

**Narain v Society Pass Inc.**

2020 NY Slip Op 33858(U)

November 18, 2020

Supreme Court, New York County

Docket Number: 656956/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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RAHUL NARAIN

Plaintiff,

- v -

SOCIETY PASS INCORPORATED,

Defendant.

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INDEX NO. 656956/2019
MOTION DATE 10/28/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for DISCOVERY.

Upon the foregoing documents and for the reasons set forth on the record (11/18/2020), Rahul Narain’s (the Plaintiff) motion to compel is granted to extent that the parties are ordered to meet and confer on the Plaintiff’s outstanding demands and to enter into an ESI protocol in accordance with the below within the next fourteen (14) days.

CPLR § 3101 (a) requires the full disclosure of “all matter material and necessary in the prosecution or defense of an action,” and this provision is interpreted liberally to require disclosure of facts that assist a party’s good faith preparation for trial (Johnson v Natl. R.R. Passenger Corp., 83 AD2d 916 [1st Dept 1981]). CPLR § 3120 also requires a party to produce any documents that are within its “possession, custody or control.”

### A. Plaintiff's Custodians for ESI Search

Here, the Plaintiff is entitled to production from Society Pass Incorporated's (the **Defendant**) independent director and employee email accounts that are within their control (*see* CPLR § 3101 [disclosure of material and necessary matter is required from an "officer [or] director ..., of a party"]; *see also Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 62 [2013] ["possession, custody or control" means constructive possession and permits discovery from parties with practical ability to request, or influence another party with the desired documents]).

The affidavit of Dennis Nguyen, CEO of the Defendant, stating that the independent directors are not prepared to be subject to search is problematic and unavailing (NYSCEF Doc. No. 50). The company's current independent directors and employees owe fiduciary duties to the Defendant. If the Defendant fails to produce the searches with respect to (i) its current independent directors and employees whether such email accounts are on the company's server or not and (ii) any former director and employee email accounts that the Defendant continues to have custody and control over, the court shall order an adverse inference that any such email accounts had information which confirmed that the Defendant did not complete the Series C financing so as to avoid paying the Plaintiff its cash and equity compensation. If the current independent directors and employees fail to permit discovery, this may constitute a breach of their fiduciary duties.

However, to the extent that such former directors and employees may have email accounts that are no longer within the custody and control of the Defendant, the Defendant shall provide an affidavit sworn under penalties of perjury as to (i) when such former director or employee ceased

to be a director or employee, (ii) whether such former director and employee had a company email account, and (iii) when such company email account was (if it was) removed from the Defendant's system. With respect to information sought from former employees and directors whose email accounts are not within the Defendant's custody and control, this must be obtained through non-party discovery.

### **B. Scope of Discovery**

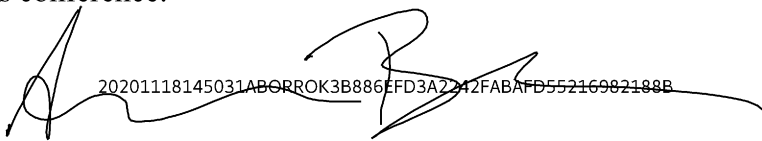
As discussed on the record (11/18/2020), the Plaintiff may explore discovery as it relates to the Plaintiff's cash and equity compensation which was supposed to vest on the closing of the Series C financing. To the extent that the claims here include the notion that the Series C financing was not consummated so to avoid the vesting of the Plaintiff's cash and equity compensation, the Plaintiff is entitled to vet its theory. The relevant information includes board resolutions, board minutes, as well as capitalization tables contemporaneous with the Plaintiff's employment which go to the heart of the Plaintiff's liability cause of action and its equity valuation on damages. For the avoidance of doubt, the branch of the Plaintiff's motion for sanctions is denied at this time without prejudice. This court may revisit this branch of the Plaintiff's motion with a supplemental order at the court conference.

Accordingly, it is

ORDERED that the Plaintiff's motion to compel is granted in accordance with the above; and it is further

ORDERED that the parties are directed to meet and confer over the next fourteen (14) days to agree on an ESI protocol and to tailor the Plaintiff's outstanding demands in accordance with this decision and order; and it is further

ORDERED that the parties shall appear for a remote conference on December 9, 2020 at 12pm, unless the parties submit an ESI protocol and proposed discovery schedule to sfc-part53@nycourts.gov 24 hours before the status conference.

  
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11/18/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE