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| <b>People v Richmond Capital Group LLC</b>   |
| 2021 NY Slip Op 32367(U)   |
| November 19, 2021  |
| Supreme Court, New York County   |
| Docket Number: Index No. 451368/2020   |
| Judge: Andrew Borrok   |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART 53

Justice

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

Petitioner,

- v -

RICHMOND CAPITAL GROUP LLC, RAM CAPITAL FUNDING LLC, VICEROY CAPITAL FUNDING INC. ALSO DOING BUSINESS AS VICEROY CAPITAL FUNDING AND VICEROY CAPITAL LLC, ROBERT GIARDINA, JONATHAN BRAUN, TZVI REICH, MICHELLE GREGG,

Respondents.

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INDEX NO. 451368/2020
MOTION DATE
MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578

were read on this motion to/for DISCOVERY

Richmond Capital Group, LLC, Robert Giardina, and Michelle Gregg's (Richmond Capital Group, LLC, together with Mr. Giardina and Mr. Gregg, hereinafter, collectively, the Richmond Capital Respondents) motion to (i) compel the People of the State of New York, by Letitia James, Attorney General of the State of New York (NYAG) to produce unredacted notes of its oral communications with nonparty merchant witnesses, (ii) compel NYAG to produce unredacted copies of communications previously produced invoking the law enforcement privilege with such nonparty merchant witnesses, and (iii) grant the Richmond Capital Respondents leave to recall any and all nonparty merchant witnesses for deposition upon such production, is denied in its entirety. The documents requested are protected from discovery under New York law because they are either materials prepared in anticipation of litigation or are protected by law enforcement immunity, and the Richmond Capital Respondents have failed to

demonstrate substantial need for, or any entitlement to, such documents. The motion for recalling witnesses for deposition is denied as moot.

This proceeding arises out of NYAG's investigation into the Respondents' business of marketing, issuing, and collecting merchant cash advances (MCAs). NYAG alleges that these MCAs are "in fact fraudulent, usurious loans with interest rates in the triple and even quadruple digits, far above the maximum rate permissible for a loan under New York law" (Amended Petition; NYSCEF Doc. No. 426, ¶ 1). NYAG commenced this proceeding pursuant to New York Executive Law § 63(12), which gives NYAG the authority to bring a proceeding to enjoin fraudulent or illegal acts or fraud and illegality in the carrying on, conducting, or transaction of business. On June 2, 2021, the court denied the Respondents' motions to dismiss and provided the Respondents "an opportunity to do some limited discovery" (Tr. of June 2, 2021 Hearing; NYSCEF Doc. No. 472, at 40:22-23).

Pursuant to CPLR 3101(d)(2), "materials otherwise discoverable...and prepared in anticipation of litigation or for trial by or for another party...may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Witness statements "are trial preparation materials and not absolutely privileged" (*People v Kozlowski*, 11 NY3d 223, 245 [2008]). Production of such materials is not proper, however, where the party seeking production has failed "to seek interview with the [witnesses] at an earlier time or stated whether they ever made an independent attempt to secure the relevant statements, a requirement for obtaining an attorney's trial preparation materials" (*id.*, 245-246).

Law enforcement privilege is codified in NY Pub Off § 87(2)(e)(i)-(iv), which allows an agency to deny access to records or portions thereof that

“are compiled for law enforcement purposes and which, if disclosed, would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures.”

This privilege “is qualified and must be balanced with the substantial need for the information sought” (*Colgate Scaffolding & Equip. Corp. v York Hunter City Servs., Inc.*, 14 AD3d 345, 346 [1st Dept 2005]). Public interest privilege “permits appropriate parties to protect information from ordinary disclosure, as an exception to liberal discovery rubrics” and “envelops confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged” (*In re World Trade Ctr. Bombing Litig.*, 93 NY2d 1, 8 [1999] [internal quotation marks and citation omitted]). “The balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure” (*City of New York v Keene Corp.*, 304 AD2d 119, 122 [1st Dept 2003], quoting *Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 118 [1974]).

The Richmond Capital Respondents have failed to identify any right to, let alone substantial need for, the notes of oral communications between NYAG and nonparty merchant witnesses. In some instances, they have failed to show that such notes even exist. The excerpt of NYAG’s

privilege log, dated September 20, 2021 (the **Privilege Log**; NYSCEF Doc. No. 541) explicitly states that the “documents listed below are handwritten attorney notes taken by the Office of the New York State Attorney General (NYAG) contemporaneous with telephone interviews with nonparty witnesses concerning the NYAG’s investigation of Respondents or concerning the above-noted proceeding.” It does not claim to document every phone call between NYAG and nonparty witnesses, nor can it be assumed from the evidence produced that notes were made of every such phone call. To the extent that the Richmond Capital Respondents allege that notes have been improperly withheld because phone calls were requested for dates that do not appear in the privilege log, no evidence has been offered to show that such notes were ever made.

Richmond Capital Respondents objection to NYAG’s withholding of such notes as privileged fails. The notes are plainly created in anticipation of litigation. The assertion that such an argument is “disingenuous” is unpersuasive, at best, and is contrary to established New York law (*see* Aff. of Anthony Varbero, counsel for the Richmond Capital Respondents; NYSCEF Doc. No. 539, ¶ 16). The argument that, because such notes contain quotations attributed to the Richmond Capital Respondents, they cannot be withheld, is unsupported by caselaw. As the Richmond Capital Respondents admit, these nonparty witnesses were and are available for and have been subject to deposition (*id.*, ¶ 18). The Richmond Capital Respondents have failed to demonstrate that they could not obtain the information they seek at deposition or by otherwise asking of the nonparty witnesses. Nor have they demonstrated undue hardship in obtaining the same or substantially similar information. In fact, they wholly fail to demonstrate any attempt to procure the information sought from the nonparty witnesses. Accordingly, the Richmond Capital Respondents have failed to demonstrate entitlement to materials created by NYAG in

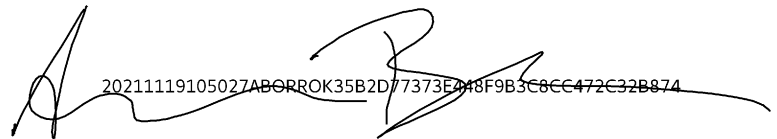
anticipation of litigation, and the branch of the motion ordering production of such documents is denied.

NYAG asserts that, in addition to the investigation that gave rise to this proceeding, it has “investigated and inquired into possible fraud and illegality committed by other entities in the MCA and business funding industries that are not party” to this proceeding (Nonparty Investigations) (Aff. of John Figura, Assistant Attorney General in the Office of NYAG; NYSCEF Doc. No. 557, ¶ 45). NYAG further asserts that its communications with merchants, including nonparty merchant witnesses in this proceeding, concern ongoing Nonparty Investigations (*id.*, ¶ 46). NYAG has redacted certain information in emails with nonparty witnesses as it relates to Nonparty Investigations (*id.*, ¶ 48), and informed Respondents of the reason for such redactions by letter dated August 31, 2021 (NYSCEF Doc. No. 577, at 2 [“Petitioners have redacted from these communications references to other investigations conducted by the NYAG that do not concern respondents pursuant to the law enforcement privilege under New York law”]).

The Richmond Capital Respondents assertion that they have a “compelling need for the information” (NYSCEF Doc. No. 539, ¶ 32) fails. The sole basis for such assertion appears to be the speculative assertion that “Petitioner removed a substantive portion of this communication about the pending civil case for purposes of preventing scrutiny by the Respondents” (*id.*, ¶ 27). The Richmond Capital Respondents provide no support for their *ipse dixit* assertion. Thus, the branch of the motion ordering production of such unredacted documents is denied. The branch of the motion for leave to recall witnesses for deposition must also be denied as moot.

It is hereby ORDERED that the motion of Richmond Capital Group, LLC, Robert Giardina, and Michelle Gregg to compel production of documents and for leave to recall witnesses for deposition is denied.

11/19/2021  
DATE



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ANDREW BORROK, JSC

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