

Velez v Mitchell

2021 NY Slip Op 30898(U)

March 22, 2021

Supreme Court, New York County

Docket Number: 654372/2020

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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Dagoberto Velez a/k/a "Street Star Norbes" or "Norbes",

Plaintiff,

- v -

Troy Mitchell a/k/a "Smack White" or a/k/a "Smack", Eric Beasley, Jean French a/k/a "Cheeko", and Ultimate Rap League, LLC a/k/a URL,

Defendants.

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Table with 2 columns: INDEX NO. (654372/2020), MOTION DATE, MOTION SEQ. NO. (001)

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

The Court heard oral argument on defendants' pre-answer motion to dismiss via Microsoft Teams on March 17, 2021. For the reasons set forth below, the motion is granted in part and denied in part.

This action arises out of an alleged oral agreement to form a partnership. The Complaint alleges sixteen causes of action: (1) Wrongful Dissolution (2) Misrepresentation (3) Negligent Misrepresentation (4) Breach of Fiduciary Duty (5) Breach of Oral Joint Venture of Partnership Agreement (6) Breach of the Implied Covenant of Good Faith and Fair Dealing (7) Promissory Estoppel (8) Unjust Enrichment (9) Quantum Meruit (10) Equitable Accounting (11) Violation of the Right of Publicity - NY Civil Rights Law § 51 (12) Conversion (13) Defamation (14) Declaratory Relief – Determine the Existence of Partnership (15) Declaratory Relief – Dissolution by Decree of Court and (16) Declaratory Relief – Plaintiff's Rights to Partnership's Property.

Motion 001 by defendants Troy Mitchell, Eric Beasley, Jean French, and Ultimate Rap League seeks to dismiss the Complaint pursuant to 3211(a)(1) and CPLR 3211(a)(7).

Background

Defendant Ultimate Rap League, LLC, (“URL”) is a limited liability company organized under the laws of the state of New York. Cmplt. 6. URL hosts acapella “rap battles”, including live events, and pay-per-view online content, as well as streaming content. Cmplt. 16. Since 2009, URL has hosted rap battles across the United States and internationally. Cmplt. 20. In the 81-page Complaint, the majority of the 412 paragraphs are devoted to chronicling many of the events that URL has hosted between 2009 and the present, identifying the events by date and indicating which rappers performed.

The Complaint alleges that “[i]n 2009, Plaintiff was approached by Defendants to be a partner and to form what would become the Ultimate Rap League” and that “Plaintiff Velez, Defendant Troy Mitchell, Defendant Eric Beasley, and defendant Jean French agreed that Plaintiff’s pivotal role in the partnership was to create the structure for the Ultimate Rap League” and that “[o]n or about October 26, 2009, the Ultimate Rap League began its operations as a New York general partnership with Troy Mitchell, Jean French, Eric Beasley, and Dagoberto Velez as partners. Cmplt. 10 – 13.

The Complaint alleges that from 2009 onward, Plaintiff understood himself to be a partner in URL. Plaintiff’s role was to acquire the talent for URL events, including but not limited to recruiting rappers. Cmplt. 27.

The Complaint alleges Plaintiff was wired money to cover the expenses of URL by professional football player Gerald McCoy. Cmplt. 179, 180, 183, 188, 190, 192, 197, 200, 202, 205, 206, 211, 213, 219. The Complaint does not state McCoy’s connection to URL. The

Complaint also alleges Plaintiff occasionally used out of pocket funds to cover URL expenses, such as a hotel room or a flight for talent related to an event. Cmplt. 189, 191, 207, 215, 216. The Complaint alleges, without further detail, that “Plaintiff would share profits with Defendants, when made available, from some of the URL events, more specifically, “Born Legacy” and “Proving Grounds” events. Plaintiff allegedly received profits in cash. Cmplt. 258.

The Complaint acknowledges that “Plaintiff never received a contract, in writing, for the plethora of services that he was providing to the Ultimate Rap League or a written employment agreement from the Ultimate Rap League.” Cmplt. 260. The Complaint nevertheless alleges that “[t]he agreement was that the four partners (Mitchell, Beasley, French, and Velez) would be equal partners that would not only help with the production but split all profits equally.” Cmplt. 321. The Complaint does not allege a date or specific statement, or surrounding circumstances regarding the alleged oral agreement.

The Complaint alleges that “after more than ten years of promoting Plaintiff as a partner” (Cmplt. 322), “[o]n or about Tuesday, April 28, 2020, Defendant Ultimate Rap League, LLC, published a press release on various social media platforms, saying that it is dissolving its relationship with Plaintiff.” Cmplt. 360. Plaintiff then sent a formal demand for an inspection of the books and records of the URL and a demand for an accounting of financial information of the URL League from 2009 to the present. Plaintiff alleges he received a response from Defendants’ counsel denying Plaintiff’s request. Cmplt. 364, 365.

The heart of Plaintiff’s sixteen causes of action is that Plaintiff was allegedly a partner in URL and then URL publicly ended its relationship with Plaintiff on April 28, 2020 (Cmplt. 243), without offering to buy out Plaintiff’s membership interest (Cmplt. 359). Further, Plaintiff seems to allege that Plaintiff was cut out of a lucrative financial deal between URL and non-party

Caffeine, Inc. to supply battle rap content on Caffeine's social broadcasting platform. Cmplt 233. Finally, Plaintiff includes allegations that Defendants used images and videos of Plaintiff in promotional materials without Plaintiff's "written consent." Cmplt. 370.

Discussion

Defendants move to dismiss the Complaint pursuant to 3211(a)(1) and CPLR 3211(a)(7).

Standard on Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, the Court must afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994).

"Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss." *Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC*, 155 A.D.3d 1218, 64 (2017), *aff'd*, 31 N.Y.3d 1090 (2018) (collecting cases). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Id. citing Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 (2017).

Pursuant to CPLR 3211(a)(1), a motion to dismiss based upon documentary evidence should be granted only "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002) (citation omitted). Pursuant to CPLR 3211 (a)(7), a pleading must be dismissed where it fails to state a cause of action.

The Complaint Fails to Allege the Existence of a Partnership

The formation of a partnership requires a shared purpose and knowing mutual assent by all parties to the partnership. A partnership is an association of two or more persons to carry on as co-owners a business for profit. Partnership Law § 10. “No person can become a member of a partnership without the consent of all the partners.” Partnership Law § 40(7). When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties.” *Fasolo v. Scarafile*, 120 A.D.3d 929, 930 4th Dep’t. 2014). Where a party alleges the existence of an oral partnership, that party “bears the burden of proving the indicia of such a relationship.” *F & K Supply, Inc. v. Willowbrook Dev. Co.*, 304 A.D.2d 918, 920 (3d Dep’t 2003).

To determine whether a partnership was formed, the Court looks at factors such as “the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution.” *Moses v. Savedoff*, 96 A.D.3d 466, 470 (1st Dep’t 2012). Of these elements, it is “[t]he requirement that the parties have agreed to share in the profits and losses,” that is “an indispensable essential of a contract of partnership” *Kidz Cloz, Inc. v. Officially For Kids, Inc.*, 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004) (quoting *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317 (1958)).

Here, the Complaint alleges “Plaintiff and Defendants in October of 2009 had an oral agreement to partner to form the Ultimate Rap League.” Cmplt. 310. The Complaint also alleges that Ultimate Rap League is a “limited liability company organized under the laws of the state of New York.” Cmplt. 6.

Defendants argue in support of their motion to dismiss that the undisputed existence of

the entity Ultimate Rap League LLC that does not name Plaintiff as a member is fatal to Plaintiff's partnership claims. Defendants further submit documentary evidence, specifically the LLC Articles of Organization for Ultimate Rap League filed in 2013 (NYSCEF Doc. No. 11), the LLC Operating Agreement for Ultimate Rap League signed in March 2014 (NYSCEF Doc. No. 12), and another LLC Articles of Organization for Ultimate Rap League filed in 2017 (NYSCEF Doc. No. 13).

In opposition, Plaintiff argues that Defendants' documents are irrelevant because they were created after 2009 and without Plaintiff's knowledge. Plaintiff argues, "the Complaint alleges that Plaintiff and Defendants formed a partnership in 2009 prior to Defendants' alleged LLC formation some four years later and separate from any alleged, then-existing legal entity. *See* Compl. ¶ 10. Thus, Defendants' attempt to attach corporate formation documents as "documentary evidence" is nothing more than an apparent attempt to ignore the pleading standards, neglect the allegations in the Complaint and distract the Court from the Complaint with Defendants' narrative." MOL in Opp. p. 3 (NYSCEF Doc. No. 28).

Defendants, on the other hand, assert that the "majority of Plaintiff's claims are premised upon an alleged oral partnership (between Plaintiff and the Individual Defendants) that somehow operated in the shadow of two longstanding, well-documented, formal business entities: Smack White, a New York corporation; and URL LLC, a New York limited liability company." MOL in Support, p. 8 (NYSCEF Doc. No. 7).

While the corporate formation documents may cast doubt on Plaintiff's claim that Plaintiff was a partner in a partnership, the existence of a registered LLC does not utterly refute Plaintiff's allegation that there *could* have been a preexisting or coexisting partnership among

Plaintiff and the individual defendants. Thus, the Court cannot dismiss Plaintiff's claims on the basis of documentary evidence.

The Court must then evaluate the sufficiency of Plaintiff's allegations. As stated above, the relevant considerations when determining whether an oral partnership exists are "the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution." *Moses v. Savedoff*, 96 A.D.3d 466, 470 (1st Dep't 2012). While no one of these factors is dispositive, the Court finds that Plaintiff has failed to allege sufficient facts to support any cause of action based on the existence of an oral partnership.

Construing the Complaint in the light most favorable to Plaintiff on a motion to dismiss, the Court can infer that Plaintiff has alleged the intent of the parties to form a partnership, from Plaintiff's allegation that "[i]n 2009, Plaintiff was approached by Defendants to be a partner and to form what would become the Ultimate Rap League." Cmplt. 10. However, Plaintiff pleads no other facts in support of the parties' intent and Plaintiff has not alleged all of the elements required to establish a partnership.

Plaintiff has also sufficiently alleged joint management of the business at the pleading stage. Plaintiff alleges that "[f]rom 2009 to 2020, Plaintiff, as a partner, executed many activities that include but were not limited to, the following: recruiting talent (on-screen and support staff), engaging in promotions, hosting battle rap events, organizing battle rap events, executing contracts, raising capital, and developing business concepts for the Ultimate Rap League. Cmplt 17. And that "[f]rom 2009 to the present, the Ultimate Rap League has featured the talent that Plaintiff has secured to perform for the company at its live events and on its digital platforms. Cmplt. 18. Defendants argue that Plaintiff does not allege to have been involved in "business

decisions” including financial decisions and did not have access to or control over the streaming part of the business. Based on the record before the Court, URL has three aspects to its business: (1) Recruiting Talent (2) Hosting Live Events featuring that Talent and (3) Streaming or otherwise Selling Footage from the Live Events. According to the Complaint, Plaintiff was involved in two out of those three aspects of the business – recruiting talent and hosting live events. Accordingly, Plaintiff has alleged sufficient control over the management of the business to survive a motion to dismiss.

Nevertheless, Plaintiff’s partnership claims fail because Plaintiff fails to allege that he was responsible for the losses of URL which was clearly a start up business in 2009. The Complaint alleges that Plaintiff “would share profits, when made available, from some of the URL events, more specifically, “Born Legacy” and “Proving Grounds” events and received these alleged profits in cash Cmpl. 258. The Complaint also alleges that Plaintiff and Defendants “shared losses on an equal basis” (Compl. ¶ 298) but alleges no facts or specific instances that would support this allegation. As stated above, conclusory allegations need not be taken as true. The only expenses (which are distinct from “losses”) referenced in the Complaint were reimbursed. Additionally, the Complaint does not allege that Plaintiff ever contributed capital to URL. All parties acknowledge “the requirement that parties have agreed to share in the profits and losses is an indispensable element of a contract of partnership or joint venture.” *Kidz Cloz*, 320 F. Supp. 2d 164, 171.

Accordingly, Plaintiff has failed to state any cause of action based on an alleged oral partnership and the following causes of action must be dismissed: (1) Wrongful Dissolution (5) Breach of Oral Joint Venture or Partnership Agreement (6) Breach of the Implied Covenant of Good Faith and Fair Dealing (10) Equitable Accounting (12) Conversion (14) Declaratory Relief

– Determine the Existence of Partnership (15) Declaratory Relief – Dissolution by Decree of Court and (16) Declaratory Relief – Plaintiff’s Rights to Partnership’s Property.

**Plaintiff’s Breach of Fiduciary Duty and Quasi-Contract Claims are Sufficiently Stated
(4) Breach of Fiduciary Duty (7) Promissory Estoppel (8) Unjust Enrichment (9) Quantum Meruit**

A claim for breach of fiduciary exists when Plaintiff alleges (1) the existence of a fiduciary duty owed, (2) a breach of that duty, and (3) resulting damages. *Jones v. Voskresenskaya*, 125 A.D.3d 532, 533 (4th Dep’t 2015). Whether a fiduciary duty exists is a fact-dependent analysis. In *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 58 (1st Dep’t 1988) (“Apple I”), the court affirmed the denial of the defendant’s motion to dismiss a breach of fiduciary duty claim, recognizing that a fiduciary relationship, whether formal or informal, “is one founded upon trust or confidence reposed by one person in . . . the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances between close friends.” “Such a relationship might be found to exist . . . even where confidence is based upon prior business dealings.” *Penato v. George*, 52 A.D.2d 939, 942 (2d Dep’t 1976); *see also Comer v. Krolick*, 2015 N.Y. Misc. LEXIS 4395 at *26 (N.Y. Sup. Ct. 2015) (the court found a breach of fiduciary duty when the plaintiff relied on the personal and professional relationship of the defendant to make business decisions to his detriment).

Here, although Plaintiff’s claims are insufficient to support a finding of an oral partnership, Plaintiff clearly had a close relationship with the individual defendants and worked with them on what appears to be a near-daily basis for a decade. The Complaint details collaborative efforts between Plaintiff and Defendants and frequent communications that went into planning, promoting and executing a decade’s worth of live events. *See St. John’s Univ. v.*

Bolton 757 F.Supp.2d 144, 166 (E.D.N.Y., 2010) (“a fiduciary relationship embraces not only those the law has long adopted . . . but also more informal relationships where it can be readily seen that one party reasonably trusted another”).

Indeed, the facts presented here are very similar to the facts this Court analyzed in *Pai v. Blue Man Group Pub. LLC*, 2016 WL 5468234, *aff'd* 151 AD3d 456 (1st Dep’t 2017) There, as here, Plaintiff alleged that he had made significant creative contributions to an entertainment group, only to be left in the dark regarding the group’s finances and cut out of a more lucrative financial arrangement. This Court sustained Pai’s breach of fiduciary duty claims based on the nature of the close personal and professional relationship between plaintiff and defendants, at the pleading stage, except to the extent they were barred by the statute of limitations. The same result is appropriate here.

Likewise, Plaintiff’s quasi-contract claims may stand. It is clear from the Complaint that there was a decade-long course of conduct, which involved Plaintiff rendering services and Defendants accepting those services, to the benefit of the overall enterprise. Plaintiff has alleged sufficient facts to proceed with discovery on these claims. Manifestly, if, as Plaintiff alleged during the oral argument, the URL/Caffeine transaction resulted in a \$113 million payment to URL that involved transferring the broadcast rights to a decade’s worth of performances that Plaintiff arranged, Plaintiff has an actionable claim.

Accordingly, Plaintiff’s claims for (4) Breach of Fiduciary Duty (7) Promissory Estoppel (8) Unjust Enrichment (9) Quantum Meruit will proceed.

**Plaintiff Fails to State Misrepresentation Claims
(2) Misrepresentation (3) Negligent Misrepresentation**

To state a claim for fraudulent misrepresentation, a plaintiff must allege “a misrepresentation or a material omission of fact which was false and known to be false by the

defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011) (quoting *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996)).

To state a claim for negligent misrepresentation, the plaintiff must demonstrate “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007).

Pursuant to CPLR 3016(b), fraud-based claims are subject to a heightened pleading standard, and where a cause of action is based upon a misrepresentation, the circumstances constituting the wrong must be stated in detail. Here, Plaintiff’s fraudulent misrepresentation and negligent misrepresentation claims are not stated in detail.

Count Two of the Complaint for Fraudulent Misrepresentation asserts that:

Defendants released false statements to third parties that Plaintiff was fired as an employee and no longer involved and doing business on behalf of the Ultimate Rap League. Plaintiff alleges that Defendants never represented Plaintiff as anything but a partner in the URL. Over more than a decade with the Ultimate Rap League, Defendants never presented an IRS Form W-2 or IRS Form 1099 to Plaintiff. Defendants’ statements were made by Defendants with the sole purpose of defrauding Plaintiff.

Cmplt. 280 – 282.

This claim refers to a press release issued by Defendants indicating that they had terminated their professional relationship with Plaintiff. *See* NYSCEF Doc. No. 18. The statement does not use the term “fired” or “employee” and instead states only that URL had decided to “discontinue [its] professional relationship” with Plaintiff at that time. *Id.* This statement is not false. Regardless of the form of Plaintiff’s professional relationship with URL, it

was not a false statement to say that it had been “discontinued” as of April 28, 2020.

Accordingly, this cause of action must be dismissed.

Count Three of the Complaint for Negligent Misrepresentation asserts that “For over ten years, [Defendants] made a statement to Plaintiff and third parties that Plaintiff was a partner of the URL” Cmpl. 288. However, Plaintiff never alleges specific statements or the surrounding circumstances giving rise to this claim. In fact, the only statements that Plaintiff cites using the term “partner” (and it appears in the colloquial rather than legal sense) are a question by *a third party* and a statement *by Plaintiff*. Cmpl. 98, 109. The Complaint does not include any statements by Defendants indicating that Defendants told or otherwise represented to Plaintiff they were involved in a partnership or joint venture.

**Plaintiff Fails to State a Defamation Claim
(13) Defamation**

Plaintiff’s Thirteenth cause of action for defamation alleges:

In a written statement from the URL on or about April 28, 2020, Defendants said that Plaintiff was no longer involved with the URL. In interviews with bloggers, Defendant Mitchell and Defendant Beasley knew the statements would get out to thousands of URL followers knowingly made the false and defamatory statements about Plaintiff. In the alternative, Defendants negligently made false and defamatory statements about Plaintiff.

Cmpl. 384- 386. The first allegation refers to the April 28, 2020 press release that states

Defendants “discounted” their “professional relationship” with Plaintiff.

As explained above, Plaintiff does not contend that this statement is false, *i.e.* Plaintiff does not allege that he continued to have a business or professional relationship with Defendants after April 28, 2020. To the contrary, Plaintiff contends that Defendants wrongfully terminated their business relationship, but Plaintiff cannot dispute that the relationship was “discontinued.” The press release makes no other assertions about the nature of Plaintiff’s business relationship

with Defendants. If there are other statements made “in interviews with bloggers” Plaintiff did not plead them beyond the conclusory allegation quoted above. Accordingly, Plaintiff’s defamation cause of action must be dismissed.

**Plaintiff Sufficiently States a Claim for Violation of the Right of Privacy
(11) Violation of the Right of Publicity – Civil Rights Law § 51**

Plaintiff’s Eleventh cause of action for Violation of the Right of Publicity - Civil Rights Law § 51 is as follows:

Between October 31, 2009, and present, Defendants held events in New York where they sold tickets. Defendants used Plaintiff’s name and likeness on promotional flyers and social media posts to advertise the event. This advertisement was done without the written consent of Plaintiff.

Cmplt. 369 – 371.

The Complaint alleges generally that “Plaintiff often appeared on camera to represent the Ultimate Rap League on various media platforms. Plaintiff’s image and likeness often appeared on advertisements and videos for the Ultimate Rap League.” Cmplt. 261, 263. The only specific instances of using Plaintiff’s image without Plaintiff’s consent alleged in the Complaint is found at paragraphs 249 – 251 of the Complaint. Plaintiff alleges that video footage of Plaintiff was included on the Caffeine Inc. platform.

NY Civil Rights Law §§ 50 & 51 apply when any person, firm or corporation uses any living person’s name, portrait, picture or voice, for advertising or trade, without written consent. Here, it is unclear from the present record whether the video footage including plaintiff’s image is incidental to Plaintiff attending an actual live event, as Defendants claim, or whether, the content features events that Plaintiff “hosted” and therefore are replete with uses of his image.

Construing the Complaint in the light most favorable to the Plaintiff at the pleading stage, the Court finds that Plaintiff has stated a claim for Violation of the Right of Publicity pursuant to NY Civil Rights Law § 51.

Accordingly, it is hereby,

ORDERED that the motion to dismiss the Complaint is granted to the extent of directing the Clerk to sever and dismiss counts (1) Wrongful Dissolution (2) Misrepresentation (3) Negligent Misrepresentation (5) Breach of Oral Joint Venture of Partnership Agreement (6) Breach of the Implied Covenant of Good Faith and Fair Dealing (10) Equitable Accounting (12) Conversion (13) Defamation (14) Declaratory Relief – Determine the Existence of Partnership (15) Declaratory Relief – Dissolution by Decree of Court and (16) Declaratory Relief – Plaintiff’s Rights to Partnership’s Property; and it is further

ORDERED that the motion to dismiss the Complaint is denied as to counts: (4) Breach of Fiduciary Duty (7) Promissory Estoppel (8) Unjust Enrichment (9) Quantum Meruit (11) Violation of the Right of Publicity - NY Civil Rights Law § 51 and these claims will proceed to discovery; and it is further

ORDERED that defendants shall answer the remaining cause of action in the Complaint within 20 days of this decision and order; and it is further

ORDERED that the parties shall comply with the preliminary conference order (NYSCEF Doc. No. 32). A status conference is scheduled for June 22, 2021 at noon.

Dated: March 22, 2021


BARRY R. OSTRAGER, 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