

Apollo Global Mgt., Inc v Cernich
2022 NY Slip Op 32187(U)
July 8, 2022
Supreme Court, New York County
Docket Number: Index No. 653234/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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APOLLO GLOBAL MANAGEMENT, INC, APOLLO
MANAGEMENT, L.P., APOLLO ADVISORS VIII, L.P.,
APOLLO ADVISORS IX, L.P.,

Plaintiffs,

- v -

STEPHEN CERNICH, HUAN TSENG,

Defendants.

INDEX NO. 653234/2020

MOTION DATE 04/25/2022,
05/25/2022,
05/24/2022

MOTION SEQ. NO. 010 011 012

DECISION + ORDER ON
MOTION

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 206, 207, 208, 209,
210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 238, 244, 245,
246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265,
266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285,
286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305,
306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325,
326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345,
346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365,
401, 402, 403, 404

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 011) 372, 373, 374, 375,
376, 377, 378, 379, 380, 381, 382, 385, 386

were read on this motion to/for SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 012) 366, 367, 368, 369,
370, 371, 383, 384, 399, 400, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420,
421, 422

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, the defendants are not entitled to summary judgment (Mtn. Seq.
No. 010) and dismissal. The plaintiffs have specified in a detailed allocation (NYSCEF Doc.
No. 218) among the Apollo group entities which entities paid the of \$34,804,132.34 in damages
that they claim (i.e., \$22,886,760.91 of which was paid for by Apollo Management Holdings,
L.P., \$8,552,299.38 of which was paid for by Athene Asset Management, \$2,970,779.45 of

which was paid for by Apollo Management, L.P., \$204,140.60 of which Apollo Management Holdings, L.P. paid third parties and certain subscription services and \$190,152 of which Athene Asset Management paid third parties and certain subscription service [NYSCEF Doc. No. 218]). In addition, to the extent that the defendants' discovery was not complete, the plaintiffs reserved the right to supplement their damage request.

With respect to the approximately \$35 million of claimed damages, depositions of the plaintiffs' witness have not yet occurred such that the defendants can inquire into additional detail that they require. Nor does it matter that certain members of the Apollo group which were originally not named as plaintiffs were the payors of the development of the confidential information that belongs to the plaintiff. To the extent that this is an issue, this pleading defect is addressed by the Proposed AC (hereinafter defined).

The plaintiffs' motion to amend its complaint (Mtn. Seq. No. 012) must be granted to the extent of permitting the plaintiffs (i) to change the name of Apollo Global Management, Inc. to Apollo Asset Management, Inc. (**Apollo Asset**) and (ii) to add Apollo Management Holdings, L.P. and Apollo Insurance Solutions Group LP as additional plaintiffs. The motion must however be denied to the extent of permitting the plaintiffs to bring causes of action for unfair competition (fifth cause of action) and unjust enrichment (sixth cause of action) because they are palpably improper and clearly without merit (*WDF, Inc. v Trustees of Columbia University*, 170 AD3d 518 [1st Dept 2019]). This Court previously dismissed the cause of action sounding in unfair competition (*Apollo Global Management Inc v Cernich*, 2021 NY Slip Op 31741(U) [Sup Ct, NY County 2021]; NYSCEF Doc. No. 33) and the Appellate Division dismissed the cause of

action sounding in unjust enrichment (*Apollo Management, Inc. v Cernich*, 202 AD3d 527, 528 [1st Dept 2022]; NYSCEF Doc. No. 165) and otherwise held that the plaintiffs could seek recovery of their development costs of confidential information:

Supreme Court properly determined that plaintiffs will be permitted to seek, among other things, compensatory damages in the form of recovery of their development costs of confidential information with respect to the aiding and abetting claims. While plaintiffs did not specifically allege a claim for aiding and abetting misappropriation of confidential information, their claims for aiding and abetting breach of fiduciary duty and fraud were intrinsically tied to the primary wrongdoers' misappropriation of confidential information. Furthermore, the complaint sufficiently alleges that, by aiding and abetting the primary wrongdoers' conduct, defendants diminished the worth of plaintiff's confidential information by robbing it of the value of its confidentiality (*see E.J. Brooks v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018]). Indeed, the law is settled that "[t]he person responsible for the injury must respond for all damages resulting directly from and as a natural consequence of the wrongful act" (*Steitz v Gifford*, 280 NY 15, 20 [1939]).

(202 AD3d at 527-528; NYSCEF Doc. No. 165).

The proposed amended complaint (the **Proposed AC**) does not include sufficient additional facts to make these otherwise deficient causes of action actionable.

Finally, dismissal based on a three-year statute of limitations fails is not appropriate. A six-year statute of limitations applies to the plaintiffs' claims because the claims sound primarily in fraud and fraudulent concealment and the plaintiffs are seeking both monetary and equitable relief (*Tiny 1, Ltd. v Samfet Marble Inc.*, 201 AD3d 423, 424 [1st Dept 2022]; *Kaufman v. Cohen*, 307 A.D.2d 113, 119 [1st Dept 2003]; *Cusimano v Schnurr*, 137 AD3d 527, 529 [1st Dept 2016]; *Wimbledon Fin. Master Fund, Ltd. v Hallac*, 192 AD3d 617, 618 [1st Dept 2021]; *Homapour v. Harounian*, 182 AD3d 426, 427 [1st Dept 2020]).

The plaintiffs' motion to seal (Mtn. Seq. No. 011) their Memorandum of Law in Opposition to the defendants' summary judgment motion and certain exhibits to the Affirmation of John P. Sefick (NYSCEF Docs. No. 244, 247, 249-253, 255-256, 259, 263-266, 268-278, 280, 282-285, 287-290, 293, 295, 297, 299-301, 303-305, 308-312, 316, 318-322, 324, 326, 328, 330, 335-339, 346, 349, 352, 365) is granted for good cause shown.

RELEVANT FACTS AND PROCEDURAL HISTORY

The facts in this case are set forth in this Court's Decision and Order dated May 19, 2021 (the **Prior Decision**; NYSCEF Doc. No. 33). Familiarity is presumed.

In the Prior Decision, the Court dismissed the claim for unfair competition (fifth) cause of action and limited the plaintiffs' damages to the costs of developing its confidential information and investigative costs. On appeal, as discussed above, the Appellate Division dismissed the unjust enrichment (sixth) cause of action as duplicative of the aiding and abetting claims and otherwise indicated that the plaintiffs could seek recovery of the costs of developing their confidential information (*Apollo Management, Inc. v Cernich*, 202 AD3d 527, 528 [1st Dept 2022]).

Subsequently, the plaintiffs stipulated to further limit their recovery by waiving their rights to recover investigative costs (NYSCEF Doc. No. 180 at 2). Thus, the remaining causes of action in this case are (i) aiding and abetting Dang's breach of fiduciary duty (first cause of action), (ii) aiding and abetting Dang's fraud (second cause of action), (iii) aiding and abetting Siddiqui's breach of fiduciary duty (third cause of action) and (iv) aiding and abetting Siddiqui's fraud

(fourth cause of action) and damages are predicated on the costs of developing the confidential information and punitive damages.

On March 14, 2022, in their Fifth Amended Responses and Objections to Defendants Interrogatories (the **Plaintiffs' Responses**; NYSCEF Doc. No. 218), the plaintiffs broke down the costs they allegedly incurred in developing their confidential information:

INTERROGATORY NO. 1:

Provide a computation of each and every category of damage alleged by Apollo Global Management, Inc. in this Action and/or that Apollo Global Management, Inc. will allege or seek to recover in this action, including, but not limited to, a computation of the following categories of damages alleged by Apollo Global Management, Inc.:

1. Any costs incurred by Apollo Global Management, Inc. in developing the confidential and/or otherwise protectable information it alleges and/or will allege in this Action was wrongfully taken, used, transmitted, and/or disclosed;

....

AMENDED RESPONSE TO INTERROGATORY NO. 1:

....

Notwithstanding and without waiving the foregoing specific and general objections, Apollo Global Management, Inc. states that it is pursuing both compensatory and punitive damages for the Defendants' unlawful conduct. These include, without limitation:

<u>Category of Damages</u>	<u>Total Amount</u>	<u>Breakdown of Costs</u>
Costs Apollo Incurred in Developing the Stolen Confidential information	\$34,804,132.34	<ul style="list-style-type: none"> • Monies Apollo entities paid in connection with employees, contractors, outside consultants, and professional advisors:

		<ul style="list-style-type: none"> ○ Approximately \$22,886,760.91 as to which Apollo Management Holdings, L.P. was the payor; ○ Approximately \$8,552,299.38 as to which Athene Asset Management was the payor; ○ Approximately \$2,970,779.45 as to which Apollo Management, L.P. was the payor. ● Monies Apollo entities paid in connection with third party subscription services and database access: <ul style="list-style-type: none"> ○ Approximately \$204,140.60 as to which Apollo Management Holdings, L.P. was the payor; ○ Approximately \$190,152 as to which Athene Asset Management was the payor.
Punitive Damages	TBD	TBD

Apollo continues to investigate and analyze the damages that Defendants’ unlawful conduct caused to Apollo, which will include Apollo’s ongoing analysis of documents that Defendants have produced in discovery and of documents which Apollo believes Defendants must continue to produce in discovery, and Apollo will supplement this Interrogatory Response as appropriate.

(NYSCEF Doc. No. 218 at 4-5).

Discovery is not complete. At the time the instant summary judgment motion was brought by the defendants, the plaintiffs had filed a motion to compel additional document production, and, significantly, none of the 16 depositions agreed to in this case had yet occurred (NYSCEF Doc. No. 243).

DISCUSSION

The defendants are not entitled to summary judgment and dismissal (Mtn. Seq. No. 010)

On a motion for summary judgment pursuant to CPLR § 3212, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

In support of their motion for summary judgment, relying on the plaintiffs’ response to Interrogatory # 1 discussed above, the defendants argue that the aiding and abetting claims brought by Apollo Asset, Apollo Advisors VIII, L.P. and Apollo Advisors IX, L.P. should be dismissed because they themselves incurred no costs in developing their confidential information. In addition, the defendants argue that they are entitled to dismissal because the plaintiffs have not produced sufficient evidence to substantiate their claims that the affiliate

entities actually incurred these costs. Finally, the defendants argue that claims based on conduct prior to January 31, 2017 should be dismissed as time-barred based on a three-year statute of limitations. The arguments all fail.

The plaintiffs are a consolidated group that are majority owned by Apollo Global Management, Inc (*i.e.*, the original plaintiff which is now known as Apollo Asset Management, Inc.) with a minority share held by an entity controlled by the founders of Apollo. The plaintiffs indicate that they are operated in a “highly integrated manner” and do not restrict the flow of information among the various Apollo entities. The screening is around the entire Apollo group and employees working at the various Apollo entities are not screened from each other (*i.e.*, employees working at any one particular Apollo entity are not screened from employees working at a different Apollo entity) as to the flow of information (NYSCEF Doc. No. 244 at 10-11 *citing* Apollo Global Management 2017 Form 10-K, at 8 and the March 8, 2019 Arbitration Deposition of Marc Rowan at 1414). As such, the harm of the development costs of its confidential information is occasioned by the parent. It does not matter that another member of the group issued the checks as payout entities. To the extent of any defect in pleading, it is addressed by adding the other entities as additional plaintiffs and, as discussed above, there simply is no prejudice in doing so. Stated differently, dismissal as against non-payers based on the fact that others in the Apollo group paid puts form over substance and is completely inappropriate. The harm was to the Apollo group. How the parent allocates and accounts for the recovery is not a basis for dismissal.

Dismissal based on insufficient substantiation is also not appropriate. Discovery in this case is not complete. When this motion was filed, as discussed above, neither document production (NYSCEF Doc. No. 405), nor depositions were completed (NYSCEF Doc. No. 243).

Lastly, dismissal of claims based on conduct which predates January 1, 2017 is also not appropriate. A six-year statute of limitations applies to the plaintiffs' claims because they sound in fraud (*Tiny I, Ltd. v Samfet Marble Inc.*, 201 AD3d 423, 424 [1st Dept 2022]; *Kaufman v. Cohen*, 307 A.D.2d 113, 119 [1st Dept 2003]; *Cusimano v Schnurr*, 137 AD3d 527, 529 [1st Dept 2016]; *Wimbledon Fin. Master Fund, Ltd. v Hallac*, 192 AD3d 617, 618 [1st Dept 2021]). The underlying conduct to which these defendants are alleged to have aided and abetted were found by the arbitrator to constitute fraud:

The elements of a common law fraud against Dang have been satisfied.

....

Dang made misrepresentations to Apollo during the course of his employment. He made repeated and false certifications of his compliance with Apollo Code of Ethics. He also certified falsely that he had not engaged in any outside business activities. His extensive and time-consuming work for Caldera makes clear that his representations were false. This conduct was clearly deliberate. Given that Dang did not reveal the true facts, Apollo continued to employ him under false pretenses. As an entity that required annual certifications on these subjects Apollo reasonably relied on their truthfulness. The testimony of Apollo's Chief Compliance Officer made clear the importance to Apollo of compliance with these requirements.

(Final Arbitration Award; NYSCEF Doc. No. 14 at 16).

In *Tiny I, Ltd. v Samfet Marble, Inc.*, the Appellate Division affirmed the trial court's application of a six-year statute of limitations on the causes of action for breach of fiduciary duty and aiding and abetting breach of fiduciary duty because fraud was an essential element of the claims (201 AD3d 423, 424 [1st Dept 2022]). Specifically, the plaintiffs in *Tiny I* alleged that the defendants

schemed to fraudulently conceal wire transfers, increase debt, and deny access to books and records which had been falsified to force the sale of a company for far less than it was worth (*id.* At 423-424).¹ These allegations almost mirror the allegations levelled in this case.

In this case, the fraud element of plaintiffs' claims are not incidental to the plaintiffs' aiding and abetting breach of fiduciary duty claims (*cf. Romanoff v Romanoff*, 148 AD3d 614, 616 [1st Dept 2017]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Specifically, the defendants are alleged to have concealed Messrs. Siddiqui and Dang's involvement with Caldera by removing their electronic "fingerprints" from documents, lying about their involvement in Caldera, deleting emails and scrubbing desks presented to Caldera investors so that it appeared they were not taken directly from the plaintiffs (NYSCEF Doc. No. 244 at 4-6). Stated differently, the fraud and fraudulent concealment is fundamental to the claim. Thus, a six-year statute of limitations applies (*Tiny I*, 201 AD3d at 424; *Kaufman*, 307 AD2d at 119). For the avoidance of doubt, the cases primarily relied upon by the defendants (*Romanoff v Romanoff* (148 AD3d at 615) and *IDT Corp. v Morgan Stanley Dean Witter & Co.* (12 NY3d at 138)) do not compel a different result because in those cases the fraud claims were either not viable (*i.e.*, *IDT Corp.*) or incidental (*i.e.*, *Romanoff*).

¹ Similarly, in *Kaufman v Cohen*, the Appellate Division modified the trial court decision to dismiss a breach of fiduciary claim based on the application of a three-year statute of limitations and a fraud claim for lack of specificity pursuant to CPLR § 3016(b) (307 AD2d 113, 118 [1st Dept 2003]). The parties in that action had formed a partnership to purchase and develop a commercial property in Long Island City (*id.* at 115). The partnership was unable to make the project a commercial success, and after defaulting on its mortgage, the bank foreclosed on the loan and the property was sold at public auction (*id.*), the defendant allegedly told the plaintiffs at the time of the foreclosure auction that the parties' partnership interest in the property could not be salvaged (*id.*). The plaintiffs did not become aware that the defendant had a direct or beneficial interest in the entity that purchased the property at auction at a substantial discount, to the exclusion of the plaintiffs (*id.* at 116). The Appellate Division reinstated the fraud claim and held that a six-year statute of limitations should apply to the breach of fiduciary duty claim, which was based upon the plaintiffs' allegations that the defendant intentionally and actively misrepresented the ability of the partnership to reacquire the property and concealed his involvement in the purchasing entity, all to the plaintiffs' detriment (*id.* at 121).

The Plaintiffs may file the Proposed AC solely to the extent of changing Apollo Asset's name and add the additional plaintiffs (Mtn. Seq. No. 012)

Leave to amend the pleadings should be granted absent prejudice or surprise (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). The plaintiffs' claims in the Proposed AC are premised on the same facts, transactions or occurrences that were alleged in the complaint. There simply is no prejudice or surprise because the parties being added, subsidiaries of the originally named Apollo entity, were known to the defendants and neither discovery nor depositions have been concluded (*Castor Petroleum, Ltd. v Petroterminal de Panama, S.A.*, 90 AD3d 424, 425 [1st Dept 2011]). In addition, having moved for summary judgment based upon the fact that the new plaintiffs were the paying entities, and not the parent, the defendants cannot now complain about their addition in the Proposed AC.

Morand v Farmers New Century (171 AD3d 1167, 1168 [2d Dept 2019]), *Spiegel v Kempner* (145 AD3d 505, 506 [1st Dept 2016]) and *Pecora v Pecora* (204 AD3d 611, 612 [1st Dept 2022]) do not suggest a different result. The procedural posture of those cases were very different than this case.²

² In *Morand v Farmers New Century*, the Appellate Division held that the trial court providently exercised its discretion when it denied a motion to amend because when the motion was made "the case had already been certified as ready for trial" and "new damage claims were based on facts that the plaintiffs had been aware of prior to commencement of the action" (171 AD3d 1167, 1168 [2d Dept 2019]). In *Spiegel v Kempner*, the Appellate Division affirmed the trial court's decision to deny a second motion by plaintiff to amend the complaint where the plaintiff's first motion to amend, which was made more than three years earlier, was previously denied and she failed to proffer a reasonable excuse for the delay in making a second motion (145 AD3d 505, 506 [1st Dept 2016]). In *Pecora v Pecora*, the Appellate Division reversed the trial court's decision to grant the plaintiff's motion to amend the complaint where he had waited seven years after commencement of the action to request an amendment to include facts about the sale of a property that had occurred ten years earlier (204 AD3d 611, 612 [1st Dept 2022]).

Finally to the extent that the defendants' argue that Apollo Insurance Solutions Group LP cannot maintain a claim in New York State because it is not authorized to do business here, the plaintiffs may cure this defect and are given leave to do so prior to trial (*see Uribe v Merchant Bank of New York*, 266 AD2d 21, 22 [1st Dept 1999] (failure of the plaintiff to obtain a authorization to do business in New York may be cured prior to the resolution of the action); *see also Tri-Terminal Corp. v CITC Industries, Inc.*, 78 AD2d 609 [1st Dept 1980] (plaintiff, a foreign corporation doing business in New York, allowed to cure defect by obtaining requisite authority to do business in New York prior to trial)).

However, the branch of plaintiffs' motion seeking to reassert an unfair competition (fifth) and an unjust enrichment (sixth) cause of action is denied. These causes of action have already been dismissed and the plaintiffs do not allege sufficient new facts which make these claims otherwise actionable (*Apollo Global Management Inc v Cernich*, 2021 NY Slip Op 31741(U) [Sup Ct, NY County 2021]; *Apollo Management, Inc. v Cernich*, 202AD3d 527, 528 [1st Dept 2022]; *WDF, Inc. v Trustees of Columbia University*, 170 AD3d 518 [1st Dept 2019]).

The plaintiffs are directed to file their Amended Complaint as set forth above by no later than August 5, 2022.

Good Cause Exists to seal (Mtn. Seq. No. 011)

The plaintiffs' motion to seal NYSCEF Docs. No. 244, 247, 249-253, 255-256, 259, 263-266, 268-278, 280, 282-285, 287-290, 293, 295, 297, 299-301, 303-305, 308-312, 316, 318-322, 324, 326, 328, 330, 335-339, 346, 349, 352, 365 is granted because they have shown good cause to

seal records containing their confidential business information (*Crain Commc'ns, Inc. v Hughes*, 135 AD2d 351 [1st Dept 1987]).

Accordingly, it is

ORDERED that the defendant's motion for summary judgment (Mtn. Seq. No. 010) is denied; and it is further

ORDERED that the plaintiffs' motion to amend its complaint (Mtn. Seq. No. 012) is granted solely to the extent that the plaintiffs may amend their complaint to (i) change the name of Apollo Global Management, Inc. to Apollo Asset Management, Inc. and (ii) add Apollo Management Holdings, L.P. and Apollo Insurance Solutions Group LP as plaintiffs; and it is further

ORDERED that the motion to amend is denied to the extent that the causes of action for unfair competition (fifth) and unjust enrichment (sixth) must be stricken from the amended complaint; and it is further

ORDERED that the plaintiffs register Apollo Insurance Solutions Group LP to do business in the state pursuant to Partnership Law § 121-907 prior to trial; and it is further

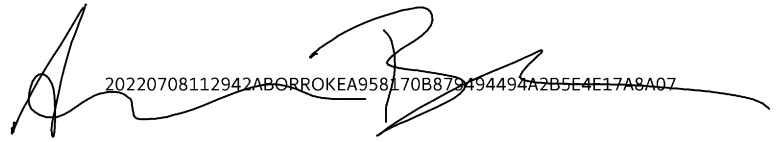
ORDERED that the plaintiffs file the amended complaint as directed above by no later than August 5, 2022; and it is further

ORDERED that the plaintiffs' motion to seal (Mtn. Seq. No. 011) NYSCEF Docs. No. 244, 247, 249-253, 255-256, 259, 263-266, 268-278, 280, 282-285, 287-290, 293, 295, 297, 299-301, 303-305, 308-312, 316, 318-322, 324, 326, 328, 330, 335-339, 346, 349, 352, 365 is granted; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal NYSCEF Docs. No. 244, 247, 249-253, 255-256, 259, 263-266, 268-278, 280, 282-285, 287-290, 293, 295, 297, 299-301, 303-305, 308-312, 316, 318-322, 324, 326, 328, 330, 335-339, 346, 349, 352, and 365 and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



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7/8/2022

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