# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. DAKOTA D. RAMSEUR **PART** 34M
*Justice*

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HILTON WIENER, LLC

Plaintiff,

- v -

FRED ZENK,

Defendant.

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**INDEX NO.** 657440/2019

**MOTION DATE** 10/01/2021

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

## DECISION MEMORANDUM

Plaintiff Hilton Wiener, LLC, whose sole proprietor is attorney Hilton Wiener (Wiener), commenced this action against Defendant Fred Zenk seeking damages arising from Defendant's failure to pay for legal services performed on his behalf. In this motion sequence (mot. seq. 002), Plaintiff moves for summary judgment under CPLR 3212 on each of its four causes of action for: (1) breach of contract; (2) accounts stated; (3) unjust enrichment; and (4) *quantum meruit*. Defendant opposes the motion in its entirety and cross moves for summary judgment pursuant to CPLR 3212 dismissing each cause of action. For the foregoing reasons, Plaintiff's motion for summary judgment as to its cause of action in *quantum merit* is granted, but denied as to its other three; conversely, Defendant's motion for summary judgment is denied as to Plaintiff's cause of action in *quantum meruit* but granted as to those remaining. Plaintiff has demonstrated entitlement to reasonable fees for its legal services, yet triable issues of fact remain as to the exact sum it is entitled to under its *quantum meruit* theory.

## BACKGROUND

In 2014, Defendant retained Cold Spring Advisory Group (Cold Spring) to analyze potential financial losses resulting from alleged misconduct by Obsidian Financial Group (Obsidian). Cold Spring advised Defendant that he had a potential claim against Obsidian under the Financial Industry Regulatory Authority (FINRA)'s dispute resolution system. Cold Spring recommended attorney Hilton Wiener, who was then practicing law as part of the "Law Office of Hilton M. Weiner, Esq" (not Hilton Wiener, LLC). (NYSCEF doc. No. 51 at 7, def. memo. of law.) The parties entered into a Legal Service Agreement (the Agreement) dated May 22, 2014, wherein Defendant hired Wiener to represent him in a FINRA arbitration proceeding against Obsidian. (*See* NYSCEF doc. no. 39, retainer agreement.) The Agreement, for present purposes, has three relevant provisions. Under Paragraph 2, Wiener's compensation would be determined

by a one-third contingency fee based on the amount Defendant recovered through the FINRA arbitration; Paragraph 3 provides that, "If Client [Defendant] substitutes another lawyer or law firm, the Client will be responsible for the disbursements and hourly legal fee of the Firm at the regular billing rate of $350 per hour, regardless of recovery"; and Paragraph 6, entitled "Right to Withdraw," states that "if the Client fails to cooperate with the Firm in the handling of this claim, Client agrees to compensate the Firm at a reasonable amount for its services, and for the time spent on this claim on an hourly basis." (NYSCEF doc no. 39, Agreement.)

In the Arbitration Award dated September 23, 2018, Plaintiff, on Defendant's behalf, recovered a $139,904.18 Award (the Award) against Obsidian. Subsequent emails dated between September 24, 2018, and October 24, 2019, demonstrate that Plaintiff communicated with Defendant to confirm the award into a judgment. (NYSCEF doc. No. 43, email xxchanges between plaint. and def.) Plaintiff hired an outside firm—Roach & Murtha, P.C.—to confirm and collect the Award. (NYSCEF doc. no. 59, roach & murtha collection agreement.) As Defendant's memorandum of law acknowledges, in January 2019, Roach & Murtha filed a petition in the Supreme Court, Suffolk County to confirm the Award. (*See Matter of the Arbitration of Fred Zenk v Posillico*, NYSCEF Index No. 600025/2019.) In June 2019, Plaintiff sought to execute a change of attorneys, allegedly believing that Roach & Murtha were not capable of collecting the award. Defendant initially promised to sign the form but eventually stopped responding to this request to change attorneys. (NYSCEF doc. no. 53 at ¶18, aff. of Hilton Wiener; NYSCEF doc. no. 43, email between plaintiff and defendant.) Further email exchanges reveal that Defendant would forward messages from Plaintiff to Cold Springs and reply to Plaintiff with communications authored by Cold Springs.[1] (*Id.*)

On or around November 12, 2019, Plaintiff sent an invoice to Defendant in the amount of $33,050.00, representing 82 hours worked by Wiener in pursuing the Award at $400 per hour. (NYSCF doc. No. 40, invoice.) Accompanying the invoice, Plaintiff sent a Notice of Client's Right to Arbitrate a Dispute Over Attorney's Fees, which Defendant, according to the Notice, waived by failing to file a Request for Fee Arbitration within thirty days. (NYSCEF doc. No. 41.) Plaintiff alleges that it took this step because Defendant had effectively terminated the attorney-client relationship by actively interfering with its ability to confirm the Award.

Plaintiff thereafter commenced the instant action, which now appears to part of a broader ongoing dispute between Plaintiff and Louis Ottimo. As a stockbroker who founded Cold Springs, Ottimo originally advised Defendant to hire Plaintiff in the FINRA arbitration, but since Plaintiff won the Award, he has (allegedly) interfered in Plaintiff's collection efforts. According to Plaintiff, this is one of eight cases,[2] the others brought in the Supreme Court, Nassau or Suffolk County, wherein it was forced to invoice former clients after Ottimo persuaded them to discharge Plaintiff before it could confirm awards. (NYSCEF doc. no. 53.) Plaintiff alleges that Ottimo agreed to indemnify each defendant (including Defendant herein); Ottimo retained

[1] The further importance of Cold Spring will be discussed *infra*.

[2] The other cases are: (1) *Asset Based Funding v Vining* (Index No. 608578/2017); (2) *Asset Based Funding v Naddell* (Index No. 614025/2017; (3) *Asset Based Funding v Shiffman* (Index No. 608572/2017); (4) *Asset Based Funding v Hoffman* (Index No. 608603/2017); (5) *Asset Based Funding v Scott* (Index No. 608577/2017); and (6) *Asset Based Funding v Puglia* (608579/2017). In each case, Plaintiff sold or assigned his right to collection of the underlying unpaid attorney's fees to Asset Based Funding, LLC. The remaining case is *Wiener v Andersen*, Index No. 650858/2019.

attorney Steven Legum (the attorney of record for Defendant in this case) to defend all eight lawsuits and has been paying his legal fees.[3] As several Decision and Orders in these related cases are instructive—specifically because the defendants therein, as represented by Legum, raised some of the same issues as Defendant does here—the Court will refer to them as needed in its discussion section.

On December 13, 2019, Plaintiff commenced this action and on September 7, 2021, he filed the instant motion seeking summary judgment pursuant to 3212 on each of its four causes of action. Defendant filed it opposition and cross-moved for summary judgment by Notice of Motion dated September 24, 2021. The Court held oral arguments on the motion on August 16, 2022.

**DISCUSSION**

On a motion for summary judgment under CPLR 3212, the moving party bears the initial burden of establishing no material issues of triable fact exist and that it is entitled to judgment as a matter of law. (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept. 2012].) In rebutting the movant's prima facie showing, it is incumbent on the opposing party to produce evidence in admissible form to raise a triable issue of material fact. (*Zuckerman v City of New York*, 49, NY2d 557, 562 [1980].) Where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence, summary judgment should be denied. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

*Plaintiff's Cause of Action in Quantum Meruit*

In construing contracts between attorneys and their clients, the Court of Appeals has observed that traditional contractual principles are not always applicable. (*Campagnola v Mulholland*, 76 NY2d 38, 43-44 [1990].) Unlike with other contracts, clients have an absolute right to terminate the attorney-client relationship, at any time, with or without cause. (*See Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 177 [1986].) Where a client has discharged their attorney without cause, the attorney may recover only under a theory of quantum meruit for the reasonable value of the services rendered, not under a breach-of-contract theory. (*Atkins & O'Brien LLP v ISS Int'l Serv. Sys.*, 252 AD2d 446, 448 [1st Dept 1998] [Due to the unique relationship between the attorney and client, "the discharge of the attorney does not constitute a breach of contract"]; *Vioni v Carey & Assoc.*, 192 AD3d 617, 617 [1st Dept 2021].)

Under the doctrine of quantum meruit, the performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such service. The elements are: (1) the performance of the services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) the expectation of compensation therefor; and (4) the reasonable value of the services. (*Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014].) The Legal Service Agreement between Plaintiff and Defendant cannot reasonably be construed to do anything other than demonstrate the existence of each element. It called for Plaintiff to perform legal services to secure the FINRA Award, which he did; Defendant received the benefit

[3] Defendant's testimony at his deposition reveals that he did not hire Legum in this matter. He did not know Legum's name when questioned; revealed the Legum reached out to him—not the other way around; and did not know what this case was about.

of the services; the Agreement quite literally set out the expected compensation; and lastly, the Agreement (in Paragraph 6) provides that, should Defendant interfere with Plaintiff's representation, Plaintiff will receive the reasonable value of his services. This result—that Plaintiff has demonstrated entitlement to recovery under the doctrine of quantum merit—is fully consistent with the Decision and Orders issued in all eight cases in Supreme Court, Nassau County. On summary judgment motions in each case, Justice Sharon Gianelli wrote, "Plaintiff has established his entitlement to be paid under the contract. However, triable issues of fact remain as to how much Plaintiff is entitled to under *quantum meruit*." (NYSCEF doc. no. 54, orders in other cases.)

*Defendant's Arguments in Opposition*

Defendant contends that Hilton Wiener, LLC does not have standing to commence the instant action because he instead retained "The Law Office of Hilton Wiener" for legal services. He argues that the appropriate plaintiff in this action is either the Law Office or Hilton Wiener in his individual capacity because "a corporation has a separate legal existence from its shareholders even where the corporation is wholly owned by a single individual." (*Harris v Stony Clove Lake Acres*, 202 AD2d 745, 748 [2d Dept 1994].) After reviewing the relevant case law, the Court concludes that Defendant's argument is without merit. Whatever relevancy this single quotation has, it is no doubt overshadowed by the fact that the larger context in which *Harris* was decided lends little support for Defendant's position. In *Harris*, the mortgage at issue was executed by Stony Clove Lake Acres, a corporate entity, not its single individual owner. When the corporation defaulted on the mortgage, the court held that the individual—who had intervened in the case—could not assert defenses such as lack of consideration and failure to comply with the Statute of Frauds, which belonged only to the corporation. (*Id.* at 746-747.)

Two readily apparent distinctions between *Harris* and the present case limit the former's applicability. First, *Harris* involved a corporate entity and a principal owner with conflicting liability interests on the underlying mortgage. As the court noted, the individual chose to conduct business under the corporate entity to limit any personal liability arising from her ownership. (*Id.*) Here, the interest that Hilton Wiener, LLC asserts and the one that Hilton Wiener could have asserted had he brought the action in his individual capacity are identical, meaning their interests are perfectly aligned. Second, unlike the corporate structure at issue in *Harris*, there is no appreciable difference between Hilton Wiener, LLC and Hilton Wiener, the individual, when asserting a cause of action the *individual* owns. (Again, remember, in *Harris*, the corporation owed an *obligation* and defaulted). In the same way "The Law Office of Hilton Wiener" was an extension of Hilton Wiener in his individual capacity (because the Law Firm's only source of revenue was him providing legal services to clients), "Hilton Wiener, LLC" is an extension of Hilton Wiener in this action. That Hilton Wiener, individually, operated under the first designation when he entered the Agreement with Defendant but reorganized or changed the designation to its current form is of no consequence to the underlying claim.[4] Throughout the Agreement's entire existence, Hilton Wiener had been solely responsible for its obligations—which Defendant acknowledges he performed satisfactorily—and the sole beneficiary of the

[4] Public records with the New York Secretary of State, Division of Corporations demonstrate that both the Law Office of Hilton Wiener and Hilton Wiener LLC have the same address.

rights it confers.[5] Now he seeks to uphold his rights under the legal entity he solely owns and operates under. Defendant has not provided any reason why this Court should be an obstacle to that achievement.

Defendant's only remaining contention as to his liability on this cause of action is that he always intended to pay the contingency fee upon recovery as provided by the Agreement, but no recovery has yet occurred. (NYSCEF doc. no. 51 at 12.) According to Defendant, he did not discharge Plaintiff without cause and therefore Plaintiff does not have a cause of action in *quantum meruit*. The Court does not find this line of argument persuasive. Beginning in September 2018, Plaintiff communicated potential steps it could take to confirm the Award; in October 2018, Plaintiff notified Defendant that it had located certain assets that could be used to satisfy the Award; and in January 2019, Plaintiff entered into an agreement with Roach & Murtha, LLC to confirm the Award. NYSCEF records indicate that Roach & Murtha filed a petition in the Supreme Court, Suffolk County on January 2, 2019. (NYSCEF doc. no. 1, Index No. 600025/2019.) The records also show that Roach & Murtha took no further action and the court, by Decision and Order entered June 7, 2019, dismissed the petition. The court noted that Roach & Murtha failed to properly submit the necessary electronic paperwork in line with the Part Rules of the court and did not file proof of service upon the respondent.[6] (NYSCEF doc. no. 7, Index No. 600025/2019.)[7]

Thereafter, Plaintiff enlisted Defendant to sign a consent to change attorney form so that Plaintiff could attach the assets. On June 27, 2019, Plaintiff prepared the form and sent emails later that week requesting Defendant's consent. (NYSCEF doc. no. 40.) On July 1, July 9, July 16, and July 26, Plaintiff sent emails in this regard. (NYSCEF doc. no. 43.) The July 26, 2019, email states, "Fred, I have asked you many times over the past month to sign and notarize the attached [consent form] so I can collect our award. Please make sure this is taken care of beginning of next week." (*Id.*) In an email exchange dated August 16, 2019, Plaintiff reiterates its position that Defendant has refused to sign the form despite promising on numerous occasions to do so; that Defendant is "standing in my way of collecting my fees as well as collecting your own award;" and (for the first time) notes that "I will have no alternative but to seek my reasonable fees directly from you." (*Id.*) After forwarding this email to Cold Springs, Defendant then forwarded a response email crafted by Cold Springs on August 22 that stated:

> "Hilton, [j]ust so I understand, you were retained on a contingency fee basis. How could you possibly seek fees from me if there is no

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[5] The answer to whether Hilton Wiener LLC can maintain this action is even simpler when considering the other eight lawsuits that seek reasonable attorney's fees for services provided by Hilton Wiener. In each case, while under the designation "The Law Office of Hilton Wiener," he performed legal services; he then assigned the rights to his causes of actions to Asset Based Funding LLC. As described *supra*, our sister court has already held that (1) Asset Based Funding may bring these actions; and (2) the defendants therein were liable. Should this Court find Plaintiff *does not* have standing, it would be treating Plaintiff's own LLC (which is solely owned and has as its only source of revenue Plaintiff's legal services) differently and less favorably than Asset Based Funding.

[6] Plaintiff alleges that he was unaware of Roach & Murtha's business connection with Cold Springs and that the two conspired to frustrate attempts to recover assets to cover the Award. (NYSCEF doc. no. 53 at ¶18.) The degree to which Cold Springs influenced Roach & Murtha, if at all, the Court does not know. However, it is evident that Roach & Murtha did not do the bare minimum to confirm the Award.

[7] Contrary to Legum's assertion, there was no pending case for collection of the FINRA Award when Plaintiff filed the instant action. It had already been dismissed.

> recover [sic]? I am not willing to change Attorneys in the recovery since I don't know that they did anything wrong. Advise me of a reason to change and I will consider it. Don't threaten me about your fees unless you want me to defend it with all the knowledge I have about how you handle your affairs." (*Id.*)[8]

Plaintiff responded the next day, writing, *inter alia*, that:

> "First of all, why are you having Cold Springs write emails for you? Why are you allowing them to interfere in collecting the award we obtained? . . . [O]ur agreement clearly specifies that you must cooperate with me in handling the claim. It also provides that I may associate with other attorneys, as I see fit. If you are discharging me or you refuse to cooperate in the collection, I have every right to send you an invoice for my time spent on the case. That's both fair and clearly spelled out in our agreement." (*Id.*)

On September 3, 2019, Plaintiff wrote, "Confirming our telephone conversation last week, you will be sending me the substitution so that I can continue to collect the award we obtained against the Obsidian broker"; on September 10, Plaintiff wrote again, "Did you sign and send out the substitution as promised," to which Defendant replied, "I will try to get it notarized and sent back this week." (*Id.*) Similarly, on September 25, in response to another email from Plaintiff, Defendant wrote back "I have been harvesting. I will try to get it to you soon thanks." (*Id.*) Plaintiff continued to send emails of this variety through October and into November 2019. On November 12, 2019, Plaintiff sent Defendant an invoice for the 82 hours of legal services performed, with a fee of $400 per hour, for a total of $32,800 plus $250 in expenses, representing the reasonable value of his services. Furthermore, as counsel informed this Court at oral arguments held on August 16, 2022, Defendant made no other attempts to confirm the Award, whether that be through petitions filed by Roach & Murtha or any other entity operating on Defendant's behalf.

The above digression demonstrates how thoroughly Defendant thwarted Plaintiff's attempts to collect on the Award. To summarize: Defendant not only made numerous promises to sign the change of consent form for approximately five months from early July through December 2019 and then refused to do so when called upon, but he has also made no further attempts to collect the Award. That Defendant has not brought forth evidence of additional steps he has taken, if anything, makes it evident that *he*, not Plaintiff as he argues (*see* NYSCEF doc. no. 46 at ¶10, aff. of Steven Legum) believes the FINRA Award is uncollectable. Plaintiff has established that it made numerous efforts—from the Court's perspective, the only efforts—to collect the Award and was willing to pursue the matter even further but for Defendant's obstinacy.

Notwithstanding Plaintiff's attempts to collect on the Award, Defendant argues that an issue of fact remains as to whether he discharged Plaintiff. The argument is premised on an

[8]In addition to the forwarded emails between Defendant and Cold Spring, Defendant testified at his deposition that he does not compose emails from the account from which this message was sent.

alleged failure by Plaintiff to inform him of its reason for discharging Roach & Murtha. (*See* NYSCEF doc no. 50.) If only Plaintiff provided him with good cause, the reasoning goes, then he would have consented to changing attorneys. That Plaintiff failed in this respect does not mean Defendant discharged Wiener or refused to cooperate. The emails, however, demonstrate that Plaintiff's alleged failure to specify why he wanted to change attorneys was not motivating Defendant's unwillingness to cooperate. The record demonstrates that Defendant first requested Plaintiff inform him of the reasons for firing Roach & Murtha in an email dated August 22, 2019. However, by this time, Defendant had already repeatedly promised and then refused to sign the consent to change attorneys. (NYSCEF doc. no. 43 at 5.) Likewise, even *after* making the request, Defendant repeatedly promised but, again, refused to sign the forms. Defendant cites to his email dated December 11, 2019, (again, an email that was written by Cold Springs) that allegedly confirmed he only wanted assurances from Plaintiff that whatever fee the new attorneys required would be paid by Plaintiff and not himself. (NYSCEF doc. no. 50.) Yet, the email is dated approximately one month after Plaintiff sent his invoice for reasonable attorney's fees, which it did so, as discussed at length, only in response to Defendant's months-long obstinacy. As Paragraph 6 of the Agreement provides, "if the Client fails to cooperate with the Firm in the handling of this claim, Client agrees to compensate the Firm at a reasonable amount for its services, and for the time spent on this claim on an hourly basis." (NYSCEF doc no. 39.) Because this language mirrors a cause of action in *quantum meruit* and because Defendant has failed to present material issues of fact as to whether it cooperated with Plaintiff's good faith attempts to collect the Award, Plaintiff has shown it is entitled to its reasonable fees for the legal services provided.[9]

Yet, while Plaintiff has demonstrated entitlement to the reasonable value of the legal services it performed, it has not demonstrated whether the invoice it sent to Defendant represents a fair and reasonable fee. Plaintiff sent an invoice in November 2019 that provides an itemized bill accounting for the hours worked, but such invoice is insufficient to demonstrate the reasonableness of the fees charged. Likewise, Plaintiff's affidavit is insufficient as it only states that (1) his fee of $400.00 per hour is a reasonable hourly rate, and (2) that a total fee of $33,050, when compared to the contingency fee worth $46,634.20, makes the total invoice reasonable. (*See re T.J. Ronan Pant Corp.*, 98 AD2d 413, 419 [1st Dept 1984].) What Plaintiff's affidavit lacks is any assertions as to his experience, ability, reputation, and details as to the prevailing hourly rate for similar legal work in the community. (*Citicorp Trust Bank, FSB v Vidaurre*, 155 AD3d 934, 935-936 [2d Dept 2017].) As such, the Court does not possess sufficient information upon which to an informed assessment of the reasonable value of the services rendered. (*JK Two LLC v Garber*, 171 AD3d 496, 496-497 [1st Dept 2019].) Accordingly, a hearing is necessary to determine whether the amount of fees Plaintiff invoiced is reasonable.

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[9] Defendant's reliance on *Ausch v St. Paul Fire & Marine Ins. Co.* (125 AD2d 43) to argue Plaintiff has not met its burden in demonstrating Defendant's non-cooperation is unwarranted. There, the defendant raised the plaintiff's lack of cooperation with provisions in an insurance contract as an affirmative defense to liability. The Second Department found that the standard of proof applicable in establishing that particular affirmative defense was a preponderance of the evidence. (*Id.* at 46.) First, *Ausch* and the present case are not analogous. Defendant has not raised as an affirmative that Plaintiff was under a duty to cooperate but failed in that respect. The reverse is true: Plaintiff is arguing Defendant's failure to cooperate entitles it to summary judgment on its claim. Second, even if *Ausch* is applicable, Plaintiff has shown *beyond* just a preponderance of the evidence that Defendant did not cooperate—indeed, Plaintiff has shown no material issues of fact exist as to Defendant's cooperation.

*Plaintiff's Remaining Causes of Action*

Plaintiff's remaining causes of action are dismissed. Where an attorney and client have entered into a contingent fee agreement and the client terminates the relationship without cause prior to collecting an award, the attorney's only redress is in *quantum meruit*. (*King v Fox*, 7 NY3d 181 [2006]; citing *Campagnola v Mulholland, Minion & Roe*, 76 NY2d at 43-44.) Thus, Defendant's summary judgment motion to dismiss Plaintiff's breach-of-contract, unjust-enrichment, and accounts-stated causes of action is granted.

Accordingly, it is hereby

ORDERED that Plaintiff Hilton Wiener, LLC's motion for summary judgment pursuant to CPLR 3212 is granted as to his cause of action in *quantum meruit*; and denied as to his breach-of-contract, unjust-enrichment, and accounts-stated causes of action; and it is further

ORDERED that Defendant Fred Zenk's cross-motion for summary judgment is denied as to Plaintiff's *quantum meruit* cause of action; and granted as to Plaintiff's remaining causes of action; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the Clerk of the Court shall schedule a hearing on damages for November 1, 2022, at 9:30 a.m. at 80 Centre Street, Courtroom 325; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.

8/23/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
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| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |