff. Since it appears that plaintiff seeks only those documents found from Rosso's custodial box, defendants must revise their hit reports to indicate the number of responsive documents found for Rosso.

B. Requests for Unscheduled Raises

Plaintiff argues that, at the April 10 Conference, this Court directed defendants to "furnish information concerning corporate employees at or above the director-level who had requested unscheduled raises," but defendants "unilaterally narrowed the inquiry" by limiting their responses to Fornari's direct supervisees, as opposed to all corporate employees (NYSCEF Doc No. 179 at 9). Plaintiff seeks an order directing Fornari to furnish a proper response.

Defendants, in response, maintain that it was their understanding the request pertained to Fornari only, as stated in their response dated May 10, 2019 (NYSCEF Doc No. 184, Klein affirmation, exhibit A at 3 [item 4).

This Court finds that plaintiff is entitled to disclosure regarding whether anyone holding the title of "director", its equivalent, or a higher position at GAC had requested an unscheduled salary increase, and whether those requests were granted or denied, regardless of whether Fornari

is that employee's direct supervisor or direct report, since this disclosure is potentially germane to plaintiff's claim of retaliation (NYSCEF Doc No. 1, ¶¶ 37-38), and should not be restricted to those who reported directly to Fornari.

However, this Court rejects plaintiff's assertion that defendants improperly restricted the search to those employees with offer letters containing language similar to that in plaintiff's offer letter. Plaintiff's offer letter plainly states that he would receive a raise effective January 5, 2016 if his performance "achieve[s] expectations" (NYSCEF Doc No. 175 at 1). The letter does not guarantee that he would regularly receive raises apart from the initial salary adjustment described. This comports with Rosso's testimony that "[n]obody received regular raises," and that executive compensation was "really individualized" (NYSCEF Doc No. 188, Harwin reply affirmation, exhibit C [Rosso tr] at 104). To the extent an employee received a raise, Chan testified that the increase generally took effect in July or August (NYSCEF Doc No. 174, Harwin affirmation, exhibit G [Chan tr] at 102]). Thus, it was proper for defendants to limit the search to those employees who had requested a raise in advance of a scheduled raise in their offer letters.

C. Pastorelli's Deposition

Plaintiff moves to compel defendants to produce Pastorelli, the Worldwide Director of Legal Affairs for GAC's parent company, Giorgio Armani SpA (GAC SpA). According to GAC's offer of employment to plaintiff, plaintiff would report "functionally to the Worldwide Director of Legal" at GAC SpA (NYSCEF Doc No. 173, Harwin affirmation, exhibit F at 1). Plaintiff argues that Pastorelli, who lives and works in Italy, has information material and relevant to this action because he was involved in the decision to hire, terminate and replace him. He contends that GAC SpA controls GAC's operations because GAC SpA selects the members sitting on GAC's board,

which is comprised of GAC SpA executives. Plaintiff asserts that this Court has the authority to compel defendants to produce an employee of a parent corporation for a deposition.

In opposition, defendants assert that plaintiff first requested Pastorelli's deposition in December 2015 (NYSCEF Doc No. 184, Klein affirmation, exhibit D at 1), and that defendants rejected the request because Pastorelli is a nonparty who is not employed by either named corporate defendant (NYSCEF Doc No. 184, Klein affirmation, exhibit E at 1). On this motion, defendants again reject plaintiff's request to depose Pastorelli, as well as plaintiff's contention that GAC and GAC SpA are under "common control." In support, defendants rely on an affirmation from Rouda, who explains that GAC SpA is a wholly separate, legal entity from GAC (NYSCEF Doc No. 185, Rouda affirmation, ¶ 3). GAC hires and trains its own staff, applies its own policies and procedures related to its employees, pays its employees' wages, and prepares its own financial statements (*id.*). Rouda adds that he was unaware of Pastorelli ever visiting GAC's office at any time in his four and one-half years as GAC's General Counsel and Senior Vice President of Legal Affairs, and that Pastorelli does not regularly travel to GAC (*id.*, ¶¶ 1, 4 and 7). Regarding his reporting obligations, Rouda states that, as GACs's only in-house attorney, he "functionally had and … [has] dotted line reporting to Mr. Pastorelli, … which simply means that if there is a need for US legal to report or reach out to someone outside of GAC, the contact person at Giorgio Armani S.p.A. was, and is, Mr. Pastorelli" (*id.*, ¶ 5). Rouda also states that "Pastorelli does not work for GAC, and he is not involved in the day in and out legal, or any other businesses, of GAC" (*id.*).

It is well settled that a party cannot be compelled to produce a nonparty witness for a deposition where the nonparty is outside of its control (*see Holloway v Cha Cha Laundry,* 97 AD2d 385, 386 [1st Dept 1983]). Plaintiff acknowledges that Pastorelli is not employed by either

GAC or Presidio. Nevertheless, he argues that GAC and GAC SpA are under the common control of a single person, which makes Pastorelli one of GAC's agents.

This Court finds that plaintiff has not demonstrated that Pastorelli's deposition is necessary. A party seeking a further deposition must make "a 'detailed showing' of the necessity for taking additional depositions ... [by demonstrating that] there was a substantial likelihood that those sought to be deposed possess information necessary and material to the prosecution of the case" (*Alexopoulos v Metropolitan Transp. Auth.*, 37 AD3d 232, 233 [1st Dept 2007]). Plaintiff herein relies on several documents on which Pastorelli's name or position appears. The first is plaintiff's offer letter dated September 16, 2014 (NYSCEF Doc No. 175, Harwin affirmation, exhibit H at 1). Pastorelli's name appears on a handwritten note dated April 16, 2015 (NYSCEF Doc No. 176, Harwin affirmation, exhibit I at 1), and on an email from September 15, 2014 Rosso had written to Pastorelli, Fornari and Graziano de Boni about the pending offer of employment to plaintiff (NYSCEF Doc No. 177, Harwin affirmation, exhibit J at 1). However, plaintiff did not name Pastorelli as one of the persons who engaged in the allegedly discriminatory and retaliatory conduct in the complaint. The mere inclusion of Pastorelli's name or position on these documents is also insufficient to demonstrate that Pastorelli has particular knowledge about the circumstances of plaintiff's hiring or termination. Moreover, plaintiff has already deposed at least four witnesses employed by GAC, including Fornari and Rosso, and he has not demonstrated that any of these witnesses lacked sufficient knowledge of his claims (*see Hayden v City of New York,* 26 AD3d 262, 262 [1st Dept 2006]).

Similarly, plaintiff has not demonstrated that Pastorelli is defendants' agent. Plaintiff has presented testimonial evidence that GAC is a wholly owned subsidiary of GAC SpA (NYSCEF Doc No. 174 at 89). Although common ownership is "intrinsic to the parent-subsidiary

relationship," it is not by itself determinative (*Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 468 [1st Dept 2018] [internal quotation marks and citation omitted] [discussing personal jurisdiction]). "[T]he parent company's degree of control over the subsidiary's activities 'must be so complete that the subsidiary is, in fact, merely a department of the parent'" (*Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359 [1st Dept 2001] [internal citation omitted]). In this instance, plaintiff has not presented satisfactory evidence of GAC SpA's dominion and control over GAC to conclude that Pastorelli is GAC's agent (*see Goessel v Club Med Sales*, 209 AD2d 356, 356 [1st Dept 1994] [concluding that there must be evidence of dominion and control to establish an agency relationship]). Absent sufficient evidence of control, defendants cannot be compelled to produce Pastorelli for a deposition (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 200], *affd* 11 NY3d 843 [2008]).

Plaintiff's reliance on *Grande Prairie Energy LLC v Alstom Power, Inc.* (5 Misc 3d 1002[A], 2004 NY Slip Op 51156[U] [Sup Ct NY County 2004]) is unavailing. First, *Grande Prairie Energy LLC* is a trial court case. Therefore, it is not binding on this court. Second, the facts presented in *Grande Prairie Energy LLC* are not identical to those in this action. In *Grande Prairie Energy LLC*, the court granted the plaintiff's motion to compel defendant to produce an employee of a Swiss company for a deposition (*Grande Prairie Energy LLC*, 2004 NY Slip Op 51156[U], *2-3). The Swiss company, which was separate from, but related to, the defendant, was not a party to the action. The court reasoned that the employee, who was based in Switzerland, should be deposed because the defendant had "held out" the witness as a person in possession of knowledge (*id.*). The employee was key in negotiating the transaction at issue, and had drafted or received nearly every email written on the project (*id.*). In addition, at least two witnesses for the defendant had testified that the employee had superior knowledge on certain issues. Here, by

contrast, plaintiff has not presented similar evidence sufficient to establish Pastorelli's close participation in the decisions pertaining to GAC's General Counsel position. As discussed above, plaintiff has not alleged in his complaint that Pastorelli participated in any of the allegedly unlawful actions complained of, and defendants have not identified Pastorelli as a person with specific knowledge of the events.

D. Defendants' Request for Sanctions

This Court declines to impose monetary sanctions against plaintiff at this time. Defendants have not shown that "the challenged conduct, while without legal merit, was 'so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1'" (*Bradley v Bradley*, 167 AD3d 489, 490 [1st Dept 2018] [internal citation omitted]).

Motion Sequence 008

In motion sequence 008, plaintiff seeks an extension of time to complete pre-trial discovery and to file a note of issue on the ground that discovery remains outstanding. Defendants oppose the motion and state that all discovery material and relevant to this action has been exchanged.

Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (d), which addresses pretrial proceedings, provides, in pertinent part, that:

> "Where a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate."

CPLR 2004 allows the court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." It is within the court's discretion

to grant a motion brought under CPLR 2004, taking into consideration such "'factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, [and] whether the moving party was in default before seeking the extension'" (see *Grant v City of New York*, 17 AD3d 215, 217 [1st Dept 2005]), quoting *Tewari v Tsoutsouras*, 75 NY2d 1, 12 [1989]). Contrary to defendants' contention, it is evident that discovery is incomplete. Therefore, plaintiff has established good cause for granting the extension.

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

ORDERED that the motion of plaintiff Fabio Silva to compel discovery (motion sequence 005) is granted to the extent that, within 45 days of the date of service of this order with notice of entry, defendants Giorgio Armani Corporation, Presidio International, Inc., Giorgio Fornari and Lucinda Rosso shall furnish plaintiff with (1) any written communications which "reflect[ ] the time of the hiring of Hank Rouda and the decision to hire Mr. Rouda" for the period between November 13, 2014 and April 10, 2015, to the extent responsive documents have not already been exchanged, and (2) copies of the documents discussed in the 11 instances described above, and the balance of the motion is otherwise denied; it is further

ORDERED that the motion of plaintiff to compel discovery (motion sequence 006) is granted to the extent that, within 45 days of the date of service of this order with notice of entry, defendants shall produce nonparty Henry Rouda for a continued deposition limited to the topics and questions described above, and the balance of the motion is otherwise denied; and it is further

ORDERED that the parties shall mutually agree to a date, time and location for the continued deposition and shall mutually agree to conduct the continued deposition in a manner that is safe for all of those in attendance; and it is further

ORDERED that the motion of plaintiff to compel discovery (motion sequence 007) is granted to the extent that, within 45 days of service of this order, with notice of entry, defendants shall (1) supplement the "hit" reports in their response dated May 10, 2019 (items 3 [a] and [b]) by identifying whether defendants' ESI search protocol involved a deduplication procedure, providing revised hit reports to set forth the number of duplicate documents located if the protocol did not previously include a deduplication procedure, and providing individualized "hit" counts for defendant Lucinda Rosso based on the search terms directed at the April 10, 2019 court conference; (2) supplementing their response dated May 10, 2019 (item 4) by identifying whether any individuals with offer letters setting forth a schedule for a potential salary increase(s) and who hold the title of "director", its equivalent, or above at GAC had requested an unscheduled salary increase between January 1, 2012 through July 2, 2015, and whether that request(s) was granted or denied, and the balance of the motion is otherwise denied; and it is further

ORDERED that motion of plaintiff Fabio Silva for an order extending all pretrial deadlines (motion sequence 008) is granted; and it is further

ORDERED that all pretrial discovery in this action shall be completed no later than March 1, 2021; and it is further

ORDERED that a note of issue and certificate of readiness shall be filed on or before April 1, 2021; and it is further

ORDERED that, given that the undersigned has not been recertified and will be leaving the bench as of December 31, 2020, this action is to be transferred to another Justice and, if a further discovery conference is necessary, the parties are directed to contact the newly assigned Justice upon reassignment of this matter so that a conference may be scheduled at his or her convenience; and it is further

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

11/17/2020
DATE

KATHRYN E. FREED, J.S.C.

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