Iacovacci v Brevet Holdings, LLC
2020 NY Slip Op 33892(U)
November 19, 2020
Supreme Court, New York County
Docket Number: 158735/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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PAUL IACOVACCI,

Plaintiff,

- v -

BREVET HOLDINGS, LLC,BREVET SHORT DURATION PARTNERS, LLC,BREVET SHORT DURATION HOLDINGS, LLC,BREVET CAPITAL PARTNERS, LLC,A DELAWARE LIMITED LIABILITY COMPANY, BREVET CAPTIAL HOLDINGS, LLC,A DELAWARE LIMITED LIABILITY COMPANY, DOUGLAS MONTICCIOLO, MARK CALLAHAN, JOHN TRIPP,

Defendant.

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INDEX NO. 158735/2016

MOTION DATE 02/09/2020

MOTION SEQ. NO. 022

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 022) 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 739, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 842, 843, 844, 845, 846, 847, 876, 931, 933, 1071, 1072

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, defendants Brevet Holdings, LLC, Brevet Short Duration Partners, LLC, Brevet Short Duration Holdings, LLC, Brevet Capital Partners, LLC, and Brevet Capital Holdings, LLC (defendants or Brevet) move for spoliation sanctions against plaintiff due to his failure to disclose text messages on his cellphone and attorneys' fees, and plaintiff cross moves for an order directing defendant Mark Callahan's cellphone be inspected by a neutral expert.

Defendants' Motion

Background

By letter dated October 14, 2016, plaintiff was terminated from his employment with Brevet. The letter referred to possible litigation, and specifically requested that plaintiff "preserve . . . electronically stored information ('ESI') relating" to Brevet's business, including, e.g., its clients, investors, customers and employees, since plaintiff's employment with Brevet began (NYSCEF Doc. No. 685). "The ESI would include all emails, text messages, . . . and the like, . . . [including] material on a phone" (id.). Plaintiff filed the instant complaint against defendants three days later on October 17, 2016 alleging, inter alia, wrongful termination and breach of contract (see NYSCEF Doc. No. 1). On November 30, 2016, defendants filed an answer with counterclaims against plaintiff for, inter alia, misappropriation of Brevet documents, breach of fiduciary duty and alleged that plaintiff engaged in self-dealing (NYSCEF Doc. No. 7). Thereafter, discovery ensued and defendants served their first combined demands on December 2, 2016, which included requests for documents concerning communications with various third parties (NYSCEF Doc. No. 691, ¶¶ 154, 155, 157). Text messages were included in this demand according to the definitions of "documents" and "communication" (see id.). Plaintiff objected to those demands as irrelevant and overbroad (NYSCEF Doc. No. 692, ¶¶ 154, 155, 157). On October 10, 2017, defendant served its second request for documents (Second RFP), which included requests for documents and records relating to the cellphone plaintiff used while employed with Brevet (NYSCEF Doc. No. 693). A deficiency letter to plaintiff dated January 25, 2018 specifically stated that the demand included text messages (NYSCEF Doc. No. 15, ¶ 16, citing NYSCEF Doc. No. 104).

Thereafter, on March 7, 2018, plaintiff filed a motion for a protective order and to compel defendants to respond to outstanding demands (motion sequence no. 3). As for that branch of the motion seeking a protective order, plaintiff argued the defendants' demand for his cellphone records and electronic calendar was an invasion of privacy and a fishing expedition (NYSCEF Doc. No. 101). Defendants opposed and cross moved to compel plaintiff's response to the outstanding demands. The Court resolved the motion by order dated May 16, 2018 (Cohen, J.) directing plaintiff to produce cellphone and electronic calendar records as requested by defendants within forty-five (45) days (NYSCEF Doc. No. 695). Plaintiff produced a response and the parties engaged in correspondence over the deficiency of the text messages (NYSCEF Doc. Nos. 696-699).

At the parties' status conference on December 18, 2018, the Court directed plaintiff to "provide mobile text messages pursuant to the Court's 5/16/18 Order to the extent not already done within 30 days" (NYSCEF Doc. No. 700). The parties engaged in further correspondence regarding the production and, on April 19, 2019, defendants ultimately filed a motion to strike plaintiff's complaint for failing to provide the text messages (motion sequence no. 16). The Court granted the motion to the extent of directing plaintiff "to respond to the demand for cellphone text messages re: self-dealing & messages with [other] people . . ., or provide [a] Jackson affidavit re: the same" (NYSCF Doc. No. 703).

Plaintiff responded by producing text messages from his phone dated February-October of 2018 (NYSCEF Doc. No. 704-705) and an affidavit dated June 5, 2019 stating that he accidentally lost or destroyed multiple phones in 2015, 2016 and 2017 (NYSCEF Doc. No. 706).[1] The details are vague, but plaintiff's affidavit states that he "lost or accidentally destroyed

[1] The Court notes that this affidavit, as well as the plaintiff's affidavit submitted in opposition to defendants' motion and in support of his cross motion dated September 23, 2019 (NYSCEF Doc. No.

a phone in June 2015 and March 2016 [and] also lost a phone sometime in 2017" (NYSCEF Doc. No. 706, ¶ 8). Plaintiff stated, "A few [phones] I have left in places I do not know and was not able to retrieve them. Therefore I was not able to save or transfer the data because the phone was lost" (id. at ¶ 6). At some unspecified time, he states "Two of my phones were destroyed — one in a pool and another was crushed by a car. In those circumstances, I tried to save and retrieve the data, and brought the phones to a phone professional with the hopes of retrieving the data. I was told by the phone professional that the data could not be retrieved" (id. at ¶ 7). Plaintiff further claims that he has texts beginning on January 30, 2018 because he was able to maintain the data when he voluntarily switched phones in October of 2018 (id. at ¶ 8).

Discussion

"A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 45 [1st Dept 2012]; see Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 547-48 [2015]).

It is undisputed that plaintiff had an obligation to preserve his cellphone and the data contained therein, including text messages, as far back as October 14, 2016, the date of plaintiff's termination letter. This is the earliest time the Court can state with certainty that the parties could "reasonably anticipate[] litigation" (see VOOM HD Holdings LLC, 93 AD3d at 36,

782), are inadmissible as they are not acknowledged with the language set forth in RPL § 309-b, nor accompanied by a certificate of conformity (see RPL § 299-a) for acknowledgments taken without the state (see CPLR 2309 [c]). However, the defect is not fatal and may be overlooked as a substantial right of a party is not prejudiced (see Midfirst Bank v Agho, 121 AD3d 343, 350-52 [2d Dept 2014]).

quoting Zubulake v UBS Warburg LLC, 220 FRD 212, 218 [SD NY 2003]). Indeed, not only does the letter itself mention an anticipation of litigation, but, a mere three days later, plaintiff commenced the instant action. Although plaintiff's counsel argues that defendants first requested text messages in 2018, it is irrelevant as the duty to preserve electronic data arose prior to that time.

Defendants argue that plaintiff intentionally destroyed his cellphones and text message records contained within them. In support of this argument, defendants submit the deposition transcript of Bob Nokley, one of plaintiff's former business partners, who was deposed as a non-party in this matter. Nokley testified that around November 2016 he and plaintiff discussed deleting emails between each other as Nokley would likely become a witness to this action (NYSCEF Doc. No. 708 at 113-116).

Defendants also claim that plaintiff was able to retrieve and use text messages in support of his claims in three different lawsuits. Plaintiff submitted his text messages with Nokley as evidence against Nokley in a lawsuit plaintiff filed against him in the U.S. District Court of Nevada on January 17, 2017 (NYSCEF Doc. No. 707, 711). The text messages are dated between November 29, 2016 and January 11, 2017 (NYSCEF Doc. No. 711). Defendants also point to plaintiff's amended complaint in this action, dated August 23, 2018, wherein plaintiff's allegations refer to text messages between him and defendant Mark Callahan that allegedly occurred between February/March 2016 (NYSCEF Doc. 712). Plaintiff made similar allegations in a separate action against defendants and others filed in the U.S. District Court for the Southern District of New York on August 31, 2018 (NYSCEF Doc. No. 713).

Defendants additionally argue that intentional destruction could be inferred from the fact that plaintiff moved for a protective order in March of 2018 to seek protection from disclosure of

the same records that he now claims do not exist. Further, there was no explanation as to why plaintiff never advised the parties or the Court that the sought-after text messages were destroyed until his Jackson affidavit was submitted in June of 2019.

In response, plaintiff maintains that he never purposely or deliberately destroyed the phones, and each instance was accidental. With respect to Nokley, plaintiff states that his "attorney on that case gathered them for a motion that was filed in that case. However I subsequently lost or accidentally destroyed that phone and no longer have the original texts" (NYSCEF Doc. No. 706 at ¶ 10).

The Court finds the destruction of plaintiff's cellphones and the relevant data contained therein was grossly negligent, if not intentional. The vagueness of plaintiff's affidavits concerning what happened to his phones, or when they were destroyed, or why data was not preserved/backed up, and his failure to show any effort to preserve them may not be certain proof of intentional destruction but constitutes, at minimum, gross negligence (see, e.g., Siras Partners LLC v Activity Kuafu Hudson Yards LLC, 171 AD3d 680, 680-81 [1st Dept 2019]; Ahroner v Israel Discount Bank of New York, 79 AD3d 481, 482 [1st Dept 2010] [trial court "fairly inferred" that hard drive was destroyed intentionally or as a result of gross negligence where defendants agreed to produce hard drive for inspection but then the hard drive was erased and the record was "unclear as to when the hard drive was erased or whether it was preserved, and defendants never explained what happened"]; Arbor Realty Funding, LLC v Herrick, Feinstein LLP, 140 AD3d 607, 609-10 [1st Dept 2016]).

Similarly, in Siras Partners LLC, the Appellate Division found that the motion court "providently exercised its discretion in granting plaintiffs an adverse inference as a spoliation sanction" where the principals of defendant "admitted that they used the social media application

WeChat to discuss the [parties' joint development project] and failed to preserve those communications following the discovery requests" that were served in May 2015 (171 AD3d at 680-681). More specifically, defendant's principals asserted "that in separate incidents in May 2016 their phones were damaged and they replaced them with new phones. When they downloaded the application to the new phones, the chat histories were lost" (id. at 681). "Even assuming that Shang Dai and Dennis Shan did not intentionally destroy the WeChat messages, defendants' failure to preserve the discussions for more than a year and to take timely actions to recover the damaged phones and data constitutes gross negligence" (id.).

Here, plaintiff's "clumsiness," so to speak, is hardly an excuse for failing to produce evidence, particularly where, as here, the sophisticated parties are not strangers to litigation and using electronically stored information in support of that litigation. The "accidental" loss of the phones is also undercut by plaintiff's use of the same, either as actual evidence in other matters or by way of reference in this matter and other cases — they were preserved and useful to plaintiff at a specific point in time but then presumably not preserved and/or unavailable when sought by his adversary.

In light of the above, the Court finds that relevance of the missing text messages is presumed (see VOOM HD Holdings LLC, 93 AD3d at 46; Ahroner, 79 AD3d at 482). While that presumption is rebuttable, the Court finds that plaintiff failed to rebut the presumption here (see VOOM HD Holdings LLC, 93 AD3d at 45-46, citing Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., 685 F Supp 2d 456 at 468-469 [SD NY 2010]; Arbor Realty Funding, LLC, 140 AD3d at 609-10).

Plaintiff claims that he "rarely ever texted prior to 2018, and almost never use texts for business communications" (NYSCEF Doc. No. 706 at ¶ 12). He further explained he only texted

Nokley because Nokley began to ignore plaintiff's emails and calls, and therefore had to communicate with him by text (id.). The texts with Nokley were "the only business texts in which [he] was engaged" (NYSCEF Doc. No. 786 at ¶ 4). Regarding texts with Vik Kapoor, he used texts to confirm a meeting location, but "[f]or anything of substance, [he] used email" (NYSCEF Doc. No. 786 at ¶ 6). In other words, plaintiff claims that "there was nothing material to this case in my texts," other than the texts between him and defendant Callahan, and him and Nokley (NYSCEF Doc. No. 782 at ¶ 16). Finally, plaintiff also claims that defendants know that he has a "penchant" for losing his phones and they are using that against him to claim spoliation and wilfull destruction of evidence (id. at ¶¶ 17, 19).

The Court finds plaintiff's reasoning insufficient to rebut the presumption of relevance. The availability of other evidence in this case, namely evidence on plaintiff's computer, is not an adequate substitute for the text messages which were of a different nature and also contain variably different content (see, e.g., VOOM HD Holdings LLC, 93 AD3d at 47). Indeed, plaintiff admits that he stopped emailing Nokley about business and began texting him instead, which presumably would not have been duplicated on plaintiff's computer.

Plaintiff also admits that there are missing text messages that are materially relevant in this matter, namely those texts between him and Callahan and him and Nokley. Furthermore, though plaintiff claims that his texts with Kapoor were nothing "of substance," disclosure has revealed that plaintiff's text messages with Kapoor were clearly business-related, and defendants provided such examples:

Date	Text Message Conversation
3/26/2018	Plaintiff: "**Can you confirm receipt of my stuff?**" (emphasis added)
5/8/2018	Kapoor: "In NYC MAY 24th" Plaintiff: "Do you want to meet?" Kapoor: "Yes" Plaintiff: "I am open so just tell me what time and where"
6/11/2018	Kapoor: "You coming now?" Plaintiff: "I am downstairs"
6/13/2018	Plaintiff: "Did you get any feedback about our meeting?" Kapoor: "They really liked you and will see JAMES to talk about next steps"
6/16/2018	Kapoor: "Talked to JAMES and Ramesh! John and JAMES loved you"
6/27/2018	Plaintiff: "Any timing on the term sheet we spoke about last week?"

Date	Text Message Conversation
	Kapoor: "Met Ramesh yesterday and we really want to do it"
7/4/2018	Plaintiff: "Am I getting a term sheet this week?"
7/16/2018	Kapoor: "With Ramesh! Let's chat in 30" Plaintiff: "Call me when your [sic] done. I just sent the presentation. I need to explain a few things"; "Also please tell Ramesh that there was a miscommunication between you and me on where Ninepoint was in the process. This way he does not think I am unrealistic related to timing"
8/1/2018	Plaintiff: "Did you review the presentation. We should be working on that now while they are away"; "You need to review the presentation since you know those guys. I have gotten feedback from others saying it's good and we are moving forward based on it. But you need to tell me how to tailor it for your guys"
10/5/2018	Plaintiff: "FYI. Brevet confirmed that my noncompete runs out on Oct 14".

(NYSCEF Doc. No. 824 [Semprevivo Reply Aff., ¶ 48 [citing NYSCEF Doc. No. 705]).

If plaintiff would not find these text messages to be business-related, there could be countless other similar messages that would be disregarded as not "of substance" but could in fact be potentially supportive of defendants' counterclaims. Accordingly, the Court finds defendants are entitled to spoliation sanctions against plaintiff for the loss of his text message records.

As it concerns the appropriate remedy, "[o]ur state trial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action" (Pegasus Aviation I, Inc., 26 NY3d at 551, citing Ortega v City of New York, 9 NY3d 69, 76 [2007]).

While defendants seek dismissal of the complaint and ordering that their allegations of self-dealing be deemed true, the Court finds that that an adverse inference instruction is the appropriate remedy for the destruction of the text messages on plaintiff's cell phone(s).

"Generally, dismissal of the complaint is warranted only where the spoliated evidence constitutes the sole means by which the defendant can establish its defense, or where the defense was otherwise fatally compromised or defendant is rendered prejudicially bereft of its ability to defend as a result of the spoliation" (Arbor Realty Funding, LLC, 140 AD3d at 609-10 [internal citations and quotations omitted]; see VOOM HD Holdings LLC, 93 AD3d at 47, citing Melendez v City of New York, 2 AD3d 170 [2003]).

Importantly, other evidence is available to defendants to support their counterclaims, such as emails and other documents on plaintiff's computer and other devices, or disclosed by third-party subpoenas (see VOOM HD Holdings LLC, 93 AD3d at 47 ["Evidence from this vital time period is not entirely duplicative of other evidence. The court's imposition of an adverse

inference, a lesser sanction than striking of the answer, factored this overlap into account, and reflects an appropriate balancing under the circumstances"]; Arbor Realty Funding, LLC, 140 AD3d at 609-10 ["The record . . . does not support such a finding [for dismissal], given the massive document production and the key witnesses that are available to testify, including the eight additional persons identified in the minutes, on whom Herrick had not yet served interrogatories or deposition notices at the time it filed its renewal motion. Accordingly, an adverse inference charge is an appropriate sanction under the circumstances"]). Additionally, an adverse inference instruction can be "appropriately tailored by the trial court" to fit the particular circumstances of this case (see Pegasus Aviation I, Inc., 26 NY3d at 554, citing PJI 1:77; Ahroner, 79 AD3d at 482-83; see, e.g., Arbor Realty Funding, LLC, 140 AD3d at 610).

The missing text messages are directly relevant to plaintiff's claims against defendants, as they are cited or referred to in support of his allegations as to the events leading up to his departure from Brevet. They are also directly relevant to the defendants' counterclaims and allegations of self-dealing. Accordingly, both issues may be addressed in the proposed adverse inference instruction, which will be submitted to the Court as directed below.

As for that branch of the motion seeking attorneys' fees as sanctions, the Court finds it appropriate to grant attorneys' fees as it pertains to motion sequence no. 18. The order resolving that motion mentioned the possibility of incurring such a sanction (NYSCEF Doc. No. 703), which the Court finds appropriate here as the motion would not have to have been made if the Court and parties were made aware that the phone(s) and text message data were destroyed over a year prior.

Plaintiff's Cross-Motion

Background

Plaintiff cross moves for order directing that the cellphone Mark Callahan used for the first three quarters of 2016 be turned over to a neutral expert to examine whether text messages between Callahan and plaintiff are still on the phone and/or whether they were deleted.

Plaintiff served his Third Set of Document Demands on July 26, 2018, demanding "[a]ll . . . texts . . . concerning and/or relating to Plaintiff's notice that he intended to leave and withdraw from the Brevet Companies, Plaintiff's intended departure and/or withdrawal from the Brevet Companies, Plaintiff's status as a member and/or employee of the Brevet Companies . . ." (NYSCEF Doc. No. 779, item no. 1). Defendants responded by objecting to the demand (NYSCEF Doc. No. 780). The issue was discussed at a status conference on May 8, 2019, at which time the Court directed both parties to produce text messages between plaintiff and Callahan from October 2015 to the present within forty-five (45) days (NYSCEF Doc. No. 766). Defendants then responded to the order and produced text messages (NYSCEF Doc. No. 716). Further, in response to this cross motion, defendants submitted an affidavit from Callahan stating that most communications between March and October of 2016 were through counsel and that he has now produced all text messages between him and plaintiff regardless of date (NYSCEF Doc. No. 834 at ¶¶ 3, 8).

Plaintiff bases the request to clone Callahan's cellphone on his recollection of text messages between him and Callahan from January through September of 2016 wherein a meeting was set up to discuss plaintiff's departure. Callahan allegedly asked plaintiff not to retire, because it was plaintiff's understanding that investors would be concerned about plaintiff's departure, and offered plaintiff a consultant position, which plaintiff rejected

(NYSCEF Doc. No. 782 at ¶¶ 7-9, 12). Accordingly, plaintiff claims Callahan is either being dishonest or deleted the messages (id. at ¶ 13).

Discussion

"The discovery process is designed to be extrajudicial, and relies upon the responding party to search his records to produce the requested data" (Diepenhorst v City of Battle Cr., 1:05CV00734, 2006 WL 1851243, at *3 [WD Mich June 30, 2006]). "In the absence of a strong showing that the responding party has somehow defaulted in this obligation, the court should not resort to extreme, expensive, or extraordinary means to guarantee compliance" (id.) Accordingly, courts have required proof of intentional deletion, alteration, or withholding of data in order to turn over an electronic device for inspection (see Melcher v Apollo Med. Fund Mgt. L.L.C., 52 AD3d 244, 245 [1st Dept 2008], citing Scotts Co. LLC v Liberty Mut. Ins. Co., CIV.A. 2:06-CV-899, 2007 WL 1723509, at *2 [SD Ohio June 12, 2007]; Menke v Broward County School Bd., 916 So 2d 8, 11-12 [Fla Dist Ct App 2005], citing Etzion v Etzion, 7 Misc 3d 940, 941-42 [Sup Ct, Nassau County 2005]).

The Court finds that plaintiff failed to meet his burden as the record is barren of evidence of intentional deletion or withholding. Plaintiff's recollection, alone, simply demonstrates a "mere suspicion" of withholding. "Such conduct is always a possibility in any case, but the courts have not allowed the requesting party to intrude upon the premises of the responding party just to address the bare possibility of discovery misconduct" (Diepenhorst, 2006 WL 1851243 at *4). The Court is similarly unwilling to expand the expense and burden of cloning another electronic device in this case (see, e.g., Melcher, 52 AD3d at 245; Scotts Co. LLC, 2007 WL 1723509 at *2; Diepenhorst, 2006 WL 1851243 at *3; Menke, 916 So 2d at 11-12; cf. Etzion, 7

Misc 3d at 941-42; see generally Scotts Co. LLC, 2007 WL 1723509 at *2 [citing cases where electronic devices were directed to be inspected]).

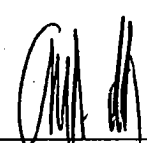
Accordingly, it is hereby ORDERED that defendants' motion is granted to the extent that an adverse inference instruction shall be issued in their favor against plaintiff in accordance with this decision and order; and it is further

ORDERED that defendants are directed to submit a proposed adverse inference instruction (see PJI 1:77.2) within twenty (20) days; plaintiff may submit a counter instruction and/or a short letter brief (1-2) pages, if necessary, within twenty (20) days thereafter; and defendants may submit a short letter brief (1-2 pages) in response, if necessary, within ten (10) days thereafter; and it is further

ORDERED that that branch of the defendants' motion seeking attorneys' fees as sanctions is held in abeyance for forty-five (45) days during which time counsel for defendants shall submit to the Court an attorneys' affirmation and provide supporting proof of actual expenses reasonably incurred and reasonable attorney's fees pertaining to motion sequence no. 18 only; and it is further

ORDERED that plaintiff's cross motion is denied.

This constitutes the decision and order of the Court.



11/19/2020
DATE

ALEXANDER M. TISCH, J.S.C.

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