

**Millennium Consolidated Holdings, LLC v Bluefin  
Capital Mgt., LLC**

2023 NY Slip Op 34466(U)

December 19, 2023

Supreme Court, New York County

Docket Number: Index No. 656387/2022

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X  
MILLENNIUM CONSOLIDATED HOLDINGS, LLC  
and MILLENNIUM ADVISORS, LLC

Plaintiffs,

- v -

BLUEFIN CAPITAL MANAGEMENT, LLC,

Defendant.

INDEX NO. 656387/2022

MOTION DATE 10/19/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

-----X  
HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 86, 87, 88, 100 were read on this motion to/for QUASH SUBPOENA

In this action arising from defendant Bluefin Capital Management, LLC's (Bluefin) employment of plaintiffs Millennium Consolidated Holdings, LLC and Millennium Advisors, LLC's (together, Millennium) former employee, Ruochen "Frank" Zhou (Zhou), Millennium moves pursuant to CPLR 2304 and CPLR 3103(a) to quash a subpoena duces tecum, dated June 20, 2023, issued by Bluefin to Zhou and for a protective order.<sup>1</sup> Bluefin opposes the motion. For the following reasons, Millennium's motion is granted.

**Background**

*The Instant Action*

The court assumes the parties' familiarity with the background of this case, which was detailed in its Decision and Order, dated April 17, 2023 (NYSCEF # 46). As alleged in Millennium's complaint, Zhou is a former Millennium employee who began working at the company in January 2019 (NYSCEF # 2 – compl ¶¶ 5-6, 50-51, 55). During his employment, Zhou executed three separate and successive restrictive covenant agreements, as well as two unit incentive bonus agreement, to incentivize his performance and ensure his compliance with his non-compete and

<sup>1</sup> Millennium initially sought a temporary restraining order enjoining Zhou from producing any documents or information in response to Bluefin's subpoena. By stipulation, dated October 23, 2023, the parties agreed to notify and instruct Zhou not to produce any documents pending a determination by the court on Millennium's motion, thereby mooting Millennium's application for a temporary restraining order (NYSCEF # 82).

confidentiality obligations (*see id.* ¶¶ 8-10, 51-56, 60-61, 65-66, 69-81, 83). Eventually, on or around June 10, 2021, Millennium terminated Zhou's employment and entered into a severance agreement with him on June 15, 2021 (*see id.* ¶¶ 88-89, 95).

On October 15, 2021, Zhou informed Millennium of his intention to work for Bluefin (compl ¶¶ 98-100). In response, Millennium determined that Bluefin was a competitor and informed Zhou that his employment with Bluefin would violate his non-compete obligations (*id.* ¶¶ 16, 101). After sending a cease-and-desist letter to Bluefin on or about March 16, 2022, Millennium commenced this action on May 20, 2022, asserting claims against Bluefin for tortious interference with contract, tortious interference with prospective business relations, and unfair competition (*id.* ¶¶ 115-134).

On July 15, 2022, Bluefin moved to dismiss the complaint in its entirety (NYSCEF # 26). By Decision and Order, dated April 17, 2023, this court denied Bluefin's motion to dismiss Millennium's tortious interference with contract claim, but granted that branch of Bluefin's motion seeking dismissal of Millennium's second cause of action for tortious interference with prospective business relations and third cause of action for unfair competition (NYSCEF # 46 at 7-8). Bluefin filed its answer and affirmative defenses on May 22, 2023 (NYSCEF # 52).

#### *The FINRA Arbitration and Corresponding Discovery*

Concurrent with Millennium filing this action, Zhou commenced an arbitration proceeding against Millennium before the Financial Industry Regulatory Authority (FINRA), captioned *Zhou v Millennium Advisors, LLC et al*, FINRA Arbitration No. 22-00858. (compl ¶ 112; NYSCEF # 70). Zhou brought causes of action for (1) breach of contract based on Millennium's refusal to pay Zhou past due and future severance compensation, and (2) a violation of the North Carolina Wage and Hour Act based on that unpaid severance compensation (NYSCEF # 70 ¶¶ 11-24). Millennium responded by counterclaiming against Zhou for breach of his non-compete, non-solicitation, and confidentiality obligations, breach of the implied covenant of good faith and fair dealing, and unfair competition (NYSCEF # 71 ¶¶ 111-136, 143-147). Millennium also sought declaratory judgment that, because Zhou breached his various agreements with Millennium, Millennium's obligations to make payments to Zhou ceased (*id.* ¶¶ 138-142).

On October 8, 2022, Zhou served upon Millennium 68 requests for documents and information (NYSCEF # 72). Broadly speaking, Zhou's requests sought information concerning (1) Millennium's policies and procedures, including employee training materials (*see id.* at reqs 1, 3-5, 12, 38); (2) Millennium's proprietary models, methods, and technologies (*see id.* at reqs 2, 8, 57); (3) Zhou's termination from Millennium "for cause" (*see id.* at reqs 1, 12-14, 23, 27, 29, 54-55, 60), (4) internal communications and materials concerning Zhou (*id.* at reqs 6, 20,

31-35); (5) other current and former Millennium employees (*see id.* at reqs 24, 28, 29); and (6) Millennium's assessment of Bluefin's business model and practices (*see id.* at reqs 7, 36). Later, on December 22, 2022, Zhou and Millennium executed a confidentiality agreement for the production and exchange of information (*see* NYSCEF # 73 – FINRA Confidentiality Agreement). Millennium thereafter produced documents—totaling approximately 1.76 million pages (*see* NYSCEF # 100)—that were responsive to Zhou's request, including training materials, business and financial reports, trading reports and analysis, confidential information concerning Millennium's employees, and confidential and sensitive business information about Millennium's counterparties/clients (NYSCEF # 69 ¶ 6).

On September 7, 2023, following a hearing, the FINRA arbitration panel issued an award denying Zhou's claims, determining that Zhou was liable for a sum of \$27,083.32 in compensatory damages, and determining that Millennium was liable for a sum of \$27,405.00 as a discovery sanction (NYSCEF # 75 at 4-5).

### *The Instant Discovery Dispute*

In this action, the parties are engaged in discovery on Millennium's remaining tortious interference claim (*see* NYSCEF # 63). On June 23, 2023, around the time discovery had begun, Bluefin served a subpoena duces tecum on non-party Zhou (NYSCEF # 74 – the Subpoena). The Subpoena included one single request for “[a]ny and all documents and communications produced to [Zhou] by Millennium in connection with the FINRA Dispute, including, without limitation, all documents concerning the claims, counterclaims, and defenses asserted in connection with the FINRA Dispute” (*id.*). On July 17, 2023, Millennium raised objections about the Subpoena to Bluefin, arguing that the documents exchanged in the FINRA proceedings are confidential in nature and subject to a confidentiality agreement, and that Zhou's document requests in the FINRA proceedings sought many categories of documents that are not material and necessary to the instant action (NYSCEF # 77). Although Bluefin initially agreed to hold the Subpoena in abeyance, it eventually informed Millennium that it would instruct Zhou to produce documents in response to the Subpoena. Millennium, in turn, filed this instant motion to quash and for a protective order.

In its motion, Millennium argues that the documents sought by the Subpoena are not discoverable, are unreasonable and highly disproportionate to the needs of this case, and contain confidential, sensitive, and proprietary information. (NYSCEF # 68 – Pltfs MOL at 10-11; NYSCEF # 88 – Pltfs Reply at 6). To support this point, Millennium contends that the FINRA proceedings involved different parties and different, broader claims, meaning that many of the documents sought by Zhou are irrelevant to Millennium's sole tortious interference claim in this case (Pltfs MOL at 10-11; Pltfs Reply at 2-4). Moreover, Millennium further explains, it has already produced to Bluefin relevant documents from the FINRA proceedings in the form of transcripts and exhibits used during the hearing, and these are the only

materials from the FINRA proceedings that would be useful or probative of Zhou's or Millennium's respective claims and defenses (Pltfs MOL at 11; Pltfs Reply at 5, 7). Finally, Millennium avers that the Subpoena's overbroad request is nothing more than a fishing expedition designed to circumvent Millennium's rights under the CPLR (Pltfs MOL at 11, 15; Pltfs Reply at 5-6).

Bluefin counters that the Subpoena seeks relevant information and Millennium has failed to establish otherwise (NYSCEF # 86 – Deft opp at 6-7). Specifically, Bluefin contends that the claims in this action and in the FINRA proceedings arise out of the same set of facts—namely, the restrictive covenants into which Zhou entered with Millennium, Millennium's termination of Zhou's employment, and Bluefin's subsequent employment of Zhou (*id.* at 6-7). For this reason, Bluefin further avers, many (but not all) of the purported categories requested by Zhou from Millennium are “clearly relevant” (*id.* at 8).<sup>2</sup> Bluefin otherwise contends that the court should favor efficiency and allow Bluefin to obtain documents directly from Zhou through the Subpoena, in its current form, so that it can avoid having to fight Millennium to produce relevant documents (*id.* at 9-10). To that end, Bluefin observes that nothing in the CPLR prevents it from seeking documents from Zhou or having to first seek documents from Millennium (*id.* at 10).

### Discussion

Under CPLR 3101(a), there “shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required” (CPLR 3101 [a] [4]; *see also Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 108 [1st Dept 2006] [holding that “[i]t is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding”]). To be considered “material and necessary,” the information sought must “bear[] on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Forman v Henkin*, 30 NY3d 656, 661 [2018] [“material and necessary”—i.e., relevant”]). Thus, “so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty” (*Kapon*, 23 NY3d at 38). As a result, “[a]n application to quash a subpoena should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ . . .

<sup>2</sup> This includes categories such as “[p]olicies, procedures, training materials, and presentations to employees,” “[d]ocuments regarding Millennium's proprietary programs and systems,” “[i]nternal communications about Zhou and documents regarding his termination,” “[i]nformation regarding employee restrictive covenants, breaches of agreements, or terminations for other employees,” and “[c]ounterparty and client information, trade data, and trading practice” (Deft opp at 8).

or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*id.* at 38-39).

At the outset, although the FINRA proceedings involved different claims and parties than those at issue here, the court is persuaded, at least for now, that some of the categories of documents requested by Zhou from Millennium may be material and necessary to the prosecution or defense of Millennium’s tortious interference claim in this action. To establish this claim, Millennium will need to prove (1) the existence of a valid contract between plaintiff and Zhou, (2) Bluefin’s knowledge of that contract, (3) Bluefin’s intentional procurement of Zhou’s breach of contract without justification, and (4) actual breach and damages (*see Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]). And because the specific contractual terms that Zhou allegedly breached are the restrictive covenants between Millennium and Zhou (*see* compl ¶¶ 1, 48-97, 116-123), one of the central issues that the parties will confront in this lawsuit is the enforceability of these restrictive covenants. In particular, the parties will litigate whether the restrictive covenants are “reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee” (*see BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]). With this context in mind, it appears that certain document requests propounded by Zhou in the FINRA proceedings appear to “bear[] on the controversy” at the heart of Millennium’s tortious interference claim (*see Kapon*, 23 NY3d at 38), and, more specifically, the enforceability of Zhou’s restrictive covenants. The relevance of the documents produced by Millennium to Zhou during the FINRA proceedings (or lack thereof) is therefore not a basis to quash the Subpoena.

That Millennium already produced to Bluefin the transcripts of, and exhibits used during, the FINRA hearing does not alter this conclusion. It is true the exhibits used during the hearing are seemingly the ones deemed as most useful or probative of the parties’ claims or defenses. But it does not follow that any document produced to Zhou automatically becomes “completely irrelevant” if it was not used during the FINRA hearing. Nor is the fact that Bluefin chose to first seek documents from Zhou, rather than Millennium, a basis to strike down the Subpoena. As Bluefin notes, there is “no requirement” under New York law “that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source” (*Kapon*, 23 NY3d at 38).

The above notwithstanding, the Subpoena, in its current form, is improper and deficient. It is well settled that a party may not use “procedural mechanism of a subpoena duces tecum to expand the discovery available under existing law” (*Matter of Terry D.*, 81 NY2d 1042, 1045 [1993]). To this end, a subpoena duces tecum cannot be used to ascertain the existence of evidence or as a fishing expedition (*see id.* at 1044 [“a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence”]; *Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept 2010] [“a subpoena duces

tecum ‘may not be used for the purpose of discovery or to ascertain the existence of evidence’ and a subpoena should be quashed when the subpoena is being used for a fishing expedition to ascertain the existence of evidence”]; *Humphrey v Kulbaski*, 78 AD3d 786, 787-788 [2d Dept 2010] [quashing subpoena that demanded production of “all . . . files and records” pertaining to plaintiff’s treatment received at a hospital without narrowing request to target the subject of litigation]). “Rather, its purpose is ‘to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding’” (*Matter of Terry D.*, 81 NY2d at 1044, quoting *Matter of Constantine v Leto*, 157 AD2d 376, 378 [3d Dept 1990]).

Here, the Subpoena contains a single request: “Any and all documents and communications produced to [Zhou] by Millennium in connection with the FINRA Dispute, including without limitation all documents concerning the claims, counterclaims, and defenses asserted in connection with the FINRA Dispute” (NYSCEF # 74). In propounding this request, Bluefin neither imposes a limiting principle tailored to the issues in this litigation nor attempts to articulate what categories of relevant and material documents Zhou may possess from the FINRA proceedings. Rather, the Subpoena is a textbook example of shooting first and asking questions later. Indeed, Bluefin is directing Zhou—an apparently friendly subpoena target—to produce *all* documents produced by Millennium, regardless of their relevance to the instant action,<sup>3</sup> and is doing so to ascertain—on its own terms after the dust settles—the existence of potentially relevant evidence amid a trove of documents. Courts may favor efficiency in the discovery process, but this court will not countenance such a blatant fishing expedition by Bluefin.

Of course, there may be potentially relevant documents produced by Millennium during the FINRA arbitration that are in Zhou’s possession. Bluefin is therefore free to propound a new subpoena to Zhou seeking specific categories of material and necessary documents that it believes Zhou possesses. And Millennium, in turn, remains free to raise objections to those categories of documents and challenge the validity of the Subpoena as necessary (*see Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 195 [2d Dept 2013] [“A person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications”]).<sup>4</sup> But it ultimately does not fall on the court to prune the scope of the Subpoena and “cull the good from the bad” (*Soho Generation of N.Y. v Tri-City Ins. Brokers*, 236 AD2d 276, 277 [1st Dept 1997]). Accordingly, the Subpoena, in its current form, is quashed in its entirety.

<sup>3</sup> Bluefin concedes, as it must, that at least some of the materials requested by Zhou in the FINRA proceedings are not relevant to the instant action (*see* Deft opp at 9).

<sup>4</sup> Nothing in this Decision and Order should be construed as final determination by the court as to the relevance of any specific category documents that may eventually be sought by Bluefin from Zhou.

Finally, insofar as any documents sought by Bluefin from Zhou in a future subpoena are deemed relevant and responsive (and therefore subject to production), Bluefin is directed to ensure strict adherence to the terms of the FINRA Confidentiality Agreement between Millennium and Zhou. To facilitate this directive, prior to the production of documents by Zhou to Bluefin (if any), the parties shall meet and confer to determine the most efficient pathway forward to navigate this issue—whether it be by agreeing that Bluefin is bound to confidentiality designations used in the FINRA proceeding, providing Millennium with an opportunity to apply confidentiality designations pursuant to the confidentiality stipulation in place for this action, or determining some other mutually agreeable solution to address Millennium’s confidentiality concerns (*see* NYSCEF # 66).

**Conclusion**

For the foregoing reasons, it is hereby

ORDERED that plaintiffs’ motion to quash and for a protective order is granted.

This constitutes the Decision and Order of the court.

12/19/2023

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: