SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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RODOLFO TECOCOATZI-ORTIZ, NEFTALI BATEN, CAMILO RAMOS FLORES, OMAR RAUL ZAPOTITLAN SANCHEZ, REYMUNDO MOLINA MEDEL, BERNALDO TLACZANI CARRANZA, DARIO FERNANDEZ GUTIERREZ,

Plaintiff,

- v -

JUST SALAD 600 THIRD LLC,JUST SALAD 134 37TH ST. LLC,JUST SALAD 315 PAS LLC,JUST SALAD 320 PARK AVE LLC,JUST SALAD 30 ROCK LLC,JUST SALAD 706 6TH AVE LLC,JUST SALAD WWP LLC,JUST SALAD 663 LEX LLC,JUST SALAD 8TH ST LLC,JUST SALAD 1471 3RD AVE LLC,JUST SALAD 1ST AVENUE LLC,JUST SALAD HUDSON SQUARE LLC,JUST SALAD 90 BROAD STREET LLC,JUST SALAD 223 BROADWAY LLC

Defendant.

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INDEX NO. 656657/2022

MOTION DATE 01/06/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81

were read on this motion to/for DISMISS.

Defendants' motion to dismiss plaintiffs' complaint in part as to claims for breach of implied contract, failure to pay overtime, failure to supply wage statements, and failure to pay spread of wages is granted, and plaintiffs' remaining claims are limited by the statute of limitations to those accruing after August 14, 2012 except for plaintiff Gutierrez – his claims are limited to those accruing after November 21, 2012.

Background

In this action, plaintiffs seek recovery for various alleged Labor Law violations made by defendants ("Just Salad"), a fast casual dining restaurant. All plaintiffs worked as deliverymen

for Just Salad at at least one of the various Just Salad locations. During their time as Just Salad employees, plaintiffs allege that defendants failed to pay overtime wages, failed to provide adequate wage notices, failed to reimburse plaintiffs for investment in tools of the trade to deliver food to customers, and other Labor Law violations pursuant to Labor Law §§ 195(3) and 198(1). Plaintiffs alleged that Just Salad failed to present notification of tip credit forms in the plaintiffs' native language (Spanish) and instituted a delivery fee that confused customers and resulted in them not tipping Just Salad employees under the belief that the delivery fee went to the deliverymen (it did not).

This action is the third time plaintiffs brought these claims. The parties refer to the first filed action, was commenced in September 2016, as "Just Salad 2"[1] and the second action as "Just Salad 3)[2], which was filed in August 2018, both in the Southern District of New York. Within 6 months of dismissal of Just Salad 3, plaintiffs commenced this action. For consistency, this Court keeps these same references (even though the fact is that the instant case is the third case).

Defendants bring this motion to dismiss seeking dismissal of plaintiffs' claims for (1) class status; (2) enterprise liability; (3) delivery fees; (4) breach of implied contract; (5) failure to pay "on the road" reimbursements; (6) overtime pay; (7) spread of hours pay; (8) failure to provide Labor Law § 195(3) notices; (9) minimum wage and overtime on behalf of plaintiff Gutierrez; (10) all remaining claims accruing prior to August 12, 2012.

Defendants first contend that CPLR 205(a) requires that plaintiffs' claims that accrued prior to August 14, 2012 be dismissed as untimely. Defendants claim that plaintiffs brought their claims in Just Salad 3 on August 14, 2018, and given the 6-year statute of limitations, any claims

[1] Camara v. Kenner, No. 16-cv-7078.
[2] Tecocoatzi-Ortiz v Salad, 18-cv-07342.

that accrued prior to August 14, 2012 should be dismissed as untimely when Just Salad 3 commenced. Similarly, defendants contend that the federal court dismissed all of Gutierrez's overtime claims, plaintiffs' enterprise liability claims, and plaintiffs' delivery fee claims with prejudice. Defendants further contend that plaintiffs' claim for class certification should be dismissed. In Just Salad 2, plaintiffs moved for class certification with the same alleged facts and circumstances, and the court denied plaintiffs' motion for failing to demonstrate four out of the five necessary conditions for class certification; defendants contend that motion was made after close of discovery and therefore the denial was made on the merits. Next, defendants contend that the breach of implied contract claim should be dismissed for failure to demonstrate there was a "meeting of the minds." Specifically, plaintiffs failed to demonstrate that defendants agreed to reimburse plaintiffs for the costs of purchasing and maintaining their bicycles. Defendants argue that plaintiffs offer no evidence of a meeting of the minds regarding reimbursement, therefore no implied contract exists.

Defendants further argue that plaintiffs do not have a viable claim for "on the road" reimbursement as the plaintiffs used bicycles and did not utilize gas or electricity. Additionally, defendants submit that plaintiffs' claim for wage statements is based on false allegations as the documentary evidence indicates plaintiffs were provided all statutorily required information with each payment of wages. Similarly, defendants argue that the overtime claims are based on false statements as plaintiffs' sworn testimony indicates they did not work overtime and if they did, they were paid accordingly. Finally, defendants contend that the spread of hours claim based is also based on false allegations as plaintiffs' testimony contradicts these claims.

In response, plaintiffs argue that their claims are not wholly barred by CPLR 205(a). Plaintiffs claim that before Just Salad 2, plaintiff Carranza was a party to another action relating

to Just Salad between June 5, 2017 and March 29, 2018. Plaintiff Carranza joined Just Salad 2 within six months of being dismissed from that other litigation without prejudice. Thus, plaintiffs allege the statute of limitations for Carranza's claims runs from June 5, 2017 and the accrual period is June 5, 2011. Plaintiffs make the same argument regarding plaintiff Medel, who joined the still-prior action on January 12, 2017, making his accrual date January 12, 2011. Plaintiffs do not dispute that the statute of limitations has run on plaintiff Ortiz's claims accruing before August 14, 2012 and plaintiff Gutierrez's claims accruing before November 21, 2012.

Next, plaintiffs contend that the minimum wage claims founded on performing non-tipped side work made by Ortiz, Baten, and Flores were not dismissed with prejudice, and neither were claims for overtime by Ortiz, Flores, and Sanchez. Plaintiffs assert these claims should be included in the instant action, but they concede that Gutierrez does not bring a minimum wage claim and further assert that Baten's claim for overtime is made in error and should be dismissed. Plaintiffs further argue that their class certification claims should not be dismissed pursuant to collateral estoppel because the denial of class certification in the prior action was decided on procedural grounds, not on the merits. Plaintiffs characterize the discussion of the merits was in dicta and claim that Rule 23 and CPLR 901 standards are distinct.

Next, plaintiffs state that their claims for breach of contract and "on the road" reimbursement should be construed as a claim for reimbursement for tools of the trade. Plaintiffs allege they were paid the minimum wage, less various credits, and had expenses for delivery vehicles that included "purchasing and maintenance as well as batteries," that ultimately drove their wages below minimum wage. Plaintiffs further allege their wage statements were inaccurate, incomplete, and noncompliant with the requirements of Labor Law § 195.3. Regarding overtime, plaintiffs contend there is a material issue of fact regarding whether

defendants satisfied their tip credit notice obligations. Plaintiffs claim that because their overtime claims survived summary judgment in the prior action, they should not be dismissed here. Finally, plaintiffs contend a spread of hours claim is appropriate for "any employee who leaves work more than 10 hours after arriving, even if part of that work was spent on break or between two shifts," (NYSCEF Doc. No. 58 at 21). Plaintiffs claim that Ortiz, Medel, and Carranza allege various workdays where shifts were 10 to 13 hours. Plaintiffs concede that Baten, Flores, Sanchez and Gutierrez do not allege they worked spreads of more than 10 hours.

In reply, defendants contend that plaintiffs' argument regarding CPLR 205(a) frustrates the purpose of the statute of limitations and would allow parties to toll the statute of limitations indefinitely. Defendants contend that the attempts by Medel and Carranza to prosecute claims dating back to 2008 would prejudice the defendants and frustrate the purpose of statute of limitations because they waited so long to bring the claims and brought them twice in federal court. As to claims previously dismissed with prejudice, defendants note that plaintiffs did not oppose their request for dismissal of claims based on a theory of enterprise liability, and further note that plaintiffs conceded they would not pursue claims for kick-backs or tip retention. Defendants further contend that plaintiffs conceded Gutierrez's claims for minimum wage and overtime were dismissed with prejudice, as were Baten's overtime claims, entitling defendants to dismissal of those same claims here.

Defendants next contend that plaintiffs' class certification claims should be dismissed as the federal court's analysis of the deficiencies in plaintiffs' motion was not just dicta but a clear basis for denying the motion. Additionally, defendants argue that Rule 23 and § 901 are nearly identical, and a finding that plaintiffs cannot demonstrate the Rule 23 factors is sufficient to conclude they cannot satisfy the § 901 conditions either. Defendants observe that plaintiffs failed

to file a cross-motion to request that this Court construe plaintiffs' breach of implied contract and "on the road" claims as reimbursement for tools of the trade. Additionally, defendants assert that plaintiffs did not establish any violation of the Labor Law as plaintiffs do not allege that any type of electric vehicle was required to perform their duties, thus they are not entitled to reimbursement for gasoline, depreciation, insurance or repairs.

Defendants point out that plaintiffs did not identify a single inaccuracy in the wage statement, only listing statutory requirements with which plaintiffs allege defendants did not comply. Defendants assert the wage statements themselves disprove any of plaintiffs' claims made in opposition. Defendants note that plaintiffs did not oppose the request to dismiss the overtime claims of Baten, Medel and Carranza, thus entitling defendants to dismissal of those claims. Additionally, defendants contend that Flores testified he never worked more than forty hours a week and Ortiz and Sanchez testified they were always paid the overtime rate when it was applicable. Finally, defendants note that plaintiffs conceded Baten, Flores, Sanchez, and Gutierrez did not allege that they worked spreads greater than 10 hours, and further contend that none of the plaintiffs alleged that defendants failed to pay them for spread of hours worked and that the claims for spread of hours should be dismissed.

Discussion

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52 [2016]).

"Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion to dismiss based on documentary evidence "may be appropriately 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 New York*, 98 NY2d 314, 326 [2002]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 87 [2d Dept 2010] [observing that affidavits and deposition testimony are not documentary evidence under CPLR 3211(a)(1)]).

Claims Barred by Statute of Limitations

CPLR 205(a) provides that:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which' conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

CPLR 205(a) is supposed to give a second chance to a plaintiff who has made a technical defect or oversight. As one Supreme Court case noted "Reduced to its common denominator, the intent of CPLR 205(a) is to afford a claimant the fair opportunity to have 'one full bite of the apple', no more but no less" (*Goldberg v Nathan Littauer Hosp. Assn.*, 160 Misc2d 571, 574, n 2, 610 NYS2d 446 [Sup Ct, Albany County 1994]).

Plaintiffs assert that CPLR 205(a) permits a litigant to file new actions within six months of dismissal, in succession, one after the other, and the statute of limitations remains stuck as if every action was filed when the first action was filed. This Court does not agree and neither does the Second Circuit Court of Appeals. In fact, this very issue was recently decided by the Second Circuit in *Ray v Ray*, 22 F4th 69, 2d Cir 2021. There, the plaintiff essentially argued that all the successive cases commenced pursuant to CPLR 205 (a) were a chain and related back to the first link. The Court found that the statute of limitations related back only to the case filed immediately prior to the current case.

CPLR 205(a) does not extend the statute of limitations in perpetuity; rather, it relates back only to the case immediately preceding the instant case; whatever would have been timely in the case immediately prior to the instant case is timely now, but no more. Therefore, the claims here are limited to the 6-year statute of limitations based on the initial filing date of Just Salad 3 (August 14, 2018) and so plaintiffs' claims are limited to those which accrued after August 14, 2012. And any claims by Gutierrez are limited to those which accrued after November 21, 2012.

Res Judicata

"It is well settled that a defendant who was not a party to a prior proceeding may nevertheless assert res judicata where [its] liability ... is altogether dependent upon the culpability of one exonerated in a prior suit; [a] person not a party to a prior action, but only derivatively or vicariously liable for the conduct of another, may invoke the res judicata effect of a prior judgment on the merits in that action in favor of the one primarily liable" (*Marinelli Assocs. v*

Helmsley-Noyes Co., Inc., 265 AD2d 1, 7, 705 NYS2d 571 [1st Dept 2000] [internal quotations and citations omitted]).

Undoubtedly, this matter involves the same parties and the same facts as the previous federal actions. If a claim that was dismissed with prejudice is brought in this action, it is ripe for dismissal pursuant to res judicata. The decision issued in Just Salad 3 states, “all these plaintiffs’ remaining state law claims are dismissed without prejudice,” (NYSCEF Doc. No. 53 at 53). The only claim previously dismissed with prejudice that is brought in this action is by Baten for overtime wages. Plaintiffs concede that this claim should be dismissed. The remaining claims brought by plaintiffs were not dismissed with prejudice. Defendants refer to claims for kick-backs and tip retentions, however those claims are not included in plaintiffs’ complaint. Therefore, plaintiff Baten’s claim for overtime is dismissed and the branch of defendants’ motion to dismiss the remaining claims by plaintiffs based on res judicata is denied.

Class Certification

Pursuant to CPLR 3211(a)(5), "Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same," (*Storman v Storman*, 90 AD3d 895, 898, 935 NYS2d 63 [2nd Dept 2011] [internal quotations and citations omitted]).

Despite plaintiffs’ insistence that the federal court did not decide denial of their class certification motion on the merits, the decision issued by Judge Koeltl in Just Salad 3 clearly indicates “plaintiffs’ cross motion [for class certification] fails on the merits,” (NYSCEF Doc. No. 53 at 48). Judge Koeltl continued, stating, “the plaintiffs have plainly failed to demonstrate several necessary conditions for class certification, including commonality, typicality,

predominance, and superiority," (*id*. at 49-50). The decision in Just Salad 3 clearly demonstrates that plaintiffs failed to meet their burden to establish a class. The fact that Jude Koeltl issued this decision to deny class certification based on more than one reason does not mean that the issue is ripe again because one of those reasons was procedural in nature.

Plaintiffs had every opportunity to demonstrate that they were entitled to class certification, and twice the federal court decided they were not. Here, they make the exact same request on the exact same facts. As is clear from the papers on this motion, the employees do not have the same claims against the employer; rather, what they all have in common is the employer, not much else. For this reason, class status is denied, and this Court adopts the reasoning of the federal court decisions.

Breach of Implied Contract and On the Road Reimbursements

"With respect to implied-in-fact contracts, "[b]ased on the facts and circumstances surrounding the dispute as manifested in the acts and conduct of the parties, there must be an indication of a meeting of minds of the parties constituting an agreement" *DG & A Mgt. Servs., LLC v Securities Indus. Assn. Compliance & Legal Div.*, 52 AD3d 922, 923, 859 NYS2d 305 [3rd Dept 2008]).

Pursuant to 12 NYCRR 146-2.7 where an employee "must spend money to carry out duties assigned by his or her employer, those expenses must not bring the employee's wage below the required minimum wage."

Plaintiffs conceded that they did not plead the elements of a breach of implied contract and request that this Court construe their requests as something else entirely—reimbursement for tools of the trade. Regardless of the procedural hiccups plaintiffs made in requesting this relief,

the Court disagrees that these items qualify as tools of the trade. Plaintiffs testify to buying bicycles throughout their employment, but do not indicate whether purchasing the bicycles brought their wages below the required minimum wage. Moreover, at least one plaintiff testified to purchasing an electric bicycle, but did not testify as to the necessity of purchasing an electric bike to carry out deliveries. At this juncture, plaintiffs failed to plead either breach of implied contract *or* reimbursement for tools of the trade. Therefore, the Court dismisses this claim.

Labor Law § 195.3 Failure to Furnish Wage Statements

To state an actionable claim under Labor Law § 195(3), plaintiff must allege that defendant failed to provide a statement with each paycheck that included:

> the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages.

(*Davis v Carlo's Bakery 42nd & 8th LLC*, 2022 NY Misc. LEXIS 7410, 2022 NY Slip Op 22377 *5 [Sup Court, NY County 2022]). The Court dismisses plaintiffs' claim for lack of proper wage statements. Plaintiffs conceded that they failed to show that wage statements were not provided but stated the wage statements failed to include "information about allowances claimed as part of the minimum wage," (NYSCEF Doc. No. 58 at 20). Without more specific information, this Court cannot opine on the validity of plaintiffs' claims. Plaintiff Medel produced pay stubs that he claims were inaccurate regarding hours worked, but immediately stated the stubs he produced were not the ones he received while working at Just Salad (NYSCEF Doc. No. 42 Medel Dep. 49:2-9). In his deposition, plaintiff Flores indicated his tips were correct on the pay stub presented to him, but reiterated that he sometimes received the incorrect amount, though he

never addressed this with a supervisor (NYSCEF Doc. No. 40 Flores Dep. 72:2-8). Plaintiff Baten admitted that he never even reviewed his pay stubs (Baten Dep. NYSCEF Doc. 39 at 76:2-12). This Court cannot identify the inaccuracies in the paychecks of the plaintiffs if they themselves cannot elaborate on those inaccuracies. Therefore, the Court dismisses this claim.

12 NYCRR § 146-1.4 Failure to Pay Overtime

NYCRR § 146-1.4, a provision concerning overtime hourly rates, provides that "An employer shall pay an employee for overtime at a wage rate of 1 1/2 times the employee's regular rate for hours worked in excess of 40 hours in one workweek."

Plaintiffs conceded that Baten, Medel, Carranza and Gutierrez did not work overtime or qualify for overtime pay during the course of their employment at Just Salad. Therefore, the Court dismisses their claims for overtime pay. The remaining claims are those of Flores, Ortiz and Sanchez. Flores testified that he never worked more than 35 or 36 hours in a week (NYSCEF Doc. No. 40 Flores Dep. 57:5-9). Although he claims he should receive overtime pay, there is no indication that this claim is correct as he did not work 40 hours. Ortiz testified that he “always [got] paid overtime when [he] worked overtime,” despite signing a document to the contrary (NYSCEF Doc. No 38 Ortiz Dep. 67:25-68:2). Finally, Sanchez testified that he was always paid for his overtime work (NYSCEF Doc. No. 41 Sanchez Dep. 50:11-14). Based on the deposition transcripts, there was a clear miscommunication about the issue at hand as none of the plaintiffs testified to not receiving overtime pay. Therefore, the Court dismisses the claims for overtime pay by Baten, Medel, Carranza, Gutierrez, Ortiz, Flores, and Sanchez.

12 NYCRR 146-1.6 Failure to Pay Spread of Hours

Pursuant to 12 NYCRR 146-1.6, each day an employee's hours exceed 10 hours, an employee is entitled to receive "spread-of-hours" pay, "one additional hour of pay at the basic minimum hourly rate."

Plaintiffs concede that Baten, Flores, Sanchez, and Gutierrez do not allege spreads of greater than 10 hours, therefore any claims made for spread of hours by these plaintiffs are dismissed. The remaining plaintiffs (Ortiz, Carranza and Medel) alleged spreads of greater than 10 hours in a day; however, these plaintiffs did not clarify whether these spreads went unpaid. Medel testified the checks he produced were not the ones he received from Just Salad and that his hours were incorrect (NYSCEF Doc. No. 42 Medel Dep. 49:2-9). But there is no clarification on whether he was paid for a spread of hours that consisted longer than 10 hours on a given day, and he failed to produce any evidence to back up his claim. Carranza testified to working part-time but does not claim he was not paid for working more than 10 hours a day, only that he should have been paid more for performing tasks after his workday was finished (NYSCEF Doc. No. 43 Carranza Dep. 55:7-23). Finally, Ortiz admitted the hours on his paycheck were correct and he was always paid for the hours he worked (NYSCEF Doc. No. 38 Ortiz Dep. 69:15-70:9). This Court cannot extrapolate claims from plaintiffs' testimony. Plaintiffs detail that the statute covers breaks in a 10-hour day, and while this is true, they fail to show that those hours were not paid. Simply pleading that an employee worked a spread of more than 10 hours is not enough to demonstrate that an employer did not pay for that time worked. Moreover, when the employee, under oath, fails to back up what. In fact, like many other claims here, there was no support from the plaintiffs and indicates that the lawyers' blunderbuss complaint was not tailored to the

claims of the clients. In any event, the claims by Ortiz, Carranza and Medel for spread of hours are dismissed.

Accordingly, it is hereby

ORDERED that the branch of defendants' motion to dismiss Labor Law § 195(1) claims made by plaintiff Gutierrez accruing before November 21, 2012 is granted and the Labor Law § 195(1) claims are severed and dismissed as time-barred; and it is further

ORDERED that the branch defendants' motion to dismiss Labor Law § 195(1) claims by remaining plaintiffs accruing before August 12, 2012 is granted and the applicable claims are severed and dismissed as time-barred; and it is further

ORDERED that the branch of defendants' motion to dismiss all of plaintiffs' claims for breach of implied contract, failure to furnish wage statements, failure to pay overtime wages, and failure to pay spread of hours is granted and these claims are severed and dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff Baten's claims for overtime is granted and plaintiff Baten's claims for overtime are severed and dismissed; and it is further

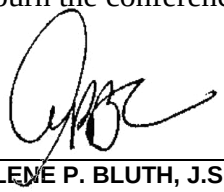
ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on March 21, 2023 at 11:30 a.m.

By March 14, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess

whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required).

If nothing is uploaded by March 14, 2023, the Court will adjourn the conference.



2/17/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE