SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

-against-

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD M. PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL, ANTHONY R. MORDENTE, and VERA PRINCIOTTA,

Defendants.

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INDEX No.: 451533/2019

MOT. DATE: 4/21/2020

MOT. SEQ. No.: 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 89, 92, 99, 100
were read on this motion to/for MOTION TO DISMISS

The facts alleged are set forth in Motion Sequence Number 001, familiarity with which is assumed and will not be repeated here (NYSCEF Doc. No. 208). Defendant Daniel C. Austin, Sr. moves to dismiss the New York Attorney General's ("AG") complaint as against himself pursuant to CPLR 1001, 1003, 503, 510, and 214. For the following reasons, defendant's motion is denied.

I. ARGUMENTS

A. Defendant's Affirmation in Support

Defendant Austin, Sr. ("Austin") submits an affirmation signed by his counsel in support of his motion and moves to dismiss the complaint based on: (i) plaintiff's failure to join the Cemetery, Wells Fargo, A.G. Edwards (as Wells Fargo's predecessor), and The Burke Group as necessary parties to this action, (ii) lack of standing to bring this action, (iii) failure to overcome a business judgment defense, (iv) improper venue, and (v) the statute of limitations (Def. Aff. ¶ 2 [Doc. No. 68]). He argues that the AG failed to join the Cemetery and members of the Cemetery

as necessary parties to this action (*id.* ¶¶ 9-11). Defendant argues a party should be joined in an action (i) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action, and (ii) where the unnamed party might be inequitably affected by a judgment in the action (*id.* ¶ 11; CPLR § 1001; CPLR § 1003; *Lindkvist v Honest Ballot Ass'n*, 31 Misc3d 1234(a) [Sup Ct 2011]). Defendant argues that, because plaintiff's complaint seeks the removal of all Board Members who are defendants in this action and damages from the defendants on behalf of the Cemetery, the litigation has altered who is authorized to act on the Cemetery's behalf as a Director which the Cemetery has a "vital interest" in (Def. Aff. ¶ 12). Austin further argues the Cemetery and its plot/lot owners should have the right to participate in this action because "the Attorney General cannot speak for plot/lot owners" and their right to keep or remove board members could be impacted by this litigation (*id.* ¶¶ 12-13). In the alternative, he argues a special meeting of all Cemetery members should be held allowing members to vote as to whether they agree with the litigation (*id.*).

Defendant next argues that plaintiff lacks standing to bring this suit, drawing a distinction between the statutory authorization to sue and legal standing (*id.* ¶¶ 15-17; *Matter of Graziano v County of Albany*, 3 NY3d 475, 478 [2004] ["Capacity to sue is . . . distinct from the question of standing"]; *Cmty. Bd. 7 of the Borough of Manhattan v Schaffer*, 84 NY2d 148, 155-156 [1994]). New York courts have dismissed Attorney General actions where the State has failed to establish a legally cognizable interest separate from those of identified private parties (Def. Aff. ¶ 18; *People v Lowe*, 117 NY 175 [1889] ["it is not sufficient for the People to show that wrong has been done to someone; the wrong must appear to be done to the People in order to support an action by the People for its redress"]). Defendant argues that, here, the Attorney General's allegations concern the Cemetery and its plot/lot owners, not the public (Def. Aff. ¶ 18). Defendant cites *People v Singer* to illustrate his point, wherein the court dismissed an Attorney General's action against a cemetery's Board Members because the allegations concerned internal affairs and, consequently, the State lacked standing because no public policy was implicated (*id.* ¶¶ 19-21; *People v Singer*, 193 Misc. 976 [1949]). Defendant argues that the matter here is analogous as the State only alleges Board Member misconduct and no public interest argument has been invoked (*id.* ¶ 22-23). Defendant reiterates that because the Cemetery's plot/lot owners have the ability to attend Board Meetings and vote by proxy, they should be afforded the right to vote on whether an action should be brought by the Attorney General (*id.* ¶ 24).

Defendant next argues that the Attorney General's action cannot proceed without joining Wells Fargo and A.G. Edwards, Wells Fargo's predecessor, as necessary parties to this action because Wells Fargo and its predecessor directly participated in the Rabbi Trust which was created for Austin, Sr. and because A.G. Edwards was the institutional trustee of the Rabbi Trust (*id.* ¶¶ 26-30). Defendant further argues that the Burke Group, which served as the Cemetery's financial advisors and directly participated in the liquidation of the Rabbi Trust, must also be added as a necessary party to this action (*id.* ¶¶ 31-34).

He then asserts that the business judgment rule protects the Board's actions (*id.* ¶¶ 35-36; *People ex rel. Spitzer v Grasso*, 11 NY3d 64, 70 [2008]; *see* N-PCL § 717). The Cemetery's Board Members regularly expressed their gratitude towards Austin, Sr. for his "tremendous work ethic involving the Cemetery" and wished to authorize bonuses and raises for him as a result, including the Rabbi Trust (Def. Aff. ¶ 37). The payments he received were made in good faith and, consequently, the business judgment rule should bar judicial inquiry into the Board's actions (*id.* ¶¶ 38-39).

He maintains that the complaint should be dismissed as the Attorney General commenced this action in an improper venue (*id.* ¶¶ 40-41). Defendant argues that the CPLR deems corporations as residents of the county in which their principal office is located (*id.*; CPLR § 503). Because the Cemetery is located in Queens, all defendants worked in Queens, and all actions alleged occurred in Queens, New York County is not the proper venue for this matter (Def. Aff. ¶¶ 42-44). Some of the parties and potential witnesses also reside in Queens County or in nearby Nassau and Suffolk Counties which may prompt a discretionary change of venue for their convenience (*id.* ¶ 45; *State v Quintal, Inc.*, 79 AD3d 1357 [2010]).

Finally, defendant argues the claims the AG asserts are barred by the statute of limitations pursuant to CPLR 214 (Def. Aff. ¶ 48). A six-year limitations period applies to the equitable causes of action and a three-year limitations period applies to breaches of fiduciary duty seeking money damages only (*id.* ¶ 49; *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). He adds that the fourth claim exclusively requests monetary relief and, consequently, a three-year limitations period should apply (*id.* ¶ 51). As the lump sum payment was made to Austin, Sr. in May 2014, the cause of action expired in May 2017 (*id.*). Moreover, the same three-year limitations period applies to all remaining claims seeking monetary damages (*id.* ¶ 52). Defendant concludes by preserving all affirmative defenses in his Answer (*id.* ¶ 53).

B. Plaintiff's Memorandum in Opposition

Plaintiff responds that the N-PCL and EPTL empower the Attorney General to bring this action (Pl. Br. at 3 [Doc. No. 92]). The AG notes Austin, Sr. concedes that plaintiff possesses authority to sue from "a statutory predicate," here N-PCL and EPTL (*id.*; *Cmty. Bd. 7 of the Borough of Manhattan v Schaffer*, 84 NY2d 148, 155-156 [1994]). The AG also argues that defendant bears the burden to show that plaintiff lacks standing to sue, a burden defendant has failed to meet (*Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept 2016]). Article 15 of the N-PCL emphasizes that public cemeteries, such as the subject Cemetery, are a matter in which "the people of this state have a vital interest" (Pl. Br. at 3; N-PCL § 1501). Plaintiff argues that the Cemetery, its officers and directors are subject to the Attorney General's enforcement powers under the N-PCL and EPTL because N-PCL 1505(c) states all public cemetery corporations, such as the Cemetery, are "charitable corporations under this chapter" (Pl. Br. at 3-4; N-PCL § 1505(c)). The Court of Appeals has recognized that the N-PCL accords the Attorney General the authority to: (i) commence "actions or special proceedings to annul or dissolve corporations that have acted beyond their authority or to restrain unauthorized activities" (N-PCL § 112(a)(1)); (ii) "enforce any right given to members of (charitable corporations)" (N-PCL § 112(a)(7), (9)); (iii) "seek redress for injuries resulting from . . . unlawful distributions of corporate cash, property or assets, improper loans, waste of corporate assets, and breach of fiduciary duties" (N-PCL §§ 719-720; *People v Grasso*, 11 NY3d 64, 69 [2008]).

The AG's authority under the EPTL is equally clear under Part 1, Article 8 which instructs that "The attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries through appropriate proceedings in the courts" (EPTL § 8-1.1(f)). Plaintiff argues Austin does not cite authority challenging these mandates because no such authority exists, and further that Austin's challenge to the standards for evaluation of *parens patriae* authority do not apply to this case (Pl. Br. at 4-5; *People v Lowe*, 117 NY 175 [1889] [the court here examined the question of public interest in common law claims against the trustees of a privately-formed nineteenth century lending society]; *see People v Singer*, 85 NYS2d 727 [Sup Ct New York County 1949] [the court here examined claims brought against a cemetery corporation and its officers and directors under the General Corporation Law over twenty years prior to N-PCL's enactment in 1977]). The AG argues that the N-PCL's express standards for the

operation of public cemeteries oversight by the AG's office are the exact legislative reforms that *Singer* proposed as a means to "authorize the state to sue" (Pl. Br. at 5; *Singer*, 85 NYS2d at 732). Accordingly, Austin's challenge to the Attorney General's standing should be rejected.

Plaintiff next argues that the venue for this action is properly laid in New York County. CPLR 503(a) provides several bases for the selection of venue and instructs that venue be laid in the county in which any party resides at the time the action is commenced (Pl. Br. at 5; CPLR § 503(a)). Austin cannot dispute that the Attorney General's principal office is located in Manhattan, thus rendering venue in this court proper. Austin's argument also ignores the first clause of CPLR 503(a) and instead focuses on the second which permits venue to be based on where events giving rise to the claim occurred. The second clause merely describes an alternative basis for venue, not, as Austin suggests, the exclusive basis for it (Pl. Br. at 5). Further, Austin's venue argument is untimely as a demand for change of venue on such grounds must be served on or before the Answer is served and a motion for change of venue must be filed within fifteen days of its service (*id.* at 6; CPLR 511(a); *see Herrera v R. Conley Inc.*, 860 NYS2d 21, 22 [1st Dept 2008]; *see also Villalba v* Brady, 80 NYS3d 220, 221 [1st Dept 2018]; *Rodriguez v Metro. Transp. Auith.*, 127 AD3d 534, 534 [1st Dept 2015]; *Banks v New York State and Local Employees' Ret. Sys.*, 271 AD2d 252, 252-253 [1st Dept 2000]). Because Austin did not seek a timely change of venue and made no attempt to excuse the delay in making a motion to dismiss, his request should be denied (Pl. Br. at 6). Austin's discretionary request to change venue to Queens County must also fail as he does not make any factual showing to justify it (*id.* at 6-7). Austin himself resides in Nassau County, not Queens, and that the defendants in this action are located in Queens, Nassau, Suffolk, and Florida (*id.*). Plaintiff further argues that Austin has failed to provide affidavits or other proof demonstrating that both "convenience of material witnesses and the ends of justice would be promoted" by the requested discretionary transfer (*see Villalba*, 80 NYS3d at 221; *Margolis v United Parcel Serv.*, 57 AD3d 371, 371-372 [1st Dept 2008]).

As to the limitations of action defense, the AG argues that her claims are timely and well-pleaded, noting that Austin concedes that "where the relief sought is equitable in nature, the six-year limitations period applies" (Pl. Br. at 7; Def. Aff. ¶ 49; *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). Plaintiff notes that its claims seek equitable relief for Austin's misconduct in the form of: (i) an accounting for his failure to perform duties in the management of charitable

assets; (ii) restitution for waste and misuse of charitable assets under his control, including through self-dealing transactions; (iii) and injunctive relief to prevent future fiduciary service at a New York non-profit (Compl. ¶ 32). The AG maintains that Austin cannot avoid liability by characterizing her efforts to obtain return of charitable assets and an injunction against future fiduciary service as a demand for "pure money damages, nothing equitable" (Pl. Br. at 8; Def. Aff. ¶ 51; *Spitzer v Schussel*, 792 NYS2d 798 [Sup Ct New York County 2005] [court rejected identical argument to deny dismissal where the AG brought claims pursuant to N-PCL and EPTL for a director accounting and repayment of waste resulting from the director's misconduct]; *see also DiBartolo v Batteryu Place Assocs.*, 84 AD3d 474 [1st Dept 2011] ["Where, as here, a suit alleging breach of fiduciary duty seeks both equitable relief and money damages, a six-year statute of limitations applies"]).

Austin misstates the allegations against him to suggest that the only event under review is the lump payment received in May 2014 as opposed to a pattern of conduct including that payment (Pl. Br. at 8-9). Plaintiff argues that, as a matter of law, the statute of limitations for claims against a fiduciary for breach of its duty is tolled until the fiduciary repudiates the role (*id.* at 9; *see Matter Barabash*, 31 NY2d 76, 80 [1972]; *People v Trump*, 88 NYS3d 830, 837 [Sup Ct New York County 2018]). This tolling can apply where, as here, a mix of equitable and monetary damages are sought (*Trump*, 88 NYS3d at 837; *see also Westchester Religious Inst. V Kamerman*, 262 AD2d 131, 131-132 [1st Dept 1999]; *Matter of Therm, Inc.*, 132 AD3d 1137, 1138 [3d Dept 2015]). Even if a three-year limitation period applied the claims would still be timely as the Attorney General would be entitled to seek relief for amounts lost until three years from the date of Austin's dismissal (*see e.g. Deutsch v Polly N. Passoneau, P.C.*, 297 AD2d 571, 572 [1st Dept 2002]). Plaintiff asserts its action is separately governed by a six-year limitations period under CPLR 213(7) (CPLR § 213(7); *see Roslyn Union Free School Dist. V Barkan*, 16 NY3d 643, 648-653 [2011] [although claims seeking monetary damages for property injury are typically subject to a three-year limitation period, CPLR 213(7) extends that period to six years for an action by or on behalf of a corporation against a present or former officer to recover damages for waste, injury to property, or an accounting in conjunction therewith]).

Plaintiff next argues that Austin has not identified any additional necessary party as he has failed to demonstrate that the entities and individuals he lists are necessary to accord full relief to the parties presently joined or would be inequitably affected by any judgment that may

result from this action (Pl. Br. at 10-11; *Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359-360 [1st Dept 2001]). N-PCL and EPTL authorize the Attorney General to pursue this relief independently of the Cemetery and for its benefit and its charitable beneficiary lot owners (N-PCL §§ 112(a), 720; EPTL § 8-1.4). Plaintiff argues these statutes do not, as Austin argues, entitle the Cemetery lot owners to vote on how or whether the AG's regulatory authority should be exercised in support of the Cemetery's continued operation (Pl. Br. at 11; Def. Aff. ¶ 12). Neither the Cemetery, its plot owners, nor former investment advisors would be prejudiced by a judgment against Austin for breach of his individual fiduciary duties to the Cemetery. Austin's assertion, that plot/lot owners have a vital interest in the identity of the board of directors, did not hold up the Cemetery Board termination of Austin in March 2019, six months prior to filing this action's (Pl. Br. at 11). Austin's insistence on including the prior Trustee to the Rabbi Fund, Wells Fargo, A.G. Edwards, and the Burke Group as parties to this action is insufficient as he does not explain how these parties would be necessary to, or prejudiced by, complete relief against him (*id.* at 11-12). The AG adds that to the extent Austin seeks to argue that these parties participated in the unlawful distribution of assets from the Cemetery's retirement trust, those parties would be at best joint tortfeasors and therefore unnecessary in this action (*id.* at 12; *see Ansellem*, 280 AD2d at 360; *see also Weinstein v W.W.W. Assocs., LLC*, 178 AD3d 486, 486-487 [1st Dept 2019]; *Ferriola v Dimarzio*, 83 AD3d 657, 658 [2d Dept 2011]).

Finally, the complaint alleges malfeasance and self-dealing by Austin, which are proper matters for this court's review. The business judgment rule does not protect corporate officials who engage in fraud, self-dealing, or make decisions affected by conflict of interest (*Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]; *see also People v Lutheran Care Network, Inc.*, 167 AD3d 1281, 1286 [3d Dept 2018]). Plaintiff argues the complaint alleges Austin's repeated exploitation of his positions in the Cemetery to obtain unlawful personal benefits as to which none of the defendants sought independent review of (Pl. Br. at 13; Compl. ¶¶ 6, 8, 47-49, 53, 55, 57-61, 78). Austin's business judgment rule cannot challenge the trust of the complaint but, instead, at best raise questions of fact that may not be resolved on a motion to dismiss (Pl. Br. at 13-14; Def. Aff. ¶ 38; *see Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]; *Lutheran Care Network*, 167 AD3d at 1286; *see also Connolly v Long Island Power Auth.*, 30 NY3d 718, 728 [2018]; *Time Equities, Inc. v Naeringbygg 1 Norge III AS*, 50 Misc3d 1221(A), 2016 WL 730411, at *6 [Sup Ct New York County 2016]).

II. DISCUSSION

CPLR 3211(a)(10) states that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court should not proceed in the absence of a person who should be a party" (CPLR § 3211(a)(10)). Courts are afforded braod latitude in determining whether parties are to be added pursuant to CPLR 1001 and 1003 (*Lindkvist v Honest Ballot Ass'n*, 31 Misc3d 1234(a), at *4 [Sup Ct New York County 2011]). "It is well settled that dismissal for failure to join a necessary party should be granted only as a 'last resort'" including circumstances where an unnamed party is not subject to the court's jurisdiction and will not voluntarily appear or where the party not named is so essential to the litigation that the action cannot proceed in their absence (*id.*; *see In re Redhook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 457-459 [2005]).

Defendant Austin has failed to demonstrate that the Cemetery's plot owners are necessary parties to this action. Specifically, Austin argues that "without joining all of the members of the Cemetery [to this action], their rights and powers could be seriously impacted" (Def. Aff. ¶ 13). Defendant, however, fails to explain how specifically plot owners would be disadvantaged outside of conclusory arguments that the owners have the right to keep or remove board members, a baseless claim given that Austin himself has not been a Board Member to the Cemetery since his termination in March 2019. Defendant Austin further fails to demonstrate how Wells Fargo or A.G. Edwards are necessary parties to this action, instead baldly alleging that they were "institutional trustees" of the Rabbi Trust without documentary evidence (Def. Aff. ¶ 28). Although the record supports Austin's claim regarding the Burke Group advising him to take the Rabbi Trust as a lump sum distribution, this alone does not demonstrate why the Burke Group is an essential party as Austin has not shown how the Burke Group may have had a fiduciary duty to the Cemetery as the Board Members did. Consequently, defendant Austin's argument to dismiss the complaint pursuant to CPLR 3211(a)(10) does not meet the high bar necessary to constitute a "last resort" and his motion as to this argument is denied.

Similarly, Austin has failed to demonstrate that the Attorney General lacks standing to sue. His argument relies solely on case law that predates both the N-PCL and the EPTL to argue that the People of the State of New York have no interest in "the internal affairs and management of the corporation between itself and its stockholders and lot owners" (Def. Aff. ¶¶ 15-25). As plaintiff points out, however, both the N-PCL and EPTL explicitly grant the Attorney General

standing in this matter (N-PCL § 1501 [public cemeteries are a matter in which "the people of this state have a vital interest"]; EPTL § 8-1.1(f) ["the attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes . . . through appropriate proceedings in the court"]). In response, defendant merely claims that his affirmation in support already established a *prima facie* showing that plaintiff had no standing to sue, citing to the same two pre-statutory cases (Reply Aff. ¶ 29, NYSCEF Doc. No. 99). The motion to dismiss this action for lack of standing must be denied.

The business judgment rule defense also fails. The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Owen v Hamilton*, 44 AD3d 452, 456 [1st Dept 2007]). Austin argues that distribution of the Rabbi Trust to him was done in good faith because Board Members did so to "express their gratitude towards" him and relied on the representations made by the Burke Group and Wells Fargo. Similar to the defendants in *People v Moore*, however, Austin cannot use the business judgment rule to sidestep the allegations of bad faith described in the compaint (*People v Moore*, 2012 WL 10057358 [2012]). Specifically, the complaint states that Austin and others "breached their duties of loyalty and good faith to the Cemetery," citing not just the Rabbi Trust distribution but also attempts by Austin, Sr. to ignore and conceal his son's misconduct (Compl. ¶ 113). Neither Austin's argument that the complaint is not sufficiently particular about his misconduct, nor his reluctance to focus on allegations beyond distribution of the Rabbi Trust, is sufficient to support dismissal of the complaint on the basis of a business judgment defense.

Austin further fails to meet his burden that this action was commenced in an improper venue. First, the claim that, under CPLR 503, the case must be moved to Queens County because that is where the Cemetery is located is not persuasive because, as plaintiff notes, the Attorney General is located in New York County and, pursuant to CPLR 503(a), trial shall be in the county in which one of the parties resided at commencement (CPLR § 503). Second basis for a change of venue under CPLR 510 is similarly insufficient as he fails to demonstrate how any witnesses located in Queens, Nassau, or Suffolk County would be inconvenienced by prosecution of this matter in New York County. Accordingly, that branch of the motion seeking a change of venue must be denied.

Finally, Austin's statute of limitations defense also fails. "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (*Island ADC, Inc. v Baldassano Architectural Group, P.C.* 49 AD3d 815, 816 [2008] [citations omitted]). Here, Austin has failed to make a *prima facie* showing that time has expired on plaintiff's claims. Austin's affirmation in support focuses primarily on plaintiff's fourth claim for Wrongful Related Party Transactions, arguing that a three-year statute of limitations applies on breaches of fiduciary duty claims seeking only money damages (Compl. ¶¶ 98-100; Def. Aff. ¶¶ 48-52; *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). Austin's argument that the fourth cause of action does not include any request for equitable relief does not pass muster as this claim explicitly calls for equitable relief in the form of an accounting for any profits made from Cemetery transactions that enriched Austin (Compl. ¶ 99; *Spitzer v Schussel*, 792 NYS2d 798 [Sup Ct New York County 2005]). As for the remainder of plaintiff's claims, Austin baldly argues "this same three year statute of limitation applies to remaining causes of action that seek monetary damages" (Def. Aff. ¶ 52). Suffice to say, this one-sentence argument does not meet the *prima facie* standard necessary to meet Austin's initial burden under CPLR 3211(a)(5).

Accordingly, it is hereby

ORDERED that the motion of defendant Daniel Austin, Sr., to dismiss the complaint as to him (Motion Sequence Number 004) is denied in its entirety.

1/29/2021
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
APPLICATION:	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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